Classica Cracoviensia
XVII, 2014
DOI: 10.12797/CC.17.2014.17.07

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PENALTIES IN ACTION IN CLASSICAL ATHENS

A PRELIMINARY SURVEY[1]

SUMMARY: This paper attempts to look at the inner workings of the punitive system in ancient Athens. After a brief survey of the range of penalties available in Classical Athens (capital punishment, exile and outlawry, disenfranchisement, financial penalties, imprisonment, corporal penalties), it proceeds first to examine their nature (as they frequently fail to meet our criteria of punishment), and then to map them on the substance vs. procedure controversy regarding the Athenian legal system. The last two sections of the paper are devoted to the manner in which penalties were imposed (summary punishment, punishment by sentence, "automatic" punishment) and executed (private vs. public execution of court verdicts; coercive measures etc.).

KEYWORD: Athenian law, enslavement, corporal penalties, capital punishment, exile, outlawry, disenfranchisement, financial penalties

> Afraid of what? That I suffer what Meletus has assessed (*timatai*) for me? That, I can't even say to know for a fact whether it is good or evil. Should I then choose an assessment from what I know to be an evil? As imprisonment? What good is living in prison, forever a slave to the ever-present

[1] This study is part of a project funded by the Polish National Science Centre (NN103 429640).

> command of the Eleven? Perhaps a fine then, with imprisonment until I pay? But it comes down to the same as before since I have no money from which I could pay. Perhaps then I should assess exile? Perhaps that's what you would assess for me (Plato, *Apology* 37b-c).

Unfortunately, Socrates chose for himself yet another form of "punishment", and his apparent effrontery estranged also those among the jury who, so far, were even reluctant to convict him: free meals in the Prytaneion, an honor bestowed on the most distinguished citizens (and their descendants), which must have seemed like a gratuitous mockery to the Athenians judging his case. Before making up his mind, however, the Platonic Socrates manages to give us a revealing glimpse into the Athenian judiciary with a list of available penalties: fine, imprisonment and exile, to which we should add disenfranchisement (*atimia*), as well as the punishment Socrates eventually suffered. He also reminds us that punishment in classical Athens was not always fixed by law, but frequently assessed for each particular case independently, and that from a wildly divergent range of possibilities. Nevertheless, when it comes to the inner workings of the Athenian penal system and the intricate relationship or, so to say, hierarchy of punishments within it, Socrates' deliberation, for all its historical value, barely scratches the surface.

Now the tradition of legal thought is universally acknowledged to be one of the few original Roman contributions to the cultural heritage of Western civilization, whereas Athenian – or more generally Greek – law is notoriously considered a "dead end" in the history of ideas.[2] Even so, however, a close study of its "intense otherness" (Todd 1993: 29, 64-70);[3] is well worth the effort – and that not only for antiquarian reasons – as it not only pinpoints the arbitrary, conventional nature of many rules and regulations too frequently taken for granted, but also illustrates how a complex, politically advanced, democratic society can function within a very different legal and ideological framework.

[2] Todd 1993: 4: *the cultural tradition of western Europe derives its metaphysiscs from Judeo-Christian sources and its ethics from Greek philosophy rather than Greek religion. In law, as in religion, the Greeks have left no legacy*; cf. Wohl 2010: ix.

[3] See also Rhodes 1998: 145.

Unsurprisingly, the last decades saw an impressive growth in the study of Greek law and its various aspects, ranging from technical issues to questions of its cultural and ideological grounding, and resulting in heated, not infrequently sharp-edged debates. As of now, however, no systematic study of penalties within the Athenian legal system has been provided. The work of Karabélias (1991)[4] gives a modest account of their range, whereas the full-length monograph on "politics of punishing" in Athens (Allen 2000), an otherwise illuminating account of the social and political context of Athenian penology, only occasionally devotes any attention to the workings of the system itself. This paper is therefore an attempt towards filling that gap, one which, hopefully, will be followed by further studies on the subject.

1. THE RANGE OF PENALTIES IN CLASSICAL ATHENS

A peculiar feature of the Athenian legal system was that, in many cases, the penalties lacked statutory, substantial definition (see below on substance and procedure). In other words, the laws of Athens frequently specified no particular form punishment to redress a given offence, but instead left its assessment – as in the case of Socrates – to the discretion of the prosecutor and the jury: from token penalty to capital punishment. Thus, for example Thrasybulus of Steria, the leader of the democratic rebellion against the Thirty, was fined only a symbolic drachma for an unconstitutional proposal,[5] while in different cases the very same offence could even be punished with death (Hansen 1974: 31-32; 52; catalogue no. 12, 14). Such trials, known as *agōnes timētoi*, usually entailed two separate, consecutive hearings:[6] the first – to determine the culpability of the accused, and, upon conviction, the

[4] Reprinted as chapter 6 of his subsequent book (Karabélias 2005).

[5] Sch. Aesch. 3.195, though the story may be suspicious; quite certainly, however, Polyeuctus of Kydantidai, the prosecutor of Euxenippus (Hyp. *Eux*.), in a similar case was fined with an equally insignificant amount of 25 drachmas (Hyp. *Eux*. 18).

[6] The procedure of *eisangelia*, though most likely an *agōn timētos*, had only one hearing, as the penalty was "assessed" beforehand, during the preliminary hearing at the Assembly, and followed automatically upon conviction (Hansen 1975: 33-36).

second – to assess the penalty, where the jury was to choose between the propositions given by each side. Those trials, on the other hand, where the penalty for a given offence was fixed by law, referred to as *agōnes atimētoi*, had only one hearing, and the statutory punishment followed directly upon conviction.[7] With this fundamental distinction in mind, we may proceed to a brief survey of the penalties available in Classical Athens.

The Athenian law made use of capital punishment with truly Draconian severity, providing for it in a number of cases, some of them being, by our standards at least, quite innocuous.[8] It should be kept in mind, however, that many among these involved procedures with an assessment of penalty (*agōnes timētoi*), which means that capital punishment was not prescribed by statute, but merely a possibility left to the discretion of the prosecutor and the jury. Like in many pre-modern societies, in classical Athens capital punishment could present various degrees of severity, both in the manner of execution (*apotympanismos*, hemlock)[9] and in the possible post-mortem embellishments, such as denial to the right of burial in Attica (*ataphia*).

Exile and outlawry deserve to be treated together, since in terms of practical effects both were much the same, the latter being a somewhat more severe version of the former. Outlawry deprived the punished person of all legal protection, allowing for anyone who wished to kill him; in some cases, even a price was placed on the convict's head.[10] The imposition of this penalty was therefore tantamount to banishment, as such conditions, as noted by MacDowell, *would make it virtually impossible for him to remain in Athenian territory* (MacDowell 1978: 73).[11] Exile "proper" seems much less harsh against this backdrop. Not only did some of its forms provide for a more or less precisely defined term

[7] A catalogue of both *agōnes timētoi* and *atimētoi* is given by Harrison 1968-1971: 2.80-82).

[8] An exhaustive list of "capital offences" was' compiled long ago by Barkan (1935: 5-40), into five groups: "crimes against the state", "religious crimes", "moral offences", "kakourgemata", and "homicide".

[9] On executions in Classical Athens see Gernet 1982: 175-211; Todd 2000.

[10] E.g. Thuc. 6.60.4 (Hermocopidae); cf. Eur. *El*. 32-33.

[11] Cf. ibid: *Such* atimia *was roughly equivalent to expulsion from Attika*.

of punishment (ostracism; exile for involuntary homicide),[12] but, most importantly, the convicted person continued to enjoy legal protection as long as he did not violate the conditions of his banishment, that is as long as he did not set his foot in Attica or at the panhellenic gatherings. An outlaw, on the other hand, could be killed with impunity wherever he was found.[13] It should also be noted that both exile and outlawry could extend to the descendants of the punished person, thus effectively banishing his entire family from the Athenian soil.

The penalty of disenfranchisement (*atimia*) in Athens, despite many in-depth studies, remains to this day an issue fraught with difficulties and unanswered questions.[14] In earlier sources, the Greek term is frequently seen to denote outlawry,[15] which in itself could be considered as the most extreme and savage form of depriving one of his civic rights (Paoli 1930: 307-316; Hansen 1976: 75-82; Harrison 1968-1971: 2.169-171; MacDowell 1978: 73-75; Velissaropoulos-Karakostas 1990: 100-101; Youni 2001: 124-132). Even in its more restricted sense, however, *atimia* could also vary in severity. The so-called full *atimia* was more than just privation of one's civic rights. Apart from being banned from the Assembly (and *a fortiori* from moving and debating decrees), from the lawcourts (as a juror, prosecutor and even witness)[16] and from

[12] Exile from ostracism (on ostracism and the nature of punishment see below) lasted 10 years, after which time the person was reestablished into Athens; exile as punishment for involuntary homicide could be repealed on the discretion of the victim's family (*aidesis*), who, it should be noted, had no legal obligation to grant one; see IG I^3 104.13-19; Dem. 23.72; MacDowell 1963: 117-126; Phillips 2008: 54-55, 63-64.

[13] This is most explicitly given in the phrase in the phrase νηποινεὶ τεθνάναι attached to laws and decrees concerning outlawry (Velissaropoulos-Karakostas 1991; see also Youni, 2001: 117-121; cf. MacDowell 1978: 255).

[14] MacDowell 1978: 75: atimia *remains one of the most difficult topic in the study of Athenian law*.

[15] Dem. 9.44: ἐν τοῖς φονικοῖς γέγραπται νομοίς, ὑπὲρ ὧν μὴ διδῶι δίκας φόνου δικάσασθαι, ἀλλ' εὐαγὲς ἦι τὸ ἀποκτεῖναι, καὶ ἄτιμος φησὶν τεθνάτω. τοὺτο δὴ λέγει καθαρὸν τὸν τούτων τιν' ἀποκτείναντ' εἶναι; the term ἄτιμος is sometimes replaced with a more explicit πολέμιος, as in πολέμιος ἔστω 'Αθηναίων καὶ νηπονεὶ τεθνάτω (And. 1.98) or ἀγώγιμος (cf. Youni 2001: 133-4).

[16] Is. 10.20; Dem. 22.53 = 24.165; Ant. 6.36; Dem. 25.74, 94; Lys. 6.24-25; Dem. 21.92; 53.14; Aesch. 1.19; cf. Hansen 1976: 61, note 6; according to And. 1.101 an *atimos* was not even entitled to plead his case as a defendant (οὐδ' αὐτῶι ὑπὲρ αὐτοῦ

magistracies, a disenfranchised person (*atimos*) was also forbidden to enter the sanctuaries and the agora. Partial *atimia,* on the other hand, could involve any of the above privileges (or their particular details) as well as some others (Paoli 1930: 324-327; Hansen 1976: 63). A person found in violation of the terms of his disenfranchisement was liable to the procedures of "arrest" (*apagōgē*) and "denunciation" (*endeixis*), and may have faced, upon conviction, the death penalty.[17] Some particular cases of *atimia*, however, were subject to different legal measures (see below).

Perhaps the most common method of punishment in Classical Athens were financial penalties (MacDowell 1978: 257; Todd 1993: 144). They came in two different forms, once again varying in severity: fines and confiscation (*dēmeusis*). It is usually assumed that the latter was never imposed as the main penalty by a verdict of a court (see below),[18] though there are apparent exceptions to this (Dem. 24.50; 47.44).[19] The former, never distinguished on the notional plane from damages (or compensation) (MacDowell 1978: 257; Todd 1993: 144, 208), could vary in severity, from token-punishments of a symbolic drachma to fines ruinous or downright impossible to discharge. The

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ἔστιν ἀπολογεῖσθαι); it seems unlikely to me that *atimos* in Pl. *Gorg*. 486c is to be taken in the juridical sense, whereas that in 508d might rather signify "outlawry" (τύπτειν […] χρήματα ἀφαιρεῖσθαι […] ἐκβάλλειν ἐκτῆς πόλεως […] ἀποκτεῖναι).

[17] Some procedures of *apagōgē* and *endeixis* for violating the terms of disenfranchisement were *atimētoi* (as those against a state-debtor filling in an office or entering a sanctuary) with a mandatory death penalty, others *timētoi* (for serving as a juror or addressing the Assembly); even the latter, of course, could entail capital punishment, should the prosecutor and the jury demand it; cf. Hansen 1976: 96-98.

[18] Thus Todd 1993: 143; cf. MacDowell 1978: 255-256.

[19] Cf. Gernet 1957: 215, note 2); Harrison 1968-1971: 2.179; Karabélias 1991: 111 = Karabélias 2005: 272; Dem. 24.50, the "law on supplication" (Canevaro, 2013: 132) prescribes confiscation of property for anyone who acts as a suppliant on behalf of a person convicted by the court. Karabélias confuses this clause with the one directly following it, which prescribes *atimia* for the magistrate presiding over the Assembly (*proedros*), who admits a similar plea to the debate; according to Canevaro (2013: 132--138) the document is reliable insofar as the provisions contained in it are concerned; Dem. 47.44 concerns a decree (not law) regulating the use of naval equipment, and prescribing confiscation for not returning public gear and for refusing to sell one privately owned to the state.

amount due could be specified by law or left to the discretion of the relevant (judicial or executive) authority. Along with the death penalty, fines are the most frequently attested propositions in lawsuits where punishment was not defined by law (*agōnes timētoi*). Financial penalties were also imposed summarily (*epōbelia*); this, however, applied only to fines of a limited amount. Included in this category should also be court-fees (*parastasis*, *prytaneia*, *parakatabolē*):[20] though payable by both parties in advance of a lawsuit, the winning party was eventually reimbursed, which rendered it a *de facto* financial penalty to the other side.

In the above-quoted passage, among the possible penalties available for assessment, Socrates mentions also imprisonment. The extent of its use as a penalty remains, however, a debatable question (see below). Living conditions in the Athenian prison seem to have been, on the whole, harsh. There may have been some differences regarding the treatment of prisoners. The inmates usually suffered the hardship of bonds or fetters, which, however, need not have entailed strict confinement, but rather "psychical discomfort, curtailed movement and degradation" (Hunter 1997: 310).[21] Some, however, were subject to the more severe treatment of being bound to the stocks (*podokakkē*).[22] All were provided with sustenance far below the minimum, and they were most likely expected to seek livelihood from their families and friends. This was, to some extent, mitigated by the fairly unrestricted access to the prison by visitors.[23] Our sources also indicate that escaping confinement was also a viable option.[24]

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[20] Todd 1993: 144n26); on court fees in general see Harrison 1968-1971: 2.129--136; MacDowell (1978: 239.

[21] Binding prisoners: Dem. 22.56; 24.144; Lys. 6.23; 13.55 bonds and imprisonment are frequently denoted with the same terms, δέσμα and δεῖν (And. 1.2, 66; 2.15; 4.4; Lys. 6.21; Lys. 13.60; Dem. 24.92-93, 146, 152; Thuc. 6.60.2; cf. Hunter 1997: 308).

[22] And. 1.45, 92-93; Dem. 24.105, 146; cf. Gernet 1982: 204-205; Hunter 1994: 179-180; Hunter 1997: 310-311.

[23] Once the prison was opened for the day; until then visitors had to wait outside, as did Socrates' friends who came to see him on his last day (Pl. *Phaed*. 59d-e); cf. Hunter 1997: 298, 311-312.

[24] Dem. 22.34, 56 (Andron, the father of Androtion); 25.56 (Aristogiton), 54 (Aristogiton's father); Demosthenes himself (Ep. 2.17).

It is frequently assumed that corporal penalties in ancient Athens were reserved exclusively for non-citizen classes.[25] While essentially correct, this view is in need of further elaboration. Strictly speaking, the heading "corporal penalties" comprises forms of punishment where pain is inflicted for that very reason upon the punished. In classical Athens, this took the form of whipping or putting a person to the wheel (Isocr. 17.15; Ant. 5.40; Dem. 29.40): the two standard devices of "torture" (*basanos*). The most notorious use of this device, however, seems to have been neither punitive nor even "judicial" – though such uses are also attested – but "evidentiary",[26] that is serving to verify a claim with the testimony of a slave (admissible only under torture); the dearth of evidence, however, may suggest that it was more of a legal fiction, at least in the age of the orators.[27] Punitive torture was also applied to foreigners and metics.[28] Citizens, on the other hand, were, in theory, legally protected from such punishment: the law reported by Andocides (1.22, 64) and Lysias (13.27, 59) expressly forbids subjecting anyone of citizen-status to this kind of treatment (Harrison 1968-1971: 2.150 and note 6; Hunter 1994: 154, 173-174). In times of crisis, however, the law could have been suspended, and we know of at least two, perhaps three, instances of a citizen being actually put to torture,[29] and that, most likely, as a penalty. This also brings us to another problem: the use of legally sanctioned, non-lethal violence by a private person against certain types of offenders such as adulterers (*moichoi*) and adulteresses.[30]

[25] Finley 1980: 93: *corporal punishment, public or private, was restricted to slaves*.

[26] I follow the distinctions proposed by Gagarin (1996: 2-3); apart from punishing an offender ("punitive") torture may be used to extract vital information concerning a crime ("judicial"); its "evidentiary" use, however, applies to the case where a person is tortured merely to verify information already obtained (with an answer tantamount to "yes" or "no"); cf. Harrison 1968-1971: 2.147-150; MacDowell 1978: 246-247; Todd 1993: 400.

[27] Thus Gagarin 1996; cf. Todd 1993: 400.

[28] For examples cf. Hunter 1994: 174-175.

[29] Aristophanes of Cholleis (PA; LGPN; Lys. 13.58-60); Antiphon (PA; LGPN; Din. 1.63; Dem. 18.132-133); perhaps too Andocides (cf. And. 2.15; Lys. 6.26-27); cf. Hunter 1994: 175; a mention should also be made of the proposition put to the Assembly and eventually dismissed to submit Phokion to torture before executing him (Plu. *Phoc*. 34-35).

[30] The former in case of conviction in a *graphē moicheias*, the latter in violation of the terms of their *atimia*.

Enslavement. Selling a person to slavery, along with debt-bondage, was abolished by Solon in the early 6th century (Ar. *AP* 6.1).[31] This, however, applied only to citizens,[32] though even in their cases there may have been an exception to the rule. If a citizen was captured abroad by enemies, sold into servitude, and subsequently ransomed, he could be liable to enslavement upon failing to reimburse those who paid the ransom (Dem. 53.11; Gernet 1959: 85-86; Bers 2003: 60, note 21).[33] In principle, however, this regulation need not stipulate actual reduction to servitude for debt, but rest on the premise that the ransomed person simply continued to remain a slave – only now belonging to his creditor who paid the ransom;[34] even so, this still does not solve the questions of enforcing such an obligation. Other social classes were not exempt from this possibility. Metics, aliens, and freedmen, both men and women, could have been subject to enslavement as punitive measure upon failure to discharge certain duties or committing a transgression (MacDowell 1974: 256). In some cases, at least, this also applied to the family, i.e. the descendants of the convicted person.

2. THE NATURE OF PENALTIES

Enumerations such as the above, however, present us with many problems regarding the working and the nature of such "penalties". Some of them, in the first place, will not even meet the criteria of punishment as it is understood in modern jurisprudence and philosophy of law.[35] Its most important, distinguishing criterion nowadays is that it

[31] Cf. *AP* 2.2; 4.4; 9.1; Harris (2002) argues that Solon abolished only enslavement for debt and not debt-bondage.

[32] Cf. Todd 1993: 172 note 6): *[t]hroughout the history of classical democracy, it is atimia rather than slavery which marks the lowest status to which a citizen can fall*.

[33] Cf. Karabélias 1991: 120 = Karabélias 2005: 282-283); contra: Harris 2002: 424-425; the debtor becoming ἀγώγιμος to the creditor (for the wording see *AP* 2.2.; Plu. *Sol*. 13.4-5).

[34] Thus Harris 2002: 425; cf. MacDowell 1978: 256.

[35] On which see Flew 1954; Hart 1977; Feinberg 1977.

is meted out for an already committed offence,[36] which presupposes that it is visited upon the offender because of the offence, and not for any other reason, even if (according to the utilitarian view) its ends are to be sought elsewhere. Quite obviously, therefore, this excludes "penalties" inflicted for, say, preventive reasons (that is to avoid a possible threat or a crime he has not yet committed), or as a purely coercive measures (that is to force the individual to comply to a rule or expectation, and not to redress its transgression). And it will become clear that many of the above-listed penalties were employed in a manner which defies our own expectations regarding the nature of punishment.

Consider, for instance, the use of imprisonment in Classical Athens, a thorny issue, and a subject of long-standing disagreement. The words of Plato's Socrates (quoted above) seem to corroborate the now-prevalent view that it was also employed as a narrowly understood penalty, that is imposed upon an individual for a certain transgression, as that of which Socrates himself had been accused. It should be kept in mind, however, that the quoted passage from the *Apology* is the only unambiguous testimony to such a use of it.[37] According to our sources, most of the inmates of the Athenian prison (*dēsmōterion*) were, on the one hand, persons awaiting trial or execution, quite like – in the end – Socrates himself, and, on the other, state-debtors remaining in confinement until their debt was paid (Hunter 1997: 300-301). In other words the bulk of evidence presents imprisonment primarily as a custodial or coercive measure.[38] Furthermore, the relatively insignificant size of the Athenian prison, along with the unsophisticated and rather poor secu-

[36] The following characteristics of punishment have been elucidated in the above-listed (note 35) studies: 1) it must involve pain or other consequences normally considered unpleasant; 2) it must be for an offence against legal rules; 3) it must be of an actual or supposed offender for his offence; 4) it must be intentionally administered by human beings other than the offender; 5) it must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

[37] [And.] 4.4-5 (ἐξὸν κολάζειν χρήμασι καὶ δεσμῶι καὶ θανάτωι) may just as well refer to the use of confinement as a coercive measure against state-debtors.

[38] I use the terms "punitive", "custodial" and "coercive" following Hunter (1997: 306), whose paper, as of now, is the most reliable study of Athenian prison and imprisonment.

rity measures to keep the inmates in line and prevent their escape, seem to militate against its large-scale use as punishment *per se*. As observed by Hunter, it was *not designed specifically as a prison where inmates were expected to serve long sentences in solitude*", but rather as *a kind of a large lodging-house for inmates whose stay was temporary and usually very brief* (Hunter 1997: 316).[39]

Very similar objections may be raised in the case of disenfranchisement, or at least in some of its particular uses. Quite like imprisonment, *atimia* was employed against state-debtors too, only this time regularly. A defaulting payer suffered total disenfranchisement the very moment of being recorded by the relevant magistrates (*praktores*) as owing to the treasury. His condition, however, was fully reversible, as he could regain all the lost – perhaps suspended would be a better word here – civic rights upon discharging his debt. It may be, therefore, perfectly reasonably argued that cases of disenfranchisement such as this were nothing more than a coercive measure, merely intended to force the defaulter to pay up.[40] While perfectly reasonable in theory, such assessment seems to be at odds with the ancient Greek, Athenian practice. In the first place, many debts, especially those incurred as fines resulting from major political trials, were quite simply unpayable: hence the loss of civic rights which followed seems to have been, for all intents and purposes, the "penalty" aimed at by the prosecutors. Secondly, as noted by Hansen, the relevant texts themselves tend to label such form of disenfranchisement, quite explicitly, as "punishment".[41]

An even more glaring ambivalence presents itself in the case of exile. The most widely known use of this form of "penalty" in classical Athens (more precisely: in 5th century Athens) – ostracism – clearly falls outside the narrow understanding of punishment and its nature,[42] as it

[39] Allen's case for "lengthy sentences of imprisonment" (Allen 1997: 129) lack persuasiveness.

[40] Glotz 1904: 511: *La dégradation civique, conçue comme moyen de contrainte*.

[41] Dem. 24.83 (ζημία), 101 (τιμωρία); leaving aside the fact that state debtors are referred to as "criminals"; cf. Hansen 1976: 69.

[42] MacDowell 1978: 255: *Ostracism* […] *was not a penalty for an offence and is not relevant here*; it has been sometimes described as a *inverted form of general election* (Todd 1993: 290, critically).

was not imposed retrospectively, for an offence already committed, but prospectively, as a preventive measure against possible threats to the democratic polity.[43] The only certainly attested use of exile as a penalty (the main penalty), on the other hand, comes from the law on homicide, traditionally attributed to Draco.[44] Subject to it were individuals guilty of unintentional killing (*phonos akousios*), killing of a metic (both tried by the ephetai at the court of Palladion), and "deliberate wounding", sometimes also known as "wounding with intent to kill" (*trauma ek pronoias*), under the jurisdiction of the Areopagus.[45] In these cases it was prescribed by law, which means that the penalty directly followed the conviction in the court. Plato's *Apology* (above) suggests that it was also as such in the procedure of "assessment" (*timēsis*). Though, indeed, we do hear of it very frequently in this context, it remains uncertain whether it is to be taken as the punishment imposed by the court, or its surrogate form, that is self-imposed exile in order to avoid facing death penalty.[46]

3. SUBSTANCE VS. PROCEDURE

It has already become an orthodoxy that the law of ancient Athens had a procedural rather than substantive orientation. In other words, it was

[43] DS. 11.55.3: νομοθετῆσαι δὲ ταῦτα δοκοῦσιν οἱ Ἀθηναῖοι, οὐχ ἵνα τὴν κακίαν κολάζωσιν, ἀλλ ἵνα τὰ φρονήματα τῶν ὑπερεχόντων ταπεινότερα γένηται διὰ τὴν φυγήν; DS 11.87.2: οὐ πονηρίας κολάσεις […] ἀλλὰ δυνάμεως καὶ αὐξήσεως […] ταπείνωσιν; Plu. *Arist*. 7.2: μοχθηρίας γὰρ οὐκ ἦν κόλακις ἀλλ[ὰ] […] δυνάμεως βαρυτέρας ταπείνωσις καὶ κόλουσις.

[44] Hansen's statement that *[e]xile is a penalty applied directly in trials for homicide only* (Hansen 1975: 74) may seem too far-fetched.

[45] On *trauma ekpronoias* see most recently Phillips (2007) who suggests the former understanding ("Intentional wounding").

[46] The words of Thucydides (4.65.3): Ἀθηναῖοι τοὺς μὲν φυγῆι ἐζημίωσαν, Πυθόδωρον καὶ Σοφοκλέα, τὸν δὲ τρίτον Εὐπυμέδοντα χρήματα ἐπραξαντο, may imply that exile was indeed used as a judicial, court-imposed penalty; however, a similarly "active" use of the relevant term by Xenophon (*Hell*. 5.4.19): τὸν δ', ἐπει οὐχ ὑπέμεινεν, ἐφυγάδευσαν is undoubtedly used to describe self-imposed banishment (ἐπει οὐχ ὑπέμεινεν).

less concerned with rights, obligations, prohibitions, and precisely defined sanctions as such, and much more with the legal procedures available "to protect or indeed create them" (Todd 1993: 65).[47] The latter (i.e. procedures) defined the former (i.e. sanctions): a given offence gained legal substance only as a corollary of the procedure used to get the case into court. The flipside of this phenomenon is that the penalties themselves were also attached to procedures and not to the offences themselves. A particular form of punishment, in other words, was imposed not for a given crime, but upon conviction in a certain type of trial. A thief, for instance, if brought to court by means of a private lawsuit (*dikē klopēs*), had to pay double the damages and could be put into stocks for five days on top of that;[48] if, however, prosecuted in a public trial (*graphē klopēs*),[49] he *could* face the death penalty,[50] which in turn became a certainty upon conviction in the procedure known as "arrest" (*apagōgē*), with the provision, however, that the culprit be caught "red-handed" (*ep' autophōrōi*).[51] This procedural flexibility is further complicated by the fact that the penalties for many lawsuits – "public" and "private" alike – were not defined by statute, but assessed individually for each case upon conviction (*agōnes timētoi*). Thus the already mentioned public prosecution for theft (*graphē klopēs*) need not have necessarily entailed capital punishment upon conviction, but merely presented it as one of the possibilities and left its imposition to the discretion of the prosecutor and the jury.

Though already an orthodoxy, the procedural orientation of Athenian law has not gone unchallenged in modern scholarship. It has been

[47] Cf. Hansen 1975: 10; contra: Harris 2013: 138-174 = Harris 2009/2010), with a useful survey of other opinions and their implications (2013: 140-142).

[48] The relevant passage listing all procedures available for redressing theft is Dem. 22.26-7, for the discussion on which see Osborne 2010: 175-177.

[49] The existence of a *graphē klopēs* for the theft of private property has been doubted by Cohen 1983: 44-49; cf. however Todd 1993: 108, 283-284.

[50] The *graphē klopēs* being most likely an *agōn timētos*, where capital punishment was available to be chosen by the prosecutor and the jury; cf. Osborne 2010: 176.

[51] On the meaning of *ep' autophorōi* as "in the act" or "in the possession of the stolen goods" see Harris 2006a: 373-390 = Harris 1994; cf. Hansen 1976: 22: *seizing him while the offence was being committed or* […] *on finding the stolen goods in his house*.

frequently pointed out that many legal statutes, known either from epigraphy or from the – usually incomplete and distorted – quotations by the orators, provide a more or less precise range of penalties defined not so much by the type of procedure, as by the nature of the offence itself. Not infrequently, furthermore, are we faced with an apparent incongruity between the substantial and the procedural provisions in this particular respect. In what will follow, I will give some examples of such conflicting intersections between substance and procedure in the use of capital punishment for certain offences against the entire community.

According to a law mentioned by Xenophon, a person found guilty of "betrayal" (*prodosia*) was to be deprived of burial in Attica (*ataphia*), while his property subject to confiscation.[52] The text of the Greek original is highly reminiscent of the actual statutes as we know them, though it is difficult to determine if any minor changes have been introduced to it by Xenophon himself. The law gives us no information regarding the procedure. The two penalties mentioned – *ataphia* and confiscation – were usually treated as mere embellishments to capital punishment which, however, is not mentioned explicitly by Xenophon. One might be tempted to assume that it is simply understood, but this is far from self-evident. Taking the procedural aspects into account presents further difficulties. We know of at least three distinct types of (public) lawsuits employed in cases of "betrayal": 1) "impeachment" (*eisangelia*) – probably the most frequent one; 2) *apophasis*, introduced somewhere in the middle of the 4th century;[53] 3) a dedicated, though least known, and perhaps seldom used procedure of public prosecution for betrayal (*graphē prodosias*).[54] The problem is that all three, or at

[52] X. *Hell*. 1.7.22: κατὰ τόνδε τὸν νόμον ὅς ἐστιν ἐπὶ τοῖς ἱεροσύλοις καὶ προδόταις, ἐάν τις ἢ τὴν πόλιν προδιδῶι ἢ τὰ ἱερὰ κλέπτηι, κριθέντα ἐν δικαστηρίωι, ἂν καταγνωσθῆι, μὴ ταφῆναι ἐν τῆι Ἀττικῆι, τὰ δὲ χρήματα αὐτου δημόσια εἶναι; cf. MacDowell 1978: 176-179.

[53] Among the peculiarities of this procedure was the fact that the preliminary investigation was carried out by the Areopagus, while the prosecution was the responsibility of elected, and not volunteer prosecutors; it was employed in cases of treason and bribery, much like *eisangelia* which it may have began to replace (cf. Worthington 1992: 357-358).

[54] Which is hardly surprising, given that *eisangelia* was swifter, risk-free and more prosecutor-friendly a procedure (cf. Hansen 1975: 37-50, 58-65; in the case of a

least the first and the second, which were the most common, involved an assessment of the penalty (even if it was not the traditionally understood *timesis* in the form of a separate hearing upon conviction). We must therefore assume that either cases of betrayal prosecuted by *eisangelia* or *apophasis* were given special treatment in that they offered no room for alternatives to capital punishment by virtue of the law (precedence of substance over procedure),[55] or that despite the letter of the law a conviction in these two procedures did not as a rule entail capital punishment (precedence of procedure over substance).[56] The second possibility seems much more attractive, not least because we do hear of three such prosecutions (*eisangelia*) for betrayal, where conviction resulted in a fine.[57]

"Deceiving the people" (*apatē tou dēmou*) presents yet another example of contradiction between substance and procedure insofar as the penalties are concerned. A law quoted by Demosthenes (20.135) quite

magistrate yet another possibility was the procedure of audit (*euthynai*), during which anyone who wished coud prosecute him for misconduct during his term in office (cf. Harrison 1967-1971: 2.208-211; MacDowell 1978: 170-172; Todd 1993: 112-113.

[55] Since the penalty was usually proposed during the preliminary hearing at the Assembly and subsequently fixed in the decree on which the case was brought to court, it is not difficult to imagine that at this early stage the legal substance found its way into the workings of procedure; Harrison (1968-1971: 2.59) assumes that the law on treason was assimilated into the law governing *eisangelia* (*nomos eisangeltikos*), on which see Hansen 1975: 12-20.

[56] Barkan's explanation that there was a distinction between "high treason" and "ordinary treason", or between offences explicitly defined by law as treason and those only assumed by the prosecution to constitute it (in both cases only the former would be mandatorily punished by death penalty) is pure speculation, further contradicted by the fact that the (possible) three known cases of eisangelia for treason which resulted in a fine (below) involved the most serious charges (betraying the Chersonese, losing a battle as a result of bribe) (Barkan 1935: 7-8; following Thonissen).

[57] Thus Cephisodotus has been charged by Euthycles with treason through an *eisangelia,* and yet managed to escape with a fine of five talents (Hansen 1975: 98, case no. 96); similarly, Ergophilos it impeached with the same charge and punished with a (heavy) fine (Hansen 1975: 94, case no. 86); finally, Timotheus has been charged by Aristophon of Azenia with both treason (Isocr. 15.29; Nep. Tim. 3.5) and taking bribes (Din. 1.14 = 3.17), found guilty, and yet managed to escape with a fine (which eventually forced him into exile nonetheless); cf. Hansen 1975: 101, case no. 101).

explicitly prescribes capital punishment in such cases.[58] The offence itself is defined quite vaguely, and it may very well have embraced a variety of specific charges. In what seems to be another quotation from the same law, next to the "people" listed are: the courts (*dikastērion*) and the Council (*boulē*),[59] which, in turn, may suggest that it also accounted for the well-known sanction against citing a non-existent law, as well as for that against fraudulent vote by casting two ballots instead of one; the penalty in both cases was also death. Yet again, however, the only two procedures known to have dealt with such offences were: 1) *probolē*, and, once more,[60] 2) *eisangelia*. Neither of these two entailed a punishment fixed by law. Of the *probolē* and its use to prosecute "deception of the people" we know next to nothing. However, one famous case of – most likely – *eisangelia* has been recorded, in which a conviction on the charge of deceiving the people ended up in a heavy fine, despite the fact that the prosecution demanded capital punishment: the trial of Miltiades, son of Kimon, in the aftermath of his unsuccessful Parian expedition.[61] Granted, the case itself rests on very insecure grounds: we do not know it for a fact that the procedure employed was *eisangelia*, nor do we know much about the details of its functioning at such an early stage of Athenian democracy. Nevertheless, the contradictory nature of the relevant law seems quite conspicuous: it is explicitly described by Demosthenes as "ancient" (*archaios*), which may suggest that it was already in force during the time of Miltiades' trial. And yet, apparently, it was not applied in all its severity in this particular case.

[58] Dem. 20.135: ἔστιν ὑμῖν νόμος ἀρχαῖος […] ἐάν τις ὑποσχόμενός τι τὸν δῆμον, κρίνειν, κἂν ἁλῶι, θανάτωι ζημιοῦν; cf. Barkan 1935: 10-11; MacDowell 1978: 179--181.

[59] Dem. 20.100: ἔστι δὲ δήπου νόμος ὑμῖν, ἐάν τις ὑποσχόμενός τι τὸν δῆμον ἢ βούλην ἢ δικαστήριον ἐξαπατήδηι, τὰ ἔσχατα πάσχειν; cf. Hansen 1975: 13-14.

[60] The defining feature of the probolē were the preliminary proceedings in the form of an initial (and not binding) vote in the Assembly, only after which the case went to a regular dicastic court; apart from cases of widely understood treason, it was also employed to redress wrongdoings concerning religious festivals (cf. MacDowell 1990: 13-17).

[61] Inconsistency noted by Harrison 1968-1971: 2.170); MacDowell 1978: 179-180.

4. THE IMPOSITION OF PENALTIES

That penalties need not always be the result of a court-verdict is obvious even nowadays, and the criterion separating the summary from the judicial authority in this respect is usually the extent of punishment. Though much the same could be said about classical Athens, a peculiar feature of its legal system is that, in certain circumstances, even the harshest penalties could be imposed summarily. Indeed there was an upper limit to both financial and corporal punishment meted out thus by the magistrates themselves (*autoteleis*)[62] to citizens and slaves respectively. Yet, at the same time, the executive authorities (the Eleven) also had the right to pronounce the death penalty on their own in some particular cases, as that of a "common criminal" (*kakourgos*)[63] caught "red-handed" (*ep' autophōrōi*) if he confessed his guilt. Even more bewildering, however, must seem the fact that some forms of punishment were incurred "automatically". The latter is an umbrella term covering at least three distinct phenomena. First, a penalty could be a natural consequence of committing a certain offence, or failing to perform a duty; second, a penalty could be inherited from the person originally punished upon the latter's death, and third, a penalty could be extended at once to the entire family of the convict.

The inner workings of the penalty of disenfranchisement (*atimia*) provide a good, if highly problematic on its own (see above), illustration of this bewildering network. The first problem, already mentioned above, is a formal one: in some (usually early) sources, the term *atimia* also denotes outlawry. These two are frequently treated together as two stages or even faces of the same phenomenon, outlawry being the more savage privation of all rights and legal protection, and disenfranchisement limited to civic privileges only. However, the practical results of the former were significantly different from those of the latter, since disenfranchised citizens usually remained in Athens, whereas outlaws were forced to flee.

[62] The fines thus imposed are called ἐπιβολαι in our sources; cf. Harrison 1968-1971: 2.4-6.

[63] Perhaps the best way to translate the Greek term, instead of the slightly archaic "malefactor"; Gagarin (2003) postulates "career criminals"; contra: Harris 2013: 167, note 87.

Just like exile (see above), *atimia* could be temporary, permanent, and hereditary. This apparent progression of severity is, however, upset by the fact that the most common case of disenfranchisement, the one incurred by debt to the state, was at once temporary and hereditary.[64] It was temporary insofar as it lasted as long as the debt was not solved, and it was hereditary insofar as upon the death of the original debtor it passed on to his descendants, who also remained *atimoi* until the money owed was paid. No other case of temporary disenfranchisement is known, but there is evidence that *atimia* could be imposed upon the descendants of the convict in other cases, and with immediate results (Hansen 1976: 71).

The most comprehensive – though not full – list of offenses "punished" with disenfranchisement is given by Andocides (1.73-76; cf. Hansen 1975: 72-74; MacDowell (1962: 106-107). It includes state debtors, persons guilty of neglecting or misconducting certain civic (especially military) duties,[65] as well as those found to have committed acts (not necessarily crimes) unworthy of a citizen,[66] and finally recurrent abusers of certain functions and privileges.[67] The problem here is

[64] Lys. 20.34; Is. 10.17; fr. 129; Dem. 22.33-34; 24.201; 43.58; 58.1-2, 16, 19; Lex. Seg. 247.10; Suda s.v. Aristogeiton; Hyp. fr. 139 Jensen; cf. Hansen 1976: 71 and note 1).

[65] Cf. Hansen 1976: 74; Todd 1993: 117; military derelictions: 1) draft-dodging (*astrateia*); 2) desertion (*lipotaxion*); 3) cowardice (*deilia*); 4) deserting a naval battle (*anaumachion*); 5) deserting the navy (*liponaution*); civic derelictions: 1) evading service as an arbitrator (A. *Ath*. 53.5) 2) withdrawing a public action (perhaps only in cases of monetary reward); 3) frivolous prosecution – upon obtaining less than 1/5 of the jury's votes in public lawsuits.

[66] 1) squandering one's patrimony (Aesch. 1.30-32, 94, 105, 154; cf. Hansen 1976 73, note 19); 2) neglecting one's parents in old age (And. 1.74; X. Mem. 2.2.13; Dem. 24.60; 103-105; Aesch. 1.28; Poll. 8.44-45; cf. Hansen 1976: 72, note 7); 3) prostituting oneself or inducing a citizen to prostitution for a gain (Aesch. 1.134, 160; Poll. 8.44-45; Ar. *Eq*. 877f; And. 1.100; Aesch. 1.3, 14, 19-20, 28, 40, 46, 73, 119, 154, 164, 188, 195; Dem. 22.21, 29, 30, 53, 73, 77; 24.79; D.L. 1.55; Sch. Dem. 20.156; cf. Hansen 1976: 74, note 20); 4) marrying a foreign woman pretending that she is Athenian ([Dem.] 59.52); 5) not divorcing a woman caught in adultery ([Dem.] 59.87); 6) obstructing public officials in the exercise of their office (Dem. 21.22).

[67] Upon the third conviction of 1) giving false testimony (*pseudomartyrion*); 2) giving false testimony regarding judicial summons (*pseudokleteia*); 3) giving unconstitutional proposal (*paranomon*); 4) idleness (*argia*).

that, in some of these cases, *atimia* was clearly *not* the consequence of a judicial verdict, while in others the exact manner of its imposition remains uncertain.

Yet the simple distinction between "automatic" disenfranchisement and disenfranchisement "by sentence" cannot do full justice to the complexity of this phenomenon.[68] The former is, of course, most conspicuous in the case of state-debtors, however even here, as in the case of bribery and theft,[69] there is still room for disagreement. Other instances of automatic disenfranchisement include cases of frivolous prosecution: here *atimia* might be incurred either upon withdrawing a "public" lawsuit (*graphē*), or failing to obtain one fifth of the jury's votes;[70] the precise nature of both the punishment and the offences subject to it, however, also remain a matter of controversy.[71]

Even more problematic is the question of disenfranchisement for certain transgressions or failures in the domain of civic mores and duties. Punished with *atimia* were citizens who prostituted themselves, who squandered their patrimony, and who refused to support their elderly parents. Desertion, under various particular forms, also resulted in this penalty. Yet we do not know exactly when and how it was incurred in any of these cases. The common-sense assumption is that subject to it were persons convicted in court on any of these charges. This, however, is upset by the fact that some relevant procedures (such as *dokimasia rhētorōn*) were not, in fact, a prosecutions for any of these acts as such, but for illegally exercising certain privileges (speaking

[68] A distinction made by Hansen 1975: 66-67).

[69] And. 1.73; cf. Paoli 1930: 305-306; Hansen 1976: 86-89; MacDowell 1983: 69-76.

[70] Disenfranchisement (on which see below) was accompanied by a 1000 drachma fine; Wallace (2006) argues that withdrawing public prosecutions did not entail partial *atimia* (contra: Harris 2006a: 422; Harris 2006b).

[71] *Atimia* thus incurred was a partial one, its extent, however, is uncertain; according to some authorities, it entailed the loss of the right to prosecute (in public lawsuits) altogether (Harris 2006a: 405-422 = Harris 1999), others claim that it merely banned the disenfranchised from bringing similar cases to court in the future (Hansen 1976: 63-65; Todd 1993: 143; MacDowell 1990: 327-328); Paoli's suggestion that we are dealing here with full *atimia* merely resulting from debt to the state, incurred by the 1000 drachma fine, seems untenable (cf. Paoli 1930: 323; Harrison 1968-1971: 2.83).

in the Assembly) to which such a person was no longer entitled.[72] In other words, it might be taken to presuppose that *atimia* – partial or total – was incurred automatically, in the very moment when transgressions such as these were committed (Todd 1993: 116, note 15; Carey 2000: 20). Yet the penalty upon conviction in these cases was nothing else than disenfranchisement, perhaps only extended from partial to total.[73] By contrast, all other *atimoi*, if found in violation of their penalty, were subject to the much harsher procedures of "denunciation" (*endeixis*) and "arrest" (*apaogōgē*), in which the offender faced capital punishment (MacDowell 2000: 22-25; MacDowell 2005: 84-85). These incongruities and – apparent – contradictions only prove that a major study of disenfranchisement and its working as a penalty still remains a desideratum.

5. THE EXECUTION OF PENALTIES

Yet another orthodoxy, one which has also – and predictably – raised voices of dissent, holds that in the virtual absence of law-enforcement apparatus, the execution of penalties and judgments in classical Athens lay predominantly in the hands of individuals.[74] There are, of course, obvious limits to the extent of this private initiative. Imprisonment could only be put into action by the relevant authorities (the Eleven), though certain forms of forced confinement in private quarters (as that of an

[72] Other such procedures included *graphē astrateias*, *lipotaxiou* and deilias (prosecution for draft-evasion, desertion and cowardice), *graphē kakoseōs goneōn* (for maltreating one's parents), *graphē hetaireseōs* (for prostitution) perhaps also *graphē paranoias* (lit. 'for insanity', possibly used against those who squandered their patrimony); cf. Paoli 1930: 327-330; Hansen 1976: 72-73; see also Todd 1993: 106-108; on the procedure of *dokimasia rhetorōn* see MacDowell 2005.

[73] That is the above-mentioned cases of *graphē astrateias*, *graphē hetaireseōs* and others; cf. Paoli 1930: 327-329; Hansen 1976: 66-67 and note 3, 72-73; see e.g. Dem. 59.27 for *atimia* as a result of conviction in a *graphē astrateias*.

[74] Thus Hunter 1994: 120-153; contra: Harris 2007; Harris 2013: 249-251; though cogent, Harris' arguments about the punitive authority of magistrates pertain much more to the imposition than to the actual execution of penalties.

adulterer) were legally acceptable (Harrison 1968-1971: 1.33-34).[75] Similarly, corporal penalties were administered by the officials only, though the punishment or torture (in order to obtain evidence) of slaves were left to private persons.[76] Finally, the execution of a convicted homicide was strictly the business of the authorities (again the Eleven), which Demosthenes is quite keen to stress;[77] yet even here, at least in theory, a private execution of an exiled murderer – or any exile for that matter – found in violation of his banishment was still within the limits of the law.[78]

Most perplexing, however, must seem the manner in which enforced and executed were penalties of considerably milder severity: fines. In most modern legal systems, collecting such debts is the business of special authorities (bailiffs), aided, when needed, by police force. Though classical Athens did have magistrates responsible for managing debts to the state (*praktores*),[79] their duties were most likely limited to keeping record of the defaulters, and did not include collecting due payments.[80] On the other hand, the measures provided by law to force a debtor to discharge the sum owed to the treasury were complex, and their working remains elusive in many cases.

In the first place, there were certain sanctions warranting further penalties for the defaulters. Among these were: 1) doubling of the

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[75] Doing so under false pretences, however, could be prosecuted by a public lawsuit (*graphē adikōs heirchthēnai*); cf. Todd 1993: 278.

[76] As it seems, however, an owner was not free to kill his slave; cf. MacDowell 1978: 80-81.

[77] Dem. 23.69: ἄν δὲ δόξηι τὰ δίκαι' ἐγκαλεῖν καὶ ἕληι τὸν δεδρακότα τοῦ φόνου, οὐδ' οὕτω κύριος γίγνεται τοῦ ἀλόντος, ἀλλ' ἐκείνου μὲν οἱ νόμοι κύριοι κολάσαι καὶ οἷς προστέτακται; cf. MacDowell 1963: 111; Gagarin 1981: 25-27.

[78] Dem. 23.28: τοὺς δ' ἀνδροφόνους ἐξεῖναι ἀποκτείνειν ἐν τῆι ἡμεδαπῆι καὶ ἀ πάγειν (IG I^2 115.30 according to Stroud's reconstruction; IG I^3 104.30 is more conservative); cf. MacDowell 1963: 121-122.'

[79] A debt owed to a sacred treasury, however, was managed by treasurers of the relevant divinity (cf. MacDowell 1978: 165.

[80] Cf. Hansen 1980: 160; his misgivings about the restoration of IG I^2 75.49 [πραττόντ]ον ηοι πράκτορες; lit. *let the praktores collect*), has been corroborated in the more recent edition (IG I^3 59.48), where the missing part is given 9 letter-spaces.

fine, unless paid by the ninth prytany,[81] 2) disenfranchisement, and 3) imprisonment. Their imposition, however, depended on multiple factors, and they were not employed indiscriminately against all state-debtors alike. Exempt from doubling of the penalty may have been certain categories of fines, as those imposed upon conviction for theft and bribery, which from the beginning were the tenfold of the incriminated amount, though the reasoning behind this is far from certain.[82] More problematic is, predictably, the working of *atimia* in such cases. Though it may be reasonably assumed that disenfranchisement was normally incurred by all state-debtors, the question still remains – when exactly a person became one: at the very moment of the imposition of the fine, or perhaps at the doubling deadline of the ninth prytany.[83] In any event, the *atimia* thus incurred was a total one, which, in turn, rendered the state-debtor liable to further penalties (including capital punishment) upon transgressing the limitations imposed by it. Imprisonment, finally, was employed only against certain kinds of state-debtors,[84] and only certain categories of persons punished with a fine were actually incarcerated. The evidence, however, for its use as a sanction enforcing the discharge of a fine gives a hopelessly untidy picture. It is even uncertain whether it is to be considered a coercive measure at all, since the wording may sometimes suggest that it was an additional penalty imposed on top of a fine, and not just means to enforce it.[85] In some cases it could be stipulated by the prosecution during the assessment (*timēsis*), in others

[81] The ninth prytany, the penultimate in the bouleutic calendar (according to which the year was divided into ten prytanies altogether), was the time in which most of the payments to the public treasury were due. This, however, did not apply to fines, which were payable from the moment of their imposition.

[82] Cf. Paoli 1930: 305), who bases his argument on the fact that those convicted of bribery and theft are listed separately (And. 1.73-74) from other debtors to the state who were subject to this sanction; contra: Hansen 1976: 86.

[83] Discussion: Harrison 1968-1971: 2.173-175).

[84] There were, of course, many ways one could become a state-debtor, fines being only one among them; failing to pay the rent for the lease of public property and unsuccessful tax-farming were at least equally frequent; in these cases, however, one was not recorded as such until the ninth-prytany (cf. MacDowell 1978: 165; see above).

[85] E.g. προστιμᾶν δεσμοῦ, lit. *assess imprisonment as an additional penalty* (Dem. 24.39, 41, 46, 56); cf. Hunter 1997: 304, note 23.

it seems to have been statutory. Though it usually followed the verdict immediately,[86] there is evidence that, for some categories of wrongs, the fined person was given a certain time to discharge the debt, after which he was confined.[87] From 353 onwards (the so-called law of Timocrates), a person sentenced to a fine with imprisonment had the option to name sureties and thereby remain free, until, once again, the ninth prytany; only if his debt was not discharged until then did he go to prison, while the sum he owed was doubled.[88]

So much for sanctions and coercive measures, which were nothing more but indirect methods of exacting financial penalties. The Athenian legal system, however, provided yet another, direct way of enforcing a debt owed to the state in the procedure known as "denunciation" (*apographhē*).[89] The term covered at least three related but distinct types of legal actions, among them one in the form of listing property owned by an individual which should be cashed to redeem his debt to the state. The case was open to volunteer prosecution, which de facto meant it rested exclusively on private initiative; the officials in charge of the procedure, the Eleven, had no capacity to initiate the legal action on their own. Even more perplexing, however, must seem the end result of a conviction. The property thus listed was handed over to another board of magistrates, "the sellers" (*polētai*), who put it up for auction.[90] Yet the public treasury received only a quarter of its proceeds, the remainder

[86] As in the cases of fines resulting from conviction on the charge of impiety, already given in the opening quotation (Pl. *Ap*. 37c; cf. Harrison, 1968-1971: 2.242-243; Hunter 1997: 304.

[87] As in the cases of *hybris* – if the punishment imposed by the court was a fine, of course (Aesch. 1.1.; Dem. 21.47; cf. Hunter 1997: 304.

[88] Dem. 24.39-40; cf. Hunter 1997: 305.

[89] "Denunciation" is, of course, not a literal translation (cf. LSJ sv III.2), but legal explication of the procedure covered by the name (cf. Osborne 2010: 178); on the known cases of *apographhē* cf. Osborne 2010: 193-196; on the procedure in general cf. Lipsius 1905-1915: 299-308; Harrison 1968-1971: 2.211-217; MacDowell 1978: 166-167; Todd 1993: 118-119; Osborne (2010: 178-183 = Osborne 1985: 44-47.

[90] Handed over not necessarily in the literal sense, since, as the *AP* (52.1) informs us, the *apographhē* usually concerned lands and houses (χωρία καὶ οἰκίας εἰσάξοντας εἰς τὸ δικαστηριον); cf. Harrison 1968-1971: 2.214).

going to the successful prosecutor himself.[91] Another peculiarity must have been the actual subject of the trial itself: the defendant, a state-debtor whose financial burden resulted from a fine, was in no position to question the validity of the prosecution: his could not deny the fact that he owed money to the state, he could only claim that the property listed by his opponent (to be cashed) did not actually belong to him.[92] The relevant procedure, known as *enepiskēpsis*, could only be introduced by a third party, a person claiming that the listed items were his, and not the debtor's, property.[93]

CONCLUSION

The emerging picture of the Athenian penal code is that of a truly bewildering lack of consistency. To some extent, it is no doubt embedded in the workings of the legal system itself. The availability of different penalties in *agōnes timētoi*, where the form punishment was left to the discretion of the prosecutor – and ultimately the jury itself – already accounts for its considerable diversity. The "open texture" of Athenian law, that is the inevitable fuzziness of crucial substantial concepts as defined in the statutes, offered even more room for inconsistency in the treatment of certain offences. Finally, its undeniable procedural flexibility renders even those cases where the available evidence seems relatively secure much less predictable insofar as the question of sanctions and penalties is concerned. On top of this all, however, our largely incomplete and fragmentary knowledge of the Athenian legal system, and of its frequently conflicting overlaps between substance and procedure,

[91] [Dem.] 53.2: τὰ μὲν τρία μέρη, ἃ ἐκ τῶν νόμων τῶι ἰδιώτηι τῶι ἀπογράψαντι γίγνετα, τῆι πόλει ἀφίημι; see Harrison 1968-1971: 2.214; Lewis 1997: 172, note 67; cf. Osborne 2010: 179; Todd (1993: 118, note 18) suggests that the cardinal τρία should be changed to ordinal τρίτα, which would drastically change the meaning from "three [quarters]" to "third [part]", and thus conform the rules of this procedure to those governing some other prosecutions for reward (e.g. *graphē xenias*).

[92] As in Dem. 53.2.

[93] Apollodorus' extant speech, *Against Nicostratus* ([Dem.] 53) belongs to this type of case.

as illustrated by the tangled workings of capital punishment, amply demonstrates the extent to which a detailed and major study of punishment in classical Athens still remains a desideratum.

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