

## DIVIDED POWER AND ΕΥΝΟΜΙΑ: DELIBERATIVE PROCEDURES IN ANCIENT SPARTA

### I. INTRODUCTION

Spartan institutions were pictured as a model of political stability from the Classical period onwards.<sup>1</sup> The so-called Spartan ‘mirage’ did not involve only its constitutional order but also social and economic institutions.<sup>2</sup> Xenophon begins his *Constitution of the Lacedaemonians* by associating Spartan fame with the *politeia* set up by Lycurgus, which made the Laconian city the most powerful (δυνατωτάτη) and famous (ὀνομαστοτάτη) polis in Greece (Xen. *Lac.* 1.1).<sup>3</sup> In Aristotle’s *Politics*, in which the assessment of Sparta is more complex and nuanced, one finds a critique of contemporary Spartan institutions as well as praise for Lycurgus as a great lawgiver who established the laws of Sparta (Arist. *Pol.* 2.1269a69, 2.1273b20).<sup>4</sup> Most other ancient sources often remark upon the unchangeable features of some Spartan institutions as a key aspect of Spartan εὐνομία. Thucydides maintains that, after a long period of war and *stasis*, the Dorians established excellent laws and Sparta employed the same constitution for more than four hundred years (Thuc. 1.18.1: τετρακόσια καὶ ὀλίγω πλείω ἐς τὴν τελευταίην τοῦδε τοῦ πολέμου ἄφ’ οὗ Λακεδαιμόνιοι τῇ αὐτῇ πολιτείᾳ χρῶνται).<sup>5</sup>

This ancient invention of the ideal Spartan constitution and of its legendary lawgiver Lycurgus has been long recognized in scholarship.<sup>6</sup> Cartledge has pointed out how the ‘partly distorted and partly invented’ view of Sparta was due to non-Spartans.<sup>7</sup> In an essay published in 2002, however, Flower has shown that the Spartans themselves were not immune from inventing their own past during the Classical and the Hellenistic periods. This outcome was often reached by attributing contemporary institutional and social innovations to Lycurgus according to an ideological attitude that is also well known with regard to Solon and the πάτριος πολιτεία in fourth-century

<sup>1</sup> For Sparta as model for modern republicanism, see W. Nippel, ‘Ancient and modern republicanism: “mixed constitution” and “ephors”’, in B. Fontana (ed.), *The Invention of the Modern Republic* (Cambridge, 1994), 6–26.

<sup>2</sup> For the expression *mirage spartiate*, see F. Ollier, *Le Mirage Spartiate. Étude sur l’idérialisation de Sparta dans l’antiquité grecque de l’origine jusqu’aux Cyniques* (Paris, 1933).

<sup>3</sup> On Xenophon’s *Constitution of the Lacedaemonians*, see C. Tuplin, ‘Xenophon, Sparta and the *Cyropaedia*’, in S. Hodkinson and A. Powell (edd.), *The Shadow of Sparta* (London, 1994), 127–82; M. Lipka, *Xenophon’s Spartan Constitution* (Berlin, 2002), 36; V. Gray, *Xenophon On Government* (Cambridge, 2007).

<sup>4</sup> For a careful analysis of Sparta in Aristotle’s works, see L. Bertelli, ‘La Sparta di Aristotele: un ambiguo paradigma o la crisi di un modello?’, *RSA* 34 (2004), 9–71.

<sup>5</sup> See also Lys. 33.7.

<sup>6</sup> For studies about the myth of Sparta, see e.g. E.N. Tigerstedt, *The Legend of Sparta in Classical Antiquity*, vols. 1–3 (Stockholm, 1965–1978); A. Powell and S. Hodkinson (edd.), *The Shadow of Sparta* (London, 1994).

<sup>7</sup> P. Cartledge, *Agésilaos and the Crisis of Sparta* (London and Baltimore, 1987), 118.

Athens.<sup>8</sup> Yet, Hodkinson has shown in several important studies how this view of Sparta as an exceptional and static society within the Greek world during the Archaic and the Classical periods is in need of revision.<sup>9</sup> In fact, most of the evidence about the institutions, the economy and the society of Sparta does not reflect the actual Archaic and Classical Spartan κόσμος but results from later invention, which is aimed at shaping collective memory about the past, and is consistent with reforms of the Hellenistic period.

This is especially true when it comes to studying the Spartan political institutions and deliberative practices. The preservation of the Great *Rhetra*, the alleged ‘founding’ constitutional document of Sparta, has given rise to a long debate about the origin of Spartan institutions. The text of the *Rhetra*, preserved in Plutarch’s *Life of Lycurgus* (Plut. *Lyc.* 6.1–10), reports a document from the lost Aristotelian *Constitution of the Lacedaemonians* and an additional clause, the so-called ‘rider’, which Plutarch attributes to Kings Theopompus and Polydorus.<sup>10</sup> This document details the constitutional structure and the deliberative procedures of Sparta traditionally attributed to Lycurgus and based on the interaction between three institutions: the two kings, the Council of Elders (γερονσία) and the δῶμος. Nafissi has recently demonstrated that the *Rhetra* does not, in fact, outline the original foundation of the Spartan constitution; rather, it is a piece of retrospective history elaborated and accepted by Archaic Spartan society.<sup>11</sup> The *Rhetra* marks the moment of institutionalization of the Spartan community between the seventh century and the sixth century, and is itself a first attempt of dating back their institutions to a remote past.<sup>12</sup>

<sup>8</sup> M. Flower, ‘The invention of tradition in Classical and Hellenistic Sparta’, in A. Powell and S. Hodkinson (edd.), *Sparta beyond the Mirage* (London, 2002), 191–217. For first lawgivers, see K.J. Hölkenskamp, *Schiedsrichter, Gesetzgeber und Gesetzgebung im archaischen Griechenland* (Stuttgart, 1999), 44–59; G. Camassa, *Scrittura e mutamento delle leggi nel mondo antico: dal Vicino Oriente alla Grecia di età arcaica e classica* (Rome, 2011), 71–177; M. Canevaro, ‘Making and changing the laws in ancient Athens’, in M. Canevaro and E.M. Harris, *The Oxford Handbook of Ancient Greek Law* (Oxford, 2015) (DOI 10.1093/oxfordhb/9780199599257.013.4).

<sup>9</sup> S. Hodkinson, ‘“Blind ploutos”? Contemporary images of the role of wealth in Classical Sparta’, in A. Powell and S. Hodkinson (edd.), *The Shadow of Sparta* (London, 1994), 183–222; S. Hodkinson, ‘Was Sparta an exceptional polis?’, and M.H. Hansen and S. Hodkinson, ‘Spartan exceptionalism. Continuing the debate’, in S. Hodkinson (ed.), *Sparta: Comparative Approaches* (Swansea, 2009), 417–22 and 473–98 respectively. For a concise but effective history of modern scholarship about Sparta, see in the same volume pages ix–xxxiii (Introduction with bibliography).

<sup>10</sup> The noun ῥήτρα shows an oral origin of the archaic text. The division of the text of the *Rhetra* and the ‘rider’ are in fact later antiquarian distinctions; see M. Nafissi, *La nascita del kosmos: studi sulla storia e la società di Sparta* (Perugia, 1991), 67–71.

<sup>11</sup> M. Nafissi, ‘The Great *Rhetra* (Plut. *Lyc.* 6): a retrospective and intentional construct?’, in L. Foxhall, H.J. Gehrke, N. Luraghi (edd.), *Intentional History. Spinning Time in Ancient Greece* (Stuttgart, 2010), 89–119 (with full bibliography on the Great *Rhetra* at 93 n. 20), *pace* F. Schulz, *Die homerische Räte und die spartanische Gerusie* (Düsseldorf, 2011), 154. For intentional history, see H.J. Gehrke, ‘Myth, history, and collective identity: uses of the past in ancient Greece and beyond’, in N. Luraghi (ed.), *The Historian’s Craft in the Age of Herodotus* (Oxford, 2001), 286–313. See also A. Maffi, ‘Studi recenti sulla Grande *Rhetra*’, *Dike* 5 (2002), 195–235; and M. Lupi, ‘Testo e contesti. La Grande *Rhetra* e le procedure spartane di ammissione alla cittadinanza’, *Incidenza dell’ Antico* 12 (2014), 9–41, who controversially maintains that the Great *Rhetra* is not a constitutional document but provides an archaic procedure for the admission of new members in the Spartan civic body during the religious festival of the ἀπέλλα.

<sup>12</sup> M. Nafissi, ‘Sparta’, in K. Raaflaub and H. van Wees, *A Companion to Archaic Greece* (London, 2009), 117–37, at 127; on the relationship between the Great *Rhetra* and Tyrtaeus’ *Ἐννομία*, see H. van Wees, ‘Tyrtaeus’ *Eunomia*: nothing to do with the Great *Rhetra*’, in S. Hodkinson and A. Powell, *Sparta: New Perspectives* (London, 1999), 1–42; H. van Wees, ‘Gute Ordnung ohne grosse *Rhetra*: noch einmal zu Tyrtaeos’ *Eunomia*’, *GFA* 5 (2002), 89–103, who argues that it is very difficult to identify clear cross-references between the two texts *contra* K.A. Raaflaub, ‘Athenian and Spartan *eunomia*, or:

Although the *Rhetra* cannot be used for exploring the foundation of the Spartan political system, it is important evidence for the working of Spartan institutions at the time when it was composed. It provides a brief account of the three most important Spartan institutions, which are still attested during the Classical and the Hellenistic periods along with the fundamental office of the five ephors, not mentioned in the text of the *Rhetra*. Spartan deliberation was the result of a complex interaction between the Council of Elders (*Gerousia*), the ephors and the Assembly. The *Gerousia* and the ephors constituted the most important boards of officials in Sparta. They shared the probouleutic power and checked the legality of the enactments of the Spartan Assembly, which ratified the proposals of the γέροντες and the ephors.<sup>13</sup>

There is, however, no consensus amongst scholars about the actual workings and the balance of power among deliberative bodies of ancient Sparta. Some scholars have stressed the fundamental oligarchic features of Spartan deliberation, in which the Assembly played a marginal role, whereas powerful officials made all the decisions.<sup>14</sup> By contrast, Ruzé has argued that the text of the *Rhetra* already envisaged a right of free speech for the δᾶμος, which could actively shape Spartan policy-making.<sup>15</sup> In particular, Ruzé's approach dismisses the official role of the *Gerousia* in the probouleutic procedure, by arguing for an informal *probouleusis* (προβούλευσις) during which the δᾶμος debated preliminary proposals without however taking a formal vote. Conversely, in a recent monograph on the Homeric councils and the Spartan *Gerousia* Schulz has made the case for a prominent role of the *Gerousia* in Sparta's institutional system, and has provided a picture of the legislative procedure in which the γέροντες played a key role. Although Schulz recognizes that the decision-making process was achieved through interaction between the *Gerousia* and the ephors, he argues that, when there was no consensus amongst the γέροντες about a motion to submit before the δᾶμος, the ephor did not introduce the bill to the Assembly, but an advisory assembly was actually gathered to check the people's opinion informally, and only after this passage could the *Gerousia* either submit or veto the draft through their probouleutic power before an actual vote of the Assembly.<sup>16</sup> These approaches are, however, problematic, for several reasons. First, there is no evidence of informal or advisory meetings of the people's Assembly in Greek deliberative practice *tout court*, especially in non-democratic contexts, and this assumption is mainly based on the idea of Sparta's exceptionality. Second, Schulz's reconstruction fails to isolate the difference between the power of *probouleusis* and the power of *nomophylakia* (νομοφυλακία), which was performed by the *Gerousia*'s veto of decision after the debate in the Assembly.

It is my contention in this article that the Spartan decision-making process shared with the Athenian decision-making process the principle of 'divided power', as is clearly shown by historical evidence regarding the role of the *Gerousia* and the ephors in the deliberative procedures of Classical and Hellenistic Sparta. Pasquino has recently introduced the concept of 'divided power' to the study of ancient Greek institutions in

what to do with Solon's timocracy?', in J.H. Blok and A.P.H.M. Lardinois (edd.), *Solon of Athens: New Historical and Philological Approaches* (Leiden, 2006), 390–428.

<sup>13</sup> See section III below.

<sup>14</sup> A. Andrewes, 'The government of Classical Sparta', in E. Badian (ed.), *Ancient Societies and Institutions. Studies Presented to Victor Ehrenberg on his 75th birthday* (Oxford, 1966), 1–20, at 5 n. 8; G.E.M. de Ste. Croix, *The Origins of the Peloponnesian War* (London, 1972), 127 n. 99; L.H. Jeffrey, *Archaic Greece: The City-States 700–500 B.C.* (London, 1976), 249.

<sup>15</sup> F. Ruzé, *Délibération et pouvoir dans la cité grecque de Nestor à Socrate* (Paris, 1997), 150–6.

<sup>16</sup> Schulz (n. 11), 196–201.

his analysis of fourth-century Athenian democracy. He defines the Athenian constitution as a ‘divided power’ because of the absence of ‘monocratic governmental agencies’, as no single institution could run the entire decision-making process.<sup>17</sup> Although Pasquino’s analysis is strongly reliant on Hansen’s problematic claim of an institutional superiority of the law courts in the fourth-century Athenian constitution, the principle of ‘divided power’ conveys effectively the set of constitutional balances of the Athenian institutional system.<sup>18</sup> In Sparta, too, deliberation was the result of a complex interaction, and particularly regarding the institutional relationship between the *Gerousia*, the ephors and the δῆμος. The balance of power and a sound legal order are key features of the Greek *poleis* since the Archaic period. Εὐνομία (*eunomia*) is the term that Spartans and other Greek communities used to refer to this kind of political system, which preserved freedom under the laws, and was regarded as typical of the Greek *poleis* in opposition to tyranny (Hdt. 1.65; 7.104; Thuc. 1.18.1).<sup>19</sup> Indeed, when Sparta’s institutions were devised, they were not conceptualised as an oligarchy in opposition to a democracy. The opposing pair oligarchy–democracy became prominent in Greek politics and political thought only from the second half of the fifth century, and Spartan understanding of their regime as non-democratic emerged later, after the Peloponnesian War.<sup>20</sup> Just as in the other Greek *poleis*, the rule of law and ‘divided power’ were at the foundation of the Spartan constitution, defining the very aim of its institutions. These institutions and procedures, however, were marked (compared, for example, to those in Athens) by stronger devices to limit the power of the people, and to keep it in check, while, at the same time, recognising its formal authority. It was, as at Athens, a case of ‘divided power’, but one with explicit protection of the deliberative power of the elite vis-à-vis that of the δῆμος—a power that was maintained, path-dependently, through complex procedures and institutional steps from the Archaic period to the Hellenistic period. Thus, the interplay between different governmental bodies followed these ideological patterns of the Spartan *politeia*, which gave the probouleutic bodies—the *Gerousia* and the ephors—the power to shape policy-making through the powers of *probouleusis* and *nomophylakia*. Neither of these governmental agencies, however, had exclusive control over these functions, which were in fact divided between the ephors and the γέροντες. The study of the practical workings of this constitutional mechanism underscores the complexity of Sparta’s institutional equilibrium and the features of ‘divided power’ in practice within a non-democratic political system.

<sup>17</sup> P. Pasquino, ‘Il potere diviso. Dalla *graphé paranomon* nella democrazia ateniese a John Locke e James Madison’, in *Conflitti* (Naples, 2005), 89–99; P. Pasquino, ‘Democracy ancient and modern: divided power’, in M.H. Hansen (ed.), *Démocratie athénienne – démocratie moderne: tradition et influences* (Geneva, 2010), 1–50, at 27–8.

<sup>18</sup> Harris shows that there was no shift from popular sovereignty in the fifth century B.C. to the sovereignty of law in the fourth century B.C. In both periods it was the role of the courts to implement the rule of law and for the Assembly to uphold popular sovereignty. See E.M. Harris, ‘From democracy to the rule of law? Constitutional change in Athens during the fifth and fourth centuries B.C.E.’, in C. Tiersch (ed.), *Die athenische Demokratie im 4. Jahrhundert. Zwischen Modernisierung und Tradition* (Stuttgart, 2016), 80–5, *pace* M.H. Hansen, *The Athenian Democracy in the Age of Demosthenes: Structures, Principles, Ideology* (Oxford, 1991), 150–5, 300–4.

<sup>19</sup> For Spartan εὐνομία and the spirit of archaic law, see E.M. Harris, *Democracy and Rule of Law in Classical Athens. Essays on Law, Society, and Politics* (Cambridge, 2006), 3–28.

<sup>20</sup> E.M. Harris, ‘The flawed origins of ancient Greek democracy’, in A. Havlíček, Ch. Horn, J. Jinek (edd.), *Nous, Polis, Nomos. Festschrift Francisco L. Lisi* (St. Augustin, 2016), 1–13.

This essay examines the two most detailed ancient accounts (Diod. Sic. 11.50.2–7; Plut. *Agis* 8.1–11.1) concerning the workings of Spartan deliberation. It begins by sketching an overview of Spartan political institutions and their functions within the theoretical framework of New Historical Institutionalism (section II). I shall then focus on the analysis of the literary sources in order to reconstruct the interactive relationship between distinct governmental bodies, in particular the interplay between the two probouleutic bodies, the *Gerousia* and the ephors, and the Spartan Assembly in the process of deliberation (section III). This will shed light on the constitutional workings as well as on the ideological features of Spartan deliberation by focussing on the powers of *probouleusis* and *nomophylakia* shared by γέροντες and ephors.

## II. SPARTAN DECISION-MAKING INSTITUTIONS: KINGS, *GEROUSIA* AND EPHORS

The two kings, the *Gerousia* and the ephors made up the three institutions that dominated Spartan political deliberation. The text of the Great *Rhetra* alludes to two of these institutions:<sup>21</sup> the γέροντες and the founders (ἀρχαγέται), a term interpreted by Plutarch as referring to the kings.<sup>22</sup> Although the *Rhetra* is a retrospective document, these references show that both the *Gerousia* and the Spartan kingship were already fully institutionalized in the early Archaic period.

During the Classical and the Hellenistic periods, the Spartan kings were formally limited in their power. In Xenophon's *Constitution of the Lacedaemonians*, one reads that the kings had to take an oath in which they swore to reign according to the established laws (Xen. *Lac.* 15.7: ὁ δὲ ὄρκος ἐστὶ τῶ μὲν βασιλεῖ κατὰ τοὺς τῆς πόλεως κειμένους νόμους βασιλεύσειν). Aristotle, in the *Politics*' discussion of good kingship (1285a7), states that the Spartan constitution provides a kingship which is lawful and limited in its authority (ἡ γὰρ ἐν τῇ Λακωνικῇ πολιτεῖα δοκεῖ μὲν εἶναι βασιλεία μάλιστα τῶν κατὰ νόμον, οὐκ ἔστι δὲ κυρία πάντων). He then defines the nature of Spartan kingship as a kind of supreme generalship for life (αὕτη μὲν οὖν ἡ βασιλεία οἷον στρατηγία τις αὐτοκρατόρων καὶ αἰδῖος ἐστίν). As recent studies have pointed out, although the two kings were limited in their constitutional power, they could enjoy significant charisma-based authority grounded in the mythical origin of the Heraclid dyarchy as well as in their wealth and broad powers during military campaigns, especially during the Hellenistic period.<sup>23</sup> Harris has noted that the

<sup>21</sup> The incorrect identification of the ephors in the *Rhetra* and in Tyrtaeus' ἄνδρες δημόται is based on weak interpretations of literary evidence from Plut. *Lyc.* 6.10 and Diod. Sic. 7.12.6, and on arbitrary assumptions that Diodorus' lines come from Tyrtaeus' poem (cf. Nafissi [n. 11], 98–102), pace N. Richer, *Les éphores. Études sur l'histoire et sur l'image de Sparte (VIII – IIIe siècle av. J. C.)* (Paris, 1998), 98–106; S. Link, *Das frühe Sparta. Untersuchungen zur seiner staatlichen und gesellschaftlichen Entwicklung im 7. und 6. Jh. v.Chr.* (St. Katharinen, 2000), 19–30; A. Luther, *Könige und Ephoren. Untersuchungen zur spartanischen Verfassungsgeschichte* (Frankfurt am Main, 2004), 44–59.

<sup>22</sup> See Plut. *Lyc.* 6.3. Nafissi (n. 11), 104–7 points out that this is a retrospective word, normally used for oikists and founders of cults.

<sup>23</sup> M. Nafissi, 'Forme di controllo a Sparta', *Il pensiero politico* 40 (2007), 329–44, at 331–2; E. Millender, 'The Spartan dyarchy: a comparative perspective', in S. Hodkinson (ed.), *Sparta: Comparative Approaches* (Swansea, 2009), 31–40. On Spartan kingship, see P. Carlier, *La royauté en Grèce avant Alexandre* (Strasbourg, 1984); P.A. Cartledge, *Spartan Reflections* (London, 2001), 55–67.

Spartan military success was partly due to the balance between legal controls over the kings and the need of a centralized military command. This institutional design prevented the kings from acquiring too much power without interfering with the unity of command necessary for military efficiency on campaign.<sup>24</sup>

More interestingly for our purpose, as the text of the *Rhetra* shows, the two kings along with the twenty-eight γέροντες constituted a collegial institution, the *Gerousia*.<sup>25</sup> The *Gerousia*, however, should not be interpreted as a 'royal Council'. As several sources confirm, the kings' votes had the same weight as those of the other γέροντες,<sup>26</sup> and, as I shall show in detail later, during the Hellenistic period the kings even needed the support of the ephors to introduce motions to the *Gerousia*.

Unlike the Athenian *Boulē*, made up of five hundred citizens appointed by lot every year, the Spartan *Gerousia* was constituted of only thirty members appointed for life (Aeschin. 1.180; Arist. *Pol.* 1270b39, 1272a36; Plut. *Lyc.* 6, 26.1; Paus. 3.5.2; Plut. *Ages.* 4.2.).<sup>27</sup> Ancient evidence confirms that the *Gerousia* was the most respected and prestigious Spartan institution, according to the typical values of aristocratic constitutions, such as καλοκἀγαθία, σωφροσύνη and ἀρετή.<sup>28</sup> According to Aristotle's *Politics*, the *Gerousia* represented the aristocratic element of the Spartan mixed constitution, and its members were the καλοὶ κἀγαθοί.<sup>29</sup> As Aristotle states (*Pol.* 1270b24–5), in Sparta the different parts (μέρη) of the city kept their relevant roles allowing the endurance of the constitution: the kings received their honour (διὰ τὴν αὐτῶν τιμὴν), the people held the ephorate (διὰ τὴν ἐφορείαν), and the καλοὶ κἀγαθοί were entitled to the membership of the *Gerousia* as an award for their individual merits and virtues (οἱ δὲ καλοὶ κἀγαθοὶ διὰ τὴν γερουσίαν, ἄθλον γὰρ ἢ ἀρχὴ αὕτη τῆς ἀρετῆς ἐστίν), which the Spartan civic community highly respected, although the only formal requirement for appointment to the *Gerousia* was that the candidate had reached the age of sixty.<sup>30</sup> This is also confirmed by Xenophon, who states that Lycurgus was a good lawgiver for having established the *Gerousia*, which makes it possible for the γέροντες to show off their virtues (Xen. *Lac.* 10.1–3). In the speech *Against Leptines* (Dem. 20.107), Demosthenes employs an expression similar to that used in Aristotle's *Politics*, stating that the *Gerousia* is the master of the Spartan *politeia* and a reward for merit (τῆς ἀρετῆς ἄθλον). Such values played a

<sup>24</sup> E.M. Harris, 'Military organization and one-man rule in the Greek polis', *Ktēmata* 40 (2015), 83–90. For the legal controls of military leadership in the Greek poleis, see E.M. Harris, 'The rule of law and military organization in the Greek polis', in G. Thür (ed.), *Symposion 2009: Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Vienna, 2010), 405–17.

<sup>25</sup> The regular Doric word was γεροντία (Xen. *Lac.* 10.1).

<sup>26</sup> See Nafissi (n. 23), 331; Schulz (n. 11), 237. For the voting powers and the epistemic status of the γέροντες, see M. Schwartzberg, *Counting the Many: The Origins and Limits of Supermajority Rule* (Cambridge, 2014), 25–7. See also M. Lupi, 'Il voto dei re spartani', *Quaderni di Storia* 79 (2014), 38–41. Cf. Hdt. 6.57; Thuc. 1.20.3; Pl. *Leg.* 692a2 (δύναμις ἰσόνημος).

<sup>27</sup> For the life appointment, see E. David, *Old Age in Sparta* (Amsterdam, 1991), 18; Ruzé (n. 15), 138–9.

<sup>28</sup> Schulz (n. 11), 106–8.

<sup>29</sup> For καλοκἀγαθία in Sparta, see H. Wankel, *Kalos kai Agathos* (Frankfurt, 1961); P. Davies, 'Kalos kagathos and scholarly perception of Spartan society', *Historia* 62 (2013), 259–79, *pace* F. Bourriot, 'Kaloi kagathoi, kalokagathia à Sparte aux époques archaïque et classique', *Historia* 45 (1996), 129–40. Cf. D.L. Cairns, 'Review of F. Bourriot, *Kalos Kagathos—Kalokagathia: D'un terme de propagande de sophistes à une notion sociale et philosophique: Étude d'histoire athénienne* (Zürich and New York, 1995)', *CR* 47 (1997), 74–6.

<sup>30</sup> Schulz (n. 11), 121–2 calculated that the average office term for a γέρων was roughly 7.5 years, with a turnover of 3.73 new γέροντες every year.

very important role in shaping the institutional task of the γέροντες and the nature of their political decisions in the legislative and deliberative procedure.

This seems to be confirmed by the appointment procedure of the γέροντες—described by Plutarch—in which the δῶμος played an important role in the election of the candidates by shouting (Plut. *Lyc.* 26).<sup>31</sup> They declared as elected whoever received the longest and loudest shouts (ὅτω δὲ πλείστη γένοιτο καὶ μεγίστη, τοῦτον ἀνηγόρευον). In the *Politics* Aristotle disapproves the voting procedure for electing the γέροντες and labels it as ‘childish’ (παιδαριώδης), a term that he employs also for the appointment of the ephors (*Pol.* 1270b28, 1271a10).<sup>32</sup> Aristotle does not justify his severe judgement, but it is likely that he is referring to the same acclamatory procedure described by Plutarch. In spite of Aristotelian criticism, the acclamatory shouts of the Spartan δῶμος reflected a voting procedure embedded with precise ideological features. As Schwartzberg argues, by voting through acclamation, the Spartans in the Assembly secured a collective result for the election, in which the individual votes were not counted, because of the different levels of ‘epistemic dignity’ among the members of the civic community as a whole.<sup>33</sup> As already shown, the *Gerousia* voted by majority rule, because the political and epistemic weight of each γέρων—including the two kings—was the same but also higher than that of the common citizen of the Assembly. The δῶμος, on the other hand, voted as a collective deliberative body, showing the will of the community through acclamation. This different voting system also had relevant consequences for the legislative process, as I will show later when analysing the veto powers of the *Gerousia*.

The collective vote of the whole citizen-community in selecting the γέροντες was an important acknowledgement of the moral and political virtues of the Elders as representatives of the δῶμος within the *Gerousia*. Once elected by the δῶμος, the γέροντες held several honours, which were broadly similar to those for the winners of athletic contests. A new γέρων wore a crown and visited the temples followed by a procession of young men and women praising him with songs. He then went to the common mess in which he received a double portion that he should offer to one of his female relatives, whom he esteemed the most.<sup>34</sup> Such considerable honours for the new γέροντες were not excessive in light of the broad powers of the *Gerousia*. The Council of Elders, including the kings, had exclusive judicial powers in lawsuits in which the penalty was death, ἀτιμία or exile (*Xen. Lac.* 10.1; *Arist. Pol.* 1294b29; *Plut. Lyc.* 26).<sup>35</sup> The *Gerousia* was also involved in trials of the kings, but in this case the law court was composed of twenty-eight γέροντες, the other king and the ephors.<sup>36</sup>

Despite the fact that they are not mentioned in the *Rhetra*, the ephors were fundamental to the Spartan decision-making process. The ephorate was established after the *Rhetra* was composed, by the creation of a board of five officials.<sup>37</sup>

<sup>31</sup> See also *Hdt.* 9.28.1; *Thuc.* 1.87.

<sup>32</sup> Schulz (n. 11), 114–15. For the election of the ephors, see Richer (n. 21), 296–307.

<sup>33</sup> Schwartzberg (n. 26), 25–6.

<sup>34</sup> For an analysis of the ritual, see B. Jordan, ‘The ceremony of the helots in Thucydides IV 80’, *AC* 59 (1990), 37–69; David (n. 27), 18–19; Schulz (n. 11), 117–19.

<sup>35</sup> For death penalty and exile, cf. Schulz (n. 11), 180–1.

<sup>36</sup> For instances of trials of Spartan kings, see *Hdt.* 6.82, *Paus.* 3.6.8, *Xen. Hell.* 3.3, 8–11, *Plut. Agis* 19. The legal procedure for capital trials began before the ephors, who conducted the ἀνάκρισις and brought the charge before the *Gerousia*. See also *Vat. Gr.* 2306 fr. A 1–30 and J.J. Keaney, ‘Theophrastus on Greek judicial procedure’, *TAPhA* 104 (1974), 179–94.

<sup>37</sup> Ephors are also called by sources as: ἀρχή, ἄρχοντες, τὰ τέλη, οἱ ἐν τέλει. See Richer (n. 21), 265–70.

Evidence for the origin of the ephorate is lacking, and the story about their origin in connection with King Theopompus is a later tradition (Arist. *Pol.* 1313a25–33). As Nafissi suggests, it is likely that the office was instituted during the sixth century reflecting the institutional consolidation of the political community.<sup>38</sup> Its members were the highest magistrates of Sparta—one of whom was the eponym—elected by the δῆμος for one year, possibly with the same procedure used to elect the γέροντες.<sup>39</sup> As suggested by their name, the ephors had to oversee (ἐφορᾶν) the respect of *nomoi* as well as the behaviour of the individual citizens (Xen. *Lac.* 8.3). The kings were also subject to close control by the ephors, who accompanied one of the kings during military campaigns or, as we saw, could prosecute them in a trial. They also had jurisdiction over areas which in Athens were supervised by the Council, such as the mobilization of the army, public order, public finance, religion and the supervision of other officials (Arist. *Pol.* 1271a6–7).<sup>40</sup>

The interaction between ephorate and *Gerousia* was not confined to the judicial sphere but was particularly prominent in political deliberation. As was typical of Greek institutional practice, the Council had probouleutic power, which in Sparta was shared between the Council of Elders and the ephors. If one compares Spartan *probouleusis* with its Athenian equivalent, it is immediately clear that Sparta shows a peculiar constitutional pattern. In Athens the probouleutic power was held by the *Boulē*, which submitted προβουλευματα to the Assembly. There were no other institutions entitled to prepare the agenda or to submit formal proposals to the *dēmos*.<sup>41</sup> The Athenian Assembly could only discuss items put in the agenda by the Council. For example, when Nicias tried to have the πρυτάνεις put a motion to the vote about the expedition to Sicily, which was not on the agenda of the Assembly, he knew that he was doing something illegal, because his proposal did not follow the probouleutic procedure and was not in a προβούλευμα of the Council (Thuc. 6.14).<sup>42</sup> In Sparta, on the other hand, *probouleusis* was not exercised by a single institutional agency but by both the *Gerousia* and the ephors according to different procedures, which shows that this fundamental power was actually ‘divided’. Unlike in democratic contexts, however, the interplay between the deliberative institutions reflects different institutional values, embedded in the constitutional design and therefore in the non-democratic features of the Spartan *politeia*. Spartan institutions evolved from the archaic arrangement shown by the *Rhetra*, for example, by introducing the board of five ephors. Nevertheless, political institutions changed path-dependently—according to New Historical Institutionalism terminology—and preserved, to an extent, functions, features and values of the εὐνομία which originally shaped them. These values, embedded in the relevant institutions, preserved the balance of powers as well as the stability of the legal order, and were still found in the workings of the deliberative

<sup>38</sup> Nafissi (n. 12), 130–1.

<sup>39</sup> It is possible that an ephor could be elected only once to that office. On ephors, see also S. Sommer, *Das Ephorat. Garant des spartanischen Kosmos* (St. Katharinen, 2001).

<sup>40</sup> For the mobilisation, see Richer (n. 21), 324–34; for the religious role, 157–257; for finance, 477–9; for εὐθυνα, 442–4 with P. Fröhlich, *Les cités grecques et le contrôle des magistrats (IVe–Ier siècle avant J.-C.)* (Geneva and Paris, 2005).

<sup>41</sup> For *probouleusis* in Athens, see P.J. Rhodes, *The Athenian Boule* (Oxford, 1972), 52–81; R.A. de Laix, *Probouleusis at Athens: A Study of Political Decision-Making* (Berkeley, 1973); cf. Dem. 22.5–7; [Arist.] *Ath. Pol.* 45.4.

<sup>42</sup> See E.M. Harris, ‘Nicias’ illegal proposal in the debate about the Sicilian expedition (Thuc. 6.14)’, *CPh* 109 (2014), 66–72.

institutions in the Hellenistic period, with consequences for the workings of decision-making.<sup>43</sup> With this framework in mind, one can analyse the literary evidence from Diodorus and especially from Plutarch's *Life of Agis*. These sources offer an account of Spartan deliberation in practice in the Hellenistic period, and a careful analysis will reveal the institutional and ideological patterns of the Spartan decision-making process.

### III. INTERACTION BETWEEN EPHORS AND GEROUSIA: 'DIVIDED' PROBOULEUSIS AND NOMOPHYLAKIA

In Aristotle's *Politics* one finds the theoretical description of the workings of *probouleusis* in oligarchic regimes. At 1298b26–35 he states that in oligarchies there are probouleutic magistrates, called πρόβουλοι or νομοφύλακες,<sup>44</sup> who put forward proposals to the *dēmos*, which can only discuss these motions. The *dēmos* cannot advance or debate proposals, except those already approved by these magistrates (ἔτι ἢ ταῦτά ψηφίζεσθαι τὸν δῆμον ἢ μηθὲν ἐναντίον τοῖς εἰσφερομένοις).<sup>45</sup> If one compares the Aristotelian account with the text of the Great *Rhetra*, it seems clear that Aristotle's statement matches the procedures envisaged in the Great *Rhetra* as well as in Spartan institutional practice. The text of the Great *Rhetra* is the following:

Διὸς Συλλανίου καὶ Ἀθανᾶς Συλλανίας ἱερὸν ἰδρυσάμενον, φυλὰς φυλάξαντα καὶ ὠβὰς ὠβάξαντα, τριάκοντα γερουσίαν σὺν ἀρχαγέταις καταστήσαντα, ὥρας ἐξ ὥρας ἀπελλάζειν μεταξὺ Βαβύκας τε καὶ Κνακίωνος, οὕτως εἰσφέρειν τε καὶ ἀφίστασθαι δάμῳ <...> καὶ κράτος. [...] αἱ δὲ σκολιὰν ὁ δᾶμος ἔλοιτο, τοὺς πρεσβυγενέας καὶ ἀρχαγέτας ἀποστατήρας ἦμεν.

Having founded a cult of Zeus Syllanios and Athena Syllania, having divided the people [or 'kept the divisions'] in tribes and having divided it in *obai*, having appointed a council of thirty members, including the founders, regularly celebrate the *Apellai* between Babyka and Knakion. Bring forward and reject [proposals] as follows: to the people must go <...> and final decision, [...] but if the people speaks crookedly [or 'asks for something crooked'] the elders and the founders are to be rejecters. (trans. Nafissi)

The text of the Great *Rhetra* shows that, during the Archaic period, the *Gerousia* and the kings had the power of putting proposals before the Assembly (οὕτως εἰσφέρειν τε καὶ ἀφίστασθαι).<sup>46</sup> The 'rider' also implies that the *Gerousia* could veto motions of the Assembly in case the δᾶμος 'speaks crookedly', which means that the Assembly

<sup>43</sup> J.G. March and J.P. Olsen, 'The New Institutionalism: organizational factors in political life', *APSR* 78 (1984), 734–49; and id. 'Elaborating the "New Institutionalism"', in R.A.W. Rhodes, S.A. Binder and B.A. Rockman (edd.), *The Oxford Handbook of Political Institutions* (Oxford, 2006), 3–20; O. Fioretos, T.G. Falleti, A. Sheingate, 'Introduction: historical institutionalism in political science', in O. Fioretos, T.G. Falleti, A. Sheingate (edd.), *The Oxford Handbook of Historical Institutionalism* (Oxford, 2016), 4–23.

<sup>44</sup> On πρόβουλοι or νομοφύλακες, see Arist. *Pol.* 1323a; πρόβουλοι were elected in Athens soon after the defeat in the Sicilian expedition. See Thuc. 8.1.3; [Arist.] *Ath. Pol.* 29.2–31.3. Cf. P.J. Rhodes, *A Commentary to the Aristotelian Athenaion Politeia* (Oxford, 1981), 362–415; E.M. Harris, 'The constitution of the Five Thousand', *HSPH* 93 (1990), 243–80.

<sup>45</sup> Cf. M. Canevaro, 'Aristotele, *Politica* IV, capitoli 14–16', in L. Bertelli and M. Moggi (edd.), *Aristotele. La Politica. Introduzione, traduzione e commento* (Rome, 2014), 279–377, at 314.

<sup>46</sup> A late sixth-century probouleutic Council of Elders (πρεΐγα) is also attested in an unknown city of Western Locris. It played a role along with the assembly (πόλις) and the ἀποκλεισία in overriding an entrenchment clause about division of the land (*IG IX I*<sup>2</sup> 609).

could not pass an enactment contrary to the *Gerousia*'s proposal without the possibility of being vetoed—a clear example of the power of *nomophylakia* of the γέροντες (Plut. *Lyc.* 6.3).

Evidence for the working of deliberation in Classical and in Hellenistic Sparta is scanty. The very same terms *probouleusis* and *nomophylakia*, used in accordance with Aristotle's usage, are not found in Sparta. The former, in Aristotle, indicates the power of the Council or of the probouleutic officials (or a collaboration between these two bodies) to set the agenda of the people's assemblies in order to achieve efficient deliberation. The latter function is the power to control the conformity of the motions of the Assembly to the general laws governing the life of the community. Both of these powers were fundamental to preserve balance between popular sovereignty and rule of law typical of the Greek *poleis* from the Archaic period onwards. In Greek normal institutional terminology, the two terms πρόβουλοι or νομοφύλακες (and cognates) were often used interchangeably to indicate special magistrates (and functions) with the power of drafting proposals and checking the legality of deliberations. For example, Plutarch uses the expression τὸ προβουλεύειν at *Agis* 11.1 to describe the powers of the Spartan γέροντες when vetoing *Agis'* *rhetra*. In Plutarch's passage the term indicates that the γέροντες were acting as πρόβουλοι with their relevant powers of legislative review. In Aristotle's terminology that would constitute an exercise of *nomophylakia*. Despite the occasional terminological overlap, the Aristotelian classification shows that the two procedures were conceptually different, and they marked two different moments of the decision-making.<sup>47</sup> Even though neither term is found in Spartan practice, however, just as in most of the Greek *poleis*, the Spartan deliberative bodies performed those functions through the relevant legal procedures, and therefore the use of this terminology has significant heuristic value within a Greek perspective.

The only piece of evidence for the probouleutic procedure in fifth-century Sparta is provided by a slightly obscure passage in Diodorus. He describes a debate in Sparta in 475/474 B.C. after the conflict between the Greek *poleis* and the Persians (Diod. Sic. 11.50.1–7). The historical authenticity of these events seems dubious, even though recent scholarship accepts Diodorus' account as trustworthy.<sup>48</sup> The historical events might be fictional, but it is hard to argue that the institutional framework is fictional: as Griffith pointed out, Ephorus—Diodorus' source for this passage—can hardly be accused of ignoring Spartan deliberative procedures.<sup>49</sup> Diodorus narrates that the *Gerousia* was summoned (συναχθείσης δὲ τῆς γερουσίας) to deliberate on the possibility of making war against the Athenians (ἐβουλεύοντο περὶ τοῦ πολέμου), who had supremacy over the seas and had therefore become a threat for Sparta.

<sup>47</sup> Cf. Arist. *Pol.* 1299b–1300a4 with Canevaro's commentary (n. 45), 336–7.

<sup>48</sup> On the historicity of the event, see in particular the good analysis of R. Vattuone, 'Hetoimaridas: note di politica interna a Sparta in età classica', in C. Bearzot and F. Landucci (edd.), *Partiti e fazioni nell'esperienza politica greca* (Milan, 2008), 131–51. See also P. Green, *Diodorus Siculus. Books 11–12.371. Greek History, 489–431. The Alternative Version* (Austin, TX, 2006), 111 n. 190; see also M. Zaccarini, 'The case of Cimon: the evolution of the meaning of philolaconism in Athens', *Hormos—Ricerche di Storia Antica* 3 (2011), 287–304, at 291 n. 15 *contra* C.W. Fornara and L.J. Samons II, *Athens from Cleisthenes to Pericles* (Berkeley and Los Angeles, 1991), 122–4.

<sup>49</sup> G.T. Griffith, 'Isegoria in the assembly at Athens', in E. Badian (ed.), *Ancient Society and Institutions. Studies presented to Victor Ehrenberg on his 75th birthday* (Oxford, 1966), 115–38, 134 n. 10; see also D.H. Kelly, 'Policy-making in the Spartan Assembly', *Antichthon* 15 (1981), 47–61, at 59 n. 45.

Likewise, the Assembly was summoned (ὁμοίως δὲ καὶ τῆς κοινῆς ἐκκλησίας συναχθείσης) and the majority of the citizens agreed that Sparta had to gain leadership of the seas. Diodorus' account seems at first glance to imply that a second meeting of the *Gerousia* was held (τῆς γερουσίας συνεδρευούσης περὶ τούτων), in which the γέροντες were about to make their decision by following the people's preference for war (Diod. Sic. 11.50.2–5). But Hetoimaridas, one of the γέροντες, persuaded both the *Gerousia* and the δᾶμος with his eloquence to change their mind. The problem with this account is that it excludes the ephors from the procedure, whereas other evidence pictures active interaction between the *Gerousia* and the ephors. As I argue below, in case of absence of unanimity within the *Gerousia*, the ephors could formally introduce a proposal to the δᾶμος for ratification, but this bill had then to be examined and voted again by a majority of γέροντες in order to be passed.

This is shown by the most detailed account of the political decision-making procedure in Sparta found in Plutarch's *Life of Agis*, which describes the legislative procedure during the Hellenistic period (Plut. *Agis* 8–11).<sup>50</sup> Plutarch's account is not immune from ideological bias, as it relies on the contemporary work of Phylarchus, who was fiercely criticized by Polybius for his dramatic historiographical style.<sup>51</sup> Yet, Polybius' critiques should not be overestimated, as he himself adopted a biased perspective against Phylarchus because of his anti-Spartan attitude. In his analysis of the role of women in the *Lives of Agis and Cleomenes*, Powell shows how several details drawn from Phylarchus' work are indeed plausible pieces of information from contemporary Sparta.<sup>52</sup> According to Plutarch, in 243/242 B.C. King Agis IV proposed an ambitious plan of reforms—remission of debts, distribution of land and extension of citizenship.<sup>53</sup> Agis succeeded in procuring the election of Lysander as ephor and through him the bill was put forward before the *Gerousia* (Plut. *Agis* 8.1: εὐθύς εἰσέφερε δι' αὐτοῦ ῥήτραν εἰς τοὺς γέροντας). The new *rhetra*, however, did not receive the unanimous favour of the γέροντες, who were divided in their opinions (γραφεῖσις δὲ τῆς ῥήτρας, καὶ τῶν γερόντων εἰς ταῦτο ταῖς γνώμας οὐ συμφερομένων). Lysander thus summoned the Assembly (ἐκκλησίαν συναγαγὼν ὁ Λύσανδρος) to discuss the proposal (Plut. *Agis* 9.1). After a debate between Kings Agis and Leonidas, who supported the traditional κόσμος against Agis' reforms, the Spartans backed Agis by passing his motion (τῶ μὲν Ἄγιδι τὸ πλῆθος ἐπικολούθησεν). But the γέροντες eventually vetoed it through a majority vote (Plut. *Agis* 11.1), so that the reform never entered into force (τοὺς γέροντας, οἷς τὸ κράτος ἦν ἐν τῷ προβουλεύειν).

Building on these two literary accounts, several studies on Spartan legislative procedures have reconstructed it as characterized either by an unclear distribution of powers between ephors and *Gerousia* or by an 'informal' preparatory phase. Kelly, in

<sup>50</sup> Plut. *Agis* 8–11.

<sup>51</sup> E. Gabba, 'Studi su Filarco', *Athenaeum* 35 (1957), 3–55, especially 15; T.W. Africa, *Phylarchus and the Spartan Revolution* (Berkeley and Cambridge, 1961); cf. Polyb. 2.56; P. Pédech, *Trois historiens méconnus: Théopompe, Duris, Phylarque* (Paris, 1989), 403. For a recent study on Polybius and Phylarchus' dramatic historiography, see G. Schepens, 'Polybius on Phylarchus' "tragic" historiography', in G. Schepens, J. Bollansée (edd.) *The Shadow of Polybius. Intertextuality as a Research Tool in Greek Historiography. Proceedings of the International Colloquium, Leuven, 21–22 September 2001* (Leuven-Paris-Dudley, 2005), 141–64.

<sup>52</sup> A. Powell, 'Spartan women assertive in politics? Plutarch's *Lives of Agis and Kleomenes*', in S. Hodkinson and A. Powell, *Sparta: New Perspectives* (London, 1999), 401–15.

<sup>53</sup> For the reforms of Agis IV, see P. Cartledge and A. Spawforth, *Hellenistic and Roman Sparta* (London and Berkeley, 1991), 68–72.

his reconstruction of the procedure in Diodorus, highlights that the meeting of the *Gerousia* was held before the δᾶμος, which usually showed its mood through shouts, silence and applause.<sup>54</sup> As Diodorus makes clear (Diod. Sic. 11.50.5), the *Gerousia* was still in session when the δᾶμος expressed favour for war (πάντων δὲ σχεδὸν τῶν πολιτῶν πρὸς ταύτην τὴν ὑπόθεσιν ὠρμημένων, καὶ τῆς γερουσίας συνεδρευούσης περὶ τούτων). For this reason, Kelly argues that, when the γέροντες and the ephors—not mentioned by Diodorus—did not agree on a motion, they put their case before the Assembly and decided on the spot whether to put their motions to the vote in the Assembly. Thus, during the same meeting, Hetoimaridas persuaded the γέροντες to put his motion to the vote, which was passed by the δᾶμος. Kelly envisages the very same procedure in Plutarch's account on the reform of Agis IV without clearly identifying the relevant roles of the ephors and of the γέροντες in the decision-making procedure.<sup>55</sup> Other scholars have adopted views stressing the informality of Spartan deliberation. Following Ruzé, Richer argues that the literary sources show that both the *Gerousia* and the Assembly were not summoned to make an ultimate decision, because the γέροντες did not submit a formal proposal to the δᾶμος, so that the early stages of the procedure (the first meeting of the *Gerousia* and the first meeting of the Assembly) consisted of mere preparatory work before the final decision.<sup>56</sup> Schulz argues that these passages from Diodorus and Plutarch attest deliberative procedures in which the Assembly played an advisory role when there was no unanimity among the γέροντες.<sup>57</sup> According to Schulz, Plutarch's passage in particular illustrates a probouleutic procedure structured in two steps:<sup>58</sup> first, the *Gerousia* prepared the motions to be submitted to the Assembly; second, the Assembly was summoned and the motion was put to the vote. However, if the *Gerousia* could not make a unanimous decision, a meeting of the δᾶμος could be held in order to gauge the people's opinion without taking a formal vote. After hearing that, the *Gerousia* submitted a final προβούλευμα for the vote before the δᾶμος, approving it by majority rule.<sup>59</sup> These studies, however, provide accounts of the probouleutic procedure that does not fit the historical evidence of deliberative practice in non-democratic constitutions.<sup>60</sup>

<sup>54</sup> Diodorus' text does not mention shouts and applauses, but this practice is attested in Sparta. For voting by shouting, see n. 35.

<sup>55</sup> Kelly (n. 49), 60.

<sup>56</sup> Richer (n. 21), 349–51; cf. Ruzé (n. 15), 150; F. Ruzé, 'Dire le droit: retour sur la grande rhètra', in B. Legras and G. Thür (edd.), *Symposion 2011: Études d'histoire du droit grec et hellénistique (Paris, 7–10 September 2011)* (Vienna, 2012), 5–15 has recently reasserted her interpretation through a controversial reading of the *Rhetra*. Cf. Gagarin's reply: M. Gagarin, 'Observations on the Great *Rhetra*: a response to Francoise Ruzé', in Legras and Thür (this note), 17–20.

<sup>57</sup> Schulz (n. 11), 198–200 substantiates his thesis by including other pieces of evidence. In particular, the passages in Plut. *Agis* 5.3–5 about the *rhetra* introduced by the ephor Epitadeus and the passages in Plut. *Lys.* 16–17 about the prohibition of silver and gold seem clearly to highlight the wide probouleutic power of the ephors rather than the primacy of the *Gerousia*. Yet, Schüttrumpf and Hodkinson have clearly demonstrated that the Epitadeus episode in the *Life of Agis* is an unhistorical account, and that it is based on Plato's *Republic* (555c–e). See E. Schüttrumpf, *Aristoteles, Politik: Buch II und Buch III* (Berlin, 1991), 317; S. Hodkinson, *Property and Wealth in Classical Sparta* (London, 2000), 90–4. See also M. Nafissi, 'Asteropos e Epitadeus. Storie di due efori spartani e di altri personaggi dai nomi parlanti', *Incidenza dell' Antico* 6 (2008), 49–89, at 72–84.

<sup>58</sup> For previous reconstructions, see W.G. Forrest, 'Legislation in Sparta', *Phoenix* 21 (1967), 11–19.

<sup>59</sup> Schulz (n. 11), 196–201. Schulz singles out two distinct kinds of assemblies: an advisory assembly (*beratende Volksversammlung*) and a decision-making assembly (*entscheidende Volksversammlung*).

<sup>60</sup> Ruzé (n. 15), 154 argues that the 'spécificité' of the Spartan *polis* made it difficult for the ancient author to describe the decision-making by using ordinary institutional terminology. For examples of oligarchic practice, see pp. 369–70 below.

In reconstructing the Spartan deliberative procedure, all these scholars have drawn a forced analogy between Hetoimaridas' debate in Diodorus' *Library* and Plutarch's account of Agis' reforms. Schulz's reconstruction, moreover, underestimates the role of the ephorate in the deliberative practice by implying that the Assembly did not discuss a formal proposal. There are several problems with these accounts.

First, one should clearly identify the specific procedural features of the two historical accounts. The problem with any simple juxtaposition is that the episodes are substantially different from a procedural point of view—not in the nature of the procedure but in how the procedure unfolds. We can see that Diodorus' account, structured in two parts, shows a decision-making process that is conditioned by a key difference with that summarized by Plutarch. Initially, the *Gerousia* and the *δῶμος* agreed on making war against Athens, then Hetoimaridas delivered his speech and persuaded both the *γέροντες* and the citizens to change their plans. Diodorus thus makes clear that there was an initial general consensus among the *γέροντες*, as well as among the citizens, and this is the reason why no one 'dared to advance any other proposal' (Diod. Sic. 11.50.5: οὐδένα τολμήσειν συμβουλευσαι ἕτερόν τι). In contrast to the case of Agis described by Plutarch, there is no dispute within the *Gerousia*, and this consensus in the *Gerousia* determines the next procedural step: a vote of ratification by the Assembly. Plutarch clearly shows that in the case of Agis' reforms there was instead political dissent, organized into two factions: on one side, Agis, the ephor Lysander and the majority of the citizens, and, on the other side, the majority of the *γέροντες* and King Leonidas. This dissent was already expressed in the first meeting of the *Gerousia* and later in the debate in the citizens' Assembly. By contrast, in Diodorus' passage there is no contrast at all. Everyone agreed about the proposal for making war and an assembly was called to ratify the decision of the *Gerousia*. Hetoimaridas, at that point, delivered his speech by which he persuaded the *γέροντες*, still in session, and the Assembly, which rejected the proposal without any opposition from the *γέροντες*. This shows a probouleutic procedure that follows the usual pattern common in the Greek world. The Council of Elders, and possibly the unmentioned ephors, reached an agreement about a proposal, which was then submitted to the Assembly for ratification. In that case, the Assembly, influenced by a *γέρων* who spoke against the bill approved by the *Gerousia*, rejected the bill, with the endorsement of the rest of the *Gerousia*, that had by then also changed its mind.

Moving from Diodorus to Plutarch's *Life of Agis*, we find a more detailed description of the procedure, the steps of which are compatible with those identified in the case of Hetoimaridas. In Plutarch, the kings, the *Gerousia*, the ephors and the Assembly are all involved. First, Plutarch makes it clear that it was the ephor Lysander who drafted a formal written proposal (*γραφεΐσις δὲ τῆς ῥήτρας*) in the *Gerousia* (*εὐθύς εἰσέφερε δι' αὐτοῦ ῥήτραν εἰς τοὺς γέροντας*).<sup>61</sup> The use of written documents in Spartan public life is not surprising. As Millender has convincingly shown, the Spartans made wide use of written documents for their diplomatic activities, and already in the Classical period Sparta had an archive with copies of state documents, such as international treaties, lists of eponymous ephors and athletic victories.<sup>62</sup> This means that there was an official document containing the provisions of the bill, and only after (aorist participle) the

<sup>61</sup> Plut. *Agis* 8.1, 9.1. Schulz (n. 11), 200. For the use of writing by the ephors, see Richer (n. 21), 436–7, 446–7, 479–80; for the Spartan *στυάλη*, see Richer (n. 21), 483–90; on literacy in Sparta, see T.A. Boring, *Literacy in Ancient Sparta* (Leiden, 1979).

<sup>62</sup> E.G. Millender, 'Spartan literacy revisited', *CIAnt* 20 (2001), 127–41.

presentation of the formal draft did the legislative procedure begin. The γέροντες did not reach unanimity about the provisions of the bill (καὶ τῶν γερόντων εἰς ταὐτὸ ταῖς γνώμας οὐ συμφερομένων), which means that a proper draft was prepared after a discussion in the *Gerousia* (Plut. *Agis* 9.1). The two genitive absolute clauses are key here. The former genitive absolute shows a causal connection between the presentation of the *rhetra* by Lysander and the subsequent dissent of the γέροντες, which presupposes a formal debate in the *Gerousia*, after which the ephor prepared the relevant draft. The latter can be understood as having concessive meaning: ‘the *rhetra* was written, although the opinions of the γέροντες did not agree’. This confirms that the ephor could introduce a proposal, even if the γέροντες did not pass the proposal. The following sentence (ἐκκλησίαν συναγαγὼν ὁ Λύσανδρος αὐτὸς τε διελέχθη τοῖς πολίταις) is logically coordinated and implies that Lysander, in force of his ephoral power, summoned the Assembly to discuss the same written motion.

Thus, the role of the ephor Lysander in starting the decision-making process highlights a key feature: *probouleusis* was not the exclusive province of the *Gerousia*; rather, the power was actually divided between ephorate and *Gerousia*. Even without the unanimous vote of the Elders in the *Gerousia*, the ephor Lysander was able to summon an Assembly and to put the motion to the vote. This is also supported by the fact that Agis IV was very concerned with procuring the election of Lysander before presenting his bill to the *Gerousia*, in order to have a political ally for his revolutionary reforms. The king had clearly no power to introduce his *rhetra* to the Assembly without the fundamental support of the ephor who could bypass the γέροντες when initiating the deliberative process.<sup>63</sup>

The ephors took part in the *Gerousia* meetings, and the eponymous ephor was in charge of presiding over the Assembly and supervising the voting of the δᾶμος.<sup>64</sup> This is consistent with the evidence concerning the power of the ephors to initiate legislation. In the *Hellenica* Xenophon says that in 400 B.C. the Spartan ephors and the Assembly resolved (ἔδοξε τοῖς ἐφόροις καὶ τῇ ἐκκλησίᾳ) to send ambassadors to Elis (Xen. *Hell.* 3.2.23). He employs the same expression when Sparta decides to go to war with the Achaeans against the Acharnians (*Hell.* 4.6.3: ἔδοξε τοῖς τ’ ἐφόροις καὶ τῇ ἐκκλησίᾳ).<sup>65</sup> Ruzé rightly points out that this formula resembles the Athenian enactment formula, which shows a parallel between the probouleptic function of the Athenian *Boulē* and the probouleptic function of the Spartan ephors.<sup>66</sup> The ἔδοξε–formula in deliberative practice not only is similar to the Athenian version but also was widespread across the Greek world.<sup>67</sup> Thucydides reports the Spartan

<sup>63</sup> For the *Boulē–Dēmos* opposition in the narrative of Plutarch’s *Lives*, see C. Pelling, ‘Plutarch and Roman politics’, in C. Pelling, *Plutarch and History. Eighteen Studies* (London, 2009), 211–17.

<sup>64</sup> N.M. Kennell, *Spartans: A New History* (Chichester, 2010), 169. Cf. Xen. *Hell.* 2.3.34; the decisions of the board of ephors were binding for all its members.

<sup>65</sup> Cf. Plut. *Lys.* 14.4, which reports the decree of the ephors stating: ‘this is resolved by the authorities of the Lacedaemonians’ (τὸ δ’ ἄληθινὸν δόγμα τῶν ἐφόρων οὕτως εἶχε: τότε τὰ τέλη τῶν Λακεδαιμονίων ἔγνω).

<sup>66</sup> Schulz (n. 11), 212 explains that the formula mentions only the ephors and the Assembly, because of an ellipsis of the term ‘*Gerousia*’, since it was in-between these two institutions in the decision-making. The ephors started the legislative procedure by putting forward the motion in the *Gerousia* and the Assembly ratified it. However, the enactment formula usually shows the enactment bodies of a decree or of a law, and Schulz’s explanation is forced.

<sup>67</sup> There are 3,692 occurrences of this clause on the PHI database of Greek inscriptions. However, cf. P.J. Rhodes and D.M. Lewis, *The Decrees of the Greek States* (Oxford, 1997), 258 e.g. on Mytilenean probouleumatic formulas, which are very different from this model.

enactment formula by quoting two treaties in Doric dialect between Sparta and Argos (Thuc. 5.77.1, 5.79.1). The first text is a Spartan peace-treaty draft with the preliminary proposal to Argos (καττάδε δοκεῖ τᾶ ἐκκλησίᾳ τῶν Λακεδαιμονίων), the second document provides the final text of the alliance between the Spartans and the Argives (ἔδοξε τοῖς Λακεδαιμονίοις καὶ Ἀργείοις).<sup>68</sup> In both cases, the formula shows patterns similar to those found in Xenophon's *Hellenica*, even if the ephors are not mentioned.<sup>69</sup> These formulas are not in contradiction with each other. Indeed, Xenophon had direct access to Spartan institutional practice and the formulas he cited should therefore be taken to represent the normal deliberative practice in Classical Sparta. Thucydides instead reports the draft and the final version of a copy of an international treaty, which he perhaps consulted during the period of his exile.<sup>70</sup> In the Spartan proposal only the Assembly is mentioned, but it is clear that some unmentioned probouleutic body—in all probability the ephors—must have introduced the motion to the Assembly. It is interesting to note that, in early fifth-century Athens too, decrees could have only ἔδοχεν τῷ δέμοι without mentioning the Council in the enactment formula (for example, *IG I<sup>3</sup> 1*). In this case, Thucydides might have consulted an archival copy, because it seems implausible that the Spartans or the Argives had inscribed on stone a copy of the preliminary proposals. On the other hand, the second formula underlines the agreement procedure between the two communities without mentioning the respective deliberative bodies of the two cities. Another famous Thucydidean passage shows that the ephors were in charge of putting a matter to the vote even without the unanimous consensus of the *Gerousia*. When the Spartans were discussing whether they should declare war against Athens in 432 B.C., King Archidamus delivered a speech against war, while the ephor Sthenelaidas spoke forcefully in favour of war, and he himself put the question to the vote of the Assembly (τοιαῦτα λέξας ἐπεψήφισεν αὐτὸς ἔφορος ὢν ἐς τὴν ἐκκλησίαν τῶν Λακεδαιμονίων), which passed it (Thuc. 1.79–87).<sup>71</sup> Yet, a comparison with other Hellenistic cities shows that the role of the Spartan ephors in the decision-making process has also a contemporary parallel in the function of the Iasian *πρυτάνεις*. Decrees from Hellenistic Iasos attest that, after the third century's reform, the Iasian Assembly could only examine motions passed by the Council after the prior consideration of the *πρυτάνεις* acting as *πρόβουλοι*.<sup>72</sup> Likewise, in Hellenistic Cyme, the *στρατηγοὶ* summoned the Council and introduced the *προβουλευόμενα* to the Assembly.<sup>73</sup>

The probouleutic power of the ephors and their relevant role in the deliberative procedure shows that there is no need to hypothesize any *contio*-like or advisory

<sup>68</sup> On the treaty in Thucydides, see L. Canfora, 'Trattati in Tucidide', in L. Canfora, M. Liverani, C. Zaccagnini, *I trattati nel mondo antico. Forma, ideologia, funzione* (Rome, 1990), 193–216.

<sup>69</sup> Richer (n. 21), 339.

<sup>70</sup> On Thucydides' autopsy of these documents, see G. Schepens, *L'autopsie dans le method des historiens grecques du Ve siècle avant J.-C.* (Brussels, 1980), 184.

<sup>71</sup> Schulz (n. 11), 206–7 interprets this passage as evidence for the lack of *probouleusis* between the two speeches and the vote of the Assembly. It is possible that no written draft was discussed, but it is clear that the ephor was legally empowered to use his probouleutic power by putting the item to the vote of the *δᾶμος*. Similarly, in Polyb. 4.34–5 the ephors allowed the Aetolian ambassador to address the Assembly and to discuss the alliance, even if there was no unanimity amongst the *γέροντες*.

<sup>72</sup> R. Fabiani, 'Dedochtai tei Boulei kai toi Demoi: protagonisti e prassi deliberativa a Iasos', in C. Mann and P. Scholz (edd.), *Demokratie im Hellenismus. Von der Herrschaft des Volkes zur Herrschaft der Honoratioren?* (Mainz, 2012), 156.

<sup>73</sup> P. Hamon, 'Kymè d'Éolide, cité libre et démocratique, et le pouvoir des stratèges', *Chiron* 38 (2008), 63–106, at 70.

meeting of the Spartan Assembly.<sup>74</sup> As Nafissi rightly points out, the Great *Rhetra* does not mention any informal meeting of the δῶμος.<sup>75</sup> An examination of the probouleutic practice in the Greek *poleis* shows no evidence of such advisory meetings of an assembly before or during *probouleusis*. Instead, Greek deliberative procedure shows that the people's assemblies were always gathered either to discuss a well-defined proposal drafted by the relevant probouleutic body—a Council or a board of officials—or to discuss an open προβούλευμα, which implies broad deliberative powers of the people's Assembly.<sup>76</sup> It is clear from the evidence that the Spartan Assembly had only the first of these prerogatives, and could only enact or reject a proposal submitted by the *Gerousia* and the ephors but could not deliberate on an open προβούλευμα.<sup>77</sup> In the passage from Diodorus, the Assembly is asked to vote on the *Gerousia*'s proposal for war, already approved by the γέροντες unanimously. Conversely, in the passage from Plutarch, Lysander opens the formal discussion in the Assembly about Agis' reforms, which are then passed by the δῶμος, but the bill had not been previously approved unanimously by the *Gerousia*. The text shows that, if the bill had not been unanimously pre-approved by the *Gerousia*, even after the Assembly's approval, it could be vetoed by the γέροντες with a simple majority vote.<sup>78</sup> This point should be stressed: it appears that the vote of the δῶμος on a decree not pre-approved unanimously by the γέροντες was not final; but it was not meaningless either, as it gave the bill the chance to be approved by a simple majority of γέροντες, whereas at the normal probouleumatic stage it needed unanimity in order for the vote of the δῶμος to be final.

Thus, a procedure structured in these three stages fits both the so-called 'rider' of the Great *Rhetra* and the Aristotelian account of oligarchic *probouleusis* already mentioned. At *Pol.* 1272a10–12 Aristotle describes the similarities between the Cretan and the Spartan constitutions by drawing analogies between the roles of the Cretan κόσμοι and the roles of the Spartan ephors, as well as between the role of the Councils of Elders.<sup>79</sup> He then states that in both constitutions every citizen attends the meetings of the Assembly, which has however no authority (κυρία δ' οὐδενός ἐστίν)<sup>80</sup> except

<sup>74</sup> For the Spartan Assembly as *contio*, see n. 15 above.

<sup>75</sup> Nafissi (n. 10), 364.

<sup>76</sup> Rhodes and Lewis (n. 67), 484–91 with many examples of *probouleusis* in practice in the Greek *poleis*.

<sup>77</sup> Nafissi (n. 23), 335, *pace* Ruzé (n. 56). For the prohibition on emending proposals drafted by magistrates in the Spartan assembly, see *Arist. Pol.* 1272a10–12 below, *pace* Andrewes (n. 14), 4, who drew an analogy with the Athenian practice of open προβουλεύματα. It is worth noting that even in fourth-century Athens, where the Assembly had broad powers, in the period from 403/402 B.C. to 323/322 B.C. the number of preserved decrees on stone that were verbatim ratifications of the Council's προβουλεύματα is higher than non-probouleumatic decrees amended by the *dēmos* (52%–48%); see G. Oliver, 'Oligarchy at Athens after the Lamian War: epigraphic evidence for the *Boule* and the *Ekklesia*', in O. Palagia and S. Tracy (edd.), *The Macedonians in Athens 322–229 BC. Proceedings of the International Conference held at the University of Athens, May 24–26 2001* (Oxford, 2003), 40–51, at 46.

<sup>78</sup> Kennell (n. 64), 110.

<sup>79</sup> For Cretan Councils of Elders, see M. Youni, 'Councils of Elders and aristocratic government in the Cretan *poleis*', with the answer of A. Maffi, 'Il consiglio degli anziani e le istituzioni politiche delle città cretesi: risposta a Maria Youni', in M. Gagarin, A. Lanni (edd.), *Symposion 2013: Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Cambridge MA, 26.–29. August 2013) (Vienna, 2015), 13–26 and 27–30 respectively. Against a view of powerful Councils of Elders in Crete, see M. Gagarin and P. Perlman, *The Laws of Ancient Crete: 650–400 B.C.E.* (Oxford, 2016), 62–4.

<sup>80</sup> The term *kyrios* (κύριος) indicates both in the documentary sources and in philosophical language a legally recognized power that does not need to refer to a higher authority. Cf. F.D.

in ratifying the proposals (συνεπιψηφίσαι τὰ δόξαντα) of the Elders and of the κόσμοι.<sup>81</sup> Yet, at *Pol.* 1298b, when describing the institutional powers of πρόβουλοι and νομοφύλακες, Aristotle states that in the *politeia*-regimes—such as Sparta and Crete—the few have the authority to reject (οἱ γὰρ ὀλίγοι ἀποψηφισάμενοι μὲν κύριοι) but not to pass proposals (καταψηφισάμενοι δὲ οὐ κύριοι), which are always referred to the *dēmos* (ἀλλ' ἐπανάγεται εἰς τοὺς πλείους αἰεὶ). The verb ἀποψηφίζεσθαι is the very same term that Plutarch employs to describe the vote of rejection by the *Gerousia*. As the literary evidence shows, this verb is often used in Athenian forensic speeches for penalties that needed to be approved (*Antiph.* 1.12, 5.96; *Lys.* 10.31, 12.90; *Lyc.* 1.149), therefore of proposals that had already been formally presented. In the case of Sparta, the verb marks the fact that the proposal had already been passed by the δῆμος.<sup>82</sup> To push the parallel with the Athenian usage of the verb, the ἀπεψηφισμένοι were those Athenian citizens who lost their civic rights for not fulfilling the legal requirements and were therefore 'rejected' from the civic registers of the demes.<sup>83</sup> Thus, according to the Aristotelian account, in some oligarchic constitutions legislation is to be ratified by assemblies, but the probouleutic bodies can make them invalid a posteriori. In addition to the probouleutic power, which is used before a proposal reaches the Assembly, they have a veto power that can be used after the approval of a bill by the Assembly. This matches precisely the powers of the Spartan γέροντες: they clearly had probouleutic powers (exercised before a bill reached the Assembly) but also the power of *nomophylakia* through which they could stop the legislative procedure by invalidating those motions that contradicted the *nomoi*, which were therefore σκόλιον, as the *Great Rhetra* states.<sup>84</sup> A similar view is found in Aeschines' *Against Timarchus* (*Aeschin.* 1.180–1).<sup>85</sup> When praising Sparta, Aeschines states that, during a debate, a dissolute but skilful speaker addressed the Assembly which was persuaded by his argument. A γέρον, however, stood up and said that they should not listen to that man, and asked a virtuous man to give the same advice, so that the Spartans could act according to the suggestions of a distinguished citizen. This anecdote is unlikely to be historically accurate, but it clarifies the Athenian understanding of the political decision-making in Sparta, and of the role of the *Gerousia*. A γέρον could stop the debate in the Assembly, if some basic principles embedded in the εὐνομία were not respected, performing therefore a *nomophylakia* role.

Finally, a comparison between Plutarch's account and other non-democratic deliberative practices may also shed light on this issue. Demetrius of Phalerum introduced magistrates called νομοφύλακες in Athens between 317 and 307 B.C. during the oligarchic government following the peace between the Athenians and the

Miller, 'Aristotle's philosophy of law', in F.D. Miller and C.A. Biondi (edd.), *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* (Dordrecht, 2007), 106–7.

<sup>81</sup> Cf. Nafissi (n. 10), 363–5; Bertelli (n. 4), 40–3; cf. the use of the same expression in Polyb. 21.32.1 to indicate the ratification vote of the motion of the συνέδριον by the *dēmos* (δόξαντος δὲ τῷ συνεδρίῳ, καὶ τοῦ δήμου συνεπιψηφισάντος, ἐκυρώθη τὰ κατὰ τὰς διαλύσεις).

<sup>82</sup> Canevaro (n. 45), 315–17. Cf. also *IG* II<sup>2</sup> 1237 (lines 31, 38, 90, 95, 98, 101–3).

<sup>83</sup> E. Poddighe, 'Ateniesi infami (*atimoi*) ed ex Ateniesi senza i requisiti (*apepsephismenoi*). Nuove osservazioni in margine al fr. 29 Jensen di Iperide sulle diverse forme di esclusione dal corpo civico di Atene', *AFLC* 61 (2006), 5–24, at 16.

<sup>84</sup> David (n. 27), 33—*contra* Schulz (n. 11), 155–7—recognizes that the *Gerousia* was empowered of *nomophylakia* but does not include it in his reconstruction of the probouleutic and deliberative procedure.

<sup>85</sup> Cf. N. Fisher, *Aeschines Against Timarchos* (Oxford, 2001), 329.

Macedonian king Cassander.<sup>86</sup> The powers of the Athenian νομοφύλακες are described in an entry of the *Lexicon Rhetoricum Cantabrigiense* (s.v. νομοφύλακες), based on Philochorus' evidence, which states that the νομοφύλακες sat at the meetings of the Council and the Assembly next to the πρόεδροι with the task of stopping inexpedient deliberations.<sup>87</sup> This shows a clear analogy with the role of the γέροντες in Spartan decision-making procedures. The *Gerousia* indeed was present and gathered during the Assemblies of the δῶμος,<sup>88</sup> as were the Athenian νομοφύλακες, but not to gauge 'informally' the δῶμος; rather, their role involved checking the legality of deliberation and potentially vetoing illegal enactments. This is the reason for which, after Agis' *rhetra* had been enacted by the Assembly, a simple majority vote of the γέροντες would have sufficed for the bill to be carried, instead of the unanimity required at the probouleutic stage. Agis must have known that he could not obtain a unanimous vote from the γέροντες but must have hoped that, faced with the overwhelming favour of the δῶμος, at least a simple majority of γέροντες would decide to let the bill stand. Agis claimed to represent the Lycurgan tradition, but similarly his opponents among the γέροντες could maintain that his *rhetra* was contrary to the established *nomoi*. The *Gerousia* therefore exercised its prerogative to halt the legislative procedure safeguarding the traditional order—the majority vote at *nomophylakia*—stage sank his reform.

What was the ideological rationale of this decision-making procedure? In democratic Athens, for example, the Assembly could delegate power to the Council to enact a further decree, in order to complement the decision-making by exploiting the expertise of the βουλευτοί in particular matters and displaying a 'divided power' in deliberation between Council and Assembly (*SEG* 10, 40; *IG* I<sup>3</sup> 136; *IG* II<sup>2</sup> 204; *RO* 53; *IG* II<sup>2</sup> 1629).<sup>89</sup> That procedure was rooted in the democratic ideological framework according to which the deliberative power did not belong exclusively to one governmental agency. Democratic ideology was alien to Sparta, but one can nevertheless find patterns of 'divided power', though essentially non-democratic in their nature. The *ēthos* of the Spartan deliberative procedures was to constrain deliberation within the boundaries of the traditional *nomos*. As the evidence has shown, the probouleutic procedure in Sparta limited free debate in the Assembly. *Probouleusis* therefore assumes a prominent role in the constitutional equilibrium, since every matter discussed in the Assembly was put forward through this procedure without allowing further changes. The Spartan institutional system, however, shows that this fundamental power was shared between ephors and

<sup>86</sup> For the legislation of Demetrius of Phalerum, see L. O'Sullivan, *The Regime of Demetrius of Phalerum in Athens, 317–307 B.C.E.* (Leiden, 2009); A. Banfi, *Sovranità della legge. La legislazione di Demetrio del Falero ad Atene (317–307 a.C.)* (Milan, 2010); M. Canevaro, 'The twilight of *nomothesia*: legislation in early Hellenistic Athens (322–301)', *Dike* 14 (2013), 55–85, at 66–9.

<sup>87</sup> C. Bearzot, 'I *nomophylakes* in due lemmi di Polluce (VIII 94 νομοφύλακες e VIII 102 οἱ ἐνδῆκοι)', in C. Bearzot, F. Landucci and G. Zecchini (edd.), *L'Onomasticon di Giulio Polluce: tra lessicografia e antiquaria* (Milan, 2007), 43–68; id. 'Nomophylakes e nomophylakia nella *Politica* di Aristotele', in C. Talamo and M. Polito (edd.), *Istituzioni e Costituzioni in Aristotele tra storiografia e pensiero politico* (Tivoli, 2012), 29–47; Canevaro (n. 45), 315–17. For *nomophylakes* in Athens, see Canevaro (n. 86), 66–7; M. Faraguna, 'I *nomophylakes* tra utopia e realtà istituzionale delle città greche', *Politica Antica* 5 (2015), 141–55. Cf. also Harp. s.v. νομοφύλακες and Pollux (8.94), who confirms the information in the *Lexicon Rhetoricum Cantabrigiense*, *pace* G.R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws* (Princeton, 1960), 199 n. 108, who argues that there is no evidence of νομοφύλακες acting as probouleutic officials apart from Aristotle's statement.

<sup>88</sup> Kelly (n. 49), 60.

<sup>89</sup> Cf. Harris (n. 18), 76–80.

*Gerousia*, because neither of these two bodies had an exclusive role in bringing motions before the δᾶμος. Α προβούλευμα thus needed the unanimous vote of the *Gerousia* in order to be submitted for ratification before the Assembly, but the ephors, being in charge of initiating the legislative process, could also present a motion directly to the δᾶμος. This institutional mechanism allowed the ephors to run the legislative process by giving voice to the people, in case of opposition by the γέροντες. As a consequence, the Spartan system gave a prominent role to the voice of the Assembly in case of dissent between the γέροντες and the ephors and when the γέροντες could not reach unanimity. The standard legislative procedure was therefore based on the need for general consensus within and between those bodies of government that held the probouleutic powers. No single institution had a more prominent role in the decision-making process, as the constitutional system was designed to achieve balance and stability. Ephors and γέροντες, therefore, had to play a joint role in managing an effective *probouleusis*, in order for a decision to be finally enacted by the Assembly.

On the other hand, when there was no consensus between the two probouleutic bodies, or within the *Gerousia*, a bill could go to the Assembly anyway but with the proviso that it would still need to be ratified by the γέροντες by simple majority. The alleged 'rider' of the *Rhetra* provided the legal foundation for this by allowing a decision of the γέροντες after a vote of the Assembly was taken. In Athens, the *Boulē* could be legally empowered through a delegation-clause to enact a new decree to integrate the decision passed by the Assembly. Just as in Athens, therefore, in Sparta a decision could be reconsidered by the probouleutic body, but there was no need of *ad hoc* delegation, because the γέροντες were in charge of checking whether the decisions of the Assembly conformed to the *nomoi*, rather than integrating the people's decisions with new enactments. Thus, the *Gerousia* played the role of a judicial-review body that in Classical Athens was performed by the law courts. Athenian law courts democratically scrutinized the legality of Assembly decrees through the γραφή παρανόμων, which could be brought by any Athenian citizen (ὁ βουλόμενος). By contrast, in Sparta the same institutional task was performed by a restricted body according to different procedures but addressing the same need to conform to the laws.

In order to be performed, this *nomophylakia* did not require the unanimity of the Elders, who rejected the *rhetra* of Agis with a vote by simple majority. The different voting procedure adopted by the *Gerousia* at the two different stages reflects the different roles it was called to perform—in one case *probouleusis*, in the other *nomophylakia*. Through its use of majority vote in the veto procedure, the Council of Elders was able to render invalid a decision of the δᾶμος, which voted by acclamation, because of their higher status in the community in terms of the institutional knowledge, values and prestige that the office of γέρον carried.<sup>90</sup> More remarkably, it is worth stressing that the *Gerousia* itself employed two different voting systems in performing *probouleusis* and *nomophylakia*, which had relevant implications for the nature of deliberation. The difference in the voting system not only is a matter of institutional technique but also was supported by strong connections with two distinct ideological approaches. When voting a draft to be sent for ratification to the Assembly, the *Gerousia* did not use majority rule but a unanimous vote, which was a deliberative mechanism favouring the creation of consensus within the political body, in this case the narrow gathering of the Elders. This consensus-based mechanism was typical of deliberative settings in the Greek world and tried to shape decision-making through the

<sup>90</sup> For the institutional values of the office of γέροντες, cf. p. 358 above.

inclusion, rather than the exclusion, of dissent.<sup>91</sup> By contrast, when the γέροντες acted as guardians of the laws, performing a legislative review over deliberation, they adopted the principle of majority rule. In this case, the task required by the decision-making procedure was different. When vetoing a decision of the δᾶμος, the γέροντες were checking the consistency of that decision with the traditional Spartan *nomos*. What was at stake was not a political decision and the creation of consensus but rather the safeguarding of the laws. Again, this is consistent with the practice of other Greek *poleis* in which legislative or judicial review is attested. In democratic Athens, most of the time, the Council and the Assembly passed their decrees with overwhelming consensus or unanimity, very rarely by a bare majority (for example, Thuc. 3.37.3–4 during the Mytilenean debate).<sup>92</sup> The law courts, however, when adjudicating the legality of decrees and laws through the γραφή παρανόμων and the γραφή νόμων μή ἐπιτήδειον θεῖναι voted by majority rule because of their distinct institutional task. Each voting procedure was thus designed to answer the distinctive ideological and institutional goals of *probouleusis* and *nomophylakia*.

In addition to this, it is important to underscore that the features of ‘divided power’ applied not only to *probouleusis* but also to the practice of *nomophylakia*, which was also shared between γέροντες and ephors. The νομοφύλακες, as we find them attested in other *poleis* and as their function is described by Aristotle, not only exercised control over deliberation but also supervised the application of the rule of law. While the *Gerousia* was in charge of supervising the legality of the debate in the Assembly, the ephors had the task of overseeing the observance of the laws by public officials as well as the individual behaviour of citizens according to the traditional custom. As the ancient evidence shows, like the Athenian νομοφύλακες during the Demetrian oligarchy, the ephors had broad powers over the other magistrates, who had to perform their duties according to the laws in order not to be subject to the severe sanctions of the five ephors.<sup>93</sup> Xenophon states that the ephors did not (as in other *poleis*) leave the elected magistrates to rule as they liked throughout the year (τοὺς αἰρεθέντας ἀεὶ ἄρχειν τὸ ἔτος) but immediately punished those who broke the laws (τινα αἰσθάνωνται παρανομούντά τι, εὐθύς παραχρήμα κολάζουσι), in the manner of tyrants and supervisors of athletic games (Xen. *Lac.* 8.4). Aristotle says that the ephors have the power to perform the εὐθυναί over the other magistrates (Arist. *Pol.* 1271a4–6). The kings themselves were supervised by the ephors during their military campaigns, and every month the kings and the ephors took an oath.<sup>94</sup> The kings swore to rule respecting the established *nomoi* (κειμένους νόμους βασιλεύσειν) and the ephors swore to preserve the kingship (Xen. *Lac.* 15.7).<sup>95</sup> The ancient sources therefore illustrate that both the power of *nomophylakia* and the power of *probouleusis*

<sup>91</sup> Cf. a list of forty-one epigraphical examples of voting figures in S.C. Todd, ‘The publication of voting figures in the ancient Greek world’, in B. Legras and G. Thür (edd.), *Symposion 2011: Études d’histoire du droit grec et hellénistique* (Paris, 7–10 September 2011) (Vienna, 2012), 33–48. Consensus was also used by boards of officials: cf. Thuc. 6.46.5–6.50.1; Plut. *Nic.* 14.3; *Alc.* 20.2–3 and see Harris (n. 24), 410. For consensus in Greek deliberative practice, see now M. Canevaro, ‘Majority rule vs consensus: the practice of deliberation in the Greek *poleis*’, in M. Canevaro, A. Erskine, B. Gray and J. Ober (edd.), *Ancient Greek History and the Contemporary Social Sciences* (Edinburgh, forthcoming).

<sup>92</sup> Cf. Canevaro (n. 91).

<sup>93</sup> Fröhlich (n. 40), 294–7: in democratic regimes, ὁ βουλόμενος could bring a charge against magistrates who were usually supervised by larger bodies, such as the Council or the Assembly. For the ephors as supervisors of magistrates, see Fröhlich (n. 40), 373–6.

<sup>94</sup> Harris (n. 24), 87.

<sup>95</sup> See Lipka (n. 3), 246; cf. Plut. *Cleom.* 9.2, who, reporting Aristotle, says that the ephors taking

were shared between the *Gerousia* and the ephors, who worked jointly in running the deliberative process as well as in preserving Spartan laws according to the ideology of the Spartan *politeia*. This conservative ideology required a permanent control of the elected magistrates regarding deliberation, which was strictly constrained within the limits of the traditional *nomoi*. Institutions and legal procedures were therefore shaped according to these ideological values, which, in the institutional sphere, favoured in practice the dominant role of the elite within the restricted group of Spartan citizens.

#### IV. CONCLUSION

To sum up: the analysis of ancient evidence concerning deliberative procedure in Sparta shows that a decision could go back to the *Gerousia* because of the permanent legal and political control of its officials over the δᾶμος, which regulated the decision-making interplay between *Gerousia*, ephors and Assembly. As in the rest of the Greek world, the Assembly in Sparta played an important role in deliberation, but the people's deliberation was strictly controlled by probouleutic officials. The *Gerousia* and the ephors shared the role of probouleutic bodies as well as that of νομοφύλακες within the Spartan decision-making process, according to the patterns of 'divided power'. As literary evidence from Plutarch demonstrates, the ephors had the power of initiating the legislative procedure, both in the *Gerousia* and in the Assembly, but a unanimous vote of the γέροντες was needed in order to submit a προβούλευμα to the δᾶμος for final ratification. The ephor could introduce a motion in the Assembly with no need of unanimity among the γέροντες, but in this case the procedure required the bill to be revised by the *Gerousia*, which could veto the motion with a majority vote by employing the power of *nomophylakia* granted by the Great *Rhetra*. The deliberative procedure therefore required a third passage in the Council of Elders, when there was a lack of consensus among the probouleutic bodies (or even within the *Gerousia* alone). The ideology of Spartan institutions granted the power to officials to shape decisions through *probouleusis* and *nomophylakia*, and the aim was to avoid innovation in legislation and institutional practice, as well as to maintain balance in the decision-making process, even if Spartan society was remarkably unequal even with its very narrow citizen body.<sup>96</sup> Such a decision-making process combines the need to gain popular consent with a strict control over legislation in accordance with conservative values and practices.<sup>97</sup>

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office told the citizens 'to shave their moustaches and to obey the laws' if they wanted to avoid their sanctions.

<sup>96</sup> For analysis of property and wealth in Sparta, see Hodkinson (n. 57).

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