THE RULE OF THE PEOPLE AND THE RULE OF LAW IN CLASSICAL GREEK THOUGHT

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Editorial

The legitimacy of modern liberal democracies is based on the implicit assumption that democracy is closely aligned with the rule of law. Their connection seems to be the keystone of any community that considers itself democratic and based on the universal values of equality and human rights.[1] However, if we leave the level of declarations and self-presentations of regimes and look at real politics, the situation no longer seems so clear-cut. First of all, the connection between the rule of the people and the rule of law does not apply universally, but is rather a historically limited phenomenon. At a time when the modern understanding of the rule of law or the Rechtstaat was being established, the rule of the people was seen as a threat to it rather than as its natural constitutional base.[2] Only after democracy began to be considered the best, and in fact the only acceptable form of government (roughly, from 1915),[3] has the connection between the two concepts come to seem necessary and natural. The model of a political system thus conceived, in which democracy, as a way of selecting those who hold power, and the rule of law, as the way in which this power is exercised, exist simultaneously, has long been considered normative; this model corresponded typically to the political reality of the countries of post-war Western Europe and North America, i.e. those that, in the view of political scientists, belonged to the stable "canon" of Western democracies.[4]

1 "Human rights, the rule of law and democracy are interlinked and mutually reinforcing and … they belong to the universal and indivisible core values and principles of the United Nations". *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, (A/67/L.1), 19. September 2012, par. 5, available at http://unrol.org/files/Official%20Draft%20Resolution.pdf.

2 A. de Tocqueville, *De la démocratie en Amérique*, Paris 1835–1840, II, p. 356; J. S. Mill, *On Liberty*, London 1859, pp. 7–9; J. Burckhardt, *Griechische Kulturgeschichte*, Berlin 1908, I, pp. 84 f.

3 M. H. Hansen, *Was Athens a Democracy? Popular Rule, Liberty and Equality in Ancient and Modern Political Thought* (Historisk-filosofiske Meddelelser, 59), Copenhagen 1989, p. 5.

4 See, e.g., M. Duverger, *Les partis politiques,* Paris 1951; G. Sartori, *Parties and Parties Systems. A Framework for Analysis*, Cambridge 1976.

With regard to this political model, the issue of the transitions of undemocratic regimes to democracy (whether in Central and Eastern Europe or in Latin America or Asia) has also been studied by political scientists for the last thirty years. The need for a legal framework, and therefore for the rule of law, was seen as a necessary complement to the process of democratization.[5] At the same time, however, it has become more and more obvious that democracy and the rule of law haven't become mutually reinforcing in many cases, with a number of post-authoritarian states developing a model of illiberal democracy characterized by the separation of these two principles, typically while maintaining majority rule but without guaranteeing the rule of law. In addition, we have recently seen not only in the newly transformed countries, but also in some old Western democracies, a gradual rise of populism accompanied by a process which, though being called *democratic backsliding*,[6] consisted not primarily in the retreat of democracy, but on the contrary in the decline of the rule of law.

This state of affairs raises a strong need to rethink the foundations of our political order. It must first be admitted – in accord with some contemporary political theorists – that in today's democracies, the relation of the rule of the people and the rule of law seems to be a rather ambivalent issue.[7] Second, we should focus more than before on the fact that the rule of law is *conceptually* independent of democracy, since its rationale is meant to confront power regardless of its shape or of its autocratic or democratic nature.[8] Then, after excluding beliefs shared rather unconsciously so far, and after putting off the fear of corrosion of our well-known political world, we can think about what remains as a possible starting point for finding a new legitimization for our politics.

It is arguable that in this thinking we can benefit – as in other areas of political and spiritual life – from the lessons and inspirations of ancient Greek political thought. It is here that significant parallels with our time can be seen. And although the scholarly debate on the extent to which the Greek conceptions of democracy and the rule of law are principles comparable to

5 See, e.g., J. J. Linz – A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*, Baltimore – London 1996, pp. 6–7. Cf. J. Ferejohn – P. Pasquino, *Rule of Democracy and Rule of Law*, in: J. M. Maraval – A. Przeworski, *Democracy and the Rule of Law*, Cambridge 2003, pp. 242–260.

6 N. Bermeo, *On Democratic Backsliding, in: Journal of Democracy*, 27, 2016, pp. 5–19.

7 J. Raz, *Ethics in the Public Domain*, Oxford 1994, p. 361; R. Dworkin, *Law's Empire*, Cambridge (Mass.) 1986, p. 376; L. Morlino – G. Palombella, *Introduction*, in: *id.* (eds.), *Rule of Law and Democracy. Inquiries into Internal and External Issues*, Leiden – Boston 2010, p. ix.

8 G. Palombella, *The Rule of Law as an Institutional Ideal*, in: L. Morlino – G. Palombella (eds.), *Rule of Law and Democracy*, p. 33.

the modern ideas is still open,[9] it is at least remarkable that we encounter here similar ambivalences and a corresponding series of historical changes.

Also for many ancient Greeks during the classical epoch, democracy has been closely associated with the dominant role of law.[10] Equality under the law (*ison*, *isonomia*) presented – besides liberty (*eleutheria*) – one of the principles which the ancient Greek democracy was based on;[11] *demokratia* could either be directly defined as *isonomia*[12] or at least described as a political system in which the law rules and prevailes over any privilege.[13]

The key to this development is the establishing of the concept of law, which includes the notion of regularity and repetition and is related to the moral notions of punishment and reward. Human laws were understood as given by the gods, which was an extremely strong intuition that retroactively influenced the origin of the concept of natural law and whose wide acceptance was not abolished by the reinterpretation of the origin of law in Greek materialism, whether philosophical or sophistic; this intuition was also incorporated into an attempt to intellectualize the concept of law in the Socratic-Platonic tradition.

The belief in the divine origin of laws also persisted in the distinction between written law, valid for individual cities, and unwritten, universally valid law,[14] both of which were crucial for the emergence of the notion of the rule of law in the classical era. On the one hand, the concrete form of the

9 M. H. Hansen, *Was Athens and Democracy?*, holds the thesis that contemporary democracy corresponds to the ancient one, both as an ideal and from an institutional point of view (although he acknowledges that the Athenians did not know the division of powers). J. Bleicken, *Die athenische Demokratie*, Padeboron 1986, kap. XVI, emphasizes rather the differences between Athenian and modern democracy.

10 See Aeschines, 1,4–6, 3,6; Euripides, *Suppl.* 406 ff.; Thucydides, *Hist.* II,37,1–3; ps.-Xenophon, *Ath. pol.* 1,4 f.

11 Aristotle, *Pol.* 1310a28–33.

12 See Herodotus, *Hist.* III,80,6, 83,1. J. W. Jones, *The Law and Legal Theory of the Greeks*, Oxford 1956, p. 90; J. Bleicken, *Die athenische Demokratie*, p. 47.

13 Thucydides, *Hist.* III,79; Andocides 1,87. M. H. Hansen, *The Athenian Democracy in the Age of Demosthenes*, London 1999, pp. 81 ff., takes a different position, claiming that *isonomia* was not a current political concept at all. Ch. Meier, *Die Entstehung des Begriffs „Demokratie". Vier Prolegomena zu einer historischen Theorie*, Frankfurt a. M. 1970, pp. 7 ff., 44–49; *Id.*, *Der Wandel der politisch-sozialen Begriffswelt im 5. Jahrhundert v. Chr.*, in: *Archiv für Begriffgeschichte*, 21, 1977, pp. 7–41, distinguishes *isonomia* together with *eunomia* on the one hand and *demokratia* together with other "cracies" on the other as two different stages in the development of Greek politics.

14 Srv. A. Lesky, *Der Kampf um die Rechtsidee im griechischen Denken*, Athen 1968; differently R. Hirzel, *Ἄγραφος νόμος* (Abhandlungen der philosophisch-historischen Classe der Königlichen Sächsischen Akademie der Wissenschaften, 20), Leipzig 1900, p. 96, who understands the tension between unwritten and written law as a conflict between divine law and human norms or between the universal law of nature and individual rights. Similarly M. Oswald, *Nomos and the Beginnings of the Athenian Democracy*, Oxford 1969, pp. viii, 55–56.

isonomy, i.e., equality before the law, was associated with and guaranteed by written law;[15] on the other hand, the rule of law represented the Panhellenic ideal, which constituted the common identity of otherwise diverse Greek communities.[16]

In addition to equality before the law, the rule of law included the principle of distribution of power among different offices, which is probably a key principle for the establishing of the very concept of a *politeia*,[17] as well as the principle of the responsibility of officials. The fact that officials were held accountable before special authorities and that any citizen could hold an official accountable and accuse him of breaking the law was considered a democratic principle.[18] It is in these institutions and in the related idea of an immutable *nomos* (as opposed to a mere *psephisma* issued by an assembly or council), where the people cannot change the essentials of the system, that a certain dynamics of the relationship between the rule of law and democracy develops and goes beyond the meaning of democracy itself.[19]

However, shortly after democracy was established as the most widespread constitution in Greece, this internal relation between the rule of law and democracy came into question. These changes are usually associated with the sophistic movement. While the first generation of sophists, led by Protagoras still accepts the essential connection between democracy and the rule of law (although out of merely pragmatic reasons and based on their relativism), the second generation of sophists, represented by the figures of Thrasymachus and Callicles in Plato's dialogues, reinterprets this connection in a rather radical way. Claiming that the rule of people is actually the rule of the weak over the strong, they degraded the law, on which this rule is based, to an artificial instrument of power by which the prevailing majority pursues their own goals. This position, which certainly has its presuppositions in the field of general beliefs about the goal of life and happiness, can be understood in two ways: either in the light of moral skepticism and relativism, where the given diagnosis is only a description of sociological facts (this

15 Andocides, I,85, 87, 89.

16 E. M. Harris, *Solon and the Spirit of the Law in Archaic and Classical Greece*, in: *Democracy and the Rule of Law. Essays in Law, Society, and Politics*, Cambridge 2006, p. 25.

17 Crucial here is the terminological isolation of the term *politeuma* for the civic body, where the term *politeia*, which originally included *politeuma*, continues to denote only relations between institutions. The Greek constitutional teaching from Herodotus through Plato and Aristotle to Polybius presupposes this narrow usage. Also the modern concept of the constitution was created by abstraction from this narrow usage. In this narrower context, the concept of constitution is indeed closely linked to the concept of law. See Aristotle, *Pol.* 1292a32.

18 Herodotus, *Hist.* III,80,6; Aristotle, *Ath. pol.* 43,4, 45,2, 48,3–4, 61,2.

19 M. Ostwald, *From Popular Sovereignty to Sovereignty of Law: Law, Society and Politics in Fifth-century Athens*, Berkeley 1987, p. 497, even talks about "subordinating the principle of popular sovereignty to the principle of sovereignty of laws".

position is also associated with legal positivism), or as a normative teaching of moral egoism, according to which the law as an instrument in the hands of a stronger majority oppresses, contrary to nature, the naturally superior minority and prevents excellent individuals from ruling.

Also as a reaction to this sophistic interpretation, Plato denied the original identification between the rule of the people and the rule of law and set them rather as opposites, at least to the extent that the rule of the people is understood – similarly to the sophists – as the rule of the majority oppressing the minority. Against a democracy understood in this way, the law (*nomos*) is conceived as a manifestation of the rational and divine order and its sovereignty over the purely human interests is emphasized. This intellectualization of the law, combined with the radicalization of the demand of the rule of law,[20] has also contributed to the extension of the concept of *nomos* to natural phenomena and thus to the constitution of the concept of natural law. That the law should rule and prevail unconditionally, is precisely the point at which the central issue of Platonic political philosophy occurs, namely that of relation between the prevalence of the law and the sovereignty of philosophical knowledge.

Tracing a basically similar path as his teacher, Aristotle made the sovereignty of law the criterion of the good constitution and in a more specific context of his constitutional taxonomy, he made the rule of law the differentiating feature of various types of moderate democracy, indicating that insofar as a democratic constitution is ruled by law, it in fact presents less of a democracy.[21] Even in the second context of his political theory, which instead of a comparative constitutional taxonomy emphasizes the normative view of politics, Aristotle is a supporter of nomocracy, claiming that it is the law who should rule. Precisely for this clear-cut argument, contrasting the rule of law with the rule of man (and without need for further qualification whether the man in question is a philosopher or not), Aristotle is more generally accepted as one in whom the idea of the rule of law clearly finds application.

However, while sharing concerns about the risks of the unlimited rule of the people, Plato and Aristotle tried to avoid the strict opposition of de-

20 The debate over whether to consider this constellation to be comparable to the modern rule of law (with G. R. Morrow, *Plato and the Rule of Law*, in: *The Philosophical Review*, 50, 1941, pp. 105–126; and G. Klosko, *Knowledge and Law in Plato's Laws*, in: *Political Studies*, 56, 2008, pp. 456–474, giving the affirmative response, on one side, and F. L. Lisi, *Plato and the Rule of Law*, in: *Méthexis*, 26, 2013, pp. 83–102, on the other) is still ongoing, as our volume also expresses.

21 See J. Ober, *Mass and Elite in Democratic Athens*, Princeton 1989, p. 303, who holds the view that Aristotle contrasted the rule of law and the rule of the people.

mocracy and the rule of law by (a) a relative appreciation of the existing empirical legislation (especially the law code of Athens) including its clearly democratic aspects and by (b) conceiving *nomos* as a form of public reason that can persuade the majority to live a lawful life. Being a direct alternative to the impact of demagogues the rational or – in case of those who are not able to participate in reason directly – semi-rational discourse can reconcile the rule of people with the rule of law: in such a constitution the majority is eligible for responsible political participation since it has been formed by the *logos* of the law.

In this special issue of the Philosophical Journal, papers dealing with the above-mentioned issues are gathered. Their original versions were presented at the XIX. Annual Meeting of the Collegium Politicum, hosted by the University of Pardubice in May 2019. Their revised versions gathered in this volume are arranged chronologically but some of them focus also on reception of ancient Greek thought and on its impact on today's politics.

Thanks of the editor of this volume belong to the University of Pardubice, which enabled the aforementioned meeting to take place, and especially to Aleš Prázný and Ondřej Krása, who participated in its organization. I am also indebted to the reviewers of the individual papers, as well as to the reviewers of the entire volume; I further thank Willliam Wood, who proofread the contributions of non-native speakers, as well as to the editors of the Philosophical Journal, and especially the editor-in-chief for their helpful approach.

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The Rule of Law and the Law of Nature

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Summary
Traditionally, the understanding of the Greek notion of νόμος, especially concerning the notion as it was conceived in Athens, has been hindered by a tendency to project modern interpretations of the law onto the ancient mentality and praxis. The first confusion comes from the exclusive identification of νόμος with the modern concept of law, which originates in the Roman tradition and has substantial semantic and practical differences with the Greek notion. The paper presents a diachronic consideration of the concept of *nomos* and explains how the word acquired the different meanings that led to its classical function, especially in the Athenian democracy, as 1. order that organizes the behaviour of the individual and the society, 2. the democratic notion of "rule of law", 3. the notion of "the law of nature" and its relationship with our concept of "natural law", and 4. the democratic and Platonic notions of rule of law, their differences and similarities. The central hypothesis of the paper is that the semantic kernel of *nomos* is not only linked to the concept of "distribution", or rather "just distribution", but also to the notions of "order" and "repetition" in the different fields of human action through the idea of the hierarchic distribution of values in human society. Finally, the paper points to Plato's concept of "rule of law" and its value for us, underlining the danger of some philosophical positions, such as perfectionism, as involving a revival of totalitarian ideas.

Introduction

In his opus on the history of the formation of some of the main concepts of our contemporary mentality, Rudolf Eucken heads the chapter on the law with the following motto of the Chinese philosopher Confucius:

> To know that you know what you know and to know that you do not know what you do not know, this is the true science.[1]

1 R. Eucken, *Geschichte und Kritik der Grundbegriffe der Gegenwart*, Leipzig 1878, p. 115.

This is just the central problem of hermeneutics, the mother of all knowledge, especially scientific knowledge. Karl Popper's fundamental work for understanding Plato's political philosophy[2] considers as the major gnoseological mistake of Plato's doctrine the belief in an equivalence between natural and social laws, i.e. that development in society occurs based on rules similar to the laws which exist in nature. In what follows, I shall try to show that the modern concept of a law of nature has its origin in the classical notion of law. The idea of regularity and repetition, which are the core of the contemporary notion of natural law, is a projection of the perception of social regularity. Traditional Greeks believed that this regularity comes from the superior design of the gods, insofar as what happens in the natural world is also a reflection of this divine will. This is a very complex issue that I cannot consider here in the depth it deserves. My intention is much humbler: I want only to point to the fact that the idea that the natural world is composed of a totality of regular, repetitive and predictable phenomena is a projection of a political concept which originated, at least to the point I can follow it, in the reality of the Greek polis.

I must also anticipate that this hypothesis is not entirely original. In his scholarly impressive contribution *Antike Vorstufen des modernen Begriffs des Naturgesetzes* Wolgang Kullmann maintains:

> Die Metapher von göttlichen Regeln und Gesetzen, die nach Analogie menschlicher Gesetze das ganze kosmische Geschehen einschließlich der menschlichen Angelegenheiten bestimmen, stammt aus der archaischen Zeit Griechenlands. Wir finden sie schon bei Hesiod, dann besonders deutlich bei Heraklit. In der Zeit der Sophistik wird dieser Gedanke zugunsten einer strikten Trennung von Natur und Kultur … zurückgedrängt. In der klassischen Philosophie von Platon und Aristoteles und in der aristotelischen Naturwissenschaft wird die Welt als ewig und ungeworden betrachtet und die Vorstellung von Gesetzen, nach denen sie lebt, als zu metaphorisch aufgegeben.[3]

2 K. Popper, *The Open Society and Its Enemies*, London 1945.

3 W. Kullmann, *Antike Vorstufen des modernen Begriffs des Naturgesetzes*, in: O. Behrends – W. Sellert (eds.), *Nomos und Gesetz. Ursprünge und Wirkungen des griechischen Gesetzesdenkens. 6. Symposion der Kommission „Die Funktion des Gesetzes in Geschichte und Gegenwart"* (Abhandlungen der Akademie der Wissenschaften in Göttingen. Philologisch-Historische Klasse, 209), Göttingen 1995, p. 107 (= *id.*, *Naturgesetz in der Vorstellung der Antike, besonders der Stoa. Eine Begriffsuntersuchung*, Stuttgart 2010, p. 136). This hypothesis had been defended before by R. Eucken, *Geschichte und Kritik der Grundbegriffe der Gegenwart*, Leipzig 1878.

Kullmann traces an evolution of the concept of the law of nature in which the main contribution is attributed to the Stoics and the Christian thinkers. He describes a history of the idea based mainly in the textual occurrences of the word *nomos* and sometimes in the idiom ὁ τῆς φύσεως νόμος and its variants. Contrary to Eucken's and Kullmann's opinions, this paper tries to show that the way that leads to the modern notion of a law of nature[4] has its origin in Plato and the Academic tradition, including Aristotle and his school.

1. Preliminary methodological issues

Before beginning with the subject, I would like to advance some hermeneutical precisions:

1. One of the main obstacles for the interpretation of the origin of the notion of "natural law" lies in the usual confusion between the actual concept of "the rule of law", i.e. the order ruling in a given society that lives following its laws and customs and the theoretical formulation of the concept of "the rule of law" (ἀρχὴ τῶν νόμων; νόμος δεσπότης).[5] Indeed there are many expressions similar to the one occuring in the famous fragment 169a (Snell-Maehler) of Pindar, but I am referring here to the theoretical determination of the concept.

2. The same statement is valid for the law of nature: one thing is to recognize and to work with the regularities and limitations existing in nature, and a completely different issue is the theoretical formulation of the notion of "natural law". In this case, it is not enough to refer vaguely to "laws of nature".

3. Greeks have never had a theoretical notion of natural law in a modern sense; therefore, we cannot limit our research to the occurrences of the idiom "law/s of nature". However, although they did not have a similar concept, they established the foundation for the long development of the idea.

4. A further point is the projection of contemporary views in an ancient text. I am primarily referring to the opposition between law and nature. In general, it is assumed that these terms have the same meaning as they have today. Although there was a certain contradiction between both words, in

4 I understand a "law of nature" or a "natural law" as a general statement about necessary and regularly occurring processes which are independent of the will of human beings.

5 As seems to be the case in, e.g., M. Ostwald's (*From Popular Sovereignty to the Sovereignty of Law. Law, Society, and Politics in Fifth-Century Athens*, Berkeley – Los Angeles – London 1986.) and H. J. Gehrke's (*Der Nomosbegriff der Polis*, in O. Behrends- W. Sellert [eds.], *Nomos und Gesetz. Ursprünge und Wirkungen des griechischen Gesetzesdenkens. 6. Symposion der Kommission „Die Funktion des Gesetzes in Geschichte und Gegenwart"* [Abhandlungen der Akademie der Wissenschaften in Göttingen. Philologisch-Historische Klasse, 209], Göttingen 1995, pp. 13–35) contributions.

some cases very pointed as for Plato's Callicles in the *Gorgias*, it does not necessarily mean that the whole conventional order of society and the whole of nature were conceived as opposed, even contradictory, as a whole, as could be believed according to some interpretations based on the well-known book of Heinimann.[6]

5. It is too often forgotten that Greek society is the product of a long historical evolution, especially in the case of the norms regulating the interrelation of the members of the community. Anthropological, sociobiological, and behavioural research among many other disciplines has already demonstrated that the essential elements determining human behaviours, like imitation, repetition and the so-called ratchet effect, are indeed prehuman and already exist in hominids and in a limited way in apes in general. The same can be stated about the contamination in customs, behaviours, and knowledge produced by the contact between the Mediterranean peoples. Plato observed this fact.

6. It is also often presumed that the history of ideas, if not history in general, exhibits a continuous, homogeneous and unidimensional progress without reversals, changes, contaminations, etc. This is not always the case, and in the field that I am considering here, there was never straightforward progress; among other reasons, because different conceptions about the law of nature coexisted throughout the whole of antiquity and there was no Hegelian *Aufhebung* in proper sense.

7. Two characteristics distinguish the modern concept of natural law: (a) its repeatability and (b) its mathematically formulatable structure. By (a), I understand the fact that every natural law can be repeated, i.e. confirmed, in an experiment. With (b) I am referring to the conviction that every natural law can be expressed in mathematical formulae, which reflect its regularity.

The expositions about the origin of the idea of natural law suppose that an independent and progressive discovering of natural causation has taken place. At least among the classicists, this supposition goes together with the conviction that this process has taken place only in the classical world, especially in Greece at a late historical stage or in Rome without the influence of other civilizations. These premises raise vast and complex issues, which I cannot develop in this paper. I shall mainly limit my task to showing the significance of the Academic tradition in the process of understanding the external world on the basis of mathematical relations.

6 F. Heinimann, *Nomos und Physis. Herkunft und Bedeutung einer Antithese im griechischen Denken des 5. Jahrhunderts*, Basel 1945; cf. É des Places, *Nature et loi*, in: *L'Antiquité Classique*, 16, 1947, pp. 329–336.

2. The conceptions of natural law in the classical world

I do not suppose that there is a progressive discovery of natural causation by the Greeks. I take as given that hominids, like other animals, had a relatively clear perception of causation, or at least, they saw that some phenomena are followed by others and used these observations to build up their culture. Greek culture is the result of millennia of evolution, and as such, they knew that there were regularities in society and nature. In classical times these repetitions were described by the word νόμος, which was applied both to society and to nature. My hypotheses are:

1. In the Greek and Roman world, there existed three lines or approaches to the regularities in nature which coexisted until the end of antiquity.
2. These approaches can be characterized as (a) the traditional, religious belief, (b) the materialistic conception and (c) the mathematizing one.
3. These lines contaminated one another.
4. (c) was an answer to (b). It also attempts to transcend (a) through a new theoretical formulation and reunite the human and natural world through the incorporation of the advances in the knowledge of nature.

The notion and the semantic core of *nomos* in Athens had a very interesting evolution. The word acquired a meaning contaminated by the former expression used at Athens for designing the written laws, *thesmos*, i.e. the rule issued by a higher authority, may this authority be the political power or the god.[7] Something similar happened with the meaning of the Homeric *themis*.[8] Originally *nomos* designated a custom, i.e. a regularly repeated social or human action. The semantic core of *nomos* is not only linked to the concept of "distribution" – rather, "just distribution" – as its kinship with the verb νέμω shows, but also to the notions of "order" and "repetition" in the different fields of human action through the idea of the hierarchic organization of society according to values founded on divine will.[9] These social and human behaviours were transmitted through imitation. The implied determinations of the word *nomos* are therefore three: authority, repetition, and imitation.

7 P. Chantraine, *Dictionaire etymologique de la langue Grecque. Histoire des mots*. Paris 1999, p. 432.
8 *Ibid.*, p. 428.
9 V. Ehrenberg, *Anfänge des griechischen Naturrechts*, in: *Archiv für Geschichte der Philosophie* 35, 1922, p. 120.

a) The traditional, religious belief

The idea that the cosmos is ordered according to laws emanating from Zeus can already be found in the reflection of the chorus in Aeschylus' *Prometheus bound*.

> νέοι γὰρ οἰ-
> ακονόμοι κρατοῦσ' Ὀλύμ-
> που, νεοχμοῖς δὲ δὴ νόμοις
> Ζεὺς ἀθέτως κρατύνει
>
> *New helmsmen master the Olympus.*
> *and Zeus rules with new laws*
> *without attending to the old norms*[10]
> (Aeschylus, *Prom.* 149 f.)

Even if the authorship of the piece and its date of composition are uncertain, it belongs without question to the fifth century. It supplies a noteworthy testimony to a time in which the classical opposition between law and nature was at its peak. Another passage states that Zeus governs with his laws (ἰδίοις νόμοις, 403). Although it cannot be denied that these laws are valid for the whole cosmos, including for nature and for gods, it is clear that they are conceived according to the social rules, and they are valid insofar as they express the will of Zeus. The chorus is explaining Prometheus' punishment. The whole natural order is conceived in a similar way to the order ruling human affairs.

It is not that Athenians did not perceive the existence of natural regularities, but rather that the sources always show a political conception of them, i.e. society and nature follow the same rules. The passage states, therefore, that the new laws are the result of Zeus' victory over Cronos. The validity of the new norms is based on an act of force. Consequently, they are not eternal and can be changed following the will of the master.

It is unnecessary to multiply testimonies about the divine foundation of the laws. It is enough to indicate that the Greeks conceived these *nomoi* as being valid for the whole of humanity, for example the burial of the dead in battle (Isocrates, *Panath.* [12],169), or for both men and beasts, for example love for one's parents (Demosthenes, *Contra Aristog.* I,[25],65). The universal

10 The translation of ἀθέτως is difficult, because there is a pun with a reference to the old norms (θέμιστες or θεσμοί) and the introduction of new regulations or norms, of a very different character (νόμοι), i.e. the complete destruction of the old order existing in the world and the beginning of a new one. In any case the usual translation ("despotically") introduces a rebellious nuance that does not exist in the text.

validity of these laws is a political or, rather, a moral one. Although they are projected onto nature, they cannot be considered natural laws in the modern sense.

These testimonies indicate how erroneous it is to project a supposed evolution onto the history of the notion of the law of nature.[11] It is noteworthy that the distinction between natural and political laws, i.e. written laws, is not as strict as the usual interpretation could lead us to believe. Some principles present in the unwritten laws are also adopted in the written penal law, e.g. the distinction between intentional and unintentional crime (Demosthenes, *Pro cor.* [18],275). The belief that these unwritten norms are in some sense innate (Menander, *Sent.* 491 Meineke) does not represent a further step. Because of their universal validity, the unwritten laws are also called common law.[12] A well-known passage of this phenomenon can be found in the Aristotelian *Rhetoric*:

> νόμος δ' ἐστὶν ὁ μὲν ἴδιος ὁ δὲ κοινός· λέγω δὲ ἴδιον μὲν καθ' ὃν γεγραμμένον πολιτεύονται, κοινὸν δὲ ὅσα ἄγραφα παρὰ πᾶσιν ὁμολογεῖσθαι δοκεῖ.
> The law is particular or general. In particular, I mean the written law following which a state is administered; by general, the unwritten regulations which appear to be universally recognized (Aristotle, *Rhet.* I,10,1368b7–9).[13]

It is remarkable that the expression κοινὸς νόμος, which later is again specified with a minor variation in the same book (I,13,1373b4–9), was taken by Aristotle as being very common. It is still more remarkable that Plato, so far as I know, never used it. The Pseudo-Platonic *Minos* gives a strong version of this approach, which extends the notion of a unique kind of law valid for all people mechanically. This theory probably existed in Socratic circles. However, the most significant version can be found in Cicero, who identifies this law which is valid everywhere with reason itself (i.e. *De leg.* I,6,18–19). As has already been remarked, in *On the Nature of the Gods* (*De nat. deor.* I,14,36) Cicero attributes a similar doctrine to Zeno the Stoic. However, this identification of law with reason was already achieved by Plato, who characterizes the law as νοῦς.[14]

11 The contrary interpretation can be found in W. Kullmann *Antike Vorstufen*, p. 55 *et passim*

12 Demosthenes, *Contra Aristocr.* (23),61: 7–8 παρὰ τὸν κοινὸν ἁπάντων ἀνθρώπων; Chrysippus *SVF* III,4.

13 Translation by J. H. Freese, *Aristotle in 23 Volumes*, XXII: *Rhetoric*, Cambridge – London 1926.

14 Cf. F. L. Lisi, *Einheit und Vielheit des platonischen Nomosbegriffes. Eine Untersuchung zur Beziehung zwischen Philosophie und Politik bei Platon,* Königstein – Taunus 1985, pp. 75–84 with bibliography.

The close relationship between rationality and law is a common belief in the Greco-Roman philosophical tradition. It reaches its highest expression in the Stoic conviction of a universal law created and governed by the supreme god, as it appears in Cleanthes' *Hymn to Zeus*. Zeus' rule over everything is accompanied by law (νόμου μετὰ πάντα κυβερνῶν; *SVF* I,537,121,35). The universe obeys his rule willingly, while Zeus keeps it in his immutable hands (ἀνικήτοις ἐνὶ χερσὶν, 122,5 f.). The law of nature permeates the whole cosmos, and like the political law, it has a moral projection.[15] Human beings are an imitation of the gods (μίμημα), as Cleanthes says in the *Hymn to Zeus*, and both share in *logos*, which is the actual law according to nature. According to a testimony of Arius Didymus preserved by Eusebius (*SVF* II,169), this *logos* rules the universe from eternity and is also called *heimarmenê* (cf. *SVF* II,937). The *heirmamenê* embraces the whole world (Plutarch, *De fato,* 569e). It appears in this passage as a superior law of nature that pervades all phenomena occurring in the physical and human world. As we shall see below, the term is crucial for the development of our idea of natural law. To sum up: the universe is conceived like a polis, in which God is the lawgiver, and the laws of nature are the expression of his will (Plutarchus, *De Stoic. repug.* 1044c).

It is difficult to present a coherent exposition of Christian thinkers. However, for them, God is not subordinated to the laws of nature, but the laws of nature to God, and He can change them, as happened after the deluge.[16] Their vision is far away from our concept of natural law and stays still within the religious tradition. In general, they follow the Stoic notion of a world ruled by God as a universal lawgiver on whose decrees depend all existing human social norms (Origen, *Contra Cels.* V,40). According to Kullmann,[17] a passage of the *Commentary on Psalm 148* of Johannes Chrysostomus implies a qualitative change, i.e. the beginning of the modern conception of natural law:

> Καὶ τὸ δὴ θαυμαστόν, οὐχ ὅτι διακρατεῖ μόνον, οὐδὲ ὅτι ἑστήκασιν ἀκίνητοι οἱ νόμοι τῆς φύσεως, ἀλλ' ὅτι καὶ χρόνον οὕτως ἄπειρον.
> And it is astonishing not that only he rules, nor that the laws of nature remain immutable, but that they do so for an infinite time (Johannes Chrysostomus, *PG* LV,487,19–21).

15 W. Kullmann, *Antike Vorstufen*, p. 60.

16 Cf. Gregory of Nazianzus, *De pauperum amorem* (*Or.* 14,27 = *PG* XXXV,893); *In diem natalem Christi* (*PG* XLVI,1136,1–4); *Opus suppletorium*, 50,1 Jaeger. Cf. W. Kullmann, *Antike Vorstufen*, pp. 94 ff.

17 W. Kullmann, *Antike Vorstufen*, p. 96.

A superficial consideration of the passage shows that Chrysostomus' conception does not leave the traditional ground, consisting in the belief in the existence of a superior entity, which legislates the natural laws in a way similar to political legislators. God acts as king and legislator of the universe. The similarity is remarkable even in the use of the terminology.[18] The immutability of the natural laws is the only point, which apparently changes. However, they continue to be contingent since they depend on the will of God.[19] It is not different from the promise made by the Demiurge to his creature in Plato's *Timaeus* (41a7–b6). How far Chrysostomus' notion of the laws of nature is from our own can be observed in his *Commentary to Psalm 142*. The natural laws can be pulled down from their foundations (*PG* LV,448,39 f.). The fact that these laws are the ones with which God rules the world (*PG* LV,452,52) and consist in the ten commands given to Moses (*PG* LV,457,27–29) also shows that the Christian notion of natural laws is not related to our present concept. They are above all ethical and religious precepts. Apparently, Kullman confuses the modern idea of natural law with the use of the word νόμος among Christian authors. φυσικὸν νόμον is not necessarily a "natural law" in our sense, but refers to a law emanating from God (e.g. Moses' commandments; cf. Johannes Chrysostomus, *Ad populum Antiochenum* [*Hom. 12*] Migne; *PG* IL,134,56). In the *Commentary to the Letter to the Romans* (*PG* LX,502,15), Chysostomus employs *physikos nomos* in general but applied in parallel with Moses' ten commandments and the command given by God to Adam and Eve. In *To those who have been seduced* (chapter 8), the natural law is identified with an existing unwritten law directly enacted by God and prior to the Ten Commandments. This conception of natural laws is above all of ethical character.[20]

All these quotations show a vision which still remains on the traditional Greek ground. The Greeks believed that the same kind of laws ruled gods, the cosmos, and society. According to Christian thinkers, there was a superior law emanating directly from God, on which the particular laws of the different peoples depend. In this conception, there is not a clear differentiation between natural law and the law of nature (cf. Origen from Alexandria *Contra Cels.* V,37,1–11,40). The Christian adoption of the Greek terminology and ideas reaches as far as accepting the identification of the Christian God with the Platonic Demiurge (Eusebius, *Praep. Evang.* VII,9,3–4). Kullmann assigns a still more significant role to the work of Basil of Caesarea, who in his *Hexae-*

18 Cf. the use of the variations of κρατεῖν in the passage of Aeschylus' or Cleanthes' *Hymn to Zeus* (*SVF* I,537,122,4).

19 Chysostomus expresses similar views in *In Epist. I ad Thimot.* (*PG* LXII 508,30–38).

20 More passages are indicated by W. Kullmann, *Antike Vorstufen*, pp. 97 f.

meron (V,1,2; VII,3,156b, 156c, 157a) offers a teleological version of the laws of nature.[21] However, impartial consideration of Basil's description of his commentary on the animal and vegetal world shows that the text does not go beyond what Aristotle had achieved in his biological works. On a passage of the *Praeparatio Evangelica* (VII,10,1–4) Kullmann maintains, "daß, anders als in der Stoa, der Naturgesetzgeber nicht bloße Metapher ist".[22] I wonder what it can mean that the legislator of nature is metaphoric in one case, but not in the other (cf. Johannes Chrysostomus, *In epist. I ad Tim.* [*Or.* 1–18] *PG* LXII,508,32–38).

It has become evident, I hope, that the conviction that human society and the natural world were ruled by similar laws depending on the will of the supreme divinity was present from the beginning until the end of antiquity.[23]

b) The materialistic view

With "the materialistic view", I am referring exclusively to the atomistic philosophy.[24] Contrary to Kullmann's supposition, Greeks had already achieved a vision more proximate to our concept of natural law in the fourth century B. C. Demosthenes, e.g. expressed the supremacy of law and order in nature:

> ὅλως δ' οὐδὲν οὔτε σεμνὸν οὔτε σπουδαῖον εὑρήσομεν ὃ μὴ νόμου κεκοινώνηκεν, ἐπεὶ καὶ τὸν ὅλον κόσμον καὶ τὰ θεῖα καὶ τὰς καλουμένας ὥρας νόμος καὶ τάξις, εἰ χρὴ τοῖς ὁρωμένοις πιστεύειν, διοικεῖν φαίνεται.
> We shall not find at all anything outstanding or extraordinary which does not take part of law, since the order of the law[25] seems to guide the whole world, the heavenly bodies and the seasons, if we must trust what we see (Demosthenes, *Contra Aristog.* 2[26],26 f.).

It is worth remarking that Demosthenes' testimony does not make the law ruling natural events dependent on the will of a god. On the contrary, the law represents an order in which external reality participates. Lucretius also defends the existence of objective natural laws in his poem *On the Nature of Things*. The Roman poet uses different names for the principles sanctioned by nature that rule becoming: *foedera naturai* (I,586; II,301; V,56, 924) and *leges naturai* (V,58 f.), etc.[26] Cicero (*Pro Scauro*, 5), Vergil (*Georg.* I,60; *Aen.* I,69) and

21 W. Kullmann, *Antike Vorstufen,* pp. 91 ff.
22 *Ibid.*, p. 89.
23 This statement does not mean that after antiquity the belief disappeared.
24 Stoics and other philosophical schools were also materialists, but I do not include them here.
25 I take νόμος καὶ τάξις as a hendiadys.
26 W. Kullmann, *Antike Vorstufen*, p. 72, states that the concept of scientific law has in Lucretius a strong metaphoric sense that does not exist in the modern notion. Nevertheless, the modern

Ovid (*Metam.* X,353) also used the word *foedus* to designate the natural laws as unchangeable principles that govern becoming. That points to a usual, straightforward, understandable meaning of these terms among Roman intellectuals. As in the case of the Greek authors, the metaphor comes from social reality. Seneca follows the Stoic view in his *Natural Problems*. He also uses the expressions *leges naturae* and *constituta naturae*. His use of both concepts is based on the parallelism macro-/microcosmos,[27] and compares natural processes with developments in the human body, which he also considers natural laws (*Natur. qaest.* III,15,3). Seneca believes that the whole of nature proceeds through *constituta*, "laws" or "ordinances" (III,16,3–4; cf. 29,4), which are already in the seeds of beings (III,29,3–4). This concept is similar to the Lucretian *semina rerum*.

These streams originate at the end of the classical time and also survive until the end of antiquity. I could not discover a similar notion of necessary natural laws independent of the divinity among the Christian authors.

c) The mathematizing approach

The idea that there are some unwritten principles shared by all people and others related only to particular civilizations or communities lies, probably, at the origin of the antinomy nature/law.[28] In this opposition, nature was understood as the universal, immutable and unchangeable norm, while the law was conceived as particular, arbitrary, changing and relative. Both referred to social norms. When some circles mentioned the law or laws of nature, they were not referring to natural laws in the modern sense, but speaking metaphorically of supposed natural legislation, where the strongest could exercise arbitrary power. However, only some small intellectual circles maintained such a position in Athens. Not even all Sophists can be included in this radical critique of the order existing in the polis. Plato, who had a significant role in transmitting the vision of some philosophical tendencies, mainly materialists and relativists, tried to reinforce the traditional image of the unity between the order existing in nature and in the human world. He defended the correlation of both spheres and, like Aristotle, defended a politics according to nature. Nevertheless, the debate had no relation to the problem

concept is also used metaphorically, since it too comes from the social concept of law. A better interpretation offers R. Eucken, *Geschichte und Kritik*, pp. 15 f. R. Kl. Reich, *Der historische Ursprung des Naturgesetzesbegriff*, in: *Festschrift E. Kapp zum 70. Geburtstag am 21. Januar 1958 von Freunden und Schülern überreicht*, Hamburg 1958, pp. 121–134, located in this Lucretian passages the origin of our concept of natural law.

27 W. Kullmann, *Antike Vorstufen*, p. 73.

28 In this way, I am opposing the usual interpretation that anthropological "researches" or contact with other peoples were what produced this opposition. Greeks have always had continuous contact with other peoples and were very conscious of the existing differences.

of the existence of natural laws in our sense. The Greeks acknowledged the existence of natural regularities, but they did not arrive at a formulation of the concept of natural law. Nevertheless, several determinations of our notion have their origin among the Greeks. In this sense, Plato contributed in a decisive way to the modern conception of natural law through:

1. the mathematizing of philosophy as the researches of the so-called Tübinger Schule, and especially of Konrad Gaiser, have shown,[29]
2. the theory of Forms,
3. the extension of the use of word νόμος to natural phenomena, and
4. the radicalization of the notion of the rule of law.

(1) In the history of the emergence of the notion of natural law, the Pythagoreans probably occupied a significant position. A passage of Aristotle hints in this direction:

> Μεγέθους δὲ τὸ μὲν ἐφ' ἓν γραμμή, τὸ δ' ἐπὶ δύο ἐπίπεδον, τὸ δ' ἐπὶ τρία σῶμα·καὶ παρὰ ταῦτα οὐκ ἔστιν ἄλλο μέγεθος διὰ τὸ τὰ τρία πάντα εἶναι καὶ τὸ τρὶς πάντη. Καθάπερ γάρ φασι καὶ οἱ Πυθαγόρειοι, τὸ πᾶν καὶ τὰ πάντα τοῖς τρισὶν ὥρισται· τελευτὴ γὰρ καὶ μέσον καὶ ἀρχὴ τὸν ἀριθμὸν ἔχει τὸν τοῦ παντός, ταῦτα δὲ τὸν τῆς τριάδος. Διὸ παρὰ τῆς φύσεως εἰληφότες ὥσπερ νόμους ἐκείνης, καὶ πρὸς τὰς ἁγιστείας χρώμεθα τῶν θεῶν τῷ ἀριθμῷ τούτῳ.
>
> A unidimensional magnitude is a line, while a bidimensional one is a surface, and a three-dimensional, a body. There is no other kind of magnitude beyond these, because the "trice" extends in all directions. For, as also the Pythagoreans say, the three determines the world and everything, since beginning, middle and end have the number of the universe, and they believe that it is the number of the triad. Therefore, since we have taken this number from nature as its law of it, we also use it for the cult of the gods (Aristotle, *De caelo*, I,268a7–15).

Despite the mixture between mathematical and superstitious language, it is clear that the Pythagoreans gave the first step on the long path leading to our concept of natural law. However, according to the existing testimonies, Plato presented the most comprehensive understanding of reality on mathematical terms. Mathematizing is one of the central characteristics of the modern concept of natural law. Platonic philosophy, especially his oral

29 K. Gaiser, *Platons ungeschriebene Lehre. Studien zur systematischen und geschichtlichen Begründung der Wissenschaftlen in der Platonischen Schule*, Stuttgart 1968[2].

teaching, is the demonstration of his interest in giving a mathematical explanation of the whole of reality. The mathematical character of the physical and the political world also occurs in his written work, and especially in the *Timaeus* and even in the *Laws*. Plato offers numerous passages in which both mathematical and regular aspects of the physical world are manifest.[30]

(2) Plato tried to transcend the opposition between law and nature. He proceeded to extend the notion of *nomos* to the whole of reality and to root it in the intellect. The clearest exposition of this approach occurs in the refutation of materialism in the tenth book of the *Laws*. He offered a very complex and nuanced approach to nature, which in its different connotations applies to every field of reality. Plato formulated for the first time in a coherent way the idea that nature was ruled by laws (cf. *Leg.* X,892b3–8). The highest meaning Plato has given to *physis* is the union of the natural disposition and the form[31] contained in the law and transmitted through education. Not only human beings but also the whole of reality is submitted to the harmony and regularity of the mathematical structure of the law, where the Ideas have the same function as the law in the human sphere. As the Ideas are mathematically defined, so is their reflection, our world. The only difference is that in our world the kind of *chora* introduces a principle of movement, multiplicity, and change that is not present in the ideal world, as it is manifest in the allegory of the line at the end of the sixth book of the *Republic* (VI,509d6–511e5).[32]

(3) However, there are much fewer occurrences of the idiom νόμος ὁ τῆς φύσεως applied to the natural world. It occurs related to particular natural phenomena. For instance, in the *Phaedrus* (250e–251a), sodomites practice a *nomos* against *physis,* since they follow the *nomos* of quadrupeds. In the description of the blood diseases, Timaeus mentions those disorders produced by the intake of food against the laws of nature (83d–e). In the *Critias* (121b–c), the main character of the dialogue mentions that Zeus rules ἐν νόμοις. It is about the traditional representation of Zeus' governance, already present in Hesiod and Aeschylus among others. The distinction between human and natural phenomena is not yet fulfilled, as happens in all deistic beliefs: God can change the ordinary course of natural events for helping or punishing human beings. Nevertheless, the essential aspect with the highest impact

30 It is impossible here to detail the importance of Plato's thought in the construction of a mathematical model for the interpretation of reality. This issue has been studied in detail by K. Gaiser, *Platons ungeschriebene Lehre*, esp. pp. 325–331, for the significance of Plato's oral philosophy for the mathematical understanding of nature.

31 I understand as "form" the norm of behaviour conatained or transmitted by the *nomos*. Cf. F. L. Lisi *Einheit und Vielheit*, pp. 179—181.

32 Cf. F. L. Lisi, *República VII 517a8–521c1*, in: *Emerita*, 82, 2018, pp. 233–252.

lies on a field that for Plato belongs to *physis*, even if for us it is strange, namely the laws of destiny (νόμοι τῆς εἱμαρμένης; *Tim.* 41d–42e, 90e–92c; *Leg.* X,904c–905c; *Phaedr.* 248c–249d; etc.). This conception has had its most decisive impact on the Stoics and the philosophy depending on them. The laws of destiny regulate the world of nature not only in reincarnation but also in the whole of becoming, as the myth of the *Statesman* (269c4–274e4) tells us. Nevertheless, they are still related to the moral world. In antiquity, the unity between moral and natural spheres was permanent as it is today for most of people with a religious belief. My punishment or reward depends on my behaviour, and this behaviour can also have consequences for natural phenomena, in myself or my circumstances with positive or negative influences. Although this human colouration is manifest, it is undeniable that these are the first occurrences of the word law applied in a modern sense to the natural world.

The word *nomos* has the most numerous occurrences in the Platonic corpus. This fact shows the significance that Plato gave to the concept of regular repetition of phenomena in the human and natural world. He conceived both spheres as a unity, and he intended to overcome the opposition of *physis* and *nomos*. As it is shown in the X. book of the *Laws*, *nomos*, i.e. the ordered regular repetition of the phenomena, has priority over chaos and disorder. The law is god, as it is said in the *Laws*.[33] The *nomos* rules not only nature but also men, since the good ones follow the law of the city and the ordered movement of the world-soul in the sky, as the end of the *Timaeus* (89d2–90d7) proclaims. Human and natural spheres proceed according to mathematical proportions that determine the order of becoming.

(4) Among the preserved testimonies, Plato represents the first and highest acme of the theory of the rule of law. In the *Republic*, if the philosophers are above the law, it is because they are the incarnation of law, the true god of the community, as it is declared in the *Laws*. Everybody is the slave of the law, especially the rulers (*Leg.* IV,715c6–d6). The law rules over humans and over the universe, which has a mathematical structure so far as possible. Here actually begins not only modern politics, but also modern science. The law is the reflex of the immutable order of the World of Forms and political and natural law are no contradictory, but analogically related. Human beings can be happy only if they imitate the order of the cosmos. This means regularity, especially the regular repetitive movement of the universe, man and society as it happens in the seasons, the feasts and the behaviour of the individual. All of them imitate or, better, follow the cyclical movement of the stars.

33 Cf. F. L. Lisi *Einheit und Vielheit*, pp. 65–75.

Education is for Plato the continuous repetition of behaviours learned through imitation for introducing order in the cycles of the different kinds of souls. It is unnecessary, I believe, to insist on Plato's stress on research in astronomy, mathematics or other types of mathematical knowledge in the Academy. The conception of a world that regularly repeats and recalls the order of the ideal world is one of the main contributions to our vision of the law of nature. Another is the extension of the political ideal of the rule of law to nature, because in principle it puts the accent on the unrestricted sovereignty of order and repetition in the political sphere and considers it an imitation of the order existing in nature. As the Demiurge rules over reality, the law rules over the community. This position of the law in both society and the natural world had an enormous impact. It utters a very modern aspiration: to live according to nature. Plato has tried to unite both traditions, or rather to conciliate the new emerging approach to reality, which insisted on the importance of nature in human affairs, with the truth of the tradition. Unfortunately, I cannot follow this history in detail here. Still, I hope to have demonstrated not only that our notion of natural law has its roots in the social conception of the norm, but also that it determines in a tangible way how we perceive nature itself. The remaining question is, whether we really know what we think we know. In other words, whether the mathematical structure of reality is genuinely that or a mere projection of our social experience.

Conclusion

The first result of this brief panorama is that the historical analysis of the concept of natural law cannot be reduced to the occurrences of the idioms οἱ τῆς φύσεως νόμοι, *leges naturae* or similar expressions. More significant than these occurrences are clear references to regularities existing independently of man, which can be mathematically formulated. Secondly, it is manifest that there was no unidimensional evolution. On the contrary, different conceptions coexisted and coexist simultaneously, and their predominance changed in different periods.[34] Further, the mutual contamination certainly existed, and this is an issue that should be more precisely determined. The concept of natural law had a religious origin. It was a projection of the regularities existing in social and individual behaviour and related to moral principles of punishment and reward. It was a radicalization of the idea that

34 Although the progress in the knowledge of natural phenomena is accompanied by a clear predominance of the scientific notion of natural law, the idea that God can work miracles is still present in theology and popular belief.

the gods had transmitted to humans the rules they had to respect in their relationship to them, to nature, and among themselves. With these norms, the gods ruled the cosmos in a way parallel to the world and human order. Finally, it is probably that this seminal perception of human regularities substantially determined how we perceive the external world and believe in the existence of an objective order which can be understood based on our aprioristic mathematical approach.

The Rule of Law in Athenian Democracy and in Plato's *Laws*

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Summary
This paper examines how Plato both draws on Athenian ideas about the rule of law but also refines and reforms in accord with his philosophical views. Like the Athenians, Plato also believes in the importance of the accountability of officials, but takes a different approach. The Athenians required all officials to submit their accounts to the logistai selected by lot each year and allowed average citizens to bring charges before the euthynoi, who introduced cases to court (*Ath. pol.* 48,4–5). Plato strongly believes in the principle of accountability, but places the task in the hands of scrutineers, who are appointed by election and not by lot (*Leg.* 715c, 874e–875d). Plato also believes strongly in the importance of fairness in procedure and adopts several Athenian procedures while also introducing reforms. In Athens there was equality before the law and in access to office, but Plato thought that democracy took the principle of equality too far. As a result, Plato introduces different penalties and different rights for members of different census classes, for citizens and foreigners (854c–855a) and for parents and children (944a–c).

Introduction

Modern scholars writing about the political thought of the ancient Greeks concentrate most of their attention on the main forms of government discussed by Plato, Aristotle and other authors: democracy, oligarchy and aristocracy, tyranny and kingship.[1] Less attention is paid to the concept of the rule of law and the role of legal institutions. Yet the Athenians of the fifth and fourth centuries BCE firmly believed that their political system was based both on democracy – the rule of the people – and the rule of law.

1 See for example the essays of K. Raaflaub and J. Ober in: C. Rowe – M. Schofield (eds.), *The Cambridge History of Greek and Roman Political Thought*, Cambridge 2000. J. Ober, *Political Dissent in Democratic Athens: Intellectual Critics of Popular Rule*, Princeton 1998, and P. C. Cartledge, *Ancient Greek Political Thought in Practice*, Cambridge 2009, do not discuss the importance of the rule of law. See my review of the latter in E. M. Harris, Review of J. Ober, *Political Dissent in Democratic Athens*, in: *Classical Review*, 50, 2000, pp. 509–511.

The word *dêmokratia* was not invented until the second half of the fifth century BCE, possibly as late as the 430s.[2] The Athenians of the Classical period strongly believed in the rule of law. In his Funeral Oration delivered in 322 BCE, Hyperides (*Epitaph.* 25) declares: "For men to be happy they must be ruled by the voice of law, not the threats of a man; free men must not be frightened by accusation, only by proof of guilt; and the safety of our citizens must not depend on men who flatter their master and slander our citizens but on our confidence in the law" (transl. Cooper). According to Thucydides (II,37), Pericles in his Funeral Oration praised his fellow citizens: "In public life we do not violate the laws because we obey those in office at any time and the laws, especially those established to protect victims of injustice."[3] When the young men of Athens became ephebes, they swore to follow the established laws, those magistrates who give prudent orders and any laws that may be established prudently in the future.[4] The Athenians did not find the rule of law in conflict with democracy: Aeschines (3,6) says that when the Athenians obey the law, the democracy remains safe. On the other hand, when the courts allow themselves to be distracted by irrelevant charges, the laws are ignored, and the democracy is destroyed (Aeschines, 1,179. Cf. Demosthenes, 24,75–76).

The Athenian conception of the rule of law shared many features in common with the modern concept.[5] First, they believed in the principle of equality before the law. In fact, there was a provision enacted in 403/402 BCE that "it is not permitted to enact a law directed at an individual unless that same

2 See E. M. Harris, *The Flawed Origins of Democracy*, in: A. Havlíček– C. Horn – J. Jinek (eds.), *Nous, Polis, Nomos. Festschrift Francisco L. Lisi*, St. Augustin 2016, pp. 43–55, on the origins of the terms *demokratia* and *oligarchia*.

3 For discusssion of this passage see E. M. Harris, *Democracy and the Rule of Law in Classical Athens*, Cambridge 2006, pp. 29–39.

4 For the text of the oath see M. N. Tod, *A Selection of Greek Historical Inscriptions,* II, Oxford 1948, p. 204.

5 For detailed comparison see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, Oxford 2013, pp. 4–11. A. Lanni, *Law and Justice in Classical Athens*, Cambridge 2006, and *id.*, *Law and Order in Ancient Athens*, Cambridge 2016, claims that the Athenians did not have the rule of law in the sense of deciding cases by consistent rules in statutes, but this view ignores key sources and has been widely rejected. See E. M. Harris, Review of A. Lanni, *Law and Justice in Classical Athens*, in: *Dike*, 12/13, 2009/2010, pp. 323–331, and E. M. Harris, Review of A. Lanni, *Law and Order in Classical Athens*, in: *The Journal of Hellenic Studies*, 138, 2018, pp. 270–272. See also P. Gowder, *The Rule of Law in the Real World*, Cambridge 2016, P. Scheibelreiter, *Nomos, engklema und factum*, in: G. Thür – U. Yiftach – R. Zelnick-Abramowitz (eds.), *Symposion 2018: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Wien 2018, pp. 212–250, M. Canevaro, *The Rule of Law as the Measure of Legitimacy in the Greek City States*, in: *Hague Journal of the Rule of Law*, 9, 2017, pp. 211–236, and K. A. Kapparis, *Athenian Law and Society*, London – New York 2018.

law applies to all Athenians" (Andocides, 1,87).[6] In Euripides' play *The Suppliant Women* (433–434, 437), Theseus, the king of Athens, announces that "when the laws are written, both the powerless and the wealthy have equal justice, and the lesser man with justice on his side prevails over the powerful man" (cf. Thucydides, II,37,1). This principle was implemented by the way the Athenians formulated their laws, many of which begin with the words: "if anyone" followed by a verb containing the name of the offense. Second, the Athenians thought that all officials should be accountable before the law. Every official in Athens had to present records of their financial transactions to a board of *logistai* (accountants), and anyone who wished could present a charge against an official before the *euthynoi* ([Aristotle], *Ath. pol.* 48,4–5. Cf. Aeschines, 3,15). Even Pericles, the leading politician in Athens at the beginning of the Peloponnesian War, was deposed from his office as general and fined (Thucydides, 2,65). Third, the rule of law requires that all statutes and legal procedures be accessible to all. The Athenians certainly made their laws and decrees accessible by inscribing the most important ones on *stêlai* and placing them in central locations.[7] The Athenians also attempted to make their laws clear and easy to read (Demosthenes, 20,93). Fourth, the Athenians tried to make their legal procedures fair and transparent. Defendants had to be presented with the charges against them and had the right to present documents and witnesses to prove their innocence.[8] They also took measures to ensure that judges would be impartial and not influenced by bribes. Fifth, the Athenians believed that there should be no punishment without law. In fact, there was a rule that officials could not apply a law which had not been written down, that is, enacted by the Assembly and included in the lawcode (Andocides, 1,87). Laws went into force on the day they were enacted and could not be applied retroactively (Demosthenes, 24,43). In fact, many laws explicitly state that they are to go into effect "henceforth" (*to loipon*) and not be used about actions in the past.[9] One must not make the

6 M. H. Hansen, *Nomos ep' andri in Fourth-Century Athens: On the Law Quoted at Andocides 1.87*, in: *Greek, Roman and Byzantine Studies*, 57, 2017, pp. 268–281, believes that the text of this law found in *Andocides* (1,87), which permits exceptions to this rule after a vote of five thousand, is genuine but see M. Canevaro, *Honorary Decrees and νόμοι ἐπ' ἀνδρί: On IG II³ 1 327; 355; 452*, in: L. Gagliardi – L. Pepe (eds.), *DIKE: Essays on Greek Law in Honour of Alberto Maffi*, Milan 2019, pp. 71–86, for detailed refutation. Cf. P. J. Rhodes, *Nomothesia in Fourth-century Athens*, in: *The Classical Quarterly*, 35, 1985, pp. 55–60.

7 On the accessibility of Athenian law see J. Sickinger, *The Laws of Athens: Publication, Preservation and Consultation*, in: E. M. Harris – L. Rubinstein, *The Law and the Courts in Ancient Greece*, London 2004, pp. 93–110.

8 On the plaint and its role in promoting fairness in procedure by informing the defendant about the charges see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 114–136.

9 On the expression *to loipon* see E. M. Harris, *Democracy and the Rule of Law in Classical Athens*, pp. 425–430.

mistake of believing that the Athenians had popular sovereignty in the fifth century BCE and the sovereignty of law only starting in the fourth century BCE.[10] The ideal of the rule of law went back to Solon and continued after Cleisthenes' reforms of 508 BCE right down into the Hellenistic period.[11] As we have seen in the passage from Aeschines (3,6), the Athenians believed that democracy and the rule of law went hand in hand and did not find the two ideals incompatible.[12]

In his longest work, the *Laws*, Plato shares the Athenian respect for the rule of law. Like the Athenians, Plato believes that the highest virtue of a citizen is obedience to the laws (715c). On the other hand, if the laws do not rule and officials are not subject to the laws, the community will be destroyed (715d). At the same time Plato enters into a complex dialogue with the Athenian legal system.[13] In some cases Plato follows the rules found in the laws of Athens, but in others he modifies them. This paper will discuss four main areas of his approach to the rule of law: the accountability of officials, fairness in procedure, equality before the law, and the problem of the open texture of statutes.

1. The accountability of officials

One of the main features of the rule of law not only in Athens but also in the Greek *poleis* was the accountability of officials.[14] As Pierre Fröhlich has shown, the vast majority of Greek *poleis* created methods to ensure that officials would obey the law and not embezzle public funds.[15] Different cities

10 For the view that Athenians had popular sovereignty in the fifth century BCE and the sovereignty of law only starting in the fourth century BCE see M. Ostwald, *From Popular Sovereignty to the Rule of Law: Law, Society and Politics in Fifth Century Athens*, Berkeley – Los Angeles 1986, and M. H. Hansen, *The Athenian Democracy in the Age of Demosthenes*, Oxford 1991, pp. 150–155, 300–304.

11 For the ideal of the rule of law in Solon see E. M. Harris, *Democracy and the Rule of Law in Classical Athens*, pp. 3–28.

12 For the evidence showing that the Athenians believed democracy and the rule of law went hand in hand in the fifth and fourth centuries BCE see E. M. Harris, *From Democracy to the Rule of Law? Constitutional Change*, in: C. Tiersche (ed.), *Die Athenische Demokratie im 4. Jahrhundert: Zwischen Modernisierung und Tradition*, Stuttgart 2016, pp. 73–87.

13 For detailed comparison of Athenian legal and political institutions and the institutions of Magnesia see G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, Princeton 1960. I do not discuss Plato's *Crito* in this essay because its theme is the moral obligation of the citizen to obey the law and the decisions of the courts. This essay studies the legal procedures of Magnesia, a very different topic.

14 For the rule of law as a criterion of legitimacy for the Greek *polis* see M. Canevaro, *The Rule of Law as the Measure of Legitimacy in the Greek City States*.

15 P. Fröhlich, *Les cités grecques et le contrôle des magistrats (IV^{e}–I^{er} siècle avant J.-C.)*, Genève 2004. D. Cohen, *Law, Violence and Community in Classical Athens*, Cambridge 1995, pp. 43–51, does not discuss the accountability of officials in Plato's *Laws*.

had different procedures, but the basic principle was universal. At Athens the Council had a general supervision of officials during their term of office.[16] Private individuals could also bring an *eisangelia* against an official during his term of office to the Council.[17] Once his term of office was completed, each official was required to present his accounts to a board of *logistai*, who checked these records to see if the sums tallied and made sure no sums were stolen ([Aristotle,] *Ath. pol.* 48,4–5). If they discovered any embezzlement, bribery or maladministration, they handed the case to a court. In the first two cases the fine was ten times the amount. After officials submitted their accounts, anyone who wished could submit an indictment to one of the *euthynoi* with the name of the offense and the amount of the penalty. Both the *logistai* and the *euthynoi* were selected by lot, the *logistai* from the Council, the *euthynoi* from all citizens. If the *euthynos* who received the charge judged it proven, it was handed to the judges in the deme for private cases and to the *thesmothetai* for public cases. The case was then heard by a regular court with several hundred judges ([Aristotle,] *Ath. pol.* 48,4–5; 54,2).

In the *Laws* (XII,945e–948b), Plato has a very interesting section on his scrutineers, also called *euthynoi*.[18] Plato believes that this position is far too important to be given to men selected by lot and creates an elaborate system of election. Every year all citizens meet at the summer solstice, and each proposes the person fifty years old or above whom he considers the most virtuous. Those who receive votes are divided into two groups, and those with fewer votes eliminated. The process is repeated until only three are left. During the first year however twelve are selected. These men are given crowns and their honor announced. These are dedicated as a first fruit (*akrothinia*) to Helios, are to serve until they are seventy-five and to live in the precinct of Apollo and Helios. They are to divide all officials into twelve groups and to examine all those who have finished their term of office. They then post the penalty or fine they impose in the *agora*. But they also enjoy special religious honors and civic privileges. The person who comes top of the list in a given year also serves as the eponymous magistrate. If there is a tie among the top three candidates, the leading candidate is selected by lot. Finally, they

16 On the supervision of officials by the Council see P. J. Rhodes, *Athenian boule*, Oxford 1972, pp. 147–162.

17 On *eisangelia* to the Council see M. H. Hansen, *Eisangelia: The Sovereignty of the People's Court in Athens in the Fourth Century B. C. and the Impeachment of Generals and Politicians*, Odense 1975, pp. 112–120.

18 On the *euthynoi* see G. R. Morrow, *Plato and the Rule of Law*, in: *Philosophical Review*, 50, 1941, pp. 116–119, G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, pp. 219–229, K. Schöpsdau, *Platon. Nomoi (Gesetze): Übersetzung und Kommentar*, III, Göttingen 2011, pp. 534–544, and M. Piérart, *Platon et la cité grecque: théorie et réalité dans la constitution des Lois*, Paris 2008, pp. 456–458.

are given elaborate funerals, which recall hero cults with a stone crypt, and three kinds of games celebrated each year.

There are several aspects of this institution that merit attention. First, Plato clearly considers the task of keeping officials accountable so important that he does not assign it to officials selected by lot. This is in keeping with Plato's principle that a court should have few judges who are highly qualified (766d). The *euthynoi* are elected by an elaborate procedure to ensure the most virtuous are selected, and only those over fifty are qualified to make sure that they have experience as well as virtue. They also acquire more experience through their continual service up to the age of seventy-five. The use of election and permanent tenure of office recall the Spartan *gerousia*; at Athens they resemble the Areopagus, whose members went through a selection process, also served for life and enjoyed special honors at religious ceremonies.[19] The special funerals recall the burial rites for Spartan kings (Herodotus, VI,58,1–3). Even though the *logistai* and the *euthynoi* had the main duty, the Areopagus could also exercise surveillance over officials ([Demosthenes,] 59,80–3). In democratic Athens the task is assigned to average citizens, who serve only a year; in Plato's *Laws* this task requires virtue and experience. For this reason there is a rigorous process of selection and life-long tenure of office. The elaborate rituals seem to create a cult of the rule of law.[20] In Athens accountability was enforced by a series of procedures carried out by different bodies. Plato endows the function with a religious aura to create respect for authority. Despite its similarities to some institutions in Athens and Sparta, this is a uniquely Platonic creation.[21]

On the other hand, the *euthynoi* themselves are subject to the laws: the principle of accountability is so important that not even those who hold other officials are exempt (947e, 948a). If any of the *euthynoi* is a disgrace to his office and distinctions, he can be accused before the *euthynoi* and the Guardians of the Laws and if convicted, be deprived of his position and honors. This prevents the *euthynoi* from becoming an oligarchic body. These rules also made the *euthynoi* of Magnesia accountable in a way that the *euthynoi* of Classical Athens were not accountable.

19 On the Areopagus and its reputation see E. M. Harris, *Aeschylus' Eumenides, The Role of the Areopagus and Political Discourse in Attic Tragedy*, in: A. Markantonatos – E. Volonaki (eds.), *Poet and Orator: A Symbiotic Relationship in Democratic Athens*, Berlin – Boston 2019, pp. 389–419. On the *dokimasia* of archons and Areopagites see C. Feyel, *Δοκιμασία: la place et le rôle de l'examen préliminaire dans les institutions des cités grecques*, Nancy 2009, pp. 171–184.

20 Alberto Esu draws my attention to the cult of fear in Sparta, which was created to promote obedience to the law, and the statue of a personification of Fear in the office of the Ephors (Plutarch, *Ages.*).

21 Cf. G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, p. 227: "The result of this remodelling is an institution different from anything we know of in any historical state."

In addition to the oversight exercised by the *euthynoi*, every citizen in Magnesia has the right to bring an action against officials who treated them unfairly. If the rural magistrates impose unfair levies, seize property without the owner's consent, or receive gifts or make unfair decisions, the injured person can bring an accusation in the common courts (761e–762a). In another provision, if an official makes an unjust judgment, the wronged person can sue for double the amount of damage in the common courts (846b). These procedures are close to the Athenian procedure for *euthynai* but without the intervention of the *logistai* and *euthynoi*.[22]

2. Fairness in procedure

Plato also makes innovations in legal procedure to enhance fairness.[23] In the Athenian legal system there were private actions and public actions. For private actions after around 400 BCE, the accuser would present the defendant with a summons to appear before a magistrate. On the agreed day, the accuser would present a document with his charges and the defendant would reply by denying them.[24] The case was then sent to a public arbitrator, who would attempt to reconcile the litigants.[25] If unable to reach an agreement, the arbitrator would give a judgment. If the parties agreed, the case would be settled and not proceed further. If one of the litigants did not accept the judgment, the case was handed to a court, which heard the litigants and decided by majority vote. If the accuser lost at this level, he paid a fine of one-sixth of the amount claimed.[26] There was no chance for appeal unless one of the litigants could prove that a witness for his opponent had committed perjury. Otherwise the decision by the court could not be overturned. Plato introduces three levels of courts (766d–768c).[27] He retains the first level of

22 Cf. G. R. Morrow, *Plato and the Rule of Law*, pp. 116–117.

23 On the legal system of Magnesia see in general G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, pp. 241–296. In his discussion of the rule of law in Plato's *Laws*, D. Cohen, *Law, Violence and Community in Classical Athens*, pp. 43–51, does not discuss fairness in procedure.

24 On the plaint and its role in initiating litigation see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 114–136.

25 On private and public arbitrators see E. M. Harris, *Trials, Private Arbitration, and Public Arbitration in Classical Athens or the Background to [Arist.] Ath. Pol. 53, 1–7*, in: C. Bearzot – M. Canevaro – T. Gargiulo – E. Poddighe (eds.), *Athenaion Politeiai tra storia, politica e sociologia: Aristotele e Pseudo-Senofonte* (= *Quaderni di Erga/Logoi*), Milano 2018, pp. 213–230, with references to earlier treatments.

26 On the *epobolia* see D. M. MacDowell, *The Athenian Penalty of Epobolia*, in: E. M. Harris – G. Thür (eds.), *Symposion 2007: Akten der Gesellschaft für griechische und hellenistische Rechtsgeschichte*, Wien 2008, pp. 87–94.

27 For commentary see K. Schöpsdau, *Platon. Nomoi (Gesetze): Übersetzung und Kommentar*, II, Göttingen 2003, pp. 427–437. Cf. L. Rossetti, *Processo et instituzioni giudiziarie nelle "Leggi" di*

the Athenian system by requiring the litigants to use an arbitrator first, but allows them to choose the arbitrator.[28] The public arbitrators at Athens were assigned by lot ([Aristotle,] *Ath. pol.* 53,5). If one litigant rejects the arbitrator's judgment, the case goes to a court composed of villagers and tribesmen. If the defendant loses at this level, he must pay another one-fifth of the penalty. If the defendant rejects this verdict, he can take the case to the Select Judges. If he loses again, he has to pay one and a half times the amount of the original penalty. If the accuser rejects the judgment of the arbitrator and wins at the second level, he gains another one-fifth of the penalty, but loses this amount if the court votes against him. If the prosecutor rejects the decision at this level and loses at the next level, he must pay half the amount of the penalty. This adds another level of decision to the Athenian system, but resembles the Athenian system by imposing penalties for litigiousness.

In the *Apology* (37a–b), Plato records Socrates' objection to Athenian legal procedure for public cases, which took place in one day. According to Socrates, one day does not allow the defendant an adequate amount of time to discuss the charges.[29] Plato appears to respond to this criticism in the *Laws* (855c–856b). First, he assigns capital cases to the guardians of the laws. Second, Plato eliminates the procedure of *timêsis* or the assessment of the penalty. In Athenian courts the accuser and the defendant each proposed a penalty in the second phase of a public case, and the court chose one of the proposals.[30] Plato removes this procedure by making death the penalty in certain cases. Third, Plato has the trial take place over three days. On each day the accuser and defendant speak, but after this each of the guardians of the laws reviews the case and fills in any points omitted by the litigants. These points are then recorded, and the judges sign the documents. Fourth, at the end of the third day, the judges vote openly. Plato does not discuss the reasons for these procedures, but appears to believe that by discussing the case in public over three days and voting openly, the judges will act more responsibly than those who vote by secret ballot as in Athens. In several ways, Plato draws on Spartan procedure before the *Gerousia*, where the case was heard over several days and the voting was done openly. Morrow rightly remarks about open voting: "the juridical intent underlying Plato's proposal

Platone, in: A. Giuliani – N. Picardi (eds.), *L'Educazione giuridica*, VI: *Modelli storici della procedura continentale*, Perugia 2004, pp. 7–10.

28 Cfr. K. Schöpsdau, *Platon. Nomoi (Gesetze): Übersetzung und Kommentar*, II, p. 429: "Platon vereinigt hier demnach Elemente beider attischen Konzeptionen, indem er eine Apellation von dem privaten Schiedsgericht an die ordentlichen Gerichte zuläßt."

29 Cf. G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, p. 255.

30 On the *timêsis* see A. R. W. Harrison, *The Law of Athens: Procedure*, Oxford 1971, pp. 166–168.

is clearly to enforce his principle of judicial responsibility, and thereby to protect the citizen against the abuse of judicial power."[31]

In Athenian law there was a statute of limitations for private cases.[32] No one could bring a private charge after five years. The rule made no exceptions and was the same in all circumstances. According to Demosthenes (36,25–7), the rationale behind the statute was to prevent frivolous lawsuits. After a period of five years, it might be hard to prove one's case. In the *Laws* (954c–e), Plato takes the principle that there should be a time-limit to private cases, but attempts to take different circumstances into account.[33] In Magnesia, land and houses are inalienable so there can arise no dispute about their ownership, but there can still be disputes about movables.[34] Plato limits to one year claims for items seen to be used in public spaces such as the city, the *agora* and the temples. The implicit assumption is that if no one brings a charge when the object is in plain sight, this would indicate that the person in possession must have ownership. The situation is different with objects used openly in the countryside: here Plato retains the period of five years found in Athenian law. If the object is concealed inside a house in the city, the limit is three years; in a house in the countryside ten years. If the object is transported to a foreign country, there is no time-limit. Plato maintains the basic principle from Athenian law but creates different rules for different circumstances. We will return to this point in the discussion of open texture.

3. Equality before the law

I will deal with the topic of equality before the law very briefly. In Athenian law, statutes often take the form of a conditional sentence with the protasis starting "If anyone …" followed by a verb with the name of the offense with the penalty or procedure in the apodosis.[35] No distinction is made between male and female, youth and adult and citizen and foreigner. In some cases we find a monetary penalty for a free person and fifty lashes for a slave (e.g. *SEG* 26:72, lines 14–16; *IG* II^2 1362, lines 9–10); in the *Laws* Plato sometimes makes the same distinction between the penalties for slaves and free (764b, 881c, 882b, 914b–c). In penalties for free persons in Athenian law however no

31 G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, p. 289.

32 For the statute of limitations see Demosthenes, 36,25–7; 38,17, with J. F. Charles, *Statutes of Limitation at Athens*, Chicago 1938.

33 K. Schöpsdau, *Platon. Nomoi (Gesetze): Übersetzung und Kommentar*, III, pp. 558–559, does not analyze the differences between the statute of limitations at Athens and the rules in Magnesia.

34 On the ownership of land in Magnesia see G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, pp. 103–112.

35 For the standard form of Athenian laws see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, p. 140.

differentiation is made. This was in accordance with the principle of equality before the law (see above). In the *Republic* (VIII,558c, 562e–563d) Plato expresses the view that democracies take the principle of equality too far and in the *Laws* Plato often assigns different penalties for different categories of offenders. One of the most elaborate examples of this Platonic approach is found in the law of assault in which the penalty varies if the offender is older or younger, or a citizen or a foreigner (879e–882a). In general, when a younger man beats an older man, there should be a harsh penalty, but when an older man strikes a younger man, the latter should put up with this treatment in silence (878e–879a). There are also different rules for parents who kill children and for children who kill parents (868c–869c). In certain cases, there are also different penalties for those in different property-classes (756d–e, 774a, 880c–d, 934d, 945a, 948a).[36] There is no parallel in Athenian law in which property-qualifications were only pertinent when it came to holding office.

4. Law's open texture

I come to my final topic, the issue of open texture. This is a term coined by the British legal theorist H. L. A. Hart. In his *The Concept of Law* H. L. A. Hart observes that the law must refer to broad classes of persons or classes of acts, things, or circumstances.[37] The operation of the law therefore depends on the "capacity to recognize particular acts, things and circumstances as instances of the general classification which the law makes". In most cases, this is not a difficult process. From time to time, however, one encounters "fact-situations … which possess only some of the features of the plain cases but others which they lack". One might try to avoid this problem by formulating detailed definitions of key terms that would clarify how they were to be applied in any given situation. Yet, as Hart rightly notes, it is impossible to find a rule "so detailed that the question whether it applied or not to a particular case was always settled in advance and never involved, at the point of actual application, a fresh choice between open alternatives". The legislator simply cannot know in advance all the different kinds of situations that will occur in the future ("ignorance of fact"). Nor can legislators predict what other interests may come into play in any given situation and possibly take precedence ("indeterminacy of aim").

36 Cf. G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, pp. 134–135.

37 For the analysis of law's "open texture" see H. L. A. Hart, *The Concept of Law*, Oxford 1961, pp. 121–127.

The view that the law must provide general rules goes back to Plato and Aristotle and was implicit in Athenian legislation as we have seen. In the *Statesman* (295a) Plato compares legislators to trainers who "cannot do their work in detail and issue special commands adapted to the condition of each member of the group. When they lay down rules for physical welfare, they find it necessary to give bulk instructions having regard to the general benefit of the average pupil." In a similar way, the legislator "who has to give orders to whole communities of human beings in matters of justice and mutual contractual obligation will never be able in the laws he prescribes for the whole group to give every individual his due with absolute accuracy". Instead the legislator will make "the law for the generality of his subjects under average circumstances. Thus he will legislate for all individual citizens, but it will be by what may be called a 'bulk' method rather than an individual treatment …"

Aristotle (*Pol.* 1292a33) also noted that the laws should deal with all general matters, but that magistrates would deal with particular circumstances. This was necessary "because of the difficulty of making a general rule to cover all cases" (*Pol.* 1282b2). In particular, Aristotle (*Ath. pol.* 9,2) noted that the laws of Athens were often unclear, leaving the power of decision for any given case in the hands of the court. Some argued that the lawgiver Solon did this deliberately so as to unfetter the judges' power of the judges to decide cases. But Aristotle rightly dismisses this view and argues that the alleged lack of clarity results from the difficulty of "defining what is best in general terms".

The Athenian legal system had two ways of addressing the problems of open texture. First, if there was any doubt about the way a general rule was to be applied to a particular case, there were records of previous decisions, which litigants could use to show that the law had previously been applied in one way and not in another.[38] The other was the use of *epieikeia*, that is, the argument that there existed exceptions to the general rule in the relevant statute.[39] The problem for Plato was that the interpretive space created by open texture provided an opportunity for rhetorical manipulation, which he criticizes at length in the *Gorgias*. He makes his reservations clear in a re-

38 On the use of decisions in previous cases as arguments about the interpretation of laws see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 246–273 and E. M. Harris, *The Athenian View of an Athenian Trial* in: C. Carey– I. Giannadaki – B. Griffith-Williams (eds.), *The Use and Abuse of Law in the Athenian Courts*, Leiden 2018, pp. 42–74, for a complete list of previous cases mentioned in extant forensic speeches.

39 On *epieikeia* in the Athenian courts see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 274–301. On *epieikeia* as a moral virtue see Ch. Horn, *Epieikeia: The Competence of the Perfectly Just Person in Aristotle*, in: B. Reis (ed.), *The Virtuous Life in Greek Ethics*, Cambridge 2006, pp. 142–166.

mark he makes when discussing rules about fraud in the marketplace. In the *Laws* (916d–e), Plato criticizes *hoi polloi*, the majority of mankind, for believing that lying and deceit are acceptable as long as they are done *en kairô* – on the right occasion, or in the right circumstances – but leaving these circumstances undefined (*aoristos*). In his view, it is not permissible for the lawgiver to leave this matter undefined. On the contrary, he must clarify the upper and the lower limits. In other words, it is not enough for a lawgiver to lay down a general rule and then allow litigants and judges to decide what circumstances permit exceptional considerations to override the rule. The lawgiver must indicate precisely where the exceptions lie and what effect they will have on the application of the rule. When discussing penalties, Plato advises the lawgiver to give clear guidance to the judge (934b). In public cases, Athenian law gave the court the power to impose whatever fine or punishment the court deemed appropriate after listening to arguments made by both sides. But Plato says that the lawgiver should act like a painter and give a sketch of the actions to be covered by the law and thus help the judge in finding the appropriate penalty for an offender.

This is an aspect of Plato's approach to Athenian statutes that has not received much attention in the main works on the *Laws* such as Morrow and Piérart. These are excellent works, but their main interest is about political institutions. Let us start with two examples from the laws about homicide. Athenian law contained three basic categories of homicide ([Aristotle,] *Ath. pol.* 57,3): *phonos ek pronoias* ("intentional homicide"), which was tried at the Areopagos (Demosthenes, 23,22–8), *phonos akousios* ("involuntary homicide") tried at the Palladion (Demosthenes, 23,71–3), and *phonos dikaios* or *kata tous nomous* ("just homicide or homicide according to the laws") at the Delphinion (Demosthenes, 23,74–7). The first category contained a potential ambiguity. The phrase *ek pronoias* means "intentional" or done in such a way that the person is aware of what the consequences of his action will be. But what kind of intention is meant? In modern American law there is a distinction among three categories – first degree murder, in which the offender intends to kill, second degree murder, in which the offender intends only to harm, and voluntary manslaughter, in which the offender kills after provocation. But Athenian law did not specify. This made homicide committed after provocation a "hard case" as is shown by Demosthenes, 21,70–76 and Antiphon's *Third Tetralogy*.[40] In the first case a man killed a victim who had struck him in an insulting way. The court divided almost exactly evenly, but convicted by one vote. According to Demosthenes, those voting to acquit were willing to allow the offender the right to retaliate to a greater degree

40 On these cases see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 186–8.

than the harm he suffered. In the *Second Tetralogy* the accuser and the defendant differ over the nature of the intent required for a conviction: the accuser believes that all he has to do is to prove that the killer acted willingly and not under constraint.[41] The defendant and his supporting speaker claim that he lacked the intent to kill even though he acted willingly.

In the statutes about homicide in his *Laws* (865a–874e), Plato attempted to remove these ambiguities.[42] To deal with cases of provocation such as the one in the *Third Tetralogy*, Plato adds two categories of homicide not found in Athenian law (*Leg.* 866d–867e). First, there is the case where someone acts in anger and retaliates immediately without planning ahead to kill, then feels repentance. Second, there is the man who is insulted and becomes angry, then later kills with the intent to kill and feels no remorse. The latter resembles the person who kills willingly, while the latter is like the person who kills unwillingly. Plato therefore imposes a harsher penalty on the latter and a milder on the former. If a man kills a free person with his own hand, in anger, and without prior planning, he will go into exile for two years. On the other hand, if a man kills in anger but kills "after planning" i.e. to kill, he will go into exile for three years. Thus Plato distinguishes between a case where the defendant kills without intending to and a case where the defendant aims to kill and achieves his aim. Because the latter is a more serious offense, it receives a harsher penalty. Here Plato adds two new categories to deal with cases that did not fit clearly into the Athenian categories and reduced the amount of open texture.

In regard to the second category of homicide, *phonos akousios* or "involuntary homicide" there was an issue about the extent to which someone could be held responsible for a death caused by his own actions. In Athenian law, one could be held responsible for murder not only when one caused death by direct physical violence, but also for causing death indirectly, for instance, by giving an order to kill someone.[43] But if one committed an action, which set off a chain of events that resulted in the death of another person, to what extent could this person be held responsible? For instance, if someone was responsible for a choral competition and for training the boys for the perfor-

41 For analysis of the meaning of *ek pronoias* and its possible ambiguity see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 182–189.

42 The analysis of M. Piérart, *Platon et la cité grecque: théorie et réalité dans la constitution des Lois*, pp. 423–434, concentrates mainly on procedural aspects of homicide law and finds several parallels with Athenian law. T. J. Saunders, *Plato's Penal Code: Tradition, Controversy and Reform in Greek Penology*, Oxford 1991, also does not make a detailed comparison between the Athenian law of homicide and the law of Magnesia on this topic. K. Schöpsdau, *Platon. Nomoi (Gesetze): Übersetzung und Kommentar*, III, pp. 316–317, does not see how the vagueness of the Athenian law about intentional homicide created the need for the new categories.

43 See E. M. Harris, *Democracy and the Rule of Law in Classical Athens*, pp. 391–404.

mance, but then one of the boys died after drinking a potion given by someone else to improve his voice, could he be held responsible for involuntary homicide (*phonos akousios*)? One could argue that by placing the boy under the supervision of another person, who administered the potion, the chorus-producer had "caused" his death and was guilty of murder. This is in fact the argument made by an accuser in an Athenian court (Antiphon, 6,11–14).

Plato attempts resolve this issue by limiting the extent to which someone could be held responsible for a death caused by his own actions but against his will. Plato does not allow a charge of unwilling homicide to be brought whenever someone's actions set off a chain of events that eventually leads to the death of another person. The law applies only when death comes about by the direct physical causality of the defendant (*Leg.* 865): "And if one man kills another by his own hand, but unwillingly, whether it be by his own unarmed body, or by a tool or a weapon, or by giving a drink or solid food, or by application of heat or cold (lit. 'fire or winter'), or by deprivation of air, either with his own body or through other bodies, in every case let him be considered to be one who has killed with his own hand and let him pay the following penalties." In other words, the defendant's action cannot be a remote cause of death, but must be a proximate cause. Here again Plato is specifying the circumstances to be covered by the statute and attempting to remove potential ambiguities of the category of involuntary homicide in Athenian law.

One can see how the method works in the law of sale concerning latent defects. As we have just seen in the discussion of Hyperides' *Against Athenogenes* (15), the Athenians had a law about the sale of slaves, which required that "When anyone sells a slave, he must state in advance any ailment the slave has; should he fail to do so, there is a procedure for return (*anagogê*)."[44] The law does not specify what kinds of illnesses nor envisage the possibility that the slave may have a disease that the master cannot discern. Nor is a time limit set down. The regulations formulated by Plato (*Leg.* 916a–b) are much more detailed: he lays down different rules depending on whether the seller or the buyer are skilled workers such as doctors and trainers and thus should be able to recognize diseases. He imposes a time limit on the right of return, which makes sense since it would be unlikely that a disease noticed long after the purchase originated before the purchase and was thus the fault of the seller. He also makes a separate rule for epilepsy, which of course might not show up as soon as other diseases. Finally, he creates a special rule for the slave who has committed murder and is thus polluted. We may find this an odd sort of defect, but since the Greeks believed that pollution could

44 On the rules about latent defects in contracts of sale see F. Pringsheim, *The Greek Law of Sale*, Weimar 1950, pp. 472–497.

cause disease or misfortune, this provision makes good sense.[45] Instead of creating a general rule and leaving it to the courts to determine how to deal with unusual circumstances, Plato sets forth time-limits and deals with exceptional cases.

Another area where Plato is more specific and detailed than Athenian law is in regard to impiety. As far as we can tell, the crime of impiety was not defined in Athenian law, though the Athenians obviously had some idea of what the term meant and what kinds of actions normally fell under the description "impious". For instance, when Meletus brought his charge of *asebeia* against Socrates, he listed three charges: 1) introducing new gods (Plato, *Apol.* 26a), 2) not believing in the gods (27a), and 3) corrupting the young (24c). In his reply to these charges, Socrates implicitly accepts Meletus' view that these actions did constitute *asebeia* since he does not challenge his accuser on this legal point, but seeks rather to show that the charges are false on factual grounds. In the *Laws* (885b), Plato does not leave the concept undefined. Instead he lists three specific types of *asebeia*: 1) not believing in the existence of the gods, 2) believing that the gods exist, but do not pay attention to human beings, and 3) believing that the gods are easily influenced and led astray by sacrifices and prayers. Where Athenian Law left the term undefined, Plato lists several specific categories of *asebeia* to clarify meaning of the term and remove potential ambiguities.

Athenian law contained a general statute about "cowardice", which provided a procedure and a penalty for several offenses relating to military discipline.[46] The three main offences covered by this law were "throwing away one's shield", "leaving one's position" (*lipotaxion*) and "leaving the army" (*lipostratia*) (Aeschines, 3,175–176). The law about cowardice punished these offenses with the loss of citizen rights but did not provide a definition of the main terms. In the *Laws* (943d–945a) Plato observes that one must distinguish between cases in which one is forced to abandon one's weapons and cases in which it is shameful to throw them away. He recalls the example of Patroclus, who lost his weapons to Hector, but was no coward (*Il.* XVI,791–817; XVII,125; XVIII,78–85). One can also lose one's weapons when thrown from a height, in a storm at sea, when caught in a torrent or in many other

45 On pollution for homicide see E. M. Harris, *The Family, the Community and Murder: The Role of Pollution in Athenian Homicide Law*, in: C. Ando – J. Rüpke (eds.), *Public and Private in Ancient Mediterranean Law and Religion*, Berlin – München – Boston 2015, pp. 11–35, and E. M. Harris, *Pollution for Homicide after 400 BCE: More Evidence for the Persistence of a Belief*, in: L. Gagliardi – L. Pepe (eds.), *DIKE: Essays on Greek Law in Honour of Alberto Maffi*, Milano 2019, pp. 143–150.

46 On the law about cowardice (*deilia*) see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 217–218 with criticism of D. Hamel, *Coming to Terms with lipotaxion*, in: *Greek, Roman and Byzantine Studies*, 39, 1998, pp. 361–405, who does not understand the structure of the law.

circumstances. One should therefore make a distinction between "abandoning" one's shield (*rhipsaspis*) and "losing one's shield" (*apoboleus hoplon*). When one loses one's shield because of circumstances beyond one's control, it is not the same as deliberately throwing it away (Plato, *Leg.* 944c). The person who deserves punishment is the one who "finds the enemy at his heels and instead of turning round and striking back with the weapons he has, deliberately let them drop or throws them away, preferring a coward's life of shame to the glorious and blessed death of a hero" (transl. adapted from Saunders). Where Athenian law left the phrase "throws away one's shield" undefined, Plato describes the specific circumstances that the judge must take into account when judging cases, thereby reducing the "open texture" of the law.

Conclusion

In the *Laws* Plato takes many of the principles implicit in the Athenian conception of the rule of law and develops them in new ways. He accepts the principle that officials must be accountable, but creates different procedures for reaching this goal. To promote fairness in procedure, he creates a more complex structure of courts. In most cases he adheres to the principle of equality before the law, but departs from this tenet in certain cases, especially in regard to elders and parents. Finally, Plato attempts to reduce the amount of "open texture" in statutes to ensure predictability in adjudication. The *Laws* of Plato shows that the rule of law was a widely shared ideal in the Greek *poleis*, but different regimes might attempt to implement this ideal in different ways.[47]

47 For the rule of law as an ideal shared by democracies and aristocracies see E. M. Harris, *Democracy and the Rule of Law in Classical Athens*, pp. 3–28, and M. Canevaro, *The Rule of Law as the Measure of Legitimacy in the Greek City States*. I would like to thank Jakub Jinek for the invitation to present an oral version of this paper at the May 2019 meeting of the *Collegium Politicum* in Pardubice. I would also like to thank Alberto Esu for reading over an earlier version and offering helpful comments.

Protagoras on Democracy and the Rule of Law

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Summary
The sophist Protagoras is famous for being the first consistent relativist who argued that there is no objective truth and every perception is valid for those who experience it. He extended this relativism to morality and politics and maintained that the law is "the opinion of the city", thus disjoining justice from any metaphysical foundation. However, if we read Protagoras' "Great Speech" in Plato's *Protagoras* we find that his argument to the effect that all men possess the two political virtues leads to the conclusion that democracy is the best form of government. The paper argues that Protagoras was not inconsistent. His relativism is confined to his theory of knowledge. In practical matters, human beings devise their values and political institutions through a dialogic process. This is the all-important role of *logos* in the public sphere according to Protagoras: through their interactions, human beings exchange information which enables them to shape the most just institutions and make the best decisions. Democracy is thus the best form of government because it best allows citizens to have a public discourse on an equal footing. This is the value of *isegoria* and *parrhêsia* which, together with *isonomia*, are the foundation of democracy. Protagoras' position, thus interpreted, can serve as a "liberal" foundation of democracy. Indeed, his view about democracy and knowledge is very similar to the theoretical foundation of liberalism in contemporary authors such as Friedrich von Hayek and Michael Oakeshott.

The setting

When the sophist Protagoras (485–415 BCE ca) arrived in Athens in the 450s, the city was reaching the peak of its power. After the assassination of Ephialtes in 462 BCE, Pericles had been firmly in command for a decade and in a few years would succeed in having his starkest opponent, Thucydides the son of Melesias, ostracized (442 BCE). Pericles engaged Athens in an imperialistic policy which would result in the establishment of Athenian *archê* in the Aegean Sea, making it one of the most powerful cities in the Mediterranean area. In 431 BCE, two years before dying of plague, he delivered the famous Funeral Speech reported by Thucydides, in which he praised Athens

as "the school of Greece" and extolled the merits of its constitution and of the Athenian way of life. He famously concluded his discourse by stating that

> To show that this is no empty boasting for the present occasion, but the actual truth (*alêtheia)*, you have only to consider the power (*dynamis*) which our city possesses and which has been won by those very qualities which I have mentioned (Thucydides, *Hist.* II,41).[1]

Something tangible and observable, the very power (*dynamis*) of the city, testified to the truth of Pericles' statements. The gist of Pericles' speech was, thus, that "democracy works".

In the past two decades, the classicist and political scientist Josh Ober has elaborated a sophisticated argument to demonstrate that Pericles was correct, that democracy actually works, and democratic Athens was indeed the most powerful city of Greece. Ober has argued that the democratic institutions devised by Cleisthenes and refined by Ephialtes' and Pericles' reforms, which stripped the Areopagus of its powers, enabled a circulation of civic knowledge which made democracy so effective.[2] If we take a step back and look at the establishment of democracy in 508 BCE, we may note that the catchword used by Cleisthenes and his supporters was *isonomia*, namely equality before the law and implemented through the law. This word identifies an ideal, not a form of government, nor a "proto-democracy" or *Urdemokratie*.[3] It was first used by the aristocrats who fought Peisistratus' tyranny as a rally-word and the epitome of their political programme: against the arbitrary, capricious will of the tyrant, they advocated the certainty of law, of a *nomos* that was objective and therefore the same for everybody.

I wish to argue here that the ideal of *isonomia* identifies for the first time the notion of "rule of law", namely the existence of a system of laws which are publicly promulgated and equally enforced; these laws apply to every citizen and do not make exceptions because no-one is above the laws. From its inception this ideal involves some corollary notions. First of all, *isonomia* is a *Kampfbegriff*, a "battle-concept" devised with a polemical target:[4] the tyrant, who transgresses equality before the law and rules without restraints.

1 Power (*dynamis*) is the standard by which Thucydides evaluates the quality of political arrangements: see G. Giorgini, *The Riddle of Pausanias. Unraveling Thucydides' Account*, in: *Rivista Storica dell'Antichità*, 34, 2004, pp. 181–206.

2 J. Ober, *Mass and Elite in Democratic Athens*, Princeton 1989; *id.*, *Democracy and Knowledge*, Princeton 2008; *id.*, *Demopolis*, Cambridge 2017.

3 Contra Ch. Meier, *The Greek Discovery of Politics*, Cambridge (Mass.) 1990. For a refined discussion of *isonomia* see K. Raaflaub, *The Discovery of Freedom in Ancient Greece*, Chicago 2004.

4 On the notion of "battle-concept" see C. Schmitt, *The Concept of the Political*, Chicago 2007; R. Koselleck, *Futures Past*, New York 2004.

The first occurrence of *isonomia* is in a *skolion*, a hymn, sung by aristocrats, which celebrates the tyrant-slayers Harmodius and Aristogeiton for making Athens "isonomical".[5] Equality before the law is by definition the opposite of tyranny because it contrasts the certainty of an objective law to the capricious decisions of the tyrant. It is also a means to prevent tyranny from emerging, just like in the case of the expression "rule of law", which appears in the context of the struggle for containing the ambitions of absolute monarchs.[6] Secondly, *isonomia* is connected with the idea of *euthyna*, of being accountable to the citizen body for one's actions while in office: all Athenian citizens elected to some magistracies were held accountable for their decisions and could be investigated at the end of their term; there existed specific procedures to enable any citizen to sue public officers and civil servants.[7] Thirdly, *isonomia* implies the notion of publicity: laws and decrees are presented to the public and then enacted by citizen bodies in which everyone can participate or to which everyone can be elected; they are made publicly known and are written down.[8] Fourthly, *isonomia* entails *isegoria* and *parrhêsia*, namely the possibility for everyone to speak their mind on an equal footing (for instance in assembly or in court, without restrictions or deference). As a result of all these features, we may conclude that *isonomia* had a more comprehensive meaning, namely that of "equality before the law and implemented through the law".[9]

Before continuing, I need to tackle one possible objection to my quick statements. One could argue that the idea of the "rule of law", simply interpreted as the existence of a system of laws which apply to aristocrats and commoners, wealthy and poor citizens alike, already existed before in Greek cities, and it existed in Athens at least from the time of Solon (640–560 BCE ca). It is well-known that Greek cities had systems of laws and even written law-codes before the establishment of democracy at Athens; what is com-

5 Athenaeus, *Deipn.* XV,695.

6 See the likely first occurrence of the expression in Samuel Rutherford's (1600–1661) *Lex, Rex: The Law and the Prince. A Dispute for the Just Prerogative of King and People* (London 1644, p. 237): "The prince remaineth, even being a prince, a sociall creature, a man, as well as a king; one who must buy, sell, promise, contract, dispose: ergo, he is not *Regula regulans*, but under rule of law…".

7 See D. McDowell, *The Law in Classical Athens*, Ithaca 1986; F. Abdel-Nour – B. L. Cook, *As If They Could Be Brought to Account: How Athenians Managed the Political Unaccountability of Citizens*, in: *History of Political Thought*, 35, 2014, pp. 436–457.

8 Herodotus uses in this context the visual metaphor of "putting it to the middle" (*es to meson*) or "making it common" (*es to koinon*). For the functioning of the Athenian assembly see M. H. Hansen, *The Athenian Democracy in the Age of Demosthenes*, Oxford 1991.

9 On *isonomia* and the foundational values of Athenian democracy I wish to refer to my *The Foundations of Democracy: Citizenship, Equality and the Common Good*, in: *Philosophy and Public Issues*, New Series, 9, 2019, pp. 143–162.

mon to these systems of laws is that they consistently place no one above the law and make everyone accountable to the law. As for Athens, there is a consistent strand of literature dating from the end of the 5th century BCE which interprets Solon as the creator of democracy in Athens and longs for a return to the "ancestral constitution" (*patrios politeia*) – Solon's allegedly more sober version of democracy.[10] We should, however, resist these partisan reconstructions which, in the heated years around 411 BCE, aimed at surreptitiously overthrowing Athenian democracy and replacing it with an oligarchy. Solon described his ideal political arrangement as *eunomia* and *eukosmia*: it is the vision of a regime where two entities – the aristocrats and the *dêmos*, the rich and the poor – conceived as morally, socially and politically unequal could harmoniously coexist thanks to good laws. Solon prided himself on having created a well-balanced constitution in Athens, avoiding the two extremes of anarchy and tyranny[11] and "giving to the *dêmos* as much privilege as is sufficient"; he added that "in this way the *dêmos* would best follow its leaders, if it is neither given too much freedom nor subjected to too much restraint".[12] Solon's political arrangement presupposes unequal citizens and attributes to them different roles and tasks: it is evident, for him, that the *dêmos* is not an active political agent, that it needs leaders; his constitution is certainly not a democracy.[13] It is however true, and to Solon's credit, that in his constitutional reform he "wrote laws for the lower and upper classes [lit: 'the bad and the good'] alike, providing a straight legal process for each person".[14] I consider this a lesser version of the rule of law, since it seems to regulate only the private matters of citizens of unequal status. And I find that the same is true regarding all Greek legal systems before Athenian democracy.[15] The notion of the rule of law applies to the relations between equal citizens, the institutions of the State and the government.

Finally, before examining Protagoras' political views we should bear in mind what Josh Ober has acutely observed: "In the Athenian case, democratic practices were established well *before* any (surviving) text discussed

10 See for instance Thucydides, *Hist.* VIII,76,6; Aristotle, *Ath. pol.* 29,3, 34,3; Isocrates, VII,20. Cf. M. Ostwald, *From Popular Sovereignty to the Sovereignty of the Law*, Berkeley – Los Angeles 1986.

11 We find the same ideal of moderation expressed in Aeschylus, *Eum.* 526–530, where the opposition is between an anarchical life and one under a master/despot (*despotoumenon*).

12 Aristotle, *Ath. pol.* 11,2–12,1.

13 For a different opinion see M. Stahl, *Solon F 3D. Die Geburtsstunde des demokratischen Gedankens*, in: *Gymnasium*, 99, 1992, pp. 385–408, and R. W. Wallace, *Revolutions and a New Order in Solonian Athens and Archaic Greece*, in: K. Raaflaub – J. Ober – R. Wallace (eds.), *Origins of Democracy in Ancient Greece*, Berkeley 2007, pp. 49–82.

14 Aristotle, *Ath. pol.* 12,3.

15 See E. M. Harris, *Law and Society in Ancient Athens*, Cambridge 2006, pp. 3–28. Harris, however, has a broader concept of "rule of law" and calls it "the spirit of the laws".

democracy in abstract terms".[16] The theory of democracy, including the discussion about the merits and demerits of this regime, came after the establishment of democratic institutions and practices at Athens. However, we can see those institutions and practices as the embodiment of certain political ideas, albeit without their being fully spelled out. For instance, the fact that the magistrates who sat in the Athenian courts of justice were not professionals or experts and were appointed by lot discloses the belief that *any* citizen was able to properly judge a case because he possessed the necessary wisdom: *gnômê,* political judgment, is not unique to aristocrats.

Enter Protagoras

Protagoras was famous for being the first consistent relativist who argued that there is no objective truth and that every perception is valid for those who experience it.[17] He expressed this concept in a grand statement that gave him incredible notoriety[18] and lasting fame:

> Man is the measure of all things; of things which are, that they are; of things which are not, that they are not (*DK* 80 B 1).[19]

He extended his relativism to morality and politics and maintained that the law is "the opinion of the city",[20] thus disjoining justice from any metaphysical foundation. This includes any relation with a divinely ordained cosmos. As he famously stated at the beginning of his work *On the Gods*:

> Concerning the gods, I cannot verify that they exist or that they do not exist nor what their shape is; for many are the obstacles that prevent our

16 J. Ober, *Political Dissent in Democratic Athens*, Princeton 1994, p. 32; italics in the original.

17 R. Bett, *The Sophists and Relativism*, in: *Phronesis*, 34, 1989, pp. 139–169, argues that the sophists were not, in general, relativists and convincingly demonstrates this for Thrasymachus, Gorgias and the author of the *Dissoi Logoi*. He considers Protagoras an exception, the only interesting and profound relativist, because of his man/measure doctrine.

18 It is hardly necessary to go beyond Plato's presentation in the *Protagoras*: the great sophist walks through Callias' house followed by an accolade of spellbound disciples who move disciplined in neat formation: Plato, *Prot.* 315a–c. Even Aristotle, who is very dismissive of Protagoras because he takes him as someone who denies the principle of non-contradiction, and therefore not worth wasting time with, admits that Protagoras' grand statement had an enormous impact on his contemporaries: *Met.* IV,4–6.

19 For an interesting interpretation of this fragment which rejects the traditional relativist reading see R. Zaborowski, *Revisiting Protagoras' Fr. DK B 1*, in: *Elenchos*, 38, 2017, pp. 23–43. For "things" Protagoras uses the word *chrêmata* (from *chraomai*, "to use") which implies a relation to an agent, a *metron.*

20 See Plato, *Tht.* 167c, 171a–b.

> knowledge: not only the obscurity [of the problem] but also the brevity of human life (*DK* 80 B 4).[21]

This is far from being the arrogant profession of atheism that many simplistic interpreters would expect from a sophist. In his humble statement, Protagoras maintains that God is an article of faith and God's existence cannot be argued for or against since no empirical evidence can be brought to the case.[22] As a consequence, any moral value or political action must rest on purely human knowledge: the gods cannot be taken as models for building any system of morality or any political arrangement.[23] In addition, religion does not make human beings any more sociable, as we learn from the "Great Speech" he delivers in Plato's *Protagoras*.[24]

It follows that politics is a human, all-too-human matter; a dimension where men act or refrain from acting according to purely human standards.[25] And since the law is "the opinion of the city"[26] and justice is therefore inevitably connected to a political arrangement, it seems to be impossible to weigh different political regimes and determine which is the best. However, if we consider the implications of the "Great Speech", we find that Protagoras' argument to the effect that all men possess (albeit only potentially) the two political virtues – respect (*aidôs*) and justice (*dikê*)[27] – leads to the con-

21 All translations of Protagoras are mine. I believe that the proper beginning for an investigation of Protagoras' thought is still M. Untersteiner, *I Sofisti*, Torino 1949; English translation by K. Freeman, *The Sophists*, Oxford 1954.

22 R. Bodéüs, *Réflexions sur un court propos de Protagoras*, in: *Les Etudes Classiques*, 55, 1987, pp. 241–257, argues that Protagoras was stating his inability to express an opinion on the gods since they do not manifest themselves and the absence of perceptions makes it impossible to make a judgment.

23 "The gods abandon the city", states E. Terray, *La politique dans la caverne*, Paris 1990, p 21. Or, we could say more mildly, "Man is the measure, and the gods are silent" as it is put by C. Farrar, *The Origins of Democratic Thinking*, Cambridge 1988, p. 51.

24 Plato, *Prot.* 320c–328d. From a political point of view this implies that soothsayers and priests have no necessary role in the city. On this myth see M. Vegetti, *Protagora autore della Repubblica (ovvero il "mito" del Protagora nel suo contesto)*, in: G. Casertano (ed.), *Il Protagora di Platone: strutture e problematiche*, Napoli 2004, pp. 145–157.

25 This statement is not contradicted by the fact that the Great Speech is populated by all sorts of gods, who in addition give human beings the gift of political art: Protagoras is narrating a myth there and conforms to the conventions of the genre.

26 Plato, *Tht.* 167c.

27 I take Protagoras to mean that all men potentially possess the two political virtues, which need to be actualized through education. This is the meaning of his statement that Zeus ordered Hermes to distribute respect and justice to everybody because "cities cannot be formed if only a few have a share of these as of other arts. And make thereto a law of my ordaining, that he who cannot partake of respect and justice shall die the death as a public pest" (Plato, *Prot.* 322c–d). Here Protagoras is simply admitting that there can be exceptions, people who do not possess these virtues: they are criminals and must be treated as such. Protagoras is in fact reiterating and reinforcing his view that all ordinary human beings possess these virtues.

clusion that democracy is the best and most natural form of government because every man possesses the political art (*politikê technê*) which enables him to be an active citizen.[28] Is this conclusion inconsistent with the statement that the law is the "opinion of the city" and that every city therefore has a different notion of justice and view of the best regime?

I think that Protagoras was not inconsistent. His relativism is confined to his theory of knowledge. In practical matters there is no truth, but this does not mean that all opinions have the same value: some are worse, some are better, although not truer. Although there is no Platonic-style objective standard by which one can evaluate political regimes in Protagoras' thought, we are not left without any guidance: the wise man's (i.e. the sophist's) experience provides the standard in practical matters. This is the lesson we learn from Plato's *Theaetetus*, where Protagoras is given the opportunity to explain his thought.[29] Consistently with his belief in the impossibility of knowing the gods, Protagoras maintains that our knowledge is limited to the phenomenal realm. The choice of words also reveals that "the things" (*chrêmata*) we human beings deal with are things with reference to us, concerning the world we live in. Protagoras then goes on to argue that "each of us – the single individual – is the measure both of what is and of what is not"; but he adds that "there are countless differences between men for just this very reason, that different things both are and appear to be to different subjects". Finally, he concludes, some of these semblances (*phantasmata*, representations) are "better" (*beltiô*) than others, although in no way "truer" (*alêthestera*) – as some maintain out of ignorance.[30] In practical matters, when we make our life choices or when we make political decisions, some opinions are better, namely more useful, than others: some "truths" work better than others. Protagoras, for instance, would not question the truth-content of the opinions of a male chauvinist: he knows that, for such a person, women are inferior to men. He would, instead, point out that political arrangements where women have the same rights as men flourish more than those where women are in a condition of subalternity because they can exploit the talents

28 It is worthwhile noting that Protagoras argues that *politikê technê*, to be interpreted as a civic art, the art of living and flourishing together, is the salvation of humanity: this is an art that all human beings possess. Plato, on the contrary, sees salvation for human beings in the *metrêtikê technê*, the art of measurement, possessed by few and ignored by the populace. F. Rosen, *Did Protagoras Justify Democracy?*, in: *Polis*, 13, 1994, pp. 12–30, argues that the Great Speech "is not set forth explicitly as a justification of democracy or any other constitution" (p. 24). Likewise, P. P. Nicholson, *Protagoras and the Justification of Athenian Democracy*, in: *Polis*, 1, 1980, pp. 14–24, argues that Protagoras is a relativist and therefore merely offers a value-neutral theory of politics.

29 Interesting observations in U. Zilioli, *Protagoras and the Challenge of Relativism*, Aldershot 2007.

30 Plato, *Tht.* 166d–167b.

of the female part of the population. Gender equality works in practice, and therefore is true.

It is at this level that we can appreciate the important role of the sophist, who is described as a "wise man" because he knows the ways of the world, has experience of human beings and political arrangements, and can therefore teach other people what is most advantageous for them. Protagoras argues that

> the man I call wise is the man who can change the appearances – the man who in any case where bad things both appear and are for one of us, works a change and makes good things appear and be for him (Plato, *Tht.* 166d).

The wise man, identified with the sophist, operates as a physician, turning bad states of mind (or the soul) into better states, which enables his listeners and students to have better perceptions, using words instead of drugs:[31] he cannot persuade people they are wrong (because there is no right or wrong as far as truth is concerned), but he can make them change attitude (*hexis*) and adopt behaviours which are more in line with the city's values, thus moulding good citizens. In addition, the sophist can steer statesmen towards a better political arrangement (one he has seen to work better in practice). This education works both at the individual and at the societal level: through his words and examples, the sophist can persuade a pupil that some of his life-choices are wrong and make him opt for better ones. When we face moral disagreement, we cannot say that someone is right and someone else is wrong, for their beliefs are true for them. Instead, we must effect a change from one condition (*hexis*) to another, because health is better than illness. This is why the sophist works like a physician, because he does not try to persuade the sick person that what he perceives as cold is in fact warm; instead, he tries to heal him, to change his condition, his bodily state.[32] The physician is no relativist about the presuppositions of his own art: he assumes that health is better than illness because he has practical experience of the consequences; likewise, the sophist assumes that education and wis-

31 This idea that words are like drugs, which affect the soul instead of the body, may be found also in Gorgias' *Encomium of Helen*: *DK* 82 B 11,8–11. Gorgias argues that "Speech is a powerful lord, which by means of the finest and most invisible body effects the divinest works"; and goes on to compare its power to that of witchcraft and incantations.

32 This is what the physician does according to [Hippocrates] *De ant. med.* 4–5; the physician, for instance, changes the diet of the patients in order to heal them. Interestingly, [Hippocrates] argues that regarding diet "no-one is a layman" (*idiotês*); Protagoras states that in the political art "no-one can act for himself" (*idioteuein*): Plato, *Prot.* 327a. On this see A. T. Cole, *The Relativism of Protagoras*, in: *Yale Classical Studies*, 22, 1972, pp. 19–45.

dom are better than ignorance and savagery because he has experience of the world. This is Protagoras' point:

> Whatever in any city is regarded as just (*dikaia)* and admirable (*kala*) is just and admirable, in that city and for so long as that convention maintains itself; but the wise man replaces each pernicious (*poneron*) convention by a wholesome (*chrêsta*) one, making this both be and seem just (Plato, *Tht.* 167c; cf. *Prot.* 313d).

For, judging from his experience, the sophist can suggest to a city the most convenient political arrangement suited to mould good citizens in the specific situation. Again, in so doing, the sophist acts as a physician, who studies the symptoms of an illness as well as the constitution of the patient and adapts the treatment to the circumstances: there is no general rule in these matters; rather the "judgement resides in perception" of the single case, as we read in [Hippocrates] *De antiqua medicina*, 9. The physician is guided by an unstated, obvious premise: health is better than disease. Likewise, to keep up the analogy, the sophist has seen that civil strife is like an ailment in the body politic and he will resort to his experience and technique to prevent its emergence inside a city. Harmony, *homonoia*, political friendship constitutes the natural, healthy condition of the city. *Stasis*, turmoil, faction, conflict disrupts this harmony and the sophist's task is to restore order, and therefore health, inside the community.

Relativism and democracy

Relativism reigns in the realm of knowledge, but has practical limits, determined by experience of what is advantageous for human beings. Protagoras' relativism is thus connected to a kind of "humanism": the human being is at the centre of the world; education, values, behaviours, institutions, political arrangements, they all revolve around human beings and what is advantageous to them. This is why Protagoras can state with assurance that he teaches how best to manage practical matters, making the right choices (*euboulia*):[33] he is at home when it comes to evaluating human actions and decisions and deciding what is the best course.

33 Plato, *Prot.* 319a. N. O'Sullivan, *Pericles and Protagoras*, in: *Greece & Rome*, 42, 1995, pp. 15–23, noticed that the way Protagoras explains his educational programme in this passage is very similar to an expression Thucydides uses to describe Pericles' political ability: see Thucydides, *Hist.* I,138,4.

We should also consider the democratic context of the sophists' teaching: sophists like Gorgias and Protagoras, coming from outside, were surely struck by the practices of Athenian democracy. They noticed that citizens attended the Assembly and sat in the courts listening to different, and conflicting, opinions being voiced on the same topic; citizens and jurors had to make a choice based on what argument was more persuasive and, therefore, true (or, rather, truer). Truth for these authors was the argument that emerged victorious from a battle of conflicting discourses (*antilogiai*). They were not frivolous but rather tragic in maintaining that "there are two arguments standing opposed to each other on every issue":[34] truth, and consequently the correct course of action, becomes a matter of human choice.

In Plato's *Theaetetus* Protagoras makes his political point in a passage full of nuances. He states that

> Whatever view a city takes on these matters [justice and religion] and establishes as its law or convention, is truth and fact for that city. In such matters neither any individual nor any city can claim superior wisdom. But when it is a question of laying down what is to the interest (*sympheronta*) of the city and what is not, the matter is different. … It is in those other questions I am talking about – just and unjust, religious and irreligious – that men are ready to insist that no one of these things has by nature any being of its own; in respect of these, they say, what seems to people collectively to be so is true (Plato, *Tht.* 172a–b).

"Truth" in politics consists in "what seems to people collectively to be so" (*to koinê doxan*). After an evocative digression on God's role in human life, Protagoras reiterates his political point:

> Whatever any community decides to be just and right, and establishes as such, actually is what is just and right for that community and for as long as it remains so established. On the other hand, when it is a question of what things are good (*tagatha*), we no longer find anyone so courageous that he will venture to contend that whatever a community thinks useful (*ôphelima*), and establishes, really is useful, so long as it is the established order (Plato, *Tht.* 177d).

It is in the realm of practical matters – what is just, good, holy, advantageous to a person and a city – that relativism finds its limit. Protagoras puts forth a pragmatic notion of truth: truth is what works in practice. Since there is

34 This is the way Protagoras phrased it in *DK* 80 A 1.

neither a divine standard nor truth in politics, each political regime decides what is right and good for itself. The city, each city, is the criterion of justice, of piety and of sanctity. However, the sophist, drawing on his own experience, may recommend to each polis what the most useful laws and institutions are according to the specific circumstances; for the sophist knows that different people are suited to different political regimes. Protagoras has thus demonstrated the importance of the sophist, conceived as a wise and educated man, in practical matters: there is a criterion to evaluate what is useful, namely conducive to the greatness of the city and the flourishing of the citizens, in a political community and the sophist is the measure. In the realm of practice, people should cease speaking of "truth" (*alêtheia*) and should instead speak of "correctness" (*orthotês*): what is the most correct course of action (or form of government) according to the circumstances?[35]

Protagoras therefore thought that the question of the best regime does not admit of one single, straight answer: it depends on the circumstances, on the human material at hand. However, in the *Protagoras* he elaborates an anthropological view designed to show that, since all human beings are potentially endowed with the political virtues which enable them to participate in politics, a healthy community should opt for democracy. An obvious objection to Protagoras' democratic stance would be that it is an unfounded opinion; or rather, that it is just one opinion of equal value to its opposite. Protagoras' next step must therefore consist in showing that democracy works, that it is the best form of government because it enables all citizens to flourish while making the city strong and powerful: a win-win situation.

Protagoras is prompted to deliver his "Great Speech" by Socrates' statement that he does not believe that virtue and political science are teachable. Among the reasons supporting his contention Socrates argues that the behaviour of the Athenian people, who are reputed wise, confirms his belief:

> I observe that when we convene in the Assembly and the city has to take some action on a building project, we send for builders to advise us; … This is how they proceed in matters which they consider technical. But when it is a matter of deliberating on city management, anyone can stand up and advise them, carpenter, blacksmith, shoemaker, merchant, ship-captain, rich man, poor man, well-born, low-born – it doesn't matter (Plato, *Prot.* 319b–d).

35 I believe that Aristotle gave his own answer to this Protagorean question through his doctrine of *phronêsis* in *Nicomachean Ethics* VI. See the interesting observations of P. Gottlieb, *Aristotle versus Protagoras on Relatives and the Objects of Perception*, in: *Oxford Studies in Ancient Philosophy*, 11, 1993, pp. 101–119; *id.*, *Aristotle's Nameless Virtues*, in: *Apeiron*, 27, 1994, pp. 1–15.

The Athenians' behaviour in politics seems to indicate that they do not think political science can be taught – anyone can possess it and no-one is considered an expert in this art more than anyone else. Protagoras' reply is both evocative and punctual. He first smoothly shows that *politikê technê* is the most important possession for human beings, who are also unique among living beings in possessing justice, although not originally: they need Zeus' gift, who is thus the benefactor of humanity.[36] After Epimetheus' ill-executed distribution, Prometheus steals fire from the gods and gives it to mankind; however, this gift enables men to shelter and defend themselves but not to create societies and flourish. Interestingly, Protagoras maintains that human beings' kinship with the gods prompted them to create religion, but this was not enough to bring justice into the cities.[37] He says:

> Since man thus shared in a divine gift, first of all through his kinship with the gods, he was the only creature to worship them, and he began to erect altars and images of the gods (Plato, *Prot.* 322a).

Man needed another gift from the gods.[38] Hence Zeus sent Hermes on earth to bring respect and justice to all mankind, excluding none.[39] These two virtues encapsulate the "political art" which is necessary to have a flourishing society because it brings friendship and justice into the city.[40] Protagoras is thus able to bring home the point that neither technical skill nor even religion are sufficient for mankind to flourish; mankind needs the political art, which exists in potentiality in any human being, being an equally distributed gift of Zeus, but needs education to be actualized. And, in Protagoras' view, the sophist fulfils this educational role.

36 Plato, *Prot.* 322b. Protagoras is thus in agreement with Hesiod, *Erg.* 276–280, who maintained that Zeus gave justice, which is the best gift of all, to human beings only.

37 S. Zeppi, *Studi sul pensiero etico-politico dei sofisti*, Roma 1971, p. 1, noticed that Protagoras was the first sophist who relinquished the soothing faith in the beneficial influence of the divine on human society. We may add that this low consideration of the role of religion in civic matters is consistent with Protagoras' stance on the impossibility of knowing the gods and therefore of deriving any teaching from them.

38 W. Nestle, *Bemerkungen zu den Vorsokratikern und Sophisten*, in: *Philologus*, 67, 1908, pp. 531–581, noticed the identity of the notion of *pronoia theou* that we find in Plato, *Prot.* 321b, and in Herodotus, *Hist.* III,108; and more generally the resemblance between the content of Protagoras' Great Speech and Herodotus' chapter on the providence of the Gods.

39 On the role of Hermes as a Protagorean promoter and distributor of political art see S. Yona, *What About Hermes? A Reconsideration of the Myth of Prometheus in Plato's Protagoras*, in: *Classical World*, 108, 2015, pp. 359–383.

40 A. R. Nathan, *Protagoras' Great Speech*, in: *Classical Quarterly*, 67, 2017, pp. 380–399, argues that Protagoras' virtue boils down to "a vague notion of civic duty". He finds much more interesting the form of the myth, which displays Protagoras' ability before his audience.

In addition, Protagoras smoothly pays a tribute to the Athenians and their practices: they are correct in accepting advice from anyone when it comes to political matters, because those matters involve justice (*dikaiosynê*) and moderation (*sôphrosynê*) and "it is incumbent on everyone to share in that sort of excellence (*aretê*), or else there can be no city at all".[41] Protagoras emphasizes how in a city, different educational actors – the nurse, the mother, the teacher, the father – try to instill civic virtue in the child; the same role is played by laws and punishments, which aim at correcting wrong behaviour in an educational perspective. The city – Protagoras maintains – "lays down laws, devised by good lawgivers of the past, for our guidance, and makes us rule and be ruled according to them, and punishes anyone who transgresses them".[42] Protagoras is not a political revolutionary: he deems that the sophist should work in a traditional legal and political context designed by the excellent people of the past.[43]

Now, being a consistent relativist, Protagoras knows all too well that when you cannot appeal to a divine or a human truth in politics, you are left with either persuasion or violence. The latter alternative is exemplified by tyranny, but it is also practiced in oligarchies, where a few alleged "best citizens" purport to possess political capacity (*gnômê*) thanks to their ancestry and exclude all others from politics. Protagoras evidently does not believe in aristocracy of blood, or lineage, nor in the primary importance of wealth. The exclusion of some citizens from political participation on these grounds is therefore illegitimate.

In democratic politics, on the contrary, human beings devise their values and political institutions through a dialogic process.[44] This is the all-important role of *logos* in the public sphere according to Protagoras: through their interactions, citizens exchange information which enables them to shape the most just institutions and make the best decisions. Democracy is thus the best form of government because it best allows citizens to have a public discourse on an equal footing, at least on principle. It does not matter that some citizens can contribute more than others to the deliberative process: every citizen has a specific expertise, and every contribution is therefore

41 Plato, *Prot.* 323a; cf. 325a.

42 *Ibid.*, 326d.

43 This conclusion had already been reached by the great historian George Grote in his *History of Greece*, I–XII, London 1846–1856, VIII, ch. 67.

44 See the refined treatment of Protagoras, depicted as a supporter of pluralism, by L. J. Apfel, *The Advent of Pluralism*, Oxford 2011, pp. 46–115. Apfel argues that Protagoras is not a relativist nor a subjectivist but rather a pluralist, for he maintained that the objects of knowledge do in fact exist; however, the fact that they are objective does not mean that they are unique.

useful and important.[45] This is the value of *isegoria* and *parrhêsia* which, together with *isonomia*, are the foundations of democracy.

Since all other political regimes besides democracy involve an element of violence, indeed of un-naturalness, due to the illegitimate exclusion of some citizens from the political process, we may conclude that for Protagoras democracy is the only form of government where there exists the rule of law. For the rule of law is by definition the opposite of violence, arbitrariness and secrecy; but it also stands against partisanship and civic conflict (*stasis*), which is inevitable when one part, and not the entire citizen body, rules in a city.

It is hardly necessary to point out the distance between Protagoras' elevated view of the rule of law, of good laws, inside a city and Thrasymachus' vision that every city is inevitably characterized by civil war, since "the just is the advantage of the stronger".[46] For Thrasymachus the laws are a fraud, devised by the constituted government to force citizens to pursue the interest of the rulers: "justice is someone else's good" shouts Thrasymachus in the face of Socrates and his other listeners.[47] Thrasymachus sees every political arrangement as inevitably divided into two factions – the rulers and the ruled. They have nothing in common because the rulers make laws to their own advantage and to the detriment of the ruled: democratic laws favour the poor, oligarchic laws the wealthy and the tyrant rules to the advantage of himself and his own family. From this comparison we can appreciate both the audacity and the originality of the singular sophists.

One final point may be useful to emphasize the significance of Protagoras' reliance on the rule of law and his defence of democracy. Democracy is the regime where equality before the law (and through the law) is implemented at its fullest because all citizens are politically equal. Protagoras surely knew that in 5th century Greece there existed forms of *oligarchia isonomôn*, as the Thebans call it in Thucydides: regimes where politics is managed by the aristocrats or the wealthy (who most often coincide) who consider themselves equal before the law.[48] Protagoras would consider this an unmotivated, self-

45 The point I am making here is that what is important about democracy is that it allows all citizens to voice their opinion; it does not matter that not all pieces of advice are of the same value nor that some, or even many citizens, have nothing to contribute: what is important is the principle. Contra, see G. B. Kerferd, *Protagoras' Doctrine of Justice and Virtue in the Protagoras of Plato*, in: *Journal of Hellenic Studies*, 73, 1953, pp. 42–45.

46 Plato, *Resp.* 338c.

47 *Ibid.*, 343c.

48 Thucydides, *Hist.* III,62. To defend themselves from the accusation of siding with the Persians, the Thebans blame their bad regime: "Our constitution then was not an oligarchy in which all the nobles enjoyed equal rights before the law (*oligarchian isonomôn*), nor was it a democracy: power was in the hands of a small group of powerful men (*dynasteia oligôn andrôn*), and this is

proclaimed and therefore arbitrary oligarchy which excludes part of the population from the political decisions; and he would add that such a regime is less efficient and thus less useful to the citizen body. Such a view is shared by Plato, who takes the point but argues that an intellectual aristocracy, an aristocracy of virtue, rules legitimately and is in fact the best form of government, superior to democracy and indeed above the rule of law. For Plato, especially in the *Politicus*, states clearly that the possession of political science enables the true statesman to rule and disregard the law, which is seen as an impediment for its fixity; "the best thing is not that the laws be in power, but that the man who is wise and of kingly nature be ruler" says the Eleatic Stranger.[49] In all Plato's works the rule of law is at the most a second best, inferior to philosophical rule. On the other hand, Aristotle, in his theory of the forms of government, says explicitly that if a political community is lucky enough to have a person whose virtue is incomparably superior to all others' so as to appear "like a god among men", everyone should obey him willingly and gladly. Such extraordinary people are not bound by the laws because they are themselves the law; and to think of ruling over people of such extraordinary virtue is as ridiculous as to think of ruling over Zeus.[50]

Protagoras: the forerunner of sceptical liberalism

I wish to conclude by arguing that Protagoras' position, thus interpreted, can serve as a proper foundation of contemporary liberal democracy. Indeed, his view about democracy and knowledge is very similar to the theoretical foundation of liberalism we find in such contemporary authors as Friedrich von Hayek and Michael Oakeshott. Of course, I am far from arguing that Protagoras was a liberal; the very idea is misconceived. My point is that a liberal foundation of democracy can use the kind of relativism and pragmatic notion of truth I attributed to Protagoras.

In my depiction, Protagoras argued that in politics one cannot invoke and import any notion of "the justice of Zeus" or cosmic justice, because our limitations as human beings prevent us from knowledge of these matters.

the form of government nearest to tyranny and farthest removed from law and the virtues of moderation."

49 See Plato, *Polit.* 294a: cf. 293c–d; at 297c the Eleatic Stranger says that a multitude of people will never be able to acquire political science and rule the city with wisdom: the rule of only one person is the best. Finally, at 300c the Eleatic Stranger states that the person who knows, the real statesman, will do many things with his art and will completely disregard written laws.

50 Aristotle, *Pol.* III,13,1284a4–11; cf. III,17,1288a5–30; VII,3,1325b10. For an interpretation of these statements I wish to refer to G. Giorgini, *Aristotle on the Best Form of Government*, in: S. Farrington (ed.), *Enthousiasmos. Essays in Ancient Philosophy, History and Literature*, Baden-Baden 2019, pp. 121–145.

We must rest content with purely human standards: human values are the result of opinions held, and decisions made, by citizens, which in turn establish political institutions and legal systems and thus create justice in a city. However, Protagoras does not leave the question at that; his legal positivism is tempered by his conviction that observation and experience teach what works best in practical matters, namely which arrangements are most conducive to human flourishing. What has proved to work in practice to secure human flourishing is superior (albeit not truer) to what does not work in this respect: human rights, gender equality, superiority of democracy may only be the opinion of a part of the world ("the West"), but they work in practice because states that adopt them have a better quality of life than those which don't; and people flee the latter and rush into the former. Protagoras believed in the capacity for excellence of every human being and in the educational role of good laws and institutions. These laws and institutions were the result of a collective effort to which the sophist gave his contribution through his peculiar expertise in practical matters.

Protagoras thought that, since it is impossible to agree on an objective truth in morality and politics, the sophist should persuade his audience of the superiority of certain values or of a specific political arrangement. Democracy was the political regime most conducive to that result, for democracy enables all citizens to speak their mind and thus gathers the richest variety of opinions;[51] in democratic assemblies and deliberations all sorts of opinions are voiced because all citizens can contribute, each with their own specific knowledge. Democracy enables this circulation of knowledge and proves superior to all other regimes in thus making effective decisions, because equal opportunity to speak exploits the partial knowledge of each citizen and allows for proper deliberation prior to decision-making. This is one feature that Pericles also singles out in his praise of Athenian democracy:

> We are all involved in either the proper formulation or at least the proper review of policy, thinking that what cripples action is not talk, but rather the failure to talk through the policy before proceeding to the required action (Thucydides, *Hist.* II,40, transl. M. Hammond, Oxford 2009).

I think that in contemporary times this position can be the foundation of a sceptical, liberal vision of democracy.[52] I call this view sceptical because

51 This is a point that even Plato acknowledges in *Resp.* VIII,557c: democracy contains "the greatest variety of individual character".

52 I am obviously not arguing that Protagoras (or Pericles for that matter) was a liberal or a forerunner of liberalism. I am making the opposite point: contemporary political liberalism could use a "tempered relativistic" foundation of its values such as the one provided by Protagoras.

it is founded on a pragmatic notion of truth: it eschews cultural relativism and the notion that the very word "truth" signals cultural imperialism; but, while acknowledging that "truth" in fact exists, it also maintains that "truth" is more of a goal than a once-and-for-all achievement; and that it is a human truth (namely neither divine nor self-evident but requiring a supporting argument). Truth is a progressive notion, in the sense that one truth can be superseded by a better truth, one that works better. For instance, Newton's law of universal gravitation is a truth; however, Einstein's theory of general relativity has improved on it by showing that it applies only to our universe.

I find that a similar position was put forth by two of the most original liberal authors of the 20th century – Michael Oakeshott and Friedrich von Hayek. They are an interesting counterpart to Protagoras – a sophist concerned both with the theoretical and the practical side of politics – because they both wrote during the Cold War and thus their works, though exploring the theoretical foundations of politics, had an inevitable practical import: they both starkly opposed the theory and practice of Soviet Communism. The British philosopher Michael Oakeshott (1901–1990) turned his attention to politics after World War 2 and especially during the years of Clement Attlee's Labour government. Oakeshott opposed the socialist effort to create a perfect society based on "social justice", which he considered an example of "rationalism in politics": the dream of using the mind in a technical manner, as an instrument, disregarding tradition and against authority and prejudice, to create the absolutely best society.[53] To achieve this result, the mind should start from a *tabula rasa*, should be purged of the biases of the era, and should thus design the blueprint of the perfect society. Government is then viewed as a reservoir of power which should be used to reach one target common to all citizens, mobilizing them in a common enterprise such as achieving social justice.[54] Oakeshott, who describes himself as a conservative and a sceptic (a very unusual combination), saps the theoretical foundations of such an enterprise. Through some fanciful examples (such as the attempt by Victorian designers to create a "rational dress" for cycling women), he showed that human reason can never completely abstract from the contingencies of a historical situation; therefore, abstract perfection in politics (as in any other department of human activity) can never be achieved: we should

53 Oakeshott considered the notion of "instrumental mind" the "relic of a belief in magic": M. Oakeshott, *Rational Conduct*, in: *Rationalism in Politics and Other Essays*, Indianapolis 1991, p. 113.

54 "The pursuit of perfection as the crow flies" becomes a lifelong task and human beings become the slaves of an ideal: M. Oakeshott, *The Tower of Babel*, in: *Rationalism in Politics and Other Essays*, pp. 465–487.

rest content with the best according to circumstances.[55] Oakeshott's political stance is based upon his view of the limitations of human reason.

Oakeshott finds that the best political arrangement human beings have so far devised is the rule of law. And, using a Latin expression derived from the Roman law, he calls *societas* every vision of the state based on respect for the rules of conduct agreed upon by the citizens: these consider themselves as *socii*, partners, in the acceptance of certain rules which do not prescribe what to do.[56] He finds this to be the most civilized and least demanding (in terms of constriction) of all conceptions of the state: it was not invented by theoreticians and was instead developed by the Romans and the Normans. Oakeshott emphasizes that a rule is not a command which requires obedience; it rather requires the acceptance of the conditions it prescribes. Historically, the rule of law in England is connected to the development of the common law and provides a traditional, not an abstract, liberty to British citizens. The opposite view of the state is identified as *universitas*, which is an enterprise association where all citizens have a common purpose. Oakeshott is mistrustful about this vision of the state for both theoretical and practical reasons. Theoretically, it relies on an ill-founded notion of reason and on the mistaken view that all knowledge is technical, namely can be expressed in rules and thus taught and learnt. This is the Rationalist's mistake, to neglect traditional or practical knowledge, which cannot be put down in a code and can be learnt only through use and practice. But these theoretical mistakes can have ominous consequences when they constitute the foundation of an actual state. For they imply the imposition of a single vision of the perfect society to all citizens: a private dream is turned into a public way of life. And, Oakeshott grimly adds, "the conjunction of dreaming and ruling generates tyranny".[57]

Perhaps even closer to Protagoras' intellectual and political position is the vision of politics put forth by the Austrian economist Friedrich A. von Hayek (1899–1992). Already when he was working in Vienna in the early 1920s, Hayek conceived of a model of the human mind whose functioning is explained through abstract, meta-conscious norms which are the result of past experiences. He then published these ideas in his *The Sensory Order* (1952), a work that investigates the relation between sensory perception and

55 See M. Oakeshott, *Rational Conduct*, pp. 99–131.

56 M. Oakeshott, *On Human Conduct*, Oxford 1975. A similar dichotomy is put forth in M. Oakeshott, *The Politics of Faith and the Politics of Scepticism*, ed. by T. Fuller, New York – London 1996; see also M. Oakeshott, *Morality and Politics in Modern Europe*, ed. by S. R. Letwin, New Haven – London 1993.

57 M. Oakeshott, *On Being Conservative*, in: *Rationalism in Politics and Other Essays*, pp. 407–437.

the activity of the mind.[58] Hayek argued that the order that the mind confers on sensory experience is due to norms which are not innate or natural but are the result of a long selection process. There exists a spontaneous order in our mind, which results from certain regularities in our behaviour. Our mind is the product of cultural evolution, of civilization, because our mind does not itself produce the norms. It follows that rational, conscious processes are only a minimal part of our mental activity, on which we cannot therefore exercise deliberate control. Consequently, human beings conform their behaviour to norms which are not explicit. We elaborate competing models of behaviour and we select those whose outcomes have proved to be positive. Our actions are guided by rules which are often not explicit and therefore – Hayek concludes – the central fact of our lives is our inevitable ignorance.

From this view of the human mind Hayek derives a political conclusion: no mind, no human being and therefore no deliberate activity can take into account all particular facts: knowledge is dispersed and individual. We may centralize power, but we cannot centralize knowledge. Hayek accordingly labels as "constructivism" the use, or rather "the abuse of reason", namely the belief that it is possible to have total control of a society: this has been "the fatal conceit" of both socialism and national-socialism.[59] This is the myth of social engineering, the belief that it is possible to design a perfect society from scratch using the human mind as a tool. Our inevitable ignorance prevents us from being able to achieve such a result. In addition, Hayek finds the notion of *homo oeconomicus* a caricature, because it presupposes that human beings behave rationally, whereas experience shows that they are lazy and improvident; only natural necessity forces them to evaluate means and ends. All dreams of central planning and totalitarian society are thus shattered.[60]

This is the reason why individual freedom is so important and to be cherished – it is essential to accommodate the unpredictable and the unfathomable.[61] Individual freedom rests on the inevitable ignorance of every one of us concerning the factors on which our happiness and the achievement of our goals rest. To collectivism and centrally planned economy Hayek opposed the vision of a society based on the free market and the rule of law. The superiority of the free market results from its being the closest approximation to the functioning of our mind. The free market exploits the dispersed knowl-

58 F. A. von Hayek, *The Sensory Order*, Chicago 1952.

59 F. A. von Hayek, *The Counter-Revolution of Science*, Glencoe 1952; see also *id.*, *The Fatal Conceit* ed. by W. W. Bartley, III, Chicago 1988.

60 See F. A. von Hayek, *The Constitution of Liberty*, Chicago 1960.

61 On this topic J. N. Gray, *Hayek on Liberty*, London 1984, is still very useful

edge in society and selects behaviours, rewarding useful ones and punishing the disadvantageous. There exists a spontaneous order in the free market, which results from the actions of individuals who did not deliberately pursue it. Similarly, Hayek argued that the emergence of certain formations such as the state, money, language is not the result of a deliberate design. The rule of law is also the result of a spontaneous order: it is a way of conceiving government as the enforcement of a set of rules agreed upon by citizens; it welcomes subsequent improvements to a traditional body of laws, drawing on new additions to the general knowledge of a society. In his later work *Law, Legislation, and Liberty* (1973–1979) Hayek elaborated two great antitheses, drawing on Greek political vocabulary. He called spontaneous order *kosmos*, and *nomocracy* any form of government based on respect for rules of conduct (*nomoi*) which are abstract and negative, without a substantial purpose but with underlying values; on the other hand, he labelled *taxis* a constituted order, and *teleocracy* a regime based on the pursuit of one common purpose (*telos*).[62]

Hayek was persuaded of the fundamental value of individual freedom in our human circumstances. Only if there existed omniscient beings, if we could know not only what affects the satisfaction of our current desires but also our future needs and aspirations, would we have little use of our freedom. The rationalist and the central planner want to use reason to achieve control and predictability; but the very progress of reason, and of society, is based on freedom and the unpredictability of human action. Hayek found in David Hume and Adam Smith his most congenial authors; I am inclined to think that he would have been intrigued by the political consequences of Protagoras' thought.

62 F. A. von Hayek, *Law, Legislation, and Liberty*, I–III, Chicago 1973–1979. On the opposition between *kosmos* and *taxis* and the origin of the dichotomy *nomocracy*/*teleocracy* see the excellent work by R. Cubeddu, *Leoni and Hayek on Nomos and Physis*, in: *Il Politico*, 85, 2020, pp. 58–95.

Sophistic Criticisms of the Rule of Law: A Comparison of Callicles and Thrasymachus

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Summary
This article discusses different interpretations of Callicles and Thrasymachus' positions. There are good reasons for interpreting Callicles as a critic of democracy and as an aristocratic political thinker whose political views are closer to Plato's than is usually assumed. The paper argues that Callicles defends a natural right of the best citizens to rule over the crowd. However, in contrast to Plato, for Callicles the rule of the best should not aim at the common good but at their personal advantage. The paper also discusses the view that Thrasymachus is just a sociologist of power who diagnoses what actually happens in politics (Henning Ottmann, Max Salomon). This interpretation is still current, and enables us to understand important aspects of legislation in contemporary democracies. Finally, the paper argues that there are reasons to understand Thrasymachus not only as a political realist, but, similar to Protagoras, as a moral sceptic.

1. Plato's and Aristotle's appreciation of the rule of law

Today the rule of law is usually recognized as a central political ideal or principle of governance. According to it, all citizens and in particular the state authority and government are subject to the law and held accountable by it. Nobody is above the law. The effective enforcement of the rule of law requires the separation of powers and in particular an independent judiciary. Further constraints are that everyone is equal before the law and that the law needs to be publicly promulgated. The rule of law aims at both preventing the abuse of power and safeguarding the public good and the freedom of the citizens.[1]

1 In his important book on the history, politics, and theory surrounding the rule of law, Tamanaha conceives of the rule of law as "an exceedingly elusive notion" which is understood in several contrasting ways; B. Z. Tamanaha, *On the Rule of Law. History, Politics, Theory*, Cambridge 2004, p. 3. In his book, Tamanaha isolates three "themes of clusters of meaning" that "run through the rule of law tradition": 1) "the sovereign, and the state and its officials, are limited by the law"; 2) formal legality, i.e. "public, prospective laws, with the qualities of generality, equality

In the archaic period of ancient Greece, equality before the "law" (*nomos*) was already established as a principle.[2] However, the law was usually used in favor of the interests of the aristocrats, which constituted an injustice that outraged the farmers. The demand for a truly equal application of the law was an important part of the democratic idea.[3] In Herodotus' constitutional debate, Otanes links a "multitude's rule" to "equality before the law" (*isonomia*) (Herodotus, *Hist.* III,80, transl. A. D. Godley). In 462/461 B. C., prepared by the reforms of Cleisthenes (508/507 B. C.), democracy was established in Athens and in the following period "popular sovereignty reached its peak".[4] In Athenian democracy, the law was no longer seen as an unchangeable pattern established by the gods, but as "the instrument in which the people of Athens asserted their sovereignty over their own legal and political affairs".[5] Nevertheless, the enacted law could not be modified easily by legislative assemblies or popular courts and the rule of law, which included equality before the law and accountability of magistrates, was respected as an essential part of democracy.[6]

In his important study on Athenian democracy, Martin Ostwald examines the "challenges popular sovereignty had to face" throughout the fifth century.[7] As a result of these challenges, when democracy was restored in Athens at the end of the fifth century, "the principle of the sovereignty of law was given official primacy over the principle of popular sovereignty".[8] Sovereignty of law complements the rule of law and means that a written law code is enacted by "lawgivers" (*nomothetai*) and that no decree by either the Popular Assembly or the Council had higher authority than a law.[9]

of application, and certainty. … Formal legality emphasizes a rule-bound order established and maintained by government"; 3) the rule of law is contrasted to the rule of man; *ibid.*, pp. 114, 119, 122.

2 J. Bleicken, *Die athenische Demokratie*, Paderborn 1994², p. 289.

3 *Ibid.*

4 Ch. Meier, *Athen. Ein Neubeginn der Weltgeschichte*, Berlin 1993, p. 351; M. Ostwald, *From Popular Sovereignty to Sovereignty of Law. Law, Society, and Politics in Fifth-Century Athens*, Berkeley 1987, p. xx.

5 M. Ostwald, *From Popular Sovereignty to Sovereignty of Law*, pp. 129–130;

6 J. W. Jones, *The Law and Legal Theory of the Greeks*, Oxford 1956, pp. 69–70; democracy "was synonymous for the Athenians with the 'rule of law'"; *ibid.*, p. 90; cf. B. Z. Tamanaha, *On the Rule of Law*, pp. 7–8.

7 M. Ostwald, *From Popular Sovereignty to Sovereignty of Law*, xix.

8 *Ibid.*, pp. xx, 497, 524.

9 *Ibid.*, pp. 500 ff., 523. It is interesting to notice that Ostwald nowhere in his book uses the term "rule of law" and it is not clear whether for him "rule of law" is identical with "sovereignty of law". However, the distinction between the two terms makes sense. "Sovereignty of law" complements the "rule of law" but further expresses that only in cases of clearly proven inadequacy can existing laws be changed. Compared to regular rule of law, sovereignty of law aims at preventing the people from declaring and changing the law as they please and thus at thwarting the dangers entailed in popular sovereignty.

A consistent and stable "new kind of democracy" was established in which "jury courts held center stage", while in "matters of legislation the Assembly relinquished its final say to *nomothetai*".[10] The conception of sovereignty of law, which comprises the rule of law and aims at thwarting the dangers entailed in popular sovereignty, inspired Plato who advocates it in the *Laws* as the essential and primary principle of governance:

> Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state (Plato, *Leg.* IV,715d; transl. T. J. Saunders).[11]

In the *Laws*, Plato develops a mixed constitution in which the ruling citizens are subject to the laws.[12] He even sets up a special court that examines the conduct of the holders of the political offices (*Leg.* XII,945b ff.; cf. *Polit.* 298e–299a). In doing this, he establishes a whole system of "checks and balances" and anticipates some of the basic principles of modern political systems.[13] However, Plato's version of the sovereignty and rule of law has to be clearly distinguished from its modern and contemporary counterpart, which it partly anticipates.[14] For Plato, the institution of laws that aim at the common good of the whole city is a crucial precondition for a flourishing political community (*Leg.* IV,715b; cf. IX,875a).

Aristotle agrees with Plato's appreciation of the sovereignty and rule of law and distinguishes right and wrong constitutions according to the criterion of whether the rulers and their laws aim at the common good or rather at their personal advantage (*Pol.* III,6,1279a17–21, 11,1282b8–13;

10 *Ibid.*, p. xi, 524; cf. B. Z. Tamanaha, *On the Rule of Law*, p. 8.

11 Plato anticipates this appreciation of the sovereignty of law in the *Politikos*, in which he distinguishes three right constitutions from three wrong ones by means of the criterion of whether the rulers govern according to the law or against it (*Polit.* 302d–e). The fact that Plato chooses a lawful government as the essential criterion for evaluating existing constitutions demonstrates the important role that the rule of law begins to occupy in his later political philosophy. However, as early as in the *Republic* Plato talks frequently about the laws of the city and – anticipating a central idea of the *Laws* – says that the "guardians of the laws" should not change the most important laws of the city (*Resp.* IV,421a, 445e; VI,484b, 504c).

12 M. Knoll, *Platons Konzeption der Mischverfassung in den Nomoi und ihr aristokratischer Charakter*, in: M. Knoll – F. L. Lisi (eds.), *Platons "Nomoi". Die politische Herrschaft von Vernunft und Gesetz* (Staatsverständnisse, 100), Baden-Baden 2017, pp. 23–48.

13 Cf. R. F. Stalley, *An Introduction to Plato's Laws*, Oxford 1983, pp. 115–116.

14 A main difference between the two versions of the rule of law is that, for Plato, reasonable laws are an expression of divine reason. Cf. F. L. Lisi, *Plato and the Rule of Law*, in: *Methexis*, 26, 2013, pp. 83–102. Lisi argues mainly against G. Morrow's influential article titled *Plato and the Rule of Law*, in: *The Philosophical Review*, 50, 1941, pp. 105–126.

IV,1,1289a10–22). Like Plato in the *Laws*, he states that the sovereignty and rule of law is more desirable than the rule of individual citizens and that individual rulers "must be established as law-guardians and as servants of the laws" (*Pol.* III,16,1287a21–22, transl. C. Lord; cf. *Leg.* IV,715c). Aristotle calls the law an „intellect without appetite" (*aneu orexeôs nous*) (*Pol.* III,16,1287a33, transl. C. Lord).[15] This wording elucidates why for Aristotle and the later Plato the sovereignty and rule of law is superior to the rule of persons who display moral and intellectual excellence. Even such persons are subjected to their appetites and passions, inclinations and disinclinations, and to pleasure and pain. Because of these tendencies and because of avarice and selfishness they are constantly at risk of making arbitrary and unjust decisions and of treating equal cases unequally (*Leg.* IV,713c; IX,875b–d; cf. V,739a–e). In contrast, laws are devoid of such tendencies and therefore represent, if they are good and reasonable, an assurance for justice and the flourishing of the political community.

Of course, not all ancient Greek political thinkers were in agreement with Plato's and Aristotle's appreciation of the sovereignty and rule of law. In particular Callicles and Thrasymachus, both portrayed by Plato as sophists, advanced substantial criticisms of these principles in the late fifth century. Today, Callicles and Thrasymachus are among the well-known proponents of sophistic views because of their appearances in Plato's *Gorgias* and *Republic*. However, in the literature it is disputed whether they are merely fictional characters or actual historical persons. It is likely but not certain that Plato's Thrasymachus is identical with the eponymous orator and teacher of rhetoric from Chalkedon (today a part of Istanbul called Kadıköy).[16] Several scholars claim that Callicles is just a fictional character ("eine Kunstfigur

15 However, the concept of "reason" (*nous*) on which Aristotle's statement is based is very different from Plato's. While for Plato reasonable laws are an expression of divine reason, for Aristotle good laws are the expression of human "prudence" (*phronêsis*). For Aristotle's concept of "prudence" see R. Elm, *Klugheit und Erfahrung bei Aristoteles*, Paderborn 1996.

16 Guthrie and Untersteiner identify Plato's Thrasymachus with the orator from Chalkedon and try to square their views; W. K. C. Guthrie, *A History of Greek Philosophy*, III, Cambridge 1977, ch. "The Sophists", pp. 88–97, 294–298; M. Untersteiner, *I Sofisti* (Presentazione di Fernanda Decleva Caizzi), Milano 1949, pp. 497–501 (engl.: *The Sophists*, Oxford 1954). At the beginning of his article, Kerferd identifies the two as well, making a reference to E. Schwarz, *De Thrasymacho Chalcedonio* (Index scholarum in academia Commentatio Rostochiensi), Rostock 1892, pp. 3–16; G. B. Kerferd, *The Doctrine of Thrasymachus in Plato's Republic*, in: *Durham University Journal*, 9, 1947, pp. 19–27; again in: C. J. Classen (ed.), *Sophistik* (Wege der Forschung, CLXXXVII), Darmstadt 1976, pp. 545–563. In contrast, Maguire distinguishes between Plato's Thrasymachus and the orator from Chalkedon. In *Resp.* I, Maguire makes out three different assertions about "the just" and attempts to decide which of these need to be assigned to which Thrasymachus; J. P. Maguire, *Thrasymachos – – – or Plato?*, in: *Phronesis*, 16, 1971, pp. 142–163; again in: C. J. Classen (ed.), *Sophistik*, pp. 564–588.

Platons"[17]). However, others such as George B. Kerferd and Hellmut Flashar stated in 1998 that a majority of scholars today are inclined to acknowledge him as a historical person.[18]

This article analyses and compares Callicles' and Thrasymachus' criticisms of the rule of law. Their criticisms of the validity of *nomos* (law, morality, custom) are similar in some ways and both seem to be informed by the historian Herodotus that *nomos* varies from one culture to another. Based on this information, the sophist Protagoras defended the view that in moral and legal matters there are no universal truths.[19] One important parallel between Callicles and Thrasymachus is that both relate the *nomos* to questions of power and benefit. Both analyze its origin and the interests it serves. It is not easy to come up with indisputable interpretations of Thrasymachus' and Callicles' legal, political, and ethical views. Our only source for Callicles is Plato's *Gorgias*. The surviving fragment from Thrasymachus of Chalkedon on justice is not easy to reconcile with the position Plato's Thrasymachus holds on the subject.[20] In the literature, Thrasymachus' and Callicles' views are a controversial issue. In particular with respect to the interpretation of Thrasymachus' position, many proposals have been advanced. George B. Kerferd, who discusses several of them, distinguishes between "ethical nihilism" (no real moral obligation exists), "legalism" (all moral obligation stems from legal enactment), "natural law theory" (moral obligation exists and arises from the nature of man), and "psychological egoism" (humans by nature act in their presumed self-interest).[21]

The following interpretation of Callicles' and Thrasymachus' criticisms of the rule of law starts out with an analysis of their views of a good and happy life (sections 2 and 3). Both defend similar views of human nature and a good life. Callicles defends a radical form of hedonism and of psychologi-

17 H. Ottmann, *Geschichte des politischen Denkens. Die Griechen*, Stuttgart 2001, 1/1, p. 225; 1/2, p. 15.

18 G. B. Kerferd – H. Flashar, *Die Sophistik*, in: H. Flashar (ed.), *Die Philosophie der Antike*, 2/1: *Sophistik. Sokrates. Sokratik. Mathematik. Medizin* (*Grundriss der Geschichte der Philosophie*, eds. K. Döring – H. Flashar – G. B. Kerferd – C. Oser-Grote – H.-J. Waschkies), Basel 1998, p. 85; cf. E. R. Dodds (ed.), *Plato: Gorgias*, Oxford 1959, pp. 12–13. Following Dodds, Balot believes "that Callicles was a real person in the late fifth century who held views similar to those attributed to him in the *Gorgias*"; R. K. Balot, *Greed and Injustice in Classical Athens*, Princeton 2001, p. 5.

19 Most of our knowledge of Protagoras is derived from Plato's dialogues *Theaetetus* and *Protagoras*; see *Tht.* 172b, 177d.

20 Thrasymachus of Chalkedon refers to justice as the "greatest of human goods" and laments that humans "make no use of it" and that the gods don't take notice of this (*DK* 85 B 8, transl. M. K.).

21 G. B. Kerferd, *The Doctrine of Thrasymachus in Plato's Republic*. For another overview of different interpretations of Thrasymachus' views see R. C. Cross – A. D. Woozley, *Plato's Republic. A Philosophical Commentary*, London 1964, pp. 28–41. Cross and Woozly distinguish between (1) Naturalistic Definition, (2) Nihilist View, (3) Incidental Comment, (4) Essential Analysis.

cal and ethical egoism, claiming that a good life consists in an unrestrained satisfaction of desires. Thrasymachus holds that the life of an unjust person is better than that of a just one, and that the life of a tyrant is best. Callicles' and Thrasymachus' criticisms of the rule of law are linked to their respective views of a good and happy life. Understanding the latter improves our comprehension of the former. Therefore, their criticisms of the rule of law (sections 4 and 5) are only examined after their views of a good and happy life (sections 2 and 3). This is the reverse order in which Plato presents their respective views. The conclusion advances final interpretations of both their positions and the similarities and differences of their political thought. It argues that Thrasymachus is not only a legal positivist but a political sociologist and political realist who holds a coherent view. Furthermore, the conclusion claims that Thrasymachus should be understood, similar to Protagoras, as an ethical relativist and a moral skeptic. However, Thrasymachus rejects Protagoras' view that legislation always aims at the good and the advantage of the whole political community. This article also argues against the prevailing interpretation according to which Callicles defends a natural right of *the stronger*. Rather, Callicles advocates a natural right of *the better* and should be interpreted as an aristocratic political thinker who criticizes popular sovereignty and democracy (section 4).

2. Callicles' view of a good and happy life

Callicles lays out his criticism of the rule of law and his view of a good and happy life in Plato's *Gorgias*. In the text, Socrates first has a debate with the famous sophist Gorgias, then with his student Polos, and finally – in the dialogue's climax – with Callicles of the *deme* Acharnae (*Gorg.* 495d). In the dialogue, Callicles hosts Gorgias in his house in Athens. This is one of several reasons for the interpretation that Callicles was a student of Gorgias.[22] Callicles' role as host also implies that he was a well-off man from a privileged family or is at least depicted as such by Plato. He clearly has "aristocratic and oligarchic connexions" and his aristocratic descent is explicitly mentioned (*Gorg.* 512d).[23] However, it seems that Callicles was not a sophist in the strict sense because in the *Gorgias* he dismisses "those who profess to instruct people in virtue (*aretê*)" as worthless (*Gorg.* 519e–520a; transl. W. Hamilton – C. Emlyn-Jones). Rather, Callicles is depicted as an ambitious young man at the beginning of his political career (*Gorg.* 481e, 515a).

22 Irwin claims that Callicles "is a disciple of neither" Gorgias nor Polus; Plato, *Gorgias*, transl. T. Irwin, Oxford 1979, p. 110.

23 For details see W. K. C. Guthrie, *A History of Greek Philosophy*, III, p. 102.

In Plato's *Gorgias*, Callicles not only defends his view of a good and happy life, but also a theory of natural right, which will be analyzed in section 4. In the first phrase of the following central quotation, Callicles refers to natural right and its authority:

> *Callicles*: I tell you frankly that what is fine and right by nature (*kata physin kalon kai dikaion*) consists in this: that the man who is going to live as a man ought should encourage his appetites (*epithymia*) to be as strong as possible instead of repressing them, and be able by means of his courage (*andreia*) and intelligence (*phronêsis*) to satisfy them in all their intensity by providing them with whatever they happen to desire. For the majority, I believe, this is an impossible ideal; that is why, in an endeavour to conceal their own weakness, they blame the minority whom they are ashamed of not being able to imitate, and maintain that excess is a disgraceful thing. As I said before they try to make slaves of those who are better by nature (*beltiôn tên physin*), and because through their own lack of manliness they are unable to satisfy their passions (*hedonais*), they praise moderation (*sôphrosynê*) and righteousness (*dikaiosynê*). To those who are either the sons of kings to begin with or able by their own qualities to win office or absolute rule or sovereignty (*archê tina ê tyrannida ê dynasteia*), what could in truth be more disgraceful or worse than moderation and justice, which involves their voluntary subjection to the conventions and standards and criticism of the majority, when they might enjoy good things without interference from anybody? How can they fail to be wretched when they are prevented by your fine righteousness and moderation from favouring their friends at the expense of their enemies, even when they are rulers in their own city? The truth, Socrates, which you profess to be in search of, is in fact this: luxury (*tryphê*) and excess (*akolasia*) and licence (*eleutheria*), provided that they can obtain sufficient backing, are virtue (*aretê*) and happiness (*eudaimonia*); all the rest is mere pretence, man-made rules contrary to nature (*para physin*), worthless cant (Plato, *Gorg.* 491e–492c, transl. W. Hamilton – C. Emlyn-Jones).

This rich and dense passage contains several views. First, in the terminology of contemporary ethics, Callicles defends a radical form of psychological and ethical egoism. *Psychological egoism* is a view of human nature which claims "that we always do that act that we perceive to be in our own best self-interest. That is, we have no choice but to be selfish".[24] *Ethical egoism* "is the moral view that everyone ought always to do those acts that will best serve

24 L. P. Pojman – J. Fieser, *Ethics. Discovering Right and Wrong*, Belmont (CA) 2012[7], p. 82.

his or her own best self-interest. That is, morally right actions are those that maximize the best interest of oneself, even when it conflicts with the interests of others".[25] One common argument for ethical egoism is that it follows immediately from psychological egoism.

Plato's Callicles combines his psychological and ethical egoism with a defense of a radical form of hedonism. This form likely goes back to Aristippus of Kyrene because it defines a good and happy life as the maximization of sensual pleasures.[26] We arrive at this conclusion because Callicles talks about satisfying our "appetites" (*epithymia*) and identifies "excess" (*akolasia*) with happiness (cf. *Gorg.* 494a–c). For him, this is natural. And what is natural is also good and justified. Today we call this the fallacy of deriving an "ought" from an "is". For Callicles, it is in our best interest to strive for both a maximum of pleasure and for the material means to attain these pleasures. Therefore, Callicles' defense of hedonism is linked to a defense of *pleonexia*, of the desire to have more (*pleon* = more; *echein* = to have). According to Callicles' and similar views on human nature, *pleonexia* mainly aims at goods such as wealth, power, and honor or recognition.[27] Following Plato's understanding, today the term "pleonexia" is usually given a negative connotation and is translated as "avarice" or "greed" (*Resp.* II,359c; IX,586b; *Gorg.* 508a; *Symp.* 182d, 188b). However, for Callicles *pleonexia* is not only a natural human striving, but nature herself demonstrates "that it is right (*dikaion*) that the better man should have more (*pleon echein*) than the worse" (*Gorg.* 483c–d; transl. W. Hamilton – C. Emlyn-Jones; cf. section 4 of this article). In his excellent "reconstruction of the Greek discourse on greed", Ryan K. Balot refers to

25 *Ibid.*, p. 87.

26 For Aristippus of Kyrene see M. Knoll, *Antike griechische Philosophie*, Berlin – Boston 2017, pp. 185–192, and K. Döring, *Der Sokratesschüler Aristipp und die Kyrenaiker* (Akademie der Wissenschaften und der Literatur. Abhandlungen der Geistes- und Sozialwissenschaftlichen Klasse, 1), Mainz – Stuttgart 1988. For the literature on Callicles' "notion of happiness" see R. K. Balot, *Greed and Injustice in Classical Athens*, p. 6, fn. 16. Following Charles H. Kahn, Balot holds Callicles to be "an indiscriminate hedonist"; *ibid.*, p. 9, fn. 24.

27 According to Plato's psychology, the "spirited part of the soul" (*thymoeides*) is the source of the striving for power and recognition and the "appetitive part of the soul" (*epithymêtikon*) is the root of the striving for pleasures and for the material wealth to obtain them (see *Resp.* IV,435c–441c and IX,580d–581c). The greed for having more material possessions, power, and recognition than others is identified by several Greek authors, such as Thucydides and Aristotle, as a main feature of human nature (Thucydides, *Hist.* I,22; III,82; V,105). For Aristotle, *pleonexia* is the main motive for unjust actions. This is a central aspect of his proof that particular forms of injustice and justice exist that are opposed to the general form of injustice and justice; *Eth. Nic.* V,2–4,1129b1 ff., 1130a15–b6; cf. R. K. Balot, *Greed and Injustice in Classical Athens*, pp. 10, 22–34, and M. Knoll, *Aristokratische oder demokratische Gerechtigkeit? Die politische Philosophie des Aristoteles und Martha Nussbaums egalitaristische Rezeption*, München – Paderborn 2009, pp. 65–68.

Callicles as a "paradigmatic figure" exhibiting "the widest possible range of immoral desire to get more".[28]

In Plato's *Gorgias*, Callicles argues against Socrates who defends the prevailing morality of the Greeks and the paradoxical thesis that it is better to suffer injustice than to commit injustice. Callicles rejects the common morality and in particular two of the classical four cardinal virtues. He rejects "moderation" (*sôphrosynê*) and "justice" (*dikaiosynê*) because he conceives them as obstacles to a good and happy life. However, he praises the two other cardinal virtues "courage" (*andreia*) and "intelligence" (*phronêsis*). For him, these two virtues, and reason in general, are means or instruments for attaining pleasure and a good life. It is important to note that in the wake of his discussion with Socrates, Callicles defines the elite of the stronger and better people, who have a right to rule and to have more than others, mainly by the possession of these two virtues (*Gorg.* 489e, 491a–d; cf. section 4).

As previously noted in the literature, Callicles' position is a model for the views Nietzsche expresses in his *Genealogy of Morality*. Callicles claims that "moderation" (*sôphrosynê*) and "justice" (*dikaiosynê*) are praised by the weak who cannot enjoy excessive pleasures and cannot get away with doing injustice. With this Callicles gives a genealogy of these virtues that is based on psychological assumptions. Like later Nietzsche, Callicles praises "great individuals", shows contempt for the masses, and aims at a revaluation of the prevailing egalitarian moral values. We find a similar view about the origin of justice at the beginning of Book II of the *Republic*, where Glaucon presents unnamed sophistic views close to those defended by Thrasymachus (*Resp.* II,358e–359b).[29] Callicles' defense of psychological and ethical egoism, a radical form of hedonism, and *pleonexia* culminates in a defense of tyranny and the life of the tyrant. This is something that he has in common with Thrasymachus, who appears in Book I of Plato's *Republic*.

3. Thrasymachus' view of a good and happy life

In Book I of Plato's *Republic*, Socrates argues against the three definitions of justice that are proposed consecutively by Kephalos, Polemarchus, and Thrasymachus. The position advanced by Thrasymachus is connected to his criticism of the rule of law. Before this criticism is analyzed in detail, it is

28 R. K. Balot, *Greed and Injustice in Classical Athens*, pp. 5, 17, 20.

29 Glaucon introduces these sophistic views by saying that he will "restore Thrasymachus' argument" (*Resp.* II,358b–c, transl. A. Bloom). For an instructive comparison of Callicles', Thrasymachus', and Glaucon's views see M. Vegetti, *Antropologie della pleonexia. Callicle, Trasimaco e Glaucone in Platone*, in: *id.*, *Il potere della verità. Saggi platonici*, Rome 2018 (2002[1]), pp. 195–208.

beneficial to reconstruct Thrasymachus' view of a good and happy life, which is similar to the one defended by Callicles. Thrasymachus explains his understanding of happiness in the context of a criticism of common morality and in particular of justice. He argues both that just behaviors are detrimental to a good and happy life and that injustice is beneficial for happiness. Therefore, he concludes that injustice is superior to justice. Thrasymachus begins supporting these claims with the assertion that

> the just man everywhere has less (*pantachou elatton echei*) than the unjust man. First, in contracts, when the just man is a partner of the unjust man, you will always find that at the dissolution of the partnership the just man does not have more than the unjust man, but less. Second, in matters pertaining to the city, when there are taxes (*eisphorai*), the just man pays more on the basis of equal property, the unjust man less; and when there are distributions, the one makes no profit, the other much. And, further, when each holds some ruling office, even if the just man suffers no other penalty, it is his lot to see his domestic affairs deteriorate from neglect, while he gets no advantage from the public store, thanks to his being just; in addition to this, he incurs the ill will of his relatives and his acquaintances when he is unwilling to serve them against what is just (Plato, *Resp.* I,343d–e, transl. A. Bloom).

As this passage and its context demonstrate, Thrasymachus, like Callicles, links happiness to *pleonexia*. While to have less goods is detrimental to a good and happy life, to have more is beneficial for it. This shows that Thrasymachus and Callicles have similar conceptions of a good and happy life. Thrasymachus' main thesis about the relation of happiness to justice and injustice reads: "the just man everywhere has less (*pantachou elatton echei*) than the unjust man". While being unjust is to a person's private advantage, being just is a serious obstacle for attaining happiness. Thrasymachus illustrates his main thesis by first referring to voluntary business transactions such as contracts and the exchange of goods. In Book V of the *Nicomachean Ethics*, Aristotle investigates this sphere of justice for which Thomas Aquinas coined the term *iustitia commutativa*. Second, Thrasymachus exemplifies the disadvantages of being just in relation to citizens' contributions and distributions in the polis. In such cases, the unjust citizen will pay less and get more goods than the just citizen. Third, Thrasymachus illustrates his central thesis by pointing to the disadvantages of being just when holding a political office. The just citizen is not corrupt and will not take advantage for himself and his friends and family from his office and thus will get less than he could have and thus harm himself. In all these three spheres being just means

being moral and fair in the common sense and being unjust means being immoral and unfair.

After arguing for how disadvantageous being just is for a good and happy life, Thrasymachus moves on to show that unjust behaviors are beneficial for happiness. However, this demonstration is mainly valid for doing injustice on a large scale,

> The unjust man's situation is the opposite in all of these respects. I am speaking of the man I just now spoke of, the one who is able to get the better in a big way. Consider him, if you want to judge how much more to his private advantage the unjust is than the just. You will learn most easily of all if you turn to the most perfect injustice (*adikia*), which makes the one who does injustice most happy (*eudaimonestaton*), and those who suffer it and who would not be willing to do injustice, most wretched. And that is tyranny, which by stealth and force takes away what belongs to others, both what is sacred and profane, private and public, not bit by bit, but all at once. When someone does some part of this injustice and doesn't get away with it, he is punished and endures the greatest reproaches – temple robbers, kidnappers, housebreakers, defrauders, and thieves are what they call those partially unjust men who do such evil deeds. But when someone, in addition to the money of the citizens, kidnaps and enslaves them too, instead of these shameful names, he gets called happy (*eudaimones*) and blessed (*makarioi*), not only by the citizens but also by whomever else hears that he has done injustice entire. For it is not because they fear doing unjust deeds, but because they fear suffering them, that those who blame injustice do so. So, Socrates, injustice, when it comes into being on a sufficient scale, is mightier, freer, and more masterful than justice… (Plato, *Resp.* I,343c–344c, transl. A. Bloom; cf. II,358b–362c).

Similar to Callicles' view of a good and happy life, Thrasymachus' analysis of happiness culminates in a defense of tyranny and the life of the tyrant. Just as for Callicles, for him the life of a tyrant is best. However, to this interpretation of the passage quoted above one could object that Thrasymachus' praise of *pleonexia*, injustice, and the happiness of the tyrant is not as unambiguous as that of Callicles and that Thrasymachus might just be reporting the prevailing opinion of the masses. However, one of the quoted statements, which needs to be attributed to Thrasymachus himself, refutes this objection. In the conclusion of his argument he explains, "injustice, when it comes into being on a sufficient scale, is mightier, freer, and more masterful than

justice".[30] This is a value-judgment in favor of *pleonexia* and injustice.[31] Later in the dialogue, Thrasymachus also declares that injustice is "good counsel" (*euboulia*) and that unjust people are "prudent" (*phronimoi*) and "good" (*agathoi*) persons (*Resp.* I,348d, transl. A. Bloom). Such favorable assessments of unjust persons are another indication that Thrasymachus does not merely report the common view of the crowd but shares it. Another argument for the claim that Thrasymachus is putting forward "the case for pleonexia" is that as a dramatic *persona* Plato characterizes him "as animal-like, aggressive and incontinent" and thus "as in some respects an embodiment of the position he is made to defend".[32]

Section 2 elucidated that Callicles defends psychological and ethical egoism, a radical form of hedonism, and *pleonexia*. Keimpe Algra, for good reasons, speaks of "Thrasymachus' implicit anthropology of *pleonexia*" and suggests that Glaucon is making this anthropology explicit in Book II of Plato's *Republic*.[33] This is a convincing interpretation because Glaucon, who announces that he wants to "restore Thrasymachus' argument", interprets "the desire to get the better (*pleonexian*)" as "what any nature naturally pursues as good" (*Resp.* II,358b–c, 359c). Thrasymachus' endorsement of *pleonexia* strongly suggests that he also supports ethical egoism. Whether he grounds his ethical egoism on psychological egoism is less clear.[34] Finally, despite the fact that Thrasymachus does not explicitly make a reference to hedonism, it is plausible to assume that his view of a good and happy life is inextricably linked to it. It seems natural to presume that the desire to possess a considerable amount of goods such as wealth, power, and recognition is also mo-

30 This conclusion continues with a restatement of what he defended earlier. He continues explaining, "and, as I have said from the beginning, the just is the advantage of the stronger, and the unjust is what is profitable and advantageous for oneself" (*Resp.* I,344c; transl. A. Bloom).

31 According to Balot, not only Callicles but also Thrasymachus expresses "the ideals of greed"; R. K. Balot, *Greed and Injustice in Classical Athens*, p. 235.

32 K. A. Algra, *Observations on Plato's Thrasymachus: The Case for Pleonexia*, in: K. A. Algra – P. W. van der Horst – D. T. Runia (eds.), *Polyhistor. Studies in the History and Historiography of Ancient Philosophy. Presented to Jaap Mansfeld on his Sixtieth Birthday* (Philosophia Antiqua, LXXII), Leiden 1996, pp. 41–59.

33 Plato, *Resp.* II,359c4; K. A. Algra, *Observations on Plato's Thrasymachus: The Case for Pleonexia*, p. 59. Mario Vegetti, who also contributed to the volume in which Algra's aforementioned paper appeared, takes up the term "antropologia della *pleonexia*" and includes it in the title of his article. However, he does not include a reference to Algra's article; M. Vegetti, *Antropologie della pleonexia*, p. 196.

34 Psychological egoism is attributed to Thrasymachus by H. W. B. Joseph, *Plato's Republic: The Argument with Thrasymachus*, in: *id.*, *Essays in Ancient and Modern Philosophy*, Oxford 1935, p. 17. Kerferd concludes that "Thrasymachus was not a psychological egoist". His argument is that the ruled "think they ought to be just against their own interests (cf. 343c6 ff.)"; G. B. Kerferd, *The Doctrine of Thrasymachus in Plato's Republic*, p. 562). However, Kerferd's argument is not convincing because to abide by the law is in the best self-interest of the ruled in order to avoid punishment (cf. *Resp.* I,338e, 344b).

tivated by the desire to use them as a means to obtain a substantial amount of pleasure. While Thrasymachus holds the law to be an instrument of those who have political power to reach these goals, for Callicles it is a means of the crowd to subdue the best and strongest citizens and their striving to have an unequal amount of goods.

4. Callicles' criticism of the rule of law

According to Martin Ostwald's research, "the absolute validity of *nomos*, the embodiment of the concept of popular sovereignty, remained unquestioned" in Athens until "about the mid-fifth century".[35] Regardless of whether Callicles was a real person or just a fictional character, what the Athenian is attacking in Plato's *Gorgias* is the validity of the democratic *nomos* of the late fifth century. Callicles relates the democratic *nomos* to questions of power and benefit and analyzes its origin and the interests it serves. For him, it is the *hoi polloi*, the crowd, that decides the laws and establishes the moral and legal rules to their advantage. Callicles claims that the crowd's interest is to prevent the better and more virtuous citizens from accumulating an unequal amount of material goods and political power. While the crowd strives for arithmetic equality, the few, motivated by *pleonexia*, aim at inequality and privilege. Callicles' argument to justify *pleonexia* and to criticize the *nomos* is based on the opposition of *physis* and *nomos*, of *nature* on the one hand, and *law, morality,* and *custom* on the other. This was a well-known opposition in later 5th century Greek thought and several philosophers based their arguments on it.[36] The common scheme of these arguments is to criticize the *nomos* by claiming that it can claim no real authority because it is neither divine and unchangeable nor part of the order of the cosmos. The *nomos* is just a human and artificial product, which contradicts nature and in particular human nature. However, the interpretations of human nature in these kinds of arguments differ. While the sophist Antiphon concludes that human equality requires social and political equality, for Callicles human in-

35 M. Ostwald, *From Popular Sovereignty to Sovereignty of Law*, p. 250.

36 In all likelihood, the opposition of *physis* and *nomos* goes back to Anaxagoras' student Archelaus (*DK* 60 A 2). Sophocles' Antigone invokes a natural right to bury her brother Polynices despite the ban of king Creon, her uncle. For the opposition of *physis* and *nomos* see G. Casertano, *Natura e istituzioni umane nelle dottrine dei sofisti*, Napoli 1971; W. K. C. Guthrie, *A History of Greek Philosophy*, III, pp. 55–134; F. Heinimann, *Nomos und Physis. Herkunft und Bedeutung einer Antithese im griechischen Denken des 5. Jahrhunderts*, Basel 1965 (1945[1]); G. B. Kerferd, *The Sophistic Movement*, Cambridge 1981, pp. 111–130; M. Ostwald, *From Popular Sovereignty to Sovereignty of Law*, pp. 250–273.

equality demands social and political inequality.[37] Callicles' genealogy of the *nomos* and his argument to justify *pleonexia* and to criticize the *nomos* read,

> *Callicles:* Conventions (*nomoi*), on the other hand, are made, in my opinion, by the weaklings who form the majority of mankind (*hoi polloi*). They establish them and apportion praise and blame with an eye to themselves and their own interests (*to autois sympheron*), and in an endeavour to frighten those who are stronger and capable of getting the upper hand they say that taking an excess of things is shameful and wrong, and that wrongdoing consists in trying to have more (*pleon echein*) than others; being inferior themselves, they are content, no doubt, if they can stand on an equal footing with their betters. That is why by convention an attempt to have more than the majority is said to be wrong and shameful, and men call it wrongdoing; nature (*physis*), on the other hand, herself demonstrates, I believe, that it is right (*dikaion*) that the better man should have more than the worse and the stronger than the weaker. The truth of this can be seen in a variety of examples, drawn both from the animal world and from the complex cities and nations of human beings; right is judged to be the superior ruling over the inferior and having the upper hand (*ton kreittô tou hêttonos archein kai pleon echein*). … My conviction is that these actions are in accordance with nature (*kata physin*); indeed, by Zeus, I would go so far as to say that they are in accordance with natural law (*nomos tês physeôs*), though not perhaps with the law enacted by us. Our way is to take the best and strongest among us from an early age and endeavour to mould their character as men tame lions; we subject them to a course of charms and spells and enslave them by saying that men ought to be equal and that this is fine and right. But I think that if there arises a man sufficiently endowed by nature, he will shake off and break through and escape from all these trammels; he will tread underfoot our texts and spells and incantations and all our unnatural (*para physin*) laws, and by an act of revolt reveal himself our master instead of our slave, in the full blaze of the light of natural justice (*physeôs dikaion*) (Plato, *Gorg.* 483b–484b, transl. W. Hamilton – C. Emlyn-Jones; cf. *Resp.* II,358e–359b; *Leg.* X,890a).

As explained in section 2, Callicles' genealogy of the *nomos* has many similarities with Nietzsche's genealogy of morality. With *nomoi*, which is translated here as "conventions", Callicles seems to refer more to morals and mo-

37 For Antiphon see *Papyri Oxyrhynchus* (*POxy*) 1364, *DK* 87 B 44a; *DK* 87 B 44b; cf. *POxy* 3647, which was published in 1984; cf. M. Knoll, *Antike griechische Philosophie*, pp. 159–165.

rality than to laws. However, he also rejects the morality of equality that is incorporated and enforced by democratic laws.[38] For him, natural right and natural justice exist, which can be derived from a natural law. This law, which is based on natural inequalities, is a source of law superior to positive law and allows for criticism of it. According to natural law, it is just that the better citizens have more goods and rule over the worse citizens, i.e. over the crowd. Similarly, Gorgias states in his *Encomium of Helen* that by nature "the weaker are ruled and directed by the stronger" (*DK* 82 B 11, transl. M. K.). This is another indication that Callicles was Gorgias' student. In the exchange between the Melian commissioners and the Athenian envoys which Thucydides reports, he has the latter express similar thoughts, "For of the gods we hold the belief, and of men we know, that by a necessity of their nature (*hypo physeôs anankaias*) wherever they have power they always rule" (Thucydides, *Hist.* V,105; transl. C. F. Smith; cf. V,89, 101).[39]

The literature usually refers to Callicles' position as a "natural right of the stronger".[40] However, he uses the opposition of the weaker and the stronger only when he introduces his views (*Gorg.* 483b ff.). In the wake of his conversation with Socrates he makes clear that by "the stronger" he really means "the better" (cf. section 2). The better citizens who have a right to rule and to have more goods than others are the elite of those who possess the virtues "courage" (*andreia*) and "intelligence" (*phronêsis*) (*Gorg.* 489e, 491a–d).[41] What Callicles is actually defending is not a natural right of the stronger but a natural right of the better. This is evidence that, in line with his family background and his oligarchic connections, Callicles was not only a critic of popular sovereignty and democracy, but an aristocratic political thinker.[42]

38 Cf. R. K. Balot, *Greed and Injustice in Classical Athens*, p. 5, and M. Ostwald, *From Popular Sovereignty to Sovereignty of Law*, pp. 248–249.

39 Cf. F. Heinimann, *Nomos und Physis*, p. 167 (footnote 7).

40 A. Graeser, *Die Philosophie der Antike 2: Sophistik und Sokratik, Platon und Aristoteles*, München 1983; W. K. C. Guthrie, *A History of Greek Philosophy*, III, p. 101; H. Ottmann, *Geschichte des politischen Denkens*, 1/1, p. 226; 1/2, pp. 15–16; D. Silvermintz, *Thrasymachus*, in: P. O'Grady (ed.), *The Sophists. An Introduction*, London 2008, p. 95.

41 Ostwald is not aware of this because he wrongly claims, "Callicles has no clear idea in what the superiority sanctioned by *physis* consists"; M. Ostwald, *From Popular Sovereignty to Sovereignty of Law*, p. 250.

42 For the debate on Callicles' political position see G. B. Kerferd, *Plato's Treatment of Callicles in the Gorgias*, in: *Proceedings of the Cambridge Philological Society*, New Series, 20, 1974, pp. 48–52. In line with Kerferd's view, Mario Untersteiner affirmatively quotes Adolfo Levi's view that Callicles is "presentato come un campione del partito democratico" and refers to *Gorg.* 481d–e, 513a–b, 515e; M. Untersteiner, *I Sofisti*, p. 502, 523. The passages Untersteiner adduces partly display Socrates' irony and do not substantiate Levi's view, which is also refuted by Callicles' explicit political statements and the information Guthrie gathered about Callicles' "aristocratic and oligarchic connexions"; W. K. C. Guthrie, *A History of Greek Philosophy*, III, p. 102; cf. M. Ostwald, *From Popular Sovereignty to Sovereignty of Law*, pp. 245–247.

Being an aristocratic political thinker, Callicles' political views are closer to Plato's than is usually assumed. In the *Republic*, Plato designates the "political system" (*politeia*) of his best city – depending on the available amount of virtuous rulers – as an aristocracy or a kingship (*Resp.* IV,445d; cf. VII,520c; VIII,544e, 545c).[43] This is in line with the literal meaning of the term *aristokratia*, which is "rule of the best" or "rule of the most virtuous". Like Callicles, Plato does not value an aristocracy based on birth. However, in contrast to Plato's virtuous rulers, those Callicles defends only possess "courage" (*andreia*) and "intelligence" (*phronêsis*), not "moderation" (*sôphrosynê*) and "justice" (*dikaiosynê*) (*Gorg.* 489e, 491a–492c; cf. section 2). A further difference to Plato is that, for Callicles, the rule of the one or few best men should not aim at the common good, but at their personal advantage. Therefore, it is difficult to locate Callicles' "ideal constitution" in Plato's and Aristotle's scheme of six constitutions (*Polit.* 302c–e; *Pol.* III,6–7,1279a17–b10). In the context of the natural right of the better, Callicles introduces the leonine man who heroically frees himself from the unnatural egalitarian and democratic *nomoi*, seizes political power and realizes his *pleonexia* as a tyrant.[44] Such an ideal is alien to Plato's version of aristocratic political thought.

5. Thrasymachus' argument about justice and law

In all likelihood, Thrasymachus, the orator from Chalkedon, spend a considerable amount of time in Athens in the late fifth century.[45] Like Callicles, he relates the law to questions of power and benefit and analyzes its origin and the interests it serves. For Callicles, in democracies the crowd decides the laws and establishes the moral rules to their advantage. In Book I of the *Republic*, Thrasymachus generalizes Callicles' view by claiming that in *every* political system the ones who have the power and make the laws do not aim at the common good but at their personal advantage. Thrasymachus' argument about justice and law in Book I of the *Republic* reads,

> *Thrasymachus*: Don't you know … that some cities are ruled tyrannically, some democratically, and some aristocratically? … In each city, isn't the ruling group master? … And each ruling group sets down laws (*nomoi*)

43 For the aristocratic character of the mixed constitution Plato outlines in the *Nomoi* see M. Knoll, *Platons Konzeption der Mischverfassung in den Nomoi und ihr aristokratischer Charakter*.

44 According to Mario Vegetti, Callicles and his ideal of the leonine man reflect nostalgia toward the power of the Athenian oligarchy, which was humiliated by egalitarian democratic law. Similarly, for Vegetti, Callicles' ideal evokes the shadow of Alcibiades; M. Vegetti, *Antropologie della pleonexia*, p. 198.

45 M. Knoll, *Antike griechische Philosophie*, pp. 153–154.

> for its own advantage (*to autê sympheron*); a democracy sets down democratic laws; a tyranny, tyrannic laws; and the others do the same. And they declare that what they have set down – their own advantage – is just for the ruled, and the man who departs from it they punish as a breaker of the law and a doer of unjust deeds. This, best of men, is what I mean: in every city the same thing is just, the advantage of the established ruling body. It surely is master; so the man who reasons rightly concludes that everywhere justice is the same thing, the advantage of the stronger (*tou kreittonos sympheron*) (Plato, *Resp.* I,338d–339a, transl. A. Bloom; cf. *Leg.* IV,714c–d).

In the literature, we find numerous attempts to reconstruct Thrasymachus' argument about justice and law. According to Maguire, "Thrasymachus says three distinct things about the just".[46] In the debate, several scholars distinguish between two definitions of justice and disagree about whether these are compatible or not: (a) justice is the advantage of the stronger/ruler (*Resp.* I,338c, 339a, 344c); and (b) justice is someone else's good (*Resp.* I,343c).[47] The disagreement about whether these two definitions are compatible is identical with the dispute about whether Plato's Thrasymachus defends a coherent and consistent view. The problem linked to this debate, however, is that many scholars over-analyze Thrasymachus' position in the sense that they decompose it into several independent statements and definitions. Thrasymachus' statement that "justice is the advantage of the stronger/ruler" is not an isolated statement and cannot be understood as a proper definition of

46 The just is (1) "the advantage of the stronger" (*Resp.* I,338c); (2) obedience to the laws (*Resp.* I,339b); (3) "someone else's good" (*Resp.* I,343c; transl. A. Bloom); J. P. Maguire, *Thrasymachos – – – or Plato?*, p. 565.

47 See, also for the literature, K. A. Algra, *Observations on Plato's Thrasymachus: The Case for Pleonexia*, pp. 55–58. Probably influenced by Algra's distinction between the two definitions of justice mentioned above (a and b), Vegetti distinguishes between "due tesi differenti". He also claims that thesis a and b are not logically connected; M. Vegetti, *Trasimaco*, in: *id.* (ed.), *Platone, La Repubblica. Traduzione e commento* (Elenchos, I/1), Napoli 1998, pp. 233–256; M. Vegetti, *Antropologie della pleonexia*, pp. 199–201; cf. A. Maffi, *Trasimaco fra Platone e Aristotele*, in: *viaBorgogna3. il magazine della Casa della Cultura*, 10, 2018 (per Mario Vegetti), pp. 68–75. According to Boter's research, the majority of interpreters "believe that Thrasymachus' utterances are incompatible". Boter summarizes some readings of such scholars who "over-analyze" (my term) Thrasymachus' statements out of context, which leads to extreme misinterpretations. Such scholars argue that "the ruler acts justly by pursuing his own advantage" or that "the ruler acts justly by *not* pursuing his own advantage"; G. J. Boter, *Thrasymachus and ΠΛΕΟΝΕΞΙΑ*, in: *Mnemosyne*, Fourth Series, 39, 1986, p. 262. Among the interpretations that contend that Plato's Thrasymachus defends a coherent view are G. F. Hourani, *Thrasymachus' Definition of Justice in Plato's Republic*, in: *Phronesis*, 7, 1962, pp. 110–120, and G. B. Kerferd, *The Doctrine of Thrasymachus in Plato's Republic*.

justice.[48] It is rather a provocative catchphrase, which can be synthesized out of his views and with which he rhetorically draws attention to his position. Similarly, the statement that "justice is another one's good" does not stand alone but is part of a whole proposition which claims that

> justice (*dikaiosynê*) and the just (*to dikaion*) are really someone else's good (*allotrion agathon*), the advantage of the man who is stronger (*kreittonos*) and rules (*archontos*), and a personal harm to the man who obeys and serves. Injustice (*adikia*) is the opposite, and it rules the truly simple and just; and those who are ruled do what is advantageous for him who is stronger, and they make him whom they serve happy (*eudaimon*) but themselves not at all (Plato, *Resp.* I,343c–d; transl. A. Bloom).

Thrasymachus conceives of just behavior, in the sense of law-abiding conduct, exclusively as a behavior of the ruled.[49] Algra, for good reasons, objects to "incompatibilist" interpretations of Thrasymachus' position that they "usually focus exclusively on the definitions and on what may be inferred from them (i.e. they study the definition in isolation from their context)".[50]

Thrasymachus' argument about justice and law should be reconstructed as follows. According to the *first premise* of the argument, justice is defined as abiding by the laws of the *polis* and injustice as breaking them. This is a common usage and explanation of the term "just" (*dikaion*).[51] This definition is similar to Aristotle's understanding of universal justice in Book V of the *Nicomachean Ethics* (V,3,1129b11–1130a13). However, while Aristotle closely links legal justice to the ethical virtues, Thrasymachus' argument seems to presuppose a form of legalism or legal positivism.[52] According to it, *dikaion* is *nomimon*. Justice is identical with the positive or established laws of the

48 The view that Thrasymachus' statement is not a definition is shared by G. J. Boter, *Thrasymachus and ΠΛΕΟΝΕΞΙΑ*, p. 264; G. B. Kerferd, *The Doctrine of Thrasymachus in Plato's Republic*, p. 560; P. P. Nicholson, *Unravelling Thrasymachus' Arguments in The Republic*, in: *Phronesis*, 19, 1974, p. 211.

49 Cf. K. A. Algra, *Observations on Plato's Thrasymachus: The Case for Pleonexia*, p. 58; P. P. Nicholson, *Unravelling Thrasymachus' Arguments in The Republic*, pp. 214–215.

50 K. A. Algra, *Observations on Plato's Thrasymachus: The Case for Pleonexia*, p. 55.

51 Cf. M. Salomon, *Der Begriff des Naturrechts bei den Sophisten*, in: *Zeitschrift der Savigny Stiftung für Rechtsgeschichte: Romanistische Abt.*, 32, 1911, p. 143.

52 For the interpreters who understand Thrasymachus' position as "legalism"; see G. B. Kerferd, *The Doctrine of Thrasymachus in Plato's Republic*, pp. 546–547; this is also the view of G. F. Hourani, *Thrasymachus' Definition of Justice in Plato's Republic*, and M. Vegetti, *Antropologie della pleonexia*, p. 199; for Kerferd's criticism of this view see G. B. Kerferd, *The Doctrine of Thrasymachus in Plato's Republic*, p. 561, and for his reply to Hourani see G. B. Kerferd, *Thrasymachus and Justice: A Reply*, in: *Phronesis*, 9, 1964, pp. 12–16. For some evidence in support of Kerferd's views that Thrasymachus was not a legalist see D. J. Hadgopoulos, *Thrasymachus and Legalism*, in: *Phronesis*, 18, 1973, pp. 204–208.

polis; no natural law exists. Several interpreters claim that Thrasymachus does not recognize any moral obligation or value that transcends the law.[53] However, Thrasymachus uses the terms "just" and "unjust" also according to the meaning they have in the common morality (*Resp.* I,343d–344c). In the conventional morality, to behave justly means to honor private contracts, to pay taxes and to refrain from corruption and the appropriation of other's possessions. As we have seen, Thrasymachus argues that, in contrast to unjust behaviors, just ones are not beneficial for a good and happy life (cf. section 3).

The *second premise* of Thrasymachus' argument relates justice and law to political power. In every political system, the law is given by the members of the ruling group (i.e. "the stronger ones"). This is simply a description of political reality. The *third premise* of Thrasymachus' argument, which relates justice and law to the self-interest of the rulers, is more controversial. According to it, *all* ruling groups or rulers – be it democrats, aristocrats or just one tyrant – use their power and legislative authority to pass laws that serve their self-interest or advantage. For example, as Plato observed, in *all* political systems the ruling group passes laws that "ensure that it remains permanently in power" (*Leg.* IV,714d, transl. T. J. Saunders). Of course, the preservation of political power is merely *one* specification of the self-interest or advantage of the rulers. The ruling group uses political power, legislation and legal justice also as a means to gain recognition and to enrich itself. This is in line with Callicles and Thrasymachus' view that human beings are driven by *pleonexia*. The third premise of Thrasymachus' argument is controversial because it can be objected that ruling groups aim with their legislation not primarily at increasing their personal advantage, but at maximizing the common good of the *polis*. This is Aristotle's criterion for distinguishing between the three right political systems – kingship, aristocracy, and "polity" (*politeia*) – on the one hand, and the three wrong ones – tyranny, oligarchy, and democracy – on the other (*Pol.* III,6,1279a17–21, 11,1282b8–13; IV,1,1289a10–22).[54] Finally, it is important to note that Thrasymachus' generalization and conviction that *"each* ruling group sets down laws for its own advantage" is a reason that substantiates that he was not only an ethical egoist, but also a psychological egoist.

According to the *conclusion* of Thrasymachus' argument, citizens who are just and abide by the laws of their *polis* realize the interests of the ruling

53 These interpreters are usually the ones who understand Thrasymachus' position as "legalism".

54 If we ask whether Thrasymachus' argument about justice and law allows for a political system in which the rulers legislate and rule for the common good, one possibility would be a true democracy with a high degree of equality (e.g. of property) among the citizens.

group. These interests are embodied in the clauses and regulations of the laws, which were passed by the rulers in order to promote their self-interest. This is why justice is the advantage of the stronger/the rulers or someone else's good. Legal justice is the good of the ruling group and the harm of the just and law-abiding citizens. Thrasymachus ascribes just behaviors, in the sense of law-abiding conduct, exclusively to the ruled who are forced to abide by the laws by the threat of punishment (*Resp.* I,338e, 344b).[55] Thrasymachus does not address the question of whether the ruling group is subject to the law or above it. However, if the ruling group makes – as he claims – no mistakes in setting down what is best for it, and if the ruled are forced to do what is best for the rulers, there is no need for them to be above the law (cf. *Resp.* I,340e–341a). This would give them no additional advantage.

Conclusion: The relation of Callicles and Thrasymachus

This article has demonstrated that there are several important similarities between Thrasymachus' and Callicles' political thought. Both relate the *nomos* to questions of power and benefit and analyze its origin and the interests it serves. Both defend psychological and ethical egoism and acknowledge *pleonexia* as a natural human striving. Callicles is clearly a champion of hedonism; Thrasymachus in all likelihood shares this position. Both have similar ideas about a good and happy life and defend tyranny and the life of the tyrant. However, while Callicles' position is more extreme than Thrasymachus', it is theoretically less profound.[56]

According to Kerferd, there is one more crucial similarity between the two. He claims that Thrasymachus defends a version of the "theory of Natural Right".[57] If this were the appropriate interpretation, Thrasymachus' position would be indeed "practically identical with that of Callicles" who defends a natural right of the better.[58] However, Kerferd's claim is not convincing and in Book I of the *Republic* there are no statements that substantiate this

55 Cf. K. A. Algra, *Observations on Plato's Thrasymachus: The Case for Pleonexia*, p. 58; P. P. Nicholson, *Unravelling Thrasymachus' Arguments in The Republic*, pp. 214–215.

56 Cf. M. Vegetti, *Antropologie della pleonexia*, pp. 197–198. Louis Groake interprets Callicles as "a kind of freedom-saint" because, like Gorgias and Polus, he defends "rhetoric as a means to individual liberty (*eleutheria*)"; L. Groake, *Callicles*, in: P. O'Grady (ed.), *The Sophists*, pp. 106–107.

57 G. B. Kerferd, *The Doctrine of Thrasymachus in Plato's Republic*, pp. 548, 550.

58 *Ibid.*, p. 547. With reference to Gorge Grote and Callicles' supposed "right of the stronger", Guthrie claims that Thrasymachus' theory is "essentially different from that of Callicles"; W. K. C. Guthrie, *A History of Greek Philosophy*, III, p. 97. Solomon, who rejects the interpretation that Thrasymachus defends a "right of the stronger" (*Recht des Stärkeren*), informs us that this was a prevailing view in the literature of the 19th century; M. Salomon, *Der Begriff des Naturrechts bei den Sophisten*, p. 144.

interpretation. Kerferd himself acknowledges that Thrasymachus nowhere speaks "of natural *Justice*".[59] Kerferd's methodical approach is to first list all positions that have been attributed to Thrasymachus in the literature. In a second step, he tries to determine which is the most appropriate interpretation by eliminating all inadequate ones. However, Kerferd neglects to consider a line of interpretation that goes back to Max Salomon.[60] According to it, Thrasymachus' argument about justice and law wants to set up no norm and has no normative dimension. For Salomon, Thrasymachus is just a descriptive sociologist who diagnoses what actually happens in politics. This interpretation certainly captures an important dimension of Thrasymachus' argument, which can still be applied to analyze central aspects of legislation in contemporary democracies. In the parliaments of Western democracies there are many MPs who do not mainly represent the will of the people who voted for them, but the will of certain lobbies or economic groups such as the agricultural lobby, trade unions or employer's associations. Those MPs use their political power to influence legislation with the goal of leveraging legal justice to promote the interests of the lobby they belong to.

Despite the fact that Thrasymachus' position includes important insights that fit squarely within the realm of political sociology, it cannot be reduced to it. His praise of *pleonexia*, injustice, and the happiness of the tyrant implies that he appreciates politicians who have enough power to give laws for their personal advantage and happiness. Nevertheless, Kerferd's view "that for Thrasymachus injustice is a moral obligation" is exaggerated because the sophist does not explicitly prescribe to anyone that they behave unjustly.[61] Rather, Thrasymachus should be interpreted as a political realist. Like Callicles, he has a sober and realistic view of human nature and politics.[62] Human beings are motivated by *pleonexia*. Politics is mainly a struggle for power. In this struggle, for Thrasymachus, politicians usually neither respect the

59 G. B. Kerferd, *The Doctrine of Thrasymachus in Plato's Republic*, p. 550.

60 M. Salomon, *Der Begriff des Naturrechts bei den Sophisten*, pp. 142–147. Salomon restates his views on Thrasymachus in M. Salomon Shellens, *Der Gerechtigkeitsbegriff des Thrasymachus*, in: *Zeitschrift für philosophische Forschung*, 7, 1953, pp. 481–492. In the recent literature, Salomon's interpretation is defended by Ottmann who does not refer to Salomon; H. Ottmann, *Geschichte des politischen Denkens*, 1/1, p. 226; 1/2, pp. 28–29. Cf. G. B. Kerferd – H. Flashar, *Die Sophistik*, p. 56.

61 Based on his interpretation that Thrasymachus assigns "to injustice the predicates normally given to justice as a moral ideal at which people ought to aim", Kerferd claims that he is no ethical nihilist; G. B. Kerferd, *The Doctrine of Thrasymachus in Plato's Republic*, p. 561.

62 In Chapter IV (3), which is headed by "The realists", Guthrie includes besides Thucydides, Glaucon, and Adimantus only Thrasymachus. Callices is treated in Chapter IV (4) headed "The upholders of *physis*"; W. K. C. Guthrie, *A History of Greek Philosophy*, III, pp. 84–134. Untersteiner, for good reasons, treats both Callicles and Thrasymachus under the headline "Sofistica e realismo politico"; M. Untersteiner, *I Sofisti*, pp. 497–504.

prevailing morality nor aim at the common good or the happiness of their subjects. Rather, through legislation they pursue their self-interest and personal advantage. A realistic analysis of life shows that people act immorally in private and public matters and that only powerful and unjust persons can live a truly good and happy life. These are the main lesson of Thrasymachus' descriptive sociology and political realism.[63] Considering the fact that a good life was the conscious goal of all Greek citizens, this lesson constitutes a huge provocation to all moralists and idealists.[64] Guthrie argues that Thrasymachus was a "disillusioned moralist".[65] He supports this claim by referring to the surviving fragment from Thrasymachus of Chalkedon on justice in which he complains that humans make no use of justice, the "greatest of human goods" (*DK* 85 B 8, transl. M. K.). However, whether Plato's Thrasymachus is identical with the historical orator, as Guthrie claims, is not certain.

While Callicles is an aristocratic political thinker, Thrasymachus is a political sociologist and political realist. Callicles defends a natural right of the better, Thrasymachus seems to be a legal positivist. However, despite his legalism Thrasymachus also uses the terms "just" and "unjust" according to the meaning they have in the common morality (cf. section 5). Notwithstanding his criticism that acting morally is detrimental to a good and happy life, it is likely that Thrasymachus would acknowledge that a certain moral obligation arises from the moral norms of the time. However, for him it seems to be more important to be happy than to be moral.

Like Protagoras, Thrasymachus seems to be not only a legalist but an ethical relativist and a moral skeptic. For a moral skeptic, no moral facts and no moral truths exist in mind-independent ways. For an ethical and legal relativist, everything which is just and legal is valid only for one *polis* and relative to its particular morality and laws.[66] According to the principal clause of Protagoras' philosophy, man is the measure of all things (*Tht.* 152a). Applied to the field of morality, law, and politics, this clause claims that no such thing

63 The corruption of justice is a topic in Greek political thought that goes back to its beginnings with Hesiod, *Works and Days*, and Solon (Fr. 4 *Eunomia*).

64 This is acknowledged by Socrates' immediate reaction to Thrasymachus' speech, in which Socrates asks him rhetorically whether he is "trying to determine a small matter and not a course of life on the basis of which each of us would have the most profitable existence?" (*Resp.* I,344d–e, transl. A. Bloom).

65 W. K. C. Guthrie, *A History of Greek Philosophy*, III, p. 97; cf. M. Untersteiner, *I Sofisti*, p. 501. By claiming that Thrasymachus seems to be "ein enttäuschter Moralist", Ottmann takes up Guthrie's interpretation; H. Ottmann, *Geschichte des politischen Denkens*, 1/2, p. 28. However, Ottmann makes no reference to Guthrie.

66 Despite Protagoras' rejection of any universal truths in moral and legal matters, he argues that some moral beliefs or views about the good and just are more beneficial or useful than others (*Tht.* 166d–167d, 172a–b, 177d–e). This implies that he rejects an "absolute relativism" that claims *de gustibus disputandum non est*.

as "the just and unjust" has "by nature (*physei*) any being (*ousia*) of its own" (*Tht.* 172b, transl. M. J. Levett, rev. M. Burnyeat). Rather, "whatever any community (*polis*) decides to be just and unjust, and establishes as such, actually is what is just and right for that community and for as long as it remains so established" (*Tht.* 177d, transl. M. J. Levett, rev. M. Burnyeat). This quote expresses both Protagoras' legal positivism and his ethical and legal relativism, which both presuppose his moral skepticism. For Protagoras, legislation always aims at the good and the advantage of the whole community, "A community always makes such laws as are most useful to it" (*Tht.* 177d, transl. M. J. Levett, rev. M. Burnyeat). For Thrasymachus' political realism, this is an idealist view and an unwarranted generalization that needs to be revised. It is neither the whole *polis* that passes the *nomoi* nor do the laws always aim at the common good. Rather, it is the ruling group that passes the laws to promote their self-interest.[67] While Protagoras neglects the relation between the rulers and the ruled, Thrasymachus' perspective on the *nomos* focuses on this relationship. The rulers use the *nomoi* to suppress the ruled. In contrast, Callicles' perspective on the *nomos* focuses on the relation between the individual and the democratic *polis*. In such a *polis* the crowd uses the *nomoi* to suppress the most outstanding individuals.

67 Cf. D. Silvermintz, *Thrasymachus*, p. 96.

What Makes a Law Good? Plato on Legal Theory in the *Statesman*

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Summary
Plato's legal epistemology is simultaneously context-sensitive and generalist. Particularly in the *Statesman*, Plato prefers a competent individual to the rigid rule of laws (294a), but it seems implausible that he does so on the basis of a moral particularism. Although nowhere utilizing the word *epieikeia* to appeal to a perfect personal knowledge distinct from written rules, Plato outlines a competence quite similar to Aristotelian *epieikeia*: He introduces a twofold "art of measurement" (*metrêtikê*) whose second part is concerned with "the mean, and the fit, and the opportune and the due, and with all those words, in short, which denote a mean or standard removed from the extremes" (πρὸς τὸ μέτριον καὶ τὸ πρέπον καὶ τὸν καιρὸν καὶ τὸ δέον καὶ πάνθ' ὁπόσα εἰς τὸ μέσον, 284e6–7). This competence can deal with the shortcomings of written law. What he describes as the insufficiency of the law is that it does not perfectly comprehend "what is noblest and most just for all" and that it "therefore cannot enforce what is best". Plato tells us that "the differences of men and actions, and the endless irregular movements of human things, do not admit of any universal and simple rule, and no art whatsoever can lay down a rule which will last for all time" (294b2 ff.; transl. B. Jowett). Apparently, the *metrêtikê* under discussion is the competence to find the mean and the fit which makes Plato's perfect leader superior to the written laws. As we are told in the *Statesman*, laws are no more than necessary substitutes for the perfect knowledge of the man who possesses full insight. Plato's political personalism, however, is certainly not founded on a particularist idea of decision-making. The underlying Platonic epistemology tends to favour an absolute expert who is in possession of an ideal type of abstract knowledge, not of practical experience. What Plato seems to have in mind is a sort of infallible and invariant knowledge, not a radically context-dependent Wittgensteinian capacity of deliberation and judgment.

Introduction

In his late dialogue *Statesman*, Plato famously gives us a list of six political constitutions which he orders according to their quality or normative value as follows: 1. monarchy, 2. aristocracy, 3. good democracy, 4. deviant democ-

racy, 5. oligarchy, and 6. tyranny (291c–292a and 302b–303b). One of the two criteria that determine the order of this list is lawfulness: the three better constitutions, i.e., monarchy, aristocracy, and good democracy, are based on law, whereas the three worse ones, i.e. deviant democracy, oligarchy, and tyranny, are lawless. The other criterion which is relevant for the ranking is the number of ruling persons: Plato believes that, under conditions of lawfulness, it is better to have only one or few rulers (since then abidance by law is more likely to be guaranteed) while, under conditions of unlawful rule, the governance of the multitude (or a greater number of persons) is preferable to that of a sole reign because a bigger group of rulers is considering a wider range of interests. An isolated ruling individual, as Plato apparently assumes, is more likely to follow his arbitrary political ideas and his personal desires.

Manifestly, the criteriological role as formulated by Plato grants law an eminent role within political thought. Let us call, in what follows, such an appreciation of law "legalism". We can say then that Plato is a legalist at least to a considerable extent. But there is also a criticism of law in the *Statesman* which should make us cautious before we unambiguously characterize Plato as a legalist. He regards law, due to its generality, as inappropriate to determine the best for everyone; lawgiving cannot proceed in as detailed a manner (*akribôs*, 294b1) as it should in each individual case: the legal order of a polis must hence ideally be replaced by the rule of an insightful person who can judge individually. Such a ruler would transcend the rigidity of legal orders. Laws in an optimal city of this type can at best serve the purpose of aids to memory (*hypomnêmata*, 295c4) given by the person who possesses the *basilikê technê* to thus compensate for his temporary absence. This kingly ruler can – like a trainer or a physician – individually prescribe the best for the citizens; and as long as he is present, i.e., under ideal conditions, he will do so, at least approximately, in every single case. Law is suboptimal due to its generality; but still, it has some value if it is given by an insightful legislator for limited purposes.

We see from this that Plato is both a legalist and an anti-legalist. His anti-legalism amounts to what one might call his "political personalism". The best case of a constitution would be the rule of an insightful individual – a form of government that outweighs law and is hence better than the six constitutions of the list mentioned above. The ideal ruler is for Plato the person who possesses the "kingly art of weaving" which is described in one of the main parts of the dialogue (277c–283b).

1.

There exists, in Plato's *Statesman*, a manifest evaluative ambiguity between a high appreciation of law and an even higher estimation of individual competence. How can we reconcile the aspects of legalism and personalism? The simple answer to this question is that law should be followed in a polis whenever there is no ideal ruler in office: whereas the insightful individual makes use of his optimal knowledge (i.e., of the kingly art of weaving), the law at least protects us from the crude arbitrary decisions made by a tyrant. By following law, the polis proceeds ordinarily and regularly. To be sure, it is part of Plato's convinctions that order and regularity is preferable to chaos and arbitrariness. But is this all a law can achieve – to give us a better instruction for our agency than that of a (potentially) stupid and covetous tyrant? And is that true for any given law? Laws, we would object, can be highly defective – both in their efficiency and in their morality. Should we, in such cases, see orderliness as sufficient to make a political regime good?

Here we are facing a second, much deeper interpretive problem about the relationship between Plato's legalism and his personalism: namely the question of what makes law valuable in the first place. Is law constitutive for a good political constitution only if it is given by an insightful legislator? By which sort of quality then: by its efficiency or morality or by something else? Or is any law valuable, simply by the fact that it stabilizes the community, hence by the simple aspect of providing order and regularity? In this case, Plato would subscribe to some sort of legal positivism. He should then say that citizens must strictly obey the laws – which he in fact explicitly does (293d4–e5). Or can there, according to Plato, arise better and worse legal orders, even in the absence of an ideal governor, depending on a legislative competence which can also be shared by ordinary people (i.e., those who are below the status of Plato's "kingly rulers")?

The difficulties become even more demanding when we take into consideration what Plato says in the passage 297e–299e of the *Statesman*. There, the Eleatic Stranger introduces the image of a noble navigator and an indispensably valuable doctor who are completely unappreciated and even maligned by their fellow citizens. These two characters represent the kingly rulers who, when they emerge, are malevolently ignored by the nescient multitude. The text apparently has the character of a simile: simple-minded people may have the same suspicion against competent politicians as against excellent physicians. Also, these doctors are suspected to arbitrarily decide whom to cure and whom to mutilate and kill, even if they receive money for the treatment of their patients. Likewise, excellent navigators are (erroneously) suspected by the multitude of harming their customers. Now, people sharing

these suspicions when discussing in a council (*boulên*) decide that these arts should not be allowed to rule any longer unlimitedly (*archein autokratori*, 298c1). Instead, the ignorant people establish a practice of doing navigation and medicine based on the decisions of an assembly (*ekklêsian*, 298c2) and collecting the contributions of everyone to these fields of expertise. In the end, they even engrave rules on wooden columns and on blocks of stone (*grapsantas en kubersi tisi kai stêlais*, 298d7) or follow questionable unwritten traditions (*agrapha patria themenous ethê*, 298e1). What must be meant here regarding the written rules is that people establish *new* laws out of ignorance and then strictly prescribe them to the city. Following these new laws of the community, the rulers are selected annually from the multitude by lot; they are required to act in strict accordance with these laws. After their time in office, those who are selected have to give an account of what they achieved and can easily be accused by everyone.

What Plato gives us here, in an abstract form, is obviously a harsh criticism of contemporary Athenian democracy. This becomes thoroughly clear from the passage which alludes to the fate of Socrates: a real medical or nautical specialist, we are told, is under these circumstances disparaged as a star-gazer and a babbling sophist (*meteôrologon, adoleschên tina sophistên*, 299b7–8) who spoils young people (*hôs diaphtheironta allous neôterous*, 299b8) and tries to convince them to rule ships and treat patients independently of the laws. Such a figure will then be severely punished by a court since "nothing is allowed to be wiser than the laws" (*ouden gar dein tôn nomôn einai sophôteron*, 299c6–7). What so far might have appeared as a mere thought-experiment now turns out to be entirely a description of political reality. Young Socrates, the interlocutor of the Eleatic Stranger, concludes from the Stranger's remarks that if the arts were generally practiced according to such a paradigm, they would perish. He mentions as explicit examples arts such as military strategy, hunting, painting, house-building, fabrication of instruments, agriculture, horse breeding, divination, board games, arithmetic or mathematics. All of these arts would collapse and never come back if there were laws instead of research. Finally, young Socrates adds that life (which already now is difficult: *chalepos*) would then no longer be worth living (*abiôtos*, 299e8).

The passage 297e–299e significantly increases the problem of how to reconcile Plato's legalism with his personalist anti-legalism. If it is true that democracy is to be seen as the rule of the incompetent multitude that establishes arbitrary laws which, nevertheless, must be strictly followed, then legislation and law-abidance, for Plato, must be things of a much lesser value than we expected them to be. Hence, the most demanding element of the theory of law in the *Statesman* is in the passage 297e–299e: here, democracy

is blamed for its establishment of a legal order, although it follows the principle of lawfulness; and even worse, regulation by law is here generally relativized compared to the possession of a *technê*.

These difficulties have first been pointed out by Christopher Rowe,[1] who believes that Plato should not be seen as a legalist at all. Instead, Rowe thinks that his appreciation for law is only apparent; what Plato really values is an insight-based rulership and nothing else.[2] This thesis appears implausible to me; and like some other scholars I reject it.[3] Following an article in which I deal with this problem,[4] I want to draw the attention to the fact that Plato, in our passage (*Polit.* 297b–303d), gives us three indications for his genuine appreciation of lawfulness: (1) In 298e1, we are told that the misguided form of doing medicine or seamanship might include, besides written texts, the use of ancestral unwritten customs (*agrapha patria … ethê*). (2) According to 299a4–5, the officer-holders cannot only be charged on the basis of written rules, but also based on "ancient customs of their ancestors" (*kata ta palaia tôn progonôn ethê*). And (3), in 299d1, we hear that someone who wants to be "wise" could, according to the critics of the *technai*, easily learn the contents of written materials and of "those established by ancestral customs" (*patria ethê keimena*). These three passages are taken up again in 301a2–3, where the Stranger says that one should "never do anything contrary to what is written and contrary to ancestral customs" (*mêden poiein para to gegrammena kai patria ethê*). In my eyes, the mistake identified by Plato consists exclusively in an inadequate establishment of newly formulated laws, but also in a stupid way of following traditional rules. Therefore, rule-following, regardless if directed towards written or unwritten rules, can be fatal (if it is mindless) or valuable (if it is based on an insightful practice of legislation). And Athenian democracy, despite not being lawless, belongs to the group of constitutions establishing bad laws.

In what follows, I want to make two important additions to this reading. First, I will raise the question whether personal insight, for Plato, is better in

1 C. J. Rowe, *Plato: Statesman*, Oxford 2005[2]; *id.*, *The Politicus and other Dialogues*, in: Ch. Rowe – M. Schofield (eds.), *The Cambridge History of Greek and Roman Political Thought*, Cambridge 2000, pp. 233–257; *id.*, *The Statesman and the Best City*, in: A. Havlíček – J. Jirsa – K. Thein (eds.), *Plato's "Statesman": Proceedings of the Eighth Symposium Platonicum Pragense*, Prague 2013, pp. 40–50.

2 In this interpretation, Rowe is followed, e.g., by M. Lane, *Method and politics in Plato's Statesman*, Cambridge 1998, and D. El Murr, *Savoir et gouverner: essai sur la science politique platonicienne*, Paris 2014.

3 See, e.g., F. Ricken, *Platon, Politikos: Übersetzung und Kommentar*, Göttingen 2008, and A. D. Sørensen, *Plato on Democracy and Political technê*, Leiden – Boston 2016.

4 Ch. Horn, *Does Law Abidance Make Life Impossible? Plato's Theory of Law in the Statesman (297b–303d)*, in: *Plato's Statesman, PDP Oslo 2018* (forthcoming).

a radical, incommensurable sense or not: does Plato believe that true competence as it is held by the insightful politician should be in terms of what we, in modern meta-ethical debates, call particularism? Should a normatively appropriate instruction in moral and political philosophy, according to Plato, be generated by a situation-relative judgment, instead of being derived from a generalized rule? I don't think so; I will argue that Plato is a generalist, and so his seeming anti-legalism itself is basically built on a certain form of legalism.

My second point is based on the question: can we learn something additional from the *Laws* that might help us to resolve the tension between legalism and anti-legalism in the *Statesman*? Actually, I think we can. We find in this work ample evidence for philosophical considerations of what makes a law good. I will discuss these questions in the following two sections.

2.

In contemporary metaethics, there is a debate about generalism and particularism which has also some importance for our view of Plato's theory of law.[5] Whereas generalism gives us a rule-oriented account of practical normativity, particularism provides a perception-based model. Generalism, as we know it, e.g., from Kantian and other deontologist types of moral philosophy, assumes that concrete practical rules must be derived from general ones. Thus, what should be done in a certain situation (someone may, e.g., be wondering if she is obliged to violently stop an aggressor who is about to kill innocent people) should be derived from a general rule (such as "emergency assistance is at least permitted, if not mandatory under certain conditions"). Particularism, by contrast, signifies the standpoint for which all adequate normative judgments must be grounded on perception of the morally relevant features of a given situation. Particularists typically claim that it amounts to a mistake to take for granted a rule such as "lying is morally prohibited" since there are cases in which telling a lie can be the right thing to do. According to particularism, there is a fundamental "incommensurability" between the different practical situations we have to deal with, such that a generalized procedure would be inappropriate.[6]

5 On this debate, see the informative volume of B. W. Hooker – M. Little (eds.), *Moral Particularism*, Oxford 2000.

6 Important supporters of contemporary particularism are John McDowell (*Virtue and Reason*, in: *The Monist*, 62, 1979, pp. 331–350), David Wiggins (*Incommensurability. Four Proposals*, in: R. Chang [ed.], *Incommensurability, Incomparability, and Practical Reason*. Cambridge [Mass.] 1997, pp. 52–66), or Jonathan Dancy (*Ethics without Principles*, Oxford 2004).

Is Plato a particularist in the modern sense? One aspect of his political thought that in fact points into a particularist direction is his personalism. As we saw, Plato believes that in order to establish and protect a sound polis, we have to rely on outstanding individuals. The decisive factor for the well-being of states are persons, not institutions, rules, offices, or procedures. Therefore, in his *Republic*, the topic of law is almost absent, and also the institutional design of the ideal city, the *kallipolis*, is hardly even discussed. Everything depends on the presence of competent individual rulers, the philosopher-kings and philosopher-queens. Also in the *Statesman*, Plato defends an unambiguously personalist model of good governance; even the politician described there is not a philosopher like the philosopher-king in the *Republic*. He explicitly says that the best constitution for a state is to be governed by a "kingly man with insight" (*andra ton meta phronêseôs basilikon*, 294a8) and that a polis which is thus ruled exceeds the other constitutions "as a god should be separated from human beings" (*ekkriteon hoion theon ex anthrôpôn*, 303b4). Plato's personalism in both dialogues seems to imply that political expertise cannot be formulated in the form of general rules – rules that could also be applied by incompetent people. For him, it takes a brilliant individual, not a set of rules, to adequately deal with all possible political challenges.

On the other hand, there is a strong argument against a particularist reading of Plato: the sort of expertise that qualifies the philosopher in the *Republic* and the politician in the *Statesman* is far from being founded on perception (*aisthêsis*) or experience (*empeiria*). The competence achieved by the philosopher is based on his or her knowledge of the Forms, and the competence possessed by the politician is the "art of weaving", i.e. an integral combination of politically relevant skills and arts. Plato nowhere says that it takes a certain perception of the present situation to correctly deal with a given challenge, and he doesn't claim that the decisive feature of an excellent ruler is being experienced about concrete political reality. Rather, Plato assumes that the best possible ruler has some sort of abstract knowledge, derived from his or her insight into universals. What makes him or her additionally unique is the way in which he or she knows how to apply it. This description would clearly fit a generalist position.

To confirm this conclusion, let us look at two of the crucial passages of our dialogue. To begin with, Plato says in *Statesman*:

> *Stranger*: In a sense, however, it is clear that law-making belongs to the science of kingship; but the best thing is not that the laws be in power, but that the man who is wise and of kingly nature be ruler. Do you see why?
> *Younger Socrates*: Why is it?

> *Stranger*: Because law could never, by determining exactly what is noblest and most just for one and all, enjoin upon them that which is best; for the differences of men and of actions and the fact that nothing, I may say, in human life is ever at rest, forbid any science whatsoever to promulgate any simple rule for everything and for all time. We agree to that, I suppose?
> *Younger Socrates*: Yes, of course.
> *Stranger*: But we see that law aims at pretty nearly this very thing, like a stubborn and ignorant man who allows no one to do anything contrary to his command, or even to ask a question, not even if something new occurs to someone, which is better than the rule he has himself ordained.
> *Younger Socrates*: True; the law treats each and all of us exactly as you describe.
> *Stranger*: So that which is persistently simple is inapplicable to things which are never simple?
> *Younger Socrates*: I suppose so (Plato, *Polit.* 294a6–c9, transl. H. N. Fowler).

According to the quoted text, laws are deeply insufficient because they are unable to grasp the "differences of men and of actions" and because of the "fact that nothing in human life is ever at rest". We learn from the passage that there exists no *technê* which can deal fully with the transitory character of sensible reality and formulate simple rules for it. With regard to the fluctuant physical world showing permanent change, a written regulation such as law turns out to be "like a stubborn and ignorant man who allows no one to do anything contrary to his command or even to ask a question". Moreover, an established law makes it impossible to adopt a new and better rule, if the situation changes and a new challenge comes up. If someone acts based on his own, more profound insight, the only way in which a legal order can react is through punishment. As the quotation confirms, Plato still defends in the *Statesman* – as he did in the *Republic* – the idea that it is the knowledge of essential and invariant facts about physical reality that constitute the expertise of a good politician.

If my analysis is correct, however, the difficulty pointed out in the quotation is that one cannot simply *apply* rules since sensible reality is a somewhat unstable copy or image of a well-ordered intelligible reality. Legal rules are too simplistic to cover all cases that occur in political reality. There is, however, nothing intrinsically bad about rules; Plato does not reject generalism. It is only that their generality is inappropriate and that it cannot easily be transferred to the sensible flux of phenomena. The doctrine of two spheres of reality, the invariant intelligible realm and the unstable sensible world, is exactly what we know from Plato's ontology and epistemology, famously

expressed by the dichotomy of *epistêmê* and *doxa*. This antithesis appears throughout the Platonic writings.[7] Its fundamental point is that we cannot have knowledge in the full sense of something that is in permanent change. The best thing we can have is knowledge of the Forms (which is, of course, a knowledge of universals) and then apply it to unstable physical reality.

But if it is right that the dichotomy of *epistêmê* and *doxa* provides the background to his personalism, then we are not facing a particularism at all. On the contrary, the insightful ruler is in fact able to adequately judge each given situation using the appropriate general rule. The non-competent multitude cannot do so: they establish some sort of positive law based on limited number of suboptimal general rules – and leave no room for changes and improvements. Not having access to the theory of Forms, they will not be able to formulate the right general rules.

Immediately after the quoted passage above, Plato continues the dialogue with a discussion of the necessity of lawgiving:

> *Stranger*: Why in the world, then, is it necessary to make laws, since law is not the most perfect right? We must ask the reason for this.
> *Younger Socrates*: Yes, of course.
> …
> *Stranger*: And so we must believe that the law-maker who is to watch over the herds and maintain justice and the obligation of contracts, will never be able by making laws for all collectively, to provide exactly that which is proper for each individual.
> *Younger Socrates*: Probably not, at any rate.
> *Stranger*: But he will, I fancy, legislate for the majority and in a general way only roughly for individuals, whether he issues written laws or his enactments follow the unwritten traditional customs.
> *Younger Socrates*: Quite right.
> *Stranger*: Yes, quite right. For how could anyone, Socrates, sit beside each person all his life and tell him exactly what is proper for him to do? Certainly anyone who really possessed the kingly science, if he were able to do this, would hardly, I imagine, ever put obstacles in his own way by writing what we call laws.
> *Younger Socrates*: No, at least not according to what has just been said.
> *Stranger*: Or rather, my friend, not according to what is going to be said.
> *Younger Socrates*: What is that?

7 Plato, *Meno*, 96e–97b; *Phd*. 79c–d; *Resp*. V,474b–480a; VI,507a–511e; *Tht*. 200e–201c; *Tim*. 27d–28a, 29b–c, 51b–52a; *Philb*. 59a–d.

> *Stranger*: Something of this sort: Let us suppose that a physician or a gymnastic trainer is going away and expects to be a long time absent from his patients or pupils; if he thinks they will not remember his instructions, he would want to write them down, would he not?
> *Younger Socrates*: Yes.
> *Stranger*: What if he should come back again after a briefer absence than he expected? Would he not venture to substitute other rules for those written instructions if others happened to be better for his patients, because the winds or something else had, by act of god, changed unexpectedly from their usual course? Would he persist in the opinion that no one must transgress the old laws, neither he himself by enacting new ones nor his patient by venturing to do anything contrary to the written rules, under the conviction that these laws were medicinal and healthful and anything else was unhealthful and unscientific? If anything of that sort occurred in the realm of science and true art, would not any such regulations on any subject assuredly arouse the greatest ridicule?
> *Younger Socrates*: Most assuredly.
> *Stranger*: But he who has made written or unwritten laws about the just and unjust, the honorable and disgraceful, the good and the bad for the herds of men that are tended in their several cities in accordance with the laws of the law-makers, is not to be permitted to give other laws contrary to those, if the scientific law-maker, or another like him, should come! Would not such a prohibition appear in truth as ridiculous as the other?
> *Younger Socrates:* It certainly would.
> *Stranger:* Do you know what people in general say about such a case?
> *Younger Socrates*: I don't recall it just now off-hand.
> *Stranger*: Yes, it is very plausible; for they say that if anyone has anything better than the old laws to offer, he must first persuade the state, and then he may make his laws, but not otherwise (Plato, *Polit.* 294c10–d3 and 294e8–296a9; transl. H. N. Fowler).

According to this text, law is necessary whenever a polis does not have a competent ruler. We can now explain the seemingly contradictory presence of both legalism and personalism in the *Statesman*: Note that this is an explicit confirmation of legalism, although we learn, at the same time, that law is not the best possible constitutional option. Plato's point is that any legal order consists of a very limited number of rules. They are valid at best "for the majority of cases" (*hôs epi to poly*). The set of laws established in a city may not contain the right – written or unwritten – rules that should be used in a given case. Or the rule is available, but not appropriately applied. Inversely, if a competent ruler is present, this person can successfully

find the right general rules and also apply them to concrete situations. He doesn't simply judge on the basis of context-relative reflections. Instead, as we already said, he knows how to formulate adequate laws as *hypomnêmata* for the time of his absence.

Furthermore, we see that Plato appreciates certain (if not all) legal designs of political communities, e.g., that of ancient Athens (given by Solon), of Sparta (given by Lycurgus), and of Crete (given by Minos and Rhadamanthys). It is certainly not the case that he subscribes to meta-ethical particularism. Plato admits that a lawful polis can in principle be a good one – even if the rule of an outstanding individual is said to be the better option.

3.

Is it justified to look at the *Laws* in order to answer problems that arise in the *Statesman*? I think this is a legitimate move (even a necessary one) given the fact the two dialogues are close to one another in their time of origin and in their content. The *Statesman* appears to be the bridge between the *Republic* and the *Laws* in that it introduces an idea of political science which is not based, at least not explicitly, on the theory of Forms and by inaugurating a real esteem for laws, offices, procedures, and administration. It is not an anti-institutional text, let alone an anti-legalist one. On the other hand, the *Laws* preserve the idea that, in the best possible case, we can hope for a personalized appearance of reason (*nous*), and then all of these non-ideal instruments would become superfluous.

Apparently the two texts are closely interlinked. Personalism is still seen, in the *Laws*, as the best option, and legalism only serves as its unavoidable surrogate. For, unfortunately, as Plato claims in a famous passage, the personal appearance of reason "exists nowhere at all":

> Yet if ever there should arise a man competent by nature and by a birthright of divine grace to assume such an office, he would have no need of rulers over him; for no law or ordinance is mightier than Knowledge, nor is it right for Reason to be subject or in thrall to anything, but to be lord of all things, if it is really true to its name and free in its inner nature. But at present such a nature exists nowhere at all, except in small degree; wherefore we must choose what is second best, namely, ordinance and law, which see and discern the general principle, but are unable to see every instance in detail (Plato, *Leg.* IX,875c3–d4; transl. R. G. Bury).

The polis based on laws is, according to this quotation, still to be seen as no more than the second-best option. The expression *to deuteron* in *Laws*

IX,875d4 clearly alludes to the formula *deuteros plous* in *Statesman* 300c1, and also the wording *hôs epi to poly* in *Laws* IX,875d5–6 refers back to the *Statesman* (294e1 and 295a5). These observations confirm that the *Statesman* and the *Laws* are consistent in their complicated positions combining personalism and legalism.

Moreover, we find the basic points of the myth of the *Statesman* (268d–274e) repeated in *Laws* IV,713a–714b. In both dialogues, Plato develops the opposition between two eras, that of Cronos and that of Zeus, in a remarkably similar way. The two alternating historical epochs are cosmologically, anthropologically, and politically different from one another. In the Cronos epoch, it was a god who governed human beings, whereas in the era of Zeus, the god is withdrawn from the world and humans must establish a political rule – a situation which has seen as heavily suboptimal. In both dialogues, Plato maintains that the best thing we can do in the age of Zeus is to emulate the era of Cronos to the highest possible extent. The crucial passage is the following:

> And even today this tale has a truth to tell, namely, that wherever a state has a mortal, and no god, for ruler, there the people have no rest from ills and toils; and it deems that we ought by every means to imitate the life of the age of Cronos, as tradition paints it, and order both our homes and our states in obedience to the immortal element within us, giving to reason's ordering the name of "law" (Plato, *Leg.* IV,713e3–714a2; transl. R. G. Bury).

We must emulate (*mimeisthai*) the era of Cronos since, in our present time, the fact that men are ruling over men leads into a chain of political disasters. The most appropriate way to do so is by the obedience to the immortal element within us, giving to reason's ordering the name of 'law'." The quotation clearly corroborates that Plato is a legalist.

All of these observations justify, in my opinion, reading the more detailed account of legal thought developed in the *Laws* as the standpoint that must already be present in the background of the *Statesman*. As the last quotation additionally shows, Plato defends a kind of political rationalism in that he stipulates the rule of reason. On this basis, he postulates a certain principle of what has a law has to be: namely an "ordering of reason" (*tên tou nou dianomên*, 714a1–2). On this basis, we can distinguish between better and worse laws.

On closer inspection, Plato describes this distinction in much more detail: the criterion of legitimacy is that laws must be directed towards justice (IV,705e), that they must support virtuous actions and attitudes among the

citizens (IV,705e–706a),[8] and that they must be oriented towards the common good (IV,715b). All of this is far from any legal positivism. For Plato, good laws are following reasonable norms. This includes a certain cautious form of fallibilism. Newly established laws must be a possible object of scrutiny and revision; only after a certain period of probation do they become permanently valid (*Laws* VIII,840e f.). What we see in the *Laws* is that Plato proposes a substitute for the legislation of a competent ruler by a complex institutional design, especially by the "Nocturnal Council". Plato accepts here a version of a trial-and-error method. According to the *Laws*, legislators do not have absolute authority; instead, the polis has the right to select among the legislative proposals advanced by them (III,702c–d; V,739a–b). Some laws are simply bad: a historical example is, for Plato, the legal regulation of testaments which was not in favour of the common good (XI,923a). The lawgiver has always to keep in mind the goal of unity and harmony of the polis; the city "ought to be free and wise and in friendship with itself, and the lawgiver should legislate with a view to this" (III,693b3–6). As Plato claims, the "fundamental purpose of our laws was that the citizens should be as happy as possible, and in the highest degree united in mutual friendship" (V,743c5–6).

A remarkable detail of Plato's theory of legislation in the *Laws* is his idea of a "temperate tyrant" in book IV (709d–712a). There, not only are substantive virtues ascribed to the tyrant – he is moderate, insightful, docile, brave, and magnanimous – but also the ability directly to bring about a lawful condition. Thus, this sort of tyrant is described as a "divine piece of luck" (IV,710c–d). Given that the tyrant is normally, especially in the *Republic*, seen as an extremely bad, arbitrarily acting political ruler, this implies that Plato ascribes to the law a deeply transformative power. As Cinzia Arruzza remarks, for Plato "under specific circumstances, tyrannies could be significantly reformed and used as a starting point for the implementation of beneficial policies or the realization of radical political programs."[9] The law has the capacity to tame even the worst of people.

4.

In sections II and III we collected evidence for Plato's serious appreciation of laws and lawgiving. Now, if we can take it for granted that he genuinely valued a legal order based on insight and competence, why then does he judge Athenian democracy and its procedures of legislation so negatively, as

8 Already in *Gorg*. 504d–e, law is praised for its function of bringing about justice and temperance in the soul of the citizens.

9 C. Arruzza, *A Wolf in the City. Tyranny and the Tyrant in Plato's Republic*, Oxford 2019, p. 58.

we find in *Statesman* 297e–299e? I think that two explanations can be given which are not mutually exclusive, but can be combined. The first is that Plato wants to criticize Athenian democracy in particular, in spite of its lawfulness – but not every legislative procedure in general. The Athenian procedure of legislation combines, in his eyes, absolute incompetence with stupid rigidity. The second is that Plato wishes to emphasize the deep difference between an ideal law-transcendent rule and any legal order; this difference still exists even if a concrete legislation is a relatively good one.

Concerning the first point, we know that Plato developed his political thought vis-à-vis the Athenian democracy of his time (and also with regard to Athenian tyranny). He makes Athens responsible for the juridical murder of Socrates who firmly obeyed the laws of the city although they were deeply unjust. Socrates, as Plato believes, was "the best, most reasonable, and most just among the men who lived at that time" (*Phd*. 118a). Likewise, in the *Seventh Letter*, Socrates is characterized as the most just individual among his contemporaries (324b–326b). In this context, Plato tells us that he himself immediately turned away from politics under the impression of what happened to Socrates.

For Plato, the principal shortcoming of Athenian democracy is its inadequate tendency towards equality. Democracy, as he sees it, is not oriented towards the common good of the polis. Instead, it violates both the principle of intellectual competence and the principle of moral virtue which lead him towards the idea of expertocracy. Democrats falsely advance an understanding of freedom in the arbitrary sense of living as one pleases. Thereby, they destroy the political community and create a divided society. Thus, democracy is vulnerable to instability since it does not integrate all groups of a society.

As to the second point, one has to take into consideration how profoundly Plato is dissatisfied with the human condition concerning politics. The myth of the *Statesman* is serious in its emphasis on the deep non-ideality of our historical period. The fact is that laws are necessary since otherwise people would radically misbehave. In a passage of the *Laws*, Plato gives us a self-referential evaluation of what he is actually doing by formulating penal laws:

> *Athenian*: It is, in a sense, a shameful thing to make all those laws that we are proposing to make in a state like ours, which is, as we say, to be well managed and furnished with all that is right for the practice of virtue. In such a state, the mere supposition that any citizen will grow up to share in the worst forms of depravity practiced in other states, so that one must forestall and denounce by law the appearance of any such character, and, in order to warn them off or punish them, enact laws against them, as

> though they were certain to appear – this, as I have said, is in a sense shameful. But we are not now legislating, like the ancient lawgivers, for heroes and sons of gods – when, as the story goes, both the lawgivers themselves and their subjects were men of divine descent: we, on the contrary, are but mortal men legislating for the seed of men, and therefore it is permitted to us to dread lest any of our citizens should prove horny-hearted and attain to such hardness of temper as to be beyond melting; and just as those "horn-struck" beans cannot be softened by boiling on the fire, so these men should be uninfluenced by laws, however powerful (Plato, *Leg.* IX,853b4–d4; transl. R. G. Bury).

As we learn from this quotation Plato considered it a depressing fact that he had to formulate penal laws for Magnesia which are determined to put human beings under pressure by warning and threatening them. In this context, he reflects on the historical circumstances of our contemporary age of Zeus: whereas former legislators had to establish rules for "heroes and sons of gods", we nowadays have to do the same job for people who can be profoundly bad and indocile wrongdoers. It seems clear from this passage why Plato saw such an enormous difference between a legal order and insight-based rule: to formulate laws is not only a permanently insufficient business, but also a shameful thing to do – but nevertheless it is a necessary task for a human society.

Plato's Socrates and the Law Code of Athens

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Summary
The paper claims that Socrates' disawoval of wisdom in the *Apology* is not to be taken too seriously since it belongs to the rhetorical strategy of the sovereign philosopher who speaks in front of the crowd. In the political arena, the philosopher admits his obligation to become a philosopher-king, but only under a condition: only if his fellow-citizens would freely recognize his legitimacy to rule. As a potential ruler, he has to take into consideration the existing law code which is to be respected if his intended political reform should take place and succeed. The paper stresses that despite Plato's condemnation of the democratic way of life current in Athens, he never criticizes Athenian law code as such; Solonian legal reform forms a starting point for his own political project. As a brief glance at the proposed law code of Magnesia in Plato's *Laws* makes clear, the Platonic philosopher is full of respect to the Athenian legislative tradition.

Introduction

For the modern age, the Socrates of Plato's *Apology* is the personification of a central political idea – the idea of the autonomy of the individual who questions the legitimacy of the government or even supports revolutionary ideas.[1] Although this picture of Socrates has faded somewhat in more recent times, probably also in connection with growing skepticism about the possibility that the *Apology* could be a source of knowledge about the historical Socrates,[2] the interpretation itself has notable successors. Its vari-

1 Voltaire, *Socrate* in: *Oeuvres complètes de Voltaire*, ed. A. Wedding, Paris 1835, pp. 710, 714: „Dans ma maison, dans Athènes, dans les cachots, je suis également libre." (II. act, 10. scene) „... j'ai obéi à la loi, tout injuste qu'elle est, parce qu'elle n'opprime que moi. Si cette injustice eût été commise envers un autre, j'aurais combattu." (III. act, 4. scene). G. W. F. Hegel, *Vorlesungen über die Philosophie der Geschichte*, ed. G. Irrlitz, Leipzig 1971, II,2,3 (p. 329): „Sokrates ... hat das Subjekt als entscheidend gegen Vaterland und Sitte gesetzt ... Das Prinzip des Sokrates erweist sich als revolutionär gegen den athenischen Staat."

2 On the question of the historicity of the *Apology* in general, see T. Meyer, *Platons Apologie*, Stuttgart 1962, p. 5 (see also p. 175); E. de Strycker – S. R. Slings, *Plato's Apology of Socrates*, Lei-

ant is the understanding of the Socrates of the *Apology* as someone who articulates the conditions of civil disobedience[3] or represents a fundamental conflict between politics and the philosophical mission.[4] But to this line of interpretation we can also assign those contemporary positions, considered standard today, which see in Socrates "a portrait of unwavering devotion to the value of the philosophical life".[5] The use of the phrase "philosophical life", which does not appear in the *Apology* or any other passage in Plato,[6] suggest that in the background is the "Aristotelian" notion of choice between various *bioi*, ways of life, especially the tension between the political and the philosophical life, with the obvious preference for the latter.[7] Even this last interpretation is thus in fact a late (and, of course, considerably moderated) variation on the idea of "Socrates as an autonomous individual", whose "politics" consists primarily in opposition to, or at least in detachment from, the existing political regime.

In this article, I would like to correct this interpretive tradition and to show that the *Apology* actually presents an image of the true philosopher as a political agent who does not reject the existing regime and its laws, but on the contrary confirms their legitimacy to a large extent, insofar their validity is a prerequisite for developing his potential political action. The basic political contradiction that Plato presents in the *Apology* is not the opposition between politics and philosophy (these, on the contrary, form a unity) but that between the rule of many and the rule of law; the law here also means (though not exclusively) the positive Athenian law. Socrates acts on the side

den – New York – Köln 1994, pp. 1–8; D. Morrison, *On the Alleged Historical Reliability of Plato's Apology*, in: R. Kamtekar (ed.), *Plato's Euthyphro, Apology, and Crito. Critical Essays*, Lanham (Md) 2005, pp. 97–126.

3 E. Barker, *Greek Political Theory*, London 1957, p. 112; G. Young, *Socrates and Obedience*, in: *Phronesis*, 19, 1974, p. 1; R. J. McLaughlin, *Socrates on Political Disobedience*, in: *Phronesis*, 21, 1976, p. 185; R. Kraut, *Plato's Apology and Crito: Two Recent Studies*, in: *Ethics*, 91, 1981, p. 651.

4 H. Arendt, *Philosophy and Politics*, in: *Social Research*, 71, 2003, pp. 427–454.

5 T. C. Brickhouse – N. D. Smith, *Plato and The Trial of Socrates*, New York – London 2004, p. 70; almost identical wording: P. A. Miller, *Plato's Apology of Socrates. A Commentary*, Norman (Okl.) 2010, p. 7; similarly also: V. V. Haraldsen, *Introduction*, in: V. Haraldsen – O. Pettersson – O. E. W. Tvedt (vyd.), *Readings of Plato's Apology of Socrates: Defending the Philosophical Life*, Lanham – Boulder – New York – London 2018, p. 3.

6 The passages of the *Apology* that speak of βίος in a sense other than purely biological, that is, of a certain content of life (33a1, 37d4, 38a5, 39c7, 40d7, 41a5), do not relate to philosophy, but always, on the contrary, to the practical-ethical formation of life. This is also true of passage 38a5, which is often evoked in connection with "the philosophical life", but in fact speaks of *elenchus* which, in addition to *logoi* about virtue that represent the theoretical aspect of life, corresponds to the practical side of Socrates' activity.

7 The opposition to „political life" is stated explicitly: T. C. Brickhouse – N. D. Smith, *Plato and The Trial of Socrates*, p. 129; cf. pp. 140–144; P. A. Miller, *Plato's Apology of Socrates. A Commentary*, pp. 174 f. Cf. V. V. Haraldsen, *Introduction*, pp. 2–3; and K. Ågotnes, *Plato's Socrates in the Apology. Speaking in Two Voices*, p. 71 in the same volume.

of the law and in opposition to the multitude (which, as we shall see, does not constitute a complete contrast to the rule of the people); this opposition also corresponds to his situation in court.

In this paper, I will thus concentrate on Plato's Socrates as a *type* of the sovereign thinker, who hides behind the events of Socrates' life presented during his judicial defense. The starting point of the first part will be the assumption that the main issue of the *Apology* is not "Who has committed something?" but rather "Who is the accused person?" and the main attention will be given not to the prospects of the defense,[8] but to the figure of the sage and his relationship to the city and its citizens, represented by the prosecutors and jurors.[9] I will exclude not only the question of Socrates' historicity,[10] but also the whole suggestive dramaturgy of the judicial defense and focus only on the basic constellation of persons or parties to the litigation. This will result in the understanding of the basic constellation of relevant political players in the city: the philosophical expert, his supporters, his opponents, the people and God.

In the second part I will focus on Socrates' (intentionally obscured)[11] wisdom and show that the true intention behind the narrative scenes is to

8 One may ask whether we have to do with a defence at all. The notorious ineffectiveness of Socrates' judicial rhetoric led to the interpretation that Socrates' speech is intentionally designed to fail. It was Xenophon who, in his *Apology*, came up with the thesis that the hidden goal of Socrates' speech was to be condemned (Xenophon, *Apol.* 1,5 ff.); an influential treatment of this motif was presented by Nietzsche, according to which Socrates committed judicial suicide (F. Nietzsche, *Menschliches, Allzumenschliches*, Chemnitz 1879, II,1,94). A somewhat different direction is taken by another traditional interpretation, the origin of which lies with the rector Maximus of Tyre (2nd century A. D.) and his question whether Socrates acted correctly when he did not defend himself (Maximus of Tyre, *Diss.* XXXIX, ed. J Davisius, Cambridge 1703, pp. 405–414.). Socrates' behavior in court not only isn't determined by the desire to be acquitted, but ultimately relativizes the entire trial and brings other, more fundamental issues to the fore. From this perspective, the fact that the plot takes place in court should be considered secondary, as a mere framework comparable with the external context of other Socrates' debates held e.g. in the gymnasium, in a private house, on the street or on a path outside the city walls.

9 In this sense, Plato's *Apology* depends, more than on the historical event of Socrates' trial, upon works of the traditional Greek genre depicting the fate of a righteous poet before the court of an unjust city, the aim of which was primarily to present a celebratory image of an author representing God. See T. Compton, *The Trial of the Satirist: Poetic Vitae (Aesop, Archilochus, Homer) as Background for Plato's Apology*, in: *The American Journal of Philology*, 111, 1990, pp. 330–347.

10 Including those interpretations according to which Plato imprints at least some historical features on that work, whether in an effort to positively shape Socrates' image (Ch. H. Kahn, *Plato and the Socratic Dialogue*, Cambridge 1996, pp. 52—53), or to gain a leading role in the interpretation of Socrates' heritage (D. Leibowitz, *The Ironic Apology of Socrates. Plato's Apology*, Cambridge 2010, p. 7; G. Danzig, *Apologizing for Socrates: Plato and Xenophon on Socrates' Behavior in Court*, in: *Transactions of the American Philological Association*, 133, 2003, pp. 281–321).

11 To this, see S. J. Senn, *Ignorance or Irony in Plato's Socrates?: A Look Beyond Avowals and Disavowals of Knowledge*, in: *International Plato Journal*, 3, 2013, pp. 77–108; see already R. Musil,

present, by a series of substantial hints, the standard type of a sovereign thinker, which remains basically stable in Plato's dialogues.[12] If we speak of the *philosophical type*, however, it should be added that it is not an *ideal type* that only approximates reality, in Max Weber's sense, but rather a *paradeigma* by which reality is directly represented and which might remind us of the figure of the philosopher-king known from the *Republic*.

The *Apology* examines the relationship of a potential philosophical king to the rule of law and the rule of many against the background of the validity of a specific code, namely the Athenian. In the third part I will show that Socrates does not reject, but rather presupposes the laws of Athens. With the parellel glimpse at the project of Magnesia in Plato's *Laws*, one can understand that the thinker, who aspires to the leading role in politics, naturally accepts the major part of the law-code of his own city, and that his legislation project consists rather in reviewing some of its particular problematic parts.

Parties to the litigation

The focus of Socrates' speech on depicting the philosopher's relationship with the city is evident from its introductory sentences, which describe a complex constellation of divisions among a variety of agents. Already in the first sentence of the defense, Socrates sets himself against the jurors (ἐγὼ – ὑμεῖς, ὦ ἄνδρες Ἀθηναῖοι), in such a way that "I" and "you" get into opposition by the action of a third type of agent, namely the plaintiffs ("they"; αὐτῶν, 17a1). These are not, at least initially, perceived as a separate party to the dispute, but rather as an external circumstance that doesn't deserve serious concern (17b, 35d); the direct confrontation of Socrates with the plaintiff party occurs only during the interrogation of Meletus (24c ff.), who, however, cannot even formulate a consistent position. The actual drama thus unfolds between "I" and "you", but always with exposure of both parties to God,[13] who is involved by Socrates as, as it were, the fourth actor in the trial. In court, then, it is about who this Socrates is and who the jurors, as the representatives of the Athenians, consider him to be. Based on their assessment, reflected in a court decision at the end of the trial, their initially united "you"

Aus einem Rapial und anderen Aphorismen: Tagebücher, Aphorismen, Essays und Reden, Hamburg 1958, p. 553: „Sokratisch ist: sich unwissend stellen. Modern: unwissend sein."

12 This will also help neutralize the widespread view of the *Apology*'s allegedly exceptional position vis-à-vis Platonic dialogues. See e.g. Ch. H. Kahn, *Plato and the Socratic Dialogue*, p. 97.

13 We are either witnessing a direct conflict, where the "I" seeks from God a shield against "you" (29d, 31c, 31e; cf. 32b–c), or the confrontation of both "I" and "you" with God's command (35c), or the complicated constellation of current agreement and difference, where the fate of "I" is decided jointly by God and "you", but the resulting decision has an impact on both "I" and "you" (35d).

splits – again in confrontation with Socrates' "I" and under divine sanction (38c) – into two opposing groups: those who wanted to acquit Socrates and to whom the title of "real jurors" belongs, and the remaining ones who do not even deserve the title of "juror".[14]

However, not only are the jurors divided, but also the other agents in the dialogue. This is explicitly the case for the plaintiffs (18b ff.), among whom Socrates distinguishes the "earlier" ones, who influenced the general public opinion in Athens and who also initiated Meletus' lawsuit (see 19b1), from the "current" ones, led by Meletus himself (24b ff.). The former are more dangerous than the latter (who, as mentioned, seem rather ridiculous), due to the length of their activity, their number and, in particular, their anonymity. That is why they must be represented in court, paradoxically by Socrates himself, who is to deliver, or literally – and certainly not without a comic touch – to read[15] their accusation as if they were real plaintiffs on the court: "Socrates is guilty and commits crimes investigating the things beneath the earth and in the heavens and making the weaker argument stronger, and teaching others these same things" (19b4–c1).[16] It is difficult for Socrates to defend himself against this assignment to "wise men," (18b) not because of the force of the indictment or because he would not be able to,[17] but rather because the plaintiffs are not present. They cannot be brought here (i.e. to court) and must be refuted *in absentia*, "as shadows", in a situation where no one answers (μηδενὸς ἀποκρινομένου, 18d7). In the background, there is certainly the critique of writing known from the *Phaedrus* (274b–278b): a written indictment without the "help" of a living plaintiff is not sufficient even to articulate the accusation, nor does it allow a valid defense.

The most interesting division, however, usually escapes the attention of interpreters; it is the subdivision of the figure of Socrates himself. The split of the title character is prepared by the remark in the very introduction that Socrates' "I" (ἐγώ) has almost forgotten "myself" (ἐμαυτοῦ, 17a2–3). A little later, Socrates asks the jurors for benevolence toward his unprepared and linguistically imperfect speech:[18] Because he is facing the court for the first time in his life and is unfamiliar with the manner of speech here, they should

14 At the very end of the *Apology*, this double "you" is reunited as opposed to the "I" that goes to death, while the "you" goes to life, and it is again God who guarantees this difference (42a).

15 It is a *graphê*, a pre-written indictment. It should be noted that the verb ἀναγιγνώσκω in the sense of reading is used in classical drama exclusively in comedy, never in tragedy. See H. G. Liddell – R. Scott et al., *A Greek-English Lexicon*, Oxford 1996, *s. v.* V., II.

16 Σωκράτης ἀδικεῖ καὶ περιεργάζεται ζητῶν τά τε ὑπὸ γῆς καὶ οὐράνια καὶ τὸν ἥττω λόγον κρείττωποιῶν καὶ ἄλλους ταὐτὰ ταῦτα διδάσκων.

17 Cf. "It's not hidden from me at all what its [i.e. the defense] nature is" (19a5).

18 εἰκῇ λεγόμενα τοῖς ἐπιτυχοῦσιν ὀνόμασιν (17c3). For an interpretation of this phrase, which includes both the weakness of the argument (εἰκῇ) and the imperfection of the lan-

treat him as if he were a foreigner in Athens, and instead of the manner of his speech pay attention merely to what he says (17d f.). In addition to the current spokesman – Socrates, who is a foreigner here (i.e. in court) but is at home in Athens[19] – another Socrates thus comes into play, who is a foreigner in Athens and is brought up in language and manner elsewhere, literally "there" (ἐκείνη, 17d5). The reference to the place from which this other Socrates comes, which would be superfluous if the only point of reference for his speech (λέξις) were the current "here" (ἐνθάδε),[20] suggests a possible transgression of the present situation.

Socrates' plea for benevolence presupposes that being a foreigner in Athens is a disadvantage for the accused; nevertheless, the "manner of speech there" seems, on the contrary, to bring advantages in rebutting the accusation. If we consider two different modes of speech, "here" and "there", and two Socrates' defenses in the *Apology*, first the one against the fictitious (19a–20c) and then the other against the current plaintiffs (24b–28a), we see that the text indicates a chiastic relationship between two groups of plaintiffs and two Socrateses: the Athenian Socrates – the foreigner in court – fights against fictitious prosecutors, while Socrates – the foreigner in Athens – opposes real prosecutors led by Meletus. In the first case, Socrates is indeed somewhat clumsy, as is consistent with his earlier request for benevolence. His only argument will be the testimony of those present about himself, to which everyone can testify, that he did not deal with the doctrines with which he is associated by a fictitious indictment (19d). Socrates' colloquial language also corresponds to this clumsiness, as well as the frequent emphasis that Socrates, unlike his opponents, is telling the truth[21] – all of which is supposed to correspond to the usual conduct of the defendant in the Athenian court.

In refuting the second, current accusation, Socrates acts incomparably more confidently and expertly. Colloquial language, *ad hominem* arguments and unfounded declarations of truth have disappeared, and the defendant sovereignly cuts his accuser Meletus down to size with a series of philosophical arguments, or – literally, with a piece of sufficient evidence (see ἱκανὸν τεκμήριον, 24d8–9; ἱκανά, 28a4). Despite being "from elsewhere", this way of speaking brings about a significant, albeit temporary, success in the defense, in which we recognize the signature of the sovereign philosopher leading the debate.

guage used (λεγόμενα τοῖς ἐπιτυχοῦσιν ὀνόμασιν), see already T. D. Seymour, *Notes on Plato's Apology, 17b, 20b*, in: *The Classical Review*, 15, 1901, pp. 27–28.

19 The same statement, together with the mention of Socrates' age of 70, is made by the Athenian Laws in the *Crito* (52e).

20 Then it would be enough to say "in a *foreign* language and manner".

21 Plato, *Apol.* 17a4, b5, 7, 8, 18a6, b2, 6, 19e1.

But what is the exact relation of this sovereign thinker to Socrates the Athenian? Let us look again at the three alleged accusations that the Athenian is defending himself against. It seems that the second and third, namely the Sophistic "making the weaker reasons stronger and teaching others these same things" (19b–c), might be seen as sufficiently refuted by Socrates' characteristic self-opposition to other sophists who teach these things for money, while Socrates remains poor (23c1; cf. 36d5). A much more ambiguous situation occurs in the case of the first accusation, "investigating the things beneath the earth and in the heavens" (ζητῶν τά τε ὑπὸ γῆς καὶ οὐράνια, 19b5), i.e. in the case of the question of eschatology[22] and natural science. Not only is this accusation not refuted in any way by the narrative about the Oracle in Delphi; but Socrates in other dialogues really deals with these fields of research, also in the dramaturgically closely related *Phaedo*. Does this other figure correspond to Socrates the foreigner? Some interpreters have inferred that the *Apology* and the *Phaedo* consciously represent two different images of Socrates, one historical and the other Platonic.[23] Such an interpretation, which attributes to Plato the motives of the modern historian of philosophy, is hermeneutically difficult to defend. It is therefore better to stick to the text, namely to what Socrates the Athenian says at court. He calls those present, i.e. the jurors, as witnesses against the absent plaintiffs, and encourages them to share their abundant experiences with his conversations and confront these experiences with the accusation, confident that none of the jurors has ever heard him talk about "such things" (19d5) of which the indictment talks. Now this can be said by someone who has never really said anything about these things, as well as someone who has never said anything *publicly* about them, and at the same time made sure that those who have heard him *privately* will keep silent about it – in other words, someone who can distinguish between the *exoteric* and *esoteric* aspects of the doctrine and is also able to apply this distincion in practice.

It is precisely this double context that corresponds to the difference between the two Socrateses, who then clearly do not stand in any contradiction, or even in tension, but represent only different ways in which the same figure is perceived by different viewers. To one who knows both contexts, the two Socrateses merge in such a way that the Foreigner includes his Athenian namesake as his mask, i.e. rhetorical instrument. However, for those who know only the external context, the Foreigner must remain hidden be-

22 I take it – on the background of the *Phaedrus* (249a6–7: εἰς τὰ ὑπὸ γῆς δικαιωτήρια ἐλθοῦσαι δίκην ἐκτίνουσιν) – that the phrase τά ὑπὸ γῆς – refers to Hades and thus to the destiny of souls after death. Cf. Hesiod, *Op*. 153–155.

23 A. Patzer, *Platons Apologie als philosophisches Meisterwerk*, in: *id*., *Studia Socratica. Zwölf Abhandlungen über den historischen Sokrates*, Tübingen 2012, p. 120.

hind the familiar Socrates the Athenian, whose "weapons" of exploration and conversation are mitigated and diminished by awovals of ignorance and Athenian courtesy.

It is from this difference between the real Socrates and Socrates "for the people" that Socrates' crucial distinction between "himself" and his "name" (20d, 23a–b and 34e), i.e. his reputation among the Athenians, is based; at least once Plato situates both against each other (23a).[24] We will deal with this passage in the next section.

On the basis of these clarifications, the structure of the whole defence can be summed up as shown in the table on the next page.

If we look at this complex configuration of actors and characters, it strongly reminds us of ancient Greek drama, to which Plato's writing is close in genre, and its strong tendency to various forms of mirroring and duplication of identities. The *Apology* in this sense fully corresponds to Plato's general conception of a literary work which is created only in play (*Phaedr.* 276d). It would therefore be foolish to look in this composed work for a reflection of real events in court or a picture of the historical Socrates (we have to do with at least two Socrateses!). Nevertheless, it would be also a mistake to assume that the consequence of this understanding of a literary work would be the ambiguity of the message. Ambiguity is something undesirable for Plato in his written work, as the critique of Meletus shows in our text (*Apol.* 27a).[25]

So what does the constellation which we have brought to light tell us? First of all, it shows us the central position and at the same time the complexity of the character of Socrates. His two identities are not in conflict or tension with each other; Plato passes freely between them and it is clear that their difference is merely a matter of literary stylization. Socrates' approach to the plaintiffs can be described as completely sovereign. The actual plaintiffs represented by Meletus are only an opportunity for him to demonstrate his absolute superiority; the fictitious plaintiffs are entirely his construction, and the claim of their alleged dangerousness only reveals the picture of Socrates as an exceptional figure in the narrative of the Oracle and finally also the systematically central distinction between the exoteric and esoteric

24 If we accept at 238a the conjecture of τοῦτ' οὐ λέγειν τὸν Σωκράτη (see below, end of note 32) – the opposition would then be: προσκεχρῆσθαι δὲ τῷ ἐμῷ ὀνόματι.

25 A systematic support for the rejection of ambiguous speech can be found in the philosopher's debate with the poet in the *Laws* (IV,719c–e; VII,817b–c), in which the former rejects the latter's right to speak ambiguously and to remain in contradiction to himself. For a general rejection of the opinion that Plato leaves some key questions intentionally ambiguous, see T. A. Szlezák, *Reading Plato*, London – New York 1999, ch. 9–10. Plato's playfulness in his texts, which sometimes allows to develop seemingly contradictory ideas, is therefore always moderate and must be distinguished from the works of modern literature such as Shakespeare's *Hamlet*, in which the ambiguity of the hero's situation can be seen as its own message.

Plaintiffs	*Main point of indictment*	*Injured*	*Defender*	*Witness*	*Author of the objection*	*Objection*	*Second witness*	*Convinced by the indictment*
Fictional	Socrates is a wise man (18b)	The city	Socrates–Athenian	Jurors (19d)	Someone of the Jurors (20c4)	"So what are you actually doing?"	God (20e ff.)	True Jurors*
Real	Socrates spoils the youth and does not believe in city's gods (26c)	The city and the gods the city believes in	Socrates–Foreigner	Meletus (24d, 27c…)	Someone (28b3)	"Are you not ashamed of being put to death as a result?"	Semigods (28b)	False Jurors

* It seems that Socrates was not condemned in the matter of the corruption of the youth, and thus the damage to the city, precisely by those who were convinced of his "guilt" in the other matter, i.e. that he was a wise man. For seeing the apparent corruption of young people as a manifestation of a certain higher "education" presupposes that behind it one sees wisdom and philosophical knowledge. Those who could not be persuaded by the fictitious indictment composed by Socrates himself see in him a sage whose attitudes and activities are most beneficial to the city.

form of teaching. Socrates even calls the plaintiffs as witnesses to his defense, which can undoubtedly be considered a summit of Platonic stylisation of Socrates' process.

However, unlike the plaintiffs, Socrates' sovereignty does not apply to the jurors. Despite his rhetoric and argumentative superiority, the outcome of the trial is not in Socrates' hands – and while he easily controlled the plaintiffs, he failed to convince the majority of his jurors. The division, which is crucial not only for the outcome of the trial, but especially for the image of the philosopher's relationship with the city, is not the initial division between the two types of plaintiffs (nor the temporary divisions of the person of Socrates, because they ultimately fall into one), but the final division between two groups of jurors, i.e. those who voted for his release and those who condemned him.

The philosopher who, by his supremacy, can obtain the consent of his opponents and unite with God, is finally handed over to the court of "you" of the city. The possible benefit he can give to the city thus ultimately depends on their consent, especially on whether they would be willing to see him as an agent beneficial to them. This is the basic political constellation of Platonic politics on the side of its presuppositions.

Socrates' wisdom

Let us now return to the question of the "place" or source from which the foreigner Socrates draws his wisdom. In the text we find twice explicitly discussed "there" (ἐκεῖ), each time in connection with a different transformation of Socrates. One is "some Socrates" of Aristophanes' comedy (probably the *Clouds*), who "*there* talked a lot of other gossip about things that I don't quite understand".[26] From this "Socrates there", i.e. in Aristophanes, the "I" of Socrates-Athenian (ἐγώ, 19c4), who, as we know, is only the mask of real Socrates, is now expressly distancing himself. Whether this means that Plato attributes the knowledge of the true Socrates, that is, the Socrates dealing with eschatology and natural philosophy, also to Aristophanes and his – albeit deliberately comical – presentation of Socrates cannot be examined here. However, if the answer were yes, it would certainly help to remove the controversy over why Aristophanes, who seems to have been Plato's personal friend, is becoming the subject of Plato's apparent criticism in the *Apology*; in fact, Aristophanes would be one of those who, unlike others, is able to reveal

26 Σωκράτη τινὰ ἐκεῖ … ἄλλην πολλὴν φλυαρίαν φλυαροῦντα, ὧν ἐγὼ οὐδὲν οὔτε μέγα οὔτε μικρὸν πέρι ἐπαΐω (19c3–5).

the stylization of Socrates-Athenian and proceed beyond the mask to the figure of a true philosopher.

Another "there" discussed in the text is Hades, that is presented at the end of Socrates' last speech as a possible place of Socrates' stay after his death. Hades is by Socrates characterized by a series of four *there* (ἐκεῖ): (a) the dead live *there* (40e6); (b) Minos, Rhadamanthus, Aeacus, Triptolemus and all the other demigods serve as jurors *there* (41a3; cf. b4); (c) Socrates may continue exploring and examining of the local population *there* (41b5); these are – as many examples suggest – also demigods. (d) Socrates can talk to them *there*, spend time with them and examine them (41c2). Thus, both in the case of the jurors and in the case of his new "fellow citizens", Socrates can expect a much better audience than the one before which he speaks now; in this sense, "there" of Hades, linguistically so strongly emphasized, represents the opposite of the situation "here" in court with a clear difference in evaluation. But the fact that the foreigner Socrates was able to assert himself against Meletus "here" with the tools he intends to use in Hades as well, i.e. with the tools of conversation and examination, these tools being "here" non-original and foreign, suggests that these tools which, of course, are nothing but instruments of true philosophy, could have originated "there".

It has already been suggested that the link between all the different characters and their contexts is the figure of Socrates, who, after the initial split into two and stylization into an unconscious person, increasingly reveals a unity based on his true nature as a wise man.

This revelation first occurs in shifts between different statements in two different Socrates' speeches interrupted by the interrogation of Meletus. Socrates later masters a number of things that he initially denies. While he allegedly has no idea at the outset whether the jurors are convinced by the prosecution (17a), after the rebuttal of Meletus he states the reason why he will be convicted (28a), and after the verdict he is surprised by the low number of convicting votes (36a). Although at first he is not able to neatly compose ὀνόματα and ῥήματα (17c1) or to form speech (πλάττων λόγους, 17c5), in the end he declares precisely this ability – and expresses it with the usual Platonic technical terms (λόγους ποιεῖσθαι, 38a3–4; srv. διαλεγομένος, ἐξετάζων, a4–5); he even explicitly denies that he did not defend himself for lack of words (38d). Finally, his repeated assurances that he does not teach anyone anything are ultimately overturned in the confession that he lectures (see ἀκροάσονται, 37d7) to the youth.

Everything suggests that his original claims about his own ignorance are highly stylized. As a supposedly weak orator, he wants to speak simply and as he is accustomed to speak, but the use of a number of colloquial expressions reveals a deliberate choice rather than a virtue made out of necessity – after

all, the literary Socrates does not use such a lexicon in other dialogues.[27] Behind the alleged unlearned simplicity is therefore a rhetorical intention. Socrates wants to refute what the plaintiffs said, when they drew attention to his rhetorical power (δεινὸς λέγειν), by the evidence of deed (ἔργον), i.e. by showing his true weakness in speech (17b2). Rather, by deed, he proves the exact opposite, that is, he is strong in speech. Since he claimed (a) that he always speaks only the truth to the jurors and (b) that the plaintiffs only lie, but neither, as we have just seen, applies. In fact, this is a comic inversion of the liar's paradox. The declaration of ignorance is in further tension with the fact that Socrates knows very precisely what to do if he is to come to an understanding of the Oracle's statement (and it is far from being generally shared knowledge). In examining his interlocutors, Socrates proceeds methodically: he examines politicians, poets, craftsmen in turn; he uses the methods of hypothesis (21b–c, 22a–b).[28] It seems that we have many reasons to believe that the original ignorance of the Athenian Socrates is only a mask of a literary figure.

Special attention must be paid to the reference point of Socrates' ignorance – the Delphic Oracle. Let us now set aside that narration of him is quite unlikely,[29] and let us focus instead on Socrates' interpretation of the Oracle's intention, which gave the negative answer to the question, "Whether anyone is wiser than I am."[30] According to Socrates, the God wants to show by the prophecy the insignificance of human wisdom (23a7), the measure of which is the wisest among men – Socrates himself. However, according to

27 If the author's intention in this section were to show how the historical Socrates actually spoke (see above, note 23), it would condemn the Socrateses of others, including "Socratic" dialogues, to be non-historical; moreover, it would not be understandable why Socrates left this vocabulary in later parts of the *Apology*.

28 Moreover, he characterizes this activity with an obvious allusion to the figure of Heracles as a set of difficult tasks associated with travel, which is, however, a position that contradicts the life of the self-styled Athenian Socrates, at least as described by the Athenian Laws in the *Crito*.

29 Socrates' defence suggests that it was first after Chairephon's inquiry in Delphi that he started to act in his typical Socratic way that brought him the indictment. One may however ask why Chairephon would go to Delphi to ask whether anyone was wiser than Socrates if Socrates were not well-known for precisely that activity at the time. Moreover, after the Oracle's statement, Socrates, according to his words, tormented himself for a long time and spoke publicly only with great reluctance (21b) – even that would delay his public activity, which, in reality, Socrates associates with his whole life. All this shows that the goal of narration is not history and its main purpose is to draw attention to several modes of indirection in the oral presentation and testimony, which is both appropriate to the divine instance in question and contrasts with the written indictment of Meleuts.

30 εἴ τις ἐμοῦ εἴη σοφώτερος (21a6). At this point, Plato's playing with the duality of Socrates' name or reputation and his ἐγώ reaches a point of culmination. Indeed, God did not answer the question "whether anyone is wiser than *I* am," but "whether anyone is wiser than *Socrates*." However, it is precisely (Socrates') ἐγώ, and not (his) name or reputation, that can be identified as the central subject of the message of the Oracle.

his further speech, the name "wise" is wrongly applied to him, because it is God who is truly wise. Earlier, Socrates admitted that he possessed "a kind of wisdom", which is "perhaps human wisdom" (ἴσως ἀνθρωπίνη σοφία, 20d8), against which he ironically opposed the "more than the human wisdom" of the Sophists. This is then, in the overall picture, a negative image of the wisdom of God, and Socrates' human wisdom would therefore occupy a middle position between God's wisdom and sophistic ignorance as a kind of limited and at the same time merely reflected ability. According to Socrates' interpretation, the Oracle wants to show that in Socrates' person, wisdom and ignorance come together, that Socrates, or "the wisest" (which is Socrates' name according to the Oracle, i.e. God), is a measure of human wisdom precisely by reflecting his own ignorance.

However, this construction stems only from Socrates' interpretation. God did not say that Socrates is ignorant, it is only Socrates himself who makes that claim, and therefore it is he, and not God, who generally attributes imperfection to the wisdom of men. But that's not all. Socrates himself relativizes in a special reinterpretation the very core of God's statement, namely the appellation of Socrates as the wisest:

> And it appears that he does not really say this of Socrates himself, but merely uses my name, and makes me an example, as if he were to say: "This one of you, O human beings, is wisest, who, like Socrates, recognized that he is in truth of no account in respect to wisdom."[31] (Plato, *Apol.* 23a7–b4; Fowler's translation slightly altered)

With this interpretation of God's intention, Socrates extends the title of "wisest" bestowed upon him by God, potentially to everyone. Even more remarkable is the distinction that Socrates makes between his own self ("Socrates himself") and his "name" (or reputation; see above). He willingly shares the name with others, since everyone can also become the wisest in the human sense. But what is then left for "Socrates himself"? What does God attribute to him if he does not speak of him in this statement? The possibility of lowering him somewhere to the level of the clumsy Athenian Socrates cannot be taken seriously in the light of what has been said above. Since the quoted passage immediately follows Socrates' statement that "human wisdom has

31 καὶ φαίνεται τοῦτ' οὐ λέγειν τὸν Σωκράτη, προσκεχρῆσθαι δὲ τῷ ἐμῷ ὀνόματι, ἐμὲ παράδειγμα ποιούμενος, ὥσπερ ἂν <εἰ> εἴποι ὅτι "Οὗτος ὑμῶν, ὦ ἄνθρωποι, σοφώτατός ἐστιν, ὅστις ὥσπερ Σωκράτης ἔγνωκεν ὅτι οὐδενὸς ἄξιός ἐστι τῇ ἀληθείᾳ πρὸς σοφίαν". In the first sentence, I accept F. A. Wolf's (*Platonis dialogorum delectus*, I, Berlin 1812, *ad loc.*) conjecture τοῦτ' οὐ λέγειν τὸν Σωκράτη instead of Burnet's τοῦτον λέγειν τὸν Σωκράτη.

little or no value" (23a7), it can be understood that precisely *this* (that human wisdom has little or no value) *is not said by God about Socrates himself*. God does not say about Socrates that which applies to human wisdom (which may belong to anyone who reflects on his ignorance). What he would say *positively* about Socrates himself is not stated in the text. However, given that "God is truly wise" (23a5–7), the separation of "Socrates himself" from human wisdom seems to mean rather that the border between Socrates and divine wisdom is opened up.

"Socrates himself" is obviously Socrates the Foreigner whose sovereign person is also shown in his relationship to the divine. He is the one who "puts the cause of God above all things" (21d), giving himself the title of one who "helps God" (τῷ θεῷ βοηθῶν, 23b7) by showing the foolishness of others. In doing so, Socrates is accompanied and imitated by young people who do this on their own (αὐτόματοι, 23c3). This situation strongly reminds us of Plato's *Symposium* and Socrates' reversal of the traditional erotic relationship between lover and beloved there;[32] also here, Socrates eventually emerges as a daemonic character (*Symp.* 219c).

Cooperation with God is symbolized by Socrates' comparison with Achilles and other demigods (28c). Socrates stations himself (ἑαυτόν) in the place he considers best to be there, or where he is placed by the ruler, God (28d–e).[33] Instead of a religiously intimate effort to testify to the truth of God's word (21d ff.), there is now a claim of God's collaborator who openly opposes the jurors: If you set me free on the condition of no longer philosophizing and researching, I will disobey (29c), for "I will obey God more than you, O men of Athens."[34] Since this contrast between God and the citizens of Athens immediately follows the contrast between "I" and "you" (ἐγὼ – ὑμᾶς), it is hardly a mere repetition of the formula of traditional piety,[35] but again a rather confident self-positioning of God's close collaborator who has a divine and daemonic element in himself (31c7). Since what God commands is now independently interpreted by Socrates ἐγώ, the principle of κελεύει ὁ θεός is transformed into a claim on his pedagogical authority being exercised over others (30a–b).

It is because of Socrates being such as this (τοιοῦτος) that his condemnation will have serious consequences for the city (30c). Focusing on the *quality* of his person as being "sent from God" leads to a definitive confirmation of the crucial *political* importance of the question of "Who is Socrates." Every

32 And which is then used in Aristotle's philosophical theology, cf. Aristotle, *Met.* XII,7,1072b3.
33 See esp. 28e4; cf. κελεύει ὁ θεός, 30a5.
34 ὦ ἄνδρες Ἀθηναῖοι, … πείσομαι δὲ μᾶλλον τῷ θεῷ ἢ ὑμῖν (29d3–4).
35 See e.g. Sophocles, *Ant.* 450 nn.

Athenian, represented by the jurors, must now ask this question for the sake of himself and his city.

So what answer is expected from the Athenians – and also from the contemporary reader? Given the role of Socrates as a sovereign thinker on the one hand and the authority that stems from his divine and daemonic character on the other, I think the answer is not far from that given in the *Republic* which similarly puts forth the picture of the philosopher whose exceptional intellectual and moral character includes – this time explicitly – a claim to take the leading position in the city. The characterization of Socrates in the *Apology* as a daemonic figure appointed by the Delphic Oracle resembles strikingly the revelation of the philosopher-kings in the *Republic* "as daemons, if the Pythian priestess permits – or if not, as men close to daemons and gods" (540b–c).

Socrates' description in the *Apology* of his *daimonion* that discourages him to engage in politics (32b–d) does not contradict this interpretation, since this response of the *daimonion* corresponds to the situation of the city's lack of readiness to grant Socrates his appropriate political role. One has to remember the conditionality of the philosophical rule – the philosopher has no duty to aspire to ruling position against the will of his fellow-citizens (*Resp.* 489b–c; cf. 499b–500a). The discouraging *daimonion* in the *Apology* reveals this systematic conditionality of the philosophical rule which, however, as such is not invalidated only by its current impossibility in Athens.

That the *daimonion* can play precisely this role in considering the given conditions for the philosophical rule can be also supported by the second formulation of the *daimonion*'s unwillingness that Socrates engage in politics. The *daimonion* prevents Socrates, literally, from "going up before the people and counseling the city" (31c–d). Going upwards here means going to Pnyx Hill, the seat of the Assembly (ἐκκλησία), the highest body of the city. The indication of a precise place corrects the apparent contradiction of Socrates' non-political politics. Socrates walks around the city, exercising his specific political authority over his fellow-citizens, but is unwilling to go up to the Assembly, the embodiment of the current problems of democratic politics. However, he would be happy to go up to another hill, namely the Acropolis, where he is to be fed by the city in the Prytaneum according to his bold proposal of "punishment" (36d). It can be recalled that the Prytaneum is a place where the most revered guests – foreigners – are fed by the city. In his foreign, and therefore, as we already know, philosophical identity, Socrates is willing to ascend to this sovereign position. And it is precisely the Acropolis where, according to the *Republic* and the *Laws*, the real rulers of the city live, namely the philosopher-kings (*Resp.* IX,592b3; *Leg.* XII,946e–947e, 969c1–2). The proper accommodation and honors that Socrates lacks

in Athens for the status of king are therefore a legitimate demand, and the reluctance to acknowledge them is a sign of an unwillingness to establish a philosopher on the throne, and thus a sign of the impossibility of the best constitution.[36]

Socrates' provocative joke about the Prytaneum, which would of course be completely meaningless in a real judicial defense, shows once again that the aim of our text is not to portray Socrates' prospect as a party to litigation, but rather the position of a philosopher in the city – a philosopher who is unwilling to participate in the declining politics of the fallen democracy of the time, but who would be – with the consent of his fellow citizens – willing to take on the best, i.e. aristocratic government. [37]

Finally, Socrates' position as a potential philosopher-king can be confirmed by another passage of the *Apology* that describes his role among young people. These follow their favorite in his seemingly unpolitic action as "many helpers" (33b ff.), who are expected to bring about a fundamental change in the city (39d). This wording not only strongly resembles the governmental structure envisaged in the *Republic*, where the rule of a few philosopher-kings also requires the assistance of a larger number of helpers, but also raises the issue of Socrates' succession. This question is, as I have tried to show in a series of works on the first tetralogy and on the *Laws*,[38] systematically connected with the question of the feasibility of the best constitution. Socrates' non-political politics, by its philosophical content, points to Plato's own political project presented in his two largest works. This brings us to our last topic, the question of Plato' depiction of his teacher's relationship to

36 In the *Apology* we also find an allusion to the activity typical of the ruling philosophers. Socrates walks around the city and does many works (πολυπραγμονῶ, 31c5). In his case, this does not mean – as the superficial reading of the introductory books of the *Republic* would suggest – injustice, because Socrates "is doing his own" (33a6–7), and this is what he teaches his students. In the *Apology*, as well as in the *Republic*, the philosopher's doing is an exception to the general command of specialization, which binds ordinary citizens. The philosopher–king, as the only one, can do many works, dealing with both philosophy and ruling at the same time, which in his case is, in the end, one and the same activity.

37 It is important, as I will further point out below, to distinguish between the philosopher's critique of a declining democratic government and his limited acceptance of the democratic principle of civic consent as a complement to his own aristocratic government. Exactly such a mixture is the essence of the constitution presented in Plato's *Laws*.

38 J. Jinek, *Zum Problem des Gehorsams gegenüber dem Gesetz bei Platon*, in: A. Havlíček (+) – Ch. Horn – J. Jinek (eds.), *Nous, Polis, Nomos. Festschrift Francisco Lisi*, Academia-Verlag, St. Augustin 2016, pp. 163–179; id., *Politische Theologie des Alleinherrschers bei Platon und Aristoteles*, in: A. Maffi (ed.), *Princeps legibus solutus* (Collana del Dipartimento Giurisprudenza dell'Università di Milano-Bicocca), Torino 2016, pp. 17–34; J. Jinek, *Ctnost, duše a vědění v Platónových Zákonech* (Virtue, Soul and Knowledge in Plato's *Laws*), in: K. Thein – J. Jirsa – J. Jinek, *Obec a duše. K Platónově praktické filosofii* (City and Soul. On Plato's Practical Philosophy), Praha 2014, pp. 253–313.

the Athenian Law-Code and its reception in Plato's own proposal for the best constitution.

Athenian laws

The actual impossibility of Socrates' ruling in Athens emphasizes the topicality of his foreignness. However, as we have already indicated, this foreignness does not contradict the rooting of Socrates in the legislation of his own city, which is especially emphasized by the Athenian laws in the *Crito*. Socrates' dominance, which at the same time makes his actual foreignness a potential political dominance, does not mean disobedience to Athenian laws, for example by the – rather modern – invocation of freedom of conscience. Socrates is a man who "first knows" and therefore respects the laws (24e). Let us now examine how the figure of the philosopher-king relates to the laws of his city of origin.

It can be shown that Socrates' defense or, more precisely, the defense of both Socrateses, that is, both the original and the one that is gradually turning into an accusation of the Athenians, presupposes the framework of Athenian legislation. Socrates is directly appealing to a number of Athenian laws: His repeated requests to the jurors not to shout during his speech are based on a law that protected the speaker from interruption. This seems absolutely crucial for the success of the defense, as its time was – also legally – limited. Socrates' calls on Meletus to obey the law and answer his questions (25d2) are again based on the existence of a law that allowed both parties to the dispute to interrogate the opposing party. Socrates further appeals to jurors not to violate their oath to judge not on the basis of personal impressions, and thus, for example, on aroused emotions, but merely on the basis of laws (35b–d).[39] He can also find support in the law, according to which the parties had to speak exclusively to the matter, which in fact forbade the appeal of compassion.[40] Both the above mentioned law and the oath of the jurors are related to Socrates' introductory remark that the juror should pay attention only to the content, not to the form of his speech (18a). The final argument against Meletus is also legalistic – Socrates states that it is not lawful to bring someone who sins unintentionally to court, but only those who require punishment and not instruction (26a3, 6).

39 The oath of the jurors of the popular court, called Ἡλιαία (or ἡλιαστικὸς ὅρκος) after the god Apollo, to whom the jurors had sworn, was probably introduced by Solon: "I will vote according to the law … neither out of favor nor out of hatred, and I will listen to both the plaintiff and the defendant." See M. H. Hansen, *The Athenian Democracy in the Age of Demosthenes: Structure, Principles, and Ideology*, Oklahoma 1991, pp. 170, 182.

40 L. Dyer, *Plato's Apology of Socrates and Crito*, Boston et al. 1908, p. 34.

In still other passages, the presence of positive Athenian laws is not explicit, but the contemporary reader certainly cannot overlook it: Socrates' repeated complaints of lack of time (19a, 24a, 37a) refer to the procedural law on limiting the length of court speeches by water clock (κλέψιδρα, or simply: ὕδωρ). We also mentioned above that the indictment was read aloud, because in the case of public disputes, and therefore also in the case of an indictment of impiety, it had to be submitted in written form. Against the background of Athenian legislation, the whole conclusion of the work can be read, when Socrates proposes punishment for himself (36b ff.) – it was not the task of the court, but the matter of the disputing parties.

It is essential that Socrates himself is committed to obey the law. He explains his willingness to defend himself in court with a pun connecting obedience to the law and to God (19a).[41] At the same time, however, he apparently has in mind a very specific Athenian law, which required the personal active participation of both parties in court. On the opposite side of the process, it is Socrates' willingness, which seems almost inconsistent with his previous "defense", to propose the relevant punishment as an alternative to the death penalty proposed by the other party. Although at first it seems that Socrates will want to ridicule this procedural law by an ironic proposal of reward (in the form of a lifelong meal in the Prytaneum; see above) instead of punishment, in the end his seriousness and his respect for Athenian law prevail.

However, Socrates' obedience also applies to other Athenian laws, as the account of his deeds shows us further (32a ff.). During his two brief political engagements, he opposed both democratic and oligarchic governments, precisely because of their illegality (παρανόμως, 32b2), and in both cases he nearly lost his life.[42] Finally, in connection with the *daimonion*, he states that he is always willing to prevent illegalities. In a sense, Socrates can even be considered the only Athenian who follows the law consistently, due to his perfectly unique practice of not persuading his jurors with emotion.

According to reports from the 4th century, it was Solon who established the popular courts and their respective procedures.[43] On the contrary, what later legislators such as Pericles have added to the Athenian judiciary – espe-

41 For a systematic connection between the two terms, see Plato, *Leg.* IV,713e–716a; cf. I,645b; IV,711d–712a; XII,951b; *Resp.* VI,499a–c.

42 The condemnation of the *strategoi* from Arginusae was – as was later acknowledged – illegal because it was made (a) by a decision of the people-assembly, (b) en masse, (c) without the defendants being able to prepare for defense (F. Rösiger, *Platons Apologie und Kriton*, p. 85).

43 M. H. Hansen, *The Athenian Democracy in the Age of Demosthenes*, pp. 182, 298–299, points out that in the 4th century, everything about the popular courts was uncritically attributed to Solon. Whether this was the case, that is, whether Solon was the originator of all these procedures, is a secondary question for us; we are primarily concerned with Plato's reception of Solon.

cially the payment for participation in court – is not mentioned at all in the *Apology*.[44] At the same time, we know from the same sources that the 4th century considered Solon's laws on the judiciary to be the origin and focal point of a democratic constitution.[45] "When the people are the master of the vote in court, they are the master of the constitution," Aristotle comments.[46] It is remarkable that Socrates, in both the *Apology* and the *Crito*, although dramatically opposed to *hoi polloi* in both dialogues, fully identifies with the democratic heart of the Athenian constitution.

Plato himself identifies with it too, although the scholarship constantly reminds us of his alleged anti-democratic sentiments.[47] The surprise is all the greater because in the case of other authors considered critics of the Athenian democratic system, it is the popular courts that are the subject of the harshest criticism.[48] It is Plato's *Laws*, which provides evidence for Plato's acceptance of this institution, since these courts are held as an essential part of the second best constitution there (*Leg.* VI,768a ff.). It is possible that they will also operate in the very best constitution, because the exclusion of litigation here applies only to the class of guardians (see *Resp.* V,464d). The rule of philosophers, and thus the aristocratic constitution, is by no means precluded by the existence of democratic laws.

However, Plato's following of Solon also has clear limits. There are three main critical points in Socrates' approach to the existing laws of Athens. These critical points correspond in principle to the content of Plato's revision of the Athenian legislation presented in his constitutional project in the *Laws*. A parallel examination of both the critique (in the *Apology*) and the alteration (in the *Laws*) of the Athenian Code can be very instructive for understanding the unity of Plato's political thought.

First, Socrates complains about the lack of time in his defense, and therefore also about the specific Athenian law, according to which capital trials were to be decided in a single day. This law was also from Solon's pen, and part of it was the rule to divide the trial day into three parts in the case of capital crimes – these roughly correspond to the three distinct parts of

44 Cf. Aristotle, *Ath. pol.* 27,3–5; 28,3.

45 *Ibid.*, 9,1; 9,2; 41,2; Aristotle, *Pol.* II,12,1273b35–1274a5; Isocrates, *Or.* VII,16–17; Demosthenes, *Pro cor.* 6.

46 Aristotle, *Ath. pol.* 9,1.

47 E.g. R. H. S. Crossmann, *Plato Today*, London 1937, pp. 71–75; J. Ober, *Mass and Elite in Democratic Athens: Rhetoric, Ideology, and the Power of the People*, Princeton 1991, p. 334, note 58; L. Brisson, *Ethics and Politics in Plato's Laws*, in: *Oxford Studies in Ancient Philosophy*, 28, 2005, pp. 106–109; L. Bertelli, *Democracy and Dissent: the Case of Comedy*, in: J. P. Arnason – K A. Raaflaub – P. Wagner (eds.), *The Greek Polis and the Invention of Democracy: A Politico-cultural Transformation and Its Interpretations*, Oxford 2013, p. 101. See also above, note 37.

48 Aristophanes, *Eccl.* 655–672; pseudo-Xenophon, *Ath. pol.* 1,13, 16–18.

the *Apology*. Against this provision, Socrates – apparently the Socrates the Foreigner – invokes differing legislation in other cities (37a–b). If we look at the *Laws*, we see that this point is thoroughly discussed here. Instead of dividing the day, the trial itself is divided here, both in terms of time, when a sufficient period is reserved for the trial of capital crimes, and in terms of the possibility of appeal to higher courts (*Leg.* IX,855c–856a).

The second critical point can be seen in the already mentioned shift in the situation after Socrates' conviction, when Socrates first proposes a lifelong meal in the Prytaneum as his "punishment", but then retreats and proposes a fine, at first – still with a touch of irony – very low and only later an actually significant one. Despite the obligatory respect for the law, behind this slow, almost reluctant recognition of the validity of the law, the writer's disagreement with this particular provision is evident. It was again part of Solon's code, which deliberately did not specify concrete punishments for certain offenses and left this issue to the initiative of the disputing parties and the subsequent court decision. This must have been regarded as a very arbitrary procedure by Plato and it is again the subject of rather a lengthy correction in Book IX of the *Laws*. It is interesting that, according to the then widespread interpretation quoted by Aristotle, this law of Solon's was guided by the intention of strengthening the power of the people, who ultimately decide upon punishment.[49] At this and the previous point, it would actually be an attempt on Plato's side to mitigate the extreme democracy while preserving its essential element.

Third, the whole *Apology* can be seen as a document of the instability of Athenian law. All the problems indicated in the text, i.e. frequent non-compliance with procedural requirements, interruptions, appeal to emotions, refusal to answer during interrogation, but also exceeding time limits, probably corresponded to the practice of the time and demonstrated the flexibility of Athenian law and the fact that everyone could *interpret* it in their own way. The opposite side of the same problem was the provision requiring certain acts to be carried out in writing, although it would be more natural to perform them orally, in particular the prosecution and the defense. Socrates' "reading" of the first indictment does not lack a hint of irony against this provision. According to Plato's Socrates, what should be a stabilizing element of the judicial system is a source of confusion, and the problem in both cases – in the case of arbitrary interpretation of positive laws and in the case of written accusations – lies in the deficient nature of writings, including written positive laws, which are not in position to provide help for themselves (*Phaedr.* 275e).

49 Aristotle, *Ath. pol.* 9,2.

The fundamental shortcoming of the Athenian laws, addressed again in Plato's *Laws* (*Leg.* VI,752e ff., 759c ff.; XII,964b), is therefore the absence of a living instance that would interpret the laws and thus actually keep them in force. According to ancient testimonies, Solon fled to Egypt after being asked by his fellow-citizens to comment on the given laws.[50] Solon's error at this point is critical in Plato's eyes. His escape, which contrasts so strongly with Socrates' decision to stay in Athens even at the cost of physical death, can be considered the most serious mistake of the legislator. The Athenian guest subjects it to harsh criticism in the *Laws* (*Leg.* IX,861b6). We find a systematic justification for its opposite in *Phaedrus*: the legislator must be able to help the written law (*Phaedr.* 278c; with a direct mention of Solon). Solon's law code was written, more precisely engraved and exhibited at the Athenian Agora. This brought it stability on the one hand (its validity exceeded 200 years);[51] on the other hand, it gradually lost its authority. Plato's *Apology* is also written with an intention to testify to this gradual decline.

Conclusion

The *Apology* is a fictitious work, which is entirely subordinated to the intentions of the author, whose literary abilities were well known to his contemporaries.[52] Socrates' typical avowal of his own ignorance is also fictitious. Against the background of his lawsuit and defense, it is perhaps even more pronounced than before the "private trial" of interlocutors in other dialogues.

As an expert, he could also aspire to the role of a potential ruler in the city, i.e. the role of a philosopher-king, but this is conditioned by two things: by his acceptance of existing laws and by the consent of his fellow citizens. This consent, that is, the willingness of the Athenians to recognize the philosopher's claim to rule in the city, is at stake in the situation in court. The traditional interpretation, according to which the *Apology* is in fact a trial not of Socrates but of the city,[53] holds precisely in this sense: the focus is on whether the city will allow the philosophical ruler to – in the words of the

50 Aristotle, *Ath. pol.* 11,1.

51 See E. Ruschenbusch, *ΣΟΛΩΝΟΣ ΝΟΜΟΙ. Die Fragmente des Solonischen Gesetzwerkes*, Wiesbaden 1966, Introduction.

52 See Isocrates, *Or.* II,240, 246, 250; Diogenes Laertios, *Vitae*, III,35, cf. 63. The fact that Isocrates' critique in his *Panathenaicus* is addressed to Plato has been proved by P. Roth, *Der Panathenaikos des Isokrates. Übersetzung und Kommentar*, München 2003; see also K. Schöpsdau, *Platon. Gesetze I–III*, Göttingen 1994, pp. 350–352.

53 It can be found already in the ancient anonymous treatise Περὶ ἐσχηματισμένων (*On Figured Speeches*), in: *Dionysii Halicarnasei opuscula*, eds. H. Usener – L. Rademacher, II, Leipzig 1929, 305.3–23 („The *Apology of Socrates* has as its primary purpose an apology, as its title makes

Republic (473c) – "relieve it of its evils". The fact that the city rejects this possibility by a decision of the jurors is not an unexpected result of the trial or Socrates' life story, but a message for the *reader* – and this must be stressed, because it is not primarily a message to the Athenian jurors but to the readers of Plato's written work – relevant to the politics of the time: Both of the mentioned conditions and the potential of philosophical rule still apply, even after Socrates' death. They represent the starting point for Plato's own legislation.

Socrates, although potentially a philosopher-king sovereign over the law, voluntarily submits to the law of Athens. This connection to the Athenian city in its "most formal" aspect,[54] which is the law, is the counterpart to his divine nature, and together they form the unity of the character of Socrates depicted by Plato. It is not true that Socrates does not want to rule in a city with democratic laws; the demand for nourishment in the Prytaneum is not an impertinent ambition to become an honorary official without government duties. His position, including both respect for the existing laws and their critique (including a comparison with non-Athenian conditions), in which the knowledge of the way to correct them is voiced (and demonstrated elsewhere) and his readiness to be introduced to the Acropolis, is a philosopher's declaration that he is willing to assume ruling responsibilities here and now. It is an important finding for the readers of the *Apology* to uncover the dual conditionality of the best constitution, consisting both in the willingness of the sovereign philosopher to rule under given legal conditions, and the favor of external circumstances, including the will of the governed.[55]

clear, but it is also an accusation of the Athenians, seeing that they brought such a man to court.")

54 For the imterpretation of the *nomoi* as *eidê* in *Crito* viz H. Flashar, *Überlegungen zum platonischen Kriton*, in: H.-C. Günther – A. Rengakos (ed.), *Beiträge zur antiken Philosophie. Festschrift für Wolfgang Kullmann*, Stuttgart 1997, p. 58; J. Jinek, *Zum Problem des Gehorsams gegenüber dem Gesetz bei Platon*, pp. 174–175.

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The Role of the Law in the Classification of Democratic Constitutions in Aristotle, *Pol*. IV

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Summary
The author aims to show: (a) that the equality that characterizes ideal democracy (the "first" democracy) aims to ensure equal protection for the minority of the rich and the majority of the poor; (b) that equality thus understood is the fundamental *nomos* that every democratic regime must respect if it does not want to risk ruin; (c) that "extreme" democracy, led by demagogues, does not give rise to institutional changes but introduces, in particular through the uncontrolled use of decrees of general content, a political practice that finds its historical foundation in the Athens of the fourth century B. C.

1. The Nomos of the *prôtê dêmokratia*

In the *Politics*, the investigation of democracy is distributed in numerous sections, which are often difficult to put in order and reduce to a systematic treatment: I refer here in particular to book IV,4 and 6 and to the first part of book VI.[1] As is known, the classification of democratic regimes in *Pol*. IV,4 and IV,6 is based on two concomitant criteria: extension of the *politeuma* and compliance / non-compliance with the law (or laws). It is particularly this second criterion that I will consider here. My aim is to show that the *nomos* that characterizes the "first democracy" (*Pol*. IV,1291b31–34), that is, the rule that the majority of the poor must not override the minority of the rich, is the fundamental rule that all democratic regimes must obey if they do not want to perish. The „first democracy" is called democracy *kata to ison*. In what sense, then, must we understand the notion of equality and how does it relate to the notion of freedom, which (not only for Aristotle) is

1 However, it would be necessary to take into account all the other passages of the *Politics* which explicitly or implicitly concern democratic regimes. In the rest of the article I will limit myself to mentioning those that seem most pertinent to the perspective adopted here.

the essential characteristic of democracy? In my opinion equality should not be understood here in the sense that all citizens, be they poor or rich, must have an equal right to exercise power, with particular reference to the voting system in the assembly.[2] In a democracy, in contrast to what happens to the poor in the oligarchies, the right to vote is not denied to the rich, so that no one is excluded from the exercise of political rights (except for any tenuous census limitations for access to offices, such as those provided in the second *eidos* of democracy: *Pol*. IV,1291b39–41). Here equality must rather refer to the relations between the two groups that, according to Aristotle, face each other within the regime: the rich and the poor.[3] The problem arises from the fact that, in a democracy, political decisions are taken by a majority. How then will it be possible to guarantee the equal exercise of power between rich and poor, if the majority principle ensures the predominance of the poor, who are usually more numerous than the rich, in the assembly? This is the great aporia that makes it difficult to build a balanced and stable model of democracy.

Aristotle proposes two possible solutions. One is to introduce a voting system based on the weighting of the voters' assets (*Pol*. VI,1318a33 ff.); but it is a purely theoretical solution, to which Aristotle no longer returns in the rest of the work. The other, as can be inferred from *Pol*. IV,1292a4 ff., consists in recommending compliance with the law of non-predominance (*hyperochê*) of the majority of the poor in collective deliberations, while maintaining in force the usual functioning of democratic political bodies. This second solution also affects the profile of freedom. Indeed, Aristotle recalls that an (evidently) authoritative trend of thought believes that it is precisely freedom, here to be understood as "freedom to do what one wants" (*Pol*.

2 How do they mean e.g. R. Mulgan, *Aristotle's Analysis of Oligarchy and Democracy*, in: D. Keyt – F. D. Miller Jr. (eds.), *A Companion to Aristotle's Politics*, Cambridge (Mass.) – Oxford 1991, p. 318: "political equality for all"; E. Schütrumpf – H. J. Gehrke (eds.), *Aristoteles, Politik Buch IV–VI*, Berlin 1996, p. 302: "Gleichheit der Rechte von Armen und Reichen"; L. Bertelli, *Il cittadino in Aristotele: criteri di inclusione/esclusione*, in: F. de Luise (ed.), *Cittadinanza. Inclusi e esclusi tra gli antichi e i moderni*, Trento 2018, p. 147: "sia i ricchi sia i poveri partecipano sul piede di eguaglianza alla *politeia*"; P. Pellegrin, *L'Excellence menacée: Sur la philosophie politique d'Aristote*, Paris 2017, p. 288: "partagent de la même manière le pouvoir politique".

3 So also P. Pellegrin, *L'Excellence menacée: Sur la philosophie politique d'Aristote*, p. 288: "égalité entre classes et non entre individus". Therefore, "de ce fait, cette démocratie n'en est pas une, puisque le peuple y partage le pouvoir *à égalité* avec les gens aisés". However Pellegrin finds the conclusion of the passage problematic (IV,1291b37–38) where, according to him, "Aristote << redémocratise >> les choses, en rappelant que le principe de base de la démocratie, c'est la souveraineté populaire" (p. 289). In my opinion, the incongruity pointed out by Pellegrin is resolved if the equality that characterizes the "first" democracy is understood not as equality in the right to exercise power, but as a guarantee of equal protection of the interests of the rich and the poor, given that we are still in a democracy. See the solution proposed in *Pol*. VI,1318a27 ff., on which *infra*.

V,1310a31–32), that characterizes democracy (*Pol.* IV,1291b34 ff.). Aristotle shares this widespread opinion,[4] but he further specifies it by arguing that there can be no authentic freedom unless it guarantees to all citizens that particular equality that derives from the *nomos* of this particular democracy (ὁ νόμος ὁ τῆς τοιαύτης δημοκρατίας). And this equality will be realized only if what we could define as the "constitutional guarantees" of personal and property rights are implemented.[5] It is no coincidence that Aristotle emphasizes that living according to the constitution does not mean being a slave (*Pol.* 1310a34–36). The law in question is in a certain sense postulated (see *Pol.* IV,1292b28: *ton nomon epistêsantes*) without specifying who the author is. In *Pol.* IV,1292b28 its creation is attributed to the class of the owners of a medium-sized patrimony, that is, the class that predominates in the second *eidos* of democracy discussed in *Pol.* IV,4; but whether the law is the work of an enlightened legislator or of a legislating assembly wisely guided by the "best" is not known. Now, as I said at the beginning, what interests me here is to point out that the principle of non-abuse of the rich at the hands of the poor majority (i.e. the *dêmos*) is defined as the *nomos* that characterizes the "first" democracy (1291b31–34). I agree, therefore, with the scholars who see in the *prôtê dêmokratia* the ideal model of democracy, with which all other *eidê* must be compared (this seems to me to be confirmed by the fact that the only characteristic that Aristotle attributes to the *prôtê dêmokratia*

4 See e.g. *Pol.* IV,1294a11 and VI,1317b2–11.

5 It seems to me that most of the recent commentators on the *Politics* miss the dialectical relationship that *Pol.* IV,1291b34–37 establishes between freedom and equality in democracy, and translate the passage by putting them on the same level. R. Laurenti, *Aristotele, Politica*, Bari 2007: "Poiché, certo, se la libertà esiste soprattutto nella democrazia, come suppongono taluni, e lo stesso l'uguaglianza, si realizzeranno soprattutto qualora tutti senza esclusione partecipino in egual modo al governo"; E. Schütrumpf – H. J. Gehrke (eds.), *Aristoteles, Politik Buch IV–VI*: "Denn, wenn, wie einige glauben, freie Geburt am ehesten in der Demokratie zur Geltung kommt und zusätzlich Gleichheit, dann dürften diese (Ziele) am ehesten verwirklicht werden, wenn alle möglichst in gleichem Umfang an der Verfassung teilhaben"; Guagliumi (in L. Bertelli – M. Moggi [eds.], *Aristotele, La politica, Libro IV*, Roma 2014): "Se infatti la libertà esiste soprattutto in democrazia, come sostengono alcuni, e anche l'uguaglianza, esse si realizzerebbero in massimo grado se tutti partecipassero in ugual misura al governo"; P. Pellegrin, *L'Excellence menacée: Sur la philosophie politique d'Aristote*: "Car, si c'est en démocratie que se trouve principalement, comme le soutiennent certains, la liberté ainsi que l'égalité, il en sera ainsi principalement si tous partagent principalement de la même manière le pouvoir politique" (p. 343 n. 12). On the other hand, the translations of Aubonnet and Terrel seem closer to the meaning of the text: J. Aubonnet, *Aristote, Politique l. III–IV*, Paris 1989 (1971[1]): "Car, s'il est vrai que c'est en démocratie que la liberté se trouve au maximum – comme certains l'admettent-, de même aussi l'égalité doit s'y trouver au maximum, si tous les citoyens sans aucune exception participent au maximum au gouvernement, et de façon pareille"; J. Terrel, *La Politique d'Aristote. La démocratie à l'épreuve de la division sociale*, Paris 2015: "Car si la liberté la plus grande se trouve en démocratie, comme certains le soutiennent, l'égalité la plus grande s'y trouve aussi, quand tous ont part en commun au régime de la manière la plus semblable possible" (p. 202).

consists precisely in the application of the majority principle). The *nomos* of which Aristotle speaks here must therefore be understood as the fundamental law, the constitutional principle (the *Grundnorm*, in Kelsenian terms), which must govern every democracy that deserves the status of *politeia* (*Pol*. IV,1292a30 ff.).[6] If we accept the interpretation I proposed of the *nomos* enunciated in *Pol*. IV,1291b31–34, we can better understand what *archein ton nomon* means in the regimes marked with n. 3 and n. 4 (*Pol*. IV,1291b39–1292a4). Modern commentators do not care to investigate the meaning of this *nomos*: it is generally stated that in these *eidê* of democracy, the law is sovereign. I believe instead that Aristotle wants to say more precisely that, in the regimes n. 3 and n. 4 (but in reality also in n. 2), the law of equality is respected, which, as we saw in *Pol*. IV,1291b31–33, protects the minority of the rich against vexatious measures eventually approved by the poor majority who are in power. It is therefore a description of democratic regimes in the light of an evaluation criterion: the greater or lesser respect for equality understood in the sense established by the law of the "first democracy".

2. *Psêphismata* and *nomoi* in the extreme democracy

To support the interpretation that I have proposed, it is now appropriate to investigate the role that this law plays in defining the democratic regimes in which it should be applied. From the comparison between *Pol*. IV,4 and IV,6 it is clear that Aristotle is not so much interested in specifying the content of the law or laws in question,[7] as in highlighting the conditions which ensure or which, respectively, threaten the safeguarding and effectiveness of the regime. The determining factor is considered by Aristotle to be the relationship between compliance with the law and the role of the assembly in the various types of democracy. More precisely, Aristotle formulates a sort of theorem: the less extensive and less frequent is the participation of citizens in the assembly, the more firm and widespread the compliance with the laws will be. If a preponderant majority of poor people go to the assembly, for Aristotle this inevitably leads to the violation, if not the elimination, of the law that ensures equality between rich and poor in the sense we have indicated above. It is not easy to understand the reasons behind such a "theo-

6 Contra R. Zoepffel, *Aristoteles und die Demagogen*, in: *Chiron*, 4, 1974, p. 70 n. 6, which, while correctly identifying in the *prôtê dêmokratia* "das Grundprinzip, oder Ideal dieses Verfassungstyps", argues without justification that "diese erste Urform spielt in den weiteren Überlegungen keine Rolle mehr".

7 Aristotle alternates between the singular and the plural. In my opinion he always refers to the principle which defends the rich against the predominance of the poor, a principle which, from time to time, depending on the context, may manifest itself in one or more concrete laws.

rem": it almost seems that, in Aristotle's thought, the normal functioning of democracy, based by definition on the will of the majority, inevitably causes the ruin of the regime itself.[8] In order to try to explain this *aporia*, it is convenient first of all to focus our attention on the composition and role of the assembly in the various kinds of democracy identified in the *Politics*. Why did Aristotle focus his attention on the assembly rather than on other constitutional bodies, such as the people's court or the public offices (*archai*)? Because, as Aristotle himself (*Pol*. IV,1298a3–7) observes, the assembly is the body that holds legislative power: in democracy, therefore, it is the place where authentically (and, for Aristotle, unfortunately) democratic laws can be created, that is, laws aimed at favoring the interests of poor to the detriment and at the expense of the rich. And since decisions in the assembly are taken by majority vote, the orientation of the legislative power depends on the composition of the assembly. Here a sort of socio-economic determinism emerges in Aristotle. In fact, participation in the assembly does not depend on the subjective choice of the individual, but on the objective socio-economic conditions that determine the availability of time, that is, the necessary *scholê* to devote oneself to public affairs.[9] Those who have to work to survive, even if they reach a certain amount of wealth,[10] will not have much time to devote to public activity, in particular to participate in the assembly and to sit in the courts. Therefore they will participate only in the "necessary" assemblies (*Pol*. IV,1292b29)[11] and will often avoid performing the functions of judge (*Pol*. IV,1293a9). In the Aristotelian analysis of democratic political life (we are obviously talking about a direct democracy) the generic wealth / poverty opposition is therefore projected into the dimension of work, on which depends the need to work or its absence, and the consequent availability or unavailability of free time (*Pol*. IV,1292b27–28).

So the rich (*euporoi*) would be those who, having no need to work, have free time (*scholê*); the poor (*aporoi*) those who, being forced to work to live,

8 Scholars generally tend to take note of Aristotle's assertion without attempting to investigate the reasons.

9 Cf. G. E. M. De Ste. Croix, *The Class Struggle in the Ancient Greek World from the Archaic Age to the Arab Conquest*, Ithaca – New York 1961, p. 71: however, the identification of the rich with landowners and the poor with non-owners does not seem to me to correspond to the more flexible categories used by Aristotle.

10 As we have already observed, Aristotle notes that in certain regimes, although they are democratic, a patrimonial threshold for the exercise of political rights is established by law. He acknowledges that limiting the number of political rights holders is an oligarchic measure, but realistically concludes that, in the absence of public stipends, those below that threshold would have no free time available (presumably because they are full-time looking for a way to survive): *Pol*. IV,1292b31–33.

11 It can be assumed that, if Aristotle is thinking in particular of Athens, he is referring to the "main" assembly (*kyria*), mentioned in *Ath. pol.* 43,4.

do not have free time. But, reasoning in this way, Aristotle discovers that the predominance of the majority of the poor, the keystone of democracy, would end up being overthrown. If, in fact, participation in democratic bodies (in particular in the assembly) requires availability of time, it would be the rich, who do not need to work, who would constitute the majority. Actually Aristotle himself knows that the connection between wealth / no need to work / availability of free time / propensity to participate in political life cannot be taken as an incontrovertible axiom. A passage like *Pol*. VII,1328a27 ff. is revealing. Here Aristotle observes that the *euporoi*, although they do not have to work to live and therefore have a lot of free time, do not want to neglect their business to participate in public life (here in particular to perform the function of judge). On the other hand, that the opposition between those who do not work and those who do work does not exactly correspond to the opposition between rich and poor is well known to Aristotle himself: even the oligarchy admits rich artisans to citizenship, consequently to political participation (*Pol.* III,1278a21–25). In any case, any marginal inconsistencies due to the possible choices of individuals which go against the general current of the group to which they belong do not undermine the basic scheme: the opposition between those who work and those who do not work provides Aristotle with the tools to build his typology of kinds of democracy (which is meant to be, as often in *Politics*, both descriptive and prescriptive). The standard model of democracy would make it impossible to change the numerical ratio of rich to poor in favor of the former. But Aristotle observes (and at the same time suggests) that the model can (and, from his point of view, must) be modified. The workers, even if they can be counted among the relatively wealthy subjects, like the peasants (*to georgikon: Pol*. IV,1292b25), tend to limit their participation in political life to what is strictly necessary. But even those who don't work, not because they are rich but because they are homeless and unemployed, will be too busy putting together lunch and dinner to have time to take care of public affairs. Thus the political space controlled by the *beltiones* could turn out to be much larger than one would expect in a democracy, ending up as an effective counterweight to the overwhelming numerical power of the poor.

The solution to the paradox is the introduction of compensation for those who take an active part in political life. It is therefore the *misthos*, paid at the beginning to the judges, and, since the 4th century B. C., to citizens participating in the assembly, that breaks the coherence of the criterion of political participation based on work and time availability. In fact, subjects who would not have free time (as they would have to work to live) now have the opportunity to participate in political life as much as, and even more than,

those who do not have to work to live (*Pol.* IV,1293a6).[12] Aristotle is therefore strongly opposed to the payment of *misthos*, not only, as it is logical to expect, when the necessary money is extorted from the rich in an illegitimate way (*Pol.* VI,1320a17 ff.), but also when it comes from public revenue (*Pol.* VI,1320a29 ff.). In fact, it is consistent with democratic ideology and political practice to ensure that the poor do not become too poor; nevertheless, according to Aristotle, it is necessary to avoid what we would today define as welfarism (to which demagogues tend instead: *Pol.* VI,1320a29 ff.). Any surplus of public money must be distributed to the poor only to favor productive investments.[13] In the worst scenario the rich could be forced to pay a *misthos* to the poor, but only to attend the "necessary" assemblies: the reference here to that kind of democratic regime that Aristotle had already praised in *Pol.* IV,1292b29, where the law is obeyed, is evident.

We have so far ascertained that, for Aristotle, it is the *misthos* that ensures the numerical prevalence of the poor in the assembly (and in court). We must focus now on the ways in which the predominance of the poor to the detriment of the rich is achieved in the extreme democracy.[14] The criticism of the decisions of the assembly under the impulse of the demagogues is conducted by Aristotle on both the substantial and the formal level.[15] To illustrate the criticism on a substantial level we must return to *Pol.* III,10 (1281a13 ff.). Aristotle begins by raising the famous question: who must be *kyrios* in the city?[16] The answer, as is known, varies according to the regime in power; but everywhere the holders of power tend to use it against those who are excluded. The first example that Aristotle proposes concerns precisely the degenerate democracy described in *Pol.* IV,1292a4 ff. If the poor, being the majority, distribute the goods of the rich among themselves, do they not commit something *adikon*? The hypothetical interlocutor replies

12 As highlighted by S. Podes, *Bezahlung für politische Partizipation im klassischen Athen: die Diäten als sozialstaatliche Institution*?, in: *Ancient Society*, 26, 1995, p. 15, from this point of view the *misthos* (with the exception of *theorikon*) can be considered a kind of compensation.

13 *Pol.* VI,1320a36 ff. This will lead them to reduce their participation in the assembly, as they are mainly dedicated to looking after their own business. It is natural to link this productive use of public money with the intention of expanding the class of the *mesoi*, a guarantee, according to Aristotle, of the implementation of a stable and balanced democratic regime.

14 To argue that in extreme democracy "the masses hold absolute control and, consequently, the rich do not participate in the most important institutions of government – the assembly and courts", as I. Jordović, *Aristotle on Extreme Tyranny and Extreme Democracy*, in: *Historia*, 60, 2011, p. 40, writes, can give rise to misunderstandings. The passages he cites attest to a certain reluctance on the part of the rich, not their exclusion from the organs in question.

15 I believe it is futile to try to attribute a precise identity to the demagogues, as R. Zoepffel, *Aristoteles und die Demagogen*, tried to do. In extreme democracy, as Aristotle presents it, they simply carry out the function of spokespersons for the aversion of the poor to the rich.

16 Cf. S. Gastaldi, *A chi deve appartenere l'autorità suprema nella città? Il problema del kyrion nella Politica di Aristotele*, in: *Teoria politica*, N. S., 8, 2018, pp. 63–79.

maliciously that these measures are legally irreproachable, since they are approved by the majority. And since the laws are adapted to the nature and the purpose of the regime that enacts them (*Pol*. III,1281a36), they must also be considered just measures (what the laws establish must therefore be right). The reply, which seems to express the point of view of Aristotle himself, highlights the contrast between law and justice, which will later find its echo in the famous Latin formulation *summum ius summa iniuria*.[17] It will be noted, however, that to the argument based on the effectiveness of the formally valid norm Aristotle is not able to oppose instruments such as the Athenian *graphê paranomon* and *graphê nomon mê epitêdeion theinai* against measures contrary to the law. Instead, his criticism is based on the factual consequences that are likely to be expected from measures of that kind: the *dikaion*[18] cannot by definition cause its own ruin. Compliance with legal forms cannot therefore hide the unjust content of the measures that harass the rich. Only the tyrant, with whom extreme democracy is compared,[19] can behave in a way that is contrary to the laws, precisely because the tyrannical regime disregards the observance of any law other than the will of the tyrant himself. It must therefore be very clear to the legislator that there is a limit to the adaptation of laws to the interests of those who hold power (i.e. the rich in oligarchies and the poor in democracies): care must be taken not to go beyond the point where the dominated party considers oppression intolerable and blows up what we would call the social contract. Therefore, the laws that must regulate both oligarchic and democratic regimes are those that ensure the survival of the respective regimes (*Pol*. VI,1320a1–4). And it is precisely those laws that, as Aristotle notes in his classification of both democracy (*Pol*. IV,4) and oligarchy (*Pol*. IV,5), are in force in those first regimes that achieve a degree of relative stability by keeping the centrifugal thrusts of opposing interests in balance.

In *Pol*. III,10 Aristotle, as we have seen, criticizes extreme democracy with regard to the consequences of the apparently formally correct measures which it in fact implements out of, hatred for the rich. In *Pol*. IV,4 he goes further and also questions the formal validity of those measures (I refer in particular to *Pol*. IV,1292a32–37). In *Pol*. IV,1292a32 we read: "where laws (*nomoi*) do not command, there is no *politeia*; in fact, the laws must regulate everything". And in *Pol*. IV,1292a35–37: "a constitution in which everything is regulated by decrees is not a democracy because a decree cannot have

17 Cicero, *De off*. I,10. But see already the Aristotelian criticism of *akribodikaios* in *Eth. Nic*. 1138a1.

18 *Dikaion* is to be understood here as both law and justice proper to every regime: cf. *Pol*. 1309a37–38.

19 Aristotle, *Pol*. 1281a22–24 anticipating *Pol*. 1292a15 ff.

a general scope".[20] These two statements, which are logically linked within the same argument, presuppose that Aristotle distinguishes *nomoi* from *psêphismata*. And the criterion by which they are distinguished inevitably refers back to Athens in the 4th century (while we cannot say whether a similar distinction was in force in other poleis too): *psêphismata* have a particular content and are approved by the assembly, while *nomoi* have a general content and are passed by the *nomothetai*. However, the logical link between the two statements quoted above is not immediately clear. We would expect Aristotle to present the argument which did not emerge in *Pol.* III,10, that is, that the vexatious measures against the rich, formally correct or not, are contrary to the laws in force. We would therefore expect him to say: the laws do not command because the assembly approves decrees contrary to the laws and these decrees remain valid (it is not by chance, as we noted, that the *graphê paranomon* is not mentioned in the *Politics*). Instead, criticism of the legislative production of extreme democracy is conducted, at least in appearance, only in terms of the form of the measures in question: demagogues get approval for *psêphismata* of general content, while *psêphismata* can only have a particular content.[21] Now, there can be no doubt that demagogues also approve *psêphismata* whose particular content is contrary to the *nomoi*. We must therefore think that, when Aristotle just before (*Pol.* IV,1292a16) writes that the *dêmos* no longer wants to be commanded by law, he refers to *psêphismata* of both types, i.e. of both particular and general content. However, Aristotle does not mention *psêphismata* of particular content, perhaps because they could be considered contingent phenomena, which do not threaten the existence and the stability of the *nomoi*.[22] According to Aristotle it is therefore the *psêphismata* of general content that cause the

20 Aristotle, *Pol.* 1292a30–37: εὐλόγως δὲ ἂν δόξειεν ἐπιτιμᾶν ὁ φάσκων τὴν τοιαύτην εἶναι δημοκρατίαν οὐ πολιτείαν. ὅπου γὰρ μὴ νόμοι ἄρχουσιν, οὐκ ἔστι πολιτεία. δεῖ γὰρ τὸν μὲν νόμον ἄρχειν πάντων τῶν δὲ καθ᾽ ἕκαστα τὰς ἀρχάς, καὶ ταύτην πολιτείαν κρίνειν. ὥστ᾽ εἴπερ ἐστὶ δημοκρατία μία τῶν πολιτειῶν, φανερὸν ὡς ἡ τοιαύτη κατάστασις, ἐν ᾗ ψηφίσμασι πάντα διοικεῖται, οὐδὲ δημοκρατία κυρίως: οὐθὲν γὰρ ἐνδέχεται ψήφισμα εἶναι καθόλου.

21 As it is adequately clarified in *Eth. Nic.* V,1134b18–24, 1137b13 and 32, 1141b21–28

22 It is worth briefly mentioning here the interpretation proposed by F. Quass, *Nomos und Psephisma. Untersuchungen zum griechischen Staatsrecht*, München 1971, p. 35–36: extreme democracy is characterised by the fact that "der souveräne Volkswille in allen Angelegenheiten des Staates nur noch von Fall zu Fall entscheidet und alles staatliches Handeln sich modern gesprochen in reiner Exekutive erschöpft; in einem so gedachten Staat werden dann folgerichtig etwa bestehende Normen ignoriert und sind damit bedeutungslos" (with a cross-reference, p. 36 n. 41, to *Eth. Nic.* VII,1152a19–23). But Aristotle criticizes precisely the fact that demagogues have general rules approved in form of decree. The solution of individual cases is rather attributed to the authority of the public officials (*archai*) (*Pol.* IV,1292a33–34), who, however, do not take decisions through the emanation of *psêphismata*, since these are measures issued by collegial bodies on the basis of a vote.

non-application of the *nomoi* and the consequent destruction of the *politeia*. It seems that it is the issue of measures of a general content in the form of a *psêphisma* that has a subversive effect, even if their content is not contrary to the laws. Now, how can this radical criticism of the form of the normative measures taken by the assembly of extreme democracy be reconciled with the assertion that in every regime legislative production is the responsibility of the assembly (*Pol*. IV,1298a5 and *Rhet*. I,4,1359b)? It could be assumed that, in Aristotle's extremist representation of degenerate democracy, the demagogues have obliterated the Athenian distinction between the procedure for the approval of *nomoi*, entrusted, as is well known, to the *nomothetai*,[23] and the procedure for the approval of *psêphismata*, which is the competence of the assembly. If this were the case, it would explain why the same measures are named *nomoi* in *Pol*. III,10 and *psêphismata* in *Pol*. IV,4. And to consider the measures against the rich, approved by the majority of the poor in the assembly (*Pol*. III,1281a14 ff.),[24] formally valid would be justified. In this case we would return to the situation that characterized the enactment of laws in Athens in the 5th century, that is, before the creation of the *nomothetai*. However, one can object to this explanation that Aristotle could not say that a regime in which normative measures are issued in the form of *psêphismata* is not a *politeia* (*Pol*. IV,1292a30–32). A regime in which one legislates only through *psêphismata* is not a *politeia*, because only the laws (in particular the law of the "first democracy") can ensure the internal balance necessary for the survival of every democracy. *Psêphismata* have by definition a particular content; which means they are often approved for and in the interest of an individual. In our case they are approved in the interest of the *dêmos*, which is comparable to a single individual, that is, to the tyrant (*Pol*. IV,1292a15 ff.). For this reason the *psêphismata*, even if they aim at the interest of a group, that is of the *dêmos*, are equated with the *epitagmata* of the tyrant, which are made exclusively in his interest. In one of his latest works, Vegetti had pointed out the paradox that, for Aristotle, all laws are unjust because all constitutions are deviant.[25] However, it can be observed that, in the *Politics*, the validity of a law is not measured on the basis of a cri-

23 Cf. M. H. Hansen, *The Athenian Democracy in the Age of Demosthenes*, Oxford 1991, ch. 7. I do not agree with the thesis that the *nomothetai* are the same members of the assembly who deliberate in a different capacity, as supported in particular by Canevaro (cf. lastly the bibliography in M. Canevaro, *Honorary Decrees and Nomoi ep'andri: on IG II³ 1 327; 355; 452*, in: L. Gagliardi – L. Pepe [eds.], *Dike. Essays on Greek Law in Honor of Alberto Maffi*, Milano 2019, pp. 71–86).

24 Here demagogues are not explicitly mentioned, but we could identify an advocate of the demagogues in the one who answers the objection (*Pol*. III,1281a16), since the situation described is exactly the same as in *Pol*. IV,4 and IV,6.

25 M. Vegetti, *I fondamenti del sapere politico. Aristotele contro Platone?*, in: *Teoria politica*, N. S., 8, 2018, pp. 23–34.

terion of absolute justice, but on the basis of its aptitude to preserve, if observed, the *politeia*. We must therefore conclude that, according to Aristotle, extreme democracy has not abrogated the distinction between *nomoi* and *psêphismata*, as we know it in 4th century Athens.[26] But the *psêphismata* that characterize extreme democracy are opposed both to formal rules, because they have a general content, and to substantive rules because they violate the fundamental law of the balance between the parties which ensures the survival of democratic regimes. Now, if it is true that the model of legislative production, which Aristotle thinks of when criticizing extreme democracy, is Athens in the 4th century, one could resolve the contradiction noted above, taking into account the fact that the competence to initiate the legislative procedure is in any case left to the assembly, even if it is the *nomothetai,* and not the assembly, that passes the new laws.[27] If we place ourselves in this perspective and reason in the terms in which Aristotle sets up his critique, we could ask ourselves why the demagogues could not make Aristotle's critique ineffective by having their general measures approved in the form of a law instead of a *psêphisma*. Given that they control moods and orient opinions and the will of the assembly (*Pol*. IV,1292a27), it would not be difficult for demagogues, respecting the rules of the Attic *nomothesia* of the 4th century, to obtain the repeal of laws that are contrary to their aims, and to have approved in the form of a *nomos* those general measures, which, according to Aristotle, they (illegally) approve in the form of a *psêphisma*. In this way they would easily escape, at least from a formal point of view, the philosopher's criticism, since Aristotle himself acknowledges that democratic laws are by definition in favor of the *dêmos* (*Pol*. III,1282b10–11). According to the logic of a purely theoretical constitutional bricolage an objection of this kind seems to me insurmountable: it is not clear why demagogues do not approve their measures in the form of *nomos* instead of *psêphisma*. An explanation must therefore be sought not in the logic of the system of classification of constitutions built by Aristotle, but on the historical level. And history, because of

26 The fact that the oppressive measures taken by the majority against the minority are called *nomoi* in *Pol*. III,1280b21, is to be explained by the fact that in this passage of Book III the discourse is valid for any type of regime: *Pol*. III,1281a17–19 reasons in fact in terms of pure majority/minority dialectic, which also applies in oligarchic regimes, where presumably there is no hierarchy between norms. In *Pol*. IV,4, instead, the model of legislative production in democracy is, as we noted, the Athenian model of the 4th century, based on the distinction between *nomos* and *psêphisma*. But this does not exclude the possibility that even in extreme democracy laws are passed precisely in order to limit the excessive power of the majority: cf. *Pol*. VI,1319b37–1320a4, which applies above all to extreme regimes, both democratic and oligarchic.

27 M. H. Hansen, *The Athenian Democracy in the Age of Demosthenes*, chap. 7; M. Canevaro, *Athenian Constitutionalism: nomothesia and the graphe nomon me epitedeion theinai*, in: G. Thür – U. Yiftach – R. Zelnick-Abramovitz (eds.), *Symposion 2017*, Wien 2018, pp. 65–98.

the very way in which, as we have seen, Aristotle carries out his criticism of extreme democracy, can only be the history of Athens.

As is well known, it is much debated whether the entire description of democratic regimes in *Pol.* IV,4, IV,6 and VI,4 is to be related to the historical reality of Athens.[28] The prevailing opinion does not exclude the possibility that Aristotle keeps the Athenian experience in mind, even if we cannot speak of a direct reference.[29] In my opinion, the tendency to resort to *psêphismata* as a tool to legislate in Athens is attested by unequivocal sources. First of all, a mention must be made of the trial of the Arginusae (Xen. *Hell.* 1,7), to which many commentators of *Politics* have considered that Aristotle alludes without explicitly mentioning it.[30] At the time of the Arginusae trial the 4th century *nomothesia* procedure was not yet in force, but to judge the *stratêgoi* through a summary and collective trial, it would have been necessary, in any case, to preliminarily repeal the law which provided for an individual trial. By choosing this way, however, the accusers would have diluted the rhetorical effect that allowed them to obtain the immediate condemnation of the defendants by the assembly. We have already mentioned that, according to Aristotle, under the influence of demagogues, the people become a monarch, almost a collective but unitary subject, easy to persuade as a whole to approve a measure with immediate effect (*Pol.* 1292a11–13), just as the tyrant is persuaded by the flatterers without any particular formality being necessary.[31] In the 4th century, with the introduction of the *nomothesia* procedure, the distinction between *psêphismata* and *nomoi* was institutionalised, so that the former were subordinated to the latter. But this didn't prevent attempts to pass the typical contents of a *nomos* through *psêphismata*. In particular, Demosthenes has given us a number of valuable references to the risk of the abusive approval of *psêphismata* of general

28 For a summary of current arguments cf. E. Schütrumpf – H. J. Gehrke (eds.), *Aristoteles, Politik Buch IV–VI*, Excurs 2, p. 298–305; more recently L. Bertelli, *Aristotele democratico?*, in: *Teoria politica*, N. S., 8, 2018, pp. 96–97.

29 For a good synthesis see L. Bertelli, *Democrazia e metabolé. Rapporti tra l'Athenaion Politeia e la teoria politica di Aristotele*, in: G. Maddoli (ed.), *L'Athenaion Politeia di Aristotele 1891–1991. Per un bilancio di cento anni di studi*, Napoli 1994, p. 86: the constitutional forms of *Pol.* IV–VI "sono ideal-tipi modellati sulla combinazione di molti fattori empirici". Cf. also F. Pezzoli in: L. Bertelli – M. Moggi (eds.), *Aristotele, La politica, Libro IV*, Roma 2014, pp. 205 ff.

30 Cf. e.g. A. Lintott, *Aristotle and Democracy*, in: *Classical Quarterly*, 42, 1992, p. 120; most recently F. Pezzoli in: L. Bertelli – M. Moggi (eds.), *Aristotele, La politica, Libro IV*, Roma 2014, p. 213.

31 The comparison with tyranny (*Pol.* IV,1292a15 ff.), however, must be considered a rhetorical exaggeration, and does not intend to designate a real change of constitution, not even in the intention of the demagogues (which, moreover, Aristotle never names or locates in a precise place and time). On the other hand, no classification of constitutions contemplates a collective tyranny. The allusion to the Homeric πολυκοιρανίη (*Pol.* IV,1292a13–14) must therefore be considered a joke.

content contrary to an existing law.[32] We can recall here Demosthenes, *Or.* 20,92 (*Contra Lept.*) ("*nomoi* no longer differ from *psêphismata*"); *Or.* 22,48–49 (*Contra Androt.*) (tax laws are emended by decree); *Or.* 23,86–87 (*Contra Aristocr.*) (attempt to make a *psêphisma kyrioteron* of a *nomos*); *Or.* 24,29–30 (*Contra Timocr.*) (where we find the same words as in *Or.* 23 cit. above: rendering a *psêphisma kyriôteron* of a *nomos*). These are certainly statements that are functional to the favorable outcome of the trial; but it must be taken into account that a *psêphisma* that was not attacked in court remained in force even if it should have been issued as a *nomos*. And evidently it was not such a rare or sporadic phenomenon if the author of *Ath. pol.* 41,2 writes that the people (*dêmos*), after the democratic restoration of 403 B. C., became master (*kyrios*) of everything, and everything was regulated (*dioikeitai*, as in *Pol.* IV,1292a35–36) by *psêphismata* and the courts. This last statement has been considered unreliable;[33] in particular, it was pointed out that it does not take into account the fact that the *psêphismata* could be invalidated by *graphê paranomon*.[34] But *Ath. pol.* 41,2 must be considered, as we said, a political judgment,[35] not the trace of a legislative reform measure; and one should not underestimate the fact that *Ath. pol.* doesn't ignore the existence of the *graphê paranomon* (*Ath. pol.* 56,2), while the *Politics* ignores it. Certainly the extreme democracy of the *Politics* accentuates for didactic purposes the potentially negative characteristics inherent in the democratic

32 Cf. for a synthetic reference P. J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia*, Oxford 1993, p. 329.

33 E. Schütrumpf – H. J. Gehrke (eds.), *Aristoteles, Politik Buch IV–VI*, p. 303, taking up a remark by Aalders, maintain that deciding everything by means of *psêphismata* "besagt nicht, dass man die Gesetze nicht beobachtet": it seems to me, however, that this interpretation does not take into account the context in which Aristotle places his statement, since in *Pol.* IV,1292a15–16 we read that the *dêmos* does not want to be commanded by the law. More inclined to believe that the type of democracy that Aristotle had in mind to build his model was the Athenian one, is F. Pezzoli in: L. Bertelli – M. Moggi (eds.), *Aristotele, La politica, Libro IV*, p. 210, although he argues that Aristotle ignores "la distinzione gerarchica" between *nomos* and *psêphisma*. This would be demonstrated by the same passages of Demosthenes that we have instead cited in the opposite direction, i.e. as an indication that the attempt to legislate in the form of *psêphisma* was quite a widespread practice in Athens during the 4th century. More recently L. Bertelli, *Aristotele democratico?*, p. 97 n. 72, argues that *Ath. pol.* 41,2 is not a "prova" of conformity to the real situation in Athens, but a "derivato" from his theory of democracy in the *Politics*. In my opinion it is exactly the opposite. The criticism of the use of approving *psêphismata* of general content in the extreme democracy is inspired by the historical judgment on the Athenian legislative policy that we read in *Ath. pol.* 41,2: to the *dêmos* made *kyrios apantôn* in *Ath. pol.* 41,2 corresponds the *dêmos pantôn kyrios* in *Pol.* IV,1292a26–27.

34 Thus already B. Haussoullier (ed.), *Constitution d'Athènes*, Paris 1922, p. XXV ff.

35 We are unable to say how peculiar to Aristotle this view was. A. Lintott, *Aristotle and Democracy*, believes in a strong influence of Athenian history on the constitutional theory of democracy expounded in the *Politics*. J. Bleicken, *Die athenische Demokratie*, Paderborn – München – Wien – Zürich 1994 (in particular pp. 305–306 and 343–344) believes that in Athens the social and political conflicts were not so pronounced.

constitution.[36] It is striking, however, that the *graphê* does not even among the corrections that Aristotle suggests to improve democratic regimes (*Pol*. IV,1298b11 ff.). I suppose that in a regime in which the polarization between rich and poor, and the consequent irremediable conflict, become the key to interpreting the entire social, political and juridical structure, there can be no room for mechanisms to control the legitimacy of deliberations, such as the *graphê paranomon*. Therefore, the remedies suggested by Aristotle tend to prevent the approval of vexatious measures against the minority, rather than to create annulment procedures that would prove ineffective. However, it is interesting to note that Aristotle also considers it necessary to issue laws, both written and unwritten (*Pol*. VI,1319b1–4, 1319b37–1320a4, 6–9). Such laws are therefore given a higher status than the *psêphismata*, although it is not specified how this superiority will be ensured: this confirms that in the Aristotelian conception of extreme democracy the *nomoi* have not been abolished. As for unwritten laws, as far as democracy is concerned, they can probably be identified with those principles contained in the law of equality which, as we have seen, characterizes the "first democracy". What Aristotle intends to stigmatize by criticizing extreme democracy is therefore not a change of constitution, but only an anomalous praxis that finds illuminating parallels in the Athenian historical experience.

3. Adjudication and public officials in the extreme democracy

We have seen so far that the negative judgement towards extreme democracy in *Pol*. IV,4 is centred on the attribution to the *psêphismata* of the function that should be left to the *nomoi*: a deviation, both formal and substantial, that allows the *dêmos* to easily violate the fundamental *nomos* that forbids the predominance of the poor over the rich. At least if we consider the text of *Pol*. IV,1294a4 ff., in defining the characteristics of extreme democracy Aristotle does not seem to attribute to the judicial abuse of the rich, again by demagogues, a role of importance equal to that of legislating through *psêphismata*. Yet there are other passages from which it appears that the judicial policy conducted by demagogues is considered by Aristotle as an equally serious and evident violation of the constitutional order of the *prôtê dêmokratia* (e.g. *Pol*. VI,1320a4 ff.). In fact, the violation of the *nomos* of the equality between rich and poor does not derive only from assembly decisions, but also (and one would say above all) from convictions that are the consequence of judicial actions (mainly public actions) brought primar-

36 This point is rightly emphasized by F. Pezzoli in: L. Bertelli – M. Moggi (eds.), *Aristotele, La politica, Libro IV*, p. 211.

ily by the demagogues themselves (*Pol*. VI,1320a5). It is true that the judges, unlike the assembly participants, in an extreme democracy are drawn by lot; therefore, juries could also include members of the wealthy class. However, Aristotle does not seem to doubt that in this type of democracy the court, like the assembly, is also dominated by the *dêmos* led by demagogues; but, as we said, he does not put control over the courts alongside the prevalence of *psêphismata* as a characteristic of extreme democracy. Perhaps, if we want to look for a reason for this lack of theoretical emphasis, we have to take into account the fact that *Ath. pol.*'s exposition is historical, while in *Politics* the theoretical and prescriptive dimensions assume a dominant role. The replacement of *nomoi* with *psêphismata* in the extreme democracy violates a constitutional principle, that, as we know, in the Athens of the 4th century would have exposed the violators to prosecution. On the contrary, since sentences cannot be appealed, it is not possible to distinguish sentences which comply with the law from those which do not. Therefore, sentences issued in hatred of the rich violate the fundamental "law of non-predominance of the rich over the poor", but cannot be formally declared contrary to law. If the ideal legislator wants to influence the outcome of trials, he must use indirect remedies: either modify the method of recruitment to ensure the participation of judges from the wealthy class (*Pol*. IV,1300b35 ff.), or severely punish public accusers for having proposed frivolous prosecutions (*Pol*. VI,1320a11–13), or allocate the assets confiscated from the rich into the treasury of the gods (*Pol*. VI,1320a5). It can therefore be assumed that the judicial side of the predominance over the rich is also contained implicitly in Aristotle's repeated statement that the *dêmos* (or *plêthos*) becomes *kyrios tôn nomôn* (*Pol*. V,1305a32, 1310a4) or *tês politeias* (*Pol*. IV,1293a9–10).[37] Then we can perhaps better understand, to return to *Pol*. IV,1292a32, why Aristotle says that there is no *politeia* where laws do not govern. If an essential component (*Pol*. III,1283a17–19) of the population, i.e. the rich, are no longer protected by the law of equality, which condemns the predominance over the rich through decrees approved by the poor in the assembly and through vexatious judicial sentences, the foundation of what Rousseau would call the social contract is destroyed, and the way is opened to the dissolution of the political community.

We have so far seen the Aristotelian criticism of extreme democracy with regard to the assembly and the courts. The third *morion* of the government structure, the public officials, has remained in the background so far. As is well known, Aristotle suggests that democratic regimes entrust the

37 I do not therefore share Schütrumpf and Gehrke's underestimation of the judicial dimension (E. Schütrumpf – H. J. Gehrke [eds.], *Aristoteles, Politik Buch IV–VI*, p. 295).

public offices to members of both classes (*Pol*. V,1309a1; VI,1318b25 ff.), or even that they request a census, however minimal, from the candidates (*Pol*. IV,1291b39). Indeed, the last requirement seems to be present also in the extreme democracy, if we have to take literally the premise "everything is as in the previous forms" (*Pol*. IV,1292a4–5). This seems to be confirmed by the fact that demagogues and public officials are not necessarily the same people, as we can infer from *Pol*. V,1308a22 ff. However, a brief passage in the discussion of extreme democracy in *Pol*. IV,4 reveals the tension that can be created between demagogues and public officials who are not aligned, already because of their origin, on the positions of the tyrannical *dêmos*. I refer to *Pol*. IV,1292a28–30, of which I quote here the translation of Aubonnet:[38] "En outre, ceux qui portent des accusations contre les magistrats disent que c'est au peuple à décider; celui-ci accepte volontiers cette invitation, et, de la sorte, c'est pour les magistrats la ruine de toute autorité."[39] Presumably the demagogues who accuse the public officials (perhaps at the end of their term of office), although they also have the control of the court, trust the assembly more, perhaps because the judge's vote, because it is secret, is less easy to control.[40] The effect that Aristotle attributes to this type of accusations (which do not necessarily result in a conviction) remains to be considered: *katalyontai pasai archai*. Schütrumpf and Gehrke[41] (followed by Pezzoli and Curnis)[42] argue that, according to Aristotle, the public offices are abolished and replaced by the assembly. In my opinion such a radical interpretation is not convincing. One cannot see, for example, how the assembly could command an army instead of the *stratêgoi*.[43]

38 J. Aubonnet, *Aristote, Politique l. III–IV*.

39 In my opinion, Schütrumpf and Gehrke's (*Aristoteles, Politik Buch IV–VI*) translation of this passage is not correct: "Ausserdem fordern diejenigen, die (den Einfluss der) politischen Ämter kritisieren, dass der Demos die Entscheidungen fällen müssen, und dieser nimmt diese Aufforderung gerne an; so kommt es denn dazu, dass alle Ämter beseitigt werden" (the Guagliumi translation in L. Bertelli – M. Moggi [eds.], *Aristotele, La politica, Libro IV*, is clearly influenced by the translation of the German scholars mentioned above: "… quelli che criticano i magistrati in carica sostengono che è il popolo a dover deliberare…"). The participle *enkalountes* usually refers to those who brings a legal action; therefore, the verb *krinein*, referring to the assembly, must be understood in the sense of adjudication. For this reason, I'm not convinced that the correction *proklêsis*, instead of *prosklêsis* attested by more than one codex, is to be approved.

40 The commentators on the *Politics* see here again, probably rightly, an allusion to the aforementioned Arginusae trial: cf. E. Schütrumpf – H. J. Gehrke (eds.), *Aristoteles, Politik Buch IV–VI*, p. 301, and F. Pezzoli in: L. Bertelli – M. Moggi (eds.), *Aristotele, La politica, Libro IV*, p. 213.

41 E. Schütrumpf – H. J. Gehrke (eds.), *Aristoteles, Politik Buch IV–VI*, p. 292.

42 F. Pezzoli in: L. Bertelli – M. Moggi (eds.), *Aristotele, La politica, Libro IV*, p. 213.

43 What Aristotle writes in in *Pol*. IV,1292a7–9 may sound misleading, but it does not mean that demagogues take the place of the public officials.

Likewise, the interpretation of *Pol.* IV,1292a33–34[44] by Schütrumpf and Gehrke is far from convincing,[45] when they write: "ein Aspekt der Kritik an Volksbeschlüssen war, dass Entscheidungen, die den Ämtern zustehen, von der Volksversammlung wahrgenommen wurden". In my opinion, here Aristotle, reasoning as an expert in Athenian constitutional law, means that the public officials must decide the concrete case on the basis of general provisions of law, not on the basis of *psêphismata*, whose function is also to regulate specific concrete cases. We can therefore conclude that *Pol.* IV,1292a28–30 must be interpreted in the sense that demagogues provoke a redefinition of the spheres of competence of the public officials on one hand, and of the assembly, the council (*Pol.* IV,1299b38) and the courts on the other. By accepting this conclusion, it is confirmed that we are not dealing with a real *metabolê* of the democratic constitution, in the sense that we do not pass from democracy to another type of constitution (as happened in the Platonic *Politeia* in the transition from democracy to tyranny: *Resp.* 562a ff.). It is within the democratic form that the distorted interpretation of genuine democratic principles (freedom and equality) by the demagogues actually causes a *metabolê* from the *patria* to the *neotatê dêmokratia* (*Pol.* V,1305a28).

The analysis we have conducted in the preceding pages allows a conclusive reflection on Aristotle's attitude towards democracy. As we have seen, the main problem of every democratic regime is that arithmetic equality means that the majority, composed by definition of the poor, tends to pursue its own interest at the expense of the minority of the rich. Control over legislation, adjudication and competences of the public officials converge toward this goal. Against this total subordination of the institutions to the interests of the majority, Aristotle suggests a remedy based on a normative conception of equality. It is neither strictly democratic arithmetical equality nor oligarchic equality based on census. Rather, it is an equality that must inspire every provision and every decision by purifying them of the ideological conditioning deriving from the fact of having its author in one of the two irreconcilable and irreducible groups (*Pol.* IV,1290a10–11 with IV,1291b7 and IV,1296b1). We are therefore faced with an optimistic investment in the ability to obey a fundamental law that imposes self-control and self-limitation on human beings.[46] However, in proposing this solution of the basic aporia of democratic regimes, it is clear that Aristotle does not have excessive il-

44 τῶν δὲ καθ᾽ ἕκαστα τὰς ἀρχάς κατὰ τὴν πολιτείαν κρίνειν.

45 E. Schütrumpf – H. J. Gehrke (eds.), *Aristoteles, Politik Buch IV–VI*, p. 296.

46 C. A. Bates Jr., *Law and the Rule of Law and Its Place Relative to Politeia in Aristotle's Politics*, in: L. Huppes-Cluysenaer – N. M. M. S. Coelho (eds.), *Aristotle and The Philosophy of Law: Theory, Practice and Justice*, Dordrecht 2013, p. 71, writes: "Hence law is a form of self-restraining guideline which allows those who lack authority in the given community to restrain those who do

lusions.[47] Best of all is that the space for political participation should be reduced to a minimum, and that citizens should keep as far away as possible from it by dedicating themselves to their private affairs. If this proves impossible, as pervasive as possible a system of checks and balances should be adopted,[48] so that any temptation to prevail over the adversaries is harnessed. I refer to the huge repertoire of institutional instruments described in *Pol.* IV,14–16, where an explicit piece of advice to democratic regimes concerns precisely how to rebalance the participation in the assembly of the rich and the poor (*Pol.* IV,14,1298b13 ff.). *Ultima ratio*: to make everyone aware that, by pushing to excess the attitude which seeks predominance, just when we believe we are tasting the triumph, we are rushing into the self-destruction of the political structure. We could basically consider that the sanction of the "Grundgesetz" of the *prôtê dêmokratia*.

rule and hold authority". But without the introduction of special institutional mechanisms, the minority will not be able to enforce the laws against the excessive power of the majority.

47 Only the *politeia* in the proper sense (*Pol.* III,1279a37; IV,1296b35 ff.) constitutes an acceptable solution, not only thanks to the balanced mix between democratic and oligarchic institutions, but above all because it is the constitutional expression of the *mesoi* community. On the double "anatomy of the city" see recently M. Canevaro – A. Esu, *Extreme Democracy and Mixed Constitution in Theory and Practice. Nomophylakia and Fourth-Century Nomothesia in the Aristotelian Athenaion Politeia*, in: C. Bearzot – M. Canevaro – T. Gargiulo – E. Poddighe (eds.) *Athenaion Politeiai tra storia, politica e sociologia: Aristotele e Pseudo-Senofonte*, Milano 2018, pp. 105–146.

48 Cf. A. Maffi, *Legittimazione del potere, autorità della legge*, in: F. de Luise (ed.), *Legittimazione del potere, autorità della legge: un dibattito antico* (*Collana Studi e Ricerche*, 10), Trento 2016, in particular pp. 131 ff.

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