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## SPARTAN JUSTICE? OR «THE STATE OF THE EPHORS»? \*

### 1. JUSTICE

Justice: we all want justice – either in the very broad sense of receiving what we consider to be appropriate recognition of our social status and our personal merits, or in the narrower sense of receiving proper treatment as a citizen under the laws of our country. But what exactly is meant by «justice», both in theory and in practice, will vary very widely, from individual to individual (especially if the individual in question is a philosopher, especially a legal philosopher), and from society to society, depending also on time (historical epoch, historical conjuncture) as well as geographical place. One person's sense or conception of «justice» may thus seem to another person from another place or in another time to be the most unjust thing in the world <sup>1</sup>.

In ancient Greece, and for the purposes of this article that means especially Classical Greece, during the fifth and fourth centuries BC, justice was a burning issue: both in theory and in practice <sup>2</sup>. In theory,

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<sup>1</sup> Rawls 1971 is now a modern classic, but it is both very American and very much a product of its time. More recently, see, *e.g.*, Hampshire 1999.

<sup>2</sup> See Havelock 1978, for a general, evolutionary overview; but note the severe critique by H. Lloyd-Jones, «JHS» 102 (1982), pp. 258-259.

that is in properly philosophical theory, justice was precisely the subject of the most original if also the most controversial single work of ancient Greek political philosophy – Plato’s *Republic*, whose title was *Peri Dikaiousunes*<sup>3</sup>. *Dikaiousune*, besides, was itself a very interesting word. It had been invented in order to enable Greeks to draw a distinction (such as we also might want to draw today) between legal justice (what happens in the courts, *dike*) and «true» justice, that which people really deserve to receive, both as individuals and as members of a society. Plato’s own definition of *dikaiousune* was, typically for him, eccentric. But he was intervening in a general Greek philosophical debate that we can see being famously played out already in the pages of Thucydides, particularly in the so-called *Melian Dialogue* (5.84-116): was the Athenians’ harsh treatment of the Melians in 416/415 a case of one city giving another city its just deserts, or was it, on the contrary, a truly monstrous piece of injustice? The argument still rages today<sup>4</sup>.

However, it was not only at the highest theoretical level, among more or less professional philosophers, that justice was a subject for debate and disagreement in Classical Greece. In everyday practice, too, the Greeks held very different views on how legal justice ought best to be defined and administered. One reason for this is the purely technical one, that in the Classical period «the Greeks» were not a nation, let alone a nation-state, but a collection of about 1500 different, often radically self-differentiated political entities (*poleis* or *ethne*)<sup>5</sup>. Another more substantive reason was that these 1500 self-governing political entities chose to govern themselves by different forms of «constitution» (*politeia*). In the third quarter of the fourth century, as Aristotle pointed out in his *Politics* (1296a22-24), most Greek *poleis* were governed by one or other form of either oligarchy (rule of the Few rich) or democracy (People-power, rule of the Many, or the Majority of poor citizens, *politai*). And Greek oligarchs and Greek democrats, as Aristotle also made abundantly clear, often held radically opposed views on the proper way to make and to administer the laws (*nomoi*) of their *polis*.

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<sup>3</sup> For a recent introduction, commentary, and attempted recuperation of the *Republic*, see Sayers 1999.

<sup>4</sup> See, e.g., Cagnazzi 1983; Cartledge 1986.

<sup>5</sup> Hansen 1998.

Before I consider specifically Spartan justice, therefore, I want first to say a little about two other issues: (i) the nature of politics and the political in the (all, any) Greek *poleis* of the fifth and fourth centuries BC; and (ii) the nature of legal justice in contemporary, democratic Athens. The peculiarity, the specific character, of Spartan justice both in theory and in practice should then emerge more clearly by way of comparison and contrast.

## 2. POLITICS AND THE POLITICAL IN CLASSICAL GREECE <sup>6</sup>

Greek cities were typically small, face-to-face, self-governing political communities (*koinoniat*) – communities in the strong sense of that word, holding the power of decision-making in common, or more particularly, as they put it, placing it «in the middle» (*en mesoi, es meson*). Regularly, this power was construed as a prize to be contested; as Jacob Burckhardt long ago emphasised, these were quintessentially «agonal» communities <sup>7</sup>. Classical Greek citizens – legitimate adult males only, with at least a father who was a citizen before them; though Athens insisted that the mother too had to be of citizen status <sup>8</sup> – valued the public sphere above the private sphere; indeed, unlike us, they did not oppose a private sphere to the public sphere of the State, because they did not have an impersonal bureaucratic State to contend with in the first place <sup>9</sup>. Lacking this form of State, they therefore did not need to formulate, let alone try to implement, any «separation of powers» doctrine – the separation of the legislative, the executive, and the judicial powers of government – that is in modern states a vital guarantee of individual citizens' rights and freedoms. Indeed, quite consistently, the Greeks did not develop the notion of individual rights to any significant extent <sup>10</sup>. Instead, the citizens (or «the People») all in principle ruled collectively in all three ways: they legislated, they executed decisions, and they adminis-

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<sup>6</sup> Cartledge 1996; Idem 2000b.

<sup>7</sup> Burckhardt 1998 (originally 1898-1902).

<sup>8</sup> Boegehold 1994.

<sup>9</sup> Berent 1994; Idem 1998.

<sup>10</sup> Separation of powers: Shapiro 1999. No Greek «rights»: Schofield 1999.

tered legal justice. On the other hand, they did not all do so in exactly the same ways by any means.

### 3. JUSTICE IN DEMOCRATIC ATHENS <sup>11</sup>

The Classical Greek *polis* about whose legal justice system we know by far the most is democratic Athens, and the Athenian *demos* (People) took the very robust view that the *demos* must rule in the courts no less totally and no less firmly than it ruled (itself) in the Assembly. The popular juries at Athens were indeed known collectively as the *Heliaia*, a word based on the Greek for «gathering» or «assembly»; or, alternatively, as the *dikasteria* – so called because they were staffed by *dikastai*, jurors who were also (as we would put it) judges, since their decisions were final, and inappellable. Because the Athenians took the role of jurisdiction and litigation so seriously, as a means of both promoting and safeguarding their democracy, they acquired a reputation for being litigious, that is, unusually devoted to going to law <sup>12</sup>. But what did the Athenian *dikastai* themselves think they were doing, apart from «ruling» democratically? What sort of justice did they think they were delivering?

To put it mildly, it was not always, let alone necessarily, what you or I might consider justice today, in the modern sense of equity <sup>13</sup>. Many cases heard in the Athenian democratic courts were, in our sense as well as theirs, «political». The classic example, probably, is the trial of Socrates in 399 <sup>14</sup>. He was accused of (i) impiety (*asebeia*), for introducing new divinities that the *polis* had not recognized, and not recognizing the divinities that the city did recognize and (ii) corrupting the youth of Athens. Impiety was a political crime against the gods who protected the *polis*; the alleged corruption of the youth was also a public, civic crime, since in Socrates's case the charge referred to his teaching of young men who had then turned out to

<sup>11</sup> Cartledge - Millett - Todd 1990; Carey 1997; Todd 1993; Cartledge 1999a, pp. 15-21.

<sup>12</sup> Christ 1998; Johnstone 1999. The fictional *locus classicus* is the *Wasps* of Aristophanes (422 BC).

<sup>13</sup> Jones 1956; Todd - Millett 1990.

<sup>14</sup> Hansen 1995; Cartledge 1999a, pp. 15-21.

be traitors to the democracy (Alcibiades and Critias above all). However, contrary to modern Western ways of implementing our legal justice today, both under the common law tradition and under the civil law tradition, it did not matter most to the 501 Athenian *dikastai* on that jury in 399 BC whether or not Socrates in fact was guilty as charged. What did really matter was that their judgement of the case should be (as they saw it) of political benefit to the democratic *polis* of the Athenians. To quote the subtitle of a recent collection of essays (Foxhall - Lewis 1996), what counted were *Justifications not Justice*.

In other words, strict equity mattered less to them than broadly political advantage. Since Athens was a democracy, and Socrates – or at any rate some of his pupils – was far from being straightforwardly a democrat, convicting Socrates was in the eyes of the majority of the jury in the best interests of Athens in 399; especially indeed in the circumstances of 399, when painful memories of the brutal oligarchic junta and civil war of 404-403 had by no means yet faded<sup>15</sup>. Was democratic Athens, then, unique in taking this strongly political attitude to jurisdiction and legal justice? Far from it, as we shall see. For once again, I shall argue, Sparta should be seen as an extreme example of a general Greek phenomenon, not as some unique exception<sup>16</sup>.

#### 4. SPARTAN JUSTICE?<sup>17</sup>

I must begin of course by issuing a standard warning: our knowledge of «how it actually was» in Sparta is very defective and controversial. This is mainly for two reasons. First, Sparta was itself a secretive society (Thuc. 5.68.2), not keen to let all outsiders know how exactly it organised its political, and therefore legal, system. Second, our evidence for Sparta comes not directly from Spartans but from non-Spartan outsiders, who usually were prejudiced – either pro-

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<sup>15</sup> Cartledge 1999b.

<sup>16</sup> Hodkinson 1999, esp. pp. xiv-xv in my view goes too far in trying to «normalize» Sparta.

<sup>17</sup> Bonner - Smith 1942; MacDowell 1986, esp. pp. 123-150 («The Administration of Justice»); Link 1994, with my review in «CR» 45 (1995), pp. 188-189.

Sparta (in the case of oligarchic writers such as Xenophon of Athens) or anti-Sparta (as in the case of democratic or pseudo-democratic propagandists such as Lycurgus or Isocrates)<sup>18</sup>. One giant exception to that rule is, we hope, Aristotle: he and his pupils included Sparta naturally enough among the 158 *Constitutions* (*Politeiai*) drawn up at his Lyceum school, and although the Aristotelian *Politeia of the Spartans* does not survive as such, we do have a number of «fragments» (nos 532-545 ed. V. Rose), and some of the results of this research are incorporated in Aristotle's great work of analysis and synthesis, the *Politics* (esp. Book II)<sup>19</sup>.

On the other hand, it is not due either to Spartan secretiveness or to ancient prejudice that we lack for Sparta the principal source of our evidence for Athenian jurisdiction and litigation, namely published versions of lawcourt speeches. The reason for that lack is quite simply that in Sparta such speeches were not either written or published, thanks to the radically different nature of the Spartan legal system. Sparta, that is to say, entirely lacked the popular judiciary system of democratic Athens<sup>20</sup>. Instead, as we learn from Xenophon and Aristotle, above all, Spartan legal justice – like the Spartan educational system, like Spartan foreign policy relations, and like a very great deal else – was administered by the annual board of five officials known as the Ephors<sup>21</sup>.

I shall begin my account of Spartan justice therefore by saying a little about the origins, recruitment, personnel and functions of the Ephorate. I shall then discuss two particularly revealing historical examples of the Ephors in action performing their judicial functions. The questions that I shall try to answer are twofold. First, did Sparta, so far as the administration of justice was concerned, satisfy Victor Ehrenberg's characterization, in terms of its true centre of political power, as «the state of the Ephors»? Second, was the Spartans' theory and practice of jurisdiction based merely or chiefly on considera-

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<sup>18</sup> «Spartan Mirage»: Ollier 1933-1943; cf. Tigerstedt 1965-1978; Rawson 1969; Lanzilotta 1984. For Xenophon see also below, n. 48.

<sup>19</sup> David 1982/1983; Herrmann-Otto 1998.

<sup>20</sup> Arist. *Pol.* 1275b8-11, with de Ste. Croix 1972, pp. 349-350.

<sup>21</sup> On all questions to do with the Ephors, see now Richer 1998, a monument of scholarship, with my review, forthcoming in «Gnomon»; on their legal prerogatives, see Link 1994, pp. 64-71; and esp. Richer 1998, ch. 24.

tions of *Realpolitik*, or did they operate (also) with some sort of notion of equity?

## 5. ORIGINS OF THE EPHORATE <sup>22</sup>

Like almost everything else to do with the institutional history of «Early» Sparta (before, say, *c.* 550 BC), the origins of the Ephorate are lost in mist and mystery. The name «Ephors» means in Greek «Overseers», and that is apt especially for their rôle in overseeing the state educational system (*agoge*) that was compulsory for all Spartan boys between the ages of 7 and 18 – compulsory in the sense that successful passage through it was a condition of the boys attaining full adult Spartan citizenship by being elected eventually to a *sysstition* (communal dining-group) at the age of 20 <sup>23</sup>. But that educational system was not certainly in existence before the sixth century. Yet the office of the Ephors was thought to have been created either right at the very beginning of the Spartan *polis*, by the semi-legendary lawgiver Lykourgos, or at any rate as early as the reign of King Theopompos, who was reliably credited with defeating the Messenians in what came to be known as the First Messenian War (either late eighth century or early seventh century BC). So perhaps the Ephors originally had had mainly religious functions (later they watched the skies for omens and looked after Sparta's religious/civil calendar) <sup>24</sup>. Or perhaps, rather, they had started with a mixture of religious and political functions, which somehow or other they had to exercise in relation to those of the two (hereditary) kings.

In the document known as the Great Rhetra (a constitutional law of some sort, authorized by the Delphic oracle, not certainly written down, and of uncertain date – most scholars incline to put it *c.* 650 BC) <sup>25</sup>,

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<sup>22</sup> Hdt. 1.65 among others ascribes the origin of the Ephorate to Lykourgos – see Richer 1998, ch. 2. Aristotle, *Pol.* 1313a23-33, however, ascribes it to King Theopompos – Richer 1998, ch. 5. For the possible rôle played by the pamphlet of King Pausanias in this change of ascription, see *ibid.*, ch. 3. For Chilon, see n. 26.

<sup>23</sup> For the *agoge*, see Cartledge 2001, ch. 7. For admission to the messes (*sysstia*, *syskania*), see Singor 1999.

<sup>24</sup> Richer 1998, Pt II, chs 11-16.

<sup>25</sup> Ruzé 1997, pp. 157-172; Cartledge 2001, ch. 3.

the (two) Spartan kings feature prominently, under the title *archagetai*. So also do the Spartan Gerousia or Senate of twenty-eight elected members, aged over 60, chosen to hold office for life, and the People (*damos*), the Spartan citizen body of hoplite warriors. The Ephors themselves, however, are not explicitly mentioned therein. Yet at latest by the time of the ephor Chilon (so famous outside Sparta that he was sometimes included in lists of the «Seven Sages» of all Greece), in the middle of the sixth century, the Ephors had become important enough both to direct Sparta's relations with the outside world and even to order kings around, as well as – presumably – to run the *agoge* and conduct certain important religious business. It would not be too bold to suggest that the annual injunction of the Ephors to all Spartans on entering office to «shave their moustaches and obey the laws» originated no later than Chilon's day <sup>26</sup>.

By the time of Xenophon (first half of the fourth century) and Aristotle (third quarter of the fourth century), the process had gone much further. The Ephorate had risen so far in political prominence that some contemporary observers (Xenophon, Plato, Aristotle) could even liken its powers to those of a tyrant (*tyrannos*), that is, a non-responsible absolute ruler or autocratic despot <sup>27</sup>. It is this situation of apparent *de facto* authority that most justifies Victor Ehrenberg's phrase «The State of the Ephors». Not the least of the reasons for seeing the Ephors' power in that way was the nature and extent of their strictly legal prerogatives.

Classical Sparta, famously, or notoriously, did not have written laws; if the Great Rhetra was an exception to this rule, it was probably the only exception. It did not therefore have to distinguish, judicially or jurisprudentially, as the democratic Athenians came to do, between laws as such (*nomoi*, permanent enactments of a general nature) and decrees (*psephismata*, decisions of the Assembly that need not have general application or permanent validity) <sup>28</sup>. This lack of written laws or decrees of course gave great scope for interpretation to those officials who were empowered to administer the rules –

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<sup>26</sup> Chilon: Poralla - Bradford 1985, *s.v.*; Richer 1998, esp. pp. 117-134. Prohibition on moustaches: Arist. fr. 545 Rose, *ap.* Plut. *Cleom.* 9.3; cf. Richer 1998, pp. 251-255; and on all matters to do with Spartan facial hair, David 1992 (omitted by Richer).

<sup>27</sup> Richer 1998, pp. 496-498 discusses the main texts.

<sup>28</sup> Hansen 1999, esp. pp. 161-177.



which is why Greek democrats such as the Athenians insisted on having written laws in the first place, and then on having them displayed publicly for the benefit of all who wished to read and apply them <sup>29</sup>. The Ephors, moreover, not only were not bound by any written rules but also, like an Athenian jury, were not bound to observe any legally binding precedent. On top of that, in certain circumstances they had the power to bypass due legal process altogether and impose fines «on the spot». To the Athenians, who took a less obsequious attitude towards officials and who were permitted to question the validity of their own laws, these powers would surely have looked quasi-tyrannical indeed.

But how were Ephors chosen? What sort of Spartans would become Ephors? Did the Ephorate somehow represent the Spartan *damos* <sup>30</sup>? We cannot say for sure what precisely the electoral process was, but we do know that Ephors were elected, not chosen by the lot, as were Athenian *dikastai*. Since they were chosen «from the *damos*» – that is, any Spartan citizen in good standing was eligible to become Ephor – it is possible that they were also chosen by the People, in a popular election. We know too that the Ephorate was a board that was chosen annually; no one could be Ephor for more than one year at a time. It is not known for sure but it is almost certain that no one could be Ephor more than once in all – the office was not iterative <sup>31</sup>. Given Spartan demographics, and especially the known steep drop in numbers of available Spartan citizens between about 480 and 370, pretty well all Spartans are likely to have had to become Ephor at one time or another, at least in the fourth century and later <sup>32</sup>. That will help to explain Aristotle's negative criticism of the fact that the Ephors were often poor men and therefore easily bribed <sup>33</sup>. Normally in Classical Greece candidates for elective offices which carried large executive power would be drawn only from the top few per cent. of the citizenry, from the «rich few» (*plousioi, oligoi*), as the Greeks called them. The fact that in Sparta the social

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<sup>29</sup> Harvey 1966; Thomas 1996; Hedrick 1999.

<sup>30</sup> The controversial issues are fully explored in the *agon* between Rahe 1980 and Rhodes 1981; the latter seems to me to emerge the clear winner.

<sup>31</sup> Westlake 1976.

<sup>32</sup> Hodkinson 2000.

<sup>33</sup> Arist. *Pol.* 1270b8-11; with Noethlichs 1987.

catchment was much wider means that the office is likely to have been seen as far more representative and «popular».

It looks therefore as though we ought to distinguish between the enormous powers of the office, and the eminence (or rather the lack of eminence) of the office-holders. Not all Ephors, of course, were humble or poor men; the law of averages meant that men of aristocratic birth or of great wealth would also from time to time be elected Ephors, and such men were surely more likely than ordinary Spartans both to want to, and to be in a position to, do something extraordinary during their (single) term of office. Three of these exceptional Ephors can be cited by name (though we know the names of only 67 in all, out of a possible total of almost 3000 from the mid-eighth century to the late third century): Brasidas, Athens' most formidable opponent during the Ten Years' War (431-421); Antalkidas, leading diplomat and admiral of the early 380s; and Nausikleidas, one of the Board of Ephors of 403/402<sup>34</sup>. The last of these three will return to «star» in one of my two historical illustrations, the first of King Pausanias's two trials, in 403.

But before we consider that in detail, we must add in a final ingredient of the Spartan legal system. This is no minor ingredient, either, but the Spartan supreme court, as it were, since it had the power to try even kings of Sparta. That court was the Gerousia, acting in conjunction with – at latest by 403 – the board of five Ephors<sup>35</sup>. The relationship, and conjunction, of the Gerousia and the Ephors in this way confirm the rise in status and power of the Ephorate as a body. The most visible juridical expression of this was the exchange of oaths that (so we learn from Xenophon, *Lac. Pol.* 15) took place once every month (presumably on the 7th day, sacred to Apollo, at the time of the monthly meeting of the Assembly) between the kings (jointly) and the Ephorate (collectively): the Ephors swore that they would maintain the kings undisturbed on their thrones – but only on condition that they, the kings, continued, in the opinion of the (majority of the) Ephors, to observe the laws of Sparta. Clearly, the onus was on the king(s) to obey the laws – with

<sup>34</sup> Poralla - Bradford 1985 has all the relevant prosopographical data. IG V 1,1564 from Delos (used as the cover illustration for Richer 1998) is exceptional in listing a complete board, datable somewhere between 403 and 398 BC: Richer 1998, p. 262 n. 11.

<sup>35</sup> de Ste. Croix 1972, pp. 131-137; followed by Cartledge 1987, esp. ch. 8.

the Ephors standing for the *polis* in the representative capacity of *sopbronisteres* or public regulators. So we move on to consider, in specific historical detail, the justice of the Ephors.

## 6. THE JUSTICE OF THE EPHORS

### 6.1. *The Trials of King Pausanias, 403 and 395*

I begin with the trial – or rather, as we shall see, the trials – of King Pausanias. Spartan kings were not fullblooded monarchs with unfettered powers at home and abroad<sup>36</sup>. But although their formal powers were limited, more so at home than abroad on campaign, their charisma was institutionalised, and a king with a forceful personality and political skill might become a figure of real political power. The trial of a king should not therefore be regarded by us as a «normal» event but on the contrary as a sign of some deeper crisis, either a power-struggle between Spartan potentates and/or their «factions», or a struggle between opposed policies, either domestic or foreign<sup>37</sup>.

In the case of King Pausanias, the crisis was composed of both of these elements at once. We happen to be unusually well informed: not only by Xenophon, an insider-outsider source, in his *Hellenica*, but also, uniquely, by Pausanias's namesake, Pausanias the Periegete, the Asia Minor Greek travel-writer of the second century AD. Who Pausanias's source was, we do not know; an attractive suggestion is that it was ultimately the so-called *Oxyrhynchus Historian*, who was used later by the fourth-century universal historian Ephorus<sup>38</sup>. Whoever his source was, Pausanias was unusually well-informed, because he actually tells us (3.5.2) the breakdown of the voting: fifteen members of the Gerousia, including the other (and rival) king, Agis II, voted «Guilty», fourteen Gerontes and all five Ephors (including the aforementioned Nausikleidas) voted «Not Guilty», so that King

<sup>36</sup> Full discussion of the kings' powers and prerogatives: Cartledge 2001, ch. 5.

<sup>37</sup> Trials of kings: David 1985. «Factions»: Cartledge 1987, pp. 139-140. Relations between kingship and Ephorate: Richer 1998, ch. 23.

<sup>38</sup> Recent bibliography on the *Oxyrhynchus Historian*: Cartledge 2000a.

Pausanias was acquitted by a majority and therefore allowed to keep his throne.

What was the charge against Pausanias? Since our source for that is Xenophon, we cannot be sure that we have the wording exactly right. But the thrust of the accusation is not in doubt: Pausanias was charged with allowing the Athenian *demos* to recover its power at Athens following the overthrow of the junta of 30 Tyrants, which had been imposed by Sparta in 404 and had ruled Athens in the Spartan interest, with the aid of a Spartan garrison, from 404 to 403. To put it more neutrally, Pausanias had sanctioned the restoration of democracy at Athens in 403, under very strict terms – for the observance of which Sparta was to be the guarantor<sup>39</sup>. It was not therefore an entirely liberal settlement, by any means. But clearly it was too liberal for some Spartans, and for one Spartan in particular: King Agis. It must have been Agis who instigated the prosecution of Pausanias, with a view to not only having his rival co-king deposed but also reinstating Sparta's actively interventionist policy towards Athens<sup>40</sup>. The Gerousia, therefore, when acting with the Ephors as a supreme court of justice in such a case as this, was not merely a judicial instrument but also an instrument of political power, a key means of promoting or altering a line of political policy.

For such a major political trial to be held, however, the Ephors had first to decide through a preliminary investigation (*anakripsis*) that such a trial ought to take place<sup>41</sup>. Only if they decided that there was a case to answer would the trial actually happen. However, as the voting record preserved by the other Pausanias reveals, the fact that the Ephors (or at least a majority of them) deemed a trial appropriate did not necessarily mean that they also considered the defendant to be guilty as charged or meriting conviction. In this particular instance, at any rate, the Ephors seem to have felt that they could not resist Agis's demand for a trial but yet all of them were prepared to stand up to Agis and be counted as voting to acquit Pausanias. What may have influenced their votes?

One possibility is that they or a majority of them were «Pausanias's men», that is, in some sense members of his «faction», who owed

<sup>39</sup> Cartledge 1987, pp. 134-135, in an earlier discussion of Pausanias's 403 trial.

<sup>40</sup> *Ibid.*, pp. 248-253.

<sup>41</sup> Richer 1998, pp. 432-441.

their past or present political careers to his patronage, or who thought they might need to depend on his support in the future. That inference seems, however, unlikely, if only because Pausanias's own chequered career suggests he was by no means the most skilful operator of the undoubted Spartan patronage system that was so brilliantly manipulated by clever kings such as Agesilaos (below)<sup>42</sup>. A more likely explanation therefore is that the Ephors agreed with Pausanias's interpretation of what was in Sparta's best foreign policy interests in 403 (and perhaps more generally). That is, they supported as non-interventionist a policy as was compatible with maintaining Sparta's grip on Athens's former empire and with preventing Thebes from stepping into the vacuum left in central Greece by Athens's defeat in the Peloponnesian War. The fact that almost twenty years later, in 385, Pausanias (by then ex-King) reappears playing a very similar rôle in relation to the democratic leaders of Mantinea to the one he had played in relation to the democratic leaders of Athens in 403 suggests that for him the settlement with Athens of 403 was not the outcome of mere expediency but rather the implementation of a carefully considered and principled foreign policy<sup>43</sup>.

In 403, then, he was acquitted. Eight years later, however, Pausanias's enemies, personal ones no doubt as well as political ones, did finally nail him – and, in part, on the very same charge as in 403. For in 395 he was brought to trial again, on two counts: first, and immediately, for having failed to support adequately the army under the command of Lysander in Boiotia (he was killed at Haliartos); and, second, retrospectively, for having been too «soft» in dealing with the Athenian democrats of 403. The former charge gives us the key clue as to who initiated the prosecution; it will have been King Agesilaus II, Lysander's former beloved (*eromenos*) and Agis's younger half-brother, who throughout his long reign (c. 400-360) shared Lysander's and Agis's traditionalist hard-line, anti-democratic approach to foreign relations, especially against Thebes (cf. generally Thuc. 1.19)<sup>44</sup>. Judicially and jurisprudentially speaking, however, it is the latter charge

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<sup>42</sup> Cartledge 1987, ch. 9.

<sup>43</sup> *Ibid.*, p. 260.

<sup>44</sup> For Agesilaos's hardline foreign policy, see *ibid.*, esp. ch. 14; see also below, n. 47. For his pederastic relationship with Lysander, *ibid.*, p. 29; and for the politics of institutionalized pederasty at Sparta in general, see Idem 2001, ch. 8.

that is the crucially important one. For it reveals that in Sparta there existed the legal practice that we in England call «double jeopardy» (and have excluded from the common law since the twelfth century): *i.e.*, a man could be tried twice for exactly the same alleged offence.

The justification for such a practice might, in theory, have been based on a perfectly good principle of equity. For example, new evidence might have come to light that cast serious doubt on the correctness of the first judgement. But the Spartan legal system, as we learn for sure from the trials of Pausanias, and more especially from that of Sphodrias (below), was no more based on such an equity principle than was that of Athens. What counted in reaching a legal decision at Sparta, especially in such a high-profile political trial, was what was considered to be the good, or the best interests, of the state. In Sparta, indeed, that was the overriding principle of every aspect of life, private and individual no less than public and collective. So the operative question as a general rule always was: who – or which body – was to decide what was «good» or «best» for Sparta? The practical Spartan answer was, to put it crudely, the man or men who commanded the larger share of support on the key judicial decision-making body or bodies, in this case the Supreme Court consisting of Gerousia *plus* Ephors. In 403, thanks to the unanimity of the Ephors, Pausanias had won the verdict, if only barely. In 395, however, thanks chiefly to Agesilaos, he lost – though by how wide a margin, we do not know<sup>45</sup>. Was that «just»? By Spartan standards, of course it was. By the legal standard of equity, equally clearly it was not.

## 6.2. *The Trial of Sphodrias, 378*<sup>46</sup>

My other illustration of Spartan justice in action, the trial of Sphodrias in 378, also, and not just coincidentally, concerns Agesilaus II. Our main source for Sphodrias's trial is Xenophon, writing a general history of Greece between 411 and 362 (*Hell.* 5.4.23-33; cf. Diod. 15.29;

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<sup>45</sup> Agesilaos was in Asia at the time of Pausanias's second trial; his vote had therefore to be registered by his proxy on the Gerousia, according to the system reported, slightly misleadingly, by Hdt. 6.57.5 (criticized by Thuc. 1.20.3); cf. Cartledge 1987, p. 109.

<sup>46</sup> *Ibid.*, pp. 136-138, 156-159; Ruzé 1997, p. 131.

Plut. *Ages.* 24-26). Unfortunately, he was not as careful and accurate a historian as we should have liked; so the fact that he does not mention the Ephors' rôle should probably not be taken to mean that they in fact played no rôle. On the other hand, the rôle they played was presumably not like that of 403, but like that of 395: that is, they did not by themselves make the difference between the condemnation and – as actually happened – the acquittal of Sphodrias. What did make the difference was Agesilaos. By 378, he had been king for some twenty-two years. It follows that most of the members of the Gerousia (minimum age 60) who were due to try Sphodrias had been elected after he had come to the throne. So, Agesilaos had had the chance either to promote their candidature or at least to ingratiate himself with them after their election. This control over the Gerousia's votes was to win the day.

The Sphodrias in question was a very high-ranking Spartan officer, recently entrusted with the command of a Boiotian city under close Spartan supervision (the situation in Boiotia in early 378 being something like that at Athens in 404/403). But he had committed a grave breach of international «law», by invading Athens's territory in peacetime, possibly under the orders of the other Spartan king, Kleombrotos. At any rate, that breach ran flagrantly counter to Agesilaos's own policy of velvet-glove diplomacy towards Athens – for him, it was Thebes rather than Athens which was private as well as public enemy number one. It would therefore have been assumed by most Spartans that Agesilaos would vote for Sphodrias's condemnation, if indeed he had not actually brought the prosecution (Xenophon typically fails to tell us who did), on a capital charge of high treason. And since Agesilaos was then the single most powerful individual in Sparta, capable of easily carrying with him a majority of the Gerousia (and presumably Ephors too), it would also have been assumed by most Spartans as a matter of course that Sphodrias would be found guilty. Certainly, that was what was assumed by Sphodrias's friends in Sparta, some of them very high-ranking, including members of the Gerousia. Certainly, it was what was assumed by Sphodrias – so much so, indeed, that he did not even bother to return to Sparta to stand trial and thereby in effect condemned himself.

And yet, in the event, Agesilaos – and therefore Agesilaos's men on the court, since Agesilaos was a pastmaster of patronage manipulation – voted to acquit Sphodrias. Why? There are subtle, almost

machiavellian reasons and motives that can be plausibly proposed. For example, Sphodrias once acquitted would now owe nothing less than his life to Agesilaos and might therefore be expected no longer to support his likely original patron, Agesilaos's rival king Kleombrotos, too vigorously against him<sup>47</sup>. However, according to Xenophon (who as a client and «friend» had the ear of the king), Agesilaos's publicly declared reason for voting to acquit Sphodrias was that «Sparta needed such soldiers as Sphodrias». In other words, Sparta's interests in terms of *Realpolitik*, as interpreted by Agesilaos, outweighed any other possible considerations, including even – or especially – strict justice.

Xenophon, as conventionally interpreted, normally presented a very positive image of Sparta. That view of Xenophon's general attitude to Sparta has recently been challenged<sup>48</sup>. But even if he was generally more critical than has usually been supposed, there is no questioning his unswerving dedication to his friend and patron Agesilaos, after his death no less than during his lifetime. Yet even the loyal Xenophon felt obliged to record (*Hell.* 5.4.24) that the acquittal of Sphodrias in 378 was considered by many to be «the most unjust decision ever reached by a Spartan court!» As indeed it was. In any other Greek city at almost any time Sphodrias's failure to appear at his trial would have been enough by itself to condemn him. However, just as important and revealing as the injustice itself, I believe, are the precise nature and source of the injustice, as I shall try to bring out in my conclusion.

## 7. DEMOCRATIC JUSTICE OR OLIGARCHIC JUSTICE?

For the trial of Sphodrias was also the most spectacular illustration of the fundamentally non-democratic nature of the justice system in Sparta. What decided the outcome of Sphodrias's trial was the opinion of just one man, Agesilaos. And in order for Agesilaos's opinion to prevail, he had to persuade, by fair means or foul, only another

<sup>47</sup> It was no coincidence that both Kleombrotos and Sphodrias perished on the battlefield of Leuktra, in 371, implementing Agesilaos's diehard anti-Theban policy.

<sup>48</sup> «Revisionist» views of Xenophon: Tuplin 1993; Humble 1999, esp. p. 346.



seventeen Spartans (Gerontes and/or Ephors) at the most. The Spartan *damos*, or citizen body as a whole, was not formally involved or consulted at all at any stage of the proceedings – though «public opinion» could have been determined (that is, both discovered and formed) through informal channels such as the common messes. For, unlike in democratic Athens, there was no popular judiciary in Sparta, and the Spartan Assembly, which was essentially a warrior assembly, was never, unlike the warrior assembly of Macedon, for example, either invited or inclined to play the rôle of a lawcourt. What light does this throw on the vexed contemporary problem of Sparta's correct constitutional classification <sup>49</sup>?

Aristotle (*Pol.* 1265b35–41) reports that constitutionally speaking Sparta was found to be a puzzle. Some elements of the political system were monarchic (or tyrannical), some seemed rather oligarchic, others (the common meals, the communal daily lifestyle) even democratic. So, Sparta was sometimes classified as one or other of these three – as a kingship, an oligarchy, or a democracy; sometimes, to save the phenomena, as a mixture of all three. We today can, and I think should, do better, and we can do so in Aristotle's own terms. I end therefore with Aristotle's definition of a citizen, a definition which he confessed applied more closely to the citizen of a democracy than of an oligarchy (*Pol.* 1275a22 ff.).

A citizen, he decided, was he who had an active share or participation in *krisis* and *arkhe*. *Krisis* means «judgement», and Aristotle made it clear that he understood it to mean especially legal judgement. *Arkhe* means «rule» or «office». Now all Spartan citizens, thanks to their eligibility for the Ephorate, «had a share in *arkhe*», indeed in one of the most important Spartan offices, and thus had access also to an active share in legal *krisis*. Nevertheless, the terms on which that *krisis* was exercised meant that the *damos* as such was formally excluded altogether from the legal process. In practice therefore it makes little or no sense to call Sparta a «democracy», even if one were to have in mind the most moderate of Aristotle's sub-species of democracy <sup>50</sup>. For in its original Classical Greek signification *demo-*

<sup>49</sup> For a full discussion, see Cartledge 1978 (= Idem 2001, ch. 4); Idem 1980 (= Idem 2001, ch. 3).

<sup>50</sup> Arist. *Pol.* 1316b29 ff. insisted on distinguishing between at least four different kinds or varieties of *demokratia*.

*kratia* meant the active exercise of *kratos* (power) by the *demos* (the People or citizen-body as a whole, acting collectively as such)<sup>51</sup>.

Nor, *pace* Ehrenberg, was Sparta a «state of the Ephors», in the sense that the Ephorate was the sole or even the most significant centre of all public political power. As I have tried to show, the Gerousia and the kings (who were members of the Gerousia *ex officio*) could be equally, if not more, important, not least in the sphere of justice. Instead, all of those three entities – kings, Gerousia, Ephorate – should in my judgement be regarded as forming part of the Spartan oligarchy, even if it was very much a *sui generis* oligarchy. The justice that it meted out was correspondingly oligarchic, that is, non- or rather anti-democratic. Spartan justice? No thanks!

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<sup>51</sup> Cartledge 1999a. For the devaluation in the meanings of *demokratia* over time, see de Ste. Croix 1981, pp. 321-326.

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