Etica & Politica / Ethics & Politics, IX, 2007, 1, pp. 5-9

Guest Editor's Preface
Nomos despotes: *Law and Legal Procedures in Ancient Greek Society*

Michele Faraguna
Università di Trieste
Dipartimento di Scienze dell'Antichità
faraguna@units.it

1. Greek society was characterised by a constant tension towards the definition of concrete rules governing community life and, at the theoretical level, by relentless reflection and dialogue on the nature of politics, i.e. the experience of associated life within the framework of the *polis*. Not surprisingly, awareness of the central role of law was therefore intensely felt almost from the times of the emergence of the *polis* itself. At the beginning of the VI century B.C., for instance, Solon the Athenian, to whom Kurt A. Raaflaub in a recent essay assigned the «discovery of politics», claimed merit for his action as a reformer by proudly stressing that he had «written laws (*thesmous*) for the low and the noble (*tôi kakôi te k'agathôi*) (fr. 30 Gentili-Prato, ll. 18-20). And, in a similar way, in a well-known passage of Herodotus' *Histories* – a dialogue between the Spartan exile Demaratus and the Persian Great King Xerxes (8,103-104) –, the «rule of law», *nomos despotes* (hence the title of this issue) became the symbol of the freedom of the Greeks (and their identity and *Weltanschauung*), as opposed to the «slavery» of the Persians – the King's *douloi* – subject to his overwhelming authority and orders.

The tradition of modern scholarly work on ancient Greek law can be traced back to the early 19th century, while the appearance of the first comprehensive handbooks covering specific areas of the field goes back to the last decade of that century. The study of ancient Greek law, however, acquired an autonomous status breaking the ties with the models and paradigms of Roman law and jurisprudence, to which it had long been ancillary, only when the first «International Symposion of Greek and Hellenistic Law» was organized at Rheda, Germany, in 1971. Since then an increasing number of scholars have found in the *Symposia*, now organized every two years by the «Gesellschaft für griechische and hellenistische Rechtsgeschichte», and in the journal *Dike*, their «official» loci to further work in the field and encourage discussion and intellectual exchange. Over the years discussion has become more and more interdisciplinary in character and the scope

of the questions traditionally looked into by legal historians, historians, philologists, epigraphers and papyrologists has now been broadened by new methodologies and new approaches to the sources from an anthropological and sociological perspective.

Such developments, based on the assumption that «law and legal process ... were embedded in society», with some exceptions, have been dominant among Anglo-American scholars since the beginning of the '90s and, notwithstanding the broad variety of approaches represented by its contributors, the sociological perspective is especially prominent in the *Cambridge Companion to Ancient Greek Law* recently edited by Michael Gagarin and David Cohen (2005). In his *Introduction* to the volume, David Cohen stresses that, while continental tradition «emphasizes detailed technical exposition of legal norms, and more particularly, procedure», Anglo-American methodologies «have largely evolved in the direction of looking at legal practices in its social and cultural historical context, informed by comparative evidence drawn from social history, anthropology, and the practices of other historical and contemporary legal systems». At the core of the problem, thus lies the different evaluation of the role of institutional structures and formal norms in defining the shape of ancient Greek law: while for the continental tradition the technical legal aspects remain of primary importance, according to the «Anglo-American school» they are secondary to the political, social and economic context to the point that, in Classical Athens, legal «practices are shaped by participatory democracy and the rhetorical and political culture of which they were a part».

This issue of *Etica & Politica / Ethics & Politics* aims at offering an overview of current scholarly work in this community of Greek legal historians, with particular reference to some of the themes where discussion has recently been most lively and intense. Although reflecting a variety of methodological positions, the essays to a large extent are the product of scholars working within the «continental» tradition. Altogether, they show that this tradition is lively, methodologically sound and well capable of contributing to the progress of the discipline. They also show that an institutional approach can provide new insights and solutions for problems, and whole set of problems, even in areas of inquiry where scholarship has long been unquestioned.

2. Considering the essays more in detail, Alberto Maffi in the opening article draws a balance on the state of the art of the discipline, concentrating on studies carried out in the past century, on the problem of the sources and on current trends and future prospects. He suggests that important advances are to be ob-

tained from systematic work on the inscriptions. These were to be found virtually in all *poleis* throughout the Greek world and can contribute to broadening the scope of modern investigation beyond the Athenian case. Entire areas of research, such as Hellenistic law (with the obvious exception of Ptolemaic Egypt), remain moreover almost totally unexplored.

Gerhard Thür, building on his extensive work on the development of legal institutions in ancient Greece, looks at the question of the unity of Greek law, which, following an influential essay by Moses I. Finley, has often been denied. He presents a strong case for an affirmative answer. Unity, he argues, is found both in terms of the general conceptions («Grundvorstellungen») that underlay the legal systems of each individual *polis*, and in an engaging overarching theory on the development of judicial procedures from decisive oaths, and resort to divine sanction, used to settle disputes in Homer through the Gortyn code to the popular courts of democratic Athens. His contention that, even in the democratic *polis*, legal process was characterised by the presence of both «rational» and «irrational» elements and that the act of *dikazein* by a magistrate originally, and for a long time, entailed imposing an oath to one of the litigants (therefore not implying «judgement») and referred to a settlement by *Beweisurteil*, will no doubt stimulate more controversy and discussion.

Edward M. Harris, on his part, deals with the text of the oath annually sworn in by Athenian judges and advances new arguments to counter the currently widespread (but rather extreme) view that trials at Athens were above all rhetorical contests to assert one's status within the community and to prove that the Athenians believed in the ideal of the «rule of law» and attempted to put this ideal into practice in their legal procedures. He convincingly shows that the clause enabling judges to vote according to their best judgement (*gnômê dikaiotatê*) only applied to those cases where written statutes gave no clear guidance and thus provided no justification to ignore the law. Harris observes that this clause is only invoked twice in extant speeches, which indicates that it was rarely considered applicable. In the same way, arguments based on personal political achievements tended to be advanced only in trials on public charges (*graphai*) when, in the second phase of court proceedings, following conviction the judges had to assess the penalty.

Orality and literacy, and the way they interacted in Greek society and culture, has been one of the most hotly-debated questions engaging scholarship on classical Antiquity over the last few decades. Michele Faraguna analyses the effects of the introduction of writing in an oral society with reference to law, and the «codification» of law, and to judicial procedures. With regard to the latter, the essay shows that, contrary to what is usually assumed, the use of written documents in the preliminary phases of legal procedures heavily conditioned the «rhetorical

phase» which took place in front of the judges in court. Thus, an «institutional approach» leads to a revision of long well-established views.

Law and rhetoric in the Athenian democracy, and the nature of the Athenian trial, are also at the core of Cinzia's Bearzot thought-provoking contribution. Again, the analysis, starting from a thorough analysis of the acute problems connected with the use of the orators as a historical source, leads her to conclude that «rhetoric, the lack of specialised competence and social competition probably affected the workings of the Athenian judicial system; at the same time, however, they do not seem to have prevented it from guaranteeing Athenian citizens fair judgements both in terms of substance and procedure».

Moving from institutional structure to society, Stefano Ferrucci devotes his essay to the relationship between *oikos* and *polis*, «family and State», or private and public. The author stresses, especially on the basis of Aristotle's *Politics*, that the individual entered into a kind of dual relationship with the *polis*, both politically, as a «citizen» (*politês*), and, socially, as the head of an *oikos*. Although what happened at domestic level remained outside the scope of politics, nonetheless the *polis* took it as a matter of public interest to enact laws with a view to preserving the *oikos* and effecting its survival through the generations. The relationship between *oikos* and *polis* is interestingly examined in a dynamic perspective. As the economy became more complex, wealth not only consisted of land and houses but was increasingly converted into movable assets to avoid liturgies and «fiscal» pressure from the *polis*. Ferrucci wonders why Athens never tried to regulate these phenomena by law and his argument is that this could happen because legal norms and moral obligations effectively interacted as instruments of social control.

As a part of this same problem area, Robert W. Wallace deals with freedom of the individual in Athenian democracy. In his stimulating contribution, he advances convincing arguments in support of his contention that Athenian citizens enjoyed both positive and negative freedoms. With respect to positive freedoms, he concentrates on «freedom of speech» and argues that *isêgoria* is to be intended as a possibility, and a «right», to speak in front of the assembly but not as an equal right to be listened to and not silenced: «while every citizen could exercise the freedom to speak, the community's power to shut down stupid or windy speakers was democratic freedom. The denial of that freedom amounted to oligarchy or tyranny». As for negative freedoms, though conceding that the Greeks never developed the notion of «inalienable rights», he holds the view that in a society where the State machinery was not «heavy» the laws were effective enough to safeguard the freedom of the individual. In actual fact, in democratic Athens the possibility to «live as one pleases» was assured to a remarkable degree except for those cases when such freedom conflicted with the interests of the community,

which always came first. The trial of Socrates, of which Wallace offers a political interpretation, is paradigmatic in this respect.

The central role of law in Greek society is also revealed by the fact that, from the 5th century B.C., the nature and essence of *nomos* became the object of philosophical speculation. Jean-Marie Bertrand retrieves a «fragment» of the ongoing debate among intellectuals at Athens through a comparison of the concept of positive law in Antiphon and in Plato's *Laws*. He believes that Plato deliberately intended to refute some of Antiphon's views, as they can be reconstructed from the surviving parts of his works. Whereas Antiphon regarded positive law as an obstacle impeding the free exercise of one's natural capabilities and could only find a solution in hiding away from the community, in Plato's *Laws* there is no conflict between *nomos* and *phusis* as the laws must be in accordance with the divine project. Man is bound to law not by some sort of «social contract» but directly on an individual basis. To some extent, moreover, *nomos* is not necessary, for the political community is above all meant to find coherence and harmony by means of a number of collective rituals that make it impossible to withdraw from society.

With Bertrand's claim that «[l]es propositions de l'utopie platonicienne font, en fait, une large part à des moyens non juridiques pour assurer la paix sociale et l'harmonie politique» we are thus brought back to the key question of the relationship between law and society and to the polarity between doctrinal and sociological approaches, which seems to be the main cause for dissent among scholars of ancient Greek law. It is my belief that there is in fact no justification for such polarity and that, as the majority of the essays of this collection attempt to do,[1] advances in scholarship can only be achieved through interaction, integration and mutual exchange of different ideas and expertise.

---

[1] For other attempts to bridge the divide between the two approaches see A. Maffi, *Hans Julius Wolff e gli studi di diritto greco a trent'anni dal I Symposion*, «Dike» 4 (2001), pp. 269-291; Id., *Gli studi di diritto greco oggi*, in Nomos. *Direito e sociedade na Antiguidade Clássica* (edd. D. Leão-L. Rossetti-M. do Céu Zambujo Fialho), Coimbra 2004, pp. 33-49; E.M. Harris, *Essays on Law, Society, and Politics*, Cambridge 2006, pp. XVII-XXXI. For more details see also A. Maffi's article in this collection.

*Photo on the cover: The Gortyn code (columns III-IV from a cast in Rome) from M. Guarducci, *Epigrafia greca, II*, Roma, 1969.