SEMINARIOS COMPLUTENSES DE DERECHO ROMANO

REVISTA INTERNACIONAL
DE DERECHO ROMANO Y TRADICIÓN ROMANÍSTICA

XXX

SEMINARIOS COMPLUTENSES DE DERECHO ROMANO

REVISTA INTERNACIONAL DE DERECHO ROMANO Y TRADICIÓN ROMANÍSTICA

Publicación de la Fundación Seminario de Derecho Romano «Ursicino Álvarez»
Presidente: Javier Paricio
Administradora: Mercedes López-Amor
Secretario: Juan Iglesias-Redondo

Javier Paricio (*director*)
jparicio@der.ucm.es

Esta publicación tiene carácter anual. El volumen XXX es ordinario y se vende al precio de 150 euros

Los pedidos deben realizarse a:
MARCIAL PONS
c/ San Sotero, 6 - 28037
Madrid (91 304 33 03)

Para el envío de aceptación de originales:
jparicio@der.ucm.es

http://www.derecho-romano.org

SEMINARIOS COMPLUTENSES DE DERECHO ROMANO

REVISTA INTERNACIONAL
DE DERECHO ROMANO Y TRADICIÓN ROMANÍSTICA

XXX

2017

Publicación de la

FUNDACIÓN SEMINARIO DE DERECHO ROMANO
«URSICINO ÁLVAREZ»

Marcial Pons
MADRID | BARCELONA | BUENOS AIRES | SÃO PAULO
2017

© Fundación Seminario de Derecho Romano
«Ursicino Álvarez»
Facultad de Derecho. Universidad Complutense
Ciudad Universitaria
28040 Madrid
© MARCIAL PONS
EDICIONES JURÍDICAS Y SOCIALES, S. A.
San Sotero, 6 - 28037 MADRID
☎ (91) 304 33 03
www.marcialpons.es

ISSN: 1135-7673

Depósito legal: M-23.970-1990

Fotocomposición: JOSUR TRATAMIENTO DE TEXTOS, S. L.

Impresión: ARTES GRÁFICAS HUERTAS, S. A.
C/ Antonio Gaudí, 15
Polígono Industrial El Palomo - 28946 Fuenlabrada (Madrid)
MADRID, 2017

ÍNDICE

ARTÍCULOS

PÁGINAS DE AYER Y HOY

LIBROS

«NULLUM CRIMEN ET NULLA POENA SINE LEGE». SOME REMARKS ON FOURTH-CENTURY ATHENS

POR
CARLO PELLOSO
Universidad de Verona

> «We despise the priest who preaches against his conscience, but we admire the judge who despite his sense of justice remains unswervingly loyal to the law» (G. RADBRUCH, *Rechtsphilosophie*[4], edited and introduced by E. WOLF, Stuttgart, 1950, 182).

SUMMARY: 1. PUBLIC ACTIONS AS PERSONAL CONFLICTS: ATHENS AS THE REIGN OF ANTI-LEGALISM AND ANTI-LIBERALISM.—2. PUBLIC ACTIONS AND THE SOVEREIGNTY OF 'NOMOS'.—3. JUDGES AND PROSECUTORS.—4. LEGAL PROCEDURE, 'NOMOI' AND 'GNOME DIKAIOTATE'.—5. LEGAL PROCEDURE AND 'AGRAPHOI NOMOI'.—6. 'NE BIS IN IDEM' AND ATHENIAN 'NOMOI'.—7. 'TIMESIS' AND RETRIBUTION.—8. 'TIMESIS' AND THE LENGTH OF ATHENIAN TRIALS.

ABSTRACT

The essay focuses on the Athenian antecedents of the Enlightenment principle *nullum crimen et nulla poena sine lege.* Among many historians, it is commonly held that, in the fourth century B. C. the Athenian legal system still embodied an «agonistic society» where *nomoi* represented either forms of evidence or mere pretexts for starting legal actions, and public trials were «arenas» directed to determine societal hierarchies. The essay challenges this view: it investigates the role of written and unwritten *nomoi*, as well as of the discretionary powers of the courts in the area of public actions, and strengthens the idea that Classical Athens implemented the rule of law.

Keywords: principle of legality, *nomos*, public actions, punishment, rule of law.

SOMMARIO

Il saggio tratta degli antecedenti ateniesi del principio illuministico *nullum crimen et nulla poena sine lege.* Secondo una ben radicata scuola di pensiero, ancora nel IV secolo a. C., l'ordinamento giuridico ateniese sarebbe stato espressione di una *«agonistic society»* in cui i *nomoi* avrebbero rappresentato o dei mezzi di prova o dei meri pretesti di iniziative giudiziali, e i processi pubblici sarebbero stati «arene» volte a determinare gerarchie sociali. Contro questa ricostruzione, il saggio, dopo un'indagine sul ruolo concretamente svolto nell'area delle azioni pubbliche dai *nomoi* scritti e non scritti, nonché dai poteri discrezionali dei tribunali, corrobora l'idea secondo cui nell'Atene classica sarebbe stato inverato uno stato di diritto.

Parole-chiave: principio di legalità, *nomos*, azioni pubbliche, pena, stato di diritto.

1. PUBLIC ACTIONS AS PERSONAL CONFLICTS: ATHENS AS THE REIGN OF ANTI-LEGALISM AND ANTI-LIBERALISM

According to article 49[1] of the *EU Charter of Fundamental Rights* (under the rubric *Principles of legality and proportionality of criminal offences and penalties*) «no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed»[1]. This provision at first forbids criminal convictions without any legal basis; second, it embodies the principle that criminal statutes must be clear and precise in order to allow individuals to ascertain which conduct constitutes a criminal offence and to foresee what the consequences of transgressions will

[1] The ECFR was published in *GUCE* 2000/C 364/01. It corresponds to art. 7 of the *European Convention on Human Rights* (ECHR) that entered into force on 3 September 1953: see C. C. MURPHY, «The Principle of Legality in Criminal Law Under the ECHR», in *European Human Rights Law Review*, 2 (2010), 192-209; D. HARRIS - M. O'BOYLE - C. WARBRICK, *Law of the European Convention on Human Rights*, New York, 2009, 331-339.

be. Third, it stipulates that penalties meted out for criminal offences must not be aggravated retroactively and must not be more severe than the ones provided by law when the offences were committed.

According to a widespread *opinio*, nothing similar could be found in the «irremediably alien» Greek world: substantive law and legal procedure in fourth century Athens would represent a totally different system for approaching and resolving public concerns, and, in the area of law, the ancient Greeks would have no significant influence on subsequent societies because of their «intense otherness»[2]. Among social historians it is nowadays very common to claim that public and private actions did not differ from each other in character: both types of legal procedure would be only *agones* between members of the Athenian elite. Athenian courts did not attempt to resolve disputes according to legal rules and principles, «the concept of law being primarily the regulation of relations between citizens rather than the control of human conduct»[3]. They did not apply the law impartially. Rather, they turned out to be above all a social and political body providing an arena for the parties to define and weigh their social relations to one another, as well as the societal hierarchies. As it has been assumed: «The courts can be seen to be a publicly visible, non-violent, mechanism for determining the social position of the parties within the community»[4]; litigants were therefore engaged in a (procedural) competition for honour and prestige and the alleged issue of the dispute represented a mere pretext[5].

---

[2] S. C. TODD, *The Shape of Athenian Law*, Oxford, 1993, 3, 25.

[3] R. OSBORNE, «Religion, Imperial Politics, and the Offering of Freedom to Slaves», in V. HUNTER - J. EDMONDSON (eds.), *Law and Social Status in Classical Athens*, Oxford, 2000, 85-86.

[4] R. OSBORNE, *Religion, cit.,* 70.

[5] In Cohen's view, «the courts were a natural arena [...] and the rhetoric of enmity, envy, and invective was the primary instrument with which they were waged»; «litigants portray envy as base», and «advance vengeance as a respectable motivation for litigation»; «parties to the dispute employ the legal process as a weapon by which to pursue their conflict»; consequently, «legal judgments are by no means binding, nor do they serve to terminate or resolve the conflict» (D. COHEN, *Law, Violence and Community in Classical Athens*, Cambridge, 1995, 82-83, 92). See, moreover, R. OSBORNE, «Law in action in classical Athens», in *JHS*, 105 (1985), 52, who believes that much of the work of the Athenian courts was at the level of regulating personal conflicts. A different and dichotomized view characterizes Lanni's theory: «Rather than approaching Athenian courts as a homogeneous entity», she focuses on the supposed differences between ordinary cases tried before the Athe-

Consequently, the *nomoi* under which a case was tried before a court was unimportant; the statute quoted by a claimant in a private action or by a prosecutor in a public one was simply a procedural mechanism directed to transfer personal feuds or personal rivalries onto a public stage. Judicial procedure tended neither to the discovery of truth nor to the final settlement of legal disputes. The only real dissimilarity would be that public actions represented a more evolved stage in the escalating feud between two litigants, the stakes being higher for the prosecutor and for the defendant. Athenian courts would not tend to resolve disputes and apply the established laws. On the contrary, they would be mainly characterized by a social and political role, providing a real 'arena' for the parties to publicly and finally determine their mutual social relations, as well as the societal hierarchies. Statutes would be merely an incidental pretext for moving personal competitions from a private stage onto a public level. This view —crediting Athens with attempting to implement only social and informal rules— totally underestimates the role played by the substantive aspect of *nomoi* and thus represents the most extreme position among the sociological approaches to the Athenian legal system and to its legal procedure[6].

---

nian people, and the homicide and maritime cases that were tried in special courts with their own procedures. According to Lanni, the Athenians understood the desirability of a regular application of abstract legal principles and rules, but made this «the dominant ideal only in the homicide and maritime cases» (A. LANNI, *Law and Justice in the Courts of Classical Athens*, Cambridge, 2006, 2).

[6] Believing that the difference between pre-civic and civic courts was merely a matter of difference in the forms of judicial proceeding, Allen takes an even more extreme approach than Cohen's and Osborne's, depicting a very quaint picture of public litigation. This is interpreted as the 'public realm' where the prosecutors acknowledge that their personal involvement in public cases «was necessary but not sufficient for justifying a trial», since the case, as a political or social *paraidegma*, should have affected the city's whole structure: «Prosecution could be valid even if no specific law criminalized the act being prosecuted». Law was not «used to frame the case» and «to allow a case to be cast in terms of decisions on facts»; the popular power of judgment «included not only the power to judge where there were no laws, but also the power and right to decide contrary to the laws» and «the Athenians typically subordinated law to judgment and aimed at making the just decision about anger and pity required by each particular context»; public prosecutors were led to suggest that «only illustrious wrongdoers should be tried by *graphe*». See D. ALLEN, *The World of Prometheus: The Politics of Punishing in Democratic Athens*, Princeton, 2000, 175, 176, 191, 193; see, for a similar and extreme approach, J. OBER, *Mass and Elite in Democratic Athens*, Princeton, 1989, *passim*.

According to a less extreme version of such view, in fourth century Athens *nomoi* —whether they pertained to public offences or not— were nothing more than forms of evidence (alongside public decrees, private documents, witnesses, oaths, torture of slaves). In other words, once a litigant —at first the accuser— had attached and quoted a *nomos* as relevant, it would have just limited or shapen behaviours in court, since that particular *nomos* —like all legal provisions— had no binding force: the *nomoi*, as such, were evaluated out of the principle of the judicial free conviction[7]. Thus, Athenian judges resolved disputes above all according to their conscience and sense of equity; they did not have to apply the law strictly, as basing their resolution on the law was just a mere possibility[8]. As the principle *iura non novit curia* was in force[9], Athenian judges were not

---

[7] Todd starts from the assumption that «politics and law were at Athens ultimately indistinguishable» (and so that every trial was a public event). On the one hand, he also maintains that, in both public and private cases, statute law had only «persuasive and not binding force on an Athenian court» (S. C. TODD, *The Shape of Athenian Law, cit.,* 59). On the other hand, he believes that in public cases the adversarial nature of the Athenian legal system implied that «trials [...] were disputes between opposing individuals» and «punishment was designed [...] to reorder the relative position of the two litigants» (S. C. TODD, *The Shape of Athenian Law, cit.,* 160, 162).

[8] See A. R. W. HARRISON, *The Law of Athens*, II, *Procedure*, London, 1971, 48: «The juror is to vote according to his conscience; there would certainly have been many cases not completely or not at all covered by law or decree»; E. RUSCHENBUSCH, «ΔΙΚΑΣΤΗΡΙΟΝ ΠΑΝΤΩΝ ΚΥΡΙΟΝ», in *Historia*, 6 (1957), 257-274, claims that there were gaps in Athenian law (*Rechtslücken* and *Gesetzeslücken*), even if most of the evidence discussed deals with the so-called *asapheis nomoi*, that is the problem of lack of clarity in Athenian statutes. According to S. C. TODD, *The Shape of Athenian Law, cit.,* 54-55, litigants «call on their hearer to bring in a verdict on the basis of more general considerations of justice, in circumstances where (we may suspect) the letter of the law is against them». P. VINOGRADOFF, *Outlines of historical jurisprudence*, II, *The jurisprudence of the Greek city*, Oxford, 1922, 65-69, esp. 68, maintains that «the range of considerations of justice was very large, and was not really restricted to cases where there were no laws». For similar positions, see J. W. JONES, *Law and Legal Theory of the Greeks*, Oxford, 1956, 135; R. HIRZEL, *Agraphos Nomos*, Leipzig, 1900, 51; see, moreover, V. WOHL, *Law's Cosmos. Juridical Discourse in Athenian Forensic Oratory*, Cambridge, 2010, 31.

[9] U. E. PAOLI, *Studi sul processo attico*, Padova, 1933, 66; F. PRINGSHEIM, *The Greek law of sale*, Weimar, 1950, 2; H. MEYER-LAURIN, *Gesetz und Billigkeit im altischen Prozess,* Weimar, 1965, 39; J. K. TRIANTAPHYLLOPOULOS, «Le lacune della legge nei diritti greci», in A. BISCARDI (ed.), *Antologia giuridica romana ed antiquaria*, I, Milano, 1968, 55; ID., *Das Rechtsdenken der Griechen*, München, 1985, 4-5, 223, 249; H. J. WOLFF, *Demosthenes als Advokat: Funktionen und Methoden des Prozeß-*

bound to frame the case tried before them within a specific *nomos*. On the one hand, if they ignored the statute relevant to settle the dispute, they lawfully decided the case although failing to consider and apply it. On the other hand, if they knew it (since the prosecutor, in a criminal case, or the claimant, in a civil case, had attached it), they were not bound and could lawfully apply even an extra-legal rule either created *ad hoc* out of their conscience, or drawn from the world of equity[10]. There would not be any room, in classical Athens, for Feuerbach's criminal law theories. Indeed, the lack of clear statutory definitions of public offences, the alleged procedural orientation of the legal rules, and the use of the judicial machinery against personal or public enemies would make Athens the reign of anti-legalism and anti-liberalism. Rather, the Athenian legal system, implementing the principle *nonnullum crimen, nonnulla poena sine lege*, would appear to embrace a policy that, *mutatis mutandis*, would resemble —at least in its outcome— the inglorious German approach that supported the *Täterstrafrecht* and rejected the *Tatstrafrecht* grounded on Feuerbach's celebrated theory[11].

---

praktikers im klassischen Athen. Vortrag gehalten vor der Berliner Juristischen Gesellschaft am 30. Juni 1967, Berlin, 1968, 8; A. BISCARDI, *Diritto greco antico*, Milano, 1982, 365; E. STOLFI, *Il diritto, la genealogia, la storia. Itinerari*, Bologna, 2010, 63.

[10] See U. E. PAOLI, *Studi sul processo attico, cit.,* 59.

[11] The German scholar, both adhering to the Kantian doctrine of infringement of rights (*i. e.* legitimate state punitive violence is limited to the punishment of violations of subjective rights), and continuing and strengthening the Enlightenment tradition, shapes a theory of general deterrence and positivistic liberalism. On the one hand, he firmly believes that state coercion cannot be carried out by imposing punishment, as this would stand for using a human being as a means to the ends of others. Accordingly, he focuses on the so-called threat of punishment by means of secondary rules directed at an unidentified number of unknown people. On the other hand, he maintains that it is only written law that has to define what offence has to be labelled as crime and what particular threat of punishment has to be meted out. They both cannot be defined *ex post*; they must be clearly formulated and open neither to interpretations that may go beyond the literal meaning of the words, nor to analogy. These consequences (*i. e.* the prohibition of unwritten law; the prohibition of retrospective criminal provisions; the prohibition of obscure and imprecise criminal laws; the prohibition of analogy) are usually summarized in Feuerbach's statement: *nulla poena sine lege* (even if this maxim appears with the contemporary non-Feuerbachian addition '*nullum crimen sine lege*'). Indeed, two further phrases, *nulla poena sine crimine* and *nullum crimen sine poena legali* are found in Feuerbach' *Lehrbuch* in the sense that 'no state punitive violence takes place unless a crime (as defined by law) is perpetrated' and 'no crime (as defined by law) shall remain unpunished': see P. J. A. VON FEUREBACH, *Lehrbuch des ge-*

2. PUBLIC ACTIONS AND THE SOVEREIGNTY OF 'NOMOS'

The sociological approach depicted above shows a serious lack of awareness of the basic difference between law and legal procedures *per se* (that is law in its binding force, and actions brought according to the law) and 'misuse of law and legal procedures' (that is both the failure to apply or to use correctly the relevant statutes, and phony actions brought despite the law)[12]. These flaws have been

---

meinen in Deutschland gültigen peinlichen Rechts, Giessen (first published 1801), § 20. In the nineteenth century, Feuerbach's theory influenced the understanding of the criminal system: the principle *nullum crimen et nulla poena sine lege* ended up being included in almost all criminal codes and constitutions, and gradually embraced by a great variety of scholars: see H.-L. SCHREIBER, *Gesetz und Richter. Zur geschichtlichen Entwicklung des Satzes 'nullum crimen, nulla poena sine lege'*, Frankfurt a.M., 1976, 156 ff. Yet, during the first decades of the century, unwritten criminal law gained the support of those voices still demanding the recognition of «natural» crimes or adhering to the German Historical School: see, on Binding's criticism of the «tyranny» of the principle at issue, H.-L. SCHREIBER, *Gesetz und Richter, cit.,* 169 ff.; see, moreover, F. VON LISZT, «Die deterministischen Gegner der Zweckstrafe», in *ZStW*, 13 (1893), 365, who distanced himself from it. During the early twentieth century, the view focusing on the offenders' attitudes became increasingly prevalent. On the one hand, Feuerbach's principle was not embodied in the rule of law of the Weimar Republic; on the other hand, the ideology that refused a highly precise definition of crime as well as any formal pattern of thought became stronger and stronger. This line of thought was radicalized by the National Socialist scholars. Their criminal law theory embraces the doctrine of infringement of duties and maintains that the offender who fails in his/her duties to the community is a criminal. This means that criminal law shifts from *Tatstrafrecht* (*i. e.* law objectively focusing on the wrong) to *Täterstrafrecht* (*i. e.* law subjectively focusing on the wrongdoer, on his/her attitudes and convictions) and shows a clear desire to make the judges free from the formal written law. All in all, criminal liability and punishment need no prior enactment of a prohibition expressed with high precision and clarity in statutory law; rather, it should encompass substantial justice *per se* and realize the concrete order of life in the community: see C. SCHMITT, «Nationalsozialismus und Rechtsstaat», in *JW*, 63 (1934), 71; ID., *Über die drei Arten des rechtswissenschaftlichen Denkens*, Hamburg, 1934, 8. On anti-liberalism and irrationalism, see K. MARXEN, *Der Kampf gegen das liberale Strafrecht. Eine Studie zum Antiliberalismus in der Strafrechtswissenschaft der zwanziger und dreißiger Jahre*, Berlin, 1975, *passim*. For a general overview, see M. SCOGNAMIGLIO, *'Nullum crime sine lege'. Origini storiche del divieto di analogia in materia criminale*, Salerno, 2009, 9-46.

[12] This dogmatic inaccuracy, resulting in an untenable naivety, is apparent in J. KUCHARSKI, «Vindictive Prosecution in Classical Athens: On Some Recent Theories», in *GRBS*, 52 (2012), 167-197, and in M. CHRIST, «Response to E. M. Harris», in *Symposion 2005*, Wien, 2007, 146, who claims that «the pursuit of enemies

criticized several times from different perspectives. For instance, through a strong challenge of the scholarly trend at issue, one has remarked that the so-called 'rule of law' —or rather the sovereignty of *nomos*— played a fundamental role in Athens, on the institutional, ideological and practical level[13].

—personal or political— through the legal process was a real possibility and probably a common phenomenon». Yet, such an assumption —although true— does not consider the role 'theoretically' and 'teleologically' played by law and its possible concrete abuses. Moreover, there was a *graphe sykophantias* against malicious prosecutors who brought false charges for the sole purpose of extorting money from opponents [see Dem. 58.12-13 with D. HARVEY, «The sycophant and sycophancy: Vexatious redefinition?», in P. CARTLEDGE - P. MILLETT - S. TODD (eds.), *Nomos. Essays in Athenian Law, Politics and Society*, Cambridge, 1990, 103-121; R. OSBORNE, «Vexatious Litigation in Classical Athens: Sykophancy and the Sykophant», in P. CARTLEDGE - P. MILLETT - S. TODD (eds.), *Nomos, cit.,* 83-102; M. CHRIST, *The Litigious Athenian*, Baltimore-London, 1998, 47-71]. Moreover, although Athenian law did not usually require those who brought a public action to pay court fees (see *Ath. Pol.* 59.3 with A. R. W. HARRISON, *The Law of Athens*, II*, cit.,* 94), a serious penalty for bringing vexatious charges was provided. As is well known, if the prosecutor did not gain at least one-fifth of the votes, he became an *atimos* and lost his right to bring any public charges (like an ordinary *graphe*, a *phasis*, an *ephegesis*, or an *apagoge*), and was subject to a fine of 1,000 drachmas [Theophr. fr. 4b (Szegedy-Maszak); Andoc. 4.18; Dem. 18.266, 23.80, 24.7, 26.9, 53.1, 58.6. As for Poll. 8.52-53, it is stated that there was only a penalty of 1000 drachmas for the prosecutor who did not gain one-fifth of the votes in an *eisangelia*, so that M. H. HANSEN, *'Eisangelia': The Sovereignty of the People's Court in Athens in the Fourth Century B. C. and the Impeachment of Generals and Politicians*, Odense, 1975, 29-31, argues that such penalty was introduced between 333 and 330, while there was no penalty in an *eisangelia* before; see, however, L. RUBINSTEIN, *Litigation and Cooperation: Supporting Speakers in the Courts of Classical Athens*, Stuttgart, 2000, 115-122]. These penalties also applied when a volunteer prosecutor, once the public action was initiated, failed to *exepelthein*, that is 'to follow through' (Dem. 21.103, 58.6), either bringing the case to trial or formally withdrawing the charge at the *anakrisis* before the magistrate. As for *atimia*, U. E. PAOLI, *Studi di diritto attico*, Firenze, 1930, 322-323, holds that the only kind of *atimia* suffered by frivolous prosecutors was temporary 'total disenfranchisement', a status lasting until the penalty was paid. *Contra*, M. H. HANSEN, *'Apagoge', 'Endeixis' and 'Ephegesis' against 'Kakourgoi', 'Atimoi' and 'Pheugontes'*, Odense, 1976, 73-75, argues that the prosecutor lost only his right to bring a case of the same type, but this opinion is undermined, *inter cetera*, by the frequent confusion of illicit and informal withdrawals of the case with licit and formal ones: see, *amplius*, E. M. HARRIS, *Democracy and the Rule of Law in Classical Athens: Essays on Law, Society and Politics*, Cambridge-New York, 2006, 421-422 (supporting the view that *atimia*, in these cases, implied the loss of the right to bring all public actions).

[13] See, paradigmatically, E. M. HARRIS, *The Rule of Law in Action in Democratic Athens*, Oxford, 2014, *passim*. In addition see R. SEALEY, *The Athenian Re-*

In two of my previous articles, I tried to demonstrate —on grounds of both general considerations, and a specific focus on the so-called 'flexibility of action'— that *nomoi* did not represent just a pretentious, specious and rhetorical device embedded in a capricious and chaotic system[14]. On the contrary, as the dikastic oath[15]

---

public: Democracy or Rule of Law?, London, 1987, 146 (thinking that the Athenians pursued the rule of law, not democracy); M. OSTWALD, *From Popular Sovereignty to the Sovereignty of Law*, Berkeley-Los Angeles, 1985, 524 (adhering to the view that the creation of rules of legal change did mean in Athens a limitation of popular sovereignty, and that the turn of the fourth century attests to a shift from a form of radical democracy to the sovereignty of the law); M. H. HANSEN, *The Athenian Democracy in the Age of Demosthenes: Structure, Principles, and Ideology*, Oxford, 1991, 150-155 (sharing the view that the Athenians pursued popular sovereignty in the fifth century, the rule of law in the fourth century). These two views are now challenged by E. M. HARRIS, «From Democracy to the Rule of Law? Constitutional Change in Athens during the Fifth and Fourth Centuries BCE», in C. TIERSCH (ed.), *Die Athenische Demokratie im 4. Jahrhundert Zwischen Modernisierung und Tradition*, Stuttgart, 2016, 73-88.

[14] C. PELLOSO, «Coscienza nomica e scienza giuridica: un confronto tra il modello 'autoritativo' ateniese e il modello 'anarchico' romano», in C. PELLOSO (ed.), *Atene e oltre. Saggi sul diritto dei greci*, Napoli, 2016, 3-62; ID., «Flessibilità processuale e regime solonico del furto. A margine di Dem. 22.26-27 e Dem. 24.113-114», in C. PELLOSO (ed.), *Atene e oltre, cit.,* 101-146.

[15] The document at Dem. 24.149-151 —*pace* E. DRERUP, «Über die bei den attischen Rednern eingelegten Urkunden», in *Jahrbuch für klassische Philologie (Supplementband)*, 24 (1898), 256-264, seemingly followed by S. JOHNSTONE, *Disputes and Democracy: The Consequences of Litigation in Ancient Athens*, Austin, 1999, 33-45, and G. THÜR, «The Principle of Fairness in Athenian Legal Procedure: Thoughts on *Echinos* and *Enklema*», in *Dike*, 9 (2008), 51-74— does not turn out to be reliable evidence: see M. CANEVARO, *The Documents in the Attic Orators. Laws and Decrees in the Public Speeches of the Demosthenic Corpus*, Oxford, 173-180. Even if it includes some plausible clauses, it omits others: see M. FRÄNKEL, «Der attische Heliasteneid», in *Hermes*, 13 (1878), 452-466, on the basis of A. WESTERMANN, *Commentationes de iurisiurandi iudicum Atheniensium formula*, Leipzig, 1858-1859; see, moreover, G. GILBERT, *Beiträge zur inneren Geschichte Athens*, Leipzig, 1877, 392; J. F. CRONIN, *The Athenian Juror and his Oath*, Chicago, 1936, 18; for two different approaches to Fränkel's reconstruction, see, on the one hand, A. SCAFURO, *The Forensic Stage: Settling Disputes in Greco-Roman New Comedy*, Cambridge, 1997, 50-51, and D. MIRHADY, «The Dikast's Oath and the Question of Fact», in A. H. SOMMERSTEIN - J. FLETCHER (eds.), *Horkos: The Oath in Greek Society*, Exeter, 2007, 48-59, 228-233; on the other hand, E. M. HARRIS, *The Rule of Law in Action, cit.,* 101-137. J. H. LIPSIUS, *Das attische Recht und Rechtsverfahren (mit Benutzung des attischen Prozesses von M. H. E. Meier und G. F. Schoemann dargestellt von J. H. Lipsius)*, Leipzig, 1905-1915, 152-153 —followed by R. J. BONNER - G. SMITH, *The Administration of Justice from Homer to Aristotle*, II, Chicago, 1930-1938, 154-155, and A. BISCARDI, *Diritto greco antico,*

unquestionably attests, if one carefully considers its first two clauses [16], *nomoi* were the very basis of the judicial power of the Athenian people, and the judges were bound to vote, not *exo tou pragmatos*, but exclusively about matters pertaining to the issue resulting either in the accusation or in the statement of claim(*graphe-egklema*) [17].

---

cit., 363-364— believes that the document is a *pastiche* containing sections from different periods. In addition, on the first clause and its connection to the *gnome dikaiotate*, see H. MEYER-LAURIN, *Gesetz und Billigkeit, cit.,* 29-30; H. J. WOLFF, «Gewohnheitsrecht und Gesetzrecht in der griechischen Rechtsauffassung», in E. BERNEKER (ed.), *Zur griechischen Rechtsgeschichte*, Berlin, 1968, 119-120; A. BISCARDI, *Diritto greco antico, cit.,* 361-371; M. TALAMANCA, «Il diritto in Grecia», in M. BRETONE - M. TALAMANCA, *Il diritto in Grecia e a Roma*, Roma-Bari, 1981; ID., «Politica, equità e diritto nella pratica giudiziaria attica», in *Mneme Petropoulou*, II, Athénes, 1984, 337-338 with nt. 7; ID., «*Ethe* e *nomos agraphos* nel *Corpus oratorum Atticorum*», in L. BOVE (ed.), *Prassi e diritto. Valore e ruolo della consuetudine*, Napoli, 2008, 24-31; J. L. O'NEIL, «Was the Athenian *gnome dikaiotate* a Principle of Equity?», in *Antichthon*, 35 (2001), 20-29; A. H. SOMMERSTEIN, «The Judicial Sphere», in A. H. SOMMERSTEIN - A. J. BAYLISS (eds.), *Oath and State in Ancient Greece*, Göttingen, 2013, 69-79.

[16] For the first clause see: Aeschin. 3.6: Διόπερ καὶ ὁ νομοθέτης τοῦτο πρῶτον ἔταξεν ἐν τῷ τῶν δικαστῶν ὅρκῳ, «ψηφιοῦμαι κατὰ τοὺς νόμους» ἐκεῖνό γε εὖ εἰδὼς ὅτι ὅταν διατηρηθῶσιν οἱ νόμοι τῇ πόλει, σώζεται καὶ ἡ δημοκρατία. Dem. 20.118: Χρὴ τοίνυν, ὦ ἄνδρες Ἀθηναῖοι, κἀκεῖν' ἐνθυμεῖσθαι καὶ ὁρᾶν, ὅτι νῦν ὀμωμοκότες κατὰ τοὺς νόμους δικάσειν ἥκετε. See, for further references, Aeschin. 3.6, 31, 198; Andoc. 1.2, 4.9; Ant. 5.85; Dem. 8.2, 18.121, 21.42, 21.211, 22.7, 22.20, 22.43, 23.2, 23.101, 24.188, 34.45, 34.52, 36.26, 39.41, 46.27, 43.34, 52.33, 58.56, 58.25, 36, 59.115; Din. 1.17, 1.84; Hyp. 2.5; Hyp. 5.1, 39; Isae. 6.65, 11.6; Isoc. 15.173, 19.15, 19.44, 19.46; Lyc. 1.143; Lys. 9.19, 10.32, 14.22, 22.7. This clause, requiring the judges to decide according to the laws, was the most frequently cited part, which means that it was considered to be the most important one in the oath. For the other clause, see: Dem. 45.50: δικάσειν γὰρ ὀμωμόκαθ'ὑμεῖς οὐ περὶ ὧν ἂν ὁ φεύγων ἀξιοῖ, ἀλλ' ὑπὲρ αὐτῶν ὧν ἂν ἡ δίωξις ᾖ. ταύτην δ' ἀνάγκη τῇ τοῦ διώκοντος λήξει δηλοῦσθαι; Aeschin. 1.154: Ὑμεῖς δὲ τί ὀμωμόκατε; ὑπὲρ αὐτῶν ψηφιεῖσθαι ὧν ἂν ἡ δίωξις ᾖ; Aeschin. 1.170: Ὅλως δέ, ὦ Ἀθηναῖοι, τὰς ἔξωθεν τοῦ πράγματος ἀπολογίας μὴ προσδέχεσθε, πρῶτον μὲν τῶν ὅρκων ἕνεκα. See Aeschin. 1.170, 175-176, 179; Dem. 18.56, 22.43, 24.151, 44.14; Hyp. 4.31; Lyc. 1.13 (an oath sworn by the litigants not 'to speak outside the subject' is linked to this part of the dikastic oath: see, for private actions, *Ath. Pol.* 67.1; but a similar oath must have occurred in public cases too). See P. J. RHODES, «Keeping to the Point», in E. M. HARRIS - L. RUBINSTEIN (eds.), *The Law and the Courts in Ancient Greece*, London, 2004, 137-158; E. M. HARRIS, *The Rule of Law in Action, cit.,* 114; *contra*, see M. TALAMANCA, «Politica, equità e diritto», *cit.,* 345-348, and ID., «Il diritto in Grecia», *cit.,* 27; A. LANNI, *Law and Justice, cit.,* 42-64 (believing that homicide and maritime courts had a stricter standard of relevance).

(Vid. nota 17 en página siguiente)

If the 'sociological' reconstruction that views Athens as an agonistic society[18] were true, *a fortiori* both prosecutors and defendants would be exposed to arbitrary bias. Athenians would not have been ruled by law, but by chaos. Their 'system' would have wholly ignored the so-called 'principle of legality'. Thus, there would be no equivalent to the maxim stating that there can be no public offence committed (and no punishment meted out) unless a penal law, being in force as the alleged offence occurred, was violated (*nullum crimen sine lege*)[19].

---

[17] E. M. HARRIS, *The Rule of Law in Action, cit.,* 114-136; J.-M. BERTRAND, «À propos de la Rhétorique d'Aristote (I 1373b1-1374b23). Analyse du processus judiciaire (τὸ ἐπίγραμμα - τὸ ἔγκλημα)», in *Dike*, 5 (2002), 161-185; G. THÜR, «The Principle of Fairness in Athenian Legal Procedure», *cit.,* 51-74.

[18] See, in these terms, M. CHRIST, *The Litigious Athenian, cit.,* 160-192.

[19] The principle of legality was in force also in the Athenian legal system, at least as a principle implying that the *nomos* only defines crimes. The lawgiver sets out the scope of the crime and the applicable punishment in clear terms before its commission. This principle represents a fundamental defence in criminal law prosecution according to which no crime or punishment can exist without a legal ground. Some sources could (erroneously) be read against this view. First, in analyzing the *idios nomos* (divided into written and unwritten *nomoi*) in contrast with the *koinos* (and *agraphos*) *nomos*, Aristotle deals with the unwritten duties and the unwritten offences (*agrapha adikemata*), *i. e.* just and unjust actions that neither the written particular laws, nor the unwritten common laws cover and foresee (Arist. *rhet.* 1.13.9-10, and with a slightly different perspective, Arist. *rhet.* 1.10 and 1.15). Yet, it is clear that the philosopher —like Perikles in Thuc. 2.37.3— merely describes social or moral actions as totally unrelated with any —human, divine, and natural— positive law [see, for the context, C. CAREY, «*Nomos* in Attic Rhetoric and Oratory», in *JHS*, 116 (1999), 33-46; J. DE ROMILLY, *La legge nel pensiero greco. Dalle origini ad Aristotele*, ital. transl., Milano, 2005, 45; E. M. HARRIS, *Democracy and the Rule of Law, cit.,* 53-57; ID., *The Rule of Law in Action, cit.,* 281-285; E. STOLFI, *Quando la Legge non è solo legge*, Napoli, 2012, 115 and nt. 47; J. K. TRIANTAPHYLLOPOULOS, *Das Rechtsdenken der Griechen, cit.,* 14-16; M. TALAMANCA, «Il diritto in Grecia», *cit.,* 35-36]. Second, the existence of a clause in the *nomos eisangeltikos* providing *kaina kai agrapha adikemata* is totally unfounded (Hyp. 4.7-8; Lex. Cant. s.v. '*eisangelia*'; Poll. 8.52): see M. H. HANSEN, «Εἰσαγγελία: A Reply», in *JHS*, 100 (1980), 91-93, who maintains that the only source for the view that *eisangelia* could be started even for new, unknown and unwritten offences is the Sophists' *diatribai*, that is a too weak foundation for any statement about the law of Athens [*pace* P. J. RHODES, «Εἰσαγγελία in Athens», in *JHS*, 99 (1979), 103-114, and, more recently, J. ENGELS, *Lykurg: Rede gegen Leokrates*, Darmstadt, 2008, 118]. Moreover, if it is true that litigants were responsible for finding and quoting any law that could help their case, this does not imply that there was no obligation to attach the relevant laws and a prosecution could be grounded even if no specific legal provision qualified the human behaviour at issue in terms

Athens, all in all, would be 'desperately alien' even regarding its 'legal sphere', and its total 'otherness' would be more than apparent compared with current western expectation of a system ruled by law. In this article, it will be assumed that even in Athens a person could not be convicted of an offence that had never been publicly and formally provided for by a law existing at the time when the offence was committed. If all this is true, also the view that emphasizes the role played by legal reasoning in Athenian litigation and argues that the Athenian judges applied the law strictly is not totally convincing. Indeed, it erroneously tends to harmonize some heterogeneous data emerging from the logographical and rhetorical sources. More precisely, they read the above-mentioned clauses included in the dikastic oath through the Aristotelian category of *pistis*, conceived of as a legal proof, rather than a means of persuasion[20]. Moreover, this thesis fails to consider the undebatable gaps

---

of *adikema* (A. LANNI, *Law and Justice, cit.,* 37-38; D. ALLEN, *The World of Prometheus, cit.,* 176). The fact that some speeches do not cite any law is not a decisive point at all: even though litigants in certain speeches do not have *nomoi* read out, this does not mean that the litigants —or the judges— pay no attention to the law. A *diokon*, indeed, could not bring a case into court unless he cited a specific *nomos* and framed the charge in the language of the relevant statute. In the speeches where the *diokon* does not have a law read out by the *grammateus*, he would have cited a specific law in the *egklema*. Thus, his main arguments would have been directed to demonstrate that the defendant violated the substantive part of the law (since the judges payed attention only to issues to the charge brought against the opponent). Finally, Lys. 31.27 does not attest the legal possibility to bring to court some atypical offence, since nothing rules out that the prosecutor has initiated an ungrounded action. One can suppose that the relevant *nomos*: 1. either does not define the crime in general and precise terms; 2. or shapes a list of unlawful conducts. One litigant (the *kategoroumenos*) would support a literal interpretation of the law; the other one (the *kategoros*), in order to get the *pragma* covered by the law, reads either the provision as an open one (1), or the list as a paradigmatic one (2). Moreover, as Lys. 31 is a *dokimasia* speech, one does not know whether the accuser had, or had not, to provide a plaint. Equally, Dem. 47.82, 48.58 and 56.4, are not *testimonia* of cases tried before a court in absence of a citation of a specific *nomos*. See D. M. MACDOWELL, *The Law in Classical Athens*, London, 1978, 60.

[20] See: Arist. *rhet.* I.2.2: τῶν δὲ πίστεων αἱ μὲν ἄτεχνοί εἰσιν αἱ δ' ἔντεχνοι. ἄτεχνα δὲ λέγω ὅσα μὴ δι' ἡμῶν πεπόρισται ἀλλὰ προϋπῆρχεν, οἷον μάρτυρες βάσανοι συγγραφαὶ καὶ ὅσα τοιαῦτα, ἔντεχνα δὲ ὅσα διὰ τῆς μεθόδου καὶ δι' ἡμῶν κατασκευασθῆναι δυνατόν, ὥστε δεῖ τούτων τοῖς μὲν χρήσασθαι, τὰ δὲ εὑρεῖν; Arist. *rhet.* I.15.1-3: Περὶ δὲ τῶν ἀτέχνων καλουμένων πίστεων ἐχόμενόν ἐστι τῶν εἰρημένων ἐπιδραμεῖν· ἴδιαι γὰρ αὗται τῶν δικανικῶν. εἰσὶν δὲ πέντε τὸν ἀριθμόν, νόμοι, μάρτυρες, συνθῆκαι, βάσανοι, ὅρκοι. πρῶτον μὲν οὖν περὶ νόμων εἴπωμεν, πῶς

endemically affecting the Athenian laws (for instance the systematic lack of statutory definitions)[21], the deficiencies that occur when no specific rule is enacted to deal with an exceptional case (thus absorbed into an —excessively— general statutory provision)[22].

χρηστέον καὶ προτρέποντα καὶ ἀποτρέποντα καὶ κατηγοροῦντα καὶ ἀπολογούμενον. This excess of harmonization clearly emerges in the idea that the *nomos* is binding even if this effect comes from its nature of «formales Beweis»: see H. MEYER-LAURIN, *Gesetz und Billigkeit, cit.,* 29-30. On the concept of *pistis* (as relevant from a rhetoric and not from a procedural perspective), see W. M. A. GRIMALDI, «A Note on the *Pisteis* in Aristotle's Rhetoric 1354-1356», in *AJPh*, 78 (1957), 188-192; J. T. LIENHARD, «A Note on the Meaning of *Pistis* in Aristotle's Rhetoric», in *AJPh*, 87 (1966), 446-454; T. M. LENTZ, «Spoken versus Written Inartistic Proofs in Athenian Courts», in *Ph&Rh*, 16 (1983), 242-261; D. C. MIRHADY, «Non-technical *Pisteis* in Aristotle and Anaximenes», in *AJPh*, 112 (1991), 5-28; L. CALBOLI MONTEFUSCO, «La force probatoire des *pisteis atechnoi*: d'Aristote aux rhéteurs Latins de la République et de l'Empire», in G. DAHAN - I. ROSIER-CATACH (eds.), *La Rhétorique d'Aristote. Traditions et commentaires de l'antiquité au XVIIe siècle*, Paris, 1998, 13-35; C. CAREY, «Artless Proofs in Aristotle and the Orators», in *BICS*, 39 (1999), 95-106; A. MAFFI, «*Nomos* e mezzi di prova nella teoria aristotelica e nella prassi giudiziaria attica», in *Atti del I Seminario Romanistico Gardesano [19-21 maggio 1976]*, Milano, 1976, 115-126.

[21] Arist. *rhet.* 1.13.9: διὰ ταῦτα δέοι ἂν καὶ περὶ τούτων διωρίσθαι, τί κλοπή, τί ὕβρις, τί μοιχεία, ὅπως ἐάν τε ὑπάρχειν ἐάν τε μὴ ὑπάρχειν βουλώμεθα δεικνύναι ἔχωμεν ἐμφανίζειν τὸ δίκαιον. For instance, since no legal definition of 'damage' occurs in the nomic body, the following legal question arises from the case of Mantitheus vs Boeotus (Dem. 39). Is one allowed to start a *dike blabes* (but see H. MEYER-LAURIN, *Gesetz und Billigkeit, cit.,* 31) claiming that the defendant both caused him some annoyance in the past (without any economic loss), and shall cause further inconvenience in the future (without any current damages)? See E. M. HARRIS, *The Rule of Law in Action, cit.,* 93-96, 223-225.

[22] Arist. *rhet.* 1.13.13-14: συμβαίνει δὲ τοῦτο τὰ μὲν ἑκόντων τὰ δὲ ἀκόντων τῶν νομοθετῶν, ἀκόντων μὲν ὅταν λάθῃ, ἑκόντων δ᾽ὅταν μὴ δύνωνται διορίσαι, ἀλλ᾽ ἀναγκαῖον μὲν ἢ καθόλου εἰπεῖν, μὴ ἢ δέ, ἀλλ᾽ ὡς ἐπὶ τὸ πολύ, καὶ ὅσα μὴ ῥᾴδιον διορίσαι δι᾽ ἀπειρίαν, οἷον τὸ τρῶσαι σιδήρῳ πηλίκῳ καὶ ποίῳ τινί: ὑπολείποι γὰρ ἂν ὁ αἰὼν διαριθμοῦντα. ἂν οὖν ᾖ ἀόριστον, δέῃ δὲ νομοθετῆσαι, ἀνάγκη ἁπλῶς εἰπεῖν, ὥστε κἂν δακτύλιον ἔχων ἐπάρηται τὴν χεῖρα ἢ πατάξῃ, κατὰ μὲν τὸν γεγραμμένον νόμον ἔνοχός ἐστι καὶ ἀδικεῖ, κατὰ δὲ τὸ ἀληθὲς οὐκ ἀδικεῖ, καὶ τὸ ἐπιεικὲς τοῦτό ἐστιν. An interesting case concerning a statute shaped in excessively broad terms seems to be attested in the speech against Athenogenes (Hyp. 3): ὅσα ἄν ἕτερος ἑτέρῳ ὁμολογήσῃ, κύρια εἶναι (Hyp. 3.13; see Dem. 47.77; Isoc. 18.24). It is a common belief that there is not any further requirement spelled out in the statutory text at issue (but only Epicrates, that is the speaker, argues that a contract was binding only if it was *dikaion*, *i. e.* just). Accordingly, a literal and simplistic reading of this provision (the so-called law of contract), by disregarding the spirit of the law and failing to adhere to a systematic interpre-

In addition, it underestimates, besides gaps and deficiencies in the legal system, the ambiguity and the vagueness of several Athenian statutes and, accordingly, miscalculates the actual role played by an

---

tation, would enhance the following despicable consequence: even if the parties entered an agreement overriding the law itself (no matter if it is *ius dispositivum* or not), they would be bound by contract. See D. D. PHILLIPS, «Hypereides 3 and the Athenian Law of Contracts», in *TAPA*, 139 (2009), 89-122; D. AVILÉS, «Arguing against the Law: Non-Literal Interpretation in Attic Forensic Oratory», in *Dike*, 14 (2011), 19-42; D. J. KÄSTLE, «Νόμος μεγίστη βοηθεία: Zur Gesetzesargumentation in der attischen Gerichtsrede», in *ZSS*, 129 (2012), 193-202; G. THÜR, «The Statute on *homologein* in Hyperides' Speech against Athenogenes», in *Dike*, 16 (2013), 1-10; L. GAGLIARDI, «Accordo e contratto in diritto attico», in G. GITTI - F. DELFINI - D. MAFFEIS (eds.), *Prospettive e limiti dell'autonomia privata. Studi in onore di Giorgio De Nova*, II, Milano, 2015, 1511-1556; C. PELLOSO, «Giustizia correttiva e rapporti sinallagmatici tra dottrina etica e declinazioni positive», in C. PELLOSO (ed.), *Atene e oltre, cit.,* 3-62; E. M. HARRIS, *The Rule of Law in Action, cit.,* 198-215. Likewise, interpreting some legal rules (whose formulation appears too broad) as provisions dealing with cases of strict liability would imply the violation of some general and mandatory principles (*nomoi koinoi*: see Dem. 18.274) clearly inspired by *epieikeia* [E. M. HARRIS, *The Rule of Law in Action, cit.,* 105-106; 274-301; R. A. SHINER, «Aristotle's theory of equity», in S. PANAGIOTOU (ed.), *Justice, law, and method in Plato and Aristotle*, Edmonton, 1987, 182-183; J. K. TRIANTAPHILLOPOULOS, «Aristotle's equity and the Doctrine of the Mean», in *Syllecta classica*, 1 (1989), 43-54; J. BRUNSCHWIG, «Rule and Exception: On the Aristotelian Theory of Equity», in M. FREDE - G. STRIKER (eds.), *Rationality in Greek Thought*, Oxford, 1996, 135-139]. On the one hand, an extraordinary event or circumstance (act of God; force majeure) prevents a party to a contract from performing his/her obligations and determines an exemption of liability (Dem. 56.13-20, 42; Dem. 18.194-195; An. Bekk. I, 283); on the other hand, the degree of the offender's guilt and the fault principle directly affect the penalty's entity (Dem. 21.43; Dem. 52.2): see Arist. *rhet*. 1.13.16-18 (δεῖ συγγνώμην ἔχειν, ἐπιεικῆ ταῦτα, καὶ τὸ τὰ ἁμαρτήματα καὶ τὰ ἀδικήματα μὴ τοῦ ἴσου ἀξιοῦν, μηδὲ τὰ ἁμαρτήματα καὶ τὰ ἀτυχήματα: ἔστιν ἀτυχήματα μὲν γὰρ ὅσα παράλογα καὶ μὴ ἀπὸ μοχθηρίας, ἁμαρτήματα δὲ ὅσα μὴ παράλογα καὶ μὴ ἀπὸ πονηρίας, ἀδικήματα δὲ ὅσα μήτε παράλογα ἀπὸ πονηρίας τέ ἐστιν: τὰ γὰρ δι᾽ ἐπιθυμίαν ἀπὸ πονηρίας. καὶ τὸ τοῖς ἀνθρωπίνοις συγγινώσκειν ἐπιεικές. καὶ τὸ μὴ πρὸς τὸν νόμον ἀλλὰ πρὸς τὸν νομοθέτην, καὶ μὴ πρὸς τὸν λόγον ἀλλὰ πρὸς τὴν διάνοιαν τοῦ νομοθέτου σκοπεῖν, καὶ μὴ πρὸς τὴν πρᾶξιν ἀλλὰ πρὸς τὴν προαίρεσιν, καὶ μὴ πρὸς τὸ μέρος ἀλλὰ πρὸς τὸ ὅλον, μηδὲ ποῖός τις νῦν, ἀλλὰ ποῖός τις ἦν ἀεὶ ἢ ὡς ἐπὶ τὸ πολύ); Dem. 18.274 (παρὰ μὲν τοίνυν τοῖς ἄλλοις ἔγωγ᾽ ὁρῶ πᾶσιν ἀνθρώποις διωρισμένα καὶ τεταγμένα πως τὰ τοιαῦτα. ἀδικεῖ τις ἑκών: ὀργὴν καὶ τιμωρίαν κατὰ τούτου. ἐξήμαρτέ τις ἄκων: συγγνώμην ἀντὶ τῆς τιμωρίας τούτῳ. οὔτ᾽ ἀδικῶν τις οὔτ᾽ ἐξαμαρτάνων εἰς τὰ πᾶσι δοκοῦντα συμφέρειν ἑαυτὸν δοὺς οὐ κατώρθωσεν μεθ᾽ ἁπάντων: οὐκ ὀνειδίζειν οὐδὲ λοιδορεῖσθαι τῷ τοιούτῳ δίκαιον, ἀλλὰ συνάχθεσθαι).

authentically creative interpretation[23]. Finally yet importantly, the formalistic and positivistic approach shows an inner and apparent incoherence. From the theoretical point of view, it is unsound to maintain that, on the one hand, in fourth century Athens, *nomoi* were forms of evidence (notwithstanding the judicial free conviction); and, on the other hand, the legal system did thoroughly implement a strict legalism where *nomoi* represented, rather than a limit, a fundamental frame and basis for any judicial ruling.

3. JUDGES AND PROSECUTORS

In light of these considerations, the following brief remarks aim at strengthening a legal and formal view, already put forward by

[23] Plut. *Sol.* 18; *Ath. Pol.* 9.1-2. For instance, a statutory list of wrongdoings could be read either as an exhaustive one (out of a literal interpretation that emphasizes the actual wording of the law), or as a paradigmatic one (with a view of discovering the legislator's intent). Lys. 10.6-9 attests the law about slander that forbids to use some words, such as *androphonos*, and to say that someone has thrown away his shield. Out of the letter of the law, the defendant argues for the *numerus clausus* of such *aporrheta* and, thus, of the types of *kakegoria*: see M. HILLGRUBER, *Die zehnte Rede des Lysias: Einleitung, Text, und Kommentar mit einem Anhang über die Gesetzesinterpretationen bei den attischen Rednern*, Berlin, 1988, *passim* (*Untersuchungen zur antiken Literatur und Geschichte*, 29); D. J. KÄSTLE, «Recht und Rhetorik in der Rede gegen Theomnestos (Lysias or. 10)», in *RhM*, 155 (2012), 1-40; E. M. HARRIS, «Open texture in Athenian Law», in *Dike*, 3 (2000), 56-57; ID., *The Rule of Law in Action, cit.,* 177. In Lyc. 1 the broadness of the crime of treason is under debate (see Hyp. 4.7-8; Lex. Cant. s.v. '*eisangelia*'; Poll. 8.52). The *nomos eisangeltikos* —that classified a variety of serious crimes under three rubrics: 1. subversion of the democracy; 2. treason; 3. making speeches against the public interest in return for gifts— attempted to cover the second offence at issue by listing several kinds of treasonable conducts and not by providing a comprehensive definition of *prodosia*. A problem, thus, arises: *i. e.* it is not clear whether the lawgiver intended the specific cases mentioned as an exhaustive catalogue list (according to the principle of tipicality), or as mere examples of treason. If the former (as it is more plausible), one would win a conviction only if the case precisely fitted one of the criminal conducts named in the statute. If the latter, the judge could sentence the defendant found guilty of treason, even if his conducts did not meet the statutory conditions. See, in general terms, J. ENGELS, *Lykurg: Rede gegen Leokrates*, *cit., passim*; on the *nomos eisangeltikos* and its open texture, E. M. HARRIS, *The Rule of Law in Action, cit.,* 233-241; see, moreover, H. MEYER-LAURIN, *Gesetz und Billigkeit, cit.,* 33: since Leokrates fled Athens after the defeat at Chaeronea but before the legal decrees forbidding the Athenians to leave the city were passed, the scholar correctly underlines the non-retroactive effects of the above-mentioned decrees.

others and by myself, that needs and deserves to establish itself as dominant. First of all, it is worth stressing that in 'public actions' courts are expressly said to be directed to punish those who have broken the law: on the one hand, judges are (and must be) 'guardians of the law' and their institutional duty is just to show their disapproval by punishing offences[24]. In order to give the judgment, they must cast their ballot according to the existing laws, and not to *eleein* (to have pity)[25], or to show *kharis* (favour), *eunoia* (benevolence) or other feelings like *ekhthra* (enmity)[26]. Moreover, it is a firm

[24] Dem. 21.30, 34, 76, 177, 22.57, 24.36, 25.6; Din. 3.16; Aeschin. 1.7, 3.7.

[25] Lys. 15.9. As D. KONSTAN, «Pity and the Law in Greek Theory and Practice», in *Dike*, 4 (2000), 125-145, has shown, pity in archaic and classical Greece differs from the modern notion. Greek pity is in fact predicated on innocence, not on misfortune. Therefore, in Athenian law courts, forensic appeals to pity (Lys. 9.22, 18.27, 19.53; Dem. 27.66-69, 45.85, 55.35, 57.70), tending to presuppose innocence, take place after all the evidence and the arguments supporting the speaker's case have been presented: the judges cannot pity someone whom they found guilty, even if the verdict shall bring misfortune. For instance, in Lys. 19.53 the speaker states that if the judges believe that he has proved his case, he deserves the full extent of their pity. It is implicitly clear that, if he does not produce enough evidence to prove his case, he does not deserve any dikastic pity. On some alleged analogies between acting on tragic stage and the performances of litigants in court, see E. HALL, *The Theatrical Cast of Athens: Interactions between Ancient Greek Drama and Society*, Oxford, 2006, 353-392; *contra*, see E. M. HARRIS, «How to 'Act' in an Athenian Court: Emotions and Forensic Performance», in S. PAPAIOANNOU - A. SERAFIM - B. DA VELA (eds.), *The Theatre of Justice Aspects of Performance in Greco-Roman Oratory and Rhetoric*, Leiden-New York, 2017, 223-242.

[26] Dem. 23.96-7, 57.63. Scholars commonly claim that the Athenians were very litigious as they lived in an agonistic society, and were obsessed with honour and status. It follows that litigants would often use the courts not to enforce the law, but to pursue feuds in order to enhance their power and prestige and to win personal enemies. Accusers and claimants would have brought charges against opponents to wreak vengeance only: see D. ALLEN, *The World of Prometheus, cit.,* 21-22, 50-51, 61, 69-72, 125, 248, 260; D. COHEN, *Law, Violence and Community in Classical Athens, cit.,* 72-80; M. CHRIST, *The Litigious Athenian, cit.,* 171; *contra*, see L. RUBINSTEIN, *Litigation and Cooperation, cit.,* 179-180; A. KURIHARA, «Personal Enmity as a Motivation in Forensic Speeches», in *CQ*, 53 (2002), 464-477; G. HERMAN, *Morality and Behaviour in Democratic Athens: A Social Study*, Cambridge, 2006, 191, 194-203; E. M. HARRIS, *The Rule of Law in Action, cit.,* 64-71. At first, the *egklema* (with its contents) and the *horkos heliastikos* (with its first clauses) seem to prove the opposite. Second, in forensic oratory, *ekhthra* does not figure in such a prominent manner, *philodikia* is often presented as a negative value, and just a few passages meet the opposite view. Third, a simple further remark undermines the assumption that in the Athenian 'agonistic society' forensic orations deal with the role of revenge as a valid and grounded motivation

belief that ancestors established the courts not for the Athenians to dispute for their personal reasons, but to determine whether someone has carried out conducts against the *polis* and has committed wrongs for which the laws provide penalties[27]. On the other hand, the duty of the just citizen, in the quality of public prosecutor, is not to bring to public trial, for the sake of private quarrels, those who have caused no harm (above all) to the *polis*. A prosecutor is to consider those who have violated the law as personal enemies and to view crimes affecting the community as providing public grounds for his enmity against himself[28]. A public prosecutor pursues the public interest only, not his own[29]. The Solonian rule that allows any volunteer (*ho boulomenos*)[30] to bring the so-called public actions

---

for initiating legal proceedings and for giving judgments, since honour would be a highly prized commodity, and there would be a significant social and psychological pressure to avenge oneself. It is indeed unfounded to take the noun *timoria* and the verbs *timorein* and *timoreisthai* to refer always to the 'pre-legal' and 'agonistic' sphere of revenge, as the context does not rule out that these words can plainly stand, from a 'fully legal' and 'procedural' perspective, for penalty or punishment: see Lys. 10.3, 13.1, 3, 41, 42, 48, 83-84, 14.1, 15.12; Dem. 21.207, 22.29, 24.8, 53.1-2, 58.1, 58, 59.1, 12, 15, 126. Finally, assuming that punishment in Athens was not distant from anger presupposes an arbitrary extension to the entire civic morality of the Foucaultian idea that Greek sexual morality put forward a model of continence and measure chosen because of the lack of 'external coercive rules': E. CANTARELLA, «Controlling Passions or establishing the Rule of the Law? The functions of punishment in ancient Greece», in *Punishment & Society*, 6.4 (2004), 429-436. This, however, does not contradict the fact that, in forensic oratory, the accusers are used to urge the judges to be angry with the defendants as they have broken the law: see L. RUBINSTEIN, «Stirring up Dicastic Anger», in D. CAIRNS - R. A. KNOX (eds.), *Law, Rhetoric and Comedy in Classical Athens*, Edinburgh, 2004, 187-203.

[27] Dem. 18.123, 23.1; Aeschin. 1.1-2; Lys. 31.2, 26.15.

[28] Lyc. 1.6.

[29] Dem. 18.281, 283-4, 290-3, 306-9.

[30] *Ath. Pol.* 9.1 (ἔπειτα τὸ ἐξεῖναι τῷ βουλομένῳ τιμωρεῖν ὑπὲρ τῶν ἀδικουμένων); Plut. *Sol.* 18.5 (καὶ γὰρ πληγέντος ἑτέρου καὶ βιασθέντος ἢ βλαβέντος ἐξῆν τῷ δυναμένῳ καὶ βουλομένῳ γράφεσθαι τὸν ἀδικοῦντα καὶ διώκειν, ὀρθῶς ἐθίζοντος τοῦ νομοθέτου τοὺς πολίτας ὥσπερ ἑνὸς μέρη σώματος1 συναισθάνεσθαι καὶ συναλγεῖν ἀλλήλοις). Fully aware of the deficiencies present in the Drakonian system, Solon introduced the second of his most 'populist' reforms, that is 'entitling the volunteer to exact a penalty in the interest, in the name, and on behalf of the offended party': see C. PELLOSO, «Popular Prosecution in Early Athenian Law: the Drakonian Roots of the Solonian Reform», in *EHHD*, 45 (2014-2015), 9-58; L. C. WINKEL, «Quelques remarques sur l'accusation publique en droit grec at romain», in *RIDA*, 29 (1982), 287-288. Apart from the problem of Plutarch's inaccurancy when mentioning the *graphai* [see P. J. RHODES, «The Reforms of Solon: an Optimistic View», in J. BLOK - A. LARDINOIS

(eds.), *Solon of Athens: New Historical and Philological Approaches*, Leiden, 255; M. GAGARIN, «Legal Procedure in Solon's Laws», in J. BLOK - A. LARDINOIS (eds.), *Solon of Athens: New Historical and Philological Approaches, cit.,* 263], an essential question arises from the two ancient sources above quoted. To what extent do these new actions, characterized by voluntary prosecution, overlap the modern category of 'public actions'? Scholars are divided on what type of remedies could originally be brought under the 'procedures by volunteer', as well as on the applicability of such procedures to offences against the community as a whole (M. OSTWALD, *From Popular Sovereignty to the Sovereignty of Law, cit.,* 9). Some scholars agree that Solon did not allow anyone who wished to prosecute in all cases, but only in those cases in which the person concretely wronged was unable to bring a legal action himself: see R. J. BONNER - G. SMITH, *The Administration of Justice from Homer to Aristotle*, II*, cit.,* 168; A. R. W. HARRISON, *The Law of Athens*, II*, cit.,* 77; R. SEALEY, *The Justice of the Greeks*, Ann Arbor, 1994, 129; M. GAGARIN, «Legal Procedure in Solon's Laws»*, cit.,* 263. Conversely, N. FISHER, «The law of hubris in Athens», in P. CARTLEDGE - P. MILLETT - S. TODD (eds.), *Nomos, cit.,* 124, has argued that «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 the *graphai*-system, and the prosecution by 'anyone who wishes' (*ho boulomenos*), cannot be explained solely in terms of the need to protect defenceless victims». Other scholars strongly believe that the Solonian reform dealt with crimes against the *polis* from its beginnings: see, paradigmatically, M. OSTWALD, *From Popular Sovereignty to the Sovereignty of Law, cit.,* 9; J. ALMEIDA, *Justice as an Aspect of the Polis Idea in Solon's Political Poems*, Leiden-Boston, 2003, 66. Others seem to share this view (S. C. TODD, *The Shape of Athenian Law, cit.,* 100, 111-112; D. ALLEN, *The World of Prometheus, cit.,* 39, 346 nt. 48), even if —with no reasonable diachronic interpretation of Athenian legal procedures— they fail to distinguish 'public actions against offences harming the community as a whole' from 'public actions against offences affecting an incapacitated party'. Finally, M. CHRIST, *The Litigious Athenian, cit.,* 119-121 —even though admitting 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». This does not mean, however, that 'third-party prosecution' should have necessarily had a public dimension; this simply means that *dikai demosiai* —depending on the case— could be brought in order to pursue different objectives (public or private punishment) and on the ground of different interests (individual or super-individual rights). Given these various interpretations, some brief personal remarks shall follow. First, it is certainly misleading to assume the existence of a mutual link between 'Solonian *dikai demosiai*' and 'criminal procedure': see explicitly, in these terms, P. VINOGRADOFF, *Outlines of historical jurisprudence*, II*, cit.,* 165; G. M. CALHOUN, *The Growth of Criminal law in Ancient Greece*, Berkeley, 1927, 6. Second, the Solonian provision allowing voluntary prosecution (*i. e.* introducing an open 'standing to sue') on behalf of those who have been wronged but are incapacitated to start a legal action, formalizes a notion of justice viewed as 'defence of the weak' [M. P. J. DILLON, «Payments to the Disabled at Athens: Social Justice or Fear of Aristocratic Patronage?», in *AncSoc*, 26 (1995), 27-57]. Third, it is true that *dikai demosiai* are not totally different

(*dikai demosiai*) for safeguarding the community is perceived as the cornerstone for the archaic and classical adversarial system. Indeed, it connects the laws (the objective of which is to indicate what must not be done) with the judges (whose task is to punish those who have been found guilty), since neither the law nor the dikastic vote would have any power without a prosecutor who initiates a proper legal proceeding[31].

4. LEGAL PROCEDURE, 'NOMOI' AND 'GNOME DIKAIOTATE'

Holding that a 'public action' (as well as a private one) could be brought without alleging a pre-existing statute is an unfounded statement stemming from a deep and dangerous misunderstanding of Athenian legal categories. Focusing on the public sphere only, it is true that our sources provide evidence for an opposite opinion, which gains support from several examples of 'written indictment'[32]. An Athenian, either as a volunteer or as a claimant, starts an ordinary action by issuing a summons to the defendant in order to make him appear before the magistrate on a certain day. Nonetheless the magistrate is allowed to accept the case and, therefore, to post a copy of the claim before the statues of the Eponymous Heroes, only provided that the case, on the ground of a first scrutiny, has passed the basic test of admissibility (*i. e.* it is *eisagogimos*), being it framed in a written law in force[33]. The indictment included: 1) the name of the prosecutor; 2) the name of the defendant; 3) the name

---

from *graphai*, since the former represent a broader class of actions and are therefore comprehensive of the latter (D. M. MacDowell, *The Law in Classical Athens, cit.,* 57; S. C. Todd, *The Shape of Athenian Law, cit.,* 98, nt. 1, *pace* A. R. W. Harrison, *The Law of Athens*, II*, cit.,* 75-76). Moreover, *graphai* do not neatly map onto our concept of 'public actions': they rather turn out to be 'popular actions' that, depending on the case, involve at times a public interest, at times a private one. *Graphai* (that is the ordinary sub-type of *dikai demosiai*) can be initiated by *ho boulomenos* and are characterized by a written indictment, whilst the distinguishing feature of *dikai demosiai* is the 'generalized standing to sue', no matter —as already stated— if the peculiar interest involved is a public or a private one.

[31] Lyc. 1.3-4.

[32] See *graphe*: Dem. 18.8, 9; *egklema*: Lys. 9.8; Plato *apol.* 24b-c; *phasis*: Dem. 58.7; *eisangelia*: Lyc. 1.137; Hyp. 2.3, 3.29-32; *apographe*: Lys. 9.3; *apagoge*: Lys. 13.85; *endeixis*: Dem. 58.1; Poll. 8.49.

[33] Andoc. 1.86; Dem. 24.32, 34-8; Dem. 32.1; Dem. 33.2-3; Dem. 35.3; Dem. 43.7,15,16; Dem. 59.66.

of one of the typical offences 'criminalized' (or qualified in terms of 'torts') in a pre-existing statute; 4) the facts the accuser intended to prove[34]. It was not necessary to indicate the penalty, neither in the case of *agones atimetoi* (since it was prescribed by law), nor in the case of *agones timetoi* (since it had to be definitively fixed during the *timesis*-phase), even if the prosecutor was anyhow allowed to write a suggestion of penalty in the indictment, without waiting for the conviction of the defendant[35].

Moreover, the view here challenged does not gain any support, neither from the *gnome dikaiotate* clause ('each judge has to *psephizein* or to *dikazein* according to the justest opinion')[36], nor from

---

[34] An exhaustive discussion of the topic is found in E. M. HARRIS, *The Rule of Law in Action, cit.,* 114-136. See the version included in Dem. 21.103, where one finds the indictment written by Euctemon against Demosthenes (Εὐκτήμων Λουσιεὺς ἐγράψατο Δήμοσθένην Παιανιέα λιποταξίου: Euctemon from the deme of Lousia has brought a written charge of the crime of desertion against Demosthenes from the deme of Paiania). See, moreover, Aeschin. 2.14; Ar. *Vesp.* 894-97; *Ath. Pol.* 48.4; Dem. 37.22, 25, 26, 28, 29; Dem. 45.46; Dem. 58.43; see also Aeschin. 3.200; Dem. 18.56; Dem. 19.8; Dem. 22.34; Dem. 23.215-8; Dem. 59.17, 126; Diog. Laert. 2.40; Dion. Hal. 3.15; Hyp. 3.7-8, 29-30; Lys. 13.85-87; Plato *apol*. 24 b 6 - c 3; Plut. *Alk.* 22.

[35] See Aeschin. 2.14; Ar. *Vesp*. 894-897; *Ath. Pol.* 48.4; Dem. 25.83; Dem. 58.43; Din. 2.12; Dion. Hal. 3.15; *SEG* 33, 679, ll. 27-32. On the issue, see S. C. TODD, *The Shape of Athenian Law, cit.,* 134; E. M. HARRIS, *The Rule of Law in Action, cit.,* 116, nt. 43.

[36] The sources present two different versions of the same clause. On the one hand, see Dem. 20.118 (καὶ περὶ ὧν ἂν νόμοι μὴ ὦσι, γνώμῃ τῇ δικαιοτάτῃ κρινεῖν. καλῶς. τὸ τοίνυν τῆς γνώμης πρὸς ἅπαντ' ἀνενέγκατε τὸν νόμον) and, on the other hand, see Dem. 23.96-97 (γνώμῃ τῇ δικαιοτάτῃ δικάσειν ὀμωμόκασιν, ἡ δὲ τῆς γνώμης δόξα ἀφ' ὧν ἂν ἀκούσωσι παρίσταται· ὅτε τοίνυν κατὰ ταύτην ἔθεντο τὴν ψῆφον, εὐσεβοῦσιν. πᾶς γὰρ ὁ μήτε δι' ἔχθραν μήτε δι' εὔνοιαν μήτε δι' ἄλλην ἄδικον πρόφασιν μηδεμίαν παρ' ἃ γιγνώσκει θέμενος τὴν ψῆφον εὐσεβεῖ). See, moreover, Poll. 8.122, Dem. 39.40-41, and Arist. *pol.* 1287 a 26, for the first wording, and Dem. 57.63 (which recalls Plato *apol.* 35 c 4), for the second. Given this discrepancy in forensic oratory, lexicography and philosophical works, some scholars argue that only the clause «concerning matters about which there are no *nomoi*» was included in the oath sworn by the Athenian judges: see J. H. LIPSIUS, *Das attische Recht und Rechtsverfahren*, *cit.,* 152-153; H. MEYER-LAURIN, *Gesetz und Billigkeit, cit.,* 29-30; J. MEINECKE, «Gesetzesinterpretation und Gesetzesanwendung», in *RIDA*, 18 (1971), 359-360; R. J. BONNER - G. SMITH, *The Administration of Justice from Homer to Aristotle*, II*, cit.,* 154-155; M. TALAMANCA, «Il diritto in Grecia»*, cit.,* 45, nt. 9; ID., «*Ethe* e *nomos agraphos*»*, cit.,* 24; J. K. TRIANTAPHYLLOPOULOS, «Le lacune della legge nei diritti greci»*, cit.,* 49-61; A. H. SOMMERSTEIN, «The Judicial Sphere»*, cit.,* 79. RUSCHENBUSCH, «ΔΙΚΑΣΤΗΡΙΟΝ ΠΑΝΤΩΝ ΚΥΡΙΟΝ»*, cit.,* 266, on the

one hand, shares the view that the correct wording of the *gnome dikaiotate* clause was «concerning matters about which there are no laws, to judge by the justest opinion». On the other hand, he believes that such *Formulierung* was *«überflüssig»*, as Athenian laws were usually conceived of in such a generic way that they could potentially encompass all cases: so it ended up filling *Gesetzeslücken* and not *Rechtslücken.* E. M. HARRIS, *The Rule of Law in Action, cit.,* 105, by contrast, states that there is no reason to doubt that the phrases 'about issues for which there are no laws' and 'without hatred or favour' were parts of the oath: see M. FRÄNKEL, *Der attische Heliasteneid, cit.,* 452-466; G. GILBERT, *Beiträge zur inneren Geschichte Athens, cit.,* 392; J. F. CRONIN, *The Athenian Juror and his Oath, cit.,* 18. See, moreover, A. BISCARDI, *Diritto greco antico, cit.,* 363-364, who considers both versions as included in the dikastic oath, as consistent one with another, as evidence of two chronologically differentiated formulations. Finally, D. MIRHADY, «The Dikast's Oath and the Question of Fact», *cit.,* 48-59, maintains that the oath simply required the judges to vote according to the fairest opinion, and argues that the actual text mentioned neither the phrase concerning the lack of *nomoi*, nor the one claiming the necessary absence of favour (*kharis*, *eunoia*) and enmity (*ekhthra*). Thus, the author assumes that both versions of the sworn clause were only interpretations invented by the litigants. Lipsius' view, however, seems to be the most persuasive. 1) First, as far as the period between the fourth and the second century B. C. is concerned, epigraphical evidence supports it. The judicial oath found in an Amphictyonic law (*IG* II² 1126, 2 f.: 380-379 B. C.) links the dikastic *gnome* to issues not covered by the law. Similarly, a decree from Eresos (*IG* II-III² 1126, 3 ff.; *GHI* 191, 87 ff.: 324 B. C.) establishing procedures for the trial of tyrants out of a *diagraphe* of Alexander, stipulates that, if the case lies within the law, the judges shall apply it; otherwise they shall decide with care, as is best and justest (*arista kai dikaiotata*). Moreover, according to a decree recording a treaty between Temnos and Clazomenai (*SEG* 29, 1130 bis, 28 ff.: second century B. C.), the judges swear to decide cases according to the international *synthekai*; as for issues that have not been written down, however, they shall give their own justest judgment (*gnome dikaiotate*). An arbitral award given by the Knidians in a dispute between Kalymnus and Kos recalls the principle that the arbitrators (who, as well known, do not settle disputes according to the laws) are required to decide by the 'justest opinion' (*Tit. Calymni* 79 a, 26 ff.: early second century B. C.). Second, in Ptolemaic Egypt a royal edict provided that cases should be decided according to royal edicts (*diagrammata*), to civil laws (*politikoi nomoi*) and, finally and subsidiarily, according to the 'justest opinion' [Pap. Gurob 2, 40 ff. (Hunt - Edgar 256) = c. Pap. Iud. 19, 40 ff.]. Finally, Herondas points out that Charondas' Koan laws required to arbitrate (*diaitan*) on a dispute by 'just opinion' in the case of absence of witnesses (Her. *mim*. H 84 ff.): this source, provided that it concerns an arbitration rather than a judicial trial, attests to a further case where the *gnome* works as a subsidiary means of decision. 2) With regard to Dem. 57.63 (the only text explicitly including the phrase 'not for the sake of favour or enmity' related to the *gnome dikaiotate*), it is worth remarking that it refers to the voting of demesmen, acting in a judicial capacity: *pace* Fränkel (and his followers), this source does not represent direct evidence for the dikasts' oath. Moreover, in Dem. 23.96-97 the orator states that the *doxa* of the *gnome* derives from what (law and fact) the judges hear from the

the scant amount of mentions to *nomoi agraphoi* found in forensic oratory[37]. Since, as far as the fourth century is concerned, a case cannot be filed without claiming the violation of a *nomos* in force, I am persuaded that the only plausible meaning one is allowed to attribute to the *gnome dikaiotate* clause 'about issues for which there are no *nomoi*'[38], is the following[39].

---

litigants, and when they vote according to such *gnome* they act piously: a careful reading of the passage suggests that in this context the *gnome dikaiotate* is not identified with «not following favour or enmity». The lack of *kharis* and *ekhthra* is here described in terms of a prerequisite of judging pursuant the *gnome dikaiotate*, and equally other sources give evidence that such a lack is also a prerequisite of both judging according to the *nomoi* and adhering to the *horkos* (Plato *apol.* 35 c; Isoc. 2.18; Isoc. 7.33; Aeschin. 3.233; Dem. 21.211; Din. 1.17; Isoc. 18.34; Andoc. 1.91). Likewise, in the Gymnasiarchal Law from Beroia, the magistrate swears both to perform his office according to the law about the gymnasiarch, and, for what does not lie within the law, to use his own judgment according to *hosiotata kai dikaiotata*, neither doing favours nor harming in violation of justice (*SEG* 27, 261, a 26-30: second century B. C.). In other words, even this source does not describe the lack of *kharis* and *ekhthra* as the content of the so-called *gnome dikaiotate*. All these epigraphical and papyrological passages are quoted and discussed, although from different perspectives, in J. K. TRIANTAPHYLLOPOULOS, «Le lacune della legge nei diritti greci», *cit.,* 49-61; A. BISCARDI, *Diritto greco antico, cit.,* 362-363; E. M. HARRIS, *The Rule of Law in Action, cit.,* 104-105.

[37] See E. M. HARRIS, *Democracy and the Rule of Law in Classical Athens, cit.,* 41-80; M. TALAMANCA, «*Ethe* e *nomos agraphos*», *cit.,* 3-104; E. STOLFI, *Quando la Legge non è solo legge, cit.,* 115 and nt. 47.

[38] Indeed, if one argues that the wording of the clause at issue is «I will vote (or judge) according to the *gnome dikaiotate*» (see D. MIRHADY, «The Dikast's Oath and the Question of Fact», *cit.,* 48-59), it follows —as already mentioned— that the references to 'the absence of *nomoi*' and to 'the absence of enmity or favour' are just two interpretations of the same phrase. Yet, even these two different readings do not correspond to two different tasks attributed to the *gnome dikaiotate*: both cover the same concepts (although expressed with different words) and share the same view. The *nomos* represents the unescapable ground of any legal procedure. The *nomos* allegedly violated is to be quoted in the *egklema* or in the *graphe*. If the *nomos* does not cover the facts alleged by the *diokon/kategoros*, the judges shall acquit the *pheugon/kategoroumenos* (casting the vote neither through favour for the former, nor through enmity for the latter). If the facts lie within the lines of the *nomos*, a condemnatory judgement shall be given (always without favour and enmity).

[39] A minor position (H. J. WOLFF, «Gewohnheitsrecht und Gesetzrecht in der griechischen Rechtsauffassung», *cit.,* 119; H. MEYER-LAURIN, *Gesetz und Billigkeit, cit.,* 29-30; J. MEINECKE, «Gesetzesinterpretation und Gesetzesanwendung», *cit.,* 359-360) holds that the fairest opinion represented a subsidiary means of decision that was invoked and applied only when there was no law that either gave guidance on a particular point or provided the frame for a particular case. The

Let us suppose that the prosecutor or the claimant falsely frame the case in a given *nomos* (in the general sense of written statute possibly composed by several articles and including different rules)[40].

---

rule of law was not limited by the fairest opinion, but it was complemented by it, so that any *pragma* not foreseen in a statutory provision would have been protected or punished *ex post*, if —in the magistrate's opinion, at the *anakrisis*, and in the judges' *krisis*— such *pragma* deserved protection or punishment. By contrast, the current predominant view is that the *gnome dikaiotate* —according to the intention of the legislator who formulated the dikastic oath— embodied a principle of equity that was able to override the letter of the law, to fill the gaps in the law, and to deal with the conflicts of law (see U. E. PAOLI, *Studi sul processo attico, cit.,* 33-35, 57-70; see, moreover, R. HIRZEL, *Agraphos Nomos, cit.,* 51; P. VINOGRADOFF, *Outlines of historical jurisprudence*, II*, cit.,* 68); as E. RUSCHENBUSCH, «ΔΙΚΑΣΤΗΡΙΟΝ ΠΑΝΤΩΝ ΚΥΡΙΟΝ»*, cit.,* 268, maintains, «*an die Stelle des Gesetzes trat somit als höchste Rechtsnorm die willkürliche Entscheidung der Richterschaft*». Likewise, Jones and Plescia believe that this task —even though the oath did not support it— was used by speech-writers and accepted by the jury-courts in this fashion (J. W. JONES, *Law and Legal Theory of the Greeks, cit.,* 135; J. PLESCIA, *Oath and Perjury in Ancient Greece*, Tallahassee, 1970, 28). Biscardi championed a middle way: 'the fairest opinion' was used as a principle grounding both the lawgiver's intent in the formulation of the *nomoi*, and the interpretation of the (letter of the) law towards the disclosure of the real meaning of a *nomos* [see A. BISCARDI, *Diritto greco antico, cit.,* 365-366; E. M. HARRIS, *The Rule of Law in Action, cit.,* 181, nt. 25; A. LANNI, *Law and Justice, cit.,* 72 and ntt. 151-152; J. L. O'NEIL, «Was the Athenian *gnome dikaiotate* a Principle of Equity?»*, cit.,* 20-29; C. BAERZOT, «La γνώμη del giudice dell'oratoria attica», in C. BEARZOT - E. VIMERCATI (eds.), *La giustizia dei Greci tra riflessione filosofica e prassi giudiziaria. Atti della giornata di studio, Milano, 5 giugno 2012*, Milano, 2013, 85-98]. It is clear that all these authors (whether adhering to a formalistic view or not), in other words, give credit to the untenable thesis that a case —whether concerned with a public interest or not— could be tried before a court, even if no (written) *nomos* had previously been broken. A fourth view argues that in classical Athenian litigation, the justest understanding generally referred neither to gaps in the laws, nor to equitative considerations. It would have been connected to the so-called questions of fact, as the first clause of the dikastic oath dealt with the question of law (D. MIRHADY, «The Dikast's Oath and the Question of Fact»*, cit.,* 48-59). A. H. SOMMERSTEIN, «The Judicial Sphere»*, cit.,* 77-78, although assuming that the *gnome dikaiotate* clause included the phrase 'in matters about which there are no laws', shares Mirhady's main thesis, and argues that the *gnome dikaiotate* clause was primarily meant to refer to what would now be called questions of fact. Yet, he credits the clause with three further functions: issues regarding the interpretation of vague or ambiguous expressions in a law; issues relevant to a trial that were of an ethical rather than a legal nature; issues concerning the expediency and the utility of a *nomos* on trial.

[40] As Hansen has rightly pointed out, «*nomos* can mean anything from one line of a law to complete legislation» [M. H. HANSEN, «Athenian *nomothesia*», in *GRBS*, 26 (1985) 359]: see Dem. 25.37, 60, where the orator discusses as differ-

In this case, the litigant that starts the legal action alleges and quotes an irrelevant law: in other words, he brings to court a case concerning a conduct that is not expressly prohibited by any of the single *nomoi* (in the particular sense of 'legal clauses') included in the written *nomos* (statute) quoted in the *graphe* or in the *egklema*. Thus, the court —by facing a case that fails to be covered by law, although a *nomos* was formally invoked in order to get the case proceeded by the magistrate at the *anakrisis*-stage— has to follow the *gnome dikaiotate*. The court has to share the solution that at best discloses the legislator's *dianoia*, that is the best legal reasoning provided by either litigant. Accordingly, if the literal interpretation of the *nomos* neatly maps onto the authentic spirit of the law (for instance when the *nomos* includes a precise list of wrongful acts) the defendant shall be acquitted[41].

Let us suppose, moreover, that the prosecutor, or the claimant, bases his cases on a law that either does not define the allegedly illicit behaviour carried out by the defendant, or does not explicitly mention what, according to the opponent's possible plea, shall rule out a conviction. Adhering to the *gnome dikaiotate* still means to find out the actual intent of the legislator by giving a systematic interpretation of the nomic provisions and filling general clauses and terms with their appropriate meaning. Thus, as the case may be, the judge shall qualify either the defendant's conduct or the facts in favour of the defendant in terms of *adikema* or *dikaion*[42]. If the

---

ent *nomoi* two different texts that were found in the same inscription as parts of a single statute (*IG* I³ 104.26-9, 37-38). See, moreover, M. CANEVARO, «*Nomothesia* in Classical Athens. What Sources Should we Believe?», in *CQ*, 63 (2013), 148, who believes that the *nomos* read out by the *grammateus* at Dem. 24.33 «is likely to be a further section of the legislation on *nomothesia*».

[41] See, for instance, Lyc. 1.68-74, where Lycurgus attempts to convince the judges that the list of offences incorporated in the *nomos eisangeltikos* is not exhaustive and that Leocrates, leaving intentionally Athens when in peril, committed *prodosia* even if his conduct was not expressly labelled in terms of crime in the law at issue. See moreover, Aeschin. 3.252, where it is noted that Leocrates was finally acquitted, albeit by a slight margin. Even if the text of the *nomos eisangeltikos* makes it clear that the lawgiver does not specifically cover the conducts carried out by Leocrates, J. ENGELS, *Lykurg: Rede gegen Leokrates*, *cit.,* 118, has recently (and unpersuasively) claimed that the orator takes advantage of the provision.

[42] For instance, a mere annoyance unable to cause economic losses to the counterparty shall not give rise to a cause of *dike blabes* (Dem. 39.15-19, 22; Dem. 55.12, 20). Moreover, relying on the law providing that *diathekai* are valid only if the testator is of sane mind when making his disposition, one of the nearest rela-

particular case being tried seems to be encompassed by the broad spectre of the *nomos*, the judges shall exclude the interpretation that respects the letter but breaks the spirit[43].

In other words, the court's first or sole vote on the guilt of the defendant must be neutral and impartial. The *gnome dikaiotate* is not a capricious, unpredictable, and extra-legal standard that completely remains in the hands of the judges. Since *nomoi* are very often equated to *dikaion*[44], what is *dikaiotaton*, at the same time, completely corresponds to the authentic spirit of the *nomoi*: a contrast between equity and *nomos* appears to be logically and practically unconceivable[45]. Since the wording of the judicial oath in the part concerning the *gnome dikaiotate* involves no subjective point of view, *gnome* is not a mere personal opinion, or a flexible and open choice[46]; the clause rather refers to a 'mandatory' interpretation of the letter of the law itself. The expression *dikazein tei gnomei di-*

---

tives of the deceased will be allowed to bring a legal action against the 'successors *ab testato*'. Promoting the extensive meaning of *mania* and *paranoia*, the judgment shall declare the will invalid, even if the testator was not affected by insanity, but by senselessness (Dem. 48.56; Hyp. 3.17; Is. 1.18-21, 41-43; Is. 4.19; Is. 6.9).

[43] For example, although the general law of contracts seems to claim that what the parties have agreed upon is valid and binding in any case, a contract is not *dikaion* and does not bind the parties to it, if it violates the applicable mandatory laws (Hyp. 3.13-22). A party to a contract that does not perform his/her obligations, since prevented by an *atykhema*, shall not be held liable, even though the relevant law does not seem to provide any exemption (Dem. 18.194-195, 274; Dem. 21.43; Dem. 52.2; Dem. 56.13-20, 42; see, moreover, An. Bekk. I, 283).

[44] On the connection *nomos-dikaion*, see Aeschin. 3.199; Antiph. 5.7, 5.87; Isae. 2.47, 4.31, 6.65, 8.46, 9.35, 11.18, 11.35; Lys. 9.19, 14.22, 14.42, 14.46; Dem. 43.34, 42.52, 43.60, 43.84, 46.28 (with C. PELLOSO, *'Themis' e 'dike' in Omero. Ai primordi del diritto dei greci*, Alessandria, 2012, 50, nt. 43; ID., «Coscienza nomica»*, cit.,* 42-43 and nt. 89; *contra* see M. CHRIST, *The Litigious Athenian, cit.,* 195; D. ALLEN, *The World of Prometheus, cit.,* 175).

[45] If this is correct, «risulta [...] esclusa la funzione della cd. *gnome dikaiotate*, come ipotizzata *in primis* dal Paoli, di risolvere eventuali dissidi tra legge ed equità» (C. PELLOSO, «Coscienza nomica»*, cit.,* 42, nt. 89; *contra* see U. E. PAOLI, *Studi sul processo attico, cit.,* 34).

[46] Among those who remark —whether intentionally or not— the subjective nature of the *gnome dikaiotate* by including the personal adjective «your» or «their» (although absent in the Greek text) in the translation of the clause at issue, see: P. VINOGRADOFF, *Outlines of historical jurisprudence*, II*, cit.,* 68; J. W. JONES, *Law and Legal Theory of the Greeks, cit.,* 135; A. SCAFURO, *The Forensic Stage, cit.,* 50; S. JOHNSTONE, *Disputes and Democracy, cit.,* 41; A. LANNI, *Law and Justice, cit.,* 72; V. WOHL, *Law's Cosmos, cit.,* 31; E. M. HARRIS, *The Rule of Law in Action, cit.,* 104, 221. See, also, A. BISCARDI, *Diritto greco antico, cit.,* 361-365 (who does

kaiotatei must be translated as 'in conformity with the fairest understanding', or 'according to the most correct legal reasoning', and not as 'with your fairest judgment', or 'according to your best opinion', *vel similia*[47]. All this therefore excludes that *gnome dikaiotate* can work as a subsidiary and para-legislative remedy susceptible to be applied when statutes are lacking, even if the clause at issue includes the wording 'concerning issues about which there are no *nomoi*'.

5. LEGAL PROCEDURE AND 'AGRAPHOI NOMOI'

As for the role played by *nomoi agraphoi* in forensic oratory and in judicial practice, orators appeal to them very rarely and only as a support for the main written law quoted as relevant as it encompasses the case tried[48]. First, such *nomoi agraphoi* are conceived of as a 'universal set of rules and principles' which the Athenian legal system comprehends. For instance, Demosthenes appeals to the principle of culpability and to the filial piety towards parents[49]. Second, Lysias and Demosthenes recall a 'positive set of subsidiary and secondary rules enacted by divine or heroic legislators', which, being part of the Athenian legal system, are intended to specify primary written laws, such as those concerning homicide and impiety[50]. Therefore,

---

not use personal adjectives in his own version of the clause, but clearly gives it a subjective nuance).

[47] Among those who seem to emphasize the non-subjective nature of the *gnome dikaiotate*, see: H. MEYER-LAURIN, *Gesetz und Billigkeit, cit.,* 29-30; J. K. TRIANTAPHYLLOPOULOS, «Le lacune della legge nei diritti greci»*, cit.,* 57; D. M. MACDOWELL, *The Law in Classical Athens, cit.,* 60; A. H. SOMMERSTEIN, «The Judicial Sphere»*, cit.,* 77.

[48] See E. M. HARRIS, *Democracy and the Rule of Law in Classical Athens, cit.,* 51-56; M. TALAMANCA, «*Ethe* e *nomos agraphos*»*, cit.,* 38-62.

[49] See Dem. 18.274-5 (where the orator makes a distinction between three types of harmful actions: harm caused intentionally, harm caused against one's will, and harm caused with no wrongdoing or negligence. Then he continues: φανήσεται ταῦτα πάνθ᾽ οὕτως οὐ μόνον ἐν τοῖς νόμοις, ἀλλὰ καὶ ἡ φύσις αὐτὴ τοῖς ἀγράφοις νομίμοις καὶ τοῖς ἀνθρωπίνοις ἤθεσιν διώρικεν). See Dem. 25.65-6 (regarding piety towards parents).

[50] See Lys. 6.10 (καίτοι Περικλέα ποτέ φασι παραινέσαι ὑμῖν περὶ τῶν ἀσεβούντων, μὴ μόνον χρῆσθαι τοῖς γεγραμμένοις νόμοις περὶ αὐτῶν, ἀλλὰ καὶ τοῖς ἀγράφοις, καθ᾽ οὓς Εὐμολπίδαι ἐξηγοῦνται, οὓς οὐδείς πω κύριος ἐγένετο καθελεῖν οὐδὲ ἐτόλμησεν ἀντειπεῖν, οὐδὲ αὐτὸν τὸν θέντα ἴσασιν: ἡγεῖσθαι γὰρ ἂν αὐτοὺς οὕτως οὐ μόνον τοῖς ἀνθρώποις ἀλλὰ καὶ τοῖς θεοῖς διδόναι δίκην); Dem. 23.70 (where the orator, after recall-

the Aristotelian depiction of the trial included in the first book of the *Rhetoric* is a highly unreliable source for the Athenian law, at least in this vein, since —apart from adopting totally divergent concepts for *nomos koinos* and *nomos agraphos*— it seemingly does not fit the Athenian practices of the courts[51]. Out of the two main meanings occurring in forensic speeches, one can easily understand and contextualize the prohibition, directed to magistrates only, to use *nomoi*

---

ing the Athenian provisions concerning homicide, points out: ἓν γὰρ οὐδ᾽ ὁτιοῦν ἔνι τούτων ἐν τῷ ψηφίσματι τῷ τούτου. καὶ πρῶτον μὲν παρ᾽ ἑνὸς τούτου δικαστηρίου καὶ παρὰ τοὺς γεγραμμένους νόμους καὶ τἄγραφα νόμιμα τὸ ψήφισμ᾽ εἴρηται). See also Xen. *Mem.* 4.4.19.

[51] Arist. *rhet.* 1.15.4-11 (φανερὸν γὰρ ὅτι, ἐὰν μὲν ἐναντίος ᾖ ὁ γεγραμμένος τῷ πράγματι, τῷ κοινῷ χρηστέον καὶ τοῖς ἐπιεικεστέροις καὶ δικαιοτέροις καὶ ὅτι τὸ «γνώμῃ τῇ ἀρίστῃ» τοῦτ᾽ ἐστίν, τὸ μὴ παντελῶς χρῆσθαι τοῖς γεγραμμένοις. καὶ ὅτι τὸ μὲν ἐπιεικὲς ἀεὶ μένει καὶ οὐδέποτε μεταβάλλει, οὐδ᾽ ὁ κοινός [κατὰ φύσιν γάρ ἐστιν], οἱ δὲ γεγραμμένοι πολλάκις [...] καὶ ὅτι βελτίονος ἀνδρὸς τὸ τοῖς ἀγράφοις ἢ τοῖς γεγραμμένοις χρῆσθαι καὶ ἐμμένειν [...] καὶ εἴ που ἐναντίος νόμῳ εὐδοκιμοῦντι ἢ καὶ αὐτὸς αὑτῷ [...] καὶ εἰ ἀμφίβολος, ὥστε στρέφειν καὶ ὁρᾶν ἐπὶ ποτέραν τὴν ἀγωγὴν ἡ τὸ δίκαιον ἐφαρμόσει ἢ τὸ συμφέρον, εἶτα τούτῳ χρῆσθαι. καὶ εἰ τὰ μὲν πράγματα ἐφ᾽ οἷς ἐτέθη ὁ νόμος μηκέτι μένει, ὁ δὲ νόμος, πειρατέον τοῦτο δηλοῦν καὶ μάχεσθαι ταύτῃ πρὸς τὸν νόμον): see D. C. MIRHADY, *Aristotle on the Rhetoric of Law,* in *GRBS*, 31, 1990, 393-410; C. CAREY, «*Nomos* in Attic Rhetoric and Oratory»*, cit.,* 33-46; M. TALAMANCA, «Politica, equità e diritto»*, cit.,* 339-343; J. L. O'NEIL, «Was the Athenian *gnome dikaiotate* a Principle of Equity?»*, cit.,* 20-29; E. M. HARRIS, *The Rule of Law in Action, cit.,* 106-109. In these passages, the philosopher contrasts the written law (*nomos gegrammenos*) with the unwritten one (*agraphos*), that is the *idios nomos* with the *koinos nomos* (see Arist. *rhet.* I.10.3 and, for a slightly different and systematically incoherent view, Arist. *rhet.* I.13: on the contradiction, see E. STOLFI, *Quando la Legge non è solo legge, cit.,* 115 and nt. 47). Aristotle, interested in advising a potential litigant (either as a defendant, or as a prosecutor), maintains that particular written law often changes, sometimes presents inner contradictions, and is not always formulated clearly and precisely. By contrast, the unwritten and common law —as well as equity— never changes, is always just, coherent, useful and applicable. Therefore, on the one hand, he suggests the use of *gnome dikaiotate* as a means aiming at opening the Athenian system to the superior *koinos nomos* if the *pragma* tried before the judges does not fit the *idios nomos*. On the other hand, when the written law is not against the case, the litigant should argue that the 'best opinion' clause was included in the oath just to prevent the judges being foresworn if they cannot recall the laws. Aristotle does not mirror judicial practices and rhetorical strategies taking place in classical Athenian courts: see C. CAREY, «*Nomos* in Attic Rhetoric and Oratory»*, cit.,* 39; E. M. HARRIS, *The Rule of Law in Action, cit.,* 109; C. PELLOSO, «Diorthotic Justice and Positive Law. Some Remarks on συνάλλαγμα and κλοπή», in RΔE, 1 (2011), 217-218.

agraphoi in force during the fourth century B. C. After the fall of the Thirty and the restoration of democracy under the archonship of Eucleides, as of year 403 a magistrate was allowed to admit claims and accusations grounded on the 'written legal system': the body of Athenian *nomoi* resulting from the so-called *dokimasia* (scrutiny) and *anagraphe* (re-inscription) represented the unescapable frame of reference in any legal action[52]. In other words, a prosecutor or a plaintiff could have his case tried before the popular court only if one of the *nomoi (ana)gegrammenoi* had been quoted and allegedly

[52] As evidence of the procedures followed in the republication of the laws at the end of the fifth century B. C., see Lys. 30; *IG* I³ 104; Andoc. 1.81. The document preserved in Andoc. 1.83-84, *i. e.* the so-called decree of Teisamenus, is a later forgery (so that accepting it adversely affects a full and correct awareness of the revision of the laws in 410-399 B. C.): see M. CANEVARO - E. M. HARRIS, «The Documents in Andocides' On the Mysteries», in *CQ*, 62 (2012), 110-116. See, also, A. R. W. HARRISON, «Law-Making at Athens at the end of the fifth century B. C.», in *JHS*, 75 (1955), 26-35; D. M. MACDOWELL, «Law-Making at Athens in the Fourth Century B. C.»., in *JHS*, 95 (1975), 62-67; K. CLINTON, «The Nature of the Late Fifth-Century Revision of the Athenian Law Code», in *Studies Vanderpool (Hesperia Suppl.)*, 19 (1982), 27-37; P. J. RHODES, «*Nomothesia* in Fourth-Century Athens», in *CQ*, 35 (1984), 55-60; ID., «The Athenian Code of Laws, 410-399 B. C.», in *JHS*, 111 (1991), 87-100; N. ROBERTSON, «The Laws of Athens, 410-399 B. C.: the Evidence for Review and Publication», in *JHS*, 110 (1990), 43-75. Andoc. 1.86: ἆρά γε ἔστιν ἐνταυθοῖ τι περιελείπετο περὶ ὅτου οἷόν τε ἦ ἀρχὴν εἰσάγειν ἢ ὑμῶν πρᾶξαί τινι, ἀλλ᾽ ἢ κατὰ τοὺς ἀναγεγραμμένους νόμους; ὅπου οὖν ἀγράφῳ νόμῳ οὐκ ἔξεστι χρήσασθαι, ἤ που ἀγράφῳ γε ψηφίσματι παντάπασιν οὐ δεῖ γε χρήσασθαι; Andoc. 1.89: ὅπου οὖν ἔδοξεν ὑμῖν δοκιμάσαι μὲν τοὺς νόμους, δοκιμάσαντας δὲ ἀναγράψαι, ἀγράφῳ δὲ νόμῳ τὰς ἀρχὰς μὴ χρῆσθαι μηδὲ περὶ ἑνός. This provision seems to refer to laws that are not republished and inscribed in or next to the *stoa basileios* (R. HIRZEL, *Agraphos Nomos, cit.,* 37-38; M. TALAMANCA, «Il diritto in Grecia»*, cit.,* 36-37; ID., «*Ethe* e *nomos agraphos*»*, cit.,* 62-68; with a different interpretation, ID., «Politica, equità e diritto»*, cit.,* 337; A. R. W. HARRISON, «Law-Making at Athens»*, cit.,* 33; P. J. RHODES, «The Athenian Code of Laws»*, cit.,* 97; M. OSTWALD, *From Popular Sovereignty to the Sovereignty of Law, cit.,* 91-92; J. P. SICKINGER, *Public Records and Archives in Classical Athens*, Chapel Hill-NC, 1999, 100). It is undeniable that the opposite of *nomos agraphos* is *nomos gegrammenos* ('written'), and not *anagegrammenos* ('posted', 'published', 'inscribed'), as pointed out by K. CLINTON, «The nature of the late fifth-century revision»*, cit.,* 34 (recently followed by M. CANEVARO, *Demostene, Contro Leptine. Introduzione, Traduzione e Commento Storico*, Berlin-Boston, 2016, 347-348; M. CANEVARO - E. M. HARRIS, «The Documents in Andocides' On the Mysteries»*, cit.,* 116, nt. 98). Yet, the mention of a *psephisma agraphon* at Andoc. 1.86 clearly implies that, in such a peculiar context, the adjective *agraphos/on* is constantly used as a synonym for *anagegrammenos/on.*

violated. Only after the case passed the test of admissibility carried out by the *arkhai* at the *anakrisis* (preliminary hearing), the prosecutor or the plaintiff could strengthen his argumentation before the judges by recalling further relevant *nomoi agraphoi*, that is common or divine laws that after the process of scrutiny and inscription were not included in the code, but kept on being part of the Athenian system. Indeed, the statutory prohibition at issue did not cover the hearing in chief and was not directed to judges and speakers.

6. 'NE BIS IN IDEM' AND ATHENIAN 'NOMOI'

According to the view which understands Athens as an agonistic society, judicial process tended neither to the discovery of truth nor to the final resolution of legal disputes. Yet, the belief that judgments were not legally binding but ways to assess societal hierarchies, reveals, among other flaws, a serious miscalculation of the role concretely played by the '*ne bis in idem*'[53] principle in the Athenian legal system, especially when public actions are concerned. Trials and popular judgments were not formal mechanisms for determining the position of the parties within the community: the final judicial ruling was indeed binding and could not be modified, or reviewed[54]; once a cause of action was litigated, the same could not be re-litigated[55]; once an issue of fact was determined, the same parties

---

[53] See Quint. *inst.* 9.6.4; Quint. *decl.* 216; Iul. Vict. *rhet.* 3.10.4, 8. See, on the Athenian origins of he Roman principle, A. STEINWENTER, *Die Streitbeendigung durch Urteil, Schiedsspruch und Vergleich nach griechischem Rechte,* München, 1925, 86; H. J. WOLFF, *Die attische Paragraphe. Ein Beitrag zum Problem der Auflockerung archaischer Prozeßformen*, Weimar, 1966, 87-90. D. LIEBS, «Die Herkunft der Regel *bis de eadem re ne sit actio*», in *ZSS*, 84 (1967), 121-122, 131-132; U. E. PAOLI, *Studi sul processo attico, cit.,* 91-92; E. M. HARRIS, *The Rule of Law in Action, cit.,* 72-73. See, also, M. MARRONE, «*Agere lege*, *formulae* e preclusione processuale», in *AUPA*, 42 (1992), 30, nt. 28, who maintains, according to H. J. WOLFF, *Die attische Paragraphe, cit.,* 90, nt. 8, 103, that «*l'effetto preclusivo appare collegato al giudizio già iniziato [a prescindere dunque da una sentenza] pure se i casi discussi sono tutti di giudizi definiti con sentenza*» (the same action on the same plea would have been barred, if the case had already been brought to court, even though not decided yet).

[54] On the extraordinary power of the Assembly to reverse a judgment, see C. PECORELLA LONGO, «Il condono della pena in Atene in età classica», in *Dike*, 7 (2004), 85-111.

[55] Dem. 20.147 (οἱ νόμοι δ᾽ οὐκ ἐῶσι δὶς πρὸς τὸν αὐτὸν περὶ τῶν αὐτῶν οὔτε δίκας οὔτ᾽ εὐθύνας οὔτε διαδικασίαν οὔτ᾽ ἄλλο τοιοῦτ᾽ οὐδὲν

could not re-litigate that issue even in a proceeding on a different cause of action[56]. Moreover, valid out-of-court settlements[57] were legally binding, so that, if a litigant brought a suit that had already been settled by private arbitration or by agreement, the defendant could oppose a *paragraphe* (counter-claim) to get the second plea barred[58].

εἶναι); Dem. 24.54 (ὅσων δίκη πρότερον ἐγένετο ἢ εὐθυνα ἢ διαδικασία περί του ἐν δικαστηρίῳ, ἢ ἰδίᾳ ἢ δημοσίᾳ, ἢ τὸ δημόσιον ἀπέδοτο, μὴ εἰσάγειν περὶ τούτων εἰς τὸ δικαστήριον μηδ᾽ ἐπιψηφίζειν τῶν ἀρχόντων μηδένα, μηδὲ κατηγορεῖν ἐώντων ἃ οὐκ ἐῶσιν οἱ νόμοι); Dem. 38.16 (οἱ νόμοι δ᾽ οὐ ταῦτα λέγουσιν, ἀλλ᾽ ἅπαξ περὶ τῶν αὐτῶν πρὸς τὸν αὐτὸν εἶναι τὰς δίκας); see, moreover, Dem. 40.39-43; Antiphon 5.87 and 6.3; Dem. 24.50 (together with Dem. 24.52-53) seems to refer to the *res iudicata* principle: see F. S. NAIDEN, «Supplication and the Law», in E. M. HARRIS - L. RUBINSTEIN (eds.), *The Law and the Courts in Ancient Greece*, London, 2004, 75; E. M. HARRIS, *The Rule of Law in Action, cit.,* 73; see also M. CANEVARO, *The Documents in the Attic Orators, cit.,* 133-134. On the topic, see M. FARAGUNA, «Alcibiade, Cratero e gli archivi giudiziari ad Atene», in M. FARAGUNA - V. VEDALDI IASBEZ (eds.), *'Dynasthai didaskein'. Studi in onore di Filippo Cassola*, Trieste, 2006, 206; M. CANEVARO, *The Documents in the Attic Orators, cit.,* 138-141; E. M. HARRIS, *The Rule of Law in Action, cit.,* 72-73. In fifth century Athens, if a litigant filed a case that had already been decided, the defendant could start a procedure called *diamartyria* before the magistrate: if the latter found the objection grounded, he did not allow the action to proceed (Isoc. 18.11-12; Lys. 23.13-1). In the fourth century, under a new procedure —originally introduced for violations of the reconciliation agreement of 403 B. C.— the defendant, claiming by *paragraphe* that the case had previously been decided, made his objection to the magistrate (Isoc. 18.1-3: see A. R. W. HARRISON, *The Law of Athens*, II*, cit.,* 101; P. J. RHODES, *A Commentary on the Aristotelian Athenaion Politeia*, Oxford, 1981, 473). Then, if the court held for the *diokon/kategoros*, the case went forward; otherwise, if the counter-claim was considered founded, the main legal procedure was barred. On this procedure, see H. J. WOLFF, *Die attische Paragraphe, cit., passim*; *contra*, U. E. PAOLI, *Studi sul processo attico, cit.,* 75-174; finally, see E. M. HARRIS, «The Meaning of the Legal Term *Symbolai*on, the Law about *Dikai Emporikai* and the Role of the *Paragraphe*», in *Dike*, 18 (2015), 7-36 (championing a third and middle way).

[56] See, *amplius*, C. PELLOSO, *Flessibilità processale, cit.,* 104-111.

[57] See, on *aphesis* and *apallage*, A. SCAFURO, *The Forensic Stage, cit.,* 123-131.

[58] Dem. 36.25 (ἀκούετε τοῦ νόμου λέγοντος, ὦ ἄνδρες Ἀθηναῖοι, τά τ᾽ ἄλλ᾽ ὧν μὴ εἶναι δίκας, καὶ ὅσα τις ἀφῆκεν ἢ ἀπήλλαξεν. εἰκότως: εἰ γάρ ἐστι δίκαιον, ὧν ἂν ἅπαξ γένηται δίκη, μηκέτ᾽ ἐξεῖναι δικάζεσθαι, πολὺ τῶν ἀφεθέντων δικαιότερον μὴ εἶναι δίκας); Dem. 37.1 (δεδωκότων, ὦ ἄνδρες δικασταί, τῶν νόμων παραγράψασθαι περὶ ὧν ἄν τις ἀφεὶς καὶ ἀπαλλάξας δικάζηται); Dem. 38.1 (δεδωκότων, ὦ ἄνδρες δικασταί, τῶν νόμων παραγράψασθαι περὶ ὧν ἄν τις ἀφεὶς καὶ ἀπαλλάξας πάλιν δικάζηται); see A. R. W. HARRISON, *The Law of Athens*, II*, cit.,* 118, 120; D. M. MACDOWELL, *The Law in Classical Athens, cit.,* 114-5; S. C. TODD, *The Shape of*

As is well known, the Athenian legal system was an adversarial one, based on voluntary prosecution. Accordingly, as far as public actions are concerned, the absence of a 'governmental public prosecutor' and of a 'mandatory prosecution' could bring about serious problems, if the laws providing the principle 'not twice for the same plea' (*i. e.* the laws prohibiting re-litigation on a case either already judged or already privately settled) were not formulated with the most proper wording. The '*ne bis in idem*' principle, on the basis of Roman rules[59], is usually said to require a concurrence of four conditions at the same time, in order to make an issue procedurally unrepeatable: identity in the matter sued for; identity of the cause of action; identity of persons and of parties to the action; identity of the quality in the persons for or against whom the claim is advanced. Yet, these conditions cannot work in the Athenian legal system. Demosthenes points out that when a judgment is given, regardless of its contents, a legal action against the same defendant, either condemned or acquitted, and for the same issues cannot be brought again before a magistrate: it is remarkable that the law quoted by the orator does not refer to the claimant or to the prosecutor. This cannot be a mere coincidence: this statutory silence, entailing a full awareness in the legislator of all implications determined by «prosecution by volunteer», is extremely eloquent and brings about very important consequences. The law, once interpreted literally, does mean that, if a public charge is concerned, after the first *dike* had come before the judges, no one else (better: neither the same prosecutor, nor another Athenian) is allowed to re-initiate the same issue. Otherwise, if the law had run like the following '*bis de eadem re inter easdem partes ne sit actio*', the principle would not actually

---

Athenian Law, cit., 137, assumes groundlessly that *paragraphe* could not «be used to block public actions» (but he does not consider Poll. 8.57 and Dem. 24.54).

[59] Paul. 70 *ad ed.* D. 44.2.12: *Cum quaeritur, haec exceptio noceat nec ne, inspiciendum est, an idem corpus sit,* Ulp. 75 *ad ed.* D. 44.2.13: *Quantitas eadem, idem ius*; Paul. 70 *ad ed*. D. 44.2.14 pr.: *Et an eadem causa petendi et eadem condicio personarum: quae nisi omnia concurrunt, alia res est. idem corpus in hac exceptione non utique omni pristina qualit ate vel quantitate servata, nulla adiectione deminutioneve facta, sed pinguius pro communi utilitate accipitur.* Ulp. 75 *ad ed*. D. 44.2.11.7; Ulp. 15 *ad ed*. D. 44.2.3; Ulp. 72 *ad ed*. D. 44.2.4; Ulp. 2 *ad ed*. D. 44.2.5; Ulp. 75 *ad ed*. D. 44.2.7.4. For *res iudicata* in Roman Law, see M. MARRONE, «L'efficacia pregiudiziale della sentenza nel processo civile romano», in *AUPA*, 24 (1955), *passim*; G. PUGLIESE, s.v. «Giudicato civile (storia)», in *Enc. dir.*, 18, Milano, 1969, *passim*; L. GAROFALO (ed.), *Res iudicata*, I-II, Padova, 2015, *passim*.

have barred all the Athenians, other than the first prosecutor, to raise again the matter.

As for the out-of-court private settlements related to public cases, many sources attest, from a practical perspective, that they were very common, and, from a legal perspective, that they were not void, as long as some specific requirements were met (the prosecutor was indeed prohibited to drop the case after making an initial indictment)[60]. An essential question, at least from a legal perspective, emerges from the asset described above, whenever the interest involved in the case is a super-individual one, *i. e.* an interest of the Athenian community as a whole. Can the issue already settled by *aphesis* and *apallage* (between a first prosecutor and the offender) be brought again to court by a new prosecutor? To put it in a different way: if the offence affects the Athenian people, can the private settlement bar the first *boulomenos* and anyone else to initiate, as volunteer, the same proceedings against the same offender again? The law paraphrased by Demosthenes seems to provide a positive answer to the first question and, obviously, a negative one to the second, since its precise wording expressly names the first prosecutor who has formally withdrawn the case (*apheis kai apallaxas*) as the party that is prohibited from suing again (*dikazetai*). *Ergo*, when the litigants in a public case enter a valid out-of-court settlement, nothing in the letter (and in the spirit) of the law seems to preclude a third-party to bring to court the same issue in the quality of volunteer and, consequently, the defendant is not allowed to oppose a valid *paragraphe* and have the plea barred.

7. 'TIMESIS' AND RETRIBUTION

The sovereignty of *nomos* was in force in Athens: this implied that no *adikema* could be punished unless a *nomos* was broken. Yet,

[60] See Dem. 21.103 (Euctemon vs. Demosthenes); Dem. 58.8 (Theocrines vs. Micon); the prosecutor, on the contrary, had the duty to show up at the *anakrisis* and to formally declare the withdrawal of the case, after entering an agreement with the defendant; see, as instances of valid out-of-court settlements: Dem. 20.145 (X vs. Leptines); Dem. 58.32 (Theocrines vs. Polyeuctus); Dem. 58.33-4 (Theocrines vs. father); Dem. 59.52-4 (Phrastor vs. Stephanus); Dem. 59.64-70 (Stephanus vs. Epaenetus); Din. 1.94 (Demosthes vs. Callimedon); for invalid settlements directed to cheat *to demosion*, see Dem. 58.5, 20; see, *amplius*, E. M. HARRIS, *Democracy and the Rule of Law, cit.,* 405-422.

fourth century legal procedures and current ones differ from each other at least in one respect. If *timesis* (evaluation) is conceived of as a normal aspect in both Athenian and contemporary civil actions, on the contrary, the principle of legality, as it is nowadays interpreted, implies that only penalties already precisely established by law for a public wrong can be imposed. *Ergo*, from a substantive point of view, the existence and the relevance of a crime depends on the previous enactment of a (primary) provision qualifying a human conduct in terms of 'public offence' (that is *nullum crimen sine praevia lege certa scripta*). Moreover, from a procedural point of view, a specific penalty can be inflicted by the court, only if the law that was in force when the crime was perpetrated assessed the penalty as one of the possible sanctions (*nulla poena sine crimine*). In contemporary legal systems, as far as criminal justice is concerned, a judicial *timesis* would undoubtedly be anti-democratic and at odds with the rule of law.

This is not true for classical Athens. If, on the one hand, with regard to the *agones atimetoi*, penalties were fixed by statute (so there was no assessment of the penalty), on the other hand, an *agon demosios timetos*, once the judgment was given against the defendant, a further stage, directed to estimation, took place. This stage, called *timesis***,** is well attested in the sources on public trials: this means that a person could be accused on the ground of a criminal *lex imperfecta* (that failed to embody the principle *nulla poena sine lege*) and convicted in a trial where the judges could only choose between the two penalties proposed by the parties[61]. Moreover, once one has demonstrated that any offence must be brought to court under a specific legal rubric, the idea that judges, influenced by social and political factors, can even overrule the law, even after it is introduced in the trial by the statement of claim or the indictment, is not persuasive. As mentioned before, the *basileia* (sovereignty) of *nomos* —well defined by Lysias—[62] was not just a motto invoked before

---

[61] U. E. PAOLI, *Studi sul processo attico, cit.,* 68; A. R. W. HARRISON, *The Law of Athens*, II*, cit.,* 63-64; S. C. TODD, *The Shape of Athenian Law, cit.,* 134-135. Once the defendant was found and proclaimed guilty, the *timesis*-stage resulted in a paradoxical situation: the condemned had to propose a fine against himself, so that it was not too low, while the prosecutor could not put forward penalties excessively severe. Indeed, the judges would not support the proposal that was too far from the just middle.

[62] Lys. 2.17-19: Πολλὰ μὲν οὖν ὑπῆρχε τοῖς ἡμετέροις προγόνοις μιᾷ γνώμῃ χρωμένοις περὶ τοῦ δικαίου διαμάχεσθαι [...] ἀνθρώποις δὲ

the court for rhetorical purposes[63]. It was a legal principle in force. The so-called *horkos heliastikos* included a clause (probably the first one), requiring each judge to vote in accordance with the *nomoi* finally passed (and, secondarily, with the *psephismata*). Second, it included a further clause that established for the Athenian judges the sworn duty not only to listen to both parties, but also to consider only the relevant matters alleged, and, consequently, to give a judgment consistent with —and not exceeding the limits of— the claim or the accusation (*dioxis*) formalized in the *egklema*[64]. The letter of the oath clearly contrasts with the approach taken by those social historians who claim that the Athenian courts did not address the issues of fact and law raised in the claim or in the indictment, and that the orators often appealed to political considerations or to their social prestige. By contrast, when an orator in a public case refers

---

προσήκειν νόμῳ μὲν ὁρίσαι τὸ δίκαιον, λόγῳ δὲ πεῖσαι, ἔργῳ δὲ τούτοις ὑπηρετεῖν, ὑπὸ νόμου μὲν βασιλευομένους, ὑπὸ λόγου δὲ διδασκομένους.

[63] Dem. 18.6.

[64] Dem. 45.50; Aeschin. 1.154; Aeschin. 1.170; see Dem. 52.1-2; 58.23, 42; Aeschin. 2.1; Dem. 18.2; Isoc. 15.21. The syntagma *ou peri tou pragmatos*, equivalent to *exo tou pragmatos* [*pace* D. M. MACDOWELL, *Athenian Homicide Law in the Age of the Orators*, Manchester, 1963, 43-44, 99; see A. R. W. HARRISON, *The Law of Athens*, II*, cit.,* 163; C. BEARZOT, «Sul divieto di ἔξω τοῦ πράγματος λέγειν in sede areopagitica», in *Aevum*, 64 (1990), 47-55] concerns the judges' duty to pay attention only to matters pertaining to the charge brought by the prosecutor/plaintiff and formalized in the indictment/plaint. The prohibition was even stricter if a (private) case was tried before the Areopagus (see Ant. 5.11-12, 6.90; Arist. *rhet.* 1354 a; Luc. *Anach.* 19; Lyc. 1.12-13; Lys. 3.46; Lys. 7.42; Poll. 8.117; Rhet. Gr. 5.552). Here a prohibition was imposed directly to the parties (and not to the judges only), and it was conceived of in terms of *legein exo tou pragmatos*: before the people, by contrast, each judge —as already pointed out— swore to *dikazein* within the limits of the *dioxis*. Yet, on the one hand, *Ath. Pol.* 67.1 (καὶ διομνύουσιν οἱ ἀντίδικοι εἰς αὐτὸ τὸ πρᾶγμα ἐρεῖν) attests the general extension of such prohibition to all *agones idioi* in the late fourth century B. C.; and, on the other hand, Dem. 52.1-2 shows that in 369-368 B. C. litigants in a private case did not yet take an oath «to speak to the point». Moreover, Dem. 57.7, 33, 59-60, 63, 66, plausibly proves that in 345 B. C. such extension already covered the *agones demosioi* (P. J. RHODES, «Keeping to the Point»*, cit.,* 137). Finally, further sources demonstrate that litigants understood that the trial was to be judged on the specifics of the charge (Aeschin. 1.166, 3.198; Antiph. 6.7-8; Dem. 58.41; Is. 6.59-62). Likewise, Athen. 13.590e (καὶ ἀφεθείσης ἐγράφη μετὰ ταῦτα ψήφισμα, μηδένα οἰκτίζεσθαι τῶν λεγόντων ὑπέρ τινος μηδὲ βλεπόμενον τὸν κατηγορούμενον ἢ τὴν κατηγορουμένην κρίνεσθαι) cites a decree proposed by Hyperides where the litigants —supposedly at any legal trial, whether private or not— are forbidden to excite pity on behalf of the judges.

to the social status of his adversary, he points out that this does not (and must not) influence the courts. Many ancient sources, regarding the *agones demosioi timetoi*, attest that public services and social status were completely irrelevant in the first phase of the trial, that is the phase intended to assess guilt or innocence[65]. Yet, as far as the *timesis*-phase of a public action is concerned, two main problems do emerge and still need to be addressed: the standard of relevance, on the one hand, and the duration and articulation of the trial, on the other.

As for the first problem, according to those scholars who attempt to support the agonistic nature of Athenian legal procedure, 'anger' (*orge*) would play a fundamental role in any case: «The notion employed in Athens for judging 'desert' and 'equivalency' was not that the punishment should fit the crime but the anger should»[66]. This simplistic statement is misleading and inaccurate, for at least three fundamental reasons. First, *orge*, interpreted as a key-term for Athenian legal reasoning, is groundlessly overemphasized with plenty of quotations from classical sources: statistics are impressive but pointless, for the single passages are often misunderstood or extrapolated from their context[67]. Second, from an historical perspective, the essential difference between *agones atimetoi* and *timetoi* is completely underestimated: in the first type of trials, 'anger' as a criterion for the assessment of penalty is ineffective. Third, from a legal perspective, it is correct to assume that, on the one hand, punishment *per se* presupposes the violation of a rubric of law and the previous commission of a crime (whether the *agon* is *atimetos* or not). On the other hand, the extent of punishment may be influenced, when an *agon* is *timetos*, by social and extra-legal factors. Indeed, in the second part of a public case a more 'fluid' and 'different' standard of relevance is at work, if one compares it with the first stage where the judges are to vote only about matters pertaining to the charge, and

---

[65] Aeschin. 1.113, 2.147, 3.195; Dem. 21.178, 182; Din. 1.14.

[66] D. Allen, *The World of Prometheus, cit.,* 173. On the role of anger in Athenian society, see V. H. Harris, *Restraining Rage: the Ideology of Anger Control in Classical Antiquity*, Cambridge, 2000, *passim*.

[67] Aeschin. 3.197; Dem. 18.138; Dem. 21.42-3, 175, 183; Dem. 24.118, 138; Lyc. 1.78; Lys. 26.13-4, 31.11. For instance, since Aeschines initiated the proceedings out of enmity, his accusation was without substance (Dem. 18.143; see, also, Dem. 18.278 and Dem. 23.190, where personal enmity or anger are depicted as negative features, and, in particular, Aeschines pursuing his private enmity is represented as a bad citizen).

the litigants have to 'stick to the point'[68]. What is more the noun *orge* is often and plainly translated with 'anger', but the concept seems to cover a variety of much more subtle legal nuances. In fact, according to the retributive theory, punishment must be proportionate to the seriousness of the offence *per se* and the pain inflicted must be balanced only to desert; punishment and pain, in other words, must be for the sake of the crime itself[69]. On the contrary, the frequent appeal to public *orge* as a criterion aiming at establishing the concrete penalty in the *timesis*-phase implies a general concept of punishment which, however grounded on the principle of proportion and enlivened by a 'backward looking rationale', turns out to be much more elastic and fluid, since 'general disapproval' is brought into play at a second level[70]: if the offence committed by the defendant and ascertained by the court is more serious and brings about greater disapproval, the penalty to be inflicted will be more severe; if the offence is less serious and determines less disapproval, the penalty to be inflicted will be less severe[71]. At the same time, Aeschines makes it clear that, in the second stage of an *agon timetos*, it is common for a defendant 'to ask for a vote' (*aitein ten psephon*) without 'speaking to the point' and 'addressing the legal and factual issue' (*legein eis auto to pragma*), that is to ask for a vote either in appreciation of his public service or given the relevance of his power, influence, and status in the assessment of the penalty[72].

---

[68] P. J. RHODES, *Keeping to the Point, cit.,* 137-158.

[69] See Lys. 13.3, 42, 48-9, 92, 97; Lys. 14.3. Retribution and deterrence are simultaneously invoked as the aims of punishment in Dem. 22.68, 88; Lys. 14.12-3, 30.23-4; Thuc. 3.39-40; *contra*, for a philosophic anti-retributionist approach, see Plato *Prot.* 324 a-b. On these concepts and problems, see D. COHEN, «Theories of Punishment», in M. GAGARIN - D. COHEN (eds.), *The Cambridge Companion to Ancient Greek Law*, Cambridge, 2005, 170-190, as well as E. CANTARELLA, *I supplizi capitali. Origine e funzione delle pene di morte in Grecia e a Roma*, Milano, 2011, 9-50.

[70] See Aeschin. 3.197-8.

[71] See Dem. 24.118 and Isoc. 20.3; see, moreover, Aeschin. 1.176, who assumes that legislation shows popular disapproval in advance.

[72] For example, Demosthenes considers it tolerable for a defendant to ask the court, during the second part of the trial, to calculate liturgies and military service (Dem. 21.152-68; see Dem. 19.290; Plato *apol.* 35c-38c); what is more, it is a common belief that some legal and extra-legal circumstances (*e. g.* the degree of the harm; the age of the offenders; the social and economical status of the defendant) can be taken into consideration to support some mitigation or aggravation during the assessment-phase (Dem. 54.21-2; Lys. 20.18; Lys. 31.11). Aeschines himself at-

Gnome dikaiotate worked with regard to issues not covered by the law, and *agones timetoi* represented a clear exemplification of such a judicial discretion conveyed by, and within the limits of, the two opposing dikanic *logoi*.

8. 'TIMESIS' AND THE LENGTH OF ATHENIAN TRIALS

As far as the second problem is concerned, one must point out that —beside the basic clauses concerning the judgment given according to the *nomoi* and *gnome dikaiotate*, as well as the vote about matters pertaining the charge— the dikastic oath required Athenian judges to listen to both the accuser and the defendant equally[73]. The articulation of the trial itself ensured equality of arms between prosecution and defence: thus the following brief notes will attempt to shed some new light on the structure of the *timesis*-stage.

At first, many scholars believe that only a single public suit had to be completed within one single day[74] (or, more specifically, only one *agon demosios* could be heard on any single day)[75]. In such kind of procedure, each party was allowed to speak once before the judgment on conviction or acquittal was given. In addition, the *klepsydra*

---

tests that confessing the offence committed has nothing to do with the first stage, but is relevant with a view to *timesis* (Aeschin. 1.113). See, *amplius*, E. M. HARRIS, *The Rule of Law in Action, cit.,* 131-136.

[73] Aeschin. 2.1; Dem. 18.2; Isoc. 15.21.

[74] J. H. LIPSIUS, *Das attische Recht, cit.,* 915 with nt. 41; A. R. W. HARRISON, *The law of Athens*, II*, cit.,* 161 and nt. 4; D. M. MACDOWELL, *The law in classical Athens, cit.,* 24.

[75] I. WORTHINGTON, «The Duration of an Athenian Political Trial», in *JHS*, 109 (1989), 204-207; ID., *A Historical Commentary on Dinarchus*, Ann Arbor, 1992, 284-285. Worthington believes that only major political trials with more than one prosecutor could last longer than one day: see, in particular, I. WORTHINGTON, «The Length of an Athenian Public Trial: A Reply to Professor MacDowell», in *Hermes*, 131 (2003), 364-371, *contra* D. M. MACDOWELL, «The Length of Trials for Public Offences in Athens», in P. FLENSTED-JENSEN - T. H. NIELSEN - L. RUBINSTEIN (eds.), *Polis and Politics: Studies in Ancient Greek History Presented to Mogens Herman Hansen on his Sixtieth Birthday*, Copenhagen, 2000, 563-568. However, Plato *apol.* 37a attests that even a *graphe asebeias* both involving three prosecutors and resulting in a death penalty was concluded within one day only [whereas in other cities, like Sparta, we are told that capital cases took several days to be decided: here the condemnation, once executed, could not be reversed as it could occur in non-capital cases: see (Plut.) *Mor.* 217a-b, with D. M. MACDOWELL, *Spartan Law*, Edinburgh, 1986, 14].

(court-room water-clock)[76] was not stopped for the quotation of the supporting evidence (such as laws, decrees, private documents, witness testimony, torture): the time for reading documents was not deducted from one's own time-allowance, as this occurred in private cases only[77]. More precisely, a 'full day' is supposed to be allocated to all the *agones demosioi* involving imprisonment, death, exile, *atimia*, confiscation of property[78].

Once said that, with a focus on *agones demosioi timetoi*, on the one hand, some scholars tend to believe that in fourth century Athens each litigant would speak for 5 *amphoreis* and 6 *khoes* (*i. e.* 198 minutes including the speeches on *timesis*, that is 132 minutes and 1/2 of 132 minutes, since the 'one-day' presents a tripartite structure

---

[76] It was a large amphora with a plugged hole at the bottom and filled with water. When the speaker started his speech, the plug was removed: when all of the water had run out, he had to stop (see S. C. TODD, *The Shape of Athenian Law, cit.,* 68, 130-132).

[77] *Ath. Pol.* 67.1 (ταῦτα δὲ ποιήσαντες εἰσκαλοῦσι τοὺς ἀγῶνας, ὅταν μὲν τὰ ἴδια δικάζωσι τοὺς ἰδίους, τῷ ἀριθμῷ τέτταρας, ἵνα ἐξ ἑκάστων τῶν δικῶν τῶν ἐκ τοῦ νόμου, καὶ διομνύουσιν οἱ ἀντίδικοι εἰς αὐτὸ τὸ πρᾶγμα ἐρεῖν: ὅταν δὲ τὰ δημόσια, τοὺς δημοσίους, καὶ ἕνα μόνον ἐκδικάζουσι); *Ath. Pol.* 67.2-3 (εἰσὶ δὲ κλεψύδραι αὐλίσκους ἔχουσαι ἔκρους, εἰς ἃς τὸ ὕδωρ ἐγχέουσι, πρὸς ὃ δεῖ λέγειν περὶ τὰς δίκας. δίδονται δὲ ἑξάχους ταῖς ὑπὲρ πεντακισχιλίας καὶ τρίχους τῷ δευτέρῳ λόγῳ, ἑπτάχους δὲ ταῖς μέχρι πεντακισχιλίων καὶ δίχους, πεντάχους δὲ ταῖς ἐντὸς β καὶ δίχους, ἑξάχους δὲ ταῖς διαδικασίαις, αἷς ὕστερον λόγος οὐκ ἔστιν οὐδείς. ὁ δ' ἐφ' ὕδωρ εἰληχὼς ἐπιλαμβάνει τὸν αὐλίσκον, ἐπειδὰν μέλλῃ τινὰ ἢ νόμον ἢ μαρτυρίαν ἢ τοιοῦτόν τι ὁ γραμματεὺς ἀναγιγνώσκειν. ἐπειδὰν δὲ ᾖ πρὸς διαμεμετρημένην τὴν ἡμέραν ὁ ἀγών, τότε δὲ οὐκ ἐπιλαμβάνει αὐτόν, ἀλλὰ δίδοται τὸ ἴσον ὕδωρ τῷ τε κατηγοροῦντι καὶ τῷ ἀπολογουμένῳ). In the fourth century B. C., the time allowed for speeches in private cases changed according to the pecuniary value of the matter. If the value was over 5.000 drachmas, the claimant and the defendant were allotted 10 *khoes* each for their first speech and 3 *khoes* each for the second; as for values between 1.000 and 5.000 drachmas, the first speech lasted 7 and the second 2; if the value was less than 1.000, the respective figures were 5 and 2. See, moreover, Lys. 23.4 and Dem. 19.213, with A. R. W. HARRISON, *The law of Athens*, II*, cit.,* 161-162, and P. J. RHODES, *A Commentary on the Aristotelian Athenaion Politeia, cit.,* 722-723.

[78] *Ath. Pol.* 67.5 (ἐν δὲ τοῖς [...] αὐτο [...] ἐξεῖλε τῷ διαψηφισμῷ [...] ῳ, διαιρεῖται δ' ἡ ἡμέρα ἐπὶ τοῖς [...] ἀγώνων ὅσοις πρόσεστι δεσμὸς ἢ θάνατος ἢ φυγὴ ἢ ἀτιμία ἢ δήμευσις χρημάτων, ἢ τιμῆσαι δεῖ ὅ τι χρὴ παθεῖν ἢ ἀποτεῖσαι): H. HOMMEL, *Heliaia. Untersuchungen zur Verfassung und Prozessordnung des athenischen Volksgerichts, insbesondere zum Schlussteil der 'Athenaion politeia' des Aristoteles*, Leipzig, 1927, 24; *pace* P. J. RHODES, *A Commentary on the Aristotelian Athenaion Politeia, cit.,* 728.

out of Aeschines[79]). The remaining part of the day would be spent on manning the courts and voting[80]. On the other hand, some other believes that each litigant would be allotted 198 minutes for his own pleading on conviction or acquittal, while another 198 minutes would be spent on voting and *timesis*[81]. Both views are based on the assumption that one *amphoreus* (corresponding to 12 *khoes*) would take approximately 36 minutes to run out, since —as is assumed— the first surviving *klepsydra*, dating back to the late fifth century, empties at a rate of 3 minutes per *khous*[82]. Second, in accordance with Aeschines[83], the supporters of the first view believe that 11 *amphoreis* would cover one whole court day (396 minutes)[84], while the second opinion assumes that 11 *amphoreis* correspond to 2/3 of

---

[79] Aeschin. 3.197-8: εἰς τρία μέρη διαιρεῖται ἡ ἡμέρα, ὅταν εἰσίῃ γραφὴ παρανόμων εἰς τὸ δικαστήριον. ἐγχεῖται γὰρ τὸ μὲν πρῶτον ὕδωρ τῷ κατηγόρῳ καὶ τοῖς νόμοις καὶ τῇ δημοκρατίᾳ, τὸ δὲ δεύτερον τῷ τὴν γραφὴν φεύγοντι καὶ τοῖς εἰς αὐτὸ τὸ πρᾶγμα λέγουσιν: ἐπειδὰν δὲ τῇ πρώτῃ ψήφῳ λυθῇ τὸ παράνομον, ἤδη τὸ τρίτον ὕδωρ ἐγχεῖται τῇ τιμήσει καὶ τῷ μεγέθει τῆς ὀργῆς τῆς ὑμετέρας.

[80] P. J. RHODES, *A Commentary on the Aristotelian Athenaion Politeia, cit.,* 723, 726-727. Also S. C. TODD, *The Shape of Athenian Law, cit.,* 134, suggests to divide, as far as a 'measured-through day' is concerned, the total amount of time allowed for the speeches in a trial (equivalent to 11 *amphoreis* = 132 *khoes* = 396 minutes) into three identical parts (44 *khoes* = 132 minutes): one third would be allocated to the prosecution, one third to the defence, and the remaining part to the assessment of the penalty. The time taken for other proceedings would be considered as additional.

[81] L. RUBINSTEIN, *Litigation and Cooperation, cit.,* 35-36, with nt. 33.

[82] See S. YOUNG, «An Athenian Klepsydra», in *Hesperia*, 8 (1939), 274-284. The *klepsydra* was discovered in the Agora excavations: it was found to hold two *khoes* of water (corresponding to 6,4 litres) and took six minutes to drain. Since one *khous* is one-twelfth of an amphora and would take three minutes to empty, then one amphora would drain in 36 minutes. Conversely, B. KEIL, *Anonymus Argentinensis: Fragmente zur Geschichte des Perikleischen Athen aus einem Strassburger Papyrus*, Strasbourg, 1902, 235-269, assumes that an *amphoreus* corresponds to 48 minutes: this figure was obtained on the basis of his practical experiments in reading fourth century speeches aloud. This led the scholar to set 4 minutes per *khous* as the lowest practical limit, even for a native speaker.

[83] Aeschin. 2.126: ἄγομεν δὲ καὶ τοὺς οἰκέτας καὶ παραδίδομεν εἰς βάσανον. καὶ τὸν μὲν λόγον, εἰ συγχωρεῖ ὁ κατήγορος, καταλύω: παρέσται δὲ ὁ δημόσιος καὶ βασανιεῖ ἐναντίον ὑμῶν, ἂν κελεύητε. ἐνδέχεται δὲ τὸ λοιπὸν μέρος τῆς ἡμέρας ταῦτα πρᾶξαι: πρὸς ἕνδεκα γὰρ ἀμφορέας ἐν διαμεμετρημένῃ τῇ ἡμέρᾳ κρίνομαι.

[84] J. H. LIPSIUS, *Das attische Recht, cit.,* 915. *Ath. Pol.* 67.4; Harp. s.v. *hemera diamemetremene.*

one court day. It would last 16 *amphoreis* and 6 *khoes*, for a length equivalent to one of the shortest days in the year, in the month Poseidon, during midwinter (*i. e.* 576 minutes about)[85]. I believe that these recent interpretations raise some problems.

First, Aeschines makes it clear that in a public trial the court day is divided into 'three sections'. The first is for the accuser, the laws, and the democracy; the second for the defendant and those supporting speakers who address the charge in the indictment; the third for the assessment of the penalty and to measure the extent of the judges' *orge* (anger). Accordingly, it is a mere conjecture to maintain that the three sections of a *hemera diamemetremene* are perfectly equivalent to one another (132 minutes, or 198 minutes each), and that each litigant is allowed to hold his main speech for 'one third of a court day'. What one can unquestionably assert is only this: that the same time is allocated to each speech; that time equivalent to 11 *amphoreis* is set before the final *krisis*; and that even in the assessment stage, each litigant is granted equal time. Aeschines, by contrast, does not state that in public lawsuits the length of the last section (devoted to the penalty assessment) corresponds exactly to 1/3 of the whole court day (*i. e.* that its length as a whole corresponds to that of each of the first two sections).

Second, one tends to rule out that 11 *amphoreis* can be allocated to one party only[86]. As Aeschines points out, there is plenty of time for torturing slaves, since 'eleven *amphoreis* of water are assigned in a court day before the defendant is convicted or acquitted (*krinomai*)'. However, while it is plausible that such length does include the time set aside for both parties, one cannot rule out that the time necessary for the vote and, thus, for the final judgment on guilt or innocence, was comprised[87].

---

[85] L. RUBINSTEIN, *Litigation and Cooperation, cit.,* 36, nt. 33.

[86] See A. R. W. HARRISON, *The law of Athens*, II*, cit.,* 162; J. H. LIPSIUS, *Das attische Recht, cit.,* 915.

[87] This might be inferred, together with Aeschin. 3.197-8, *a contrariis* from Xen. *Hell.* 1.7.23: τούτων ὁποτέρῳ βούλεσθε, ὦ ἄνδρες Ἀθηναῖοι, τῷ νόμῳ κρινέσθων οἱ ἄνδρες κατὰ ἕνα ἕκαστον διηρημένων τῆς ἡμέρας τριῶν μερῶν, ἑνὸς μὲν ἐν ᾧ συλλέγεσθαι ὑμᾶς δεῖ καὶ διαψηφίζεσθαι ἐάν τε ἀδικεῖν δοκῶσιν ἐάν τε μή, ἑτέρου δ᾽ ἐν ᾧ κατηγορῆσαι, ἑτέρου δ᾽ ἐν ᾧ ἀπολογήσασθαι. Here, the whole measured-through day for the *krisis* of an *agon demosios atimetos* is divided into three parts (corresponding to the first two sections of the wider time-allotment in Aeschin. 3.197-8). In the first part, the prosecutor presents his case. In the second, the defendant makes his defence. In

Third, these two approaches do not consider the possibility that the bronze tube of the *klepsydra* may have lost one millimetre from its internal diameter, now providing a faster flow than originally[88]: this would make a 4-minute *khous* less unlikely.

Finally, they do not take into proper consideration this element: in the *timesis*-phase, the total amount of time was infinitely shorter compared to the time allowed for the main speeches, if we rely on the *Athenaion Politeia*[89]. Here the author, dealing with the least important private actions, attests that each litigant was allowed to speak about 1/14 of the time attributed to him for the main speech (1/2 *khous* vs. 7 *khoes*)[90]. What is more, this account is confirmed by the only extant speech that claims to have been delivered as an *antitimesis*, that is the second part of Plato's *Apology*[91]. If we suppose that this is an accurate reproduction of the original words pronounced by Socrates[92], and assume a delivery-speed of 130 words

---

the third, the dikasts gather and vote. However, such tripartite structure does not correspond to three different time-measurements. See, moreover, Dem. 19.120 (ὃς γὰρ ἀγῶνας καινοὺς ὥσπερ δράματα, καὶ τούτους ἀμαρτύρους, πρὸς διαμεμετρημένην τὴν ἡμέραν αἱρεῖς διώκων, δῆλον ὅτι πάνδεινος εἶ τις), and Dem. 53.17 (ἡμέραις δὲ οὐ πολλαῖς ὕστερον εἰσελθὼν εἰς τὸ δικαστήριον πρὸς ἡμέραν διαμεμετρημένην, καὶ ἐξελέγξας αὐτὸν τὰ ψευδῆ κεκλητευκότα καὶ τὰ ἄλλα ὅσα εἴρηκα ἠδικηκότα, εἶλον): it is clear that the phrase '*airein pros diamemetremenen hemeran*' implies that in the same measured-through day the vote took place and a judgment against the defendant was given. Yet, nothing in the passages seems to deny that the time-measurement, corresponding to 11 *amphoreis*, covers even the voting operation.

[88] M. LANG, «Klepsydra», in A. L. BOGEHOLD (ed.), *The Law Courts at Athens: Sites, Buildings, Equipment, Procedure and Testimonia*, Athens, 1995, 77-78. Moreover, the *klepsydra* from the Agora is a tribal one (that is from Antiokhis). Thus, those used in the law courts as instruments to measure the length of the speeches may have been different in their capacity from that of the tribe at issue.

[89] *Ath. Pol.* 69.2.

[90] D. M. MACDOWELL, «The Length of the Speeches on the Assessment of the Penalty in Athenian Courts», in *CQ*, 35, (1985), 526, argues for an emendation at *Ath. Pol.* 69.2: this would make the time allowed for speeches for the assessment of the penalty one half the time for the speeches in the main trial.

[91] Plato *apol.* 35c-38c.

[92] C. KAHN, *Plato and the Socratic Dialogue: The Philosophical Use of a Literary Form*, Cambridge, 1996, 88. On the contrary, for the view supporting quite drastic changes in the circulated copy of a speech, see I. WORTHINGTON, «Greek Oratory, Revision of Speeches and the Problem of Historical Reliability», in *C&M*, 42 (1991), 55-74; ID., «History and Oratorical Exploitation», in I. WORTHINGTON (ed.), *Persuasion. Greek Rhetoric in Action*, London-New York, 1994, 109.

per minute[93], the time required to deliver the speech, constituted by 867 words, would be less than seven minutes. Yet, this does not mean that each speech for the assessment of the penalty could not last longer than 7 minutes or so.

To conclude, I am inclined to believe, although with caution, that, as far as *agones demosioi timetoi* are concerned, 11 *amphoreis* might correspond to the time allowed to the prosecution and defence speeches and to the dikastic vote on guilt or innocence. They would cover 528 minutes if 1 *khous* corresponds to 4 minutes, or, alternatively, 396 minutes if 1 *khous* runs out in 3 minutes: each speech —if we suppose that voting operation lasts no longer than 60 minutes for 1500 judges— should not exceed 234 or 168 minutes[94]. If one supposes that the *timesis*-phase is excluded from the 11 *amphoreis* that measure the time preceding the final *krisis*, and if one assumes that the whole *hemera diamemetremene* lasts —more or less— 576 minutes, the litigants are supposed to have a total of 48 minutes, or, alternatively, 180 minutes. If the former, the time would correspond to 1/11 of the total time allocated to the first stage; if the latter, less than 1/2.

[93] A. ROME, «La vitesse de parole des orateurs attiques», in *Bull. Acad. Roy. Belg. Cl. Lett*., 38 (1952), 596-609.

[94] I. WORTHINGTON, *The Length of an Athenian Public Trial, cit.,* 364-371, convincingly suggests that the speech of Deinarchus —as well as those of Aeschines and Demosthenes from the False Embassy and Crown trials— is so long that it could not possibly have been delivered within the time corresponding to 132 minutes. Moreover, it is worth highlighting that in 323 B. C., when Demosthenes was charged with *dorodokia* (*i. e.* taking bribes from Harpalus) before 1500 citizens (Din. 1.107), ten prosecutors had also been appointed (Din. 2.6): Stratocles spoke first, and was then followed by the client of Deinarchus (Din. 1.1, 1.20. 1.21). Deinarchus and Hyperides had several items of supporting evidence read out (like Demosthenes and Aeschines in their speeches from the False Embassy and Crown trials). It is very hard to imagine, along with ten speeches, the quoting of all of this additional evidence fitting into the above-mentioned time. If one believes that an effective short speech making only one or two points could be held in five minutes, ten speeches could last more than 20 minutes each.