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Democracy and International Law:
An Analysis of the Origins of
Democracy, its Relationship with
International Law and its Applicability
to Modern International Institutions

Submitted for the degree of
Doctor of Philosophy: Law

2010

Roslyn Fuller

I, Roslyn Fuller, citizen of Canada, birth date 9th of February 1980, declare that this thesis has not previously been submitted as an exercise for a degree, either at Trinity College/University of Dublin or at any other University. I declare it to be entirely my own work. I agree that the Library of Trinity College/University of Dublin may lend or copy this thesis upon request.



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Summary

This thesis utilises legal history, comparative law, the law of state organization and international economic law, as well as analyses of political scientists, national and international jurisprudence and original systematic findings to determine the attributes of democracy. Following the introduction (Chapter 1), Chapter 2 of this thesis examines the Athenian democracy (established approximately 2500 years ago, and the only well-studied democracy in the Western world) identifying its basic tenets, *modus operandi*, and its benefits and deficiencies. Chapter 3 examines the political and legal organisation of the Roman Republic, which developed the rule of law standard now common in Western nations, comparing its development, strengths and weaknesses to those of Athens and, in particular, its compatibility or non-compatibility with the prerequisite conditions of democracy. Chapter 4 briefly investigates the historical development of the legal concept of human rights and their relationship to democracy and the rule of law.

Based on these largely empirical data, a sound, comprehensive list of the absolutely essential attributes of a democracy, as opposed to the Republican *Rechtsstaat* based almost purely on rule of law and the enlightened despotism of human rights regimes, is elaborated. In addition, areas where these three concepts are in reconcilable and irreconcilable tension with each other and areas in which our modern society differs unalterably from the original concept of democracy have been identified. This enables an answer to the question as to why some of the efforts to democratise, be they on the nation-State level or international level, do not succeed, and illustrates that, due to the confused understanding of the democratic term that they are based upon, these efforts not only do not succeed, but cannot succeed and are, in fact, predestined to deliver undemocratic outcomes.

The basic findings of this first part of the thesis are that democracy requires a high level of direct participation by large swathes of the populace, strict equality in office-holding, fluid majorities, direct communication, as well as relative economic equality. Modern Western democracies do not fulfil these attributes, but are instead near-exact replicas of the emphatically non-democratic Roman Republic with human rights grafted uneasily onto the system.

In Chapters 5-7, the focus turns to applying the essential attributes of democracy to international organisations, bearing in mind the legal framework of these organisations, as well as current international jurisprudence. In addition, the synergy between national democracy and international governance often necessitates an examination of the national legal systems which inform the possibilities for international decision-making. The analysis in

these chapters is grouped around three main themes gleaned from the historical/conceptual findings: Representation, Financial Considerations and Participation.

The findings here show that the drawbacks and failures of modern democracy (most often the failure to transform a nation into a prosperous, peaceful society, but also the failure to deliver an international order which enjoys any level of public approval) are not incidental, but rather inherent in the system. Electoral systems result in statistically skewed representation, which is magnified at an international level and further exacerbated by the practice of devolving much international decision-making to obscure subcommittees of limited membership. Electoral systems, which often suffer from a completely inadequate legal regulation of finances, are extremely susceptible to the vicious cycle of legal and political corruption and extreme economic inequality. Undemocratic financial influence on a national level is then compounded by a formal privileging of wealthy nations and businesses at international institutions, either by guaranteeing privileged voting rights or by allowing access through corporate NGOs to decision-making fora. Outright vote-buying is endemic to the day-to-day operations of international institutions. International institutions are also systematically used to accrue anti-democratic levels of wealth and undermine national democracy through conditionality, loan-guarantees, take-or-pay schemes and investor bail-outs. Direct participation, both at a national, but particularly at an international level, is sparse. Participation via petition is a near-hopeless enterprise, while court-like mechanisms, such as the IBRD Inspection Panel and the WTO Dispute Settlement Procedure offer extremely passive, and extremely limited, modes of participation. Participation via NGOs is also limited, skewed in favour of those better-financed, and is statistically less accurate than even electoral representation.

For these reasons, the traditional methods of advancing democratic reform (increased electoral activity, NGO participation, passive deliberation) are not helpful in advancing democracy (although clearly, they may be helpful in advancing a rights-based, humanitarian regime). This thesis instead offers suggestions for reform based upon the democracy existent in Athens, which necessarily involve a dramatically decreased role for elections, NGOs, and finance, and a dramatically increased role for the individual citizen.

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“In the case of a word like democracy, not only is there no agreed definition but the attempt to make one is resisted from all sides. It is almost universally felt that when we call a country democratic we are praising it: consequently the defenders of every kind of regime claim that it is a democracy and fear that they might have to stop using the word if it were tied down to any one meaning.”¹

¹ George Orwell, “Politics and the English Language”, in *George Orwell: Essays* (Penguin Books, 1994), 348 at 353.

1. Introduction

Although both “democracy” and “international law” are old terms, they often remain vague concepts in the minds of many, charged with political and emotional overtones and rarely dispassionately scrutinised, or in fact scrutinised at all. In the relatively recent past even international lawyers, who spend their entire careers delving into the complexities of international law, and can therefore be said to scrutinise it very rigorously indeed, rarely spoke of democracy other than to refer to its existence on a (mere) national level, or to cynically note that it did not exist on an international level (and probably never would). However, as the world grows ever more interconnected, as nation-states exhibit a proclivity for joining into ever more powerful units and alliances, as decision-making is increasingly delegated to the international sphere, it appears that something akin to government on this level must inevitably coalesce, for it is to that level that political and legislative power is rapidly shifting. Such a hazy apprehension that tighter international cooperation must form a definitive component in the legal and societal regulation of the new future has led to a recognition of the shortcomings of international organisations’ ability to deal with a world in the throes of globalisation, which in turn has caused an upsurge in interest in democracy, not only among political scientists, but for the first time, widespread interest from international lawyers, as well. In the words of one eminent legal scholar, “[r]eferences to democracy, which a generation or even a decade ago would have been regarded as political and extra-legal, are entering into the justification of legal decision-making in a new way.”¹

Democracy is the political system with momentum, the system for which there is already widespread superficial consensus as regards its general desirability, the system which is regarded as the standard upon which a government’s legitimacy ultimately rests. Virtually every State in the world today purports to be democratic,² the EU even reserves the right in all its treaties to suspend compliance with its obligations if the other party fails to observe democratic standards,³ and around the globe more and more courts are rendering judgements on issues of democracy. International institutions, of course, do not derive their legitimacy from a commitment to democratic decision-making, and as other theories of legitimacy which do not include any elements of democracy have lost much of their acceptability, this has

¹ James Crawford, “Democracy and International Law” in Richard Burchill ed., *Democracy and International Law* (Ashgate Publishing, 2006) 49 at 58-59.

² By late 1991, more than 100 nations were “legally committed to permitting open, multiparty, secret-ballot elections with a universal franchise” (Thomas Franck, “The Emerging Right to Democratic Governance” in Burchill ed., *Democracy and International Law*, 3 at 4), while less than 20 years later “there is a near-global consensus on the right to democracy” (Ezetah, “The Right to Democracy: A Qualitative Inquiry” in Burchill ed., *Democracy and International Law*, 169 at 171).

³ Gregory Fox and Brad Roth, “Democracy and International Law” in *Democracy and International Law*, 71 at 76.

resulted in a legitimacy-crisis, commonly referred to as a “democratic deficit”. That democracy equals legitimacy and legitimacy equals democracy is a thought which has become so widespread, that the very undemocraticness of international institutions has called their entire legitimacy into question.

Precisely due to the dominating aspect of the term “democracy”, this thesis attempts to fill a substantial knowledge gap that other scholars who have broken new ground in this area have already identified, namely that:

articulating a definition of democracy that can be used to identify and guide responses to failures of democracy is more critical than ever. Without such a definition, responses to failures of democracy will be determined piecemeal, ad hoc, unilaterally and opportunistically⁴

This will be done with a particular view to the application of such principles to the international level.

The relationship between democracy and international law is, however, complex and transferring democratic principles to an international level is certainly not an easy task or one to take lightly. For this reason, the terminology which will form the basis of the later analysis must first be adequately defined. Thus, the first part of this thesis, researches the question, “what is democracy”?

Extensive research into this issue has led unavoidably to the conclusion that modern, Western-style democracy developed in three phases, only the first of which can correctly be termed democracy. This was the establishment of democracy in the city-state of Athens, approximately 2500 years ago. Chapter 2 of this thesis examines the Athenian democracy identifying its basic tenets, *modus operandi*, and its benefits and deficiencies. This chapter shows how the Athenian democracy worked in great detail, including how its various components interacted with each other and the individual citizen, to furnish a living, viable democracy. The chapter concludes by identifying and describing the necessary elements of a democracy in some detail.

The next phase in the development of modern “democracy” was the development of the rule of law by the Roman Republic, whose rigid organisation and ceaseless categorisation in all things legal forms the basis of modern Western jurisprudence. Chapter 3 of this thesis examines the political and legal organisation of the Roman Republic, comparing its

⁴ Molly Beutz, “Functional Democracy: Responding to Failures of Accountability” in *Democracy and International Law*, 123 at 124, whereby she is referring to the implementation of democracy on a national level.

development, strengths and weaknesses to those of Athens and, in particular, its compatibility or non-compatibility with the prerequisite conditions of democracy.

The Enlightenment period added the third phase to the current concept of “democracy”, the concept of inalienable human rights. Just as the first and second phases developed over the course of centuries, this third phase, so recently begun, is not yet fully developed and remains poorly defined and haphazardly implemented. Chapter 4 of this thesis briefly investigates the historical development of the legal concept of human rights and their relationship to democracy and the rule of law.

Based on these largely empirical data, a sound, comprehensive list of the absolutely essential attributes of a democracy, as opposed to the Republican *Rechtsstaat* based almost purely on rule of law and the enlightened despotism of human rights regimes, is elaborated. In addition, areas where these three concepts are in reconcilable and irreconcilable tension with each other, and areas in which our modern society differs unalterably from the original concept of democracy have been identified. This enables an answer to the question as to why some of the efforts to democratise, be it on the nation State level or international level, do not succeed, and illustrates that, due to the confused understanding of the democratic term upon which they are based, these efforts not only do not succeed, but cannot succeed and are, in fact, predestined to deliver undemocratic outcomes.

While this part was in itself quite intensive and certainly represents a “dissertation” from currently accepted thought on the matter, this thesis is not limited to negative criticism of the *status quo* or a long recital of current systemic flaws.

Therefore, the second half of the work comprising Chapters 5-7, focuses on applying the essential attributes of democracy to international organisations, bearing in mind the legal framework of these organisations, as well as current international jurisprudence. In addition, the synergy between national democracy and international governance often necessitates an examination of the national legal systems which inform the possibilities for international decision-making. The analysis in this part is grouped around three main themes gleaned from the historical/conceptual findings: Representation (Chapter 5), Financial Considerations (Chapter 6) and Participation (Chapter 7). The study of national systems has included both civil and common law systems, centring mainly upon Canada, the USA, Ireland, the UK, Germany and Israel. Analysis of the international institutions has mainly been restricted to the major organisations, namely: the United Nations (UN), the World Trade Organisation (WTO), the World Bank Group and the International Monetary Fund (IMF). Measuring the workings of these national and international systems against the requirements of democracy in the three aforementioned fields has enabled the areas in which anti-democratic effects primarily occur to be identified with some precision, and has facilitated an analysis of the potential effectiveness of many proffered solutions for making international relations “more

democratic". The research presented in this thesis also offers its own systematic suggestions for democratic improvement, following the analysis of each organisation.

As previously mentioned some topics have fallen outside the scope of this work. While a comparative study of governmental development in non-Western systems represents a fascinating possibility for later analysis, the comparative aspect of the thesis was already quite wide, so that this must be left for another time. The EU was also not analysed as an international organization due to its particular *sui generis* structure. Perhaps most importantly, information and communication structures, which in modern societies are so different than those in Athens, were unfortunately beyond the scope of this thesis.

Part I: Historical Analysis, Chapters 2-4

The first part of this thesis concentrates on a historical analysis of the legal aspects of Athenian democracy, Roman Republicanism and the Enlightenment human rights area, seeking to redefine democracy more substantively via the empirical information which each of these areas yields.

In order to determine what “democracy” in its truest sense means and what its characteristics are, it is necessary to study the political and legal organisation of the State which first identified itself by that name. This excursion into ancient history is necessitated by the fact that such a system has never been repeated in the modern era.

Although many of the ancient Greek city-States adopted democracy at some point during the classical period, the concept was first elaborated in Athens which became home to what was not only the most successful democracy of its time, but also that most thoroughly analysed by contemporary commentators.¹

Perhaps the first remark on Athenian democracy should be an etymological one – although the Greek word *demokratia* is almost always rendered “rule by the people” in the English language, this is something of a mistranslation. In ancient Greek, *demokratia* literally means “power of the people” or “people power”.² This is not without significance. One could technically ask if democracy is rule by the people, who is being ruled? And one could answer that they are ruling themselves. This would be a modern way of considering the issue. The object of Athenian democracy was not to rule, but to empower. If the people chose to make rules for themselves, that was merely a by-product of the process, not its *raison d'être*. Such a different understanding of the word may seem trifling at first glance, but, as we shall see, it had and continues to have a profound effect on the interpretation of democracy.

A second set of remarks must now be spared for a very brief historical overview of Athens during the democratic era, as reference will necessarily be made to these events during the following analysis. Democracy in Athens was established gradually through a series of reforms, beginning with the significant legal and, above all, economic reforms of Solon in 594/593 B.C., and continuing with the reforms of Cleisthenes in 508/7 B.C. and Ephialtes in 462 B.C., the last of which are regarded as finally having ushered in the Athenian democracy.³ The “people power” method of governing survived for approximately 140 years in Athens. During that period it was twice overthrown by oligarchs, a small group of citizens who held themselves aloof from the democratic system. The first oligarchic coup occurred in

¹ Modern democracies which have been at the very least amalgamated with the concepts of *Rechtsstaat* and human rights are not suitable for such an analytical study which aims at isolating key characteristics.

² Geraint Parry and George Moyser, “More Participation, More Democracy?” in Beetham ed., *Defining and Measuring Democracy*, (SAGE, 1994) 44 at 44; Stuart Weir, “Primary Control and Auxiliary Precautions: A Comparative Study of Democratic Institutions in Six Nations” in *Defining and Measuring Democracy*, 112 at 112; Douglas Lummis, *Radical Democracy*, (Cornell University Press, 1996) at 11 and 22.

³ Alan Boegehold, “Resistance to Change in the Law at Athens” in Ober and Hedrick eds., *Demokratia* (Princeton University Press, 1996) 203 at 204; Martin Ostwald, *From Popular Sovereignty to the Sovereignty of Law: Law, Society and Politics in Fifth-Century Athens*, (University of California Press, 1986) at 78.

411 B.C. while a large portion of Athens' citizen population was engaged in a distant naval battle and therefore absent. After the "temporary" establishment of oligarchy was presented to the remaining voters as the only way of winning the war that the Athenians feared they might otherwise lose, the Assembly voted to abolish democracy and establish oligarchy.⁴ The second oligarchic coup occurred in 404/403 B.C. under the brutal rule of the Thirty Tyrants. Classical Athenian democracy was successfully restored following each of these coups, but was finally militarily defeated by Macedonia in 322 B.C. and absorbed into the Macedonian empire.⁵ The second oligarchic take-over, due to its brutality and the short period of time that had elapsed since the first coup, led to a massive upheaval in Athenian democratic thought and the adoption of extensive modifications to the system of government once democracy was restored. There are, thus, two phases of Athenian democracy, approximately equal in duration and quite distinct from each other, to be considered. This distinction is made whenever necessary in the appropriate sections below.

A third remark concerns the extremely pragmatic nature of Athenian democracy, which was not founded on an abstract theory. Athens did not have jurists in any capacity even approximating the modern sense and the systematic philosophers who wrote during this period "had a set of concepts and values incompatible with democracy".⁶ There are no known examples of contemporary pro-democracy writers – the closest is Aristotle who attempts to explain the system of democracy while continuing to criticise it. The organisational structure of democratic Athens must therefore be analysed based not so much on the academic works of theorists as on the empirical evidence of the manner in which the Athenians conducted their affairs.

2.1. Athens' Basic Legal Structure – Participation and Representation

All substantial decision-making in Athens took place in three main fora:⁷ the Assembly (*ekklesia*), the Council of Five Hundred (*boule*) and the Courts (*dikasteria*). In addition, various duties were performed by officials (*archai*).

⁴ M.I. Finley, "Athenian Demagogues" in Rhodes ed., *Athenian Democracy* (Edinburgh University Press, 2004), 163 at 178; Ostwald, *Sovereignty*, note 3, at 366.

⁵ Sheldon Wolin, "Fugitive Democracy" in Benhabib ed., *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 31, at 42.

⁶ Finley, "Athenian Demagogues", note 4, at 169.

⁷ Sheldon Wolin, "Transgression, Equality and Voice" in *Demokratia*, 63 at 68; Aristotle, *Politics* (3rd Edition, Clarendon Press, 1968) at 107.

2.1.1 The Assembly (*ekklesia*)

2.1.1.1 Competencies

The most important competencies of the *ekklesia* were: to issue executive decrees known as *psephismata* (eg the decision to go to war) and certain administrative acts (eg granting citizenship);⁸ to pass laws (*nomoi*); to elect generals and treasurers; occasionally to try suspects for political crimes (before 350 B.C.);⁹ to transact the business of the State, for example, approving expenses.¹⁰ Every substantial decision was taken by the people in the Assembly. Decrees or laws delegating substantial decision-making powers to officials were never issued, even in states of emergency.

The week-by-week conduct of a war, for example, had to go before the Assembly week by week, as if Winston Churchill were to have been compelled to take a referendum before each move in WWII, and then to face another vote after the move was made in the Assembly or the law-courts, to determine not merely what the next step should be but also whether he was to be dismissed and his plans abandoned, or even whether he was to be held criminally culpable¹¹

2.1.1.2 Composition

Every citizen was automatically a member of the Assembly¹² and it was considered a duty to attend if one was physically capable of doing so. The Assembly was held in an enclosure on the Pnyx Hill, which naturally limited attendance to those who could be seated inside, approximately 6000 people.¹³ The right to attend Assembly was universal within the citizen body, although in exceptional circumstances individual citizens could be deprived of their participatory rights in the Assembly for several reasons, the most common of which was financial indebtedness to the State, a condition known as *atimia*.¹⁴ The *atimios* was allowed

⁸ P.J. Rhodes, "The Polis and the Alternatives" in Lewis, Boardman, Hornblower and Ostwald eds., *The Cambridge Ancient History, Vol. VI: The Fourth Century B.C.*, (2nd Edition, Cambridge University Press, 1994), 565 at 567.

⁹ Mogens Hansen, "Initiative and Decision: The Separation of Powers in Fourth-Century Athens", in (1981) 22 *GRBS*, 345 at 352.

¹⁰ Aristotle, note 7, at 107.

¹¹ Finley, "Athenian Demagogues", note 4, at 175 et seq.

¹² E.S. Staveley, *Greek and Roman Voting and Elections* (Thames and Hudson, 1972) at 78.

¹³ *Ibid.*, at 80, 82.

¹⁴ Hansen, "Initiative and Decision", note 9, at 350.

neither to speak nor vote in the Assembly; there is, however, no evidence suggesting that he was prohibited from attending.

2.1.1.3. General Procedure

Initially, the Assembly met at ten fixed meetings per year.¹⁵ Gradually, this increased to forty meetings a year or four per month,¹⁶ one of which was designated the “main meeting” (*kyria ekklesia*) of the month and which had a considerably longer agenda.¹⁷ Additional meetings were called when urgent business necessitated.¹⁸ For two of the four monthly *ekklesia* a minimum agenda including three items pertaining to religious matters, three pertaining to foreign policy, and three pertaining to domestic policy was obligatory.¹⁹

2.1.1.4 Procedure at Legislative Assemblies

Before 380 B.C., legislative assemblies were presided over by the fifty members of the Council of Five Hundred – all from the same tribe – who formed the *prytaneis* or executive committee for that month, one of whom was selected by lot to be the *epistates* (“supervisor” or head of State) for the day. After 380 B.C., legislative Assemblies were presided over by nine *proedroi* (selected by lot from the Councillors) one of whom was also chosen by lot to be *epistates*.²⁰

The *epistates* presented the motions drafted by the Council on the basis of its own members’ or citizens’ proposals, often in the form of a vague draft. A preliminary vote known as the *procheirotomia* was then taken as to whether the draft should be accepted unchanged (rarely possible due to the lack of detail) or opened to debate vis-à-vis possible amendment or rejection.²¹ Once debate was opened, citizens made speeches for or against a certain view, amendment or interpretation of the issue under debate. Because Athens lacked formal party structures and official platforms,²² these speeches were genuine attempts to persuade one’s fellow citizens rather than the formalised statements of position common in modern parliaments. Those participating in the debate had a vested interest in its outcome and

¹⁵ Staveley, note 12, at 79.

¹⁶ Kurt Raaflaub, “Equalities and Inequalities in Athenian Democracy” in *Demokratia*, 139 at 154; Rhodes, note 13, at 565; M.M. Markle, “Jury Pay and Assembly Pay at Athens”, in Rhodes ed., *Athenian Democracy*, (Edinburgh University Press, 2004), 95 at 104-105.

¹⁷ Mogens Hansen, “How did the Athenian Ecclesia Vote?” in *Athenian Democracy*, 40 at 45.

¹⁸ Markle, note 16 at 105.

¹⁹ Hansen, “How did the Athenian Ecclesia Vote?”, note 17, at 45.

²⁰ Hansen, “How did the Athenian Ecclesia Vote?”, note 17, at 42; Staveley, note 12, at 82 et seq.

²¹ Staveley, note 12, at 83 et seq.

²² Rhodes, “The Polis and the Alternatives”, note 8, at 576; cf. E.M. Walker, “The Periclean Democracy” in Bury, Cook and Adcock eds., *Cambridge Ancient History, Vol. V, Athens 478-401 B.C.* (5th Edition, Cambridge University Press, 1973), 98 at 108.

therefore every motivation to convey their point of view to their fellow citizens, because each member of the Assembly was directly affected by its decisions – for example, when the Assembly voted to go to war, many of those voting had every intention of personally engaging in combat.²³

The *epistates* presided over discussion, formally put the question to a vote, after all the speakers had been heard, and announced the results of the voting.²⁴ The *prytaneis* or *proedroi* judged whether a vote on any matter was admissible by law,²⁵ a procedure rendered necessary by various limitations which shall be discussed in greater detail below.²⁶ With few exceptions, the gathered citizens voted by show of hands, a procedure known as *heirotonia*.²⁷ Officials surveyed the show of hands and roughly judged which side had the simple majority of votes, after which the decision of the simple majority was implemented.²⁸ If a citizen thought that the vote had been incorrectly estimated, he could lodge a formal complaint under oath against the decision immediately after its announcement, in which case a second show of hands was taken and the majority again estimated.²⁹

Due to the fact that a plurality of views were often presented during the debate, owing to the vagueness of the initial draft, a simple “yes or no” vote on the entire decree or law was rarely possible. The Athenians therefore voted in succession in favour or against every single suggestion made, as opposed to voting on the draft of the bill as a whole.³⁰ What had actually been agreed upon was then amalgamated from the sum of the individual parts or amendments that had received a favourable vote. Such an arduous voting process avoided the “compromise” solutions common today in which negotiations sometimes lead to several bundled measures being passed, none of which enjoys the backing of the majority of citizens. In contrast, due to their method of voting on each individual aspect of a measure, each component of an Assembly decree was endorsed by the majority of Athenian citizens. The practice of drafting vague proto-legislation also had the effect that much of the input for the final legislation originated spontaneously and directly from the assembled citizens.

²³ Finley, “Athenian Demagogues”, note 4, at 174.

²⁴ Staveley, note 12, at 83.

²⁵ *Ibid.*

²⁶ *Infra* pp. 35.

²⁷ Hansen, “How did the Athenian Ecclesia Vote?”, note 17, at 40; this point is disputed by historians, a few of whom find it plausible that votes were always counted individually.

²⁸ Paul Cartledge, “Comparatively Equal” in *Demokratia*, 175 at 180.

²⁹ Hansen, “How did the Athenian Ecclesia Vote?”, note 17, at 54.

³⁰ Staveley, note 12, at 84.

2.1.1.5 Procedure at Special Assemblies

On certain issues, decided upon at special assemblies, a quorum of 6000 was required. These issues were: the decision to ostracise a citizen (only possible if a previous legislative assembly had decided to legalise ostracism for the year), the decision to grant immunity, and the conferral of citizenship.³¹

Voting at these Assemblies was more precise and less public than at legislative assemblies. For example, the decision to ostracise a citizen was taken by ballot and supervised by the archons. The ballots used were shards of tile or pottery upon which the voter inscribed the name of the citizen he wished to see ostracised and subsequently cast into a basket,³² thus imbuing the voting process with an increased sense of accuracy, formality and secrecy.

2.1.2 The Council of Five Hundred (*boule*)

As the name implies, the Council of Five Hundred was a board of five hundred individuals selected each year to discharge mainly administrative duties.

2.1.2.1 Competencies

The functions of the *boule* included: drafting legislation; setting the agenda for the Assembly;³³ manning the council chamber to hear proposals or complaints from citizens; providing the *epistates* and discharging his duties.³⁴ The *boule* also had legal jurisdiction regarding the payment of tribute by members of the Delian League and over certain religious offences. The Assembly at times instructed the Council to investigate unusual offences and refer them to a court, and the Council was empowered to try officials on its own initiative or following a report made by a private citizen.³⁵

The State finances were discharged by the Council of Five Hundred,³⁶ which also had the power to imprison those who failed to pay debts due to the State in a timely manner in an effort to coerce payment. The Council also supervised public works and reported offences concerning them to the Assembly, which, in the event of condemnation, again referred the

³¹ *Ibid.*, at 88 et seq.

³² Hansen, "How did the Athenian Ecclesia Vote?", note 17, at 48 et seq; Staveley, note 12, at 89.

³³ Walker, note 22, at 108; Rhodes, "The Polis and the Alternatives" note 8, at 565; Staveley, note 12, at 27.

³⁴ Rhodes, "The Polis and the Alternatives", note 8, at 565 et seq.

³⁵ Raphael Sealey, "Ephialtes, Eisangelia and the Council" in *Athenian Democracy*, 310 at 321.

³⁶ Ernest Barker in Aristotle, *Politics - Notes*, at 259.

case to the courts.³⁷ If a case was taken to the Council of Five Hundred and the Council imposed a penalty of less than 500 drachmae, the case could not be referred to the courts – the decision of the Council was final.³⁸

2.1.2.2 Composition

The Council of Five Hundred was selected by lottery each year and composed of fifty men over age thirty from each of Athens' ten tribes.³⁹ All five hundred members of the *boule* met every day.⁴⁰ Each citizen could serve on the Council only twice in his lifetime,⁴¹ a circumstance which meant that at least a quarter of all citizens served on the Council at some point in their lives.

2.1.2.3 Procedure

The Council voted by show of hands, except when the rights and status of an individual were concerned, in which case they cast a ballot.⁴² The councillors were subjected to *dokimasia* and *euthunai*⁴³ and, like all magistrates, wore a crown.⁴⁴

At any time, the Council of Five Hundred could vote to temporarily expel one of its own members on grounds of being unworthy of the post. This vote was called *ekphyllophonia* because the councillors voted using olive leaves as tokens. *Ekphyllophonia* was usually followed by a formal trial for misconduct.⁴⁵

2.1.3 The Courts (*dikasteria*)

2.1.3.1 Jurisdiction

Certain cases, for example, fines of five hundred drachmae or less imposed by the Council, cases worth less than ten drachmae and criminals caught in the act were unjusticiable

³⁷ Sealey, note 35, at 321.

³⁸ *Ibid.*, at 319.

³⁹ Rhodes, "The Polis and the Alternatives", note 8, at 568; Staveley, note 12, at 52.

⁴⁰ Hansen, "Initiative and Decision", note 9, at 351.

⁴¹ Rhodes, "The Polis and the Alternatives", note 8, at 565 et seq.

⁴² Staveley, note 12, at 93.

⁴³ Procedures aimed at the rigorous scrutiny of public actions, they are explained in more detail below, *infra* pp. 65.

⁴⁴ Hansen, "Initiative and Decision", note 9, at 351.

⁴⁵ Staveley, note 12, at 94.

or respectively decided upon by public arbitrators or magistrates known as the Forty.⁴⁶ The Forty were a group of citizens selected by lot to hear small claims of up to 10 drachmae, while all Athenian citizens in their sixtieth year were also obliged to hear small claims in the capacity of public arbitrators. Neither group's decisions were necessarily final – either could be appealed to “the people” sitting in court.⁴⁷ All other points of contention were heard exclusively before the courts.

2.1.3.2. Composition

Courts in Athens were jury courts and the jurors were initially selected randomly from an annual pool of 6000 citizens⁴⁸ all of whom were required to be over thirty years of age⁴⁹ and not subject to *atimia*.⁵⁰ By the late 4th Century B.C., the jurors' pool had been abolished and all Athenian citizens over thirty years of age were potential jurors.⁵¹ Jurors or *dikasts* were randomly picked for service on the day of the trial, and each jurors' section was randomly assigned to a courtroom, which effectively thwarted bribery attempts. Therefore, the first lottery determined who would serve that day and the second lottery determined to which court his section would be assigned. The section that the juror belonged to remained constant – every Athenian eligible for jury duty was assigned to one of the jurors' sections lettered A-K⁵² – though due to the first lottery its composition in the courtroom varied daily. The letter of the court to which a juror was assigned was recorded “to make sure that the juror took his seat in the court assigned to him and to make it impossible for him to arrange to sit in the same court with certain others”.⁵³

Court proceedings were divided into two broad categories: the private suit (*dike*) and the public suit (*graphe*).⁵⁴ The minimum jury size for a private suit was 201 which increased to 401 if the claim was worth more than 1000 drachmae.⁵⁵ For public suits, the minimum jury size was 501 with additional jurors being added in increments of 500, depending on the importance of the case,⁵⁶ with juries of 2500 or even 6000 citizens not uncommon.⁵⁷

⁴⁶ W.S. Ferguson, “The Fall of the Athenian Empire” in *Cambridge Ancient History*, Vol. V, 348 at 350; Rhodes, “The Polis and the Alternatives” note 8, at 566.

⁴⁷ A.R.W. Harrison, *The Law of Athens, Volume II*, (2nd Edition, Bristol Classical Press, 1998) at 19.

⁴⁸ Susan Cole, “Oath Ritual and the Male Community at Athens” in *Demokratia*, 227 at 236.

⁴⁹ Boegehold, note 3, at 205.

⁵⁰ A.R.W. Harrison, note 47, at 44; if a citizen sat in court as a juror despite being subject to *atimia*, he risked execution.

⁵¹ Sterling Dow, “Aristotle, the Kleroteria, and the Courts” in *Athenian Democracy*, 62 at 87.

⁵² *Ibid.*, at 84.

⁵³ quoted from Aristotle in Staveley, note 12, at 113.

⁵⁴ Louis Gernet, “Capital Punishment” in *Athenian Democracy*, 132 at 148.

⁵⁵ Ernst-Wolfgang Bockenfoerde, *Geschichte der Rechts- und Staatsphilosophie: Antike und Mittelalter*, (2nd Edition, Mohr Siebeck, 2006) at 24.

⁵⁶ A.R.W. Harrison, note 47, at 48.

The court was presided over by a magistrate who had a purely administrative function. He did not fulfil the tasks of a judge, such as directing the jury or deciding on the admissibility of evidence. As a citizen could only serve in any office once in his lifetime, he was, in any event, rarely qualified to make such decisions.⁵⁸ Magistrates, time-keepers and those distributing ballots were all randomly selected and assigned to a courtroom.⁵⁹ The magistrates were chosen randomly “so that they would have no prior knowledge of the case over which they would preside”.⁶⁰

The lack of formal training of both the magistrate and the jurors was somewhat mitigated by the fact that because participation in the *ekklesia* and courts formed part of daily life, most Athenians had a relatively good grasp of their law and juridical ideas.⁶¹ Furthermore, as precedent played no role in Athenian jurisprudence, it was not necessary to have an overview of similar preceding cases. Far from being binding, precedents were never so much as cited by litigants.⁶²

2.1.3.3 Parties Entitled to Appear before the Courts

In private claims only the alleged victim or his family were entitled to sue; in public claims any citizen could sue as these were matters of national interest.⁶³ While the Council or Assembly could, in exceptional cases, appoint a public prosecutor,⁶⁴ in almost all preserved laws dealing with public suits, the individual citizen is specifically mentioned as being the prospective prosecutor.⁶⁵ Thus, the maintenance of the Athenian legal system relied heavily on individuals voluntarily prosecuting in matters purely of public interest.

All court appearances, public and private, tended to be personal, hands-on affairs. Originally, litigants were required to personally deliver their speeches in court, and it was illegal to give or receive payment for rendering legal advice or delivering court speeches. The profession of lawyer was thus effectively banned.⁶⁶ Although this rule was always technically adhered to, by the fourth century B.C. a litigant could, in practice, employ a professional

⁵⁷ Ostwald, *Sovereignty*, note 3, at 68 et seq.

⁵⁸ Bockenfoerde, note 55, at 24.

⁵⁹ Staveley, note 12, at 112.

⁶⁰ quoted from Aristotle in Staveley, note 12, at 113.

⁶¹ Ferguson, “The Fall of the Athenian Empire”, note 46, at 351.

⁶² A.R.W. Harrison, note 47, at 135.

⁶³ Ferguson, “The Fall of the Athenian Empire”, note 46, at 349; Hansen, “Initiative and Decision”, note 9, at 361; However, it should be kept in mind that many cases which would today be regarded as cases of public interest, for example, homicide, were in Athens considered to be private cases, see Harrison, note 47, at 76 et seq.

⁶⁴ Rhodes, “The Polis and the Alternatives”, note 8, at 566.

⁶⁵ Hansen, “Initiative and Decision”, note 9, at 361.

⁶⁶ Bockenfoerde, note 55, at 23; Rhodes, “The Polis and the Alternatives” note 8, at 566.

speech-writer and/or advocate.⁶⁷ An advocate was still, however, not a source of legal representation in the modern sense. He was – technically – merely a fellow-citizen, who, due to a close personal relationship with the litigant, was willing to speak on his behalf in court. To this end, it was common practice for an advocate – even one who was illegally receiving payment – to stress his personal ties with the litigant or his own personal grudge against the opponent, as he had to satisfy the jurors that he was involved for personal and not professional reasons. Advocates thus tended to be acquaintances of litigants who also happened to be particularly skilful orators, rather than experts who earned a living by exercising any unusual degree of legal knowledge. Even in cases where a skilled advocate was illegally employed, the litigant himself delivered part of his own case.⁶⁸

The Athenians' positive ban on the legal profession can be seen as a consequence of their determination that wealth should not buy political or legal privilege. It clearly demonstrates that the citizens of Athens were ignorant neither of the possibilities of professional oration nor legal advice. Of course, the ban on legal assistance opened up new avenues of unfairness – court presentation was highly dramatic and an uncharismatic litigant was as likely to lose against a more extroverted opponent as a dull litigant was to lose against an opponent who could argue cleverly. Those unendowed with the natural talents helpful to successful litigation encountered difficulty in purchasing skill to compensate for shortcomings of personality or intellect. This emphasises a key attribute of Athenian democracy, namely that the Athenians were not generally very concerned that processes should be fair. They were chiefly concerned with the particular unfairness of allowing wealth to buy power and privilege, and in insisting on personal, direct participation as opposed to participation via proxy. They were often disinclined to recognise differentiated abilities as the existence of such differentiations was a common argument in favour of aristocracy.

2.1.3.4 Procedure for Presenting a Case

Court proceedings were swift – all cases heard by juries had to be completed within the course of a day and there was no possibility of appeal from the decision of a court. Speaking-time was allotted to each party and measured with the use of a water-clock.⁶⁹ During his speaking-time, a litigant could direct questions to his opponent who was obliged to answer him.⁷⁰ The claimant spoke first, followed by the respondent, whereby a rebuttal was permitted only in certain private cases.

⁶⁷ Harrison, note 47, at 156 et seq.

⁶⁸ *Ibid.*, at 158 et seq.

⁶⁹ Walker, note 22, at 112; A.R.W. Harrison, note 47, at 161.

⁷⁰ A.R.W. Harrison, note 47, at 162.

Pericles is recorded as having been the first person to write out a law-court speech in advance,⁷¹ which points up the spontaneity and lack of structure in court presentations. Even after this point, completely oral pleadings remained common until written evidence and pleadings became mandatory in 378/7 B.C.,⁷² possibly in compliance with the Athenians' new found appreciation of a more structured law in the post-Thirty Tyrants era.

The jury did not receive any time for deliberation and it is thought likely that they were discouraged from discussing their vote with each other once proceedings had come to a close. Throughout the proceedings the jurors were, however, free to speak with whomever they chose and could therefore discuss the case with fellow jurors during the parties' speeches or even antagonise the parties themselves if they had an objection to what was being said.⁷³ The entire process was thus intensely participatory for all present.

2.1.3.5. Voting Method

Despite the intense and even raucous communication of court proceedings, voting was a highly sophisticated affair. Voting in courts was taken by ballot, initially using mussel shells as tokens. In criminal cases, two receptacles were placed at the magistrate's tribunal, the foremost in favour of condemnation, the rearmost in favour of acquittal. It is thought that this method offered some secrecy as it would have been possible to place a hand over each urn preventing anyone from seeing from which hand the token was dropped.⁷⁴

Later, bronze discs with shafts through the centre were used as tokens. One disc had a hollow shaft, indicating condemnation, and the other a solid shaft, indicating acquittal. The discs were placed on a special stand in front of each juror by four officials appointed by lot. A bronze urn and a wooden urn were placed at the front of the court. The bronze urn received the "votes" of the jurors, the wooden urn their superfluous tokens. After all tokens had been cast, the votes were counted by use of a board covered with rows of slots. The solid tokens were inserted into these slots starting at one end, the hollow tokens at the other end. Once all the tokens were placed on the board the result was not only very public, it could be determined within a matter of seconds.⁷⁵ The use of the slotted board also made it easy to assess whether the same amount of votes had been cast as jurors were present, and thus prevented "ballot-box" stuffing. This sophisticated method of voting allowed for both secrecy – an important point in repressing bribery and other forms of external pressure – and

⁷¹ P.J. Rhodes, "Political Activity in Classical Athens" in *Athenian Democracy*, 185 at 200.

⁷² A.R.W. Harrison, note 47, at 98.

⁷³ *Ibid.*, at 161.

⁷⁴ Staveley, note 12, at 96 et seq.

⁷⁵ Staveley, note 12, at 98; A.R.W. Harrison, note 47, at 164.

transparency, while virtually eliminating the possibility of a juror managing to cast multiple votes unnoticed.

In criminal cases, the jurors decided on the sentence in a subsequent decision to the verdict of guilt. In this, they were obligated to choose between the sentences suggested by the parties.⁷⁶ In civil cases, the jurors also chose between the remedies proposed by the litigants as opposed to creating a solution of their own. This had the effect of giving justice an all-or-nothing character, as the jurors could not split up the aspects of the case, giving one litigant the right on certain aspects and the other the right on other aspects, nor could the jurors decide to reach a compromise solution by rendering a judgement midway between the solutions proposed by the litigants.⁷⁷ The court system as a whole was, like many aspects of Athenian democracy, intensely participatory, sometimes crass in outcome, and virtually proof against corruption.

2.1.4 Office-Holders (*archai*)

Within the confines of citizenship, the Athenian concept of “equal access” was quite radical and – typical of Athenian democracy – crassly efficient. While the *ekklesia* and *dikasteria* were the decision-making centres of Athens, the day-to-day administration of the state was carried out by the *boule* and various officials. Approximately 700 of Athens’ officials were elected or appointed by another office-holder, usually to be his assistant,⁷⁸ while other tasks, such as policing, were carried out by publicly-owned slaves.⁷⁹ However, the vast majority of officials were citizens chosen randomly by lottery.⁸⁰ Appointment by lot was often complex and utilised multiple rounds of sortition, which are elaborated upon in more detail below.⁸¹

The power of all officials was limited and their duties consisted almost exclusively of carrying out routine matters necessary to the functioning of the state.⁸²

⁷⁶ J.B. Bury, “The Age of Illumination” in *Cambridge Ancient History, Vol. V*, 376 at 392; Staveley, note 12, at 98 et seq.

⁷⁷ For this reason, small cases under 10 drachmae could be taken to publicly regulated arbitrators who did have leeway to reach compromises or divide the case into different aspects, A.R.W. Harrison, note 47, at 73.

⁷⁸ Hansen, “Initiative and Decision”, note 9, at 352

⁷⁹ Marcus Tod, “The Economic Background of the Fifth Century”, *Cambridge Ancient History, Vol. V*, 1 at 30.

⁸⁰ Raaflaub, note 16, at 140; Alan Sommerstein, *Aristophanes: Lysistrata and Other Plays*, (2nd Edition, Penguin Books, 2002) at 68.

⁸¹ *Infra* pp. 51 et seq.

⁸² Hansen, “Initiative and Decision”, note 9, at 358.

2.1.4.1 Competencies

2.1.4.1.1 Competencies Common to all Magistrates

The office-holders had various specific tasks, the most relevant of which will be discussed below, but common to them all was the task of enforcing the decisions of the *demos*.⁸³ To this end, they were empowered to inflict a fine of up to fifty drachmae on anyone who refused to comply with their orders.⁸⁴ If an office-holder was of the opinion that a greater fine than that which he was empowered to impose was necessary, he could summon the offending citizen before a court, upon which the court decided on the guilt of the accused and, if found guilty, sentenced him either to the fine he himself proposed or the fine that the official proposed. Being taken to court by a magistrate, therefore, did not greatly differ from being taken to court by anyone else.⁸⁵ Conversely, if a citizen felt that a fine had been wrongly imposed, he could refuse to pay it and so force the magistrate to take him to court for the case to be decided there.⁸⁶ A citizen's dealings with the *archai* were thus entirely justiciable by "the people" sitting in easily accessible courts, who were the ultimate guarantor of enforcing the decision of an official attempting to enforce a decision of "the people".

2.1.4.1.2 Competencies of the Archons

The office-holders selected by lot were in factual terms roughly equal in importance,⁸⁷ however those considered to be the traditionally most powerful were known as *archons*, of which nine were selected plus a tenth who served as their secretary.⁸⁸

The *eponymous archon* was the archon designated as such because he gave his name to the year in which he had been chosen to serve. He presided over all cases concerning the family, for example, the maltreatment of orphans or parents, disputes arising from the management of an orphan's estate, cases relating to guardianship, cases brought against parents alleged to be squandering the family's wealth through insanity or idleness, and inheritance claims. The eponymous archon was also responsible for the welfare of orphans, heiresses and widows, often overseeing their estates. He was also in charge of managing dramatic festivals and liturgies and thus, by extension, all related disputes.⁸⁹

⁸³ *Ibid.*, at 357.

⁸⁴ *Ibid.*, at 358; 50 drachmae was a significant sum, representing approximately one month's wages.

⁸⁵ A.R.W. Harrison, note 47, at 5 et seq.

⁸⁶ *Ibid.* at 6.

⁸⁷ Rhodes, "Political Activity in Classical Athens", note 71, at 202.

⁸⁸ Staveley, note 12, at 37 et seq.

⁸⁹ A.R.W. Harrison, note 47, at 8.

The second archon was known as the *basileus* or “king”, whose duties consisted chiefly of presiding over festivals and other religious matters.⁹⁰ Thus, he presided over disputes as to which family member inherited a priesthood. The *basileus* was also charged with overseeing land belonging to the gods, which could be leased out, and was obliged to report its management to the *boule*.⁹¹

The *archon polemarch* was nominally the head of the army, although military affairs were, in fact, completely in the hands of the generals.⁹² He remained responsible for sacrifices and competitions associated with war and for the welfare of children whose parents had been killed in war.⁹³ The *archon polemarch* also presided over disputes involving metics, the outcome of which – if the dispute arose between a metic and a citizen – depended to a large extent on the terms of treaties existing between Athens and the metic’s home State.⁹⁴

The remaining six *archons* were known collectively as *thesmothetai* and these had purely judicial duties,⁹⁵ presiding over courts concerned with cases not falling into one of the aforementioned categories.⁹⁶

The duties of the archons demonstrate three things: those of the *eponymous archon* in particular show the extent to which Athens was a “welfare” state in which officials were required to make provision and provide legal protection for those deemed unfit to act in their own best interests. The rather extensive and specific list of their several responsibilities, which is by no means exhaustive, also shows a certain tendency to legal specialisation, however slight in degree (it must be remembered that the archons only presided over certain courts, they did not make any decisions themselves). A third aspect concerns the combination of judicial and executive duties imposed upon the three chief *archons*, and which demonstrates the complete lack of a separation of powers. No official or organ in Athens wielded substantial power – the only power was “people power” – therefore the need to separate it did not come into question.

2.1.4.1.3 Competencies of the *Stratego*

Athens’ ten elected generals (*stratego*) were originally each responsible for their tribes’ contingent of warriors⁹⁷ but by the late fourth century tribal affiliation was no longer a

⁹⁰ Sommerstein, note 80, at xlv.

⁹¹ A.R.W. Harrison, note 47, at 9; Ostwald, *Sovereignty*, note 3, at 138.

⁹² Staveley, note 12, at 42.

⁹³ A.R.W. Harrison, note 47, at 9 et seq.

⁹⁴ *Ibid.*, at 10 et seq.

⁹⁵ *Ibid.*, at 12.

⁹⁶ *Ibid.*, at 13.

⁹⁷ Staveley, note 12, at 41.

consideration in their election.⁹⁸ By this time, the generals were instead allocated specialised duties concerning the command of the entire military force.⁹⁹ For example, one general was “in charge of the heavy arms”, another in charge of the Piraeus, a third in charge of defending Attica in case of attack, etc.¹⁰⁰

Although the duties of the *strategoï* always related directly to military matters, such issues played a large role in Athens, with a certain proportion of the Assembly’s schedule mandatorily concerning itself with foreign policy. Thus, while accorded no formal distinction in the Assembly, generals frequently voiced their opinions and often played a central role in the discussion of foreign policy.

2.1.4.1.4. Other Officials

The Athenian democracy made use of a raft of other office-holders selected by lot and working in panels of ten, for example the *astynomoi* (responsible for the cleanliness of the streets), the *agoranomoi* (responsible for the cleanliness of market-places as well as for ensuring that prices fixed by law were complied with, that the goods were genuine and that neither buyers nor sellers were cheated), the *metronomoi* (charged with ensuring that sellers used correct weights and measures) and *sitophylakes* (who oversaw the supply and marketing of grain and prevented an artificial rise in grain prices).¹⁰¹ The *apodektai* received State revenues and paid them into the appropriate funds¹⁰² while the *practores* were responsible for collecting debts, recording the names of the debtors and collecting fines imposed by the courts.¹⁰³

2.1.4.1.5. Paredroi

Certain office-holders were aided by assistants, whom they appointed themselves. For example, the three chief *archons* appointed two assistants each (known as *paredroi*) to accompany them in their duties.¹⁰⁴ An archon’s *paredroi* were often chosen on the entirely acceptable basis of nepotism or selling the position to the highest bidder,¹⁰⁵ although it is unclear why a citizen should wish to pay to hold this office. The most plausible reason would

⁹⁸ Rhodes, “The Polis and the Alternatives” note 8, at 570; Staveley, note 12, at 44 et seq.

⁹⁹ A.R.W. Harrison, note 47, at 31.

¹⁰⁰ Rhodes, “The Polis and the Alternatives”, note 8, at 570.

¹⁰¹ A.R.W. Harrison, note 47, at 25 et seq.

¹⁰² *Ibid.*, at 27.

¹⁰³ Mogens Hansen, “Did the Athenian Ecclesia Legislate after 403/2 B.C.?” in 1979 20 *GRBS*, 27 at 33; A.R.W. Harrison, note 47, at 187.

¹⁰⁴ S.C. Humphreys, “Public and Private Interests in Classical Athens” in *Athenian Democracy*, 225 at 232.

¹⁰⁵ A.R.W. Harrison, note 47, at 11 et seq.

seem to be to increase his standing as a citizen and thus lend his arguments more weight in the Assembly and courts, or to raise his stature in order to run for one of the elected positions.

The archons' assistants were empowered to act with authority as the proxy of the archon who had selected them. Although not chosen by lot, they were also subjected to *dokimasia* and *euthunai*.¹⁰⁶ It is unknown if one could serve as a *paredroi* to a specific official more than once. It is possible (though by no means certain) that *paredroi* serving recurrently led to an increased level of consistency and professionalisation of the Athenian "civil service".

2.1.4.2. Limitations on Holding Office

Each office could be held by the same person only once with the exception of the *strategoï*, a position to which one could be re-elected indefinitely. However, since the officials were elected to panels, some of which had specialised duties, it is unknown if a former archon polemarch, for example, could never again be an archon of any sort, or if he was only prohibited from holding the specific office of *archon polemarch* a second time.¹⁰⁷

All posts were held for one year,¹⁰⁸ a rapid rotation grounded in democratic sentiment. As Aristotle wrote, "Now one aspect of liberty is being ruled and ruling in turn...this is the second defining principle of democracy, and from it comes the ideal of not being ruled, not by anybody if at all possible, or at least only in turn".¹⁰⁹ All posts were thus transient.

2.1.4.3. Procedural Requirements

The offices were subject to very few procedural requirements. Being called upon to serve as a lottery-selected official was not compulsory; one had to nominate oneself to be put into the selection pool.¹¹⁰ Technically, the lowest class of Athenian citizens, the *thetes*, were not eligible to hold office or sit on the Council of Five Hundred. These rules were always more theoretical than real and eventually completely ignored.¹¹¹

¹⁰⁶ *Ibid.*, at 11.

¹⁰⁷ Rhodes, "The Polis and the Alternatives", note 8, at 566; A.R.W. Harrison, note 47, at 1 et seq.

¹⁰⁸ Walker, note 22, at 99.

¹⁰⁹ Aristotle, *Politics*, note 7, at 145 et seq.

¹¹⁰ Walker, note 22, at 99.

¹¹¹ A.R.W. Harrison, note 47, at 2; Rhodes, "The Polis and the Alternatives" note 8, at 565.

2.1.4.4. Conclusions Concerning *Archai*

This brief excerpt from the total number of Athenian office-holders and their duties illustrates the extent of regulation and organisation present in Athens. In particular, the Athenians devoted a significant portion of manpower to legal and economic regulation, and to providing care and guardianship for weaker members of society. This organisation and regulation was carried out in a decentralised fashion on the initiative of the selected office-holders, as opposed to the centralised fashion common today, however, it was not necessarily less effective for it. Certainly, democratic Athens, which saw fit every year to select a multitude of officials charged with such exciting duties as ensuring clean streets, was not the lawless place it has often been made out to be.

Although themselves highly regulated, those enforcing the regulations had very little decision-making power. Even referral to the “chief” archons is misleading as their duties consisted of little more than presiding over courts, the decision-making power of which resided in the juries. While their array of duties displays the essential role the *archai* fulfilled in the governance of Athens, they were invested with little personal authority. They were assigned to extremely specific tasks, which allowed the *demos* a high degree of clarity to judge whether those tasks were being adequately fulfilled, while at the same time ensuring that each official knew his duty and had very little discretion in its interpretation.

This significantly offset the fact that sortition for posts that could be held only once led to a lack of expertise in regards to carrying out duties. This issue was further mitigated by the fact that office-holders usually worked together in teams or panels, often composed of ten citizens, one from each tribe – or in some cases panels of five citizens which included one member from each tribe over a two year cycle – so that between them they could usually cobble together enough experience to discharge their limited duties in a reasonable manner. Because officials were rarely tasked with complex procedures “the scope for competence or incompetence was slight”.¹¹²

This was in line with democratic thought: Democracy was people power, meaning more concretely that the will of the majority at any given time should be implemented as precisely as possible and that the official neither added nor subtracted anything from that will. Because the people were sovereign they could always adjust events and actions to their liking, *ie* by impeaching an official who had not acted in the way the Assembly thought to be correct. The great accessibility of Athenian democracy meant that a citizen never had to put up with the “wrong” decision of an official, though one was by no means guaranteed consistency by “the people”.

¹¹² Rhodes, “The Polis and the Alternatives” note 8, at 565; Staveley, note 12, at 47.

2.1.5. Conclusions Regarding Athens' Basic Legal Structure

The basic legal structure of Athens already allows some pertinent conclusions to be drawn. Firstly, the enormous quantity of citizens involved in decision-making and as office-holders lent Athens an extraordinary degree of participation and transparency. The involvement of so many citizens in each decision would by itself have largely precluded secrecy or corruption. Participation and transparency were also achieved through a profound lack of delegating decision-making power to *archai*, combined with a complete lack of formal constraints and the absence of a separation of powers, particularly between the Assembly and courts. The decision-making centres (*ekklesia/dikasteria*) were always under the control of the majority at any given time and a sufficient segment of the population served on the juries to statistically mirror the Assembly and provide no real check on its will.

The particulars of the manner in which justice was exercised in Athens had a profound impact on the exercise of democracy. The transfer of judicial decisions into the hands of the people, as opposed to having them remain the prerogative of magistrates was seen by Aristotle as one of the most significant reforms that had heralded in democracy, "for...when the people is master of the vote [in the courts] it becomes master of the constitution",¹¹³ in other words, by this means, the people of Athens not only passed laws, but also interpreted their content under consideration of the basic premises of Athenian democracy – the constitution, or most basic legal structure, was at the discretion of the people in their role of jurors to determine.

To say that Athens was a direct democracy is, however, only partially true: the number of citizens who made any one decision in court or the Assembly was usually between 2% and 15% of the population. In a sense, all other citizens were represented (on that particular issue) by these citizens. However, this "representation" was determined randomly, as democracy dictated that when it came to political decision-making one Athenian was as good as another. In addition, any citizen could take a measure he did not agree with before the courts, and thus did not have to "put up with" a decision, potentially made in his absence, that he disagreed with.

That democracy is inefficient is a common modern complaint, however this research demonstrates the opposite. Efficiency was not a priority in Athens, at least not one for which it was considered worth sacrificing any sizeable degree of participatory opportunities, yet, overall, the Athenian democratic system was extremely efficient, even crassly so.

The Athenians also very much chose democracy. They were not ignorant of the possibilities of legal representation or of delegating responsibility to committees. In addition,

¹¹³ Aristotle, *Athenian Politics*, 3.5 quoted in A.R.W. Harrison, note 47, at 3.

their organisational methods were often undergirded by ingenious technical innovations (eg court tokens, water-clocks, juror selection) specifically developed to enable democratic processes to occur efficiently.

They were well aware of the possibilities of representation: after the reforms of Solon, but prior to the introduction of democracy they had, in fact, elected a 600-member legislative Assembly to represent the people.¹¹⁴ To view modern democracy as a natural development of a more primitive Athenian version is therefore fallacious, as classical Athenian democracy actually developed from a representative form of government more similar to the modern Western “democratic” system.

2.2. Political Organisation

2.2.1. Political Parties

2.2.1.1. Opposition to Partisanship

Political parties as such did not exist during the Athenian democracy. The Athenians not only disapproved of “factions” or “party-like structures”, but of any sustained or formalised discord or division in their *polis*. The state of being split into political factions was known as *stasis* and considered to be a negative development which could lead to civil war.¹¹⁵ To combat the formation of such entrenched divisions, the Athenians utilised the measure of ostracism.

This measure introduced by Cleisthenes near the beginning of the democracy,¹¹⁶ was not always a case of a witch-hunt as portrayed by writers such as Aristotle, but often a method of dispute settlement between politically opposed and uncompromisingly deadlocked individuals. When a sustained and deep-rooted difference of opinion formed between two politically active individuals, threatening to lead to the formation of political camps or sustained partisan sentiments, one of those individuals would be ostracised in the interests of preserving harmony and preventing the paralysation of the democratic system.¹¹⁷ Thus, the citizen who received the greatest number of votes against him was sent into exile, usually for

¹¹⁴ Federalist Paper No. 63, commonly attributed to James Madison, in *The Federalist Papers*, (Mentor Books, 1961), at 386.

¹¹⁵ Finley, “Athenian Demagogues”, note 4, at 166 et seq.

¹¹⁶ Humphreys, note 104, at 231.

¹¹⁷ Staveley, note 12, at 103 et seq.

ten years,¹¹⁸ although it was not uncommon to be recalled before that time. An ostracism vote required a quorum of 6000 to gain effect¹¹⁹ (approximately 15-20% of the citizen population).

Measures to prevent *stasis*, however, went much further. The Athenians also took measures to prevent cliques forming within the democratic fora. For example, to combat the fact that councillors of the *boule* often sat together with groups of friends during meetings, a new mechanism was introduced in 410 B.C., whereby each councillor was allocated a seat in a lettered section at random, and even had to swear as part of his oath to sit in the section thus assigned to him.¹²⁰

Even activities such as preparing the ground for a vote in the *ekklesia* by sounding voters out in private, or attempting to procure pledges in advance were activities the Athenian simply did not engage in.¹²¹ Each voter was to cast his vote as he saw fit at the time without being burdened by prior commitments or pledges of loyalty to any cause. Due to these measures, the majority on any given measure tended to be fluid. Long-lasting majorities and minorities, and thus real or perceived disenfranchisement, were avoided.

2.2.1.2. Party-like Tendencies

Despite the efforts made to prevent friends sitting near each other in the *boule* and *dikasteria*, no such effort was, or perhaps could be, made in the Assembly and many sources contain references to political friends sitting together,¹²² as the physical manifestation of a loose political alliance. In addition, leading *rhetors*¹²³ sometimes surrounded themselves with slightly less-distinguished colleagues to whom they delegated some of their daily workload, for example, proposing measures in the Assembly, holding an elected office, or appearing in the courts. According to Plutarch, after the citizen Lycurgus had completed his maximum four-year tenure of the treasury he backed the election of friends to the position in order that he might retain control, and Pericles reputedly “saved himself for the great occasions and otherwise had various men acting for him”.¹²⁴ These behaviours were, however, informal, highly irregular and extremely weak. Lacking any formal or centralised authority, political alliances rose and fell quickly¹²⁵ as interests continually converged and diverged.

¹¹⁸ Humphreys, note 104, at 231; Staveley, note 12, at 90 et seq.

¹¹⁹ Ostwald, *Sovereignty*, note 3, at 68.

¹²⁰ Ostwald, *Sovereignty*, note 3, at 418; Staveley, note 12, at 94 et seq; Rhodes, “Political Activity in Classical Athens”, note 71, at 198; for details on the lot machine, see *infra* pp. 51 et seq.

¹²¹ Staveley, note 12, at 106 et seq; Rhodes, “Political Activity in Classical Athens”, note 71, at 196.

¹²² Staveley, note 12, at 81.

¹²³ Citizens who often spoke in the Assembly and had considerable influence.

¹²⁴ Rhodes, “Political Activity in Classical Athens” note 71, at 196.

¹²⁵ Rhodes, “The Polis and the Alternatives” note 8, at 574 et seq.

More conducive to the formation of parties were the two explicitly undemocratic aspects of Athens: the oligarchs, who continued to exist – albeit as a tiny minority – and work against the democracy, and the elected offices. Athenians in favour of oligarchy often formed clubs known as *hetaireiai*, the members of which were exclusively former aristocrats. Although officially banned after the Thirty Tyrants, the *hetaireiai* were merely driven underground, not eliminated. *Hetaireiai* were the closest thing Athens had to political parties. They were organised, disciplined, and sometimes contrived to mobilise support in the Assembly for their own agenda by strategic placement of their supporters, or by arranging for large numbers of their supporters to travel to the Assembly from outlying areas. The *hetaireiai* were instrumental in circumventing some of the democratic laws, for example, providing their members with witnesses and skilled advocates in court cases.¹²⁶

The elected positions in Athens, particularly the position of *strategos* also tended slightly to party politics as the choice of generals tended also to represent a policy choice, with the citizens tending not just to vote a popular speaker such as Pericles to the generalship, but also his political allies.¹²⁷

For the purposes of this study, it is worth considering that only those aspects considered as a concession not quite to oligarchy, but to “undemocraticness”, tended seriously to the formation of political parties.

2.2.1.3. The Effects of the Absence of Parties

The lack of collectivised political opinion in the Athenian democracy meant that political decisions, especially in the Assembly, had absolute consequences. Bargaining and power-sharing were logistical impossibilities. Lacking formalised structures through which to channel far-reaching differences of opinion:

Athenian politics had an all or nothing quality. The objective of each side was not merely to defeat the opposition but to crush it, to behead it by destroying its leaders. And often enough this game was played within the sides as a number of men manoeuvred for leadership¹²⁸

Nothing mitigated or softened political disagreement. The lack of structure, however, also meant that the Athenian citizen was free to form and exercise his own opinion on any

¹²⁶ W.S. Ferguson, “The Oligarchical Movement in Athens” in *Cambridge Ancient History, Vol. V*, 312 at 324; Rhodes, “The Polis and the Alternatives”, note 8, at 577; A.R.W. Harrison, note 47, at 159 et seq.

¹²⁷ Staveley, note 12, at 106.

¹²⁸ Finley, “Athenian Demagogues”, note 4, at 181 et seq.

issue without party discipline. The very idea of political parties ran counter to the Athenian idea of democracy, namely that each individual should reach an independent decision on the issue before him and that the direction in which the majority decided was not only just, but also probably correct, with even a democratic doubter such as Aristotle explicitly admitting of this possibility.¹²⁹ In the ideal democracy, personal interests and loyalties played no role. The extent to which this ideal was realised has sometimes been harshly judged:

I place the word “freely” [free decision-making in the Assembly] within quotation marks for the last thing I wish to imply is the activity of a free, disembodied, rational faculty, that favourite illusion of so much political theory since the Enlightenment. Members of the Assembly were free from the controls which bind the members of a parliament; they held no office, they were not elected, and therefore they could be neither punished nor rewarded in subsequent elections for their voting records. But they were not free from the human condition, from habit and tradition, from the influence of family and friends, of class and status, of personal experiences, resentments, prejudices, values, aspirations and fears¹³⁰

This statement is quite pertinent. No one should labour under the illusion that Athenian democracy was a utopia which freed its inhabitants from the human condition, but the Athenian citizen did enjoy a freedom from outside coercion that a modern parliamentarian can only dream of. The question therefore is not whether the lack of parties led to perfect freedom, but only whether it led to significantly more freedom than is currently enjoyed. And as one historian has put it: “the Athenian citizen is more likely than the modern MP to have gone to a meeting intending to make up his mind as a result of the debate”.¹³¹ The lack of party structure thus led to a significant increase in the value of real, as opposed to *pro forma*, deliberation.

2.2.2. Demagogues and Orators

2.2.2.1. The Rhetor

Although the Athenian democracy did not have groups or organisations resembling party structures, the concept of political leadership was not completely unknown. Although

¹²⁹ Aristotle, *Politics*, note 7, at III-11.

¹³⁰ Finley, “Athenian Demagogues”, note 4, at 173 et seq.

¹³¹ Rhodes, “Political Activity in Classical Athens” note 71, at 200.

any Athenian citizen could voice his opinion or table a motion in the Assembly, certain citizens tended to take advantage of this opportunity more often than others. Any citizen who spoke in the Assembly was a *rhetor*, or orator, by virtue of speaking, but some citizens spoke so often as to *de facto* be self-employed as *rhetors*. Successful orators such as Pericles and Demosthenes often guided Assembly decisions for decades, though by no means were they able to carry public opinion on every issue they supported.¹³² It is these citizens whom the term *rhetor* commonly denotes.

The role of orator was not an easy one and required a large degree of dedication which was more likely to be punished than rewarded. When policy went awry, the Assembly almost invariably blamed the *rhetor* who had proposed the failed policy, regardless of the popular level of support it had initially enjoyed. Even Pericles – by far the democracy’s most popular orator – was on one occasion temporarily deposed from his office as general and fined heavily,¹³³ while Thucydides writes that in the aftermath of the failed military expedition to Sicily: “when they did recognise the facts, [the people] turned against the public speakers who had been in favour of the expedition, as though they themselves had not voted for it”.¹³⁴ Even a *rhetor* with a record of endorsing highly successful policies enjoyed but a very precarious position in this respect. The composition of the Assembly changed every time it met, so that those speaking for or against motions would have a relatively difficult time judging their audience.¹³⁵ Furthermore, it was spontaneous in its debates and decisions, so that an orator could not compensate lack of talent with meticulous preparation.

The role of orator whether exercised constantly or occasionally thus entailed no material gain and the risk of considerable material loss. The only motivations to act in this capacity were a personal belief in the importance of the measures proposed and the satisfaction of personal ambition in knowing that one was unofficially admired. Participation in the democracy was quite intense for all but the most disinterested of citizens, but

[t]heir leaders had no respite. Because their influence had to be earned and exerted directly and immediately...they had to lead in person, and they had also to bear in person, the brunt of the opposition’s attacks... The critical point is that there was no “government” in the modern sense. There were posts and offices, but none had any standing in the Assembly. A man was a

¹³² cf. Ostwald, *Sovereignty*, note 3, at 200, noting among other events, that an embassy was sent to negotiate peace with Sparta against Pericles’ wishes. Steering the *ekklesia* was by no means easy, as meetings were often preceded by an enormous volume of informal debate between citizens on the issues of the day, which served to formulate preferences in a manner difficult to control.

¹³³ Finley, “Athenian Demagogues” note 4, at 173.

¹³⁴ Thucydides, *The History of the Peloponnesian War*, (Folio Society, 2006) at 8.1.1

¹³⁵ Finley, “Athenian Demagogues” note 4, at 171; although the ability to know such a large percentage of the population personally must have somewhat mitigated the unpredictability.

leader solely as a function of his personal, and in the literal sense, unofficial status within the Assembly itself. The test of whether or not he held that status was simply whether the Assembly did or did not vote as he wished, and therefore the test was repeated with each proposal¹³⁶

It would be going too far to say that orators thus rose and fell on personal merit alone, but it would be correct to state that their mistakes were not overlooked and a *rhetor* who wished to maintain his unofficial standing could not afford to become lax or fail to give his best effort when exercising his judgement or speaking before the Assembly.

2.2.2.2. The *Rhetor* as Demagogue

Unlike the elected positions, such as *strategos*, the technical expertise or knowledgeability of the *rhetor* was not necessarily the deciding factor in his success. “[T]he issue raised by Greek writers is one of the essential *qualities* of the leader, not (except very secondarily) his techniques or technical competence, nor even (except in a very generalised way) his programme and policies” because to an Athenian democrat a “good” leader led in the interests of the whole people despite the fact that he might not always make the technically right decision, whereas a “bad” leader might make some technically very good decisions, but acted out of self-interest. This distinction based on motivating factors was of fundamental importance¹³⁷ and betrays an inclination to support a *rhetor*’s motion based on trust and personal inclination rather than on hard facts.¹³⁸

Due to this tendency combined with the emphasis placed on rhetorical skills in Greek education,¹³⁹ and the at times flip-flopping, and occasionally ill-advised,¹⁴⁰ decisions of the Assembly, the question has been raised as to the extent to which the Athenians were subject to the undue influence of *rhetors* who were not mere orators, but demagogues in the modern sense of the word,¹⁴¹ in other words what the quality of individual participation at the Assembly really was.

¹³⁶ *Ibid.*, at 175 et seq.

¹³⁷ *Ibid.*, at 166.

¹³⁸ Although one could argue that decision-making in modern democracies occurs based on much the same criteria.

¹³⁹ Rhodes, “Political Activity in Classical Athens” note 71, at 200; interestingly Thomas Jefferson also noted the importance attached to eloquence and persuasion in Native American societies which were not governed by coercion, Thomas Jefferson, *Notes on the State of Virginia*, (Harper Torchbooks, 1964) at 58.

¹⁴⁰ For example, the infamous failed military expedition to Sicily in 413 B.C.

¹⁴¹ In ancient Greece the term “demagogue” did not have negative implications, but merely denoted a leader of the people, cf. Ostwald, *Sovereignty*, note 3, at 201.

In this context the Athenian definition of treason is interesting. It defines treason as being committed

if anyone overthrows the *demos* of the Athenians, or conspires for overthrow of the *demos*, or gathers together a *hetairikon* [group of comrades], or if anyone betrays a city, or ships, or a force of infantry, or sailors, or being an orator fails in return for bribes to give the best advice to the *demos* of the Athenians¹⁴²

It is noteworthy that forming a club and failing to give the best advice (albeit only in connection to receiving bribes) are mentioned in the same breath with betraying a city and overthrowing the State. It implies a reliance of the *demos* on the orators, who may or may not be giving their best advice, and perhaps a willingness to be too easily convinced to do things not in their own best interests, as the onus is placed on the orators to give their best advice rather than on the *demos* to exercise its judgement more lucidly. The approach taken is typical of the Athenian democracy in which the people were never blamed directly for any mistake regardless of severity, and in which anyone with any power (official or unofficial) was held to a much stricter level of accountability. Because the Assembly and courts were seen as directly constituting “the people”, *ie* being identical to “the people”, they were also seen as being inherently incapable of committing an illegal action. The people could do no wrong, because they were sovereign and all power originated from them.¹⁴³

Thus, it was even, in a certain sense, useful not to dampen the dramatic influence of the *rhetors* or suggest that their power to persuade be mitigated, for, when a mistake had clearly been made, the *rhetor* – and not the *demos* as a whole – was conveniently made to pay the price. In this the Athenians encouraged demagogy in a negative sense, through their own paradoxical abdication of responsibility for the negative consequences of decisions they insisted were their prerogative to make.

At the same time, the frequency of bad decision-making under the pernicious influence of certain orators needs to be relativised: the number of times that the Athenian *demos* made poor decisions of any sort pales in comparison to the number of ill-advised military campaigns undertaken by monarchs and dictators. Personal and immediate affectedness seems to have had a sobering effect on “the people” to the extent that even considering the influence of oratory and drama, they on balance made better decisions than those placed at the head of governmental systems in a manner virtually exempting them from the consequences of faulty policy-making.

¹⁴² Sealey, note 35, at 311 et seq.

¹⁴³ Raaflaub, note 16, at 140.

2.2.2.3. Demagogues and Democracy

Thucydides says that under Pericles,

in what was nominally a democracy, power was really in the hands of the first citizen. But his successors, who were more on a level with each other and each of whom aimed at occupying the first place, adapted methods of demagoguery which resulted in their losing control over the actual conduct of affairs [and according to another translation left them to the “whims of the people”]¹⁴⁴

Thucydides is rather perceptive here – he does not view the Pericleian era as a democracy;

[b]ecause of his prestige, intelligence and known incorruptibility with respect to money, Pericles was able to lead the people as a man should. He led them instead of being led by them. He did not have to humour them in the pursuit of power; on the contrary, his repute was such that he could contradict them and provoke their anger¹⁴⁵

Thus, because Pericles led instead of followed, Athens at this time was not a democracy in Thucydides’ eyes, despite the high level of participation by the average citizen, but the demagogic State is considered to be a democracy, because it is conducted according to the “whims of the people”. This underlines the classical view of democracy in which the people did not allow themselves to be guided by the particularly intelligent and accomplished, but where the orator was to be the mere channel of current popular sentiment. Thus, a true democracy could not exist under a shepherd-like orator, but only under orators who acted as conduits of public opinion. It is this second type of orator who is always referred to as a demagogue in ancient sources, when the term is used at all.¹⁴⁶

Democracy was thus viewed, at least by some, as a sort of stultified state, fundamentally at odds with charismatic visionaries. The democratic leader did not reason with

¹⁴⁴ Thucydides, *Peloponnesian War*, note 134, at 2.65, second translation, the same, quoted in Finley, “Athenian Demagogues”, note 4, at 164.

¹⁴⁵ Thucydides 2.65.8, quoted in Finley, note 4, at 165.

¹⁴⁶ Of course, this view of democracy is, logically, at odds with the practice of punishing *rhetors* for giving bad advice, which would seem to imply at least something more than being the mere channel of popular sentiment. The average view of democracy was considerably less logically coherent than that elaborated by Thucydides, however, his more discriminating views are useful, because Pericleian “non-democracy” functioned much better than later “true democracy”.

the people or seek to persuade them of his own convictions, but instead proposed whichever measures he felt the people likely to endorse at any given moment, employing drama and rhetoric to sway any doubters. The demagogue was thus an integral part of democracy in a classical sense, but one which inhibited its growth and contributed to unreasoned policy formation. In modern times, it would seem more commendable to seek to approximate the less purist Periclean-style of democracy, as opposed to the more authentic, but also more stultified “true” democracy in the sense of Thucydides.

2.2.3. Conclusions Regarding Political Organisation in Athens

The lack of political parties in Athens meant that “deals” were not often struck as to which legislation or litigant would be supported in advance of *ekklesia* or *dikasteria* meetings, meaning that psychological or financial influence was limited and that entrenched power bases were virtually non-existent. The position of respected *rhetor* was the most powerful position any Athenian could aspire to achieve. However, as it offered no monetary rewards and could entail considerable danger, there was no reason to pursue such a “position” out of mercenary interests. The purely power-hungry may, of course, have put themselves forward as *rhetors*, but power of this sort was extremely fickle – it was impossible to hold absolute sway in the Assembly for more than fleeting moments and the attempt to do so merely effectively neutralised the excess ambition of power-hungry democrats by keeping them happily occupied. The effects of demagogy are perhaps the most important to address in this context. While any view of the Athenians mindlessly supporting the most dramatic or flattering *rhetor* must be rejected as a simplistic caricature, it also cannot be ignored that their government flourished best when its most able and ethical citizens took a role in convincing others of their own convictions, a state of affairs, which of course, depends on such citizens coming forward of their own volition.

2.3. The Role of Law in Athenian Democracy

While democracy was generally viewed as synonymous with the rule of law – as opposed to aristocracy which represented the more “natural” rule by certain individuals¹⁴⁷ – the idea of laying down rules which could dictate the outcome of future decisions to be made by the people appeared to be contradictory to the role of the people as “sovereign” whose will was “final and just”. However, the oligarchic coups of 411/10 and 404/3 B.C. prompted the

¹⁴⁷ Ostwald, *Sovereignty*, note 3, at 260 et seq.

Athenians to revise the role of law in the democracy and to give it a much more prominent position.

2.3.1. Between Citizens

2.3.1.1 The Emphasis on the Procedural over the Substantive

Athenian laws were generally quite inspecific, for example the *graphe hybreos* (procedure against outrage) read: “if anyone commits hybris against anyone, whether against a child or a woman or a man, from among free persons or slaves, or does anything unlawful against any of these”.¹⁴⁸ The law thus defined those who might be victims, but omitted the *actus reus*. Thus, whether or not a party had fulfilled the *actus reus* of an offence was largely left to the interpretation of the jurors.

[I]t would be more in accordance with Athenian habits to devise a criminal procedure without having any specific charge in mind. That is, if anyone in Athens thought that an act deserving punishment had been committed, he could report his information to an appropriate authority; he did not necessarily have to specify a substantive provision of criminal law against which the alleged act offended; he reported the act because he found it outrageous and deserving of punishment¹⁴⁹

The lack of substantive provisions is consistent with the Athenian view of democracy in which “the state” did not decide which behaviour to punish or reward. Instead the citizen was to take an active role in this determination. If a behaviour – no matter how trivial – aggravated him, he could take its perpetrator to court where they could conduct their argument before the people on an *ad hoc* basis. The sole point of any convention was simply to provide the citizens with mechanisms whereby they could resolve disputes and make collective decisions.

2.3.1.2. The Role of Law before the *Dikasteria*

Jurors were required to take an oath at the beginning of the year to obey the law, and if there was no relevant law, to vote according to what was most just. For their part, the magistrates were required to swear that they would perform their duties in accordance with

¹⁴⁸ Sealey, note 35, at 314.

¹⁴⁹ *Ibid.*, at 316 et seq.

the law.¹⁵⁰ Despite this oath, law in Athens, whether in the form of *nomos* or *psephisma*, did not have a particularly high regard in the courts. They were ranked as a mere form of “evidence” by Aristotle and did not necessarily enjoy much more respect than other forms of evidence brought by litigants.¹⁵¹ The law was a point to be considered, not a force which could settle a matter conclusively on its own.¹⁵² Even if an applicable law did exist it was likely to leave substantial room for interpretation.¹⁵³

Moreover, the jurors were not required to give any reasons for their decision and it is uncertain as to whether they made any effort to be objective,¹⁵⁴ although the jurors’ oath required them to listen impartially to both sides and vote strictly on the issue at hand.¹⁵⁵ Parties were exhorted to discuss only matters of public interest and were made to swear an oath to keep to the point at hand while delivering their speeches.¹⁵⁶ Thus, some effort was made to prevent bias and separate the legally relevant from the irrelevant. However, despite these oaths and exhortations, it appears that the jurors often tended to base their decisions on the general conduct of the litigants, and not solely on the specific accusations.¹⁵⁷ This may have been partially due to the fact that the jurors’ oath explicitly required them to concentrate on the concrete case as opposed to abstract principles.¹⁵⁸ Although the magistrate recorded the basic points of contention of each case in writing, these records did not contribute to the systematisation of Athenian law since precedent was not influential much less binding.¹⁵⁹ It should therefore come as no surprise that no Athenian democrat ever sat down to compose a treatise on legal principles.

This lack of cohesion was, like so much else in Athens, a product more of choice than of ignorance. The Athenian legal system was, in fact, quite sophisticated. For example, a separate procedure known as *paragraphe* existed, the function of which was to determine the admissibility of a claim. A claim could be deemed inadmissible for several reasons, for example, being time-barred, the claimant having chosen the wrong procedure under which to introduce his claim, or a lack of legal relationship between the defendant and claimant that would be necessary to the claimant’s carrying the main proceedings. A *paragraphe* was most often introduced by a defendant who wished to block the main proceedings on some point

¹⁵⁰ Cole, note 48, at 236; Ferguson, “Fall of the Athenian Empire”, note 46, at 351; A.R.W. Harrison, note 47, at 44.

¹⁵¹ A.R.W. Harrison, note 47, at 133 et seq.

¹⁵² *Ibid.*

¹⁵³ *Supra* pp. 33.

¹⁵⁴ Bockenfoerde, note 55, at 24.

¹⁵⁵ Ferguson, “Fall of the Athenian Empire”, note 46, at 351.

¹⁵⁶ Robert Wallace, “Law, Freedom and the Concept of Citizens’ Rights in Democratic Athens” in *Demokratia*, 105 at 109-113; Aristotle, *Politics*, VI-7.1 quoted in A.R.W. Harrison, note 47, at 163.

¹⁵⁷ Rhodes, “The Polis and the Alternatives”, note 8, at 574.

¹⁵⁸ Ferguson, “Fall of the Athenian Empire”, note 46, at 351.

¹⁵⁹ *Ibid.*

more technical than substantive.¹⁶⁰ Its existence indicates that the Athenians did not fail to separate legal questions from each other when they chose. The Athenians also developed legal mechanisms by which one party could demand a copy of a document held by the other party or a third party and which had some bearing on the case at hand (*eg* wills, contracts, bank ledgers),¹⁶¹ and although professional lawyers did not exist, citizens who frequently acted as mediators (known as *logographoi*) between contending parties did.¹⁶²

In short, the Athenians concerned themselves with many complex legal concepts. These concepts merely failed to solidify into a system of rigid principles to be taught and accepted as fact, and the reason for this failure was the prerogative of the *demos* to make adjustments to the law and its interpretation at any given time.

2.3.2. In State Organisation

2.3.2.1. Separation of *Nomoi* and *Psephismata*

Due to the fact that during the first half of the democracy, a proposed law needed only to attain the majority of votes on a given day in the Assembly in order to become law, the Athenians were soon confronted with the difficulty of preventing their core principles from being overthrown and in maintaining certain laws for more than a brief period of time. They sought to achieve this via a law that explicitly banned retroactive laws and a law that prohibited laws directed against an individual.¹⁶³ As a further deterrent, fines for proposing laws that were later deemed “inappropriate” or in contravention of existing law were introduced as a method of fool-proofing the Assembly against demagogues as these ran the risk of punishment once public opinion swung against them.¹⁶⁴ Of course, as simple laws, these could always be overturned by a more recent law. In an effort to improve continuity, the Athenians sometimes used entrenchment clauses, which usually prescribed a severe punishment for any citizen who even proposed a change to the entrenched law in the Assembly. However, this only led to citizens introducing motions to waive the punishment for violating the entrenchment clauses. These waivers expressly allowed citizens to propose any motion so long as it was “for the good of the city” and thus circumvented the entrenchment clauses.¹⁶⁵ While helpful, none of these methods produced the desired effect, and also failed to prevent the “legal” oligarchic takeover of 411.

¹⁶⁰ A.R.W. Harrison, note 47, at 106-124.

¹⁶¹ *Ibid.*, at 135 et seq.

¹⁶² *Ibid.*, at 157.

¹⁶³ Wallace, note 156, at 109-113.

¹⁶⁴ Boegehold, note 3, at 209.

¹⁶⁵ *Ibid.*, at 208.

After the second oligarchic coup, different methods were invented to ensure that law-making became somewhat more systematic and laws themselves more stable.

Prior to these reforms, the Assembly had discharged legislative and executive measures (known as *nomoi* and *psephismata* respectively) in exactly the same manner, barely differentiating between the two and often using the terms interchangeably.¹⁶⁶ In addition, the laws of Solon were still technically in force and formed the basis of the substantive legal system, but had been virtually buried under two centuries of relatively unsorted Assembly and Council decrees and amendments, making it next to impossible to determine with any certainty what the law was. Left unto themselves, the Athenian democrats perceived no flaw in this system and took no measures to alter it for half a century. Almost half of the time spent under democratic rule was spent under this rather haphazard method of law-making. Only following the terrorising experiences of oligarchy was this system deemed to be in need of an overhaul by specially-created panels known as the *nomothetai* (law-makers),¹⁶⁷ who in 399 B.C. were charged with harmonising Athens' laws and compiling a revised legal code, a task which they thereafter repeated on an annual basis.¹⁶⁸

A panel of *nomothetai* consisted of 1000 randomly selected citizens over the age of 30.¹⁶⁹ They not only harmonised the laws, but also divided all previous measures passed by the Assembly into two categories, *nomoi* (laws) and *psephismata* (decrees). *Nomoi* were intended to be permanent and represent general rules, while *psephismata* were to be subsidiary to *nomoi*, more detailed and usually of a temporary nature.¹⁷⁰ All acts of foreign policy, however, (eg alliances, peace treaties) were passed as *psephismata* regardless of the intended duration of the peace treaty.¹⁷¹

From this point onwards¹⁷² the Assembly passed only executive decrees¹⁷³ while legislation in the narrower sense was passed first by the Assembly and then the *nomothetai*. The *nomothetai* operated in a similar fashion to the Assembly with speeches being made for or against the point of law at issue and with the panel members subsequently voting. Very few

¹⁶⁶ Mogens Hansen, "Nomos and Psephisma in Fourth-Century Athens" in (1978) *19 GRBS*, 315 at 316.

¹⁶⁷ Rhodes, "The Polis and the Alternatives", note 8, at 567.

¹⁶⁸ Hansen, "Initiative and Decision", note 9, at 366; Ferguson, "Fall of the Athenian Empire", note 46, at 374 et seq.

¹⁶⁹ Hansen, "Nomos and Psephisma in Fourth-Century Athens", note 166, at 316.

¹⁷⁰ Hansen, "Did the Athenian Ecclesia Legislate?", note 103, at 28.

¹⁷¹ *Ibid.*, at 31.

¹⁷² Sources differ and set the date at either 399 B.C. or 403 B.C.

¹⁷³ Claude Mosse, "How a Political Myth takes Shape: Solon, 'Founding Father' of the Athenian Democracy" in *Athenian Democracy*, 242 at 246; Rhodes, "The Polis and the Alternatives", note 8, at 567.

nomoi but a substantial number of *psephismata* from this period are known,¹⁷⁴ so that it seems that the Assembly decree was still the dominant form of conducting business.¹⁷⁵

The *nomothetai*'s powers were limited, and their institution does not represent as much of a break with democratic principles as it may first seem. Most importantly, the *nomothetai* could not initiate the procedure to pass a law. Any *nomos* was first read out and discussed in the Assembly.¹⁷⁶ The Assembly then passed a *psephisma* ordering the selection of *nomothetai* to hear the *nomos* and vote on it.¹⁷⁷ Thus, through the *nomothetai*, the Assembly effectively provided itself with a second legislative chamber on certain matters. Unlike many modern upper parliamentary chambers, which are appointed or chosen from a different subset of candidates than the lower house, the *nomothetai* were only more exclusive than the Assembly in that the citizens were fewer (although 1000 was still a substantial number) and that they had to be over the age of 30 (the right to attend Assembly began at 21). It is therefore difficult to construe the *nomothetai* as a "check" on democracy, except to the extent that their existence on rare occasions necessitated debating particularly important measures twice, the second time within a slightly more mature circle of participants.

Even after the division between *nomoi* and *psephismata* had been made, a great deal of uncertainty as to the precise content of the law continued to exist, testified by the fact that a litigant who cited a non-existent law in court was liable to the death penalty.¹⁷⁸ Although this practice was doubtless checked by the severe penalty imposed, the need for a law and penalty reveals that the Athenians considered it entirely possible to cite a non-existent law in court without any of the considerable number of people in attendance noticing.

This state of affairs was somewhat mitigated in the fourth century democracy when it became common to keep records of laws in the Metroon where they could at least be consulted, and the compulsory submission of written pleadings. However, while legal organisation thus substantially increased, it was still by no means a rigid structure.

2.3.2.2 A Hierarchy of Norms and Judicial Review

The democracy also disposed over other mechanisms which encouraged the repeated consideration of any measures. If a *psephisma* were passed which a citizen believed to be in conflict with a *nomos*, he could indict the *psephisma* as unconstitutional. The case would then

¹⁷⁴ Rhodes, "The Polis and the Alternatives", note 8, at 567 et seq; Hansen, "Did the Athenian Ecclesia Legislate?", note 103, at 49 – six *nomoi* passed by the *nomothetai* compared with 480 *psephismata* passed by the Assembly.

¹⁷⁵ cf. Rhodes, "The Polis and the Alternatives", note 8, at 572

¹⁷⁶ Hansen, "Nomos and Psephisma in Fourth-Century Athens", note 166, at 328.

¹⁷⁷ *Ibid.*, at 329.

¹⁷⁸ A.R.W. Harrison, note 47, at 134 et seq.

be heard before the courts in a procedure known as *graphe paranomen*.¹⁷⁹ If no one brought a complaint the *psephisma* was considered to be valid, even if it manifestly conflicted with a *nomos*.¹⁸⁰ A *nomos* thought to be unconstitutional could be brought before the courts in a procedure known as the *graphe nome me epiteion theinai*,¹⁸¹ so that any prospective *nomos* often had to pass through three “chambers” of randomly selected citizens: the *ekklesia*, the *nomothetai* and the *dikasteria*.

Eventually it became common practice to instigate a *graphe paranomen* against a *psephisma* one opposed in the Assembly if it appeared likely that it would be passed.¹⁸² Thus, the courts took on an additional function as a body charged with judicial review, as they came to rule on virtually every matter brought before the Assembly. However, as with the *nomothetai*, a substantial overlap in jury and Assembly membership continued to exist and kept the court from being a true check on the Assembly. The function of the courts was not to limit the will of the people, but to allow them to reconsider proposals. This secured a far higher level of scrutiny during the decision-making process and thus greater continuity without sacrificing democratic ideology.

If a *nomos* was passed with which previously passed *psephismata* were in conflict, it is probable that those *psephismata* were automatically and retroactively repealed. In his speech *Against Leptines* Demosthenes argues against a new *nomos* abolishing the granting of *atelia* on the grounds that it would automatically strip all previous recipients of their status. This is corroborated by a recorded law regarding silver coinage which in part empowered certain officials to sort through all *psephismata* and delete those which were in conflict with the new law on silver coinage.¹⁸³

This practice led to a greater harmonisation of laws and therefore in one sense more legal security than had previously existed, and although the retroactive effects of a *nomos* on conflicting *psephismata* may have led to some insecurity as to what the law was, it must be borne in mind that *nomoi* were not passed very often, so that this would have been an infrequent occurrence.

¹⁷⁹ Ferguson, “Fall of the Athenian Empire”, note 46, at 374-375; Hansen, “*Nomos* and *Psephisma* in Fourth-Century Athens”, note 166, at 324.

¹⁸⁰ Hansen, “*Nomos* and *Psephisma* in Fourth-Century Athens”, note 166, at 325.

¹⁸¹ Hansen, “Did the Athenian Ecclesia Legislate?”, note 103, at 51.

¹⁸² Finley, “Athenian Demagogues”, note 4, at 170; Rhodes, “The Polis and the Alternatives”, note 8, at 574.

¹⁸³ Demosthenes, *Against Leptides*, 20.44 cited in Hansen, “*Nomos* and *Psephisma* in Fourth-Century Athens”, note 166, at 324 et seq.

2.3.2.3. Conflict Between Democracy and the Rule of Law in Athens?

The role of the Thirty Tyrants as a catalyst for the increased role of law in Athens can hardly be overstated and is comparable to the impact World War Two has had on international law. Their rule was a cataclysmic event in Athenian history which led directly to a profound restructuring of society to prevent such extreme events in the future.

It has been speculated that despite creating the *nomothetai* the Athenians were not entirely comfortable with their presence as it meant that voting on each law was not purely equal – rather this had been replaced by a sort of aggregate equality resting on the basis that as the *nomothetai* were selected by lot in large numbers, each citizen would have, over the course of his life, a more or less equal say on Athenian laws as a whole. In keeping with this, the *nomothetai* were rarely accorded a mention in ancient sources. In speeches the Athenians frequently chose their phrases in order to emphasise the object “*nomos*” and de-emphasise the existence of those who had passed it “the *nomothetai*”,¹⁸⁴ eg “this *nomos* was passed” or “it is the intent of the *nomos*” as opposed to “the *nomothetai* passed” or “it was the intent of the *nomothetai*”. To complete this politically correct thought pattern, laws which were clearly passed by contemporary *nomothetai* were attributed to Solon.¹⁸⁵

In the 4th century B.C. Athenian ideology taught that the true sovereign was not the *nomothetai* but the *nomoi*, which began to be frequently mentioned as necessary for the preservation of democracy, and democracy itself increasingly characterised by “the rule of law”.¹⁸⁶ Upon the restoration of democracy, the Athenians even passed a law, defining the concept of law. This law came to be viewed as fundamental to the restored democracy and was frequently quoted by orators.¹⁸⁷

The difficulty with the new-found role of law in Athens was not so much that law existed or that it held a prominent position in their society. This had always been the case – the *ekklesia* and *dikasteria* existed for the sole purpose of determining and interpreting the law, and man-made law had been strongly associated with democracy in opposition to other forms of government, from the very beginning of the democratic era.¹⁸⁸ Nor was it necessarily the existence of *nomothetai*, which, after all, were selected by lot and could only act upon the initiative of the *ekklesia*. The main difference was the idea that the will of the majority at any given time was itself no longer a sufficient reason to instantly overturn any measure. An increased role was given to a more prolonged hashing out of measures in multiple fora, which

¹⁸⁴ Hansen, “Initiative and Decision”, note 9, at 366 et seq.

¹⁸⁵ *Ibid.*, at 366.

¹⁸⁶ *Ibid.*, in particular footnote 71 which mentions several speeches from the period in which this occurred.

¹⁸⁷ Hansen, “Did the Athenian Ecclesia Legislate?”, note 103, at 28.

¹⁸⁸ *Supra* pp. 32 et seq.

achieved the sought-after objective of ensuring that fleeting support for oligarchy could never again be turned so easily into a successful coup. In addition, a greater clarity as to the content of the law – such as it was – was achieved through the separation of *nomoi* and *psephismata* and the keeping of written records concerning their content. Other than this very little changed. The individual could speak freely at the *ekklesia*, which continued to make virtually all decisions, he could participate just as frequently at the courts, the new mechanisms such as *graphe paranomen* were at his disposal to initiate, and his chances of being selected as one of the *nomothetai* were as good as anyone else's. The Athenians thus managed to correct the "flaws" which had led to temporary tyranny, while sacrificing only an infinitesimal fraction of their democratic ideology. Rule of law in Athens did not mean a displacement of the *demos*, but only a more responsible exercise of democracy.

2.3.3. Conclusions Concerning the Role of Law in Athens

Democracy in Athens was not coupled with a completely chaotic approach to law. The Athenians were not, on the whole, wild bohemians, but rather a group of quite traditionally-minded, conservative citizens. Law had an important place in the Athenian method of State organisation, but that place was perceived to be in facilitating democracy rather than limiting it. Even in its most stringent later forms, the rule of law in Athens was used to force a due consideration of measures, it never placed their debate or overthrow "out of bounds" as some modern constitutions do. While juries were exhorted to take existing laws into consideration, it was never implied that citizens owed an allegiance to a body of legal principles that should entirely supersede their own judgement. No one, after all, had the authority to develop guiding legal principles.

The emphasis on procedure over substance also played a key role in facilitating democracy and preventing societal frustration. One was rarely left without legal recourse due to technicalities or because the behaviour complained of was not regulated for. Dispute settlement occurred from the bottom-up, not the top down, according to pre-defined rules. As we have seen, once again, this was not because the Athenians lacked legal sophistication – it was because they made a genuine attempt to subordinate the rule of law to democracy.

A modern critic might argue that this practice subjected the average Athenian to a high degree of insecurity – he could be dragged to court at any moment. This is indisputably true, although certain safeguards curtailed the bringing of spurious cases.¹⁸⁹ However, one must also ask if the modern citizen who is subjected to adverse behaviour, say his government having accorded a multinational enterprise a licence to mine in the vicinity of ancestral lands,

¹⁸⁹ *Infra* pp. 69.

and who enjoys the protection of no specific law on which to base his claim, is really in a more secure position. The same could be said for criticism of the Athenian's lack of clarity as to their own laws: how many modern citizens are familiar with more than the rudiments of their national laws and entertain virtually no knowledge of international ones?

It is not the purpose of these questions to justify Athenian shortcomings by pointing out that they are equalled in our own society, but merely to deflect the argument that such shortcomings are particular to democracy and avoidable by using law to restrain instead of facilitate it.

2.4. The Individual (*ho boulemenos*) and Citizen in Athens

2.4.1. Citizenship

2.4.1.1. Restrictive Citizenship

Athenian citizenship was at all times restrictive and this has been one of the great criticisms of Athenian democracy. Not only were women, slaves and foreigners categorically excluded, other restrictions such as a requirement from 451/450 B.C. that both parents be Athenian for a man to be considered a citizen¹⁹⁰ were sometimes imposed. Although citizenship could be granted to individuals by the Assembly as long as at least 6000 citizens were present, and was on rare occasions granted *en masse* to whole tribes of allied peoples or slaves, usually in cases of national emergency,¹⁹¹ it rarely constituted true integration as provisions were often made for the new "Athenians" to keep their own laws and run their affairs to their own liking. They became not so much Athenians as people with equal citizenship rights to Athenians.¹⁹² Even this step was avoided as often as possible. It took Thrasybulus – the Athenian who had virtually single-handedly overthrown the Thirty Tyrants (and was therefore a living legend) and whose cause would have surely been lost but for the aid of non-citizens – two years to overcome opposition and carry through on his promises to have his allies made citizens or granted status as *isotelia* (having everything but political rights). In this case, the important service, namely the restoration of democracy and deliverance from tyrants had already been effected so that the Athenians initially resisted taking recourse to such emergency measures, offering money and ceremonial honours

¹⁹⁰ Ferguson, "Fall of the Athenian Empire", note 46, at 373; A.R.W. Harrison, note 47, at 23.

¹⁹¹ Raaflaub, note 16, at 154.

¹⁹² John Davies, "Athenian Citizenship: The Descent Group and the Alternatives" in *Athenian Democracy*, 18 at 21.

instead.¹⁹³ Their notable lack of enthusiasm in granting citizenship to the very people who had literally and indisputably risked their lives to liberate Athens highlights the extent to which Athenian citizenship was jealously guarded. Left to their own devices, the citizens of Athens were much more willing to part with money than extend their citizenship.

Of course, the vast majority of Athenians acquired their citizenship not by conferral, but by descent, and this too was rigorously examined. Inter-marriage between Athenians and non-Athenians had never been commonplace, but after the decree that only a man of citizen parentage on both sides could himself be a citizen, it became very rare indeed, part of the reason doubtless being that a “permanent union” between an Athenian and non-Athenian was punishable for the non-Athenian by being sold into slavery.¹⁹⁴ Citizens were obliged to have their male children acknowledged as legitimate Athenian citizens-in-waiting by their *phratry*. The father swore an oath before his *phratry* that the child was in fact his, but this oath could be challenged, in which case the *phratry* voted on whether the child qualified to be an Athenian citizen when he reached the appropriate age.¹⁹⁵ Even with these preliminary controls as to who was acknowledged as a citizen, there were occasional additional citizenship purges when windfall goods were being distributed or the *demes*¹⁹⁶ were accused of having admitted people to the citizenship in a corrupt manner.¹⁹⁷

2.4.1.2. Further Methods of Increasing Homogeneity: Ostracism and *Atimia*

We have already discussed the uses of ostracism in quelling ongoing dissent, but Athenians went even further in ensuring homogeneity, through the practice of *atimia*, ie the practice of preserving the protective rights extended to a citizen while stripping him of his participatory rights by declaring him to be *atimios*. In its original form *atimia* was a form of societal ex-communication and placed the citizen upon whom it was pronounced completely outside of the law. Any citizen could do to him as they pleased. Although this type of *atimia* remained possible, it was generally replaced during the democracy with a more “modern” version, according to which the *atimios* was not placed outside of the law, but only either temporarily or permanently lost his participatory rights in the democracy. *Atimia* of this type was commonly pronounced upon debtors to the State, those who were repeatedly found guilty of the same type of crime, as well as upon “notorious evil livers”, a term including those who squandered their inheritance, maltreated their parents, failed in their military duties or

¹⁹³ J. Davies, note 192, at 35; the motion to grant citizenship was originally passed by the Assembly, but later rejected by the courts in a *graphe paranomen* on technical grounds, after which it became the subject of constant haggling, Ostwald, *Sovereignty*, note 3, at 504-508.

¹⁹⁴ A.R.W. Harrison, note 47, at 169; J. Davies, note 192, at 25 et seq.

¹⁹⁵ J. Davies, note 192, at 23 et seq.

¹⁹⁶ Smaller administrative units akin to townships.

¹⁹⁷ J. Davies, note 192, at 26 et seq.

committed homosexual crimes.¹⁹⁸ Financially-induced *atimia* was inherited with the debt for which it had been incurred.¹⁹⁹

Together with ostracism *atimia* offered a convenient tool for eliminating anyone who was creating a problem from the *demos*.

2.4.1.3. The Position of The Non-Citizen

The position of the non-citizen in Athens was not an enviable one. He (or she) was completely shut out from the democratic process and had few avenues to be heard or complain. With few exceptions only citizens could own land or houses in Attica, inherit property from Athenians, purchase a lease on a silver mine, receive distributions of money or grain from the State or participate in tribal feasts. Only citizens could take part in political life, including voting in court, or even pleading in court (the non-citizen was required to plead before the special court of the *archon polemarch*), holding office or holding a public priesthood.²⁰⁰ Metics were obliged to have an Athenian patron and could be sued if they did not.²⁰¹ Even those metics who were obliged to perform military service were generally excluded from property-owning and politics.²⁰²

Discriminating and exclusive as such treatment was, it was not unusual for the time, and metics and slaves had been marginalised to an even greater extent prior to democracy, causing the Old Oligarch to complain that under the democracy, slaves and metics “can no longer be distinguished from Athenians in appearance or attire and even have the nerve to talk back to free citizens”.²⁰³

The exclusion of non-citizens from owning substantial property in Athens was also an important component of democracy, leading as it did to a virtual identity between citizens and the owners of Athens’ collective assets. As citizens, property-owners could not “opt out” of Assembly decrees – they were also less likely to move away in the interests of avoiding inconvenient laws or decrees.

¹⁹⁸ A.R.W. Harrison, note 47, at 171-175

¹⁹⁹ *Ibid.*, at 175

²⁰⁰ J. Davies, note 192, at 20.

²⁰¹ A.R.W. Harrison, note 47, at 11.

²⁰² J. Davies, note 192, at 32.

²⁰³ Pseudo-Xenophon, *Constitution of the Athenians*, 1.10-12; another translation complains that slaves and metics in Athens lead “a most undisciplined life...one is not permitted to strike them, and a slave will not stand out of the way for you.” Furthermore, “so far as clothing and general appearance are concerned, the common people here are no better than the slaves and metics...they allow their slaves to live in the lap of luxury”, Pseudo-Xenophon, *Constitution of the Athenians*, (2nd Edition, London Association of Classical Teachers, 2004) at 1.10-11.

2.4.1.4. Intermediary Conclusions Regarding Citizenship

The aforementioned measures resulted in a homogenous citizenship and the Athenians were wary of allowing anyone with interests that could diverge fundamentally from their own in on the game. As any citizen had a very real ability to affect Athenian society, it was vital that that person have been pre-moulded into the Athenian value-system. Due to the near complete exclusion of metics, no one could be a citizen of Athens part-time, thus a significant source of conflicting interests was cut off. Beyond their common heritage and gender, Athenian citizens further forged themselves together by excluding anyone who behaved in ways detrimental to the collective interest. The ramifications of this point for modern democracies should not be overlooked. A fundamental and unalterable difference between modern Western societies and Athenian society is that modern societies are by comparison very heterogeneous.

2.4.2. The Role of the Citizen in the Democratic *Polis*

2.4.2.1. The Ideology of Participation

As the initiator of each and every public action, the individual (*ho boulemenos*) was central, and publicly regarded as being central, to the proper functioning of Athens.²⁰⁴ Any citizen could submit a proposal to the Council of Five Hundred to be placed on the Assembly's agenda²⁰⁵ and citizens constantly took part in assemblies, law courts and various offices, to the extent that,

the sheer volume of their activity has amazed later scholars, who found it incredible that citizens of little means would travel great distances and spend considerable time away from their own concerns to deal with public matters²⁰⁶

The high level of participation is even more "amazing" when one considers that there was always a certain risk in becoming active in the Athenian political and legal system as it was possible to be punished if suggestions or legal actions were later deemed to have been incorrect by the Assembly or jurors. Post-Thirty Tyrants, the losing party of a *graphe*

²⁰⁴ Philip Manville, "Ancient Greek Democracy and the Modern Knowledge-Based Organization: Reflections on the Ideology of Two Revolutions" in *Demokratia*, 377 at 380 et seq; Hansen, "Initiative and Decision", note 9, at 360.

²⁰⁵ Walker, note 22, at 108.

²⁰⁶ Wolin, "Transgression, Equality and Voice", note 7, at 68.

paranomen or *graphe nome me epiteion theinai* could be heavily fined or sentenced to death, even if the measure he had proposed had been unanimously passed by the *ekklesia* or *nomothetai*.²⁰⁷ Similar risks were attendant upon the initiator of a court case. If a prosecutor withdrew from a case he had started or failed to obtain at least one-fifth of the jurors' votes, he was deemed to have brought a spurious suit and was punished by a fine of 1000 drachmae (a sum four times the annual wage of an unskilled labourer) and either *atimia*, or a form of partial *atimia* which prevented him from acting as a prosecutor again while retaining his other participatory rights.²⁰⁸

The great level of participation despite personal risk can perhaps be explained by the Athenian understanding of democracy which saw the individual not so much as having a right to participate in democracy as a duty to do so.²⁰⁹ According to Thucydides, Pericles once held a speech stating, "we...consider the man who takes no part in public life not as one minding his own business, but rather a good for nothing".²¹⁰ The Athenians correctly realised that their democracy depended on a high level of direct individual participation and initiative and took measures to officially encourage it.

2.4.2.2. The Day-to-Day Participation of the Individual

The amount of time the average citizen spent participating in the democracy can only be roughly calculated. The quorum of 6000 for certain measures suggests that at times Assembly attendance may have been less than that. We know from Aristophanes' comedies that, especially after Assembly pay was introduced, those wishing to attend the Assembly sometimes exceeded the maximum possible attendance and that latecomers were turned away.²¹¹ Conversely, at times when Assembly attendance was lax, slaves would be sent into the agora with a red-dyed rope to herd the citizens to the Assembly area on the Pnyx Hill. A citizen who got red dye on his clothing (from being too slow) was obliged to pay a fine.²¹² Assembly attendance thus probably fluctuated from a little below 5000 to 6000.

It is estimated that there were 150 000 to 170 000 Athenian men, women and children in Athens during the democratic period.²¹³ Taking the higher estimate, this would mean approximately 85 000 males and 85 000 females, accounting for minors, the insane and those

²⁰⁷ Hansen, "Initiative and Decision", note 9, at 362 et seq.

²⁰⁸ Hansen, "Initiative and Decision", note 9, at 362; A.R.W. Harrison, note 47, at 83, 175-176, 179 – there is some disagreement among experts as to whether full or only partial *atimia* was meted out.

²⁰⁹ Wallace, note 156, at 116.

²¹⁰ quoted in Manville, note 204, at 380 et seq.; alternative translations read "as someone who has no business here at all".

²¹¹ Markle, note 16, at 106.

²¹² Staveley, note 12, at 80.

²¹³ Tod, note 79, at 11.

subject to *atimia*, perhaps 45 000 full citizens in all,²¹⁴ of which some would have lived in the countryside and rarely attended the Assembly in Athens. Because Athens consisted not only of the city but also the area of Attica and in the fifth-century the entire Delian League comprising approximately one thousand square miles of territory,²¹⁵ many citizens were factually unable to attend the *ekklesia* or courts or function as office-holders to the same degree as others who lived in Athens itself. The opportunities for daily participation were thus inherently unequal, however, technologically impossible to overcome.

The rate of participation as estimated here shall be based upon the total number of citizens and not only those living in Athens itself. If out of 45 000 citizens only 5000 attended the Assembly, this means an actual average participation rate of about 1/9 at every Assembly meeting. If one takes the lower estimate of 150 000 Athenians, which translates into approximately 70 000 males and perhaps 35 000 citizens, the regular participation rate at the Assembly would be 1/7 each time it met.

The Athenian courts sat approximately 300 days a year²¹⁶ and it is estimated that the average juror would have had to serve one day in seven to make up the numbers.²¹⁷ According to Aristotle, if one were to factor in jury duty, public office and part-time administrative posts, there were approximately 11 000 peace-time government positions in Athens,²¹⁸ which had to be filled by, at most, 45 000 citizens. The *boule* alone required that ¼ of all citizens serve on it at some point in their lives.²¹⁹

Thus, taking the low figure of an average Assembly attendance of 5000 between 11 and 14% of the Athenian citizen population attended each Assembly, forty of which were held per year. If Aristotle's estimate is correct, at least ¼ of the Athenian citizen population was active in public service every day, excluding Assembly attendance.

2.4.2.3. Pay for Participation

The participation of all income classes in the various democratic fora was encouraged not only by ideology but also by financial compensation. Democracy in Athens depended on some degree of compensation for most forms of public service, because non-payment meant that only the rich could afford to participate on a regular basis,²²⁰ and such a situation would have been contradictory to the very premise of democracy.

²¹⁴ cf. Rhodes, "The Polis and the Alternatives", note 8, at 566.

²¹⁵ P.J. Rhodes, "General Introduction" in *Athenian Democracy*, 1 at 1.

²¹⁶ Staveley, note 12, at 95.

²¹⁷ *Ibid.*, at 96.

²¹⁸ Raaflaub, note 16, at 154.

²¹⁹ *Supra* pp. 12.

²²⁰ Aristotle, *Politics*, note 7, at 259.

2.4.2.3.1. Assembly Pay

Assembly pay was introduced in 403 B.C. at 3 obols or half a drachma per day²²¹ a sum equivalent to the pay received by a soldier in the second half of the fifth century B.C.²²² and about half what a carpenter or mason could expect to earn for a day's labour.²²³ It is estimated that the cost of feeding a family of four during this period was approximately 2 ½ obols per day,²²⁴ so that attending Assembly once or twice a month would have presented no financial difficulty even to a semi-skilled labourer with three dependents to provide for. This state of affairs was indeed reflected in Assembly attendance, which according to Socrates was predominated by fullers, shoe-makers, carpenters, blacksmiths, farmers, merchants and traders,²²⁵ in other words, those whom the ancient philosophers considered to be "the poor".²²⁶ Later, Assembly pay was increased between the 390's and 320's to one drachma for regular assemblies and 1 ½ drachma for a *kyria ekklesia*,²²⁷ however, due to considerable inflation this did not represent a significant real increase in Assembly pay.²²⁸ The fact that one received more for attending a *kyria ekklesia* indicates that on other Assembly days the meeting did not span the entire day and a citizen might manage a few hours of gainful employment. If this is true, than attending Assembly would have entailed an even less significant financial sacrifice.

2.4.2.3.2. Pay for the Council of Five Hundred

From 411 B.C. onwards, members of the *boule* received five obols per day (slightly less than one drachma).²²⁹

2.4.2.3.3. Jury Pay

Compensation for jury duty was introduced at the rate of first two and then, from the 420's onward, 3 obols a day. Significantly, jury pay was introduced with the express purpose of preventing jury duty from being monopolised by those who could afford significant time away from their own affairs to attend.²³⁰ According to Aristotle, Pericles invented jury pay in

²²¹ Markle, note 16, at 106.

²²² *Ibid.* at 107 et seq.

²²³ *Infra* pp. 59.

²²⁴ Markle, note 16, at 110 et seq.

²²⁵ Xen. Mem. 3.7.6, quoted in Markle, note 16, at 111.

²²⁶ Markle, note 16, at 106; *infra* pp. 60 et seq.

²²⁷ Markle, note 16, at 95.

²²⁸ *cf.*, *ibid.*, at 95 et seq.

²²⁹ Staveley, note 12, at 53.

²³⁰ Tod, note 79, at 30; Walker, note 22, at 110; Markle, note 16, at 95; Rhodes, "The Polis and the Alternatives", note 18, at 566.

order to counter the wealthy citizen Cimon, who had made a habit of lavishing his money upon the less affluent in an attempt to gain their support. He then refers to Pericles' actions as "bribing the people with their own money".²³¹

Because pay for jury duty was not raised again, it quickly became a less adequate compensation during the inflation of the 4th century B.C., during which the average unskilled labourer earned approximately 1 ½ drachma a day, or three times the amount paid for jury duty. There is therefore reason to believe that during this time regular jury duty became less popular with the working class and increasingly taken over by what was seen as the middle class.²³² However, it should not be overlooked that although compensation at this time was not necessarily very appealing, it allowed a labourer to spend a day at the courts while earning a third of his daily wage, and that therefore he could still afford to serve as a juror more often than he would have been had no compensation been offered.

The lack of increase in jury pay can be directly attributed not to a loss of political will, but to the fact that by the 4th century B.C. Athens had lost its Empire, an important source of revenue, and thus already encountered difficulty in maintaining pay for public service at the current level. Of all costs, jury duty – owing to the large number of citizens participating – was the most expensive for the state to maintain. At times court sittings had to be postponed due to lack of funds to pay the jurors.²³³ The Athenians did not embrace the logical conclusion that their financial straits could have been mitigated simply by using fewer jurors. Instead they decided on a tax hike.²³⁴ Economic difficulty was preferable to compromising democracy.

2.4.2.3.4. Pay for *Archai*

Archai were also financially compensated for exercising their office, usually receiving half a drachma or one drachma a day.²³⁵ Public arbitrators, for example, received one drachma from each litigant per day.²³⁶ Since most occupations could provide a greater income, there was little to be gained in the way of either power or money from holding office. However, at the same time, one did not have to be financially independent to do so.

²³¹ Humphreys, note 104, at 235; A.R.W. Harrison, note 47, at 49.

²³² A.R.W. Harrison, note 47, at 49.

²³³ *Ibid.*

²³⁴ Mosse, note 173, at 253.

²³⁵ Tod, note 79, at 24; Walker, note 22, at 103 and 105; Mosse, note 173, at 252.

²³⁶ A.R.W. Harrison, note 47, at 67.

2.4.2.3.5. The Importance of Pay for Participation in the Athenian Democracy

While offering a degree of compensation that would have allowed many tradespeople to attend the assembly and courts more regularly than they otherwise would have, the amount of compensation was not high enough to encourage most able-bodied people to attend these institutions solely for financial gain, as they could earn more in virtually any other occupation.²³⁷

There is considerable evidence for the effectivity of jury and assembly pay in enabling tradespeople and labourers more leisure to attend. The oligarchies of the 400 and the 5000 positively and explicitly outlawed compensation,²³⁸ and jury and assembly pay were frequently lamented by democracy's critics. Although they may have been prone to exaggerate its effectiveness, they must have viewed compensation as contributory to the democracy, as they repeatedly singled it out for complaint and criticism. Isocrates mourned the past when "those who had leisure and sufficient property were in charge of public affairs" indicating that pay for public service had rendered this no longer the case, and in his description of complete democracy, Aristotle writes:

all citizens take part in this sort of government because of the predominance of the masses, and they participate and exercise their citizen rights because even the poor (*tous aporous*) are able to have leisure by receiving pay (*misthos*)²³⁹

Aristotle further states:

Also the power of the Council is weakened in democracies of the sort in which the people in assembly deals with everything itself; this usually happens when there is a plentiful supply of pay for those attending the assembly, for having leisure they meet often and themselves make all decisions²⁴⁰

The effects that pay can have on participation do not represent a historical anomaly limited to Athens. Virtually everything that occurred in Athens has been repeated in modern society with the same results, although usually in the opposite direction. For example, in the

²³⁷ Markle, note 16, at 95 et seq. and 102; A.R.W. Harrison, note 47, at 49.

²³⁸ Markle, note 16, at 102.

²³⁹ Pol. 1293a3-7, both quoted in Markle, note 16, at 102 and 103 respectively.

²⁴⁰ Aristotle, Politics, 1299b, quoted in Markle, note 16, at 104.

UK in the 1800s, the public opposed the idea of paying elected MPs. “The result was that only the wealthy or the well-patronised could afford to be MPs”. Some MPs were forced to withdraw from politics, due to the necessity of making a living with even *The Economist* complaining of this leading to politics being limited to a very narrow class of people.²⁴¹ The lack of pay for MPs was one of the prime reasons that the Radical and Socialist parties were not able to get representation in Parliament during this period.²⁴²

We should not overlook that even in Athens pay for participation did not completely equalise participatory opportunities. The Old Oligarch stated: “all those offices, which involve the receipt of money and benefit for one’s household, these the common people seek to hold”,²⁴³ while portraying the “common people” as having an ambivalent attitude towards procuring the presumably unpaid elected offices, which were, in addition, fraught with increased responsibilities and dangers.²⁴⁴ Unpaid participation as *rhetor* or public prosecutor or in an elected office was rarely taken up by the less affluent, remaining for the most part the preserve of landowners and new “industrialists” whose wealth granted them sufficient leisure to engage in such activities.²⁴⁵ This was rendered less problematic by two basic facts concerning Athens’ structure: that *rhetors* and public prosecutors did not have any power to make decisions themselves, thus wealth could only be indirectly translated into political power; and that the most influential “positions” in Athens were not, as in modern society, highly paid, so that while this made them unattractive to those of more moderate income, it at least prevented the wealthy from becoming more wealthy by exercising them. A *strategos*, for example, could be punished by fines and exile for failure on the battlefield²⁴⁶ and was therefore more likely to end up poorer than richer as a result of his service. The same held true for the other elected positions.

We must briefly contrast this to the situation today in which the more influential positions are also the most generously compensated, and where much public activity is not compensated at all. We can only imagine the effect that being paid 40 Euros would have on voter turn-out or attendance of town council meetings.

2.5. Political Equality in Athens

We have already seen how pay for participation enabled many Athenians to involve themselves in the democracy to a greater extent than would otherwise have been possible. The

²⁴¹ Martin Linton, *Money and Votes*, (Institute for Public Policy Research, 1994) at 9 et seq.

²⁴² *Ibid.* at 10.

²⁴³ Pseudo-Xenophon, note 203, at 1.3.

²⁴⁴ Ostwald, *Sovereignty*, note 3, at 82.

²⁴⁵ *cf. ibid.*, at 202 et seq.

²⁴⁶ Walker, note 22, at 109.

idea of equal access and equal participation in Athens, however, went far beyond financial compensation.

2.5.1. The Lottery Method

As has already been mentioned, the Athenians selected all jurors as well as the vast majority of their officials by lot. In addition, while some priesthoods were hereditary, the priests of cults established during the democratic era were also selected by lot.²⁴⁷ Although selection by sortition may conjure up ideas of drawing names out of a hat, sortition was in fact a highly sophisticated process which the Athenians must have expended much labour in developing.

Sortition usually occurred with the aid of a *cleroterion* or allotment machine which was certainly in use by 370 B.C. and probably much earlier. The allotment machine resembled an ancient “lotto-machine” that released coloured balls – so-called *kyboi* – and was employed in most lottery selections.

2.5.1.1. Lottery Process for Jurors

Athenians carried identity tickets – known as *pinakia* – which bore two or three seals and had their name, their tribe and the section of jurors they belonged to inscribed on it.²⁴⁸ Upon arriving at the courts each juror threw his ticket into one of ten baskets placed at his tribe’s entrance, according to the letter of his jurors’ section (each basket was lettered accordingly). The baskets were then shaken to ensure that the last tickets thrown in were not uppermost.²⁴⁹ These tickets were placed in the *cleroterion* via a random draw made by ten persons selected by the presiding archon by randomly drawing one ticket each from each tribe’s basket pertaining to the first jury section. These ticket inserters were thus automatically admitted to jury duty that day.²⁵⁰

The tickets were placed into the allotment machines by inserting each one into a groove on its face.²⁵¹ Two allotment machines were simultaneously used for each jurors’ section with five vertical columns each. The ticket-inserter for tribe A would insert all the tickets he drew randomly into the first column, top to bottom, while the ticket-inserter from tribe B would insert the tickets of tribe B into the second column, etc.²⁵² The *kyboi* were then

²⁴⁷ Ostwald, *Sovereignty*, note 3, at 139.

²⁴⁸ Dow, note 51, at 73; A.R.W. Harrison, note 47, at 44.

²⁴⁹ Dow, note 51, at 88.

²⁵⁰ Staveley, note 12, at 63 et seq.; Dow, note 51, at 88 and 89.

²⁵¹ Staveley, note 12, at 63 et seq.

²⁵² Dow, note 51, at 89.

shaken up and poured through a funnel into the machine by the presiding archon.²⁵³ The first coloured ball delivered a positive (white) or negative (black) answer regarding all those whose tickets were in the first (highest) row of the allotment machines on whether they were selected for jury service that day.

Since through coincidence some tribes would have more members presenting themselves for jury duty on a particular day than others, some columns would be filled with more tickets than others. The number of white balls to be inserted in the machine was calculated based on the number of full rows.²⁵⁴ This ensured that an even number of members from each tribe participated in each jurors' section on any given day.²⁵⁵ Therefore, anyone whose ticket was "below" the line of full rows in the allotment machine was automatically rejected.

Once those who would serve on the juries were selected, a second lottery in which each section was randomly assigned to a court was conducted, though being simpler, the *cleroterion* was not used for this second sortition.²⁵⁶

2.5.1.2. Lottery Process for *Archai*

The *cleroterion* was also used for the selection of office-holders. Different lottery machines were used for the various sortitions, depending on how big the pool was from which the selection would be made and how many people were required to fill the posts. If drawing from a small pool, the fate of each individual could be decided individually (single column, one *pinakia* in each row), if drawing from a large pool for many positions, the fate of five or six people would be decided at one time (five or six tickets per row).²⁵⁷

Sometimes to assign certain duties to specific officials within a panel of *archai* the Athenians used a process called *synclerosis* or simultaneous sortition which required two allotment machines. The tickets in one machine represented the officials of the panel, the tickets in the other machine represented the specific duties to be assigned. Each machine contained only one white ball and however many black ones were necessary to make up the difference. The balls were released simultaneously and the official who got a white ball for his ticket received the set of duties that had also received a white ball. The tickets representing him and his duties were then withdrawn, the tickets were randomly placed in the machine again and the process was repeated.²⁵⁸

²⁵³ Dow, note 51, at 89; Staveley, note 12, at 63 et seq.

²⁵⁴ Dow, note 51, at 90 et seq.

²⁵⁵ A.R.W. Harrison, note 47, at 45.

²⁵⁶ Staveley, note 12, at 63 et seq.; Dow, note 51, at 66 et seq.

²⁵⁷ Staveley, note 12, at 63 et seq.; Dow, note 51, at 66 et seq.

²⁵⁸ Staveley, note 12, at 68 et seq.

2.5.2. Reasons for the Lottery

It has been suggested that the Athenians' intense belief in fate may have made the selection of officials by lot more palatable than to the average person today.²⁵⁹ However this may or may not be, the practical reasons for sortition were many and its legal-philosophical basis well analysed by the Greeks themselves.

The Athenians chose the lottery method as opposed to elections, because in their opinion, elections were more easily won by the rich, powerful, popular and eloquent. They also entailed the danger that candidates would garner votes through corruption. Elections were thus not democratic, but in fact oligarchic – or at best aristocratic – and therefore to be avoided to the greatest extent possible.²⁶⁰ Even Aristotle, at one point, writing about the situation previous to the existence of democracy in Athens in which magistrates had been elected and called to account by the three higher classes of citizen, describes it as giving “the people only the necessary minimum of power” to remain free citizens and not be classified as slaves.²⁶¹

Only a random lottery could ensure a truly egalitarian selection of officials and thus be consistent with people power. The theory behind this choice was recorded by Aristotle:

since it is not possible for all to hold office at once, they do so either on an annual basis or on the basis of some other kind of term... The better course would be to always have the same persons [i.e. seasoned professionals] as rulers, if possible; but where that is impossible because all are equal in nature, and where it is regarded as right that... all should have a share in ruling... those who are equal yield their office to one another in turn, and retain their equality even outside their term of office: some rule and others are ruled as if having changed their personality²⁶²

Participation in government as an official or in the democratic fora was therefore considered by the Athenians to be not so much a “right” as a self-understood corollary of equality between citizens.²⁶³

²⁵⁹ *Ibid.*, at 56.

²⁶⁰ Cartledge, note 28, at 179; C. Nicolet, *The World of the Citizen in Republican Rome* (Batsford Academic and Educational, 1980) at 209.

²⁶¹ Aristotle, *Politics*, note 7, at 200; the previous system had somewhat resembled a representative “democracy”.

²⁶² Aristotle, *Politics* III.6, quoted in Martin Ostwald, “Shares and Rights: “Citizenship” Greek Style and American Style” in *Demokratia*, 49 at 55.

²⁶³ Ostwald, “Shares and Rights”, note 262, at 53; Cartledge, note 28, at 179.

All citizens were regarded as being equally capable of filling the majority of official positions. In Athens all public duty was the result of being a citizen and no one was capable of being a better citizen than anyone else. This system could function because the *archai* were not delegated any significant decision-making power, so that, as previously mentioned, the scope for incompetence was slight. The ultimate duty of any official, even those who were elected, was only to carry out the will of the people.

2.5.3. Elected Office

The Athenian democrats were conscious that vis-à-vis office-holding equality had occasionally to be qualified by the “objective” requirements of the office in question.²⁶⁴ This *Durchbruch* of the lottery principle manifested itself in the election of the generals (*strategoï*), as well as the officers under them,²⁶⁵ the treasurers,²⁶⁶ a small number of civil magistrates who served four-year terms, as well as certain “special positions”, namely embassies to foreign states, *syngraphies* (boards which suggested revisions to the Constitution) and *teichopoioi* (commissioners to build up the city’s defences in times of crisis).²⁶⁷ The election of the *strategoï* was an implicit admission that some were better generals than others and while different capabilities were not as important as the equality principle in other offices, in the case of the *strategoï* they could not be ignored, as competence on matters of warfare was absolutely necessary to the survival and welfare of all Athenian citizens and residents.²⁶⁸

The treasurers were elected because it was perceived that elections favoured the rich, and this circumstance was exceptionally considered convenient, because the workload of a treasurer was so high that he needed to be sufficiently wealthy as to not have to exercise other employment to maintain his income.²⁶⁹ The reasons for electing other officials are slightly more obscure, but probably stemmed from a need for expertise – for example, knowledge of foreign cultures and languages would be useful on an embassy – and the *teichopoioi* were probably elected for the same reasons as the generals.

The Athenians apparently did very little in the way of campaigning to be elected. Plutarch cites the general Phocion who was elected general forty-five times although he never campaigned, was of a very serious disposition, not inclined to pander to the Assembly and

²⁶⁴ Wolin, “Transgression, Equality and Voice”, note 7, at 63.

²⁶⁵ Rhodes, “The Polis and the Alternatives”, note 8, at 566; the elected officers under the generals were the *taxiarchs* and *phylarchs* who commanded cavalry and hoplite battalions respectively and two *hipparchs* who had joint cavalry command under the generals, Staveley, note 12, at 47.

²⁶⁶ Rhodes, “The Polis and the Alternatives”, note 8, at 569.

²⁶⁷ Staveley, note 12, at 47.

²⁶⁸ Cartledge, note 28, at 180.

²⁶⁹ *Ibid.*

sometimes was not even present when voted in. At election time, the Athenians apparently preferred qualification (the sole reason they were voting in the first place instead of using the lot) instead of personality.²⁷⁰

Some candidates, not so unworldly as Phocion, would make their way from one citizen to another immediately prior to an election advertising themselves, but they were expected to make a case for their skills. It should be noted that the candidate personally spoke to his fellow citizens – there were no organisations in place to canvass on his behalf.²⁷¹ The direct role of wealth in successful election was therefore minimal. Nonetheless, as noted above, it was unusual for anyone without at least some personal fortune to seek the elected, unpaid offices.

In sum, elections were low-key and only implemented where absolutely necessary.

2.5.4. Wealth Disparity and Political Equality

2.5.4.1. Patronage

Wealthy citizens had more options than poor ones to increase their own social standing, such as making loans to citizens in need,²⁷² paying their property tax on time (only the wealthy were subject to this tax), making generous voluntary contributions in cases where a special appeal to the citizens was made, making private payments for public buildings, or winning a victory at the Olympics, especially in the most expensive competition, the chariot race,²⁷³ and they often attempted to translate such behaviour into political clout, by mentioning such activity as evidence of uprightness or public-mindedness before the *dikasteria*.²⁷⁴

In the court case *Defence Against a Bribery Charge* the defendant exhorts the jury to vote for him, because as a wealthy citizen his generosity has benefitted the less-affluent jurors in the past and “one ought to pray that the benefitted should give their vote to their benefactors”.²⁷⁵ The line of argument so attempted would have been immediately recognisable to any citizen of the Roman Republic as a form of client-patron relationship in which in return for material advantages the benefitted give their benefactor their vote in political matters. Although this indicates that the Athenians were not immune to this line of thinking, it is noteworthy that in Athens such thoughts had to be expressly articulated (and

²⁷⁰ Staveley, note 12, at 101 et seq.

²⁷¹ *Ibid.*, at 108.

²⁷² Rhodes, “Political Activity in Classical Athens”, note 71, at 194.

²⁷³ *Ibid.*, though in his view this last was the least significant way in which one could increase one’s status.

²⁷⁴ *Ibid.*

²⁷⁵ Lysias 32, quoted in Markle, note 16, at 117.

remained of dubious effect), whereas in Rome such behaviour on behalf of one's clients would be taken for granted.²⁷⁶

One should also bear in mind that although portraying oneself as a generous benefactor may have gained certain advantages, Athenians also often employed the tactic of portraying themselves as poor citizens of meagre means deserving the jurors' pity (and therefore their vote). A litigant was quite capable of alternating between these two tactics to suit the occasion. A reputation for generosity with wealth was thus always a point that an affluent Athenian could fall back on in the courts or Assembly but it was likely to amount to little more than one more tool in the average Athenian's bag of oratorical tricks.

2.5.4.2. Wealth and Equality before the Law

Once admitted to the citizen body formal political status was extremely egalitarian, although wealth disparities continued to exist and formed the basis of dividing citizens into four economic classes based on their ability to contribute to warfare.

Within five years of establishing democracy, the office of archon, which had previously been reserved for the two highest classes (the *pentacosimedimni* and *hippeis*), was also opened to the third class (the *zeugitae*) who usually served as hoplites. Although the position officially remained closed to the lowest class (the *thetes*) who owned no substantial property, this barrier was rarely enforced.²⁷⁷

Court access was also not subject to formal economic barriers. In certain cases, usually those where the plaintiff sued purely in his own interest, both plaintiff and defendant were obliged to pay a small fee which was used to offset the costs of the jurors. In cases worth less than 100 drachmae, no fee was due, in cases worth more than 100 drachmae but less than 1000 drachmae, the fee was 3 drachmae from each litigant. In cases worth more than 1000 drachmae, the fee was 30 drachmae from each litigant. The losing party was obliged to reimburse the fee paid by the winner.²⁷⁸ As these fees were fairly small, they would not have imposed a serious impediment to litigants or restricted the access of the less affluent to the courts.

Wealth did lead to some advantages detrimental to substantive equality, not intended by the democratic system, but also not entirely counteracted by it. As we have seen the *hetaireiai* and those wealthy enough to illegally hire speech writers and accomplished orators still tilted the playing field of the *dikasteria* slightly in favour of the wealthy.

²⁷⁶ *Infra* pp. 113.

²⁷⁷ Walker, note 22, at 101; Mosse, note 173, at 250 et seq.

²⁷⁸ A.R.W. Harrison, note 47, at 93.

2.5.4.3. Upward Mobility

Just as majorities were fluid in Athens, one's social position vis-à-vis political participation was also relatively fluid. Initially, many important political leaders, such as Pericles, were descended from wealthy, formerly aristocratic families, but this quickly changed and leaders from more humble backgrounds emerged.²⁷⁹ Such leaders, however, had humble origins only. Virtually every prominent *rhetor* and general throughout the democracy was relatively affluent, if not at the time of their birth, than certainly by the time they achieved prominence in the democratic system.²⁸⁰

If a citizen stemmed from a "poor" family and hoped to further a political career it was essential that he acquire good oratory skills, a general knowledge of government (such as it was) acquired by having held some appointment by lot, and have a good military record.²⁸¹ The achievement of a good military record may have been the most difficult given that a citizen's function in the army was based on his ability to provide his own equipment, a circumstance which consigned the *thetes* to the status of rowers of the fleet, a task which afforded little scope for personal distinction.²⁸²

A citizen with inherited wealth generally managed to launch a political career much earlier in life than a man from a humble background – the wealthy were usually politically active and well-known by their twenties or early thirties, while those from "poor" backgrounds were rarely able to achieve anything of note before their mid-forties.²⁸³ While far from fair, the democratic system permitted citizens of skill and determination to rise to "the top" within their own lifetime.

2.5.4.4. Conclusions on Wealth and Political Equality

Wealth tended to be an enabling factor for activity as an elected official or frequent *rhetor*. It was no factor at all for voting in the Assembly or courts, occasionally voicing one's opinion in Assembly, or working as any non-elected official, including as archon or councillor or as one of the *nomothetai*. Thus, it could and did happen that wealthy *rhetors* were voted against in an Assembly full of *zeugitae* and *thetes* and pursuing their case in court had their will frustrated by those of the same income classes again. It was also routine for a *thetes* official to fine a *pentacosiodinmi* for any violation of the law. Wealth certainly had

²⁷⁹ cf. Rhodes, "Political Activity in Classical Athens", note 71.

²⁸⁰ Rhodes, "The Polis and the Alternatives", note 8, at 573 et seq.

²⁸¹ Rhodes, "Political Activity in Classical Athens", note 71, at 203 et seq.

²⁸² cf. Ostwald, *Sovereignty*, note 3, at 230.

²⁸³ Rhodes, "Political Activity in Classical Athens", note 71, at 205 et seq.

an effect on the level of democratic participation one could afford to engage in, but not an overwhelming one which deprived others of their decision-making power.

2.6. Economic Equality

2.6.1. Distribution of Wealth

In the world of the Greek cities...since, to repeat an expression of Herodotus, power lies at the centre, not above the community, this knowledge of the law assumes a certain equality among its members. This equality before the law, this *isonomia*, has specific implications; that dependent relations among members of the community should be suppressed. This was the work of Solon. After him, there are no longer in Athens, at the heart of the community, people who are dependent on others, even if there persist what we should call in modern terms social inequalities²⁸⁴

Economic equality in Athens was thus explicitly linked to equality before the law. One could not speak of true legal equality, so necessary for democracy, when some members of the community were dependent upon others.

While far from Marxist, the Athenians went to some lengths to alleviate a disparity of income and redistribute wealth.

Not all public revenue was provided by the wealthy – the average Athenian would be confronted at some point by small import and export duties (ranging from one to five percent), market dues and a tax on all sales conducted before state officials – but most of it was. The *eisphoria*, a capital levy imposed in times of need, was exacted only from those whose property exceeded 2500 drachmae,²⁸⁵ and the majority of substantial public expenses (gymnastic and musical equipment, banquets, the equipage of military vessels, financing a chorus at the festivals, or a relay team for the torch races) were borne exclusively by wealthy citizens.²⁸⁶

At the same time, cultural activities were subsidised in that the “poor” were usually allotted five drachmae a year from the Theoric Fund (Athens’ treasury fund for surplus revenue) to allow them to take time off and pay admission to the theatre for the festivals of

²⁸⁴ Mosse, note 173, at 258.

²⁸⁵ Markle, note 16, at 121 et seq.

²⁸⁶ Tod, note 79, at 28 et seq; Rhodes, “Political Activity in Classical Athens”, note 71, at 192 et seq.

Dionysia and Panathenaea,²⁸⁷ and disabled citizens who possessed little property were given two obols a day from the State, an amount more than sufficient to purchase adequate food.²⁸⁸ Around 403/402 B.C., the Assembly passed a decree providing one obol per day to the orphans whose parents had died fighting for the democracy, obtaining funds for this by simultaneously reducing the pay for cavalry soldiers (who would have been among Athens' richer citizens).²⁸⁹ The Athenians further assisted wealth redistribution by confiscating private wealth in the law courts, allegedly often on trumped-up charges during *euthunai*, and distributing it among "the people".²⁹⁰ Here the Athenians suffered the opposite problem to Rome where public wealth was often transferred into private pockets.

Furthermore, the revenues of public property (including gold and silver mines in Thrace, Macedonia and Laurium) was distributed among all citizens, much as a portion of oil revenue is distributed in some modern States. Food prices were low and in times of crisis the State provided subsidised food. The Athenians engaged in intensive diplomacy with grain-exporting states to ensure that grain prices remained in a range that was accessible to all.²⁹¹ Even Aristotle subscribed to the desirability of wealth redistribution, provided one had one's heart set on democracy, stating that: "Poverty is the cause of the defects of democracy. That is why measures should be taken to ensure a permanent level of prosperity."²⁹²

Via the redistributive measures elaborated above, the economy was kept in a sufficient state of flux to prevent the monopolisation of wealth and material dependency between formal equals.

2.6.2. Wages and Personal Wealth

Wages were quite egalitarian. The accounts of the Erechtheum from 409-407 B.C. state that carpenters and masons received 1 drachma per day while the architect received 37 drachmae for the 36-day *prytany*. Since the architect was not required to be on-site full-time, his advantage is slightly larger than appears at first glance; however, his income per hour spent on the job cannot have been much more than double that of the carpenters. Slaves were also frequently hired out to work on such projects, in which case the owner was paid the same amount for their labour that a free citizen would have earned, and if hired out with acumen slaves used thus could provide a large source of revenue.²⁹³

²⁸⁷ Markle, note 16, at 122 et seq, footnote 44 and 124.

²⁸⁸ Markle, note 16, at 129; *Politics-Notes*, note 7, Ernest Baker, at 259.

²⁸⁹ This decree was indicted as unconstitutional, but upheld by the courts, Hansen, "Did the Athenian Ecclesia Legislate?" note 103, at 37.

²⁹⁰ Aristotle, *Politics*, note 7, at 267; Ostwald, *Sovereignty*, note 3, at 222.

²⁹¹ Nicolet, note 260, at 187 and 189.

²⁹² Aristotle, *Politics*, note 7, at 268 et seq.

²⁹³ Markle, note 16, at 129.

The median value of houses sold in Athens in 414 B.C. was 410 drachmae, while the average price for a slave was 174 drachmae. In the same year a cloak cost about 10 drachmae 3 obols and a pair of shoes 6 drachmae.²⁹⁴ Housing prices were thus fairly reasonable, and in fact quite low, representing less than two years' income from unskilled labour.

While the average annual income for unskilled labour was about 250 drachmae per year, about 30 % of the Athenian population possessed the 2500 drachmae in property which obliged them to pay the *eisphoria*.²⁹⁵ This calculation means that the top 30% possessed in property wealth equivalent to a decade's gross earnings by the unskilled.

There are also records of citizens ordered to pay huge fines, for example, 10 000 drachmae against Agoratos for sycophancy and fifty talents against Militaides for his failed military promises.²⁹⁶ To sustain a fine of this sort these individuals must either have been far wealthier than even the majority of the 30% of Athenians wealthy enough to be obliged to pay the *eisphoria* or the fine must have been understood as a means of indirectly imposing *atimia* on the subject. The prominent fourth century *rhetor* Demosthenes sued his guardians for the recovery of his inheritance upon reaching his majority amounting to about 50 000 drachmae, including the house, his mother's jewellery, raw materials, cash and the income from the skills of the family slaves,²⁹⁷ setting himself up with a personal fortune equivalent to between 100 and 200 times the average annual income of unskilled labour.²⁹⁸ In return he could expect to have hefty bites taken out of this fortune – the cost of being trierarch alone was estimated at about 5000 drachmae each time one was called to this service and the wealthy were obliged to undertake many other activities.²⁹⁹ There was thus a sizeable differential in personal wealth between the nation's richest and poorest, which, however, in comparison to the wealth discrepancies existing in Rome and modern societies was still fairly moderate.

2.6.3. The Athenian Concept of Wealth

The Athenians viewed leisure as the ultimate good. The point of wealth was to allow one to have leisure, which meant more time to pursue education and develop other skills.³⁰⁰ A common court tactic was the attempt to gain sympathy by claiming that the litigant was

²⁹⁴ *Ibid.*, at 129 et seq.

²⁹⁵ *Ibid.*, at 130 et seq.

²⁹⁶ A.R.W. Harrison, note 47, at 60 et seq.; though the latter case occurred in 489 B.C., as yet during the transition phase to full democracy, Ostwald, *Sovereignty*, note 3, at 29.

²⁹⁷ M.I. Finley, *The Ancient Economy*, (Chatto and Windus, 1973) at 116.

²⁹⁸ As aforementioned, by Demosthenes' time, inflation had increased so that labourers earned significantly more than one drachma per day.

²⁹⁹ Finley, *Ancient Economy*, note 297, at 150; *supra*, pp. 58 et seq.

³⁰⁰ Markle, note 16, at 98 et seq.

obliged to work. Even if a citizen owned slaves, he was still considered to be poor if he were obliged to labour alongside them.³⁰¹ Having to work was generally seen as degrading, but at the same time the Athenians attempted to prevent discrimination against those who had to (one law punishing as slander any “reproaching” of a citizen for working in the market place).³⁰²

Thus, when Greek writers refer to the “poor” (*aporoí*) they are not designating the destitute, but rather citizens who had little leisure, because they had to work full-time to support themselves and their families.³⁰³ The actual poor were sharply distinguished from mere *aporoí* by the separate term *ptochéia*, meaning “beggars”.³⁰⁴ In *Ploutos* Aristophanes writes: “the life of the *ptochos*... is to live having nothing whilst that of the *penes* is to live frugally, occupied with his work, having no surplus, but at the same time lacking nothing”.³⁰⁵ In addition to this idea of the true purpose of wealth, there was a strong social imperative to avoid excess of any kind. This included being either excessively rich or excessively poor.³⁰⁶

The drive to become ever richer was thus heavily curtailed, the official attitude perhaps best summed up in Pericles’ Funeral Oration: “We regard wealth as something to be properly used rather than something to boast about. As for poverty, no one need be ashamed to admit it; the real shame is in not taking practical measures to escape it.”³⁰⁷

The relatively ambivalent view of wealth – at least on the part of the democrats – coupled with low living costs, fairly egalitarian wages and the practice of distributing many financial burdens onto the wealthy, meant that, while prosperity was by no means evenly distributed in Athens, it was also not distributed in an excessively unbalanced manner. The level of imbalance that did exist was a source of continual difficulty for the democrats, in that the very rich tended periodically to violently overthrow them.

The same conclusions regarding economic equality and its relationship to democracy as empirically existed in Athens were reached through theoretical reasoning by Enlightenment-era legal philosophers. Montesquieu wrote: “In a democracy real equality is the soul of the State” so that “one must regulate dowries, gifts, inheritances, in sum, all kinds of contracts.” The laws “must make each poor citizen comfortable enough to be able to work as the others do and must bring each rich citizen to a middle level such that he needs to work

³⁰¹ *Ibid.* at 101, at times quoting directly from Lysias.

³⁰² *Ibid.*, at 116.

³⁰³ *Ibid.*, at 96

³⁰⁴ *Ibid.*, at 100 et seq.

³⁰⁵ Aristophanes, *Ploutos*, at 537-54, quoted in Markle, note 16, at 101; the same distinction was made by Aristotle and by Plato in *The Republic*.

³⁰⁶ Ian Morris, “The Strong Principle of Equality and the Archaic Origins of Greek Democracy” in *Demokratia*, 19 at 22 et seq.

³⁰⁷ Thucydides, note 134, at 2.40.

in order to preserve or to acquire”.³⁰⁸ This conclusion was further endorsed by Rousseau who claimed that democracy presupposed, “a large measure of equality in social rank and fortune, without which equality in rights and authority will not last long,” before continuing, “the word finance is the word of a slave” and that a preference for making money over taking a personal part in government would inevitably end in “chains”.³⁰⁹

Wealth disparity existed in Athens and money was not without its advantages, but the democracy mitigated its advantages rather than underscoring them.

2.6.4. The Significance of Tribute and Slaves for the Athenian Economy

The Athenians – like the Romans after them – shifted the costs of their State to the greatest extent possible onto non-citizens: their slaves (who worked in the mines and the fields), metics (who were required to pay an annual fee of twelve drachmae), and its subject states (from which it demanded tribute). In the fifth century B.C., much of the money used to pay for office-holders and jurors, originated directly from war exploits.³¹⁰ A common line of inquiry has thus been whether outside sources of income (slaves and empire) were necessary to give the Athenians leisure, and the extent to which a high standard of living approaching a work-free lifestyle is necessary for a highly participative democracy.

The Athenians did indeed use slaves to fulfil much of their heavy labour needs. However, their standard of living was still much, much lower than that prevalent in Western society. In fact, it was considerably lower than the standard of living in even semi-industrialised nations. That the Athenians did to some extent depend on slaves, because they would otherwise have been subsistence farmers, is an obsolete point in a modern society where no one is facing such a choice. If Athenians relied on slaves to produce excess wealth, modern citizens can rely on technological innovation. Today one tractor can do the work of a thousand slaves: technology has made exploitation of human beings to maintain a leisured standard of living obsolete.

Furthermore, as mentioned above, the loss of the Delian League and its tribute did not cause even the slightest waver in the Athenian commitment to costly, participative democracy. Not only did the Athenians continue to finance democracy, they also managed to finance welfare mechanisms and lavish considerable sums on religion and warfare. It is

³⁰⁸ Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws, Vol. 1*, Nugent (trans.) (G. Bell and Sons, Ltd., 1914), at 44-49.

³⁰⁹ Jean-Jacques Rousseau, *The Social Contract*, Maurice Cranston (trans). Penguin Books, 1968, at 113 and 140 et seq.; he continued, in much the same vein as Pericles, “As soon as someone says of the business of State, ‘What does it matter to me?’, then the State must be reckoned lost”.

³¹⁰ Walker, note 22, at 105; Ostwald, *Sovereignty*, note 3, 187 et seq.

estimated that the cost of equipping 10 triremes with a force of 2000 hoplites and 200 cavalry for a year was double the amount of annual assembly pay.³¹¹

It is not a question of how much wealth there is, but how it is distributed and the use it is put to. In comparison to modern society Athenians were poor, but chose to use some of their excess income for democratic means.

2.6.5. The Impact of Democracy on Economic Development

Another frequent argument to be heard is that democracy is detrimental to economic development, that loss of self-determination is the necessary price of an increased standard of living, that – above all – no one will “invest” in a democracy in which the *demos* could at any given moment expropriate one. According to one source: “countries subject to more turbulent but perhaps more democratic political changes or countries which contain the vestiges of some form of radical nationalism, experience tangibly more frosty relations with the IFIs”.³¹²

Further:

The motif of stability runs through Bank-supported reform in governance states. Governance states are not strongly constrained by the Bank as their operations compel groups to adhere to state fiat – in fact this might connote stabilisation and order even if it is experienced by some as oppression. The Bank is certainly keenly concerned to ensure the stability of ruling elites³¹³

According to another:

One of the most compelling rationales for private provision [of basic services] is that it helps make reforms permanent. The ebb and flow of the political system creates a certain degree of uncertainty. What one reform accomplishes today may be undone by the next administration. Private provision is thus a useful way to remove policy from the political agenda³¹⁴

³¹¹ cf. Kirsty Shipton, “Private Banks in Fourth-Century Athens: A Reappraisal” in (1997) 47 *CQ*, 396 at 406.

³¹² Graham Harrison, *The World Bank and Africa: The Construction of Governance States* (Routledge, 2004), at 125 et seq; the term “IFIs” here denoting the international financial institutions, meaning the IMF and World Bank Group.

³¹³ *Ibid.*, at 127.

³¹⁴ Tim Kessler, “Assessing the Risks in the Private Provision of Public Services” in *The IMF and the World Bank at Sixty*, Buira ed, (Anthem Press, 2005) 235 at 270.

Of course, following the financial collapse of most of the world's major banks in late 2008, one may freely wonder just how secure investing in mechanisms without any popular oversight really is.

The Athenians themselves were economically sophisticated in comparison to many societies at the time, and very affluent. At the height of their Empire, they held the equivalent of over 50 000 000 denarii in a reserve fund.³¹⁵ The Athenians were capitalists. They did not expropriate private property except following conviction for a criminal trial. They had banks, coinage and mortgages. They even had factories and their own military-industrial complex: he who owned a shield factory staffed by slaves could count on a steady income and tended to have the leisure to pursue political activities on a large scale.³¹⁶ Banking was also a lucrative activity – charging interest was disapproved of, but nonetheless the societal norm: of seven known citizen bankers, four of them were wealthy enough to have liturgical obligations.³¹⁷

Despite being capitalist-oriented and “business-friendly” (many of the metics living in Athens were there for trade purposes), their economy was markedly different from the modern one. It was not regarded as separable from the people of Athens. Economic activity was always sublimated to the predominant societal values. It was not an enterprise unto itself.³¹⁸

Bankers rarely lent to anyone who was not at least in some form a personal contact, banks were family-run, loans were given in a friendly, personal context (frequently referred to as “favours”), and any loan was governed not only by economic, but also by social, considerations.³¹⁹ Athenians frequented banks as a social activity, and at least on some occasions loans were given without any security. Once again, this was not a matter of lack of sophistication, as the use of land as a security is well-documented in other cases.³²⁰

In addition, large-scale economic reform had preceded democracy through the reforms of Solon which had included sweeping debt-forgiveness, and while the Athenians did not expropriate, they did make the wealthiest citizens responsible for meeting virtually all public financial obligations. Democracy therefore did not have an enormous impact on the economy and certainly not a negative one.

³¹⁵ M. Cary and H.H. Scullard, *A History of Rome Down to the Reign of Constantine*, (3rd Edition, MacMillan Press, 1975), at 183.

³¹⁶ *cf.* Shipton, note 311, at 410 et seq.

³¹⁷ *Ibid.*, at 409.

³¹⁸ *Ibid.*, at 408.

³¹⁹ *Ibid.*, at 411

³²⁰ *Ibid.*, at 408 et seq.

2.7. Transparency

As can be gleaned from the preceding findings, Athens was a very transparent society with the vast majority of action and debate being taken before large groups of citizens in the Assembly and courts. Even debate in the *boule* and on the panels of *nomothetai* took place before a large cross-section of the Athenian citizen population. Only private arbitration and *proanakrasis*³²¹ were relatively private affairs, but both these procedures could easily be referred to the very public courts. Because no final decision could be made by a small number of citizens, any level of secrecy or circumspection in matters of public interest was futile. In addition, several measures were taken to ensure that records of what had been agreed upon in the fora were also publicly available. The *nomoi* were inscribed on a stele set up in the Stoa Basileois.³²² If a plaintiff's plea was accepted by a magistrate, *ie* the magistrate agreed that there were grounds to fix a day for further proceedings, the plea was written on whitened tablets and publicly displayed in the *agora*. It is likely that following the trial pleas and judgments were deposited in the state archives at the Metroon.³²³

2.8. Corruption/Abuse

The Athenians were extremely concerned to prevent their form of government being circumvented by means of corruption or other abuses and took quite extreme measures in pursuit of this aim.

2.8.1. *Dokimasia*, *Euthunai* and Impeachment

In stark contrast to the Assembly and jurors, who were "the people" and therefore absolutely sovereign, all officials, including those that were elected, were scrutinised severely via three procedures: *dokimasia*, *euthunai* and impeachment,³²⁴ and could be punished if found guilty of wrongdoing. In fact, a high proportion of Athenian laws concerned the punishment of office-holders found to be in breach of their duties.³²⁵ *Dokimasia* refers to the review of officials before assuming office and *euthunai* to examination after stepping down.³²⁶

³²¹ An ascertaining of facts before trial.

³²² Hansen, "Did the Athenian Ecclesia Legislate?", note 103, at 29.

³²³ A.R.W. Harrison, note 47, at 91.

³²⁴ Manville, note 204, at 381.

³²⁵ Mogens Hansen, "The Ancient Athenian and the Modern Liberal View of Liberty as a Democratic Ideal" in *Demokratia*, 91 at 99; Ferguson, "Fall of the Athenian Empire", note 46, at 375.

³²⁶ Sealey, note 35, at 310.

The *dokimasia* procedure for archons was recorded by Aristotle and it is reasonable to assume that the examination of other magistrates bore some resemblance to it. The main focus of the *dokimasia* was to establish whether the potential office-holder was a good democrat without oligarchic sympathies,³²⁷ and also a good Athenian.³²⁸ At a minimum, he was required to show that he had a family tomb, and that he observed the traditional religious rites, before being submitted to questioning about whether he had paid his taxes, whether he had absolved his prescribed period of military service and whether he had treated his parents with respect. Witnesses gave evidence on these points, after which anyone present was given the opportunity to lodge a complaint or challenge the potential office-holder's credentials. If a complaint were brought, a legal trial involving both prosecution and defence ensued and the final verdict on the candidate's suitability was taken by vote.³²⁹ The *dokimasia* was extremely thorough – the orator Lysius stated that in his view it was right that a candidate should be obliged to give an account of his whole life at the *dokimasia*.³³⁰ Archons were subjected to *dokimasia* twice, once before the *boule* and once before the courts. Other magistrates were scrutinised before the courts and councillors were scrutinised before the outgoing Council of 500.³³¹

During *euthunai* the official's conduct in office was examined to determine if it had been in order and prosecutions for minor transgressions were not uncommon.³³² Anyone could bring a complaint against a recently retired magistrate during *euthunai* by submitting a written complaint to one of the ten officials known as *euthynoi*, who were selected by lot, one from each tribe. The *euthynos* examined these charges and could reject those he deemed unfounded or spurious. If, however, he felt a case was given he referred it to the *thesmothetai* (in cases of public wrong) or to the *deme* judges (in cases of private wrong).³³³

In addition, officials could be impeached during their time in office by the Assembly. At each of the ten *kyria ekklesia* throughout the year the general question was asked, "are the officials carrying out their duties correctly?" which presented every person in attendance with the chance to make an objection known.³³⁴ If an objection were raised against a magistrate, the *ekklesia* voted on whether to refer the matter to a court. If the *ekklesia* voted in favour of

³²⁷ Aristotle, *Politics*, note 7, at 193; Ostwald, *Sovereignty*, note 3, at 447 who cites Theramenes' rejection at his *dokimasia* to the generalship on the grounds that his commitment to the democracy was suspect.

³²⁸ cf. Staveley, note 12, at 58.

³²⁹ *Ibid.*, at 58.

³³⁰ *Ibid.*, at 58.

³³¹ Sealey, note 35, at 324; Staveley, note 12, at 58.

³³² Walker, "Periclean Democracy", note 22, at 109.

³³³ Ostwald, *Sovereignty*, note 3, at 55 et seq.; A.R.W. Harrison, note 47, at 30.

³³⁴ Rhodes, "The Polis and the Alternatives", note 8, at 574; Staveley, note 12, at 83.

referral, the magistrate was suspended from office until acquitted by the court,³³⁵ which was, of course, by no means certain.

Furthermore, the accounts of every magistrate – even those who never handled public money – were examined each prytany by the *logistai*, a body of ten officials selected by lot from the councillors (of the Council of 500), at which point any irregularities were dealt with and charges brought before the courts.³³⁶

The precise reasons for *dokimasia* and *euthunai* are disputed. Some suggest that the prime purpose was to keep the blatantly incompetent out of office,³³⁷ however it seems that the questions were not directed at establishing a candidate's competence, but rather his character and "clean record", which points more to a desire to root out corruption. Even those questions regarding religion and morality point to this, for the religious and morally upright are theoretically less likely to be corrupt. The questions primarily pertain to the Athenian traditional value system as opposed to skill or education and seem focussed on ensuring that the official acted in a manner that the majority of Athenians would find acceptable.

Due to the intense and efficient scrutiny of officials, the vast majority of illegal behaviour was uncovered quickly as any complaints against an official could be dealt with on a monthly basis in the Assembly. However, in the war to have one's views implemented by the Assembly, the "safety devices" of the Athenian democracy, including *dokimasia*, ostracism and court prosecution, were themselves abused for political ends and a public figure might find himself facing false accusations during *dokimasia* or *euthunai* in an attempt to discredit him.³³⁸

2.8.2. The Lottery and Rapid Rotation in Office

Not only did the Athenians select the majority of their officials via the lottery method, they also made holding elected and unelected office subject to a very rapid rotation, usually not more than one year. This rapid rotation contributed as much to combating corruption and undue authority as did sortition,³³⁹ for no one could cement his position of authority in a certain area over years.

³³⁵ A.R.W. Harrison, note 47, at 59.

³³⁶ A.R.W. Harrison, note 47, at 28 et seq.; Ostwald, *Sovereignty*, note 3, at 55 et seq.

³³⁷ Staveley, note 12, at 60.

³³⁸ Finley, "Athenian Demagogues", note 4, at 182.

³³⁹ Staveley, note 12, at 55.

2.8.3. Bribery and Blackmail

On the whole, bribery was not very widespread. Because wealth distribution was not excessively disparate and the number of people involved in decision-making so large, it was difficult to impossible for one person to afford a meaningful bribe. Nevertheless, one record claims that a citizen by the name of Anytus successfully bribed the entire jury during his trial during the first half of the democracy,³⁴⁰ while another statement records that a citizen named Straton refused to accept a bribe to change his vote in a lawsuit.³⁴¹ The bribery of jurors was almost completely eradicated in 400 B.C. through the new practice of leaving the jury panels unassigned to specific trials until the moment court was opened and then assigning them by lottery.³⁴² Once jurors were selected they passed through an entrance to a courtroom with no further contact with the general public.³⁴³

Although there is no record of it, it is possible that the *hetaireiai* may have collectively possessed enough funds to enable a few key bribes. There is some circumstantial evidence for this view: referring to a failed attempt to bribe the Assembly, the contemporary commentator Aechines “distinctly conveys the impression that this was not an everyday occurrence, and speaks in terms of the activities of a group rather than of an individual”.³⁴⁴

Bribery on an individual basis was, however, feasible and the Athenians were very much in the habit of hurling the accusation of bribery at each other, often in the form of an accusation of having received bribes from foreigners.³⁴⁵ Demosthenes is, in particular, accused of having “bribed” his way onto the Council. Since the selection of the Council was a lottery process, it is believed that he achieved this by bribing the other candidates of his *deme* not to run so that he was the only possible choice to be sent for the national selection.³⁴⁶

Of course, the potential gains of bribing an individual were quite minimal. The *archai* had virtually no power – even if one were to bribe one to commit or refrain from a certain action, the victim could always take the matter up before Assembly or courts, where the bribery stood a high chance of being discovered and the colluders sentenced to death.³⁴⁷ One could perhaps attempt to bribe some citizens in Assembly in the hopes that it would be enough to swing the vote on a particular measure, but even this would require a significant number of bribes and coordination – likely the tactic used by the *hetaireiai*.

³⁴⁰ Ferguson, “Fall of the Athenian Empire”, note 46, at 351 et seq.

³⁴¹ Markle, note 16, at 119 et seq.

³⁴² Ferguson, “Fall of the Athenian Empire”, note 46, at 374.

³⁴³ Dow, note 51, at 80.

³⁴⁴ Staveley, note 12, at 109

³⁴⁵ *Ibid.*, at 110.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

The *cleroterion* was virtually impossible to rig, so that bribery to manipulate lottery outcomes was futile.

The relatively small-scale case outlined above against Demosthenes is probably one of the most plausible, and it was a well-known fact to the Athenians that corruption was much more prevalent on the *deme* level, one of the reasons that they moved most business to the national level.³⁴⁸

The concept of bribery was well known, but high levels of participation and transparency made a successful bribe very difficult, very risky and hence very rare.

Of greater significance than bribery was the issue of blackmail. Litigation was so common that citizens were frequently blackmailed with indictment by others either from motivation to damage a political opponent or to benefit financially from the practice of allocating part of the fine to a successful prosecutor in certain cases, a practice termed “sycophancy”.³⁴⁹ A trial against friends or associates of a political leader as a means of weakening him is attested in the trials against Aspasia and Anaxagoras meant as attacks on Pericles.³⁵⁰ This was unfortunately a problem inherent in the Athenian court system which relied on private initiative, but slightly off-set by punishment of prosecutors who did not obtain 1/5 of the votes.³⁵¹

Thousands of years later, the grassroots “democracy” of New England encountered exactly the same problem. Because officials were elected as opposed to being appointed there was no way of punishing or promoting them, except by way of the courts. But, of course, a court can only judge on a matter when it is seized of it, in other words, when a third party has already lodged a claim or complaint, and cannot decide to act on its own initiative. This led, on the one hand, to many offences going unprosecuted as no one started an initiative against them and on the other encouraged the report of drummed-up offences in exchange for monetary rewards.³⁵²

2.8.4. Fraud

There is very little evidence of fraud in the Athenian democracy.³⁵³ Demosthenes did allege that at one vote, thirty men managed to cast sixty ballots, however, this was a preliminary *deme* election, outside of the national “machinery” and the tokens used were –

³⁴⁸ Humphreys, note 104, at 227; Staveley, note 12, at 48.

³⁴⁹ Ostwald, *Sovereignty*, note 3, at 81 et seq.

³⁵⁰ *Ibid.*, at 195 et seq.

³⁵¹ *Ibid.*, at 81 et seq.

³⁵² cf. Tocqueville, *Democracy in America*, (Harper and Row 1966).

³⁵³ Staveley, note 12, at 113.

atypically – olive leaves, so that rigging would have been fairly simple.³⁵⁴ To rig an allotment machine would have been almost impossible, since the person placing the tickets and the person pouring the balls into the machine were both also chosen by lot immediately prior to the commencement of the lottery process.³⁵⁵

The Athenians were also on guard against financial fraud. In the fifth century, publicly held money was held in various funds, each with a separate purpose, and its own elected treasurers, who were required to individually approve every expense.³⁵⁶ In the fourth century, officials were allotted a certain annual stipend to meet the expenses they were required to cover by virtue of their office, but still had to satisfy the boards of *logistae* each month that they had not embezzled or misspent.³⁵⁷

2.8.5. Political Violence

Oligarchic forces within Athens assassinated two influential democratic leaders, Ephialtes in 462/461 and Androcles in 411,³⁵⁸ who was murdered to pave the way for the persuasion of the oligarchy of the Five Thousand/Four Hundred (411/410 B.C.).³⁵⁹ However, aside from these and the oligarchic coups themselves, Athens was subject to very little political violence during democracy. The very enactment of democracy itself via a series of reforms was comparatively bloodless and caused very little upheaval, rather ending the turmoil that had preceded them.³⁶⁰

2.8.6. Conclusions Regarding Corruption and Other Forms of Abuse

The same Athenian state organisation which foresaw no checks on the power of the “people”, provided for many innovative ones concerning the power of officials. Through *dokimasia*, *euthunai* and impeachment, “the people” kept their officials on a tight leash and ensured that any delegation of responsibility for a task was carried out in a manner that absolutely satisfied the collective society.

With tight control and efficient methods, the Athenians managed to virtually eliminate bribery, fraud and abuse of power. Democracy itself, by involving such high percentages of the citizen population, was a powerful force undermining the possibility of

³⁵⁴ *Ibid.*, at 115.

³⁵⁵ *Ibid.*, at 116; except in jury selection where the archons poured the *kyboi* into the allotment machines.

³⁵⁶ Rhodes, “The Polis and the Alternatives”, note 8, at 569 et seq.

³⁵⁷ Hansen, “Did the Athenian Ecclesia Legislate?”, note 103, at 39 et seq.

³⁵⁸ Finley, “Athenian Demagogues”, note 4, at 181; Ostwald, *Sovereignty*, note 3, at 176.

³⁵⁹ Ostwald, *Popular Sovereignty*, note 3, at 358.

³⁶⁰ *Ibid.*, at 175.

bribes. However, the mechanisms used generally revolved around shifting responsibility and initiative to the individual citizen, which in turn presented the opportunity for blackmail and false accusations, the two forms of abuse which truly plagued the democracy.

2.9. The Rights of the Individual in Athens: Tyranny of the Majority?

2.9.1. The Basic Premise of Democracy vis-à-vis the Individual

Citizens were obliged very literally to serve their fellow-citizens, through participation in warfare and through being forced to take up elected office with all its attendant risks if the people so desired.³⁶¹ The Athenians never formally and unequivocally guaranteed the rights of the individual in opposition to the community.³⁶² For the Athenians there was essentially no such thing.³⁶³ The people were the State and the State was the people, thus a separate institution known as “the State” and which could possibly be an instrument of oppression was unknown.³⁶⁴ The community/State was utterly incapable of taking any action except via the participation of the majority and, according to Aristotle, in a democracy, “what the majority decides is final and is just”.³⁶⁵ Minority rights were completely unknown, as any member of a “minority” (foreigners, women, children, slaves) was a non-citizen, and thus *ipso facto* non-existent in public life. Thus, there was very little an individual could do to defend himself against the decision of the majority even if it were unfavourable and unjust towards him.

2.9.2. Citizens’ “Rights” in Athens

The Athenians did, however, have a few rudimentary “rights”. Athenian citizens could never be made slaves,³⁶⁶ and they could never be tortured.³⁶⁷ Only thieves and robbers caught in *flagrante delicto* could be executed without trial and only if they pleaded guilty.³⁶⁸ Instead any accused held in custody had a “right” to trial within thirty days.³⁶⁹ In the later democracy, the *nomothetai* could not pass a law affecting a specified individual unless the

³⁶¹ Staveley, note 12, at 104.

³⁶² Wallace, note 156, at 114 et seq.

³⁶³ Ostwald, “Shares and Rights”, note 262, at 51 and 55.

³⁶⁴ Rhodes, “The Polis and the Alternatives”, note 8, at 566.

³⁶⁵ Aristotle, *Politics*, note 7, IV-2.

³⁶⁶ Hansen, “The Ancient Athenian and the Modern Liberal View of Liberty”, note 325, at 93 et seq.

³⁶⁷ A.R.W. Harrison, note 47, at 150.

³⁶⁸ Considering the circumstances one cannot imagine that a plea of guilty was entered very often.

³⁶⁹ A.R.W. Harrison, note 47, at 56 et seq.

Assembly voting by quorum of 6000 with a ballot permitting it to do so,³⁷⁰ and private property was protected from seizure by the State through a promise made each year by the *eponymous archon* when he took office.³⁷¹

In addition to these, the absolutely central right in Athens was freedom of speech. Demosthenes claimed that the difference between Sparta and Athens was that in Athens one was free to praise the Spartan constitution and way of life, whereas in Sparta it was forbidden to praise any but the Spartan constitution.³⁷²

This right was subdivided into *parrhesia* (the freedom to say what one liked) and *isegoria* (the freedom to speak in the Assembly), and was thus not only a negative right protecting liberty to express oneself, but also a positive right to participate in affairs of State through the medium of free speech in a public setting. In this sense, the Athenians outstripped the modern concept of rights – today a mere citizen does not have the right to address parliament – this right is reserved for parliamentarians, and often restricted according to their rank in regards to time.

All of the “rights and freedoms” enumerated above were, however, general guidelines, not concretely defined terms subject to strict guarantees, and at the hands of “the people” they were rather whimsically interpreted. For example, it was common practice to drag an unpopular speaker from the orator’s podium, and when discussing a topic felt to demand expertise, the Assembly would not allow anyone who did not have that expertise to speak.³⁷³ Execution without trial, and without a guilty plea, for various deeds was not unknown.³⁷⁴ The few “rights” that Athenians had were thus generally respected, but not immune from attack.

2.9.3. The Dissenting Athenian: The Trial of Socrates and other Dissenters

Although rarely violent towards their own, the democracy was felt by some to impose “a tendency to conform to an establishment mentality dictated by the ignorant mob and stifling rather than nurturing the intelligence of the educated citizen”.³⁷⁵ According to Aristotle, ostracism was often used as a means of expelling anyone too rich, influential or merely gifted, thus “levelling” the citizen body and “cutting off” anyone who stood out, either

³⁷⁰ Hansen, “How Did the Athenian Ecclesia Vote?”, note 17, at 48.

³⁷¹ A.R.W. Harrison, note 47, at 8.

³⁷² Hansen, “The Ancient Athenian and the Modern Liberal View of Liberty”, note 325, at 97.

³⁷³ Plato, *Protagoras*, quoted in Wallace, note 156, at 106.

³⁷⁴ *Infra* pp. 75 et seq.

³⁷⁵ Ostwald, *Sovereignty*, note 3, at 87.

positively or negatively.³⁷⁶ In a world before telecommunications, this was quite an effective way of dealing with minor opposition or those questioning the basic principles of the *polis*.

However, as we have seen above, the use made of ostracism is somewhat controversial. On the one hand, it prevented major schisms within the democratic state. On the other hand, Aristotle's complaint that anyone radically more intelligent or progressive than the average citizen was more likely to "lose" an ostracism vote is credible, although its truth is difficult to ascertain as such accusations were often tendered by those who would have abolished rule by the people and therefore should perhaps not have been surprised that the people gave them short shrift. Although unfair and unjust to the individual thus ostracised, who may from an absolutist point of view have been more "right", ostracism was consistent with the idea of democracy which had never purported to be fair or just to the individual.

A citizen who radically questioned the basic tenets of democracy might, however, find himself not facing an ostracism vote, but instead before a *dikasteria*, the most famous trial of this sort being the case of Socrates, an ardent critic of democracy. Officially convicted of "worshipping strange gods and speaking blasphemy among the young"³⁷⁷ in 399 B.C., according to classical scholars the decisive point of Socrates' trial was not his religious beliefs, as he had propagated these for many years without censure. What earned him the death sentence was "his students' participation in the murderous right-wing junta that had brutalized Athens in 404". Aeschines, an ancient commentator, expressly states this as the reason for Socrates' trial. Because an amnesty had been declared for all crimes connected with the Thirty it was not possible to put Socrates on trial for treason, thus the pretext of his religious beliefs was utilised as the official basis for the trial.³⁷⁸

This information casts Socrates' trial in a somewhat different light than it is usually assumed to have – it is almost comparable to a hypothetical situation of Nietzsche having been alive at the end of WWII, and bears remarkable similarity to the isolated cases today of extremist religious figures calling for the violent overthrow of the democratic states in which they reside and the strain this has put on interpreting basic freedoms and criminal law areas such as conspiracy and incitement.

In Athens, there were no basic freedoms that the courts and Assembly could not overturn, thus it was a simple matter to prosecute Socrates for his religious and intellectual beliefs, which the citizens believed to be a *sine qua non* of their recent problems, and sentence him to death.

³⁷⁶ Aristotle, *Politics*, note 7, at 135 et seq; this sentiment was later famously echoed by Tocqueville who also viewed democracy as bringing statesmanship to the lowest common denominator as politicians fought for the broadest possible public appeal and stated, "I will never grant to several that power to do everything which I refuse to a single man" (de Tocqueville, note 352, at 272).

³⁷⁷ Bockenfoerde, note 55, at 63.

³⁷⁸ Wallace, note 156, at 113 et seq; Bury, note 76, at 390 et seq.

Such drastic action was, however, extremely uncommon. According to scholars there are few historically accepted cases of the *demos* persecuting an intellectual: Socrates, Damon, a music philosopher who was thought to be manipulating music in an attempt to affect the behaviour of the Athenians,³⁷⁹ the trial of Anaxagoras for proclaiming the sun to be a mere fiery stone (a religious offence) and the exile of Protagoras for agnosticism.³⁸⁰ Anaxagoras' trial was politically motivated as a move to unseat his friend Pericles and of the four, only Damon and Socrates were sentenced to death.

Furthermore, it is likely that in Socrates' case, the intent of the prosecutors was only to have him exiled – the death sentence is thought to have been the outcome of Socrates' own provocative stance during the trial, as well as his refusal to bow to custom and name exile as an alternative penalty. Instead, he incited the jurors by proposing as his "penalty" that he be given free room and board by the State.³⁸¹ Left with only the choice between imposing the death penalty, as proposed by the prosecution, and granting Socrates free room and board, as proposed by himself, the irritated jurors opted for the death penalty.³⁸²

Prosecution for dissent was thus an infrequent occurrence. In fact, the Athenian democracy tolerated a large volume of dissent from Socrates, Plato and Aristotle (the last of whom was not even a citizen, but, in fact, from Macedonia, a monarchy (the monarchs of which were tutored by himself) that only a little later permanently ended the Athenian democracy), to name but a few, for many years. However, once trial was instituted the dissenter was not furnished with any protective rights of which he could avail in his defence.

2.9.4. Public Indignation: The Example of the Arginousai

Due to their sovereign position as "the people" neither the jurors nor the Assembly could ever be punished for making a "wrong" decision or breaking the law. At most they had been "misled" and would punish whoever had misled them. These "wrong" decisions not only concerned actions that were later deemed to have been morally or philosophically wrong, they also included measures taken that had turned out to be materially unsuccessful. The

³⁷⁹ Wallace, note 156, at 114.

³⁸⁰ Ostwald, *Sovereignty*, note 3, at 274.

³⁸¹ Bury, note 76, at 392; Sommerstein, note 80, at 70; because the jurors could only choose between the sentences proposed by the parties, it was customary for the prosecutor to demand a stiff sentence, for example, the death penalty and for the accused to demand the next stiffest penalty, exile. The jury would then usually opt for exile. Socrates, however, proposed that as "punishment" the State should give him free room and board, a suggestion which inflamed the jurors.

³⁸² That the jurors were incensed is attested by the fact that more of them voted in favour of the death penalty than had voted in favour of the conviction.

unfortunate citizen who had suggested the unsuccessful measure would typically then be charged with “taking bribes to betray the interests of Athens.”³⁸³

The example of the Arginousai, though a rare one, illustrates both how this could occur and how “rights” could be overturned in Athens. In 406 B.C., after the naval battle of Arginousai, the commanding generals failed, due to a storm, to collect the Athenian survivors from the water so that they drowned, much to the horror of their surviving relatives in Athens. The Assembly sentenced them to death as a group (though the law required that they be tried as individuals before the *dikasteria* rather than the Assembly) and executed. That “trial” should occur before the Assembly was decreed by the *boule* on the motion of the citizen Callixenus. At their “trial” the *stratego*i were denied the opportunity to adequately defend themselves against the accusations brought. Some citizens objected to this procedure, including the citizen Euryptolemus, who initiated a *graphe paranomen* against Callixenus for proposing this illegal method of trial. Callixenus countered by whipping up the people to such a state of anger against Euryptolemus that he was intimidated into withdrawing the charge. According to Xenophon, the majority in the Assembly shouted “that it is shocking not to let the people do whatever they wish” and the citizen Lyciscus threatened to move that Euryptolemus and his supporters be condemned by the same vote as the generals.³⁸⁴ The Assembly later repented of this illegal (and rather hasty considering that the generals were by and large important assets) action and made up for it by punishing Callixenus to whom the law also offered no protection.³⁸⁵ He was charged with deceiving the people, escaped before trial and allegedly starved to death ignominiously.³⁸⁶

The case of Arginousai is particularly noteworthy as in this case the Assembly did not follow the laid-down procedure of *ephe*sis to the courts, but passed judgement immediately themselves. However, it should be borne in mind, that this is the only known case of such behaviour.

2.9.5. Treatment of Criminals

As in other societies until the recent past, the lack of human rights meant that criminals in Athens were treated harshly. The general rule was *ephe*sis (referral) of the accused to the courts. This was a complex procedure which depended largely on the manner in which the transgressor was apprehended and the offence committed, which sometimes

³⁸³ Rhodes, “The Polis and the Alternatives” note 8, at 574; A.R.W. Harrison, note 47, at 60 et seq.

³⁸⁴ Ostwald, *Sovereignty*, note 3, at 438 et seq.

³⁸⁵ Wallace, note 156, at 115; Ferguson, “Fall of the Athenian Empire”, note 46, at 356 et seq; Harrison, note 47, at 61; Ostwald, *Sovereignty*, note 3, at 438 et seq.

³⁸⁶ Xenophon, *Hellenica*, 1.7.35 quoted in Ostwald, *Sovereignty*, note 3, at 443.

dictated the method of apprehension.³⁸⁷ Following apprehension, a preliminary hearing known as *proanakrasis* was held before one of the *thesmothetai* to determine whether the complainant had a justiciable case, to determine the eligibility of the litigants to appear in court, and to define the case in more precise terms.³⁸⁸

Ephesis to the *dikasterion* was the safeguard of individual liberty and security against arbitrary behaviour by magistrates and public bodies. The modern doctrine of the separation of powers was unknown. Instead it was taken for granted that any public authority, which we might call legislative or executive, should have some power, of the kind which we would call judicial, to enforce its will and to remedy wrongs; the citizen's guarantee against abuse of that judicial power was *epheesis* to the *dikasterion*³⁸⁹

However, once rendered, no appeal from the decision of the people was possible and while the *dikasteria* may have served to protect the individual from arbitrary magistrates, the *proanakrasis* may have sometimes also protected a citizen from being thrown before a court on thoroughly spurious charges and convicted on a high tide of emotion.

Once convicted, the death penalty was a fairly common sentence. Criminals were sometimes executed by forcing the condemned to drink hemlock (recorded from the end of the 5th century B.C.) and possibly by hurling them into a pit (*barathon*),³⁹⁰ but the most common method of execution between the 7th and 4th century B.C. was by *apotumpanismos*,³⁹¹ a form of crucifixion in which the condemned was clamped to a board set in the ground by iron rings at the neck and each hand and foot and every other person forbidden from venturing near him or aiding him in any way until the person thus condemned died of hunger, thirst and exposure, a process which usually took several days.³⁹² This cruel and humiliating treatment might be partially explained by the fact that although "death" constituted the penalty for a wide array of offences, the Athenians seem to have avoided directly executing criminals wherever possible, preferring instead to force suicide (hemlock),

³⁸⁷ *ie* via *apagoge* (arrest by a private citizen); *ephegesis* (bringing an official to catch the offender in the act) or *endeixis* ("pointing out" the offender to an official, either literally or by sending a letter with the relevant information).

³⁸⁸ Sealey, note 35, at 317 et seq.; A.R.W. Harrison, note 47, at 96 et seq. Sometimes the first stage of criminal procedure was heard before the *boule* or Assembly instead of before one of the archons, if the complainant so chose. In this case, the preliminary referral was not called *epheesis*, but rather *katagnosis*, and a preliminary resolution by the Assembly was called a *proboulema*, A.R.W. Harrison, note 47, at 13 et seq; Sealey, note 35, at 318.

³⁸⁹ Sealey, note 35, at 318.

³⁹⁰ Gernet, note 54, at 137.

³⁹¹ *Ibid.*, at 132 et seq.

³⁹² *Ibid.*, at 135.

expose to the elements (*apotumpanismos*) or throw into a pit, in which case it is the impact which directly kills the victim.

Whatever the reasons for their choice of method, the Athenians were certainly not subject to any legal considerations or humanitarian principles enjoining a quick or painless death. This was somewhat mitigated by the fact that the death penalty could often be avoided by going into voluntary exile, even for crimes as serious as murder.³⁹³

2.9.6. Historical Comparisons/Treatment of the Thirty Tyrants

Brutal and violent as the democrats could sometimes be, it is striking in comparison to other societies how rarely they engaged in such behaviour. In fact, the oligarchies of Athens and other Greek states were significantly more brutal³⁹⁴ than the democrats, who treated the oligarchs relatively well whenever they displaced them. Indeed, the democrats never engaged in a Reign of Terror even when provoked.³⁹⁵ When democracy was again restored in Athens following the Thirty Tyrants,

the leading democrats and the most renowned among them, Thrasybulus, signalled firmly to the *demos* that there was to be no revenge taken on the defeated opponents, as was the practice elsewhere. On the contrary, an amnesty was announced...³⁹⁶

So while democracy did not provide its citizens with instant enlightenment, it also did not produce behaviour less restrained than the Roman or Persian governments or other Greek governments did.³⁹⁷ Because the Assembly did not often blatantly ignore the limits on its own competencies, the “tyranny of the majority” was not a particularly acute problem in Athens. However, it always remained a latent risk with potentially severe consequences.

³⁹³ A.R.W. Harrison, note 47, at 75.

³⁹⁴ The Thirty Tyrants, for example, composed a list of three thousand citizens who enjoyed their protection and declared everyone else fair game. They proceeded on a spree of murders and expropriations, culminating in the slaying of an entire city to provide a fortress for their retreat from Athens; the Spartans kept an entire population as *helots* (serfs) and periodically culled them if they thought they had become too many, as well as engaging in ritual humiliation of them.

³⁹⁵ Finley, “Athenian Demagogues”, note 4, at 181.

³⁹⁶ Mosse, note 173, at 246.

³⁹⁷ Enforced suicide of political opponents was *de rigueur* in Rome as was painful execution for a multitude of crimes, eg singing anti-patrician songs.

2.9.7. Personal Liberty in Athens

Although he had no guaranteed rights which were proof against majority decisions in the Assembly, the Athenian citizen enjoyed a broad sphere of activity which was generally not interfered with by the Athenian state. According to Aristotle, “another element [of liberty] is to live as you like. For this, they say, is what being free is about, since its opposite, living not as you like, is the condition of a slave”.³⁹⁸ Thus in Athens, every citizen had a “right” to live as he pleased without being oppressed by other citizens or the authorities. How far this right extended is controversial – some think it meant freedom to act as one chose so long as one was in compliance with the democratic laws, others that one possessed this freedom only in the private sphere and not in the public one.³⁹⁹

What is certain is that personal freedom was an important ideal in Athens, with the citizenry frequently referring to themselves as “free” and even going so far as to avoid social disapproval – even by a “look” – of a citizen’s private actions according to Pericles.⁴⁰⁰ There was therefore a high level of tolerance for private affairs, but this is not the same thing as having a justiciable right in the legal sense. In other words, it may have been the Athenian ideal to live without state interference, but the citizen was not invested with any formal rights that would allow him to combat such interference if it arose. This is because the interests of the collective were seen to always outweigh the interests of the individual.⁴⁰¹

This is demonstrated by the fact that various laws were passed which infringed heavily on the private sphere of citizens, for example, a law prohibiting marriage to foreigners was passed at re-occurring intervals,⁴⁰² as well as a law against idleness, a law forbidding citizens from remaining neutral in political conflicts and a law forbidding women to travel with more than three dresses. The passing and enforcing of such laws tended to be erratic and they were often repealed before long,⁴⁰³ but nonetheless they were passed as no legal considerations stood in the way. The idea of negative rights based on liberty found no resonance in Athens. If one were a citizen, one was – to the Athenian mode of thinking – entirely free anyway, *ie* not a slave, and if one were not a citizen one didn’t count, so that from a legal point of view the concept of freedom was essentially uninteresting.

³⁹⁸ Aristotle, *Politics*, note 7, at 258.

³⁹⁹ Hansen, “The Ancient Athenian and the Modern Liberal View of Liberty”, note 325, at 93 et seq.

⁴⁰⁰ Thucydides, note 134, at 2.37.

⁴⁰¹ Wallace, note 156, at 108.

⁴⁰² *Ibid.*, at 106.

⁴⁰³ *Ibid.*, at 108.

2.9.8. Human Rights in Athens?

The idea of human rights was in the vacuum of even such a thing as veritable citizen's rights, not a popular one, and the Assembly acted accordingly, conquering other territories, exploiting wealth and killing any rebellious population wholesale. Scione and Melos in 421 and 415 B.C. respectively were dealt the same treatment for their rebellions, namely destruction of the city, death for the entire male population and enslavement for the rest.⁴⁰⁴ The Athenians extended no greater benevolence to those they were as yet only attempting to conquer. In the 406-405 B.C. war against Sparta and Persia, Athenian generals were explicitly authorised to amputate the right hands of captured seamen to prevent them rowing "against Athens" again.⁴⁰⁵

However, the democracy could also show mercy when it chose. The rebelling city of Mytilene was originally sentenced to the same fate as Scione and Melos by the Assembly, but the next day the populace felt that they had been carried away by the moment and called a meeting to reverse their decision.⁴⁰⁶

The Athenian democrats had few qualms about engaging in aggressive imperialism-driven warfare, although it does appear that some raised objections to it from Pericles' statement regarding Empire: "by this time, you are holding it as a tyranny; though to have taken it seems to be unjust, it is dangerous to let it go",⁴⁰⁷ which indicates that there were at least some strong anti-imperialist streams of thought. However, they failed to carry the day.

Within the domestic affairs of Athens itself, some basic considerations of humanity did exist towards certain non-citizens, particularly slaves, and those considerations became more pronounced throughout the democracy. Eventually the right of the master to kill his slave or subject him to prolonged cruelty was withdrawn, a right of sanctuary for slaves was recognised, and if a slave were habitually ill-treated, he might demand to be sold to a new master. Slaves were sometimes freed as a reward for loyalty and good service, but more often by the slave paying a ransom from the savings that it was customary to allow him to accumulate.⁴⁰⁸ Discrimination towards metics was self-understood, but mistreatment was not.⁴⁰⁹

The Athenian position on the rights of non-citizens can thus be summed up by saying that they acknowledged the existence of no such thing, but occasionally felt twinges of conscience that led them to exhibit what could be termed small signs of humanitarian

⁴⁰⁴ Sommerstein, note 80, xix; Ostwald, *Sovereignty*, note 3, at 305 et seq.

⁴⁰⁵ Ferguson, "Fall of the Athenian Empire", note 46, at 360.

⁴⁰⁶ Finley, "Athenian Demagogues", note 4, at 172.

⁴⁰⁷ Thucydides, note 134, at 2.63.2.

⁴⁰⁸ Tod, note 79, at 9 et seq.

⁴⁰⁹ Rhodes, "The Polis and the Alternatives", note 8, at 567.

consideration. The frequency and scope of humanitarian consideration increased throughout the years of the democracy.

2.9.9. Conclusions Regarding Individual Rights

The Athenian individual lacked any guaranteed rights, stemming from the fact that all law was equal and therefore easily overturned or amended, and also the Athenian mindset which did not readily conceive of the individual as being easily separated from his “people” or having markedly different interests. At this time in history, the citizen’s survival was entirely dependent on his community – he rose and fell with his own tribe which was the sole entity within which he enjoyed any legal standing.⁴¹⁰ The interests of the individual were therefore always subordinated to those of the society which permitted interference with the personal sphere, particularly for infringements which impacted the community, such as laziness or religious crimes.

The sovereignty of the people in all things led to a latent tyranny of the majority and resulted at times in reckless and arbitrary decisions made without due thought and which sometimes led to horrific consequences for the individuals involved. It also opened the gateway to political abuse. At least three of the four known trials of societal dissenters were based around openly fraudulent charges of blasphemy.

From this angle the interplay between individuals and democratic institutions seems very one-sided to the detriment of the individual who was in the absence of protective laws at the mercy of the majority’s will as expressed through the relatively undifferentiated institutions of Assembly and courts. However, the tyranny of the majority was mitigated not by rights or an adequate separation of State powers, but by two factors consistent with “people power”.

The first of these was the high level of participation afforded to Athenian citizens. A citizen may have been subject to the majority decision of the Assembly, but he had the opportunity of personally addressing his fellow citizens and attempting to sway them to his side. This would have been all the easier considering that the population of Athens was relatively small and that virtually all Athenians as well as their fathers and grandfathers had spent their entire lives in the Athenian state, so that connections spanning generations were in place. Many of the citizens at the Assembly would be known personally to each other. Therefore, the ability to make one’s case or appeal to other citizens was not as difficult as it may have been in a larger forum.

⁴¹⁰ Rudolph von Jhering, *Geist des roemischen Rechts auf den verscheidenen Stufen seiner Entwicklung, Ersten Teil* (9th Edition, Wissenschaftliche Buchgemeinde, 1953) at 228 et seq.

A further reason why individuals were less in need of rights vis-à-vis the state was the relative homogeneity of “the people”. The Athenians were already bound together by language, custom, religion and blood-ties. Thus, certain rights such as freedom of religion were devoid of practical use. An Athenian worshipped the Athenian gods, because that was part of the very definition of being an Athenian.⁴¹¹ Moreover, as proper worship of their gods was accepted by the majority of citizens as having a direct and real impact on their personal well-being and their survival as a people, the prosecution of heretics was seen as a convoluted form of collective self-defence.⁴¹² By the same token, self-determination was largely without content as anyone who was not free to do as he pleased was a slave. The quality of self-determination was expressed by the condition of not being a slave and therefore once again the very definition of being an Athenian citizen.

Other “rights” such as freedom of assembly and speech were viewed as self-understood corollaries of the democratic process without being articulated as rights as such. The high level of homogeneity among citizens – carefully preserved via restrictive citizenship – meant a certain identity of interests. The Athenians could therefore afford to allow a high level of debate as it was unlikely that anyone would question the basic tenets of society.

Other rights such as the prohibition on enslavement, torture, and seizure of private property which were integral parts of the social contract which could not be contravened without endangering equality and the democracy as a whole, were never contravened. As these are the only rights absolutely necessary for a democracy to function, their *de facto* occurrence was enough to keep the form of government relatively stable.

2.10. The Stability of Athenian Democracy as a Political and Legal Framework

The American Federalists set modern expectations concerning democracy when they claimed that:

democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths⁴¹³

This was a complete fabrication. The Athenian democracy afforded its citizens a level of personal security and property rights at least equal to any other contemporary civilisation.

⁴¹¹ Tod, note 79, at 29.

⁴¹² Ostwald, *Sovereignty*, note 3, at 137.

⁴¹³ James Madison, Federalist Paper No. 10 in *The Federalist Papers*, at 81.

The high-level of rewards that the majority gleaned from the democratic system meant that they had a vested interest in its preservation, so that it was – despite the many repeated and unfactual claims to the contrary – quite stable. It experienced little political violence and its only true periods of volatility were directly caused by militantly anti-democratic forces. Despite its many faults the Athenian democracy never self-destructed as the Roman Republic did, though of course this must take into account that Athenian democracy only lasted about 140 years and we cannot exclude that given enough time it might not have. Given the intensity with which many Athenians defended their form of government, it does not seem terribly likely that this could have happened without major changes to the system. It is likely that democracy was kept strong as a form of government, by the intense and sometimes vicious conflict in the world of politics. It was a “living” form of democracy, far from passivity.⁴¹⁴

2.11. Concluding Remarks: Necessary Components of Athenian Democracy and Preliminary Thoughts Regarding their Application to Modernity

The foregoing analysis reveals several key points about the systematic implementation of democracy in Athens.

2.11.1. People Power

The sovereignty of the people exercised through the overlapping constituencies of the Assembly and the courts ensured that at any given time the will of the majority was implemented and that the individual helped shape this will through discussion and a direct vote. The near complete lack of delegation of authority to officials meant that all political power continued to reside solely in the collective people. Vital to democracy is not only that citizens participate, it is the empowered quality of their participation in a decision-making capacity.

As historians have noted, the *ekklesia* decided on general policy not technical details, eg the Assembly might decide to order the building of more ships and might also decide on the plan according to which they should be built, the scale of construction and the time schedule for delivery. It was not necessary for each of them to be personally capable of overseeing the construction of a ship to make these decisions. The shipwrights were often explicitly tasked with presenting the Assembly alternative choices which it could debate, and it was the shipwrights who used their expertise to implement the plan decided upon, who

⁴¹⁴ Finley, “Athenian Demagogues”, note 4, at 181.

made decisions about the quality of wood to be used, the quantity of pitch, the technical method used to bend boards, the suitability of a trunk to serve as mast. The Assembly could, of course, take them to account for any perceived wrongdoing in fulfilling these tasks, but otherwise tended not to deal with technical implementation.

This example can be easily transferred to today. The average citizen does not need to be able to construct a Volvo or Mercedes Benz in order to make a decision on what type of car the Head of State should be provided with, nor do they need to personally be capable of manufacturing medical vaccines to decide upon whether these should be provided for by the government. The information required to make political decisions is not complicated nor overly specialised. Decision-making via the people is an aspect of Athenian society which could be transferred to modernity.

2.11.2. Mass Participation

In Athens mass participation was enabled by the systematic shunning of delegating decision-making power to individuals, as well as through the mechanism of pay for participation, and the rapid rotation of even the most powerless offices.

The importance of the high level of participation for the success of democracy can hardly be overstated. It moved the Athenians to reaffirm their commitment to democracy every single day. Any change to that pattern was immediately perceptible and entailed an immediate and apparent worsening of their political situation. This can be contrasted to the present time in which for many people the choice between having the opportunity to vote in national elections once every four years or not does not represent an immediately apparent alteration in their circumstances. It is possible that Aristotle was referring to precisely this point when he accused Pericles of compensating participation as a means of bribing Athenians into democracy with their own money.

The quality of participation was also more substantive than formal. Although the Athenians spent a massive amount of time in deliberating political affairs, they did not do this with a view to “expressing their views” – they did it with the intention of convincing enough of their fellow-citizens of their views to have them implemented. Similarly a court appearance was not “having one’s day in court” – the object of a court case was clearly to have one’s way in the dispute at hand. In other words, Athenians participated in democracy with some fixed objective in mind, which they felt would improve their own lives or benefit the people as a whole. It was not a civic exercise to be carried out *pro forma*, regardless of whether the participation affected or indeed had any impact at all on the outcome.

The Athenian example proves that mass participation is not necessarily inefficient, and thus defangs the argument made by some that “[e]ven if only 1000 [citizens] enjoyed the

right to participate in the decision-making processes this would still be too great a number for any effective form of decision-making".⁴¹⁵ Athens routinely experienced juries of more than one thousand citizens, and Assembly attendance was almost always at least five times that number. The panels of *nomothetai*, which were perceived as a measure that curtailed participation, numbered 1000 citizens. This form of decision-making lasted for nearly a century and a half, and it was, if nothing else, extremely efficient, even crassly so, despite the fact that deliberation of any given issue prior to decision-making was not in any way limited in the Assembly, while the law courts allowed quite generous time for oral proceedings. If anything, the Athenian democracy in which over 11 000 citizens participated each and every day, 17 000 on Assembly days, suffered at times from rather too much efficiency.

The high-level of Athenian participation also meant, that while democracy was almost completely free of bribery and corruption, its greatest scourge was blackmail, as a few citizens inevitably abused the democratic institutions to threaten their fellow-citizens into submission. This, not inefficiency, is perhaps the prime danger inherent in a system of mass participation.

2.11.3. Political and Economic Equality

Political equality was achieved via relative economic equality, as well as the appointment of office through sortition, and the severe and constant scrutiny of public action to prevent corruption and any advantage ensuing therefrom. Literally anyone could be head of state for the day or serve as a magistrate. Despite being rather prone to coups from oligarchs, the Athenian democracy was quite immune to the subtle building of power bases from within as all significant power resided with the people.

The Athenian example would seem to disprove the widespread opinion that a certain level of economic prosperity is a necessary precondition of democracy. By modern standards the Athenians were not well off – but what they did have was reasonably distributed and wealth could not be easily translated into political power. As one commentator has pointed out:

The split between the private and the public realms, between a political community of equal citizens acting cooperatively and a civil society of unequal individuals acting competitively, with the former relegated to the role of guaranteeing the conditions for the latter, was an innovation of liberalism. Initially hostile to the extension of the propertied classes, liberal

⁴¹⁵ Steven Wheatley, "Democracy and International Law: A European Perspective" in *Democracy and International Law*, 99 at 110.

elites gradually incorporated the democratic program as the latter proved susceptible to ‘domestication’⁴¹⁶

By removing the ability of some citizens to control others, the Athenians paved the way for political equality and democracy.

2.11.4. Subordinate Position of the Individual vis-à-vis the Community

The Athenians concentrated almost exclusively on positive rights, *ie* rights to participation based on their strong notion of equality. This was what democracy was about – the right to participate, not the right to be protected. The needs, or perceived needs, of the collective were held to always supersede those of the individual (because of the felt survivalist imperative).

Modern theories, such as those of Juergen Habermas, of a deep interconnectedness between human rights and democracy, as well as modern international legal documents such as the Vienna Declaration and Programme of Action from the 1993 World Conference on Human Rights, which states in part that “[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing”,⁴¹⁷ do not find much empirical support in the Athenian model, although their possible relevance for heterogeneous societies is a point we shall return to.

If the Athenians had endowed the individual with inalienable rights, this would have limited the *demos*’ scope of action. This is not without its lessons for today. On the one hand, we must acknowledge that a society without any individual rights protection is neither acceptable nor desirable. On the other hand, we must also acknowledge that the individual rights of some, in particular the right to private property, have often been used to prevent governments taking action that would be beneficial to the vast majority of their citizens. It is questionable if rights today are less abused than the lack of them was abused in Athens.

2.11.5. Subordination of the Rule of Law to Democracy

Separation of powers was never held to be desirable in Athens. The biggest power base was the individual which followed from the conviction that all are equal. Both the division of laws into *nomoi* and *psephismata* and the introduction of judicial review, as well

⁴¹⁶ Brad Roth, “Evaluating Democratic Progress” in Fox and Roth eds., *Democratic Governance and the Rule of Law*, (Cambridge University Press, 2000) 493 at 501.

⁴¹⁷ United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, para. 8 in 32 ILM 1993 at 1661.

as the keeping of written records, were all implemented without contradicting the basic tenets of democracy. Although the Athenians remained acutely aware of the tension between rule of law and democracy, they managed to formulate a system which was fairly successful in combining the best of both worlds and which did not ultimately entail a broad sacrifice of “people power”. Moreover, law in Athens seems to have been enforced quite effectively.

2.11.6. Direct and Personal Communication

The importance of the mode of communication for democracy can hardly be overstated. The Athenians possessed no technology for mass communication. Few citizens could even read. Because all knowledge and opinions were communicated personally, communication occurred as a two-way street. It was difficult to monopolise conversation or hold an audience captive with one’s own point of view. When Athenians deliberated public affairs it was on an equal footing and they were aware of each others’ personal prejudices and past behaviour. This deliberation also did not pass through the distorting prism of “experts”.

Today, media are heavily concentrated and the purpose of such enterprises is primarily to sell their product, not to provide a conduit to facilitate public debate. Due to the character of media as a profit-centre, it is easily manipulated by governments and public relations experts. The difficulty for modern society will be finding a way in which not 45 000 citizens, but millions and even billions can communicate with each other in an open, non-distorting fashion. On a global level this attempt must run into the added barrier of a lack of common language.

2.11.7. Homogeneity

Because citizenship was restrictive and largely based upon a common heritage and social status, Athenian society had a certain cohesiveness which led to a lower level of conflict about basic issues than would have otherwise been the case. Although sub-divided into ten tribes, the entire population shared a common language, religion and culture, in addition to common enemies. Such monotony of citizenship is obviously not acceptable in a modern society and presents one of the key obstacles to implementing democracy.

2.11.8. Fluid Majorities

Part of the reason democracy in Athens enjoyed such success was the fluidity of the majority on any given topic, so that opinion did not freeze around group identity and lead to virtually irreconcilable differences as it does in so many societies today. As we have seen, this

was partially facilitated by the method of ostracising the minority leaders of any long-running political conflict. We are thus left with the problem of how to achieve reasonably fluid majorities in a heavily divided world.

2.11.9. The Power of Demagogues

One of the main modern arguments against increased “people power” is the sway that can be achieved by demagogues. At times Athens had *rhetors* who sought earnestly to convince the people of their opinions, at others it was overrun by those who simply told the citizens whatever they thought they wanted to hear. A willingness to believe a facile version of events instead of confronting difficult truths would appear to be a part of human nature that has not changed much in the past 2500 years. An important question, however, is whether demagogy is truly more present and more dangerous in a democracy. One of the worst examples of demagogy at work was the “trial” of the Arginousai, in which agitators riled the Assembly into immediately executing the generals.

In our modern “democracies” on the other hand, a group of individuals recently falsified a considerable amount of information in order to convince their constituents that they were endangered by the alleged weapons of mass destruction possessed by another State and that they must wage war on it. No level of fear-mongering demagogy or silencing of the opposition, either literally or through intimidation, was spared in the effort to wind citizens up in favour of the war, which resulted in over half a million deaths.

It would seem, therefore, that participative democracy does not necessarily have a monopoly on demagogues. In fact, it would seem that the potential for demagoguery is significantly less. For one thing, in Athens it was rather difficult to claim that one had secret information that others were not allowed to see, and no one had State machinery at his disposal through which to propagate his own opinion. In addition, a majority of support had to be achieved and sustained. It is unlikely that the “coalition” States in the Second Iraq War enjoyed majority support at any time – in a representative democracy one need only make sure that it is plausible that the opposite view is not held by a wide majority of citizens.

Nevertheless, we are not bound to repeat Athenian mistakes. Vacant demagogy is something that any modern democracy should seek to counteract, an enterprise possibly best achieved not by any political system, but by a critical education.

2.11.10. Fairness

The equality of the Athenian system depended on downplaying existing inequalities such as talent that were regarded as “irrelevant”. This was the source of a great deal of the

criticism levelled at democracy by its contemporary critics, who did not ascribe to the belief that all citizens are equal in their merits. In Plato's Republic, democracy is said to be a system which dispenses equality to equals and unequals alike.⁴¹⁸ There is something to this position: democracy led to its own injustices, though as we will see these generally pale in comparison to those created by a Republic predicated on inherent inequality.⁴¹⁹ These injustices tended to be either those that formed because a citizen was not capable of exercising his democratic rights effectively (eg a citizen was required to represent himself in court which automatically disadvantaged those without good oratory skills) or accrued to citizens with a high level of merit who were "held back" by the democratic system, whose vote on the jury or in the *ekklesia* carried no more weight than that of a less meritorious fellow citizen.

However, these injustices were relatively slight: court cases were not based on oratory alone and they were not terribly sophisticated; the most able citizens could exercise their superiority by running for elected office or acting as *rhetor*. That being said, anyone who hopes to equate democracy with absolute fairness is hoping in vain.

2.11.11 Summary of Final Conclusions

The essential characteristics of a democracy are: decision-making via "the people" acting directly and on an equal basis, mass participation, fluid majorities, relative economic equality, and interpretations of rule of law and rights that are compatible with the exercise of democracy.

Conditions which were present in the Athenian democracy, but which will need to be overcome for modern implementation are a homogenous citizenship and a lack of means of unilateral mass communication. The inherent weakness of a democratic system is blackmail, due to the virtually unlimited power of each individual citizen to initiate an action against another. Democracy seems to have little effect on aggregate fairness, and the prevalence of demagoguery.

⁴¹⁸ Plato, *The Republic*, (Anchor Books, 1989) at 250.

⁴¹⁹ *Infra* pp. 123 et seq.

Chapter 3. Roman Republicanism – The Original *Rechtsstaat*

In modern times we do not only speak of democracy, but also rule of law or the *Rechtsstaat*, which is, however, often mentioned in the same breath as democracy and seen as being virtually equivalent to it. However, the modern “rule of law” term does not refer to the type of rule of law present in Athens – indeed, this concept of rule of law is scarcely even known outside the circles of classical scholars. Instead, the modern rule of law concept is based on the state organisation developed in Rome. It was this form of organisation and law that was preserved and forms the basis of the vast majority of law and legal concepts in the Western world. We must therefore inquire as to what were the characteristics of this state and whether it is, indeed, virtually synonymous with democracy.

Although many modern societies would qualify as pure rule of law states, their very proximity to our own culture makes abstract study more difficult. The very alienness of Roman customs and thought contribute to making its salient features all the more apparent. The study is also enabled by the fact that although the Roman Republic claimed the will of the people as the basis for its authority, its members explicitly rejected democracy as a political system. Its study is therefore unburdened by the State’s own efforts to claim the democratic nature of any given mechanism, and thus to determine more easily the necessary criteria of a *Rechtsstaat*. In addition, the Romans developed the entire *Rechtsstaat* concept instead of merely adopting it, so that the underpinning justification for each action is often more exposed than in modern times.

“*Rule of law* is commonly defined in the procedural terms of a well-ordered legal system under an independent judiciary”.¹ As we will see, the Roman Republic came to admirably fulfil these conditions.

The historical period of the Roman Republic began in the first years of the 5th Century B.C. and ended approximately in 45 B.C. with the death of Julius Caesar and ensuing rule of the triumvirate, a time span covering almost half a millennium.

During this time the Republic underwent several changes of enormous magnitude, transforming itself from a small city surrounded by other similar cities to a world superpower supported by a powerful army. As the Roman Republic expanded and became more sophisticated and challenging to administer, its organs and offices continued to evolve to meet these challenges. It is therefore difficult to pick any one point in time as precisely exemplifying the law of State organisation in the Roman Republic. The last century of Republican rule was particularly tumultuous, and although this time period represents that best-documented by contemporary observers, it can also be regarded as a period in which the

¹ Eric Stein, “International Integration and Democracy: No Love at First Sight” in *Democracy and International Law*, 297 at 301.

Republic steadily unravelled, spiralling into a constant series of atypical crises. In view of these circumstances, an effort has been made in the following to give some sense of the historical development while focusing on the most enduring aspects of the Republic's state organisation. While details may have changed, the underlying system remained virtually unaltered.

3.1. Basic Legal Structure of the Roman Republic

3.1.1. Bodies of Collective Decision-making: Their Composition and Competencies

In contrast to Athens, Rome had what could be termed a separation of powers, best characterised as a diffusion of power among the elite through a set of interlocking offices and assemblies.

While the Athenians had one Assembly the Romans had several, the most important of which are elaborated upon below.

3.1.1.1. The Senate

3.1.1.1.1 Composition and Function

The prime governmental organ of the Roman Republic was the Senate which was originally composed of the heads of the one hundred most important families. Although new seats were added throughout the years, eventually increasing to six hundred, this principle – that the Senate was composed of the heads of the most important families – remained.² Senators could be either patrician or plebeian, though the vast majority remained patrician and it is unknown when the first plebeians were admitted.³ Virtually all seats in the Senate were occupied by former magistrates so that the decision to appoint a citizen to it – initially made by the consuls and later by the censors – was largely a formality. Once appointed, a senator retained his seat for life unless he committed a misdemeanour serious enough for the censors to strip him of his rank.⁴

The Senate did not pass legislation, but it did appropriate public funds (thus having “the power of the purse”), appoint governors, carry out peace-time foreign relations and the

² H.F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law*, (3rd Edition, Cambridge University Press, 1972), at 31.

³ *Ibid.*, at 31 et seq.

⁴ *Ibid.*, at 32 et seq.

administration of Italy,⁵ and advise the consuls on warfare, although in practice they also advised the consuls on every issue upon which they felt the consul could use their advice.⁶ Via the *senatus consulta* the Senate could also direct other magistrates,⁷ often by instructing the colleague of a magistrate whom they felt had acted incorrectly to veto his action.⁸

Almost all legislation was submitted to the Senate for approval prior to a vote, independent of whether such a submission was legally compulsory.⁹ In the unlikely event that a magistrate failed to consult it before proposing legislation, the Senate would find a tribune of the plebeians to veto the legislation or, failing that, announce that the measure was unlawful due to technical reasons, such as a failure to take the auspices correctly. Although such an announcement had no legally binding effect, the collective political clout of the Senators ensured that it was almost always respected.¹⁰

The Senate took care to preserve this state of affairs. In an extreme case, the reformist tribune of the plebs Tiberius Gracchus placed legislation regarding the redistribution of *latifundia* holdings¹¹ to the benefit of the dispossessed before the Plebian Council without first consulting the Senate (which would have refused to give its approval). In the subsequent debacle, Tiberius Gracchus was murdered by a mob of angry senators.¹² In the later Republic some forms of magisterial disobedience vis-à-vis the Senate even constituted criminal offences.¹³

The Senate was therefore a nebulous, central power almost akin to an ill-defined administrative or constitutional court which reviewed the acts of the magistrates and stepped in if they were deemed remiss. Its lack of clear competencies should not obscure that it was the most powerful organ in Rome.¹⁴ According to one historian, “*Dass der Senat zum mindesten in der spaeteren Republik tatsaechlich das eigentliche Regierungsorgan war, ist offenkundig und unbestritten*”.¹⁵

⁵ Polybius 6.4 in C. Nicolet, *The World of the Citizen in Republican Rome* (Batsford Academic and Educational, 1980), at 210; Michael Crawford, *The Roman Republic*, (2nd Edition, Harvard University Press, 1992) at 26.

⁶ M. Crawford, note 5, at 26.

⁷ *Ibid.*

⁸ M. Cary and H.H. Scullard, *A History of Rome Down to the Reign of Constantine*, (3rd Edition, MacMillan Press, 1975), at 98.

⁹ M. Crawford, note 5, at 26; E.S. Staveley, *Greek and Roman Voting and Elections* (Thames and Hudson, 1972) at 227; Nicolet, note 5, at 286.

¹⁰ Jolowicz and Nicholas, note 2, at 34.

¹¹ Enormous estates often partially acquired by usurping the smallholdings of neighbours away at war.

¹² Andrew Borkowski and Paul du Plessis, *Textbook on Roman Law*, (3rd Edition, Oxford University Press, 2005), at 10.

¹³ W. Kunkel, “Magistratische Gewalt und Staatsherrschaft” in Temporini and Hildegard, eds., *Aufstieg und Niedergang der Roemischen Welt: Geschichte und Kultur Roms im Spiegel der neueren Forschung*, 2. Band, (Walter de Gruyter, 1972), 3 at 19.

¹⁴ Jolowicz and Nicholas, note 2, at 30.

¹⁵ “That the Senate, at least in the later Republic was the actual organ of government is well-known and undisputed”, Kunkel, note 13, at 13, my translation.

Therefore, “all citizens being at the mercy of the Senate, and looking forward with alarm to the uncertainty of litigation, are very chary of obstructing or resisting its decisions”,¹⁶ although via legislation and the tribunes of the plebs it would have been theoretically possible to do so.

3.1.1.1.2. Procedure

In the Senate the presiding magistrate sought the views of the leading members on the business at hand in an established order of precedence dictated by official rank.¹⁷ During this time motions were tabled by those invited to speak, whereby they did not necessarily have any connection to the issue proposed by the magistrate. There was no time-limit imposed on the speeches of the senators, and because a session had to close by sunset a senator would sometimes filibuster a motion which he disagreed with by holding an extremely lengthy speech.¹⁸

Provided that this did not happen, the presiding magistrate decided which of the motions put forward it would be useful to put to a vote,¹⁹ whereby a certain quorum of senators was required to be present for a vote to take place.²⁰ The presiding magistrate himself did not vote in the Senate.²¹ The senators voted “yes” by assembling around the person whose motion was being voted on and “no” by separating themselves from him.²² Once a motion was passed, all other motions on that topic were automatically dropped. If the magistrate who had asked to consult the Senate accepted the resolution it became a *senatus consultum* with binding force. If he vetoed it, it was merely a non-binding *auctoritas* or opinion.²³

While the Senate was synonymous with the privileged elite and wise “Fathers” of Rome, all other assemblies were “people’s assemblies”. Next to the Senate, the most important assemblies were the *Comitia Centuriata*, the *Comitia Tributa* and the *Consilium Plebis*.²⁴

¹⁶ Polybius, 6.17 in Nicolet, note 5, at 212; the quote goes on to read, “Similarly everyone is reluctant to oppose the projects of the consuls, as all are generally and individually under their authority when in the field”.

¹⁷ Cary and Scullard, note 8, at 99.

¹⁸ Jolowicz and Nicholas, note 2, at 44.

¹⁹ Staveley, note 9, at 227.

²⁰ *Ibid.*, at 228.

²¹ *Ibid.*, at 227.

²² *Ibid.*, at 228.

²³ Jolowicz and Nicholas, note 2, at 44 et seq.

²⁴ Two further assemblies, the *Comitia Calata* and *Comitia Curiata* also existed, but were of limited importance for the duration of the Republic.

3.1.1.2. Centuriate Assembly (*Comitia Centuriata*)

3.1.1.2.1. Function

The Centuriate Assembly had legislative powers regarding military and foreign policy, and elected censors, praetors and consuls,²⁵ *ie*, those magistrates concerned with warfare and justice. It was presided over by the consuls.²⁶ After the *Lex Hortensia* granted legal status to the plebiscite, the legislative powers of the Centuriate Assembly, while remaining intact, were used more rarely.²⁷ The *Comitia Centuriata* rendered judgement on capital crimes until these were transferred to the courts in the 2nd Century B.C.,²⁸ and even after this point it continued to pass judgement in cases of treason.²⁹

3.1.1.2.2. Composition

The *Comitia Centuriata* was composed of all male Roman citizens who were divided into one hundred and ninety-three *centuriae* which were in turn organised into five classes based on economic status, including the eighteen centuries of the *equites* who were members of the first property class, but held a privileged position within it and formed their own separate centuries.³⁰ In addition to the five property classes, a propertyless sixth class, the *proletarii*, existed whose members were afforded a single century.³¹

The *equites* comprised 18 centuries, the rest of the first class initially 80 centuries,³² the second, third and fourth classes 20 centuries each and the fifth class 30 centuries. In addition 4 centuries for artisans and musicians existed and voted together either with the first and second or the fourth classes.³³ The centuries voted according to rank, *ie* first the *equites* voted, then the centuries of the first class, followed by the centuries of the second class, etc.³⁴

²⁵ Nicolet, note 5, at 223; M. Crawford, note 5, at 196; Staveley, note 9, at 129.

²⁶ Jolowicz and Nicholas, note 2, at 26.

²⁷ Nicolet, note 5, at 223.

²⁸ Corey Brennan, *The Praetorship in the Roman Republic, Volume One*, (Oxford University Press, 2000) at 125; Staveley, note 9, at 129.

²⁹ Nicolet, note 5, at 223 et seq.

³⁰ M. Crawford, note 5, at 196; Nicolet, note 5, at 85, 211; Jolowicz and Nicholas, note 2, at 21.

³¹ Cary and Scullard, note 8, at 80; Nicolet, note 5, at 157.

³² Sometime between 241 and 220 B.C. the number of centuries allotted to the senatorial class was reduced from 80 to 70. This reduction was not due to a democratic impulse, but rather it had been decided by the senatorial class to arrange its – and only its – centuries according to tribe. Since there were 35 tribes, the number of centuries accorded to a tribe had to be a multiple of 35 and 70 was the closest thing to 80. By re-arranging the senatorial centuries to allocate two to each tribe a more even balance of power between the urban and rural aristocratic families was achieved, Staveley, note 9, at 127, 138.

³³ Nicolet, note 5, at 221.

³⁴ Staveley, note 9, at 126.

Each century was accorded one vote. The direction of its vote was determined by the direction in which the majority of its members had cast theirs.

The number of members each century contained varied widely. At the beginning of the Republic, patrician families, who would have comprised the *equites* and first class, accounted for about one-tenth of the population,³⁵ and by Cicero's time, the century of the *proletarii* contained more members than all the senatorial centuries combined.³⁶ In fact, the first and second property classes made up only "a very small proportion of Roman citizens."³⁷ However, because the *equites* and centuries of the first property class controlled the majority of the *centuriae* they could often carry a vote without the support or only with minimal support from the lower four classes.³⁸

Cicero wrote:

Sencius [who first established the centuries] so disposed the centuries in the classes that the votes were under the control of the rich and not of the masses. He accepted the principle, to which we must forever adhere in the Republic, that the majority should not have the strongest voice...No one was deprived of the right of suffrage and yet he who had most to gain from the well-being of the State could use his voice to the greatest effect³⁹

That this organisation effectively achieved its goals is corroborated by Livy who records:

For the knights were called upon to vote first, then the eighty centuries of the first class; if there were any disagreement there, which rarely happened, it was provided that the centuries of the second class should be called; and they almost never descended so far as to reach the lowest citizens⁴⁰

The Centuriate Assembly thus strongly reinforced the power of those already sitting on the Senate.

³⁵ Cary and Scullard, note 8, at 62.

³⁶ Staveley, note 9, at 126.

³⁷ *Ibid.*, at 199.

³⁸ M. Crawford, note 5, at 194; Cary and Scullard, note 8, at 80.

³⁹ quoted from Staveley, note 9, at 128.

⁴⁰ Livy 1.43.11, quoted in Nicolet, note 5, at 259.

3.1.1.3. Tribal Assembly (*Comitia Tributa*)

3.1.1.3.1. Function

The *Comitia Tributa* was also endowed with legislative powers, elected aediles curulis, quaestors and military tribunes, and conducted trials for minor crimes against the State until standing courts were set up in 287 B.C.⁴¹ Capital offences were also tried in the *Comitia Tributa*.⁴² The *Comitia Tributa* was usually summoned by a consul or praetor.⁴³

3.1.1.3.2. Composition

Like the *Comitia Centuriata*, the *Comitia Tributa* was composed of all male Roman citizens, this time divided into thirty-five tribes. Each tribe cast one vote in the *Comitia Tributa*.⁴⁴ Power was unevenly divided in the *Comitia Tributa*, as there were thirty-one rural tribes and only four urban tribes, despite the extreme population density of Rome.⁴⁵ Tribal membership depended primarily upon place of domicile⁴⁶ although citizens retained their original tribal membership if they moved to the city.⁴⁷

Membership was not distributed among tribes in even a roughly equitable manner. Some tribes had only a few hundred members, while others had tens of thousands.⁴⁸ This composition was not coincidental. According to Livy, in the year 304 B.C. the censor Q. Fabius "in order that the elections might not be in the hands of the basest of the people, culled out all the market-place mob and cast them into four tribes, to which he gave the name of "urban".⁴⁹ The impact tribal membership had on effective participation can be gleaned from the fact that a popular censorial punishment was to transfer an offender to one of the crowded urban tribes where the power of his vote would automatically be diluted.⁵⁰ Freedmen were given voting rights in one of the four urban tribes⁵¹ and a substantial effort was made to

⁴¹ M. Crawford, note 5, at 196; Staveley, note 9, at 131; Nicolet, note 5, at 234.

⁴² Polybius 6.14, quoted in Nicolet, note 5, at 210.

⁴³ Jolowicz and Nicholas, note 2, at 26; Nicolet, note 5, at 228.

⁴⁴ M. Crawford, note 5, at 195.

⁴⁵ *Ibid.*, at 79.

⁴⁶ *Ibid.*, at 195; Staveley, note 9, at 136.

⁴⁷ Staveley, note 9, at 136 et seq.

⁴⁸ Nicolet, note 5, at 84.

⁴⁹ Livy 9.46.14, quoted in Nicolet, note 5, at 227.

⁵⁰ Jolowicz and Nicholas, note 2, at 53.; Nicolet, note 5, at 84.

⁵¹ Staveley, note 9, at 140.

prevent them from transferring to rural tribes where their vote would have carried more weight.⁵²

3.1.1.4. Plebeian Council (*Consilium Plebis*)

The Plebeian Council constituted the third important Assembly and elected plebeian aediles and plebeian tribunes, legislated for the plebeians before 287 B.C. and, enabled by the *Lex Hortensia*, which stated that legislation did not have to obtain the approval of the patrician Curiate Assembly and Senate to attain the force of law, for the entire Republic after that date.⁵³ As a sub-part of the *Comitia Tributa*, the Plebeian Council also voted according to tribe.⁵⁴

3.1.2. Procedure of the Popular Assemblies (*Comitia Centuriata, Comitia Tributa, Consilium Plebis*)

3.1.2.1. Preparatory Work

Which Assembly was summoned for legislative purposes depended largely on the magistrate who wished to convene it.⁵⁵

Only magistrates proposed legislation in the assembly (the ordinary citizen had no right to initiate legislation) and legislation was only voted on, not debated, although pre-vetted formal speeches were occasionally made for or against.⁵⁶ It should be noted that because magistrates initiated every action, the passing of a law, for example, was not seen as a “people’s action”, but instead as the end product of a contract between the magistrate and the people and in recognition of this fact summoning an assembly was referred to as *agere cum populo* (“to treat with the people”).⁵⁷

Before an Assembly was called to vote, the proposed measure (be it trial, legislation or election) was published as an edict, both orally and in writing on a whitened wooden tablet

⁵² Nicolet, note 5, at 227 et seq.; H. Chantraine, “Zur Entstehung der Freilassung mit Buergerrechtserwerb in Rom” in Temporini and Hildegard eds., *Aufstieg und Niedergang der Roemischen Welt: Geschichte und Kultur Roms im Spiegel der neueren Forschung*, 2. Band, 59 at 61.

⁵³ Nicolet, note 5, at 224 et seq; Staveley, note 9, at 131; although, as previously mentioned, all law was unofficially required to obtain the sanction of the Senate before even being tabled.

⁵⁴ Jolowicz and Nicholas, note 2, at 24 et seq.; Staveley, note 9, at 130.

⁵⁵ Jolowicz and Nicholas, note 2, at 26.

⁵⁶ M. Crawford, note 5, at 195; Jolowicz and Nicholas, note 2, at 18.

⁵⁷ Nicolet, note 5, at 215.

which also contained the date on which the vote was to be held.⁵⁸ In general, 23 days had to elapse between promulgating the edict and the vote.⁵⁹

When a legislative matter was to be voted on, the magistrate who had drafted the bill would summon a series of meetings known as *contiones* to explain the content of the bill, express his views and those of his supporters, and occasionally those of notable adversaries. “Only those invited were permitted to speak, but by custom these frequently included private citizens of note, as well as colleagues, other magistrates and tribunes.” Magistrates could not only select speakers, but also cross-examine them. Other magistrates not involved with the proposed legislation also sometimes held such meetings to air their views.⁶⁰ At no point throughout the entire process was the average citizen given the opportunity to publicly express his views, much less take a leading role in proceedings.⁶¹

3.1.2.2. Conducting the Vote - Technicalities

Procedure in the Assemblies was fairly similar both for legislation and elections. First the proposed legislation or list of candidates was read out and then the formal question orally put to the voters by the presiding magistrate.⁶² For the information of the voters and as an aid to their memories, at electoral assemblies a very large tablet with the names of the candidates was set up at the front.⁶³

In cases of legislation, the wording of the question had to be such that it could be answered with a straight “yes or no” as these were the only two answers a citizen was permitted to give.⁶⁴ Immediately following the reading of the question, the citizens sorted themselves into their voting units (*centuriae* or tribes). This was followed by selection – by lot – of the voting unit which would vote first (in the Centuriate Assembly this was, of course, always one of the *equite* centuries).⁶⁵ The tribe voting first was known as the *principium*; the century voting first the *praerogativa*.⁶⁶

In the case of elections, each citizen was allowed to vote for an equal number of candidates (*eg* eight praetors) regardless of how many of those positions had already been filled by the pre-voting units. This practice was not motivated by any desire to ensure equality amongst the voters. Because candidates were not ranked in order of preference each candidate

⁵⁸ Nicolet, note 5, at 237; Staveley, note 9, at 143.

⁵⁹ Staveley, note 9, at 144.

⁶⁰ Jolowicz and Nicholas, note 2, at 27; Staveley, note 9, at 149.

⁶¹ Cary and Scullard, note 8, at 98.

⁶² Staveley, note 9, at 152 et seq.

⁶³ Staveley, note 9, at 162; Nicolet, note 5, at 255 et seq.

⁶⁴ Staveley, note 9, at 153.

⁶⁵ Cary and Scullard, note 8, at 80; Nicolet, note 5, at 260.

⁶⁶ Cary and Scullard, note 8, at 80; Nicolet, note 5, at 274 et seq.

named received the full support of the voter. Thus, if the “lower classes” continued to vote for eight candidates, most of the candidates who had polled high with the upper classes, but not quite high enough, would almost inevitably be elected. Thus, the upper classes had an even greater influence over the vote than is immediately apparent.⁶⁷

3.1.2.3. Voting Method

Until the mid-second century B.C. voting was carried out orally. The individual members of each voting unit filed past an official known as the *rogator* (questioner), who was appointed by the presiding magistrate. As they did so, they announced their answer to the question put or named the candidate(s) of their choice. The *rogator* – who was not a simple citizen, but usually a person of high rank such as a senator⁶⁸ – in turn recorded the votes by making a mark inscribed on a large waxed tablet against the appropriate verdict or name.⁶⁹

Oral voting was replaced by written voting through three laws: the *lex Gabina*, 139 B.C. (which introduced the ballot for elections), the *lex Cassia*, 137 B.C. (which introduced it for judicial decisions) and the *lex Papiria*, (which introduced it for legislative votes). The secret ballot was not introduced for technical reasons, but in order to protect the anonymity of the vote and prevent bribery.⁷⁰ Voters had previously sometimes been intimidated by threats into casting their vote in a given direction. For example, soldiers who had served under Aemilius Paullus originally refused to vote him a triumph on the grounds that he had been too miserly in his distribution of the spoils of war. However, when Paullus threatened to observe their vote and so ascertain who had voted against his triumph, they changed their minds.⁷¹

Voting by ballot was never completely accepted by some members of the upper classes.⁷² Cicero objected to the secrecy of the vote and advocated a system of continuing voting by ballot, but with the people “voluntarily” showing their ballots to any high-ranking citizen who wished to see them, thus enabling the common people to honourably win the favour of the aristocracy. According to Cicero his proposal, “grants the appearance of liberty, preserves the influence of the aristocracy, and removes the causes of dispute between the classes”.⁷³ While indicative of the strategy generally pursued by the upper classes, who

⁶⁷ Staveley, note 9, at 183 et seq.

⁶⁸ Nicolet, note 5, at 267.

⁶⁹ Staveley, note 9, at 158.

⁷⁰ Jolowicz and Nicholas, note 2, at 27.

⁷¹ Nicolet, note 5, at 267 et seq.

⁷² *Ibid.*, at 268 et seq.

⁷³ Cicero, *De Legibus* 3.38-39 quoted in Nicolet, note 5, at 270; another translation reads “the appearance of liberty is given to the people, the authority of the aristocracy is retained, and the cause of quarrelling is removed” (printed in Cicero, *The Republic, The Laws: A New Translation by Niall Rudd*, Oxford University Press, 1998, at 3.38-39).

concentrated on the appearances of liberty, it is uncertain whether many voters found his arguments convincing.

After ballots were introduced, citizens voted by filing up a ramp and dropping their ballot into an urn placed at shoulder-height in front of the presiding magistrate's tribunal. The voter then exited the voting enclosure. The ballots used were small waxed wooden tablets, issued blank at elections (voters inscribed the names of their preferred candidates), and issued at judicial assemblies with two letters on the same side (L for *libero* and D for *damno* – voters crossed out the verdict they did not agree with). At legislative assemblies it is uncertain if two tablets were issued, one marked U for *uti rogas* (yes) and the other A for *antiquo* (no) and the voter deposited the one he agreed with in the urn, or if one tablet with both U and A on it was issued and the procedure was identical to that at judicial assemblies.⁷⁴

After written ballots were introduced, the vote was counted by officials known as *custodes* who were always men of high rank. The magistrate appointed at least three *custodes* to count the vote of each voting unit and at elections each candidate could also appoint at least one further *custode* to safeguard his own interests.⁷⁵

3.1.2.4. Adjudging the Results of the Vote

In addition, during elections in all assemblies, voting always stopped as soon as a number of candidates equal to the number of places to be filled had secured an absolute majority of possible votes.⁷⁶

This meant that as soon as a candidate received the votes of 18 tribes or 97 *centuriae* he was deemed elected, despite the fact that had voting continued another candidate may have received a larger proportion of the overall vote, *eg* someone could be elected if he received the votes of a bare 97 *centuriae* provided they were the right *centuriae* (the upper classes voting first), while another candidate who would theoretically have received the votes of 150 *centuriae* may not have been elected if many of his supporters were members of the lower-ranking *centuriae*.⁷⁷ In the event of a tie between two candidates, not within the voting units but overall, the *Lex Malacitana* foresaw a specific order of precedence – if one candidate were married and the other a bachelor, the married man was to be elected. If one of the candidates had children and the other was childless, the man with children was deemed elected. Only as a last resort was a tie decided by lot.⁷⁸ This procedure occurred even if there

⁷⁴ Nicolet, note 5, at 273; Staveley, note 9, at 159 et seq; Jolowicz and Nicholas, note 2, at 27.

⁷⁵ Staveley, note 9, at 176; Nicolet, note 5, at 276.

⁷⁶ Staveley, note 9, at 170.

⁷⁷ *Ibid.*, at 179.

⁷⁸ Nicolet, note 5, at 274.

were remaining units whose votes had not been counted yet (and who therefore could have determined the outcome of the tie).⁷⁹

Initially, all units voted successively and the results for each voting unit were announced before the remaining units voted. It is possible in tribal assemblies that with the introduction of the written ballot that in the interests of speed the next voting unit would commence its voting before the results from the immediately preceding unit were announced. However, results were announced as soon as they were known, so that the remaining tribes would have a fairly good idea of the direction the vote was taking before voting themselves.⁸⁰

In the later Republic, voting units voted simultaneously, usually thirty-five units at a time, though voting still stopped as soon as the quota required was known to have been reached, and in the Centuriate Assembly, voting was still arranged by class, with the vote of each class being announced before the next class was permitted to vote.⁸¹ In the Tribal Assembly only elections were conducted by simultaneous vote – judicial and legislative matters continued to be voted on successively.⁸² After simultaneous voting was introduced in the tribal assemblies, a lot was cast to determine in which order the results would be read out.⁸³ The vote within the tribe or *centuriae* was by no means unanimous.⁸⁴ Each voting unit was deemed to have cast its vote in the direction that the relative majority of its members had voted.⁸⁵ A tie within the voting unit was treated in different ways depending on the issue being voted on. On legislative matters this was deemed to be a vote against the proposed legislation, in judicial decisions it was counted as a vote in favour of acquittal, and in elections a lot was drawn between the two tied candidates to decide which received the vote of that unit.⁸⁶

3.1.2.5. The Influence of the Presiding Magistrate

By virtue of his position, the magistrate, who tabled the legislation and who presided over its limited public debate, also had myriad methods at his disposal with which to influence the actual vote in his favour.

If fewer than five members of a voting unit were present, the presiding magistrate could transfer citizens who were officially members of another voting unit to it, which

⁷⁹ Staveley, note 9, at 180.

⁸⁰ *Ibid.*, at 179.

⁸¹ Nicolet, note 5, at 258 et seq.; Staveley, note 9, at 159, 169 et seq.; Jolowicz and Nicholas, note 2, at 27.

⁸² Staveley, note 9, at 171 et seq.

⁸³ Nicolet, note 5, at 267, 278; Staveley, note 9, at 181.

⁸⁴ Staveley, note 9, at 197.

⁸⁵ *Ibid.*, at 177.

⁸⁶ *Ibid.*, at 178.

afforded him the opportunity to make this transfer in such a way as to stack the unit and ensure that it voted in the direction he desired.⁸⁷

Because the vote of the first unit was considered an omen and often set the trend for the subsequent voters,⁸⁸ there is evidence (though uncertain) that at least in legislative assemblies the presiding magistrate also often chose the first voter to cast his vote within each voting unit and that this person was almost always someone who had pledged to support the motion.⁸⁹ Thus, although voting orally was relatively private and ballot voting technically secret, the direction in which the first voter cast his vote was generally common knowledge. These “first voters” thus had a function akin to an “*animateur*” or “motivator” to their fellow voters and had the task of setting an example of positive voting for the others,⁹⁰ who knew that he had endorsed the legislation at hand.

A presiding magistrate could also arrest the voting procedure at any time and order it to start from the beginning again. The reasons for this could be utterly arbitrary, for example, the failure of the voters to vote in the direction that the magistrate desired was considered an acceptable reason for halting the procedure. In this case, the magistrate would order voting to stop, deliver a speech outlining his views and then order voting to commence from the beginning again.⁹¹ An example is recorded of precisely such behaviour having occurred at a consular election in 215 B.C. The presiding *suffect consul* Q. Fabius Maximus became alarmed when the vote of the first century named two competing candidates as consuls. Q. Fabius interrupted proceedings to make a speech against the two citizens elected by the first century and ordered them to vote again, whereupon he and another candidate, M. Marcellus, were elected consuls.⁹²

It is little wonder that magistrates seem to have rarely suffered a vote going against them.⁹³ The power of the presiding magistrate to direct the outcome of the vote was already considerable, even if confined to perfectly acceptable and legal behaviour.

3.1.2.6. Conclusions Regarding the Assemblies of the Roman Republic

One notices in the assemblies the extent to which their composition had a greater impact on content than it did in Athens, as status determined the time and extent of participation.

⁸⁷ Staveley, note 9, at 209; Nicolet, note 5, at 254 et seq.

⁸⁸ Jolowicz and Nicholas, note 2, at 27; Staveley, note 9, at 153 et seq.; Nicolet, note 5, at 257; Cary and Scullard, note 8, at 80.

⁸⁹ Nicolet, note 5, at 272; Staveley, note 9, at 242.

⁹⁰ Staveley, note 9, at 165 et seq.

⁹¹ *Ibid.*, at 210.

⁹² Livy 24.7.12-24.9.1, quoted in Nicolet, note 5, at 261.

⁹³ Staveley, note 9, at 168.

Because the Romans voted in units they had fewer individual participatory rights than the Athenians who were free to participate as individuals and to vote as individuals. In the Athenian system of direct participation every vote was counted – no vote was wasted in advance of the final tabulation. In the Roman system if a citizen voted contrary to the majority of his unit, his vote was “thrown out” and received no weight in the final tabulation.

Moreover, by facilitating participation in units as opposed to individually, the assemblies were instrumental in concentrating power in the hands of the wealthy by keeping the majority of the *centuriae* in the Centuriate Assembly in the hands of the highest classes and the vast majority of tribal units in the Tribal Assembly in the hands of the wealthy landowners.

The similarities to the current international system in which, participation also occurs by group, namely by nation, and in which some group’s (or nation’s) voices are given priority hardly needs to be pointed out. Just as the Romans did not ask the proletariat for their opinion, it is rather unlikely that the opinion of Togo or Somalia would be required at an international conference. Noteworthy is, perhaps, that as all centuries and tribes were equal under Roman law, so are all States equal under international law. The very equality between inherently unequal voting units, necessarily leads to a great inequality between individuals. However, in Rome, every citizen could cast a vote within his unit in regards to the issue at hand and so influence the final vote of that unit, whereas today, even in modern democracies, a referendum is not taken before the nation’s delegates are sent to international conferences, nor before the internal elections of officials of international institutions. It is, therefore, important when contemplating the distortion of voting in the Roman Republic to remember that it was not half so distorted as the current skewing on an international level.

Another noteworthy aspect of the Roman system was the level of power it placed in the hands of the magistrates, who had several tools at their disposal with which to influence voting (stopping the vote, stacking voting units, etc.). Because the magistrates also proposed legislation in the first place this gave them a very influential position – only they decided which issues could be voted upon, following which they used a multitude of manipulative devices to ensure that the desired result was delivered. The Assemblies were thus subject to an extreme degree of political manoeuvring, while the individual citizen was limited to – at most – casting his vote within his voting unit.

3.1.3. Elected Positions

3.1.3.1. The Magistrates and Their Competencies

The business of the Republic was carried out by magistrates each of whom had specific duties to fulfil and none of whom was directly paid for their services.⁹⁴ Magisterial offices were almost always filled simultaneously by two or more officials who had the power to veto each others' actions.⁹⁵ Although the rule for the entire duration of the Republic was one-year magistracies which could not be immediately renewed, *imperium* could occasionally be extended via prorogation if necessary (usually when military exigencies demanded that there be no change of command in the field).⁹⁶

3.1.3.1.1. Consul

The highest elected office in Rome was that of consul. At first exclusively patrician, for the most part of the Republic starting in 342 B.C. consuls could be either patrician or plebeian,⁹⁷ with two being elected each year by the Centuriate Assembly. Once elected a consul could only be deposed by a dictator.⁹⁸ Generally, a citizen was required to be 41 (patrician) or 42 (plebeian) years of age to be elected consul.⁹⁹ The consuls oversaw the functioning of Rome including all inferior magistrates, except the plebeian tribunes,¹⁰⁰ carried out diplomacy between the Senate and foreign states, convened the Senate and presided over its meetings,¹⁰¹ and acted as commanders-in-chief of the Roman legions.¹⁰²

The consuls performed their duties in one month rotations, *ie* "Consul A" would undertake the consular duties for the first month, "Consul B" would take responsibility for them in the second month, and so on. However, the non-acting consul always retained veto power over any an action his co-consul had taken.¹⁰³ Thus consuls did not necessarily have to reach an agreement before undertaking action and the risk that they would simultaneously undertake contradictory actions was avoided. While at war, the consuls – who literally headed the armies in the field – could arrest and inflict punishments to whichever degree they saw

⁹⁴ Jolowicz and Nicholas, note 2, at 38; Cary and Scullard, note 8, at 81.

⁹⁵ M. Crawford, note 5, at 109.

⁹⁶ Prorogation was granted sometimes by the Senate and the Plebeian Council, later by the Senate acting alone, Brennan, note 28, at 73 et seq.

⁹⁷ M. Crawford, note 5, at 25.

⁹⁸ Jolowicz and Nicholas, note 2, at 46.

⁹⁹ Gary Forsythe, *A Critical History of Early Rome: From Prehistory to the First Punic War*, (University of California Press, 2005) at 150.

¹⁰⁰ Jolowicz and Nicholas, note 2, at 49.

¹⁰¹ Brennan, note 28, at 61.

¹⁰² Forsythe, note 99, at 150.

¹⁰³ M. Crawford, note 5, at 22; Staveley, note 9, at 231.

fit¹⁰⁴ and during campaigns they were inviolable. After a campaign, however, they could be prosecuted, for example, for wasting resources.

In the later Republic, it was common for former consuls to become governors of one of the provinces.

3.1.3.1.2. Praetor

The office of praetor was created to relieve the consuls of their judicial duties in 367 B.C.¹⁰⁵ and he was elected in the same manner and on the same day as they were.¹⁰⁶ In addition to his judicial duties, he also literally “held down the fort” in Rome while the counsels were absent on military campaigns.¹⁰⁷ At first the praetor was always a patrician,¹⁰⁸ but starting in 337 B.C. he might also be a plebeian, with the first plebeian praetor being elected in 336 B.C.¹⁰⁹ In either case, a citizen had to be at least 39 years of age to be considered for the office.¹¹⁰

In 241 B.C. a second praetorship was created.¹¹¹ From this point on, one praetor was given the title *praetor urbanus*¹¹² and was responsible for disputes between Roman citizens. The other praetor was known as the *praetor peregrini* and dealt with disputes between Roman citizens and foreigners or *peregrinii*.¹¹³ As the Roman Republic expanded, additional praetors were added to govern and carry out justice in the new provinces, with the number of praetors increasing to 14 during the Republic.¹¹⁴ The praetor, like all magistrates except the plebeian tribunes, was subject to the discipline of the consuls who could veto his actions.¹¹⁵

3.1.3.1.3. Censor

The duties of censor were to maintain the census and supervise public morality. Two censors were elected, starting in 443 B.C., on the same day by the Centuriate Assembly.¹¹⁶ Although at first always patrician, starting in 367 B.C. one censor could be either patrician or

¹⁰⁴ Forsythe, note 99, at 150.

¹⁰⁵ *Ibid.*, at 211.

¹⁰⁶ Brennan, note 28, at 58.

¹⁰⁷ *Ibid.*, at 1.

¹⁰⁸ *Ibid.*, at 58.

¹⁰⁹ Jolowicz and Nicholas, note 2, at 16; Brennan, note 28, at 68.

¹¹⁰ M. Crawford, note 5, at 73.

¹¹¹ Nicolet, note 5, at 30.

¹¹² Forsythe, note 99, at 211.

¹¹³ Forsythe, note 99, at 211; Nicolet, note 5, at 30.

¹¹⁴ Nicolet, note 5, at 235; M. Crawford, note 5, at 71; Brennan, note 28, at 4.

¹¹⁵ Jolowicz and Nicholas, note 2, at 49.

¹¹⁶ Brennan, note 28, at 54 et seq.; M. Crawford, note 5, at 210.

plebeian.¹¹⁷ In 339 B.C. the *legis publilae* reserved one censorship from that point on for a plebeian.¹¹⁸ The office of censor was an exception to the usual one-year term of Roman magistrates as they were elected only every five years.¹¹⁹ Initially, the office of censor ranked somewhere between the position of aedile and consul, but it eventually rose in importance until only those who had been consuls could be elected censor.¹²⁰ A citizen could only be elected censor once in his life.¹²¹

3.1.3.1.3.1 Censorship

The censors enforced the *mos*, which were unwritten but nonetheless legally binding rules describing each Roman's obligation to act in conformity with traditional values. Failure in these areas often resulted in a severe demotion in rank, a punishment not to be taken lightly in a hierarchically organised society. This censorial punishment is recorded by Aulus Gellius:

If anyone had allowed his land to run to waste and was not giving it sufficient attention, if he had neither ploughed nor weeded it, or had neglected his orchard or vineyard, such conduct did not go unpunished, but was taken up by the censors, who reduced such a man to the lowest class of citizens. So, too, any Roman knight, if his horse seemed to be skinny or not well groomed, was charged with *impolitia*, a word which means the same thing as negligence¹²²

In less severe cases, such as excessive luxury and immature behaviour (*eg* refusal of aristocratic children to perform manual labour, obnoxious overconfidence in regards to military matters), the censors issued an official reprimand (*nota*) and a fine.¹²³

An idea of the scope of censure may be elicited from Dionysius who contrasts Athens and Sparta where such faults as idleness were severely punished, but also where the people never presumed to regulate, or even publicly take note of, activities confined to a private home, to Rome where any home could be scrutinised from top to bottom by the censors in order to ensure that: finances were not disposed of unwisely;¹²⁴ a master was not overly cruel

¹¹⁷ Brennan, note 28, at 55.

¹¹⁸ M. Crawford, note 5, at 210.

¹¹⁹ Cary and Scullard, note 8, at 69; Jolowicz and Nicholas, note 2, at 39.

¹²⁰ Brennan, note 28, at 56.

¹²¹ Jolowicz and Nicholas, note 2, at 52.

¹²² Aulus Gellius 4.12 in Nicolet, note 5, at 79.

¹²³ Borkowski and du Plessis, note 12, at 4; Nicolet, note 5, at 73 et seq.

¹²⁴ Rudolph von Jhering, *Geist des roemischen Rechts auf den verscheidenen Stufen seiner Entwicklung, Ersten Teil* (9th Edition, Wissenschaftliche Buchgemeinde, 1953), at 193.

to his slaves; a father was not overly harsh or lenient to his children; a husband was not unfair to his wife; children were not disobedient to their parents; brothers did not strive for more than their equal share; there were no night-long banquets; no wantonness; no neglect of ancestral honours of sacrifice and funeral; “nor any other things done contrary to propriety and the advantage of the state”¹²⁵.

As this last makes clear: “The dividing line between public and private life was never clearly drawn in Rome”.¹²⁶ The higher a person’s rank, the more intrusive the censors could be. Virtue was “indivisible” so that “a bad man” could not be “a good citizen.”¹²⁷ In this, the censors had a function not unlike the *dokimasia* and *euthunai* of Rome, except that instead of reviewing the conduct of officials, they scrutinised the conduct of all those who could potentially become officials, and did so in a manner not directly linked to their actions in office.

It was not uncommon for a member of the first classes who had behaved in an extravagantly immoral fashion to be demoted by the censors to one of the lower classes¹²⁸ so that a moral misstep by a citizen of high rank could bring down political disaster upon himself and his family, making intense scrutiny of those who had much to lose a politically fruitful occupation. Thus, as time wore on the censors “censure” became an increasingly political tool,¹²⁹ despite the fact that they were required to take a pledge against abuse and to keep written records of all punishments they imposed along with the reason the punishment had been meted out.¹³⁰

3.1.3.1.3.2 Census

Each pair of censors was charged with conducting a census.¹³¹ Part of the census consisted in determining not only how many citizens there were and therefore the military manpower Rome could call on, but also which economic class each citizen belonged to, as this had an effect on military capability.¹³² The citizens themselves were required to furnish the censors with information regarding the amount of property, including slaves, that they owned,¹³³ and their economic class as well as the amount of their taxes was determined by the censors based on the value of the property. Citizens not only declared their capital, but also

¹²⁵ Dionysius, 20.12.1-3, 20.3.2-3 in Nicolet, note 5, at 78.

¹²⁶ Nicolet, note 5, at 86.

¹²⁷ *Ibid.*, at 74.

¹²⁸ *Ibid.*, at 52.

¹²⁹ *Ibid.*, at 78.

¹³⁰ Jolowicz and Nicholas, note 2, at 52.

¹³¹ Nicolet, note 5, at 66.

¹³² *Ibid.*, at 87

¹³³ *Ibid.*, at 67 et seq.

any debts that they had, and debts were deducted from capital before the tax assessment was made.¹³⁴ Any *paterfamilias* who failed to appear before the censors and give an account of his household or send someone to register him by proxy was sold as a slave.¹³⁵

Not only wealth, but also morality could have an impact on one's class, and since the censors also enforced public morality, they were in a prime position to factor in one's misdemeanours when determining class standing.¹³⁶ The censors had little personal discretion in determining class based on wealth, as the method of determining class and value of property was laid down in the Quiritarian Law, however, they could be quite arbitrary when it came to judging morality. The censor Cato once demoted a citizen to the status of commoner for joking, when asked during the census if he had a wife, that he had one, but not one he desired.¹³⁷ The example not only illustrates the power of the censors in this regard, but also how severely the *mos* could be enforced at all times including during the census itself.

The censors did not usually collect the taxes themselves. These were farmed out to the highest bidder, the terms being laid down in a law which the censors published before bidding commenced. The censors granted public contracts in all other areas as well, *eg* building aqueducts and roads, the reparation of public buildings, mining concessions, etc.¹³⁸

3.1.3.1.4. Tribune of the Plebs

The office of plebeian tribune was established in 493 B.C. and the tribunes were elected by the Plebian Council.¹³⁹

By 449 B.C. ten plebeian tribunes were elected each year.¹⁴⁰ In contrast to other high offices, tribunes continued to invariably be plebeian throughout the Republic. Within Rome or its immediate vicinity the tribunes were inviolable and could help or rescue any plebeian from a magistrate, thus acting as a guarantor of citizens' rights, a prerogative known as *auxilium*.¹⁴¹ To this end, the tribunes' homes were required to be open to visitors at all hours day or night. Later the tribunes acquired the power to veto any act or proposal by any other magistrate, and at the height of their power they could also veto a decision of the Senate.¹⁴² Behind much of the reform which took place in the Roman Republic, particularly economic and legal reform, the plebeian tribunes can be found.

¹³⁴ *Ibid.*, at 70.

¹³⁵ according to Cicero, *Pro Caecina*, quoted in Nicolet, note 5, at 61.

¹³⁶ Nicolet, note 5, at 80.

¹³⁷ Gellius 4.20 quoted in Nicolet, note 5, at 68.

¹³⁸ Jolowicz and Nicholas, note 2, at 39; Nicolet, note 5, at 211.

¹³⁹ Forsythe, note 99, at 172; Jolowicz and Nicholas, note 2, at 12 (sources differ on whether the year was 494 or 493 B.C.).

¹⁴⁰ Jolowicz and Nicholas, note 2, at 12.

¹⁴¹ Forsythe, note 99, at 171; Jolowicz and Nicholas, note 2, at 12; M. Crawford, note 5, at 25.

¹⁴² Forsythe, note 99, at 171; M. Crawford, note 5, at 25.

3.1.3.1.5. Dictator

The office of dictator was reserved for emergencies, and was appointed by the consuls at the behest of the Senate.¹⁴³ The dictator was usually appointed to overcome a specific crisis, for example, a rebellion, and it was common for him to resign as soon as this task had been adequately fulfilled. In any case, the dictator was appointed for a maximum of six months.¹⁴⁴ In contrast to all other magisterial positions, the office of dictator was held by one person only, who was invested with supreme authority and could never be held accountable for any action he committed while in office. All magistrates except the plebeian tribunes were subordinated to the dictator and he could force even a tribune out of office if the tribune disobeyed him. The dictator was the supreme judge during his time in office and could change legislation for the duration of his term. The dictator's power was, however, not quite absolute, as he had no control over public finances. The disbursement of these remained the prerogative of the Senate.¹⁴⁵ The existence of the position of dictator has often been falsely perceived to be the key to the downfall of the Republic: a gross oversimplification which fails to take other aspects into account.

3.1.3.1.6. Quaestor, Aedile, Governor

Less central to Roman government, but still important were the offices of quaestor, aedile and governors.

The quaestors were the treasurers of the Republic, considered to be the most junior elected position.¹⁴⁶ From 420 B.C. four quaestors were elected annually by the *Comitia Tributa* and starting in 267 B.C. ten quaestors were elected annually. While two quaestors remained in Rome, the others accompanied the consuls in the field or other magistrates to their provinces.¹⁴⁷ The minimum age of quaestor was thirty.

The aediles were akin to a head administrator whose duties included maintaining public buildings,¹⁴⁸ regulating public holidays, organising games and festivals and also contributing much of the financing towards these,¹⁴⁹ maintaining public order, *eg* enforcing preparations against fire, regulating traffic and enforcing regulations regarding dangerous

¹⁴³ Forsythe, note 99, at 150.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ M. Crawford, note 5, at 73.

¹⁴⁷ Jolowicz and Nicholas, note 2, at 40.

¹⁴⁸ *Ibid.*, at 50.

¹⁴⁹ Nicolet, note 5, at 363.

animals,¹⁵⁰ and procuring provisions, in particular grain, for the Republic.¹⁵¹ The number of aediles was divided evenly between curule and plebeian, with the plebeian aediles being always plebeian and the curule aediles sometimes plebeian and sometimes patrician.¹⁵² The minimum age for election as aedile was 36.¹⁵³

Governors were sometimes elected and sometimes appointed by the Senate to administer Roman provinces. The governor was often a former consul, censor or praetor. He was considered to be an agent of the State and therefore immune from prosecution during his term of office. His duties comprised financial regulation (levying taxes, minting coins, overseeing public works), functioning as chief justice of the province, in particular, hearing all cases which carried the death penalty (the decision of a governor could be appealed to the praetor in Rome) and leading the military forces assigned to his province.

3.1.3.1.7. Further Elected Positions

The Romans elected a multitude of other official positions, for example, the *triumviri monetales* (supervisors of the mint) and *triumviri capitales* (supervisors of the prisons).¹⁵⁴ Any person with substantial public responsibility in the Republic tended to gain that responsibility via an election.

3.1.3.2. Competencies Common to all Magistrates

Magistrates were invested with *imperium* or authority to make binding decisions, the same legitimising power that the Roman king had possessed prior to the establishment of the Republic.¹⁵⁵ Magistrates were entitled to enforce their lawful decrees by any means necessary, including physical force – for example, by flogging – and, at least in the beginning of the Republic, death.¹⁵⁶

Unlike Athenian officials, Romans were not required to give any account of their magistracy, except a financial one. As long as the bottom line was in order, a magistrate was

¹⁵⁰ David Daube, *Roman Law: Linguistic, Social and Philosophical Aspects* (Edinburgh University Press, 1968) at 158.

¹⁵¹ Jolowicz and Nicholas, note 2, at 50.

¹⁵² Brennan, note 28, at 64; Nicolet, note 5, at 235.

¹⁵³ M. Crawford, note 5, at 73,

¹⁵⁴ Nicolet, note 5, at 235.

¹⁵⁵ Jolowicz and Nicholas, note 2, at 9; with the exception of the censors who were not endowed with *imperium*, but *arbitrium*.

¹⁵⁶ A. W. Lintott, "Provocatio: From the Struggle of the Orders to the Principate" in Temporini and Hildegard eds., *Aufstieg und Niedergang der Roemischen Welt*, 226 at 259 et seq.; Nicolet, note 5, at 319 et seq.

deemed to have conducted himself properly. He tended only to face public trial when he had failed in this respect.

Because there were age restrictions on each office and due to the fact that one was generally required to have held a lower office before standing for election for a higher one, the Roman government attempted to foster a certain level of expertise among its office-holders. From 198 B.C. onwards virtually every consul had already been praetor,¹⁵⁷ and a censor would typically have served as quaestor, aedile, praetor and consul and perhaps also as governor of a province. This progression from quaestor on up was known as the *cursus honorum*¹⁵⁸ and while it was not always strictly adhered to, it did ensure that in theory the higher-ranking officials could be expected to know much about the work of the lower magistrates, enabling better co-operation, informed decision-making and coherent policy. This was particularly relevant to the office of consul as they oversaw the lower magistrates.

Even if a high official failed to gain such competence, available expertise was not necessarily endangered. High officials were assisted by several professional scribes, many of whom were highly qualified, and it is known that these scribes frequently carried out important tasks and were instrumental in decision-making whenever the magistrate lacked the necessary intelligence or drive.¹⁵⁹

3.1.3.3. Conclusions Concerning Office-Holders

The various competencies of the magistrates were quite thoroughly delineated and diffused with some precision among the various magistracies, meaning that an effective if haphazard system of checks and balances between the elite existed, enhanced by the collegiality of almost all offices.

A strict, well-defined hierarchy existed among the offices and, above all, a reliance on election as the method of determining that hierarchy. In stark contrast to the Athenians, the Romans loved elections, and for exactly the same reasons that the Athenians despised them – elections were likely to be won by the most intelligent, educated, well-connected and well-spoken candidates.

The wording of legislative proposals so that they could be answered with a straight “yes or no” was also much different than the Athenians method of debate based on vague drafts. Magisterial legislation left no room for debate and legislation was thus – for the magistrates – highly predictable. With the backing of Rome’s elite in the form of the Senate already obtained before legislation was tabled, the worst that could happen was that “the

¹⁵⁷ M. Crawford, note 5, at 73.

¹⁵⁸ *Ibid.*

¹⁵⁹ Nicolet, note 5, at 327.

people” would – against expectation – reject the bill, a possibility often countered by including a few highly popular passages in it.

Between the magistrates carried a heavy workload, as they were responsible for initiating and implementing virtually every significant measure.

In addition, all magistrates were vested with considerable personal authority and discretion in their area of competency. The people of Rome were not the final arbiters on the legality or expediency of a magistrate’s actions, and only in extreme cases of flagrant disregard for the laws were magistrates brought before the judicial, non-jury, magistrate-run courts. The level of inequality between magistrate and non-magistrate was therefore considerable, the divide between governmental and non-governmental very noticeable.

Together these organisational patterns added up to the result that in Rome, “the people” did not direct the magistrates as they did in Athens, the magistrates directed the people.

3.1.4. Concluding Remarks on Rome’s Basic Legal Structure

One of the chief features of the Roman Republic was its convoluted separation of powers via various assemblies and magistracies – one could perhaps refer to it as “power-sharing” – through which the Romans sought to diffuse governmental authority among the vying elite, under the assumption that these would compete against one another for prestige,¹⁶⁰ but essentially according to a set of rules which placed an emphasis on acting in the group’s interests,¹⁶¹ a group which was united and the members of which were placed in formal communication with each other through the central organ of the Senate.

Small rules, but significant rules, such as the fact that no command could be issued to a soldier within Rome¹⁶² and the fact that the Centuriate Assembly as the people under arms was not permitted to meet within the *pomerium* highlight the nature of the Roman system as a very conscious “truce” between competing powers with “rules” to prevent any one faction gaining an upper edge by force.¹⁶³ This was enabled via the virtual exclusion of the vast majority of citizens from participation as officials and meaningful decision-making, an exclusion emphasised, not mitigated, by the electoral system.

¹⁶⁰ M. Crawford, note 5, at 9.

¹⁶¹ *Ibid.*, at 24.

¹⁶² Staveley, note 9, at 150.

¹⁶³ Rules famously broken by Julius Caesar when he crossed the Rubicon and essentially ended the increasingly volatile power struggle.

3.2. The Election Process

3.2.1. Electoral Campaigning

3.2.1.1. Procedure and Eligibility to Stand for Election

It was absolutely necessary for those wishing to be elected to office to embark upon a political campaign. This process began with the *professio*, ie the candidate professing his interest in being nominated to the presiding magistrature,¹⁶⁴ upon which the presiding magistrate would nominate him, unless he was legally disqualified from the post.¹⁶⁵ *Professio* could be made or withdrawn at any time before the election actually commenced,¹⁶⁶ but was not absolutely necessary – in Rome, as in Athens, a citizen could be elected against his will and had to make a credible excuse in order to abdicate his position.¹⁶⁷ Elections of consuls, praetors and censors were presided over by the outgoing consuls.¹⁶⁸ If, due to extenuating circumstances, elections were postponed to the point that the previous magistrates left office, an *interrex* was appointed who nominated only as many candidates as were necessary to fill the vacant positions – instead of tendering the names of the candidates they wished to see elected, the electorate simply voted “yes” or “no”.¹⁶⁹

3.2.1.2. Political Parties and the Client-Patron Voting Machinery

There were no political parties in Rome. Of course, factions emerged at times, also within the Senate, and politically active persons tended to associate with those who held similar views, but these activities were not comparable to the workings of a modern political party.¹⁷⁰ The practice of two or more candidates pooling their resources (known as *coitio*)¹⁷¹ was anathema and virtually any form of association was prohibited by law. Only religious associations and a few trade guilds which organised themselves under religious pretexts were permitted.¹⁷²

¹⁶⁴ Staveley, note 9, at 146; Nicolet, note 5, at 240.

¹⁶⁵ Staveley, note 9, at 148.

¹⁶⁶ Nicolet, note 5, at 240 et seq.

¹⁶⁷ In 211 B.C., T. Manlius Torquatus was elected consul for the third time although he had not wanted to be re-elected. He successfully declined on the grounds that his eyesight was failing and therefore he would be unable to discharge his duties, Livy 26.22.5-6 in Nicolet, note 5, at 240 et seq.

¹⁶⁸ Nicolet, note 5, at 223.

¹⁶⁹ Staveley, note 9, at 208.

¹⁷⁰ *Ibid.*, at 191 et seq.

¹⁷¹ *Ibid.*, at 205.

¹⁷² Nicolet, note 5, at 309.

Banding together to elucidate a political platform would have been superfluous in any event since election rarely centred around a candidate's policies. In fact, a pamphlet known as the *Commentariolum Petitionis* – allegedly written by Cicero¹⁷³ – specifically advised against taking any political stand during a campaign for fear of making enemies.¹⁷⁴ Campaigns were therefore not about convincing the electorate of a certain viewpoint, they were about ensuring that the candidate's personal following turned out and voted for him.¹⁷⁵ What resulted in a successful election according to the unwritten rules was the size of one's *clientelae*.¹⁷⁶ Elections were thus a sort of test of strength between competing aristocrats without having to resort to civil war.¹⁷⁷

A tacit agreement to avoid appealing to the masses via a political programme was an essential feature of the aristocratic ceasefire and balance of power. Any attempt to do so signalled a treacherous bid to use the power of the masses to subjugate the rest of the aristocracy and establish one-man rule (early candidates such as Spurius Cassius and Marcus Manlius are alleged to have attempted just such a coup, and were successfully eliminated by the rest of the aristocratic class).¹⁷⁸

Because electoral success did not depend on direct popular appeal, but rather on mobilising the right people at the right time, the successful candidate spent much effort on manipulating the client system which governed Roman society. The client system worked on the basis that the high-ranking conferred benefits on their social inferiors (*eg* speaking for their clients in the law courts, relieving debt, pulling strings in finance, military or politics, hosting them when they travelled to Rome, writing testimonials) and it was understood that for these services the client was indebted to his patron and paid this debt back by voting for him, his relatives or his allies in elections,¹⁷⁹ with desperate magistrates, particularly populist ones, sometimes going so far as to have their extended *clientelae* carted in from the countryside to overwhelm the opposition.¹⁸⁰

Therefore the political aspirant nurtured his contacts, especially all those members of his *clientelae* who were just one step beneath him (the *Commentariolum Petitionis* advised obtaining the support of moderately important citizens by promising them a position such as centurion or military tribune once elected)¹⁸¹ and therefore could sway large numbers of their

¹⁷³ *Ibid.*, at 299.

¹⁷⁴ Staveley, note 9, at 192.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*, at 193.

¹⁷⁷ cf. Staveley, note 9, at 216; or, as the modern slogan would have it, "ballots not bullets".

¹⁷⁸ Cary and Scullard, note 8, at 64; Staveley, note 9, at 193.

¹⁷⁹ M. Crawford, note 5, at 27; Cary and Scullard, note 8, at 62.

¹⁸⁰ Staveley, note 9, at 200 et seq.

¹⁸¹ Nicolet, note 5, at 301.

own clients,¹⁸² so that the system of mobilisation bore some resemblance to that of a modern pyramid scheme.

In addition, the candidate would seek to have the *clientelae* of his supporting friends and anyone to whom he was related through strategic marriage mobilised on his behalf.¹⁸³ Of course, *clientelae* and political alliances took years, if not generations, to build up,¹⁸⁴ with those not already in a position of entrenched political power obliged to perform favours for influential individuals which could be called in at election time, as the *Commentarolium Petitionis* makes clear.¹⁸⁵

3.2.1.3. Conducting a Campaign and the Role of “the People”

Consistent with the idea that connections and not ideas should determine the outcome of elections, between the *professio* and the actual vote (usually 23 days later) “the official view was that persuasion in the form of oratory should for the most part be excluded” and that the “party machinery for delivering the vote should be allowed to operate unimpeded. Unofficial meetings of the people specifically summoned to discuss the merits or demerits of a candidate were unknown.”¹⁸⁶ In fact, two early laws forbid candidates from whitening their togas to draw attention to themselves and from travelling to local market towns to address public meetings,¹⁸⁷ though these early prohibitions fairly quickly lost all effect.¹⁸⁸ However, public opinion continued to be held in low-esteem as demonstrated by the following passage:

C. Piso, in very critical circumstances, upheld his consular dignity with admirable firmness, as the following incident will show. M. Palicanus, a most seditious citizen, had ingratiated himself with the people by pernicious flattery, and every effort was being made in the comitia to raise him to the consulship. It was a high disgrace to seek to confer the supreme magistracy on this man, whose odious conduct deserved exemplary punishment rather than the least honour. The people’s enthusiasm was abetted by the unbridled agitation of the tribunes, who can be relied on to stir up popular fury when it is slumbering and to stoke the fires once they have broken out. At this juncture, so deplorable and shameful to the Republic, the tribunes surrounded Piso, hustled him onto the platform and

¹⁸² Staveley, note 9, at 193 et seq.

¹⁸³ Staveley, note 9, at 194.

¹⁸⁴ *Ibid.*, at 197.

¹⁸⁵ Nicolet, note 5, at 300 et seq.

¹⁸⁶ Staveley, note 9, at 148.

¹⁸⁷ *Ibid.*, at 193.

¹⁸⁸ Nicolet, note 5, at 298.

held him there like a prisoner, urging him to say that he would declare Palicanus consul if the people voted for him. At first he replied that he could not believe his fellow-citizens so blind as to commit such an outrage. But the tribunes pressed him saying, 'Yes, but what if they did so vote?', and in the end Piso replied: 'No, in that case I would not declare him elected.' This firm reply made it certain that Palicanus would not obtain the consulship; and thus Piso braved many dangers rather than relax his noble austerity of mind¹⁸⁹

It is particularly this last sentence "made it certain that Palicanus would not obtain the consulship" that is most interesting – regardless of whether Palicanus was only an empty rabble-rouser or a candidate of integrity whom the aristocrats disliked for perhaps popular policies, the point remains that the aristocracy could effortlessly block his election. What is even more noteworthy is that with "the people" the tribunes must be referring to members of the first and second property classes, since the election for consul would have occurred in the Centuriate Assembly. The "people" in this case are thus not the urban proletariat or even the fourth and fifth property classes, as these would only vote in the unlikely case of a deep split in the votes of the upper classes. The "people" whose will is to be disregarded here are thus the upper classes which indicates a schism not only between rich and poor, but between rich and elite as well.

However, while those below the rank of second property class were almost never afforded the opportunity to vote in the Centuriate Assembly and although the vote of the urban poor and other undesirable citizens was carefully contained in only four of the thirty-five tribes, the Roman elite was well aware of the dangers of actions that would inflame "the people" in the wider sense of the word and bring down the wrath of the plebeian tribunes, who could be extremely uncooperative if their ire was aroused. Furthermore, it was quite possible for citizens – also influential citizens – to fall outside of the sphere of influence of any of the leading candidates.

Therefore, despite the fact that political manoeuvring among the elite was indispensable, it was only the first step to a successful candidacy. The public at large had to be pandered to. A candidate had several means – none of them democratic – by which to portray himself in a flattering light.

The first was to obtain an endorsement by others of high-rank. The political friends of a candidate often wrote him a recommendation (*commendatio*), a form of character reference which also served the purpose of ensuring that all of the endorser's clients and their clients

¹⁸⁹ Valerius Maximus 3.8.3 in Nicolet, note 5, at 245.

and their clients' clients knew which way his sympathies lay and why he personally held the candidate in high esteem. It also amounted to a "pledge" of support from which the endorser could only extract himself with difficulty. The *commendatio* were often painted on signs along the roads and on the walls of properties owned by the clients of the candidate in the municipal towns.¹⁹⁰

The second was a form of self-aggrandising perambulation through the city, during which the candidate surrounded by his own supporters would often shake hands with citizens,¹⁹¹ and the following attention-seeking strategy:

[f]or several months before the elections...arrange for himself to be saluted each morning at his house by an imposing crowd of retainers, and during the last twenty-four days he paraded the city streets, making personal appeals in a toga conspicuously whitened with chalk (*candidata*), and often attended by a band of followers known as *sectatores*¹⁹²

The number of retainers a candidate could muster to greet him in the morning was a show of strength and seen as indicative of his probable success.¹⁹³ If a candidate appeared to be unpopular, his supporters might drop him and gravitate to a candidate who appeared to have a greater chance of winning. In a system that depended on personal favours and patronage, backing the winning side as often as possible was vital.

However, the "popularity" component was still mostly window-dressing, aimed at gaining only the acquiescence of the majority of citizens. The real role reserved for "the will of the people" is made apparent throughout the history of Rome by written accounts such as the *Commentarolium Petitionis*, as well as by the actions and words of Rome's elite in relation to the wishes of the people. Perhaps the most eloquent example is that of Spurius Maelius.¹⁹⁴

In 439 B.C. Spurius Maelius, a wealthy man, distributed grain free or at low prices to the urban plebs in time of shortage. In Athens, such an activity often resulted in an honorific decree from the Assembly or even a statue. In Rome, the Senate appointed a dictator to "deal" with Maelius by having him beheaded, something that the dictator alone could accomplish with impunity, given that Maelius had not committed a crime and even if he had, at that time would have had to be sentenced by the people, who certainly would have protested. "[T]he story shows that Roman suspicion of private generosity, at all events on the part of a non-

¹⁹⁰ Staveley, note 9, at 195.

¹⁹¹ Nicolet, note 5, at 245.

¹⁹² Staveley, note 9, at 202.

¹⁹³ Nicolet, note 5, at 302.

¹⁹⁴ Similar to those of Marcus Manlius and Spurius Cassius mentioned above, *supra* pp. 113.

magistrate, was chiefly an aristocratic reaction and was due to acute mistrust of the urban plebs".¹⁹⁵

Generally the Romans did not consider popularity, especially popularity with the masses in a positive light, because it involved giving people what they wanted instead of what was "right" or "best". Cicero even refers to "the ignorant mob",¹⁹⁶ a luxury of expression which it is unlikely many democratic *rhetors* could have afforded.

3.2.1.4. Jockeying for Position in the Electoral System

In votes of the Tribal Assembly, an electoral candidate usually carried his own tribe and this was indeed expected, since within his own tribe he would be a person of considerable influence.¹⁹⁷ He would often rely on his political allies to "bring" him the other tribes he needed. " 'Name any tribe,' remarks Cicero, when speaking of the election of Plancius to the aedilate, 'and I will tell you through whom he carried it.'"¹⁹⁸

Another method of securing influence was to purchase several villas in strategic positions throughout Italy in which the aspiring politician could reside and from these "bases" build up whole new *clientelae* in that territory's tribe. A further tactic was to use one's position as a magistrate to sponsor the granting of citizenship to certain people and then strategically manoeuvre them into tribes one did not already control in a "takeover" bid.¹⁹⁹

In the last century of the Republic it became necessary not only to gain support but also to carefully neutralise opposition as a few citizens were so powerful that any candidate had to at least ensure their neutrality to stand a chance of winning an election. These included most men of censorial rank, plutocrats such as Crassus, a man who controlled so many companies that he could have financially ruined most senators and could therefore boast to have the Senate in his pocket, popular military commanders such as Pompey and Marius who could call on the support of a large section of the disbanded soldiery to follow their instructions, and political string-pullers such as Cathgus, apparently an expert at blackmail and corruption, of whom it was said "that no noble could attain office without first winning his favour".²⁰⁰

¹⁹⁵ Nicolet, note 5, at 190.

¹⁹⁶ Cicero, *De Domo* 10-11, in Nicolet, note 5, at 202.

¹⁹⁷ Nicolet, note 5, at 301.

¹⁹⁸ Staveley, note 9, at 197.

¹⁹⁹ Staveley, note 9, at 198; Nicolet, note 5, at 234, anyone for whom a candidate procured citizenship was indebted to him and could be counted on for support.

²⁰⁰ Staveley, note 9, at 194.

3.2.1.5. Conclusions Regarding Electoral Campaigning

A closer inspection of election thus reveals it as an expression of “the will of the people” in only the most nominal sense. Popularity played a small role, but it was subordinated to political connections which ensured that the vast majority of citizens could, at most, register their support for a pre-vetted candidate.²⁰¹

Such an electoral system ensured that politicians espousing ideas of radical change remained rare and that the rule of law remained entrenched and largely unchanged, a testament to the fact that one can, indeed implement elections while remaining unaccountable to one’s citizens,²⁰² something that remains unchanged up to today.

As one Third World leader recently commented on his country’s transition to “democracy”: “the forces of order wanted us to vote so that it would appear to the outside world that we were a happy peaceful democracy, and then exploitation and corruption could go on just as before”.²⁰³

While exploitation and corruption are more endemic in the Third World, they are also relatively commonplace in the First World. Elections cannot transform a nation into a “happy peaceful democracy” for the good reason that they are not a democratic device. They are a Republican device and can, at most, bring about a society resembling the Roman Republic, in which lip service is paid to the public and laws are not applied randomly.

Another aspect concerning elections is the degree of latent violence which permeated the entire Roman system of power-conferral.

It might be comforting to think that extreme examples of the thwarting of popular opinion under the *Rechtsstaat*, such as the cases of Spurius Maelius and the Gracchi, are historical anomalies due to the eccentric, old-school and red-blooded habits of the Republicans. However, when one peruses the number of political figures espousing radical change who have been assassinated in the past fifty to one hundred years in modern states, one is forced to reconsider the allegation that such heavy-handed tactics have become outdated. Indeed, the organs of a pure rule of law State must be prepared to resort to violence, as the “will of the people” is also a type of “force” or latent violence.

The most striking difference between the Roman Republic and the modern “democratic” nation State is perhaps the idea of a political platform playing a role in election and it is through assenting to a certain platform that a slightly greater degree of legitimisation is given to the concrete actions of the ruling politicians (so long as they abide by their

²⁰¹ Even if “popularity” had played a larger role, it would still have made a poor substitute for direct participation in concrete decision-making.

²⁰² cf. Molly Beutz, “Functional Democracy: Responding to Failures of Accountability” *Democracy and International Law*, at 135.

²⁰³ Jean Bertrand Aristide, President of Haiti, quoted in Beutz, note 202, at 135.

platform) than to the Roman magistrates although the degree to which national politics revolves around the popular appeal of platforms is actually quite negligible.²⁰⁴ In virtually all other respects Roman electioneering precisely mirrors its modern counterpart, from such details as the practice of walking streets with one's retainers and shaking hands with a few citizens, to the substantive need to procure pledges of support from influential actors near the beginning of a campaign.²⁰⁵ Even the practice of political patronage has often been preserved,²⁰⁶ although in a format less crass, and often limited to the upper tiers of society.

3.2.2. Electoral Corruption/Abuse

The Roman view of corruption was closely bound to preserving the *status quo*. Thus, the first law against bribery at elections was passed in 368 B.C. and according to Livy its purpose was to "suppress corrupt practices, particularly on the part of men risen from the people, who used to haunt country fairs and gathering places",²⁰⁷ another example of the Roman elite laying down ground-rules in their aristocratic ceasefire, meant to limit both their own competition and protect themselves from upstarts.²⁰⁸ Corruption among the elite themselves was nonetheless widespread, partially because it was difficult to distinguish from the many legitimate methods a Roman could employ to manipulate his chances of success.

3.2.2.1. Clientelae and Bribery

Electoral success in Rome depended to a great extent on the material benefits one provided to one's clients.

One common practice for wealthy citizens with political aspirations was to throw a public banquet or other entertainment in honour of a deceased relative shortly ahead of an election for which they had entered a *professio*, while another tactic involved abruptly casting oneself as the generous patron of fellow tribesmen, lavishing gifts and invitations to banquets, and reserving good seats at entertainment venues. On an individual basis such favours constituted a central part of the client-patron relationship, but on the massive scale that

²⁰⁴ *Infra* pp. 236 et seq.

²⁰⁵ This practice is at its most overt in the United States; however, it is also a common, if less visible, practice in other nations, where any candidate for high office must attain the approval of the influential members of his party, as well as other organizations (*eg* unions, major financial contributors to the party's funds) if he wishes to launch a successful campaign.

²⁰⁶ In the Irish system of political family dynasties quite clearly, while in other systems the influence of organizations such as unions and churches in instructing their members on how to vote is not insubstantial.

²⁰⁷ quoted in Nicolet, note 5, at 298.

²⁰⁸ Daube, note 150, at 126.

massive wealth came to permit,²⁰⁹ such behaviour became virtually the only quality relevant to the achievement of electoral success. The entrenched client-patron way of life did not allow for effective legal action against the massive deployment of wealth in the interests of political gain to be taken.²¹⁰

To take one example, a Roman seeking high office could not afford to stop at providing favours for his own clients. Bestowing gifts or other favours on persons outside of one's own tribe was specifically prohibited by law, but this rule was easily circumvented by the method of employing the *divisores*²¹¹ of many tribes, providing them with a substantial amount of material goods and instructing them to distribute it among their tribesmen on the donor's behalf. An attempt was made to halt this practice, but the tactic had become so widespread that the law prohibiting it was difficult to enforce.²¹² To take another, associations within tribes known as *sodalicia* kept careful track of tribespeople staying in Rome and "arranged for the most effective distribution of bribes in the interests of whoever was prepared to pay the highest price". A law and later *senatus consultum* passed against *sodalicia* also proved ineffective.²¹³ Of course, the easiest strategy of all, was simply to induce friends and supporters to lavish favours within their own tribes with their own means. This was perfectly legal and nothing could be simpler than repaying them in other favours once elected.²¹⁴

An electoral candidate could also improve his chances by hiring "supporters" to greet him in the morning or attend him throughout the day. The Romans outlawed this practice but, of course, payment was difficult to prove.²¹⁵

Not only was it possible to influence elections through bribery, the reward of doing so was so great and the practice of economic dependency (client-patron relationship) between citizens so widespread that law after law remained ineffective in combating it. Because financial influence was allowed to play some role in electioneering, illegal action was extremely easy to disguise.

3.2.2.2. Vote-buying

Starting in the second century B.C. outright vote-buying became a serious problem and laws prohibiting the practice, some likely carrying the death penalty, were passed.²¹⁶

²⁰⁹ Staveley, note 9, at 203.

²¹⁰ Daube, note 150, at 126.

²¹¹ Officials in charge of distributing gifts within their own tribe.

²¹² Nicolet, note 5, at 306; Staveley, note 9, at 204.

²¹³ Staveley, note 9, at 204; Nicolet, note 5, at 309.

²¹⁴ Staveley, note 9, at 204.

²¹⁵ Nicolet, note 5, at 305.

²¹⁶ Cary and Scullard, note 8, at 178; Staveley, note 9.

These laws proved ineffective causing a new wave of legislation against bribery in the first century B.C.²¹⁷

Because the prerogative century usually set the tone for the election, in the late Republic candidates would make it known that they would reward this century – whichever century it turned out to be – financially for its vote.²¹⁸ The important centuries of the knights and first property class may have been difficult to bribe, given that they did represent quite a few individuals who were already wealthy and often had a political agenda of their own.²¹⁹ On the other hand, because the Roman political hierarchy was largely based on wealth, a Roman, no matter how affluent, could always use more money – one never knew when one might need it, and the sums in play by the most powerful were vast.

3.2.2.3. Religion as a Political Tool in Elections

Religion was also often used as a cover for what otherwise may have been deemed fraud or corruption. Priests and augurs were virtually always members of the upper classes and as exercising a priesthood was rarely a bar to political advancement many priests and augurs were directly involved in politics.²²⁰ A priest could intervene to prevent voting or secure a nullification of the vote for religious reasons at all assemblies except those convened by the plebeian tribunes.²²¹ Both magistrates and members of the augural college were recognised by law as being capable of interpreting auspices and any of them could claim to have observed an unfavourable auspice before or during proceedings. Auspice-taking was thus an obstruction that could be used by the presiding magistrate if he felt things weren't going his way, or by a person in the crowd who wished to obstruct whatever the presiding magistrate was trying to achieve. Thus, according to Cicero:

in 55 B.C. when Pompey was presiding over the praetorian elections and the conservative Cato had already been returned by the all important prerogative century, he claimed to hear thunder and so procured the postponement of the election until such time as bribery and intimidation could be relied upon to bring about a more acceptable outcome²²²

²¹⁷ Staveley, note 9, at 203.

²¹⁸ Nicolet, note 5, at 263.

²¹⁹ *Ibid.*, at 311.

²²⁰ Jolowicz and Nicholas, note 2, at 88.

²²¹ Nicolet, note 5, at 252; Staveley, note 9, at 206 et seq.

²²² Staveley, note 9, at 207.

In 44 B.C Marcus Antonius even more openly employed this tactic, threatening to oppose Dolabella's election as consul by using his powers as a priest entitled to take auspices to hinder or nullify the election.²²³

The augural college itself – a self-appointing body – also sometimes annulled elections or legislation on “augural” grounds long after it had been passed.²²⁴

Although not formally illegal, religious manipulation was a tool used to thwart the existing laws and procedures – in other words, it undermined the rule of law. It, of course, also thwarted the will of the people, but given that the popular will was little more than a proxy or tool in the fight between elite individuals or groups, this was not necessarily regarded as improper behaviour. If one candidate had “popular will” on his side, it was perfectly acceptable for another candidate to try to neutralise that advantage by fabricating an omen and thus nullifying the day's decisions. Religion was, like the *mos*, a sort of legal grey area and therefore an acceptable avenue of political manipulation, however detrimental such manipulation was to the will of the people or the general rule of law.

*Die Auguraldisziplin war streng, sehr streng, was die genaue Beobachtung der Formen anbetraf, aber wer die Formeln genau erfüllte, der konnte alles erreichen, was er wollte*²²⁵

3.2.3. Conclusions on the Election Process

Although the Romans emphasised rule of law more than the Athenians ever did, they encountered much greater difficulty in enforcing their laws against corruption and other forms of political manipulation. This was largely due to the positivist nature of Roman law, which led to a tendency to ignore its teleological purpose. Because the Roman state was governed by the rule of law and the rule of law alone, an ability to manipulate that law was key to success. Those aspects which were part of written law or unwritten but rigid custom were impossible to ignore, but some grey areas were necessarily left unregulated. In the interests of personal success and the absence of a force that could prevent such actions, the tendency was to manipulate such grey areas to personal advantage.

The rule of law and ostensibly timocratic election process were further undermined by the fact that financial influence played a key part in politics and legal status. The very fine

²²³ Cicero, Phil. 2.80-82, quoted in Nicolet, note 5, at 252.

²²⁴ Staveley, note 9, at 208 et seq.

²²⁵ “Augural discipline was strict, very strict, as far as the exact observance of the forms was concerned, but whoever took care to precisely fulfil the forms could achieve whatever he desired”, von Jhering, note 124, at 353 et seq., my translation.

line between legal and illegal use of finance meant that its influence was virtually impossible to combat, that it therefore grew.

Other factors were political and economic inequality. Without a mechanism by which the majority of citizens participated significantly in government, the rich became richer and more powerful and the poor became poorer and more disenfranchised, less educated, less powerful and more easily tricked, bribed, and sidelined. Without a redistributive mechanism or fora in which one could meaningfully participate purely by virtue of being a citizen one was always in danger of losing status and becoming sidelined oneself. Thus the necessity of maintaining a powerful position was imperative. The elites of Rome at any given time were trapped by this system – to attempt to use the power of the masses for political ends would have required a willingness to significantly alter the State system and also have inspired the enmity of other elites – no Republican Roman ever survived such an attempt. The only other option was to play the rule-bending game to the detriment of the electoral laws.

The Romans struggled for power, because concentrations of power existed. The person who exercises power has some self-determination, while the person who does not, has none. The incentives are simply too great to combat through any legislation, however well thought-out.

It is, as we have seen from Athens, more or less possible and not even particularly turbulent, to have democracy without rule of law, however, as we can see from Rome, it is extremely difficult and probably even impossible to enjoy effective rule of law without democracy, at least not without some strong central power that can crush the manoeuvring of other factions.²²⁶ Roman elections were rarely *per se* rigged – the most common indicator of the authenticity of modern elections – competition for magisterial positions was fierce,²²⁷ the choices were very real. Nonetheless, as we have seen it was corrupt to the core and only grew worse over time.

3.3 Political Equality

One of the most striking aspects of Roman state organisation was the institutionalised inequality among the populace based on wealth and morality, as determined by the censors, and birth as either a patrician or a plebeian. This class membership determined one's voting rights in the *Comitia Centuriata* while identification as a patrician or plebeian decided upon one's eligibility to belong to either the Senate or the Plebian Council as well as the right to

²²⁶ Many of the more pure modern rule of law states repeat this pattern and are subject to rampant corruption, *eg* China, Iran, while the list of corrupt dictators allegedly supporting stability and rule of law is indeed extensive.

²²⁷ M. Crawford, note 5, at 23.

hold certain offices. The class inequality between patrician and plebeian was eventually diminished as the offices of consul, praetor and censor were opened to both orders along with membership in the Senate. Overt discrimination based on wealth, however, remained the rule. While the plebeians as an order acquired more power, this circumstance benefited only rich plebeians – the power-shift is thus best regarded as a redefinition of the “in-club” from the sanctified wealthy to the merely wealthy so that Rome went from being an aristocracy to an oligarchy or plutocracy. It was not a sign of increased democracy.²²⁸ At all times, “[t]he Roman timocratic system...was carefully devised to exclude the poorest citizens from civic and especially political functions”.²²⁹

The Romans justified excluding the poor from political participation with the argument that those who did not bear the burden of military conquest and its financing should not have a say in the decision-making process.²³⁰ However, this was circular logic, because the reason given for the upper-classes contributing most to military campaigns was that as the aristocracy and political power of the city, they had the most to lose in the event of a conquest, and therefore a vested interest in preventing its occurrence.

Social superiority was a distinction to take pride in and maintained in the face of attack. In a court speech, Cicero says of his client’s accuser, Ser. Sulpicius, who had attempted to reduce the influence of the first centuries through electoral reforms: “Men of standing, influential in their neighbourhoods and towns, objected to a man such as you fighting to remove all distinctions of prestige and influence”,²³¹ a statement not meant as a compliment.

Inequality in office-holding was also viewed as desirable. Cicero made a fairly similar statement regarding the Republic as Aristotle had about democracy:

the man who rules efficiently must have obeyed others in the past, and the man who obeys dutifully appears fit at some later time to be a ruler. Thus he who obeys ought to expect to be a ruler in the future, and he who rules should remember that in a short time he will have to obey²³²

²²⁸ Jolowicz and Nicholas, note 2, at 76; Cary and Scullard, note 8, at 179.

²²⁹ Nicolet, note 5, at 188.

²³⁰ *Ibid.*, at 58. For much of the Republic, only those wealthy enough to furnish their own weapons, armour and supplies were admitted to the Roman army, and citizens contributed to the campaign according to their means, so that the wealthiest contributed the most – this system only changed as the Romans found that they needed a much bigger army for their campaigns and garrisons, at which point everyone was “permitted” to enrol in the army (*Ibid.*, at 92 et seq, 155); “poor” is meant much in the Athenian sense to describe those obliged to work for a living.

²³¹ *Ibid.*, at 304.

²³² Cicero, *De Legibus* 3.5. in Nicolet, note 5, at 318; according to another translation “A man who exercises power effectively will at some stage have to obey others, and one who quietly executes orders shows that he deserves, eventually, to wield power himself. So it must be the case that anyone who

However, the Roman “ruler” was invested with much more power than an Athenian magistrate and could only be one of a select group of citizens, instead of anyone appointed by lot.²³³ The highest magisterial positions (from quaestor on up) were open only to very select citizens, the *equites*.²³⁴

An *equite* started as a man of the first property class who, like every other man of the first property class, was obliged to perform military service from the age of 17 to 27 as a knight with a public horse, upon completion of which, he had to give an accounting of himself before the censors. The censors then decided whether he would be permitted to keep his public horse and thus retain his status as an *eques*.²³⁵

Although these tasks were a burden to the upper classes, they played a pivotal role in cementing its privileges. A citizen of the first property class had to perform military service for ten years in the cavalry, no one else could serve in the cavalry and thus attain status as a politically active citizen entitled to run for higher office.²³⁶ “In practice the recruitment of magistrates was even more narrowly based, since from the earliest days of the Republic there was a de facto trend towards heredity at various levels. In this way there grew up a ruling class based largely on birth and only enlarged at long intervals”.²³⁷ Due to this hereditary trend, “[t]here is no known example of a nouveau riche freedman or plebeian attaining high office by dint of wealth alone”... These were distributed according to “the prestige of illustrious names, a network of friendships, influence and patronage, and finally the conservatism and snobbery of an electorate which respected traditional values”.²³⁸

The much vaunted *cursus honorum* was thus completely unattainable for the vast majority of Romans from the moment of their birth. However, Roman society did offer channels for ambition to comparatively low-born citizens who could aspire to attain a less glamorous position as scribe or *viator*.

Scribes, who formed the backbone of the Roman bureaucracy, were highly educated and required to have their qualifications acknowledged by the State after which they registered in an association, similar to modern legal and medical associations. In late Republican times it was common for a scribe wishing to retire to auction off his position to the highest bidder. This was lucrative, because being a scribe or *viator* was a significant step

executes orders will have hopes of holding power at some point himself, while the man at present in charge will bear in mind that before long he will have to obey others”, Cicero, note 73, at 3.5.)

²³³ Nicolet, note 5, at 318.

²³⁴ Nicolet, note 5, at 82 et seq, 318, Jolowicz and Nicholas, note 2, at 80. It is not known if these qualifications also applied to the tribunes of the plebs.

²³⁵ Cary and Scullard, note 8, at 81; Nicolet, note 5, at 91 et seq.

²³⁶ Cary and Scullard, note 8, at 347; Until 107 B.C. proletarians were not permitted to serve in the army in any capacity and were thus denied an important avenue of career advancement. Jolowicz and Nicholas, note 2, at 85.

²³⁷ Nicolet, note 5, at 318.

²³⁸ *Ibid.*, at 311.

up on the social scale and therefore much coveted by citizens and freedmen on the rise.²³⁹ This demonstrates the extent of the Roman hierarchy, which did not merely involve a distinction between the political elite and all others, but was a finely graded system which permitted distinctions at all income and social levels. It also demonstrates the vast disparity of wealth and prestige in Roman society. For most Romans, the position of mere scribe was a coveted aspiration and represented a major achievement if successfully procured. The level of education required – at a time when education was not publicly funded – would have put even this ambition beyond the hopes of most citizens.

The Republican system thus rigorously reinforced political inequality. It should be noted that at the same time, the existence of such inequality was often rhetorically downplayed, *eg* the fact that one had to be an *equus* to attain high office was law, but scarcely ever mentioned in public speeches or debate. Advancement in the Roman system was possible, but it did not result in significant political influence unless one had already started out very near the top – in a political sense advancement was ultimately somewhat illusory, in which one exchanged one's old masters for a newer set of slightly more illustrious ones. Because political influence was not equal, there was also severe competition to acquire as much of it as possible.

3.4. Economic Equality

3.4.1. Wealth Disparity

Economic inequality was quite significant: a legionary earned approximately 108 denarii a year, whereas the “impoverished” aristocrat, L. Aemilius Paullus, died with a fortune of a mere 360 000 denarii on his hands.²⁴⁰ Cicero is on record as stating that 100 000 sesterces a year (25 000 denarii) would permit a gentleman only a very frugal life and that 600 000 per year would be necessary to live in great luxury.²⁴¹ He himself paid 3 500 000 sesterces for a villa in Rome²⁴² and earned 2 200 000 sesterces through legitimate means during a one-year governorship of Cilicia.²⁴³ Wealth discrepancy was thus much greater than in Athens. While Demosthenes fortune was equivalent to about 150-200 times the average wage of unskilled labour, Cicero proposes to spend roughly the same ratio of money each year just to live “frugally”. While certain Athenians were considerably wealthier than others,

²³⁹ Nicolet, note 5, at 333.

²⁴⁰ M. Crawford, note 5, at 75.

²⁴¹ Jolowicz and Nicholas, note 2, at 81.

²⁴² M.I. Finley, *The Ancient Economy*, (Chatto and Windus, 1973), at 52.

²⁴³ *Ibid.*, at 55

a certain segment of Roman society was so much wealthier than the rest as to virtually inhabit another sphere.

Unsurprisingly, indebtedness of the poor to the rich and the rich to the richer remained a constant economic strain. Much of the law of the early Republic focused on the problem of debt and various debt crises, for example the *lex Duillia* (357 B.C.) halved interest rates, the *lex Genucia* (342 B.C.) abolished interest on loans and the *lex Poetilia* (326 or 313 B.C.) abolished *nexum* for debt.²⁴⁴ None of these measures, nor subsequent measures, had a substantial effect on the ever greater concentration of wealth in the hands of a few and simultaneous increase in *proletarii*. From at least the second century B.C. many clients existed in a state of economic dependency on their wealthier patrons. This was in particular the case of freedmen,²⁴⁵ who owed their former masters obedience and respect, and often a continuation of services on slightly better terms.²⁴⁶

These wealth disparities were further reinforced by the infamous institution of *publicani* (tax-collectors). Always men of wealth in approximately 123 B.C. a law was passed stating that only an *eques* could be a *publicani*.²⁴⁷ The collection of taxes other than *tributum* was farmed out to the *publicani* by the censors through public auction,²⁴⁸ and they made a profit by attaining the licence for less money than they were authorised to collect. Although the amount of total tax to be collected by the *publicani* was proclaimed publicly,²⁴⁹ they were often accused of exacting far greater amounts from the taxpayer.

Furthermore, while political office was unpaid, it allowed for the opportunity to collect vast fortunes, for example, through confiscation or fulfilling public contracts. In addition war booty was distributed disproportionately according to rank, which further enriched the already wealthy.²⁵⁰

The entire Roman political system had the unfortunate effect of concentrating money into private hands. The key to political success was wealth and the key to wealth was political success, thus ensuring that the economy embarked on a vicious, narrow upward spiral.

3.4.2. *Tributum* and Other Taxes

The tax burden largely fell on the wealthy to the relief of the poor. Until 167 B.C. Romans had, in most years, to pay *tributum*, a direct tax to finance warfare and used mostly to

²⁴⁴ Brennan, note 28, at 62; *nexum* was a form of contract which empowered the creditor to execute upon a defaulter without procuring a court judgement, Finley, *Ancient Economy*, note 242, at 64.

²⁴⁵ Cary and Scullard, note 8, at 178.

²⁴⁶ Chantraine, note 52, at 60.

²⁴⁷ Senators, on the other hand, were forbidden from operating as *publicani*.

²⁴⁸ Nicolet, note 5, at 170 et seq.

²⁴⁹ *Ibid.*, at 173.

²⁵⁰ Finley, *Ancient Economy*, note 242, at 55.

pay the soldiers.²⁵¹ The amount of *tributum* to be levied in a given year was determined by the Senate and magistrates and not voted on by any Roman assembly.²⁵²

The *tributum* was only imposed when necessary and occasionally even refunded if the campaign went well.²⁵³ One paid *tributum* according to one's census rating – in which capital and not income was the deciding factor – with the wealthiest paying the most and the *proletarii* paying nothing at all.²⁵⁴

According to Dionysius, Servius Tullus who invented this system said, “I regard it as both just and advantageous to the public that those who possess much should pay much in taxes and those who have little should pay little”.²⁵⁵ By modern standards, however all of the Romans paid “little”, a state of affairs which circumvented any possible redistributive function of taxation. The amount of *tributum* to be levied depended on the needs of the State, but it is estimated that at the most it was an amount equal to the value of around 0.1 to 0.3% of a citizen's property.²⁵⁶

At times special taxes were imposed, *eg* sometimes senators were required to pay a fixed tax for every roof tile on a dwelling they owned.²⁵⁷ Funds for the regular administration of the State were obtained through various fixed fees, such as customs and harbour dues (*portoria*), fees for the right to pasture livestock on public land (*scriptura*), revenues from public lands (forests, mines, etc.) (*vectigalia*), the manumission fee (5% of the slave's value, paid by the master if he initiated manumission and by the slave if he bought himself free) (*vicesima libertas*).

3.4.3. Grain Subsidies

Like the Athenians the Romans went to large efforts to ensure steady grain supplies at reasonable prices, a task entrusted to the aediles. In cases of emergency “merchants and wholesalers were forced to bring stocks on to the market” and envoys were sent to acquire cheap grain from other States:

these measures were taken on the Senate's initiative and financed from public funds: unlike the Greek cities, Rome seems always to have taken an

²⁵¹ Jolowicz and Nicholas, note 2, at 38; Nicolet, note 5, at 153 et seq.

²⁵² Nicolet, note 5, at 165; Jolowicz and Nicholas, note 2, at 38.

²⁵³ Jolowicz and Nicholas, note 2, at 38; Nicolet, note 5, at 153 et seq.

²⁵⁴ Nicolet, note 5, at 70, 157.

²⁵⁵ Dionysius 4.9.7., in Nicolet, note 5, at 157.

²⁵⁶ Nicolet, note 5, at 160.

²⁵⁷ *Ibid.*, at 70.

adverse view of private charity in a field so sensitive politically as that of feeding the urban proletariat²⁵⁸

While every citizen could take advantage of subsidised grain, this practice ensured that while wealth was unevenly distributed, the poor of Rome did not often want for basic necessities.

3.4.4. The Republican Concept of Wealth

In the early Republic, the purpose of having wealth was to permit one to live a superior honourable life and to make some great contribution to the community, for example, overseeing the construction of a road or an aqueduct, or leading Roman armies to conquer new lands. Items regarded as “luxurious” were frowned upon by the Roman nobility who equated austerity with merit. At times the censors cracked down and valued items they considered as luxury items at a punitive rate.²⁵⁹ The concept of wealth was thus as a means of self-aggrandisement, albeit through service to the community.

The upper classes, however, rapidly failed to live up to even this ideal. Most of them lived lives of extravagant luxury, and to live in such a style quickly came to be the aspiration of the lower classes and equated with the purpose of having wealth.²⁶⁰ Thus the point of wealth was a mixture of political power and material luxury, and because there was heavy competition for both, one had to work very hard.

3.4.5. Upward Mobility

The ability to quickly scale the political and economic ladder as a Roman citizen has been much vaunted and for the most part exaggerated.

One example in particular sticks out, that of Ventidius Bassus, who was taken captive as a small child and exhibited in the triumphal parade of Pompeius Strabo. Later he worked as a mule trader in which capacity he managed to win state contracts and eventually accompany Julius Caesar to Gaul. Caesar promoted Bassus and he later became praetor and consul.²⁶¹ This meteoric rise in status was, however, extremely atypical and only possible by Bassus’s coincidental relationship with Caesar who was to acquire enough power to be considered the

²⁵⁸ *Ibid.*, at 189.

²⁵⁹ Jolowicz and Nicholas, note 2, at 38, Nicolet, note 5, at 69 et seq.

²⁶⁰ cf. Cicero, de Legibus 3.30 in Nicolet, note 5, at 74, laying the blame for Rome’s wealth obsession at the feet of members of the first property class – note this is the same Cicero who purchased a villa for 300 000 times the annual wage of a legionary.

²⁶¹ Nicolet, note 5, at 43.

de facto king of Rome. Bassus' career path occurred at a time when the Roman Republic was breaking down and can be viewed as more typical of a career path under the Caesars, in which an able and loyal individual who – above all – was in no position himself to threaten the Caesar's hierarchical position, might be able to rise high at the personal discretion of the reigning Caesar.

The example of Cicero, which occurred virtually simultaneously, but under the “old rules” presents a very different picture. Considering that Cicero's father was an *equite*, and therefore a Roman so wealthy as to belong not only to the rich but to the economic elite of the Republic, it seems rather surprising at first that Cicero should be considered by the Roman establishment to be a “new man” unwelcome in the prestigious halls of power. This adverse circumstance was due solely to the fact that although his family was wealthy, none of his ancestors had ever held high office.²⁶² Although Cicero eventually “beat the odds”, it cannot be overlooked that he was already born into a family forming part of the tiny fraction of Romans controlling the Republic's wealth, that his father was an *eques*, therefore already a man of considerable social standing, and that in addition to this he had many family connections through his mother and grandmother to a large portion of Rome's most distinguished citizens. In addition to this it must be remembered that Cicero himself was not untalented, but rather an intelligent man with a universally acknowledged skill for oratory, a gift which he ceaselessly employed in his efforts to rise socially.²⁶³ Cicero's struggle to obtain high office although gifted with wealth, connections and talent, exemplifies the exclusivity of the hierarchy that existed in Rome and how very difficult it was to rise in the ranks. Cases such as Cicero's and not Bassus's were the rule during the Republic and Cicero is only exceptional in that he succeeded in attaining high office where many others of a similar background had failed.²⁶⁴ Between 264 and 201 B.C. only 11 *novi homines* (those whose families had not previously held the coveted position) attained the consulship, while between 200 and 134 B.C., the consulship remained almost exclusively in the hands of 25 families, with only five “new” family names appearing in the records during this time.²⁶⁵

3.4.6. Conclusions on Economic Equality in Rome

Rome also was a “welfare” state, in some respects more so than Athens which relied extensively on private generosity in times of crisis. However, although a minimum was provided for each citizen, the extensive wealth discrepancies were not impinged upon, as the

²⁶² Jolowicz and Nicholas, note 2, at 17; Nicolet, note 5, at 291.

²⁶³ Nicolet, note 5, at 299 et seq.

²⁶⁴ Jolowicz and Nicholas, note 2, at 17; Cary and Scullard, note 8, at 81.

²⁶⁵ Cary and Scullard, note 8, at 178.

tax system knew no redistributive function and opportunities existed by which to politically enrich oneself, *eg* through state contracts and magistracies, particularly governorships. Excessive economic inequality and political inequality thus formed a vicious cycle.

3.5. Roman Law

3.5.1. Sources of Roman Law and Development of Legal Concepts Throughout the Republic

Key to the development of all Roman law were the famous Twelve Tables, a collection of laws compiled around 450 B.C.²⁶⁶ at the alleged insistence of the plebeians. Previously, the plebeians had been at the mercy of the patricians, who determined the law, before allegedly seceding twice from the Roman state in order to force the patricians into fixing the law in writing.²⁶⁷ These laws were literally engraved onto twelve panels and displayed at the Forum, and they came to form the backbone of Roman civil and procedural law.²⁶⁸ Although little more than a codification of pre-existing Roman tradition, they could be specific and complex and contained the seeds of several legal concepts that have come to form a major part of civil law, including differentiated punishments for the same crime based on a diminished capacity for guilt, *eg* due to status as a minor,²⁶⁹ and on intent with differentiation based on whether the culprit had committed an act purposefully (*dolus*), negligently (*culpa*) or purely accidentally (*casus*)²⁷⁰, as well as the circumstances in which self-defence by exercising violence or even inflicting death was justified,

Although many other detailed laws were passed with newer laws continually abrogating the older ones, the Twelve Tables were never repealed and remained the gold standard of Roman law-making for centuries. Notable citizens continued to elaborate on the basic legal principles hinted at in the Twelve Tables and many became experts by virtue of their education in the field of law, gaining a reputation as *iuris consulti*, that is, legal consultants, a role very similar to that of a professional lawyer.²⁷¹ Even the citizen accused of violating the *mos* was permitted to employ the services of a *iuris consulti*.²⁷² Although the *iuris consulti* were not always directly paid for their advice – indeed a (routinely ignored) law prohibited such payment from 204 B.C. onwards – they were often men attempting to advance their political careers and giving legal advice to those in need was considered to be a

²⁶⁶ Forsythe, note 99, at 210; M. Crawford, note 5, at 209.

²⁶⁷ Jolowicz and Nicholas, note 2, at 12 et seq; Cary and Scullard, note 8, at 66, stating that the plebs may have seceded up to five times between 494 and 287 B.C.

²⁶⁸ Forsythe, note 99, at 201 et seq.

²⁶⁹ Jolowicz and Nicholas, note 2, at 170.

²⁷⁰ Jolowicz and Nicholas, note 2, at 170; Daube, note 150, at 131.

²⁷¹ Nicolet, note 5, at 375; Jolowicz and Nicholas, note 2, at 91 et seq.; Cary and Scullard, note 8, at 67.

²⁷² Nicolet, note 5, at 73 et seq.

sound method of attaining the political support, the financial support and the vote of those aided and their *clientelae* at the polls.²⁷³

The *iuris consulti* precisely classified many legal concepts such as the difference between possession and ownership, as well as the different types of contract via legal commentaries and treatises.²⁷⁴ They even made the abstract differentiation between a *Verpflichtungsgeschaef*t and a *Verfuegungsgeschaef*t.²⁷⁵

Daily life in the Republic was minutely regulated, down to such particulars as a neighbour being allowed to cut the branches of a tree overhanging his property provided they were less than fifteen feet above the ground, while branches more than fifteen feet above the ground had to be tolerated and the owner of the tree permitted to collect fruit that had fallen from them.²⁷⁶ This is but one of thousands of similar regulations.

Furthermore, the Romans began to develop abstract legal principles or “fictions”, for example, regulating that only soldiers who had taken an oath before engaging in battle on behalf of the Republic were lawful combatants while anyone who failed to take the oath was a mere looter,²⁷⁷ categorising war as a legal situation requiring a formal declaration,²⁷⁸ and requiring a purely formal decree of the *comitia curiata* to invest the magistrates with *imperium (lex de imperio)* – without which they possessed no legal authority.²⁷⁹

3.5.2. Hierarchy of Norms?

The Romans did not have an official hierarchy of norms – even those laws central to the legal system could theoretically be repealed by a simple law using ordinary procedures.²⁸⁰ However, according to Cicero every law contained a closing clause stating that “If there would be anything that it would be contrary to law to enact, then no such enactment is contained in this statute.”²⁸¹ Therefore, it seems to have been common practice to expressly repeal previous laws before passing a newer conflicting one.

²⁷³ Borkowski and du Plessis, note 12, at 64; Jolowicz and Nicholas, note 2, at 94; Finley, *Ancient Economy*, note 242, at 57.

²⁷⁴ Forsythe, note 99, at 201.

²⁷⁵ Jolowicz and Nicholas, note 2, at 144; the differentiation between *Verpflichtungsgeschaef*t and *Verfuegungsgeschaef*t forms an important part of civil law. A *Verpflichtungsgeschaef*t is an act which creates a legal obligation, while a *Verfuegungsgeschaef*t is an act which disposes over an object, for example, the transference of ownership.

²⁷⁶ *Ibid.*, at 157.

²⁷⁷ Nicolet, note 5, at 104.

²⁷⁸ K.H. Ziegler, “Das Voelkerrecht der roemischen Republik” in Temporini and Hildegard eds, 68 at 101.

²⁷⁹ Nicolet, note 5, at 218.

²⁸⁰ Jolowicz and Nicholas, note 2, at 28 et seq.

²⁸¹ *Ibid.*, at 29.

Like the Athenians, in Rome, no principle was sacrosanct or placed above the will of “the people” to alter. The key difference lay in the fact that in Rome only a magistrate could propose a change in legislation. Because there were very few magistrates, all of whom belonged to the upper classes who benefitted most from maintaining the *status quo*, radical or sudden legislative changes were rare.

3.5.3. The Standing Courts

Though minor acts such as manumission validation could occur wherever convenient, civil and criminal proceedings always took place in a formal court setting under charge of a praetor

3.5.3.1. Civil Cases

Although rarely subject to a criminal court, the average Roman could expect to be involved in civil litigation at some point in his life.²⁸² In civil cases (*causae privatae*) the praetor publicly decided the admissibility of a claim by checking that it had been properly classified into one of the official categories and that all prerequisites were fulfilled.²⁸³ During this part of the proceedings it was of the utmost importance that the claimant phrased his claim according to a precise formula laid down, sometimes in the Twelve Tables, but at other times in semi-secret texts administered by the pontiffs. Even a slight deviation from this wording caused the automatic rejection of his suit. For example, once a citizen wishing to sue another for cutting down his vines under the section of the Twelve Tables dealing with “cutting down of trees” used the word “vine” instead of “tree” in his claim which was subsequently rejected. This requirement was entirely formalistic – if the claimant had used the word “tree” his claim would have been admitted, although in reality it pertained to vines.²⁸⁴ After he had admitted a case, assured its proper classification and determined the issue at hand, the praetor passed the suit on to a private citizen – always a senator or knight²⁸⁵ – to act as judge (*iudex*) and decide on the merits. In turn, the *iudex* often consulted a *iuris consulti* during his deliberations and took his opinion into consideration.²⁸⁶ In Republican times, the *iuris consulti* did not generally state the reasoning behind their conclusions unless they were writing a treatise. As the value of their opinion was based more on their standing as important individuals than their reasoning in the particular case, they tended to simply state their final

²⁸² Nicolet, note 5, at 336.

²⁸³ *Ibid.*

²⁸⁴ Jolowicz and Nicholas, note 2, at 90; Cary and Scullard, note 8, at 67.

²⁸⁵ Nicolet, note 5, at 336.

²⁸⁶ Forsythe, note 99, at 214; Brennan, note 28, at 131 et seq; Jolowicz and Nicholas, note 2, at 48, 95.

view.²⁸⁷ In any event, the private judge merely rendered an opinion on the facts of the case in much the same way a jury of today decides the question of guilty or not-guilty. The most pertinent points of law were already dealt with by the praetor,²⁸⁸ who sometimes gave the *iudex* specific instructions regarding his decision.

Sometime prior to 200 B.C. cases that did not fall squarely into the pre-defined categories began to be heard at the praetors' discretion. Thereafter they and the *iuris consulti* took a leading role in developing law. It was customary for the *praetor urbanus* to issue an *edictum perpetuum* at the beginning of his term. This edict was valid for the entire year and informed the public as to how he intended to apply the law, *ie* remedies he would introduce and the procedural rules under which he would operate. Praetorian edicts soon became a valid source of law unto themselves,²⁸⁹ as did *responsa prudentium*, the opinions of the *iuris consulti*.

3.5.3.2. Criminal Cases

Eventually even those crimes that had traditionally been heard before an Assembly were tried instead before a praetor.²⁹⁰ As the number of judicial magistrates increased, each praetor in Rome was assigned a specific crime that he presided over continuously, for example "treason" or "embezzlement of public money".²⁹¹ Criminal justice in Rome therefore gradually became specialised according to jurisdiction. The specialised criminal courts were regulated by laws which stipulated their procedure and the penalty at stake. The accused was also afforded the opportunity to avoid trial by going into voluntary exile.²⁹²

In criminal cases, the praetor presided over a court and judgement was rendered by a panel of jurors between 50 and 75 in number. Prior to 123 B.C. the jurors were always senators, after 123 B.C. they were *eques*.²⁹³ The juries were usually very lenient with members of their own orders and open to flagrant bribery.²⁹⁴ The majority of criminal cases were highly politicised and more likely to involve a member of the upper classes for the simple reason that most crimes were of a distinctly public nature that the average person was in no position to commit.

²⁸⁷ Helmut Coing, *Grundzuege der Rechtsphilosophie*, (5th Edition, Walter de Gruyter, 1993) at 248.

²⁸⁸ Nicolet, note 5, at 336

²⁸⁹ Brennan, note 28, at 132 et seq; Nicolet, note 5, at 337 et seq.

²⁹⁰ Nicolet, note 5, at 373.

²⁹¹ As very few actions were considered to be "crimes" of State interest, this did not necessitate very many praetors.

²⁹² Nicolet, note 5, at 374; Exile in the ancient world was genuinely viewed with horror, attested to by the amount of time exiled Athenians and Romans devoted to bitter complaints on the topic. Part of the reason for this was that outside of one's home state one was utterly bereft of any rights whatsoever and thus deprived of security, *cf.* von Jhering, note 124, at 228.

²⁹³ Nicolet, note 5, at 335.

²⁹⁴ *Ibid.*

As in Athens, court cases were also a theatre for political manoeuvring, and like them, the Romans fought their court cases in and out of court with a fair deal of drama. One tactic was for the defendant to keep his hair dishevelled at all times, a clear sign of mourning in clean-cut Rome which insinuated that he was deeply and tragically affected by the unfair case brought by the plaintiff.²⁹⁵ Political abuse of the court system was not necessarily less common than in Athens – one of the Catos had at least 44 politically motivated charges brought against him during his career.²⁹⁶

3.5.4. Evading the Law

The Romans valued obeying the letter of the law and enforcing it against one's own relations was viewed as particularly praiseworthy. Obedience to the spirit was not valued in the slightest, and laws were circumvented creatively, regularly and openly. Whereas outright disobedience was a serious offence, evasion on a technicality carried no stigma whatsoever, and it is probable that this constant legal manoeuvring contributed to the ultimate sophistication of Roman law.

For example, the Roman prohibition on usury was applicable only to Roman citizens and thus easily circumvented by using Latin friends as frontmen.²⁹⁷ To take another case: In the late Republic a citizen could not legally name an alien, an outlaw or a woman of the first property class as heir or legatee, a prohibition which was circumvented by the widely used practice of *fideicommissa*, that is naming an eligible person as heir and instructing that person to pass the property on to the desired heir or legatee.²⁹⁸ The public sphere saw an even wider use of doublethink in this regard. A consul or praetor acting as general who had suffered any sort of accident was obliged to await more auspicious omens in Rome before proceeding with his campaign. In order to avoid the inconvenience that journeying to Rome would have entailed, a piece of land in close proximity to the theatre of war was declared to be "*ager Romanus*" and the omens duly taken there.²⁹⁹ In a particularly noteworthy example, the *flamen dialis* (a priest) was not allowed to swear oaths, however, magistrates were required to swear an inaugural oath. When a *flamen dialis* was elected to the post of aedile, a proxy swore the inaugural oath for him. The oath was attributed to the aedile, but not the act of swearing it. This case is particularly noteworthy, because the aedile elected enjoyed a reputation as a strict proponent of the law and utilising a technicality to enter office did not damage his

²⁹⁵ Jolowicz and Nicholas, note 2, at 273.

²⁹⁶ Cary and Scullard, note 8, at 180.

²⁹⁷ Nicolet, note 5, at 37; eventually this practice was put to a stop by imposing the same law on usury on the Latins.

²⁹⁸ Daube, note 150, at 96 et seq.

²⁹⁹ von Jhering, note 124, at 351.

reputation.³⁰⁰ These are only a representative fraction of the ways in which all laws were evaded if desirable and possible to do so.

3.5.5. Legal Equality

Although the theoretical principle of equality before the law was always upheld,³⁰¹ it is highly doubtful if a poor citizen or one without connections could hold a claim against a rich and influential adversary.³⁰²

The courts officially took the parties' standing in the Roman hierarchy into account when deliberating – the higher one stood the more one deserved the benefit of the doubt. Next to the merits of the case and the character and reputation of the parties, it was expected that “all the prestige, authority, power, influence and favour” would “naturally be brought to bear on litigation as on every other aspect of life”.³⁰³ Some Roman texts speak casually of the poor (and it should be borne in mind that the idea of “poor” was quite relative) being completely unable to initiate criminal trials against members of the elite, no matter how grievous the crime.³⁰⁴

Of course, it was precisely when one was confronted with a summons that the other side of the client-patron relationship sprang to life and the litigant called upon his patron to aid him. In fact, most court cases involved a number of people up and down the client-patron-scale on both sides of the dispute. This ensured that court proceedings were invariably very transparent and very public, however, not necessarily more conducive to legal equality as the standing of the patrons on either side would be weighed up in the final decision, a circumstance which only encouraged clients to seek out the most powerful patron possible, removing the issue of social status to another layer without resolving it. Cicero himself frequently wrote recommendations to praetors regarding his friends and associates who were scheduled to appear in the magistrate's court, or mentioned a forthcoming appearance to them in a manner perhaps vague, but which nevertheless left no doubts that the person mentioned enjoyed Cicero's friendship.³⁰⁵ Such representations in which the recipient was left to conclude what was in his own best interests were made as a matter of course.

In addition, the Roman court system, especially for criminal cases, was professionalised, with the litigant often retaining the services of both a Greek-trained orator to

³⁰⁰ *Ibid.* at 352.

³⁰¹ Nicolet, note 5, at 398.

³⁰² *Ibid.* at 336.

³⁰³ J.M. Kelly, *Roman Litigation* (Oxford University Press, 1966) at 43.

³⁰⁴ *Ibid.*, at 49 et seq.

³⁰⁵ *Ibid.*, at 56 et seq.

deliver the speech in court and a *iuris consulti* to prepare his case. The ideal orator could fulfil both of these functions himself and was thus more or less equivalent to a modern lawyer.³⁰⁶

Legal inequality between ordinary citizens was compounded by the inequality between magistrates and non-magistrates. Because they made the law, magistrates and senators could often visit random punishments on the heads of others with impunity. Some Roman magistrates could even afford to punish lower local magistrates (such as quaestors) with severe beatings for such infractions as “neglecting travel arrangements” or failing to clear out public baths for their use quickly enough.³⁰⁷

3.5.6. Judicial Corruption

Bribery in criminal cases, not only to obtain acquittals, but also to obtain the convictions of one’s enemies was absolutely rampant and gives some idea as to the extent that judicial corruption eventually reached. C. Gracchus introduced the *Lex Sempronia* in 123 B.C. which was meant to repress judicial bribery. Such efforts failed to the extent that decades later Cicero casually labelled all judges “prostitutes” in a letter to an associate.³⁰⁸

Historians have pointed out that of all factors which could influence a sentence such as, “[t]he ability of lawyers, their political links with those in power, and the personality of the accused,” money played the largest – “Hortensius, a well-known lawyer, actually had voting tablets of different colours distributed to those whom he had bribed, so as to ensure that he received value for money”.³⁰⁹ Financial influence thus played an extremely large role not only in elections, but also in the judiciary.

3.5.7. Conclusions Concerning the Role of Law in Rome

Legal activity in the Roman Republic was certainly very sophisticated, with daily life subject to intense regulation. It is noteworthy, however, that the upper echelons were poorly regulated and regulation of accountability was often fragmentary and nebulous. Even the role of the Senate was poorly defined, noteworthy in a society that had gotten as far as determining when one might and might not clip off the overhanging twigs of the neighbouring shrubbery.

In addition, the Republican system resulted in extremely poor law enforcement. Democratic “disorderly” Athens was far, far more efficient in this area.

³⁰⁶ Jolowicz and Nicholas, note 2, at 96; of course one had to have the means of paying for such services through political favours.

³⁰⁷ Nicolet, note 5, at 37 et seq.

³⁰⁸ Kelly, *Roman Litigation*, note 303, at 33 et seq.

³⁰⁹ Nicolet, note 5, at 335.

The judiciary was relatively independent. Only a consul could dismiss a praetor, a step that was not easy to take without good grounds and because the praetor had little discretion over what the law was he could not alter the rules in any particular case. But while justice was unlikely to be administered on a whim, it could very well be maladministered if a citizen had a motive to injure a less powerful victim, in which case he needed only to subsume his actions under a plausible legal mechanism. The average citizen was relatively safe from such dangers only by virtue of being “below the radar” of those with influence.

This is something of an irony considering that Roman law was founded on a desire – primarily by the weaker elements of society – for *Rechtssicherheit*. The law was not intended as an instrument to realise justice or equality, it was intended, in the main, to achieve security and security alone, a system in which every member of society knew his place and his rights. The security that the Republican rule of law model provides is thus somewhat illusory. Most importantly, it did not lead to genuine equality before the law, a necessary prerequisite to security.

The intense formality of Roman law is also striking – unlike Athenian law it did not aim to resolve disputes within the community no matter how trivial they may have seemed. Instead it aimed to apply the letter of a predefined law. If a dispute could not be made to conform to that pattern then for much of the Republic it simply went unheard. Even the later lenience of praetors in hearing uncategorised claims was fairly limited. Many of the basic laws of the Twelve Tables were extremely specific and left little room for interpretation. This is, of course, the essence of a formal *Rechtsstaat*, a law that stands above the community.

Justice in Rome was still rather participative, considering jury size and the work of *iudex* and *iuris consulti*, but these individuals were only selected from the highest class of citizens. Once again, participation was fairly high for the uppermost class and non-existent for everyone else.

3.6. Corruption other than Electoral and Judicial Corruption

We have already dealt with electoral and judicial corruption under the appropriate sections, but in Rome these merely amounted to speciality fields. The scope for corruption in multiple disciplines was virtually endless.

3.6.1. Bribery and Financial Corruption

Bribery and financial corruption were endemic to the Roman political classes. To cite a few examples of the multiple forms this could take:

The unelected offices (*ie* the scribes) were subject to increasing corruption, by the 1st Century B.C. often colluding with magistrates. The scribes Maevius and Volcatius to the governor Verres even invented an entire range of fictitious “duties” for the average citizen to pay, among them a non-existent “wax duty” and “clerk’s fees” which went directly into their own and Verres’ pockets.³¹⁰

Bribery, always an issue, became endemic, with laws against bribery being passed in 181 B.C. and at regular intervals thereafter. In only the last thirty years of the Republic, five laws against electoral corruption were passed, the *leges Cornelia* (81 B.C.), *Calpurnia* (67 B.C.), *Tullia* (63 B.C.), *Licinia* (55 B.C.) and *Pompeia* (52 B.C.).³¹¹

Extortion by governors became so commonplace that in the mid-second century B.C., a standing criminal court had to be established in Rome to deal exclusively with this issue.³¹²

The transference of much of Rome’s publicly earned (by way of military conquest and ensuing tribute) wealth into private hands, was at all times *de rigueur*.³¹³ Roman public works were built by private contractors who were invariably very wealthy as they were required to give surety in land that they would fulfil the contract. Senators were not allowed to bid on these contracts, as they were supposed to be overseeing the process, however, they frequently did bid through an agent.³¹⁴ The *publicani* were often not properly controlled, and thus made huge profits by squeezing an unfair amount of money out of the taxpayers.³¹⁵

Land reform by limiting the area of public land a citizen might occupy was constantly thwarted by landowners submitting lists of fake tenants to the authorities.³¹⁶

The list of corrupt practices could continue *ad nauseum*. The important point for this thesis is that it was an endemic problem affecting all affairs of State and continued inexorably to increase.

3.6.2. Manipulating Legislative Activity

As mentioned above, manipulation of Rome’s voting assemblies through every means imaginable was commonplace.³¹⁷ In addition to the tactics already described, it was common for priests to arrange festivals or to declare festivals that had already occurred to have been faulty and demand their repetition in order to maximize interference with a magistrate’s

³¹⁰ Nicolet, note 5, at 328 et seq.

³¹¹ Staveley, note 9, at 215 et seq.

³¹² Brennan, note 28, at 235.

³¹³ M. Crawford, note 5, at 73 et seq.

³¹⁴ *Ibid.*, at 200.

³¹⁵ Jolowicz and Nicholas, note 2, at 39.

³¹⁶ Cary and Scullard, note 8, at 186.

³¹⁷ *Supra* pp. 101 et seq., and pp. 119 et seq.

proposed legislation or shorten the year so as to limit an opponent's time to introduce unwanted legislation.³¹⁸

The principle that it was right and proper for members of the nobility to deceive the people in matters of religion was accepted by the famous pontifex maximus Q. Mucius Scaerola; and Cicero made it very clear in his *de legibus* that the use or misuse of the auspices and of augural authority was an essential feature in his ideal state. 'Magisterial auspices,' he says, 'were meant to secure the postponement of many unprofitable assemblies by providing plausible excuses for delay. The gods have often suppressed the unjust pronouncements of the popular will by means of the auspices'³¹⁹

3.6.3. Political Violence

Throughout the Republic voting was also disrupted by removing the necessary equipment, such as the ballot urns or ramps.³²⁰ For example, at the end of the Second Punic War *publicanii* who were about to be convicted upset the voting urns at the last moment. The same was done by Tiberius Gracchus' opponents during voting on his first land bill.³²¹

In the very late Republic violence also became commonplace with hired gangs intimidating voters or preventing them from entering the voting arena. Assassination also became fairly widespread. What is noteworthy is that it was the Roman upper classes who tended most to use political violence. It was members of the Republican elite who killed the Gracchi, Clodius, Julius Caesar, the praetor A. Sempronius Asellio (in 89 B.C.) who was murdered by creditors after giving their debtors legal protection, as well as Spurius Maelius, earlier on.

3.6.4. Conclusions Regarding Corruption

Corruption of all kinds was the Republic's chronic and debilitating problem, which meant, ironically, that the well-developed political and legal system often did not function in the intended manner according to the law. Corruption extended to virtually all political

³¹⁸ Staveley, note 9, at 206; the conduct of official business was prohibited during religious festivals.

³¹⁹ Staveley, note 9, at 209; von Jhering corroborates, note 124, at 357, seeing this practice in a positive light as it could be used to prevent "the people" acting in a state of agitation and to "correct" their mistakes.

³²⁰ Staveley, note 9, at 211 et seq.

³²¹ Nicolet, note 5, at 289.

activity and was aided by the vast social and financial discrepancies of the populace. While numerous attempts were made, no law succeeded in containing it.

3.7. The Individual and Citizen

3.7.1. Roman Citizenship

As in Athens, Rome differentiated strictly between citizens and non-citizens. However, unlike in Athens, the Romans also differentiated between citizens based on economic class and birth as patrician or plebeian. Although initially the patricians were akin to aristocrats and the plebeians to commoners, there seems to have been something more to the distinction, possibly religious or superstitious, as it continued long after many plebeians had grown wealthy and many patricians had sunk into relative poverty.³²²

Due to its internal inequalities, Roman citizenship was easier to attain than in most other societies of the time in which enfranchisement was virtually impossible. Because the Roman Republic expanded rapidly through conquest, its leaders sought to Romanize and enfranchise large numbers of non-citizens as a social and military imperative.³²³ Thus, for the first time, they detached citizenship from birth and tradition and reattached it to loyalty to a State. Even a slave could become a freedman and then a citizen.³²⁴ While generous in regards to granting citizenship on an individual basis, the Republic continued to resist pressure for mass enfranchisement and political integration from its allies,³²⁵ until the so-called Social War of 91-89 B.C.³²⁶

Those who were granted citizenship were assimilated and integrated to a much higher degree than was common at the time. A freed slave – and the Romans were relatively generous about freeing at least their more qualified slaves – for example, instantly became a full Roman citizen,³²⁷ and invariably took the family name of his former master whose client he became.³²⁸ Thus with one stroke, the freedman was integrated into the client-patron framework and the Roman family or clan structure. A freedman (*libertinus*) himself was not

³²² M. Crawford, note 5, at 24, 29.

³²³ Nicolet, note 5, at 17; M. Crawford, note 5, at 31.

³²⁴ M. Crawford, note 5, at 39.

³²⁵ In 338 B.C. when, prior to the “Latin War”, the Latins suggested peace terms which included their own participation in Roman politics and their assimilation into the Roman citizenship, they were rejected. Similarly, when in 216 B.C. the Capuans demanded that, if they were required to come to the military aid of Rome against Hannibal, one consul should henceforward be Capuan, they were also rejected, Nicolet, note 5, at 24 et seq.

³²⁶ Jolowicz and Nicholas, note 2, at 66; Nicolet, note 5, at 23; successful because they were granted citizenship, not because they succeeded in conquering Rome.

³²⁷ Nicolet, note 5, at 23.

³²⁸ Jolowicz and Nicholas, note 2, at 83; Nicolet, note 5, at 23.

eligible to hold office or serve in the army, delaying the social rise of foreign families,³²⁹ but these restrictions did not apply to their descendants. In 304 B.C. the first son of a freedman (Cn. Flavius) was elected to office (that of aedile).³³⁰ However, it is often overlooked that the freedman and his descendants almost always remained politically and economically dependent upon their former master and patron.³³¹ Their achievements were often attributable to a powerful clan leader and exercised at least partially in his interests.

Roman citizenship was not sought after by everyone. It was in the main desired by the upper classes of subject populations, who sought an entrance into the powerful Roman aristocracy. It could not only be acquired, but also voluntarily relinquished with relative ease. It was not uncommon for poor Roman citizens to give up their Roman citizenship in order to join a Latin colony and thereby acquire land.³³²

The Romans rarely imposed their customs or language on conquered peoples although they were widely adopted.³³³ The heterogeneous character of Roman citizenship is expressed by Cicero who states that many Romans had two “fatherlands”, the Roman “Empire” as a whole, and the part of it in which they had been born.³³⁴ This expresses a dispassionate view of citizenship and the ability of the Republican system to absorb peoples of different cultures into a functioning State.

3.7.2. *Civitas sine suffragio*

In the Republic, the half-way house to procuring full citizenship was to become a *civis sine suffragio* or citizen without the vote.³³⁵

Civitas sine suffragio enjoyed the full protection of Roman laws, but were barred from voting in the Roman assemblies and from running for office. Full “born” Roman citizens could be demoted to the status of *civitas sine suffragio*.³³⁶ It thus functioned as both reward and punishment depending on the concrete circumstances, both in individual cases and inter-State relations. For example, during an attack by the Gauls in 390 B.C. the Etruscan city of Caere hid Rome’s sacred objects from the invaders. Following the repulsion of the attack, its

³²⁹ Jolowicz and Nicholas, note 2, at 84.

³³⁰ M. Crawford, note 5, at 44.

³³¹ *Supra* pp. 125.

³³² Jolowicz and Nicholas, note 2, at 59; Nicolet, note 5, at 31.

³³³ Nicolet, note 5, at 44.

³³⁴ Cicero, *de legibus* 2.25 in Nicolet, note 5, at 44.

³³⁵ M. Crawford, note 5, at 40.

³³⁶ Nicolet, note 5, at 27.

citizens were granted *civitas sine suffragio*.³³⁷ However, at other times, the Romans used *civitas sine suffragio* to keep distrusted populations under strict control.³³⁸

The institution of *civitas sine suffragio* is in some respects similar to that of *atimia* in Athens. However, that its conferral could be viewed at times as positive – which is something that cannot be said of *atimia* – reflects the difference between the Roman and Athenian state. To be a *cives sine suffragio* entitled one to the full protection of the *ius civile* as a Roman citizen, a protection which even carried weight in lands not under Republican control. The position was therefore not without its value, all the more so considering that the majority of the *cives sine suffragio* would not have possessed sufficient wealth to effectively utilise a vote even if they were entitled to cast one. By contrast, the position of *atimios* was always purely negative, explicitly meant as a punishment and excluding him entirely from what were meant to be the benefits of the State, namely meaningful participation. The benefits of citizenship were differently understood in the democracy and republic – in the Republic they signified protection, in the democracy, participation.

3.7.3. Participation

For Rome's elite, participation in the political and legal system was quite intense.³³⁹ The high turnover of magistrates who were elected annually and were often restricted in when they could run for the same office again,³⁴⁰ in addition to a ban on running for any office for two years, starting in 180 B.C.³⁴¹ ensured a fairly high participation rate among the most privileged.

If a citizen participated in all legislative and electoral assemblies this would have occupied about 60 days in a year.³⁴² However, attending the assemblies only made sense if one would be called upon to vote. In electoral assemblies and legislative assemblies of the Centuriate Assembly even the second class of citizens did not always vote, and for members of urban tribes there was also little point in attending tribal assemblies as the collective vote of the tribe had little weight and the vote of the citizen within his crowded tribe less still.

³³⁷ *Ibid.* at 26, 28.

³³⁸ "The people of Anagnia and such others as had borne arms against the Romans were admitted to citizenship without the right of voting. They were prohibited from holding councils and from intermarrying, and were allowed no magistrates save those who had charge of religious rites" Livy, 9.43.23, in Nicolet, note 5, at 26. This is backed up the Roman decision after the Latin War to dissolve the Latin League and impose *civitas sine suffragio* on many formerly Latin cities, Nicolet, note 5, at 28.

³³⁹ Nicolet, note 5, at 390.

³⁴⁰ Starting in 342 B.C. a citizen could only hold the same office twice once every ten years and in 151 B.C. a law was passed prohibiting a citizen from becoming consul more than once, although this prohibition was occasionally waived, M. Crawford, note 5, at 73.

³⁴¹ M. Crawford, note 5, at 73.

³⁴² Nicolet, note 5, at 237.

Participation in the government process was thus for the vast majority of citizens largely non-existent, as they could not hope to run for office, rarely had a chance to cast a vote at the Centuriate Assembly and were in a minority of four tribes at the Tribal Assembly. In the Plebian Council, the situation was only slightly more advantageous than in the Tribal Assembly and even when “the people” did manage to pass a meaningful law in the Plebian Council, members of the upper classes looked on the legislation with disdain, Cicero commenting, “many evil and disastrous decisions are taken by the people, which no more deserve to be regarded as laws than if some robbers had agreed to make them.”³⁴³

Towards the very end of the Republic it is estimated that facilities to provide for 70 000 voters existed with the total Roman population entitled to vote being 1 700 000. It is estimated that only about 17 000 citizens routinely had a chance to cast a vote before a majority was reached and voting stopped.³⁴⁴ The participation rate for voting in the popular assemblies was thus 1/100, while only 0.0003% of those citizens with voting rights participated in the Senate.

The nature of participation even for those able to cast a meaningful vote in the popular assemblies was also shallow. Only magistrates were authorised to call public meetings and table legislation, which in turn always required a yes or no answer without debate or other input from the general population. The assemblies were “rubber stamp” affairs, with no participation rights of the citizen other than to – at most – influence the vote of his curiae or tribe.

The citizen of old Rome only gave his opinion when asked for it ritually under the vigilant eye of his natural mentors. He voted, but he did not debate. Thus he might, at a given moment, reject one leader or improve the chances of another, but he had little or no control over his own career, which was entirely in the hands of his peers and meticulously governed by official rules³⁴⁵

Roman citizens were not obligated to exercise their right to vote and there is no mention in their records of a quorum ever being necessary outside of the Senate to pass any measure.³⁴⁶

³⁴³ Cicero, *de legibus* 2.13-14, quoted in M. Crawford, note 5, at 26; a different translation reads “many harmful and pernicious measures are passed in human communities – measures which come no closer to the name of laws than if a gang of criminals agreed to make some rules” (Cicero, note 73, 2.13-14).

³⁴⁴ Nicolet, note 5, at 290 et seq.

³⁴⁵ *Ibid.* at 361.

³⁴⁶ *Ibid.* at 290

Because high magistrates were surrounded by lictors, scribes, heralds, and other attendants in public, they were not easily accessible to the average person.³⁴⁷ The point of contact for the average citizen was thus likely to be a member of Rome's extensive unelected bureaucracy of scribes and *apparitores* who worked under the magistrates.³⁴⁸ Thus, not only did the average citizen have little scope to directly affect decision-making, the decision-makers themselves were not easy to access.

The opinion of the masses was not entirely disregarded by the Roman nobility, for example, the reaction of the crowd to theatre plays at games and festivals was considered to be a political barometer of the city and carefully analysed by politicians. Both Greek and Roman theatre were politically-oriented and "tragedies were staged in order to draw public attention to great national questions".³⁴⁹ However, having had the chance to applaud a certain political scene at a play in the hopes that watching magistrates will pick up on the general mood cannot be viewed as a particularly effective means of influencing government.

Although it was not unknown for the lower classes to successfully back populist magistrates for short periods of time (such as the Gracchi and Julius Caesar), this was exceedingly rare with over eighty years elapsing between the assassination of the Gracchi and Caesar's rise to power. It also did not result in gaining the disenfranchised more participation.

Despite their restricted level of participation, it is thought likely that the average citizen was well-informed. Political pamphlets were widely circulated and there was a reasonable level of literacy in Rome.³⁵⁰ It is thought that "the cultural level of the Roman voter was remarkably high".³⁵¹ Their factual "ignorance" was thus of a far lesser degree than leading political figures often made out to justify their own exclusivity.

While participation levels for the vast majority of citizens were minimal compared to Athenian democracy, the scope of participation, such as it was, was always upheld as an ideal and felt to be an important and venerated right. Compared to the monarchic State or States such as Egypt and Persia where the leader was held to be akin to a god, this attitude was justified. However, it also blinded many Romans to the far greater participatory opportunities of other forms of government.

³⁴⁷ Cary and Scullard, note 8, at 81; Nicolet, note 5, at 326 et seq.

³⁴⁸ A scribe was not a mere copyist (a copyist was referred to as a *librarii*), but occupied a position akin to the magistrate's PA, Nicolet, note 5, at 327.

³⁴⁹ Nicolet, note 5, at 364 et seq.

³⁵⁰ *Ibid.*, at 361.

³⁵¹ *Ibid.*, at 390.

3.7.4. Conclusions Regarding the Position of the Individual Citizen

The single most interesting aspect of Roman citizenship was that it was heterogeneous, with new citizens often not prohibited in any way from exercising most of their traditional customs, and relatively easy to obtain. This can be seen as partially caused by the Roman drive to conquer the world. Had citizenship not been so freely granted, the Romans would inevitably have become so outnumbered as to make further military expansion impossible.

However, another factor is undoubtedly the very lack of meaningful participation granted to the majority of citizens. Unlike the Athenians, the Romans could afford to grant citizenship to vast numbers of non-Romans, because such an act changed very little in regards to the concrete governance of Rome. Should the occasional freedman who had had the good fortune to be purchased by an influential Roman family, against all odds, succeed in rising to the status of *eques* and his sons become magistrates, all this meant was that he had assimilated himself into the Roman elite and learned to play the political game in its proper manner. Far from altering anything substantial or causing the Romans to “lose control” of their State, they had successfully recruited new talent, a possible ally for some, which owed its power to the same source they did and could thus be counted on to “play by the rules”. In a State that left very little scope for self-determination, the question of who precisely enjoyed citizenship was fairly irrelevant.

3.8. Democracy in Rome

People power was not welcome in the Republic under any circumstances. Such power was always passed through the mediating and manipulable filter of elections.

Disapproval of spontaneous communal decisions applied in all circumstances. At a battle in Spain in 211 B.C. the Roman army was defeated and its proconsular generals killed leaving the force without a commander. The soldiers elected the *eques* Lucius Marcius as their new general, who, based upon this action, granted himself the status of propraetor. The Senate noticeably did not approve of this grass-roots initiative, despite the extenuating circumstances, the fact that an election had occurred and Marcius enjoyed the proper rank to exercise his new position.

It was a bad precedent, they said, for generals to be chosen by armies, and for the sanctity of elections with the required auspices to be removed

instead to camps and the provinces, far from laws and magistrates, at the bidding of reckless soldiers³⁵²

Considering the later civil wars, it must be granted that the senators shrewdly understood the balance of power in their State. Lucius Marcius had acted outside of the approved power structures and was therefore a threat to the very Republic.

Despite this general attitude, some historians have discerned “a tendency in the later Republic to defer to a greater extent to the principle of popular sovereignty”.³⁵³ Tiberius Gracchus once even made a statement very atypical of a Roman, but very typical of an Athenian, when he, in an extremely unorthodox and controversial move, had a fellow tribune deposed because of his continued obstruction of Gracchus’s laws: “If it is right for him to be made tribune by a majority of the votes of the tribes, it must be even more right for him to be deprived of his tribuneship by a unanimous vote”.³⁵⁴

However, Tiberius Gracchus was ultimately unsuccessful, with such opinions costing not only his own life, but those of many of his supporters. His views were quite far outside of the mainstream of Roman opinion, but that these ideas were voiced at all does indicate an increasing awareness of what could be termed the latent democratic sympathies of the people. In a continuation of his brother’s policies, Gaius Gracchus proposed that the centuries be called to vote by lot rather than the pre-ordained wealthiest-to-poorest order used. Needless to say, this proposal was not adopted³⁵⁵ and the younger Gracchus and his followers met a similar end to his brother.

Steps towards more democratic participation were thus successfully thwarted and replaced by an increased appeal to popular sympathy, a method which was harnessed as a political tool by ambitious Romans. Influential families hosted lavish funerals for important members at which the deceased’s entire exalted lineage was re-enacted and praised, thus raising the profile of his living family members and gaining sympathy from the common man for their loss.³⁵⁶ The urban masses began to demonstrate at funerals, for example at Sulla’s and at Clodius’s (at which the people burned down the Curia and attempted to attack Clodius’s assassins). The people also demonstrated at Caesar’s funeral, killing a man they had mistaken for one of his assassins. Caesar’s heir, Octavian, used the pomp and ceremony surrounding funeral celebrations to deify Julius Caesar, step into his newly sanctified shoes and turn the Republic into an Empire.³⁵⁷ Another power-building event was the personal

³⁵² Livy, 26.2.3. in Nicolet, note 5, at 106.

³⁵³ Staveley, note 9, at 211.

³⁵⁴ Plutarch, Ti. Gracchus 12, in Nicolet, note 5, at 281.

³⁵⁵ Nicolet, note 5, at 312.

³⁵⁶ *Ibid.*, at 345 et seq.

³⁵⁷ *Ibid.*, at 347 et seq

triumph, an increasingly spectacular and competitive event between military leaders who came to be personally adored at triumphs as liberators by the masses, with rescued prisoners in the triumphal parade at times explicitly referring to the triumphator as “saviour”.³⁵⁸

However, this increasing reliance on, and therefore responsiveness to, the popular will should not be confused with a leaning towards democracy, which entails not only the right to express popular will but to shape and enact it oneself. These actions are thus expressive only of the breakdown in the aristocracy’s “gentlemen’s agreement” not to involve the latent violence of mass appeal in their power struggle. The intention of everyone, except perhaps the Gracchi, was certainly not to usher in an age in which the lower classes dictated their own destiny, but rather to enlist them as a tool in the aristocrat’s personal quest for ambition.

3.9. Transparency

Throughout the Republic all Romans enjoyed freedom of speech, though it seems more than plausible that they would have censored themselves at times to avoid offending powerful patrons.³⁵⁹ This freedom of speech was “an organic part of the city’s life, in which, even if real power was confined to an oligarchy, the process of government, justice and administration was supposed to be carried out and debated in public”.³⁶⁰ Only in the Republic’s death throes did decisions begin to be made in secret counsels and without public discussion.³⁶¹ Roman aristocrats committed abhorrent actions at times, but they almost always committed them in public.³⁶²

On the other hand, no concerted effort was made to publish the decisions of government bodies. Resolutions passed by the Senate were sometimes publicly displayed, but at other times merely filed away in the treasury or only sent to interested parties, such as provincial governors.³⁶³

In the later Republic, the *edicta perpetuum* did provide for a fairly high level of transparency in regards to the application of the law.

This presents a somewhat mixed picture – there was greater transparency as to what the rules were than in Athens and significantly less transparency regarding the processes by which they were made, unsurprising in a *Rechtsstaat* ruled by oligarchs, who would desire for each citizen to know what the law was without thinking too deeply about who had made it. A

³⁵⁸ *Ibid.*, at 352 et seq.

³⁵⁹ *Ibid.*, at 323.

³⁶⁰ *Ibid.*, at 324.

³⁶¹ *Ibid.* at 324.

³⁶² *Ibid.* at 340 et seq.

³⁶³ Jolowicz and Nicholas, note 2, at 28, 45.

more concerning comparison is the high level of transparency present in Rome compared to modern Western states, not to mention international institutions.

3.10. Individual Rights

3.10.1. Citizens' Rights

The Roman lifestyle has been characterised as “complete subordination of the individual to the community”.³⁶⁴ In almost all cases,

protests against injustice or oppression were aimed against individuals (such as Sulla) or specific groups (such as a party in the Senate), not against the State in general; in Roman eyes oppression was not a natural feature of the state, but a negation and depravation of it³⁶⁵

– therefore there were no rights vis-à-vis the State *per se* in the modern sense. The common idea of the State was not as an adversary, but a natural entity to whom one owed one's life, and the relationship between State and individual was frequently likened to the relationship between parent and child.³⁶⁶

The citizen was graciously equipped with certain rights by his State, although these were not “inherent”, the most important being – as in Athens – protection from the death penalty without trial.³⁶⁷ Even those excluded from the political benefits of citizenship (women, children, slaves, freedmen) had rights, though theirs were lesser ones. These rights were mainly procedural in nature, centring around such things as the right to a fair hearing before the courts and a correct application of the law, the right of the plebeian tribunes to arouse public opinion against a verdict and prevent execution of the sentence,³⁶⁸ and the right to appeal a magistrate's decision to the people in an assembly through the so-called *provocatio*, a possibility “unanimously extolled in Roman literature as the essential achievement and most precious privilege of Roman freedom” (but which was scrapped when standing courts were instituted and was never easy to implement).³⁶⁹ *Provocatio* was superficially akin to the Athenian *dikasteria*, except that participation in the Roman Assemblies was unequal and the participants were not chosen by lot.

³⁶⁴ Nicolet, note 5, at 90.

³⁶⁵ *Ibid.*, at 324.

³⁶⁶ Livy 27.9-10, in Nicolet, note 5, at 33.

³⁶⁷ Precisely the same protection Athenian citizens were afforded; it is thought that the Twelve Tables were partially modelled on some aspects of Solon's laws.

³⁶⁸ *cf.* Kelly, *Roman Litigation*, note 303, Chapter II; Nicolet, note 5, at 340 et seq.

³⁶⁹ Nicolet, note 5, at 320, 335; Lintott, note 156, at 233 et seq.

Such rights could, of course, be altered through legislation, but such action was infrequent. Unless he had become tangled in high politics, a Roman could be quite certain that the relatively independent judiciary would apply the law and his rights correctly and with only the officially allowed prejudice.

The degree of protection afforded by such rights should, however, be kept in perspective. To take one example: in cases concerning a sum of money, the losing party was given thirty days to pay the amount owed. If he failed to do this, his creditor could take him before the magistrate and ceremonially seize him. Although the debtor did not become the slave of the creditor, the creditor now disposed over his person, was entitled to keep him in chains weighing up to fifteen pounds and obliged to feed him a certain measure of grain each day. He was further obliged to present the debtor on three consecutive market days on which the amount of the debt was publicly proclaimed, possibly to present friends with a chance of alleviating it. If after sixty days the debt had still not been paid, the creditor was entitled to kill the debtor or sell him as a slave outside of Rome. If the debtor had several such creditors, the Twelve Tables specifically authorised them to cut up his body into pieces according to how much he owed them and explicitly exculpated any creditor for cutting off a disproportionate amount of the debtor's body.³⁷⁰ This practice was eventually replaced by the practice of either holding the debtor hostage as described above, but without authorisation to kill or sell him, or by the praetor putting the creditor in possession of the debtor's property and authorising him to sell as much of it as necessary to meet the amount owed,³⁷¹ but it does demonstrate that the level of "protection" the law provided was not necessarily very high. As we have seen above, the censors could interfere in private life to a large degree.

The Romans did not appear to miss the lack of very many material enforceable rights against the State. Although, the core value of the Roman Republic was ostensibly *libertas* or freedom, the word was rarely used on its own. It was most commonly used in phrases such as "freedom to exercise one's rights" or in connection with a "guarantee of equality under the law".³⁷² The Romans rarely endorsed the general idea that people were essentially "free".³⁷³ One was not free to do as one liked, one was only free to exercise one's, by modern standards relatively minimal, rights within their proper scope.³⁷⁴ Nonetheless, Roman citizens' rights

³⁷⁰ von Jhering, note 124, at 133; Jolowicz and Nicholas, note 2, at 189; Cary and Scullard, note 8, at 67.

³⁷¹ Jolowicz and Nicholas, note 2, at 216 et seq.

³⁷² Nicolet, note 5, at 320.

³⁷³ von Jhering, note 124, at 104.

³⁷⁴ This limited view of freedom was perhaps enforced by the fact that many citizens were, for a large portion of their lives, legally subjected to the will of another – the *paterfamilias*. All the descendants of a *paterfamilias* and their wives were almost exclusively in his power and had no right to own property in their own name for the duration of his lifetime. Any property that they did acquire was automatically the property of the *paterfamilias*, Jolowicz and Nicholas, note 2, at 114 et seq; Only a *paterfamilias*

represent an important doctrinal break with Athens, because so long as they were exercised within their proper scope, very few people were empowered to interfere with them.

3.10.2. Human Rights?

In a certain sense the Romans acknowledged human dignity by developing various cases of insult for which a Roman could sue for compensation. For example, refusal to allow one to use the public baths was a justiciable insult.³⁷⁵ While denoting a certain level of individual protection, the Romans viewed this not so much as a human right, as the right to demand one's hierarchical due as a member of society. A member of another society could make no such demands. Moreover, within Roman society, citizens did not enjoy equal dignity. A citizen's dignity and the respect he was due were directly proportionate to his status, based upon his rank, office and character.³⁷⁶ That "[a]n unpopular or powerless individual or a minority" could be "as much entitled to justice as anyone else"³⁷⁷ would have been a laughable concept.

Their constant contact with new cultures, many of whom had laws similar in content to their own, did provoke the Romans into developing a rudimentary concept of natural law (*ius naturale*) heavily influenced by Stoic ideology and defined as laws that made sense to a reasonable person. *Ius naturale* was, however, not necessarily conducive to developing human rights. For example, as every people they had encountered also took slaves and manumitted them, such practices were considered a part of *ius naturale*.³⁷⁸ The majority of Republican Romans did not ascribe to Stoicism and *ius naturale* thus remained at the conceptual level.³⁷⁹ The development of the vast majority of Roman law remained practical and casuist, tied to the end of retaining their own traditional way of life and value system.³⁸⁰ Fuzzy ideas of human dignity and natural law thus remained fringe concepts, not penetrating the entire system. Slaves, for example, were – in blank contradiction to any understanding of human dignity – legally categorised as "objects",³⁸¹ while war – although officially legally

could legally command the family's resources and as a result most Romans – even high magistrates – acted according to the will of their *paterfamilias*, Daube, note 150, at 84 et seq.

³⁷⁵ Jolowicz and Nicholas, note 2, at 273.

³⁷⁶ Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" in (2008) 19 *EJIL*, 655 at 656 et seq.

³⁷⁷ *T.D. v. Minister for Education*, [2001] 4 IR 259 at 338 (per Hardiman, J).

³⁷⁸ However, the peculiar Roman laws and ceremonies governing the exact form of manumission were part of Roman law exclusively – one could argue that, by recognizing manumission as part of natural law, an implied right of the slave to be manumitted was present. It is, however, doubtful if the Romans saw things quite this way, Jolowicz and Nicholas, note 2, at 104 et seq.

³⁷⁹ Jolowicz and Nicholas, note 2, 104 et seq.

³⁸⁰ *Ibid.*, at 97.

³⁸¹ Chantraine, note 52, at 60.

categorised – was understood to be war against every member of the enemy, including non-combatants, often with a genocidal intent.³⁸²

3.11. Conclusions Regarding the Roman Republic as a Political and Legal System in Particular with Regard to Probable Advantages over Athenian Democracy

Having rejected democracy and as yet without the idea of human rights, the Romans perfected the rule of law in a near-vacuum of other conflicting ideas, and can be regarded as a very pure example of such a state, characterised by elections, extreme economic and political stratification and low participation levels for the majority of the populace. And because it was such a pure rule of law state, the rule of law was in fact little more than a sophisticated illusion, as virtually all aspects of public life were prone to serious corruption which placed power squarely in the hands of an elite. The law in Rome was placed above most people to manipulate, but not above all people. To be specific it was not placed above those people with the ability and resources to manipulate it. Having looked at this nation which eventually collapsed under the weight of its problems, the first question we must ask is what is worth salvaging. In what ways was the Roman Republic superior to the Athenian democracy?

3.11.1. Stability

As Rome imploded, Cicero claimed in *Pro Flaco* 15-16 in a comparison between Rome and contemporary Greek cities in Asia:

Oh, if only we could maintain the fine tradition and discipline that we have inherited from our ancestors!... Those wisest and most upright of men did not want power to reside in the public meetings. As for what the commons might approve or the people might order, when the meeting had been dismissed and the people distributed in their divisions by centuries and tribes into ranks, classes and age groups, when the purposes of the measure had been heard, when its text had been published well in advance and understood then and only then did they wish the people to give their orders or their prohibitions. In Greece, on the other hand, all public business is conducted by the irresponsibility of a public meeting sitting down. And so... that Greece of ancient times... fell through this single evil, the excessive liberty and licence of its meetings. When untried men, totally

³⁸² Ziegler, note 278, at 104 et seq.

inexperienced and ignorant, had taken their seats in the theatre, then they would decide on harmful wars, put trouble-makers in charge of public affairs and expel from the city the citizens who had served it best³⁸³

While Cicero's accusations regarding the *ekklesia* were at times true, his conclusion is not. Athens did not fall from within – it was conquered from without. It is possible that had the *ekklesia* made wiser decisions this would not have happened, however the Roman elite was also not infallible and was known to have made ill-considered, near fatal military decisions. No one can deny that the Athenians were conquered by an external force, Macedonia. The Roman Republic, on the other hand, self-destructed into repressive imperialism. Its well-managed army could not protect it from the State's own inherent instability which concentrated wealth and power in the hands of an ever-diminishing few. It is impossible to say for certain that Athenian democracy was more stable than the Roman Republic, but it does seem likely that it was not more unstable.

3.11.2. Rechtssicherheit

The Roman Republic developed independent courts, and a reasonably educated judiciary presided over by relatively qualified magistrates. Bureaucracy was highly organised and professionalised so that accidental misapplication of the law was rare. Provided that the circumstances of the case were similar, the decision of the court would also be similar.

However, once one attained a certain level of status and wealth, the law was a tool of manipulation, not a force to be reckoned with. One was safe from one's neighbours, not from a more powerful foe that one had crossed. The chances, of course, of this happening to a simple citizen who was not striving to get above himself, were minute. The majority of Roman citizens thus lived remarkably well-regulated lives, with a great deal of certainty as to the law and the manner in which it applied to them. The precise content of the law might have been arbitrary, but they could generally take it as a basis upon which to build their lives and factor it into any decision they had to make. It was unlikely to change quickly and unlikely to change much. This can be contrasted to Athens in which any citizen could find himself dragged to court by any other for any reason. As we have seen, there were mechanisms by which it was attempted to limit such behaviour, but nonetheless it was still a very real possibility. If one did find oneself before the court on criminal charges, one did not know what the sentence was likely to be, as the prosecutor could ask for whatever he chose. Furthermore, in Athens, laws were constantly debated and could be changed from week to

³⁸³ Nicolet, note 5, at 216.

week. Although the Assembly did not very often make flip-flopping decisions and does not seem to have very often been swayed beyond rationality by a demagogue, it did happen. Under the Roman system, so long as the citizen obeyed the law that was laid down for him and did not become involved in politics, he was quite secure from any of these activities.

3.11.3. Individual Freedom

It has been said that *Rechtsstaat* alone can rationally secure individual freedom.³⁸⁴ This may be true, provided that there is some higher law stating that individual freedom is a societal goal. Certainly, there are better chances in a *Rechtsstaat* for one achieving an individual sphere of activity that cannot be interfered with than in a democracy, where one may factually have a large degree of individual freedom, but no legal securities whatsoever. In a Republican rule of law State one would appear to have less factual individual freedom, but a greater degree of security as to its boundaries and exercise.

3.11.4. Rationality

Perhaps the key advantage of the rule of law as developed by Rome was the understanding that law should be applied rationally, that decisions should be made rationally. The Romans did not always fulfil these aspirations, but they did attempt to, and they developed rational, complex legal arguments that are still in use today. Rigorous self-examination was not always a feature of Athenian democracy and at times led the *demos* to make foolhardy decisions based on little more than whims. It is, however, highly questionable whether a *Rechtsstaat* tends in real terms to be more rational than a democracy.

3.11.5. Efficiency

Both the Athenians and the Romans were extremely efficient. In addition, in an equal democracy one tends at least to focus on the substantive issues. In a republic citizens are often distracted over gaining power with its concrete exercise almost a secondary consideration.

3.11.6. Conclusions

The Roman Republic was superior in very few ways to the Athenian democracy: it offered considerably more certainty as to what the law was, and it is possible that a rule of

³⁸⁴ Fernando Teson, "The Kantian Theory of International Law" in *Democracy and International Law*, Richard Burchill (ed.), 211 at 242.

law state might permit for a greater degree of individual freedom than a democracy provided either that one is sufficiently powerful to flout the laws (which is to step outside the *Rechtsstaat*) or that individual freedom is a goal that the laws are meant to support (which was not the case in Rome).

It is important to remember that in the long-run the Roman system did not work and had been in dire straits for centuries before it finally completely collapsed. For most citizens, it was more “secure”, but it could not prevent the rampant corruption and inequality that ultimately led to its demise. This is inevitable in a rule of law republican system without real democracy, as successful manipulation of the rules goes unchecked. If power does not reside in the collective citizenry, wherever it does reside – such as in official positions – becomes the source of intense competition. Whoever wins the competition to control (even temporarily) such power, becomes more powerful, inequality (political, economic and legal) again increases, competitiveness encourages citizens to thwart restrictive laws and eventually the winners dominate society in their own law-free zone. Rule of law without real democracy thus undermines itself. It is therefore necessary to meticulously separate the positive from the negative.

Were elections, political and economic inequality between citizens and substantial delegated decision-making – all anti-democratic – necessary to attain *Rechtssicherheit*? In a certain sense they were, because they all served to keep law-making the hands of a few who had a vested interest in the *status quo*, but in the long run they were not. The Republican rule of law system thus exhibits few advantages, while at the same time undermining virtually any democratic content.

Chapter 4. The Enlightenment, the Nuremberg Tribunals, Natural Law and Human Rights

4.1. Natural Law and Human Rights

During the Enlightenment, philosophers began to rework an idea that the Roman Stoics had considered in their writings – the idea of a universally binding natural law. However, unlike the Romans, who extrapolated natural law from their own observations of other civilisations, the Enlightenment philosophers defined natural law as law which could be deduced from considerations of ethics and justice.¹ Modern natural law is thus closely tied to the areas of philosophy and theology, particularly monotheism, and therefore cannot properly be seen as an element of the “rule of law” in the historical sense, which concentrates on formal, positivist structures.

Natural law, in turn, eventually gave rise to the idea of dignity not based upon personal status – the prevalent form of dignity in ancient civilisations – but solely as a consequence of one’s humanity. One variation of Kant’s categorical imperative: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end”² was possibly the first precise formulation of human dignity, and the moral imperative to accord others certain treatment based solely on their attribute as human beings is ultimately only another way of acknowledging the existence of inherent human rights. In time, this idea gradually transformed itself from the moral to the secular and made its way into legal documents. The first known use of the English term “human rights” was Thomas Paine’s translation of the French Declaration of the Rights of Man and of the Citizen” adopted by the French National Assembly on 27 August 1789 and incorporated into the French Constitution of 1791.³ From there, however, the route from categorical imperative to modern human rights doctrine was a circuitous one, and it is imperative to understand the new conceptions of democracy and rule of law into which it was introduced, ostensibly as a basic, supporting, component.

4.2. The Origins of Modern Democracy and Human Rights

Modern “democracies” were consciously modelled not on the Athenian *polis*, but on the Roman Republic.⁴ A striking aspect of post-Revolution American “democracy” (the

¹ Helmut Coing, *Grundzuege der Rechtsphilosophie*, (5th Edition, Walter de Gruyter, 1993), at 199.

² Kant, *Groundwork of the Metaphysics of Morals*, quoted in Fernando Teson, “The Kantian Theory of International Law” in *Democracy and International Law*, Richard Burchill (ed.), 211, at 222.

³ A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, (Oxford University Press, 2004), at 9.

⁴ P.J. Rhodes, “General Introduction” in *Athenian Democracy*, 1 at 5 et seq.

“democracy” on which others, both presidential and parliamentarian, came to be modelled) is that its orchestrators conspicuously did not share the conviction that the government they were implementing was in fact a democratic one, with alleged “fathers of democracy” such as Thomas Jefferson referring instead to “republican government” throughout their work.

This was not a mere whim of vocabulary – the debate regarding the future form of government to be implemented in America was conscious and overt. Most of it took place between two opposing camps, the Federalists and the Anti-Federalists. The Anti-Federalist aim was either a direct democracy or a small democracy in which representatives were kept as close to the people as possible, through short terms of office, frequent rotation, and large numbers of representatives. The Federalists, on the other hand together with their counterparts, the Republicans, in England alleged that democracy was chaotic, lawless and enabled “lower orders to ruin the great”.⁵ The Federalists ultimately won the debate and proceeded to implement republicanism.⁶

The elements which they viewed as necessary to a republic and subsequently incorporated into the new State were laid out by many writers, but most famously by James Madison in Issue 10 of the *Federalist* in which he argued for a system that would elect representatives who would speak with a “public voice” consonant with the greater public good, but not necessarily what the people themselves would have chosen.⁷ The use of representatives was in Madison’s view the key difference between a republic and a democracy and a necessity in preventing a tyranny of the majority. In a republic there would be a “greater variety of parties and interests; you make it less probable that the majority of the whole will have a common motive to invade the rights of other citizens”.⁸ Moreover, “an extended republic should not take public opinion in its raw form”. Rather, it was “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens”.⁹ Madison was supported in his views by two other influential writers, Hamilton and Mason, with Mason arguing that the President should not be directly elected because “an act which ought to be performed by those who know most of eminent characters and qualifications” would then “be performed by those who know least”,¹⁰ while Hamilton stated

⁵ Sheldon Wolin, “Fugitive Democracy” in Benhabib ed., *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 31, at 36 et seq.

⁶ Ellen Wood, “Demos versus “We the People”: Freedom and Democracy Ancient and Modern” in *Demokratia*, 121 at 123; Jennifer Roberts, “Athenian Equality: A Constant Surrounded by Flux” in *Demokratia*, 187 at 189; Michel Rosenfeld, “Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts” in *European and US Constitutionalism*, Nolte ed, (Cambridge University Press, 2005), 197 at 220.

⁷ James Madison, Federalist Papers No. 10, in *The Federalist Papers*, at 82.

⁸ Madison, quoted in James Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (Yale University Press, 1991) at 16.

⁹ James Madison, Federalist Paper No. 10, in *The Federalist Papers*, at 82; this bears a striking resemblance to the German legal definition of political parties, cf. Art. 2 (1) PartG.

¹⁰ Mason, quoted in Fishkin, note 8, at 93.

in *Federalist* Issue 71 that the republican principle “does not require an unqualified complaisance to every sudden breeze of passion or to every transient impulse which the public may receive from the arts of men who flatter their prejudices to betray their interests”.¹¹

In light of this it is perhaps unsurprising that according to the American Declaration of Independence; governments derive ‘their just powers from the consent of the governed’, just as the Roman elite had before them.¹² This was not only theory, but also practice:

The framers sought at every turn to minimize the effect of popular participation, creating multiple layers of government, large election districts, and indirect, staggered elections. The message would be that ordinary people were not the sort to understand the issues of politics. They were competent only to grant or withhold their consent, approve or reject the actions of the elite¹³

In other words, precisely the same level of participation as was permitted to the average Roman.¹⁴ This was explicitly stated in *Federalist* Issue 63, where one element in the ‘most advantageous superiority’ of the American system lay in ‘the total exclusion of the people in their collective capacity’ from any share in government.¹⁵ These precepts came to form the basis of governmental systems in Western societies.

Thus, individual rights and “human rights” when they came into existence much later were introduced into democracies that were not really democracies, but Republican “rule of law” states, based upon a slightly renovated version of the Roman system.

4.3. Human Rights and Constitutionalism: The Incorporation of Rights Justified by Natural Law into the Positivist Legal Order

Despite modern democracy’s rather manipulated beginnings, the new-found natural law was not without its modest effects on the new “democratic” States. The first of these was the rise of written constitutions which often enshrined citizens’ rights vis-à-vis the State.

¹¹ Hamilton, *Federalist Papers* No. 71, in *The Federalist Papers*, at 432; This is strikingly reminiscent of Valerius Maximus’ account of the consular candidate Palicanus as a “seditious citizen” who had “ingratiated himself with the people by pernicious flattery” and whose election was therefore justly blocked by more worthy men, *supra* pp. 114 et seq.

¹² American Declaration of Independence.

¹³ Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (University of Chicago Press, 1990), at 205.

¹⁴ *Supra* pp. 144.

¹⁵ *Federalist Paper* No. 63, commonly attributed to James Madison, in *The Federalist Papers*, at 356.

Legal documents such as the Bill of Rights and the Rights of Man and the Citizen incorporated rights that were officially sanctioned as inherent and “self-evident”.¹⁶ Although stripped of religious overtones, these “rights” represented secularised value-judgements, were – at least in theory – extended to all citizens and sometimes to all human beings, and were placed above all other laws and well beyond the power of the simple majority of the people to alter. Constitutionalisation of basic rights can thus be seen as a form of “positivised natural law”.¹⁷

However, such rights were only “absolute” or “universal” within the confines of the country, and although nominally “inherent” were, in practical terms, still granted to one by the State, and therefore successfully sublimated into the Republican system. A certain theoretical tension between democracy and rights had come into existence, but as a qualified majority could still overturn the human rights provisions and as state sovereignty on this point had not yet come into question, the tension was comparatively small – aided by the fact that “democracies” were not really democratic in the true sense of the word as power did not reside in the people. Basic rights were only one of many aspects of policy not subject to their will.

Human rights essentially amounted to an attempt to balance out a lack of democracy in the new system by adding individual rights. The citizen of the modern state, much like the Roman plebs, demanded protections vis-à-vis those with political power. Thus, while the decision-making power of the individual was only marginally enhanced compared to his previous situation, there was considerable improvement in the protective rights that he enjoyed.

4.4. The Nuremberg Tribunals and the Rise of Natural Law Rights Beyond the Bounds of National Positivism

Because the constitutionalisation of “inherent” rights could still be subsumed under “rule of law”,¹⁸ the expression “human rights” remained obscure. In fact, between the late 18th and mid-20th centuries, the idea of human rights fell into “oblivion”.¹⁹ The term was not even mentioned in the archives of the British Foreign Office until 1941,²⁰ nor was it used by pre-

¹⁶ cf. American Declaration of Independence; American Bill of Rights, Art. III-XII; Preamble and in particular Art. II and XVII, Declaration of the Rights of Man and the Citizen, 24 August 1789; Preamble, Art. I and Art. XXXV Declaration of the Rights of Man and the Citizen 24 June 1793.

¹⁷ cf. Coing, note 1, at 204.

¹⁸ Although in practice it was more often subsumed under the extremely ill-defined modern concept of “democracy”.

¹⁹ Jan Burgers, “The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century” in (1992) *14 Human Rights Quarterly*, 447 at 448.

²⁰ A.W. Brian Simpson, note 3, at 10.

WWII NGOs campaigning against such issues as torture.²¹ Pioneering international jurists pushing human rights, such as Alejandro Alvarez, Andre Nicolayevitch Mandelstam, Boris Mirkine-Guetzevitch, and Antoine Frangulis remained on the fringes of discussion.²²

However, during the Second World War, the Allied governments desired a doctrine to justify their decision not to negotiate, but to pursue the unconditional surrender of Axis nations and the replacement of their governments.²³ The idea of human rights fit these needs to the point that Allied nations began to compete with each other in the extremity of their “rights rhetoric”, and included the protection of human rights and the need to establish a lasting peace, in the United Nations Declaration of 1942,²⁴ stating that “complete victory” was essential “to preserve human rights and justice” in both their own and other States.²⁵ The idea quickly took on a life of its own and many NGOs began to push for international human rights protection.²⁶ This level of enthusiasm began to outstrip the initial intentions of the Allied governments.

Simultaneously, the Allies made prosecuting for war crimes one of their aims in the Moscow Declaration.²⁷ However, the very idea of holding a tribunal for the Nazi leadership was problematic from a positivist point of view: the precise crimes the Nazis standing trial were accused of (war crimes, crimes against peace, and crimes against humanity) were only bindingly defined in the London Charter of the International Military Tribunal issued on August 8 1945, by which time all the crimes for which the defendants had been tried had long been committed. On the face of it the Charter contravened a basic principle of the rule of law, *nulla poena sine lege* which prohibits retroactive punishment. This *Durchbruch* of the rule of law was legitimised in legal theory by the *Radbruch'sche Formel*, which states that law which is intolerably incompatible with justice cannot be adhered to or seen to have any force. Such laws are invalid. The formula thus provided the legal philosophical basis for the categorical decision in the London Charter not to accept superior orders or obedience of national laws as a defence (after all, no one is obliged to obey invalid laws).

A more positivist justification was elucidated by Hans Kelsen. According to Kelsen, if a war is illegal then every action which contributed to that war must also be illegal under international law, right down to killing enemy soldiers.²⁸ According to Kelsen:

²¹ Burgers, note 19, at 460 et seq.

²² *Ibid.*, at 450 et seq.

²³ A.W. Brian Simpson, note 3, at 183.

²⁴ *Ibid.*

²⁵ Preamble, United Nations Declaration 1942.

²⁶ Burgers, note 19, at 476.

²⁷ Moscow Declaration on Atrocities 1943.

²⁸ Hans Kelsen, *Peace Through Law* (University of North Carolina Press, 1944) at 95.

An international treaty authorizing a court to punish individuals for acts they have performed as acts of the State constitutes a norm of international criminal law with retroactive force, if the acts at the moment when they were committed were not crimes for which the individual perpetrators were responsible. There is no rule of general customary international law forbidding the enactment of norms with retroactive force, so-called *ex post facto* laws²⁹

If the suspects in question were responsible for their State violating international law, then their actions were illegal and imposing retroactive responsibility through a treaty only amounted to establishing the concrete attributability.³⁰

Whether one prefers the positivist formulation of Kelsen or the natural law solution of Radbruch, the London Charter circumvented the previous understanding of rule of law to retroactively protect human rights implicitly, by punishing their violation via criminal law.³¹ The “duties” imposed by the London Charter and later by the Genocide Convention of 1948 raised the question that if individuals had responsibilities under international law were they not also subjects of international law and therefore entitled to rights under it?³²

This idea soon partially came to fruition in the first multilateral human rights convention,³³ the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in 1950. The road to the Convention was, however, by no means linear or even intentional, not surprising as its signatories comprised a group of States which at the time possessed as their colonies a large proportion of the world’s territory containing millions of “subject peoples”, the revolts of whom were occasionally brutally suppressed, and who espoused the idea of a racial hierarchy legitimising these actions. At the time the Convention was agreed, “it was...believed that human rights were already adequately respected in member states; the Convention’s function...was in part symbolic, and in part an exercise in conservation. Western Europe was anxious to preserve the freedom it currently enjoyed to the full.”³⁴

²⁹ *Ibid.*, at 87.

³⁰ *Ibid.*, at 88.

³¹ *cf.* A.W. Brian Simpson, note 3, at 334; previous responsibility under international law had largely been limited to responsibility for piracy (Kelsen, note 28, at 75 et seq.) and various ill-enforced laws of war, *eg* the Hague Land Warfare Conventions of 1899 and 1907, although Art. 228 of the Peace Treaty of Versailles from WWI included a provision reading:

“The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law” (Kelsen, note 28, at 109).

³² *cf.* A.W. Brian Simpson, note 3, at 100.

³³ *Ibid.*, at 9.

³⁴ *Ibid.*, at 5.

The Allied nations had become trapped by their own rhetoric. A British official at the time wrote, in reference to the European Convention: "Government spokesmen have said, with applause from both sides of the House, too much about human rights and freedoms to render it possible for them to take a purely negative attitude to this proposal without coming in for a deplorable amount of criticism".³⁵ Corroborating this, another official wrote in a note pertaining to the right of individual petition in the European Convention,

The only other member of the committee who did not accept the arrangements for the individual petitions...was the Greek representative...I think that we should put ourselves in a very embarrassing position if we, of all the members of the Council, were the only ones besides the Greeks who did not accept the Convention...Also I think that such a refusal would be impossible to defend in Parliament or in public at home³⁶

The acknowledgement of non-nationally positivised, supranationally supervised "human rights" thus brings to mind a sort of legal groping in the dark brought on by a problem (two devastating wars and a genocide of monumental proportions) that could not be adequately dealt with according to the old principles of national democracy/sovereignty and the rule of law.

The transformatory potential of supranational human rights was correctly estimated by very few and when perceived it was often considered – just as it had been in Athens and Rome – as self-understood that the rights of the individual would not prevail against the wishes of governments. In fact, the "danger of abuse by Communists" was repeatedly cited in negotiations regarding all types of human rights treaties, including the Universal Declaration and the European Convention. A British negotiator for the European Convention stated in a typical example that he:

thought it essential to take consideration of the current political situation, in which their political enemies, the Communists, would take every opportunity to abuse the right of access to the Commission on Human Rights. Mr. Schuman's suggestions [advocating individual petition, but only for nationals of the signatory states] would not protect them against this danger, as the signatory powers had reason to fear domestic as well as foreign communists³⁷

³⁵ quoted in A.W. Brian Simpson, note 3, at 613.

³⁶ *Ibid.*, at 724.

³⁷ quoted from A.W. Brian Simpson, note 3, at 733.

clearly demonstrating the prevalent attitude that individual human rights should in no way affect the *status quo* and that any interpretation that did so was deemed not a “use” of rights, but an “abuse”.³⁸ For this reason, the original Convention permitted, but did not require, members to accept complaints from individuals or groups, much as in the Roman Republic, rights were reluctantly granted and hedged to the greatest extent possible.

The pattern was similar at the drafting of the UN Charter and Universal Declaration. At the Dumbarton Oaks negotiations, the USA mentioned in its proposal that the future General Assembly should promote and observe basic human rights, but none of the other negotiating parties made such a proposal and no one, including the USA, advocated a bill of rights as they themselves all engaged in domestic rights violations.³⁹ A proposal by ECOSOC’s Working Group on Implementation that an International Court of Human Rights be set up which was rejected by the US, UK and USSR.

Nonetheless, the Universal Declaration did come into being and did contain some far-reaching “rights” although these were regarded as aspirational at the time and their present status as customary international law is not undisputed.

In the sixty intervening years, particularly after the entry into force of the ICCPR and ICESCR, a rights explosion – at least on paper – has occurred, however, the general pattern of a slowly expanding sphere of protection carved out in opposition to governments, haphazardly enforced, and with little emphasis on decision-making and participation, remains the same.

4.5. Conclusions Regarding Human Rights, Democracy and Rule of Law

How do human rights, rule of law and democracy fit together? It is often said that they reinforce each other, but researched answers as to how this is the case are rare, an issue complicated by the vagueness of modern definitions of democracy.

4.5.1. Modern Definitions of Democracy

Almost all modern definitions of democracy are simply attempts to define an absence of dictatorship.

³⁸ A.W. Brian Simpson, note 3, at 3; much the same way in which the Romans viewed men risen from the people who “haunted” marketplaces in their election campaigns as corrupt, *supra* pp. 119.

³⁹ Thomas Buergenthal, “The Human Rights Revolution” in (1991-1992) 23 *St. Mary’s Law Journal*, 3 at 7; A.W. Brian Simpson, note 3, at 241.

The German Federal Constitutional Court defines democracy as:

a system which under the exclusion of all violence and despotism, constitutes a system based on the rule of law on the basis of the self-determination of the people according to the will of the current majority and the principles of freedom and equality.

The most important and basic principles of this system are, at the very least: respect for the human rights outlined in the Basic Law, especially the right to life and free development, the sovereignty of the people, the separation of powers, the accountability of government, the legality of the administration and administrative acts, independent courts, the multiple-party system and equal opportunities for all political parties, and the right to form and exercise an opposition as long as it is in conformity with the constitution⁴⁰

Now that we have examined these principles in isolation, throwing them so forcefully together seems ill-advised. Which “power” is to be separated when “the people” are sovereign? How are the will of the current majority and the principles of freedom and equality to all match up? And what does the multi-party system have to do with anything? The word participation – so important to Athenian democracy – is not even mentioned.

Similarly, the Maastricht Treaty states in Art. 6 (1) that “[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to member States”.

Democracy is thus a mere “principle” (mentioned after “liberty”) as are respect for human rights and rule of law. However, as we have seen, none of these concepts are “principles” to be called on to justify policies when convenient – their implementation requires certain conditions and results in certain consequences. Snatching “principles” out of a legal document at will simply results in incoherent legal reasoning which must resort to ever more complex mental acrobatics in an effort to avoid open contradiction.

The jurisprudence of the European courts does not even speak of democracy, but of a “democratic society”, because this is the term used in the laws which they commonly review. Several articles in the European Convention on Human Rights state that the right conferred may be limited to the extent necessary for a “democratic society”.⁴¹ The ECHR found in *Handyside* that “pluralism, tolerance and broadmindedness” are necessary to a “democratic society” and added in *Young, James and Webster* that “although individual interests must on

⁴⁰ BVerfGE 2, 12 et seq.; 5, 197 et seq.; 20, 97 et seq.

⁴¹ Arts. 6, 8–11 ECHR.

occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position".⁴² The Court reiterated this point of view on many occasions, *inter alia*, in *Lingens*, and *Johnston*, so that it has since become a basic tenet of its jurisprudence.⁴³

The European courts have thus adopted a pragmatic approach attributing to "democracy" precisely some of those characteristics so essential to a republic, such as pluralism and a "balance" between various interests. By doing this the Court has sought to define democracy in a manner radically different from the way in which it was exercised in Athens. If people power does not mean that the views of the majority must always prevail, we are left in a vacuum as to what it does mean. Concerns regarding treatment and minorities are valid points, but not part and parcel of participative, collective decision-making on a basis of equality. Democracy or "democratic society" is thus rebranded as "doing the right thing", but this is a concept so open to subjective interpretation as to provide practically no handholds for any legal interpretation to grasp, thus placing an enormous area of discretion in the hands of judges, as well as elected officials to determine its content.

Courts in other Western-oriented States have taken a similar approach. The Supreme Court of Israel has defined democracy and countermajoritarianism in great detail, stating "...judicial review of constitutionality is the very essence of democracy, for democracy does not only connote the rule of the majority. Democracy also means the rule of the basic values and human rights as expressed in the constitution. Democracy strikes a delicate balance between majority rule and the basic values of society."⁴⁴ Here we are left wondering how the basic values of society can differentiate from those held by the majority of citizens – it would seem to be the very definition of a basic societal value that it is held by the majority of persons who constitute that society.

In *Oakes*, the Canadian Supreme Court defined a "free and democratic society" as one in which there is "respect for the inherent dignity of the human person, commitment to social justice and equality, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals in society".⁴⁵

This particular definition comes perhaps closest to summarising the characteristics of people power, as it mentions commitments to social justice and equality as well as participation of individuals, although again these are roughly mixed in with such ideas as

⁴² *Handyside v. UK*, 7. December 1976 A 24, para. 49; *Young, James and Webster v. UK*, 13. August 1981, A 44, para 63.

⁴³ *Lingens v. Austria*, 8. July 1986, A 103, para. 46; *Johnston v. Ireland*, 1986, A 112, para. 5, Separate Opinion of Judge de Meyer.

⁴⁴ *United Mizrahi Bank Ltd v. Migdoi Village* (1995) 49(4) P.D. 221 (quoted slightly differently in *T.D. v. Minister for Education* [2001] IR 4 259 at 312 et seq.).

⁴⁵ *R. v. Oakes* [1986] 1 S.C.R. 103, para. 64.

respect for group identity, and the necessity of being “free”, while individual participation in “society” does not necessarily connote a political decision-making dimension.

The strategy for defining democracy in modern terms would thus seem to be to write a list of all properties one deems to be beneficial and hope that everything works out without due regard for the fact that at best serving two masters is difficult and at worst it permits for an *a la carte* approach to all three concepts which makes for extremely poor implementation and judicial statements which often defy logic and sometimes common sense, while tending to leave gaping questions (how can a society’s basic values differ from those held by the majority? How is the individual meant to participate in society?) at the very centre of their definitions. Modern definitions which seek to amalgamate democracy, rule of law and human rights into a sort of *ueber-concept* are thus unsatisfying.

We thus need to turn to our previous research to determine at which points the three basic concepts of democracy, rule of law and human rights reinforce each other – in other words, at which points they can be amalgamated – and at which points they are irreconcilable.

4.5.2. False Connections Between Democracy, Rule of Law and Human Rights

As has been pointed out, an attempt was made to balance out a lack of democracy in the modern system by adding individual rights – the citizen in a modern State, much like the Roman plebs, demanded protections against “the State”, in other words, against those with political power. Therefore the connection between democracy and human rights tends to be more theoretical than practical. The less democracy one has (*ie* the less real power), the greater one’s need for a basic level of human rights protection. Human rights do not *per se* “buttress” democracy – first and foremost, they compensate for a lack of it, by serving as a proxy for participation – the citizen participates via his rights. However, this is a passive participation: certain acts may not be perpetrated on the citizen, but he does not take part in determining his own destiny. It is negative participation (“I prevented them from getting away with it!”) as opposed to positive participation (“I decided to do something”). Such methods of participation are extremely constraining – the citizen may be able to prevent gross interferences in his personal sphere by exercising his rights, but these are exceptional situations. For the most part decisions are handed down to him, and to the extent that they do not infringe his rights he simply lives with them. Simply granting a bevy of rights without increased participation is merely enlightened despotism and not democracy. The idea that in some mysterious way such rights as freedom of religion, artistic freedom or freedom to choose one’s workplace are inextricably connected to democracy and actually promote it is a false one. These rights primarily focus on the right to live without tyrannical interference in

one's bodily or financial well-being on the part of a powerful State entity – precisely the sort of rights that are absolutely necessary in a *Rechtsstaat*.⁴⁶

It is equally unclear what connection can exist between Republican elements such as elections and human rights, as so many international resolutions proclaim.⁴⁷ The Roman Republic had very frequent elections which were also genuine in the sense that all sides engaged in political manipulation and that the battles for office were very real. Elections nonetheless failed to usher in a human rights era, in much the same manner that they have failed to do so in many modern States.

4.5.3. False Disconnects Between Democracy, Rule of Law and Human Rights

One of the most common areas in which democracy, rule of law and human rights are seen to conflict is the dilemma of the so-called countermajoritarian difficulty, and indeed, if one were to imagine an Athenian system with all components except the *dikasteria*, which would instead be replaced by judges appointed either for life or lengthy terms of office, and entrusted with the specific task of impartially applying the law regardless of the current wishes of the majority of citizens, this would indeed represent a real and deep conflict between people power and the interpretation of law and human rights.

In contrast, in a representative democracy the countermajoritarian difficulty has been overstated, because in a representative democracy no one knows what the majority desires most of the time.⁴⁸ A parliament might easily pass a piece of legislation with which the majority of citizens disagrees. One need only look at the ample government-backed referenda that are knocked down by the voting public for evidence of this – for example, the first Lisbon referendum in Ireland in 2008 which was passed without even a division of the Dail as fewer than ten members stood for the division and subsequently rejected in referendum – or the situation in Hungary where the Constitutional Court Act permits anyone to file for constitutional review of a law, resulting in citizens bringing “laws to the Constitutional Court which contradicted governmental interests and which would never have been challenged by ministers or parliamentarians”.⁴⁹ Equally, certain legislation may be desired by the majority of

⁴⁶ While as a packaged concept, human rights are not particularly relevant to democracy, certain tentative “rights” which will be elaborated below.

⁴⁷ According to GA Resolution 46/137 of December 17, 1991 “periodic and genuine elections” are a “crucial factor in the effective enjoyment...of a wide range of other human rights”, quoted from Franck, “The Emerging Right to Democratic Governance”, in Burchill ed., *Democracy and International Law*, 3 at 22.

⁴⁸ This will be elaborated upon in great detail below, *infra* pp. 174 et seq.

⁴⁹ Lazlo Solyom, “Comment” in *European and US Constitutionalism*, 249 at 252.

citizens, but may not be passed by the legislature, leaving judicial review as an important secondary mechanism to obtain one's end goal.⁵⁰

While in present-day reality the countermajoritarian difficulty does not necessarily even exist, it certainly would in the hypothetical situation of direct legislative and executive participation without direct judicative participation described above.

The Supreme Court of Israel stated vis-à-vis countermajoritarianism:

In examining the democratic aspect of judicial review it must be noted that every constitution provides for methods by which it may be amended. As long as these methods are not rigid they allow today's majority to realize its aspirations. The methods by which a constitution may be amended reflect the balance that the society wishes to maintain between past and present, between long-term values and short-term aspirations, between value and policy. These methods are set forth in the constitution itself and are shaped by political forces⁵¹

The Athenians themselves often tried to tie themselves to the mast, as it were, concerning their own laws, for which they sometimes wished a more lasting character. In addition, through the *graphe paranomen* and the *graphe nome me epiteion theinai* the Athenians practiced judicial review to a great extent, ultimately achieving much the same effect promoted by the Israeli court.

The countermajoritarian difficulty should not lead to the conclusion that judicial review is anti-democratic – judicial review is a very important component of a well-functioning democracy. Its anti-democraticness stems purely from the restrictive identity of those performing the review, as well as those who have control over constitutional amendment.

Countermajoritarianism is thus certainly a bridge to be crossed on the path to democracy, but it is as yet, very far down that road. For the meantime, the practice is far less destructive to democracy than many other practices, and the more concrete definition of democracy we are striving towards will reduce some of the impact of the countermajoritarian difficulty by giving judges less discretion concerning such matters.

⁵⁰ Gerry Whyte, "Rights and Judicial Activism" in *Theorising Irish Social Policy*, Fanning, Kennedy, Kiely and Quin eds., (UCD Press, 2005), 165 at 191, who astutely states that an activist court may be "a symptom of malaise rather than a malaise itself. Certainly in the area of socio-economic rights, and probably in other contexts as well, the use of litigation to promote rights was invariably a reaction to the lack of any response from the political system".

⁵¹ *United Mizrahi Bank Ltd v. Migdoi Village* (1995) 49(4) P.D. 221 (quoted in *T.D. v. Minister for Education* [2001] IR 4 259 at 312 et seq.)

4.5.4. Real Connections Between Democracy, Rule of Law and Human Rights

One very real connection between democracy, rule of law and human rights is that without positive law or the will of the *demos* to enforce them human rights are essentially a nice idea. Human rights thus needs one of these two things to factually exist.

The reverse connection is not as strong, but present nevertheless. In some ways, human rights are beneficial to democracy, though these are not necessarily the ways in which they are commonly perceived to be.

The very idea of human rights is aspirational and progressive, and thus they may be an important tool in preventing the intellectual stultification of democracy that ancient critics so often lampooned.

In addition, certain human rights can underpin a democracy and help it to flourish. These are precisely those rights which are not commonly accepted as rights: the right to actively participate in collective decision-making and the right not to be economically dependent upon other citizens. Even when democratic rights have been addressed, *eg* the right to freedom of information, they have not been properly adapted to imbue them with relevant political meaning in a modern society. Economic rights, in particular have been sidelined, and, when granted, have often – in contrast to civil and political rights – originally been declared merely aspirational, and have been quite curtailed in content and narrowly interpreted, a trend which is only recently and slowly changing.⁵²

The concept of human dignity also has positive implications for democracy. For one thing, it is often acknowledged as being the “master human right” from which all other human rights flow,⁵³ and as such takes a central role in many European constitutions, particularly the German Constitution. The German Federal Constitutional Court has defined human dignity on quite Kantian lines as “the social value and respect that each person deserves, purely because he/she is a human being”.⁵⁴ According to its jurisprudence, human dignity is even infringed through such actions as taking away the minimum means needed for a person to survive, for example through over-taxation,⁵⁵ or life imprisonment without the hope of future release.⁵⁶ It also means that German authorities may not shoot down a plane intended to be used as a weapon in the fashion of 9/11, as this would involve killing innocent passengers,

⁵² *Infra* pp. 286 et seq.

⁵³ Giovanni Bogneri, “The Concept of Human Dignity in European and US Constitutionalism” in *European and US Constitutionalism*, 85 at 90.

⁵⁴ BVerfGE 87, 209 (228).

⁵⁵ BVerfG NJW 1999, 561 (562).

⁵⁶ BVerfGE 45, 187.

thus using them as mere objects in the quest to save other lives, even though these passengers would arguably die in any event.⁵⁷

This modern understanding of human dignity is not completely devoid of implications for people power. Even in Athens there was a certain realisation of human dignity. A citizen was provided for by the State, if necessary, and a citizen could not be made a slave to another citizen, neither could he be tortured, *ie* he could not become a disposable object. Of course, these practices only extended to other citizens, not to all human beings, and could thus better be termed “citizens’ dignity”, however, the point remains that the Athenians – who did not acknowledge individual rights – found it necessary to act in accordance with these aspects of human dignity in order to facilitate the functioning of their State system, and that, therefore, these practices (sufficient financial support for those in need, lack of economic dependency, prohibition on treating other citizens as objects) facilitated democracy by promoting political equality.

In a modern democratic context, human dignity can serve to limit the level of inequality permitted, *eg* citizens might be economically unequal to one another, but not so unequal that one person can be economically dependent on another, and not so unequal as to deprive some of basic necessities.

This was the tack taken by the Inter-American Court of Human Rights in the Street Children case,⁵⁸ and also by the Indian Supreme Court which decided that the constitutional guarantee of life and liberty included the right

to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings⁵⁹

Similarly, the Hungarian Constitutional Court, in a manner similar to that of the German Court cited above,⁶⁰ stated that “the right to social security contained in Article 70/E of the Constitution entails the obligation of the State to secure a minimum livelihood through all of the welfare benefits necessary for the realisation of the right to human dignity”⁶¹ and, in a separate decision, that

⁵⁷ BVerfGE 115, 118.

⁵⁸ Inter-American Court of Human Rights, *Case of the “Street-Children”, Villagran-Morales v Guatemala*, Judgement of Nov. 1999 (Merits) at para. 144.

⁵⁹ *Mullin v. The Administrator, Union Territory of Delhi*, AIR 1981 SCR (2) 516 at 518.

⁶⁰ *Supra* pp. 169.

⁶¹ Decision 32/1998 (VI. 25) AB, ABH 1998, 251 at 254.

the benefits to be offered in the framework of social institutions should secure a minimum level guaranteeing the enforcement of the right to human dignity. In case of services not reaching the above minimum level, the right to social security may not be deemed enforced⁶²

In this regard, however, it should be borne in mind that while the Romans and Athenians provided for the basic needs of citizens, they simultaneously enforced certain duties to the community, such as the Athenian law against idleness, or the Roman duty to adequately care for assets, such as fields, vineyards and horses.

This is particularly interesting in light of a recent Canadian decision regarding “workfare”. The Canadian Court upheld the workfare policy, deciding that it promoted “self-sufficiency and autonomy of young welfare-recipients through their integration into the productive work force” and combated

the pernicious side effects of unemployment and welfare dependency. The participation incentive worked towards the realization of goals that go to the heart of the equality guarantee: self-determination, personal autonomy, self-respect, feelings of self-worth, and empowerment. These are the stuff and substance of essential human dignity⁶³

This is a more pro-democratic interpretation of the duty of minimum guarantee stemming from the recognition of human dignity, as it aims to whittle down economic dependency between citizens, while still providing a minimum living standard where necessary. An idea of human dignity which stops at the provision of basic goods fails to capture its democracy-enhancing power, which places a duty on the individual to utilise the goods provided to free himself from a situation of dependency and participate in decision-making and implementation on an equal footing.

Another aspect of human dignity is that the state should be seen to exist for the sake of the individual and not vice versa.⁶⁴ This is an important point for democracy on an international level, because it means that we must look at individuals as the ultimate subjects of democratic reforms and not States.

⁶² Decision 42/2000 (XI. 8) AB, Constitutional Court File Number 5/G/1998, published in *Gazette Magyar Kozlony* MK 2000/109.

⁶³ *Gosellin v. Quebec* 2002 SCC 84.

⁶⁴ Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” in (2008) 19 *EJIL*, 655, at 679.

The single biggest impact human dignity has for international democracy, however, is that the idea of intrinsic worth of every human being is the enabling factor in allowing democracy within a heterogeneous population by creating in the population a mindframe conducive to the respect of differences and a willingness to refrain from legislating for certain issues (religion, language, etc.).

In *Law v Canada (Minister of Employment and Immigration)* the Canadian court unanimously stated that

[h]uman dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society”⁶⁵

Although this statement is a little ambiguous and in some ways misses the mark, it does touch on the point that an entrenched concept of human dignity is necessary for a highly heterogeneous population to embark upon creating a democratic society. In particular the last part of the citation which deals with the marginalisation of groups and individuals is important, as it is necessary for a democracy that majorities remain fluid. Human dignity can thus provide the legal and psychological basis for achieving this.

In conclusion, democracy, rule of law and human rights do reinforce each other, but in quite precise ways which are not necessarily those so commonly attributed to them (*eg* elections, classical liberal rights), while tensions between the concepts (*eg* countermajoritarianism) are sometimes more apparent than real. Any democratic overhaul of the international legal system must seek to implement democracy and other values such as human dignity in the consistent manner outlined above.

⁶⁵ 3 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, para. 53.

The thorough study of the historical development of modern Western “democracy” in the previous sections, reveals it to be significantly non-democratic in the Athenian sense (democracy in the true sense of the word has, in fact, been all but eliminated from modern consciousness), but rather overwhelmingly a combination of Republican and human rights elements. In the remainder of this thesis, the task to be pursued is thus twofold: first to determine the practical consequences of this conception of democracy on the international system, and secondly to determine how the previously elucidated democratic principles – as opposed to Republican ones – could be applied to the sphere of international law and relations.

“International” in the sense of this thesis means that area of relations with which international public law is concerned, not the implementation of democracy in third States (although many of the findings could be beneficially applied to that area as well). Due to the fact that the vast majority of international relations are mediated by nation States, the analysis of the current organisational model will often need to begin with internal State situations before progressing out to the international sphere. This is subdivided into three main segments with relevance for democracy: representation, financial influence and participation. Because the theoretical groundwork of rigorously examining the necessary characteristics of democracy has already been thoroughly laid down, it is now quite easy to determine when a system deviates from democratic characteristics, why it does so and whether or not such a deviation is necessary in the interests of rule of law and human rights, as well as assessing whether an alternative method of realising such goals would be more compatible with democracy.

We shall therefore not in the following analysis associate democracy with particular institutions, but rather judge institutions on the extent to which they promote a democratic environment, holding to the sentiment that “Democracy is not a model to copy from certain States, but a goal to be achieved by all peoples!”¹

¹ Boutros Boutros-Ghali, address at the opening of the World Conference on Human Rights, 1993, quoted in Ezetah, “The Right to Democracy: A Qualitative Inquiry” in Burchill ed., *Democracy and International Law*, 169 at 188.

Chapter 5. Representation

5.1. National Representation

Although the study of Athenian democracy and Roman Republicanism permits a very clear conclusion regarding the democraticness of elections, central importance continues to be attributed to them as a means of implementing democracy, both nationally and internationally. We must therefore take cognisance of the fact that to a modern observer, the Athenian view of elections might be easily deemed a historically anomalous quaint eccentricity, despite the fact that the same opinion was held by both the more contemporary Romans and modern State founders. That being said, we must be prepared for the argument that modern electoral systems are superior to the point where elections may safely be praised as democratic.

On an international level, citizens – at least in theory if they reside in a democratic state – are adequately represented by their national governments at the international level, because the government “is supposed to operate automatically to produce the result approximating what it would be if the people had political virtue, thereby making political virtue itself superfluous”.¹ After all, so the argument would go, if it were specifically applied to this research, we are not living under a set of Roman overlords who may openly use wealth to grant themselves primacy at the ballot box. Furthermore, in most nations, it is no longer acceptable for parliament to be filled with members of a dominant minority: jurisprudence now demands that the legislature reflects the “diversity of our social mosaic”.²

Our initial consideration is therefore, whether elections result in legislatures and/or governments that represent – at the time of the election – the choice of the people, and which adequately represent them to the point that their own political virtue on an international level is superfluous. If that were the case, we might be able to question whether direct participation as in Athens is still a prerequisite of democracy.

The empirical facts largely negate this hopeful presupposition. A study of virtually all voting systems in the Western world reveals that they tend to lead to legislatures which represent a statistically skewed version of the direction in which the populace had voted and also to manufacture majorities (*ie* to produce a cabinet majority that does not correspond to the popular vote), whereby the tendencies of some systems are more grievous than others.

¹ Douglas Lummis, *Radical Democracy*, (Cornell University Press, 1996), at 38.

² *Reference re Provincial Electoral Boundaries (Sask.)* [1991] 2 S.C.R. 158.

5.1.1. Statistically Skewed National Legislatures

5.1.1.1. In the First-Past-the-Post System

The first-past-the-post system in place in Canada, the United States, the UK and formerly used in New Zealand, is characterised by a division of the territory of the State into ridings. In each riding, party or independent candidates run for office and the candidate who receives the most votes receives a seat in Parliament. First-past-the-post elections virtually never lead to a close approximation of the will of the majority concerning the direction of the vote.

The UK's first-past-the post system resulted in a Parliament that deviated from the actual popular vote by 11% in 1966, 24% in 1983 and 16.9% 1992. In 1988 the USA first-past-the-post system delivered results off by 6.7%.³

Representative skewing is frequently due to the almost complete exclusion of small and mid-size parties from parliamentary seats, as they may receive a significant fraction of votes, but rarely poll high enough in an individual riding to beat the candidates of the main parties. In the 1945 national elections in Britain, the Labour and Conservative parties together won only 85% of the popular vote, but managed to secure 92.5% of the seats in the House of Commons. Between 1950 and 1970 the Labour and Conservative parties always won at least 87.5% of the vote and at least 98% of the seats in Parliament.⁴ While these two parties only garnered about 81% of the popular vote in 1979 and just 70% in 1983, they received 93% or more of the seats in Parliament following both elections.⁵ Conversely, the Liberals, who received 18.6% of the popular vote in 1974, only received 2% of parliamentary seats.⁶ This pattern has continued uninterrupted to the present day. Despite media hype to the effect that the "3rd" party, the Liberal Democrats would play a defining role in the 2010 election outcome, this role will only come about through the flukish exigency of coalition-building and not as the result of a more accurate reflection of voters' preferences through the first-past-the-post system. As of May 8th 2010, results had been delivered for 649 out of 650 ridings in the UK national elections. With 36.1% of the popular vote, the Conservative Party garnered 306 seats or 47% of all available seats. The Labour party received 29% of the popular vote,

³ Stuart Weir, "Primary Control and Auxiliary Precautions: A Comparative Study of Democratic Institutions in Six Nations" in *Defining and Measuring Democracy*, 112 at 124; Patrick Dunleavy and Helen Margetts, "The Experimental Approach to Auditing Democracy" in Beetham ed, *Defining and Measuring Democracy* (SAGE, 1994), 155 at 172 et seq; the prime reason for the lower level of skewing in American elections is that there are only two parties to choose from.

⁴ Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, (Yale University Press, 1999) at 13.

⁵ *Ibid.*

⁶ *Ibid.*, at 15.

but still managed to gain 258 or nearly 40% of all parliamentary seats. The Liberal Democrats received 23% of the popular vote, trailing Labour by only 6%, but garnered 200 fewer seats, with only 57 seats or 8.8% of all available seats.⁷ If all parties had attained seats in accordance with the percentage of votes received, the dynamics of coalition-building would be substantially different than they are under the current situation, which continues to favour the larger parties. Similarly, in the 1978 New Zealand elections, the Social Credit party obtained 17.1% of the popular vote, but only 1 seat (just over 1 % of available seats), in 1981 they won 20.7% of the vote, but obtained only two seats, thereby once again being underrepresented in Parliament by a factor of 10.⁸ In the 1983 UK election, the SDLP of Northern Ireland received 17% of the popular vote, yet only 6% of seats allocated to Northern Ireland. Sinn Fein polled lower at 13% of the popular vote, but also only garnered 6% of available seats. In the Canadian federal election of 1980, the Liberal Party received 20% of the popular vote in B.C., Alberta and Saskatchewan, but no seats in those provinces, while the Progressive Conservative Party polled at 12% of the popular vote in Quebec, but procured only 1 seat of the 75 available.⁹

Presidential systems fare even worse.¹⁰ Only one person can hold the office of president and therefore a great many votes are necessarily “lost”. For example, in the 1996 direct election for prime minister in Israel, Netanyahu received 50.49% of the vote and Peres 49.51%. Since Netanyahu exercised 100% of the power allocated him as prime minister and Peres 0%, this resulted in a level of disproportionality of 49.51%,¹¹ in an office that would proceed to decide over issues not only of national, but of regional importance.

5.1.1.2. In the Personalised Proportional Vote

In the personalised proportional system used in Germany each voter has not one but two votes. The first vote is cast directly for one of the candidates running for office in the voter’s riding. The second vote is cast for a party of the voter’s choice.¹² The Parliament is divided (for the purposes of tabulating the election results) into two halves. The seats of the first half are filled with all the candidates who were elected directly, by winning at least the relative majority in their ridings. The seats of the second half are filled with pre-selected members of the parties, whose names have been compiled in set lists prior to election.¹³ First,

⁷ <http://news.bbc.co.uk/2/shared/election2010/results/>

⁸ *Ibid.*, at 165.

⁹ William Irvine “Additional Member Electoral Systems” in Arend Lijphart and Bernard Grofman eds *Choosing an Electoral System: Issues and Alternatives*, (Praeger Publishers, 1984), 165 at 166.

¹⁰ Lijphart, *Patterns of Democracy*, note 4, at 155.

¹¹ *Ibid.*, at 161 et seq.

¹² §4 BWahlG.

¹³ §1 BWahlG.

the percentage of votes one party received nationwide is calculated, which determines the percentage of seats it has a right to fill in Parliament, for example, if a party receives 35% of all votes, its members are entitled to fill 35% of parliamentary seats. The number of seats that the party has already filled with their directly elected candidates is subtracted from this number. The remaining of seats (if any) are then filled from the parties' "lists". The process continues until all seats in the Parliament are filled.¹⁴

Parties, however, often win more direct seats in Parliament than they have a "right" to given the percentage of the vote they received as a party. In this case, extra seats are tacked on to the Parliament (known as *Überhangsmandate*).¹⁵ The use of *Überhangsmandate* is highly controversial in part due to a concept known as *Stimmensplittung* (vote splitting), the practice used by parties with a coalition agreement to encourage their combined voters to give their first vote to the larger party (which will have more direct candidates elected, whose seats are not tabulated against the provincial polling percentage) and their second vote to the smaller party (which then collects an inflated number of second votes and is therefore overrepresented via the lists). Thus far, the German Federal Constitutional Court has decided that the use of *Überhangsmandate* in this way is permissible as long as they are kept below a certain proportion of seats,¹⁶ a limit that thus far has never been exceeded. In addition, only parties who receive at least 5% of the popular vote can send candidates from their lists, leading to further inaccuracy in legislative representation.

Although there is a greater representation in Parliament of smaller and special interest parties than can generally be found in first-past-the-post States, the composition of the German Bundestag deviated from the popular vote by 8% in 1990.¹⁷

Denmark, which uses a proportional vote combining elements of Germany's and Ireland's voting systems with a 2% threshold, had a deviation between parliamentary seats and the popular vote of 4% in the 1988 elections.¹⁸

New Zealand adopted personalised proportional representation in 1996¹⁹ leading to a marked decrease in disproportionate representation. The largest party which had previously gained up to 16% more seats than it would have been entitled to based on the popular vote had this advantage reduced to a mere 3% of "undeserved seats". In addition six parties gained seats in the House of Representatives, which had previously been almost exclusively dominated by the two largest parties.²⁰

¹⁴ §6 I BWahlG.

¹⁵ §6 V 1 BWahlG.

¹⁶ BVerfGE 79, 169 (172); BVerfGE 95, 335 et seq.

¹⁷ Weir, note 3, at 124.

¹⁸ Weir, note 3, at 124.

¹⁹ Lijphart, *Patterns of Democracy*, note 4, at 21.

²⁰ *Ibid.*, at 26 et seq.

However, while inaccuracies of 4 or 8% may not sound sensational, especially when compared to the first-past-the-post system, such “small” discrepancies often have an enormous impact on the concrete exercise of power and on decisions taken. Firstly, it can have a decisive impact on which parties form the government. Even if this is not affected, if the discrepancy is in favour of the ruling party, it gives them an increased ability to pass legislation that does not enjoy much support within the party, by giving the party an inflated position of strength within the legislature. Conversely, if the ruling party is weakened by an inaccuracy against it, it may be forced to go into coalition and/or may be reluctant to introduce legislation for fear of further undermining its position within the parliament. Such a discrepancy also impacts on the ability to change the constitution or make other decisions requiring a qualified majority.

5.1.1.3. In the Pure Proportional Vote

In this system, the parties select lists of candidates to run in multi-member districts and voters cast one vote for the party of their choice. The members of parliament are selected only from the party lists, according to the proportion of the vote the party has received. The number of seats each party receives in Parliament is usually calculated according to the d’Hondt method, which slightly favours larger parties.²¹

District size is the single biggest factor contributing to disproportionality under this system. The bigger the district (*ie* the fewer districts a nation has) the fewer votes are wasted and the more accurate final representation will be.²² Pure proportional systems, however, are still not completely reflective of the “social mosaic”. Up to 1982, Israel’s Knesset was on average 94% proportional, Finland’s parliament 95% proportional, the Netherlands 97%, Belgium 94%, and Spain only 84%.²³ In regards to approximating “the people” the pure proportional vote does not deliver results much better than those of the personalised proportional system.

5.1.1.4. In the Single Transferable Vote

In the single transferable voting system, the voter numbers each candidate (or as many as he likes) in order of preference. In each riding, not one, but several candidates are

²¹ In some systems, the voters are allowed to express a preference for one or more candidates in the party list and these must be taken into consideration when deciding which party members will enter parliament, Lijphart, *Patterns of Democracy*, note 4, at 147.

²² Arend Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1945-1990*, (Oxford University Press, 1994) at 139.

²³ Richard Rose “Electoral Systems: A Question of Degree or of Principle?” in *Choosing an Electoral System*, 73 at 74 et seq.

elected. To be deemed elected a candidate must procure a number of votes equal to the total number of votes cast plus one, divided by the number of seats contested in the riding plus one. If a candidate receives more first preferences than he needs, he is deemed elected and the excess votes are redistributed among the remaining candidates according to the second preferences marked on the ballots. In the absence of excess votes for redistribution, the lowest polling candidate is eliminated and his votes are redistributed amongst the remaining candidates according to the second preferences marked on them. The redistribution is performed as many times as necessary until the seats for the riding are filled.

It is difficult to determine how to assess proportionality and thus true representativeness for this system. Because it is candidate-centred, a voter might well give his first preference to a candidate of Party A, his second preference to a candidate of Party B, his third preference to an independent, a fourth preference to a second candidate of Party B and so on. In the 1997 Irish election, “Fianna Fail’s internal transfer solidarity was only 68 percent, and Fine Gael’s was only 64 percent”.²⁴ Thus, it is impossible to measure the degree to which voters’ preferences have been realised by “measures of proportionality that are based on votes and seat shares for *parties*”.²⁵ While little concrete research has been done, one study in Australia revealed that between 1949 and 1998 Australia’s two largest “parties” (the ALP and Coalition Combined) averaged 92.3% of seats in the Senate (which is elected by STV) with 86.7% of the vote.²⁶

It is also clear that STV results in wasted votes, because it is possible for the vote to become non-transferable if, on being transferred, all of the candidates (if any) for which the voter gives his lower preferences have already been either elected or eliminated, and also for the vote to be wasted if it was given or transferred to a candidate left in the count after the quota of candidates has been elected.²⁷

STV also suffers from a flaw similar to that encountered by the Romans namely that the candidates eliminated are always the lowest-ranking candidates at the time. If the counting continued it would be theoretically possible for a candidate lagging behind in the first few rounds to overtake a candidate who was temporarily further ahead at the time of elimination.²⁸

²⁴ Michael Gallagher, “The (Relatively) Victorious Incumbent under PR-STV: Legislative Turnover in Ireland and Malta” in Shaun Bowler and Bernard Grofman (eds.), *Elections in Australia, Ireland and Malta under the Single Transferable Vote: Reflections on an Embedded Institution*, (University of Michigan, 2000), 81 at 90; these are Ireland’s two largest parties.

²⁵ David Farrell and Ian McAllister, “Through a Glass Darkly: Understanding the World of STV” in Bowler and Grofman, eds., *Elections in Australia, Ireland and Malta under the Single Transferable Vote*, 17 at 21.

²⁶ Colin Hughes, “STV in Australia” in *Elections in Australia, Ireland and Malta under the Single Transferable Vote*, 155 at 166.

²⁷ Michael Laver, “STV and the Politics of Coalition” in Bowler and Grofman, eds., *Elections in Australia, Ireland and Malta under the Single Transferable Vote*, 131 at 133.

²⁸ Nicolaus Tideman and Daniel Richardson, “A Comparison of Improved STV Methods” *Elections in Australia, Ireland and Malta under the Single Transferable Vote*, 248 at 259 et seq.

This has the further consequence that STV does not ensure monotonicity, that is the principle that a first-preference vote can never hurt a candidate's chances of winning.²⁹ Because in STV systems which candidate is eliminated with each round is strategically important, it is theoretically possible for a candidate to garner too many first-preference votes in the first round, thus causing another candidate to be eliminated whose transfers go to a third candidate who then overtakes and beats the original candidate to the quota.³⁰ The indicators are thus that STV does not deliver a legislature which statistically reflects the preferences of voters any more accurately than any other system.

5.1.1.5. Conclusions

At present all electoral systems³¹ deliver a legislature which differs markedly in political affiliation from that voted on by "the people" often by an extremely wide margin. Representative "democracy" therefore does not even remotely "operate automatically to produce a result approximating what it would be if the people had political virtue, thereby making political virtue itself superfluous". Nothing has changed since antiquity to make direct participation less necessary to determining the will of the majority. As yet, however, only part of the case demonstrating representative shortcomings has been delivered.

5.1.2. Manufactured Majorities on the National Level

A second even more serious problem of electoral representation is the manufacturing of a majority, which then becomes the executive. The term is used here to refer to one of two situations: either the governing party received the relative majority of votes in an election, but an absolute majority of seats, or managed to win at least the relative majority of seats while another party won the popular vote.

5.1.2.1. In the First-Past-the-Post System

Manufactured majorities are endemic to first-past-the-post systems, meaning that often all decisions, including international ones, are for a period of years made by an executive which did not receive the endorsement of the majority of people. In 1988 the

²⁹ William Riker, "Electoral Systems and Constitutional Constraints" in *Choosing an Electoral System*, 103 at 106.

³⁰ Steven Brams and Peter Fishburn, "Some Logical Defects of the Single Transferable Vote" in *Choosing an Electoral System*, 147 at 150.

³¹ by no means limited to those discussed here, but also including the alternative vote used in Australia (off by 16.7% in the 1990 elections) and the double ballot system used in France (off by 17.3% in the 1990 elections), Weir, note 3, at 124.

Progressive Conservative Party obtained 43% of the popular vote in the Canadian federal election while their closest rivals, the Liberal Party, obtained 31.9% of the vote and the New Democratic Party 20.4% of the vote. The Progressive Conservatives, however, took 57% of all available seats, a comfortable majority that easily allowed them to exercise 100% of executive authority without relying on the support of either the Liberals or the NDP, who between them had received 55.3% of the popular vote, but only 42% of seats available in the House of Commons. Among other things, the Progressive Conservative government signed and ratified the Free Trade Agreement with the USA. Whether or not it was democratically legitimated to do so, having received less than 50% of the popular vote (despite the fact that the Free Trade Agreement was a major election issue) remains a subject of academic controversy in Canada.³²

Due to this skewing of the vote, the governing party sometimes does not even receive the relative majority of votes. It has been known repeatedly in Canadian history for the party receiving slightly fewer votes to become the ruling party by virtue of winning more seats. In the 1896 Canadian federal election, the Liberal party received 45.1% of the popular vote and won 118 seats in Parliament (55% of all available seats). Although the Conservative Party won 46.1% of the vote, they obtained only 88 seats in Parliament (41% of all available seats) and therefore had to be content with forming the official opposition. The situation was repeated in the Federal Election of 1957. This time the Progressive Conservatives won only 38.9% of the popular vote, but received 112 seats in Parliament, whereas the Liberal party won 40.9% of the popular vote, but only 105 seats in Parliament. The Conservatives formed a minority government rather than seek coalition with the smaller parties who held between them 48 seats in Parliament and were for the most part Liberal-oriented.³³

These statistics are by no means unique to Canada. In the UK normally two-fifths of the popular vote suffices to put a party into government (in a comfortable majority, single-party cabinet) for four to five years. In fact, between 1979 and 1997, although the ruling party always held the majority of seats in Parliament, they never received more than 44% of the popular vote – no ruling party since 1945 has actually received as much as 50% of the popular vote. As in Canada, it has sometimes happened in Britain that another party received a greater percentage of the popular vote than the ruling party – in 1951, the Labour party received more votes than the Conservatives, but the Conservatives formed the government by virtue of

³² Ray Argyle, *Turning Points: The Campaigns that Changed Canada*, (White Knight Publications, 2004) at 401, 425.

³³ The Liberals themselves did not seek coalition with these smaller parties, because it was felt that this would be seen as an illegitimate attempt to hold on to power and provoke a constitutional crisis, Argyle, note 32, at 91, 323, 349 et seq.

winning the majority of seats in Parliament. In Britain in 1974 the Labour party won 319 seats in Parliament (50.2% of available seats) with only 39.3% of the popular vote.³⁴

In the 1978 national elections of New Zealand, the National Party won 55% of all seats and therefore formed the government, despite the fact that it had only won 39.8% of the popular vote, while the Labour party had won 40.4% and therefore the relative majority of the popular vote. This was repeated in 1981: Labour received 39% of the popular vote, just ahead of the National Party with 38.8%, but the National party retained 51% of seats and therefore formed the government. Between 1954 and 1996 the governing party of New Zealand never received 50% or more of the popular vote.³⁵ To add to these statistics, in the 1984 Indian election the Indian Congress party won 76.5% of the seats with only 48.1% of the popular vote. A party may thus even attain a supermajority of over 2/3 of parliamentary seats (the usual requirement to change the constitution) without having received even half the popular vote.³⁶

A similar conclusion can be reached regarding presidential elections in the United States: Harry Truman, J.F.K. and Richard Nixon, all became president without achieving an absolute majority of the popular vote. In 1860, Abraham Lincoln became President with only 39.8% of the popular vote,³⁷ while the popular vote in the 2000 presidential election was won by Al Gore with 48.38% of the vote, while George W. Bush received 47.87%.³⁸

5.1.2.2. In the Single Transferable Vote

Manufactured majorities occur about 1/3 of the time in the Australian Senate and about 20% of the time in Ireland.³⁹ Four of six Tasmanian elections under STV brought a party to government with fewer votes than that procured by the other main party.⁴⁰ Manufactured majorities in Malta are no longer possible only because there are only two parties. After STV very obviously led to manufactured majorities, the Maltese began to tabulate the percentage of first-preference votes that each party received and grant the parties *Ausgleichsmandate* to ensure a percentage of seats in Parliament equivalent to its percentage of first-preference votes.⁴¹

³⁴ Weir, note 3, at 124.

³⁵ Lijphart, *Patterns of Democracy*, note 4, at 23.

³⁶ *Ibid.*, at 219 et seq.

³⁷ Rose, note 23, at 74.

³⁸ www.fecgov/public/fe2000/elecpop.htm, March 10 2010, even more interesting considering that most of the remaining votes went to Ralph Nader who campaigned with a more “leftist” program than that of Gore, while Bush was the candidate of the “right”.

³⁹ Farrell and McAllister, note 25, at 35.

⁴⁰ Hughes, note 26, at 169.

⁴¹ Farrell and McAllister, note 25, at 35.

5.1.2.3. In the Proportional Systems

Each of the eight Western democracies that did not produce a manufactured majority between 1945-1990 (Germany, Finland, Israel, Iceland, Denmark, Luxembourg, the Netherlands, Switzerland, Sweden)⁴² uses the pure proportional vote and tend to balance out disproportionality with *Ausgleichsmandate* or similar systems.⁴³ However, all electoral systems, including the pure proportional vote can manufacture a parliamentary majority for parties that have not actually secured a majority of the vote.⁴⁴

5.1.2.4. Conclusions

The best that can be said is that it is possible to severely limit the frequency of manufactured majorities by using a pure proportional system simultaneously with *Ausgleichsmandate*. Even then they cannot be completely avoided. On the whole, electoral systems do not only fail to operate in such a fashion as to theoretically make the political virtue of citizens superfluous, they actually often produce results directly contrary to the preferences of the majority.

One might argue, of course, that the pure proportional system with *Ausgleichsmandate* should then be implemented and the problem would be solved to a satisfactory degree. However, even such a system can produce a manufactured majority, and further begs the question as to whether it would truly deliver representation so accurate as to render the political virtue of all others superfluous. Thus far we have only dealt with the “wishes” of the people as expressed by their choice of candidate/party on polling day, working under the assumption that those elected will continue to act in a way that represents those who voted for them consistently in every governmentally relevant action for the next four to five years.

5.1.3. Further Factors Affecting the Accuracy of National Representation

In addition to this skewed statistical representation we might also bear other factors in mind, such as the social backgrounds of representatives,⁴⁵ lack of representative autonomy,⁴⁶ and vote-trading,⁴⁷ all of which further reduce any remaining accuracy of representation.

⁴² Lijphart, *Electoral Systems*, note 22, at 160 et seq.

⁴³ *Ibid.*, at 146; an *Ausgleichsmandate* is the practice of granting a party seats to compensate for a competing party's *Ueberhangsmandate*.

⁴⁴ Douglas Rae quoted in Lijphart, *Patterns of Democracy*, note 4, at 165.

⁴⁵ In the 2009 Canadian House of Commons out of 392 seats, 48 were held by lawyers, 30 by business managers or directors and 34 by businessmen (including bankers, stockbrokers and real estate agents),

5.1.4. Conclusions Regarding National Representation

Even a perfect mirror representation at the time of election, would not guarantee that the legislature would reflect the will of the people in each decision, subject as the electoral system is to overrepresentation of certain social backgrounds among legislative and executive representatives, lack of representative autonomy and the practice of vote-trading to name but a few quantifiable factors. For these reasons, even the pure proportional vote – the best system by far – falls far short of any sort of representation that would make the political virtue of the citizenry superfluous.

Far from delivering “people power”, modern elections are thus a process by which certain “lucky few nations have succeeded in evolving their own legitimate means of validating the process by which the people choose those they entrust with the exercise of power”,⁴⁸ a statement from a contemporary international jurist, which could just as easily be a quote from Cicero. He continues:

those who hold or seek political power have made a far-sighted bargain comparable to John Locke’s social compact; they have surrendered control over the nation’s validation process to various others: national electoral commissions, judges, an inquisitive press and, above all, the citizenry acting at the ballot box. This collectivity decides whether the standards of the democratic entitlement have been met by those who claim the right to govern. In return, the legitimacy bestowed by that process gives back far more power to those who govern than they surrendered⁴⁹

<http://www2.parl.gc.ca/parlinfo/Lists/Occupation.aspx>. In 2005 in the UK out of 561 seats in the House of Commons, 72 were held by either barristers or solicitors, 44 by professors or lecturers and 87 by politicians or political organisers. In addition, over 33% of MPs had attended a fee-paying school, while the national average of children attending such schools is 8%. 75% of MPs held a university degree, with 25% of them graduating from just two universities: Oxford and Cambridge, www.parliament.uk/commons/lib/research/notes/snsg-01528.pdf, 11.09.2009. Needless to say, the percentage of the British populace with a degree from Oxford or Cambridge is not 1 in 4, nor is the number of Canadians who are lawyers 1 in 8. Representative elections thus also result in an overrepresentation of certain social sectors, particularly those from privileged backgrounds, just as they did in antiquity.

⁴⁶ Achieved through disciplining those failing to vote the party line, and refusing to promote those who are overly critical, but also through the executive determining the majority of bills to be introduced as well as the time allocated to their discussion among its own members. According to one source, “in legislative votes [in Ireland]...[d]eviations from party solidarity are very rare and are met with a draconian response, typically expulsion from the party”, Gallagher, note 24, at 109.

⁴⁷ The practice of trading a vote on an issue one does not support in exchange for a return vote on an issue that one does. For example, Party A may pledge support on issue X, if Party B pledges support on issue Y. Thus, two measures can be passed neither one of which enjoys majority support.

⁴⁸ Thomas Franck, “The Emerging Right to Democratic Governance” in Burchill ed., *Democracy and International Law*, 3 at 7.

⁴⁹ *Ibid.*

Far from delivering “people power” elections instead “give back far more power to those who govern”. Representative democracy does not, in fact, provide the people with representation so accurate as to make their own political virtue superfluous, in many nations it leaves them governed by a movement that could secure only a minority of votes, and yet it does give back far more power, because it legitimises this process of granting power to those who already have it.

Nonetheless, they continue to be extolled through international law. In the *Greek Case*, the European Commission on Human Rights decided that Art. 3 of the First Protocol to the ECHR “presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society”.⁵⁰ Elections are mentioned as necessary in the Universal Declaration of Human Rights;⁵¹ the Universal Declaration on Democracy;⁵² the Warsaw Declaration;⁵³ the OSCE’s Charter of Paris for a New Europe;⁵⁴ the Copenhagen Document;⁵⁵ UNHCR Paper “Promoting and Consolidating Democracy” 25 April 2000⁵⁶ and it is no secret that: “The UN and other intergovernmental organizations have invested heavily in the crafting and monitoring of electoral processes in many nations across the globe.”⁵⁷

Even switching to the proportional vote which clearly results in more representative legislatures and fewer manufactured majorities has not been viewed by the judiciary as necessary to democracy. In *Lindsay v. UK*, the Commission decided that it was permissible to use different electoral systems in England and Northern Ireland for European elections, despite the fact that the first-past-the-post system clearly resulted in privileging larger parties.⁵⁸

In *Liberal Party v. UK*, the Liberal Party complained that the first past the post system amounted to a discrimination against smaller parties, an argument rejected by the Commission on European Human Rights.⁵⁹ In *Mathieu-Mohin and Clerfayt v. Belgium*, the Court decided that:

⁵⁰ Report of the European Commission on Human Rights on the “Greek Case” (Appl. No. 3321/67, Denmark v Greece, Appl. No. 3322/67, Norway v Greece, Appl. No. 3323/67, Sweden v Greece, Appl. No. 3344/67, Netherlands v Greece), at para. 416.

⁵¹ Art. 21 (3) UN Universal Declaration of Human Rights.

⁵² UN Doc. A/52/334, 11 Sept. 1997, para. 12

⁵³ (2000) ILM 39(6) at 1306.

⁵⁴ (1991) ILM 130(1) at 190.

⁵⁵ (1990) ILM 29(5) at 1305, para. 6.

⁵⁶ UN Doc. HR 2000/47, preamble and para.1(d).

⁵⁷ Gregory Fox and Brad Roth, “Democracy and International Law” in *Democracy and International Law*, 71 at 73.

⁵⁸ *Lindsay v. UK*, Appl. No. 8364/78, 15 DR 247 (1979).

⁵⁹ *Liberal Party, R and P v. UK*, Appl. No 8765/79, 21 DR 211 at 225 (1980).

Electoral systems seek to fulfil objectives which are sometimes scarcely compatible with each other; on the one hand, to reflect fairly faithfully the opinions of the people, and on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. In these circumstances the phrase “conditions which will ensure the free expression of the opinion of the people in the choice of the legislature” implies essentially – apart from freedom of expression (already protected under Art. 10 of the Convention) – the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election.

It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus, no electoral system can eliminate “wasted votes”⁶⁰

Why a faithful reflection of the will of the people would fail to produce a “sufficiently clear and coherent political will”, so that this must be pursued as a separate objective which justifies some neglect of the first objective is left unexplained.

The tendency to recognise the significant democratic shortcomings of elections has been very slight: The Human Rights Committee has stated that nations need to minimize distortions of the popular will in their electoral systems.⁶¹ Nevertheless, para. 21 of its General Comment which states that “The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group”, is generally understood only as a prohibition on gerrymandering; “it does not seem to target distorted election outcomes”.⁶²

When we put the “rediscovery” of democracy in a historical perspective, the emphasis on the electoral franchise as the prime means of participation is unsurprising. Just as some aspects of Greek and Roman political and legal organisation were influenced by the foibles of culture and time, so, too, are our own. For one thing, while representation may have served republican interests, it was also simply necessary in large States which did not possess telecommunications. For centuries direct democracy in a large territorial State with millions of citizens was not very feasible without at least some bodily representation.

⁶⁰ *Mathieu-Mohin and Clerfayt v. Belgium*, Eur. Ct. Hum. Rts. 113 (ser. A) (1987) at 24.

⁶¹ Human Rights Committee General Comment 25 (Dec. 7 1996, para. 21, available at www2.ohchr.org/english/bodies/hrc/comments.htm, called up 18.06.2009.

⁶² Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, (2nd Edition, Oxford University Press, 2004) at 661.

Another aspect, however, has been the psychological fixation on the electoral franchise. Electoral participation was initially granted on a very limited basis. In the parliamentary democracy of Great Britain, prior to 1832, 2.7% of the population was entitled to vote for parliament. After the Reform Act of 1832, this doubled to 4.4% of the population. Only in 1884 were the majority of adult males permitted to vote, with university graduates and businessmen retaining two votes each until 1948. Between 1848 and 1917 only about 11% of adult males were entitled to vote in Dutch elections. These patterns are fairly similar in most Western countries with universal adult male suffrage usually being achieved in the latter part of the 19th century or earlier years of the 20th century. Even in the United States of America, the electoral college was elected by direct vote for the first time in 1860, almost one hundred years after independence.⁶³

After the point at which universal adult male suffrage was reached – which in many cases was much later than is commonly perceived – , “democracy” took a very new turn. In Athens very little effort had been devoted to the identity of “the people” and thus who could participate in democracy. The answer to that question was obvious. It was far more interesting to argue about what democracy was.

In modern times, very little effort has been devoted to what democracy is – the answer to that question (it is widely held) is obvious. It is far more interesting to debate just “who” the people are. Can these be former slaves? Foreigners? Women? Who is entitled to participate in democracy?

In light of the prolonged struggle to achieve universal electoral suffrage and redefine the *demos*, it would be as unfair to say that we are excessively fixated on electoral emancipation, as it would have been to say that the Athenians were excessively fixated on the danger posed by oligarchs. Attention was justly attracted to both issues. However, a large degree of focus on one issue, necessarily leads to the neglect of others. That the Athenians had oligarchs to concern them does not exonerate them from their failure to contemplate a more inclusive *demos*, and that we have had a limited suffrage to contend with does not exonerate us from failing to consider what democracy is, the more so as the shortcomings of representative “democracy” on a national scale become magnified on an international level.

⁶³ Gregory Fox, “The Right to Political Participation in International Law”, in Fox and Roth, eds. *Democratic Governance and International Law*, (Cambridge University Press, 2000) 48 at 52.

5.2. The Effects of Flawed National Representation on One Nation – One Vote International Institutions

Although national systems are “democratic” in only the most superficial sense, their shortcomings would be less perceptible if their effects were confined there. The flaws of “representation” are magnified when transferred to international institutions.

5.2.1. Decision-making at the WTO and UN General Assembly

All substantial decisions at the WTO are taken by the Ministerial Conference, which is composed of representatives of all WTO members, and the General Council which is the chief decision-making and policy body between Ministerial Conference meetings,⁶⁴ and is also composed of all WTO members. The vast majority of WTO decisions are taken by consensus, in that a consensus is deemed to have been achieved if no Member present at the meeting formally objects to the proposed decision.⁶⁵ If a decision “cannot be taken by consensus” each member is accorded one vote and in most cases a simple majority suffices to pass the measure at hand.

According to Art. 9 of the UN Charter all Members are represented equally in the General Assembly, which according to Art. 10 may discuss any matters within the scope of the Charter. The General Assembly may make recommendations to Members or the Security Council on any matter within the scope of the Charter, including matters relating to peace and security as long as the Security Council is not seized of the matter. Although these recommendations are non-binding, they are not without legal significance – the content of some recommendations has passed into customary law and others have been instrumental in building the *opinio juris*.⁶⁶ Nonetheless, the GA rarely has an immediate, decisive impact on any issue: Roosevelt is on record as having said that the UN General Assembly should meet once a year to allow “all the small nations...to blow off steam at it...”,⁶⁷ which is exactly what, in fact, tends to happen.

According to Art. 18, para. 2 decisions on “important questions” *eg* recommendations regarding peace and security, the election of non-permanent members to the Security Council, suspensions of rights and privileges of membership, require a 2/3 majority. All other questions, including the question as to whether a type of question should require a 2/3

⁶⁴ Art. IV, Marrakesh Accord, 1994.

⁶⁵ Art. IX, Marrakesh Accord, 1994.

⁶⁶ Art 11, UN Charter.

⁶⁷ A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, (Oxford University Press, 2004) at 250.

majority, are decided by simple majority.⁶⁸ Decisions are always made by 2/3 or 1/2 of the Members “present and voting”.

5.2.2. Factors Affecting the Accuracy of Representation

5.2.2.1. Magnification of National Statistical Skewing

Because national governments at most represent only the direction in which either a slender majority or a sizeable minority voted in the last election, but go on to represent the entire nation at the international level all of the time, many citizens, in particular members of fixed national minorities tend to be virtually invisible on an international level.

Even supposing that each member of an international organisation were a representative democracy and that each government or major coalition partner (which almost always control the relevant ministries such as trade or foreign affairs) achieved a generous 48% of the popular vote, that this figure was more than any other single party had achieved, and that each measure they propose to take at international institutions enjoys the same level of backing from the populace (a supposition that is not even remotely realistic), we not only end up with a situation in which the representatives at the IGOs even nominally fail to represent the majority of the world’s citizens, their every decision exacerbates this discrepancy. If an absolute majority of representatives’ votes is required to carry a resolution, it is (in the worst possible scenario using the figures above, which are more than fair) possible to pass a motion with the assent of those representing approximately 24% of the world’s population. A decision passed by consensus or a qualified majority gives a better voter-representative ratio, but delivers disastrous results for all decisions blocked by representatives of tiny fractions of the world’s population. Even under the best possible conditions, representation is skewed even further than the already far from ideal situation in many national democracies.

The following example provides an illustration of a scenario involving an egalitarian representative voting situation on an international level:

At the Council of Europe negotiations on 7 August 1950 a disagreement surfaced over the right of individual petition with Ireland supporting mandatory individual petition and the UK against. A vote was taken in which a large majority (all but four States) backed the Irish proposal.

⁶⁸ Art. 18, para. 3, UN Charter.

Lange for Norway then argued the importance of achieving unanimity on the issue. So it was that the ministers, with the exception of McBride for Ireland, agreed to accept the British proposal as the only way of achieving this. McBride was persuaded by Schumann to change his negative vote, which would have operated as a veto into an abstention.

He [McBride] then suggested that the result of this procedure was undemocratic since it resulted in the view of a minority of the Committee of Ministers being submitted to the Assembly. Would it not be proper to inform the Assembly of the majority view? Lange (Norway) pointed out that such was the inevitable result of the unanimity rule, and McBride gave up the struggle...⁶⁹

5.2.2.2. Unequal Unit Size

As there are severe inequalities in population distribution, the practice of according each State one vote means that some citizens (*eg* the inhabitants of Ireland) are overrepresented while others are severely underrepresented (*eg* the inhabitants of India). The ability of the General Assembly (or the WTO Ministerial Conference/General Council) to accurately represent the desires of the world's population is thus severely undermined. The situation is akin to that of the Republican assemblies in which voting units were accorded equal voting power, but not equal levels of membership.

5.2.2.3. Delegating Decision-making to Subcommittees

To compound the representational issues mentioned, few decisions, are in reality taken in the WTO Ministerial Conference or UN General Assembly. Instead the decision-making task is often delegated to subcommittees on the basis of Art. 22 of the Charter, each with its own particular membership, often based on election, and rules of procedure. These subcommittees, in turn, often delegate decision-making power to their own subcommittees.

For example, ostensibly the General Assembly controls the UN financial apparatus, as it sets membership dues, sets the budgets for the specialised agencies and examines their spending habits. However, this task is delegated to the Fifth Committee,⁷⁰ on which every UN

⁶⁹ A.W. Brian Simpson, note 67, at 735.

⁷⁰ David Malone, "Eyes on the Prize: The Quest for Non-Permanent Seats on the UN Security Council", in (2000) 6 *Global Governance*, 3 at 3.

member also has a seat.⁷¹ Most decisions are, however, not made in the Fifth Committee *per se*, but rather blindly on the recommendation of ACABQ (the Advisory Committee on Administrative and Budgetary Questions) which is “composed of sixteen members elected on the basis of regional representation with demonstrated experience in administrative and budgetary matters”.⁷² Not only do these multiple layers of delegation obscure the identity of decision-makers, they further skew representation, as it turns out that only sixteen members are actually making budgetary decisions. The peoples of the remaining 150-odd members of the UN are simply not represented in this decision-making process.

The UN’s main committees and sub-organisations operate in a similar fashion. The Economic and Social Council (ECOSOC) which co-ordinates the activities of the specialised agencies⁷³ in carrying out many of the UN’s tasks, such as assistance to refugees, economic development and relations between rich and poor states, the protection of the environment, and the development of international law,⁷⁴ consists of only 54 UN Members elected by the General Assembly, on a rolling system.⁷⁵ Decisions are made by a majority of members present and voting,⁷⁶ so that theoretically fourteen members can make a binding ECOSOC decision. ECOSOC is also empowered to set up various commissions to deal with economic and social issues,⁷⁷ giving rise to a further raft of subcommittees.

The example of the Human Rights Council is even more interesting because its reconstitution (the Human Rights Council replaced the earlier Human Rights Commission in 2005)⁷⁸ was subject to intense discussions centering around participation and decision-making processes. While the Human Rights Commission was a subsidiary body of ECOSOC, the Human Rights Council received a status upgrade and is now a subsidiary body of the GA. While the chain of delegated power has been shortened, other measures meant to facilitate increased participation were not implemented.

The High-Level Panel on Threats, Challenges and Change had recommended that every UN member should have a seat on the new Human Rights Council,⁷⁹ but this solution was opposed by several industrialised States, who, infuriated by the election of Libya and

⁷¹ Irene Martinetti, “Secretariat and Management Reform”, in *Managing Change at the United Nations*, at www.centerforunreform.org/node/308; the Fifth Committee attempts to decide by consensus (although occasionally a motion is put to a vote).

⁷² *Ibid.*

⁷³ Art. 62, para. 1; Art. 63, para. 2 UN Charter.

⁷⁴ Art. 62 UN Charter.

⁷⁵ Art. 61, UN Charter.

⁷⁶ Art. 67, UN Charter; ECOSOC Rules of Procedure, Rule 60.

⁷⁷ Art. 68, UN Charter.

⁷⁸ Via UN Doc. A/RES/60/1.

⁷⁹ Transmittal Letter dated 1 December 2004 from the Chair of the High-Level Panel on Threats, Challenges and Change addressed to the Secretary-General, Doc. A/59/565, para. 285 www.un.org/secureworld/report.pdf.

Sudan to the Commission, pushed hard for membership to the new Council to be more restrictive, particularly based on ratification of certain treaties.

US Ambassador John Bolton advocated for a Council with a disproportionate level of influence by a select group of countries that the US viewed as 'good guys' and no level of influence from the 'bad guys'. Most importantly, the US wanted a Council 'that downplayed the US policy on human rights at the international human rights review' one UN official noted⁸⁰

As a result, the new Human Rights Council has 47 members, each elected by an absolute majority in the GA, so that only 24 members can make binding decisions.⁸¹ As this example illustrates, much of the decision-making of one nation/one vote institutions is funnelled into more restrictive committees, thereby skewing the accuracy of nominal representation in the decision-making process still further.

Many WTO decisions are also, in reality, concluded in subcommittees. Art. IV WTO Agreement contains provisions for the creation of specialised councils and committees that report to the General Council, including the Council for Trade in Goods, the Council for Trade in Service and the Council for TRIPs, which are themselves empowered to establish committees or subsidiary bodies. In addition the Ministerial Conference has established specialised committees, such as the Committee on Trade and Development, the Committee on Balance of Payments, the Committee on Budget, Finance and Administration and the Committee on Trade and Environment, as well as Councils and Committees that Oversee the Plurilateral Trade Agreements.⁸² Moreover, *ad hoc* working parties and committees, consisting of representatives of WTO Members who work on a voluntary but official basis are set up to deal with a variety of issues.⁸³ According to a former deputy director-general, there are at least 67 WTO bodies and between them these various committees hold approximately a thousand meetings per year, often simultaneously, and play a key role in formulating WTO policy and future decisions within the organisation. While any member may attend these meetings, nations who do not have the resources to keep a substantial number of staff at WTO headquarters in Geneva are simply unable to attend all meetings, much less prepare adequately for them, while other nations, predictably the world's poorest nations, such as

⁸⁰ Nana Yeboah, "The Establishment of the Human Rights Council" in *Managing Change at the United Nations*, www.centerforunreform.org/node/308, at 3.

⁸¹ *Ibid.*, at 5.

⁸² Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: Law, Practice and Policy*, (2nd Edition, Oxford University Press, 2006) at 9.

⁸³ *Ibid.*

Mali, Mozambique and Namibia have no permanent representatives at the WTO headquarters and therefore no ability to attend meetings at all.⁸⁴

5.2.2.4. Pre-Negotiations in *Hetaireiai*

While in some cases, decision-making is delegated to small, closed committees, at the WTO such “committees” of like-minded States also take it upon themselves to make decisions prior to convening in an open forum.

A draft package of WTO agreements is generally negotiated in informal Quad meetings between the US, EU, Canada and Japan. Such negotiations are then extended to Green Room discussions which include representatives from other developed nations, friendly developing nations, such as South Africa, as well as those nations which are too large to ignore completely, such as India and Brazil.⁸⁵ The Quad draft is rarely substantially altered during the Green Room meetings,⁸⁶ instead these meetings serve mainly to break down potential opposition. Green Room invitees have been referred to as a “de facto executive council” of the WTO.⁸⁷

“The draft is presented at a formal WTO meeting and is usually accepted with only minor amendments. When one country opposes such a packaged deal, it is likely to come under pressure from other countries, e.g. the threat of a sanction, such as the withdrawal of aid.”⁸⁸ No issues are substantively discussed at this final public stage. According to one delegate,

[i]n the informal meetings, I will say whatever my position is, but all of that is not recorded. I don't repeat what I had said at the informal meeting [at the formal meeting] because we have already spoken. The real difficulties are addressed informally without records and the formal meetings are mere rubber stamps. So it is difficult to find records that cover an issue and give a sense of history of the issue and the real substantive differences that members may have had⁸⁹

Needless to say, this method of decision-making entirely undermines the “equal” representation afforded in the Ministerial Conference/General Council.

⁸⁴ Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations*, (Zed Books, 2003) at 21 et seq.

⁸⁵ *Ibid.* at 58 et seq.

⁸⁶ *cf. Ibid.* at 112.

⁸⁷ *Ibid.* at 280.

⁸⁸ Ofer Eldar, “Vote-trading in International Institutions” in 2008 *19 EJIL*, 3 at 30.

⁸⁹ Jawara and Kwa, note 84, at 282.

5.2.2.5. Opacity of Consensus Decisions

The practice of decision-making via consensus at the WTO is more theoretical than real. In reality it leads to an opaque decision-making process in which a vote is not formally taken. One delegate to WTO negotiations prior to the launch of the Doha Round told researchers that instead of holding a vote on divisive issues, delegates would simply be told that “consensus is building”.⁹⁰ This is even more concerning when one takes into account that what the consensus is, is often determined by representatives of the Secretariat or more powerful nations interviewing the representatives of other members individually, behind closed doors, and with no written record.⁹¹ Any residual possibility of citizens being accurately and effectively represented by their delegates is thus virtually eliminated.

5.2.3. Conclusions

Not only does transferring national representation to an international level result in considerably increased skewing of representation, the vast majority of General Assembly and WTO decisions are sub-delegated to committees with a membership that is more restrictive and therefore even less representative than in the nominal decision-making forum. The end result is not the crude and often grossly inaccurate approximation of majority wishes on a national level, but a chaotic mess in which the will of the majority cannot even hope to be expressed. Due to the fact that consensus decisions are not taken in a forum where consent is explicitly given, majority will in these matters has become the most impossible to determine of all.

5.2.4. Suggested Solutions to the Issue of Representation in Cases where Voting Units are Accorded Equal Voting Rights

Now that we have pinpointed exactly how the WTO main fora and UN General Assembly deviate from democratic characteristics – a deviation often several layers deep – we can better ascertain which reforms are likely to lead us closer to democracy and which are not.

⁹⁰ *Ibid.*, at 76 et seq.

⁹¹ *Ibid.*, at 277.

5.2.4.1. Parliamentary Input

One frequent solution advocates permitting national parliamentarians to influence UN policy via the Inter-Parliamentary Union, an association of members of national parliaments which has existed since 1889. The IPU itself states that it “considers questions of international interest and concern and expresses its views on such issues in order to bring about action by parliaments and parliamentarians”,⁹² and the General Assembly has welcomed cooperation between the UN and IPU.⁹³ The same solution has been advocated in regards to the WTO, not via the IPU, as an alternative mechanism for parliamentary input into international trade policy debates, and by including regular informal meetings of WTO members’ parliamentarians.⁹⁴

Although this may alleviate the excessively narrow interests being put forward, by allowing a broader spectrum of representatives to speak, precisely what parliamentarians meeting together are going to achieve remains obscure. Perhaps they may agree on some course of action and perhaps it could lead to issues being discussed on an international level that may otherwise not have been discussed. Conceivably the parliamentarians might be able to exert enough pressure on the WTO trade ministers, for example, to pass a measure that otherwise would not have been taken. There is, however, still no mechanism for determining whether such measures would actually enjoy the backing of the majority of the population. Furthermore, this solution contains no decision-making content – not for “the people” and not even for their national representatives who are relegated to giving “input”. Its democratic value is therefore virtually non-existent.

5.2.4.2. Limit Consensus Decisions

It has been suggested that formal majority voting on certain WTO issues, such as choosing committee chairs, the broad agenda of ministerial conferences and the transmission of draft texts to ministers, should be formally voted upon in a majority takes all manner, as “consensus” voting has resulted in ambiguous knowledge as to what the majority wants and a number of complaints that what has been deemed to be the consensus opinion has in fact contravened the will of the majority of States on a number of occasions.⁹⁵

While this would represent some improvement by reducing ambiguity, it would still leave the representative skewing caused by unequal voting units, delegating decision-making

⁹² www.ipu.org/english/whatipu.htm, accessed Oct. 25, 2009.

⁹³ GA Res. 61/6.

⁹⁴ Matsushita, Schoenbaum and Mavroidis, note 82, at 15.

⁹⁵ Jawara and Kwa, note 84, at 285.

to subcommittees and passing already statistically skewed national representation through another filter to the international level.

5.2.4.3. Stop Closed-Door Decisions by Giving the Powerful a Privileged Position

In order to counteract the practice of closed-door negotiations at the WTO some authors suggest that an Executive Body of the General Council that would have general decision-making power and be composed of permanent and rotating members should be created. Members would be chosen based on GDP, their share of world trade and population. "Other criteria could assure representation by developing countries and a geographic balance". They also suggest that a weighted voting system replace consensus voting, but fail to mention what the votes should be weighted according to.⁹⁶

It is highly questionable whether the need for consensus is – as the authors claim – the driving force behind closed-door decisions at the WTO. After all, despite the fact that only 14 nations sit on the Security Council, only 9 of which must accede to a resolution, the P-3 and P-5 still negotiate behind closed doors before involving other members. Rather than rectifying a problem, this solution merely exacerbates the situation by legally institutionalising it.

5.2.4.4. Creation of a World Parliament

Variations on the World Parliament theme have been presented not only in popular literature,⁹⁷ but also in academia by the so-called cosmopolitan democrats, first and foremost, David Held and Juergen Habermas.

Held advocates the reinforcement and/or creation not of a World Parliament, but of regional parliaments on each continent capable of passing binding law, with international civil, political, economic and social rights being enshrined in all levels of parliament.⁹⁸ These would be supplemented by an international assembly cobbled together out of the GA, which would consider global issues such as health, food supply, global finance, environment, disarmament, etc.⁹⁹ Like a World Parliament, however, setting up regional parliaments would represent a concentration of power, not its dispersal. Enshrining rights and creating a forum where global issues are considered, does not particularly amount to anything that the General

⁹⁶ Matsushita, Schoenbaum and Mavroidis, note 82, at 15.

⁹⁷ *cf.*, for example, George Monbiot, *The Age of Consent : A Manifesto for a New World Order*, (Harper Perennial, 2004) at 88 et seq.

⁹⁸ David Held, "Cosmopolitan Democracy and the Global Order: A New Agenda" in Bohman and Lutz-Bachmann, eds, *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (MIT Press, 1997), 235 at 247.

⁹⁹ *Ibid.*

Assembly is not already attempting, and it is unclear how “the people” are to participate in this international assembly.

Habermas advocates adding a second chamber to the GA, the members of which would be elected by popular vote. States that do not allow democratic election would have their citizens represented by NGOs that this World Parliament selects.¹⁰⁰ Security Council membership would be extended to other powerful nations (*ie* Germany, Japan). The veto of the permanent members would be abolished and voting would occur according to some sort of majoritarian rule scheme.¹⁰¹ All people would become subjects of international (now rebranded as cosmopolitan) law and judicial police forces would be created¹⁰² and put at the disposal of the existing international tribunals dealing with war crimes. According to this version, cosmopolitan law aims to give status to the individual subjects as well as direct and unmediated membership in an “association of free and equal world citizens”.¹⁰³ In fact, however, because it does not question the accepted wisdom of the mechanisms that constitute “democracy”, this highly centralised solution has little to nothing to do with the concept it ostensibly seeks to promote. Instead, it is a template for creating a *Rechtsstaat*. While concentrating heavily on rights and the maintenance of peace, it largely ignores the “real” issues of democracy: substantive decision-making participation, corruption, and centres of financial and/or military power. In particular, it is difficult to see the democratic value imparted upon the citizen of a dictatorship who would under this scheme have the honour to be represented by an NGO, lacking even Republican-style legitimisation, which has been selected for him by a World Parliament.

5.2.4.5. Redistribution of Voting Power within the General Assembly

This solution advocates redistributing voting power in the General Assembly according to the number of people each State represents and the democratic legitimacy of its government, with the criteria for determining how democratic a country is outlined in an objective global index.¹⁰⁴

Other systems of re-orienting voting power, some of them suggested by States, centre around the introduction of weighted voting according to varying factors such as population, GNP, financial contribution to the UN budget, degree of development or provision of social services. It is sometimes suggested that weighting not be allocated according to simple

¹⁰⁰ Juergen Habermas, “Kant’s Idea of Perpetual Peace with the Benefit of Two Hundred Year’s Hindsight”, in Bohman and Lutz-Bachmann, eds, *Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal*, 113 at 134.

¹⁰¹ *Ibid.*, at 135.

¹⁰² *Ibid.*, at 135.

¹⁰³ *Ibid.*, at 128.

¹⁰⁴ Monbiot, note 97, at 132.

proportionality, but be based instead on the square root or cube root of the aforementioned factors in order to decrease the votes of the larger nations and increase the votes of the smaller.¹⁰⁵

Of course, powerful nations would likely abuse the system to claim elections in less powerful states as fraudulent or legitimate depending on their relationship with the smaller state in question, but then, such behaviour is already *de rigueur* under the current system, and the emphasis on State population would to some extent even mitigate the effects of purely political manoeuvring based on a nation's supposed democraticness. In this case it would be important that not only formal "democratic" criteria (*eg* elections) be used as a benchmark, but also substantive criteria such as real participation levels. It is equally important that it not rely on criteria such as GNP or financial contribution to the UN budget. Such a solution would at least mitigate the problem of statistical skewing, although it is a foregone conclusion that it would become the focal point of severe political manoeuvring.

5.2.4.6. Transnational Governance

Slaughter suggests that States simply disaggregate and the legislatures, executives and judicatives of each country co-operate freely with their counterparts in other States without every decision having to run up and down the government gamut.¹⁰⁶ "If government denotes the formal exercise of power by identifiable and discrete institutions, governance denotes cooperative problem-solving by a changing and often uncertain cast of concerned actors".¹⁰⁷

Slaughter draws attention to the network of transgovernmental cooperation that exists, be it formal (*eg* the Basle Committee of Central Bankers, the International Organization for Securities Commissioners, or the International Organization of Insurance Supervisors) or informal such as informal cooperation between law enforcement agencies and memoranda of understanding between agencies without the involvement of national executives or legislatures (such as the restatement of the terms of co-operation) or consultative organisations such as the Tripartite Group.¹⁰⁸ National level controls, such as obligations to submit reports, external reviews and strict decision-making procedures could possibly be transferred to the "transgovernmental level".¹⁰⁹

¹⁰⁵ Geoff Simons, *UN Malaise : Power, Problems and Realpolitik*, (MacMillan Press, 1995) at 246 et seq.

¹⁰⁶ *cf.* Anne-Marie Slaughter, "International Law in a World of Liberal States" in *Democracy and International Law*, 261-296.

¹⁰⁷ Anne-Marie Slaughter, "Government Networks" in Fox and Roth eds, *Democratic Governance and International Law*, 199 at 200.

¹⁰⁸ *Ibid.*, at 201, 214 et seq.

¹⁰⁹ *Ibid.*, at 204.

While this solution might at first seem appealing in its decentralisation, as Slaughter herself points out “it is very difficult to establish precisely who is acting and when. Influence is subtle and hard to track; important decisions may be made in very informal settings”.¹¹⁰ Such a system would not only fail to deliver any power to the people (the vast majority of whom are not on the Basle Committee of Central Bankers, etc.), it would make holding officials to account much more difficult, so that the *dokimasia/euthunai/impeachment* process, so important to democracy, would be impossible to realise.

5.2.4.7. Intermediary Conclusions

At this stage, we are forced to conclude that even the best and most innovative suggestions aimed at tweaking representative democracy amount to just that – tweaking, even if we were to combine all of the best solutions. No amount of jiggling representatives around is likely to deliver decision-making into the hands of the people. Therefore we must ask whether we need to be content with these solutions or whether direct decision-making is at all feasible.

5.2.4.8. Increase Direct Decision-making

Direct democracy seems more technologically feasible today than it was two thousand years ago given that some nations have already pioneered voting techniques that do not demand a physical appearance at the ballot-box. In 2005, Estonia allowed internet voting in local elections, of which 9 300 citizens availed themselves. In the 2007 parliamentary elections 30 000 citizens cast their ballots over the internet, and Estonia is planning to permit voting via mobile phone in 2011. Switzerland has allowed internet voting in referenda for several years, a measure which has found general approval among the electorate.¹¹¹ As the foregoing examples, coupled with vast daily increases in computing power, indicate, even supposing direct e-democracy is not now completely technologically feasible, it soon will be.

By some detractors this model has been labelled “a utopian view that can only come from the pages of science fiction”, although, of course, the Athenians did not have science fiction at all, while many of the utilities taken for granted today (air travel, vaccination, electricity), were, of course, at one point science fiction. Why precisely such goals are “utopian” is rarely, if ever, elaborated on by the adherents of this view. Instead their real

¹¹⁰ *Ibid.*, at 232.

¹¹¹ “E-voting pioneer Estonia plans mobile phone ballots”, Dec. 11 2008 (AFP), available at: http://www.google.com/hostednews/afp/article/AleqM5gTGWVvQTdroF3kfmgzTO8-Y_6F_g; Alexander Trechsel, “E-voting and Electoral Participation” in (de Vreese, ed) *The Dynamics of Referendum Campaigns: An International Perspective*, (Palgrave Macmillan, 2007), 159 at 159 et seq.

reasons often appear very shortly following such statements, and make clear that the means are only used as a convenient starting point for attacking an end goal (democracy) with which they disagree. For example, the commentator quoted above, goes on to say, “Here [in the science fiction “utopia”] government can be commanded by the touch of a button, citizens can vote on line on a whole range of matters in a way that has not been seen since the direct democracy of ancient Athens...[these are] *fortunately, as technologically unfeasible as they are politically undesirable*”.¹¹²

Much of this opposition to re-creating a direct democracy seems to stem more from ignorance of what Athenian democracy was like than anything else, with authors seeming to equate it either with a free-wheeling enlightened utopia or, on the other end of the spectrum, a harsh tyranny of the majority in which all harmless dissenters were put to a cruel death at the first available opportunity. The authors of one article on e-democracy, for example, stress that technology cannot be used to create an Athenian-style direct democracy and then proceed later on to outline a proposal for internet participation that virtually perfectly mirrors the Athenian decision-making process in the *ekklesia*, with the usual modern caveat that a wishy-washy “consensus” is substituted for a clear majority vote.¹¹³

While technologically direct democracy is or soon will be feasible, the question remains as to whether it is politically feasible. After all, it is the Republican model and not the democratic one that excels in situations dealing with a multitude of fixed heterogeneous populations by substituting ballots for bullets. Representative democracy, that is controlled government in the hands of a few, mediates between the various clashing views of “the people”,¹¹⁴ by ensuring that debate is limited within predetermined parameters.

Because all representation skews perceived opinion in favour of majorities, direct participation would, in fact, be in the interests of minorities, but at the same time it would make the existence of fixed voting blocs, especially blocs which are not often getting their way, much more obvious, and result in increased tension, much as, for example, the death of Tito resulted in long-repressed ethnic tensions bubbling to the surface in the former Yugoslavia. Any increase of direct decision-making must deal with this issue, which was – due to homogeneity of the citizenry – not present in Athens.

¹¹² John Morison, “E-Democracy: On-Line Civic Space and the Renewal of Democracy” in (2004) 17 *Canadian Journal of Law and Jurisprudence*, 129 at 131, emphasis mine.

¹¹³ John Morison and David Newman, “On-Line Citizenship, Consultation and Participation in New Labour’s Britain and Beyond” (2001) 15 *International Review of Law, Computers and Technology*, 171 at 183 et seq.

¹¹⁴ Eric Stein, “International Integration and Democracy: No Love at First Sight” in *Democracy and International Law*, 297 at 339.

5.2.4.8.1. Fluid Majorities and Heterogeneous Populations

In Athens every minority opinion had the chance of someday becoming the majority opinion. This was what made majority rule tolerable and the best approximation of “people power”. It would have been an extremely rare occurrence for an Athenian to find himself exclusively in a minority view for a long period of time and thus subjected to a situation in which the will of the majority was continuously imposed on him. Even many an ostracised Athenian returned to successfully promote his cause. The fluidity of Athens’ majorities was promoted by a very homogenous citizenship, which was not permitted to split into parties or other semi-permanent political alliances, and the fact that legislation was debated and voted upon on a point-by-point basis, as opposed to being passed as a package. The global *demos* is necessarily the furthest thing imaginable from homogenous. We must therefore ask whether a high degree of heterogeneity precludes democracy either within nation States or between members of nation States? Does it require a reformulation of some of the other characteristics of pure democracy to allow for irreconcilable differences between majority and minority and to fall back on merely reforming representative solutions?

Several theoretical models have attempted to deal directly or indirectly with this difficulty and while most suggestions as to how to deal with the issue of heterogeneous citizenship have been made in the context of national democracy, they can easily be applied to the international level.

5.2.4.8.1.1 The Deliberative Democracy Model

Deliberative democracy advocates that all affected individuals, whether citizens or non-citizens, be given equal opportunity to initiate and participate in any discussion of a measure. According to this theory, measures that are deliberated in a rational manner enjoy a higher level of legitimacy because “[t]hose on the losing side are more likely to accept a decision if they think it was taken for reasons they see as valid, as opposed to arbitrary or entirely besides the point”.¹¹⁵

Deliberative democracy aims at consensus, but...“even when this is not possible and participants resort to voting, their result is a collective judgement rather than the aggregate of private interests”.¹¹⁶ This certainly bears a resemblance to the Athenian ideal in which all citizens were able to air their views before the *ekklesia* and which viewed decision-making as

¹¹⁵ Ian Johnstone, “Legislation and Adjudication in the UN Security Council” in (2006) *102 AJIL*, 275 at 279.

¹¹⁶ Iris Young, “Communication and the Other: Beyond Deliberative Democracy” in Benhabib ed, *Democracy and Difference*, 120 at 122.

a collective interest issue and not as a time at which citizens were encouraged to indulge their own private interests.

However, in concrete terms, deliberative democracy tends to emphasise the importance of discussion to the detriment of real decision-making power. As long as there is identity between the deliberators and the voters this is not necessarily harmful, but when the pool of the decision-makers is smaller than the pool of deliberators, it degenerates into another sugar-coating of the democratic deficit and can become an effective tool to maintain restrictive power, as it gives the deliberators the illusion of true participation while continuing to divorce real decision-making power from the debate. As one proponent claims: “...for deliberation to shape behaviour, it need not even be sincere. The felt need to justify is enough, even if the justifications are strategic”.¹¹⁷

Deliberative democracy also – despite the emphasis on reason as the basis for all decisions, remains wary of mob behaviour:

The argument that there may be an invisible limit to the size of a deliberative body that, when crossed, affects the nature of the reasoning process is undoubtedly true. Nevertheless, the reason why a deliberative or proceduralist model of democracy does not need to operate with the fiction of a general deliberative assembly is that the procedural specifications of this model privilege a plurality of modes of association in which all affected can have the right to articulate their point of view. These can range from political parties, to citizen’s initiatives, to social movements, to voluntary associations, to consciousness-raising groups, and the like. It is through the interlocking net of these multiple forms of associations, networks and organizations that an anonymous ‘public conversation’ results¹¹⁸

Reliance upon an unquantifiable, anonymous and nebulous opinion-formation does not seem likely to lead to accurate information about what anyone truly desires. It also would not seem to be particularly different than the current system of organisation, as it merely, through a nebulous web, disguises differences and defuses the situation by allowing participants to “blow off steam”. The aim pursued here is not to disguise majority or minority positions, but only to ensure a fluidity between the two. Encouraging rational discussion between citizens could be helpful in this endeavour – any true democracy does involve a

¹¹⁷ Johnstone, note 115, at 279.

¹¹⁸ Seyla Benhabib, “Toward a Deliberative Model of Democratic Legitimacy” in Benhabib ed, *Democracy and Difference*, 67 at 73.

substantial amount of deliberation – but as a system deliberative democracy, as advocated by its proponents, does not seem likely to help very much further beyond recognition of this point.

5.2.4.8.1.2 Unanimity or Qualified Voting

The most basic approach to rectifying the issue of fixed majorities has been to protect minorities by instituting decision-making via unanimity or qualified majority. This system is, however, from a democratic point of view, extremely dissatisfying. It is still more inequalitarian than majority rule, because under unanimity rule the vote of a single objector is given more weight than the votes of all those in favour of the motion, while under a qualified majority fixed minorities are *de facto* granted a privileged position. Majorities are not always malevolent mobs bent on trampling the rights of minorities. The majority's desires may be beneficial and even necessary in their own interests.¹¹⁹ Qualified majority or unanimity requirements have therefore at times been characterised as little more than a bias in favour of the status quo, which is essentially irrational, because omitting an action can be as costly as committing it.¹²⁰

5.2.4.8.1.3 Level of Interest

A third model proposes to weight voting according to the level of interest the voter has in the subject, thereby preventing a disinterested majority from imposing decisions on an interested minority.

That some citizens are manifestly more affected by certain issues than others is unavoidable in heterogeneous populations. Should men, for example, have a say on the issue of abortion? Especially if it is not publicly financed? Should people without children have a say equal to that of those with children on issues of child education?

Weighting votes, however, necessitates that it is possible to determine the level of interest each person has in a particular issue, which raises its own questions. When determining if a party is interested, should one distinguish between factual interest in the legal sense of being an interested party (*ie* party is materially affected by the outcome of a decision on that issue), and intense self-proclaimed interest as a result of the citizen's arbitrary value judgements?¹²¹

¹¹⁹ Wojciech Sadurski, "Legitimacy, Political Equality and Majority Rule" in 2008 *Ratio Juris*, 21(1), 39 at 48.

¹²⁰ James Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (Yale University Press, 1991) at 49; Sadurski, note 119, at 49.

¹²¹ Sadurski, note 119, at 44.

The similar system of cumulative voting could circumvent this difficulty. Under the cumulative voting system, which was used to elect the lower house of parliament in Illinois until 1980,¹²² every voter receives several votes which he can then distribute across measures as he chooses.

Cumulative voting enables minority groups to exert influence over political processes if they make a concerted effort to vote in one direction, *ie* if they were all to put their votes behind a particular legislative measure, this measure would certainly be passed unless the majority makes an equally concerted effort to prevent it. It can therefore help to balance a system in which there are hardened majority and minority positions. It will not, however, necessarily make those positions more fluid.

5.2.4.8.1.4 Enabled Participation

Enabled participation does not attempt to alter the processes by which decisions are made, but rather aims at enabling participation within pre-existing decision-making mechanisms, much as the Athenian pay-for-participation model encouraged participation from the most disadvantaged groups in society. It is advocated by Elizabeth Kiss who argues that wholesale non-recognition of other cultures by the dominant culture often places the individual members of a non-dominant culture at a disadvantage in a democracy.¹²³ Kiss uses the case of deaf children to illustrate her point. In a culture that does not recognise a difference between deaf and non-deaf children, the correct approach to schooling would be to treat all children in the same manner, that is the deaf children would be taught how to speak and read lips and take lessons in a “normal” school. However, as Kiss points out, no one with a serious hearing impediment can learn to speak in as flexible a manner as a person who has the full use of their hearing, so that such a solution would place deaf children at a permanent disadvantage. It makes more sense to recognise the difference between deaf and non-deaf, teach deaf children sign language and teach them in this language, as through these means they can express themselves with agility equal to that possessed by a hearing person using spoken language. Through the medium of sign language, the hearing impaired can participate in society and democracy to a degree greater than they would be able to if forced to speak orally.¹²⁴

The same logic could be applied to other topics, for example, granting educational financing to children from socially disadvantaged households or historically discriminated

¹²² Lijphart, *Patterns of Democracy*, note 4, at 198.

¹²³ Elizabeth Kiss, “Democracy and the Politics of Recognition” in Shapiro and Hacker-Cordon, eds, *Democracy's Edges*, 193 at 200.

¹²⁴ *Ibid.*, at 201 et seq.

ethnic groups (eg Travellers in Ireland, Natives in Canada). This solution is predicated on the understanding that: “Justice requires not the *same* conditions for each one but rather *equivalent* conditions determined by differentiated needs. Justice then entails a recognition and consideration of relevant differences”.¹²⁵ The Canadian Supreme Court has taken much the same view, arguing that: “the accommodation of difference is the essence of true equality”,¹²⁶ while Denham, J in her judgement on *Sinnott v Minister for Education*, concerning the education of a person with severe autism, reiterated Art. 40.1 of the Irish Constitution, which states that “[a]ll persons shall, as human persons, be held equal before the law”. She held that this “does not mean uniformity”, but paraphrasing the continuation of Art. 40.1, that “due regard may be had for differences of capacity, physical and moral, and of social function”. She went on to state that, “mere fact of discrimination or distinction as between persons or groups does not make the difference unconstitutional”.¹²⁷ Such an approach – at least in regards to high-consensus apolitical differences – has enjoyed much reinforcement through international treaties, most recently, the UN Convention on the Rights of Persons with Disabilities. While such conventions tend to concentrate heavily on “rights”, they do contain some participatory content. For example, Art. 29 of the Convention on the Rights of Persons with Disabilities stipulates that voting procedures should be accessible and easy to understand and that governments should create an environment where people with disabilities can participate fully in public life. The Second European Ministerial Conference on Disability in 2003, which issued the Malaga Ministerial Declaration on People with Disabilities, has taken an approach more heavily oriented towards participation, including participation in decision-making processes.

How to implement different modes of participation predicated on difference is a point that the Irish system is currently being confronted with in the particularly democratically relevant forum of jury service. Currently, a High Court judgment in a claim challenging the disqualification of deaf persons from jury service under the Juries Act 1976 is pending.¹²⁸ The plaintiff, who has a significant hearing disability, argues that she is entitled to assistance from a sign language interpreter in order to enable her to serve as a juror, while the Juries Act 1976, which was amended in 2008, states that a person may be excused from jury service if he or she has “an enduring impairment, such that it is not practicable for them to perform the duties of a juror.”¹²⁹ The Law Reform Commission, in its recent consultation paper on the topic, has pointed out that this may still,

¹²⁵ Carol Gould, “Diversity and Democracy: Representing Differences” in Benhabib ed, *Democracy and Difference*, 171 at 180.

¹²⁶ *Andrews v Law Society of British Columbia* (1989) 10 C.H.R.R. D/57/9 (S.C.C.)

¹²⁷ *Sinnott v. Minister for Education*, [2001] 2 IR 545 at 660 (Denham, J).

¹²⁸ The case is: *Clarke v Galway County Registrar and Attorney General*.

¹²⁹ Juries Act 1976, First Schedule.

depending on the outcome of the pending court case, prevent citizens with a disability from serving on a jury on the grounds of impracticality.¹³⁰ The Commission recommended that “persons with disabilities who present for jury service should be assessed on the grounds of capacity in the same way as any other person”, but that “the overriding priority must be the provision of a fair trial.”¹³¹

As can be seen from the Irish example, this approach raises difficult questions as to which differences should be accommodated. Is it a matter of choice? *Eg* an affliction such as deafness should be facilitated, but more malleable cultural or linguistic differences should not be? Or is it a matter of political difference vs. apolitical difference? Or a question of compatibility with the values of the majority? These are the second order questions with which such an approach must eventually come to grips. Such difficulties are, however, not insurmountable.

Although it would seem that this method exacerbates difference by recognising some differences as politically relevant, it must also be considered that via these means a great many differences can be considered as politically irrelevant and thus not to be accommodated. It is thus not entirely incompatible with the traditional liberal model which emphasises the universality of certain values. This solution emphasises the importance of ensuring that all citizens are placed on an even participatory playing field and thus prevents disadvantageous positions from becoming entrenched. Such mechanisms could thus increase the fluidity of the majority which is so necessary for democracy.

5.2.4.8.1.5 Manufacture Homogeneity by Repressing Divisive Issues

The Athenians themselves further enhanced their homogeneity by dealing harshly with divisive public action. The same basic method was used in an Irish decision which was upheld by the European Court of Human Rights in *Murphy v Ireland*.¹³²

In this case, the Irish Independent Radio and Television Commission had refused to permit an independent radio station to broadcast an advertisement inviting listeners to watch a video on the resurrection of Jesus Christ on the grounds that it contravened Sec. 10(3) of the 1988 Radio and Television Act. The applicant and originator of the ad, Roy Murphy, claimed before the Irish courts that Sec.10 (3) of the 1988 Radio and Television Act was unconstitutional, because by banning advertisements directed towards any religious ends it violated the freedom of religion guaranteed by Arts. 44.2.1 and 44.2.3 of the Irish

¹³⁰ Law Reform Commission Consultation Paper on Jury Service, LRC CP 61-2010, para. 4.02.

¹³¹ *Ibid.*, at para. 4.23.

¹³² *Murphy v Ireland*, ECHR No. 44179/98, 10 July 2003, Reports of Judgments and Decisions, 2003-IX, 3.

Constitution.¹³³ The Supreme Court dismissed the application, deciding *inter alia* that Sec. 10 of the Broadcasting Act did not constitute an attack on a citizen's right to practice his religion, but was instead a limited restriction on the manner in which he could express or practice it.¹³⁴ The reasoning for this was unconvincing: "It appears to the Court that the prohibition on advertising contained in s. 10(3) is broad enough to cover not only advertisements tending to favour any or all religions but also advertisements tending to attack all or any religion. It cannot therefore be regarded as an attack on the citizens' right to practice his religion."

The Court accepted that the applicant could also rely on Art. 40.6.1 of the Irish Constitution which protects freedom of expression, but that "[h]is problem is that both the right of freedom of expression and the right of freedom of communication are personal rights and both can, in certain circumstances, be limited in the interests of the common good".¹³⁵ In this case the common good demanded that advertisement relating to matters that were extremely divisive in Irish society be banned on the grounds that such advertisements might lead to unrest. The limitation in this case was deemed to be proportional as the applicant was free to air his religious views in other contexts so that the restriction on constitutional rights was "very slight", and Sec. 10 was "rationally connected to the objective of the legislation and is not arbitrary, unfair or based on irrational considerations".¹³⁶

The ECHR unanimously confirmed the decision of the Irish Supreme Court,¹³⁷ deciding that the issue at hand primarily concerned the regulation of the means of expression and not the profession or manifestation of religion as such. Therefore Art. 10 and not Art. 9 of the ECHR was more relevant. The Court decided that the exercise of freedom of expression "carries with it duties and responsibilities, which in the context of religious beliefs, include a duty to avoid as far as possible expression that is gratuitously offensive to others."¹³⁸ The Court further decided that, "While there is little scope under Art. 10 for restrictions on political speech or on debate of questions of public interest, States enjoy a wider margin of appreciation in relation to matters liable to offend intimate personal convictions in the sphere of morals or, especially, religion".¹³⁹ In its presentation before the Court, the Irish government relied heavily on the particular religious sensitivities of Irish society, an argument which the Court accepted without closer examination.¹⁴⁰

¹³³ *Murphy v. IRTC* [1999] 1 IR 12, at 13 (per Barrington J).

¹³⁴ [1999] 1 IR 12 at 23 (per Barrington J).

¹³⁵ [1999] 1 IR 12 at 23 (per Barrington J).

¹³⁶ Barrington J in *Murphy v. IRTC* [1999] 1 IR 12 at 25 et seq.

¹³⁷ *Murphy v Ireland*, ECHR No. 44179/98, 10 July 2003, Reports of Judgements and Decisions, 2003-IX, at 3.

¹³⁸ *Murphy v Ireland*, ECHR No. 44179/98, at 26.

¹³⁹ *Murphy v Ireland*, ECHR No. 44179/98, at 26 et seq.

¹⁴⁰ *Murphy v Ireland*, ECHR No. 44179/98, at 29.

While Sec. 10 of the Broadcasting Act has since been slightly diluted by Art. 65 of the same Act, the case bears remarkable similarity to that of Socrates who was dealt with – albeit in a much more fatal and absolute fashion – for propounding views that had proven divisive and led to violence in Athenian society. That the potential divisiveness of the issue at hand was a very real consideration for both courts, is confirmed by the fact that the ECHR had taken a markedly different stance in the earlier (and later) *Vgt. Tierfabriken* case.¹⁴¹ *Tierfabriken* was in many ways a remarkably similar case to *Murphy*, as it concerned the banning of political advertisements on Swiss television, which had resulted in the Swiss authorities preventing television from airing the pro-vegetarian commercials of a vegetarian association. The different outcomes of the cases, and the rather flexible interpretation of Art. 10 which the court was obliged to deliver in order to accommodate both judgements, can be attributed to the fact that while religion is arguably a divisive topic in Ireland, vegetarianism is unlikely to be an explosive political issue in Switzerland, a nation divided primarily on linguistic and ethnic lines. It has also been argued, that the purpose of Art. 10 ECHR is to allow “the political discourse which is necessary in any country that aspires to democracy” whereas religious expression, which often takes a absolutist stance on opposing views, is a “conversation stopper”¹⁴² which can therefore only entrench hardline heterogeneous positions.

The success of this solution largely depends on the feasibility of increasing real homogeneity – when this is not possible or desirable, it only results in ignoring important differences. For example, wealth discrepancy can be either ignored (*fiktierter* homogeneity) or eroded (real homogeneity).

While this method might work well if it is directed towards enabling participation, extreme caution is called for: history is rife with misguided examples of coercive minority assimilation programs intended to manufacture societal homogeneity. It is entirely compatible with Athenian-style democracy (under the understanding, of course, that the *demos* and not a select group of judges decides upon the disruptive quality of a given view), but as the Supreme Court’s unconvincing reasoning shows, very difficult to reconcile with modern human rights values. This solution amounts to a reiteration of the worst aspect of Athens – the complete repression of the individual in the interests of the common good.

¹⁴¹ *VgT Verein gegen Tierfabriken v Switzerland*, ECHR No. 24699/94, 29 June 2001, 34 EHRR 4 (ECHR); *VgT Verein gegen Tierfabriken v Switzerland No.2*, ECHR No. 32772/02, 30 June 2009.

¹⁴² Andrew Geddis, “You can’t say ‘God’ on the Radio: Freedom of Expression, Religious Advertising and the Broadcast Media after *Murphy v Ireland*” in (2004) *European Human Rights Law Review*, 181 at 187 et seq, esp 190.

5.2.4.8.1.6 Point-by-Point Voting

Another possible way to break down heterogeneity would be to pass measures individually as opposed to as packages. When presented with either/or situations voting behaviour tends to harden based upon “common denominator” interests. For example, if a group of feminists puts forward a bill providing that women must receive equal pay for equal work, forbidding discrimination in hiring behaviour and mandating that women only should always receive preferential treatment in custody battles, one might agree to the bill for the sake of the first two points and put up with the third. Or one might reject it completely. If it were broken down into three parts, on the other hand, one might agree with the feminists on some points, while agreeing with their opponents on others. Permitting more differentiated voting works towards eroding excessive group identity, by eliminating the need to put up an organised concerted effort to make any gains at all and bringing about a situation in which people find themselves at times agreeing with their alleged opponents.

5.2.4.8.1.7 Preferenda

An alternate model to “yes or no” point-by-point voting is the preferenda model which was recently used by the Green Party of Ireland in determining support of its members for various options of NAMA legislation.¹⁴³

The preferenda model is in some ways similar to the Athenian system, as it starts with a debate in which all participants may propose options and/or amendments to the options. The advocates of this system propose that all options must be in accordance with some sort of constitution, suggesting the United Nations Charter of Human Rights. At the end of the debate, the chairperson(s) (sometimes referred to as “consensors”) asks the backers of each proposal to confirm that they are satisfied with its final wording.

The procedure then, however, differs quite widely from that in Athens. As opposed to voting positively or negatively on each proposal in sequence, each voter marks his preferences on a ballot from highest to lowest according to the modified Borda system. In a list of ten options this means that he allocates 10 points to his most preferred option, 9 to his second choice, 8 to his third choice, etc. If a voter does not wish to indicate a preference for all options, the number of points he may give to his first option equals the number of total options minus the number of options he is not indicating a preference for. For example, if from a list of ten a voter wished to indicate a preference for only five options, his first option would only be allocated five points, his second option, four points, etc.

¹⁴³ <http://www.irishtimes.com/blogs/politics/2009/09/14/good-ship-nama-sails-close-to-the-rocks>.

According to its advocates by encouraging voters “to express, not only their favourite option, but also those options on which they are prepared to compromise” the modified Borda count makes it possible to find “the common consensus or the collective best compromise, *ie* the option with the most points or the highest average preference”.¹⁴⁴

As this makes clear, the preferenda system is not necessarily a system of majority rule. The option with the highest level of preference is the winning option and may still represent a minority view. It thus introduces some in clarity – the “best compromise” delivered by the Borda count may not be capable of garnering majority support in a straight-out vote, and it seems rather strained to elevate measures incapable of garnering even simple majority support to the level of a “consensus view”.

The advocates of the de Borda count to some extent recognise this issue, stating “to take the example of a 5-option ballot, if the winning outcome gets an average preference score of between 1 and 1 ½, it may be said to represent the overwhelming view. If the score is about 2, it can be called the common consensus. While if it is of the order of 2 ½, it may be described as the best possible compromise. If the winning option gets a score below, say 2.7, then maybe the chair should ask for the debate to be resumed, and the process is repeated until the required level of consensus is indeed achieved”.¹⁴⁵

As its advocates point out, the referendum avoids exacerbating ongoing opinion splits over single issues, by allowing multiple options as opposed to “yes” or “no”.¹⁴⁶ In other words, although they do not use the term, it could avoid *stasis*, but for this it sacrifices some clarity as to majority opinion. It could, however, be useful as an alternative strategy in the event that point-by-point yes or not voting fails to mitigate the formation of static voting blocs.

5.2.4.8.1.8 Conclusions Concerning Models Aimed at Defusing Tensions Stemming from Heterogeneity in Direct Democracy

The issue of heterogeneous citizenship, in particular in a context of “modern tribalism” presents a major obstacle for any democratic reform to overcome. The deliberative democracy model, as well as unanimous/qualified voting amount to little more than improvements on the Republican ceasefire model, as they do not deliver power to “the people”, while the method of manufacturing homogeneity by repressing political division is consistent with democracy, but clashes with modern human rights considerations, making it

¹⁴⁴ <http://www.deborda.org/faq/voting-systems/what-is-a-modified-borda-count-or-borda-preferendum.html>.

¹⁴⁵ *Ibid.*

¹⁴⁶ <http://www.deborda.org/faq/what-is-a-preferendum/is-there-not-a-danger-that-the-use-of-the-preferendum-idea-w.html>.

desirable to avoid its use to the greatest extent possible. Cumulative voting offers a less rigid balance between the power of various factions, but does not necessarily lead to more fluid majorities, while preferenda introduce an element of skewing and uncertainty in regards to the majority will. The best method of overcoming fixed factional voting would appear to be the use of cumulative voting, combined with two measures aimed at increasing the fluidity of majorities, point-by-point voting and enabled participation. It is, however, highly questionable whether these methods would suffice on a global level.

5.2.4.8.2. Political Parties and Heterogeneity

One of the major differences between politics in Athens/Rome and current democracy is the existence of formal political parties in the latter. While political parties are now part of the representative system, since the idea is familiar, there is no reason to believe that they would not form under a direct system. Not only do political parties exist, their existence is acknowledged in many legal documents which sometimes accord them certain privileges. The Maastricht Treaty states: "Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union".¹⁴⁷ According to para. 2 I 1 of the German *Parteiengesetz*, a party is

an association of citizens, which permanently or for a reasonably long period of time seeks to influence political opinion on the federal or provincial level and to participate in representing the people in the national or provincial parliaments, and which according to the extent and durability of its organization, the number of its members and its public activities seems able to pursue this goal seriously¹⁴⁸

Parties by this definition are thus highly structured, intransient organisations, recognised partially on the basis of their very durability.

The accepted role of political parties in Germany is "*Meinungsbildung und Meinungsbuendelung*" – forming and consolidating opinion.¹⁴⁹ In the Anglo-Saxon sphere, the function of political parties has been described as to "provide organisational structures through which individuals can both seek to gain political office, and participate effectively in

¹⁴⁷ Art. 138a, Treaty on European Union.

¹⁴⁸ Art. 2, para. 1 *Parteiengesetz*, my translation.

¹⁴⁹ Rolf Schmidt, *Staatsorganisationsrecht*, (2nd Edition, Rolf Schmidt Verlag, 2001) at 154.

political debate".¹⁵⁰ But although parties do form and consolidate certain streams of opinion, they are essentially divisive, always seeking to represent "a part of society and never the whole."¹⁵¹

According to political scientist Ernst Fraenkel

only when parties and parliamentarians admit that when it gets down to it they only represent certain interests and certain needs, will a meaningful battle between collective opposing interests be possible. Then the resulting compromises will be acceptable and one's own opinion, which is always coloured by personal interest, won't have to be shrouded by the saintly illusion of being in the general welfare¹⁵²

The consolidation of opinion within stable groups can lead to a deep rift within the polity, paralysing state organs and leading to public turmoil and deep dissatisfaction among a large percentage of the populace, and in extreme cases rioting and civil war. Precisely for this reason, the Athenians discouraged political alliances. Rousseau agreed, writing in the *Contrat Social* that parties were undemocratic because they could not represent the collective will of the people. Both Athens and Rome went to some lengths in their legal structure to avoid the formation of parties, through anathemising *coitio* in Rome and the methods of ostracism and forcing citizens to take sides in Athens.

In a representative democracy with large centres of power which form the basis of the state (executive, judicative, etc.) citizens must form themselves into their own power centres to make themselves heard. They are thus an anti-democratic reaction to an anti-democratic situation. Not only would parties be unnecessary to direct democracy, in a heterogeneous society they could be very harmful, and would have to be discouraged.

5.2.4.9. Conclusions on Solutions to Representation Distortion at the WTO and UN General Assembly

Because every filter (eg filter of a state government) substantially distorts the will of the people, the best concept of international democratic participation should be the individual where practicable, the State where necessary. None of the State-mediated representative solutions put forward improve the accuracy of representation to the point where the political

¹⁵⁰ Steven Wheatley, "Democracy and International Law: A European Perspective" in *Democracy and International Law*, 99 at 113.

¹⁵¹ Peter Loeschke, "Parteiensystem" in *Informationen zur politischen Bildung*, 4 (5).

¹⁵² quoted in Peter Loeschke, "Annäherung an einen komplexen Begriff" in *Informationen zur politischen Bildung*, 7 (12), my translation.

virtue of citizens is superfluous, with some, such as Slaughter's transnational governance solution, further obscuring the decision-making process. At the same time, it is questionable whether the measures meant to enhance fluid majorities would suffice for the international level, and we must further consider the language barriers which would hamper international direct participation at this point.

However, measures, such as point-by-point voting, cumulative voting and enabled participation, would likely suffice to keep majorities relatively fluid on a national level where the population usually shares at least some characteristics (*eg* language, ethnicity, religion, level of economic development). The best solution is thus direct participation on a national level utilising the methods outlined above, which upholds the principle of national sovereignty, but has immediate ramifications for the international level, as it would enable citizens to decide themselves on such major topics as voting for or against GA resolutions or restarting trade negotiations, effectively combating the hopeless level of statistical skewing currently existent in the GA and WTO. Combined with redistributing voting power in the GA according to democratic criteria and forcing votes at the WTO, instead of allowing closed-door "consensus", this is likely the largest pro-democracy shift that can be realistically achieved. Since such a reformation would dramatically increase the transparency of decision-making (albeit from the abominably low current levels) it would hopefully pave the way for more substantial future democratic change in one-nation, one-vote institutions.

5.3. Representation in International Institutions with Unequal Voting Units and Rights

In many of the principal international organisations, voting units and rights are explicitly unequal, which further compounds those issues we have already discussed above in relation to one-nation, one-vote organisations. Because the precise manner of inequality varies from institution to institution, they will each be given an individual treatment in the following section.

5.3.1. The UN Security Council

5.3.1.1 Overview

The most well-known example of unequal voting is the P-5 veto of any Security Council action. The inequality thus created is, however, often underestimated, due to the double veto (because the question of whether or not a particular question is procedural is itself a non-procedural (*ie* substantive) question, permanent members can effectively also veto procedural questions by vetoing a decision that they are in fact procedural questions, and they

have two opportunities to veto non-procedural questions), the “hidden veto” (sufficiently large number of abstentions) and the “unofficial veto” (preventing a motion being put to a vote by declaring their intention to veto). The situation is thus every bit as crassly privileged as that enjoyed by the Roman *equites* under Republican rule.

Participation for other States, particularly those not on the Security Council, is rather thin: If the Security Council considers that a nation is specially affected by a matter being discussed by the Security Council, then that nation can participate in the discussions, but cannot vote.¹⁵³ According to Art. 32, any nation party to a dispute under consideration before the Security Council is invited to the discussion, but does not have a right to a vote.

Before a meeting of the Security Council, the P-5 meet in private consultation in a room assigned to them, prior to which the P-3 meet at one of their embassies in New York. After these meetings, all fifteen members of the Security Council meet in consultation and only after this meeting do they adjourn to the Council chamber to cast their votes and state their positions. Only this last step is at all public.¹⁵⁴

A spontaneous change in this system is unlikely. According to Art. 108, amendments to the Charter must be passed by 2/3 of the General Assembly and ratified by 2/3 of the General Assembly and the P-5 must be included in those 2/3. The P-5, therefore, have a veto over amending the Charter, a circumstance which any reform must take into account.

5.3.1.2. Suggested Solutions

5.3.1.2.1. Arms Reduction via Art. 26 UN Charter

Any feasible solution needs to take into account the reason for the existence of the UN Security Council veto, namely that “no peace could be foreseen without the agreement of the most powerful states, from a military and strategic point of view”.¹⁵⁵

However, when drafting the Charter, the founding States incorporated Art. 26, which states that the Security Council is obligated with the assistance of the Military Staff Committee¹⁵⁶ to formulate a plan for the establishment of a system for the regulation of armaments in order to limit the human and economic resources diverted to producing them.¹⁵⁷

¹⁵³ Art. 31, UN Charter.

¹⁵⁴ W. Michael Reisman, “The Constitutional Crisis at the United Nations” in (1993) 87 *AJIL*, 83 at 99.

¹⁵⁵ Michael Cosnard, “Sovereign Equality – The Wimbledon Sails On” in Nolte and Byers eds, *United States Hegemony and the Foundations of International Law*, (Cambridge University Press 2003), 117 at 122.

¹⁵⁶ Art. 47, UN Charter.

¹⁵⁷ In a certain sense this is an echo of Kant, whose first article for a league of nations was: “no treaty of peace shall be held to be such if it is made with a secret reservation of material for a future war”, because in that case the agreement is only a truce and not real peace, and whose third

It is worthwhile pursuing whether this article could be the undoing of the P-5 and possibly the Security Council as a whole through the means of reducing their superior military power, the sole justification of their privileged position. By obligating all nations to disarm, concentrated military power would eventually be done away with. The nations of the world would in time become (militarily) more equal, and the factual reason for maintaining unequal voting rights would disappear.

The Military Staff Committee was constituted and continues to meet and issue reports to the Security Council, and while there have been movements in the General Assembly to have the Committee take on an active role, particularly in the area of peace-keeping,¹⁵⁸ due to arguments among the P-5 these were never realised. Its work in the area of arms regulation thus has been almost non-existent.¹⁵⁹

Furthermore, the precise legal obligations that Art. 26 entails, particularly towards the P-5, to whom it is primarily addressed, are unclear. Art. 26 speaks of the “regulation of arms” and not “disarmament” and it has thus been argued that it should be interpreted to mean “arms control”, *ie* that arms races should be prevented, the use of destabilising weapons systems should not be pursued, and that any production of arms should be tightly controlled and regulated. Arms stockpiles and armed forces should only be reduced if compatible with the goal of keeping the peace, a goal which under the UN system depends on military might. Under this interpretation, Art. 26 does not entail a hard obligation to wide-scale disarmament in the interests of saving resources,¹⁶⁰ and certainly not in the interests of pursuing democracy.

The work of diverting resources from arms production has in practice been carried out by the General Assembly’s First Committee, the Disarmament Committee, which drafts resolutions for the General Assembly to consider. The majority of draft resolutions concern the “usual topics” of limiting nuclear weapons and controlling illegal trade in small arms, but a few more notable ones have centred around attempts to head off new threats such as the manufacture of new types of weapons of mass destruction,¹⁶¹ and the prevention of an arms

article was: “Standing armies shall in time be abolished altogether”. He justified this article with the statement “being hired to kill or be killed seems to involve a use of human beings as mere machines and tools in the hands of another (a state) and this cannot well be reconciled with the right of humanity in our own person (Kant, “Toward Perpetual Peace” in Gregor ed, *The Works of Immanuel Kant: Practical Philosophy*, (Cambridge University Press, 1976), 316 at 317 et seq.)

¹⁵⁸ http://untreaty.un.org/cod/repertory/art47/english/rep_supp4_vol1-art47_e.pdf,

http://untreaty.un.org/cod/repertory/art47/english/rep_supp5_vol2-art47_e.pdf and

http://untreaty.un.org/cod/repertory/art47/english/rep_supp6_vol3_art47_e.pdf.

¹⁵⁹ Hans-Joachim Schuetz, “Art. 26” in Simma ed, *The Charter of the United Nations: A Commentary*, Vol. 1 (2nd Edition, Oxford University Press, 2002), 464 at 465 et seq.

¹⁶⁰ *Ibid.*

¹⁶¹ UN Doc. A/63/382.

race in outer space.¹⁶² The Committee has also considered the reduction of military budgets,¹⁶³ but failed to reach a proposal on this topic.

The General Assembly, of course, cannot pass immediately-binding resolutions and does not bear the prime responsibility for peace and security, while referring to the Security Council resolutions concerning its own ultimate obsolescence seems over-optimistic. The slow mechanism of General Assembly-made law limiting expenditure could eventually equalise military might, but if so than not for a very long time to come.

5.3.1.2.2. Increase Security Council Membership

The measure of increasing Security Council membership has a precedent: prior to 1963, the Security Council consisted of only the P-5 and four non-permanent members, whereas today ten non-permanent Members are elected by the General Assembly for two year terms. The General Assembly officially chooses the non-permanent Members based on their contribution to the maintenance of peace and security and forwarding the other purposes of the UN, as well as equitable geographical distribution.¹⁶⁴

Various models for expansion of the Security Council to include up to 25 seats in a mixture of permanent and non-permanent have been put forward by various States, groups of States and the UN High-Level Panel on Threats, Challenges and Change¹⁶⁵ while the “Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council” created by GA Res. 48/26¹⁶⁶ has thus far not delivered many concrete public results on the subject.

The model which enjoys the highest profile is spearheaded by the G-4,¹⁶⁷ who advocate six more permanent seats without veto on the SC, plus four more non-permanent seats.¹⁶⁸

Wrangling over the precise configuration of additional seats has been ongoing for about 15 years. However, presuming a resolution were to be reached, it would – in particular with regards to permanent seats – only represent a case of expanding oligarchy, opening up

¹⁶² UN Doc. A/63/388.

¹⁶³ UN Doc. A/63/381.

¹⁶⁴ Art. 23, para. 1, UN Charter – in reality the system is subjected to substantial vote-buying, *infra* pp. 261 et seq.

¹⁶⁵ *cf.* Walter Hoffman and Ayca Ariyork, Special Paper No. 4, Security Council Reform Models A and B, Italian Proposal, Blue and Green Models and A New Model C, 2005, www.centerforunreform.org/node/148 (called up 15.05.2009).

¹⁶⁶ GA. Res. 48/26, Doc.A/RES/48/26 set up (3 December 1993).

¹⁶⁷ Germany, Japan, Brazil and India.

¹⁶⁸ Johnstone, note 115, at 302.

the privileged circle to some States that have proven particularly successful, much as the Roman system was opened up to the most powerful plebeians.

The majority of smaller States (the Uniting for Consensus Group) appear to agree: GA Res. A/RES/53/30 – an initiative of the non-aligned movement which did not want the G-4 to attain permanent seats on the SC¹⁶⁹ – stipulated that any future resolutions on expanding the SC membership would require a 2/3 vote to pass.¹⁷⁰ In the view of smaller States “eleven great powers with permanent seats would be inclined to consult even less broadly than the current P-5”.¹⁷¹ It is difficult to argue the logic of this position. At the moment, the P-5 are obliged to venture out of the SC to secure the backing of Germany and Japan and scramble over those States not aligned to them, but with eleven permanent members between them they would have virtually every other nation as their clients. Expanding the Security Council, especially with permanent seats, is thus not well suited to bringing about democratic change.

5.3.1.2.3. Exploit the Position of the Ten Non-Permanent Members

Decisions of the Security Council on procedural matters are passed if 9 of 15 members vote in favour.¹⁷² All other decisions are passed with 9 “yes” votes including the concurring votes of the P-5. Thus, the 10 non-permanent members also have a *de facto* “veto” over the P-5. Any measure requires nine votes in favour to pass. Therefore, even were the P-5 in agreement as to a measure, four of the non-permanent members must vote in favour in order for it to pass. Although, theoretically significant, this *de facto* collective veto is not very meaningful in practice. The P-5 are among the wealthiest, militarily powerful states in the world and have so far encountered few difficulties in using their position as such to convince some of the weakest and poorest States on the Council to back their decisions. The difficulty is thus in turning the theoretical veto of the non-permanent ten into a real one.

According to Reisman, in order to achieve this a mechanism should be established whereby the General Assembly is informed on an ongoing basis of the operations of the Security Council under Chapter VII, in expansion of the informational loop under Art. 12 (2) of the Charter. Reisman proposes the formation of a “Chapter VII Consultation Committee” composed of 21 members selected annually from the General Assembly. The Security Council would be obligated to notify the Committee whenever it went into Chapter VII decision mode, at which point the President of the Council and the Secretary-General would

¹⁶⁹ Jonas Freiesleben, “Security Council Reform” in *Managing Change at the United Nations*, Centre for UN Reform Education, at 4 et seq. www.centerforunreform.org/node/308.

¹⁷⁰ GA Res. 53/30 “Question of Equitable Representation on and Increase in the Membership of the Security Council and Related Matters”.

¹⁷¹ Johnstone, note 115, at 303.

¹⁷² Art. 27, para. 2, UN Charter.

meet with the Committee to exchange views. The Council and Committee would remain in constant contact throughout the crisis and facilitate an exchange of views between the Assembly and the Security Council. Through the funnel of the Committee, the Assembly could consolidate its view of the Council's measures (if it so chose) and organise opposition (if it deemed necessary) by co-ordinating a "veto" by the ten non-permanent members.¹⁷³ Potentially the ten non-permanent members would become more "representatives" of the Assembly than temporary members of the Council and would possibly have more to gain by acting as such than accepting the short-term advantages afforded to them by complying with the voting preferences of the P-5.

This solution is extremely clever, and could be an ingenious approach to gradually eroding the power of the P-5. Although it would only prevent the P-5 from passing measures that are broadly opposed and would not affect their own exercise of the veto, it would still lead to a factual situation of slightly more equality.

5.3.1.2.4. Application of Deliberative Democracy Principles

While the deliberative democracy model did not particularly improve the quality of direct decision-making, it is conceivable that it could hold some improvements if applied to the crasser and far less "representative" situation obtaining in the Security Council. The deliberative democracy model aims to substitute reasoned discussion for the bargaining and voting more typical of SC negotiations,¹⁷⁴ thus "imposing an expectation of impartial discourse rather than self-serving trade-offs. Even if the discourse is mere lip service for public consumption, the fact that it occurs at all – and to the extent that the audience is persuaded by it – helps to legitimate decisions".¹⁷⁵

Under this model, "the Council ought to consult those most directly affected by its actions – explaining the reasons for its proposed or past decisions and seeking feedback. Even if agreement does not result from these interactions, they at least give interested actors a sense that their views have been heard and considered"¹⁷⁶ or as Cicero might have put it, "grants the appearance of liberty, preserves the influence of the aristocracy, and removes the causes of dispute between the classes".

However, as one advocate has provided a case study of deliberative democracy in action concerning Security Council Resolution 1540, there is no need to limit ourselves to theory.

¹⁷³ Reisman, "The Constitutional Crisis at the United Nations", note 154, at 99.

¹⁷⁴ Johnstone, note 115, at 277.

¹⁷⁵ *Ibid.*, at 305.

¹⁷⁶ *Ibid.*, at 303.

According to the commentator:

Consultations by the P-5 began in October 2003 and proceeded exclusively among them for five months. By the end of that period four of the five had reached agreement on a draft... The consultations were extended to other members of the Council in March 2004, and a draft was first discussed by the Council as a whole at an informal meeting on April 8. An open meeting followed on April 22, where the draft resolution, which had been amended twice over the previous week, was discussed at length. Meanwhile, the co-sponsors actively briefed the Non-aligned Movement and regional groups in trying to “de-fang” opponents by countering rumours that had been building up during the period of closed negotiations. After the open meeting, the resolution was revised once more and then adopted by unanimous vote on April 29¹⁷⁷

We can discern the usual pattern: the most powerful nations, both legally and factually, decide upon a concerted strategy, which – when they are well-prepared – they launch to the rest of the world.

Thus, while the negotiations originated among the P-5, the process was “intentionally porous”, allowing other members of the Council, non-members, the press, and nongovernmental organizations the opportunity to follow the deliberations and provide input... In an open meeting on April 22 (requested by Canada, Mexico, New Zealand, South Africa, Sweden, and Switzerland), fifty-one states spoke and more than half commented on the scope and timing of the consultations to that point, either disparagingly or in a complimentary way... changes were made to the draft as a result of the broad consultations: references to disarmament obligations and the integrity of existing treaty regimes were added; a reference to “interdiction” was removed; the sovereign rights of non-parties to non-proliferation treaties were affirmed; language on the usefulness of peaceful dialogue was strengthened; and the proposal to create a monitoring committee was introduced... The changes were sufficient to enable even the staunchest critic (Pakistan) to succumb to pressure to vote for the resolution¹⁷⁸

¹⁷⁷ *Ibid.*, at 290.

¹⁷⁸ *Ibid.*, at 292 et seq.

Deliberative democracy at the Security Council thus amounts to allowing others to follow the deliberations and even – in what is apparently a democratic orgy – to comment on it, occasionally resulting in superficial alterations in the wording of side issues, which can be used to pacify their constituents to the point where it is politically feasible to “succumb to pressure” from other States.

“Even for those who did not participate directly, the public nature of the deliberations meant that the ‘audience effect’ enhanced legitimacy.”¹⁷⁹

It is interesting that when we talk about Athens we refer disparagingly to such methods as “oratory”, but when we wish to become apologists for the severe democratic shortcomings of our own society, it is elevated to the “audience effect” which serves only to legitimate a decision that has already been taken. That was, after all, the intent of the exercise. In the example of Res. 1540, the P-5 parted with precisely the level of control that was absolutely necessary to achieve their goals – and that level was not very high. Deliberative democracy without other substantial changes is thus false democracy. It merely serves as yet another screen for the continued exercise of unequal political power.

5.3.1.2.5. Suggestions of the High-Level Panel on Threats, Challenges and Change at the UN

The High-Level Panel on Threats, Challenges and Change at the UN has suggested several changes to increase democracy and accountability. The Panel’s own justification for reforming the Security Council is, however, quintessentially Republican – “The financial and military contributions to the United Nations of some of the five permanent members are modest compared to their special status”,¹⁸⁰ thus there should be an increase in involvement in decision-making of those who contribute most to the United Nations financially, militarily and diplomatically – specifically in terms of contributions to United Nations assessed budgets, participation in mandated peace operations, contributions to voluntary activities of the United Nations in the areas of security and development, and diplomatic activities in support of United Nations objectives and mandates. Among developed countries, achieving or making substantial progress towards the internationally agreed level of 0.7 per cent of GNP for foreign development should be considered an important criterion of contribution.¹⁸¹ Level of participation is thus, as in Rome, directly linked to certain types of contribution to society, in particular, contributions of a fiscal variety.

¹⁷⁹ *Ibid.*, at 293.

¹⁸⁰ Transmittal Letter dated 1 December 2004 from the Chair of the High-Level Panel on Threats, Challenges and Change, addressed to the Secretary-General, Doc. A/59/565, www.un.org/secureworld/report.pdf, accessed Oct. 26 2009, para. 246.

¹⁸¹ *Ibid.* para. 249.

Based on this reasoning, the panel proposed two main solutions for Security Council reform. Model A advocated six new permanent seats without veto and thirteen new 2-year term non-permanent seats, while Model B advocated the creation of 8 new four-year term, non-renewable seats and 1 new 2-year-term, non-renewable seat. As elaborated above, this is not a democratic solution.¹⁸²

Furthermore, according to the Panel, the General Assembly should

elect Security Council members by giving preference for permanent or longer-term seats to those States that are among the top three contributors in their relevant regional area to the regular budget, or the top three voluntary contributors from their regional area, or the top three contributors from their regional area to the United Nations peace-keeping missions¹⁸³

This amounts to a slight devolution in favour of regional powers, a form of power-sharing reminiscent of the Roman Republic, based on fiscal contributions. It thus amounts to allowing participatory rights to be bought, and thus does not represent any particular change in the basic system.

While the High-Level Panel could not see how to get rid of the veto, it declared it increasingly unsuitable in a “democratic age” and therefore “urges that its use be limited to matters where vital interests are genuinely at stake [...and to...] refrain from the use of the veto in cases of genocide and large-scale human rights abuses”. The High-Level Panel expressed unqualified opposition to any expansion of veto powers as well as any move to confer them upon additional states,¹⁸⁴ which is certainly a welcome brake on increased anti-democratic activity.

The High-Level Panel also advocated introducing a system of “indicative voting” whereby states would publicly announce their positions prior to the vote in the SC.¹⁸⁵ In theory this might lead to some increased discomfort for those whose voting record does not easily align with their rhetoric, although in the hands of a good speaker it can probably be made to. The Panel also proposed greater engagement of NGOs with the General Assembly¹⁸⁶ and with the Security Council.¹⁸⁷ However, there are serious democratic issues in using NGOs as a substitute for popular participation which will be discussed in greater detail below.¹⁸⁸

¹⁸² *Supra* pp. 216 et seq.

¹⁸³ Transmittal Letter of the High-Level Panel, note 1054, paras. 252 et seq.

¹⁸⁴ *Ibid.*, para. 256.

¹⁸⁵ *Ibid.*, para. 257.

¹⁸⁶ *Ibid.*, para. 243.

¹⁸⁷ *Ibid.*, para. 260.

¹⁸⁸ *Infra* pp. 329 et seq.

Once again, what initially appears to be a recipe for sweeping reform turns out to possess little democratic content. While some suggestions such as halting an expansion of the veto and indicative voting are democratically-speaking vaguely positive, the Panel Report unsurprisingly amounts to “a Roman solution for a Roman problem”.

5.3.1.2.6. Judicial Activism

According to Kelsen, one of the central causes of failure of the League of Nations was the fact that the Council of the League took the predominant position within the organisation instead of the PCIJ.¹⁸⁹

The ICJ could be effective in hastening a more democratic international order by exercising judicial review over Security Council Resolutions (thus decreasing the power of the P-5). This is a thorny legal issue without direct precedent, but the ICJ has occasionally hinted at its willingness to do so,¹⁹⁰ for example in *Lockerbie*¹⁹¹ and *Genocide Convention*.¹⁹² The ICJ also indirectly decided on the formal legality of Security Council resolutions in *Namibia* (in which it recognised that the practice of not treating abstentions as vetoes was lawful, thereby indirectly asserting that all resolutions passed via this method were lawful, although it simultaneously clearly stated that it did not view itself as competent to review the legality of SC resolutions).¹⁹³ In addition, the ICJ decided on the legality of actions of UN political organs in another Advisory Opinion, the *Certain Expenses* case,¹⁹⁴ in which the General Assembly asked whether the expenditures it had authorised relating to peacekeeping missions in the Congo and Middle East fell within the meaning of “expenses of the Organization” in Art. 17 para. 2 of the UN Charter, and were therefore valid. The argument against such an interpretation was that the Security Council and not the General Assembly enjoyed competency for peacekeeping and all related expenditure and that therefore finances for such missions should be raised through agreements negotiated in accordance with Art. 43 of the Charter and not levied as dues through the General Assembly.¹⁹⁵ The ICJ noted *inter alia* that while the Security Council had a “primary” responsibility for peace and security according to Art. 24 of the Charter, this was not an exclusive one and that the General

¹⁸⁹ Hans Kelsen, *Peace Through Law* (University of North Carolina Press, 1944) at 49.

¹⁹⁰ Johnstone, note 115, at 300.

¹⁹¹ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Preliminary Objections*, 1998 ICJ Rep. 115 (Feb. 27).

¹⁹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. And Herz. v. Serb. And Mont.)*, Preliminary Objections, 1996 ICJ Rep. 595 (July 11).

¹⁹³ *Legal Consequences of States for the Continued Presence of South Africa in Namibia, Advisory Opinion*, ICJ Rep. 1971, 16, 22 (21 June).

¹⁹⁴ *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, ICJ Rep. 1962, 151 (20 July).

¹⁹⁵ *Certain Expenses*, ICJ Rep. 1962, 151 at 161.

Assembly also had certain related competencies under Art. 14 of the Charter.¹⁹⁶ By a vote of 9-5, the Court decided that the expense of ONUC and the Emergency Force in the Middle East were expenses within the meaning of Art. 17, para. 2, thus essentially deciding on the validity of GA resolutions as well as the competencies of the SC. This created an indirect precedent, especially in consideration of the fact that, although they were merely advisory, these opinions were accepted by the States and organs concerned, who altered their behaviour accordingly.

While it has never directly ruled on an SC resolution, the ICJ has seemed more open to the possibility of doing so in more recent decisions. Significantly, it did not base its findings in *Lockerbie* on the point that granting relief to Libya would require it to decide over the legality of Res. 731 and 748, despite the fact that this would seem to have been the most straightforward solution if one accepted the statement the Court made regarding its competencies in *Namibia*. Instead it based its findings on the fact that Libya had not sufficiently established a cause of *mala fides* or *ultra vires* actions of the Security Council.¹⁹⁷ This more than implies that in the opinion of the Court it would have been theoretically possible for Libya to prove *ultra vires* actions of the Security Council and that whether or not the Security Council had committed *ultra vires* actions was highly relevant to the Court's decision, which can only mean that it was theoretically considering judicially reviewing such actions.

Furthermore, several judges indicated that a Security Council resolution could, under certain circumstances, be viewed as invalid by the Court, thus implying a competence of the Court to review these resolutions.¹⁹⁸ Judge Oda stated that a decision of the Security Council properly taken in the exercise of its competence cannot be summarily reopened, giving rise to the question of whether decisions taken improperly or outside of the Council's competence can be.¹⁹⁹ Judge Lachs stated that the ICJ is the guardian of legality both within and without the United Nations.²⁰⁰ Further, he explicitly stated that the fact that the Court had not decided on the legality of Resolution 748 should not be seen as an abdication of the Court's powers, as there was no need to analyse the Resolution more closely in *Lockerbie*.²⁰¹ Judge

¹⁹⁶ *Certain Expenses*, ICJ Rep. 1962, 151 at 163.

¹⁹⁷ Thomas Franck, "The Powers of Appreciation: Who is the Ultimate Guardian of UN Legality?" (1992) 86 *AJIL*, 519 at 521; ICJ *Provisional Measures Regarding the Aerial Incident at Lockerbie (Libya v. United States)* (Order of April 14 1992) 31 I.L.M. (1992) (Sep. Op. of Judge Shahabuddeen, at 679).

¹⁹⁸ ICJ *Provisional Measures Regarding the Aerial Incident at Lockerbie (Libya v. United States)* (Order of April 14 1992) 31 I.L.M. (1992) (Declaration of Acting President Oda, at 673-674, Sep. Op. of Judge Lachs, at 677-678, Sep. Op. of Judge Shahabuddeen, at 678-679).

¹⁹⁹ ICJ *Provisional Measures Regarding the Aerial Incident at Lockerbie (Libya v. United States)* (Order of April 14 1992) 31 I.L.M. (1992) (Declaration of Acting President Oda, pp. 673-674)

²⁰⁰ *Lockerbie, Provisional Measures, 1992*, Judge Lachs, at 677.

²⁰¹ *Lockerbie, Provisional Measures, 1992*, Judge Lachs, at 678, similar Judge Shahabuddeen, at 679.

Shahabuddeen described a situation in which there are no limits on the Council's powers of appreciation as "curious".²⁰²

The jurisprudence of the ICJ thus far would seem to slightly lean in favour of judicial review. The ICJ has decided upon its jurisdiction in an expansive manner before in *Nuclear Tests*,²⁰³ *Nicaragua*,²⁰⁴ and *Phosphate*,²⁰⁵ and clearly what it has done before, it can do again.

This solution is ultimately analogous to the methods used by Solon to create the preconditions for Athenian democracy essentially by fiat. Elected judges are of course no more democratic than SC representatives, but, as our research has shown, they not necessarily less democratic. While this solution owes more than a little to the old rule that "the enemy of my enemy is my friend", it might still be the best possible interim solution, as it seems the only one that combines both a (tentative) will to pursue and the ability to have a serious impact on the power of the P-5 and SC without having to directly attack their position.

Reservations to the competence of international courts on the basis of "domestic jurisdiction" should be eroded in the interests of democratic equality. As Kelsen pointed out long ago, disputes concerning matters that are "solely within the domestic jurisdiction of a State" could easily be subject to the international court; if a matter is indeed solely within the domestic jurisdiction of a State, the Court will simply rule that no part of international law is applicable.²⁰⁶

This solution runs into the obstacle that judgements of the ICJ are enforced by the Security Council on non-complying parties,²⁰⁷ as well as the issue that when the P-5 cannot obtain a resolution they simply act unilaterally (viz. Kosovo and Iraq). The first obstacle is possibly the less serious – if the ICJ declares a resolution invalid it is probable that the majority of UN members will cease to obey and support it, so that the need for enforcement will not be as great, however, the second obstacle necessitates a concerted effort on the part of the international community to reject substitute methods of legality, such as "pre-emptive self-defence" and thus to force measures through the Security Council to the greatest extent possible.

5.3.1.2.7. Conclusions

The Security Council veto poses a severe obstacle to any international democratic reform. Increasing the number of States which enjoy veto powers or a privileged position as

²⁰² *Lockerbie, Provisional Measures, 1992*, Judge Shahabuddeen, at 679.

²⁰³ *Nuclear Tests (Australia v France)* ICJ Rep. 1974, 253 at 457 (20. December).

²⁰⁴ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v U.S.A.), Jurisdiction of the Court and Admissibility of the Application*, ICJ Rep. 1984, 392 (26. November).

²⁰⁵ *Certain Phosphate Lands in Nauru, Preliminary Objections*, ICJ Rep. 1992, 240 (26 June).

²⁰⁶ Kelsen, note 189, at 32 et seq.

²⁰⁷ UN Charter, Arts. 94 and 33 (2).

permanent Security Council members amounts only to a more expansive oligarchy as it does not achieve the equality of participation characteristic of a democracy. “Deliberative democracy” exercised in a system of entrenched privilege amounts to little more than candy-coating, and increasing the effectiveness of General Assembly decision-making does not go to the heart of the equality issue. The only helpful suggestion of the High-Level Panel – that the veto not be expanded and that it not be used wantonly – aims more at containing the situation than markedly improving it.

Utilising the ten non-permanent seats to block the P-5 could be promising as it offers a means by which to erode the privilege of the P-5, albeit in relatively slight ways. Substantial demilitarisation via Art. 26 of the Charter or some other route would be an extremely effective, but relatively long-term, solution. Judicial review of Security Council resolutions in itself is no more democratic than the *status quo*, but it has value for its ability to erode the power of the P-5, creating a situation of greater equality, provided that obstacles of enforcement and tendencies to unilateral action can be overcome. A combination of the latter three solutions would thus seem to be the best possible way to inch towards democracy.

5.3.2. The World Bank Group and International Monetary Fund

5.3.2.1. An Organisational Overview

Representation at all World Bank institutions and the IMF is similar. Both the IBRD and IMF each have a Board of Governors and an Executive Board.²⁰⁸ Officially all power resides in the Board of Governors and certain functions remain reserved to them, but the vast majority of the institutions’ work is carried out by the Executive Board.

The Executive Directors are selected every two years and are responsible for the general operations of the Bank. There are twenty-four Executives Directors. One is appointed by each of the five countries with the largest number of shares. In addition at the IMF, according to Art. XII, section 3(c) the two members, the holdings of whose currencies by the Fund in the General Resources Account have been, on the average of the preceding two years, reduced below their quotas by the largest absolute amounts in terms of the special drawing right, may also appoint an Executive Director (provided they haven’t already under the general rule). This essentially means that a country can appoint an Executive Director if its currency is in particularly high demand. Over the years, Canada, Saudi Arabia and India have all managed to occasionally take advantage of this provision and appoint a director.²⁰⁹

²⁰⁸ Art. V, Sec. 1, IBRD Articles; Art. XII IMF Articles.

²⁰⁹ James Vreeland, *The International Monetary Fund: Politics of Conditional Lending*, (Routledge, 2007) at 15.

The remaining Directors are elected by the Governors (excluding the Governors of the five largest share-holding countries) in a manner similar to STV. Each Governor can only vote for one Executive Director. All his voting power accrues to this candidate. Each Executive Director must receive a predetermined percentage of total voting power to be elected.²¹⁰ If nineteen EDs cannot be elected on the first ballot, there is another ballot to fill the remaining positions. On this ballot all of the elected EDs, plus the lowest-polling candidate from the first ballot are eliminated. Only Governors who in the first ballot voted for a candidate who did not get elected on that ballot, and governors whose votes are deemed to have raised the votes cast for an elected Executive Director above the required percentage of eligible voting power, are allowed to vote on the second ballot. Which votes raised the total votes for a candidate above the required percentage is determined in the following manner: First the Governor who cast the largest number of votes for the winning candidate is excluded from voting again, then the Governor of the country which cast the second largest number of votes for that candidate, etc., until the required percentage is reached. Everyone else who voted "above" that mark is allowed to vote on the following ballot. As many ballots are cast as are necessary to fill the positions.²¹¹

The voting for Executive Directors tends to occur along regional and linguistic lines, the usual pattern being that one or two States with considerable voting power and several less powerful States of the same region or linguistic group pool their votes for an Executive Director. For example, in the current grouping at the IBRD, Director Familiar from Mexico represents Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Spain and Venezuela, with Spain being the largest shareholding country of the group with 28 247 votes and Costa Rica and El Salvador being the smallest with 483 and 391 shares respectively. Director Watson from Canada represents Canada with 45 045 votes, as well as Ireland (5 521 votes) and eleven largely English-speaking countries of Central America and the Caribbean, the largest shareholder of which is Jamaica with 2 828 votes.

One question that needs to be raised is to which extent the elaborate voting procedure for the Executive Directors leads to an egalitarian voting process and proportional representation. This must be answered in the negative. On one end of the scale Director Watson (Canada, Ireland, Caribbean) represents just 0.65%, Director Aass (Scandinavia, Baltic States) only 0.49%, and Director Al Mofahdi (Saudi Arabia) merely 0.43% of all persons whose governments are represented at the IBRD. On the other end of the scale, Director Kumar (Indian Subcontinent) represents 20.1% of members' total population, Director Zou (China) represents 20.5% and Ketsela (English-speaking Africa) and Deraman

²¹⁰ For a discussion of voting power, see *infra* pp. 227 et seq.

²¹¹ Schedule B, IBRD Articles of Agreement; Schedule E IMF Articles of Agreement.

(Southeast Asia) each represent 7.69%. These inequalities are not mitigated, but rather exacerbated by the fact that the Directors are not endowed with equal voting power.

The appointed Executive Directors cast the same number of votes as the member which appointed them has. The elected Executive Directors cast the number of votes that counted towards their election. The Executive Directors cannot split their vote. All votes must be placed as a unit on the same option. Therefore, representing 0.65% of the total population of all members, Director Watson exercises 3.85% of total voting power while Director Kumar exercises only 3.4% and Director Zou 2.79% of total voting power, a percentage of total voting power equal to that of Director Al Mofahdi of Saudi Arabia (representing 0.43% of the population). Only in a few cases is the percentage of voting power exercised roughly equivalent to the percentage of population represented (Director Hasan, representing a large percentage of Arab-speaking nations, exercises 2.91% of total voting power and represents 2.74% of the population; Director Krasov of the Russian Federation represents 2.79% of voting power and 2.18% of the population). To compound the matter, the five largest shareholding nations, who have the privileged position of being able to appoint a Director, between them represent just 9.76% of the population of IBRD members, but exercise 37.39% of total voting power.²¹² The situation is no different at the IMF, where Director Kiekens of Belgium exercises 5.13% of voting power on behalf of eight European nations together with Kazakhstan and Turkey, while Director Itam represents 20 African nations, including Nigeria and South Africa with 3.01% of total voting power. Director Rutayiswe represents a further 23 African nations with 1.34% of total voting power.²¹³

The EDs can only pass decisions if 50% plus 1 of them are present and they represent ½ the total voting power of the Bank.²¹⁴ As this rule virtually precludes a group of States that does not include at least one of the major shareholders from calling a meeting, it grants the major powers even larger control of the decision-making process from beginning to end.

5.3.2.1.1 Unequal Vote Distribution

As demonstrated above, each Executive Director exercises a different level of voting power, and this system is entrenched in both the IBRD and IMF.

The capital stock of the IBRD is divided into shares which are available “for subscription” by members of the Bank. Each member is obligated to buy a certain minimum number of shares. The minimum for original members is laid out in Schedule A, which

²¹² Figures regarding voting power and Directors’ identity taken from www.worldbank.org and figures regarding population taken from <https://www.cia.gov/library/publications/the-world-factbook/index.html>, 26.02.2009.

²¹³ <http://www.imf.org/external/np/sec/memdir/eds.htm>, 02.04.2010.

²¹⁴ Art. V, Sec. 4 (f), IBRD Articles of Agreement, Art. XII, Sec. 3 (h), IMF Articles of Agreement.

stipulates a different “minimum” for each State and which also represents more or less the maximum amount of shares a State can purchase. The rules under which a State can purchase additional shares to its minimum/maximum allotment are outlined in Sec.3b. Each member receives 250 votes, plus 1 additional vote for each share of stock.

At the IMF each member is assigned a quota expressed in special drawing rights. The subscription that each member has to pay is equal to its quota. The quota is based on a nation’s GDP, volume of international trade and the size of its official reserves.²¹⁵ Each member is allocated 250 votes plus 1 additional vote for each part of its quota equivalent to 100 000 special drawing rights. The voting power of a member is adjusted on the day of the vote according to its net sales and purchases at the IMF. One vote is added for every 400 000 in SDRs of net sales of a member’s currency from the general Resources of the Fund and one vote is deducted for every 400 000 in SDR purchases. These are, however, only taken into account to the extent that a member’s quota is not exceeded.²¹⁶

The basic votes of members (*ie* the 250 base votes allocated to each member) have not increased during the IFI’s lifespan, while quota-based votes have increased by 37 times, diminishing the influence of developing countries at the IMF.²¹⁷ As in the IBRD, a State cannot buy power in the IMF by unilaterally increasing its subscription – voting power has been pre-determined. At most it can request the Board of Governors to adjust its quota. This permits both institutions to be dominated by a handful of wealthy nations – the “first centuries” of the global citizenry, as it were.

According to the IBRD, the USA currently holds 16.41% of voting power, Japan holds 7.87%, Germany holds 4.49% and France and the UK each hold 4.31%.²¹⁸ The EU has 56 percent greater voting power than the United States in the World Bank and eight Executive Directors on the World Bank Executive Board.²¹⁹ At the IMF, the USA holds 16.74% of voting power, Japan holds 6.01%, Germany 5.87% and France and the UK 4.85% each.²²⁰ While the USA has by far the largest single share,

[t]he 15-member European Union (EU), with a smaller GDP than the United States has 74 percent greater voting power and is currently represented by nine Executive Directors in the IMF Executive Board... The excessive weight of the EU group of countries is partly attributable to the

²¹⁵ Vreeland, note 209, at 14.

²¹⁶ Art. XII, Sec. 5 (b) IMF Articles of Agreement.

²¹⁷ Ariel Buira in “The IMF and the World Bank at Sixty: An Unfulfilled Potential?” in Ariel Buira, ed, *The IMF and World Bank at Sixty* (Anthem Press, 2005) 5 at 6 et seq.

²¹⁸ <http://www.worldbank.org>, 06.05.2007, re-confirmed on 26.10.2009.

²¹⁹ Buira, note 217, at 25.

²²⁰ <http://www.imf.org/external/np/sec/memdir/eds.htm>, 02.04.2010.

treatment of intra-EU trade in goods and services in the formula used for quota calculations²²¹

Since most trade within the EU now occurs under a single currency within the common market it cannot cause balance of payment problems and should therefore be disregarded in the quota calculations.²²²

Each and every vote in either institution is thus skewed in favour of the "first class" of States, a source of frequent complaints by sovereign developing nations during the *travaux preparatoires* of their respective Articles, particularly Mexico.²²³

To compound this highly inaccurate representation, many votes at the IBRD and IMF occur via qualified voting. For example, the following IMF measures require an 85% majority of voting power in favour: a variety of gold transactions,²²⁴ any change to subscription quotas,²²⁵ any amendment to the IMF Articles, a decision to provide general non-obligatory exchange arrangements, a decision to force a State to pay back its loans to the IMF,²²⁶ a change of the principle of valuation or a decision to fundamentally change the application of the principle in effect,²²⁷ to permit non-members, members that are non-participants in the Special Drawing Rights Department, institutions that perform functions of a central bank and other official entities to become holders of SDRs.²²⁸ A 70% majority is required to "publish a report to a member regarding its monetary or economic conditions and development which directly tend to produce a serious disequilibrium in the international balance of payments of members",²²⁹ determine the method of valuation of the SDR,²³⁰ decide upon the administrative rules and regulations of the Special Disbursement Account, decide to liquidate the Special Disbursement Account,²³¹ set various service charges,²³² set the rate of remuneration for members who have more money deposited with the IMF than they are

²²¹ Buira, note 217, at 25.

²²² *Ibid.*, at 26.

²²³ *Proceedings and Documents of the United Nations Monetary and Financial Conference, Vol. 1*, US Government Printing Office, Washington, 1948, *cf.* 95 et seq, 128 et seq; it should be borne in mind that a sizeable portion of modern developing nations were at that point colonies with no independent representation.

²²⁴ Art. VIII, Sec. 7, IMF Articles of Agreement.

²²⁵ Art. III, IMF Articles of Agreement.

²²⁶ Art. IV, Sec. 7, IMF Articles of Agreement; depending on circumstances, this sometimes only requires a 70% majority.

²²⁷ Art. XV, IMF Articles of Agreement.

²²⁸ Art. XVII, Sec. 3, IMF Articles of Agreement.

²²⁹ Art. XII, Sec. 8, IMF Articles of Agreement.

²³⁰ Art. XV, IMF Articles of Agreement.

²³¹ Art. IV, Sec. 4, IMF Articles of Agreement.

²³² Art. IV, Sec. 8, IMF Articles of Agreement.

obligated to,²³³ set the IMF's interest rate,²³⁴ and decide to partially distribute the general resources.²³⁵

Thus the 30% of shares that the first-class States possess, not only confer an enormous advantage in all majority voting by virtue of overrepresentation, but in a great many cases also confers them a collective veto, while in cases that necessitate an 85% majority, the USA alone can exercise a veto. They are also able to push through packages that require a qualified majority more easily by forming subgroups (known as k-groups).²³⁶

Often overlooked in discussions of voting power at the IFIs, however, is the fact that decisions are rarely voted upon at all. Like the WTO organs, the Executive Boards prefer to take decisions by "consensus".²³⁷ This does not mean that the advantages of voting power are somehow negated. Voting power plays a huge role in negotiating consensus as it determines the playing field on which such negotiations are held. For example, the IMF established a Contingent Credit Line in 1999 which initially contained several flaws. The majority of Executive Directors were in favour of retaining and reforming the CCL, but they did not constitute the 85% qualified majority that would have been necessary to keep it in existence. "So on 30 November 2003 the IMF terminated the CCL. The official statement said that many emerging market countries had reduced their vulnerability to speculative attacks by building up their reserves and adopting flexible exchange rates and other reforms".²³⁸

5.3.2.1.2. Choice of Representatives

The choice of national representation at the IFIs is more restrictive than at other institutions. According to Art. III, Sec. 2 of the IBRD Articles of Agreement, each member may only deal with the Bank through its treasury, central bank, stabilisation fund or other similar fiscal agency, a rule repeated in the IMF's Articles.²³⁹ This means, for example, that the US IMF Governor is the Secretary of the Treasury and the Alternate is the Chairman of the Federal Reserve Board.²⁴⁰ According to Joseph Stiglitz, former chief economist at the World Bank, the concentration of control in these ministries has led to other nominal "representatives" being by-passed in decision-making. According to him:

²³³ Art. IV, Sec. 9, IMF Articles of Agreement.

²³⁴ Art. XX, IMF Articles of Agreement.

²³⁵ Art. XII, Sec. 6, IMF Articles of Agreement.

²³⁶ Strom Thacker, "The High Politics of IMF Lending" in (1999) *52(1) World Politics*, 38 at 42.

²³⁷ Vreeland, note 209, at 17.

²³⁸ Buira, note 217, at 19.

²³⁹ Art. V, Sec.1, IMF Articles of Agreement.

²⁴⁰ Vreeland, note 209, at 15.

In 2001 Congress passed and the President signed a law requiring the United States to oppose proposals for the international financial institutions to charge fees for elementary school. Yet the US executive director simply ignored the law [voting in favour of elementary school fees]... Only because of a leak was the matter discovered²⁴¹

The already minimally-existent representative function of national legislatures is thus further eroded by keeping representation at the IFIs constantly insulated in the hands of a few key ministries, in a manner most contrary to the rapid rotation of office on the basis of sortition used in Athens. However, even these rather insulated “representatives” are not all-powerful, particularly at the IMF.

5.3.2.1.3. The Role of IMF Staff

While decision-making at the UN and WTO is often delegated to less visible subcommittees, at the IFIs, particularly the IMF, it is often delegated to staff, who have accrued wide decision-making powers, particularly in regards to conditionality.

The Executive Board meets about three times a week to discuss and approve the Fund’s programmes and Board members are normally provided with staff reports four weeks in advance of such meetings, “which include detailed descriptions of the country’s situation and the loan’s performance criteria.” However, these discussions are formalities as most significant aspects including conditionality are negotiated “on the ground” between staff and borrowing governments,²⁴² due to a 1948 decision that having Executive Directors head negotiations with member governments was too unwieldy. A representative from the office of the Executive Director concerned is normally present during negotiations with the borrower, but actual decision-making involvement in lending arrangements tends to come only at the ‘endpoint’.²⁴³ While the Executive Board has threatened to veto future programmes, it rarely fails to approve programmes already negotiated by staff.²⁴⁴ Furthermore, this approval tends to take the form of a decision upon the entire package of loan terms and conditions presented to them, without the Executive Directors making any amendments to them.²⁴⁵ The participation of even the Executive Board in this process is self-limited to a Roman “yes or no”, so that even their minimal and skewed representative qualities are further negated.

²⁴¹ Joseph Stiglitz, *Globalization and Its Discontents*, (Penguin Books, 2002) at 51 et seq.

²⁴² Sarah Babb and Ariel Buira, “Mission Creep, Mission Push and Discretion: The Case of IMF Conditionality” in Buira ed, *The IMF and the World Bank at Sixty*, 59 at 69.

²⁴³ With, so it is said, the exception of the USA’s Executive Director who continues to be consulted in advance.

²⁴⁴ Babb and Buira, note 242, at 66 et seq.

²⁴⁵ Thacker, note 236, at 50.

Furthermore, many conditions, particularly within the last thirty years, are not approved by the Executive Directors at all, as these are agreed upon in the form of so-called “prior actions”, *ie* actions that a State must undertake prior to having a loan approved. Because these actions take the form of preconditions, they are often not included in the Letters of Intent put forward for the Board’s approval (although they are known to the Executive Director representing the country). Not only do they lack Board approval, because prior actions do not form part of the “the precise and formal rules laid out as performance criteria in the Letters of Intent” the decision as to whether they have been fulfilled lies largely within “the discretion of management and staff.”²⁴⁶ Many conditions are thus carried through without even the pretence of representation. “[T]he performance criteria formally approved by the Executive Board are only the tip of the iceberg”. It is not uncommon for “a complex set of prior actions, structural benchmarks, reviews, and waivers” to exist “the full significance of which may be known only to a few Executive Directors, management and staff”.²⁴⁷

The same staff discretion is exercised in regards to waiving the inevitable failures to absolutely comply with conditions and programme reviews, because although the Executive Board formally makes such decisions, it almost invariably blindly follows the recommendation of staff. “Under these circumstances it is in the borrowing government’s best interests (and also in the interest of the Executive Director representing the borrowing government) to cultivate the goodwill of the IMF staff members with which it is negotiating”. This is done by complying with structural benchmarks and with “policy understandings”, “(eg an informal acknowledgement that it would be a good idea to privatize a state-owned firm).”²⁴⁸ The elected Executive Directors are thus in some instances kow-towing to IMF staff, whom they know they cannot afford to antagonise.²⁴⁹

5.3.2.2. Conclusions

Representation at the IFIs is skewed through many layers: the pre-existing skewing of national elections, which means that even citizens of “first-class” States are inaccurately represented, added to the narrow spectrum of possible IFI representatives (who must come

²⁴⁶ Daves Kapur, “Conditionality and Its Alternatives” in Buira ed, *The IMF and the World Bank at Sixty*, 31 at 35 et seq.; to give some examples of the scope of prior actions: “IMF supported arrangements averaged less than half a prior action in 1987-90, but in 1997-2000, they averaged more than five. The use of prior actions has been particularly evident in credits for economies undergoing post-socialist transitions: for example, the stand-by with Ukraine in 1997 was tied to a startling 45 prior actions”, Babb and Buira, note 242, at 67; while the estimates for Indonesia’s 1997 programme range from between 18 and 81 conditionalities, Kapur, at 37.

²⁴⁷ Babb and Buira, note 242, at 74.

²⁴⁸ *Ibid.*, at 69.

²⁴⁹ *Ibid.* at 76.

from a national financial institution), further added to the weighted voting bias in favour of “first-class” States which is so extreme as to amount to a virtual annihilation of any representation on behalf of any other entity.

On top of this comes the added problem that even the “representatives” produced by the above methods are not making a large proportion of substantial decisions, but merely acting as a rubber stamp to officials who scarcely have a nominal personal accountability to Member States, let alone their citizens. As a result of what can only be termed an organisational disaster, it is not surprising that any country that can afford to disengages from the IFIs to the greatest extent possible.²⁵⁰

5.3.2.3. Suggested Solutions

5.3.2.3.1. Non-Voting Seats for Developing Nations

The General Assembly has suggested that the participation of developing countries in the IFIs should be “enhanced”²⁵¹ and this is the line most reform suggestions take, *eg* giving Africa additional non-voting seats on the Executive Board.²⁵² However, this suggestion amounts to little more than the deliberative model warmed over and is unlikely to lead to a great deal of democratic change by itself.

5.3.2.3.2. Transfer Decision-Making Power Back to the Executive Boards

One could contemplate forcing a transfer of power back to the Executive Board, insisting that it truly make all decisions, a solution which undoubtedly would find its champions among the proponents of “representative democracy”. However, while a vast improvement on the current situation, this ultimately only amounts to a *Rechtsstaat* solution in which a chosen few exercise all power.

5.3.2.3.3. Limit Conditionality

In conjunction with other reforms, a limit of ten to twenty conditions per loan should be set to curtail excessive top-down regulation on the part of either staff or Executive Directors, which would preclude any possibility of national democracy. This would seem

²⁵⁰ Buira, note 217, at 5; Stiglitz, note 241, at 48.

²⁵¹ GA Res. 60/1.

²⁵² Stiglitz, note 241, at 229.

quite reasonable in economic terms – if twenty conditions are not able to virtually guarantee loan repayment, the wisdom of making the loan seems highly questionable.

5.3.2.3.4. Axe Subscriptions

Far from offering “pay for participation”, the IFIs demand pay in exchange for the right to participate. Because the scale of contributions is used quite successfully as a justification for unequal voting rights and because they no longer represent the bulk of loan funding,²⁵³ the obvious answer is simply to do away with the pretence and stop country subscriptions to the IMF and IBRD. As both institutions tend to act as loan facilitators between third States/private banks and borrowers, this should in future be their explicit task. Instead of scaled subscriptions, each nation and lending institute which wishes to be involved can pay a comparatively small flat fee towards the running of the IFIs, provided no other convenient source of revenue can be found.²⁵⁴ Because scaled subscriptions will be done away with, voting can proceed on a more egalitarian basis, *ie* one nation, one vote. The assembled nations can decide on whether a loan should be granted and what its conditions should be by majority vote. Individual nations and banks who wish to lend in order to accrue interest can then put up all or part of the funds for the loan. While not precisely democracy, this would be a massive improvement in representation at the IFIs, which would now resemble the workings of the General Assembly. If we combine this reform with the reform of the UN and WTO, we altogether begin to see a sizeable shift in the direction of democracy.

5.3.2.3.5. Conclusions Regarding Representative Solutions at the IFIs

Offering nations non-voting seats is completely ineffective in a democratic sense as it does not confer decision-making power, and transferring power away from officials and back to the Executive Boards would achieve a Republic of inequality rather than a democracy. Limiting conditionality is necessary, but more relevant to permitting national direct democracy to flourish than to the reform of the international system.

The only way to democratically reform the IFIs is to penetrate to the core of their inequality – differentiated subscriptions. This is possible, because as elaborated below, only a small percentage of subscriptions are paid in and loan funding is primarily acquired from other sources, while the guarantee functions that subscriptions are supposed to have are barely functioning. National subscriptions can thus be done away with and a one-nation, one-vote arrangement ushered in.

²⁵³ *Infra* pp. 265 et seq.

²⁵⁴ Such as the Tobin Tax, *infra* pp. 306.

5.4. Conclusions Regarding Representation

In conclusion, it can safely be said that the existence of representation, particularly representation on an international level, is a myth. Statistical skewing, control of positions by certain ministries and those of certain social backgrounds, combined with delegating decision-making to subcommittees and staff, closed-door pre-negotiations and “consensus-building”, leave a situation which makes a mockery even of the idea of “representative democracy”.

Recognising the fact that every decision-making filter leads to a significant statistical skewing of “representatives”, but also that direct decision-making on a global level would be unfeasible due to the extreme heterogeneity of the population, the best possible solution would be to implement direct democracy on a national level, thus annihilating one filter of skewing while keeping the level of heterogeneity within bounds which measures such as cumulative voting, point-by-point voting and enabled participation can effectively deal with. Simultaneously, measures to reduce the level of undemocratic practices at international institutions should be implemented, in particular, weighting voting at the UN GA according to population and substantive democratic criteria, putting a stop to delegating decision-making at both the WTO and UN GA to subcommittees, forcing votes at the WTO instead of permitting closed-door “consensus voting”, and removing the subscription system of the IFIs, a near-obsolete mechanism which is used to justify unequal voting power, replacing it with a one-nation, one-vote decision-making forum, acting in a loan-facilitating capacity. Furthermore, the entrenched power of the Security Council should be eroded in the longer term via disarmament, either through Art. 26 of the Charter or some other mechanism, as well as judicial review of its resolutions through the ICJ.

Chapter 6. Financial Influence

Drastically uneven levels of finance can accord certain citizens or other legal entities a much higher level of influence than others. Here we must clarify whether the view represented in this thesis is that democracy requires there to be no inequality of influence between citizens at all, merely whether inequality stemming from certain sources, *ie* wealth, should be prohibited,¹ or whether unequal influence should instead be tolerated within certain boundaries.

The latter is the case. In the ancient world all sources of inequality were viewed in much the same light – to procure a decision in one’s favour on the basis of personal charisma was not necessarily much better than bribery – Pericles’ high level of influence was enough to earn Athens the title of non-democracy from Thucydides.

However, it would seem neither possible nor desirable to eradicate a situation in which certain citizens, by whichever qualities, attain a position of greater influence than others. In Athens, certain citizens clearly played a greater role in influencing the *demoi* than others and sometimes wealth facilitated this. However, this occurred indirectly, in that wealth facilitated education and leisure. It was virtually impossible to buy decisions in one’s favour via the direct or indirect deployment of wealth. In addition, no position of influence in Athens, based on wealth was stable, formalised or institutionalised.

Inequality of influence, based upon factors such as wealth, is thus only harmful to the extent that these factors exercise a direct, decisive or institutionalised influence on the decision-making process. This is therefore the question we must investigate here.

We are particularly interested in the factor of wealth, because it played an immense role in the Republican government of Rome. Because modern Western societies have adopted a Republican form of government, this is the factor most likely to have achieved a position of institutional influence on decision-making. In addition, three out of four of the major international institutions concern the regulation of finance and trade, so that the regulation of wealth already forms an integral part of the international system.

6.1. Wealth and National Democracy

6.1.1. The Role of Wealth in National Elections

Far from negating the privileges of wealth, elections serve – as they did in the Roman Republic – to reinforce them. The exigencies of modern life exacerbate rather than reduce this

¹ *cf.* Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, (Harvard University Press, 2000) at 194, who, of course, construes the issue as a question of “fairness”.

tendency, because while talk may be cheap, gathering a mass audience to hear that talk is not. One of the major differences between ancient and modern governments is the presence of mass media and the ability to communicate to a mass audience, which is critical to winning elections, coupled with the complete absence of a Pynx Hill or Forum serving as a free gathering point for citizens to avail of political communications. Campaigns which must be fought via these systems of mass communication are thus very costly, and via this circumstance, wealth exercises a systematic and decisive influence over all elections and referenda.

6.1.1.1. Financing a Campaign

In the past thirty years, the cost of elections to parties and candidates in Western “democratic” nations has skyrocketed. The 1997 Irish elections cost 2.5 million Irish pounds² and the 2002 elections cost 9.24 million Euros.³ In the UK, the Conservative and Labour parties reportedly spent over £54 million pounds in the 1997 election.⁴ In 1980, the total cost of campaigns for the US House and Senate was \$242 million,⁵ while by 2008 over \$1 billion was spent on the presidential election alone. It is estimated that in the 1993 Canadian federal election the Conservative party spent £10 million, the Liberals £5.5 million and the NDP £3.5 million (the official cap was £5.3 million per party in this election).⁶ The level of financial investment necessary even to seriously contend a national political election thus at least equals the sums in play at Rome.

Elections thus necessitate that parties dispose over large sums of money. The average annual income of British political parties is: Conservatives £33 000 000, Labour £16 000 000, Liberal Democrats £3 000 000.⁷ The average annual income of CDU, SPD and FDP in Germany is £74 million, £68 million and £12 million (before state funding).⁸ A significant portion of these funds are acquired through private donations often from large businesses, the only entities other than individual millionaires capable of disposing over such large amounts of money on a regular basis. In 1990, Daimler-Benz gave £418 000 to CDU/CSU, £200 000 to the SPD and £80 000 to the FDP. Deutsche Bank gave £324 000 to the CDU/CSU, £92 000

² Michael Marsh, “Candidate Centered but Party Wrapped: Campaigning in Ireland under STV” in Bowler and Grofman eds., *Elections in Australia, Ireland and Malta under the Single Transferable Vote*, 114 at 120.

³ Ian Hughes, Paula Clancy, Clodagh Harris and David Beetham, *Power to the People? Assessing Democracy in Ireland*, (New Island Press, 2007), at 393.

⁴ Nick Davies, *Flat Earth News*, (Vintage Books, 2008) at 86.

⁵ Skelly Wright, “Money and the Pollution of Politics” (1982) *82 Columbia Law Review*, 609 at 620.

⁶ Martin Linton, *Money and Votes*, (Institute for Public Policy Research, 1994) at 57.

⁷ *Ibid.*, at 22.

⁸ *Ibid.*, at 22; these are Germany’s three strongest parties.

to the FDP and £72 000 to the SPD.⁹ This pattern of donations from Germany's largest businesses to the nation's major political parties, continues virtually uninterrupted into the present. From February 16 to March 13 2006, BMW AG made donations to the value of 74 435.01 Euros and 81 639.03 Euros to the CDU, a donation of 93 396.86 Euros to the SPD, and a donation of 51 917.35 Euros to the FDP. In the same period the RAG AG made a donation of 70 000 Euros to the CDU and 100 000 Euros to the SPD and Altona AG donated 100 000 Euros to the CDU.¹⁰

Property developer Patrick Gallagher testified before the McCracken Tribunal that former Irish Taoiseach Charles Haughey had personally solicited and received a £300 000 donation from him,¹¹ while in Britain:

Ernest Saunders, who was jailed for his part in the Guinness affair, gave an account to Panorama in October 1990 of a meeting with senior Government ministers during his company's take-over battle with Distillers. 'One of them, a very senior figure, came straight out while I was doing my sales pitch on my competition policy...and he said he noticed we did not contribute to the Conservative Party and when were we going to do. I think there were three occasions during the period when the question of our non-contribution came up, not in any way as a threat, but it came up sufficiently for me to realise that if we were going to go on rolling, I would have to put this matter to the board'¹²

In neither Canada nor the UK has any party ever won a national election which did not receive corporate financing.¹³

In the USA, the money contributed to virtually all candidates by corporate-controlled PACs is legendary. They provided 17% of candidate funding for Congressional candidates in 1974 and 26.4% in 1980.¹⁴ Between 1980 and 2004, the level of direct PAC donations to candidates increased by over 700% to \$205.1 million in contributions given directly to candidate campaigns. In 2006 they gave \$248.2 million.¹⁵ The value of each dollar contributed is further enhanced by the fact that PACs spend their money strategically on

⁹ *Ibid.*, at 87.

¹⁰ Bundestagsdrucksache 16/1021.

¹¹ Hughes, Clancy, Harris and Beetham, note 3, at 399.

¹² Linton, note 6, at 72.

¹³ *Ibid.*, at 61.

¹⁴ Wright, note 5, at 615.

¹⁵ <http://www.fec.gov/press/press2004/20040830pacstat/20040831pacstat.html>, accessed 06/11/2009; <http://www.fec.gov/press/press2006/20060828pac/20060830pac.html>, accessed 06/11/2009.

“those who are more likely to win and have useful influence in Congress”,¹⁶ often sponsoring candidates likely to gain a leadership position on committees responsible for legislation affecting them. In 1978, PACs provided 56% of the campaign money spent by 22 House Committee chairmen, compared with 25% for House candidates as a whole.¹⁷

Of course, one could ask whether this has any effect on elections. Perhaps all of this spending and counter-spending cancels itself out in some mysterious Shangri-La of wishful thinking. It would certainly be more convenient to think so.

6.1.1.2. Effect of Finance on Electoral and Referenda Outcomes

In reality, financial backing has a real, measurable and decisive effect on electoral success. For example: in 1978 there were 307 contested races for the US Congress. The candidate who spent more on his campaign won the seat 78.8% of the time. In 159 out of the 307 contested elections one candidate outspent the other by a ratio of more than 2 to 1, resulting in electoral victory 93% of the time. In 58 of the contested elections, one side outspent the other by a ratio of more than 5 to 1, in 100% of those cases the winner was the bigger spender. In the Senate elections the bigger spender won the seat 88.6% of the time in the 1978 elections. In Senate races in which there was no incumbent the winner outspent the loser 13 out of 14 times (*ie* in 92.8% of the campaigns).¹⁸ The level of finance a candidate enjoys is thus directly proportional to their electoral success. Money power, not people power, decides elections.

Even more concerningly, such financing continues to affect the behaviour of representatives after election. In 1979 the National Association of Realtors, which supported a motion to eliminate enforcement powers against fraudulent realtors, contributed to campaigns of 51 out of 71 Congressmen elected for the first time. 43 of these 51 supported the motion (which is a success rate of 84%). Of the 20 first-time Congressmen who opposed the bill, 13 had received no funding from NAR. Also in 1979, 95% of Congressmen who received more than \$2500 in campaign contributions from oil-industry PACs voted to reduce windfall profits tax.¹⁹ The chances of a politician supporting legislation are thus also directly proportional to the level of campaign contributions he has received from the bill's beneficiaries.

Such activities have an immediate knock-on effect on the international level. One study revealed a direct relation between US Congress representatives receiving campaign

¹⁶ Wright, note 5, at 615.

¹⁷ *Ibid.*, at 617.

¹⁸ *Ibid.*, at 622.

¹⁹ *Ibid.*, at 61; this pattern is still holding strong. According to Dworkin, “The candidate who has or raises the most money, as the 1998 mid-term elections demonstrated once again, almost always wins”, Dworkin, note 1, at 351.

contributions from corporate internationally-lending banks and their support for quota increases at the IMF. The banks desired these increases, because they reduced the likelihood that they were taking an economic risk in a debtor country as the IMF would step in and bail them out with the funds raised from quotas.²⁰ The logical conclusion that “[t]he more money politicians need to be elected, the more they need rich contributors and the more influence such contributors have over their political decisions once elected”²¹ is obvious.

One could, of course, argue that these statistics pertain to the USA where regulation is notoriously loose. However, election financing not only has a systematic, decisive effect in the world’s largest economy with elections with the most at stake in a first-past-the-post system, it also takes place in much smaller economies with very little at stake, and where, due to STV, the influence of money is more difficult to track, *ie* local elections in Ireland.

Irish local elections occur in small districts, often of only a few thousand voters, where a great deal of money is not required to publicise a candidate’s name and reputation. As the local authorities have little power there is no reason for interest groups to sponsor one candidate over another,²² a circumstance reflected in the low levels of finance involved. In the 1999 local elections, median candidate spending was just 1500 Euros.²³

Nonetheless, the amount of money a candidate spent relative to the other candidates in the district exhibited a clear link to electoral success. A one per cent increase in a candidate’s spending as a share of their party’s total spending resulted on average in that candidate receiving a 0.45% greater share of that party’s first preference votes. The candidates studied received anywhere from 22% to 72% of their party’s spending in their respective district. A shift from a 22% share to a 72% share resulted in a 22.3% increase in the number of first-preference votes, meaning that those candidates on whose behalf the most money was spent had a much, much higher chance of being elected than those candidates on whose behalf the least was spent.²⁴

Similarly, without taking parties into consideration, a candidate who spent 25% of all election money in a district received on average between 5.98% and 6.68% more first-preference votes than those who spent only 2% of the campaign money in that district. This is significant, because on average, candidates only receive about 8.6% of all first-preference votes,²⁵ thus even moving from 2% to 5% of total spend for a district “basically doubles a

²⁰ Lawrence Broz and Michael Hawes, “US Domestic Politics and International Monetary Fund Policy”, in Hawkins, Lake, Nielson and Tierney eds., *Delegation and Agency in International Organizations*, (Cambridge University Press, 2006), 77 at 79, 93.

²¹ Dworkin, note 1, at 351.

²² Kenneth Benoit and Michael Marsh, “For a Few Euros More: Campaign Spending Effects in the Irish Local Elections of 1999”, (2003) *9 Party Politics*, 561 at 566.

²³ *Ibid.*, at 563.

²⁴ *Ibid.*, at 575.

²⁵ *Ibid.*, at 573.

challenger's chances of winning a seat".²⁶ The amount of finance necessary to win an Irish local election can almost be put in concrete terms. For example, a candidate who increases his spend from 500 Euros to 1000 Euros will receive an additional 1.27% of first-preference votes, while a candidate who jumps from 500 Euros to 5000 Euros can expect this to bring him a further 4.20% of the vote, a decisive margin.²⁷ As the authors state, the link between spending and electoral success in a system as small as the local Irish elections is strong evidence that finance generally plays a role in any election.²⁸

Lord McAlpine, a former treasurer of the Conservative Party, went on record to emphasise the importance of a well-financed campaign to electoral success, stating that "a poster campaign could persuade the public to believe virtually anything, given enough money. A poster campaign costing £1 or £2 million is a waste of money, he once told a reporter, 'but give me £8 million and I will deliver whatever you want.'"²⁹

Significantly for our findings in regards to representation, financial influence also plays a substantial role in deciding referenda. In Switzerland, the wealthy politician Christoph Blocher first came to prominence "by bankrolling a successful 1986 referendum campaign against Swiss UN membership",³⁰ while in a 1998 Oregon referendum three billionaires engaged in a referendum campaign, outspent their opponents by a factor of 50 to 1.³¹ Nevertheless, legal regulation of this issue has been largely unforthcoming.

The US Supreme Court delivered a pivotal judgement on referenda-funding in *First National Bank of Boston v. Bellotti* in 1978.³² The case centred around the constitutionality of a statute enacted in the state of Massachusetts which prohibited corporate expenditures on state-wide referendum issues not directly related to a corporation's business interests. The Supreme Court struck down the statute and in the words of one judge "thereby effectively declared open season for the influence of concentrated wealth upon initiative and referendum campaigns".³³ As a result, in America, "A number of studies show that, in state after state, in election after election, massive spending and sophisticated media campaigns by special interest groups have swamped referenda that were initially favoured by a majority of the voters".³⁴ In 15 referenda in American states in 1978, the side spending the most won in 11 cases. The side with corporate support outspent its opponent in 12 cases, in 8 cases by a

²⁶ *Ibid.*, at 576.

²⁷ *Ibid.*, at 578 et seq.

²⁸ *Ibid.*, at 563.

²⁹ Linton, note 6, at 29, or as Cicero would have said: "Name me any tribe" said Cicero, "and I will tell you through whom he carried it."

³⁰ Gavin Barrett, "Referendums Vulnerable to Chequebook Democracy", *Irish Times*, 3 March 2009.

³¹ *Ibid.*

³² 435 US 765 (1978).

³³ Wright, note 5, at 612.

³⁴ *Ibid.*, at 623.

margin of 10 to 1 or more. When the corporate side was outspent it lost in every case.³⁵ That this is the case should not be surprising considering the inequality of resources deployed. To take one example:

the citizens of Long Beach, California voted on a referendum to reject a proposed lease between the city and Standard Oil for construction of an oil storage terminal. Community opponents of the lease raised \$17, 721, all of it in contributions under \$1000. Standard Oil and related companies pumped in \$864, 568; the smallest contribution was over \$16 000³⁶

Thus, corporate interests can distort “the will of the people” by drowning out their opponents.³⁷ This pattern is not limited to the USA or the 1970s.

In the recent referenda regarding the Lisbon Treaty in Ireland, the “no” campaign leader “Libertas” admitted to spending 1.3 million Euros during Lisbon I, which the “no” side won.³⁸ During Lisbon II, on the other hand, the “yes” side outspent the “no” side by a considerable margin. Ireland’s three largest parties spent a combined 1 million Euros, while private businesses such as Ryan Air (500 000 Euros), Intel (300 000 Euros) and IBEC (150 000 Euros) also spent significant amounts. On the “no” side Libertas spent only between 100 000 and 120 000 Euros, the UK Independence Party spent 190 000 Euros and Coir, the biggest “no” spender, spent 250 000 Euros.³⁹ While Ireland negotiated a few guarantees between the referenda, the package was essentially the same as that presented to the voter the previous year. A deciding factor in the referenda outcomes was financing, which permitted first one side and then the other to outgun the opposition and sway the electorate to their views.

This example is not anecdotal. The earlier Nice referenda had followed a similar pattern. After a “no” vote on Nice I, a second referendum was held 17 months later. During Nice II, “yes” vote supporters contributed substantially to the campaign with IBEC spending at least 400 000 Euros and the Business Alliance for the Yes Campaign spending 500 000 Euros, while non-party affiliated “no” groups spent only 50 000 Euros between them, resulting in the “yes” side outspending the “no” side by a “huge margin”.⁴⁰

³⁵ *Ibid.*

³⁶ *Ibid.*, at 624.

³⁷ *Ibid.*, at 624 et seq.

³⁸ http://www.workerspartyireland.net/sitebuildercontent/sitebuilderfiles/lisbon_analysis.doc

³⁹ www.irishtimes.com/newspaper/world/2009/0421/1224245068555.htm.

⁴⁰ Michael Marsh, “Referendum Campaigns: Changing What People Think or Changing What They Think About?”, in de Vreese ed, *The Dynamics of Referendum Campaigns: An International Perspective*, 63 at 68.

The role that finance plays in determining the outcome of modern elections and referenda is thus decisive and systematic.

6.1.1.3. Regulation

6.1.1.3.1. Regulating Donations

Regulating political donations has had little impact in curbing the role that wealth plays in manipulating elections and referenda.

In Canada any donation over \$100 must be disclosed. However, companies still provide “41% of the Liberal Party’s and 47% of the Conservative Party’s income”,⁴¹ *ie* nearly half the income of the only two parties to ever win a federal election. As of 2007, the Federal Accountability Act has banned donations exceeding \$1 000 CDN per year to political parties or candidates from any corporations or unions, and considering the low ceiling, this may have a marked impact on Canadian party finance in the near future, although it is too soon to tell.⁴² In the United States, the limit of \$1000 from individuals and \$5000 from committees that are funding more than one candidate has been completely circumvented by Political Action Committees.⁴³ In Germany donations over 10 000 Euros must be recorded in the party’s accounts with the name and address of the donor and donations over 50 000 Euros must be immediately reported to the President.⁴⁴ These are then published to no apparent effect.

6.1.1.3.2. State Financing

Some nations seek to offset corporate donations by partially financing parties. In Germany, the CDU and SPD on average receive about 35% of their income from the state, the FDP around 45%.⁴⁵ In Canada, the 1974 Election Expenses Act provides for some reimbursement, usually amounting to about 50% of expenses and accounting for about 10% of party finance in Canada.⁴⁶ Irish parties receive some public funding, in the form of leaders’ allowances, and some reimbursement for annual running costs and election expenses.⁴⁷

⁴¹ Linton, note 246, at 49 et seq.

⁴² <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/bp437-e.htm#expenses>.

⁴³ Stuart Weir, “Primary Control and Auxiliary Precautions: A Comparative Study of Democratic Institutions in Six Nations” in *Defining and Measuring Democracy*, 112 at 130 et seq.

⁴⁴ Para. 25, Part G.

⁴⁵ Linton, note 6, at 38.

⁴⁶ *Ibid.*, at 49 et seq.

⁴⁷ Sec. 17 and 21 Electoral Act 1997, Sec. 57 of the Electoral Act 1992 in conjunction with Sec. 78 Electoral Act 1997, Oireachtas (Ministerial and Parliamentary Offices) (Amendment) Act 2001

It is possible that this has had an impact on the level of campaign contributions made from private enterprise, as corporate finance tends to be lower in these nations, as opposed to the USA, for example. However, while it has had some impact, as we have seen, it has not been enough to prevent corporate donations from exercising a decisive influence in elections.

6.1.1.3.3. Regulating Advertisement

In *CBS v. Democratic National Comm* the American Supreme Court decided that television networks can refuse to run paid political ads on the grounds that it would weight the system “in favor of the financially affluent, or those with access to wealth”.⁴⁸ However, the later *Buckley v. Valeo* and *Bellotti* decisions made clear that while a network could refuse to run an ad, no ban on political advertisement would be imposed.

In Ireland RTE, cannot air any advertisement which is “directed towards any religious or political end or has any relation to any industrial dispute”⁴⁹ unless requested by the Referendum Commission. Sec. 10 (3) of the Radio and Television Act 1988 essentially contains the same rule for independent media and the ECHR upheld the legality of this provision in *Murphy v Ireland*.⁵⁰ Part of the reasoning for this legislation was that “the Oireachtas may well have thought that in relation to matters of such sensitivity, rich men should not be able to buy access to the airwaves to the detriment of their poorer rivals”.⁵¹ The ECHR agreed that audiovisual media have an immediate, invasive and powerful impact and because advertisements have particular objectives, “it cannot be, and is not, therefore subject to the principle of impartiality outlined above, and the fact that advertising time is purchased would lean in favour of unbalanced usage by religious groups with larger resources”.⁵²

However, in *Purcell v. Ireland*, the European Commission on Human Rights decided that Art. 3 “did not include the right that all political parties be granted equal coverage by the broadcasting media, or, indeed, any coverage at all”,⁵³ while in *Tierfabriken*, it found that a Swiss law banning any televised political advertisement on the grounds that it would allow wealth to influence politics was a violation of Art. 10.⁵⁴ So while States may ban certain types of advertisement, including advertisement regarding divisive political issues, a positive guarantee of equal access to advertisement which would negate the influence of wealth does

⁴⁸ 412 U.S. 94 (1973); the case itself concerned the running of Anti-Vietnam War ads. The applicants claimed that CBS violated the Fairness Doctrine by representing a skewed view in favour of the Vietnam War.

⁴⁹ Sec. 20 (4) Broadcasting Authority Act 1960.

⁵⁰ ECHR No. 44179/98, 10 July 2003, Reports of Judgements and Decisions, 2003-IX, 3

⁵¹ *Murphy v IRTC*, [1999] 1 IR 12 at 22 (per Barrington J).

⁵² ECHR, No. 44179/98, 10 July 2003, Reports of Judgements and Decisions, 2003-IX, 3 at 29.

⁵³ *Purcell v. Ireland*, Appl. No. 15404/89, 70 DR 262 (1991).

⁵⁴ *VgT Verein gegen Tierfabriken v Switzerland*, Appl. No. 24699/94, 29 June 2001, 34 EHRR 4.

not exist. Instead, the debate surrounds regulation of campaign advertisement that adheres to a very liberal ideology, centred around what authorities may and may not prohibit, while fairness doctrines tend to be rather loosely interpreted. Much the same can be said in regards to referenda campaigns.

Since *McKenna v An Taoiseach* the Irish government has been prohibited from funding referenda campaigns,⁵⁵ while the later *Coughlan* decision⁵⁶ concerning the divorce referendum centred on Sec. 18 of the Broadcasting Act 1960 which reads in part,

1(b) the broadcast treatment of current affairs including matters which are either of public controversy or the subject of current debate, is fair to all interests concerned and that broadcast matter is presented in an objective and impartial manner and without any expression of the Authority's own views... (2) Nothing in this section shall prevent the Authority from transmitting political party broadcasts.

The majority of the Court decided that Sec. 18 required the national broadcaster RTE to grant a certain level of equality to opposing campaigns in referenda. In particular, it prohibited RTE from granting free political broadcasts to each political party, all of whom were part of the "yes" campaign in the referendum on divorce concerned, resulting in over four times as much coverage for the "yes" side as compared to the "no" side.⁵⁷

Barrington, J dissented with the very Republican view that it is "also right and proper that the special position of political leaders be recognized",⁵⁸ thus effectively neutralising any possible direct participatory value of referenda. In his view, the people need to be "well-advised", so that "to play down or neutralise the role of political leaders in favour of committed amateurs would be, to say the least, unwise."⁵⁹ This opinion was based on a view of equality that Aristotle or any Republican Roman would have recognised. According to Barrington, J, the Constitution mandates equality before the law, "but at the same time it recognizes that citizens may have differences of capacity, physical and moral and that they may, by virtue of their office or otherwise have different social functions to fulfill".⁶⁰ Even the court majority, however, was preoccupied with state interference and did not enter into possible interference by private enterprise, while defending, albeit to a far lesser extent, the privilege of political parties to inform citizens and entertaining rather loose ideas of fairness.

⁵⁵ *cf. McKenna v An Taoiseach*, [1995] 2 IR 10.

⁵⁶ *Coughlan v Broadcasting Complaints Commission*, [2000] 3 IR 1.

⁵⁷ [2000] 3 IR 1 at 1.

⁵⁸ [2000] 3 IR 1 at 46.

⁵⁹ [2000] 3 IR 1 at 43.

⁶⁰ [2000] 3 IR 1 at 46.

Hamilton, CJ referred back to his own judgement in *McKenna*:

As the guardians of the Constitution, and in taking a direct role in government either by amending the Constitution or by refusing to amend, the People, by virtue of the democratic nature of the State enshrined in the Constitution are entitled to be permitted to reach their decision free from unauthorized interference of any of the organs of State that they, the People, have created by the enactment of the Constitution⁶¹

He continued, “The party political broadcasts with which we are concerned in these appeals cannot be regarded as normal party political broadcasts but were devoted specifically to the issue to be put to the electorate in the referendum”. RTE therefore had an obligation “in the context of the referendum, to hold the scales equally between those who support and those who oppose the amendment” and concluded that “[p]olitical parties undoubtedly have and are entitled to play an important role in the conduct of a referendum”, but that they can do so in other ways.⁶²

Denham, J concurred with Hamilton, CJ, stating,

if political parties take different stances on a referendum issue the broadcasting of party political broadcasts would present a divided view which would *prima facie* be fair, even if not mathematically equal. Mathematical equality is not a requirement of constitutional fairness and equality”.⁶³

However, she markedly failed to state how a situation of “non-mathematical” equality can be fair, for any inequality must surely go to the advantage of one side.

The net result of these judgements has been – as has been correctly noted by at least one observer⁶⁴ – to privatise the referendum process, by annihilating government interference while simultaneously failing to address the issue of large-scale campaign spending on the part of corporations and associations, which have even less reason to truly reflect public opinion than even a government empowered on the distorting basis of elections. While the aforementioned judgements have dealt with some of the most blatant distorting influences of

⁶¹ [2000] 3 IR 1 at 22.

⁶² [2000] 3 IR 1 at 25.

⁶³ [2000] 3 IR 1 at 31.

⁶⁴ Particularly Gavin Michael Barrett, (*cf.*, for example, *Research Paper No. 08/2009* at <http://ssrn.com/abstract=1400029>, who, however takes a rather different view of the role of government than that reflected in this thesis.

government in referenda, albeit in a rather rough and ready fashion, they have completely failed to address the much more concerning distorting influence of private individuals and corporations, who tend to act purely in their own interests. The current regulations thus reflect the classic view that government should not encroach on liberty, while giving little attention to the importance of democratic equality and its relationship to material resources, and thus fail to effectively and consistently regulate political advertisement in a manner which would be conducive to democracy.

6.1.1.3.4. Spending Caps

According to the UN Human Rights Committee, “reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party”.⁶⁵

In Ireland, campaign spending per candidate is limited to 25 395 Euros in 3-seat-ridings, 31 743 Euros in 4-seat-ridings, and 38 092 Euros in 5-seat-ridings.⁶⁶

The 1983 Representation of the People Act in the UK puts a cap on candidate spending and severely limits private individuals and firms from campaigning for or against a candidate. However, it places no limitations on the campaign spending of parties, so long as it is campaigning for the party as a whole and not for particular politicians within the party, and explicitly excludes media outlets from the ban on political publications.⁶⁷ The 2000 Representation of the People Act does not contain any major alternations of these regulations.

In 1976 in *Buckley v. Valeo* the US Supreme Court struck down certain sections of the 1974 American Federal Election Campaign Act as infringing on the First Amendment,⁶⁸ including provisions pertaining to limits on overall campaign spending by a candidate who does not receive public financing, restrictions on independent expenditures supporting or opposing a candidate, and ceilings on candidate spending from personal or family wealth.⁶⁹ Following the decision the number of PACs, particularly corporate PACs, skyrocketed. In 1974, prior to the decision, there were 89 corporate-controlled PACs, by 1982 there were 1327.⁷⁰ Coal, oil and gas interests had just 12 registered PACs in 1974 but 110 by 1978.

⁶⁵ Human Rights Committee General Comment 25 (Dec. 7 1996, para. 19), available at www2.ohchr.org/english/bodies/hrc/comments.htm.

⁶⁶ Hughes, Clancy, Harris and Beetham, note 3, at 394.

⁶⁷ Arts. 75 and 76, 1983 UK Representation of the People Act.

⁶⁸ The First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”.

⁶⁹ Wright, note 5, at 611, see *Buckley v. Valeo*, 424 US 1 (1974).

⁷⁰ Wright, note 5, at 614.

Utilities had no PACs in 1974 and 64 in 1978. Banking interests had 36 PACs in 1974 and 161 in 1978.⁷¹ The number of corporate PACs has since risen to 1712 corporate PACs in 2006,⁷² in addition to 950 trade/membership and health PACs (bearing in mind that health is a private enterprise in the United States), as well as the PACs run by major banks and accounting firms. This compares to 299 labour PACs in the same year.⁷³

Following two decisions, which seemed to lean slightly in favour of election spending reforms – *Austin v. Michigan Chamber of Commerce*,⁷⁴ in which the Supreme Court decided that legislation which prohibited corporations from using treasury money to support or oppose election candidates did not violate the First and Fourteenth Amendments, while still allowing corporations to donate from a segregated fund, and *McConnell v Federal Election Commission*⁷⁵ in which the Supreme Court upheld much of the Bipartisan Campaign Reform Act 2002, which contained limits on advertising by unions, corporations and non-profit organisations within certain time periods before an election as well as a ban on unrestricted direct campaign contributions – the Supreme Court once again adopted a hard line against campaign restrictions in the recent *Citizens United v Federal Election Commission*⁷⁶ which decided that any restriction of corporate funding of independent political broadcasts infringed on the First Amendment, completely overruled *Austin* and struck down the aforementioned provisions of the *Bipartisan Campaign Reform Act*. It did uphold the ban on direct contributions, a ban which PACs already make virtually superfluous. Part of the Court's reasoning was that media are also corporations and that such a ban would mean a stop to political speech in newspapers, television, books and blogs. Thus, there are no spending caps to speak of in the USA.

The use of spending caps is real in Ireland and the UK, as mentioned above, as well as most other Western States, but limited. While they may prevent parties and candidates from spending unimaginable amounts of money, they do not prevent them from spending large amounts of money. Any entity that cannot dispose over a relatively large sum of money is thus still unable to compete effectively for votes, so that a significant wealth barrier to election still exists. While not completely ineffective in limiting the influence of wealth, limitations tend to occur at too high of a level to stop it forming a bar or eradicate its influence.

⁷¹ *Ibid.*, at 616.

⁷² <http://www.fec.gov/press/press2004/20040830pacstat/20040831pacstat.html>;

<http://www.fec.gov/press/press2006/20060828pac/20060830pac.html>

⁷³ <http://www.fec.gov/press/press2004/20040830pacstat/20040831pacstat.html>;

<http://www.fec.gov/press/press2006/20060828pac/20060830pac.html>.

⁷⁴ 494 U.S. 652 (1990).

⁷⁵ 540 U.S. 93 (2003).

⁷⁶ 558 U.S. (2010).

6.1.1.4. Non-Party Spending

In addition to the types of spending already mentioned, non-party spending must also be considered.

The value of indirect influence should not be underestimated. In the UK in the 1992 campaign, the Sun and Daily Express carried no negative reports about the Conservatives or positive reports about Labour, while the Daily Mirror carried no negative reports about Labour and no positive reports about the Conservatives. More reputable papers such as the Times and the Independent also favoured one party over the other (the Conservatives received 336 negative stories in the Times, Labour only 114). If the parties had purchased equivalent advertising space, the cost would have been in the millions. Moreover, "A rule of thumb in the advertising/public relations world is that coverage in the editorial pages of a newspaper is worth three times as much as the equivalent advertising space". If one were to accept this proposition, one would have to accept that the exposure provided by the tabloids alone was worth more than the entire campaign finances of the parties, "making a mockery of all the rules and laws that are intended to ensure a fair contest in the election".⁷⁷

In addition, other organisations may spend large sums of money on their own campaigns. In the 1988 Canadian federal election, which largely centred on whether Canada should ratify the FTA, non-parties spent more on election advertising than the parties did, whereby pro-free trade outspent anti-free trade by a ratio of 9 to 2, resulting in the victory of the only pro-free trade party, the Progressive Conservatives.⁷⁸ Legislation limiting non-party spending was passed after the election, but slapped down by a provincial court.⁷⁹

American PACs, not only donate to candidates, but also spend money on their own, "especially those with ideological or single-issue orientations" which "spend large sums of money on highly effective campaigns against "hit listed" candidates".⁸⁰ In 2004, corporate PACs spent \$154.75 million, trade, membership and health organisations spent \$132.1 million and Labour PACs spent \$ 109.5 million.⁸¹ These figures rose in 2006 to \$188.5 million for corporate PACs, \$153.6 million for labour PACs and \$158.8 million for trade/membership/health PACs.⁸²

The top contributing PACs in 2004 were surprisingly similar to those cited in similar research nearly 25 years previously, and represent predominately corporate and trade

⁷⁷ Linton, note 6, at 31.

⁷⁸ *Ibid.*, at 54, when one considers that the Progressive Conservative party did not win the popular vote, one also notices that they did not simply spend money, they spent it in all the right places necessary to manipulate the first-past-the-post system.

⁷⁹ *Ibid.*

⁸⁰ Wright, note 5, at 616.

⁸¹ <http://www.fec.gov/press/press2004/20040830pacstat/20040831pacstat.html>

⁸² <http://www.fec.gov/press/press2006/20060828pac/20060830pac.html>.

interests, including: National Association of Realtors (#1 with donations of \$2, 106, 733) and the Dealers Election Action Committee of National Automobile Dealers Association (#7 at \$1, 547, 100), as well as the International Beer Wholesalers Association (#2 at \$1, 994, 500), Wal-Mart Stores Inc. PAC for Responsible Government (#8 at \$1, 484, 000), American Bankers Association (#20 at 1, 160, 245), Lockheed Martin (#35 at \$875, 624), Microsoft (#37 at 857, 000), Deloitte and Touche (#42 at \$772, 376), Boeing (#44 at 746, 830), Verizon Communications (#45 at \$735, 664), Pfizer (#47 at \$717, 950) and General Electric (#48 at \$706, 176).⁸³ Virtually all large firms not featured on the top 50 overall, make an appearance on the Corporate top 50, including Time Warner at the bottom of the list with \$312, 282 and featuring General Motors, Ford, Daimler-Chrysler, Johnson & Johnson, J.P. Morgan, and Raytheon.⁸⁴

Legal regulation has largely failed to attack the issue of non-party spending be it via businesses mounting their own campaigns or “donating” favourable editorials in widely-read newspapers. Thus, so long as one is prepared to forego formally funnelling money through an official party treasury, one’s abilities to employ wealth in the pursuit of electoral success are unlimited.

6.1.2. Conclusions Regarding Wealth and National Democracy

As one can only win or lose an election, one simply has to take all measures necessary to ensure victory, and this, as we have seen, is directly related to the resources at one’s disposal. Participation and influence are directly proportional to wealth, exactly as in the Roman system. The only difference is that in modern times it is not explicitly regulated. While in the Roman Republic, a candidate had to possess a certain amount of money to run for high office, this amounts to little more than a formalisation of the system today, which also *de facto* requires that one either have certain personal wealth or substantial financial backing.

Because money plays such a huge role in national elections, it greatly reduces the increased equality gained by measures such as the secrecy of the vote and laws against coercion. Today economic inequality plays its role before the ballot-box, as enough money can effectively drown out true deliberation.

It should be borne in mind that we have barely touched on corruption in the technical sense. Like the Romans, the legal manipulation that our system affords wealth is already immense, making it at times difficult to separate the legitimate from the illegitimate uses of

⁸³ http://www.fec.gov/press/press2004/20040830pacstat/top_50_pac_contrib.pdf

⁸⁴ http://www.fec.gov/press/press2004/20040830pacstat/top_50_corp_contributions.pdf

wealth. It would, however, take someone of exceptional naivety to suppose that significant corporate donations continue to be made because of a love of democracy. It should also be noted that while such donations must cause a little financial pain to the corporation, it certainly does not require them to beggar themselves. Thus, they can acquire considerable political influence at a relatively cheap price. \$20 000 is small change to Wal-Mart – it is the difference between winning and losing an election to a candidate.

Justice White, dissenting with Brennan, J and Marshall, J in *Bellotti* stated,

[c]orporations are artificial entities created by law for the purpose of furthering certain economic goals...It has long been recognized...that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy, but also the very heart of our democracy, the electoral process⁸⁵

He was right – it has been recognised for a long time, since approximately 400 B.C.

We also have not discussed the more direct ways in which wealth controls national democracies, for example, through currency attacks and capital flight over social policies, as well as the cessation of monetary control to independent banks. We have, in other words, limited the study to hard evidence, avoiding the conjecture that would inevitably surface in trying to prove corruption or the motivations of private currency speculators. The figures used are not controversial. However, even this overwhelmingly indicates that elections are not only statistically unrepresentative, they are also won by those with greater financial resources and that the level of financial resources required to have an impact is sufficient to bar the vast majority of citizens from meaningful participation.

Why instituting a World Parliament or similar institution would not bring about significant democratic change should now be obvious. Election to such an institution, wielding vast power, would inevitably become dependent on finances, just as national elections are.

⁸⁵ 435 U.S. 765 (1978), at 809.

6.1.3. Suggested Solutions

6.1.3.1. Referenda

Referenda by themselves unfortunately do not offer a substantial improvement on the financial difficulties encountered in elections, especially if they are held infrequently. This pattern holds consistently in various nations at various times.

However, the role of money would be less pervasive if referenda were very frequent, for the simple reason that massive expenses cannot be indefinitely maintained. However, even this would not eliminate, or even necessarily satisfactorily, limit the role of money, as different interests would take part in different referenda and the resources of some are considerable.

6.1.3.2. Shareholder Rights

Shareholders customarily do not vote on whether a company gives donations to political parties which is generally deemed to be the prerogative of the board, despite the fact that they are rarely explicitly empowered to do so in the Articles of Association.⁸⁶ Linton suggests that companies be required to hold a shareholder vote on political donations (as is required on many other issues).⁸⁷ Such legislation has been adopted to a limited extent in the UK, where the Political Parties, Elections and Referendums Act 2000 and the Companies Act 2006 require shareholders to give blanket approval to political donations up to a specified amount at the annual meeting.⁸⁸ However, the resolution must be couched in general terms and “may not purport to authorise particular donations or expenditure”⁸⁹ so that the level of actual control afforded to shareholders remains negligible. In addition, shareholders still represent a select group of people – those with enough disposable income to invest. As it would still permit companies to donate to political parties, it might – at most – change the identity of the parties to which the largest sums are given, but would do little to remove democratic politics from the inequitable influence of wealth.

⁸⁶ Linton, note 6, at 83 et seq.

⁸⁷ *Ibid.*, at 86.

⁸⁸ Schedule 19, Part XA, Art. 347C, Political Parties, Elections and Referendums Act 2000; Art. 367, Companies Act 2006.

⁸⁹ Schedule 19, Part XA, Art. 347C (4), Political Parties, Elections and Referendums Act 2000.

6.1.3.3. Conflict of Interest Legislation

In Ireland members of the Oireachtas are required by the 1995 Ethics in Public Office Act to disclose certain interests including their occupational income, shares in excess of £10 000, directorships or shadow directorships, interests in land and buildings exceeding £10 000 (excluding private homes), gifts of over £500, any property or services including travel facilities and entertainment that have been supplied to themselves at a price considerably below the commercial value, any paid positions as a political or public affairs lobbyist, consultant or adviser, and any contracts with the state. All members of the Oireachtas are required to state any material interest in a person or situation before making a speech or voting on the matter concerned in either House (the statement must be made in writing and submitted to the clerk in the case of voting). Although there have been investigations, sanctions under the Ethics Act are weak (rather like the Roman corruption courts) and therefore not a significant deterrent.⁹⁰ Thirty-nine members of the current Oireachtas have declared quite significant shares, directorships and board memberships in large companies such as Royal Dutch Shell, Royal Bank of Scotland, Tesco, AIB, Bank of Ireland, Alcoa and Monsanto. One member even listed an off-shore address as the headquarters for a company he owned shares in. The effect would thus seem to be that representatives closely tied to business interests simply “confess” their interests and carry on business as usual.

6.1.3.4. Absolute Prohibition on Using Finance to Further Political Goals

The only feasible solution would thus seem to be an absolute prohibition on using wealth to further any political goals. What – after all – does money have to do with democracy? Any justification of “getting the message out” simply means spinning one’s message in the proper manner and drowning out one’s opponents. Any citizen intending to vote can surely adequately inform themselves by watching television news or reading a newspaper (both activities which incur negligible costs) or availing of the party platforms on their websites. One only needs money if one’s opponent has it as well.

Regarding non-party spending we are not bereft of models on this point. Non-party spending is prohibited in Quebec and enforced with vigour, with authorities issuing injunctions against non-party election spending to large companies (*eg* Bombardier, Royal Bank of Canada) and individuals (town councillors having spent a total of £25 on photocopying pamphlets) alike. Newspapers, while free to endorse a candidate or party in their editorials, are prohibited from devoting any more space to editorials during campaigns

⁹⁰ Hughes, Clancy, Harris and Beetham, note 3, at 376 et seq.

than they usually do.⁹¹ Such measures should be applied regardless of whether the “democracy” is representative or direct. Until wealth ceases to play a decisive role in national democracies, international delegates – who continue to owe their success to its deployment – will always be compromised in their decision-making.

6.2. Financial Influence at the WTO

6.2.1. Observations on the Concrete Utilisation of the Dispute Settlement Procedure

The WTO does not explicitly allow States to buy non-compliance.⁹² As the Arbitrators stated, it is the purpose of countermeasures “to induce compliance” (as opposed to punishing non-compliance, *eg* with a fine that a State might find convenient to simply pay).⁹³

However, the DSU cannot prevent one party from pressuring another into accepting a situation in practice that is not entirely in line with the panel decision.⁹⁴ The many patent cases between the U.S. and nations producing generic pharmaceuticals testify to this.⁹⁵ The dispute settlement procedure has also been severely underutilised by the world’s poorest and smallest nations, while the most frequent complainants are also the most economically powerful States. As of 24 November 2009, the USA was the complainant in 91 files opened under the Dispute Settlement Procedure, while the EC was the complainant in 80 cases, followed distantly by Canada (complainant in 33 cases) and Brazil (complainant in 23 cases). Not one African country was a complainant in any case, nor was any Arabic nation, nor any Central Asian nation. The large majority of Asian complaints were brought by the region’s wealthier, larger nations (Japan, India, Korea, Thailand), while only one was submitted from among the poorer nations of the region (*eg* Cambodia, Laos, Nepal, Sri Lanka, Vietnam). Significantly only one complaint surfaced from the Caribbean region – from the tax haven of Antigua and Barbuda. Most small nations who have participated as complainants, have been traditional Western allies (Panama, Chinese Taipei, Columbia, Guatemala, Honduras, the Philippines) often filing jointly with a Western nation.

⁹¹ Linton, note 6, at 62 et seq.

⁹² Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: Law, Practice and Policy*, (2nd Edition, Oxford University Press, 2006) at 167.

⁹³ *EC-Bananas III (US) (Art.22.6)*, WTO Doc. DS27/ARB/ECU of 9 April 1999, para. 71.

⁹⁴ Rachel Brewster, “Rules-Based Dispute Resolution in International Trade Law” in (2006) *Virginia Law Review*, 251 at 257

⁹⁵ *cf.* Pakistan (US) – Patent Protection for Pharmaceutical and Agricultural Chemical Products, Dispute DS36; Portugal (US) – Patent Protection under the Industrial Property Act, Dispute DS37; Brazil (US) – Measures Affecting Patent Protection Dispute, DS199, Argentina (US) – Patent Protection for Pharmaceutical and Test Data Protection for Agricultural, Disputes DS171 and DS196, all of which ended in “mutually agreed solutions” making a panel report superfluous.

While this situation cannot be blamed on the dispute settlement mechanism, which at least hands States a powerful lever (the threat of pursuing a case that they will probably win) that can be used in negotiations, it is still present and demands a solution.

6.2.2. State Wealth and Negotiations

Money is not only an issue when it comes to utilising the DSU, it often affects negotiations regarding increased trade liberalisation. Such negotiations often occur during gruelling conferences in which negotiations often continue around the clock. Third World negotiators have stated that developed nations have a large pool of negotiators upon which to draw, while they themselves are restricted to small delegations. As a result developed nations stagger their negotiators in shifts, allowing everyone to get sleep, whereas the developing world negotiators must simply stay awake. According to an African source present at the Green Room negotiations prior to Doha, “[a]fter forty hours of continuous talks, our ministers gave in on things out of sheer exhaustion. This is a critical part of the developed countries’ strategy.”⁹⁶ This view was confirmed by another African delegate: “they looked exhausted and did not have the stomach to take it any further”⁹⁷ and by an Asian delegate, “Lamy and Zoellick, the marathon runners, are physically fit and knew our minds were not working [due to exhaustion], so they put out a draft after an all night meeting and got it through”.⁹⁸ While this presents a picture quite undignified and almost comical, it is still an important source of economic power being translated into political power.

6.2.3. The Role of Business-NGOs at WTO Conferences and Negotiations

Art 5(2) of the Marrakesh Agreement states that the WTO should make “appropriate arrangements for consultation and co-operation with non-governmental organizations”.⁹⁹ The WTO has made good on this imperative, but action centres primarily on business-NGOs.

The World Economic Forum, for example, was instrumental in launching the Uruguay Round of trade negotiations,¹⁰⁰ and has always been heavily involved in the WTO, as have other important business groups (eg the European Roundtable of Industrialists), think tanks (eg the Brookings Institution) and special interest groups (eg the US Dairy Foods

⁹⁶ Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations*, (Zed Books, 2003) at 104.

⁹⁷ *Ibid.*, at 107.

⁹⁸ *Ibid.*, at 112.

⁹⁹ Art. 5 (2) Marrakesh Accord, 1994.

¹⁰⁰ Jan Aart Scholte, Robert O’Brien and Marc Williams, “The WTO and Civil Society” (1999) 33 *Journal of World Trade*, 107 at 110.

Association). These are the NGOs most often in attendance at WTO meetings.¹⁰¹ According to one source, at the Singapore Ministerial Conference, 65% of civic organisations accredited to attend were business interests, while most grassroots organisations are never accredited to attend.¹⁰²

The webpage of the World Economic Forum contains in its FAQ section the question: “Is the World Economic Forum just a private club for the rich and powerful?”

Its answer then sidesteps the question, and bases itself on the (alleged) material benefits of its work, stating that the Forum:

believes that economic development has created a better life for millions of people and offers hope to millions more. For these reasons the Forum regularly convenes business leaders and leaders from other key sectors of society to discuss, debate and address the major issues confronting humanity. Far from being a “rich man’s club” [*ie hetairaeia*], the World Economic Forum is a unique platform for progress on some of the most difficult problems facing the world today.

One paragraph later, it states

our members represent the 1000 leading companies and 200 smaller businesses – many from the developing world – that play a potent role in their industry or region [in other words business that are “small” compared only to the top 1000 global businesses]. Our members are influential, talented and powerful people [thus, according to its official information the WEF is not a rich man’s club, but rather a club for influential, talented and powerful people who happen to control the concentrated wealth of the world’s biggest companies]...we also work closely with communities of leaders from academia, government, religion, the media, non-governmental organizations and the arts [but not the average person and how precisely they work with these leaders is left unsaid]

According to its website, the WEF funds itself entirely from membership fees (42 500 Swiss Francs per year – apparently charging a membership fee that constitutes more money than most people are ever likely to see in their lives does not make the WEF a “rich man’s club”), partnership fees from Strategic Partners (companies that play a leading role in the

¹⁰¹ *Ibid.*, at 113.

¹⁰² *Ibid.*, at 118.

Forum) and from partners in the Forum's events, as well as participation fees for the Annual Meeting and for regional meetings and summits.

Far from providing pay for participation, the WEF demands pay to participate. Its means of preventing undesirables from participating are, however, not limited to the merely financial – the answer to the question “Why is [the Annual Meeting] held in Davos” is: “The alpine location... means that local authorities are in a better position to implement the high level of security required for such an event”.¹⁰³

Bearing in mind that the WEF has been instrumental in shaping WTO policy, it is worth a thought that it represents a club with extremely limited membership dependent upon control of substantial global resources and which habitually needs physical protection from the very people whose lives it allegedly strives to improve, so much so that it is unable to meet in their midst – and this is according to its own propaganda.

The other NGOs who never fail to appear on the WTO guest list operate according to much the same principles. According to its website, the International Chamber of Commerce “is the voice of world business championing the global economy as a force for economic growth, job creation and prosperity”. Its activities include fighting corruption and commercial crime, as well as

making the case for open trade and the market economy system... ICC speaks for world business when governments take up such issues as intellectual property rights, transport policy, trade law or the environment... Signed articles by ICC leaders in major newspapers and TV interviews reinforce the ICC stance on trade, investment and other business topics... Every year, the ICC Presidency meets with the leader of the G-8 host country to provide business input to the summit... ICC is the main business partner of the United Nations and its agencies

Membership rates are 1500 Euros a year, though there are “national” sections, where businesses can pool their resources. The ICC claims to represent “companies of every size” although the excerpt from the member list provided does not reflect this.¹⁰⁴

Another NGO attending WTO talks, the European Roundtable of Industrialists,

is an informal forum bringing together around 45 chief executives and chairmen of major multinational companies of European parentage... Companies of ERT members are widely situated across

¹⁰³ <http://www.weforum.org/en/about/FAQs/index.htm>.

¹⁰⁴ cf. <http://www.iccwbo.org/id19696/index.html>.

Europe, with sales to EU customers exceeding Euro 1 000 billion, thereby sustaining around 6.6 million jobs in the region¹⁰⁵

Membership is not open: “Individuals join at the personal invitation of existing members”.

ERT makes its views known to the political decision-makers at national and European level by means of reports, position papers and face-to-face discussions. At European level, ERT discusses its views with Members of the European Commission, the Council of Ministers and the European Parliament. Every six months ERT strives to meet the Head of Government that holds the EU Presidency to discuss priorities. At national level, each Member communicates ERTs views to his own national government and parliament, as well as business colleagues and contacts in industrialist federations, other opinion-formers and the press¹⁰⁶

According to its own webpage, the ERT has been one of the major drivers behind European economic integration.¹⁰⁷

While the research presented here has been restricted to three NGOs for the sake of succinctness, the list could continue *ad nauseum*.

These NGOs have been some of the foremost participants in WTO-NGO co-operation, yet their prime purpose is to represent monetary interests. Not only do their members have the opportunity to influence the choice and policy of national representatives *eg* at the WTO through financing campaigns, their practice of forming into exclusive wealth-based NGOs also enables them to influence the policy of those representatives directly at the institutes in question: an opportunity which those with fewer resources to direct towards activities such as creating “position papers and reports” and routinely communicating with “opinion-formers” cannot hope to compete with. WTO-NGO co-operation thus serves to further privilege wealth, by permitting the wealthy a unique participatory role in policy formation, a role which, needless to say, can easily be used to further increase their wealth.

Unlike the *hetaireiai* of Athens, who understandably had a very difficult time influencing the decisions of the entire population, the electoral-control system provides these NGOs with a select set of individuals to apply pressure to. The same could be said of the WTO Ministerial Conference, which essentially serves up the small number of individuals

¹⁰⁵ <http://www.ert.be/home.aspx>.

¹⁰⁶ <http://www.ert.be/communications.aspx>.

¹⁰⁷ http://www.ert.be/ert_milestones_and_its_chairmen.aspx.

who between them make the decisions concerning the trade of the entire world to NGO invitees, such as the European Roundtable of Industrialists. The *hetaireiai* were a dangerous force in Athens, but the Assembly did not periodically select a few people, appoint them a decision-making capacity for several years and then invite the *hetaireiai* in to consult with them.

6.2.4. Suggested Solutions

6.2.4.1. Subsidisation of Weakest Groups

Most solutions tend to centre around advocating an increase in resources for interchange between NGOs and the WTO, particularly for marginalised groups,¹⁰⁸ or the provision of funds for Third World States to pursue a Dispute Settlement Procedure. This owes something to the idea of pay for participation so prevalent in Athens. While it does not go so far, it at least ensures that lack of finances is not a bar to participation. However, in this instance, it may only result in the richest having to marginally increase their own spending rate so as to keep the gap between them sufficiently wide, which will continue to be an enormous advantage in an adversarial situation. In addition, lack of resources is likely not the only reason for the underutilisation of the DSU – fear of reprisals will also play a role.

6.2.4.2. Elimination of NGO Participation

The main necessary change to the functioning of the WTO would seem to be simply to block NGOs from attending. There is no reason why national ministers of trade need these organisations to “inform” them and a glance at the webpages of the WEF, ICC and ERI would not indicate that their purpose is to “inform” of anything beyond a very particular viewpoint. There would seem to be no reason why national ministries cannot be expected to gather their own information, a task two or three interns could easily achieve.

Of course, as magistrates in the Republic first received the blessing of the Senate on a measure, so too, do trade ministers seek the blessings of industrialists, because just as pushing through legislation was very difficult without the Senate’s approval, so too is tinkering with trade regulations without industrialist approval. But while this is very difficult, a democracy that depends on the approval of a select few is utterly impossible and in the face of impossibility, there is no choice but to attempt what is merely very difficult.

¹⁰⁸ Scholte, O’Brien and Williams, note 100, at 123.

Either Art. 5 (2) needs to be stricken from the Marrakesh Agreement or the word “appropriate” as in “appropriate arrangements for consultation and cooperation” needs to be more precisely interpreted as the current arrangements are not appropriate for a democracy.

6.2.4.3. Procedural Rules Pertaining to Negotiations

The Like-Minded Group has made a proposal to introduce procedural regulations aimed at increasing transparency and curtailing extensive financial influence during WTO negotiations. This proposal includes a provision that work on declarations should be completed in Geneva to the greatest extent possible (Section 1, para. 6) and that Ministerial Conferences should not exceed the schedule agreed upon in Geneva (Section 2, para. 12). These two measures would decrease the financial disadvantages of small nations, who often have an office in Geneva, but find it expensive to send delegates to various locations around the world for negotiations, and then to extend their stay there on short-term notice. Section 2, para. 7 of the proposal also states that late night meetings and marathon negotiating sessions, which give nations with larger teams an advantage, should be avoided.¹⁰⁹

6.2.4.4. Conclusions

The financial problems facing the WTO – underutilisation of the DSU, business NGOs and differentials in delegation strength can be significantly combated by implementing all of the above measures, whereby the most important is the elimination of NGO participation.

6.3. Financial Influence at the United Nations

Although it is the least fiscally oriented of the major international institutions, financial influence also affects decision-making at the UN.

6.3.1. Money and Participatory Opportunities

Since the UN GA has six main committees as well as numerous subcommittees in which most policy is formulated, many smaller states simply cannot afford to send enough delegates to attend them all and prepare adequately for effective participation in them.¹¹⁰ The

¹⁰⁹ quoted in Jawara and Kwa, note 96, at 143 et seq.

¹¹⁰ W. Michael Reisman, “Redesigning the United Nations” in (1997) *1 Singapore Yearbook of International and Comparative Law*, 1 at 20.

monetary bar to participation in the decision-making process therefore repeats exactly that experienced at the WTO and clearly demonstrates how a practice as apparently innocuous as delegating to subcommittees functions systematically as a method of restricting decision-making abilities to a select group of “representatives” to the extent that they accurately reflect anyone at all.

6.3.2. Money and Security Council Seats

Finances play an enormous role in jockeying for a seat on the Security Council, particularly among Western democracies which devote significant resources to attending international conferences where they attempt to gain pledges of support from other attendees.¹¹¹ Canada admitted to spending 1.3 million USD on its 1998 campaign for a non-permanent seat, which included the costs of sending out more than a dozen special envoys, including the Speaker of the Senate and several MPs with ancestral ties to the nations visited, to garner support for its bid,¹¹² redesigning its permanent mission to the UN, and wining and dining UN representatives of various nations at a *Cirque du Soleil* performance in Manhattan (while one of its hottest rivals, Greece, took UN representatives and their spouses on two cruises of the Greek islands).¹¹³

Such behaviour is a necessity in a successful bid as: “Representatives in New York who make up their own minds on their country’s vote [i.e. whose governments have not sent instructions] will frequently vote with their personal friendships in mind”.¹¹⁴

However, such money is well spent, because once on the SC, a nation can demand compensation from the P-5 in exchange for voting in the desired direction.¹¹⁵ A seat is also a useful tool for pursuing a State’s own direct advancement, because it has become increasingly common “for the council president, during any given month, to champion a substantive theme for broad-ranging discussion as distinct from the Council’s usual crisis-response mode of interaction.”¹¹⁶ For example,

During Morocco’s most recent term on the council in 1992-1993, its influential government representative Ahmed Snoussi exerted considerable

¹¹¹ David Malone, “Eyes on the Prize: The Quest for Non-Permanent Seats on the UN Security Council”, in (2000) 6 *Global Governance*, 3 at 12.

¹¹² *Ibid.*, at 13.

¹¹³ *Ibid.*, at 13 et seq.

¹¹⁴ *Ibid.*, at 15.

¹¹⁵ Ofer Eldar, “Vote-trading in International Institutions” in 2008 19 *EJIL*, 3 at 25.

¹¹⁶ Malone, note 111, at 7.

leverage over the Western Sahara file. The Polisario Front was unable to counteract directly or through its ally Algeria (then not on the council)¹¹⁷

6.3.3. Conclusions on Financial Influence at the United Nations

Money directly affects influence at the UN. In its worst aspects pay for participation is the rule. Additionally, some countries are able to mitigate the redistributive effects of means-tested dues payments through direct contracts, so that even if one were to accept the undemocratic premise that money should buy power, the situation is untenable. To some extent, the UN even functions as a fulcrum for transferring public money into private hands.

6.3.4. Suggested Solutions

By introducing a fixed rotating schedule for non-permanent seats (a system already in use amongst some developing nation blocs), the selection of a non-permanent member of the Security Council would become significantly less dependent on wealth. This would prevent certain States, in particular regional powers from “buying” themselves access to decision-making via an expensive campaign.

6.4. Wealth at the International Financial Institutions

Nowhere does finance play a more controlling legal and political role than at the international financial institutions.

6.4.1. Using Money to Control Member States – Conditionality

At the IBRD and IMF, not only does money gain privileged access to decision-making, the prime activity of these institutions – granting loans – is often, intentionally or unintentionally, used as a means of subverting national “democracy” such as it is.

6.4.1.1. The Conditioned

This synopsis of conditionality shall primarily focus on the IMF, which has been a driving force behind conditionality, whereby the reader should bear in mind that the findings are equally applicable to the IBRD.

¹¹⁷ *Ibid.*, at 6.

The IMF's 1944 Articles of Agreement contained no provision for conditions to be placed on lending arrangements, but in 1952, after the largest shareholder (the US) vetoed lending until conditions were placed on loans,¹¹⁸

the IMF developed a practice whereby access to its resources would be contingent upon agreement to implement certain policies, and the Stand-by Arrangement became the legal vehicle through which these policy promises were made and enforced

The policy of conditionality was officially legalised in 1969 through an amendment to Article V, section 3(a), which states that the IMF has the right to ensure that borrowers can repay. The IMF did not further regulate conditionality until a decade later when it published its Guidelines on Conditionality, which "recommended that conditions be kept to a minimum, but imposed little obligation on IMF staff to adhere to them".¹¹⁹

Camdessus, the head of the IMF, justified imposing structural conditions by claiming that the IMF's mandate was not limited to addressing balance-of-payment issues, but also included promoting growth, a view theoretically consistent with the original Articles of Agreement, which stated that one purpose of the Fund was "...to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy",¹²⁰ but which was opposed by others among them Joseph Gold, the head of the IMF's Legal Department.¹²¹ Even if we were to accept that this is a purpose of the Fund, there is no reason to accept that conditionality is at all suited to achieving these objectives and/or that there are no other less obtrusive means that would be suitable to achieving that goal.

Although a State may borrow up to 25% of its quota condition-free and both the Compensatory Financing Facility and the Oil Facility offer loans with minimal conditionality,¹²² at any one time roughly ¼ of all States are participating in a conditioned IMF program.¹²³ In fiscal year 2000/2001, 80 countries participated in IMF conditional loan

¹¹⁸ Sarah Babb and Ariel Buira, "Mission Creep, Mission Push and Discretion: The Case of IMF Conditionality" in Buira ed, *The IMF and the World Bank at Sixty*, 59 at 71.

¹¹⁹ Davesh Kapur, "Conditionality and Its Alternatives" in Buira ed, *The IMF and the World Bank at Sixty*, 31 at 34; Babb and Buira, note 118, at 62.

¹²⁰ Art. 1 (ii), IMF Articles of Agreement

¹²¹ Babb and Buira, note 118, at 64 et seq.

¹²² James Vreeland, *The International Monetary Fund: Politics of Conditional Lending*, (Routledge, 2007) at 26.

¹²³ *Ibid.*, at 75.

agreements.¹²⁴ The average number of conditions attached to loans was 6 in the 1970's, 10 in the 1980's and 23 in 1999, excluding prior conditions.

The nature of conditionality has also changed. Conditions traditionally concerned fiscal and monetary policy in the narrower sense (*eg* exchange rates), but now pertain to, “financial-sector reform, privatization and public enterprise reform, social safety nets, tax and expenditure policies...labour market policies, pricing and marketing/distribution policies, agricultural policies, environmental policies, and policies to combat corruption and money-laundering”¹²⁵ as well as global terrorism. “In some cases the agreements stipulated what laws the country's Parliament would have to pass to meet IMF requirements or “targets” – and by when”.¹²⁶ The control thus exercised through IFI conditionality has been compared to “informal but far-reaching lawmaking authority...which existed under the Mandate system of the League of Nations”.¹²⁷

There are no mechanisms via which this control is subjected even to Republican-style acquiescence. IMF conditions are not international obligations in the sense of Art. 12 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, hence failure to fulfil them cannot constitute an internationally wrongful act and thus cannot incur liability. The only consequences are factual, *ie* the difficulty of acquiring another loan.¹²⁸ This grey-zone of non-legality, however, cuts both ways, and cuts particularly deeply into national democracy. Because the agreements are not legally binding, they do not need to be ratified domestically.¹²⁹ Standard practice is for a Letter of Intent outlining the policies a nation intends to pursue if it receives an IMF loan to be drafted by IMF officials. A member of government later signs on behalf of the country and the IMF Managing Director presents the Letter of Intent to the Executive Board which gives or withholds approval.¹³⁰ Through this “loophole” millions of citizens are bound to repay loans under conditions that their theoretical representatives have not even nominally approved. Only a few IMF and government officials have given their consent.

This convenient legal trick is also often used by national governments in order to use IMF conditionality as an excuse to push through unpopular reforms.¹³¹ For example, in 1990 the President of Uruguay, Luis Alberto Lacalle found himself in a situation where both his

¹²⁴ Erica Gould, “Money Talks: Supplementary Finances and International Monetary Fund Conditionality” in (2003) 57 *International Organization*, 551 at 552.

¹²⁵ Kapur, note 119, at 37.

¹²⁶ Joseph Stiglitz, *Globalization and Its Discontents*, (Penguin Books, 2002) at 44.

¹²⁷ Nico Krisch “More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law” in Nolte and Byers eds, *United States Hegemony and the Foundations of International Law*, (Cambridge University Press, 2003), 135 at 158.

¹²⁸ A difficulty which is largely overstated. It is almost always possible to get a further loan. However, it will almost always come with a higher interest rate and more severe conditions attached.

¹²⁹ Vreeland, note 122, at 31 et seq.

¹³⁰ *Ibid.*, at 32 et seq.

¹³¹ *Ibid.*, at 62.

allied parties and most of his own party would not agree to his envisaged reforms. In order to push through the reforms he took out a conditioned IMF loan, even though Uruguay did not need it. The parliament was then forced to vote in many of the laws required to meet the conditions and avoid a drop in credit rating.¹³²

Fellow South American leader, Osvaldo Hurtado, president of Ecuador from 1981-84 did not so much as consult his own Congress when implementing an austerity program and is on the record as having said:

You can imagine what would happen if I would have subjected economic policy to debates within the party! No political party would have ever approved of the kind of economic policy I undertook...I did not want economic policy in the hands of people who would politicize it¹³³

Such behaviour also occurs in developed nations “in the 1974 and 1977 negotiations between Italy and the IMF, domestic conservative forces exploited IMF pressure to facilitate policy moves that were otherwise infeasible internally”.¹³⁴

6.4.1.2. The Conditioners

Considering the foregoing, it might be somewhat astonishing to learn that the IMF staff are not the sole initiators of conditionality. Conditionality is a complex vortex with many contributors. The IBRD sometimes imposes conditions even tougher than those assigned by the IMF¹³⁵ and States contributing to IMF rescue packages for other states impose their own conditions on their financing.¹³⁶ In addition, much of the funding for IMF programs in the past thirty years has been provided by private commercial banks, as IMF resources do not suffice to provide large loans¹³⁷ and usually represent only a fraction of the total resources involved in a Fund programme.¹³⁸

¹³² *Ibid.*, at 65 et seq.

¹³³ Stephen Schnably, “Constitutionalism and Democratic Government in the Inter-American System” in Fox and Roth, eds, *Democratic Governance and International Law*, 155 at 192 et seq.; this statement is even more striking if one considers that Hurtado was not the elected President of Ecuador; he was the Vice-President and became President when his predecessor was killed in a plane crash.

¹³⁴ Robert Putnam “Diplomacy and Domestic Politics: The Logic of Two-Level Games” (1988) 42 *International Organization*, 427 at 457.

¹³⁵ Ibrahim Shihata, *The World Bank and the IMF Relationship – Quo Vadis?: Essays in International Financial and Economic Law* (London Institute of International Banking, 2002), at 16.

¹³⁶ Ariel Buira in “The IMF and the World Bank at Sixty: An Unfulfilled Potential?” in Ariel Buira, ed, *The IMF and World Bank at Sixty* (Anthem Press, 2005) at 14; E. Gould, note 124, at 552 et seq; Kapur, note 119, at 39.

¹³⁷ E. Gould, note 124, at 560.

¹³⁸ Kapur, note 119, at 39.

The IMF is, in fact, chronically underfunded: it was originally endowed with less than ¼ of the resources Keynes thought necessary for it to fulfil its mission as a lender of last resort, and that figure as a percentage of GDP has plummeted even further since.¹³⁹ IMF resources were equivalent to 58% of world trade in 1944, 15% in 1965 and 4% in 2005.¹⁴⁰ Reliance on private financiers has naturally risen accordingly.

Between 1954 and 1960, in 77% of IMF stabilisation programs in Latin America at least 50% of the funding came from supplementary financiers (other states and private financiers).¹⁴¹ Between 1974 and 1979, 60% of external financing for non-OPEC states came from commercial banks.¹⁴² At the end of 1980, the 12 largest non-oil producing borrowers had external debt totalling \$199 billion, \$120 billion of which was owed to private banks.¹⁴³

Because the IMF needs the private institutions to agree to debt restructuring (which usually means agreeing to roll-over the loan) or risk the collapse of their entire program (one that has often been ongoing for several years), the banks are put in a position to demand that the IMF include bank-friendly conditions in the loan,¹⁴⁴ such as measures to ensure that borrowers in the country in question repay the commercial banks that have lent them money promptly.¹⁴⁵

The influential position of private financiers is further enhanced by their practices of organising as a cohesive interest group in order to present a united front when negotiating the conditions of their finance with the IMF,¹⁴⁶ and lending to States via credit syndication, which involves large loans being shared “among several major banks and scores of smaller ones”.¹⁴⁷ Such syndicate co-operation is further facilitated by creditors forming into informal clubs, *eg* the Paris Club (official, *ie* State, creditors), the London Club (private creditors) and New York Club (private creditors),¹⁴⁸ much like the *hetaireiai* of Athens.

The Fund acts as a mediator between these *hetaireiai* and the borrower. Most private financing that accompanies an IMF loan is “explicitly negotiated and controlled... Supplementary financing packages are often negotiated concurrently with Fund program negotiations”.¹⁴⁹ The IMF also monitors borrowers to ensure that they fulfil all conditions and acts in this respect more as a service-provider or agent of the banks than of the

¹³⁹ Babb and Buira, note 118, at 71; I. de Vegh, “The International Clearing Union” in (1943) 33 *American Economic Review*, 534 at 538.

¹⁴⁰ Buira, note 136, at 13.

¹⁴¹ E. Gould, note 124, at 556.

¹⁴² Charles Lipson, “The International Organization of Third World Debt” in (1981) *International Organization* 35(4), 603 at 611.

¹⁴³ *Ibid.*

¹⁴⁴ E. Gould, note 124, at 573 et seq.

¹⁴⁵ *Ibid.*, at 576.

¹⁴⁶ *Ibid.*, at 561.

¹⁴⁷ Lipson, note 142, at 609.

¹⁴⁸ *Ibid.*, at 620.

¹⁴⁹ E. Gould, note 124, at 558.

industrialised nations that ostensibly control it. After all, it is the commercial banks and not the industrialised nations who have to be routinely pacified into restructuring debt.¹⁵⁰

6.4.1.3. Conclusions Regarding Conditionality

Conditionality is an example of the enmeshed interconnection of national and international democracy. It is such a potent mechanism for controlling national decision-making that national democratic reform would prove nearly useless for many States without simultaneous reform of conditionality. Conditionality is also one of the least democratic legal practices in existence, even by “representative democracy” standards, as conditions are most often set by IMF and banking officials whose endorsement by any people at all via any mechanism at all is non-existent.

Conditionality reduces the scope for citizen participation dramatically and it does so on openly economic grounds. Such a system largely undoes the scant participation and representation afforded at IFIs, as well as further undermining any possible participation on a national level. Discussion and decision-making power is discreetly cut-off for fear of irritating financiers. Rather than providing an alternative to these financiers, the IFIs co-operate with them to facilitate the implementation of their conditions. To this extent the IFIs are not fulfilling their intended task – they are not providing a true alternative to borrowing from private banks.

6.4.1.4. Suggested Solutions

6.4.1.4.1. Abolition of Subscriptions

The representative solution advocating an abolition of subscriptions and recasting the IFIs as loan facilitators outlined above is equally applicable here,¹⁵¹ a solution which makes even more sense considering that expansion of the IMF’s resources is blocked by the wealthy States which control the majority of shares,¹⁵² so that it is not likely that the dominant position of commercial banks, which rests on their provision of vital funds, will ever be circumvented by these means.

¹⁵⁰ *cf.* Lipson, note 142, at 619.

¹⁵¹ *Supra* pp. 234.

¹⁵² Buira, note 136, at 13.

6.4.1.4.2. Reforming Conditionality

In addition to the above solution, there is still room to reform conditionality, as conditionality would continue to exist under a loan facilitation model.

In the IFIs, design, lending and monitoring of conditioned loans are all accomplished by the same institutions, which creates an “inherent conflict of interest”. Recently, monitoring by peer-review institutions, *eg* NEPAD¹⁵³ which facilitates a peer-review of each member State’s action on good governance and democracy by a panel of eminent Africans every three years, has sprung up and could be a viable alternative to review via the IFIs.¹⁵⁴

Furthermore, Letters of Intent should become legally binding instruments with defined consequences of non-repayment, requiring national ratification. Prior conditions should be abolished.

6.4.2. Wealth Centralisation

The IFIs also contribute to exorbitant wealth inequality by acting as a fulcrum for wealth centralisation. The accumulation of extreme wealth is symptomatic of Republican governance, while democracy requires that wealth inequality remain below levels at which it amounts to economic dependency between citizens and/or States.

6.4.2.1. Money Flow from Poor to Rich

Money does not only flow from the IFIs to borrower States, equalising wealth disparities in a democracy-enhancing manner. A considerable stream flows the other way as well, mirroring the general flow of finance not in Athens, but in the Roman Republic.

6.4.2.1.1. Public Liability for Privately Incurred Debts

One way in which this wealth transfer occurs is the creation of public liability for privately incurred debts, achieved through loan guarantees, subsidised privatisation, take-or-pay clauses and investor bail-outs.

¹⁵³ New Partnership for African Development.

¹⁵⁴ Kapur, note 119, at 51.

6.4.2.1.1.1. Loan Guarantees

Due to an amendment of the Articles in 1965, the IBRD can guarantee loans made by private investors, through “the usual investment channels”.¹⁵⁵ Of the World Bank Group, the IFC and MIGA most often give loan guarantees, with the former protecting against commercial risks, *ie* commercial failure of the enterprise, and the latter against political risks, such as expropriation and nationalisation.¹⁵⁶

However, the member on whose territory the project is occurring must guarantee the loan back to the Bank.¹⁵⁷ Therefore, although the loan is being invested by a private entity, the State ultimately carries the risk of paying the loan back. It seems more than questionable from a democratic point of view as to how a privately incurred debt, which if successful would have directly benefited only the private investor, can, in case of failure, be legitimately transferred to the entire population of a State, who must then bear the financial burden of paying back the loan, the closure of which is more often than not agreed to behind closed doors. Such guarantees have become a significant source of some State’s indebtedness.¹⁵⁸

For example, in 2000 MIGA paid out its first claim for political risk insurance, \$15 million given to Enron to reimburse it for cancellation of a power project agreement with the Suharto dictatorship, which the successor government of Indonesia subsequently cancelled. MIGA forced the Indonesian government to reimburse it the \$15 million, refusing to issue further coverage for business in Indonesia until it did so, although it openly agreed that Indonesia was right to cancel the project which was not economically or politically viable. “Thus Indonesian taxpayers have to pay the bill for a politically corrupt and economically unviable contract signed between a dictatorship and a multinational firm”¹⁵⁹ – and, as we now know, a very fraudulent multinational firm at that.

6.4.2.1.1.2. Privatisation and Take-or-Pay

Public money is also often used to subsidise privatisation deals with multinational firms. Many guaranteed loans are made to facilitate privatisation, often of (previously) public services, some of which have proven records of profitability as publicly-owned companies.¹⁶⁰

¹⁵⁵ Art. IV, Sec. 1, No.2, IBRD Articles of Agreement.

¹⁵⁶ Tim Kessler, “Assessing the Risks in the Private Provision of Public Services” in *The IMF and the World Bank at Sixty*, Buiria ed, (Anthem Press, 2005) 235 at 252 et seq.

¹⁵⁷ Art. III, Sec. 4, IBRD Articles of Agreement.

¹⁵⁸ Kessler, note 156, at 253.

¹⁵⁹ *Ibid.*, at 254 et seq.

¹⁶⁰ *Ibid.*, at 249; *eg* Gabon’s water services were privatised in 1996, after being described by an IFC investment officer, as a ‘relatively wealthy company [which] will make a decent profit in 1996... There is no overstaffing and the company is quite well-managed’.

These often include financing to cover the costs of incentives to attract private firms, such as “cash contributions during the construction period; subsidies during the operating period (*eg* in the form of non-refundable grants), and a favourable tax regime – including tax holidays, refunding of tax on construction and operating costs.”¹⁶¹

Furthermore, many privatisation deals guarantee profits for the private firms while placing all risk on “the people”.¹⁶²

On the advice of the World Bank, Pakistan allowed private electricity generation from 1992. No private firms took up this offer, so two years later Pakistan produced the Policy Framework and Package of Incentives for Private Sector Power Generation Projects in Pakistan, which offered guaranteed prices for electricity production, with regulations pertaining to inflation and exchange-rate fluctuations, exemption from corporate income tax, sales tax, customs duties and surcharges on imported equipment, and permission to issue corporate bonds and shares at discounted prices.¹⁶³ Later a private generating plant Hubcap was established from which the Water and Power Development Authority and Karachi Electric Supply Corporation agreed to purchase power at a fixed price, regardless of how much energy was actually used, “The state-owned WAPDA will purchase power from Hubcap and the power purchase agreement assures a guaranteed revenue equivalent to 60 per cent of gross capacity utilisation, irrespective of the actual takeoff from the power station”¹⁶⁴ This pattern has been repeated the world over.

In Bolivia only one company Agues del Tuner (a consortium owned by Bechtel) made a bid in the public auction of Cochabamba’s water system. Del Tuner’s terms included rights to all water resources as well as a guaranteed 15% profit margin to be indexed to US inflation.¹⁶⁵

A power plant founded by US company AES in Bojanala, Uganda, included a power purchasing agreement concluded on the basis of advice that the World Bank had given Uganda. The PPA required the government to purchase all power produced at a price fixed in foreign currency so that it would be proof against a devaluation of Ugandan currency. Of course, this also meant that in the event of a devaluation the price of electricity would rise dramatically for Ugandans.¹⁶⁶

An independent review by an Indian consulting firm concluded that not only were capital costs the same as other power plants with twice the

¹⁶¹ World Bank Annual Report 1998 quoted in Kessler, note 156, at 251 et seq.

¹⁶² Kessler, note 156, at 257.

¹⁶³ *Ibid.*, at 252.

¹⁶⁴ *Ibid.*, at 259.

¹⁶⁵ *Ibid.*, at 257 et seq.

¹⁶⁶ Jawara and Kwa, note 96, at 34.

generating capacity, but the PPA imposes excessive payment requirements¹⁶⁷

These examples are only a few illustrations of a broader pattern. Similar power purchasing agreements have been closed in Costa Rica, India, Croatia, the Dominican Republic, Hungary and Indonesia.¹⁶⁸

From an economic point of view this practice bears some serious thought: why, after all, should a State be given a loan to facilitate privatisation? Is it not the very nature of the capitalist free market system that private enterprises do not rely on loans or subsidies from the State? If a private enterprise does not spring up to fill a niche in the economy, is the obvious conclusion not that that niche it is not profitable or that the risks associated with it are too high to risk investment? If a sector is to be subsidised, would the obvious conclusion not be that it must be exposed to some degree of governmental control? Why must providing a basic service such as water be profitable? Why do citizens pay taxes, after all? Furthermore, how can there possibly be enough liquidity in a nation that needs a loan to provide basic infrastructure to repay the loan with interest, plus a profit to the enterprise that has garnered the contract to provide it? The answer is a mixture of ideological misguidedness as well as the plain fact that such policies amount to a licence to print money for the large multinationals who consort with the IFIs. Such an arrangement has been referred to as a tax worthy of the feudal era.¹⁶⁹ But then again, perhaps the feudal era never ended. What appellation could be more fitting to those who must pay back the loan plus rates that provide the enterprise with a profit than that of “serf”?

The only thing that is truly being privatised is control over a substantial piece of the world’s wealth and resources.

6.4.2.1.1.3. Investor Bail-Outs

When a currency attack or capital flight occurs, the IMF often steps in to “bail out” the country under attack by providing funds with conditions attached. Often the liquidity provided goes to companies that have borrowed from Western banks and is used to pay off these loans so that the exercise amounts to a *de facto* subsidisation and privileging of those banks which are thus protected from the consequences of having made a bad loan,¹⁷⁰ at the literal expense of the population of the borrower country which is left to pay back the loan

¹⁶⁷ Kessler, note 156, at 259.

¹⁶⁸ *Ibid.*, at 260.

¹⁶⁹ *cf.* Stiglitz, note 126, at 20.

¹⁷⁰ *Ibid.*, at 95 et seq.

under the conditions that the IFIs have attached. In other words, the practice functions exactly as the loan guarantees do to facilitate the enrichment of the already wealthy at the direct expense of the poor via a financial sleight of hand.

Bank bail-outs and speculator subsidisation via efforts to maintain currency rates are not occasional, unfortunate occurrences, but rather embedded practices to the extent that

in the lead up to the ruble crisis in Russia in 1998...even as the Wall Street creditors were making loans to Russia, they were letting it be known how large a bailout they thought was needed and, given Russia's nuclear status, they believed would get¹⁷¹

This faith was well-placed – the IMF made a loan of nominally \$11 billion to Russia. Three weeks after the payment was made Russia was forced to suspend payments and devalue the ruble, leaving the purpose of the loan unfulfilled and Russian taxpayers in debt to the tune of \$11 billion.¹⁷²

The bail-out component of loans is even sometimes explicitly agreed upon. The IMF stand-by arrangement to Ghana in 1983 specified that the loan be deposited directly into a Bank of Ghana account at the Bank of England;

the Bank of England would then follow irrevocable instructions that these deposits be directly transferred to the Standard Chartered Bank to repay a short-term bridging loan. In other words, Fund financing was being directly funnelled to a commercial bank creditor, rather than to Ghana itself¹⁷³

The evidence is not only anecdotal. Statistical analyses prove that across the board those nations in which foreign investors, particularly American commercial banks, have the largest stake, receive the largest bail-out loans. One study showed that each increase of \$4 billion in US bank exposure led to a 3.4% increase in the chances of a State receiving a loan, and on approved loans it led to an increase in the size of the loan by 1.5 million SDRs.¹⁷⁴

According to free market theory, a capitalist who makes a bad loan must bear the consequences – this is the justification for charging interest. Therefore, consistent provision of funds to debtors also amounts to the provision of “public goods for creditors”,¹⁷⁵ because the money is used to continually pay interest to the enrichment of the creditor. Via this

¹⁷¹ *Ibid.*, at 201.

¹⁷² *Ibid.*, at 149 et seq.

¹⁷³ E. Gould, note 124, at 564.

¹⁷⁴ Broz and Hawes, note 20, at 98.

¹⁷⁵ Lipson, note 142, at 619.

system, Western taxpayers bail out Western creditors (funneling money straight from poor to rich, public to private) and on the way conditions are imposed on the borrowing country which is still in debt and merely functions as the fulcrum for this exchange of resources.

6.4.2.1.2. Subscription Quotas, Interest and Fees

We have seen how wealth is often funnelled from poor to rich and public to private via the IFIs in vast quantities, now we must question the extent to which a counterflow exists

The first point that should be made is that while it would appear that wealthy States finance the IFIs through their subscription quotas this is not in reality the case. Originally members paid in 20% of their IBRD subscriptions, However, at the last General Capital Increase only 3% was required to be paid in, while the remainder is callable capital – capital that can be called in in case of emergency and which the IBRD can borrow against to raise capital for its projects.¹⁷⁶ In addition, risks of pledging callable capital are mitigated by many safeguards. The administrative costs of these safeguard measures were estimated to be \$81 million in 2001, and additionally cost borrowing nations between \$118 and \$215 million to satisfy.¹⁷⁷ There is a growing divergence between “voting rights and the contributions made to IBRD equity by shareholders and borrowers as the share of retained earnings has risen while the share of paid-in capital has declined over the years”.¹⁷⁸

While a certain portion of the IBRD’s net income (usually close to \$1 billion per year¹⁷⁹) is used to fund concessionary lending through the IDA¹⁸⁰ and the HIPC¹⁸¹ (meaning that initiatives to “aid” the poorest nations are financed by the interest-paying “middle-poor” nations) the rest is distributed to the State shareholders, whereby each State receives a fixed sum per share.¹⁸²

The situation is similar at the IMF. The IMF charges borrowers, through interest and fees roughly what it pays its creditor members for the resources used in its regular lending operations.¹⁸³ Increasing loan charges have also served to transfer financial risk from creditors to borrowers.¹⁸⁴ The basic rate of charge is equal to the rate of interest.¹⁸⁵ According to the

¹⁷⁶ Aziz Ali Mohammed, “Who Pays for the World Bank?” in Buira ed, *The IMF and the World Bank at Sixty*, 181 at 184.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*, at 181.

¹⁷⁹ *Ibid.*, at 192.

¹⁸⁰ Available to States with per capita incomes below 750 USD.

¹⁸¹ Heavily Indebted Poor Countries Initiative

¹⁸² Art. V, Sec. 14, IBRD Articles of Agreement; Mohammed, “Who Pays For the World Bank?”, note 1304, at 191 et seq.

¹⁸³ Aziz Ali Mohammed, “Burden-Sharing at the IMF”, http://www.unctad.org/en/docs/gdsmdpbg2420035_en.pdf.

¹⁸⁴ Kapur, note 119, at 38.

¹⁸⁵ Art. XX, IMF Articles of Agreement.

Articles of Agreement, the rate of remuneration payable to creditors cannot be reduced below 80% of the SDR rate of interest.¹⁸⁶ Although creditors are obliged to forego remuneration on 25% of their quota as it stood on April 1 1978, quotas have since increased, so that this currently represents on average only 3.8% of each creditor's quota. The burden of administrative costs also largely falls on borrowers. The relative contribution of creditors to the IMF has fallen from a peak of 72.3% in 1982 to 25% in 2002.¹⁸⁷

The largest shareholding nations thus fund the IFIs to a far lesser degree than is immediately apparent as pledged shares are overwhelmingly callable capital, initiatives to relieve the poorest nations are funded by interest from middle-income nations and all States receive interest payments in proportion to the number of shares they own.

6.4.2.2. Conclusions Regarding Reverse Money Flow

The IFIs do not redistribute resources from wealthy to poor, instead they facilitate the transfer of public goods to private hands, much as the Roman system did. Loan guarantees, take-or-pay clauses and investor bail-outs all enrich the wealthy at the expense of the impoverished. The costs of financing the IFIs do not in factual terms fall very hard on "creditor" States, significant as this is the alleged justification for their controlling position within these organisations. Due to the shift of credit risk to borrower States (which in the long-term would seem to be an economic impossibility), the IFIs and the commercial banks they collaborate with have become quite irresponsible in their lending behaviour.

Once again, it must be borne in mind that we have not touched on the even minimally controversial tactics of wealth centralisation, such as the fact that the Articles of the IFIs frequently contain provisions that specify that no conditions that the proceeds of a loan shall be spent in the territories of any particular member or members shall be imposed,¹⁸⁸ a circumstance which has often led to the accusation that loans are used to purchase supplies, expertise from more developed countries who supply the funding for the loan, thereby enriching their economies, at the expense of the economy in need of the loan.

¹⁸⁶ Art. IV, Sec. 9, IMF Articles of Agreement.

¹⁸⁷ Kapur, note 119, at 40.

¹⁸⁸ *cf.* Art. III, Sec. 5, IBRD Articles of Agreement, Art. 5, IDA Articles of Agreement.

6.4.2.3. Suggested Solutions

6.4.2.3.1. Anti-Corruption Legislation

While we have not particularly touched upon corruption, certain activities such as take-or-pay clauses, shady privatisation deals, and openly planned bail-outs are quite borderline, as is the co-relation between foreign bank exposure and IFI loan size. This solution is mentioned here, because it is the traditional modality used to try to control the influence of wealth in decision-making, and therefore it could be argued that an expansion of this policy to cover the abovementioned practices could solve the issue.

There are several international anti-corruption treaties, most of them fairly recent and mostly quite narrow in scope. Both the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Council of Europe's Criminal Law Convention on Corruption focus intensely on bribery and money-laundering. The UN Convention Against Corruption which came into force in 2005 also deals primarily with bribery,¹⁸⁹ embezzlement,¹⁹⁰ and money-laundering,¹⁹¹ however it also includes preventative measures in Arts. 5-14 which would seem on first reading to be quite far-reaching and could possibly affect major international money-funnelling enterprises. The Preamble of the Convention states in part that the Parties are "convinced that the illicit acquisition of personal wealth can be particularly damaging to democratic institutions" and Art. 15 [Bribery], if read very widely, could possibly be interpreted to prevent party financing by corporate entities, while Art. 9 [Public Procurement] could have some ramifications for take-or-pay enterprises, by at least forcing open bidding. However, a contextual reading indicates that the preventative measures only relate to preventing the specific crimes mentioned in Arts. 15 et seqq.

GRECO¹⁹² assesses States and pressures them to implement anti-corruption laws. Unlike most mechanisms which are primarily directed against flagrant corruption in developing States, GRECO also focuses on more hidden forms of corruption in developed nations. Its most pertinent action for democracy is calling on specific States to implement Council of Europe Recommendation Rec(2003)4 of the Committee of Ministers to Member States on Common Rules Against Corruption in the Funding of Political Parties and Electoral Campaigns.

This recommendation, however, amounts to little more than a conglomeration of the various rules already in place in developed nations, *eg* limitation of party spending via a ceiling,¹⁹³

¹⁸⁹ Arts. 15, 16 and 21, UN Convention Against Corruption.

¹⁹⁰ Arts. 17, 22, UN Convention Against Corruption.

¹⁹¹ *eg* Art. 23, UN Convention Against Corruption.

¹⁹² Group of States Against Corruption.

¹⁹³ Art. 9, Council of Europe Recommendation Rec(2003)4.

registering donations that exceed a certain limit,¹⁹⁴ and regulating donations from foreign donors.¹⁹⁵ Art. 5 (b) only states that States should take measures aimed at limiting, prohibiting or otherwise strictly regulating donations from legal entities *which provide goods or services for any public administration*,¹⁹⁶ leaving other legal entities free to donate, while Art. 5(a) (i) provides only that shareholders should be notified of any donation from “their” corporation. Furthermore, a systemic problem remains the implementation of such regulation. For example, Art. 3 of the recommendation foresees that rules to “avoid conflict of interest” in political donations should be put in place, but does not contemplate what these rules could be, leaving the addressees without concrete obligations.

International institutions are obligated to observe their own anti-corruption regulations. Sec. 5 of the IBRD Articles of Agreement is typical stating that the President and staff owe duty only to the Bank and that no one should attempt to “influence” them, which amounts to little more than a prohibition of bribery.

While such legislation is commendable, its practical achievements can be summarised in saying that it makes some forms of corruption risky and ensures that all successful rule-manipulators possess a high degree of intelligence and innovativeness – the skills requisite in bringing about a large increase in one’s wealth without crossing the jagged line into technically illegal territory. It should be borne in mind that this was a prominent feature of Republican legalism, a law which permitted many activities specifically centred around transferring public money to private hands, thus making the identification of corruption difficult and allowing all forms of technically legal manipulation to flourish unchecked. As a result Republican anti-corruption legislation was chronically running behind – very far behind – practice on the ground, just as it is today. It succeeds only in banning those practices of exploitation and personal enrichment at others’ expense which are already passé. Seeking to prevent corruption in a system that allows for vast income inequalities and which provides the mechanisms whereby those inequalities can be easily expanded as well as traded for political influence is like trying to prevent malaria by swatting mosquitoes to death one at a time. It is possible that such legislation may prevent Canada from inviting all UN representatives to the *Cirque du Soleil* again, but for a country with Canada’s resources this is unlikely to create a serious impediment to exercising influence as it addresses the symptom only and not the root cause.

¹⁹⁴ Art. 12 (b), Council of Europe Recommendation Rec(2003)4.

¹⁹⁵ Art. 6, Council of Europe Recommendation Rec(2003)4.

¹⁹⁶ Italics mine.

6.4.2.3.2. Reform in Accordance with the Idea of an International Clearing Union

Prior to the Bretton Woods negotiations, the British government circulated a suggestion made by Keynes which proposed the establishment of an International Clearing Union, which would give loans to allow countries in deficit to reduce their consumption gradually.¹⁹⁷ Every nation would have a quota at the International Clearing Union denoted in so-called bancor (today we would probably say SDRs) and its debt and credit would be reviewed based upon this quota. If a State's debt were to exceed a quarter of its quota averaged over two years, it would be entitled to devalue its currency relative to the bancor by up to 5% to make exports more attractive and prevent capital from leaving the country, and if a State's debt were to reach the amount of half of its quota, the Board would be entitled to request it to deposit suitable collateral.

As a condition of letting the debit rise above 50 per cent of the quota, the Board may require the application of three other remedies; namely, (a) a stated reduction of the value of the member's currency, (b) the control of outward capital transactions, if not already in force, (c) the surrender of a suitable portion of its gold or other liquid reserves.¹⁹⁸

Any State continuing to exceed its quota without taking measure could eventually be barred from drawing against its account.¹⁹⁹

While the plan thus far resembles the blueprint for the modern IFIs as we know them, the flip side of this arrangement included a number of limitations on a State exceeding its quota in credit. The Plan read in part,

A member State whose credit balance has exceeded half of its quota on the average of at least a year shall discuss with the Governing Board (but shall retain the absolute decision in its own hands) what measures would be appropriate to restore the equilibrium of its international balances

These could include the appreciation of its currency, the expansion of domestic credit, reducing tariffs against imports – quite interesting in the context of the WTO – and giving international development loans.²⁰⁰ At one point in the Plan, Keynes suggested that if a State

¹⁹⁷ Vreeland, note 122, at 7; Shihata, note 135, at 6.

¹⁹⁸ de Vegh, note 139, at 536 et seq.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.* at 537.

persistently remained in credit surplus over its limit, this portion might simply be cancelled or compulsorily invested.²⁰¹

While the effectiveness of some of Keynes' methods, such as the devaluation of currency, is disputed by economists, the main thrust of his plan remains: that addressing debt also means addressing credit. In addition to preventing countries from becoming poor by accumulating debt, this system also would prevent countries from becoming rich by lending and would thus lead to the greater wealth equilibrium so conducive to democracy. It would reduce the lucrativeness of lending large amounts to debt-ridden nations which flow back to wealthy nations through private enterprise.

A potential problem with this solution is the practice of lending via bank syndicates which allows loans to be spread across entities in many States and could disguise sizeable credit surpluses. In addition, the mandatory devaluation of currency would be difficult to implement in the current system of floating exchange rates. However, it is possible that even considering syndicate lending and the inability to adjust exchange rates, that such a mechanism could still be useful in curtailing excessive lending, which in turn would lead to fewer bail-outs.

6.5. Vote-Buying, Vote-Trading, Vote-Fixing

In addition to the economic issues already discussed and their impact on democracy at international organisations, the economic inequality which is exacerbated by many institutions also encourages vote-trading, vote-buying and vote-fixing, a situation which further deepens inequality. As this practice is endemic to all international institutions, a separate section has been devoted to its discussion.

6.5.1. Vote-Fixing

Decision-making outcomes in international institutions tend to be pre-determined through political alliances. The campaign for a non-permanent seat on the SC is a good example of this,²⁰² with candidates for non-permanent seats often supporting each other through traditional alliances. For example, Canada, Australia, and New Zealand form the so-called CANZ group. Not only do they have an agreement not to run against each other, “[t]hey campaign for each other, with each bringing significant client constituencies to the

²⁰¹ *Ibid.*, at 542.

²⁰² Malone, note 111, at 8 et seq; see discussion *supra* pp. 261.

table”.²⁰³ Such behaviour is not restricted to States: environmental NGOs actively recruit new State members to the International Whaling Commission, “in order to gain the votes needed to impose the moratorium on commercial whaling.”²⁰⁴

Such alliances or voting cartels distort the true state of member opinion on issues and give a significant advantage to those States and NGOs with the resources to facilitate tight organisation and direct client-State voting powers.

Another tactic, which could loosely be subsumed under vote-fixing is the practice of fixing speaking time to exaggerate the level of support that an agreement enjoys during conferences and negotiations. At the final meeting of the Committee of the Whole to approve a Green Room draft declaration in the run-up to the WTO Doha negotiations,

those who supported the text were given the floor to speak first...It was arranged in this way to literally set the consensus...People cheered and clapped after every endorsement of the text...This made those who wanted more clarifications feel like they were the bad guys...This is a common tactic, to make a certain viewpoint appear dominant²⁰⁵

It was also a tactic used over two millennia ago by Roman magistrates who chose their first voters and first voting units to convey precisely the same impression.²⁰⁶

6.5.2. Vote-Buying

Vote-buying can take the form of either offering a State a benefit in order to vote a certain way or threatening to withhold a benefit (*eg* bilateral aid) if the country does not vote in the preferred direction.²⁰⁷

Vote-buying in the SC, in particular, is considered to be the norm, the most publicised example being Res. 678 on Iraq. To secure this resolution, the US promised financial aid to Columbia, Cote d’Ivoire, Ethiopia and Zaire, promised the USSR to keep the Baltic States out of the 1990 Paris Summit, persuaded Kuwait and Saudi Arabia to give the USSR hard currency, forgave an Egyptian debt of \$14 billion, donated military equipment valued at \$8 billion to Turkey, allowed a World Bank loan to Iran to go through, lifted the sanctions on China that had been imposed after Tiananmen Square, supported a \$114 million World Bank

²⁰³ *Ibid.*, at 12; from a linguistic point of view, it is interesting to note how often the word “client” surfaces when describing modern decision-making mechanisms.

²⁰⁴ Steve Charnovitz, “Two Centuries of Participation: NGOs and International Governance” in (1996-1997) *18 Michigan Journal of International Law*, 183 at 263.

²⁰⁵ Jawara and Kwa, note 96, at 108.

²⁰⁶ *Supra* pp. 101.

²⁰⁷ Eldar, note 115, at 7.

loan to China and resumed normal diplomatic relations. They also cut off \$70 million in bilateral aid to Yemen which opposed the war and either instigated or permitted hundreds of thousands of Yemeni workers to be expelled from the surrounding Gulf States, mostly Saudi Arabia.²⁰⁸

Votes in the UN General Assembly are also routinely sold in exchange for loan approval at the IFIs. A recent study, which was particularly rigorous in controlling for other factors, found that countries which voted along with the US in votes that the US State Department had determined to be “key votes” at the UN General Assembly were more likely to have IMF loans approved than countries which voted against the US in the UN; even switching only 1 in 10 votes to a vote in favour of the US significantly increased the chances of receiving an IMF loan. This study also found that the link between favourable voting in the General Assembly and loan approval at the IMF had increased since the end of the Cold War,²⁰⁹ so that it cannot be brushed aside as a previous tactic no longer in use.

Votes are often also bought in exchange for direct financial aid from the buyer nation. The average developing country voted in the same direction as France 64% per cent of the time in the UN GA. One “standard deviation” in voting behaviour, *ie* an increase to voting with France 73% of the time resulted in a 96% increase in foreign aid to that country. A standard deviation in voting in favour of the US resulted in an increase of USAID by 78% to the country voting in the “right” way, while one standard deviation in voting for Japan resulted in a staggering 345% increase.²¹⁰ If any further evidence were needed, at one point a State Department official dispatched a memo to the director of the Food for Peace Program stating that “at critical moments in the world’s history, the US ‘bought’ votes subtly and indirectly to support its stand in the General Assembly. The ‘buying’ is in terms of US assistance to the voting country”²¹¹

Vote-buying is also common at the WTO, where, as in the Security Council, votes are sometimes “bought” with threats of negative actions rather than positive inducements. One Latin American delegate to WTO negotiations reported that the Costa Rican ambassador (an ally of the United States) “will stop some of us Latin Americans and ask whether or not we

²⁰⁸ Geoff Simons, *UN Malaise : Power, Problems and Realpolitik*, (MacMillan Press, 1995) at 63 et seq; Eldar, note 115, at 17 et seq; (another source claims that the US Representative actually told the Yemeni representative in the Security Council chambers that he had just cast his country’s most expensive vote).

²⁰⁹ Strom Thacker, “The High Politics of IMF Lending” in (1999) *52(1) World Politics*, 38 at 59, 65 and 70.

²¹⁰ Alberto Alesina and David Dollar, “Who Gives Foreign Aid”, (2000) *5 Journal of Economic Growth*, 33, whereby the authors do not see these statistics as an indication of vote-buying, but rather as a reflection of “political alliances” between countries. In their view, because UN votes are not very important, there is no reason to believe that donor State would bother to buy them. Though presumably the aid given supplies the *raison d’etre* for the alliance in the first place. The statement of the US State Department official flatly contradicts their conjecture.

²¹¹ Thacker, note 209, at 54.

were going to support negotiations on transparency in government procurement. If the answer happened to be no, your name would be written on a list and sent directly to the US mission in Geneva” after which one’s State could expect to be greeted with a threat from the US to withdraw from preferential bilateral trade agreements if the position was not changed.²¹²

Such negative action may also be directed personally at the negotiator of the recalcitrant State, with there being general agreement that powerful States collude to have tough negotiators removed from their job, either by spreading disinformation about them back to their governments or by demanding of their governments that they be sacked as a pre-condition for other types of co-operation. According to one negotiator who was removed in such a manner, “My head was presented on a tray to the US authorities during an official visit by my president to the USA. Until this was done my authorities were not able to put any other bilateral issue on the table.”²¹³ Thus votes can be bought for the “price” of simply refraining from ruining a hard-won career.

The mere practice of vote-buying works in favour of wealthier nations, because “[p]oor countries have a greater incentive to sell their votes because payments are usually worth more to a poor country than to a wealthy country.”²¹⁴ A wealthy country may thus acquire a large voting advantage at a low cost, enabling it to further its own interests, so that next time it is in a position to acquire an even bigger advantage at a still lower cost.

Furthermore, when some countries sell their votes, not only do they lose out – the biggest losers are the countries who do not manage to sell their votes and now lose the vote without any compensation.²¹⁵ Over time, vote-buying can thus even lead to a pattern of pre-emptive vote-selling as representatives seek to salvage material benefits for their nations. The example of the WTO illustrates the ease and efficiency with which vote-buying can be used to attain one’s wishes at a low cost even in an institution providing nominally equal voting rights to each State. At the WTO:

the main parties that buy votes, other than via internal logrolling, are the US and the EC, and both tend to agree on a common position either before or during ministerial conferences. Developing countries, even the large ones, do not offer similar inducements to other developing countries to prevent defections from their coalitions, simply because they cannot afford

²¹² Jawara and Kwa, note 96, at 77.

²¹³ *Ibid.*, at 152.

²¹⁴ Eldar, note 115, at 4; it should be noted that this author has a much more positive view of vote-trading and vote-buying than the one espoused in this thesis.

²¹⁵ *Ibid.*, at 14.

to make side payments. Accordingly, there is no meaningful competition among vote-buyers in the WTO²¹⁶

This was clearly demonstrated by the fate of the so-called Like-minded Group (a group of 14 developing countries) during the Doha Round. The developed countries managed to rip away virtually every nation but India from the LMG by withholding preferential trade agreements, blocking the availability of IMF loans, the US granting South Africa \$9 million in technical assistance and \$9.2 million in assistance under AGOA, giving Tanzania \$3 billion in debt relief under the HIPC initiative and the ACP waiver, giving Jamaica an aid package from the IMF and an ACP waiver, giving Kenya an ACP waiver and technical assistance to establish training programmes on international trade at the University of Nairobi, Japan signing a bilateral investment agreement with Indonesia on the condition that Indonesia endorse the talks about investment at Doha, promising Malaysia non-agricultural market access, and giving Mauritius a non-binding promise about a study programme relating to small and vulnerable countries.²¹⁷ Egypt was bought in return for \$10.3 billion in aid from Western donors as well as the start of substantive talks with the US on a bilateral trade agreement,²¹⁸ while Pakistan, previously one of the LMG's most committed members, received \$600 million in US aid and \$500 million in debt relief in exchange for keeping quiet at WTO negotiations as well as acquiescing in "the war on terrorism" against Afghanistan.²¹⁹

While later the G-20 bloc formed and held together to the point where the US and EC made some concessions to the largest members (India and Brazil) behind closed doors and to the exclusion of everyone else,²²⁰ vote-buying has obviously been very successful in delaying reforms and increasing the costs to nations which wish to push them through.

The vote-buying game is not only easy, it is all-pervasive. Vote-buying plays a significant role at international institutions, right down to such niche organisations as the International Whaling Commission, where Japan not only pays members of the IWC to vote in its interests; it also pays nations to join the organisation. Payment usually occurs via Japan's Overseas Development Assistance program. Chief recipients include St. Lucia, St. Vincent, St. Kitts and Nevis, Grenada, Dominica and Antigua and Barbuda, which vote with Japan on virtually any issue before the IWC.²²¹ For each 10% increase in the number of votes

²¹⁶ *Ibid.*, at 31.

²¹⁷ Jawara and Kwa, note 96, at 168 et seq., 176 et seq.; Eldar, note 115, at 27 et seq; South Africa was never part of the LMG, but was instrumental in using its regional influence to peel other States away from the group in return for benefits received from developed nations.

²¹⁸ Jawara and Kwa, note 96, at 172 et seq.

²¹⁹ *Ibid.*, at 174 et seq.

²²⁰ Eldar, note 115, at 28.

²²¹ *Ibid.*, at 35.

a recipient State cast in favour of Japan at the IWC between 1999 and 2004, it received an increase of \$2.1 per capita in aid.²²²

This is a particularly interesting study for the effects of vote-buying on democracy, since polls have revealed that a majority of Japanese are ambivalent to whaling, which is not an important component of their national economy. In addition, most of the citizens of nations which support Japan at the IWC also do not support commercial whaling and explicitly stated that their representative should not vote in favour of lifting the commercial whaling ban (which they, of course, repeatedly, if unsuccessfully, do). However, because a minority of Japanese strongly support whaling, all politicians support whaling in an attempt to gain their votes, and spend a part of the Japanese budget in coercing government members of other states to support them in that endeavour.²²³ The example, thus clearly demonstrates how national and international governance flaws combine to result in a situation where a substantial amount of money is spent in the service of achieving a state of affairs that no majority anywhere desires.

In summary, vote-buying often involves a combination of inducements and threats, results in a rapid accrument of benefits to the wealthy as the less affluent scramble to receive a piece of the pie in exchange for their vote, which is essentially only worth the price they can get for it, as if they do not sell someone else will, is easy to implement, as the LMG demonstrated, and is endemic to international institutions of major and minor importance.

6.5.3. Vote-Trading

Also referred to as logrolling, vote-trading occurs when one state agrees to vote in a certain direction on Issue A in exchange for a second State voting in a certain direction on Issue B. This may involve an exchange of votes within the same institution or the exchange of a vote in one institution for a vote in another institution.²²⁴

In the UN GA “vote-trading among countries is consistently the norm,”²²⁵ much of it pertaining to the selection of the non-permanent members of the SC and ICJ judges. As regards the selection of non-permanent members “...countries often trade votes for votes in elections to other organizations...The votes of certain countries are worth more than those of others because of those countries’ active or passive influence over other countries’ votes.”²²⁶ Although the P-5 do not trade openly, “there may be exchanges of votes for ‘badly needed

²²² Andrew Miller and Nives Dolsak, “Issue Linkages in International Environmental Policy: The International Whaling Commission and Japanese Development Aid” in (2007) 7 *Global Environmental Politics*, 69 at 86.

²²³ *Ibid.*, at 69-96.

²²⁴ Eldar, note 115, at 5.

²²⁵ *Ibid.*, at 23.

²²⁶ *Ibid.*

favours' or in recognition of diplomatic friendship."²²⁷ Virtually all other States aggressively participate. The most common vote trade is a vote for election to the SC in exchange for a vote onto ECOSOC.²²⁸

Vote-trading is also a common method of procedure between the P-5. Regarding Res. 940 concerning intervention in Haiti, it is considered to be fairly certain that the US obtained Russia's abstention by promising to support Res. 937 which conferred formal peacekeeping status on Russian troops in Georgia.²²⁹

Internal vote-trading is also the norm in WTO negotiations, either between voting blocs or within them. Most voting blocs within the WTO are formed on the basis that each member agrees to vote in favour of a list of objectives only some of which are of interest to it.²³⁰ This is justified with the explanation that since the WTO decides by consensus, it would be virtually impossible to reach any decision without reciprocal trade-offs.²³¹

At the IWC, Japan trades votes in its favour in return for votes in favour of African countries which want to reintroduce trade in ivory at the Convention on International Trade in Endangered Species of Wild Fauna and Flora.²³²

6.5.4. Conclusions

Even those organisations that do not legitimise a privileged position for wealthier nations in their basic documents are subject to a network of client-patron relationships which effectively allow the outcome of votes to be pre-determined by those with the greatest economic resources. Because such behaviour inevitably leads to action being taken in the interests of the resource-rich, their wealth inexorably increases, while that of their dependents inexorably declines. Democracy cannot exist in a polity where some members are economically dependent on others. It is fundamentally incompatible with a client-patron system. Democracy requires that no citizen is in a position to bribe any other as any bribe, or other use of wealth in the pursuit of political influence, distorts the will of the majority.

Vote-trading, generally regarded to be the least harmful of the practices listed above, is also anti-democratic in that it further obscures any possible knowledge of the majority preference.

²²⁷ Malone, note 111, at 17; Eldar, note 115, at 23.

²²⁸ Malone, note 111, at 17.

²²⁹ Eldar, note 115, at 18; in the same resolution it is alleged to have obtained the Chinese abstention by itself abstaining from voting on World Bank loans to China (*ie* not obstructing them) in addition to granting China various concessions relating to Taiwan.

²³⁰ *Ibid.*, at 27.

²³¹ *Ibid.*, at 29.

²³² *Ibid.*, at 35.

6.6. Suggestions to Eliminate the Financial Distortion of Democracy

The empirical study both of modernity and Athens bears out the theoretical conclusions of philosophers who hold that “the dominance of wealth in the political process is inconsistent with both the philosophical meaning and the practical exercise of political equality”²³³ and the economic dependency of certain States upon others has long been recognised as a root of political exploitation.²³⁴ As in Athens, it is necessary to find ways to reduce exacerbated wealth discrepancies and contain the political influence that wealth can exercise. This must be done in a systematic manner that attacks the root of the problem rather than simply treating the symptoms.

6.6.1. Removing Foreign Aid from the War Chest

In order to alleviate the distorting practice of vote-buying, foreign aid bribery could simply be removed from the arsenal of deployable weapons.

The USA has allegedly attempted to make its conditions for aid more transparent and less subject to political discretion via the Millennium Challenge Account scheme, which lists conditions that countries must meet to qualify for aid.²³⁵ This programme is meant to prevent aid from being granted to nations purely on the basis of their unquestioning allegiance to US policy.

In determining eligibility, the Millennium Challenge Account rates nations on sixteen criteria, *eg*, “Political Rights”, “Primary Education Completion Rate”, “Trade Policy” and “Inflation”, with the rating for each criterion being determined by a particular agency, in most cases, Freedom House or the World Bank Institute, with Institutional Investor Magazine, the Heritage Foundation and the IMF also determining a few criteria. The independence of these assessor institutions is hardly credible. Many of Freedom House’s Board of Trustees have worked for the American government, from which it received 66% of its 2007 15.9 million USD income. The World Bank Institute is part of the World Bank group, in which the US is the largest shareholder, while the Heritage Foundation is frank about its credentials as a “conservative think tank”.²³⁶

The EU’s equivalent programme the General System of Preferences, grants aid when countries meet certain environmental, democratic and labour requirements via the ratification and implementation of international conventions.²³⁷ The programme is known as GSP+ and is

²³³ John Rawls, *A Theory of Justice* (Clarendon Press, 1972) at 204.

²³⁴ Jawara and Kwa, note 96, at 305.

²³⁵ Kapur, note 119, at 50 et seq.

²³⁶ <http://www.heritage.org/>.

²³⁷ Kapur, note 119, at 51.

approved in three-year instalments by the Council.²³⁸ While this programme is a little less blatant than the American programme, there is always discretion, for example, in determining whether a nation is effectively implementing a convention, or – as a further requirement for qualifying for GSP+ – whether a nation's trade accounts for less than 1% of EU imports and whether the five largest sectors account for more than 75% of its GSP-covered imports to the EU.

However, it is possible to remove foreign aid from the war chest in another way, simply by scrapping the idea of foreign aid entirely. In a democracy, after all, it is not beneficial for some members of the community to be economically dependent on other members of the community and it is not surprising that the very act of giving which creates the situation of dependency is subject to political manipulation. The reforms mentioned in relation to specific institutions have already paved the way for this solution. Between freeing up money through an elimination of IFI quotas and the ever-contentious development aid, plenty of funds should be readily available to lend to third States at realistic rates of interest through the facilitory functions of the IFIs outlined above,²³⁹ a function that could be reinforced by adopting Keynes' suggestion of forcing surplus credit to be used for development loans. Unlike aid, which one can only recover through profit flow-back, loans are made to be returned, especially when they are made at long-term low-interest rates. If one takes out a loan and pays it back with a reasonable (as opposed to a debilitating) rate of interest and one is in addition protected from the creditor randomly calling in his loan, then one is not financially dependent on the creditor, one merely has a specific legal obligation towards him.

6.6.2. Social and Economic Rights

6.6.2.1. Relevance of Socioeconomic Rights for Democracy

One method of eliminating vote-buying would be to use one of the methods that the Athenians did – ensure that wealth discrepancy is not so great and the pool of decision-makers so small as to make vote-buying economically feasible. The point of social and economic rights in this democratically-driven view is not to guarantee a certain standard of living for everyone – it is to generate a more equitable wealth distribution. This is the difference between democracy and republicanism. The Roman proletariat did not starve, but they were economically dependent upon the ruling class.

²³⁸ <http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/>.

²³⁹ *Supra* pp. 234 et seq.

Democracy is not necessarily either a self-implementing system or a self-sustaining system. It is difficult for democracy to erupt spontaneously in societies where some are economically dependent on others. Solon first reconfigured Athens' economy using undemocratic methods before democracy could flourish. Later Aristotle would observe, "where democracies have no middle class, and the poor are greatly superior in number, trouble ensues and they are speedily ruined".²⁴⁰

6.6.2.2. Sublimation of Civil-Political and Socioeconomic Rights

Not only are socioeconomic rights desirable from a democratic point of view, they also find justification in the modern concept of human dignity as outlined in detail above. The Inter-American Court of Human Rights recently stated:

A person who in his childhood lives, as in so many countries of Latin America, in the humiliation of misery, without even the minimum condition of creating his project of life, experiences a state of suffering which amounts to a spiritual death; the physical death which follows to this later, in such circumstances, is the culmination of the total destruction of the human being

On the basis of this reasoning, the Court decided that

the arbitrary deprivation of life is not limited, thus, to the illicit act of homicide; it extends itself likewise to the deprivation of the right to live with dignity. This outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights²⁴¹

This viewpoint recognises that in situations of extreme disparity, it is of no practical use for citizens to have, for example, freedom to choose one's work. For those who did not receive an adequate education this remains a truly theoretical consideration. With no education, there is little, if anything, to choose from and the stage is set for a lifetime of

²⁴⁰ Aristotle, *Politics* (3rd Edition, Clarendon Press, 1968), at 182.

²⁴¹ Inter-American Court of Human Rights, Series C: Decisions and Judgments No. 63 Villigran Morales et al Case ("The Street Children Case"), Judgment of November 19 1999, Concurring Opinion of Judges Antonio Augusto Cacado Trindade and Alirio Abreu Burelli, at 4 and 9.

economic dependency. There is an intrinsic contradiction in the position that certain rights should be acknowledged in the citizen's relationship with the State, but not be enforced in the relationship of one citizen to another. An inherent right must surely be protected at all times by its very quality as an intrinsic position seen as necessary for the quality and dignity of life. Such an inherent, normative position cannot logically be turned on and off like a light switch.²⁴² Rights are thus indivisible according to this view which results not only in overcoming the somewhat artificial distinction between civil and political rights and socioeconomic rights, but also the distinction of having rights against the State that are not enforceable against fellow citizens. Kant himself already envisaged the protective function of the State as a consequence of his theory, claiming that a ruler not only had to desist from certain actions himself, but also to prevent anyone else from committing them.²⁴³

6.6.2.3. Which Socioeconomic Rights are Essential to Democracy?

The most relevant international covenant on social and economic rights is the ICESCR which provides for: "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts";²⁴⁴ "the right of everyone to the enjoyment of just and favourable conditions of work, including: fair wages, equal pay for equal work; a decent living for themselves and their families, as well as the "equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence";²⁴⁵ the right to form or join a trade union;²⁴⁶ right to social security, including social insurance;²⁴⁷ the right to be free from hunger;²⁴⁸ the right to health care²⁴⁹ and the right to education, including the "progressive introduction" of free education.²⁵⁰

As Athenian democracy is the only democracy available to measure other systems by, the situation demands that we compare these "rights" to the *de facto* situation obtaining in Athens. To start with the right to education: the vast majority of Athenians were educated by their parents, usually in a trade such as masonry or farming. The overall literacy level in Athens is thought to have been quite low, although this did not have a particularly damaging

²⁴² Rodolfo Arango, "Basic Social Rights, Constitutional Justice and Democracy" in (2003) 16 *Ratio Juris*, 141 at 143

²⁴³ Immanuel Kant, "Toward Perpetual Peace" in Gregor ed, *The Works of Immanuel Kant: Practical Philosophy*, (Cambridge University Press, 1976), 316 at 320.

²⁴⁴ Art. 6 ICESCR.

²⁴⁵ Art. 7 ICESCR.

²⁴⁶ Art. 8 ICESCR.

²⁴⁷ Art. 9 ICESCR.

²⁴⁸ Art. 11 ICESCR.

²⁴⁹ Art. 12 ICESCR.

²⁵⁰ Art. 13 ICESCR.

effect on political participation as proceedings were always oral and few citizens prepared written notes for speeches. On the other hand, many of the most successful *rhetors* and *strategoï* were highly educated, and it is beyond doubt that only the wealthy could afford to pay for lessons from Sophists or be admitted to the exclusive echelons of a philosopher/acolyte relationship. There was an enormous discrepancy in the education that citizens received, and education and the value placed on it greatly increased during the democratic period as did general literacy levels.²⁵¹ The inescapable conclusion is that the lottery system and lack of elections negated much of the impact of highly unequal education. While the Athenians valued an educated opinion, decision-making power remained with the *demos*.

Would the provisions of the ICESCR have a similar impact? If implemented would they manufacture a situation that would create a “democracy” without the necessity of further radical change?

Equal education would not in itself produce a situation of democracy if other institutions (*eg* elections) were to be left unaltered. However, the more egalitarian education is, the more career options one has, including the option of self-employment, and thus the less likely one is to fall into economic dependency, provided the means of production are not overly concentrated, which is the situation that must be avoided for a democracy.

The same could be said of the right to be free from hunger, as a starving person is in no position to bargain. The rights related to the workplace, such as just working conditions, fair wages, and the right to form a union are also related to democracy, because they reduce economic dependence. Fair wages, in particular, lead to a better distribution of wealth. One could think, in this regard, in particular of caps on profit margins as a method to secure fair wages. Importantly, the rights relating to the workplace secure the means by which other rights, such as the right to be free from hunger, can be realised. Because we are seeking in this instance to avoid economic dependency, it is better that the right to be free from hunger, for example, is achieved via being paid a fair wage rather than through public or private charity, much as the Canadian court has viewed human dignity as best served by workfare rather than welfare.²⁵²

Other legal documents pertaining to social and economic rights have essentially reiterated the rights enumerated in the ICESCR. GA Res. 60/1 which was intended to galvanize members in favour of a “more peaceful, prosperous and democratic world”²⁵³ encourages the promotion of basic education, the eradication of illiteracy and expanded

²⁵¹ T.J. Morgan, “Literate Education in Classical Athens”, (1999) 49 *Classical Quarterly*, at 46-61.

²⁵² *Gosselin v. Quebec* 2002 S.C.C. 84.

²⁵³ Para. 16, GA Res. 60/1.

higher education,²⁵⁴ recognising the goal of “full and productive employment and decent work for all”²⁵⁵ and the “right to development”.²⁵⁶ Most of the proposed measures are directed towards the eradication of abject poverty, for example, free primary education and basic health care for all children in Africa or the cancellation of all debt for heavily-indebted poor countries.²⁵⁷ Of these, debt cancellation would be particularly helpful as it would remove a source of economic dependency – this was a method the Athenians used under Solon (pre-democracy) and which the Romans also frequently turned to. However, in order to avoid having to make as frequent use of it as the Romans did, such cancellation should only be the first step in a series of reforms, as otherwise the Republican system will automatically re-concentrate wealth in the hands of a few.

The implementation of these rights has been exhorted the world over. The UN’s High-Level Panel on Threats, Challenges and Change has suggested that it would be helpful to use the annual meetings between ECOSOC and the IFIs to “encourage collective action in support of the Millennium Development Goals and the Monterrey Consensus”.²⁵⁸ The Human Rights Committee has stated that “Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively”.²⁵⁹ OAS Res. 1080 mentions the alleviation of extreme poverty as essential to promoting democracy, and the Washington Protocol reiterates this. The General Assembly of the OAS also mentioned this in 1992.²⁶⁰ It further stated in its 1993 Annual Report that:

Popular participation, which is the aim of a representative democracy, guarantees that all sectors of society have an input during the formulation, application, and review of national policies...[T]he implementation...[of economic, social, and cultural rights] creates the condition in which the general population is able, i.e. is healthy and educated, to participate actively and productively in the political decision-making process²⁶¹

²⁵⁴ Para. 43, GA Res. 60/1.

²⁵⁵ Para. 47, GA Res. 60/1.

²⁵⁶ Para. 123, GA Res. 60/1.

²⁵⁷ Para. 68 (b) and (d), GA Res. 60/1.

²⁵⁸ Transmittal Letter dated 1 December 2004 from the Chair of the High-Level Panel on Threats, Challenges and Change addressed to the Secretary-General, Doc. A/59/565, para. 278(c) (www.un.org/secureworld/report.pdf, accessed Oct. 26 2009).

²⁵⁹ Human Rights Committee General Comment 25 (Dec. 7 1996), para. 12, available at www2.ohchr.org/english/bodies/hrc/comments.htm.

²⁶⁰ Declaration of Nassau, AG/DEC I (XXII-o/92) May 19 1992; Schnably, note 1261, at 165.

²⁶¹ Annual Report of the Inter-American Commission on Human Rights 1993, OA/Ser.L/V/II.85, Doc. 9, rev. (Feb. 11 1994), 519.

However, while the relief of abject poverty and near complete lack of education has been much applauded, the introduction of more meaningful socio-economic rights which would ensure truly equal access to such commodities are less forthcoming. Even social and economic rights in developed nations are carefully hedged. The European Convention on Human Rights, Protocol 1, Art. 2 adopts the negative phrase: "No person shall be denied the right to education" as opposed to the alternative positive "everyone shall be provided with", so that, in end effect, it states that no one shall be denied what happens to be on offer anyway, and *de facto* transforms the social right to education into a right of non-discrimination. Even in its current phrasing, it was extremely difficult to reach an agreement on the right to education, and an unusually large number of States have made reservations to the Article.²⁶² The norm was subsequently interpreted by the Court to include a right to access to educational institutions existing at a given time, a right to effective education, and a right to official recognition of successfully completed studies. However, all of these rights were relative and the Court decided that States were not obligated "to establish at their own expense, or to subsidise, education of any particular type or at any particular level".²⁶³ There is no constitutional right to welfare even in Germany, and virtually no socio-economic rights are acknowledged in the USA. In Ireland, the majority of justices took rather dim views of judicially elaborated socio-economic rights in *Sinnott v Minister for Education*²⁶⁴ and *T.D. v Minister for Education*. For example, in *Sinnott*, Geoghegan, J. expressed a very narrow, formalistic interpretation of the right to education, saying,

[i]t may well be, therefore, that largely due to poor teaching in a particular school a child who has difficulty in learning to read and write may never acquire those skills. But apart from possibly exceptional circumstances, such a child either at the time of schooling or in a later life would not be entitled to bring an action based on an alleged breach of Article 42.4. Still less would some adult immigrant be entitled to invoke the Article²⁶⁵

6.6.2.4. Implementation of Socioeconomic Rights Through Judicial Activism

Besides the obvious reticence of some courts, one factor possibly leading to extremely narrow judicial interpretations of socioeconomic rights could be significant

²⁶² David Harris, Michael O'Boyle and Chris Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995), at 541.

²⁶³ *Belgian Linguistic Case*, A 6, 1968.

²⁶⁴ *Sinnott v Minister for Education* [2001] 2 IR 545.

²⁶⁵ [2001] 2 IR 545 at 719 et seq.

financial counterpressures, which in the event of a wider recognition of rights could lead to a singling out of such States for trade retaliation.

Some commentators see increasing judicial co-operation being used to overcome similar problems. While national courts have always co-operated with each other on non-sensitive international issues such as interpreting the liability of aircraft carriers and determining jurisdiction over Internet providers, they are now loosely banding together (by referring to each other) to judicially review the actions of their governments and, in effect, tie the hands of the executive and legislative branches to prevent them bowing to global forces.²⁶⁶ A successful precedent of such judicial comity already exists regarding the legal ramifications of September 11th, a key issue on which the courts of several countries cited each others' decisions and effectively created a united front to resist the machinations of their executives to undermine human rights,²⁶⁷ eg the *House of Lords Belmarsh Detainees Case* of December 2004 in the UK,²⁶⁸ *Suresh v. Canada*,²⁶⁹ *Charkaoui v. Canada*,²⁷⁰ and *A (FC) v. Secretary of State for the Home Department*.²⁷¹ Even the US Supreme Court is making overtures to consult foreign jurisprudence. Justice Breyer wrote in his dissent in *Printz v. United States* that foreign courts and legal systems while, of course, not binding, "may nonetheless cast an empirical light of the consequences of different solutions to a common legal problem".²⁷² The same co-operation could be applied to the issue of socioeconomic rights to ensure that States implementing such rights do not become the target of punishments by trade and financial interests

A further obstacle is the more theoretical question as to whether a wider judicial recognition of socioeconomic rights would inevitably lead to the judiciary abusing its powers as it opens the gate to subjective interpretations of the law. Advocates of the judicial recognition of basic social rights believe that these rights can be determined and granted by courts with a reasonable amount of objectivity. This is the so-called Cognitivist Thesis of Rights, which determines the actions the State and third parties must commit to fulfil a right based on whether the teleological purpose of the right has been fulfilled. For example, it is not necessarily enough for the State to provide a space for a child to attend school; if the family of the child lacks the material resources that would permit the child to attend school effectively, these must also be provided.²⁷³ The Cognitivist Thesis of Rights holds that judges

²⁶⁶ Eyal Benvenisti, "Reclaiming Democracy: The Strategic Use of Foreign and International Law by National Courts" in (2008) *102 AJIL*, 241 at 243.

²⁶⁷ *Ibid.*, at 253 et seq.

²⁶⁸ *Ibid.*, at 254.

²⁶⁹ *Minister of Citizenship and Immigration* [2002] 1 S.C.R. 3.

²⁷⁰ *Citizenship and Immigration* [2007] S.C.C. 9.

²⁷¹ [2005] UKHL 71.

²⁷² 521 US 898 (1997).

²⁷³ Arango, note 242, at 145.

are not required to make subjective value judgements when upholding the existence and justiciability of basic social rights. It is enough that the judge be able to prove that non-recognition of the right would be incompatible with the principles of democracy and constitutionalism and therefore unlawful.²⁷⁴ Others view the issue more substantively, questioning whether legal certainty can be attained, and whether, even if it could, it would automatically enjoy a higher priority than the goal of affording important legal protection in cases of extreme need.²⁷⁵

On the other end of the spectrum, some critics argue that recognising social rights, particularly those that have been extracted from, rather than explicitly stated in, the Constitution is destructive to the democratic system, as it would give judges discretion over public spending, a realm which appropriately belongs to the legislature and should be decided upon via specific laws. This is a particular favourite position of some judges in Ireland²⁷⁶ but is also a common position at European level.²⁷⁷

As one commentator has put it, “the Irish judges have been very strong on *liberte*, but very weak on *egalite*”, despite the fact that equality is a constitutional principle.²⁷⁸ The Irish courts have gone to some lengths to justify their lack of enthusiasm for judicial activism in the area of social and economic rights and these findings are of some interest for this thesis in that their ostensible justification is the protection of democracy. This view was particularly elaborated on in *Sinnott v. Minister for Education* and *T.D. v. Minister for Education*.

In *Sinnott*, the plaintiff, Jamie Sinnott, a severely autistic 22-year-old man sued the State via his mother for *inter alia* failing to provide ongoing education suitable for a person of his abilities into adulthood. The High Court had taken a very substantive approach in deciding that this failure to provide appropriate educational facilities was a breach of the plaintiff’s right to education, and then proceeded to grant a mandatory injunction which was extremely specific and wide-reaching.

The Supreme Court rescinded the injunction on two main grounds: a narrow interpretation of the right to education stemming from Art. 42.4 of the Irish Constitution, as discussed above, as well as the fact that by granting a detailed mandatory order the High Court had overstepped its competencies and interfered in matters of policy rightly delegated to the Oireachtas. The judges then proceeded to mash the two separate lines of reasoning together, essentially attempting to prove that the separation of powers doctrine, as mandated

²⁷⁴ *Ibid.*, at 146.

²⁷⁵ Gerry Whyte, “Rights and Judicial Activism” in *Theorising Irish Social Policy*, Fanning, Kennedy, Kiely and Quin eds., (UCD Press, 2005), 165 at 175.

²⁷⁶ *Doherty v. South Dublin City Council* [2006] IESC 57; *Gavin and Others v. Dublin City Council* [2008] IEHC 187.

²⁷⁷ *Chapman v. United Kingdom*, Appl. No. 27238/95 European Court of Human Rights, 2001.

²⁷⁸ David Gwynn-Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* (Cork University Press, 2001), at 35.

in Art. 6 of the Irish Constitution, demands a narrow interpretation of socioeconomic rights. In this, they relied heavily on the earlier High Court case of *O'Reilly v. Limerick Corporation*. Hardiman, J. in particular adopted the differentiation between commutative and distributive justice, *ie* that justice concerned with determining which portion of the collective wealth of a polity an individual is entitled to, made in *O'Reilly v. Limerick Corporation* by Costello, J. Costello, J. had decided on this point that

distribution can only be made by reference to the common good and by those charged with furthering the common good (the Government); it cannot be made by any individual who may claim a share in the common stock and no independent arbitrator, such as a court, can adjudicate on a claim by an individual that he had been deprived of what is his due²⁷⁹

Hardiman, J. considered that this was the case, no matter how obviously the act or omission of the Oireachtas was clearly “wrong”, meaning presumably unjust.

Even Keane, J, who found that the plaintiff’s right under Art. 42.5 of the Constitution had been breached, concurred with Hardiman, J’s conclusions regarding the separation of powers, specifically stating that the plaintiff was entitled to a declaration, as opposed to a mandatory order.²⁸⁰

The Supreme Court reaffirmed many of these findings in the later *T.D. v. Minister for Education*, a case concerning minors with behavioural problems who were placed in detention facilities or other unsuitable care, because appropriate facilities for them were not made available. The High Court had already granted without great success declaratory relief concerning cases of this nature. Thus, it decided to grant an injunction on the basis that because the injunction merely concerned the implementation of a policy already decided upon by government, it did not amount to interference in policy formation, and that such action was necessary if the plaintiffs, some of whom would shortly cease to be minors, were to derive any benefit from the appropriate facilities. The injunction issued by the High Court was once again extremely detailed, including precise equipment in the facilities and construction completion dates, whereby the Minister was to seek permission of the Courts to allow any further postponement.

Unlike *Sinnott*, *T.D.* concerned an unenumerated right, namely “a right to be placed and maintained in secure residential accommodation so as to ensure, so far as practicable, his or her appropriate religious and moral, intellectual, physical and social education.”²⁸¹

²⁷⁹ [1989] ILRM 181 at 194.

²⁸⁰ [2001] 2 IR 545 at 642.

²⁸¹ *T.D. v Minister for Education*, [2001] 4 IR 259 at 279.

Murphy, J. decided that the plaintiffs did not have a right to the provision of facilities, stating that with the exception of education, previously interpreted very narrowly by him in *Sinnott*, that, “the personal rights identified in the Constitution all lie in the civil and political rather than the economic sphere”. He noted,

the absence of any express reference to accommodation, medical treatment or social welfare of any description as a constitutional right in the Constitution as enacted is a matter of significance. The failure to correct that omission in any of the twenty-four referenda which have taken place since then would suggest a conscious decision to withhold from rights which are now widely conferred by appropriate legislation the status of constitutionality²⁸²

This view fails to consider that because referenda are held at the discretion of government, or at most parliament, and always involve a “yes or no” answer they are also only indicative of the will of the majority at the time in a very rudimentary sense. In particular, the failure to hold a referendum on a particular point cannot be seen as reflecting the will of the majority of the population, because the majority does not make the decision as to whether or not to hold a referendum.

He went on to state that

it is, of course, entirely understandable, and desirable politically and morally, that a society should, through its laws, devise appropriate schemes and by means of taxation raise the necessary finance to fund such schemes as will enable the sick, the poor and the underprivileged in our society to make the best use of the limited resources nature may have bestowed on them. It is my belief that this entirely desirable goal must be achieved and can only be achieved by legislation and not by any unrealistic extension of the provisions originally incorporated in *Bunreacht na hEireann*²⁸³

Keane, J stated that, “I would have the gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as “socio-economic rights” to be unenumerated rights guaranteed by Article 40”, but then went on to

²⁸² [2001] 4 IR 259 at 316 et seq.

²⁸³ [2001] 4 IR 259, at 321 et seq.

find that the present case constituted an exceptional circumstance, “in which the State is under a duty to ensure that their right to treatment is upheld.”²⁸⁴

Just as in *Sinnott*, however, Keane went on to find that the High Court had breached the separation of powers, citing previous decisions such as *Buckley v Attorney General*,²⁸⁵ and *Boland v. An Taoiseach*,²⁸⁶ as well as Article 28.2. of the Irish Constitution, which reads “The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on authority of the Government”. In his view, the High Court went far beyond finding that there had been a breach by the executive by also requiring “the executive power of the State to be implemented in a specific manner by the expenditure of money on defined objects within particular time limits” and that he was satisfied that “the granting of an order of this nature [meaning a mandatory order as opposed to a declaratory order] is inconsistent with the distribution of powers between the legislative, executive and judicial arms of Government mandated by the Constitution.”

Hardiman, J. fell back on the countermajoritarian argument, stating “it may gratify those who agree with the judge...but it would be equally available in all cases regardless of public opinion.”²⁸⁷ This particular statement reveals the curious doublethink that most arguments against countermajoritarianism rely upon. It is the duty of courts under the current system to apply the law regardless of public opinion. The sudden resort to an uncertain “public opinion” concerning socioeconomic rights is at odds with the entire functions of the court in the *Rechtsstaat* and is certainly never relied upon concerning classic civil rights,²⁸⁸ so that it is revealed as an argument not of abstract principle, but one which is predicated on a very specific goal, namely that of preventing the acknowledgement of such rights. Hardiman went on to state that simply because treatment was ineffective did not mean that it had been inadequate, as in his view the reason for ineffectiveness lay within the fault of those being treated.²⁸⁹

This is again exemplified in the statement

²⁸⁴ [2001] 4 IR 259 at 282.

²⁸⁵ [1948] IR 3

²⁸⁶ [1974] IR 338

²⁸⁷ [2001] 4 IR 259 at 339.

²⁸⁸ Gwynn-Morgan points out that in *A.G. v. Hamilton (No.1)* [1993] 2 IR 250 in which the Supreme Court ruled that cross-examining public representatives before the Beef Tribunal would contravene parliamentary privilege, the Court did not seem “afraid to risk public unpopularity”, Gwynn-Morgan, *A Judgement Too Far?*, note 278, at 60, while another commentator points out that Hardiman’s lengthy exegesis on the separation of powers, which was an essentially free-floating opinion and not, at the core, even necessary to the judgements in *Sinnott* and *T.D.*, could well be cited as an example of judicial activism itself, Rory O’Connell, “From Equality Before the Law to the Equal Benefit of the Law: Social and Economic Rights in the Irish Constitution” in Carolan and Doyle, *The Irish Constitution: Governance and Values* (Thomas Roundhall, 2008) 327 at 333 et seq.

²⁸⁹ [2001] 4 IR 259 at 343.

The proposition that ‘The Court has to attempt to fill the vacuum which exists by reason of the failure of the legislature and the executive’²⁹⁰ seems to me to come close to asserting a general residual power in the courts, in the event of a (judicially determined) failure by the other branches of government to discharge some (possibly judicially identified) constitutional duty. If this were accepted I believe it would have the effect of attributing a paramountcy to the judicial branch of government²⁹¹

Of course, accepting that it is not the task of the court to identify constitutional duties and determine instances of failure, does raise the question as to what precisely its tasks are.²⁹²

However, some of the justices did state that “in very exceptional circumstances it may be open to a court to order allocation of funds where a constitutional right has been flouted without justification or reasonable excuse of any kind” although such an order should refrain from involving itself in details. Ideally the court would issue only declaratory orders in such cases.²⁹³ Others pointed out that effective statutory legislation would avoid the difficulties inherent in a constitutional interpretation of such rights.²⁹⁴

Denham, J., however, who had not revealed her views on the separation of powers in *Sinnott*, as she viewed primary education as ceasing at the age of 18, unveiled a markedly different interpretation of the separation of powers. In her dissenting opinion, she saw the right concerned not as an unenumerated right, but as one under Art. 42.5 of the Constitution, which provides that

[i]n exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptable rights of the child

²⁹⁰ This had been part of the High Court’s reasoning.

²⁹¹ [2001] 4 IR 259 at 339.

²⁹² Agreeing on this point, David Langwallner, “Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual” in Carolan and Doyle eds., *The Irish Constitution: Governance and Values*, (Thomas Roundhall, 2008) 256 at 261, who states that “the notion that we should defer as a matter of course to the legislature or executive on issues of policy or principle simpliciter and without examining the rights driven claim involved undermines our system of judicial review and constitutes a failure by the court to engage in the protection of the rights of the individual”.

²⁹³ per Geoghegan, J, in *Sinnott*, cf. also Denham, J, in *Sinnott* [2001] 2 IR 545 at 724.

²⁹⁴ [2001] 2 IR 545 at 711.

She further stated that the separation of powers was not a doctrine rigidly applied throughout the Constitution and cited Walsh, J. in *Murphy v Corporation of Dublin*²⁹⁵ emphasising that all power ultimately derives from the people. While the separation of powers means that there is a presumption that actions/omissions of the Oireachtas are lawful, it has been well established in precedent that “the doctrine of the separation of powers does not protect the Government if there is a clear disregard of its constitutional powers and duties”.²⁹⁶ As the guardian of the Constitution, the Courts have a duty not only to acknowledge and remedy a breach of rights after the fact, “the court also has jurisdiction to protect a person from an anticipated breach of a constitutional obligation.” This protective function of the courts was also well established by precedent in *East Donegal Co-operative v. Attorney General*.²⁹⁷ She also relied upon Walsh, J in *Byrne v Ireland*²⁹⁸ in which Walsh J stated “Where the People by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce these must be deemed to be also available” and went on to state herself later that “The ultimate decision maker is neither a majority of representatives elected (in the executive or legislature) nor the judges but the people in a referendum.” She found that “simply because a case affects a policy of an institution does not per se render it unconstitutional or bring it into conflict with the principle of the separation of powers”.

She then declared that *O'Reilly* was distinguishable from *T.D.* on the grounds that in *O'Reilly* the plaintiffs claimed a duty of the State (provision of halting sites) that was not statutorily mandated. The plaintiffs instead relied on a quite overt claim that they “had a right to a share of the national resources. In effect, a claim was being made that specific socio-economic rights were constitutional rights grounded in the unenumerated rights section of the Constitution or rights in relation to the family... That is not the situation in this case”, as all parties had agreed that the plaintiffs did have rights. She agreed with the findings in *O'Reilly* concerning distributive justice

and the fact that such a concept does not apply to the justice rendered by the courts. The distribution of the nation’s wealth is a matter for the executive and the legislature. In this case the applicants are not making a case that the nation’s wealth be justly distributed. Their cases have been brought to protect constitutional rights which had been recognised and acknowledged

²⁹⁵ [1972] IR 215 at 234.

²⁹⁶ [2001] 4 IR 259 at 300.

²⁹⁷ [1970] IR 317 at 338.

²⁹⁸ [1972] IR 241 at 281.

She then stated:

I am satisfied that in exceptional circumstances it may be open to the court to make a mandatory order in circumstances where a constitutional right has not been protected by defendants and where there are no reasonable grounds to balance such a decision against the protection of constitutional rights...In the applicants' cases before this court exceptional circumstances exist in a situation where constitutional rights have not been protected – indeed they have been breached²⁹⁹

Due to the urgency of the matter and the fact that the policy the High Court sought to enforce was in fact one on which the executive had already fixed, she found that the High Court had jurisdiction to make mandatory orders on this issue.

All of the opinions in both judgements featured several errors in fact and reason regarding the separation of powers, and it is precisely this point that has occasioned much comment.³⁰⁰ Much of the Court's reasoning on this point was thus based on a false premise that the separation of powers is somehow related to democracy, which caused them repeatedly to flounder in a logical quagmire in which they unsuccessfully attempted to reconcile a separation of powers with the majority will and determine their own role in such a self-contradictory system.

The courts also drew a false distinction between civil and political rights and socioeconomic rights. Civil and political rights are also conferred by the legislative and executive, but no one suggests that the courts should not adjudicate on them, deciding on their precise content in contentious cases.³⁰¹ In the absence of adequate provisions, the court must make a decision and a conservative decision is still a decision. Why this should differ in the case of socioeconomic rights merely because they allegedly involve a "different sort" of justice (distributive justice) is unfathomable, even according to their own theory and even supposing it could be separated adequately from the idea of commutative justice. To place all decisions in regards to distributive justice in the hands of the legislative without any check mechanism or the involvement of any other state organ would seem a far greater affront to the alleged separation of powers.

Furthermore, the justices sought to avoid the accusation of countermajoritarianism, by using circular logic in determining which rights should be granted and their scope. This,

²⁹⁹ [2001] 4 IR 259 at 306.

³⁰⁰ In contrast, there is little disagreement with the Court's basic finding that mandatory orders should only be used in extreme situations, *cf.* Langwallner, note 292, at 272.

³⁰¹ Precisely this point has been remarked by many commentators, *cf.* for example, Langwallner, note 292, at 258.

according to the Court's critics, can be seen in Murray, J's opinion in *Sinnott* in which he recognised that the standard of education to be provided had to be assessed based upon the current situation, which allowed a special provision for disabled children which would not have been recognised in 1937, while at the same time insisting on interpreting the duration of education based on a historical and literal interpretation of the law alone without reference to societal progress or expectations.³⁰² Other justices glided between historical and contextual interpretations to cobble together a result that the right to primary education stopped at eighteen, a result they would not have been able to come to by relying on one form of interpretation alone.³⁰³ Similarly, by equating the term "child" with "those who generally receive primary education", "Denham, J allowed the duration of the guarantee of free primary education to be determined by reference to the duration for which such education is already provided. Such an approach would merely require the State to provide what it already provides, thus emptying Art. 42.4 of any normative content".³⁰⁴ This is a very common tactic resorted to by courts when deciding upon socioeconomic rights. In other words, they seek to maintain the *status quo*. As we have pointed out above, this is no more inherently democratic than radical change would be.³⁰⁵

By the same token, the Constitution Review Group decided not to suggest that the Constitution should provide for socioeconomic rights, stating

these are essentially political matters which, in a democracy, it should be the responsibility of the elected representatives of the people to address and determine. It would be a distortion of democracy to transfer decisions on major issues of policy and practicality from the Government and Oireachtas, elected to represent the people and do their will, to an unelected judiciary

This "report seeks to justify a particular vision of democracy by reference to the essence of that democracy which they seek to justify."³⁰⁶ This can be seen in Murphy, J's reasoning that if socioeconomic reform were desired, there would have been a referendum on it. One could just as easily argue that the Irish Constitution can be amended relatively easily. If the Oireachtas dislikes a decision of the court regarding socioeconomic rights, they may lay

³⁰² Oran Doyle, "The Duration of Primary Education: Judicial Constraint in Constitutional Interpretation" in (2002) *ISLR*, 222 at 232.

³⁰³ *Ibid.*, at 236 et seq.

³⁰⁴ *Ibid.*, at 230.

³⁰⁵ *Supra* pp. 203.

³⁰⁶ Report of the Constitution Review Group (Stationery Office, Dublin 1996), p. 235, quoted in Oran Doyle, *Constitutional Equality*, (Thomas Roundhall, 2004), at 42 et seq.

the issue before the people in an attempt to get them to change the Constitution in a manner that obviates the decision.³⁰⁷

At the base of the Supreme Court's ill-reasoned and highly subjective findings lie two problems. The first is a rather vague Constitution, which, initially failing to explicitly incorporate even such basic rights as the right to bodily integrity, has necessitated "[c]onsiderable creativity on the part of the judge...if the Constitution is to be anything other than a dead letter".³⁰⁸ The second is the lack of a consistent methodology for constitutional interpretation. The need for decisions to be "derived from some clearly articulated, consistently followed and rationally grounded principles" is clear.³⁰⁹ This is not impossible to implement. In Germany the four recognised methods of interpretation are: *Wortlaut* (wording), *systematisch* (systematic), *historisch* (historical) and *teleologisch* (teleological or interpreted according to the purpose of the law), whereby a guiding maxim is "*der Wortlaut setzt die Grenzen jeglicher Auslegung*" meaning the wording sets the limits of any interpretation. At the problematic points in the case, all of these methods are applied consecutively, often with an explicit statement as to which method is being used. They are then weighed up against each other, with the greatest weight generally given to the wording and teleological interpretations. While a great deal of concern does exist about reaching the proper interpretation of uncertain terms (*unbestimmte Rechtsbegriffe*), it does not seem to have prevented the court from exercising a certain level of judicial activism³¹⁰ or its prerogative to draw its own boundaries, as it did famously in the *Schleyer-Fall*.³¹¹

The German Constitutional Court has sometimes gone to lengths to avoid judgements in difficult political areas, such as European integration, in particular when it was likely that it would have to apply the law in a manner contrary to the actions taken by the executive.³¹² This politically expedient approach, in its own way no less a form of judicial activism, is usually well-cloaked behind a façade of rigorous, if sometimes unconvincing, reasoning. More often the Court has "stood up" to the executive and struck down laws regarded as

³⁰⁷ This point also made by Gerry Whyte, note 275, at 177.

³⁰⁸ David-Gwynn-Morgan, "Tax-Decision Usurps Powers of Legislature?" in *Irish Times*, 6. Feb. 1980, at 10.

³⁰⁹ cf. David Gwynn-Morgan, "Judicial Activism - Too Much of a Good Thing", in Murphy and Twomey, eds, *Ireland's Evolving Constitution: 1937-1997 Collected Essays* (Hart Publishing, 1998), 107 at 119.

³¹⁰ As it did in the *Lueth-Urteil* in which it essentially single-handedly grounded the horizontality of rights in the German legal system.

³¹¹ Schleyer was the head of the German Employers' Association. He was kidnapped by the RAF (Red Army Faction) who demanded a ransom for his release. The Court was asked to decide whether the State was obliged to pay the ransom, due to its protective duty in regards to Schleyer's life and bodily integrity (Art 2 II of the Basic Law). The Court decided that any decision would require it to weigh Schleyer's life with those of potential future RAF victims (as paying the ransom would embolden them and put future victims in danger) and that it could not balance life against life ("*keine Abwaegung von Leben gegen Leben*"). It therefore decided that the decision was a political decision left in the hands of the executive, BVerfGE 46, 160.

³¹² *Solange II* BVerfGE 73, 339; *Bananenmarktordnung* BVerfGE 102, 147.

politically important,³¹³ as well as, as aforementioned, taking a wide view of rights interpretation.³¹⁴ However, in doing so, it never issues anything comparable to a mandatory order. At most it strikes down a law and issues as part of its judgement a statement as to which criteria would need to be fulfilled for it to uphold a similar law in the future. There is not necessarily a great deal of antagonism between the Court and the other branches of government, as the Court operates on the understanding that those organs will pass laws to achieve their goals. It is only the prerogative of the Court to ensure that those laws are compatible with the Constitution, but it usually performs that task relentlessly.

Israel's Supreme Court has also taken a particularly active role, interpreting many rights into the concept of human dignity, partially because the Knesset was unable to reach consensus on the inclusion of certain rights at the time the Basic Law was formulated, primarily due to objection from certain religious parties. These include the right to equality, freedom of religion and conscience and freedom of speech. Other rights not necessarily debated during the drafting of the Basic Law, but which have since been interpreted into the concept of human dignity include the right to strike, the right of minors not to be subject to corporal punishment and the right to know the identity of one's parents.³¹⁵

One would not consider that the relationship between legislative, executive and judiciary has broken down in these nations or that the judiciary has somehow usurped the running of the country. This is possible, because, unlike in Ireland where the Constitution offers little "clear-cut guidance", in these nations, the invalidation of laws is often viewed as a necessary and even inevitable consequence of a correct interpretation of the Constitution.³¹⁶ In Germany, the idea that laws are "made" or "invented" by judges or academics is anathema. Laws, and even legal techniques, are not invented, they are discovered via the powers of reasoning on the understanding that they have been there all along. In Ireland, such an opinion is described as "a rather old-fashioned belief with (I should guess) a minority of adherents among informed people".³¹⁷ However, quaint as such a precept may be, it does have the rather salutary effect of ensuring that any new idea is thoroughly grounded in a rigorous application of logic, as it is necessary to convince one's audience that the view one is propagating has been the only logical one all along. Via such methods, judicial activism can take the form of a logical and consistent extension of the constitutional principles, rather than a haphazard application of the justices' personal inclinations. Such methods of interpretation need by no

³¹³ *Flugsicherheitsgesetz*, BVerfGE 115, 188; *Hartz IV*, BVerfG 1 BvL 1/09 from 09.02.2010, Absatz-Nr. (1-220)

³¹⁴ *Lueth-Urteil*, BVerfGE 7, 198.

³¹⁵ Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" in (2008) 19 *EJIL*, 655 at 721.

³¹⁶ Cf. David Gwynn-Morgan's assessment of the situation in Ireland in *A Judgment Too Far?*, note 278, at 8.

³¹⁷ *Ibid.*, at 17.

means even be imported from foreign legal systems. It would be quite possible, for example, to develop a uniquely Irish system of constitutional interpretation and some suggestions in this direction have already been made.³¹⁸

We thus have quite imperative reasons to wish for more judicial activism in the areas of social and economic rights and no persuasive argument against them. The purpose of affecting wealth is to create the preconditions for democracy not to be democracy. And why not continue to have judges protecting human rights, at least for a while? As judges have no power to command armies, police or infrastructure it is difficult to see how they could usurp real power, and if the people disagree with the courts' decision they can, of course, always elect a government that will pass laws effectively annihilating those previous decisions.

As we have seen, the influence of wealth as well as the statistical inaccuracy of representation, which is in many nations quite acute, mean that at any time the executive is not more likely to represent the wishes of the majority than the judiciary. In fact, for the very reason that wealth plays such a large role in elections, it is unlikely that socioeconomic rights would ever be implemented in this manner, regardless of the proportion of citizens in favour.

6.6.3. Inheritance Regulation

Tocqueville already stressed the importance of regulating inheritance in the interests of democracy and equality. In America, during his time, inheritance was divided by law among the sons of the deceased instead of being inherited completely by the first son as was common in France under the law of primogeniture. Tocqueville believed that this law was beneficial because over the generations great fortunes were gradually diminished as they were split among more and more offspring, instead of being hoarded and producing substantial financial inequality already at birth.³¹⁹ Although there is now no law of primogeniture, inheritance is still a significant factor in creating extremely high levels of wealth inequality.

Attempts to impose equality later in life through enforcing social and economic rights can become a serious source of acrimony within a *polis* and therefore should not be overused. So while this phase is as necessary as Solon's reforms were, it is desirable to move beyond it as quickly as possible. Would it not be simpler, if citizens were simply born into a more financially egalitarian world, where none were in a position to factually oppress others? And could this not to some extent be achieved via the means already recognised by Tocqueville – namely the regulation of inheritance? Let us look at the situation currently obtaining in Western democracies.

³¹⁸ Cf. O'Connell, note 288, at 335 et seq, suggesting an interpretation based on the equality principle of Art. 40.1 of the Irish Constitution.

³¹⁹ Alexis de Tocqueville, *Democracy in America*, (Harper and Row 1966) at 45 et seq.

In Canada, inheritance tax was abolished in the 1970s and inherited property is treated via a legal fiction as if it were sold to the heir. The “tax” accruing from the sale is then “paid” by the deceased out of his estate on his final tax return.³²⁰ In Ireland inheritance tax is payable by the heir (spouses exempted), at the rate of 20%, if the value of the estate exceeds a certain threshold after certain items such as the value of dwelling houses are excluded and the value of agricultural and business equipment is fictively reduced by 90% in the calculation. The amount of the threshold depends upon the identity of the heir: in 2006 it was 478 155 Euros for children under 18, 47 815 Euros for other close relatives, and 23 908 Euros for all other heirs.³²¹ The UK taxes inheritance at 40% for the amount that the inheritance exceeds the tax exempt threshold. For 2009, the threshold was 325 000 British pounds. In addition, exemptions are made for spouses and tax relief is available on businesses.³²²

Let us say that a wealthy English business magnate dies leaving his estate of personal wealth worth 400 million pounds to his son. Supposing the son would pay all of the tax, this would leave him with well over 200 million pounds. We might feel that we have made a dent in the heir’s wealth and have taken something away from him, but this is a false perception. The heir has gained 200 million pounds, which previously he did not have at his disposal, 200 million pounds on top of whatever he has managed to accrue in his lifetime. Perhaps if he acquires 400 million himself, he will leave his son 600 million, of which the son will keep close to 400 million. In this way, inequality can be considerably deepened over generations, despite what at first appears to be a significant tax. The problem is even more severe when one considers that businesses are often to a large degree exempt.

Banning inheritance on the other hand would create a situation at least vaguely approximate to Dworkin’s hypothetical situation of each citizen being endowed with equal resources at birth in his discussion of political equality.³²³ This would represent a fairly radical solution, one without an exact precedent in history. Marx himself feared that abolishing inheritance would provoke a counter-revolution and predicted that the custom of inheritance would fade out once a more overall equitable situation obtained, in line with his theory that law follows economics and not vice versa.³²⁴

Nonetheless, in 1918, the USSR officially abolished inheritance through the Central Executive Committee’s Decree on the Repeal of Inheritance, which required property to devolve on the State. However, even at this point, several exceptions were made. Close relatives could inherit provided that the estate was worth less than 10 000 rubles or if it

³²⁰ Revenue Canada.

³²¹ <http://www.revenue.ie/en/about/index.html>.

³²² <http://www.hmrc.gov.uk/inheritancetax/intro/basics.htm>.

³²³ Dworkin, note 1, at 194 et seq.

³²⁴ Frances Foster-Simons, “The Development of Inheritance Law in the Soviet Union and the People’s Republic of China”, (1985) 33 *American Journal of Comparative Law*, 33 at 34 et seq.

consisted of a farmhouse, domestic furniture, or the means of economic production. If the estate exceeded 10 000 rubles in value, propertyless and/or disabled close relatives were entitled to a portion of inheritance sufficient for self-support.³²⁵ These were the maximum restrictions ever imposed on inheritance in the Soviet Union. Just one year later, the rules were loosened when the Commissariat of Justice decided that the 10 000 ruble ceiling did not apply to “worker’s households”. In 1926, the 10 000 ruble rule was abolished altogether in order to “aid the possibility of the continued existence of commercial and industrial enterprises after the decease of their owners and to establish more attractive conditions for the creation and influx into the country of material and resources”. At the same time inheritance tax was increased. This was a progressive tax which maxed out at 90% on estates of 500 000 rubles or more.³²⁶ It was eliminated in 1943 and replaced by notarial fees of a maximum of 10%.³²⁷ By 1964, Soviet inheritance law was practically identical to the inheritance law of West Germany.³²⁸

However, greater economic equality was achieved in other ways, which were hardly less radical, such as the factual and complete realization of serf emancipation, the expropriation of land and collectivisation of certain means of production, as well as the introduction of substantial State-provided education and health care facilities, and the centralisation of economic planning in a politically-controlled atmosphere. The Soviets, after all, had different goals. They were not attempting to create a democracy. In addition, it is possible that they required a capital influx – leading to the regulation regarding business of 1926 due to their plan of building massive economies of scale in an effort to rapidly industrialise.

It could be possible to devise a similar modern scheme allowing for exceptions to the inheritance ban, such as exempting small, sentimental items and distributing the rest of the estate equally among the populace. If consisting of material goods the estate could be auctioned off, and the proceeds of the auction be distributed evenly among the populace. The practice of sending each citizen a cheque every month with his share of inheritance earnings could make the entire scheme significantly more palatable and also easier to enforce.

Such a system would need to be combined with a strict regulation of gifts, capping how much one person can receive in gifts from another person over the course of their lives, as well as how much any one person can receive from every other person over the course of their lives. This could be achieved by requiring all substantial gifts to be registered and

³²⁵ At the time, the State was unable to provide social security.

³²⁶ Foster-Simons, note 324, at 41 et seq.

³²⁷ *Ibid.*

³²⁸ *cf.* Foster-Simons, note 324, at 50 et seq; *cf.* Reece Bader, Peter Brown and Kazimerz Gryzbowski, “Soviet Inheritance Cases in American Courts and the Soviet Property Regime”, in (1966) *1 Duke Law Journal*, 98 at 99 and 105.

notarized. Such a reform might ultimately prove a second option for wealth redistribution if social and economic rights cannot be implemented or fail to yield results.

6.6.4. Tobin Tax

The purpose of the so-called Tobin Tax is to “moderate swings in major exchange rates”,³²⁹ by taxing currency conversions at 1%. Tobin recognised that extreme short-term currency fluctuations had a negative impact on even large economies as they precipitated economic changes at a pace too fast for the real economy to adjust to, while serving no discernible purpose but to enrich short-term speculators, thus increasing an element of irrationality in the market and forcing governments to excessively co-ordinate their economies in view of the short-term prerogative of maintaining currency stability. Tobin suggested that the envisioned tax be paid into the IMF or World Bank, and added that it would have to apply to all payments in one currency for “goods, services or real assets sold by a resident of another currency area”, in order to prevent “financial transactions disguised as trade”.³³⁰

According to the Bank for International Settlements, turnover in foreign exchange markets, *ie* currency trading, is running at \$3 200 billion USD per day and some sources have estimated that it would be possible to raise as much as \$20-30 billion USD per year with a Tobin Tax as low as 0.005%.³³¹ The Tobin Tax would heavily curtail currency speculation which would lead to a sharp decrease in short-term fiscal crises, thus limiting the number of bail-out loans that the IFIs feel obliged to give and therefore dramatically decreasing this method of wealth transfer from public to private hands. Recently, the financial crisis has prompted the EU to declare the Tobin Tax a “potentially useful revenue-raising instrument,” although it has also made clear that it will make no formal appeal to introduce it. The American government opposes the tax, as does the IMF, with Managing Director Dominique Strauss-Kahn declaring it to be unworkable in the modern financial system.³³²

³²⁹ James Tobin, “A Proposal for International Monetary Reform” in James Tobin ed., *Essays in Economics*, (MIT Press, 1982), at 494.

³³⁰ *Ibid.*

³³¹ Tony Barber and George Parker, “EU Leaders Urge IMF to Consider Tobin Tax”, in the Financial Times, 11.12.2009, available at http://www.ft.com/cms/s/0/76e13a4e-9725-11de-83c5-00144feabdc0.html?nclick_check=1.

³³² A view James Tobin allegedly shared towards the end of his life.

6.6.5. Pegged Salaries

Another method of decreasing exorbitant wealth accumulation would be to peg salaries within corporations. Via this method, the salary of the highest-paid employee of a company would be pegged to the salary of the lowest-paid employee, *ie* the highest paid employee (or proprietor) would not be permitted to earn more than 50 or 100 times the wages paid to the lowest-paid employee. In the case of companies with employees in multiple countries, an index regulating equivalent salaries,³³³ would be available. The highest-paid employee would thus only be able to increase his salary by increasing the salaries of his lower-paid workers. This solution would increase economic equality while preserving the differentiated pay so important to the capitalist system and allowing those in top positions to improve their own position so long as they take everyone else with them. Even permitting the highest-paid to make as much as 100 times as much as the lowest-paid would still have an enormous impact on wealth equalisation. A study of one multinational company revealed the highest-paid CEO to earn 39 441 024 Euro per year, while the lowest-ranking sales employee (entry-level job which normally requires a university degree) earned a maximum of 40 000 Euro per year, provided their sales target was hit. This was a difference of 975 times, and we have not even considered the truly low-paying jobs (cleaning, packing, maintenance). The same company also paid an average of 5 733 Euro per year to highly-skilled employees in India and 4 997 Euro a year to mid-skilled workers located in Romania.³³⁴

6.7. Conclusions on Financial Influence

Wealth predetermines the outcome of virtually every political decision in the current system, effectively annihilating any democratic aspects of decision-making which managed to survive the already debilitating impact of representation. Wealth in the current system does not indirectly affect influence in a contained manner as it facilitated the *rhetors* in Athens. Instead it enjoys a controlling, institutionalised position on both the national and international level.

On a national level expensive electoral campaigns ensure that corporations and very wealthy individuals can exert a controlling influence by virtue of financing electoral success. The amount of money spent on behalf of a candidate's or referendum campaign directly determines its success. This is a further argument against elections to add to the findings on representation, but even if elections were eliminated, wealth would still play a pivotal role in

³³³ *Eg* 10 000 USD a month is equal to how many rupees a month based on consumer purchasing power?

³³⁴ This information gained from personal interviews.

decision-making, as it does in referenda. For this reason, referenda alone are not an adequate solution, shareholder approval of corporate campaign spending holds only marginal democratic value and conflict of interest legislation remains without any discernible effect. Regulation of political spending and donations has proven ineffective, but could possibly contain the situation if limits and ceilings were extremely low so as to place the ability of making the maximum possible donation within the abilities of middle-income citizens. The better solution would simply be to prohibit political donations and limit spending to absolutely minimal levels. There is no conceivable reason, after all, that the control of resources should lead to a privileged position in democratic decision-making or that regular news sources and political speeches/websites cannot adequately inform citizens of a party's policy. The vast majority of electoral spending is, after all, not spent in informing citizens of policy, but rather in projecting a certain image.

On an international level, wealth is used to control the WTO by influencing the use of the Dispute Settlement Procedure and delegation size at negotiations. In addition, business NGOs spend considerable sums in lobbying WTO representatives to adopt their point of view, an activity that those without wealth cannot afford to indulge in. This institutionalised relationship between control of resources and WTO decision-making could be combated by providing funds to poorer nations for dispute settlement proceedings and, most importantly, eliminating NGO participation from WTO meetings. NGOs enjoy no democratic legitimisation whatsoever and their participation entails an automatic privileging of those which can command the greatest resources.

At the UN, wealth often leads to a controlling position of the General Assembly's many subcommittees and a greater ability to procure a Security Council seat which entails greater participation in decision-making. To correct these issues, the UN needs to introduce a rotating system for Security Council seats, weighted perhaps according to substantive democratic criteria.

The IFIs suffer from two main issues: conditionality, which undermines national democracy, and the ease with which the institutions are used to centralise wealth and transfer public funds to private enterprise. Conditionality can be ameliorated by introducing a loan facilitation model of organisation as opposed to the subscription model currently in use (or allegedly currently in use), by permitting whether or not conditions have been fulfilled to be determined by truly independent groups, and to legalise Letters of Intent so that they require national ratification, which, in a direct democracy, would mean a collective decision of the people. Wealth centralisation can best be combated by reforming the IFIs in a manner similar to Keynes' proposed International Clearing Union, in other words, a system which would address not only debit imbalances, but also credit imbalances. As long as only debit

imbalances are punished, wealthier economies will continue to permit practices such as loan guarantees, investor bail-outs and take-or-pay clauses.

The endemic issues of vote-trading, vote-buying and vote-fixing can only be dealt with by addressing the severe economic inequality prevalent on a global scale. While increased economic equality is not democracy it is a precondition of it as exacerbated inequality leads inevitably to the aforementioned practices. While there are several good suggestions as to how to achieve this, the best would seem to be to strike foreign aid, as it only produces a situation of economic dependency, to ban inheritance (which, of course, is entering into unknown legal territory), to introduce a system of pegging salaries within enterprises, and to implement the Tobin Tax or similar arrangement to curtail currency speculation. These measures infringe very little upon civil and political liberties and upon the capitalist market system, allowing citizens to become wealthy using their own powers, so long as they take others with them.

The implementation of socioeconomic rights could be helpful if the protective scope of such rights were raised to a standard adequate to achieve more than the bare relief of abject poverty and lack of education. However, as socioeconomic rights depend upon redistributing wealth, sometimes wealth earned through hard labour, they can easily be perceived as “unfair” and as infringing on civil and political liberties, as those receiving benefits are viewed as only “taking” from others. It is possible to combat this perception by conferring duties along with benefits (“workfare”), but it would be preferable if relative economic equality would be achieved by the less intrusive measures outlined above which permit the individual a greater level of autonomy throughout the course of his life and to increase his wealth via his own efforts.

Chapter 7. Participation

Participation in a decision-making capacity is a vital component of democracy. There can be no democracy where “the people” do not collectively make all significant decisions.

7.1. Participation on a National Level

If citizens participate fully in their national governments’ decisions on foreign policy, it would be possible to claim that they are indirectly participating in international affairs. However, conversely, if citizens have a low level of participation in their national governments, it is difficult to see how they could be meaningfully involved internationally as most international affairs are conducted via States, with few exceptions the sole subjects of international law.

7.1.1. The Electoral Franchise

The Athenians would certainly have agreed that “[a]n average of twelve crosses on a ballot paper in a lifetime is an insufficient test of democratic citizenship”.¹ Tellingly, the Romans also agreed, not with the implied desirability of increased participation, but with the truth that the electoral franchise could not be equated with political freedom or power residing in the people. In Cicero’s *De Republica* freedom is identified with participation on a continuous basis. When the people merely vote, elect officials and have bills proposed to them: “They are really granting only what they would have to grant even if they were unwilling to do so and are asked to give to others what they do not possess themselves”.² This stinging summary of the situation remains applicable today, particularly in regards to efforts to institute “democracy” in nations that fail grotesquely to fulfil the real conditions prerequisite to its establishment. As one expert put it: “it has been clearly demonstrated that

¹ Geraint Parry and George Moyser, “More Participation, More Democracy?” in Beetham ed., *Defining and Measuring Democracy*, (SAGE, 1994) 44 at 49.

² Sheldon Wolin, “Transgression, Equality and Voice” in *Demokratia*, 63 at 83; it is portrayed as a view of Scipio Africanus in defending democracy. He goes on to defend other sources of government, finally deciding that monarchy is the best form. Another source reads, “Nothing can be sweeter than liberty. Yet if it isn’t equal throughout, I will not say in a monarchy, where slavery is evident and unmistakable, but in those states where everyone is free in name only? They register their votes, they bestow military commands and political offices, they are canvassed and asked to say yea or nay; but they confer what they would have to confer even if they didn’t want to things which they themselves don’t have, in spite of being asked for them by others. For they have no share in the supreme power, or in national policy-making or in legal decisions” (Cicero, *The Republic/The Laws*, Book 1.47, note 497).

increased election activity in the world has not necessarily brought conditions conducive to the development of the individual and society”.³

Even if representation were not skewed and governments truly reflected the opinions of their people on any given topic, even if wealth played no role in elections or decision-making, true democracy would not exist due to a lack of personal participation. It is impossible to exercise democracy by proxy, *ie* representatives, elected or otherwise – it depends on individuals personally exercising their own “power”. The importance of this participation can hardly be overstated. As we have seen above, democracy does not exist in an atmosphere in which one is subject to benevolent decisions that one can live with: it exists only where each person can take genuine political actions to affect his own destiny. This is particularly true in regards to decision-making. The Athenians often delegated tasks, but rarely delegated decision-making to individuals or small bodies of citizens.

While international law and international institutions almost always endorse elections as “the” method of political participation, they have not been completely silent on other possibilities.

Article 21 of the Universal Declaration as well as Art. 25 ICCPR, which virtually reiterates it, provides that everyone has the right to take part in government, directly or through freely chosen representatives. According to one author, because Art. 25 (b) of the ICCPR stipulates holding genuine elections, Art. 25 (a) which guarantees citizens the right “to take part in the conduct of public affairs, directly or through freely chosen representatives” must mean something additional to holding elections. The drafters rejected a version which granted citizens the right to participate in “all organs of authority”, however, the Human Rights Committee has stated that Art. 25 (a) “covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.”⁴ While the General Comment does emphasise a central role for elections⁵ it also dwells on modes of direct participation, such as referenda and participation in local assemblies,⁶ although, for the time being, “The conceptual leap from free expression as the human right to criticize government without suffering harm to free expression as the human

³ Richard Burchill, “Introduction” in Burchill ed. *Democracy and International Law*, xi at xv.

⁴ Gregory Fox, “The Right to Political Participation in International Law”, in Fox and Roth, eds. *Democratic Governance and International Law*, (Cambridge University Press, 2000) 48 at 54 et seq; Human Rights Committee General Comment 25 (Dec. 7 1996, para. 5), available at www2.ohchr.org/english/bodies/hrc/comments.htm.; see also Annotation by the Secretary-General of the Draft International Covenants on Human Rights, UN GAOR, 10th Session, Supp. No. 19 (1955).

⁵ *cf.* paras. 9-22, Human Rights Committee General Comment 25.

⁶ *cf.* Human Rights Committee General Comment 25 (Dec. 7 1996, para. 6, available at www2.ohchr.org/english/bodies/hrc/comments.htm).

right to participate fully in the democratic affairs of the State [which was the way it was interpreted in Athens] is not one the international community seems inclined to make".⁷

The HRC has been conservative in its interpretation of Art. 25 as evidenced in *Marshall v. Canada*. This case concerned a series of conferences held in Canada to discuss the position of Natives in the new Constitution. Invitees were federal and provincial elected leaders, as well as representatives of four national Native associations. The Mikmaq protested, arguing that they had not conferred any rights on the organisation (Assembly of First Nations) ostensibly representing them. When it became clear that the Mikmaq would not be permitted to send their own representatives:

they attempted, without success, to influence the AFN. In particular, they refer to a 1987 hearing conducted jointly by the AFN and several Canadian Government departments, at which Mikmaq leaders submitted a package of constitutional proposals and protested 'in the strongest terms any discussion of Mikmaq treaties at the constitutional conferences in the absence of direct Mikmaq representation'. The AFN, however, did not submit any of the Mikmaq position papers to the constitutional conferences nor incorporate them in its own positions⁸

The HRC decided that this was acceptable, stating,

surely it cannot be the meaning of Art. 25 (a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or leave it to freely chosen representatives. It is for the legal and constitutional system of the State party to provide for the modalities of such participation⁹

and further

article 25 (a) cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an

⁷ Gerry Simpson, "Imagined Consent: Democratic Liberalism in International Legal Theory" in Burchill ed., *Democracy and International Law*, 501 at 524.

⁸ *Marshall v. Canada*, (205/86), para. 4.2.

⁹ *Marshall v. Canada*, (205/86), para. 5.4.

extrapolation of the right to direct participation by the citizens, far beyond the scope of Art. 25 (a)¹⁰

Although the HRC has since retreated from this hardline position vis-à-vis minorities, it has done so via Art. 27, not via Art. 25, which indicates only increased sensitivity for ethnic or other differences, not for participation in general.

However, while international law focuses excessively on elections and representative “participation” it in no way limits democratic participation to these methods.

7.1.2. Non-Electoral Participation Focused on Influencing Representatives

Of course, it could be argued that citizens in “democratic” First World countries, have other participatory modes other than periodic electoral voting at their disposal. We shall proceed to examine some of these participatory avenues.

7.1.2.1. Signing Petitions

In the early 1980’s over 60% of British citizens signed a petition at least once over a five year period.¹¹ Between 2002 and 2005, 26% of the Irish adult population signed a petition.¹² According to a further study in 1999 56% of all Western Europeans signed a petition, while 31% of Eastern Europeans did so.¹³

7.1.2.2. Initiating Contact with a Local or National Representative

In the early 1980’s less than one in ten British citizens had contacted a member of parliament in the past five years, while one in five had contacted a local councillor.¹⁴ Only 16% of Irish citizens attended the clinic of their local TD or councillor over a three year period; better than their British counterparts, but still well in the minority of citizens.¹⁵ One must look not just at the quantity of contact, but also the quality. Although Irish TDs are extremely accessible for constituency service, the role of most in the legislative process is negligible. It may therefore be effective to contact one’s TD about a specific local problem

¹⁰ *Marshall v. Canada*, (205/86), para. 5.5.

¹¹ Parry and Moyser, note 1, at 47.

¹² Ian Hughes, Paula Clancy, Clodagh Harris and David Beetham, *Power to the People? Assessing Democracy in Ireland*, (New Island Press, 2007) at 452.

¹³ Patrick Bernhagen and Michael Marsh, “Voting and Protesting: Explaining Citizen Participation in Old and New Democracies” in (2007) *14 Democratization*, 44 at 48.

¹⁴ Parry and Moyser, note 1, at 47.

¹⁵ Hughes, Clancy, Harris and Beetham, note 12, at 475.

(lack of public transport, for example, or a personal problem with the civil service), however, they rarely act as a conduit to national legislative procedures. Indeed, most backbenchers are so focused on constituency work as to rarely take an interest themselves in national legislation, unless they perceive it to affect their personal chances of re-election.¹⁶ The Democratic Audit Ireland study showed that 61 % of respondents viewed the most important duty of TDs to be representing constituency and local interests, while only 15% viewed implementing new laws and policies as their most important duty.¹⁷ In addition, the above statistics merely relate to contacting one's representative in any manner whatsoever. That such a contact would prove fruitful or have an effect on policy is far from certain. To initiate contact with representatives merely indicates an attempt on the part of the citizen to influence public policy. His ability to do so is, however, not ultimately in his hands.

7.1.2.3. Boycott, Organising a Petition and Other Forms of Active Protest

The 1980s study revealed that 8% of British citizens had organised a petition once, while about 1 out of every 100 citizens had blocked traffic. 5.2% had on at least one occasion participated in a protest march.¹⁸

An Irish study in 2005 revealed that over the past three years 8% of the population had boycotted a product (although this does not seem to have been part of an official or organised boycott action, so the political relevance is questionable) and 5% had taken part in a political demonstration, picket march or political meeting.¹⁹ In 1999 14% of Western Europeans and 5% of Eastern Europeans stated that they joined a boycott, 27% of Western Europeans and 17% of Eastern Europeans attended a "lawful demonstration" and 4% of Western Europeans and 1% of Eastern Europeans occupied a building.²⁰

Again – apart from the extremely small figures – we might look at the quality of participation. Protest is often considered to be a drastic form of it, utilised when all else fails. In addition, it is subject to quite strict legal regulation. As in many States, freedom of assembly in Ireland is only guaranteed to those assemblies which are peaceable and unarmed. According to the Constitution, legislation to control or prevent meetings which are calculated to cause a breach of the peace or to be a danger or nuisance to the general public may be

¹⁶ *Eg* medical card "scandal" of late 2008; similarly "For most Canadians...their elected MP is important only for constituency service, not as a conduit to the legislative process. What is the point in making one's views known to one's MP when individual MPs seem to have no role in the legislative process?", Will Kymlicka, "Citizenship in an Era of Globalization: Commentary on Held" in *Democracy's Edges*, 112 at 116.

¹⁷ Hughes, Clancy, Harris and Beetham, note 12, at 474.

¹⁸ Parry and Moyser, note 1, at 47.

¹⁹ Hughes, Clancy, Harris and Beetham, note 12, at 452.

²⁰ Bernhagen and Marsh, note 13, at 48.

passed. In addition, meetings in close proximity to either house of the Oireachtas are heavily regulated. The right to hold a demonstration on a roadway is also prohibited.²¹ Because the freedom of assembly is only protected insofar as public order and morality are not infringed, even if a meeting itself is lawful, if it is likely to provoke others it might be controlled or prevented.²²

Illegal protest (chaining oneself to railway tracks and the like) often leads to at least a few hours in jail and possibly a criminal record. Although the restrictions on protesting in the vicinity of parliaments may originate with the desire to prevent coups, it also results in protests not being held in the very place they could be deemed to be most effective – in front of the “people’s” representatives. Other restrictions also make sense: an unrestricted right of protest could lead very easily to the intimidation of other citizens. However, the fact remains, that due to the many restrictions on protest, which generally aim to make the protest non-disruptive to anyone else, legal demonstrations often lack real effectiveness, so that there is little point in engaging in one except to let off steam. It is ultimately an act of frustration, not of participation.

Although citizens’ freedom to publicly express their opinions is a precondition of democracy, it does not in itself constitute effective democratic participation. Romans of all classes were also free to express their opinions, even in groups and even in public. Over centuries, it rarely affected the decisions made by the upper classes. Protest is essentially an undemocratic reaction to an undemocratic situation. To protest in Athens would have made little sense – one could always have one’s say in the *ekklesia*. Boycotting might prove somewhat more effective, but is limited to influencing companies who seek to sell consumption goods and therefore limited in scope.

7.1.2.4. Party Activity

According to the 1980’s study, 3.5% of British citizens had canvassed for a political party at least once in the past five years.²³ According to an Irish study, between 2002 and 2005, 4% of the population had taken an active part in a political party campaign and 3% had taken an active part in other political campaigns.²⁴ In other words, more than 95% of the population does not participate actively in political campaigns.

²¹ J.M. Kelly, *The Irish Constitution*, Hogan and Whyte eds, (4th Edition, Butterworths, 2003) at 7.5.138.

²² *Ibid.*, at 7.5.159.

²³ Parry and Moyser, note 1, at 47.

²⁴ Hughes, Clancy, Harris and Beetham, note 12, at 452.

7.1.2.5. Overall Participation

In the 1980's British study, a scale rating citizens' level of participation between 0 and 100, found the average score to be 6, with only 2.2% of the population scoring above 20.²⁵ By rating material resources on a scale of 1-17, they found that those who fell into the highest resource category (17) (0.2% of the population) had an average political activity score of 51.71, which they still considered to be low. By contrast those citizens whose material resources were rated at between 2 and 6 (about 50% of the population) had a political activity rate of between 6.11 and 7.59.²⁶

There is thus relatively little non-electoral participation and the vast majority of citizens drastically underutilise the participatory channels that they do have, possibly because of the perceived futility of doing so. One may contact the media – it is not forbidden – but it is unlikely that they will agree to give coverage to the desired project; one may boycott a business, but it is unlikely one will succeed in changing its policy; one may complain to a local councillor, but it is impossible to know if he will even convey the complaint to his colleagues.

However, these all are subject to one caveat: it is unlikely that the media will cover a certain topic, unless a great many citizens request them to do so; it is unlikely that a boycott will change public policy or private enterprise unless a great many citizens participate in it; it is unlikely that a local councillor will act on a single complaint, but it is very likely that he will act if he receives many complaints on the same issue. The biggest issue thus seems to be that lacking any forum in which they may discuss their views unmediated by filters, citizens become lethargic, recognising the futility of individual participation.

However, even if it were possible to instantly communicate with all other fellow citizens and form plans of action to facilitate a high-level of participation through all of the channels mentioned above, one should bear in mind that the percentage of concrete decision-making activities an average citizen would participate in would still be zero, as the quality of participation on offer differs profoundly from that exercised in Athens.

7.1.3. Participation through Referendum

The participation rate in Irish referenda has on average been 49.125% of those entitled to vote. Although this figure is not particularly high, it is vast compared to the percentage of population normally involved in decision-making. However, due to the "Roman" "yes or no" framework and lack of citizen's initiative, the participation afforded

²⁵ Parry and Moyser, note 1, at 48.

²⁶ *Ibid.*, at 54 et seq.

through referenda is still very basic and can result in *stasis*, especially in highly divided societies. In addition, due to the concentration on voting on single issues at long intervals, referenda also become a focal point for wealth and media control to distort public deliberation and opinion-forming.

7.1.4. Participation through Official Complaint Procedures

The Irish Ombudsman's office was set up in 1984 to examine citizens' complaints of maladministration, but cannot examine complaints relating to elected officials, the gardai or courts and prisons.²⁷ Nevertheless, by 2007 it had dealt with over 62 000 complaints. Public bodies are not bound to accept the recommendations of the Ombudsman, but if they do not, the office can submit a report to the Oireachtas about the matter. As of 2007 this had only happened once.²⁸

This mode of participation, although one of the most widely used is quite passive. A citizen files a complaint, most often under the opinion that an official is contravening the State's laws. A complaint is thus primarily aimed at redressing a fault in the *Rechtsstaat*. The procedure differs markedly from that used in Athens to redress official wrongs, in that the "people" decide neither on the acceptable grounds for the complaint nor on its validity.

7.1.5. Social Partnership and Concertation

This Irish mechanism involves the government meeting with employers, unions and (recently) non-profit organisations to hash out policy implementation. Social partnership dialogue rarely involves negotiating new policies, but instead concentrates on implementing existing government policies.²⁹ Because many of the organisations involved in negotiations represent sub-organisations with substantial membership, and because unions often hold ballots on accepting the draft agreement and many people "would join a union" if given the opportunity, the authors of one authoritative study view social partnership as constituting "a level of civil participation in public policy making" unparalleled anywhere else in the world".³⁰

From a democratic point of view, it is highly questionable if it should be paralleled. For one thing, substituting hypothetical participation in a union for actual participation seems ludicrous: one is not participating simply because one would participate if given the chance.

²⁷ Although there is a special Garda Siochana Ombudsman.

²⁸ Hughes, Clancy, Harris and Beetham, note 12, at 83 et seq.

²⁹ *Ibid.*, at 479 et seq.

³⁰ *Ibid.*, at 483.

For another, one must ask the extent to which a member of a grassroots organisation belonging to an umbrella organisation which in turn participates in the talks is participating themselves: this does not afford the average member any closer degree of participation to negotiations than are afforded to him/her by virtue of having voted for a TD who voted on the formation of government. Thirdly, this method of proceeding opens up the issue of equality: a person who is a member of multiple organisations will theoretically be more represented (for what it is worth) than a person who is only a member of one organisation. Fourthly, as the organisations which are permitted to participate are hand-picked, some – and their memberships – are necessarily excluded from the negotiations. In regards to decision-making, this technique bears resemblance to the concept of transnational governance.³¹ By involving many actors of uncertain transparency and accountability, no one can be certain of the real desires of the majority thus “represented”. It may have real value for effective implementation, but does not have any particular bearing on democracy.

7.1.6. Conclusions Regarding National Participation

There is very little citizen participation in the majority of national democracies and therefore individuals are not involved in deciding their nation’s policy vis-à-vis other nations, or indeed deciding anything at all. Because there is no effective way to participate in national politics between elections, it is virtually impossible to hold anyone accountable for decisions taken in international fora. Many of the much-touted avenues for participation in “free nations” are really only avenues of steam-letting, or at most, attempts to circumvent the existing participation deficit by “balancing it out” with participation for some citizens via passive, non-decision-making methods or innovative discussions where it is difficult to quantify the degree of their effective participation.

In short, as yet, no substitute for direct decision-making participation can be determined. The substitutions offered always amount in the end to non-participation, or at the most another avenue of participation for those who already benefit most from the electoral system. As some entities participate in the two-level, national/international game and others do not, the level of involvement becomes even more imbalanced.

7.2. Participation on an International Level

Almost all participation on an international level is State-mediated and we have already discussed its ineffectiveness as a means of “participation”. A few exceptions which

³¹ *Supra* pp. 198 et seq.

afford more direct non-State participation are the many court-like mechanisms in place at various international organisations, as well as participation as an official and participation through NGOs. These mechanisms thus bear examination as possible methods via which the individual can take a decisive influence in international institutions and international law.

7.2.1. Participation via Court-Like Mechanisms, Petition and Official Complaints

7.2.1.1. Court-Like Mechanisms

7.2.1.1.1. The WTO Dispute Settlement Procedure

One of the few avenues that technically affords non-State-mediated participation is the dispute settlement procedure via the submission of *amicus curiae* briefs. A closer inspection, however, reveals the true extent of such participation.

The Dispute Settlement Understanding itself does not contemplate *amicus curiae* briefs, and the possibility of their submission was, in fact, explicitly rejected during negotiations.³² This state of affairs was called into question when in its seminal *Asbestos Decision*³³ the Appellate Body decided after consulting all the parties and third parties to the dispute that it could accept *amicus curiae*, a decision often hailed as a major breakthrough for wider participation. It is often overlooked that the Appellate Body made very clear that its decision applied only to the present case and was not necessarily intended to become general practice.³⁴ The Appellate Body also carefully regulated the submission of *amicus curiae*, establishing a special procedure for their acceptance pursuant to Art. 16 (1) of its own Working Procedures, known as “the Additional Procedure”. According to the Additional Procedure, third parties, be they legal or natural persons, were granted a period of just eight days to file an application to be permitted to submit an *amicus curiae* brief. The application was limited in length to three typed pages and had to contain *inter alia* the specific nature of the interest of the applicant, the specific issues of law covered in the Panel Report, as well as the legal interpretations developed by the Panel and which formed the subject of the appeal which the applicant intended to address in his written brief. It was also required to contain a description of the applicant, including a statement of its membership and legal status, its general objectives, the nature of its activities and the source of its financing. In addition, it had to:

³² *cf.* WTO Doc. TN/DS/W/18 (Oct. 7 2002).

³³ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body (AB-2000-11), 12 March 2001, WT/DS135/AB/R.

³⁴ *EC – Asbestos* at para. 51.

state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements for the Appellate Body to grant the applicant leave to file a written brief in this appeal, and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute³⁵

Based on the applications, the Appellate Body would decide whether to allow a brief to be submitted, under the explicit understanding that even if it did, it was under no obligation to address the legal arguments made therein in its Report. If an entity were allowed to submit a brief, it had to “be concise and in no case longer than 20 typed pages, including any appendices” and “set out a precise statement, strictly limited to legal arguments”.³⁶ According to para. 9 of the Additional Procedure, “The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure”.

Seventeen requests for leave to file a brief were submitted in *Asbestos*, six of which arrived after the eight day deadline and were thus denied.³⁷ In the remaining eleven cases, the Appellate Body “carefully reviewed and considered each of these applications in accordance with the Additional Procedure and, in each case, decided to deny leave to file a written brief” on the grounds that the application failed to conform to the requirements of the Additional Procedure.³⁸

In addition, to the glaring fact that the Appellate Body did not so much as consider any *amicus curiae*, thus calling into question the extent to which this will prove to be any avenue whatsoever of participation in future, it also put obstacles in the way of anyone seeking to submit one, due to the short time period (eight days) to submit an application, and which did indeed result in belated submission by six entities, who apparently did not have sufficient resources at their disposal to react quickly enough. Furthermore, in order to fulfil the material standards set by the Appellate Body, one would either have to be an international trade lawyer or have the finances necessary to retain one.

³⁵ *EC – Asbestos* at para. 52.

³⁶ Additional Procedure, para. 7.

³⁷ *EC – Asbestos* at para. 55.

³⁸ *EC – Asbestos* at para. 56.

That the Additional Procedure makes demands that require significant resources to fulfil is a matter that has been addressed by developing countries, who remain opposed to the practice, and claim that the necessity of responding to *amicus curiae* briefs would impose a difficult burden upon them – “In addition, constraints of financial resources would prevent non-governmental entities in developing countries from effectively participating in the dispute settlement process even if *amicus curiae* briefs are permitted”.³⁹ The *Asbestos Decision* does not therefore open the gates to the participatory frenzy that is often attributed to it.

Further decisions confirm this point. In *US-Shrimp*, the Appellate Body decided that its and the panels’ competence to “seek” information did not preclude them from accepting information that was offered without being officially sought after. However, the fact that a panel may request information, “does not, by itself, bind the panel to accept and consider the information” submitted.⁴⁰ In *Lead and Bismuth II*, it stated that

Individuals and organizations which are not Members of the WTO, have no legal *right* to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal *duty* to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations not Members of the WTO⁴¹

As in *Asbestos*, the Appellate Body decided that

[w]e are of the opinion that we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two *amicus curiae* briefs filed into account⁴²

In *EC-Sardines*, it did accept an *amicus curiae* from Morocco, although stating that it was largely irrelevant, making clear, yet again, that they were not “suggesting that each time a Member files such a brief we are required to accept and consider it. To the contrary,

³⁹ WTO Doc. TN/DS/W/18, Oct. 7 2002, Negotiations of the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe

⁴⁰ *US-Shrimp*, WTO Doc. WT/DS58/AB/RW, 21. Nov. 2001, para.106 et seq.

⁴¹ *US-Lead and Bismuth*, Appellate Body Report, WTO Doc. WT/DS138/AB/R, 7.June 2000, para. 41 et seq.

⁴² *US-Lead and Bismuth*, Appellate Body Report, para. 41 et seq.

acceptance of any *amicus curiae* brief is a matter of discretion, which we must exercise on a case-by-case basis.”⁴³

The submission of *amicus curiae*, to the extent that such submission is even permitted, thus affords only the opportunity for those with the substantial resources and time at their disposal to meet the requirements of the Additional Procedure the opportunity to have their submissions ignored.

7.2.1.1.2. Participation of Natural and Corporate Persons in WTO Processes through National Mechanisms

National law gives natural and corporate persons the ability to become involved in lawsuits concerning the covered agreements and thus a *Durchgriff* to participation on an international level.

While the WTO Agreements cannot be directly invoked in EU or Member State courts,⁴⁴ the ECJ can review the legality of an EU measure under the WTO agreements if the EU intends to implement a particular WTO obligation (so-called Nakajima Doctrine)⁴⁵ or the measure in question refers to specific provisions of a WTO agreement (so-called Fediol Doctrine).⁴⁶

The EU also adopted the Trade Business Regulation (TBR) in 1994 via Council Regulation No. 3286/94 which provides that any natural or legal person or any association without legal personality acting on behalf of an industry that considers that it has suffered injury as a result of obstacles to trade affecting the European market may file a complaint with the Commission. If the Commission determines that action is necessary to remove the injury or adverse trade effects, appropriate retaliatory trade measures may be adopted, in accordance with the recommendations of an appropriate international dispute settlement body.⁴⁷ Any Community enterprise suffering adverse trade effects may also request the Commission to investigate obstacles to trade in third-country markets.⁴⁸ While complaints via the TBR have sometimes resulted in cases being brought before the WTO, they have also sometimes simply resulted in the EU reaching a “diplomatic” solution with the country concerned, *eg* Volkswagen’s complaint against Columbia concerning VAT on imported vehicles.⁴⁹ To date 24 procedures have been initiated via the TBR, with complainants falling

⁴³ *EC-Sardines*, WT/DS231/AB/R, para. 167.

⁴⁴ Case C-149/96 *Portugal v Council* [1998] ECR I-7379, para.48.

⁴⁵ C-69/89, *Nakajima All-Precision Co., Ltd. v Council* [1991] ECR I-2069, para. 31.

⁴⁶ Case 70/87, *Fediol v Commission* [1989] ECR 1781, para. 19-22.

⁴⁷ Art. 3 TBR.

⁴⁸ Art. 4 TBR.

⁴⁹ http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/investigations/countries/columbia/inv_columbia_001.pdf.

exclusively into two categories: large corporations, or, more commonly, European level trade organisations which are in turn composed of national trade organisations. While some trade organisations represent relatively small producers *eg Bureau National Interprofessionnel du Cognac* or *Conzorzio del Prosciutto di Parma*, other trade organisations can count many large corporations among their members, *eg the Confederation Europeenne des Producteurs de Spiriteux*, whose national members list in turn such enterprises as DIAGEO and Bacardi amongst their memberships; COLIPA (European Cosmetic, Toiletry and Perfumery Association) which lists virtually every large manufacturer of such products amongst its members; IFPI (International Federation of the Phonographic Industry) whose members comprise major record labels; as well as the European Confederation of Iron and Steel Industries (EUROFER) and the European Federation of Pharmaceutical Industries (EEPIA) which have brought two complaints each.⁵⁰ This mechanism – passive as it is – is thus used primarily by those entities which already have influential possibilities via other means, such as the ICC or European Roundtable of Industrialists. No case has ever been brought by a natural person.

The American equivalent to the TBR is Section 301 of the Trade Act of 1974 which can be invoked by the US Trade Representative or any other “interested person” which can include individuals, unions and private businesses. The “interested person” must file a petition which the US Trade Representative may accept or reject. If he accepts, he requests consultations with the third State concerned in an attempt to reach a negotiated agreement. If they fail to reach such an agreement within the allotted time period (usually 18 months) the US Trade Representative is authorised to take unilateral retaliatory action. This includes authorisation to cross-retaliate, *ie* sanction completely different goods or subject matter. In practice, Section 301 operates much as the TBR does, and is used primarily by those businesses who besides not being natural persons already enjoy privileged methods of influencing decision-making such as via PAC contributions.

These mechanisms thus only afford increased participation to those entities which already enjoy a privileged position.

7.2.1.1.3. The IBRD Inspection Panel

The World Bank created its own Inspection Panel in 1993 which allows citizens affected by Bank projects to file a petition complaining that the Bank has violated its own

⁵⁰ *cf.* <http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/investigations/>.

policy, procedures or loan agreements,⁵¹ whereby it is limited to investigating claims pertaining to the IBRD and IDA and has no remit in regards to the IFC or MIGA.⁵²

Bank officials have traditionally attempted to block any complaint on grounds of admissibility, such as the *locus standi* of the complainant or other entirely formal criteria.⁵³ Forcing detailed arguments about formal requirements has made the process very difficult for complainants who require expert legal advice in order to stand any chance of their complaint reaching the merits stage.⁵⁴ If a complainant succeeds in reaching “the merits” the response of the Bank’s Board to the complaint is rarely revealed either to the public or the claimant. The panel’s final report is released to the Bank Board two weeks before it is released to the complainant and public,

which leaves little room for public input or scrutiny and lots of room for Bank management manipulation and misrepresentation of the report. In this two-week period Bank management are able to influence the Board with their version of events without public knowledge of what they are saying and without the public or claimants having any opportunity to influence the particular board members who represent their countries⁵⁵

Furthermore, the selection of Inspection Panel members is highly selective and controlled by high-level Bank management.⁵⁶ The Panel is thus staffed by IBRD insiders and not by those likely to be adversely affected by the Bank’s decisions.

The complaint process in itself is extremely passive: the citizen is allowed to complain while the elite, after doing their best to obstruct the complaint, decide upon it in secrecy and according to their rules. While the Bank has recognised some of the participatory shortcomings in its Inspection Panel process, as well as its underutilisation – only 58 complaints have been received over the past fifteen years – the Bank seems to be concentrating more on a change of image than on a change of substance in the proceedings.⁵⁷ The “participation” afforded is thus as negligible as the protection offered.

⁵¹ Lori Udall, “The World Bank and Public Accountability” in Fox and Brown, eds, *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements*, 391 at 414; Molly Beutz, “Functional Democracy: Responding to Failures of Accountability” in *Democracy and International Law*, 123 at 163.

⁵² Udall, note 51, at 422.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at 423.

⁵⁶ *Ibid.*, at 415 et seq.

⁵⁷ The Inspection Panel Annual Report 2008-2009, <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/380793-1254158345788/InspectionPanel2009.pdf>.

7.2.1.2. Participation via Petition

In addition to the court-like mechanisms, several organisations also offer petition procedures, so that we might question whether these offer a democratically acceptable avenue of participation.

Theoretically, an individual can submit a complaint to the UN Human Rights Council via the Complaints Procedure Mechanism⁵⁸ which is a revised version of the former Human Rights Commission 1503 Procedure. Such a complaint may be based on alleged violations of the Universal Declaration of Human Rights. It is not necessary that the State complained of has ratified any particular human rights treaty. The prospects of a complaint – referred to in the mechanism as a “communication” – resulting in action are, however, dim. The Procedure is limited to dealing with “consistent patterns of gross and reliably attested violations” of human rights and fundamental freedoms, so that a petition only comes into question in the most extreme cases. Furthermore, before a complaint is submitted the complainant must exhaust all local remedies.⁵⁹

If a complaint is submitted after the fruitless exhaustion of local remedies, it is pre-screened by the Working Group on Communications and the Working Group on Situations. First the Working Group on Communications, which is composed of “five independent and highly qualified experts”, assesses the admissibility and merits of a communication, whereby such assessments are only carried out at the WGC’s semi-annual five day conferences. If the WGC finds communications (individually or in combination with other communications) admissible, it transfers them to the Working Group on Situations, which is composed of five members appointed by the five regional groups among the State members of the Council. The WGS assesses the situation and the response of the State concerned and “presents the Council with a report on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and makes recommendations to the Council on the course of action to take”. The entire complaint process is confidential “with a view to enhancing cooperation with the State concerned”. In other words, leaving aside the glacial pace of decisions⁶⁰ which is hardly conducive to preserving the life or bodily integrity of the complainant, this “participatory” avenue is little more than a drawn-out, bureaucratic process, which once again ensures the privileged position of those in charge of the State complained of who are protected from public scrutiny.

⁵⁸ Established pursuant to Council Resolution 5/1.

⁵⁹ Art. 5(2)(b) ICCPR First Optional Protocol.

⁶⁰ Generally two to three years, Claire Callejon, “Developments at the Human Rights Council 2007: A Reflection of Its Ambivalence” in (2008) 8 *Human Rights Law Review*, at 323-342; Patrick Flood, “The UN Human Rights Council: Is It’s Mandate Well-Designed?”, in (2008-2009) 15 *ILSA Journal of International and Comparative Law*, 471 at 481.

The admissibility criteria for a complaint are also stringent. Since the Complaint Procedure is thus centred around a strict application of the law, which is, of course, determined by the governments being complained of via their membership at the UN, as opposed to those citizens being abused, its potential for meaningful participation is quite restricted, and symptomatic of a system which seeks to annihilate the participative possibilities of citizens to alter what are essentially the political decisions of their rulers. It even utilises the age-old strategy of claiming that complaints cannot be “politically motivated”,⁶¹ while apparently the decisions that catalysed the complaint are not political, and presumably therefore, as the only other possible explanation, God-given.

Even if a complaint is admitted, it must establish in the merits a consistent pattern of violations that does not rely on mass media reports.⁶² In other words, the complainant must either have at his disposal resources sufficient to gather such data himself, hope that a large number of his fellow citizens will spontaneously submit similar complaints, or rely upon a large organisation to coordinate such an effort. Once again, this places power even to complain outside of the grasp of the individual and into the hands of large, usually Western and usually centrally-organised, NGOs.

Rather than proceeding on an individual complaints basis, the prior Human Rights Commission often established thematic and country-specific working groups and rapporteurs.⁶³ While this method has enabled the Commission/Council to deal with human rights violations more effectively, it has also undermined the importance of the individual citizen as an initiator of proceedings, a position that is now virtually obsolete due to the new Universal Periodic Review Mechanism of the Human Rights Council via which States regularly monitor each other’s human rights records.

The alternative complaint possibilities to the Human Rights Committee under Art. 2 of the First Optional Protocol to the ICCPR are also subject to strict admissibility requirements, in particular the interpretation of the status as “victim”. For example in *Morrison v. Jamaica*, the complainant, a prisoner, found the correspondence of other prisoners dumped in an abandoned cell instead of being delivered, and assumed that his own correspondence had received similar treatment. For the HRC, this was, however, jumping to conclusions. Since the prisoner had not discovered any documents addressed by or to himself, it decided that he could not himself claim to be a victim.⁶⁴ Similarly, in *Tadman v. Canada*, the majority of the HRC found that parents of other religions were not victims of Canadian measures which publicly fund Catholic schools, but not the religious schools of other

⁶¹ <http://www2.ohchr.org/english/bodies/chr/complaints.htm>.

⁶² <http://www2.ohchr.org/english/bodies/chr/complaints.htm>.

⁶³ Callejon, note 60, at 323-342.

⁶⁴ *Morrison v. Jamaica*, 663/95.

denominations or religions. They would only qualify as victims if they were at the time of the case incurring damages to themselves by sending their children to privately funded religious schools.⁶⁵ Again, in *Aumeeruddy-Cziffra v. Mauritius*, the HRC decided that only women actually married to alien men – as opposed to merely potentially married to them – could possibly be victims of legislation whereby alien wives of Mauritian men were automatically eligible for residency status, but alien husbands of Mauritian women were not.⁶⁶

Declaring wide swaths of applications inadmissible on various grounds is a trend that has continued, in particular regarding complaints against Western nations. An application of notorious holocaust-denier Ernst Zundel, who submitted a claim 23 years after an alleged attack, was deemed an abuse of the system,⁶⁷ while the case of a Pakistani woman whose asylum application had been denied by Canadian authorities was also determined to be inadmissible, as according to the HRC, it is the prerogative of national mechanisms to determine the facts of the case and that there was no reason to believe that the Canadian authorities had not correctly assessed her situation.⁶⁸ The case of a Dominican citizen whose university degree was not recognised in Spain on the grounds that the education system in Spain had been altered since the degree-recognising co-operation agreement with the Dominican Republic on which her claim was based, was also deemed inadmissible.⁶⁹ While these cases and many similar ones, may not have been successful at the merits stage, the remarkable point in regards to participation is that they do not reach that stage.

As in the 1503 Procedure, the complainant must also exhaust domestic remedies. In *P.S. v. Denmark*, the HRC decided that even “financial considerations and doubts about the effectiveness of domestic remedies do not absolve the author from exhausting them”.⁷⁰ However, in *Henry v. Jamaica*, the HRC found that a domestic remedy for which legal aid is unobtainable and for which the complainant himself has no funds is not an “available remedy” in the meaning of Art. 5 ICCPR First Optional Protocol and therefore exempt from this rule.⁷¹ A complaint to the Human Rights Committee or one of its affiliated bodies may only be made if the State complained of has ratified the corresponding treaty.

7.2.1.3. Conclusions Regarding Court-Like Mechanisms, Petitions and Official Complaints

It is extremely difficult to reach the merits stage of a complaint to any international body. Even when one has succeeded in this endeavour, the participation afforded is extremely

⁶⁵ *Tadman v. Canada*, 816/98.

⁶⁶ *Aumeeruddy-Cziffra et. al. v. Mauritius*, 35/78.

⁶⁷ *Zundel v Canada*, CCPR/C/89/D/1341/2005

⁶⁸ *P.K. v. Canada*, CCPR/C/89/D/1234/2003

⁶⁹ *Estela Josefina González Cruz v. Spain*, CCPR/C/88/D/1151/2003

⁷⁰ *P.S. v. Denmark*, 397/90.

⁷¹ *Henry v. Jamaica*, 230/87.

passive. One must wait while a panel of experts decides the outcome. Due to their immense workload, there is a tendency to eliminate complaints at the admissibility stage. Beyond the thin “participation” afforded to citizens via these mechanisms lies the practical infeasibility of funnelling all possible complaints that a citizen may have through a very small number of experts. This ultimately means that these mechanisms fail to fulfil the function of the Athenian *dikasteria* which was to provide citizens with a forum in which to decide upon their grievances against one another. The current system suppresses these grievances.

7.2.1.4. Suggested Solutions

7.2.1.4.1. Increase WTO Sensitivity to National Concerns

A favoured reform path is the alteration of trade rules to reflect deep national concerns in an effort to allow “the people” some influence on panel decisions. Claims that a national law of a country restricts trade contrary to the Agreement should be rejected by panels if “the national measure reflects a deeply embedded value (which at times may be idiosyncratic)” and “enjoys the clear support of [that country’s] population” and “where the country imposing the measure bears the greater part of the cost” of any trade distortion the legislation has caused.⁷²

Although it would be at least very slightly more democratic to take the will of the inhabitants of the country as expressed in their “deeply embedded values” into consideration, it should be remembered that such a circumstance cannot be equated with “people power”, as the ultimate decisions about what is a “highly embedded value” and when it enjoys the clear support of the population are left in the hands of the panel and not the people. We could, of course, potentially allow for a mechanism whereby the population could initiate a referendum on such a point. While this would be cumbersome, WTO processes are not currently known to proceed at lightning speed anyway. Of course, the most repressive governments could easily manufacture a citizen’s initiative to manipulate trade rules in their favour, and in less authoritarian nations, referenda would be subject to the manipulations of wealth and media coverage, unless appropriate reforms were to be put in place in those areas as well.

7.2.1.4.2. Increase Merit-Stage Decisions

One element is easily rectified, and that is the reduction of complaints that are rejected on admissibility criteria. To achieve this one only need loosen the criteria or

⁷² Jefferey Aitik, “Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade,” (1998) 19 *University of Pennsylvania Journal of International Economic Law*, 229 at 229.

standards of interpretation slightly and increase the number of decision-making officials. On an international scale, the expense of such an operation is hardly worth mentioning. In the utmost extremity, it would easily be funded with proceeds from the International Clearing Union or Tobin Tax. Any slight decrease in the elite credentials of such decision-making officials, is, of course, only to the benefit of democracy.

7.2.1.4.3. Schoeffengericht

The *Schoeffengericht* is a German mechanism whereby in certain types of cases the court is composed of a judge and two laypeople, who sometimes, but not always, have some expertise in the area concerned, for example, if the case concerns construction, they may be construction foremen.

There is no reason we could not apply this mechanism to international court-like settings. By selecting random individuals, even those from a pool that is in some way knowledgeable about the issue at hand, *eg* citizens from the State that is being complained about, to make up say half of the panel, the pressure to find legal experts to staff them full-time is reduced, while participation via a wider range of ever-changing individuals increases.

7.2.2. Participation via NGOs⁷³

There is a tendency in academic and public discourse to view NGOs as a panacea for the participatory shortcomings of the international legal system. This section first examines the methods by which NGOs participate in international organisations, omitting the avenues such as the submission of *amicus curiae* which have been thoroughly discussed above, and then the manner in which individuals participate in NGOs.

7.2.2.1. At the WTO

Many NGOs directly lobby the WTO,⁷⁴ but their activity outside of the unofficial lobbying sphere, which necessarily privileges the wealthy, is rather thin. In 1996, the WTO published its "Guidelines for Arrangements on Relations with Non-Governmental Organizations", which read in part that the WTO should hold *ad hoc* symposia with NGOs and that arrangements should be made whereby NGOs can submit information to "interested

⁷³ I use the term "NGO" intentionally as it is more accurate than the now trendy "civil society". NGOs are discrete organizations with defined memberships, not a substitute for society.

⁷⁴ Jan Aart Scholte, Robert O'Brien and Marc Williams, "The WTO and Civil Society" (1999) 33 *Journal of World Trade*, 107 at 109.

delegations”.⁷⁵ The Guidelines go on to state that there is a “broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings”.⁷⁶ The Guidelines were elaborated on by the WTO’s General-Director in WTO Press Release 107, 17 July 1998, which stated that NGOs “with links to trade issues” had been invited to WTO Ministerial Conferences and that the External Relations Division would “begin a programme of regular briefings for NGOs on the work of WTO committees and working groups”. It also stated that the Secretariat would prepare a list of documents and position papers submitted by NGOs on a monthly basis and which Member States could demand to receive and which would appear on the WTO website. The Director-General noted that “other issues including opening Dispute Settlement hearings and other WTO meetings to the public can only be approved by a consensus of member states. The same situation pertains to the issue of more rapid derestriction of documents”.⁷⁷ The WTO has “undertaken various outreach initiatives towards civic associations” including increasing its public dissemination of information and altering substantive policy to partially meet civil society demands.⁷⁸ These compromises remain nebulous. Why decisions alter certain components of substantive policy are undertaken and at the behest of which members/NGOs can often be a difficult process to track, and the WTO increasing its own dissemination of information can hardly be a substitute for active participation. Nevertheless, the WTO can be used by NGOs to distribute their views to Member States. The WTO also gives “civil society representatives” office space and media facilities at Ministerial Conferences.⁷⁹

The WTO has convened an annual Public Forum since 2001 which invites “representatives from civil society, academia, business, the media, governments and inter-governmental organizations including regional economic and development organizations” to participate in panel discussions on a pre-determined topic. In the seven years from 2001-2008, 8500 delegates or 0.0001% of the world’s population attended the Public Forum. The 2009 “high-level inaugural debate” “featured” WTO Director-General Pascal Lamy, former South African President Thabo Mbeki, former Prime Minister of Norway Gro Harlem Brundtland, and former Foreign Minister of Uruguay Sergio Abreu.⁸⁰ The Forum is thus only another participatory avenue for those who already have multiple channels of influence and participation at their disposal.

⁷⁵ WT/L/162, 23 July 1996, para. IV.

⁷⁶ WT/L/162, 23 July 1996, para. V.

⁷⁷ Press Release 107, July 17.1998.

⁷⁸ Scholte, O’Brien and Williams, note 74, at 116.

⁷⁹ *Ibid.*, at 117.

⁸⁰ WTO Press Release 573, 24.09.2009.

7.2.2.2. At the UN

NGO participation is officially authorised in Article 71 of the UN Charter and regulated by ECOSOC Res. 1996/31.⁸¹

Since the 1970s it has been standard practice for NGOs to gather at and participate in various UN Conferences on specific themes (eg the World Population Conference, the World Summit for Children, etc.).⁸² The number of participating NGOs can be large: at the 1996 Conference of the Parties to the UN Climate Change Convention more than 500 NGOs took part in the debate.⁸³ The participatory value of such debate is, however, thin. On the whole NGO representatives address the plenary session and then fade into the background, so that their participation amounts to little more than an invitation to “blow off steam”.⁸⁴

The same can largely be said for participation at ECOSOC meetings. ECOSOC Res. 1996/31 specifically states that the distinction drawn by the UN Charter between participation in deliberation without a vote and the term “consultation arrangements” means that the latter “should not be such as to accord to non-governmental organizations the same rights of participation as are accorded to States not members of the Council”.⁸⁵ The arrangements should not “overburden the Council or transform it from a body for co-ordination of policy and action, as contemplated in the Charter, into a general forum for discussion”.⁸⁶

ECOSOC maintains lists of three categories of NGOs: those with general consultative status (currently 140 NGOs), those with special consultative status (2170 NGOs) and roster NGOs (980 NGOs).⁸⁷ To qualify for general consultative status an NGO must be active in the majority of ECOSOC’s areas of activity and be “broadly representative of major segments of population in a large number of countries”. They can propose items for the provisional agenda of ECOSOC, attend public meetings as observers, submit written statements of up to 2000 words for circulation to ECOSOC members and request opportunities to make oral presentations.⁸⁸ This is the highest level of participation afforded to NGOs and it is far from pro-active: NGOs can make submissions for the provisional agenda and must request an opportunity to speak. NGOs with special consultative status (those that “are concerned with a few fields covered by ECOSOC and that are known internationally within those fields”), may

⁸¹ UN Doc. A 15113 (Part II) (1996).

⁸² Steve Charnovitz, “Two Centuries of Participation: NGOs and International Governance” in (1996-1997) *18 Michigan Journal of International Law*, 183 at 261 et seq.

⁸³ *Ibid.*, at 266.

⁸⁴ Cf. Roosevelt’s statement, *supra* pp. 188 et seq.

⁸⁵ ECOSOC Res. 1996/31, para. 18.

⁸⁶ ECOSOC Res. 1996/31, para. 19.

⁸⁷ Statistics taken from <http://www.un.org/esa/coordination/ngo/>.

⁸⁸ ECOSOC Res. 1996/31, paras. 22, 28, 29, 30 (d), 32.

also attend meetings as observers.⁸⁹ Both special and roster NGOs may submit written statements of up to 500 words for circulation to Members.⁹⁰ The situation is similar at the Human Rights Council, where 284 NGOs participated in its sessions the first year of its existence.⁹¹

7.2.2.3. At the IBRD

NGOs interface with the IBRD via the NGO-World Bank Committee. This Committee elects its own members, whereby any NGO can nominate itself for election.⁹² An NGO Working Group on the World Bank which is composed of NGOs from the NGO-World Bank Committee also exists for the purpose of meeting to discuss their strategy towards the Bank.⁹³

In 1989, the IBRD issued an operational directive to staff ordering them to involve NGOs in projects⁹⁴ and in 1996 appointed 23 NGO liaison officers “who are attached to Bank resident missions to facilitate participatory approaches to Bank-financed projects”.⁹⁵ The IBRD reported for fiscal year 1995 that NGOs were “associated” with more than 70% of projects in health, agriculture and the social sector, 60% of projects in industry, 50% of projects in education and 40% in mining, environment, urban and water projects. However, meeting with Bank staff once to discuss some aspect of a project already qualifies an NGO as being “associated” with it,⁹⁶ so that the figures cited give an inflated sense of NGO participation. According to the IBRD 2006 Annual Report, “civil society organizations were consulted on nearly all of the 31 country assistance strategies approved by the Bank in fiscal 2006 and they were consulted during the preparation of 72 percent of new loans approved.”⁹⁷ While this would appear to be an increased level of involvement in the planning stages, the term “consulted” is rather vague and gives but little idea of the depth of participation. The Annual Report goes on to state that over half of all foreign donations to rebuilding following the Asian tsunami was channelled through civil society organisations,⁹⁸ which is in line with usual NGO involvement at the IBRD, which is generally confined to the implementation of

⁸⁹ ECOSOC Res. 1996/31, paras. 29.

⁹⁰ ECOSOC Res. 1996/31, para. 30 (e).

⁹¹ Lucia Nader, “The Role of NGOs in the UN Human Rights Council” in (2007) 7 *SUR – International Journal on Human Rights*, 7 at 9.

⁹² Jane Covey, “Is Critical Co-operation Possible? Influencing the World Bank through Operational Collaboration and Policy Dialogue” in Fox and Brown eds, *The Struggle for Accountability*, 81 at 96.

⁹³ *Ibid.*, at 96 et seq.

⁹⁴ Directive 14.70.

⁹⁵ World Bank Annual Report 1996, at 75.

⁹⁶ Covey, note 92, at 83.

⁹⁷ IBRD 2006 Annual Report, at 25.

⁹⁸ IBRD 2006 Annual Report, at 25.

projects, as opposed their design or other decision-making aspects.⁹⁹ Their participation is thus more akin to that of outsourced employee than of equal decision-maker.

7.2.2.4. Participation via NGOs in General

As has been demonstrated, the official participation afforded to NGOs is thin, with those that can afford to professionally lobby at a distinct advantage. However, we must not therefore immediately accept the facile conclusion that if only NGO participation were enhanced this would lead to democratic participation.

NGOs could possibly enhance democratic participation, if they represented a reflection of society so accurate as to render the “political virtue” of each and every citizen redundant. However, most participants in NGO activity, particularly at higher levels, are “urban-based, university-educated, computer-literate, (relatively) high-earning English speakers”.¹⁰⁰ Thus, NGO participation (such as it is) has “tended to reinforce structural inequalities in world politics”.¹⁰¹

A study of the backgrounds of the heads of nine of the largest and most well-known NGOs (the tenth NGO picked for the study, *Medecins sans Frontieres* has no head, as it is organised regionally, while WWF has two heads), revealed that one held a M.P.H. from John Hopkins University, two were Rhodes scholars at Oxford (*ie* winners of a prestigious scholarship to Oxford, based on academic achievement and references, as well as a personal statement about one’s life intentions), two had attended Harvard Law School, one had acquired a scholarship to attend London University, one who described himself as coming from a relatively poor background had achieved an MA from the University of Pennsylvania and one had no apparent university education. The scope for high-level participation through NGOs does not seem to go much beyond the exclusive circles of elite universities. The views of these NGO heads may differentiate from their government-placed former schoolmates, but given the enormous overlap in their education and adult life experience, this does not reflect the diversity truly present in the world nor offer an avenue of meaningful participation for those currently excluded.

In addition, organisation in many NGOs can be hierarchical:

most civic groups have to date attended insufficiently to questions concerning their representativeness, consultation processes, transparency

⁹⁹ Covey, note 92, at 86.

¹⁰⁰ Scholte, O’Brien and Williams, note 74, at 118.

¹⁰¹ *Ibid.*, at 119; *cf.* also Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology*, (Oxford University Press 2000) at 85.

and accountability. Indeed, some of the organizations that have pressed hardest for a democratization of the WTO have done little to secure democracy in their own operations¹⁰²

Many “movements” to affect policy of international institutions are clumsily constructed coalitions particularly between international NGOs or NGOs in wealthier countries and grassroots groups on the ground in the affected country. Interactions within these coalitions can range from a very high level of agreement and communication between NGOs and grassroots movements to a very low level in which those actually affected by the issue at hand are virtually ignored.¹⁰³

There is yet a third reason as to why NGOs cannot fulfil a representative question. At their best, NGOs can work as a lens for focussing “people power” on a particular issue. However as there is no reliable data on whether their agenda truly reflects the will of the majority, we do not know how often and when this occurs. While NGOs can “vocalize the interests of persons not well-represented in policy-making” and might “enhance the accountability of both national governments and international organizations by monitoring their behaviour”,¹⁰⁴ they can also skew certain issues, especially considering that most NGOs are based in industrialised States and are usually better financed than those from poorer nations.

NGOs selected for close co-operation with IGOs are not necessarily either grassroots or representative. The NGOs listed on ECOSOC’s website are too numerous to permit a thorough analysis of background and membership in the scope of this thesis. However, picking a random NGO from the first page of each category led to some thought-provoking results. It is not clear, for example, why the members of 3HO “Happy, Healthy, Holy Organization”, a meditation society featuring such articles as “Living Yoga in the Age of Aquarius” are granted roster status, nor why the Club of Madrid, “the world’s largest forum of former democratic Presidents and Prime Ministers” needs special consultative status. Presumably the views of its members were not sufficiently heard when they were governing nations. Then there is ACUNS, the Academic Council of the United Nations System, apparently a subsidiary of Canadian university Wilfred Laurier which offers as one of its “benefits to members”...“access to official UN system meetings...thanks to our Category 1

¹⁰² Scholte, O’Brien and Williams, note 74, at 122.

¹⁰³ Jonathan Fox and David Brown, “Accountability within Transnational Coalitions” in Fox and Brown eds, *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements*, 439 at 444-447, 459-461.

¹⁰⁴ Charnovitz, note 82, at 274.

consultative status with ECOSOC” for as little as \$50 CDN per annum.¹⁰⁵ In other words, this organisation is literally selling access to ECOSOC participation.

In addition, many NGOs are subsidised by national governments,¹⁰⁶ meaning that their often generous resources do not reflect the real level of public support for their activities. In Ireland, for example, 60% of funding for non-profit organisations was received from the government. 30% of these funds went to health-related organisations, international development organisations received 7.7% of state funding, arts, culture and heritage groups received 5.6% and environmental groups 0.6%. Significantly, this differed from the pattern of private donations, 25.1% of which went to international development organisations, with 8.4% going to arts, culture and heritage, and only 8% going to health organisations.¹⁰⁷ This practice is not limited to Ireland – many of the world’s top NGOs receive up to 99% of their budgets from single States.

This pattern holds true on an international level as well. Most of the funds that governments donate in an emergency situation are channelled to NGOs, often via an institution such as the IBRD, which provide basic services in the emergency. This is primarily to prevent corruption that could – and in some cases undoubtedly would – ensue by giving money directly to governments,¹⁰⁸ however it makes the veracity of support, particularly “grassroots” support for NGO agendas extremely difficult to discern.

Furthermore, a certain proportion of “NGOs” are artificially created front organisations for business interests, whose members may or may not be aware of this character. These are referred to as “Astro-Turf groups” because of their artificially manufactured “grassroots”, which are frequently set up via a PR agency. Besides the recent “tea parties” in America, organised courtesy of Fox News which in turn belongs to the Murdoch media empire, some examples include:

- Cancer United (set up by Weber Shandwick for Roche to promote anti-cancer drugs)
- Americans for Constitutional Freedom (set up by Gray and Co. for the porn industry)
- Americans Against Unfair Gas Taxes (set up by Beckel Cowan for the American Petroleum Institute)
- Africa Harvest (set up in West Africa by GM companies, primarily DuPont, it was exposed in 2005, but continues its operations)¹⁰⁹
- The Iraqi National Congress (a group of Iraqi exiles active in the run-up to the Second Iraq War, which was facilitated and given media access by the American government)¹¹⁰

¹⁰⁵ <http://www.acuns.org/membership>.

¹⁰⁶ Charnovitz, note 82, at 283.

¹⁰⁷ Hughes, Clancy, Harris and Beetham, note 12, at 443.

¹⁰⁸ Joanna Macrae, “NGOs: Has the ‘N’ Gone Missing?” in (1996) *Red Cross Crescent*, 3 at 18.

¹⁰⁹ Nick Davies, *Flat Earth News*, (Vintage Books, 2008) at 170;

<http://www.sourcewatch.org/index.php?title=SourceWatch>.

In addition, Exxon Mobil reportedly spent up to 15.8 million USD on forty-three “Astro Turf” front organisations against the Kyoto Protocol between 1998 and 2005.¹¹¹

7.2.2.5. Conclusions Concerning Participation and NGOs

The participation afforded NGOs under international law is often thin, usually limited to “discussions”. This is not entirely unwarranted as the level of support that any of them enjoys as well as the veracity of their cause and membership are all extremely difficult to ascertain, even in those cases where they have not been set up by a business interest or government. Multi-layered strategising such as via the NGO Working Group on the World Bank which in turn feeds into the NGO-World Bank Committee can skew the preferences of their members on the long journey from grass-roots level to IBRD level.

NGOs are essentially hierarchical power structures that try to counter-balance existing power structures, and while they add a (weak) alternative to State-centric participation for the individual, they do not alter the quality of his participation, which remains passive, or afford him accurate representation.

7.2.2.6. Suggested Solutions

The only viable solution to the democratic difficulties posed by NGO-mediated participation is simply to cut their access to decision-making. There is absolutely no democratically legitimated reason for which self-appointed groups, whose popular support is impossible to determine and whose accountability is virtually non-existent, should be given privileged access to decision-making. While such groups might pursue goals that certain segments of the population might regard as worthy, they do not particularly further participation. Their only value is in pursuing certain goals, such as socioeconomic rights, which may eventually set the preconditions of a democracy. However, they are just as likely to pursue diametrically opposed goals as these.

7.3. Conclusions on Participation

Participation for the average citizen is virtually non-existent and, when it does occur, extremely passive in nature.

¹¹⁰ Nick Davies, note 109, at 238

¹¹¹ Nick Davies, note 109, at 188, estimate from the Union of Concerned Scientists, January 2007; partially confirmed by Jeffery Ball, “Exxon Mobil Softens Its Climate-Change Stance” Wall Street Journal, Jan. 11 2007.

Direct democracy on a national level would drastically alter this by giving the citizen the chance to regularly participate in a decision-making capacity. On an international level, participation is, of course, more difficult. The highly restrictive admissibility criteria attached to all petition and complaints procedures need to be substantially loosened in order to permit more merit-stage decisions and thus more participation. The increased workload could be dealt with by drafting citizens in to participate on the decision panels. NGOs should be eliminated from all decision-making processes, as they enjoy no democratic legitimisation and obscure the will of the people. In a system of direct national democracy, with increased abilities of the citizen to individually participate on an international level, the “need” for them would be greatly reduced, a “need” which they are unable to fulfil, anyway.

Chapter 8. Final Conclusions

8.1 Characteristics of Democracy, Rule of Law and Human Rights

8.1.1 Athens and Rome

This research has helped to expose the essential characteristics of a pure democracy as “people power”, namely: decision-making via “the people” acting directly and on an equal basis; mass participation; fluid majorities; relative economic equality; and interpretations of rule of law and human rights that are compatible with the exercise of democracy. It has also highlighted those conditions of democracy which are incompatible with modern political-legal organisation and which would need, if democracy is to be pursued, to be severely adapted. These are, first and foremost: homogenous citizenship and multilateral mass communication. We have also learned that blackmail is an inherent weakness of a democratic system, due to the virtually unlimited power of each individual citizen to initiate an action against another, and that democracy seems to have little effect on aggregate fairness (however defined), and the prevalence of demagoguery.

We have also discovered that a rule of law system which lacks a strong democratic base, may offer a limited sphere of personal security and recognise rational decision-making as a higher value, but is ultimately instable. These tendencies are historically illustrated by the example of the Roman Republic, but are repeated with remarkable accuracy in modern globalised society.

8.1.2. Democracy, Rule of Law and Human Rights: Summary of Findings

On the basis of these findings, this thesis has been able to determine more precisely how the three “pillars” of “modern” Western democracy (democracy, rule of law and human rights) can fit together in a systematic, harmonious manner. This has revealed some accepted tenets of common wisdom to be fallacious upon closer examination. Notably, it has exposed the idea that human rights inevitably reinforce democracy and the assumption that the level of individual rights one enjoys is directly proportional to democracy as facile. Far from “buttressing” democracy, modern human rights primarily compensate for a lack of it by serving as a proxy for participation. This passive participation may be more correctly described as a system of enlightened despotism. We have also determined that there is no connection between elections and human rights. The Roman Republic had very frequent, genuinely contested elections. Elections nonetheless failed to usher in a human rights era, in much the same manner that they have failed to do so in many modern States.

On the other end of the spectrum, the anti-democratic nature of countermajoritarianism tends to be overestimated in modern “democracies”, as neither the legislative nor executive is necessarily more accurately representative than the judicative. A countermajoritarian difficulty would only become apparent in a society in which legislative and executive activity were predicated on direct participation and judicative activity was not. However, even this does not necessarily lead to the conclusion that judicial review is anti-democratic in and of itself. Judicial review was practiced in Athens primarily via the *graphe paranomen* and was, and is, a very important component of a well-functioning democracy. Its potential anti-democraticness stems purely from the restrictive identity of those performing the review, as well as those who have control over constitutional amendment.

We have also discovered some valid relationships between democracy, rule of law and human rights. One is that without positive law or the will of the *demos* to enforce them human rights cannot factually exist. The reverse connection is not as strong, but present nevertheless. Certain human rights can underpin a democracy and help it to flourish. These, however, are precisely those rights that are not commonly accepted as legal rights: the right to actively participate in collective decision-making and the right not to be economically dependent upon other citizens. The concept of human dignity also has positive implications for democracy, in that it may serve to limit the level of inequality permitted in a society, *eg* citizens might be economically unequal to one another, but not so unequal that one person can be economically dependent on another, and not so unequal as to deprive some of basic necessities. This tack has been taken by several national and regional courts in the recent past. In a democracy, such entitlements must, however, as in Athens, find their boundaries in the interests of the community, and comprise not only rights but also duties. By enshrining the idea of intrinsic worth of every human being, human dignity may also advance democracy within a heterogeneous population by fostering a mindframe conducive to the respect of differences and a willingness to refrain from legislating for certain issues, preventing the *stasis* so harmful to any democracy.

In short, although democracy, rule of law and human rights do reinforce each other, they do so in ways which are not necessarily those commonly attributed to them (*eg* elections, classical liberal rights), while tensions between the concepts (*eg* countermajoritarianism) are sometimes more apparent than real.

8.2 Implementing Democracy Nationally and Internationally

This research has shown that democracy cannot be brought about by the commonly suggested means (elections, increased NGO participation, minimal socioeconomic rights, throwing unfiltered information onto the internet, etc.) – these are suitable for the founding of

a republic, but not of a democracy. This realization also allows us to realize that many of the issues we face in implementing democracy are not isolated or freakish events; rather their occurrence is inherent in the Western “democratic” tradition, which is, in fact, a Republican tradition.

8.2.1 Representation

8.2.1.1. National Representation

Modern elections do not deliver “people power” and do not provide citizens with representation so accurate as to make their own political virtue superfluous. In many nations it leaves them governed by a movement that could secure only a minority of votes. Transferring national representation to an international level further skews its inaccuracy. The research presented here investigated other factors complicating representation at various international institutions and attempted to address these shortcomings in a democratic context.

8.2.1.2. WTO and UN General Assembly

The research showed that representation, in the sense of an accurate reflection of citizen preferences, is further skewed at the WTO and UN General Assembly by several harmful practices, including: voting through units which differ greatly in the number of their constituent members; sub-delegating substantial decisions to committees with a membership that is even more restrictive and therefore less representative than in the nominal decision-making forum; closed-door pre-negotiations; and the practice of the ill-defined “consensus-building”.

Many of the most popular solutions proposed to these shortcomings were analysed and rejected on democratic grounds. Permitting national parliamentarians to influence UN policy via the Inter-Parliamentary Union was rejected on the grounds that it failed to provide a mechanism for determining whether such measures would actually enjoy the backing of the majority of the population, and that this solution contained no decision-making content – neither for “the people”, nor their national representatives who are relegated to giving “input”. The suggestion of some authors to counteract the practice of closed-door negotiations at the WTO by creating an Executive Body of the General Council that would have general decision-making power and be composed of permanent and rotating members was rejected on the grounds that it merely legally institutionalised the uneven balance of power created by “consensus” decisions rather than rectifying it. The creation of a World Parliament was also rejected due to the fact that this solution largely ignores the “real” issues of democracy:

substantive decision-making participation, corruption, and major centres of financial and/or military power. Transnational governance solutions were also found short of democratic content, as they merely redistribute decision-making power over a broader base of elites, while at the same time drastically reducing transparency and accountability.

Other solutions, however, were found to have some promise for democratic reform. Formal majority voting on certain WTO issues to counteract the practice of “consensus” voting would represent some improvement by reducing ambiguity, although it would still leave the representative skewing caused by unequal voting units. Redistributing voting power within the General Assembly according to the number of people each State represents and the democratic legitimacy of its government would be more helpful in mitigating the level of representational skewing (albeit very prone to political manoeuvring), provided that not only formal “democratic” criteria (*eg* elections), but also substantive criteria, such as real participation levels, were to be used.

Since none of these solutions was very satisfactory, the thesis asked whether direct decision-making would be at all feasible in a highly heterogeneous population, be it a global or national one. We then examined several theoretical models which have attempted – albeit from a completely different angle, to deal directly or indirectly with this difficulty.

Deliberative democracy was rejected because when the pool of decision-makers is smaller than the pool of deliberators – which is the basis from which most proponents of this theory proceed – deliberation degenerates into another sugar-coating of the democratic deficit, giving the deliberators the illusion of true participation while continuing to divorce real decision-making power from the debate. Unanimity or qualified voting was also rejected as it is more inegalitarian than majority rule. Under unanimity rule the vote of a single objector is given more weight than the votes of all those in favour of the motion, while under a qualified majority, fixed minorities are *de facto* granted a privileged position. Manufacturing homogeneity by repressing divisive issues is also a method which can be effectively used to encourage fluid majorities, and is in fact already often used in nation states. However, it is very difficult to reconcile with modern human rights values, and amounts to a reiteration of the worst aspect of Athens – the complete repression of the individual in the interests of the common good.

However, several models were identified which could help to reduce the level of strain a highly heterogeneous population could face in increasing their level of participative democracy, thus making direct democracy more feasible. Cumulative voting enables minority groups to exert influence over political processes if they make a concerted effort to vote in one direction. It can therefore help to balance a system in which there are hardened majority and minority positions. Enabled participation could help bring about more fluid majorities, much as the Athenian pay-for-participation model encouraged participation from the most

disadvantaged groups in society. It emphasises the importance of ensuring that all citizens are placed on an even participatory playing field and thus prevents disadvantageous positions from becoming entrenched.

Another possible way to break down heterogeneity would be to pass measures individually as opposed to as packages. Permitting more differentiated voting works towards eroding excessive group identity, by eliminating the need for centrally coordinated platforms and doctrines. A further avenue is provided by the preferenda model. The referendum avoids exacerbating ongoing opinion splits over single issues, by allowing multiple options as opposed to “yes” or “no” answers. In other words, it could avoid *stasis*, although for this it sacrifices some clarity as to majority opinion.

While these latter methods should increase the fluidity of democratic majorities, it remains highly questionable whether they would suffice on a global level of extreme heterogeneity. Therefore, the author recommends instead that they be implemented nationally which would have a knock-on effect at the WTO and UN General Assembly, by increasing the accuracy of national “representation” (in this context, of course, representation would become a much more formal execution of certain tasks, much as it was in Athens) and the participatory value of national decision-making.

8.2.1.3 UN Security Council

The Security Council’s representational shortcomings stem from the well-documented position of the P-5, a particularly thorny difficulty, given the *realpolitische* exigencies of attempting to regulate for military superpowers. Any democratic solution to this issue must concentrate on decreasing the level of military (and thus political) inequality between the P-5 and other States. Again in doing so, we have rejected some solutions on democratic grounds stemming from the findings of the first three chapters of the thesis, while accepting others.

Increasing Security Council membership is by far the most popular reform suggestion, but also the one with the least democratic value. Increasing Security Council membership, particularly through permanent seats with or without a veto, merely represents a case of expanding oligarchy, opening up the privileged circle to some States that have proven particularly successful, much as the Roman system was opened up to the most powerful plebeians. This is particularly true of the High Level Panel on Threats, Challenges and Change’s suggestions to allocate Security Council seats based on financial contributions to the goals of the UN.

On the other hand, demilitarization via the Military Staff Committee as proposed in Art. 26 UN-Charter could be the undoing of the P-5, and possibly the Security Council as a

whole, through the means of reducing their superior military power, the sole justification of their privileged position. However, such a solution must take into account the extremely weak position that the Military Staff Committee has thus far enjoyed, as well as the fact that it is widely agreed that Art. 26 obliges only to enact arms control and not to disarm. This is, thus, a very long-term solution, which would also require a radical reinterpretation of Art. 26.

Exploiting the decisions of the ten non-permanent members of the Security Council as suggested by Reisman, by using them to act as a focal point for General Assembly policy could potentially lead the ten non-permanent members to become more “representatives” of the Assembly than temporary members of the Council. Although it would only prevent the P-5 from passing measures that are broadly opposed and would not affect their own exercise of the veto, it would still lead to a factual situation of slightly more equality.

Judicial activism, in the form of the ICJ reviewing the legality of Security Council resolutions, could gradually decrease the power of the P-5 by curtailing one of their options for implementing their own preferred policy. While legal precedent is rather ambivalent on this point, some recent decisions indicate a potential willingness of judges to pursue this path in future. This solution is ultimately analogous to the methods used by Solon to create the preconditions for Athenian democracy essentially by fiat. This solution, however, runs into the obstacle that judgements of the ICJ are enforced by the Security Council on non-complying parties, as well as the issue that when the P-5 cannot obtain a resolution they simply act unilaterally (viz. Kosovo and Iraq).

In conclusion, any democratic reform of the Security Council is a very long-term project indeed, predicated as it is on a reduction in factual economic and military power. The potential solutions raised in this thesis represent only the first tentative steps towards a viable solution to this issue. The most important findings in this regard relate to the “red herring” reforms outlined above, which do not entail any real democratic gains.

8.2.1.4. The IFIs

The research in this thesis showed that representation at the international financial institutions is skewed through many layers: the pre-existing skewing of national elections, which means that even citizens of “first-class” States are inaccurately represented, added to the narrow spectrum of possible IFI representatives (who must come from a national financial institution), further added to the weighted voting bias in favour of “first-class” States which is so extreme as to amount to a virtual annihilation of any representation on behalf of any other entity. On top of this comes the added problem that even the “representatives” produced by the above methods do not make a large proportion of substantial decisions, but merely act as a rubber stamp to staff members who are subject to very little accountability, a situation further

compounded by the practice of conditionality which has a crippling effect on any democratic practices which may exist on the national level.

As with the UN Security Council, the correction of representation at the IFIs is a particularly difficult problem, and has been the one least addressed in pre-existing literature. The most popular suggestion – the creation of non-voting seats for developing nations on the Executive Board amounts to little more than the deliberative model warmed over and is unlikely to lead to a great deal of democratic change by itself. Transferring actual decision-making from staff members back to the Executive Board, while a vast improvement on the situation currently obtaining, amounts only to the institutionalisation of a thin “representative” form of democracy, the representational value of which remains heavily skewed.

One essential reform in the interests of democracy is to limit the number of conditions attached to loans in an effort to prevent further erosion of even thin, non-participative forms of national democracy. Abolishing the subscription method of finance, while a radical solution, may be the only way to substantially increase the democratic value of representation at the IFIs. As this thesis has revealed, subscription finance is largely obsolete and abolishing the system would at least destroy the current justification for unequal voting rights.

8.2.2 Financial Reform

Severe economic inequality must also be addressed – as long as it persists, it will continue to determine the outcome of all political decisions, thus transforming any aspiring democracy into a plutocracy.

We have seen that the level of wealth over which a candidate, party or involved third party disposes has a decisive, systematic impact on the outcome of elections and that current legislation regulating election financing has rarely been severe enough to prevent these manipulations. We have seen that courts, particularly American courts, but also the European courts, have often protected the right to electoral spending in the interests of freedom of speech and/or expression, but that these very decisions have had a devastating impact on the ability of the vast majority of citizens without substantial resources to participate in the electoral process, and have allowed an increased determining role for non-natural persons, *ie* corporations, in the decision-making process. Because money plays such a determining role in national elections, it greatly reduces the increased equality gained by measures such as the secrecy of the vote and laws against coercion. It excludes most citizens from meaningful participation and equal chances of success, while further skewing the actual state of public opinion on any given measure. These issues are magnified and repeated on an international level.

8.2.2.1 WTO

At the WTO, the world's poorest nations have been unable to effectively use the dispute settlement procedure, while wealthier nations leverage their fiscal advantages to send large delegations to carry out basic negotiating in relays, thus, breaking down opposition from smaller delegations through physical exhaustion. NGO participation at WTO meetings and conferences is heavily tilted towards powerful oligarchically-organized business-NGOs with no democratic legitimation, who are dedicated to increasing their members' wealth. Wealth is thus used to purchase political advantage in the decision-making process.

Once again the solutions presented to these problems were analysed using the democratic criteria gleaned from the first part of this thesis.

Subsidising Third World States to pursue a Dispute Settlement Procedure owes something to the idea of pay for participation so prevalent in Athens. While it does not go so far, it at least ensures that lack of finances is not a bar to participation. However, in this instance, it may only result in the richest States having to marginally increase their own spending rate so as to keep the gap between themselves and their adversaries sufficiently wide. The privileged position enjoyed by business-NGOs would be best counteracted by simply blocking NGOs from attending WTO meetings and conferences, as their presence serves no democratic purpose. Legally, this would require either that Art. 5 (2) be stricken from the Marrakesh Agreement or the word "appropriate" as in "appropriate arrangements for consultation and cooperation [with NGOs]" be more precisely interpreted. The Like-Minded Group's proposal to introduce procedural regulations aimed at increasing transparency and curtailing extensive financial influence during WTO negotiations should also be adopted.

8.2.2.2. United Nations

The research presented here clearly demonstrates that wealth plays a role at the United Nations, in that smaller, poorer nations do not have the resources to permit them to participate in all of the many sub-committees where the majority of the UN's decisions are made. In addition, Security Council seats are often hotly contested, particularly among Western nations, who spend large amounts of money essentially bribing other nations to their cause. Once ensconced in a non-permanent seat, the State in question recuperates its outlay by using the platform to pursue its own agenda.

This situation could be partially resolved by introducing a fixed rotating schedule for non-permanent seats (a system already in use amongst some developing nation blocs). This would prevent certain States, in particular regional powers from "buying" themselves access to decision-making via an expensive campaign.

8.2.2.3. IFIs

Nowhere does finance play a more controlling legal and political role than at the international financial institutions, in particular by further subverting national “democracy” through conditionality. It is such a potent mechanism for controlling national decision-making that national democratic reform would prove nearly useless for many States without simultaneous reform of conditionality. The IFIs have also, like the UN, become a lever which distributes more wealth from poor to rich than vice versa, as well as from public to private funds via loan guarantees, brokering take-or-pay-clause deals between poorer nations and multinational enterprises and using State loans to bail out private investors.

In the interests of democracy, which demands a relative, though not absolute, level of economic equality, the misuse of the IFIs to increase economic inequality must be halted. This will require legalizing conditionality by making Letters of Intent binding instruments with defined consequences of non-repayment, requiring national ratification, thus preventing conditionality being used as a “payment” which enables the lenders to bypass parliament to create a national debt which commits the nation to far-reaching reforms, tying the hands of parliament in future.

Preventing financial transfer from poor to rich and public to private is more difficult to counteract. Traditional methods such as anti-corruption legislation generally succeeds only in banning those practices of exploitation and personal enrichment at others’ expense which are already passé. Seeking to prevent corruption in a system that allows for vast income inequalities and which provides the mechanisms whereby those inequalities can be easily expanded as well as traded for political influence is like trying to prevent malaria by swatting mosquitoes to death one at a time. A more thoroughgoing reform is necessary. A promising solution in this regard is the reformation of the IFIs to punish credit imbalances as well as debit imbalances along the lines suggested by Lord Keynes in his proposed International Clearing Union. This would directly mitigate gross economic inequality by reducing the lucrateness of lending large amounts to debt-ridden nations which then flow back to wealthy nations through private enterprise.

8.2.2.4 Vote-buying, Vote-trading, Vote-fixing

The research presented in this thesis showed that vote-buying, vote-trading and vote-fixing are endemic to all international institutions, a situation which can only be rectified by avoiding exacerbated economic inequalities. We then attempted to address how such a solution might come about.

Foreign aid is often used as a tool to buy votes, because it facilitates a situation of economic dependency. It would therefore be possible to imagine a solution in which foreign aid is scrapped in favour of low-interest loans via reformed IFIs.

Social and economic rights could also be used to generate a more equitable wealth distribution not as democracy, but as a precondition to it. A serious challenge here is that socioeconomic rights tend to address only the most severe clefs in income, leaving room for income disparities more than wide enough to have serious anti-democratic effects. For the very reason that wealth plays such a large role in elections, it is unlikely that sweeping socioeconomic rights would ever be implemented in this manner, regardless of the proportion of citizens in favour. As this thesis demonstrated, a wider-ranging judicially activist interpretation of such rights is not necessarily legally problematic or anti-democratic, but courts, Western courts in particular, have so far shown little inclination to engage in such activism.

Drastically reducing the ability of private citizens to inherit large resources could also reduce economic dependency. Legal precedent for such measures is largely confined to the rather unencouraging example of the Soviet Union in the decades immediately following the Revolution. However, such a reform might ultimately prove a second option for wealth redistribution if social and economic rights cannot be implemented or fail to yield results.

Implementing the famous Tobin Tax would heavily curtail currency speculation which would lead to a sharp decrease in short-term fiscal crises, thus limiting the number of bail-out loans that the IFIs feel obliged to give and therefore dramatically decreasing this method of wealth transfer from public to private hands.

Another method of decreasing exorbitant wealth accumulation would be to peg salaries within corporations. This solution would increase economic equality while preserving the differentiated pay so important to the capitalist system and allowing those in top positions to limitlessly improve their own position so long as they take everyone else with them.

While there is no question that implementing these solutions would encounter an enormous level of resistance, if implemented, they could potentially reduce economic inequality to levels which eradicate economic dependency, thus throttling the need for vote-buying, while at the same time preserving an essentially capitalist economic system. While sometimes unorthodox, such solutions are absolutely necessary to democratic reform, due to the near-complete inefficacy of traditional methods such as anti-corruption legislation.

8.2.3 Participation

Democracy demands a high level of participation from all citizens in decision-making processes. However, in modern “democracy” and international institutions active participation is often inaccessible and instead replaced with passive, non-decision-making forms of participation, mostly in the form of having “input” or making a complaint. Even then, as this research has shown, it is extremely difficult to reach the merits stage of a complaint to any international body, and the participative value of mechanisms such as *amicus curiae* briefs tends to be overrated.

NGOs are often upheld as an alternative avenue for individual citizens to participate in international decision-making, and would therefore seem to be the obvious solution to this participative dilemma. However, the participation afforded NGOs under international law is often thin and of a non-decision-making nature. This is not entirely unwarranted as the level of support that any of them enjoys, as well as the veracity of their cause and membership, are all extremely difficult to ascertain. Moreover, multi-layered strategising can skew the preferences of their members on the long journey from grass-roots level to international level. NGOs are, thus, essentially power structures that attempt to counter-balance other (State) power structures, without, however, radically altering the quality of the average citizen’s participation. Far from being encouraged, NGO access to decision-making should be cut. There is absolutely no democratically legitimated reason for which self-appointed groups, whose popular support is impossible to determine and whose accountability is virtually non-existent, should be given privileged access to decision-making. Their only value is in pursuing certain goals, such as socioeconomic rights, which may eventually set the preconditions of a democracy. However, they are just as likely to pursue diametrically opposed goals. Other avenues of reform must therefore be sought.

One element of active participation is easily rectified, and that is the reduction of complaints that are rejected on admissibility criteria, an option which would clearly necessitate an increase in the number of persons hearing such complaints. This could be achieved via so-called *Schoeffengerichte*, that is, courts composed of a judge and two laypeople, who sometimes, but not always, have some expertise in the area concerned.

As these closing remarks clearly indicate, facilitating mass participation remains an acute difficulty on the road to democracy. By breaking with the conventional, but unfortunately hopeless, received wisdom on how to facilitate “participation”, this thesis has suggested a few tentative steps on the path to true democratic reform.

8.4 Closing Comments

By measuring institutions and proposed reform measures in light of democratic criteria, we have discovered that the truly undemocratic aspects of current methods of decision-making are often different than those that conventional wisdom would suggest, and that therefore the best path to democratic reform is also different.

While some of the reform methods outlined above could be instituted in isolation, many of them exist in a relationship of interdependency. For example, while NGOs are not particularly democratic in nature, many of them have been invaluable in protecting rights in an undemocratic world. Excluding NGOs from international institutions without instituting other reforms, such as some national direct decision-making, more egalitarian wealth distribution, and more inclusive international participation mechanisms would be foolhardy, as would striking foreign aid without providing for a low-interest loan mechanism controlled by the majority of States instead of the wealthiest few in tandem with corporate banking structures.

Should the gap between rich and poor continue to widen, and should political power continue increasingly to fall into the hands of dynasties, the impetus for democratic reform will become more urgent. The implementation of such reform is, however, an undertaking that necessitates careful planning and extreme caution. This research has attempted to quantify many factors, predominately legal ones, in the implementation of democracy, but others, such as the effects of information technology, have been beyond its scope. Further research into these areas and many others will be necessary to achieve a full understanding of the implications of democracy for our international institutions and a “globalised” world society.

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