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Pollution in the Athenian Homicide Law

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The Athenian legislation on homicide was and continues to be a focus for the historians of ancient Greek law, because of the relative abundance of evidence and of the great interest of the way in which the Athenian society regulated the most extreme offence against persons (1). A result of this preoccupation is the harvest of books and articles of the last thirty years (2). Through long

1) Although it seems self-evident, it is necessary to point out that Athenian citizens, male and female, had full legal protection. For slaves see *Ath. Pol.* 57.3 and for dependent workers see Plato, *Euthyphro*. In the preserved speeches there is no trace of a prosecution against the killer(s) of a woman; in (D.) 47 there is the only reference to a woman's murder. Women are prosecuted, at least in two cases (Antiphon 1 and Arist. *MM* 1188b, 29-38). The majority of the forensic speeches concern murder of men or less often boys. For another aspect of the degrees of protection see GERNET (1984), 23.

2) The beginning of a new period of interest in homicide is marked mainly by three attempts: RUSCHENBUSCH, E., "ΦΟΝΟΣ. *Zum Recht Drakons und seiner Bedeutung für das Werden des athenischen Staates*", *Historia* 9 (1960), 129-154, MACDOWELL (1963) and the republishing after a new examination of *IG I³*, 104 by STROUD (1968). The recent

discussion certain points have been clarified but more still remain obscure. One such point is the meaning of pollution (3) in the context of the Athenian homicide law and its function in the socio-cultural context of ancient Athens.

In modern handbooks (4) of criminal law the aims of a penalty are described by the "inclusive theory of punishment" as prevention, restraint, rehabilitation, deterrence, education and retribution. Of course not all of them deserve the same attention and have the same importance; recently, education and rehabilitation are the central points of discussion. This was not the case in ancient Athens, where the penalty for homicide aimed, principally, to avenge the killing and, only secondly, to deter.

According to the traditional theory, which I shall call "the pollution doctrine", the originality of the regulation in ancient Athens consisted in the alleged principle of pollution, which was dominant in the notion of homicide and as a result influenced the legal rule and the penalty. This interpretation claims that there was a causal relation between homicide and pollution, that is, homicide was always a cause of pollution, not only for the killer

bibliography is reviewed by MAFFI, *RD* 66 (1988), 111-115. KARABELIAS (1991) offers a useful overview of all the matters related to punishment.

3) In this article I shall use the terms "pollution" and "defilement" as equivalent of the Greek word *μίαισμα*, although I am aware that the former English term has a broader sense than the Greek. All the translations of the cited passages are taken from Loeb editions of the texts.

4) See LAFAYE, W.R. and SCOTT, A.W., *Handbook on Criminal Law* (St. Paul, Minnesota 1972), 24.

but also for the city and its citizens. Consequently, a major role of the penalty was to ensure the cleansing of the city from the pollution (5). A re-assessment of the arguments put forward for or against this doctrine should answer the following questions :

- A. What is the evidence in favour of the pollution doctrine ?
- B. Was cleansing the third function of the penalty and what does that mean for penal theory in Athens ?
- C. Given that the word μίᾱσμα occurs most frequently in the *Tetralogies* attributed to Antiphon, it will be interesting to see, exempli gratia, the features and the nature of the threatened pollution in these speeches.

First, the word μίᾱσμα has various meanings and its origin (6) has been connected with different places. Its meaning in Homer has to do more with the physical dirt, a stain, easily washed out with the use of water (7). But in late archaic Greece

5) For this theory see PHILIPPI, *Der Areopag und die Epheten* (1874), 61-2, 127, GLOTZ (1904), 228ff, TRESTON (1923), 141-148, VINOGRADOFF, *Outlines of Historical Jurisprudence* (1922), 2.185, JONES (1956), 251 and 254-7, MACDOWELL (1978), 109-110 and KARABELIAS (1991), 79. See also the severe criticism of CALHOUN (1927), 27 and recently PARKER (1983), 115.

6) About the causes of pollution see ADKINS (1960), 86 and the discussion in PARKER (1983), 130.

7) DODDS (1951), 36, MOULINIER (1952), 28, ADKINS (1960), 86, and recently CANTARELLA, E., "Per una preistoria del castigo", in *Du châtimeut dans la cité*, École Française de Rome, (Rome, 1984), 37-73. The lack of pollution in Homer is important as an indication but not as a proof as VERNANT (1972), 123 pointed out. LLOYD-JONES, H., *The Justice of Zeus* (1971), 71 suggested that the lack of pollution in the Homeric poems is due

the same word means something radically different, something that compels cities to define procedures of purification (*SEG* 9.72:133-141, cathartic law of Cyrene (8), 6th century B.C. ; *LSCG* 56.4-6 : Cleonai 6th century B.C. ; and from hellenistic Crete *LSS* 112) and appears in texts and activities of legal character. The semantic transition will not be subject of this paper. We need a practical definition of μίασμα in homicide cases, like that of PARKER (1983), 104. He describes μίασμα as the state where

the blood of his (the killer's) victim clings to the hand of a murderer, and, until cleansed, demands his seclusion from society.

Other features of pollution in general, according to PARKER, are that a) it contaminates individuals or cities who come into contact with the killer, without distinction, and moreover it "attaches to those who, by omission or commission, obstruct the victim's right to revenge" (9) and b) it is purposive in the sense that it aims at the social isolation of the killer.

I am not going to consider, in this paper, defilement per se since it is a moral or religious category. I shall examine it in

to the lack of interest of the poet. For a recent discussion see PARKER (1983), 130ff who claims that in supplication, a theme quite common in Homer, there is an implicit reference to purification.

8) The passage concerns purification of a murder suppliant. For a brief comment see PARKER (1983), 332-351, especially 350-1. The most recent publication in SOKOLOWSKI's *LSS* 115.

9) PARKER (1983), 110.

close association with the indictment. The concept of pollution expresses the social disruption caused in the society ; it gains enormous normative power only when it is connected with the indictment. Only then it is inscribed in the social body, it affects the existing social equilibrium (10), and it regulates and leads the social life to a new balance.

Pollution in homicide cases is not present in the Homeric poems, nor in the Hesiodic *Works and Days*, nor even in *Aethiopsis*, a poem of the second half of the eighth century B.C., attributed to Arktinos of Miletus (11). On the contrary, pollution emerges as a vital component of homicide in the fifth century B.C., in the *Tetralogies* attributed to Antiphon, in Plato, *Leg.* (12), in tragedies (Aisch. *Oresteia* (13), Soph. *OT* 97 and 1012, Eur. *Hipp.* 35, 1447-51) and in the mythological cycle of the god Apollo (14).

10) See DOUGLAS, M., *Purity and Danger* (London: Routledge and Kegan Paul, 1966), 3-4.

11) For this particular piece of evidence see the important argument expressed by CALHOUN (1927), 29 and MOULINIER (1952), 42-3 about the reliability of this passage, which is still considered as the locus classicus of pollution in archaic Greece. CALHOUN concludes that it is completely inadequate and inaccurate as a proof of pollution after a homicide in the second half of the eighth century B.C. Cf. PARKER (1983), 130 n. 102. The most recent edition is that of DAVIES, M. (ed), *Epicorum Graecorum Fragmenta* (Göttingen 1988), p. 47, l. 11-13.

12) See the recent work of SAUNDERS (1991), 65-6 and 217-257.

13) *Ag.* 1645, *Ch.* 1028 and *Eu.* 169, 281.

14) For a brief account of Apollo's murderous activities see PARKER (1983), 375-92.

A. The evidence for pollution in the homicide law is to be found either in the legislation on homicide or in the procedure of a prosecution for homicide, or finally in the oratorical arguments.

In the Athenian legislation on homicide preserved in the inscription (*JG I³ 104*) or prose texts there is no trace of the notion of pollution (15). In particular, there is no place where a statement about the status of the killer as *μιαρὸς* or not *ὄσιος* or a similar expression occurs, as happens for example in the case of tyrannicide (16). A single implication made by the occurrence of the indictment pronounced by the *basileus* led to erroneous assumptions about the presence of pollution in this law. The only implicit references are in D. 20.158 which I shall discuss later, and D. 23.72 :

τηνικαῦτα δ' ἤκειν δέδωκεν ἔστιν ὄν τρόπον,
οὐχ ὄν ἂν τύχη, ἀλλὰ καὶ θύσαι καὶ
καθαρθῆναι καὶ ἄλλ' ἄττα διήρηκεν, ἃ χρῆ
ποιῆσαι, ὀρθῶς, ὧ ἄνδρες Ἀθηναῖοι, πάντα
ταῦτα λέγων ὁ νόμος (Then the law permits him to
return, not casually, but in a certain manner ; it instructs
him to make sacrifice and to purify himself, and gives

15) Similar conclusions expressed by MOULINIER (1952), 44 and HUMPHREYS (1991), 30.

16) For example see And. 1.96-7 and *SEG* 12.87:10-11 (336 B.C.). There is unanimous agreement about the meaning of *ὄσιος* as blessed, although some reservations may arise (see BOLKESTEIN, J.C., "*ὄσιος en Eύσεβής*" (Amsterdam: Paris 1936), 198 about the meaning of the word. The adjective, in both instances, does not qualify the murderer as such but rather praises him as a benefactor of the city. It has rather a moral than a legal sense.

other directions for his conduct. In all these provisions, men of Athens, the law is right).

These passages from Demosthenes are supposed to be the only direct evidence connecting pollution and homicide. Two important objections can be brought ; first, D. 23.72 concerns the return of an exile for involuntary homicide after being pardoned by the relatives of the victim. If pollution was linked with homicide why do the orators, in general, fail to provide us with more concrete evidence ? Second, it is not certain if the word νόμος refers to a statutory law or to a customary law (17). So, any mention of pollution at this stage cannot justify establishing a link between pollution and homicide, depicted in law, since it is possible that the Demosthenic testimony serves extra-procedural and supra-legal needs.

1. The first evidence on pollution comes from the moment when the pursuit of the killer starts. The first reaction of the victim's relatives, who had the right to start the prosecution, was to announce the murder and the known or possible killer to the basileus ; then the basileus would formally declare that the killer should keep away from all public places. The formal pronouncement made by the basileus was called πρόρρησις (18). The first argument of the prevailing doctrine about

17) Similar view has been expressed by BRAVO, B., "Androlepsiai. La 'prise d'hommes' comme vengeance d'un meurtre commis dans une cité étrangère", in MODRZEJEWSKI, J. and LIEBS, D. (eds), *Symposion 1977 (Chantilly 1-4.06.1977)*, (Köln: Böhlau, 1982), 138.

18) For *prorrhesis* and the problems related to it see PAOLI (1956), 136. According to his opinion, there are two types of proclamation : one

pollution emerges from this special public proclamation ; its aim is the purity of the city and citizens. The presence of the killer pollutes them.

2. The second argument for that doctrine is based on the distinctions between the law-courts (19). While the Areopagos, the Palladion and the Delphinion have no connection with pollution and their competence seems to be safely based on secular grounds, Phreatto and Prytaneion are alleged to be strictly linked with two different aspects of pollution. In Phreatto (20), the exile for unintentional homicide was obliged to defend

pronounced by the relatives of the victim in the market place and a second one made by the archon (135 n.2). MACDOWELL (1963), 24 distinguishes three, including the religious one made on the tomb of the dead. Cf. PIÉRART, M., "Note sur la «prorrhesis» en droit attique", *AC* 42 (1973), 427-435. PAOLI claims that the killer was deprived of his civil rights (ἄτιμος) immediately after the murder, ipso iure, and not after the proclamation either by the dead person's relatives or by the basileus, because "il est un peu difficile d'admettre qu'un homme considéré comme impur, pût continuer jusqu'au moment de là πρόρρησις à fréquenter sans limitations la société qu'il contaminait par sa présence". The proclamations, according to PAOLI, aim at a juridical confirmation of the ἄτιμος status of the killer and "d'autre part de porter à la connaissance de tout le monde que cet homme était impur". The problem with this opinion is that it implies the internalization of the pollution by the killer or the supposed killer. MACDOWELL (1963), 23 objects to PAOLI's view quoting Antiphon 6.38 and explains that the processual *prorrhesis* was indispensable in the pursuit of the killer, an opinion which seems to prevail, e.g. KARABELIAS (1991), 118. For the necessary concurrence of the *prorrhesis* with pollution see RICOEUR, P., *Finitude et Culpabilité*, vol. II (Paris: Aubier, 1960), 41.

19) For the distinction of the homicide courts, apart from particular discussions for each one, see the recent article of SEALEY, R., "The Athenian courts for homicide", *CPh* 78 (1983), 275-296.

20) For the procedure in Phreatto see KARAWAN, Ed., "Trial of exiled homicides and the court at Phreatto", *RIDA* 37 (1990), 47-67.

himself against an accusation for intentional homicide standing on a boat, while the jury (51 *ephetai*) sat on the sea-shore, according to the Aristotelian description. The reason explaining this strange and rare procedure is again the fear of pollution. The presence of the killer is dangerous for the Attic land, which should remain pure and clear. The same fear governed the trials in Prytaneion, whose decisions were delivered when the "killer" was unknown or an animal or an object, in which case the court ordered the expulsion of the person or thing responsible for the killing.

3. Other evidence is found in the place where the trial takes place ; according to *Ath. Pol.* 57.4 : εἰσάγει δ' ὁ βασιλεὺς καὶ δικάζουσιν ἐν ἱερῶι καὶ ὑπαίθριοι. The upholders of the pollution doctrine claim that this happens because of the fear of pollution ; the killer, the vehicle of pollution, should not be under the same roof with the jurors, otherwise he is going to pollute them (21).

4. One can possibly argue that Antiphon, *Tetralogies* 2 g 11 provides a further and more explicit instance in favour of the prevailing theory :

ταῦτα οὖν εἰδότες βοηθεῖτε μὲν τῷ ἀποθανόντι, τιμωρεῖσθε δὲ τὸν ἀποκτείναντα, ἀγνεύετε δὲ τὴν πόλιν (so with this in mind come to the victim's aid, punish his murderer, and cleanse the city).

21) See JONES (1956), 256.

In this passage there is a clear reference to the three-fold function of the penalty in homicide cases, that is vengeance, deterrence through the punishment of the killer, and cleansing (or keeping clean) the city.

These are the pieces of evidence on which the supporters of the traditional theory found the causal relation between homicide and pollution. But inherent in this theory there is a number of *inconsistencies* concerning pollution itself, as a function and dimension of the penalty.

I. In the law about justified homicide (e.g. when someone kills in self-defence, or kills the thief who had entered his house or an adulterer caught in flagrante delicto (22), etc.) there is no mention of pollution, according to our sources, although a murder has been committed. Plato, *Leg.* 9.865b prescribes purification as necessary, but only for some cases and not in general, according to an oracle from Delphi (23).

22) Cases are enumerated in D. 23.53 and *Ath. Pol.* 57.3. GAGARIN, M., "Self-defense in Athenian Homicide Law", *GRBS* 19 (1978), 110-120, distinguishes the case of justified homicide described by law and the cases where, in modern terms, the homicide would be characterized as excusable.

23) Hermann, C.F. (ed) (1927), *Sch. Pl. Laws* 9.865b, Teubner: ὁ ἐκ Δελφῶν κοιμισθεὶς νόμος ἦγουν χρησμός ἐπὶ τοῦ ἄκοντος ἀνελόντος τὸν φίλον

ἔκτεινας σὸν ἑταῖρον ἀμύνων· οὗ σε μιαίνει
αἷμα, φόνου δὲ πέλεις καθαρώτερος ἢ πάρος ἦσθα.
and the scholiast continues: ὁ δ'ἀντίστροφος τούτῳ ἐπὶ τοῦ μὴ ὑπεραποθανόντος τοῦ φίλου·

ἀνδρὶ φίλῳ θνήσκοντι παρὼν πέλας οὐκ ἐπαμύνας·
ἦλυθες οὐ καθαρός· περικαλλέος ἔξιθι νηοῦ.

II. In the case of ἀνδροληψία (24) (when an Athenian was killed outside Attica and the killer did not surrender) the relatives of the dead had the right to abduct not more than three people of the city in which the homicide occurred, till the killers presented themselves in a court in their homeland in order to be put on trial or extradited to Athens. Here, the presence of the killer was considered desirable despite the prevailing view about pollution, according to which the presence of the killer ought rather to have been avoided, so as to protect the city from the pollution.

III. What was the legal status of the supposed killer during προδικασία (preliminary hearings)? According to the prevailing theory, the killer, who was still in the city, was a source of pollution.

IV. Why, in cases in which ἄφεσις (pardon by the victim) was granted, is there no mention of pollution? Why is it acceptable to make such a private settlement of the most extreme offence?

Finally, there is at least one unambiguous case where the killer lives without suffering any consequence after the murder. Such a case is described in Antiphon 1, where the son of the deceased accuses his stepmother of the killing of his father. In

24) For ἀνδροληψία in general see BRAVO, *supra* n.17, 131-56, where previous bibliography is mentioned as well.

this speech there is not the slightest reference to pollution in the period between the murder and the prosecution (25).

If we summarize the evidence presented, all the references to pollution, or even where it is implied, are concentrated either on the procedural rules or occur in myths or literature (tragedies, epic, etc.) but not in any text of substantive or procedural law on homicide. Where is then the causal relation between homicide and pollution? How is it possible that cleansing was a function of the imposed penalty, when there are so many exceptions? Does this imply that pollution was simply a convenient fiction necessary for the pursuit of the killer?

The inconsistencies mentioned above are sufficient to cast doubts on the alleged causal relation between homicide and pollution and the role of pollution in the function of the penalty inflicted in a case of homicide. BONNER and SMITH (1932), 2.200, had already seen this incompatibility and remarked in the context of their evolutionary conception of the criminal law in

25) The lack of pollution can be reasonably explained when we consider that the activity of the people was determined, first of all, by the dichotomy between public and private space. For details on this distinction see COHEN (1991), 73ff. But the actual spatial limits were not clearly demarcated as the theoretical exposé of COHEN suggests. Individuals were moving quite freely in both public and private areas, provided and manipulated explanations about their presence in these areas. The *prorrhesis* concerned areas qualified principally as places for men. A similar prohibition would be less effective in cases of women killers than in men. That is the reason for the lack of prohibition and pollution in the first speech of Antiphon. It would be interesting to consider whether there is pollution in any other case of murder committed by a woman, apart from Antiphon 1, and to examine the vocabulary used there.

Athens : "The whole matter of pollution in homicide looks like a sort of legalized pollution which was foisted upon homicide procedure by religion for various reasons. It had considerable to do with the forms of the procedure, but very little to do with the punishment".

MACDOWELL's (1963), 150, statement that "it is possible that it [the pollution] was no more than the subject of an appendix" expresses these doubts and at the same time shows one of the principles of a new search.

In an attempt to explain the relation between homicide and pollution one should take into account that the social life of an ancient Athenian was entirely based on his relations with the other citizens and metics in the life of the city-state, on his profound conviction that he was member of the city. What confirmed this belief and contributed to the formation of his symbolic social capital is his participation in the everyday political, social and religious life of the city. The restrictions pronounced by a *prorrhesis* limited strictly the range of these activities, or entirely suppressed them, because the killer could not participate in the community's life, and besides there was always the danger of being killed by the victim's relative. As a result, the killer was condemned, summarily, to a social "death" (26). Therefore, the interpretation I propose considers the pollution not only as an effective means in the pursuit of the killer and, in general, an "anti-criminal policy" (if this term can be

26) KARABELIAS (1991), 113 and 118.

used for antiquity) aiming at vengeance and deterrence, but as a substitute for the penalty which under normal conditions would have been inflicted on the killer. In other words, the concept of pollution together with indictment can be classified among those ideas which enhance social control and contribute to the maintenance of the social order.

PARKER's (1983), 104-143, approach to the problem has often been considered complete. He is exploiting ethnographical data and states: "Pollution, therefore, is not so much a rationalization as a vehicle through which social disruption is expressed" (121). He sees pollution as "a kind of institution, the metaphysical justification of conventional responses to the disruption of normal life through violent death" (120) and such beliefs could appear in a "society that lacks more formal institutions. They (the beliefs) express and focus concerns that cannot be discharged through fixed channels of procedure" (125).

But, if pollution is an expression of a social deregulation, how can we explain pollution in the context of law, (sacral (27)

27) This seems to be the conclusion from D. 47.68-73, where the plaintiff asked the Interpreters what to do after the murder (probably involuntary) of a nurse. The response of these Interpreters consisted of two parts, i. ἐξηγήσονται, where they instruct him about rituals on the tomb and purification and ii. συμβουλεύσωσιν, where they advise him not to prosecute, since he was not an eyewitness. This passage reveals that pollution was not included in the homicide law of Athens. Discussion of this particular passage in MACDOWELL (1963), 94-96, EVJEN, H.-J., "(Dem.) 47.68-73 and the δίκη φόνου", *RIDA* 18 (1971), 255-65, GAGARIN, M., "The Prosecution of Homicide in Athens", *GRBS* 20 (1979), 307-13 and KIDD, I, "The case of Homicide in Plato's *Euthyphro*", in CRAIK, E.M. (ed.), *Owls to Athens*, (Oxford: CP, 1990) 213-23. The

or secular), when it obtains legal or quasi-legal importance ? In this respect, PARKER's explanation is not adequate, since it fails to stress that pollution was not only an expression of disruption but at the same time provided the ways (legal or generally social) for the attenuation of the conflict. In other words, PARKER explains sufficiently the nature of pollution as a social phenomenon but not its function. The question remains, even after PARKER's exhaustive analysis ; how is this disruption expressed in the legal depiction of homicide ? Does pollution lead to the imposition of a legal penalty, or of a merely social consequence or finally of a social penalty adopted by the law at some later stage ?

Recently SAUNDERS (1991), 65, claimed : "Yet pollution is not in itself a penalty. To an offender pollution is no doubt a disagreeable consequence of an offence ; but not all disagreeable consequences are punishments. For punishments are imposed, either by an injured party or by someone on his behalf. Pollution, by contrast, is generally imagined to occur automatically, simply in virtue of the offence". But a few lines below he concedes : "Nevertheless, there are certain senses in which pollution can take on something of the nature and purpose of punishment. (1) Both the offender and the injured party may regard it, like the actual penalty, as an imposition, and to that

interconnection between religion and law appears very clearly in the cursing tablets ; see VERSNEL, H.S., "Beyond Cursing : The appeal to Justice in Judicial Prayers", in FARAONE, C. and OBBINK, D., *Magika Hiera. Ancient Greek Magic and Religion* (Oxford: CP, 1991), 60-106.

extent as a punishment in a special guise", and he continues to enumerate possible cases. Thus, for SAUNDERS (1991) pollution is a strong belief internalized by the killer, who immediately after the murder is haunted by the avenging spirits of the dead (28). But his claim seems to ignore certain features and the function of pollution in the context of ancient Athens. Pollution does not occur automatically, since declaration of the (possible) killer(s) is needed ; in other words pollution is not inherent in the killer immediately after the murder. Pollution appears after the proclamation. Pollution is selective and purposive ; that is, it can fall on the killer, and if the killer is not convicted it can affect all the city, depending on the gravity of the type of homicide. Thus, it works rather as an external, imposed social penalty. In this respect, pollution has the double function of any penalty, retribution and deterrence. Pollution is perhaps only a disagreeable consequence in the case of adultery (29) but it is much more serious in homicide.

28) GLUCKMANN, M., *The ideas in Barotse Jurisprudence*, (Manchester : MUP, 1972), 208 describes similar considerations among Barotse.

29) (D.) 59.86-7. Of course it is debatable whether this consequence did not deprive women of their only manifestation of public life. For adultery, in general, see COHEN (1991), 98-171 and 225.

Evidence concerning the *disassociation* of pollution from homicide comes from : 1) D. 20.158 :

ἐν τοίνυν τοῖς περὶ τούτων νόμοις ὁ Δράκων φοβερὸν κατασκευάζων καὶ δεινὸν τό τιν' αὐτόχειρ' ἄλλον ἄλλου γίνεσθαι, καὶ γράφων χέρνιβος εἶργεσθαι τὸν ἀνδροφόνον, σπονδῶν, κρατήρων, ἱερῶν, ἀγορᾶς, πάντα τᾶλλα διελθῶν οἷς μάλιστα ἄν τινας ᾤετ' ἐπισχεῖν τοῦ τοιοῦτόν τι ποιεῖν, (now Draco, in this group of laws, marked the terrible wickedness of homicide by banning the offender from the lustral water, the libations, the loving cup, the sacrifices and the market place ; he enumerated everything that he thought likely to deter the offender).

From this it is clear that the exclusion from sacred places was not any more an order inspired by religion but rather a way of deterring people from killing. The deterrence was exercised by convincing people that it was impossible to escape punishment, even if they escaped arrest and detention.

2) Ensuring the effectiveness of legislation with the threat of social penalties is not an unknown method in pre-modern societies. In ancient Greece evidence has been preserved about early legislators such as Charondas and Zaleukos (30). The

30) For the historicity of the early lawgivers see SZEGEDY-MASZAK, A., "Legends of the Greek Lawgivers", *GRBS* 19 (1978), 211-226. For the role of writing in the codification see GAMASSA, G., "Aux origines de la codification écrite des lois en Grèce", in DETIENNE, M. (ed.), *Les savoirs de l'écriture en Grèce* (Lille: Presses Universitaires de Lille, 1978), 130-59.

reliability of the authors reporting these penalties is of course doubtful, but if these sanctions are regarded as mere social practices, whose enforceability depended on the community rather than on any repressive mechanism, then these reports may deserve some credit. The first (Diod. Sic. 12.12.2) spells out that men found guilty of false accusations were forced to wear a wreath of tamarisk and the second (Diod. Sic. 12.16.1-2) provides that deserters should sit for three days in the market dressed in women's clothes.

In these cases there is a penalty which works through the disapproval of the unlawful act in public, when the condemned and punished offender, exposed to ridicule and public outrage, serves as a deterrent to future offenders. Moreover, anthropological studies of the last forty years, made evident that in small-scale societies the ways of settling disputes are not limited to the omnipotence of a central penal mechanism, but they can include "fighting and other forms of self-help, resort to supernatural agencies, the use of shaming and ridicule, or the unilateral withdrawal of essential forms of co-operation" (31). So, even if

About the reliability of late sources see COHEN, D., "Late sources and the 'reconstruction' of Greek legal institutions", in THÜR, G. and NENCI, G. (eds), *Symposium 1988 (Siena-Pisa 6-8.06.88)*, (Köln: Böhlau, 1990), 283-93. For the aforementioned personalities, see MÜHL, M., "Die Gesetze des Zaleukos und Charondas", *Klio* 22 (1929), 105-24 and 432-63. For early codification see HÖLKESKAMP, K.-J., "Written law in archaic Greece", *PCPS* 38 (1992), 87-117.

31) ROBERTS, S., "Law and the study of the small-scale societies", *The Modern Law Review* 39 (1976), 666. See also FARRAR, J.H. and

we accept that the report of these practices is based on legend or it is a gross moralizing exaggeration they are easily comprehensible as vestiges of older practices.

3) If pollution in cases of homicide is considered in the first stage as a supplementary means of the pursuit of the killer, and in the second stage, as a social substitute for revenge and deterrence, then the above mentioned inconsistencies can be easily resolved :

I. In the case of justified homicide the lack of punishment and the licence to kill, as it is legislated by the city, lead to the lack of pollution. So there is no need for revenge since the victim, in a way, has provoked his or her own death ; there is no need also for deterrence since it is the law which permits and/or justifies the killings. There is no pollution since the murder in such circumstances is acceptable by society ⁽³²⁾.

II. In the case of ἀνδροληψία there is no pollution because the presence of the killer is necessary for taking the revenge for the dead person and also as an example of the application of law

DUGDALE, A.M. (eds), *Introduction to legal method* (London : Sweet and Maxwell, 3rd edition, 1990), 5, and KARABELIAS (1991), 113ff.

32) The possibility of purification is not excluded, but it should be regarded as a ritual necessity and not as a part of the legal procedure. See PARKER (1983), 366-69, and RADCLIFFE-BROWN, A.R., *Structure and Function in primitive Society* (London : Routledge, 1952, reprint 1979), 213. Contra HEWITT, J.W., "The necessity for ritual purification after justifiable homicide", *TAPhA* 41 (1910), 111.

even in cases when the crime has been committed outside the actual borders of the city.

III. In the case of προδικασίαι (preliminary hearings) the presence of the alleged killer does not pollute, since after the proclamation the supplementary function of pollution, as described above, has finished and there is no need for substitution, since the suspect, debarred already from the public life, is to be put on trial.

IV. In the case of ἄφεσις (pardon by the victim), it seems that since the law grants the victims the right to pardon the killers, the killers do not need to be pursued in order to be brought into the court. In these cases the will of the individual cancels any legal intervention. But PARKER (1983), 108, explains this case differently: "In exempting from all legal sanctions, therefore, the killer who had been pardoned by his dying victim, the Athenians were not bidding defiance to pollution, but acknowledging its source", attributing more importance to the knowledge of the source of pollution. It is also possible to attribute such a feature to the fact that homicide is not entirely yet a public offence as in the modern penal systems, but retains the character of a private offence (33).

33) BONNER and SMITH (1932), 2.196 offer another dimension claiming that "the dying man by giving release to the guilty man declared that he wished no poiné", that is no compensation.

The proposed interpretation of pollution seems to explain adequately the pieces of evidence invoked by the upholders of pollution doctrine.

1. The *prorrhesis* issued by the *basileus* was the realization of the complementary function, that is, to put into effect the pursuit of the killers, by limiting their activities (34) and punishing them in this way. It is important to note here that pollution starts immediately after the *prorrhesis*; before the proclamation there is no hint about it. *Prorrhesis* constituted a ritual of passage from the status of the citizen, enjoying full legal protection, to that of a citizen with reduced rights and subject to certain constraints. *Prorrhesis* pronounced by the *basileus* on behalf of the community conveyed a specific meaning to certain acts and I am inclined to believe that it did not have any evidentiary value. Nevertheless, there is, at least, one instance (35) in which the orator uses an argument from the existence of personal contacts between prosecutor and defendant implying lack of pollution. Since there was no law on evidence, it is difficult to assess the legality of the use of these arguments as evidence.

2. In the procedure in the Prytaneion the revenge for the dead person who was killed by an animal or by an inanimate object was taken at a symbolical level, by the punishment of the

34) PAOLI (1956), 141.

35) My account relies on the analysis of TIERSMA, P.M., "Rites of Passage: Legal Ritual in Roman Law and Anthropological Analogues", *The Journal of Legal History* 9 (1988), 3-25.

animal or object, as a form of retribution. The fact that the defenders in the court in Phreatto stood a boat (36) does not mean that there was a fear of pollution but simply that they must pay the penalty for the unintentional homicide.

3. The fact that the law-courts sat in the open air can be explained as an attempt to avoid being under the same roof, which might be considered a proof of friendship between the prosecutor and the killer (37).

The references found in literary texts, which almost all are dated in the 5th century, are remarkable for the presence of an Apollonian influence, or, as many scholars have claimed (38), for an influence from the oracle of Delphi related to the expansion of Apollo's worship. However, in the majority of the literary

36) KARABELIAS (1991), 94-5 endorses the traditional interpretation. BONNER and SMITH (1932), 2.194, suggest that the exile "had not completed the *poine* and had not secured a pardon from the relatives" and PARKER (1983), 119 claimed that "these regulations ... protected the exile himself who, if he set foot in the forbidden territory became an outlaw to be killed with impunity".

37) Antiphon 5.11. See as well Antiphon 6.34 and 39, D. 21.117 where the hard core of the defendant's argumentation includes the commerce between prosecutor and defendant.

38) See especially CANTARELLA (1976), 83, where there are references to earlier bibliography, and recently BISCARDI, A., *Diritto antico greco* (Milan: Giuffrè, 1983), 283. TRESTON (1923), 142 maintains that in the principle of pollution there are Semitic influences, while ADKINS (1960), 97 and GERNET (1984), 23 claim that the priests of Delphi did not invent pollution in homicide cases but that they encouraged existing beliefs. BURKERT, W., "Itinerant Diviners and Magicians: A neglected element in cultural contacts", in HÄGG, R. (ed.), *The Greek Renaissance of the Eighth Century B.C.: Tradition and Innovation* (Stockholm, 1983), 115-19, discusses possible intercultural influence as it concerns different activities of diviners and magicians including purification and implies a Semitic spell.

references homicide is not the most important crime, but rather parricide (Oidipous) or matricide (Orestes) or incestuous marriage (Oidipous again) etc. (39). Besides, in the Homeric version of Oidipous' story, Oidipous continues to reign in Thebes after the revelation of his crimes.

B. According to the preceding analysis the relation between cleansing and punishment is easily explained. Cleansing is not a feature of the penalty on homicide, and it is not a remarkable particularity of the Athenian homicide law. This finding frees our conception of Athenian penal law from a possible demonic or metaphysical dimension. The penalties inflicted, especially in the case of homicide, serve above all the purposes of vengeance and deterrence. The city-state, deprived of a repressive mechanism, could not do anything but use current beliefs as dissuading and deterring factors.

C. The several mentions of pollution in the *Tetralogies* (40) are no more than appeals to the sentimental world of the jurors.

39) For a similar assessment see MIKALSON, J.D., *Honor thy Gods. Popular Religion in greek Tragedy* (London : University of North Carolina Press, 1991), 168.

40) The most recent discussion of the *Tetralogies* is by SEALEY, R., "The Tetralogies ascribed to Antiphon", *TAPhA* 114 (1984), 71-85, where there is a short note on pollution ; however the most complete commentary on

Given their highly sophisticated and argumentative character (41), these texts can provide us with examples of orators' manipulation of common beliefs or expectations in order to succeed in their purpose, that is the conviction or the acquittal of the defendant (42). The manipulation consists in the way in which both prosecution and defence use the motif of pollution. In the speeches for the prosecution (2.α:11, γ:11, 3.α:2, γ:12, 4.α:3-4, γ:7) pollution is invoked as a reminder to the jurors of their duty to punish the murderer and thus, to keep the city clean of the pollution. On the other hand, in defendants' speeches the spectre of defilement is raised in order to remind the jurors that their task is to find the guilty person and not to condemn innocent people (2.β:11, δ:11-12, 3.δ:9, 4.β:8-9, δ:10-11). The contradiction between speeches where real cases are tried, in which there is hardly any mention of pollution, and the *Tetralogies*, in which the great bulk of evidence occurs, is also significant of the kind of pollution mentioned there. In particular, only in the *First*

pollution in the *Tetralogies* can be found in PARKER (1983), 104-107. DOVER, K.J., "The chronology of Antiphon's speeches", *CQ* 44 (1950), 44-60 deals with the question of authenticity of these speeches; see as well the adventurous dating of the speeches in ZUNTZ, G., "Once again the Antiphontean Tetralogies", *MH* 6 (1949), 100-103.

41) The arguments used throughout the *Tetralogies* are based almost exclusively on probability (εἰκόσ). This kind of argumentation has the advantage of being practically irrefutable; the adversary can "answer" only with a counter-argument from probability. See SOUBIE, A., "Les preuves dans les plaidoyers des orateurs attiques", *RIDA* 20-21 (1973-74), 171-253 and 77-134.

42) On this aspect see GAGARIN, M., "The prohibition of just and unjust homicide in Antiphon's Tetralogies", *GRBS* 19 (1978), 291-306.

Tetralogy ($\alpha.3$ and $10-11$, $\beta.11$, $\gamma.11$) there is a very clear proof about pollution. The main theme is the defilement and the cleansing of the city, and only in the last instance the speaker identifies the three functions of the imposed penalty. In the *Second Tetralogy* there is only a short mention of the city's defilement ($\alpha.2$), and there are similar references in the *Third Tetralogy* ($\alpha.2-5$, $\gamma.7$) (43). In Antiphon's 5th and 6th speeches, there are no references of special interest except maybe 5.82, where there is a mention of polluted people who caused the sinking of ships on which they were travelling. But this argument has an auxiliary character and it is strictly connected with this particular case. Antiphon 6.34 and 39 can be considered as implicit references to pollution, especially as an argument "ex opposito" underlining the belief in some sort of defilement. But still its nature at least does not exclude the claim that pollution is used rather as an extra-legal indication and not as a legal argument. However, I think that even these two passages simply reinforce my interpretation of pollution as an external, socially imposed confinement.

Another feature of the use of pollution in these speeches is that pollution and arguments about it are never the central theme; pollution appears only at the beginning and at the end of the

43) There are similarities between the kind of the pollution mentioned by Antiphon and that observed in African tribes like Nuer [PARKER (1983), 120] and Arusha [GULLIVER, P.H., *Social Control in an African society*, (London: Routledge, 1963), 127-134]. It seems only that the social response was different, given the developed state-like social structure of the Athenian city.

text (44), as an argument about the well-being of the society, similar to the modern appeals to law and order even in cases of minor importance. I do not think that we shall be far from the truth if we claim that defilement is in *Tetralogies* a topical reference which was a favourite with this author.

To sum up, the notion of pollution, which appears after the end of the sixth century B.C. in our testimonies about legal life in Athens (45), was neither an independent feature of the homicide law in Athens nor a function of the penalty. Its impact on a social level was similar to that of controlling effectively the activities of the offender, not because of pollution but in order to promote a settlement of the dispute, restoring the disrupted social order and enhancing the cohesion of the society (46). On a legal level, it was on the one hand an accessory penalty, a kind of restrictive measure, when the killer was arrested, and on the other hand, when the killer escaped, a functional substitute for revenge and deterrence, in a society where there were not enough developed means and ways for the city-state, which was still in its infancy,

44) See for example in the *First Tetralogy* α.3, α.10, β.11, γ.9-11, δ.11. *Second Tetralogy* α.2, β.11-2, γ.8, γ.11-2, δ.9-10 and *Third Tetralogy* α.1-4, β.8-9, γ.6-7, δ.10-1.

45) For chronology see MACDOWELL (1963), 150, where he suggests, in accordance with BONNER and SMITH (1932), 199 that the doctrine of pollution may have been inserted in the legislation on homicide later than the seventh century B.C.

46) VERDIER *et al.* (1984), 150 considers *prorrhesis* as the sacralized function of the person who is responsible for taking revenge for the murder.

to ensure the implementation of its legislation (47). However, in the late fifth and fourth centuries B.C. the indictment could be enforced by the procedures of ἀπαγωγή (D. 23.80-1) or ἔνδειξις (And. 1.10), while for the earlier period it is difficult to say if these procedures were available. (*)

47) In this respect it is possible to insert pollution - indictment in GAGARIN's (1986), 1-7 explanatory scheme of the primarity of procedural rules over substantive law, since it satisfies the conditions of publicity and formality. However, it seems to me that in this particular case GAGARIN's initial assumption presupposes a substantive norm, which will define the legally protected article, that is human life. Cf. HÖLKESKAMP, *Gnomon* 62 (1990), 116-28.

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