

THEOPHRASTUS ON GREEK JUDICIAL PROCEDURE

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In 1943, Wolfgang Aly published from folia in a Vatican palimpsest (Vat. Gr. 2306) two fragments dealing with the political and legal antiquities of several Greek states.¹ Publication was delayed for eleven years in expectation of a *corollarium Theophrasteum* by Wilhelm Croenert, who cooperated with Aly in deciphering the (almost illegible) text. This work never appeared, but Sbordone's discussion is a good substitute for it. Doubtless because of the date of publication, the text has almost totally escaped notice:² an unfortunate result, since it contains much of interest, especially to the constitutional historian of Greece. I propose here to concentrate on the first fragment (A). It is my main purpose to argue that the general interpretations of this fragment which have hitherto been offered are wrong, although there will remain some points of detail which, given present knowledge, seem insoluble.

The text is written on two folia (designated A and B). Originally the folia contained three columns of writing on each side, with 44 lines

¹ I use the following abbreviations: Aly = W. Aly, *Fragmentum Vaticanum de eligendis magistratibus* = *Studi e Testi* 104 (1943); Sbordone = F. Sbordone, "Le pergamene vaticane 'De eligendis magistratibus,'" *PP* 3 (1948) 269–90; Oliver = R. P. Oliver, *CP* 45 (1950) 117–19. The new material in the ms. was first reported by Aly in *Forschungen und Fortschritte* 11 (1935) 302 f.

² I have found the fragments referred to by A. Calderini, *Aevum* 18 (1944) 211 (review of Aly), W. Peremans, *RBPh* 24 (1945) 580, H. Avery, *CP* 61 (1966) 257–58, E. Meyer, *Einführung in die antike Staatskunde* (Darmstadt 1968) 302, A. Dreizehnter, *Aristoteles Politica* = *Studia et Testimonia antiqua* 7 (Munich 1970) xix (Dreizehnter denies the attribution to Theophrastus), P. Canart and V. Peri, *Sussidi bibliografici per i manoscritti greci della Biblioteca Vaticana* = *Studi e Testi* 261 (1970) 701 and J. H. Oliver, *Marcus Aurelius: Aspects of Civil and Cultural Policy in the East* = *Hesperia* Supplement 13 (1970) 14. Cf. also *OCD*², 1059.

to a column and *c.* 13 letters to a line. Of A there is preserved the third column of the *recto* and the first column of the *verso*: each column is truncated and contains 34 lines. Of B the three columns on each side are preserved. The text is written in a majuscule hand which Aly dates to the sixth century. These folia were used for a Nomocanon at some later date and, in the ninth or tenth century, for the Pentateuch (A, *Genesis*; B, *Exodus*). The AB-order in which Aly prints the fragments is not based on physical evidence: it can only be stated with certainty that the two folia were never part of a larger single folium.³

From their contents, Aly concluded that the fragments came from a work of Theophrastus. Sbordone adduced further arguments in support of this conclusion, and there seem no good grounds for challenging it. The fragments contain no reference to characters or events later than the fourth century. The amount of historical and constitutional information they contain almost requires the assumption that their author had before him the Aristotelian collection of 158 *Politeiai* or, perhaps more precisely, the material on which that collection was based.⁴ Of Aristotle's followers, only Theophrastus⁵ had the kind of interest in political theory that the fragments reveal.⁶

³ Cf. Aly 32. In the present state of Vat. Gr. 2306, each folium is in a different quaternion: cf. Aly, *De Strabonis codice rescripto = Studi e Testi* 188 (1956) xvii–xviii.

Lines 44–45 of fragment B contain a reference (καθάπερ εἴρηται) to a preceding discussion of ταμεία: the reference corresponds to nothing in A. Aly 34 thought that the treatment of higher magistrates (B: στρατηγοί, ταμίαι) should follow the treatment of magistrates in general (A) and found support for this order in Aristotle, *AP* 61, where the ἀρχαὶ πρὸς τὸν πόλεμον are discussed after the other officials. But the order in the *AP* is not based on the importance of military officials but on the division (*AP* 43.1) between ἀρχαὶ κληρωταί and ἀρχαὶ χειροτονητοί.

Croenert (Aly 32, n. 2) and Sbordone 280 thought that A should follow B.

A grant from the Princeton University Committee on Research in the Humanities and Social Sciences made it possible for me to inspect the manuscript in June, 1970, but I could make no improvement on Aly's readings based on autopsy.

⁴ Of the eleven place-names in the fragments (A: Sparta, Megalopolis, Epizephyrian Locri; B: Carystus, Cythnus, Epirus, Phocis, Ambracia, Argos, Carthage), there are only three (Carystus, Phocis, and Carthage) for which an Aristotelian πολιτεία is not attested. (It is occasionally assumed, e.g., H. Weil, *Aristote et l'histoire* (Paris 1960) 228–29 that the discussion of Carthage in *Politics* 2 is based on a Καρχηδονίων πολιτεία, but it is more probable that *Politics* 2 antedates the collection of *politeiai*.)

H. Bloch, *HSCP*, Suppl. Vol. 1 (1940) 355–76, has shown that Theophrastus in the *Nόμοι* and Aristotle in the *Πολιτεῖαι* drew on the same collection of material which each used for his own purposes (cf. also W. R. Connor and J. J. Keaney, "Theophrastus on the End of Ostracism," *AJP* 90 (1969) 313–19). So here, there are comments about Hagnon

The question of the particular work is more problematical. On the basis of a phrase in B 115-18, *μηδὲν χεῖρον διοικουμένων τῶν τῆς πόλεως*, Aly assigned the fragments to the *Πῶς ἂν ἄριστα πόλεις οἰκοῦντο α'.*⁷ This title is found in the third catalogue of Theophrastus' writings preserved by Diogenes Laertius (5.49), but nothing of the work has survived. It might be better to suggest that the fragments belong to Theophrastus' most famous work in this area, the *Nomoi*.⁸ The extant fragments of that work would not lead one to expect the amount of constitutional (as distinct from legal) material which is found in B, but in this, as in other features, the fragments show affinities with Plato's *Laws*. However this may be, it is clear enough that the fragments depend upon the same body of material upon which Theophrastus drew for the *Nomoi*.

I print Aly's text of A, with his corrections and supplements, followed by a selective apparatus.

A⁺ III

[ἐὰν κατ' ἐξέτα-]
 [σ]μόν, ὅπερ καὶ
 διαιτητῆς ποι-
 [εῖ] χρόνιον <ὄν> καὶ ἐρ-
 [γ]ῶδες, ἕκαστον
 5 [ἀ]νακρίνη, καθά-
 [π]ερ ἐν Λακεδαίμο-
 [ν](ε)ι ποιοῦσιν·
 [δ]ιὸ κρ<ε>ίττον ἴσως

(B 118-29) and Aristeides (B 32-35: perhaps from Aeschines Socraticus) which do not come from the *AP* and about Epaminondas (B 26-27) which does not come from a *Θηβαίων πολιτεία*, for none existed (for the possibility that Epaminondas was a subject of Peripatetic historiography, cf. G. S. Shrimpton, *Phoenix* 25 [1971] 316-17).

⁵ A possible exception to this statement is Demetrius of Phaleron, but his political works were historical (e.g., *Ἀρχόντων ἀναγραφὴ*) or autobiographical and tendentious (e.g., *Περὶ τῆς δεκαετίας*) rather than comparative and theoretical.

⁶ On the political writings of Theophrastus, see O. Regenbogen, *RE Supplb.* 7.1516-21.

⁷ This work is probably to be identified with a title in the first catalogue (D. L. 5.45), *περὶ τῆς ἀρίστης πολιτείας α*. For the form of the title, cf. Stobaeus 43.89: *πῶς ἄριστα αἱ πόλεις οἰκοῦντο*.

⁸ D. M. Lewis pointed out to me that the *Nomoi* is the political work of Theophrastus most likely to have survived until the sixth century. Oliver 119 noted the resemblance of the fragments to the long passage on laws of sale from the *Nomoi* (F 97 Wimmer).

- [ᾶ]τε <τὸ> ἀκριβὲς ζη-
 10 τούντας πολλὰς
 ἀδικάστους ποι-
 εῖν ἢ ἄνευ τῆς ἀ-
 νακρίσεως δικά-
 ζειν, ἐπεὶ καὶ τοῦ-
 15 το πλεονεξίαν
 [τινὰ] ποιεῖ τοῖς
 φιλονικοῦσιν,
 ὅπερ φασὶ συμβαί-
 νειν καὶ ἐν τῇ
 20 Σπάρτῃ· τοιγὰρ
 σκυτάλῃ ἀνα-
 κρίνουσιν οὕτως
 καὶ ἀνακρίναντες
 ἐκκαλοῦσιν τῇ
 25 ὥρᾳ τοὺς ἄλλους,
 ὁ καὶ Κλεομένης
 ἐποίησεν ὁ βα-
 σ[ι]λεὺς ἐν τῇ
 κρίσει τῇ ἐς Κλε-
 30 ολαν. πάντα δὲ ταῦ-
 τα συλληπτέον
 εἰ μὴ
 τοὺς διδόντας
 αλ. . εἴν

A^v I

- 44 [πολλὰς]
 45 ἡμέρας ἀκροᾶ-
 σθαι καθάπερ [ἐν]
 Λακεδαίμονι·
 καὶ τῷ πλήθει[ι ἔ-]
 νι τῶν ψήφω[ν]
 50 ὑπεραίρειν, ὥ[σ-]
 περ ἐν Μεγάλῃ
 πόλει περὶ τῶν
 φθιनिχῶν. ἐν[ια-]
 χοῦ δὲ καὶ ὑπο-
 55 (δ)οῦσιν τῷ κρι-
 νομένῳ, καθά-

- περ ἐν Λοκροῖς φά-
 σι τοῖς Ἐπιζεφύ-
 ρίοις. χρεὶ δ' ἐν γ[ε]
 60 τοῖς τοιούτοις ἰ-
 ἐν(αι) εἰς ἀνυχίαν
 τε καὶ πάθος τὰ
 πολλὰ τοῖς δράσα-
 σιν, ὥσπερ ἐν τοῖς
 65 χρόνοις καὶ ὅσα
 δὴ χρονιζόμε-
 να μὲν βλέπτει
 τὴν πολιτείαν.
 ἐνίων δὲ καὶ ἀ-
 70 ποφυγὴν πολ-
 λάκις ἀκροασαμέ-
 νων καὶ ἀνακρι-
 νάντων, ὁσίως
 ὑπεύθυνόν πως
 75 πάλιν ποιητέον
 ὥσπερ ἐν Λακε-
 δαί[μον]ι· διὰ βίον[υ]
 δ[ε] νταῖ πα[ρὰ]

6 εν] Croenert agnovit οἱ (Aly); 16 ΕΕΥΦΑΙΝΕΙ primum Cr. postea
 ΤΙΝΑ ΠΟΙΕΙ agn.; 21 σκυταλην cod., ν expunctum est (Aly); 53 de θ et χ
 noli dubitare (Aly); 54–55 Cr. visus est agnoscere απειλουσιν sed ν post
 και certum (Aly), ὑπο[τε]λοῦσιν Sbordone; 61 ex ΕΝΕ ΕΝΑΙ correctum
 esse videtur (Aly): si vis, ἀνυχίαν legas (Aly); 65 καθ' ὅσα Sbordone;
 69–70 καὶ ἀποφύγη?

In general, Aly, Sbordone and Oliver understand both passages to
 refer to an examination of magistrates. Aly thinks a double examina-
 tion to be involved, A^r dealing with the preliminary examination before
 the magistrates assume office, A^v with the examination after the term of
 office is completed. Sbordone and Oliver pass over this distinction in
 silence and take both columns to refer to the second examination (Sbor-
 done adds the further refinement of an “inchiesta preliminare” = ἀνά-
 κρισις within the second examination). I will later argue that the
 passages have nothing to do with examinations of magistrates (they
 rather deal with procedures in capital cases), but it is useful to begin by

questioning a false assumption, made by Aly and accepted by Sbordone and Oliver, on which the general interpretation rests.

The assumption is that, since B unquestionably deals with (the qualifications of) magistrates, A must also have to do with magistrates. This assumption is behind the title which Aly assigned to the fragments (*de eligendis magistratibus*) as well as the order in which he printed them. Once this assumption is made, Aly (p. 33) argues as follows: *Cum duplex in iudiciis Atheniensium interrogatio hac voce (sc. ἀνάκρισις) significetur, altera arbitri, altera, cum magistratus vel designati probantur vel functi rationem reddere coguntur, arbitro obiter in enuntiato secundario laudato demonstratur hic agi de δοκιμασίᾳ, ut Athenienses magistratuum probationem vocare solebant. Mox post lacunam verba τοῖς δρᾶσαιν et ὑπεύθυνος v. 63 et 74 documento sunt tum de ratione reddenda disseri.*

As logical arguments, these are of themselves insubstantial and the assumption on which they are based is neither necessary nor valid. The only statement which can be made with confidence about the relationship between A and B is that they both come from the same work. As we have seen, it is certain that they were never part of the same folium and there is no physical evidence that they were ever contiguous.

Once we dispense with this assumption, the arguments lose force. There is no reason, either in the meaning of the word or in the context in which it is found, why *τοῖς δρᾶσαιν* should refer to magistrates. Although *ὑπεύθυνος* is frequently used of a magistrate subject to examination (*εὐθυνα*) after his term of office, it may also refer in a wider sense to anyone subject to (trial and) punishment.

A more critical issue is the use of the words *ἀνάκρισις* and *ἀνακρίνειν*. In a wider, non-technical sense of "examination, interrogation" the noun *ἀνάκρισις* is never found of the second examination of a magistrate, and the verb *ἀνακρίνειν* is found only once. That is in Photius, s.v. *Εὐθύναι· οἱ ἀπολογισμοὶ τῶν ἀρξάντων· καὶ εὐθνοὶ οἱ τούτους ἀνακρίνοντες· Νόμων ιβ*. This itself is a comment on Plato, *Laws* 12.945B ff. and, given its late date, does not tell us anything about Attic usage.

Of the preliminary examination of magistrates, the verb is attested in Dinarchus 2.37: *πρὸς δὲ τούτοις ἀνακρίνοντες τοὺς τῶν κοινῶν τι*

μέλλοντας διοικεῖν, and in Demosthenes 57.66 and 70. It is occasionally alleged that the noun can be used of this examination:⁹ the allegation is based on a gloss in the *Lexicon Cantabrigiense*: s.v. Θεσμοθετῶν ἀνάκρισις· κατ' Ἀριστοτέλην (AP 55.1) οἱ θεσμοθέται εἰσὶν ἐκ τῶν ἐννέα ἀρχόντων, αὐτοὶ ἕξ ὄντες· οἱ δὲ λαχόντες ὑπὸ τῆς βουλῆς τῶν πεντακοσίων καὶ τοῦ δικαστηρίου δοκιμάζονται πλὴν τοῦ γραμματέως, ἐρωτώμενοι τίνες αὐτῶν πατέρες, ὁμοίως καὶ δῆμων τίνων εἰσὶ καὶ εἰ ἔστιν αὐτοῖς Ἀπόλλων πατρῶος καὶ Ζεὺς ἔρκειος καὶ εἰ τοὺς γονεάς εὖ ποιοῦσι καὶ εἰ τὰ τέλη τελοῦσι καὶ εἰ τὰς ὑπὲρ τῆς πατρίδος στρατείας ἐστρατεύσαντο· πάντα οὖν ἀνάκρισιν εὐλόγως ὠνόμασαν.¹⁰ The lemma contradicts the gloss in that it restricts the examination of the nine archons to the thesmothetai. The gloss (and the error) most probably originated in a comment (of Didymus?) to Dem. 57.66: ὥσπερ γὰρ τοὺς θεσμοθέτας ἀνακρίνετε, ἐγὼ τὸν αὐτὸν τρόπον ἑμαυτὸν ὑμῖν ἀνακρινῶ. The examination Demosthenes refers to here is the preliminary one of all the archons.¹¹ The reason for his restriction of it to the thesmothetai is topical: the case he is arguing came under the competence of that board for referral to a court,¹² and a member of that board was the presiding officer in the court.¹³

If the argument is correct that ἀνάκρισις is not used of the examination of magistrates, we must seek a more suitable interpretation. I begin with two questions: (1) what is the content of A¹ and of A²? (2) what, if any, relationship exists between the two fragments? In attempting to answer these questions, I will first offer a general interpretation based on parallel passages from other authors: this

⁹ T. Thalheim, *RE* 1.2050, does not go far enough when he says that the use of the substantive is "fraglich." The notion of J. H. Lipsius, *Das Attische Recht und Rechtsverfahren* 2.272, that the phrase ἀνάκρισις τῶν θεσμοθετῶν is an "altertümlicher Ausdruck" used of the nine archons is unwarranted and unnecessary.

¹⁰ I assume that the last clause (πάντα-ὠνόμασαν) was added because the glossator did not find ἀνάκρισις/ἀνακρίνειν in his source: Aristotle (AP 55.3) used ἀνερωτᾶν and ἐπερωτᾶν of this examination. The noun, ἀνάκρισις, is also used of the examination before a person is admitted into a phratry (IG II² 1237.72).

¹¹ Cf. Dem. 57.70: δικασταί, τοὺς ἐννέα ἀρχοντας ἀνακρίνετε.

¹² Cf. AP 59.4: the thesmothetes εἰσάγουσιν...καὶ τοὺς ἀπεψηφισμένους ὑπὸ τῶν δημοτῶν κτλ.

¹³ An additional argument against Aly's version is that one might have expected the author to have used δοκιμασία/δοκιμάζειν. The author used δοκιμάζειν in its technical sense at B 102-3.

will be followed by a tentative translation of the fragments and a brief commentary. As I noted at the beginning of this paper, there are some particular problems for which I have no solutions: I can only try to make some suggestions which are consistent with the general interpretation.

(1) In A^v 44–47 we are told that at Sparta [πολλὰς] ἡμέρας ἀκροᾶσθαι: in A^v 69–77 that at Sparta a person can be made subject to (trial and) punishment, even if he has been once tried and acquitted. Parallels to both statements are found in Plutarch, *Aporhthegmata Laconica* = *Moralia* 217AB: Ἐρωτῶντος δέ τινος αὐτὸν (sc. Anaxandridas) διὰ τί τὰς περὶ θανάτου δίκας πλείοσιν ἡμέραις οἱ γέροντες κρίνουσιν, καὶ ἀποφύγη τις, ἔτι οὐδὲν ἡττόν ἐστιν ὑπόδικος, “πολλαῖς μὲν,” ἔφη, “ἡμέραις κρίνουσιν, ὅτι περὶ θανάτου τοῖς διαμαρτάνουσιν οὐκ ἔστι μεταβουλεύσασθαι· νόμῳ δὲ ὑπόδικον δεήσει εἶναι, ὅτι κατὰ τοῦτον τὸν νόμον ἂν εἴη καὶ τὸ κρεῖττον βουλεύσασθαι.” The practice of adjudication of capital cases over several days is doubtless alluded to by Plato (*Apol.* 37A), is the model followed by Plato in such cases (*Laws* 9.855D–56A), and is implied in Thucydides’ statement (1.132.5) that the Spartans χρώμενοι τῷ τρόπῳ ᾧ περ εἰώθασιν ἐς σφᾶς αὐτούς, μὴ ταχεῖς εἶναι περὶ ἀνδρὸς Σπαρτιαίου ἀνευ ἀναμφισβητήτων τεκμηρίων βουλευσαί τι ἀνήκεστον κτλ. I do not know what precisely is at issue in the references to the practices of Epizephyrian Locri and Megalopolis, but the parallel passage from Plutarch suggests that A^v concerns the disposition of defendants in capital cases. In terms of a court-process, the first reference to Sparta concerns the trial itself and the reference may imply a trial (if τῷ κρινομένῳ [A^v 55–56] = “the defendant while he is on trial”): on the other hand, the second reference to Sparta alludes to a period after an initial trial and so, I think, does the reference to Megalopolis.

(2) Aly, 34, rightly noted that the word συλληπτέον (A³ 31) signals the end of the discussion.¹⁴ It is clear enough that the topics of A^r and A^v differ, since A^r deals with the importance of examination to achieve accuracy and A^v with methods to ensure that a guilty defendant is punished.

¹⁴ Cf. also Sbordone 273.

Thus, question (2) resolves itself into two further questions: (a) does A^r, like A^v, deal with capital cases? (b) if A^r does deal with capital cases, does it refer to a prior and distinct (as in the Athenian *anakripsis*) part of the court-process?

(a) There is nothing *prima facie* in the *content* of A^r which tells whether or not it deals with capital cases. I suggest that it does and will so interpret it in the commentary, but the suggestion is based on the content of A^v and on the assumption that, given the fact that only twenty brief lines have been lost between A^r and A^v, the context of both passages will have been the same.

(b) One approach to this question is to decide whether *ἀνάκρισις/ἀνακρίνειν* is to be taken in the limited sense (as frequently in Athenian practice) of “examination preliminary to the trial” or in the more general sense of “examination/interrogation” (whether this takes place before or during the course of the trial). Although the Spartan practice adverted to in A^r clearly envisages a two-stage process (A^r20–25), I think the general sense is the more likely to be correct.

First, there is no allusion to the Athenian practice of *ἀνάκρισις*, and, as we shall see, it is possible that there is an implicit criticism of Athenian practice.

Second, a passage in Plato's *Laws* (6.766DE) offers several parallels to the text of A^r: *πᾶσα δὲ δήπου πόλις ἄπολις ἂν γίγνοιτο, ἐν ᾗ δικαστήρια μὴ καθεστῶτα εἴη κατὰ τρόπον ἄφωνος δ' αὖ δικαστῆς ἡμῖν καὶ μὴ πλείω τῶν ἀντιδίκων ἐν ταῖς ἀνακρίσεσι φθεγγόμενος, καθάπερ ἐν ταῖς διαίταις, οὐκ ἂν ποτε ἱκανὸς γένοιτο περὶ τῇ τῶν δικαίων κρίσιν· ὧν ἕνεκα οὔτε πολλοὺς ὄντας ῥάδιον εἶδικάζειν οὔτε ὀλίγους φαύλους. σαφὲς δὲ αἰὲν τὸ ἀμφισβητούμενον χρεὼν γίγνεσθαι παρ' ἐκατέρων, ὃ δὲ χρόνος ἅμα καὶ τὸ βραδὺ τό τε πολλάκις ἀνακρίνειν πρὸς τὸ φανερὰν γίγνεσθαι τὴν ἀμφισβήτησιν σύμφορον.* Both authors use the analogy of the *δίαιτα* (albeit in different ways), both stress the necessity of interrogation, both cite accuracy (*τὸ ἀκριβές-σαφές . . . γίγνεσθαι*) as a goal and both assert that the process is time-consuming. The parallels are close enough to allow the suggestion that Plato has influenced the content of A^r.¹⁵ While some commentators and translators have assumed that Plato is here talking about preliminary

¹⁵ For the use of Plato's *Laws* in Theophrastus' *Nomoi*, cf. F 97 Wimmer.

examinations, it is fairly certain that he is not.¹⁶ As Saunders has recently pointed out, the procedure recommended here is precisely that used *during the trial* in capital cases. It is worthwhile to quote the passage in full (*Laws* 9.855E–56A):¹⁷ μετὰ δὲ τοὺς λόγους τούτους ἄρχεσθαι μὲν τὸν γεραιτότατον ἀνακρίνοντα, ἰόντα εἰς τὴν τῶν λεχθέντων σκέψιν ἱκανήν, μετὰ δὲ τὸν πρεσβύτατον ἐξῆς ἅπαντας χρή διεξελθεῖν ὅτι ἂν παρ' ἑκατέρου τις τῶν ἀντιδίκων ῥηθὲν ἢ μὴ ῥηθὲν ἐπιποθῇ τίνα τρόπον· ὁ δὲ μὴδὲν ποθὼν ἄλλω τὴν ἀνάκρισιν παραδιδότω. τῶν δὲ ῥηθέντων ἐπισφραγισμένους ὅσα ἂν εἶναι καίρια δοκῇ, γράμμασιν σημεία ἐπιβάλλοντας πάντων τῶν δικαστῶν, θείναι ἐπὶ τὴν ἐστίαν, καὶ πάλιν αὔριον εἰς ταῦτόν συνελθόντας, ὡσαυτῶς τε ἀνακρίνοντας διεξελθεῖν τὴν δίκην καὶ σημεία ἐπιβαλλόντας αὖ τοῖς λεχθεῖσιν κτλ.

Finally, it appears from A^v that chronological considerations play little part in the author's methodology. That is, he is not so much interested in specific institutions in and for themselves as he is in the effectiveness of institutions in accomplishing legal ends which he deems desirable.¹⁸ Thus he cites different practices of Sparta, Megalopolis, and Locri, all of which have apparently the same purpose, viz. to ensure that a guilty defendant is punished. He does not recommend one of these practices over another: he uses them to illustrate different means to an end. While a two-stage process is envisaged in A^r, that is so because the author mentions only the practice of Sparta. But to restrict ἀνάκρισις only to a preliminary examination would run counter to this methodology, in the sense that it would seem to exclude questioning during the trial. On the other hand, the more general interpretation ("examination/interrogation") does not exclude a preliminary examination: it only insists that there be an active examination somewhere in the judicial process.

In sum, I suggest for these reasons that both A^r and A^v treat the disposition of capital cases.

A^r: *Translation* (material within parentheses is explicatory)

"if by examination, which an arbitrator also does, a lengthy and laborious process, (the magistrate) interrogates each (party), as they do

¹⁶ Cf. G. Morrow, *Plato's Cretan City* (Princeton 1960) 280–85.

¹⁷ Cf. T. J. Saunders, *Notes on the Laws of Plato* = *BICS* Supplement 28 (1971) 42–43.

¹⁸ The same procedure is found in F 97.

in Sparta. Wherefore, perhaps it is better, in as much as it is accuracy which is being sought, to leave many (*dikai*) undecided than to decide them without the examination, since in fact this (viz. to decide cases without an examination) gives a certain unfair advantage to the contentious, which, they say, happens also (or, even) in Sparta. Therefore, (the magistrates) conduct the examination in this way with a *skytale* and, after the examination, they call out the others at the proper time, which Kleomenes the king did in the trial of Kleolas. All these factors must be taken into account, unless. . . .”

Commentary

1-2. (ἐὰν κατ' ἐξετασ)μόν: for ἐξετάζειν used of διαιτηταί, cf. *Lexicon Cantabrigiense*, s.v. *Μὴ οὔσα δίκη*: a suit cannot be introduced into court εἰ μὴ πρότερον ἐξετασθείη παρ' αὐτοῖς (sc. τοῖς διαιτηταῖς) τὸ πρᾶγμα; of magistrates, cf. Harpocration, s.v. *Ἀνάκρισις*: ἐξέτασις ὑφ' ἐκάστης ἀρχῆς γινομένη πρὸ τῶν δικῶν περὶ τῶν συντεινόντων εἰς τὸν ἀγῶνα. ἐξετάζουσι δὲ καὶ εἰ ὅλως εἰσάγειν χρή.

For other instances of haplography, cf. A9, B31-2: ἐστρατήγησαν <ἄν>.

3. διαιτητής: cf. Plato, *Laws* 6.766DE, quoted above. It is certain that Plato and possible that Theophrastus here (implicitly) criticizes Athenian procedure. During an Athenian trial, the jurors were not allowed to direct questions at the parties involved. Further, the Athenian *anakrisis* was mainly procedural: the magistrate had to decide whether the plaintiff had a case at law and whether the case was within the competency of the court over which the particular magistrate presided. Although the magistrate directed questions at the parties, not all the evidence had to be produced at this preliminary stage, and the magistrate made no final decision for the plaintiff or defendant.¹⁹

5-7. καθάπερ ἐν Λακεδαιμόνι ποιοῦσι: *Anakrisis at Sparta and the identity of the Spartan officials*. This passage is the first secure evidence for the existence of a preliminary examination (*anakrisis*) as part of a formal trial-process at Sparta,²⁰ but such, I think, could have been

¹⁹ Cf. A. R. W. Harrison, *The Law of Athens* 2 (Oxford 1971) 94-105.

²⁰ Cf. R. J. Bonner and G. Smith, "Administration of Justice in Sparta," *CP* 37 (1942) 113-29, esp. 123-24: "If the two ephors, who always accompanied a king on his military expeditions by the time of the Persian Wars, suspected him of any wrong-doing, they

inferred from the affair of Pausanias.²¹ In 477 B.C. (Thuc. 1.95.3-5) οἱ Λακεδαιμόνιοι μετεπέμποντο Πausανίαν ἀνακρινούντες ὧν περί ἐπυνθάνοντο· καὶ γὰρ ἀδικία πολλή κατηγορεῖτο αὐτοῦ ὑπὸ τῶν Ἑλλήνων τῶν ἀφικνουμένων καὶ τυραννίδος μᾶλλον ἐφαίνετο μίμησις ἢ στρατηγία. . . . ἔλθων δὲ ἐς Λακεδαίμονα τῶν μὲν ἰδίᾳ πρὸς τινα ἀδικημάτων ἡθύνηθη, τὰ δὲ μέγιστα ἀπολύεται μὴ ἀδικεῖν· κατηγορεῖτο δὲ αὐτοῦ οὐχ ἥκιστα μηδισμὸς καὶ ἐδόκει σαφέστατον εἶναι. Pausanias was recalled again (1.131.2): ὁ δὲ βουλόμενος ὡς ἥκιστα ὑποπτος εἶναι καὶ πιστεύων χρήμασι²² διαλύσειν τὴν διαβολὴν ἀνεχώρει τὸ δεύτερον ἐς Σπάρτην. καὶ ἐς μὲν τὴν εἰρκτὴν ἐσπίπτει τὸ πρῶτον ὑπὸ τῶν ἐφόρων (ἔξεστι δὲ τοῖς ἐφόροις τὸν βασιλέα δρᾶσαι τοῦτο), ἔπειτα διαπραξάμενος ὕστερον ἐξῆλθε καὶ καθίστησιν ἑαυτὸν ἐς κρίσιν τοῖς βουλομένοις περὶ αὐτῶν ἐλέγχειν.

Thucydides' account of the first trial is, characteristically, brief but it is compatible with the process described in our passage. First, the ephors²³ summoned Pausanias in order to hold an investigation (ἀνακρινούντες²⁴): a capital²⁵ trial ensued and Pausanias was acquitted of the major charge. The second process is different. He was imprisoned (doubtless to give the ephors time to get evidence against him), but contrived to escape and presented himself for trial for any who wished to bring charges against him. This looks very much as if Pausanias wanted to avoid the first stage of the process, the investigation, and go directly into the second stage. The device was temporarily successful, for a trial probably did not take place (at least, Thucydides does not mention any judicial decision), but the investigation continued (Thuc. 1.132.2).

doubtless brought the matter before the board of ephors, which held a preliminary examination comparable to the Athenian ἀνάκρισις."

²¹ Cf. P. Oliva, *Sparta and her Social Problems* (Amsterdam and Prague 1971) 146-52.

²² For the bribery of Spartan ephors (if that is what Thucydides is implying), cf. Aristotle, *Pol.* 2.1270B10.

²³ The role of the ephors in the first process is not made specific by Thucydides, but it is a necessary inference from their powers of prosecution and police control and from their activity at Pausanias' second return.

²⁴ The word is used by Thucydides only here.

²⁵ Nepos, *Paus.* 2.6: *accusatus capitis absolvitur*.

The identity of the officials is not far to seek. We are told that οἱ γέροντες judged cases involving capital punishment:²⁶ in the affair of Pausanias and in other cases,²⁷ the ephors conducted the investigation. I conclude, then, that ἔφοροι is the subject of ἀνακρίνουσιν (21-22), ἀνακρίναντες (23) and ἐκκαλοῦσιν (24) and that τοὺς ἄλλους (25) are the *gerontes*.

14-20. ἐπεὶ-Στάρτη: the precise point at issue is not clear. In general, it is easy to see how unexamined or untested (false) claims or statements could work to the disadvantage of an opposing party.

For a good discussion of Spartan *philonikia* in other social contexts, cf. M. I. Finley in *Problèmes de la Guerre en Grèce ancienne* (Paris and La Haye 1968) 143-60.

20. τοίγανρ: this is one of the earliest, if not the earliest, occurrence of the particle in Attic prose. It is also found in Theophrastus' *Peri Eusebeias*, F3, line 1 Poetscher.

26. σκυτάλη: neither of the two uses of the σκυτάλη which Photius (s.v.) specifies as Spartan²⁸ seems to fit this context: the first is its use in despatches to officials abroad (to ensure secrecy); the second (Dioscurides 594 F5 Jac) in private loan-transactions (to preserve an accurate record of the transaction). In his *Constitution of Ithaca* (F 509 Rose) Aristotle is reported to have discussed other uses of the σκυτάλη but, without further information, it is idle to speculate as to its use here.²⁹

²⁶ Xenophon, *Lac. Pol.* 10.2, *Plut. Mor.* 217A (quoted in the text).

²⁷ Cf. Bonner and Smith, *op. cit.* (above, note 20) 118, 124.

²⁸ Cf. also schol. *Ar. Av.* 1283.

²⁹ I am tempted to suggest that the allusion is not to strips of leather wound around a baton but to sheets of leather (cf. L. H. Jeffery, *The Local Scripts of Archaic Greece* [Oxford 1961] 57-58): one of the scholia to Pindar *Ol.* 6.154 (1.190-91 Drachmann) reads: ἐχρώντο δὲ πλατεῖαις σκυτάλαις οἱ Λάκωνες, ἐγγράφοντες αὐταῖς τὰς ἐπιστολὰς καὶ ἐγκλείοντες εἰς σκύτινα ἀγγεῖα καὶ οὕτω σφραγίζοντες. Nothing is here said about the use of these *skytalai* in a judicial context, but to seal material in jars is reminiscent of the practice in Athens in public arbitration (Aristotle, *AP* 52.2-3). If the decision of the arbitrator was not accepted by one of the contending parties, the arbitrator put into a vase (ἔχυνος), which was later sealed, documents containing his decision, the statements of witnesses, the challenges and the relevant laws. When the suit was brought to the court, only the material in the vase was "admissible evidence." It would be idle to press for detailed parallels, but I suspect that the allusion in the text is to the inadmissibility of further evidence after the ephors had completed their investigation (cf. my remarks above [p. 190]) on Pausanias' actions on his second return; for the notion of relevant (καίρια) evidence in Plato's disposition of capital cases, cf. *Laws* 855E7).

26–30. *ὁ καὶ–Κλεόλαν*: totally a mystery. There is no way to tell whether it is Kleomenes I or Kleomenes II³⁰ and Kleolas cannot be identified.

A^v: *Translation*

“to listen (during the course of the trial) for several days, as in Sparta. And it is in the power of the *plêthos* to override the votes, as in Megalopolis in capital cases. In some places they even put fetters on the defendant, as they say (is the practice) in Epizephyrian Locri. In situations of this kind, the culprits should generally be put into a state of emotional distress, as in instances of delay and in those matters which, when protracted, are harmful to the constitution. In some states, even if (a defendant) is acquitted after trial and examination, he is to be made again subject to (trial and) punishment in some way, with due regard to divine law, as in Sparta. For life. . . .”

Commentary

44–45. [*πολλὰς*] *ἡμέρας*: *πλείονας* is possible (Plut., *Mor.* 217A: *πλείουσιν ἡμέραις*) but Aly’s supplement is confirmed by Plato, *Apol.* 37A: *πολλὰς* (sc. *ἡμέρας*) and by Plutarch, *loc. cit.*: *πολλαῖς ἡμέραις*.

48–52. *καὶ τῷ πλήθει–πόλει*: the word *ὑπεραίρειν* is not elsewhere used in a judicial context. I suggest that the reference is to the primary assembly of the Ten Thousand overruling a previous judicial decision.³¹ Next to nothing is known about judicial procedure in the Arcadian League, and it is not possible to say whether this decision would have been made by a court or by a board of magistrates.

52–53. *περὶ τῶν φθινιχῶν*: the word does not occur elsewhere, and accent and gender are uncertain. Aly translated “in iudiciis finalibus?” and noted (p. 41), on the analogy of the phrase, “fortasse talium causarum mentio fit, de quibus Gaius in instit. I 20 scribit: idque fit ultimo die conventus.” Within the judicial context I have proposed, I rather suggest that it is a nominal (or adjectival) form of *φθίνειν* “to

³⁰ Kleomenes II was mentioned by Theophrastus in the *Πολιτικά πρὸς τοὺς καιροὺς* (P. Oxy. 1012, F 9, lines 43 ff.).

³¹ The federal executive did have the power of arrest, but decisions of the executive could be overruled by the Ten Thousand (cf. J. A. O. Larsen, *Greek Federal States* [Oxford 1968] 188).

be killed," and that it refers to cases in which the penalty is execution.

54-55. ὑποδοῦσιν: it is tempting, with Aly 41, to interpret ὑποδοῦσιν in the light of Hesychius, s.v. ὑποδῆσαι· ἐνεχυρασθῆναι, Ἰταλιῶται.³² But the imposition of securities (presumably to guarantee the presence of the defendant at the trial) does not seem of the same weight as the other measures here cited. I suspect that it refers to the fettering³³ of the defendant during the trial, perhaps as an act of public humiliation.

59-68. χρή-πολιτείαν: the first half of the sentence seems tolerably clear: the author recommends that guilty defendants undergo psychological distress: perhaps he intends thereby a deterrent effect on others. The second half has many difficulties.

I have translated Aly's text (χρόνοι = "delays," an inference from χρονιζόμενα) but can make no sense of it. Sbordone 274, n. 1 takes χρόνοι differently, emends καὶ ὅσα to καθ' ὅσα and translates: "i termini relativi a quelle faccende che (prorogate, daneggiano la cosa pubblica)."³⁴ Sbordone's interpretation makes sense in itself, but I cannot attach it to what precedes. It is barely possible that, after advising a prolonged judicial process, the author went on to say that it should not be too protracted lest it damage the State. But a prolonged process is mentioned only with reference to Sparta: this does not explain the plural ἐν τοῖς τοιούτοις and, in any case, the correlation between ἐν τοῖς τοιούτοις and ὥσπερ is unclear.

63-64. τοῖς δράσασιν: "qui aliquid deliquerunt" Aly 29; "i colpevoli" Sbordone 274. For ὁ δράσας = "guilty culprit," cf. Plato, *Laws* 9.865D,E; 869A,E; 871C; 872E (all with reference to homicide).

67. μὲν βλάπτει: μὲν is not *prima facie* coordinate with δέ of ἐνίων δέ. Perhaps it should be excised as dittography from χρονιζόμενα.

68. τὴν πολιτείαν: "civitas." Cf. B14-18: ὅπερ καὶ ἡ παιδεία καὶ τὰ ἔθνη τὰ χρηστά τῆς πολιτείας ἀποτελεῖ.

³² *An legendum υποδήσασθαι?*

³³ The only parallel I can adduce is the following. According to one of the accounts (Polyaen. *Strat.* 2.21) of the quelling of factional strife in Trachinian Heraclea (399 B.C.), the Spartan harmost Herippides ordered the Trachinians *περὶ ὧν ἀδικοῦσι Λακεδαιμονίοις κρίσιν ὑποσχεῖν, ὡς νόμιμόν ἐστιν ἐν τῇ Σπαρτιατίδι, δεθέντας.*

³⁴ In line with his interpretation that ἀνάκρισις refers to the examination of officials after their term of office is completed, Sbordone understands χρόνοι to refer to a limitation on the time consumed by such examinations.

69–70. *κᾶν ἀποφυγήν*: I emend to *κᾶν ἀποφύγη*³⁵ because (a) *ἀνά* makes no sense, (b) part of the phrase recurs in a similar context in Plut., *loc. cit.* (*κᾶν ἀποφύγη τις*) and (c) the noun *ἀποφυγή* does not mean “acquittal.”³⁶

69–71. *κᾶν–πολλάκις*: I understand “si forte.”

74. *ὑπεύθυνον*: for *ὑπεύθυνος* in the sense of “subject to trial and punishment” see the law of Solon cited by Diog. Laert. 1.55: *καὶ ὁ ἀργὸς ὑπεύθυνος ἔστω παντὶ τῷ βουλευμένῳ γράφεσθαι*. Cf. also the lists of synonyms in Pollux 8.22 (*καὶ ὁ τοιοῦτος κατάδικος ὑπόδικος, ὑπεύθυνος*) and 68 (*ὑπαίτιον ὑπόδικον ὑπεύθυνον*).

³⁵ The process: *ΑΠΟΦΥΓΗ* → *ΑΠΟΦΥΓΗΝ*

³⁶ The verb *ἀποφεύγειν* in the sense of “to be acquitted” is an ellipsis of *ἀποφεύγειν τοὺς διώκοντας*, but the ellipsis was not carried over to *ἀποφυγή*.