ALEXANDER TULIN

DIKE PHONOU

THE RIGHT OF PROSECUTION AND ATTIC HOMICIDE PROCEDURE

B. G. TEUBNER STUTTGART UND LEIPZIG

Beiträge zur Altertumskunde

Herausgegeben von
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For Nadia

Ἐγὼ μὲν γὰρ οἶμαι πάσας τὰς πόλεις
διὰ τοῦτο τοὺς νόμους τίθεσθαι,
ἵνα περὶ ὧν ἂν πραγμάτων ἀπορῶμεν,
παρὰ τούτους ἐλθόντες σκεψώμεθα
ὅ τι ἡμῖν ποιητέον ἐστίν.

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March 1996
Washington, D.C.

Alexander Tulin

ABBREVIATIONS

(References to ancient authors follow the usual conventions)

Darem.-Sag. = C. Daremberg - E. Saglio, *Dictionnaire des antiquités grecques et romaines*. Paris, 1877-1919.

DK = H. Diels - W. Kranz, *Die Fragmente der Vorsokratiker*. 6th ed., Berlin, 1951-52.

FGrH = F. Jacoby, *Die Fragmente der griechischen Historiker*. Berlin, 1923-1958.

IG = *Inscriptiones Graecae*. Berlin, 1873-.

M.-L. = R. Meiggs - D. Lewis, *A Selection of Greek Historical Inscriptions to the End of the Fifth Century B.C.* Revised ed. Oxford, 1988.

RE = A. F. Pauly - G. Wissowa - W. Kroll, *Realencyclopädie der classischen Altertumswissenschaft*. Stuttgart, 1894 -.

Schol. Patm. = Ι. Σακκελιων, ed., Λέξεις μεθ' ἱστοριῶν ἐκ τῶν Δημοσθένους λόγων. *Bulletin de correspondance hellénique* vol. 1, 1877, 10-16, 137-55.

Stallbaum (*Plat. Opera Omnia*) = G. Stallbaum, *Platonis Opera Omnia. Recensuit et Commentariis Instruxit*. Various dates. Rpt. New York, 1980.

Tod GHI = M. N. Tod, *A Selection of Greek Historical Inscriptions*. 2nd ed. 2 vols. Oxford, 1946-48.

INTRODUCTION

The Greeks were not the first people to concern themselves with the occurrence of murder. Indeed, the problem of homicide has occupied man seemingly from the beginning of time, and appears destined to plague him to the very end. Still, the Greeks were among the earliest to establish a complete, or nearly complete homicide code, and to lay down precise procedural rules by which the process of bringing so unsettling an event as murder to an orderly conclusion could be controlled.[1]

Of course, the ancient conception of murder differed profoundly from our own. The modern notion of homicide presupposes the inalienable rights of each and every individual of whatever status or type, and it views any violation of this arrangement as contractually of the utmost concern to the State. More precisely, the modern view, despite its complex origins in Judeo-Christian values, in the Roman codes, in Franko-Germanic common law, as well as in other exigencies of the modern world,[2] relies upon the fundamental and interrelated notions of 'individualism' and of a 'corporate' State fully empowered to act on the individual's behalf.[3]

[1]For the early Hebraic and Mesopotamian codes as they relate to the problem of homicide, see H. J. Boecker, *Recht und Gesetz im Alten Testament und im Alten Orient* (Neukirchen-Vluyn, 1976), 28f., 140ff.; M. Greenberg, "More Reflections on Bibilical Criminal Law," *Scripta Hierosolymitana* 31, 1986, 1-17; J. H. Walton, *Ancient Israelite Literature in its Cultural Context: A Survey of Parallels Between Biblical and Ancient Near Eastern Texts* (Grand Rapids, 1989), 69-93, esp. 79f.; also R. Sealey, *The Justice of the Greeks* (Ann Arbor, 1994), 30-37, 145-50. For archaic Greece, outside of Attica, cp. E. Cantarella, *Studi sull' omicidio in diritto greco e romano* (Milan, 1976), 81ff. The Greek preoccupation with procedural rules was both innovative and important, as is properly stressed by M. Gagarin, *Early Greek Law* (Berkeley, Los Angeles and London, 1986), 12ff., 72ff., 86ff., 106ff.

[2]For the historical origins of modern law, see (by way of introduction) M. Bloch, *Feudal Society*, tr. L. A. Manyon (Chicago, 1961), 109-20, 359ff., 459-62; W. Ullmann, *Law and Politics in the Middle Ages: An Introduction to the Sources of Medieval Political Ideas* (London, 1975), esp. 53-79 (on Roman law), and 193-223 (on Germanic, customary law); C. R. Radding, *The Origins of Medieval Jurisprudence: Pavia and Bologna, 850-1150* (New Haven and London, 1988); H. Lange, *Die Anfänge der modernen Rechtswissenschaft: Bologna und das frühe Mittelalter* (Stuttgart, 1993); J. A. Brundage, *Medieval Canon Law* (London and New York, 1995).

[3]For these two important notions, and their close interrelationships in modern thought, see, e.g., T. Hobbes, *Leviathan*, Part I, chs. 13-14; Part II, chs. 17-18; J. Locke, *Two Treatises of Government*, II, ch. 2, §§ 4, 13-15; ch. 7, §§ 87-89; ch. 8, §§

Both of these notions were absent, at least, in early antiquity. It seems, in fact, to be a nearly universal phenomenon that early societies are constructed as an aggregate — not of isolated individuals — but of kinship units bound together with biological, economic, and religious bonds; and that murder, in consequence, is viewed originally as a violation of just this familial unit, and not of any larger corporate entity. In the archaic community, in other words, homicide is seen not simply as a transgression against the individual murdered, but as a far broader attack upon the primal solidarity of the ancient family, the primitive organism of social life. As such, the response to homicide was not controlled by the State nor by any larger 'corporate' unit, but remained firmly rooted in the family's ancient right of vengeance — what the Greeks called *Poine* — and the matter was handled initially simply by resorting to self-help.[4]

95-99; J. J. Rousseau, *Le Contrat social*, livr. I, chs. 2, 6-7; also (albeit critically) K. Marx, "Zur Judenfrage I. Rez. Bruno Bauer: 'Die Judenfrage'" (1843) = K. Marx and Fr. Engels, *Werke* (Berlin, 1956ff.), 1:347-70, esp. 363ff. On this whole *Problematik*, see principally E. Cassirer, *Die Philosophie der Aufklärung* (Tübingen, 1932), 313-67, esp. 329ff.; also *Kants Leben und Lehre*, 2 Aufl. (Berlin, 1921), 237-40, 424-28; H. Dippel, *Individuum und Gesellschaft. Soziales Denken zwischen Tradition und Revolution: Smith-Condorcet-Franklin* (Göttingen, 1981). For the origins, and the relatively late development of the modern, "corporate" State, see M. Bloch, 123-42, 421ff.; J. R. Strayer, *On the Medieval Origins of the Modern State* (Princeton, 1970); also (with extensive bibliography) A. London Fell, *Origins of Legislative Sovereignty and the Legislative State*, esp. vol. 4, *Medieval or Renaissance Origins? Historiographical Debates and Deconstructions* (Königstein, Cambridge, New York and London, 1983-91; and n.b. the author's salutary comments at 188f.n.1, 191n.15). For the complex problem of 'Staatsbegriff' in antiquity, particularly as it relates to archaic and classical Athens, see (*exempli gratia*) F. Jacoby, *Atthis* (Oxford, 1949), 257n.119, 274n.262, 333n.21, etc.; D. J. Allan, "Individual and State in the *Ethics* and *Politics*," in *La <<Politique>> d' Aristote*, Entretiens sur l'antiquité classique 11 (Geneva, 1964), 55-85; V. Ehrenberg, *The Greek State*, 2nd ed. (London, 1969), chs. 1-2, *passim*; M. I. Finley, *Authority and Legitimacy in the Classical City-State* (Copenhagen, 1982), esp. 3f.; F. de Polignac, *La Naissance de la cité grecque* (Paris, 1984); W. Gawantka, *Die sogenannte Polis: Entstehung, Geschichte und Kritik der modernen althistorischen Grundbegriffe der griechische Staat, die griechische Staatsidee, die Polis* (Stuttgart, 1985); W. R. Connor, "'Sacred' and 'Secular': Ἱερὰ καὶ ὅσια and the Classical Athenian Concept of the State," *Ancient Society* 19, 1988, 181-85; M. B. Sakellariou, *The Polis-State: Definition and Origin* (Athens, 1989), 29, 46f., *et passim*; M. H. Hansen, *The Athenian Democracy in the Age of Demosthenes* (Oxford, 1991), 55ff., 80; idem, "The *Polis* as a Citizen-State," in *The Ancient Greek City-State*, ed. Hansen (Copenhagen, 1993), pp. 7-29; and, most recently, "Boiotian *Poleis* — A Test Case," in *Sources for the Ancient Greek City-State*, ed. Hansen (Copenhagen, 1995), 13-63. See nn.259-260 infra.

[4]This hardly requires proof. See, e.g., G. Glotz, *La Solidarité de la famille dans le droit criminel en Grèce* (Paris, 1904), esp. x-xi (with n.23 infra), 47-93, 225-43, 299-324, 372-76, 425-42, etc.; J. H. Lipsius, *Das attische Recht und Rechtsverfahren unter Benutzung des attischen Prozesses* (Leipzig, 1905-15), 6-27; H. J. Treston, *Poine: A Study in Ancient Greek Blood-Vengeance* (London, 1923), *passim*; K. Latte, *Heiliges*

Now, as is well known, the Greeks of the classical period distinguished various types of procedure, principal among these being the δίκη and the γραφή. While a γραφή could be brought by anyone who wished to do so (cp. Ar. Ἀθ. Πολ. 9.1 ὁ βουλόμενος), a δίκη could only be lodged by the injured party himself (or, in the event of certain types of legal incapacitation, by some person[s] designated on his or her behalf). The δίκη therefore approximated to the modern category of tort. It is not surprising, given the archaic nature of the Greek conception of homicide, that 'murder' (φόνος) was pursued primarily, if not exclusively, as a δίκη, thereby giving *legal* expression to the notion that homicide was essentially a private matter to be settled by the families of the parties involved.[5] Yet this brings us directly to our topic of discussion.

Recht: Untersuchungen zur Geschichte der sakralen Rechtsformen in Griechenland (Tübingen, 1920); idem, "Beiträge zum griechischen Strafrecht," *Hermes* 66, 1931, 30-39 (= idem, *Kleine Schriften*, edd. O. Gigon, W. Buchwald, and W. Kunkel [München, 1968], 252-60); R. J. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle* (Chicago, 1930-38), 1:1-56, 2:192-231; J. Lambert, *La Vengeance privée et les fondements du droit international public* (Paris, 1936), esp. 15-38; E. Ruschenbusch, "ΦΟΝΟΣ. Zum Recht Drakons und seiner Bedeutung für das Werden des athenischen Staates," *Historia* 9, 1960, 140ff.; E. Heitsch, *Aidesis im attischen Strafrecht* (Wiesbaden, 1984), 15ff.; Gagarin (1986), 62ff., 89n.23. For all of the controversy surrounding the tribal structure of early Greek society (for a recent discussion [with full bibliography], see I. Morris, "The Gortyn Code and Greek Kinship," *GRBS* 31, 1990, 233-54), few (cp. Morris, 248n.37) would dispute the primacy of kinship patterns as such; also n.28 infra. For the comparative material, see (in addition to Lambert) R. Verdier, Y. Thomas, and G. Courtois, edd., *La Vengeance: Études d'ethnologie, d'histoire et de philosophie*, 4 vols. (Paris, 1981-84 [?]; voll. III et IV non vidi).

[5]On the important distinction between a δίκη and a γραφή, see Glotz (1904), 369ff.; Lipsius, 238ff.; Bonner-Smith, 1:170ff.; A. R. W. Harrison, *The Law of Athens* (Oxford, 1968-71), 2:76ff.; Hansen, "The Prosecution of Homicide in Athens: A Reply," *GRBS* 22, 1981, 11-13; idem, "Initiative and Decision: the Separation of Powers in Fouth-Century Athens," *GRBS* 22, 1981, 359ff. (on ὁ βουλόμενος); see, additionally, (1991), 192f.; R. Osborne, "Law in Action in Classical Athens," *JHS* 105, 1985, 40-58; Sealey (1994), 127ff. In what follows, we are only concerned with the procedures used in a δίκη φόνου, as all of the texts to be discussed refer to cases of this type. (For a list of the known δίκαι φόνου, see Osborne, 57; also E. Carawan, "ΕΦΕΤΑΙ and Athenian Courts for Homicide in the Age of the Orators," *CP* 86, 1991, 13n.34.) Consequently, we need not enter into the question of whether there ever existed a γραφὴ φόνου (for which, at any rate, there is no reliable evidence). The existence of this procedure is defended, *inter alios*, by D. M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester, 1963), 133-35; Hansen, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes: A Study in the Athenian Administration of Justice in the Fourth Century B.C.* (Odense, 1976), 108-12; also (1981), 13-17. It is rejected, and properly so, by Glotz (1904), 372f.; Lipsius, 243n.13; Bonner-Smith, 2:210f.; Harrison, 2:77n.2; Gagarin, "The Prosecution of Homicide in Athens," *GRBS* 20, 1979, 322f.; G. Lalonde, *AJP* 99, 1978, 133; by MacDowell himself, *CR*, n.s., 28, 1978, 175; and it is even questioned now by Hansen, "*Graphe* or *Dike Traumatos*?" *GRBS* 24, 1983,

It is usually maintained, largely on the basis of certain texts (Drakon's Code [IG i^3 104]; [Dem.] 47.68-73; Pl. *Eu.* 3E7-5D7),[6] that only the agnate relations of the victim or, if the victim was a slave, only the master had the right of prosecution in the case of murder — that is, that the right of prosecution in a δίκη φόνου was legally restricted to the relations (or to the master) of the deceased — and that, if there were no relatives or master around to prosecute, there simply would have been no prosecution.[7] This, of course, is just what might be expected if the ancients conceived of homicide as an affair not merely of the individuals implicated (nor, to be sure, of the State), but as a matter instead of direct and primary concern to the families involved; for, on this view, practically speaking, no stranger (ἀλλότριος), situated outside of the economic, religious, and biological bonds of the victim's family (οὐκ οἰκεῖος), would ever really have sufficient motive to prosecute on behalf of another stranger's death. This, at least, is the traditional view.

This position, however, has come under attack from two quarters. Douglas MacDowell rejects this restrictive interpretation outright, and maintains that the ancient law was in fact ambiguous: while it certainly enjoined the obligation to prosecute upon the relatives or master of the victim, it did not actually prohibit others from leading a prosecution. The law, in other words, was not legally restrictive, and a prosecution could

317n.26; also G. Thür, *Gnomon* 55 (1983), 609. None of this is to deny that other procedures, such as *apagoge* or (more improbably) a γραφὴ ὕβρεως, may have been exceptionally available; see n.265 infra.

[6]Cp. also Pollux 8.118 φόνου δὲ ἐξῆν ἐπεξιέναι μέχρις ἀνεψιῶν, καὶ ἐν τῷ ὅρκῳ ἐπερωτᾶν τίς προσήκων ἐστὶ τῷ τεθνεῶτι· κἂν οἰκέτης ᾖ, ἐπισκῆπτειν συγκεχώρηται. Pollux, however, is not likely to be independent of [Dem.] 47 (see A. Philippi, *Der Areopag und die Epheten* [Berlin, 1874], 79-84), the precise significance of which is itself in dispute; see Chapter Two infra.

[7]So, e.g., Glotz (1904), 299ff., 372ff., 425ff.; Lipsius, 6ff., 243, 600f.; Bonner-Smith, 2:192-231, esp. 198f., 207f.; Treston, 191ff.; L. Gernet, *Démosthène, Plaidoyers civils* (Paris, 1954-60), 2:200; H. Evjen, "(Dem.) 47.68-73 and the δίκη φόνου," *RIDA*, 3^e ser., 18, 1971, 255-65; E. Grace, "Status Distinctions in the Draconian Law," *Eirene* 11, 1973, 8; eadem, "Note on Dem. XLVII 72 ΤΟΥΤΩΝ ΤΑΣ ΕΠΙΣΚΗΨΕΙΣ ΕΙΝΑΙ," *Eirene* 13, 1975, 5; Hansen (1981), 11ff.; Heitsch (1984), 10n.24; I. Kidd, "The Case of Homicide in Plato's *Euthyphro*," in *Owls to Athens: Essays on Classical Subjects Presented to Sir Kenneth Dover*, ed. E. M. Craik (Oxford, 1990), 213-21; also, albeit in passing, Thür, "Die Todesstrafe im Blutprozess Athens (zum δικάζειν in IG I^3 104.11-13; Dem. 23.22; Arist. AP 57.4)," *JJP* 20, 1990, 144; S. Humphreys, "A Historical Approach to Drakon's Law on Homicide," in *Symposion 1990: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, ed. Gagarin (Köln, 1991), 24.

be brought by anyone who wished to do so.[8] Michael Gagarin has argued a similar claim, though more cautiously.[9] He concedes that the intent of Drakon's original code is probably not itself in doubt. But he allows that the law was vague, and that later litigants might occasionally have had a motive to seek "a loophole" in the law that would allow a non-relative to prosecute. In such cases it might be noticed that the homicide code, which certainly allowed that relatives had the right of prosecution, did not expressly prohibit non-relatives from this procedure, and while there would have been a broad "legal expectation" that *only* relatives would prosecute, such an "expectation" was never tantamount to an actual restriction. The law, in other words, whatever the intent of its original framer, might have been *thought* to be ambiguous by later litigants, and this perceived ambiguity may on occasion have been exploited.[10]

Since each of these two interpretations will force a reevaluation of certain long-held assumptions concerning both the prosecution, and the very nature of homicide in ancient Greece, and as defenders of the traditional view have thus far failed to respond to these critics in a full and persuasive manner, the entire question requires reexamination. And so, in the hope of settling the question of whether the right of prosecution in a δίκη φόνου was legally restricted to the agnate relations (or to the master) of the murdered victim, each of the three passages previously mentioned will be discussed in turn.

[8]See MacDowell (1963), 11ff., 94ff. He is followed closely by S. Panagiotou, "Plato's *Euthyphro* and the Attic Code on Homicide," *Hermes* 102, 1974, 419-37, who fails, however, to mention MacDowell's important monograph.

[9]See Gagarin (1979), 302-13. He is followed by C. Pecorella Longo, "ΓΡΑΦΗ ΤΡΑΥΜΑΤΟΣ ο ΔΙΚΗ ΤΡΑΥΜΑΤΟΣ?" *SIFC* 53, 1981, 246; Sealey, "The Athenian Courts for Homicide," *CP* 78, 1983, 278n.9.; also R. Wallace, *The Areopagos Council to 307* B.C. (Baltimore and London, 1985), 252n.26; contrast Gagarin, *Drakon and Early Athenian Homicide Law* (New Haven and London, 1981), 56nn.70 and [esp.] 68, with Hansen's (cp. [1981], 11) more precise formulation.

[10]Proponents of this view often imply that the search for "a loophole" (cp. Gagarin [1979], 304) was most likely to occur in the event that the victim was neither a slave nor a citizen of Athens, i.e., in the case of metics, foreigners, and freedmen — so-called "off-status" victims — where it might well be the case that there was no living relative or master around to prosecute. Such individuals thus lived in a sort of legal twilight, with no one actually empowered to prosecute on their behalf. We shall have more to say about such persons below. The best introduction to the problem of off-status victims (and culprits) remains Grace (1973). Useful comments are also to be found in Gagarin (1979), *passim*, as well as in some of the specialized literature. But see Connor (1988), 182ff., on the presuppositions that underlie this whole approach.