

MOGENS HERMAN HANSEN'S CONTRIBUTION TO THE STUDY OF GREEK LAW

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Summary: Hansen was not a legal historian by academic background. However, his research on the nature of the *polis* represents a fundamental contribution to the study of what we might, to some extent anachronistically, call Greek public law. He presented a paper only twice at the *Symposium* on Greek Law, namely at the Third *Symposium* (Chantilly 1977, Hansen 1982) and the Fourth *Symposium* (Aegina 1979, Hansen 1983a). In both cases, these were *parerga* related to previously published works (respectively, the book on the *Apagoge* from 1976 and *Aspects of the Athenian Society in the Fourth Century B.C.* (1975, in collaboration with S. Isager). After the 1977 *Symposium*, his interests were increasingly centered on Athenian politics and political institutions, rather than law.

Interestingly, while his contribution to the 1977 *Symposium* explicitly addressed private law relationships, it already highlighted a grey zone between the private and public spheres that would be a key theme in all his subsequent research on the *polis*. The blurred boundary between public and private is also reflected in two articles (Hansen 1981b and Hansen 1983b) that, in the early 1980s, explored another theme that had formed Chapter IV of the book on the *Apagoge* (Hansen 1976): the *apagoge* concerning murderers (*androphonoi*). My essay is therefore divided into two parts. In the first, I discuss these two articles which both concern criminal law. In the second part, I shall focus on some aspects of Hansen's central research theme, namely the *polis*, understood both as a historical phenomenon and as a political model to be compared with the modern state. In both parts of the essay, I shall also attempt to account for the reactions that Hansen's ideas have gradually elicited in scholarship, and, in turn, I shall express my own perspective on both Hansen's theses and those of his interlocutors.

I

Studies on judicial procedure and criminal law

In his 1983b article, Hansen reiterated the thesis he had already supported in the appendix (pp. 108-12) to the chapter on the *apagoge phonou* in Hansen 1976 and Hansen 1981b, namely that a considerable number of sources attest to the existence of a *graphe phonou* alongside the more common *dike phonou* that can be brought by the relatives of the deceased, as stipulated by the law of Dracon. I shall begin by examining two of the aspects considered by Hansen 1981b, and shall continue by giving a critical assessment of the opinions expressed by some of the scholars who have addressed this issue since the publication of his article.¹

Trauma ek pronoias

The first point concerns the scope of the crime of *trauma ek pronoias*. In Hansen 1976: 110, he had already argued that this was a type of homicide on a par with those listed in *Ath. Pol.* 57.3, namely *phonos* itself, poisoning, and arson. Now, in the first part of the article, Hansen reiterated that “if *trauma* was a subspecies of *phonos*, the implication is that *trauma* was not simply ‘wounding’ but rather ‘assault with intent to kill’”, as is clear from *Lys.* 3.41-43 and 4.5-11 (Hansen 1981b: 15). If one of the four categories of homicide, that is, *trauma ek pronoias*, was prosecutable with a *graphe*, the logic of the system dictates that a *graphe* was also permitted in the other three cases. In fact, Hansen asserts the coexistence of *dike* and *graphe* only for *phonos* and *trauma*, in addition to theft.

In 2007 David Phillips devoted an article to the subject of *trauma ek pronoias*. Phillips attributed to the act of wounding (using a weapon) not the intention to kill, but rather merely the intention to injure. However, he also concluded that the perpetrator of the crime was to be prosecuted by means of a *graphe*, and he even questioned the existence of a *dike*. In my opinion, the question remains open, because it involves interpreting the meaning of *pronoia*. If it refers to the intention to kill, attempted murder can be prosecuted, and Hansen’s position would be justified. If it re-

1 It is somewhat puzzling that Hansen responded to an opinion different from his only on *trauma ek pronoias* (Hansen 1983b) but not on homicide.

fers to the intention to injure, its assimilation with homicide loses its justification, and the use of a *graphe* (as underlined by Hansen 1983b: 317) cannot be readily explained. Moreover, the reason given by Phillips (2007: 98) do not appear entirely convincing, i.e. that the injured person might be unable to appear in court: yet, even Ariston in Dem. 54 prosecuted his assailant, Konon, with a private *dike*, presumably after he has recovered from his injuries. It should also be noted that the law attributed to Solon, reported in Dem. 24.113, allows killing or wounding a thief caught committing a theft at night (τοῦτον ἐξεῖναι καὶ ἀποκτεῖναι καὶ τρῶσαι διώκοντα): therefore, it refers to two distinct behaviors.

Apagoge phonou and the meaning of ep' autophoroi

The second part of Hansen 1981b concerns the *apagoge phonou*: this procedure was admissible only if the killer was caught in the act. As its etymology reveals, the Greek expression *ep' autophoroi* originally refers to theft, but it was extended to categories of perpetrators liable to *apagoge kakourgon*. According to some sources, these also included murderers, as confirmed (according to Hansen 1976: 52) by Aeschin. 1.91 and *Ath. Pol.* 52.1. As regards theft, Hansen (1976: 48-49), observed that the original meaning of 'catching the thief during the theft' (48) could be extended to 'catching a thief oneself during the discovery of the theft' (49). This second meaning referred to the person in whose home the owner discovers the stolen goods, through the procedure of *phora*. It follows that the flagrancy is prolonged over time (as in the case of *furtum manifestum* in *Iust. Inst.* 4.1). This makes possible a broader interpretation of the expression in question, albeit in a metaphorical sense when applied to homicide, given the differences between homicide and theft.² At this point it is appropriate to quote the passage from Aeschines (1.91):

τίς γὰρ ἢ τῶν λωποδυτῶν ἢ τῶν μοιχῶν ἢ τῶν ἀνδροφόνων, ἢ τῶν τὰ μέγιστα μὲν ἀδικοῦντων, λάθρα δὲ τοῦτο πραττόντων, δώσει δίκην; καὶ γὰρ τούτων οἱ μὲν ἐπ' αὐτοφώρῳ ἄλόντες, ἐὰν ὁμολογῶσι, παραχρῆμα θανάτῳ ζημιοῦνται, οἱ δὲ λαθόντες καὶ ἕξαννοι

2 However, see Thür 1983: 606 n. 11: "Für Delikte ohne Sachentzug, wie Ehebruch und Mord, scheidet die Haussuchung als Ersatz für das Ergreifen auf frischer Tat von vornherein aus."

γιγνόμενοι κρίνονται ἐν τοῖς δικαστηρίοις, εὐρίσκεται δὲ ἡ ἀλήθεια ἐκ τῶν εἰκότων.³

According to Hansen, Aeschines here cites the *nomos ton kakourgon*. On Hansen's interpretation, "an *apagoge* is permitted, even though the offender escapes undetected (λαθόντες)" (1976: 52) and the accuser is only able to provide circumstantial evidence of guilt (ἐκ τῶν εἰκότων).

The other fundamental source for the study of the question is Lys. 13.85-87 (examined by Hansen 1976: 48 and 51). In Hansen 1981b: 29, the passage from Lysias is again discussed. Hansen states that the scope of *ep' autophoroi*, which The Eleven asked to be specified in the indictment, is susceptible to two possible interpretations, between which it will be up to the court to choose. On one side Agoratos would have denied being caught (*lambanein*) *in flagrante*. On the other, the accuser argued that the murder attributed to Agoratos was committed *in flagrante* "and to persuade the jurors that the meaning is 'manifestly'" (Hansen 1981b: 29), although the murder accusation before the *Boule* and the assembly had taken place years earlier. Therefore, Hansen believed that, from a certain period (the fourth century? see 1976: 52) the *apagoge* was permitted "long after the crime had been committed, providing that the accuser was able to substantiate his charge and convince The Eleven that the person arrested was the culprit" (1976: 51).

MacDowell (1963) had in a certain sense anticipated the position taken by Hansen 1976 (although Hansen did not cite him), arguing that in Lys. 13.85-87 *ep' autophoroi* means "manifestly" (135), not "arrested in the act" (133). It should be noted, as Hansen had observed, that in Lys. 13.85-87, Dionysius, the one who carried out the *apagoge* of Agoratos, did not ask that he should be put to death immediately: the reason would be that "the accused was not literally caught *ep' autophoroi*" (Hansen 1976: 52). This means that *ep' autophoroi*, in the sense of 'in flagrante', is no longer

3 "For what mugger or thief or seducer or homicide, or anyone else who commits the gravest offenses but does so in secret, will be punished? For in fact, those of them who are caught with their guilt manifest are executed at once if they confess, but those who go undetected and deny their guilt are tried in the courts, and the truth is discovered on the basis of likelihood" (tr. Carey 2011)

“a condition for the arrest of the offender but only his instant execution without trial”.

In my opinion, the hypothesis supported first by MacDowell and then by Hansen is unconvincing. A murder can be considered manifest only if the guilty party is arrested in the act. Maintaining, instead, that the *apagoge* “could be used only against killers whose guilt was beyond doubt”, MacDowell (1963: 133) implicitly eliminates a qualifying feature of the procedure, namely the right of the arrested person to contest the legitimacy of the arrest. MacDowell (1963: 133) reasonably believes, given the time that has passed, that Agoratos cannot be considered ‘arrested in the act’. But curiously, the problem of the change in meaning of *ep' autophoroi* from ‘killer caught in the act’ to ‘manifest killer’, which was later addressed by Hansen, was not raised by MacDowell.⁴ MacDowell instead rightly asked whether “a person who merely made a denunciation can be called a manifest killer” (1963: 133). We can assume that, according to the speaker of Lysias 13, someone could have arrested Agoratos in front of the Boule or the assembly while he was publicly making his denunciations: it would then have been up to the court to decide whether the charge of murder was justified or not. The accuser here, having fled Athens when The Thirty were in power, would not have been able to arrest Agoratos in the act. However, he would have been able to do so now, during the trial: Lys. 13.30.⁵ And, again according to the accuser, Agoratos had already been recognized as a murderer and as a result expelled from a religious ritual (Lys. 13.81), which seems to confirm (against Hansen 1981b: 28-29) that what Agoratos’ accuser carried out was probably an *apagoge phonou*.⁶

We must therefore ask ourselves why the accuser had not, on his own initiative, specified that Agoratos had been arrested *ep' autophoroi*. The

4 See Gagarin 1979: 319 n. 58. MacDowell 1978: 122 had meanwhile proposed a reasonable solution (but one of which the oration makes no mention whatsoever), namely that Agoratos was arrested because he “since 403 (the period not covered by the amnesty) frequented sacred and public places although guilty of homicide.” But, if this thesis were credible, how could one explain why the accuser had not included *ep' autophoroi* in his indictment?

5 See Hansen 1981: 28 with n. 30.

6 MacDowell and Gagarin (see Hansen 1981: 27) are of the same opinion, and likewise Phillips 2008: 187 n. 7.

only plausible explanation is that he was aware that, given the time that had passed, one could not technically speak of an arrest in the act. But then why did The Eleven require him to add this clarification, instead of simply rejecting the request as lacking an essential requirement? Probably because they considered that the circumstances justified a delayed *apagoge* and thus dispelled the accuser's probable doubts about the legitimacy of the procedure that he had set in motion.⁷ As for Hansen's observation (1976: 52) that the accuser did not request the immediate death of Agoratos (see also Lys. 13.41-42), it seems to me that he does not consider the possibility of contesting the arrest, a right which Agoratos evidently availed himself of.

The point of view of later scholars on the theses of Hansen

Let us now look at some of the main comments and reactions to Hansen's 1976 and 1981b theses about the homicide's *apagoge*, and, in particular, the meaning to be attributed to *ep' autophoroi*. The first intervention in response to Hansen's opinion was that of Gagarin 1979. Regarding Lys. 13.85-87, Gagarin observes that *ep' autophoroi* should be understood "in a sense broad enough to mean that the killer was observed, but not necessarily arrested, in the act of killing" (1979: 319). Thus, Gagarin denies, at least regarding homicide, that there has been an extension of the scope of the requirement in question: simply, where there has been no proclamation against the homicide, the *apagoge* would always have been permitted "against ... those 'caught in the act' – that is, those clearly committing the homicide" (1979: 320 and n. 60).

D. Cohen 1983 (who does not engage with either Gagarin 1979 or Hansen 1981b) has the opposite opinion, according to which *ep' autophoroi* maintains the original meaning of flagrancy. And, in the case of Agoratos,

7 The verb *anankazo* (Lys. 13.86), in my opinion, does not mean that The Eleven imposed the addition against the will of the accuser (*contra* Hansen 1981: 29). As suggested by Gernet 1967: 188, the *apagoge* may have been admissible, even in the absence of the requirement of flagrancy, if the arrested person, was not a citizen, as in the case of the metic Agoratos. However, The Eleven would have deemed it necessary, for their own safety when rendering accounts, to uphold the requirements for the *apagoge* towards citizens. It can be observed that these two statements by Gernet are contradictory.

“the speaker really does argue that the defendant was taken in the act, because the Assembly saw him commit the acts that resulted in the death of the victim” (55). As regards Aeschin. 190-91, Cohen denies that οἱ λαθόντες “have been brought before the court by means of *apagoge*,” contrary to what Hansen (1976: 52) believes. Ordinary actions will instead be taken against *kakourgoi* who have not been caught red-handed.

Next, we can mention Pepe 2004, who sides with Cohen, and Harris 1994: 129-46 (= 2006: 373-90). Based on a parallel with *fur manifestus* in Roman law,⁸ Harris argues that *ep' autophoroi* “has the meaning of ‘clear,’ obvious, or ‘manifest’” (1994: 175 = 2006: 380); consequently, it should never be understood as ‘in the act’. I shall focus here on passages that have already been commented on by previous scholars. Harris (2001: 80 = 2006: 397) refers to Lys. 13.87, translating, consistently with his hypothesis, *ep' autophoroi* as ‘clearly’. And he adds: “In his speech to the court (Lys. 13.87) the speaker replies to the objection that Agoratos did not ‘clearly’ (*ep' autophoroi*) kill his brother”.

Aeschin. 1.90-91 deserves a few more words. In interpreting the passage, Harris underlines the fact that Timarchus’ crimes cannot be proven with witnesses because they take place in the secrecy of homes (1.90). As a result, if testimonies are necessary to obtain the conviction of the criminal, “those who commit misdeeds without being detected will never be brought to justice” (1994: 180 = 2006: 385). Therefore, if the *halontes* of 1.91, which can be understood both in the sense of ‘physically seized’ and in that of ‘detected’, confess, they are put to death. Harris leans towards the first meaning: “Those who avoid detection and deny their guilt are tried in court ... *ek ton eikoton* ... not by the testimony of those who witnessed him committing the crime” (1994: 180 = 2006: 385).

Harris had already dealt with the passage from Aeschines in the appendix of Harris 1990: 376-377 (= 2006: 292-93), comparing it (as Hansen 1981b: 22-23 had done) with *Ath. Pol.* 52.1. According to Hansen, both passages refer to the *nomos ton kakourgon*, even if the inclusion of *androphonoi* and *moichoi* is probably not taken from the text of the law but is the result

8 Hansen 1976: 49 (cited by Harris 1994: 169 n. 1 = 2006: 374 n. 1) had already recalled the parallel.

of an interpretation by Aeschines. According to Harris, however, Aeschin. 1.91 does not allude to the *apagoge* illustrated in *Ath. Pol.* 52.1,⁹ for the following reasons: the terms *apagoge* and *apagein* do not occur, The Eleven are not mentioned, it is not remembered that the arrested person can deny his guilt thus giving rise to a trial before the popular court. And above all, “those who avoid being caught in the act are not subject to the procedure” (1990: 377 = 2006: 293). In Harris 1994: 180 n. 25 (= 2006: 385 n. 25), Harris warns against using Aeschin. 1.91 “as evidence for the kinds of offenders subject to *apagoge* to The Eleven”; but it should be noted that in 1990 Harris interpreted *hoi lathontes* as those “who avoid being caught in the act”, while in 1994 he considers them as those whose crime is discovered thanks to testimony. But above all (and in interpreting Lys. 13.87, this applies to both Hansen 1981b: 29, as we have seen, and to Harris), arguing that the accuser is referring to an *apokteinein ep’ autophoroi* is misleading. Hansen (1981: 29) argues that “the jurors had no time to reflect, and they may have been persuaded”. In fact, if one reads the beginning of Lys. 13.87, it is clear that arrest *ep’ autophoroi* concerns not only those who kill with material means (a stick or a knife) but can also apply to those who have caused the death of others by reporting them. The rhetorical question with which 13.87 closes should be interpreted in the same way: how could you not be *ep’ autophoroi ho apokteinas*? Here we simply have a reference to the requirement that The Eleven requested be inserted in the indictment. As Gernet (1967: 212 n. 4) notes, “Lysias cherche à transformer une analogie, qui serait discutable, en une véritable identité.” Moreover, Hansen (1981: 29 n. 32) himself observes that “a criminal can be convicted of his crime *ep’ autophoroi*, but he cannot commit the crime *ep’ autophoroi*”. It seems to me, therefore, concluding the summary examination of Harris’ opinion, on the one hand, that to attribute different meanings to the expression *ep’ autophoroi* depending on the context is not justified (if anything, it could qualify behaviors that are only rhetorically assimilated to those of someone caught *ep’ autophoroi*, as in Dem. 19.121-23, on which see Harris 1994: 178 = 2006: 383); on the other hand, that the meaning of manifest act does not find real confirmation in the sources. As regards Aeschin. 1.91 in particular, it seems difficult to me to maintain that it does not refer to the *apagoge* discussed

9 Harris 1990: 376 n. 30 = 2006: 292 n. 30.

in *Ath. Pol.* 52.1. The most effective argument, which Harris relies on, namely that *hoi lathontes* cannot be the object of *apagoge*, can be considered persuasive (however, according to Hansen, 1976: 52, *apagoge* is also permitted against *lathontes* if it is based on convincing *eikota*); but the joint presence of 'those who deny', in my opinion, makes it clear that Aeschines is once again alluding to the procedure of *apagoge*. It would be entirely superfluous to specify the obvious, namely that those who have acted secretly are denying their guilt, whereas, as we know from *Ath. Pol.* 52.1, it makes sense in the case of being caught red-handed.

The next significant intervention is that of Phillips 2008.¹⁰ Phillips also believes that "since the interval between act and arrest was undeniable ... the speaker argues that Agoratus qualifies as *ep'autophôrôî* because he publicly and manifestly made denunciations that led to executions" (187); conversely, "Agoratus advocates a traditional interpretation of *ep'autophôrôî* as referring to the proximity of the arrest to the act" (188). As regards the invitation by The Eleven to include the mention of the arrest *ep'autophoroi* in the indictment, it was a matter of respecting the rules regarding *apagoge*, even though The Eleven were convinced that it could now be interpreted (or that the judges would have interpreted it) as 'manifestly'. In my opinion, what The Eleven's conviction was on that occasion seems difficult to establish. The fact is that they felt they had to respect the rules regarding *apagoge*. Therefore, I believe that the meaning of 'arresting *in flagrante*' also applies to *apagoge phonou*.¹¹

At the end of this analysis of Hansen's three works on criminal law, it seems to me that a common thread can be discerned, even though they deal with distinct cases. Hansen (1982) states that apparently private actions, the conviction in which could lead to *atimia*, must indeed be interpreted as public actions; in his 1976 book and his 1981b and 1983b articles, he postulates the existence, in certain circumstances, of a *graphe traumatos ek pronoias* and a *graphe phonou*. One thus gets the impression that Hansen tends to shift the protection of private interests by the victim (or his family) onto the level of the protection of public interests by

10 A brief mention is also found in Gagarin 2008: 212

11 See Thür 1983: 608. Todd 2020, 254, to my knowledge the latest intervention on the matter, limits itself to acknowledging the two possible interpretations of the phrase without taking a position about the interpretation of Lys. 13.85-87.

the fellow citizens of the person directly affected. This can indeed be interpreted as an indication of the primacy of the community over the individual, even though, as we shall see, Hansen was throughout his career an advocate of a clear separation between state and society within the structure of the *polis*.

II

Polis as City-State

We now come to the heart of Hansen's lifelong scientific interests. In some respects, the results of his research could be interpreted as a refined extension of the *Griechische Staatskunde*. Despite the customary tributes to a 'sacred monster', in recent decades several prominent scholars have taken a highly critical stance toward Hansen's approach to the study of the *polis*.¹² I am referring, in particular, to the considerations of some French scholars,¹³ who have criticized Hansen's institutionalist approach, attributing him to the 'cité des juristes' (as opposed to the 'cité des anthropologues') and viewing him as an advocate of a narrow conception of politics based on the separation of state and civil society and limited to the participation of citizens alone. In my opinion, this criticism misses the mark. In fact, I believe that Hansen has always looked from a certain distance, so to speak from the outside, at the historical-legal approach to the reality of the *polis* (in 1998: 35, he writes that "the scholars

12 An incisive intervention can already be found in Ober 1989: 22-23, where Hansen is accused of having fallen into the "constitutional-law trap", an expression dating back to M.I. Finley (and often repeated by other critics of Hansen), and it is stated that "the laws ... may be less significant than the thought process that led to decisions about when laws should be enforced and when they should be ignored" (23). See also p. 42, where the "dead end" is mentioned.

13 See Azoulay-Ismard 2006: 273-75; Fröhlich 2010; Azoulay 2014; Ismard 2014. But see also Giangiulio 2004, and, recently, Barbato et al. 2025.

who have always been preoccupied with the concept of state are the professors of law").¹⁴ For example, Hansen believes that the constitutive elements of the *polis* as a state (that is, of the city-state, as he believes it correct to continue to define it: see Hansen 1998: 123) are those made canonical by Jellinek, that is, population, territory and government. It is true that the German scholar is not even cited in Hansen 1999, which remains the cornerstone of Hansen's reflection on Athens in the fourth century BC; but he is cited in Hansen 1998, which constitutes the *summa* of his theorization of the *polis* as a state, and therefore not limited to Athens. Hansen's interests are not antiquarian, nor can it be said that he seeks to adapt the basic principles of the modern state to Greek reality. On the contrary, he seeks the specific nature of the *polis* by combining the anatomy and physiology of public institutions. In this sense, the extremely complex and multifaceted picture of the institutional reality of the *polis*, which Hansen has painted over the decades, also provides legal historians with material for their own specific investigations. Naturally, it must be assumed that the functioning of political institutions conforms, or rather must conform, to broadly legal rules: the very concept of the state, which lies at the heart of Hansen's reflection, presupposes a legal structure, even if defining the *polis* as a state governed by the rule of law (*Rechtsstaat*) probably sounds anachronistic (see *infra*).

The Polis and the modern 'State'

I therefore begin a review of the aspects of Hansen's thought that I consider most significant from the point of view of a legal historian. Listing the similarities between the *polis* and the modern state, Hansen 1998 observes that, on the political level, the *polis* is identified "with its principal political institutions"; but immediately afterwards adds: "On a more abstract level the ancient *polis*, like the modern state, is often seen ... as a

14 In this he can be compared to another leading exponent of the 'institutionalist' tendency, who was, albeit with a rather different attitude, Philippe Gauthier (who not by chance participated in the meetings of the Copenhagen Polis Center): for a reference in this regard see Maffi 2023 and Barbato et al. 2025: 1.

permanent public power above both ruler and ruled” (1998: 119 no. 7).¹⁵ Thus, in Hansen 1998 we find two distinct paragraphs dedicated to illustrating the definition in question: § 2 of chapter III, “The Concept of State”, 40–41; § 4 of chapter IV, “The Concept of *Polis*”, 67–73. Regarding this last chapter, the one dedicated to the *polis*, Hansen finds confirmation of his definition in the sources in which an act actually performed by a citizen or by a “body of government” is attributed formally to the *polis* as an entity: they therefore act *hyper tes poleos*, that is, “for the sake of the *polis*” or “on behalf of the *polis*” (1998: 70)¹⁶. The conclusion is that the *polis* “in some contexts is close to becoming a juridical person” (1998: 72).

Hansen is clearly handling modern concepts of a purely juridical nature here. However, he does not seem interested in delving into the issue from the technical perspective cultivated by scholars of Roman law (in the notes to § 4 of chapter IV of Hansen 1998, cited above, we find no reference to specific studies on the subject). This is what Ismard (2014: 726 and n. 13) criticizes him for, referring to an illuminating article by Y. Thomas (Thomas 1993 = 2011). In this work, Thomas argued that, in principle, before the concept of legal person develops, only a physical person can be represented, which cannot be said, looking at Greece, of the *polis* or of the community itself (i.e., the *demos*), if we want to identify with it in particular the democratic state.¹⁷ It should also be noted that Thomas was referring to the representation of the state, or in any case of a public body, in private affairs, while Hansen underlines how “we would describe as political and belonging in the public sphere” all acts attributed in the

15 This is a definition, taken from contemporary political theory (see Hansen 1998: 161 n. 95), which often recurs in his works: e.g., Hansen 2003: 265 no. 27, where he speaks of “*polis* as abstraction”; and Hansen 2006: 162. For a recent criticism of the qualifications of ‘superpersonal and permanent’ see Dreher 2024: 34, who however accepts Hansen’s thesis on the separation between state and civil society (35); cf. Fröhlich 2010: 670.

16 Hansen returns to the meaning of this expression in Hansen 2010 (see below) and in Hansen 2013, 98, where he correctly denies that “the officials coming from different subdivisions of a *polis* or from different census classes were supposed to represent those who had elected them or from among whom they had been selected by lot.”

17 It is not enough, therefore, to simply say that “representation, acting on behalf of another, implies distinction and not identity” (Hansen 1983c: 159).

sources to the *polis* (1998: 69). However, it remains to be clarified whether the *polis* also acts within the framework of private relationships, such as a loan, and through which legal instruments. The loan granted by Sparta to the Athens of the Thirty, to which Hansen refers (in 1998: 69) is not structurally different from the loans obtained from a private individual by the city of Arkesine, to which we shall return later. But even the loans, more or less forced, made by the temples in favor of their own city pose similar problems.¹⁸

Of course, beyond the distinction between public and private acts, one could and should ask whether the question raised by Thomas (1993 = 2011) for Roman law is relevant to the Greek world, where, by definition, legal reflection in the strict sense is lacking.¹⁹ In my opinion, it makes sense to address it if the solution reached allows for a more adequate explanation of certain events and their outcomes. In any case, if, following Hansen's lead, one enters the debate on the nature of the *polis* and leans toward the analogy with the modern state, the question inevitably arises. The fact remains that, as we shall see below, the debate has continued, and, as far as Hansen is concerned, it concludes with his 2010 article, which I shall consider after discussing Hansen's own contributions that precede it.²⁰

The question of representation

Let us therefore start again from the concept of acting *hyper tes poleos*, which constitutes, as it emerges from the comparison with the Roman conceptions, the legal knot to be untied. As we have seen, Hansen 1998: 70 underlines that the one acting can be either "a body of government" or a private citizen. As we shall see better later, Hansen identifies the

18 See especially Dreher 2014: 19–20, and Scheibelreiter 2019.

19 See the works of E. Stolfi, especially Stolfi 2020.

20 I cannot here list all the scholars who have contributed to the debate. Among recent positions, I recall that of Anderson (2009: 16): he proposed understanding the *demos* as a "fictitious corporate person", acting through "artificial persons", thus creating an "intra-action" between state and society. His conclusion, according to which the "unitary self", i.e., the community, is responsible for the "business transacted in its name" (18), remains, in my opinion, merely a statement of principle without addressing the concrete issues that arise from a strictly legal perspective.

latter with *ho boulomenos*, that is, the private citizen who presents a proposal for approval by the assembly or initiates a legal process in the public interest. As regards the government bodies, Hansen 1990 had already argued that, while the assembly does not represent the *demos*, but the *demos* “acting as a body of government”, the *dikasteria* were “representative of the *demos*”, since in various judicial orations it is declared that “the *dikastai* are assembled to act on behalf of the *demos*” (221), just as the *epistates* of the *prytanes* represented the *demos* for 24 hours (222). It should be noted, however, that, particularly with regard to the courts, the passages cited by Hansen (n. 29) are not formulated in legally rigorous terms and do not contain the expression *hyper tes poleos*: to say that “the citizens have entrusted the city to you judges” (Aeschin. 3.8) is a metaphorical expression that cannot be translated into the technical concept of representation (as confirmed by the fact that the sentence requested by Aeschines must benefit the judges themselves as well as the *polis*, while, according to the principles of representation, it should benefit only the represented). Regarding the acts performed by private citizens, Rubinstein 1998 remains fundamental, comparing the role of magistrates and private individuals acting for the *polis*. She defines the magistrate as “an instrument of the *polis* ... perhaps the closest Athenian parallel to our modern notion of the impersonal state” (134). Therefore, here, while also stating that magistrates are “the agents who administer power delegated to them by the *polis*” (129), Rubinstein seems to come very close to the modern constitutional theory which considers the holders of executive power as organs of the state. However, she rightly observes that Athenian magistrates (but the discussion could certainly be extended to other *poleis*) remain “visible, personally responsible and individually accountable” (134). An essential difference with the administrative structure of the modern state emerges here: for example, according to art. 28 of the Italian Constitution “The officials and employees of the state and of public bodies are directly responsible ... for acts committed in violation of rights. In such cases, civil liability extends to the state

and public bodies" (my own translation, as elsewhere). The *polis*, however, is not liable with its own assets for damages caused by magistrates.²¹ As for private individuals who perform "quasi-magisterial functions" (139), such as trierarchs and ambassadors, they also act *hyper tes poleos* but cannot be considered organs of government. To these considerations of Rubinstein, it should be added that private citizens can assume public responsibilities even independently of their will, but only for the benefit of the city as a whole, for example for the payment of public debts. This is the case of Arkesine, already mentioned, where not only citizens but also foreign residents are held liable with their own assets in the event of non-payment of the capital and interest on the loan contracted by the *polis* (Migeotte 1984: 168ff.; note that, on the other hand, Roman citizens are not liable for debts contracted by their city: see Thomas 1993 = 2011). Hansen himself (2002: 27), cites a law of Chios with which the *polis* undertakes to assist and pay the debt of a citizen. See also, regardless of adherence to Bravo's thesis on the practice of *sylai* (on which see most recently Maffi 2023), the cases examined by Bravo 1980, chap. IX: "Droit de saisie d'un particulier contre une cité étrangère", chap. X: "Droit de saisie d'une cité contre un étranger", and the consequences for all citizens of the proclamation of the state of reprisals. From this perspective, the communitarian aspect of the *polis* appears to prevail over a hypothetical "super-personal" aspect. Society, understood as the collection of individual free inhabitants regardless of their political status, appears to be an integral part of the debtor or creditor state (thus creating a peculiar blend of public and private). It is also noteworthy how even the gods become participants in the acts attributable to the *polis*: that occurs, for example, when they are beneficiaries of financial sanctions imposed by the *polis* itself.²²

Initiative and Decision

Continuing to discuss the concept of the *polis* as a suprapersonal power, it will be useful to take a closer look at the actors through which the *polis*

21 Therefore, the statement in Hansen 1999: 78, with reference to Dem. 21.29-32, appears imprecise from a legal perspective: "Since the magistrate was held to embody the *polis*, private *euthynai* and other similar types of prosecution were litigation between a citizen and the *polis* ..."

22 On the rights of the gods s. Dreher 2014.

actually operates. I begin with a reference to the structure of the modern state. The Italian Constitution, Title III, entitled “The Government”, is divided into two sections (Articles 92-98): the Government in the strict sense, composed of the Prime Minister and the ministers themselves, and the Public Administration, that is, public offices organized according to legal provisions (to which a Section III is added under the title “Auxiliary Bodies”). According to Hansen, even in the political-legal structure of the Greek *polis*, there exists a “basic distinction between ‘politics’ and ‘administration’, which corresponds to a dichotomy between decision-making and administrative institutions” (Hansen 2019: 337). In Athens the decision-making institutions were the *demos*, the *boule*, the courts, and, in the fourth century, the *nomothetai*. As for the administrative institutions, they were the 700 *archai* (Hansen 1980) and again the *boule*, which carried out both types of activity. It should be noted, however, that there are conspicuous traces of differentiated legal statutes within the scope of administrative functions, as is evident, for example, from Aeschin. 3.13ff.²³ The description of the work of the holders of power that we find in Hansen 2019b seems to modify to some extent the description of the functioning of the governing bodies of the *polis*, outlined in a famous article (Hansen 1981a), which we shall now consider.

Hansen 1981a begins with a statement of strong impact: “a basic form of separation of powers in fourth-century Athenian democracy consists in a separation of initiative and decision: a decision-making body of government is not allowed to take an initiative, and, conversely, a body of

23 See Hansen 1980 and Scafuro 2006. Still on the subject of the distinction between political activity and administration, Hansen 2019b has taken seriously Ismard’s thesis (2015), according to which administrative activities were carried out in Athens by public slaves, while the activities of political bodies (including magistrates) were the prerogative of citizens. But, as Hansen notes – persuasively in my opinion – the magistrates’ main collaborators, namely the various types of secretaries, were generally citizens. Note, above all, that as far as administrative activities are concerned, slaves who acted on instructions from the *polis* officials whom they served do not seem to have been individually accountable in a public procedure of *euthynai* (I owe this remark to the anonymous referee). Ismard’s assertion that “if the slave is at the heart of the functioning of politics, then its existence permits it to conjure up any form of representation” (215) therefore appears exaggerated and essentially unacceptable, precisely from the perspective of an investigation of the *polis* as a state.

government empowered to take an initiative is never allowed to make a decision on any important issue". (345) To the traditional enumeration of the "bodies of government", that is *ecclesia*, *boule*, *archai* and *dikasteria*, Hansen substitutes a classification that only partially differs from it: he adds the *nomothetai* to the courts (because they are selected among the potential judges), includes the *boule* among the *archai*, and adds the *rhetoires* among the constitutional bodies, although they do not form a 'body of government' as they have no official position and no authority. This interpretation of the exercise of political power in fourth-century Athens, certainly innovative, does not seem to have provoked great reactions among scholars.²⁴ However, it raises a series of questions. The first is linguistic: the separation of powers usually refers to state bodies, not to the transversal competences of the same body.²⁵ The second takes its cue from p. 345 n. 1 of the article: here Hansen observes that, in *Politics*, Aristotle deals with democracy in general, but shows little interest in fourth-century Athenian democracy. Now, Aristotle's analysis of *politeia* as *taxis ton archon* refers precisely to the three powers that characterize every *polis* and which we therefore also find in Athens.²⁶ Furthermore, the proposal to unify under the generic term "decision" (352) the sentences of the court, the resolutions of the assembly, and the laws approved by the *nomothetai* fails to account for the profound differences in nature and function of the three types of measures. Even with regard to the 'constitutionalized' category of initiative, it can hardly be applied to all the activities of the *archai*. Even the execution of measures taken by decision-making bodies involves decisions by magistrates (which will then be subject to review during the *euthynai*: see Arist. Pol. 1299a25-27). In the same way, for example, the archons entrusted with conducting the trial cannot be considered simple intermediaries (362, 364) with respect to the tribunal understood as a decision-making body: it is not they who, as a rule, at least in Athens, take the initiative of the trial. Nor, on the other hand, can the *boulomenos* who initiates a public trial (*graphe*) necessarily be designated as a *rhetor*: the *idiotes*, referred to in the well-

24 See however Bleicken's critical stance (1994: 505-6).

25 For a new attempt in a direction similar to that advocated by Hansen, see Esu 2024.

26 See Maffi 2018.

known passage from *Against Leocrates* (Lycurg. 1.79), covers a much broader range of interventions than the initiation of a legal action.²⁷

We now ask ourselves whether Hansen, in his works after 1980, continued to use the initiative-and-decision paradigm to characterize the exercise of power within the *polis*. It is a question that takes its cue from this specific issue, but which arises throughout his work: one often gets the impression that he gradually deepened and broadened an original core of ideas to which he always remained faithful (with some exceptions, as we shall see later). Browsing his later works, one can see that the categories in question interact with different qualifications, which tend to describe the complex institutional realities more effectively. Consider, for example, Hansen 1999, the reference manual for the study of Athenian democracy. Within the framework of the One Hundred and Sixty Theses, which form a sort of appendix, no. 142 distinguishes the large decision-making bodies (i.e., the *ekklesia*, the *dikasteria*, and the *nomothetai*) from the *archai* responsible for executing decisions. In chapter 13, "The Character of Athenian Democracy," we find a section entitled "decision-making" (306-7); but within this, a distinction is made between active and passive political participation. The decision-making powers of the Boule underwent a series of limitations during the 5th century (chap. 10, 255), so much so as to induce Hansen to affirm: "It was the Council's probouleutic and administrative functions, not any power of decision-making, that gave it its central place in the democracy" (247). In chap. 11 ("The political leaders") the first paragraph is entitled "Political initiatives" (266). It begins with these words: "In Athens decisions were taken collectively (by the Assembly, the *nomothetai* or the courts). The preparatory work to the taking of a decision, and responsibility for its execution, lay with the magistrates, but the matter had first to be brought before them by an ordinary, individual Athenian citizen" that is, *ho boulomenos*. As can be seen, here Hansen applies the theoretical scheme outlined in 1981a (and it also re-emerges in other points of the discussion: see for example 1999: 228). In his main theoretical text, i.e., Hansen 1998, if I have seen correctly, the references are less explicit: however, in the chapter dedicated to the comparison between the concepts of *polis* and

27 See in this regard the fundamental study by Rubinstein (1998).

of state, Hansen writes that "the Athenian political leaders ... never took decisions, only made proposals" (115).

The nomothetai

The element of Hansen's proposal that has sparked the liveliest discussion over the past decade (particularly between Hansen and Canevaro) consists in considering the *nomothetai* as a constitutional body in its own right. The discussion began about the law included in Dem. 24.20-23, which Canevaro 2013 deemed a forgery. Hansen 2016 reacted by reaffirming its validity, and the back-and-forth continued without the contenders changing their minds (see Hansen 2019 and Canevaro 2020). It is not appropriate to follow the debate in its entirety here. It is instead important to summarize the conclusions. Based on the law included in Dem. 24.20-23 and other references in the sources, Hansen 2019a reiterates that the *nomothetai* were a selected body different from the *demos* in the *ekklesia*, recruited by drawing lots from citizens who had taken the oath required of candidate judges (cf. Hansen 1999: 167-69). According to Canevaro 2023: 13 (I quote from his last written statement with Esu), "the *nomothetai* were a special Assembly meeting with special legislative prerogatives."²⁸ Now, even if one does not wish to trust the content of the law reported in Dem. 24.20-23, and in the absence of sufficiently unequivocal sources on which to base one's thesis, in my opinion one cannot ignore arguments based on verisimilitude.²⁹ The epigraphic laws, the text of which is explicitly approved by the *nomothetai*, attest that it was a body distinct from the other deliberative bodies, in particular the assembly. It's true that the methods of convocation and voting (even according to Hansen 1999: 169 the *nomothetai* voted by a show of hands), being analogous to those we know for assembly resolutions, would seem to support Canevaro's thesis (and conversely, it is strange that people authorized to

28 Harris 2016 confirms his endorsement of Canevaro's thesis. Hansen 2018: 25 tersely reiterated that "the sources ... show that they were not the *demos*, but a selected body different from the *demos* in the *ekklesia* ..."

29 I personally find it rather irritating to argue, as is sometimes read, that Canevaro 'proved' who the *nomothetai* really were. Hansen 2019a: 452 judiciously observes that it is impossible to reach a certain solution on this question ("although definite proof is not possible").

judge decide in a different manner than the usual one for the courts). But then, one wonders, why convene a special assembly? Is it plausible that an assembly be named in accordance with the type of measure it is charged with approving or rejecting? Wasn't it enough to include the decision in the agenda of a normal assembly (see *Ath. Pol.* 43, 4-6)? If the entire procedure is carried out as if it were an ordinary assembly, the only reason for attributing the title of *nomothetai* to the participants seems to depend on the criteria applied in their selection: therefore, it does not include all citizens normally entitled to take part in the assembly.³⁰

Acting on behalf of the demos

The time has now come to examine Hansen's 2010 article, with which he, at least as far as he himself is concerned, signalled the end of his own participation in the debate on the nature of the Athenian constitutional bodies. The article's starting point is Ober's review of Hansen 1987. Ober's thesis is that the Athenian constitutional bodies should be considered a "synecdoche" of the *demos*, understood as "the whole of the Athenian citizen body" (Ober 1996: 117). Therefore, each of the constitutional bodies can be considered representative of the whole, that is, of the *demos*. I note in passing that Ober transfers and resolves the legal problem on a linguistic level. Of course, law is also a language; but resorting to a rhetorical figure does not constitute a satisfactory solution because it cannot describe concrete acts, such as those that are legally relevant. Ober argues that "the *polis* cannot be characterized as a political agent distinct from 'the will of the citizen body'" (quoted in Hansen 2010: 517). Hansen reiterates, for his part, that "the Athenians often saw the *polis* as an abstract public power above the citizens" (517). We cannot follow here the arguments with which Hansen, on the basis of the sources, reiterates his

30 The most recent position known to me, that of Carawan (2020: 63-67), seems to move in this direction, according to which "only those who were eligible, who were of age, and who had sworn the qualifying oath would present themselves at that session of the Assembly" (65). For previous bibliography, see Dietze-Mager 2022: 36 n. 118. Harris 2021, with arguments of unequal persuasiveness in my opinion, takes a fierce stand against Hansen in favor of *nomothetai* such as "special session of the Assembly" (95).

convictions. We are instead interested in reading the Appendix of the article, entitled "The Idea of Representation" (535-36). Here Hansen writes: "In 1974 I argued that the Athenians did not see a *dikasterion* as a judicial session of the *demos* but rather conceived of the people's court as an institution that acted on behalf of the *demos* and in some way represented the *demos*". The three passages on which Hansen relies are Dein. 1.84; 3.16 and Aeschin. 3.8.³¹ But at this point Hansen declares that he prefers a different interpretation: "the meaning of ὑπὲρ τοῦ δήμου is not 'on behalf of' in the sense of 'acting on behalf of another' but 'for the benefit of / in favor of'". It seems to me, however, that this interpretation faces some objections, especially in the sense that one meaning does not exclude the other. In the passages that Hansen (536) adduces to support the thesis that ὑπὲρ τοῦ δήμου should be understood in the sense of 'for the benefit of / in favor of the *demos*', that is IG II² 47.25-28, Dem. 21.145, and Andoc. 2.26, in my opinion the phrase can also be understood as 'in representation of the *demos*', understood however as democratic regime. But also, in the two passages of Deinarchus there is an oscillation between the two meanings: the orator hopes for a ruling in favor of the interests of the *demos* by those who are called to judge as the judicial body of the *polis*. As for Aeschin. 3.8, Hansen, (536) recognizes that "the verb παρακαταθέμενοι does suggest some form of representation but in this case the subject is not δῆμος but πάντες οἱ πολῖται, who in this passage are not all citizens but all the other citizens apart from the jurors." In my opinion here, as Hansen himself states above (502-3), "the term *demos* is used synonymously with πάντες πολῖται or πάντες Ἀθηναῖοι." Therefore, in Aeschin. 3.8 πάντες οἱ πολῖται alludes once again to the role of judicial organ of the *polis*, as I think is confirmed by Aeschin. 3.7, where it is the *nomoi* of the city that made the judges guardians of democracy. But above all, the thesis supported by Hansen 2010 in the Appendix misses the point, because the organs of the *polis* can only act in favor of the *polis* if they do not wish to violate the law and suffer the consequences: it would be redundant to say they act in favor of the *polis*. Therefore, 'in favor of' cannot identify the legal nature of the action of constitutional bodies towards the *polis*. One might wonder whether it might not instead describe intervention in the public interest of a private citizen; if that were the

31 An almost identical development was already present in Hansen 1990: 221-22.

case, however, its meaning would be too broad, as it would also include acts of euergetism by citizens and foreigners. Therefore, in my opinion, the problem of clarifying the legal meaning of ὑπὲρ τοῦ δήμου is not resolved by this proposal of the late Hansen, nor of the scholars he criticizes.

III

From the Rule of the People to the Rule of Law

Let us now turn to another cornerstone of Hansen's conception of the Athenian *polis*. Hansen 1990 outlines an evolution of the constitutional bodies between the fifth and fourth centuries, focusing on the relationship between the assembly and the courts: to use Aristotelian terms (*Pol.* 1278b8ff.), which is the *arche kyria panton*? According to Hansen, in the fifth century it was the assembly, while after the restoration of the democratic regime in 403 it became the court, as the body charged with enforcing the laws. This would have led to a shift from the sovereignty of the *demos* to the sovereignty of the law.³² Hansen thus introduces an element of historical differentiation within the decision-making bodies that he has so far considered in a purely functional dimension.

To assess the significance of this thesis, which has sparked much debate, it is now appropriate to examine the role of the law in the functioning of the Athenian state.

To summarize the concept in Aristotelian terms, we speak of Rule of Law (RoL) when both rulers (*archontes* in the broad sense) and ruled (*archomenoi*) are required to respect the laws. This definition essentially underlies what Hansen writes in *Inventory* (Hansen & Nielsen 2004: 80): "The *polis* had a government, i.e., a set of political institutions (*politeia*) manned

32 Harris 2016 observes that the RoL was a principle that did not only emerge in Athens in the fourth century but was already in force in the fifth century. Hansen (2018b: 29), agrees, but adds: "A difference between the two centuries appears only if we ask: which persons were *kyrioi*?" This way of reiterating one's thesis, however, seems somewhat overblown: the Arginoussai trial demonstrates that all constitutional bodies were required to observe the laws.

by citizens (*politai*) in charge of political decision-making and enforcement of the legal order.”³³ In Aristotle's *Politics*, the emphasis falls primarily on rulers. Alongside the tripartite classification of political regimes, Aristotle draws a contrast between regimes dominated by the law³⁴ and regimes dominated by the arbitrary will of men, whether of the individual, as in tyranny, or of the masses, as in extreme democracy. Even within the same regime, particularly oligarchic or democratic, there may be a gradation of this opposition.³⁵ Upon closer inspection, therefore, the sources do not attribute a univocal meaning to the prevalence of laws; in particular, they do not clarify whether there was awareness of the formal and substantial characteristics that modern doctrine connects to the RoL.³⁶ As regards the Greek *polis*, many scholars have referred to the RoL.³⁷ Here I shall limit myself to citing D. Cohen (1995) and E.M. Harris (2013). Cohen (1995: 35ff.) underlines that it is necessary to distinguish the formal RoL, that is, the binding nature of the law for rulers and ruled, from the substantial RoL, where one looks at the contents. For example, Aristotle is in favour of granting magistrates a power of control (defined

33 The definition of the modern state found, for example, in Hansen 1998: 40 is thus transferred to the *polis*: “The state’s prerogative is the legitimate use of physical force, and for a specific purpose: viz., the enforcement of a legal order; and from this point of view the concept of state is inseparably connected with the legal system as such and with the rule of law as the end of the state.” See, however, Hansen 1998: 118 n. 12, where he echoes the debate with Berent, which cannot be dealt with here.

34 See Hansen 1998: 118 n. 9, on the differences between the *polis* and the (modern) state: “The ... sovereign as a supreme legislator who stands above the laws is foreign to the ancient Greeks, who invariably emphasized the supremacy of the laws”; and 120 n. 11, on the similarities: “The widespread tendency in this century ... to take the sovereign to be the legal order as such, or, specifically, the constitution, is not far from the ancient Greeks’ belief that the laws (*nomoi*) were the masters (*kyrioi*) of the *polis*.” The content of the two statements is practically identical regarding the *polis*; what has changed in recent centuries is the term of comparison, namely, the modern concept of sovereignty (which, however, remains debatable: for example, Article 1 of the Italian Constitution attributes sovereignty to the people, who, however, “exercises it in the forms and limits of the Constitution”).

35 See Maffi 2021.

36 A useful summary of these characteristics regarding the modern state can be found in Waldron 2016.

37 For a useful summary, again referring to Athens, see Gagarin 2020: chap. 8. Recent bibliographic references in Canevaro 2025: 198 n. 78

by Cohen as ‘censorial’) even over the private life of citizens to achieve *eunomia*. Conversely, democratic ideology is averse to concede such powers to its magistrates (Arist. *Pol.* 1317b12-38). Harris (2013: 5) distinguishes “thin definitions” of the RoL, which include “fixed rules in adjudication and administration, equality before the law, and the accountability of officials,” from “thick definitions”, which also include “requirements to recognize basic human rights.” Hansen (1998: 91-97), in turn, in the paragraph entitled “The Notion of Rights”, illustrates a list of privileges reserved for Athenian citizens: no one can be executed without first being convicted in court; the citizen cannot be subjected to torture; the citizen’s home cannot be violated and his property is protected by the eponymous archon; furthermore, the citizen enjoys freedom of speech both public and private and can take action against the magistrates for both public offenses and private wrongs.

Written and unwritten laws

Here we are primarily interested in exploring Hansen’s thinking regarding the role of law in the functioning of the *polis*.³⁸ Speaking of RoL with reference to ancient Greece, the first point to clarify is whether it concerns written and/or unwritten laws. The late Hansen has dedicated an interesting contribution to the notion of oral law (Hansen 2018a). The article begins by asking the question whether the Greeks of the pre-writing era knew oral laws in a technical sense or only “customs and traditions” (172). On the basis of comparison with texts of other peoples, even those distant in space and time from the ancient Greek world, such as, for example, the Icelandic Oral Code (178) or the English Constitution (185), Hansen argues that, even in Greece, alongside customs one must assume the existence of oral laws, particularly in constitutional matters and in the religious sphere (186). Hansen 2018a does not intend to address the issue of the relationship between written and oral laws in all its complexity (so much so that the bibliography he uses lacks fundamental

38 I shall leave aside Hansen’s extensive work specifically on the methods of legislative production in Athens, also because it is mostly summarized in chapter 7 of Hansen 1999. M. Canevaro has contributed to the study of Athenian legislation in numerous works (some of which polemize against Hansen).

writings such as Wolff 1962 = 1968, and Talamanca 2008). I therefore specify that oral laws must be understood as texts transmitted orally in a fixed and immutable form; customs are understood as rules which, by definition, are not formulated and transmitted in verbal forms, but suggest how to resolve an indefinite series of concrete cases even independently of the emergence of a controversy. That in ancient Greece it was possible technically to distinguish between oral laws and customs seems difficult to demonstrate. Hansen himself notes that the memorizers, i.e., the *mnemones*, who originally exercised their function in a society which, with a few exceptions, ignored writing, carried out their task more in the field of justice than of legislation (182). This is not the place to fully address the issue of the relationship between written laws and *agraphoi nomoi*,³⁹ also because it is not a topic to which Hansen devoted particular attention. However, it is undeniable that there did not exist, neither in Athens nor presumably in other *poleis*,⁴⁰ codes of written laws comparable to the written constitutions and the codes of public and private law of modern states.⁴¹ Therefore, one must adhere to Hansen's thesis that the functioning of the political institutions of the *polis* was largely governed by oral laws (and this regardless of the number of written laws that have reached us on the subject, both through literary texts and epigraphic documentation).⁴²

39 In the extensive bibliography, I would also point to Poddighe 2019 for further references.

40 According to Ruschenbusch 1984, only the largest *poleis* had written legislation. In many cases, the literal content of the sources does not allow us to confirm or deny this assertion: see, for example, the so-called colonial law of Naupactus (Van Effenterre & Ruzé 1994-95: I.43), where l. 30 discusses the *nomoi* of each community in Hypocnemidian Locris.

41 However, it is necessary to consider the 'open texture' nature that characterizes many legislative formulations, particularly Athenian ones: see in this regard Harris 2013: chaps. 6-7.

42 For a list of laws known in Athens, see Harris 2013: 147-48. The prohibition on using an *agraphos nomos*, attested by Andoc. I.87 and much discussed in scholarly literature, should therefore be referred to written laws that had not been transcribed by the *anagrapheis*, not generically to hypothetical unwritten laws forming part of the legislative corpus. Moreover, the prohibition should also be addressed to citizens who intended to base a claim to be enforced in court on an unwritten norm. Hansen (1999:

This observation forces us to rethink one of the fundamental principles attributed to the RoL, namely the knowability of norms. It also invites us to consider in a different light Hansen's reconstruction of Athenian political and legal history based on the transition from the rule of the people to the rule of law after the restoration of democracy in 403.⁴³ The most significant institutional consequence of this constitutional change is the hierarchy established between *nomoi* and *psephismata*. The latter continued to be issued by the assembly but must not conflict with the laws approved by the *nomothetai* (see Andoc. I.89 and Dem. 23.87): compliance with this principle is ensured, as is well known, by the *graphe paranomon*. Hansen draws the corollary: the popular court became the most important governing body⁴⁴ (*panton kyrion*) in fourth-century Athens.⁴⁵

Three critical observations on the relationship between the judiciary and the legislative power

Hansen's reconstruction has been criticized by much of the scholarly literature. Here I add my personal observations. First: The Athenian courts go against one of the principles recognized in doctrine as a characteristic of the RoL: the judicial body must be independent of the executive and legislative powers. Now, the Athenian *dikasteria* are composed of ordinary citizens (provided they are over 30 years of age), therefore by members of the assembly who are called upon to judge the legitimacy of the

170) had taken the opposite position. In fact, he wrote, commenting on Andoc. I. 87: "... in legal contexts the concept of a 'law' came to be restricted to a written statute". However, he adds that, in the fourth century, this prohibition applied only to magistrates, as they were "under the law"; while judges, "regarded over the law" could use "unwritten law and custom if there is no written law on a matter".

⁴³This thesis, reiterated in particular in Hansen 1990, had already been taken up, as the title of his book itself indicates, by Ostwald 1986: 524 and *passim*. An original approach has been proposed by Wohl 2010 and Gowder 2014, who, albeit from different perspectives, tend to bring the two concepts together (see Gagarin 2020: 155).

⁴⁴Note that 'government' can mean either "the political structure at large", in which case it also includes the judiciary, or, more specifically, "the top of the power pyramid, i.e., the chief executive" (Hansen 1998: 64).

⁴⁵Hansen's thesis has been criticized in particular by Harris 2016, to which Hansen 2017 responded. See again Harris 2019.

decrees that they themselves have approved in the legislative body. Many scholars have underlined "an essential identity between jury and people" (Hansen 2010: 520).⁴⁶ Hansen himself (2010: 523) recognizes "that there was an enormous overlap in personnel between the different democratic political institutions". However, he argues, on the basis of a good number of sources, that "there was an important distinction which often led to a direct opposition ... between the assembly and the courts" (524-25). Proceeding with his reasoning, he asks: why should a decision of the assembly be re-examined by the court? One answer (which however does not seem to be confirmed by the sources) is that "the double consideration of a proposal allowed the possibility of coming to a better decision" (Hansen 2010: 531, who gives the example of the double resolution regarding Mytilene that Thuc. 3.42.1 informs us about).⁴⁷ Hansen goes on wondering why the Athenians did not resort normally to a renewed resolution of the assembly, as happened in the case of Mytilene. And he responds by listing five reasons that would have led to preferring a re-examination by a *dikasterion*: "(1) the higher age of jurors, (2) the heliastic oath taken by the jurors, (3) the form of debate practiced in a *dikasterion*, (4) the way the vote was taken, and (5) a reduction in the cost of having an issue debated twice" (2010: 531). In my opinion, however, it must be borne in mind that this is not simply a review of a decision by a deliberative body, but a judicial pronouncement aimed at resolving a dispute. It is therefore inevitable that entrusting the task of judging to the same people who, to a lesser or greater extent, had already voted for or against the measure in the assembly seems an anomaly (also because the need for impartiality in the judge was certainly felt in the Greek world, as evidenced by the Athenian Heliastic Oath). Of the criteria mentioned by Hansen, the only one that, in my opinion, can truly differentiate a member of the assembly from a member of the *dikasterion* is the Heliastic Oath. But is this sufficient to guarantee an objective and fair decision? The

46 See the authors cited by Hansen 2010: 520-21.

47 The example of the *graphe paranomon*, proposed by Hansen *ibid.*, does not seem entirely pertinent to me, however: in an assembly resolution, two alternative proposals are addressed; in a trial for the illegality of a decree, except in special cases, the only request is the annulment of the measure.

speakers insist on this point, which raises suspicions about the effectiveness of that oath.

The second remark is that Hansen's thesis essentially applies to the issue of reviewing the 'constitutionality' of the assembly's decrees (since the *graphe nomon me epitedeion theinai* served primarily to verify the usefulness of a new law or its non-contradiction to a previous law). But the obligation to issue a law instead of a decree, or vice versa, is never raised in court: therefore, review can only be carried out on existing laws. As regards the application of laws in court, however, the change primarily concerns political processes, which are shifted from the jurisdiction of the assembly to that of the court.⁴⁸ But it should also be noted – and this is an aspect on which Hansen 1990, in his fundamental article dedicated to illustrating the powers of the popular court in the fourth century, does not dwell – that the RoL, even if we wanted to include oral law in the legislative corpus, was not considered complete and exhaustive.⁴⁹ Otherwise, it would be inexplicable that the Heliastic Oath provided for recourse to the most just opinion of judges in the absence of laws (see Harris 2013: 104–14).⁵⁰

The third observation is based on the assumption that Hansen intends to refer to the *polis* in general: hence the need to broaden the investigation of the relationship between legislative and judicial power beyond Athens. This question concerns oligarchic regimes above all, given that in democracies, in accordance with the Aristotelian definition of citizen (*Pol.* 1275a22–23), courts appear as collegial bodies whose members, as in Athens, should be the same ordinary citizens who take part in the assembly.⁵¹ Naturally, this does not necessarily mean that a hierarchy of norms like that established in fourth-century Athenian democracy was recognized in every democratic regime, with the consequent role of control entrusted to the court. In oligarchic regimes, as confirmed by the recent

48 *Contra* Harris lastly 2019.

49 See Liddel 2025 with reference to the rules governing the issuance of decrees by the Athenian assembly.

50 It is no coincidence that Waldron 2016: 10, observes that “rule by judges, too, can sometimes be seen as the very sort of rule by men that the Rule of Law is supposed to supersede”.

51 See Hansen 1998: 119.

monograph by Simonton (2017), deliberative and judicial bodies, as well as magistracies, tend to be reserved for a small number of full citizens. In any case, at least according to the information Aristotle gives us in the *Politics* (1300b35-1301a15), these were collegial bodies, although it cannot be ruled out that judicial functions were also carried out by individual magistrates. It is difficult to say, however, whether these were the same people, as in the case of the Athenian assembly and courts.⁵² It is equally difficult to say whether these were systems in which the *nomoi*, not the men, were *kyrioi*.⁵³ According to Aristotle, however, even oligarchies were governed by laws (albeit inspired by the values and objectives of this type of regime). Therefore, it is reasonable to assume that the courts applied the laws to resolve both public and private disputes.⁵⁴

Ultimately, compliance with the RoL becomes a political weapon serving the interests the speaker intends to assert.⁵⁵ As D. Cohen (1995: 34) notes, referring to Plato and Aristotle: "Skeptical of radical democracy, they contrasted the RoL of the good society with the lawlessness and license of contemporary Athens. Athenian democratic politicians, on the other hand, ... reaffirmed that the rule of law was the bulwark of radical democracy," and, at the same time, argued that in non-democratic *poleis*, those in power did not respect the laws and the constitution.⁵⁶ On the

52 See the 300 of Thasos, or the 100 of Phlius: Simonton 2017: 111.

53 It is striking that in the analytical index of Simonton's book there is neither an entry for 'law' nor an entry for '*nomos*'.

54 Simonton's thesis that oligarchic regimes tended to curb litigation (among members of the ruling elite) and that in trials there was no debate characterized by a dialectical exchange between the parties, modeled on the Athenian example, does not appear to be based on solid arguments. It should be noted, in this regard, that voluntary accusers are also found in non-democratic constitutions: see Rubinstein 2018: 106. Simonton states that he does not deal with Crete. He therefore does not consider the Gortyn Code, which features a single judge, the *dikastas*, identified with a *kosmos* by several specialist legal historians, although they are unable to adduce decisive evidence to support their thesis.

55 See the recent contribution on the notion of *patrios politeia* and *patrioi nomoi* by Loddo 2025.

56 Without wishing to reiterate a long-standing controversy, it seems to me that this type of argument is in stark contrast with what we read in Ober 1989: 22-23: attempts "to enunciate a 'rule of law' that was exterior, superior, and in opposition to the will

other hand, both in democratic regimes, particularly Athens as we have seen, and presumably in oligarchic regimes, the judiciary, due to its very composition, constituted an independent power only in form, not in substance. It is curious that Hansen (1998: 117-18) does not identify this point as one of the essential differences between the *polis* and the modern state.⁵⁷

IV Conclusions

What Henri Van Effenterre once wrote about the ancient Cretans could be repeated, *mutatis mutandis*, for Hansen: “Il faisait du droit sans le savoir!”, but, in Hansen’s case, it would be better to say: “sans le vouloir”. Indeed, I believe that the examination of certain aspects of Hansen’s thought, which we have undertaken above, has shown that he was primarily interested in law, if we may use this metaphor, as the channel into

of the people” do not help us understand the nature of Athenian democracy, even though laws and constitutional forms “reflected and subsequently influenced the political attitudes of the Athenian populace”. That institutions can, intentionally or by mistake, violate the laws (which happens daily even today) does not detract from the widespread awareness of the existence and validity of those same laws (similar considerations apply to what Ober (1989: 299-301) writes: in my opinion speaking of the “simultaneous sovereignty of the people and the law” is a subterfuge that confuses law and fact. In my opinion, what Hansen (1998: 116) writes about the distinction between the modern definition and ancient awareness regarding the concept of *polis*, also applies to the RoL. Hansen 2018b: 29, however, prefers to speak of *nomos kyrios* rather than RoL, as he considers it a modern concept.

57 This does not mean that “the juries did act in place of and on behalf of all the citizens”, as claimed by Ober (1989: 145). As we have already seen above, maintaining that the judges represent the members of the assembly “at least indirectly” (145) is not legally correct. The cases, mentioned by Ober (1989: 146) in which the speakers address the judges evoking the (erroneous) decisions they would have taken as members of the assembly, in my opinion can be explained precisely as a “personnel overlap between courts and Assembly” (which Ober denies) and not that the judges “were regarded as standing in for the *demos* and as representing the *demos*’ interests” (which Ober claims). In the 160 theses published in the appendix to Hansen 1999: 334 no. 58, it is reiterated that *demos* can mean “the Athenian people” in the sense of “the Athenian state”.

which the river of political activity was channeled, not as a system of norms and principles to which political activity had to adapt or with which it had to confront itself (that is, with the RoL in the strict sense). Let us give some examples to illustrate this statement. In Hansen's "Introduction" in Hansen & Nielsen (2004: 80ff.), we find a paragraph entitled "Constitution." But we do not find a paragraph entitled "Law"; furthermore, if I am not mistaken, the name of the most important Greek legal scholar of the last century, H.J. Wolff, does not appear in the bibliography of any of the entries relating to individual *poleis*, and the most relevant legal documents (especially the epigraphic ones) are only mentioned without any examination of their historical-legal significance.⁵⁸ However, Hansen's "classifying spirit" (which Fröhlich 2010: 657 criticizes) provides scholars with material that, in a certain way, also prefigures the problems to be addressed on a historical-legal level. To give just one example, the question of dependent *poleis* (extensively discussed in Hansen 1998 and in Hansen's "Introduction" in Hansen & Nielsen 2004)⁵⁹ involves, from a conceptual point of view, legal solutions which cannot be overlooked.

I therefore mention here some lines of research that, in my opinion, are likely to develop insights from Hansen's work from a historical-legal perspective. One avenue still largely unexplored concerns the world of *poleis* outside of Athens. Hansen's study of the *polis* as a city-state is, in fact, explicitly or implicitly, strongly focused on Athens. The reasons, as is well known, are obvious, as the sources available to the historian, for the centuries Hansen deals with, largely come from Athens and concern Athens. However, it is striking, for example, that Hansen considers Sparta an exception to the principle, which he repeatedly reiterated, of the separation of state and society in the Greek *polis*. Another theme, which would be interesting to develop, is the comparison with Aristotelian writings, especially the *Politics* and the *Ath. Pol.* Hansen draws very

58 See, for example, Tegea (no. 297, p. 532); Delphoi (no. 177, p. 414); Abdera (no. 640, p. 874); Miletos (no. 854, p. 1086), and especially Chaleion (no. 159), Naupaktos (no. 165) and Oianthea (no. 166).

59 This is the question addressed extensively by Fröhlich 2010 and responded to by Hansen 2015b.

often on these texts,⁶⁰ sometimes taking them directly as historical sources (for example, in Hansen 1999: 228); he also made it the subject of a monographic work in Hansen 2013.⁶¹ Another broad field of application of Hansen's method would be the study of the historical process through which the *polis* was constituted: this is a topic that Hansen always treats marginally, given that he focuses essentially on fourth-century Athens.

Regarding Athens in particular (but not only Athens), I believe a promising research perspective is the participatory conception of the *polis*. The relevance of this conception depends, in my opinion, on the non-representative nature of Greek political institutions: we usually speak of direct democracy, but it would also be correct to speak of direct oligarchy. The modalities of this participation, as mentioned above, are not limited to proposing legislative measures or pursuing public interests in court through *graphai* or other public actions by *ho boulomenos* (on which Hansen 1981a in particular focuses). In Maffi 2018, which is effectively only a first draft, I mentioned a broader notion of citizen participation in the management of public affairs (citing, for example, the new articles of the Italian Constitution on subsidiarity; but it would also be interesting to compare the citizen participation with the figure of the *de facto* civil servant, envisaged by the Italian administrative system: two themes that would certainly have interested Hansen). We are therefore not addressing the distinction between government bodies and civil society, as proposed by the doctrinal trend (which has found successful expression, for example, in Ismard 2010) that tends to recognize intermediate public bodies, or even private associations, as having a slightly inferior, if not equal, leadership role to the governing bodies of the *polis*. I am referring instead to private activities that interfere with the public sphere, determining the active or passive involvement of citizens in acts of common

60 In Hansen 1998, we have two and a half pages of quotations from Aristotle, making him the most cited source (especially the *Politics*); in Hansen 1999, there are as many as three pages (where *Ath. Pol.* and *Politics* are more or less equal and slightly less than the citations from Demosthenes).

61 See Fröhlich 2016: 93, although he does not cite Hansen 2013 in this article.

interest: we can recognize in them concrete manifestations of the concept of a self-administering political community⁶². This is a concept that does not contradict⁶³ but coexists with that of a *polis* as an embryonic subject of rights and duties, in which, however, the concept of a legal person is not yet recognizable: ultimately, it could be considered the explicitation of that enigmatic Aristotelian definition of the *polis* as *κοινωνία πολιτῶν πολιτείας* (*Pol.* 1276b1) (on which see Hansen 2013: 50–51). It can be added that the relevance of the private dimension in the public sphere goes even further: for example, according to *Ath. Pol.* 55.3, the *dokimasia* of the archons also includes the verification that the interested party has provided for his parents. A similar, more detailed assessment regarding behavior toward parents is also required for the *dokimasia* of *rhetores* in Aeschin. 1.28 (where other private behaviors acquire public relevance).

The perspective I just mentioned naturally counterbalances a continuation of Hansen's research on government bodies. In my opinion, it would be appropriate to explore in more depth his research on the role of magistrates, that is, the *archontes* of Aristotelian theory.⁶⁴ My impression is that, apart from Hansen 1980, magistrates do not occupy a space in his work commensurate with their importance.⁶⁵ It remains indeed to be explained how a constitutional regime, whether democratic or oligarchic, could function in the absence of a "monocratic 'sovereign' governmental agency". It should be remembered that government is a term that can be used both in the sense of a constitutive element of the State, as Hansen himself defines it (Hansen-Nielsen 2004, 80),⁶⁶ and in the sense of bodies responsible for exercising a power that, not coincidentally, is defined as 'executive' in constitutional law theory.

62 For documentation relating to the substitute participation of private individuals in the management of public affairs, see Fröhlich 2021

63 As Fröhlich (2010: 670) believes.

64 In the vast bibliography, I refer to the contributions published in Beck 2013, to which I may add Maffi 2018.

65 Note, for example, how Hansen 1999: chapter 9, "The Magistrates", devotes relatively little space to the 'Functions' and 'Tasks' of magistrates.

66 In the same way it is essentially defined in the long series of contributions published in Beck 2013

In conclusion, in my opinion, there is nothing ‘old’ about Hansen’s work: his ideas on the nature and functioning of the *polis* continue to stimulate research both by historians *tout court* and by legal historians. Without wishing to diminish methods of inquiry that aim to create a broader and more nuanced picture of the political life of Greek communities,⁶⁷ the study of the institutions of the *polis sub specie iuris* remains a timely topic, one that cannot ignore the findings of Hansen’s research, and above all his method, based on a fundamental premise: the study of the Greek *polis* is the study of the Greek state.⁶⁸ From this point of view, I declare myself *totus Hafniensis*.

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67 These tendencies were somewhat anticipated by Hansen when, on the last page of Hansen 1999, he wrote: “It is ... often, and justly, remarked that Athenian democracy was not just a constitution and a set of institutions but a way of life... Certainly; but, again to the Greek way of thinking, it was the political institutions that shaped ‘the democratic man’ and ‘the democratic life’, not vice versa: the institutions of the polis educated and moulded the lives of the citizens ...” (320).

68 Obviously, I do not agree with H. Beck (2013: 2), when he writes: “No one nowadays seriously subscribes to a concept of politics that reduces governmental action to the formalistic execution of laws or the interplay between state branches whose conduct is governed only by their place in the juristic domain of the constitution”. The precious works of Lene Rubinstein would be enough (in particular Rubinstein 2010 and 2012) to disprove it.

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