

## ANCIENT AND MODERN CONCEPTIONS OF THE RULE OF LAW

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Well, what if anything can we judges do about this mess? The answer lies in the shadow of a jurisprudential disagreement that is not less important by virtue of being unavowed by most judges. It is the disagreement between the severely positivistic view that the content of the law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer's or legal pragmatist's view that the practice of interpretation and the general terms of the Constitution . . . authorize judges to enrich positive law with the moral values and practical concerns of civilized society . . . Neither approach is entirely satisfactory. The first buys political neutrality and a type of objectivity at the price of substantive injustice, while the second buys justice in the individual case at the price of considerable uncertainty and, not infrequently, judicial wilfulness. It is no wonder that our legal system oscillates between the approaches.

from the dissent to *United States v. Marshall* (1990)<sup>1</sup>

There has been a long-running debate in scholarship between those who believe that the ancient Athenian democracy valued and strove to achieve the rule of law (RoL) and those who believe that the Athenians, while aware of the concept, did not fully embrace it. According to some scholars in this latter camp, the Athenians even deliberately rejected the RoL in favour of other values such as revenge or notions of equity. Standing firmly in the first camp are scholars such as Martin Ostwald, Edward Harris and Gabriel Herman. Equally adamant on the other side are the voices of Josiah Ober, David Cohen and Adriaan Lanni.<sup>2</sup>

1 *United States v. Marshall* 908 F.2d 1312 (7th Cir. 1990) (en banc), aff'd sub nom. *Chapman v. United States*, 500 U.S 453 (1991).

2 Ostwald 1986; Harris 2006; 2013; Herman 2006; Ober 1989; Cohen 1995a; 1995b; Lanni 2006. Other scholars lining up on either side include on the first side: Rhodes 2004 (but contrast Rhodes 1995); Meyer-Laurin 2007; Sickinger 2008.

Who is right in this debate? How can such dramatically different positions be held so firmly and be based on a valid reading of the evidence? In this chapter, I will suggest that part of the reason for these different assessments is that scholars have discrepant understandings of the meaning of the RoL. I will further suggest that while there is considerable debate even in modern legal circles regarding the meaning of the RoL, nevertheless the concept can be broken down into three components against which the ancient Athenian legal system can be measured: legal supremacy, legal equality and legal certainty. Using this analytical frame, I will suggest that the Athenian democracy achieved legal equality in a remarkably comprehensive way. Yet I will also demonstrate that its ascription to the other two components of the modern concept of the RoL, namely legal supremacy and legal certainty, was somewhat compromised by other social practices and cultural values.

This conclusion may suggest that the Athenians did not fully ascribe to the modern concept of the RoL. I will show, however, that – as suggested in the quotation above – even modern legal systems strike an uneasy compromise between stricter and looser applications of the law, and that legal certainty is not fully achieved even in the modern world. One of the most important conclusions of this chapter will be to show that the Athenians were remarkably aware of the trade-offs between competing conceptions of justice, and struck a compromise that is arguably as sophisticated as any modern system has been able to achieve.

Before turning to the argument proper, it is important to emphasise that the question of whether the ancient Athenian democracy achieved the RoL is not of mere antiquarian interest. Rather, it relates to very important debates about the value of ancient Athenian democracy as a model for rethinking democracy in our own times.<sup>3</sup> In these debates, the question of whether the Athenian democracy resulted in the tyranny of the majority and infringed on the civil liberties of its citizens looms large. A demonstration that the Athenians' understanding of the RoL was comparable to the modern one, therefore, contributes to the view that Athenian democracy was not a form of reckless mob rule and in fact was fairly effective – not perfect, but effective at least in ways comparable to modern democracies – at protecting what we might now call citizen rights.

On the second side: Todd 1993; Christ 1998; Sundahl 2003. Rubinstein (2007) occupies a middle ground between these two poles.

3 For orientation in these debates, see recently Lane 2015; Cartledge 2016; Ober 2017.

## 1 THE MODERN CONCEPT OF RULE OF LAW

Like the word ‘democracy’, the phrase ‘the rule of law’ is used widely in modern political discourse, yet with little precision. Some scholars argue that the phrase is virtually useless because it is so widely used with such different meanings.<sup>4</sup> Other scholars have attempted to delineate the main features of the RoL and specified lists of essential elements. Some of these lists are quite extensive, and though I have consulted them, I believe that conceptual clarity is better achieved through a smaller list of key elements.<sup>5</sup> Accordingly, I have boiled down the various definitions and lists to the following three components:<sup>6</sup>

1. *Legal supremacy*: the principle that society should be regulated through authoritative rules rather than violence.
2. *Legal equality*: the principle that laws are to be applied equally to all and that no one – not even a monarch or magistrate – is above the law.

4 Shklar 1987, with response by Waldron 2002; 2008. For a similar point in reference to ancient uses of the concept, see Cohen 1995b.

5 Bingham 2010, for example, provides the following definition: ‘that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts’ (pp. 8, 37). Bingham then lists eight essential elements of this definition: (1) the law must be accessible and, so far as possible, intelligible, clear and predictable; (2) questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion; (3) the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation; (4) ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably; (5) the law must afford adequate protection of fundamental human rights, including the right to life, the prohibition of torture, the prohibition of slavery and forced labour, the right to liberty and security, the right to a fair trial, no punishment without trial, the right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression; freedom of assembly and association; the right to marry; (6) means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve; (7) adjudicative procedures provided by the state should be fair [= fair trial]; (8) the rule of law requires compliance by the state with its obligations in international law as in national law.

6 Although different terminology is used by different scholars, this list of three items captures the principles in the following discussions of modern concepts of the rule of law: Dworkin 1986; Hutchinson and Monahan 1987; Fallon 1997; Tamanaha 2004; Maxeiner 2007; Bingham 2010; Nardulli et al. 2013. The Wikipedia website ‘General Principles of EU Law’ has useful links to the various aspects of the RoL from a modern European perspective. For discussion of the concept of rule of law in ancient Greece, see Cohen 1995b; Gagarin 2004: 173–4; Sundahl 2003; Harris 2013. Cohen argues that the concept had radically different meanings for oligarchs and democrats, but observes importantly that both sides held it as a positive ideal.

3. *Legal certainty*: the principle that laws should be clear in meaning, accessible, and their application consistent and predictable.<sup>7</sup>

While the first two elements are fairly straightforward, the third one is implicated in central debates in modern legal scholarship about the meaning of the RoL. For while it is easy to understand that disputes should be regulated peacefully through the law, or that all people should be equal before the law, the idea that laws should be clear in meaning and their application consistent and predictable enters into the disputed territory of whether general laws can be absolutely clear in meaning such that they can be predictably applied to particular situations. Furthermore, even if the true meaning of the law can be known, the question is raised as to whether strict application of apparent meaning of the law results in justice in particular cases.

A separate but related debate that has implications for legal certainty is the distinction between ‘thin’ and ‘thick’ definitions of the RoL. ‘Thin’ definitions of the RoL simply require that the law be followed no matter how repressive it might be. ‘Thick’ definitions, on the other hand, require that the law ‘afford adequate protection of fundamental human rights’.<sup>8</sup> Another way of conceptualising this difference is that between formal legality – that is, the idea that law is a system of rules to be followed without any requirements about the content of the law – and substantive legality – the idea that law is a set of rules that ‘capture and enforce moral rights’, in the words of one proponent of this conception of the law, Ronald Dworkin.<sup>9</sup> In the latter theory, the protection of individual rights is a critical aspect of the RoL and – as has already been pointed out – the lack of such protection is a key area in which ancient Greek democracy is thought to have fallen short of modern standards.

As I shall show in the final part of the chapter, however, this judgement underestimates the extent to which the ancient Athenian

7 See Gagrin 2004: 173–4 and Harris 2013: 4–10 for similar attempts to determine the contours of the modern concept. Harris’ criteria overlap with but are not identical to my own: (1) the law should apply equally to all persons; (2) all officials are accountable for their actions; (3) law is accessible to all; (4) no punishment without law. In my view, (1) and (2) amount to the same principle of legal equality. Number (3) addresses one aspect of legal certainty, and number (4) is another way of expressing the principle of legal supremacy.

8 Bingham 2010: 66. For a thin definition of the rule of law, see Raz 1979; Tamanaha 2004: 37.

9 Dworkin 1985: 12. For an overview of these two different conceptions of the rule of law, see Tamanaha 2004: 91–113.

democracy did in fact protect certain fundamental rights of its citizens. While it would obviously be anachronistic to claim that the Athenians recognised natural or human rights in the form that they have been promulgated by modern liberal theorists, nevertheless I shall argue that a thick-ish definition of the RoL is appropriate because of the Athenians' commitment to certain fundamental freedoms and (what today we call) rights. Moreover, I shall demonstrate that a similar debate between legal formalists and substantivists took place in classical Greece, and that, at least in democratic Athens, the substantivists prevailed. As we shall see, this preference for a thick-ish understanding of the RoL, moreover, had consequences for Athens' realisation of legal certainty, as it also does for modern states. Interestingly, however, despite much critique in the early to mid- twentieth century from legal formalists such as A. V. Dicey and F. Hayek, scholars since then have been more inclined to accept substantive legality as a feasible system of the RoL despite its tension with the principle of legal certainty.<sup>10</sup>

Before turning to these complex issues, however, let us consider the less controversial first two components of the RoL: legal supremacy and legal equality. What is remarkable about ancient Greek political development is that these two crucial elements of the RoL were recognised and implemented very early on in the evolution of the Greek city-state. Moreover, these principles were quite widely acknowledged, if imperfectly realised, in many Greek states, not just fully democratic ones. Despite these early developments, I shall show that it was only in Athens in the democratic period (508/7–323 BCE) that the principles of legal supremacy and legal equality came into full force. Indeed, in the classical period, these principles became firmly associated with democracy, as opposed to other regime types, and became key elements of Athenian democratic ideology.

## 2 LEGAL SUPREMACY AND LEGAL EQUALITY

As early as the archaic period (c. 750–500 BCE), several Greek states took steps towards the achievement of legal supremacy and legal equality by passing laws affirming the subordination of magistrates to communally enacted written laws. In contrast to Homer's and Hesiod's depictions of greedy and self-interested kings for whom unwritten communal norms and religious beliefs served as only a modest restraint on behaviour, by the seventh century we find communally enacted

10 Tamanaha 2004: 110–13. See, for example, Finnis 1980: 281–4; Weinrib 1987 and Fuller 1969: 42–4; Nussbaum 1993; Solum 1994; Fallon 1997: 21–4; Smith 2015.

written laws enforcing, for example, an orderly rotation of political office.<sup>11</sup> In the law from Dreros on Crete of c. 650 BCE, for instance, the *polis* and the people (*damioi*) created a rule requiring magistrates (*kosmoi*) to wait ten years between terms in office:

The city has thus decided: when a man has been *kosmos*, the same man shall not be *kosmos* again for ten years. If he does act as *kosmos*, whatever judgements he gives, he shall owe double, and he shall lose his rights to office, as long as he lives, and whatever he does as *kosmos* shall be nothing. The swearers shall be the *kosmos* [i.e. the body of *kosmoi*] and the *damioi* and the twenty of the city.<sup>12</sup>

While such ‘constitutional laws’ are a far cry from a comprehensive subordination of ruling elites to the law, the emergence of written laws circumscribing the power of magistrates is a first step towards the principle that society should be regulated by written rules rather than violence (legal supremacy) and that all men – even ruling elites – are subject to the law (legal equality). By the sixth century, moreover, these principles emerge in stronger form at Sparta and in other Greek *poleis*, as has recently been discussed by Lynette Mitchell.<sup>13</sup>

In Sparta during the sixth century BCE, for example, the system of the ephorate was created, and with it the requirement that the kings obey the laws. The ephors were a group of five magistrates elected by the Spartan assembly, and seem to serve as a popular counterweight to the influence of the aristocratic Council of Elders and the two kings. Most significantly, for our purposes, a new ritual was inaugurated at this time whereby the kings and ephors swore mutual oaths once a month. According to our sources, the kings were required to swear that they would rule according to the established laws of the state, and the ephors in turn swore that they would preserve the kingship undisturbed if the kings abided by their oath.<sup>14</sup>

As Aristotle observed, the creation of the ephorate was a method of preserving the kingship, not eliminating it, since without such a reform, the kingship would not have lasted long.<sup>15</sup> One might compare this bargain struck between Spartan kings and ephors to the agreement between King William III and Parliament in the Glorious Revolution

11 On Homeric society (c. 750–700 BCE), see Raaflaub 1997; Balot 2006.

12 Meiggs and Lewis 2, whose translation is adopted here.

13 Mitchell 2013: 119–51.

14 Kennell 2010: 102–9. For the oath of kings to obey the laws, cf. Xenophon, *Lac. Pol.* 15.7; Plato, *Laws* 684a1–b2.

15 *Politics* 1270b17.

of 1688. When King James II fled, Parliament offered the throne to King William of the Netherlands on the condition that he agree to abide by a set of rules, chief among them that his authority was subject to the law. Modern scholars mark this moment as a key step to the development of the modern concept of the RoL, but arguably it can already be traced back to sixth-century Greece.<sup>16</sup>

It was in Athens, as a result of the reforms of Solon of 594/3 BCE, that the other side of legal equality – namely equal protection of the laws – was clearly established. Several of Solon’s reforms aimed at ensuring that all citizens, no matter how lowly their condition, had access to the benefit of the law, particularly in defending their right to the liberty and security of their own persons. In order to protect the poor against seizure and sale into slavery abroad for debt, for example, Solon not only banned the practice of debt bondage but introduced the right of appeal to the Assembly of the people against the decisions of a magistrate. Significantly, such appeals could be made by a third party, thus enabling even the enslaved to seek redress.<sup>17</sup> These measures provided legal security to Athenian citizens, although it should be noted, of course, that such protections were denied to non-citizens, including resident foreigners (metics) and slaves.

It is noteworthy that this right of equal protection of the laws was achieved well before the establishment of democracy in 508/7 BCE. Moreover, the principle of legal equality is articulated very prominently in Solon’s poetry describing his reforms.

I wrote laws for all, for high and low alike,  
Made straight and just.

θεσμοὺς δ’ ὁμοίως τῶ κακῷ τε κάγαθῷ  
εὐθελίαν εἰς ἕκαστον ἀρμόσας δίκην  
ἔγραφα<sup>18</sup>

Despite this early history of the ideal of legal equality, the clearest articulations of the principle are found in classical texts where it is firmly associated with democratic rule.<sup>19</sup> Thucydides, for example, articulates this ideal in his account of the speech that the leading Athenian statesman Pericles gave at the public funeral held for those who died fighting in the first year of the Peloponnesian War in 430 BCE.

16 Bingham 2010: 23–5; cf. North and Weingast 1989: 816.

17 [Aristot.] *Ath. Pol.* 9.1.

18 Solon fr. 36.18–20; trans. M. L. West.

19 For a full list of references to this ideal, see Hansen 1999: 84.

In this speech, Pericles presents equality before the law as a fundamental principle of the Athenian democracy.

We have a constitution that does not emulate the laws of our neighbours, but we ourselves are a model for some, rather than imitating others. In name, it is called a democracy since it is governed not for the few, but for the many. In private disputes, there is equality for all according to the laws (μέτεστι δὲ κατὰ μὲν τοὺς νόμους πρὸς τὰ ἴδια διάφορα πᾶσι τὸ ἴσον).<sup>20</sup>

In democratic traditions, equality before the law in a democracy is often contrasted to the arbitrariness of a tyrannical regime, as in the following passage from Euripides' play *Suppliants* of 423 BCE.<sup>21</sup>

Nothing is more hostile to a state than a tyrant.  
 For first of all, there are not laws that are common  
 But he alone has power, controlling the law  
 himself for himself. And then this – there is no longer equality.  
 But when the laws have been written down, the weak  
 and the rich have equal justice (ὃ τ' ἀσθενῆς  
 ὁ πλούσιός τε τὴν δίκην ἴσην ἔχει)  
 and it is possible for the weaker to say the same things  
 as the prosperous when he is spoken badly of  
 and the weaker prevails over the great man,  
 if he has justice on his side.<sup>22</sup>

In fifth-century texts of the democratic period, such as the one above, we can perceive clearly what was only implicit in the seventh-century introduction of written law and Solon's sixth-century reforms. Indeed, these texts reveal very explicitly that the Athenian principle of legal equality entailed both the fact that all citizens – including kings and magistrates – were subject to the law and also that all citizens had right to equal protection of the law.

By the classical period, of course, the Solonian provision of the right of appeal to the popular assembly had been strengthened by the establishment of separate popular courts in which large panels of randomly selected citizens determined the outcome of the disputes brought before them. In addition, the principle of the right to a trial is clearly firmly in place, as is evident from texts evoking outrage at its

20 Thucydides 2.37.1

21 See also, for example, Aeschines 1.4.

22 Eur. *Supp.* 429–37.



occasional violation under the democracy and especially its complete transgression by non-democratic regimes. For example, the fifth-century historian Herodotus views it as the distinctive behaviour of tyrants to not only overturn the ancestral laws, but specifically execute men without trial.

I am going to tell you the greatest offences [of tyrannical rule]: a tyrant disrupts ancestral laws, violates women and puts men to death without trial. The rule of the people, by contrast, first has the most beautiful name of all – political equality – and second does none of the things that a tyrant does. The people hold office in turn by lot, and its rule is held to account, and all matters are decided collectively.<sup>23</sup>

Here we see that the principle of a right to a trial is not only contrasted to the lawlessness of the tyrant, but also firmly connected with democratic rule. Similarly, Xenophon makes clear the importance of this principle through his depiction of its violation in the trial of the Arginusae generals in 406 BCE and during the rule of the Thirty Tyrants in 404–403 BCE.<sup>24</sup> The brutality of the rule of the Thirty Tyrants, along with that of the oligarchy of the Four Hundred in 411, served as the prime example of the lawlessness of such regimes in democratic traditions. The illegal collective trial of the Arginusae generals, however, took place under democratic rule and is often cited as an example of the trampling of individual rights (here the right to an individual rather than a collective trial) under the democracy. We will return to this trial at the end of the chapter, but I emphasise here that the right to a trial was firmly embedded in democratic culture and its violation apparently so rare that its transgression in this instance led to considerable comment and outrage.

In wrapping up this consideration of the principles of legal supremacy and legal equality in ancient Athens, it must be acknowledged that in practice the Athenians, (as is the case with many pre-modern populations) had a parallel system of justice that operated alongside the formal legal system.<sup>25</sup> In this parallel system, the citizens acted often spontaneously, yet in highly ritualised and communally sanctioned ways, to punish particular types of offenders. Sometimes this parallel system operated within or together with the formal system and sometimes wholly without recourse to formal laws and institutions.

23 Herodotus 3.80.5–6

24 Xenophon, *Hellenica* 1.7.16–33, 2.3.20–56.

25 Forsdyke 2008; 2015: 144–70 for full discussion.

Adulterers and adulteresses, for example, could be publicly shamed and the perpetrators of these (sometimes quite brutal) humiliations were not liable for prosecution as long as they used communally accepted means against communally agreed upon transgressors. In one particularly extreme case of popular justice, a man called Kallixeinos was excluded from society so comprehensively that he was unable to secure the means to live and died of starvation.<sup>26</sup>

Such extreme instances of popular justice – though apparently rare – are a reminder the Athenians' subscription to the RoL was only one part of a complex set of social practices and values. Paradoxically, the extreme instance of extra-legal justice just mentioned was exacted against a person who transgressed one of the cardinal principles of the Athenian system of the RoL, namely the right to a trial. Indeed, it was Kallixeinos who proposed that the generals who fought at Arginusae be tried collectively and not given the opportunity for individual trials. Another notorious instance of popular justice involved the stoning of a member of the Council of 500 for proposing that the Athenians betray Greece by submitting to the invading Persian army. In response, the rest of the Council and the crowd outside the Council house stoned the councillor to death and a crowd of women went to his house and stoned his wife and children.<sup>27</sup>

These exceptional instances notwithstanding, the existence of modes of popular justice is a reminder that the Athenians maintained a somewhat flexible attitude to the administration of justice. While many disputes were settled through formal legal procedures in the popular courts, there did exist an alternative system of justice for certain classes of offences. This alternative system somewhat undermines the Athenians' full realisation of the principle of legal supremacy. This is a point to which we will return at the end of the chapter.

### 3 LEGAL CERTAINTY

So far we have established that the principles of legal supremacy and legal equality were firmly embedded in the institutional practices and ideals of the Athenian democracy, the exceptions noted above notwithstanding. We can now turn to the more controversial category of legal certainty. As indicated already, scholars debate about the degree to which legal certainty is possible even in the modern world, given the difficulties of interpreting the law consistently and the differing views on the validity of balancing the strict application of the law with

<sup>26</sup> Xenophon, *Hellenica* 1.7.35.

<sup>27</sup> Herodotus 9.5.

broader concerns about moral rights and fairness in particular situations. It is true that some modern legal theorists are quite confident that the intent and meaning of a law can be understood and applied consistently. Passing over the early twentieth-century movement in legal formalism and its proponents, even more recent legal experts such as Supreme Court Justice Antonin Scalia, while noting the difficulties of interpretation, have nevertheless expressed confidence in the ability of judges to determine the original meaning of a law.

There is plenty of room for disagreement as to what the original meaning was, and even more as to how that original meaning applies to the situation before the court. But the originalist at least knows what he is looking for: the original meaning of the text. Often – indeed, dare I say usually – that is easy to discern and simple to apply.<sup>28</sup>

Similarly, in the civil law traditions of Western Europe, the principle of legal certainty is not only accepted, but believed to have been achieved to a fairly high degree. As James Maxeiner states: ‘Legal indeterminacy may govern Americans, but it is not acceptable to Europeans. Legal certainty – not legal indeterminacy – is a guiding principle of European legal systems.’<sup>29</sup>

It is noteworthy, however, that even Maxeiner, following the German legal philosopher Gustav Radbruch, notes that there is a conflict between justice, public policy and legal certainty and that ‘every legal system must balance these three competing components’.<sup>30</sup> Given that there is a spectrum of particular points at which different societies balance the good of legal certainty with other considerations of justice and public policy, it is not surprising to find that the Athenian democracy also strove to find the right balance.<sup>31</sup> Moreover, it is important to recognise that the Athenians’ struggle to balance these competing goods results in the somewhat contradictory testimony in

28 Scalia 1997: 45. But see Fallon 1997: 40, who argues that, in practice, Scalia’s conception of the RoL comprises not just originalism and formalism, as suggested in the quotation above, but also ‘legal process’ conception and even, arguably, a ‘substantive’ conception.

29 Maxeiner 2007: 543. Cf. pp. 544–5: ‘It is wrong . . . to generalize from American experiences and to assume that high levels of legal indeterminacy are inevitable. Other systems can and do perform better . . . [this article] does not contend that any legal system in Europe has achieved absolute certainty.’

30 Maxeiner 2007: 547.

31 Compare, for example, the debate between Eskridge 1994 and Scalia 1997 about where to draw the line between a positivist, textualist approach to the law and a more dynamic and realist approach.

our ancient sources, and that these tensions and contradictions in our sources – while reflecting real tensions and contradictions in the Athenian legal system – have fuelled current scholarly controversy about whether the Athenians strove to achieve the RoL. Rather than arguing that the Athenians adhered to one or the other side of this necessary equilibrium, a better approach is to show that the Athenians wrestled with the same problem as modern legal theorists, and indeed were remarkably sophisticated in their recognition of the need to balance these values.

Before turning to the consideration of Athenian attitudes towards legal certainty, it is important to acknowledge a turning point in Athenian democratic history that has been viewed by many scholars as tipping the balance towards a stricter application of the RoL.<sup>32</sup> According to these scholars, the oligarchic revolutions of 411 and 404/3 BCE, and especially the Athenian defeat in the Peloponnesian War in 403, led to a recalibration of ideas about the relationship of a community to its laws. The crimes of the oligarchs had demonstrated the fragility of the principle that rulers were subject to the law and that all citizens had the right to a trial. On the other side, oligarchs believed that the rule of the people had led to a politics fed by desires rather than rational deliberation. As it turned out, the strengthening of the rule of law was a course of action that suited both sides.

In 410 and again in 403, the restored democracy set about revising and publishing a new law code.<sup>33</sup> In many ways, the actions of the democrats aimed at strengthening legal certainty, in so far as this principle requires that the laws be clear in meaning and accessible. A set of law commissioners (*nomothetai*) was established whose job it was to collect, examine, revise and publish the laws. It was at this time that the distinction between laws and decrees of the Assembly was made, and a novel procedure was created for ratifying new laws. According to some scholars, this change equated to a tempering of the democracy in favour of the RoL, since the popular Assembly was no longer a source of law, but rather a new board of *nomothetai*.<sup>34</sup>

Other scholars observe that this new board was selected from those who had sworn the jurors' oath, namely the 6,000 citizens chosen randomly each year to form the juries of the democratic law-courts.<sup>35</sup> According to these scholars, there was little difference in composition and expertise between the Assembly and the new board of *nomothetai*,

32 See, especially, Ostwald 1986; Hansen 1999.

33 Key sources include Lysias 30, Andocides 1 and *IG I*<sup>3</sup> 104. For recent discussion, see Shear 2011.

34 Ostwald 1986; Hansen 1999.

35 Ober 1989; Rhodes 1995.

except that jurors had to be over thirty years of age rather than eighteen. On this view, then, the people were still in control of the procedure for ratifying the laws, even if this was now a two-step process. The main difference between the fifth and fourth century, for these scholars, is that there was an attempt by the democrats to clarify the laws and make them accessible, as well as to make them more durable and authoritative by publishing them permanently on stone.

Whichever of the two views outlined above one accepts, it must be acknowledged that both tend in the same direction. Whether there was a tempering of democracy through the new two-stage procedure for ratifying laws, or whether the Athenians simply clarified the laws and made them more accessible, the reforms of 410–403 would have aimed at strengthening legal certainty. What is remarkable, nevertheless, is that despite this apparent pursuit of the ideal of legal certainty, fourth-century Athenians also recognised that it was an ideal that could never be realised absolutely, and furthermore that legal certainty had to be balanced against competing notions of equity or fairness in particular cases. We can now examine in more detail the evidence for these two parallel trends – namely the affirmation of the RoL and particularly the ideal of legal certainty, on the one hand, and the acknowledgement of the need to balance legal certainty with broader notions of justice, on the other.

It is remarkable that in the fourth century, both oligarchs and democrats frequently articulated the idea that the law should govern and not men, and often appealed to the ideal of the impartial application of the law. For example, speakers in the democratic law-courts frequently claimed to be ‘coming to the aid of the laws’ by prosecuting a case.<sup>36</sup> Some speakers even went so far as to represent the laws in personified form, a move that Socrates also makes in Plato’s famous version of Socrates’ explanation of why he accepted the verdict of the courts condemning him to death.<sup>37</sup> Similarly, in the *Laws*, Plato personifies the sovereign laws of the imagined colony of Magnesia, and recommends that citizens be educated to believe that they are the servants of these Laws.<sup>38</sup>

In one fourth-century law-court speech, a prosecutor exhorts the jurors to completely erase himself from their minds, and to imagine the personified Laws themselves to be prosecuting the defendant.

36 E.g. Aeschines 1.1 For excellent discussions of the rhetoric of the law in classical Athens, see Johnstone 1999; Wohl 2010.

37 Lysias 1.26; Plato, *Crito* 50a6–54e.

38 For the conception of the laws in Plato’s *Laws*, see Cohen 1995a; Piérart 1995.

Consider that the laws and Neaira here are engaged in a legal dispute with one another. And whenever you hear the prosecution, listen to the laws themselves (τῶν νόμων αὐτῶν ἀκούετε), through which the city is governed (δι' ὧν οἰκεῖται ἡ πόλις) and according to which you have sworn to judge (καθ' οὓς ὁμωμόκατε δικάσειν). What do the laws command and how have they transgressed [them]? And whenever you hear the defence, being mindful of the prosecution made by the laws and the cross-examination of the things said, and seeing her face, remember this alone, if, being Neaira, she has done these things.<sup>39</sup>

In this passage, the speaker encourages the jurors to 'listen to the laws themselves' and thereby elides his own presence and the fact that human agents are required to interpret and apply the law.<sup>40</sup> Through this clever rhetorical technique, the speaker instrumentalises himself and the jurors, turning them into mechanical extensions of the laws themselves. This elision of human agency required to interpret and apply the laws is further enhanced by the speaker's assertion that the city is governed through the laws and by his invocation of the oath sworn by each of the jurors that they will judge cases 'according to the laws'.<sup>41</sup> This last reference to the jurors' oath, as we shall see, obscures more than it reveals, since a consideration of the full text of the oath reveals that the Athenians understood that cases could not always be decided 'according to the laws' alone.

Indeed, while many ancient speechwriters made use of the ideal of the RoL and glossed over the difficulties of interpretation and application of the law, other sources, including other courtroom speeches, reveal that the Athenians understood these difficulties. These latter sources reveal that the Athenians recognised the need to balance the ideal of the RoL with judgements about justice and social goods. Let us turn to these sources next.

Perhaps the best evidence for the Athenians' acknowledgement of the limitations of the RoL is the jurors' oath itself. As already mentioned, the requirement that the jurors judge cases 'according to the law' represents only one clause in the oath, albeit the clause that is

39 Pseudo-Demosthenes 59.115.

40 We might compare this elision with that in such aspirational modern statements as John Adams' concept of 'a government of laws not of men' in the Massachusetts Constitution of 1780. The phrase 'the rule of law' itself contains this elision of the role of men, and is ubiquitous in the modern world (see above, nn. 5–6).

41 Pseudo-Demosthenes 59.115

most often cited in our surviving speeches.<sup>42</sup> Although the oath does not survive in its complete form in any surviving text, scholars agree on its essential elements.<sup>43</sup> Jurors pledged:

1. To vote according to the laws and the decrees of the Athenian people.
2. To decide to the best of one's judgement in matters for which there are no laws.
3. To decide without favour or hostility.
4. To listen to both the accuser and defendant equally.
5. To vote concerning the matters pertaining to the charges.

The key clause for our purposes is the second, in which jurors swore to decide 'to the best of one's judgement (*γνώμη τῆ δικαιοσύνη*) in matters for which there are no laws'.<sup>44</sup> A key question is how this second clause relates to the first one, and whether the requirement to decide 'to the best of one's judgement' applies only to situations in which there are no relevant laws, or also to cases in which there were ambiguities (i.e. a need for interpretation) in the law, and where strict application of the law could result in injustice or unfairness.<sup>45</sup> Scholars have lined up on each side of this question, although recently there has been more support for the broader interpretation.<sup>46</sup> It is significant, however, that even on the narrower interpretation, the Athenians recognised that it was not always possible to decide 'according to the laws' and that jurors needed also to rely on their own judgement of justice in the absence of explicit instruction from the law.

Support for the broader interpretation of the clause, moreover, is found in the philosophical texts of Plato and Aristotle, who not only

42 In Harris' list (see next note), this clause is mentioned fifty-four times in surviving speeches.

43 The text has been reconstructed from the various sources by Max Fraenkel 1878: 464. Recent discussions include Scafuro 1997: 50–66; Mirhady 2007; Harris 2013: 101–137. For a complete list of quotations or allusions to the jurors' oath in law-court speeches, see Harris 2013: 353–6.

44 The phrase *γνώμη τῆ δικαιοσύνη* is translated variously, and I adopt the translation of Cronin 1936: 18. Other translations include: 'to vote or judge with one's most just judgment' (Harris 2013: 102) and 'by the most just understanding' (Mirhady 2007: 49).

45 Debate has arisen in part because the crucial phrase identifying in which circumstances the jurors are authorised to use their judgement as to what is most just, namely 'where there is no law', is only attested in two Demosthenic speeches and a late source that is probably dependent on Demosthenes: Dem. 20.118, 39.40; Pollux 8.122. For doubts about whether this phrase is genuine, see Mirhady 2007: 52–3.

46 See Scafuro 1997: 51 for a summary of older scholarship, and the view that the second position is more tenable.

acknowledge the need for interpretation of the law, but also provide evidence that the jurors aimed to strike a balance between the strict application of the law and considerations of fairness or equity. Some of these points are made in the context of discussions of the best form of government, but as we shall see, Aristotle also attests to the importance of these factors in the operation of the courts in Athens. Fascinatingly, although both philosophers strongly supported the ideal of the RoL, each acknowledged the impossibility of its full realisation.

Let us begin with the political sphere. As we have discussed, it was difficult to support the idea of oligarchy after the failure of the regimes of the late fifth century. While Plato and Aristotle dreamed of a politics in which the virtuous few led the masses (and they even toyed with the idea of a single supremely virtuous individual who might guide the state in the interests of the ruled), each ultimately recognised this as unrealistic since no individual or small group could be trusted to remain virtuous in a situation of absolute power. The solution that both hit upon was ultimately that no individuals, but rather the laws should rule.

Plato states this verdict in no uncertain terms in the *Laws*:

In those states in which the law is subject to something else and has no authority, destruction in such a state is at hand, in my view. In states where law is the master of the rulers, and the rulers are slaves to the law, I foresee salvation and all the good things that the Gods give.

ἐν ἧ μὲν γὰρ ἂν ἀρχόμενος ἦ καὶ ἄκυρος νόμος, φθορὰν ὀρῶ τῇ τοιαύτῃ ἐτοιμὴν οὖσαν· ἐν ἧ δὲ ἂν δεσπότης τῶν ἀρχόντων, οἱ δὲ ἄρχοντες δοῦλοι τοῦ νόμου, σωτηρίαν καὶ πάντα ὅσα θεοὶ πόλεσιν ἔδοσαν ἀγαθὰ γιγνόμενα καθορῶ.<sup>47</sup>

Aristotle, although reaching the same conclusion as Plato that the RoL is the best option for a well-run state, was more troubled (at least than Plato at the time he wrote the *Laws* late in his life) by the problem arising from the fact that laws cannot apply themselves to particular situations and human interpreters are always necessary.

For example, in book III of the *Politics*, Aristotle discusses ‘whether it is more advantageous to be ruled by the best men or the best laws’.<sup>48</sup> Here he acknowledges the problem with a strong notion of the rule of

47 Plato, *Laws* 715d2.

48 Aristotle, *Politics* 1286a8–b5.



law, namely that ‘the laws enunciate only general principles’ and ‘do not provide directions for dealing with circumstances as they arise’.<sup>49</sup> Plato had wrestled with this problem in his dialogue *The Statesman*, written before the *Laws*. In this work, Plato advocates the rule of a wise individual in part because

legislation can never issue perfect instructions which precisely encompass everyone’s best interests and guarantee fair play for everyone at once. People and situations differ, and human affairs are characterized by an almost permanent state of instability. It is therefore impossible to devise, for any given situation, a simple rule which will apply to everyone for ever . . . [The law] is like a stubborn stupid person who refuses to allow the slightest deviation from or questioning of his own rules, even if the situation has in fact changed and it turns out to be better for someone to contravene these rules.<sup>50</sup>

Building on Plato’s discussion in the *Statesman*, Aristotle observes that the single ruler, rather than the laws, will decide better about particular cases. Just as in arts such as medicine, practitioners are not governed by written rules alone, so Aristotle observes, ‘it is clear that government according to written rules is not the best’.<sup>51</sup>

After reaching this conclusion midway in his discussion, however, Aristotle considers a countervailing point, namely that ‘a thing that does not contain the emotional element is generally superior to a thing in which it is innate’ and that the laws are free of ‘the emotional element’ whereas men possess it. After flip-flopping back and forth in this way, Aristotle ends with a new, but somewhat ambiguous conclusion that while there is need of a human agent compose the laws, once the laws have been formulated, they should be authoritative in all cases except ‘where they go astray (ἢ παρεκβαίνουσιν)’.<sup>52</sup> While it is unclear what precisely Aristotle means by this phrase, it is noteworthy that the verb that Aristotle uses for the idea of ‘going astray’ (παρεκβαίνω) has the same root as the noun (παρέκβασις) that Aristotle uses for the ‘deviations’ from the correct constitutions in his classificatory scheme for constitutions.<sup>53</sup> Aristotle distinguishes the deviant forms of constitution (tyranny, oligarchy and democracy) from the correct forms (kingship, aristocracy and constitutional government) by their failure

49 Aristotle, *Politics* 1286a10–13.

50 Plato, *Statesman* 294a; trans. Robin Waterfield.

51 Aristotle, *Politics* 1286a14.

52 Aristotle, *Politics* 1286a23–4.

53 I owe this observation to Josiah Ober.

to seek the common good (τὸ κοινῇ συμφέρον) and absolute justice (τὸ ἀπλῶς δίκαιον).<sup>54</sup> It seems likely, therefore, that Aristotle is here envisioning circumstances in which the strict application of the law does not result in an outcome that is in accord with the common good and absolute justice.

The idea that the law should not be authoritative in all cases is strengthened by Aristotle's subsequent discussion. For, in the next section of his argument, Aristotle narrows his inquiry to the question of whether the rule of a single person or the citizens as a whole is best 'in matters in which it is impossible for the law either to decide at all or decide well (ὅσα δὲ μὴ δυνατόν τὸν νόμον κρίνειν ἢ ὅλως ἢ εἶ)'.<sup>55</sup> With this last phrase, Aristotle expands the category of areas in which the laws 'go astray' to include not just matters in which the law 'does not decide well', but those areas where it 'cannot decide at all'. In this statement, it is likely that he is referring again to the fact – also acknowledged by Plato, as we have seen – that the laws provide general principles but do not give directions for dealing with particular circumstances. This impression is strengthened by the fact that Aristotle goes on to state that currently 'the citizens assemble to administer justice (συνιόντες δικάζουσι) and deliberate (βουλευόνται) and give judgements (κρίνουσιν)' and 'all these judgements (κρίσεις) concern particular cases (περὶ τῶν καθ' ἕκαστον)'.<sup>56</sup>

In sum, it is clear that Aristotle concludes that human rulers and judges are needed not only to formulate the laws, but also to use their own best judgement in the various circumstances in which the law does not provide guidance. Therefore, while Aristotle clearly approves of the RoL, his discussion shows that he recognises its limitations. It is noteworthy, moreover, that Aristotle's discussion above is clearly framed not just in reference to judicial contexts (cf. his use of the phrases 'assemble to administer justice' and 'rendering judgements') but also to politics (cf. his use of the word 'deliberate' – βουλευόνται – a word that is used of debate in the political Assembly and Council). It is remarkable, therefore, that Aristotle – despite his anti-democratic tendencies – concludes that the masses judge better than any single individual in such circumstances. Strikingly, he suggests that this superiority is not just because a multitude of people is harder to corrupt than a single individual, but also because the cumulative effect of the good judgements of individual citizens is greater than that of any single person 'just as a banquet to which many contribute is better

54 Aristotle, *Politics* 1279a18, 1289a26.

55 Aristotle, *Politics* 1286a24–6.

56 Aristotle, *Politics* 1286a26–8.

than a single plain dinner'.<sup>57</sup> Yet, before we get too carried away and think that Aristotle has become a democrat, he reminds us at the end of the discussion that the masses should 'do nothing apart from the law except on matters about which the law must of necessity be deficient (μηδὲν παρὰ τὸν νόμον πράττοντες ἀλλ' ἢ περὶ ὧν ἐκλείπει ἀναγκαῖον αὐτόν)'.<sup>58</sup>

In advocating the RoL yet acknowledging its limitations in these passages, Aristotle is thinking of both political and legal contexts, as we have just seen. Examination of Aristotle's discussions of the virtue of justice in his ethical treatises, however, and his discussions of legal strategies in his treatise on rhetoric, confirms and further expands his understanding of the limits on the RoL in judicial settings. Most significantly, in these works he explicitly acknowledges the need to balance the RoL with notions of equity or fairness (τὸ ἴσον, τὸ ἐπιεικές). Furthermore, Aristotle's discussion in the *Rhetoric* confirms that the laws were not the only factor determining the outcome of legal cases in Athens, but one of several factors that juries considered in determining guilt and punishment.

In his *Nicomachean Ethics*, for example, Aristotle outlines the virtue of justice and suggests that it consists not only in what is lawful but also in what is fair.

In fact, both the man who breaks the law and the man who takes more than his share are considered unjust. It is clear then that the just man is both law-abiding and fair. *Justice then consists in both that which is lawful and that which is fair*, and the unjust is both that which is unlawful and that which is unfair.

δοκεῖ δὴ ὁ τε παράνομος ἄδικος εἶναι καὶ ὁ πλεονέκτης καὶ ἄνιστος, ὥστε δῆλον ὅτι καὶ [ὁ] δίκαιος ἔσται ὁ τε νόμιμος καὶ ὁ ἴσος. τὸ μὲν δίκαιον ἄρα τὸ νόμιμον καὶ τὸ ἴσον, τὸ δ' ἄδικον τὸ παράνομον καὶ τὸ ἄνιστον.<sup>59</sup>

Similarly, in the *Rhetoric*, Aristotle notes that 'The equitable seems to be just and equity is justice that goes beyond the written law (τὸ γὰρ ἐπιεικές δοκεῖ δίκαιον εἶναι, ἔστι δὲ ἐπιεικές τὸ παρὰ τὸν γεγραμμένον νόμον δίκαιον).'<sup>60</sup>

In both of these passages, Aristotle affirms that justice is a broader

57 Aristotle, *Politics* 1286a30, with recent discussion by Waldron 1995 and Ober 2013.

58 Aristotle, *Politics* 1286a36.

59 Aristotle, *Nicomachean Ethics* 1129b.

60 Aristotle, *Rhetoric* 1.13.13; 1374a.

category than the laws alone, and that justice is achieved by considering fairness or equity alongside or in addition to the laws. The latter passage above, however, is followed by the claim that it is the arbitrator rather than the juror who considers equity, and indeed Aristotle asserts that arbitration was invented precisely so that equity could be considered.<sup>61</sup> Yet when he subsequently considers the arguments that can be made in the law-courts, he suggests that litigants can use arguments from equity especially when the law does not support their case. Moreover, he explicitly mentions the jurors' oath, thereby confirming that he is thinking of the Athenian law-courts in his advice to litigants to use arguments about equity. Most striking in this latter passage is the fact that Aristotle explicitly cites the jurors' oath as evidence that considerations of equity could trump the law in certain cases.

For it is evident that, if the written law is counter to our case, we must have recourse to the common law (τῷ κοινῷ νόμῳ) and equity (τοῖς ἐπιεικέσιν) as more in accordance with justice; and we must argue that, when the juror takes his oath to decide to the best of his judgement (γνώμη τῆ ἀρίστη), he means that he will not abide rigorously by the written laws; that equity (τὸ ἐπιεικές) is ever constant and never changes, even as the common law (ὁ κοινός), which is based on nature, whereas the written laws often vary. This is why Antigone in Sophocles justifies herself for having buried Polyneices contrary to the law of Creon, but not contrary to unwritten law (οὐ παρὰ τὸν ἄγραφον): 'For this law is not of now or yesterday, but is eternal . . .'. . . For the judge is like a tester of silver, whose duty is to distinguish spurious from genuine justice.<sup>62</sup>

Interestingly, in this passage Aristotle mentions not just equity but 'common law' as elements of justice that go beyond the written law. Furthermore, he contrasts written law with unwritten law, and places 'common law' and 'equity' in the latter category. Finally, and most significantly, he explicitly takes these additional considerations – common, unwritten laws about what is equitable – as glosses on the key phrase in the jurors' oath that we discussed above. For Aristotle, therefore, the jurors' promise 'to decide to the best of one's judgement' does not refer simply 'to matters for which there are no laws' but to any considerations that go beyond the written letter of the law,

61 Aristotle, *Rhetoric* 1.13.19.

62 Aristotle, *Rhetoric* 1.15.3–7; trans. Freese, slightly adapted.

including considerations of equity (τὸ ἐπιεικές) and generally agreed-upon norms (ὁ κοινός νόμος).<sup>63</sup>

If this conclusion is accepted, then there are clear consequences for our assessment of the Athenians' realisation of the ideal of legal certainty. For if jurors considered factors apart from the written law, then legal decisions were not the predictable result of the mechanical application of the law as some ancient sources, and modern legal positivists, prefer. Legal uncertainty would then be the result, particularly if considerations of equity are brought to the table, since much would depend on the particular individuals and context, rather than the laws themselves, in the outcome of a trial. On the other hand, one may well ask whether generally accepted – albeit unwritten – norms of behaviour (identified by the Greeks as 'common' or 'natural' law) could form a reliable guide to behaviour whereby individuals can know the norms 'so that they can abide by [them] and plan their lives accordingly'.<sup>64</sup> It is striking in this regard that lists of unwritten norms in our sources tend to name a standard set of behaviours, suggesting generally agreed-upon behaviours that could predictably result in punishment.<sup>65</sup> Similarly, one might note that the instances of popular justice discussed above involve certain universally condemned behaviours (adultery, treason) that seem to have predictably triggered punishments.

It is clear that the Athenians themselves were troubled by the tension between their recognition of the good of legal certainty and their desire to preserve some flexibility in the application of the law, especially in recognition of equity concerns. One reflection of this unease is the passage of a new law by the restored democracy in 403 BCE that forbade the use of unwritten law.<sup>66</sup> Nevertheless, some litigants still appeal to the standard of unwritten law after the passage of this law, and Aristotle's own endorsement of such arguments in the

63 The ancient term 'common law' is not equivalent to the modern concept of common law, of course, but is rather equivalent to 'natural law', the idea that there are certain generally accepted norms which are so universally accepted that they are not necessarily written down in law (although they may be). For the Greeks, standard elements of common or natural law include the obligations to honour one's parents, to return favours to benefactors, to avoid incest and to bury the dead (as in the example Aristotle cites above). Key ancient sources include: Sophocles, *Antigone* 453–7; Isocrates, *Panathenaicus* 12.168–9; Xenophon, *Memorabilia* 4.4; Plato, *Laws* 636a–c, 838a–d, 841a–b; Demosthenes 10.40; Pseudo-Demosthenes 25.65–6; *Rhetorica ad Alexandrum* 1421b36. I thank B. W. Frier for drawing my attention to these passages.

64 A cardinal principle of the modern ideal of legal certainty, according to Maxeiner 2007: 549.

65 See above, n. 63.

66 Andocides 1.87.

passage above suggests that they could still influence the outcome of legal trials.<sup>67</sup>

Broader consideration of the design of the Athenian system of justice, furthermore, suggests that little attempt was made to police the boundaries of written law or exclude considerations of equity.<sup>68</sup> As many have observed, Athenian juries, consisting of large numbers of ordinary citizens and no professional lawyers or judges, seem designed to ensure that fairness, as judged by a group of peers, rather than formal law was the determining factor in deciding justice.<sup>69</sup>

Significantly, even scholars such as Edward Harris, who has argued strenuously that the Athenians adhered to a fairly rigorous standard of the RoL, admits in his discussion of the jurors' oath that there was 'still . . . room for considerable debate about how to apply the law' and 'the question of how to apply the general rules contained in the laws to particular situations might . . . be not all that straightforward', and that 'an appeal to fairness . . . that is, to other principles implicit in the laws . . . might take precedence over the law'.<sup>70</sup> A key point of disagreement remains, however, as to how often this occurred. Strikingly, scholarly debate about ancient Athens echoes modern disagreements on this point. Harris' conclusion, for example, recalls the quotation of Scalia cited above: 'In most cases, the application of the law was a simple matter of deductive reasoning once the facts were established.'<sup>71</sup>

Summing up this discussion of the evidence of the law-courts, we might conclude that while the rhetoric of the courts in the fourth century often articulated the ideal of the RoL, the jurors' oath both reinforced this ideal and acknowledged its impossibility. As we have seen, the oath sanctioned the jurors' use of their own judgement in the inevitable situation where either there were no laws, or the applicability of a law to a particular circumstance was either unclear (i.e. needed interpretation) or could result in unfairness. This is not to say that the jurors 'could dispense with the law when making decisions'.<sup>72</sup> Rather, the Athenians wisely recognised that the law could never operate on its own, and that inevitably jurors would need to use their interpretative skills and moral judgements as to what was just in a particular circumstance. Moreover, it turns out that even the most adamant

67 See, for example, Lysias 6.10–11; Demosthenes 18.275, 23.70.

68 See also Carugati and Weingast, this volume.

69 For recent discussion, see Lanni 2004; 2006; 2009; 2013.

70 Harris 2013: 137.

71 Harris 2013: 137.

72 See Harris 2013: 103 for this characterisation of one side of the debate.

supporters of the RoL in ancient Athens, namely philosophers with aristocratic sympathies such as Plato and Aristotle, recognised these practical limitations and acknowledged the important role of interpretation, supplementation and judgements of fairness that go beyond the strict letter of the laws.

#### 4 THE RULE OF LAW AND ATHENIAN DEMOCRACY

In this chapter, I have demonstrated that the ancient Athenians did in fact recognise all three aspects of the modern concept of the RoL: legal supremacy, legal equality and legal certainty. Yet I have also shown that they acknowledged the practical constraints on the full realisation of the ideal, and the need for balance against other socially recognised goods. In the final part of the chapter, I turn to an assessment of the implications of this interpretation for the question of the success of the Athenian democracy and its viability as a model for thinking through the challenges of modern democracy.

As mentioned at the beginning of the chapter, the Athenian democracy has often been compared unfavourably to modern liberal democracies, particularly for its alleged tendency to devolve into ‘mob rule’ and failure to protect individual rights.<sup>73</sup> Key illustrations of these failings are found in the institution of ostracism as well as in a number of episodes in Athenian history in which the Athenian democracy is thought to have behaved irrationally and disastrously (the failed attempt to conquer Sicily in 415–413 BCE), brutally (the conquest of Melos in 415 BCE), tyrannically and contrary to its own political and legal principles (the collective trial of the Arginusae generals in 406 BCE and the trial of Socrates in 499 BCE). In response, Josiah Ober has pointed out that the Athenian democracy lasted as a relatively stable regime for almost two hundred years, with only two brief interruptions. Moreover, Ober explained this stability through a brilliant analysis of the ideological underpinnings by which individual and collective goods were harmonised, particularly by harnessing elite leadership for democratic ends.<sup>74</sup>

Ober’s subsequent studies have focused on the knowledge-optimising effects of Athenian institutional design and the prosperity-enhancing effects of the Athenians’ democratic institutions.<sup>75</sup> Moreover,

73 This critique goes all the way back to the Enlightenment and continues in modern assessments such as Samons 2004. For orientation in modern critiques of ancient democracy, see Roberts 1994; Dunn 2005; Cartledge 2016.

74 Ober 1989. See, however, Carugati and Weingast, this volume, for some criticisms.

75 Ober 2008; 2015.

Melissa Lane, building on my own study of ostracism, has argued that this institution is not an example of the irresponsible and tyrannical rule of the masses, but rather a quite limited and restrained method of stabilising and preserving democracy.<sup>76</sup> The limit of one ostracism per year, the requirement of a quorum of 6,000 Athenians and the temporariness of the term of exile all constrained the use of this instrument and turned it into a largely symbolic expression of popular power. Lane furthermore emphasises the ways that the Athenians scrutinised office holders, including councillors and jurors, before and after their terms of office and in this way promoted accountability and responsibility. The jurors' oath is itself evidence of how seriously the Athenians took their legal responsibilities.

The current chapter contributes to and complements this line of argument by showing that the Athenians were fully cognizant of the key elements of the RoL and strove to achieve them within certain limits. I have argued that the Athenians were in fact very successful at achieving the principles of legal supremacy and legal equality, and with the exception of two brief oligarchic interludes, largely adhered to them. This is a remarkable achievement and deserves emphasis. In this context, the failure to grant the Arginusae generals individual trials – that is, give them the full protection of the law – appears to be an exception which proves the rule. As noted above, our sources decried this transgression and the instigator of this unlawful condemnation, one Kallixeinos, paradoxically became the victim of a harsh instance of popular justice himself.

The case of Kallixeinos brings up the issue of extra-legal justice – a topic that has gained relatively little attention in debates about the RoL in classical Athens. I briefly noted above that the existence of customary popular modes of justice provides another exception to the RoL and particularly the principle of legal supremacy. While it is certainly true that popular justice violates the RoL in the sense that popular justice did not follow the dictates of written law and formal legal procedures, nevertheless one of the results of my studies of this aspect of popular culture was to show that the 'violence' of these episodes was not 'arbitrary' but followed communally accepted (though unwritten) codes of conduct.<sup>77</sup> The ritualised nature of these modes of justice, I suggest, conforms to unwritten rules that were well known and predictable in the same way as written laws. In this sense, popular justice was not necessarily in tension with legal certainty. Nevertheless, victims of popular justice were denied the

<sup>76</sup> Lane 2015; Forsdyke 2005.

<sup>77</sup> Forsdyke 2008; 2012.



right to a trial in most instances and therefore it is quite true that the Athenian adherence to this principle was malleable in such instances.<sup>78</sup>

In addition to this acknowledgement of the blending of formal and informal modes of justice, this study also demonstrates that the Athenians deliberately set limits on the RoL in ways that further impacted its achievement of legal certainty. The Athenians were fully aware of the need for interpretation of the law and particularly the difficulties of deriving just decisions in particular cases by relying on the law alone. The jurors' oath and the passages from Aristotle demonstrate that the Athenians expected jurors to use their best judgements about justice in situations where the law was 'deficient' in the broadest sense of the word. The Athenians considered decisions holistically and in context, and expected their fellow citizens to render judgements in the law-courts in accordance with an expansive conception of justice that considered fairness and equity alongside the strict letter of the law. In sum, the Athenians understood that legal certainty – though an agreed-upon good – was not realisable in an absolute sense and furthermore that, even if it were, strict application of the letter of the law was not always in accord with justice.

This mixed conclusion reflects the compromise that the Athenians made and explains why there has been such heated debate on the question of the RoL in Athens. I suggest that the Athenians achieved a high degree of the RoL, yet also wisely recognised the necessary trade-offs. In some sense this conclusion is a vindication of the Athenians, since, as I have suggested throughout this chapter, even modern legal systems must balance the good of legal certainty with recognition of the practical and moral limitations on its realisation.

In this latter regard, moreover, it may also be observed that the Athenians adopted a thick-ish understanding of the RoL in which certain fundamental protections were afforded. For example, the Athenians enjoyed personal liberty and security, freedom of speech and association, as well as equal access to the law, including the right to a trial.<sup>79</sup> While these 'rights' are limited compared to modern concepts of human rights, they represent a commitment to freedom and equality that was sufficient to sustain democratic citizenship.<sup>80</sup> It must be emphasised, of course, that such 'rights' were only afforded to citi-

78 In one type of trial, 'for unjust confinement of a person as an adulterer', the victim appears to have had legal redress for the customary practice of detaining, torturing and extorting ransom from a presumed adulterer. See Pseudo-Demosthenes 59.66 with discussions in references above, n. 77.

79 Hansen 1999: 76–7; Ober 2017.

80 Ober 2017.

zens, and hence a better term in this context might be ‘citizen rights’ rather than ‘human rights’.<sup>81</sup>

Before we rush to condemn the Athenians for allowing broader norms to influence the outcome of legal cases, we must remember that recently modern legal theory has moved away from notions of the RoL as strictly based on rule application and has argued that substantive concerns based on notions such as freedom, equality and fairness are compatible with the RoL.<sup>82</sup> Some scholars even suggest that modern legal practice can learn from the ancients by acknowledging the complexity of human affairs and allowing room for considerations of equity.<sup>83</sup> While there is certainly a fine line between maintaining the RoL and allowing for some flexibility in the application of laws according to context, it seems that both modern and ancient Greek legal thought and practice recognise the tension and the need for compromise between these forces.

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## BIBLIOGRAPHY

- Balot, R. (2006), *Greek Political Thought*, Oxford.
- Bingham, T. (2010), *The Rule of Law*, London.
- Cartledge, P. A. (2016), *Democracy A Life*, Oxford.
- Carugati, F. (2014), ‘What is rule of law good for? Democracy, development and the rule of law in classical Athens’, *Buffalo Law Review* 62: 119–56.
- Christ, M. (1998), *The Litigious Athenian*, Baltimore.
- Cohen, D. (1995a), *Law, Violence and Community in Classical Athens*, Cambridge.
- Cohen, D. (1995b), ‘The rule of law and democratic ideology in classical Athens’, in W. Eder (ed.), *Die athenische Demokratie im 4. Jahrhundert v. Chr.: Vollendung oder Verfall einer Verfassungsform?*, Stuttgart : 227–47.
- Cronin, J. F. (1936), *The Athenian Juror and His Oath*, Chicago.
- Dunn, J. (2005), *Setting the People Free: The Story of Democracy*, London.
- Dworkin, R. (1985), *A Matter of Principle*, Cambridge, MA.
- Eder, W. (ed.) (1995), *Die athenische Demokratie im 4. Jahrhundert v. Chr.: Vollendung oder Verfall einer Verfassungsform?*, Stuttgart.

81 For discussion see Ostwald 1996; Wallace 1996.

82 See references in n. 10.

83 See, for example, Nussbaum 1993; Solum 1994; Fallon 1997: 50–1.

- Eskridge, W. N. (1994), *Dynamic Statutory Interpretation*, Cambridge, MA.
- Fallon, R. H. (1997), 'The rule of law as a concept in constitutional discourse', *Columbia Law Review* 97 (1): 1–56.
- Finnis, J. (1980), *Natural Law and Natural Rights*, Oxford.
- Forsdyke, S. (2005), *Exile, Ostracism and Democracy: The Politics of Expulsion in Ancient Greece*, Princeton.
- Forsdyke, S. (2008), 'Street Theater and Popular Justice in ancient Greece: Stoning, shaming and starving offenders inside and outside the courts', *Past & Present* 201: 1–50.
- Forsdyke, S. (2012), *Slaves Tell Tales and Other Episodes in the Politics of Popular Culture in Ancient Greece*, Princeton.
- Fraenkel, M. (1878), 'Der attische Heliasteneid', *Hermes* 13: 452–66.
- Fuller, L. (1969), *The Morality of the Law*, New Haven.
- Gagarin, M. (2004), 'The rule of law in Gortyn', in E. Harris and L. Rubinstein (eds), *The Law and the Courts in Ancient Greece*, London: 173–83.
- Hansen, M. H. (1999), *The Athenian Democracy in the Age of Demosthenes: Structure, Principles and Ideology*, Norman, OK.
- Harris, E. (2006), *Democracy and the Rule of Law in Classical Athens*, Cambridge.
- Harris, E. (2013), *The Rule of Law in Action in Democratic Athens*, Oxford.
- Harris, E. and L. Rubinstein (eds) (2004), *The Law and the Courts in Ancient Greece*, London.
- Herman, G. (2006), *Morality and Behaviour in Democratic Athens*, Cambridge.
- Hutchinson, A. and P. Monahan (eds) (1987), *The Rule of Law: Ideal or Ideology?*, Toronto.
- Johnstone, S. (1999), *Disputes and Democracy: The Consequences of Legislation in Ancient Athens*, Austin.
- Kennell, N. (2010), *Spartans: A New History*, Oxford.
- Lane, M. (2015), *The Birth of Politics: Eight Greek and Roman Political Ideas and Why They Matter*, Princeton.
- Lanni, A. (2004), 'Arguing from "precedent": Modern perspectives on Athenian practice', in E. Harris and L. Rubinstein (eds), *The Law and the Courts in Ancient Greece*, London: 159–71.
- Lanni, A. (2006), *Law and Justice in the Courts of Classical Athens*, Cambridge.
- Lanni, A. (2009), 'Judicial review and the Athenian "Constitution"', in M. H. Hansen, A.-C. Hernández and P. Pasquino (eds), *Démocratie athénienne – démocratie modern: Tradition and influences*, Vandoeuves: 235–76.
- Lanni, A. (2013), 'Law and democracy in classical Athens', in J. P. Arnason et al. (eds), *The Greek Polis and the Invention of Democracy*, Malden: 163–80.
- Maxeiner, J. R. (2007), 'Legal certainty: A European alternative to American legal indeterminacy?', *Tulane Journal of International and Comparative Law* 15 (2): 541–601.
- Meyer-Laurin, H. (1965), *Gesetz und Billigkeit im attischen Prozess*, Weimar.
- Meyer-Laurin, H. (2007), 'Law and equity in the Attic trial', in E. Carawan (ed.), *Oxford Readings in the Attic Orators*, Oxford: 116–39.
- Mirhady, D. (2007), 'The dikasts' oath and the question of fact', in A. Sommerstein and J. Fletcher (eds), *Horkos: The Oath in Greek Society*, Exeter: 48–59.

- Mitchell, L. (2013), *The Heroic Rulers of Archaic and Classical Greece*, London.
- Nardulli, P. et al. (2013), 'Conceptualizing and measuring rule of law constructs, 1850–2010', *Journal of Law and Courts* 1: 139–92.
- North, D. C. and B. R. Weingast (1989), 'Constitutions and commitment: The evolution of institutions governing public choice in seventeenth-century England', *Journal of Economic History* 49 (4): 803–32.
- Nussbaum, M. C. (1993), 'Equity and mercy', *Philosophy & Public Affairs* 22: 83–125.
- Ober, J. (1989), *Mass and Elite in Democratic Athens: Rhetoric, Ideology and the Power of the People*, Princeton.
- Ober, J. (2008), *Democracy and Knowledge: Innovation and Learning in Classical Athens*, Princeton.
- Ober, J. (2013), 'Democracy's wisdom: An Aristotelian middle way for collective judgment', *American Political Science Review* 107: 104–22.
- Ober, J. (2015), *The Rise and Fall of Classical Greece*, Princeton.
- Ober, J. (2017), *Demopolis: Democracy Before Liberalism*. Cambridge.
- Ober, J. and C. Hendrick (eds) (1996), *Dēmokratia: A Conversation on Democracies, Ancient and Modern*, Princeton.
- Ostwald, M. (1986), *From Popular Sovereignty to Sovereignty of the Law*, Berkeley.
- Ostwald, M. (1996), 'Shares and rights: Citizenship Greek style and American style', in J. Ober and C. Hendrick (eds), *Dēmokratia: A Conversation on Democracies, Ancient and Modern*, Princeton: 49–61.
- Piérart, M. (1995), 'Du règne des philosophes à la souveraineté des lois', in W. Eder (ed.), *Die athenische Demokratie im 4. Jahrhundert v. Chr.: Vollendung oder Verfall einer Verfassungsform?*, Stuttgart: 249–69.
- Raaflaub, K. A. (1997), 'Homeric society', in I. Morris and B. Powell (eds), *A New Companion to Homer*, Leiden: 624–48.
- Raz, J. (1979), *The Authority of the Law: Essays on Law and Morality*, Oxford.
- Rhodes, P. (1995), 'Judicial procedures in fourth-century Athens: Improvement or simply change?', in W. Eder (ed.), *Die athenische Demokratie im 4. Jahrhundert v. Chr.: Vollendung oder Verfall einer Verfassungsform?*, Stuttgart: 303–19.
- Rhodes, P. (1998), 'Enmity in fourth-century Athens', in P. Cartledge et al. (eds), *Kosmos: Essays in Order, Conflict and Community in Classical Athens*, Cambridge: 144–61.
- Rhodes, P. (2004), 'Keeping to the point', in E. Harris and L. Rubinstein (eds), *The Law and the Courts in Ancient Greece*, London: 137–58.
- Roberts, J. T. (1982), *Accountability in Athenian Government*, Wisconsin.
- Roberts, J. T. (1994), *Athens on Trial: The Antidemocratic Tradition in Western Thought*, Princeton.
- Rubinstein, L. (2007), 'Arguments from precedent in Attic oratory', in E. Carawan (ed.), *Oxford Readings in the Attic Orators*, Oxford: 359–71.
- Samons, L. J. (2004), *What's Wrong with Democracy? From Athenian Practice to American Worship*, Berkeley.
- Scafuro, A. (1997), *The Forensic Stage: Settling Disputes in Graeco-Roman New Comedy*, Cambridge.

- Scalia, A. (1997), *A Matter of Interpretation: Federal Courts and the Law*, Princeton.
- Shear, J. L. (2011), *Polis and Revolution: Responding to Oligarchy in Classical Athens*, Cambridge.
- Shklar, J. (1987), 'Political theory and the rule of law', in A. Hutchinson and P. Monahan (eds), *The Rule of Law: Ideal or Ideology?*, Toronto: 1–16.
- Sickinger, J. (2008), 'Indeterminacy in Greek law: Statutory gaps and conflicts', in E. M. Harris and G. Thür (eds), *Symposion 2007: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Vienna: 99–112.
- Smith, H. (2015), 'Property, equity and the rule of law', in L. Austin and D. Klimchuk (eds), *Private Law and the Rule of Law*, Oxford: 224–46.
- Solum, L. B. (1994), 'Equity and the rule of law', in I. Shapiro (ed.), *The Rule of Law, Nomos* 36: 120–47.
- Sundahl, M. J. (2003), 'The rule of law and the nature of the fourth-century democracy', *Classica et Mediaevalia* 54: 127–56.
- Tamanaha, B. Z. (2004), *On the Rule of Law: History, Politics, Theory*, Cambridge.
- Todd, S. C. (1993), *The Shape of Athenian Law*, Oxford.
- Waldron, J. (1995), 'The wisdom of the multitude: Some reflections on book 3, chapter 11 of Aristotle's *Politics*', *Political Theory* 23: 563–84.
- Waldron, J. (2002), 'Is the rule of law an essentially contested concept? (in Florida)', *Law & Philosophy* 21: 137–64.
- Waldron, J. (2008), 'The concept of the rule of law', *New York University School of Law, Public Law & Legal Theory Research Paper Series*, No. 08–50.
- Wallace, R. W. (1996), 'Law, freedom and the concept of citizens' rights in democratic Athens', in J. Ober and C. Hendrick (eds), *Démokratia: A Conversation on Democracies, Ancient and Modern*, Princeton: 105–19.
- Weinrib, E. (1987), 'The intelligibility of the rule of law', in A. Hutchinson and P. Monahan (eds), *The Rule of Law: Ideal or Ideology?*, Toronto: 59–84.
- Wohl, V. (2010), *Law's Cosmos: Juridical Discourse in Athenian Forensic Oratory*, Cambridge.