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The rhetoric of justice: strategies of reconciliation and revenge in the restoration of Athenian democracy in 403 BC

JON ELSTER has drawn our attention to the way in which the restoration of the Athenian democracy after the oligarchic coup in 404 BC should be regarded as the first case of transitional justice. He has also pointed to a number of typical features of modern cases of transitional justice which are already present in Athens: 'Besides being of interest in its own right, the episode shows that many of the issues and solutions we confront today have been with democracy from its beginning.' The connection of the reconciliation to democracy in general and to Athenian democracy in particular is one which has not been extensively explored by ancient historians (1). Even more neglected is the study of the strategies by which the rhetoric of justice and reconciliation was employed after the restoration of democracy.

The Athenians regarded the reconciliation of the democrats and their enemies as a very unusual event in a world where civil strife usually led to the extra-legal annihilation of the losing faction. They used the forbearance of the victorious democrats to confirm for themselves and other Greek states the uniqueness and glory of democratic Athens. Given the prevalence of festering conflict or outright civil strife (*stasis*) between oligarchic and democratic factions in Greek cities of this period, both the reconciliation and the long period of political stability (at least by Greek standards) which it helped to establish are indeed

(1) Full length treatments of the reconciliation are to be found in P. CLOCHE, *La Restauration Démocratique à Athènes* (Paris, 1915); N. LORAUX, *La Cité Divisée: l'oubli dans la mémoire d'Athènes* (Paris, 1997) and A. WOLPERT, *Rebuilding the Walls of Athens* (diss. Univ. of Chicago, 1995). See also M. OSTWALD, *From Popular Sovereignty to the Sovereignty of Law* (Berkeley, 1986), 460-500. For the reconciliation agreement itself, see T.C. LOENING, *The Reconciliation Agreement of 403/402 B.C. in Athens* (Stuttgart, 1987).

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unusual. More interesting, however, were the uses to which the oligarchic revolution, its defeat, and the ensuing reconciliation were put in internal Athenian politics. Indeed, for decades afterwards these events were strategically used and rhetorically manipulated in political rivalries that were played out in the Athenian Assembly and the law courts. This inquiry into the distinctive features of this first case of transitional justice and, more specifically, into the strategic dimensions of its representations in Athenian democratic culture can provide a comparative historical perspective on the processes of transitional justice at work in our own time. I will begin by providing an account of the oligarchic coup and its aftermath and the way in which these events should properly be seen in the larger context of the political culture of the period and of the previous oligarchic coup that enjoyed brief success in Athens in 411. In the final section of the paper I will turn to an analysis of the rhetoric of justice, revenge, and reconciliation in the strategic context of Athenian democratic politics.

I

After almost three decades of conflict involving most of the Greek world, the Peloponnesian War ended in 404 BC with the total defeat of the Athenian Empire at the hands of Sparta and its allies. During a protracted siege in which the Spartans finally starved the Athenians into submission, a group of Athenian leaders made duplicitous use of the dire straits of their city to lay the groundwork for the overthrow of the democracy. Accepting the advice of these men, the Athenians acceded to the Spartan demand to tear down the walls and harbor fortifications that had been a bulwark of Athenian power and central to Athens' imperial pride. It was typical of the Peloponnesian War that when the Spartans or Athenians conquered a city they imposed upon it, respectively, an oligarchic or democratic constitution. So it is no surprise that with some intimidation from Lysander, the Spartan commander, the Athenians voted to appoint thirty men to fashion the ancestral laws into a new constitution (2). These men, however, usurped power and instituted a reign of terror that earned them eternal ignominy and the title of The Thirty Tyrants.

(2) See D. WHITEHEAD, Sparta and the Thirty Tyrants, *Ancient Society* 13/14 (1982-83), 106-130.

Like many despotic regimes, the Thirty, as they were called, at first began with a limited purge of political opponents, manipulating the legal process to have them condemned to death. Xenophon reports that in the crisis conditions at the end of this devastating war many citizens were not displeased at this (2.3.12-13), thinking that Athens might thus rid itself of some harmful elements. As is frequently the case in the initial stages of dictatorship, such acquiescence by the citizenry emboldened the Thirty. They moved to secure their power to 'do as they pleased' (3) by persuading the Spartans to send a permanent garrison to the city. For the first time in their history, the Athenians had to live with a foreign occupying force, no less of hated Spartans ensconced in the very Acropolis that had embodied the identity of democratic Athens.

Under pressure, the Thirty eventually brought 3,000 citizens ('The Three Thousand') into the oligarchy, but they retained the reins of power until events began to slip from their control. In the terror they instituted to eliminate enemies and potential opponents, they put 1,500 citizens (perhaps 7% of the male citizens) and many metics (permanent residents—including many important members of Athens' commercial class) to death without trial. Further, they prohibited those who were not members of the Three Thousand from entering the city, thus exiling the bulk of the citizen body. They also engaged in massive confiscations for their personal benefit, and ruthlessly purged dissenters from their own ranks (4).

A small group of Athenian exiles under the leadership of Thrasybulus returned to Attica to occupy a fortified position, Phyle, about 12 miles from the city. The growth of a democratic resistance exacerbated divisions among the oligarchs, many of whom now, as is typical when authoritarian regimes begin to wobble, began to reconsider their position in light of whether they expected vengeance or clemency to be their lot if the democracy was restored. When the exiles, now grown to a force of about 1,000 (including many non-citizens), took the Athenian harbor, the Piraeus, these divisions became acute and the Three Thousand forced out the Thirty Tyrants who occupied the nearby town of Eleusis. The Three Thousand appointed ten leaders who tried to calm internal dissension and fear and decided to enlist Spartan assistance, since the numbers of the democrats swelled with their success. Under Lysander, a Spartan siege of the Piraeus was beginning to shift the tide when the

(3) Note the way Xenophon repeatedly uses the phrase 'do as they pleased' to describe the oligarchs. This phrase had been a label which oligarchic critics used to denigrate the popular sovereignty of the radical democracy.

(4) For a detailed account of the Thirty, see Ostwald (1986), 462-490.

intervention of the second Spartan king, Pausanias, led to successful negotiations to end the conflict (5) .

It is surely not coincidental to the willingness of both sides to accept a negotiated settlement that the military outcome had become uncertain. The position of the democrats in the Piraeus had been eroded and they were no longer so confident of ultimate victory. The 'men of the city' as the oligarchic supporters were later called, were fearful and disunified, and many of them were in all likelihood eager to find a way to end the conflict that ensured their personal safety. The Spartans, in any event, threw their weight behind the settlement not because they intrinsically favored the democrats, but rather because peace served Sparta's interest.

The settlement reinstated the Athenian democracy, but in important ways was a compromise that reflected the mixed state of affairs described above. Although the reconciliation agreement is often simply referred to as 'the Amnesty', it is not quite as straightforward as that term implies. It is often also taken to reflect an agreement to 'forget' what had happened during the oligarchic interlude, but this is also inaccurate (6).

What the agreement provided was that the principal oligarchic leaders (the Thirty and the Ten), together with the governors of the Piraeus and the chief security/police officials of Athens (the Eleven), could be called to account unless they went into exile in the nearby town of Eleusis or submitted to a scrutiny of their behavior while in office. This type of scrutiny for malfeasance was normally required of all officials at the end of their term of office. In the case of the Thirty or the Ten this would inevitably have amounted to political trials, which could have resulted in capital penalties. Permanently exiling this significant number of men of the city's leading families was a serious, but measured, punitive response. It not only would have made it easier to reach a negotiated settlement, but also may have helped provide for future stability in that executing them would have produced a duty for revenge on the part of their kin. It also emphasized the democratic commitment to the rule of law because it gave the oligarchic leaders the option of facing the normal procedure applied to all Athenian officials.

All other citizens who had remained in the city under the oligarchy were free to move with the oligarchic leaders to Eleusis without penalty, except that if they did so they would be barred from holding office in

(5) On the Spartan role see Ostwald (1986), 488-500.

(6) See, for example, the interpretation of Loraux (1997) who takes the notion of 'forgetting' quite literally in claiming that this '*oubli fondateur*' (39) provides the basis for a reconstituting of the Athenian democracy. As will appear below, one must understand the question of 'memory' as inextricably linked to that of revenge and to the rhetorical uses to which 'remembering' and 'forgetting' can be put in various political and legal contexts.

Athens. This form of loss of civic rights (*atimia*) was regarded as a very serious disability in this participatory democracy, especially for the propertied classes. Except for the above mentioned leadership echelon all other citizens were to enjoy a limited amnesty, and they swore oaths to honor this agreement. At Athens there was no mechanism for the 'State' to initiate prosecutions. Criminal prosecutions were no different than private suits in that they were both brought by private citizens. What the 'amnesty' thus actually involved was a solemn promise given by all citizens not to engage in litigation to avenge the wrongs they had suffered (7). The relevant phrase which grounds the amnesty is typically translated as 'to forget' or 'not to remember' what the oligarchs had done. In this context, however, the crucial phrase 'not to *mnesikakein*' actually means not to hold a grudge in the sense in which this is understood in a revenge society: that is, not to seek vengeance (more on this below) (8).

Of central concern, therefore, was instituting a mechanism limiting legitimate desires for revenge, as reflected in the other major limitation of the amnesty. This clause provided that prosecutions might be brought in cases of murder or injury if the deed was accomplished *with the defendant's own hands* (*autocheir*). Of course enabling prosecutions for murder or injury would have defeated the entire idea of amnesty, so the latter limitation was crucial because most of the killings would have been carried out through instruments of the state, and particularly the Eleven, who were the officials responsible for administering executions (and who were exempted from the amnesty). The inclusion of the provision about homicide prosecutions testifies to the strength of the duty to avenge the death of family members in this society. Homicide prosecutions could only be brought by kin, and the failure to do so was itself considered an act of impiety as well as a cause of dishonor (9). Given the participatory and non-professional institutions of the Athenian legal system, negotiators would have realized that this provision would serve as a wedge for prosecutions (it did, see below). It would, however, have been impossible in this society to deny completely the right of kin to seek vengeance through the law. Note that I say 'seeking vengeance' rather than 'seeking justice', for we will see that this is the way the Athenians thought of it. Justice, in the traditional Greek view, consisted in helping

(7) It must be remembered that criminal prosecutions could be brought on purely private initiative and served as a principal means for seeking vengeance in Athens in this period. See D. Cohen, *Law, Violence, and Community in Classical Athens* (1995), chapters 4-6.

(8) According to Andocides the Athenians swore: 'I will not hold a grudge (*mnesikakein*) against any citizen, except the 30, the 10, and the 11, and even of them against none who will submit to euthuna.' The euthuna, as Lysias 10 reveals would provide the opportunity to seek revenge by coming forward in accusation. For Loraux's (1997) interpretation of *mnesikakein* see 150*ff*.

(9) See, e.g. Plato, *Euthyphro* 4a-6b.

your friends and harming your enemies. At the political level, according to a rhetorical topos, the city benefited when private enmity brought wrongdoers before the popular courts (10).

The Athenians were justly proud of the success of their reconciliation. It stood out in sharp contrast to the vindictiveness which usually followed the triumph of democratic or oligarchic factions in the many Greek cities which experienced civil strife (11).

As Isocrates put it, 'It is worthy of remembrance that although our forefathers performed many glorious deeds in war not the least of our city's esteem has come from these agreements of reconciliation. Many cities may be found to have waged war gloriously, but in regard to civil war there is none which could be shown to have taken better counsel than ours' (18.31-2) (12).

Despite its status as a foundational event for Athenian political identity, the reconciliation did not bring about either complete harmony or cultural amnesia as some scholars have maintained. The oligarchs exiled at Eleusis were later (401 BC) found to be plotting again, but this time the Athenians could impose their own solution without Spartan interference and with the conviction that the oligarchs had failed to respect the amnesty agreement. They attacked with their whole army and, at a conference with the enemy generals, put them death. Despite the apparent illegality of this expedient they then acted in a way which indicates that the original amnesty was not merely a Spartan imposition. As Xenophon recounts: 'By sending to the others their friends and kinsmen they persuaded them to be reconciled. And having sworn oaths not to hold a grudge (*mnesikakein*), still today they conduct their political affairs together and the demos abides by its oath.' That is, having eliminated the leadership echelon, they were wise enough to use this opportunity to reintegrate their followers into the Athenian polity through a formal amnesty and a process of reconciliation. These events marked the end of the legacy of violence of the Thirty. The Athenians set up a monument, a stele, to commemorate the confiscation and sale of the property of the Thirty (SEG 32.161). The property was used to produce processional ornaments. Since the major religious processions,

(10) See Cohen (1995) Chapter 4 on the rhetorical configurations of revenge in Athenian forensic oratory.

(11) Thucydides in Book 3 of his history documents the frequency of such events and analyzes the causes which produce them.

(12) They regarded it as their agreement and not one imposed by Sparta. There is certainly justice in this in that the reconciliation depended on their readiness to end the conflict. The Thirty had been ousted already, and many of the 3,000 were really concerned about their security in a restored democracy. The Spartans might have been able to impose an agreement but not to make it work. Note also how in 411 they refused to intervene because they felt that the divisions in the city were not genuine (Thuc. 8.71).

involving the entire population of Athens, were perhaps the highest representation of civic unity and identity in this society, the symbolic value of using the property of the defeated Thirty to express this unity is strikingly apt.

One attempt by a returned exile to violate the amnesty was treated with summary justice (Ath. Pol. 40.2), which seems to have served as a deterrent to others. A variety of court cases, however, show how for many years after the reconciliation individual litigants sought indirect avenues of prosecution or attempted to gain a rhetorical advantage by referring to their opponents' real or imagined conduct under the Thirty (see below). Indeed, the Athenians were forced to pass a measure which introduced a special procedure designed to impede and deter such prosecutions (Isocrates 18.2-3). Finally, no reconciliation, however successful, can completely wash away all resentment and suspicion. For example, the men who had served in the cavalry (i.e. men wealthy enough to own or breed horses) under the Thirty had not only supported the oligarchy but were also seen as a social elite associated with anti-democratic values. Continued enmity towards these men is demonstrated not only in some lawsuits, but also perhaps in the decision to decrease their pay. Even more eloquent is the testimony of Xenophon (3.1.4) that in 399 BC the former cavalry of the Thirty were especially selected for an expedition to Persia because the Athenians thought it would benefit the democracy if 'they lived in foreign lands and perished there'. This also testifies to their perceived continuing hostility towards the democracy.

In short, the Athenians could take pride in their reconciliation, but we should remember that they would be wont to represent these events as another glorious milestone for a variety of reasons. Not the least of these was that it helped to cover over the humiliation of defeat, enemy occupation, and widespread collaboration with tyranny. For this reason, much subsequent oratory demonizes the Thirty and represents the 'men of the city' not as collaborators but as sharing in the victory of the democrats (13). Modern examples of this phenomenon are familiar enough in countries like postwar France or Italy where after the initial reckoning myths are constructed to gloss over the extent and depth of collaboration.

The Athenians decided to swear that they would live together again as a political community and they did so. This did not mean that as

(13) Orators typically address their audiences as if all had participated in the overthrow of the oligarchy. As in Nazi Germany the demonization of the highest leadership accompanies a shifting of guilt away from the mass of their supporters.

individuals they all were transformed in such a way that desire for vengeance, social tensions, and political rivalries disappeared. Hence, we should not gloss over contrary evidence in rushing to attribute to them a total amnesia or complete social harmony so as to have further cause to celebrate the glories of Athens. Despite the continuing enmity and political tensions, the reconciliation, restoration of the democracy, reaffirmation of the rule of law, and eighty years of political stability until the Macedonian overthrow of democratic institutions, are remarkable enough as achievements.

II

The Peloponnesian War was the longest and bitterest war in Athenian history. It was responsible for a major decline in population, the destruction of most of the agricultural communities in the surrounding countryside, the loss of Athens' navy and empire, and a significant economic impoverishment of the city. Not surprisingly, the pressures generated by such a long, and ultimately unsuccessful, conflict had an effect upon Athenian politics. It is no coincidence that the only two interruptions of the Athenian democracy after its founding (until the Macedonian dispensation) occurred during this war, both after major military disasters. The first came in 413 BC, eighteen years into the war, after the defeat of the Athenian attempt to widen their empire by invading Sicily. In the single greatest defeat ever suffered by Athens thousands of soldiers perished and the bulk of her navy was destroyed. A short-lived oligarchic revolution followed in 411. The second was described above. In this section I will briefly compare these two oligarchic revolutions and consider them in light of Thucydides' discussion of stasis and its aftermath. Seeing the reconciliation of 403 BC in light of the failure of the coup of 411 BC will be helpful in assessing its distinctive characteristics.

The impact of the pressures of war upon different sorts of societies is, of course, a major theme of Thucydides' History. In Book III.69-85 he uses a vicious civil war in Corcyra as the occasion for a remarkably incisive analysis of the phenomenon of stasis in general. It is beyond the scope of this paper to consider Thucydides' discussion of stasis in full. Of particular relevance are his treatments of revenge and of the difficulty of ending the cycle of civic violence once it has begun. On Thu-

cydides' account the violence begins with the subversion of legal institutions and the rule of law. First, the oligarchic party in Corcyra brings to trial the democratic leader on trumped up political charges. Having been acquitted, he retaliates by using legal process to ruin his opponents financially. He ignores their formal religious appeal for mercy as suppliants and they break into a meeting of the Council and murder the democrats. This begins a cycle of violence where, 'as usually happens in such situations, people went to every extreme and beyond it. There were fathers who killed their sons; men were dragged from the temples or butchered on the very altars; some were actually walled up in the Temple of Dionysus and died there' (3.81).

Stepping back from the events at Corcyra, Thucydides describes how, under the pressures generated by war, such civic strife spread throughout the Greek world and followed similar patterns. Because 'revenge was more important than self preservation', to gain an advantage over their enemies men destroyed the civic and religious institutions designed to mediate conflict and make mutual trust possible. They violated oaths and covenants, ignored the demands of piety, subverted legal institutions and generally destroyed every basis for civic co-operation. As a result, 'Society became divided into two ideologically hostile camps, and each side viewed the other with suspicion. As for ending this state of affairs, no guarantee could be given that would be trusted, no oath sworn that people would fear to break; everyone had come to the conclusion that it was hopeless to expect a permanent settlement...' (3.83)

This description makes the success of the Athenian reconciliation appear even more remarkable. Thucydides' pessimism, moreover, is entirely consistent with Greek political theory, which, as exemplified by Plato and Aristotle, sees oligarchy and democracy as constitutional arrangements that simply institutionalize the temporary victory of one political party over the other in the incessant struggle for power which characterizes the politics of almost all states. It is also true, however, that Plato and Aristotle both view oligarchy as even more unstable than democracy because of the inevitable rivalry for pre-eminence among the oligarchs themselves (14). Since Thucydides describes the inexorable cycle of revenge as making a permanent settlement of civil strife almost impossible, it may be worthwhile to look at his account of the failure of the oligarchic coup of 411.

One factor was the mistakes of the oligarchic Council of 400 who promised to share power with the hoplite class (the '5,000') but in fact

(14) See Cohen (1995) Chapter 3.

kept it in their own hands (15). This, according to Thucydides, 'was for the motives of personal ambition' because 'most of them were following the line that is most disastrous to oligarchies when they take over from democracies. For no sooner is the change made than every single man, not content with being the equal of others, regards himself as greatly superior to all else' (8.89) (16). Dissension grew as erstwhile supporters were swayed by the staunch democratic resistance of the navy or began to doubt the chances of success of the oligarchs: 'Most of those involved in the oligarchy were... discontented with it and would have been glad enough to get out of the business if they could do so safely' (8.89). This dissension, and the inability of the 400 to rely on the loyalty of the 5,000, made some of the oligarchs fearful lest they be 'the first people to be destroyed by a reconstituted democracy' (8.91). As a result they, like the Thirty in 403, decided to betray the city to the Spartans so as to save themselves. This helped to unify opposition against them.

When the opposition marched against the city, they were met with men sent by the 400, who asked them not to engage in violence which 'might destroy the state' (8.93). They agreed because they shared the conviction that the security of the city was paramount and agreed to settle their differences at an Assembly the next day. On that occasion, however, they received news of a Spartan attack and joined together in rushing down to the Piraeus, 'feeling that more serious than the war among themselves was this war with the common enemy'. This unity against the Spartan threat soon proved the undoing of the 400 who were deposed and the democracy was soon restored. As after the fall of the Thirty there was no wave of revenge, perhaps because of the felt need to join together against the Spartans. Another factor which also must have contributed to the ease of the overthrow of the oligarchs in 411 is mentioned by Thucydides as an inherent difficulty which anyone attempting to subvert the Athenian democracy would encounter: '... for it was no easy matter about 100 years after the expulsion of the tyrants to deprive the Athenian people of their liberty—a people not only unused to subjection itself, but, for more than half of this time, accustomed to exercise power over others' (8.68) (17).

The revolution of 411 failed, then, not only because of the mistakes of the oligarchs but also because of the strength and resiliency of Athenian democratic culture. The 400 did not rule long enough to

(15) On the events of 411 see Ostwald (1986), 337-395.

(16) See also Xenophon's description of how the Thirty begin to purge men 'who were least likely to submit to being ignored' (2.3.14).

(17) See also 8.71 where the Spartans do not think that it will be so easy for the oligarchs to deprive the Athenians of their liberty.

undermine it, and their supporters appear more disgruntled with the course of the war than genuinely committed to a radically new political order. Hence the apparent instability of their attachment to the new regime. Oligarchic leaders were more concerned with their personal advantage, and their followers were maneuvering to abandon them as soon as it appeared the safer course to do so. On the other hand, the ability to appeal to a common cause and the restraint of the democrats in demanding revenge eased the transition. Of crucial importance is doubtless the democrats commitment immediately to re-establish the rule of law after the failure of the oligarchs. Again and again, in Thucydides' account, the enemies of the 400 agree to refrain from all out violence against their opponents, and in the end it is not their desire for revenge (8.82), but their feeling of unity in the face of external and internal enemies that prevails. The partnership of the demos and the leisure classes that the Athenian Empire had made strong seems to have become a habit of political co-operation which could endure even the major stresses engendered by the long war.

The dynamic of the blood feud that characterized civil strife in Corcyra and elsewhere thus never fully established itself at Athens and the Athenian democrats, unlike their Corcyran counterparts, did not pervert the administration of justice to obtain revenge. While opponents of oligarchy might have hated the 400 or the Thirty they do not seem to have hated the mass of their supporters enough to push stasis to the kind of extreme seen in Corcyra and elsewhere where the desire for 'justice' lead to massacre and resistance to the last. Hence the Athenian democrats' agreement to stay their hand and adjourn to an assembly in 411, or the moving appeal *after* the democrats' military victory at Munichia in 403. When the victors were giving back the bodies of the dead, 'men from both sides mingled together and talked with one another. And Cleocritus... said "Fellow citizens, why do you drive us out of the city? Why do you wish to kill us? For we never did you any harm, but we have shared with you in the most solemn rites and sacrifices and the most splendid festivals, we have been companions in the dance and schoolmates and comrades in arms, and we have braved many dangers with you... in defense of the common safety and freedom of us both... In the name of our ties of kinship and marriage and comradeship... cease... to sin against your fatherland and do not obey these most accursed Thirty, who for the sake of their private gain have killed more Athenians in eight months, almost, than the Peloponnesians in ten years of war. And when we might live in peace as fellow citizens these men bring upon us war with one another...'" (2.4.23)

This is a remarkable speech at the moment of victory, especially when their commander had spurred the soldiers on to battle by recalling all the wrongs against them and urging them to take deadly vengeance. Here also appears the theme that was to dominate the discourse of reconciliation: it was the Thirty who were to be blamed not their followers. In both 411 and 403 joining together in hatred of the oligarchic leaders seems to have laid the basis for re-establishing civic unity. It also helped greatly that there was a powerful external enemy with whom the Thirty could be identified. In contemporary Rwanda and Bosnia, on the other hand, the violence reached such extremes and the fabric of common culture was so deliberately and utterly undermined that, as in Corcyra, there remained no basis for rhetorically reconstructing the opposing groups as ultimately united by deeper bonds and common enemies. Despite the efforts of the transitional Rwandan regime to portray itself as a government of unity embracing both Hutu and Tutsi, the rift remains deep and prosecutions for collaboration in the genocide embrace huge numbers of ordinary citizens. In Athens, on the other hand, even in the midst of civil war the oligarchic and democrat factions never seem to have ceased to regard one another as 'Athenians'. They did not dehumanize their opponents collectively as vermin (as the Hutus did the Tutsi 'inyenzi' [cockroaches]) or as subhuman or utterly 'other' (as the Serbs did the 'Turks', i.e. Bosnian muslims). Athenians, like Frenchmen or Italians in 1945, could still appeal to their common education, institutions, religious rites, precious freedoms, and common interests in external security. They could construct a common enemy against whom both resisters and collaborators could define themselves. In Rwanda and Bosnia the basis for developing such a rhetoric of reconciliation had been eroded by the demonization of the opposing groups and the fact that the external enemy (e.g. the Hutu militias in Congo) is identified with the losing faction in the country.

III

In this section I discuss a number of features of the Athenian amnesty and reconciliation which can help focus a comparative analysis of the discourse of transitional justice in Athens. The emphasis here will be on the strategic uses to which the oligarchic interlude and the restoration of democracy were put in the politics of the ensuing period. First we will

consider the way in which the restoration of the rule of law contributed to the political culture of 4th century Athens. An examination of contemporary political discourse reveals how the particular constructions of these events could be used to strengthen the political identity of democratic Athens by contrasting it with the lawlessness inherent in oligarchy. In this way, as suggested above, a transitional regime can forge a unifying identity by defining itself against what becomes a common enemy of all the citizenry. Second, we will look at the way in which forward and backward looking arguments about security and vengeance/justice played a role in coming to terms with the overthrow and restoration of the democracy. Finally, I want to look at the role which the upheaval of 404/403 came to play in Athenian discourse, and particularly at the way in which collaboration or resistance might be rhetorically represented and manipulated for various purposes in different contexts.

1. In the political discourse of 4th century Athens, the Thirty Tyrants came to stand for the antithesis of the rule of law. In the political rhetoric of this period equating democracy with the rule of law and oligarchy with its antithesis became a powerful tool to be used for a variety of purposes in the competition for power and influence in the polis.

As noted above, one of the chief grievances against the Thirty was that they put 1,500 citizens and many metics to death without trial and illegally confiscated property for their own gain. Lysias' speech 'Against Eratosthenes' and Xenophon's account of the 'trial' of Theramenes (2.3.24-51) hammer this point home. The very title 'Thirty Tyrants' also conveys this, for in Greek constitutional theory a tyrant is one who rules outside the law, without a constitution. For this reason, and because of the deep-rooted hatred of tyrants in the Athenian historical tradition, characterizing one's opponents in this way could have a powerful emotional resonance in political or forensic oratory. As rhetorical treatises taught, however, topoi about lawlessness, tyranny, and the virtues of the rule of law could be manipulated to argue either for or against democracy. Thus, critics of Athenian radical democracy like Aristotle could say that this most extreme democracy was like tyranny because the people were sovereign and not the laws (*Politics* 1292a, 24-34). On the other hand, democratic critics of oligarchy made the same point, arguing that oligarchs rule only for their own personal gain, disregarding the law whenever they think it is in their interests to do so. As Aeschines puts it, 'Autocracies and oligarchies are administered

according to the tempers of their masters, but democracies according to the established laws... In a democracy it is the laws that guard the person of the citizen and the constitution of the state' (1.5; see also Demosthenes 24.75-6).

Such charges against oligarchy became easier to sustain after the fall of the Thirty. The Thirty provided a kind of paradigm that could be used to discredit oligarchy by equating it with tyranny and the disaster this oligarchic tyranny brought upon Athens. For decades after their fall, Athenian orators tirelessly recounted their principal misdeeds—tearing down the walls that made Athens an imperial power, betraying the city to its bitterest enemies, the Spartans, and putting thousands to death without trial. Fourth century orators like Isocrates push the argument to its logical conclusion by attributing their crimes to the defective nature of oligarchy itself (20.11). The actions of the 400 and the 3,000, following in many ways a pattern similar to the crimes of the Thirty, only helped substantiate this way of thinking.

One might argue that in postwar Germany Nazi lawlessness and its perversion of the system of justice similarly provided the foundation upon which the rule of law, embodied in the concept of the *Rechtstaat*, could assume a central and unassailable role in the political identity of the Bundesrepublik. The kind of instrumentalist accounts of law that were already circulating in Germany before the Nazis came to power, and which provided a theoretical basis for their attack upon the rule of law, were permanently discredited (18). Even as the German judiciary and judicial ministerial bureaucracy were filled again with many of the same personnel who had served the Nazi regime, all political parties could agree that the *Rechtstaat* was the core of the 'new' Germany. As in a number of modern transitional situations like the BRD or the Czech Republic, the Athenian restored democracy realized that it could unequivocally differentiate itself from the Thirty Tyrants by making clear its commitment to the rule of law.

In Athens, after the restoration, democratic politicians realized the uses to which critiques of oligarchy could be put and were quick to occupy the high ground of the rule of law by appropriating its rhetoric for their cause. By invoking the moderation of the agreement, their determination to abide by the mutual oaths of the amnesty, and the completion of a major law reform, the democrats identified themselves with the rule of law and their vanquished foes in particular, and oligar-

(18) E.g. the principle 'Recht ist was dem Volke nutzt'. On the role of such theories in the German jurisprudence of the 1920s see D. COHEN, The Development of the Modern Doctrine of Necessity: A Comparative Critique, *Rechtshistorisches Journal* 4 (1985), 215-234.

chy in general, with its opposite. The legal reforms, by the way, made it more difficult for the constitution and laws to be changed, thus creating a check both on oligarchic plotting and against democratic rashness (19). They also institutionalized principles of legality closely associated with the rule of law, for example that no one could be prosecuted except on the basis of a written law, that no law could be aimed against individuals, and so on (Andocides 1.87). In the wake of the overthrow of the Thirty, orators could argue that the future security of Athens lay in respecting the oaths, the laws, and the amnesty agreement, for this would bind the community together in opposition to its oligarchic opponents who sought to undermine its institutions to create stasis (Lysias 26.23-32; Andocides 1.103-5).

Paradoxically, one might well be justified in attributing part of the political stability of 4th century Athens to the Thirty and their aftermath (20). Oligarchy in any extreme form was lastingly discredited and the democrats could represent themselves as the restorers of Athenian unity who had brought the divided political community back together through their moderation and respect for their oaths and the laws. One might make the same kind of argument about postwar Germany and France, where, especially in the former, politics of the extreme right were permanently rendered taboo and any respectable politician would shrink from having his position publicly identified with Nazi doctrines. As Athenian orations make abundantly clear, any oligarchically minded critic of the democracy would quickly find himself equated with the depredations of the Thirty. As Isocrates says of his opponent in a lawsuit, 'Even though the defendant is too young to have belonged to the oligarchy, his [hubristic] character is in harmony with their regime' (20.10-11, and see also Lysias 16 and 26). Thus, the topos of oligarchic excesses of the Thirty could be rhetorically deployed long after the restoration, even against those who had no connection whatsoever with their regime. The memory of the Thirty was thus kept alive although, as we shall further see, it was strategically constructed and deployed to serve the interests of particular speakers and of the democracy.

2. Though the Athenian amnesty barred most prosecutions for wrongs committed under the Thirty, there clearly existed a tension between the

(19) On the law reforms see N. ROBERTSON, The Laws of Athens, 410-399 BC, *Journal of Hellenic Studies* 110 (1990), 43, and P. RHODES, The Athenian Code of Laws, 410-399 BC, *Journal of Hellenic Studies* 111 (1991), 87.

(20) On the politics of the postwar period, see B. STRAUSS, *Athens after the Peloponnesian War* (Ithaca, 1986).

desire of particular individuals for revenge and the societal recognition that future security depended upon preservation of the oaths and agreements that made up the reconciliation. Such tensions are a feature of most transitional situations and in places like Rwanda and Cambodia have made political stability difficult to achieve. Mechanisms like the South African Truth Commission represent an attempt to steer a middle course between the two poles. In Athens the amnesty, which excluded the leading figures of the oligarchy and those who had murdered with their own hands, also represented a middle course adapted to the peculiar nature of Athenian institutions (peculiar from the perspective of the institutions of modern states). This moderation in mediating the desire of individuals and families for revenge was vital to the success of the reconciliation. The argument that the victims have a right to know the truth plays no role in the Athenian context. The justifications for prosecution focus only on exacting revenge and deterring future would-be oligarchs.

In the Athenian state, with mass courts of lay judges and no professional jurists or state controlled administration of justice, the maintenance of the terms of the amnesty depended upon the ongoing collective willingness of citizens to apply its terms in any litigation dealing with the reign of the Thirty (21). There was no higher legal institution to overturn the verdict of an Athenian trial court against a former oligarchic collaborator. As the orations of Lysias testify, any Athenian coming under public scrutiny (as all 700+ annual officeholders regularly did) might find himself the subject of accusations arising out of his alleged conduct during the oligarchic interval. In arguing such cases the tension between forward and backward looking considerations was mediated by means of two related antitheses: the first was that of vengeance as opposed to future security, the second civic unity or concord (*homonoia*) as opposed to future civic strife (*stasis*).

Andocides, in a famous oration, illustrates the rhetorical uses to which such antitheses could be put. Though he constructs these antitheses for his own rhetorical purposes, they are consistent with the discourse of our other sources and doubtless reflect perspectives widely employed in contemporary debates. In a kind of paean to civic unity (*homonoia* 106, 108, 109; a core political value in Athens) he explains that the democrats upon returning to the city could have taken revenge, but considered the safety of the city more important than private revenge. The continued greatness and prosperity of Athens depends upon the citizens' willing-

(21) See above the comments on the special mechanism introduced to deal with suits that might violate the amnesty.

ness to follow the example of their ancestors and not bear a grudge (*mnesikakein*), but rather control their passions (*sophronein*) and live with one another in unity (109; *cf.* 103-5).

It is typical of such discourse that revenge is strategically characterized as 'private', in opposition to public security or safety. Thus, Isocrates argues that normally a private suit is of no public concern, but a private suit brought in violation of the amnesty is, 'because the common interests of the city are at stake' (18.34). Building upon this point he later argues that in such a trial the amnesty itself is on trial, and only if it is upheld will those 'who remained in the city' be able to dwell there without fear. If the Athenians violate their oaths this fear will ultimately return Athens to stasis. 'Certainly', he concludes, 'you do not need to learn from others how great is the blessing of concord (*homonoia*) or how great a curse is stasis' (18.42-44; see also Lysias 25.21-32) (22).

On the other hand, speakers defending their prosecutions seeking vengeance had to come to terms with such arguments. They did so rhetorically, by turning the argument around to show how the public interest in security and unity was *served* by such suits. Their arguments have two components, one dealing with the issue of security, the other of unity. In Lysias' oration *Against Eratosthenes* (one of the Thirty), the first step is to argue that there are both private and public reasons for anger (12.2). Next, he explains that if that the judges pity or pardon such men and do not express their anger in punishment, the supporters of the oligarchs will not only feel that there is an amnesty for all past crimes but also 'that they can do as they please in the future' (12.53-56) (23).

Folding the retributive argument into a forward looking strategy of prevention and deterrence, he goes on to say that such men 'must think you to be *forgetful* if they think that you can be moved to save the Thirty'. Rather, he continues, 'if they escape they will be able to destroy the city again and those they killed will have had no revenge against their enemies' (12.88).

The second component that must be linked up with the concerns about revenge and security is unity. What good will punishment serve if it stirs up stasis again by producing fear of a purge? In contemporary contexts such arguments may also cut either way. The Cambodian

(22) Lysias' Funeral Oration makes the point succinctly: The democrats not only revived the greatness of Athens but also revived civic harmony to replace stasis... They acted not for vengeance against their enemies but for the salvation of the city (2.63-4).

(23) The phrase 'do as they please' is used by Xenophon and Lysias to express the tyrannical, arbitrary nature of the Thirty's rule. Critics of radical democracy used it to critique a democracy unchecked by law. See Cohen, Law, Sexuality and Society: The Enforcement of Morals in Classical Athens (1991, Chapter 9).

government has argued that if prosecutions before the new international tribunal are extended beyond the two defendants now in custody onto the former Khmer Rouge leadership as a whole, the fragile stability thus far achieved may be undermined and civil strife resumed. In Rwanda, on the other hand, the government has deflected criticism of its detention for trial of 120,000 suspects by saying that punishment of the guilty is the only possible foundation for future stability.

The Athenian answer to arguments about ensuring future stability is to strategically reconfigure the conflict so that the Thirty emerge as the common enemy of the re-united Athenian citizen body. The 'men of the city' will then be recast as victims rather than willing collaborators (24). The 30 and the 10 are identified not with Athens, but with the Spartan enemy to whom they betrayed the city. If not for these men the Athenians would have successfully completed their negotiations to reunite the city after the battle of Munichia (i.e. before the Spartan intervention) (12.53-6). Blame, and this is typical of such orations, is thus shifted away from the supporters and onto the ruling elite. This is, of course, a move familiar from Nazi Germany, postwar France and Italy, the GDR, Rwanda, Cambodia, and elsewhere. In Germany the postwar myth that it was the SS and a relatively small group of evil sadists who were the real criminals served to exonerate the Wehrmacht, the rank-and-file NSDAP members, and German society as a whole. The parallel myth that many Germans had, at least 'innerly' resisted and that there had existed 'another Germany' served to reinforce this sentiment.

In the next section of this speech Lysias joins together the 'men of the city' and the 'men of the Piraeus' as victims (12.92), saying that he wants to recall the events of that period so that *both* groups will remember their grievances against the Thirty and their common desire for revenge. The first thing he says to the men of the city is that they were *commanded* by the Thirty in such a way that they were *compelled* to wage war against their *brothers, sons, and fellow citizens* (12.92; 'compelled' again in 93). He strikingly brings them together against the Thirty: not only were they compelled, but they were fighting against their own (and thus equating their fellow-citizens with their own kin). He then tells them to remember these wrongs and says they should take vengeance not only on their own behalf but also that of the democrats (the men of the Piraeus, 12.94). Having established this common ground he

(24) It should be noted at the outset that speakers typically address the court in the second person as if they all had opposed the Thirty: these men must think *you* to be forgetful (see also Isocrates 18.2). Against Eratosthenes at one point in the speech Lysias brilliantly distinguishes the 'men of the Piraeus' and 'the men of the city' only rhetorically to re-unite them.

can then address the democrats in turn. He tells them: 'Remember!' and then proceeds to enumerate their injuries, urging them to feel the same anger now as when they were exiles (12.92). He concludes by telling the court they must avenge the dead whom they were unable to protect when still alive (12.99-100). In other words, revenge will not only promote the security of the city but will also reinforce its unity in opposition to a common enemy.

Such arguments are often employed in contemporary transitional situations. The excuse of compulsion, so familiar from both Germanys, Rwanda, Cambodia, and elsewhere, assists in recasting the 'ordinary' collaborator into a victim of the common enemy. Italian politicians in the immediate postwar decades were quick to define themselves against a defeated enemy against whom all Italians could unite. Annual national celebrations of the end of WWII still focus on the atrocities of the Germans and the unity of the Italian nation in their struggle leading to the postwar democracy. On these all Italians, like the French, can agree. More contentious matters like the widespread support of Italian facism, the Axis Alliance, and collaboration with the Germans are, of course, not mentioned. In Cambodia, while moving ahead with the formation of a Cambodian/international tribunal, many in the current government have a Khmer Rouge past they prefer to be forgotten. While rejection of the horrors of the Khmer Rouge regime is a unifying factor in Cambodian politics, that genocide was perpetrated through the collaboration, in many cases initially willing collaboration, of thousands of Cambodian rural communities. Here too achieving unity and reconciliation seems only possible by identifying all Cambodians as victims of a murderous ruling elite. The fact that this elite eventually turned upon its own supporters makes this task easier. Such options are not available to the shattered communities of Bosnia and Kosovo.

3. Recasting the collaboration on which the Thirty and the Ten depended to maintain their power is a common rhetorical strategy in the oratory of this period. This is not surprising considering that deliberative bodies would have included men who had belonged to both sides of the conflict. Isocrates also speaks of the supporters of the Thirty as having been compelled by the Thirty into wrongdoing (18.17). On the other hand, Lysias anticipates that Eratosthenes and Agoratus will plead superior orders. Eratosthenes, he says, pleaded that he committed these crimes 'acting from fear under orders'. As in postwar trials of Nazi leaders, Lysias dismisses this defense, saying that the highest leadership echelon cannot complain that someone above them was responsible. The

rest of the Athenians who supported them have an excuse (*prophasis*) to attribute the responsibility (*aitia*) to the Thirty, but there the buck stops (12.25-28).

Men accused of collaboration could also adopt different strategies to place themselves on the winning side. One such speaker in an oration by Lysias devises just this kind of strategy which brings together many of the themes discussed above. In times of crisis, he argues, it is natural for all men to calculate their advantage rather than look to ideological commitments. For this reason, he claims, men who stayed in the city should not be punished. This is because it was their shift in commitment, due to fear of vengeance if the democracy should be restored, which, when they sensed momentum shifting to the democratic exiles, decisively turned the tide of victory (25.18-22). He builds upon this point to turn the case for revenge into a forward-looking argument against those who would accuse him. The right way to take vengeance against the oligarchs is to live up to the oaths and enhance civic unity, because this will most effectively thwart the city's enemies: 'You ought therefore to take the events of the past as your example in resolving on the future course of things, and to account those men [i.e. himself] the best democrats who, desiring your concord (*homonoia*), abide by their oaths and covenants, because they hold this to be the strongest security for the city and the severest vengeance against her enemies. For nothing could be more vexatious to them than to learn that we [their former supporters] are taking a part in the government and to perceive at the same time that the citizens are behaving as though they had never had any fault to find with each other' (23; and see also 28). Thus, those who bring divisive lawsuits seeking revenge are like the Thirty, only using a different means to harm the city (30-32). The truest revenge against the Thirty, it follows, will be to forgo personal desires for vengeance and live in harmony.

Accusations regarding conduct during the reign of the Thirty continued for decades after the reconciliation (see e.g. Lysias 16 and 26). The event continued to be regarded as a milestone in Athenian history like the victory over the Persians. Ironically, it was the recovery from the trauma of internal conflict which helped efface the memory of the defeat they had suffered in their great struggle with Sparta. As will have been noted, Spartan intervention scarcely figures in the oratorical accounts discussed above. That this might have been a sensitive point is perhaps indicated by an oration of Isocrates where he is at pains to tell the judges that the agreements of reconciliation had not been made under compulsion, 'but because you considered them of advantage to the city'

(18.2). Portraying the reconciliation as their own, and identifying the vanquished Thirty and Ten with the Spartan enemy, enabled them to turn defeat into a kind of victory, a victory of a rhetorically reconfigured united polis over its common enemies. At the civic level, this, together with other features of the reconciliation discussed above, provided an ideological basis for the stable democracy of much of the 4th century (25). At the individual level this broad ideological consensus about the reconciliation established the framework within which those seeking revenge, those defending themselves against accusations, and those exploiting these opportunities for litigation for other purposes, rhetorically positioned themselves and crafted arguments to suit their own interests.

Despite the efforts of individuals to exploit lingering resentment for their own interests, the Athenian Amnesty limited the circle of those who could directly be punished, and for the most part the Amnesty was respected. Supporters of the Thirty Tyrants remained immune from prosecution. This represents a decision that must be made in every transitional case. In imposing justice upon defeated Germany the Allies initially decided to try a relatively small group of high profile war criminals with maximum publicity to educate the Germans about the iniquity of the regime they had supported. They also planned to then use a theory of collective responsibility to reach the groups they regarded as the worst supporters of Nazi criminality. The plan involved criminalizing organizations like the SS and Gestapo and then punishing mere membership in these organizations through assembly line trials which could in principle have encompassed hundreds of thousands of defendants. The refusal of the International Military Tribunal at Nuremberg to sanction the criminalization of mere membership rendered this plan unfeasible. For German society as a whole, the de-Nazification program was also designed to weed out very large numbers. Perhaps for this very reason it was doomed to fail. The Germans, like the Athenians, were able to focus blame on the few truly evil men (the SS, SD, and Gestapo) and shift it away from themselves through a variety of strategies. Although there was no formal amnesty as in Athens, the Adenauer era was characterized by what has aptly been called the 'Kalte Amnestie' in which de-Nazification was undone and governmental ministries, the judiciary and parliament were again filled with the same men, now without their

(25) Of course, during the second half of the century, particularly under the pressure of Macedonian expansion, more moderate oligarchic perspectives began to influence Athenian politics, but without the upheavals of 411 and 404/3.

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Nazi armbands (26). Instead of an oath of personal loyalty to Hitler they now solemnly swore to uphold the *Rechtstaat* enshrined in the new Constitution. Since the Allies had conveniently tried the leadership echelon, when the postwar German government began its own trials in the 1960s it focussed its desultory efforts on those whom all could agree were culpable: the staff of the extermination centers. Bureaucrats were largely left in peace. For example, apart from the many who reinhabited their former ministerial or judicial offices, no member of the group of transportation specialists from the Reichsbahn, whose skill and determination had moved millions of victims to their deaths despite wartime crisis conditions, was prosecuted.

In many former Nazi occupied countries, on the other hand, the identification and punishment of relatively small numbers of leaders and active collaborators (given the number who actually actively or passively collaborated or profited from the Nazi occupation) could, as in Athens, create the illusion of a nation unified in its rejection of a tyranny imposed from without with the help of a few traitors. The Soviet Union could play the same role for new democracies in Eastern Europe. In countries like France and Italy the initial stigmatization of collaborators and severe punishment of leading figures lead to a long period of silence, a necessary expedient since the past of relatively few could have sustained scrutiny. The myth of the resistance to Nazi imposed tyranny could operate in a similar way to the reconstruction of the episode of the Thirty as one in which all Athenians joined together to destroy the foreign imposed dictators. In some places, however, this powerful unifying force is more difficult to employ. In Rwanda and Bosnia, for example, where so much of the killing was done by neighbors, friends, and even relatives—and done so openly and so viciously, wounds are harder to heal, a strategy of reconciliation and a myth of unity harder (impossible?) to construct. It remains to be seen if in Cambodia the reconciliation strategy of symbolically trying a tiny number of Khmer Rouge and extending a *de facto* or *de jure* amnesty to the others can provide the desperately needed national unity which the Athenians achieved when they decided to forgo revenge and re-imagine themselves as a unified and democratic political community. In such circumstances, as in postwar France and Germany, the price of accepting the reconstructed history on which this unity was based, was to forgo both truth and accountability for widespread collaboration.

(26) See J. FRIEDERICH, *Die kalte Amnestie* (Frankfurt, 1984).