

ATHENIAN FESTIVAL JUDGES – SEVEN, FIVE, OR HOWEVER MANY

No ancient authority has left us a clear account of how the judges at the Athenian dramatic festivals operated. We can therefore never know for certain what happened. But it may be possible to improve the reconstruction normally given, which does not look as if it could ever have yielded acceptable results.

One thing that is very clear (from Isocrates 17.33–4) is that the choice of judges was taken seriously. Not only did it involve the Council, the Prytanies, and the Treasurers, but any tampering with the panel from which the judges were eventually selected seems to have been punishable with death. Even the physical arrangements were quite complicated. Names approved by the Council were deposited in ten jars, one jar for each tribe but each jar containing several names, sealed by the Prytanies, held in safe-keeping on the Acropolis, and eventually brought down to the theatre, where the archon publicly broke the seals and drew out one name from each jar.¹

At this stage of the process there emerged ten judges, one from each tribe. Their quality had been guaranteed by the Council's prior vetting of the panel, but their actual names were unpredictable because randomly selected from it. All had been done democratically and with equal representation of tribes, in perfect accord with normal Athenian practice.²

But now comes the difficulty. The paroemiographers record a proverb (or rather perhaps a joke since it seems to be a kind of parody of a Homeric verse) about judgement being in the lap of five judges – ἐν πέντε κριτῶν γούνασι κείται;³ Lysias tells us of a judge whose vote was not counted;⁴ and Lucian, who likes to disguise a very careful antiquarianism behind an apparent casualness of style, says that at festival competitions the many know how to clap and hiss but that judgement is in the hands of seven or five or however many.⁵ In order to accommodate these separate items of evidence it is supposed that the archon put the ten names that he had drawn into another urn, that these were then mixed up and a second draw made to select a final jury of five judges. These five, it is then assumed, were the ones who decided the contest. But it is not clear what is supposed to be gained by this second draw.

¹ IG II² 204, 24–42 (a mid-fourth century decree of *boule* and *demos*) prescribes a somewhat similar procedure under which *hydriae* are to be sealed and handed over to the *tamiae* for safe keeping on the Acropolis.

² The only direct evidence we have for the tribal basis of nomination is rather late – Plutarch's story (*Kimōn* 8.7–9) of how in 468 B.C. after the battle of the Eurymedon the archon set aside the regular procedure and chose the heroes of the day, Kimon and his fellow generals, to do the judging, justifying his action on the ground that they were one from each tribe. However, this can be supported by inference from contemporary evidence. Isocrates tells us that the Council-approved names were put into *hydriae*, and this must mean a separate one for each tribe's nominees. Otherwise they would more sensibly have been put into a single *hydria* and mixed up together in it before being drawn.

³ Zenobius 3.64 cites this as a proverbial phrase, apparently to explain a remark in Epicharmus about five men judging a comedy. Hesychius (s.v. πέντε κριταί) says this happened 'not only in Athens but also in Sicily', from which one may infer that as far as Hesychius was concerned the institution (however it operated) and the mock-proverb originated in Athens.

⁴ Lysias iv 3. ἀπέλαχεν is the word used for the judge not having his vote drawn after he had deposited it in the *hydria*.

⁵ Lucian, *Harmonides* 2: καὶ γὰρ ὅν ἐν τοῖς ἀγῶσιν οἱ μὲν πολλοὶ ἴσασι κροτῆσαι τε καὶ συρίσαι, κρίνουσι δ' ἐπὶ τὰ πέντε ἢ ὅσοι δῆ.

Solomon in his wisdom talked of 'the lot that stinteth strife', but arbitrarily to disenfranchise five tribes in this way does not seem likely to be strife-stinting. It might be thought at first glance that a jury of five, being an odd number, would be able more easily to arrive at a majority decision. But it would have to be a very brief first glance that allowed us to think so. Consideration will quickly show that when there are more than two contestants to decide between (as was always the case at Athenian dramatic festivals) a jury of five is as likely to be evenly divided as a jury of ten. The number five has therefore no special virtue. Furthermore the envisaged procedure gives rise to several awkward questions. If the five judges retired to discuss their verdict, where exactly did they retire to, how long were they allowed for their deliberation, and what happened if they failed to agree? On the other hand if they did not retire for discussion but a verdict was announced by the archon as soon as he had drawn five *γραμματοῖα* (as seems to be assumed by Pickard Cambridge⁶), one may ask what happened if there was a tie – such as would arise from a 2–2–1 vote at a tragic competition or a 2–2–1–0–0 or 1–1–1–1–1 vote for comedies or dithyrambs. It is hard to think of a solution that could command confidence when there were still five unexamined votes lying in the original urn. What is more, even an outright majority would result in questionable justice. Counting the votes of five out of ten judges would often produce a different verdict from counting the votes of the whole panel. If the complete vote at a tragic festival was Poet *A* – 6, Poet *B* – 4, Poet *C* – 0, there is a more than 25% chance that the first five votes drawn would give the victory to *B*. The same if the original vote was 5–4–1. And with a more closely contested competition where the original votes went 4–3–3 the chance of five of them randomly drawn giving either an outright victory or an equal first to one or other of the two weaker entries is over 40% ! Admittedly the Athenians could not have calculated the precise figures, probability statistics being a discovery of post-renaissance Europe and quite unknown to the ancient world, but common sense, to say nothing of possible post-mortems among the judges and the considerable experience of the working of sortition that all Athenian citizens had in their political life, would have been enough to show that five votes out of ten was not a reliable sample. And of course for Comedy and Dithyramb (where there were five or ten entries instead of three for the original votes to be divided between) the chance of a distorted result was very much greater.

In short it is impossible to imagine that this proposed system could have been accepted by poets or people, let alone have warranted the time and attention devoted to it by the public authorities of Athens. One may add that the Athenians found boards of ten satisfactory for most purposes, that there is no parallel in their constitutional practice for a board of five like the one envisaged in this reconstruction of the procedure,⁷ and that as for Lucian's rider 'seven or however many', this remains totally unexplained.⁸

But there is an alternative reconstruction possible which would yield a simpler and more rational procedure, which would explain Lucian's qualification about the numbers, and for which a parallel can be cited in ancient, though admittedly not in Athenian, constitutional practice. This is that the ten judges whose names were drawn

⁶ 'At the end of the contest each (sc. of the ten judges) wrote his order of merit on a tablet; the tablets were placed in an urn, from which the archon drew five at random, and on these five tablets the issue of the contest was decided.' Pickard-Cambridge, *The Dramatic Festivals of Athens*², 1968, 97.

⁷ It is not conceivable that the 'five youngest νομοφύλακες' in Plato's *Laws* xi are relevant to such a comparison.

⁸ Pickard-Cambridge, op. cit. 97 n. 4 'the reference in ἐπτά is inexplicable'.

by the archon from the Council-approved panel constituted the final jury. They watched the competition and at the end of it each recorded his vote on a *γραμματεῖον* and deposited it in an urn or box. The votes were then drawn at random by the archon who announced, or rather caused a herald to announce, each one as it came out. The victor was the first to obtain five votes. This will usually have happened before the urn was empty, and in this case any judge who did not have his vote drawn will have 'failed to cast a ballot that counted', and the word *ἀπέλαχεν* can appropriately have been used of him. As for the others, there will normally have been five who voted for the winner. The winner could therefore truthfully be said to owe his victory to a mere five judges.

On this scheme the verdict will have been reached by a process that was public, rational, and quick. However, not every voting combination will have been equally easy. 3-3-4 (for tragedies) and 0-1-2-3-4 or 0-0-3-3-4 (for comedies) would presumably give outright victory to the entrant with the most votes despite their numbering four not five. But 4-4-2 and 3-3-2-1-1 are also possible combinations, and these would need to have their dead heats settled in some way.⁹ The most straightforward would be for the judges who had voted for the outsiders to be made to vote again, depositing their votes once more into the urn for the archon to draw and announce. The winner will still be the one who first secures an overall total of five votes, though he will have taken slightly longer to do so.

A more remote possibility, but one which would nevertheless have to be foreseen and provided for, is a triple tie. This could happen at festivals where there were five comedies presented if the original votes were cast in the pattern 3-3-3-1-0. In such a case the one man out would have the equivalent of a casting vote – and this might be what winning *ἐνὶ κριτεῖ* 'by a single judge' could mean in Aristophanes, *Birds* 447, if the phrase is anything more than a comic exaggeration.

Dithyrambic competitions where there were ten competitors allow a wider range of voting patterns. Nevertheless they can all be subsumed under four types. If one chorus attains five votes, it is unbeatable and can be declared the victor. If one chorus emerges with a clear majority when all the votes have been announced, this can then be awarded the victory. If there is a tie between two or more entrants, the judges who have voted for the losing entries can be asked to vote again to resolve the dead heat: as soon as a chorus has five votes, or else achieves a clear majority, it is declared the winner. Finally, and this must surely have been very rare if it ever happened at all, the original votes may have been divided two all or one all. In that case the result could have been deemed tantamount to no vote and the judges required to vote afresh as for their second choices.¹⁰ For of course second and third places were awarded will have been judged by the same procedures. How long it would all take is hard to guess, perhaps twenty minutes or half an hour. But there would always have been something to watch, which is important in the circumstances of a large public

⁹ There seem to be no recorded dead heats in Attic musical or dramatic competitions. The gold crown for the citharodic contest at the Panathenaea in 402 was probably unawarded since it was dedicated in the Hecatompedon (*IG* II-III² 1388.36 and see J. A. Davison, *JHS* 78 [1958], 37), but there is no proof that this was because of a tied vote, and the fact that 402 was such a troubled year in Athens makes other explanations easy to imagine. To find a clear instance of a dead heat it would appear that one must go as far afield as Acraephium in the first century B.C., where the citharodic prize and the prize for comic performance were each deemed *ἱερός* (*IG* VII 2727, 21 and 24).

¹⁰ The same problem could in theory arise at a festival of five comedies if two judges voted for each one, and the same solution could have been employed.

gathering. And, what is equally important, there would always have been a clear verdict, never a stalemate.

In some cases the winner will have emerged with a clear overall majority, but short of five votes. However, this does not affect the point of the proverb, which is that he never needs more than five votes. And this is indeed the case. Any extra votes the winner may have in the box will never materialise. As for the possibility of a dead heat if the judges had voted five all, this could never be other than notional. The counting of votes will always have stopped at 5–4, and nobody can ever have officially known how the last vote would have gone.¹¹

An analogy for this ‘first to the post’ system can be found in Roman elections. Allusions in Cicero and in Livy guarantee its existence in republican times, but the procedure is most clearly explained for us in the charter granted by Domitian to the town of Malaga, the so-called *Lex Malacitana*. It prescribes as follows (section 57):

Qui comitia h.l. (sc. hac lege) habebit, is relatis omnium curiarum tabulis nomina curiarum in sortem coicito, singularumque curiarum nomina sorte ducito, et ut cuiusque curiae nomen sorte exierit, quos ea curia fecerit, pronuntiari iubeto; et ut quisque prior maiorem partem numeri curiarum confecerit, eum, cum h.l. iuraverit caveritque de pecunia communi, factum creatumque renuntiato, donec tot magistratus sint quod h.l. creari oportebit.¹²

There is a difference of course in that the Roman procedure is intended for the election of a college of magistrates, not to decide an outright winner. But the points of similarity to our proposed reconstruction of how Athenian festival judges voted are more numerous and more fundamental. First, the order of announcement is randomised. This means that a dead heat is as it were solved before it happens and the only people who could dispute it would be the kind of people who would dispute the toss of a coin. Second, the successful contender is announced as soon as his victory is secure, which saves time. Finally, the surplus votes are not announced or recorded, which saves strife. The winners are always equal and cannot claim that their victory is greater than that of their colleagues or predecessors.¹³

Needless to say the existence of an electoral procedure at Rome does not prove anything about what may or may not have taken place in Athens. It does however show that the principles involved are practicable ones, and that the ancients, who were by and large very much more sensitive to what was fair and unfair in matters of voting than we are, need not have found anything to object to in them.

One may add that recent speculation on how ambassadors and generals were voted for in the Athenian assembly provides support in two important respects. ‘Pour

¹¹ It is worth noting that on the other reconstruction five judges are far from enough to ensure victory. Though a winner might emerge with only three judges out of the original ten voting in his favour, he would need eight to be absolutely safe.

¹² The text is in Bruns, *Fontes Iuris Romani* 1907. Staveley, *Greek and Roman Voting and Elections* (1972), 235, offers the following translation for it: ‘When the voting returns from all the *curiae* have been brought in, the presiding magistrate shall put the names of the *curiae* in the lot and shall draw the lots one by one to determine the order in which the several results shall be announced. As soon as any one candidate secures a majority of the *curiae* he shall take the oath and give security for the public money and shall then be declared duly elected. The procedure shall continue until as many magistrates are declared elected as required.’

It would like to thank Dr L. Holford Strevens for pointing out to me the possible relevance of Roman procedure in this matter.

¹³ Roman politicians claimed a kind of superiority (of *gradus*, not of *dignitas*) if they were the first to have their majority announced, even though this might be due to nothing more meritorious than chance (see Cicero, *Pro Murena* 18, *In Pisonem* 2, and Livy 7.5.9), and one may therefore presume that claims to superiority in a more serious sense would have been customary if it had been the practice to publish the total vote.

chaque magistrature' writes Marcel Piérart, and his account is accepted in its main outline by Rhodes,

celui des membres de l'assemblée qui le désire propose le candidat de son choix. Le vote à main levée consiste simplement à accepter ou à rejeter la proposition. Celui qui obtient le quorum requis, sans doute la majorité simple, est proclamé. Le vote s'arrête dès que le nombre de magistrats à élire est atteint.

If this reconstruction is correct it shows (a) that the Athenians in political assembly were concerned to ensure that the candidates they elected were acceptable in an absolute sense, not to find out which were more acceptable than others, and (b) that voting did not continue after the requirements of the election were satisfied.¹⁴

Finally, to come back to Attic festivals and to Lucian. The arithmetic we have done so far assumes ten tribes and ten judges. But in Lucian's day there were thirteen tribes, and if there was a judge for each tribe, then seven judges, not five, will have been needed for an unbeatable vote. At other moments in Athenian history the number of tribes had been eleven or twelve. Lucian covers himself for this by adding ἡ ὄσοι δῆ. Thus Lucian's numbers are explained. And there is a further, more qualitative, aspect to the matter. We may feel that if Lucian has been so careful to get his figures right he may also be right about the moral he draws. The point he is making in the context is not 'How arbitrary!' or 'How haphazard!' but 'How few judges are needed to give true fame!'. Had it really been the case that five judges were regularly disenfranchised at every competition the system is not likely to have worked so well that it could be taken as synonymous with a fair trial and a valid aesthetic judgement.¹⁵

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¹⁴ *BCH* 98 (1974), 141–2. Piérart leaves open the question whether nominees were put forward one by one and then voted on or whether a complete list was established before any voting began. Rhodes, *GRBS* 22 (1981), 130–2, prefers this alternative. If he is right and if the order in which the names were voted on was determined by lot, then there will be a third parallel with the Roman procedure. M. H. Hansen however (*The Athenian Ecclesia*, 120–1) envisages the possibility of subsequent challenges, the effect of which would be to secure the election of the most preferred men, not simply of acceptable ones.

¹⁵ An anonymous reader suggested that I mention the matters raised in my notes 1, 2, 9 and 14, and I should like to record my thanks to him.