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«APAGOGE» IN HOMICIDE CASES ¹

1. INTRODUCTION

Laws constitute a favourite topic in Greek oratory. They are exploited in a wide range of ways according to the rhetorical needs of the speeches. Examining the diverse rhetorical appeals to the content and value of laws, as found in forensic orations can help us to acquire a deeper understanding of the Athenians' attitude toward their laws. The following discussion will explore particularly the Athenian views on the nature and continuity of homicide law.

Our Athenian sources praise the homicide laws as the finest of all for having three qualities – religious foundation, antiquity, and stability. This attitude to the homicide laws is attested over a period of almost a hundred years, from the last quarter of the fifth century until the middle fourth century. An example from the earlier period, dating at 420s, is found in Antiphon's speech, *On the Murder of Herodes*, where the defendant Euxitheos emphasizes the value of the

¹ The idea and some material for the present paper derives from my Ph.D. thesis submitted to Royal Holloway Bedford New College, University of London, with the title: *A Commentary on Lysias' speeches 13 and 30* (1998), and particularly from the introduction and commentary on speech 13, *Against Agoratos*. I wish to express my gratitude to my supervisor, Professor Chris Carey for the helpful and profitable discussion and comments which resulted in addressing the issue of *apagoge* as a homicide procedure into the present form. I would also like to thank Dr. Michael Edwards and Dr. Stephen Todd for their useful comments on the subject during the examination of my Ph.D. thesis, which initiated my current research. Finally, many thanks are also addressed to Dr. Lene Rubinstein for repeated discussions on the *apagoge* procedure, and to Professor Alberto Maffi for his valuable comments.

homicide laws while he is accusing his opponent of inventing new laws for homicide cases:

καίτοι τούς γε νόμους οἱ κείνται περὶ τῶν τοιούτων, πάντας ἂν οἶμαι ὁμολογήσαι κάλλιστα νόμων ἅπαντων κείσθαι καὶ ὀσιώτατα. ὑπάρχει μὲν γε αὐτοῖς ἀρχαιοτάτοις εἶναι ἐν τῇ γῆ ταύτῃ, ἔπειτα τούς αὐτοὺς νόμους ἀεὶ περὶ τῶν αὐτῶν, ὅπερ μέγιστόν ἐστι σημεῖον νόμων καλῶς κειμένων. (Ant. 5.14)²

Yet everyone would agree, I think, that the laws which deal with such cases as this are the finest and most hallowed of all laws. They have the distinction of being the oldest in this country and also have always remained the same concerning the same matters; and this is the surest sign of laws well made.³

The same idea that the homicide laws were distinct from all the other laws due to their divine content, and had thus remained unchanged until the middle fourth century, is also found in the speech composed by Demosthenes in 352, *Against Aristokrates*⁴; the speech was delivered in a *graphe paranomon* brought by a person called Euthykles against Aristokrates for proposing a decree in favour of Charidemus of Oreus in Euboea. There is a comparable praise of the homicide laws in the extensive section, where Euthykles gives an account of all the institutions available in Athens for homicide cases (Dem. 23.70-79).

The homicide laws were said to go back to Drakon in the seventh century. In the sixth century Solon brought important innovations into the Athenian legal system, but left one single area unbounded, the homicide laws, which were preserved as they had originally been introduced by Drakon, and were ever afterward until the late fourth century referred to as Drakonian institution, in distinction from Solon's laws⁵. The origin of the homicide laws became obscure due to their great age, and thus they were also referred to as

² All citations from Antiphon's speech 5 (text and translation) used in this paper derive from Edwards (1985), pp. 30-66.

³ Cf. also Ant. 5.87-89 and 6.2-4 (the date of Antiphon's speech 6, *On the Choreutes*, is close to speech 5, probably 419).

⁴ For the divine origin of these laws, cf. Ant. 4.a2-3. b7; Edwards (1985), p. 76.

⁵ Cf. *Ath. Pol.* 7.1; Plut. *Sol.* 17; Bonner - Smith (1930), pp. 110-111; Stroud (1968), p. 76 n. 44; Gagarin (1981), pp. 21-29.

ancestral or divine⁶. During the last decade of the fifth century, when the Athenians decided to revise and publish all their laws, secular and sacred, the Drakonian homicide law was the first to be re-published in 409 (IG I³ 104.4-7) without any alterations made to it.

The Athenians wished to uphold the ancestral measures in matters of homicide cases. The traditional and usual process for homicide was the *dike phonou*, which was restricted to the victim's relatives⁷. Nevertheless, there was an alternative legal homicide procedure, *apagoge*, introduced in the second half of the fifth century and presumably in force until the middle fourth century. There seems to be a «doublethink»⁸ in the Athenians' conceptualization on homicide law; on the one hand they wished to keep the Drakonian homicide law unchanged for more than three centuries and on the other hand they extended the law through additional enactments.

The aim of this paper is to examine the co-existence of fixity and flexibility within the Athenian legal system, with particular reference to cases of homicide concerning the procedure of *apagoge*. Also, it will attempt to explain the use of *apagoge* against homicides, and its evolution from the second half of the fifth century until the early years in the restored democracy of 403.

⁶ Cf. Ant. 5.48; Dem. 23.70.

⁷ On the basis of the section of Drakonian homicide law (Dem. 43.57, IG I³ 115.20-23) prescribing that the prosecution is to be shared by «members of the phratry», scholars have disputed whether *dike phonou* was strictly initiated by the relatives of the victim and the master of a slave (cf. Hansen 1981, pp. 11-30; Kidd 1990, pp. 216-218) or, in exceptional cases, also by non-relatives (MacDowell 1963, pp. 17-18; Gagarin 1979, pp. 301-323). The evidence from Dem. 47.68-73, dealing with the legal process to be initiated for the death of a freedwoman by the *trierarchos* who was not a relative of hers nor her master, has been taken to support the latter view. Tulin (1996, pp. 21-54) offers a different interpretation of Dem. 47.68-73, pointing out that the *trierarchos* did not actually initiate a homicide case for the death of the freedwoman but intended to claim her as relative or slave under oath and then proceed with the prosecution against her killer; cf. MacDowell (1997), pp. 384-385.

⁸ «doublethink» is a term found in Orwell, 1984, to describe a mental process in which two contradictory notions are held simultaneously in the same mind.

2. «APAGOGE» AS A HOMICIDE PROCEDURE

Apagoge was a public action used against homicide along with other offences, such as theft (κλοπή), highway robbery (λωποδυσία), seizure of a person (άνδροληψία)⁹. As a public action, *apagoge* enabled *ho boulomenos* to bring a legal action for homicide. It involved the arrest of the offender, the written indictment of the charge to be approved by the Eleven, and the reference of the case to a *beliastic* court. Another similar type of procedure used against homicides was *endeixis* followed by *apagoge*. Hansen (1976, pp. 9-24) has argued plausibly that *endeixis* and *apagoge* could be two stages in the same process, where *endeixis* involved the formal indictment (καταγγελία) and *apagoge* the arrest of the killer (άπαγωγή)¹⁰. Generally in an *apagoge* the action of the arrest of the offender was connected with the legal term *ep'autophoroi*, catching the accused «in the act» or «with manifest proof of guilt». As will become clear (section 7 below), the condition of *ep'autophoroi* was also of legal importance in the *apagoge* actions against homicide.

Our evidence for homicide cases tried under the legal procedure of *apagoge* is rather poor, and therefore we are left to make only hypotheses about the establishment and use of the process.

Two homicide cases, separated from each other by at least twenty years, were unambiguous *apagoge* actions, Antiphon, 5, *Against Eu-xitheos* (section 3) and Lysias, 13, *Against Agoratos* (section 4). There are also two other but ambiguous cases of *apagoge*, the prosecutions against Menestratos (Lys. 13.56) and the murderers of Phrynichos (Lyk. 1.112) (sections 5-6). The ancient sources indicate the use of two forms of *apagoge* for homicide, *apagoge kakourgon* and *apagoge phonou*, in both of which *ho boulomenos* could arrest and take the killer to prison.

In *apagoge kakourgon* homicides were prosecuted and tried as *kakourgoi*. It is difficult to be sure whether murderers were formally classified as *kakourgoi*. In the law of *kakourgon*, only *kleptai*, *lopydytai*, and *andrapodistai* are explicitly defined as *kakourgoi*. But

⁹ For a full account of offenders subject to *apagoge*, cf. Hansen (1976), pp. 36-48.

¹⁰ The earlier and most common view of the distinction between *apagoge* and *endeixis* concerns the person who executed arrest, being the prosecutor in the former and the magistrate in the latter; cf. MacDowell (1963), p. 135; Harrison (1971), p. 229.

Hansen has argued plausibly that the specific offenders were listed merely as examples and that other offenders as well, including *androphonoi*, could have been subject to the *kakourgon* law¹¹. The question, of course, is how other offenders were included in the category of *kakourgoi*. It would seem improbable that they were automatically classified to as *kakourgoi* when prosecuted and brought to court for an alleged *kakourgema*. It would seem more likely that the *kakourgon* law was extended by the Athenians later in the fifth century to be applicable to other kinds of offences than those initially prescribed. The view that *androphonoi* could have been later classified to as *kakourgoi* is plausible based on the one case known to us of a murderer, Euxitheos, who was for the first time prosecuted as a *kakourgos* on the charge of homicide (see section 3).

Apagoge phonou was the legal action taken against a suspect of homicide who was going around in the holy places and *agora*. The evidence we have for this kind of action derives from Demosthenes' description in *Against Aristokrates*, 23.80, where he concludes with the last legal procedure available to homicide cases:

εἰ πάντα ταῦτά τις ἠγνόηκεν, ἢ καὶ παρεληλύθασι οἱ χρόνοι ἐν οἷς ἔδει τούτων ἕκαστα ποιεῖν, ἢ δι' ἄλλο τι οὐχὶ βούλεται τούτους τοὺς τρόπους ἐπεξιέναι, τὸν ἀνδροφόνον δ' ὄρῳ περιόντ' ἐν τοῖς ἱεροῖς καὶ κατὰ τὴν ἀγορὰν, ἀπάγειν ἔξεστιν εἰς τὸ δεσμωτήριον, οὐκ οἴκαδ' οὐδ' ὅποι βούλεται, ὥσπερ σὺ δέδωκας. κἀνταῦθ' ἀπαχθεὶς οὐδ' ὀτιοῦν, πρὶν ἂν κριθῇ, πείσεται, ἀλλ' ἐὰν μὲν ἀλφῶ, θανάτῳ ζημιωθήσεται, ἐὰν δὲ μὴ μεταλάβῃ τὸ πέμπτον μέρος τῶν ψήφων ὁ ἀπαγαγών, χιλίας προσοφλήσει.

Suppose that a man is ignorant of all the processes I have mentioned, or that the proper time for taking such proceedings has elapsed, or that for any other reasons he does not choose to prosecute by those methods; if he sees the homicide frequenting places of worship or the market, he

¹¹ Hansen (1976, p. 47; 1981, pp. 23-24) assumes that both *moichoi* and *androphonoi* are to be classified to as *kakourgoi* based on Aischines, 1.91, where *moichoi* and *androphonoi* are quoted together with *kleptai* and *lopodytai*. It is to be noted that Aischines aims to dissuade the jurors from acquitting Timarchos for lacking proof of the act of the crime, and he therefore stresses the law on instant execution of several criminals. Hence, the specific passage does not seem conclusive of the definition of *kakourgoi*; cf. Gagarin (1979), p. 320 n. 60. The phrase ἢ τῶν τὰ μέγιστα μὲν ἀδικούντων may suggest that Aischines does not deal only with *kakourgemata* but the most serious offences (τὰ μέγιστα). For the implausibility of the assumption that *moichoi* were regarded as *kakourgoi*, cf. Harris (1994), p. 182 n. 30.

may arrest him and take him to jail; but not, as *you* have permitted, to his own house or wherever he chooses. When under arrest he will suffer no injury in jail until after his trial; but, if he is found guilty, he will be punished with death. On the other hand, if the person who arrested him does not get a fifth part of the votes, he will be fined a thousand drachmas.¹²

Demosthenes does not refer to the particular procedure by name, but the wording τὸν ἀνδροφόνον ~ ἀπάγειν seems to indicate that we are dealing with an *apagoge* process prescribed for cases *phonou*. Given that the date of the speech is 352, we can assume that this kind of *apagoge* was in use in the mid-fourth century. Even though the arrest in an *apagoge phonou* involved primarily the offence of exercising rights from which a suspect killer would have been banned, the offence of murder was still essential and needed to be proved¹³.

Carawan (1998, pp. 362-364) has disputed that trespass on prohibited areas constituted «the substance or legal basis for the charge» in cases of *apagoge phonou*. He admits that according to Demosthenes' account (23.80) of the *apagoge phonou* procedure, such trespass was a requirement to the process, but argues that «it is doubtful whether the same condition applied to the turn of the century». He attempts to demonstrate with arguments *e silentio* that such a condition was not required in the case against Agoratos (399 B.C.), but fails to explain when and why this condition became a legal requirement to cases of *apagoge phonou*. Finally, based solely on his interpretation of the evidence from Lysias, 13, *Against Agoratos*, Carawan generalizes that trespass constituted the condition for arrest rather than the substance of the charge in *apagoge phonou* cases¹⁴.

As will be demonstrated in the following discussion, *apagoge phonou* was different from all other procedures available for homicide (i.e. *dike phonou*, *apagoge kakourgon*, *endeixis* and *apagoge*

¹² The text and translation are from Demosthenes, vol. III in the Loeb series.

¹³ For the distinction between *apagoge* applied to those accused and proclaimed by the Basileus as murderers and were thereafter found in prohibited areas, and this type of *apagoge* (Dem. 23.80) applied to suspect homicides who had not been previously accused of murder, cf. Hansen (1976), p. 99 ff.

¹⁴ Further on Carawan's view concerning the nature of charge in an *apagoge phonou* case, see below section 4.

kakourgon), in that it alone did not directly involve the homicide charge; it was so used in the one and most plausible *apagoge phonou* case we know of – the case against Agoratos – as to evade the Amnesty oaths which prevented the prosecution of any homicide case that was not committed *autocheiriai*, «with one’s own hands» (see section 4). It is therefore more than likely that the actual charge in the whole of an *apagoge phonou* action, including the arrest and the trial, was the trespass on prohibited areas, as Demosthenes’ account suggests.

Apagoge was introduced into Athenian homicide law in the second half of the fifth century, as will be shown below in section 3. It was a public action and as such was alternative to the *dike phonou*, enabling other persons than the victims’ relatives to initiate a prosecution against homicide.

Compared to the traditional measures of a *dike phonou*, *apagoge* offered some advantages for a homicide prosecution, regarding the time that one could initiate it, the lack of the oath-taking proceedings, the court before which it was heard, and finally the conditions that secured the offender’s presence from the beginning of the prosecution until the completion of the trial. As an institution used in homicide cases, *apagoge* was undoubtedly an innovation in the homicide law. It is worth examining to what extent this was an important change and how it did occur within the Draconian homicide laws, despite the Athenians’ belief of those laws being kept unchanged throughout three centuries. Also, one needs to examine why there were two distinct forms of *apagoge* for homicide cases, the *apagoge kakourgon* and *apagoge phonou*. The existence of these two different forms of *apagoge* seems to suggest that we are dealing with a rather complex change and development of the homicide laws. For our better understanding some answers can be given through a detailed analysis of the few *apagoge* cases for homicide known to us.

3. ANTIPHON, 5, «AGAINST EUXITHEOS» («ENDEIXIS-APAGOGE KAKOURGON»)

Euxitheos, a Mytilenean, was charged with the murder of Herodes, an Athenian citizen, and prosecuted by Herodes’ relatives several years

after the alleged offence took place. The procedure used was *endeixis* followed by *apagoge kakourgon*, within the period 420-417¹⁵.

According to Antiphon's account, as presented by the speaker, the background for the trial has as follows: Euxitheos and Herodes were on board a ship on a voyage from Mytilene to Ainos, while their ship, forced by a storm, sought harbour near Methymna. During the night, Herodes went ashore, disappeared and was never found. After making investigations, his relatives denounced Euxitheos for having murdered Herodes in collusion with Lykinos, one of his enemies, and with the assistance of a slave present at the ship. Consequently, Euxitheos was summoned to appear in Athens. As soon as he arrived there, he was arrested and held in custody for the period preceding the trial, bail being refused. He was tried as a *kakourgos* for the offence of homicide, under the process of *apagoge*.

The defence argues that *apagoge* is not the appropriate procedure since the defendant is not liable to the law against malefactors as an alleged homicide (§ 9), but the traditional procedure of *dike phonou* should have been used instead (§§ 10-12). Euxitheos's complaint that he should have faced a *dike phonou* seems to be designed to undermine the prosecution case rather than constitute a formal attack against the procedure held in this case. The rhetorical appeal to the usual and traditional homicide procedure and laws is emphasized by Euxitheos in the beginning (§§ 9-15) and the closure of his speech (§§ 90-96). In the rest of his defence he attempts to prove with a series of arguments from probability that the accusation of homicide is false, in the absence of adequate proof from the prosecution's side. The point on the legality of the case is effectively used as a rhetorical frame to strengthen the defendant's innocence, by implying that the prosecution not only falsely accuse him of homicide but they also wrongly use the procedure of *apagoge* against him to serve their purposes. Hence, the defence argument concerning the wrongful use of the *endeixis-apagoge* action against Euxitheos cannot be taken to raise doubts on the propriety of the procedure to a homicide case nor on the classification of murderers as *kakourgoi*. The fact is that Euxitheos *was* actually tried for homicide as *kakour-*

¹⁵ Gagarin (1997), pp. 173-174; against the most common view of dating the speech later, after 417, cf. Edwards (1982), pp. 33-39.

gos under the process of *endeixis-apagoge*, and there is no firm indication in the speech that this action was formally flawed; the emphasis is rather placed on the fact that this was an unusual procedure for a homicide case, and as such was not the appropriate one¹⁶.

The procedure of *endeixis* followed by *apagoge kakourgon* may well have been unusual at the time of Euxitheos' trial, and this would offer a reason why Euxitheos could plausibly make such a claim. The novelty of the procedure would then constitute a further advantage for the defence to rhetorically manipulate the whole action as something strange and attack the prosecution's motives on that ground. Carawan (1998, p. 337 ff.) rejects the view that the procedure in Euxitheos' case was novel and regards felony warrant and arrest as an «ancient and proper remedy against homicide» going back to the Drakonian institutions. He is right to say that Euxitheos does not suggest anywhere that the *endeixis-apagoge* procedure was not allowed against homicides. Also, he is right that Euxitheos' argumentation focuses on the necessity to be tried by a *dike phonou*. But, the view that Euxitheos' complaint involves his case only and not any homicide case tried by the *endeixis-apagoge* procedure is not consistent with the evidence from Antiphon's speech. From §§ 9-10 it can be inferred that the *kakourgon* law is employed in a homicide case for the first time in Euxitheos' case:

πρῶτον μὲν γὰρ κακοῦργος ἐνδεδειγμένος φόνου δίκην φεύγω, ὃ οὐδεὶς πώποτ' ἔπαθε τῶν ἐν τῇ γῆ ταύτῃ. καὶ ὡς μὲν οὐ κακοῦργός εἰμι οὐδ' ἐνοχος τῷ τῶν κακοῦργων νόμῳ, αὐτοὶ οὗτοι τοῦτου γε μάρτυρες γεγέννηται. περὶ γὰρ τῶν κλεπτῶν καὶ λωποδυτῶν ὁ νόμος κεῖται, ὧν οὐδὲν ἐμοὶ προσὸν ἀπέδειξαν. οὕτως εἷς γε ταύτην τὴν ἀπαγωγὴν νομιμωτάτην καὶ δικαιοτάτην πεποιήκασιν ὑμῖν τὴν ἀποψήφισίν μου. φασὶ δὲ αὐτὸ τε ἀποκτείνειν μέγα κακοῦργημα εἶναι, καὶ ὁμολογῶ μέγιστόν γε, καὶ τὸ ἱεροσυλεῖν καὶ τὸ προδιδόναι τὴν πόλιν· ἀλλὰ χωρὶς περὶ αὐτῶν ἐκάστου οἱ νόμοι κεῖνται.

¹⁶ An alternative interpretation of Euxitheos' case is the following: The prosecutors try to demonstrate that Euxitheos is a *kakourgos*, and as a *kakourgos* he should be punished by death. On the other hand Euxitheos's argument is that he is not a *kakourgos* and therefore he should have been charged with homicide and tried by a *dike phonou*. Undoubtedly, Euxitheos emphatically argues that he should have been tried by a *dike phonou* instead of an *apagoge kakourgon*. However, in the largest part of the speech Euxitheos does not attempt to prove that he is not a *kakourgos* but on the contrary that he is not a murderer.

First, although an information has been laid against me as a malefactor I am being tried for murder, a thing which has never happened before to anyone in this country. Indeed, the prosecution themselves have born witness to the fact that I am not a malefactor nor liable to the law against malefactors. For this law is concerned with thieves and footpads and they have not shown me deserving of either title. Thus, as far as this arrest of mine is concerned, they have made my acquittal your most lawful and just course. They argue that murder is a grave malefaction – and I agree, a very grave one indeed – as are sacrilege and treason: but the laws which apply to each of them differ. (Ant. 5.9-10)

This passage suggests that homicides would not normally be tried by an *apagoge*, as not explicitly liable to the law against malefactors, and that such a trial was unprecedented. One can assume that this very fact may have persuaded Antiphon to defend Euxitheos¹⁷.

If we accept the view that *endeixis* followed by *apagoge* was an unusual process for homicide cases in 420 B.C., the question then to raise is how and why did the Athenians make changes to the homicide law. There are two possibilities as to how this change took place; firstly, the prosecutors of Euxitheos were trying to extend the use of *apagoge kakourgon*, and secondly the Athenian Assembly decreed the extension of such a procedure to homicide cases before the prosecution of Euxitheos.

There is some ground to argue for the first option since Euxitheos attacks the prosecution for employing the *endeixis-apagoge* procedure. If we notice however how Euxitheos' arguments on this issue develop throughout the speech, we can recognize in this kind of attack the common rhetorical topos aiming at the representation of the prosecutor as a disrespectful person to the traditional homicide procedure of *dike phonou* rather than a real offender. In § 12, the defendant argues that the prosecutor has *invented* laws to suit himself, ἃ σὺ παρελθὼν, αὐτὸς σεαυτῷ νόμους ἐξευρών. In § 13 he accuses the prosecutor of *framing* a law to suit himself, σὺ δέ, ὃ τοῖς ἄλλοις Ἑλλησι κοινόν ἐστιν, ἰδίᾳ ζητεῖς με μόνον ἀποστρεῖν, αὐτὸς σεαυτῷ νόμον θέμενος. The accusation against the prosecution is further exaggerated when Euxitheos calls his opponent a *legislator* who dared to change the homicide laws in § 15: σὺ δὲ μόνος δὴ τετόλμηκας γενέσθαι νομοθέτης ἐπὶ τὰ πονηρότερα, καὶ ταῦτα πα-

¹⁷ Edwards (1982), pp. 23-40.

ρελθὼν ζητεῖς με ἀδίκως ἀπολέσαι. There is no ground to suppose that the prosecutor literally acted as a legislator nor that he extended the existing laws of homicide¹⁸. Furthermore, no evidence is provided of a law introduced by the prosecution. It seems therefore unlikely that the prosecutor was the one who introduced the procedure of *endeixis-apagoge* as a legal process against homicides.

The second alternative that the Athenians had decided to extend the Drakonian homicide law and establish procedures that were already *in use* for other offences, as legal processes for homicide is more plausible. Such a decision was presumably made by the Athenian Assembly, involving additional enactments to be inscribed complementary to the original homicide law on the *stelai* of the Akropolis. Such a decree would probably not remain long unusual. We have evidence that c. 420 it could be testified as unusual. Therefore, it was probably introduced in the last third of the fifth century, just before Euxitheos' trial. The difficulty with this view is that if such an enactment did exist at the time of Euxitheos' trial, «Antiphon would hardly have used an argument which the prosecutors could refute simply by reading out the law to the jurors»¹⁹. The point to bear in mind here is how recent this enactment was by the time of Euxitheos' trial; if *apagoge kakourgon* had been established as a legal homicide procedure only a short time before the case of Herodes' murder was brought to court, the presentation of such a law before the jury might not have the same effect as that of any other long established law, particularly considering the novel and odd use of *apagoge kakourgon* in a homicide case. It is hard to tell which circumstances could have led the Athenians to make such a decision in the last third of the fifth century. It is probable that the relatives of Herodes were involved in the enactment of the law. They could have themselves made the proposal for the law or have asked other political figures to do so. If that were the case, the proposal would have been presented in the Athenian Assembly, and successfully passed as an additional enactment to the homicide law before the prosecution against Euxitheos initiated. This would explain why Euxitheos re-

¹⁸ A similar attack is rhetorically manipulated to attack Nikomachos in Lysias, 30 as a legislator though he was only an *anagrapheus* of the Athenian laws; cf. Volonaki (1998), pp. 175-184.

¹⁹ Hansen (1976), p. 105.

gards the prosecutor responsible for the establishment of such an institution by saying that he has misled the jurors in complying with the new procedure and not the *dike phonou* (§ 12: ἔπειτα κελεύεις τοὺς δικαστὰς ἀνωμότοις πιστεύσαντας τοῖς μαρτυροῦσι φόνου δίκην καταγῶναι, οὗς σὺ αὐτὸς ἀπίστους κατέστησας παρελθὼν τοὺς κειμένους νόμους, καὶ ἡγῆ χρῆναι αὐτοῖς τὴν σὴν παρανομίαν κρείσσω γενέσθαι αὐτῶν τῶν νόμων). That such a decree recognizing the *endeixis-apagoge* process as a legal homicide procedure was made in the 420s would also explain the necessity to republish the Athenian homicide law in 409 B.C., and not simply retain or reinscribe the original Draconian homicide law. This would mean that all new enactments made in the homicide law since the Draconian institutions were meant to be published and inscribed together with the original laws of Drakon.

The existence of more than one homicide procedure would provide further means of prosecution against homicides, and more significantly the availability of a public action in homicide cases that would enable *ho boulomenos* to initiate the prosecution against any suspect killer. In effect, additional legal means were available to the relatives of the victims to take vengeance upon the death of the killed, and moreover killers could not escape punishment since all the Athenians were enabled to proceed with the prosecution. The choice of summary arrest (*apagoge*) suggests that the Athenians were interested in the immediate punishment of murderers in such a way that they could not escape the trial. The denunciation (*endeixis*) of the offender for homicide followed by summary arrest, as in Euxitheos's case, was a provision to force the suspect killer to come to Athens or lose the case *in absentia* and never be allowed to return. This kind of process could be initiated at any time of the year. Not only the procedure itself but also the trial was different from the *dike phonou* in that it was heard before a *beliastic* court. Hence, this procedure could apply to all homicides including Athenians and non-Athenians, as well to all kinds of murders, those committed in the city of Athens and those committed outside Attika. Such an institution indicates that the Athenians wished to secure the prosecution of those homicide crimes that might escape punishment due to restricted rules prescribed by the *dike phonou* procedure.

The process of *endeixis* followed by *apagoge kakourgon* would inevitably entail procedural disadvantages for the defence, which

can explain Euxitheos's insistence in a trial of a *dike phonou* rather than an *apagoge kakourgon*²⁰. The use of such a process prevented the defendant from going into exile during the trial, which was an option available to a *dike phonou*. The solemn oath of homicide trials in *dikai phonou* did not have to be taken at this trial, and its avoidance enabled the prosecution to attack the defendant on his background and nationality. Furthermore, the fact that the case was heard before a *beliastic* court, consisting of ordinary citizens as jurors and not Areopagites, allowed the presentation of issues that were not closely related to the homicide case but were useful to character attack. Also, in an *apagoge* trial more witnesses were allowed to testify on more subjects than the homicide charge since they were not bound to give an oath concerning the guilt of either of the litigants, as was required in *dikai phonou*. In contrast with the *dikai phonou*, which could not take place until the fourth month after the registration of the charge, an *apagoge* trial could initiate any time after the killing. Finally, the summary arrest and the imprisonment of the accused prevented the defendant from making any preparations for the trial.

The conclusions that can be firmly drawn from Euxitheos's case are the following; *endeixis* followed by *apagoge kakourgon* was established as an alternative homicide procedure to *dike phonou* in the last third of the fifth century, and was probably used for the first time in the case against Euxitheos (420-417). This is the only case of *apagoge kakourgon* used for homicide we know of, and it provides us with a certain example of *androphonos* clearly defined and prosecuted as *kakourgos*.

Regarding the formal conditions in this type of procedure, it is worth asking whether the *ep'autophoroi* condition was an actual factor to such cases, although in Antiphon's speech there is no reference that Euxitheos was or should have been arrested *ep'autophoroi*. Various explanations have been offered by scholars, which are all based upon a comparison between the case under discussion and the prosecution against Agoratos (Lysias, 13, see section 4), where the *ep'autophoroi* was made a necessary condition by the Eleven in order to authorize the charge of homicide²¹.

²⁰ Edwards (1982), pp. 44-45.

²¹ For an account of all theories, cf. *ibid.*, pp. 16-18.

The possibility that the *ep'autophoroi* was not a condition in an *endeixis* followed by an *apagoge kakourgon* cannot be excluded²². Due to the novelty of the procedure, when used at Euxitheos's trial, one might argue that not all procedural details had been defined at the time. Nevertheless, given that summary arrest was available also for other offences (e.g. *kakourgemata*, such as theft, robbery etc.) than homicide, where the condition of self-incrimination was prescribed as necessary, it would seem unlikely that the same legal formality was exceptionally not enforced in homicide cases.

Herodes's murder was a mystery and his body was not even found. Edwards argues (1982, p. 18) that if *ep'autophoroi* had been a necessary condition, «Antiphon would not have allowed such a chance of counter-attack to slip by». Even though this assumption seems reasonable, it does not necessarily indicate that the prosecution were not legally compelled to prove Euxitheos's manifest guilt of murder. The fact that the prosecution attempt to establish Euxitheos's guilt on the denunciation made by the slave under torture and the letter allegedly written by the defendant confirming his responsibility for Herodes's murder seems to suggest that self-incrimination was an important factor in the validation of the charge. The *ep'autophoroi* condition may not be mentioned by the speaker either because it would not constitute a defence to the charge of conspiracy for homicide or because it would probably undermine the defendant's case, who was trying to prove that he was not a *kakourgos*²³. He does, however, repeatedly argue that no one saw him to kill Herodes or dragging the dead body off board. On balance, even though a reference to the legal condition of *ep'autophoroi* might be expected in Euxitheos's case since it was an *apagoge* case, its absence does not necessarily prove that *ep'autophoroi* was not a condition for the use of the procedure.

4. LYSIAS, 13, «AGAINST AGORATOS» («APAGOGÉ PHONOU»)

Agoratos, a privileged metic, is charged with responsibility for the murder of Dionysodoros, an Athenian taxiarch, and other democrats

²² Further on this view, cf. below section 7.

²³ Harrison (1971), p. 25.

who were all put to death by the Thirty. He is prosecuted by an *apagoge*²⁴, and the trial can be dated in 399/398. According to the speaker, Dionysodoros' cousin and brother-in-law, Agoratos had colluded with the oligarchs before the establishment of the Thirty (405/404), and denounced some generals, taxiarchs and other democrats on the charge that they were allegedly conspiring against the constitution. The denunciations were made firstly in the Boule and subsequently in the Assembly at the theatre of Mounichia, where it was decided that the accused should be tried by a jury court consisted of 2,000 jurors. When the Thirty came to power, they cancelled the appointed trial and replaced it by an unconstitutional procedure in the Boule, where the defendants were all condemned to death, with the exception of Agoratos who was allegedly acquitted on the grounds that he had given true information.

Scholars are divided as to which of the two forms of *apagoge* was used against Agoratos. Hansen (1976, pp. 101-103, 107) argues that the action was an *apagoge kakourgon* for homicide. The main problem with this view is that nowhere in the speech is the defendant referred to as *kakourgos*, which would be normally expected especially if one considers the presentation of such a charge against Euxitheos.

Hansen (1976, p. 52) connects his view of the case entirely with the Eleven's requirement of including in the prosecutor's indictment the phrase *ep'autophoroi* (86: οἱ ἔνδεκα οἱ παραδεξάμενοι τὴν ἀπαγωγὴν ταύτην, ... σφόδρα ὀρθῶς ποιήσαι Διονύσιον τὴν ἀπαγωγὴν ἀπάγοντ' ἀναγκάζοντες προσγράψασθαι τό γε ἐπ' αὐτοφώρῳ²⁵). With the presuppositions that murderers were classified as *kakourgoi* and that the condition of *ep'autophoroi* was closely related only to *apagoge kakourgon* and not to other forms of *apagoge* or to any form of *endeixis*, he draws the conclusion that Agoratos' case was *apagoge kakourgon*²⁶. However, there is no conclusive evidence to support

²⁴ The title of the speech, Κατὰ Ἀγοράτου ἐνδείξεως, must have post-dated Lysias since the speech obviously describes the process of *apagoge* (86: Διονύσιον τὴν ἀπαγωγὴν ἀπάγοντα). Even though Agoratos' arrest is not explicitly stated, it can be inferred from the general evidence concerning *apagoge*.

²⁵ The text of Lysias, 13 used in this paper is from Hude's edition (Oxford 1912), and the translation used of passages from the same speech is from the Lysias' volume in Loeb series.

²⁶ With regards to the one case of homicide already presented and known to us as *apagoge kakourgon*, Antiphon, 5, Hansen (1976, pp. 101-102) argues that the term *ep'au-*

the view that the *ep'autophoroi* was a condition strictly restricted to cases of *apagoge kakourgon*. Hansen's argumentation seems to follow a circular process, and it remains dubious whether the insertion of the specific phrase in the indictment against Agoratos should direct us to a certain form of *apagoge* for homicide.

MacDowell (1963, p. 131 ff.; 1978, pp. 120-122) argues for an *apagoge phonou*, as described in Dem. 23.80, and maintains that Agoratos was arrested on the grounds that he frequented the public places in the period after 403. He further explains that *apagoge phonou* was used in order to manoeuvre around the Amnesty agreement, according to which only *autocheiriai* homicide cases were allowed to proceed in the traditional ways. The problem with this option is that the prosecutor does not explicitly state that the defendant frequented the public places²⁷. With respect to the question why Agoratos' trespass is not raised in the speech, Gagarin (1979, p. 321) has convincingly suggested that this point would not be questioned by either side since it could be easily verified and did not concern the main charge of murder²⁸. One could also argue that the speaker does indirectly refer to Agoratos' appearance in public places though a suspect killer, when attacking him on his illegal public activity under the restored democracy as an Assembly and jury member, and also as a *sykophant* initiating public actions against innocent citizens where he was penalized with the fine of 10,000 drachmas (§§ 65-66, 73, 76). The implication for the jurors (or at least for the reader) is that we are dealing not only with a suspect homicide who has not yet been punished but also with a man from slave origin who has masqueraded as Athenian citizen.

As indicated in section 2, Carawan has argued against the view that trespass could be the substance of charge in an *apagoge phonou* case. Particularly for the case against Agoratos, he (1998, pp. 362-

tophoroi was not required because it was not initially an *apagoge* but an *endeixis*. As has been shown above (sections 2-3), such an assumption is based on an argument *e silentio*. Gagarin (1979, p. 320 n. 61) points out that if the term *ep'autophoroi* was not required in Euxitheos's case because it was an *endeixis* followed by an *apagoge kakourgon*, Dionysios could have employed the same procedure to avoid the problem caused by the insertion of the phrase *ep'autophoroi*.

²⁷ Gernet - Bizos (1926), pp. 187-188.

²⁸ Cf. Todd (1993), p. 275.

364) argues that since the violation of the prohibited areas would be closely connected with the formal criterion for arrest *ep'autophoroi*, it would have been mentioned by the speaker; hence, he concludes that trespass constituted the condition of arrest rather than the substance or legal basis of the charge. There are some difficulties with Carawan's view: Firstly, the absence of a reference to the trespass is an argument *e silentio*, and is not conclusive of the actual grounds for Agoratos' arrest. Moreover, such a reference may have been deliberately avoided by the speaker either because trespass was evident and easily proved or because it would undermine the prosecution case, since it appears difficult to prove that Agoratos was a self-evident murderer. Secondly, Carawan's connection of trespass with the *ep'autophoroi* condition suggests that the *ep'autophoroi* was a term involving the arrest rather than the charge of homicide. If that were the case, the prosecution would not have any difficulty with the insertion of the *ep'autophoroi* clause as required by the Eleven, and could easily prove that the arrest was made in accordance with the procedural formalities. Nevertheless, Lysias, 13.85 suggests that the *ep'autophoroi* term involved the charge of homicide and not the arrest of Agoratos:

τοῦτο δὲ οὐδὲν ἄλλο ἔοικεν ἢ ὁμολογεῖν ἀποκτεῖναι, μὴ ἐπ' αὐτοφώρῳ δέ, καὶ περὶ τούτου διισχυρίζεσθαι, ὥσπερ, εἰ μὴ ἐπ' αὐτοφώρῳ μὲν, ἀπέκτεινε δέ, τούτου ἔνεκα δέον αὐτὸν σῶζεσθαι.

This simply amounts, it would seem, to an admission that he has killed, but has not been taken in the act; and to insist on that is to imply that, if he was not taken in the act, but did the killing, he ought therefore to escape.²⁹

Finally, Carawan's argument that trespass was only a condition for the arrest but not the trial brings some confusion to our understanding of the *apagoge phonou* process. If the legal basis of the case was not trespass of prohibited areas then it must have been the homicide charge. According to the Amnesty terms, however, only *autocheiriai* homicides were liable to prosecution (*Ath. Pol.* 39.5). Such a charge could not be made against Agoratos. He was charged as responsible

²⁹ For a further discussion on Lysias' presentation of the *ep'autophoroi* condition in 13.85-87, cf. Volonaki (1998), pp. 157-162.

for the murder of Dionysodoros and other democrats by making denunciations against them before the rule of the Thirty. He cannot therefore be accused of killing them with his own hands. Since he was covered by the Amnesty treaty, the homicide charge could not be used as the legal basis of the *apagoge* process. Moreover, Carawan's argument suggests that the legal basis of the arrest in an *apagoge* case was distinct from that of the *apagoge* trial (even though he does not explain what the latter would be), which would imply that there were two legal stages within the procedure of *apagoge* different from each other. There is no evidence to support such an assumption, and it seems unlikely that different rules applied for one single process. The argument that trespass could be used only as a condition for arrest means in effect that there is no punishment for trespass, which would contradict Demosthenes' description of summary arrest in cases *phonou* (23.80).

On balance, neither view of *apagoge* for homicide is entirely free from difficulties. Fewer problems are found with *apagoge phonou* and consequently it seems probable that this was the action taken against Agoratos. It is also probable that the legal basis of the charge was the trespass of the prohibited areas, whereas the trial involved mainly the homicide charge.

From Agoratos' case, it can be concluded that *apagoge phonou* was another type of the *apagoge* process, which was available as an alternative legal procedure for homicide cases. It cannot be certain when exactly this kind of procedure was introduced, but probably some time after the Amnesty treaty (404) and before Agoratos' trial (399). The Athenians may have decided to expand the use of *apagoge* against homicides in order to secure the punishment of suspect killers, who could not be directly prosecuted as homicides and could therefore escape. This would explain why this type of *apagoge* process was introduced, if *apagoge kakourgon* was already available and still *in use*³⁰.

Similarly to the use of *apagoge kakourgon*, *apagoge phonou* would offer several advantages to the prosecution of homicides, as can be implied from the case against Agoratos. Agoratos was prosecuted

³⁰ On the question whether the two forms of *apagoge* were simultaneously available for homicide cases, see below section 8.

several years after he had made the denunciation against Dionysodoros. Due to the Amnesty agreement, the prosecution could not initiate any other action on homicide nor could they charge Agoratos with killing *autocheiriai*, since he had not killed the victim with his own hands. Moreover, they could not have taken an action soon after the denunciation or the execution of Dionysodoros, because the Thirty were in power. Therefore, the delay of prosecution was inevitable and purposeful, even after the restoration of the democracy in order to avoid facing a jury highly prejudiced against any kind of violation of the Amnesty. Nevertheless, it seems clear that even though an action of *apagoge phonou* did not formally violate the Amnesty, since the arrest was established upon an offence distinct from the murder and subsequent to the restoration of the democracy, it did constitute a breach of the spirit of the Amnesty, because in practice the offender was being tried for the original murder, which had not been committed *autocheiriai*. *Apagoge phonou* may have also been used by the prosecution in the hope of increasing the chance of winning the case and securing the desired verdict against Agoratos. The wide range of issues that could be raised before a *beliastic* court in contrast with the stricter rules prescribed by other homicide courts (e.g. Areopagos), would allow the application of all possible rhetorical means of persuasion ³¹.

5. LYSIAS, 13.55-57: «MENESTRATOS' CASE»

Menestratos' case is used by Lysias as a precedent for Agoratos' case with procedural similarities. According to the story as told by the speaker, Menestratos was an Athenian citizen from the deme of Amphitrope, who was denounced by Agoratos just before the oligarchy of the Thirty, arrested and imprisoned. When presented before the Assembly at Mounichia, he was given immunity under a decree made by Hagnodoros. In return, he turned informer and made additional depositions. He was let off by the Thirty on the same judge-

³¹ The same motive could also have played a significant role to the initiation of an *apagoge kakourgon*; see above section 3.

ment as Agoratos, δόξαντα τάληθῆ εἰσαγγεῖλαι. After the restoration of the democracy, at some time around 400, he was tried by the people's court and condemned to be executed by *apotympanismos*.

Since it would appear that Menestratos and Agoratos are prosecuted for homicide relating to their denunciations against democrats, the two cases might have been treated in a similar way. As with Agoratos' case, scholars argue for the two forms of *apagoge* for homicide, *apagoge kakourgon* and *apagoge phonou*.

Hansen (1976, p. 104; 1981, pp. 21-22) emphasizes the fact of the execution by *apotympanismos* and the link between this method and the criminals classified as *kakourgoi*, and concludes that the case was *apagoge kakourgon*. The problem with this view is that, according to the speaker, Menestratos is brought to court and tried as an *androphonos* and not a *kakourgos* (56: ὑμεῖς δὲ πολλῶ χρόνῳ ὕστερον λαβόντες ἐν δικαστηρίῳ ὡς ἀνδροφόνον ὄντα). As regards Hansen's argument (*op. cit.*) that the case must be an *apagoge kakourgon* because the execution by *apotympanismos*, which was inflicted upon Menestratos, was confined to *kakourgoi*, one can say that we have no evidence for this type of execution to draw such a conclusion.

MacDowell (1963, pp. 137-138) argues for *apagoge phonou* based on the fact that Menestratos was prosecuted «as being a killer». *Dike phonou* is ruled out by the amnesty (since there is no question of *autocheiriai*), and therefore *apagoge phonou* seems more likely.

On balance, Menestratos was probably charged with homicide. Given that his trial took place after the restoration of democracy in 403, Menestratos' arrest and the method of his execution were presumably based on the offence of exercising the right of appearing in prohibited places, although he was a suspect killer. As in Agoratos' case, it seems probable that the action taken against Menestratos was *apagoge phonou*.

Finally, it is to be noted that Lysias' account of Menestratos' case may not be reliable, given that he uses it rhetorically as a precedent against Agoratos. It is striking that, except for the brief account on Menestratos' conviction, no further elements are used to strengthen the prosecution against Agoratos, especially as concerns disputable legal matters such as the phrase *ep'autophoroi* or the violation of the Amnesty. Even if Menestratos' condemnation to death was legally justified by the restored democracy, his case is not similar to Agoratos' as Lysias attempts to convince the jurors. Menestratos was obvi-

ously vulnerable to the accusation of intention in making depositions against democrats, since he was granted immunity to do so. Consequently, Lysias deliberately avoids picking up on this point so that he covers the weakness of his case against Agoratos.

6. LYKOURGOS, 1.112-115: «THE CASE OF PHRYNICHOS' ASSASSINS»

According to Lykourgos' account of Phrynichos' assassination, which combines mixed elements from earlier sources (Thukydides, VIII 92, Lysias, 13.71), Thrasyboulos and Apollodoros killed Phrynichos and were later imprisoned. After an inquiry was held by the Athenians, it was decided that Phrynichos was a traitor and his killers were released. The events consequent to the killing appear obscure and it is difficult to draw any firm conclusions about the alleged imprisonment of the killers. MacDowell (1963, p. 139) offers a plausible and attractive hypothesis: Thrasyboulos and Apollodoros returned to Athens after the restoration of the democracy in 410. Phrynichos' relatives, then, tried to proceed against them by *apagoge phonou*. In the meantime, decrees were passed proclaiming Phrynichos as a traitor and rewarding his killers; by implication the case never came to court. Nevertheless, Lykourgos' evidence cannot be considered reliable to the events, and the case against Phrynichos' killers (if there was any prosecution at all against them) still remains a dubious case of *apagoge*.

7. «ἘΠ'ΑΥΤΟΦΟΡΟΙ»

As has already been observed (sections 3-6), the common features of the two forms of *apagoge* for homicide, *apagoge kakourgon* and *apagoge phonou*, are the arrest of the offender followed by the written indictment of the charge before the case was brought to court and the offence of murder dealt with in the trial. The legal term *ep'autophoroi* appears to be connected with both kinds of *apagoge*, and it is necessary to examine the applicability of the term to the *apagoge* process.

The adjective *autophoros* means «self-detected» and the phrase *ep'autophoroi* denotes the circumstances of self-incrimination that can prove unambiguous guilt. The term tends to have the sense «manifestly», «clearly» in ancient sources ³².

The *ep'autophoroi* condition has been strictly connected by Hansen with *apagoge kakourgon* (above, section 4). However, the evidence, such as it is, does not allow us to conclude that the *ep'autophoroi* term is exclusive to *apagoge kakourgon*. It is reasonable to suppose that in *apagoge phonou* it was essential to prove that the accused was a manifest killer, since otherwise any suspect of murder who frequented the public places could easily become a victim of arrest.

Carawan (1998, pp. 352-353) argues that, according to the evidence from ancient sources, the *ep'autophoroi* was a condition of arrest for summary execution and not a condition of arrest followed by trial. Such an assumption leaves unclear the conditions which determined the applicability of *apagoge* in homicide cases. It distinguishes the arrest action from the *apagoge* trial, inferring that the legal term of *ep'autophoroi* was valid outside court but not inside. According to Dem. 23.80, however, the suspect killers under arrest would suffer no injury until after their trial, and this indicates that the *apagoge* trial was regarded as a necessary continuity of the summary arrest. It would then seem unlikely that the same legal rules were not applicable to both stages of *apagoge*, and it is difficult to believe that the Athenians would not maintain the same legal condition used of the arrest, when a case was heard before the *beliastic* court. We know, for example, that Euphiletos in Lysias, 1 established his justifiable killing of Eratosthenes in court on the same legal grounds that had dictated his action of murder outside court, and that was the fact that Eratosthenes had been caught in the act and admitted his guilt. This example seems to indicate that the same legal term had an equal force both within self-help and court.

With reference to Agoratos' case, Carawan (*ibid.*, p. 366 ff.) sees it as the first case where the arrest *ep'autophoroi* was recognized as a «lawful condition of arrest-for-trial», based on the fact that the plaintiffs did not originally make the arrest *ep'autophoroi* and did not

³² Harris (1994), pp. 169-184.

expect it to be a condition of prosecution at trial. He further suggests that the scope of *ep'autophoroi* was extended to cases against guilt-by-planning and as such was introduced by the magistrates (*i.e.* the Eleven) in the case against Agoratos, as a kind of innovation to resolve the provisions of the Amnesty concerning homicide cases.

Carawan's supposition that the *ep'autophoroi* was not a statutory requirement before Agoratos' case is based upon an argument *e silentio*; it is true that there is no other explicit reference to the *ep'autophoroi* arrest-for-trial, but due to the limited number of *apagoge* cases for homicide known to us, one cannot draw any firm conclusion of the formalities applied to the procedure (see above, section 2). The claim that the plaintiffs did not expect the *ep'autophoroi* to be a condition of prosecution at the trial may be true, but not necessarily because such a condition was not in existence before the particular case. In section 4, it was argued that Agoratos' case was probably an *apagoge phonou*, and the legal grounds in this procedure was the trespass of suspect killers and not the homicide action; on this legal basis, the plaintiffs might have hoped that the *ep'autophoroi* term was not required here, and deliberately avoided including it in the indictment.

Concerning Carawan's assumption that the scope of *ep'autophoroi* was extended to cases of guilt-by-planning to evade the conditions of the Amnesty, and introduced by the Eleven for the first time in Agoratos' case, it is difficult to understand how the guilt-by-planning can be equivalent to *autocheiriai*, which were the only cases of homicide allowed by the Amnesty to bring to court. The term *autocheiriai* involves killing with one's own hands and cannot relate neither to manifest proof of murder (*ep'autophoroi*) nor to a killing from planning (*bouleusis*). Lysias is deliberately blurring the notions of the terms *ep'autophoroi* and *autocheiriai*, in order to evade the issue of manifest killing and emphasize instead Agoratos' responsibility for the murder of the democrats:

οὐ γὰρ δήπου τοῦτο μόνον οἶει τὸ ἐπ' αὐτοφώρῳ, εἴαν τις ξύλῳ ἢ μαχαίρᾳ πατάξας καταβάλῃ, ἐπεὶ ἕκ γε τοῦ σοῦ λόγου οὐδεὶς φανήσεται ἀποκτείνας τοὺς ἄνδρας οὐδ' ἀπέγραψας· οὔτε γὰρ ἐπάταξεν αὐτοὺς οὐδεὶς οὔτ' ἀπέσφαξεν, ἀλλ' ἀναγκασθέντες ὑπὸ τῆς σῆς ἀπογραφῆς ἀπέθανον. οὐκ οὖν <ὁ> αἴτιος τοῦ θανάτου, οὗτος ἐπ' αὐτοφώρῳ ἐστὶ;

For you cannot of course suppose that «in the act» only applies to a man felled with the stroke of a club or a dagger; since, by your argument,

nobody will be found to have actually killed the men against whom you deposed. For no one either struck them or assassinated them, but your deposition had the effect of compelling them to die. Then is not the author of their death a person caught «in the act»? (Lys. 13.87)

Finally, if the extension of the condition of *ep'autophoroi* to arrest-for-trial was an innovation made *ad hoc* by the Eleven, one would expect to hear about this elsewhere in connection with the Amnesty agreement or the procedure of *apagoge phonou*. Moreover, considering that the prosecution had difficulty to deal with the *ep'autophoroi* term, they might attempt to dispute its validity to the case against Agoratos.

On balance, it seems that the *ep'autophoroi* term is connected with summary arrest, and consequently also with cases of *apagoge* brought to court after the arrest of the accused. The Athenian law probably prescribed the *ep'autophoroi* condition as applicable both to cases of *apagoge kakourgon* and *apagoge phonou*, on the one hand to establish the arrest for homicide charge and on the other hand the action of killing. In effect, the Athenians were interested in preventing innocent citizens from being arrested and illegally prosecuted for homicide.

CONCLUSION

From the seventh until the fourth century B.C. the Athenians wished to maintain the Drakonian institutions on homicide and believed that they were doing so. However, within the period from the last third of the fifth century until the beginning of the fourth century, the Drakonian homicide law was extended in order to allow further means of prosecution for homicide to the relatives of the killed and also to all the Athenians. Additional enactments were presumably made and inscribed as complementary provisions to the original homicide law.

Apart from the usual and traditional homicide procedure of *dike phonou*, which was restricted to the victim's relatives, the Athenian law prescribed also the public actions, *endeixis* followed by an *apagoge kakourgon*, *apagoge kakourgon* and *apagoge phonou* to be used

for homicide³³. It is difficult to consider the *apagoge* procedure as exceptional, based on the fact that there are two unambiguous cases of *apagoge* known to us, the prosecutions against Euxitheos and Agoratos. From Dem. 23.80, it appears that at least in fourth century Athens the process of *apagoge* was widely known and legally recognized for homicide cases.

As has been demonstrated, there were two forms of *apagoge* for homicide, *apagoge kakourgon* and *apagoge phonou*. Euxitheos's case was certainly an *apagoge kakourgon* and Agoratos' case was probably an *apagoge phonou*. The evidence from Euxitheos's case indicates that *apagoge kakourgon* preceded by an *endeixis* was a novel procedure at the time of the trial (420-417). It seems that the Athenians decided to introduce this kind of procedure into the homicide law in order to proceed fast and effectively with the prosecution of killers, who might otherwise escape from punishment. In terms of procedural technicalities, *apagoge* may have been chosen at that time in order to manoeuvre legal difficulties or weaknesses in homicide cases; it enabled the prosecution to proceed a charge on homicide to court at any time of the year, where the *basileus* did not need to intervene in order to set the necessary proceedings, and without any obligations of taking oaths, presenting witnesses and making the sacrifices that were required to a *dike phonou*³⁴. *Apagoge phonou*, as was used against Agoratos in 399/398, enabled the plaintiffs to manoeuvre with the Amnesty agreement that excluded all homicide cases from prosecution with the exception of *autocheiriai* actions.

Since *apagoge kakourgon* and *apagoge phonou* had many similarities concerning the arrest, the offence and the circumstances of *ep'autophoroi* (section 7), it is difficult to explain the use of two forms of *apagoge* for homicide. Euxitheos's case predates all other known or conjectural cases of *apagoge* for homicide. In the absence of evidence, we cannot know with certainty the extent to which

³³ Although *apagoge* would theoretically enable *ho boulomenos* to initiate a prosecution against a murderer, the evidence from Antiphon, 5 and Lysias, 13 (though not conclusive since it is not adequate) seems to suggest that this kind of homicide procedure was also available and used by the victim's relatives to bring a charge on homicide.

³⁴ For the role of *basileus* and the procedure held in a *dike phonou*, cf. MacDowell (1963), pp. 33-38, 90-109; Idem (1978), pp. 117-120; Todd (1993), pp. 273, 275.

such a process was actually used by the Athenians. Nevertheless, it is conceivable that *apagoge kakourgon* was initially the available public action against homicides and that *apagoge phonou* was a development produced either by the restored democracy of 403 or earlier³⁵.

It is reasonable to suppose that *apagoge phonou* was introduced soon after the restoration of the democracy, since it involved cases *phonou* that were not covered by the Amnesty agreement. It has become clear that the terms of the Amnesty would leave out all cases of homicide, where the accused had not physically killed the victim. To prevent the city from the subsequent pollution, the Athenians may have enacted the *apagoge phonou* as a means of prosecution for all cases of homicide, while manoeuvring within the Amnesty law³⁶. According to Teisamenos' decree (And. 1.82), it was decided in 403 to republish the original institutions of Drakon and laws of Solon and introduce amendments where needed. Alterations to the existing laws were to be temporary displayed in the Basileia Stoa for everybody to see and then to be scrutinized by the Boule and five hundred *nomothetai*, who were elected by the demes. The ratified laws were to be inscribed on stone and permanently displayed on the Walls in the Basileia Stoa. It is possible that the addition to the homicide law concerning the enactment of *apagoge phonou* was made in this manner. The difficulty with this view is that if we are dealing with an innovation in the homicide law that took place in

³⁵ One might argue that there could not have been a succession of the two forms of *apagoge* since they were two different procedures dealing with different charges. It is to be noted, however, that *apagoge kakourgon* against homicides and *apagoge phonou* were both forms of the *apagoge* procedure used for homicide cases. Also, based on the rare evidence from *apagoge* cases (which may not be conclusive), we do not hear about the *apagoge kakourgon* against homicides after the case against Euxitheos, not even a reference to it is made in Demosthenes, *Against Aristokrates*, where an account of all the homicide procedures available in Athens by 352 is presented. This may indicate that *apagoge kakourgon* was *not in use* at least in the mid-fourth century, if not even earlier.

³⁶ A counter-argument suggested to me by Professor Alberto Maffi is that if *apagoge phonou* was introduced to deal with *phonoi* that were not covered by the Amnesty the clause on *autocheiria* would have been completely baffled. It is true that such an enactment would be against the spirit and the law of Amnesty, but one cannot exclude the possibility that the Athenians might have found certain ways to evade the restrictions of the Amnesty agreement. For the alternative that the *apagoge phonou* had been introduced before the restoration of the democracy, see next paragraph.

403, we might expect this to be mentioned in the Amnesty law referring to homicide cases (*Ath. Pol.* 39.5)³⁷.

Alternatively, the *apagoge phonou* could have been enacted during the period 410-404, when the Athenians appointed *anagrapheis* to republish all the Solonian laws that were in use³⁸. In 409, it was decreed to republish the Draconian homicide law, and it is possible that any additions to homicide procedure were included and published in that instance. By that time the enactment concerning the introduction of *apagoge kakourgon* in homicide cases had already been made, since it was in use at a date around 420 for the prosecution against Euxitheos. If *apagoge phonou* was introduced in 409 against homicides, it would then plausibly have replaced the existing process of *apagoge kakourgon*, unless we wish to assume that both types of *apagoge* were simultaneously available for homicide cases. It would seem, however, certain that at least by the middle of the fourth century the *apagoge kakourgon* process was no longer in use against homicides, since otherwise Demosthenes would have included it in all the homicide procedures available to the Athenians at that time in his speech *Against Aristokrates* (352 B.C.).

It has become clear that *apagoge* as a homicide legal procedure was of great value and usefulness to litigants. Its enactment as a complementary provision to the original homicide law of Drakon, and its evolution within the period from 420s until the first years of the restored democracy (404-400) in two different forms, *apagoge kakourgon* and *apagoge phonou* indicate that the Athenians' attitude toward legal matters of homicide was ambiguous. The concept and rhetoric concerning homicide cases focuses on the traditional mea-

³⁷ Another point against the view that *apagoge phonou* was an innovation to the homicide law introduced by the restored democracy is that nothing in the text of Demosthenes is referred to a statutory law. Thus one could argue that Demosthenes by mentioning the *apagoge* in homicide cases is referring to the very old customary institution directed to preserve the city against pollution. The existence however of the *apagoge kakourgon* as was used in the mid-fifth century against homicides seems to indicate that particular forms of the *apagoge* procedure had been introduced to the homicide law to be used for trials on murder. It is thus conceivable that the *apagoge* mentioned by Demosthenes is another type of *apagoge* used in homicide cases involving among others the offence of pollution, as was probably the case against Agoratos.

³⁸ Apart from the inscriptions, the evidence we have of the publication of the Athenians laws toward the end of fifth century derives from Lysias, 30, *Against Nikomachos*.

asures enforced in the seventh century by Drakon. In the reality, however, changes were made in a way that the original law was extended rather than altered or repealed. The Athenian legal system entailed fixed terms and institutions, but at the same time allowed flexibility when needed. The development of homicide law, as has been presented in this paper, indicates that the manner in which the Athenians were making laws was a gradual, continuous process involving expansion of already existing laws rather than creating completely new ones.

There is one final issue to be addressed: was there any other public homicide procedure apart from *endeixis* and *apagoge* available in Athens? There has been a dispute among scholars whether the public action of *graphe phonou* was also in existence for homicide cases. Hansen (1976, pp. 110-112; 1981, pp. 14-17) has argued for the existence of *graphe phonou* on the ground that it was used for trauma *ek pronoias* (Dem. 54.18), which was regarded as a «subspecies of *phonos*». The difficulty with this assumption is that it is based on conjecture rather than hard evidence³⁹. Anomalies in legal procedures should not be rejected, considering that the Athenians do not appear to have been systematic in the codification of institutions and procedures. Furthermore, and more importantly the existence of the *apagoge* action might have rendered *graphe phonou* unnecessary.

³⁹ Cf. MacDowell (1978), p. 175; Gagarin (1979), pp. 322-323.

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