LAURA LODDO

Voluntary Exile and *Eisangelia* in Athens: Remarks about the Lawfulness of a Widespread Practice[1]

Abstract

This paper aims to investigate the question of the (un)lawfulness of voluntary exile by defendants in relation to *eisangelia* trials. I argue that the defendant's habit of evading trial by going into exile was never seen as lawful, despite the frequency with which it occurred. First, I examine the issue of alternating between the death penalty and exile in *eisangelia* trials with the aim of showing that exile was not a penalty linked to the procedure of impeachment. Then, I argue that Athenian law took into consideration the issue of the (un)lawfulness of self-exile, as demonstrated by the existence of an Athenian law concerning the same matter in homicide cases. Lastly, I analyse some ancient passages that allow us to state that defendants in high treason trials who evaded justice were likened to outlaws. Elements such as the practice of setting bounties on those who escaped trial, extradition requests for fugitives, the imposition of additional penalties such as confiscation of property and inscribing the fugitive's name on a bronze stele, can corroborate this assumption.

Questo articolo si propone di indagare la questione della (il)legittimità dell'esilio volontario da parte degli imputati nei processi per *eisangelia*. Si sostiene che l'abitudine dell'imputato di sottrarsi al processo con l'esilio non fu mai considerata legittima, nonostante la frequenza con cui si fece ricorso a tale condotta. In primo luogo, si esamina la questione dell'alternanza tra la pena di morte e l'esilio nei processi per alto tradimento, con l'obiettivo di dimostrare che l'esilio non fu una pena legata alla procedura di *eisangelia*. In secondo luogo, si sostiene che il diritto attico prese in considerazione la questione della (il)legittimità dell'auto-esilio, come dimostra l'esistenza di una legge ateniese che regolava la stessa materia nei casi di omicidio. Infine, si analizzano alcune testimonianze che permettono di affermare che gli imputati in processi per alto tradimento che si sottraevano alla giustizia furono assimilati a dei fuorilegge. Elementi come la pratica di fissare delle taglie su chi si sottraeva al processo, le richieste di estradizione per i fuggitivi, l'imposizione di ulteriori sanzioni come la confisca dei beni e l'iscrizione del nome del fuggitivo su una stele bronzea, corroborano questa ipotesi.

[1] Earlier versions of this paper were read in 2017 in Aix-en-Provence and in 2018 at the 'Giustizia e politica nell'Atene classica' workshop, organized by Lorenzo Tanzini at the Università di Cagliari. I thank Cinzia Bearzot, Mirko Canevaro and Alberto Maffi for their helpful remarks and Maria Youni for allowing me to read her paper on *atimia* and outlawry before publication. Thanks are also due to the anonymous referees for their useful criticism.

1.

A significant part of the *eisangelia* trials in classical Athens ended with the defendant not appearing at the trial. Hypereides explains in detail why this happened[2]. Prosecution by *eisangelia* was perceived as dangerous for defendants, who often chose to leave the country before the trial in the belief that it would be difficult for them to avoid being convicted. But how did the polis behave when a defendant failed to appear? Hansen suggested that in such cases the court would first issue a death sentence *in absentia*, then it automatically commuted it into exile. Failure to appear, therefore, was perceived as an admission of guilt and accordingly was punished with the maximum penalty. The commutation of the death penalty into exile obviously took account of the practical situation that had arisen through the voluntary departure of the accused from the country. But is there actually any trace of this commutation in the sources? And, above all, could this conduct on the part of the accused be considered lawful, as some have assumed?

In this paper I analyse the question of the (un)lawfulness of voluntary exile by defendants in relation to *eisangelia* trials and argue that the habit of evading trial by going into exile was never seen as lawful, despite the frequency with which it occurred. While some scholars have assumed that voluntary exile was an option available to those who risked capital punishment, Hansen has suggested that when a defendant evaded trial, thus incurring the death penalty by default, the penalty was commutated to permanent exile[3]. I argue instead that such commutation does not make any sense. An *in absentia* defendant was considered guilty, sentenced to death by default, his property was confiscated, and his name was inscribed on the stele of the infamous. This means that he was considered an outlaw and for this reason he could have been prosecuted even in exile. Already MacDowell, although he has not developed the point, has noted that such a condemnation must have been similar in effect to exile, but that there are some differences between these two situations[4]. However, his remarks have not found support.

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2 Hyp. 4.3.

3 TODD 1993, 139-140; KUCHARSKI 2014 and 2015, 19; HANSEN 1975, 35-36.

4 MACDOWELL 1978, 255: 'Condemnation of an absent man to death or outlawry must have been similar in effect to exile, since a man who suffered any of these was liable to be put do death if he showed himself in Attika. But one difference was that, as long as he remained outside Attika, an exile retained some protection under Athenian law, whereas an outlaw did not; thus anyone who killed or harassed an Athenian exile outside Attika and then came into Attika himself could be prosecuted for that offence'.

The issue of (un)lawfulness of self-exile is connected with the range of sanctions that could be imposed in the *eisangelia* procedure and has implications in our understanding of the sentencing procedures for *eisangelia* and its nature as an *agōn timētos*. In other words, we must assess whether exile could be one of the penalties in the *eisangelia* procedure. So, in the second section of this paper I examine the issue of alternating between the death penalty and exile in those trials, which were prosecuted by *eisangelia,* with the aim of showing that exile was not a penalty linked to the procedure of impeachment. This is possible through both a new interpretation of a passage in Aeschines' *Against Ctesiphon*, which scholars have often used to argue the opposite view, and the analysis of some trials where mention of exile could be explained by the fact that they were held *in absentia*. To exclude that exile could be a penalty related to the *eisangelia* procedure is a precondition for arguing that evading trial, which was comparable to a sort of self-exile, was perceived as unlawful.

However, it is necessary to define what I mean by lawful/unlawful. We may say that a conduct is unlawful when it openly violates an existing law. Thus saying that the choice of the defendant to leave the country and to avoid trial is unlawful presupposes that in Attic law there was a law that prohibited one from not attending trial. But is there any trace of such a law in the sources? I argue in the third section of this paper that Athenian law addressed this issue, as demonstrated by the existence of a law regulating the same matter in homicide cases. This law could be invoked as a useful touchstone for the *eisangelia* trials, although there are some significant differences due to the different nature of the two procedures – *eisangelia* was a public procedure, while trial for homicide was a private one. My main point is that if Athenian law was concerned with regulating when a defendant could legitimately abandon the trial in a homicide case, it is fair to suggest that it did so all the more in public trials for high treason, where the constraints on the defendant were probably even greater, since the offence concerned the whole community. Of course, evading trial was always interpreted as an admission of guilt by the defendant[5], but someone accused of homicide could legitimately leave the country after the parties pronounced their first speeches and go into exile. Was it the same for defendants in *eisangeliai* trials? The existence of precautionary orders of imprisonment for those awaiting trial

[5] And. 1.3.

issued by the Assembly or by the Council would tend to exclude it[6]. This means that the individual who chose not to stand trial became *strictu sensu* a defaulter and his behaviour was considered unlawful.

In the fourth section I analyse some ancient passages that allow us to state that defendants in high treason trials who evaded justice were likened to outlaws. Elements such as the practice of setting bounties on those who escaped trial, extradition requests for fugitives, the imposition of additional penalties such as confiscation of property and inscribing the fugitive's name on a bronze stele, corroborate my assumption. In my last section I consider the law dealing with the persecution and seizure of a murderer, preserved in Demosthenes' *Against Aristocrates*, which provides for protection from the risk of enslavement of those exiled for unintentional homicide. The paraphrase of the law by Demosthenes makes it evident that such protection was guaranteed only for those who went into exile after a formal sentence of the court and not for those who were charged with intentional homicide and chose self-exile in order to escape the death penalty. This law shows that even when self-exile was permitted it was not comparable to exile as a penalty. Lastly, I make some final observations on how a *dike eremos* was conducted and what happened when a person convicted *in absentia* tried to return to Athens.

2.

In his work on *eisangelia* in Athens, in regard to sentencing, Mogens H. Hansen has argued that *eisangelia* was an *agōn timētos*, a trial in which the penalty was not specified in the law, but was left to the parties involved to propose alternative penalties[7]. Normally, in an *agōn timētos* judges had to vote twice for a guilty verdict[8]: first they had to vote on the issue of the innocence or guilt of the defendant; then, they made a choice between the penalty proposed by the prosecution and that proposed by the defence. But, unlike other *agōnes timētoi*, Hansen has claimed that in *eisangelia*

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6 This occurred in the case of the Hermocopids (And. 1.11-18, 64), the generals of Arginusae (Xen. *Hell*. 1.7.3), Agoratus (Lys. 13.22-24). Cfr. HUNTER 1994, 143-144; ALLEN 2000, 201-202. Clearly in these cases it did not qualify as a penalty, but as a preventive measure to keep the defendant from evading.

7 HANSEN 1975, 33. The major work on *eisangelia* is HANSEN 1975 to which one has to add Hansen's following papers containing some specifications, namely HANSEN 1979-1980, and 1980. See also RHODES 1979. Other contributions are dedicated to specific points: SEALEY 1981; CARAWAN 1987; PICCIRILLI 1987; BEARZOT 1996; PECORELLA LONGO 2002; PHILLIPS 2006; WHITEHEAD 2006; ORANGES 2013; FARAGUNA 2016; VOLONAKI 2018.

8 For the opportunity to translate the term δικαστής as judge rather than juror see CANEVARO 2016, 178-179.

cases judges were not always obliged to vote twice to determine the sentence; sometimes the penalty was included in the indictment in the form of a decree of the Assembly or the Council[9]. In this case judges limited themselves to implementing what the Assembly or the Council had previously established. Because of the scarcity of evidence, it cannot be determined whether prosecutors were allowed to choose on each occasion which of these two procedures to apply or if the choice was regulated by a specific provision in the law.

Despite this uncertainty, I believe it will be useful to take a look at what penalties were required in the few indictments preserved. In Phrynichus' *eisangelia,* Critias charged not him but his corpse with treason (*prodosia*); the decree of the Assembly concerning his trial required that if he was found guilty his bones were to be dug up and removed from the boundaries of Attica[10]. This was what normally happened in accordance with the law on treason: defendants found guilty of *prodosia* incurred the penalty of *ataphia*, being deprived of burial in Attica, and their properties were confiscated[11]. After the *in absentia* deposition of the board of generals of 406/5 through an *apocheirotonia*[12], a decree of the Assembly disposed that if guilty the generals would be sentenced to death[13]. Likewise, according to Aeschines, Demosthenes passed a decree in the Assembly by which Anaxinus of Oreus would be given the death penalty if found guilty[14]. A similar pattern can be found in the case of the *eisangelia* against the board of generals of 411/10, which was presented to the Council[15]: according to Andron's decree they were to be judged under the law on

9 HANSEN 1975, 33 n. 33 has pointed to 6 cases in which it is possible to find the penalty mentioned in the indictment: the *eisangeliai* to the Assembly against Phrynicus of Deirades, the board of generals of 406/5 and Anaxinus of Oreus; the *eisangeliai* to the Council against Antiphon of Rhamnous, Archeptolemus of Agryle and Onomakles. The same possibility may have been extended to *graphai*. Cfr. SCAFURO 2004, 125 n. 21. For the paradox that the death penalty often was the result of an *agōn timētos* see KUCHARSKI 2015, 17-18.

10 Lyc. 1.113. The Assembly decree was red out to the judges, as we learn from 1.114. Cfr. HANSEN 1975, 82-83; BAUMAN 1990, 68-69.

11 For this law see Xen. *Hell.* 1.7.22. Cfr. Thuc. 1.138.6; Dio. Chrys. 31.85. For his part, Diod. 16.25.3 cites a *koinos nomos,* which denied the right of burial to sacrilegious persons. Cfr. LIPSIUS 1984 [1908], 377-380; MACDOWELL 1978, 176-179; HELMIS 2007, 261; QUEYREL BOTTINEAU 2010, 105-106; KUCHARSKI 2014, 130.

12 On trials of generals following their deposal through *apocheirotonia* see now SCAFURO 2018, 203-205. She has challenged the traditional definition – after HANSEN 1975 - of these trials as *eisangeliai* and has argued that it would be preferable to speak of 'trials by decree'.

13 Xen. *Hell*. 1.7.9-10. Cfr. HANSEN 1975, 84-86.

14 Aeschin. 3.224. Cfr. HANSEN 1975, 103.

15 HANSEN 1975, 113-115. On the correctness of the procedural *iter* of this *eisangelia* see FARAGUNA 2016, 75.

treason[16]. If we look at the charge in these trials, we note that all the cases shared that of *prodosia*, and this allows us to conclude that when treason was at stake no penalty less than death could be taken into consideration. But why the need for a decree of the Assembly or the Council, in which it was specified that only death could be imposed in case of guilt? In my opinion, two main hypotheses can be formulated. The first is that the democratic bodies felt obliged to give a precise indication of the penalty to be imposed when the charge at hand was very serious, in the awareness that in an *agōn timētos* the parties involved in the trial could propose lighter sanctions. The second is that prosecutors were able to choose different penalties than death, such as exile[17]. While I am inclined to accept the first hypothesis, the last one cannot be ruled out aprioristically. Hansen's catalogue, in fact, allows us to identify, with regard to *eisangelia* trials, penalties such as exile or a fine, besides death. But while references to a financial penalty, especially if the fine was quite affordable, are easily understandable, signifying that judges accepted the defence's proposal, the meaning of exile in these trials is disputed. While some scholars, especially in the past, have argued that exile was effectively a penalty linked to political trials, now it is believed that the opposite is true[18]. Let me explain the leading hypothesis, which has been formulated by Hansen[19].

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16 [Plut.] *X Orat.* 833EF. Cfr. HANSEN 1975, 113-115. This is an interesting case of a decree ordering the parties to act in accordance with a specific law. For a parallel see *IG* I^3 84, ll. 17-18, 23-24, where the law in question is that on precincts. On the authenticity of Andron's decree see now FARAGUNA 2016, 73-76; 2017, 26-27. *Contra* HARRIS 2013b, 144 n. 7.

17 It is useful here to recall the distinction between the *eisangelia* to the Council and the *eisangelia* to the Assembly in respect to both their substance and procedure. At any meeting of the Assembly any citizen *epitimos* could make a formal complaint or impeachment (*eisangelia*) to the Assembly. It could be employed against magistrates and private citizens for serious crimes (see n. 29). If the Assembly accepted the request of impeachment, it ordered the Council to draw up a *probouleuma* including the charge and fixing the sentence (HANSEN 1975, 26). After the Assembly ratified the *probouleuma*, the case could be heard by the *dikasterion* or by the Assembly itself. See n. 13 for issue of *eisangelia* as an *agōn timētos*. The *eisangelia* to the Council could be presented at each meeting and was essentially directed against magistrates who had not carried out their duties in accordance with the law. The Council could make a definitive judgment in cases in which the penalty was up 500 drachmae (Dem. 47.42-43), but only if the magistrate under investigation did not appeal to the *dikasterion* (Arist. *Ath. Pol.* 45.2). If the penalty assessed was higher than 500 drachmae, the councillors passed the case to the thesmothetai, who introduced it to the *dikasterion* (Arist. *Ath. Pol.* 59.4). Cfr. CANEVARO 2016, 321-323.

18 LÉCRIVAIN 1919, 350-352; 1940, 214-216. Lécrivain made a distinction between defendants who did not appear at the trial (*les contumaces*), whose exile was voluntary, and those who were subject to exile as a legal penalty, among whom he included individuals accused of treason. However, it is at least questionable that he included individuals such as Hipparchus or Themistocles in the first group despite the fact that they were accused of *prodosia*. Moreover, he failed to account for the relationship between the different procedures at stake and exile as a penalty.

19 HANSEN 1975, 35-36.

According to the evidence on ancient trials undertaken in accordance with the *eisangelia* procedure, three types of sanctions occurred in case of a guilty verdict: death, exile or fine. This evidence should be read with a number of references in which the defendant fled the country before the trial. In such cases the law-court, after hearing only the prosecutor's speech, pronounced a death sentence by default, which became immediately enforceable. Hansen excluded the possibility that exile could be one of the options available to both prosecution and defence. However, how can we interpret the several references to exile and to the condition of φυγάς of the defendant? Exile should be considered as a clue that the defendant fled the country before the trial and that judges passed a death sentence *in absentia*; since the capital sentence cannot be enforced due to the defendant's failure to appear, the law-court commuted its previous verdict into exile. This would explain why we find in the sources contradictions on the penalty imposed. For example, Epicrates, Andocides, Cratinus and Euboulides, the Athenian ambassadors of 392/1, accused by Callistratus upon an *eisangelia*, are said by Demosthenes to have been sentenced to death, and by Philochorus to have been exiled[20]. Yet, as Hansen conceded, some trials do not fit this pattern[21]. The most glaring case is the trial of three members of the board of generals of 424/3, Eurymedon, Pythodorus and Sophocles, in charge of an Athenian squadron, which operated in Sicily. Our only source on this trial, Thucydides, argues that all the generals came back to Athens at the end of their assignment and were tried for having agreed to sign a peace with the Sicilians. Signing the peace was seen as a clear sign that the generals were corrupted and, accordingly, they were accused of bribery[22], as was often the case with *stratēgoi*[23]. But the generals, each of whom was judged

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[20] Dem. 19.277: κατὰ τουτὶ τὸ ψήφισμ', ὦ ἄνδρες Ἀθηναῖοι, τῶν πρέσβεων ἐκείνων ὑμεῖς θάνατον κατέγνωτε; Philoch. *FGrH* 328 fr. 149a: ἀλλὰ καὶ τοὺ[ς πρέσ]βεις τοὺς ἐν Λακεδαίμονι συγχωρήσα[ντας] ἐφυγάδευσαν, Καλλιστράτου γράψαντος, κ[αὶ οὐ]χ ὑπομείναντας τὴν κρίσιν, Ἐπικράτην Κηφισιέα, Ἀνδοκίδην Κυδαθηναιέα, Κρατῖνον Ṣφήττιον, Εὐβουλίδην Ἐλευσίνιο. Cfr. HANSEN 1975, 87-88. See also the other three examples made by HANSEN 1975, 36 n. 57 to support his argument.

[21] HANSEN 1975, 36.

[22] Thuc. 4.65.3 makes it evident that the charge against the *stratēgoi* was to have taken bribes or *dōrodokia* (δώροις πεισθέντες). Cfr. HANSEN 1975, 73.

[23] The charge of corruption appears to be often connected with that of treason against both the generals and the ambassadors. In the case of generals, it is interesting to note that the charge of treason was presented when they failed to accomplish the orders of the demos, as demonstrated by the fears expressed by Nicias in Thuc. 7.48.1-4, or to win the war. Cfr. BETTALLI 2017. On the perception of corruption in Athens see CUNIBERTI 2014, 2017 and 2018 with discussion of previous bibliography. On the legal approach to the corruption in Athens see ORANGES 2016.

separately[24], were not punished in the same way: all the defendants were found guilty, but, while Eurymedon was just fined, Pythodorus and Sophocles were condemned to exile[25]. Hansen has explained the different treatment that the Athenians reserved to Eurymedon with the fact that he was the only defendant to remain in Athens for the trial: once convicted of bribery, the judges accepted the penalty proposed presumably by his defence. On the other hand, Pythodorus and Sophocles, who may have returned to Athens from Sicily without staying for the trial, were judged *in absentia* and condemned to death. This is consistent with the generals' widespread fear of being tried for corruption or treason if they returned to Athens without having successfully completed their mission. According to Nicias, there would be a real risk for generals to be unjustly put to death[26]. It should be added that it was difficult to determine the individual responsibilities of the generals, even if we admit that normally each defendant had the right to be judged separately[27]. It has been noted that 'when a board of generals was in command, decisions were made by consensus'[28]. Of course, generals did not always agree on the strategy to be followed[29], but this is not the case with the generals of 424/3, as demonstrated by the fact that all three were condemned.

24 In Attic law the defendant had the right to a separate trial. This can be deduced from the fact that in the Arginusae trial Callixenus' proposal to judge all the generals together and not separately was branded as unconstitutional by Euryptolemus (Xen. *Hell*. 1.7.23, with regard to both the Cannonus decree and the law which applied to temple-robbers and traitors: τῷ νόμῳ κρινέσθων οἱ ἄνδρες κατὰ ἕνα ἕκαστον; Xen. *Hell*. 1.7.34, only with respect to the Cannonus' decree: κατὰ τὸ Καννωνοῦ ψήφισμα κρίνεσθαι τοὺς ἄνδρας δίχα ἕκαστον). On the decree see LAVELLE 1988. We should add to this, evidence of Dem. 22.38-39, according to which members of the Council had the right of an individual hearing in their *euthynai*, and Antiph. 5.69-70, who attests that the *hellenotamiai* were tried separately. Cfr. RUBINSTEIN 2012, 333 n. 9.

25 Thuc. 4.65.3: ἐλθόντας δὲ τοὺς στρατηγοὺς οἱ ἐν τῇ πόλει Ἀθηναῖοι τοὺς μὲν φυγῇ ἐζημίωσαν, Πυθόδωρον καὶ Σοφοκλέα, τὸν δὲ τρίτον Εὐρυμέδοντα χρήματα ἐπράξαντο. This appears to be in some contradiction with what Philoch. *FGrH* 328 fr. 127 = *schol.* in Ar. *Vesp*. v. 240 says about these *stratēgoi*, as he only mentions Sophocles and Pythodorus, while he says nothing about Eurymedon.

26 Thuc. 7.48.4. It is the same fear Alcibiades and his associates have been feeling when the ship Salaminia went to Sicily to take them back (Thuc. 6.61.6: δείσαντες τὸ ἐπὶ διαβολῇ ἐς δίκην καταπλεῦσαι).

27 The Athenians rarely resorted to collective sanctions. LANNI 2017, 12-20 has identified three main categories of crime for which the law provided a sanction of this kind: failure to pay debts owed to the State; serious crimes against the State, such as bribery and attempt to overthrow the democracy; failure of the boards of magistrates to carry out their duties. In this last group she has included the collective sanction imposed to the Arginusae generals, but she has considered it an exceptional case (pp. 19-20). As regards the meaning of the collective liability, scholars believed that collective penalties may have had a deterrent function and constituted an efficient incentive for other members of the board to report offences committed by their colleagues, especially in the case of 'invisible offences' or 'victimless offences'. On this point see RUBINSTEIN 2012; LANNI 2017, 23 ff. and 2018, 162.

28 HARRIS 2010, 410.

29 HARRIS 2010, 411 for cases in which this consensus was not reached.

Moreover, we know from Thucydides that Eurymedon was again elected as *stratēgos*, while the other two generals are no longer mentioned[30]. It is more likely that the latter did not stay for his trial. If so, according to Hansen, reference to exile in their case should be understood as the usual commutation of the death penalty by default into exile. Thucydides may have omitted the procedural details of the trial, focusing instead on its outcome, namely a life in exile for both generals. But, as even Hansen recognizes, this trial might not have been prompted by an *eisangelia*, but by the final audit (*euthynai*) of the *stratēgoi*[31]. The relationship between the *eisangelia* and the *euthyna* procedure is far from clear and, while I am persuaded that serious crimes detected during the *euthynai* could result in an *eisangelia*[32], it is difficult to determine which of these two procedures was employed to prosecute the *stratēgoi* of 424/3. In any case, despite knowing that *euthyna* could have been a plausible alternative, Hansen has treated this trial as an *eisangelia*.

One of the most controversial issues of Hansen's thesis concerns the assessment of the procedure employed in those treason trials that occurred before the democratic restoration. It was claimed that subversion of the democratic regime (*katalysis tou dēmou*) and treason (*prodosia*) - two of the three offences covered by the fourth-century law on *eisangelia* (*nomos eisangeltikos*)[33] - were two different

30 Thuc. 7.16.2, 31.3-5, 33.3, 35.1, 42.1, 43.2, 49.3, 52.2.

31 The hypothesis all the three generals were prosecuted in the framework of their official scrutiny has been accepted by OSTWALD 1986, 64-65 n. 246, 221, 315, who has believed they may have been recalled to Athens after their failure of conquering Sicily, and BAUMAN 1990, 85. On the contrary, HANSEN 1975, 73 n. 2 has suggested that the procedure used was a εἰσαγγελία προδοσίας. His view is followed by CARAWAN 1987, 176 n. 13; COBETTO GHIGGIA 2017, 105-106 n. 23. See also ORANGES 2016, 89-91, who believes that it was undertaken upon an *eisangelia* in the framework of their final accounts. See also CATALDI 1996, 50 for the idea that the trial was a *graphē dōrōn*.

32 On the *euthyna* as a preliminary investigative procedure see EFSTATHIOU 2007, 121-123. On the relation between *euthyna* and *eisangelia* see ORANGES 2013 (with regard to Cimon's trial) and 2016; SCAFURO 2018, 214, limited to the relation between *euthynai* of deposed generals and *eisangeliai*. For the relation between *euthyna* and *graphai* see LODDO 2015, 114-117.

33 The law concerning *eisangelia* is known by its fourth-century version through Hyp. 4.7-8; Theophr. *Nomoi* fr. 4b Szegedy-Maszak = *Lex. Cant. s.v.* εἰσαγγελία and Poll. 8.52; Dem. 24.63. While fifth-century *eisangelia* could be employed for prosecuting a broader range of offences, including new offences for which no law existed (MACDOWELL 1978, 183-184 and RHODES 1979, 107-108 on the basis of what Caecilius of Calacte – *Lex. Cant. s.v.* εἰσαγγελία and *Schol. Plat. Rep*. 565c – says περὶ καινῶν ἀδικημάτων; *contra* HANSEN 1980, 91-93), the fourth-century law covered specific crimes: subversion of democracy; treason; taking bribes or speaking as a rhetor against the people's interests. Cfr. HANSEN 1979-1980, 91-93; HARRIS 2013a, 118-119, 167, 233-234. We know only two exceptions, which to further careful inspection do not turn out to be such (HARRIS 2013b, 146-148), as speakers tried to adapt descriptions of their cases to offences envisaged by the *nomos eisangeltikos*: Ariston and Lycurgus' *eisangelia* against Lycophron in which the charge against the defendant was adultery (Hyp. 1) and Lycurgus' *eisangelia* against Leocrates for having fled Athens to Rhodes right after Chaironeia. In the first case Hypereides complains that the expected

crimes, inasmuch as treason always presupposed an agreement with the enemy, while *katalysis tou dēmou* did not always imply an act of treason. Evidence of this can be found in the fact that *katalysis tou dēmou* and *prodosia* were prosecuted according to different laws: *katalysis* was punished on the basis of Solon's alleged law on *eisangelia*[34], the decree of Demophantus[35], and the law of Eucrates[36]; *prodosia* (and *hierosylia*) was sanctioned through the law on temple-robbers and traitors[37]. If *prodosia* had been prosecuted through the law on temple-robbers and traitors, the penalties would have been exile, denial of burial (*ataphia*), and confiscation of property. It follows that the procedure used could not have been an *eisangelia*, which was an *agōn timētos*, but a public action on treason (*graphē prodosias*), which was an *agōn atimētos*[38]. Between 411/10[39] and 403/2 alone, possibly after the trials against Antiphon and the generals of Arginusae, the instrument of the *graphē* was replaced by *eisangelia* for prosecuting treason[40]. Yet, this argument is not convincing. All the evidence we have about the existence of a *graphē prodosias* is a passage in Pollux's *Onomosticon* dealing with a list of public actions[41]. But if we admitted that this passage is reliable, we would have to explain why there is no accurate record of historical *graphai prodosias*[42]. Finally, we should not overlook the fact that the choice of *eisangelia* was particularly advantageous for the prosecutor, as long as he ran no risk of punishment. From the second half of the fourth century, maybe after 333, in case of defeat, and of failure to obtain one-fifth of judges' votes, the prosecutor only

procedure to use was a public action (for the alternative procedure see PHILLIPS 2006, 381-390), but Lycurgus would have presented it as a threat to citizenship and democracy (COOPER in WORTHINGTON – COOPER – HARRIS 2001, 70); in the latter case Lycurgus presented Leocrates' departure from Athens in a time of crisis for the city as an act of treason (Lyc. 1.8-9), and 'stretched the meaning of treason to cover an action the Athenians did not normally associate with the term' (HARRIS in WORTHINGTON – COOPER – HARRIS 2001, 159-160; WHITEHEAD 2006, 136 n. 18).

34 Arist. *Ath. Pol.* 8.4. For the meaning of this law see LODDO 2018, 110-113.

35 And. 1.96-98.

36 *SEG* 12.87 = *GHI* 79.

37 See *supra* p. 117 n. 11.

38 Poll. 8.40. Already LIPSIUS 1984 [1908], 379 stated that 'Dass aber gegen Verrat auch eine Schriftklage statthaft war, das dem Pollux nicht zu glauben, liegt keine Grund vor'. Cfr. also HANSEN 1975, 49.

39 HANSEN 1975, 17.

40 PICCIRILLI 1987, 36-49 and before him HARRISON 1971, 59; MACDOWELL 1978, 176-179, who has recognised the use of *eisangelia* for treason. Piccirilli has considered as *graphai prodosias* the trials against Hipparchus, Themistocles, Licidas, Thucydides, Phrynicus, Antiphon and his colleagues, and the board of the generals of the Arginusae, most of whom HANSEN 1975 has classified as *eisangeliai*.

41 Poll. 8.40.

42 KUCHARSKI 2014, 130-131 is perplexed about the use of this least known procedure and considered more likely recourse to *eisangeliai* in cases of treason.

incurred a fine of 1000 drachmae[43], but, unlike public actions, he retained the right to bring charges of the same kind; before this date defeat in an *eisangelia* had entailed no unfavourable consequences for the prosecutor[44].

As regards exile in the *eisangelia* procedure, it has been argued, on the basis of a passage of Aeschines' discourse *Against Ctesiphon* referring to the outcome of Leocrates' trial, that it was an alternative sanction to death[45]. As is well known, Leocrates was charged of treason for having fled Athens at the time of the battle of Cheroneia, when news of Philip's victory reached Athens, but he was put on trial only 8 years after the events. The only reference to the outcome of this trial is provided by Aeschines, who, in reporting that Leocrates escaped conviction by one vote, states that:

> 'If a single vote had fallen the other way, he would have been put beyond our borders or condemned to death'[46].

This passage has been emended in various ways. The main difficulty concerns the interpretation of the apodosis ὑπερώριστ᾽ ἂν ἢ ἀπέθανεν. Around the middle of the nineteenth century Schaefer intervened to emend the passage, deleting ἢ ἀπέθανεν: he considered the expression as a gloss of the previous ὑπερώριστ᾽ ἄν, as if to say that whoever was punished with death could not be buried in Attica[47]. This emendation has been accepted by most subsequent editors[48]. Yet, more recently some scholars have questioned Schaefer's correction, claiming that if we respect the text transmitted by the manuscripts the meaning of the apodosis is perfectly understandable, indicating that a different outcome of the trial would have involved the risk for Leocrates of being convicted to exile or death[49]. This implies that exile could be one of the options available to both the parties involved in an *eisangelia*. Hansen, for his part, has corrected the passage in another way, substituting for the

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43 Hyp. 1.8, 12; Poll. 8.52-53; Harp. *sv.* εἰσαγγελία. HANSEN 1975, 30, has argued that before 333 all *eisangeliai* were *azēmioi* on the basis of Dem. 18.250, recently followed by VOLONAKI 2018, 294. But RUBINSTEIN 2000, 116-117 is probably right when she says that evidence of Theophrastos should be considered as a *terminus post quem* for the introduction of this fine.

44 HANSEN 1975, 29-30.

45 PICCIRILLI 1987, 36-49; SULLIVAN 2002, 5; BIANCHI 2002; ORANGES 2016, 90-91 n. 70.

46 Aeschin. 3.252: εἰ δὲ μία ψῆφος μετέπεσεν, ὑπερώριστ᾽ ἂν ἢ ἀπέθανεν (translated by Carey 2000).

47 *Status quaestionis* in BIANCHI 2002, 84-85.

48 Cfr. BIANCHI 2002, 85 n. 8.

49 PICCIRILLI 1987, 48; BIANCHI 2002.

aorist indicative (ἀπέθανεν) an aorist participle (ἀποθανών), which allows him to maintain his point, i.e., that ὑπερορίζειν means to drive beyond the borders of the country[50].

But what is the meaning of the verb ὑπερορίζειν? This also is hotly debated. Erika Bianchi believed that the main meaning of the verb is 'to banish'. She substantiated this by the fact that among the seven occurrences of the verb in the sources of the Classical period most of them do mean 'to exile', 'to banish'[51]. However, three of the seven occurrences are in Aeschines' *Against Ctesiphon*. At 3.131 about Demosthenes, the curse of Greece (ὦ τῆς Ἑλλάδος ἀλειτήριε), Aeschines wonders if, for his misdeeds, he should 'be crowned as a result of the city's misfortunes, or cast beyond the borders (ὑπερωρίσθαι, cfr. Din. 1.77)'. One must wonder if this is in fact a technical use of ὑπερορίζειν. In other words, can ὑπερορίζειν be a synonym for φεύγειν or φυγαδεύειν? It rather seems to me that here the verb is used to indicate the broad concept of casting away someone and has nothing to do with formal banishment, something that needs to be proven[52]. More interestingly, at 3.244 Aeschines asks the judges to envision the reaction of the war dead to the granting of a crown to Demosthenes, who had provoked their death by his reckless conduct; he contrasts the rationale of such a grant with the habit of removing from the boundaries of Attica senseless objects - a piece of wood, a stone or iron -, which fall on someone, causing their death. Even in this case, he uses the form ὑπερορίζομεν. It is noteworthy that the verb is put in connection with inanimate objects that are expelled from Attica in a kind of metaphorical exile[53]. Other passages show that Aeschines' use is not an isolated case[54]. Finally, at 3.252 Aeschines recalls the trial of Leocrates, who became notorious for having escaped conviction because

50 HANSEN 1975, 35.

51 BIANCHI 2002, 87-88 cites as evidence: Isoc. 6.32: ἔτι δὲ τοὺς ἠσεβηκότας εἰς τοὺς παῖδας τοὺς Ἡρακλέους ἐκβεβληκότες, οἳ δικαίως ἂν ἐξ ἁπάσης τῆς οἰκουμένης ὑπερωρίσθησαν; Plat. *Resp*. 560d: μετριότητα δὲ καὶ κοσμίαν δαπάνην ὡς ἀγροικίαν καὶ ἀνελευθερίαν οὖσαν πείθοντες ὑπερορίζουσι μετὰ πολλῶν καὶ ἀνωφελῶν ἐπιθυμιῶν; Σφόδρα γε. She also cites Ctesias *FGrH* 688 fr. 14a, but the sentence Κυρταία· πόλις ἐν τῆς Ἐρυθρᾶι θαλάσσηι, εἰς ἣν ὑπερώρισεν Ἀρταξέρξης Μεγάβυζον is rather the explication of Stephanus of Byzanthium to the word Κυρταία that he found in Ctesias' *Persica*. By that I mean the word ὑπερώρισεν is not an example from the Classical period, as Bianchi maintains, but Stephanus' own use.

52 I agree with TODD 2016, 341 n. 81 about the fact that compounds in *–horizō* referred to "the casting out of bodies rather than to the exile of living persons".

53 This use is similar to that of the above-mentioned passage of Plato's *Republic*, where ὑπερορίζειν (here 'to cast out') is referred to moral concepts. Cfr. also Paus. 6.11.6, in which it is said that the Thasians threw into the sea Theagenes' statue, which had caused the death of a citizen. In doing so they would follow Dracon's laws on homicide.

54 Paus. 6.11.6; Poll. 8.120. These passages are already identified by HAGER 1879, 3.

of Athena's vote[55]: the verdict was tied (*isopsēphos dikē*) and he was acquitted[56]. A recent proposal to reject Schaefer's emendation and accept the text transmitted by manuscripts is appropriate here, as there is no reason to correct a text when its meaning is understandable. However, I am not convinced of the resulting interpretation, which fails to explain the connection of this passage with what we know about the *eisangelia* procedure through which Leocrates was prosecuted. I suggest instead that this sentence should be understood as referring to the fate of traitors once they are convicted: they could be condemned to death or could suffer the additional penalty of *ataphia*.

When treason was prosecuted by *eisangelia*, the prosecutor always proposed death, as fourth-century evidence on *eisangeliai prodosias* demonstrates[57]; this could be accompanied by confiscation of property (δήμευσις), *ataphia*, razing of the house (κατασκαφή)[58], sometimes setting up of pillars (ὅροι), and disfranchisement of one's offspring[59]. Something similar also concerns Athens' international relations with its allies. The decree for constituting the second Athenian League provides exile or death for those allies who defect, but it is noteworthy that *ataphia* – the decree extended the ban to Attica and to territories included in the alliance - was limited only

55 Reference here is to the vote of the judges in Aeschylus' *Eumenides*, where Orestes is said to win the case thanks to Athena's vote (Aesch. *Eum*. vv. 741, 752–753, 795–796).

56 The tied vote in a trial was quite rare. Its meaning is far from clear, as normally there was an odd number of judges Cfr. BOEGEHOLD 1995, 34; WHITEHEAD 2006, 133 n. 4. Scholars have offered several explanations about it: Athena's vote in Orestes' trial produced the tied vote (GAGARIN 1975); Aeschines refers to the second vote in Leocrates' *eisangelia* where judges had to determine punishment (SULLIVAN 2002, but see *contra* BIANCHI 2002, WHITEHEAD 2006, 133 n. 4; HARRIS 2013a, 240-241 n. 71); Aeschines here is not accurate in reporting the vote and there was simply one more vote for acquittal (FILONIK 2017, 251 n. 94).

57 See *supra* p. 118. In addition to these, one should consider the case of Nicophemus and Aristophanes about which Lys. 19.7 says that 'they were put to death without trial (ἄκριτοι) before anyone could come to their aid as the proof of their guilt was being made out. For nobody even saw them again after their arrest, since their bodies were not even delivered for burial (οὐδὲ γὰρ θάψαι τὰ σώματ' αὐτῶν ἀπέδοσαν): so awful has their calamity been that, in addition to the rest, they have suffered this privation also'. The context for this speech allows us to suggest that Nicophemus and Aristophanes were considered traitors for not having fulfilled their mission in support of Evagoras of Cyprus in 390, for which see Xen. *Hell*. 4.8.24. Cfr. QUEYREL BOTTINEAU 2010, 279, 459; BEARZOT 2015, 156 n. 48. I suggest that the execution without trial may have occurred while they were in Cyprus, something that can also explain the failure to return the corpses to their family. For this view see TODD 2000a, 200, although he is expressed this more cautiously. *Contra* MEDDA 2007[5], 127.

58 On the additional penalties see MACDOWELL 1978, 255-256; KUCHARSKI 2015, 20, although I do not find suitable his definition of embellishments for these penalties. For the razing of a house see CONNOR 1985. I cannot agree with the view expressed by FORSDYKE 2012, 159, that the razing of a house was an example of popular justice (as many other punishments that she has interpreted as acts of extra-legal justice (pp. 144-170). For a harsh criticism of Forsdyke's view see HARRIS 2019, 108-109.

59 This is the case of the *eisangelia* against Antiphon and Archeptolemus according to Plut. *Mor*. 833a. For the meaning of this provision see FARAGUNA 2016, 82-86.

to those condemned to death[60]. Denial of burial is also attested outside Attica both in Corinth and in Syracuse[61]. The penalty of *ataphia* is also found in the city of Magnesia, where the law provides for an analogous provision for murderers of relatives[62].

It should not be surprising that in the above-mentioned passage in Aeschines' *Against Ctesiphon* mention of *ataphia* precedes that of the death penalty; the logical order of the sentence corresponds to a *hysteron proteron*, something that is not unusual in Ancient Greek. As regards its meaning, I suppose that Aeschines refers to two alternatives, both linked to the consequences of the death penalty. In the case of traitors found guilty, the only possible penalty was death, but it was highly important what to do with their corpses. Danielle Allen has rightly pointed out that for the Athenians the important thing was not how wrongdoers were executed, but how to handle their corpses[63]. We know that during the fifth century the bodies of the condemned were thrown into a natural chasm, the *barathron*, while in the fourth century they were deposited in the *orygma*, an artificial cave of which Plato speaks[64]. It is debated whether precipitation in the *barathron* or in the *orygma* was a method of

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60 *IG* II^2 43, ll. 57-63: κρινέσθω ἐν Ἀθην[αίο]ις καὶ τ[οῖς] συμμάχοις ὡς διαλύων τὴν συμμαχία[ν, ζ]ημιόντων δὲ αὐτὸν θανάτωι ἢ φυγῆι ο͂[περ] Ἀθηναῖοι καὶ οἱ σύμμαχοι κρατο͂σι[ν· ἐὰν] δὲ θανάτο τιμηθῆι, μὴ ταφήτω ἐν τῆ[ι Ἀττι]κῆι [μ]ηδὲ ἐν τῆι τῶν συμμάχων.

61 See what happened to Cypselus (Nicolaus Dam. *FGrH* 90 fr. 60: Ὁ δὲ δῆμος τάς τε οἰκίας τῶν τυράννων κατέσκαψε, καὶ τὰς οὐσίας ἐδήμευσεν, ἄταφόν τε ἐξώρισε τὸν Κύψελον, καὶ τῶν προγόνων τοὺς τάφους ἀνορύξας, τὰ ὀστᾶ ἐξέρριψεν) and Dionysius I (Plut. *De sera* 559D: εἰ δὲ μὴ δόξαιμι παίζειν, ἐγὼ φαίην ἂν ἀνδριάντα Κασάνδρου καταχαλκευόμενον ὑπ' Ἀθηναίων πάσχειν ἀδικώτερα καὶ τὸ Διονυσίου σῶμα μετὰ τὴν τελευτὴν ἐξοριζόμενον ὑπὸ Συρακοσίων ἢ τοὺς ἐκγόνους αὐτῶν δίκην τίνοντας). In the case of Dionysius I the verb used is ἐξορίζειν to indicate that his corpse was cast outside the borders of Syracuse. This passage is evidence for the practice of κατασκαφή, which involved both houses and tombs. On their ruins Timoleon ordered law-courts to be built. For a collection of sources on such practices see CONNOR 1985, especially p. 83 for this episode. It is not clear from the context if the Dionysius cited is Dionysius I or Dionysius II. While Plutarch mentions Dionysius II's sons, Nysaius and Apollocrates, it was likely it Dionysius I who suffered that fate. Effectively, Dionysius II died in exile in Corinth. Maybe Plutarch is referring here to what Timoleon and the Syracusans did in 343/2 against the tombs of the tyrants (τὰς οἰκίας καὶ τὰ μνήματα τῶν τυράννων ἀνέτρεψαν καὶ κατέσκαψαν, Plut. *Tim*. 22.2). On the meaning of this passage with regard to Aristotle's *Rhetoric* see CROMEY 1979, 16. For identifying this Dionysius as Dionysius I see MUCCIOLI 1999, 480 n. 1347.

62 Plat. *Leg*. 9.873b-c: ἐὰν δέ τις ὄφλῃ φόνου τοιούτου, τούτων κτείνας τινά, οἱ μὲν τῶν δικαστῶν ὑπηρέται καὶ ἄρχοντες ἀποκτείναντες, εἰς τεταγμένην τρίοδον ἔξω τῆς πόλεως ἐκβαλλόντων γυμνόν, αἱ δὲ ἀρχαὶ πᾶσαι ὑπὲρ ὅλης τῆς πόλεως, λίθον ἕκαστος φέρων, ἐπὶ τὴν κεφαλὴν τοῦ νεκροῦ βάλλων ἀφοσιούτω τὴν πόλιν ὅλην, μετὰ δὲ τοῦτο εἰς τὰ τῆς χώρας ὅρια φέροντες ἐκβαλλόντων τῷ νόμῳ ἄταφον. A similar penalty was applied to suicide victims (Plat. *Leg*. 9.874c-d).

63 ALLEN 2000, 218.

64 Plat. *Rep*. 4.439e. See ALLEN 2000, 393 n. 83 for evidence about *barathron* and *orygma*.

execution or they were only used for the disposal of the corpses[65]. What we read in Xenophon's *Hellenica* concerning the Cannonus decree is not conclusive: reference to the fact that those condemned were to be thrown into the *barathron* does not prove that they were precipitated alive[66]. To get back to Aeschines' passage, I suggest that while the verb ἀπέθανεν implies that the corpse of Leocrates could be placed within the city in the *orygma* or returned to his family, ὑπερώριστ᾽ ἂν alludes to the fact that he could be condemned to the most severe form of *ataphia*, i.e., disposal of the corpse near the border of Attica. Indeed, Plato describes this place as situated on the road that goes from Piraeus under the outer side of the northern wall. Archaeological excavation has discovered a small triangular outcropping on mount Beletsi, bearing an inscription that reads *bar*, possibly a piece of the word *barathron*. The outcropping overlooks a drop situated at the north side of the fortification and looking northwest toward Kapandriti, which was the border of Attica[67]. I think wrongdoers such as Leocrates could have been thrown into this chasm: the more appropriate penalty for those who abandoned Athens in face of danger was to deny them burial in Attica after execution. This is consistent with ancient explanations of this passage. The scholiast comments ὑπερώριστ᾽ ἄν as follows:

> 'Traitors were buried not in their homeland, but outside of its borders'[68].

Accordingly, there is no reason to suppose that Aeschines alludes here to exile as an alternative to the death penalty[69].

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65 MacDowell 1978, 254; Todd 1993, 141 and 2000b, 37-39; Allen 2000, 218-219, expressing the view that execution by precipitation was not an Athenian feature, but it was characteristic of other *poleis*. *Contra* Cantarella 1991, 96-105, especially p. 102, who believes that both *barathron* and *orygma* were employed for execution by precipitation. For a middle view see Kucharski 2015, 28, who believes that precipitation was used only early in the fifth century, for example in the case of Miltiades' execution, but after the middle of the century this practice was abandoned.

66 Cfr. *supra* p. 120 n. 24 and Allen 2000, 324-325. Indeed those who think that this passage indicates execution by precipitation base their view on the text edited by Dobree for Teubner (see Cantarella 1991, 372 n. 20), while manuscripts that read as follows ἀποθανόντα εἰς τὸ βάραθρον ἐμβληθῆναι support the hypothesis that those condemned to death were thrown into *barathron* after dead. Cfr. Todd 2000b, 38 n. 26.

67 Allen 2000, 220-221.

68 *Schol. in Aeschin*. 3.252 (Dilts): οὐ γὰρ ἐν τῇ πατρίδι οἱ προδόται ἐθάπτοντο, ἀλλ ἐν τῇ ὑπερορίᾳ.

69 Even those who believe that Aeschines refers to exile as an alternative penalty to capital punishment recognize that this did not correspond to the Athenian legal practice, but rather it should consider as part of his rhetorical strategy. See Bianchi 2002, 94.

If exile was not a penalty in an *eisangelia*, we should agree with Hansen that mention of exile in the sources is to be considered a kind of commutation of the death penalty when the defender failed to face trial. Such commutation, which Hansen believed to be automatic, seems to be confirmed by three trials: those against Gylon of Cerameis, the board of generals of 379/8, and Callistratus of Aphidna[70]. Aeschines, in his attempt to call into question the legitimacy of Demosthenes' citizenship on his maternal side, reports that his grandfather Gylon was charged with *prodosia* for having handed over Nymphaius, a fort in Pontus, to the enemy. Prosecuted by an *eisangelia*, he left Athens in order to escape conviction; consequently, he was condemned to death *in absentia* and became an exile (φυγὰς ἀπ'εἰσαγγελίας)[71]. Plutarch also speaks of this Gylon in his *Life of Demosthenes* and cites Aeschines as a source. Despite this, Plutarch states that Gylon was banished on a charge of treason (ἐπ'αἰτίᾳ προδοσίας φεύγοντος)[72]. This alternation in the sources between the death penalty and exile can be explained by the fact that Plutarch misinterprets Aeschines' words (φυγὰς ἀπ'εἰσαγγελίας) or focuses on Gylon's status rather than on the procedural details[73].

Likewise, exile and the death penalty were equally connected with sanctions in the *eisangelia* against two generals who operated at the border with Boiotia at the time of the counter-coup by which democracy was restored in Thebes[74]. We do not know who brought the charge and any attempt to identify the prosecutor may be only conjectural. Despite this, I suggest the prosecutor could have been Callistratus of Aphidna or one of his faction, whose anti-Theban feelings are well known[75]. It is possible, in fact, that Callistratus was the politician who showed his anti-Theban views most openly; on the contrary, Cephalus, who proposed issuing a decree to send an Athenian force to

70 HANSEN 1975, 36 n. 57, 83-84, 94-95.

71 Aeschin. 3.171.

72 Plut. *Dem*. 4.2. Cfr. Liban. *Dem*. 3: Γύλωνος τοῦ πάππου τοῦ Δημοσθένους φυγόντος μὲν ἐξ Ἀθηνῶν ἐπὶ προδοσίας ἐγκλήματι.

73 According to HANSEN 1975, 83-84 this trial can be dated between 410-405.

74 HANSEN 1975, 90.

75 GEORGIADOU 1997, 100 cites Plut. *Praec. ger. reip.* 810F as evidence of Callistratus' hostility towards Theban exiles. Plutarch reports an exchange of words between Callistratus and Epaminondas, in which Callistratus rebuked the Thebans and the Argives for the mythical parricide of Oedipus and the matricide of Clytemnestra, and Epaminondas replies saying that the Thebans expelled the authors of these misdeeds, while the Athenians accepted them. It is probable that this episode refers to a debate that occurred in 357 in the Arcadian Assembly, between Callistratus as Athenian ambassador and Epaminondas, on which see Nep. *Ep*. 6; Plut. *Apopht.* 193CD. Cfr. TUCI 2019, 40-41.

Thebes in order to overthrow Leontiades' regime[76], could have been one of the demagogues Plutarch speaks of[77]. Initially, the Athenians sheltered the Theban exiles in return for the favour received by them at the time of the Thirty[78]. These generals were charged for having joined the Theban exiles in the uprising against Leontiades' oligarchic faction without Athens' formal authorization[79]. In describing Athens' new political policy toward Thebes, when the Spartan Cleombrotus, after having retaken control of Corinth, was about to pass into Boiotia, Xenophon observes that the Athenians were so alarmed that they put on trial both of the *stratēgoi*[80]: one was condemned to death and the other, not remaining to stand trial (ἐπεὶ οὐχ ὑπέμεινεν), became an exile[81]. On the contrary, Plutarch, who does not seem to have used Xenophon on this point[82], states that the Athenians, in the grip of fear, broke the alliance with Thebes[83], tried those who sided with the Boiotians and "put some of them to death, banished others, and others still they fined"[84]. It is hard to reconcile the two reports, which present several discrepancies. It has been noted that Plutarch is careful to avoid speaking about any possible Athenian assistance given to the exiles; accordingly he refers to a faction of *boiotiazontes* in a generic way[85]. What is certain is that we know of no notice about a flood of court cases that took place in Athens after the liberation of Thebes. Such punitive justice would have left a mark in the sources. It does not align with Athens' new anti-Spartan policy immediately after Sphodrias' raid[86]. For all these reasons I agree with Hansen in preferring Xenophon's version, which is the oldest source for the events. So it follows that one of these two

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76 Din. 1.38-39. Cfr. Diod. 15.26.1, who recalls the vote in the Assembly on the grant of aid to Theban exiles without mentioning Cephalus.

77 Plut. *Pel*. 7.1.

78 On this topic see now BEARZOT 2020.

79 On this episode see LODDO 2019b, 10-11 and 2020, 211-212 with further references.

80 In this regard BUCK 1994, 86-87 is probably right in believing that at the beginning Athens had sent unofficial aid to the democrats, maybe in support of those democratic exiles who had taken refuge in Athens. However, then the Athenians gave some concrete and official aid: they deliberated, on Cephalus' proposal, to send some troops in Boiotia in support of Theban exiles; they dispatched Athenian peltasts, led by the *stratēgos* Chabrias, who guarded the fort of Eleutheria at the borders of Attica with Boiotia. Cfr. also GEORGIADOU 1997, 133.

81 Xen. *Hell*. 5.4.19.

82 On the sources of the *Life of Pelopidas* see GEORGIADOU 1997, 15-28, who has excluded Plutarch's use of Xenophon as his main source and has considered more likely that the biographer used Callisthenes' *Hellenica*. For Plutarch's extensive use of Theopompus see SORDI 1995.

83 But we have no idea whether and when such an alliance was made up. For a summary of the debate on this topic see GEORGIADOU 1997, 134.

84 Plut. *Pel*. 14.1 (translated by B. Perrin).

85 GEORGIADOU 1997, 134.

86 SEALEY 1956, 188.

stratēgoi was tried and condemned to death while the other was condemned to death *in absentia*. Consequently, Xenophon observes that the latter became an exile.

Even clearer is Callistratus' *eisangelia* of 362/1. He was charged by an anonymous (for us) prosecutor for having made proposals contrary to the people's interests in his capacity as *rhētōr*, and having taken bribes[87]. Our main source is Hypereides' discourse *On behalf of Euxenippus*, which includes a list of well-known politicians who were prosecuted by *eisangelia*. Hypereides' main point is that in his day *eisangelia* has lost its importance as it has been trivialised[88]. To prove it he refers, among other things[89], to the fact that in the past the habit of the defendants in an *eisangelia* was to leave the country before trial, in the belief that it would have been difficult for them to avoid conviction. This is why the charges at stake were the most severe. It is in this framework that Hypereides cites the example of Callistratus' *eisangelia*, who, like Timomachus, Leosthenes, Philon, and Theotimus, did not await trial and went into exile. The orator Lycurgus expresses a similar view in his discourse *Against Leocrates*, when says that "the city condemned him to death, but he fled into exile"[90].

Excluding that exile was a penalty in the *eisangelia* procedure makes it mandatory to reassess the nature of the *eisangelia* as an *agōn timētos*. I suggest that not all *eisangeliai* were *agōnes timētoi*. *Eisangeliai* derived from a formal deposition (*apocheirotonia*) were always *timētoi*[91], while *eisangeliai* to the Assembly could be both *timētoi* and *atimētoi.* If the determination of the sentence was entrusted to the parties, the prosecutor usually required the death penalty, while the defendant proposed a fine[92]. But, to judge from the evidence, when the issue at stake was treason or impiety, the prosecutors could specify the penalty clause in the indictment and this

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87 HANSEN 1975, 94-95.

88 On the trivialisation of *eisangelia* in the second half of the fourth century see VOLONAKI 2018.

89 Hyp. 4.3: "But today, what's happening in the city is absolutely ridiculous. Diognides and Antidorus, the metic, are accused of hiring out flute girls for more than the price prescribed by the law, Agasicles of Piraeus for being registered in the deme Halimus, and Euxenippus because of the dreams he says he saw. Not one of these charges, of course, has anything to do with the impeachment law".

90 Lyc. 1.93.

91 Arist. *Ath. Pol.* 61.2.

92 In other words, this is the same pattern we can see in *eisangeliai* derived from *apocheirotoniai*.

penalty normally was death[93]. In these cases, therefore, *eisangelia* was an *agōn atimētos*.

This helps us to understand why Socrates' trial cannot be used as evidence that exile was one of the penalties proposed in the *timēsis* of an *eisangelia*. In 399 Socrates was tried by an Athenian law-court for impiety (*asebeia*) in the form of a public action for impiety (*graphē asebeias*)[94]. After the first speeches by prosecution and defence, the judges voted on the verdict by secret ballot. For thirty votes the law-court issued a sentence of conviction against Socrates[95]. Because the *graphē asebeias* was an *agōn timētos*, the parties in the trial had to give their second speeches and to propose the penalty. Meletus, the main prosecutor, proposed the death penalty, while Socrates made an unconventional proposal: at the beginning he claimed to deserve a reward rather than a penalty for his deeds and proposed to receive the public maintenance (*sitēsis*) at the Prytaneion; then, he imagined taking into consideration alternative sanctions such as a fine with prison until he paid for it and exile, but he rejected them as bad solutions; finally, on the advice of his friends, he proposed to be fined with thirty minae[96]. The judges accepted the prosecutor's proposal and condemned Socrates to death. He was taken into custody in the *desmōtērion* until his

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93 Evidence of fourth-century *eisangeliai* for treason in fact shows that the prosecution always proposed the death penalty. Sometimes confiscation of property was added to death. See the trials of the board of ambassadors of 392/1 (death *in absentia*, as they fled the country before the trial, cfr. HANSEN 1975, 87-88); Antimachus (death and confiscation of property, cfr. HANSEN 1975, 91-92), Timagoras (death, cfr. HANSEN 1975, 92), Callisthenes (death, cfr. HANSEN 1975, 93-94), Leosthenes, Philon, Timomachus, and Theotimus (death *in absentia*, as they fled the country before the trial, cfr. HANSEN 1975, 95-98). Callistratus, Chabrias, and Iphicrates were acquitted, but it has been suggested that the prosecutors proposed capital punishment in all the three trials (HANSEN 1975, 92-93, 100). Some cases are doubtful. Dem. 19.180-181 (καὶ ὅσοι διὰ ταῦτ' ἀπολώλασι παρ' ὑμῖν, οἱ δὲ χρήματα πάμπολλ' ὠφλήκασιν, οὐ χαλεπὸν δεῖξαι, Ἐργόφιλος, Κηφισόδοτος, Τιμόμαχος, τὸ παλαιόν ποτ' Ἐργοκλῆς, Διονύσιος, ἄλλοι, οὓς ὀλίγου δέω σύμπαντας εἰπεῖν ἐλάττω τὴν πόλιν βεβλαφέναι τούτου) speaks of several politicians tried by *eisangelia*, probably to the Assembly, but this source does not allow us understanding what punishment was applied in each case. As a matter of fact we know of trials in which defendants were punished with a heavy fine. This is what happened to Cephisodotus (fine of five talents, cfr. HANSEN 1975, 98; but I guess that the Assembly reversed the original verdict, as *schol. in Aeschin.* 3.51 (Dilts) seems to attest: τῆς μὲν θανατικῆς ζημίας ἀπελύθη), and Timotheus (fine of 100 talents; Timotheus being not able to pay the fine went into exile to Chalkis; cfr. HANSEN 1975, 101; the fine was repaid by his son Conon after being reduced to 10 talents, cfr. PECORELLA LONGO 2004, 93-94). But we should point out that both trials resulted by an *apocheirotonia*.

94 Diog. Laer. 2.40. Further sources are cited in FILONIK 2013, 53 n. 157. While in the fifth century impiety was prosecuted by the *eisangelia* procedure, at least after the promulgation of Diopithes' decree, in the fourth century we only know of public actions (*graphai*) for impiety. MACDOWELL 1978, 201 has suggested that until Diopithes' decree was in force, impiety was prosecuted by *eisangelia*; such a decree may have lapsed in 403 when the revision of the Athenian law code took place.

95 Plat. *Apol*. 36A 1-5.

96 Plat. *Apol*. 37C-E.

execution. While he was in prison his friend advised him to escape from prison and leave Athens, but once again Socrates refused to evade justice[97]. A few days later he died, poisoned by hemlock. Yet, should we consider Socrates' claim, which he may have proposed exile in the *timēsis*, as a clue that exile could be one of the sanctions to be proposed in the assessment of the penalty? I think we should in the case of public actions, but Socrates' trial tells us nothing about exile in the *eisangelia* procedure.

In the light of the evidence above, I believe Hansen was right in postulating a close connection between a defendant's failure to stand trial, his voluntary flight and his consequent death sentence *in absentia*. But are we entitled to suppose an automatic commutation of the sentence? Some scholars have assumed that voluntary exile could be an option available to those condemned to capital punishment as a "milder substitute"[98]. They could simply flee the country before trial choosing exile in the place of death; in return, the law-court passed a death judgment *in absentia*. Furthermore, such behaviour in procedures involving capital punishment has been compared to that of defendants in a homicide case. This view, apparently, is based on the consideration that there is abundant evidence that defendants made recourse to this option[99].

However, it has to be asked if the city, in response to the defendant's voluntary flight, reconsidered its verdict in an official way, by commuting the death penalty into a formal exile[100]. If so, it follows that, in fleeing the country and avoiding trial, defendants acted in a legal way. But, I wonder, did Athens renounce any forms of retaliation against such a defendant, who was definitively a wrongdoer and an enemy of the city?

3.

Before attempting to answer this question, I think a few points need to be made clearer. First, to claim that exile was not a penalty foreseen by the *eisangelia* procedure does not amount to saying that it could not have been a penalty in other

97 Xen. *Apol*. 23.

98 TODD 1993, 139-140; KUCHARSKI 2014 and 2015, 19.

99 KUCHARSKI 2015, 19 n. 24 presents as evidence the list of politicians who escaped conviction in an *eisangelia* fleeing abroad in Hypereides' *On behalf of Euxenippus*.

100 I am not referring here to the practice of *aphesis*, by which the Assembly could reverse the original sentence of the court. Although we know of some cases in which *aphesis* was applied, it must be acknowledged that in principle the Athenians were reluctant to pardon their fellow citizens. When they did so, it was not so much out of magnanimity as out of necessity or utility. Cfr. PECORELLA LONGO 2004, 108.

procedures of Attic law. I refer here to those legal situations in which the polis imposed formal exile (φυγή) as the result of a judicial process or a formal deliberation of an institutional body such as the Assembly. Such an exile implied the expulsion for the individual condemned from the territory of the polis and could be associated with supplemental provisions such as confiscation of his property and extension of the exile to his descendants. In Athens exile could be the sanction imposed for some types of homicide (unintentional homicide or *phonos akousios*; homicide by *bouleusis*: homicide of a foreigner or a resident alien[101]). In certain cases homicide could be sanctioned by perpetual exile[102]. Moreover, it appears to be linked to *trauma ek pronoias* (intentional wounding) of a citizen[103]. This penalty guaranteed that some of the condemned individual's rights would be safeguarded as long as he respected the limitations imposed by law, such as the right not to be killed with impunity, in line with the right of any Athenian citizen.

Exile could be also connected with outlawry and *atimia*[104]. Outlawry deprived the convicted person of all civic rights and the legal protections that the polis guaranteed to each citizen. As a result of this, anyone could kill him with impunity. Outlawry was related to exile in the sense that a person who suffered such a penalty could no longer continue to remain in Attica. As for exile, outlawry too could be extended hereditarily to the outlaw's family's members.

Finally, *atimia* should be considered a disfranchisement involving the loss of some civic rights. In this case, exile was not linked to disfranchisement directly, but could become one of its consequences. To lose some civic rights as the possibility to

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101 WHITEHEAD 1977, 93.

102 Dem. 21.43.

103 PHILLIPS 2006.

104 According to the traditional view, the term *atimia* originally meant 'without punishment' and it was tantamount to banning the citizen from the community (SWOBODA 1893). The meaning of *atimia* would have evolved from an absolute form, which can be linked to outlawry and implied a total loss of juridical protection, in a milder form that was expressed in some limitations to the political and/or social citizen rights. This view, which has been accepted by most scholars (*e.g.* HARRISON 1971, 169-170; PICCIRILLI 1976, 741-743), albeit with some adjustments – I refer to the shift of the concept of *atimia* from the legal sphere to the moral one with the meaning of dishonour or more precisely loss of τιμή (MAFFI 1983; PODDIGHE 2001, 38-40) -, has been questioned in recent times by several scholars. According to DMITRIEV 2015, 35-50, since the two meanings of *atimia* continued to exist in the Classical Age, it should be considered that the Athenians tried to adapt a concept typical of pre-solonian Athens to a more advanced legal context. On the contrary, YOUNI 2001 and 2018 has argued that outlawry does not represent the original form of *atimia*, but a different form of punishment that originated from Drakon's law. So, outlawry and *atimia* should be regarded as two distinct penalties. A similar conclusion has been reached by JOYCE 2018. However, see the perplexities expressed by MAFFI 2018.

bring a suit for defending oneself from an abuse suffered could prompt the disfranchised individual to choose exile rather than continue living a life of humiliation at home.

My second point concerns the existence, as a penalty, of a voluntary flight different in nature from exile, which the Athenians considered as lawful, if this right was exercised within the constraints imposed by law. Defendants could choose such a voluntary flight in a trial for homicide. The main text to refer to is Drakon's law on homicide, whose original form dates back to the seventh century, but whose content is known thanks to an epigraphic document republished under the Athenian archon Diocles (409/8). Drakon's law presents several novel aspects. In this regard Biscardi has argued that, while in the Homeric epic the community exercised a form of control over the use of force that the injured party could exert on the murderer, Drakon's law, in taking away the prerogative of revenge from the family group, entrusted the city with the exclusive power to impose sanctions. This new way of thinking implied that homicide was no longer a crime, which it was up to the victim's kin to avenge, but rather an act expressly forbidden by the law of the polis[105]. For this reason only the polis had the power to judge the defendant and to impose the appropriate penalty. On a closer look, exile was a sanction in clear continuity with previous practice, in the sense that it was intended to give a formal aspect to the defender's choice to flee the country in order to avoid revenge by the victim's family. Through the promulgation of Drakon's law the legislator imposed that such recourse was considered a formal sanction imposed by the polis. Of course it was a novelty, as shown by the fact that the legislator felt the need to clarify it in the text of the law[106]:

> 'If someone kills the slayer or is responsible for his being killed while he is avoiding the *agora* by the *horoi*, games, and Amphiktyonic rites, he shall be treated on the same basis as one who kills an Athenian. The Ephetai shall bring in the verdict'[107].

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105 BISCARDI 1982, 275-278, 286-287.

106 On the novelty of exile as a punishment for involuntary homicide see CANTARELLA 1976, 87.

107 *IG* I^3 104, ll. 26-29 (translated by R. Stroud). The meaning of the expression *agoras ephorias* is disputed. For the traditional view see GAGARIN 1981, 58-61; for a challenge to this view see CANEVARO 2017, according to which *agorâs ephoriâs* is the *archaia agora* marked by *horoi*.

By this clarification the legislator attempted to eliminate a widespread practice allowing the victim's family to 'hunt down' the wanted slayer[108]. In this way, for slayers the status of fugitive was replaced with that of an exile who continued to enjoy legal protection, if he is maintained far away from specific areas closely related to the political and religious life of the community[109]. But, beyond this form of legal exile, the law allowed the defendant in a homicide case to avoid trial by leaving the country before the prosecution and the defence delivered their second speeches. Some passages in the orators seem to demonstrate it[110]. In dealing with a homicide case in which the prosecutor charged the defendant with intentional homicide, while the defendant claimed to have acted in self-defence, the speaker, who pronounced the second speech for the defence in Antiphon's *Third Tetralogy*[111], stated that the accused had withdrawn from the trial (ὑπαπέστη), not because he was guilty, but because he was frightened of the accusers[112]. Although the continuation of the trial after the departure of the defendant appears very unlikely, this passage is evidence for the opportunity available to the defendants in homicide trials to leave the country after making the first of their two defence speeches when they feared being convicted[113].

That such behaviour appeared lawful in the eyes of judges can be deduced from a passage in the discourse *On the Murder of Herodes*[114], which dates to 420-417[115]. The accused, charged with homicide, complains about the unlawfulness of the procedure used against him by the prosecutor: despite being accused of murder, they had resorted to summary arrest (ἀπαγωγή), a procedure that they should not have used, because it was reserved for a particular category of criminals, the so-called wrongdoers (κακοῦργοι)[116], on the pretext that it was necessary to prevent the

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108 On this point see CANTARELLA 1976, 86-87; STOLFI 2006, 105; PEPE 2012, 21-22.

109 CANEVARO 2017, 57-58.

110 Antiph. 4 δ1; 5.13; Dem. 23.69; Poll. 8.117.

111 We might interpret this passage as an indication that the defendant was supported by *synēgoroi*, as a joint defence was possible in private lawsuits, cfr. RUBINSTEIN 2000, 80-87. However, it is hard to reconcile joint defence with the fact that the defendant withdrew from the trial.

112 Antiph. 4 δ1. Cfr. GAGARIN 1997, 170: "The speaker explains briefly that the defendant has voluntary left (for exile), as was allowed (Ant. 5.13; Dem. 23.69), leaving friends or relatives speak for him".

113 It is not clear why the defendant was able to abandon the trial after making only his first defence speech. One explanation is that the defendant had to abandon his trial *before* making his second speech because the court voted immediately afterwards. Cfr. GAGARIN 1997, 183.

114 On this speech see HEITSCH 1984, 33-89; GAGARIN 1989 and 1997; USHER 1999, 34-40.

115 GAGARIN 1997, 173-174.

116 The procedure employed was an *apagogē kakourgōn* (cfr. MACDOWELL 1963, 136-137; GAGARIN 1997, VOLONAKI 2000, 152 and *passim*). According to some scholars it represented a novelty in prosecuting homicide (GAGARIN 1997, 179-180; ID. 2011, 318). In particular,

defendant from leaving the country[117]. The speaker contrasted this argument by saying that:

> 'You say that if I had been set free, I would not have awaited trial but would have departed, as if you had compelled me to come to this land unwillingly; but if being banned from this city was of no concern to me, I could equally well have not come when summoned and lost the case by default, or I could have made my defence but left after my first speech. This course is available to everyone, but you have enacted your own private law, trying to deprive me alone of something all other Greeks have'[118].

This passage allows us to argue that the legislator gave a legal form to a defendant's habit of withdrawing from his trial and leaving the country, probably when the inevitability of conviction became apparent. In principle this right was certainly allowed to defendants in all the homicide trials, even in those for intentional homicide[119]. Indeed, a passage from *Athenaion Politeia* attests that the sellers (*pōletai*) "sold the properties of those who are in exile from the Areopagus", namely of those charged with voluntary homicide who did not await the verdict of the Areopagus going into voluntary exile[120]. There were some limitations to this right. Pollux says that self-exile was not allowed for a charge of parricide, but it is not clear what his source is for this statement[121].

Antiphon expressly said that the faculty of not standing trial was a custom common to all Greeks, but he limited its application to homicide cases only. This can

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VOLONAKI 2000, 153, 157-158 has suggested that it was introduced in the last third of the fifth century, shortly before the start of the trial. For the idea that *androphonoi* could be considered as *kakourgoi* see HANSEN 1976, 47, but against this view see GAGARIN 2011, 317 n. 52.

117 It has been suggested (PHILLIPS 2008, 125) that recourse of *apagogē* here was intended to prevent the defendant from fleeing Athens.

118 Antiph. 5.13 (translated by M. Gagarin).

119 Evidence of this can be found in Antiph. 4, since the defendant who did not stand trial was charged with voluntary homicide, and in a passage from Pollux (8.117), where he mentions this right in connection with *dikai phonou* judged by the Areopagus. Cfr. MACDOWELL 1963, 117; GAGARIN 1981, 111-115 and ID. 1989, 27 n. 31; VOLONAKI 2000, 154; PHILLIPS 2016, 352.

120 Arist. *Ath. Pol.* 47.2 with MACDOWELL 1963, 116; RHODES 1993, 554; HARRIS 2012, 292. Cfr. Lys. 1.50; Dem. 23.69; Poll. 8.99. Confiscation of property for those convicted of voluntary homicide is also attested by Dem. 21.43.

121 Poll. 8.117. But TODD 2016, 335-336 n. 58, is rather sceptical of the reliability of the lexicographer.

be deduced by the fact that immediately after explaining his point the speaker praises the laws on homicide, which are defined as the most beautiful and the most sacred of all laws by virtue of their antiquity and immutability[122]. However, it cannot be excluded that the same rule also applied to cases other than homicide, at least in principle. The other option available to the accused, i.e. not to appear at trial when summoned and to lose the case *in absentia,* is more difficult to assess[123]. While the possibility of abandoning a trial after the first speeches of the parties is widely attested, the indication that the defendant could wholly escape a trial is referred to only in the speech *On the Murder of Herodes*, where the accused is a foreigner. Thus it could be suggested that the defendant might here be referring to his theoretical option of remaining in his home and ignoring the summons rather than to an option allowed him by law. This is not to say that in the case of a *dike phonou* the *contumacia* was unlawful and thus sanctioned, but rather that the scanty evidence we have does not allow us to say anything for sure about this issue.

Instead, it is unlikely that the right to wholly avoid trial or to abandon it after the first speeches was also valid in cases of impeachment. In *eisangeliai* a guarantee was always required that the defendant would appear in court. The *probouleuma* issued by the Council specified whether the defendant should provide for sureties or should be arrested, but for serious charges, such as treason or an attempt to overthrow the democracy, provision of sureties was not allowed and the accused was held in custody[124]. Preventive detention for those who were awaiting trial is well attested and indicates the will to prevent the accused from escaping[125]. These differences in prosecuting homicide and crimes chargeable under *eisangelia* are understandable when we think of the distinction between private and public actions, that is between *dikai* on one side and *graphai* on the other side (which include *eisangeliai* as procedures deeming it a serious threat to public order). Although it is difficult to make a clear distinction in ancient Greek law between the public and private sphere, given the difficulty of keeping the rules of social life apart from political governance, prosecution for homicide is an emblematic instance of such distinction, since,

122 Antiph. 5.14.
123 Antiph. 5.13: ἴσον ἦν μοι καὶ προσκληθέντι μὴ ἐλθεῖν.
124 Dem. 24.144-145. The Eleven had to bring the defendant to trial within 30 days from his arrest (Dem. 24.63).
125 See *supra* p. 116 n. 6.

contrary to what we would expect, it was entrusted not to the state, but to the victim's relatives.

These reflections lead to the conclusion that the legislator took into consideration as much the faculty of abandoning a trial during its course as the issue of *contumacia* not only for homicide trials, but even more so for serious crimes whose impact on the public sphere was evident. What I intend to show is that in the latter case none of these options were permitted.

4.

We have said that defendants in *eisangelia* trials often went into exile in order to avoid the death penalty. Yet such behaviour, despite the frequency with which it occurred, was considered as unlawful. Some clues can support this statement.

A fragment of Aristotle's *Constitution of Pellene* attests to the existence of μαστῆρες[126]. These were a sort of professional 'impounders', officers charged to search for the property of those exiled for life (ζητηταὶ τῶν φυγαδευτικῶν χρημάτων). It can be suggested that the purpose of seeking the property of exiles was to confiscate it. Of course from Aristotle it is possible only to speak of them at Pellene, but we know, from Hypereides' lost speech *Against Pancalus,* of which only one fragment survives, about officers with the same name operating in Athens[127]. A more striking parallel can be found in a passage of the fourth epistle of Themistocles and addressed to Abronicus, in which the former complains about the fury of his fellow citizens, who added a death sentence to exile resulting from ostracism. Furthermore, Themistocles reports the presence of Athenian investigators (μαστῆρες Ἀθηναίων) sent to Argos to find him[128]. This data allows us to affirm that the μαστῆρες did not limit themselves to hunting down 'undeclared' goods in their homeland, but extended their impounding efforts beyond the exile's native country[129].

An important issue to take into consideration is the placing of defendants who did not face trial being considered like outlaws. This is a point on which I disagree with Hansen. While he postulates that exile in the sources means that a death penalty *in absentia* was commuted into exile, I suggest that such commutation makes no sense

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126 Arist. 8.44 fr. 567 (Rose) = Phot., *Lex. Seg. s.v.* μαστῆρες.

127 Hyp. fr. 133 Jensen. The name Pancalus is quite rare. For the identification of this Pancalus with the one mentioned in the speech *Against Athenogenes*, see WHITEHEAD 2000, 293.

128 Them. *Epist*. 4.16.

129 Cfr. Dem. 23.44-45.

in Attic law; on the contrary, I argue that the main penalty continued being death, which was never cancelled. Moreover, the relevant judicial authority, which in this instance had a good chance of being the Assembly[130], could add to it outlawry and other supplementary penalties such as hereditary *atimia* and razing of the house. In this regard I shall examine some aspects of the *eisangeliai* against the Hermocopids and Thessalus' *eisangelia* against Alcibiades[131]. In the first instance different prosecutors, among whom we know that Pythonicus, Speusippus and Thessalus were included, impeached many Athenian citizens and at least a metic after denunciations both to the Assembly and to the Council[132]. The defendants were charged with profaning mysteries as well as mutilating the Hermai. Of the individuals accused, most left the country before trial. Only Polystratus and Leogoras remained to stand trial. The former was arrested and remained in custody till his trial day; then he was condemned to death and executed.

The latter brought a *graphē paranomōn* against his prosecutor Speusippus on the basis of the unlawfulness of his proposal[133]. All the other defendants fled Athens and were condemned to death and confiscation of property by default[134]. Moreover, Thucydides states that 'bringing the accused to trial executed as many as were apprehended, and condemned to death such as had fled and set a price upon their heads[135]. My point is that if voluntary exile had been lawful, it would not have been possible to place a price on the defendants' heads. The same can be said about confiscation of property, which was added to the Hermocopids, who escaped trial after their flight[136]. If their departure from Athens was legal or somehow was connected to a lawful form of exile, this measure would not have been applied. In

130 I follow the view of YOUNI 2018, 152: 'A decree of outlawry could also be issued after a normal trial had taken place which had resulted in a death sentence in those cases when the convict had escaped, as in the case of Alcibiades and the other persons convicted in the numerous *eisangeliai* of 415'.

131 These and other trials dating back to the years of the Peloponnesian War have been examined recently by YOUNI 2018, 143-146 with regard to outlawry.

132 Cfr. HANSEN 1975, 77-82, who has recorded the names of more than fifty citizens in two different waves of indictments.

133 And. 1.17, 22.

134 Thuc. 6.61.7.

135 Thuc. 6.60.4: τοὺς δὲ καταιτιαθέντας κρίσεις ποιήσαντες τοὺς μὲν ἀπέκτειναν, ὅσοι ξυνελήφθησαν, τῶν δὲ διαφυγόντων θάνατον καταγνόντες ἐπανεῖπον ἀργύριον τῷ ἀποκτείναντι.

136 And. 1.13, 47; *IG* I³ 421-430; *SEG* 13.17, 89, 94. For the authenticity of Andocides' lists on the names of individuals involved in the affair of the Hermai and in the parody of Mysteries see HARRIS 2013b, 159-160.

fact, both ostracism and lawful exile were not accompanied by confiscation of property.

The same holds true for Thessalus' *eisangelia* against Alcibiades[137]. A passage from Plutarch's *Life of Alcibiades* preserves the indictment (ἔγκλημα)[138] with the charge of impiety (*asebeia*) towards the two goddesses for having parodied the mysteries of Eleusis[139]. Although some sources emphasize Alcibiades' status of *phygas*[140], the sequence in which the facts are narrated shows that the death penalty was a consequence of his failure to appear at his trial. An important point is what Diodorus says about the procedural *iter* followed in the case of undefended actions (ἐρῆμαι δίκαι):

> 'The Athenians, after having transferred to the court the names of Alcibiades and the other fugitives, condemned them to death by default[141].

If Diodorus is right, once it was clear that Alcibiades and his comrades would not returned to Athens, the Athenians brought the names of the fugitives to the law-court for a trial by default. We do not know if in this kind of trial the judges were expected to hear the prosecution's speech before voting or if they limited themselves to voting after hearing the charge against the defendant included in the indictment[142]. The law-court established the death penalty and confiscation of property[143]. Besides this, it is possible to say that additional penalties were added by the Assembly, which

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137 On the reasons for considering the procedure used against Alcibiades an *eisangelia* originated from Diopithes' decree (Plut. *Per*. 32.1) see LODDO 2019a, 19-24. *Contra* FILONIK 2013, 41, who believes it was a *graphē asebeias*.

138 In the *eisangelia* procedure the plaint could be called both *enklēma* and *eisangelia*. Cfr. HARRIS 2013b, 143 n. 3.

139 Plut. *Alc*. 19.2-3; 22.4-5. Scholars have generally considered this indictment as authentic (FROST 1961; STADTER 1989, LXIX-LXXI; PELLING 2000, 27) with rare exceptions (HARRIS 2013b, 148 n. 21; FILONIK 2013, 41 n. 107) and derived from a documentary source, probably Craterus' collection of decrees (FARAGUNA 2006, 199-205; 2016; 2017, 27-28, but for a more cautious approach see ERDAS 2002, 18-23, 29 ss., 303-304). Craterus' work included both indictments and trial judgments (*dikai*), as shown by Phrynicus and Antiphon's trials (FARAGUNA 2017, 28). Finally, we know that *eisangelia* indictments were stored in the archives of the Council and the Assembly. On this point see SICKINGER 1999, 131-133 and 240 n. 100; HARRIS 2013b, 154-160, also for all types of judicial documents kept on file. It was in this way that Craterus consulted such material (FARAGUNA 2017, 28).

140 Thuc. 7.61.7; Isoc. 16.45; Dem. 21.146. On Demosthenes' alterations of the case for resembling that of Midias see HARRIS 2013b, 153-154 n. 38.

141 Diod. 13.5.4: οἱ μὲν οὖν Ἀθηναῖοι παραδόντες δικαστηρίῳ τοῦ τε Ἀλκιβιάδου καὶ τῶν ἄλλων τῶν συμφυγόντων τὰ ὀνόματα δίκην ἐρήμην κατεδίκασαν θανάτου.

142 The anonymous reviewer suggests to me that the second hypothesis is more likely.

143 Death penalty: Thuc. 6.61.7; Diod. 13.5.4; Nep. *Alc*. 4.5. Confiscation of property: Plut. *Alc*. 22.5; *IG* I^3 421-430.

'decreed that his name should be publicly cursed by all priests and priestesses'[144]. Likewise the Assembly issued a decree that Alcibiades was to be considered an outlaw and that accordingly his name was inscribed on the bronze stele[145].

Alcibiades' irregular status is also proven by the extradition request the Athenians made to the Argives[146]. According to his son, the speaker of Isocrates' speech *On the team of horses*, Alcibiades sought refuge at Argos, but was forced to leave when some Athenian ambassadors had gone to Argos to ask for his extradition[147]. The Athenians, therefore, did not tolerate Alcibiades' voluntary exile. This is shown by his behaviour once he returned to Athens. For fear of his enemies, he did not disembark immediately, but he looked around to see if any of his friends were present. And only when he saw some relatives and friends did he disembark, taking care to avoid being touched[148]. This is why, despite the safe-conduct he received, he was aware that until the sentence against him was formally annulled anyone could have arrested him and taken him to the Eleven, as he was also considered an outlaw[149].

As we see for the Hermocopids, there was in Athens the practice of setting bounties on those who escaped trial. This could be a way to increase the likelihood of enforcing the sentence issued by the court[150]. Although our information about them is quite episodic and most evidence concerns famous personalities, some interesting cases can be mentioned. Both the Athenians and the Lacedaemonians, for example, hunted down Themistocles. When he was already in exile because of ostracism for his collaboration with Pausanias, the Athenians issued an arrest warrant against him and instructed some emissaries to find him and arrest him wherever he was[151]. We have no information about the identity of those Athenians sent to seek out Themistocles, whether they were magistrates or ordinary citizens paid for this task. This episode might be correlated with what is reported in the abovementioned epistle credited to Themistocles: were these emissaries in some way related to the Athenian seekers who

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144 Plut. *Alc*. 22.5. Diod. 13.69.2; Nep. *Alc*. 4.5.

145 Inscription of his name on a stele: Isoc. 16.9; Diod. 13.69.2; Nep. *Alc*. 4.5.

146 For extradition of exiles and refugees see LONIS 1988.

147 Isoc. 16.9. For discussion on plausibility of this version see LODDO 2019a, 26-27 n. 70.

148 Xen. *Hell*. 1.4.18-19; Diod. 13.69.1.

149 For an attempt to reconstruct the procedure which those sentenced to death and outlawry *in absentia* had to follow in order to return home, see *ultra* pp. 147-149.

150 HARRISON 1971, 185-186.

151 Thuc. 1.135.3.

went to Argos to arrest him?[152]. It is also known that even the Persians promised a reward for Themistocles' capture. In this regard Plutarch says that, having sought refuge in Cuma, he noticed on arrival at the port that there were several men on the beach ready to capture him. Among them he distinctly recognized Ergoteles and Pythodorus[153]. It was the enormous reward of two hundred talents promised by the Persian King to whoever captured him, dead or alive, that attracted these men. They probably were Athenians, since Themistocles could recognize them at once, but it is impossible to say whether they acted in an official capacity, whether they were professional exile hunters or whether they were ordinary citizens, attracted by the rich reward[154].

A similar fate struck the poet Diagoras of Melos. Although Hansen has not included this trial in his catalogue, it is likely that it was an *eisangelia*[155]. By Diopithes' decree, probably dating back to the years 440-430, it was proposed to indict 'those who did not believe in the gods or who taught on celestial phenomena'[156]. By this decree the scope of the *eisangelia* may have been extended to crimes related to the religious sphere. Diagoras was judged *in absentia*, as a result of his having fled Athens for Pellene in Achaia, likely frightened by the hostile sentiments of the people. He can be considered indeed a fugitive who left Attica to escape trial. The Athenians did not limit themselves to sentencing him to death, but when they learned that Diagoras was in Pellene they asked for his extradition[157]. Faced with Pellenes's refusal, they announced a reward of one talent for whoever killed Diagoras, and two talents for whoever brought him back alive to Athens. The episode must have had a certain resonance, as shown by the fact that Aristophanes, in his comedy *The Birds*, also mentions him[158]. Another important reference to this case can be found in the speech *Against Andocides*:

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152 Them. *Epist*. 4.16.

153 Plut. *Them*. 26.1.

154 We know about individuals who hunted after exiles by profession. The best known was Archias of Thurii, the so-called 'hunter of exiles' (φυγαδοθήρας). Cfr. Plut. *Dem*. 28.3; [Plut.] *X orat*. 846f.

155 MACDOWELL 1978, 201; ERDAS 2002, 202-204; WINIARCZYK 2016, 56 n. 73.

156 Plut. *Per*. 32.2. On Diopithes' decree see LODDO 2019a, 23-24.

157 Craterus *FGrH* 342 fr. 16a = *schol. Ar. ran*. 320; fr. 16b + Melantius *FGrH* 326 fr. 3 = *schol. Ar. Av*. 1073.

158 Ar. *Av*. 1073. Cfr. ERDAS 2002, 197-207.

> 'You should not set free those criminals you have at hand, while seeking to capture those who are in exile, proclaiming by herald that you will give a talent of silver to anyone who arrests or kills them. Otherwise, it will seem to the Greeks that you are more keen to show off than to punish'[159].

The ban against Diagoras was accompanied by the inscription of his name on a bronze stele. This corresponds to the widespread use in Athens to engrave on a stele the names of the dishonoured and their confiscated property[160]. Pollux reports that the list of property confiscated from those who had committed acts of impiety against the goddesses was found in the stele of Eleusis (ἐν δὲ ταῖς Ἀττικαῖς στήλαις, αἳ κεῖνται ἐν Ἐλευσῖνι)[161]. It is striking that the term στηλίτης, whose meaning is literally 'written up on a stele', had the specialised meaning of 'dishonoured'[162].

Another clue that voluntary exiles of this kind were to be considered as fugitives, and that their behaviour was considered unlawful, is the existence of a law prohibiting citizens from helping exiles by giving them passage on Athenian ships. This ban, which is implicit in Thucydides narrative about Themistocles' escape to Ionia, emerges more clearly from a long passage of the speech *Against Policles*. The speaker says that Callistratus of Aphidna, who was in exile to avoid standing trial, tried to join the general Timomachus, to whom he was related. He gave a messenger letters for Timomachus, asking him to send a trireme in order to reach him. Later the speaker was approached by Callicles of Tria, who revealed to him that without his knowledge he was about to transport in his ship an exile, whom the Athenians had twice condemned to death. However, the law forbade doing it. The speaker, being aware of the risks he was about to face, told Callippus that he had no intention of

159 [Lys.] 6.18. Cfr. BAUMAN 1990, 67, TODD 2007, 453. See also YOUNI 2018, 145.

160 And. 1.51; Lyc. 1.117; Plut. [*Mor*.] 834b. It is noteworthy that the polis' decision to eliminate all physical traces of the convicted traitor - for the ways in which this happened see *supra* pp. 125-127 - went hand in hand with the practice of publicizing his infamy by inscribing his name on a bronze stele. Cfr. HELMIS 2007, 267-268; QUEYREL BOTTINEAU 2010, 277-278.

161 Poll. 10.97.

162 Some examples: Isoc. 16.9, who uses it with regard to Alcibiades; Dem. 9.45 on Arthmius of Zelea; Arist. *Rhet*. 2.24.1400a 33-34, on Thrasybulus of Collytus' allegation against Leodamas. The latter would have been a στηλίτης, but he would have ordered his name on the stele of traitors (here paraphrased as 'his hostility towards the demos') to be taken down under the Thirty. Cfr. Lys. 26.13, 21-24.

transporting Callistratus, as the laws did not permit taking on an exile and punished the transgressor with the same penalties as those in flight[163].

But the most important evidence of a different treatment of those exiled in consequence to a court sentence, as opposed to those who escaped trial by fleeing into exile, can be found in an extract from the homicide law in the speech *Against Aristocrates*. I report the law on the persecution and seizure of a murderer included in the speech and Demosthenes' subsequent paraphrase of it:

> (44) Read the next law.
> [Law] *If anyone pursues or seizes and carries away beyond the border any of the murderers in exile whose goods are not confiscated, he is to owe the same penalty as one who did this in our own territory*[164].
> Here is another law, men of Athens, which is humane and good. This man has obviously violated this law in a similar way. (45) "If anyone [pursues or seizes] a murderer in exile," it states, "whose goods are not confiscated." He means those who have left the country on a charge of involuntary homicide. What makes this clear? His use of the phrase "who has gone abroad" and not "who has gone into exile" and the qualification "whose goods are not confiscated" because the property of those who commit deliberate homicide is confiscated[165].

This law forbade pursuing, seizing, and carrying away murderers in exile across boundary lines; it established for the transgressor the same penalties as if these acts had been committed in Attica, that is as if they had been committed against a citizen *epitimos* who lived in Attica[166]. It must be said that the meaning of the law is debated. Some scholars have held that it referred to the arrest and the forced repatriation of convicted murderers[167]; others have argued that the law focussed on the property of exiled murderers[168], while others have claimed that it protected the exiles from

[163] Dem. 50.46-49. The existence of such a law is implicitly confirmed by Themistocles' fear when he embarked on an Athenian ship during his flight to Ionia (Thuc. 1.137.2).
[164] This document also is part of the stichometric edition. See CANEVARO 2013, 58-61.
[165] Dem. 23.44-45.
[166] Dem. 23.46: ἐὰν δέ τις παρὰ ταῦτα ποιῇ, τὴν αὐτὴν ἔδωκεν ὑπὲρ αὐτοῦ δίκην, ἥνπερ ἂν εἰ μένοντ᾽ ἠδίκει [οἴκοι], γράψας ταὔτ᾽ ὀφείλειν, ἅπερ ἂν οἴκοι δράσῃ.
[167] MACDOWELL 1963, 121-122; PHILLIPS 2008, 64, 79.
[168] GAGARIN 1981, 60 n. 83; CANEVARO 2013, 61.

enslavement[169]. These different views are motivated by the distance we can see between the text of the law in Dem. 23.44 (and Demosthenes' comments at § 45), where the expression is ἐλαύνῃ ἢ φέρῃ ἢ ἄγῃ, and what Demosthenes said at § 46, where the expression is simply ἐλαύνειν καὶ ἄγειν. It is important to stress that the legislator was concerned with specifying to which category of murderers this rule applied, as is evident from use of the relative clause ὧν τὰ χρήματα ἐπίτιμα. However, the difficulty of interpretation does not seem insurmountable, given the convergence between the text of the law and Dem. 23.45. Thus, I believe that the law focussed on the exiled murderer and not his property, which is mentioned only in the relative clause, and that those exiled for unintentional homicide were protected from the risk of enslavement[170]. It is true, however, that, in addition to revenge on the part of the victim's family, one of the reasons why the exile could be pursued was the desire to take possession of his property, as Demosthenes implied.

This provision applied only to those convicted of unintentional murder. While the text of the law is not so explicit in referring to them, Demosthenes is clear about this. He says that the expression ἐάν τίς τινα τῶν ἀνδροφόνων τῶν ἐξεληλυθότων, ὧν τὰ χρήματα ἐπίτιμα indicates those who left the country following a conviction for unintentional homicide[171]. It is remarkable that Demosthenes draws attention to some expressions that are important for understanding the implications of the law. "Τῶν ἐξεληλυθότων» designates those who went into exile after a formal conviction[172], since it contrasts with "φευγόντων", which means " those who fled into exile" without a court sentence. It is evident here that while ἐξέρχομαι indicates those sentenced to exile, φεύγω means "to flee", "to abandon the country of origin"[173].

[169] HARRIS 2018, 43-44 n. 72.

[170] On this point I agree with HARRIS 2018, 43-44 n. 72.

[171] We should also consider what Demosthenes says in § 40, i.e. the legislator forbade the murderer from any place where the victim was wont to frequent in his lifetime.

[172] From the use of the term ἀνδροφόνος we can infer that the law in Dem. 23.37 and Demosthenes' paraphrase of this law at §§ 38-43 only referred to a convicted murder. Cfr. GAGARIN 1981, 59. This is confirmed by what Demosthenes says at § 38: ἐκεῖνος ᾤετο τὸν πεφευγότ᾽ ἐπ᾽ αἰτίᾳ φόνου καὶ ἑαλωκότα, ἐάνπερ ἅπαξ ἐκφύγῃ καὶ σωθῇ, εἴργειν μὲν τῆς τοῦ παθόντος πατρίδος δίκαιον εἶναι, κτείνειν δ᾽ οὐχ ὅσιον πανταχοῦ, where ἑαλωκότα means "convicted".

[173] This is not to say that Demosthenes always distinguished in this speech between ἐξέρχομαι and φεύγω in this way, but that he did it when he commented the wording of the law. On the ambiguity of the meaning of φεύγω/φυγή see GRASMÜCK 1978, 20-29; SEIBERT 1979, 2-3; YOUNI 2001, 130; FORSDYKE 2005, 9-11; GAERTNER 2007, 2-3; PEPE 2012, 22-24.

This piece of information is consistent with what we know about the penalty imposed on intentional murderers[174]. But what is interesting here is the opposition between exiles for unintentional murder, who were legitimately in exile following a court verdict, and intentional murderers, who escaped the death sentence by going into exile. As we have seen, the law allowed anyone accused of homicide to go into exile after making the first of his two speeches. For this reason recourse to exile by someone accused of intentional homicide was lawful and no one could prevent him from choosing this option. Nevertheless, what we can infer from this law is that exile as a practical alternative to the death sentence for intentional murder was not comparable to the penalty of exile for those convicted of unintentional murder. While it is debated whether even those accused of intentional homicide who abandoned trial continued to be protected in exile, like unintentional murderers, some features seem to attest a clear distinction between the two legal situations.

First, the property of the intentional murderer who went into exile voluntarily was confiscated[175]; second, the law preserved in Dem. 23.44 attests that the Athenian law protected any murderers in exile, beyond its borders, from the risk of enslavement, while this protection was not accorded to those who had fled into exile voluntarily; lastly, pardon (*aidesis*) could be theoretically granted both to intentional and unintentional murderers who underwent the trial[176], but it was less likely that those who escaped the death penalty by going into exile would obtain it. This is evident from the fact that their property was confiscated at home and, if we are right in our interpretation of the law in Dem. 23.44, was exempt from any protection abroad[177]. Besides, it is reasonable to believe that the confiscation of property would have made it more difficult for intentional murderers to negotiate a pardon with the victim's family[178].

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174 Lys. 1.50; Dem. 21.43; Arist. *Ath. Pol.* 47.2; Poll. 8.99.

175 The penalties imposed on those found guilty for intentional murder were death and confiscation of property; if the defendant did not stand trial he was sentenced to permanent exile (ἀειφυγία) and confiscation of property. Cfr. MACDOWELL 1963, 115-117 and *ultra* n. 178. However, see GAGARIN 1981, 112-115 for the view that exile was a penalty for intentional homicide.

176 PEPE 2012, 71 n. 142 with further references.

177 It is tempting to connect this provision with the practice of sending officials abroad to search for the property of those exiled for life (ζητηταὶ τῶν φυγαδευτικῶν χρημάτων), for which see *supra* p. 138 n. 126.

178 For this consideration see PEPE 2012, 76-77. Moreover, most scholars have considered *aeiphygia* a definitive condition (MACDOWELL 1963, 113; WALLACE 1989, 125, 258 n. 119), which was "irreversibile" (PEPE 2012, 77), a "punishment virtually equivalent to death"

We can draw some conclusions. In Athens being prosecuted by the *eisangelia* procedure must have inspired fear in a defendant, regardless of whether he was innocent or guilty. While the risk for a prosecutor was minimal, a defendant was likely to be condemned to death and executed. For these reasons prosecutors were in the habit of resorting to *eisangelia* even in those cases in which Attic law provided for alternative procedures, such as public actions. Considerations about the frequency with which prosecutors used *eisangelia*, with the high risk to ending in a conviction, must have advised defendants against standing trial and, instead, choosing to go into a voluntary exile. Scholars have considered this particular form of exile as lawful or a tolerated practice. But the frequency of an action says nothing about its legitimacy. There may well have been some tolerance shown towards an increasingly widespread practice, especially if defendants were not so prominent or in cases that had not caused any particular uproar. Nevertheless, the evidence I have presented in this paper shows that such behaviour was never considered lawful or in conformity with the law.

This paper has shown that recourse to self-exile in order to escape the death penalty was common to defendants in trials for voluntary homicide and in *eisangelia* trials. But while those accused of homicide could abandon trial and go into exile after giving their first defence speeches, this option was not available for defendants in *eisangeliai*. In the first instance, if a defendant left the trial, it was tantamount to admitting his guilt; it is reasonable to assume that the court voted immediately after hearing the second prosecution speech and merely acknowledged the guilt of the defendant. As concerns *eisangelia* trials, ancient evidence enables us to see only what happened to defendants who did not stand trial. In the case of the ἔρημος δίκη, when a defendant in a capital case failed to appear at trial, the court always opted for the sternest penalty in the statutes, namely capital punishment. It was up to the Assembly to decree additional penalties, such as confiscation of property and outlawry, since they were *ep'andri* measures. All these penalties were tantamount to making the defendant who had evaded Athenian justice an outlaw. The inscription of the names of those condemned by default on the stele of the infamous, which was placed on the Acropolis, seems, in this sense, the clearest proof of the illegality of this conduct.

One wonders at this point if and in what way an individual sentenced *in absentia* could return to Athens. Was a formal annulment of the sentence required? Or

(HARRIS 2018, 41 n. 66; cfr. FORSDYKE 2005, 11: "is not surprising that the penalty for intentional homicide is variously designated as death, ἀτιμία, ἀειφυγία, exile for life").

was the original trial reopened, as in the case of the *anadikos dikē*[179]? Despite our scanty evidence, it seems reasonable to exclude the latter hypothesis. In order to return to Athens, those sentenced to capital punishment *in absentia* had to obtain above all a safe-conduct; otherwise, being outlaws, they could suffer summary arrest or be killed with impunity. What happened to Callistratus of Aphidna is indicative. He returned to Athens from exile without a safe-conduct, maybe on the basis of some reassurances received from those who supported his return, but was executed. Alcibiades' caution is equally suggestive[180]. When he arrived at Piraeus, after a formal recall, he did not disembark before making sure that his friends and relatives were among the crowd that had gathered at the harbour to welcome him[181]. Once he disembarked, he was escorted by his *epitēdeioi* to the Assembly. They made sure that no one touched him, in the fear that someone would resort to summary arrest against him. At the Assembly he delivered his defence speech, in which he said that he had committed no act of impiety and that he had been the victim of injustice. Others spoke after him in the same terms. At that point the Assembly approved a decree advanced by Critias on Alcibiades' return[182]. The decree provided for the granting of a golden crown, the appointment of Alcibiades as a *stratēgos autokratōr*, the return of the confiscated goods, and the withdrawal of the curse against him by Eumolpides and Cerices. Nepos and Diodorus add that the stelae on which the sentence and the other measures against Alcibiades had been inscribed were destroyed and thrown into the sea[183]. Notwithstanding all the limitations inherent in the generalization of a particular case for reconstructing the procedure, it must be admitted that this represents the most likely scenario for those trying to return to Athens. Only a formal decree of the Assembly could have overturned outlaw status.

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179 Although the rule of the *ne bis de eadem re* (Dem. 24.54) was strictly observed in Athens, in some particular circumstances it was possible to reopen the case (*schol. Plat. Leg.* 937d: ἐπὶ μόνης ξενίας καὶ ψευδομαρτυριῶν καὶ κλήρων), especially when it was connected with the conferment of false evidence, cfr. HARRISON 1971, 191-192 and more extensively BEHREND 1975.

180 Ancient accounts stress Alcibiades' fear once he arrived in Athens: φοβούμενος τοὺς ἐχθρούς (Xen. *Hell.* 1.4.18); ἀλλ ἐκεῖνος καὶ δεδιὼς κατήγετο (Plut. *Alc.* 32.2).

181 We know of Alcibiades' return from the accounts of Xen. *Hell* 1.4.12-19; Diod. 13.68.3-69.2; Nep. *Alc.* 6; Plut. *Alc.* 32-33.

182 Plut. *Alc.* 33.1. It was the second attempt to recall Alcibiades after the one that occurred in 411, when the Athenians decreed that he and his comrades in exile could return to Athens (Thuc. 8.97.3); according to Diod. 13.42.2 Theramenes was the proposer.

183 Diod. 13.69.2; Nep. *Alc.* 6.5.

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