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‘Popular Prosecution’ in Early Athenian Law: the Drakonian Roots of the Solonian Reform

Drakonian procedures and offences against the community

Among many legal historians it's a very common belief, mainly grounded on a famous passage of the (Aristotelian) Constitution of the Athenians¹, that the so called ‘public actions’, as opposed to those *δίκαί* that just the party concretely harmed is entitled to bring, date back to the Solonian reforms, that is back to the beginning of the sixth century B.C.²

1. *Ath. Pol.* 9.1: τρία ταῦτ' εἶναι τὰ δημοτικώτατα: ... ἔπειτα τὸ ἐξεῖναι τῷ βουλομένῳ τιμωρεῖν ὑπὲρ τῶν ἀδικουμένων. This source is always read together with *Plut. Sol.* 18.5: ἔτι μέντοι μᾶλλον οἰόμενος δεῖν ἐπαρκεῖν τῇ τῶν πολλῶν ἀσθενείᾳ, παντὶ λαβεῖν δίκην ὑπὲρ τοῦ κακῶς πεπονθότος ἔδωκε. καὶ γὰρ πληγέντος ἐτέρου καὶ βιασθέντος ἢ βλαβέντος ἐξῆν τῷ δυναμένῳ καὶ βουλομένῳ γράφεσθαι τὸν ἀδικοῦντα καὶ διώκειν, ὀρθῶς ἐθίζοντος τοῦ νομοθέτου τοὺς πολίτας ὥσπερ ἐνὸς μέρη σώματος συναισθάνεσθαι καὶ συναλγεῖν ἀλλήλοις. On these passages and on the beginnings of ‘Athenian voluntary prosecution’, see: Glotz (1904: 371 f.); Bonner and Smith (1938: 151 ff.); Ruschenbusch (1968: 48 ff.); Harrison (1971: 76 f.); MacDowell (1978: 53 f.); Rhodes (1981: 160); Osborne (1985); Fisher (1990: 123 f.); Todd (1993: 91 f., 100); Hunter (1994: 125 f.); Sealey (1994: 129 ff.); Christ (1998: 26 ff., 120 ff.); Rubinstein (2003); Ober (2005: 402); Gagarin (2006: 263); Rhodes (2006: 255). Rhodes has shown that behind Plutarch and Aristotle a common source lies; that this source had access to Solon's poems, given that both accounts partly are overlapping and partly are different; and that, since Aristotle quotes laws which are no longer in force and Plutarch quotes laws from numbered axones, it also had a direct access to Solonian laws: Rhodes (1981: 88, 118); see, moreover, MacDowell (1978: 31).

2. See, for instance, Todd (1993: 100); Sealey (1994: 127 ff.); Allen (2000: 39); Gagarin (2006: 263); Lanni (2006: 35); Wohl (2010: 117).

Apart from the problem concerning the real legal significance of the above-mentioned ‘procedural categories’³, such a belief is to some extent not incorrect. Yet, it certainly needs a deeper analysis and a more developed and detailed overall reconstruction. Thus, with a view of this main object, this article will deal with some pre-Solonian institutions that may be considered the actual historical roots – if not the direct and immediate antecedents – of the early and classical adversarial legal system. A system that, as it is well known, in Athens was persistently focused on two strongly democratic principles: ‘voluntary prosecution’ and ‘popular sovereignty in judicial jurisdiction’.

Many sources support the idea that – at least in the view shared by some fourth century Athenian writers – in the archaic πόλις, i.e. even before Drako, the Areopagus was not only an aristocratic Council vested with deliberative, executive and administrative powers, as the noun βουλή itself suggests, together with the Aristotelian⁴ statement ‘διώκει δὲ τὰ πλεῖστα καὶ τὰ μέγιστα τῶν ἐν τῇ πόλει’ (‘it administered the most numerous and the most relevant of the πόλις’ affairs’). Indeed, as a fundamental pillar of the ‘oligarchic’ constitution in force at least from Kylon to Solon⁵, the early aristocrat-

3. The main differences between civil and public procedures turn on the objective, on the interests protected and, accordingly, on the methods of prosecution. Nowadays, a civil action seeks to pursue redress by restitution or compensation, since the wrongdoer, once convicted, is not punished but only suffers so much harm as it is necessary to make the successful claimant to get a benefit or to avoid a loss; in contrast, the main goal pursued by criminal justice is to inflict a punishment intended to deterrence, retribution, incapacitation, rehabilitation. Civil cases, being disputes between individuals concerning legal duties and responsibilities they owe one another, are started by the individual who has suffered a harm for his own benefit only, so that bringing a civil action is never mandatory, but always dependent on the personal choice of the individual injured; criminal cases, on the contrary, are considered offences against the state or against the society as a whole and, accordingly, they are started in the name and on behalf of the state in order to punish the accused, rather than to restore the single individual involved (Geldart [1984: 146]; Hall [2012: 17 f., 25 ff.]). On this background, it is noteworthy that some legal systems apply rules providing an unfettered ‘prosecutorial discretion’ (this means that prosecutors enjoy full discretion whether to file a charge against a suspect, or not: Damaska [1981]), others involve ‘mandatory prosecution’ (that is the law imposes the duty to prosecute if the conviction, given the evidence, seems to be possible: Luparia [2002]); in others again, there is a criminal justice principle to the effect that any citizen has the right to bring criminal charges when a public interest is harmed (art. 125 Spanish Const.). Athenian legal system hardly seems to match such a modern antithesis: the Athenians created a very adversarial system based on voluntary prosecution, and characterized by the absence of a ‘governmental public prosecutor’ and of a ‘mandatory prosecution’.

4. Cf., on the problem concerning the authorship of *Ath. Pol.*, Rhodes (1981: 58 ff.).

5. *Ath. Pol.* 2.2, 4.1-2, 7.1, 8.2, 41.2; *Arist. Pol.* 1274b 15-18; von Fritz (1954: 77 ff.); Rhodes (1981: 84 ff.); Valdés Guía (2012: 322 f.).

ic βουλή was empowered to exercise 'judicial' and 'supervisory' functions (rather than 'censorial' ones, comparable to the Roman *cura morum*)⁶. Aristotle, together with Plutarch⁷, attests that the Areopagites were vested with the

6. Cf. Ostwald (1993: 143 f.); see, *contra*, Cawkwell (1988: 9 f.), who, on the grounds of *Ath. Pol.* 3.6, 8.4, Philochorus (FGrHist 328 F196), and Isokrates (above all Isok. 1.46), argues that «the Areopagus would seem to have had a sort of moral supervision of the state, a *cura morum* in Roman terms» (a similar opinion was earlier proposed by Bonner and Smith [1938: 97]; see, for a more recent account, O'Sullivan [2009: 78 ff.]). More exactly, I suppose that the nomophylactic function tended to control and to punish some offences (provided in laws, whether written or not) which even embraced immoral behaviors and disorderly conducts: yet, it hardly seems for men to be liable for anything other than for breaches of νόμοι. As regards this particular topic, we do have information on one matter: indeed, we know that Solon, by reforming a previous and more severe law enacted by Drako, gave the Areopagus jurisdiction over ἀργία (idleness) and introduced a γραφή (or, better, an action susceptible to be taken by anyone): cf. Diog. Laert. 1.55; Lex. Cantabr. 665.19-20; Anektd. Bekk. 310.3; Poll. 8.42; Plut. Sol. 17.2, 22.3; *Ath. Pol.* 8.5; Dem. 57.32; Isok. 1.44; see Lipsius [1905-15: 353 f.]; Bonner and Smith [1938: 133]; Wallace [1989: 62 ff.]; Sealey [1994: 128 f.]; de Bruyn [1995: 79 ff.]). In my opinion, this ancient law (already in its Drakonian formulation) was mainly aimed at preserving the family estate from ἀπορία (Isok. 1.44), i.e. from 'dissipation of substances', and the Solonian remedy was directed to provide protection in the particular interest of victims that the legislator himself clearly perceived as legally and/or physically prevented from initiating procedures autonomously, i.e., as for this case, the future heirs of the ἀργός. Differently, the goal pursued by this archaic νόμος, in Wallace's opinion, «was ... to protect against theft» (Wallace [1989: 63]), while, according to de Bruyn, «était de protéger la société contre les dangers de l'oisiveté et de la prodigalité, dont la conséquence inévitable était la pauvreté, qui elle-même conduisait au crime» (de Bruyn [1995: 80]). Both these ideas fail to consider the wrong at issue, that is ἀργία, as an offence against the family (qualifying it, on the contrary, as a 'societal crime', even if the sources do not prove such an inference), as well as they fail to focus on the legal problem consequently implied (overlooking that the immediate victims of this offence did not have any 'standing to sue').

7. See *Ath. Pol.* 3.6 (ἡ δὲ τῶν Ἀρεοπαγιτῶν βουλή τὴν μὲν τάξιν εἶχε τοῦ διατηρεῖν τοὺς νόμους, διώκει δὲ τὰ πλείστα καὶ τὰ μέγιστα τῶν ἐν τῇ πόλει, καὶ κολάζουσα καὶ ζημιοῦσα πάντας τοὺς ἀκοσμοῦντας κυρίως, ἡ γὰρ αἵρεσις τῶν ἀρχόντων ἀριστίνδην καὶ πλουτίνδην ἦν, ἐξ ὧν οἱ Ἀρεοπαγῖται καθίσταντο, διὸ καὶ μόνη τῶν ἀρχῶν αὕτη μεμένηκε διὰ βίου καὶ νῦν), and 8.4 (τὴν δὲ τῶν Ἀρεοπαγιτῶν ἔταξεν ἐπὶ τὸ νομοφυλακεῖν, ὥσπερ ὑπῆρχεν καὶ πρότερον ἐπίσκοπος οὖσα τῆς πολιτείας, καὶ τὰ τε ἄλλα τὰ πλείστα καὶ τὰ μέγιστα τῶν πολιτικῶν διετήρει, καὶ τοὺς ἀμαρτάνοντας ἡθύενεν κυρία οὖσα καὶ ζημιοῦν καὶ κολάζειν). On the link existing between the Solonian and the pre-Solonian Areopagus, cf. de Bruyn (1995: 20, nt. 11): «nous pensons ... que l'idée prônée par Aristote d'une continuité entre l'Aréopage antésolonien et solonien, même si elle ne s'appuie sur aucun document, est raisonnable dans la mesure où elle s'inscrit dans la vision d'un développement continu des institutions athénienne depuis l'origine de la πόλις» (*contra*, cf. Wallace [1989: 39 ff.], who maintains that the account of the pre-solonian Areopagite regime is retrojected from what Aristotle knew or believed about the Solonian Areopagus). For the Areopagus was composed by archons chosen 'by distinction and by wealth'



τάξις (the institutional task) of διατηρεῖν τοὺς νόμους (watching over the νόμοι), and their Council acted in the quality of ἐπίσκοπος of the πολιτεία (supervisor of the constitution) before and under Solon's archonship, as well as of φύλαξ τῶν νόμων (guardian of the 'nomic system') according to the terminology used in the (spurious) Drakonian constitution⁸. What is more, the pre-Drakonian Areopagites, administrating the πόλις with regard

(*Ath. Pol.* 3.6; cf. *Plut. Sol.* 19.1), and for this Council was considered the oldest and most venerable political board in Athens, it's reasonable to believe that, even before Solon, the Areopagus had wide, if not even undefined, powers which are elsewhere described in terms of 'guardianship of the laws' (cf., as for the Solonian Areopagus, *Ath. Pol.* 8.4; *Plut. Sol.* 19.2; with regard to the so-called Drakonian constitution, cf. *Ath. Pol.* 4.4; finally, as for the period after the Persian wars, cf. *Ath. Pol.* 25.2), and which very likely included 'jurisdiction over crimes against the πόλις' (cf. Rhodes [1979: 104 f.]; Ostwald [1985: 7 f.]). Accordingly, nothing in *Ath. Pol.* 3.6 seems to allow, as for the πρώτη πολιτεία, a distinction between a 'constitutional function of overseeing and protecting the laws' and 'a *de facto* governmental power' (cf., *contra*, Wallace [1989: 40]). For debate on the original Areopagite powers and their restriction, see: Bonner and Smith (1938: 88 ff., 145, 163, 255 ff., 326 ff., 362); Harrison (1971: 36 ff.); MacDowell (1978: 114 ff.); Gagarin (1981a: 60, 111 ff.); Ostwald (1985: 7 ff., 28 ff., 41 f., 66 f., 70 ff.); Thür (1991). Cf., on the contrary, Wallace (1989: 3 ff.), supporting the view that, before Solon, the Areopagus just heard homicide cases (yet, «on voit difficilement pourquoi Solon aurait subitement transformé un simple tribunal pour cause d'homicide en un Conseil aux attributions étendues»: de Bruyn [1995: 20, nt. 11]); moreover, the scholar assumes that *Ath. Pol.* 3.6 is «based on *a priori* conceptions of the nature of Solon's reforms, and virtually isolated in its claim that before Solon the Areopagos had broad judicial or managerial powers». These statements cannot be shared: the Kylonian affair and the Solonian amnesty law, as well as Plutarch and Isokrates, prove the opposite; the extraordinary importance attached to the Prytaneion (qualified as an aristocratic body vested with political powers and advisory roles) rests ultimately on some personal (and open to criticisms) inferences from the Solonian amnesty law (cf., *infra*, ntt. 12, 17).

8. *Ath. Pol.* 4.4: ἡ δὲ βουλὴ ἢ ἐξ Ἀρείου πάγου φύλαξ ἦν τῶν νόμων καὶ διετῆρει τὰς ἀρχάς, ὅπως κατὰ τοὺς νόμους ἄρχωσιν. de Bruyn (1995: 86, nt. 360), following Bonner and Smith (1938: 262), and Wade-Gery (1958: 131 f.), believes that 'ἐπίσκοπος of the constitution' and 'φύλαξ of the laws' are not interchangeable phrases, since the former would concern jurisdiction over crimes against the city, while the latter would be only related to the control over the magistrates (cf. Daverio Rocchi [2001: 334 f.]; Berti [2012: 73]). Yet, out of *Ath. Pol.* 8.4 (τὴν δὲ τῶν Ἀρεοπαγιτῶν ἔταξεν ἐπὶ τὸ νομοφυλακεῖν, ὥσπερ ὑπῆρχεν καὶ πρότερον ἐπίσκοπος οὖσα τῆς πολιτείας), one can argue against her assumption (see Cawkwell [1988]; Wallace [1989: 42]; Poddighe [2014: 331 ff.], with further bibliography). We could accordingly suppose that, in its strictest sense, the Areopagite νομοφυλακία consisted in protecting and watching over (διατηρεῖν) all those rules and principles (νόμοι) that granted public order, peace, and constitutional stability (πολιτεία), as well as in judging, fining, and punishing those who violated such rules and principles (ἄκοσμοῦντες; on the equation 'ἄκοσμοῦντες = offenders of the established order', see *Dem.* 24.9; cf. *Isok.* 7.37, 39, 46); cf. Banfi (2012: 52), who uses the phrase «controllo di legalità». Further, see, *infra*, nt. 10.

to the most copious and the most important issues, passed final judgments and decisions (κυρίως), inflicting both bodily punishments and monetary fines⁹ to all the ἀκοσμοῦντες tried before them (i.e. all those Athenians who infringed the ‘established order’, whether they were magistrates or not)¹⁰.

9. The two participles κολαζοῦσα and ζημιοῦσα (*Ath. Pol.* 3.6), that – in my opinion – explain both ‘διώκει δὲ τὰ πλείστα καὶ τὰ μέγιστα τῶν ἐν τῇ πόλει’ and ‘τὴν μὲν τάξιν εἶχε τοῦ διατηρεῖν τοὺς νόμους’, corroborate the idea that the Areopagus originally had an undifferentiated, indistinct and extremely broad power that merged several functions. In other words, the Areopagus’ political management was not confined to a particular and specified sphere of competence, as well as ‘punishing’ and ‘inflicting fines’ were not limited to the judicial sphere. ‘Punishing’ and ‘inflicting fines’ (on the grounds of political and judicial powers) are mentioned as mere examples, although Aristotle evidently conceived of the Areopagite activity of combating offences against the established order as the most important form of ‘administration’ of the archaic city: cf. Rhodes (1981: 108); Wallace (1989: 40); Ostwald (1993: 144). *Ath. Pol.* 23.1 and 25.1-2 give support to this interpretation: in these passages, indeed, the Areopagite hegemony, obtained after the Persian wars not by decree (οὐδενὶ δόγματι), but *de facto* (cf. Ryan [1999]; Berti [2003]), is considered as a ‘renewal’ of an ancestral strength of the Council (πάλιν ἴσχυσεν). Yet, as for the pre-Drakonian city, the Areopagites were *de iure* granted with deliberative, political, supervisory and judicial functions (as the terms used by Aristotle at *Ath. Pol.* 3.6 clearly suggest). Likewise, the phrase ‘κυρία οὔσα καὶ ζημιοῦν καὶ κολάζειν’ (*Ath. Pol.* 8.4) appears to be related to the Areopagite function of ‘νομοφυλακία’ (assimilated to the quality of ἐπίσκοπος τῆς πολιτείας) and, at the same time, to activities of ‘political management’ (exemplified with ‘the control over magistrates’: cf. Ostwald [1985: 12 f., 40 ff., 518]; de Bruyn [1995: 68 ff.]). The Areopagus could give ‘final decisions’ in both judicial and non-judicial contexts, so that punishments and fines could be provided either in ‘binding judgments’, or in ‘authoritative political orders’.

10. All this implies a general Areopagite jurisdiction extended over all forms of ‘infringement of the existing order’ perpetrated by anyone. *Ergo*, one can assume, on the one hand (μὲν), that the Areopagus had the task of ‘overseeing the laws’ (upstream); on the other hand (δέ), that its deliberative, governmental and judicial powers were concretely directed to pursue its main institutional aim (downstream). Moreover, even if the task of ‘overseeing the laws’ does not consist in ‘watching over the magistrates’ only (as Bonner and Smith [1938: 262], as well as de Bruyn [1995: 86, nt. 360], seem to believe), other sources permit to include in the former phrase, in its broad sense, the latter (cf. Andok. 1.83-84; FGrHist 328 F64): cf., on the link existing between ‘overseeing the laws’ and ‘watching over the magistrates’, Cawkwell (1988: 3); O’Neil (1995: 20); O’Sullivan (2001: 52 ff.); Bearzot (2012: 29 ff.). Accordingly, it is true that one can suppose that among the ἀκοσμοῦντες tried before the Areopagus (*Ath. Pol.* 3.6) there could be even those magistrates who infringed the established order. Yet, *Ath. Pol.* 4.4 (that, although characterized by a more recent terminology, could really describe authentic Areopagite functions: de Bruyn [1995: 70]) seems to give further support to an opposite idea. Here Aristotle – with regard to the so called ‘constitution of Drako’ (Rhodes [1981: 84 ff.]; Wallace [1993]) – states, on the one hand, that the Areopagus was ‘the guardian of the laws’ (as it will be under Solon [*Ath. Pol.* 8.4], and as it had been before Drako [*Ath. Pol.* 3.6]); on the other hand, that it ‘διετήρει τὰς ἀρχάς, ὅπως κατὰ τοὺς νόμους ἄρχωσιν’

Once ruled out the opinion that the Areopagus was a Solonian creation only¹¹, as well as the view that, even before Solon, it heard private cases of φόνος (ἐκ προνοίας)¹², it is easy to admit that this Council was principally a court whose 'jurisdiction' over criminal cases was only recognized, and not introduced *ex novo* by Solon. The latter, indeed, just reconfirmed the Athenian aristocratic body in its previous capacity, and better specified and increased its powers in the 'public sphere'¹³. Thus, in seventh century Athens, cases affecting 'the community as a whole'¹⁴ were tried before the Areopagites sitting as 'guardians of the laws'; they were members of a Council that, representing the ruling elite, turned out to be the most proper body for taking any 'public action'. This view does gain support from several ancient sources.

(i.e. 'it controlled that the magistrates exercised their terms according to the laws' and 'it punished those who, acting in their official capacity, did not abide by the laws'; cf. *Ath. Pol.* 8.1-2, as far as the Areopagite choice of the magistrates is concerned). As regards the infringements committed by magistrates during their term of office, anyway, Aristotle points out that the aggrieved party only had the right to initiate the procedure before the court by denouncing the law under which he was wronged (ἐξῆν δὲ τῷ ἀδικουμένῳ πρὸς τὴν τῶν Ἀρεοπαγιτῶν βουλήν εισαγγέλλειν, ἀποφαίνοντι παρ' ὃν ἀδικεῖται νόμον). This rule concerning the so called 'standing to sue' could prove a substantial difference between the function of 'watching over the νόμοι' and 'watching over the ἀρχαί', since the former is related to a public interest (that is to an interest of the whole πολιτεία), the latter to a private one (that is an interest of a single ἀδικούμενος). Moreover, since this control over the magistrates is directed to punish wrongs already committed against individuals (as one can infer from the dative τῷ ἀδικουμένῳ) and to prevent further violations of the law (as one can infer from the sentence 'ὅπως κατὰ τοὺς νόμους ἄρχωσιν'), it is clear that Drako – at least in accordance with the version included in *Ath. Pol.* 4.4 – neither deals with the legal procedure directed to check the conduct of 'outgoing magistrates' (cf. *Arist. Pol.* 1274a 15-18, 1218b 32-34 with Poddighe [2014: 195 ff.]), nor qualifies εισαγγελία in terms of public procedure against 'societal offences' (cf., *infra*, nt. 68).

11. Cf. *Plut. Sol.* 19.3; *Poll.* 8.125; *Cic. Off.* 1.22. Cf., *infra*, Appendix 1 (α).

12. This view finds, at first, strong corroboration in *Plut. Sol.* 19.2 (οἱ μὲν οὖν πλείστοι τὴν ἐξ Ἀρείου πάγου βουλήν, ὥσπερ εἴρηται, Σόλωνα συστήσασθαι φασί· καὶ μαρτυρεῖν αὐτοῖς δοκεῖ μάλιστα τὸ μηδαμοῦ τὸν Δράκοντα λέγειν μηδ' ὀνομάζειν Ἀρεοπαγίτας, ἀλλὰ τοῖς ἐφέταις ἀεὶ διαλέγεσθαι περὶ τῶν φονικῶν), and in *Poll.* 8.125 (ἐφέται τὸν μὲν ἀριθμὸν εἰς καὶ πεντήκοντα, Δράκων δ' αὐτοὺς κατέστησεν ἀριστίνδην αἵρεθέντας· ἐδίκαζον δὲ τοῖς ἐφ' αἵματι διωκομένοις ἐν τοῖς πέντε δικαστηρίοις. Σόλων δ' αὐτοῖς προσκατέστησε τὴν ἐξ Ἀρείου πάγου βουλήν): accordingly, from Drako to Solon the board of the ephetai was the only court that heard homicide cases (see, further, *Phot. Lex.* s.v. ἐφέται). Moreover, *e silentio*, such a reconstruction, confirmed by IG I² 115 = IG I³ 104, seems to be further supported by Aristotle who, in *Ath. Pol.*, never mentions, with regard to the Areopagus, any pre-Solonian jurisdiction over φόνος. On this topic, see further, *infra*, nt. 17 and Appendix 1 (β).

13. See, for instance, Bonner and Smith (1938: 88, 97); MacDowell (1978: 28); Rhodes (1979: 104); Ostwald (1985: 7); de Bruyn (1995: 21 ff.). Cf., *infra*, Appendix 3.

14. See Cohen (2005: 215).

At first, according to a common opinion, in a period characterized by strife between the classes as well as by intra-elite conflicts, Kylon attempted to set up a tyranny and, with the help of eupatrid supporters, seized the Akropolis. The ruling magistrates together with the Alkmenonid Megakles played a substantial role in the Kylonian affair, for they were responsible for the final submission of the conspirators. Indeed, if Kylon escaped the siege and fled Athens, his supporters were impiously killed: as a matter of fact, they remained as suppliants in the temple on the Akropolis; thence, they were persuaded to rise up from the altar of the goddess by the false promise either that they would not be killed or that they would stand a fair and just trial¹⁵. Thus, at least on the grounds of the latter version of the promise made to the Kylon’s followers, it is worth noting that these testimonia – if read carefully – may suggest the existence, even during the pre-Drakonian period, of a procedure before the Areopagus against the public offence of ‘attempted tyranny’, if not against a wider and vaguer range of offences essentially identified with infringements of societal interests. This is explicitly attested in a *scholium vetus* to Aristophanes and implied in Plutarch’s account and in his reference to the shrine of the Erinyes (where the Areopagites used to meet)¹⁶.

Secondly, the text of the ‘Solonian amnesty θεσμός’ – as it is found in Plutarch – shows, as far as its exceptions are concerned, that, even after it was passed, those Athenians who, before Solon’s archonship, had been substantially rather than formally sentenced to exile for attempting to establish a tyranny, had to remain beyond the Attic frontiers, in order to avoid any possibility of immediate execution. If the ‘chiastic’ interpretation of this early rule is correct (as I am persuaded)¹⁷, from the source at issue we can infer

15. The main sources on the conspiracy at issue are Hdt. 5.71; Thuk. 1.126.3-12; Plut. Sol. 12.1-9; Paus. 1.28.1, 7.25.3; schol. Ar. Eq. 445; for the date, cf. Rhodes (1981: 81 f.). Herodotus and Thukydides attest the former version of the assurance, Plutarch the latter.

16. Schol. Ar. Eq. 445: οἱ συγκατακλεισθέντες τῷ Κύλῳ ἐν τῇ ἀκροπόλει εἰς τὴν κρίσιν κατέβησαν ἐν Ἀρείῳ πάγῳ. Such a criminal jurisdiction, indeed, cannot be denied by assuming – as Wallace (1989: 24 f.) does – that Plutarch (together with Thukydides) does not mention in his account any kind of Areopagite trial (Plut. Sol. 12.1: τοὺς συνωμότας τοῦ Κύλωνος ἰκετεύοντας τὴν θεὸν Μεγακλῆς ὁ ἄρχων ἐπὶ δίκῃ κατελθεῖν ἔπεισεν). Indeed, the reference to the shrine of the Erinyes (where the Areopagites used to meet) as the place which the Kylonians reached to stand the trial that Megakles had promised, can be interpreted as a subtle attestation of the Areopagus as a criminal court (... ὡς ἐγένοντο περὶ τὰς σεμνὰς θεὰς καταβαίνοντες, αὐτομάτως τῆς κρόκης ῥαγείσης, ὥρμησε συλλαμβάνειν ὁ Μεγακλῆς καὶ οἱ συνάρχοντες).

17. Plut. Sol. 19.3-4: ὁ δὲ τρισκαιδέκατος ἄξων τοῦ Σόλωνος τὸν ὀγδοὺν ἔχει τῶν νόμων οὕτως αὐτοῖς ὀνόμασι γεγραμμένον. ‘ἀτίμων ὅσοι ἄτιμοι ἦσαν πρὶν ἢ Σόλωνα ἄρξαι, ἐπιτίμους εἶναι πλὴν ὅσοι ἐξ Ἀρείου πάγου ἢ ὅσοι ἐκ τῶν ἐφετῶν ἢ ἐκ πρυτανείου καταδικασθέντες ὑπὸ τῶν βασιλέων ἐπὶ φόνῳ ἢ σφαγαῖσιν ἢ ἐπὶ τυραννίδι ἔφευγον ὅτε

that, once tried before the Areopagus and once found guilty, those who had committed the offence of ‘attempted tyranny’ had been formally declared ἄτιμοι, i.e. ‘outlawed’¹⁸. Thus, although a trial and a declaratory judgment are not necessary requirements¹⁹, the incontrovertible final decision given by the Areopagite court, in the event that the ἄτιμος’ relatives bring a legal action for murder, represents an insuperable defense for the killer pleading not guilty (since the killing of him who has been declared ἄτιμος, being lawful, does not meet all the elements of the offence of φόνος)²⁰.

Thirdly, one has to focus on a very well-known law reproducing the provisions included in some ancestral θέσμια and being still in force under Peisistratus. Such archaic rules, certainly antedating Solon and, in my opinion, even prior to Drako’s θεσμοί, stipulated the negative penalty of ἀτιμία (in its strongest and earliest meaning) against those who had attempted to set up a tyranny or those who had aided in establishing a tyrant²¹. In other

ὁ θεσμός ἐφάνη ὅδε’. See, for the genuineness of the text and for the ‘chiastic’ interpretation of the law (which rejects the old view that the courts and their jurisdiction are given in parallel order and which, consequently, ascribes the jurisdiction over tyranny to the Areopagus only), Ruschenbusch (1960: 132 ff.); Ruschenbusch (1966: 7); Gagarin (1981a: 128); de Bruyn (1995: 24 ff.); Pepe (2012: 50 ff.). Cf., *infra*, Appendix 1 (γ).

18. It is commonly accepted that, before Solon, ἀτιμία was equivalent to ‘outlawry’ and not to ‘loss of citizen-rights’: cf., paradigmatically, Swoboda (1905), who further believes that in Solon’s time ἀτιμία had already evolved to *Rechtlosigkeit*; *contra*, see, among others, Gagarin (1981a: 118 ff.), who, out of Plut. *Sol.* 19.4 (Solonian amnesty law), assumes that it is reasonable to suppose that ἀτιμία retained its strongest force under Solon; moreover, see Carawan (1993: 310 f.), who, mainly on the grounds of *Ath. Pol.* 8.5 (Solonian law against neutrality), maintains that «evidently ἀτιμία still carried much of its ancient meaning – public dishonor inviting reprisal and denial of rights and legal protections –, yet Solon somehow redefined the rules of self-help and ‘justifiable homicide’ in such a way as to alter profoundly the practical consequences of ἀτιμία». On this matter, see, *infra*, nt. 25.

19. *Contra*, see Ostwald (1955), who appears to suppose that, originally, the sentence of outlawry had (always) to be imposed by verdict of the Areopagus.

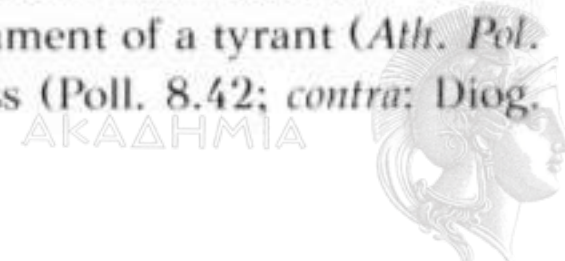
20. Cf., on this possibility, Hansen (1976: 58).

21. *Ath. Pol.* 16.10: ἦσαν δὲ καὶ τοῖς Ἀθηναίοις οἱ περὶ τῶν τυράννων νόμοι πρᾶτοι κατ’ ἐκείνους τοὺς καιρούς, οἳ τ’ ἄλλοι καὶ δὴ καὶ ὁ μάλιστα καθήκων πρὸς τὴν τῆς τυραννίδος κατάστασιν, νόμος γὰρ αὐτοῖς ἦν ὅδε, ‘θέσμια τάδε Ἀθηναίων καὶ πάτρια: ἐάν τινες τυραννεῖν ἐπανιστῶνται [ἐπὶ τυραννίδι] ἢ συγκαθιστῇ τὴν τυραννίδα, ἄτιμον εἶναι καὶ αὐτὸν καὶ γένος’. The anti-tyranny law (for the text, as far as the pleonasm and the shift from the plural to the singular are concerned, see Ostwald [1955: 121, nt. 97]; Rhodes [1981: 221]) dates back, at least, to Solon (see Gagarin [1981b: 74]; Ostwald [1985: 8, nt. 19]; Forsdyke [2005: 83 f.]; Gagarin [2008: 116]). According to a different interpretation (see Ostwald [1955: 106 ff.]; Carawan [1993: 149 ff.]; Ryan [1994: 129]; Gallia [2004: 458 f.]), the law’s authorship must be instead assigned to Drako. Now, I am more inclined to agree with the first view, out of the following remarks. Indeed, even if some scholars

words, the θέσμια at issue provide that those who uncontestably act like public enemies lose any legal and social protection. If, on the one hand, the letter of the law implies that this negative status resulted as an automatic and immediate consequence of the commission of the wrong itself²², on the

maintain that the report found in *Ath. Pol.* 3.4 (θεσμοθέται ... ἀναγράφαντες τὰ θέσμια φυλάττωσι πρὸς τὴν τῶν ἀμφοισβητούντων κρίσιν) is historically groundless and assume that Aristotle was inferring the thesmothetai's duties only from their name since he had no further information about this magisterial board (Rhodes [1981: 102 f.]), it is my belief that: 1) in *Ath. Pol.* 3.4 the use of the very infrequent and uncommon word θέσμια (see Pelloso [2012b: 101, nt. 238]), instead of θεσμοί, may support the existence of a further source on these magistrates, used by Aristotle; 2) if the thesmothetai were instituted prior to Drako (*Ath. Pol.* 3.4; Thuk. 1.126.8) and, thence, prior to the first written Athenian legislation (*Ath. Pol.* 41.2), *a fortiori*, the θέσμια, considered in themselves and regardless of their contents, cannot be properly identified with ‘written laws’; 3) the θέσμια cited at *Ath. Pol.* 16.10 may reasonably precede Drako's θεσμοί (*contra*, Ostwald [1955: 106], who erroneously maintains that the written traditional ‘rules’ of *Ath. Pol.* 16.10 cannot precede Drako, since he wrote the first laws); 4) the original terms of such previous θέσμια could not be included into Drako's law-code (as Gallia [2004: 459, nt. 38] believes), since, on the one hand, ancient sources do not attest any autonomous Drakonian anti-tyranny law (as, on the contrary, one would expect: see, for the multiplicity of Drakonian laws, Stroud [1968: 80], and, *contra*, Ruschenbusch [1968: 33], who suggests that Drako wrote no other fundamental law outside of the homicide code), and, on the other hand, once considered the anti-tyranny law as a part of the homicide discipline (Ostwald [1955: 108]), such rules would not have needed to be reenacted (as, on the contrary, it actually happened); 5) it's likely to believe that Solon first incorporated the traditional anti-tyranny θέσμια (of which *Ath. Pol.* 16.10 attests just one among many rules) in a new, wider, and more detailed law (see, for instance, *Ath. Pol.* 8.4, where it is attested that the Areopagus ‘καὶ τοὺς ἐπὶ καταλύσει τοῦ δήμου συνισταμένους ἔκρινεν, Σόλωνος θέντος νόμον εἰσαγγελίας περὶ αὐτῶν’), perhaps after drawing up its legal *corpus*, when the conspiracy against the political order in force was becoming more and more evident and dangerous; 6) the Aristotelian qualification of this law as ‘mild’ does not mean that a Drakonian regulation on tyranny, superseded by Solon's legislation, was reenacted by the enemies of the Peisistratids, about eighty years after Solon, thus replacing the less severe Solonian law (see, on this topic, Ostwald [1955: 109]); indeed, Aristotle «misunderstands the force of its penalty of outlawry ... assuming that it means disenfranchisement (as it did in his own time), not exile (as was the archaic meaning of the word)»: cf. Forsdyke (2005: 266), who further confuses the legal concept involving ‘outlawry’ as a sanction with the common practice consisting in exile. However, the (Solonian) law found in *Ath. Pol.* 16.10 was probably never abrogated and may perhaps have been just reaffirmed – once fallen into disuse – either when Hippias was expelled (about 510 B.C.), or at the time of Ephialtes, if not at the end of the fifth century: see Ostwald (1955: 108); Rhodes (1981: 223).

22. See Paoli (1930: 310 ff.); Ruschenbusch (1968: 16 ff.); Harrison (1971: 169 ff.); Hansen (1976: 54 ff.); MacDowell (1978: 73 ff.). In the archaic πόλις automatic ἀτιμία is clearly attested as a penalty for four offences: changing Drako's homicide law (*Dem.* 23.62); attempting to set up a tyranny or aiding in the establishment of a tyrant (*Ath. Pol.* 16.10); remaining neutral in civil strife (*Ath. Pol.* 8.5); idleness (*Poll.* 8.42; *contra*: *Diog.*



other hand, the Kylonian affair and the Solonian amnesty law attest, at the same time, that a non-obligatory trial – merely resulting in a declaration – could anyhow take place. Accordingly, if the *θέσμια* cited by Aristotle are imagined – rather than as *θεσμοί* (i.e. ‘general written rules’ enacted by a human legislator) – as ‘legal maxims’ or ‘judicial principles’ drawn by the magisterial board of the *thesmothetai* from previous judgments for future trials²³, one could suppose that in the archaic *πόλις* a straightforward link existed between these ancient authorities (that in later times retained jurisdiction over most public actions), on the one side, and the Areopagus as the primitive Athenian court endowed with a judicial power on cases concerning the community as a whole, on the other side.

To tell the truth, our sources do not provide any precise indication concerning the exact procedure that, in the late seventh century, one was to follow in order to submit the case to the Areopagus, in the event that an offence affecting the community as a whole had been committed. It can only be guessed that the aristocratic Council, both as a criminal court and as a body that had the general task of supervising the laws²⁴, *de facto* acted on the basis of information laid by one of its members, by one of the ruling magistrates, or by one of the private citizens. Furthermore, as we have already seen, it is plausible to suppose that it acted in combination with the board of the *thesmothetai* in enforcing its authority by the formulation of judgments and the application of penalties. Obviously, apart from the problems relating to the actual sources of information which stood at the basis of the Areopagite criminal trials and the initiative in bringing a public matter before such a court, no detailed mention of the existence of an authentic ‘lay voluntary prosecution’ occurs. Indeed, we do not know whether the information was conceived of as the act whereby the procedure had to start (that is an ‘oral

Laert. 1.55; Plut. *Sol.* 17.2). Furthermore, *ἀτιμία* resulted also from *φόνος*, as Solon’s amnesty law shows (Plut. *Sol.* 19.4): those who were subject to *ἀτιμία* for a homicide and, when the law was enacted, were still abroad (either as voluntary exiles or as sentenced ones), were not covered by the amnesty. Forsdyke (2005: 11, 83) confuses legal categories (such as *ἀτιμία*) and *de facto* measures (such as exile), which undermines, at least from a strictly legal perspective, for the most part, her argumentations.

23. Here – just as concerns this particular topic – I partially follow Gagarin (2008: 115): «in the classical period the *thesmothetai* were closely associated with the law courts. If they had a judicial role from the beginning, they may have been writing down established practices and procedures, not for publication but just to keep them for use in the future. If so, the *thesmothetai* were not writing legislation, but something like notes for their own use» (see, moreover, Gagarin [1981b: 71]; Gagarin [1986: 56]; Sickinger [1999: 10 ff.]; Pelloso [2012b: 101 and nt. 238]; anyway, against the view that law was originally built up by judgments, see Pelloso [2013]).

24. *Ath. Pol.* 3.6: see, *supra*, nt. 7.

indictment'), or it was just the act which could give occasion to a legal action before the Areopagite court (according to the principle of discretionary prosecution). Furthermore it is not clear whether the role of the accuser was played by the informant, or by one of the magistrates, or even by a member of the Areopagus itself.

Dem. 23.28 and the Drakonian ἀπαγωγή: some recent interpretations

Out of the remarks included in the previous paragraph, can one assume that the archaic πόλις did not know at all the institution of voluntary prosecution? I do not think so. Some testimonia – often underestimated at least regarding this topic – might give support to the thesis that even in pre-Solonian times, if the community as a whole was offended, 'anyone who wished' was allowed to take a legal action, on behalf of the whole citizen group, against the public offender.

According to two provisions usually included in the Drakonian homicide θεσμός, on the one hand, 'if someone directly kills the killer or if someone causes the killer's death, when the latter abides by the terms of exile remaining abroad and avoiding border markets, athletic contests, Amphictyonic sacrifices, the former is subject to the same treatments as the murderer of an Athenian citizen, and the ephetai are to give judgment' (ll. 26-29)²⁵.

25. Dem. 23.37: ἐὰν δέ τις τὸν ἀνδροφόνον κτείνῃ ἢ αἵτιος ᾗ φόνου, ἀπεχόμενον ἀγορᾶς ἐφορίας καὶ ἁθλῶν καὶ ἱερῶν Ἀμφικτυονικῶν, ὥσπερ τὸν Ἀθηναῖον κτείναντα, ἐν τοῖς αὐτοῖς ἐνέχεσθαι, διαγιγνώσκειν δὲ τοὺς ἐφέτας. On the meaning of αἵτιος φόνου, cf. Pelloso (2012a: 196, nt. 25), who assumes that the phrase, considered *per se*, just means 'he who brings about another person's death'; *contra*, see Pepe (2012: 42 f.), who suggests that this legal term always implies πρόνοια. Yet, regardless of the problem related to the general meaning of αἵτιος φόνου, on the basis of the context – i.e. the so called laws of the Areopagus – one can infer that the law providing protection for the exiled murderer who abides by the terms of the banishment concerns intentional homicide (cf. Gagarin [1981a: 60]; Carawan [1998: 42 f.]; Pepe [2012: 46]). Cf., for the authenticity of this rule, MacDowell (1963: 118); Stroud (1968: 53 f.); Gagarin (1981a: 58 ff.); Carawan (1998: 104); *contra*, in Ruschenbusch's opinion, Dem. 23.72 is a very Drakonian law, while the other protections, as mentioned at Dem. 23.37 and Dem. 23.44, extended and elaborated this rule (Ruschenbusch [1960: 140]); Maschke (1926: 89), persuaded that the original word for indirect agency was βουλεύσας, later replaced by αἵτιος, believes that Dem. 23.37 represents a late interpolation in the law. This provision has recently been re-examined by Gagliardi (2012: 53 ff.). In his opinion: 1) «il brano potrebbe apparire in contrasto con la ricostruzione del ruolo degli efeti come giudici per i soli φόνοι μὴ ἐκ προνοίας e ἀκούσιος (...). Infatti, secondo unanime dottrina (...) la fattispecie in esame in concreto avrebbe più frequentemente integrato casi di omicidio premeditato»; 2) yet, «occorre ricordare che (...) gli efeti giudicavano non solo i casi di omicidio non premeditato e involontario ai danni di cittadini ateniesi, ma giudicavano anche nei processi per tutti gli omicidi di stranieri.

On the other hand, 'if the ἀνδροφόνος finds himself in Attika, it is lawful

di meteci e di schiavi»; 3) if it is true that «l'uccisore dell'esiliato soggiaceva alle stesse norme cui sarebbe stato sottoposto 'se avesse ucciso un Ateniese'», this implies that «l'esiliato in questione, benché originariamente cittadino di Atene, a seguito della condanna all'esilio da lui subita non era più considerato ateniese», and «in assenza della norma *de qua* al suo uccisore si sarebbero applicate norme diverse da quelle che si applicavano agli uccisori di cittadini ateniesi». This argumentation does not persuade me: it is indeed my firm belief that the Drakonian rule at issue shows that in pre-Solonian Athens the Areopagus did not hear any case of φόνος ἐκ προνοίας (Pelloso [2012a]), such as many other testimonia do: the *silentium* in *Ath. Pol.* (which attests that Aristotle found no historical grounds for the tradition of early homicide cases tried before the Areopagus); the chiasmic interpretation of the Solonian amnesty law (which rules out the Areopagite competence in homicide cases); the incipit of the Drakonian homicide law, i.e. 'even if' (which ascribes to the ephetai full competence). At first, as Gagarin (1981a: 40) points out, the phrase 'ἐν τοῖς αὐτοῖς ἐνέχεσθαι' cited at Dem. 23.37 seems to indicate that the treatment is the same in all respects (i.e. with regard to the type of prosecution, as well as to the penalty). Secondly, the comparison between the 'exiled killer' and the 'Athenian' neither implies that the former is a normal 'foreigner', nor that, without the enactment of this rule, the intentional killer of the exiled killer, similarly to the intentional killer of the foreigner, would have been subjected to a milder punishment than death. On the contrary, such a comparison may have the following meaning: he who ἐκ προνοίας brings about the φόνος of an exiled killer abroad can be sued through an ordinary δίκη and sentenced to death by the ephetai, even if the 'exiled killer' is an ἄτιμος and, out of previous customary rules, he does not enjoy all the rights and all the privileges of an Athenian citizen (Tulin [1996: 39 ff.]; Forsdyke [2005: 10, nt. 25]; Pepe [2012: 69]). In other words, in the absence of the rule cited at Dem. 23.37, killing an exiled killer, like killing any other outlawed, would have been lawful: by introducing this rule, Drako seems to modify – even prior to Solon – the primeval discipline concerning ἄτιμία and to make it less severe, at least with regard to exiled murderers. Indeed, on the one hand, before Drako's legislation, neither legal recourse nor private actions against the killer of any ἄτιμος were allowed at all; accordingly, ἄτιμία was equivalent to 'full outlawry' and all ἄτιμοι were – without any exception – subject to self-help execution with impunity. On the other hand, after Drako's innovation, as the provisions preserved at Dem. 23.37-38 and at Dem. 23.28 (τοὺς δ' ἀνδροφόνους ἐξεῖναι ἀποκτείνειν ἐν τῇ ἡμεδαπῇ καὶ ἀπάγειν) demonstrate, 'licit self-help execution' (susceptible to escalate into killing) was exclusively limited to the apprehension of the ἄτιμος in Attika. In short, Drako innovatively parallels the murder of a condemned killer to the murder of an ἐπίτιμος Athenian, provided that the former is committed abroad; moreover, he mitigates, as far as 'ἄτιμοι killers found in Attika' are concerned, the primeval discipline, by stipulating the right to kill the killer alongside ἀπαγωγή. With Drako – and not with Solon – the concept of 'outlawry' starts to change its legal significance (cf. Harrison [1971, 169 ff.]; Hansen [1976: 54 ff., 77]; MacDowell [1978, 73 f.]; Vleminck [1981]; Carawan [1993: 310 ff.]; Forsdyke [2005: 10 f.]; all these authors, in my opinion, fail to remark this plausible Drakonian modification of the primeval concept of ἄτιμία). If all that is true, after Drako's legislation, he who is convicted of attempting to set up a tyranny and the condemned killer are not subject to the same remedy (*contra*, cf. Carawan [1993: 312]). The life and person of the former (cf. the pre-Drakonian θέσμις cited at *Ath. Pol.*

to put him to death on the spot (ἐξεῖναι ἀποκτείνειν)'; alternatively, the ἀνδροφόνος 'can be proceeded against by means of summary arrest' (ll. 30-31), and, consequently, by delivery to the proper authorities (that is the thesmothetai, the magistrates overseeing the arrest and the execution of any returning killer)²⁶. The latter rule shows a clear reference to the remedy of the ἀπαγωγή, which – as we can infer from another Drakonian provision paraphrased by Demosthenes – might, or might not, be preceded by a 'public denunciation' (ἐνδειξις)²⁷. Against this backdrop, the following describes

16.10, as well as the Solonian amnesty law cited at Plut. *Sol.* 19.4) is forfeited to his captor to do with as he wants, both in Attika and abroad (thus, the public offender can be held for ransom, maimed, put to death with impunity). On the contrary, the latter, if he does not trespass the prohibited areas, is granted with some basic rights, since he cannot be killed on the spot, or – *a fortiori* – maimed and hold for ransom (Dem. 23.37-8). Moreover, even in the event that he sets foot ἐν τῇ ἡμεδαπῇ, it is plausible to believe that 'ἐξεῖναι ἀποκτείνειν', only provided that the initiated ἀπαγωγή has not worked properly and, accordingly, has failed (Dem. 23.28): in other words, ὡς ἐν τῷ α ἄξονι ἀγορεύει, he who is incontrovertibly a killer, even in Attika, can only be either 'arrested' or 'killed' (while it is forbidden to hold him for ransom and to maim him to force him to pay: λυμαίνεσθαι δὲ μή, μηδὲ ἀποινᾶν).

26. Dem. 23.28: τοὺς δ' ἀνδροφόνους ἐξεῖναι ἀποκτείνειν καὶ ἀπάγειν, ὡς ἐν τῷ α ἄξονι ἀγορεύει, λυμαίνεσθαι δὲ μή, μηδὲ ἀποινᾶν, ἢ διπλοῦν ὀφείλειν ὅσον ἂν καταβλάψῃ, εἰσφέρειν δ' ἐς τοὺς ἄρχοντας, ὧν ἕκαστοι δικασταὶ εἰσι, τῷ βουλομένῳ, τὴν δ' ἡλιαίαν διαγιγνώσκειν. See MacDowell (1963: 119 ff.); Gagarin (1981a: 24 f., 60 f.); Gagarin (2008: 99); Pepe (2012: 10, nt. 6). Even if one admits that the provision for a trial before the ἡλιαία, as well as the formal mention of ὁ βουλόμενος, are anachronistic if attributed to Drako (yet, see, *infra*, nt. 70), once realized that only the first part of the law quoted in Dem. 23.28 fits the lines 30-31 of the epigraph (see Stroud [1968: 55, nt. 102]; Sickinger [1999: 19 f.]), the following prohibitions (λυμαίνεσθαι δὲ μή, μηδὲ ἀποινᾶν), in my opinion, do not need to be ascribed to Solon. They harmoniously fit the precedent rule (τοὺς δ' ἀνδροφόνους ἐξεῖναι ἀποκτείνειν καὶ ἀπάγειν) as a sort of clarification and specification (cf., *supra*, nt. 25), as well as they are perfectly coherent with some of the aims pursued by Drako's law: it was indeed directed to specify many details still not fixed in the traditional oral rules and, thence, to indicate, among other provisions, on the one hand, whether, when, and how a killer would be protected and, on the other hand, whether, when, and how the protection should cease. *Contra*, see Stroud (1968: 54 ff.), and Figueira (1993); on the later amendments, see Carawan (1998: 73, nt. 78, 90 f., 111, 150); more generally, cf. Gagarin (1981a: 23 ff.), and Canevaro (2013b: 48 ff.). See, moreover, Dem. 23.31: οἱ θεσμοθέται τοὺς ἐπὶ φόνῳ φεύγοντας κύριοι θανάτῳ ζημιῶσαι εἰσι.

27. Dem. 23.51: φόνου δὲ δίκας μὴ εἶναι μηδαμοῦ κατὰ τῶν τοὺς φεύγοντας ἐνδεικνόντων, ἐάν τις κατ'ἣν ὅποι μὴ ἔξεστιν. Hansen's interpretation (ἀπαγωγή and ἐνδειξις are two phases of the same type of process) is here accepted (Hansen [1976: 17, 24 f., 113 ff.]). See, as regards the link existing between these passages and Dem. 23.80, Lipsius (1905-15: 328); Harrison (1971: 17, 227); MacDowell (1978: 122, 140); Carawan (1998: 337 f.); Scafuro (2005).

two recent interpretations of the provisions at issue and presents their flaws, while the next paragraph provides a personal reconstruction of this matter.

A. Following Carawan's overall account, the double provision cited at Dem. 23.28 (both allowing self-help execution or summary arrest, and prohibiting to maim or hold for ransom) belongs to a table of statutes consisting in Solonian modifications with a clear cross-reference to the Draconian code²⁸. This provision is considered as part of a wider regulation concerning any 'exiled homicide' (regardless of intent)²⁹. The traditional remedy sanctioned for the victims' kinsmen in the original 'law of arrest' was strengthened by Drako through the introduction of a 'procedure by warrant and arrest'; afterwards, it was restricted by Solon by means of the so called 'law against torture and extortion'³⁰. Indeed, as early as the era of the Draconian homicide-code, any kinsman as well as any concerned citizen would have had the right to kill lawfully the ἀπαγόμενος resisting arrest, if the latter had been first identified as an 'exiled homicide' before the magistrates (Dem. 23.51)³¹. To be more precise, the scholar believes that the Draconian provision cited at Dem. 23.28 «was originally intended to apply to voluntary exiles who had not been formally tried; it would naturally apply also to accused killers who would neither avail themselves of exile nor come to terms with their accusers», while the Solonian amendment implies «that forcible arrest to the magistrate, carried out with potentially deadly force, would still be available against accused or suspected killers who did not seek refuge or legal resolution (so long as they were not subjected to abuse and ransom)»; in a similar fashion, in Carawan's opinion, the Draconian law referred to at Dem. 23.51 «originally applied to homicides who had not been tried and sentenced but were, in effect, automatic exiles»³². On the grounds of this

28. As for the law cited at § 28, «it is a later amendment giving what appears to be an accurate cross-reference to the original Draconian table»; «the provisions for prosecution by 'anyone willing' and trial before a court of the people show that this law is a product of Solon's reform. And the rule not to torture or hold for ransom is consistent with other restrictions on the plaintiffs' claims in the age of Solon. This law was framed as a safeguard against attempts by the plaintiffs to extort a higher settlement from an exiled homicide. By contrast, the earlier provision 'on the axon' to which this later statute refers, a provision allowing self-help execution or summary arrest of an exiled homicide who returns without settlement, is almost certainly an authentic Draconian law: it can be restored with reasonable confidence in the fragmentary inscription; the terminology is consistent and the practice itself entirely in keeping with the archaic mode of resolving homicide disputes» (Carawan [1998: 77]).

29. Carawan (1998: 77); *contra*, Ruschenbusch (1960: 140).

30. Carawan (1998: 90 ff.).

31. Carawan (1998: 81, 163 f., 335 f.).

32. Carawan (1998: 335 f.).

reconstruction, he maintains that the common idea that the arrest of accused homicides is a late innovation has no basis: the procedure against ‘known’ or ‘suspected’ homicides described at Dem. 23.80 is considered as «a direct descendant of the ancient remedy»; likewise, «the procedure against accused killers that Demosthenes describes» (*rectius*: the second document preserved at Dem. 24.105) follows «a logical progression from the Drakonian procedure», so that «in the intervening period, it is reasonable to assume, there was nothing novel or irregular in prosecuting homicide by warrant and arrest»³³. This suggestive depiction reveals, in my opinion, some flaws.

It is hazardous to assume that the procedure described at Dem. 23.80 ‘directly’ descends from the ancient remedy cited at Dem. 23.28. Indeed, the former applies to the offence of homicide *per se*, while the open violation of prohibited areas turns out to be at the same time an aggravating element of the wrong and a legal requirement for prosecution; it is characterized by a mandatory trial; the killer is to be brought before the Eleven (as the mention to the prison suggests). As regards the latter, on the contrary, the substance of the charge is ‘trespass carried out by a killer’; no trial is mentioned at Dem. 23.31; the thesmothetai have jurisdiction on these cases.

It is undemonstrated that the Drakonian laws of arrest and of denunciation originally concerned homicides who had not been tried and sentenced. Quite the reverse, if we restore lines 30-1 of the Drakonian homicide law, on the basis of the first provision cited at Dem. 23.28³⁴ and if we consider that Drako seems to use the participle ‘κτείνας’ to designate him ‘who has brought about another man’s death and has not yet been tried’³⁵, it is extremely plausible that ἀνδροφόνος, as a legal term, originally indicated a ‘convicted homicide’ only (as Demosthenes apparently claims)³⁶.

33. Carawan (1998: 336).

34. Cf. Stroud (1968: 54 ff.).

35. Cf. Gagarin (1981a: 59). As Harris (2006: 404) notes: «the verb (ἀπο)κτείνειν in Attic Greek is used to denote the act of causing death. It describes the action of one who brings about death by direct physical causality (e.g., stabbing, strangling, beating) or by indirect means (plotting, giving orders to magistrates, or encouraging an assailant to strike)» (cf. IG I³ 104.11-13; And. 2.7; Lys. 13.85-87).

36. Dem. 23.29: ἤκούσατε μὲν τοῦ νόμου, σκέψασθε δ’, ὦ ἄνδρες Ἀθηναῖοι, καὶ θεωρήσατε ὡς καλῶς καὶ σφόδρ’ εὐσεβῶς ἔθηκε ὁ τιθεὶς τὸν νόμον. “τοὺς ἀνδροφόνους” φησὶν. πρῶτον μὲν δὴ τοῦτον ἀνδροφόνον λέγει, τὸν ἐαλωκότ’ ἤδη τῇ ψήφῳ. οὐ γὰρ ἐστ’ οὐδεὶς ὑπὸ ταύτῃ τῇ προσηγορίᾳ, πρὶν ἂν ἐξελεγχθεὶς ἀλῶ (cf. Gagarin [1981a: 59]). It is true that Lys. 10.6-12 and Dem. 23.80 prove that the orators used the noun ἀνδροφόνος with a different nuance (Stroud [1968: 53]; Bonner and Smith [1938: 119]); anyway, this does not imply that Demosthenes’ definition is just a «sophistry», as Stroud claims. Indeed, both Lys. 10.6-12 and Dem. 23.80 deal with a particular kind of ‘murderer’, that is the ‘incontrovertible murderer’ (or ‘he who ἐπ’ αὐτοφώρῳ ἀπέκτεινε’, ‘he who has man-



It is unjustified to assume that only the victims' kinsmen formerly had the right to arrest the killer, and that such a right was later extended by Drako to any concerned citizen.

The supposed analogy between 'suspected' and 'accused' killers seems to rest upon the unpersuasive interpretation of the second part of the document preserved at Dem. 24.105 and of the procedure by arrest depicted at Dem. 23.80³⁷, as originally suggested by Gagarin³⁸. Afterwards, maintaining, on the grounds of Dem. 23.28, that any citizen was empowered with the right to arrest anywhere in Attika him who was simply suspected to be a killer, is extremely unlikely, if one focuses on the Drakonian innovations concerning the ordinary procedure against homicides³⁹.

ifestly brought about another man's death': cf. Harris [2006: 373 ff., 391 ff.]). This is clear, above all, from the second testimonium (τὸν ἀνδροφόνον δ' ὁρᾷ περιόντ' ἐν τοῖς ἱεροῖς καὶ κατὰ τὴν ἀγοράν), once read together with Lys. 13.86 (τοῦτο δὲ οὐδὲν ἄλλο ἔοικεν ἢ ὁμολογεῖν ἀποκτείνειν, μὴ ἐπ' αὐτοφώρῳ δέ, καὶ περὶ τούτου δισχυρίζεσθαι, ὥσπερ, εἰ μὴ ἐπ' αὐτοφώρῳ μὲν, ἀπέκτεινε δέ, τούτου ἔνεκα δέον αὐτὸν σῶζεσθαι): cf. MacDowell [1963: 120 ff., 131 ff.]; Gagarin [1979: 320]; Volonaki [2002: 162 ff.]). *Ergo*, since the person who has been convicted by the court becomes an 'incontrovertible murderer' after entry of a final judgment, one can suppose that the second broader meaning analogically derives from the first one: from 'he who is incontrovertibly a killer, after final conviction' to 'he who is incontrovertibly a killer, even if not tried yet'. Likewise, the clause 'πρὶν ἂν ἐξελεγχθεὶς ἁλῶ' may stand for 'until he has been found guilty and convicted', and for 'until he has been without a doubt proved to be guilty', since ἀλίσκομαι means both 'to be caught or detected (doing something)' and 'to be condemned', as well as ἐξελέγχω means 'to prove, to ascertain, to convict' (cfr. *LSJ*, s.v. ἐξελέγχω).

37. Dem. 24.105: ἐὰν δέ τις ἀπαχθῇ, τῶν γονέων κακώσεως ἐάλωκώς ἢ ἀστρατείας ἢ προειρημένον αὐτῷ τῶν νόμων εἴργεσθαι, εἰσιὼν ὅποι μὴ χρή, δησάντων αὐτὸν οἱ ἑνδεκα καὶ εἰσαγόντων εἰς τὴν ἡλιαίαν, κατηγορεῖτω δὲ ὁ βουλόμενος οἷς ἔξεστιν. ἐὰν δ' ἁλῶ, τιμάτω ἢ ἡλιαία ὃ τι χρή παθεῖν αὐτὸν ἢ ἀποτεῖσαι. ἐὰν δ' ἀργυρίου τιμηθῇ, δεδέσθω τέως ἂν ἐκτείσῃ; Dem. 23.80: ἔτι τοίνυν ἔσθ' ἔκτη τιμωρία πρὸς ἀπάσαις ταύταις, ἣν ὁμοίως παραβὰς γέγραφεν τὸ ψήφισμ' οὕτοσί. εἰ πάντα ταῦτά τις ἡγνόηκεν, ἢ καὶ παρεληλύθασιν οἱ χρόνοι ἐν οἷς ἔδει τούτων ἕκαστα ποιεῖν, ἢ δι' ἄλλο τι οὐχὶ βούλεται τούτους τοὺς τρόπους ἐπεξιέναι, τὸν ἀνδροφόνον δ' ὁρᾷ περιόντ' ἐν τοῖς ἱεροῖς καὶ κατὰ τὴν ἀγοράν, ἀπάγειν ἔξεστιν εἰς τὸ δεσμωτήριον, οὐκ οἶκαδ' οὐδ' ὅποι βούλεται, ὥσπερ σὺ δέδωκας, κἀνταῦθ' ἀπαχθεὶς οὐδ' ὀτιοῦν, πρὶν ἂν κριθῇ, πείσεται, ἀλλ' ἐὰν μὲν ἁλῶ, θανάτῳ ζημιωθήσεται, ἐὰν δὲ μὴ μεταλάβῃ τὸ πέμπτον μέρος τῶν ψήφων ὁ ἀπαγαγών, χιλίας προσοφλήσει.

38. Cf., *infra*, Appendix 2 (α).

39. In my opinion, the first two lines of the Drakonian law on homicide show «una rigorosa consequenzialità logica e cronologica ... : 1. contemplazione, a livello di 'sostanza', della fattispecie di illecito perseguita, descritta sia con riguardo all'elemento materiale che a quello psicologico; 2. indicazione del necessario ricorso agli strumenti processuali mediante chiamata in giudizio dell'asserito omicida, ai fini, *in primis*, di accertamento, nonché, *in secundis*, di condanna; 3. riferimento alla fase introduttiva *in iure* dell'ἀνάκρισις, con la menzione dei magistrati competenti (βασίλεις), sempre che il verbo δικάζειν possa ovvia-

The whole reconstruction fails, in the end, to consider the problem concerning the authenticity of the document preserved at Dem. 24.105⁴⁰.

B. In Scafuro’s view, the relation between Dem. 23.28 and Dem. 23.80 is differently represented. Once ruled out the full authenticity of the second section of the document preserved at Dem. 24.105⁴¹ (and, thence, daggered the phrase concerning the accused killers: ‘ἡ προειρημένον αὐτῶ τῶν νόμων εἶργεσθαι’)⁴², she maintains that «returned killers who are found anywhere in Attika will be arrested ‘to the thesmothetai’, and if they confess, will be executed by those magistrates (Dem. 23.28, 31). If they do not confess, the thesmothetai will hand them over the Eleven for custody and either the thesmothetai or the Eleven will preside over the ensuing trial ... for which the penalty is death (Dem. 23.31)»; when the law cited at Dem. 23.80 came into operation (that is c. 400 B.C.)⁴³, returned killers «who set foot in the Agora or in sacred places would additionally be liable to the apagoge of 23.80 which followed almost the same procedure except that trial is obliga-

mente essere inteso come sinonimo di *ius dicere* e non di *iudicare*; 4. menzione dell’attività cognitoria e decisoria degli Efeti (fase *apud iudicem*)»; it is clear that the legislator’s main objective is «quello di attribuire al processo (privato) funzione necessariamente sostitutiva dell’auto-tutela, senza nessun riferimento ad una medesima sanzione per l’omicidio tanto ‘volontario’, quanto ‘involontario’» (Pelloso [2012a: 194, nt. 24]). Cf. Phillips (2008: 49); Pepe (2012: 14 ff.).

40. See, on the topic, Canevaro (2013a): in his opinion – above all on the grounds of Dem. 24.60, 102, 103, 107, and *Ath. Pol.* 63.3 – the second section of the document preserved at Dem. 24.105 «should contain two laws concerned with two separate categories: parent abusers and draft dodgers. It should state that, if convicted parent abusers or draft dodgers transgress the conditions of their *atimia*, they must be tried and, if their penalty is a fine, they must be imprisoned until the fine is paid». On the contrary, we can easily realize that the document at issue states that ‘if someone is arrested for entering where he is not allowed, since he is a convicted parent abuser, draft dodger, as well as a banished murderer, the Eleven shall imprison him and bring him before the Heliaia’.

41. Scafuro (2005: 67): «a hypothesis of inauthenticity may be radical or conservative – radical if we declare 105B in its entirety inauthentic, conservative, if we choose only to dagger the clause concerning the accused killer as ‘misplaced’. In both cases, all killers (suspected, accused, convicted) discovered in forbidden places may have been arrested and brought – not to the Eleven – but to the thesmothetai who are attested as the magistrates overseeing the arrests of killers who illicitly return to Athens (Dem. 23.31)».

42. Scafuro (2005: 67): «105B appears inconsistent with what we know of the way Athenian law functioned: *atimoi* elsewhere are denounced by *endeixis*; the unintentional accused killers of 105B might be penalized differently from the suspected, unintentional killers of 23.80».

43. Here Scafuro (2005: 65) inclines to follow, although superficially, Hansen’s theory (cf. Hansen [1976: 101 ff.]), even if her overall reconstruction appears very different, for she broadens the applicability of the remedy described at Dem. 23.80 and partially counters the authenticity of the document preserved at Dem. 24.105. Cf., *infra*, Appendix 2 (β).



tory»⁴⁴. What is more, in her opinion, from c. 400 B.C., even suspected and accused killers, once discovered in the Agora and in the holy places, could be arrested and imprisoned before trial and then «tried for homicide ... and penalized with death upon conviction», since the law paraphrased at Dem. 23.80 is considered as even covering these subjects⁴⁵. Some weaknesses, in my opinion, undermine this conjectural reconstruction.

If the law described by Demosthenes at 23.80 was enacted approximately at the beginning of the fourth century B.C.⁴⁶, this means that for more than two centuries the violation of the βασιλεὺς' prohibition to enter the Agora and the holy places⁴⁷ was practically ineffective without a procedure directed to uphold it: thus, such a development looks as an extremely implausible one. Moreover, the orator here does not seem to paraphrase a precise statute: he rather describes a specific use of the procedure by arrest⁴⁸.

Arguing that the Drakonian law cited at Dem. 23.28 merely applies to

44. Scafuro (2005: 66 f.).

45. Scafuro (2005: 61 ff.).

46. This view is countered *infra*, Appendix 2.

47. See Dem. 20.158; Ant. 6.36; *Ath. Pol.* 57.2; *Lex. Seg.* 310.6; *Poll.* 8.90.

48. Cf. Gagarin (1979: 314): «this is not the text of a law but Demosthenes' description of a procedure»; see, moreover, Hansen (1976: 103): «Demosthenes does not quote the law when he analyses the ἀπαγωγή φόνου». According to Phillips (2008: 128 f.), Dem. 23.80 shows a 'conflation' of two types of procedure by arrest. This hypothesis is unpersuasive. First of all, Phillips maintains that Dem. 24.105 includes valid evidence for reconstructing Athenian law (which is not: cf., *supra*, ntt. 37 ff.); he believes that the decision of the Eleven against Euxitheos (Ant. 5) set a precedent that – as confirmed, among other sources, by Lys. 13 and Aeschin. 1.90-91 – permitted to label suspected killers as χαχοῦργοι, alongside thieves, cloak-snatchers, seducers (which is not: cf., *infra*, Appendix 2). Finally, he radically rejects the existence of an ἀπαγωγή φόνου, because such a procedure (considered as contradicting Athenian homicide law and defying common sense) «would allow any would-be prosecutor to create and enforce a ban simultaneously»: this rejection is groundless, indeed. At first, if the ἀπαγωγή φόνου existed, popular judges would not face at the same time two issues (as, on the contrary, Phillips states, following Hansen [1976: 100]), but just one, i.e. the commission of homicide: trespass, as a condition required for prosecuting the killer, would have discussed during the pre-trial hearing. Secondly, it is not true that, by way of ἀπαγωγή φόνου, any unsuspecting person could be dragged out the 'forbidden places', hauled off to jail, accused of murder and of trespass: on the one hand, trespass is a procedural condition, while homicide is the substance of the charge (so that they cannot be equated from a legal perspective); on the other hand, only any 'manifest killer' – and not any unsuspecting person – could be licitly arrested through this type of ἀπαγωγή (cf. Lys. 13.86; Isae. 4.28; And. 1.91; Dem. 45.81, 54.24; Phot. s.v. περὶ τῶν ἐνδεκα; on the exact meaning of the phrase ἐπ' αὐτοφώρῳ, cf. Pelloso [2008: 72 ff.], with Eur. *Ion* 1214; Hdt. 6.72; Aeschin. 3.9-10; Din. 1.29, 77, 2.9; Dem. 19.121-3). All that said, it is unnecessary to deny that Dem. 23.80 properly describes the so called ἀπαγωγή φόνου, and the scenario of Lys. 13 does not speak against it (see, *infra*, Appendix 2).

the returning killer is not convincing: the use of the locative 'in fatherland', as well as the reference to any ἀνδροφόνος, and not to the φεύγων (either upon conviction, or voluntarily), are good hints to suppose that this rule was susceptible to apply even to killers who never left Attika⁴⁹. Furthermore, extending the meaning of ἀνδροφόνος to any returning killer – suspected, accused, convicted – is unconvincing from a legal and a rational perspective. Demosthenes himself (Dem. 23.29) counters this interpretation; and, what is more, it unlikely implies that the same rules, sanctions, and remedies apply to completely different cases. If a person has been finally convicted, he or she is indeed an 'incontrovertible killer', while the 'suspected killer', at least after Drako's legislation, is to be sued through an ordinary legal action only⁵⁰.

Dem. 23.31 does not attest that a trial had to take place if the arrested pleaded not guilty⁵¹. At first, the use of the adjective κύριοι suggests that, at least before Solon's procedural reforms, the decision given by the magistrates was 'final' (i.e. it was not subject to any sort of appeal or referral)⁵². Secondly, this reading is not consistent with the right stipulated for the ἀπάγων and for the ἐνδείξας at Dem. 23.28 and at Dem. 23.51. Thirdly, several testimonia show that the phrase 'θανάτῳ ζεμιοῦσθαι', confronted with 'κρίνεσθαι' and 'εἰσάγειν εἰς τὸ δικαστήριον', may well imply 'execution without trial', regardless of the exact procedure initiated⁵³. Finally, as far as I know, our sources do not provide any evidence of trials of killers returning to Attika.

49. Even Gagarin (1979: 316) believes that the rule applies to «anyone in exile for homicide who returned to Attica». Hansen (1976: 108 f.) gives a full catalogue of exiles for homicide (implying that the rule cited at Dem. 23.28 concerns returning killers only): «to set foot in Attika was forbidden on pain of death for any person who had been a) sentenced *in absentia* to death for murder of an Athenian citizen, b) sentenced to exile for life for attempted murder of an Athenian or murder of a metic; and c) sentenced to temporary exile for unpremeditated homicide».

50. Phillips (2008: 49); Pelloso (2012a: 194, nt. 24); Pepe (2012: 14 ff.).

51. Cf. Hansen (1976: 108), who assumes that «when arrested, the accused could demand to be brought before the court if he denied that he had previously been condemned to death for homicide». Carawan (1984: 118) maintains that it is not accurate to regard this procedure as execution without trial, since Demosthenes makes it clear that the accused must be first convicted and then if a convicted murderer returns from exile it is the office of thesmothetai to carry out the sentence. This interpretation actually fails to take into due account the real substance of the charge (that is 'trespass' carried out by a banished killer, and not 'homicide *per se*': cf. Scafuro [2005: 60]); moreover, it seems to imply that the rule described at Dem. 23.31 only applies to killers previously sentenced to death *in absentia* (what is not likely: cf. Hansen [1976: 107 f.]). *Contra*, in favor of 'execution without trial', cf. Lipsius (1905-15: 328); MacDowell (1963: 140); Phillips (2008: 122).

52. *Ath. Pol.* 3.5.

53. Aeschin. 1.91, 113; *Ath. Pol.* 52.1; Lyk. 1.117.

The above-mentioned reconstruction does not gain any support from the procedure by arrest depicted at Dem. 23.80. In this passage the orator exclusively states that the victim's kinsmen have the right to arrest the killer under the condition that the latter trespasses the Agora or the holy places, if they do not know how to start the ordinary legal remedies, or if the deadline is expired, or if they do not want to sue the killer following the ordinary procedure. In other words, Demosthenes: a) clearly describes the ἀπαγωγή as an alternative remedy to the ordinary action for homicide; b) implies that all those who can start a δίκη φόνου can also start an ἀπαγωγή, provided that a further legal condition required for prosecution occurs; c) does not exclude that the procedure by arrest is available to any citizen (as the penalty for failing to win one fifth of the votes seems to demonstrate)⁵⁴; d) suggests that this type of ἀπαγωγή can be initiated only if the arrested has been neither accused and formally barred by the βασιλεὺς' proclamation, nor sentenced by the proper judges.

The supposed diversification and overlap between Dem. 23.28 and Dem. 23.80 are inconsistent. On the one side, it is undeniable that both rules could apply to killers who never left Attika. On the other side, it is equally true that the former testimonium comprises an ancient law dating back to the Draconian code and applying to 'condemned killers' only, while the latter describes a more recent procedure (which came into operation during the fifth century) available against 'suspected killers' only.

Dem. 23.28 and Dem. 23.80: some personal remarks

Once dismissed the authenticity – at least – of the second section of the document preserved at Dem. 24.105⁵⁵; once assumed that Dem. 23.80 does not describe a new statute, but a particular use of the procedure by arrest against killers⁵⁶; once rejected the existence of a procedure by arrest directed to prosecute a murderer as a καχοῦργος⁵⁷; in the light of the previous assumptions one can put forward the following hypothetical reconstruction.

Originally, the provisions cited at Dem. 23.28, 31, 51 (τοὺς δ' ἀνδροφόνους ἐξεῖναι ἀποκτείνειν ἐν τῇ ἡμεδαπῇ καὶ ἀπάγειν; οἱ θεσμοθέται τοὺς ἐπὶ

54. See, *contra*, Evjen (1970: 409).

55. Cf., *supra*, ntt. 37 ff. and Appendix 2. Regardless of whether one shares the view supporting the radical inauthenticity of the document preserved at Dem. 24.105 (Canevaro [2013a]), or considers such a document only partially inauthentic (Scafuro [2005: 67]), it is undeniable that in our sources no explicit rule concerning ἀπαγωγή is attested with regard to the case of the killer accused and banished by the king.

56. Cf., *supra*, § 2.

57. Cf., *infra*, Appendix 2.

φόνω φεύγοντας κύριοι θανάτω ζημιῶσαί εἰσι; φόνου δὲ δίκας μὴ εἶναι μηδαμοῦ κατὰ τῶν τοὺς φεύγοντας ἐνδεικνύοντων, ἐάν τις κατὶ ἧ ὅποι μὴ ἔξεστιν) were conceived of as measures available against the category of ‘convicted killers’ found in Attika⁵⁸. The Drakonian rules indeed referred to those who had been banned from Attika, whether the ban was the formal punishment inflicted by the judges, or a ‘*de facto* measure’ voluntarily chosen by the defendant in order to avoid the possibility of a more severe penalty (that is death) upon conviction. Notwithstanding that, open texture (especially the use of the term ἀνδροφόνος, the phrase ‘ἐν τῇ ἡμεδαπῇ’, the lack of the mention of the magistrates with jurisdiction over the arrested) allowed for broader applications.

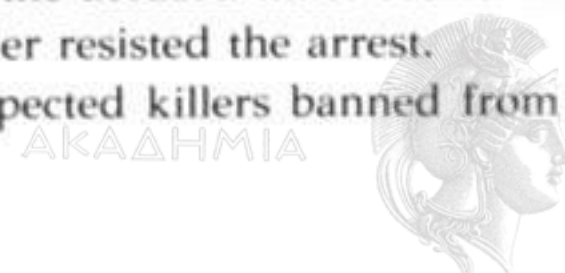
On the one hand, shortly after the enactment of the Drakonian homicide law, a defendant in a δίκη φόνου, once banned by the βασιλεὺς from the Agora and from the holy places, could be paralleled to the voluntary exiled and to the killer sentenced to exile. The former, such as the latter, was a ‘banished person’; the former, such as the latter, could be arrested and led away before the proper magistrates (likely the thesmothetai), once caught in a forbidden place (ἐξεῖναι ἀπάγειν)⁵⁹; he could even be killed on the spot, if he resisted the arrest (ἐξεῖναι ἀποκτείνειν)⁶⁰. Moreover, if the accused killer, found in a forbidden place, had previously been denounced to the public authorities by means of ἐνδειξις, no δίκη φόνου could be started against the citizen who, carrying out the arrest, had killed the ‘trespassing accused killer’⁶¹.

58. On the one hand, this category included those who failed to appear for the trial and to contest the case; on the other hand, it included those who withdrew from the case after the first speech of the claimant: these ‘killers’, accordingly, were adjudged guilty *in absentia*, likely by the magistrate himself (Dem. 21.81; Lyk. 1.117). Cf. Bonner and Smith (1938: 120 f.); Hansen (1976: 107 f.); Gagarin (1981a: 59, nt. 82); Thür (1990: 149).

59. The verb ἀπάγειν refers to the ‘procedure by arrest’: cf., paradigmatically, Antiph. 5.85, Isae. 4.28, Dem. 23.80, 24.146, 209.

60. Cf., in the same sense, Kennedy (1856: 176, nt. 2). In the light of the word order of the first section of the law cited at Dem. 23.28, and, accordingly, on the basis of the (syntactical but, obviously, not chronological) priority of the verb ‘killing’ (ἀποκτείνειν ἐν τῇ ἡμεδαπῇ) over ‘arresting’ (καὶ ἀπάγειν), this interpretation appears to be more persuasive than the majority view, which translates ‘καί’ with ‘or’ (Stroud [1968: 54 ff.]; Hansen [1976: 16, 107 f., 114 ff.]; Gagarin [1979: 316 f.]; Phillips [2008: 122, nt. 37]). One can indeed suppose that the Drakonian version cited by Demosthenes is the final result of a formal and substantial development by which the phrase ‘καὶ ἀπάγειν’ was added to the original permission: originally the convicted killer could be lawfully killed if found in Attika; then, anyone was entitled to arrest the convicted and the accused killer found in forbidden areas, and even to kill him in the event that the killer resisted the arrest.

61. Cf., as an evidence of the use of ἐνδειξις against suspected killers banned from



On the other hand, during the fifth century B.C., the meaning of the Drakonian rules at issue was further broadened, allowing for a completely new use of the ancient ἀπαγωγή-procedure. Thus, the rule reproduced at Dem. 23.28 (τοὺς δ' ἀνδροφόνους ἐξεῖναι ἀποκτείνειν ἐν τῇ ἡμεδαπῇ καὶ ἀπάγειν), after it was opened to those who were formally prohibited by the βασιλεὺς to 'εἵργεσθαι ἐκ τῶν νόμων τινῶν ἢ τόπων ἢ πράξεων', started applying even to those who had, beyond doubt, committed homicide (as the events described in Lys. 13 and the use of the procedure by arrest at Dem. 23.80 show)⁶². An ἀνδροφόνος (i.e., according to the new meaning attributed to this legal term, 'a person who has incontrovertibly caused another person's death'), although neither formally banished nor tried, could be paralleled to a 'person finally convicted of homicide' and, at the same time, to an 'accused killer subject to public proclamation and excluded from customary places'. Indeed, the former, since he had killed ἐπ' αὐτοφώρῳ, came to be considered an 'incontrovertible killer' (such as a convicted killer); moreover, the offence itself came to be considered the cause of the automatic and immediate loss of political and religious rights (similarly to the magisterial πρόρρησις)⁶³. Accordingly, from an unspecified time of

the Agora and the holy places by the magisterial proclamation, Suda s.v. ἐνδειξις: εἶδος δίκης δημοσίας ὑφ' ἣν τοὺς ἐκ τῶν νόμων εἵργομένους τινῶν ἢ τόπων ἢ πράξεων, εἰ μὴ ἀπέχοντο αὐτῶν, ὑπῆγον (cf., for the same lemma, Harp., Etym. Mag., as well as Poll. 8.50). It is worth remarking that the same phrase (that is εἵργεσθαι τῶν νόμων / νομίμων: cf. Piérart [1973]) could be applied to persons exiled for homicide (cf. Dem. 23.42; Lyk. 1.65) and to persons warned off the Agora and the holy places (cf. Ant. 6.34-36, 40; Dem. 20.158; Dem. 21.114; Ath. Pol. 57.2; Pol. 8.90; Lex. Seg. 310.6; Harp., Suid., Etym. Mag., Lex. Sab. s.v. ἐνδειξις). The same expression refers to killers at Pl. Leg. 871a and 873b. On this phrase, cf. MacDowell (1963: 26 f.); Hansen (1976: 99 f.); Gagarin (1979: 315 f.); Hansen (1981: 17 ff.); Scafuro (2005); Phillips (2008: 129 f., nt. 60).

62. See, similarly, Carawan (2013: 129): «if the participant is responsible for an outcome that anyone else would reasonably expect, there is all the more reason to credit what 'everyone knows' about his guilt: he is the 'known killer', ἀνδροφόνος, even if no court has yet condemned him» (cf. Dem. 23.29-41, 46, 51, 80).

63. This means that the prohibition from entering the Agora and the holy places, on the grounds of this new interpretation of the Drakonian rule cited at Dem. 23.28, is conceived of as being directly derived from the manifest commission of the homicide: cf. Hansen (1976: 70). This emerges from Dem. 20.158: ἐν τοίνυν τοῖς περὶ τούτων νόμοις ὁ Δράκων φοβερόν κατασκευάζων καὶ δεινὸν τό τινα αὐτόχειρα ἄλλον ἄλλου γίνεσθαι, καὶ γράφων χέρνιβος εἵργεσθαι τὸν ἀνδροφόνον, σπονδῶν, κρατήρων, ἱερῶν, ἀγορᾶς, πάντα τᾶλλα διελθὼν οἷς μάλιστα ἂν τινὰς ὦετ' ἐπισχεῖν τοῦ τοιοῦτόν τι ποιεῖν (cf. Ant. 6.36; Ath. Pol. 57.2; Soph. OT 236-42). In this passage, the 'incontrovertible killer' (τὸν ἀνδροφόνον), as soon as the homicide is committed and before a charge is brought against him, is stated as being banned from lustral water, libations, bowls of wine, the holy places and the Agora, as well as Drako goes through everything that can dissuade people from

the fifth century B.C., whoever ‘τὸν ἀνδροφόνον δ’ ὁρᾷ περιώντ’ ἐν τοῖς ἱεροῖς καὶ κατὰ τὴν ἀγοράν’ has the right to ‘ἀπάγειν ... εἰς τὸ δεσμωτήριον’ (Dem. 23.80)⁶⁴.

Now, since the Draconian rules preserved at Dem. 23.28, 31, 51, do not identify those eligible to kill the killer or to proceed against him by bringing the procedure by forcible arrest⁶⁵, such a silence can be easily read as a hint that the institution of the ‘volunteer prosecutor’ antedated Solon’s reforms, although restricted to particular cases. The arrest of the person who turns out to be an incontrovertible killer and an ἄτιμος, whether preceded by a public denunciation or not, is an alternative to the lawful execution and it can be carried out by ‘anyone who wishes’: the provision for this act, thence, both implies a further infringement of the law, i.e. the presence of an ἄτιμος in Attika (which means that the previous homicide is not the offence at issue), and it tends to protect a ‘public interest’ (which means that this new breach of the law does not affect the killed man’s kin only)⁶⁶.

Public interests and third-party prosecution in the late seventh and the early sixth centuries B.C.

Our sources show that, during the late seventh century, in some cases where the community as a whole is wronged (since the killer represents, from a legal and religious perspective, a ‘public menace of pollution’)⁶⁷, any citizen,

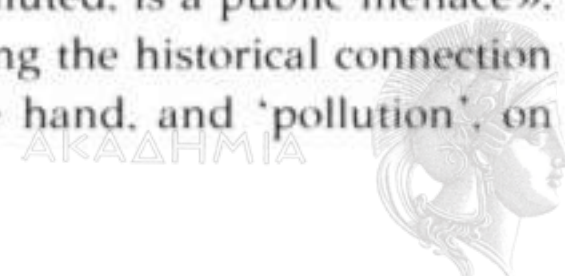
committing such an offence. On the contrary, Ant. 6.36 – where the orator, in order to mention just a ‘suspected killer’, does not use the word ἀνδροφόνος – shows that, as soon as a charge of homicide is brought against a presumed killer, he is banished from the places and rites listed in the law: ὁ γὰρ νόμος οὕτως ἔχει, ἐπειδὴν τις ἀπογραφῇ φόνου δίκην, εἴργεσθαι τῶν νομίμων.

64. Cf., *supra*, ntt. 25-26. As the law cited by Demosthenes was extended to ‘incontrovertible killers’, the right to kill without trial either had already fallen into disuse, or had already been repealed.

65. Without any argumentation, Humphreys (1992: 38) and Carawan (1998: 82) limit to the victim’s kinsmen the right to kill the homicide and to start against him an ἀπαγωγή (or an ἐνδεξις), as well as Evjen (1970: 409) did with regard to Dem. 23.80; see, *contra*, Usteri (1903: 9); Lipsius (1905-15: 608); Bonner and Smith (1938: 121 f.); Hansen (1976: 108); Gagarin (1981a: 62); Phillips (2008: 79).

66. Usteri (1903: 9): «der zur Verbannung Verurteilte, der im Lande bleibt oder unbefugt darin zurückkehrt, vergeht sich damit gegen die Gesetze, somit gegen die gesamte Bürgerschaft, und nicht nur gegen die Familie, die durch sein Totschlagbetroffen wurde»; see, further, Bonner and Smith (1938: 122, 168).

67. Bonner and Smith (1938: 120 f.): «the state now intervenes and executes the outlaw not for the original crime-homicide, but because, being polluted, is a public menace». Against the traditional ‘miasma theory’ (i.e. the view supporting the historical connection between ‘Athenian homicide law and procedure’, on the one hand, and ‘pollution’, on



representing the πόλις, is granted with the power to prosecute the offender through those legal means that in later times, compared to the ‘ordinary popular action’ (γραφή), shall be qualified as ‘extraordinary’ (i.e. ἀπαγωγή and ἔνδειξις). All this can therefore be considered a patent model for that famous Solonian rule setting, as Aristotle and Plutarch clearly prove, an open generalization of ‘voluntary prosecution’: in other words, such a feature, even though still legally unshaped and formally implicit, was not completely absent in the spirit of Drakon law. In the first paragraph, we highlighted that, in the event of offences affecting the community as a whole, no evidence exactly describes the procedure to be followed in order to submit such public cases to the Areopagus. In the light of the remarks included in the preceding paragraph, one can accordingly hypothesize both that the early aristocratic Council judged on the basis of information laid by ‘any private citizen’ (βουλόμενος) who, in the name of the ‘principle of representation’, acted on the behalf and in the interests of the community, and that such an information was conceived of as an accuser’s indictment. If all this is true (or, at least, likely), thence, the Solonian legal reforms concerning litigation and procedures just improved what Drako had already shaped, extended it and made it less ambiguous. Such a conjectural explanation is corroborated by a famous passage of the Constitution of the Athenians: as for tyranny and other serious offences affecting the πόλις as a whole (i.e. for public wrongs already provided, combated and punished in the pre-Solonian era), Aristotle indeed attests the enactment by the late sixth century legislator of an ‘impeachment’ procedure (εἰσαγγελία), both susceptible to be started by anyone, and allocated to the Areopagus Council for trial⁶⁸.

the other hand), see the remarks pointed out by Parker (1983), who advances the idea that the threat of pollution did intrude upon homicide procedure, but later than Drako’s times (see, also, MacDowell [1963, 140 ff.]; Gagarin [1981a: 164 ff.]; Arnaoutoglou [1993]; Carawan [1998: 17 ff.]). Actually, the magisterial proclamation against the suspected killer was directed to prevent the latter from spreading pollution by contact with public rituals, as well as holy and public places (Dem. 20.158); the court at Phreatto seems to be aimed at excluding the defendant’s pollution from Attica; moreover, the requirement that trials take place in the open air was imposed so that the judges would not enter the same place as people whose hands were unclean (Ant. 5.11).

68. At *Ath. Pol.* 8.4 Solon is granted with the enactment of a new ‘law against the κατάλυσις τοῦ δήμου’, which stipulated that such charge was to be tried before the Areopagites (καὶ τοὺς ἐπὶ καταλύσει τοῦ δήμου συνισταμένους ἔκρινεν, Σόλωνος θέντος νόμον εἰσαγγελίας περὶ αὐτῶν): accordingly, out of the amnesty law and the Kylonian affair, Hignett is right when he assumes that «if Solon passed a law on this subject, his purpose can only have been to give more precise definition to previous powers of the Areopagus in this sphere» (Hignett: [1952: 90]; recently, *contra*, see Poddighe [2014: 197]). To some extent, *Ath. Pol.* 3.6 (concerning, as we have already seen, the pre-Drakon law

On the contrary, a different legal gap – which also represented a lack of protection in the most ancient *θεσμοὶ* enacted in Athens – should inevitably

Areopagus) and 8.4 (concerning the Solonian Areopagus) are very similar: according to both passages, the ancient Council gives final judgments, inflicts monetary fines and bodily punishments, and has the task of ‘guarding the laws’, i.e. of ‘overseeing the constitution’ (on this equation, see Sealey [1964: 11]). Yet, some differences do apparently emerge. Those who are subject to the Areopagus’ final punitive power are labeled at 3.6 as ‘transgressors of the established order’, and at 8.4 as ‘magistrates who, acting in their official capacity, commit offences’ (cf. Piérart [1971]; Ostwald [1985: 12]; de Bruyn [1995: 69 ff.]; *contra*, Rhodes [1981: 155], who refers the phrase ‘τοὺς ἀμαρτάνοντας ἡῶθονε’ to offenders in general); the Council ‘manages’ the most numerous and most relevant of the political affairs at 3.6, whereas it simply ‘watches over’ them at 8.4 (cf. Ostwald [1993: 7]); under Solon (who enacted the above mentioned νόμος εἰσαγγελίας), the Areopagus started to try those who attempted at ‘dissolving the people’ or ‘overthrowing the people’ (that is, although the terminology is patently anachronistic, those who committed crimes against the πόλις; cf. Gagarin [1981b: 71, nt. 80]; Ostwald [1985: 7]). On the one hand, Solon confirms and widens the aristocratic Council in its previous jurisdiction over ‘public cases’ (limited, during the pre-Solonian age, to the only offence of ‘attempt at tyranny’); therefore, Hignett [1952: 89], and Chambers [1965: 83], clearly exaggerate when claiming that even after Solon’s reforms the Areopagus’ early competence remained unaltered; cf. Gehrke [2006]). On the other hand, he establishes a more elaborated procedure, susceptible to be brought by anyone (ὁ βουλόμενος); a (type of) εἰσαγγελία, that is a particular type of ‘impeachment procedure’ (see Harrison [1971: 52]). To tell the truth, the reliability of the report included in *Ath. Pol.* 8.4 has been strongly questioned in Hansen (1975: 17 ff., 56 f.), and in Hansen (1980): the scholar believes, and tries to demonstrate, that the εἰσαγγελία was first introduced by Kleisthenes and was always a denunciation to the Ekklesia. Against Hansen’s view, in several contributes on the topic Rhodes has put forward a different opinion: the phrase κατάλυσις τοῦ δήμου, pertaining to a real judicial power of the Areopagus, should be explained both as referring to a Solonian law against the establishment of a tyranny, and as being a symptom of the disdain of the unconstitutional usurpation of power through tyranny. See Rhodes (1979); Rhodes (1981: 156); Rhodes (2006: 254); Ruschenbusch (1968: 81 f.); Gagarin (1981b: 75 f.); Gagarin (2006: 264). Ostwald, instead, persuasively believes that such a law on εἰσαγγελία was really passed under Solon, but, at the same time, maintains that «since later legislation differentiated κατάλυσις τοῦ δήμου at least verbally from attempts at establishing tyranny, and since the law under discussion was not invoked against the Peisistratids after their overthrow, it makes more sense to see in Aristotle’s description a reflection of a broader measure, designed to protect the public institutions of Athens against any kind of subversion, that is against any crime against the state»; moreover, the scholar assumes that the statement at issue is anachronistic only «if we understand by *eisangelia* the complex procedure that in the fifth and fourth centuries involved the Council and the Assembly or the jury colts» (Ostwald [1985: 8]; Almeida [2003: 65 f.]; on the fifth century εἰσαγγελία against the crime of κατάλυσις τοῦ δήμου/τῆς δημοκρατίας, i.e. a procedure providing the power for any citizen to bring a legal action before the Council or the Assembly against anyone whose activities tended to the ‘destruction of the people or of the democracy’, cf. And. 1.96-98; Hyp. 4.7-8; Lyk. 1.125-26; SEG 12.87).



be filled with a supplement of procedural rules. On the one hand, it is reasonable to infer from the so-called Drakonian constitution, as a general principle (which, if reliable, was very probably reaffirming Athenian ancestral traditions), the prohibition of the so called ‘third-party prosecution’, since just the person aggrieved is entitled to take a legal action against the offender (obviously by bringing the case to the proper *forum*)⁶⁹. On the other hand, as far as the pre-Solonian legal system is concerned, magistrates were entitled to pass final judgments and to impose penalties on their own initiative (even if all this does not mean that, as early as the end of the seventh century B.C., only magistrates could give ‘final’ – that is not challengeable – decisions), provided that they remain in their own subject-matter jurisdiction and they do not inflict or enforce condemnations beyond the maximum amount allowed: before ‘ἔφεσις to the popular court’ was introduced by Solon (whether it is conceived of as an appeal of the dissatisfied litigant, or as a magisterial referral, or as a veto, or as an opposition to execution)⁷⁰.

69. *Ath. Pol.* 4.4: ἐξῆν δὲ τῷ ἀδικουμένῳ πρὸς τὴν τῶν Ἀρεοπαγιτῶν βουλὴν εἰσαγγέλλειν, ἀποφαίνοντι παρ’ ὃν ἀδικεῖται νόμον.

70. *Ath. Pol.* 9.1: τρίτον δὲ <ὧ καὶ> μάλιστα φασιν ἰσχυκέναι τὸ πλῆθος, ἢ εἰς τὸ δικαστήριον ἔφεσις· κύριος γὰρ ὢν ὁ δῆμος τῆς ψήφου, κύριος γίγνεται τῆς πολιτείας. According to the majority view, Solon both introduced the ἔφεσις and newly established the Athenian people as a ‘popular court’ endowed with the power of giving final judgments and superseding magisterial decisions: see Lipsius (1905-15: 27); Bonner and Smith (1930: 232 ff.); Hignett (1952: 97); Ruschenbusch (1965: 381); Harrison (1971: 69 ff., 190 ff.); MacDowell (1978: 27 ff.); Rhodes (1981: 160 ff.); Ostwald (1985: 9 ff.); Todd (1993: 100, nt. 2); Rhodes (2006: 255). Yet, a word by word reading of *Ath. Pol.* 9.1 leads the interpreter to assume that Solon just ‘renewed’ and ‘strengthened’ an existing body (by means of the attribution of new functions and powers), since he is only said to have created the procedure introduced by the act of ‘ἔφεσις to the (popular) court’ (cf. Bonner and Smith [1938: 158]). For the primeval name of this court, see Lys. 10.16 and Dem. 24.105, where the two authors, discussing the permanence of ancient language in legal writing, mention the name ἡλιαία (word used even prior to the Solonian age in other Greek dialects: Hignett [1952: 97]; for a smooth breathing – ἡλιαία – as the proper spelling, cf. Rhodes [1981: 160]). As for the skeptical views of the problems implied in *Ath. Pol.* 9.1, Hansen assumes that Solon already established several tribunals, acknowledges that Solon instituted the ἡλιαία as a first instance court, refuses the common view of it as a judicial session of the people, and keeps open the possibility that Solon’s institution of the ἡλιαία and public lawsuits are fourth-century inventions (Hansen [1975]; Hansen [1981-1982]). Osborne thinks that the invention of public actions and the introduction of ἡλιαία «have a good chance of being genuinely Solonian» (Osborne: [1996: 220]); Mossé accepts ‘appeals’ but considers the popular court as anachronistic, and allocates appeals to the Areopagus Council (Mossé [1979: 433 f.]). Cf., for the equation ἔφεσις = real appeal, Lipsius (1905-15: 27 f.); Wade-Gery (1958: 173 f.); Bonner and Smith (1930: 231 ff.); MacDowell (1978: 27 ff.); Rhodes (1981: 160 ff.); Ostwald (1985: 9 ff.); Todd (1993: 100, nt. 2); Rhodes (2006: 255); for the view that identifies ἔφεσις with a mandatory referral

magistrates were both *κύριοι* (i.e. qualified to pass decisions that could not be amended or quashed) and *αὐτοτελείς* (i.e. qualified to start *ex officio* legal procedures)⁷¹. All this balanced the lack of the principle of ‘third-party prosecution’. For instance, as a remnant of very early magisterial prerogatives, during the fourth century B.C. the *ἄρχων* – who had to take care of children without fathers, *ἐπικληρος*, *οἴκοι* left destitute of heirs, and all pregnant women who remained in the *oikoi* of their deceased husbands – was still entitled to prohibit anyone from committing *ὑβρις* to the individuals protected, as well as to penalize, by giving a final decision, the offender, provided that the *τέλος* imposed by law was respected (i.e. the fine was imposed both *ratione materiae*, i.e. according to the *ἄρχων*’s competence, and within a given value-limit)⁷². Such a magisterial power, as a symptom of prosecutorial discretion, perfectly fits the above-mentioned general description sketched, with regard to the pre-Solonian era, in the Constitution of the Athenians, as well as it is fully justifiable, from a legal and historical point of view, if embedded in the early Athenian legal system, where litigation was not still shaped by the principle of ‘third-party prosecution’.

Thus, as concerns the law cited by Demosthenes in a strongly amended

(or transfer), see Wilamowitz (1893: 60); Adcock (1926: 56); Gagarin (2006: 264 f.); see, finally, Paoli (1950) and Just (1968), who, on the grounds of Steinwenter (1925: 68 ff.), tend to qualify this act in terms of ‘veto’ or ‘opposition’. Cf., for the polysemy of the word *ἔφεσις*, Ruschenbusch (1961); Ruschenbusch (1965); Sealey (1994: 121, nt. 19).

71. *Ath. Pol.* 3.5: τοῖς μὲν οὖν χρόνοις τοσοῦτον προέχουσιν ἀλλήλων ... κύριοι δ’ ἦσαν καὶ τὰς δίκας αὐτοτελείς κρίνειν, καὶ οὐχ ὥσπερ νῦν προανακρίνειν.

72. *Dem.* 43.75: ὁ ἄρχων ἐπιμελείσθω τῶν ὀρφανῶν καὶ τῶν ἐπικλήρων καὶ τῶν οἴκων τῶν ἐξερημουμένων καὶ τῶν γυναικῶν, ὅσαι μένουσιν ἐν τοῖς οἴκοις τῶν ἀνδρῶν τῶν τεθνηκότων φάσκουσai κυεῖν, τούτων ἐπιμελείσθω καὶ μὴ ἐάτω ὑβρίζειν μηδένα περὶ τούτους, ἐὰν δέ τις ὑβρίζη ἢ ποιῇ τι παράνομον, κύριος ἔστω ἐπιβάλλειν κατὰ τὸ τέλος, ἐὰν δὲ μείζονος ζημίας δοκῇ ἄξιός εἶναι, προσκαλεσάμενος πρόπεμπτα καὶ τίμημα ἐπιγραφάμενος, ὃ τι ἂν δοκῇ αὐτῷ, εἰσαγέτω εἰς τὴν ἡλιαίαν, ἐὰν δ’ ἄλῳ, τιμάτω ἢ ἡλιαία περὶ τοῦ ἀλόντος, ὃ τι χρὴ αὐτὸν παθεῖν ἢ ἀποτεῖσαι. The phrase ‘κύριος ἔστω ἐπιβάλλειν κατὰ τὸ τέλος’ is controversial, since it could be translated as ‘according to the Solonian class of the offender’, or as ‘within the limits of his competence’; for bibliographical references and for a summary of the debate, see Harrison (1971: 5, nt. 2) and Rhodes (1981: 634 f.). Here, I would like to point out that the source at issue does not mention any ‘ἔφεσις to the popular court’; it just deals with a ‘magisterial referral’ in terms of εἰσάγειν; the name ἡλιαία does not certainly prove the post-Solonian origin of the rule; *ergo*, if one supposes that it is a pre-Solonian provision, all that means that, after *ἔφεσις* was introduced, even the fine within the *τέλος* (i.e. the fine imposed by the magistrate according to his competence, and within a given value-limit) could be ‘attacked’; on the contrary, before Solon (*Ath. Pol.* 4.4), the person aggrieved was just entitled to take a new legal action before the Areopagus, denouncing the violation perpetrated by the magistrate (with regard to his competence *ratione materiae* and according to a given value-limit).



formulation at 23.28, forbidding any ransom and any related maltreatment (λυμαίνεσθαι, ἀποινᾶν) against the murderer who infringes the banishment, the lack of procedural protection would obviously have made such prohibitions pointless: once qualified the contents of the rules at issue as consistent with Drako's homicide-code, it is convenient to make a few considerations on this matter⁷³. On the one hand, the victim, since he is incontrovertibly a killer and, as such, an ἄτιμος, is unqualified to start any legal action and to appear before the court as a claimant or as an accuser. On the other hand, since the offence committed represents an infringement of a private interest only, no citizen has the power to initiate the procedure, no third party is allowed to initiate a legal action on the behalf and in the interests of an incapacitated victim. In this event, one can suppose that the proper magistrates, on their own initiative, would have imposed a penalty, while, under Solon, ὁ βουλόμενος was entitled to start a legal action, and the offender was condemned by the popular court to pay a fine which was twice either the amount extorted or the damages suffered.

In short, Drakonian law, on the one side, even if it did not develop any formal and general concept of 'crime', treated, from a procedural point of view, some offences as wrongs injuring the πόλις (as the wrongs of 'attempted tyranny' and 'breach of the exile rule')⁷⁴; on the other side, the

73. Dem. 23.28: λυμαίνεσθαι δὲ μή, μηδὲ ἀποινᾶν, ἣ διπλοῦν ὀφείλειν ὅσον ἂν καταβλάψῃ. Cf., *supra*, ntt. 25 and 26. In Carawan's opinion, the rule that forbids torture and ransom is consistent with other Solonian restrictions (Carawan [1993]; Carawan [1998: 90]; see Gagarin [1981a: 25 f.]). On the one side, it is evident that line 31 of the Drakonian homicide-code (IG I³ 104) cannot be restored with the same word order of the law cited by the orator, since the traces on the stone tend to be incompatible (cf. Stroud [1968: 54 f.]); on the other side, the unusual reference to the first axon (ὥς ἐν τῷ α ἄξονι ἀγορεύει) immediately after the first section of the law cited (τοὺς δ' ἀνδροφόνους ἐξεῖναι ἀποκτείνειν καὶ ἀπάγειν) makes it clear that everything that follows in the quotation is later than Drako's θεσμοί. Yet, I believe that the substance of the traditional restoration (cf. Ruschenbusch [1960: 140]; MacDowell [1963: 119 ff.]), rather than its form, is still valid, likely once the mentions of the 'volunteer prosecutor' and of the 'public court' have been removed (εἰσφέρειν δ' ἐς τοὺς ἄρχοντας, ὧν ἕκαστοι δικάσταί εἰσι, τῷ βουλομένῳ, τὴν δ' ἡλιαίαν διαγιγνώσκειν; cf. MacDowell [1963: 122]; Pepe [2012: 10]). If Drako stipulates that, if a convicted murderer sets foot in Attika, anyone has only the right to arrest him or to kill him (if the arrest fails), all this means that the prohibitions included in the second (formally post-Drakonian) section of Dem. 23.28 are implied in the first (formally and substantially Drakonian) section. The original legal gaps concerned the type of punishment for those who, for instance, blackmailed and maimed the convicted killer found in Attika (misusing their right to ἀποκτείνειν καὶ ἀπάγειν), the legal procedure to be followed and the respective 'standing to sue' (since the aggrieved party was an ἄτιμος), the court before which the matter had to be brought. Solon filled these gaps.

74. In other words, in the seventh century Athens, even earlier than Drako, some

magistrates took care of the incapacitated victim (as one can conjecture with regard to the convicted killer harmed by blackmail and torture). Solon, fully aware of the deficiencies present in the Drakonian system, believed that a corrective was anyhow required to meet the necessities of a more ‘demotic’ legal system: from a strictly legal perspective, how could an orphan or an epikleros take personally an action against the damages perpetrated by the guardian⁷⁵? From a merely factual perspective, how could an old father take an action against a son who had broken his duty to support the parents⁷⁶? Moreover, who was the person entitled to bring a legal suit against idleness and paranoia⁷⁷?

If it is true that all these questions did not find a clear answer in Drako’s laws, it is likewise true that Solon did not introduce *ex novo* any ‘popular and voluntary prosecution’. The Athenian legislator – focused on a need of solidarity and cohesion in the whole community, rather than on a need of protection in favor of the whole community – through the introduction of the general principle of ‘third-party prosecution’, diminished the role formerly played by magistrates and, at the same time, renewed a procedural feature already existing⁷⁸: indeed, ‘entitling the volunteer’ (ἐξεῖναι τῷ

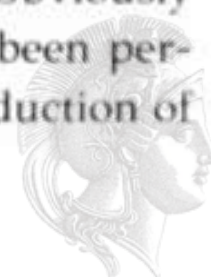
offences were treated as wrongs injuring the ‘community as a whole’, though no formal concept of ‘crime’ had been elaborated as a ‘super-category’ (what contributes to undermining the conclusions reached by Hunter [2007], who tends to confuse the ‘word’ crime with the ‘concept’ of crime).

75. *Ath. Pol.* 56.6.

76. *Ath. Pol.* 56.6.

77. Aeschin. 3.251; *Ath. Pol.* 56.6; Dem. 57.23; Lex. Cantabr. 665.20; Lex. Seg. 5.310.3.

78. See Glotz (1904); Bonner and Smith (1938: 168); Ruschenbusch (1968: 53); Harrison (1971: 77); Rhodes (1981: 160); Hunter (1994: 125); Sealey (1994: 129); Ober (2005: 402); Gagarin (2006: 263); Wohl (2010: 196, nt. 64): all these scholars, as for the goal pursued with the new procedure attested by *Ath. Pol.* 9.1, agree that Solon did not allow anyone who wished to prosecute in all cases, but only in cases where the person concretely wronged was unable to bring a legal action himself. Other authorities believe that the Solonian reform was susceptible to be applied from the beginning to crimes against the πόλις: see, paradigmatically, Ostwald (1985: 9); Almeida (2003: 66). Others seem to agree with the latter trend, both failing to distinguish ‘public actions against offences harming the community as a whole’ from ‘public actions against offences affecting an incapacitated party’, and being far from a reasonable diachronic interpretation of Athenian legal procedure: cf. Todd (1993: 100, 111 f.), and Allen (2000: 39, 346 nt. 48). Christ (1998: 119 ff.), even if he recognizes the opportunity to differentiate ‘third-party litigation’ from ‘public suit on behalf of the city’, maintains that «Solon conceived of volunteer prosecution as an act undertaken in the public interest» (see, further, MacDowell [1978: 53]). Obviously «other cases, such as adultery and theft, where a public interest seems to have been perceived in addition to the wrong to the individual, support the view that the introduction of



βουλομένῳ) 'to exact a penalty' (τιμωρεῖν)⁷⁹ 'on the behalf of the offended private party' (ὕπὲρ τῶν ἀδικουμένων)⁸⁰ meant impacting profoundly on

the γραφαὶ system, and the prosecution by 'anyone who wishes' (ὁ βουλόμενος), cannot be explained solely in terms of the need to protect defenceless victims» (Fisher [1990: 124]; cf., moreover, Winkel [1982: 287 f.]; Humphreys [1983: 239]); anyway, this does not mean, in my opinion, that 'third-party prosecution' is always characterized by a public dimension; this just means that popular actions could be undertaken in the view of different aims and on the basis of different interests, depending on the case (*ergo*, it is surely misleading to assume the existence of a mutual link between 'Solonian public actions' and 'criminal procedure': explicitly Vinogradoff [1922: 165]; Calhoun [1927: 6]; implicitly Osborne [1985: 173]). The provision for voluntary prosecution on behalf of those who have been wronged and are either *de facto* or *de iure* incapacitated to start a legal lawsuit formalizes in a positive rule a notion of justice interpreted as 'defense of the weak': cf. de Romilly (1971: 142 ff.); Mossé (1987: 165 ff.); Ober (1989: 217-9); Dillon (1995).

79. On the meaning of this verb and of the noun τιμωρία, see Allen (2000: 50, 51, 61, 69 ff., 125, 248, 260, 279 ff.).

80. *LSJ*, s.v. ὑπὲρ (with genitive and metaphorically): in defense of, on behalf of, for, instead of, in the name of. Neither Aristotle, nor Plutarch make clear which court, after this Solonian reform, tried cases brought by a third-party prosecutor. As regards the Solonian allocation of the so called public actions, many authorities don't deal directly with the problem; notwithstanding that, their opinion emerges, more or less clearly, from the context of their argumentation, which suggests the belief that magistrates did not give judgments at the end of the fifth century (either because of a formal legal prohibition, or because of a progressive disuse): cf. Bonner and Smith (1938: 96); Harrison (1971: 3 ff.); MacDowell (1978: 26 f., 32 f.); Rhodes (1981: 105); Ostwald (1985: 7 ff.); Hansen (1991: 189); Todd (1993: 100, nt. 2). Other scholars believe that the ἡλιαία, as a court of first and final instance, held the majority of the so called public actions from their primeval emergence under Solon. This is indeed a required conclusion, if one shares the view that Solon limited the penalties susceptible to be imposed by magistrates with a final judgment, and that he prescribed for higher penalties a mandatory 'referral' to the popular court: cf., for instance, Wilamowitz (1893: 60). Yet, on the one hand, it is unlikely that Solon made all magisterial judgment subject to ἔφεσις (where it is plausible that he granted that magistrates kept their original judicial powers at least in certain minor cases): MacDowell (1978: 30 f.). On the other hand, there are some hints in the sources suggesting that, at least in the earliest examples attested, ἔφεσις – regardless of the problem concerning its legal nature – was an act of the dissatisfied litigant (Plut. *Sol.* 18.2). Other scholars have achieved the same conclusion through a different path. Allen, for instance, assumes that «δίκαι were heard before individual magistrates», whereas «Solon's introduction of the γραφαί was an introduction of a new form of court case», and that «presumably the procedure would have been modeled, to some degree, on the homicide cases, since they were the only form of court procedure already in existence» (Allen [2000: 40]; see, accordingly, Ober [2005: 402]: «a voluntary prosecutor could initiate proceedings against another for wrongs committed against any Athenian. The judging body to which the prosecutor would turn in exposing wrongdoing was the citizen body itself [or some very substantial fragment thereof], sitting in a judicial capacity»). Afterwards, she points out that «if the γραφή was in fact invented to be a court case as distinct from a δίκη, then it is unlikely

the jurisdictional power of the Athenian ἀρχαὶ and on their prosecutorial discretion; furthermore, it finally involved full protection for those persons who had not any ‘standing to sue’ (while ‘popular prosecution’ was previously related to the safeguard of the community only).

To conclude, the second of the most populist reforms enacted by Solon got each member of the πόλις – regardless of his social status – and the entire Athenian community connected with one another⁸¹. This measure,

that Solon would have invented ἔφεσις at the same moment as he invented the γραφή» (Allen [2000: 347, nt. 55]). Many legal misunderstandings and many historical mistakes undermine all this circular reconstruction. First of all, neither Aristotle, nor Plutarch attest a Solonian reform of the Athenian legal procedure concerning the judicial authorities of first instance: *ergo*, as for ‘third-party litigation’ at least, nothing seems to rule out that Solon kept on allocating these trials to magistrates, even if Solon grants – in contrast with the past – a provision for appealing their judgments, so that they cannot longer be qualified as αὐτοτελεῖς and κύριοι (cf. *Ath. Pol.* 3.5; *Arist. Pol.* 1285 b 9-12, 1298 a 9-31). Secondly, from both ancient authorities, as far as the second populist measure introduced by Solon is concerned, the only noteworthy divide emerging between δίκαι and γραφαὶ concerns those who are entitled to prosecute, so that it is just an *a priori* and groundless assumption to maintain that γραφαὶ must be tried before a different kind of court, since no functional link exists between the second Solonian reform and the rule to the effect that a new tribunal, whose new function was limited to hearing cases object of ἔφεσις, was added to the magisterial and Areopagite jurisdiction. Third, it is not true, as it has been already seen, that homicide cases were the sole court-cases existing at the beginning of the sixth century B.C.: in fact, cases affecting the community, as attempted tyranny, were held before the Areopagus since the pre-Drakonian age. Fourth, the skeptical view, supporting the late (i.e. Kleisthenic) introduction of ἔφεσις, cannot be shared, since it is just logically drawn from the unfounded belief that the point of the γραφαὶ was to distinguish between court and non-court procedures and, what is more, since it is contradicted by our extant sources.

81. *Ath. Pol.* 9.1; *Plut. Sol.* 18.5. It is commonly accepted that Solon introduced the so called ‘public actions’: see Rhodes (2006: 255). What is controversial is the role played by the magistrates as far as third-party litigation is concerned (cf., *supra*, nt. 78). To sum up: nothing prevents from assuming that, during the sixth century B.C., Athenian magistrates, even after Solon’s reforms, kept their power to give judgments, not only as far as private δίκαι were concerned, but also if a third-party brought a legal action before them in the interest and on the behalf of an incapacitated individual, or if ὁ βουλόμενος took public charges. Afterwards, in opposition to the past, the convicted offender was entitled to appeal to the people against their decision, and it is obvious that ἔφεσις was constantly demanded in the most serious cases, so that all this may well explain why magistrates never seem to have acquired the power to pass capital sentences. The Areopagus, as the most ancient criminal court, hears εἰσαγγελίαι, judges the most serious offences against the πόλις, passes judgments that even after Solon keep on being final. This system probably changes at the beginning of the fifth century B.C. (if not a short earlier), when a law including the so called ‘δῆμος πληθύνων provisions’ was first enacted. On the one hand, this formalized the disuse of giving capital judgments or of inflicting very high monetary penalties at the magisterial hearing, since during the seventh century such a judicial practice, although

on the one hand, perfectly fitted, from a procedural perspective, the more general μεταβολή of the constitutional system promoted by the legislator on the way towards democracy and against the earlier oligarchic and magistrate-centric τάξις⁸²; on the other hand, it constituted the legislative attempt to ensure that the lowly citizens and the nobles received by law equal prerogatives (as ‘popular prosecutors’, and as ‘judges’): what Solon himself seems to boast in his poetry⁸³.

Key-words: Attempted tyranny; Drakonian procedures; magisterial powers and incapacitated victims; offences against the community; Solonian reforms; ‘third-party prosecution’; ἀπαγωγή against killers; ὁ βουλόμενος.

consistent *de iure* with magistrates’ powers, became *de facto* worthless because of, and as a result of, the Solonian ἔφεσις provision. On the other hand, it brought to an end the Areopagite criminal jurisdiction over the most serious offences against the community as a whole: the ancient ‘impeachment’ procedure ceases to be a fully aristocratic prerogative.

82. Cf. *Ath. Pol.* 41.2; *Arist. Pol.* 1273b 35-40: see Poddighe (2014: 139 ff.), with further bibliography.

83. Sol. fr. 36.18-20 (West): θεσμούς δ’ ὁμοίως τῷ κακῷ τε κάγαθῷ, / εὐθεΐαν εἰς ἕκαστον ἀρμόσας δίκην, / ἔγραψα. In my opinion, it is not unsound to interpret these lines in the light of an implicit mention to the written laws which established ‘popular prosecution by anyone who wishes’ (ὁ βουλόμενος), as well as ‘ἔφεσις’ to the popular court (ἡ ἡλιαία; cf. *Ath. Pol.* 7.3: the θῆτες were not qualified to hold office, but received the right to sit in the assembly and in the courts). This reading seems to be preferable to the generic view proposed by Almeida (2003: 231 ff.), who believes that the lines at issue suggest that Solon attempted a re-institution of the πόλις idea «at the level of the official agencies of political authority», and that the aim of his reforms was «to create conditions within the πόλις where the norms of political δίκη would apply equally to all citizens». Indeed, such laws were enacted, so that all the Athenians became similar, at least to some extent: Solon neither introduced or anticipated the concept of ‘absolute equality’ (ἴσον; cf. Raaflaub [1996]; Mülke [2002: 389]), nor enacted laws which were fair to the lower and upper classes alike (Rhodes [1981: 177]). He just made ‘peers of unequals’, as far as the two above-mentioned measures are concerned (cf. Noussia-Fantuzzi [2010: 474 ff.]).

APPENDICES

Appendix 1: Areopagus and ephetai before Solon.

α) The view that the Areopagus was a Solonian creation seems to be shared by Pepe (2012: 62), who, besides Plut. *Sol.* 19.3, Poll. 8.125, and Cic. *Off.* 1.22, even quotes Arist. *Pol.* 1273 b: «verisimilmente con Solone ... venne istituito il Tribunale dell’Areopago e venne stabilita la sua competenza in materia di omicidio volontario». Yet, this reconstruction is patently contradicted, as Plutarch himself admits, among the other sources, by the Solonian amnesty law (Plut. *Sol.* 19.4), and most scholars support the existence of the Areopagus even before Solon. Wallace (1989: 7 ff.), Ryan (1994), Roselli della Rovere (1999), believe that the aristocratic βουλή – composed by ephetai – was only a site for judicial trials, in particular for homicide. Ostwald (1985: 7), on the contrary, shares the thesis of the existence of early deliberative and judicial powers (cf. Bonner and Smith [1938: 88 ff.]; de Bruyn [1995: 21 ff.]); he therefore assumes that «with the benefit of the hindsight that later developments provide, it is possible to distinguish three areas of public law in which we ascribe jurisdiction to the Areopagus: it tried crimes against the state, it held magistrates accountable for their official acts (*euthyna*), and it scrutinized elected officials before they embarked upon their term of office to ensure that they possessed the formal qualifications for the office to which they had been elected (*dokimasia*)»; the scholar further believes that from the beginning the Areopagus even held trials for all those offences that, under the presidency of the archon-king, it will try during the classical era, that is – beyond homicide and wounding – arson and destruction of sacred olive trees (cf. Ostwald [1985: 9]; Busolt and Swoboda [1926: 2.803 ff.]; Hignett [1952: 80]; Stroud [1968: 36]; MacDowell [1978: 71]). Others have expressly rejected the view that the aristocratic βουλή was originally a court with jurisdiction over homicide cases, thus implying its political functions and its judicial powers concerning ‘public issues’ only (cf. Ruschenbusch [1960: 129 ff.]; Gagarin [1981a: 130]; Sealey [1983: 265 ff.]; Carawan [1998: 89 ff.]; Westbrook [2009]).

β) The theory that denies any Areopagite jurisdiction over homicide cases before Solon has been recently challenged by Gagliardi (2012). In his opinion, before Solon: 1) the ephetai (that are not considered Areopagites, as Wallace [1989: 11 ff.] claims) just tried cases of φόνος μὴ ἐκ προνοίας; 2) the rules concerning Areopagus and φόνος ἐκ προνοίας were inscribed in IG I² 115 below the preserved section on ‘unintentional homicide’; 3) ‘καὶ ἐάν’ (IG I² 115, l. 11) does not mean ‘even if’, but ‘and if’ (so that the first sentence cannot be conceived of as treating φόνος ἐκ προνοίας by im-



plication); 4) Areopagite jurisdiction over homicide cases is attested by the Solonian amnesty law; 5) Areopagite jurisdiction over homicide cases is supported by mythical tradition. This thesis is not fully persuasive. At first, the argument under 2) is just a hypothetical proposal put forward without any documentary evidence and, as concerns 5), one can object that the myths on early homicide trials at the Areopagus are legally inaccurate (for they depict cases of lawful, intentional and unintentional homicides, all tried before the ancient aristocratic βουλή) and, such as post-Drakonian inventions, they only attest the respect this ancient court «was accorded in the fifth century and later» (Gagarin [1981a: 125 f.]). Accordingly I will focus on 3) and 4), in order to refute 1). In Gagliardi's opinion, the meaning 'and if' attributed to the nexus 'καὶ ἐάν' gains support from the statute – erroneously described as a decree – proposed by Timokrates and cited at Dem. 24.39 and at Dem. 24.71 (Τιμοκράτης εἶπεν, καὶ εἴ τινι τῶν ὀφειλόντων τῷ δημοσίῳ προστετίμηται κατὰ νόμον ἢ κατὰ ψήφισμα δεσμοῦ ἢ τὸ λοιπὸν προστιμηθῇ, εἶναι αὐτῷ ἢ ἄλλῳ ὑπὲρ ἐκείνου ἐγγυητὰς καταστήσῃ τοῦ ὀφλήματος, οὓς ἂν ὁ δῆμος χειροτονήσῃ, ἢ μὴν ἐκτείσειν τὸ ἀργύριον ὃ ὤφλεν). The comparison between Timokrates' law and IG I² 115, l. 11 is not sound, in the light of the structure of the two rules at issue. As for the Drakonian law's incipit, the protasis is a negative statement and the apodosis provides a negative consequence for the offender (killer); as for the law proposed by Timokrates, the protasis is an affirmative sentence, and the apodosis includes a positive provision for the offender (public debtor). Moreover, Gagliardi seems to misunderstand the contents of the law challenged by Demosthenes and its relation with previous Athenian regulations: the orator indeed assumes that imprisonment is a possible 'additional penalty' stipulated by Solon and susceptible to be imposed by the court for serious categories of criminals (cf. Dem. 24.103). More precisely, if someone serves as a judge while being a state debtor or another type of ἄτιμος, he is subject to ἐνδειξις and then tried; if convicted, the court is to assess the penalty, and if a monetary fine is inflicted, he can be further sentenced to imprisonment until the fine is paid (*Ath. Pol.* 63.3: cf. Mirhady [2005]; Canevaro [2013a: 37 ff.]). *Ergo*, I believe that Demosthenes vigorously criticizes Timokrates, since the latter, through his law, allowed criminals like state debtors to avoid prison by presenting sureties. And this possibility was granted 'even if the imprisonment itself had been inflicted by the popular court as an additional penalty, according to prior laws or decrees in force'. In other words, the 'even if' clause in Timokrates' law seems to be directed to emphasize the introduction of an 'exceptional discipline' which substantially bypasses the popular judgment (προστίμῃσις) and contradicts prior legal rules (νόμοι and ψηφίσματα). As regards the argument *sub* 4), Gagliardi assumes that «data la somiglianza tra il testo dell'amnistia soloniana e il decre-

to di Patroclide, sembra più verosimile che per entrambi i testi sia proponibile la stessa interpretazione, che abbiamo già fornito e che mostra che l’Areopago già prima di Solone giudicava nei processi per φόνος ἐκ προνοίας». This reasoning is not convincing. At first, Gagliardi primarily founds his view on a section of a ‘document’ preserved at And. 1.78, neglecting the hypothesis that the text of the decree is only an inaccurate forgery. As Canevaro and Harris (2012: 109) maintain (highlighting the existence of many incongruities between this text and the ordinary usage of inscribed decrees and procedural laws, as well as specifying that the insert in the manuscript is far from being a faithful transcription of the original): «the person who composed the inserted document drew on the Solonian law quoted in Plutarch but introduced errors when trying to adjust its terms to a different context. Every time the text of the inserted document differs from Plutarch’s text, the former contains corruptions and impossible Greek. The person who composed the document may have found the Solonian law in Plutarch or in a compilation of Solon’s laws». Secondly, even if the document at issue were authentic, some doubts would still remain. One must observe that, when the decree was enacted (405 B.C.), the Areopagus undeniably tried cases of φόνος ἐκ προνοίας, while, as regards the pre-Solonian era, this competence is *sub iudice*. *Ergo*, it is not correct to provide an earlier statute with the same legal sense attributed to a more recent one, even if the latter derives its formal structure from the former. Moreover, on the one side, the Solonian amnesty law mentions three courts, Areopagus, ephetai, Prytaneion (ἀτίμων ὅσοι ἄτιμοι ἦσαν πρὶν ἢ Σόλωνα ἄρξαι, ἐπιτίμους εἶναι πλὴν ὅσοι ἐξ Ἀρείου πάγου ἢ ὅσοι ἐκ τῶν ἐφετῶν ἢ ἐκ πρυτανείου καταδικασθέντες ὑπὸ τῶν βασιλέων ...), while, on the other side, the decree of Patrokleides cites four courts (adding to the list the Delphinion: cf. Pepe [2012: 195 ff.]); both indeed exclude from reprieve those who have been convicted of homicide, slaughter, tyranny (... ἐπὶ φόνω ἢ σφαγαῖσιν ἢ ἐπὶ τυραννίδι ἔφευγον ὅτε ὁ θεσμός ἐφάνη ὅδε). Thus, one can reasonably suppose that, between Solon and Patrokleides, the judicial competence underwent some modification, if one believes that the ephetai did not meet at the Delphinion (cf. Gagliardi [2003]); otherwise, if one believes that the ephetai even judged at the Delphinion (cf. MacDowell [1978: 28]), the mention of this court is totally redundant and ungrounded, so that the source itself turns out to be less reliable.

γ) The amnesty law (cf., *supra*, nt. 17), in my opinion, argues against those who *toto coelo* identify the ephetai with the members of the Areopagus (cf. Wallace [1989: 7 ff., 12 ff.]; Roselli della Rovere [1999]), whereas it does not rule out – at least *per se* – the thesis that the ephetai represented a ‘commission’ of Areopagites (Bonner and Smith [1938: 99]). In Wallace’s opinion, before Solon: 1) the Areopagus was just a court that tried



homicide cases; 2) it was composed by the fifty-one ephetai established by Drako c. 621 B.C.; 3) once assumed that the Areopagus and the ephetai were the same body, by process of elimination he hypothesizes that trials for tyranny were held at the Prytaneion. The rejection of the view *sub* 1) is explained *supra* at nt. 12 and in Appendix 1 (β): many data, on the one hand, allow to conceive of the Areopagus as a βουλή with deliberative and supervisory functions, and as a court trying cases involving public interests; on the other hand, the sole ephetic jurisdiction over homicide cases is well attested, as far as the pre-Solonian age is concerned. Yet, if 2) were true, the criticisms against Gagliardi would turn out to be ultimately pointless. If Phot. s.v. ἐφέται appears to be completely irrelevant, it is false that Harp. s.v. ἐφέται (Δημοσθένης ἐν τῷ κατ' Ἀριστοκράτους, οἱ δικάζοντες τὰς ἐφ' αἵματι κρίσεις ἐπὶ Παλλαδίῳ καὶ ἐπὶ Πρυτανείῳ καὶ ἐπὶ Δελφινίῳ καὶ ἐν Φρεαττοῖ ἐφέται ἐκαλοῦντο) poses no obstacle to the identification of Areopagites and ephetai, since the lemma explicitly rules out that ephetai sat at the Areopagus (although it mistakenly maintains a regular connection between these judges and the Prytaneion: cf. Gagliardi [2003]). What is more, this view does not gain support from Poll. 8.125 (cf., *supra*, nt. 12). Out of this lemma, one can indeed assume that the Areopagite jurisdiction over φόνος is more recent than the ephetic one (since, originally, only the ephetai ἐδίκαζον δὲ τοῖς ἐφ' αἵματι διωκομένοις in five different tribunals) and that it was Solon that added, as a homicide court, the Areopagus to the ephetai (Σόλων δ' αὐτοῖς προσκατέστησε τὴν ἐξ Ἀρείου πάγου βουλήν). Very likely Pollux just meant that originally each ephetic tribunal tried one of the five types of φόνος, i.e. 'lawful', 'committed by exiles', 'committed by unknown people' or 'not committed by human beings', 'unintentional', 'intentional' (rather than the ephetai, already in the period between Drako and Solon, sat in Athens' classical homicide courts, i.e. Delphinion, Phreato, Prytaneion, Palladion, and – obviously – the 'hill of Ares'). Furthermore, he states that under Solon the Areopagus started to hear homicide cases 'alongside the ephetai', implying that the primeval jurisdiction over φόνος must have somehow undergone a change (rather than the Areopagus, from Solon on, represented a 'sixth homicide court' alongside the precedent five courts that were composed by ephetai). Cf., on the lemma, Wallace (1989: 12); Carawan (1998: 14, nt. 20); see, moreover, Phot. *Bibl.* 279.535 a 32-4. Finally, FGrHist 324 F4a and 328 F20b (Androtion and Philochoros quoted by Maximus the Confessor in his prologue to Dionysios the Areopagite) are not decisive at all. This source just attests that in a first phase, likely before Drako, the Areopagus was constituted from (or composed of) the nine appointed archons (ἐκ γὰρ τῶν ἐννέα καθισταμένων ἀρχόντων), while, in a second phase, 'fifty-one distinguished men' sat at the Areopagus (ἐξ ἀνδρῶν

περιφραεστέρων πεντήκοντα καὶ ἐνός): cf. Bonner and Smith (1938: 99 f.); Wallace (1989: 14 ff.); Carawan (1998: 14 f.); Pepe (2012: 52 f.). Actually, the account sketched by Maximus the Confessor could only mean that, at least between Drako and Solon (since it is commonly maintained that from Solon on the Areopagite Council included all former archons: cf., on the grounds of Plut. *Sol.* 19.1, Wallace [1989: 52 ff.]), the courts trying cases of ‘intentional’ and ‘unintentional’ φόνος, on the one side, and the Areopagus, on the other side, are found to have – by chance – the same number of members (and Schol. Aeschyl. *Eum.* 743, according to Petit’s emendation, could be read in the same fashion).

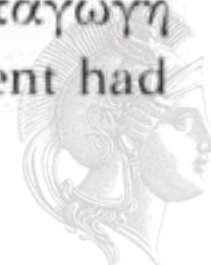
Appendix 2: ἀπαγωγή against accused and suspected killers

α) Gagarin (1979) highlighted some presumed similarities between the procedures described at Dem. 24.105 (against parent abusers, draft dodgers, persons banished from the ‘νόμοι’: cf., *supra*, nt. 37) and at Dem. 23.80 (killers who find themselves ἐν τοῖς ἱεροῖς καὶ κατὰ τὴν ἀγοράν: cf., *supra*, nt. 37); he then tried to assimilate such two types of remedies and to annihilate their (more than evident) differences. In Gagarin’s opinion, Demosthenes, in the second testimonium, is just reporting the penalty usually assessed by the judges (that is death); the absence of the mention of a 1000 drachmai fine for the unsuccessful prosecutor at Dem. 24.105 is due to an intentional abridgment; both sources may deal with an arrest carried out after the magisterial πρόρρησις, the mention of which the orator has omitted in the paraphrase included in Dem. 23.80 (or, alternatively, Gagarin [1979: 320] hypothesizes that an arrest without any proclamation could be carried out under the condition that the killing was ‘public and manifest’). At first, this reconstruction is not persuasive from a rational perspective. If it were true, indeed, it would have been advantageous for any killer to violate the forbidden places (or to commit publicly and manifestly a homicide): the penalty for ‘ordinary homicide’ was either death or exile, while a ‘trespassing killer’ (or a ‘flagrant killer’), once arrested, could even get off with a monetary fine. Secondly, it is not exact from a legal perspective: Dem. 23.80 clearly attests that trespass is not the substance of the charge (as, on the contrary, Gagarin [1979: 315] is inclined to maintain, followed by Volonaki [2002: 153]), but only a ‘condition of arrest’ (on the basis of Lys. 13 and Dem. 23.80, Carawan [1998: 362 f.] rightly concludes that trespass was a requirement for the process, but he erroneously assumes that the ‘ἐπ’ αὐτοφώρῳ condition’ involved the arrest, rather than the homicide). As far as Lys. 13 is concerned, I point out, at first, that the prosecutor, before the court, does not offer any evidence that Agoratos has violated the prohibited places: this datum weighs

against the view that trespass is the very nature of the charge. Secondly, Agoratos is never labeled as a κακούργος; thus, the theory – proposed by Hansen (1976: 101 f.) and followed by Hunter (1994: 135) and by Phillips (2008: 126 f.) – that the prosecution at issue is an ἀπαγωγὴ κακούργων cannot be shared. Thirdly, if trespass is conceived of as a ‘procedural condition’, it is natural and easily explainable that the prosecutor, before the judges, never accuses the arrested of appearing where he was not allowed, although Agoratos could be arrested provided that he frequented public places (cf. MacDowell [1963: 120 ff., 130 ff.]; Todd [1993: 276]). Such a matter had to be treated during the pretrial stage before the Eleven, since the judges – during the trial – were primarily concerned with the substance of the charge, that is ‘homicide’. Finally, in order to evade the amnesty terms (*Ath. Pol.* 39.5: τὰς δὲ δίκας τοῦ φόνου εἶναι κατὰ τὰ πάτρια, εἴ τις τινα αὐτοχειρίᾳ ἔκτεινεν ἢ ἔτρωσεν), it was not necessary – as Volonaki (2002: 163 f.), on the contrary, claims – to treat trespass as the only formal charge. Indeed, the exception to the rule laid down in the sentence ‘τῶν δὲ παρεληλυθότων μηδενὶ πρὸς μηδένα μνησικακεῖν ἐξεῖναι’ (*Ath. Pol.* 39.6) may mean that the traditional remedies (i.e. the actions undertaken κατὰ τὰ πάτρια) were still available against those who were suspected to have brought about another man’s death αὐτοχειρίᾳ during the Thirty, and not that they who had killed ‘manifestly and indirectly’ in the same period could not be sued through ‘non-traditional’ procedures. Thence, the ἀπαγωγὴ φόνου could be undertaken without violating the Amnesty provided that the required legal condition (that is ‘violation of prohibited areas’) had occurred in the period after 403 B.C.: cf. MacDowell (1963: 121 f.); Evjen (1970: 406); Todd (1993: 275 f.); Riess (2008: 69 ff.); Volonaki (2002: 161 f., 167 ff.); Pepe (2012: 90, nt. 9). If this interpretation is correct, it is neither necessary to believe that this procedure came into operation after the Amnesty treaty (403 B.C.) and before Agoratos’ case (399 B.C.), as Volonaki (2002: 164) supposes, nor to consider the speech against Aristokrates (352 B.C.) as the *terminus ante quem* and the speech against Agoratos (400-390 B.C.) as the *terminus post quem*, as Hansen (1976: 103) states. On the one hand, one is allowed to infer that in 399 B.C. this procedure was not conceived of as a ‘totally novel remedy’ (since Agoratos does not counter the procedure *per se*, but only the applicability of this extraordinary action to his own case) and, at the same time, that it was not a ‘traditional remedy’ (since, otherwise, it could not have been undertaken). On the other hand, it is hard to assume that this procedure did not exist in 419/418 B.C. (cf. Hansen [1976: 103]), when a choregos, in the last but one month in the year, was challenged to a δίκη φόνου taken by the kinsmen of a choir-boy who had died after receiving the wrong medicine by the choregos-substitute (*Ant.* 6): it is apparent

that, in this case, the ‘ἐπ’ αὐτοφώρῳ requirement’ did not occur, even if the choregos certainly appeared in public places. To conclude, we can just consider 399 B.C. as the *terminus ante quem* for the introduction of the so called ἀπαγωγὴ φόνου, while the precise year (some time during the fifth century) remains uncertain.

β) As far as Hansen’s view is concerned (Hansen [1981]), four types of ‘procedures by arrest’ were available against homicides during the fourth century B.C.: ἀπαγωγὴ against persons accused of homicide (for which the scholar does not suggest any precise date of introduction); ἀπαγωγὴ against persons suspected of homicide (introduced between c. 400 and 352 B.C.); ἀπαγωγὴ against homicides as κακούργοι (introduced in the second half of the fifth century); ἀπαγωγὴ against exiles who had been sentenced for homicide (Drakonian remedy). In his opinion, the second section of the document included at Dem. 24.105 (the inauthenticity of which is not even taken into account) describes a temporary interruption of the ordinary legal action initiated by the magisterial public proclamation. In other words this peculiar ἀπαγωγὴ would not have replaced a δίκη φόνου, while the procedure described at Dem. 23.80 – that is the ἀπαγωγὴ φόνου introduced during the first half of the fourth century – would have been a substitute for a δίκη φόνου. If this explanation rides out Gagarin’s inconsistencies, it presents anyhow several problems (some of which the author himself noted). At first, Dem. 24.105 is our only testimonium for a simple ἀπαγωγὴ against ἄτιμοι. Secondly, it is quite impossible that, in the same context, the ἀπαγωγὴ against parent abusers and draft-dodgers turns out to be an autonomous remedy that ends with a final judgment, while the ἀπαγωγὴ against homicides represents an interruption of the main process implying just an interim award on a secondary and dependent matter. Thirdly, it is very unsound that a person who did not kill ἐκ προνοίας, if arrested before the magisterial proclamation, is to be sentenced to death (according to Dem. 23.80), while, if arrested after the magisterial proclamation, may be just fined and, then, sentenced to exile (Dem. 24.105). To conclude, Hansen’s interpretations of the document preserved at Dem. 24.105 must be ruled out (as well as Gagarin’s reading); moreover, this testimonium turns out to be radically inconsistent with our sources. *Ergo*, we do not have any valid evidence, coming from the age of the orators, for the precise procedure available against ‘suspected homicides’ who have been formally banned by the βασιλεὺς from the Agora and the holy places (see, *amplius*, Canevaro [2013a]). Furthermore, as regards the supposed ἀπαγωγὴ κακούργων against killers, Hansen’s assumptions cannot be shared. Lys. 13.56 and Lys. 13.85-87 do not demonstrate that the procedure by arrest taken against Agoratos was an ἀπαγωγὴ κακούργων (Hansen [1976: 52, 101 ff.]); they show that the indictment had



to be completed with the mention of a ‘homicide committed ἐπ’ αὐτοφώρῳ’, and all this may well mean – since Agoratos is never labeled as a κακούργος – that the ‘ἐπ’ αὐτοφώρῳ requirement’ was a condition for any type of ἀπαγωγή, and not for the ἀπαγωγή κακούργων only (cf. Volonaki [2002: 161 f.]; Harris [2006: 291 ff., 373 ff.]; Pelloso [2008: 72 ff.]). Moreover, Ant. 5 – which Hansen (1976: 105 ff.) considers a good source for reconstructing the Athenian law of homicide – seems to shape a phony action (in substance and in form), rather than a proper remedy rested upon a solid legal basis (MacDowell [1963: 136 f.]; see Gagarin [1979: 318 f.]; *contra*, cf. Lipsius [1905-15: 324 ff.]). On the contrary, the following data suggest that Ant. 5 is not valid evidence (and, above all, it does not support the thesis that ἀπαγωγή κακούργων was legally available against homicides). The speech at issue is the only example, among the extant sources, attesting the use of ἐνδειξις against a ‘felon’-‘homicide’ (although Carawan [1998: 337 ff.] rightly suggests that Euxitheos never assumes that the procedure by ἐνδειξις and ἀπαγωγή was not allowed against killers). Euxitheos maintains that the opponent party, in order to prosecute him through such a procedure, invented a law *ad hoc*, behaving like a real legislator (Ant. 5.12, 13, 15: cf. Volonaki [2002: 163 ff.]). The case was unprecedented (Ant. 5.9: cf. Gagarin [1997: 173, 180 f.]; Hansen [1976: 105 ff.]; Phillips [2008: 123 f.]; *contra*, see Carawan [1998: 334 f.]). The prosecutors – violating the rule of law – did stretch the letter of the law by means of an extensive interpretation of the word κακούργος, notwithstanding that the νόμος κακούργων used such a term in a technical and strict sense and did not include in the (likely exhaustive) κακούργοι-list those who committed homicide (Ant. 5.9-10: see Hansen [1976: 105]; Gagarin [1979: 317 f.]). The unusual and vexatious nature of the procedure undertaken for Herodes’ death emerges from the fact that the prosecutors previously made some irregular proposal by way of penalty-assessment: which is impossible for an ἀπαγωγή κακούργων (cf. Gagarin [1989: 26 ff.]), and very implausible for a homicide case. It is not true that Aeschin. 1.90-1 attests, for the second half of the fourth century, that the ἀπαγωγή κακούργων against homicides was warranted by law (cf., for this erroneous interpretation, Hansen [1976: 45]; Hansen [1981: 23 f.]; Phillips [2008: 124]); provided that in the passage neither the noun ἀπαγωγή occurs, nor the technical term κακούργος appears, as Harris (2006: 291 ff.) has convincingly demonstrated. «Aeschines’ aim in this passage is not to discuss a particular legal procedure, but to make a more general point about the punishment of all types of serious criminals» (cf. Gagarin [1979: 320, nt. 60]; Carey [1995]; Fisher [2001: 224 ff.]). Dem. 23 – where we should expect to find a complete catalogue of all the procedures available against killers – does not include any mention of the ἀπαγωγή κακούργων. According-

ly, we can infer that the use of the ἀπαγωγὴ κακούργων against homicides rests upon no legal basis (once further maintained that the Menestratos' case described at Lys. 13.56 is a precedent for the trial of Agoratos, i.e. an example of ἀπαγωγὴ φόνου, and that Lex. Seg. 250.4 carries little weight). *Contra*, several different interpretations concerning the procedure undertaken against Euxitheos have been proposed, and all of them imply that the case, at least in form, is not groundless: paradigmatically, see Evjen (1970: 404 ff.) and Heitsch (1984), who believe that ἀπαγωγὴ was not an uncommon remedy against foreigners; Carawan (1998: 337 ff.), who rejects the view that the procedure against Euxitheos was novel and assumes that it was available even against Athenians; Volonaki (2002: 153 ff.), who supposes that the procedure at issue was established as an alternative homicide procedure in the last third of the fifth century by way of a law enacted by the Assembly; Riess (2008: 62 ff.), and Phillips (2008), who consider the case against Euxitheos the precedent for all ensuing procedures by arrest against homicides.

*Appendix 3: some brief considerations on the so-called
'δῆμος πληθύων provisions'.*

According to Ryan, after 594 B.C. neither the Areopagus, nor the Athenian magistrates were entitled to inflict the most severe punishments: this scholar, in fact, believes that the so called 'δῆμος πληθύων provisions' (IG I³ 105, l. 35: ἄνευ τῷ δέμῳ τῷ Ἀθηναίων πλε[θ]ύοντος μὲ ἔναι θαν[ά]τοι ζεμι[ο]σαι...; IG I³ 105, l. 40-1: [...ἄνευ τῷ δ]έμῳ τῷ Ἀθηνα[ί]ο[ν] πλε-[θύο]ντος μὲ ἔναι θοὰν ἐπιβαλὲν [Ἀθε]ναίων) were actually passed under Solon (against the majority view that, on the contrary, conceived of them as dating back between the end of the sixth century and the mid of the fifth century): in his opinion, «the place to start the argument that a Solonian date ... makes the most historical sense is with the provisions themselves» (Ryan [1994: 128]). Accordingly, already in the early sixth century Athenian citizens could not have been sentenced to death or to the highest (monetary) fines without a final 'popular decision': magistrates and Areopagus were thence expressly forbidden by law to give judgments, at least as far as the most serious public offences were concerned. This view, although extremely intriguing, is not persuasive for several reasons. 1) It implies that the phrase 'δῆμος πληθύων', is not only suitable to describe the people sitting in both its political capacity (as ἐκκλησία) and in its judicial capacity (as ἡλιαία), but it is the original Solonian name of the institutionalized Athenian people (above all in its judicial capacity). Apart from the problematic presence of the word ἐκκλησία at ll. 53 and 54, this interpretation cannot be shared, since it is contradicted by a great amount of sources attesting both the antiquity of the denomination

‘ἡλιαία’, and the sole judicial meaning of this word from the beginning: see Dem. 24.105, 114 and Lys. 10.16 (where Solon is directly connected with such an institution); Antiph. 6.21, 23 (where the semantic interchange between ἡλιαία and δικαστήριον occurs and where it is attested that the name and the institution date back to the beginning of the sixth century); Dem. 24.148; Hyper. 4.40 (where the oath sworn by the popular judges is called either ‘heliastic’ or ‘of the heliasts’); Ar. *Eq.* 798, *Vesp.* 195, 772, 891, *Lys.* 380 (where the noun δικασταί overlap ἡλιασταί); actually the idea that the Solonian name for the new tribunal was ἡλιαία is generally agreed: cf. Rhodes (1981: 160); Ostwald (1985: 9 f.); but see, also, although from an excessively skeptical view, Bleicken (1995: 27): «wie die Behörde hieß, die Solon einrichtete, ist uns nicht bekannt». *Contra* Ryan’s hypothesis, Cloché (1920) proposes a date between 508-7 and 480-79; Bonner and Smith (1930: 340 ff.) believe that 501 is the most probable date; Rhodes (1972: 197 f.), underlines that «the Athenians were content to retain obsolete expressions in their laws», reckons with «a more conservative drafter» and assumes that the provisions at issue «are likely to have been drafted before 450», even if he does not believe that «greater precision is possible». Ostwald (1985: 29 ff.) adduces six trials for which only popular jurisdiction is attested as evidence for the prior passage of the so called ‘δῆμος πληθύων provisions’ (cf. Hdt. 6.21.2 [the trial of Phrynichus for ‘having reminded the Athenians of their misfortunes’: 493-2 B.C.]; Hdt. 6.104.2 [the first trial of Miltiades for tyranny: perhaps 493-2 B.C.]; Hdt. 6.136 [the second trial of Miltiades for deception of the Athenians: 489 B.C.]; Lyc. 1.117 [the trial of Hypparchus for treason: after 480 B.C.]; Thuk. 1.135.2-3 [the trial of Themistokles for treason: about 471-0 B.C.]; *Ath. Pol.* 27.1; Plut. *Cim.* 14.3-4, 15.1, *Per.* 10.6 [the trial of Kimon for having accepted bribes: 462 B.C.]), and since the first trial took place before 490, he assumes «an early fifth-century version», or «legislation enacted in the late sixth or early fifth century». To me this seems the most plausible view: first, all of these cases involve a public interest and the πόλις as a whole is the wronged party (tyranny; deception of the Athenians; treason; bribes); second, one would expect the Areopagus to have jurisdiction over these cases, while, following Hignett (1952: 154 f.) and Ostwald (1985: 31), all these trials, virtually implying ‘death penalty’, or ‘declaration of outlawry’, or ‘very high monetary fines’, were definitely allocated to the people (for a different interpretation, cf. Hansen [1975: 69 ff.]; Rhodes [1979: 105]). 2) It also maintains that in the seventh century B.C. the Areopagus was simply a homicide court, becoming, only after Solon’s reforms, a very criminal court: in other words, after 594 B.C. public cases would have been undertaken before the Areopagus, but its judicial powers would have been immediately limited by the ‘δῆμος πληθύων provisions’. Apart from the un-

likelihood that a supposed new Areopagite power emerges from the outset already so restricted, no source does indeed support these statements: on the one hand, it is well attested, either directly or indirectly, that since the pre-Drakonian age offences against the community were tried before the aristocratic Council of the Athenians; on the other hand, it is apparent that Solonian ἔφεσις solely concerned ‘magisterial judgments’ (Plut. *Sol.* 18.2). 3) Furthermore, the final nature of the Areopagite decisions turns out to be a constant principle for the pre-epialtic legal procedure (cf. MacDowell [1978: 39]), so that it seems very implausible to assume that Solon extended ἔφεσις to cases heard by the Areopagus (cf. Dem. 23.22; Lys. 7; *Ath. Pol.* 8.2, 60.2). But see, skeptically, Ostwald (1985: 12): «from the time of Solon we have no indication whatever to affirm or deny that the verdict of the Areopagus was final in crimes against the state». That Areopagite judgments were probably just final is not even contradicted by IG I³ 105, l. 35, 40-1. If the rules at issue provide that the death sentence (as well as the imposition of a θοά) cannot be passed ἄνευ τῷ δέμῳ τῷ Ἀθηναίων πλε]θύοντος, it is clear that the Areopagus cannot longer give a final judgment concerning those crimes against the πόλις for which Solon had established an ‘impeachment’ procedure (cf., *supra*, nt. 68). Yet, at the same time, it is not compulsory to believe that the phrase ‘ἄνευ τῷ δέμῳ τῷ Ἀθηναίων πλε]θύοντος’ implies a first Areopagite judgment susceptible to be appealed. Indeed, the provision could mean that a preliminary hearing had to take place before the ancient aristocratic court and the case was then referred to the people for a final judgment. 4. Finally, it presumes that ἔφεσις was just a ‘mandatory referral’ from the beginning: which is not uncontroversial at all (see, *supra*, ntt. 70, 80 and 81).

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ΠΕΡΙΛΗΨΗ

C. PELLOSO: *Η υποβολή κατηγορίας από τον βουλούμενον στο πρώτο αττικό δίκαιο: οι Δρακόντειες καταβολές της νομοθετικής αναθεώρησης του Σόλωνα*

Είναι άραγε πιθανόν να ανιχνευθούν κατάλοιπα της νομοθεσίας του Δράκοντος στην σολώνεια αναθεώρηση όσον αφορά στον θεσμό της υποβολής δίωξης από τον βουλούμενον, δηλαδή του δικαιώματος που είχε κάθε πολίτης (ό βουλούμενος) να προσφύγει στο δικαστήριο προς υπεράσπιση οποιουδήποτε αδικουμένου; Υπό το πρίσμα ενός τόσο βασικού ερωτήματος, η μελέτη αποσκοπεί να καταδείξει ότι ο νόμος του Δράκοντος, έστω κι αν δεν ανέπτυξε μία συστηματική και γενική αντίληψη περί της εννοίας του εγκλήματος, αντιμετώπισε από διαδικαστική άποψη ορισμένα αδικήματα ως εγκληματικές συμπεριφορές στρεφόμενες κατά της πόλεως (όπως για παράδειγμα την απόπειρα εγκαθίδρυσης τυραννικού πολιτεύματος ή την παράβαση του κανόνος περί εξορίας) και ταυτόχρονα έδωσε στους πολίτες τη δικονομική δυνατότητα να φέρουν τις υποθέσεις δημοσίου ενδιαφέροντος προς εκδίκαση ενώπιον του αρμοδίου δικαστηρίου. Από την άλλη πάλι μεριά θα μπορούσε να υποστηριχθεί η εκδοχή ότι και, πριν ακόμα από τον Σόλωνα, οι Αθηναίοι άρχοντες, αρμόδιοι για να εκδίδουν οριστικές αποφάσεις και να επιβάλουν ποινές με δική τους πρωτοβουλία, ανέλαμβαναν τη δικονομική προστασία των ανυπεράσπιστων εκείνων θυμάτων που δεν είχαν δικαίωμα να υποβάλουν κατηγορία (όπως φερ' ειπείν μπορεί κανείς να συνάγει αναφορικά με τον καταδικασθέντα για ανθρωποκτονία συνεπεία εκβιασμού και βασανιστηρίων).

Κατ' ακολουθίαν μπορεί κανείς να συνάγει το συμπέρασμα ότι ο Σόλων δεν εισήγαγε *ex novo* τη νομική κατασκευή της «λαϊκής και εθελούσιας κατηγορίας»: πράγματι ο αθηναίος νομοθέτης, επικεντρωμένος περισσότερο στην ανάγκη αλληλεγγύης και συνοχής της αθηναϊκής κοινωνίας από την ανάγκη προστασίας του κοινωνικού συμφέροντος, μέσω του θεσμού της μήνυσης εκ μέρους τρίτου – μη εμπλεκόμενου – μέρους περιορίσε τον ρόλο που επιτελούσαν στο παρελθόν οι άρχοντες ενώ ταυτόχρονα αναβάθμισε την προϊσχύουσα διαδικασία που αρχικά εξυπηρετούσε μόνον την ασφάλεια του κοινωνικού συνόλου.

Λέξεις-κλειδιά: Απόπειρα τυραννίας, διαδικασίες με βάση τη νομοθεσία του Δράκοντα, αρμοδιότητες αρχόντων και ανυπεράσπιστα θύματα, εγκλή-

ματα κατά του κοινωνικού συνόλου, αναθεωρήσεις του Σόλωνα, δικαίωμα
προσφυγής στο δικαστήριο από τρίτο – μη εμπλεκόμενο – μέρος, άπαγωγή
κατά ανθρωποκτόνων, ό βουλόμενος

