ALEXANDER TULIN

DIKE PHONOU

THE RIGHT OF PROSECUTION
AND ATTIC HOMICIDE PROCEDURE

B. G. TEUBNER STUTTGART UND LEIPZIG
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For Nadia

'Εγώ μὲν γὰρ ὀλίγα δια τὸ τούτον νόμον τίθεομαι, ἵνα περὶ δὲν ἄν πραγμάτων ἀποροῦμεν, παρά τούτοις ἐλθόντες σκεύωμεθα ὅ τι ἦμιν ποιητέον ἐστίν.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acknowledgements</td>
<td>IX</td>
</tr>
<tr>
<td>Abbreviations</td>
<td>X</td>
</tr>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Chapter One (Dracon’s Code [IG i^3 104])</td>
<td>7</td>
</tr>
<tr>
<td>Chapter Two (Ps.-Demosthenes 47.68-73)</td>
<td>21</td>
</tr>
<tr>
<td>Chapter Three (Plato’s <em>Euthyphro</em> 3E7-5D7)</td>
<td>55</td>
</tr>
<tr>
<td>Conclusion</td>
<td>101</td>
</tr>
<tr>
<td>Bibliography</td>
<td>107</td>
</tr>
<tr>
<td>Indices</td>
<td>125</td>
</tr>
</tbody>
</table>
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Washington, D.C.

Alexander Tulin
ABBREVIATIONS

(References to ancient authors follow the usual conventions)


IG = Inscriptiones Graecae. Berlin, 1873-.


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


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


³For 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 by 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.\(^4\)

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\(^3\)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, 1956-71), 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 Fourth-Century Athens," GRBS 22, 1981, 359ff. (On δυσμική, see, additionally, 1991, 192ff.; 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 φιλού, as all of the texts to be discussed refer to cases of this type. (For a list of the known δίκαι φιλού, see Osborne, 57; and see A. Carawan, "ΦΕΠΑΙ 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 γραφή φιλού (for which, at any rate, there is no reliable evidence). The existence of this procedure is defended, inter alia, by D. M. MacDowell, Athenian Homicide Law in the Age of the Orators (Manchester, 1963), 133-35; Hansen, Apoageis, Endexis and Ephexis 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), 372ff.; Lipsius, 243n.13; Bonner-Smith, 2:210ff.; Harrison, 2:277n.2; Gagarin, "The Prosecution of Homicide in Athens," GRBS 20, 1979, 322ff.; G. Lalonde, AJP 99, 1978, 133; by McMowell himself, CR, n.s., 28, 1978, 175; and it is even questioned now by Hansen, "Graphe or Dike Trauma?" GRBS 24, 1983.

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Introduction

It is usually maintained, largely on the basis of certain texts (Dracon's Code [IG i2 104]; [Dem.] 47.68-73; Pl. Eu. 3E7-5D7), 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. 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 (ἀλλοτριός), situated outside of the economic, religious, and biological bonds of the victim's family (οἰκείος), 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 be brought by anyone who wished to do so. Michael Gagarin has argued a similar claim, though more cautiously. He concedes that the intent of Dracon'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 framers, might have been thought to be ambiguous by later litigants, and this perceived ambiguity may have on occasion been exploited.

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.

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

6Cf. also Pollux 8.118 φόνου δέ ἐξήν ἐπεξεύγαρνε μέχρις ἀνεμων, καί ἐν τῷ ὄρκῳ ἐπέγραφαν τις προσφοράς ἐστὶ τῷ τεθνῃτί: κάνεικας δὲ, ἐπιστάμενες κοινοφαραγιας. Pollux, however, is not likely to be independent of [Dem.] 47 (see A. Philippi, Der Areopag und die Epheben [Berlin, 1874], 79-84), the precise significance of which is itself in dispute; see Chapter Two infra.


8See 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.


10Proponents of this view often imply that the search for "a loophole" (ep. 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.