AKTEN DER GESELLSCHAFT FÜR GRIECHISCHE UND HELLENISTISCHE RECHTSGESCHICHTE

10

SYMPOSION 1993

AKTEN DER GESELLSCHAFT FÜR GRIECHISCHE
UND HELLENISTISCHE RECHTSGESCHICHTE

begründet von

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Gerhard Thür

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INHALT

II. HELLENISTISCH-RÖMISCHES RECHT

VORWORT

Die neunte Tagung der Gesellschaft für Griechische und Hellenistische Rechtsgeschichte fand vom 12. bis 16. September 1993 in Graz-Andritz statt. Vor über 20 Jahren hat Hans Julius Wolff, der Begründer der Gesellschaft, das "Symposion" ins Leben gerufen. Etwa die Hälfte der heutigen Teilnehmer haben die erste Tagung in Rheda, 1971, noch in lebhafter Erinnerung. Der von Wolff geprägte Arbeitsstil leitete auch dieses Symposion, das fast genau zehn Jahre nach seinem Tode, am 23. August 1983, stattfand. Es war ein Anlaß, seiner zu gedenken.

Bei der Niederschrift dieser Zeilen ist auch eines weiteren Kollegen zu gedenken, den der Tod uns entrissen hat. Am 3. April 1994 verstarb Henryk Kupiszewski, der unserem Kreis als Freund und Kollege nahe stand. An der Tagung konnte Kupiszewski nicht mehr teilnehmen, doch wies er uns darauf hin, daß etwa um diese Zeit das Erscheinungsjahr jenes Buches sich zum hundertsten Male jährte, auf dem unsere gesamte Forschung auch heute noch aufbaut: Ludwig Mitteis, Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs (Leipzig 1891).

Die damals einsetzende Flut von Papyrusdokumenten beflügelte einen Teil der Romanisten, über den engen Zaun der Digesten hinweg in den Alltag des Imperium Romanum zu blicken. Daß dabei auch die gesamten literarischen Quellen der griechisch-römischen Antike mit einzubeziehen waren, verstand sich für die Alten Meister - denen noch kein TLG auf CD-ROM zur Verfügung stand - von selbst. Im Zentrum des Interesses stand damals freilich immer noch das römische Recht, das lediglich aus einem anderen Blickwinkel, historisch getreuer, erklärt werden sollte. Hans Julius Wolff - der hierin die Spuren seines Lehrers Joseph Partsch weiter verfolgt - verdanken wir es, daß sich auch für Juristen das Recht der altgriechischen Poleis als selbständiges, dem römischen ebenbürtiges Arbeitsgebiet etablieren konnte. Nach hundert Jahren ist unser Wissen über Details gewiß über Ludwig Mitteis hinausgelangt; doch wage ich zu behaupten, daß es heute niemanden gibt, der die antiken Quellen aus eigener Lektüre in ähnlichem Maße beherrschte wie er. Die Ideen von Mitteis, Partsch und Wolff leben in dem auf dem Symposion vertretenen Kreis der Disziplinen fort: Juristen, Althistoriker, Philologen, Papyrologen, Epigraphiker (mit der "Anthropologie" haben wir unsere liebe Mühe). Zur Kontuinität unserer Forschungsarbeit vielleicht noch ein persönliches Detail: Wolff bewahrte unter den wenigen Büchern, die er in die Emigration mitnehmen konnte, auch ein Exemplar von Mitteis; es trägt die Widmung: "Herrn Dr. Julius Wolff zur Erinnerung an seinen Lehrer überreicht von Ilse Partsch. September 1926."

Nachdem Österreicher bei den Symposien bisher stets als Gäste aufgetreten waren, war es an der Zeit, auch einmal die Gastgeberrolle zu übernehmen. Herr Kollege Arnold Kränzlein und der Unterzeichnete kamen dieser ehrenvollen Aufgabe gerne nach. Das Josef-Krainer-Haus in Graz-Andritz bot eine ideale Atmosphäre für Arbeit und persönliche Begegnung. Zu danken ist dem österreichischen Bundesministerium für Wissenschaft und Forschung, dem Land Steiermark und der Stadt Graz bzw. der Karl-Franzens-Universität Graz für namhafte finanzielle Zuschüsse.

Den ursprünglichen Intentionen des Symposions gemäß stand die Tagung unter keinem "Generalthema". Ein Blick in das Inhaltsverzeichnis zeigt jedoch sofort, daß sich gewisse Schwerpunkte spontan bilden. Vor allem zeichnet sich ab, daß - nach einigen Jahren Pause - die Diskussion um den Charakter des altgriechischen Vertrages, ein Lieblingsthema Wolffs, wieder in Gang kommt (Stephen C. Todd, Edward E. Cohen, Julie Vélissaropoulos-Karakostas, Éva Jakab - wenn auch noch ohne überzeugende Ergebnisse). Bewährt hat sich das von unseren amerikanischen Kollegen eingeführte System, die Erörterung der einzelnen Vorträge möglichst mit einem vorbereiteten "Diskussionsbeitrag" zu beginnen. Sie sind auch in diesem Band mit publiziert. Daß nicht jedes Referat so kommentiert ist, liegt an der beschränkten Zahl der Teilnehmer. So hätte etwa der Beitrag von Edward M. Harris dringend eines juristischen Kommentars bedurft. Die Autoren hatten Gelegenheit, ihre Darstellung zu glätten, die sachlichen Differenzen blieben selbstverständlich bestehen. *Videant prudentes.*

*

Wie versprochen, kann dieser Band ein Jahr nach der Tagung erscheinen. Zu danken habe ich dafür zunächst den Autoren, die in einem für Geisteswissenschaftler geradezu atemberaubendem Tempo arbeiteten. Dem Land Steiermark ist für einen Zuschuß zu den Druckkosten des vom Hause Böhlau verantwortungsvoll betreuten Bandes zu danken. Die "Aufsichtsvorlage" wurde im Grazer Institut für Römisches Recht und Antike Rechtsgeschichte auf Macintosh IIvx (Microsoft Word 5.1., SP Greekkeys "Attika") und Laser Writer Pro hergestellt. Danken möchte ich bei dieser Gelegenheit auch der Grazer Rechtwissenschaftlichen Fakultät, die keinen meiner Ausstattungswünsche offen ließ. Die Last des Satzes nahmen mir Frau Eva Ploder und Frau Mag. Kaja Uibopuu ab. Bei ihnen möchte ich mich im Namen aller Autoren bedanken.

Graz, im August 1994 Gerhard Thür

I. ALTGRIECHISCHES RECHT

Henri et Micheline van Effenterre (Paris)

Arbitrages Homériques

Il existe une certaine continuité dans l'élaboration du droit grec depuis les temps homériques jusqu'à l'époque classique. Du moins, osons-nous le penser, pour beaucoup d'entre nous, et sans oublier toutes les différences, les progrès d'une ère à l'autre, ni la variété des règles retenues.

Parmi les indices de cette continuité, on cite volontiers la ressemblance de la procédure, arbitrage, puis jugement, que l'on observait entre la scène du *Bouclier* d'Achille dans l'Iliade et le système athénien classique des *diaitètai*, arbitres publics qui intervenaient dans les affaires avant les tribunaux et, si possible, à leur place. L'un des derniers articles que nous avons pu lire, grâce à Jo Mélèze, dans la bibliographie démentielle du sujet - qui de vous n'a jamais traité du *Bouclier*? -, celui de N. G. Hammond (*BASP*, 22, 1985, 79-86), va toujours dans le même sens, en montrant à la manière de Milman Parry, la survivance de ce système de jugement après arbitrage pour les crimes de sang dans l'Albanie moderne. Il rappelle que Walter Leaf, dès 1888, avait souhaité qu'Evans, qui n'était pas encore Sir Arthur, pût étudier le "blood-feud" en Albanie ..., mais le départ pour la Crète du futur seigneur de Cnossos mit fin à pareil espoir. C'est donc en Crétois aujourd'hui que nous venons vous évoquer cet épisode et risquer un réexamen de la scène du *Bouclier*, en y ajoutant ce que, dans la ligne des trouvailles minoennes, la grande fresque de Santorin pourrait apporter de précision graphique à l'ensemble.

Nous serions les derniers, vous le savez, à mettre en cause les continuités existant entre monde créto-mycénien ou homérique et monde grec. Mais en l'occurrence, nous croyons qu'il y a maldonne et que l'arbitrage du *Bouclier* n'est pas celui qu'on pense. Ce sera le sujet de notre intervention.

Nous devrions, à ce point de notre discours, faire comme nos prédécesseurs et vous donner le texte et notre traduction du passage d'Homère, *Iliade*, XVIII, 497-508, dont nous allons parler. Le texte, vous l'avez sous les yeux (*voir in fine*). Notre traduction, hélas!, nous sommes bien incapables encore de vous la fournir. Il y a tant de sens possibles à toutes les expressions de ces douze vers, tant de bons arguments avancés par les meilleurs auteurs pour dire le contraire de leurs devanciers, qu'il n'y a pas aujourd'hui, ce nous semble, d'interprétation moyenne et raisonnable qui rallie tous les suffrages sur la célèbre description. Que ceux qui parmi vous en ont défendu une nous

pardonnent! Et tant pis pour nous si, tout à l'heure, vous pensez que la nôtre ne vaut pas mieux que les autres - les Crétois sont menteurs! - ou qu'elle enfonce des portes ouvertes!

*

Nous allons donc nous contenter d'abord de commenter le texte en signalant au fur et à mesure les hésitations qui se sont exprimées tout au long de plus d'un siècle d'exégèse homérique acharnée.

v. 497-8: "les gens - ou des gens - étaient nombreux - ou rassemblés - sur *l'agora*: une querelle s'était élevée là, deux hommes se querellaient à propos de la *poinè* d'un homme tué".

Je vous rappelle qu'à nos yeux, *laoi* veut dire "le peuple", "n'importe qui" et pas seulement "les guerriers" - nous nous en sommes déjà expliqués ailleurs - et que la *poinè*, das Wergeld, la compensation ou prix du sang, a donné lieu à toutes sortes d'études fort intéressantes, mais qui ne nous soucient pas pour le moment.

v. 499-500: "l'un déclarait tout donner - ou avoir tout donné-, il le proclamait au peuple; l'autre refusait de rien prendre - ou niait qu'il eût rien reçu".

Les deux sens ont été soutenus, le premier étant seul conforme à la bonne syntaxe grecque: comme le poète use de propositions infinitives dépendant d'un verbe déclaratif, *eucheto*, *anaineto*, la négation devrait être *ouden* s'il s'agissait de l'expression d'un fait; l'emploi de *mèden* implique une intention, une volonté quelconque. Evidemment, cette lecture soulève la grave question du caractère privé et non obligatoire de la *poinè*. Ce n'est pas une excuse pour faire dire au texte ce que le grec ne dit pas! Disons en tout cas qu'il y a violente querelle et que l'affaire doit être très sérieuse.

v. 501: "les deux adversaires s'en sont remis à un arbitre - ou à un arbitrage - pour trouver le moyen d'en sortir".

Nous n'insistons pas sur *epi histori*, nous y reviendrons bientôt: c'est le coeur même de notre sujet.

v. 502 sqq.: "les gens soutiennent les deux parties, prenant fait et cause d'un côté comme de l'autre; il y a des hérauts pour les contenir; quant aux Anciens, ils sont assis dans un cercle sacré, sur des pierres dressées - ou polies - tenant à la main des bâtons de hérauts à la voix retentissante":

Pas de difficulté majeure ici.

v. 506 sqq.: "avec eux (les bâtons) - ou devant eux (l'assistance) - peu nous importe! - ils se lèvent à tour de rôle pour juger; et, au milieu d'eux, ont été mis deux talents d'or qui seront donnés à celui, parmi eux - ou devant eux - qui aura dit son jugement le plus droitement".

Ici, nous avons encore tranché dans notre interprétation: nous sommes résolument en faveur du maintien des mêmes personnes, les Anciens à tour de rôle, comme sujets des verbes *èisson*, *dikazon* et *eipoi*, nous y reviendrons. Nous croyons en effet devoir écarter l'idée qu'il puisse s'agir là des deux adversaires, comme certains l'ont soutenu, contre le scholiaste d'ailleurs. Sur ce point, serions-nous contredits dans notre Symposion?

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Passons maintenant à l'essentiel: la valeur de *histôr* et l'arbitrage homérique. *Histôr* signifie "celui qui sait", notamment pour avoir vu, donc un témoin oculaire. Homère connaît le terme de *marturos* pour le "témoin". Mais ici, comme en XXIII, 485-6, pour la course de chars, il a employé *histôr*, que l'on a traduit généralement par "arbitre". Pour ne citer qu'eux, nos maîtres et amis P. Mazon et P. Chantraine ont expressément rendu *histôr* par "arbitre", et Mazon précise même, dans sa traduction du *Bouclier*, "tous deux recourent à un juge".

C'est à partir de là que les choses se sont compliquées, que l'affaire - et la bibliographie - se sont enflées comme de véritables bulles de savon! Car le mot d'"arbitre", en français, comme sans doute ses équivalents dans d'autres langues, recouvre deux réalités très différentes. Nous nous en sommes rendu compte récemment à Roland Garros en voyant l'Inde écraser l'équipe de France en Coupe Davis ... Nous appelons d'ordinaire "arbitre", ou "arbitre de ligne" ou "juge de ligne" ou "juge de touche", celui qui voit et dit où est tombée la balle: *in,* or *out,* or *on the line*. Dans d'autres sports, le même rôle est joué par la photo d'une arrivée groupée sur un hippodrome, ou en escrime par l'allumage d'une petite lampe - que nous appelons d'ailleurs "lampe-témoin". C'est une question de fait et ce sont les équivalents modernes de *l'histôr* de XXIII, 486 (trad. P. Mazon): "Tiens, dit Idoménée à Ajax, parions donc un trépied, un bassin - en prenant pour arbitre le fils d'Atrée, Agamemnon - sur lequel des chars est en tête: quand tu paieras, tu comprendras". Il faut s'adresser à qui est bien placé et a de bons yeux, à un "témoin oculaire". Rien de commun avec un véritable arbitrage: c'est un "témoignage", qui peut parfois aider l'arbitre proprement dit à décider.

Celui-ci, c'est le personnage important juché sur sa haute chaise, à Roland Garros, qui vient éventuellement jeter un coup d'oeil complémentaire sur le terrain et qui pèse les affirmations ou les protestations des joueurs ou hélas! les hurlements des supporters. Il doit décider, trancher. En droit archaïque, c'est lui qui doit *omnunta krinein*, jurer et juger. C'est aussi le *diaitètès* athénien qui tente de donner raison à l'un des adversaires.

En matière de compétition sportive, l'arbitre est d'avance accepté par tous pour diriger *souverainement* la partie. Dans la vie courante, c'est un sage, un expert, ein Rechtskundiger (traduit notre ami E. Ruschenbusch), librement choisi par deux

adversaires pour suggérer un accord, un arbitrage, qui mette fin à leur querelle. Sa décision n'est pas légalement contraignante, mais, bien évidemment, elle ne sera pas ignorée du juge si, la dispute se poursuivant, les deux parties en viennent à s'affronter devant un tribunal. Nous ne croyons rien vous apprendre en disant cela.

Mais est-ce de cela qu'il s'agit dans la scène du *Bouclier*? Nous ne le pensons pas.

S'il y avait quelque chose à "voir" aux vers 497-503 et une décision à prendre sur le même objet aux vers 503-508, il devrait être question de *l'histôr* ou au moins de son avis après le vers 501. Il n'en est rien. Et surtout, les Anciens n'ont plus à choisir entre deux adversaires, mais à trouver la solution "la plus droite", au superlatif (entre eux, certes, mais aussi à l'endroit de *deux* adversaires)! Faut-il alors penser, comme certains l'ont soutenu, que *l'histôr* serait tout le cercle des Anciens (!) ou celui des Anciens dont l'avis serait retenu, ou leur président (?), ou faudrait-il prendre le nom d'agent caractérisé *histôr* pour un nom d'action, "un arbitrage"? Comment d'ailleurs penser à un arbitrage dans une affaire très grave au point de passionner les foules? Il est peu probable a priori que les adversaires aient pu en accepter un? Ils doivent vouloir aller jusque'au bout! Alors?

*

Et si *l'histôr* du *Bouclier* n'etait pas plus un arbitre, au sens plein du terme, que celui du pari crétois à la course de char? S'il était, comme celui-là, un témoin oculaire? Autrement dit, ne fautrait-il pas traduire le vers 501:

"tous deux s'en sont remis à un témoin": *epi histori*, un témoin chacun, ce qui en ferait deux!

Mais le singulier peut-il avoir cette valeur?

Elle était admise autrefois, par exemple dans l'édition de l'Iliade de C. G. Heyne, en 1802, en un temps où les savants savaient tout de même le grec. Elle a été abandonnée par la suite, sans doute à cause de *l'histôr* du chant XXIII, qui est tout seul bien évidemment et, croyait-on, dans une expression similaire. Toutefois le verbe, le mode et le genre sont différents:

histora d'Atreidèn Agamemnona theiomen amphô, (1ère personne du pluriel d'un subjonctif aoriste second actif): "constituons tous deux comme juge Agamemnon, le fils d'Atrée", on dirait tout aussi bien: "prenons-en tous deux à témoin Agamemnon", il s'agit d'une question de fait.

Dans la scène du *Bouclier*, *amphô d'iesthèn epi histori peirar helesthai*, le verbe est une troisième personne du duel d'un indicatif imparfait médio-passif, ce n'est pas exactement la même chose! Le duel avec *amphô* peut suffire à marquer, ce me semble, que chacun des deux a agi pour son compte, que chacun est allé chercher un témoin.

Ici, ce n'est plus le souvenir récent de la Coupe Davis qui nous a inspiré, mais un vieux souvenir du professeur d'anglais de l'un de nous, en classe de sixième, il y a septante années; ce bon maître, pour faire entrevoir aux gamins que nous étions le fait que le *Chanel* ne séparait pas deux pays, mais deux mondes de pensée, nous apprenait à traduire l'anglais *they put their hats on their heads* (au pluriel) par le français *ils mirent leur (au singulier) chapeau sur leur (toujours au singulier) tête*. Pluriel là, singulier ici. Si vous préférez: sens de la communauté d'un côté, individualisme de l'autre!

Une brève enquête nous a montré que le flamand et le néerlandais usaient du pluriel comme l'anglais, tandis que l'allemand, tout en préférant le pluriel, employait parfois le singulier par souci d'exactitude.

Et le grec? Les grammaires que nous avons consultées n'en disaient rien. Les hellénistes et philologues que nous avons pu interroger se sont montrés plutôt embarrassés. La description d'Homère, aux vers 505-506, assure l'emploi possible du pluriel:

skeptra en chersin echon, pour évoquer l'ensemble de la scène, alors que de toute évidence chacun tient le sceptre d'une seule main quand il se lève pour donner son avis, ce qui autorise P. Mazon à jouer de la syntaxe en traduisant: "Ils ont dans les mains (*pluriel*) le bâton (*singulier*) des hérauts sonores et c'est, bâton en main (*singulier*) qu'ils se lèvent (*pluriel*) ...

Sur le conseil d'un respectable inspecteur général de grec de nos amis, nous avons relu alors Aristophane qui, nous rappela-t-il, était le meilleur maître de l'usage grec commun. Eh bien, le grec est comme l'allemand: il préfère le pluriel, mais il use parfois du singulier quand il ne peut y avoir d'erreur.

Ainsi, dans *Lysistrata* 662: *tèn exômid'ekduômetha*, ôtons notre exomide", mais au vers 1093 de la même pièce: *ta himatia lèpsesthe*, "vous prendrez vos manteaux". Ou à l'inverse, *Assemblée des femmes*, 273: *perideisthe tous pôgônas*, "fixez bien vos barbes", alors que - sauf votre respect, Mesdames! - dans *Ploutos* 152:*ton prôkton autas trepein*, - il s'agit des filles de Corinthe - "elles (*pluriel*) lui offrent leur derrière (*singulier*) ...

Et, d'une façon générale, chaque fois qu'il s'agit pour les femmes de leur "myrte", de leur "delta", de leur "champ de pouliot", de leur "petit cochonnet", ou pour les hommes de ce que vous pensez, le singulier est de règle, même quand il s'agit de plusieurs personnes ...

N'insistons pas! Nous espérons que vous admettrez, au moins comme une hypothèse raisonnable, que les deux adversaires dans la scène du *Bouclier* aient pu recourir chacun à un témoin (ou bien, m'a-t-on suggéré, chacun à un groupe de témoins, *singulier à valeur collective*). Et cela peut éclairer toute l'affaire.

*

Ces "témoins oculaires" ne se contredisent pas. Il n'y a aucun faux témoignage, bien que les témoins se prononcent en sens opposé sur une questions de fait. Non pas le paiement ou le non-paiement de la *poinè*: l'un des deux mentirait dans ce cas et, s'il devait jurer, ce serait un parjure! Mais bien sur la réalité des affirmations des deux parties: la promesse faite de tout payer - tout ce que l'usage pourrait exiger - et le refus proclamé de rien prendre - l'emploi du verbe *hairein* au lieu de *lankanein* qui serait attendu doit répondre à l'idée qu'il ne s'agit pas d'une rançon à recevoir *passivement*, mais d'une compensation que l'on rejette même si l'on pourrait la saisir en quelque sorte *activement*. D'un côté, l'offre d'une compensation totale; de l'autre, le maintien des droits sacrés de l'offensé. Comme il s'agit d'intentions, les témoins sont là pour en attester la réalité.

Faut-il penser qu'ils puissent être seulement des "témoins instrumentaires", de ces co-jureurs ou *compurgatores* qui viendraient, a-t-on pu dire, soutenir par principe un homme de leur famille, de leur clan ou de leur cercle d'amis? Il y a peut-être quelque chose de cela, bien que la langue grecque ait alors d'autres mots pour le dire, *homômotai*, *horkômotai*, *sundikoi*, etc. Mais, même si l'idée ne peut être formellement exclue, ces deux hommes (ou ces deux groupes d'hommes) sont appelés comme de vrais témoins, des hommes qui savent pour avoir vu ou entendu, qui garantissent donc l'opposition apparemment irréductible des deux adversaires. Aucun motif en tout cas d'y chercher des partisans, des supporters (ceux-là sont aussi présents, mais dans l'assistance, dans le peuple).

Dès lors, les Anciens n'ont pas à dire qui aurait raison et qui aurait tort. Les deux parties ont toutes deux raison et cela fait l'intérêt de la scène. Il faut trouver une solution *neuve* pour en sortir - c'est exactement la valeur propre de *peirar hélesthai*, avec le sens premier de la racine **PER*, "traverser, aller jusqu'au bout". En effet la vengeance privée est un droit sacré: l'offrande d'une compensation n'impose aucune acceptation à la famille de la victime. Mais la paix sociale souffre de ces vendettas à répétition et la contrainte de la cité va se faire de plus en plus forte, sans jamais triompher. Même de nos jours, des affaires récentes le montrent, qui ne sont pas forcément réservées à des populations plus ou moins "en voie de développement". Alors des Anciens cherchent. Comme Salomon quand, au lieu de juger, il proposa de couper l'enfant en deux. Mais en forgeant le bouclier d'Achille, Héphaistos n'a pas mis, comme l'eussent fait les Egyptiens à côté de leurs bas-reliefs ou comme le feraient aujourd'hui les auteurs de *Bandes Dessinées* dans leurs "bulles", le texte révélateur qui nous dirait ce que chaque sage a proposé et la proposition qui, brusquement, a paru "la plus droite", la meilleure, de l'avis de tous, celle qui laissait sans voix le perdant parce que tous, lui compris, avaient le sentiment qu'une sorte de divinité, de sagesse supérieure, s'était prononcée. Nous ne la connaîtrons

jamais. Même chez Homère, l'archéologie juridique grecque reste, comme disait notre maître Charles Picard, un livre d'images sans légende ...

*

Notre conclusion sera, en évoquant devant vous les cinq cités de la célèbre fresque navale de Santorin, si proches de la description du *Bouclier*, de vous proposer pour finir notre traduction de la scène en vous faisant remarquer - mais ce serait une autre communication! - que tout peut s'y dessiner sous la dictée, comme on pourrait le faire en lisant les scènes de la *West House* d'Akrotiri, tout sauf la solution finale:

Il y avait une foule de gens sur la place (cf. les dessins de Dubout ou les miniatures de Cnossos). *Deux hommes se disputaient à propos d'un homme tué* (le cadavre est visible à l'arrière plan). *L'un disait qu'il allait tout payer, il le criait à la foule; l'autre refusait de rien emporter* (les deux ennemis se font face au centre). *Les deux avaient eu recours à leurs témoins pour qu'on en sorte* (les témoins lèvent le bras? - sans doute y avait-il un geste traditionnel? - pour jurer, face à face). *Les gens prenaient fait et cause des deux côtés.* (Agitation dans le fond, comme derrière le *Grand Stand* de Cnossos). *Mais les hérauts les retenaient. Et les Anciens étaient assis sur des pierres bien polies dans un cercle sacré. Ils tenaient à la main des bâtons de hérauts à la voix retentissante et, avec eux, ils se levaient, se prononçant à tour de rôle. Au milieu, il y avait deux talents d'or: ils iraient à celui d'eux tous qui aurait dit le plus droitement sa solution.*

*

Dans la fort sérieuse revue américaine Nestor, il y eut longtemps une rubrique intitulée "*Qu'il est permis de rire entre mycénologues ...*" Comme nous ne pensons pas que le rire soit condamnable, même chez des historiens du droit, nous allons vous donner, pour faire excuser ce radotage, la transcription qu'un de nos petits-fils, élève d'une école primaire de la périphérie parisienne, nous a faite de la scène d'Homère qui lui paraissait tout à fait banale sur le stade à la sortie de son école:

"*Plutôt qu'y avait plein d'monde su' l'terrain! Deux types s'engueulaient, rapport à un mec qui s'était fait casser la tête. L'premier disait qu'y casquerait pour tout, l'arrêtait pas de l'gueuler. L'deuxième voulait savoir que dalle. Les deux, y-z-avaient amené leurs témoins pour voir à voir. Y avait des supporters de chaque côté. Mais les keufs les r'tenaient. Les vieux, trônant coul dans la tribune officielle, leur mégaphone à la main, se l'vaient l'un après l'autre pour faire leur baratin. Au milieu, y-z-avaient mis du pognon qui r'viendrait à çui qu'aurait dit comment trancher à la finale*!"

Oberservations de M. Amelotti, D. Behrend, M. Gagarin, D. Gofas, F. Gschnitzer, D. MacDonald, A. Maffi, J. Mélèze-Modrzejewski, H.-A. Rupprecht, G. Thür et J. Vélissaropoulos, dont il a été tenu compte dans la mesure du possible.

Il. 18, 497–508

λαοὶ δ' εἰν ἀγορῇ ἔσαν ἀθρόοι· ἔνθα δὲ νεῖκος
ὠρώρει, δύο δ' ἄνδρες ἐνείκεον εἵνεκα ποινῆς
ἀνδρὸς ἀποφθιμένου· ὁ μὲν εὔχετο πάντ' ἀποδοῦναι
δήμῳ πιφαύσκων, ὁ δ' ἀναίνετο μηδὲν ἑλέσθαι·
ἄμφω δ' ἰέσθην ἐπὶ ἴστορι πεῖραρ ἑλέσθαι.
λαοὶ δ' ἀμφοτέροισιν ἐπήπυον ἀμφὶς ἀρωγοί·
κήρυκες δ' ἄρα λαὸν ἐρήτυον· οἱ δὲ γέροντες
ἥατ' ἐπὶ ξεστοῖσι λίθοις ἱερῷ ἐνὶ κύκλῳ,
σκῆπτρα δὲ κηρύκων ἐν χέρσ' ἔχον ἠεροφώνων·
τοῖσιν ἔπειτ' ἤισσον, ἀμοιβηδὶς δὲ δίκαζον.
κεῖτο δ' ἄρ' ἐν μέσσοισι δύω χρυσοῖο τάλαντα,
τῷ δόμεν ὃς μετὰ τοῖσι δίκην ἰθύντατα εἴποι.

*

Postscript

G. Thür a bien voulu nous communiquer l'aimable "Diskussionsbeitrag" qu'il a rédigé à la suite de notre communication au *Symposion 1993*, si parfaitement organisé par A. Kränzlein et lui-même. Il reprend, avec toute sa compétence, sa gentillesse et son humour habituels, les interprétations qu'il défend depuis des années. Ce ne sont pas exactement les nôtres. Mais, comme il le reconnaît lui-même, il y a parfois deux manières d'entendre le grec et le droit homériques dans la célèbre scène du Bouclier. Nous n'avons donc rien à ajouter.

H. et M. v. E.

Gerhard Thür (Graz)

Diskussionsbeitrag zum Referat Henri und Micheline van Effenterre

Elias Canetti schrieb über die 1967 erstmals publizierten Briefe Franz Kafkas an Felice Bauer seinen bewegenden Essay "Der andere Prozeß" (Neuausgabe München–Wien 1984). Ich schwanke, ob der Essay als Literatur oder als Beitrag zu deren Geschichte höher einzuschätzen ist. Kostbares Gefäß, kostbarer Inhalt. Die Ekphrasis ποίει δὲ πρώτιστα σάκος .... Homer Σ 478–606, ist, soweit die Ilias noch eine Steigerung zuläßt, ein Juwel in der Schatzkammer der Weltliteratur. Herr und Frau van Effenterre haben seine Facetten aufleuchten lassen. Die zwölf Verse, die Homer der Gerichtsszene widmet, die auf dem Schild des Achilleus mit abgebildet ist (497–508), regen in der Altertumswissenschaft immer wieder zu Betrachtungen an: Wie ist die Rechtspflege in der homerischen Polis zu erklären, welche Instrumente standen zur Verfügung, um Frieden und Gerechtigkeit zu stiften? Die zweite Frage entlockt persönlich gefärbte Exkurse. So erwähnt H. Hommel (Palingenesia IV 1969) stets auch einen selbst geführten Prozeß um sein legendäres "Eisenöfchen". Meine harte Kritik (ZSSt.Rom 87, 1970) hat eine jahrzehntelange Gewogenheit begründet. Im Andenken an den großen Philologen möchte ich, reichlich verspätet, die hohe literarische Qualität seiner damaligen Abhandlung würdigen. Ist es Zufall, daß auch der Beitrag von Herrn und Frau van Effenterre in diesen Spuren wandelt? Homer selbst scheint aus den Autoren zu sprechen. Doch auch hier ist Vorsicht am Platze.

Es kann nicht meine Aufgabe sein, die beachtliche Literatur nachzutragen, auf der vorliegende Essay aufbaut (vgl. meine Hinweise in Symposion 1985, 56 Anm. 5). Zu prüfen ist vielmehr, ob die Gesamtinterpretation in sich schlüssig ist. Zunächst ist zu begrüßen, daß neues Bildmaterial in die Diskussion eingeführt wird. Wer denkt schon an die homerische Gerichtsszene, wenn man die großartigen Fresken aus Santorin bewundert? Doch bleibt zu bedenken, daß Homer kein Fresco, sondern ein Bildwerk aus Metall vor seinem geistigen Auge hat: ... χρυσείῃ περ ἐοῦσα· τὸ δὴ περὶ θαῦμα τέτυκτο (549). Letztlich bleibt, das räumen auch die Verfasser ein, die homerische Archäologie stumm. So oft auch im Epos sonst die Helden zu Wort kommen, in der Ekphrasis verwendet Homer – stilistisch konsequent – kein einziges Mal die direkte Rede. Durch diesen Kunstgriff schafft er Distanz zwischen der Zeit der Heroen und seiner liebevoll–idyllisch geschilderten Gegenwart. Wir können also nur erschließen, was

die abgebildeten Streitparteien, was die *Gerontes* sprechen und schließlich welche Funktion der rätselhafte, nur in indirekter Rede erwähnte ἴστωρ hat.

Ganz knapp fassen sich die Autoren zu den *Gerontes*. Erst aus der wirkungsvoll an den Schluß gestellten Übersetzung erfährt der Leser, daß die *Gerontes* kein Urteil fällen, sondern nur eine "Meinung äußern", die in irgendeiner Weise zur "Lösung" des Streites führt. Stünde das ganze nicht von Anfang an unter der Devise des Schiedsgerichts, könnte ich dem zustimmen. Unter "arbitrage" verstehen die Autoren nicht ein Schiedsverfahren, das nach einem *compromissum* für beide Parteien verbindlich abläuft, sondern Vergleichsverhandlungen. Die *Gerontes* sollen die Parteien zum Einlenken bewegen, wie das im klassischen Athen der amtliche Diaitet – und übrigens auch der Gerichtsmagistrat in der Anakrisis – tun. Auch das ist unbestritten. Allerdings steht in Athen der Zwang eines staatlichen Gerichtsverfahrens im Hintergrund. Wie die homerische Polis den Rechtsfrieden ohne diesen Zwang wahrt, verraten die Autoren leider nicht. Sie verzichten jedenfalls darauf, anthropologische Modelle zu analysieren (zu diesen s. die Beiträge von Burchfiel und Behrend in diesem Band), doch vielleicht ist hier auch mit den klassischen Methoden noch mehr aus dem Text herauszuholen.

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Die Überlegungen der Autoren konzentrieren sich auf die Verse 499–501: Was ist Gegenstand dieses Streites und welche Funktion hat der ἴστωρ? Zum ersten Problem stützen die Autoren sich auf ein angeblich zwingendes sprachliches Argument. Der verfolgte Täter habe versprochen, das ganze Wergeld für den erschlagenen Mann zu zahlen, der Rächer (und Kläger im Prozeß) habe sich geweigert, etwas anzunehmen. Er bestehe auf seinem Recht auf Blutrache. Zwingend ergebe sich diese schon oft vertretene Deutung aus der Verneinung μηδέν (500). Die andere Version: "Der eine behauptete, alles bezahlt zu haben, ..., der andere verneinte, etwas empfangen zu haben," müßte mit οὐδέν verneint sein. Die Diskussion der sprachlichen Problematik hat M. W. Edwards, The Iliad: A Commentary V (Cambridge 1991) 214f. nunmehr bequem zusammengefaßt (mit einem möglichen Gegenargument aus Ar. Equ. 572). Es gibt allerdings keinen einzigen Beleg dafür, daß ein von ἀναίνομαι (ableugnen) abhängiger Infinitiv mit οὐ verneint würde. Zu denken gibt mir, daß bereits die Scholien (bT) die einfache Deutung, wurde bezahlt oder nicht, vertreten. Ich möchte deshalb bei dieser, auch von Hommel und Wolff (trotz aller sonstigen Gegensätze) übereinstimmend vertretenen Übersetzung bleiben. Der simple Streitgegenstand: Wurde bezahlt oder nicht, paßt bestens in die Idylle der Ekphrasis. Alles andere: Muß der Rächer ein Wergeld annehmen? (oder: Welcher Verwandte ist berechtigt, gegen Bezahlung des Wergeldes Verzeihung zu gewähren? M. Gagarin, Drakon, 1981, 14) ist viel zu sehr von Grundsatzfragen belastet. Nach wie vor

scheinen mir beide Varianten vertretbar, man muß also das Gesamtergebnis im Auge behalten.

Zu diesem Gesamtergebnis muß jedenfalls auch das Verständnis der Wendung ἐπὶ ἵστορι πεῖραρ ἑλέσθαι (501) passen. Hier bereichern die Autoren die seit hundert Jahren geführte Diskussion. Ihre neue Deutung: "Beide stützen sich auf ihre Zeugen", ist sicher rein sprachlich möglich. Aber ist sie im vorgeschlagenen – oder in irgendeinem – Zusammenhang auch sinnvoll? Die Autoren meinen, die Streitparteien hätten ihre feste Absicht, das Wergeld zu bezahlen bzw. es nicht anzunehmen, durch Zeugen bestätigen lassen. "Zeugen für die Absichten der Parteien" sind jedoch sinnlos. Jede Partei hat die Möglichkeit und die Pflicht, ihre eigenen "Absichten" vor Gericht in Form von Erklärungen zu äußern. Nur behauptete und bestrittene Tatsachen bedürfen des Beweises, allenfalls auch Erklärungen des Gegners, die dieser vor dem Prozeß abgegeben hat, niemals aber das eigene Klagebegehren. Wäre damit also die erste Variante, wurde bezahlt oder nicht, vorzuziehen? Doch ist dann nicht einzusehen, warum beide Parteien Zeugen beibringen sollten; wer behauptet, "nichts erhalten zu haben", muß dafür keine Zeugen führen. Auf diese unlösbaren inneren Widersprüche der gewiß geistreichen Lösung ist in erster Linie hinzuweisen. Schwerer wiegt jedoch der Einwand, daß der formale Zeugenbeweis in einem System, das angeblich nur Vergleichsverhandlungen kennt, überflüssig ist. Auch in meiner Gesamtinterpretation der Stelle komme ich ohne Zeugen aus.

Bevor ich meine These – hier notgedrungen in aller Kürze – skizziere, ist noch auf die zweite Stelle einzugehen, in welcher Homer einen ἵστωρ erwähnt, die Wettszene im Wagenrennen (Ψ 485–487). Idomeneus und Aias streiten darum, welches der aus der Ferne heranstürmenden, in eine Staubwolke gehüllten Gespanne derzeit an der Spitze liege: Diomedes oder Eumelos. Idomeneus bietet Aias eine Wette um einen Dreifuß oder ein Becken an und schlägt vor, Agamemnon als ἵστωρ einzusetzen: ἵστορα δ' Ἀτρεΐδην Ἀγαμέμνονα θείομεν ἄμφω (486). Die Etymologie ("aus unmittelbarer Wahrnehmung Wissender") und der Vergleich mit dem heutigen Sportbetrieb führen die Autoren zu dem verblüffend einfachen Ergebnis, "Augenzeuge" und "Schiedsrichter" fielen in der Person des Agamemnon zusammen. Wie ein "Linienrichter" habe er die Aufgabe wahrgenommen, vom hohen Sitz aus gewisse Tatsachen für den Wettkampf verbindlich festzustellen; seine Entscheidung hätten auch die Streitenden anzuerkennen gehabt. Dem ist aus zwei Gründen zu widersprechen. Nicht Agamemnon, sondern Idomeneus, selbst einer der Streitenden, sitzt auf der hohen Warte (451). Gerade seine direkte Beobachtung löst den Streit aus. Wenn ἵστωρ ein Sportfunktionär wäre, dann wäre es Idomeneus. Weiters soll Agamemnon von den beiden Streitenden erst zum ἵστωρ "eingesetzt" werden. Vorher hat er im Wettkampf keinerlei Funktion – und ich meine, auch nachher nicht. Wie so oft, leiten allzu kurze Schlüsse aus der Etymologie auch hier in die Irre. Nicht das "unmittelbare Wahrnehmen" ist die Aufgabe Agamemnons

– wie Achilleus vernünftig beschwichtigend bemerkt, wird jeder in Kürze selbst sehen, wer an der Spitze liege (497) –, sondern die Abwicklung der Wette. Keine der beiden Streitparteien hat den Wetteinsatz bei der Hand. Wer garantiert dem Gewinner, daß ihm der Verlierer den Dreifuß auch wirklich übergibt? Agamemnon soll wegen seiner Autorität als Feldherr, nicht wegen seiner scharfen Augen zum ἴστωρ bestellt werden, zum Garanten dafür, daß die Wette ordnungsgemäß abgewickelt wird. Er ist also weder "Schiedsrichter" noch "Augenzeuge", am allerwenigsten "Rechtskundiger", sondern schlicht und einfach Garant.

Mit "Garant" lassen sich sämtliche ἴστωρ–Stellen am ehesten in einen sachlichen Zusammenhang bringen, unbeschadet der etymologischen Wurzel. Bindeglied zwischen den beiden Texten der Ilias sind jene Eidesformulare, in welchen die Schwurgötter – Augenzeugen für den Eid und Garanten fallen hier zusammen – als ἴστορες bezeichnet werden (im athenischen Ephebeneid, Lyk. Leokr. 77, und im hippokratischen Eid), und jene böotischen Geschäftsurkunden, in welchen ἴστορες als Geschäftszeugen und Garanten auftreten (Schwyzer, Dialect. Gr. ex. 492, 503a, 523; in 491,19 garantiert sogar der Gott Asklepios für eine Freilassung – näheres s. Symposion 1985, 56 Anm. 5).

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Mein Lösungsvorschlag: Agamemnon ist als Garant für den Wetteinsatz anzusehen, mit dem ἴστωρ in der Gerichtsszene verlangen die Parteien, daß ihr Streit durch Anrufen einer Schwurgottheit beendet werde; beide Teile drängen sich zum streitentscheidenden Eid. Daß das δικάζειν der *Gerontes* nichts anderes ist, als das Formulieren des jeweils passenden Eides, folgt aus der parallelen Stelle Ψ 581–585, dem Streit um die Wettkampfpreise nach dem Wagenrennen. All das habe ich schon seit Jahren versucht, verständlich zu machen (ZSSt.Rom 87, 1970, Symposion 1985; leider liegt eine ausführliche Fassung seit 1989 bei unseren Londoner Kollegen zum Druck – aber unsere Disziplin hat einen langen Atem. – Daß ich hier auf den anregenden Aufsatz von R. Westbrook, The Trial Scene in the Iliad, HavStudClPh 94, 1992, 53–76, nicht eingehen kann, versteht sich von selbst. Seine Domäne ist der Vergleich mit den altorientalischen Rechten: Den Gegenstand des Streites faßt er ähnlich auf wie Herr und Frau van Effenterre, doch drückt er sich vor der Erklärung des ἴστωρ, 75 Anm. 69; immerhin unterstreicht er, 64 Anm. 31, die Bedeutung des Eides im Prozeß.)

Blicke ich am Schluß nochmals auf unseren als Kostbarkeit gehüteten Schild, σάκος μέγα τε στιβαρόν τε, finde ich noch ein winziges Detail, das die Gerichtsszene Σ 505 und den Streit nach dem Wagenrennen Ψ 567f. miteinander verbindet: Der Gutsherr, der soeben als *Geron* auf der Agora mit seinen Pairs im politischen Wettstreit

lag, steht still und fröhlich als *Basileus* bei der Getreideernte unter seinem Gesinde, nicht die lange Pfeife, sondern das unvermeidliche Szepter(!) in Händen (Σ 556f.). Auch die Herolde(!) fehlen dort nicht. Was machen sie? Sie bereiten die festliche Mahlzeit. Damit schließe ich in Verbundenheit mit unseren beiden Symposiarchen diese bescheidenen Bemerkungen.

Peter Siewert (Wien)

Eine archaische Rechtsaufzeichnung aus der antiken Stadt Elis

(Tafel)

1. Zur Forschung

Aus den über tausend publizierten Inschriften aus Olympia und den etwa hundert veröffentlichten Texten aus dem übrigen Gebiet der Landschaft Eleia[1] sind nicht wenige von rechtsgeschichtlichem Interesse. Diese bewegen sich in drei Bereichen: Während die zwischenstaatlichen Verträge vor allem dank der vorbildlichen Editionsreihe der "Staatsverträge des Altertums"[2] in der Forschung angemessene Aufmerksamkeit finden, und nun das Gebiet des olympischen Wettkampfrechts durch die neugriechische Dissertation von Konstantinos Frankandreas eine umfassende Behandlung gefunden hat, die allerdings noch unpubliziert ist[3], gibt es für den dritten Bereich: das Recht der Eleer, im Gegensatz zu ihren Institutionen[4] meines Wissens keine systematische Behandlung und nur wenige Einzeluntersuchungen, meist nur einzelner Inschriften. So analysiert z.B. 1982 I.K. Karnezis in einigen Inschriften die Adoption im antiken Elis[5] und R. Koerner in größerem Zusammenhang Beamtenvergehen und -strafen auch in einigen elischen

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1 Vgl. IvO = W. Dittenberger, K. Purgold: Die Inschriften von Olympia (Olympia V), Berlin 1896; H. Taeuber: Elische Inschriften in Olympia, in: A.D. Rizakis (Hg.): Achaia und Elis in der Antike, Akten des 1. Internationalen Symposiums (Meletemata 13), Athen 19-21. Mai 1989, Athen 1991, 11-113, und P. Siewert: Die Inschriften der Landschaft Eleia ohne Olympia, ebd. 105-107; der dort (S. 106 f.) erwähnte Schiedsspruch elischer Richter im Grenzstreit der phokischen Städte Phanoteus und Stiris ist inzwischen veröffentlicht durch D. Rousset, Ph. Katzouros: Une délimitation de frontière en Phocide, BCH 106, 1992, 197-215.

2 Bd. 2 bearbeitet von H. Bengtson, München[2] 1975; Bd. 3 von H.H. Schmitt, München 1969.

3 Το νομικό καθεστώς των Ολυμπιακών Αγώνων στην αρχαιότητα. Diss. Athen 1991; zum gleichen Thema P. Siewert: The Olympic Rules, in: Proceedings of an International Symposium on the Olympic Games, 5.-9. Sept. 1988, hrsg. von W. Coulson, H. Kyrieleis. Athen 1992, 113-117.

4 K.-W. Welwei: Die griechische Polis. Stuttgart 1983, 283-285; N.F. Jones, Public Organisation in Ancient Greece, Philadelphia 1987, 142-145; M.B. Sakellariou: The Polis-State (Meletemata 4), Athen 1989, passim, s. Index S. 500 s.v. Elis, Eleians.

5 Η "παίδωσις" εις Αρχαίαν Ηλείαν. ΕΕΕΜ (= Επετηρίς Εταιρείας Ηλειακών Μελετών) 1, 1982, 259-268.

Texten[6], jedoch ohne die für Elis oder Olympia geltenden Merkmale zusammenzufassen. Dies geschieht auch nicht in Koerners postumer, gerade erschienenen Edition und Kommentierung früher griechischer Inschriften, in der er allerdings eine neue wertvolle Grundlage zum rechtshistorischen Verständnis von acht Urkunden aus Olympia schafft[7]. D. Penna interpretierte die umstrittene elische Rhetra IvO 2 nicht wie etwa Koerner[8] als Privilegienverleihung an einen Patrias, sondern als Gesetz zum Schutz der Mitglieder eines gentilizischen Personenverbandes (πατριά) und ihres Eigentums vor der Selbsthilfe eines Geschädigten oder seiner entsprechenden Personengruppe[9]; diese Urkunde zeige damit den Beginn der staatlichen Jurisdiktion beim Übergang vom Stammstaat zum Polisstaat der Eleer[10]. Penna (S. 230) setzt deshalb diese Inschrift unter großzügiger Geringschätzung von Jefferys[11] unwiderlegter Schriftdatierung (475-450 v.Chr.) um ein Jahrhundert früher in das erste Viertel des 6. Jh. Daß dies nicht richtig sein kann, wird die vorzulegende Bronze-Urkunde zeigen.

2. Der elische Rückgriff auf einen früheren Gesetzestext in spätarchaischer Zeit

Ehe wir uns in die Frühzeit elischer Rechtsaufzeichnungen begeben, sei gezeigt, daß die Eleer in der spätarchaischen Periode auf eine längere Tradition schriftlicher Rechtskultur zurückblicken. Eine leider sehr unvollständig erhaltene Bronze-Tafel (IvO 3) aus dem frühen 5. Jh.[12] enthält die Bestimmung, daß τὰ ζίκαια = die Strafen (oder nach Koerner[13]: die Rechtssatzungen) gemäß der alten Rechtsurkunde gelten sollen (Z.5: [τ]ὰ ζίκαια κα(τ') τὸ γράφος τἀρχαῖον εἴε κα.) Wie alt "die alte Rechtsaufzeichnung" zum Zeitpunkt ihrer offenbar teilweisen Novellierung war, und wo sie sich befand, ist nicht gesagt. Die Nennung von Damiorgen, Bule und Volksversammlung und die spezifisch elische, sonst im Alpheios-Tal anscheinend unübliche Verwendung des Zeta anstelle des

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6 Beamtenvergehen und deren Bestrafung nach frühen griechischen Inschriften, Klio 69, 1987, 464 f.; 474; 492; 495 f.; 496.

7 Inschriftliche Gesetzestexte der frühen griechischen Polis, Köln - Wien - Weimar 1993, Nr. 36-44 = IvO 1-5; 7; 16. Ich verdanke der Freundlichkeit Gerhard Thürs die Einsichtnahme in die hier einschlägigen Teile des Werks vor der Veröffentlichung.

8 Vier frühe Verträge zwischen Gemeinwesen und Privatleuten auf griechischen Inschriften, Klio 63, 1981, 190-194.

9 Alcune osservazioni sulla Rhetra degli Elei (IvO n.2), Annali della Facoltà di Lettere e Filosofia, Perugia 25 (n.s. 9) 1987/88, 218-231.

10 Penna a.O. 229 f.; vgl. 224.

11 LSAG^2 = L.H. Jeffery: The Local Script of Archaic Greece. Revised Edition with Supplement by A.W. Johnston, Oxford 1990, 220, Nr. 15; 218 f.

12 LSAG^2 (s.o.A. 11) 220, Nr. 15, "c. 475?" (v. Chr.).

13 Koerner (A. 7) Nr. 38.

Delta[14] lassen den Staat der Eleer als Urheber von IvO 3 erkennen, der damit auch für Erlaß und Aufzeichnung des genannten alten Gesetzes verantwortlich war. Daß die frühen Rechtsaufzeichnungen der Eleer nicht in Olympia, sondern in der Stadt Elis aufbewahrt wurden, ergibt der dortige Fund der bisher ältesten elischen Rechtsurkunde, die nun vorgelegt werden soll.

3. Fund und äußere Merkmale der Bronzeurkunde von Elis

Am 4. Mai 1914 kam bei den österreichischen Ausgrabungen in Elis unter Otto Walter im Südteil der dortigen Agora über der nordöstlichen Mauer des sog. Propylon das Fragment einer Bronzetafel zusammen mit überwiegend weiblichen Terrakottafigürchen und anderen Weihgaben zum Vorschein[15]. Die bis jetzt unpublizierten Votive und die Urkunde scheinen aus dem wohl nahegelegenen Heiligtum einer Göttin zu einem noch unbestimmten Zeitpunkt - vielleicht erst in der hellenistischen Periode - in diese Opfergrube sekundär verbracht worden zu sein.

Von der glänzend polierten, dunkelgrün patinierten Bronze-Tafel, die ca. 1 mm stark, oben 9,2, unten 6,8 cm breit und 9,6 cm hoch ist, blieb der originale Rand unten und, wenn auch mit stärkeren Ausbrüchen, auch oben erhalten. Beide Seiten sind abgebrochen, öfters im Verlauf von Senkrechthasten dortiger Buchstaben. Die (unvollkommen gereinigte) hell bis dunkelgrün patinierte Rückseite ist glatt. Da Spuren einer anderen Funktion fehlen, scheint die Tafel eigens zur Aufnahme dieses Textes hergestellt worden zu sein. Reste feiner Ritzlinien sind schwach zwischen allen Zeilen erkennbar; am deutlichsten ist eine doppelte Ritzlinie zwischen Z. 2 und 3 auf deren linker Hälfte wahrzunehmen (auf dem Foto nicht sichtbar). Diese Zeilenlinien dienten dem Schreiber zur Einhaltung sehr gleichmäßiger Zeilenhöhen von ca. 1,7 cm.

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[14] IvO2; AM 106 (1991) 81f Nr. 4-8; J. Mendez Dosuna: On <Z> for <Δ> in Greek Dialectal Inscriptions, Die Sprache 35, (1991-1993) 83-85.

[15] Tagebuch; Vgl. O. Walter ÖJh 18, 1915, Beibl. 61-63 und AD 1, 1915 Parart. 69. Ich danke dem Österreichischen Archäologischen Institut und Frau Dr. Veronika Mitsopoulos-Leon für die Publikationserlaubnis und Information aus den Grabungsunterlagen, ferner dem Bundesministerium für Wissenschaft und Forschung, das die Autopsie dieser und anderer Inschriften in Elis ermöglichte. Zum Fundort s.u. § 9 u.A. 36. Das Propylon liegt zwischen Bau H und Bau D auf dem Plan von F. Tritsch, die Agora von Elis und die altgriechische Agora, ÖJh. 27, 1932, 69, Abb. 78; bei N. Papachatzis, Παυσανίου Ἑλλάδος Περιήγησις, Bd. 3 [= Paus. B. 4-6] Athen 1979, auf dem Plan S. 396 zwischen Bau 12 und Bau 13.

Bronzetafel (Elis, öst. Grabung 1914, Inv. Nr. 251) Zeichnung P. Siewert

Während die Omikra einheitlich rund sind und 0,8 cm messen, sind die Buchstaben mit Senkrechthasten ganz unterschiedlich hoch, am höchsten in Z. 4 mit 1,8 cm des Ny und des Iota (2. und 3. Buchstabe von rechts, während z.B. in Z. 1 das Iota 1,0 cm mißt. Da viele Hasten auch nicht ganz geradlinig erscheinen (z.B. am rechten Rand), sondern ganz leichte Krümmungen zeigen, ergibt sich, daß die geraden Hasten nicht mit verschieden breiten Meißeln eingeschlagen wurden, sondern mit einem Stichel eingraviert sind; die schwieriger zu gravierenden Rundbuchstaben sind jedoch mit einem Ringmeißel eingepunzt und dringen deshalb nicht so tief ins Metall wie die geraden gravierten Hasten. Das gleiche Verfahren, Einmeißelung der Rundbuchstaben und Gravierung der übrigen Schriftzeichen liegt - wie der Augenschein lehrt- z.B. in dem in Olympia gefundenen

Vertrag zwischen Sybaris und den Serdaiern vor[16]; dagegen scheinen die archaischen lokalen oder elischen Bronze-Urkunden in Olympia meist gemeißelt zu sein[17]. Die jeweils aus drei runden Punkten bestehenden Interpunktionszeichen der neuen Urkunde sind mit einer wohl nagelartigen Spitze eingedrückt oder eingeschlagen, also ebenfalls nicht graviert.

Die bustrophedon eingetragene Schrift beginnt (Z. 1) ungewöhnlicherweise von links nach rechts, während sonst frühe Inschriften aus Olympia - seien sie einzeilig oder bustrophedon geschrieben[18] - meist von rechts nach links beginnen. Der rechtsläufige Beginn eines Bustrophedon-Textes weist auf die spätere Phase dieses Schreibstils, der in den Rechtstexten aus Olympia ca. 525 v. Chr. endet[19]. Zwar dreht der Schreiber die nicht-symmetrischen Buchstaben (z.B. E, K) jeweils konsequent nach der jeweiligen Schreibrichtung, setzt aber ohne Rücksicht auf sie den Mittelstrich des Alpha durchgehend etwa im rechten Winkel zur linken Schräghaste und damit von links nach rechts geneigt zwischen die Schräghasten; d.h. er verwendet nur eine (die rechtsläufige) Form des Alpha für beide Schreibrichtungen. In Z. 2 stellen der zweite und der vierte Buchstabe von rechts ein San (anstelle von Sigma, s.u. § 5) dar, wobei der lange Anstrich einmal links, einmal rechts am Buchstaben angesetzt ist. Richtig im Sinn der linksläufigen Schreibrichtung dieser Zeilen ist nur der 4. Buchstabe von rechts, das San an der 2. Buchstabenstelle ist rechtsläufig. In diesen Verstößen gegen den Bustrophedon-Stil kündigt sich die Tendenz zu einem gleichbleibenden (rechtsläufig orientierten) Buchstabenbild und damit zu einer einheitlichen Schreibrichtung an.

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16 7. Olympia-Bericht 207-210; Tf. 86,2; halbrunde Buchstaben, wie Delta oder Rho, sind graviert; auf der hier vorzulegenden Urkunde ist jedoch der einzige vorkommende halbrunde Buchstabe Gamma in Z. 3 mit dem leicht schräg gehaltenen Ringmeißel eingeschlagen.

17 Untersuchungen über die Beschriftungstechniken von Bronzeblechen sind ein Desiderat.

18 Linksläufige einzeilige Gerätinschriften aus Olympia auf Helmen, Gefäßen, Werkzeugen u.a. z.B. AM 106, 1991, 82, Nr. 8 u. 9; zwei archaische Helme, AM 106, 1991, Tf. 4; IvO 629; SEG 22, 345 (dazu SEG 34, 331 u. LSAG^2 456, Nr. 30a). Bustrophedon-Texte, linksläufig beginnend, die noch unpublizierten Bronzeurkunden B 1292; B 7962 und B 6901; vgl. auch IvO 717, Z. 1-2; rechtsläufig beginnend wie hier auch die unpublizierte Bronzeurkunde B 6076. Allgemein über Schreibrichtungen und Bustrophedon LSAG^2 43-49.

19 LSAG^2 219; 220 Nr. 2.

4. Text, Übersetzung und kritischer Apparat

→ 1 _ _ _]MON : ἔα · ὰ ζίκα · A[_ _ _
← 2 _ _ _]ὅσας κα : ΑΠΕΤ[_ _ _
→ 3 _ _ _]ΟΙΓΕΟΙΤΑΝ : ὁ ζικ[αστὰς (?) _ _ _
← 4 _ _ _].: αἰ μά ϝο(ι) ἔα : A[_ _ _
→ 5 _ _ _].ΟΝΟΝ μὰ ζικ[άζοι (?) _ _ _

1 "... (einer bestimmten Person oder Personengruppe) soll das Urteil (oder: der Prozeß) sein (obliegen)
2 alle welche (?) --------
3 ... (wenn die) zwei (Amtsträger etwas Bestimmtes tun oder unterlassen) soll der Richter (?)
4 ... wenn (ein bestimmter Gegenstand oder Sachverhalt oder Zustand) ihm nicht gehört (oder: nicht zuteil wird) ...
5 ... soll er nicht Recht sprechen (?) ..."

Z. 1, 1. Bst (=Buchstabe): Senkrechthaste des My verläuft in Bruchkante; letzter Bst (A) nur schwach, aber eindeutig sichtbar.

Z. 2, 1. Bst links: Senkrechthaste eines schmalen Tau verläuft in Bruchkante.

Z. 3, 1. Bst links: Senkrechthaste in Bruchkante des halben Omikron nicht erkennbar, aber Phi oder Rho nicht auszuschließen.

1. Bst rechts: Die sehr geradlinige Bruchkante im Zeilenbereich läßt die Senkrechthaste eines Epsilon, Iota, Kappa, My, Ny, Pi, Rho oder San vermuten. Wegen Z. 1 (ὰ ζίκα) ist Kappa, also ζικ[zu erwägen.

Z. 4, 1. Bst rechts. Senkrechthaste verläuft in Bruchkante; möglich Iota oder San, die beide an dem (wegen der nachfolgenden Interpunktion anzunehmenden) Ende des Wortes stehen konnten.

Z. 4, linker Rand: Schräghaste verläuft in Bruchkante; an deren oberen Ende Reste einer überschneidenden zweiten Schräghaste erhalten, gemäß dem hier benützten Alphabet und dem vorliegenden Wortlaut nur Alpha möglich, jedoch in etwas abweichender Stellung gegenüber dem rechts daneben stehenden Alpha, vgl. aber das ähnliche Alpha vier Bst weiter rechts.

Z. 5, linker Rand: vor dem Omikron in waagrecht verlaufender Bruchkante vielleicht rechter Teil des Querstrichs eines hohen Tau oder eines Zeta.

Z. 5, rechter Rand: in Bruchkante Senkrechthaste deutlich,von den zahlreich möglichen Buchstaben ist wie am rechten Rand der Z. 3 aufgrund von Z. 1 ein Kappa und damit ein Verb, Adjektiv oder Sustantiv von der Wurzel ζικ- = δικ- am wahrscheinlichsten.

Bronzetafel
Elis, österreichische Grabung 1914, Inv. Nr. 251
Photo P. Siewert

5. Die Verwendung des San im Elischen

Der elische Charakter der Urkunde ergibt sich nicht nur aus seinem Fundort, sondern aus typischen Dialektmerkmalen wie dem Gebrauch des Zeta anstelle des Delta (Z. 1; 3; 5), Psilose (Z. 1; 3) u.a., und aus der elischen Schrift[20], insbesondere aus dem halbrunden Gamma (Z. 3). Die auffällige Ausnahme ist der Gebrauch des My-ähnlichen San anstelle des Sigma (Z. 2), während sonst bisher alle sicher elischen Inschriften in Olympia, Elis oder sonst irgendwo das Sigma verwenden[21]. Die nächstgelegene Landschaft, in der das San üblich war, ist Achaia[22]. Es gibt in Olympia einige Inschriften des 7. und frühen 6. Jh. im achäischen Alphabet, die importiert oder lokal-pisatischer Herkunft sein könnten[23], doch fehlen diesen die Merkmale elischer Sprachform oder Herkunft. So muß vorerst offenbleiben, ob der Gebrauch des San in Elis auf eine frühere Verbreitung der achäischen Schrift zurückgeht, ehe sich in Olympia und Eleia aus Arkadien kommend das im wesentlichen lakonische Alphabet durchsetzte[24], oder ob das San nachträglich infolge der Nähe zu Achaia in die Schrift der Siedlung Elis eingedrungen ist.

6. Datierung der Schrift

Während im 5. Jh. die Breite der Buchstaben sich etwa ihrer Länge nähert, sie also nahezu quadratisch werden, sind vor allem Buchstaben des 8. und 7. Jh. extrem schmal und hoch ("Spinnenschrift"[25]). Epsilon, Digamma, Kappa, Ny, Pi dieser Urkunde sind drei- bis fünfmal höher als breit. Keiner der publizierten und der mir bekannten unpublizierten elischen Bustrophedon-Texte aus Olympia oder Elis selbst zeigt derartig altertümliche Buchstabenformen. Der einzige publizierte, bustrophedon geschriebene Text (IvO 1) wird von Jeffery mit guten Gründen in die Zeit um 525 gesetzt[26]. In dessen Schrift verhalten sich Breite und Länge der gleichen Buchstaben etwa wie 1:2 oder 2:3[27].

Neben den genannten hochaltertümlichen Buchstaben zeigt unsere Inschrift aber auch 'moderne' Züge, die schließlich für die Datierung maßgeblicher sind, wie das breite Alpha und San, und die schon behandelten Indizien einer latenten Tendenz zur

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20 Dazu LSAG² 206f; 216ff.

21 Vgl. z.B. IvO 1ff; LSAG² 206f; 216ff; zum Gebrauch von San statt Sigma LSAG² 33.

22 LSAG² 248f; 221-4, Tf. 44.

23 Vgl. Verf., Die frühe Verwendung und Bedeutung des Ortsnamens 'Olympia'. AM 106, 1991, S. 65, Anm. 3, S. 66, Anm. 10.

24 LSAG² 208.

25 Bezeichnung und wichtige neue Kriterien zur Schriftdatierung bei H.R. Immerwahr: Attic Script, A Survey, Oxford 1990, 15-18.

26 LSAG² 220 Nr. 2; 219.

27 Nach der Facsimile-Zeichnung in IvO.

rechtsläufigen Schreibweise (s.o. § 3 Ende). Die Formen der Buchstaben und ihre Unregelmäßigkeit in der Breite und Höhe, die Verwendung des altmodischen San und die starke Interpunktion entsprechen am besten den peloponnesischen Bustrophedon-Inschriften der ersten Hälfte des 6. Jh. v. Chr.[28]. Damit ist diese Tafel deutlich älter als alle bisher aus Olympia bekannten Urkunden ("Rhetrai") und wohl eines der frühesten Schriftzeugnisse der Eleer überhaupt[29].

7. Kommentar

Daß hier ein Gesetz vorliegt, zeigen die typischen Optative elischer Rechtsregeln in Z. 1; 3; 4; die Formel αἰ μά Z.4 "wenn nicht" und die Verwendung von δίκη in Z.1 ἀ ζίκα und seiner Ableitung Z.3 vielleicht ὀ ζικ[αστάς?] und Z.5 vielleicht eine Verbalform μὰ ζικ[άζοι?].

Z. 1: Der Ausdruck ἔα ἀ ζίκα findet sich fast gleichlautend und in gleicher Wortstellung in IvO 7, wo es in der Übersetzung Koerners[30] heißt (Z.2): "Wenn aber einer gegen das Gesetz urteilt, soll das Urteil ungültig sein (ἀτελὲς κ' εἴε ἀ δίκα); ἔα und εἴε sind mehrfach bezeugte, wohl gleichwertige Varianten für den elischen Optativ von εἶναι[31]. Der verlorene Teil der ersten Zeile könnte eine nähere Bestimmung enthalten haben, welchen Organen die Aufgabe des Urteilens zukomme oder unter welchen Umständen oder Voraussetzungen ein Prozeß zu führen sei.

Z. 2: Das ΟΣΑΣ könnte eine feminine Partizipialendung im Genetiv Sing. sein (vgl. IvO 7,3: ἀ δὲ ϝράτρα ἀ δαμοσία τελεία εἴε δικάδοσα). Auch ein maskulines Partizip im Nominativ des Aorist eines Verbums auf -όω käme in Frage[32]. Doch etwas mehr Wahrscheinlichkeit kann wegen des nachfolgenden κα der Vorschlag von F. Gschnitzer (s.u.) beanspruchen, hier das weibliche Relativpronomen ὅσας 'wie groß', 'wie viel(e)', sei es im Genetiv Sing. oder im Akkusativ Plur., anzunehmen[33]. Worauf

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28 LSAG² Tf. 20, Nr. 18; Tf. 24, Nr. 5; Tf. 25, Nr. 6; 8; Tf. 26, Nr. 7; Tf. 27, Nr. 9.

29 Die ältesten sicher elischen Inschriften sind Kessel- und Geräteweihungen ausdrücklich "der Eleer": in Olympia AM 106, 1991, 82, Nr. 8 (linksläufig und ältere, kleine Omikra), Nr. 4-7 (rechtsläufig, jüngere, große Omikra) mit jüngeren Buchstabenformen, die der 2. Hälfte des 6. Jh. angehören. Ein Teil dieser Geräte auch bei W. Gauer: Die Bronzegefäße von Olympia, Teil I (Olympische Forschungen 20) S. 181 Le 26 (= AM 106, 1991, 82, Nr. 8), S. 184 Le 38 (= AM 106, 1991, 81, Nr. 4), S. 184 Le 39 (= AM 106, 1991, 82, Nr. 6, Taf. 9,1).

30 Nr. 37 (ob. A. 7).

31 Vgl.z.B. IvO 3; 4; 7; 9.

32 Vgl. z.B. in IvO 13 mehrere Formen von τιμόω = τιμάω.

33 Vgl. ὅσσα κα ὕσταριν γίνωνται im elischen Amnestiebeschluß Z. 7f. ÖJh 1, 1898, 199 = C.D. Buck, The Greek Dialects, Chicago 1955, S. 262, Nr. 65; über das Nebeneinander der Varianten -αις und -ας (z.B. IvO 3,4 u. 4,3) für den Akk. Plur. Fem. im Elischen Buck S. 68 § 78.

sich das ὅσας bezog - etwa auf zukünftige ζίκαι 'Urteile' oder 'Prozesse'? - läßt die Lückenhaftigkeit des Textes nicht erkennen.

Z. 3: In ΟΙΓΕΟΙΤΑΝ ist die reguläre Optativform eines Duals erkennbar, der entweder in einem Wenn-Satz mit αἰ aussagte, falls zwei Leute etwas täten oder unterließen, dann solle der Richter(?) (ὁ ζικ[αστάς?] oder ζικ[αστέρ?] oder ὁ ζικ[άζον?]) agieren, oder der Satz endete mit der Interpunktion nach dem Dual mit dem Gebot, daß zwei Leute etwas tun oder unterlassen sollten, und die nachfolgenden Buchstaben gehören zu einem neuen Gedanken. Die Zweizahl läßt vermuten, daß sie sich auf zwei Träger eines Amtes bezieht. Die verlockende Korrektur [δαμι]ο⟨ρ⟩γεοίταν (belegt in IvO 16, 16), wobei das eindeutige Iota zu einem Rho geändert werden müßte, verbietet sich jedoch angesichts der benachbarten Textlücke aus methodischen Gründen. Mit allen Vorbehalten sei erwogen, daß gemäß Z. 3 der Richter handeln müsse, falls die Träger eines zweistelligen Amtes gemeinsam etwas (gegen ihre Pflichten?) tun oder unterlassen.

Z. 4: In αἰ μά ϝο(ι)[34] ἔα sind erkennbar: "...wenn ihm (ein vorher genannter, uns unbekannter Gegenstand oder Sachverhalt oder Zustand) nicht gehört" oder "nicht zuteil wird[35] ...." Es scheint vorher mit Bezug auf eine Einzelperson eine positive Bestimmung gestanden zu sein, für deren Gegenteil oder deren Verletzung eine Konsequenz oder Aktion, vielleicht eine Strafverhängung angeordnet war. Auch wenn man das Personalpronomen auf den in der vorhergehenden Z.3 vermuteten Richter bezieht, wird der Sachverhalt nicht deutlicher. Angesichts der ähnlichen Formulierung in Z.1 wäre auch möglich, daß ἁ ζίκα als Subjekt dieses Satzes gedacht ist in dem Sinn: "falls ihm (dem vorgesehenen Funktionär) nicht die Urteilskompetenz gewährt wird."

Z. 5: Aufgrund der Z.1 und 3 läßt sich annehmen, daß in μὰ ζικ[ebenfalls von richterlicher Tätigkeit die Rede ist, sodaß etwa denkbar wäre "jemand darf nicht urteilen" μὰ ζικ[άζοι.... Eine andere, weniger in den Zusammenhang passende Möglichkeit wäre, daß ein Sachverhalt als "rechtswidrig" (μὰ ζίκ[αιον]) gelten solle.

8. Gesamtinterpretation

Angesichts der zahlreichen offenen Probleme fragt sich, was sich mit einiger Sicherheit an diesem Text feststellen läßt:

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[34] Zu diesem, im Elischen bisher nicht, jedoch bei Homer und in anderen westgriechischen Dialekten bezeugten Personalpronomen LSJ. s.v. οὗ, οἷ. ἕ; Buck, §118, 1.4; zur häufigen Elision im Elischen vgl. Buck §91; 94, 9; 240, 7.

[35] Zu diesem εἶναι mit Dativ vgl. IvO 4,1: τοι ζέ κα θεοκόλοι θ[ά(ρ)ρο]ς ἔ(α). αὐτῦι καὶ χρεμάτοις "dem Theokolos aber soll [Sicherheit] sein, ihm und (seinem) Vermögen" nach Koerner (A. 7) Nr. 39.

1) Kein Wort zeigt eine religiöse Färbung, nichts ist über eine Gottheit oder Opfer erkennbar. Obwohl zusammen mit Votivgaben gefunden, trägt dieses Bronzeblech kaum eine *lex sacra.*

2) Positiv betrachtet, weisen mehrfache Ausdrücke des Wortstammes von δίκη darauf hin, daß die Modalitäten der Urteilsfindung oder Kompetenzen von Richtern (δικασταί) in dieser insgesamt nur fünf Zeilen umfassenden Urkunde geregelt wurden.

3) Der Dual in Z.3 läßt ferner an eine Abstimmung der richterlichen Tätigkeit mit den Funktionen anderer elischer Behörden denken.

9. Der Publikationsort

Die mitgefundenen Weihgaben weisen auf die Aufstellung oder Aufbewahrung der Urkunde in einem nahegelegenen Heiligtum einer weiblichen Gottheit. In Frage kommt vor allem das Heiligtum der Aphrodite, das Pausanias (6,25,1) bezeugt und das nahe dem Fundort zu vermuten ist[36]. Zwar sind in Elis bisher keine weiteren Inschriften des 6. oder 5. Jh., doch genügend (allerdings kaum publizierte) Reste gefunden, die zeigen, daß sich dort in archaischer Zeit ein oder mehrere Heiligtümer und eine Siedlung befanden[37].

Obwohl der Synoikismos von Elis, der diesen Ort zur Hauptstadt der Eleer machte, erst für das Jahr 471 überliefert ist[38], läßt die Aufbewahrung der staatsrechtlichen Urkunde vermuten, daß diese zentral in der Landschaft gelegene Siedlung überraschenderweise schon im frühen 6. Jh. eine hauptstädtische Funktion in der Gemeinschaft der Eleer ausübte.

Der Fundort dieses Gesetzes im Süd-Teil der von Pausanias (6,24,1ff.) bezeugten Agora läßt vermuten, daß dort schon im frühen 6. Jh. - also vor dem Synoikismos von Elis - Gerichtssitzungen (zumindest solche von gesamtstaatlichem Interesse) stattfanden, wie dies auf archaischen Agorai üblich war[39]. Somit läßt sich die Existenz der Agora von Elis schon in die hocharchaische Zeit zurückdatieren, was zugleich auch die Nachrichten

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36 F. Tritsch: Die Agora von Elis und die altgriechische Agora, ÖJh 27, 1932, Plan S. 68: die Bronzetafel wurde bei dem unmittelbar südlich von Bau H gelegenen Propylon gefunden (das auf dem Plan gezeichnet, aber nicht benannt ist) s.o.A. 15. Zum Propylon Tritsch 73.

37 N. Yalouris: Elis, in: R. Stillwell, W.L. MacDonald, M.A. McAllister (Hgg.): The Princeton Encyclopedia of Classical Sites, Princeton N.J. 1976, 299; Ders.: Ἦλις. πόλις-κράτος, Athen, im Druck, Kap. III (Ich danke dem Verfasser für die freundlich gewährte Einsicht.)

38 Diod. 11,54,1; Strabo 8,3,2 (336). H. Swoboda: Elis, Geschichte, RE 5 (1905) 2393. Jones (A. 4) 144; 145.

39 Vgl. F. Kolb: Agora und Theater, Volks- und Festversammlung, Berlin 1981, Tabelle S. 108f.; ferner S. 2; 3; 11; bes. 83f. Private Prozesse der Eleer entschieden zur Zeit des Polybios umherziehende Richter Plb. 4, 73,7f.

über dort oder nahebei befindliche uralte Bauten (Grab des Oxylos und des Achill) und dort stattfindende Zeremonien (z.B. der 16 "heiligen Frauen") glaubhafter macht[40].

10. Olympia als Publikationsort elischer Staatsurkunden

Etwa um 570 v.Chr. eroberten die Eleer die Pisatis und übernahmen die Leitung der olympischen Spiele[41]. Im mittleren Drittel des 6. Jh. setzen in Olympia Urkunden in elischer Schrift und Dialektform ein[42], die den dortigen Zeus-Kult[43] oder die olympischen Agone[44] oder die Verwaltung oder Politik des elischen Staates[45] betreffen. Das Zeus-Heiligtum wurde damit Publikationsort des elischen Staatswesens und als Empfänger von Tributen Lepreons an die Eleer[46] eine Art Staatskasse. Die Eleer haben demnach das den Pisaten abgenommene, prestigeträchtige Olympia mit einigen "Hauptstadtfunktionen" ihrer Staatsverwaltung ausgestattet, was auch den Anlaß für die Errichtung des archaischen Buleuterion[47] und des Prytaneion[48] gegeben haben mag. Da - wie früher erwähnt (s.o. § 3) - die elische Urkunde IvO 3 die Gültigkeit einer früheren Rechtsaufzeichnung bestätigt, läßt sich vermuten, daß in Elis ältere Urkunden wie die hier vorgelegte aufbewahrt wurden. Elis ist demnach bis zur Gewinnung Olympias schon ein Zentralort der elischen Staatsgemeinde und Publikationsstelle ihrer Rechtsaufzeichnungen gewesen. Somit läßt sich die Entstehungszeit der Urkunde aus Elis (s.o. § 6) wohl auf ca. 600-570 v. Chr. einschränken, d.h. auf die Zeit, ehe Olympia Publikationsort des elischen Staates wurde.

11. Der Beginn von Rechtsaufzeichnungen bei den Eleern

Etwa um die Mitte des 7. Jh. beginnt bekanntlich der Einzug der Schriftlichkeit in griechische Staatsorganisationen und damit das Zeitalter der Gesetzgeber und

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40 Vgl. Paus. 6,23,3. 24,1. 9 und 5,3,3f; über den ersten Synoikismos durch Oxylos; V. Mitsopoulos: Nochmals: "Αξιε ταῦρε und die sechzehn heiligen Frauen, AM 99, 1984, 275-290.

41 E. Meyer: Pisa, Pisatis, RE 20 (1950) 1751 f.

42 Die frühesten Urkunden werden vom Verfasser zur Publikation vorbereitet.

43 Z.B. IvO 1; 5; 14.

44 J.Ebert, P. Siewert: Eine archaische Bronzeurkunde aus Olympia mit Vorschriften über Ringkämpfer und Kampfrichter, 11. Olympia-Bericht, im Druck.

45 IvO 2; 3; 9; Kultisches und Staatsrechtliches in IvO 4; 7.

46 Thuk. 5,31,2 = Staatsverträge II (A. 2) 164.

47 A. Mallwitz: Olympia und seine Bauten, Darmstadt 1972, 93. H.-V. Herrmann: Olympia, Heiligtum und Wettkampfstätte, München 1972, 104 f.

48 Mallwitz 127; Herrmann 232, A. 257.

Rechtsaufzeichnungen[49]. Aristoteles, der in Olympia die Inschrift des Iphitos-Diskos studierte[50] und eine Staatsverfassung der Eleer selbst oder durch Mitarbeiter verfaßte[51], erwähnt in seinen "Politika" ein altelisches Gesetz, das die Zeitgenossen dem legendären König Oxylos zuschrieben: dieses habe festgelegt, jeder Eleer müsse einen Teil seines Landbesitzes unverpfändet lassen[52].

An anderer Stelle des gleichen Werkes berichtet der Philosoph, daß es in Elis einst (ποτέ) eine sehr enge Oligarchie gab, deren Rat aus 90 lebenslänglichen Mitgliedern bestand: Andere Oligarchen, die von den Ämtern ausgeschlossen waren, hätten diese Verfassung gestürzt und eine erweiterte Oligarchie eingeführt[53]. H. Swoboda datiert mit ausführlichen Überlegungen das Ende dieser strengen Oligarchie, von der die elischen Urkunden keine Spur mehr zeigen, in den Anfang des 6. Jh.[54], also gerade in die Entstehungszeit unserer Urkunde. Aristoteles' detaillierte Nachricht von der Verfassungsänderung dürfte auf Schriftquellen zurückgehen, die er bei seinen eigenen Forschungen oder mittelbar durch lokalhistorische Literatur (Hippias von Elis?) kennenlernte.

Aus all diesem ergibt sich als Hypothese, daß im frühen 6. Jh. eine politische Krise zu der von Aristoteles erwähnten Verfassungsreform führte und in deren Folge die Änderungen in der elischen Staatsorganisation erstmals schriftlich fixiert wurden. Daß Rechtsbestimmungen anläßlich der Bewältigung konkreter, politischer oder sozialer Krisen aufgezeichnet wurden, hat K.-J. Hölkeskamp unlängst betont[55]. In diesen politisch bedingten Zusammenhang der schriftlichen Fixierung administrativer Regeln könnten demnach die Quelle von Aristoteles Nachricht über die Verfassungsänderung und die (nicht notwendig genau zeitgleiche) Aufzeichnung der wohl neuen prozeßrechtlichen Bestimmungen unserer Bronzetafel gehören. Möglicherweise zählt auch - wie erwähnt (o. § 2 und § 10) - die in IvO 3 zitierte "alte Urkunde" zu diesen frühen öffentlichen Aufzeichnungen in Elis infolge jenes Verfassungssturzes. Somit erlauben die Bronzetafel und das Aristoteles-Zeugnis, die Änderungen der oligarchischen Verfassung als Anlaß für die öffentliche Verwendung der Schrift und für die Aufzeichnung der neuen Regeln zu erwägen.

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49 M. Gagarin: Early Greek Law, Berkeley - Los Angeles - London 1986, 51 f., 129 f. Allgemein K.-J. Hölkeskamp: Written Law in Archaic Greece, PCPhS 38, 1992, 87-117.

50 Plut. Lyk. 1,2.

51 Aristot. Fr. 450; 451 Rose.

52 Pol. 6,1319 a 12 ff.; Swoboda (A.23) 2423.

53 Pol. 5, 1306 a 12 ff.; Swoboda (A. 23) 2424 f.

54 S. vorhergehende Anm.

55 (A. 49) bes. 93.

12. Zum elischen Staatswesen in archaischer Zeit

In den "Dark Ages" wanderten bekanntlich - sei es durch Eroberungszüge oder durch Einsickern - Träger des nordwestgriechischen Dialekts in die Peneios- und Alpheios-Regionen ein[56]. Sie schufen sich im Zeus-Heiligtum von Olympia einen gemeinsamen kultischen Mittelpunkt und bildeten die von U. Kahrstedt erschlossene Amphiktionie von Olympia[57], deren Mitglieder - wie neuere Untersuchungen zeigen[58] - Kultgeräte ins Zeus-Heiligtum stifteten und sich wahrscheinlich als "Aitoloi" bezeichneten[59]. Inwieweit diese westpeloponnesischen "Aitoloi" einen Stammstaat bildeten, sei dahingestellt. Jedenfalls entstanden nach der Seßhaftwerdung - durch die unterschiedliche landschaftliche Gliederung bedingt - zwei territoriale Herrschaftsgebiete, das der Eleer und das der Pisaten, die sich nach den von ihnen besiedelten Landschaften benannten und von "Königen" regiert[60] wurden. Während das pisatische Königtum erst durch die Expansion der Eleer um 570 v.Chr. beseitigt wurde, bestand bei den Eleern vermutlich schon im 7. Jh. die von Aristoteles überlieferte enge Oligarchie mit mehreren Ämtern und einer festgelegten Zahl von Ratsmitgliedern (s.o. § 11). Die Siedlungen (δᾶμοι) im Alpheiostal, soweit sie nicht von den expansiven Eleern annektiert wurden,[61] bekamen oder behielten ihre formale Selbständigkeit, mußten aber gefolgschaftspflichtige Bundesgenossen der Eleer werden, wie eine neue Bronzeurkunde aus dem späten 6. Jh. erschließen läßt[62]. Sie zeigt, daß die Mitglieder der darin genannten hegemonialen Symmachie (τοὶ ϝαλεῖοι καὶ ἀ συμαχία) - wohl aufgrund ihrer alten amphiktionischen Funktion - Mitwirkungsrechte im Bezug auf die olympischen Agone haben. Diese elischen Symmachoi dürften nichts anderes darstellen als die von den Geschichtsschreibern so bezeichneten Periökengemeinden der Eleer, die damit - wenigstens zur Entstehungszeit jener Inschrift - formal nicht als untergeordnete δᾶμοι des elischen Staates, sondern als staatsrechtlich selbständige, aber gefolgschaftspflichtige Gemeinwesen zu betrachten sind.

Während sich im Alpheiostal, wohl bedingt durch seine stark gegliederte Hügellandschaft, aus den aitolischen Ansiedlungen politische Kleinstaaten wie

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56 Daß auch auf der südlichen, später triphylischen Seite des Alpheios der gleiche Dialekt wie auf der Nordseite gesprochen wurde, zeigt die neue Bürgerrechtsverleihung aus Mási (SEG 35, 389).

57 Zur Geschichte von Elis und Olympia, NGG 1927, 160-162.

58 P. Siewert: Staatliche Weihungen von Kesseln und anderen Bronzegeräten in Olympia. AM 106, 1991, 81-84, Tf. 9; J. Ebert, P. Siewert (A. 44)

59 Vgl. Pindar Ol. 3,12 f.; Bakchyl. 8,29 f.; Strabo 8,354; Tzetzes Chil. 12,363 dazu Ebert -Siewert a.O.

60 Dazu P. Carlier: La royauté en Grèce avant Alexandre, Strasbourg 1984, 408-411.

61 Vgl. E. Meyer: Pisa, RE 20 (1950) 1752.

62 Ebert - Siewert (A. 44)

Chaladrion, Skillus, Epitalion, Marganeis, Ledrinoi, Amphidoloi entwickelten[63], sind aus dem offenen, weithin ebenen Siedlungsgebiet der Eleer, der Koile Elis, keine derartigen politisch selbständigen Gemeinden zu irgendeiner Zeit bekannt[64]. In der äußerst fruchtbaren Landschaft Elis gab es eine Vielzahl von Siedlungen, Gauen, Dörfern oder Demen[65], aber als einzige politische Organisation ist im markanten Kontrast zur Pisatis nur der Staat der Eleer erkennbar; keine einzige der in Olympia gefundenen Inschriften, die politische Einheiten in der näheren oder weiteren Umgebung nennen, bezieht sich nachweislich auf eine Gemeinde des elischen Siedlungsgebietes (Koile Elis), mehrere jedoch auf politische Gemeinden des Alpheios-Tales[66].

Nach der von F. Gschnitzer unlängst dargelegten Typologie erfüllt der elische Staat den Typ der "Großpolis" mit zahlreichen Landgemeinden[67]. Mit dem ebendort definierten Typ des Stammstaates, der mehreren Poleis des gleichen Stammes politisch übergeordnet sei[68], hat der archaische Staat der Eleer, soweit er uns erkennbar ist, nichts gemein, obwohl man ihn nicht selten als Stammstaat anspricht[69].

Jedenfalls enthüllt die Bronzetafel aus Elis, daß das elische Gemeinwesen schon im frühen 6.Jh. einen festorganisierten Staat mit Behörden und einer geregelten Rechtsprechung unter öffentlicher Verwendung der Schrift darstellte. Dies zwingt zu einem neuen Durchdenken unserer relativ reichlichen Quellen über diesen frühen, wohlorganisierten Staat, den ein Chor der Eleer in einem von Simonides verfaßten Zeushymnos als πόλις (Διός) besungen zu haben scheint[70]. Die elischen Frauen und Mädchen sangen noch zu Pausanias Zeit regelmäßig einen Hymnos auf den "staatsrettenden" Daimon Sosi-*polis*, bei dem die Eleer wichtige Eide leisteten und dessen Kult in Olympia und in Elis gepflegt wurde; der Kult des Sosipolis dürfte aufgrund seines altertümlichen Rituals und wegen dessen Rolle in öffentlichen Eiden in die archaische Zeit zurückreichen[71]. Somit läßt sich bei den Eleern der archaischen Zeit nicht nur ein ausgebildeter Staat unter der Bezeichnung πόλις, sondern auch ein ausgeprägtes

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63 IvO 11; 16; 257; 930; AD 19, 1964, B' 169; Xen. Hell. 3,2,26: 2,30; 4,2,16.

64 Pylos und Kyllene gelten z.B. als Orte der Eleer, nicht als selbständige Poleis.

65 Yalouris (A. 22) 300; Strabo 8,336 f.; Jones (A. 4) 145.

66 S.o.A. 61.

67 Zum Verhältnis von Siedlung, Gemeinde und Staat in der griechischen Welt, in: Stuttgarter Kolloquium zur historischen Geographie des Altertums 2, 1984 und 3, 1987 (Geographica Historica 5) Bonn 1991, 440 f.

68 Gschnitzer (vorhergehende A.) a.O.

69 Welwei (A. 4) 283; Ch. Veligianni-Terzi: Damiurgen. Zur Entwicklung einer Magistratur, Diss. Heidelberg 1977, 17; 25; 162; Penna (A. 9) 230 f.

70 Simonides Fr. 589 Page (= Himerios Or. 39,1 Colonna) Ἠλεῖοί ποτε τῆς Σιμωνίδου λύρας λαβόμενοι, ὅτε ἐπὶ τὴν Πίσαν ἔσπευδεν ὕμνῳ κοσμῆσαι τὸν Δία, δημοσίᾳ φωνῇ τὴν Διὸς πόλιν πρὸ Διὸς ἄδειν ἐκέλευον.

71 Paus. 6,20,2-6; 6,25,4; dazu, wenn auch wenig ertragreich, E. Kearns: Saving the City, in: O. Murray, S. Price (Hgg.): The Greek City, Oxford 1990, 323 ff.

politisches Gemeinschaftsbewußtsein feststellen. Der Ausdruck παρὰ τᾶς πό[λιος] in einem leider lückenhaften Kontext der schon mehrfach (§ 2 u. § 10) angeführten Urkunde IvO 3 Z. 3 könnte Leistungen von seiten der elischen Staatsgemeinde gemeint haben wie es in IvO 39 Z. 21ff: τίμια ... ὅσσα τοῖρ ἄλλοιρ προξένοιρ καὶ εὐεργέταιρ ὑπάρχει παρὰ τᾶρ πόλιορ, der Fall ist.

13. Schluß

Zum Schluß sei gefragt, was die neue Urkunde für die Rechtsgeschichte bedeutet. Der materielle Zuwachs an Kenntnissen über das elische Recht ist infolge der miserablen Bruchstückhaftigkeit des Textes minimal: er liegt allenfalls in der Wahrscheinlichkeit, daß richterliche Kompetenzen geregelt wurden. Wichtiger dürfte die historische Dimension sein, daß die Dokumentation des elischen Rechts[72] um mehr als ein halbes Jahrhundert weiter in die Frühzeit und wohl nahe an den Beginn des dortigen öffentlichen Schriftgebrauchs verlegt wird. Die Tafel zeigt, daß das elische Recht der spätarchaischen olympischen Bronzeurkunden auf einer längeren schriftlichen Tradition beruht.

Reinhard Koerner sagt in seinem jüngst erschienenen Werk anläßlich der Urkunden von Olympia über Elis, "daß eine als abseits gelegen betrachtete Landschaft schon früh eine hohe Rechtskultur entwickeln konnte; man wird gut daran tun, in Elis nicht nur ein bäuerliches, geistiger Regungen unfähiges Land zu sehen"[73]; an anderer Stelle[74] lobt er das "erstaunlich liberal(e)" Verfahren zur Verbesserung von Gesetzen in IvO 7, womit "Elis ... schon früh (sc. um 500 v.Chr.) eine feste und brauchbare Form der Gesetzesrevision entwickelte, zu der Athen erst im Jahre 403 im Nomothesieverfahren fand."[75]

Bereits die Antike kannte das hohe Alter und Niveau der Rechtskultur der sonst als verweichlicht, trunksüchtig und lügnerisch verrufenen Eleer[76]. Im Zusammenhang der messenischen Geschichte steht bei Pausanias (4,28,4): "Die Eleer hatten in ältesten Zeiten unter den Peloponnesiern die besten Gesetze" ('Ηλεῖοι ... τὰ μὲν παλαιότατα εὐνομώτατοι Πελοποννησίων ἦσαν). Zumindest das hohe Alter, das τὰ μὲν

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72 Es sei darauf hingewiesen, daß die sorgfältigen, auf der Schriftentwicklung basierenden Datierungen der Bronzeurkunden von Olympia durch Jeffery LSAG², (A. 11) 216 ff., auch wenn sie manche Unsicherheiten enthalten, nicht aufgrund rechtshistorischer Interpretationen des Inhalts und daraus gewonnener Postulate umdatiert werden dürfen, indem aus früheren, methodisch ebenso verfehlten inhaltlichen Datierungen das gewünschte Datum ad libitum ausgesucht wird, s.o. zu Penna S. 2; z.T. auch Koerner (A.7) bei Nr. 36; 39.

73 (S.o.A. 7) Nr. 38, S. 113.

74 Nr. 42.

75 Nr. 43.

76 Urteile über die Eleer bei A. Philippson: Elis, RE 5 (1905) 2372.

παλαιότατα, unter den erhaltenen peloponnesischen Gesetzesaufzeichnungen wird durch die vorgelegte Bronzetafel aus Elis erwiesen[77].

[77] Die sonst in das 7. Jh. gesetzte Rechtsurkunde von Tiryns AE 1975, 150-205 = SEG 30, 380 = Nr. 31 bei Koerner (A. 7) wird in LSAG^2 (A. 11) 443 Nr. 9a "600-550 ?" datiert.

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Ich danke F. Gschnitzer (Heidelberg) und J. Ebert (Halle) für freundliche Durchsicht und Kritik des Manuskripts.

Fritz Gschnitzer (Heidelberg)

Diskussionsbeitrag zum Referat Peter Siewert

Ich habe sehr wenig beizutragen. Herr Siewert hat diesem sehr fragmentarischen Text (der gewiß auch im vollen Wortlaut nicht leicht verständlich wäre) abgewonnen, was ihm im ersten Anlauf irgend abzugewinnen war, und auch schon das Wesentliche zur historischen Einordnung gesagt.

Die Lesung der Buchstaben ist, von einigen Buchstabenresten am Rand abgesehen, überall eindeutig und von Herrn Siewert richtig festgestellt. (Mir standen zwei ausgezeichnete Fotos zur Verfügung.) Die Inschrift hat Worttrenner; daher steht auch die Abgrenzung der Wörter weitgehend fest.

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Ein paar Bemerkungen zu einzelnen Stellen seien gestattet:

Z. 1: Der Wortrest ---]MON ist vielleicht: ---]μων (Adjektiv zweier Endungen), Akk. Sg. ---]μον, z. B. τεθ]μόν, νό]μον, δᾱ]μον ... Man wird sich hier kaum festlegen oder auch nur einigermaßen begründete Vermutungen äußern können. - Davor muß irgendwo die enklitische Partikel κα gestanden sein, jedenfalls in Anlehnung an ein stark betontes Wort. (Der Optativus potentialis mit κα (= ἄν) dient im Elischen als eines der syntaktischen Mittel zur Formulierung von Vorschriften.)

In **Z.2** scheint mir die nächstliegende Deutung ὅ(σ)σας κα zu sein, also der Anfang eines Relativsatzes mit κα + Konjunktiv (oder allenfalls Optativ). Den Ausgang -ᾱς haben wir wohl eher als Gen. Sg. denn als Akk. Pl. zu fassen, da für diesen im Elischen häufiger –αις steht. Der Genetiv kann durch die innere Konstruktion des Relativsatzes bestimmt sein (in Frage kommt sowohl ein prädikativer wie ein adverbaler Genetiv), aber auch durch den Kasus des Bezugswortes (das wir nicht haben). - ἀπετ[-- wage ich nicht zu deuten; eine augmentierte Form wie z. B. ἀπέτ[εισε kommt nach κα kaum in Frage.

Z.3: Die Form auf -οίταν halte auch ich für eine Form (3. Pers. Akt.) des Duals von einem Optativ; das zugrunde liegende Verbum vermag auch ich nicht zu bestimmen. Das Subjekt dazu würde ich eher im Folgenden vermuten: einerseits ὁ ζι---, andererseits ein zweiter; man könnte zum Beispiel an den Kläger (ὁ δικαζόμενος) und den Beklagten

denken. (Die Stellung des Subjekts nach dem Verbum ist gerade auch in den elischen Inschriften häufig.)

In **Z.4** hat Herr Siewert ohne Zweifel die richtige Deutung gefunden: αἰ μά ϝο(ι) ἔα.

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Allgemein wichtig ist die Feststellung, daß das Thema ζίκα (und Ableitungen) von der ersten bis zur letzten Zeile durchgeht: wir haben also prozeßrechtliche Bestimmungen vor uns; und zwar bilden sie offenbar den eigentlichen Gegenstand des Textes, nicht ergänzende Bestimmungen zu irgend einem anderen Gegenstand. Mehr können wir wohl nicht sagen.

Ganz kurz zur Datierung: Die Inschrift gehört nach den Buchstabenformen zu den ältesten in der Reihe der elischen Verträge, Gesetze und Volksbeschlüsse. Herrn Siewerts Datierung ins frühe 6. Jahrhundert ist gut begründet, wenn wir uns auch bewußt sein müssen, daß uns vor dem 5. Jahrhundert feste Anhaltspunkte für eine absolute Datierung der elischen Inschriften fehlen.

Auf die hochinteressanten, in jeder Hinsicht förderlichen Ausführungen von Herrn Siewert zur älteren Geschichte von Elis und Olympia einzugehen, ist hier wohl nicht der richtige Ort. Nur ein kurzer Hinweis: Wenn die 'Amphiktyonie' um Olympia in älterer Zeit offiziell mit dem Namen der Ätoler bezeichnet wurde, ist die Verlockung doch groß, den alten spartanischen Staatsvertrag mit den Αἰτωλοὶ Ἐρξαδιεῖς (Meiggs-Lewis² Add. S. 312 Nr. 67 bis) auf diese "Ätoler" (oder einen Teil von ihnen) zu beziehen.

Hatto H. Schmitt (München)

Überlegungen zur Sympolitie

Nach griechischem Vorbild bezeichnet die Wissenschaft mit dem Begriff "Sympolitie" mindestens zwei von einander verschiedene Phänomene:

– das die sogenannten "Bundesstaaten", etwa den Aitoler- oder den Achaierbund, verbindende Element und

– die Einbeziehung einer oder mehrerer kleinerer Poleis in eine größere.

Gemeinsam ist diesen beiden Phänomenen die bestimmende Kraft eines gemeinsamen Bürgerrechts.

1. Die "bundesstaatliche Sympolitie" hat Adalberto Giovannini 1971 in einem wichtigen Buch[1] behandelt und vor allem im Abschnitt "Terminologie"[2] mit etlichen Systematisierungsversuchen der früheren Forschung aufgeräumt, ohne freilich selbst der Gefahr einer zu starken Systematisierung völlig entgehen zu können. Giovannini macht geltend, daß das erst im Hellenismus belegte Substantiv συμπολιτεία eher einen *Zustand* als einen *Vorgang* oder völkerrechtlichen *Akt* bezeichne; er weist auf Polybios hin, der immer nur Wendungen wie προσλαμβάνεσθαι εἰς τὴν συμπολιτείαν, μετέχειν bzw. ἀφίστασθαι τῆς συμπολιτείας verwende, nicht aber συμπολιτείαν ποιεῖσθαι. Daraus leitet er ab[3]: "Die συμπολιτεία ist nicht etwas, das ins Leben gerufen oder aufgelöst werden kann, sondern es ist etwas, das bei einem bestehenden Staat vorhanden ist und woran einzelne Personen oder Gemeinschaften beteiligt werden können."

Betrachtet man die von Giovannini herangezogenen Polybios-Stellen situativ, wird man geneigt sein, etwas vorsichtiger zu urteilen: Polybios schreibt aus der Situation der *bestehenden* "Bundesstaaten", namentlich aus der Sicht eines hohen Funktionärs des Achaierbundes; sein Bericht hat es fast ausschließlich mit "Aufnahme" in eine sympolitische Ordnung, mit "Teilnahme" oder mit Austritt, mit "Abfall" von ihr zu tun. Irgendwann muß aber diese Ordnung begründet worden sein, durch einen Akt der ersten Mitglieder, den wir als völkerrechtlichen Akt einstufen müssen. Wenn ich recht sehe, ist die Begründung des Achaierbundes der einzige Gründungsvorgang einer sympolitischen

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1 Untersuchungen über die Natur und die Anfänge der bundesstaatlichen Sympolitie (Hypomnemata Heft 33, 1971).

2 ebd. 14-24.

3 a.a.O. S. 23.

Ordnung, von dem Polybios spricht. Er verwendet für diesen Vorgang – außer dem zweifellos nichttechnischen συμφονεῖν[4] – die Vokabel συνίστασθαι: II 41,12 πρῶτοι μὲν συνέστεσαν Δυμαῖοι, Πατρεῖς, Τριταιεῖς, Φαραεῖς· und fügt hinzu: διόπερ οὐδὲ στήλην ὑπάρχειν συμβαίνει τῶν πόλεων τούτων περὶ τῆς συμπολιτείας; es waren also zu Polybios' Zeiten keine "Urkunden über die Sympolitie" der Gründungsmitglieder vorhanden, im Gegensatz zu späteren Beitritten[5]. Es fällt schwer, συμπολιτεία hier nur als Bezeichnung der sympolitischen Struktur und nicht auch als "gemeinsamen Beschluß über die Sympolitie, Abschluß der Sympolitie" zu verstehen. Griechische Terminologie ist alles andere als stringent; schließlich ist man um 400 v. Chr. von σπονδὰς περὶ εἰρήνης ποιεῖσθαι zu εἰρήνην ποιεῖσθαι übergegangen, hat sich die Bedeutung von εἰρήνη also von "Friedens*zustand* "zu "Friedens*instrument*" erweitert. So würde es kaum überraschen, wenn für die Begründung einer sympolitischen Ordnung – also eines "Bundesstaates" – eine Junktur wie συμπολιτείαν ποιεῖσθαι gebraucht worden wäre[6].

Belegt ist ein solcher Sprachgebrauch indessen bisher offenbar nicht. Die "bundesstaatliche Sympolitie" steht freilich nicht im Mittelpunkt dieser Überlegungen.

2. Das andere Phänomen, für das die Forschung "Sympolitie" gebraucht, die Eingliederung kleinerer Poleis in eine größere, wird manchmal "synoikistische Sympolitie" genannt[7]. Giovanninis terminologische Kritik gilt auch hier dem Terminus συμπολιτεία; ich brauche sie nicht zu wiederholen.

Meine Bedenken gelten dem Adjektiv "synoikistisch"; denn es ist alles andere als eindeutig. Auch die Vokabel συνοικισμός ist erst nachklassisch belegt; seit dem Hellenismus bezeichnet sie häufig eine Vereinigung von Gemeinwesen, bei der mindestens Teile der Bevölkerung an den zentralen Ort umgesiedelt werden, mindestens ebenso oft aber einfach eine "Stadtgründung". Das Verbum συνοικίζω kann im Hellenismus und später allgemein "besiedeln" oder "wieder besiedeln" bedeuten, ohne daß es sich um die Zusammenlegung ganzer Gemeinden handelt[8]. Die συνϝοικία von Euhaimon mit dem arkadischen Orchomenos[9] wiederum spricht nicht von einer räumlichen, sondern nur von einer politischen Vereinigung; und wenn Thukydides (II 15,2) für die Vereinigung Attikas unter Theseus συνοικίζω gebraucht, so denkt er

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4 II 41, 1.11: ἤρξαντο συμφονεῖν.

5 S. z.B. Polyb. XXIII 17,2; 18,1; XXIV 2,3; 8,4.

6 Vgl. dazu unten Ziffer 2 zu der Vereinigung von Stiris und Medeon.

7 Vgl. u. a. E. Szanto, Das griechische Bürgerrecht, 1892, 104ff., 110 ff.; H. Swoboda, Zwei Kapitel aus dem griechischen Bundesrecht. SB Wien 189, 2, 1924, bes. 42 ff.

8 Vgl. z. B. L. Robert, Fouilles d'Amyzon en Carie I, Paris 1983, 188 f.; Ph. Gauthier, Nouv. inscr. de Sardes II, Genf 1989, 22; Polyb. II 55,7; IV 25,4; XVIII 51,8.

9 StV II^2 297; Moggi, Sinecismi 43; Thür-Taeuber, IPArk 15: 1. H. des 4. Jh.s.

offenbar mindestens ebenso an die politische Neuordnung der Halbinsel wie an den Umzug der Geschlechterhäupter in die Hauptstadt Athen.

"Synoikistisch" ist also ebenso mehrdeutig wie die zugrundeliegenden griechischen Vokabeln. Möglicherweise hat man συνοικίζω (oder Ableitungen) früher allgemein für freiwillige oder erzwungene (räumliche *oder* politische) Zusammenlegung von Poleis und/oder anderen Gemeinwesen gebraucht. Sicher ist das Wort älter als συμπολιτεία, denn diese Vokabel setzt die Existenz von πολιτεία voraus, dürfte also jünger als das Ende des 5. Jh.s sein. Dann aber scheint eine Bedeutungsverengerung eingetreten zu sein: anscheinend bedeutet συνοικίζω usw. im Hellenismus immer eine Bevölkerungsbewegung, συμπολιτεία mag mehr die politische Vereinigung, im allgemeinen ohne planmäßige Umsiedlung bezeichnet haben. Dieser Eindruck orientiert sich an den wenigen Zeugnissen, kann also durch Neufunde leicht korrigiert werden.

Das mehrdeutige Adjektiv "synoikistisch" scheint mir jedenfalls als Fachterminus ungeeignet zu sein. Ich würde statt "synoikistische Sympolitie" einen Terminus wie "Eingemeindungs-Sympolitie" (*incorporating sympolity)* vorziehen; denn um Eingemeindung geht es in der Mehrzahl der bekannten Fälle, bei denen wir vom Vorgang genug erfahren, um ihn analysieren zu können.

So geht, um einige Beispiele[10] zu nennen,

– Helisson im größeren Mantineia auf; die Helissonier "sollen Mantineier sein auf der Grundlage völlig gleichen Rechts, an allem teilhaben, woran auch die Mantineier teilhaben, indem sie ihre χώρα und ihre πόλις nach Mantineia einbringen ... wobei die Polis der Helissonier bleibt, wo sie ist, auf alle Zeit, die Helissonier aber eine κώμη der Mantineier bilden..."[11] Hier soll also keine Umsiedlung stattfinden, wohl aber ein Identitätswandel der kleineren Stadt und ihrer Einwohner. Das Instrument über diesen Vorgang nennt sich neutral Σύνθεσις Μαντινεῦσι καὶ Ἐλισαίοις.

– Im 3. Jh. gehen Kyrbissos in Teos[12], Kalymnos in Kos[13], im 2. Jh. Pidasa in Milet[14] auf.

– Auch die Eingemeindung des kleineren Medeon nach Stiris[15] gehört hierher; sie erfolgt offenbar unter der Ägide des Phokerbundes, nach dessen Kalender das Instrument datiert ist; es beginnt: ὁμολογία τᾷ πόλει Στειρίων καὶ τᾷ πόλει Μεδεωνίων. συνεπολίτευσαν Στείριοι καὶ Μεδεώνιοι. In diesem συνεπολίτευσαν

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10 S. die Liste von Sympolitie-Urkunden bei G. -J. M. -J. te Riele, BCH 111, 1987, 187f.

11 G. -J. M. -J. te Riele, Hélisson entre en sympolitie avec Mantinée: une nouvelle inscription d'Arcadie. BCH 111, 1987, 167 ff. ; dazu BE 1988,621; SEG XXXVII 340; XXXVIII 351; XL 371; Thür-Taeuber, IPArk 9 (Ende 5.Jh.s oder frühes 4.Jh.).

12 L. Robert, Journal des Savants 1976, 153ff.; SEG XL 1029.

13 StV III 545, kurz vor 200; der dort verwendete Terminus ὁμοπολιτεία fehlt bei Giovannini.

14 Milet I 3, 149.

15 Syll.^{3} 647; Schwyzer 353; C.D.Buck, Greek Dialects S.247 Nr. 56.

scheint mir die bei Polybios (s.o. 1) nicht gefundene Vokabel eines Sympolitie-Abschlusses vorzuliegen: der Aorist kann kaum den Vergangenheits-Aspekt wiedergeben, es handelt sich offenbar um ingressiven Aspekt.

– Um eine Eingemeindung sollte es sich offenkundig auch im Fall des von Antigonos Monophthalmos befohlenen Synoikismos der Lebedier nach Teos handeln (RC 3/4), der freilich nich zustandegekommen zu sein scheint.

3. In all diesen Fällen verliert offenbar die kleinere Stadt ihre Identität als selbständige Einheit, wie sich deutlich im Wandel Helissons zu einer κώμη Mantineias, im gemein-koischen Bürgereid der Kalymnier, in der Wandlung der Medeonier zu Stiriern[16] zeigt. Doch sind auch Fälle vorstellbar, in denen sich zwei Gemeinden zusammenschließen, mit gemeinsamem Bürgerrecht, gemeinsamen Institutionen, ohne daß die eine der beiden Partnerstädte ihre Identität völlig aufgibt oder jedenfalls aufgeben soll. Das wäre gewissermaßen das Modell des bundesstaatlichen Ethnos auf kleinstem Nenner und ohne notwendig ethnischen Charakter.

Möglicherweise ist etwas Derartiges anzunehmen für Städte, die in einem Schiedsspruch Kassandreias[17] genannt sind. Kassandreia schlichtet territoriale Streitigkeiten der Μελιταιεῖς καὶ Χαλαῖοι πρὸς Πευματίους und der Πηρεῖς καὶ Φυλλαδόνιοι. Die beiden Namenpaare lassen eine enge Verbindung vermuten; außer den beiden Doppelnamen ist indessen nichts Näheres über das Verhältnis der Städte zu einander erkennbar.

Die Doppelnamen erinnern indessen an die Doppelstadt "der Plarasäer und Aphrodisiäer" an der Grenze zwischen Karien und Phrygien, die zum erstenmal im 2. Jh. v. Chr. bezeugt ist. Leider ist auch hier über die innere Struktur des politischen Gebildes, über Eigenverwaltung oder andere, über die Erhaltung des Namens hinausgehende Reste der Identität nicht mehr bekannt, als daß offenbar keine Umsiedlung erzwungen worden ist. L. Robert[18] sah ein Übergewicht Plarasas gegeben, da dessen Name zuerst genannt wird. J. Reynolds[19] vermutete, zunächst sei nur Plarasa eine Polis gewesen, an die das minder urbanisierte Aphrodisias angegliedert worden sei. Jedenfalls änderte sich dies im 1. Jh.; damals spielte Aphrodisias die herausragende Rolle, so daß in den Briefen der römischen Magistrate immer häufiger Plarasa weggelassen und schließlich nurmehr der Name Aphrodisias genannt wurde. Solche Gewichtsverschiebungen können bei derartigen Konstellationen des öfteren eingetreten sein – man erinnere sich etwa des Verhältnisses zwischen Lato und Λατὼ πρὸς Καμάρᾳ.

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16 εἶμεν [τ]οὺς Μεδεωνίους πάντας [Σ]τιρίους ἴσους καὶ ὁμοίους.

17 IG IX corrig. p. XI nr. 205 II, vermutlich 2. Jh.

18 Villes d'Asie Mineure 64. 66.

19 Aphrodisias and Rome (JRS Monographs No.1, 1982) 1ff; REA 87, 1985, 213-18.

Doppelnamen mögen also – wie auch moderne, aus Zusammenschlüssen herzuleitende Doppelnamen – ein Indiz für eine Sympolitie zweier Städte sein, die im Augenblick des Zusammenschlusses gleichstark waren und auch weiterhin gleichberechtigte Teile des neuen politischen Gebildes bleiben wollten. Die bisher vorliegende Bezeugung ist indessen zu schmal und zu unsicher, als daß man hieraus eine Systematik ableiten dürfte – wenn es denn eine solche überhaupt gegeben hat.

4. Eine Sympolitie zweier nicht völlig gleicher Partner, aber unter Beibehaltung erheblicher Teile der Selbstverwaltung sah Jean Bousquet in der von ihm zuerst (1965) herausgegebenen "Convention entre Myania et Hypnia"[20], deren Fragmente in Delphi unter bzw. in dem Plattenbelag der Heiligen Straße nahe bei der Alexanderjagd gefunden worden waren; s. zuletzt G. Klaffenbach, IG IX^2 1,3 Nr. 748.

col. I

a [. . . .]ΝΟΔ – – – – – – – – – – –
[. .]ΑΝΑΠΟΔ – – – – – – – – – –
[τ]οῦ λόγου ⁞⁞ – – – – – – – – –
[. .]χος τοῖς ἐν το – – – – – –
5 [. .]ρας. ὁ δὲ ἄρχω[ν – – – – – – – κ]–
[λαρ]ωσάτω δικασ[τήριον ? – – –]
[. . .] ἀνδρῶν πε[ντ– – – – – – – –]
[. .] λαχόντες – – – – – – – – – – –
[. .]ΤΑΤΩΝ – – – – – – – – – – – –
10 [. . ε]ἰ δέ τίς κ[α – – – – – – – – – –]
[. . .[5] . .] ΗΤ. – – – – – – – – – – – –

col. II

b – – – – – – – – – – – – Ο⁞ – –
[– – – [16] – – – – – κ]αθὼς τοῖς Ὑπνι–
[έοις – – [12]– – –]ΙΛ[. . . .]αίου δόμε–
[ν – – – – – [13–14]–]⁞ ἐν Ὑπνίαι τᾶς χώρ–
5 [ας τα]ύτας δικαστήριον δότω ἁ πόλις
[. . . .]ων τῶν ἀπολ[ει]πόντων ἐξ Ὑπνίας
[κὰτ] τὸ μέρος καθὼς καὶ τᾶν θυσιᾶν μετ–
[έ]χοντι – κὰτ ταὐτὰ δὲ καὶ τὰν ἄσπορον ν–
[ε]μόντων – κὰτ ταὐτὰ δὲ καὶ τὰς πρεσβεί–
10 ας. εἴ τοίς κα ἀποστέλλοντο. ἀποστελλ–

[20] BCH 89, 1965, 665-681; "sympolitie": 671.

όντων – ἀρχὸν ἐξ Ὑπνίας κὰτ τὸ μέρος
ἑλέσσθ[ων] – εἰ δὲ μὴ διοικέοι τὰ τῶν πολ–
ίων. ποθελεσσθων ἀρχὸν ἐξ Ὑπνίας κ–
ὰτ τὸ μέρος – τοὶ δὲ ἄρχοντες τοὶ ἐν Ὑπ–
νίαι κατα[γραφό]ντων τοὺς στρατιώτα–
ς τοὺς ἐν Ὑπνίαι – ἐπεί κα πορεύωνται
πορευέσσθων κὰτ τὸ μέρος καθὼς καὶ τᾶν
θυσιᾶν μ̣ε̣[τέχ]οντι – σ̣ί̣τ̣αρχον δὲ λα[μ]βα–
νόντων κὰτ τὸ μέρος – τὸν δὲ ἰατρὸν καὶ τ–
οὺς ἄλλους δαμοσιεργοὺς ἐν Ὑπνίαι κατα–
στᾶ[σα]ι̣. τῶν αὐτῶν μισσθῶν καθὼς καὶ πρό–
τερον Ὑπνιεῖς καθίσσθαν – καθισστάντων
ἀ[μ]φότεροι – χωροφυλακεόντων δὲ τοὶ Μυ–
ανεῖς τὰν Μυα[νιάδα] – τοὶ Ὑπνιεῖς τὰν Ὑπνι–
άδα – τὰς σκοπιὰς καὶ τὰ ὅρια κοινᾶι ἀμφό–
[τ]εροι – τὸν δὲ στατῆρα μὴ ἐμφερόντων το–
[ὶ ἐν] Ὑπνίαι χωροφυλακέοντες μηδὲ τοὶ ἐμ Μ–
[υανία]ι̣ – πρόβατα – ἑκατ[ερ . . . 11–12 . . .]

col.III

. . . . . .

[. . . .]ν̣ τᾶι προτέραι τᾶ̣ς [– – – 13 – – –]
ἑκατέρας – εἰ δέ τις τῶν προβατέων τ[ῶν χ]–
ρησαμένων τὰ πρόβατα ποτάγοι πρὸ τᾶ[ς λ]–
ώτιος λωτίξας ἀπαγέτω – ὅσοι δέ κα τῶ̣[ν πρ]–
οβα^{vvv}τέων μὴ χρήσ[ω]νται τᾶι χώραι λω[τίζ]–
ο̣ν̣τ̣ε̣ς̣ τὰς πόκας νέμ̣οντες ἐν τᾶι χώραι [α]–
ὐ̣λ̣ιζόντω ἀμέρας δέκα – εἰ δέ τί κα τῶν δ̣ι[ο]–
ρθωμάτων τῶν ὕστερον ποτιφερομένω̣ν̣
τᾶς Πανκλέος ἀρχᾶς ἀμφίλλογον γίνητ–
αι ἐπικριθέντων ἐν Αἰσχρίονι Ἀρχέστ[ρά]–
τωι Φυσκέοις – Κρατίνωνι Τριτεῖ – Κ[. . . . .]–
μωι Δαμοκλεῖ Ἀρισστομάχωι Χα[λειέοι]–
ς – κρινόντων δὲ μὴ ἔλασσον τριῶ̣[ν – τῶν]
δὲ λόγων τῶν κατὰ μῆνα τιθεμέν̣[ων – ἐ]–
πεί κα λάβηι ὁ Γ Μυανίας βούλαρχο[ς παρ]–
ὰ τῶν ἐξ Ὑπνίας ἀρχείων τὰ ἀντίγ̣[ραφα κα]–
ὶ συνθῆ̣ι ἐν τὰ κιβώτια ἐπιβαλλέτω τ[ὸν δα]–
κτύλιον ὁ ἐγ Μυανίας καὶ Ὑπνίας βούλ[αρχο]–

ς – κὰτ ταὐτὰ δὲ καὶ τοὶ ἐξ 'Υπνίας βούλαρ[χοι]
ἐπεί κα λάβωντι τὰ ἀντίγραφα παρὰ τοῦ [ἐγ Μυ]–
ανίας βουλάρχου καὶ συνθέωντι ἐν τὸ κιβ[ώτιο]–
ν συνεπιβαλλέτω τὸν δακτύλιον ὁ ἐγ [Μυ]–
ανίας καὶ ἐξ 'Υπνίας βούλαρχο[ς . . . . .]
Ν τοὶ ἐξ 'Υπνίας ἐμ Μυανίαν [. . . . . – ὁ δὲ]
νόμος καὶ τὸ ψάφισμα τὸ τῶ[ν – – – – – – – – – –]
– –
– –
– – – – – – – – – – – – – – ΔΗΤ – – – – – – – – – –

Col. I: 5-8: - - der Magistr[at - - ausllosen] soll er ein Richt[erkollegium? - | -] von fü[nf? 15? 51?] Männern [-|-] (die) Ausgelosten - - | - wenn jemand - | - -

Col. II: 2 - so wie den Hypnil[ern - -] gebel[n - -] in Hypnia für(?) dieses Land |5 ein Gericht soll geben die Polis | [-] derer, die Hypnia verlassen (?) | [entsprechend] dem Anteil, so wie sie auch an den Opfern teillnehmen. § In gleicher Weise sollen sie auch das Brachland beweiden. § In gleicher Weise sollen sie auch die Gesandtschaft||10en, wenn sie solche absenden, absendlen. § Einen Archos aus Hypnia sollen sie entsprechend dem Anteil | wählen. § Wenn er aber nicht erfüllt die Verwaltung der Angelegenheiten der Städlte, sollen sie hinzuwählen einen Archos aus Hypnia entsprechend dem Anteil. § Die Magistrate in Hypl|15nia sollen auf[schreib]en die Soldaten | aus Hypnia. § Wenn sie zum Einsatz kommen, | sollen sie eingesetzt werden entsprechend dem Anteil, mit dem sie auch an den | Opfern teilnehmen. § Den Zahlmeister sollen sie nehmen | entsprechend dem Anteil. § Den Arzt und ||20 die anderen Gemeindefunktionäre in Hypnia soll man einlsetzen, zum gleichen Sold wie schon frülher die Hypnier sie eingesetzt haben. § Und zwar sollen beide sie einsetzen. § Die Polizeiaufgaben sollen übernehmen die Mylanier im Gebiet von Myania, § die Hypnier im Gebiet von Hypnia; |25 § die Wachtürme und die Grenzposten (sollen sie) beilde (bemannen). § Den STATER (?) sollen weder einführen (?) die | [in] Hypnia als Gendarmen Dienenden noch die in Ml[yania]. § Schafe. § Beide[--]| --

Col. III: - - am Vortag (?) der -- | von beiden § Wenn einer der Schafzüchter, [die davon Ge]|brauch gemacht haben (?), die Schafe heranführt vor de[r Sch]lur (Waschung?), soll er sie scheren (waschen?) und dann wegführen. § Alle [Sch]|5afzüchter, die nicht Gebrauch machen vom Land, sollen zum Sch[er]len (Waschen?) der Wolle und zum Weiden auf dem Land | sich aufhalten für zehn Tage. § Falls eines der Amlendements, die später hinzugefügt werden | als im Amtsjahr des Pankles, strittig wird, ||10 sollen sie die Entscheidung herbeiführen vor (?) Aischrion und Archest[ra]ltos aus Physkos § Kratinos aus Tritaia, K[-]lmos, Damokles und Aristomachos aus Cha[leion]. | § Entscheiden sollen aber mindestens drei. [§ Von]| den Rechnungen, die jeden Monat aufgestellt werden, [§]|15 wenn der Bularch aus Myania erhält [von]| den Amtsstellen aus Hypnia die Absch[riften und]| sie in die Kassetten legt, soll daraufsetzen [das Si]legel der Bul[arch] aus Myania und Hypnia. § In gleicher Weise auch die Bula[rchen] aus Hypnia, ||20 wenn sie erhalten die Abschriften von dem [aus My]lania (kommenden) Bularchen und sie legen in die

Kas[sette],| soll mit daraufsetzen das Siegel der aus [My]lania und aus Hypnia [--]| die aus Hypnia nach Myania [-- § Das]|[25] Gesetz und das Psephisma der - -

Die beiden kleinen Städte, die hier eine enge Verbindung eingehen, liegen nahe beieinander am Ostrand des westlichen (ozolischen) Lokris: Myania (= heute Agia Efthymia) südwestlich von Amphissa, Hypnia (heute Kolopetinitsa) südlich von Myania.

Präskript und Grundbestimmungen, aus denen der Charakter der Verbindung der beiden Städte zweifelsfrei hervorgehen könnte, sind nicht erhalten; die erhaltenen, schwer entzifferbaren Reste der Inschrift setzen unmittelbar mit Details der vereinbarten Regelungen ein. Aus ihnen geht hervor, daß die beiden Partnerstädte mehrere gemeinsame Institutionen schaffen: "der ἀρχός" bzw. sein Ersatzmann (col. II 11-14) ist offenbar ein von beiden Bürgerschaften zu wählender gemeinsamer Funktionär, ebenso der Sitarch (II 18 f.), also der Schatzmeister einer aus Kontingenten beider Partnergemeinden zusammengesetzen Streitmacht (II 16-18) und "der Bularch aus Myania und aus Hypnia" (III 18. 22f.). Daneben bleiben aber offenkundig je eigene Funktionäre und Institutionen der Partnergemeinden bestehen: so "die ἄρχοντες (Magistrate) in Hypnia", die eine eigene (möglicherweise nicht nur Bürger, sondern auch Söldner umfassende) Militärmatrikel Hypnias zu liefern haben (II 14-16); so der Gemeindearzt und weitere Funktionäre in Hypnia, die nun freilich von beiden Partnerstädten bestallt werden (II 19-23), ein "Bularch aus Myania" und (mehrere) "Bularchen aus Hypnia" sowie τὰ ἐξ Ὑπνίας ἀρχεῖα (Beamtenkollegium?), zwischen denen unter Aufsicht des gemeinsamen Bularchen Mitteilungen über die monatlichen Finanzunterlagen ausgetauscht werden (III 13 ff.). Gemeinsame Sicherheitsorgane sind nur bei der Grenzwacht vorgesehen (II 25-26).

Anscheinend hatten die beiden Partnerstädte unterschiedliche Bedeutung: als Beteiligungsschlüssel bei den gemeinsamen Angelegenheiten dient "der Anteil, wie sie an den Opfern teilnehmen" (II 7f. 17f.; "in gleicher Weise" II 8. 9; offenbar gleichbedeutend "entsprechend dem Anteil": II 11. 13f. 19); danach bemessen sich der Anteil, mit dem jede der beiden Gemeinden an Richterkollegien, Gesandtschaften und gemeinsamen Militäreinsätzen beteiligt ist, und die Häufigkeit, mit der der ἀρχός und der Sitarchos von Hypnia gestellt wird. Diese Stadt ist offenbar der kleinere und wohl auch schwächere Partner, da einseitig formulierte Bestimmungen nur für sie gelten (II 14 f. 19ff.). Der genannte Schlüssel "Beteiligung an den Opfern" muß nicht ausschließlich die Bevölkerungszahlen der beiden Partnergemeinden wiederspiegeln, sondern kann auch einen unterschiedlichen Anteil von Bürgern (die wohl allein an den Opfern teilnehmen konnten) an der jeweiligen Gesamtbevölkerung oder unterschiedliche Wirtschaftskraft (= Zahl der Opfertiere) wiedergeben.

Von Sachbestimmungen sind nur noch Stipulationen über Nutzung von Weideland (II 8f.: proportional; III 2-7) zu erkennen; auch die Bestimmung über juristische

Entscheidung über (anscheinend anderes) Land (II 4 ff.) deutet auf gemeinsame Nutzung landwirtschaftlicher Flächen[21].

Unklar bleibt der Grad der Zusammenführung der beiden Gemeinden. Jean Bousquet[22] will einen Sympolitievertrag erkennen; dessen Grundstipulation - das gemeinsame Bürgerrecht - müßte dann, zusammen mit den Vorkehrungen für die Einrichtung (?) gemeinsamer Opfer und die Wahl der gemeinsamen Funktionäre, im verlorenen Teil der Inschrift gestanden haben. Im Vergleich mit den üblichen Sympolitiefällen, in denen die kleinere Gemeinde in der größeren aufgeht (o. Ziffer 2), sollen in unserem Fall jedoch anscheinend *beide* Partnergemeinden weiterbestehen[23]; vgl. II 12: τὰ τῶν πολίων![24] (Auch die künftigen διορθώματα, die Annahme, sie könnten strittig sein, und die dafür vorgesehene Entscheidung durch *fremde* Richter [III 7 ff.] deuten auf das Fortbestehen mindestens von Teilen dessen hin, was wir "Souveränität" nennen würden.) In *beiden* Partnerstädten bleiben, unserem Text zufolge, große Teile der Selbstverwaltung erhalten, über denen anscheinend eine gemeinsame administrative Ebene geschaffen wird, ähnlich wie in den großen Bünden des Hellenismus mit Bundesbehörden und Bundesbürgerrecht die Mitgliedsstädte Selbstverwaltung und Einzelbürgerrecht behalten zu haben scheinen[25].

In der Tat bietet sich der Aitolerbund als organisatorisches Vorbild an; ihm gehörte Westlokris vom Beginn des 3. Jh.s bis 167 an, mit Ausnahme der Jahre des römisch-aitolischen Kriegs um 191/0 bis ca. 188, in denen die Autorität des geschlagenen Bundes zusammengebrochen war. In diese Zeit ist mit L. Lerat[26] die ephemere Vereinbarung der beiden Nachbarstädte zu setzen, die auf diese Weise den Fortbestand von Sicherheit und Ordnung in ihrer unmittelbaren Umgebung organisieren wollten.

Liegt uns also ein erstes sicheres Beispiel einer Sympolitie zwischen zwei Gemeinden vor, bei der nicht die eine von der anderen eingemeindet wurde? Leider fehlt, wie bemerkt, in den erhaltenen Teilen der Inschrift jeder Hinweis auf ein gemeinsames oder übergeordnetes Bürgerrecht und ebenso auf einen neuen Namen (Doppelnamen?), den das vermutete Gebilde getragen haben könnte.

Und es bleibt zu fragen, ob zur Erreichung des oben vermuteten Ziels unseres Vertrags ein gemeinsames Bürgerrecht überhaupt als erforderlich angesehen wurde,

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21 Zur ἐπινομία vgl. StV III Nr. 495 und 554, evtl. 573; zum grenzüberschreitenden Anbau die - ebenfalls in Delphi gefundene - Vereinbarung zwischen den benachbarten westlokrischen Städten Chaleion und Tritea, StV III Nr. 557 (jetzt SEG XXIV 383).

22 und ebenso G.-J. M.-J. te Riele, BCH 111, 1987, 188.

23 Dies betont auch G. Klaffenbach im Kommentar zu seiner Ausgabe.

24 Es darf freilich nicht übersehen werden, daß πόλις nicht notwendig von einer selbständigen Einheit gesagt ist; vgl. das Zitat aus Mantineia-Helisson (o. Ziffer 2), in dem πόλις offenbar das Siedlungsgebiet der künftigen κώμη Helisson bezeichnet.

25 Für den Aitolerbund vgl. StV III 508.

26 Les Locriens de l'Ouest, 1952, XI; 26; 32; 37; II 88f.

mithin ob es sich wirklich um eine Sympolitie handelt und ob man gar die Statuten des Aitolerbundes kopierte oder auf den verkleinerten Maßstab adaptierte. Vielleicht ist es nur unser Wunsch, eine überschaubare, generell gültige Systematik des griechischen Völkerrechts zu rekonstruieren, der uns diese Deutung der Inschrift aus Westlokris suggeriert.

Daß das griechische Völkerrecht in Form und Terminologie wenig systematisch war, hat sich indessen gerade in den letzten Jahrzehnten immer wieder erwiesen. Methodische Vorsicht gebietet jedenfalls, sich zu vergegenwärtigen, daß gemeinsame Funktionäre wohl auch durch bloßes Zusammentreten zweier ansonsten selbständiger Bürgerschaften gewählt werden konnten, wie F. Gschnitzer es für den σύλλογος der Bewohner von Halikarnass und Salmakis[27] annimmt. Bestimmungen über gemeinsame Nutzung von landwirtschaftlichen Flächen – die den Bürgern der beiden Partnerstädte besonders wichtig gewesen sein mögen – finden sich sonst in *Isopolitie*verträgen und können sogar ohne bürgerrechtliche Grundlage vereinbart werden, wie der Vertrag zwischen Chaleion und Tritea – zwei Städten in nächster Nachbarschaft von Myania und Hypnia! – zeigt[28].

27 M.-L. 32 , 5.Jh.; F. Gschnitzer, Rhein. Mus. 104, 1961, 237-241.

28 S.o. Anm. 21.

Monique Bile (Metz)

La πατρῡιᾶκος des Lois de Gortyne : Etude linguistique

Introduction

Pour commencer, je tiens à préciser que, comme l'indique le titre de mon exposé, je me situe au niveau de la philologie, quand je m'intéresse aux Lois de Gortyne (= LG) et aux lignes qui concernent la πατρῡιᾶκος. Je voudrais examiner deux points de grammaire qui permettent de mieux cerner l'originalité gortynienne de la πατρῡιᾶκος ou, tout au moins, qui suscitent des questions pouvant servir de base aux discussions des historiens du droit grec. Il s'agit

- de la traduction et donc de l'interprétation de VII 15-27,
- du rôle respectif des καδεσταὶ et de l' ἐπιβάλλων.

Pour ce travail, j'ai consulté 16 commentateurs des Lois de Gortyne, c'est-à-dire des savants, la plupart du temps juristes, ayant fourni une traduction et souvent un commentaire[1].

1. Lois de Gortyne VII 15-27

Ces lignes, qui commencent le long passage consacré à la πατρῡιᾶκος[2], détaillent quel parent elle doit épouser. Quatre cas sont envisagés: le premier (5-18), à la différence des trois autres, comporte un sujet à l'accusatif τὰμ πα[τ]ρῡι[ᾶ]κον et un verbe à l'infinitif, selon le schéma régulier du texte: cette structure décrit la situation la plus normale. Les trois autres phrases débutent par une proposition hypothétique, le verbe de la principale est encore à l'infinitif, mais le sujet n'est plus indiqué.

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[1] Pour une bibliographie exhaustive du texte, cf. U.E.Paoli, *Altri studi di diritto greco e romano*, Milan 1976, p. 482 n.5 et A.Biscardi, *Diritto greco antico*, Milan 1982, p. 110 n.81. Les ouvrages des auteurs étudiés ici sont analysés dans M.Bile, *Le dialecte crétois ancien*, Paris 1988, p. 22-27.

[2] Le passage s'arrête en IX 24 selon l'opinion la plus générale. Peut-être se continue-t-il jusqu'en IX 40? S'agissant de lignes particulièrement complexes, il est hors de propos d'en traiter maintenant. Quoi qu'il en soit, le sujet est repris, en appendice, en XII 6-19.

τὰμ πα-
[τ]ροι[ō]κον ὀπυίεθαι ἀδελπι-
ōι τō πατρὸς τὸν ἰόντον τōι
πρειγ[ί]στōι. αἰ δέ κα πλίες πατ-
ροιὸκοι ἴōντι κἀδελπι[ο]ὶ τō πα-
τρός. [τ]ōι ἐπιπρειγίστōι ὀπυί-
εθαι. αἰ δέ κα μὲ ἴōντι ἀδελπιο-
ὶ τō π[α]τρός. υἱέεδ δὲ ἐκς ἀδελ-
πιῶν. ὀπυίεθαι ἰōι τōι [ἐ]ς τō π-
ρειγίστō. αἰ δέ κα πλίες ἴōντ-
ι πατροιὸκοι κυἱέες ἐκς ἀδε-
λπιῶν. ἄλλōι ὀπυίεθαι τōι ἐπ-
ὶ τōι ἐς [τ]ὸ πρειγ[ί]στō. μίαν δ'
ἔκεν πατροι[ō]κον τὸν ἐπιβάλ-
λοντα. πλίαδ δὲ [μ]ἔ.

Voici la traduction que j'en propose, dans un premier temps, aussi proche du texte que possible: "La *patroiokos*[3] épousera un frère de son père, le plus âgé de ceux qui existent. S'il y a plusieurs *patroiokoi* et plusieurs frères du père, la seconde *patroiokos* épousera le frère qui vient après le plus âgé et ainsi de suite. S'il n'y a pas de frères du père, mais des fils issus des frères , la *patroiokos* épousera celui-là qui est le fils issu du frère le plus âgé. S'il y a plusieurs *patroiokoi* et plusieurs fils issus des frères, la seconde *patroiokos* épousera un autre fils de frères, celui qui vient après le fils du frère le plus âgé et ainsi de suite. *L'épiballon* aura droit à une *patroiokos*, mais pas plus."

La première phrase n'a pas posé de problème aux commentateurs, qui ont tous reconnu un droit d'aînesse accordé à l'oncle paternel. Ce droit d'aînesse est confirmé dans la deuxième phrase, dont le sens ne prête guère à discussion non plus et où on retrouve des traits syntaxiques fréquents dans les LG. Ainsi le sujet de ὀπυίεθαι n'est pas exprimé, mais peut se déduire à cause du complément [τ]ōι ἐπιπρειγίστōι, hapax qui signifie "celui qui vient à la suite de l'aîné". La phrase traite donc des *patroiokoi*, sauf de l'aînée, dont le cas a été réglé dans la première phrase[4]. C'est pourquoi j'ai traduit "la seconde *patroiokos* épousera le frère qui vient après le plus âgé et ainsi de suite",

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3 Ne voulant pas faire une étude complète de celle qui est appelée πατρōιὸκος, je me contente de translittérer ce terme.

4 Je ne m'occupe que du texte, donc j'élimine les autres cas de figure qui ne sont pas attestés et sur lesquelles se penchent F.Bücheler-E.Zitelmann, *Das Recht von Gortyn,* extrait de *Rheinisches Museum für Philologie* 40 (1885), p. 152.

reprenant d'ailleurs presque totalement la traduction de Dareste-Haussoullier-Reinach[5]. La concision du style, ici, ne nuit pas à la compréhension. C'est à partir de la troisième phrase que le texte demande plus d'attention de la part du lecteur moderne. En l'absence d'oncles paternels, le législateur envisage, pour le mariage de la *patroiokos,* le stade suivant, celui des cousins paternels. Le sujet de ὀπυίεθαι de la l. 23 est bien la *patroiokos*, envisagée comme unique. Or, qui doit-elle épouser? Le complément du verbe ὀπυίεθαι est au datif, comme on l'y attend , mais il faut revoir la fin de la phrase: ὀπυίεθαι ἰõι τõι [ἑ]ς τõ πρειγίστõ. L'élément important est la forme ἰõι, que presque tous les commentateurs[6] ont rapproché de la même forme en VIII 8 et en IX 29, deux passages qu'il nous faut traduire pour mieux comprendre VII 23.

- au début de la colonne VIII, le législateur envisage le cas où la *patroiokos* ne veut pas épouser le prétendant qui lui est assigné (VII 52-53). Elle doit alors épouser un homme de la tribu, moyennant dédommagement à l'égard du prétendant refusé: ἀποδατẽθαι δὲ τõν κρẽμάτõν ἰõι "elle donnera une part des biens à celui-là = au prétendant refusé". C'est ainsi que Willetts explicite ἰõι "that one, (i.e. to the rejected groom-elect)".[7]

- la colonne IX 24-29 décrit une situation plus difficile à saisir, à cause des termes inconnus qui sont employés. Néanmoins, il s'agit d'un contexte de pratiques financières, avec un débiteur mort et un autre homme qui a agi en son nom: le procès doit être recommencé. C'est ainsi que j'interprète IX 28-29 ἐπιμõλẽνν ἰõ πρὸ τõ ἐνιαυτõ "on rouvrira le procès à ce sujet (ou à propos de cette personne) avant la fin de l'année". La forme ἰõ est un génitif, neutre dans ma première traduction, masculin dans ma seconde traduction. Quoi qu'il en soit, le datif ἰõι ou le génitif ἰõ sont traduits par un pronom démonstratif "celui-là". Or, de bonne heure, les commentateurs ont tenté d'expliquer ces formes. Le premier à fournir une traduction complète des LG, Comparetti[8] signalait que, chez Homère, le nom de nombre εἷς, μία connaît une variante ἰὸς et ἴα. Il fut suivi par J.Baunack-T.Baunack[9] qui notent qu'avec l'article, chez Homère, ἰός signifie ὁ πρῶτος, tout en fournissant d'ailleurs surtout des exemples de féminin. Comparetti,

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5 Dareste-Haussoullier-Reinach, *Recueil d'inscriptions juridiques grecques,* 3° fascicule, Paris 1894, p. 375.

6 A l'exception de M.Guarducci, *Inscriptiones Creticae* IV, Rome 1950, qui considère, p. 148, ces trois lettres comme une faute du graveur et qui analyse mal également les deux autres occurrences du mot , p. 163 (suivant l'opinion de Maas et malgré sa connaissance de l'article de Buck, cf. *infra*).

7 R.F.Willetts, *The Law Code of Gortyn,* Berlin 1967, p. 46.

8 D.Comparetti, "Iscrizioni arcaiche di Gortyna", *Museo Italiano* I (1885), p. 233-275 et ici commentaire p. 269.

9 J.Baunack-T.Baunack, *Die Inschrift von Gortyn,* Leipzig 1885, p. 132.

reprenant en 1893 sa traduction des LG[10], qu'il améliore de façon sensible, revient longuement sur le sens de ἰός, dont il perçoit toutes les difficultés de traduction. Je résume ici son raisonnement. Le sens de "un" ne lui paraît pas satisfaisant. Il admet que la valeur pronominale (οὗτος ou ἐκεῖνος) est indéniable et que, si le terme signifiait "le premier", l'absence de l'article constituerait un obstacle. Cependant la valeur de "premier" est, dit-il, "quasi nécessaire", pour indiquer le mariage de la *patroiokos* avec le premier fils de l'oncle le plus âgé. L'expression équivaudrait à τῶι πρειγίστωι ἐς τῶ πρειγίστω. Si j'insiste sur la réflexion de Comparetti, c'est parce qu'elle me paraît une démarche intéressante. Dans son esprit, la *patroiokos* ne peut épouser que son cousin paternel aîné, c'est-à-dire le fils aîné de l'oncle paternel aîné. Autrement dit, le droit d'aînesse s'applique également au cousin paternel, point de vue auquel la majorité des commentateurs ont adhéré. Je ne citerai que Dareste-Haussoullier-Reinach qui adoptent la même position que Comparetti[11]: "ἰῶ (VII 22) équivaut, ici, comme partout, simplement à ἐκείνῳ, mais *il va sans dire* que, s'il y a plusieurs fils, il s'agit de l'aîné". Le "il va sans dire" est une pétition de principe sur l'application du droit d'aînesse, qui, dans l'esprit des auteurs, ne prête évidemment pas à discussion. L'analyse philologique est ici nécessaire et elle a été faite par le dialectologue C.D.Buck en 1906[12]. Buck, tout en soulignant l'identité formelle avec les formes homériques, soutient qu'en crétois de Gortyne, ἰός fonctionne comme pronom. Selon lui, le texte ne précise pas, dans cette phrase et dans la suivante, que chaque frère a plus d'un fils. Si le texte avait voulu dire "le fils aîné du frère aîné", il aurait dit ou τõι πρειγίστõι τõν ἐς τõ πρειγίστõ ou τõι ἰõι τõν ἐς τõ πρειγίστõ, en admettant que ἰός soit une variante de πρῶτος. Il reste donc à étudier toutes les occurrences de ἰός dans les dialectes grecs. Chez Homère[13], seuls sont attestés le féminin ἴα. ἰῆς (plusieurs fois dans l'*Iliade*, une seule fois dans l'*Odyssée*) et le neutre, usité une seule fois ἰῷ ἤματι "ce jour-là" ou "le même jour" (*Iliade* VI,422). Outre des exemples chez Alcée, Sappho, Corinne, le terme est usité, au féminin, une fois en thessalien, dans un texte de Larisa du III° siècle[14] qui , aux l. 22 et 44-45, comporte l'expression τὰμ μὲν ἴαν ... τὰν δὲ ἄλλαν "l'une..l'autre": le féminin comporte l'article. La deuxième occurrence est dans un texte messénien d'Andanie, daté du 1° siècle a.C. qui, vu l'époque, n'a plus beaucoup de traits dialectaux[15]: aux l. 125-126 il est dit τ[ό]ν γ'ἰὸν ἐνιαυτόν "cette année-là". C'est, à part les 3 occurrences des LG, la seule attestation du masculin ἰός en grec. C'est dire à quel point il est risqué de vouloir

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10 D.Comparetti, "Le leggi di Gortyna e le altre iscrizioni arcaiche cretesi", *MA* 3, p. 1-489, et ici commentaire p. 205-206.

11 *o.c.*, p. 470 n. 1.

12 C.D.Buck, "Cretan ἰός", *Classical Philology* 1(1906), p. 409-411.

13 Cf. P.Chantraine, *Grammaire homérique* I, Paris 1958, p. 259.

14 E.Schwyzer, *Dialectorum graecarum exempla epigraphica potiora* , Leipzig 1923, n° 590.

15 *o.c.*, n° 74.

lui donner, dans les LG, un sens homérique, qu'il ne peut avoir, puisqu'il n'existe pas, chez Homère, au masculin. Par conséquent, je souscris tout à fait aux conclusions de Chantraine qui en fait un pronom démonstratif au masculin et au neutre (donc dans les LG) et qui rappelle qu'au féminin, le mot a le sens de "l'un", "le même"[16]. Ma traduction de cette phrase "la *patroiokos* épousera celui-là qui est le fils du frère le plus âgé" signifie que, selon moi, le droit d'aînesse ne s'applique qu'à l'oncle paternel et non à son fils. Celui-ci peut être plus jeune que le fils du deuxième oncle. C'est là, en tout cas, comme le dit M.Dimakis[17], un bon exemple du style des LG. La quatrième phrase apporte une autre confirmation à cette affirmation. "S'il y a plusieurs *patroiokoi* et plusieurs fils issus des frères, ἄλλοι ὀπυίεθαι τοῖ ἐπὶ τοῖ ἐς τὸ πρειγίστο" la seconde *patroiokos* épousera un autre fils de frères, celui qui vient après le fils du frère aîné". Ici s'opposent deux points de vue, comme pour la troisième phrase. Dans le premier cas de figure, s'il y a 3 *patroiokoi* A, B, C et 3 oncles paternels D, E, F ayant chacun plusieurs fils, les 3 *patroiokoi* doivent épouser les fils de l'oncle D (l'aîné). C'est ce que disent Dareste-Haussoullier-Reinach[18]. Au contraire, Kohler-Ziebarth, suivis par H.Perakis, pensent que le droit d'aînesse s'arrête aux oncles paternels[19], donc que la *patroiokos* aînée épouse le fils de l'oncle paternel aîné, la seconde épouse le fils du deuxième oncle, la troisième le fils du troisième oncle, etc ...

Il est évident que cette interprétation - une *patroiokos* pour chaque cousin, représentant un oncle - est le pendant de la deuxième phrase - une *patroiokos* pour chaque oncle[20]. En conclusion, cette interprétation, qui remet en cause le droit d'aînesse des cousins paternels, a une incidence sociale, puisque les cousins cadets ne seraient pas défavorisés; ils ne le sont pas non plus quand il s'agit de l'héritage du père et de la mère, où tous les fils reçoivent part égale, cf. IV 31-48. Le problème des cadets ne se pose donc pas dans les LG, comme il se posera plus tard en Crète, où ceux-ci s'expatrieront comme mercenaires dans les armées hellénistiques. Le législateur a voulu seulement que

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16 P.Chantraine, *Dictionnaire étymologique de la langue grecque* I, Paris (1968), *s.v.* ἰός.

17 P.Dimakis, Βυζάντινον δίκαιον. Ἐμπορικοὶ νόμοι εἰς τὴν ἀρχαίαν Ἑλλάδα. Δίκαιον τῆς Γόρτυνος. Δωδεκάδελτος, Athènes, p. 47.

18 *o.c.*, p. 471 "S'il y a plusieurs patrôoques et plusieurs oncles, ceux-ci recueillent les filles par ordre d'âge; de même s'il y a plusieurs cousins issus d'une même souche (note 2: mais s'ils sont de plusieurs souches, épuiserait-on la première avant de passer à la seconde, au risque de préférer des impubères à des pubères? La rédaction obscure du texte ne permet pas de répondre positivement)."

19 J.Kohler-E.Ziebarth, *Das Stadrecht von Gortyn,* Göttingen 1912, p. 68 : "Die Erbtochter soll zunächst verheiratet werden an den Bruder des Vaters, und zwar die älteste Erbtochter an den ältesten Bruder, die jüngere an den nächstjüngeren ... Ist allerdings kein Vaterbruder vorhanden, dann soll die Erbtochter den Sohn des Vaterbruders heiraten, und zwar wiederum die älteste Erbtochter den Sohn des ältesten Bruders, die jüngere den Sohn des jüngeren u.s.w." et cf. H. Perakis, Ἡ μεγάλη δωδεκάδελτος ἐπιγράφη τῆς Γόρτυνος, Héraklion 1973, p. 159.

20 comme le fait remarquer Buck dans son article de 1906, p. 410.

les biens paternels restent dans la famille paternelle. C'est aux historiens du droit grec à tester de la validité de mon hypothèse, qui semble aussi celle de Kohler-Ziebarth et d'H.Perakis.

2. Ἐπιβάλλων, καδεστάς

Je voudrais faire rapidement le point sur la question du sens à donner à ces deux substantifs. Comme on le sait, Willetts y voyait des noms de parenté, en se fondant sur des exemples ethnologiques[21]. Le substantif ἐπιβάλλων désignerait un parent paternel et καδεστάς un parent maternel. Ce schéma, qui insistait sur le matriarcat en Crète, avait été critiqué par H.Meyer-Laurin[22] et par H.J.Wolff[23] en particulier. Là encore, ma démarche a d'abord consisté à chercher les conclusions des divers commentateurs du texte. Le premier, Comparetti, dans sa seconde traduction des Lois de Gortyne en 1893, traduisait καδεστὰς par "un parente"[24] et proposait de mettre ce mot en rapport avec ἐπιβάλλων. Puis ce fut L.Gernet[25] qui reprenait la notion de "parent", en supposant que les substantifs qui servent, à époque classique, à marquer la parenté par alliance, avaient dû d'abord signifié "les parents". Le bon exposé de L.Lepri[26] m'a également permis de situer ce terme de façon historique. Actuellement, j'explore une piste nouvelle: je considère que les καδεσταὶ devaient former une sorte de Conseil de famille (d'où leur intervention quand un membre de la famille se trouve en difficulté) et que les ἐπιβάλλοντες (les héritiers) pouvaient faire partie de ce Conseil. Autrement dit, il y aurait deux cercles de personnes se recoupant partiellement. Il me faut, bien entendu, tester cette hypothèse. La lecture de l'écrivain albanais Ismaïl Kadaré m'a appris qu'en Albanie, jusqu'à une époque récente, une grande partie du pays était régie, socialement, par le Kanoun, texte de loi dont le nom est manifestement grec (ὁ κανὼν "la règle"). D'après les exemples fournis par Kadaré, des parents interviennent à divers moments de la vie sociale (mariage, enterrements). Seraient-ils les équivalents des καδεσταὶ gortyniens? Mes recherches sont orientées dans ce sens pour le moment.

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21 Willetts, *o.c.*, p. 18-19.

22 Dans *Gnomon* 41 (1969), p. 161-164.

23 Dans son long compte rendu de la *Zeitschrift der Savigny-Stiftung Rom.* 85 (1968), p. 418-428.

24 Reconnaissant son erreur de traduction dans son article de 1885, ce qui mérite d'être souligné.

25 L.Gernet, *Droit et société dans la Grèce ancienne*, Paris 1955, p. 47.

26 L.Lepri, *Sui rapporti di parentela in diritto attico*, Milan 1959, p. 75-91.

3. Conclusion

J'ai voulu, par ces quelques exemples, montrer que la philologie peut apporter son aide à l'étude des textes juridiques, en exposant les problèmes grammaticaux d'un document aussi complexe que les LG. Il doit y avoir, surtout pour ce genre de textes, un travail commun des philologues et des juristes. Le philologue expose les problèmes grammaticaux et le juriste choisit l'hypothèse la plus plausible, d'après ses connaissances du droit grec.

Sima Avramovic (Belgrade)

Response to Monique Bile

I will set a limit to the first problem that Mrs. Bile opened in her valuable paper. It deals with the order of claimants (*epiballontes*) who have right to marry a *patroiokos*. The Gortyn Code phrase with complicated syntax (VII 24-27) says that, if there are no uncles alive and if there are more *patroiokoi*, other *patroiokoi* "are to be married to the next after the son of the oldest"[1]. Mrs. Bile stresses that this wording permits two interpretations: the first possible explanation would be that each *patroiokos* marries a cousin according to his own age (the eldest daughter marries the eldest cousin - "la fille cadette épouse le cousin cadet"). The second interpretation should be that they are to be married according to the ages of cousins' fathers, i. e. uncles of *patroiokos* (the eldest daughter marries the son of the eldest uncle - "la fille cadette épousera le fils de l'oncle cadet"). Her hypothesis is that the right of age priority continued to be applied on uncles by representation (not on cousins, however many of them there may be), so that one *patroiokos* belonged to each cousin representing his father - the uncle of the *patroiokos*.

My first comment is that, generally speaking, the text may permit not only two, but three possibilities.

The Code says only: ἄλλοι ὀπυίεθαι τοῖι ἐπὶ τοῖι ἐς τὸ πρειγίστο[2]. The literal wording of the Code that they "are to be married to the next after the son of the oldest" allows philologically, logically and theoreticaly, three possible orders of claimants. Let us take in consideration an example of a family with three *patroiokoi* and three uncles who have died leaving two sons each.

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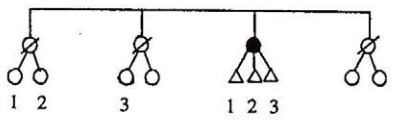
1 Translation by Willetts, R., The Law Code of Gortyn, Berlin 1967, 45.

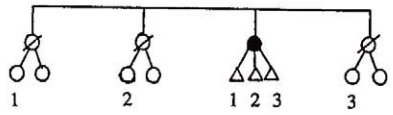
2 Some confusion caused the fact that some translators offer their interpretation, i. e. a commentary, not a literal translation. There is no doubt that the literal meaning of the phrase is only: if there should be more heiresses and sons of brothers, they are to be married *to the next after the son of the oldest* (Willetts), *dem welcher folgt auf den von dem ältesten* (Bücheler-Zitelmann), *quello che viene dopo il figlio del fratello maggiore* (Patriarca) or *celui qui vient après le fils du frère le plus âgé* (Bile). But Mrs. Bile, like some other interpretators (such as Dareste-Haussoullier-Reinach, Recueil d'inscriptions juridiques grecques III, Paris 1894, 375), also adds "et ainsi de suite" - what we cannot see in the text of the Code.

The order of claimants could be arranged according to:

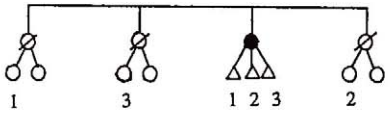
uncles' age
(without representation)
"*per capita*"



uncles' age
(with representation)
"*per stirpes*"



cousins' age only
(if e. g. the eldest son of the
youngest uncle is the
oldest among the cousins)[3]



There are two basic, confronted opinions, represented most prominently by Bücheler-Zitelmann (the order of claimants without representation) and Kohler-Ziebarth (the order of claimants with representation)[4]. However, both of them, as well as Mrs. Bile in her paper, gave no firm arguments about the priority of claimants. Scholars who favour the principle of representation, as a single proof sometimes mention a comparison with the intestate succession[5].

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3 This possibility was not favoured in the literature, probably because it seemed undeniable that the eldest son of the eldest deceased uncle had in any case priority to marry the eldest *patroiokos*, by the very wording of the Code (if there is only one *patroiokos* left), althought he might not have been the oldest of all the cousins (VII 21-24: αἰ δέ κα μὲ ἴōντι ἀδελπιοὶ τō πατρός. υἱέεδ δὲ ἔκς ἀδελπιō̃ν. ὀπυίεθαι ἰō̃ι τō̃ι ἐς τō̃ πρειγίστō̃). But, what is the order after him? Nothing in the Code speaks against this order of claimants according to the ages of remaining cousins, regardless of their fathers' ages.

4 Bücheler, F.-Zitelmann, E., Das Recht von Gortyn, RM 40/1885, 152: "Sind keine Brüder da, sondern nur Vettern, so heiratet die älteste Erbtochter den ältesten Sohn des ältesten Bruders, die zweite aber den zweiten Sohn desselben ältesten Bruders und so fort ... schliesst der jüngere Oheim die Söhne des vorverstorbenen älteren Oheims aus". The opposite view held Kohler, J.-Ziebarth, E., Das Stadtrecht von Gortyn, Göttingen 1912, 68: "Die Erbtochter soll den Sohn des Vaterbruders heiraten, und zwar wiederum die älteste Erbtochter den Sohn des ältesten Bruders, die jüngere den Sohn des jüngeren, u.s.w.".

5 Willetts, R., 23: "If there were several heiresses and several paternal cousins, they had to marry in order of age of the brothers. This order of priority is in accordance with the order of the heirs as set out in V 9ff". But, a long time before Willetts, Comparetti wrote in Daremberg, C.-Saglio, E., Dictionnaire des antiquités grecques et romains, Paris 1877-1919, 1641: "Si tout les frères sont morts ... la patroôque epousera celui qui est le fils de l'aîné de ses oncles. Si la représentation eût été admise, ce fils aurait dû venir, dans la classification des prétendants, immédiatement après son père décédé, tandis que la loi appelle successivement avant lui tous les frères de son père. A raison de l'analogie existant entre le droit à l'hérédité et le droit à la fille héritière, on peut supposer pour l'hérédité des règles identique à celles qui étaient données pour la patroioque".

However, one should not forget that representation is an institution adapted primarily to proprietary reasons, while the institution of heiress includes religious, moral, personal and other aspects: this fact could affect the order of claimants to marry her. Secondly, even if representation was applied in claiming the hand of a *patroiokos* according to the age order of her uncles, how far did it go? Did it extend to the children of the cousins? If the eldest son of the eldest uncle was dead, could his son become an *epiballon*?

There is a dozen of questions left without answers in the sources, if the theory of representation should be accepted. Philology alone cannot provide a proper explanation of them. It enables us today only to have our own impressions, just to be fans either of Bücheler-Zitelmann's or of Kohler-Zierbarth's team. Therefore I suggest to turn for a while to anthropological and ethnological evidence, so as to add comparative arguments to the philological ground.

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Many authors have tried to the find answers to the "*epikleros* problem" in comparative law: Fustel de Coulanges, Kohler, Beauchet, Gernet and others discovered some parallels in analogous Hindou institution of *putrika*, a brotherless daughter whose son (*putrika putra*) was regarded as the son of his maternal grandfather continuing his home. They found some similarities with habits of Osets, where a sonless father adopts his daughter's son as his own. Ancient Irish customs, Jewish habits, parallels with old Chinese, Japanese, Arab customs were offered, too[6], although those institutions are not quite comparable and parallel to the Greek *epikleros*, except in general terms and aims - to secure a male offspring which will continue the family and the name of his sonless grandfather.

However, as far as I know, no Greek scholar, looking for a rescue belt for different questions considering *epikleros* in comparative law, has ever paid any attention to the old South Slav and Balkan customs that still existed at the beginning of this century. I will mention here four institutions known in the anthropology of Balkan peoples, all attempting to solve the same problem as Greek *epikleros* did: how to prolong the father's house if only daughters are left.

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The first one is called *domazet*. If a father has no sons but a daughter (or daughters), he gives her in marriage during his life (or gives her an order to marry a

6 See e. g. Gernet, L., Sur l'épiclérat, REG 1921/34, 358ff.

usually from a poor family. This man enters the house as a *domazet* (etymologically: "son-in-law at home[7]") and he accepts the family name of his father-in-law, along with his "slava", specific Serbian family patron saint's day[8]. A male child that he gets with his wife is entitled to carry on the grandfather's house. Although there is no formality of adoption of a son-in-law, such an institution is by no means similar to the habits and point of view of ancient Greeks: a sonless father in Athens by adoption (*inter vivos or mortis causa* exclusively[9]) sometimes chooses a son-in-law, who is going to enable continuity of the *oikos* of his father-in-law[10].

The second interesting institution can be found in customs of the Albanians. It is called *virginesa* or *virgina*, with a striking etymology: a virgin (sometimes it is also called *tobelija*, deriving from the Turkish word *tobe* - promise, oath). This institution is mentioned in the traditional Albanian collection of customary law, the s. c. Canon of Leka Dukadjin, although without detailed regulations[11]. Therefore, ethnology is the one that gives more details[12]. It shows that it is a daughter in a sonless family who prolongs her father's house, pretending that she is a male person, a son.

There are basicaly two types of the institution. The first one is when a girl becomes *virgina* as a child, according to the decision of her father or the phratry. She dresses like a

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7 Similar to a modern Greek word and etymology σώγαμβρος (ἔσω-γαμβρος). I am thankful to Prof. D. Gofas for this remark.

8 Djordjevic, T., Nas narodni zivot (Our national life), IV, Beograd 1931; Kulisic, S., Matrilokalni brak i materinska filiacija u narodnim obicajima Bosne, Hercegovine i Dalmacije (with a summary in French: Le mariage matrilocal et la filiation matrilinéaire dans les coutumes populaires de Bosnie, d'Herzégovine et de Dalmatie), Glasnik Zemaljskog muzeja, Sarajevo 1959/XIV, 51-75; Pavkovic, N., Le mariage matrilocal et le société patriarcale de la Yougoslavie, Etudes et documents Balcanique et Mediterannéens, Paris 1986/10, 62-67.

9 Cf. Paoli, U. E. AS 559; contra, Harrison, A. R. W., The Law of Athens I, 85 note 2; Maffi, A., Symposion 1990/18, 218 note 12.

10 One could also note some slight similarities among the institution of *domazet* (where a father chooses a husband for his only daughter among relatives, regardless of the fact which of them is the nearest one) and "*epiballon* désigné" of Gortyn, as Maffi calls it (where the father or a brother of the *patroiokos* designates as her husband an *epiballon* who is not the first in order among *epiballontes*), Maffi, A., La mariage de la patrôoque "donnée" dans le Code de Gortyne (col. VIII 20-30), RHD 1987/65, 519.

11 Kanon Leke Dukadjinija, (ed. S. K. Gjecovit, Zagreb 1986), article 1228: "Virgins (women dressed like men) do not differ from other females, except by being allowed to sit among males, but without freedom to speak and vote". This is the only article of the Canon speaking directly about the institution of *virgina*.

12 Barjaktarevic, M., Problem tobelija (virdzina) na Balkanskom poluostrvu (The problem of tobelias-virgins at the Balkan Peninsula), Glasnik Etnografskog muzeja u Beogradu 1965-1966/28-29, 273; Gusic, M., Pravni polozaj ostajnice-virdjinese u stocarskom drustvu regije Dinarida (Legal position of ostajnica-virgina in the cattle-breeding society of the Dinaric region), Balkanoloski institut SANU, Beograd 1976, 269. See also Cordignano, P. F., L'Albania I, Roma 1933, 104 and 110.

boy, plays with boys the games they play, behaves like a boy and, when the physiology starts to make changes, tightens her breasts with a belt in order to hide her nature and to look more masculine (as shown in the recent Yugoslav movie "Virgina" directed by S. Karanovich). The second type is when an only daughter becomes a *virgina* when advanced in years, by her own decision. None of these two categories among the Albanians marry, they swear to be celibate and therefore are called *virgins* (or *tobelias*). So, they prolong the house only during their lives, just for one generation.

Almost identical to it is the Montenegrian institution of *ostajnica* (etymologically: "she that remains", "one that is left"). Yugoslav ethnologists have noted more than 40 cases of *virgina* and *ostajnica* during the 19th and this century (one of them is captured at the photograph shown here). *Ostajnica* is a daughter in a sonless house who takes male image and role after her father's death. She changes her female name into male (as in the example on the photo, female "Milica" switched to male "Mikash")[13].

Those women accept the illusion that they are sons of their fathers. They take over the role of man in the family and in the society. They start to behave like a man, to smoke, to go into battles, they can even vote like a man (what Albanian virgins cannot do, according to the Canon of Leka Dukadjin). Although they also usually remain unmarried, as Albanian virginas, there are examples of those who were later married or got children without marriage[14]. So, there is a possibility that in this way sometimes *ostajnica* can prolong her father's house not only for one generation, as in case of *virgina*. Their sons can save the grandfather's house as if they were offsprings of a son, not of a daughter. Of course, such situations were not very frequent. But, as these women had juridical and business ability, most often *ostajnica* was entitled to prolong the family and keep the family property as a male, by adopting the first cousin's son[15].

Finally, the fourth institution brings us nearest to our question. The South Slav (particularly Serbian-Montenegrin and also Croat) institution of *blagarica* or *blagashica* shows a few striking similarities with the Greek *epikleros*. The etymology is absolutely the same as in Athens: *blago* means estate (*kleros*) so that *blagarica* is literally "the woman of estate", as well as *epi-kleros* is "the one that goes with kleros", "the one

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13 Milica - Mikash Karadzic, who lived in a highland area of Montenegro, was born as a female *postumus*: her father died in a battle with Turks in about 1875. She was educated like a boy, she even served in the Montenegrin army and took part in battles herself. She celebrated family saint's day ("slava"), she was always in the company of males and she voted like a male. Photo and ethnological details reported by Gusic, M., 271.

14 Cases of Paska Mucina Priftno, Boca Preljina (reported by Gusic, M., 269 note 1). Also Barjaktarovic, M., 281.

15 Gusic, M., 275; Barjaktarovic, M., 286; also Gavrilovic, LJ., Tobelije (On tobelijas), Glasnik Etnografskog muzeja u Beogradu 1983/47, 67.

attached to the kleros". By definition of 19th century Serbian scholars, *blagarica* is a daughter of a sonless father, obliged to be married within the phratry[16].

The point of the institution is to make a bridge between the grandfather and the grandson. If *blagarica* gets a child (male) with a man of the same phratry, this prolongs her father's house not only for one generation (as in case of *virgina* or *ostajnica*). The main difference between *blagarica* and *epikleros* is that she was not obliged to marry exactly the nearest male relative, but even a more remote one from the phratry[17]. But, if her husband died or she remained anyhow alone, it is a duty of the eldest living paternal cousin (uncle's son) to help her and take care of her problems. This duty falls upon her cousins - men of the same generation - according to their own ages, not according to the ages of their fathers (uncles of *blagarica*).

I am far from suggesting that this example proves that the order of *patroikos'* claimants was, as in the case of *blagarica's* helping cousins, arranged in accordance with the cousins' age. Nevertheless, this antropological parallel could be a small roadsign not only against the "theory of representation" considering the order of *patroiokos'* claimants, but also a piece of argument that the third possible order of claimants (according to the ages of cousins only) is not to be excluded from the scope completely.

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Comparison of Cretan and South Slav Balkan societies and their early laws and habits may resemble D. Cohen's attitude that for a study of Athenian law, Homer is not more relevant than the Twelwe Tables or anthropological evidence from modern Africa[18]. This Gortynean case (VII 24-27) and the literature on it is a striking example of "philological antiquarianism" (to use Cohen's expression), a proof that philology alone

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16 Rjecnik hrvatskog ili srpskog jezika (Vocabulary of Croat or Serbian Language), ed. Dj. Danicic, Zagreb 1880-1882, 398. See also Westrup, C. W., Introduction to Early Roman Law, II - Joint Family and Family Property, Copenhagen - London 1934, 107 note 4; Kraus, F. S., Sitte und Brauch der Südslaven, 466 (quoted according to Westrup, ibid.).

17 Bogisic, V., Zbornik sadasnjih pravnih obicaja u juznih Slovena (Collection of present legal customs among South Slavs), vol. I, Gradja u odgovorima iz razlicitih krajeva slovenskog juga (Material - answers from different areas of Slav South), Zagreb 1874, 194, 354 etc. Valtazar Bogisic, a famous Serbian legal historian from Montenegro, wrote the Civil Code of Montenegro of 1888. For codification purposes he distributed a questionnaire with about 350 questions on legal habits all over the country. He also examined and gathered material himself during his ethnological tours over different parts of the land. As an outstanding follower of the 19th century historical school in legal history, he payed particular attention to the "national legal habits" and "national legal spirit" in formulating rules of the Code.

18 Cohen, D., Late Sources and the 'Reconstruction' of Greek Legal Institutions, Symposion 1988, 289 (as well as Cohen, D., Greek Law: Problems and Methods, ZSS 1989/106, 92): "Strictly speaking, for the study of Athenian law, Homer is no more relevant than the Twelve Tables, or, for that matter, anthropological evidence from modern Africa".

cannot offer convincing or new answers. Accepting the methodological presumption that similar societies in analogous situations often used similar solutions, I find it useful to change an optic angle, trying to see how the same problems were solved by other Balcanic people. Of course, the main question in such methodology is comparability of societies. Otherwise, comparative method could be also misleading. It is true that "philological rigour" - particulary applied on "late sources" - could be fruitless (as Cohen would say), but there is also a great danger of forced comparative or anthropological conjectures: the best example is Willetts and his theory about cross-cousin marriage among *epiballontes* and *kadestai* in Gortyn, based upon comparison with Morgan-Frazer's "classificatory system" among African and Australian tribes[19].

But, ancient Crete and Montenegro of 19th century are quite comparable societies: I will just mention preserved remnants of tribal past, political and social importance of phratry and tribal units (*bratstvo* in Montenegro, *hetaireia* or tribe in Gortyn), warlike mentality and militarical organisation of society, the importance of family property and cult, conservative character of the society and law, similar self-sufficient economies with signs of change toward money (market) economy, similar environmental and geographical conditions, making them quite isolated and exclusive societies, etc. The general social, economic and cultural level of both was nearly the same, particularly if one agrees that Gortyn was not as progressive as Athens but, in the same time, not as primitive as Willetts thought. Therefore, "Balkan anthropological comparability" offered here could have some justification.

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To conclude: institutions aiming to prolong a family through daughters in the 19th century Balkan were primarily based upon social, tribal, religious and psychological rather than proprietary reasons, even when the expansion of money economy replaced the traditional way of living. Four ethnological Balkan examples show how the problem of sonless home continuation was solved: none of them is in accordance with modern legal concepts (although they were very well known and applied in already codified South Slav legal systems of the 19th century). All of them derive from and are closely connected with tribal legal reasoning. Therefore, it seems less credible that in case of a *patroiokos'* marriage a developed legal principle of representation, not inherent to tribal customs, was applied. This could lead to conclusion that the order of claimants to marry a *patroiokos* in

19 Willetts, R., 19. No need to say that hypothesis by Mrs. Bile about *kadestai* sounds much more probable than the one by Willetts. It can also be supported by Balkan ethnological evidence - not only Albanian, which Bile herself rightly pointed out: a certain family meeting (let us say "council", as Mrs. Bile) consisting of relatives both from the family and in-law-family members often solved important family questions, particularly in Eastern Serbia.

Gortyn Code (VII 24-27), was not organized in accordance with the principle of representation, but rather *per capita* (or, maybe even according to cousins' age, not regarding the ages of a *patroiokos'* uncles).

Ostajnica Milica (Mikash) - cf. p. 57 and n. 13

Michael Gagarin (Austin)

The Economic Status of Women in the Gortyn Code: Retroactivity and Change

During the seventh and sixth centuries Greeks everywhere began to write laws. A few of these early laws are preserved on inscriptions, but much about the process of making laws in early Greece still remains a mystery. Legends tell of lawgivers apparently writing sets of laws, sometimes finding them in divine visions or at Delphi, but there is considerable doubt how much historical truth (if any) these stories contain[1]. Inscriptions provide some clues, but we generally have little or no information about their historical context. Before the late fifth century in Athens, we are rarely told who authored or authorized a legal inscription, and we do not know, in most cases, what the legal situation was before the law was enacted, or whether the new law was intended to change an existing law or state of affairs, or to affirm the *status quo*.

At first glance the large number of legal inscriptions from the archaic period at Gortyn seems to offer some hope that we might be able to trace a historical development in that city, but we find that the early inscriptions that appear to treat topics also treated in later inscriptions are too fragmentary to allow us to draw any significant conclusions[2]. Thus, in seeking a historical context for the provisions of the Great Code (inscribed around the middle of the fifth century) we are left with the text alone and whatever inferences we can draw from it. Since any legal text is better understood if we know the social and economic conditions of the society that produced it, some scholars make certain assumptions about the social structure and economic conditions of fifth-century Gortyn, and have interpreted the provisions according to these assumptions. The dangers of this approach should be obvious.

My specific focus in this paper will be the provisions in the Gortyn Code relating to the economic position of women. Scholarship on this topic has been dominated over

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1 See Szegedy-Mazak, Camassa, Hölkeskamp.

2 Among the topics treated in the Great Code, marriage and the family seem to be the subject of *IC* 4.17, 18, 20, 21 and 23 (sixth century), and the "heiress" is mentioned twice in *IC* 4.44 (fifth century).

the past 30 years by the Marxist views of Ronald Willetts. In books and articles, including his by now standard commentary[3], Willetts locates the position of women in an evolutionary schema developed by Bachofen, Morgan and Engels, and worked out in detail for ancient Greece by George Thompson. This schema postulates a primitive stage of *Mutterrecht* ("matriarchy"), which gradually yielded to the patriarchal social structure of the classical world, in which women's rights were greatly restricted. In Willetts' view the Great Code reflects a stage in this evolution: despite the apparent benefits it bestows upon women, Willetts sees the Code as "a further stage in the encroachment of males upon the old established rights of tenure of females" (*LCG* 21). Willetts acknowledges the speculative nature of many of his interpretations, but defends them by appeal to the overriding considerations of Marxist theory[4].

Today the theory that supports Willetts' views is almost universally rejected[5], but his specific conclusion, that the Code represents a restricting of the rights of women, has not been challenged. C. Thomas, for instance, while disputing Willetts' theory of matriarchy in Bronze Age Greece, finds his arguments about the Gortyn Code persuasive[6]. Others, including Schaps (85-88) and Morris have drawn correct conclusions about individual passages or specific points; but Willetts' thesis, that the effect of the Code was to diminish the rights of women, still stands. In this paper I shall argue that the Gortyn Code effected a significant improvement in the economic condition of women at Gortyn.

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3 See especially the introduction to *The Law Code of Gortyn* (hereafter *LCG*), and the fuller expression of Willetts' views in *Aristocratic Society in Ancient Crete* (hereafter *ASAC*).

4 "Where fact, even though somewhat tenuous, has attracted so much empirical attention, there is little need to hesitate about its support of a theory which we have seen good reason to maintain as a consistent guide in the elucidation of other apparently obscure points" (*ASAC* 98). The "fact" Willetts refers to here is *IC* 4.20, which he takes as proof that at an earlier time women had shares of the inheritance equal to men, whereas in the Code their shares are only half as large. He cites this law (98 n.2) as ϝισϝόμοιρ[ον - θ]ήλεια. What Willetts' remarks conceal is that in between the two Greek words he cites come two fragmentary lines of unknown length including the words οἱ γνήσιοι, and that the few preserved words in this fragment closely resemble the vocabulary of 10.48-54 of the Code, which regulate adoption. This inscription probably has nothing to do with daughters obtaining an equal share, but is, as Copmparetti saw, a fragment of a law about adoption.

5 The strongest attacks on Willetts' views came in the reviews by Wolff and Meyer-Laurin.

6 "The arguments of Willetts . . . are persuasive: the matriarchal elements noted above appear to be losing ground to the principle of male succession" (Thomas 178).

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If we examine the provisions relating to women without preconceptions, it is not immediately obvious how a woman's position may have been changed by them. Some have assumed that the explicit statement of a limit necessarily implies that previously there was no limit. Consider, for example, 4.48-51: "if a father, while he is still living, wishes to give something to his daughter who is getting married, let him give according to what is written, *but not more* (πλίον δὲ μέ)." Willetts (*LCG* 20-22) takes this to imply that previously a larger gift was permitted and that gifts to a daughter are being restricted by this new provision. Moreover, the same expression "but not more" is twice used elsewhere in the Code in reference to gifts from a man to a woman (3.40[7], 10.16); in each case the provision allows gifts to be given but sets a limit on the amount of the gift. It is not impossible that in all these cases the limit may represent a new restriction imposed on gifts that were previously unrestricted or were permitted in larger amounts. On the other hand, it is also possible that the provision establishes a new permission to give or allows a larger amount than previously. In other contexts such limits seem more like a formula used when a person has a range of possible actions available but there is a limit to what he can do[8]. Without external evidence I see no way to decide whether such provisions permit larger gifts or smaller gifts or the same amount as before the Code.

Willetts draws similarly unjustified conclusions from other provisions. He maintains, for example, that the rule allowing heiresses to marry at the age of twelve "made immature girls legal appendages of the estate" (*LCG* 23). In fact, we have no way of knowing whether the age of twelve is the same as or different from previous law or practice, but Willetts treats this and the other rules about the heiress as if they clearly

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7 These could also be from a wife to her husband.

8 Thus in one case a judge is allowed to set triple fines "or less, but not more" (1.38); cf. *IC* 4.43.Bb, which states that if one diverts part of a river's flow, one must leave as much water flowing in it as flows under the bridge in the agora, "or more, but not less." Similar expressions probably occur in two other fragmentary inscriptions from Gortyn (72.10.6-7, 84.1). In other cases, "not more" seems to be used for emphasis, as in 7.29 of the Great Code, where a man is allowed to marry only one heiress, "and not more" (though here Willetts suggests we should see "traces of the practice of marrying two or more wives"). Cf. *IC* 4.80.7, which specifies a fine of precisely a drachma but not more. Here the expression "not more" is separated from the amount of the fine; rather than qualify the amount it introduces the following provision, which specifies penalties in case one levies a larger fine. Here the added phrase "but not more" may be intended to emphasize what might otherwise appear an unlikely amount for a fine.

"curtailed the rights of the heiress in favour of the male kin beyond the point reached by earlier legislation" (*LCG* 26). Willetts' conclusion cannot stand, unless one accepts the entire Marxist framework in which he is working[9].

Putting aside this kind of reasoning, let us instead examine the only good evidence for change in the law, which is provided by clauses stating that certain provisions shall or shall not be applied retroactively. Such clauses occur five or perhaps six times: 4.52-5.1 (which is usually taken to be a provision for retroactivity but may not be), 5.1-9, 6.9-25, 9.7-17, 11.19-23, and 12.1-5. Of these, the clause in 11.19-23 is the only one that does not concern the property of women: it comes at the end of the provisions on adoption (10.33-11.19) and states that "these (rules) are to be followed from the time when this law was written, but if anyone before this time received any property from adoption or from someone who was adopted, there shall be no further legal action" (κρέθαι δὲ τοῖδδε ἃι τάδε τὰ γράμματ' ἔγραπσε τῶν δὲ πρόθθα ὄπαι τις ἔκει ἢ ἀμπαντύι ἢ πὰρ ἀμπαντῶ μὲ ἔτ' ἔνδικον ἔμεν). From this clause we may infer that the rules on adoption are a change from previous rules or customs, but we cannot tell whether the provisions of the Code are stricter or more lenient than before.

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The four or five other references to retroactivity all relate to the property of women.

A. 4.52-5.1: After provisions establishing the rules of inheritance at Gortyn and providing that a father who wishes to give a gift to his daughter upon her marriage[10] while he is still alive may do so, "according to what is written but not more[11]." The law then states that "any (daughter) to whom he gave or pledged (something) earlier is to have it, but she is not to receive anything more of her father's estate." (ὀτείαι δὲ πρόθθ' ἔδοκε ἢ ἐπέσπενσε, ταῦτ' ἔκεν, ἄλλα δὲ μὲ ἔτι τῶν πατρόιον κρέματ' ἀπολανκάνεν.)

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9 Similarly, from the explicit provision that the father shall be in charge of the children and the division of property among them Willetts infers that the mother was being deprived of a responsibility that she had previously shared in (*LCG* 21).

10 τᾶι ὀπυιομέναι (4.49-50) is usually translated "to his married (daughter)," but Maffi (1987: 510-11) makes a good case for treating the verb here as "progressive", i.e. "in the process of being married."

11 "What is written" probably refers to the preceding regulations on inheritance which begin in 4.23. Essentially the provision allows a father to give his daughter her share of the inheritance upon her marriage rather than making her wait until his death.

Most scholars take this last sentence to be a provision for non-retroactivity. The word πρόθθα ("earlier") is used in four of the other five provisions of non-retroactivity[12] in the sense "before the current law was enacted," and if it has this sense here, then this provision is to some extent non-retroactive: gifts that were already made are allowed but the daughter is to receive nothing more. This would seem to mean that in some cases a daughter who had received a very small gift upon marriage would be prevented from receiving her share of the inheritance, which might be much larger[13]. Many other cases, however, would not be affected by this provision: girls who had received more than they would be entitled to under the new law are not affected, and, more important, daughters who had previously received nothing are apparently not subject to this provision. These conclusion are puzzling, to say the least.

Another difficulty with the view that πρόθθα refers to retroactivity is that the law would say nothing about whether a daughter who receives an *inter-vivos* gift after the enactment of this new law will be prevented from receiving anything more; indeed it seems to imply that there will be no restriction, since if there was a restriction, the law would say this explicitly, as it does in the provision for retroactivity[14]. Moreover, this clause would be unique in that the five other provisions of non-retroactivity affirm that in past situations "there shall be no legal action" (μὲ ἔνδικον ἔμεν). In fact, the very next provision, 5.1-19 (see **B** below) uses this expression in connection with retroactivity but seems completely disconnected from 4.52-55.

All these factors suggest that 4.52-55 may not be concerned with retroactivity at all, but that we should rather be guided by the one other use of πρόθθα in the Code (7.13), where it simply means "before"[15] and refers to the current application of the law. On this analogy πρόθθα in 4.52 would mean "before (her father's death)": i.e., if any daughter receives or is promised a gift from her father before his death, this will count as her inheritance and she receives nothing more upon his death. The intent of this provision would be that a father could give his daughter a marriage gift equivalent to her share of the inheritance without concern that upon his death the estate might be much larger and she could return and claim a share. Essentially in accepting her

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12 The exception is **E** (see below), which has the more explicit expression πρὸ τõνδε τõν γραμμάτον (12.3).

13 We could avoid this consequence if we understood "her share of the inheritance" as the unexpressed object of "he gave or pledged" rather than an indefinite "something", as I have translated. But this would be asking a lot of the reader.

14 DHR translate πρόθθα "antérieurement à la présente loi" (369), but their discussion (464-5) understands the rule to apply to future cases as well.

15 7.13: "if a slave does wrong before or after (*sc.* he is purchased)."

marriage gift a daughter would give up her claim to a share of the inheritance. On this interpretation, then, **A** is not a provision for non-retroactivity but regulates the application of the law in present and future circumstances.

Even if this provision were concerned with retroactivity, we would not be justified in concluding, as Willetts does (*LCG* 22), that it imposes a further restriction on the rights of daughters. The provision treats *inter-vivos* gifts as, in effect, payment of the girl's share of the inheritance in advance, and states that such gifts are to count as her share even if they were made before the current law took effect. The provision would ensure the division of the estate as specified, two parts for boys and one part for girls, by not allowing a daughter to receive more as a gift. It is possible that earlier regulations had allowed girls to receive a gift from their living fathers and then have their full share of the inheritance too, in which case they would be worse off under the new law. But it is also possible that *inter-vivos* gifts were not allowed at all under earlier law or, perhaps more likely, that there was no previous law about this matter, in which case we simply do not know whether girls previously received gifts or not, or how common or how large such gifts may have been. Thus, even if this were a provision for non-retroactivity, we would not know what its consequences were for the economic position of women at Gortyn. Fortunately, a clear example of non-retroactivity follows immediately and sheds more light on the subject.

B. 5.1-9: The next provision clearly limits the retroactive application of the law."A woman with no property by gift of her father or brother or by pledge or inheritance from the time when[16] the Aitholean *startos*, those with Kyllos, acted as *kosmos*, is to have it, but with respect to women previously there shall be no legal action" (γυνὰ ὀτεία κρέματα μὲ ἔκει ἒ πατρὸδ δόντος ἒ ἀδελπιῦ ἒ ἐπισπένσαντος ἒ ἀπολακόνσα ἃι ὄκ' ὁ Αἰθαλεὺς 'ταρτὸς ἐκόσμιον οἰ σὺν Κύλλοι. ταύτας μὲν ἀπολανκάνεν. ταῖδ δὲ πρόθθα μὲ ἔνδικον ἔμεν). This provision envisions a specific time in the past[17], identified by the name of a ruling tribe and individual, and states that the law will not apply retroactively to situations before this time.

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16 Willetts supplies ἔγρατται with ἃι ὄκ' and renders: "as (enacted) when" (so DHR). This is perhaps possible (cf. 12.2-3 ἃι ἔγραττο πρὸ τῦνδε τὸν γραμμάτον), but if the clause was meant to designate actual legislation at the time of Kyllos, as Willetts assumes (*LCG* 21), this would be a very odd ellipsis. It is thus better to give the words a more general sense—"as (was the case) when"— or else follow the parallel of 9.15-17 (see **D** below) and translate "from the time when" (so G, KZ). In either case, the words mark a specific time in the past, as I shall argue below (n.17).

17 In the discussion in Graz it was suggested that the wording could be meant to designate the time when the Code was enacted, and that there might be a parallel in the reference to "before Solon became archon" in Solon's amnesty law (Plutarch, *Solon* 19). But even in Solon's law the reference is to

Scholarly discussion has centered on the meaning of the final, non-retroactive clause, which I have tried to translate in a neutral sense: "with respect to women previously there shall be no legal action." Does this indicate that some women previously received a larger share and no legal action can be taken *against* them[18]? Or that some women previously received a smaller share and action cannot be taken *by* or *for* them[19]? Or does the clause envision both situations: "there shall be no legal action *for* or *against* women previously[20]"?

An answer is suggested by the first half of this provision which, though rarely acknowledged as such, is the one clause in the Code that is positively retroactive[21]. Although many uncertainties surround the name of Kyllos and the composition of the Aitholean *startos*, the law is explicitly said to apply retroactively back to that time, but no earlier. Clearly, between the time of Kyllos and the enactment of the Code it was possible for Gortynian women to receive no property at all. The Code makes a major change, insisting that all women receive their proper share; and it makes this change retroactive to the time of Kyllos, but not earlier. In other words, a line is drawn between women after Kyllos, who are to receive their proper share, and those before him, in whose cases there is no legal recourse. The context strongly implies that women before the time of Kyllos are envisioned as having received nothing, either when they married or upon their father's death, and as having no legal recourse under the new law. The

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a time in the past (since Solon must have become archon before his amnesty law was enacted), and the verb in the Gortyn law is similarly a past tense (ἐκόσμιον). Moreover, if "from the time when the Aitholean *startos*, those with Kyllos, acted as *kosmos*" means "from the present time" or "from now on," the Gortyn provision would be redundant: the Code has just said that every woman is to have a share of the inheritance (4.23 ff.), and so it would be unnecessary to add, "from now on every woman who does not have her portion is to have it." In fact, Solon's law is a good parallel for my view, since it provides that those who were exiled before Solon (i.e. before the enactment of the amnesty law) shall be restored, except in certain cases. Here too women without property before the enactment of the Great Code shall have their portion but not those before a certain time.

18 So Willetts (*LCG* 21-22), following Guarducci: "there shall be no ground for action *against* previous female beneficiaries" (my italics). The parallel they cite—if a purchased slave does wrong, after sixty days have elapsed the case shall be "with respect to the purchaser," 7.14-15—is not helpful, because in this case any suit would obviously be brought *against* his master, not *by* his master.

19 KZ: "die aber vor diesem Zeitpunkt verheiratet wurden, *für* die soll kein Rechtsanspruch sein" (my italics).

20 DHR: "pour les filles pourvues antérieurement il n'y aura lieu à aucune réclamation *de part ni d'autre*" (their italics).

21 Willetts (*ASAC* 6, citing Bonner and Smith) maintains that the Code is never retroactive.

Code grants a new benefit to women who would have received an inheritance after the time of Kyllos but not to those who would have inherited earlier.

C. 6.9-25: A law stating that neither a husband nor a son is to sell or promise the property of his wife or mother is followed by penalties for violations; the law continues, "but with regard to previous matters there shall be no legal action" (τõν δὲ πρόθθα μὲ ἔνδικον ἔμεν). In other words, the legal redress provided by this law will not be available in cases where a wife or mother's property was sold or promised before this law was enacted. This must mean that women's property is being given greater protection in the Code[22] but this increased protection is not being granted retroactively. From now on, however, women will have a specific protection they did not have earlier[23].

D. 9.7-17: In nearly identical words as **C**, the law prohibits anyone from selling or mortgaging the property of an "heiress" except under certain conditions. The law adds, "since these words were written, but with regard to previous matters there shall be no legal case" (ἃι τάδε τὰ γ[ράμμ]ατ' [ἔγρατται, τ]ὸ̃[ν δ]ὲ πρόθα μ[ὲ ἔ]νδικον ἔμεν)[24]. As in **C** this almost certainly means that there shall be no redress for an heiress whose property was wrongly sold or promised before this law. Thus the change effected by the Code is clearly beneficial to women, even though it is not applied retroactively.

E. 12.1-5: A later addendum[25] to the Code states that if gifts from son to mother or husband to wife were made "as was written before this code, there shall be no legal case" (ἃι ἔγρατο πρὸ τõνδε τõν γραμμάτον. μὲ ἔνδικον ἔμεν), but henceforth gifts are to be given as is written (*sc.* in the Code). This probably refers to the provision in 10.14-17 limiting these gifts to 100 staters, but since we do not know the previous

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22 These provisions also give protection to the buyer/acquirer, who receives double the amount he originally paid in case the property was wrongly conveyed. But from the context the intent of the provisions seems to be to the protection of family property. The (male) seller/mortgagor is severely punished under the new provisions.

23 Maffi (1988) discusses the provisions that follow these (6.25-31) and those of **D** (9.18-24), and argues that the law envisions a male relative using the protection afforded a woman's property as a means of (illegally) shielding his own property from his creditors by claiming that his property belongs to the woman. This is plausible, but it does not affect the conclusions I am drawing from these provisions.

24 The restorations are accepted by virtually all editors.

25 We do not know how much later the provisions after 11.24 were added to the inscription. They are apparently inscribed by a different hand and (more important) violate the boustrophedon continuity of the main text at several points. This indicates that the addenda were not all inscribed or enacted at one time. Some time must have elapsed between the inscription of the main text and the last addendum, but whether this was a few months, a year or several years (or more) is impossible to say.

law concerning such gifts, we cannot know whether this provision changes the size of gifts allowed, and if so, whether it allows larger gifts or smaller gifts than previously.

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We have now considered five passages: three of these (**B**, **C** and **D**) certainly improve the position of women at Gortyn, either by guaranteeing them a share of the estate (which was not previously guaranteed to them), or by providing a new protection for their property against those who might sell or promise it. The enactment of these provisions and the limitation or denial of their retroactive application indicate that protection was needed and imply that some women had previously received no property or had been deprived of it. Thus, the Code effects a substantial improvement in women's position in this regard.

Passages **A** (which may have nothing to say about retroactivity) and **E** both refer to specific rules about giving gifts to women that include a limit on the amount of the gift: the limit for a daughter is her share of the inheritance; for a mother or wife it is 100 staters. It is possible, of course, that a higher limit or no limit on gifts to these women had previously been established by law (or custom), and that some women were thus restricted by the Code in their right to receive property; but even in this case, it seems unlikely that many women would previously have received larger gifts than are now allowed by the Code. And of course, the previous legal or customary limit may have been the same or smaller, for all we know.

In sum, the one provision of the Code with limited retroactivity (**B**) certainly provides greater benefits for women at Gortyn. Two non-retroactive clauses (**C**, **D**) also are clear in providing greater protection for women's property than had previously existed. Since the one or two other non-retroactive provisions (**A**, **E**) may have resulted in either an improvement or a worsening of the condition of women, it seems almost certain that the Code as a whole significantly improved the position of women.

Even more significant is the fact that, leaving aside **A** (which may not refer to retroactivity), four of the five statements mentioning retroactivity in the Code relate to the condition of women. These figures cannot be dismissed as mere coincidence or the result of arbitrary decisions or mistakes; they must indicate that the writers of the Great Code are treating the provisions concerning women differently from other matters.

To explain this we need to consider the reasons why a lawgiver might explicitly state that certain provisions are or are not retroactive, while saying nothing about the retroactivity of other provisions. We must also ask why all five cases emphasize the

non-retroactivity of a provision; even **B**, which affirms that the provision is retroactive to a specific time, concludes that it is not retroactive before this time. The natural inference is that the provisions of the Code are, in general, retroactive, but that these five specifically are not. This inference would be especially reasonable if, as many scholars think, the Code largely incorporates earlier legislation and traditional customs[26].

If this is the case, the explicit denial of retroactivity to five provisions must indicate that these provisions represent a significant change from previous law or custom; no one would be concerned with the possible retroactivity of a provision that did not effect a significant change. Thus the changes effected by the provisions concerning the status of women must have been among the most significant changes made by the Code. Of course, the changes need not have been large in absolute terms, but they must have been viewed as significant by the lawgiver(s) and presumably by the community as well. In other words, these provisions effected an improvement in women's position that was perceived as one of the most significant changes made by the Code. It is particularly interesting that the provisions protecting the property of women against unlawful infringement by others are explicitly said not to be retroactive (**C** and **D** above), whereas almost identical clauses protecting the property of male heirs from similar infringement (6.2-9)[27] do not mention retroactive application. We may infer that the protection offered women by these laws represents a more significant change from previous law than does the same protection offered to the male heirs. This suggests that the property of the male heirs may already have been protected in earlier legislation, or that such protection was thought unnecessary since the property of males was not often tampered with, whereas the female heirs were thought to need the new protection they are granted in the Code.

The fact that several of the changes that benefited women are explicitly non-retroactive suggests that the improvements the Code effected in the position of women met with some resistance. This is hardly surprising: changes in the legal relationship between the sexes are often perceived as more threatening than other sorts of change.

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[26] See, e.g., Willetts, *LCG* 8-9; there is no hard evidence for this conviction, since no earlier fragments from Gortyn treat precisely the same matters as the Code; see above n.2.

[27] Willetts translates the provisions about women's property (6.9ff) as if they were directly continuous with the provisions about the son's property, but (a) there is a slight but perhaps significant change in vocabulary from "mortgaging" a son's property (καταθίθεθθαι) to "promising" a woman's property (ἐπισπένσαι), and (b) the provision that follows stating the sanction for violations speaks only of the property being controlled by the mother or the wife (6.17-18). Thus 6.9 must mark a new set of provisions that apply specifically to the property of women.

Men continued to hold economic and political power at Gortyn, and men were presumably in charge of writing the new provisions of the Code. They provided greater benefits for Gortynian women but made certain that these benefits would be introduced more gradually than most other changes.

In sum, we do not have enough evidence to say with certainty that all women necessarily benefited from the Great Code. There may have been some who under earlier legislation (or in the absence of legislation) received very large gifts from males which the Code no longer allows. But if this did happen—and there is nothing in the Code to suggest it—it is not likely to have affected many women. More important, where the intent of the Code is clear, it ensures that women receive more property than in the past, when some could have nothing, and that their property is better protected.

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Risposta a Michael Gagarin

1. Opponendosi all'opinione di Willetts, tuttora dominante, Gagarin sostiene che il Codice di Gortina segna un miglioramento nella condizione economica delle donne. Ciò sarebbe confermato dal fatto che la maggior parte delle clausole che escludono esplicitamente un'applicazione retroattiva protegge i diritti successori o, più in generale, la proprietà delle donne. E l'esclusione della retroattività (πρόθθα μέ ἔνδικον ἔμεν) sarebbe un indizio sicuro di cambiamento. Muovendo dall'esame di queste clausole G. giunge poi a formulare un principio generale di tecnica legislativa: dove manca una clausola che escluda esplicitamente la retroattività di una norma, questa deve considerarsi automaticamente retroattiva, o va vista (il che - aggiungo io - non è proprio la stessa cosa), come la trascrizione di norme scritte o consuetudinarie preesistenti (p.70).

La mia risposta si articolerà in due punti. Prima di tutto prenderò in considerazione la questione della retroattività. In secondo luogo esaminerò alcuni dei passi analizzati da G. utilizzando le sigle da lui introdotte (**A**=IV 52-V1; **B**=V 1-9; **C**=VI 9-25; **D**=IX 7-17; **E**=XII1-5), e cercherò di stabilire se lo scopo del legislatore era effettivamente quello di migliorare la condizione delle donne.

2. Secondo G. l'emanazione di norme come **C** e **D** e l'esplicita esclusione della loro retroattività indica che le donne avevano bisogno di protezione e che alcune di esse in precedenza o non avevano ricevuto beni in proprietà o ne erano state private (p.69). Se così fosse, tenuto conto che il Codice almeno in un caso sembra conoscere e applicare la retroattività (col. V 1-9 = **B**), a me sembra che le donne sarebbero state tutelate ancor meglio proprio rendendo retroattive le nuove norme. E non mi pare convincente vedere nell'esclusione della retroattività un temperamento di stampo 'maschilista' alla volontà del legislatore di introdurre norme più favorevoli alle donne (G., p. 70). Fra l'altro, in questa logica, l'esclusione della retroattività avrebbe danneggiato proprio le donne più anziane e perciò più autorevoli e più rispettate.

G. nota che norme analoghe a **C** e **D**, poste a protezione di soggetti maschili (VI 2-9), non fanno parola di applicazione retroattiva. E questo dimostrerebbe che i diritti dei maschi erano tutelati anche prima del Codice, oppure che non si verificavano abusi in misura tale da giustificare una esplicita previsione di legge (p.70). A questo proposito osservo che, in relazione al divieto per i figli di alienare i beni del padre e per il padre di

alienare i beni dei figli (col. VI 2-9), non solo non si accenna a un'eventuale retroattività ma non si parla affatto di rimedi giudiziari. Da ciò discende, secondo me, che i rimedi giudiziari per una eventuale violazione del divieto in questione, se esistevano, erano quelli ordinari; il che non esclude affatto che la norma possa essere in tutto o in parte nuova rispetto alla situazione preesistente al Codice.

Attiro inoltre l'attenzione su col. VI 37 ss., dove l'atto di disposizione dei beni della madre premorta da parte del padre viene sanzionato in modo identico all'atto di disposizione dei beni della moglie da parte del marito e dei beni della madre da parte del figlio, così come è previsto in **C** (*restitutio in integrum* a favore dei figli e condanna *in duplum* del venditore), ma senza la clausola che esclude la retroattività. Se fosse vero che contro gli atti di disposizione di beni delle donne sono state introdotte norme più severe, occorrerebbe spiegare perché le stesse sanzioni tutelano anche i diritti dei figli sui beni materni, ma senza clausola di retroattività, quindi, secondo il criterio generale supposto da G., senza che si possa affermare che si tratta di una norma nuova. Si possono avanzare in teoria tre spiegazioni. 1) L'assenza della clausola di retroattività è voluta e rivela che si tratta di una norma precedente che viene trascritta tale e quale nel Codice. 2) La clausola di retroattività manca perché il legislatore (o il lapicida) si è dimenticato di inserirla, e allora la norma può essere considerata nuova. 3) La clausola di esclusione della retroattività è indizio di novità delle norme a tutela delle donne , ma non esclude che le norme cui non è apposta, come col. VI 37 ss., siano nuove.

G. non prende in esame col. VI 37 ss.; applicando i criteri da lui enunciati, si potrebbe però osservare che a ad essere tutelati da questa norma sono i figli, e in particolare i figli maschi[1]. Da un lato si giustificherebbe dunque l'assenza della clausola di retroattività, in quanto i maschi erano già tutelati anche prima del Codice; dall'altro avremmo la conferma che la tutela delle donne, ricalcata su quella dei maschi, è stata introdotta dal Codice. Ma è convincente una simile applicazione del punto di vista di Gagarin? Io credo di no, se non altro perché la tutela dei beni della donna interessa i figli anche mentre la madre è viva; dal loro punto di vista non vedo quindi perché, prima dell'emanazione del Codice, gli atti di disposizione dei beni della madre ad opera del padre avrebbero dovuto essere del tutto leciti finché la madre era viva e pesantemente sanzionati dopo la sua morte.

Resta allora da scegliere fra le altre due spiegazioni. Io non credo che l'assenza della clausola di esclusione della retroattività sia dovuta a dimenticanza; se così fosse, mi pare plausibile che sarebbe stata aggiunta negli emendamenti della col. XII, fra cui troviamo proprio una clausola del genere (XII 1-4 = **E** a proposito di donazioni del figlio alla madre e del marito alla moglie).

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[1] E' vero infatti che *tekna* indica sia i maschi che le femmine, ma alle ll. 35-37 leggiamo che l'atto di disposizione da parte del padre è lecito solo se approvato dai *tekna dromees iontes*; e *dromeis* sembra un termine applicabile esclusivamente ai maschi.

A me pare dunque preferibile la terza spiegazione. Dall'assenza di una clausola di esclusione della retroattività non si può ricavare che la norma relativa non è nuova o addirittura che è retroattiva. Credo cioè che l'esame del Codice confermi un principio di senso comune (o di buon senso): là dove troviamo una clausola che esclude esplicitamente la retroattività, siamo sicuri di trovarci di fronte a una norma innovativa; là dove non troviamo alcuna clausola relativa alla retroattività (né per escluderla né per affermarla), possiamo ritenere in linea di principio che la retroattività sia da escludere; in ogni caso una simile mancanza non ci offre alcun elemento per sostenere che siamo di fronte alla trascrizione di una norma preesistente e non a una norma innovativa.

Per chiarire ulteriormente questo punto, è forse opportuno distinguere fra norme che contengono la riaffermazione di un principio e norme che contengono le conseguenze ricollegate dal legislatore alla violazione di quel principio. Consideriamo, ad esempio, altre norme del Codice che interessano più o meno direttamente la condizione economica della donna. In caso di morte o di divorzio, la donna che sottrae cose dei figli è *endikon* (III 23), e così pure se non ha avuto figli (III 30); altrettanto vale per la *Foikea* che divorzia (III 43-44). Come giudicare queste norme dal punto di vista che ci interessa? Mi sembra inverosimile che prima del Codice una donna che divorziava potesse sottrarre impunemente cose appartenenti ai figli o al marito, o al padrone dell'ex-marito nel caso della *Foikea*. Mi pare dunque che la legge si limiti a ribadire, per esigenze di ordine e di completezza nell'esposizione, un principio che era in vigore prima del Codice e che continuerà ad esserlo dopo. Nessun problema concreto di retroattività si pone.

Un rilievo diverso può assumere invece la norma che sanziona la sottrazione di beni ereditari da parte del coerede in un momento successivo alla divisione (V 35 ss.). Fermo restando anche in questo caso che prima del Codice doveva già essere in vigore il principio che vieta al coerede di impadronirsi di beni ereditari dopo la divisione, può darsi che il legislatore abbia inasprito le sanzioni che colpivano un simile comportamento. Sotto questo (limitato) profilo la norma è probabilmente nuova e non si vede perché dovrebbe essere retroattiva.

Se è dunque vero che l'assenza di una clausola che escluda la retroattività non implica che la norma sia retroattiva e non esclude che si tratti di una norma innovativa, ci si deve chiedere perché le norme del Codice studiate da G. contengano la clausola di esclusione della retroattività. Io credo che, in assenza di principi generali del diritto contenuti in carte costituzionali, elaborati da giuristi e resi efficaci da corti costituzionali, in certi casi si avvertisse l'opportunità di una specifica ed espressa formulazione legislativa di un principio, d'altronde considerato ovvio, per consentire al giudice di respingere pretese basate su fatti precedenti l'emanazione della norma. E' verosimile, ad esempio, che in un ambiente naturalmente litigioso come quello delle famiglie greche, un'esigenza di pari trattamento fra tutti i membri della famiglia (e in particolare fra i più

anziani) spingesse coloro che erano esclusi dalla applicazione di norme innovative a considerare più equa una loro applicazione retroattiva.

3. Abbiamo visto che le norme esaminate da G. implicano certamente un'innovazione. Si tratta ora di vedere di che innovazione si tratti e a favore di chi.

Concordo con G. nel respingere la tesi di Willetts secondo cui il Codice documenterebbe il passaggio dal matriarcato al patriarcato. Credo però che la prospettiva in cui vanno esaminate le norme analizzate da G. debba essere più ampia dell'alternativa miglioramento/peggioramento della condizione della donna in cui G. ancora si muove. Secondo me la preoccupazione del legislatore è soprattutto quella di evitare conflitti di interesse sia tra gruppi familiari sia tra membri della famiglia e terzi, conflitti che possono derivare da atti concernenti il patrimonio delle donne ma non compiuti dalle donne. Più che la tutela delle donne è quindi la tutela degli interessi dei familiari o dei terzi acquirenti che secondo me sta a cuore al legislatore. Esaminiamo rapidamente i passi di cui si occupa G.

Le norme **A** e **B** (col.IV 52 - V 9) secondo me tendono soprattutto a ristabilire la parità tra fratelli e sorelle: in pratica si vuole raggiungere un risultato simile alla *collatio dotis*. Contrariamente a G.(p.66-68) io credo perciò che il diritto delle figlie a ereditare dal padre (e dalla madre) preesistesse non solo al Codice ma anche all'anno di Cillo (ma V 1-9 è un passo troppo complesso per discuterlo qui).

Per quanto riguarda i casi **C** e **D** è secondo me l'esigenza di prevenire conflitti familiari e di tutelare i terzi acquirenti che spinge il legislatore ad introdurre severe sanzioni a carico di colui che dispone arbitrariamente dei beni della moglie, della madre o della *patroiokos*.

Consideriamo prima di tutto il caso **C**. Per quanto riguarda la moglie c'è intanto l'interesse dei figli a ereditare i beni materni (come rivela VI 31 ss.) e secondariamente l'interesse della famiglia d'origine della moglie ad ottenere la restituzione dei beni della donna in caso di scioglimento del matrimonio. Per quanto riguarda il divieto di disporre dei beni della madre c'è da tener conto dell'interesse degli altri figli della stessa madre.

Io non credo perciò che il Codice introduca qui per la prima volta il diritto della moglie e della madre a non essere privata dei propri beni. E non lo credo non tanto perché sono un fautore del peggioramento invece che del miglioramento della condizione della donna per effetto del Codice, ma perché gli interessi degli altri soggetti che abbiamo menzionato esistevano anche prima del Codice; mi sembra perciò inverosimile che al marito o al figlio prima del Codice fosse consentito intascare il ricavato della vendita dei beni della donna ledendo le aspettative di altri interessati. Infatti il marito avrà pur dovuto restituire i beni della donna in caso di scioglimento del matrimonio e il figlio avrà dovuto quanto meno imputare alla sua quota ereditaria i beni della madre da lui venduti.

E' presumibile dunque che quegli atti di disposizione fossero quanto meno annullabili anche prima del Codice (si tratta pur sempre, in sostanza, di vendita di cose altrui). Tuttavia è probabile che la possibilità di disporre dei beni della donna da parte del marito o del figlio fosse considerata come una facoltà tradizionalmente ricompresa nei poteri esercitato dal capo della famiglia e fosse di fatto esercitata con moderazione. A sua volta il terzo acquirente, non importa forse se in buona o mala fede, avrà avuto dei fastidi soltanto nel caso in cui i diritti della famiglia di provenienza della moglie, o i diritti degli altri eredi della madre, fossero risultati lesi dalla vendita (ad esempio a causa dell'insolvenza del disponente). Per spiegare le nuove norme introdotte dal Codice possiamo pensare che per qualche motivo (ad esempio per le accresciute esigenze di liquidità di un'economia mercantile) gli atti di disposizione dei beni delle donne fossero divenuti molto più frequenti, incrementando così le liti in ambito familiare e rendendo incerti i titoli di acquisto di un numero sempre maggiore di acquirenti. Per quanto riguarda in particolare quest'ultimo punto, possiamo supporre che, prima del Codice, l'acquirente costretto a restituire il bene della donna potesse ottenere dal venditore soltanto il risarcimento del danno.

Si spiega così che il legislatore abbia ritenuto opportuno tutelare più efficacemente sia il patrimonio della donna sia il terzo acquirente, dichiarando nullo il negozio dispositivo e infliggendo una pesante sanzione al disponente. Che comunque l'applicazione di queste nuove norme richiedesse pur sempre l'intervento di un interessato diverso dalla donna lo rivela il fatto che il Codice si occupa qui solo dell'azione dell'acquirente contro il venditore. Occorre quindi che in precedenza qualcuno, che per me non è né la donna né un magistrato, abbia promosso l'azione contro l'acquirente allo scopo di far recuperare alla donna i beni da lui acquistati (a questo punto è da supporre in buona fede, perché altrimenti non si spiega il diritto ad ottenere il doppio del valore del bene). Ci si può chiedere anzi se il promotore di tale azione, in questo caso assimilabile alla *graphe* attica, potesse essere non solo un diretto interessato ma un cittadino qualunque, *ho boulomenos*.

Un ragionamento analogo si può fare per **D**. Anche in questo caso mi pare inverosimile che nell'ambito di un istituto in apparenza molto antico, come l'epiclerato, gli interessi dell'avente diritto a sposare la donna non fossero tutelati contro atti di disposizione arbitrari anche prima del Codice. Tuttavia anche qui dovettero verificarsi abusi che spinsero il legislatore a colpire di nullità il negozio di disposizione e a irrogare pesanti sanzioni a carico del disponente.

Dalle considerazioni fin qui svolte sulle norme **C** e **D** mi pare dùnque riduttivo chiedersi se e in che misura il legislatore intenda assicurare una tutela più efficace alle donne. Per quanto riguarda poi la esclusione esplicita della retroattività di **C** e di **D**, mi pare si possa dire che rendere retroattive le nuove norme avrebbe significato colpire pesantemente una facoltà tradizionalmente riconosciuta al capo della famiglia e nello

stesso tempo danneggiare i terzi che, avendo acquistato prima del Codice, potevano ritenersi al sicuro[2]. D'altra parte, l'esplicita esclusione della retroattività mira a ribadire che in una situazione di conflitto fra molteplici interessi contrastanti, a nessuno è consentito appellarsi a principi di equità o di pari trattamento, magari fra membri della stessa famiglia.

Nel caso E, infine, l'esclusione della retroattività sembra avere una motivazione diversa, che però, anche in questo caso, non mi sembra riconducibile esclusivamente alla tutela di un diritto femminile. (Si noti che le donazioni a favore di qualunque terzo sono valide alla sola condizione che non danneggino i creditori del donante; di una tutela dei familiari del donante, qualunque sia il loro sesso, non si parla: col. X 20-25).

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Concludo su entrambi i punti che ho trattato: 1) l'esclusione (o la previsione) della retroattività può avere motivi diversi in relazione alle diverse situazioni disciplinate e non è da interpretare esclusivamente come indizio di novità della norma a cui viene apposta; 2) il diritto di famiglia che emerge dal Codice non privilegia singoli soggetti o singole componenti dei gruppi familiari, ma tende sempre a contemperare i vari interessi potenzialmente in conflitto; da questo punto di vista le donne, in quanto tramite tra le famiglie, vanno tenute particolarmente sotto controllo legislativo perché sono un fattore di squilibrio: si vuole cioè evitare che i loro beni formino oggetto di atti suscettibili di turbare l'equilibrio patrimoniale intrafamiliare e interfamiliare.

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2 La tutela dei terzi acquirenti, oltre che dell'adottato stesso, appare preminente anche nella esclusione della retroattività in materia di atti dispositivi collegati all'adozione: col. XI 21-23.

Kenneth J. Burchfiel (Washington)

The Myth of "Prelaw" in Early Greece*

Aurea prima sata est aetas quae vindice nullo
Sponte sua, sine lege fidem rectumque colebat.
Poena metusque aberant nec verba minantia fixo
Aere legebantur nec supplex turba timebat
Iudicis ora sui, sed erant sine vindice tuti[1].

I. Introduction

In a famous essay, Louis Gernet broadened the inquiry into law in Greece in remotest antiquity, prior even to epic, by including evidence from myth and cult practices, to define a stage of social development which he characterized as "prédroit"[2]. The primitive forms of thought in this stage are of a different sort than a legal mode which is presupposed and supported by a social organization of judgment; instead, the symbols of prelaw are efficacious in themselves through the force of religion[3]. Though references to "prelegal" proceedings in Greek literature are scarce, and little evidence of continuity between the "magico-religious" era and classical law can be cited, Gernet supports his theory of legal development by a comparative method relying chiefly upon parallels found in Roman law. The distinction between the "law" of classical Greece and

* I wish to thank the Max-Planck Institut für internationales und ausländisches Patent-, Urheber-, und Wettbewerbsrecht, Munich, and its Directors for enabling me to complete the work upon which this article is based, and Professor Leopold Pospisil for reviewing the manuscript.

1 Ovid, *Metamorphoses* 1.89-93.

2 L. Gernet, "Droit et prédroit en Grèce ancienne," *L'Anée sociologique* 3 (1948-49) 21; reprinted in *Anthropologie de la Grèce antique* (Paris 1968), tr. J. Hamilton and B. Nagy, *The Anthropology of Ancient Greece* (Baltimore 1981) [hereinafter cited to the English edition as "*Anthropology of Greece*"].

3 *Anthropology of Greece* (note 2) at 187.

a "prelegal" stage has been widely accepted by subsequent researchers, though the boundary between the two stages has fluctuated.

More recently, Michael Gagarin has proposed consideration of legal anthropology as a source for comparative theoretical models that may be applied to the analysis of early Greek law[4]. In contrast to earlier scholars, he adopts an extremely restrictive definition of law, under which the distinction between *jus* and *lex* is ignored[5], and "law" is defined exclusively in terms of the existence of written statutory enactments[6]. Gagarin's definition of law is thus based on a concept of formal, abstract principles adopted by political authorities of a society and enacted as positive legislation[7], in order to distinguish a particular set of rules that the authorities have decided will be enforced[8]. From this definition it necessarily follows that both preliterate Greece and many societies known from anthropological studies simply have no substantive law whatsoever[9].

In accordance with this definition, Gagarin proposes an evolutionary theory of the development of law, which although applicable to early Greece extends to human society in general. Gagarin posits the existence of a "prelegal" evolutionary stage where there is simply no law, either in the sense of legal procedures for settling disputes, or any rules which could be applied if such procedures existed[10]. In this first golden era of human development, it is evident that there are no means for compulsory settlement of disputes, since these are not developed in any society until the final legal stage. Indeed, based upon the anthropological evidence, Gagarin suggests that societies exist in which disputes themselves are nonexistent[11], thus following Ovid's pastoral hypothesis quoted above.

In the following "protolegal" stage, disputes are settled only by voluntary consent; there is no means for coercing disputants to accept legal authority or its judgment in a given case. In this second era, Gagarin considers that purely voluntary formal procedures for settling disputes may come into existence and be recognized before any of the

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4 *Early Greek Law* (Berkeley 1986).

5 As other commentators have already objected, by failing to distinguish between various senses of the English word "law," his definition excludes the broader sense of law expressed by the Latin *ius*, German *Recht*, French *droit*, and Spanish *derecho*. E. Cantarella, "Tra diritto e prediritto: un problema aperto," *Dialogues d'histoire ancienne 13* (1987) 149-81; R. Wallace & R. Westbrook, Review of *Early Greek Law*, *AJPh* 110 (1989) 362-67.

6 *Early Greek Law* (note 4) at 3.

7 *Early Greek Law* (note 4) at 136.

8 *Early Greek Law* (note 4) at 144.

9 *Early Greek Law* (note 4) at 3.

10 *Early Greek Law* (note 4) at 8-9.

11 He cites generally, J. Nance, *The Gentle Tasaday* (New York 1975).

society's rules are formally recognized as legal rules[12]. It is only later that "a society has developed at least some ability to enforce settlements" so that "disputes can be settled in a way not acceptable to one party[13]." Only in the final "legal" stage does resolution of disputes become subject to the compulsory authority of the political authority[14], and "law" arises through enactment of written statutes[15]. Thus law is "recognized" solely in terms of its abstracted, written, positive form as statutory enactment, while "legal" procedure is distinguished by being both public and formal. Since Gernet, the prevailing concept of early Greek law has been based upon an interpretation that posits the existence of a "prelegal" stage of one kind or another. My purpose is to reexamine the concept of "prelaw" applied to characterize the precodification evidence from Greek myth and literature, in view of the cross-cultural analysis of legal anthropology. From intensive study of the legal systems of preliterate peoples, anthropologists have derived definitions of law and its attributes that are independent from the Western tradition of Roman and modern European jurisprudence, and that may be applied to the system of social control of any functioning human society. As a result, legal anthropology provides a model of analysis that asks different questions about the essential attributes of law, and redefines the basic questions that must be considered with respect to early Greece: To what extent do the disputes recorded in epic and myth constitute valid sources of law? Does the evidence from early Greek literature describe a single legal system or a plurality of distinct legal traditions? Is the concept of "early Greek law" at the level of the linguistic nation valid, and if not, at what level of social organization must law be sought? Is the widely accepted concept of a "prelegal" stage of development supported by the early evidence? The questions suggested by legal anthropology may redefine the basic concept of legal development prior to codification in Greece, and the analytical approach for seeking answers.

II. Anthropology of Law

Since it is not possible to provide even the briefest review of the history of anthropology of law, the present discussion is based principally on the analytical model

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12 *Early Greek Law* (note 4) at 12.

13 *Early Greek Law* (note 4) at 7.

14 *Early Greek Law* (note 4) at 111.

15 *Early Greek Law* (note 4) at 8-9.

proposed by Leopold Pospisil[16]. Although debate in anthropological circles continues as the basic principles are elaborated and refined through comparative studies, Pospisil's work is distinguished by its breadth, both in anthropology and jurisprudence, and by concise and elegant functional definitions of basic analytical constructs.

Form of Law

The core of the law concept is "institutionalized social control"[17]. Legal anthropologists seek to broaden the cross-cultural definition of law by examining the institutions of widely differing societies to determine institutions that accomplish social control outside the traditional Western legal model.

The Eurocentric concept that law is embodied in formal, abstractly worded rules typified by statutes is obviously inapplicable to many tribal societies because of their "virtual lack of rules", and it inevitably leads to the conclusion that there are "many lawless peoples"[18]. For this reason, the search for law in the form of abstracted formal bodies of rules is of little help in determining the law of many (but not all) preliterate peoples.

Instead, anthropologists propose to look for law in the principles applied by legal authorities in society in resolving disputes within their groups. In this case, the law consists of principles abstracted from the legal decisions, and requires study of actual cases of conflict in the society, through which disputes are resolved. This method for defining and investigating the law is not unique to cultural anthropology; indeed Oliver Wendell Holmes defined "law" as "the prophecies of what the courts will do in fact, and nothing more pretentious"[19]. The principal advantage of deriving law only from the decisions of legal authorities that are announced in solving disputes among their followers is that the concept of law becomes universal, leaving nowhere in the world a residuum of "lawless societies"[20].

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16 See particularly, *Anthropology of Law: A Comparative Theory* (New York 1971); *Kapauku Papuans and Their Law* (Yale Univ. Pubs. in Anthropology No. 54) (New Haven 1958) [hereinafter *"Kapauku Law"*]; *The Ethnology of Law* (2d ed., Menlo Park, Calif. 1978).

17 *Anthropology of Law* (note 16) at 20.

18 *Anthropology of Law* (note 16) at 23. The basic objection to the requirement that law must be manifested in statutory enactments or rules is that under this definition, "[l]aw would cease to be a universally usable concept, being limited in its applicability only to those societies which have either written codes or sets of rules deposited in the memories of their 'wise men.'"

19 "The Path of Law," *Harv. L. Rev* 10 (1897), 457, 461

20 *Anthropology of Law* (note 16) at 34-35.

Definition of "Law"

Although the core concept of law is institutionalized social control, it is evident that not all social controls are legal. Accordingly, in order to confine the investigation of law within meaningful channels, and distinguish other formal or informal social controls, such as political decisions, customs, and religious taboos, it is essential to provide a definition of law. In seeking to expand the investigation of law beyond the confines of European jurisprudence, anthropologists have emphasized various aspects of law as essential. Radcliffe-Brown, for example, proposed to define law as "social control through the systematic application of the force of politically organized society"[21]. However, this definition led to the conclusion that "some simple societies have no law, although all have customs which are supported by sanctions"[22]. Howell also emphasized the aspect of formal political organization, defining law as "social control which is maintained by organized legal sanctions and applied by some form of organized political mechanism", and reached a similar conclusion compelled by his Eurocentric definition: the Nuer "had no law, for as we have already seen, there was in the past nothing in the nature of politically organized society"[23]. These definitions proposed by anthropologists underscore the difficulty in deriving a concept of law that is not limited by the Western legal tradition and the "folk-system" of the investigator. Where the definition of law is too narrow, it is inapplicable to many primitive societies, leading to the conclusion that "some societies are simply lawless"[24].

Attributes of Law

From his study of the stone-age Kapauku Papuans, Pospisil demonstrates that "law" can be found in any functioning social group, and distinguished from other modes of social control, when "law" is defined in terms of four essential attributes:

(1) law is manifested in a decision made by a political authority;

(2) it has a regularity of application (intention of universal application);

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21 A.R. Radcliffe-Brown, *Structure and Function in Primitive Society* (London 1952) at 212.

22 *Anthropology of Law* (note 16) at 13.

23 *A Manual of Nuer Law* (Oxford 1954) at 225. Evans-Pritchard similarly concluded that "in a strict sense the Nuer have no law" based on a political organization in which legislative, judicial and executive functions are not vested in any persons or councils, and wrongs "are not brought forward in what we would call a legal form." *The Nuer* (Oxford 1940) at 162. See *Anthropology of Law* (note 16) at 100.

24 *Anthropology of Law* (note 16) at 19.

(3) it contains a definition of the relation between the two parties to a dispute (*obligatio*); and
(4) it is provided with a sanction[25].

1. Authority

In Pospisil's definition, authority is "a concrete person or group of persons passing a legal judgment or decision[26]." According to this purely functional definition, a leader or authority is "an individual or group of individuals who initiate actions in a social group or whose decisions are followed"; specific attributes such as degree of formality, specific amount of power, or any particular political organization are irrelevant[27].

The only essential requisite for authority is that the persons who are legal authorities must "possess the power to induce or force the majority of the members of their social group to conform to their decisions"[28]. Further, this power must prevail "even over the protests and resistance of either or both parties to the dispute"[29]. Even in societies with informal leadership, there are "headmen" who are recognized as leaders because their decisions are followed, and "the fact that the decisions and advice of an authority are followed by the rest of the members of the group constitutes the only important criterion of 'authority'"[30].The universality of authority is suggested by the circumstance that leadership is "not a social phenomenon over which man has a monopoly: wolves, monkeys and apes have their leaders, too"[31].

2. Intention of Universal Application

Since in many tribal societies, both political decisions and legal judgments are made by the same authority, there is a need for an additional criterion to distinguish political from legal decisions: for a legal decision, the authority must *"intend* it to be applied to all similar or 'identical' situations in the future"[32]. This intention may be expressed in

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25 *Anthropology of Law* (note 16) at 39-96.

26 *Anthropology of Law* (note 16) at 43. He observes that over 130 different conceptions of the attributes of leadership have been proposed. *Id.* at 52-57.

27 *Anthropology of Law* (note 16) at 57.

28 *Anthropology of Law* (note 16) at 44.

29 *Anthropology of Law* (note 16) at 44.

30 *Anthropology of Law* (note 16) at 47.

31 *Anthropology of Law* (note 16) at 50.

32 *Anthropology of Law* (note 16) at 79.

widely different ways in various cultures, including reference to a statute when the judge hands down a decision in Western legal culture; reference to a "mental codification of abstract rules" maintained by the Kapauku headmen; or in societies without codification, as a precedent to be followed in the future[33]. In each case, the ideal component binds the members of the group who did not participate in the case under decision.

3. Obligatio

Because law is defined only with respect to decisions that exercise social control, it is essential that the decision of an authority state the rights of one party to a dispute and the duties of the other[34]. Pospisil uses the Latin term "obligatio" because of its reference to *iuris vinculum*, a legal tie between the two parties that manifests itself in the form of a duty on the part of one and a right on the part of the other to a contract or litigation[35]. Accordingly, a pronouncement of an authority which gives one party a right while not stating the duty of the other is not included in the definition of "law" even though the attributes of authority and of the intention of universal application are present[36]. Such cases generally involve disputes that do not result in a definitive statement of the liability of the debtor or wrongdoer, because of his political influence or relationship to the legal authority, even where it is acknowledged that the rights of the complaining party have been infringed[37].

The attribute of *obligatio* is a significant factor distinguishing the realm of law from religious duty. Since law requires that a decision define a relation between two parties who are each represented by living individuals, all obligations toward the dead and toward the supernatural are excluded by the criterion of *obligatio*, including religious taboos with no living person to enforce them[38]. However, if the supernatural is represented by a living individual, such as a priest or shaman, and secular punishments are either added to supernatural penalties or replace them, then the decision of a legal authority in such cases is properly regarded as falling within the realm of religious law[39].

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33 *Anthropology of Law* (note 16) at 79-80.
34 *Anthropology of Law* (note 16) at 81.
35 *Anthropology of Law* (note 16) at 82.
36 *Anthropology of Law* (note 16) at 82.
37 *Kapauku Law* (note 16) Case 115, at 218.
38 *Anthropology of Law* (note 16) at 86.
39 *Anthropology of Law* (note 16) at 86.

4. Sanction

Earlier anthropologists defined law almost exclusively in reliance upon physical force or coercion, which is undoubtedly a sanction, based on the Western folk tradition's assumption that a proper legal decision is "a formalistic act by a formally instituted authority pronouncing a formal verdict, which is then physically enforced"[40]. Under Hoebel's famous definition, a norm is legal "if its neglect or infraction is met by the application, in threat or in fact, of the absolute coercive force by a social unit possessing the socially recognized privilege of so acting"[41]. He maintained that "the exercise of physical force to control or prevent action is the absolute form of compulsion . . . the characteristic feature of law, as distinct from mere force, is the recognized privilege of a person or social group to apply the absolute form of coercion to a transgressor when conduct deemed improper may occur"[42].

More recent anthropologists have sought to develop alternate definitions of law avoiding a criterion of forceful coercion, since there are peoples and cultures among whom physical sanctions are almost entirely lacking[43], such as the Nunamiut Eskimo, who almost exclusively use nonphysical, often psychological means of social control[44]. For example, in stone-age Kapauku society, economic sanctions are "by far the most preferred", including the payment of blood money for killing a man in order to avoid capital punishment[45].

Because some sanction, whatever its particular form and however it may be enforced, is an essential attribute of law, a corollary is that the sanction must be enforced against members of the society who are unwilling to conform[46]. The decision of a legal authority, which declares and establishes the legal right existing between two followers, is the only relevant consideration, provided that some sanction ensures compliance with

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40 *Anthropology of Law* (note 16) at 35.

41 *The Political Organization and Law-Ways of the Comanche Indians* (Am. Anthropological Ass'n Memoir 54, Santa Fe 1940) at 47.

42 *Ibid.*

43 *Anthropology of Law* (note 16) at 89.

44 *Anthropology of Law* (note 16) at 94.

45 *Anthropology of Law* (note 16) at 93. The sum imposed, 120 cowries (which would buy 600 pounds of pork) is so high as to constitute a lifetime sentence of repayment.

46 *Anthropology of Law* (note 16) at 118: Law implies regularity and order and its existence requires an organized group of people who uphold the order and take care that it is enforced in situations involving individuals who are unwilling to conform. . . . Members of these functioning subgroups cannot allow offenses to go unpunished and disputes within the groups to continue indefinitely without a solution, for the simple reason that these disorders challenge the very existence of these groups.

the decision, entirely independent from the question of how the law is enforced or the judgment executed.

Multiple Legal Levels

This definition of law has important consequences for the conceptualization of law in any society. The first concerns the social context in which law is defined. The essential feature of law implicit in Pospisil's definition is the fact that the adjudicating authority must have jurisdiction over both litigants: the personal parties to a suit must belong to the same social group in which the authority has this power, and law therefore pertains to specific groups and subgroups of a society[47]. The organized political subgroups (families, clans, bands, villages, lineages, confederacies, states, nations, etc.) are essential to any definition of the society's legal systems.

Consequently, a society segmented into politically independent lineages cannot and does not have a single overall legal system, even though it may have such common attributes as a single language and widely shared cultural or moral values[48]. Because Western theory has typically conceived of law "as the property of society as a whole" on the organized political level of the nation, if a tribal society does not have a comprehensive political organization, this preconception may lead to the conclusion that a society has no law[49]. However, what may be merely custom without enforcement on the broadest level of the linguistic group may constitute an effective body of law on the politically organized subgroup level[50].

It is unnecessary to scrutinize each detail of the model proposed by Pospisil to appreciate the significance of his theory of law for the interpretation of evidence from preliterate societies. First, it is a universally applicable concept, since law defined according to these four criteria "is present in all societies—indeed, in every functioning group or subgroup of people"[51]. By indicating the source and form of law, as revealed in the decisions of authorities who have the power to declare the legal rights of disputants irrespective of their consent, Pospisil emphasizes the essential nature of law as *ius*, and

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47 *Anthropology of Law* (note 16) at 343.

48 *Anthropology of Law* (note 16) at 343. Political organization depends on whether there is a system of regulation of relations between groups, or members of different groups within the society at large. *Id.* at 97, citing Hoebel, *Man in the Primitive World: An Introduction to Anthropology* (1949) at 376.

49 *Anthropology of Law* (note 16) at 98.

50 Llewellyn & Hoebel, *The Cheyenne Way* (1941) at 28.

51 *Anthropology of Law* (note 16) at 8.

its independence from any criteria of formality. The law of a social group requires neither statutory enactments nor formal rules, and is not necessarily correctly expressed by them if they exist.

This summary of the anthropological definition of law and its attributes provides a basis for reconsidering the earliest Greek literary evidence, and the theories of legal development based upon these sources.

III. Prehistoric Greek Law

Wolff stressed the importance of the comparative method in illuminating the obscurities present in the early Greek sources, based upon its proven utility for clarifying hints and suggestions present in the texts, that cannot be resolved by philology alone or from context[52]. He maintained that the comparative method, "which rests on the established fact that in matters legal the human mind is so constructed as to seek similar solutions for similar situations under analogous conditions, needs no justification"[53].

I do not mean to suggest that any direct conclusions may be reached about early Greek society by comparison, for example, of the stone-age Kapauku of twentieth-century New Guinea with the Ionian Greeks of the tenth to seventh century B.C., although the parallels can be most striking, and the evidence may be conclusive with respect to more general theories of legal "evolution".

The anthropological studies are valuable for other important reasons. First, they illustrate functioning systems of law in societies without the attributes of European law, for example, without written statutes, formal adjudicatory or enforcement authority, physical sanctions or incarceration. Second, the anthropologists themselves have distinguished the Eurocentric analytical model, and thus identify the underlying assumptions that are neither essential nor appropriate for analysis of legal systems in preliterate tribal society. The definition proposed by Pospisil clarifies the attributes based on the Western tradition that are irrelevant to a more general definition of "law," including the presence of a formal adjudicatory authority; the use of formalized, regular procedures in submitting disputes for resolution; any particular minimum degree of political organization; the use of written statutes or formal oral abstract rules; punishment by physical

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52 H.J. Wolff, "The Origin of Judicial Litigation Among the Greeks," *Traditio* 4 (1946) 31, 35, translated with an addendum, "Der Ursprung des gerichtlichen Rechtsstreits bei den Griechen," *Beiträge zur Rechtsgeschichte Altgriechenlands und des hellenistisch-römischen Ägypten* (Weimar 1961 = *Forschungen zum römischen Recht* 13) 1-90.

53 *Ibid.*

sanction; and execution of the judgment by a formal, public authority independent from the litigants. Instead of essential requirements of law, these factors are variables that can be used to characterize any legal system, for example, in terms of its formality or informality; weak or absolute authority; enforcement methods, etc. Third, as a result of this theoretical development, the anthropology of law provides a model of analysis that asks different questions about the essential attributes of law, which are applicable to any functioning legal system.

Unwritten Law

In some instances, the anthropological evidence is itself sufficient to disprove theories regarding the essential attributes of law. For example, Gagarin's first criterion, the existence of written statutes, has been rejected by legal anthropology as a definition which is neither necessary nor appropriate for general application, and which leads to the conclusion that some societies are simply lawless. Under the anthropological definition, neither writing nor formulation of abstract systems of legal rules is a necessary prerequisite for a complex system of law.

The evidence of the earliest Greek codes supports this conclusion. Indeed, the appearance of complex written laws in the seventh century is inconceivable without earlier and perhaps more complex unwritten laws. The earliest Athenian statutes were enacted in some instances to repeal earlier systems of unwritten law. For example, Solon's law abolished security of the person[54], which certainly implies that prior to the codification, legally enforceable debt relationships secured by the debtor's person were an established feature of Athenian law. Aristotle states that this was the case for a long period, in which the progressive enslavement of the people by the nobles led to increasing strife[55].

Universality of Substantive Law

The first principle confirmed by anthropology is that substantive law in the sense of *ius* is basic to any politically organized society or subgroup[56]. Legal anthropology

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54 Arist. *Ath. Pol.* 9.1.

55 *Ath. Pol.* 2.1-3, 6.1.

56 In Pospisil's definition, "The law of substance sets limits to permissible behavior and deals chiefly with the content of legal precepts, such as kinds of crimes and torts and their punishment, types

instructs that in any society, the principles of law can be derived from the decisions of legal authorities in resolving disputes among their followers. One obvious advantage of seeking to derive law from this source, and to define law in terms of the results reached in specific legal disputes, is the relative abundance of disputes reported in early Greek literature and preserved in myth. This evidence further suggests that Greek society, even at its earliest recorded stages, felt the litigious passion which burned in classical Athens[57].

The disputes which are recorded in early Greek literature frequently, if not generally, originate in conflicting assertions with respect to a specific substantive right. As Cantarella has demonstrated, the evidence from epic involves legal rules that are precise, definite, recognized and inviolable[58]. She proves that there are controversies in epic that can be analyzed in terms of violation of precise substantive legal rules, surely applicable to concrete cases, compulsory in application[59], which ended in a declaration establishing the right of only one of the parties. As she demonstrates, in the precodification period in Greece, justice was manifested in a series of principles, that resulted in the formulation of rules of behavior, sanctioned in case of violation by the reaction of society[60].

In his penetrating and meticulous study of the earliest legal obligations in Greek literature, Gernet similarly identified a number of basic substantive rights in mythical evidence: the right to claim an inheritance[61]; the right to avenge homicide[62]; the right to search a house for stolen property[63]; the right of sanctuary against pursuers[64]; the rights defined by the betrothal contract[65]; and such "moral" rights as the right of parents to children's filial piety[66].

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of contracts, and rights to things and ways of disposing of inheritance, as well as legally recognized family relationships." *Anthropology of Law* (note 16) at 1.

57 Odysseus, for example, describes the dinner hour of a man who spends returns from the marketplace where he has spent the day "deciding many disputes of zealously contending litigants." *Od.* 12.439-40.

58 Cantarella, *Dialogues d'histoire* 13 (note 5) at 153, 157.

59 Cantarella, *Dialogues d'histoire* 13 (note 5) at 157.

60 Cantarella, *Dialogues d'histoire* 13 (note 5) at 158.

61 *Anthropology of Greece* (note 2) at 177-79, 199-200 (obligation of burial falls on those who take over the estate, *ta khremata*).

62 *Anthropology of Greece* (note 2) at 179-81.

63 *Anthropology of Greece* (note 2) at 176.

64 *Anthropology of Greece* (note 2) at 176, 183.

65 *Anthropology of Greece* (note 2) at 198-99.

66 *Anthropology of Greece* (note 2) at 184-87.

Gernet's work conclusively establishes the recognition of many specific substantive legal rights in the earliest Greek sources, which are created, acknowledged or claimed by specific rituals. He concludes that in its origins, Greek law places extraordinary emphasis on formalism with respect to the creation of substantive rights, and suggests that the efficacy of such self-validating or self-executing procedures may predate legal procedure itself[67]. Without reconsidering the specific symbols and rituals documented at length by Gernet, his evidence fully supports the existence of a well defined system of legal obligations and legal rules capable of imposing social control in a wide variety of contexts, at the earliest discernible moment in Greek literature, thus confirming the anthropological postulate of the universality of *ius*.

Informal Compulsory Adjudication of Disputes

A further significant contribution of legal anthropology is its demonstration that effective compulsory legal adjudication of disputes is a universal attribute of functioning human society, without requirements of formal adjudicatory procedures or formal decisional or enforcement authorities. Legal anthropology demonstrates that Gagarin's requirement of formality in the decision-making process, apart from its indefiniteness[68], is not an essential prerequisite of law. Gagarin's hypothetical model of the evolution of law in three stages is refuted by the anthropological evidence, which indicates that every society has law in the sense of decisions of authorities that control the antisocial behavior of the group's members, regardless of the violators' consent or resistance.

In this context, anthropological evidence demonstrating the compulsory resolution of disputes by even more informal legal authorities in other preliterate societies may at least suggest an interpretation. Who cannot fail to be intrigued by the following eyewitness account:

> The Kapauku "process of law" starts usually as a quarrel. The "plaintiff" accuses the "defendant" of having performed an act which causes harm to the plaintiff's interests. The defendant denies this or brings forward justification for his action. The arguments are usually accompanied by loud shouting which attracts other people, who gather around. The close relatives and friends of the parties to the dispute take

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67 "In short, if the efficacy of symbolisms predates procedure, then it makes sense to study the forms in which what will become the affirmation and the rule of law presents itself very early." *Anthropology of Greece* (note 2) at 177.

68 *Early Greek Law* (note 4) at 7-8: "Legal procedures are formal—not necessarily as formal as a modern court, of course, but at least in the sense of adhering to certain accepted traditions concerning the time, place and general procedures for presenting a case and arriving at a settlement."

sides and present their opinions and testimony by emotional speeches or by shouting. If this sort of arguing, called *mana koto* by natives goes on unchecked, it usually results in a stick fight . . . . However, in most instances, the important men from the sublineage and from allied sublineages or lineages appear on the scene. First, they squat among the onlookers and listen to the arguments. As soon as the exchange of opinions reaches a point too close to an outbreak of violence, the rich headman steps in and starts his argumentation. He admonishes both parties to have patience and begins questioning the defendant and witnesses. He looks for evidence that would incriminate the defendant, at the scene of the crime or in the defendant's house. . . . Having secured the evidence and made up his mind about the factual background of the dispute, the authority starts the activity called by the natives *boko duwai*, the process of making a decision and inducing the parties to the dispute to follow it. The native authority makes a long speech in which he sums up the evidence, appeals to a rule, and then tells the parties what should be done to terminate the dispute. If the principals are not willing to comply, the authority becomes emotional and starts to shout reproaches; he makes long speeches in which evidence, rules, decisions and threats form inducements. Indeed, the authority may go so far as to start *wainai* (the mad dance) or change his tactics and weep bitterly over the misconduct of the defendant and the fact that he refuses to obey. . . . Thus, from the formalistic point of view, there is little resemblance between the Western court's sentence and the *boko duwai* activity of the headman. However, the effect of the headman's persuasion is the same as that of a verdict passed in our courts. There were only five cases [among 176 recorded] wherein the parties openly resisted and disobeyed the authority's decision[69].

Further, this method of dispute resolution is applied *ex post facto* to validate acts of self-help, where the wronged party regains his property or punishes the offender without prior authorization[70]. The legal sanction arises after the fact, when the action is approved by a legal authority[71]. When the action is later approved by the authority's decision, it becomes a legal sanction[72].

The Self-Help Model

While this account from Kapauku law does not establish that the trial scene from Homer involves compulsory resolution of the dispute over the blood-price, it demonstrates that compulsory adjudication of such disputes is clearly possible in a far

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69 *Anthropology of Law* (note 16) at 35-36. These were cases 54, 94, 105, 119, 168, reported in *Kapauku Law* (note 16).

70 *Anthropology of Law* (note 16) at 94.

71 The plaintiff destroyed the defendant's property in four cases, beat the culprit with a stick in two cases, seized the offender's property in three cases and killed one offender *in flagrante delicto*. *Anthropology of Law* (note 16) at 94.

72 *Anthropology of Law* (note 16) at 93-94.

less formal legal system than that found in epic. Moreover, such a compulsory mechanism is probable in the shield-scene, for the same reasons as the "compulsory" process invoked among the Kapauku: to prevent the expansion of an interfamilial dispute over homicide into a feud or broader outbreak of violence, which is likely due to the gravity of the rights being adjudicated.

The interpretation of the shield scene as a proceeding that is "compulsory" in the sense that it does not depend on the agreement of both parties to submit the case to arbitration, but instead is instituted at the behest of the family of the slayer to block the retaliation of the family of the slain, is consistent with the anthropological evidence of informal legal procedure, illustrating circumstances under which a political authority must intervene to maintain internal peace. Since these legal principles are (1) applied by a legal authority whose decision is affirmed as authoritative by the assembled people and (2) are intended to apply generally to resolution of similar disputes in the future; while (3) the decision defines the precise legal rights of the disputing families; and (4) is accompanied by a sanction enforced by the family or clan of the prevailing party, the homeric shield scene fully satisfies the anthropological definition of a legal proceeding.

The anthropological evidence thus augments the interpretation of the shield scene as a compulsory, socially enforced process for resolving the dispute proposed by Wolff and elaborated by Gernet, Cantarella and Thür. Despite his emphasis on an era of "prelaw," Gernet emphasized that "[f]rom the moment that a plaintiff is instructed to formulate a claim, and the defendant is instructed to deny it before a court—however rudimentary—what we call the 'idea of law' develops"[73]. Similarly, Cantarella distinguishes a rule of law from a social norm precisely on the basis that the legal rule can be enforced by the use of physical force, which does not require the existence of public enforcement agencies, but can be delegated to private entities within society[74].

The anthropological model, which systematically organizes and defines the attributes of law, is thus consonant with the earlier theories of law applied in the analysis of early Greek sources. It has the advantage of being closer to the workings of legal systems in functioning preliterate societies than Roman law, which possessed legal authorities and *leges*, and further eliminates nonessential criteria, such as the requirement of the use of physical force as a sanction. I do not mean to suggest that the definition of law proposed by Pospisil should be applied dogmatically to classify the Greek evidence, or accepted without examination. My purpose is to suggest that this analytical legal theory may redefine the approach that should be taken to Greek law in the preliterate era. The

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73 *Anthropology of Greece* (note 2) at 173.

74 Cantarella, *Dialogues d'histoire* 13 (note 5) at 156.

utility of the anthropological analysis, like any other model, depends on its ability to resolve contradictions in the source material and to suggest a theory of Greek law that is at a minimum consonant with the evidence from other preliterate legal systems which have been intensively studied on the basis of far more abundant evidence. Judiciously applied, the comparative method may draw upon the evidence from other preliterate societies in resolving the open questions of early Greek law.

1. Authority

The attribute of authority is of the greatest importance in the study of early Greek law, both because of its significance in defining the practical and theoretical sphere of "law" and in view of the relative abundance of evidence relating to a variety of highly formal authorities in early literary texts.

In the society reflected in early Greek literature, the existence of formal political, legal and religious authority in the person of the *wanax*[75], *basileus*[76], *gerontes*[77] or *hiereus*[78] is indisputable. The early Greek sources not only confirm the anthropological postulate that effective political and legal leadership exists in every social group and subgroup, but clearly reflect a society in which each type of authority is highly formal in comparison with many preliterate societies.

It is immediately apparent that the early Greek sources reveal widely divergent authorities, both in terms of formality and power. In a first tradition, legal authority in Homer is confirmed by the statement that the kings received both the scepter and the power of declaring legal judgments (or the judgments themselves—*themistes*) from

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75 The homeric commander is attested in the Mycenean period in the Linear B tablets, where the title of the king in Pylos, Knossos, and Thebes was *wanax*. W. Burkert, *Griechische Religion der archaischen und klassischen Epoche* (Stuttgart 1977), tr. J. Raffan, *Greek Religion* (Cambridge, Mass. 1985) at 50.

76 The *basileus* has the distinction of appearing throughout the history of Greek culture, from the Mycenean tablets and epic to the legal proceedings in Hesiod and in classical Athens, though his power and function vary widely.

77 The *gerontes* appear as a council of "elders" or "chiefs" in the shield scene and in epic generally. *See Il.* 2.404, *Od.* 2.14. No comparable body of jurors is found in Hesiod or at Athens, though in his ideal republic Plato approves a group of *gerontes* as a political body roughly comparable to "senators" found at Sparta, who judged cases of murder. Pl. *Laws* 692a; *cf.* Hdt. 1.65, Arist. *Pol.* 1265b38, 1275b10.

78 This religious office is as old as Greek culture itself, occurring as a formal institution in Mycenean Greek. As Burkert notes, as early as the *Iliad* Theano is "installed" as priestess to Athena (*Il.* 6.300). *Greek Religion* (note 75) at 96.

Zeus[79]. Indeed, Minos alone "dispenses justice" in disputes among the dead, sitting on a throne among applicants seeking his "rulings" while holding a golden scepter[80].

However, as Gernet remarked, the homeric *basileis* are very seldom seen exercising this prerogative, or compelling adherence to legal decisions[81]. For example, in the shield scene, the judging body of elders sit in the sacred circle with the heralds' scepters in hand, waiting to announce their judgments[82]. The proceeding appears fairly informal, and the judges lack significant power to compel the members of the community to follow their decision, since they each propose a judgment that evidently must be adopted by the surrounding crowd[83]. Moreover, the *basileus*, who only fifty lines away[84] on the shield marshals the heralds to prepare for the feast, again with his scepter in hand, conspicuously has no part in the legal process[85].

In a recent article, van Effenterre has proposed that the existence of a true Mycenean law is disclosed by the Linear B tablets[86]. If Homer refers back to a Mycenean legal tradition that remained alive in at least some core concepts, and was later lost, the legal authority in Hesiod seems firmly rooted in the dark age culture that followed. In Hesiod, the "gift-devouring" *basileis* themselves judge disputes among litigants, and are clearly legal authorities, having *themistes* as in Homer[87], although they have lost the royal scepter[88]. In legal matters these *basileis* act as rulers, and their legal decisions are commands rather than the award of an arbitrator or the judgment of a person charged by

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79 *Il.* 9.156, 9.298. According to any definition it is at least clear that the kings were described using this term as having the power to declare rights in legal disputes before them.

80 *Od.* 11.568-71.

81 *Anthropology of Greece* (note 2) at 190.

82 *Il.* 18.503-05.

83 *Anthropology of Greece* (note 2) at 208 n.185. Wolff also considers that the final decision was made by the surrounding crowd. Wolff, *Traditio* 4 (note 52) at 40-41.

84 *Il.* 18.550-60.

85 Wolff suggested that the source of authority borrowed through the scepters of the heralds might be the *dikaspolos* mentioned elsewhere, *e.g.*, *Il.* 1.238, *Od.* 11.186. Wolff, *Traditio* 4 (note 52) at 45-46.

86 "Droit et prédroit en Grèce depuis le Déchiffrement du Linéaire B," *Symposion 1985* [1989] 3-6.

87 Hes. *Theog.* 85, 235; *Erga* 221.

88 The only mention of the royal scepter in Hesiod appears in *Fr.* 144, the account from Ps. Plato, *Minos* 320d, which refers to the scepter of Zeus that is held by Minos, ruling among the dead. R. Merkelbach - M.L. West, *Fragmenta Hesiodica* (Oxford, Eng. 1967). The remaining occurrences in Hesiod are in contexts unrelated to the legal decisions of *basileis*. *Id.*, *Fr.* 272, line 3; *Fr.* 37, line 18; *Theog.* 30.

the community with the maintenance of commonly accepted legal principles[89]. In contrast both to the homeric city and classical Athens, they judge alone, without the participation or consensus of elders, a jury or an assembly.

A third tradition appears in discussions of early Athenian law. Aristotle considered that the early Athenian *basileis* combined military, religious and legal functions: they led armies, supervised sacrifices and decided cases[90]. This combined authority disappeared without a trace early in the history of Athenian law[91]. By the time of Drakon's law, the authority to decide cases of homicide was already vested in the Areopagos council or the college of *ephetai*, and the *basileus* was only a magistrate who introduced the case and presided over the proceeding without instructing the jurors on the applicable law or otherwise[92]. Even in Aeschylus, who depicts the foundation of the Areopagitic court in remotest mythical antiquity, the task of deciding a case of homicide is described as too weighty for the goddess Athena alone[93], and she empanels a jury of citizens to hear and vote on the outcome of the case. Particularly since the early *basileus* was a lifetime office[94] (and perhaps hereditary)[95], the earliest adjudication procedure at Athens was characterized by a much higher degree of formality and the legal authority possessed a greater degree of power than in epic.

Applying the requirement of a political authority having jurisdiction to adjudicate legal disputes within a particular subgroup in society, the absence of any "legal" authority capable of resolving disputes involving the conflicting substantive legal rights of the warrior-kings is evident in epic[96]. In the absence of a political and legal "authority" under the anthropological definition, the disputes are resolved by appeals to custom, religion, agreement or combat. Menelaos states that it is "customary and right" (*themis*) for

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89 Wolff, *Traditio* 4 (note 52) at 61.

90 Aristotle, *Pol.* 1285^{b}9-12.

91 Wolff distinguishes the broader competence of the *basileus* in non-homicide cases, on the basis that the magistrate had the power of decision when deciding prior disputes, as Aristotle states in *Ath. Pol.* 3.5, and that this power was not removed by Solon's reforms, but only limited by granting a right of appeal to the popular assembly by way of *ephesis*. Arist. *Ath. Pol.* 9.1, Plut. *Sol.* 18.2. Wolff (note 52) at 78-79.

92 Wolff, *Traditio* 4 (note 52) at 75-76.

93 *Eum.* 471-72.

94 Arist. *Ath. Pol.* 3.1.

95 Arist. *Pol.* 1285b4-5.

96 Wolff observes that in the dispute over the chariot race in the twenty-third book of the *Iliad*, the crowd is inactive, and nobody, including Agamemnon, tries to step in and take the matter out of the hands of the contestants. Agamemnon's authority "obviously is strictly confined to the military command." *Traditio* 4 (note 52) at 57.

Antilochos to swear the oath which he proposes (*Il.* 23.580); Ajax pleads with Achilles to accept Agamemnon's apology and gifts by analogy to the acceptance of a blood-price (*Il.* 9.632-36); the suitors urge their *basileus* Odysseus to forego revenge and accept the payment of many cattle in recompense for their plundering his household (*Od.* 22.54-59); Paris and Menelaos propose to determine the outcome of the war by personal combat (*Il.* 3.58-75, 300-382), like Ajax and Hector later (*Il.* 7.66-91, 206-32). Similarly, in the assembly in *Ithaca*, Telemachos can do no more than chide the suitors for breaches of custom and religious obligation[97].

The absence of a functioning legal authority, whether among the Achaian warriors in epic or between other politically independent groups, is confirmed by the frequent trial of legal issues such as property rights by a god, with or without a jury of gods or humans. When Odysseus and Ajax dispute the ownership of Achilles' arms on the battlefield, the case is decided by the sons of the Trojans and Pallas Athena[98]. In the dispute between Sisyphus and Aithon over the bride-price in the *Catalog of Women*, "no mortal was able to judge" and the case was referred to a goddess who decided it "strictly"[99]. In *Eumenides*, the goddess Athena is called upon to judge Orestes' case, though she empanels a human jury to aid her in the decision[100]. Alternative versions of the myth agree that the first case of homicide was tried by gods[101]. More generally, the dispute between the warring Greeks and Trojans is expressly said to be the exclusive province of Zeus to "judge", without the interference of other gods[102].

This is indirect confirmation that the requirement of a human legal authority, according to the definition proposed by legal anthropology, was recognized as an essential attribute of law in the society described by Homer, which appreciated that no "legal" resolution of disputes was possible in the absence of political authority. Where such authority exists, killers flee the community even if there are few avengers present[103], and even if they are of royal blood. Patroclos fled Opontos after unintentionally killing a playmate over a game of dice[104], and Tlepolemos, the son of Herakles, similarly fled to Rhodes after killing his maternal uncle[105].

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97 *Od.* 2.64-69.

98 *Od.* 11.545-47.

99 Hes. *Fr.* 43a.38-40.

100 *Eum.* 470-89.

101 Eurip. *Or.* 1650-52; Dem. 23.66; Aristid. *Or.* 1.48.

102 *Il.* 8.430-31.

103 *Od.* 23.118-20.

104 *Il.* 23.83-90.

105 *Il.* 2.661-66.

Consideration of the first attribute of authority indicates that the early sources describe distinct formal political, religious and legal authorities, which differ widely in degree of formality and power, suggesting at least three independent Greek legal traditions.

2. Intention of Universal Application

The anthropological criterion of universal application confirms that not all disputes over legal rights are expected to be resolved by legal decisions. The anthropological definition is valuable because it provides an objective criterion for distinguishing legal cases from disputes that do not involve a legal principle, and may in fact contradict the accepted law of a people. The issue of theft in the homeric poems is of particular interest. When confronted with evidence of Hermes' theft and slaughter of the cattle of Apollo, Zeus evidently admires not only the audacity of this act by a newborn, but also approves of the equivocation of his crooked oath[106]. This dispute is not resolved on a legal basis, because it does not apply any legal principle that is intended to govern such cases generally in the future. Nonetheless, the principle that theft is bad and reprehensible appears clear, both from Apollo's response and appeal to Zeus for judgment against Hermes, and from the punishment of Odysseus' comrades after stealing the cattle of the sun[107]. Zeus destroys their ship with a lightning bolt, even though they have sacrificed the cattle to the gods in order to avoid starvation[108].

In order to determine the law with respect to such typical and admired behavior as theft[109], it is not possible to look to the social attitude approving it in practice, but instead to the legal decisions applying the principle to define the right of the injured person to restitution and in addition, punishment of the thief. The existence of the substantive law

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106 Zeus "laughs out loud seeing his evil-plotting child well and skillfully denying his guilt about the cattle." *H. Hermes* 389-90.

107 *Od.* 12.340-88.

108 Odysseus is forewarned of this disaster, if he and his crew raid the cattle of the sun, both by Teiresias (*Od.* 11.110-13) and by Kirke (*Od.* 12.137-40). When he refuses to land on the island of the sun, he is outvoted by his companions (*Od.* 12.279-97), but makes them swear a great oath not to harm any herds of cattle or flocks of sheep they may find (*Od.* 2.297-302).

109 Burkert cites the example of Autolykos, the maternal grandfather of Odysseus, who was famed for thieving and oaths (*Od.* 19.394-97), in support of the assertion that in mountainous border areas "cattle rustling is unquestionably a virtue, as long as it remains undetected." *Greek Religion* (note 75) at 158.

declaring that thievery is bad and punishable is not negated by the circumstance that not every thief is punished.

Nor does the substantive law necessarily apply to acts of theft against persons outside the broadest group in which legal authority is present. Piracy and raiding are an accepted, if not admired, method of gaining wealth in the homeric poems[110]. Odysseus clearly feels no compunction against stealing Polyphemos' sheep[111], and indeed proposes to replenish his depleted herds by cattle raids[112], which Achilles also regards as an ordinary method of gaining wealth for a hero[113]. These cases illustrate the close dependence of the concept of "law" upon the existence of an adjudicatory authority defined by a particular subgroup, that defines the outer limits of application of its law. This limit is further suggested by the distinction which Telemachos draws between the suitors and the Ithacans present in the assembly: if the citizens were to devour the substance of his house, at least he would have a chance of gaining recompense later[114].

3. Obligatio

The anthropological definition requires that a decision from which "law" can be derived must define the rights of two living parties to a dispute. This criterion eliminates significant areas of evidence from Greek literature, including obligations which the Greeks themselves undoubtedly conceived as laws having binding force. The most significant cases that are excluded relate to violations of well defined religious obligations, the requirement of providing sanctuary to a suppliant, and the compelling duties owed to strangers, gods and parents. The gravity of these obligations is illustrated by the emphasis on duties owed to parents. Orestes, who can only follow the duty to avenge his father by murdering his mother, avoids the penalties threatened by his father's Furies, but is relentlessly pursued by those of his mother. Telemachos shrinks from the

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110 The first question frequently asked of a stranger is whether he is a pirate, λῃστήρ. *Od.* 3.71-74, 9.252-55. Athena has the epithet λῃῖτις, "giver of booty," *Il.* 10.460.

111 *Od.* 9.230.

112 *Od.* 23.357.

113 *Il.* 9.406.

114 In the assembly in Ithaca, Telemachos is so far from being able to seek any legal redress that he wishes that the Ithacans in assembly were devouring his inheritance, since then someday he might be able to press a claim. *Od.* 2.74-79. Stanford interprets this curious statement to mean that since the suitors come mostly from overseas, Telemachos wishes for his goods to be consumed by Ithacans, "for he would then have some chance of successfully suing for recompense." W.B. Stanford, *Odyssey* (London, 2d ed. 1967) note on 2.74-8.

very notion of sending his mother back to her father's house in order to preserve his own inheritance, with the explanation not only that his father-in-law would pay him back in evil, but that a mother's fearful Furies would also punish him[115].

The attribute of *obligatio* requires not only that a decision must define the rights of two living parties, but also that the law must provide a procedural means for the dispute over their conflicting rights to be brought before the legal authority for adjudication. Telemachos' answer indicates that the violation of duties owed to a parent could be punished by her relatives[116], and thus constitute valid "law" at the level of the family. However, a conspicuous feature of Athenian law was that prosecution of offenses against parents or children could not be brought before Athenian courts until Solon introduced the procedural device of the *graphe* to permit anyone who wished to remedy such wrongs[117]. Solon's reforms also permitted violation of certain religious obligations, such as the duty of a killer to avoid certain religious ceremonies and places such as temples and the agora after a proclamation of the basileus, to be prosecuted in a *graphe* for impiety.

For these reasons, in a sense the Greeks appear to have recognized a requirement similar to *obligatio* in their own law. Although a duty to honor the gods, guests and parents was recognized from time immemorial, violations of these duties were not redressable until Solon established the *graphe*. Even in classical times, it was not possible to bring a homicide prosecution (δίκη φόνου) in the absence of a defined relationship of the prosecutor and the victim[118]. There is no evidence that a prosecution for homicide was ever initiated by other than an adult male relative, and although the question is not entirely free from doubt[119], it is generally accepted that the duty was commensurate with the capacity, *i.e.*, that no one else was competent to initiate a homicide proceeding in the special courts[120]. Thus it is correct, both from the viewpoint of classical law and the

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115 *Od.* 2.130-37.

116 Indeed, the mythical accounts of Orestes indicate that his crime was prosecuted by the relatives of Clytemnestra rather than her Furies. Sommerstein cites Hellanicus, *FGrH* 4 F 169; *Marm. Par.* = *FGrH* 239 A 25 (Erigone, daughter of Clytemnestra and Aegisthus); Pausanias 8.34.4 (Perilaus, Clytemnestra's cousin); Diktys, *FGrH* 49 F 2 (Tyndareos and Erigone, together with Oeax the brother of Palamedes); and Nikolaus of Damascus, *FGrH* 90 F 25 (a relative of Aegisthus). A. Sommerstein, *Aeschylus: Eumenides* (Cambridge, Eng. 1989) at 4.

117 Arist. *Ath. Pol.* 9.1.

118 The required relationship is codified at *IG* i^3 104.20-23. The duty appears to be the same in cases of intentional homicide. *See* Dem. 47.72.

119 The evidence is summarized by MacDowell, who challenges this traditional view in *Athenian Homicide Law in the Age of the Orators* (Manchester 1963) at 17-18, 94-96.

120 *See* K.O. Müller, *Aeschylos Eumeniden* (Göttingen 1833) at 126; A. Philippi, *Der Areopag und die Epheten* (Berlin 1874) at 80; J.H. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig 1905-

definition of legal anthropology, to state that before Solon's reforms, Athenians had a law against killing other citizens, but no "law" at the level of the *polis* against killing foreigners or their own closest relatives[121]. Such violations were addressed either at the level of the family or *phyle* (which can satisfy every attribute of law at the level of this social subgroup) or were conceived to be the exclusive province of supernatural prosecution.

4. Sanction

The requirement that a legal decision be attended with a sanction is the least problematic aspect of the anthropological definition, and sanctions are abundantly illustrated in early Greek literature. One point of interest is the form of sanctions that may effectively be employed in a society without any formal public enforcement authority. For example, in societies as different as Greece and the Kapauku Papuans, sanctions for homicide include exile[122], banishment[123] and the payment of blood money[124], and a violation of the conditions of exile may result in direct punishment of the wrongdoer by the representatives of the victim[125]. Confiscation of the property of an exile[126] and "outlawry[127]" are also effective penalties.

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15) 831; G. Glotz, *La Solidarité de la Famille dans le Droit Criminel en Grèce* (Paris 1904) at 425; H.J. Treston, *Poine: A Study in Ancient Greek Blood-Vengeance* (London 1923) at 260; R.J. Bonner & G. Smith, *The Administration of Justice from Homer to Aristotle* (Chicago 1930-38) II, at 116; U. Kahrstedt, *Staatsgebiet und Staatsangehörige in Athen* (Stuttgart 1934) at 161; A.R.W. Harrison, *The Law of Athens II: Procedure* (Oxford 1971) at 76-77; G. Thür, "Die Todesstrafe im Blutprozess Athens," *Journ. Juristic Papyrology* 20 (1990) at 144.

121 Gagarin considers this possibility incongruous and "misleading." *Early Greek Law* (note 4) at 14-15.

122 Dem. 21.43, 23.69; Ant. 2b.9; *cf. Anthropology of Law* (note 16) at 93.

123 *IG* i^2 115.11-13; *cf.* Anthropology of Law (note 16) at 93.

124 This remedy is available at least in some cases in epic (*e.g., Il.* 9.632-36) but evidently was prohibited under Athenian law. *See* MacDowell, *Athenian Homicide Law* (note 119) at 8-10 (payment of bribes to avoid prosecution for homicide was "not merely disgraceful" but "might also lead to a conviction in a law-court" as indicated by Dem. 22.2). *Cf. Anthropology of Law* (note 16) at 93 on the preference for monetary sanctions in homicide cases among the Kapauku.

125 *IG* i^3 104.30-31; Dem. 23.44. The direct punishment of a paramour by the offended husband is described in Dem. 23.53; *cf. Anthropology of Law* (note 16) at 93.

126 Dem. 21.43, 23.45; Lys. 1.50; Arist. *Ath. Pol.* 47.2; *cf. Anthropology of Law* (note 16)93.

127 The penalty of *atimia* for crimes such as establishing tyranny is described in Arist. *Ath. Pol.* 16.10 and And. 1.96; *cf. Anthropology of Law* (note 16) at 78.

Menelaos versus Antilochos

Application of the various attributes of law under the anthropological definition to Greek sources may be illustrated by the famous dispute of Menelaos and Antilochos[128]. As noted above, there is no authority capable of imposing a judgment on the two quarrelling heroes, and no one, including Agamemnon, makes any effort to intervene. The absence of any intention to apply a rule that will be followed or provide guidance for future cases is evident in the initial proposal of Achilles. Having organized the event and provided the prizes, he evidently exercises the authority at least to declare the winner and award the prizes in accordance with his sense of fairness, which essentially requires that the status of the contestants be confirmed irrespective of the actual results[129]. However, even if it is regarded as authoritative, Achilles' proposal cannot be regarded as legal under the anthropological definition, because it does not appear that the award of prizes is intended to provide a precedent for the award in any future race. Menelaos' own proposal for "judgment" by oath evidently refers to a chivalrous rule defining the fair conduct of chariot races, but lacks the attribute of authority, even though it may rely upon a rule that is accompanied by the intent of universal application. Further, no sanction appears to accompany his proposal to decide the matter by an oath, that could distinguish custom from law in these circumstances. Based upon the criterion of a political authority with the power of judging the controversy, Wolff concluded that the trial scene on the shield of Achilles is a process of law, but that the resolution of this dispute over the chariot race is not[130]. The anthropological model confirms this judgment on an independent theoretical basis.

IV. Conclusion

The studies of legal anthropologists suggest that there was no stage of "prelaw" in early Greek society, and refocus the inquiry on the social group in which early Greek law was defined and applied. A first important theoretical consideration is the definition of law in terms of the specific legal authority in a defined social group or subgroup. The disputes among the warrior kings in epic take place in a context that is not a single politically organized society, but instead a confederation of politically independent groups described in painstaking detail in the second book of the *Iliad*. It is indisputably clear that

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128 *Il.* 23.571-85.

129 *Il.* 23.534-38.

130 *Traditio* 4 (note 52) at 57.

there is no political authority capable of resolving the central dispute between Agamemnon and Achilles. Accordingly, with respect to the disputes between politically independent groups, according to the definition of law provided by anthropology, there can be no "law" governing these disputes, and only voluntary composition, or appeals to custom are possible. Based on these considerations, under the definition suggested by Pospisil there was no system of "law" on the level of overall Greek society in the precodification era, and the wish to discover a uniform "law" at this level is illusory[131]. The specific differences in legal attributes considered above confirm this conclusion. Most significant are the differences in legal authority in epic, Hesiod and the Athenian tradition, including the decision by *basileus* versus *gerontes* versus jury, which relate to three essentially different concepts and structures of legal authority.

Another contribution of the anthropological theory of law is that by focusing attention on the social constraints that are actually enforced in a particular social subgroup, at a particular time, this analysis guards against temporal and territorial fallacies. The early literary evidence comes from widely differing historical and cultural eras. Based on the retention of distinctly Mycenean elements in the homeric poems, such as the authority of the *wanax*, the early sources span a history of more than eight hundred years. This history included the collapse of Mycenean civilization, widespread migration of the Greek-speaking peoples, the Dorian invasion, and the slow re-emergence of Greek culture during the Dark Ages, in isolated regions defined by this early history, significantly influenced by cultural and religious traditions adopted from the Near East.

Any analysis of early Greek law must take into account this history and these differences. In searching for a definition of early Greek law, Gagarin freely mixes the early literary evidence from Ionia (Homer); Boeotia (Hesiod, *Hymn to Hermes*); and Athens (*Catalog, Eumenides*)[132] along with the early inscriptions from Crete. He assumes that before Drakon's law in Athens the treatment of homicide was "more or less the same as we find in the early literature"[133], and further that the single legal tradition he contemplates was essentially continuous and without interruption[134]. Moreover, he bases his theory of early Greek law on a story in Herodotus about Deioces, the first king of the Medes, although this tale relates neither to Greek culture nor to a preliterate legal

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131 *Early Greek Law* (note 4) at 6 n.20.

132 *Early Greek Law* (note 4) at 51 n.1.

133 *Early Greek Law* (note 4) at 113 n.36.

134 *Early Greek Law* (note 4) at 16: "Although our evidence may be quite limited, it is 'indigenous' in that not only at the earliest stages, but even up through the classical period Greek law developed, as far as we can tell, without any significant external influences."

system[135]. Since as Gagarin admits, "taken by itself this story has no necessary relevance to the question of legal procedure among the Greeks"[136], it is unclear why he relies upon it to derive an apparently universal model for the development of "voluntary" dispute resolution mechanisms in "proto-legal" Greek society. A citation from the Nunamiut or Kapauku would be more apt, since the legal process in these societies illustrates the application of legal norms in the compulsory resolution of disputes among litigants who have not voluntarily sought out the court for peaceable arbitration.

With respect to a second fundamental point, even if Gagarin were correct in maintaining that the method of resolving disputes among the Greek warriors in the *Iliad* is exclusively voluntary arbitration, this still would not provide evidence of a "prelegal" stage of universal application of voluntary settlement at any historical era in any society. Though the evidence clearly suggests that there is no political authority in the loose confederacy of tribes participating in the war, including Agamemnon, who can impose a settlement over the objections of the recalcitrant Achilles, this situation is contrasted with the cessation of hostilities imposed within a city after acceptance of blood money. The fact that there may be no "law" at the level of the confederation is indeed significant with respect to the definition of early Greek "law" on the level of the linguistic group, but says nothing about the existence of compulsory dispute settlement at the subgroup level, whether this be the city, tribe, clan, or *oikos*. On such a lower, politically organized level, anthropological theory suggests, if it does not ensure, that the "custom" will and must be applied as "law" in the compulsory resolution of disputes between followers of the respective political and legal authorities. The anthropological definition redirects our attention to these lower legal levels as being of particular importance in the analysis of early Greek law.

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135 After becoming king, Deioces hears cases only upon submission in writing, and renders his decision in the same way. *Early Greek Law* (note 4) at 24.

136 *Early Greek Law* (note 4) at 24.

Diederich Behrend (München)

Diskussionsbeitrag zum Referat Kenneth J. Burchfiel

Ich möchte vier Bereiche des Referats von Herrn Burchfiel hervorheben und erörtern:

- die Darstellung des, wie er es nennt, analytischen anthropologischen Rechtsmodells,
- die Anwendung dieses Modells auf Nachrichten aus der frühen griechischen Geschichte,
- den Vergleich mit der Definition und dem Entwicklungsmodell, das Gagarin verwendet,
- den "Mythos" des prédroit.

Walter Selb schreibt in einem kürzlich erschienen Bändchen (Antike Rechte, 1993), der juristische Laie könne bei der Betrachtung der Rechte der Antike zu dem Erlebnis kommen, "alles schon einmal gesehen zu haben". Ebenso glaubt der Rechtshistoriker gewöhnlich, Recht ohne weiteres erkennen und von anderen Regelsystemen unterscheiden zu können. Die Unterscheidung von Recht, Moral und Sitte ist uns allen geläufig, sie wird freilich im allgemeinen gewissermaßen introspektiv und ohne viel Empirie aus den Definitionen dieser Begriffe gewonnen, wobei gewisse Wesensvorstellungen nicht zu vermeiden sind. Ich halte es schon allein deswegen für sehr wichtig und interessant, daß uns mit dem von Herrn Burchfiel verwendeten rechtsanthropologischen Modell von Pospisil ein anders konstruiertes Arbeitsinstrument vorgeführt wurde, mit dessen Hilfe die Masse der in einer Gesellschaft geltenden, befolgten oder erwünschten Regeln und Verhaltensweisen geordnet und diejenige Teilmenge bestimmt werden kann, die man "Recht" zu nennen für zweckmäßig hält.

Die Ergebnisse solcher Methoden sind, abhängig von den gewählten Bestimmungsmerkmalen, naturgemäß verschieden, doch das ist ein im Grunde unwesentlicher Mangel, solange nicht Dogmatismus hinzutritt. Dieser ist leider versteckt in dem horror vacui enthalten, mit dem die Pospisil-Schule auf die These einer "lawless society" reagiert. Man muß noch nicht kritiklos an das Goldene Zeitalter glauben, wenn man annimmt, daß einfache und übersichtliche Gruppen und Gesellschaften zwar durchaus bewertete Ordnungsvorstellungen und Mechanismen der institutionalisierten sozialen

Kontrolle kennen, daß diese aber, und sei es aus Gründen der einfacheren Begriffsbildung, nicht mit dem Namen Recht bezeichnet werden sollten, wenn man Mißverständnisse vermeiden will. (Übrigens erzeugt Pospisil seinerseits bei den Traditionalisten zunächst einen solchen horror mit der Verweisung der nicht durch menschliche Vertreter durchsetzbaren Vorschriften des sogenannten Sakalrechts in den Bereich des Nichtrechts.) Abgesehen davon scheint mir der Gewinn solch unterschiedlicher Methoden erheblich, gerade weil sie es erlauben, unter definierten Bedingungen unterschiedliche Ergebnisse zu erzielen und zu dikutieren. Sie liefern uns von unserem Gegenstand vielleicht nur *Wahrheiten*, klären aber *die Wahrheit* der eigenen Überlegungen. Von daher gewinnt für Gräzisten das "Erkenne Dich selbst" eine überraschende neue Bedeutung.

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Die Anwendung des Modells auf die bekannten Früherscheinungen der griechischen Rechtsgeschichte führt, da ja die von Pospisil übernommenen Kriterien sich nicht allzu weit von den intuitiv gewonnenen Vorstellungen von Recht entfernen, aber schärfere Abgrenzungen erlauben, durchweg zu Ergebnissen, die eine Diskussion und einen Vergleich mit bisherigen Ansichten lohnen. Freilich wird hier ein Mangel der Theorie deutlich, der noch stärker bei einer Anwendung auf das entwickelte römische oder auf heutiges Recht sichtbar würde: In die empirische Betrachtung fließen nur beobachtete Fakten ein, die nicht selbstbezüglich sind. Ob die Beteiligten, die sich in der Sonderordnung "Recht" bewegen, diese als von den anderen Ordnungen getrennte erkennen, oder ob sie undifferenziert nur die Sphäre des richtigen oder falschen Verhaltens sehen, spielt für die Anwendung der vier Kriterien keine Rolle, sondern ist ein qualitatives Merkmal innerhalb des Rechts. Damit bedarf dieser Bereich wieder weiterer Unterteilung. Die für unseren Kulturkreis mit den Griechen beginnenden Reflexionen über das Auseinanderfallen von Naturrecht und tatsächlicher Ordnung scheinen mir ebenfalls mit diesem Modell schwer erfaßbar. Es ist daher verständlich, wenn Vorbehalte gegen die Parallele zwischen z.B. Agamemnon und einem Kapauku-Häuptling auftreten; ich teile sie nicht. Es muß aber nach Möglichkeiten gesucht werden, die Selbstwahrnehmung der Rechtsordnung und das Nachdenken über Recht als selbständige Ordnung in das Modell einzubauen.

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Als erster nach Gernet hat in jüngerer Zeit Gagarin versucht, ethnologisch-anthropologische Definitionen bei der Interpretation früher griechischer Rechtssachverhalte zu benutzen. (Für Leser aus dem deutschen Sprachraum: Hierzulande kennt

man die Anthropologie vorzugsweise als biologische Disziplin, während sie im Ausland auch und häufig vor allem als Kulturwissenschaft, z.T. auch als Archäologie betrieben wird.) Er hat sich schließlich dann doch für eine eher rechtstheoretisch gewonnene Abgrenzung von Recht entschieden, dessen Anwendung und Herrschaft Phasen des *prelaw* und *protolaw* vorausgehen; erst danach beginnt das Recht als geschriebene, bewußt als Recht konzipierte Ordnung. Vom methodischen Standpunkt aus ist diese engere Definition ebenso wie die umfassende Pospisils nicht zu beanstanden, da sie offengelegt und immer auf sie rekurriert wird; die Ergebnisse sind freilich für die Zeit vor den Gesetzgebungen unbefriedigend. Da diese ja nicht aus dem Nichts aufsteigt, wird die Einfügung der genannten Entwicklungsphasen erforderlich. Insbesondere scheint mir die dabei postulierte Trennung von Verfahrens- und materiellem Recht nicht glücklich. Ich halte das für ein Mißverständnis des langsamen Prozesses der "Verrechtlichung" der Ordnungsvorstellungen; dabei kommt es zum sogenannten aktionenrechtlichen Denken, das Recht nur dort sieht, wo auch eine Klagmöglichkeit besteht. Zu dieser Verengung kann es freilich nur da kommen, wo Recht als Sonderordnung bereits besteht: Deswegen ist dieses in Gagarins Theorie auftretende Problem in gewisser Weise ein Gegenstück zu dem ubiquitären und schon immer vorhandenen materiellen *law* Pospisils, das aber von den Beteiligten noch nicht als Sonderordnung erkannt wird.

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Schließlich zum Mythos von *prédroit* und *prelaw*. Ich möchte, ungeachtet der Faszination, die von den Untersuchungen Louis Gernets ausgeht, vorschlagen, auf diese Termini zu verzichten. Es ist unbestritten, daß es von Anbeginn in den Gruppierungen der Menschen Mechanismen und Ordnungen der sozialen Kontrolle gegeben hat und aus naheliegenden Gründen geben muß; absolut ungeordnete Zusammenschlüsse (nicht Ansammlungen!) von Individuen gibt es nicht einmal bei den Tieren. Je nach Funktion, Ausübung und Organisationsgrad kann man eines oder mehrere dieser Ordnungssysteme als Recht bezeichnen, insbesondere dort, wo die Gruppenangehörigen selbst davon reden. Für die anderen jeweils wirksamen Ordnungssysteme lassen sich andere Bezeichnungen finden. Bis sich ein solches System oder einzelne seiner Elemente zu Recht verfestigen, gehört es zu der anderen Ordnung und ist *prelaw* nur *ex post*, nicht von vornherein oder infolge einer besonderen Qualität. Es gehört zu der Ernüchterung des Blicks durch die anthropologisch orientierte Rechtsgeschichte, daß man Recht zwar als eine entwickelte und entwicklungsfähige sehr komplexe und leistungsfähige Ordnung, aber keineswegs als die fortschrittlichere Form einer sozialen Ordnung kennen lernt. Daher sollte das Mißverständnis vermieden werden, hier gäbe es eine gewissermaßen natürliche Entwicklung.

Robert W. Wallace (Evanston)

The Athenian laws against slander

Freedom of speech, *isegoria* (in the assembly) and more generally *parrhesia,* was a well–established component of Athenian democratic ideology. According to Demosthenes (9.3), *parrhesia* was granted to everyone in Athens, including slaves and *xenoi;* even house–servants (he says) speak more freely than citizens in other *poleis.* [Xenophon's] *Politeia of the Athenians* states that "any of the Athenians who wants to can speak" in city politics (1.2), on equal terms (1.6). According to Plato (*Resp.* 557b), democracies are characterized in the first place by freedom of speech (especially at Athens: *Gorg.* 461e) and freedom of action[1]. In court cases, in politics and in their daily lives, the Athenians made abundant use of this practice. Every assembly began with the herald's exhortation, "Who wishes to speak?," and there is good evidence that many even ordinary Athenians took up that offer. In *Panathenaikos* 12.248, for example, Isokrates observes that sometimes the wisest speakers miss the point and one of the ordinary citizens, "deemed of little account and generally ignored," comes up with a good idea and is judged to speak the best[2]. As for free speech in court cases, extant legal speeches show that Athenian litigants were free to say almost anything, including blatant vituperation and name calling. In Deinarchos's speech against Demosthenes in 323, Deinarchos calls his opponent "this beast" (10), "this hireling" (28), "open to bribes," "a thief and a traitor" (41, cf. 77), "this person to be spit upon, this Scythian - really I cannot contain myself" (15), this "juggler" (92). Demosthenes himself observes (18.3) that everyone finds it naturally sweet to listen to *loidoriai* and *kakegoriai* - to abuse and accusations. Free speech, the freedom to insult, mock and revile in any kind of language, is a notorious facet of Attic comedy, even in the fourth century. In a different way the same principle applied to tragedy, where (for instance) year after year ordinary Athenians paid to hear characters in Euripides utter the grossest blasphemy. Democratic Athens welcomed all sorts of new

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1 See further Eurip. *Hipp.* 422, *Ion* 670-675, *Suppl.* 430-442, *Phoen.* 392, *Orest.* 917-22; Isok. *Peace* 14, Theophr. *Char.* 28.6.

2 See also, e.g., Aesch. 3.2-4, and Ar. *Ach. 45.* M. H. Hansen has calculated that in the 33-year period 355-322 B.C., between 700 and 1400 Athenians made formal proposals in the assembly. See "The number of *rhetores* in the Athenian *ekklesia,* 355-322," *GRBS* 25 (1984) 123-55, repr. in *The Athenian Ekklesia* II. *A Collection of Articles* 1983-89, Copenhagen 1989, 93-125.

philosophers, some of whom said the most outrageous things, year after year, directly challenging the fundamental social and religious bases of society.

The Athenians made great use of their right to free speech, and were intensely proud of it. The plaintiff in Lysias 10, though prosecuting Theomnestos for having said that he killed his own father, nonetheless remarks, "I regard it as illiberal and litigious to bring an action for slander" (10.2)[3]. The Athenians seem to have regarded verbal abuse as an aspect of personal freedom that should be answered not in court, but in kind. In the ancient world, free speech was uniquely democratic, and even uniquely Athenian. As Demosthenes states in his speech against the tax-collector Androtion (22.32), "in an oligarchy, even if there are people who live more disgracefully than Androtion, no one may speak ill of [κακῶς λέγειν] officials." A law is attributed to Zaleukos against speaking badly of any city or citizen (Stob. *Serm.* 44.21); the Theban Pindar condemned *panglossia* (O. 2.87); the Spartans notoriously controlled speech[4]; *aidos* ("reverent respect") was a central Greek aristocratic virtue; and Rome several times expelled philosophers[5].

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Yet despite the Athenians' ideology and practice of *parrhesia,* a number of legal measures are attested that restricted free speech, in connection with particular categories of persons, and kinds of speech[6].

The earliest of these restrictions are two laws attributed to Solon. According to Demosthenes, Plutarch and others, Solon passed a law forbidding "speaking ill of" the dead (κακῶς λέγειν)[7]. According to Plutarch he also outlawed "speaking ill of" living

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3 See [Arist.] *Probl.* 29.14: "if a man reviles a magistrate the penalties are heavy, but if he reviles a private individual, there is no penalty."

4 Demosthenes (20.106) observes that a central difference between Athens and Sparta is that in Athens one can praise Sparta and denigrate Athens, but the Spartans can only praise Sparta. See also Arist. *Pol.* 1272a, and Aesch. 1.180–81.

5 See e.g. Plu. *Cat. mai.* 22.

6 As this paper is limited to the legal restrictions of free speech, I shall not discuss *thorubos,* hubbub, used to drive off public speakers whom the Athenians did not like: see e.g. Xen. *Mem.* 3.6.1ff., and Pl. *Prt.* 319c. When the dikasts swore to (actually) listen to both sides of a legal case, this has been interpreted as a measure against *thorubos.* At Dem. 57.1, the speaker begs the jurors to please listen quietly to his presentation. For the same reason I shall also not discuss reports (e.g., Isok. 7.58, 8.14) that the assembly was intolerant of those suspected of anti-democratic sentiment, or those who did not go along with the crowd.

7 Dem. 20.104: "Again, there is another excellent *nomos* of Solon, not to speak ill of (κακῶς λέγειν) a dead man." See also [Dem.] 40.49: "the *nomoi* forbid speaking ill of (κακῶς λέγειν) ... the dead." Plu. *Sol.* 21.1: "a law of Solon which forbids speaking ill of (κακῶς ἀγορεύειν) a dead man." See also Hyper. F 100 Kenyon, Σ Ar. *Peace* 648–52 (and cf. Ar. ibid.: *loidorein*), Ael. Arist. *Or.*

persons in temples, courts, official buildings [*archeia*], and games, with a fine of 2 drachmas to the state and 3 to the victim[8].

The first question raised by these two laws must be whether they are authentically Solonian, or else further examples of the many laws anachronistically attributed to Solon as the founder of Athens' democracy. From this perspective, both measures look unexceptionable. In the law restricting abuse in specific places, the small fine obviously looks early: as we shall see, in the later fifth century the penalty for slander was 500 drachmas. In addition, apparently there were public buildings, *archeia,* in the early sixth century at Athens[9]. Finally, the purpose of this law fits well with other Solonian measures. Solon first established for Athens a formal machinery of government, and he was vitally concerned to see that it worked. Thus for example, he is attributed the dictum "obey the magistrates, right or wrong"[10]. Just so, restrictions against certain insults but only in temples, courts, official buildings and games were clearly designed to preserve public order and public authority. Support for this interpretation is provided by the remarkable provision that the polis received 2 drachmas of the 5-drachma fine. For it was in part the polis, the community, that had been injured[11].

Of Solon's law against abusing the dead Plutarch himself expresses approval, because "it is piety to consider the deceased sacred, justice to spare the absent, and good policy to rob hatred of its perpetuity" (*Sol.* 21.1). Recently, in a similar way Halliwell has explained this law as a codification of "the general ethical inhibition against abusing the dead"[12]. If ethics were the purpose of this law, however, it would constitute a unique example of moralizing or ethical legislation in Solon's code. Thus to take a parallel example from Solon's funerary measures, it appears now to be the consensus view that Solon's restrictions of elaborate funerals, of the number of female mourners permitted,

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iii 502 L.–B; *Souda* s.v. ἀποιχόμενα παῦε. Lex. Cantabr. s.v. κακηγορίας δίκη. p. 671.7. As the sources indicate, this law continued in force during the classical period.

8 Plu. *Sol.* 21.1. This law may form part of the basis for Plato's provisions on slander in *Laws* 935b–c. As we shall see, one clause of Athens' slander law (Lys. 10.6–7) forbids calling someone *androphonos,* a murderer. Some have thought the term archaic, and hence assigned this provision also to Solon. See ref. in n. 21 below.

9 On the earliest public buildings in the Agora and which appear to date to the early sixth century, see (briefly) J. M. Camp, *The Athenian Agora*[2], New York and London 1992, 38-39.

10 F30 West: misconduct by magistrates was then addressed in their *euthunai.* On this aspect of Solon's work generally, see my *Areopagos Council, to 307 B.C.,* Baltimore 1989, 49-55.

11 See also S. Bianchetti, "La normativa ateniese relativa al ΚΑΚΩΣ ΛΕΓΕΙΝ da Solone al IV secolo," *Studi e Ricerche* dell'Ist. di Storia Firenze 1 (1981) 67-68. If Solon's law was still active in the classical period, his restriction of abuse in court cannot have applied to the principals, as the constant abuse between litigants demostrates (see R. J. Bonner, "Freedom of speech," in *Aspects of Antiquity,* Berkeley 1933 [repr. New York 1967], 70-71).

12 S. Halliwell, "Comic satire and freedom of speech in classical Athens," *JHS* 111 (1991) 49 n. 6.

and of the style of mourning, were not meant as sumptuary legislation but rather to limit occasions for display that disturbed the general public[13]. With contemporary Middle Eastern parallels, Foley has pointed out the highly political nature that funerals can sometimes assume, and the political aspects of vocal female mourning which Solon may have sought to control[14].

Thus Solon restricted funerals for a political purpose, to preserve public order. As we have seen, this was also the aim of his law against abusing magistrates in temples, courts, official buildings and public games. These measures supply a context for Solon's restrictions against abusing the dead. Just as he restricted the activities of members and associates of the family of the deceased, so he limited the opportunities for disturbance available to their opponents, to insult or abuse former enemies. Again, this was intended to preserve public order. We may note that restrictions on abuse in certain places imply that the freedom to abuse was otherwise assumed, and - to judge from the restrictions - may have been common.

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Of the different restrictions of free speech at Athens during the classical period, I postpone momentarily the much debated law of slander. Except for this law and certain more or less technical measures such as laws forbidding the revelation of religious secrets, seven different provisions are relevant[15].

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13 See Dem. 43.62, Plu. *Sol.* 20.6, 21.5, Cic. *De leg.* 2.59, 63-64, Athen. 612a, 687a; D. Kurtz and J. Boardman, *Greek Burial Customs,* Ithaca, N.Y., 142-46; M. Alexiou, *The Ritual Lament in Greek Tradition,* Cambridge 1974, 14-23; G. Holst-Warhaft, *Dangerous Voices: Women's Laments and Greek Literature,* London and New York 1992, 101-3, 114-16; C. Ampolo, "Il lusso funerario e la città arcaica," *AION* 6 (1984) 71-102; O. Murray, "Solon's law on hybris," *AION* 9 (1987) 117-125, and *id.*, "The Solonian law of *hubris*," in *Nomos,* eds. P. Cartledge, P. Millett and S. Todd, Cambridge 1990; 143.

14 H. Foley, "The politics of tragic lamentation," in *Tragedy, Comedy and the Polis,* eds. A. Sommerstein, S. Halliwell, J. Henderson, and B. Zimmermann, Bari 1993, 101-43.

15 For completeness, I list other technical (or even "bureaucratic") categories of restricted speech:

a) certain restrictions on speech, especially to keep to the issue at hand, were enacted in legal proceedings (see my *Areopagos* [n. 10 above] 124) and in the assembly (Aesch. 1.35);

b) no one could speak twice in an assembly on the same subject in one day (Aesch. 1.35);

c) Athen's various religious *aporrheta* most famously involved the mysteries at Eleusis; the Cynic Demonax condemned religious Mysteries as secretive and contrary to *parrhesia* (Luc. *Dem.* 11);

For the special case of the legal offense of impiety, where issues of free speech might be thought relevant, see my article, "Private lives and public enemies: freedom of thought in classical Athens," in *Athenian Identity and Civic Ideology,* eds. A. Boegehold and A. Scafuro, Baltimore 1994, 127-55.

I begin with two reports that remain difficult to sort out. In the early fourth century, Lysias (9.6, 16) quotes a law that it was forbidden to *loidorein* (abuse) a magistrate in his meeting place *(sunedrion),* on payment of a fine[16]. In 348/7 B.C., Demosthenes states that if someone speaks badly of (κακῶς εἴπῃ) or strikes a thesmothete or the archon in office or "anyone to whom the city grants the inviolability of a crowned office or some other honor," he will incur total *atimia* (ἄτιμος ἔσται καθάπαξ); however, if he either strikes or insults an official who was not acting in his official capacity but was as if a private citizen, he will be tried for either *hybris* or *kakegoria* (21.32–33). *Prima facie* Demosthenes' statement appears to contradict the law in Lysias, that abusing a magistrate in his meeting place results in a fine[17]. It is possible that with no class of jurisconsults and a mass of laws that were sometimes self-contradictory, Athens simply had two different measures both relevant to this offense, perhaps with differences that are not indicated in the sources. It is also possible that the provision in Demosthenes was later than and replaced the provision in Lysias. In any case the purpose of these laws is clear. Like Solon's earlier laws, these measures were designed to protect the magistrates in the exercise of their official duties and thus to ensure the proper functioning of government. As Demosthenes says (21.32-3), the penalties for insulting a magistrate were much more severe than for insulting a private citizen because the offender "is outraging your laws, [Athenians], your public crown of office and the name of the city".

Second, perhaps the best known limitations of free speech in Athens are the occasional restrictions that the Athenians imposed on comedy. This is a much discussed subject, the details of which cannot be considered here. However, in a recent, careful treatment Halliwell has concluded that "the evidence is reducible to the following specific items: a probable *psephisma*" in force between 440 and 437 B.C. and "circumstantially to be connected with the Samian war," and secondly, "a possible but, I have contended, highly doubtful decree of 415 (and uncertain validity thereafter, but perhaps as late as 411), arguably designed to restrict comedy's freedom to mention the perpetrators of the scandalous impieties of that year"[18]. In fact, however, Halliwell has I think successfully

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On the grounds that these do not reflect the democracy, I also do not discuss the restrictions on assembly speech (Thuc. 8.66.1), philosophers (Xen, *Mem.* 4.4.3), and the teaching of rhetoric (*ibid.* 1.2.31) that are associated with Athens' two oligarchic periods in the late fifth century.

16 On Lipsius's view that the abuse had to consist of one of the *aporrheta* (on which see below), see Bianchetti (above n. 11) 71-72. Plato *Meno* 94e-95a also refers to slandering politicians *(kakos legein, kakegorein),* but that they were office holders is not mentioned.

17 Cf. [Arist.] *Probl.* 29.14 = 952b29-30, that if a man κακῶς εἴπῃ a magistrate, the penalties are *megala.* One further question arises from the case in Lysias 9: the soldier claims that he insulted the generals not in their *synedrion* but in Philius's bank, and yet the generals levied a fine against him (9.5-7). However, the cancellation of these fines by the treasurers (9.7) presumably indicates that they were illegal.

18 Halliwell (n. 12 above) 64.

discredited the thesis, revived by Sommerstein in 1986, that Syrakosios's decree of 415 forbade the mention in comedy of anyone who had parodied the sacred mysteries. (As D. M. MacDowell observed to me in Graz, an argument that the Athenians would actually spare those condemned for impiety from comic attack is surely pointed in just the wrong direction.) Halliwell concludes that comedy was restricted only when excessive theatrical license harmed Athens - which in the years 440 and 439 was aiding Miletos in its war against Samos. We have good evidence that the poets made merciless fun of Athenian policy against Samos because of Perikles' relations with the Milesian Aspasia[19]. The current consensus is that the restrictive measure of 440-437 B.C. reflects this period of difficulty.

Third, Aristophanes was brought to trial for criticizing the city (τὴν πόλιν κακῶς λέγειν: *Ach. 502–507*) in front of foreigners at the Dionysia[20]. (Aristophanes states that such criticisms were permitted at the Lenaia, which was not open to foreigners.) If there was a specific law about this, we dot not know its terms. In any case, the obvious purpose of Aristophanes' prosecution fits in well with the preceding conclusions about Athens' restrictions on comedy. Both were intended to safeguard the interests of the city.

Fourth, in the later fourth century the orator Hypereides reports a law restricting abuse both in speech and in song (κακῶς λέγειν and ᾄσαι ἐπὶ τὰ κακίονα) of Harmodios and Aristogeiton (Hyp. 3 *Phil.* Fr. 21 col. ii.3). Hyperides adds, "the demos thought that not even when drunk should a man be permitted to revile" the tyrant–slayers. Together with Hypereides' comment, this law's mention of song surely reflects the drinking and carousing world of the aristocratic symposion, which might not have been overly sympathetic to two democratic heroes. Therefore Halliwell and others are surely right that the purpose of restricting such derogatory singing was "presumably, directed against political skolia of an undemocratic *Tendenz*"[21].

Fifth, speaking in the assembly was also forbidden to those who had mistreated their parents, who had thrown away their shields in battle, who had not properly served in the military, who had wasted their paternal estates, or who had prostituted themselves. The purpose of these limitations is stated several times by the orators: to prevent corrupt and wicked people from addressing the community[22]. Accordingly, this also was intended as a defensive mechanism to protect the community. The most famous case brought under this law was that of Timarchos, accused of having once been a male prostitute during the controversy surrounding the peace of Philokrates in 346 B.C.

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19 See S. Bianchetti, "La commedia antica e la libertà di parola," *Atti e mem. dell'Accadem. Tosc. di Sci. e Lett. La Colombaria* n.s. 31 (1980) 11-16, with reff.

20 See also Σ Ar. *Ach.* 378, 504; Eupolis Fr. 240 Kaibel. Cf. Dem. 21.34-5 for other festival regulations.

21 Halliwell (above, n. 12) 49.

22 See especially Aesch. 1.28-32 and Dem. 22.30-32.

Sixth, and similarly, according to Andokides (1.74) soldiers who remained in Athens during the regime of the Thirty Tyrants, in 404, were forbidden to speak in the assembly or serve in the council.

Finally, seventh, those who had been convicted three times of making illegal proposals were also not allowed to address the assembly. The purpose of these last two measures was again to protect the democracy.

These different cases support the general conclusion that while the Athenians revelled in *parrhesia* and greatly enjoyed verbal attacks even on their most popular politicians, they did not hesitate to restrict speech if the interests of the community were adversely affected.

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We can now turn to the official law (or laws) of slander in classical Athens[23]. The earliest allusion to this law is either comic - Aristophanes' *Wasps* of 422 refers to the possibility of prosecuting for *loidoria* (1206-7), or possibly tragic - in *Oedipus Rex* of ca. 430 B.C., Teiresias says that to call someone a murderer is *arrheton* - "not to be said" (362). General evidence for the law of slander is provided by Dem. 23.50 of 352 B.C., which quotes some words of the law: ἀν τις κακῶς ἀγορεύῃ, adding τὰ ψεύδη – "if someone speaks ill falsely of someone" – and by Dem. 21.32, stating that if someone slanders (κακῶς εἴπῃ) a private citizen, he will stand trial in a *dike kakegorias idia,* a private suit for slander, a type of case which Demosthenes says he won against his enemy Meidias by default, in front of an arbitrator (21.79–93). More details and more of the terms of what he calls "the law of *kakegoria*" are provided by Lysias 10, of 384/3 B.C. According to Lysias the law contained a list of *aporrheta,* "things that could not be said" (10.2, 6, 8, see also Isok. 20.3), in particular that it was illegal to call a man ἀνδροφόνος (murderer), or a πατραλοίας or μητραλοίας (father–beater or mother–beater), or to claim that he ἀποβεβληκέναι τὴν ἀσπίδα, had thrown away his shield in battle (10.6-11)[24], "unless it is shown that what was said is true" (10.30). (The fourth–century comic poet Nikostratos nicely alludes to the last of these provisions: "Don't you think that *parrhesia* is a weapon of poverty? If someone destroys this he has thrown away the shield of his life" [Kock ii 227]). Also according to Lysias, before the case came to a *dikasterion* it was heard before an arbitrator, *diaitetes* (10.6), a provision already noted in

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23 In this discussion I have adopted the British distinction between libel, which is limited to written texts, and slander, which pertains to the spoken word.

24 Lys. 10.9: ἐν δὲ τῷ νομῷ εἴρηται, ἐάν τις φάσκῃ ἀποβεβληκέναι, ὑπόδικον εἶναι.

connection with Demosthenes and Meidias. According to Lys. 10.22 and Isok. 20.3, the punishment for slander was a fine of 500 drachmas[25].

One final provision on slander is attested, in Dem. 57.30: that anyone who reproaches a male or female citizen for working in the agora is subject to the law against *kakegoria*. The speaker Euxitheos states, "In reproaching us [i.e., myself and my mother] with [working in] the agora, Euboulides has acted not only contrary to your decree, but also contrary to the laws, which declare that anyone who rebukes any male or female citizen for working in the agora is subject to [the penalties for] *kakegoria*." As Thalheim and others have suggested, this measure looks like a separate law from the law in Lysias 10, about murderers and parent-beaters[26]. Demosthenes seems to imply that the law against *kakegoria* is already established, and that reproaching citizens for working in the agora is added to it. This is confirmed by the fact that whereas the law of *kakegoria* specified that the accusation must be false, the truth of the reproach in Demosthenes 57 is admitted by Euxitheos.

A number of questions are raised by these reports. The date of Athens' slander law has been the subject of much discussion[27], as has the question of whether the offense specified by that law was labelled *kakegoria* - if in fact it was given a technical name[28]. In addition, is the list of *aporrheta* mentioned in Lysias 10 complete, or were other slanders

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25 The 1000-dr. penalty in Dem. 21.88 is presumbly for slandering two persons (cf. s. 79): see G. Glotz, *Dar.-Sag.* III (Paris 1900) s.v. *kakegorias dike*, p. 790 n. 25 and reff., and J. H. Lipsius, *Das Attische Recht und Rechtsverfahren*, Leipzig 1905–15, 651 n. 56.

The relationship between this law and Solon's is uncertain: see the discussion in M. Hillgruber, *Die zehnte Rede des Lysias*, Berlin and New York 1988, 4-6, though I question Hillgruber's inclination to accept the idea of E. Ruschenbusch that these laws were the same, with certain modifications over time.

26 Thalheim, *RE* 10 (1919) col. 1525 s.v. κακηγορίας δίκη, though the point has more recently been passed over (as, e.g., in D. M. MacDowell, *The Law in Classical Athens*, Ithaca, NY, 1978, 128, and cf. Hillgruber [n. 25 above] 7 n. 19).

27 However, there appears to be a consensus that the number of *aporrheta* may well have been increased from time to time: they need not all have been cited in the original law.

In particular, on the provision about throwing away one's shield, M. Radin ("Freedom of speech in ancient Athens," *AJP* 498 [1927] 223-24) acutely observed that whereas in *Peace* (678, 1927) *Clouds* (353) and *Wasps* (19, 592) - all plays dated before 420 - Aristophanes does not hesitate to call Kleonymos a ῥίψασπις, in *Birds* 287–89 and 1473–81, of 414 B.C., he ridicules Kleonymos for having thrown away his shield but in both places he avoids stating the *aporrheton* in favor of comic periphrases. This suggests either that the slander law as a whole should be dated between 420 and 414; or that this particular slander was added to the list of *aporrheta* between 420 and 414; or that until 420–414 comedy had been allowed some exceptional license which was then removed. Radin notes that "no passage in our extant fragments [of comedies after 414] contains any of the epithets which, by the law we are considering, constituted actionable libel at Athens" (p. 229).

28 See esp. the texts (and add Dem. 18.123) cited in Glotz (n. 25 above) 788 n. 1; see also Lipsius (n. 25 above) 649.

included? In any case it seems certain that the number of slanders was limited[29]. According to Dem. 57.35, for example, Euboulides also stated that Euxitheos's mother had been a wet-nurse, but Euxitheos does not indicate that this fell under the law against *kakegoria*. In his speech against Demosthenes, we have seen, Deinarchos calls his opponent a hireling, open to bribes, a thief, a traitor, a juggler and a Scythian. This in turn raises the central question of why one could say all this but not that someone's mother worked in the agora. Why were certain slanders actionable, but not others[30]?

In regard to this question, the different explanations proposed for Athens' law of slander seem in each case incomplete. MacDowell has suggested that the purpose of prohibiting mention of people working in the agora was "perhaps ... to prevent remarks like the fifth-century jokes against Euripides's mother for being a greengrocer"[31]. This surely must be partly correct - but why was calling Euripides' mother a greengrocer felt to be so offensive as to be outlawed, but not (for example) calling someone a Scythian, or his mother a wet-nurse? In commenting on the passage in *Oedipus Rex* where Teiresias does not want to call Oedipus a murderer, Diskin Clay suggests that words such as murderer "stir up the complex and ambiguous feelings of fascination and recoil before the thought of violence and bloodshed within the family and the killing and disgrace of a fellow citizen"[32]. That again is undoubtedly true, but it will not explain why one could not say that someone had thrown away his shield. Momigliano proposed that these laws were to protect personal reputations, and just so Halliwell has briefly stated that speech was controlled because of "sensitivity ... in matters of honour, shame, and reputation"[33]. But would not the epithets thief, hireling, traitor and Scythian also pertain to shame, honor and reputation?

Three alternative explanations for the terms of this law have been advanced, pertaining primarily not to personal sensitivity or morality but rather to legal status. First, Lipsius very briefly observed that all the terms attested for the law of slander involved accusations that could legally be punished by death or *atimia*[34]. This may imply that legal consequences could follow such slanders, if left unchallenged. This is an important insight, but also incomplete. Many other accusations could lead to death or *atimia*.

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29 Cf. Arist. *EN* 1128a30-31: οἱ δὲ νομοθέται ἔνια λοιδορεῖν κωλύουσιν (though this general statement need not refer to Athens).

30 The issue raised in Lys. 10 is whether one had to say the exact word mentioned in the slander law in order to be prosecuted. Unless something is being concealed, the arbitrator had apparently agreed that the exact words had to be used.

31 MacDowell (n. 26 above) 128.

32 "Unspeakable words in Greek tragedy," *AJP* 103 (1982) 283.

33 A. Momigliano, "Freedom of speech in antiquity," *Dictionary of the History of Ideas* II, ed. P. P. Wiener, New York 1973, 258; Halliwell (above, n. 12) 48.

34 Lipsius (above, n. 25) 648: see Dem. 24.103-7.

Second, in *Athenisches Strafrecht* Ruschenbusch argued that because in Solonian times the *aporrheta* reflected crimes that led to banishment and (in effect) *atimia*, Solon passed a law of slander concerning these terms in order to protect Athenians from the summary punishments that violating the status of *atimia* entailed[35]. The two central difficulties with this argument are, first that no evidence associates the four attested *aporrheta* with Solon, and second, no evidence indicates that those who were merely thought to have beaten their parents or thrown away their shields could be summarily punished without a court conviction.

Finally, third, Bianchetti explains why these and not other terms were slanderous by correlating them with the standards that determined citizens' participation in the public life of Athens[36]. The law against slander "gave the offended party the possibility of exoneration from charges which, if true, would have prevented an Athenian from fulfilling many public tasks, especially those which involved a *dokimasia*" - especially the *dokimasiai* for officials and assembly speakers. In the case of prospective archons, for example, in addition to questions intended to establish their citizenship (as e.g. about the location of family tombs), candidates were asked "if they treat parents well, pay their taxes, and have performed their military service"[37]. In the case of assembly speakers, as we have seen, the list of questions was somewhat different: whether they "beat" their parents or "failed to support" or "provide a home for them," "failed to perform all the military service demanded of them, or thrown away their shield" in battle, or "prostituted themselves" (Aesch. 1.28-32, claiming to quote the actual law). Bianchetti's argument is based on the correlation between the questions in these *dokimasiai* and the *aporrheta* cited in Athens' slander law. Although both sets of provisions, she points out, were conditioned by Athenian standards of proper behavior, the existence of the slander law itself was a consequence of Athenian civic regulations.

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Although Bianchetti's thesis has been discussed only by Hillgruber (who rejects it, as we shall see), she is right to point out the striking correlations between some of the questions asked at Athens' *dokimasiai* and the *aporrheta*. Yet her perception, which is very briefly stated, needs both qualification and also elaboration particularly in the light of the case evidence (which she does not consider). As qualifications, first, the correlation

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35 *Untersuchungen zur Geschichte des athenischen Strafrecht*, Cologne and Graz 1968, 24-27.

36 I am indebted to Prof.ssa Bianchetti (Dipartimento di Storia, Università degli Studi di Firenze, 50129) for sending me a copy of her important article. In the U.S. only Harvard and the Library of Congress subscribed to this journal, of which neither participates in interlibrary loan. It is also not available in Rome.

37 *Ath. Pol.* 55.3, see also Poll. 8.85-86 (with similar wording).

of the *aporrheta* especially with the questions at the *dokimasiai* of magistrates seems not completely compelling. It is perhaps not critical that a false statement that someone had not paid his taxes is nowhere cited as part of the law of slander, but was a question in the magistrates' *dokimasiai*. For (as I have mentioned) the attested list of slanders may well be incomplete. This also applies to the question asked at magistrates' *dokimasiai* concerning military service, which seems broader than asking simply whether one had thrown his shield away (as attested for the slander law). *If* the law of slander mentioned only the latter point, then an Athenian could be wrongly accused of improper military service and not be able to sue for slander. But the provisions in the slander law about military service may not have been restricted to that action. However, one other difficulty may be more significant. One central focus of the magistrates' *dokimasiai* was establishing candidates' citizenship. But when for example Deinarchos calls Demosthenes a Scythian (because of gossip that Demosthenes' mother was Scythian), this accusation if true would have disqualified Demosthenes from Athenian citizenship. On Bianchetti's thesis, why should Athens' law of slander not have forbidden anything that falsely questioned an Athenian's paternity?

If Athens' *aporrheta* seem only partly relevant to the questions asked at magistrates' *dokimasiai*, they are in some respects closer to what is attested as legally prohibited for assembly speakers. Assembly speakers could be challenged on the following grounds: if they "strike" their parents (this is attested as *aporrheton*) or "failed to support" or "provide a home for them," or if they "failed to perform all the military service demanded of them, or threw away their shield" in battle (the latter provision is also expressly attested as *aporrheton*), or if they "prostituted themselves." If a speaker was found guilty of one of these offenses, he was punished by either death or *atimia*. By contrast, we may note, a citizen who failed the magistrates' *dokimasia* suffered no other penalty.

Several further problems raised by Bianchetti's hypothesis may also be noticed. First, the charge of working in the agora is also not relevant to the civic *dokimasiai*, but was an aspect of Athenian legislation against slander. In addition, one attested *aporrheton*, "murderer", is not mentioned in connection with either type of *dokimasia*. Finally, Bianchetti's brief statement of the parallels between *dokimasiai* and *aporrheta* does not indicate how in practice specific slanders might affect an Athenian citizen.

Despite these difficulties, the parallels which Bianchetti noted seem striking. They suggest two possible explanations for the provisions of Athens' slander law.

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First, quite simply, the *dokimasia* regulations presuppose that the particular offenses which they cite were offenses that the Athenians, for reasons we cannot consider here, judged to be especially reprehensible. Therefore, it may be that by means

of a law against these slanders, the Athenians also punished anyone who made false accusations in regard to them. We shall shortly consider evidence from several legal cases that partly supports a moralizing interpretation of Athens' slander provision.

The second explanation is based on the parallels between Athens' *aporrheta* and the *dokimasiai* especially of assembly speakers. The sources clearly demonstrate the Athenians' concern for the personal character of those who addresed the assembly. Accordingly, when someone who was suspected of having committed an act which the Athenians thought especially offensive spoke in the assembly, it was essential to stop him. Aeschines shows that speakers could even be stopped immediately, during the course of an assembly, by means of an *epangelia* (summons), as Aeschines himself stopped Timarchos (1.81)[38]. The speaker was then brought to trial in a people's court, in a *dokimasia rhetoron*, to determine his guilt. However, it is obvious that this whole procedure could be misused, to bar from the assembly and discredit or destroy political or personal oppenents, at very little risk to the prosecutor. In consequence, I suggest, the Athenians provided for the victims of slander to prosecute false accusers for *kakegoria*. In this instance the much valued Athenian freedom to abuse had necessarily to be curtailed, because of assembly regulations in regard to speakers.

This second hypothesis may find support in one of Athens' attested prosecutions for slander. In Lys. 10.1 the speaker refers to an earlier prosecution of his opponent Theomnestos by a certain Lysitheos, for *kakegoria*. Lysitheos had said that Theomnestos had thrown away his armor. Lysitheos made that statement in an *epangelia* challenging Theomnestos's right to speak to the assembly. As a result of Lysitheos's challenge Theomnestos underwent a *dokimasia rhetoron*, and appears to have been acquitted[39]. Did Theomnestos then prosecute Lysitheos for having made a false charge directly violating one of the provisions of Athens' slander law? In 10.12 the speaker refers to Theomnestos's prosecution of "Theon" for saying that he threw away his shield. Frohberger (in 1868) emended Θέωνι to Λυσιθέῳ. in the light of the attribution of that statement to Lysitheos in 10.1, and also because the name Theon is not attested in Athens before the third century. (In Kirchner the earliest Athenian Theon is otherwise late third-century, and no Theon appears among the 3150 individuals in Develin's *Athenian Officials 684-321 BC*, or in Davies' *Athenian Propertied Families*. However, there are

38 Other evidence for the *epangelia* is at Aesch. 1.32 (quoting the law), 1.64 and Dem. 22.29. I accept the consensus view that in Lys. 10.1 Gernet/Bizos's emendation ἐπήγγελλε should replace the MSS εἰσήγγελλε.

39 Hillgruber (n. 25 above) 1-4 argues that Theomnestos was convicted but the verdict was set aside, because he successfully prosecuted one or more witnesses in his trial for false witness. This is rightly challenged by S. Todd, *The Shape of Athenian Law*, Oxford 1993, 258-62, esp. 258 n. 1, especially because Lysias would surely have mentioned a conviction in his speech. Also, if Theomnestos were convicted in his first trial for having thown away his shield, how would he have dared to prosecute Theon (10.12) for having made that allegation? 10.22 surely implies acquittal.

fourth-century attestations of the name on Samos, and fourth- or third-century attestions on Chios and Euboea[40].) If Frohberger's emendation is right, it is clear evidence that Athens' law against slander allowed innocent victims of Athens' assembly regulations to strike back at their accusers. Many scholars have supported Frohberger's emendation[41]. Against it, Hillgruber has reasserted Szanto's argument that Athenians could not be prosecuted for slander if they made accusations (including *aporrheta*) against courtroom opponents, on the grounds that the losing party was punished anyway[42]. Szanto's main evidence for this is Dem. 18.123-24, where Demosthenes distinguishes between proper accusations, which are the business of the courts, and mere abuse in court, *loidoria*, "in which we slander [κακῶς λέγειν] each other with the *aporrheta*." (In the case in Lys. 10, Theomnestos had slandered the plaintiff in court, but in a case where the plaintiff was not one of the principals. Hence the plaintiff could sue.) If Szanto's thesis is correct, then as Hillgruber saw, the connection which Bianchetti (and I) have made between the slander laws and the ability of Athenians to perform their civic functions is not cogent. However, Lys. 10 itself provides evidence against this thesis. In Lys. 10 it is clear that the prosecutor does not dare to say that the defendant Theomnestos threw away his shield. In fact, he makes merry with many vague allusions to Theomnestos' having thrown away his shield - but he never states this openly (see 10.14, 22, 23). In *Birds*, Aristophanes had done the same with Kleonymos and his shield, as we have seen. If such allegations were free of punishment, there would be no reason to avoid them.

Unfortunately, Frohberger's emendation in 10.12 is itself not likely to be correct. In 10.12 the speaker is anxious to affirm that "Theon" did not use the correct legal terminology in his accusation, saying that Theomnestos "cast" (ῥῖψαι) his shield rather than "threw it away" (ἀποβεβληκέναι). However, in 10.1, the speaker says that Lysitheos accused Theomnestos of having "thrown away" his shield (ἀποβεβληκέναι). Nonetheless, on the main issue the position of Szanto and Hillgruber appears to be untenable. An Athenian could prosecute for slander anyone who made accusations against him involving the *aporrheta*. Therefore, since the one venue in which the particular slanders constituting *aporrheta* were more significant than other slanders (such as calling someone an Scythian) was the *dokimasia rhetoron*, we may conclude that the law of slander was designed to limit abuses of the regulations governing eligibility to address the assembly, for these accusations could lead to disfranchisement. The

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40 H. Frohberger, *Ausgewählte Reden des Lysias*, Leipzig 1868, 67; R. Develin, *Athenian Officials 684-321 BC*, Cambridge 1989; J. K. Davies, *Athenian Propertied Families 600-300 B.C.*, Oxford 1971; P. M. Fraser and E. Matthews, eds. *A Lexicon of Greek Personal Names* I. *The Aegean Islands, Cyprus, Cyrenaica*, Oxford 1987.

41 Cf. most recently Todd (above, n. 39) 259.

42 G. Szanto, "Die Verbalinjurie im attischen Process", *WS* 13 (1891) 159 (= *Ausgew. Abhandl.* 103ff.).

provisions attested for the slander law specify that one could not falsely call someone ἀνδροφόνος, or a πατραλοίας, or claim that he had thrown away his shield in battle. We are not told that they included more general accusations of not properly serving in the army, wasting one's paternal estate, or prostituting oneself, as in the *dokimasia rhetoron*. But since we do not have the actual text of Athens' slander law but only the chance mention of various provisions (which may well be incomplete), there is *a priori* no objection to including in the slander law the other slanders that I have mentioned. There is also one positive reason to include them. For if at little risk to himself someone could bar his opponents from speaking, for a short period before a *dokimasia* or else forever, merely by interjecting some idle accusation, surely this simple weapon would have been abused. Hence the Athenians saw that it had to be curtailed.

Athens' assembly regulations about speakers provide a sufficient explanation for the existence and the specific terms of its law on slander. But is this explanation complete? That question is raised by a second case, that of Lysias 10 itself. Here the unnamed speaker, x, is prosecuting Theomnestos for alleging that he, x, had killed his own father. That accusation was not made to keep x from speaking. So in prosecuting Theomnestos for slander, was x merely taking advantage of provisions intended for another purpose to strike at an enemy? X says not: "even though I'm prosecuting now for slander, by the same vote I'm being prosecuted, for murdering my father," and if Theomnestos is acquitted, x says that his *symphora*, his disaster, will be *megiste* (10.22). It is unclear whether x intends this to refer specifically to future legal consequences if he refused to defend his reputation, but in any case his meaning is surely not limited to specific legal consequences. Though we may note that no one prosecuted x for parricide after he was accused of it, such consequences could well include the prospect of *atimia* if he later attempted to address the assembly. We may conclude, I think, that just as the Athenians viewed the crimes of murder, beating one's parents, and endangering fellow citizen-hoplites by throwing away one's shield as especially terrible offenses, so false accusations about these offenses would be taken very gravely even outside the assembly. That precisely is why they were included in the *dokimasia rhetoron*. Hence, Athens' slander provisions had a clear legal but also a broader moral basis. Hence both of the hypotheses advanced here gain support.

Further confirmation of the notion that Athens' slander provisions had a properly legal but also a broader moral basis, is provided by the case in Demosthenes 57, which is concerned with the loss of citizenship. Euboulides had alleged that Euxitheos's mother sold ribbons in the agora, in order to prove that she and hence her son Euxitheos were not citizens. As a result of Euboulides' allegations, Euxitheos's fellow demesmen in fact struck him off the deme rolls. Now having a mother who worked in the agora was obviously not a legal offense, unlike murder, treating one's parents badly, deserting on the battlefield, and throwing away one's shield (see Dem. 24.103-107). However, it was

apparently irregular for a citizen's mother to work in the agora. Hence this could be - in Euxitheos's case it was - the basis for revoking his citizenship. Accordingly, the statement, true or false, that someone's mother worked in the agora could be very dangerous in that it could lead to disfranchisement. Did therefore the Athenians provide that anyone who stated this could be prosecuted as for slander? This provision would be analogous to the slander provisions relevant to the *dokimasia rhetoron*. However, it is also clear that many other statements could fit this category, of potentially leading to disfranchisement - for example, Deinarchos' comment that Demosthenes' mother was a Scythian, something no citizen's mother could be. Of course it would have been impossible for the Athenians to list in the slander law all such terms; and a general legal provision outlawing any kinds of slander that affected one's political or legal status is unparalleled for Athens. Why then did the Athenians pass this particular provision, about working in the agora? I suggest that their reason was essentially one of decency to fellow citizens. Out of poverty some citizens were unfortunately required to work for their living selling simple products in the marketplace. The Athenians judged it offensive to tax them with that.

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This examination of the various areas in which the Athenians restricted free speech has largely supported the conclusion that, except in the special case regarding selling in the marketplace, speech was restricted only when the political interests of the city were at stake. This principle may be correlated with three more general points regarding *parrhesia*.

First, among its many other virtues, an important ideological justification for *parrhesia* at Athens was the protection it was thought to provide for the democracy. According to Demosthenes (22.31), "of all types of government [a democracy] is most antagonistic to [leaders] of infamous habits, [because] every man is at liberty to publish their shame." In the Funeral Oration which is ascribed to Demosthenes, the speaker observes that whereas in oligarchies people guilty of the most revolting conduct can get off lightly merely by offering their masters presents or some other civility, in democracies "it is impossible to deter freedom of speech, which depends upon speaking the truth, from exposing the truth. For it is not possible for those who commit a shameful act to appease all the citizens, so that even the lone individual, uttering the deserved reproach, makes the guilty wince. For even those who would never speak an accusing word themselves are pleased at hearing the same, provided another utters it" (60.25-26).

Second, even apparent abuses of free speech, for example the castigating of opponents' characters in court cases, was from the Athenian perspective an important and even necessary component of legal prosecutions, again for the protection of the polis. In

his speech against Timarchos, for example, Aeschines (1.153) quotes with approval a passage from Euripides and tells the jurors to "examine the sentiments, fellow citizens, which the poet expresses. He says that before now he has been made judge of many cases, as you today are jurors, and he says that he makes his decisions not from what the witnesses say, but from the habits and associations of the accused. He looks at this, how the man who is on trial conducts his daily life, and in what manner he administers his own house, believing that in like manner he will administer the affairs of the city also, and he looks to see with whom he likes to associate. And finally he does not hesitate to express the opinion that a man is like those whose company he loves to keep." Athenian dikasts were fundamentally concerned to know whether a litigant was worth voting for: were his political views democratic, had he served the community well, did he have a good character and a family which needed support? Dikasts judged defendants in terms of the law, but also quite consciously by the commonsense light of community (their critics said mob-) standards[43].

Finally, third, just for the same reason, *parrhesia* at Athens did not mean protected speech. Individuals were liable if something they said or proposed led to evil consequences, even if the assembly had been persuaded and voted for what they proposed. In the Mytilenean debate in Thucydides, Diodotos tells the Athenians, "you would take rather more care over your decisions, if the proposer of a motion and those who voted for it were all subject to the same penalties. As it is, on the occasions when some emotional impulse on your part has led you into disaster, you turn upon the one man who made the original proposal and you let yourself off, in spite of the fact that you are many and in spite of the fact that you were just as wrong as he was" (3.43). We have numerous examples of this phenomenon, beginning with Miltiades' so-called "deception of the people" in 489. In 406 those who had proposed the measure to try in a group all of Athens' generals at Arginousai were later tried and condemned for that proposal (Xen. *Hell.* 1.7.35). Indeed, assembly meetings began with a communal curse against those who deceived the people[44]. Punishing speakers who may simply have been unlucky may strike us as unfair, but it did not seem so to the Athenians. Their advice had harmed the city.

The Athenians revelled in *parrhesia* and greatly enjoyed verbal attacks even on their most popular politicians. But they did not hesitate to restrict speech if the interests of the community were adversely affected.

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43 See generally V. Hunter, "Gossip and the politics of reputation in classical Athens," *Phoenix* 44 (1990) 299-325.

44 Dem. 19.70, Dein. 2.16.

Stephen C. Todd (Keele)

Status and contract in fourth-century Athens[1]

I. Sources of information

It was Sir Henry Maine, one of the founding fathers of comparative legal history, who observed in a famous phrase that what he called "progressive societies" were characterized by a "movement from status to contract" (Maine 1861: 169). Of all Maine's insights, this has proved the most controversial and the most influential[2]. Its importance for the study of classical Athens is immense: if we perceive Athens as a "progressive society" in Maine's terms, and if we accept the general validity of Maine's model, then we should expect to find a gradual but continuing decline throughout the classical period in the importance of legal status at Athens - that is, whether people are citizens, metics (resident aliens), or perhaps even slaves - and a corresponding move towards contractual equality in which individuals would deal with each other on even terms.

The first problem which we need to confront is the nature of our evidence, for it has to be admitted that much of our knowledge of Athenian law comes from the Attic Orators, whose status distinctions are exceedingly vague. This applies particularly to subdivisions within such broad categories as "free non-citizen". When Isager & Hansen, for instance, tried to assemble statistics on maritime traders, they found it was usually possible to determine who was and who was not a citizen, but far more difficult to distinguish between metic and *xenos* (i.e., between resident and non-resident foreigners):

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[1] My thanks are due to the organizers of the *Symposion* conference, Prof. A. Kränzlein and Prof. G. Thür; to the British Council in Austria and the British Academy for contributing to my travel costs; and to the participants in the conference for their comments and suggestions. I am particularly grateful to my respondent, Prof. E. Cohen, for full and friendly discussion, though (as our readers will rapidly discover) neither of us has succeeded in convincing the other. Underlying this paper is an attempt to broaden my earlier analysis (Todd 1993: 167-200) of the strict formal rules governing status at Athens, to take account of Finley's observation (e.g. 1981: 132) that slavery throughout Greece (though not in his view at Athens itself) was a concept which could cover a range of overlapping statuses. Harpokration similarly, as we shall see, uses surprisingly flexible language when discussing the boundary between slavery and freedom at Athens. How do formal rules and flexible language relate to each other?

[2] See for details Feaver (1969: 53-56). Feaver's book is a biography of Maine, with the significant title *From status to contract*.

only four out of fourteen such individuals can be firmly located[3]. But these uncertainties are symptomatic of a wider problem, because status is a fundamental weapon of political and therefore of forensic rhetoric at Athens. One of the most familiar features of Aristophanes' comedies is the assertion that political leaders such as Kleon and Kleophon are of foreign birth[4]; Aiskhines similarly labels Demosthenes a Skythian (Aiskh. 2.80), and because we know that Demosthenes is a practising politician, we readily dismiss that charge. But what of the allegations of slave-birth which Lysias directs against defendants such as Agoratos (13.18, 64) and Nikomakhos (30.2, 6, 27, 29)? Too often these are taken at face value (thus e.g. Lamb 1930: 278 and 609-10 respectively), but in each case the charge is weak, and the prosecution has notably failed to employ the far more potent procedures which would have been available if the defendant really had intruded himself illegally into the citizen body. This suggests that whatever their origins, Agoratos and Nikomakhos are now legitimate citizens - just as Phormion had enjoyed freedom for more than twenty years when in court Apollodoros described him as a slave (Dem. 45.76, 84, 86, not just an ex-slave as at 45.73).

At first sight, the very vagueness with which the fourth-century orators address questions of status would indeed seem to suggest the progressive blurring of status categories which Maine might encourage us to look for, but a good deal of the uncertainty is (I suspect) a function of context. Take the case, for instance, of somebody like Phormion, a former slave who had been freed by his master Pasion: what precisely had Pasion had to do to free him? Whereas at Rome manumission was a public act, involving a set ritual in which the master touched his slave with a *vindicta* or rod, requiring the presence of a public official to be valid, and carrying with it important public consequences for the beneficiary (who thereby became a citizen)[5], manumission at

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3 Only three individuals are stated to be metics and one a *xenos*, and all the rest are more or less probable inferences (Isager & Hansen 1975: 72 n. 77). At the same time, Isager & Hansen also collect statistics for citizens and for non-citizens offering maritime loans, and it is an alarming index of our uncertainty to compare their figures with those proposed by Erxleben (1974: 501-2): Isager & Hansen find 15 citizen traders, and 12 non-citizen and 7 citizen lenders; Erxleben's corresponding figures are 11, 28, and 41. Admittedly Erxleben's figures are stigmatized by Millett (1983: 37-8) as the product of "cavalier manipulation of evidence", but Millett himself notes what is for our purpose significant, that the evidence is rarely explicit enough to render impossible such manipulation.

4 Kleon is portrayed as a Paphlagonian slave throughout the *Knights*, and there are references back to this at *Clouds* 581 and at *Peace* 314. A rather obscure joke at *Frogs* 676-82 seems to imply that Kleophon can only understand the Thracian language. Accusations of slave-birth against leading politicians are rare in the comedies (Kleon's status in the *Knights* is a function of plot, not of insult): perhaps surprisingly so when compared with the orators (cf. e.g. Andokides frag. 5 Blass).

5 These comments apply to those who were formally manumitted either by will or before a magistrate. The right of formal manumission was restricted by a series of enactments during the reign of Augustus: these included the *lex Iunia*, which established the status of "Junian Latin" (i.e. non-citizen) for those who had been freed only informally. On Junian Latins, see further p.129 below.

Athens appears to have been an essentially private act with none of these requirements or consequences.

Some of our most illuminating evidence concerns the manumission of slaves by will. That is not to say that this was the only or indeed the most common occasion for granting freedom, but it is well attested in the wills of the philosophers preserved by Diogenes Laertius[6]. The authenticity of these documents has been disputed, but they are certainly early, and even those drawn up by metic testators appear to conform to what we know of Athenian law (Harrison 1968: 184). From these texts it is clear that a will was an appropriate moment for freeing a slave: indeed, each of the testators releases at least one. But there is a variety of terms and conditions. Some receive not only their freedom but additional financial gratuities or other benefits (Aristotle's Ambrakis is in future to have 500 *drakhmai* and a slave of her own, 5.14; Lykon's slave-boy Mikros is promised an education, 5.72); others are granted their freedom immediately (Theophrastos' slaves Molon, Timon and Parmenion, 5.55; for other apparent examples see *Life of Plato* 3.42 and *Life of Epicurus* 10.21); others are freed on condition that they remain in service for a specified period (sometimes carefully graded, as with the two years for Agathon and four for the litter-bearers Ophelion and Poseidonios, *Life of Lykon* 5.73)[7]. Still others appear to have been freed already during the lifetime of the testator, who is now relaxing the conditions previously imposed. Kriton of Khalkedon, for instance, is either a slave or a prisoner-of-war ransomed from the slave-market, and Lykon remits him his purchase-price (*lutra*, 5.72); while the same testator leaves to Syros "who is a free man (*eleutheros*)" a substantial bequest, the gift of another slave (this time female, so perhaps the recipient's wife), and the cancellation of any debt that he may owe the master (5.73): if this debt, like Kriton's, represents or includes the price of his freedom, then here we have another case of a slave being freed as it were in instalments[8].

The impression created by these texts is one of considerable flexibility. A testator, and presumably therefore a master freeing his slaves during his lifetime, could impose whatever he wished in the way of conditions (or lack of conditions). Perhaps most striking is the lax phrasing of some of the clauses. What does it mean, for instance, when

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6 Diogenes Laertius *Life of Plato* 3.41-43, *Life of Aristotle* 5.11-15, *Life of Theophrastos* 5.51-58, *Life of Straton* 5.61-64, *Life of Lykon* 5.69-74, and *Life of Epicurus* 10.16-21.

7 This is the so-called *paramonē* clause (derived from the verb *paramenō*, "to remain in service"). Such clauses are not often attested at Athens, but are much more common in other parts of the Greek world. Hopkins discusses a corpus of inscriptions from Delphi in the second and first centuries BC: he reports that 400 out of 1,237 recorded manumissions are conditional (Hopkins 1978: 140).

8 The best-known parallel in the orators occurs at Corinth, though the parties involved accept its validity at Athens also: Neaira's friends raise the sum of 20 *mnai* as an *eranos* (interest-free loan, Dem. 59.31) to allow her to purchase her freedom. Groups of *eranistai* (contributors to such a loan) appear with some frequency as (or in place of) the former owners on the *phialai exeleutherikai* texts (see p.129 below).

Theophrastos says that Manes and Kallias are to be freed after four years "working together in the garden and being *anamartētous*" (free from blame, 5.55)? What standard of conduct is expected, and who is to judge it? Similarly with Aristotle's slaves (5.15), who are to be freed "*kat' axian* (if they deserve it) when they are *en hēlikiai* (of an appropriate age)". At first sight such vagueness seems guaranteed to create future work for lawyers - until we remember that a will at Athens was not so much a binding document, but rather an expression of the testator's wishes designed as guidance: only if the dead man left no direct male heir did inheritance at Athens become a public matter to be resolved by the courts.

Testamentary promises of freedom could afford to be vague, because they had no public standing. But manumission during the lifetime of the master was (as we have seen) a similarly informal act[9]. So far as we know, it need consist of nothing more than an expression of the master's wishes, and these wishes might in future be disputed. If you wanted to safeguard the position of your former slave, then you needed to seek publicity: Aiskhines (3.41-44) tells us that manumissions had been proclaimed in the theatre so frequently that the practice had had to be outlawed.

All in all, the freedom enjoyed by an ex-slave could be an uncertain status. He or she might be liable to certain obligations towards the former master, but these were ill-defined when compared with the *obsequium* and *operae* of Roman law[10]. What is striking, however, at Athens is the coincidence of terminology used to describe slave and ex-slave. The phrase *khōris oikōn*, for instance, is conventionally used to describe a slave to whom the master has granted the privilege of working independently, paying him a fixed rent (*apophora*) and retaining the surplus[11]; but it can also denote the relationship of ex-slave to former master (as with the retired nurse in Dem. 47.72). A similar overlap is seen when a former master, feeling that he is not receiving the benefits of the ex-slave's continuing obligations, prosecutes the latter by *dikē apostasiou* (*apostasiou* is a

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9 The only legal formality was curiously indirect: if the ex-slave was going to continue living in Attica, then he or she needed to register as a metic, with the ex-master as *prostatēs* (patron, see further p.133 below). The *metoikion* (metic-tax) was payable by men and by at least some women (perhaps only women living independently, so that a female slave released into the custody of her husband might be exempt); and even where payable, it was a consequence of the act of manumission and not a part of it.

10 *Operae* (lit. "tasks") are days of compulsory unpaid labour which the slave may undertake to perform for the former master in return for manumission; *obsequium* is a general duty of social respect. Both obligations could be enforced at law, and *operae* in particular are extensively discussed by the jurists (e.g. *Digest* 38.1).

11 Admittedly the convention is one of modern usage (e.g. Harrison 1968: 167): the institution is often attested in classical sources (e.g. Aiskh. 1.97), but the term rarely appears in such texts, and nowhere is it explicitly used of somebody who is certainly still a slave. As Harrison notes, however, the phrase is glossed in both senses (slave and ex-slave) by one of the lexicographers (An. Bekk. 316 *sv. khōris oikountes*).

cognate of the verb *aphistēmi*, regularly used to describe a "runaway" slave). Harpokration's gloss on this procedure (*sv. apostasiou*) claims that an ex-slave who is convicted reverts to slavery, but that those who win are relieved of their obligations and become *teleōs eleutheros* (genuinely free): underlying the phrase is the revealing assumption that those ex-slaves who have not undergone this additional procedure can somehow be thought of as not wholly free.

The *dikē apostasiou* is best known from the *phialai exeleutherikai* texts, a group of inscriptions which record the results of such trials for a short period in the 320s. The most probable interpretation of these difficult documents is that they represent ghost-prosecutions brought by (ex-)masters who then refuse to plead the case, thereby conceding full freedom to the defendant. It has been suggested that this is a system of registration: what the inscription formally records is the dedication in the case of each ex-slave of a silver *phialē* (bowl) weighing 100 *drakhmai*; and there survive a few letters of a heading which may suggest that it was Lykourgos, a leading politician active until the mid-320s, who had proposed a law imposing the requirement for such a dedication[12]. What is more difficult is to determine the rationale behind this short-lived system. Is it registration for the sake of clarity, designed to protect the status of those involved (particularly of the ex-slaves) and perhaps to replace the now-obsolete proclamations in the theatre? Or is it - assuming that these are genuine dedications paid for by the parties involved[13] - a tax on manumissions put forward by a man famous for boosting Athenian state revenue? If the latter, will it have had the effect, planned or otherwise, of creating an underground system of informal manumission, parallel to that of the Junian Latins after Augustus' restrictions on manumission at Rome?[14]

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[12] The *phialai exeleutherikai* texts consist of one large inscription, assembled out of *IG* ii^2. 1554-9 and re-edited by Lewis (1959), which records some 160 dedications; roughly 150 more are found on some twenty further fragments of stone, most of which seem to belong to separate inscriptions (*IG* ii^2. 1553 and 1560-78, with an important additional fragment in Lewis 1968). The phrase "[law of Lyk]ourgos" is restored by Lewis (1968: 376 n. 22) at *IG* ii^2. 1575. 2, though he does not make clear whether he regards this as a reference to the law of which traces survive at *IG* ii^2. 1560. 1-11. For a general survey of work on these texts, see Kränzlein (1975).

[13] If these are genuine dedications, rather than simply names being added to a *phialē* supplied by the state, then that raises a question which we are unable to answer: was it the responsibility of the slave or of the master to pay the 100 *drakhmai* for the dedication? To evaluate the implications of this, we would need to know how such a figure relates to the capital cost of a typical slave at manumission; but because only a few figures survive, it is difficult to tell whether we are meant to regard as exceptionally cheap or exceptionally expensive the *20 mnai* (i.e., 2,000 *drakhmai*, Dem. 59.31, cf. n. 8 above) raised by Neaira's friends to pay for her freedom.

[14] For the status of Junian Latins, see n. 5 above. It is impossible to determine the proportion of informal to formal manumissions under the Roman empire; but informal manumission is likely to have been relatively common in the provinces, where it may often have been difficult to find a magistrate.

II. Slavery and freedom

What we are seeing, therefore, is a structural informality and not any progressive blurring of status-distinctions[15]. Ex-slaves may occupy an uncertain status (Harpokration, as we saw, can contrast them with those who are fully free), but that is because their relationship with their former master remains essentially private, unless and until it is forced into a public context. If, however, an ex-slave becomes the subject or object of litigation, then the situation may be very different, because the public regulation of the boundary between slavery and freedom is and remains very rigid; and the adversarial nature of Athenian legal procedure means that the question becomes important when it is in somebody's interest to raise it. This presumably is one reason why the *phialai exeleutherikai* inscriptions, which arise out of a context of litigation, take considerable care not only to describe the defendants, ex-slaves who are now metics, with the appropriate metic formula of residence in a particular deme (*oikōn* or *oikousa en*), but similarly to distinguish between owners who as citizens are members of a deme and those who as metics merely reside there. This taste for precision may however be a more general characteristic of Athenian public records: even texts like the building-accounts of the Erekhtheion, which have no background in litigation, typically identify at least the skilled workmen who are in receipt of public funds by name and deme either of membership (for a citizen), or of residence (for a metic), or else by name and owner (for a slave)[16].

We should not forget the symbolic power of a law such as the one regulating the activities of the *dokimastēs*, the public slave whose function is to test the purity of silver coinage. Like many other public slaves at Athens, he occupies a privileged position, but any dereliction of duty on his part is to be punished in a manner designed to remind everybody that he is not a citizen official but a civil servant: he is to flogged by the

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15 If anything, the introduction of the system of manumissions which underlies the *phialai exeleutherikai* (above) represents an attempt to formalize rather than to blur distinctions.

16 In at least some cases (it is impossible to tell whether this was done consistently) the *phialai exeleutherikai* texts even identify owners who were *isoteleis* (metics who had been granted the special privilege of exemption from the *metoikion*, e.g. *IG* ii^2. 1565.5) and citizens of those other *poleis* who have been enfranchised by block grant (Thebes, *IG* ii^2. 1569.5; Olynthos, *IG* ii^2. 1553.25). The number of individuals named in the few surviving fragments of the Erekhtheion inscriptions (409/8-407/6 BC) is relatively small, but there are repeated appearances in *IG* i^3. 475 by "Phalakros of Paiania" and "Simias of Alopeke" (citizens), and by "Simon, resident in Agryle"; Simias appears again, with his slaves Sindros and Sannios, at the start of *IG* i^3. 476. (All of them, incidentally, get the same rate of pay, so the juridical distinction does not here correspond to an economic one.)

magistrates[17]. The symbolic power of law is seen again in a procedural technicality: if at Athens somebody claims to be your owner, but you insist that you are free-born, you cannot yourself defend your status in court, because you are hypothetically a slave and as such you have no independent procedural standing. Instead, you have to find a third party to vindicate your status by *aphairesis eis eleutherian* ("leading away to freedom"). The best-known example of this procedure is that of Pankleon in Lys. 23.9-10, whose supporters promise to produce his brother in this rôle; and Pankleon's case, indeed, well illustrates what you could get away with until and unless it was in somebody's interests to take legal action. Pankleon, we are told, is the run-away slave of Nikomedes, but he has been behaving in such a way that the plaintiff initially assumed him to be a metic, only discovering when he challenged Pankleon that the latter claimed instead to be a Plataian and therefore entitled to the rights of an Athenian citizen[18].

Athenian law was careful to draw major distinctions in principle between insiders and outsiders: slaves could only give evidence under torture; torture could never be applied to citizens; its use against aliens is uncertain, but metics (and therefore ex-slaves) seem to be exempt. But it is litigation which creates the pressure to determine the status of particular individuals: this may be part of the reason behind the acrimonious debates between the litigants over whether Milyas (in Dem. 29.5) and Kittos (in Isok. 17.49-55, and see further p.137 below) are slave or free. It may also underly the odd case of Aristarkhos the leather-cutter on the Attic Stelai, who is himself denounced and sold as the property of Adeimantos, together with an assortment of chattels which are described as his (Stele 6.21, 31-46). If Aristarkhos was really the slave of Adeimantos, then logically his chattels ought to have been listed as those of his master; if Aristarkhos owned the chattels, then logically he ought to have been an ex-slave and so exempt from denunciation: but under the circumstances, it will hardly have been in anybody's interest to plead his case.

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17 This text (Stroud 1974) draws an explicit and consistent distinction between slave and free: traders who are slaves are to be flogged (rather than fined, lines 30-2); the same fate awaits the *dokimastēs* himself (lines 13-16), despite the fact that he has very considerable authority over decisions involving coinage (lines 16-18).

18 Cohen (1973: 121 n. 48 and 1991: 249) sees this speech as evidence that slaves could be parties to suits, but this rests on the assumption that the speaker's aim in convincing the court of Pankleon's slave status is to continue with the case; more likely, I suspect, it is to give Nikomedes (who is present as witness, Lys. 23.9) the implicit backing of the court to recapture him. For an interesting parallel from a very status-conscious society, the American South in the 1850s, compare the case of the Mississippi steam-boat captain Simon Gray, a slave who continued to behave as if free for an extended period because nobody bothered to complain (Davis 1966: 229-230).

III. Citizens and non-citizens

We have dealt fairly extensively with the boundary between slavery and freedom. The other prominent division is between non-citizen and citizen, and here we can afford to be more brief, because the general pattern is in certain respects similar. Within the public context, we have again the strictness of statute and the way in which it is used as a weapon in litigation; and there are the same questions about how all this relates to the realities of everyday life.

The formal rules which regulate access to citizen rights in democratic Athens are strict, and if anything become stricter with the passage of time[19]. The most significant development occurs outside the chronological scope of this paper, but still deserves a mention: Athenian citizenship was at all times based on descent, but from 450 BC the necessary qualification was no longer a citizen father but citizen parentage on both sides. We may note, incidentally, that this rule was reaffirmed after the democratic restoration of 403/2 BC, even though there seems to have been some discussion of possible alternatives (Davies 1978). The naturalization of non-citizens was at all times rare (it required a legislative act and not, as in modern jurisdictions, simply an administrative decision), but the rules governing naturalization appear to have been revised and successively toughened on several occasions during the fourth century (Osborne 1981-3. iv: 167 gives details). It is certainly true that attested grants, many of them preserved in the form of honorific inscriptions, become more common during this period; but this happens no more than we would expect from the pattern of survival of inscriptions generally. It may be significant that mass grants honouring for instance the citizens of Plataia or of Samos become if anything less frequent over time[20].

Once again, we need to remember the symbolic significance of legal statutes. There is at Athens an astonishing range of procedures available for testing claims to exercise full citizen rights. A young man coming of age had to undergo a *dokimasia* or scrutiny to examine his right to the citizenship: it occurred in two stages, one to check his age and the

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19 Quite the opposite applies, however, to the boundaries between the four census groups into which Solon in the 590s is said to have divided the Athenian citizen body. Much is made of these groups in works of constitutional history (e.g. *Ath.Pol.* 7), but they leave surprisingly few traces in fourth-century legal texts: they play an incidental part in two laws cited at Dem. 24.144 and 43.54, they seem to appear in *IG* ii^2. 30.12 (too fragmentary to be comprehensible), and they are mentioned in *Ath.Pol.* 47.1 in a context which may suggest that by the time of writing (320s BC) they were formally valid but effectively obsolete. It is of course possible that our fourth-century sources were mistaken in attributing so much significance to the census-groups in Solon's day; if not, then we may conclude that the internal boundaries between citizens declined as the external boundaries between citizen and non-citizen continued or developed.

20 These assertions are based on Osborne's figures (Osborne 1981-83) as analysed in Todd 1993: 174-6.

second whether he was indeed qualified by birth. This procedure is not to be confused with various other types of *dokimasia*, two of which are worth mentioning here[21]. Each year before taking up office every member of the council and every public official had to undergo a *dokimasia* (or in the case of the nine arkhons a double *dokimasia*), the function of which seems to have been to check formal qualification for office, or in other words the possession of full citizen rights. And anybody, whether holding office or not, who tried to deliver a public speech in the assembly or the lawcourts could at any time be challenged by *epangelia* and forced to undergo a *dokimasia rhētorōn* (lit. "of orators") if it was alleged that he was subject to *atimia* (judicial deprivation of citizen rights, including the right of involvement in public life). If such a person ignored the terms of his *atimia*, incidentally, he could alternatively be summarily arrested by *apagōgē*, while even those who kept their heads down were not exempt from further testing: we hear of several occasions on which the assembly declared a *diapsēphisis*, at which every citizen's right to the citizenship would be examined afresh[22]. Perhaps the most striking group of procedures, however, was reserved for use against metics who got too big for their boots. Metics were non-citizens resident in Attica, and were subject to various restrictions[23]. As a mark of their status, they had to be registered under the name of a citizen as their *prostatēs* or protector. We have no very clear idea of the duties of the *prostatēs*: it is often assumed that he had to represent his client in court, but this hypothesis is not wholly convincing[24]. It may indeed be that the rôle of the *prostatēs* was

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21 For the *dokimasia* of those coming of age, see *Ath.Pol.* 42.1-2; for the *dokimasia* of councillors and public officials, see *Ath.Pol.* 45.3, 55.2-4, and (for examples) Lys. 16, 25, 26, 31; Aiskh. 1 provides the clearest example of the *dokimasia rhētorōn*. Other uses of the *dokimasia* procedure concern disabled pensioners (*Ath.Pol.* 49.4, with an example at Lys. 24), the cavalry (*Ath.Pol.* 49.1-2, Lys. 14.8), and newly enfranchised citizens (this is attested in the case of mass grants at Dem. 59.105, and for individual grants epigraphically from 318 BC, for which see Osborne 1981-3. iv: 164-7).

22 A *diapsēphisis* was a general revision of the membership rolls of the demes or civil parishes of Attica; it was deme-membership which made you a citizen. Example of *diapsēphisis* underly Dem. 57 and (if this is a genuine speech) Is. 12.

23 For instance, a metic could not own land; and all male and at least some female metics were obliged to pay the *metoikion* (the only personal direct regular tax known at Athens). It was possible to gain exemptions from these obligations: the grant of *enktēsis* allowed a metic to own land, and that of *isoteleia* (lit. "equality of taxation") allowed him to be taxed on the same basis as citizens. These various exemptions allowed the Athenians to offer subtile gradations of privilege without granting citizenship itself.

24 The crucial case is Lys. 12, delivered probably in 403/2 by Lysias in person when he was almost certainly either a metic or at most an *isotelēs* (it is highly unlikely that he ever had the chance to exercise the privilege of citizenship which was offered but immediately cancelled after the democratic restoration). It might at first sight seem possible to explain away this personal appearance by arguing that homicide was a uniquely personal matter; but in fact Lys. 12 was formally a prosecution in the overtly civic context of *euthunai* (the examination of the accounts of a public official). Lysias' later

purely nominal - and if so, that would make even more striking the *graphē aprostasiou*, a public indictment against a metic who fails to register under a patron, and by such failure ostentatiously refuses to acknowledge the subordinate status that is proper for a metic. Alongside this procedure are two others, which between them offer a unique example of institutionalized double jeopardy at Athens: the *graphē dōroxenias* ("public indictment against alien bribery") existed, according to Hypereides (frag. *Aristagora*), for the sole purpose of retrying the case if a defendant appeared to have been "unjustly acquitted" in a *graphē xenias* (public indictment for pretending to be a citizen).

This is procedural overkill enshrined in legislative form, and even more illuminating is the severity of the penalties (in each case statutory ones). The *dokimasia* and the *diapsēphisis* were in principle declaratory actions: a rejected magistrate suffered no penalty other than his humiliation, and a person convicted at a *dokimasia rhētorōn* had his *atimia* thereby confirmed[25]. Similarly, a man rejected because of his birth either on coming of age at his *dokimasia* or subsequently at a *diapsēphisis* simply reverted to being a metic - unless he chose to raise the stakes, because he was entitled under such circumstances to appeal, but if he did so and lost, he would be sold into slavery. Enslavement was evidently regarded as a peculiarly appropriate penalty for non-citizens who insisted on ignoring the limitations of their status: it seems to have been what happened also to those convicted at a *graphē xenias* (thus Dem. 59.16-17) or *graphē aprostasiou* (as at Dem. 25.57), and presumably (though this is nowhere stated) at a *graphē dōroxenias* as well.

Once again, it is adversarial litigation which supplies the context in which we meet these regulations in action. We have already noted that the procedural rules governing enfranchisement appear to have been successively tightened over the course of the fourth century. Much of our knowledge of this derives from Dem. 59; in this speech Apollodoros prosecutes Neaira by *graphē xenias*, a prosecution which (as Apollodoros readily admits, Dem. 59.16) is intended chiefly to humiliate his political rival and Neaira's consort Stephanos. Underlying our best source for the *diapsēphisis* of 346 BC is another Demosthenic speech: Dem. 57, with its allegations of malpractice set in the context of a feud between two leading members of the deme Halimous, both of them active in deme politics[26]. What is more difficult is to determine how far the rules could in practice be ignored by those who kept a low profile and avoided making enemies. We do

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speech *Against Hippotherses* is inconclusive: this was delivered by a third party on Lysias' behalf, but the speaker may have been a *sunēgoros* (advocate) rather than Lysias' *prostatēs*.

25 He was lucky: an *atimos* who was arrested by *apagōgē* could expect to be executed, possibly without trial.

26 Euboulides the opponent is the current demarkh, a post held previously and - it is alleged - notoriously by his father (Dem. 57.26, 60), and on another occasion by the speaker Euxitheos (Dem. 57.63).

hear of *atimoi* who tried to exercise the rights of citizenship illegally (Hansen 1976: cases 17, 21, 31, 33), and this may have been a miscalculation of the odds rather than a deliberate attempt to defy the law. And there are illuminating fragments of information (e.g. Deinarkhos frag. *Agasikles* with Harpokration's gloss sv. *skaphēphoroi*) which imply at least a rumour - but is this more than paranoia? - of shady demes like Halimous which would allow rich metics to buy places on the deme register and therefore the citizenship.

IV. Patterns of development?

To what extent if any can we trace developments over time in the importance of legal status at Athens? We have already noted the main problem, that the patterns are complex and that the significance of any piece of information depends largely on the context in which we meet it. What does seem beyond doubt, however, is that on the large scale any evolution is of a type contrary to that hypothesized by Maine: the threefold distinction between slave and metic and citizen belongs to the classical and not to the archaic world, and the most important change in the formal rules of citizenship is the restrictive legislation of 450 BC. But what about small-scale changes within the fourth century? It is often argued that from the middle of the century we are beginning to see the breakdown of status-distinctions at least in commercial contexts. The most important questions here surround the *dikai emporikai* (lit. "cases involving *emporoi* or maritime traders"). This was a new procedure set up around the middle of the century offering streamlined access to rapid justice and granting procedural equality to all free men, that is to metics and aliens on the same footing as citizens[27]. It is often claimed that in such cases procedural rights were granted to slaves also, but on this point we must be careful: the argument relies on the sole case of Lampis, described as Dion's *oiketēs* or *pais* (Dem. 34.5, 10), both of which are words generally used of slaves; Lampis is himself a *nauklēros* (ship-owner, Dem. 34.6), and during the course of the arbitration which preceded the trial he was allowed to testify as a witness (Dem. 34.18-19). Slaves, of course, could never normally witness in Athenian courts[28], and there has been

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27 Gernet's 1938 article on the *dikai emporikai* (reprinted as Gernet 1955: 173-200) remains important, but previous work has to some extent been superseded by the wide-ranging treatment of the subject by Cohen (1973). Not all of Cohen's arguments, however, have found favour with later scholars: see e.g. the reviews by Gauthier (*Revue des études grecques* 87 [1974] 424-5) and by MacDowell (*Classical Review* 26 [1976] 84-5). There are relevant chapters in a number of more recent texts, such as Velisaropoulos (1980: 235-67). The date at which the procedure was introduced must be after Xen. *Poroi* (cf. § 3.3), a text usually dated to 355 BC, and before Dem. 7 (cf. § 12), delivered around 342.

28 It has sometimes been argued that slaves could witness in homicide cases; but the evidence proposed for this belief, as MacDowell (1963: 102-9) shows in a detailed investigation, is inconclusive. The use of the word *martus* and its cognates at Dem. 34.18-19 is important: it rules out the possibility

considerable discussion over whether Lampis is a specially privileged slave (is it because he is *khōris oikōn*?) or a slave in a specially privileged procedure (is it because this is the arbitration, or because of the *dikē emporikē?*). But once again there is the question of context: is Lampis really still a slave, or is the language of slavery being applied to an ex-slave in the familiar context of rhetorical abuse[29]?

Perhaps the most important question about the *dikai emporikai* is the scope of the procedure. The crucial evidence here is Dem. 32.1, an ambiguous paraphrase of the law, in which we are told that *dikai emporikai* were available for *emporoi* and *nauklēroi* in cases involving "*sumbolaia* (agreements) to and from Athens and concerning which there are *sungraphai* (written agreements)". The majority of scholars would now agree in rejecting Gernet's attempt to read these clauses disjunctively (i.e., any agreements to carry goods to and from Athens, or else written agreements to transport them anywhere, Gernet 1955: 186-7); preferable is a conjunctive reading, "agreements, and more specifically written ones, [to carry goods] to and from Athens" (thus e.g. Cohen 1973: 101). If so, the procedure will have been available only in fairly restricted circumstances, which fits in well with what we know about the legal regulation of trade at Athens: we possess a number of laws dealing in detail with the import of grain to Athens itself, but very little of broader application.

Several aspects of the *dikai emporikai* are revolutionary, most notably their reliance on written evidence, but they seem to have had surprisingly little impact on the general development of Athenian law, in which witnesses continue to be valued ahead of documents[30]. There is perhaps only one area in which a similar development has been

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that Lampis is giving evidence as a slave under torture (for which the terminology used is always *basanos* and its derivatives). One odd passage (which occurs, perhaps significantly, in the speech under consideration) is Dem. 34.31, "you have no witness (*martus*) either slave or free"; but a negative hypothesis is never as strong as a positive statement, and this may be a rhetorical dismissal along the lines of "you have neither a legitimate nor an illegitimate witness" or "you have no witness either living or dead" (which would not imply that dead people could witness in court).

29 Compare the discussion of Agoratos and Nikomakhos on p.126 above. What is said here about Lampis applies *a fortiori* to Zenothemis, described as a *hupēretēs* ("underling", but by no means necessarily slave) in Dem. 32.4. The fact that we meet metics and (ex-)slaves as litigants so much in the extant *dikē emporikē* cases is notable but not necessarily significant: after all, we are not likely to meet them in disputes involving land.

30 Cohen is the most wide-ranging proponent of the view that the *dikai emporikai* initiated revolutionary legal change, but subsequent scholars have not generally been convinced for instance by his argument that specialist juries were used in such cases (Cohen 1973: 93-95): Dem. 35.43-46 is conventional flattery, and Dem. 32.10 is the "everybody knows" motif familiar from Arist. *Rhet.* 3.7.7 = 1408a32-6. For the continuing use of witnesses at Athens in contexts where modern jurisdictions have traditionally used documents (e.g. to prove legitimate descent, as in Dem. 57), see Humphreys (1985: 322), Thomas (1989: 41-4), Todd (1990: 29-31). After c. 380 BC, witnesses appeared in court merely to validate statements that had previously been submitted on their behalf in writing, but as late as c. 350 a

claimed, and that is banking, on which my respondent Ed Cohen argued plausibly at our last meeting in California and now in his book, but I have to say that I do not find his views convincing. Much of his case rests on the single statement in Dem. 36.14 that the sons of Pasion leased their bank to four men and "set them free" (Cohen 1991: 240 n. 3 and 1992: 76), but alternative interpretations are possible[31]. And there is something of a dilemma here, which Cohen has not to my satisfaction resolved. In the early fourth century, it is clear that a banker's slave could have been tortured: this is the point behind the dispute over Kittos (cf. p.131 above) in Isok. 17, dated in the 390s; and this is presumably the reason why a banker would customarily free one or more of his most trusted slaves, who could thereby witness to transactions undertaken in the master's absence. It is of course possible that the rules governing such slaves were changed in the mid fourth century - there is certainly no explicit evidence later than Isok. 17 to their possible torture - and a suitable context for such a change would be the introduction of the *dikai emporikai*, if you believe that this had widespread implications throughout the whole new class of *dikai emmēnoi* (monthly cases) to which the *dikai emporikai* belonged. But if so, you are left with *dikai metallikai* (mining cases), which also belonged to the class of *dikai emmēnoi*, and in which in a case in the mid 340s it was possible to issue a challenge for the torture of a slave acting as his master's agent (Dem. 37.40-4)[32]. So I am not convinced by attempts to maximalize the role of the *dikai emporikai* either by including slaves within the terms of those granted procedural equality in such cases, or by magnifying the influence of this procedure on the supposed development of Athenian law.

V. Conclusions

Status-boundaries, therefore, remained at all times flexible in certain contexts and rigid in others, but we have seen very little evidence for any supposed breakdown in the system within the fourth century. On the question of contract there is less to say. I have to admit that I am not convinced that there is such a thing as a doctrine of contract at

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litigant can plausibly imply that a document can only be trusted so long as its witnesses are still alive to validate it (Dem. 36.26-7).

31 The crucial phrase is *eleutherous apheisan* (here translated "set them free"): idiomatically this could refer either to the granting of freedom (thus implying, according to Cohen, that they previously took out the lease when they were still slaves), or else to a binding declaration that they were free of legal claims. Either interpretation is possible: one piece of evidence which in my view tells slightly in favour of the latter is the statement at the end of the sentence that the sons of Pasion "did not at that time prosecute" not only the present defendant Phormion, but also these four men.

32 The fullest list of *dikai emmēnoi* (*Ath.Pol.* 52.2) does not contain *dikai metallikai* (or for that matter the *dikai emporikai*), but the *dikai metallikai* are described as *emmēnoi* in Dem. 37.2, and grouped together with the *dikai emporikai* at *Ath.Pol.* 59.5.

Athens: in a system where even the text of a legal statute can be regarded as a form of evidence to be used by the litigant, or (as we might say) a persuasive supporting argument, then the only thing that allows a court to distinguish between the generality of agreements and those contractual agreements which are legally binding is presumably whether or not the litigant wins his case. But that is another story, and one which perhaps should not be voiced too loudly at a meeting of a society which so rightly pays tribute to the memory of Hans Julius Wolff[33].

[33] Wolff (1957) argued in a widely influential paper that a contract at Athens did not itself create a basis for legal action, because the essence of a contract in Greek thought was a promise made on oath, which was a religious matter outside the jurisdiction of the courts; instead, the contract put the debtor under a general obligation to his creditor (the crucial term here is *Zweckverfügung*, an agreement "designed to secure only limited ends"), on the basis of which he could bring not a contractual but a delictal action for damages. My own views on contract at Athens are set out in Todd (1993: 264-8).

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Status and Contract in Fourth-Century Athens: A Reply to Stephen C. Todd

Stephen Todd notes correctly the "immense importance" of the subject of "contractual autonomy" at Athens - the right to enter into agreements legally-enforceable without regard to a party's personal status. If Athenian citizens alone could enter into legally-enforceable commitments, then metics, slaves and women[1] would be precluded not only from access to the courts, but from virtually all independent commercial activity. But a demonstration of contractual autonomy - even if limited to business matters - would be a potent challenge to the prevailing scholarly view of Athens as a society dominated by an elite minority of adult male citizens who alone had legal rights. Such exclusion has long been generally assumed - but without discussion of the underlying evidence or implications. In his effort to answer recent challenges to this *opinio communis*, Todd notes the impossibility of dealing in a short space with a subject that raises such complex considerations as the underlying nature and recognition of contract at Athens (for Todd, "another story" for another time). Similarly - although my forthcoming book "The Athenian Nation" will discuss in detail the legal and litigational rights of all residents of Attica - in this paper I can only raise some general considerations and analyze a few of Todd's key interpretations.

Absence of Evidence for Evolutionary Conjectures

Todd rightly rejects the applicability to Athens of Maine's "famous phrase" to the effect that "progressive societies" are characterized by a "movement from status to contract"[2]. He suggests instead that "on the large scale any evolution is of a type contrary

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1 Abiding by Perikles' suggestion and Athenian *mores*, women are not explicitly mentioned by Todd. His equation of citizenship status with political rights, exercised exclusively by adult male citizens, would necessarily deny women status as "citizens" for contractual purposes: the essence of an Athenian woman's citizenship is generally seen as the capacity to give birth to Athenian citizens. See Sealey 1990: 19; Just 1989: 24. For the peripheral aspects of female citizenship, see Patterson 1986; for the concept of "passive" citizens, see Mossé 1979, Lotze 1981.

2 Instead of studying "definable historical circumstances" (Humphreys 1983: 229), Maine erected grandiose theories only superficially confirmed by cursory references to a variety of ancient

to that hypothesized by Maine" (p.135) - although the only evidence he offers is that citizenship requirements were "revised and successively tightened" beginning as early as 450 and continuing through the fourth century. [This focus on citizenship is misplaced: Todd's analysis is vitiated by his failure to differentiate between political rights (the ability to participate in governmental decision-making) and legal rights (the ability to use judicial processes.)] In fact, both Maine's evolutionary pattern and that of Todd are irrelevant and unconfirmable. Virtually no evidence for Athenian contractual practices or litigational procedures predates the fourth century, precluding demonstrations of developmental patterns over the course of classical history. In any event, Todd actually does focus on the fourth century, a marked improvement over Maine who supported his arguments primarily by allusions to Roman law - about which he knew virtually nothing[3].

Economic Reality and the "Discourse of Law"

In recent years, scholars have come to recognize that, for any society, the formal rules of legal substance and procedure cannot be understood, and are not applied, in disassociation from psychological, economic and social realities, and that these rules, "the law," perform functions beyond the narrow control of behavior, including the statement of societal values which may be quite different from social reality. As he has done before - most notably in 1990 a and b - Todd here helpfully emphasizes these broader functions of law. He notes the law's "symbolic power", and the influence of social context on status denomination in the law courts. But he ignores the role of law as a mediating discourse between verbalized communal values, often received from a conservative tradition, and a reality which may be quite different[4]. This mediation is the correct explanation for the contradictory dichotomy described by Todd: legalistic indications of the importance of status juxtaposed against recurrent examples of a reality where "status distinctions are exceedingly vague" (p.125) and "the impression we receive from the texts is one of considerable flexibility" (p.127). Todd is a keen observer, and the contradictions he notes are real. But in attributing these inconsistencies and seeming discrepancies wholly to "rhetorical context," Todd ignores the two elements which

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societies - all intended to justify Maine's position on constitutional development in 19th-century India, in a debate then being conducted in England through reference to Anglo-Saxon society. (See Kuper 1985: 278-9 whose magisterial explication of the sources and purposes of Maine's *Ancient Law* should be added to the references in Todd and Millett 1990: 7, n. 12.)

3 According to Maine's friend, J. F. Stephen, "Neither Maine himself, nor I suppose, anyone else in England, knew anything whatever about Roman Law at that time. . . . I suppose he knew the Institutes, but I doubt if he ever knew much of the Pandects." (Quoted at Kuper 1985: 278.)

4 See Humphreys 1985 and Cohen 1991: 239-40, 247, 256-58.

explain why Athens in the fourth century permitted court access to a broad range of non-citizens, especially in business contexts: (1) the impact of economic factors, and (2) the inevitable deviations, incongruities and silences in law as a "discourse" expressing and accommodating social values.

(1) Economic Reality

In the fourth century, a highly-variegated population lived in Attica - citizens, who held a fiercely-guarded monopoly on political power; large numbers of slaves who included not only an object and powerless mass of exploitees but also thriving businessmen and public servants with high responsibilities and considerable actual power[5]; and many free non-citizens (metics), some of whom had personally immigrated to Attica, others of whom were descendants of earlier settlers. Numerous metics (including at least some women) were involved in commerce. And, particularly in the maritime sphere, many persons who were not resident in Attica performed business functions which facilitated Athenian life and required agreements with residents of Attica. Especially if Todd is correct in rejecting the existence of rules at Athens meaningfully determining on a substantive basis the enforceability of agreements (what he terms a "doctrine of contract")[6] and if victory in court litigation alone differentiates "the generality of agreements and those contractual agreements which are legally binding" (p.137),

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5 Slave businessmen: see below n. 14. For key governmental functionaries who were *douloi*, Hansen 1991: 244-45; for court access by public slaves, Garlan 1988: 42. Cf. Aischines 1 where a wealthy slave, Pittalakos, battles with a powerful citizen, Hêgêsandros, for the sexual favors of Timarchos, a young male citizen: the slave not only makes use of his money to maintain Timarchos in the slave's own home for a prolonged period of sexual exploitation - he ultimately brings a legal action against his citizen rival seeking through the Athenian courts redress for the citizen's jealous assault against the slave's home and person. This lawsuit is possibly an example of servile use of the γραφὴ ὕβρεως which is reported (Dem. 21.47, cf. Ais. 1.16) to have been available to redress insult to the honor of a slave. Demosthenes' testimony is rejected by orthodox scholarship as conceptually impossible (see Murray 1990: 140). But Todd (1993: 270) leans toward recognizing some degree of "residual honor" (τιμή) for slaves. Cf. Xanthakê-Karamanou 1989: 46, n.

6 For the jurisprudential issues relating to promises and their legal effects (the "doctrine of contract"), see Atiyah 1981 and the considerable scholarly literature referred to there. For analysis of the non-legal elements of a promise, see Searle 1971; Rawls 1955. Philosophical issues notwithstanding, Athenian litigants do make frequent reference to legislation mandating the primacy of "whatever arrangements either party willingly agreed upon with the other" [τοῖς νόμοις τοῖς ὑμετέροις (sc. Ἀθηναίοις) οἳ κελεύουσιν, ὅσα ἄν τις ἑκὼν ἕτερος ἑτέρῳ ὁμολογήσῃ κύρια εἶναι (Dem. 56.2.] Cf. Dem. 42.12; 47.77; Hyper., *Ath.* 13; Dein. 3.4; Plato, *Symp.* 196c.

business needs would mandate some form of court access for non-citizens involved in commerce[7].

(2) The Discourse of Law

Todd documents the inordinate extent to which male Athenian citizens jealously guarded their monopoly on political power. This obsession was, of course, reflected intensely in their ideology - as "autochthonous," in contrast to the other Greek entities which supposedly had ousted indigenous peoples[8], the Athenians justified the rigid system of double endogamy intended to perpetuate minority exercise of governmental power. To the extent that control of the legal system was a manifestation of political power[9], this control could never easily be shared with outsiders. Even mere access to the courts implied an involvement in the public life of Athens which dominant Athenian ideology could not readily allow to outsiders - even women "citizens." Accepting this ideology, scholars have asserted unequivocally that only Athenian male citizens had open access to Athenian courts[10]. Cases demonstrating participation by non-citizens-merchants involved in commercial maritime cases ("*dikai emporikai*"); resident aliens appearing in the polemarch's court; foreigners having rights under special diplomatic

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7 Proponents of the "autonomy of law" suggest that legal systems, representing a conservative and learned tradition, often function to some extent autonomously from other societal structures. See especially Watson 1981, 1984 and 1985, who gives special attention to Roman law. But this theory is best applied to legal systems operated by academic professionals following a learned tradition transmitted in formal law schools - of which Rome and modern Western societies (but not Athens) are prime examples.

8 See Plato, *Menexenos* 245c-d: οὕτω δή τοι τό γε τῆς πόλεως γενναῖον καὶ ἐλεύθερον βέβαιόν τε καὶ ὑγιές ἐστιν καὶ φύσει μισοβάρβαρον. διὰ τὸ εἰλικρινῶς εἶναι Ἕλληνας καὶ ἀμιγεῖς βαρβάρων. οὐ γὰρ Πέλοπες οὐδὲ Κάδμοι οὐδὲ Αἴγυπτοί τε καὶ Δαναοὶ οὐδὲ ἄλλοι πολλοὶ φύσει μὲν βάρβαροι ὄντες, νόμῳ δὲ Ἕλληνες, συνοικοῦσιν ἡμῖν, ἀλλ' αὐτοὶ Ἕλληνες, οὐ μειξοβάρβαροι οἰκοῦμεν . . . . The Platonic passage is ironically attributed to Aspasia, the non-Athenian consort of Perikles. On the ideological tenor of this passage, see Loraux 1986: 317-24; for the historical inaccuracy of the Athenian claim to autochthony, see Connor 1994: 35-38.

9 Standard treatments of Athenian law - Lipsius, Beauchet, Harrison - tend to focus on the role of the courts in resolving private disputes. For the important political role of the *dikastêria*, see Hansen 1990, esp. 233-39.

10 A woman "in Athenian law. . . was not considered a legally competent, autonomous individual" (Just 1989: 26). "Nor could they sue, plead or even appear in a court of law." (Walters 1993: 194). Garlan 1988: 42: "slaves could not enter into litigation." Harrison 1968: 108: "As a general rule a slave could not appear in court as a plaintiff." Carey 1992: 102: "a slave lacks legal personality," following Finley 1951 [1985]: 104-5 [who bases his conclusion on evidence not from Athens at this time, but from Delphi much later (see p. 292, n. 78)]. As to foreigners at Athens, "les étrangers. . . ne sont pas considérés comme des sujets de droit." Gauthier 1972: 155.

arrangements ("*symbola*") - have been deemed spectacular exceptions merely confirming the general rule of exclusivity[11]. Other examples have been explained away, often by resort to contrived explanations arising from *a priori* assumptions but lacking evidentiary basis, as in the example of Pankleôn (Lysias 23) discussed below.

In fact, male citizens had a monopoly only of political power - the right of governmental decision-making. Economic, social, sexual, religious and other dominances were far more equivocal and inclusive[12]. Despite the veil of indirection imposed rhetorically by Athenian ideology, there is overwhelming evidence that many Athenian court procedures were open not only to adult male citizens, but to the entire resident population - metics, women, children, and slaves, and sometimes even to non-residents[13]. Economic reality was consistent with court access, in business matters, for non-citizens with money, such as slaves operating their own businesses[14] and foreigners

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11 See Gauthier 1972: 149-56; Paoli [1930] 1974: 88-109; Cohen 1973: 59-62.

12 A woman, for example, was always the chief religious official of the Athenian *polis*. This priestess of Athena Polias, holding a hereditary position, was not without temporal power and authority- in 508 she personally excluded the King of Sparta, Kleomenês I, from the Acropolis (see Herod. 5.72).

13 As to metics: the polemarch's court was available for certain "private cases" (*dikai idiai*), "those for metics, and isoteleis and proxenoi." [Ath. Pol. 58.2-3: δίκαι δὲ λαγχάνονται πρὸς αὐτὸν (sc. τὸν πολέμαρχον) ἴδιαι μόνον. αἵ τε τοῖς μετοίκοις καὶ τοῖς ἰσοτελέσι καὶ τοῖς προξένοις γιγνόμεναι. καὶ δεῖ τοῦτον . . . τοῖς διαιτηταῖς ἀποδοῦναι. αὐτὸς δ' εἰσάγει δίκας τάς τε τοῦ ἀποστασίου καὶ ἀπροστασίου καὶ κλήρων καὶ ἐπικλήρων τοῖς μετοίκοις. καὶ τἄλλ' ὅσα τοῖς πολίταις ὁ ἄρχων. ταῦτα τοῖς μετοίκοις ὁ πολέμαρχος.] Even in "public" cases (matters involving a perceived Athenian state interest: δίκαι δημόσιαι), non-citizen involvement was not precluded. Sometimes (e.g. Dem. 21.47, 24.63, Ais. 1.32) only citizens were given the right to serve as voluntary prosecutor (ὁ βουλόμενος). But often the enabling legislation contained no explicit limitation to citizens as prosecutors. At Dem. 59.66, Epainetos,"certainly a foreigner" (Carey 1992: 121), brings a *graphê* for *moicheia*. Other examples of prosecution apparently open to metics:Dem.59.16; 21.175; 24.105; possibly 59.52. Cf. Lipsius [1905-15] 1966: 243-4; Harrison 1968: 195 n. 1.

14 For example, a group of "nine or ten" slave leather-workers are reported (Aischinês 1.97) to have operated a workshop: the slave in charge (*hêgemôn tou ergastêriou*) paid their master a fixed sum of three obols per day, and the other slaves, two. Cf. the monthly accounting for the perfume business operated by the slave Meidas (Hyp. *Ath.* 9). Similarly, Milyas, who was reponsible (*diôikêsen*) for the manufacturing businesses left by Demosthenes' father, is said to have been entitled to keep the profits from the operation of the businesses, while paying the heirs only a fixed fee. [See Francotte 1900: 12; Bolkestein 1958: 63. Demosthenes, many years later, refers to Milyas as "our freedman" (ὁ ἀπελεύθερος ὁ ἡμέτερος) (Dem. 27.19), but there is no indication that Milyas was not still a slave when he was operating the workshops.] Slave craftsmen employed in the construction trades are known to have received wages in money; when not actually living in the master's quarters, these unfree laborers paid a portion of their compensation to their masters. (See Randall 1953; Burford 1963.) Cf. the charcoal-burner in Menander's *Epitrepontes*, a slave who lives outside the city with his wife and merely pays to his owner a portion (ἀποφορά) of his earnings (see l. 380). For slave enterprise in banking and the legal adaptations permitting it, see Cohen 1992: 90-101.

engaged in maritime activities - and for women with independent assets, especially when formally judged to be "masters of themselves" (αὐτῆς κυρία)[15].

My two books cited by Todd (*Ancient Athenian Maritime Courts* and *Athenian Economy and Society*) offer considerable evidence of access to Athenian courts by non-Athenians, including women and slaves, involved in business matters such as maritime commerce and banking, and of the legal adaptations and mechanisms permitting this access. Todd terms this evidence "plausible" but ultimately "unconvincing." He cites the torture of slaves for evidentiary purposes as inherently incompatible with their participation as parties and witnesses in litigation, objecting in particular to my interpretation of Lysias 23 as showing that - like metics - slaves engaged in commerce could be sued in the polemarch's court. But consider:

Lysias 23: The Case of Pankleôn

A remarkable item of evidence, a speech from the early fourth century (Lysias 23)[16], confirms access to the polemarch's court for actions against slaves involved in commercial pursuits. In answering a defendant's contention that a case could not be brought before the polemarch because the defendant, Pankleôn, was not an alien, but a Plataian (and therefore a citizen of Athens)[17], a plaintiff insists that the action has been

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[15] In Dem. 59 we learn that Neaira had been found in an earlier case to be of free status and the head of her own *oikos*. [Dem. 59.46: καὶ οὗτοι ἐνέμειναν αὐτῇ. τὴν μὲν ἄνθρωπον ἐλευθέραν εἶναι καὶ αὐτὴν αὑτῆς κυρίαν.] The ancient rubric of Dem. 59 itself is "Against Neaira"; the summary of argument prepared in antiquity is explicit as to Neaira's direct status as defendant (κατὰ τοῦτον τὸν νόμον ἐπὶ Νέαιραν ἥκει Θεόμνηστος.] Neaira is repeatedly pointed-out as present in the courtroom(e.g. §§ 14, 16, 17, 19, 22, 24, 32, 34, 40, 43, 47, 48, 62, 63). Yet so persistent is the assumption against women's involvement in legal matters at Athens that the editor of the most recent edition of this speech still insists that "women did not appear in Athenian courts, as witnesses, plaintiffs or defendants" (Carey 1992: 16)!

[16] Concerning the substance of the claim underlying the litigation, no information has survived. Even the date of the court presentation is uncertain. Lamb 1930 suggests shortly before 387 since Thebes and Plataia are portrayed as still hostile (§15). MacDowell has argued (1971) that the speech was delivered in 400/399, the same year as Isokrates 18 which its speaker (§1) claims to be the first use of a paragraphic plea against jurisdiction. The plea against jurisdiction in Lysias 23, however, is referred to as an *antigraphê* (§5), rather than by the more familiar rubric of *paragraphê*, the term universally employed in later usage. See Wolff 1966. Thus the speech - although often cited by scholars - is almost always noted only in the context of the vast disputative literature concerning pleas against jurisdiction.

[17] For the grant of Athenian citizenship to the Plataians prior to 429, see Thucy. 3.55.3, 63.2, 68.5; 5.32.1; Dem. 59.104-106; Isok. 12.94. In the fourth century Plataians in Athens constituted a recognizable minority community with its own known gathering places. Lysias 23.6: ἀκριβέστατα ἂν

properly lodged in the polemarch's court. Pankleôn, he claims, is not a citizen: the Plataians do not acknowledge him as a member of their community; he is unknown in the citizens' deme where he alleges membership; he has previously litigated as a defendant in the polemarch's court[18]. Indeed, the plaintiff continues, the defendant is actually a slave. Nikomêdês has proffered a deposition asserting that he is Pankleôn's owner - and the plaintiff himself has seen Pankleôn being led off by Nikomêdês (§§ 8-9). Even after ample opportunity, Pankleôn was unable to find anyone, even a relative, who would assert, in proper legal form, his allegedly free status. According to the plaintiff, the sole issue concerning the defendant's status is the identity of his owner: a woman had openly asserted, before a crowd which included a number of Pankleôn's associates, her ownership of Pankleôn and had prevented Nikomêdês from taking possession of him[19]. Indeed, the largest part of the plaintiff's speech (§§ 7-12) is devoted to elaborations on the defendant's slave status, with the triumphant conclusion that the defendant has by his own actions acknowledged his unfree status[20].

The speaker's insistence upon the defendant's servitude presupposes the admissibility of cases against slaves in the polemarch's court. Unless the polemarch's court was actually open to participation by slaves, the plaintiff would never have argued - in a speech seeking to maintain an action before the polemarch - that the defendant was a slave[21]! This conclusion is so compelling that the perceptive 19th-century scholar Wilamowitz (1893: II.368 ff.), writing long before the conceptualization of law as discourse and the recognition of legal systems as mediators between social reality and societal values, sought to avoid this ideologically-unacceptable conclusion by suggesting that the plaintiff really had no interest in pursuing an action against the defendant! He was instead merely trying to get the slave returned to Nikomêdês (in Todd's more

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ἔφασάν με πυθέσθαι ἐλθόντα εἰς τὸν χλωρὸν τυρὸν τῇ ἔνῃ καὶ νέᾳ· ταύτῃ γὰρ τῇ ἡμέρᾳ τοῦ μηνὸς ἑκάστου ἐκεῖσε συλλέγεσθαι τοὺς Πλαταιᾶς.

18 § 5-6: Πλαταιῶν . . . πάντες ἀγνοοῦντες τὸ ὄνομα αὐτοῦ. § 3: Δεκελειῶν . . . οὐδεὶς ἔφασκε γιγνώσκειν αὐτόν . . . ἑτέρας δίκας τὰς μὲν φεύγοι τὰς δ' ὠφλήκοι παρὰ τῷ πολεμάρχῳ. § 13: ἐν τῇ ἀντωμοσίᾳ γὰρ τῆς δίκης ἣν αὐτῷ ἔλαχεν Ἀριστόδικος οὑτοσί. ἀμφισβητῶν μὴ πρὸς τὸν πολέμαρχον εἶναί οἱ τὰς δίκας διεμαρτυρήθη μὴ Πλαταιεὺς εἶναι.

19 § 10: γυνὴ δὲ φάσκουσα αὐτῆς αὐτὸν εἶναι δοῦλον. ἀμφισβητοῦσα τῷ Νικομήδει. καὶ οὐκ ἔφη ἐάσειν αὐτὸν ἄγειν . . . (§ 11) εἰς τοῦτο δὲ βιαιότητος ἦλθον οἵ τε παρόντες τούτῳ καὶ αὐτὸς οὗτος. ὥστε ἐθέλοντος μὲν τοῦ Νικομήδους ἐθελούσης δὲ τῆς γυναικὸς ἀφιέναι. εἴ τις ἢ εἰς ἐλευθερίαν τοῦτον (ἀφαιροῖτο) ἢ ἄγοι φάσκων ἑαυτοῦ δοῦλον εἶναι. τούτων οὐδὲν ποιήσαντες ἀφελόμενοι ᾤχοντο.

20 §12: εὖ εἰδὼς ἑαυτὸν ὄντα δοῦλον ἔδεισεν ἐγγυητὰς καταστήσας περὶ τοῦ σώματος ἀγωνίσασθαι.

21 This is an example of the heuristic method sometimes termed "forensic attestation," viz. the confirmation of a general practice by a litigant's claim that presupposes such practice, even if we cannot establish the truth or falsity of the litigant's claim. See Cohen 1990.

sophisticated language, "to give Nikomedes the implicit backing of the court to recapture him," n. 18)[22]. This explanation presents insurmountable difficulties:

1) although Lysias' brief procedural speech provides no information as to the nature of the plaintiff's underlying claim (other than a reference to the defendant's involvement in commercial activity in a fuller's shop), there is no suggestion, in the speech or anywhere else in ancient testimonia, that the plaintiff has no interest in pursuing the case whose continuation he is vigorously pressing in Lysias 23;

2) even if he were seeking to aid Nikomêdês's claim to own Pankleôn, his presentation actually undermines that claim, by clouding title through the introduction of a second claimant - a woman whose successful and personal invocation of legalistic procedures in public confrontation (§ 10) is indicative of the roles sometimes assumed by women in actual, not ideological, Athenian life;

3) there is a direct contradiction between the plaintiff's assertion of defendant's slavery, and the interests of a putative owner who would have been exposed to possible liability for the plaintiff's claim, a consideration which would have inhibited his likely collaboration with the plaintiff (although in desperation to avoid the plain implications of this case, scholars have suggested a further - again unattested - "secret understanding" between the plaintiff and Nikomêdês).

Although Wilamowitz's theory is unsupported by ancient evidence, slave responsibility for commercial wrong is compatible with independent testimonia. In considering the possible bases for "friendship" between slave and master, Aristotle explicitly recognized a slave's inherent capacity to participate in legal matters and specifically to enter into contracts (*synthêkai*)[23]. But contractual arrangements with slaves would have meaning (because legally enforceable) only if slaves could be parties to commercial litigation. A judicial grouping, for procedural purposes, of slave business proprietors with metics would mirror the assimilation of slaves and metics encountered elsewhere in Athenian practice (an association correctly noted by Todd)[24]. Thus a well-known passage in the *Constitution of the Athenians* attributed to Xenophon complains of the lack of societal control (*akolasia*) at Athens over metics *and* slaves. The setting is judicial: Xenophon posits a possible juridical remedy, a law allowing one to strike "a

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22 Todd is not the first to appeal to Wilamowitz's interpretation (see Gernet and Bizos 1967: 93-4, who do concede that "cette connivence n'apparaît pas trop dans le discours").

23 E. N. 8.11.7: ἡ μὲν οὖν δοῦλος. οὐκ ἔστι φιλία πρὸς αὐτόν. ἢ δ' ἄνθρωπος· δοκεῖ γὰρ εἶναί τι δίκαιον παντὶ ἀνθρώπῳ πρὸς πάντα τὸν δυνάμενον κοινωνῆσαι νόμου καὶ συνθήκης· καὶ φιλία δή, καθ' ὅσον ἄνθρωπος.

24 Todd, for example, justifies his brief treatment of metics' legal disabilities by noting his extensive consideration of slaves' disqualifications: the position of metics can be inferred from certain similarities in the "general pattern" denoting "the boundary between slavery and freedom (and) the division between non-citizen and citizen" (p.131).

slave or a metic or a freedman," but notes a difficulty: one would often hit an Athenian citizen by mistake - since in general appearance and dress, "slaves and metics" are indistinguishable from citizens[25]. He further asserts that freedom of expression (*isêgoria*) likewise has been extended equally to slave and free, to metic and townsman[26]. This comports with Athenian reality which placed much business activity in the hands of slaves operating independent businesses and living apart from their masters. We should not be amazed that the law here too made accommodation to reality.

Torture

Todd argues that access to Athenian courts by slaves as parties or witnesses is incompatible with suggestions in forensic speeches that testimony by slaves might be obtained only through torture[27]. But:

(1) At Athens, the enormous variety of free statuses is paralleled by a similar diversity of slave situations[28]. Public slaves working in the mines appear entirely devoid of rights; enslaved civil servants occupied, in Todd's words, a "privileged position" (p.130). Even if slaves working *for* a bank proprietor-master or for a ship-owner could testify only through torture, slaves who *were* bank proprietors or ship-owners might still enjoy direct access to the courts - as substantial surviving evidence shows they actually did in matters relating to their business activities.

(2) Despite much rhetorical posturing, no slave ever gave testimony under torture at Athens in private disputes[29]. Granting slave businessmen the right to participate in commercial litigation did not therefore violate any actual established evidentiary

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25 1.10: Τῶν δούλων δ' αὖ καὶ τῶν μετοίκων πλείστη ἐστὶν Ἀθήνησιν ἀκολασία . . . εἰ νόμος ἦν τὸν δοῦλον ὑπὸ τοῦ ἐλευθέρου τύπτεσθαι ἢ τὸν μέτοικον ἢ τὸν ἀπελεύθερον, πολλάκις ἂν οἰηθεὶς εἶναι τὸν Ἀθηναῖον δοῦλον ἐπάταξεν ἄν· ἐσθῆτά τε γὰρ οὐδὲν βελτίων ὁ δῆμος αὐτόθι ἢ οἱ δοῦλοι καὶ οἱ μέτοικοι καὶ τὰ εἴδη οὐδὲν βελτίους εἰσίν.

26 1.12: διὰ τοῦτ' οὖν ἰσηγορίαν καὶ δούλοις πρὸς τοὺς ἐλευθέρους ἐποιήσαμεν - καὶ τοῖς μετοίκοις πρὸς τοὺς ἀστούς.

27 For Todd, torture virtually defines servile status: "slaves could only give evidence under torture; torture could never be applied to citizens"; even a public slave occupying a "privileged position" was sometimes subject to flogging, a reminder that "he is not a citizen official but a civil servant" (pp.130).

28 According to the standard text, *Slavery in Ancient Greece*, "contemporary historians and anthropologists are no more successful than the ancient authors in providing a clear and precise definition of slavery." Garlan 1988: 24.

29 Thür 1977 has definitively established the fictitious nature of this forensic jousting. Todd 1990a: 33-34 summarizes: "on forty-two occasions in the orators we find the challenge, either 'torture my slaves for evidence' or 'let me torture yours'. Forty times this challenge was flatly rejected; twice (Isoc. 17.15-16, Dem. 37.42) it was accepted but not carried through."

procedures. To the contrary, enslaved businessmen functioned independently only under agreement with their masters; their presence in court in business litigation would be a natural result of their masters' underlying consent. Similarly slave absence as witnesses in other matters resulted only from their masters' refusal to permit their torture. Control of both results by private owners, rather than by the state, reflected the fact that at Athens the slave/master relationship was essentially private[30]. The *dikastêria* were essentially public. Where public met private, where the market economy of reality conflicted with the social values of theoretical ethos, the discourse of Athenian law was being written.

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30 Todd notes this private dominance primarily in the context of manumission ("an essentially private act," p.127) which resulted in an "uncertain status". *Douloi* engaged in commerce for their own account might similarly be characterized as having an "uncertain status." Slaves' position of inferiority within their own *oikos*, a private subjugation, was not necessarily reflected in their dealings with persons outside the *oikos*. Hence, the legal protection (against outsiders) for a slave's "honor" (n. 5 above); hence, the self-confidence, bordering on arrogance, with which banking slaves dealt with even the most distinguished citizen-customers (e.g. the lack of deference shown the prominent Kallippos, *proxenos* of the Hêrakleôtes, by the slave functionary at Dem. 52.5-6). Similarly, public slaves were subject to the relevant *polis* officials, not to the individual free inhabitants of Attica. Physical manhandling of citizens by slave "police" was not incompatible with the physical punishment provided by law for certain infractions by slave civil servants: the *dokimastês* charged by the state with testing the purity of coins, although himself subject to lashes from his supervisors for dereliction of duty, nonetheless has considerable discretion over the individuals - free and slave, citizen and alien - subject to his jurisdiction (Stroud 1974: ll. 13-18).

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The case of the Rude Soldier (Lysias 9)

The ninth speech attributed to Lysias is written for delivery by the defendant in a case of ἀπογραφή, in which he is being prosecuted for failure to pay a fine imposed on him some time earlier. A sentence in section 5 has been rightly interpreted by editors as meaning that his name is Polyainos; the names of the prosecutors, referred to in the plural, are not given. The date of the speech is not known; if the attribution to Lysias is correct, that would put it either at the very end of the fifth century B.C. or in the first twenty years of the fourth, and the references to military campaigns have prompted the suggestion that it belongs to the period of the Corinthian War[1].

According to Polyainos' narrative, the affair began some time before: πρότερον is the manuscript reading in section 4. Reiske emended it to προπέρυσιν, 'the year before last'; this is generally accepted and may be correct, but is not certain[2]. Polyainos arrived in Athens after being away on military service, and within two months he was 'listed as a soldier', in other words called up for further service. He made a complaint to the strategos but obtained no satisfaction; so far from it that subsequently a fine was imposed on him for abuse or slander of a magistrate. He claims that the imposition of the fine was illegal, and that it was subsequently cancelled by the tamiai; yet now he is being prosecuted for failure to pay it.

Several questions arise, both about the facts and about the legal procedures. Not all of them can be answered with certainty, but I should like to suggest some answers which seem to me to be more or less probable.

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1 Cf. F. Blass *Die attische Beredsamkeit* 1 (3rd edition 1887) 597-8. Nineteenth-century work on the speech is fully discussed by O.R. Pabst *De orationis* ὑπὲρ τοῦ στρατιώτου *quae inter Lysiacas tradita est causa, authentia, integritate* (1890).

2 The emendation is supported by the length of time which had to elapse between the imposition of a fine and the initiation of the action of ἀπογραφή: see part 5 of this article.

1. Who was Polyainos ?

Polyainos says that, after his application to the strategos was rebuffed, 'I was at a loss, and I consulted one of the citizens about what I should do'(5). It seems strange for a citizen to say 'I consulted one of the citizens', as if he were not a citizen himself; and at first sight one might wonder whether Polyainos was not a citizen but a metic, for metics too were liable to military service in Athens. But no; he is definitely a citizen. The reference a few lines later to 'some of the citizens' (7) is clearly intended to include himself. And yet he hardly seems to be at home in Athens. Later in the speech he relates how, some time earlier, he had made himself a friend of Sostratos 'because I knew that he had done remarkable service to the city' (13). He goes on to speak of Sostratos' power and influence (14). If Sostratos was distinguished and powerful, surely everyone in Athens knew that, and it is curious that Polyainos finds it appropriate to point out that he knew it too. At the end of the speech he says that essentially this trial is about his citizenship: if he is acquitted, he will remain in Athens, but 'if I were wrongly convicted, I should run off. For what hope ought to encourage me to share your citizenship, or what should be my purpose in doing so, when I am aware of the zeal of my opponents and do not know where I should obtain any justice?' (21). Is his attachment to Athens so weak that he is ready to leave it for ever if he has to pay a small fine?

I suggest that Polyainos was not a native Athenian, but had only recently obtained Athenian citizenship and come to live there. How can he have done that? Possibly because he had individually done Athens some distinguished service and been rewarded with a grant of citizenship; more probably because he had been included in some wider grant. The most obvious occasion was in 406, when Athenian citizenship was offered to all who volunteered to serve in the navy at the battle of Arginousai[3]. Polyainos may have come from some remote part of the Greek world and have made his way as a mercenary soldier; he would then naturally jump at the chance of becoming a citizen of one of the greatest Greek cities in 406, but would be ready enough to abandon it if it turned out not to be to his liking, and go off to seek his fortune elsewhere once again. There were many Greek mercenary soldiers around this time, including some Athenian citizens; we remember that Xenophon, for example, served in Asia Minor, first under Kyros and later under Agesilaos. I notice that Polyainos, though he claims to have been away on a campaign (4 ἐστρατευμένος εἴην), does not say that he was fighting for Athens. If he had actually been serving in some other army, not in the Athenian one, that may explain

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3 Ar. *Frogs* 693-4 (cf. 33-4, 191), Hellanikos *FGrHist* 323a F25.

why he was not regarded by the Athenian authorities as being exempted by recent service from liability to call-up for the Athenian army.

2. The legal powers of the strategos

To make his objection to being called up again for military service so soon, Polyainos went to 'the strategos' (4). A passage in another speech of Lysias (14.6) confirms that the strategoi had the responsibility for producing lists of men who were to serve in a particular campaign. That passage mentions listing by 'the strategoi' in the plural, but Polyainos speaks of 'the strategos' in the singular, implying that one strategos, not all ten, was concerned here. The obvious explanation of this singular is that each strategos was responsible for the call-up of men from one of the ten phylai, and Polyainos means by 'the strategos' the one who had issued the list for his phyle.

In issuing the list for call-up, the strategos would want to get the best soldiers he could[4], but he had to conform to certain laws or guidelines. Certain categories of men were legally exempt from service, for example members of a chorus for a forthcoming festival[5]. Polyainos refers to an oath to list men who were ἀστράτευτοι (15); so this must also have been a legal requirement. The definition of ἀστράτευτοι is not clear. I should guess that it means men who have not served in the present year; the rule may have been that men who had already served on a campaign in the present year should not be called up a second time as long as there were others who had not yet served this year. But provided they did not infringe any legal requirements, the strategoi presumably had some discretion about the inclusion of names in their lists[6]. So in the case of Polyainos, even if it is true that his service earlier in the year was not in the Athenian army, the strategos could have omitted him from the list if he had thought fit to do so. But in fact the application was refused, and they[7] said 'Polyainos has been in Athens just as long as Kallikrates' (5). I take that to mean that Kallikrates was another man who had returned to Athens within the last two months after service abroad and had not been excused service in the Athenian army on that account.

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4 Cf. A. Andrewes in *Classical Contributions: Studies in honour of M.F. McGregor* (ed. G.S. Shrimpton and D.J. McCargar, 1981) 1-3.

5 Cf. D.M. MacDowell in *Symposion 1982* (1989) 70-2.

6 Cf. M. Bizos in the Budé edition, *Lysias : Discours* 1 (1924) 131:'le choix des stratèges . . était parfois arbitraire et donnait lieu à des contestations'. He compares Ar. *Knights* 1369-71, *Peace* 1179-81.

7 The shift from singular to plural is considered in the next part of this article.

After failing to obtain satisfaction from the strategos, Polyainos went to consult 'one of the citizens' and was told that they were threatening to put him under arrest (5 δήσειν). This threat was not actually carried out, but we naturally wonder whether the strategoi did in fact have the power to imprison someone without trial. The main evidence for this is in Arist. *Ath. Pol.* 61.2, where we read that the strategoi have authority, whenever they are in command, to imprison τὸν ἀτακτοῦντα. This is usually taken to mean a man who disobeys orders while on active service. The only other known case certainly falls within that definition: when Apollodoros was a trierarch, he was afraid of being put under arrest by the strategos Timomakhos at Thasos for disobedience to an order (Dem. 50.51). However, ἀτακτῶν does not necessarily mean disobedience while actually on active service: Demosthenes in the *Third Olynthiac* uses the same word for men who do not perform military service at all (Dem. 3.11). So the power of the strategoi to arrest τὸν ἀτακτοῦντα may well have included power to arrest a man who failed to attend for service when called up for it. Probably the reason why the threat was not carried out against Polyainos was that, having failed to gain exemption, he did report for duty on the required day after all.

But before then there was another development. The conversation in which Polyainos was told that he was threatened with arrest took place at Philios' bank (5). No doubt Polyainos then expressed his thoughts; and my article would probably have been more entertaining if I were able to tell you what names he called the strategos. Unfortunately those were not recorded; but someone reported that he had been uttering abuse, and the consequence was that a fine was imposed on him. The law under which this was done was the law which Polyainos calls on the clerk to read out in section 8. Its full text is not preserved there, but evidently it forbade anyone to abuse an official ἐν συνεδρίῳ. Polyainos treats συνέδριον as synonymous with ἀρχεῖον, and I take it to mean a public building in which the official sits for the performance of his official functions. Polyainos maintains that he never entered this building. Presumably his approach to the strategos was made in some other place, perhaps in the street or the Agora; and the abuse which was complained of (he never denies that he did use abusive language) was uttered at Philios' bank. If his account is true, it does seem that the strategoi were not legally entitled to fine him, and this is the strongest point in his defence.

The amount of the fine is not stated, but there are good reasons to believe that a fine imposed by any Athenian official on his own authority could not exceed 50 drachmas[8];

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8 Cf. D.M. MacDowell *The Law in Classical Athens* (1978) 235-7.

so we may assume that the fine imposed on Polyainos was not more than that. If the strategoi had considered that a severer penalty was required, they would have had to take the case to trial before a jury. At a later date there was in fact a law specifying a severer penalty for this offence: Demosthenes in the speech *Against Meidias* mentions a law specifying permanent disfranchisement as the penalty for assaulting or abusing an official when acting in his official capacity (Dem. 21.32-3). That is half a century later; perhaps that law had replaced the one quoted by Polyainos. But even if it was already in force at the earlier date, the penalty of disfranchisement could have been imposed only at a trial by jury, not by the strategoi themselves.

3. Who acted with or for the strategos ?

One of the most puzzling features of the narrative is its use of plural verbs without a clearly identified subject. In section 4 Polyainos goes to the strategos, who is clearly singular. He is treated rudely (προπηλακιζόμενος), but we are not told exactly by whom, and then in the next sentence he hears that 'they' are threatening him with arrest, but ἀπειλοῖεν has no expressed subject. A plural subject appears at the beginning of section 6, οἱ δὲ μετὰ Κτησικλέους τοῦ ἄρχοντος, and it is those men who impose the fine and report it to the tamiai; they do this because of enmity towards Polyainos (7 διὰ τὰς ἔχθρας. 10 ἔχθρᾳ. 13 τῆς ἔχθρας, etc.) and are his prosecutors in the present case.

The phrase οἱ δὲ μετὰ Κτησικλέους τοῦ ἄρχοντος is difficult. At one time it was thought to mean that Ktesikles was the arkhon eponymos. The only year in the fourth century when a man of that name was arkhon eponymos is 334/3; so the conclusion was drawn that the speech was written shortly after that date, which of course would eliminate the possibility that Lysias was its author[9]. But later it was realized that the word ἄρχων can be used of the holder of any office, and everyone now agrees that Ktesikles was the strategos already mentioned; Polyainos just uses ἄρχων as an alternative word to στρατηγός, in much the same way as he uses ἀρχεῖον as an alternative to συνέδριον.

But that still does not resolve the difficulty of the phrase. It has usually been assumed that 'the men with Ktesikles the arkhon' is a way of saying 'Ktesikles and his colleagues' and means the ten strategoi. But that has the strange consequence that the strategoi are the enemies of Polyainos, who not only imposed the fine but are now

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9 Cf. J.H. Lipsius *Das attische Recht und Rechtsverfahren* (1905-15) 299 n.2.

prosecuting him in the present case. I do not find it credible that the ten men who happened to have been elected as strategoi in the same year would remain a coherent group taking joint action long after their year of office had ended, and I think that a different interpretation is easier. We can take οἱ as the pronominal use of the definite article, very common with δέ, and translate 'but they, together with Ktesikles the arkhon'.

In defence of this interpretation, I should like to consider for a moment how the listing of men for call-up may have been done. Each phyle must have had over a thousand men who were of an age to be liable for military service. Their names were presumably kept on lists, probably a separate list for each deme[10], perhaps on papyrus rolls but more probably on whitened boards. There was no electronic computer to pick out those who had served least recently and were not exempt from service for some reason in the present year; thus it was a considerable task to make out each call-up list, and we cannot suppose that each strategos did it on his own. He must have had a staff to do this on his behalf. We know that many Athenian magistrates had a γραμματεύς or secretary, often assisted by a συγγραμματεύς, associate secretary, and by one or more ὑπογραμματεῖς, under-secretaries[11]. Demosthenes derides Aiskhines and his brother for holding such positions: 'they earned money as under-secretaries and servants to all the arkhai, and eventually they were elected by you as secretaries and were maintained for two years in the Tholos' (Dem. 19.249). Even if we do not take 'all the arkhai' quite literally, the strategoi were among the most important arkhai and must surely have been provided with secretarial staff[12].

So what will have happened when Polyainos approached Ktesikles the strategos to complain about the inclusion of his name in the call-up list? It is very unlikely that Ktesikles himself checked the list in detail. He will have referred the complaint to the secretarial staff. They will have been the people who rudely dismissed his complaint and said he would be liable to arrest if he did not attend for service on the required date. Then they heard that Polyainos was using abuse, and so 'they, together with Ktesikles the arkhon,' imposed a fine. Only the strategos had authority to impose a fine, so this had to be done with his approval and in his name, rather as modern civil servants send letters

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10 The view that there was a single register of all citizens required to serve as hoplites should be rejected. Cf. M.H. Hansen *Demography and Democracy* (1986) 83-9.

11 Cf. M. Brillant *Les secrétaires athéniens* (Bibliothèque de l'École des Hautes Études 191, 1911) xiii-xv.

12 Arist. *Ath. Pol.* 31.2 mentions a provision for a secretary of the strategoi under the oligarchy in 411, and *IG* 2^2 545.17 mentions one in the late fourth century.

and take decisions with the minister's authority. But really all the business was done by the staff, perhaps by two or three men; they are the men whom Polyainos regards as his enemies, and who are prosecuting him in the case for which the speech has been written.

In further support of this interpretation I should like to draw your attention to section 11. There Polyainos says of his opponents: 'They themselves were aware that they were in the wrong; for they neither underwent *euthynai*, nor went to court and got their actions validated by a vote.' The second of those alternatives presents no problem: the officials could have prosecuted Polyainos before a jury[13], and would have had to do so if they had wanted to impose a penalty beyond a fine of 50 drachmas; the fact that they did not go to a jury implies, as I have already said, that the fine was not greater than that. But what are we to make of the comment about *euthynai* ? Strategoi were required to undergo *euthynai* at the end of their year of office. There must have been a few exceptions: if a man had been re-elected strategos for the next year and was actually abroad conducting a campaign when the year ended at midsummer, presumably his *euthynai* were postponed until he returned to Athens. But it is not credible that on the present occasion this had happened to the entire board of ten strategoi. Most of them, if not all, must have undergone *euthynai* ; therefore the subject of this sentence cannot be the board of strategoi.

An attempt has been made by several editors[14] to get round this difficulty by saying that the strategoi did undergo *euthynai* but omitted this fine from their accounts. But that explanation must be rejected, for two reasons. First, it is not what the text says; the text says 'They did not undergo *euthynai* '. Secondly, that is not how *euthynai* worked. We know from Arist. *Ath. Pol.* 48.4-5 and 54.2 that *euthynai* had two parts. In the first part, often called λόγος, magistrates submitted accounts of money which they had received; this would include any fines that were paid to them directly, but obviously would not include a fine which had not been paid. But an accusation that magistrates had acted improperly in imposing a fine would belong not in the λόγος but in the second part of the procedure, called εὔθυνα in a stricter sense. In this, the officials called euthynoi sat in the Agora to receive complaints about the actions of magistrates whose term of office had ended. The initiative then was left to anyone wishing to make a complaint. The

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13 R.J. Bonner and G. Smith *The Administration of Justice from Homer to Aristotle* 1 (1930) 280 say that Polyainos 'clearly implies that the generals were under some obligation to bring the matter into court'. That is not a correct reading of the Greek text, which implies only that they *could* have brought it into court, but were afraid that if they did so the jury would decide against them.

14 See the notes ad loc. in the editions of Lysias by E.S. Shuckburgh (1882), L. Gernet and M. Bizos (Budé, 1924), and W.R.M. Lamb (Loeb, 1930).

ex-magistrates did not make a list of all their actions, so that the possibility that they omitted a particular action from the list did not arise.

But if the subject of section 11 is not the strategoi but the secretaries of a strategos, the difficulty disappears. It seems that secretaries might remain in office for several years and undergo *euthynai* only when they finally demitted it. The evidence on these points is scanty, but I think it is sufficient. The best example of a secretary continuing in office is Antikles, who was συγγραμματεύς of the epistatai of the Parthenon for seven years and then γραμματεύς for the next four years, between 443 and 432[15]. For the *euthynai* of secretaries there seems to be no attested example, but it is most probable that they were in the same position as Nikomakhos, the inscriber of the laws in Lysias 30. Nikomakhos' title was ἀναγραφεύς rather than γραμματεύς, but the functions of these posts must have been at a similar level. It is clear that Nikomakhos held the office for several years without undergoing *euthynai* , but was expected to do so when he demitted it; a sentence of which the interpretation is disputed says either that he did undergo *euthynai* then or that his *euthynai* were prevented by the oligarchic revolution in 404[16]. So the easiest explanation of Polyainos' remark in section 11 is that the subject is a γραμματεύς and a συγγραμματεύς who had held those positions for two or three years and would not be required to undergo *euthynai* until they vacated them.

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[15] *IG* 1^3 436-51, lines 115, 171, 240, 287, 312, 344, 366, 370, 411. In *IG* 1^3 269-70 we see that Satyros was συγγραμματεύς of the hellenotamiai for two consecutive years. Cf. U. Kahrstedt *Studien zum öffentlichen Recht Athens 2: Untersuchungen zur Magistratur in Athen* (1936) 138. A different rule seems to have applied to a ὑπογραμματεύς, who could not serve the same ἀρχή twice (Lys. 30.29). However, it is not clear why a ὑπογραμματεύς should be placed under such a restriction if a γραμματεύς or συγγραμματεύς was not. Brillant *Les secrétaires athéniens* xv-xvii, perhaps rightly, prefers the view that there was no fundamental distinction between a γραμματεύς and a ὑπογραμματεύς but that the law forbidding iteration was not always applied strictly.

[16] Lys. 30.3. For a recent consideration of this disputed point see P.J. Rhodes *JHS* 111 (1991) 89.

4. The legal position and powers of the tamiai

At the end of section 6 the secretary and the associate secretary, if I am right in so identifying them, recorded on a white board or tablet the fine imposed on Polyainos and delivered it to the tamiai. What tamiai were these? Editors generally assume that they were the treasurers of Athena, who kept the sacred treasury[17]. But that seems strange. Why should a fine for abusing a strategos be payable to the sacred treasury? Surely it would be payable to the public treasury (τὸ δημόσιον), and the officials responsible for collecting sums due to that treasury were the apodektai and the praktores, of whom the praktores seem to have been the ones who collected fines. Thus Andokides, in discussing the decree of Patrokleides, refers to 'those owing money to the δημόσιον', including 'all who incurred fines' (And. 1.73); the decree itself refers to public debtors as 'those registered with the praktores or the tamiai of the goddess and of the other gods' (And. 1.77). The distinction comes out more clearly in the law forbidding the digging up of olive trees, quoted in the Demosthenic speech *Against Makartatos*. Olive trees were in some sense sacred to Athena, so that this offence was both sacred and secular. Anyone guilty of it is to pay 100 drachmas to the δημόσιον for each tree, and one-tenth of this is to belong to the goddess. The magistrates in charge of the trial are to register with the praktores what is due to the δημόσιον, and with the tamiai of the goddess what is due to the goddess[18]. So the fine imposed on Polyainos must have been payable to the praktores, not to the treasurers of Athena[19]. But there is no real difficulty here, because ταμίας is a general word for a treasurer or steward, not restricted to sacred treasurers[20]. Just as Polyainos uses ἄρχων as a general term applicable to a strategos, so he uses ταμίαι as a general term for financial officials, and the ones that he means here must actually be the praktores[21].

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17 See the notes ad loc. in the editions by Shuckburgh and Lamb, and p. 131 of the edition by Gernet and Bizos.

18 Dem. 43.71. The clause ὃ δὲ τῇ θεῷ γίγνεται is a conjecture by Reiske, but it is generally accepted and seems certain to be correct.

19 Bizos in the Budé edition (p.132) supposes that the praktores had to pass on the names of debtors to the tamiai of Athena at a later date. But there is no evidence for that hypothesis, as he concedes (p.132 n.4).

20 Even a private household can have a ταμίας: cf. Ar. *Wasps* 613.

21 The records of debts owed to the δημόσιον were kept on the Akropolis (Dem. 58.48, Harpokration Υ 1). If the praktores and the tamiai of Athena had adjacent offices there, it may have seemed to a layman like Polyainos to be unnecessary to distinguish them.

In section 7, when the record of the fine imposed on Polyainos was delivered to the praktores, they were reluctant to accept it. They examined the ground of the accusation, calling up (according to recent editors) τοὺς παραδόντας τὴν γραφήν, which may mean those who delivered the record of the fine[22]. Actually this is another conjecture by Reiske; the transmitted text is τοὺς παρόντας καὶ τὴν γραφήν, which I should interpret as meaning those who were present when Polyainos abused the strategos, and the written charge against him; the praktores checked what he was accused of, and heard from witnesses of the offence. If the transmitted text is correct, it implies that the praktores came very close to holding a trial of Polyainos themselves. They cannot in fact have had legal authority to act as a court of appeal. But Polyainos does go on to say that they heard 'what had happened' (τὸ γεγενημένον), which implies some inquiry into the facts of the case, not merely into the legal procedure. I think it is possible that the praktores did have some informal conversation with some men who had been at Philios' bank on the day in question, and I should hesitate to accept Reiske's emendation here.

Next the praktores tried to persuade the secretaries to withdraw the fine, perhaps in the hope of avoiding further argument and dispute; failing in this, they proceeded formally to declare the fine invalid. How were they able to overrule a verdict which had the authority of a strategos? Polyainos points out (7 and 12) that they were liable to *euthynai* and punishment if they acted wrongly, and that is undoubtedly true. They must have had some plausible reason for ruling the fine invalid. It is unlikely that this was a reason not mentioned in the speech, because Polyainos would naturally have taken care to mention every possible reason for regarding the fine as invalid[23]. So it was probably the reason which he does mention, that his abuse of the strategos was not uttered ἐν τῷ συνεδρίῳ. This may well be the very point which the praktores took care to check by questioning witnesses; and they will then have said to the secretaries 'We cannot register the strategos' fine because it has not been imposed in accordance with the law'.

I conclude that the praktores did not have authority to act as a court of appeal, but did have the duty to check that any fine which they were called on to register had been imposed legally. In the present case they seem to have interpreted that as meaning that they should check whether the offender had actually infringed the law. The prosecutors in

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22 For this interpretation of γραφή cf. Lipsius *Das attische Recht* 263 n.1.

23 This is the reason why I do not adopt the suggestion of R.J. Bonner and G. Smith *The Administration of Justice from Homer to Aristotle* 2 (1938) 245-6, that the reason why the fine was invalid was that its amount 'was beyond the competence of the magistrate and required court action to confirm it'. They concede that Polyainos 'nowhere explicitly mentions this feature of the case', and I do not agree that he implies it in section 11; see note 13 above.

their speeches, which of course we do not have, may well have argued that that was an over-zealous interpretation by the praktores.

5. The present prosecution

When the praktores refused to register the fine, Polyainos probably thought that was the end of the matter and did not pay it. A fine had to be paid by the ninth prytany; if it was not paid by then, the amount was doubled and the offender's property became open to confiscation under the procedure called ἀπογραφή[24]. That time has now passed, and so the secretaries of the strategos have raised this action. The procedure of ἀπογραφή is known from other sources, and since Lysias 9 adds nothing substantial to our knowledge of it I shall not discuss it in detail[25]. It was essentially a proposal that property belonging to the accused man should be confiscated to pay off a debt owed by him to the state. It was a public action which could be initiated by anyone who wished (ὁ βουλόμενος), and it was one of the types of action in which a successful prosecutor received a reward, as an incentive to bring offenders to justice. The amount of the reward is stated in only one text, Demosthenes 53.2, where it appears as τὰ τρία μέρη, three-quarters of the amount recovered by the state. This should probably be emended to τὰ τρίτα μέρη, one-third[26].

However, in the case of Polyainos I have suggested that the amount of the fine was no more than 50 drachmas. If it was more than a year overdue, it must have been doubled, making 100 drachmas[27]; but even so the reward for the prosecutors in the *apographe*, if they won the case, whether it was three-quarters or one-third, would not amount to a very large sum and would not be a strong incentive to prosecute. Polyainos does not in fact mention it at all in his speech. He attributes the prosecution to a different motive: personal enmity between himself and the prosecutors. His story is that it was because of this enmity that the secretaries of the strategos listed him for military service out of turn, then imposed a fine on him, and are now following that up by prosecuting

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24 And. 1.73, Dem. 59.7.

25 Cf. A.R.W. Harrison *The Law of Athens* 2 (1971) 211-17, D.M. MacDowell *The Law in Classical Athens* (1978) 166, R. Osborne *JHS* 105 (1985) 44-7.

26 Cf. D.M. Lewis in *Ancient Society and Institutions: studies presented to V. Ehrenberg* (ed.E. Badian, 1966) 191 n.67. The emendation is supported by Osborne loc. cit. and by P.C. Millett *Lending and Borrowing in Ancient Athens* (1991) 265 n.2.

27 For the doubling of an overdue fine see And. 1.73.

him for non-payment of the fine. They are bringing this prosecution presumably in their own personal capacity, but their earlier acts were done in the name of the strategos.

Polyainos does not explain the origin of this hostility, and we cannot check the truthfulness of his narrative. But there is no obvious reason why it should not be true, and presumably he at least thought that it was plausible enough to convince a jury. As is often the case with Athenian speeches, we cannot say for certain that these things did happen, but we can say more confidently that such things could have happened. Thus, if my interpretation is correct, the text shows how it was possible for secretaries to have considerable power over administration and legal procedures. This speech is an attack on the improper exercise of bureaucracy.

Martin Dreher (Konstanz)

Diskussionsbeitrag zum Referat von Douglas M. MacDowell

Vorweg möchte ich sagen, daß ich es für sehr begrüßenswert halte, wenn Prof. MacDowell die neunte Rede des Lysias-Corpus einer genaueren Untersuchung unterzieht. Dieser Text hat nicht nur wegen seiner Kürze und fehlenden Anspielungen auf die "große" Geschichte wenig Beachtung bei den modernen Historikern gefunden, sondern ist auch von den Rechtshistorikern noch nicht genügend ausgewertet worden, wie nicht zuletzt die Ausführungen MacDowells zeigen. Seine Ergebnisse sind daher in historischer Hinsicht aufschlußreich, bieten Erkenntnisse über die athenische Verwaltungspraxis und verbessern unser Verständnis der prozeßrechtlichen Abläufe im athenischen Recht. Die nun folgenden Einwände und Ergänzungen ändern nichts an meiner weitgehenden Zustimmung zu MacDowells Schlußfolgerungen.

zu 1. Was die Person des Polyainos betrifft, so geht MacDowell meines Erachtens zu weit, in ihm einen athenischen Neubürger zu sehen.

a) Den Hinweis des Sprechers auf Sostratos halte ich im Zusammenhang der Rede nicht für überflüssig; er erklärt sich vielmehr daraus, daß Polyainos den Richtern plausibel machen will, aus welchem Motiv heraus seine Gegner ihn verklagten.

b) Im Falle eines Prozeßverlustes würde Polyainos Athen nicht nur wegen einer kleinen Geldbuße verlassen, wie MacDowell sagt und das als Geringschätzung des Bürgerrechts interpretiert; es ging in dem Prozeß um mehr als um die verdoppelten maximal 50, also 100 Drachmen, mindestens um viel Prestige und um den Stolz eines Bürgers, der sich im Recht fühlte. Eine Verurteilung hätte den Sprecher zum Staatsschuldner und damit zum atimos erklärt[1]; mit seiner angedrohten Konsequenz, Athen zu verlassen, will er gerade zeigen, wie viel ihm das Bürgerrecht bedeutet. Auch wenn das nur ein rhetorisches Mittel sein sollte, setzt es doch Glaubwürdigkeit bei den Zuhörern voraus.

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1 Vgl. Andok. 1, 73; A. R. W. Harrison, The Law of Athens II (1971) 173ff. Anders F. Blass, Die Attische Beredsamkeit I^3 (1887) 597.

c) Der Text enthält auch einen positiven Hinweis darauf, daß Polyainos von Geburt an athenischer Bürger war. Wenn dieser sagt (§ 14), er sei zu Lebzeiten des Sostratos wegen seines Alters (ἀνάγκη διὰ τὴν ἡλικίαν) notwendigerweise öffentlich inaktiv gewesen und habe seine Gegner nicht gerichtlich verfolgt, dann muß er schon die Zeit vor seiner Volljährigkeit in Athen verbracht haben. Und er muß Athener gewesen sein, sonst hätte er wohl nicht nur seine Minderjährigkeit als Grund für seine Zurückhaltung genannt. Umgekehrt hätte Polyainos die Verleihung des athenischen Bürgerrechts und seine vorausgegangenen Verdienste, wenn MacDowells Annahme zuträfe, in seiner Rede sicher erwähnt, um damit die Richter zu beeindrucken. Mit Sostratos, der zu jener Zeit schon großen öffentlichen Einfluß hatte und daher offensichtlich viel älter war, verband ihn daher wohl eine homoerotische Beziehung[2].

zu 3. Der Identifizierung der Kläger mit den Mitarbeitern, wie man heute sagen würde, des "Strategenbüros" schließe ich mich, obwohl die Idee sehr reizvoll ist, aufgrund folgender Argumente nicht an.

a) Im Zusammenhang des Textes ist MacDowells Interpretation von οἱ δὲ μετὰ Κτησικλέους weniger überzeugend, weil οἱ δὲ in seiner Version keinen Anschluß an vorher genannte Personen hat. Für den so eingeführten Personenkreis ist es näherliegend, darunter Ktesikles und seine Mit-Amtsträger zu verstehen.

b) Die von MacDowell ins Auge gefaßten Grammateus und Hypogrammateus sind in allen herangezogenen Parallelen nur Amtskollegien insgesamt, nicht einzelnen Amtsträgern eines Kollegiums zugeordnet.

b) MacDowells Argument gegen das Strategenkollegium lautet, daß nicht alle zehn Strategen gleichzeitig ein Interesse an der Klage gehabt und nicht alle die Euthynai unterlassen hätten. Dieser Einwand entfällt, wenn wir die Formulierung nicht auf *alle* Strategen beziehen, sondern nur auf wenige, vielleicht zwei oder drei, mit denen Ktesikles befreundet war, oder die er als Mitkläger gewinnen konnte.

c) Schon die Formulierung παρὰ τὸν νόμον ζημιῶσαι ἠξίωσαν (§ 6), noch eindeutiger aber ὀμόσαντες μὲν οὖν τοὺς ἀστρατεύτους καταλέξειν (§ 15) macht klar, daß mehrere entscheidungsbefugte Amtsträger handelten. Das können nach meiner Ansicht die untergeordneten Chargen Grammateus und Hypogrammateus nicht gewesen sein.

d) MacDowells Ausführungen zeigen, und auch das ist wichtig, daß wir Sekretäre der Strategen annehmen müssen, aber nicht, daß sie hier als Kläger auftraten. Einige Handlungen ließen die Strategen zweifellos durch ihre Sekretäre ausführen, wie zum

2 Blass, a. a. O.: ἐρώμενος.

Beispiel die physische Übergabe der Schuldnertafel, aber für alles, und insbesondere für die aktuelle Klage, waren sie wohl persönlich verantwortlich.

zu 4. MacDowells Identifizierung der Tamiai mit den Praktores ist gut begründet, und ich sehe keine überzeugende Alternative dazu. Gleichwohl fällt es schwer zu glauben, daß ein eher untergeordnetes Gremium von Amtsträgern, das in der aristotelischen Athenaion politeia nicht einmal Erwähnung findet, sich die Annullierung eines Strategenbeschlusses anmaßt und Polyainos sich mehrfach auf die Autorität dieses Gremiums beruft. Auch wenn die Praktores wirklich in diesem Fall so gehandelt haben, halte ich es für undenkbar, daß sie regelmäßig die Entscheidungen von Magistraten gerichtsförmig überprüft haben – ἄκυρον τὴν ζημίαν ἔκριναν ist die Formulierung im Falle des Polyainos.

Das ist übrigens nicht deckungsgleich mit MacDowells Paraphrase, die Praktores hätten die Registrierung des Polyainos *abgelehnt*. Vielmehr erfolgte zunächst die Übergabe der geweißten Tafel (§ 6), und anschließend nahmen die Tamiai ihre Untersuchung vor. Vielleicht haben sie dann, ohne daß das ausdrücklich gesagt wird, den Namen des Polyainos gelöscht[3]; das hätte ihnen bei ihren Euthynai eine Klage einbringen können, wie § 7 andeutet[4], und zwar eine γραφὴ ἀγραφίου, wie wir aus anderen Quellen wissen[5]. Es bleibt aber unklar, ob Polyainos weiterhin registriert war, eventuell mit einem Vermerk der Praktores, oder nicht[6].

Zum Schluß, nachdem ich mit den übrigen Schlußfolgerungen MacDowells einverstanden bin, möchte ich noch auf eine Stelle aufmerksam machen, die von MacDowell nicht kommentiert wurde.

In § 15, nachdem er sich noch einmal darüber beklagt hat, daß ihn seine Gegner gesetzeswidrig als Dienstpflichtigen nominiert hätten, fährt der Sprecher fort: προῦθεσαν δὲ τῷ πλήθει βουλεύσασθαι περὶ τοῦ σώματος. Es scheint sich hier um eine Klage zu handeln, die anscheinend noch nicht richtig erklärt worden ist. Mehrere Herausgeber scheinen sie mit dem Prozeß der Rede gleichzusetzen, vielleicht weil beide die Atimie zur

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3 So Blass, a. a. O.

4 τὸν παρ' ὑμῶν κίνδυνον ὑποστάντες.

5 Ath. pol. 59,3 mit Dem. 58, 51-52; vgl. P. J. Rhodes, A Commentary on the Aristotelian *Athenaion Politeia* (1981), ad loc.; J. H. Lipsius, Das attische Recht und Rechtsverfahren (1905-1915) 410-412.

6 Die gegenwärtige Apographe wäre auch dann legitim, wenn Polyainos nicht mehr registriert wäre, zumindest nach den Aussagen des Sprechers von Dem. 58, 21. 48f.

Folge gehabt hätten[7]. Aber die mit περὶ τοῦ σώματος gemeinte Atimie wird von Andokides (1, 74f.) klar unterschieden[8] von der Atimie, in die ein Staatsschuldner verfällt. Außerdem sagt der Sprecher in Lysias 9 kurz darauf, mit ihren früheren Aktionen hätten seine Gegner nicht genügend Rache geübt[9] παραγαγόντες δὲ **πάλιν** περὶ τῶν αὐτῶν ἠδικηκότα, so daß der aktuelle Prozeß als ein neuer, zweiter Prozeß zu verstehen ist. Ich glaube daher, daß die erste Klage eine γραφὴ ἀστρατείας sein muß[10], die allerdings nicht zu Ende geführt wurde, vielleicht, wie MacDowell bezüglich der Gefängnisdrohung vermutet, weil Polyainos seiner Militärpflicht doch nachkam. Wenn das stimmt, dann hätte dieser Prozeß auch vor einem Dikasterion stattgefunden und nicht etwa vor der Volksversammlung, wie προὔθεσαν δὲ τῷ πλήθει vielleicht nahelegen könnte. Πλῆθος im Sinne von Volksgericht wäre also ein weiteres, drittes Beispiel für den von MacDowell aufgezeigten ungenauen Gebrauch von spezifischen Bezeichnungen durch den Verfasser unserer Rede.

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7 In ihren kommentierten Editionen nehmen W. R. M. Lamb (Loeb, 1930) und M. Bizos (mit L. Gernet, Budé 1924), jeweils ad loc., an, es sei auch hier Atimie im Gefolge einer Vermögens-konfiskation gemeint.

8 τὰ μὲν σώματα ἄτιμα ἦν. Atimie ist hier die Strafe, die Verurteilten blieben ausdrücklich im Besitz ihres Vermögens.

9 Vgl. § 7 mit dem Kommentar von E. S. Shuckburgh (1882).

10 Andok. a. a. O. nennt die γραφὴ ἀστρατείας unter den Vergehen, die mit Atimie bestraft werden; eine γραφὴ ἀστρατείας ist Lys. 15 (g. Alkibiades II).

Edward M. Harris (New York)

"In the Act" or "Red-Handed"? *Apagoge* to the Eleven and *Furtum Manifestum*

When dealing with certain types of common criminals, the laws of Athens meted out harsh punishments. One of the most expeditious procedures for punishing criminals was called *apagoge* ("leading away" or arrest) to the Eleven, a board of magistrates selected by lot each year to run the prison in Athens. The *Constitution of the Athenians* (52.1) describes the procedure: "the Eleven punish with death those who are arrested as thieves (*kleptas*), enslavers (*andrapodistas*), and robbers (*lopodutas*) if they confess, while if they dispute the charge, they bring them before the court. If they are acquitted, the Eleven release them, and, if not, execute them." The arrest could be made by any Athenian provided one essential condition was met: the offender had to be taken ἐπ' αὐτοφώρῳ. For instance, when Dionysius, a private citizen, employed the *apagoge* procedure to arrest Agoratus, the Eleven insisted that Dionysius add the words *ep'autophoro* on the indictment presented to them (Lys. 13.85-7). In a speech of Isaeus (4.28) we are told Chariades was arrested as a thief *ep'autophoro* and thrown into prison. According to the speaker, the Eleven, who should have put him to death, were derelict in their duty and released him. For this failure to inflict the standard punishment, all the Eleven were executed that year. The story may be courtroom slander, but it nevertheless shows that the thief had to be taken *ep'autophoro* for the Eleven to execute him. Apollodorus ([Dem.] 45.81) alludes to the procedure when accusing Phormion of embezzling money from his father's bank. Apollodorus asks Phormion how he would have defended himself if he had been arrested and taken away as a thief caught *ep'autophoro*. Since Phormion was subject to this procedure, he should have been executed for his misdeed. Apollodorus presents us with a hypothetical argument, but takes for granted that the thief caught *ep'autophoro* was subject to capital punishment.

Scholars and translators have generally taken the phrase *ep'autophoro* to mean "in the act" or "*in flagrante delicto*[1]." A scholion on Aristophanes *Plutus* 455 appears to

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1 This is the translation endorsed by D. Cohen, *Theft in Athenian Law* (Munich 1983) 52. A. R. W. Harrison, *The Law of Athens: Procedure* (Oxford 1971) 224, adopts the same translation. Cf. L. Gernet, *Droit et institutions en grèce antique* (Paris 1968) 129-30. M. H. Hansen, *Apagoge, Endeixis, and Ephegesis against Kakourgoi, Atimoi, and Pheugontes* (Odense 1976) 48-53, believes that *ep'autophoro* originally meant "to catch the offender while the offense is being committed" or "during

support this view: "obviously, in the very act." Yet the Suda (s. v. *ep'autophoro*) provides a different gloss: "self-evident, before one's eyes, caught with the stolen item itself." Did the felon have to be caught committing the crime or only with the stolen object in his possession? The second possibility would incline us to translate the phrase as "red–handed," which the *Oxford English Dictionary* defines as "having the evidences of guilt still upon the person." And was it necessary in *apagoge* to the Eleven for the criminal to be physically seized while committing the crime or in possession of the stolen object or only that he be witnessed in those circumstances? A related question is, why were only three types of *kakourgoi*, namely thieves, enslavers, and robbers, explicitly listed as subject to this procedure? These are the questions this paper will try to answer.

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In regard to the main question, we find a fascinating clue in the *Institutes* of Justinian (4.1.3). This work equates the phrase *ep'autophoro* with the term *manifestus fur* in Roman Law. Justinian's *Institutes* were promulgated in 533 A. D., but the same comparison of terms is found in a passage of Ulpian preserved in the *Digest* (47.2.3). I hasten to point out that Ulpian was murdered by his troops in 223 A. D., and thus wrote roughly five and a half centuries after the composition of the Aristotelian *Constitution of the Athenians*[2]. Yet it would be ill-advised to dismiss Justinian and Ulpian from the witness box without interrogating them further. After all, Justinian's *Institutes* and Ulpian drew on a long tradition of Roman jurisprudence reaching back to the Late Republic. Their sources were still not contemporary with Classical Athens, but the *iuris prudentes* of the Late Republic were typical members of the Roman upper classes and thus no doubt familiar with the Attic orators, who provided models for the forensic speeches delivered by the advocates they advised. Writers like Dionysius of Halicarnassus catered to this elite audience, producing literary essays on Demosthenes, Lysias, and others in the canon of the orators[3]. It would therefore be wrong to discard the statements found in Ulpian and in Justinian as mere guesswork. The jurists whose works they consulted are quite likely to have read the works of Lysias and Demosthenes

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pursuit" and compares the third definition of *furtum manifestum* given by Gaius *Inst.* 3.184, but ignores the rest of Gaius' discussion. The term was later extended because it could also apply "if stolen goods were found during a house-search." For criticisms of Hansen's analysis see Cohen *Theft* 52-7. Hansen's view is followed by P. J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia* (Oxford 1981) 580-81. K. Latte, Kleine Schriften (Munich, 1968) 269–70 believes the term was later applied to "Entdeckung auf frischer, 'handhafter' Tat," but originally meant "auf Grund eigener Entdeckung."

2 For the date of the *Constitution of the Athenians* see Rhodes, *Commentary*, 51-58.

3 Note that Dionysius dedicated his essay on Thucydides to Aelius Tubero, who is probably to be identified with the historian and jurist of the same name. See G. W. Bowersock, *Augustus and the Greek World* (Oxford 1965) 129-30.

and to have come upon the phrase *ep'autophoro*. They may also have consulted commentaries on the orators by Alexandrian scholars like Didymus. Yet there is no guarantee that the sources of Ulpian and Justian understood the phrase correctly when they read their Isaeus or Dinarchus. We should therefore treat their statement that *ep'autophoro* was similar in meaning to the term *fur manifestus* not as evidence of comparable value to the contemporary evidence of the Attic orators, but rather as a hypothesis that offers an approach to the study of the phrase. Like all hypotheses, their statement must be tested against the evidence found in the Classical period to determine whether it is valid or not.

Before proceeding to test this explanation against the evidence found in the orators, however, it is first necessary to understand precisely what the term *fur manifestus* means. Both Justinian and Gaius indicate there was some controversy about the criteria to be used when determining whether a thief was *fur manifestus* or not. As we will see, there was general agreement about the basic sense of the term and its distinction from the *fur nec manifestus*. To understand the meaning of the term, therefore, we should look for the common element underlying all the various positions taken by the jurists and examine the reasons for their divergent views. This will help us to understand exactly what the clue offered by Ulpian and Justinian tells us. What we should not do is to select arbitrarily one of these different views and label it the "correct" view, all others being rejected as erroneous, then use that view alone to interpret the phrase *ep'autophoro*[4].

We need to preface our discussion with some general remarks about the nature of theft and how it differed from the other major offense against property in Roman Law, the delict of *damnum iniuria datum* "loss wrongfully inflicted." This delict was punishable under the *lex Aquilia* and applied to anyone who killed a slave or four-footed herd animal belonging to another person (*Dig.* 9.2.2 pr.) or who caused loss wrongfully by burning, breaking, or rending (*Dig.* 9.2.27.5). The act which created liability under the statute occurred at a given moment in time. Before that moment, the animal or slave was alive, or the object still intact. After that moment, the slave or animal is no longer alive, or the object is damaged and rendered less valuable or worthless to its owner. As a result, the offender normally does not abscond with the *corpus delicti*. Indeed, it would make little sense to drag away the slave's corpse or to collect the broken fragments of a shattered vase and wrap them in one's toga since they are no longer of any value. This is of some consequence when it comes to identifying the person who committed the *damnum*. If the person is not seen wreaking the damage by the owner or other witnesses, it is impossible to track him down. Any effort to convict the person who caused the damage and avoided detection would have to be convicted solely on circumstantial evidence. If not caught in the act of breaking a vase or slaying an ox, it would be difficult

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4 This mistake is made by Hansen, *Apagoge, Endeixis, and Ephegesis*, 49.

to prove that the offender was actually guilty of causing the damage. To borrow the language of the *kakourgoi* in the Reagan administration, the person who causes damage and avoids detection would enjoy "plausible deniability."

The job of tracking down a thief is potentially much easier. Unlike the delict of *damnum*, where the defendant does not retain possession of the *corpus delicti*, the essence of theft is that the defendant not only takes the stolen object, but retains possession of it until he disposes of it. Even if the thief is not caught in the act of taking the stolen object, it is still possible to find him in possession of it at some later time. The person who is discovered with the stolen object may not be the actual thief - he may have bought the object unaware that it was stolen - but there is nonetheless a strong *prima facie* case against him. The burden of proof is on him to show that he obtained the object by some means other than removing if from the owner's possession. Whatever the manner by which he gained possession of the stolen object, he still cannot deny the he fulfills one of the major objective elements of wrongdoing. To establish his innocence he must produce the actual thief or in some other way show that he did not take the object from the owner's possession.

This brings us to Gaius' discussion of *furtum manifestum* (*Inst.* 3.183-94), a passage which Justianian's Institutes draws on. Gaius' treatment of the term indicates that the jurists realized that the longer the period between the commission of the theft and the time when the stolen object was discovered in someone's possession, the greater the likelihood that the person in possession of the stolen object was not the person who removed if from the owner's possession (i. e. was the actual thief). A thief knows that he will be caught if the object is found in his hands so he normally tries to dispose of the object by trading it with someone. Or he may hide it in the woods or a cave where it might be found by some unsuspecting bypasser. This naturally led to a debate about the length of time beyond which a *furtum* was no longer *manifestum*.

Gaius enumerates four positions the jurists took on the issue. The narrowest definition is that the theft is manifest when the thief is taken in the act (184: *dum fit, deprehenditur*). Almost as restrictive is the next view, which holds that manifest theft occurs when the thief is taken in the place where the theft is committed (*eo loco deprehenditur, ubi fit*). Gaius gives three examples of cases covered by this definition. First, there is the man who steals olives from a grove of olive trees and is caught in the grove, second, the man who steals grapes from a vineyard and is caught in the vineyard, and third, the man who steals objects from a house and is caught in the house. This helps to explain *eo loco*, which must refer to the piece of property. More inclusive is the view that *furtum* is *manifestum* when the thief is caught carrying the stolen object before he reaches the place where he planned to take it. To borrow the example cited above, this definition would cover the thief caught with stolen grapes after he left the vineyard. The

final and most expansive definition is that the *furtum* is *manifestum* whenever the thief is seen carrying the stolen object.

Evidently all four views had their advocates, but Gaius says the widest definition did not gain widespread approval. Gaius also criticizes the third view that the *furtum* was *manifestum* as long as the thief was caught before he reached the place where he planned to bring the stolen object[5]. His objection is that those who held this view did not specify how long this criterion was to apply. He further notes that thieves often attempt to carry goods from one city to another. His implicit argument appears to be that it might be difficult to tell several days after the theft whether the person caught taking the stolen object from one city to another was the actual thief. Hence his argument for a time-limit. Despite Gaius' objection, the *lanx et licium* procedure found in the Twelve Tables provides evidence for a broader definition of *furtum manifestum*. Gaius (*Inst.* 3.192-94) himself says that the Twelves Tables allowed for the search through the house of a suspected thief provided one entered naked except for a dish (*lanx*) and a loin-cloth (*licium*)[6]. If the stolen object was found on the premises, the suspect was judged to have committed *furtum manifestum*. This points to a more expansive conception of *furtum manifestum* since here the thief has already deposited the stolen object in the place where he had planned to bring it[7].

Gaius claims the second view had the most supporters, but Justinian's *Institutes* (4.1.1-3), which reports only the first three views and omits the fourth, appears to endorse the third view. There is also some difference of opinion as to whether the thief must be physically seized (*deprehenditur*) with the stolen object or only seen with it in his possession. Gaius appears to endorse the interpretation that the thief must be physically seized while holding the goods. The only place he uses the phrase *tenens visus* is then describing the fourth view, which he rejects. Justinian's *Institutes*, on the other hand, is more inclusive on this score: this work seems to side with the view that the *furtum* is *manifestum* when the thief is only seen with the stolen item (*quamdiu eam rem fur tenens visus vel deprehensus fuerit sive in publico sive in privato vel a domino vel ab alio antequam eo perveniret quo perferre ac deponere rem destinasset*).

What emerges from this debate is that what distinguished *furtum manifestum* from *furtum nec manifestum* is the nature of the evidence for the delict. The *fur manifestus* is the thief who has clearly or manifestly removed an object from the owner's possession. *Furtum nec manifestum* thus covered cases where is was not absolutely clear whether the

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5 This view was held by Ulpian (*Dig.* 47.2.3.5) and Paul (*Dig.* 47.2.4).

6 The procedure disappeared as a result of the *lex Aebutia* of c. 150 B. C. (Gel. 16.10.8)

7 The *lanx et licium* procedure reveals that the jurists did not expand the limits of *furtum manifestum* implicit in the Twelve Tables, but may in fact have narrowed them. Thus F. de Zulueta, ed., *The Institutes of Gaius II* (Oxford 1953) 199, following de Visscher, *Etudes de droit romain* (Paris 1931) 137, is unlikely to be correct when he asserts that the third view listed by Gaius was "the primitive test."

person caught or observed in possession of the stolen object was the actual thief. *Furtum nec manifestum* could thus cover cases involving finders who made no attempt to locate an owner who had lost the object unwillingly and those who had received stolen goods[8]. The difference in evidence was accompanied by a major substantive difference. In *furtum manifestum* all the elements of the standard case were unquestionably present: it was clear (*manifestum*) that the offender had removed someone else's property (*rem alienam amovit*) in order to appropriate it (*intercipiendi causa*), then continued to "handle" it (*contrectat*) against the owner's will (*invito domino*) with fraudulent intention (*contrectatio fraudulosa*) to make a profit (*lucri faciendi gratia*)[9]. In *furtum nec manifestum* all the elements are definitely present except for one: it is uncertain whether the offender actually removed the object from the owner's possession.

This substantive difference provides the explanation for the difference between the penalties for the two kinds of *furtum*. Under the Twelve Tables the penalty for *furtum manifestum* was capital: a free man was flogged, then made the *servus addictus* of the plaintiff. A slave found guilty on this charge was flogged and put to death (Gaius *Inst.* 3.189). Later the Praetor reduced the penalty to a fourfold payment of the stolen object's value, but the possibility of harsher punishment remained if the plaintiff brought the thief before the *tresviri capitales* or other magistrates[10]. Since an important substantive element was missing in *furtum nec manifestum*, the penalty was only twice the value of the stolen object (Gaius *Inst.* 3.190; Justinian *Inst.* 4.1.5)[11].

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8 For finders liable for *furtum* see *Dig.* 47.2.43.4 and in general R. Powell, "*Furtum* by a Finder," *Tulane Law Review* 33 (1959) 509-24. Note Gaius *Inst.* 3.194 states that the *manifestus fur* must be the actual thief, but those who were not actual *fures* could still be held legally liable for *furtum* even if they had not committed the offense (*at illud sane lex facere potest, ut proinde aliquis poena teneatur atque si furtum ... admisisset, quamvis nihil eorum admiserit*).

9 Gaius *Inst.* 3.195. Cf. *Dig.* 47.2.1.3 (Paul): *furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus eius possessionisve.* See also Justinian, *Inst.* 4.1.1.

10 For the jurisdiction of the *tresviri capitales* see W. Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens* (Munich 1962) Ch. 12. For punishment *extra ordinem* see *Dig.* 47.2.57.1; 47.2.92.

11 My analysis thus differs considerably from the traditional explanation of the distinction between *furtum manifestum* and *furtum nec manifestum*. The earliest example of the traditional view I have found is H. S. Maine, *Ancient Law* (London 1861; repr. New York 1986) 315: "The ancient lawgiver doubtless considered that the injured proprietor, if left to himself, would inflict a very different punishment when his blood was hot from that with which he would be satisfied when the Thief was detected after a considerable interval; and to this calculation the legal scale of penalties was adjusted". A similar explanation is given by de Zulueta, *The Institutes of Gaius II*, 199: "That by the basic *Twelve Tables* a thief caught in the act should have been dealt with more severely than one detected later requires no special Roman explanation. The explanation of this common primitive phenomenon is that in the case of flagrant theft the sufferer's indignation is hotter and also that the delinquent's guilt is certain."

Since "handling" (*contrectatio*) was the common element shared by both forms of theft in Roman Law, we can now understand why the Roman jurists considered this the key element in *furtum* and did not consider asportation necessary (Gaius *Inst* 3.195: *furtum autem fit non solum cum quis intercipiendi causa rem alienam amovit*). *Furtum* was thus radically different from larceny in the Common Law, the key element of which is a trespassory taking[12]. This conclusion has major implications for our understanding of the way the jurists treated *furtum*, but my topic here is Athenian Law so I reserve that discussion for another occasion.

For our purposes the important thing to notice is the similarity between the Law of the Twelve Tables and Athenian Law in regard to the penalties for theft. For *furtum manifestum* the penalty is *capitalis*: slaves are punished with execution, and free men with "social death," that is, enslavement[13]. The thief taken *ep'autophoro* and brought before the Eleven by *apagoge* is also punished with death. For *furtum nec manifestum* the penalty is double the value of the stolen object. The penalty on the *dike klopes* is the same (Dem. 24.105,114). But was the substantive difference between the the two procedures for theft in Athenian Law similar to the substantive difference between the two delicts in Roman Law? That depends on the meaning of *ep'autophoro*, the question we began this essay with. Now that we understand the meaning of the term *furtum manifestum*, we are in a position to compare it with the Greek phrase *ep'autophoro*. If the comparison of *furtum manifestum* with the phrase *ep'autophoro* made by Ulpian and repeated in Justinian's *Institutes* is correct, we should find that the phrase has the meaning of "clear," "obvious," or "manifest" in the passages where it is used. It should thus be found in passages describing situations where the evidence for the crime makes the offender's guilt "obvious." Conversely, it should emerge that the translation "in the act" is not an appropriate rendering for *ep'autophoro* in every passage where the phrase is used.

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12 See the British Larceny Act of 1916: "A person steals who without consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof." (quoted in Powell, "*Furtum* by a Finder," 509).

13 For this view of slavery see O. Patterson, *Slavery and Social Death* (Cambridge, MA 1982) 35-76.

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It is best to begin at the beginning of the term's history in Greek literature. The earliest attested uses of the phrase occur in two passages from Herodotus. The first is found in Herodotus' account of the downfall suffered by the Spartan King Leotychidas (6.72). During his campaign in Thessaly, Leotychidas had the opportunity of subduing the entire region, but instead accepted a large bribe of silver coins (*edorodokese argurion pollon*). He was caught *ep'autophoro* in his camp seated on a glove or, more likely, a long sleeve of a garment (*cheiridi*) full of silver coins[14]. As a result, he was brought to trial and condemned to exile. Leotychidas was not caught in the act of taking the bribe since the discovery of his crime took place in the Spartan camp, and the money was found where Leotychidas had concealed it. The mere presence of silver coins in a garment does not appear incriminating to us, but we must bear in mind that the Spartans did not mint silver coins in this period and banned or restricted the possession of gold and silver (X. *Lac. Pol.* 7.4-6)[15]. For the Spartans, therefore, the mere possession of silver coins was strong *prima facie* evidence of wrongdoing. Coupled with his failure to conquer Thessaly when the opportunity presented itself, the money found in his garment was strong evidence that he had been bribed. The phrase *ep'autophoro* must mean that his *dorodokia* was clear, not that he had been caught in the act or receiving money from the Thessalians in exchange for breaking off his campaign.

The other passage in Herodotus is his account of Onomarchus' departure from Athens. According to Herodotus (7.6.3), Onomarchus was dismissed by the tyrant Hipparchus after he was caught *ep'autophoro* by Lasus of Hermione in an act of forgery. Lasus accused Onomarchus of slipping into an oracle of Musaeus a verse of his own composition about the islands around Lemnos disappearing into the sea. It is improbable that Lasus secretly entered the room where Onomarchus was composing his forgery and watched as he placed the spurious verse in his edition of Musaeus. It is far more likely that Lasus detected the forgery by comparing a reliable copy of Musaeus' oracles with the bogus edition fabricated by Onomarchus. In other words, Lasus did not catch Onomarchus in the act, but rather had incontrovertible evidence that he had committed forgery. Once again, the best translation is "clearly" or "manifestly[16]."

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[14] For the meaning of *cheiris* see *Od.* 24.230; X. *Cyr.* 8.8.17; X. *HG* 2.1.8. The *cheiris* seems to have been larger than a glove and designed to cover both the hand and part of the arm.

[15] Cf. Plb. 6.49.

[16] A. de Sélincourt translates the phrase containing *ep'autophoro* thus: "Lasus of Hermione had caught him in the very act of the forgery." Yet in the story of Leotychidas he translates the phrase as "red-handed." Herodotus also uses the phrase at 6.137.3, but the context does not help to determine its

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Moving on to the Attic orators, we come upon the term in the account given by Aeschines (3.9-10) of the way in which corrupt politicians formerly avoided convictions for embezzlement of public funds. Aeschines uses the term in regard to magistrates who at their *euthynai* are proven to have embezzled money (*ep'autophoro kleptai ton demosion chrematon ontes exelengchomenoi*). Under the *euthynai* procedure, every magistrate was required to submit an account of all the funds he had received and disbursed during his term of office (Aeschin. 3.14-24; *Ath. Pol.* 48.3-4). These sums were checked against the amount of money he handed on to his successor in office. If the sums did not tally, the magistrate was "clearly" guilty of embezzlement[17]. Aeschines is not referring to magistrates who are caught in the act of taking public funds during their terms of office. He is talking about the *euthynai*, which took place after the magistrate left office and placed the funds under his control in the hands of his successor. Besides, a magistrate caught in the act of pilfering money entrusted to him would have been immediately deposed and would never have made it to his *euthynai*. We must again translate the phrase *ep'autophoro* as "clearly" or "obviously."

Dinarchus uses the phrase three times in his speech against Demosthenes and once in his speech against Aristogeiton, both delivered at trials arising out of the Harpalus affair. Harpalus was appointed Alexander's treasurer, but in 324 fled from Babylon with 5,000 talents and an army of 6,000 soldiers (D. S. 17.108.6). When he tried to obtain asylum with his troops in Athens, he was at first rebuffed, then later returned with only three ships and a large sum of money and allowed to enter the city ([Plu.] *Mor.* 846a). Soon afterwards, envoys came from Antipater and Olympias demanded his surrender (D. S. 17.108.7). Demosthenes argued that the Athenians should surrender Harpalus only to ambassadors send by Alexander (Hyp. 5. col. 8), yet at the same time passed a motion to have Harpalus arrested and his money deposited on the Acropolis (Din. 1.89). Harpalus declared the entire sum to amount to 700 talents, but the total amount was later discovered to be only 350 talents (Hyp. 5. cols. 9-11). Harpalus was later allowed to escape, collected the troops he had left at Taenarum, and fled to Crete where he was murdered (Hyp. 5. col. 12; D. S. 17.108.7-8). Suspicion of bribery fell on Demosthenes, who declared his innocence and proposed that the Areopagus investigate the matter (Hyp. 5.

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meaning. The passages in Herodotus, being the earliest attested uses of the phrase, undermine any theory of development from a narrow meaning of the phrase to a broader one.

[17] For other passages where *kleptes*, *kleptein*, and *klope* are used in the context of embezzlement see Aeschin. 1.110-11, 113; *Ath. Pol.* 54.2; Ar. *Eq.* 436, 444, 1224, 1226; Dem. 22.65, 24.112; 27.29, 40, 48; 58.15; Din. 1.70; Lys. 27.11. Cohen, *Theft*, 30-33, attempts to explain this evidence away, but his arguments are not convincing.

col. 2; Din. 1.61). The Areopagus was either very thorough or very leisurely in its work for it took six months to complete its report (Din. 1.45). The final report listed the names of those who had taken money and the amounts they had received (Hyp. 5. cols. 5-6). Demosthenes and Aristogeiton were among those named. Ten prosecutors were appointed by the Assembly (Din. 2.6), and the accused tried in court.

Dinarchus wrote speeches for the men who prosecuted Demosthenes and Aristogeiton. In the speech against Demosthenes (1.29), the prosecutor urges the court not to acquit Demosthenes, who was caught *ep'autophoro* holding gifts against the interest of the city. From what we know of the Harpalus affair, Demosthenes was not caught in the act of receiving gifts from the Macedonian. The investigation into the whereabouts of the money took place after Harpalus left Athens. The prosecutor is referring to the conclusion of the report delivered by the Areopagus, which declared that Demosthenes had received money from Harpalus (Hyp. 5. cols. 5-6). As the speaker says, the evidence they had was the money that was in his possession (*dora echonta*). We do not know whether the Areopagus actually entered Demosthenes' house and came upon the money or relied on the testimony of witnesses. Whatever their evidence, the Areopagus could not have arrested Demosthenes caught in the act of taking gifts. Later on in the speech (53-4), the prosecutor states that in the view of the entire Areopagus Demosthenes was caught taking money *ep'autophoro*. Still further on in the speech (77) Demosthenes is called an *ep'autophoro* thief and traitor. In a similar fashion, Aristogeiton is also said to have been caught *ep'autophoro* holding gifts contrary to the interests of the city (Din. 2.6). In all four passages, the best translation is "clearly" or "obviously."

Not surprisingly the phrase lent itself to some rhetorical abuse at the hands of overzealous prosecutors. Like scholars, prosecutors often buttress a frail argument by claiming that weak evidence "clearly" or "obviously" proves their point. When prosecuting Aeschines in 343 for treason, Demosthenes had a notoriously weak case and had to prove his charge by circumstantial evidence[18]. That does not prevent him from asserting that the evidence reveals Aeschines to be a traitor *ep'autophoro*. Demosthenes (19.121-23) recounts how Aeschines tried to avoid going on the Third Embassy to Philip after Demosthenes, who had been a member of the First and Second Embassies to Philip, declined to participate on this occasion. Demosthenes nowhere accuses Aeschines of receiving a bribe during the Third Embassy - that allegedly took place during the Second Embassy (Dem. 19. 166-68). The reason Demosthenes brings up Aeschines' initial refusal to go on the third Embassy is that it reveals Aeschines was afraid his opponent would expose his plot and persuade the Athenians to thwart Philip's plans while he was away. For Demosthenes this anxiety constitutes "clear" proof (*ep'autophoro* ...

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[18] For the weakness of Demosthenes' charge, see E. M. Harris, *Aeschines and Athenian Politics in the Age of Philip II* (Oxford 1994) Chapter 5.

exelengxei) that Aeschines had taken bribes (*dedorodokekot'*). The translation "in the act" does not fit the context.

The phrase *ep'autophoro* is also found in the speech Apollodorus delivered against Stephanus ([Dem.] 45.81]). In the passage in question, Apollodorus addresses Phormion and accuses him of embezzling money from his father Pasion. Phormion had been the manager of Pasion's bank (49.17, 60) and continued to run it under a leasing agreement (Dem. 36.4-10, 37)[19]. Apollodorus describes a hypothetical situation: what if I were to put all the property you stole from my father's bank on your back and led you away as an *ep'autophoro* thief? Where would you say you received the money from? Apollodorus is not describing the possibility of catching Phormion in the act of embezzling funds[20]. That was no longer possible since Phormion had ceased to be manager of the bank many years ago. Apollodorus claims that Phormion is still in possession of the embezzled funds and threatens to pile them on his back and drag him to the Eleven. This money allegedly taken from the bank would serve as incriminating evidence. To defend himself, Phormion would have to produce another person willing to state that he gave Phormion the money (*anagoge*)[21]. The threat is imaginary, but the hypothetical arrest is to be made on the grounds that Phormion's guilt is made "obvious" by his possession of the money. Were Phormion to be seized, he would be just like the *fur manifestus* caught with stolen goods.

These texts make it manifest, clear, and obvious that *ep'autophoro* should be translated "manifest," "clear," or "obvious." In fact, Lysias (1.21) appears to gloss the phrase with the word *phaneron* "obvious." "In the act" does not work as a translation in the passages we have examined[22]. The next question to be answered is whether being caught *ep'autophoro* means being physically seized with incriminating evidence or only witnessed in highly incriminating circumstances. The most illuminating passage for this question is in the speech Aeschines delivered against Timarchus in late 346[23]. As is widely recognized, Aeschines' case against Timarchus was quite weak[24]. In the absence

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19 On Pasion's bank see E. M. Harris, "The Date of Apollodorus' Speech against Timotheus and its Implications for Athenian History and Legal Procedure," *AJP* 109 (1988) 44-52.

20 Cohen, *Theft*, 57, has not read the passage carefully and thinks that Apollodorus is addressing Stephanus.

21 On the *anagoge* procedure see W. Wyse, *The Speeches of Isaeus* (Cambridge 1904; repr. New York 1979) 436.

22 For other passages where the translation "in the act" is inappropriate see Aeschin. 2.88; Dem. 19.132; 23.157; 39.26; Lys. 7.42. Note the phrase is often used with the verb *elengchein*: Aeschin. 3.10; Dem. 19.121, 293; 23.157; Lys. 7.42; 13.30 (cf. Aeschin. 2.88 [*deixaimi*]; Dem. 39.26 [*epideiknuei*]). One "clearly" or "obviously" shows or proves something - once again the translation "in the act" does not fit the context.

23 For the date of the speech see E. M. Harris, "The Date of the Trial of Timarchus," *Hermes* 113 (1985) 376-80.

24 See Harris, *Aeschines*, Chapter 5.4.

of any witnesses to Timarchus' alleged prostitution, Aeschines had to convict his opponent by resorting to the court's knowledge of rumors and innuendo. Aeschines tries to get the court to believe that Timarchus' entire life-style bears witness against him so there is no need of witnesses to prove his guilt. Aeschines complains that it is unfair to demand him to call witnesses. He argues that if only those whose crimes can be proven by the testimony of witnesses are punished, those who commit misdeeds without being detected will never be brought to justice. Aeschines gives the examples of robbers (*lopoduton*), seducers (*moichon*), thieves (*klepton*), and murderers (*androphonon*)[25]. Those who are *halontes*, which can mean both "physically seized" or "detected" (the Greek verb has the same ambiguity as the English verb "caught"), and confess, are executed. Those who avoid detection and deny their guilt are tried in court and the truth is established *ek ton eikoton* "from the probabilities" (C. D. Adams in the Loeb translation translates this "from circumstantial evidence"). The *ep'autophoro* criminal is thus contrasted with the one who escapes detection and is convicted not by the testimony of those who witnessed him committing the crime, but by what is generally known about his character and conduct. Since the *ep'autophoro* criminal is set opposite this kind of criminal, he must be one whose guilt is clearly established by eye-witness testimony.

Where the Athenians drew the line between *ep'autophoro* or manifest guilt and guilt determined *ek ton eikoton* is not altogether clear. Indeed, there may have been some debate about where to draw the line just as there existed differences of opinion in Roman Law about how to define *furtum manifestum*. That does not imply, however, that the Athenians did not understand the term *ep'autophoro* or that the Romans did not understand the term *furtum manifestum*. All this reveals is that Athenian Law and Roman Law, like all legal systems, possessed what H. L. A. Hart has called an "open texture"[26]. Although the basic idea expressed by each term was essentially well understood by those who used them, some debate might inevitably arise about how to apply them in particular circumstances. These were the "hard cases" where some might argue that the evidence was incontrovertible and clear, yet others might disagree.

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25 One should not use this passage as evidence for the kinds of offenders subject to apagoge to the Eleven - see E. M. Harris, "Did the Athenians Regard Seduction as a Worse Crime than Rape?" *CQ* 40 (1990) 376-77. D. Cohen, *Law, Sexuality, and Society: The Enforcement of Morals in Classical Athens* (Cambridge 1991) 111-12, repeats this mistake, which invalidates much of this analysis of the punishment of adultery in Athens.

26 H. L. A. Hart, *The Concept of Law* (Oxford 1961) 120-32. The term "open texture" is misunderstood by R. G. Osborne, "Law in Action in Classical Athens," *JHS* 105 (1985) 40-58.

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Our examination of the term *ep'autophoro* shows that the statement of Ulpian is basically correct: the term is equivalent to the word *manifestum* in *furtum manifestum*. The next question to answer is whether the contrast between *furtum manifestum* and *furtum nec manifestum* in Roman Law is similar to the contrast between the type of theft punished by *apagoge* to the Eleven (*klope ep'autophoro*) and that punished by the *dike klopes*. As we noted earlier, in *furtum manifestum* there must be strong evidence that the defendant actually removed the stolen object from the plaintiff's possession whereas in *furtum nec manifestum* it was necessary to prove only that the plaintiff owned the stolen object and that the defendant had it contrary to his will (*cum quis alienam rem invito domino contrectat*). In similar fashion, the *kleptes ep'autophoro* in Athenian Law was the one who has "manifestly" removed the stolen object from the owner's possession. But for conviction on the *dike klopes*, it appears that the plaintiff was only required to show that he had lost possession of the object and that the defendant had it in his possession. This follows from the wording of the statute for the *dike klopes* (Dem. 24.105): the procedure is available for whatever someone loses (*ho ti an tis apolese*)[27].

Just as there existed a major substantive difference between *furtum manifestum* and *furtum nec manifestum*, there was also a similar difference between the type of theft punished by *apagoge* to the Eleven and that punished by the *dike klopes*. This in turn explains the difference in penalties between the two offenses: for conviction in the *apagoge* procedure the penalty is death, in the *dike klopes* only double the amount of the stolen object, the same as the penalty in *furtum nec manifestum*. Since in both the *dike klopes* and *furtum nec manifestum* asportation is either not present or cannot be proven, the penalty is less[28].

So far we have only considered the type of thief (*kleptes*) subject to *apagoge* to the Eleven. In addition to thieves, however, one could punish two other categories of offender by this procedure: *andrapodistai* and *lopodutai* (*Ath. Pol.* 52.1). What did these three categories have in common? Before looking for the answer to that question, it is necessary to determine the meaning of the other two terms. The meaning of *andrapodistes*

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27 Cf. Cohen, *Theft*, 62-68.

28 Cohen, *Theft*, 52-61, is incorrect when he considers *klope ep'autophoro* to be "aggravated theft". Aggravation requires violence or the threat of violence. But just as violence was not a required element in the *Tatbestand* of *furtum manifestum*, there is no evidence showing that the *kleptes ep'autophoro* was necessarily one who employed violence. In fact, the passages where the phrase is used to describe embezzlers prove the contrary. In both Roman Law (Gaius, *Inst.* 3.209) and Athenian Law (Dem. 21.44), aggravated theft was dealt with under a separate statute. One of the major flaws in Cohen's analysis is his tendency to confuse the concepts of "flagrance" and "aggravation." Cf. D. M. MacDowell, review of Cohen, *Theft*, *CR* 35 (1985) 230.

poses no problem: the word refers to the person who makes a free person into a slave. But what is the difference between *kleptai* and *lopodutes*, which I have translated above as "robber" for the sake of convenience? The two terms are unlikely to denote the same type of offender, or that one term refers to a general class of offender, while the other refers to a subset of the general class. If that were the case, only one of the two terms would stand in the law.

The difference between the two terms appears to relate to the manner of acquiring the stolen object. In his definition of theft in the *Rhetoric* (1374a), Aristotle includes stealth (*lathra*) as one of the elements of the offense. The passages where the verb *kleptein* and the nouns *klope* and *kleptes* are used tend to bear him out [Ar. *Eq.* 109-11 (while owner sleeps), *Vesp.* 237-39 (*lathont'*), *Ec.* 26-7 (*lathein*), Dem. 24.114 (*hupheloito* used as variant of *kleptoi*)]. The frequent use of these verbs in cases of embezzlement provides further support for Aristotle's definition. Finally, one should note that the verb can also mean "deceive" (Hom. *Il.* 1.132; 14.217; Pi. *P.* 3.29; 4.96; Hes. *Th.* 613; Aeschin. 3.35, 142, 200) and is used to describe cases of fraud (Aeschin. 3.146; Ar. *Pax* 1232-34 with *scholion ad loc.*; S. *Ph.* 75-78, 1271-72).

Lopodusia, the crime of the *lopodutes*, is an open taking. The basic meaning of the noun *lopodutes* is one who strips off someone's clothing. The meaning is well illustrated in the case described in Demosthenes' speech against Conon (Dem. 54.1, 8, 24), where Ariston describes how the defendant knocked him down and yanked his clothes from him (8: *exedusan*). A passage from Aristophanes *Birds* (496-98) describes a similar situation and labels the offender a *lopodutes*.

The element common to all three offenses is that in each case the offender absconds with the *corpus delicti* and can thus be caught after the commission of his offense "red-handed," that is, with the *corpus delicti* in his possession. The *kleptes* can be caught after the theft with the stolen object on his person or in his house. The *andrapodistes* can be found with the free person whom he has enslaved chained up on his property[29]. And the *lopodutes* can be arrested with the clothing he has snatched from his victim. It is therefore not surprising that *moichoi*, those who have consensual sexual relations with women without the approval of their *kyrios*, are not included in the list of *kakourgoi* subject to *apagoge* to the Eleven. Unlike the other offenses, there is no "clear" or "manifest" evidence for *moicheia* after the offense has been committed[30].

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[29] Two of the cases mentioned in Din. 1.23 are probably punishments for enslavement. Menon, a miller, was put to death for putting a free youth from Pallene in his mill. Work in a mill was considered a punishment fit for slaves (Lys. 1. 18; Eur. *Cyc.* 240; Dem. 45.33; Men. *Her.* 3). Euthymachus was executed for putting an Olynthian girl in a brothel (*ep'oikematos*). This too was an activity associated with slaves - see [Dem.] 59.18-23.

[30] For this reason different rules applied for *moichoi*. The *kyrios* of the woman could kill the *moichos*, but had to discover him "on top of" the woman - see Lys. 1.30. This argument strengthens the

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Two important methodological points emerge from this study of theft in Athenian Law. First, it is better to seek parallels for Athenian legal practices and ideas in the law of the early Roman Republic than in the Common Law of late Medieval and Early Modern England. The social and economic environment of Rome at the time of the Twelve Tables was much more similar to that of Classical Athens than England at the time of Bracton or in the period when the Carrier's Case was decided. The development of commerce in Early Medieval England led to the creation of possessorial immunity in the Common Law. This in turn led to a strict distinction between larceny, which required a trespassory taking, and embezzlement[31]. D. Cohen has tried to read this distinction into the Athenian evidence, but, as our study has shown, *klope* extended far beyond larceny to include embezzlement and fraud[32]. The absence of such a distinction and of the concept of possessorial immunity in Athenian Law is not surprising given the level of social and economic organization.

Second, one should use analogies from Roman Law only as hypotheses. A concept in Roman Law may help us to understand some aspect of Athenian Law or it may not. The only way to find out is to treat the Roman concept as a hypothesis, which is then tested against the evidence with the same philological rigor that one needs to apply whenever one reads an ancient Greek text. What one should not do is to assume that an idea drawn from Roman Law provides "the key" to solving a problem in Athenian Law simply on the basis of some superficial similarity in vocabulary. For instance, the use of the term *hypotheca* in the *Digest* has led many scholars to assume that this form of security was similar to the Athenian *hypotheke* and to infer that the Athenians, like the Romans, possessed two or more different forms of real security. In this case, the analogy drawn from Roman Law turns out to be seriously misleading and has caused scholars like M. I. Finley and J. V. A. Fine to search for distinctions between different forms of real security in Athenian Law that did not exist. But in regard to theft, the analogy between the *fur manifestus* and the *kleptes ep'autophoro* is very fruitful and helps us to

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case for rejecting the idea of Cohen, *Law, Sexuality, and Society*, 111-12, that the law about *apagoge* to the Eleven made *moichoi* subject to the procedure. I owe this point to Professor Alberto Maffi.

The need for incontrovertible proof in a summary procedure finds a parallel in the reluctance of the Ephors to take action against Pausanias (Th. 1.132.5: *me tacheis einai peri andros Spartiatou aneu anamphisbeteton tekmerion bouleusai ti anekeston*).

31 On the importance of possessorial immunity in Common Law see G. Fletcher, *Rethinking Criminal Law* (Boston and Toronto 1978) 81-83.

32 Cohen, *Theft*, 10-33.

understand why certain types of offenders were subject to *apagoge* to the Eleven, and others were not.

Finally our analysis of theft in Athenian Law demonstrates the value of examining substantive issues when studying different types of Athenian legal procedures. It was not social factors that account for the variety of legal procedures in Athenian Law. The procedure was made to fit the crime, not the social status of the plaintiff[33].

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[33] Osborne, "Law in Action" argues on the basis of Dem. 22.26-27 that the Athenians created different types of procedures to suit the different social positions of potential litigants and that substantive differences were not important. This study has, I hope, shown how mistaken such an approach is. On the issue of real security in Athenian Law, see Edward M. Harris, "When is a Sale not a Sale? The Riddle of Athenian Terminology for Real Security Revisited," *CQ* 38 (1988) 351-81, esp. 352-60, and "*Apotimema*: Athenian Terminology for Real Security in Leases and Dowry Agreements," *CQ* 43 (1993) 73-95.

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Altgriechische πίστις und Vertrauenshaftung

Die moderne Zivilistik begründet die Haftung in Rechtsverhältnissen, die "zwischen Vertrag und Delikt" stehen, unter anderen mit Hilfe des Begriffs des Vertrauens (Vertrauenshaftung, reliance liability)[1]. Präziser formuliert: Wenn das äußere Verhalten einer der Parteien ein gerechtfertigtes Vertrauen bei der anderen auslöst, begründet es die Haftung für das konkrete Verhalten. Bei den Vertretern dieser Theorie zählt z.B. die Produkthaftung zu den typischen Beispielen der Begründung bzw. Ausdehnung der Haftung nach den Grundsätzen des Vertrauens.

Dieser Haftungsgrund ist nicht neu. Er wird von Rechtsordnungen solcher Gesellschaften aufgenommen, die aus der wirtschaftlichen Isolierung kommen und mit neuen Personen und gegebenenfalls neuen Gegenständen geschäftliche Aktivitäten entfalten. Bei den Römern bildete die *fides* bereits seit dem 3. Jahrhundert (wenn nicht früher) bei einer Reihe von üblichen, für die aufblühende römische Wirtschaft notwendigen Rechtsgeschäften, bei den *negotia bonae fidei*, die wir Konsensualverträge nennen, die Grundlage der schuldrechtlichen Haftung. In diesem Beitrag möchte ich versuchen zu beweisen, daß das Vertrauen als Haftungsgrundlage bereits in der griechischen Antike nicht unbekannt war.

Die meisten Rechtshistoriker nehmen an, daß der dem römischen entsprechende griechische Begriff, πίστις (*fides Graeca*) keine Grundlage einer Vertragshaftung gebildet habe. Diese sei in der griechischen Rechtsauffassung untrennbar mit einem dinglichem Rechtsgeschäft verbunden gewesen. Dennoch sind, wie die Untersuchungen von Louis Gernet beweisen, die Fälle nicht selten, in denen die Bedeutungen von πίστις und *fides* übereinstimmen[2]. Jedoch bildet die πίστις allein keinen selbstständigen Haftungsgrund, weder auf dem Gebiet des Warenverkehrs noch beim Eid, wo ihre Bedeutung der von *fides* am nächsten kommt. In den römischen formlosen Verträgen begründet die *fides* die Grundlagen der rechtlichen Ansprüche. In vielen Rechtsordnungen des griechischen Altertums verweigert der Gesetzgeber hingegen dem Kläger jegliches Rechtsmittel, wenn er mit dem guten Glauben argumentiert: ἐὰν δέ τις

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1 Für das deutsche Recht siehe vor allem Canaris, Die Vertrauenshaftung im deutschen Privatrecht (1971).

2 Die Ansicht von Gernet teilt auch Pringsheim, Gesammelte Abhandlungen II, S. 179 ff.

πιστεύσῃ, μὴ εἶναι δίκην[3]. Von diesem gesamtgriechisch geltenden Prinzip weicht zunächst der 509 v. Chr. zwischen Rom und Karthago abgeschlossene Staatsvertrag ab. Der Text des Staatsvertrags - wie er bei Polybios erhalten ist - enthält die Vorschrift, daß aus Handelsgeschäften, die vor dem κήρυξ oder dem γραμματεύς abgeschlossen wurden, ein Anspruch zugunsten des Verkäufers, sogar im Fall eines Verkaufs auf Kredit, entsteht: ὅσα δ' ἂν τούτων παρόντων πραθῇ, δημοσίᾳ πίστει ὀφειλέσθω τῷ ἀποδομένῳ[4]. Aus vielen Gründen ist die Aussage des Polybios bedenklich[5]. Sie beweist jedenfalls nicht, daß die Idee einer Vertragsbeziehung, die einen klagbaren Anspruch aus Treu und Glauben entstehen läßt, in der altgriechischen, der frühen römischen, der karthagischen oder in irgendeiner anderen Rechtsordnung der von Polybios geschilderten Zeit existiert hätte.

Es mag sein, daß die griechische πίστις ein vertragsfremder Begriff ist und sich hauptsächlich darin von der *fides* unterscheidet. Rechtsfremd ist er jedoch nicht. Die πίστις existierte nicht nur als ethisch-sozialer Begriff, der anschließend ins Beweisrecht aufgenommen wurde. Sie bezeichnet eine der ältesten Grundlagen schuldrechtlicher Bindung bei Geschäftsbeziehungen unter Bekannten und Angehörigen des gleichen sozialen Status. Wie die archaische ξενία[6] ist auch die πίστις als Institution aus den Bindungen zwischen aristokratischen Geschlechtern hervorgegangen, und zwar aus genau so starken wie diejenigen, welche durch Eheschließung zwischen Personen von verschiedenen Sippen entstehen. Die aristokratische ξενία überschreitet die Grenzen der einfachen Gastfreundschaft und führt zu einem Bündnisabkommen zwischen zwei aristokratischen Geschlechtern[7]. Die πίστις funktioniert aber auf dem Gebiet des zwischen ihnen bestehenden Geschäftsverkehrs. Diese Bedeutung der πίστις beweisen einerseits die antiken Tragödien[8], aber noch mehr eine Stelle aus der Nikomachischen Ethik des Aristoteles.

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Aristoteles analysiert die Geschäftsbeziehungen unter dem Aspekt der φιλία. Er unterscheidet zwischen sittlichen und juristischen Gründen, die eine φιλία vorschreiben. Die Geschäftsbeziehungen, die eine rechtliche Grundlage haben, schließt man entweder durch unmittelbare und gleichzeitige Erfüllung von Leistung und Gegenleistung ab

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3 Θεόφραστος Περὶ συμβολαίων 97 apud Stobeos, Anthologion 44, 22.

4 Polybios III, 22, 1 = Bengtson, Staatsverträge, 121.

5 Pringsheim, loc. cit., S. 180 ff.

6 Finley, The World of Odysseus, S. 115 ff. Für die *xenia* und die *philia* beim Homer, s. ferner Kakridis, La notion de l' amitié et de l' hospitalité chez Homère (1963).

7 So Gauthier, Symbola, S. 19 ff.

8 Siehe unten, Fn. 19–20.

oder, im Gegensatz dazu, durch die Übernahme einer Leistung mit der Abrede, eine Gegenleistung zu erbringen (καθ' ὁμολογίαν τι ἀντὶ τινός). In einigen Rechtsordnungen entstehen jedoch aus Rechtsgeschäften, die keine Bargeschäfte sind, überhaupt keine klagbaren Ansprüche. Nach Aristoteles fehlt dennoch der rechtliche Schutz nicht vollkommen: διόπερ ἐνίοις οὐκ εἰσὶ τούτων δίκαι, ἀλλ' οἴονται δεῖν στέργειν τοὺς κατὰ πίστιν συναλλάξαντας[9]. Die Verweigerung des Rechtsschutzes, die - wie sich aus den Wörtern παρ' ἐνίοις ergibt - nicht alle Rechtsordnungen dieser Epoche befolgen, bedeutet für die "auf Vertrauen Handelnden" nicht den völligen Ausschluß aus der Rechtsordnung. Man kann zwar den genauen Inhalt nicht mehr rekonstruieren, den die einzelnen griechischen Städte der Wendung στέργειν beigemessen haben, doch kann man aus der Formulierung des Aristoteles darauf schließen, daß der Gläubiger, der dem Schuldner vertraute, einen über den moralischen Beistand hinausgehenden Schutz genossen haben mußte. Meiner Meinung nach kann man die Unbestimmtheit des Verbum στέργειν ("beihelfen", "beistehen") mit *servabo* des prätorischen Edikts *de pactis* vergleichen.

Im attischen Recht der klassischen Zeit entsteht aus der Vertrauensverletzung bei bestimmten einseitigen Rechtsgeschäften eine deliktische Haftung. Die juristische Bedeutung der πίστις und ihre Stellung in der klassischen attischen Rechtsordnung ergibt sich aus dem bekannten Satz von Deinarchos: καὶ ὁ μὲν κοινὸς τῆς πόλεως νόμος, ἐάν τις ἐναντίον τῶν πολιτῶν ὁμολογήσας τι παραβῇ, τοῦτον ἔνοχον εἶναι κελεύει τῷ ἀδικεῖν. ὁ δὲ πάντας Ἀθηναίους ἐξηπατηκὼς καὶ προδοὺς τὴν πίστιν ἣν παρ' ὑμῶν ἔλαβεν[10]. Die Aussage Deinarchos' bezieht sich auf das Vertragsrecht des 4. Jahrhunderts. Sie muß also von den Rechtshistorikern aus diesem Aspekt analysiert werden. Der Text vermittelt uns den Inhalt des ältesten Gesetzes, mit dem die einseitigen Rechtsgeschäfte, die sogenannten ὁμολογίαι, geregelt wurden. Aus der ὁμολογία eines Bürgers entsteht die Verpflichtung, die Umstände, die er beim Abschluß des Rechtsgeschäftes zugestanden hat, zu beachten. Eine eventuelle Verletzung dieser Verpflichtung begründet die deliktische Haftung des ὁμολογήσαντος, der durch sein Verhalten das "Vertrauen seiner Mitbürger getäuscht und verraten" hat.

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Die gleiche Richtung kann man vielleicht in einer leider etwas unklaren Vorschrift des Kodex von Gortyn erkennen. Sie ordnet an, daß aus der Übernahme einer Bürgschaft[11], der Verurteilung[12] und der Nichtrückgabe eines Pfands an den Schuldner

9 Aristoteles, Eth. Nic. VIII, 13, 1162b.

10 Deinarchos, Gegen Philokles 4.

11 Willetts, The Law Code of Gortyn, IX, Z. 24-25: ἀν[δ]εκσάμ[ε]νος.

12 IX, Z. 25: νενικάμεν[ο]ς.

nach Erfüllung[13] eine schuldrechtliche Bindung entsteht, die nach dem Tod des Schuldners auf dessen Erben übergeht. In der Vorschrift folgen zwei besonders unklare Fälle von Bindungen, die des διαβαλλόμενος und des διειπάμενος[14]. Zu diesen Termini wurden sehr unterschiedliche Meinungen geäußert. Einige Historiker stellen auf eine Schuld aus Würfelspiel oder Wette ab[15], andere sehen darin Vorläufer des *obligatus ex scriptura* und des *obligatus verbis tantum*, also schuldrechtlicher Verpflichtungen, die aus einem schriftlichen oder mündlichen Rechtsgeschäft entstehen[16]. Die dritte Gruppe meint, daß der Terminus Technicus διαβάλλομαι jedenfalls die *obligationes ex delicto*[17] bezeichnen soll. Von den drei zuerst zitierten Fällen haben zwei einen "realen" Charakter: Der Haftungsgrund entsteht, wie auch sonst in den griechischen Rechten, durch die Übergabe einer Sache. Sowohl die ἐγγύη als auch die Verpfändung setzten die materielle Übergabe einer Sache voraus. Anders bei der Verurteilung. Es ist also nicht ausgeschlossen, das der kretische Gesetzgeber auch für die beiden letzten, unklaren Fälle angeordnet hat, daß die Haftung nicht aus der Übergabe einer Sache, sondern aufgrund eines Verhaltens, einer Handlung (διαβαλλόμενος) oder einer mündlichen Erklärung (διειπάμενος) entsteht, welche in der Öffentlichkeit und in Anwesenheit von Bürgern durchgeführt werden. Die Haftung des διαβαλλόμενος und des διειπάμενος hat keinen Vertragscharakter, weil gar kein Vertrag abgeschlossen wurde. Sie hat aber auch keinen ausschließlich deliktischen Charakter. Sogar dann, wenn durch das konkrete Verhalten keine private Interessen verletzt werden, wie beim ὁμολογήσας des Deinarchos, muß sowohl der διαβαλλόμενος als auch der διειπάμενος von Gortyn einstehen. Eine präzisere Charakterisierung dieser Haftung scheint unmöglich, da in der frühen griechischen Rechtsentwicklung die deliktische und die vertragliche Haftung häufig untrennbar ineinander verschmolzen sind. Das gilt ebenso für das attische wie für das gortynische Recht. Da die Haftung wegen Verletzung der πίστις den Bürgern gegenüber keinen Schaden an privaten Rechtsgütern voraussetzt, hat sie pönalen Charakter,

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13 Mögliche Interpretation der Vorschrift IX, Z. 25-26: ἔνκοιτὰνς ὀπέλον. Siehe Willetts, ad. loc.

14 IX, Z. 26-27.

15 Blass, Sammlung der griechischen Dialekt-Inschriften III, 2, 3, ad. loc.

16 So Guarducci, Inscriptiones creticae IV, ad. loc.

17 Dareste - Haussoullier - Reinach, Recueil des inscriptions juridiques grecques, ad loc. (S. 352 ff.). Cantarella, Nov. Dig. It. 11 (1965), S. 546 ff. Siehe aber Maffi, Studi di epigrafia greca (1983), S. 138 ff.: Il participio aor. medio διαβαλλόμενος alla r. 26-27 indice dunque che il defunto aveva intentato un'azione contro un convenuto resoso contumace probabilmente .... fin dal inizio del processo. Se gli eredi dell'attore vogliono riassumere la causa, divono dimonstrare che il rapporto processuale si era a suo tempo regolarmente constituito, nonostante la cuntumacia del convenuto ..... Διαϝειπάμενος indica dunque la situazione dell'attore che, dopo aver regolarmente citato in giudizio l'avversario, rinuncia esplicitamente o implicitamente, anche contro la sua volontà, a compiere gli atti necessari per condurre innanzi il procedimento.

während ihr die passive Vererblichkeit (wenigstens in Gortyn) den Charakter der vertraglichen Haftung verleiht.

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Kehren wir zu Deinarchos zurück: Λαμβάνω τήν πίστιν begründet also die Haftung des Vertrauensempfängers für den Fall, daß der tatsächliche Sachverhalt oder die tatsächliche Situation in Dritten (aufgrund des Inhalts und der Publizität) ein zumutbares Vertrauen hervorgerufen hat, aber der angestrebte Zweck nicht erreicht wurde. Die ὁμολογία hat auch den Gesetzgeber Athens beschäftigt, ohne daß sie in den Bereich der vertraglichen Beziehungen aufgenommen worden wäre (ὅσα ἄν ἕτερος ἑτέρῳ ὁμολογήσῃ). Die Verletzung der ὁμολογία-Erklärung bedeutet ein betrügerisches Vorgehen gegen die Gemeinschaft der Mitbürger und gegen ihr Vertrauen, das sie dem Erklärenden entgegengebracht hat.

Die πίστις der Antike und die Vertrauenshaftung der neueren Zivilistik beweisen, daß man bei einigen Rechtseinrichtungen, auch wenn zweieinhalbtausend Jahre dazwischenliegen, Übereinstimmung in den Rechtsauffassungen entdecken kann. Diese Beobachtung gilt besonders dann, wenn sich ein allgemeines Bedürfnis nach Erweiterung von traditionellen Haftungsgründe vorliegt.

Im attischen Recht der klassischen Zeit hat wahrscheinlich, mit der Ausnahme der einseitigen ὁμολογίαι vor den Bürgern, das Vertrauen als selbständiger Haftungsgrund keine Rolle gespielt. In anderen antiken griechischen Rechtsordnungen dürfte die πίστις, wie man aus dem Aristoteles-Fragment schließen kann, eine weiter entwickelte rechtliche Anwendung gefunden haben. Es bleibt aber unbekannt, unter welchen Voraussetzungen sie zur Gewährung von gerichtlichem oder anderem Rechtsschutz geführt hat. Der Sinn der πίστις existiert jedoch in der Institution der ἐγγύη, durch die eine bereits bestehende Schuld bestätigt wird. In einem älteren Stadium der Institution führte die ἐγγύη nicht zur Haftungsübernahme, sondern zur Übergabe einer Person, des Bürgen, an den Gläubiger. In einem zweiten Stadium wird die Bürgschaft, stets unter Beibehaltung ihres dinglichen Charakters, durch Übergabe eines Gegenstands an den Gläubiger geleistet, wie es sich aus dem Wort ἐγγυητήριον in der Inschrift von Pech Maho[18] nachweisen läßt, oder auch durch Händedruck, durch Handlungen also, die die materielle Übergabe der vergangenen Zeiten symbolisieren. Diese Bräuche werden durch Ausdrücke wie ἔμβαλλε χειρὸς πίστιν[19] oder δός μοι χειρὸς σῆς πίστιν[20] bezeugt, eine Geste, die

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18 Lejeune-Pouilloux-Solier, Etrusque et ionien sur un plomb de Pech Maho (Aude), Rev. arch. Narb. 21 (1988), S. 19-59. Z. 5-6: τρίτον ἡμιεκτανιον ἔδωκα ἀριθμῳι καὶ εγγυητήριον τρίτην αὐτός.

19 Sophokles, Philokt. 813. Cf. Hesychios, s.v. δεξιάς. συνθήκας. δεξιαί. αἱ γενόμεναι κατὰ συνθήκας ἐπαφαὶ τῶν δεξιῶν χειρῶν, εἰς σύμβολον τοῦ βέβαια ἔσεσθαι καὶ ἦν μετὰ τὰ

zweifelsohne einen schuldrechtlichen Anspruch aus dem Vertrauensverhältnis unter den Vertragspartnern schafft. Dieses war für die beidseitigen Verbindlichkeiten maßgebend.

Das ἐγγυητήριον von Pech Maho, der Händedruck oder das etwas unklare χειρέμβολον[21] bestätigten eine künftige Leistung: Die πίστις sorgt dafür, daß die Schuld in der Zukunft bezahlt wird. Der reale Charakter der altgriechischen Verträge und das Prinzip der gleichzeitigen Erfüllung von Leistung und Gegenleistung (Surrogationsprinzip) bedeuten, daß die Klagbarkeit auf dem Vorliegen der Gegenleistung beruht (notwendige Entgeltlichkeit). Wenn die unmittelbare Entrichtung der Gegenleistung aus irgendeinem Grund nicht möglich ist, wird diese durch einen symbolischen Gegenstand oder eine symbolische Geste ersetzt. Wenn der Gläubiger die symbolische Gegenleistung annimmt, ist das Vertrauen begründet. Es ist seinem Partner gelungen, in ihm durch sein Verhalten Vertrauen zu erwecken. Der reale Charakter der Verträge steht vielleicht mit dem rechtlichen Symbolismus im Warenverkehr in enger Verbindung: Die Parteien haften dann, wenn sie etwas übernommen bzw. angenommen haben. Der Gläubiger akzeptiert eine symbolische Gegenleistung statt der tatsächlich geschuldeten. Das bedeutet, daß er πίστις, Vertrauen, darauf hat, daß der Schuldner auch in der Wirklichkeit seine Schuld erfüllen werde. Das Vertrauen und die Erfüllungshaftung des Schuldners verkörpern sich in der symbolischen Handlung.

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Die ἐγγύη des archaischen Rechts oder das ἐγγυητήριον von Pech Maho sind mit Rechtsauffassungen verknüpft, für die der bindende Charakter des bloßen Versprechens undenkbar war. Schuldner und gleichzeitig Bürge seiner eigenen Schuld zu sein, klingt heute paradox, erklärt sich aber im Rahmen eines Rechtes, das sich weigert, allein aus dem Versprechen rechtliche Folgen zu gewähren. Aus diesem Grund ist ein äußeres Element, ein Gegenstand oder eine Geste erforderlich, wodurch die πίστις die notwendige materielle Gestalt für das künftige Verhalten des Schuldners erhält und, auch wenn daraus kein klagbarer Anspruch entsteht, der Beistand der Rechtsordnung für die κατὰ πίστιν συναλλάξαντες begründet wird.

συντιθέμενα. Partsch, Griechisches Bürgschaftsrecht, S. 46 ff. Weiss, Griechisches Privatrecht I, S. 222 ff. Wolff, Beiträge, S. 171.

20 Sophokles, Oed. Kol. 1632.

21 Vélissaropoulos, Les nauclères grecs, S. 286 ff.

Éva Jakab (Szeged–Graz)

Bemerkungen zur Vertrauenshaftung im altgriechischen Recht

Frau Velissaropoulos hat am Schluß ihres Vortrags schöne Beispiele dafür gebracht, daß die *pistis* auch im griechischen Rechtsleben gewisse Rolle spielte. Zeichen des Vertrauens wie der Händedruck bekräftigen bestehende Haftungsbeziehungen oder binden die Partner moralisch, nicht aber rechtlich. Für eine "Vertrauenshaftung" hat sie jedoch, wie ich meine, keine Belege gebracht, wohl aber Ansätze für das "Vertrauensprinzip" gefunden.

Das komplizierte System der modernen Haftungsregeln wurzelt im römischen Recht. Die *bona fides* setzte sich im Vertragsrecht des 2.-1. Jh. v. Chr. durch[1]. Seitdem der Prätor bei gewissen vertraglichen Beziehungen die Prozeßformel mit der Klausel *quidquid dare facere oportet ex fide bona* ausstattete, kennt man das Vertrauensprinzip. Die Besonderheit der *ex bona fide* gewährten Klagen führte dazu, daß bestimmte Verträge durch bloßen Konsens zustandekommen konnten.

Auf der römischen Grundlage entwickelten sich im modernen Vertragsrecht das Konsensualprinzip, wonach jede Vereinbarung eine Haftung erzeugt, das Vertrauens–prinzip, wonach Treu und Glauben die vertraglichen Beziehungen beherrschten[2], und im Schadenersatzrecht das Verschuldensprinzip. Als Korrektur bzw. Erweiterung von Konsensual- und Verschuldensprinzip entwickelten deutsche Zivilisten, auf Jhering aufbauend, die sogenannte Vertrauenshaftung[3]. Es entstehen quasivertragliche oder quasideliktische Haftungsbeziehungen ohne Konsens und ohne Verschulden, bloß aus "Inanspruchnahme fremden Vertrauens"[4].

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1 Vgl. Kaser RP I 485 ff.; H. Honsell-Th. Mayer-Maly-W. Selb, Römisches Recht, 1987, 220 ff.

2 § 242 dBGB. Nach K. Larenz, Lehrbuch des Schuldrechts I, [13]1982, 116 ist diese Bestimmung ein "konkretisierungsbedürftiger Maßstab". Treu und Glauben besagten seinen Wortsinn nach, daß "jeder in Treue zu seinem gegebenen Worte stehen und das Vertrauen, das die unerläßliche Grundlage aller menschlichen Beziehungen bildet, nicht enttäuschen oder mißbrauchen, daß er sich so verhalten soll, wie es von einem redlich Denkenden erwartet werden kann."

3 Vgl. Larenz a.a.O. 102 ff.; C. W. Canaris, die Vertrauenshaftung im deutschen Privatrecht, 1971.

4 Das dBGB enthält keinen Rechtssatz, der allgemein bestimmte, daß schon durch die "Aufnahme von Vertragsverhandlungen erhöhte Sorgfalts- und Schutzpflichten sowie Loyalitätspflichten"

Es ist deshalb wenig wahrscheinlich, die Vertrauenshaftung im altgriechischen Recht wiederzufinden, weil dieses weder das Konsens- noch das Verschuldensprinzip kennt[5]. Wenn diese beiden Prinzipien nicht gelten, braucht man auch keine Vertrauenshaftung zu derer Korrektur. Auf die schwierige Frage, wie die vertraglichen Haftungsbeziehungen im altgriechischen Recht entstehen, muß ich in diesem Diskussionsbeitrag nicht eingehen. Ich möchte nur einige von Frau Velissaropoulos vorgelegte Quellen daraufhin überprüfen, ob sie die "Vertrauenshaftung" bestätigen oder nicht.

1) Das zitierte Fragment des ersten Vertrags zwischen Rom und Karthago[6] regelt die Geschäftstätigkeit römischer Händler auf karthagischem Gebiet (Polyb. 3,22, 8 f.):

> τοῖς δὲ κατ' ἐμπορίαν παραγινομένοις μηδὲν ἔστω τέλος πλὴν ἐπὶ κήρυκι ἢ γραμματεῖ. ὅσα δ' ἂν τούτων παρόντων πραθῇ, δημοσία πίστει ὀφειλέσθω τῷ ἀποδομένῳ, ὅσα ἂν ἢ ἐν Λιβύῃ ἢ ἐν Σαρδόνι πραθῇ.
>
> Die des Handels wegen kommen, sollen kein Geschäft rechtskräftig abschließen dürfen, es sei denn im Beisein eines Herolds oder Schreibers. Was aber in deren Gegenwart verkauft wird, dafür soll die Schuld dem Verkäufer vom Staat verbürgt sein, bei allem, was entweder in Libyen oder auf Sardinien verkauft wird.

Wenn römische Kaufleute auf karthagischem Gebiet verkaufen wollten, durften sie das nur unter Mitwirkung eines Herolds, *keryx*, oder Schreibers, *grammateus*, tun[7]. In diesem Fall steht die Kaufpreisschuld unter πίστις δημοσία. In der Klausel sieht man eine staatliche Garantie für private Vereinbarungen: Öffentlichkeit und Formzwang sind die Voraussetzungen des Rechtsschutzes, der den staatsfremden Händlern sonst nicht

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begründet würden, vgl. Larenz a.a.O. 102. Das dBGB enthält aber eine Reihe von Einzelbestimmungen, die eine Ersatzpflicht für den "Vertrauensschaden" begründen, so §§ 119, 122, 307, 309, 523 Abs. 1 usw. Zur Abgrenzung von der *culpa in contrahendo* vgl. Canaris a.a.O. 30 f.

5 S. die herrschende Lehre bei H. J. Wolff, SZ 74, 1957, 26ff. Diese Kategorien treten auch im römischen Recht erst in einer späteren Entwicklungsphase des Privatrechts auf, s. o. Anm. 1.

6 Zur Datierung vgl. H. Bengston, Die Staatsverträge des Altertums II, 1975, Nr. 121; H. Bengston, Griechische Geschichte von den Anfängen bis in die römische Kaiserzeit, 1977, 47 Anm. 1; R. Werner, Der Beginn der römischen Republik, 1963, 340 ff.; A. Alföldy, Early Rome and the Latins, 1965, 350 ff.; F. Wieacker, Rechtsgeschichte 266 Anm. 140.

7 Polybios spricht von "*keryx*" oder "*grammateus*". Den griechischen *grammateus* hat man in der Literatur mit dem phoinikischen "*spr*" gleichgestellt, vgl. Werner a.a.O. 319; M. David, The Treaties between Rome and Carthago and their Significance for our Knowledge of Roman International Law, in: Symbolae van Oven, 1946, 236; W. Huß, Geschichte der Karthager, 1985, 86 Anm. 3. Herold als "Aufrufer" hieß in Karthago sonst "*qr*", CIS I 3, 4883, 2.4; vgl. Huß a.a.O. 483. Man kann nicht mehr feststellen, ob Polybios die beiden griechischen Wörter als Synonym zur Erklärung eines einzigen karthagischen Wortes verwendet habe oder zwei Beamte mit getrennten Rollen gemeint waren.

gewährt worden sei[8]. In den archaischen Rechtssystemen sichern die "öffentlich" abgeschlossenen Geschäfte vor allem den gültigen Erwerbstitel[9]. Nach Polybios kann man darauf schließen, daß besonders auf die Inanspruchnahme der öffentlichen Form und auf die Garantie für den Kaufpreis Gewicht gelegt wurde. Πίστις δημοσία ist jedenfalls mit dem lateinischen Ausdruck *fides publica* zu verbinden. Polybios gilt als zuverlässiger Autor, der seine Quellen präzise übersetzt und referiert[10]. Der Vertrag zwischen Rom und Karthago dürfte in lateinischer und vielleicht in phönizischer Sprache abgefaßt gewesen sein[11]. Es ist also sehr wahrscheinlich, daß es sich hier um die lateinische *fides publica* handelt, die als öffentliche Garantie eines privaten Vertrages dem *ius gentium* einzuordnen ist[12]. Die Klausel hat nach Nörr weder mit der Vertragstreue der privaten Vertragspartner noch mit dem *foedus* zwischen Rom und Karthago zu tun. Am wenigsten erlaubt sie Folgerungen auf die Haftungsregeln im altgriechischen Recht.

2) Im achten Buch seiner Nikomachischen Ethik analysiert Aristoteles die Kategorien der φιλία. Freundschaftliche Kontakte schafft man auch wegen Nützlichkeit, die dann entweder von rechtlichen oder bloß sittlichen Normen gesteuert werden (Aristot. NE 8,13,1162 b):

> ἔστι δ' ἡ νομικὴ μὲν ἡ ἐπὶ ῥητοῖς, ἡ μὲν πάμπαν ἀγοραία ἐκ χειρὸς εἰς χεῖρα, ἡ δὲ ἐλευθεριωτέρα εἰς χρόνον, καθ' ὁμολογίαν δὲ τί ἀντὶ τίνος. δῆλον δ' ἐν ταύτῃ τὸ ὀφείλημα κοὐκ ἀμφίλογον, φιλικὸν δὲ τὴν ἀναβολὴν ἔχει· διόπερ ἐνίοις οὐκ εἰσὶ τούτων δίκαι, ἀλλ' οἴονται δεῖν στέργειν τοὺς κατὰ πίστιν συναλλάξαντας.
>
> Die gesetzliche Freundschaft ist die 'zu bestimmten Bedingungen', einerseits völlig krämerisch, Zug um Zug, andererseits etwas ehrenhafter auf Zeit, gemäß einer Homologie, 'das eine für das andere'. In dieser (Freundschaft) ist die Leistung klar und nicht umstritten, und die Freundschaft gestattet den Aufschub. Deshalb gibt es bei einigen dafür keine Klagen, sondern sie glauben, diejenigen, welche ein Geschäft auf Treue abschließen, müssen sich damit zufrieden geben.

Das Schlüsselwort der Interpretation von Frau Prof. Velissaropoulos sehe ich in στέργειν. Gegen den Vergleich mit *servabo, pacta servabo* des prätorischen Edikts muß man Bedenken erheben. *Pacta servabo* erscheint nämlich im Edikt als rechtspolitische

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8 Vgl. David a.a.O. 236; D. Nörr, Aspekte des römischen Völkerrechts, 1989, 103.

9 Zu der zeitlich nahestehenden griechischen Praxis vgl. F. Pringsheim, Ges. Abh. 1961, 303 ff.; zum Marktkauf G. Thür-H. Taeuber, Prozeßinschriften Arkadiens, 1994, Nr. 17, Anm. 56.

10 Vgl. Bickermann, The Oath of Hannibal, 1985, 260; Nörr a.a.O. 108.

11 Die Möglichkeit eines griechischen Originals wurde noch nie vertreten.

12 Vgl. Nörr a.a.O. 109; zu der langen Entwicklung zur *bona fides* des Privatrechts s. D. Nörr, Die Fides im römischen Völkerrecht, 1991, 42 ff.; M. Kaser, Ius Gentium, 1994, 35ff.

Philokles wurde im Zusammenhang mit dem Harpalos-Fall wegen Bestechung während seiner Amtszeit angeklagt. Aus § 2 der Rede sieht man, daß er bei seiner Ernennung zum Strategos vor allen Athenern zugesagt hatte, er werde verhindern, daß Harpalos in den Piräus segelt. Wahrscheinlich hat er es mit seinem Amtseid beschworen. In § 4 ist von einer Homologie die Rede: Philokles habe alle Athener getäuscht, das von den Athenern empfangene Vertrauen (τὴν πίστιν) enttäuscht und habe damit gegen ein Gesetz gehandelt. Das zitierte Gesetz bezieht sich auf die Homologie: "Wenn jemand etwas, das er vor den Bürgern zugesagt hat, übertritt, dann soll dieser haftbar sein für seine Unrechtstat." Ich sehe zwei Möglichkeiten, dieses Zitat zu erklären: Entweder bezieht sich die Homologie im Text auf den im § 2 genannten Eid des Philokles bei Antritt des Strategenamtes. In diesem Fall ist die Stelle für die Haftungslehre uninteressant. Oder - und mir scheint diese Variante vorzuziehen - sind die Homologiegesetze von Deinarch unkorrekt wiedergegeben.

Den korrekten Wortlaut findet man bei Demostenes. In seiner Rede gegen Phainippos zitiert er ein Gesetz, "welches anordnet, daß gegenseitige Homologien maßgeblich sind, die vor Zeugen geleistet werden"[18]. In einer anderen Rede, gegen Dionysodoros, erwähnt er Gesetze, "welche anordnen, was jemand freiwillig dem anderen homologiert, sei maßgeblich"[19]. In beiden Fragmenten zitiert Demosthenes Gesetze über die Homologie. Es handelt sich dabei um vorprozessuale Maßnahmen. Die Parteien mußten in der Anakrisis oder amtlichen Diaita auf bestimmte Fragen des Gegners genaue Antwort geben: Auskünfte oder Zugeständnisse. An diese Zugeständnisse werden sie gesetzlich festgehalten. Durch die Fragen und Antworten konnten die Parteien den Streitstoff abgrenzen[20]. Die Homologie begründet keine Verpflichtungen, sondern legt nur die Äußerungen der Parteien in einem künftigen Prozeß fest: "Die Gesetze über den Antwortzwang und über das Festhalten an zugestandenen Behauptungen bilden die rechtliche Klammer zwischen dem dialektischen und dem rhetorischen Verfahrensabschnitt"[21]. Bereits Kußmaul betont: "Die Gesetze über die Homologie werden von den Rhetoren mit einem gewissen moralischen Pathos" allgemein als Pflicht zum Worthalten zitiert[22].

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18 Dem. 42 (Phain.) 12: ἕτερον δὲ τὸν κελεύοντα κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας. ἃς ἂν ἐναντίον ποιήσωνται μαρτύρων. Vgl. G. Thür, Beweisführung vor den Schwurgerichtshöfen Athens, 1977, 155.

19 Dem. 56 (Dionys.) 2: Ὑμῖν. ὦ ἄνδρες δικασταί. καὶ τοῖς νόμοις τοῖς ὑμετέροις. οἳ κελεύουσιν. ὅσα ἄν τις ἑκὼν ἕτερος ἑτέρῳ ὁμολογήσῃ. κύρια εἶναι. Vgl. Thür a.a.O. 156, in Anm. 120 mit Hinweis auf weitere Reden, wo das Gesetz zitiert wird.

20 Vgl. Thür a.a.O. 152 ff. ausführlich zu dem außergerichtlichen Verfahren im athenischen Prozeßrecht.

21 Thür a.a.O. 156.

22 P. Kußmaul, Synthekai. Beiträge zur Geschichte des attischen Obligationenrechts. Diss. phil. Basel 1969, 34.

Was ergibt sich hieraus für unsere Ausgangsstelle, Deinarch Philokl.4? Ich neige der Ansicht zu, daß auch er die bei Demosthenes überlieferten Homologiegesetze zitiert. Er wendet sie aber unkorrekt auf den Amtseid von Philokles an, was keineswegs Objekt der ursprünglichen Regelung war. Eine "deliktische" Haftung, weswegen Philokles hier angeklagt wird, entsteht nicht aus der Homologie, sondern aus der Verletzung der Amtspflichten.

4) Schließlich möchte ich auf eine ähnlich "erfinderische" Argumentation bei Hypereides hinweisen, wo das Fehlen von Gesetzen für den konkreten Fall ebenfalls durch krampfhafte Analogie ersetzt wird. Es handelt sich um die Rede gegen Athenogenes, der dem verliebten Epikrates seine Sklaven mit einem Parfumladen verkauft hatte. Dem unglücklichen Käufer wurde bald klar, daß er hineingelegt wurde, weil der Laden wegen Diebstahlschäden stark verschuldet war. Epikrates versuchte deswegen gegen Athenogenes im Prozeß vorzugehen[23].

Der Redner hatte keine leichte Aufgabe, da er sich auf Gesetze stützen mußte. Seine Hilflosigkeit ist offensichtlich, wenn er mit einer gewollten und falschen Analogie die agoranomischen Gesetze zitiert: Es gebe ein Gesetz, das befiehlt, auf der Agora nicht zu lügen[24]. Athenogenes stand ja auf der Agora, als er das betrügerische Geschäft abgeschlossen hatte. Ein anderes Gesetz ordnete an, daß derjenige, der Sklaven verkauft, vorher sagen soll, ob dieser eine Krankheit habe; wenn nicht, soll Rückgabe sein[25]. Athenogenes hat die Diebstähle verschwiegen, also soll er das Geschäft rückgängig machen. Allein die Tatsache, daß Hypereides mit seiner ganzen Redekunst nur so schwache Analogien aus weit hergeholten Gesetzen heranziehen konnte, bestätigt das Fehlen jeder Vorschrift über *bona* oder *mala fides* im athenischen Kaufrecht[26]. Dem römischen Vertrauensprinzip entsprechende Einrichtungen sucht man in Athen vergebens.

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23 Vgl. MacDowell a.a.O. 140.

24 Hypereid. Ath. 15: ὁ μὲν τοίνυν εἷς νόμος κελεύ[ει] ἀφευδεῖν ἐν τῇ ἀ[γορᾷ]

25 Hypereid. Ath. 15: μετὰ δὲ] ταῦτα ἕ[τερο]ς νόμος [ἐστὶ περὶ ὧν ὁμολογοῦν]τες ἀλλήλοις συμβάλλουσιν. ὅταν τις πωλῇ ἀνδράποδον προλέγειν ἐάν τι ἔχῃ ἀρρώστημα. εἰ δ[ὲ μ]ή. ἀναγωγὴ τούτου ἐστίν.

26 Vgl. dazu H. Meyer - Laurin, Gesetz und Billigkeit, 1965, 15 ff., 35 ff.

II. HELLENISTISCH-RÖMISCHES RECHT

Joseph Mélèze Modrzejewski (Paris)

Στέρησις θήκης. A propos du délit religieux dans l'Égypte grecque et romaine*

A la mémoire de Henryk Kupiszewski (1927-1994)

I. – Dans le dernier tiers du III^e siècle avant notre ère, au lendemain de la conquête macédonienne de l'Égypte, une certaine Artémisia, fille d'Amasis, a adressé au dieu Osérapis une curieuse plainte dont le texte est conservé au Musée national de Vienne :

"O Seigneur Osérapis et vous les dieux qui siégez avec Osérapis ! Moi, Artémisia, fille d'Amasis, j'élève devant vous cette plainte contre le père de ma fille qui l'a privée de présents funéraires et de sépulture. Comme il n'a pas fait justice envers moi et envers ses enfants et qu'il a commis un acte injuste envers moi et ses enfants, puissent Osérapis et les dieux (qui l'assistent) faire qu'il ne reçoive pas (lui non plus) de sépulture de la part de ses enfants et qu'il ne soit pas en mesure d'enterrer ses parents. Aussi longtemps que cette imprécation est déposée ici, qu'il disparaisse dans le malheur de la terre et de la mer, lui-même et les siens, par la volonté d'Osérapis et des dieux qui siègent au Posérapi, et qu'il ne connaisse pas la grâce d'Osérapis et des dieux qui siègent avec Osérapis. Artémisia a déposé cette imprécation, en suppliant Osérapis de prononcer le jugement, lui et les dieux qui siègent avec Osérapis. Aussi longtemps que cette imprécation est déposée ici, que le père de la fillette ne connaisse nullement la grâce des dieux. Quiconque enlèverait cette écriture et léserait Artémisia, que la divinité lui inflige la punition ..."

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* Cet article, qui reprend le texte de ma communication au IX^e Colloque international de droit grec et hellénistique (Graz, le 14 septembre 1993) augmenté de quelques indispensables indications bibliographiques, résume une partie des résultats de mon séminaire de papyrologie et d'histoire des droits de l'Antiquité à l'École pratique des Hautes Études (Sciences historiques et philologiques) en 1992-1993. Après le Colloque de Graz, il a fourni la matière d'un exposé présenté le 3 décembre 1993 à Lyon, dans le cadre d'un programme de recherche sur le thème "Nécropoles", à l'initiative de mes collègues M. Drew-Bear, M.-T. Le Dinahet et J.-Fr. Salles.– Au moment de terminer la mise en forme de ce travail pour le volume Symposion 1993, j'apprends la douloureuse nouvelle de la disparition de mon ami et camarade d'études Henryk Kupiszewski, décédé à Varsovie le 3 avril 1994: je le dédie à sa mémoire.

Le texte dont on vient de proposer une version française compte parmi les plus vénérables des papyrus grecs d'Égypte. Publiée pour la première fois par l'Italien Petrettini en 1826[1], l'imprécation d'Artémisia s'apparente, du point de vue paléographique, aux rares pièces papyrologiques du IV^e^ siècle av. n.è. actuellement connues : les "Perses" de Timothée[2], la convention matrimoniale d'Éléphantine[3], la "pancarte" de Peukestas fils de Makartatos trouvée à Saqqara[4]. A la paléographie correspond la langue, qui n'est pas encore la koiné mais un mélange de dialectes à dominante ionienne, ainsi que le nom de la divinité par l'invocation de laquelle commence le texte : Osérapis nous renvoie à un moment antérieur à l'institution officielle du culte de Sarapis à Alexandrie. On n'hésitera pas à assigner à ce document avec U. Wilcken une date le situant à la fin du règne d'Alexandre le Grand ou peu après sa mort, sous le gouvernement de Ptolémée fils de Lagos comme satrape d'Égypte, vers 325-320 av. n.è.[5]

Artémisia accuse un homme, qu'elle appelle "le père de sa fille", d'avoir privé celle-ci de présents funéraires et de sépulture, τῶν κτερέων ἀπεστέρησε καὶ τῆς θήκης. La périphrase, qui laisse dans l'anonymat l'identité de l'auteur de l'acte incriminé, implique-t-elle une union irrégulière ou sert-elle uniquement à ne laisser subsister aucun doute sur la paternité du malfaiteur, le décès de la fille ayant pu éventuellement coïncider avec le divorce du couple ? Difficile de trancher.

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1 P. Artémisia (Vienne, Bibliothèque Nationale d'Autriche, G 1) : G. Petrettini, Papiri greco-egizi ed altri greci monumenti dell'I.R. Museo di Corte, Vienne 1826, p. 1 sq. ; F. Blass, Philologus 41, 1882, p. 746 sq. ; C. Wessely, Die griechischen Papyri der Kaiserlichen Sammlungen Wiens (11. Jahresbericht d. k.k. Franz-Joseph-Gymnasiums), Vienne 1885, p. 4 sq. ; SB I 5103 ; Pap. Mag. Gr. XL. Version anglaise de R.F. Hock dans H.D. Betz, Ed., The Greek Magical Papyri in Translation, Chicago et Londres 1986, p. 280. L'édition que j'utilise est celle de U. Wilcken, Urkunden der Ptolemäerzeit I, Berlin-Leipzig 1927, n° 1 (UPZ I, 1). Pour l'écriture, voir la planche dans O. Montevecchi, La papirologia, 2e éd., Milan 1988, tav. 9, d'après C. Wessely, Die ältesten lateinischen und griechischen Papyri Wiens (Stud. Pal. XIV), Leipzig 1914, Taf. I. Pour la bibliographie de ce document, en dernier lieu, G. Bastianini, "La maledizione di Artemisia (UPZ I 1) : un πρωτόκολλον", Tyche 2, 1987, p. 1-3.

2 P. Berol. 9875. Voir O. Montevecchi, op. cit., tav. 8, d'après C.H. Roberts, Greek Literary Hands 350 B.C. – A.D. 400, Oxford 1956, pl. I.

3 P. Éléph. 1 (310 av. n.è.) ; rééd. M. Chr. 283 ; P.M. Meyer, Jur. Pap. 18 ; Sel. Pap. I, 1 ; Papyrological Primer[4], 25 ; P.W. Pestman, The New Papyrological Primer, Leyde 1990 (2^e^ éd. 1994), n° 1. Reproduction partielle dans O. Montevecchi, op. cit., tav. 10, d'après l'*editio princeps*, O. Rubensohn, Berlin 1907, Taf. III. Pour d'autres reproductions, voir B.L. Konkordanz, p. 59-60.

4 E.G. Turner, "A Commander-in-Chief's Order from Saqqara", JEA 60, 1974, p. 239-242 = SB XIV 11942 (331 ? av. n.è). Description et planche dans E.G. Turner, Greek Manuscripts of the Ancient World, 2^e^ éd. par P.J. Parsons, Londres 1987, p. 136 et 138-139 (n° 79). Pour l'interprétation de ce document, voir RHD 54, 1976, p. 118 (SDHI 43, 1977, p. 718) ; cf. mon article "Les tourments de Paul de Tarse", Symposion 1988, Cologne et Vienne 1990, p. 319-236, partic. p. 335.

5 U. Wilcken, UPZ I, p. 97-98.

Contre ce père indigne Artémisia sollicite une sanction, dans un style éminemment juridique. Elle propose une qualification des faits qu'elle vient d'exposer : ceux-ci constituent un outrage, ἀδικία, qui affecte toute la famille, Artémisia elle-même (ἄδικα ἐμε, l. 4) et tous les enfants du coupable[6]. Osérapis, qui siège à la manière d'un président de tribunal entouré de ses assesseurs, θεοὶ οἱ... καθήμενοι, doit infliger à l'accusé un double châtiment, pour l'avenir et dans l'immédiat : pour l'avenir, l'empêcher d'enterrer ses propres parents et de recevoir lui-même après sa mort une sépulture de la part de ses enfants ; dans l'immédiat, le faire périr sur terre ou sur mer, à moins – cela n'est pas dit explicitement, mais la conjecture s'impose – de réparer l'outrage avant que la plainte (καταβοή, l. 6) déposée au Posérapi, "Maison d'Osiris-Apis" (Prj-Wśr-ḥp), n'aboutisse à une sentence (τὴν δίκην δικάσαι, l. 10) des divinités justicières[7]. Accessoirement, une sanction est demandée contre quiconque, en enlevant l'imprécation écrite de l'endroit où elle fut déposée, commettrait une autre *adikia* à l'égard de la plaignante (l. 13).

Une accusation, un tribunal, un délit déjà commis, un autre délit possible, une double sanction pour le premier délit, une autre sanction pour le second, encore que le mauvais état du papyrus nous cache le détail de ce dernier point – voilà une affaire qui aurait dû susciter l'intérêt des historiens du droit. Curieusement, elle les a laissés pratiquement indifférents. Quelle est donc la portée juridique de la plainte d'Artémisia ? Et d'abord, en quoi consiste l'*adikia* commise par le père anonyme ?

Pour répondre à cette question, U. Wilcken a rapproché notre papyrus d'une notice d'Hérodote : le pharaon Asychis, nous dit le "Père de l'Histoire", aurait promulgué une loi autorisant un Égyptien à contracter un emprunt en donnant la momie de son père (τοῦ πατρὸς τὸ νέκυν) en gage (ἐνέχυρον) de sa dette ; en cas de non-remboursement, le débiteur encourait la peine de ne pas pouvoir ensevelir ses proches et était lui-même

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6 J'ai étudié le terme ἀδικία à la lumière des sources papyrologiques dans une conférence faite en janvier 1959 à l'Institut de Droit romain de Paris et publiée, sous le titre "La notion d'injustice dans les papyrus grecs", dans Iura 10, 1959, p. 67-85. Pour "les figures de l'impiété" (ἀσέβεια, ἱεροσυλία) dans le droit de l'Égypte ptolémaïque, on doit à présent se reporter à la thèse d'A. Helmis, Crime et châtiment dans l'Égypte ptolémaïque. Recherches sur l'autonomie d'un modèle pénal, Paris 1986 (Université de Paris X-Nanterre, 1986 ; cf. RHD 1990, p. 270 sq.), p. 34 sq., et notes, p. 240 sq. ; pour l'imprécation d'Artémisia : p. 129 sq.

7 Καταβοή, terme technique, relève d'une tradition grecque ; à ce propos, Blass citait déjà Thucydide (I 73, 1 ; VIII 85, 2) ; la Souda donne comme équivalences, μέμψις et κατηγορία (Wilcken, UPZ I, p. 103, comment. à la l. 6). Le verbe καταβοᾶν apparaît dans la version grecque du coutumier sacerdotal, P. Oxy. XLVI 3285, l. 3, 5, 7, pour rendre une tournure démotique : voir P.W. Pestman, "Le manuel de droit égyptien de Hermoupolis. Les passages transmis en démotique et en grec", Textes et études de papyrologie grecque, démotique et copte (P.L.Bat. 23), Leyde 1985, p.116-143, partic. p. 118. (Comparez κρᾶξον dans la tablette citée infra, note 31). Δίκη, à la ligne 10, se réfère à la sentence ; à la ligne 13, le même mot semble désigner la "punition", acception qui ne sera plus attestée dans l'Égypte hellénistique : voir A. Helmis, thèse précitée, p. 285 (69).

interdit de sépulture après sa mort[8]. C'est à cette même loi que se réfère de toute évidence, sur un ton moralisateur, Diodore de Sicile, à cette différence près que, dans sa version, l'usage (νόμιμον) dont il s'agit ne concerne pas le seul père du débiteur, mais ses parents (τὰ σώματα τῶν τετελευτηκότων γονέων), et qu'il n'y est pas question de gage (ἐνέχυρον), mais d'hypothèque (εἰς ὑποθήκην δανείου)[9]. Une troisième variante de la même disposition apparaîtra au IIe siècle de l'Empire sous la plume de Lucien de Samosate, qui rétablit le gage et remplace les parents par "frère ou père"[10]. Frappé par la coïncidence des formules concernant la sanction dans la plainte d'Artémisia et dans le texte d'Hérodote, Wilcken a postulé, par déduction, l'identité du délit : le père indigne aurait engagé, pour garantir une créance, la momie de sa fille et les présents qui l'accompagnaient, comme l'y autorisait la loi égyptienne ; n'ayant pas remboursé la dette, il aurait ainsi dépouillé la défunte de sa sépulture (ἀπεστέρησε ... τῆς θήκης, l. 2-3)[11].

Cette interprétation a été acceptée par de nombreux savants[12]. Elle n'est cependant pas sans faille. Une première difficulté, sans doute smineure mais qui a assez préoccupé Wilcken, a trait aux personnes visées par la loi en question. Celle-ci parle, on l'a vu, suivant la source, du père, des parents, du frère, et non pas des enfants ou, plus

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8 Hérodote, Hist. II, 136. Cf. Wilcken, UPZ I, p. 99.

9 Diodore, Bibl. histor. I, 93, 1-2. Voici le fragment en question dans la récente édition de la Collection des Universités de France, texte établi par Pierre Bertrac, traduction d'Yvonne Vernière, avec une "Introduction générale" par François Chamoux, Paris 1993 : "1. C'est une opinion bien établie chez les Égyptiens que le devoir le plus sacré, c'est d'honorer publiquement ses parents et ses ancêtres d'une manière plus éclatante encore lorsqu'ils sont passés dans la demeure éternelle. C'est aussi une coutume chez eux de donner le corps de leurs parents défunts comme gage d'une dette ; mais à ceux qui ne remboursent pas la dette s'attache la pire des infamies et ils sont, après leur mort, privés de sépulture. 2. On peut à juste titre admirer ceux qui ont établi de telles coutumes, parce qu'ils se sont efforcés d'introduire dans le cœur des hommes, autant qu'il était en leur pouvoir, la modération et la rectitude des mœurs, non seulement par les relations entre vivants, mais aussi par les funérailles et les soins donnés aux morts".

10 Du deuil, 21 : πολλάκις δὲ καὶ δεομένῳ χρημάτων ἀνδρὶ Αἰγυπτίῳ ἔλυσε τὴν ἀπορίαν ἐνέχυρον ἢ ὁ ἀδελφὸς ἢ ὁ πατὴρ ἐν καιρῷ γενόμενος.

11 Wilcken, UPZ I, p. 110 : "... den Schluß ziehen, daß der Beklagte die Mumie seiner Tochter mitsamt den ihr zugedachten Totenbeigaben für eine Schuld verpfändet hat und sich nun weigert, die Schuld zurückzuzahlen, so daß die Tochter nicht begraben werden kann. Dadurch 'beraubt' er sie in der Tat 'der Totebeigaben und des Begräbnisses'" (espacé par Wilcken).

12 Voir, p. ex., H.I. Bell, Cults and Creeds in Graeco-Roman Egypt, Liverpool 1953, p. 4 ; A. Swiderek, "Hellénion de Memphis – la rencontre de deux mondes", Eos 51, 1961, p. 55-63, partic. p. 61. Dans un sens différent et assez proche, semble-t-il, de l'interprétation que je propose ici, R.W. Daniel & F. Maltomini, Supplementum Magicum II (infra, note 31), p. 3, qui renvoient à un travail inédit de P.W. Pestman.

précisément, d'une fille, cas dont il s'agit dans la plainte d'Artémisia. Wilcken supposait une extension qui se serait opérée au cours des siècles ("eine weitergehende Anwendung"). On pourrait admettre aussi l'existence d'une liste, énumérant, dans un ordre "hiérarchique", les membres d'une famille ; les auteurs grecs n'auraient cité que les premières parmi les personnes figurant sur cette liste. Car il n'est pas dù tout sûr que Diodore utilise ici Hécatée d'Abdère, se faisant ainsi le témoin d'une "évolution" accomplie entre le milieu du V^e^ siècle av. n.è., époque d'Hérodote, et le tournant du IV^e^. Les deux auteurs peuvent fort bien utiliser la même source, chacun à sa manière, à moins que Diodore ne suive tout simplement Hérodote en modifiant son récit[13].

La deuxième difficulté concerne l'auteur de la loi. Le pharaon Asychis est un personnage énigmatique. On a du mal à reconnaître sous ce nom un des souverains égyptiens attestés par nos sources. Ici encore, Diodore de Sicile emboîte le pas à Hérodote mais, au lieu de nous donner la clé de l'énigme, il embrouille le problème. Dans sa liste des pharaons législateurs, Diodore mentionne, après Ménès à qui il réserve la première place, deux noms qu'on peut mettre en rapport avec Asychis : Sasychis, éventuellement identifiable à Shepseskaf fils de Mykérinos, dernier pharaon de la IV^e^ Dynastie (2467-2464 av. n.è.), et Sésoôsis, une variante de Sésostris[14] ; parmi les cinq souverains qui ont porté ce nom, Sésostris III (1878-1843 av. n.è.), "pharaon de légende et d'histoire", vient avant tout à l'esprit[15]. Étonnante pérennité d'une loi qui, promulguée sous l'Ancien Empire égyptien, serait encore appliquée à l'époque d'Artémisia, à la fin du IV^e^ av. n.è. sinon à celle de Lucien de Samosate, au II^e^ siècle de n.è. ! Mais les identifications en question sont douteuses et les conclusions qu'on serait tenté d'en tirer sont sujettes à caution.

Troisième et dernière difficulté : la symétrie entre sanction et acte, pivot du raisonnement de Wilcken. Que des Égyptiens, en cas de nécessité, aient pu être amenés à "mettre au clou" la momie d'un proche parent – père, frère ou fille, peu importe, on peut éventuellement l'imaginer, bien qu'aucune source égyptienne ne l'atteste de manière

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13 Sur les sources de Diodore, voir à présent Fr. Chamoux, "Introduction générale" à l'édition de P. Bertrac et Y. Vernière (supra, note 9), p. XXII-XXVI.

14 Bibl. histor. I, 94-95. Pour Asychis-Sasychis identifiable à Shepseskaf, voir K.A. Kitchen, "A Note on Asychis", Pyramid Studies and Other Essays Presented to I.E.S. Edwards, Londres 1988, p. 148-151.

15 M. Malaise, "Sésotris, pharaon de légende et d'histoire", Chr. d'Ég. 41, 1966, p. 244-272. Voir C. Obsomer, Les campagnes de Sésostris dans Hérodote, Bruxelles 1989, où l'on trouvera la bibliographie antérieure (p. 189-202), ainsi que les références aux textes des auteurs grecs et latins qui, après Hérodote, ont parlé de ce souverain et les diverses variantes de son nom (Sésotris, Sésonchosis, Sésoosis, Sostris, Vezosis : p. 33-36). Sauf erreur, Diodore est le seul à employer la variante Σεσόωσις (Bibl. hist. I, 53-58 et 94, 4), mais celle-ci apparaît sous une forme latinisée, Sesosis, chez Pline l'Ancien (Hist. univ. 36, 74) et chez Tacite (Ann. 6, 28).

directe. Encore sous le Bas-Empire romain, auteurs chrétiens et constitutions impériales stigmatisent la pratique qui consiste à s'emparer du cadavre d'un parent du débiteur pour forcer celui-ci à payer sa dette : L. Mitteis n'avait probablement pas tort de mettre ces textes en parallèle avec la notice d'Hérodote concernant le gage sur la momie du père[16]. Mais il n'en résulte pas nécessairement qu'il en soit ainsi de la fille d'Artémisia.

Le châtiment qui frappe le débiteur égyptien dans la mystérieuse loi rapportée par les auteurs grecs est une "peine réfléchissante" ; elle correspond au délit, mais ne le reproduit pas. Dans le texte de Diodore, στέρησις ταφῆς, "privation de sépulture", ne signifie certainement pas que le corps du débiteur insolvable ou récalcitrant devait être momifié et mis en gage en remplacement de celui de son père ; cette expression indique seulement que ce débiteur était privé de ce qu'un honnête homme peut attendre ici-bas après sa mort : une sépulture décente et des honneurs funéraires conformes à la tradition. Elle apparaît ici comme synonyme de στέρησις θήκης, formule que la plainte d'Artémisia (l. 2-3) nous a inspirée pour le titre de la présente étude.

La convergence entre le papyrus d'Artémisia et la notice d'Hérodote ne va pas au-delà de la peine, qui pouvait sanctionner plusieurs délits en rapport avec les sépultures et les devoirs funéraires. Elle n'implique pas l'identité de l'acte. Nous devons donc écarter cette idée de notre analyse. Reste à préciser la nature ce cet acte et le mécanisme juridique de la démarche choisie par Artémisia. Commençons par le deuxième point.

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II. – A cet effet, essayons de suivre une autre piste, plus prometteuse que la recherche de l'insaisissable Asychis et de sa loi. Elle s'ouvre à nous grâce à la deuxième sanction qu'Artémisia demande pour le père de sa fille. Artémisia appartient au milieu hellénomemphite, nourri d'une double tradition, grecque et égyptienne, qui a donné naissance au culte de Sarapis[17]. Ses ancêtres sont à chercher parmi les "hommes d'airain" (χάλκεοι ἄνδρες) dont parle Hérodote, mercenaires ioniens et cariens de Psammétique Ier (664-610 av. n.è.)[18]. On connaît bien depuis peu l'un d'eux, Pédon fils d'Amphinoos (ou d'Amphinès), un Ionien qui a fait une brillante carrière à la cour de ce roi : une "statue-cube" égyptienne avec une inscription grecque en écriture ionienne archaïque,

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16 Ambroise, De Tobia 10 ; Nov. Iust. 60, 1, 1 et 115, 5, 1, cités par L. Mitteis, Reichsrecht und Volksrecht, Leipzig 1891, p. 456 et n. 3.

17 Voir A. Swiderek, "Narodziny boga [La naissance d'un dieu]", Przeglad humanistyczny 7, 1975, p. 57-65 ; Eadem, "Sarapis et les Hellénomemphites", Le monde grec. Hommages à Claire Préaux, Bruxelles 1975, p. 670-675.

18 Hérodote, Hist. II, 152.

trouvée dans le voisinage de Priène, témoigne de sa "double allégeance" culturelle[19]. Celle-ci peut se manifester aussi dans les pratiques onomastiques. Tel est le cas de Psammétichos fils de Théoklès, commandant de flotte de Psammétique II (595-589 av. n.è.), à qui son père grec avait donné, en signe de dévouement, le nom du monarque, comme devaient le faire plus tard, sous les Lagides, les pères de tous les Ptolémaioi, de toutes les Arsinoai, etc.[20] C'est aussi le cas du père d'Artémisia, Amasis, qui porte le nom de l'impétueux général-pharaon (570-526 av. n.è.), aimé des Grecs pour avoir autorisé la fondation de Naucratis et l'établissement à Memphis des descendants des "hommes d'airain"[21].

Double culture, double sanction. La deuxième sanction que réclame Artémisia contre le père de sa fille n'a pas d'équivalent égyptien. Il est imprudent d'affirmer, comme le faisait récemment un de nos confrères d'outre-Manche avec un humour typiquement britannique, que toute la plainte d'Artémisia pourrait être définie comme un "texte égyptien écrit en grec"[22]. L'expression κ' ἐγ γᾶι κἐν θαλάσσηι, "sur la terre et dans la mer", est aussi peu égyptienne que le sera quelques années plus tard, dans la convention matrimoniale d'Éléphantine, la clause prévoyant l'exécution au profit de la femme sur la personne et sur tous les biens "terrestres et maritimes" de l'époux aux torts duquel se produirait le divorce[23]. L'une et l'autre ont en revanche des parallèles dans les textes grecs[24]. "Terre et mer", "terrestre et maritime" renvoient de toute évidence à une tradition grecque qui se perpétue chez les Hellénomemphites et qui se manifeste à Éléphantine, même si elle devait s'effacer ensuite dans la pratique notariale ptolémaïque[25]. Il en va de même pour κακῶς ἀπόλλυσθαι, "périr misérablement", et pour

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19 Texte édité par M.Ç. Sahin, Epigraphica Anatolica 10, 1987, p. 1-2 et pl. 1 ; voir O. Masson et J. Yoyotte, ibid. 11, 1988, p. 171-179. Version française et bref commentaire dans J.-M. Bertrand, Inscriptions historiques grecques, Paris 1992, p. 29-31 (n° 4). Voir aussi E. Bresciani et C. Ampolo, "Psammetico re d'Egitto e il mercenario Pedon", EVO 11, 1988, p. 237-253.

20 Graffiti d'Abou-Simbel, éd. A. Bernand et O. Masson, "Les inscriptions grecques d'Abou-Simbel", Rev. étud. grecques 70, 1957, p. 1-20, n° 1 (p. 3-10) ; P.W. Pestman, The New Papyrological Primer, op. cit., p. 7. Voir mon livre, Les Juifs d'Égypte de Ramsès II à Hadrien, Paris 1991, p. 23-24.

21 Hérodote, Hist. II, 154.

22 J.D. Ray, "Jews and Other Immigrants in Late Period Egypt", in J.H. Johnson, Ed., Life in a Multi-Cultural Society : Egypt from Cambyses to Constantine and Beyond, Chicago 1992, p. 273 : "it can almost be described as an ancient Egyptian text written in Greek". Par suite d'une confusion, cet auteur attribue au papyrus d'Artémisia la date de 311 av. n.è, autrefois admise pour le P. Éléph. 1.

23 P. Éléph. 1 (310 av. n.è.), l. 13 : πάντων καὶ ἐγγαίων καὶ ναυτικῶν.

24 Il suffit de citer le contrat de prêt maritime reproduit dans Démosthène, C. Lacritos (35), 10-13 : ἐκ τῶν τούτων ἁπάντων καὶ ἐγγείων καὶ ναυτικῶν (12).

25 C'est ce que relève en dernier lieu P.W. Pestman, The New Papyrological Primer, op. cit., p. 69 (comment. du n° 1 = P. Éléph. 1). Dans sa thèse citée supra, note 6, A. Helmis souligne avec raison "cet arrière-plan grec qui accentue les espaces marins" (p. 130).

μηδὲ ἱλάονος τυχάνοι, "qu'il ne connaisse pas la grâce" (de la divinité). D'ailleurs, la malédiction qui consiste à souhaiter que le coupable meure sans sépulture n'est pas exclusivement égyptienne ; on la retrouve aussi souvent dans le domaine grec, notamment en Attique[26]. Wilcken, helléniste chevronné, ne pouvait pas l'ignorer.

La langue conserve des images de la patrie grecque et véhicule son droit. Le parallèle qui vient immédiatement à l'esprit est fourni par les tablettes de plomb trouvées notamment en Attique et en Asie Mineure, et désignées généralement (mais la généralisation est trompeuse, on va le voir) par le terme latin de *defixio*. Voici un exemple qui vient du temple de Déméter à Cnide, en Carie, datable du IIe/Ier siècle av. n.è.[27]

Une certaine Artéméis voue à Déméter, à Koré et aux divinités qui les entourent un homme chez qui elle a laissé ses vêtements et qui ne veut pas les lui rendre : qu'il les apporte à Déméter, lui-même ou toute autre personne qui pourrait les détenir, et, brûlé de fièvre, qu'il s'avoue coupable en public ! Comme Artémisia (on notera au passage la quasi-homonymie, évidemment fortuite, qui rapproche les deux dames), elle est aussi victime d'une ἀδικία, une "injustice" (B, 5). Dans l'impossibilité d'obtenir la restitution des objets dérobés, pour des raisons que nous ignorons, Artéméis décide de s'en remettre à Déméter ; "brûlé de fièvre" (πεπρημένος) par la déesse, l'accusé passera aux aveux et le tort qu'il a causé à l'accusatrice pourra être réparé[28]. Et comme il doit rapporter ces objets aux divinités invoquées, la consécration vise à transformer le vol, κλοπή, en sacrilège, ἱεροσυλία[29].

Selon le classement proposé par notre collègue H.S. Versnel, qui a consacré à ces tablettes une étude détaillée, nous avons ici une "demande de justice", à distinguer d'une

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26 P. ex. IG III 3 Append., 1426. Voir A. Bernand, Les sorciers grecs, Paris 1991, p. 370.

27 C.T. Newton, A History of Discoveries at Halicarnassus, Cnidus and Branchidae, II, Londres 1863, p. 81 sq. ; A. Audollent, Defixionum tabellae, Paris 1904, n° 2. Texte et traduction : H.S. Versnel, "Les imprécations et le droit", RHD 67, 1987, p. 5-22, partic. p. 9-11 ; voir aussi A. Bernand, op. cit., p. 345. La nouvelle édition, révisée et complétée, de l'ouvrage d'A. Audollent, par D.R. Jordan et H. Solin, annoncée par E.G. Turner en 1980 (Greek Papyri. An Introduction, 2e éd., Oxford 1980, p. 199 n. 24), et par Versnel, p. 6, n'a pas paru à ce jour ; pour une mise à jour de ce recueil et de celui de R. Wünsch, Defixionum tabellae Atticae, Berlin 1897 (IG III 3 Append., le seul fascicule des CIA qui n'ait pas été réédité et mis à jour dans l'*editio minor* des IG), voir D.R. Jordan, "A Survey of Greek Defixiones not Included in the Special Corpora", GRBStud. 26, 1985, p. 151-197. Une abondante bibliographie est donnée par A. Bernand dans son ouvrage précité, p.409-432, qui cependant ne cite pas l'article de Versnel, dont on trouvera une version élargie dans Ch.A. Faraone et D. Obbink, Magica Hiera. Ancient Greek Magic and Religion, New York-Oxford, 1991.

28 Dans d'autres cas, le mot "brûlé" est remplacé par "châtié", κολαζόμενος. L'effet recherché est le même.

29 Sur les rapports entre κλοπή et ἱεροσυλία, voir D. Cohen, Theft in Athenian Law, Munich 1983, p. 93 sq., et T.J. Saunders, Plato's Penal Code, Oxford 1991, p. 286 sq.

exécration – *defixio* au sens strict – dont le seul but est de nuire à un individu haï[30]. La plainte d'Artémisia est elle aussi une "demande de justice" d'un type assez proche de celui que nous livre cette tablette cnidienne. Comme dans celle-ci, l'adversaire, dont l'identité est connue de l'auteur de la demande, n'est pas désigné nommément. L'acte incriminé est, dans l'un et l'autre cas, une "injustice", *adikia*. L'insuffisance des voies judiciaires ordinaires justifie le recours aux divinités justicières. La différence tient à la nature de l'objet qui est à l'origine de ce recours : un vol de vêtements appelle un acte de consécration pour justifier l'intervention de Déméter, alors que le caractère religieux de la sépulture et de l'équipement funéraire qui l'accompagne dispense Artémisia de vouer explicitement à Osérapis le coupable dont elle souhaite le châtiment.

C'est également une "demande de justice", et non pas une "malédiction pour viol de sépulture", que nous trouvons dans une tablette de bois conservée au Louvre, provenant probablement de Saqqara et datable paléographiquement du I^er^ siècle de n.è. (la date admise par le premier éditeur, IV^e^ siècle de n.è., est trop avancée)[31]. On y lit un appel adressé à un défunt pour qu'il dénonce devant les divinités infernales une femme nommée Senblynpnos qui l'a "dépouillé de sa sépulture", τὴν ταφήν σου ἀπεστέρηκε (l. 13-15)[32]. Éléments grecs (invocation des "dieux sarcophages" ; Hadès) et éléments égyptiens (Osiris ; le nom de l'accusée) se combinent dans cette tablette, comme dans l'imprécation d'Artémisia. Comme Artémisia devant le tribunal d'Osérapis, le défunt averti de l'outrage qui lui fut infligé *post mortem* doit porter une accusation publique (κρᾶξον, l. 9) devant le tribunal de l'Hadès ; et il peut espérer qu'Osiris l'entendra (εἰσακούσει σε ὁ Οὔσιρις, l. 18-19), tel le juge qui entend (ἀκούει : terme technique) les plaideurs avant de prononcer la sentence.

Nous ignorons l'identité de l'auteur de cet avertissement. Cela ne peut être ni la veuve ni l'un des descendants du défunt, qui est décédé "prématurément, sans enfant, sans femme" (l. 20-22) ; ἄωρος, "décédé avant son heure", est un stéréotype, qui peut éventuellement qualifier une personne décédée à l'âge de 73 sinon de 82 ans[33], mais

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30 H.S. Versnel, art. précité (note 27), p. 9.

31 T. Louvre inv. AF 6716, éd. B. Boyaval, "Une malédiction pour viol de sépulture", ZPE 14, 1974, p. 71-73 (SB XII 11247), texte (signalé dans mes chroniques RHD 53, 1975, p. 121 et SDHI 43, 1977, p. 724) repris dans G.H.R. Horsley, New Documents Illustrating Early Christianity, II, North Ryde 1982, n° 13, et dans R.W. Daniel & F. Maltomini, Supplementum Magicum, II (Papyr. Colon. XVI, 2), Opladen 1992, n° 52.

32 La tournure ἀποστερεῖν τί τινος au lieu de ἀποστερεῖν τινά τινος classique est bien attesté dans la koiné : voir, p. ex., LXX Sir. 4, 1 ; 34, 1, et Le Pasteur d'Hermas, Vis. III, 9, 9, cités par R.W. Daniel & F. Maltomini, op. cit., p. 6.

33 Épitaphes de Térénouthis (Kôm Abou Bellou), époque romaine, SB VIII 10162, 530 et 621 ; cf. B. Boyaval, "Quelques remarques sur les épithètes funéraires grecques d'Égypte", ZPE 23, 1976, p. 225-230, partic. p. 229. Le deuxième cas est moins sûr que le premier : voir Abd el-Hafeez Abd el-Al,

ἄτεκνος, "sans enfant", et ἀγύναιος, "non marié", doivent être pris à la lettre. Quant à Senblynpnos, il n'est pas nécessaire d'imaginer qu'elle a "violé" la tombe du défunt. Peut-être a-t-elle seulement négligé les devoirs funéraires qu'elle avait envers lui, à commencer par la confection de la momie (ce sens du mot ταφή est bien attesté dans les papyrus), et c'est ainsi qu'elle l'a "dépouillé de sa sépulture", τὴν ταφήν ... ἀπεστέρηκε. Cette hypothèse, qui s'applique aussi à la plainte d'Artémisia, nous dictera la réponse à la question que ces documents posent aux historiens du droit.

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III. – Il n'est pas nécessaire d'explorer en détail tout le champ sémantique du verbe στερεῖν, "priver, dépouiller", et de sa famille pour justifier l'hypothèse qui vient d'être énoncée. Il suffit de retenir les acceptions proprement juridiques.

Conformément à la conception grecque selon laquelle l'argent prêté ne cesse pas d'appartenir à celui qui prête, l'emprunteur qui ne rembourse pas la dette dans le délai prévu "dépouille", ἀποστερεῖ, le prêteur de "son bien". Les textes des orateurs attiques concernant le prêt en font foi[34]. Toutefois, comme il s'agit d'un bien retenu, et non pas soustrait, cette "spoliation" n'est pas un vol, κλοπή, mais un dommage matériel, βλάβη ; elle fonde au profit du prêteur qui le subit une action en dommage, δίκη βλάβης, sanctionnant l'inexécution du contrat. Sur le terrain juridique, ἀποστερεῖν désigne donc d'abord le non-accomplissement d'une obligation contractuelle par le refus de payer ou de restituer. Un cas particulièrement caractéristique de cette acception du verbe est la non-restitution d'un dépôt, qui au dommage subi par le propriétaire "dépouillé" ajoute l'opprobre dont se couvre le dépositaire infidèle. Une page de la *Rhétorique* d'Aristote et une *enteuxis* de Magdola peuvent servir d'illustration de cette espèce d'ἀποστέρησις, en théorie et dans la pratique[35]. On notera, dans ces deux textes, le lien étroit entre "spoliation" et "outrage", ἀποστερεῖν et ἀδικεῖν, comme dans le papyrus d'Artémisia.

Les conventions matrimoniales conservées par les papyrus d'Égypte fournissent un autre exemple intéressant de l'emploi du verbe, cette foi-ci sans le préfixe ἀπό : une femme qui, par son comportement non conforme aux clauses morales du contrat, se rend

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J.-C. Grenier, G. Wagner, Stèles funéraires de Kom Abu Bellou, Paris 1985, p. 35 (commentaire du n° 154).

34 Voir H.J. Wolff, "Die Grundlagen des griechischen Vertragsrechts", ZSS. RA 74, 1957, p. 26-72, partic. p. 49 n. 57.

35 Aristote, Rhétorique II, 6, 1383b ; P. Ent. 29 (Magdola, 13 janvier 218 av. n.è.). Exemple d'une imprécation contre le dépositaire malhonnête : tablette de Cnide, Audollent, n° 3 ; cf. A. Bernand, op. laud. (supra, note 26), p. 345 sq.

responsable de son divorce, doit être "privée", "dépouillée" – στερέσθω[36] – de la dot qu'elle a apportée (προσηνέγκατο) au foyer. Les sources sont nombreuses, depuis le papyrus d'Éléphantine n° 1, déjà mentionné, jusqu'aux *synchoreseis* matrimoniales de l'époque d'Auguste dans la collection de Berlin[37]. Le fait que la femme doive être privée de dot ne tranche pas à son profit la délicate question de la propriété des biens dotaux[38] ; il s'explique, comme pour le prêt, par la conception grecque de la détention de l'argent d'autrui : la dot est considérée comme appartenant à la femme, bien qu'elle ait été incorporée au patrimoine du mari[39]. Ce qui compte ici pour nous, c'est que la perte de la dot apparaît comme une sanction frappant la femme qui a négligé ses devoirs de fidélité conjugale, tout comme la privation de sépulture, στέρησις ταφῆς dans le texte de Diodore, sanctionnait le non-remboursement d'une dette garantie par la momie du père.

Ces exemples devraient suffire. En droit grec, la fonction première des mots de la famille de στερεῖν, "priver, dépouiller" (στερέσθαι, ἀποστερεῖν, στέρησις) est de décrire le comportement qui met en échec l'exécution d'une obligation, infligeant ainsi à l'intéressé un dommage matériel et moral ; par extension, ces mots peuvent s'appliquer à la sanction d'un tel comportement. L'obligation qui est en jeu peut résulter d'un lien contractuel. Elle peut aussi avoir pour source une disposition de dernière volonté ou l'ensemble des règles qui régissent les rapports entre les vivants et les morts, τὰ νενομισμένα τοῖς κατοιχομένοις[40].

Tel est croyons-nous, le vrai sens du verbe ἀποστερεῖν, "dépouiller", dans nos deux "demandes de justice". La fille d'Artémisia et l'anonyme victime de la vilaine Senblynpnos n'ont pas été privées de leur tombe au sens concret du mot, mais elles n'ont pas reçu une sépulture décente, avec momification selon les règles traditionnelles et présents funéraires. Elles ne peuvent pas jouir d'un repos conforme à l'usage éventuelle-

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36 P. Éléph. 1, lignes 6-8 (Éléphantine, 310 av. n.è.). Sur cette expression, voir notamment G. Häge, Ehegüterrechtliche Verhältnisse in den griechischen Papyri Aegyptens bis Diokletian, Cologne-Graz 1968, p. 73 sq., 79 sq., et, à ce propos, mon art. "Zum hellenistischen Ehegüterrecht im griechischen und römischen Aegypten", ZSS. RA 87, 1970, p. 50-84 = Statut personnel et liens de famille dans les droits de l'Antiquité, Aldershot 1993, n° VI, partic. p. 56 sq.

37 BGU IV 1050-1052, 1098, 1101 ; voir aussi P. Freib. III 30 ; cf. Häge, op. cit., p. 73-74.

38 Mise au point : P.D. Dimakis, "A propos du droit de propriété de la femme mariée sur les biens dotaux d'après le droit grec ancien (Notes sur la question de la dot de la femme grecque)", Symposion 1974, Athènes et Milan 1978 (Cologne et Vienne 1979), p. 227-240 (et discussion p. 240-243) ; version néo-hellénique dans le recueil de l'a., Πρόσωπα και θεσμοί της αρχαίας Ελλάδας, Athènes 1994, p. 52-63 et notes p. 339-343.

39 Häge, op. cit., p. 74.

40 P. Ryl. II 153, l. 6. Pour les antécédents classiques, voir E. Karabélias, "L'acte à cause de mort (διαθήκη) dans le droit attique", Actes à cause de mort, Première Partie : Antiquité (Rec. Soc. J. Bodin LIX), Bruxelles 1992, p. 47-129, partic. p. 67 sq.

ment précisé par une disposition *mortis causa* ; elles sont privées de rites et d'offrandes périodiques auxquelles elles pouvaient prétendre. Sans doute la mise en gage de la momie du défunt produit-elle le même effet néfaste ; mais cela ne pouvait être qu'un cas exceptionnel. Les cas "normaux" sont faciles à reconstituer à la lumière de la documentation papyrologique.

Que l'on songe à toutes les libéralités *sub modo* qu'on trouve dans les testaments et les donations *mortis causa* connus par les papyrus d'Égypte[41]. Elles établissent à la charge du bénéficiaire des devoirs concernant les soins à procurer au défunt : organiser ses funérailles, accomplir les rites posthumes, veiller à l'entretien de sa tombe (directement ou à l'aide de professionnels que le bénéficiaire devra rémunérer), célébrer ou faire célébrer des fêtes à l'intention du défunt sur le lieu de son repos éternel, vieille coutume hellénique toujours cultivée dans les milieux grecs de l'Égypte romaine, comme en témoigne le testament d'un athlète hermopolite du début du règne d'Antonin le Pieux[42]. Le *modus* ne créant qu'une obligation religieuse et morale pratiquement jusqu'aux réformes de Justinien, le testateur pouvait, pour renforcer l'obligation imposée au bénéficiaire, recourir à l'amende fiscale associant le trésor impérial à l'exécution des devoirs funéraires prescrits par le testament. C'est ce que fait, par exemple, au début du III^e^ siècle de n.è., le vétéran romain Aurélius Chairémon[43]. Une astuce qui nous rappelle la Cnidienne Artéméis associant Déméter au vol de sa garde-robe. Mais si le bénéficiaire se dérobe, il ne reste que le recours aux divinités justicières qu'un tiers, ami ou parent du défunt, plus pieux que son légataire ou héritier légitime, pourra exercer au profit de la victime "dépouillée de sa sépulture".

De ce manquement aux devoirs funéraires il faut distinguer un vrai viol de sépulture, *violatio sepulchri* en termes de droit romain, évidemment possible en tout lieu et spécialement en Égypte, pays dont les tombes ont toujours tenté les pilleurs. C'est un crime passible, sous l'Empire, de la peine capitale. Le regretté Fernand de Visscher a consacré à ce problème une étude approfondie à laquelle il suffit de renvoyer[44]. Contentons-nous de citer ici, à titre d'exemple, un cas attesté par un recueil de sentences capitales dans un codex de papyrus du IV^e^ siècle de n.è. dont la nature – exercice de rhétorique ou choix de procès à scandale qui ont effectivement eu lieu – fait depuis

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41 Voir mon art. "Additional Provisions in Private Legal Acts in Greco-Roman Egypt", JJP 7/8, 1954, p. 211-229, partic. p. 224-228.

42 Ryl. II 153 (Hermoupolis, 138 de n.è. ?).

43 P. Oxy. XXII 2348 (Oxyrhynchos, 224 de n.è.), d'après L. Migliardi Zingale, I testamenti romani nei papiri e nelle tavolette d'Egitto, 2^e^ éd., Turin 1991, n° 21.

44 F. de Visscher, Le droit des tombeaux romains, Milan 1963, p. 139-158.

longtemps l'objet d'un débat[45]. Le coupable, qui a déterré de "manière barbare" (ἐκβαρβαρωθέντα) un notable auquel la cité avait offert des funérailles publiques, a bien "dépouillé" (ἀποστερῆσαι) sa victime, non pas d'une sépulture décente, mais "d'une dernière espérance"[46]. Violer une sépulture et priver le défunt des soins posthumes qui lui sont dus sont deux choses différentes.

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Concluons. Abordées dans une perspective juridique grecque, les "demandes de justice" conservées par les documents d'Égypte jettent une lumière neuve sur le problème des fondements de la responsabilité, λόγοι εὐθύνης, objet d'un récent ouvrage de Julie Vélissaropoulos-Karakostas[47]. Elles permettent d'étendre à des devoirs non contractuels les principes dégagés par les "jus-grécistes" – on pense bien entendu avant tout aux travaux de H. J. Wolff – en matière de responsabilité contractuelle[48]. Comme la responsabilité du partenaire contractuel défaillant, qui découle, non pas d'une promesse non tenue mais du dommage matériel que son comportement crée au détriment de l'autre partie contractante, de même la responsabilité du bénéficiaire d'une disposition modale *mortis causa* et, plus généralement, celle de tout individu à qui la loi ou la coutume en vigueur impose des devoirs funéraires à l'égard d'un proche disparu repose, non pas sur le fait d'avoir trahi la piété due aux morts, mais sur l'outrage défini comme une "spoliation". L'absence physique – définitive – de l'outragé fait que la *praxis* reconnue à la victime du

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45 BGU IV 1024, page IV, lignes 1-17, éd. W. Schubart (Hermoupolis, 1re moitié du IVe siècle de n.è.). Sur ce document (que nous avons étudié à mon séminaire des Hautes Études, en 1992/1993, cf. supra, note liminaire), voir L. Wenger, Die Quellen des römischen Rechts, Vienne 1953, p. 422 sq., 832 sq. ; plus récemment, G. Poethke, "Der Papyrus-Kodex BGU 1024-1027 aus Hermupolis Magna", Proc. XVIth Intern. Congr. Papyr. (New York, juillet 1980), Chico CA 1981, p. 457-462 ; J.G. Keenan, "Roman Criminal Law in a Berlin Papyrus Codex (BGU IV 1024-1027)", Arch. f. Pap. 35, 1989, p. 15-23 ; J. Beaucamp, Le statut de la femme à Byzance (4e-7e siècle), II. Les pratiques sociales, Paris 1992, p. 55 sq., 78 sq., 182.

46 Ligne 13 : τῆς ἐσχάτης ἐλπίδας (l. ἐλπίδος) ἀποστερῆσαι.

47 J. Vélissaropoulos-Karakostas, Λόγοι ευθύνης. Ιστορική γένεση και σύγχρονη αμφισβήτηση των πηγών της ενοχικής δεσμεύσεως, Athènes-Komotini 1993.

48 H.J. Wolff, "Consensual Contracts in the Papyri ?", JJP 1, 1946, p. 55-79, et version allemande, légèrement abrégée : "Zur Rechtsnatur der Misthosis", dans Beiträge zur Rechtsgeschichte Altgriechenlands und des hellen.-röm. Ägypten, Weimar 1963, p. 129-154 ; "Die Grundlagen des griechischen Vertragsrechts", cité supra (n. 34), repris dans le volume Zur griechischen Rechtsgeschichte, éd. E. Berneker, Darmstadt 1968, p. 483-533, et résumé en français dans l'article de l'a., "La structure de l'obligation contractuelle en droit grec", RHD 44, 1966, p. 569-583. Je reviens sur cette problématique dans mon article "L''Ordonnance sur les cultures'. Droit grec et réalités égyptiennes en matière de bail forcé", RHD 72, 1994, p. 1-20, partic. p. 12 sq.

dommage cède la place à l'intervention des puissances surnaturelles à l'initiative du tiers qui agit à la place et dans l'intérêt du disparu.

Le même procédé pourra, le cas échéant, être employé par la victime elle-même, encore de son vivant, pour réagir contre d'autres manquements dont la sanction juridique n'est qu'imparfaitement assurée, tels les soins que les enfants doivent à leurs parents[49]. C'est ce que, pour ne citer qu'un exemple, le chrétien Sabinus semble reprocher à sa fille Séverine et à un certain Didymos, sans doute son gendre ; peu confiant dans la justice des hommes, il les cite devant le tribunal divin[50]. L'usage millénaire persiste, à ce détail près que le Dieu des chrétiens a pris la place d'Osérapis, de Déméter ou d'Osiris.

Pour nous, n'en déplaise aux divinités égyptiennes appelées à juger les coupables dans les documents qui ont suscité ces remarques, ceux-ci témoignent avant tout de la permanence d'une donnée essentielle de la tradition juridique grecque : le fondement délictuel de la responsabilité dite "civile". Le "délit religieux" qui est à l'origine de ces demandes de justice rejoint *mutatis mutandis* le "délit privé" qui fonde la responsabilité en matière d'inexécution des contrats. L'un s'éclaire par l'autre et aide à mieux préciser sa nature. Une nouvelle fois – mais c'est là une vérité notoire que les hellénistes avertis connaissent bien – se confirme la vertu des papyrus d'Égypte comme sources qui nourrissent et fortifient notre connaissance du droit grec.

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[49] R. Taubenschlag, "La γηροκομία dans le droit des papyrus", RIDA, 3e sér., 3, 1956, p. 173-179 = Opera minora, II, Varsovie 1959, p. 339-345.

[50] P. Upsaliensis 8 (Panopolis ?, VIe siècle de n.è.), éd. G. Björck, Der Fluch des Christen Sabinus, Uppsala 1938 ; M. David & B.A. van Groningen, Papyrological Primer, 4e éd., 1965, n° 71 ; R.W. Daniel & F. Maltomini, Suppl. Mag. II, op. cit., 1992, n° 59. Commentaire et version française : P. Collart, Rev. étud. grecques 52, 1939, p. 249-250.

Adam Lukaszewicz (Varsovie)

Artémisia - l'Antigone de Memphis? (A propos de la στέρησις θήκης)

Le papyrus d'Artémisia est un texte séduisant, surtout à cause de sa date très ancienne et du caractère insolite se son contenu. Joseph Mélèze Modrzejewski a bien démontré que la théorie d'une momie donnée en gage d'une dette d'argent est fausse[1]. Il ne reste donc qu'à ajouter à ses précisions quelques brèves remarques concernant ce texte. Nous nous concentrerons notre propos sur les mots qui concernent l'ἀποστέρησις θήκης[2].

Quant au verbe ἀπεστέρησε il faut prendre en considération deux aspects de la signification de στερέω: 1° *priver* c'est-à-dire *enlever*, *ôter* un objet; ou bien 2° *priver* au sens d'*empêcher de jouir d'un bien*, *frustrer*. Le refus de sépulture se situe sans doute au deuxième niveau.

Il faut cependant reconsidérer - sur un plan purement théorique - le première possibilité, celle d'un vol dont la défunte serait la victime *post mortem*. Si la lecture κτέρεα[3] est correcte, il s'agirait ici de l'équipement funéraire de la tombe qui a pu être volé. Ce qui pose un problème, c'est la θήκη. Ce mot, qui chez les auteurs classiques signifie d'habitude "tombe, sépulture", peut aussi être interprété d'une façon qui permet d'y voir une pièce de mobilier funéraire. θήκη signifie avant tout *caisse*, *boîte*. Il n'est pas impossible qu'il s'agisse du cercueil. Dans ce cas, le père de la fille serait peut-être un véritable voleur d'objets.

Mais il existe des raisons importantes qui s'opposent à cette explication. L'imprécation d'Artémisia comporte une expression qui nous permet de comprendre le sens de l'ἀποστέρησις θήκης. Le châtiment *per analogiam* que les dieux sont priés d'infliger au coupable est : μὴ τυχεῖν ἐκ παίδων θήκης (l.5). La présence de cette expression tranche la question en faveur de στερεῖσθαι = μὴ τυχεῖν. Dans le contexte de μὴ τυχεῖν (τυγχάνω signifiant "subir", "recevoir le lot que le destin réserve", et non *recevoir* au sens matériel), il est préférable d'interpréter θήκη comme une action plutôt que comme un objet. Cette impression est confirmée par la nature de la seconde punition, celle de [μη]δὲ αὐτὸν γονέας ... θάψαι (l.5), où θάψαι correspond par son caractère

1 U. Wilcken, UPZ I 1, p. 99.

2 ἀπεστέρησε καὶ τῆς θήκης, UPZ I 1. 2-3.

3 Ce mot se trouve déjà chez Homère: κτέρεα κτερείξαι.

d'une action au sens de θήκη. θήκη désignerait dans notre contexte l'action d'ensevelir, donc la sépulture.

En marge de notre texte on pourrait rappeler ici une inscription funéraire grecque d'Alexandrie au Musée National de Varsovie, inv. no 198835, datant du Ier siècle de notre ère; elle nous fait connaître un bon conseil qu'une défunte donne à son mari qu'elle appelle "frère" selon l'usage égyptien: καὶ σύ, ἄδελφε, μὴ σεατὸν (pour σεαυτόν) στερήσῃς (19-20)[4] – "Et toi, mon frère, ne te prive pas" (*scil* "de plaisirs de la vie"). On voit bien de quel genre de plaisirs il s'agit. Le veuf se donne carte blanche en faisant de sa femme décédée le porte-parole de ses intérêts. Ici aussi le verbe στερέω indique une privation dans un sens plus abstrait que l'élimination (ou le vol) d'un objet matériel.

Alors, qu'a fait le père de la fille d'Artémisia?

Il n'a pas violé sa tombe. Il a négligé son devoir d'ensevelir proprement sa fille défunte. Par conséquent, selon le désir d'Artémisia, ses propres enfants devraient le priver de la θήκη.

Cette réalité bien humaine nous montre Artémisia sous un jour très favorable: en défendant le droit à la sépulture elle devient presque une Antigone hellénomemphite. Mais les réalités sont plus complexes.

Que veut dire, dans le langage des réalités gréco-égyptiennes, que μὴ τυχεῖν θήκης = ἀποστερεῖσθαι θήκης ("ne pas subir la *theke*" = "être privé de la *theke*")? S'agit-il de l'abandon complet du corps? Du refus de l'inhumation?

On peut en douter. Pour préciser le sens de θήκη on prendra d'abord l'exemple du mot ταφή. En Égypte ταφή signifie "momie" plus souvent que "sépulture". Ulrich Wilcken a cru que l'usage linguistique allait encore plus loin : selon lui, ταφή signifierait aussi *le sarcophage*[5]. Il a invoqué deux "Sarkophag-Aufschriften" : Ταφὴ Πετεμενώφιος[6] et ταφὴ Τφοῦτος (CIG III 4825, 4826). Dans les deux cas, il a eu tort : l'inscription sur le sarcophage, servant d'étiquette, ne concerne pas l'emballage mais le contenu. C'est donc la momie et non le cercueil qui est appelée ταφή.

Dans le P. Par. 18 b, cité par Wilcken, on lit à la ligne 3 le mot σῶμα pour désigner le corps momifié, et à la ligne 10 le mot ταφή pour indiquer l'extérieur du "paquet" funéraire contenant la momie[7]. Contrairement à Wilcken, je n'y vois pas un *terminus technicus* pour le sarcophage mais plutôt un terme général concernant la momie, y compris une momie enfermée dans son cercueil : Ἔστιν δὲ / σεμεῖον τῆς ταφῆς· σιν/δὼν ἐστιν ἐκτὸς ἔχων χρῆ/μα ῥόδινον κτλ. (9-12). "Voilà le signe particulier de la momie : à l'extérieur il y a une toile à rosettes etc."

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4 A. Lukaszewicz, "Une inscription funéraire grecque d'Égypte au Musée National de Varsovie", ZPE 77, 1989, p. 192.

5 U. Wilcken, "Aus der Strassburger Sammlung", Arch. f. Pap. 4, 1908, p. 141.

6 SB I 3931 = J. Hengstl et al., Griechische Papyri, no 60, p. 154.

7 J. Hengstl et al., Griechische Papyri, no 59, p. 152-3.

On peut aussi mettre ce texte en parallèle avec un témoignage surprenant. Plutôt que d'improviser une traduction française, je me servirai ici de la traduction allemande de Thierfelder de l'anecdote no 171 du *Philogelos*[8] :

"Ein Kymäer brachte seinen Vater, der in Alexandria gestorben war, zu den Mumienmachern. Später wollte er ihn abholen. Da der Mann noch andere Leichen dahatte, fragte er den Kymäer nach dem Kennzeichen seines Vaters. Antwort: 'Er hustete'."

Le fragment essentiel en grec contient des mots significatifs : on y parle de σημεῖον ou signe distincif d'une momie et la momie est appelée θήκη. Il n'y a aucun doute quant à l'origine alexandrine de cette histoire (mais c'est déjà un autre sujet).

Dans ce texte, θήκη n'est pas une sépulture mais une momie prête à quitter l'atelier d'un taricheute. De même, dans le P. Artémisia θήκη peut bien signifier "momie" ou plutôt - vu l'usage de τυγχάνω - "momification". Ainsi, la "privation de sépulture", que le mauvais père aurait réservée à sa pauvre fille, n'est pas nécessairement le refus total de l'inhumation du corps. Il s'agitrait plutôt d'une sépulture imparfaite, accomplie sans momification, sans cartonnage et sans équipement funéraire (κτέρεα). Ensevelie sans ces soins, la morte est privée de l'assistance indispensable pour survivre dans le royaume d'Osiris.

Pourtant, le problème d'Artémisia n'est pas directement comparable au drame d'Antigone. Sa "plainte" est une mesure magique prise contre la négligence dans une matière d'ordre moral que les autorités de ce monde ne sauraient pas punir. Le crime (ἀποστέρησις κτερέων καὶ θήκης) et le châtiment se recontrent sur le même plan de l'irrationnel.

Pour souligner la permanence de la pratique qui consiste à s'adresser aux divinités pour punir un délit d'ordre moral, on peut - à côté des exemples invoqués par Joseph Mélèze-Modrzejewski - citer encore le P. Vindob. G. 16685, qui est un texte de magie noire chrétienne : χμγ· πρὸ μὲν πάντων κακὸς καιρὸς τοῦ κολασίμου Θεοδώρου. κακὸς γὰρ ἐστιν[9].

Dans ce texte, nous avons aussi un anathème et une raison de la punition à venir; et c'est aussi la Divinité qui est chargée de l'exécution. Mais la nature du délit n'est pas décrite dans ce papyrus. Pour justifier le châtiment, il a suffi de qualifier le coupable de κακός (l.7).

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8 Philogelos. Der Lachfreund, hrsg. von A. Thierfelder, München 1968, p. 90: no. 171. Κυμαῖος ἐπ' Ἀλεξανδρείᾳ τοῦ πατρὸς αὐτοῦ ἀποθανόντος τὸ σῶμα τοῖς ταριχευταῖς δέδωκε. μετὰ δὲ χρόνον ἐζήτει αὐτὸ ἀπολαβεῖν. τοῦ δὲ ἔχοντος καὶ ἄλλα σώματα καὶ ἐρωτῶτος. τί σημεῖον ἔχει ἡ τοῦ πατρὸς αὐτοῦ θήκη. ἀπεκρίθη· Ἔβησσεν.

9 A. Lukaszewicz, "Christlicher Fluchtext (Notiuncula ad P. Vindob. G 16685)", ZPE 73, 1988, p. 61-62.

Ce texte chrétien de l'époque tardive est aussi proche de la fin de l'Egypte gréco-romaine que le P. Artémisia l'est des ses débuts. Ces deux documents sont séparés par la distance de plusieurs siècles, mais ils se rejoignent comme témoignages la pratique d'invoquer la vengeance divine d'un délit religieux, d'un péché sinon d'une simple méchanceté.

Naphtali Lewis (New York)

Ἐμφωλεύειν as a Punishable Offense

This previously unknown delict is documented in two papyri dating from the very last years of the second century A.D. *P. Strasb.* VIII 725, which the editor reasonably assigned (in his note to line 8) to A. D. 198, is an order from a higher official to a strategos to collect a fine (πρόστιμον) from a man whose offense is stated as ἐμφωλεύειν ταῖς τοῦ νομοῦ κώμ[αις. In *PSI* XIII 1357, datable from internal evidence to A. D. 197-199 or 200, a strategos issues a public notice that by order of the prefect of Egypt certain individuals are to be tried ὡς ἐμφωλευόντων τοῖς πράγμασι. Each document consists of a salutation followed by a single sentence of cumbersome bureaucratic language (the end of the sentence is lost at the bottom of *PSI* 1357).

Neither of the two documents has elicited much comment. *PSI* 1357 was published in 1953 as one of seventeen small fragments grouped together as "Miscellanea". The half-volume in which it appears was reviewed or noticed, according to *L'Année Philologique*, in a total of eight journals. Half of those journals are devoted to ancient law, and the attention of those reviewers was drawn to four specifically legal texts published in the same half volume. Only Claire Préaux bothered to notice 1357, giving a summary of its contents[1]. On *P. Strasb.* 725, published in 1981, there are only the comment of the editor, Jacques Schwartz, and my observation in *BASP* 19 (1982) 82. Neither document has attracted further attention so far as I can discover.

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[1] *Chronique d'Egypte* 29 (1954) 335-36: "Le n° 1357 porte au verso la copie d'une circulaire du stratège de l'Oxyrhynchite, Diophanès, qui, pour obéir à un ordre du préfet Aemilius Saturninus (197-199), institue, semble-t-il, une enquête contre les fonctionnaires de ses bureaux (serait-ce le sens de τῶν ἀπὸ τῆς παρεδρείας?). L'ordre du préfet répondait à une requête des "ambassadeurs de la cité (τῶν πρέσβεων τῆς πόλεως ὑμῶν)."

I. The Texts

PSI 1357

Διοφάνης στρ(ατηγὸς) Ὀξυρυγχείτου·
τοῦ λαμπροτάτου ἡγεμόνος
Αἰμιλίου Σατουρνείνου ἡνί-
κα <ἔδωκέ> μοι τὰς τῆς στρατη̣[γ]ί̣[α]ς
ἐ̣ντολὰς πρὸ βήματος αὐ̣-
τοῦ ἐξ ἀξιώσεως τῶν
πρέσβεων τῆς πόλεως ὑ̣-
μῶν περὶ τῶν ἀπὸ τῆς
παρεδρείας ὡς ἐμφω̣-
λευόντων τοῖς πράγμα̣-
σι κελεύσαντος τὴν διά̣-
κρισιν τούτων γενέσθαι. ἡξί̣-
ωσα παραγγέλλειν̣ τοῖς
αἰτιᾶσθαι βουλομένοις

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1. Diophanes is attested as strategos of the Oxyrhynchite nome in AD 200 (*Pap. Flor.* XV, p. 96). If Aemilius Saturninus left the office of prefect in 199 (cf. below, 3n.), this document would be evidence for Diophanes' tenure as strategos in that preceding year as well. The form of the caption - name and title, without a verb - identifies this document as a πρόγραμμα, or public notice.

3. For Aemilius Saturninus' dates as prefect of Egypt (197-199 or possibly 200), cf. *ZPE* 17 (1975) 304 and 38 (1980) 85.

4-6. It is obvious that the finite verb (ἔδωκε *aut sim.*) introduced by ἡνίκα has been omitted through inadvertence. In the edition it is supplied in line 6, but that has the deprecable effect of intruding between the petitioners (lines 6-8) and the prefect's court (lines 5-6) in which they were heard. Another objection is that in that position ἔδωκεν would denote that the prefect handed the strategos his orders in front of the prefect's judicial bench, which is sureley a contresens.

5. ἐντολή is the Greek rendering of Latin *mandatum*. Just as the Roman governor setting out from Rome for his province received his *mandata* from the emperor, so the nome strategos received his ἐντολαί from the prefect of Egypt.

P. Strasb. 725

Παπείρ[ι]ο[ς Σ]ερηνιανὸς στρ(ατηγῷ) Προσωπ[ε]ίτου χ[α]ίρειν·
Ἀμμών[ιον] Ὤρου μηνυθέντα παρ' [ἐ]μοὶ ὑπὸ Κλαυδίου Ἀπολ-
λωνίου κατηγόρου διὰ βιβλ(ιδίων) ὧν ἐν σημειωσάμενος ἔπεμψά σο[ι
παρὰ τὸ ἐξὸν κατὰ τὸ ἐξῆς ἐμφωλεύειν ταῖς τοῦ νομοῦ κώμ[αις.
φρόντισον τὸ ὡρισμένον πρόστιμον ἐκπράξας τὸ ἀργύρι[ον
λημματίσαι τῷ κυριακῷ λόγῳ ἢ ἀ[ν]τιλέγοντα ἐπ' ἐμὲ ἀπ[ο-
στεῖλαι περὶ τούτου καταστησόμε[νο]ν πρὸς τ[ὴ]ν κατη[γο]ρ[ίαν.
ἐρρῶσθαί σε ε[ὔ]χομαι. (ἔτους) ζ// Θὼθ κ.

8-10. Papirius Serenianus is not otherwise known. He could have been any government official superior to a nome strategos (not necessarily the prefect of Egypt, as the parallel of *PSI* 1357 might suggest). One strong possibility, noted by the editor, is the epistrategos. Another, perhaps better, possiblility is that Papirius Serenianus was the high Roman official in charge of the emperor's privy purse, or ἴδιος λόγος. In favor of this identification are the facts that (1) that administrative branch is known to have had a staff of κατήγοροι (cf. *JJP* 9/10, 1956, 117-25), and (2) the fine collected in the instant matter is to be credited to the emperor's account (line 13).

Papirius Serenianus is not likely to have been a prefect of Egypt: see below, 15 n.

11. The reading ἐμφωλεύειν (-εις ed. pr.) has been confirmed on the original (J. Schwartz *per epist.*, cf. *BASP* 19, 1982, 82).

12. Without explanation (but presumably because the accused has not yet been tried) the editor took πρόστιμον ἐκπράξας in the unprecedented sense of requiring the accused to post a bond or security ("la caution fixée"). But there is, in reality, no reason to take πρόστιμον in other than its normal sense of a fine, or penalty. This document is addressed to the strategos, the administrative head and judicial officer of the nome in which the offense occurred, with instructions to hear the case and impose "the prescribed fine", or, if the accused interposes any objection (such as a plea of not guilty), he is to be sent to answer the charge before the writer of this order (lines 13-14).

On the expression τὸ ὡρισμένον πρόστιμον see now also my note in *BASP* 28 (1991) 170-77.

15. The list of known prefects does show a gap in the seventh year of Severus Alexander (cf. *ZPE* 17, 1975, 309 and *P. Oxy.* L 3563.10n.), but nothing argues for assigning Papirius Serenianus to that slot. Per contra, *P. Strasb.* 725.8n. presents the paleographic and other reasons for interpreting the seventh year here as that of Septimius Severus, when the prefect of Egypt was Q. Aemilius Saturninus. In that case the date here would correspond to 27 September 198.

II. The Meaning of ἐμφωλεύω

A. In General

The *TLG* provides us with over 600 occurrences (more than ten times the number in *LSJ*) of a dozen or so nouns, adjectives and verbs formed on the base φωλ-. The passages - in nearly 100 authors from Homer to the church writers of late antiquity (these last accounting for almost a third of the total) - all have to do with hiding, sheltering, and the like. The largest number relate to animals - lurking in dens or lairs, living in holes or hives or nests, sheltering under cover, or hibernating; these include the famous quotation from Matthew (8.20) and Luke (9.58), "Foxes have holes and birds of the air have nests, but the son of man has nowhere to lay his head." Some of the applications to human beings are similar in imagery, as when medical writers refer to the embryo in the womb or to diseases sited in various parts or organs of the body; or as in the story attributed by Plutarch (*Mor.* 733C) to Aristotle (= frag. 43) to the effect that an old woman in Cilicia used to hibernate (φωλεύειν) for two months each year "and only her breathing showed that she was still alive." There are also instances where a φωλ- term describes people living or hiding in caves, or sheltered in similar retreats, such as thick woods, social clubs, or the women's quarters of a house[2]. In almost all of these occurrences the connotation of the φωλ- word is either neutral or favorable, as when a sheltered virgin is styled φωλάδα in contrast to public prostitutes[3].

Against this mass of evidence there are only four, possibly five, instances in which the φωλ- word is connected with illegal behavior. Josephus tells us that in 38 B. C. Herod campaigned against τοὺς ἐν τοῖς σπηλαίοις λῃστάς who there μετὰ πάντων τῶν οἰκείων ἐφώλευον (*Ant.* 14.421-422), defeating them πλὴν καθόσον οἱ τοῖς σπηλαίοις ἐμφωλεύοντες ὑπελείποντο (*BJ* 1.307). In *OGIS* I 424, a fragmentary inscription attributed to the time of Agrippa I or II, the expression λ[αθόντες καὶ ἐν πολλοῖς τῆς χώ]ρας μέρεσιν ἐμφωλεύσ[αντες was explained by the editor (note 3), probably rightly, as another reference to the same kind of brigands. In Justinian, *Nov.* 80 (= *Authent.* 81).9 - whether the text is genuinely Justinian or not is irrelevant to our investigation - it is ordered that when *coloni* (who were forbidden by *Nov.* 42 to sojourn in the big cities) come to Constantinople to complain against their masters, a few are to be allowed to remain as *syndikoi* and the rest sent home; and the city *quaesitor* is to expel any of the latter found ἐμφωλεύοντας (*Authent.: qui commorantur nidificantes*). A

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2 E. g. Strabo 11.5.7 (506C); Josephus, Ant. 14.421-22; Nonnus, *Dionys.* 1.163, 6.270, 22.116; *Anth. Pal.* 7.375.3, 11.34.8. Cf. Eusebius, *Praep. ev.* 4.2.7, τὰς ἐν τοῖς ξοάνοις φωλευούσας δυνάμεις.

3 *Anth Pal.* 11.34. Another review of the terminology, touching upon medieval Latin as well as ancient Greek literature, is presented by S. Musitelli, *La parola del passato* 193 (1980) 244-54.

possible fifth instance is *Orac. Sibyll.* 5.148, φωλεύων μετὰ τῶνδε κακῶν εἰς ἔθνος ἀληθές: the aura of evil conspiracy is dispelled, however, by the variant reading ἀηδές for ἀληθές.

B. In *PSI* 1357 and *P. Stras.* 725

It is apparent at a glance that these two documents bear a striking resemblance to each other, both in language and in the procedure depicted. In both the verb ἐμφωλεύω denotes an action which was

a) detrimental: to the villages of a nome in one case, to the interest of the town of Oxyrhynchus in the other;

b) perpetrated by the holders of a public office or other position of responsibility;

c) the subject of a complaint or denunciation to the perfect or other high authority, a complaint which that official then referred to the nome strategos for disposition[4].

The charge is not further detailed. It did not need to be, for the writer and the addressee both knew exactly what was involved. We, however, not knowing the attendant circumstances, have only the verb ἐμφωλεύω from which to try to deduce the precise nature of the illegal action. Sheltering a criminal, an interpretation suggested by the editor of *P. Stras.* 725 (11n.), can be ruled out[5]. Of the contexts and nuances of the verb noted above (II.A), that of deliberately lying low - or "being asleep on the job[6]", as we say - seems to me to offer the best possibility, the more so when we add the following consideration.

In the above-quoted passage from Josephus' *Jewish Antiquities*, in place of ἐφώλευον one manuscript has ἐνεφώλευον and three have ἐφέδρευον, a perfectly acceptable synonym[7]. While ἐφεδρεύω is extremely rare in the papyri, its synonym and cognate ἐνεδρεύω is quite common. *P. Panop. Beatty* 1-2, of A. D. 298., may be singularly helpful in this connection. Those lengthy records of the correspondence of a nome strategos contain ten instances of ἐνεδρεύω used in contexts of malfunction or malfeasance. For example τὰ πάντα ἐνεδρεύε[τα]ι (1.179, translated by the editor, T. C. Skeat, as "the whole administration is endangered;" similarly 1.355, 357, 2.5) has very much the same ring as the ἐμφωλεύω passages in *PSI* 1357 and *P. Strasb.* 725.

4 The statement in R. Taubenschlag, *The Law of Greco-Roman Egypt*[2], p. 490, can now be emended in the light of present evidence, which shows that the delegation of penal cases to the nome strategos continued at least to the end of the third century: see esp. *P. Beatty Panop.* 1, of A. D. 298.

5 It was based on the misreading of the verb as a second person singular: see above, 11n.

6 "... si rivela equivalente a 'periodo di letargo' o 'periodo di immobilità temporanea'," S. Musitelli, *loc. cit.* (note 3), p. 247.

7 A *TLG* search reveals a long list of instances in which ἐφεδρεύω conveys (like ἐνεδρεύω) a hostile purpose, such as lying in ambush or otherwise lurking to attack: see e. g., *inter alia plura*, Appian, *BC* 1.10.90, Cassius Dio 50.12.5, Diod. Sic. 14.37.3, 15.3.1

Other such instances (especially 2.63, 66) reveal that the danger, or problem in *P. Panop. Beatty* 1-2 usually stemmed from delay on the part of one or another functionary - which brings us back to the notion of impeding (Skeat's translation at 1.158) by failing to perform on time, "being asleep on the job." The dilatoriness of local officials was a chronic complaint in Roman Egypt, one which turns up again and again in the papyri[8].

In sum, in the light of the bits of evidence now available, the best interpretation of ἐμφωλεύω in *PSI* 1357 and *P. Strasb.* 725 appears to be that it refers to a neglect of duty, possibly a failure to perform it on time, thus impeding the smooth functioning of the administrative machinery. Reading between the lines we may suspect that the neglect was intentional, with the aim of lining one's pocket, to the detriment of the governmental unit involved. But even unintentional dereliction of duty would be punishable.

III. Translations

Giving effect to the foregoing discussion, we may translate the two documents as follows.

PSI 1357

Diophanes, strategos of the Oxyrhynchite, [announces:] The most illustrious prefect [of Egypt], Aemilius Saturninus, when he gave me my mandates of office as strategos, having - as a result of the petition of a delegation from your city about the men of the assessorate, that they were derelict in [attending to] business - ordered that a judicial determination of the matter take place before his tribunal, I have judged it right to summon those desiring to lay a charge ... [The rest is lost.]

P. Strasb. 725

Papirius Serenianus to the strategos of the Prosopite, greeting. Ammonios son of Horos having been denounced to me by the prosecutor Claudius Apollonios - in an indictment of which I send you [herewith] a copy signed by me - as inadmissibly and continually neglecting[9] the villages of the nome, see to it that you exact the prescribed fine and credit the money to the imperial fisc; or, if he demurs, dispatch him to me about this, to be confronted with the charge. I bid you fare well. [Date.]

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8 See e. g. N. Lewis, *Life in Egypt under Roman Rule*, pp. 192-95

9 Or "impeding".

Hans-Albert Rupprecht (Marburg/Lahn)

Die Vererblichkeit von Grund und Boden im ptolemäischen Ägypten

Das zunächst so angekündigte Thema wird letztlich wenigstens in einem Teilbereich genauer als die Frage nach der dinglichen Berechtigung an Grund und Boden nach der Urkundspraxis des ptolemäischen Ägypten abzuhandeln sein.

Für das Mutterland hat D. Asheri[1] das Verhältnis von Erbrecht, Landbesitz und Verfassung näher untersucht. Er diskutiert vor allem die Gesichtspunkte:

Entwicklung und Einheit des Familiengutes als Wirtschaftsgrundlage des Oikos und d.h. damit auch das Problem der Zusammenhaltung bzw. der Realteilung des Landbesitzes, die testamentarische Erbfolge, sowie Mitgift und Erbtochterrecht.

Eine besondere Rolle spielt die Gleichheit der Bürger als Petitum der Staatsphilosophie und der Gesetzgebung. Nicht mehr problematisiert wird die Frage nach der Möglichkeit des Eigentums an Grund und Boden, sei es der einzelnen Familie, des einzelnen Oikos, sei es des einzelnen Individuums[2].

Die Gesichtspunkte Asheri's spielen für das ptolemäische Ägypten keine besondere Rolle, schon deshalb nicht, weil das System des Oikos nicht übernommen wurde und auch nicht übernommen werden konnte. Die Frage nach der Gleichheit der Bürger ist in der absoluten Monarchie gleichfalls überflüssig. Die Möglichkeit der Testamentserrichtung ist für die Papyri nicht weiter zu problematisieren, da die Urkunden offensichtlich die uneingeschränkte Möglichkeit erweisen, ohne daß auf die Konkurrenz mit der Erbfolge ab intestato näher einzugehen ist.

Hier soll uns vielmehr interessieren das von Asheri nicht näher erörterte Problem der Erbfolge in Grund und Boden unter dem Aspekt der privaten Rechtsstellung.

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1 Laws of inheritance, distribution of land and political constitutions in ancient Greece, Historia 12, 1963, 1 ff.

2 Vgl. hierzu M.I. Finley, The alienability of land in ancient Greece, Eirene 7, 1968, 25 ff. = Use and abuse of history, London 1975, 153 ff.

I. Die papyrologische, erbrechtliche Literatur ist hinsichtlich dieses Punktes von bemerkenswerter Kargheit, ja sogar Vagheit. So spricht H. Kreller[3] von der Vererbung von Grundstücken als selbstverständlich, macht nähere Ausführungen zur γῆ ἐν δωρεᾷ, zum κλῆρος der Kleruchen, verweist für die γῆ βασιλική und andere gleichartig bewirtschaftete Bodenteile auf M. Rostovtzeff's "Kolonat", unterläßt aber dann jede weitere Differenzierung. L. Mitteis geht in den Grundzügen darauf nicht ein. U. Wilcken dagegen[4] schließt sich voll Rostovtzeff an, dazu siehe gleich. Gleiches gilt für V. Arangio–Ruiz[5], der beim Kauf von Grundstücken betont immer nur vom Erwerb von Besitz und nicht von Eigentum spricht. R. Taubenschlag dagegen[6] geht zwar von der Position R. aus, sieht Privateigentum an Häusern, ψίλοι τόποι, Weinbergen und Gärten für möglich an, bei Ackerland allerdings scheint er für die ptolemäische Zeit eine Übergangsphase anzunehmen. E. Seidl wieder formuliert sehr vorsichtig, wenn auch in der Sache entschieden, wenn er für Land in Privatbesitz – jedoch ohne die Kategorien näher zu beleuchten – sagt: "... kein Zweifel, daß das einmal zur ἰδιόκτητος γῆ gewordene Land in jene rechtliche Interessenverknüpfung mit dem Inhaber gekommen ist, die den Namen Privateigentum allein verdient[7]". Die Abgaben qualifiziert er wohl zu Recht als bloße Steuern, ansonsten komme die Bindung an den König nur noch im Verbot der Aneignung bei herrenlosem Gut zum Ausdruck[8].

Grund für diese Zurückhaltung ist letztlich die von Rostovtzeff begründete Auffassung des Obereigentums des Königs an Grund und Boden[9]. Wie J. Modrzejewski[10] zuletzt sehr eingehend dargestellt und dann hinsichtlich der Literatur ebenso klar und überzeugend meines Erachtens auch widerlegt hat, knüpft die herkömmliche Meinung für die ptolemäische Zeit hinsichtlich der juristischen Zuordnung

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3 Erbrechtliche Untersuchungen auf Grund der gräko–ägyptischen Papyrusurkunden, Leipzig 1919, 4 ff, 10, 13.

4 In: Mitteis- Wilcken, Grundzüge und Chrestomathie der Papyruskunde 1. Bd. Historischer Teil, 1. Hälfte - Grundzüge, Leipzig-Berlin 1912, 284 ff.

5 Lineamenti del sistema contrattuale nel diritto dei papiri, Milano 1928, 44 f.

6 The Law of greco-roman Egypt in the light of the papyri, 332 B.C. - 640 A.D., 2. Aufl. Warschau 1955, 233 ff.

7 Ptolemäische Rechtsgeschichte, 2. Aufl. Glückstadt 1962, 111.

8 Zu den Bodenkategorien s. zuletzt D. Rathbone, Egypt, Augustus and roman taxation, Cahiers du Centre G.Glotz 4, 1993, 83 ff. (= Revue d'histoire ancienne), der Ackerland als privates Land gar nicht erwähnt.

9 Studien zur Geschichte des römischen Kolonates, Leipzig/Berlin 1910, 6 ff, 15, 37 ff, 79. Gesellschafts– und Wirtschaftsgeschichte der hell. Welt I, Darmstadt 1955, 213 ff, 225 ff.

10 Regime foncier et statut sociale dans l'Egypte ptol., in: Terre et paysans dépendants dans les sociétés antiques 163 ff, Paris 1979 (Coll. intern. Bésancon 2./3.5.1974).

an Rostovtzeff an: Das Land insgesamt ist danach Eigentum des Königs, er kann es in verschiedenen Abstufungen vergeben:

1, βασιλικὴ γῆ und
2, γῆ ἐν ἀφέσει; letztere wird gebildet von:
a, γῆ ἐν δωρεᾶι (vergebene Domänen, wie z.B. an den Dioiketen Apollonios - Zenonarchiv),
b, ἱερὰ γῆ (Tempelland),
c, κληρουχικὴ/κατοικικὴ γῆ (an Kleruchen vergebenes Land)[11],
d, πολιτικὴ γῆ (Land der drei griechischen Poleis) und
e, ἰδιόκτητος γῆ (Privatland).

Den Unterschied zwischen 1) und 2) sieht man darin, daß die βασιλικὴ γῆ durch die Krone im Wege der Vergabe an βασιλικοὶ γεωργοί direkt bewirtschaftet wurde, während die γῆ ἐν ἀφέσει anderen zur Bewirtschaftung bei strikter Bewahrung des königlichen Eigentums überlassen wurde. Zur ἰδιόκτητος γῆ gehören nach dieser Auffassung Hausgrundstücke, Bauplätze, Weinland, Gärten und gegebenenfalls Ackerland, aber auch dafür gilt als selbstverständlich das Eigentum des Königs[12].

Der Begriff der γῆ ἐν ἀφέσει ist allerdings noch nicht befriedigend geklärt. Verschiedene Belege und Aufstellungen sind bekannt - ohne daß hierauf näher einzugehen ist. Mit am häufigsten zitiert wird: Tebt. I 5 Z. 111 = COrdPtol 53 (118 a.): τοὺς δὲ τ[ὴν ἰδιόκτητον καὶ τὴν ἱερὰν καὶ τὴν κληρουχικὴ]ν καὶ τὴν ἄλλην τὴν ἐν ἀφέσει ... (sc. γῆν). J. Herrmann hat deutliche Zweifel an der Rostovtzeffschen und dann auch von Wilcken übernommenen Konstruktion der Landaufteilung geäußert[13]. J. Shelton hat letztlich deutlich gemacht, daß der Begriff als solcher schon in den Urkunden nicht deutlich zu fassen[14] und inhaltlich ohne zuverlässige Konturen ist[15].

Die These Rostovtzeff's wird heute grundsätzlich bestritten und ein allgemeines königliches "Obereigentum" abgelehnt, zumal sich konkrete Anhaltspunkte aus den

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11 S. hierzu J. Partsch in: Sethe – Partsch, Demotische Urkunden zum ägyptischen Bürgschaftsrechte vorzüglich der Ptolemäerzeit, Leipzig 1920, 622 ff.

12 Rostovtzeff, Kolonat 79; Gesellschaftsgesch. 215.

13 Zum Begriff γῆ ἐν ἀφέσει, CdE 30, 1955, 95 ff = Kleine Schriften 152 ff.

14 Ptolemaic land ἐν ἀφέσει: an observation on the terminology, CdE 46, 1971, 113 ff.

15 Land Register: Crown Tenants at Kerkeosiris, Coll. Youtie I S. 111 ff. Vgl. auch die Bemerkungen in der Einleitung zu P. Tebt. IV S. 2 ff, 31.

Urkunden nicht ergeben. Hinsichtlich der allgem. Überlegungen ist auf Modrzejewski[16] zu verweisen. Im folgenden soll die Überprüfung aufgrund der überlieferten Urkundspraxis erfolgen.

II. Ein Indiz für die Richtigkeit dieser neuen These müsste sich nach meinen ersten Überlegungen am deutlichsten aus der Regelung der Vererblichkeit von Grund und Boden ableiten lassen.

Im folgenden soll deshalb unter Berücksichtigung von Ort, Zeit und Objekt die Erbfolge in Grund und Boden untersucht werden[17].

Das für diese Übersicht verfügbare Material setzt sich zusammen aus letztwilligen Verfügungen, elterlichen Teilungen und Schenkungen auf den Todesfall sowie sonstigen Angaben über ererbtes Land[18].

Die Zahl der erhaltenen Testamente, Auszüge bzw. der anderen erbrechtlichen Belege von 53 weckt zunächst den Eindruck, daß wir eine reiche Überlieferung zu verzeichnen haben. Bei näherem Hinsehen schrumpft aber das Bild deutlich: 33 Fälle bilden allein die Soldatentestamente der Petrie–Papyri. Von den 20 anderen Belegen stammen nur drei aus dem 3.Jh. a.C., geben aber keine näheren Angaben zu dem betroffenen Vermögen[19]. 15 Fälle stammen aus dem 2 Jh. a.C., kommen mit Vermögensspezifizierungen alle aus der Thebais bzw. noch genauer zum großen Teil aus Pathyris, ansonsten haben wir zwei Belege aus dem 1. Jh. a.C. aus Herakleopolis bzw. Tebtunis[20].

Um mit den Katökenkleroi zu beginnen. Für diese stellt sich auch aufgrund der gesetzlichen Regelungen das Bild folgendermaßen dar: Die Kleroi der Kleruchen sind königliches Land, das zunächst mit dem Tod des Kleruchen wieder an die Krone

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16 In: Terre et paysans dépendants dans les sociétés antiques 163 ff, Paris 1979 (Coll. intern. Bésancon 2./3.5.1974).

17 Eine Übersicht entspr. der bisher hM gibt auch A. Stollwerck, Untersuchungen zum Privatland im ptol. und röm. Ägypten, Jur. Diss. Köln 1971.

18 Zum Nachlaß allgem. s. O. Montevecchi, Ricerche di sociologia... I Testamenti, Aeg. 15, 1935, 90 ff.

19 Eleph. 2 (285/4 a.), Elephantine: Vermögen im ganzen. Hal. 11 (238 a.) und SB XII 10859 (220 a.), insoweit nicht erhalten.

20 BGU VI 1285 (I a., Herakleopolites); PSI Om. 5 (I a./I, Tebt.).

zurückfällt[21] und dann üblicherweise an den Sohn übertragen wird[22]. Eine Veräußerung des Kleros war zunächst unzulässig, konnte im Verlauf allerdings durch Parachoresis unter bestimmten Voraussetzungen erfolgen, bis zum Ende der Ptolemäerzeit der Kleros letztlich frei übertragbar war, wenn auch in besonderen Formen[23]. Im Todesfall ging bei intestater Erbfolge der Kleros dann an die nächsten Verwandten über[24]. Die Regelungen über die σταθμοί, d.h. die den Soldaten zugewiesenen Quartiere im Haus von Privatleuten, waren offensichtlich restriktiver. Eine Übertragung war prinzipiell ausgeschlossen[25], eine Vererbung später zugelassen[26].

In der Testierpraxis zeigen die Soldatentestamente insbesondere der Petrie Papyri – inzwischen dankenswerterweise von Clarysse als Petrie I in zweiter Auflage herausgegeben – nun folgendes: In den Petrie–Papyri (238/7 – 226/5 a.C.) aus dem Fayum wird häufig das ganze Vermögen – ohne nähere Spezifizierung – zugewandt; spezifiziert werden aufgeführt dörfliche Grundstücke (1 b), ein Weinberg (25), Häuser (3 c, 6 a, 13), Sklaven, Mobilien und auch Stathmoi (3 ?, 16 = SB XIV 11306, 18, 22, 28, 30). Nur einmal wird der Kleros erwähnt (22b). Streitpferd und Waffen gehen an den Sohn außer in Nr. 18 auch in dem bekannten Testament des Dryton (Grenf. I 21) aus dem Jahre 126 a.C.

Soldatentestamente haben wir sonst noch in den Testamenten des Dryton (in dem gerade genannten P. Grenf. I 21 = L.Bat. XIX 4, 126 a.C. – Pathyris; VBP II 5, II a.C. – Pathyris, und vielleicht sein 1. Testament in Misc.Pap. II S. 429. 165 a.C. – Thebais) sowie in BGU VI 1285 (I a.C. – Herakleopolis) und Lond. VII 2015 (241 a.C. – Fayum). An Grundstücken werden in diesen genannt der Kleros mit Stathmos und Häusern in BGU VI 1285 sowie der Kleros in Lond. VII 2015. Die Testamente des Dryton nennen Häuser, Hof, Weinland, Bauplätze (Grenf. I 21) sowie nicht näher bezeichenbares Land (s. das sogenannte 1. Test.).

Es ergibt sich also: Vererbt werden Häuser, Kleroi, Stathmoi, dörfliche nicht bebaute Grundstücke und einmal ein anderes nicht spezifizierbares Grundstück.

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21 Vgl. allgem. Cl. Préaux, L'économie royale des Lagides, Brüssel 1939, 463 ff. J. Bingen, Les cavaliers catoeques de l'Héracléopolite au I. s., in: Egypt and the hell. world 1 ff., Löwen 1983. Lille I 14 = WChr 335 = JP 56 a (243/2 a.).

22 Lille I 4, 20 ff = WChr 336 = JP 56 b (218/7 a.).

23 Vgl. Cl. Préaux, aaO und H.–A. Rupprecht, Rechtsübertragung in den Papyri, in: GdSchr Kunkel, Frankfurt 1984, 365 ff.

24 BGU IV 1185, 16 ff = JP 56 d = COrdPtol. 71 (60 a.).

25 Hib. II 198 II 15 ff = COrdPtol. 1 (275 a.). Petr. III 20 Vo Col. II 10 ff = WChr 450 = SB VI 9454 = COrdPtol. 8 (262 a.). Vgl. nur Cl. Préaux aaO 477 ff.

26 BGU IV 1185, 12 ff = COrdPtol. 71 (60 a).

Von den Soldatentestamente einmal abgesehen, in den "normalen" Testamenten sind Gegenstand erbrechtlicher Verfügungen zunächst Mobilien/Hausrat[27] und Sklaven[28]. An Grundstücken werden vergeben Häuser bzw. Hausteile[29], Gärten[30], Weinland[31], Palmhaine[32] und auch ψίλοι τόποι , d.h. Bauplätze[33].

Sonst wird Land genannt allgemein in Cair. Goodsp. 6 , einer Abschichtung (129 a.C. – Pathyris), γῆ ἤπειρος bzw. σιτόφορος[34] in SB XVIII 13168 (123 a.C. – Pathyris), einem Testament, in Lond. VII 2191 (116 a.C. – Pathyris), und Grenf. I 27 = MChr 156 (109 a.C. – Pathyris), zwei Abschichtungen, und Lond. III 880 = Straßb. II 85 (113 a.C. – Pathyris), einer Teilung. Ein Teil eines Katökenkleros wird letztlich zugeteilt in dem Testament PSI Om. 5 (Ia.C./I – Fayum), offensichtlich kein Soldatentestament.

Damit ist festzuhalten: Häuser, Bauplätze und Gärten etc. gehören zum üblichen Bestand des durch Testament vergebenen Nachlaß. Ackerland dagegen nur ausnahmsweise – vom Kleros abgesehen– und offenkundig nur im Pathyrites, vergeben sei es durch Testament[35] sei es durch Rechtsgeschäft auf den Todesfall unter Lebenden.

Gleiches ergibt ein Überblick über die Belege für die sonstige Bezeichnung von Vermögensgegenständen als πατρικός oder μητρικός [36].

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27 BGU III 993 (127 a., Pathyris). SB XVIII 13168 (123 a., Pathyris). PSI Om. 5 (I a./I, Tebt.).

28 SB X 10282 (176/170 a., Fayum).

29 Lond. II 219 (S.1) (II a., Thebais). SB X 10282 (176/170 a., Fayum). BGU III 993 (127 a., Fayum). SB XVIII 13168 (123 a., Pathyris). Lond. VII 2191 (116 a., Pathyris), mit A. Kränzlein, ZPE 9, 1972, 289 ff. ist entgegen P.W. Pestman, JEA 55, 1969, 129 ff. eine Abschichtung anzunehmen. Lond. III 880 = Straßb. II 85 (rev. Fassung) (113 a., Pathyris) (Teilung). PSI Om. 5 (I a./I, Tebt.).

30 PSI Om. 5.

31 SB X 10282, BGU III 993, PSI Om. 5.

32 Lond. VII 2191.

33 BGU III 993, Lond. VII 2191, Lond. III 880 = Straßb. II 85. Vgl. Rossi, Aeg. 30, 1950, 421 ff.

34 Zur Qualifizierung als Hochlandacker vgl. E. Seidl, Bodennutzung und Bodenpacht nach den demotischen Texten der Ptolemäerzeit (SB Österr. Ak. 291), Wien 1973, 10 f.

35 Anders seinerzeit noch die Lage bei Rostovtzeff, Kolonat 12.

36 Vgl. nur BGU VI 1273 = BGU XIV 2395 (222/221 a.): πύργος. Ent. 1 (218 a.): Haus. Ent. 68 (222/1 a.): Kleros. Hib. II 208 (270/250 a.): Stathmos. Mon. III 51 (155/4 a.): Haus und τόπος, wohl ψίλος τόπος. BGU IV 1187 (I a.): ψίλος τόπος.

Aus den Urkunden und Erwähnungen von Nachlaßteilungen ergibt sich ein vergleichbares Bild: Die Nachlässe werden gebildet vornehmlich durch Häuser, Bauplätze, Weinberge etc.; sonstiges Land begegnet selten[37].

Daraus folgt also, daß Grundstücke außer Hausgrundstücken nur in beschränktem Umfang Teil des Nachlasses und damit des Privatvermögens waren. Mit einiger Deutlichkeit ergibt sich dies aber nur für den Pathyrites; die Soldatentestamente des Fayum sind wohl nicht verallgemeinerungsfähig.

III. Es erschien mir nützlich, dieses Ergebnis in sachlicher wie auch in lokaler Richtung noch zu überprüfen anhand der ptolemäischen Kaufverträge über Grundstücke, der Hypothekenbestellungen und letztlich auch der Belege über Versteigerungen, wo uns ja Pringsheim und Talamanca das Material zur Verfügung gestellt haben[38]. Nicht überprüft werden soll die vor allem auf die Rev. Laws 36,11 ff. gestützte Auffassung, wonach sich privates Eigentum an Gärten und Weinland aus der Anlage entsprechender Pflanzungen auf dem Gebiet von Katökenkleroi entwickelt habe[39].

Für die Käufe von Häusern, Bauplätzen etc. sind die Belege zahlreich, ich habe deshalb auf Nachweise generell und getrennt nach Orten verzichtet. Land nicht näher bestimmbarer Art begegnet in Kaufverträgen ab dem 3. Jh. a.C.[40], das Fehlen der Angabe erklärt sich zum Teil aus der Natur der Urkunde (z.B. griechischer Vermerk unter demotischer Urkunde). Einen Kauf über Ackerland, γῆ ἤπειρος/σιτόφορος, habe ich außerhalb Thebens und Umgebung nur notiert in Genf. I 20 = SB I 5865 = VBP II 3 = L.Bat. XIX 7 (109 a.C.) aus Pathyris für ein Grundstück im südlich davon gelegenen

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37 Unbebautes Land: Lond. II 401 (S.12) (116 a., Pathyris). Spezifizierung nicht erhalten: Giss. I 108 (II a., Pathyris); SB XVIII 13848 (128 a., Thebais); VBP II 11 (II a., Fayum).

38 F. Pringsheim, Der griechische Versteigerungskauf, Scritti Ferrini III 284 ff. = Ges. Schriften II 263 ff. M. Talamanca, Contributi allo studio delle vendite all'asta nel mondo classico, Atti Acc. naz. dei Lincei, Memorie Classe di scienze morali, storiche et filol. Ser. VIII Vol. VI, 2, Rom 1954, 33 ff.

39 Vgl. I.N. Kassem, Land ownership or tenancy in ptolemaic Egypt ?, BACPS 3, 1986, 30 ff.

40 Theben, Pathyris und Umgebung: SB VI 8967 (239 a.), SB I 5279 (209 a.), Grenf. II 15 (139 a.): Hügel auf Insel, SB XIV 12001 (129 a.). Oxy.: BGU XIV 2398 (213 a.) und BGU X 1973 (210 a.). Memphis: SB XVIII 13632 (155 a.). Fayum: Tebt. III 1, 740 (113 a.), Meyer 2 (II a.). Unbekannter Ort: BGU VI 1241 (III a.), CPR XV 18 (III a.).

Latopolites, einer Umwandlung eines Sicherungskaufs in einen endgültigen Kauf[41], für Pathyris, Theben und Umgebung sind die Belege häufig ab etwa 115 a.C[42].

Entsprechendes zeichnet sich für Hypotheken ab[43].

Versteigerungen betreffen u.a. Immobilien, so Häuser, Höfe und auch einen Pylon[44], Weinberge[45], ψιλοὶ τόποι[46] und einen Garten[47], Ackerland dagegen nur selten[48].

Ein Blick auf die Bodenpacht anhand der Studien Herrmanns soll das Bild abrunden: Die privaten Pachten in der Ptolemäerzeit betreffen in aller Regel Katökenkleroi, γῆ ἐν δωρεᾶι und Unterpacht von βασιλικὴ γῆ. Privates Ackerland ist nicht mit Sicherheit festzustellen[49].

Die demotischen Kaufurkunden[50] sind wenigstens in der Übersetzung nun weitgehend zugänglich in der Arbeit von Zauzich "Die ägyptische Schreibertradition ..."[51]. Mit dem Material aus anderen Editionen ergibt sich folgendes Bild:

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41 Hier genügt für diesen streitigen Fall die Verweisung auf P.W. Pestman, L.Bat. XIX S. 51 f. und 223 ff.

42 Ryl. II 248 = SB I 5104 (162 a.) – griech. Vermerk auf demot. Urkunde. Straßb. II 81 (115 a.), Straßb. II 83 (114 a.), dann häufig, vgl. nur die Adlerpapyri.

43 Hypotheken auf Haus und Hof, Bauplätze = ψίλοι τόποι, Weinberge usw. sind üblich und bedürfen keiner Aufzählung. H. auf γῆ oder γῆ ἤπειρος/σιτόφορος sind seltener und zunächst auf Pathyris und Umgebung beschränkt: Lond. III 1201 (S. 3) (161 a.), 1202 (S. 5) = SB I 4281 (161/0 a.), UPZ II 217 (131 a.). BGU III 995 = L.Bat. XIX 6 (110 a.) und BGU VI 1260 (102 a.): ὠνὴ ἐν πίστει (?), Erl. 42 (I a./Π) (?). Interessant ist auch P. Mich. III 182 (182 a. ?, Fayum), wo die H. bestellt wird an Wein– und Gartenland gelegen ἐν βασιλικῶι καὶ δωρεᾶι γῆι, das der Schuldnerin gehört (Z. 11: ὑπάρχοντος αὐτῆι).

44 UPZ II 460 (III a., Fayum); Köln VI 268 (III a., Fayum); BGU VI 1622 (II a., Thebais); UPZ II 223 a (II a., Theben); Haun. I 11 (158 a., Theben).

45 Ent. 61 (III a., Herakleopolites); BGU VI 1222 (III a., Thebais).

46 BGU VI 1218 – 1222 (II a., Fayum und Herakleopolites).

47 BGU VIII 1772 (57/6 a., Herakleopolites).

48 Für verfallene Bürgschaften von Steuerpächtern: Eleph. 27 (223 a., Elephantine); ganz allgem.: Eleph. 23 (222 a., Elephantine). Ein Hügel in UPZ II 218 (II a., Theben). Γῆ ἤπειρος in Pathyris: BGU III 992 (167 a.); SB I 5865 (110 a.); in Theben: SB I 4512, 66 (167 a.). Katökenkleros – wohl vorher konfisziert: BGU VIII 1772 (57/6 a., Herakleopolites). Γῆ ὑπόλογος, d.h. in der Ertragsfähigkeit gemindertes Land: Tebt. IV 1101 (113 a., Tebt.); nach Shelton fehlt dieses Grundstück in der Übersicht für Kerkeosiris unter dem Stichwort γῆ ἰδιοκτητος.

49 J. Herrmann, Studien zur Bodenpacht im Recht der graeco – aegyptischen Papyri, München 1958, 78 f.

50 Auf die Entwicklung in den vorhergehenden Epochen ist hier nicht einzugehen. Dafür sei nur verwiesen auf B. Menu, Recherches sur l'histoire juridique, économique et sociale de l'ancien Égypte, Paris 1982, 1 ff und 43 ff. S. auch J.G. Manning, The conveyance of real property in Upper Egypt during

In Edfu ist bereits ab 265 a.C. die Veräußerung von Ackerland überliefert, in Pois (gleichfalls in der Thebais) ab 212 a.C., in Hermonthis ab 243 a.C., in Pathyris ab 168 a.C. und in Theben ab 210 a.C. Veräußerung von Land auf Tempelgut, sonstigen Ackerlandes ab 176 a.C., im thebaischen Krokodilopolis ab 113 a.C. Veräußerungen von Häusern, Höfen, Bauplätzen, Palmgärten, Gräbern und Choachytendiensten begegnen schon ab 330 a.C. Noch nicht geklärt ist, ob "Land auf Tempelgut"[52] nun Land des Tempels – mit der Annahme eines entsprechenden "Obereigentums" des Tempels – ist oder nur topographisch im Gesamtgebiet liegt, das dem Tempel zugewiesen ist. Das müssen die Vertreter der Demotistik entscheiden. Der Hinweis auf Nachbarn jedenfalls, die ihr Land vom Pharao, d.h. vom Fiskus erworben haben[53] oder von der Priesterschaft[54], scheint mir für die letztere Möglichkeit zu sprechen[55].

IV. Wenn ich das Ergebnis der bisherigen Überprüfung zusammenfasse, so zeigt sich ein erstaunlich einheitliches Bild:

Gegenstand von Rechtsgeschäften mit Immobilien sind Häuser, Bauplätze, Weinberge, Palmhaine und Gärten über ganz Ägypten hin, Ackerland im Umfeld Thebens, besonders in Pathyris und nur vereinzelt in anderen Gegenden.

Für die eingangs gestellte Frage nach der Vererbung von Grund und Boden ergibt sich, daß alles was unter Lebenden Eigentum sein kann, auch vererbt werden kann –

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the ptolemaic period: A study of the Hauswaldt papyri and other related demotic instruments of transfer (Phil. Diss. Chicago 1992), 24 ff. Der Verf. hat mir dankenswerter Weise die noch unveröffentlichte Arbeit in Auszügen zur Verfügung gestellt.

51 Die ägyptische Schreibertradition in Aufbau, Sprache und Schrift der demotischen Kaufverträge aus ptol. Zeit, Wiesbaden 1968. Reiches Material nun auch bei J.G. Manning aaO. Vgl. zum Landbesitz weiter W. Clarysse, Egyptian estate-holders in the ptolemaic period, in: Lipinski, State and temple economy in ancient near East II 731ff. = Or. Louv. Anal. 6, 1979.

52 BM 10463 (Zauzich 24), BM 1201 (Z. 36), BM 1202 (Z. 37), Berlin 3142 (Z. 35), Berlin 3146 (Z. 37), Berlin 3111 (Z. 32), Mainz e (Z. 32).

53 Mainz e/d (Z. 115), vgl. Pestman, L. Bat. XIV S. 74 Anm. 189. S. zur Terminologie Zauzich, Enchoria 1, 1971, 79 ff. S. auch PBM 10721 Z. 4 und 10828 Z. 5 (C. Andrews, Catalogue Nr. 9 und 17). Für eine –griech.– Pacht von ἱερὰ γῆ, ἣν ἔχει (Verpächter) ἐκ βασιλικοῦ s. P. Tebt. III 1, 815 fr. 3 vo I 27 (228–221 a.C.).

54 Adler 23 (Z. 74).

55 Für Tempelland: Sethe–Partsch, Demot. Urkunden zum ägyptischen Bürgschaftsrecht vornehmlich der Ptolemäerzeit, Leipzig 1920, 164 (Sethe), 634 (Partsch). E. Seidl, Bodennutzung und Bodenpacht nach den demotischen Texten der Ptolemäerzeit (SB Österr. Ak. 291, 2.Abh.), Wien 1973, 11. Wohl auch B. Menu, Recherches sur l'histoire juridique, économique et sociale de l'ancien Égypte, Paris 1982, 103 f. Unentschieden W. Clarysse, Egyptian estate-holders in the ptolemaic period, in: Lipinski, State and temple economy in anc. near East II 733 = Or. Louv. Anal. 6,1979.

wieder von den Einschränkungen und Sonderregelungen hinsichtlich der Kleroi abgesehen.

Ebenso deutlich wird, daß außer den Stellen zur γῆ ἐν ἀφέσει keine Hinweise auf königliches Eigentum, Obereigentum oder sonstige Berechtigungen gegeben sind – wenn man Katökenlehen einmal außer acht läßt. Kein Argument ist zu ziehen aus der möglichen Konfiskation bei Steuerschulden – dann hätten wir heute bei uns von der gleichen Konstruktion auszugehen.

Es bleibt die Frage, ob sich sonst irgendwelche Indizien für ein Obereigentum finden lassen oder ob es sich hier um nur um eine moderne – vielleicht auf römischen Vorstellungen vom ager publicus[56] oder der ptolemäischen des 'speererworbenen' Landes beruhende – Annahme handelt[57].

Die Ausgestaltung der Formulare der griechischen Rechtsgeschäfte bei Kauf und Pacht entspricht den üblichen Formularen des Mutterlandes. Die Bebaiosisklausel der Kaufurkunden (προπωλητὴς καὶ βεβαιωτής) in den Papyri der ptolemäischen Zeit gleicht sehr deutlich der Formel der Inschriften (nur βεβαιωτής oder πρατὴς καὶ β.)[58]. Es besteht außerdem kein Unterschied zwischen Verkauf von Ackerland – wenn es denn verkauft wird – und von z.B. Häusern. Im übrigen entspricht das Formular auch dem der römischen Zeit, abgesehen davon, daß die Bebaiosisklausel dort ausführlicher wird[59]. Rücksicht auf staatliche Hemmnisse wird wohl mit der Klausel über das βασιλικὸν κώλυμα genommen, die aber nur in Pachtverträgen über Katökenkleroi auftaucht[60].

Die Unterscheidung von Privatland und Land in königlichem Eigentum, das anderen überlassen ist, ist den Urkunden aber andererseits nicht fremd. Einen deutlichen Beleg bildet die Übertragung von Katökenland, die bis zum Ausgang der Ptolemäerzeit in der Urkundspraxis deutlich geschieden wird vom Kauf. Während der Kauf von Privatland geschieht durch πρᾶσις/ὠνή (ἀπέδοτο/ἐπρίατο), wird Katökenland übertragen durch die Parachoresis: ὁμολογεῖ παρακεχωρηκέναι ...; d.h. es wird

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56 Vgl. A.H.M. Jones, In eo solo dominium populi romani est vel Caesaris, JRSt 31, 1941, 26 ff. S. generell G.I. Luzzatto, Sul regime del suolo nelle province romane, in: I diritti locali nelle province romane con particolare riguardo alle condizioni giuridiche del suolo, Acc. naz. dei Lincei, Quaderno 194, Rom 1974, 9 ff.

57 Zu älteren ägyptischen Vorstellungen eines Eigentums des Pharaos s. Manning aaO 27 ff. Ob und inwieweit solche Auffassungen auch in den griechischen Urkunden zum Ausdruck kommen (müssen), bedarf noch der Klärung.

58 H.–A. Rupprecht, Die Eviktionshaftung in der Kautelarpraxis der graeco–aegyptischen Papyri, Studi Biscardi III 463.

59 Vgl. H.–A. Rupprecht, Studi Biscardi III 464 ff.

60 BGU VI 1264–1267 (III a., Oxy.), X 1943, 1944 usw.

letztlich gesprochen vom Freimachen einer rechtlichen Position, die vom anderen eingenommen werden kann. Von einer τιμή ist nicht die Rede, allenfalls vom παραχωρητικὸν κεφάλαιον[61]. Im übrigen ist mitunter auch beim Erben des Kleruchen nicht vom κληρονόμος die Rede, sondern vom διάδοχος [62], eine letztlich deutlich schwächere und weniger technische Bezeichnung der Rechtsnachfolge, so wie sie auch bei der Nachfolge in Priesterstellen begegnet[63].

Als Argument für die Annahme von Privateigentum an Grund und Boden können weiter Ausdrücke wie κτῆμα, ἰδιόκτητος und κυριεύειν ins Spiel gebracht werden.

Κτῆμα wird ganz überwiegend verwendet für die Bezeichnung von Weinland und Gärten[64], nur vereinzelt ist die Art des Grundstücks nicht klar[65], der Inhaber wird gegebenenfalls auch als κύριος bezeichnet[66]. Ob man deshalb schon von der Verwendung dieses Terminus allein auf Privatland schließen kann[67], bleibt mir aber zweifelhaft.

Von ἰδιόκτητος ist in dem o.g. Prostagma P. Tebt. I 5, 111 (COrdPtol. 53) (II a.C.) die Rede, dort zusammen mit Kleruchenland, Tempelland und ἡ ἄλλη ἡ ἐν ἀφέσει (sc. γῆ). In Tebt. I 124, 32 (COrdPtol. 54) (I a.C.), gleichfalls einem Prostagma, wird gesprochen von Kleruchen als ἰδιοκτήμονες, dabei wird wohl auf den Kleros Bezug genommen. Sonst sind an Belegen zu nennen: BGU VI 1216, 83 hinsichtlich eines Teils des Kleruchenkleros (110 a.C. – Memphis), BGU XIV 2437 passim und 2440 passim (I und II a.C. – Herakleopolites), jeweils Landregister, hier wohl für Kleruchenland als Ackerland; vgl. auch die bekannte Formulierung in P. Lond VII 2188, Z. 209/335 (148 a.C. – Fayum): βασιλικὴ γῆ ἰδιόκτητος. Vom letzten Text abgesehen, den Skeat wohl zu Recht als Beleg für Privatland des Königs sieht (aaO) und abgesehen von O. Bodl. I 120 (146–135 a.C. – Theben), wohl Ackerland allgemein – wird man in diesen Quellen Indizien für eine sich verfestigende Stellung der Kleruchen am Kleros sehen können. Die Zahl der Belege ist aber insgesamt zu spärlich im Vergleich

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61 Vgl. H.–A. Rupprecht, Rechtsübertragung in den Papyri, GdSchr Kunkel 365 ff, 380.

62 Z.B.: BGU VIII 1738 und 1739 (72/1 a., Herakleopolites); Ryl. IV 583 (170 a., Fayum).

63 BGU XIII 2216, 17 (156); SB XVI 12685, 38 (139); Prag. I 61 (137).

64 PSA 4 (III a., Fayum). Tebt. III 1, 772 (236 a., Tebt.), O. Bodl. 145 (227–185 a., Theben). Cair.Zen. III 59367, 59446 und V 59838 (III a., Fayum). Ent. 89 (III a., Magdola), sowie Rev. Laws 37,14 (259 a.).

65 Cair.Zen. IV 59637 (III a., Fayum), Cair.Zen. IV 59640 (III a., Fayum): Hypothek auf Haus und κτῆμα. Ent. 61 (247/6 a., Magdola). Tebt. III 1, 815 fr. 6, 53 (228/21 a., Tebt.).

66 PSI IV 383 und VI 551 (III a., Fayum). Ent. 89 (III a., Magdola).

67 So wohl Rostovtzeff, Kolonat 14 f.

zu den anderen Belegen, außerdem zu speziell auf Kleroi bezogen, als daß man in der Verwendung des Terminus generell einen Nachweis für Privatland sehen könnte.

Es bleibt noch die Verwendung von κυριεύειν.

Der Gebrauch dieser Formulierung könnte an Eigentum denken lassen. Dem steht zunächst grundsätzlich entgegen, daß das griechische Recht keine dem römischen dominium vergleichbare Regelung des Eigentums gekannt hat, sondern nur die Verfügungsbefugnis (κυριεία) und die Sachherrschaft (κράτησις). Immerhin läßt sich aus der Verleihung der κυριεία auf eine letztlich unbeschränkte Verfügungsgewalt schließen, die für alle Sachen galt. Von voller Verfügungsmacht ist die Rede in Versteigerungen von Grund und Boden[68], der wohl erste Beleg findet sich in der Auktionsordnung Eleph. 24 = WChr 340 (223/2 a.C.), Z. 23: κυριεύσουσιν δὲ καθ' ἃ καὶ οἱ πρῶτοι κύριοι ἐκέκτηντο. Umstritten ist immer noch die Frage, m.E. aber zu verneinen, ob damit nur eine Erbpacht verliehen wird, da auch für die versteigerten Sachen noch Abgaben und ἐκφόρια zu zahlen seien[69]. Im übrigen haben wir bislang Belege für die Erbpacht, die μίσθωσις εἰς τὸ πατρικόν, nur in Prostagmata[70], aber nicht für konkrete Einzelfälle.

Zu verweisen ist noch auf das Zitat eines Prostagma (COrdPtol. All. 59) in den Akten des Hermiasprozeß (UPZ II 162 V 22 ff.) (117 a.C. – Theben): περὶ τοῦ τοὺς κεκυριευκότας τινῶν καὶ μὴ δυναμένους παρατίθεσθαι τὰ κατ' αὐτῶν συμβόλαια ἐᾶν κρατεῖν, über Eigentümer ohne Nachweis der Titel, aber mit Besitz, die danach in ihrer Rechtsstellung verbleiben.

Soweit keine besonderen Anhaltspunkte im Einzelfall gegeben sind, habe ich keine Bedenken von der Annahme einer vollen Verfügungsfreiheit auszugehen, und damit in anderer Terminologie vom Eigentum zu sprechen. Gewisse Einschränkungen sind hierbei allerdings angebracht[71] – es muß nicht immer von Eigentum gesprochen werden, so wenn z.B. der Ehefrau im Ehevertrag κυριεία neben dem Mann eingeräumt wird (Freib.

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68 BGU VI 1218 (II a., Herakleopolit.): ἀδέσποτα. BGU VI 1222 (II a., Theben): Häuser und Grundstücke. Haun. I 11 (158 a., Theben): Haus. Vgl. auch Lond. VII 2188, 275 (148 a., Fayum). UPZ II 218 I 22 (II a., Theben), UPZ II 220 I 12/221 I 17 (130 a., Theben).

69 So Wilcken, Einl. zu WChr 340, Rostovtzeff, Kolonat 21 ff. S. auch Wilcken, UPZ II S. 270 zu Nr. 218 aufgrund der Möglichkeit der Überbietung. Dagegen F. Pringsheim, Versteigerungskauf, GesSchr. II 309 f. M. Talamanca, aaO 60 Anm.2, ohne nähere Erörterung der Frage.

70 SB VI 9316, 17 = COrdPtol. 34 (163 o. 186 a.). Tebt. I 5, 12 = COrdPtol. 53 (121–118 a.). SB VI 9889, 12 = COrdPtol. 53 ter (II a.).

71 Vgl. hierzu unter bes. Berücksichtigung der Pachtverträge A. Kränzlein, Zur Urkundenklausel κυριευέτω τῶν καρπῶν ἕως..., Akten XIII. K. 215 ff.

III 30, 179 a. C. – Fayum), oder wenn der Mann wieder im Ehevertrag zusagt, kein anderes Haus zu bewohnen als das, in dem die Frau κυριεύσει (Mon. III 62, II a. C.?).

Die Verwendung von Termini wie δεσπότης, δεσπόζειν oder ἀδέσποτα bestätigt das bisherige Bild und geht offensichtlich von der vollen Rechtsstellung der Privaten aus[72].

Unter erbrechtlichem Gesichtspunkt könnte noch ein Bedenken offenbleiben. Die bisher herrschende Meinung[73] geht davon aus, daß die Bebauung der βασιλικὴ γῆ in Pachtverhältnissen auf Dauer, zumindest auf unbestimmte Zeit vergeben wurde. Dann allerdings fragt man sich, wo die stetig notwendige Eintragung der Erben in Registern erfolgte. Das Fehlen solcher Eintragungen erklärt sich allerdings ziemlich zwanglos, wenn man J. Shelton[74] folgt, der wenigstens für Kerkeosiris deutlich gemacht hat, daß Wechsel in der Bebauung ziemlich zwanglos und schnell aufeinanderfolgen konnten, sodaß der Tod eines Bauern ohne Umstände berücksichtigt werden konnte.

Die faktische Lage, daß kaum Ackerland in privater Hand war, erklärt sich wohl daraus, daß dieses Land tatsächlich Staatsland oder in beträchtlichem Umfang Tempelland[75] war. Die faktischen, fiskalischen Verhältnisse sprechen gegen Privatland, nicht die Rechtslage. Erwerben konnte man Land durch Kauf vom Fiskus[76] und hier erwarb der Einzelne wohl Eigentum[77].

Es beruht wohl nicht nur auf den Zufällen der Überlieferung, daß privates Ackerland vor allem aus der Thebais bekannt ist und dem entsprechend auch die Erbfolge in Land. In Unterägypten und vor allem im Fayum ist dagegen kaum mit überkommenen Privatland erheblichen Umfangs zu rechnen; Meliorationsarbeiten führten dort eher zur Begründung von Katökenland [78]. Ein Ergebnis entsprechend der Thebais wäre wohl auch für das Delta nicht ausgeschlossen – allerdings sind wir hier aufgrund der bekannten Überlieferung von der Möglichkeit eines Nachweises weit entfernt.

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72 Die Verwendung im Zusammenhang mit Land ist eher selten. Soweit Ackerland betroffen ist, handelt es sich um Land in der Thebais; vgl. nur SB I 4512 (167 – 134 a.), UPZ II 220/221 (130 a.), 218 (II/I a.).

73 Rostovtzeff, Kolonat 47 ff. Wilcken, Grundzüge 272 ff.

74 P. Coll. Youtie I S. 119 ff, P. Tebt. IV S. 6 f.

75 Vgl. B. Menu, Le régime juridique des terres en Egypte pharaonique, RHD 1971, 555 ff. = Rech. sur l'histoire juridique, économique et sociale de l'ancien Égypte, Paris 1982, 1 ff.; Discussion sur le rapport de J. Modrzejewski, Terre et paysans ...189 ff. = Rech. sur l'histoire ..., 101 ff.

76 S. BGU III 995 = L. Bat.XIX 6 (dort nicht genannt) und VBP II 3/Genf.I 20 = L. Bat. XIX 7 (A Z. 7/B Z. 6).

77 Vgl. Pringsheim, Versteigerungskauf 309.

78 Vgl. zu den Arbeiten M. Schnebel, Die Landwirtschaft im hell. Ägypten, München 1925, 45 ff. Cl. Préaux, L'économie royale des Lagides, Brüssel 1939, 461 ff.

Letzten Aufschluß über die Eigentumslage an Land werden wir allerdings nur gewinnen aus der Auswertung der großen Landregister wie in den Tebtunispapyri durch Grenfell – Hunt und Shelton oder aus dem Herakleopolites in BGU XIV durch Brashear. Das aber ist eine Aufgabe für den Historiker, den Wirtschaftshistoriker. Der Rechtshistoriker kann aufgrund der ihm zugänglichen Urkunden dazu nur einen kleinen Beitrag leisten.

Arnold Kränzlein (Graz)

Diskussionsbeitrag zum Referat Hans-Albert Rupprecht

In meinem Korreferat kann ich mich kurz fassen; denn ich bin mit den Hauptthesen Rupprechts weitgehend einverstanden. Auch ich sehe keine Anzeichen für ein Obereigentum des Königs an allem Land.

Meine Bemerkungen sind daher eher ergänzend. Das Referat bietet erfreulicherweise mehr, als der Titel verspricht. Im Laufe des Fortschreitens wird es immer mehr zu einer Darstellung der Eigentumsverhältnisse an Grund und Boden im ptolemäischen Ägypten anhand der Urkunden, natürlich ohne dieses Thema erschöpfen zu wollen. Deshalb kann man Rupprecht keinen Vorwurf machen, daß der neueste Stand der Meinungen über die Bedeutung der Termini wie ἡ ἐν ἀφέσει γῆ. ἰδιόκτητος γῆ usw. nicht dargestellt wird.

Das Rätsel um den Ausdruck ἡ ἐν ἀφέσει γῆ, der übrigens noch in der Römerzeit vorkommt (Oxy. XVII 2134), dauert an. Ein Oberbegriff war es sicherlich nicht, andererseits muß man damit etwas haben bezeichnen können, das man der βασιλικὴ γῆ gegenüberstellen wollte. Kollege Modrzejewski hat es als eine Bezeichnung für Land in einem Zwischenzustand bezeichnet, in einer Phase des Zuordnungswechsels. In ähnlicher Richtung lag wohl die Annahme Seidls, während Herrmann versuchte, es als einen fiskalischen Begriff zu verstehen[1].

Welche Meinung Rupprecht zu ἰδιόκτητος γῆ vertritt, wird in seinem Referat nicht deutlich[2]. Er trifft nur zu ἰδιόκτητος die Feststellung, daß die Zahl der Belege und ihre Art nicht gestatte, generell darin einen Nachweis für Privatland zu sehen. Hier wäre ein Wort über die Ergebnisse Stollwerks aufhellend gewesen[3]. Rupprechts Zustimmung zum Verständnis der βασιλὴ γῆ ἰδιόκτητος des P. Lond. VII 2188 (148 v.Chr.) als "Privatland des Königs" scheint mir wenig überzeugend zu sein. Ich möchte eher an

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1 Siehe die bei Rupprecht zitierten Arbeiten der Genannten.

2 Auch dieser Terminus lebt übrigens in der Römerzeit fort, die Belege bei A. Stollwerk, Untersuchungen zum Privatland im ptolemäischen und römischen Ägypten (jur. Diss. Köln 1971), S. 51.

3 Ein guter Überblick über die verschiedenen Landarten findet sich bei J. Mélèze Modrzejewski, Statut personnel et liens de famille dans les droits de l'Antiquité, 1993, IV (eine Arbeit aus 1974 mit Literaturnachträgen).

"durch Veräußerung privatisierte" oder "privat, d.h. nicht durch βασιλικοὶ γεωργοί. benützte" βασιλικὴ γῆ denken[4].

Bei der Darstellung der Testamente von Zivilpersonen vermisse ich ein Eingehen auf die Frage nach deren Status bzw. Beschäftigung. Waren vielleicht βασιλικοὶ γεωργοί darunter?

Unter III wendet sich die Darstellung den nichterbrechtlichen Urkunden zu. Hier sucht man vergebens ein näheres Eingehen auf die Hypothezierung von βασιλικὴ und ἐν δωρεᾷ γῆ (P. Mich. III 182), - das in dieser Urkunde begegnende ὑπάρχειν fehlt übrigens unter den auf ihre Eigentumsaussage untersuchten Worten im Abschnitt IV. Waren also die zu diesen Kategorien zählenden Ländereien zwar belastbar, aber nicht vererblich?

Die neue Meinung zur Vergabe der βασιλικὴ γῆ (Shelton) sollte man vielleicht so formulieren: Es hat aller Wahrscheinlichkeit nach keine regelmäßige allgemeine Vergabe der βασιλικὴ γῆ durch sogenannte διαμισθώσεις gegeben, sondern ein häufiger, unter Umständen auch schnell aufeinanderfolgender Wechsel der Pächter war die Praxis, wie jedenfalls die Register von Kerkeosiris zeigen.

Nachdem das Bild, welches die Urkunden der Römerzeit zeichnen, als Argument verwendet wird, wäre ein Ausblick auf die Vererbung von Grund und Boden in dieser Zeit sinnvoll gewesen. Auch hätte man gerne Rupprechts Meinung gehört, warum es in der Thebais mehr privates Ackerland als anderswo gegeben hat.

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[4] Dazu J. Modrzejewski a.a.O. S. 167.

Mario Amelotti - Livia Migliardi Zingale (Genova)

Dalle tabelle bronzee di Locri alle tavolette cerate di Pozzuoli*

Tra il 1958 e il 1959, a breve distanza di tempo e anche di luogo, avvennero due importanti ritrovamenti di materiale documentario d'interesse giuridico: quello delle tabelle bronzee scoperte tra le rovine di Locri Epizefiri e quello delle tavolette cerate reperite nell'agro Murecine, presso Pompei, ma provenienti in realtà da Pozzuoli. Nei primi mesi del 1993 - nuova coincidenza - sono apparsi in circolazione due libri fondamentali, specie il primo, dedicati rispettivamente all'uno e all'altro ritrovamento[1]. Ma non sono soltanto circostanze esteriori a proporre l'accostamento dei due gruppi di materiale, superando i motivi altrettanto palesi di divergenza. Diverso è infatti - obietterebbe qualcuno - il materiale scrittorio; diversa la lingua - greco e latino - e la stesura - epigrafica e corsiva. Diversa è l'età, rispettivamente IV-III secolo a. C. per le tabelle di Locri, I secolo d. C. per le tavolette di Pozzuoli, che assegnano il primo gruppo ancora all' epoca ellenistica e il secondo ormai all'epoca romana. Contrapposta è pure la natura giuridica, rispettivamente pubblicistica e privatistica, del primo e del secondo ritrovamento. Eppure il fondo è comune. E'quello della grecità della Magna Grecia, che pervade totalmente le tabelle di Locri, una *polis* dorica nel suo ultimo splendore[2], ma che ancora sopravvive alla conquista romana - ravvivata anzi dai commerci di Pozzuoli con l'Oriente- nelle tavolette puteolane, attraverso i nomi di alcuni protagonisti degli affari documentati, la lingua greca cui talvolta non rinunciano e, soprattutto, le manifestazioni documentarie e giuridiche di evidente impronta greca.

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* L'introduzione e la prima parte della relazione sono dovute a M. Amelotti, la seconda parte a L. Migliardi Zingale.

1 *Polis ed Olympieion a Locri Epizefiri. Costituzione economia e finanze di una città della Magna Grecia. Editio altera delle tabelle locresi*, a cura di F. Costabile, Soveria Mannelli 1992; G. Camodeca, *L'archivio puteolano dei Sulpicii*, I, Napoli 1992.

2 Entrata in contatto con Roma ai tempi di Pirro, coinvolta nella crisi annibalica, Locri passa da *civitas foederata* a *municipium* intorno all' 89 a. C. La sua grecità persiste con un filo di continuità sempre più tenue, ma tra il I e il II secolo d. C. viene definitivamente meno. Sull'argomento vedi F. Costabile, *Municipium Locrensium. Istituzioni ed organizzazione sociale di Locri romana (attraverso il corpus delle iscrizioni latine di Locri)*. Napoli 1976.

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Cominciamo dalle tabelle bronzee di Locri e dal libro che le riguarda, curato e in gran parte scritto da Felice Costabile. L'esposizione parte dal ritrovamento clandestino di una teca cilindrica in pietra, che conteneva monete d'oro e d'argento, mai più recuperate, e le nostre tabelle. Si tratta di una vera cassaforte, che apparteneva, come dimostrano il contesto topografico e l'espresso riferimento nelle tabelle, al tempio di Zeus Olimpio, del quale esse formavano l'archivio contabile. Sia della teca che del tempio si approfondiscono gli aspetti archeologici e tecnici. L'indagine passa quindi a discutere degli elementi esteriori delle tabelle, quali la procedura dell'incisione e i segni particolari che esse presentano, e della funzione dell'archivio e del tesoro di Zeus, rispetto ai tesori di altre divinità a Locri, nell'amministrazione finanziaria della *polis*. Un ampio capitolo è dedicato alla cronologia delle tabelle, sia relativa, concernente cioè la ricostruzione della loro successione temporale, sia assoluta, ossia consistente nella loro complessiva datazione. Altro capitolo tratta di problemi economico-finanziari, che da un lato riguardano le operazioni di credito fra *l'Olympieion* e la città, e dall'altro attengono alle fonti di reddito su cui può contare il santuario. Un capitolo finale mette a frutto tutti i dati risultanti dalla ricerca per delineare la costituzione locrese nel IV-III secolo a. C. Seguono ancora una rinnovata edizione delle tabelle e minuziosi indici, sia delle tabelle stesse che dell'intero volume.

Soffermiamoci ora sugli argomenti e problemi la cui discussione più c'interessa, per i quali primario è l'apporto del Costabile. Seguiamo un nostro ordine, più coerente alle finalità perseguite.

In numero di 39, le tabelle[3] presentano brevi testi, in un dialetto dorico, che documentano prestiti di denaro che il dio, generalmente rappresentato dai magistrati preposti al suo tesoro, detti *hieromnamones*, ha concesso alla città per decreto della *bolà* e del *damos*. In rari casi, costituiti dalle tabelle 4, 5 e 32 - i numeri sono quelli casuali derivanti dall'*editio princeps* - è riferito testualmente il decreto, che suona all' incirca così: Nell'anno del tale eponimo[4], essendo *proboloi* i tali e *prodikoi* i talaltri, il Consiglio e il popolo hanno decretato che i *hieromnamones* facciano iscrivere nel bronzo il debito

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3 Esse hanno dimensioni svariate, ma modeste - tra un lato massimo di 39 e un minimo di 6 cm - in forma di rettangoli orizzontali o verticali. Alcune sono lamine riutilizzate. Singolare è il caso della tab. 39, che presenta sull'orlo le lettere AΦP: una dedica ad Afrodite. Apparteneva in origine ad una *phiale*, che s'ipotizza offerta alla dea da una prostituta sacra al termine del suo servizio.

4 Prima del suo nome, proprio all' inizio di ogni tabella, e poi prima del nome degli altri magistrati menzionati figura una sigla, che indica il demo di appartenenza. La popolazione di Locri era distribuita in 3 tribù, suddivisa ciascuna in 11 o, meno probabilmente, 12 demi. Sulla base delle tribù e dei demi funzionava la rotazione delle cariche magistratuali.

contratto dalla città col dio per un determinato scopo. Ma nelle altre tabelle figura un compendio, che magari unifica più decreti presi nello stesso anno, adottando un tenore abbastanza vario, che così la tab. 22 esemplifica: Nell'anno del tale eponimo, essendo *proboloi* i tali e *prodikoi* i talaltri, attraverso i tali *hieromnamones*, la città ha preso in prestito da Zeus, per decreto del Consiglio e del popolo, nel tale mese tot, nel talaltro tot. I prestiti presentano un ammontare che può scendere fino agli spiccioli, passando dai talenti agli stateri, alle litre e alle once. Si direbbe che essi siano funzionali allo scopo e non concessi genericamente in misura arrotondata. Quanto al divario tra i testi che riportano i decreti e quelli che li compendiano, il Costabile avanza l'ipotesi che i primi corrispondano ad una prassi più antica, mentre resta uguale la procedura di trascriverli in bronzo dai decreti originali - redatti su tavole lignee con i sigilli dei magistrati[5] - di cui mantengono il pieno valore giuridico di diritto pubblico. Si tratta di un'ipotesi, che potrebbe trovare conferma nella ricerca cronologica.

Finiamo a questo punto nelle sabbie mobili. Certo è, per ragioni sostanziali che vedremo, che le tabelle sono posteriori al 346 a. C. e anche i dati paleografici e linguistici postulano una datazione tra la metà del IV e la metà del III secolo a. C. Ma non sembra possibile andare oltre. La successione cronologica delle tabelle, che gioverebbe all'ipotesi sopra riferita, può essere tentata sulla base dei nomi dei magistrati cittadini e della loro progressione in carriera. Occorre però presupporre che la progressione sia sempre ascendente, senza iterazioni e passi indietro, dal primo grado di *hieromnamon* a quello di *probolos* o *prodikos*, alla pari, e infine a quello apicale di eponimo. Ma anche con questa presupposizione non si riesce a restituire più di alcune serie di sequenze. Non è ancora possibile correggere la numerazione casuale delle tabelle. Quanto alla cronologia assoluta, molto si è contato su sei tabelle - corrispondenti ai numeri 1, 13, 23, 25, 30, 31 - che menzionano un *basileus*. In questo personaggio, cui cinque tabelle attribuiscono una contribuzione, si è voluto ravvisare un sovrano ellenistico: Agatocle di Siracusa o con maggiore propensione (nel volume in esame il van Compernolle e anche il Migeotte), Pirro re dell'Epiro. I due riferimenti propongono, rispettivamente, una datazione del gruppo documentale intorno al 300 o al 280 a. C. Ma il Costabile fa osservare che nella tab. 25 il *basileus* risulta incaricato della riscossione di una modesta imposta, la nona sui cereali, e anche la contribuzione (*synteleia*) delle altre tabelle può avere un significato fiscale: ciò mal si addice ad un sovrano straniero, mentre meglio conviene ad un magistrato cittadino, un re arconte, diverso però dall' eponimo. L'argomentazione appare ragionevole, ma toglie ogni riferimento temporale.

I singoli aspetti delle tabelle di Locri conferiscono loro una specifica originalità rispetto ad altri documenti relativi alla finanza pubblica di altre città greche, che

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5 Il Costabile parla anche di papiro o pergamena, ma un tale uso del papiro a Locri appare improbabile, mentre la pergamena non era ancora conosciuta.

conosciamo in via epigrafica: così le liste dei tributi ateniesi e i diversi conti ed inventari di Atene, Delo, Delfi e, per restare in Italia, le tavole di Eraclea e i conti di *Tauromenion*. D'altro canto esse attribuiscono al tesoro di Zeus il dinamico ruolo finanziario di erogatore ordinario di prestiti di denaro alla città. Un ruolo che sembra distinguerlo dagli altri tesori locresi, con funzioni probabilmente di accumulo. Ma si può parlare per il tesoro di Zeus di una funzione di banca o non piuttosto -come è nostra opinione e forse il volume non sottolinea abbastanza - di una funzione di tesoreria? *L' Olympieion* non opera certamente erogazioni gratuite, bensì prestiti che implicano una restituzione. Ma questa avverrà come e quando il Consiglio e il popolo lo decretino -così si esprimono le tabelle 7, 8, 22, 38 - ed è attestata raramente -nelle tabelle 9, 20, 21, 31- e magari in modo parziale o in forma diversa[6]. Quanto agli interessi il Costabile, pur supponendoli in qualche caso, precisa che non sono mai espressamente previsti. Certamente la cassa dell' *Olympieion* sarebbe destinata in questo modo ad esaurirsi. Ma è significativo a nostro avviso il fatto che al santuario siano assicurati, oltre ai redditi sui propri terreni e al ricavato della vendita di alcuni prodotti (ferro, mattoni, pece), anche proventi fiscali, come la nona della vendita dei cereali.

La costituzione di Locri quale risulta dalle tabelle è democratica moderata, posteriore quindi all' espulsione dalla città nel 346 a. C. del tiranno Dionisio II di Siracusa. Essa è succeduta tardi - ben due secoli dopo Atene - ad una secolare costituzione oligarchica di tipo spartiate. Residuo di questa le fratrie: i *phatarchoi* nelle tabelle sono coloro che riscuotono i prestiti. Organi della costituzione democratica sono il *damos*, cioè l'assemblea cittadina; la *bolà*, cioè il Consiglio, e le numerose magistrature che le tabelle ricordano. Di durata annuale, queste sono raramente monocratiche, come l'eponimo, ma per lo più ternarie. Le tabelle citano regolarmente i *hieromnamones*, che versano i prestiti del dio, e con rango più elevato i *proboloi* e i *prodikoi*. Con richiamo ad Aristotele, il Costabile definisce queste magistrature cardini della democrazia moderata: i *proboloi* rivestono, tra l'altro, un importante ruolo costituzionale nell' approvazione e promulgazione dei decreti, mentre i *prodikoi* fanno pensare dal nome a significative funzioni nell' amministrazione della giustizia. A questo punto il Costabile inserisce una nuova edizione e interpretazione di un passo del cosiddetto *Fragmentum Vaticanum de eligendis magistratibus*, contenuto nel Cod. Vat. Gr. 2306 e databile tra il 325 e il 309 a. C., probabilmente di Teofrasto. Il passo riguarda precisamente la procedura locrese di *anakrisis*, cioè d'istruttoria a carico di un magistrato. Nella sottile interpretazione del Costabile anche il brano s'inquadra nell'evoluzione democratica della costituzione locrese.

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6 Nella tab. 9 si restituisce bronzo, che servirà per le porte da collocare nel tempio, e così pure nella tab. 33, nella forma di un lebete sbalzato. Un caso di ardua interpretazione è quello della tab. 21, in cui - secondo Costabile - si è prestato oro per la doratura dello scudo appeso nel tempio, ed oro la città restituisce e si ripone nel tesoro.

Le tabelle bronzee di Locri avevano ricevuto nel 1972 una magistrale *editio princeps* a cura di Alfonso de Franciscis. Ma le numerose e fondamentali varianti di lettura proposte da diversi studiosi e la migliore conoscenza dei problemi costituzionali e finanziari locresi hanno reso necessaria una seconda edizione. Il Costabile l'ha curata con estrema attenzione e dà un ulteriore contributo al lettore affiancando a ciascun testo una nitida riproduzione fotografica dell'originale e ponendo sotto una traduzione italiana, che non solo aiuta nelle difficoltà del greco e in particolare delle sigle e dei numeri, ma significa anche e soprattutto una personale interpretazione.

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Il secondo libro che ha sollecitato il nostro interesse, suggerendo queste brevi osservazioni, è stato pubblicato da Giuseppe Camodeca con il titolo *L'archivio puteolano dei Sulpicii.*

Il libro in questione rappresenta in realtà il primo contributo a quel commento storico, giuridico, antiquario che nel progetto dell'autore deve affiancare l'edizione vera e propria delle *tabulae* di Pozzuoli, ormai prossima alle stampe. Ma già questo primo volume, nel quale sono confluiti numerosi lavori in argomento dello studioso napoletano, permette finalmente di consultare gran parte del materiale documentario puteolano attraverso una lettura più affidabile di quella offerta nelle precedenti sparse edizioni[7]. Queste ultime, ricordate esaurientemente dal Camodeca, presentavano lezioni in alcuni casi incomprensibili o addirittura insostenibili, che avevano a loro volta generato confusioni e incertezze anche gravi nei molti studiosi -in prevalenza storici del diritto e delle istituzioni privatistiche romane- che si erano avventurati nell'esegesi di quei documenti.

Ma crediamo sia ora opportuno passare rapidamente al contenuto dell'archivio puteolano e del nuovo libro, per cercare di individuare qualche elemento, che possa interessare anche uno storico dei diritti greci ed ellenistici e non soltanto un giusromanista. Il ritrovamento delle tavolette puteolane -come è noto- è stato fatto casualmente nell'agro pompeiano, durante alcuni lavori autostradali: nel triclinio di un edificio - villa privata o sede di un *collegium* o altro ancora, come è stato ipotizzato - è venuto alla luce un archivio di *tabulae* cerate, appartenenti ad un arco di anni che va dal 26 d. C. al 61 d. C.

Luogo di redazione, salvo pochissime eccezioni, è la *colonia Iulia Augusta Puteoli* e protagonisti sono nella quasi totalità alcuni membri della famiglia dei *Sulpicii*, cui il Camodeca dedica il primo capitolo. Uno di essi trasferì poi l'archivio a Murecine, forse

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7 Un 'attenta rilettura di alcune tavolette - con adeguato commento - è adesso dovuta anche a F. Costabile, *L'auctio della fiducia e del pignus nelle tabelle dell' agro Murecine*. Soveria Mannelli 1992.

per cessione o anche spostamento delle attività commerciali. Questi *Sulpicii* erano infatti mercanti-finanzieri, che operavano a Pozzuoli -probabilmente in modo autonomo e indipendente, piuttosto che in qualità di agenti di una qualche famiglia aristocratica del luogo-, concedendo prestiti ai vari mercanti orientali e italici, che trafficavano nel fiorente porto campano[8].

Molte sono le tavolette di contenuto processuale, attinenti alla procedura *per formulas* allora in uso. Nel secondo capitolo il Camodeca raccoglie e sistema i documenti vadimoniali: precisamente 15 *vadimonia* e 6 *testationes sistendi*. Viene giustamente accolta l'interpretazione di dativo d'agente data al nome di persona che segue all'espressione *vadimonium factum*: si tratta in effetti di una promessa fatta dal convenuto di presentarsi nel giorno, luogo ed ora fissati, rafforzata mediante *stipulatio* da una penale per la mancata comparizione. Ed è naturale che le *tabulae* siano in mano ai *Sulpicii*, che figurano attori. Passando al terzo capitolo, dedicato ad altri documenti processuali, va osservato come nella nuova lettura acquisti un nuovo significato un atto finora frainteso, che per la prima volta ci restituisce un accordo tra le parti sulla scelta del *iudex*, da proporre al magistrato giusdicente per *l'addictio*, ossia per la conferma. Chiarita nel suo complesso contenuto è una *conventio finiendae controversiae causa*. Altrettanto si può dire per una *interrogatio in iure 'an heres aut bonorum possessor sit et quota ex parte'*, per una *testatio exhibitionis* relativa a *depositum apud sequestrem* di *res litigiosa* e per alcuni documenti in materia di procedimento arbitrale.

Venendo ai documenti negoziali, il Camodeca nel quarto capitolo, dopo aver premesso che nessun caso di *emptio-venditio* era stato in precedenza riconosciuto nell' archivio dei *Sulpicii*, ne identifica ben tre e ne delinea il formulario. Particolarmente interessante la presenza di quella duplice stipulazione prevista dall' editto edilizio che garantisce il compratore sia per i vizi occulti che per l'evizione. Il quinto capitolo è dedicato ai mutui accompagnati da stipulazione, assai diffusi nella prassi, mentre il sesto riguarda i *nomina arcaria*, sui quali ritorneremo. Il Camodeca si preoccupa in appendice di raccogliere le date consolari dell' archivio, sistemando in ordine cronologico i documenti: alla restituzione dei nomi dei consoli, come del resto a quelli delle parti, il Camodeca ha sempre rivolto particolare attenzione nel suo faticoso lavoro di rilettura.

E' ora da notare come molti documenti negoziali, ma anche alcuni processuali, siano redatti in forma di *chirographa* e perciò strettamente collegati - almeno sul piano meramente formale - ad una tipologia documentale tipicamente greca, il χειρόγραφον appunto, da cui è mutuato lo stesso nome latino.

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8 Sul commercio tra la Campania e l'Oriente si leggano utilmente le osservazioni di D. Musti, *Modi di produzione e reperimento di manodopera servile*, in *Società romana e produzione schiavistica*, a cura di A. Giardina e A. Schiavone, I, Bari 1981, specificamente pp. 243-246; e con particolare riferimento a Pozzuoli e all'archivio dei *Sulpicii*, sempre dello stesso autore, *Il commercio degli schiavi e del grano: il caso di Puteoli*, in *Mem. Amer. Acad. Rome* 36 (1980), pp. 197-212.

Non è certo questa una novità dell' archivio puteolano, dal momento che altri chirografi sono conservati nei ritrovamenti campani già noti da tempo e cioè nelle *tabulae* pompeiane dell' *argentarius* Cecilio Giocondo e negli archivi ercolanesi. Ma è forse opportuno sottolineare ancora una volta questo dato. In ambienti cosmopoliti, quali sono Pozzuoli, Pompei, Ercolano, frequentati attivamente da mercanti, che provengono dalle regioni dell' Oriente ellenistico, non può certamente meravigliare la fruizione di una forma documentale, originaria di quel mondo ellenofono, che da tempo ormai l'utilizza nei propri rapporti obbligatori. Bisogna peraltro rilevare che il *chirographum* puteolano, e più in generale il chirografo romano, presenta alcune peculiarità che lo diversificano dall' omonimo documento greco, tra le quali la più evidente è la duplice scritturazione, diretta a meglio assicurare, nel nuovo clima di repressione del falso, l'autenticità del documento[9].

Sempre in tema di forme documentali greche, l'archivio puteolano conserva anche un'interessante attestazione di una ναυλωτικὴ (sc. συγγραφή) ἐκσφραγισμένη, richiamata in un chirografo bilingue[10]. Nella prima parte di questo, redatta in greco, una persona dichiara di aver ricevuto e s'impegna a restituire del denaro, in conformità appunto della *naulotike syngraphe*, mentre nella seconda parte, redatta in latino, altra persona presta fideiussione. Il documento non è stato testualmente ripreso nel volume in esame - dove peraltro è ripetutamente citato - ma è comunque già noto attraverso numerose pubblicazioni e in questo stesso Symposion ha dato luogo ad un importante contributo del Gofas.

Anche in questo caso non c'interessa tanto indagare il controverso contenuto dell'affare - prestito marittimo, contratto di trasporto o non piuttosto, come suggerito dal Gofas, assicurazione marittima? - quanto piuttosto evidenziare la forma documentale che quella *naulotike syngraphe* rivestiva. Essa è ancora una volta chiaramente greca e bene s'inserisce in un sistema commerciale - quello dei traffici marittimi - che affonda le sue

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9 Sull' argomento sia permesso rimandare ai nostri precedenti contributi: vedi precisamente M. Amelotti-L. Migliardi Zingale, *Osservazioni sulla duplice scritturazione nei documenti*, in *Symposion 1985*, Köln-Wien 1989, pp. 299-309: Συγγραφή, χειρόγραφον - *testatio, chirographum. Osservazioni in tema di tipologie documentali*, in *Symposion 1988*, Köln-Wien 1990, pp. 297-304; M. Amelotti, *Genesi del documento e prassi negoziale*, in *Contractus e pactum. Atti convegno Copanello 1988*, Napoli 1990, pp. 309-324.

10 In attesa dell' edizione definitiva di Tab. Pomp. 13, rinviamo per il testo a L. Bove, *Documenti di operazioni finanziarie dall' archivio dei Sulpicii*, Napoli 1984, pp. 147 ss. e 185, che ha tenuto conto di J. G. Wolf, *Aus dem neuen pompejanischen Urkundenfund : Der Seefrachtvertrag des Menelaos*, in *Freiburger Universitätsblätter* 65 (1979), pp. 23-36. Vedi pure H. Ankum, *Tabula Pompeiana 13: ein Seefrachtvertrag oder Seedarlehen?*, in *Iura* 29 (1978), pp. 156-173; J. Macqueron, *Contractus scripturae. Contrats et quittances dans la pratique romaine*, Camerino 1982, pp. 173 ss.; G. Purpura, *Tabulae Pompeianae 13 e 34: due documenti relativi al prestito marittimo*, in *Atti XVII Congr. Int. Pap., III*, Napoli 1984, pp. 1245-1266, e nuovamente H. Ankum, *Minima de tabula Pompeiana 13*, in *Cahiers d'histoire* 33 (1988), pp. 271 ss.

radici nell' *emporion* mediterraneo, da secoli ormai aduso alla singrafe per documentare le proprie negoziazioni.

A queste brevi osservazioni in tema di tipologie documentali, l'archivio puteolano aggiunge altri spunti di notevole interesse non solo per lo studioso di diritto privato romano, ma anche per il giusgrecista.

E' il caso del gruppo di documenti, detto erroneamente *tabellae Eupliae* ma in realtà *tabellae Titiniae Antracidis*, che nella nuova lettura offerta dal Camodeca rende finalmente possibile la ricostruzione del formulario, adoperato nella prassi giuridica del I secolo d. C., per i cosiddetti *nomina arcaria*. Pochi altri esempi, oltremodo frammentari, erano invero già noti attraverso alcune tavolette ercolanesi, nelle quali l' Arangio-Ruiz aveva identificato queste "registrazioni di credito", che secondo Gaio (Inst. 3, 131-132), diversamente dai *nomina transcripticia*, fonte di obbligazioni letterali, non creavano alcun rapporto obbligatorio, ma servivano soltanto a provarne l'esistenza[11]. I nuovi più completi esemplari permettono adesso una rilettura di quei "curiosi documenti" - come li aveva definiti lo stesso Arangio-Ruiz -, aprendo al contempo la via ad una globale reinterpretazione.

Senza ora soffermarci oltre su problemi strettamente giusromanistici, vorremmo invece accentrare l'attenzione su una formula presente in quella prima parte del documento di *nomen arcarium* che contiene - parallelamente al *codex accepti et expensi* - la registrazione del credito, seguita nella seconda parte del documento dalla fideiussione, prestata a garanzia del credito stesso. Nella clausola *petiit et numeratos accepit*, con la quale il debitore attesta di avere chiesto e ricevuto una *numerata pecunia*, riconoscendo così l'esborso fatto in suo favore dal creditore, è contenuta la specificazione *domi ex risco* - o la sua variante *domi ex arca* - e questa espressione non può non suggerire ad un attento lettore di documenti giuridici greci quel διὰ χειρὸς ἐξ οἴκου tante volte testimoniato nei papiri di provenienza egiziana.

Proprio quest' ultima formula, utilizzata soprattutto nei contratti di mutuo, oltre che nelle vendite in contanti o nelle quietanze[12], e già attestata nel III secolo a. C., anche se la documentazione si fa via via più numerosa in età romana, indica - come è ormai accettato pressoché concordemente[13] - un esborso effettuato personalmente dalla casa del tradente e non messo a disposizione della controparte διὰ τραπέζης, cioè attraverso l'intervento di una banca.

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[11] Cfr. V. Arangio-Ruiz, *Le tavolette cerate di Ercolano e i nomina arcaria*, in *Mél. Tisserant*, Città del Vaticano 1964, pp. 9-23 (= *Studi epigrafici e papirologici*, Napoli 1974, pp. 673-685).

[12] Cfr. per tutti H.-A. Rupprecht, *Untersuchungen zum Darlehen im Recht der graeco-aegyptischen Papyri der Ptolemäerzeit*, München 1967, specificamente p. 29 ss.

[13] Sulla formula si leggano le osservazioni di J. Triantaphyllopoulos in *Tyche* 5 (1990), p. 277 s., con una sua personale interpretazione, limitata peraltro ad un uso della formula stessa nei soli contratti di vendita: pagamento in contanti con denaro proprio, non altrui.

Anche la formula latina *domi ex risco* o *ex arca*, presente nei documenti puteolani (così come in quelli ercolanesi), può essere verosimilmente interpretata in modo analogo e cioè quale espressione che indica un versamento che il creditore - nel caso specifico la creditrice Titinia Antracide, di cui il Camodeca ha felicemente restituito il nome - ha effettuato personalmente al debitore - nel caso specifico la debitrice Euplia - dalla propria cassaforte di casa, senza l'intervento di un *argentarius*. E' poi interessante notare che nella prima delle due varianti della formula latina sia adoperato un vocabolo, che altro non è se non la traslitterazione del termine greco ῥίσκος, già di per sè raro, la cui accezione è anche, se non solo, quella di cassa o forziere[14].

Il tempo a disposizione per questa breve chiacchierata sul prezioso archivio puteolano sta volgendo al termine e desideriamo rapidamente concludere, sottolineando ancora una volta l'interesse che siffatto materiale - latino e di età romana - può presentare anche per lo studioso dei diritti greci ed ellenistici.

Come già è stato rilevato all'inizio di questo nostro intervento, un'impronta greca pervade ancora suggestivamente queste *tabulae* e ciò non può stupire. Non si deve infatti dimenticare che *Dicearchia* - è l'antico nome greco di Pozzuoli e così è ancora menzionata in uno dei documenti sopraricordati[15] - è sempre stata nella sua lunga storia antica un emporio multietnico, per il quale sono transitati uomini e merci provenienti dall' Oriente. In particolare, nella prima metà del I secolo d. C. - periodo al quale si ascrive l'archivio dei *Sulpicii* - Pozzuoli è soprattutto il porto dove approdano le navi granarie partite dall'Egitto, con il loro prezioso carico di *triticum alexandrinum*, citato nelle stesse tavolette. E proprio in questa cosmopolita città circolano Euplia di Milo, Epichares di Atene, Zenone di Tiro, Menelao di Ceramo, Trifone di Alessandria, variamente coinvolti in traffici negoziali con i *Sulpicii*. Nella stessa città, non molto tempo dopo, è stata scritta una lettera - ritrovata in Egitto, ad Ossirinco[16] - nella quale un certo Antonio Tolemeo fa sapere ad un non meglio identificato Dionisio, destinatario della missiva, che il viaggio verso l' Italia è stato più agevole dei precedenti. A noi non interessano tanto le sensazioni o le vicende personali di questo "viaggiatore" egiziano quanto piuttosto i rapporti, documentati anche attraverso queste testimonianze minime, tra la terra campana e il mondo ellenofono: in fondo la navigazione su quel mare, che avvicina l' Egitto alla terra italica, non è poi così δυσπλοία, anche se talora - come scrive il nostro Antonio Tolemeo - può risultare βραδυπλοία.

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14 Accanto ai consueti dizionari della lingua greca, si possono consultare utilmente i vocabolari papirologici, dai quali risulta che la parola è attestata dal III secolo a. C. in poi. Per i giusromanisti, inoltre, può essere interessante che il termine latino *riscus* sia documentato in D. 34.2.25.10, anche se - sembra - nell' accezione generica di "contenitore" e non in quella specifica di cassaforte.

15 Si tratta di Tab. Pomp. 13, su cui cfr. *supra*, nota 10.

16 Sul testo, conservato in P. Oxy. 18, 2191 e completamente riletto da J. Bingen in *Chron. d' Ég.* 39 (1964), p. 167 s., si vedano le osservazioni di A. Martin, in *Chron. d' Ég.* 55 (1980), p. 273.

Dimitri C. Gofas (Athènes)

Encore une fois sur la Tabula Pompeiana 13 (Essai d'une interprétation nouvelle)

I.- Une des découvertes le plus étonnantes que fait l'historien du droit qui se penche sur l'évolution dans le temps des institutions du droit maritime et commercial, c'est de constater à quel point celle-ci est longue et hésitante :

Des solutions qu'on a considéré depuis des siècles révolues, continuent, contre toute attente, une existence identique ou similaire à celle qu'on croyait depuis longtemps terminée.

Cette constatation va, d'ailleurs, dans les deux sens: ou bien on arrive à discerner dans une institution plus récente des traces d'une autre, plus ancienne, ou bien, dans le sens inverse, on entrevoit dans une institution ancienne le précurseur d'une autre, plus récente.

C'est d'un cas qui se rattache à la première de ces éventualités qu'il sera question dans la présente communication.

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II.- En examinant les documents de la pratique maritime de la Méditerranée médiévale, on rencontre des cas - qui, sans être rares ne sont pas, toutefois, fréquents - où dans des contrats d'affrètement, des "charte-parties" visant des transports de marchandises, le fréteur (normalement le patron du navire) consent à l'affréteur (chargeur) au moment de la signature du contrat d'affrètement, et en vertu d'une clause ad hoc de celui-ci un prêt à la grosse[1]. Ce prêt, qui parfois n'était pas même réel mais présentait un caractère f i c t i f [2], représentait un pourcentage de la valeur totale de la

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1 R. Zeno, Storia del Diritto Marittimo Italiano nel Mediterraneo, Milano 1946, p. 307-308, R. Lopez-J. Raymond, Medieval Trade in the Mediterranean World, New York 1955, p. 255-256. Cf. tout récemment K. Nehlsen-von Stryk, Die venezianische Seeversicherung im 15. Jahrhundert, Ebelsbach 1986, p. 11.

2 V. ci-après, n. 19 et 54.

cargaison[3] transportée. Il devait être remboursé par le chargeur au moment du paiement du fret, après la bonne arrivée du navire au port de destination[4]. Cette clause était parfois renforcée par un garant de chargeur[5].

Le prêt est soumis aux risques de la navigation (ad risicum maris et gentium)[6], de sorte que, finalement, en vertu de cette clause, les risques de mer sont réjetés sur le transporteur, puisque celui-ci ne sera remboursé du prêt qu'il a consenti si un tel risque survient[7].

Nous possédons des manifestations de cet usage maritime de la Méditerranée dans des documents datant du treizième siècle, provenant de Naples[8] et de Palerme[9], mais aussi du début du quatorzième, provenant de Candie (l'actuel Hérakleion) en Crète[10], alors sous domination Vénitienne.

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3 Dans la Loi d'Hydra de 1818, art. 43, la valeur de la cargaison devait être égale "au moins au double de celle du prêt".

4 A titre d'exemple, cf. R. Zeno, Documenti per la storia del Diritto Marittimo nei secoli XIII e XIV, Torino 1936 (reimpr. Torino 1970), doc. No 9 (17 mai 1287): "Item confessus est dictus Vanni (= le chargeur) recepisse ab eodem Leono (= transporteur) ex causa mutui ad dictum risicum (sc. maris et gentis) duplas aureas de miria eiusdem ponderis tricentas viginti quas totas duplas tam nauli quam mutui ... promisit dictus Vanni assignare dicto Leono infra dies decem ... a die quo predicta navis portum fecerit aput Tunisium".

5 Zeno, Documenti, doc. No 46 (15 janvier 1299): "et promisit (scil. Orlando de Hugolino de Messana, patronus) eis mutuare ad dictum risicum ad ipsorum conductorum requisicionem uncias auri centum ... Et erga dictos conductores pro dicto patrono erga ipsum conductoribus Bernardus de Feracortuso civis Panormi se sponte constituit fideiussorem et principalem pagatorem de premissis omnibus observandis".

6 Outre les deus documents mentionnés ci-dessus aux notes 4 et 5, cf. doc. Nos 44 (13 janvier 1299), 57 (25 février 1299), 74 (19 mars 1299), 111 (28 mai 1299) en latin. V. aussi le document en tranduction anglaise, dans Lopez-Raymond, doc. No 134 (12 mars 1261).

7 Cf. Zeno, Storia, p. 308, G. Cassandro, Genesi e svoglimento storico del contratto di assicurazione, dans Saggi di Storia del Diritto Commerciale, Napoli 1974=Enc. del Dir. 3 (1958), p. 241-242, et surtout Zeno, Documenti, Introduzione, p. LXXXI à LXXXVIII, notamment LXXXVI-LXXXVII.

8 Lopez-Raymond, No 134 (12 mars 1261). Nous n'avons pu consulter l'original, publié par G. Falco, Appunti di diritto marittimo medievale, dans: Il Diritto Marittimo, 29 (1927), p. 152-153.

9 Zeno, Documenti, No 9 (Palerme-Tunis), No 44 (Termini Imerese - Pise), No 46 (Palerme ou Trapani - Pise ou Gènes), No 57 (Palerme-Capri) etc.

10 S. Carbone, Pietro Pizolo, Notaio in Candia, II, Venezia 1985, No 985 (2 novembre 1304): Trois marchands, dont deux Grecs de Candie (Hemanuel Verivo et Hemanuel Simenachi), reçoivent à Candie de Johannes Pentulo, de Venise, 750 solidos denariorum grossorum. Johannes Pentulo est le patron d'une tarète nommée "Marie". Ils doivent lui rendre à Constantinople, où la tarète voyagera, "tot Yperperos auri recti et iusti ponderis Constantinopoli quot ascenderit suprascripti 750 soldos denariorum venecialium grossorum". Les risques de mer de l'argent de Pentulo (le patron) seront à sa charge: "Tamen suprascriptum tuum habere debet esse in tuo tali periculo maris et gentis clarefacto quali erit dicta tua (= de Pentulo) tarita et mercimonia ipsius tarete". Dans ce cas, donc, le "prêt-assurance" est combiné avec

L'extension progressive de l'utilisation du contrat d'assurance maritime à primes dans la vie des affaires méditerranéenne a fait disparaitre cette sorte de prêt à la grosse, que certains historiens appellent "prêt-assurance" (insurance loan)[11], parce qu'il constituait effectivement un substitut de l'assurance à proprement parler.

Ce ne fut que dans les parts de la Méditerranée qui se sont trouvées sous la domination Ottomane[12] que le prêt-assurance a survécu. On le retrouve ainsi dans certaines charte-parties provenant l'une de Psara de l'année 1794, les autres trois d'Hydra datées des années 1806, 1807, 1813[13], mais aussi dans l'article 43 de la Loi d'Hydra de 1818[14].

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une opération de change (cambium). La restitution du "prêt" sera faite pour la moitié 15 jours depuis la bonne arrivée à Constantinople, et pour l'autre moitié dans les 15 jours suivants. Pareil, mais moins compliqué est l'autre cas, celui de Pizolo, II, No 1013 (16 novembre 1304).

11 Lopez-Raymond, p. 255, Nehlsen-von Stryk, p. 11: "Versicherungsdarlehen (prestito a scopo assicurativo)". Pour les débuts de l'assurance sur primes, cf. Nehlsen - von Stryk, p. 3-4 avec les n. 1 et 2, et D. Gofas, Polices d'assurance du XVIe siécle provenant des archives de l'Institut grec de Venise (en grec), p. 54-55 = Etudes d'Histoire du droit Grec des Affaires, Athènes 1993, p. 325-326 (en grec), où l'on trouvera de la bibliographie.

12 Tandisque l'assurance sur primes était connue et pratiquée à Constantinople avant la prise de la ville par les Ottomans, aussi bien par des Occidentaux (Vénitiens, Génois) que par des Grecs et que jusqu'au début du 18ème siècle l'assurance était en usage même dans les parts de Grèce qui étaient passées sous la domination turque à la suite du Traité de Passarovitz de 1718, depuis lors on remarque une disparition totale de l'assurance matitime sur primes dans les parts de Grèce sujettes à l'Empire Ottoman. C'est surtout le cas de la marine marchande d'Hydra. Cf. Gofas, Polices d'assurances, 58-60 (= Etudes, p. 328-329), et du même, Esquisse d'une histoire du droit commercial grec sous la domination Ottomane (en français), dans La formazione storica del diritto moderno in Europa, III, Firenze 1977, p. 1096-1097, 1103 (= Etudes, p. 305-306, 310).

13 Hydra: Contrat de nolissement du 11 août 1806 dans J. Maniatopoulos, Le droit maritime d'Hydra, Athènes 1939 (en grec), Document No 12, art. 4ème: "Le même patron promet de remettre un capital (φόνδα, ital. fondo) de 3.000 piastres sans interêt, dont les risques et périls de mer (dont Dieu nous garde) sont entendus à charge du patron en proportion de la marchandise qu'il va recevoir dans ce schooner", art. 5ème: "Sieur Panagos promet de lui payer à titre de fret 1.800 piastres que le patron recevra du subrécargue en même temps que le capital à Malte en écus d'Espagne 1280". Contrat de nolissement du 16 août 1807, dans Maniatopoulos, Document No 13, art. 4ème et 6ème, Contrat de nolissement du 10 juin 1813, dans D. Gofas, Le Chargement en pontée - Notice historique, Athènes 1965 (en grec), Document No 9, art. 6 et 11, Psara: Document No 405 (17 septembre 1794), dans: Elie Georgiou, Ravitaillement de France par la Marine Marchande Grecque (1789-1815), Athènes 1969, p. 264. Cf. Maniatopoulos, p. 45-46, 61-64, Gofas, Chargement, p. 124 n. 4, 126 n. 2.

14 Loi d'Hydra de 1818,art. 43 (dans Maniatopoulos, p. 110): "S'il arrive qu'un navire, après la vente de la cargaison qu'il réalisera en Europe soit frété pour le Levant, et pour ce fret (le patron) devra donner des capitaux sur la marchandise, le patron doit en premier lieu prendre la marchandise sous son pouvoir et, ensuite, verser les capitaux (φόντα) et le patron est tenu de voir si cette marchandise est de bonne qualité et si elle est d'une valeur double à la quantité des capitaux que le patron a donnée (= à titre de prêt) pour cette même marchandise". Une mention de ces "fonda" se trouve aussi dans l'art. 54 de la Loi de 1818.

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III.- Il est, donc, à notre avis, d'autant plus intéressant de constater, grâce à deux tablettes (tabulae ceratae) découvertes à Puzzoles (Dikaiarchia), qu'une sorte de prêt-assurance, d'une forme un peu différente, était en usage dans la pratique de la marine marchande méditerranéenne presque treize cent ans avant les documents médiéveux auxquels nous nous sommes référés.

Les deux tablettes auxquelles nous faisons allusion, constituent ensemble un diptychon[15] sur lequel deux chirographa avaient été écrits[16]. Elles sont datées du 11 avril de l'an 38 apr. J-C., sous le reigne, donc, de Caligula[17].

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IV.- Nous allons ci-après reproduire le texte des deux tablettes, tel que celui-ci a été définitivement établi par le Professeur H. Ankum[18].

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15 C' est bien un diptychon (selon la description qu' en fait Ankum, Tabula Pompeiana 13: ein Seefrachtvertrag oder ein Seedarlehen? dans Jura, 29 (1978), p. 158) et non pas un triptychon, comme l'accepte L. Bove, Prêts d'argent et sûretés dans les "Tabulae Pompeianae" de Murecine, dans RHD 1984, p. 547. Voir aussi le croquis publié dans G. Purpura, Tabulae Pompeianae 13 et 34: Due documenti relativi al prestito maritimo, dans Atti del XVII Congresso Internazionale di Papirologia, III, Napoli 1984, p. 1250, où l'on voit clairement les deux trous d'où passaient les courroies qui unissaient les tablettes.

16 Il s'agit de deux chirographa consécutifs, l'un en grec, le second (qui contient la fideiussio) en latin. C'est ce qui est accepté par la majorité des auteurs (Bove, Prêts, p. 539, Ankum, Tabula, p. 160-161, Purpura, Due documenti, p. 1251, 1253). Il est toutefois, croyons-nous, fort douteux que le second de ces textes ait possédé un caractère autonome (cf. tabl. 2, p.3, l. 7-8: "eos ... (denarios) ... q(ui) s(upra) s(unt)" et l. 10: "uti supra scriptum est"). C'est pourquoi serait-il, peut-être, préférable de parler d'un chirographum unique, malgré le fait que l'écriture soit due à deux mains différentes. L'importance de ce point, n'est, cependant, à notre avis, que secondaire.

17 Pour la datation, cf. Purpura, Due documenti, p. 1251, Bove, Prêts, p. 547.

18 Nous avons suivi le texte définitif présenté par Ankum, Minima de Tabula Pompeiana 13, dans Cahiers d'Histoire, 32 (1988), p. 274. L'amélioration la plus importante qu'Ankum apporte, est celle de la tab. 1, p. 2, l. 6, ou il a correctement lu "μαι" au lieu de "μοι", qu'il a bien interprêté comme un "με" (Ankum, op. cit., p. 272). Sa correction est aussi suivie par Purpura, Due documenti, p. 1251. Il s'agit, en effet, de l'accusatif du pronom personnel "ἐγώ", et non pas d'une transcription phonétique du latin "me". À remarquer cependant, que le "me" latin aurait pu très bien être transcrit par "μοι" = μὴ (cf. FIRA, III, No 129, d: "μὴ [ἀκκηπίσσε ἀ]πὸ Καικιλίω". Voir aussi ci-après, à la n. 38.

Ce texte était rédigé en deux langues : en grec (tabl. 1, p.2, 1.1-12 et tabl. 2, p.3, 1.1-3) et en latin (tabl. 2, p.3, 1.4-10).

La formulation du chirographum en grec s'écarte sur certains points de ceux, également rédigés en grec, qu'on connait d'Egypte[19], et qui, selon les indices, étaient généralement répandus dans le monde des affaires gréco-romain du premier siècle apr. J-C.

Voici donc le texte en question et en voici une traduction en français :

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19 Notre chirographum grec ne contient pas la salutation épistolaire usuelle "χαίρειν", ni le verbe "ὁμολογῶ" dont dépendrait l'infinitif "ἀπέχ(ε)ιν", mais bien un "ἔγραψα" qui provient de, et correspond à, la formule latine "scripsi me accepisse" des documents pompéiens (FIRA, III, No 130, a,b = Bruns, I[7], No 157, p. 356-357, cf. Bove, Prêts, p. 539, Ankum, Tabula, p. 160, et, plus généralement, M. Kaser, Das Römische Privatrecht, I[2], München 1971, p. 234 n. 33). Il est, toutefois, vrai que le "χαίρειν" était souvent omis en Egypte (H.J. Wolff, Das Recht der griechischen Papyri Ägyptens, II, München 1978, p. 107, n. 5). Comment s'explique, d'autre part, le "ἔγραψα", traduction évidente de la formule latine "scripsi", qui constitue la seconde différence essentielle entre notre chirographum et ceux d'Egypte? Doit-on admettre qu'il a été écrit uniquement parce que l'interprète - probablament l'esclave Priscus - a imposé à Ménélas, le naukléros, cette formule, comme l'admet Ankum, Tabula, p. 160 et 164-165? Nous ne le pensons pas: Un homme d'affaires grec, comme notre Ménélas, devait avoir eu déjà à maintes reprises l'occasion de rédiger des déclarations écrites, narrant des faits "etiam contra fidem veritatis ... et non numerata quoque pecunia ... more institutoque Graecorum" (v. le texte de Pseudoasconius dans Bruns, II[7], p. 72). Le prêt fictif de l'inscription de Nicarète (Bogaert, Epigraphica, III, No 43, II) n'en est qu'un des exemples (cf. H. A. Rupprecht, Untersuchungen zum Darlehen im Recht der Graeco-aegyptischen Papyri der Ptolemäerzeit, München 1967, p. 118-147 passim, notamment pour l'inscription de Nicarète, p. 125, et pour le fait que dans ces prêts fictifs l'expression bien significative "τοῦτο δ' ἐστίν" n'était pas obligatoire, op. cit., p. 137): Rien d'extraordinaire donc qu'un peregrinus d'origine grecque, comme notre naukléros, se trouvant en plus dans une ambiance graecoitaliote (L. Bove, Documenti di operazioni finanziarie dall'archivio dei Sulpici, Tabulae pompeiane di Mucerine, Napoli 1984, p. 5), parle de Dikaiarchia comme "d'un centre de tradition grecque remontant aux origines (risalente)" - n'ait vu dans le "ἔγραψα" qu'une variante anodyne de ces reconnaissances écrites fictives de dette, créant des obligations "abstraites' (Rupprecht, p. 146) qu'il connaissait depuis toujours. Dans cette perspective, nous trouvons réussie, malgré les objections de Ankum, Tabula, p. 165, l'expression de J. G. Wolf (ci-après n. 37) p. 36 "ein hybrides Gebilde".

t.1 p.2 lin.	1	Ἐπί ὑπάτων Μάρκου Ἀκύλα Ἰουλι-
	2	άνου καὶ Ποπλίου Νωνίου Ἀσ-
	3	πρήνα πρό τριῶν εἰδῶν
	4	Ἀπριλίων ἐν Δικαρχήᾳ.
	5	Μενέλαος Εἰρηναίου Κερα-
	6	μιήτης ἔγραψα ἀπέχιν μαι
	7	παρά Πρίμου Ποπλίου Ἀττίου Σεβή-
	8	ρου δούλου[[λου]] δηνάρια χίλια
	9	ἐκ ναυλωτικῆς ἐκσφραγισμένης,
	10	ἃ καὶ ἀποδώσω ἀκο[[υ]]λούθως
	11	τῇ ναυλωτικῇ. ἦ<ν> πεποίημαι πρὸς
	12	αὐτόν, κατέστησα δέ ἔνγυον
t.2 p.3 lin.	1	εἰς ἔκτισιν τῶν προγεγραμμένων
	2	δηναρίων χιλίων Μάρκον Βαρ-
	3	βάτιον Κέλερα.
	4	Q. Aelius Romanus scripsi rogatu et
	5	mandatu M. Barbati Celeris coram
	6	ipso, quod is litteras nesciret, eum
	7	sua fide iubere eos * (denarios) q.s.s.sunt
	8	Primo P. Atti Severi ser. pro Menela-
	9	uo Irenaei f. Ceramietae, ita
	10	uti supra scriptum es[t]. (S) (S) (S)

Texte grec :

"Sous les Consuls Marcus Aquila Iulianus et Publius Nonius Aspréna, trois jours avant les Ides d'Avril à Dikaiarchia, moi Ménélas (fils) d'Irénée, de Kéramos, j'ai écrit avoir reçu de Primus, esclave de Publius Attius Severus, mille dénarii en vertu d'une naulotiké scelée, et que je vais rendre conformément à la naulotiké que j'ai conclue avec lui. Et j'ai constitué comme garant pour le paiement des mille dénarii écrits ci-dessus Marcus Barbatius Celer."

Texte latin :

"Moi Q(uintus) Aelius Romanus j'ai écrit à la requête et sur mandat de M(arcus) Barbatius Celer, en sa présence, puisqu'il ne sait pas lire, que celui-ci garantit par fideiussio à Primus, esclave de P(ublius) Attius Severus, ces mille dénarii, qui sont écrits ci-dessus, en faveur de Ménélas, f(ils) d'Irénée, de Kéramos, ainsi qu'il est écrit ci-dessus (suivent trois cachets)."

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V.- Le texte contenu dans la Tab. Pomp. 13 n'est pas sans soulever des difficultés.

Trois personnes y sont nommées, mais leurs rôles ne sont pas toujours faciles à préciser.

La première est Ménélas (Ménélaos), fils d'Irénée (Eirenaios), originaire d'une bourgade d'Asie Mineure, Kéramos[20]. Comme la forme de son patronymique l'indique, il est d'origine grecque. C'est donc un peregrinus pour les Romains, ce qui a son interêt du point de vue du droit applicable.

Le deuxième des trois personnages, c'est Primus, esclave de l'homme d'affaires Romain Publius Attius Severus. Son rôle semble avoir été celui d'un "servus actor", pour utiliser la terminologie du Digeste[21].

La troisième, enfin, des personnes impliquées joue le rôle d'un garant et apparait dans le second des chirographes contenu dans les tablettes, c.à.d. le chirographum en latin: C'est un citoyen Romain, portant les tria nomina usuels : Marcus Barbatius Celer.

Cette personne est illetrée, mais a, cependant, suffisament de crédit dans les milieux commerçants de Dikaiarchia pour être agrée comme garant (fideiussor) par Primus.

Pour revenir à Ménélas fils d'Irénée, qui est le personnage central de la transaction, la conjecture que c'était un naukléros qu'admet Ankum[22] nous parait très probable : il déclare dans le texte avoir reçu la somme des 1.000 dénarii en vertu d'une "naulotiké scellée"[23] dont il est tenu d'executer les termes. Ce lien étroit avec le document en question, qui est le document par excellence lié aux transports maritimes[24] (ou, en

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20 Une difficulté d'identification existe, à notre avis, du fait que les habitants de Kéramos en Carie étaient appelés Κεράμιοι ou Κεραμῆς (p. ex. Meiggs et Lewis, G.H.I., No 50 (38), p. 136) et non pas Κεραμιῆται, cette dernière forme étant d'ailleurs, plutôt utilisée pour l'appellation des habitants d'une localité qui aurait été nommée Κεράμιον. Ce n'est, pourtant, point impossible que Κεραμιήτης soit une appellation locale ou dialectale.

21 P. ex. D. 40, 7, 40, 3 et 8 (Scaevola), ainsi que FIRA, III, No 157 = Bruns, I[7], No 171, l. 10. Pour le servus actor, v. sommairement, J.A. Crook, Law and Life of Rome, (London) 1967, p. 60-61, 187-188.

22 Ankum, Minima, p. 277: "ναύκληρος ou ἔμπορος".

23 l. 9: "ἐκ ναυλωτικῆς ἐκσφραγισμένης". La mention de la naulotiké exclut qu'il s'agisse d'un ἔμπορος, à moins qu'on n'accepte que le terme naulotiké soit égal à contractus traiecticius, question sur laquelle nous allons revenir plus tard (n. 31).

24 Sauf erreur de notre part, le chirographum en grec discuté contient la plus ancienne mention d'une naulotiké concernant un transport par mer, et un transport qui ne soit pas effectué à l'interieur d'Egypte. Nous avons eu l'occasion de soutenir ailleurs (D. Gofas, La mer et les affaires dans la Grèce ancienne (en grec), dans Etudes d'histoire du Droit Grec des affaires, Athènes 1993, p. 220, n. 151, Epiplous, p. 433, dans Symposium 1985, Köln-Wien 1989), que les institutions qu'on voit appliquées dans la pratique des transports fluviaux proviennent de celle des transports par mer.

Egypte, fluviaux)[25] rend, à notre avis, improbable qu'il s'agissait d'un commerçant, qui voyagerait pour ses affaires sur des navires d'autrui, un simple emporos donc[26].

La mention de la naulotiké une seconde fois, un peu plus bas, dans le texte du chirographum en grec, où Ménélas promet qu'il va rendre la somme qu'il a reçue de Primus "conformément à la naulotiké que j'ai conclue avec lui'[27], montre clairement que l'obligation de restitution du prêt ne résulte point de notre document, mais était incluse dans une clause de la naulotiké, à laquelle notre chirographum renvoit. Le naukléros, Ménélas assume des obligations au delà du chirographum, mais en conformité avec la naulotiké qui a été déjà scellée.

VI.- On n'ignore pas ce que c'est qu'une naulotiké: c'est document rédigé en grec[28] entre des parties contractantes (fréteur et affréteur) pour constituer la preuve des clauses contenues dans un contrat d'affrétement. C'est donc le terme qui correspond en grec ancien à celui de la "charte-partie" de la terminologie juridique française (et anglaise)[29].

Naulotiké est, on le sait, un adjectif, qui sousentend le substantif "syngraphé", lequel est habituellement omis[30].

Or, malgré les affirmations du contraire[31], le terme naulotiké n'a été jamais - à notre connaissance, en tout cas - utilisée pour signifier le document rédigé pour prouver la

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25 Les naulotikés d'Egypte n'apparaissent qu'à partir des débuts de la domination romaine en Egypte où, selon Wolff, Das Recht, p. 124 n. 87a, 125 n. 92a, elles ne sont signalées au commencement qu'à Oxyrhynchos. Wolff est suivi par J. Vélissaropoulos, Les nauclères grecs, Genève-Paris 1980, p.280 avec la n. 52, 281 et par M. Amelotti - L. Migliardi Zignale, Una dichiarazione di "Naukleros" del 237 a. Cr. ... dans Sodalitas-Scritti in Onore di A. Guarino, p. 3014-3016 et n. 17-22).

26 Nous n'allons pas insister sur ce point bien connu. On trouvera des références dans Gofas, La mer et les affaires, p. 202.

27 Tab. 1, p. 2, l. 10-12 du chirographum.

28 C'est ce que souligne A.M. Meyer-Termeer, Die Haftung der Schiffer in Griechischen und Römischen Recht, Zutphen 1978, p. 75, 76 n. 2.

29 C'est ainsi, d'ailleurs, que traduit W. Ashburner, The Rhodian Sea-Law, Oxford 1909, p. CLXXIX, le terme naulotiké en ce qui concerne P. Lond. III, 948 = Mitteis, Chrest. 341 = Meyer, J.P. 43: "a private charter-party of A.D. 236".

30 Vélissaropoulos, p. 280, Meyer-Termeer, p. 76 n. 1.

31 Ankum, Tabula, p. 167: "Jetzt bin ich davon überzeugt, dass der Ausdruck ναυλωτική (συγγραφή) in unserem Texte wirklich auf ein Seedarlehen deutet". G. Purpura, Tabula, p. 1252: "Il termine ναυλωτική che si riscontra nel documento si applica nel diritto dei papiri secondo Meyer-Termeer ad una gamma di contratti marittimi e non e riservato esclusivamente al contratto di trasporto". Nous nous permettons de signaler que Meyer-Termeer n'a jamais - sauf erreur de notre part - soutenu que le terme ναυλωτική (à propos, pourquoi un accent circonflèxe, une περισπωμένη?) s'applique dans le droit des papyrus à toute une gamme de contrats. Voici, en traduction française, sa définition de la naulotiké (Meyer-Termeer, p. 75): "Ναυλωτικαί συγγραφαί sont les documents rédigés en langue grecque dans lesquels quelqu'un qui transporte des biens par bateau, confirme la réception et/ou le chargement de

constitution d'un prêt à la grosse. "Ναυλωτικός" n'est pas le terme correspondant au terme latin traiecticius, comme il a été prétendu[32]. Traiecticius, comme le dit explicitement le Digeste, est le terme qui sert à indiquer l'argent "qui est transporté au delà de la mer" (quae trans mare vehitur)[33]. Or ναυλωτικός n'a rien à voir avec ce "trans mare vehi". Il dérive du verbe "ναυλόω (-ναυλῶ)", qui signifie "conclure un contrat d' affrétement"[34]. Le contractus traiecticius est le terme équivalent à la ναυτική συγγραφή, selon la terminologie déjà employée par Démosthène[35]. D'ailleurs, si dans la ναυλωτική συγγραφή le substantif συγγραφή est le plus souvent omis, dans les contrats de prêts, c'est le coutraire qui se passe ordinairement: ils sont appelés "συγγραφαί"[36] sans autre qualification, car syngraphé par excellence était celle qui se référait au prêt à la grosse.

VII.- Doit-on conclure de cette analyse que la transaction à laquelle vise notre chirographum en grec était un contrat d'affrétement pur et simple, une charte-partie, un "Seefrachtsvertrag" comme l'appelle J.C. Wolf[37]?

Nous ne le croyons pas.

Les expressions utilisées dans le texte du chirographum en grec sont, il est vrai, équivoques, et peuvent être interprétées dans les deux sens: C'est ainsi que dans notre chirographum, Ménélas déclare "avoir reçu" (ἀπέχ(ε)ιν)[38] les 1.000 dénarii, qu'il promet de "rendre" (ἀποδώσω).

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marchandises, en s'obligeant en même temps, expressement ou tacitement, de transporter ces marchandises par son navire et de les livrer à un lieu déterminé". Or, on peut considérer cette définition comme trop large parcequ'elle comprend aussi les reçus d'embarquement (cf. Vélissaropoulos, p. 280 avec la n. 52), mais il nous semble hors de doute qu'il ressort de celle-ci que la naulotiké ne se réfère qu'à des contrats de transport par voie de mer ou - en Egypte - fluviaux (voir aussi Chr. Brecht, Zur Haftung der Schiffer im antiken Recht, München 1962, p. 132-136).

32 Ankum, Tabula, p. 168-169.

33 D. 22, 2,1 (Modestinus, libr. dec. pand.)

34 F. Preisigke, WB, s.v. "ναυλόω", Meyer-Termeer, p. 76 n. 1.

35 Depuis <Demosthène>, Contre Lacritos (XXXV), 17, 43, etc. jusqu'au P. Vindob. G. 19792 (149 apr. J. Chr.), l. 7.

36 <Démosthène>, Contre Lacritos (XXXV), 11, 15, 21, 22, 27, etc. Voir aussi G. Thür, Hypotheken - Urkunde eines Seedarlehens für eine Reise nach Muziris ... (zu P. Vindob. G. 40822, 2ème s. apr. J. Chr.), dans Tyche, 2 (1987), p. 230, recto, col. II, l. 12-13: "τοῦ ἐν ταῖς κατά Μουζεῖριν τοῦ δα[νείου σ]υνγραφαῖς".

37 J.G. Wolf, Aus dem neuen pompeianischen Urkundenwesen - Der Seefrachtvertrag des Menelaos, dans Freiburger Universitätsblätter, 65 (1979), p. 34-36.

38 Ankum, Tabula, p. 160, soutient que la place du "μαι" dans "ἔγραψα ἀπέχ(ε)ιν με" provient sans doute d'une traduction des mots latins "scripsi me accepisse". Le traducteur aurait dicté à Ménélas "ἔγραψα ἀπέχειν" et après coup, ayant découvert qu'il avait oublié de traduire le mot "me", il l'a ajouté après "ἀπέχ(ε)ιν". Mais si notre Ménélas a personnellement écrit le chirographum et si, au lieu du "ὁμολογῶ" auquel il était accoutumé, il a voulu déclarer qu'il avait "écrit avoir reçu" l'argent,

Deux explications de ces déclarations de Ménélas nous paraissent possibles :

a) Ou bien que les 1.000 dénarii constituent un acompte sur le fret: - ce qui militerait en faveur de la thèse du "Seefrachtsvertrag". En faveur de cette thèse on peut invoquer que dans les ναυλωτικαί d'Egypte contemporaines à notre texte (mais aussi tardives), et notamment dans celles qui se réfèrent à des transports p r i v é s, l'on voit de transporteur déclarer qu'il a reçu des acomptes, tandisque le solde du fret doit lui être payé à l'arrivée du navire au port de destination, au moment de la livraison de la cargaison[39]. Le verbe qui indique le paiement du solde du fret, après déduction des acomptes, est-tout comme dans notre chirographum grec - "ἀποδοῦναι"[40].

b) Ou bien que les 1.000 dénarii constituent un prêt. La mention de la naulotiké ne représente point en soi, insistons-nous, une preuve décisive en faveur de cette thèse puisque l'identification de la naulotiké avec la nautiké syngraphé n'est point valable[41].

Nous avons vu, cependant, que parmi les documents médiévaux similaires, les charte-parties, il y avait quelques uns qui contenaient des clauses, en vertu desquelles le patron remettait au chargeur des sommes consenties à titre de prêt ("ex causa mutui" disent les textes)[42] et soumises "ad risicum maris et gentium"[43], donc des prêts à la grosse. Ces sommes étaient remboursables par le chargeur à l'heureuse arrivée du navire, lors du paiement du fret. Ce prêt a grosse spécial constituait donc une c l a u s e du contrat d'affrétement[44]. Il n' y a donc pas besoin d'identifier la naulotiké au contractus

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n'aurait-il pas dû faire figurer, en grec, le pronom "με", qui serait, alors, tout à fait à sa place après l'infinitif "ἀπέχ(ε)ιν"?

39 Meyer-Termeer, p. 12, cf. Gofas, La mer et les affaires, dans Etudes, p. 222 avec la n. 174. V. aussi, Vélissaropoulos, p. 73 n. 130, 282 avec la n. 57, qui ne fait pas cette distinction entre transports privés et transports publics. Celle-ci, par contre, est acceptée par les éditeurs du P. Oxy., XLIX (1982), No 3482, Introduction p. 174.

40 Ainsi, P. Oxy., 3250 (63 apr. J. Chr.) = Vélissaropoulos, Annèxe, No 15, l. 14-15: "τὰς δὲ λοιπὰς τοῦ ναύλου δραχμὰς ἑξήκοντα ὀκτὼ ἀποδότω αὐτῷ ἐπὶ τῆς ἐγβολῆς τοῦ ἄρακος". P. Oxy., 3484 (58/3 (63) apr. J. -C.), l. 10-11: "τὸ δὲ λοιπὸν ὁ ... ἀ]ποδότω αὐτοῖς ἐν Εὐεργέτιδι". Dans P. London, III, 948 = Mitteis, Chrest. 341 = Meyer, J.P. 43, l. 7, une autre expression équivalente est utilisée: "τὰς δέ λοιπὰς δραχμὰς ἑξήκοντα ἀπολήμψεται ἅμα τῇ παραδόσει".

41 Contra: Purpura, Tabulae, p. 1252, qui tire la conclusion que ἀποδώσω n'a rien à faire avec un transport, car le terme utilisé serait alors παραδώσω. Mais ἀποδούναι pourrait se référer, nous l'avons vu, au fret et non pas a la cargaison. Rendre ἀποδώσω par "reddam" qui est caractéristique des prêts romains, comme le fait Ankum, Tabula, p. 165, ne se fonde que sur une petitio principii.

42 V. le document cité à la n. 4 ci-dessus, daté du 17 mai 1287.

43 Zeno, Documenti, p. LXXXV - LXXXVII.

44 C'est ce qu'a très bien entrevu, J.G. Wolf, p. 35-36, qui n'a cependant pas compris qu'il s'agissait d'un phénomène semblable à ce qu'on observe dans les charte-parties du Moyen-Age. Ankum, Tabula, p. 164 n. 26, observe que: "Ein solcher Vertrag ist aber weder im hellenistischen noch im römischen Recht bekannt". Il est, cependant, connu que le corpus des coutumes maritimes était de beaucoup plus vaste que la législation romaine sur les mêmes sujets, et qu'il en avait été ainsi encore plus pour les lois des cités grecques (pour Rome, v. D. 14, 2, 9 - Volusius Maecianus, ainsi que J. Rougé,

traiecticius (ou syngraphé) pour justifier la présence d'un prêt à la grosse dans une clause de la naulotiké. Des clauses semblables existaient dans les contrats d'affrétement du Moyen-Age. Pourquoi ne serait-il pas de même pour les ναυλωτικαί antiques?

Le verbe "ἀποδοῦναι", soulignons-le, était aussi bien utilisé pour indiquer le remboursement d'un prêt (comme nous le montre la fameuse syngraphé du discours pseudodémosthénique contre Lacritos)[45], que pour indiquer la défalcation des avances sur le fret.

Il est également à signaler - et c'est une similarité significative - que dans certains des documents médiévaux, le prêt à la grosse consenti par le transporteur (fréteur) au chargeur (affréteur) ne produit point d'interêts, ce qui est dû, manifestement, à la destination toute autre de cette sorte de prêts, qui n'a point comme objectif le financement du chargeur, mais la couverture de celui-ci contre les risques de la navigation[46]. On peut donc, si notre conjecture est justifiée, admettre la même explication

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Recherches sur l'organisation du commerce maritime en Méditerranée sous l'Empire Romain, Paris 1966, p. 341 avec la n.1, 407-413, avec les références, auxquelles il faut ajouter, P. Huvelin, Etudes d'histoire de droit commercial romain, Paris 1929, p. 38-39, J. Triantaphyllopoulos, dans Synteleia Arangio-Ruiz, p. 905-906). Le fait donc que le droit maritime romain "officiel" n'en parle pas, ne constitue pas une preuve de l'inexistence dans la pratique maritime de l'antiquité de diverses conventions tendant à assurer le propriétaire des marchandises contre les risques de mer, comme ce fut aussi, d'ailleurs, le cas pour une autre, qui se fondait sur le receptum rem salvam fore du droit romain (v. ci-après à la n. 47).

45 <Démosthène>, Contre Lacritos (XXXV), 11. Cf. aussi P. Berol. inv. 5883 +5853 = S.B., III, 7169 = Vélissaropoulos, Annèxe, No 21, l. 13 et 15. P. Vindob. G. 40822, l. 13 parle, lui aussi, d' "ἀπόδοσις" (Thür, p. 230).

46 Celà ne voulait pas dire qu'il n'y avait pas de profit pour le patron dans des cas pareils: il consistait à un fret accru qu'il obtenait du chargeur, et dans lequel étaient cumulés fret et prime. (cf. Zeno, Storia, p. 308 et, du même, Documenti, Introd. p. LXXXVII). Une autre solution tendant du même résultat consistait à ce que le tansporteur (fréteur) reconnaissait avoir reçu à titre de prêt à la grosse une somme supérieure à celle qu'il avait réellement reçue (Zeno, Storia et Documenti, loc. cit.). La différence constituait en reálité une "prime d'assurance" qui lui était versée par le chargeur à l'arrivée du navire sain et sauf au port de destination en même temps que le prêt à la grosse à proprement parler. Au contraire, si le risicum maris survenait, le chargeur (affréteur) n'avait pas à rendre le prêt à la grosse qu'il gardait alors définitivement, comme une indemnité d'assurance anticipée, qu'il avait reçue en vue d'une perte éventuelle de la cargaison (Zeno, Documenti, Introd., p. LXXXV: "una forma di risarcimento anticipato per la perdita della merce"). Il y a eu cependant des cas, au quatorzième siècle, où le caractère de contrat d'assurance de ces "prêts-assurance" fut encore plus prononcé, tel le cas dont nous informe une quittance signée à Grosseto (région de Siena) le 23 avril 1329 (le texte dans G. Valeri, I primordi dell'assicurazione attraverso il documento del 1329, dans la Rivista del Diritto Commerciale, 26 (1928), I, p. 604-605 = F. Melis, Origini e sviluppi delle assicurazioni in Italia ..., I, le Fonti, Roma 1975, p. 183), mais ces cas d'exception ne sont pas intéressants pour la présente enquête. Le même mécanisme que celui des documents italiens du Moyen Age doit d'ailleurs être admis, croyons-nous, pour le cas des prêts à la grosse "sans intérêts" que nous rencontrons dans certaines charte-parties grecques du dixhuitième siècle provenant d'Hydra, comme c'est le cas pour le contrat du 11.8.1806 (ci-dessus, n. 13).

pour le cas du prêt de notre chirographum grec, où le manque de toute mention d'interêts a tant intrigué les commentateurs de la Tab. Pomp. 13[47].

Enfin, la présence d'un garant (fideiussor) est observée dans quelques cas de prêts-assurance, comme nous avons l'occasion de le signaler plus haut[48].

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VIII.- On nous observera, cependant, qu'alors que les prêts-assurance médiévaux concernent des sommes que le transporteur (fréteur) remet effectivement au chargeur (affréteur), lequel doit les lui rendre à l'heureuse arrivée du navire au port de destination, dans le cas visé par nos tablettes, c'est au contraire le transporteur qui déclare avoir reçu (ἀπέχ(ε)ιν) les 1.000 dénarii et est tenu de les rendre "conformément à la naulotiké".

Cette difficulté n'est pourtant qu'apparente. Elle s'explique, à notre avis, par la grande expansion de l'usage des p r ê t s f i c t i f s dans le monde hellénistique pour créer des obligations "abstraites"[49].

On se rappelera dans cette perspective quelques faits - qui ne sont pas très loin, ni dans le temps, ni dans l'espace de notre chirographum - c.à.d. qu'en Sicile du temps de Cicéron, Chélidon, la maitresse de Verrès, créait des débiteurs fictifs en leur "faisant

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47 Dans cette perspective, nous sommes d'accord avec Ankum, Tabula, p. 173, lorsqu'il admet que les 1.000 dénarii constituaient une "somme globale" (Totalsumme), mais avec cette réserve, que cette somme comprenait non pas un capital et des intérêts, mais representait un pourcentage (ou le tout) de la valeur de la marchandise, plus un fret accru, couvrant la "prime d'assurance". Ce fret doit avoir été déjà versé (en tout ou la partie) par le chargeur au transporteur à la scellée de la naulotiké. Le Digeste comprend un texte où la situation a, à notre avis, des points juridiques communs avec celui que nous examinons. Il s'agit du fragment D. 20, 4, 6, 1 Ulpianus (libr. sept. tert. ad edictum) concernant le receptum nautarum. Selon ce texte bien connu, en droit romain, lorsque le transporteur assume les risques de la navigation par le receptum rem salvam fore, il reçoit en contre-partie un fret supérieur (ipsum naulum potentius fuit). Cf. O. Lenel, Kritisches und antikritisches, dans ZS (RA), 49 (1929), p. 5-6, lequel (p. 5) parle d'une responsabilité "semblable à celle d'une assurance" (Versicherungsähnliche). Du même avis, R. Zimmermann, The Law of Obligations - Roman Foundations ... Cape Towm, Wetton-Johannesburg 1990, p. 515 n. 44, L. Ménager, Naulum et receptum rem salvam fore, dans RHD 1960, p. 201-203, 212, F. de Robertis, Receptum nautarum - Studio sulla responsabilità dell'armatore in diritto romano, dans Ann. Fac. di Giurispr. Univ. di Bari, Nuova Ser. 12 (1953), p. 58 n. 6, Rougé, Recherches, p. 384 avec la n. 4, M. Kaser RPR, I[2], p. 586 avec la n. 34. Huvelin, p. 111-112, admet toutefois une autre explication du "naulum potentius" = "le fret lui-même est privilégié", explication, à notre avis, assez improbable. Pas très claire la position de A. Magdelain, Le consensualisme dans l'édit du préteur, Paris 1958, p. 147-148 n. 327.

48 Ci-dessus, n. 5

49 Cf. Rupprecht, p. 142-146, où (p. 146) cet auteur arrive à la conclusion que "die Bezeichnung des fiktiven Rechts erscheint danach berechtigt".

sceller des tablettes" (ab aliis tabellae obsignabantur)[50], et qu'en Egypte hellénistique les cas de documents contenant des prêts fictifs étaient assez fréquents[51].

Par le biais de ces prêts fictifs, on le sait, on créait des obligations, qui, quoique ne constituant pas juridiquement des "Dispositivurkunden", conduisaient, pourtant, essentiellement aux mêmes résultats quant à leurs affets pratiques[52].

On peut concevoir que dans une telle ambiance hellénistique - les naulotikés elles-mêmes étaient toujours rédigées en l a n g u e g r e c q u e[53] - une clause tendant à produire les mêmes effets que la clause du "prêt-assurance" des documents médiévaux[54] ait pu s'introduire dans ces charte-parties antiques, concernant les transports de marchandises par mer.

Selon cette clause, si notre supposition est vraie, le transporteur - naukléros déclarait dans un document à part, le chirographum en l'occurence, avoir "reçu" une somme, représentant probablement un pourcentage (ou le tout) de la valeur de la cargaison qu'il n'était obligé de restituer au chargeur qu'en cas de réalisation d'un periculum maris[55]. C'est, croyons-nous, à une telle clause que se réfère par deux fois le chirographum discuté.

On remarquera, en effet, que Ménélas, le naukléros, ne déclare pas avoir effectivement reçu la somme des 1.000 dénarii : il déclare "a v o i r é c r i t" qu'il l'a

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50 Cicero, Verr. II, 1, 52, 137. Cf. à ce sujet L. Mitteis Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs, Leipzig 1891 (réimpr. Hildesheim 1963), p. 461 n. 6, 482.

51 Cf. ci-dessus, n. 19.

52 Wolff, Das Recht, p. 144, n. 9, Ankum, Minima, p. 286. Cf. aussi, Rupprecht, p. 138-139.

53 V. ci-dessus, a la n. 31, la définition de Meyer-Termeer, et les observations de M. Amelotti - L. Migliardi Zingale, dans leur communication présentée au présent Symposion (Graz 1993) sous le titre "Dalle tabelle bronzee di Locri alle tavolette cerate di Pozzuoli", qui parlent de la "forma documentale chiaramente greca" du document discuté.

54 Il est important de signaler que parmi les "prêts-assurance" médievaux il y en avait des fictifs, c. à. d. qui n'avaient jamais été réellement remis au chargeur par le transporteur, qui, cependant, était censé les "restituer" en cas de réalisation d'un cas de risicum maris et gentium. Cf. Cassandro, p. 242, et, surtout, Valeri, p. 630-631.

55 La différence entre ces "prêts-assurance" et celui que nous croyons entrevoir grâce à la Tab. Pomp. 13 consistait dans la formulation de la clause sur les risques de la navigation: dans les cas des prêts-assurance médievaux, cette clause était conçue comme formulée sous condition résolutoire, c. à. d. le chargeur (affréteur) n'avait pas à restituer la somme du prêt si le risque de mer se réalisait. Dans le cas antique que nous supposons, le chargeur (affréteur) ne pourrait reclamer la "restitution" du prêt qu'il était supposé avoir remis au transporteur (fréteur) - mais qu'il n'avait pas en réalité remis - que si la condition suspensive de la réalisation du risque de mer survenait. Cette clause faisait, si notre supposition est vraie, partie de la naulotiké, tout comme la clause correspondante des charte-parties médievales.

reçue, et ce, en vertu d'une naulotiké déjà contractée et en vigueur ("scellée")[56]. Quant à la restitution du prêt, le chirographum en grec nous dit qu'elle sera effectuée "conformément aux termes de la naulotiké", alors qu'on s'attendrait à la voir figurer dans le chirographum.

IX.- On peut donc entrevoir les similitudes, mais aussi les différences entre la clause de la naulotiké à laquelle le chirographum se réfère, c.à.d. celle qui prévoit qu'en cas de réalisation d'un periculum maris le naukléros Ménélas paiera les 1.000 dénarii du chirographum à Primus (ou, plutôt, par son intermédiaire, à P. Attius Severus) et les charte-parties médiévales contenant des "prêts-assurance": Dans les prêts-assurance du Moyen-Age, il y a non pas une promesse de paiement, mais - sauf pour les cas des prêts fictifs[57] - une remise effective d'argent de la part du transporteur au chargeur, que le transporteur va perdre définitivement en cas de réalisation du periculum maris.

L'idée est cependant la même dans les deux cas : garantir par le transporteur au chargeur l'heureuse arrivée de la cargaison, et, en cas de réalisation d'un risque de mer, assurer l'indemnisation du chargeur. C'est donc vraiment une autre variante du même principe, celui de l'"assurance" des marchandises par le transporteur-fréteur. Cette clause était contenue dans les naulotikés, tout comme dans les charte-parties médiévales, puisqu'elle ne visait point un vrai prêt à la grosse pour faire l'objet d'un contrat spécial, mais poursuivait un but tout autre, celui d'assurer la cargaison.

Nous pouvons donc à présent réconstituer la situation juridique, à laquelle nos textes font allusion :

Primus, en sa qualité de servus actor de Publius Attius Severus, a frété le navire du naukléros grec Ménélas pour effectuer pour le compte de son maitre le transport par mer d'une cargaison de marchandises de Dikaiarchia à une destination non spécifiée[58]. Pour se couvrir contre les risques de mer, la fréteur a obtenu de l'affréteur Ménélas une déclaration écrite selon laquelle celui-ci est supposé avoir reçu de la part du fréteur P. Attius Severus la somme de 1.000 dénarii qu'il est censé rendre "conformément à la naulotiké", c.à.d. dans le cas où un risque de mer se réaliserait. Cette somme, qui est

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56 Il n'y a pas de doute que pour les Romains ce "scripsi" avait une autre signification (cf. n. 19). Mais pour notre naukléros grec, il n'y avait qu'un seul sens possible dans cet "ἔγραψα" : qu'il avait assumé une obligation de payer un prêt fictif dans le cas où la condition suspensive de la vérification du risque de mer serait réalisée.

57 Ci-dessus n. 54.

58 La conjecture si séduisante de A. Biscardi, Minima de iure civili, dans Sodalitas - Scritti in onore di Antonio Guarino, IV, Napoli 1984, p. 1535-1536, selon laquelle le port de destination du navire de Ménélas était le Pirée, (cf. aussi Wolf, p. 28 et 29) n'est pas, malheureusement, appuiyée par le texte (cf. Ankum, Minima, p. 273-274).

présentée dans le chirographum grec comme un prêt à la grosse, représente la valeur totale de la cargaison (ou un pourcentage de celle-ci) majorée, probablement, du fret déjà payé par le fréteur.

Cette convention, complémentaire à celle du contrat de transport prévu par la naulotiké scellée, est conclue selon le droit maritime coutumier grec-puisqu'elle est rédigée en grec[59] - mais elle est renforcée par une fideiussio d'un citoyen romain, rédigée en latin et régie, elle, par le ius gentium romain[60].

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X.- Résumons à présent pour conclure :

Le premier chirographum qui nous est parvenu dans les deux tablettes de cire constituant un complément d'une naulotiké en grec, avait été, dès le début, lui aussi, rédigé en grec, contrairement à la partie du fideiussor romain (deuxième chirographum), rédigée en latin.

Le chirographum en grec se réfère à une "naulotiké" - une charte-partie antique - en vertu de laquelle un transporteur, le naukléros Ménélas fils d'Irénée, un peregrinus et un Grec de l'Asie Mineure, assumait par une clause spéciale, les risques de la navigation se référant au transport visé par cette naulotiké.

En conformité avec cette clause, le transporteur déclarait dans le chirographum grec avoir "reçu" une somme de 1.000 dénarii, qu'il déclarait être tenu à restituer "conformément à la naulotiké". En réalité, il n'avait jamais reçu effectivement de l'argent :

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59 Le premier chirographum, complément de la naulotiké, était, bien entendu, lui aussi rédigé en grec et, donc, regi par le droit maritime coutumier grec. Le manque de stipulatio poenae, institution du droit romain par excellence, n'est, par conséquent, que parfaitement compréhensible.

60 Au cours de Symposium de 1993, à Andritz (Graz), M. le Professeur G. Thür a attiré notre attention sur un passage de Velleius Paterculus (Hist. Rom. 1,13,4, f) où l'historien, parlant de Lucius Mummius, le destructeur de Corinthe, nous informe qu'après la prise de la ville Mummius envoya par voie de mer des trésors artistiques, provenant du pillage de la ville, en Italie, tout en menaçant d'avance les transporteurs que s'ils perdaient les chefs d'oeuvre qui leur étaient remis, ils devraient lui en fournir d'autres à leur place ("si eas...perdidissent novas eas...reddituros"). Cette histoire, qui montre le degré de manque de culture de Mummius, semble dissimuler, pourtant, un fonds historique. En effet, il semble que les transporteurs des oeuvres d'art ont été contraints d'assumer bon gré mal gré les risques du transport. Le manque d'informations sur le montant du fret payé par Mummius ne permet pas, cependant, à notre avis, à se prononcer de façon définitive sur la question si en l'occurence il ne s'agissait, en réalité, d'un contrat apparenté à celui de l'assurance - au cas où un fret supérieur au normal aurait été payé - contrat que Paterculus, faute de connaissances commerciales, n'a pas su interpréter.

il s'agissait d'un prêt f i c t i f, qui ne serait point payable si le navire arrivait à bon port. C'est pourquoi il n'y a point dans le chirographum en question de mention d'interêts, puisque le soi-disant prêt avait comme but d'assurer le chargeur contre les risques de mer, tout comme les prêts-assurance médiévaux dont nous avons fourni des exemples.

La pratique antique ne constitue donc qu'une variante de celle qu'on rencontre au Moyen-Age.

Gerhard Thür (Graz)

Die Aestimationsabrede im Seefrachtvertrag. Diskussionsbeitrag zum Referat Dimitri C. Gofas

Der Vortragende hat eine faszinierende Lösung eines schier unlösbar scheinenden Textes angeboten. Beide bisher als Alternative vertretenen Deutungen der Tab.Pomp. 13 sind falsch. Seine Lösung dürfte, im Lichte einiger weiterer Quellen betrachtet, zum Ziel führen. Der Text ist oben (Gofas, bei Anm. 19) zitiert.

J. G. Wolf (o.Anm. 37) hat 1979 das Schlüsselwort ναυλωτική (Z. 9 u. 11) sprachlich richtig mit "Seefrachtvertrag" übersetzt; er steht jedoch vor der sachlichen Schwierigkeit, die tausend Denare, deren Rückzahlung Menelaos in der vorliegenden Urkunde verspricht, als Frachtgut zu betrachten. Wozu sollte Primus einen Sack Geldes von Puteoli nach einem nicht einmal genannten Bestimmungsort (s.o.Anm. 58) verschiffen lassen?

H. Ankum (o.Anm. 15) übersetzt ναυλωτική mit *traiecticia*. Der ναύκληρος Menelaos habe von Primus ein Seedarlehen von tausend Drachmen erhalten, Celer habe sich für dessen Rückzahlung verbürgt; eine sachlich sinnvolle, aber sprachlich unhaltbare Deutung (s.o.Anm. 31).

Gofas bleibt bei der Übersetzung "Seefrachtvertrag", stellt jedoch – völlig überzeugend – fest, daß die vorliegende Urkunde nicht dieser Seefrachtvertrag sei, sondern nur auf einen solchen verweise. Die vorliegende Urkunde deutet er als Quittung für ein Darlehen. Es handle sich jedoch nicht um ein "Seedarlehen", das Primus als Kapitalist dem Naukleros Menelaos zugezählt und dieser nun zurückzuzahlen versprochen hätte, sondern um ein "Versicherungsdarlehen": Der Naukleros Menelaos garantiere dem Belader Primus für die heile Ankunft seiner Waren im Bestimmungs-hafen. Zu diesem Zweck sei die vorliegende Quittung für ein allerdings nur fingiertes Darlehen ausgestellt worden. Die "Rückzahlung" werde nur fällig, wenn die Ladung nicht heil ankomme. Diese Bestimmungen ebenso wie die über Fracht, Frachtlohn und den Bestimmungshafen habe der – leider nicht überlieferte – Seefrachtvertrag enthalten, auf den die vorliegende Urkunde verweist.

Gofas untermauert diese auf den ersten Blick etwas kühn anmutende These nicht mit Parallelstellen aus der römischen Geschäftspraxis, sondern mit einer ursprünglich im gesamten Mittelmeer, in ihren letzten Ausläufern bis zum Beginn des 19. Jh. greifbaren

Einrichtung, dem "Versicherungsdarlehen"[1]. Gerade Gofas hat immer wieder gezeigt, wie wenig die Vertragsformulare des Seehandels sich über die Jahrhunderte hinweg geändert haben (vgl. o.Anm. 24); methodisch ist sein Ansatzpunkt voll gerechtfertigt. Mehr Beachtung hätten freilich die römischen Quellen verdient.

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Kurz zusammengefaßt, funktioniert das Versicherungsdarlehen im Mittelalter folgendermaßen: Der Frächter, nennen wir ihn in Anlehnung an unsere antike Urkunde "Menelao", zählt dem Belader "Primo" bei Abschluß des Frachtvertrags ein – unverzinsliches – Darlehen zu. Die Höhe kann den gesamten Wert der Fracht betragen oder einen Teil davon. Primo muß diese Summe nur zurückzahlen, wenn die Ladung im Bestimmungshafen heil ankommt. Menelao gibt dieses Darlehen gewiß nicht gratis. Je nach der Höhe des Darlehens und nach der Gefahr der Reise wird sich der Frachtlohn bemessen. Diese Konstellation ermöglicht eine denkbar einfache Abwicklung des Transportvertrags: Kommt das Schiff heil an, händigt Menelao dem Primo die Ladung Zug um Zug gegen Bezahlung des Frachtlohnes und Rückzahlung der Darlehenssumme aus. Kommt das Schiff nicht an, bedarf es keinerlei Transaktionen. Primo hat zwar die Fracht verloren, bezahlt aber weder den Frachtlohn noch zahlt er das (hoffentlich hoch genug aufgenommene) Darlehen zurück. Gerichtliche Schritte müssen dabei von keiner Seite unternommen werden. Mit dem vor der Reise bar zugezählten Darlehen garantiert also Menelao die sichere Ankunft der Ladung, Primo leistet sein Entgelt dafür nach dem Grad der erworbenen Sicherheit im Frachtlohn. Der Versicherungsgedanke kommt erst dadurch ins Spiel, daß sich bei Menelao die Verluste einzelner wegen Schiffbruchs oder Piraterie uneinbringlich gewordener Darlehen und der Gewinn aus einer Vielzahl glücklich eingegangener, um die Risikoprämie erhöhter Frachtlöhne zumindest die Waage halten sollen.

Von einem derartigen "Versicherungsdarlehen" unterscheidet sich unsere Urkunde, Tab.Pomp. 13, in einem wesentlichen Punkt: Nicht Primus, der Belader, bestätigt den Erhalt des Darlehens von tausend Drachmen, sondern Menelaos, der Naukleros. Die Verhältnisse scheinen also gegenüber der später üblichen mediterranen Praxis genau umgekehrt zu liegen. Gofas' Lösung ist denkbar einfach: Primus habe dieses Darlehen niemals real zugezählt, sondern sich von Menelaos lediglich die Rückzahlung versprechen lassen "gemäß dem Seefrachtvertrag" (Z. 10/11). Mit diesem "fiktiven Darlehen" habe Menelaos die Ankunft der Ladung im Bestimmungshafen garantiert. Primus habe also entweder die Aushändigung der Ladung oder die Bezahlung der

[1] Zusätzlich zu dem von Gofas (o.Anm. 1) zitierten Werk von K. Nehlsen-von Stryk sei noch auf deren Beitrag im Rechtshist. Journ. 8, 1989, 195–208, hingewiesen.

tausend Denare (als "Rückzahlung" des Darlehens) verlangen können. Die folgenden Überlegungen gehen davon aus, daß Gofas die wirtschaftlichen Aspekte richtig gesehen hat. Die rechtliche Gestalt des Geschäftes wird sich freilich etwas schärfer fassen lassen. An der Sache vorbei führt jedenfalls die Bezeichnung "fiktives Versicherungsdarlehen".

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Von einer völlig anderen Quellenbasis her hat sich kürzlich A. Bürge dem römischen Seefrachtvertrag und dessen Risiko genähert[2]. Richtigerweise geht er davon aus, daß der Verfrachter aus der *locatio conductio* nicht für *vis maior* hafte. Verlust der Ladung durch Schiffbruch oder Piraten ist auch vom weiter reichenden *receptum nautarum* nicht erfaßt[3]. Es stand jedoch bei den Vertragsparteien, die Risikoverteilung individuell zu vereinbaren. So wie in den auf Papyrus überlieferten Frachtverträgen mit den Nilschiffern gibt es auch für die Seeschiffahrt in römischer Zeit Hinweise darauf, daß das Risiko für Schiffbruch manchmal vom Schiffer übernommen wurde. Den ältesten Beleg liefert Vell. Pat. 1,13,4: Der Feldherr Lucius Mummius habe sich nach der Eroberung Korinths (146 v. Chr.) dadurch lächerlich gemacht, daß er die erbeuteten Kunstwerke mit der Klausel nach Rom verschiffen ließ, *si eas perdidissent novas eos (scil. conductores) reddituros* (vgl. a. Philogelos 78; Bürge 394f.). Mummius hatte sich offenbar in der Klausel vergriffen. Er hätte für die unvertretbaren Sachen eine Aestimationsabrede treffen, nicht aber wie beim Transport vertretbarer Sachen eine Gattungsschuld begründen sollen. Den Wert der antiken Kunstwerke in Geld, nicht aber billige Kopien hätte Mummius als Ersatz vereinbaren sollen. Daß solche Vereinbarungen, womit der Schiffer alle Gefahr auf sich nimmt, sich in erhöhtem Frachtlohn niederschlagen, beweist Philogelos 81: ἐγὼ δὲ δέκα Ἀττικὰς πλέονας δοὺς κινδύνῳ τοῦ κυβερνήτου πλέω (Bürge 396). Hier fehlt allerdings der Bezug auf römische Vertragspraxis (s. aber Gofas, o.Anm. 47, zu der nicht eindeutigen Stelle Ulp. 73 ed. D 20,4,6,1).

Für die Interpretation unserer Urkunde wichtig sind die Überlegungen, wie man in Rom die Übernahme des vollen Transportrisikos technisch bewältigte. Für die Verschiffung vertretbarer Sachen liegt die Begründung einer Gattungsschuld auf der Hand. Bürge (398) vermutet, die *condictio triticaria* habe sich speziell zur

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2 Seinen auf der SIHDA 1992 in Amsterdam gehaltenen Vortrag hat A. Bürge in Index 22, 1994, 389–407, publiziert. Wie sich nunmehr zeigt, hat er die bereits dort zur Diskussion gestellte Tab.Pomp. 13 zu Unrecht nicht in den Kreis seiner Quellen mit einbezogen.

3 Zum *receptum nautarum* s. Gofas (o.Anm. 47) und Bürge 391 (mit Anm. 9). Ansprechend vermutet Bürge, daß die sogenannte *exceptio Labeonis* (*si quid naufragio aut per vim piratarum perierit*; Ulp. 14 ed. D 4,9,3,1) bereits von Anfang an mit dem *receptum* verbunden war. Die Seegefahr hat mit der von Pomponius getadelten *improbitas hoc genus hominum* nichts zu tun.

Haftungsübernahme im Seefrachtvertrag herausgebildet. Daß vertretbare Sachen Gegenstand eines Darlehens sein können (*possumus in creditum ire*, Paulus 28 ed. D 12,1,2,1), versteht sich von selbst. Wird das Transportrisiko für unvertretbare Sachen, etwa die Kunstschätze des Mummius, übernommen, muß deren Wert sinnvollerweise bei Vertragsschluß geschätzt werden. Auch für die Schätzung unvertretbarer Sachen mit der Folge, daß die Gefahr auf den Übernehmer übergeht, wird eine ähnliche Wendung, *in creditum abire*, gebraucht (Ulp. 29 ed. D 14,4,5,18; weitere Belege Bürge, Anm. 31). In diesem speziellen Fall geht mit der Schätzung offenbar auch das Eigentum an den zum Verkauf überlassenen Waren über. Der Übergeber hat nur noch eine Geldforderung, aus Darlehen, die zwar unabhängig vom weiteren Schicksal der hingegebenen Sachen besteht, ist im Konkurs des Übernehmers jedoch auf die Quote beschränkt.

Im Seefrachtvertrag will der Belader seine Sache nicht veräußern, sondern wohlbehalten transportieren lassen. Nur im Falle des Schiffsbruchs oder der Piraterie will er die vertraglich vereinbarte Haftungssumme kassieren. Ebenso wie der Schiffer beim Getreidetransport die Haftung für die Seegefahr durch die Vereinbarung eines Getreidedarlehens übernehmen konnte, konnte er die Haftung für eine unvertretbare Sache durch die Vereinbarung eines Gelddarlehens begründen. In den Frachtvertrag dürfte neben dem allgemein üblichen *receptum rem salvam fore* noch ausdrücklich das *periculum* des Schiffers mit aufgenommen worden sein (vgl. den oben zitierten Philogelos 81; zum *recipere* eines *periculum* in anderem Zusammenhang s. Ulp. 36 ed. D 27,8,1 pr.). Neben dem Frachtvertrag wird eine Darlehensurkunde errichtet, die unter Bezug auf den Frachtvertrag den vereinbarten Wert der übernommenen Fracht als Darlehenssumme nennt. Da der Schiffer die Fracht tatsächlich übernommen hat, besteht nach römischer Auffassung kein unüberwindliches Hindernis, für den Fall des Unterganges der Sachen deren Wert als Darlehen geschuldet zu betrachten[4].

Man könnte sich, diese kleine Betrachtung abschließend, fragen, warum die Römer die *aestimatio* der Fracht nicht in eine Stipulation kleideten. Sie hätten damit die dogmatisch nicht ganz saubere Lösung über das Darlehen vermeiden können. Das dürfte daher rühren, daß der Seefrachtvertrag im Mittelmeerraum bereits seine festen Formen hatte, als ihn die römischen Händler übernahmen. Auch wenn die Wurzeln der Haftungsübernahme im "fiktiven Darlehen" der hellenistischen Rechtsauffassung liegen (Gofas, o.Anm. 19 und bei Anm. 49–52), darf man nicht übersehen, daß die Parteien in Puteoli die römische Form der Urkunden (ἔγραψα. p.2,6 – *scripsi,* p.3,4) und nicht das griechische ὁμολογῶ gebrauchten (s. Gofas o.Anm. 19). Das "fiktive Darlehen" reicht in Rom nicht aus. Nach römischer Auffassung mußte ein reales Element vorhanden sein.

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4 Zu der bekannten Kontroverse um das "Vereinbarungsdarlehen", Ulp. 31 ed. D 12,1,15 und Afr. 8 quaest. D 17,1,34 pr., s. Kaser RP I^2 531; in die Diskussion mit einzubeziehen sind die oben erwähnten Wendungen wie *in creditum ire* (vgl. Bürge, Anm. 31).

Das liegt in der Übergabe der Fracht; die Rückgabe kann als Rückzahlung eines Gelddarlehens vereinbart werden.

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Aufbauend auf den Überlegungen Gofas' suchte ich zu zeigen, daß Tab.Pomp. 13 inhaltlich nichts anderes ist als eine "Aestimationsabrede" für den Fall, daß sich die vom Naukleros Menelaos übernommene Seegefahr verwirklichte. Das Geschäft wurde in die Form eines Darlehens gekleidet, weil der Belader Primus sich auf diese Weise eine *condictio* sichern konnte. Vielleicht wirkte das Vorbild des hellenistischen "fiktiven Darlehens" noch nach, das in ähnlicher Weise eine abstrakte Forderung entstehen ließ. Dem Belader ging es lediglich darum, ein Forderungsrecht zu erwerben. Das "Darlehen" war nur leere Form. Der Schiffer übernahm damit in einer vereinbarten Höhe das Risiko der Seegefahr, der Belader zahlte dafür einen erhöhten Frachtlohn. In dieser von Gofas klar erkannten Funktion ist Tab.Pomp. 13 ein wichtiger Beleg für eine "Aestimationsabrede", die eine objektive Haftung begründet.

Gofas hat auch gezeigt, daß die Belader in wirtschaftlich und politisch unsicheren Zeiten sich nicht mehr mit einer Garantie der Verfrächter begnügten, die sie gerichtlich hätten durchsetzen müssen. Sie verlangen die Garantiesumme bar im voraus. Aus der haftungsbegründenden "Aestimationsabrede" wird das "Versicherungsdarlehen".

QUELLENREGISTER

bearbeitet von Kaja Uibopuu, Graz

1.1. Griechische und lateinische Schriftsteller

1.2. Lexikographen

1.3. Römische Rechtsquellen

2. Inschriften

3. Papyri, Tabulae, Ostraca

4. Sonstige Quellen

AKTEN DER GESELLSCHAFT FÜR GRIECHISCHE UND HELLENISTISCHE RECHTSGESCHICHTE

Begründet von Hans. J. Wolff

Herausgegeben von Arnaldo Biscardi/
Joseph Mélèze-Modrzejewski/ Gerhard Thür

-Nicht aufgeführte Bände sind vergriffen-

Bd. 2: Hans J. Wolff (Hrsg.): **Symposion 1974.** Vorträge zur griechischen und hellenistischen Rechtsgeschichte. (Gargnano am Gardasee, 5.-8. Juni 1974) 1979. VIII, 418 S. Gb. DM 140,-/ öS 1092,-
ISBN 3-412-04778-3

Bd. 3: Joseph Modrzejewski/ Detlef Liebs (Hrsg.): **Symposion 1977.** Vorträge zur griechischen und hellenistischen Rechtsgeschichte. (Chantilly, 1.-4. Juni 1977) 1982. XXVIII, 446 S. Gb. 1 Abb. DM 198,-/ öS 1545,-
ISBN 3-412-06680-X

Bd. 5: F.J. Nieto (Hrsg.): **Symposion 1982.** Vorträge zur griechischen und hellenistischen Rechtsgeschichte. 1990. VI, 317 S. Gb. DM 138,-/ öS 1077,-
ISBN 3-412-02189-X

Bd. 6: Gerhard Thür (Hrsg.): **Symposion 1985.** Vorträge zur griechischen und hellenistischen Rechtsgeschichte. (Ringberg, 24.-26. Juli 1985). 1990. XIII, 470 S. Gb. DM 188,-/ öS 1467,- ISBN 3-412-09988-0

Bd. 7: Guiseppe Nenci/ Gerhard Thür (Hrsg.): **Symposion 1988.** Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Siena-Pisa, 6.-8. Juni 1988). 1991. X, 447 S. Gb. DM 128,-/ öS 999,-ISBN 3-412-16289-2

Bd. 8: Michael Gagarin (Hrsg.): **Symposion 1990.** Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Pacific Grove, Cal., 24.-26. September 1990). 1992. 324 S. Gb. DM 118,-/öS 921,- ISBN 3-412-00192-9

Bd. 9: Inschriftliche Gesetzestexte der frühen griechischen Polis. Aus dem Nachlaß von Reinhard Koerner herausgegeben von Klaus Hallof. 1993. XXXVI, 603 S. Gb. DM 178,-/öS 1389,- ISBN 3-412-02393-0

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BÖHLAU

Jörg Gebhardt

Prügelstrafe und Züchtigungsrecht im antiken Rom und in der Gegenwart

(Dissertationen zur Rechtsgeschichte, Band 4)

1994. XLVII, 267 Seiten. Broschur. ISBN 3-412-03194-1

In der römischen Antike konnte ein Magistrat aufgrund seiner Koerzitionsgewalt die Prügelstrafe anscheinend auch ohne vorherige förmliche Verurteilung des Betroffenen anordnen, und zwar als Haupt-, Ersatz- und Zusatzstrafe. Im Unterschied zu anderen historischen Rechtsordnungen war aber das Ausmaß, d. h. die Anzahl der Stock- und Peitschenhiebe, nicht in den römischen Rechtsquellen festgeschrieben. Das Ausmaß der Prügelstrafe war dem Ermessen des Magistrats überlassen, also arbiträr. Dies führt zur Frage der sozialen Bewertung der Prügelstrafe und veranlaßt den Verfasser, der „Sozialpyramide" der römischen Gesellschaft eine „Strafenpyramide" gegenüberzustellen.
Unterschieden wird zwischen der kriminalrechtlichen Prügelstrafe (als Sanktion der Gemeinschaft auf strafwürdiges Unrecht) und dem privaten Züchtigungsrecht. In dem zweiten Hauptteil der Arbeit sucht der Verfasser dann Antworten auf folgende Fragen: Wer durfte züchtigen? Gab es Grenzen des Züchtigungsrechtes - und welche? Dabei zeigt der Verfasser an zahlreichen Beispielen und Quellentexten die Bedeutung der „humanitas" auf. In der rechtlichen Begrenzung der Züchtigung liegt der Ursprung für das Verbot des Rechtsmißbrauchs.

Über problematische Einzelfälle körperlicher Züchtigung aus neuester Zeit außerhalb und innerhalb Deutschlands, die Gegenstand der Rechtsprechung des BGH und des EuGH waren, leitet der Verfasser über zur aktuellen Diskussion um ein gesetzliches Verbot der Züchtigung in 1631 Abs. 2 BGB.

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Claudia Albrecht

Bismarcks Eisenbahngesetzgebung

Ein Beitrag zur ‚inneren' Reichsgründung in den Jahren 1871-1879

(Rechtsgeschichtliche Schriften, Band 6)

1994. L, 128 S. Gb. ISBN 3-412-03094-5

Nach der Gründung des Deutschen Reiches mußte Bismarck auch die inneren Lebensverhältnisse einander angleichen, um den neuen Staat lebensfähig zu machen. Diese ‚innere' Reichsgründung stand deshalb fortan im Mittelpunkt seiner Politik. Das vorliegende Buch schildert, wie er das zersplitterte Eisenbahnwesen im Interesse des Reiches und der Wirtschaft durch Gesetze zu vereinheitlichen suchte und wie er dabei auf den erbitterten Widerstand der auf ihre Selbständigkeit bedachten Klein- und Mittelstaaten und der Privatbahngesellschaften stieß. Die Reichsverfassung gestattete ihm nur, das Militäreisenbahnwesen reichsweit zu vereinheitlichen. Eine zentrale Lenkung der deutschen Bahnen durch das Reich oder gar eine „Deutsche Reichsbahn" konnte er politisch jedoch nicht verwirklichen. Dagegen war die 1879-1888 durchgeführte Verstaatlichung der preußischen Privatbahnen ein voller Erfolg: Der damit verbundenen Wirtschafts- und Verkehrsmacht konnten die übrigen deutschen Bahnen keine eigenständige Politik mehr entgegensetzen; sie mußten sich zu den Angleichungen und Vereinheitlichungen bequemen, die sie zuvor so leidenschaftlich bekämpft hatten. Die „Deutsche Reichsbahn" entstand erst 1921, als die Eisenbahnen Zuschußbetriebe geworden waren.

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