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# Extreme Democracy and Mixed Constitution in Theory and Practice

## *Nomophylakia* and Fourth-Century *Nomothesia* in the Aristotelian *Athenaion Politeia*

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**ABSTRACT** – This essay explores how Aristotle’s normative function of *nomophylakia* (guardianship of the laws), as described in the *Politics*, shapes the assessment of the constitutional stages of Athenian history in the Aristotelian *Athenaion Politeia*, and especially of the restored democracy after 403 B.C. It argues that the methodological baseline governing the Aristotelian account of Athenian constitutional history in the *Ath. Pol.* is the socio-economic «anatomy of the city» theorised in *Politics* IV chapter 3, pre-eminent over the institutional taxonomy of chapter 4. Thus, the socio-economic mixing of different «parts of the city» (the wealthy, the *mesoi* and the *demos*) represents the key measure for evaluating the adherence of a constitution to the principle of the sovereignty of the laws. As a result, within Aristotle’s framework, the function of *nomothesia* cannot be exercised by the same part of the city that deliberates in the assembly and appoints the magistrates. This theoretical framework explains the *Ath. Pol.*’s judgement of the eleventh *metabole* as an extreme democracy, and the puzzling absence of *nomothesia* in the account of the fourth-century institutions of Athens. It is the same part of the city, the *demos*, that controls every institutional function including the *nomothesia* procedure, which does not constitute an effective form of *nomophylakia*. The first part of this paper discusses the Aristotelian methodology in *Politics* IV and his two anatomies of the city (section 2). Building on this section, the chapter then analyses the Aristotelian assessment of the successive constitutional regimes in the first part of the *Ath. Pol.* with emphasis on their organisation of the *nomophylakia* (section 3). In section 4, it provides a concise account of the institutional architecture of *nomothesia* in fourth-century Athens. Finally, this essay explores the silence on *nomothesia* in the second part of the treatise and identifies the *nomothetai* with *demos* legislating in the Assembly (section 5).

**KEYWORDS** – Aristotle’s *Athenaion Politeia*; Aristotle’s political thought; Athenian democracy; constitutionalism; decrees; fourth-century; *graphe nomon me epitedeion theinai*; *graphe paranomon*; laws; *nomophylakia*; *nomothesia*; *politeia* – Aristotele, *Athenaion Politeia*; costituzionalismo; decreti; democrazia ateniese; *graphe nomon me epitedeion theinai*; *graphe paranomon*; leggi; *nomophylakia*; *nomothesia*; pensiero politico aristotelico; *politeia*; IV secolo.

## 1. INTRODUCTION

In *Politics* IV 14, 1298b 14-16, in the context of his survey of the institutional parts of the *politeia*, and more specifically of his discussion of the deliberative part, Aristotle mentions «the kind of democracy that is most particularly held to be a democracy nowadays (I mean the kind in which the people have authority over even the laws)» (transl. Reeve). This mention of extreme democracy (for which Aristotle here provides some institutional correctives) refers back to *Politics* IV 4, 1292a 4-38, where Aristotle discusses in more detail the most extreme form of democracy, in which all citizens participate in the *politeia* (as also in the previous, less extreme model), but the laws are no longer sovereign, the *plethos* is. This happens, Aristotle explains, because the decrees (*psephismata*) are sovereign, not the law – the *demos* runs everything at will through his *impromptu* enactments, with no regard for the existing laws<sup>1</sup>. Aristotle builds a parallelism between this constitutional form and tyranny, because in both forms supreme authority is in the hands of men, who govern through decrees, and whose power is unfettered – there are no checks to their will. Aristotle concludes his discussion by admitting to some agreement with those who claim that this kind of democracy is not in fact a *politeia* at all, because there can be no *politeia* where the laws are not sovereign – this statement, and the quick explanation provided here, are fully in line with Aristotle's conception of the laws and the *politeia* as forming a general and coherent whole with a definite character (*ethos*), a conception explored in this volume by Poddighe<sup>2</sup>. If everything is governed by decrees which do not have to conform to the general *ethos* of the *politeia*, as defined in the laws, it is clear that there can be no coherence, no unified character of the *polis*, and therefore there can be no *politeia*.

These two passages have a number of implications, and make, implicitly and explicitly, a number of points. One key point that they make is that laws are different from decrees, in that they are general, whereas decrees are particular<sup>3</sup>. They also make the point that in order for a democracy

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<sup>1</sup> See for this passage Pezzoli in Besso - Canevaro - Curnis - Pezzoli 2014, 209-213.

<sup>2</sup> See Poddighe in this volume. On the reciprocal relationship between laws and *politeia*, which are always aligned in a working constitution, see *Pol.* IV 1, 1289a 11-25; II 9, 1271a 13-14; III 12, 1282b 8-13; and also *EN* X 1181b 22-23; *Rhet.* I 8, 1365b 31 ff., with Pezzoli 2014a; Canevaro in Besso - Canevaro - Curnis - Pezzoli 2014, 283-284; Poddighe 2014, 55. On *Pol.* IV 4, 1292a 31-32 and the contention that where the laws are not sovereign there is no *politeia* see Poddighe 2014, 54-61.

<sup>3</sup> See in particular Hansen 1978 and 1979 for the workings of this distinction in fourth-century Athens, and Canevaro 2015 for their function within fourth-century *nomothesia*. As

(indeed for any regime) to be an actual *politeia*, the laws need to be sovereign over the governing bodies – over the governing «part of the *polis*»<sup>4</sup> – and the decisions of these bodies need to be constrained by the laws, and need to be coherent with the laws. These passages make apparent, then, that the main criterion for distinguishing a *politeia* from arbitrary despotism, which does not qualify as *politeia*, is the sovereignty of the laws. This point is made in book IV about democracy, but it has already been made at the end of book III (1287a 2, about sole rulership, monarchy): the absolute authority of one person over all citizens is unnatural, because the *polis* is constituted by similar individuals, and attributing different power and prerogatives (different levels of *time*) to similar individuals is unnatural<sup>5</sup>. Because of this, power and prerogatives need to be shared, and therefore the law needs to be sovereign (*archein*), because it is the law that performs the function of distributing power and prerogatives in an appropriate and orderly fashion<sup>6</sup>. Aristotle, therefore, concludes that even where it seems desirable to put power in the hands of specific individuals, their function (for a *politeia* to be one) cannot be to be sovereign over the *polis*, but rather to be the guardians of the laws (*νομοφύλακας*) and servants to the laws (*ὑπηρέτας τοῖς νόμοις*).

*νομοφύλακας*, as argued by Gehrke and, more recently and in detail, by Bearzot, is not used here to identify a specific magistracy – such a magistracy, we learn from other passages of the Aristotelian *corpus* and from other evidence, was particularly associated with aristocratic and oligarchic regimes<sup>7</sup>. The term is used here to isolate a key function, that of checking political and governmental decisions (whether executive and administrative orders by officials, or enactments of assemblies and councils) for their legality (or legitimacy, or constitutionality) – for their consistency with the laws, as general rules of a higher order. This is in fact what *nomophylakes* appear to be doing in the historical record, as shown comprehensively by Bearzot – they assess and occasionally block both orders by officials and enactments of assemblies and councils, as unlawful.

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shown by Arist. *EN* V 14, 1137b 13-29 and VI 8, 1141b 23-28 (cf. [Pl.] *Def.* 415b), Aristotle was well aware of this distinction, see Bertelli 1993, 77-80; Pezzoli in Besso - Canevaro - Curnis - Pezzoli 2014, 210, and *infra*, pp. 110-111.

<sup>4</sup> See *infra*, pp. 112-119 on the «parts» of the city and the anatomy of the city.

<sup>5</sup> See Accattino 2013, 231. On the concept of honour in ancient Greece see e.g. Cairns 2011, 29-33; Canevaro 2016a, 77-80.

<sup>6</sup> For a thoughtful account of the place of law in Aristotle's thought see now Bertelli forthcoming. See also Miller 2007.

<sup>7</sup> Gehrke 1978, 149-193; Bearzot 2007 and 2012. See Arist. *Pol.* 1298b 27-33, with Canevaro in Besso - Canevaro - Curnis - Pezzoli 2014, 313-316. Cf. Faraguna 2015 for the role of the *nomophylakes* in Plato's *Laws*.

These passages are telling examples – but only examples – of something that emerges clearly from the *Politics* and from other parts of the Aristotelian *corpus*: whether a city has magistrates called *nomophylakes* or not, in order for it to have a proper *politeia* it needs to secure the sovereignty of the laws by checking governmental action of any kind (including the action of the political assemblies of the *demos*) for its legality – the laws need to be guarded and defended. This conception, which stresses the need for political power to be limited and exercised coherently with established rules, has been correctly seen by many, notably Harris, Miller, and Canevaro, as akin to the modern ideal of the rule of law <sup>8</sup>.

It also shares key features with modern conceptions of constitutionalism, in particular because it conceives of the laws not as *ad hoc* rules but as a coherent whole which determines the character of the regime, and from which we can extract constitutional principles. And, in that, it is certainly not idiosyncratic. It is in fact perfectly consistent not only, as we have noted, with the function of magistrates called *nomophylakes* active in many oligarchic and aristocratic regimes, but also with Athenian fourth-century ideology and practice – the orators never tire of affirming the sovereignty of the laws as foundational of democracy itself, and of reminding the judges of their function of guardians of the laws and, through guarding the laws, of the *politeia* and of the very character of the Athenians <sup>9</sup>. We also know that the Athenians enforced in the fourth century a stark distinction between laws as general permanent rules and decrees as executive or administrative orders of the Assembly or the Council; they enforced a complex procedure for enacting new laws (*nomothesia*) whose aim was to secure the lawfulness (that is, the appropriateness within the context of the existing laws as a coherent whole) of new laws; and they had two public procedures for checking enactments of the *demos* (laws or decrees) for their «legality» (*graphē paranomon*) or «appropriateness» (*graphē nomon me epitedeion theinai*) <sup>10</sup>.

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<sup>8</sup> Harris 2006, 2013, 2016; Miller 2007, 79-110; Canevaro 2017.

<sup>9</sup> On Athenian constitutionalism see Canevaro 2015, and now particularly Canevaro 2018b. Cf. Canevaro 2016c for comparable arrangements outside Athens. For other discussions of whether we can identify a form of constitutionalism in Athens, see particularly: Wolff 1970; Hansen 1974; Sealey 1987, esp. 32-34; Yunis 1988; Sundahl 2000, 2003, 2009; Schwartzberg 2007; Lanni 2010; Pasquino 2010; Carugati - Calvert - Weingast 2016; Straumann 2016, 227-237.

<sup>10</sup> See below, and the classic articles of Hansen (1978, 1979) on the distinction between *nomoi* and *psephismata*; Canevaro 2013, 2015, 2016a, 2016b, 2018b on its enforcement.

Because of this similarity between Aristotle's normative priorities and Athenian ideology and practice, it is extremely puzzling that Aristotle's<sup>11</sup> judgement of fourth-century Athenian democracy – the eleventh Athenian regime – in the *Athenaion Politeia* is scathing and uncompromisingly pigeon-holes fourth century Athens as an extreme democracy in which the *demos* is sovereign over the laws – the kind of regime, we learn from *Politics* IV 4, 1292a 4-38, that hardly qualifies as a *politeia* at all. We read at *Arist. Ath. Pol.* 41, 2:

The Eleventh, that after the return from Phyle and Piraeus, from which it has persisted until that in force now, continually extending the competence of the masses: for the *demos* has made itself master of everything, and it administers everything through decrees and lawcourts, in which it is the *demos* which has the power. (Transl. Rhodes)

The verdict, to any reader alert to Aristotle's treatment in *Politics* IV, is clear: the people are sovereign over the laws, as they administer everything through decrees and the courts. The laws do not hold the position of prominence that they should – they are not sovereign, and they are not guarded. This is an extreme form of democracy, one which hardly qualifies as a *politeia* at all. But what about the *graphe paranomon* and the *graphe nomon me epitedeion theinai*, which performed precisely that function? And, most of all, what about *nomothesia*? This extremely important procedure is not mentioned at all in the *Ath. Pol.*, not even in the second part of the treatise, despite the attention the treatise pays (as we shall see) to the various instantiations of *nomophylakia* (understood as a function, rather than a magistracy) throughout the history of Athens. Scholars have indeed been puzzled by this – Bertelli provides, in an article published in 1993 and again in 2017, a survey of explanations proposed for Aristotle's silence (and, therefore, for his judgement of fourth-century Athenian democracy), with perceptive counterarguments to most of these explanations: we go from Haussoulier's and Bloch's proposal that *nomothesia* is not discussed in the *Ath. Pol.* because it was treated already in the *Nomoi* of Theophrastus, to Rhodes' proposal that *nomothesia* could not fit within the architecture – the compositional arrangement – of the *Ath. Pol.* (we refer

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<sup>11</sup> We use «Aristotle» throughout, for short, to indicate the author of the *Ath. Pol.*, although we agree that he could equally be a well-informed student of his. See the discussion in Rhodes 1981, 56-63; 2016, xv-xvi (cf. Bravo 1994 for an even more sceptical position about potential Aristotelian authorship). As it will become progressively clearer, we see however much more overlap between the theoretical presuppositions of the Aristotle, as expressed particularly in the *Politics*, and those of the author of the *Ath. Pol.* than Rhodes is willing to accept.

to Bertelli's treatment for a comprehensive answer to this explanation)<sup>12</sup>. Bertelli concludes his discussion with a nod to Sealey's statement that «[i]t is perhaps not surprising that in composing his treatise on the *Constitution of the Athenians* Aristotle overlooked the revision of the laws, carried out in 403-399, and the legislative procedure of *nomothesia* current in his own day. These features could not be accommodated within his framework for understanding the Athenian constitution»<sup>13</sup>.

Such a statement takes a particular (and definite) side within the debate on the contacts and influences between the *Ath. Pol.* and Aristotle's political theory, a debate which is thoroughly explored in Bertelli's chapter in this volume, and to which we can refer here quickly. It assumes, that is, that the theoretical framework of the *Politics* conditions (if it does not determine, as Day and Chambers proposed in their famous yet much criticized book of 1962) the account of Athenian democracy and of its evolution which we find in the *Ath. Pol.*, against the position (most prominently affirmed by Rhodes) that we find in the *Ath. Pol.* «remarkably few traces» of Aristotle's political theory as laid out in the *Politics*<sup>14</sup>. Bertelli shows in his chapter and in previous work that the *Ath. Pol.*, without being a mechanical exercise in applying Aristotle's theory of *metabolai* to the Athenian case (as Day and Chambers believed), is certainly intended as a case-study for those theories, which are tested against the Athenian case and «interact» with it<sup>15</sup>.

Yet, even once we accept this strong «interaction», Sealey's pronouncement remains troublesome. In what sense did Aristotle «overlook» *nomothesia*? After all, we do know for sure that it did not escape his notice – in book V of the *Nicomachean Ethics* Aristotle's stark distinction between *nomoi* and *psephismata*, repeated as a normative principle in the *Politics*,

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<sup>12</sup> Bertelli 1993, 53-98, republished in Bertelli 2017, 513-549. Cf. Mathieu - Hausoulrier 1922, XXV-XXVI; Bloch 1940, 369-370; Rhodes 1981, 32-35.

<sup>13</sup> Sealey 1987, 97.

<sup>14</sup> Rhodes 1981, 7-15; 2016, XIV; Day - Chambers 1962; Chambers 1993. For discussions of the relationship between Aristotle's political theory and the discussions of actual constitutions, particularly in the *Ath. Pol.*, see e.g. Blank 1984; Ingravalle 1989; Kearney 1992; Arrighetti 1993, 128; Murray 1993; Wallace 1993; Bertelli 1994; 2017, 551-577 (and in this volume); Bravo 1994; Ober 2005; Gehrke 2006; Ambaglio 2010; Poddighe 2014, 106-127. Poddighe in this volume discusses one of the few instances in the *Ath. Pol.* which, according to most scholars, displays the direct influence of Aristotle's theory.

<sup>15</sup> Bertelli 1994, 71-99, republished in Bertelli 2017, 551-576. See also Poddighe 2014, 106-127, with a position similar to Bertelli's in acknowledging the importance of theoretical considerations in the historical reconstruction of the *Ath. Pol.*, but less willing to see deliberate omissions and manipulation.

is clearly reminiscent of Athenian practice<sup>16</sup>, and at *Ath. Pol.* 59, 1 he cites accepting and presiding over cases of *graphe nomon me epitedeion theinai* as one of the duties of the *thesmothetai*, which shows that he was aware of a key step in the *nomothesia* procedure<sup>17</sup>. And in what sense could fourth-century *nomothesia* not be accommodated within Aristotle's framework?

In this chapter, we attempt to define within which normative (evaluative) framework the various stages of Athenian democracy are assessed in the *Ath. Pol.*, and in particular we highlight the centrality of *nomophylakia* (again, as a function, rather than a specific office) as one of the key elements for these assessments (in line with the normative centrality of the sovereignty of the laws and their guardianship in the constitutional taxonomies of the *Politics*). While Bertelli and much scholarship on the relationship between the *Ath. Pol.* and Aristotelian theory have concentrated on constitutional change, the *metabolai* – on the transitions and their workings – our treatment is complementary in that it focuses on the various successive constitutional arrangements in their (provisional) stability, on Aristotle's priorities in describing them, and on his criteria for assessing them. To anticipate our conclusions, we argue that the governing principle here is that of the priority of the socio-economic anatomy of the city of *Politics* IV chapter 3 over the functionalist and institutional one of chapter 4 – we discuss the two anatomies of the city found in *Politics* IV in section 2 of this chapter, showing that the socio-economic principle is indeed the central one in assessing a constitution. Because of this, we argue, the notion of socio-economic mixing (as an alternative to be pursued because of a lack of *mesotes*) is used by Aristotle as a normative ideal – the measure of the adherence of a regime to the criterion of the sovereignty of the law.

Within this framework, *nomophylakia* as an institutional arrangement that checks the adherence of executive and administrative acts with laws of a higher order can only exist (and work effectively) if it is underpinned by socio-economic mixing – the guardians of the laws, we show, cannot come from the same «part of the *polis*» (understood as the same socio-economic group) as the magistrates, the council or the assembly they are meant to control, otherwise no limit is actually set, because one «part of the *polis*», within Aristotle's framework, cannot constitute a check on itself. Because of this, for Aristotle, fourth-century Athenian *nomothesia* does not constitute a limit to the sovereignty of the *demos*, because it is the *demos* which is in charge of controlling itself in the courts, it is the *demos* that enacts laws and

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<sup>16</sup> Arist. *EN* V 14, 1137b 13-29; cf. *EN* VI 8, 1141b 23-28 and [Pl.] *Def.* 415b, with Bertelli 1993, 77-80, and Pezzoli in Besso - Canevaro - Curnis - Pezzoli 2014, 210.

<sup>17</sup> See *infra*, pp. 127-129 for an account of this procedure.

decrees alike (whatever the different procedures), it is the *demos* that is ultimately in charge of everything. And there can be no *nomophylakia* without socio-economic mixing. Finally, this paper argues that, in accordance with these principles, Aristotle's choice not to mention *nomothesia* is neither a case of overlooking nor of concealing this important procedure because, allegedly, its acknowledgement would endanger his overall explanatory framework. It is rather one among many choices to omit particulars and institutional features due to his criterion of selection, which focuses on aspects that can truly reveal the character of a *politeia*. Because, as we shall argue, the *nomothetai* are in fact none other than a special session of the Assembly, there is, to Aristotle, nothing distinctive or revelatory of the constitution in their existence – they do not constitute an example of effective *nomophylakia* but are rather yet another prerogative of the deliberative bodies through which the *demos* governs everything with its decrees.

## 2. «POLITICS» IV, THE ANATOMIES OF THE CITY AND THE MIXED CONSTITUTION

The first step of our argument is to provide an account of the methodology Aristotle applies in *Politics* IV to his taxonomy of constitutions, as well as, within this methodology, his conclusions about the best constitutional form (actually the second best, after the *politeia* of books VII and VIII). In section 3 we shall argue that this very methodology governs also Aristotle's assessment in the *Ath. Pol.* of the various constitutional stages undergone by Athens. Our analysis of *Politics* IV here builds substantially on the commentary recently published in the series directed by Lucio Bertelli and Mauro Moggi, and particularly on Accattino's work on the anatomies of the city and on Canevaro's treatment on the relationship between the three final «institutional» chapters of *Politics* IV (14-16) and the rest of the book<sup>18</sup>.

We shall start from the beginning of book IV of the *Politics*. In the *prooemium* (IV 1, 1288b 10 - 1289a 7), Aristotle significantly widens the scope of the *technē politike* (which is here promoted to *epistēmē*), to include not only (as in his predecessors, Plato *in primis*) the definition of the ideal *politeia* that can assure the good life (this is in fact the programme of books VII and VIII, and the baseline on which the discussion of constitutions in book II, and the other taxonomy in book III, are built), but also

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<sup>18</sup> Accattino 1986; Besso - Canevaro - Curnis - Pezzoli 2014.

a considerations of how the existing constitutions can be helped or saved (*boethein/sozein*)<sup>19</sup>. In accordance with this widening of the scope of the *politike episteme*, Aristotle describes in chapter 2 a new programme: (1) to formulate a taxonomy of the existing constitutions (to define what exactly distinguishes one from another); (2) to discover of the most common and best of the constitutions that actually exist; (3) to define what constitution is more appropriate for whom; (4) to analyse the measures and instruments to institute particular constitutions (oligarchic/democratic); (5) finally to examine the causes of the safety or the ruin of existing constitutions (chapter 2, 1289b 12 ff.). This programme is followed to the letter in the remainder of book IV and in books V and VI. Chapters 3 to 10 of book IV formulate a taxonomy of constitutions (1). Chapter 11 defines the most common and the best of the existing constitutions, something to which chapter 13 returns (2). Chapter 12 is concerned with the most appropriate constitutions (democratic or oligarchic) for particular *poleis* (3). Book VI is concerned with the measures needed to create a democracy, an oligarchy, etc. (4). Book V deals with the causes of the safety or ruin of existing constitutions (5). This is all very neat, but this programme does not seem to account for chapters 14-16 of book IV, which provide an institutional analysis of Greek *politeiai*, defining the various institutional arrangements that inform political decision-making, the political offices and the judiciary in the Greek *poleis*.

The reason for this becomes clear once one moves to chapter 3 of book IV, in which Aristotle provides as the criterion for his constitutional taxonomy what has been termed «the anatomy of the city». Aristotle explains (IV 3, 1289b 27 ff.) that the reason for which we find a variety of constitutions is that «in all *poleis* there are, from a numerical point of view, more parts». These «parts» (*mere* or *moirai* of the *polis*) are defined by Aristotle exclusively in socio-economic terms. He first goes for a purely economic classification: there are the rich, the poor, and the ones in the middle (the *mesoi*). Then he adds one based on social status, between the *demos* (intended as the lower classes) and the *gnorimoi* (the «respectable» class). These divisions can be further refined with reference to the occupation of the majority of the *demos*, or to the basis of the «respectability» of the *gnorimoi* (e.g. lineage, virtue, ownership of horses). The nature of a given constitution depends on what parts (*mere*) have access to power. This is consistent with Aristotle's definition of citizenship in chapter 1 of

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<sup>19</sup> On the *soteria* of the existing constitutions as the purpose of political science in Aristotle see Bertelli 2012, 281-297, republished in Bertelli 2017, 195-212. See also Camassa in this volume.

book III (1288b 22-23): citizens are those that take part to political and judicial decision making and have access to political office<sup>20</sup>. So, we discover, when all partake of power, we have democracy (and because the *demos* is the majority, when all partake, the *demos* is in charge); when only a few (the rich or the *gnorimoi*) partake of power, we have an oligarchy. Varieties of democracy and oligarchy depend on finer divisions among the parts of the *polis*, on what of these finer parts have access to power.

This analytical scheme governs much of book IV, including the discussion of the «mixed constitution», to which we shall move in the next paragraph, and therefore it is no surprise that institutional analysis does not play any part in the programme at chapter 2. Within this scheme, specific institutional arrangements can contribute little to the nature of a *politeia*. For instance, elections may be typical of aristocracies, and lottery of democracies, but ultimately if everyone can be elected (without a franchise), we have a democracy. And lottery among the few does not make the regime a democracy – it is still an oligarchy (e.g. IV 15, 1298b 5-8)<sup>21</sup>.

When Aristotle moves to discussing the constitution of the *mesoi* and the «mixed constitution» at chapters 11-12, the methodological baseline is still exactly the same: what matters is the socio-economic «parts» of the city. In chapters 11-12, he undertakes to fulfil point (2) of his programme: discovering the most common and the best of the constitutions that can actually exist (a second best after the ideal constitution of books VII and VIII). Aristotle goes back to his socio-economic anatomy of the city and argues that the *politeia* which is most likely to pursue the common good (as opposed to factional goals) is one in which neither the poor nor the rich hold power, but rather the *mesoi* do, because they are the most likely to be invested in preserving the constitution (*menein ten politeian*, IV 12, 1296b 15-16). Thus, Aristotle's second best is not in fact the *memigmene politeia* (the «mixed constitution»), but rather the *mese politeia*. But such a *politeia* can exist only in *poleis* with a strong and large middle class (IV 11, 1295b 34), which is rare. In most instances (*pollakis* - 1296a 24) the constitution is democratic or oligarchic because the middle class is very small. Hence the need of an alternative – a third best – which reproduces the features of the *mese politeia* without a strong middle class. This is the *memigmene politeia*, a constitution that is a mixture of democracy and oligarchy<sup>22</sup>.

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<sup>20</sup> See now on Aristotle's definition of citizenship, against some criticism of it (e.g. in Blok 2017), Fröhlich 2016.

<sup>21</sup> See Canevaro in Besso - Canevaro - Curnis - Pezzoli 2014, 280-281, 305-307.

<sup>22</sup> For a general account of Aristotle's notion of mixed constitution see Lintott 2002. See also Accattino 1986, 92-99; Miller 1995, 252-276; Lockwood 2006; Balot 2015. For a general overview of mixed constitution in Greek thought see Hahm 2009.

Now, democracy and oligarchy are *politeiai* characterized by putting power in the hands of particular parts of the city (the many or the few). How does one mix them? One would need to give some power to the many, and some to the few. But how does one divide power? As it turns out, this can be done according to functions (e.g. political decision making, justice, public offices). To mix the socio-economic «parts» of the city, one needs to operate on the rules, on the political roles, on access to different political functions – that is, on institutions. One «part» of the city is given control of one function, another «part» of another function, and so on. But in chapter 3 of book IV, when he describes the anatomy of the city as the foundation of his constitutional taxonomy, Aristotle tells us nothing of institutions, functions and the like. When we approach the mixing up of Aristotle's socio-economic «parts» of the city, we realize that a purely socio-economic anatomy of the city is insufficient. Within the narrow scheme of the «anatomy of the city» provided in chapter 3, and which governs the constitutional taxonomy of book IV, the only way to formulate a better alternative to oligarchy and democracy is to give the power to the *mesoi*, when there are enough of them. Otherwise, we need something more.

The same limit of Aristotle's socio-economic «anatomy of the city» had already come to the fore, to some extent, throughout the discussion of the taxonomy of constitutional forms, and there it was also connected to (limited) forms of mixing. While the democratic or oligarchic nature of a regime is determined exclusively by its social composition, Aristotle also postulates more or less extreme varieties of democracy and oligarchy. What distinguishes more or less extreme democracies? Not the franchise (and therefore the social-economic status of those that have access to power) – the key precondition of a democracy is that all (or almost all) are fully enfranchised. But institutions such as the *misthos* – a payment for Assembly attendance – may encourage the poor to participate in mass, whereas its absence could give, comparatively, a modicum of influence to the rich (IV 14, 1298b 23-26). Already in chapter 3 the socio-economic definition of a *politeia*, on the basis of which «part» of the city holds power, had been qualified with reference to relative power of different «parts», relative strength and preponderance. The implication was already that more than one part could partake of political power at the same time, but Aristotle offered no clarification as to how this would occur. It is clear that such forms of limited or more substantial «mixing» require an appreciation of the institutional dimension, but the «anatomical» model of chapter 3 lacks it entirely.

This is why institutions are introduced, suddenly and rather abruptly, in the middle of chapter 4 (1290b 21 ff.), in a methodological reflection

that emerges and is then abandoned within a couple of pages, to leave only sparse traces in the remainder of book IV, before taking centre stage in the last three chapters of *Politics* IV. Because of this sudden introduction of an alternative «anatomy», some scholars, notably Accattino, have read the discussion here less as an addition or complement to the methodology exposed at chapter 3, and more as an alternative formulation of the «anatomy of the city», according to entirely different criteria<sup>23</sup>. Ultimately, as we shall see, the two «anatomies» are in fact integrated towards the end of *Politics* IV, yet the second remains subordinated to the first.

If chapter 3 defines the «anatomy of the city» socio-economically, the second half of chapter 4 uses a functionalist approach. Aristotle examines, again and anew, the reason for the existence of multiple constitutions, and again answers that it is because there are many parts to a city. But, this time, he defines these «parts» through the use of the «biological» method (and makes comparisons between cities and animals): to define all animal forms it is necessary to identify the essential functions, investigate how these forms manifest themselves, and then analyse all the possible combinations of these forms. Likewise for the *polis*. So what are these functions? Aristotle criticises Plato's (*Resp.* II) contention that the *prote polis* (the original city) must have been composed by people performing the functions of weaver, farmer, cobbler, builder, smith, breeder and trader (both wholesale and retail). Aristotle counters that as soon as you have that many people living together, you need also people performing the functions of warrior, political administrator and judge, he observes that in fact the same people can perform more than one of these functions (*pace* Plato), and that ultimately the «political» functions are «parts» of the city as much as, or more than, the occupational functions (which parallel his socio-economic parts of chapter 3) – in the same way as the soul of an animal, and not just its body, counts as a «part».

So here we have another anatomy of the city which combines institutional «parts» (the «soul») with socio-economic «parts» (the «body»), and which could potentially allow a variety of forms of constitutional «mixing» that are not available when the focus is solely (or primarily) socio-economic. For instance, the task of lawmaking could be set up through a combination of political decision-making by the Assembly and judicial assessment of new bills by the lawcourts. These two «parts» (which mirror two different functions) could be combined in a system of checks and balances in which lawmaking would result from different bodies performing different functions counterbalancing and controlling each other. This is, incidentally,

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<sup>23</sup> Accattino 1986, 77-78.

the arrangement in Athens, which we shall discuss in section 4. In short, it is fair to say that this second «anatomy of the city» is actually capable of accommodating constitutional arrangements compatible with, and in fact very much resembling, modern constitutionalism – institutional checks and balances can be described using this anatomy<sup>24</sup>.

Does Aristotle settle for this second «anatomy of the city»? Not really. This line of enquiry is in fact (provisionally) shut close at the end of chapter 4, and from chapter 5 onwards, with the beginning of the constitutional taxonomy, the methodology is based on the earlier «anatomy», founded exclusively on socio-economic «parts» of the city that alone define the nature of the constitution when they have access to power.

Apart from random glimpses throughout the taxonomic discussion as well as the discussion of the *mese politeia*, institutions disappear for the rest of book IV (and they play no part in the programme enunciated at chapter 3), to reappear only in chapters 14-16. The theme is still the variety of constitutional forms (and Aristotle uses *palin* at the very beginning of chapter 14 to indicate that he is about to perform again an analysis of constitutional forms, just from another angle)<sup>25</sup>. The theme here is not however the «parts» of the city understood socio-economically, but rather the «parts of all *politeiai*» – the deliberative function (*to bouleutikon*), the public officials (the *archai*) and the judiciary (*to dikastikon*) – these are the parts that one can already find in Herodotus' constitutional debate, and, as shown by Hansen and Harris, govern also the organisation of the second half of the *Ath. Pol.*<sup>26</sup>. Aristotle therefore finally brings back in his second «anatomy of the city» – he does provide a discussion of the various forms in which these functions are institutionally arranged in the Greek cities, and of the various possible combination of these forms. Yet this new taxonomy (based, as we have seen, on the second «anatomy»), is not governed by the second anatomy to the exclusion of the first – far from it. It is not in fact independent of the first «anatomy» and of the socio-economic straight-jacket of the previous discussion but is subordinated to it.

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<sup>24</sup> For the influence of the Aristotelian anatomy of the city in later republican thought, notably in the Middle Ages and in Machiavelli, see Nippel 1980; Blythe 1992; Pasquino 2009, 397-407. For the evolution of the doctrine of the mixed constitution on modern constitutionalism, and for the differences between the two, see also Hansen 2010. For an excellent comparative account of the normative implications of the doctrine of the separation of powers see Moellers 2010. For a discussion of more recent conceptions of constitutionalism vis-à-vis the Athenian one see Canevaro 2018b.

<sup>25</sup> See Canevaro in Besso - Canevaro - Curnis - Pezzoli 2014, 279-281.

<sup>26</sup> Cf. Her. III 81; Eur. *Supp.* 403-408, 426-455; Thuc. II 37, 1. See Hansen 1974, 10-12, and Harris 2006, 32.

This is clear if we examine the matching of the various institutional combinations discussed and of the constitutions (democracy, oligarchy etc.), whether we are talking of political deliberation, of magistrates or of lawcourts. In chapter 14 Aristotle lists four democratic deliberative arrangements, three oligarchic ones, and two aristocratic ones. In chapter 15 he lists fifteen ways to select magistrates (some democratic, some typical of *politeia*, some oligarchic and some aristocratic). In chapter 16 he lists at least twelve possible ways of organising the lawcourts. In all these instances, among the factors that determine the various options, we find who has the right to participate (all or only some) and the use of election or lottery. Aristotle does state that lottery is typical of democracies, and election of oligarchies (IV 9, 1294b 7), but this feature ultimately plays no part in the categorization offered at chapters 14-16. Election and selection by lot are duly noted, but the oligarchic or democratic nature of a constitutional arrangement is determined exclusively by the issue of who has access – what socio-economic part of the city is preponderant in power. If it is only a few, it is an oligarchy; if it is all, it is a democracy, regardless of lottery or election. The socio-economic element trumps institutional engineering.

Institutions, therefore, are used by Aristotle only as instruments to allow the mixing of socio-economic «parts» – to give one institution to one «part», another to another «part», and, that way, to have a more moderate democracy, a more moderate oligarchy, or even a «mixed constitution». But what matters is still the socio-economic mixing, and Aristotle leaves no room for an analysis of the possible outcomes of institutional mixing *per se* – of the potential in combining institutional set-ups to perform multiple functions with respect to lawmaking, political administration or the like, and to secure checks and balances in a way that would remind one of the achievements of modern constitutionalism. Within the taxonomy of *Politics IV*, the best (achievable) constitutional form is the *memigmene politeia* – a constitution in which one part of the city controls one institutional function, and another part of the city controls another. Only this way can the *politeia* be preserved and, we may add, the laws will be effectively guarded – different socio-economic groups must have access to different institutions, and use them effectively to keep each other in check, thus preserving the *politeia*.

In chapters 14-16 of *Politics IV* Aristotle provides a minute treatment of possible institutional mixings (and of the lack thereof in other arrangements), as well as of institutional «correctives» to moderate, but not to change, extreme forms of democracy and oligarchy. These mixings and correctives, which sometimes appear to be constitutional technicalities, and

which closely resemble the treatment of the second part of the *Ath. Pol.*, are concerned with securing the mixing and cross-checking of different socio-economic groups – if there is no socio-economic mixing, there are no checks and balances. This framework, and this discussion of constitutional technicalities, is key for understanding Aristotle's approach in the *Ath. Pol.*, his interests as well as his assessment of different constitutional forms and institutional solutions, including *nomophylakia* and its fourth-century Athenian manifestation: *nomothesia*.

### 3. ARISTOTELIAN THEORY APPLIED TO CONSTITUTIONAL HISTORY IN THE «ATHENAION POLITEIA»

Turning now from the theoretical model of *Politics IV* to the *Realien* of the *Athenaion Politeia*, our contention is that it is easy to identify the same methodological presuppositions at play, and that these help explain the most puzzling judgments, as well as better to understand the «silence» on fourth-century *nomothesia*.

At *Ath. Pol.* 2, 1, Aristotle starts by describing the *archaia politeia* before that of Draco. Athens was ruled, he states, by an extreme form of oligarchy (ἦν γὰρ αὐτῶν ἡ πολιτεία τοῖς τε ἄλλοις ὀλιγαρχικῆ πᾶσι). This regime was characterized by high levels of political and economic inequality, with the wealthy controlling all the land and the political offices, and the poor not sharing in any right (οὐδενὸς γὰρ ὡς εἰπεῖν ἐτύγχανον μετέχοντες). The fields were worked by the poor called *pelatai* or *hectemoroï*<sup>27</sup>. As we should expect, given the framework of *Politics IV*, the nature of the regime is first established by socio-economic criteria. The account of the constitutional arrangement is only discussed later. Political decision-making was dominated by powerful magistrates, the king, the archon and the polemarch, who were selected by birth (*aristinden*) and by wealth (*ploutinden*) for life, and later for a period of ten years<sup>28</sup>. Such features are typical of oligarchies, and Aristotle criticises them in the *Politics* where, for example, he disapproves of the life-tenure of the members of the Spartan *gerousia*

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<sup>27</sup> For an explanation of the term *hectemoroï* in Archaic Attica see Harris 1997, 107-111; 2006, 415-430; Van Wees 1999, 19-28. For other interpretations see Stanley 1999, 203; Ober 2006. For a critical review of the scholarship on Archaic division of land see Faraguna 2012, 171-93, and now the monumental Zurbach 2017.

<sup>28</sup> For the discussion of the origin of these magistrates in the *Ath. Pol.* see Rhodes 1981, 99-106.

(*Pol.* 1279b 35-40)<sup>29</sup>. At the end of the term of office, the ex-archons became member of the Council of the Areopagus, which had the power of *nomophylakia* as well as competence over the administration of the most important issues (διώκει δὲ τὰ πλεῖστα καὶ τὰ μέγιστα). We do not discuss here the controversial evidence about the historicity of the *nomophylakia* of the Areopagus, we are rather interested in its institutional role within the Aristotelian theoretical framework<sup>30</sup>.

The *Ath. Pol.* clearly singles out the power of *nomophylakia* held by the Areopagus, whereas deliberative power is implicitly assigned to the archons and the Areopagus itself. This is the first analysis in the *Ath. Pol.* of these fundamental powers, and the different arrangements of these two institutional functions will be key to the Aristotelian discussion of the following regimes. Here, the *gnorimoi* are represented as in control both of the political decision-making process and the function of *nomophylakia*, but Aristotle clearly distinguishes these as separate functions<sup>31</sup>. It is precisely because a restricted social class controlled both political decision-making (including the enforcement of the decisions) and *nomophylakia* that this regime is characterised as an oligarchy. The institutional analysis of deliberative power and *nomophylakia* serves and underpins a judgment based on the socio-economic theory of the parts of the city found in *Politics* IV. This kind of extreme oligarchy closely resembles the one theorised in chapter *Politics* IV 14, 1298b 1-5. In this passage Aristotle describes a typology of extreme oligarchy (ὀλιγαρχικὴν ἀναγκαῖον εἶναι τὴν τάξιν ταύτην) in which the deliberative power (οἱ κύριοι τοῦ βουλευέσθαι) and the control over the laws (κύριοι τῶν νόμων) is exercised by the same restricted group of people selected by birth and hereditary (παῖς ἀντὶ πατρὸς εἰσὶν).

This extreme oligarchy, in the account of the *Ath. Pol.*, soon degenerates, and reform is needed<sup>32</sup>. The following constitutional model resembles even more closely another example found in the Aristotelian taxonomy of *Politics* IV. At chapter 4 of the *Ath. Pol.*, we find the account of the constitution of Draco, which replaced the oligarchic *prote politeia*. The so-called constitution of Draco has often been considered spurious – a later insertion in the *Ath. Pol.*, either by the author himself or by someone else.

<sup>29</sup> For a recent study of the Spartan *gerousia* see Schulz 2011.

<sup>30</sup> On the reform of Ephialtes see now Zaccarini 2018 and also Mann 2007, 45-58; For general works on the Areopagus see Wallace 1989; de Bruyn 1995. On the Areopagus powers and its fame in Classical Athens see Harris 2016, 76-80, and Harris forthcoming.

<sup>31</sup> The polarised terminology *gnorimoi* and *plethos/demos* reflects here the socio-economic anatomy of *Politics* IV – it stresses which «part» of the city is in charge of which function.

<sup>32</sup> See Bertelli in this volume for the ensuing *metabole*.

The arguments for its spuriousness have been many, but they have normally relied, first, on the clear non-historicity of the account, allegedly at odds with the higher levels of trustworthiness in the rest of the historical section<sup>33</sup>; second, on the similarities of this constitution with that which Demetrius of Phaleron imposed on Athens in the 310s: and, third, on the heavier theoretical entanglement of this section with Aristotelian political theory, allegedly at odds with the rest of the discussion. In a recent, masterly discussion, Verlinsky has reviewed the whole body of scholarship on this issue and shown that the idea of the spuriousness of Draco's constitution is based on little more than *a priori* assumptions about what is acceptable or historical for the *Ath. Pol.* He has made a strong case for the authenticity of this section, which should be assessed as part of the overall treatise<sup>34</sup>. Regardless of one's position, it is important not to prejudge the analysis by assuming spuriousness, but rather to analyse this section in the same way as the rest of the first part of the *Ath. Pol.*, to note similarities and problems. We can anticipate that our analysis shows significant similarities between this section and the rest of the first part of the *Ath. Pol.* in its reliance on the theoretical assumptions of *Politics* IV. This matches Bertelli's analysis of the similarities between Draco's constitution and the theoretical pattern of *Politics* III, in particular the passages at 1285b 15-19 and 1286b 12-16, which explain how a census-based aristocracy evolves in an oligarchic regime<sup>35</sup>.

According to the *Ath. Pol.*, Draco's reforms changed significantly the Athenian constitution. The lawgiver gave civic rights to the hoplitic class, from which the nine archons and the treasurers were elected. For the first time we hear of a Council and of an Assembly of the *demos*. Draco, according to the *Ath. Pol.*, introduced a probouleutic body of 401 members selected by lot from the civic body<sup>36</sup>. Nothing is said about the powers of this Council. More interestingly, however, the members of the Council and of the Assembly could be fined (3 drachmas for the *pentakosiomedmnoi*, 2 drachmas for the *hippeis*, 1 drachma for the *zeugitai*) in case they failed to show up at the meetings of the deliberative bodies. It is worth noting that a fine of one drachma per day for those *bouleutai* who did not attend the

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<sup>33</sup> For a sensible discussion of what we know about Draco's legislative action, see Carey 2013.

<sup>34</sup> See Verlinsky 2017, with an extensive literature review. For previous positions, see particularly Rhodes 1981, 108-181; van Wees 2011, 94-114.

<sup>35</sup> Bertelli 1994, 88-89. Cf. also Accattino 2013, 226-227.

<sup>36</sup> Rhodes 1981, 115 notes that the number 401 resembles the size of judicial panels in Athenian lawcourts, where an even number of members was required to avoid tied votes.

meetings of the Council was also introduced in the so-called «Constitution for the Future» drafted by the Five Thousand (*Ath. Pol.* 30, 6), a political regime which the author of *Ath. Pol.* explicitly praises at 33, 2<sup>37</sup>. The Council of Areopagus kept its *nomophylakia* over the application of the laws and the conduct of magistrates.

If we compare Draco's constitution with Aristotle's proposals for improving the workings of deliberative bodies in *Politics* IV 14, 1298b, the similarities are, once again, very striking. First, at IV 14, 1298b 15-20, Aristotle suggests that lawgivers should introduce a fine for those who do not attend the meetings of the assembly – rather than pay for their attendance – the same arrangement found in oligarchic lawcourts. This tool would encourage the *gnorimoi* and the *demos* to deliberate together in the Council and in the Assembly (ὁ μὲν δῆμος μετὰ τῶν γνωρίμων, οὗτοι δὲ μετὰ τοῦ πλήθους). This institutional device is praised and considered effective because it produces a mixing of different socio-economic «parts» within the constitutional body. The two «anatomies» of the city interact, but the institutional analysis of the deliberative power and of *nomophylakia* is always subordinated to the sociological approach.

Second, in order to moderate the character of an oligarchic constitution, at *Politics* IV 14, 1298b 25-35 Aristotle suggests that some of the members of the people should be coopted, or magistrates like the *probouloi* or the *nomophylakes* should be created. The *demos* ratifies or rejects the preliminary deliberations of these magistrates, but it cannot propose any change to the constitution. This Aristotelian categorization is again functionalist. He equates *probouloi* and *nomophylakes* as they carried out comparable (yet different) institutional functions by restricting the power of the people's assemblies at the probouleutic stage and after political deliberation, in a way that we find in actual Athenian deliberative practice in later times, such as in early Hellenistic Athens under Demetrius of Phalerum<sup>38</sup>. Aristotle's suggestion at *Politics* IV 14, 1298b 25-35 mirrors precisely the role played by the Areopagus in Draco's constitution. The *Ath. Pol.* makes clear that the Areopagus supervised the magistrates and was the guardian of the laws, which indicates the power to check that the magistrates, the

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<sup>37</sup> «Their political affairs seem to have been run well at this juncture, when they were in a state of war and the constitution was based on hoplites» (transl. Rhodes). For the constitution of Five Thousand as historical model for Aristotelian theory of mixed constitution see Aalders 1964, 201-237; Nippel, 1980. See also Blythe 1992, 13-14; Frank-Monson 2009, 243-70.

<sup>38</sup> For the Athenian *nomophylakes* see Bearzot 2007; Faraguna 2015; and Canevaro 2013c for their powers and function in early Hellenistic Athens. For the power of *nomophylakia* of the Spartan *gerousia* see Esu 2017, 353-373.

Council and the Assembly acted in accordance with the established laws. And, of course, the Areopagus is manned by ex-archons, which come from the highest echelons of Athenian society. Thus, deliberation is in the hand of the people (yet limited by a franchise), while *nomophylakia* is in the hands of the few – institutions with different functions allow for socio-economic mixing, which produces, for Aristotle, a desirable constitutional arrangement. The Draconian constitution, as described in the *Ath. Pol.*, therefore, appears to apply some of the institutional mechanism identified and recommended in the *Politics* for moderating an oligarchy (through socio-economic mixing), and because of this constitutes a moderately positive model (as opposed to the pre-draconian one, which fails to institutionalise any socio-economic mixing, and therefore degenerates and collapses).

In the Aristotelian perspective, Draco's constitution is therefore a positive example of institutional mixing. The same can be said about the next constitutional stage: Solon's constitution. As Bertelli points out, according to Aristotle's *Politics*, the Solonian constitution is the only «unconditionally positive model» of constitution in Athenian history<sup>39</sup>. As the corpus of the Attic orators shows, according to Athenian fourth-century ideology, Solon is the virtuous lawgiver *par excellence*<sup>40</sup>. He set the best laws and institutions (cf. *Ath. Pol.* 11, 2: σώσας τὴν πατρίδα καὶ τὰ βέλτιστα νομοθετήσας), and was considered the real founder of the democracy<sup>41</sup>. The *Ath. Pol.* makes clear that the *ethos* of Solon's constitution reflects the social class of the lawgiver. Solon is one of the *mesoi* (*Ath. Pol.* 5, 3), the middle class at the core of the good and moderate *mese politeia*. Once again, this is consistent with the *Politics* (IV 11, 1296a 19), in which Aristotle affirms that all the good lawgivers, such as Solon, Lycurgus and Charondas, were *mesoi*<sup>42</sup>.

Such a positive *ethos* of the lawgiver is in display in the institutional arrangements of his constitution, and in particular in the arrangements regarding deliberative power and *nomophylakia*. The account of Solon's

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<sup>39</sup> Bertelli 1994, 85-86. See also Poddighe in this volume, and Santoni 1979, 961-970 (for a survey of Aristotelian passages dealing with Solon); Hansen 1989; Almeida 2003, 252-255; Gehrke 2006; Poddighe 2014, 171-209; Rhodes 2015 for discussions of Aristotle's assessment of Solon. For Solon in Athenian ideology see Fuks 1953; Ruschenbusch 1958, 398-424; Cecchin 1969; Finley 1975, 34-59; Walters 1976, 129-44; Mossé 1978, 81-89; Mossé 1979, 425-37; Hansen 1989, 71-99; Walker 1995, 143-198; Dušanić 2002, 341-350; Flament 2007, 289-318; Sancho Rocher 2007, 298-327; Shear 2011, 19-69; Bearzot 2013, 113-122; Bertelli 2017, 175-194. For a new collection of the laws of Solon see Leão - Rhodes 2015.

<sup>40</sup> For Solon's function in the Athenian legal system see particularly Harris 2006, 3-28; Canevaro 2015.

<sup>41</sup> E.g. Aeschin. 1, 183; Dem. 18, 6; 20, 90; 22, 25; 24, 103.

<sup>42</sup> For the role of the lawgiver in Aristotle's *Politics* see now Pezzoli 2014, 167-178.

reforms is characterised by the same interaction between the two anatomies of the city. The *Ath. Pol.* lists Solon's constitutional reforms according to an institution-based division: the magistracies, the deliberative bodies (Council and Assembly), the judicial body (Areopagus). Thus, Solon established that the most important magistrates – the nine archons, the treasurers, the *poletai*, the Eleven and the *colacretai* – had to be selected by lot only from the first three classes from a shortlist of candidates (ἐκ προκρίτων)<sup>43</sup>. These magistrates represented a counterbalance to the *demos*, and the selection procedure shows again close similarities with chapter 15 of *Politics* IV, dedicated to the discussion of magistracies. At IV 15, 1300a 36-38, Aristotle gives an account of several ways for appointing magistrates. For *politeia* regimes (characterised by desirable socio-economic mixing), Aristotle outlines two options for appointing magistrates to office: first, they can be selected by lot or by election (or a mix of the two), but they are never chosen by the *demos* from the entire civic body (otherwise it would be a democracy). Another arrangement is when some officials are selected from a social group, and others from another social group. This is the system envisaged in the Solonian constitution. There is sortition, but from lists of pre-selected candidates, and magistrates are not chosen from the whole civic body, but from the wealthy and the *mesoi* (*Ath. Pol.* 8, 1: κληρωτὰς ἐποίησεν ἐκ τῶν τιμημάτων).

The Solonian Assembly, conversely, was open to everyone, including the *thetes*. This represented the democratic element of the mixed constitution. The Areopagus, on the other hand, kept its traditional function of guardianship of the laws (ἐπὶ τὸ νομοφυλακεῖν) and the supervision of the constitution (ἐπίσκοπος οὔσα τῆς πολιτείας). Just like in the previous constitution, these institutional reforms are instrumental to the socio-economic mixing of the parts of the city. Each socio-economic part plays a different institutional role according to the model of the *memigmene politeia*. Aristotle explicitly states this in *Politics* II 12, 1273b 35-40, when he states that Solon was a good lawgiver as he mixed well the constitution (δημοκρατίαν καταστήσαι τὴν πάτριον, μείζαντα καλῶς τὴν πολιτείαν): the Areopagus is the oligarchic feature of the constitution, the elected magistrates are the aristocratic one, and the lawcourts are the democratic one<sup>44</sup>.

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<sup>43</sup> For the tradition of shortlists in archaic times see Isoc. 7, 22-23; 12, 145; [Dem] 59, 75, with Rhodes 1981, 146-148. See also Abel 1983, 85-98; Hansen 1986, 222-229; 1990, 55-61; Kapparis 1999, 334-335; Leão - Rhodes 2015, 129.

<sup>44</sup> See also *Pol.* III 11, 1281b 30-34: «The remaining alternative, then, is to have them participate in deliberation and judgment, which is precisely why Solon and some other legislators arrange to have them elect and inspect officials, but prevent them from holding office alone» (transl. Reeve).

If we concentrate on the two decision-making functions of deliberation and *nomophylakia*, one can see that the theory of the mixed constitution is even more clearly in display in the *Ath. Pol.*'s account of Solon's reforms. The deliberative function is internally balanced by differentiating the eligibility for the Council and the Assembly. On the one hand, the Council, like the magistrates, emphasises the social role of the *mesoi* in *probouleusis*, as the *thetes* had no access to the *boule*<sup>45</sup>. On the other hand, the Assembly, just like the *dikasteria*, represented the whole civic body, including the lower classes. As Aristotle suggests in *Politics* IV 14, 1298b, this institutional arrangement underpins a form of political decision-making in which the *mesoi* and the *demos* as a whole deliberated together, even if in distinct institutional settings. By contrast, the Areopagites kept playing the role of *nomophylakes*: guardians of the constitution. The power of enforcing and preserving the laws is delegated to a group of ex-archons which, as we have seen, belongs to socio-economically to the highest echelons of society. Thus, deliberation and *nomophylakia* are institutionally separated in accordance with the criteria of the theory of the mixed constitution found in the *Politics*.

The following *metabolai* after the Solonian constitution represent negative developments from a good model of *patrios demokratia*, as this is defined in the *Politics* (II 12, 1273b 35 - 1274a 21; III 11, 1281b 32-34). The degeneration of Solon's mixed *politeia* is not attributed to the law-giver. The *Ath. Pol.* identifies the causes of the next *metabole* in the enduring conflict between *gnorimoi* and *demos*, materialising in conflict between factions, which led to Pisistratus' tyranny. Pisistratus, however, did not change the constitution, and is represented as a tyrant who ruled according to the laws (*Pol.* V 12, 1315b 22).

The post-tyrannical constitutional changes include: the constitution of Cleisthenes of 509/8 (*metabole* 5); the so-called period of the hegemony of the Areopagus after the Persian Wars (*metabole* 6); the radical democracy after the reforms of Ephialtes (*metabole* 7 and 9) which is temporarily interrupted by the Four Hundred in 411 (*metabole* 8), and the Thirty in 404 (*metabole* 10) and finally the restoration of the democracy in 403 (*metabole* 11). All these constitutional models are negative from the Aristotelian perspective, with the only exceptions of the period of Areopagitic hegemony and the mixed constitutions of the Four Hundred and Five Thousand<sup>46</sup>.

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<sup>45</sup> For *probouleusis* in Classical Athens see Rhodes 1972, 52-81; de Laix 1973; Rhodes - Lewis 1997, 11-15. Cf. Arist. *Ath. Pol.* 45, 4.

<sup>46</sup> On the Constitution of the Five Thousand see Rhodes 1981, 362-415; Harris 1990, 243-280; 1997, 300; Ruzé 1997, 483-489; Shear 2011, 19-49; Bearzot 2013, 69-70; Tuci 2013, 174-81.

No other constitutional arrangement includes elements of institutional mixing between the socio-economic parts of the city.

According to the *Ath. Pol.*'s account, until the reforms of Ephialtes, the hegemony of the Areopagus secured the stability to the constitution through the Areopagus' *nomophylakia* and its influence on the main fields of the city's administration, whereas the *demos* had control over the deliberative function in the Cleisthenic Council and in the Assembly. Similarly, the oligarchic constitutions of the Four Hundred and of the Five Thousand introduced powerful probouleutic bodies, additional *probouloi* and a censitary Council of the Four Hundred, which reduced the freedom of the Assembly and counterbalanced its power<sup>47</sup>. According to *Ath. Pol.* 29, 2, with the decree of Pythodorus establishing the new oligarchic regime, the Assembly had to elect twenty *probouloi*, in addition to the ten already appointed by the democracy in 413<sup>48</sup>. Wide powers were transferred to these magistrates as they could deliberate about the salvation of the city (περι τῆς σωτηρίας). Furthermore, they excluded the *thetes* from citizen rights, and restricted full rights to the hoplitic class (*hopla parechomenoi*), who could take part in deliberation in the Assembly, according to the Solonian model<sup>49</sup>. Most importantly, the oligarchs removed the power of *nomophylakia* from the *demos* by abolishing the *graphe paranomon* (*Ath. Pol.* 29, 4) as well as the *eisangeliai* and the *proskleseis*<sup>50</sup>.

By contrast, the fifth-century democracy (*metabolai* 7 and 9) as well as the Thirty (*metabole* 10) are all regimes in which both political decision-making and *nomophylakia* are under the control of a single socio-economic group. On the one hand, the extreme oligarchy of the Thirty concentrated the power in the hands of a few wealthy people. The Thirty passed a law in the Council which gave them full power to kill any Athenian citizen who was not included in a list of 3000 names (*Ath. Pol.* 37, 1). Accordingly, this oligarchy does not respect the basic principles of the sovereignty of the law and is therefore a *dynasteia* – a collective form of tyranny. On the other hand, the imperial democracy of the fifth-century, as Ceccarelli shows<sup>51</sup>,

<sup>47</sup> Cf. the different account in Thuc. VIII 67, 2-3; For recent studies on the oligarchic coup of the Four Hundred see Bearzot 2013; Tuci 2013, 113-184.

<sup>48</sup> For a general overview on *probouloi* in the Greek World see Pietragnoli 2010, 226-243. Cf. also Alessandri 1990, 129-147.

<sup>49</sup> On the relationship between hoplitic class and mixed constitution in Aristotle see Lintott 2002, 153-166.

<sup>50</sup> The *graphe paranomon* was recently introduced in Athens cf. And. 1, 17; 22. The first attested use dates at 415 B.C. when Leagoras of Cydathenaeum brought a *graphe paranomon* against a decree of Speusippus. See Hansen 1974, 28-48.

<sup>51</sup> Ceccarelli 1993, 460: «Il connaît l'idée qui fait de la démocratie une sorte de conséquence de la thalassocratie, mais il l'utilise dans la *Politique* avec une grande prudence; on

is a system in which the *demos* rules over the laws and has control of the Council, of the Assembly and of the lawcourts. Both constitutional systems show no mixing of the parts of the city in distinct institutional functions and are thus judged to be bad constitutions. It seems clear that the different constitutional stages of Athens are in fact assessed in the first part of the *Ath. Pol.* according to the criteria set out in *Politics* IV, and particularly in light of the need of socio-economic mixing through assigning different functions (and particularly deliberative power and *nomophylakia*) to different socio-economic part of the city. Where we find this kind of mixing, the constitution is assessed positively. When this form of mixing is lacking, the constitution is a bad one.

#### 4. THE FOURTH-CENTURY DEMOCRACY AS EXTREME DEMOCRACY

Within this framework, Aristotle's description of the eleventh constitutional stage – the fourth-century democracy – as an extreme democracy in which everything is in the hands of the *demos* which governs through *psephismata* and the courts, is no longer surprising. Scholars have remarked that the fourth-century democracy was not in fact run by the *demos* without constraints, but the *demos* was required to abide by the laws of the city, and its administrative and executive acts (performed in whatever capacity) were checked for their adherence to the laws by specific procedures, notably *nomothesia* and the *graphai paranomon* and *nomon me epitedeion theinai*<sup>52</sup>. Yet these institutions are unsatisfactory within Aristotle's framework: they are incapable of performing effectively a function of *nomophylakia* because they do not create any socio-economic mixing. Ultimately, although the «mixed constitution» in Aristotelian terms (the regime best suited for guaranteeing the sovereignty of the laws, and for guarding them)

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remarque des ressemblances avec certaines des thèses du Pseudo-Xénophon, mais chaque fois, les arguments d'Aristote sont plus nuancés. En revanche, dans la *Constitution des Athéniens*, l'influence de la foule des marins sur le développement constitutionnel athénien apparaît marquée».

<sup>52</sup> On fourth-century *nomothesia* see Canevaro 2013a, 2015, 2016b; *pace* MacDowell 1975; Rhodes 1984, 1987; Hansen 1979-1780, 1985. Hansen 2017 has challenged Canevaro's reconstruction, but see now the full confutation of Hansen's argument in Canevaro 2018a. On *graphe paranomon* and *graphe nomon me epitedeion theinai* see Wolff 1970; Canevaro 2016a, 2016b, 2018b. These public actions were designed to enforce the legal consistency between decrees and laws and to secure the coherence of the laws, *pace* Hansen 1974; Yunis 1988; Lanni 2010 who maintain that through these procedures, the lawcourts took into account political reasons and extra-legal arguments. See particularly Canevaro 2018b.

and constitutionalism are both examples of what has been called «limited» or «divided» power, they are two different (and conceptually alternative) understandings of «limited» power<sup>53</sup>. The kinds of checks and balances that we find in the Athenian fourth-century democracy represent a form of limited power more akin to modern constitutionalism – institutional mixing for the purpose of having the *demos* perform different tasks, and therefore create checks and balances on itself<sup>54</sup>.

Fourth-century *nomothesia* is the most salient example of this (and we summarise it here according to Canevaro's reconstruction): in fourth-century Athens, to pass a law, the *demos* first acted in the form of a Council selected by lottery and which acquired administrative experience by sitting in session every day of the year (festivals excluded). The Council set the agenda for the Assembly, and could be persuaded to put lawmaking (as the production of new laws – general permanent rules) in the agenda of the next Assembly. At that point, the Assembly (composed potentially of the whole *demos*, and in any case very rarely by less than 6,000 people) held a preliminary vote not on new law proposals, but on whether laws could be proposed at all. The institutional set-up was such that the first vote in the Assembly was not on a particular solution, but on whether the *demos* recognised that there was a problem that needed solving through legislation. If the vote was successful, then volunteers could propose new laws, which had to be widely publicised for a month. At the end of the month, the Assembly would set a date for the meeting of the *nomothetai* to enact new laws. There was however a concern for the coherence of the laws of the city, and for the adherence of the new bills to fundamental constitutional principles understood as the initial rationality of the original lawgiver, Solon. Thus, before enacting new laws, the proposers had to repeal all existing contradictory laws, and this needed to happen not in the Assembly, but in a lawcourt, against advocates of the contradictory laws elected by the Assembly at the end of the «publicity» month. Judges were also selected by lot from 6,000 random Athenians, who had sworn the judicial oath. And yet their procedures were designed to condition the behaviour

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<sup>53</sup> On the concept of «limited» or «divided» power applied to Classical Athens see Pasquino 2010. For «divided power» in Sparta see Esu 2017.

<sup>54</sup> See Canevaro 2018b for a discussion. Note however that the concentration on judicial supremacy as fundamental to constitutionalism seems to be moving the notion a bit closer to the Aristotelian mixed-constitution, and is duly challenged from many angles, see e.g. Kramer's «popular constitutionalism» (Kramer 2004), the success of theories of «political constitutionalism» (see Tomkins 2005; Bellamy 2007; Gee - Webber 2010; all influenced by Griffith 1979), and the attacks, notably by Waldron, against judicial review (synthetically Waldron 2006).

of the judges so that they would concentrate on issues of legality (and, in this case, of compatibility or incompatibility of the new proposal with the existing laws). This was achieved through institutional instruments such as the oath itself, preliminary hearings governed by a magistrate, no debate or deliberation in the lawcourt, and the application of strict majority rule<sup>55</sup>. Once this was done, there would be the session of the *nomothetai*, and the *nomothetai* would finally approve the new law(s). But this was not the end: if it turned out that the proposer had not followed the correct procedure to the letter, had not properly publicised his proposal, or had failed to repeal a contradictory existing law, then anyone could bring a public charge against him, and he (and his bill) would be judged by another lawcourt, in a form of constitutional judicial review.

This complex procedure for legislating encompassed several checks and balances achieved through the mixing of institutional settings, with different rules, norms and discourses that helped the *demos* to perform different functions and to counter-balance itself. It is certainly compatible with modern understandings of constitutionalism, as well as with democracy itself. It is a complex form of institutional mixing whose aim was to secure popular sovereignty while at the same time protecting constitutional principles and values. Yet none of these counts as proper «mixing» for Aristotle, and within his framework these checks and balances are ineffective. His scathing judgement of Athenian democracy (and of «extreme» democracy more generally – the constitutional form on which the Greek *poleis* were converging in the late fourth century)<sup>56</sup> is perfectly consistent with his contention that institutional mixing *per se* is ineffective and ultimately irrelevant. The discriminating factor in his assessment is the principle behind the first «anatomy of the city» of *Politics* IV: what counts is which socio-economic «parts» of the city have access to the various institutional functions. In Athens (and in most Greek democracies), it is always the *demos*. In the face of all the institutional evidence collected by him and his school, this basic socio-economic determinism allows Aristotle to believe and argue that the *demos* cannot exercise control upon itself. The procedures of *nomothesia*, therefore, within Aristotle's framework, do not make Athenian democracy less extreme, but arguably more extreme, because they identify a number of different institutional functions but obstinately grant access to all of them always to the *demos* – the same «part» of the *polis*.

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<sup>55</sup> On the Judicial Oath see Harris 2013a, 101-137. On the *anakrasis* and the *engklema* see Faraguna 2007, 21-27; Thür 2007, 131-150; Harris 2013b, 143-160. The text of the document in Dem. 24, 149-151 is a later forgery, see Canevaro 2013b, 173-180.

<sup>56</sup> See Ma 2018 for the «great convergence».

5. THE «SILENCE» ON NOMOTHEsia IN THE SECOND PART OF THE «ATHENAION POLITEIA» AND THE PROBLEM OF THE IDENTITY OF THE NOMOTHETAI

It has long been recognised that Aristotle is extremely selective in what he includes in the *Ath. Pol.* As Bravo noted, the author of the *Ath. Pol.* «non disponeva di alcun modello di pensiero che lo guidasse per introdurre un ordine intellegibile nel campo da lui scelto». His aim was «rappresentare le trasformazioni di un insieme di istituzioni e di rapporti sociali e politici», and he selected what he believed to be particularly relevant, discriminating, indicative or important for answering theoretical questions about the desirability, stability and collapse of political regimes. The historical reconstruction of the *Ath. Pol.*, to quote Bertelli, was «fondata sulla selezione e l'organizzazione intenzionale dei materiali», and, in Poddighe's words, «è funzionale a descrivere il processo politico in atto». The point, then, is not much why he omitted *nomothesia*, but whether there is, within his theoretical framework and in view of his research questions, anything compelling that a description of *nomothesia* would have added or contributed, changing substantially the picture of the last phase of Athenian democracy<sup>57</sup>.

If, as we hope we have demonstrated, *nomothesia* did not make a difference, within Aristotle's framework, to the assessment of fourth-century democracy, and if, as we established at the beginning, Aristotle was not unaware of *nomothesia*, then Sealey's explanation for the «silence» on *nomothesia* in the second part of the *Ath. Pol.* needs to be seriously qualified. It is not true that *nomothesia* could not be accommodated within Aristotle's framework, or that giving a fair account of *nomothesia* would have endangered his negative assessment of fourth-century Athenian democracy. Athenian *nomothesia*, according to Aristotle's framework, did not perform an effective function of *nomophylakia*, it did not constitute a check on the unbridled authority of the *demoi* governing everything with its decrees. It was not, then, particularly revealing or discriminating in the assessment of Athens' last constitutional stage, and Aristotle – characteristically selective – chose not to include it.

There is more: there is no compelling reason, from the point of view of the organisation of the *Ath. Pol.*, for which a description of *nomothesia* needed to be included. The second part of the *Ath. Pol.* is organised around the three functions of deliberation (political decision-making), magistrates

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<sup>57</sup> Bravo 1994, 237-238 (although he does not believe the author of the *Ath. Pol.* is Aristotle or a particularly intelligent and well-informed disciple); Bertelli 1993, 61; 2017, 521; Poddighe 2014, 123-125. See also Ingravalle 1989; Wallace 1993, 34-45.

and the judicial. The Council and the Assembly come first (*Ath. Pol.* 43, 2-49), an account of the various magistracies follows (*Ath. Pol.* 50-62), and the discussion is closed by an account of the courts (*Ath. Pol.* 63-69)<sup>58</sup>. Within this scheme, lawmaking (*nomothesia*) falls squarely under the rubric of deliberation. Aristotle states this clearly at *Politics* IV 14, 1298a 3-5, dedicated to Councils and Assemblies: κύριον δ' ἐστὶ τὸ βουλευόμενον ... περὶ νόμων. Likewise, at *Rhet.* I 4, Aristotle states that «[t]he most important subjects on which people deliberate and on which deliberative orators give advice in public are mostly five in number», and among these is «legislation» (νομοθεσίας).

Deliberation is discussed at length in the *Ath. Pol.* at the beginning of the second part (43, 2-49), and Aristotle describes comprehensively the structure and workings of Council and Assembly. As for the specific deliberative functions of the Assembly, the description is only patchwork, and it does not cover specifically all the topics on which the Assembly deliberates, but is limited to the fixed items in the agenda of particular meetings: the confirmation of magistrates, the grain trade, the defence of Attica, the *eisangeliai* for *prodosia* and the reading of lists of confiscated goods are fixed items in each *ekklesia kyria*; the vote on whether to hold an ostracism, and those on sycophants and on those who have deceived the *demos* are also fixed items in the *ekklesia kyria* of the sixth prytany; one of the other meetings in each prytany has supplications as a fixed item. The other two meetings in each prytany have, as compulsory items, three from the sacred matters, three from matters pertaining to heralds and ambassadors, and three from matters defined as *hosia*, but Aristotle does not provide a list of possible or actual topics.

Within this structure, from the point of view of the organisation of the text, the «silence» about *nomothesia* becomes an issue only if *nomothesia* involved a fixed item in the agenda of a particular Assembly, or if it involved a separate body which is neither the Council nor the Assembly. Old reconstructions of fourth-century *nomothesia* painted it as more idiosyncratic than it actually was – they fulfilled both of these conditions, with the alleged *epicheirotonia ton nomon* on the eleventh day of the first prytany, and the alleged board of *nomothetai* which was selected from those who had sworn the Judicial Oath but, unlike any other panel of judges, voted by show of hands and not by secret ballot. Canevaro has challenged in recent contributions many of the tenets of these old reconstructions of *nomothesia*, appreciating its originality but at the same time normalising it

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<sup>58</sup> See Hansen 1974, 10-12, and Harris 2006, 32.

within the known institutions of the Athenian *polis*<sup>59</sup>. There is no need to repeat here the argument that an *epicheirotonia ton nomon*, as a fixed item in the first Assembly meeting of the year, never existed. It suffices to say that Demosthenes makes no mention of such a fixed annual vote (he rather mentions preliminary votes to be held at any point, whenever one wants to propose new laws), and its existence is contradicted by inscriptions which show that laws could be proposed and enacted, and therefore a preliminary vote could be held, at any point of the year<sup>60</sup>.

The identity of the *nomothetai* is also a complex issue: the only alleged evidence that they were judges – that they were selected from those who had sworn the Judicial Oath – is a statement within an extremely problematic document found at Dem. 24, 20-23, which finds no confirmation whatsoever in our sources<sup>61</sup>. There are many reasons to consider that document a later forgery. There is in fact another passage which provides clearer information about the identity of the *nomothetai* in Aeschines' *Against Ctesiphon* (Aeschin. 3, 38-40), but this has been emended, discounted or explained away precisely because it contradicts that document. In its most obvious reading, that passage not only shows that the *nomothetai* voted by show of hands, as an Assembly and unlike a panel of judges who had sworn the Judicial Oath; it also shows that the *nomothetai* were none other than a special session of the Assembly, summoned *ad hoc* when there were new laws to enact, and labelled *nomothetai*. It is important to discuss this passage in detail, because its correct interpretation has wide implications.

Aeschines starts his discussion in this passage by claiming that it is impossible that two contradictory laws on the same topic (the award of crowns in the theatre of Dionysus) may exist, because the lawgiver has clearly prescribed a procedure to prevent this<sup>62</sup>. This procedure was probably introduced in the late fourth-century, and relied on the existing *nomo-*

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<sup>59</sup> See *infra*, pp. 00-00 for his reconstruction, and the relevant bibliographical coordinates.

<sup>60</sup> On the alleged *epicheirotonia ton nomon* see now Canevaro 2018a, *pace* Hansen 2016. That laws could be enacted at all points of the year is clear from the epigraphical record: *IG II<sup>3</sup> 1 445* was enacted on Skirophorion 8, *IG II<sup>3</sup> 1 320* in the ninth prytany, *IG II<sup>3</sup> 140* in the fifth, the seventh or the tenth prytany.

<sup>61</sup> Canevaro 2013a, 150-156, and 2013b, 94-102, now with Canevaro 2018a. The reference to those that have sworn the Judicial Oath at Dem. 20, 93 refers to the judges who judge a *graphē nomon me epitēdeion theinai*, not to the *nomothetai*, see Canevaro 2016a, 46-48, and 2016b, 19-23. One should also observe that there is no trace in the (abundant) evidence for the Athenian Judicial Oath of any provision relevant to the function of those who swore it as *nomothetai*, yet because of the importance of that function we should expect to find specific provisions about it in the oath.

<sup>62</sup> For an analysis of the arguments of Aeschines see Harris 2013a, 225-233.

*thesia* procedures<sup>63</sup>. According to Aeschines, the procedure prescribes that the *thesmothetai* every year must reconcile the laws after a careful investigation and examination, in case there are contradictions, invalid laws or multiple laws on the same subject. If they find irregularities, they must post the irregular law(s) before the monument of the Eponymous Heroes. After this, according to the text of the manuscripts, the *prytaneis* must hold an Assembly ἐπιγράψαντας νομοθέτας, and at that Assembly meeting the *epistates* of the *proedroi* must hold a *diacheirotonia* of the *demos* on the question of the removal of one set of laws and the retention of the other (τὸν δ' ἐπιστάτην τῶν προέδρων διαχειροτονίαν διδόναι τῷ δήμῳ τοὺς μὲν ἀναιρεῖν τῶν νόμων, τοὺς δὲ καταλείπειν), so that there may be only one law on each issue (ὅπως ἂν εἷς ἢ νόμος καὶ μὴ πλείους περὶ ἐκάστης πράξεως). It is clear therefore from the *paradosis* that the *διαχειροτονία* is held before the *demos*, and it is also clear that the effect of the *διαχειροτονία* is that some laws are retained and some others are repealed, straightaway, so that, as a result, there is only one law on each subject, and there are no contradictory laws left. Now, for this vote to have this effect, the *διαχειροτονία* mentioned here must be the final conclusive vote before the *nomothetai*, because we know (from Dem. 24, Dem. 20 and many inscriptions<sup>64</sup>) that a normal Assembly did not have the power to change the laws.

The most straightforward reading of this passage therefore tells us that the *prytaneis* summoned an *ekklesia* ἐπιγράψαντας νομοθέτας, that the *epistates* of the *proedroi* in this Assembly (with the *prytaneis*, that is, ἐπιγράψαντας νομοθέτας) called a vote by the *demos* on the relevant laws, and that the vote had the effect of confirming some laws and repealing others. The obvious conclusion is that this particular Assembly *is* the *nomothetai* – the *demos* acts as *nomothetai* and votes on the laws. The *διαχειροτονία* is in fact mentioned, in this passage, after the posting of the irregularities before the Eponymous Heroes, and after the mention of the *nomothetai*. That this *διαχειροτονία* is held before the *nomothetai* is confirmed by the next paragraph (Aeschin. 3, 40), straight after the *grammateus* reads out the law, where Aeschines summarises what has just been read out and applies it to the case at hand, stating that if two contradictory laws had existed, «it is inevitable [...] that once the *thesmothetai* had discovered them and the *prytaneis* had handed them over to the *nomothetai*, one of the laws would have

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<sup>63</sup> See now Canevaro 2018a, 26-30.

<sup>64</sup> The fourth-century laws preserved epigraphically are, in chronological order, SEG 26, 72; Stroud (1998); Agora Excavations, inv. I 7495 (unpublished); IG II<sup>2</sup> 140; IG II<sup>3</sup> 1 320, 429, 447, 445. Cf. also Clinton 2005-2008, nr. 138, with commentary at 2, 116; SEG 52, 104.

been annulled». The detailed description of the procedure of Aeschin. 3, 39 is reformulated, more synthetically, as τῶν δὲ πρυτάνεων ἀποδόντων τοῖς νομοθέταις ἀνήρητ' ἂν ὁ ἕτερος τῶν νόμων, and the parallelism between the general description of the procedure at Aeschin. 3, 39 and the application to the current case at Aeschin. 3, 40 makes it very clear that the action of the *prytaneis* is linked directly to the session of the *nomothetai*: the vote of the *nomothetai* is a vote of the *demos* in this ἐκκλησία, and the *nomothetai* are none other than a special *ad hoc* Assembly meeting specifically intended for dealing with laws, or possibly a special incarnation or the Assembly at a particular point of a meeting, as prescribed in the agenda, in which they perform nomothetic functions<sup>65</sup>.

Incidentally, Schöll saw that this was the obvious reading of the *paradosis* and, as a result, in order to reconcile Aeschines' account with the document at Dem. 24, 20-23 (which states that the *nomothetai* are selected from those that have sworn the Judicial Oath), chose to emend the passage: he emended, with Dobree (and most later editors) νομοθέταις into νομοθέτας (after ἐπιγράψαντας, conjuring up an «Assembly for the purpose of appointing *nomothetai*»), and deleted τῷ δήμῳ (after διαχειροτονίαν δίδοναι) to eliminate all features that show that the *nomothetai* were none other than the Assembly<sup>66</sup>. Piérart noted that the first of these emendations was not methodologically sound, and argued for retaining νομοθέτας and reading this as the «*prytaneis* call an Assembly labelling it *nomothetai*»<sup>67</sup>. This reading is the most likely, and means that the *nomothetai* were none other than a special *ad hoc* session of the Assembly labelled as such. Rhodes has countered that ἐπιγράψαντας νομοθέτας could also be read to mean «putting the *nomothetai* on the agenda»<sup>68</sup>. This is perhaps possible<sup>69</sup>, but it hardly follows that this item on the agenda was about the appointment

<sup>65</sup> We mention this as a possibility – that the *nomothetai* may be a special item on the agenda of the Assembly – but if that were the case, it is difficult to explain why the motion and enactment formulas of laws are «resolved» or «it should be resolved by the *nomothetai*» rather than «by the *demos*» or «by the *boule* and the *demos*» as in all other instances of items discussed in a normal Assembly. A special Assembly rebranded as *nomothetai*, on the other hand, would enact laws as «resolved by the *nomothetai*».

<sup>66</sup> Schöll 1886, 116-117, n. 4 and 118, n. 1.

<sup>67</sup> Piérart 2000, 229-250.

<sup>68</sup> Rhodes 2003, 126.

<sup>69</sup> Although it does strain the Greek, and also ignores the decisive presence of τῷ δήμῳ after διαχειροτονίαν δίδοναι. Unless we can ascertain on independent grounds that the document at Dem. 24, 20-23 is authentic (which, we believe, is impossible given the stichometry and its many problems and idiosyncrasies), there is no reason to emend the Greek (deleting τῷ δήμῳ) and to attempt to read, with Rhodes, τοὺς δὲ πρυτάνεις ποιεῖν ἐκκλησίαν ἐπιγράψαντας νομοθέτας as «the *prytaneis* shall hold an assembly putting the appointment of *nomothetai* on the agenda».

of the *nomothetai*, as Rhodes suggests (in accordance with the document at Dem. 24, 20-23). The passage makes clear that the consequence of the *prytaneis* ἐπιγράψαντας νομοθέτας was a final vote on the laws before the *demos* (and the importance of τῷ δήμῳ after διαχειροτονίαν διδόναι is missed by both Piérart and Rhodes, who do not seem to notice its arbitrary deletion in most editions) – the *demos* in fact is said to take the vote that was reserved for the *nomothetai*. The result is that, if we stick to the *paradosis*, even following Rhodes' (less likely) suggestion on the meaning of ἐπιγράψαντας νομοθέτας, the item on the agenda marked as *nomothetai* leads to a vote of the *demos* on the laws, with the *demos* acting as *nomothetai*. If we read the expression more straightforwardly, with Piérart, as indicating the labelling of a special Assembly as *nomothetai*, then it is even clearer that the vote of the *nomothetai* is in fact a vote of the Assembly, and that the *nomothetai* are none other than a special instantiation of the Assembly<sup>70</sup>. To sum up, the evidence of this passage strongly suggests that the *nomothetai* were not a special body, but only a special incarnation of the *ekklesia*, whether an *ad hoc* meeting (more likely) or a special incarnation of the *demos* at a certain point in a meeting. The fact that that the *prytaneis* ποιεῖν ἐκκλησίαν, rather than adding this as an item to an existing meeting, makes the first of these two options (Piérart's) the most likely.

If this is the case, the «silence» of the *Ath. Pol.* about fourth-century *nomothesia* becomes less striking, less problematic, and less worrying. *Nomothesia* was to Aristotle (that is, within his framework) undistinguishable from the normal activities of the Council, the Assembly and the courts – yet another example of the *demos* «administering everything through its *psephismata* and its court», to cite his assessment of the eleventh constitutional stage of Athens. The procedures of *nomothesia* quite simply

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<sup>70</sup> Piérart 2000, 236-237 rightly argues that the term *diacheirotomia* is strong evidence that the *nomothetai* voted by show of hands like an assembly. Rhodes 2003, 126-127 replied to Piérart by arguing that Athenian voting practice is often inconsistent, and that no conclusion about how the *nomothetai* voted can be drawn from voting terminology. Rhodes argues that «*cheir*-words and *pseph*-words are normally used appropriately, but there is one major exception in the use of *pseph*-words for decrees», and therefore other exceptions and terminological inconsistencies may have existed. Yet there is no confusion possible in this passage: the expression *diacheirotomia didonai* is never used for a lawcourt, which voted by secret ballot, but always for the Assembly voting by show of hands (see Canevaro 2013, 85-86), and here it is even complemented by τῷ δήμῳ, which always refers to the Assembly in matters of voting. If the *nomothetai* are a special session of the Assembly, this also helps explain why they were presided over by the *proedroi* and by an *epistates* (IG II<sup>2</sup> 222, 49-50) who had to estimate the votes by show of hands (cf. *Ath. Pol.* 44, 2-3: τὰς χειροτονίας κρίνουσιν with Hansen 1987, 41-44), and were the same officials presiding over the usual business of the Assembly (Canevaro 2013, 118-120).

piled up different institutional stages with different functions, enlisting the work, in turn, of Council, Assembly, and lawcourts (all manned by the *demos*). Aristotle duly provides an account of the workings of the various institutions that played a role in the procedure but does not recognise the procedure any specificity – any distinctiveness or higher function – and as a result he does not select it for inclusion, as there were, within his framework, no compelling reasons, neither from the point of view of his theoretical edifice nor from that of the organisational structure of the *Ath. Pol.*, that made its inclusion particularly meaningful. The reason for this is that, to him (that is, within his framework of *Politics IV*), there was in fact no specific or higher function to fourth-century *nomothesia* – it did not qualify as an effective form of *nomophylakia* restraining the *demos* and guarding the laws, because of the lack of socio-economic mixing effected through institutional differentiation. It was just a regular manifestation of the *demos* exercising its absolute power over everything, through the enactments of the Assembly and the decisions of the courts – a manifestation of an extreme democracy.

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