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DEMOCRACY ANCIENT AND MODERN: DIVIDED POWER ♦

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

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Pars destruens

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

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

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

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

[3] Largely overlapping with the American McCarthyism.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Pars construens: divided power

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

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

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

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

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

Divided power, mixed government and bicameralism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[45] The Council of the 500.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[65] If he was convicted by the court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Or ARIST. *Ath.* 41. 2:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Common elements between the two forms of divided power are:

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

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

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

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

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

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

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

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

Differences:

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

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

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

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

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

[82] Normally, a constitutional obligation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[91] Where there is a rigid constitution.

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

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

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

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

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

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

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

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

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

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

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

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

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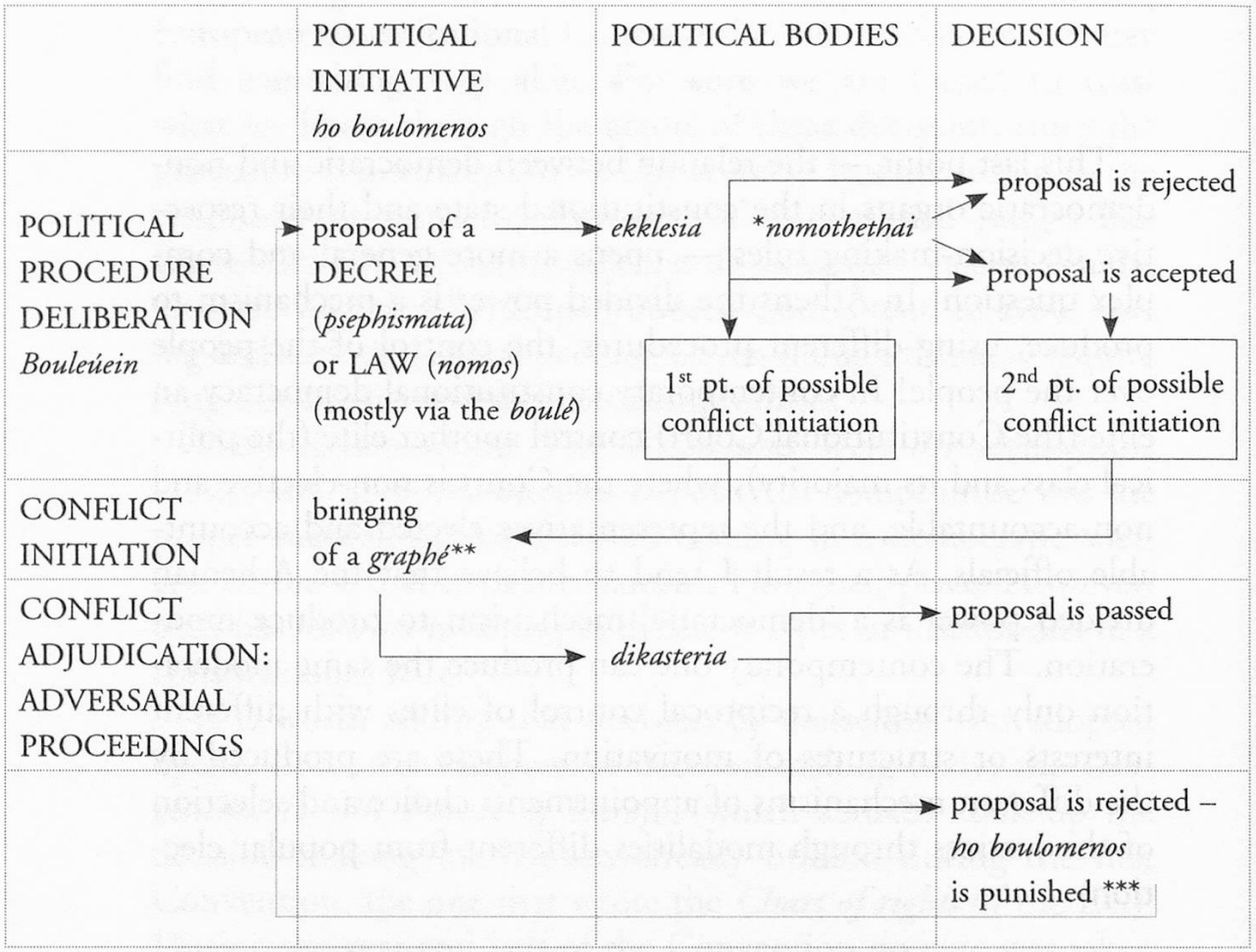
This last point — the relation between democratic and non-democratic organs in the constitutional state and their respective decision-making rules — opens a more general and complex question. In Athens the divided power is a mechanism to produce, using different procedures, the control of the people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

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

FIG. 1



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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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