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Nr. 346 (Aufsatz / *Essay*, 2018)

New Light on Draco and the Cylonian Sacrilege

Colloquia Attica. Neuere Forschungen zur Archaik, zum athenischen Recht und zur Magie, hg. v. Werner Riess (Stuttgart 2018) 27–35

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Schlagwörter: Massengrab Phaleron — *apotympanismos* — Tötung — *dikazein*,
bouleuein — Epheten

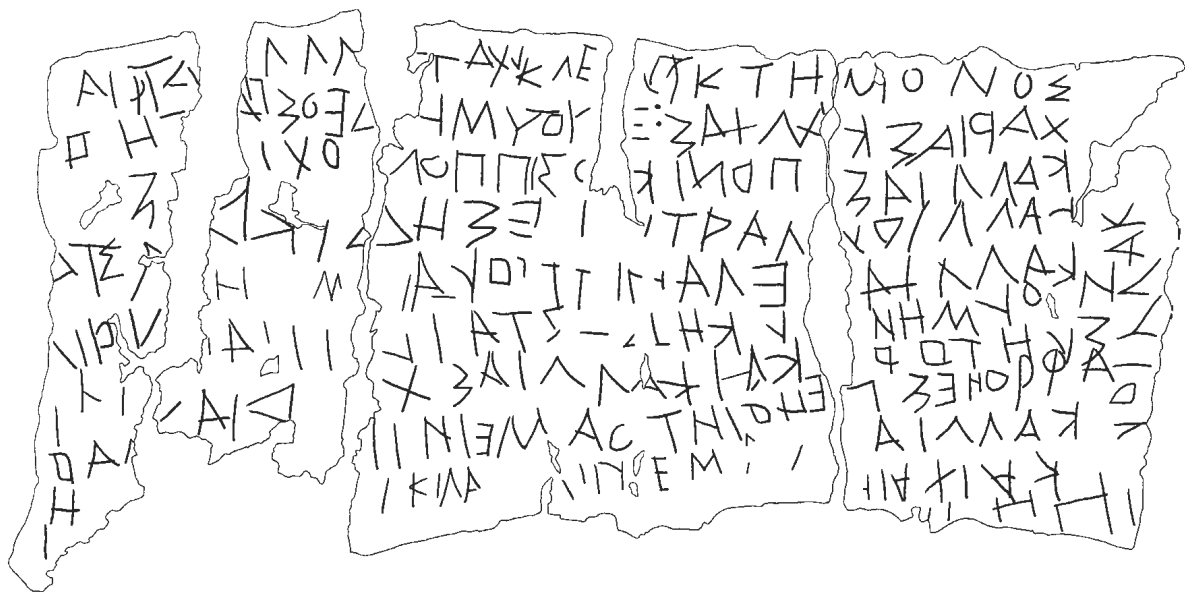
Key Words: mass burial Phaleron — apotympanismos — homicide — dikazein,
bouleuein — ephetai

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Hamburger Studien zu Gesellschaften und Kulturen der Vormoderne 4

Franz Steiner Verlag

Sonderdruck aus:

Colloquia Attica

Neuere Forschungen zur Archaik,
zum athenischen Recht und zur Magie

Herausgegeben von Werner Riess



Franz Steiner Verlag, Stuttgart 2018

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NEW LIGHT ON DRACO AND THE CYLONIAN SACRILEGE*

Gerhard Thür

While meandering through the splendid museums of Athens, the archaic vases and sculptures provide a wonderful impression of the attitude towards life held by the ancient Greeks of the 7th century B.C. The art clearly depicts a homogenous, highly aristocratic culture that is completely different from the classical perception. But what is their message? While perusing with my friend Michael Gagarin, he was struck by the impression of a well-organized polis that was recently peacefully unified, whereas I took note of the competitive elite behind it. This paper does not attempt to solve problems of art history; however, the same ambiguity affects the oldest Athenian legal document, Draco's law on homicide, enacted in 621/20¹: On the one hand, it can be considered a penal code that answered the needs of a prosperous, peacefully growing polis;² on the other hand, it possibly aimed at resolving a specific conflict, namely the crisis following the slaughtering of the Cylonians, probably in the year 636.³ Recent archaeological findings at the cemetery district of Phaleron disfavour the assessment of peaceful times: Two mass burials include people who were neatly laid side by side in a pit, their hands shackled and stretched over their heads, dated to the years 650–625. This mass execution did not result from a simple murder trial, but rather from a highly political one.⁴ The most probable connection with the Cylonians allows for rethinking an essential detail in Draco's law: Namely that, related to homicide, the verb βουλευεῖν cannot mean “to plan”, but rather, “to order, advise (an action resulting in someone's death)”. Only

* My paper at the *Colloquium Atticum 2013* was entitled “Prozesseide” and was part of a later article published in 2015. I now submit a revised English version of the paper; for additional details, see Thür 2015 (partly also 2014).

1 For the date, see Arist. *Ath.* 4.1. The definitive edition of the statute, re-inscribed in stone 409/8, is *IG I³ 104* (from 1981), based on Stroud 1968; see text and short commentary in Leão, Rhodes 2015, Fr. 5a.

2 Michael Gagarin 2008, 100; his reference to proto-Attic pottery (105) is remarkable. ‘Penal code’ is largely accepted; for my review, see below.

3 In this sense, see Stroud 1968, 70–74. See also Humphreys 1991; Thür 2015, 156–159.

4 See the preliminary reports by K. Killgrove, <http://www.forbes.com/sites/kristinakilgrove/2016/03/24/archaeologists-to-study-shackled-skeletons-from-ancient-greece-to-understand-rise-of-athens/#599926913591>, and in Kathimerini (April 15, 2016), <http://www.kathimerini.gr/856663/article/politismos/polh/oi-80-desmwtes-elkoyn-episthmones>. The photographs explicitly reveal that the individuals were executed through *apotympanismos*. For this method of execution (and the Phaleron mass burials found in 1911 and 1915, then roughly dated to the 7th century), see Thür 1990, 147–148, where any connection with death penalty for homicide is rejected.

later did oratory cause the meanings to become intermingled. Similarly, the meaning of *δικάζειν* is different in Draco's law from that in classical times. The issue can be compared with the different perception of the human body as the archaic *kouros* on the one hand and as a classic deity's statue on the other.

The 57 lines of Draco's law, fragmentarily preserved on stone, are the only direct evidence of what happened in the 7th century – and they give no mention to Cylon. On the other hand, the accounts of the Cylonian episode from classical and later times are vague and controversial.⁵ Nevertheless, it is possible to draw conclusions from the strange beginning of the text (with “καί”) to an imaginable reason as to why Draco had enacted the entire law. As far as it is possible to settle the historical facts, this paper will continue with a discussion of the legal question of what kind of procedure Draco had in mind. The answer will concentrate on oaths – again, with no word mentioned by Draco – as a means of initiating the trial. Finally, I will propose a restoration of the missing text in a lacuna in line 12.

First, it is necessary to briefly examine the beginning of the first *axón* (revolving wooden block): “And [or: Even] if someone kills someone without intention, he is to go into exile [or: shall stand trial]. The *basileis* (‘kings’, office holders) are to *dikazein* (currently untranslated) guilty of homicide... (lacuna of exactly 17 letters; probable meaning: the one who killed with his own hand)... or the one who ordered (or: planned); the *ephetai* (a board of 51 dignitaries, no office holders) are to *diagnonai* (currently untranslated).”⁶ The text continues with rules on private reconciliation, private proclamation against the killer, relatives sharing the private prosecution, safe exile, lawfully killing an unlawfully returning exile, and traces of the heading “second *axón*”. The charge for homicide, *dike phonou*, had been a private matter up to the time of the orators.

From the ‘proclamation’ on, the topics follow the order in which a homicide case would normally proceed. However, could a lawgiver begin a penal code with unintentional killing or include the word “and” ahead of the whole statute? Older literature faced this problem and argued that at the time of re-inscribing the statute, Draco's (supposed) rule on intentional killing was obsolete.⁷ The *anagrapheis* are therefore assumed to have skipped the first paragraph yet neglected to delete the word *καί*.⁸ In contrast, Stroud first translated the text as “even if”. In his opinion,

5 See below, Fn. 10.

6 *IG I³ 104*, 10–13: *πρῶτος ἄχσον· | καὶ ἐὰν μὲ ἴκ [π]ρονοίας [κ]τ[έ]νει τις τινα, φεύγ[ε]ν· δ]ι[κ]άζειν δὲ τὸς βασιλέας αἰτιο[ν] φό[νο] E.....17.....E [β]ολ[ε]ύσαντα· τὸς δὲ ἐφέτας διαγν[ῶ]ν[α]ι. [αἰδέσασθαι δ' - - - (line 11 read: [κ]τ[έ]νει *ἡκέτας*, φεύγ[ε]ν· See below, text before Fn. 11).*

7 The only essential change was an amendment, probably enacted by Solon, introducing the officially executed death penalty for intentional killing; see Thür 1990; 1991.

8 Ruschenbusch 2010, 33 reconstructs an alleged first paragraph on voluntary killing, but the connection with *καί* (instead of postpositive *δέ*; see Gagarin 2008, 100) is odd.

the ‘penal code’ moved up the rule on unintentional killing to a rank before that on intentional perpetration, and the latter topic was regulated to the second *axon*.⁹

The beginning of the law (ll. 11–13, quoted above) appears to immediately refer to the sacrilege against the Cylonians. Although picking up some facts from the antique literary tradition¹⁰ seems to be arbitrary, in some respects, a framework is given. Cylon, Olympic victor in the year 640, assembled a band of supporters to achieve tyranny over Athens and seized the Acropolis. Therefore, after an ambiguous piece of advice from Delphi, he probably chose the next Olympic festival (in the year 636), when some of his aristocratic rivals were away. The coup failed, Cylon escaped, his supporters were besieged, and finally, before starving to death, they went as suppliants to the altar of Athena Polias. According to Plutarch (*Sol.* 12.1), Megacles, an archon and member of the Alcmaeonid family, persuaded them to come down and stand trial. To maintain their hold on divine protection, they attached a thread to the statue before leaving. However, when the thread broke (significantly: at the shrine of the Erinyes), Megacles and his fellow archons ordered them to be captured (ὄρμησε συλλαμβάνειν). However, the mass stoned some to death and slaughtered others, some of whom had even taken refuge to altars. In the literary sources, only the killing and the sacrilege seemed to be worth mentioning. Considering the recently excavated mass grave, quite a number of the suppliants, who had been charged with attempting tyranny, might have been sentenced to death. All this happened under the leadership of Megacles and his Alcmaeonid colleagues. It is thus no wonder that years of blood vengeance ensued among the aristocratic families and that the polis was in danger of collapsing.

Some fifteen years later, the peculiar beginning of Draco’s law seems to respond exactly to this scenario. During the riots, Megacles and his colleagues, who didn’t raise their hands against the victims, could argue that they were in no way responsible for the Cylonians’ death. When ordering the seizure of the suppliants, they had had “no intention” of killing them. When ordering execution by *apotympanismos*, they had enforced a judgment (however it came about). They had therefore affronted the private avengers and stayed on home soil. Later, when the opposing fraction recovered, the Alcmaeonids were officially called to account, and Draco, who had been especially appointed to ban uncontrolled bloodshed, provided the verdict: Killing without intention was no exculpation; to avoid blood revenge, the perpetrator had to go into exile. Furthermore, in a second paragraph, Draco elaborated on his verdict: Not only those who had slaughtered the suppliants with their own hands were guilty of homicide, but so, too – and primarily so – were the magistrates who had ordered the action that indirectly brought about their death.

9 Stroud 1968, 34–40. Gagarin 1981, 98–102 holds that intention was not ruled on directly but rather ‘implicitly’; since the (customary) sanction against all kinds of homicide was exile (to avoid blood vengeance), there was no need to differentiate between the types; see below, Fn. 13.

10 Hdt. 5.71; Th. 1.126.3–12; Plu. *Sol.* 12.1–9; schol. Ar. *Eq.* 445 (443 Dindorf); thoroughly discussed by Stroud 1968, 70–74; Rhodes 1981, 79–84; Humphreys 1991.

“Even without the intention to kill (the supplicants, see above, Fn. 6)” applied to Megacles, who had ordered the seizure, and the intention to kill applied to those who had ordered the *apotympanismos*, perhaps despite having guaranteed their safety: ὑπεγγύους πλὴν θανάτου (being held liable, death penalty excluded; Hdt. 5.71). Every culprit had to stand trial under these provisions. This was the first attempt at reconciling the polis by means of homicide law.¹¹

In this context, the term *bouleuein* cannot mean “to plan” or “conspire”. In homicide cases at the time of the orators, *bouleusis* was an action that indirectly resulted in someone’s death, as opposed to killing at one’s own hand, which could be committed both intentionally (Antiphon 1) or unintentionally (Antiphon 6). In the latter speech the defendant, a *choregos*, reports that he is charged of having killed by “ordering” (ἐκέλευσε) the victim to drink a dangerous potion (6.17); however, the death admittedly occurred μὴ ἐκ προνοίας (6.19). The case resembles that of Mnesicles: In both cases, “planning” is ruled out. Antiphon 1 is a case of indirect perpetration through an unaware offender. The plaintiff charges his stepmother of killing her husband indirectly; “ordering” (κελεύσασα) and *bouleuein* are used in 1.26 in the technical sense. However, *pronoia* is stressed several times (1.5, 22, 25, 27); additionally, the plaintiff accuses his stepmother of *epibouleuein* (“to plan secretly,” 1.29), though this is only of rhetorical relevance.¹²

In summary, Draco’s law was an attempt at resolving the crisis that followed the Cylonian sacrilege. At the beginning (ll. 11–13), he formulated a program of how to adjudicate the cases of the main culprits. Because of the bloodshed that had taken place in the meantime, he added a comprehensive corpus of statutes that generally remained within the constraints of the customs traditionally applied in homicide cases. Immediately after handling the main culprits, Draco turned his attention to reconciliation (*aidesis*, ll. 13–20). Only here did he insert an amendment that was significant during these harsh times: If no relative who is entitled to give *aidesis* is alive, the *ephetai* are to vote on whether the killer acted unintentionally (ἄκων); if so, ten members of the victim’s phratry can allow the perpetrator to “enter” (ll. 16–19). Draco made only this clause retrospective (ll.19–20); for him, the question of intention did no matter at all in any other respect.¹³

Draco’s text stands like an erratic block in the transmission of ancient Greek law. The Cylonians are not mentioned, and there is clearly not enough specification regarding how to perform homicide trials. In the following section, I will focus on

11 As the fragmentary beginning of Arist. *Ath.* 1 shows, trials of sacrilege followed; see Rhodes 1981, 83–84.

12 These speeches are discussed in Thür 1991, 57, 65. For *bouleuein* quoted in And. 1.94, see 60–62 therein: Officials, who, under the Thirty, ordered the hauling off of the victims to be executed, were excluded from the amnesty of 402/01 because their *bouleuein* was “to be treated in the same way as if they had killed with their own hands.” This resembles ordering *apotympanismos* against some of the Cylonians.

13 Every scholarly effort to further differentiate the relevance of volition in Draco’s law (see, e.g., below, Fn. 16) seems anachronistic. Philosophical and rhetorical reasonings from classical times cannot be applied to the archaic period.

the latter issue. In lines 11–13, three terms appear to be relevant: *pheugein* (almost completely, yet well-founded restored), *dikazein*, and *diagronai*.

It is almost universally accepted that Draco is dealing with substantive law and not with procedure in the first phrase (l. 11). Later, he provides detailed rules about safe exile (ll. 26–29). In this sense, it is necessary to understand *pheugein*, which was not a measure of punishment but rather a legitimate sanction to eliminate the culprit from the polis and avoid blood vengeance, and Draco aimed at this solution. The meaning “to stand trial” seems anachronistic. At Draco’s time, not every homicide case needed a judicial decision; instead, a perpetrator could seek intermediate shelter in a sanctuary and then voluntarily go into exile. At every stage, pardoning or re-admitting him was a matter of the victim’s relatives. Only when they insisted on blood vengeance – on exiling a suspected perpetrator who denied the crime – was the case taken to court.

Moreover, the third phrase is not difficult to understand (l. 13): τὸς δὲ ἐφῆτας διαγῶναι. In line 16, the *ephetai* are called the “fifty-one”, and up to the time of the orators, in addition to the council, who sat on the Areopagus hill, the same number of judges decided homicide cases.¹⁴ The odd number of judges clearly indicates that decisions were made by voting.¹⁵ The subjects on which the *ephetai* voted are unclear. Nevertheless, they cooperated with the *basileis*, and the procedure can only be understood in its entirety.¹⁶

The key word *dikazein* is clearly preserved in the second phrase, lines 11–12. This activity is performed by the *basileis*. At the time of the orators, the victim’s relative had to file the charge of homicide with the *archon basileus*, one of the nine archons chosen annually by lot. His province was sacred affairs, to which homicide also belonged. Depending on how the act of killing was classified (not discussed here), the *basileus* brought the trial to the courts, which were in the open, close to different sanctuaries. He presided over the courts but had no vote. The plaintiff, the defendant, and their witnesses had to swear the *diomosia*, “the greatest and mightiest oath invoking destruction on oneself, one’s family and house” (Antiphon 5.11; D. 23.67–68) performed in an archaic ritual. The plural *basileis* in Draco’s text probably refers to the *archon basileus* of the polis together with the four *phylobasileis* of the ancient Ionic tribes, who continued to play a shadowy role in homicide cases in the fourth century (Arist. *Ath.* 57.4).

But what exactly did these five officials do? Again, it is not sufficient to transfer the meaning of a word from classical times to archaic times. Later, the word *dikazein* is used also as a synonym for (*dia*)*gignoskein* or *krinein* and means to

14 Arist. *Ath.* 57.4 (cf. D. 43.57). During Draco’s time, they were probably chosen on the basis of aristocratic birth, like the “Three-hundred” mentioned in Arist. *Ath.* 1.

15 It can be assumed that they voted secretly so that no judge could be made responsible for sentencing an accused individual to death (and thereby himself be charged of *bouleuein*).

16 By generalizing the special rule on reconciliation (l. 17), Ruschenbusch 2010, 19 (and earlier) incorrectly holds that in every homicide trial, the *basileis* first gave a sentence based on the facts (whether or not the defendant had killed), and the *ephetai* then voted on intention (whether or not the defendant had killed intentionally).

“decide” (done by a law court). Consistently, in Draco’s law, *diagronai* is used for the decision by the *ephetai*. With some juristic plausibility, Wolff holds that *dikazein* here means to “pronounce” the *ephetai*’s verdict.¹⁷ However, why did Draco reverse the chronological order by prefixing the *basileis*? And why should he allocate this simple job to five magistrates?

It is thus necessary to look not for an activity that concludes the trial, but rather for one that initiates it. Indeed, we can connect the kind of procedure in seventh-century Athens with the archaic trial procedure preserved in Homer and still in force in aristocratic fifth-century Crete¹⁸ on the one hand and with the conservative elements still surviving during the time of the orators in Athens herself on the other hand. In this way, it is possible to determine how the *basileis* initiated a homicide trial in Draco’s time.

In both trial scenes extensively portrayed by Homer, the law court (*gerontes* in peace time and *hegemones* in times of war, respectively) does not appear to render a verdict in substance and instead issues a ‘conditional verdict’ by imposing an oath of purgation on the defendant. Here, *dikazein* (or *diken eipein*) does not simply mean “to judge”, but rather, “to draft and propose a decisive oath”. The board of ‘judges’ (political or military leaders) competes among itself for the “straightest” (most fairly formulated) oath. Most importantly, the facts to be confirmed by swearing must be relevant, and the divinity must be competent for the case; otherwise, perjury would turn out to be harmless. The wording, which prevails after a discussion among the leaders in front of the common people, constitutes the conditional verdict, which is determined by the outcome of the swearing ceremony. If the defendant takes the oath imposed on him, he will be acquitted; however, if he refuses to swear the oath, he will be found guilty. Menelaus proposes such an oath (Hom. *Il.* 579–585), and in the shield scene (Hom. *Il.* 497–508), it is possible to draw conclusions in this direction. In the archaically structured trial procedure of Gortyn, there was no longer a competing board, and the sole jurisdictional magistrate, called *dikastas*, had to impose oaths strictly prescribed by law. There, a simple ordinance by the magistrate is also called *dikazein*. Unlike in Athens, in Gortyn, no law courts – boards of ‘judges’ that decided in substance by vote – existed.

Bearing this pattern of jurisdiction in mind, it is possible to explain the meaning of *dikazein* in Draco’s law. As mentioned above, in classical times, the archon *basileus* had to impose the *diomosiai*, “the greatest and mightiest oaths” sworn in an archaic ritual, on the parties. The parties and their supporters had to take these oaths at the beginning of the trial, which was prepared by three preliminary hearings distributed over three successive months. In these hearings, the competent court and, accordingly, the wording of the *diomosiai* were fixed. The hearings were held by

17 Wolff 1961, 74 (1946, 75); for a critique of this and other attempts, see Thür 2015, 161–162 with Fn. 45.

18 For more information on this highly controversial topic, which is summarized below, see some literature in Thür 2015, 162 Fn. 47.

the *archon basileus* and labelled *prodikasiai*, while the pre-trial proceedings performed by all other archons were called *anakrasis*. Thus, for Draco, the connection between *dikazein* and imposing oaths seems obvious.

However, there is an essential difference between Homeric and Cretan *dikazein* on the one hand and the Dracontic way on the other: In the former jurisdiction, the oath, imposed only on one litigant, was decisive, whereas in Draco's law, the 51 *ephetai* additionally had to decide by vote. It is clear that the Dracontic *basileis* imposed contrary oaths – *diomosiai* – on both litigants and that the *ephetai* had to deliberate on these oaths. This was the practice and the mentality during Antiphon's time: The accused *choregos* addressed the board of the *ephetai*: "...you must examine what each side swore (by taking *diomosiai*) and decide which of us swore more truthfully and more purely."¹⁹ By doubling the oath in the Athenian law of procedure, swearing changed its character from a decisive to a preparatory means.²⁰ This change opened the door in the following centuries to a rational course of justice. Nevertheless, in archaic mentality, voting on two contrary oaths might have been understood to be an ordeal immediately guided by the goddess to be sworn on; thus, the divine decision was uttered on the spot, and it was not necessary to wait for the subsequent divine punishment of a perjurer in an uncertain future. It is not possible to determine whether Draco invented this system or simply took it over from somewhere else.²¹

The Antiphon text just mentioned can also help us supplement the lacuna in line 12. Draco's law was doubtless still in force at the time of the orators. If Draco's *dikazein* was truly connected with the litigants' *diomosiai*, the wording of these oaths, quoted by the defendant, should be a safe basis. Ever since Wolff,²² it has been generally accepted that the antithesis to *bouleuein*, well-preserved in lines 12–13, must be a term somehow expressing "with his own hand".²³ Due to the 'stoichedon' order (inscribing the letters into a fixed grid pattern), the restoration must extend to exactly 17 letters. This rules out restoring Draco's second phrase by supplementing the lacuna according to Antiphon 6.16 with the words *χειρὶ ἐργασάμενον*.²⁴ However, it is necessary to consider that the manuscripts hand down the words *χειρὶ ἀράμενος*. Reproaching *ἀράμενος* (*ἀείρω, αἶρω*; raise) used

19 Antiphon 6.16: ἐξ αὐτῶν δὲ τούτων χρή σκοπεῖν ἅ τε οὔτοι διωμόσαντο καὶ ἅ ἐγώ, πότεροι ἀληθέστερα καὶ εὐορκότερα. The speech is dated to 419 B.C.; the translation roughly follows Gagarin, MacDowell 1998.

20 For a discussion on the 'double oath' in Greek law, see Thür 2015, 170–172.

21 Influence from contemporary Neo-Babylonian law can be excluded; Thür 2015, 172–173. The archaic Roman *legisactio sacramento* seems to be a parallel but was only handed down in its late, degenerated shape; see Liebs 2016, 175–177.

22 Wolff 1961, 70 (1946, 73).

23 Antiphon 6.16 (continuing the text quoted above, Fn. 19): διωμόσαντο δὲ οὔτοι μὲν ἀποκτεῖναι με Διόδοτον βουλευσάντα τὸν θάνατον, ἐγὼ δὲ μὴ ἀποκτεῖναι, μήτε χειρὶ ἐργασάμενος μήτε βουλευσας. (17) αἰτιῶνται δὲ οὔτοι ... (ἐργασάμενος; most editions follow Dobree: ἀράμενος, the mss., OCT)

24 For an overview of the numerous attempts, mostly based on αὐτόχερ, see Thür 2015, 164–165, Fn. 54–57.

with the indirect object χειρί, Dobree suggests the conjecture ἐργασάμενος based on And. 1.94. However, this conjecture does not take into account the fact that Andocides had spoken in 400/399 about a contemporary statute enacted on the occasion of the amnesty of 402/401.²⁵ This explanation thus cannot be accurate in explaining the traditional wording of a *diomosia* sworn in 419 in a homicide case. Consequently, it seems better to keep the antiquated word ἀράμενος in Antiphon's speech. By connecting the noun χειρί with the immediately preceding verb ἀποκτεῖναι,²⁶ it is possible to stay true to Antiphon's text as passed down and translate: "I didn't kill him – neither with my hand, having raised it – nor having given order (to kill him)."

Before the trial, the *ephetai* sitting in judgment on the *choregos* had heard the defendant's *diomosia*, in which he had denied both kinds of killing as specified in Draco's law. They remembered the crucial words χεῖρ and ἀείρω. Antiphon's wording fills in the lacuna perfectly.²⁷ However, since there is no (ἀπο)κτεῖναι immediately preceding the noun χεῖρ in Draco's law, it is not necessary to adhere to the dative. Draco was most probably speaking more informally and used the direct object,²⁸ as did the defendant in his *diomosia*. Only for rhetorical reasons did Antiphon change the accusative case. He might have dealt in the same way with the expression αἴτιον φόνου εἶναι, which would have been expected in the *diomosia* from the wording of Draco's law. By continuing the next phrase with αἰτιῶνται (6.17), Antiphon seems to also refer to that clause.²⁹

This analysis therefore implies the following restoration (*IG* I³ 104.11–13):

δ]ι|κάζεν δὲ τὸς βασιλέας αἴτιο[v] φόν[o] εἶναι ἔ χειρα ἀράμενον] ἔ
[β]ολ|εῦσαντα.

"The basileis are to impose the oaths: *He is responsible for killing* (alternatively) either *by having raised a hand* (himself) or *by having ordered* (a measure causing death)."³⁰

25 See Fn. 12 above.

26 Suggested in 1879 by Vahlen (referring to Antiphon 5.92), followed in 1900 by Wilamowitz, who translates: "mit der Hand, die ich darum geregt." For references and further discussion, see Thür 2015, 164–166.

27 See my earlier restoration: αἴτιο[v] φόν[o] εἶναι ἔ χειρι ἀράμενον] ἔ [β]ολ|εῦσαντα, Thür 1990, 152; Leão, Rhodes 2015, 19 approve the connection with Antiphon 6.16 (ἀράμενον).

28 Confer Arist. *Rh.* 1.13 (1374a35): εἰν ἐπάρηται τὴν χεῖρα. A confession inscription is a late echo: Petzl 1994, no. 44.3–5: ἐπιδη ἀράμ[ενος] | τὰς χῖρας αὐτῆ ἔκα[κώσα]το, κὲ ἀποθανούση[ς αὐτῆς] (advice by A. Chanotis).

29 For an attempt at reconstructing the *diomosiai*, see Thür 2015, 166.

30 The conjectured wordings of the oaths to be imposed on the particular plaintiffs are printed in italics. See Thür 2014, 923; 2015, 166.

These archaic provisions enacted for the very special case of the Cylonian sacrilege have been the basis of Athenian jurisdiction on homicide for centuries and have remained principally unchanged, albeit amended.

SELECT LITERATURE

- Dindorf, W. (Ed.), *Scholia Graeca in Aristophanis Comoedias Vol. I*, Leipzig 1822.
- Gagarin, M., *Drakon and Early Athenian Homicide Law*, New Haven 1981.
- Gagarin, M., MacDowell, D., *Antiphon and Andocides*, Austin 1998.
- Gagarin, M., *Writing Greek Law*, Cambridge 2008.
- Humphreys, S., “A Historical Approach to Drakon’s Law on Homicide,” in: M. Gagarin (Ed.), *Symposium 1990*, Köln 1991, 17–45.
- Leão, D., Rhodes, P., *The Laws of Solon. A New Edition with Introduction, Translation and Commentary*, London – New York 2015.
- Liebs, D., “Göttliche Sanktionen im römischen Verfahrensrecht,” in: D. Bonanno, P. Funke, M. Haake (Eds.), *Rechtliche Verfahren und religiöse Sanktionierung in der griechisch-römischen Antike*, Stuttgart 2016, 175–189.
- Petzl, G., *Die Beichtinschriften Westkleinasiens*, Bonn 1994.
- Rhodes, P., *A Commentary on the Aristotelian Athenaion Politeia*, Oxford 1981.
- Ruschenbusch, E., *Solon: Das Gesetzeswerk – Fragmente. Übersetzung und Kommentar*, K. Bringmann (Ed.), Stuttgart 2010.
- Stroud, R., *Drakon’s Law on Homicide*. Berkeley – Los Angeles 1968.
- Thür, G., “Die Todesstrafe im Blutprozess Athens,” *JJP* 20, 1990, 143–156.
- Thür, G., “The Jurisdiction of the Areopagus in Homicide Cases,” in: M. Gagarin (Ed.), *Symposium 1990*. Köln 1991, 53–72 (with response by R. Wallace, 73–79).
- Thür, G., “Rationality and Irrationality in the Ancient Greek Law of Procedure,” in: R. van den Bergh, G. van Niekerk, P. Pichonnaz, P. Thomas, D. Kleyn, F. Lucrezi, J. Mutton (Eds.), *Meditationes de iure et historia: Essays in honour of Laurens Winkel*, Unisa 2014, 916–924.
- Thür, G., “Prozesseide im Gesetz Drakons und ihr Nachleben im klassischen Athen,” in: H. Barta, M. Lang, R. Rollinger (Eds.), *Prozessrecht und Eid. Recht und Rechtsfindung in antiken Kulturen I*. Wiesbaden 2015, 153–178.
- Thür, G., *Opera Omnia* <http://epub.oeaw.ac.at/gerhard-thuer> (open access, in preparation).
- Wolff, H. J., “Der Ursprung des gerichtlichen Rechtsstreits bei den Griechen,” in: Id. (Ed.), *Beiträge zur Rechtsgeschichte Altgriechenlands und des hellenistisch-römischen Ägypten*, Weimar 1961, 1–90 (originally in English: *Traditio* 4, 1946, 31–85).