

NΟΜΟΦΥΛΑΚΙΑ AND THE AREOPAGUS

THE account of the reforms of Ephialtes given in the Aristotelian *Ath. Pol.* (25) is as follows:

For about seventeen years after the Persian Wars the constitution lasted unchanged with the members of the Areopagus pre-eminent, despite a gradual decline (καίπερ ὑποφερομένη κατὰ μικρόν). With the increase of the mass of citizens [if that is the right way to understand the phrase ἀξανομένου τοῦ πλήθους] on becoming leader of the People Ephialtes, the son of Sophonides, who was thought to be both uncorrupt and just in his attitude to the constitution, attacked the Council [*sc.* of the Areopagus]. First, he brought down many individual Areopagites, by bringing lawsuits against them for their acts of administration. Then in the year when Conon was archon (i.e. 462/1) he had removed from them all the additional functions (τὰ ἐπιθετα) by means of which they guarded the constitution (δι' ὧν ἦν ἡ τῆς πολιτείας φυλακή) and accorded some to the Council of the Five Hundred and some to the People and the Courts.

This account hardly moves one to gratitude. From other sources we could learn enough to know in broad outline what Ephialtes did, viz. that he curtailed the powers and humbled the pride of the Areopagus (*Ar. Pol.* 1274^a7, *Plut. Mor.* 812d, *Diod.* xi 77.6, *Paus.* i 29.15), taking from them most of their judicial functions (*Plut. Cim.* 15.2, *Per.* 9.5). Even the date, precisely given by the *Ath. Pol.*, could be roughly established (*Plut. Cim.* 14, 15), adequately for most purposes. What, it might well be asked, have we got from the *Ath. Pol.* other than confusion?

Confusion there certainly seems to be. The claim is made in an earlier chapter (23.1, 2) that the Areopagus gained in influence after the Persian Wars, because it had so notably well attended to the city's affairs during them. Herodotus had nothing to say of any contribution by the Areopagus. There is no reason to think that the Council which dealt so roughly with the man who was unwilling abruptly to reject the message from Mardonius (8.4) was the Areopagus, and not the Five Hundred, which always heard foreign embassies at the time when Herodotus was writing; if he had meant the Areopagus, he would surely have taken the trouble to make it clear. The notion that the Areopagus had done well during the Persian Wars was indeed current in Aristotle's day and found a place in the theorising of his *Politics* (1304^a17), but what exactly they were thought to have done is obscure. According to the *Ath. Pol.* the Council provided eight drachmas to each man who fought at Salamis, the Council be it noted and not the Areopagites individually, and while in our state of ignorance of Athenian finance at this period we cannot be certain that the Areopagus had no funds to dispense, it would be astounding if the reforms of Solon and of Clisthenes had not transferred such financial functions as the Areopagus had possessed to the Council which was concerned with day to day administration. The story looks bogus. It was certainly ill represented in the tradition. Plutarch (*Them.* 10.6, 7) did no more than repeat the *Ath. Pol.*'s story without corroboration, and proceeded to give a story of Clidemus ascribing the credit for finding the money, literally so, to Themistocles. This all seems rubbish, propaganda perhaps, but not fact (*cf.* Rhodes ad *Ath. Pol.* 23), and the whole idea of an Areopagite ascendancy very improbable. The different boards of archons during the Persian Wars may have taken with them into the Areopagus the reputation of having acted well during the crisis, and so that Council itself may have enjoyed a period of considerable influence, but whatever the truth of that, it may be firmly enough asserted that their formal powers did not increase after 479. The *Ath. Pol.* itself denied that there was any formal decision which gave the Areopagus its pre-eminence in that period (23.1), and it would be indeed strange if for a season the long-manifested tendency to diminish the institutions of the aristocratic state had been

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reversed. Admittedly there was war against Persia and wars tend to require concentration rather than diffusion of power. But Athens herself was in no pressing danger and there was no cause to attempt to turn back the tide.

Yet the *Ath. Pol.* claims that it was 'the additional functions', the extra powers, τὰ ἐπιθετὰ of which the Areopagus was deprived by Ephialtes, and, on the face of it, it seems to be implied that these had been taken on in the period after the Persian Wars, which, as has just been argued, is extremely unlikely. The phrase has therefore excited much speculation, the commonest view being that it reflects the account that Ephialtes and his supporters put about,¹ viz. that their seemingly radical curtailment of the powers of the Areopagus was merely the removal of inessential accretions, and Wilamowitz² pointed to the *Eumenides* where the foundation of the Areopagus by Athena is represented as no more than the setting up of a court to try capital cases. However, whatever Aeschylus thought, it is hard to believe that in 462 Athenians had such a keen sense of the origins of their institutions that they could describe to themselves what the Areopagus had lost as 'the additional functions'. Whence then the phrase? It was maintained by Sealey³ that in the Demosthenic period the Areopagus was given back certain powers which since Ephialtes it had not possessed, that these were the so-called 'additional powers', τὰ ἐπιθετὰ. Quite apart from the question whether the Areopagus did receive additional powers in the 340s, a fragment of a speech of Lysias early in the fourth century (Sauppe *fr.* 178)⁴ shows that the phrase was then in currency and referred to matters of jurisdiction that were not traditional (πάτρια). Now whatever the origins of the Areopagus, all the powers of which it was deprived in 462 were 'traditional'; they may not have been established by the founding fathers, but they had certainly been exercised by the fathers, and the fathers of the fathers, of the men of Ephialtes' day, and the Athenians would not have tolerated a claim that any of these powers were 'additional'. It may therefore be suggested that the phrase cropped up early in the fourth century to describe the new position of the Areopagus under the restored democracy, of which we are informed by the decree of Tisamenus quoted by Andocides (i 84). 'When the laws have been passed, let the Areopagus see to the laws, in order that the magistrates abide by the established laws.' The plain meaning of this clause is that the Areopagus is to have a permanent role in safeguarding the constitution, and since that was expressly what the *Ath. Pol.* says was taken away in 462, it must only from 403/2 be 'additional'. Some have tried to maintain that this role was only temporary, but both the text of the decree and Andocides' preceding account of the restoration of democracy show that the preliminary and temporary phase was to be ended with the formal passing of the laws.⁵ So the *Ath. Pol.*'s phrase, 'the additional functions' (τὰ ἐπιθετὰ), may well have come into vogue in the first years of the fourth century when it was used by Lysias, but whatever the right explanation is, the phrase is no help to understanding what the Areopagus lost in 462/1.

The chapter is also teasingly brief. Elsewhere, in his description of the overthrow of the democracy in 404 (35.2), the author spoke of 'the laws of Ephialtes and Arcestratus which concerned the Areopagites' and in 27.1 he attributed 'the taking away of some of the powers of

¹ Cf. P. J. Rhodes *ad* 25.2.

² *Aristoteles und Athen* (Berlin 1893) ii 187.

³ *CPh* lix (1964) 13.

⁴ Cf. Rhodes *l.c.* It is to be noted that there is no good reason to postulate an increase in the powers, as opposed to the exercise of powers, of the Areopagus in the Demosthenic period, as proposed by Busolt-Swoboda, *Griechische Staatskunde* ii 926 and Sealey *art. cit.* A decree was not a law, and the decree of Demosthenes referred to by Dinarchus (i 62) can only have required the Areopagus to exercise powers it already possessed. (D. M. MacDowell, *The Law in Classical Athens* [London 1978] 190 states that the procedure of ἀπόφασις 'was introduced by a law which must have been made

around the middle of the fourth century'. Similarly M. H. Hansen *Eisangelia* [Odense 1975] 18 and 39 f., though he does not speak of a law.) But the decree of Demosthenes, as reported by Dinarchus, spoke of the Areopagus 'using the traditional laws', which suggests that they were called on to exercise powers which they were deemed to have long had, not a power recently conferred, just as *IG* ii² 204 i 19 presumed that the supervision of the sacred land was something that was within their powers. All such activities could be deemed to derive from the decree of Tisamenus with its vague implications.

⁵ Cf. D. M. MacDowell *ad* Andoc. i 84.

the Areopagites' to Pericles. Philochorus (F64b) recorded that a board of Nomophylakes, seven in number, was set up at the time when Ephialtes 'left to the Areopagus capital cases alone'; 'they compelled the magistrates to abide by the laws and sat in the Assembly and in the Council with the Proedri'. One could wish that Chapter 25 had been less cryptic.

Pericles is associated with Ephialtes in Aristotle's *Politics* (1274^a8), and his role is perhaps best understood as that of chief supporter who played a notable part in persuading the People to vote for the reforms.⁶ As to Arcestratus, we are completely in the dark. He may be the man who moved the amendment concerning matters judicial to the Chalcis Decree of 446 (*IG* i³ 40), but that is far from sure.⁷ Since his law was repealed in 404, it must have been in operation up till then. So he cannot have been the author of the board of Nomophylakes, which must have been short-lived; it plays no part in the history of the fifth century at the very moments when it would have operated if it existed. Nor can he have been responsible for the ending of that board, for the purpose of the revolutionaries of 404, it is to be presumed, was to return to the Areopagus the full powers it had before Ephialtes attacked it, not to re-establish what must have belonged to a transitional stage between Ephialtes and the fully developed radical democracy. So we are reduced to pining that the author of the *Ath. Pol.* did not explain what Arcestratus did and how it related to the work of Ephialtes.

Philochorus' notice of the board of Nomophylakes certainly raises problems, but it is not to be denied that it was set up and, it would seem, as part of Ephialtes' reform, an attempt to bring under popular control the safe-guarding of the laws, formerly the business of the Areopagus.⁸ That it did not last long but was soon replaced by the institution of the *graphē paranomōn*, whereby it was left to vigilant individuals to challenge in the courts the legality of proposals,⁹ may argue moderation on the part of Ephialtes. But it may show no more than that the new board was quickly seen to be unnecessary and the reformers of 462/1 happily dispensed with it. Whether anyone had at that time proposed the radical alternative to Ephialtes' solution there is no knowing, but even if Ephialtes was moderate in method, he may well have been most radical in intention.¹⁰ The real question is how great was the task to which he addressed himself. Did Ephialtes merely complete a task already well on the way to completion, by pushing over a much enfeebled aristocratic council which lacked the authority and perhaps even the will to resist? Or did he take on the formidable task of destroying the solid bastion of the aristocratic state? Was he a woodman knocking down a rotten tree, or was he truly a giant-killer? That is the question, and now that the preliminary uncertainties of the *Ath. Pol.*'s account have been exposed if not removed, it is time to turn to it.

⁶ A. J. Podlecki, *The political background of Aeschylean tragedy* (Ann Arbor 1966) 97 f., suggested that Pericles was responsible for the establishment of the board of Nomophylakes, but Philochorus F 64 b suggests that they were part and parcel of Ephialtes' reforms.

⁷ Cf. Wilamowitz (n. 2) i 68 n. 40.

⁸ See Appendix.

⁹ G. Grote, *History of Greece* iv 459 (1888 edition) assigned the *γραφὴ παρανόμων* to Ephialtes without argument. C. Hignett, *A history of the Athenian constitution* (Oxford 1952) 209–13, preferred a later date 'when experience had shown the dangers of uncontrolled legislation'. He was followed by H. J. Wolff, *SHAW* (1970) ii 15–22, who was inclined to attribute it to someone like Nicias; he takes the absence of allusion to such a procedure in the alleged conversation of Pericles and Alcibiades in Xenophon's *Memorabilia* (i 2.40–6) as significant. But nothing in that conversation excludes the notion that there was a procedure to prevent the majority being induced to create confusion by ordering inconsistent things, and as to experience

showing 'the dangers of uncontrolled legislation', the creation of a board of Nomophylakes in 462 (which Hignett rejects) argues that Ephialtes was well aware of such dangers. J. Martin, *Chiron* iv (1974) 31, follows Wolff and cites with approval the argument of W. R. Connor (*New politicians of Fifth-century Athens* [Princeton 1971] 125 and n. 66). In assessing the fact that the first recorded use of the *γραφὴ παρανόμων* (*Andoc.* i 17) relates to 415, one must remember that the writing and hence the publication of speeches was a late innovation, if we may trust Ps.-Plut. *Mor.* 832d. One would not expect such information in Thucydides. If the procedure was introduced when the board of Nomophylakes was abolished, it is not greatly surprising that we do not hear of it earlier.

¹⁰ J. Martin (n. 9) 34 is sceptical about Ephialtes being a 'convinced democrat'; 'one would like to know why men like Pericles and Ephialtes, of whom the first clearly and the second probably belonged to the aristocracy, should have become democrat!'

It is commonly believed that the use of the lot in appointment of archons since 487/6 had over a quarter of a century filled the Areopagus with men of no great note or authority and in consequence the standing of the whole Council was much diminished, so that it came more and more to seem absurd that such a board should have so important a supervisory role in the working of the constitution.¹¹ It has been held that the list of eponymous archons reflects the change in the quality of those annually joining the Areopagus; whereas before 487/6 there are to be found in the two decades after Clisthenes' reform the names Hipparchus, Themistocles, Aristides, in the twenty-five years after 487/6 the only name of anyone prominent politically is Xanthippus in 479/8, the very year when the famous Xanthippus was a general and so could not have been the archon; so we have a picture of distinguished men as archons before 487/6 and undistinguished after. This, however, cannot stand, having been slashed to pieces by Badian.¹² It is far from sure that the Aristides of 489/8 is Aristides the Just; in 493/2 Themistocles may not yet have been particularly eminent; Hipparchus is to us the shadow of a great name, who may have been ostracised for nothing more than his lineage. 'In fact, it may safely be said that the reform made no recognisable difference to the quality of the men who held the eponymous archonship' (p. 16). The list of eponymous archons in itself by no means justifies the theory of a decline in the importance and the authority of those joining the Areopagus year by year. There may of course have been a decline, but other arguments would have to be adduced to show it, and it must be firmly kept in mind that we have only the names of most of the eponymous archons between Clisthenes and Ephialtes and not a single name of any of the other eight from any given year. We are also so ill-provided with information about Athenian political life in this period that comparison of the men who entered the Areopagus before 487/6 with those after that date is really impossible.

Before considering what effect the reform of 487/6 had on the Areopagus, one must ask what sort of men would have aspired to the archonship previously. The Areopagus in origin was, one presumes, a reverend council of elders, to be compared with the Senate of Rome and the *Gerousia* of Sparta, and since it consisted exclusively of those who had been elected to the archonship, one presumes that originally those elected were older men of experience and a reputation for wisdom. Was there an important change in the sixth century, whereby the Athenians took to electing younger men? Badian believes that there was such a change and he refers with approval to the views of F. J. Frost¹³ who argued that the real significance of the archonship, 'which had once made it worth fighting over (*Ath. Pol.* 13.2), had been ruined by Pisistratid *adlectio*', and who 'would therefore regard the archonship as a proving-ground for young men of promise.' So, far from thinking there was a decline in authority of the men entering the Areopagus after 487/6, Badian argued that a change had occurred two decades earlier.

Certainly something changed with the archonship under the tyranny, according to Thucydides (vi 54.6) who remarked of the period of the tyrants 'In general the city itself enjoyed the previously established laws except in so far as they always saw to it that there was one of themselves in the archonships.' But shadowy though our knowledge of the period is, it would hardly seem to be the case that the tyranny had made the archonship less sought after, to judge by Herodotus' remark about what happened after the expulsion of the tyrants (v 66). 'In the city two men were powerful, Clisthenes . . . and Isagoras . . . These men struggled against each other for power and Clisthenes, getting the worse of it, takes the people into his following.' An Isagoras was eponymous archon in 508/7 (Dion. Hal. *AR* i 74.6, v 11.1) when Clisthenes' reforms were passed (*Ath. Pol.* 21.1). It seems less likely that in the very period when *the* Isagoras was wrangling with Clisthenes, another Isagoras was eponymous archon which would have been a

¹¹ Cf. H. T. Wade-Gery, *Essays in Greek history* (Oxford 1958) 105 'From 487 onwards, the archons are nobodies: this has not seriously diluted the Areopagus by 480, but the process is cumulative: by 461 there were

probably few if any elected archons still sitting in the Council: its hollow prestige is smashed by Ephialtes.'

¹² *Antichthon* v (1971) 1-34.

¹³ *CSCA* i (1968) 114 f.

very remarkable coincidence, than that the eponymous archon was Clisthenes' opponent. So if as Isagoras struggled for power he saw fit to aspire to the archonship, it hardly looks as if the tyranny had changed his attitude to the office.

Badian, however, agrees with this view of a change of attitude and poses a formal change in the method of appointment as part of the reforms of Clisthenes and sees in Herodotus' description of the Athenian polemarch at Marathon as 'the man chosen by lot to be polemarch of the Athenians' (vi 109.2) a clue to the prevailing system, viz. that nine persons were elected by the people to be archons and were then assigned by lot to the different posts.¹⁴

The difficulty with this is that there is absolutely no hint anywhere in the evidence for Clisthenes, which is admittedly slight beyond the *Ath. Pol.*, but in the *Ath. Pol.* full enough (Ch. 21). Badian's plea for Herodotus' mention of the lot not to be casually cast aside does seem right in method¹⁵ but there is a different solution possible; viz. that the reform he postulates for Clisthenes was in fact the reform behind the *Ath. Pol.*'s ascription of the lot to Solon (8.1). If that were right, the *Ath. Pol.*'s account of the reform was very misleading, making it seem no different from that of 487/6, but at least there would be something for the *Ath. Pol.* to misunderstand. Nor would such a reform be discrepant with what Aristotle said in the *Politics* (1273b40 ff.) about Solon keeping election of archons.¹⁶ What happened under the tyranny is merely to be conjectured. The surest way for the tyrants to secure that 'one of themselves was in the archonship' was to see to it that there were only nine candidates, but there is no knowing. In this (sole) respect the tyrants acted unconstitutionally.¹⁷ The fragmentary list of eponymous archons of the 520s (ML 6) proves nothing about the Solonian system: the accession of Hippias must have been a testing and exceptional time. The only obstacle in the way of supposing that the system of appointment to the archonship attributed by Badian to Clisthenes was in fact the system inaugurated by Solon is posed by the archonship of Isagoras in 508/7.¹⁸ If the suggested system of assigning archonships by lot to the nine victors of the electoral contest happened to assign the eponymous archonship to Isagoras, that would have been mere coincidence, but, it will be asked, how could Clisthenes feel himself, in Herodotus' word, 'worsted'? If the rule against re-election already applied, Clisthenes, who had been archon in 525-4, did not himself aspire to office, but it might be imagined that the candidate he supported could also have become archon, and so Clisthenes would not have been 'worsted'. But this may be much misconceived. Both Clisthenes and Isagoras had a body of supporters (στρασιῶται), the latter's numbering, according to Herodotus (v 72.1), three hundred, and perhaps the struggle in which Isagoras emerged superior was a struggle between the two groups of supporters to gain as many archonships as they could. If this was so, the fact that Isagoras became eponymous archon in 508/7 does not argue against making Solon responsible for the change which Badian attributes to Clisthenes, and, it must be emphasised, there is evidence of a sort for such a change by Solon and absolutely none whatsoever for Clisthenes.

If the reform of 487/6 was not the first change in the method of appointing archons, it is here of considerable relevance who it was who made the change. If it was Clisthenes, effects of the sort devised by Badian for the reform of 487/6 but here still to be considered might be sought in

¹⁴ Cf. Rhodes *ad Ath. Pol.* 22.5.

¹⁵ Pace D. H. Kelly, *Antichthon* xii (1978) 10 ff.

¹⁶ Rhodes *ad Ath. Pol.* 8.2 pointed out that the role of the Areopagus may have been no more than δοκιμασία. The author may have had in mind even less, viz. that the elected men were assigned by the Areopagus to suitable archonships. There is no warrant for Rhodes' speaking of 'A.P.'s statement that previously appointments had been made by the Areopagus' or 'a surprisingly modern procedure by which candidates were summoned to an interview to determine which should be appointed' (my italics). Cf. Forrest-Stockton *art. cit.*

¹⁷ Thuc. vi 54.6. There is no knowing when the rule

against iteration (*Ath. Pol.* 62.3) was introduced. Cf. Forrest-Stockton *art. cit.* One may add that unless iteration was practised in the sixth century it is hard to see how the tyrants 'always took care that one of themselves was always one of the archons (ἐν ταῖς ἀρχαῖς)', or indeed why Hippias, the oldest son (Thuc. i 20) and an old man in 490 (Hdt vi 107, 108), indeed grown-up by 556 (Hdt. i 61.1), was not archon until 526/5.

¹⁸ The archonship of Damusias (*Ath. Pol.* 13.2) is not an obstacle. He may have obtained the eponymous archonship by chance, and then resolved to keep it.

the whole period from 508/7 onwards. But if it was Solon who introduced the lot for the assignment of archonships to those elected, it would seem far too early for any radical change in the attitude of Athenians towards office and joining the Areopagus, the ancient aristocratic council; the new council, the Solonian Four Hundred, was no doubt to be accepted as a vulgar necessity; the Areopagus was, as it had been, the body to aspire to, and the archonship continued to be earnestly sought after both for itself and as the means of joining the most reverend elders. It is here proposed that it was Solon who made the change, that his system, formally speaking, continued until 487/6.

But, it may be asked, if the tyrants rode roughshod over the Solonian system, was there induced a new attitude towards the archonship? In view of the fact that for the fifty years between the first attempt of Pisistratus and the expulsion of Hippias, in which there were 450 archons, we have the names of only thirteen eponymous archons and that of those thirteen only five are sufficiently well known to us to permit of any comment, and they belong to the exceptional period following the accession of Hippias, the question would seem almost pointless. Presumably Clisthenes and Miltiades were installed as archons eponymous in the years succeeding Hippias because of the importance of their families; their respective ages therefore are irrelevant. What is clear is that the eponymous archonship was deemed something important and desirable. Hippias himself chose to occupy it as soon as possible after Pisistratus' death. So he valued the office highly, and this series of eponymous archons preserved by merest chance gives no support for the view that the archonship was, or was becoming, 'a proving-ground for young men of promise'. Insofar as the names of the period of the tyranny suggest anything, they suggest that the archonship was still highly esteemed and sought after. As long as that was so, it was likely to be competed for by the best, and not left to ambitious but unproved young men. Nor is there any proof that the archons after 510 were any different.

It is not to be denied that of the eponymous archons known to us very few were sufficiently important to have votes cast against them in ostracism.¹⁹ Apart from the most serious candidates, whose names are amply represented, there is a very long list of people who are mere names to us and who appear on a very small number of ostraka. Of the eponymous archons of the two decades prior to 487/6 only the names of Alcmeon (?507/6) and Diognetus (492/1) are found on sherds. So one might think that the office was generally occupied by people of no importance. However, this argument will not do.²⁰ If it is right that the lot determined which of the nine posts fell to the elected nine, one would need a full list of archons before one would be entitled to say that archons as a class were not the sort of people interesting enough for anyone to want to see them ostracised. Furthermore, the finds of ostraka, large in number though they are, seem to concern a small number of ostracisms (or abortive ostracisms) and the absence of ostraka bearing the name of an eponymous archon is still less significant. Finally, much depends on how old men were when they became archons. If the archonship was normally attained when the recipient had, on average, no very long political life left, the period during which any ex-archon might excite a desire to see him ostracised would be very short. So study of the list of those named on ostraka can give no guide to the status of the men who sought the archonship, and it must be remembered that, except for a few big names, Athenian politics in the late sixth and early fifth centuries is almost completely beyond our ken.

It seems probable, however, that as long as nine persons were elected annually and so passed into the council of what Athena would be made by Aeschylus to describe as 'the best of my citizens' (*Eum.* 487), the office was competed for by the best rather than by unproved young men. One was eligible for the consulship at Rome at the age of 43. A Themistocles might well succeed in being elected archon at a younger age, but the great majority of archons are likely to have been nearer 50 than 40, if not older still. Thus the Areopagus would have been a *Senatus*, a *Gerousia*, composed of 'the best' of Athena's citizens, as long as the nine archons were elected.

¹⁹ Cf. R. Thomsen, *The Origin of Ostracism* (Copenhagen 1972) 68–108.

²⁰ Cf. Kelly (n. 15) 7 ff.

Did the reform of 487/6 make any substantial difference in Athenian attitudes? If the nine archonships were now to be filled by lot not from nine elected persons but from a hundred, did not the office lose its appeal? Was the Areopagus, by the time that Ephialtes set about the work of demolition, filled with nonentities whose only distinction was that they belonged to it?

The answer to this question depends, in large part, on the answer we give to another question, viz. were those successful in the preliminary election (the so-called πρόκρισις), but unsuccessful in the lot, re-eligible? If it was necessary to find one hundred entirely fresh candidates a year, the supply of able aspirants to office would have been quickly exhausted and with it the credit of attaining archonship and Areopagus. Unfortunately there is no evidence on the point, but it certainly seems more probable that those unsuccessful once could stand again and again; one hundred new persons a year would, one would think, have been difficult to find from the restricted numbers of the first two property classes.²¹ It is to be presumed that service was voluntary; those appointed had to be approved by the Council and in court (*Ath. Pol.* 55.2), a procedure hardly compatible with compulsion. There are unlikely therefore to have been one hundred fresh aspirants a year, and repeated candidature must surely have been allowed.

If this is correct, 'the best' of the citizens may have continued after 487/6 to aspire to the archonship and the reverend Council of the Areopagus that lay beyond.²² That we meet no one of the status of Themistocles as eponymous archon in the twenty-five years before Ephialtes may conceivably have been due in part to the rising importance of the generalship, but for the rest the quality of the men who sought the archonship and entered the Areopagus may not have been markedly different from those of the earlier period. Ephialtes was not attacking a half-dead survival. It was as authoritative as ever both corporately and individually, very much alive, fulfilling functions which had a large influence on the character of the city. That was why Ephialtes attacked.

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It has, however, been claimed by Ruschenbusch²³ that, since before Isocrates in his *Areopagiticus* of the mid-350s no writer has anything to say of the reform of Ephialtes, the importance of the reform is the product of fourth-century historiography rather than a fact of history, and he supports his claim by rejecting the *Ath. Pol.*'s notice about the repeal of the laws of Ephialtes and Arcestratus (35.2) as unhistorical.

To deal with the latter point first, it must be stated that it is certain that the Thirty began by putting an end to the reign of the sycophants in the courts (*Xen. Hell.* ii 3.38). Since they had held sway because the law of Ephialtes had accorded to the popular courts much of the jurisdiction previously exercised by the Areopagus, it is wholly to be expected that the Thirty began by removing the laws that had given rise to the abuse. Nor is it surprising that having in theory re-established the ancestral constitution and therein the place of the Areopagus, they proceeded in fact to institute a murderous and lawless regime, so that the Areopagus, restored, was promptly disregarded, a normal enough state of affairs in revolutionary times, and so did not suffer from the discredit attaching to all those who like the knights (*Xen. Hell.* iii 1.4) had collaborated. Hence the role accorded to the Areopagus by the Decree of Tisamenus (*And.* i 84); and Lysias could truthfully say that jurisdiction in murder cases had been restored to them (i 30); they had in theory never lost it but in fact had been disregarded and prevented. The evidence is all consistent. There is no good reason to treat the repeal of the laws of Ephialtes and Arcestratus as an invention.

Thus whatever one makes of the silence of writers, one can assert with confidence that the

²¹ Cf. Badian's discussion of the impossibility of finding 500 a year, as the text of *Ath. Pol.* 22.5 seems to require ([n. 12] 17 ff.). But even 100 fresh aspirants a year would have been difficult.

²² Kelly (n. 15) 14 may indeed be right in supposing that the reform of 487/6 may have marked a lessening in the importance of the archonship itself, but it may not

have meant a lessening in the quality of aspirants since membership of the Areopagus went with the office. Since promotion did not depend on tenure of the office of Prytany Secretary, the effect of the introduction of lot for it (*Ath. Pol.* 54.3) is of no relevance to what happened with the archonship.

²³ *Historia* xv (1966) 369-76.

revolutionaries of the late fifth century saw the laws limiting the Areopagus as crucial; writers may not have made much of them but men in politics had them much in mind. So how significant is it that so little is made by writers of Ephialtes and his reform? To Ruschenbusch it is vastly so. 'Supposing that the question about the position of the Areopagus were really to be considered the central problem of Athenian internal history (*Innenpolitik*) and the work of Ephialtes the turning-point in constitutional history, then we would have been bound to find at least a reference to it in Herodotus in the description of the Persian War or of the reform of Clisthenes, in the author of the pseudo-Xenophonic *Ath. Pol.* in his critique of the Athenian democracy, in Thucydides perhaps in his account of the constitution of 411, in Aristophanes, in Plato in the *Gorgias* at the least, and in Xenophon in his report of the Thirty or in the *Memorabilia*, unless they were completely blind to the chief problem of their time' (p. 373). This is really absurd. There was no call whatsoever for Herodotus to discuss the history of the Areopagus in his account of the Persian Wars; he only treats of Clisthenes in a digression to explain how Athens came to support the Ionian Revolt, confines himself to politics, and eschews constitutional matters. The Xenophonic *Ath. Pol.* was criticising democracy in his own day, not explaining how it had come to be as it was. The Areopagus had no part in 411 and Thucydides had no need to discuss it. Xenophon's silences are too well known to need comment. As to Aristophanes, one is baffled about where Ruschenbusch is disappointed; a chorus of Areopagites 'debugged' by Ephialtes and Archestratus is a pleasing idea but there seems no reason why Aristophanes must have had it or anything like. Only the silence of Plato might give pause. Why does he omit Ephialtes from his list of names of prominent fifth-century Athenians in the *Gorgias* (503c, 515de, 516d, 519a, 526b)? Those he does mention, Themistocles, Cimon, Miltiades, Pericles, Aristides, were, however, all involved in one way or another with Athenian foreign policy and the creation of the empire. Miltiades in a sense began it all with his attack on Paros (Hdt. vi 132 ff.). It is hard to see in what sense Cimon was responsible for arousing unimproving desires, but Plato certainly thought he was concerned with engrossing the city in 'harbours docks, walls, tribute and similar trash' (519a). The people, however, turned against them all and they received the reward of their influence (516). So, of course, it might be claimed, did Aristides who is the only one to emerge with credit in Plato's view (526b). But his ostracism came before he manifested his justness towards the allies. So he was lauded by Plato for his virtue. Now it is clear that in this list of those against whom the people turned Ephialtes had no part and it is absurd to argue that his absence proves that to Plato he was either unknown or insignificant. The same argument might be applied to Clisthenes. Plato never mentioned him and apart from Herodotus, the *Ath. Pol.*, Aristotle in the *Politics* and Isocrates (xvi 26) no one else in the fifth and fourth centuries did. It would therefore be interesting to know how Ruschenbusch regards this. Isocrates claims that Clisthenes' introduction of democracy made the Athenians courageous enough to withstand the Persians. Herodotus followed a somewhat different line; it was the expulsion of the tyrants which had this effect (v 78); Clisthenes' winning of power was all part of the consequences of the liberation. Now if perchance Herodotus had not engaged in his excursus to explain Athenian policy, would we have been informed that Clisthenes' reform was of little significance in fact, that Isocrates' account of its effects was the fruit of historiographical imaginings, that probably Clitophon's amendment in 411 (*Ath. Pol.* 29.3) was tongue in cheek, be it Clitophon's cheek or the author of the *Ath. Pol.*'s, so that the silence of Plato (and Aristophanes *et alii*) proves it? Probably so. Further, it is worth noting what Plato has to say about Solon. He alludes to him many times, for Solon, as one of the received Seven Sages, as poet, as ancestor of Critias, naturally appealed to him, but he makes very little indeed of Solon's laws. Beyond speaking of Solon as lawgiver, Plato manifests remarkably little concern with the laws.²⁴ The silence of Plato is an unreliable source of illumination. It by no means shows that the reform of Ephialtes was not a watershed in Athens' constitutional development.

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²⁴ One of the Seven Sages, *Tim.* 20d, *Protag.* 343a. Lawgiver, *Rep.* 599e, *Phaedr.* 278c, *Symp.* 209d.

It has been argued above that the quality of those joining the Areopagus annually from 487/6 need not have been greatly different from those of earlier generations. The archonship may have ceased to be in itself attractive, but membership of the Areopagus, that lay beyond it, was probably very attractive indeed. Few men spurn to be regarded as reverend and wise in their judgement of the best interests of their fellow men. 'The best' of Athena's citizens were doubtless no exception. Before Ephialtes, the functions of the Areopagus were venerable indeed.

It is time to return to the *Ath. Pol.*'s account. There is one element there which is not to be found elsewhere. The author speaks of 'the additional functions by means of which they guarded the constitution' (25.3). What is he talking about? The notion of 'guarding the laws' (νομοφυλακία) is largely, if not uniquely, *Ath. Pol.*'s contribution to the description of the Areopagus' role. If one looks at the evidence as fully set out by Jacoby (in his *Commentary on Androtion F3*), only Plutarch in his *Life of Solon* (19.2) speaks of the Areopagus as 'overseer of all and guardian of the laws' (ἐπίσκοπον πάντων καὶ φύλακα τῶν νόμων), no such designation occurring in the lives of Cimon and Pericles where he formally describes the work of Ephialtes.²⁵ What did guardianship of the laws entail?

Scholars have wrangled about what the powers transferred by Ephialtes were. A good recent statement is provided by B. R. I. Sealey,²⁶ who concludes that Ephialtes changed the procedure for *euthynai* and for *dokimasia* of archons. 'He was concerned about the way officials performed their tasks; the two procedures bearing on the performance of officials were *dokimasia* which tested their formal qualifications, and *euthynai*, where they were called to account for their shortcomings. To classify him among "radical democratic leaders" does not explain his work; he was a man seeking to remedy abuses of a perhaps extensive but certainly limited and specifiable kind.' Now clearly if the Areopagus were to safeguard the laws, such supervision was highly probable in the primitive state; inevitably, some authority would have had to do it and in ancient Athens that authority was surely the Areopagus. But was that all there was to 'the guardianship of the laws'? And did the reforms of Ephialtes constitute no very great change in the nature of the Athenian constitution?

A very different view of 'the guardianship of the laws' is presented by the *Ath. Pol.* In the review of the archaic, pre-Draconian constitution, the author speaks of the Areopagus 'punishing and fining without appeal (κυρίως) all those whose behaviour was disorderly (τοὺς ἄκοσμοῦντας)' (3.6) and in his discussion of the Solonian constitution he stated 'He assigned the Council of the Areopagus the task of safeguarding the laws, just as previously it was overseer of "the constitution" (ἐπίσκοπος τῆς πολιτείας), and it both kept close watch in general over the main and most important part of the state's business and corrected those in error by virtue of its full power to fine and to punish . . .' (8.4). Thus for the *Ath. Pol.* the Areopagus would seem to have had a sort of moral supervision of the state, a *cura morum* in Roman terms, and a similar view is presented by a fragment of Philochorus (F196), which runs 'Phanodemus and Philochorus and several others said in their histories that in olden times the Areopagites would summon before them and punish the spendthrifts and those living beyond their means'.

The fullest expression of this view of the Areopagus' function is, however, to be found in Isocrates' *Areopagiticus*, in which Isocrates advocates a return to the blessed days of the Areopagus' ascendancy. It is quite clear which period he is thinking about. It is the period after both Clisthenes (§16) and the reform of 487/6 (§22), the heyday of the Delian League when relations with the allies were harmonious and the Persians hard pressed (§51 f.). The role of the Areopagus then was to care for good order (εὐκοσμία §37, εὐταξία §39). 'For it was not the case that while in their education they had many in charge of them, yet when they were received into man's estate, they were able to do whatever they liked, but they had even more supervision in

²⁵ *Cim.* 10.8, 15.2 f., *Per.* 7.8, 9.3-5. (Cicero, *de officiis* i 75 is speaking of his own day. Cf. E. Rawson, *Athenaeum* NS lxxiii [1985] 63).

²⁶ 'Ephialtes, *Eisangelia*, and the Council', *Classical*

Contributions. Studies in honour of Malcolm Francis McGregor, ed. G. S. Shrimpton and D. J. McCargar (Locust Valley 1981) 125-34.

their prime than when they were boys' (§37), for the Areopagus saw to it that they had. And Isocrates is clearly not thinking of just the vetting of magistrates. 'They (i.e. the Athenians of that time) cared for all the citizens, and especially for the youth' (§43), 'they regarded each man's way of life, and brought those misbehaving themselves (ἀκοσμοῦντας) before the Council (sc. of the Areopagus), which would give some a warning, threaten others, and punish others as was fit' (§46). For in those times, he argues, there was not a multitude of precisely drafted laws, but excellence grew out of the customs of everyday life (§§39 ff.). 'It is not because of decrees that cities are well run, but because of their moral practices (ῥῆθη)' (§41). That is, Isocrates is lauding the Areopagus of those times for its control of behaviour, its *cura morum*.

Can the *Ath. Pol.*, Philochorus, and Isocrates be right? Jacoby's answer²⁷ was forthright. 'Isocrates draws a picture of the educational activity of the Areopagus which we may call idealising; at any rate it is definitely unhistorical and does not even touch upon the actual functions of the old Council.' Forthright indeed, but is Jacoby right? On the next page of his Commentary he remarks that the Nomophylakia of the Areopagus 'cannot have existed before written laws existed, i.e. before Dracon'. Here perhaps is the source of error. As Ostwald has so fully set out (*Nomos and the beginnings of the Athenian Democracy* [Oxford 1969] 20–54), the word *nomos* has many connotations other than what we mean by a defined and written law; in particular the sense of time-honoured custom is common. Was nomophylakia wider than the safeguarding of the written laws? Certainly the notion that it can only be conceived after Dracon is absurd. In the Sparta of Lycurgus, according to Plutarch (*Lyc.* 13.1), there were no written laws, but the 'laws' of Lycurgus were a lively concept and were carefully safeguarded as the whole of Spartan history attests. So the Nomophylakia of the Areopagus need not stem from Dracon's codification but, even more importantly, it may not have been concerned solely with laws but with a wide range of what the Greeks called *nomos*. There were, as Pericles remarked, the 'unwritten laws', the ἀγράφοι νόμοι (Thuc. ii 37.3) which, if broken, 'cause generally agreed disgrace'. Is it possible that the Nomophylakia of the Areopagus embraced these, that Isocrates, Philochorus, and the *Ath. Pol.* are not wrong, that what Ephialtes rid Athens of was the paternalism of the aristocratic state, a watershed indeed?

At Sparta all the everyday practices, the ἐπιτηδεύματα (cf. Thuc. ii 37.2), were spoken of as 'the *nomoi* of Lycurgus' (cf. [Xen.] *RL* 10.8, 5.1); nor does this necessarily mean that the Spartans fondly imagined that all their customs had been prescribed by the legislation of Lycurgus. In the fourteenth chapter of the Xenophontic *Constitution of the Spartans* the author speaks of the moral decline of the Spartiates in terms of the neglect of the *nomoi* of Lycurgus; but at Sparta laws were not neglected; what is referred to is a change in values, a matter of morals not of laws. However, *nomos*, as Demaratos remarked to Xerxes (Hdt. vii 104.4), held sway over the Spartans, and the ephors closely watched the conduct of Spartiates for breaches of the *nomima* (cf. Thuc. i 77.6, Hdt. i 65.5), *paranomia* (Thuc. i 132.2). Theophrastus recounted that the ephors fined Archidamus for marrying a small woman, on the grounds that her offspring would not be king-sized, but kinglet (Plut. *Ages.* 2.6)—not necessarily a fanciful story, the supervision of the ephorate making no distinction between laws and customs. At Rome the censors exercised 'control over behaviour and orderly conduct' (*morum disciplinaeque Romanae penes eam—sc. censuram—regimen*, Livy iv 8). Citizens were censured only after a hearing which was commonly called a *iudicium*, but strictly was not (Cic. *pro Cluentio* 42.117): *animadversio censoria* was not concerned with laws. Livy (xxiii 23.4) described the process as a *iudicium arbitriumque de fama ac moribus*.

If such things could happen in other aristocratic states, why is the evidence that it happened in Athens so lightly to be dismissed? Is the general opinion of the fourth century expressed by the *Ath. Pol.*, the Athidographers, Isocrates, which is in no sense gainsaid by any evidence of the earlier period, 'definitely unhistorical'?²⁸

²⁷ Commentary on Androtion F3–4 p. 112.

²⁸ It is vain to seek in the *Eumenides* illumination on this matter. Whether Aeschylus had approved or

disapproved of the reforms of Ephialtes, he could hardly have spoiled his play by suggesting that the Areopagus was no longer what it had been and perhaps should still

But, it may be objected, it would hardly seem to be Athenian for men to be liable for anything other than for breaches of clear laws. Whether this was so in the aristocratic state is precisely the point at issue, but it must be remarked that in the working of the procedure of *eisangelia* there seems to have been a great deal that was vague. Certainly the Areopagus could apply curious criteria of conduct, if we may trust the fragment of Hyperides' speech *Against Patrocles* (ap. Ath. 566F)²⁹ according to which a man was excluded from membership 'for having breakfasted in a tavern', but it is in the vagueness of the so-called *nomos eisangelitikos* that one perhaps sees a reflection of the earlier state of affairs. In the entry under 'eisangelia' in the *Lexicon Cantabrigiense*, in addition to the citation from Theophrastus of a number of grounds for prosecution, Caecilius, it is claimed, asserted that the procedure was used against 'new and unwritten offences' (καινῶν καὶ ἀγρόφων ἀδικημάτων),³⁰ and Pollux in his *Onomastikon* vii 51 f. had something of the same idea—'eisangelia was appointed for unwritten offences against the People'. But it is Hyperides' speech *For Euxenippus* which is most revealing. In his opening remarks (col. 1 ff.) Hyperides claims that the operation of *eisangelia* has recently been extended to embrace cases of remarkable triviality and concerning individuals of no special note. Of course, it emerges that Euxenippus was thought to have Macedonian connections, and it was probably for that reason that he was attacked, but the implication of the speech is clear enough—the process of *eisangelia* is capable of considerable extension, and the notion of Caecilius seems to be confirmed. Thus in the working of this favoured procedure there was a remarkably imprecise and elastic element, which may reflect the Nomophylakia of the days of what Plutarch termed 'the aristocracy of the Clisthenic period' (Plut. *Cim.* 15.3).

If it is indeed true that the Areopagus once had what may be described as a *cura morum*, the work of Ephialtes may be truly described as crucial in the development of the democracy. Before 462/1 there was the paternalism of the aristocratic state, the Areopagus watching over, like the gods in Homer, 'the violence and the good behaviour of men' (*Od.* xvii 487). After Ephialtes there was the open, permissive society of democratic Athens, in which, provided men obeyed the written laws, they were free to live their private lives as they would. Indeed this is the very point which Thucydides has Pericles make in his Funeral Oration. In that speech Thucydides contrasts the narrow, exclusive, effortful inferiority of Sparta with the tolerant, open, effortless superiority of Athens, of which he says (ii 37.2) 'The freedom which we enjoy in our government extends also to our ordinary life. There, far from exercising a jealous surveillance over each other, we do not feel called upon to be angry with our neighbour for doing what he likes, or even to indulge in those injurious looks which cannot fail to be offensive, although they inflict no positive penalty.' Here, I take it, Thucydides is obliquely referring to what Athens has rid herself of by the reforms of Ephialtes.³¹

That was in the fifth century. In the fourth, after the glorious freedom of the fifth had ended in disaster, more sober ideas prevailed. The Areopagus was accorded some sort of role in the safeguarding of the laws and as the century wore on its influence grew. Indeed by 336 it could be suspected of such antipathy to the democracy that a law was passed to prevent its sharing in any revolutionary movement (*SEG* xvii 26 and xviii 12). That was perhaps a somewhat propagandist assertion, but certainly in the last three decades before the Macedonians physically intervened in Athens the Areopagus was playing a part of which Ephialtes had sought to deprive it for ever.

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be. Nor would such precise political comment have seemed appropriate to tragedy (cf. C. W. Macleod, *JHS* cii [1982] 131 f.). The play is concerned only with a case of murder and it is the role of the Areopagus in such cases which is its sole concern (681–4); the wrong-doing which that Council is to prevent (690–2) is murder, 'a wakeful guard for those who sleep' (705–6) (cf. *art. cit.* 129).

²⁹ Sauppe *fr.* 164.

³⁰ Cf. Sealey (n. 26). The relevant entry in the *Lexicon Cantabrigiense* is printed in A. R. W. Harrison, *The Law of Athens: procedure* (Oxford 1971) 51 n. 1.

³¹ In ii 37.2 Thucydides is referring to private life. He goes on in §3 to speak of public life (τὰ δημόσια) where fear of 'unwritten laws' continues to operate.

APPENDIX

NOMOPHYLAKES

The statement in the *Lexicon Cantabrigiense* (FGH 328 F64b α) that according to Philochorus a board of Nomophylakes was established when Ephialtes made his reforms has been blandly dismissed.¹ I follow Jacoby in accepting it. 'The fact that we have no support for the information given by Philochorus is as insufficient for discrediting it as is the silence of Aristotle' (Commentary on Philochorus p. 338).² To suppose, as Hignett did (*HAC* [n. 9] 209)³ that 'the ascription of the reform to 462 was due not to Philochorus but to the lexicographer, who misunderstood some allusion made by Philochorus to the events of 462 in his description of the creation of the Nomophylakes' seems to be a method of getting rid of inconvenient evidence. The evidence, however, is there. Philochorus may have been wrongly informed, but his authority is such that one is very reluctant to abandon it.

It is clear that in book vii Philochorus was describing the role of the Nomophylakes as they were constituted in the last quarter of the fourth century. The *Ath. Pol.* omits to notice such an office, and its establishment belongs either to Demetrius of Phalerum or shortly before.⁴ In any case in the fifth century there were no Proedri for the Nomophylakes to 'sit beside'. Was the lexicographer, then, citing no more than Philochorus' discussion in book vii? If so, and if there had been an earlier Board of Nomophylakes, why did he not treat it in its proper chronological place? It is to be noted, however, that by inserting a second reference to Philochorus as his source the lexicographer may be indicating that the concluding part of the entry came from a different part of the *Atthis*. If it all came from book vii, the repetition would have been quite needless. 'The full treatment of the office in the seventh book would, of course, not preclude a succinct entry in the third which reported the establishment of the office.' Thus Jacoby,⁵ to my mind rightly.

There is no evidence for the operation of the Board at the points in the fifth century where one would reasonably expect it, principally at the trial of the Generals after Arginusae (*Xen. Hell.* i 7, esp. §§15 and 34 f.). It seems to have been illegal to put a matter to the vote a second time (*Thuc.* vi 14), but no Nomophylakes assert themselves in 415 when Nicias called for a second vote about the Sicilian Expedition, or in 427 when the decision to execute the Mytilenaeans was reversed (*Thuc.* iii 36). Jacoby's solution therefore seems the right one, viz. 'probably this special Board disappeared soon'.⁶ The development in the fifth century was not so simple as it appears in the *Ath. Pol.* 25.2.

¹ Cf. Rhodes ad *Ath. Pol.* 25.2

² Cf. *FGrH* iii b. II p. 243 n. 11.

³ Cited with approval by J. Martin, *Chiron* iv (1974) 31.

⁴ The fact that Dinarchus used the word in his speech against Himeræus (*Sauppe* xiv 2 = *Philoch.* F64a) suggests but does not prove that there were Nomophylakes before 322, the year of the death of Himeræus, brother of Demetrius of Phalerum. One has no idea what Dinarchus was talking about. Such boards existed elsewhere (*Ar. Pol.* 1298^b 29).

⁵ *FGrH* iii b II p. 242 n. 8.

⁶ *Ibid.* iii b I p. 339. Jacoby adds 'or lost its importance', which seems a needless addition. If the real function of the Board was taken from it, it was more likely to be abolished than maintained pointlessly. W. S. Ferguson (*Klio* xi [1911] 272 f.) suggested that they had the modest role of 'caretakers, in literal sense of this term, of the νόμοι' lodged in a νομοφυλακείον, but there is no evidence that there was a place so-called at Athens and the entries in the lexicographers (*Pollux* viii 102, *Hesych* s.v. 'Charonium', *Suda* s.v. 'Νομοφυλακίου Θύρα') strongly suggest that they have been misled by confusion of the δεσμοφυλάκιον.