

DEUXIÈME PARTIE

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When were the Athenian Adultery Laws Introduced ?

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The peculiar character of the laws on adultery in classical Athens and the extent to which these reflect attitudes of the Athenian society have been the subject of several studies in recent years. The controversial studies of David COHEN ⁽¹⁾ have provoked vivid debate ⁽²⁾ but our understanding of these laws has not become as clear as one would have hoped. The heart of the matter is that scholars so far have tried to give unitary explanations to these laws overlooking the fact that they were neither one single piece of legislation nor products of the same period. In this study my intention is to point out that adultery was covered by a series of different laws, which can be dated with a degree of certainty in different periods of Athenian history. I will

1) The bulk of COHEN's research into the subject is collected in his recent book *Law, Society and Sexuality*, Cambridge 1991. Many of the serious weaknesses of this study have been pointed out by D. M. MACDOWELL in his review in *CR* 106 (1992) 345-47 and K. DOVER in his review in *Gnomon* 65 (1993) 657-60.

2) See the replies of Eva CANTARELLA and Lin FOXHALL in *Symposion* 1990, (Vorträge zur griechischen und hellenistischen Rechtsgeschichte), 289-296 and 297-304.

also argue that, while there is a degree of unity in concept among all these laws, some of the differences in attitudes reflected in them should also be ascribed to the different periods in which they were introduced (3).

The core of the evidence consists of several laws either quoted *ad verbum* or paraphrased in authors of the classical period. A large number of references both in classical and in post-classical texts illustrates this information and supplies some interesting details. Although there are limitations upon the evidence from post-classical authors and doubts about the accuracy of some classical sources (4), a careful consideration of their combined evidence can render a fairly complete definition of adultery in the eyes of Athenian law. The sources quoted here,

3) In this study I will not attempt a comprehensive discussion of adultery in the Athenian Society, nor will I include many classical and post-classical sources, which illustrate further various views of this phenomenon. My use of sources is selective, intended only to support my arguments about the dates of these laws.

4) COHEN (pp. 108-109) dismisses a big slice of the evidence coming from D. 59, on the grounds that the narrative of this speech contains many inaccuracies. MACDOWELL (p. 346) and CANTARELLA (pp. 295-6) have protested stating that, whatever the case regarding the narrative, the meaning of the word *μοιχεύειν* in connection with an unmarried woman cannot be disputed. Beyond that, it is true that several inaccuracies can be detected in the narrative of D. 59, the main lines of the narrative, however, are not in question. The orator has been able to present witnesses, regarding the first marriage of Neaira's daughter, her divorce, the dispute with Epainetos over the adultery issue, and her second marriage afterwards. Details may be distorted, but, briefly speaking, before we dismiss any part of the narrative we must be able to state clearly what induces us to do so at this particular point. Parts of the narrative may be unreliable, but not necessarily the whole of the evidence drawn from it.

which I find sufficient to provide a clear picture, are numbered for quick reference:

1.

D. 23, 53: ΝΟΜΟΣ· εἰάν τις ἀποκτείνει ἐν ἄθλοις ἄκων, ἢ ἐν ὁδῷ καθελὼν ἢ ἐν πολέμῳ ἀγνοήσας, ἢ ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπ' ἀδελφῇ ἢ ἐπὶ θυγατρὶ, ἢ ἐπὶ παλλακῇ ἢν ὅν ἐπ' ἐλευθέροις παισὶν ἔχη, τούτων ἕνεκα μὴ φεύγειν τὸν κτείναντα.

See also:

i) Lys. 1, 30: διαρρήδην εἴρηται τούτου μὴ καταγιγνώσκειν φόνον, ὅς ὅν ἐπὶ δάμαρτι τῇ ἑαυτοῦ μοιχὸν λαβὼν ταύτην τὴν τιμωρίαν ποιήσεται.

ii) Lys. 1, 29: *Eratosthenes caught committing adultery* ὅπως μὲν μὴ ἀποθάνῃ ἡντεβόλει καὶ ἰκέτευε.

iii) Lys. 13, 66: γυναῖκας τοίνυν τῶν πολιτῶν τοιοῦτος ὢν μοιχεύειν καὶ διαφθείρειν ἐλευθέρως ἐπεχείρησε, καὶ ἐλήφθη μοιχός· καὶ τούτου θάνατος ἡ ζημία ἐστίν.

iv) X, *Hier.* 3, 3: μόνους γοῦν τοὺς μοιχοὺς νομίζουσι πολλὰ τῶν πόλεων νηποινεῖ ἀποκτείνειν.

v) Men. Fr. 306 KÖRTE: οὐκ ἔστι μοιχοῦ πρᾶγμα τιμώτερον / θανάτου γάρ ἐστιν ὄνιον.

vi) Aristaenet. 2, 17: *A persistent young man is repelled by a virtuous woman* ἄπιθι, τὴν σὴν ὁδὸν διανύων, πρὶν ὑπ' ἐκείνου φωραθῆς καὶ δι' ἐμὲ τοιοῦτος τεθνήξεται

νεανίας. *He replies* καὶ διὰ σὸν κάλλος ἢ γάμον ἀσμένως ἢ τάφον αἰροῦμαι.

vii) Lys. 1, 31: ὥστε καὶ ἐπὶ ταῖς παλλακαῖς ταῖς ἐλάττονος ἀξίας τὴν αὐτὴν δίκην [i.e. φόνον] ἐπέθηκεν.

viii) Aristaenet. 1, 13: *a young man desires his father's παλλακή. A cunning doctor persuades the father to agree, on the grounds that it should be treated as a cure rather than μοιχεία.*

ix) Luc. Eun. 10: καὶ μοιχὸς ἐάλω ποτέ, ὡς ὁ ἄξων φησὶν, ἄρθρα ἐν ἄρθροις ἔχων.

2.

a. Lys. 1, 25: ἤντεβόλει δὲ καὶ ἰκέτευε μὴ ἀποκτεῖναι ἀλλ' ἀργύριον πράξασθαι.

b. D. 59, 65: εἰς φόβον καταστήσας πρᾶττεται μνᾶς τριάκοντα, καὶ λαβὼν ἐγγυητὰς τούτων ... , ἀφίησιν ὡς ἀποδώσοντα αὐτῷ τὸ ἀργύριον.

See also:

i) Ar. Plu. 168: Addressed to Wealth: ὁ δ' ἁλούς γε μοιχὸς διὰ σέ που (γ' οὐ VALCKENAER) παρατίλλεται.

ii) Sch. Vet. Plu. 168: ... ὁ ἁλούς γε μοιχὸς παρατίλλεται, ἵνα δοὺς χρυσὸν ἀπολυθῇ ...

iii) Schol. Tzetz, Plu. 168: οἱ πλούσιοι ... ἄνπερ μοιχεύοντες ἠλίσκοντο, χρήματα παρέχοντες ἀπελύοντο ...

iv) Call. Com. *PCG* Fr. 1 (cf. Zenobius in *Paroemiographi*, IV, 67): κέρδος αἰσχύνῃς ἄμεινον / ἔλκε μοιχὸν εἰς μυχόν.

v) Alciphr. 3, 26, 4: ἐκεῖνος γὰρ λύτρα παρὰ τῶν μοιχῶν ἐπὶ τῇ γαμετῇ πραττόμενος ἀθώους τῆς τιμωρίας ἡφίει.

3.

Lys. 1, 49: ἐάν τις μοιχὸν λάβῃ, (ἄνευ ἐγχειριδίου) ὃ τι ἂν βούληται χρῆσθαι.

See also:

i) X. *Mem.* 2, 2, 5: ὥσπερ οἱ μοιχοὶ εἰσέρχονται εἰς τὰς εἰκτάς, εἰδότες ὅτι κίνδυνος τῷ μοιχεύοντι καὶ ἃ τε ὁ νόμος ἀπειλεῖ παθεῖν καὶ ἐνεδρευθῆναι καὶ ληφθέντα ὑβρισθῆναι.

ii) Ar. *Nub.* 1083: τί δ' ἦν ῥαφανιδωθῇ πιθόμενος σοι τέφρα τε τιλθῇ.

iii) Schol. Vet. *Nub.* 1083: τοὺς ἀλόντας μοιχοὺς οὕτω ἡκίζοντο· ῥαφανίδας λαμβάνοντες καθίεσαν εἰς τοὺς πρωκτοὺς τούτων, καὶ παρατίλλοντες αὐτοὺς τέφραν θερμὴν ἐπέπασσον βασάνους ἱκανὰς ἐργαζόμενοι.

iv) Schol. Triclin. *Nub.* 1083: ὅτε τις μοιχὸς ἐάλω, ἀνασπώμενος τὰς τε ὑπογαστρίους καὶ τὰς τοῦ πρωκτοῦ καὶ τῆς πόσθης τρίχας τέφραν πυρὶ ζέουσαν ἐπάττετο· εἰσώθουν δὲ καὶ εἰς τὴν τοῦ πρωκτοῦ ὁπὴν ῥαφάνην

[ξύλον εἰς ῥαφάνην ἐσχηματισμένον] ὁ μεγίστης ἀτιμίας καὶ ὀδύνης ἦν.

v) Schol. Tzetz. *Plu.* 168: ... ἄνπερ μοιχεύοντες ἠλίσκοντο ... μὴ ἔχοντες χρήματα δαπανεῖν δημοσίως ἀπερραφανιδοῦντο καὶ παρετίλλοντο ... ὁ ἄπορος ὁ ἠλωκῶς τῇ μοιχείᾳ, τεθεὶς ἐν μέσῃ τῇ ἀγορᾷ καὶ σποδιᾷ ...

vi) Luc. *Peregr.* 8: ἐν Ἀρμενίᾳ μοιχεύων ἀλούς μάλα πολλὰς πληγὰς ἔλαβεν καὶ τέλος κατὰ τοῦ τέγουσ ἀλόμενος διέφυγεν, ῥαφανίδι τὴν πυγὴν βεβυσμένος.

vii) Catullus 15: 17-19: *a tum te miserum malique fati, / quem attractis pedibus patente porta / percurrent raphanique mugilesque.*

viii) Schol. Iuven, 10, 37: *Mugilis piscis grandi capite postremus exilis qui in podicem moechorum deprehensorum solebat immitti.*

4.

D. 59, 66: κατὰ τὸν νόμον ὃς κελεύει, ἐάν τις ἀδίκως εἶρξη ὡς μοιχόν, γράψασθαι πρὸς τοὺς θεσμοθέτας ἀδίκως εἰρχθῆναι, καὶ ἐάν μὲν ἔλῃ τὸν εἶρξαντα καὶ δόξῃ ἀδίκως ἐπιβεβουλευσθαι, ἀθῶον εἶναι αὐτὸν καὶ τοὺς ἐγγυητάς ἀπηλλάχθαι τῆς ἐγγύης· ἐάν δὲ δόξῃ μοιχὸς εἶναι, παραδοῦναι αὐτὸν κελεύει τοὺς ἐγγυητάς τῷ ἐλόντι, ἐπὶ δὲ τοῦ δικαστηρίου ἄνευ ἐγχειριδίου χρῆσθαι ὃ τι ἂν βουλευθῇ, ὡς μοιχῶ ὄντι. κατὰ δὴ τοῦτον τὸν νόμον ...

See also:

i) D. 59, 65: λαμβάνει μοιχὸν ... καὶ εἰς φόβον καταστήσας πρᾶττεται μνᾶς τριάκοντα, καὶ λαβὼν ἐγγυητὰς τούτων ... ἀφίησιν ὡς ἀποδώσοντα αὐτῷ τὸ ἀργύριον.

ii) Aristanet. 1, 20: ἦλω τις νεανίας μοιχός, καὶ δεσμώτης ἐφυλάττετο παρ' ἐμοῦ.

5.

D. 59, 67: τὸν νόμον ... ὃς οὐκ ἔῤ' ἐπὶ ταύτῃσι μοιχὸν λαβεῖν ὅποσαι ἂν ἐπ' ἐργαστηρίου καθῶνται ἢ πωλῶνται ἀποπεφασμένως.

See also:

i) Lys. 10, 15-19: καὶ μοι ἀνάγνωθι τούτους τοὺς νόμους τοὺς Σόλωνος τοὺς παλαιούς ... ὅσαι δὲ πεφασμένως πωλοῦνται ... τὸ μὲν πεφασμένως ἐστὶ φανερώς, πωλεῖσθαι δὲ βαδίζειν.

ii) Plut. Sol. 23: ὅλως δὲ πλείστην ἔχειν ἀτοπίαν οἱ περὶ τῶν γυναικῶν νόμοι τῷ Σόλωνι δοκοῦσι. μοιχὸν μὲν γὰρ ἀνελεῖν τῷ λαβόντι δέδωκεν ... πλὴν ὅσαι πεφασμένως πωλοῦνται, λέγων δὴ τὰς ἐταίρας· αὗται γὰρ ἐμφανῶς φοιτῶσι πρὸς τοὺς διδόντας.

iii) Argentarius, AP 403, 7-8: *speaking about the services of a pimp to the community* ἀλλ' ὅτι κοινὰς / θρέψας, μοιχεύειν οὐκ ἐδίδαξε νέους.

iv) D. 59, 67: ὡμολόγει μὲν χρῆσθαι τῇ ἀνθρώπῳ, οὐ μέντοι μοιχὸς γε εἶναι.

v) Arist. EE. 1121b23-25: διὸ καὶ ἀμφισβητοῦσι συγγενέσθαι μὲν φάσκοντες ἄλλ' οὐ μοιχεύσαι, ἀγνοοῦντες γὰρ ἢ ἀναγκαζόμενοι.

6.

a. D. 59, 87: ΝΟΜΟΣ ΜΟΙΧΕΙΑΣ· Ἐπειδὴν δὲ ἔλῃ τὸν μοιχόν, μὴ ἐξέστω τῷ ἐλόντι συνοικεῖν τῇ γυναικί· ἐὰν δὲ συνοικῇ ἄτιμος ἔστω. μηδὲ τῇ γυναικὶ ἐξέστω εἰσιέναι εἰς τὰ ἱερὰ τὰ δημοτελεῖ, ἐφ' ἣ ἂν μοιχὸς ἁλῶ· ἐὰν δ' εἰσίῃ, νηποινεῖ πασχέτω ὃ τι ἂν πάσχη, πλὴν θανάτου.

b. Aesch. 1, 183: Ὁ δὲ Σόλων ... γέγραφεν ἀρχαίως καὶ σεμνῶς περὶ τῆς τῶν γυναικῶν εὐκοσμίας. Τὴν γὰρ γυναικά ἐφ' ἣ ἂν ἁλῶ μοιχὸς οὐκ ἔῃ κοσμεῖσθαι, οὐδὲ εἰς τὰ δημοτελεῖ ἱερὰ εἰσιέναι, ἵνα μὴ τὰς ἀναμαρτήτους τῶν γυναικῶν ἀναμειγνυμένη διαφθείρῃ· ἐὰν δ' εἰσίῃ ἡ κοσμεῖται, τὸν ἐντυχόντα κελεύει καταρρηγνύναι τὰ ἱμάτια καὶ τὸν κόσμον ἀφαιρεῖσθαι καὶ τύπτειν εἰργόμενον θανάτου καὶ τοῦ ἀνάπτηρον ποιῆσαι, ἀτιμῶν τὴν τοιαύτην γυναικά καὶ τὸν βίον ἀβίωτον αὐτῇ κατασκευάζων.

See also:

i) Rufinus AP 5, 71: *A frustrated husband wants to get rid of his wife. His only salvation would be to look for μοιχόν φίλον, ὅς σ' ἐλεήσας ...*

7.

Arist. *Ath.* 59, 3: εἰσὶ δὲ καὶ γραφαὶ πρὸς αὐτοὺς (τοὺς θεσμοθέτας) ... καὶ μοιχείας.

See also:

i) Arist. *Pol.* 1036a38 *referring to a trial in a law court ἐπ' αἰτίᾳ μοιχείας.*

The first passage (1) has nothing to do with any statute of adultery. The context, as well as the language (e.g. δόμαρτι) make clear that this is a quotation from Drakon's homicide law. Among other cases in which the killer should be exonerated, like an accident during games (5) or at war, adultery is mentioned. A man ought not be prosecuted for killing an adulterer caught in the act. 'Ἐπὶ + dative implying a person, could not have any other meaning and the clear phrase of D. 59, 65 μοιχὸν ἐπὶ τῇ θυγατρὶ τῇ Νεαίρας confirms that 'with somebody in the act' is the only possible understanding of this construction. CANTARELLA (6) based on a passage of Lucian (lix) has overemphasized the significance of this phrase, understanding that 'in the act' could only apply, if the lovers were caught during penetration. FOXHALL (7) has expressed her doubts about CANTARELLA's understanding and I could hardly imagine the

5) Cf. Antipho 3.

6) P. 291 ff.

7) P. 299.

individual judge in Athens worrying very much whether two people caught committing adultery were at the foreplay or in the actual intercourse! What I mean is that any statute trying to define exactly what 'in the act' meant would be an irrelevance in the Athenian legal system, where the only manoeuvre available to a judge was to vote for or against the defendant, according to whether he was persuaded by the whole of his presentation or not.

If we consider social relations in classical Athens, they reveal a reality diametrically opposite from CANTARELLA's understanding of 'in the act'. Males were not supposed to visit females who were not relatives, even in the presence of the κύριος of the house. A man found in someone's house ought to be able to give a very good reason for his presence there. In a frequently mentioned passage of Lysias (3,6) a man proud of his sister's and nieces' virtues says: οὕτω κοσμίως βεβιώκασιν ὥστε καὶ ὑπὸ τῶν οἰκείων ὀρώμενα αἰσχύνεσθαι. And, even if this is an extreme case of feminine virtue, an event narrated in D. 57, 60 illustrates very clearly that one could never be too careful not to enter somebody's house when the man was absent: A house was being looted, while the κύριος was absent. The servants of the neighbours were able to hear the cries of the women for help and they asked an Athenian man who happened to be passing to intervene. But the man did not enter the house. The reason was that he thought he should not enter while the man of the house was absent (οὐ γὰρ ἡγήετο δίκαιον εἶναι μὴ παρόντος γε τοῦ κυρίου). Instead, he stood at the neighbour's house watching and he appeared at the law-court to give evidence

for what he saw. In this context, numerous references (8) to tricks of women enabling their lovers to escape support the view that for the lover to be in the woman's house would be an incriminating fact *per se*. A passage from Achilles Tatius (5, 23, 3) confirms this explicitly: Melite and Cleitophon were about to sit down and have some wine in the women's quarters. They were still dressed and Cleitophon did not have a sexual interest in her. Her husband walked in and, seeing this man sitting with his wife, he accused the startled Cleitophon that he was committing adultery and confined him. Women did not have much freedom of movement to visit their lovers -certainly they could not do so without making the affair public- this is why almost always the scene of the adultery is their house. Ἐνδον (9), often found in context of adultery, is the key concept. To find a man with a woman in her house in suspicious circumstances would be enough proof of adulterous acts in progress and would entitle the husband to treat him as a μοιχός. In fact Euphiletos does not say that he caught Eratosthenes ἄρθρα ἐν ἄρθροις. Being naked in bed next to the woman (10) could not have been interpreted in any other way by the Athenian judges. The evidence of Lucian (1ix) must not necessarily be discredited, especially since he mentions that ἄρθρα ἐν ἄρθροις comes from a legal text. It could have been a law of the Roman era trying to define more

8) Cf. Arist. *Th.* 493 ff.; Ael. *NA* 7, 25; Aristaenet. 2, 22.

9) Lys. 1, 23; Arist. *Eccl.* 225, *Th.* 397; Rufinus *AP* 5, 41, 5.

10) Lys. 1, 24.

closely what 'to be caught in the act' meant. This definition, however, could not have been valid during the classical period.

COHEN (11) says about this law "In fact, this statute neither prohibits nor defines adultery". But it does prohibit adultery by granting immunity to the killer of an adulterer, and it does define adultery, by permitting any man to appeal to this law and treat someone as an adulterer, if he had been caught with one of the women of the man's household, whether wife or mother or sister or daughter or concubine. There is no possibility that where the strictest punishment -death- could have been inflicted the more lenient punishments prescribed in later statutes would not apply. The corroborating evidence that adultery was not limited to marital relations (i.e. legitimate wife, concubine) leaves us in no doubt that this was the case. To the evidence of D. 59, 64 ff. and Menander (*Sam.* 717), already pointed out by MACDOWELL, one could add one passage of Menander (Fr. 683, KÖRTE: δέῃ γὰρ τὸν ἄνδρα χρήσιμον πεφυκέναι / μὴ παρθένους φθείροντα καὶ μοιχώμενον) and the combined evidence of two speeches of Lysias. In 13, 66 (1iii) he speaks about μοιχεύειν in relation to free women (ἐλευθέρως), while the speaker in Lys 3. 23 by γυναῖκας ἐλευθέρως refers to his widowed sister and her daughters. In the face of this evidence one could not doubt that adultery could be committed with the wife, mother, sister, daughter or concubine of an Athenian man, i.e. all free women of his household, and that this concept of

11) P. 104.

adultery had been crystallized in the law of Drakon and remained unchanged throughout the classical period.

Caution is necessary when it comes to the provision regarding the *παλλακή* (cf. 1vii, 1viii), since the legal status of a *παλλακή* may have been different in the time of Drakon. Unfortunately we do not know much about *παλλακεία* before the classical period. But the concepts of citizenship and legitimacy, which seriously discriminated against children not born in lawful wedlock¹²), and which, therefore, drastically influenced the status of a *παλλακή* and her children, were not introduced before the Periclean law of citizenship in 451. It seems that the intention of the law of Drakon at this point was different, as probably illegitimate children from a *παλλακή* had more rights than they had in the classical period and therefore the status of their mother in the household would have inspired more respect. But whatever its concept at the time of Drakon, in classical Athens this law would be interpreted by the standards of the time. Athenian citizens kept *παλλακαί*, frequently women with a past as courtesans, from whom they might have children, as a woman in Isae. 3, or they might not, but, nevertheless share their lives with them in affectionate life-long relationships, as Olympiodoros and his ex-hetaira in D. 48 or Phrynion and Neaira (for a period of time) in D. 59. It is quite important to emphasize that most of these relationships

12) It is disputed whether legitimacy, i.e. birth in lawful wedlock, was a requirement for citizenship in addition to Athenian parentage from both sides. See RHODES, P.J., *A Commentary on the Aristotelian Athenaion Politeia*, Oxford 1981, pp. 496-7 and MACDOWELL, CQ 26 (1976) 88-91.

in Classical Athens, unlike many marriages, which were dictated by interest, were based on affection. Not only is it so with most cases known to us, but in addition, what other reason would an Athenian man have to maintain a concubine, instead of taking a legitimate wife and the dowry that would come along with her? The intention of the law of Drakon might have been quite practical, when extending adultery to cover a *πολλακή*, and clearly had in mind her offspring. In the classical period, however, the Athenians would give a broader interpretation to this provision, as it enshrined their right to exclusivity with long-term companions.

The legislation of Drakon, notorious for its harshness, punished adultery with death. The possibility of death with immunity for the killer was open not only throughout the classical period (1i-1iii) but remained so until late antiquity (1v, 1vi) and was not limited to Athens (1iv). But the death penalty was not mandatory according to the Drakonian legislation. It was an option available to the insulted man to be carried out by himself, if he wished to do so. We do not know if adultery was treated separately as an offence elsewhere in the Drakonian legislation. If not, which seems likely, an alternative to execution would be necessary, as not every man would be willing or cold-blooded enough to carry out an instant execution of the adulterer. This is why it would be reasonable to suggest that the practice of financial compensation instead of death, had started at the time of Drakon or had even preceded the Drakonian legislation.

A financial arrangement (2a, 2b) was probably not enshrined in any statute, but it was a widespread practice throughout antiquity (2i-2v). As 2b reveals, legal procedures were involved only to the extent of securing through sureties that the agreement would be kept. Alternatively the man could confine the adulterer until he arranged the payment of the agreed sum (2ii, 2iii, 4ii). Compared with other alternatives, except the fact that it was beneficial for both sides, for the κύριος it was safer than the execution of the adulterer, as an execution might lead to a prosecution for homicide with all the dangers involved (as in the case of Euphiletos). In cases of unmarried women, as the evidence of D. 59 suggests, it would be even more practical in many ways. One can imagine the raging husband killing the adulterer instantly, but hardly the hopeless father killing the lover of his naughty daughter. Negotiating a good compensation, keeping quiet about the whole affair, and, eventually, perhaps arranging a suitable marriage would be much more beneficial for both sides. If the woman was married the mandatory divorce (6a) was not always a desired option. Again, in cases like this, if the adulterer was able to pay and the husband (2iv, 2v) willing to accept, forget and keep quiet, compensation would be the preferred option. Compensation was not seen as an option of great moral calibre (2iv, 2v) but certainly it would be just suitable for some offended men. Apart from the wishes of both parties and despite its advantages this option could only be taken if the adulterer was well-off (2i-2iii).

If the adulterer was unable or unwilling to pay or the insulted man unwilling to accept money and let the matter rest, another alternative was open in the classical period (3). The man could take revenge for his wounded pride, by inflicting bodily humiliations upon the adulterer. He was permitted to confine the adulterer and maltreat him in any way he liked with one limitation: he could not injure him with a blade (see below). Comedy and satire thrived on the subject (3ii-3viii) and the punishments, so graphically described, were a humiliation 'in kind' for the adulterer. Atonement for the insulted manhood of the κούριος was made by a direct assault on the manhood of the adulterer. Although practice varied some punishments seem to have been standard in the classical period: radishes inserted in the anus of the adulterer, removal of the pubic hair and hot ash (3ii-3vi) are frequently mentioned. The vicious scorpion fish punishment (3vii, 3viii) might have been used in classical Athens, too (13). The place where the punishment took place was the house of the insulted man in most occasions. Some people would have felt the desire to make the humiliation worse by making it more public, either by leaving the door wide-open (3vii), or even by dragging the adulterer into the middle of the market and inflicting the punishment in full view of the public (3v). Financial compensation and bodily humiliations could probably be combined as some sources speak of bodily humiliations as a means of obtaining compensation (2i, 2ii, 3v). It seems reasonable, however, that if financial compensation was

13) See most recently C. CAREY in *LCM* 18 (1993) 53-5.

the agreed option from the beginning this could also buy immunity from humiliations for the adulterer.

When this alternative punishment was introduced is not clear. Perhaps the answer lies in the concise wording of this law. It simply leaves the choice of punishment open to the man. Considering that in legislation of the classical period the punishment for breaking the law tends to be more precisely defined (see 4 and 6, for example) and that this provision was not introduced by Drakon, this inevitably leads us to Solon. Passage 5 is certainly a Solonian piece of legislation (see below) and it defines which cases were not considered to be adultery. One cannot imagine that Solon would only provide a negative piece of legislation defining what is not adultery, without introducing a positive piece of legislation on adultery. If this is the case, the present law fits perfectly with this concept. It provides a less drastic alternative to the Drakonian legislation, by allowing the insulted party to take some kind of satisfaction without having to be involved in homicide proceedings. In fact, this would be the first statute to treat adultery separately as an offence. This fact made necessary a clearer definition of what was adultery and what was not. As for the former, the Drakonian law, clearly gave the definition, so Solon only gave a separate definition to the latter, by stating what could not be considered to be adultery.

Passage 4 seems to be a statute of the classical period. The language of it and also the fact that it is immediately preceded and followed by phrases stating that this is a law indicate that it must

be an almost word-for-word quotation. Although it is not certain that the ἐγγυηταί were a creation of classical law, nor that the θεσμοθέται would be responsible for handling this kind of proceedings only in the classical period, it is very likely that such proceedings would not be as fully developed in the time of Solon. Its advanced technical language points to the classical period. On the other hand, it is unlikely that people were not offered some kind of protection against unlawful confinement or unfounded accusations of adultery before the classical period. There are two possibilities: a) an older law which should be ascribed to Solon was revised or b) which I find more likely, cases of unlawful murder, unlawful confinement or unlawful humiliations under the pretext that a man was an adulterer were covered by those provisions of Solonian legislation dealing with these offences in general, but no law with specific reference to the offence of adultery was introduced before the classical period. (See also below, the discussion on passage 6).

This law was intended to deal with cases in which a man was confined against the law, under the pretext that he had committed adultery. It is quoted in D. 59, where a man is threatened and forced to agree on financial compensation, although the woman he was caught with was practising prostitution. This law enabled the case to be referred to the court and if the suspect lost, then he would be treated as an adulterer. The law permitting bodily humiliations would be enforced again, while the possibility of execution was no longer open. The phrase ἄνευ ἐγγυητιδίου

has been interpreted by PAOLI ⁽¹⁴⁾ as leaving this possibility open. In his opinion, the man could kill the convicted adulterer by other means but not bloodshed. This would be unthinkable. Individual Athenians could not perform executions themselves. To kill in a rage and not to have to face punishment for that, because the murder was dictated by an invincible impulse to enforce justice, was one thing, a cold-blooded execution was another. G.H. SCHAEFER ⁽¹⁵⁾ has correctly pointed out the correspondence with *πλὴν θανάτου* (6a). The interpretation of *πλὴν θανάτου*, given by Aeschines (6b) in his paraphrase of the law referring to the adulteress (6a), as *εἰργόμενον θανάτου καὶ τοῦ ἀνάντηρον ποιῆσαι* should be understood as applying to men, too. The phrase *ἄνευ ἐγχειριδίου* excluded death or permanent injury. The intention was to humiliate the adulterer and offer satisfaction 'in kind' to the insulted man, not to have men tortured, mutilated or killed, especially in front of the law-court. The fact that a conviction had the force of the second law (3) on adultery probably means that the restriction *ἄνευ ἐγχειριδίου* was part of that law in the first place. Its conjunction with *ὃ τι ἂν βουληθῇ* here (4), a phrase certainly included in the second law (3) on adultery, probably means that the whole phrase comes from that law (3) and that it was incorporated in the later statute (4), because the spirit of it was that if the man proved to be an adulterer, the second adultery

14) *SDHI* 16 (1950) p. 149.

15) *Apparatus Criticus et Exegeticus ad Demosthenem*, London 1826, vol. 5, com. *ad loc.*

statute which permitted bodily humiliations (3) should be enforced.

Passage 5 is attributed to Solon by Lysias, where it is read among other Solonian laws (5i), and by Plutarch (5ii). The language of it, already antiquated at the beginning of the 4th century (5i) confirms this claim (16). Solon defined in this law cases which should not be considered adultery. 'Εργαστήριον is a euphemism for a brothel (17) and καθῶνται applies to the prostitutes established in it (18). Πωλοῦνται, as Lysias defines it (5i), means 'to wander' and it refers to free lance prostitutes. The law of Solon dictated that it should not be considered adultery if a man went with a woman who was established in a brothel or practised any other kind of prostitution. A man accused of adultery could deny the accusation, claiming that although he had intercourse with this particular woman, this did not amount to adultery, because she was practising some type of prostitution (5iv, 5v), and follow the legal proceedings as defined in passage 4. If the assumption that passage 4 is a law of the classical period is correct, then, before that statute, the laws of Solon would have provided alternative protection to the unjustly

16) See also HILLGRUBER, M., *Die zehnte Rede des Lysias*, Berlin 1988, com. §§ 15-19; RUSCHENBUSH, E., *Σόλωνος Νόμοι*, Wiesbaden 1966; FLACELIÈRE, R., *RPh* 23 (1949) p. 127.

17) Cf. Aesch. 1, 124; Alc. 3, 27.

18) Cf. Aesch. 1, 74; Isae. 6, 19.

accused μοιχός through the legislation against unlawful confinement and assault of a free person.

Passage 6a in its present form is clearly a statute of the classical period, while 6b is a paraphrase of this passage by Aeschines. The meaning of ἀτιμία as disfranchisement is classical. A closer look at this law reveals that its spirit is also clearly classical. The first part of the law, which refers to men (ἐπειδὴν ... ἄτιμος ἔστω), applies only to adultery within marriage. The second part which refers to women applies to all women. Before an explanation for this unevenness is given, we need to look more closely at these two sections.

The first part is in some way a continuation of provisions covered by previous laws. Once the adulterer was caught and punished the husband could not claim that he was satisfied and let the case rest. He was obliged to take the final step and divorce the woman. This was not the step that all men would take on their own free will, especially considering the largely financial nature of marriage in Classical Athens. Some women came into the marriage with a large dowry which would have to be returned to the last obol. Why the law did not let people decide for themselves the final settlement in an adultery case, but intervened to order divorce, becomes clear if we consider the nature of the penalty, if the husband did not comply. He would lose most of his civil rights (ἄτιμος). Full civil rights and citizenship in classical Athens were reserved for the offspring of two citizens. If adultery had been committed nobody could be sure about the

father of the children and certainly an adulteress could not be trusted afterwards (19). The fear of illegitimate offspring born from adulterous unions, entering the citizen body fraudulently, compelled the state to intervene and make divorce mandatory under a severe penalty for the man.

Women did not participate in political life nor had direct dealings with the law-courts. Their public persona was expressed through participation in religious festivals, where they could turn up looking their best, socialize with the rest of the women, and perform traditional duties as representatives of their families. A woman caught committing adultery was deprived of all that. This in a sense was equivalent to ἀτιμία, as; Aeschines states (ἀτιμῶν αὐτήν) and PAOLI has eloquently described (20), since she would be deprived of her civil existence. A woman unable to attend religious festivals would be a woman with hardly any reason to leave the house. An adulteress would not only be sent back to her paternal home but also she would have to spend there a life in isolation and indignity.

These were severe punishments, but introduced only in the classical period. It is remarkable that until then the law did not bother to penalize women caught committing adultery, although it had treated men with a heavy hand. I do not believe for a minute that until then women would get away lightly. Sanctions and humiliations within the family would be harsh, and some later

19) Lys. 1, 33; Arist. HA 585a15-6; CLARK, Gillian, *Women in Late Antiquity*, Oxford 1993, pp. 35 ff.

20) *Op. cit.* 167-8.

epigrams graphically describe such humiliations (21). The fact that women were not involved with the law until then clearly has to do with the patronizing attitude of Athenian law towards women. In most occasions they did not have any direct dealings with it; instead, they were represented by their male *κύριος*, from the management of property coming with them -as in reality they did not own it- to giving evidence before the courts or seeking justice for offences committed against them. In this light it is not surprising that until the 5th century the law did not interfere to deal directly with the adulteress, leaving it to the men in charge. What changed, however, in the 5th century which induced the state to interfere and legislate directly against women, as well, was nothing but the fear of illegitimate offspring of uncertain paternity passing as citizens by birth.

This underlying fear of illegitimate children passing as citizens is what unites the two sections of 6a, i.e. provisions for husbands of adulteresses and provisions for all adulteresses, into one piece. If this interpretation is correct, this law was passed after 451.

Passage 7, with the weak support of 7i, offers little new evidence, if any at all, about one more procedure, a *γραφὴ μοιχείας*. One cannot exclude the possibility that Aristotle simply refers to passage 4, a procedure also referred to the *θεσμοθέται*. An objection to this would be that passage 4 was not a *γραφὴ*

21) See e.g. Rufinus *AP* 5, 41 and 43.

μοιχείας but one for unlawful confinement under accusations of adultery. This is not a serious objection, however, if we accept that the wording of Aristotle is elliptic. What makes me think that probably he was speaking about another procedure is that all adultery statutes which we have seen so far assume arrest in the act. This would leave cases in which the adulterer managed to escape (3vi) or somehow not to be caught -although beyond reasonable doubt he had committed the act- outside the reach of the law. This is why it is likely that a γραφή μοιχείας, as mentioned by Aristotle, existed to cover cases in which somebody was not caught in the act, but allegedly had committed adultery. As nothing is certain about this law it would be futile to attempt to read anything else into it.

Summarizing, the legislation of Dracon probably did not cover adultery in a separate statute, but by permitting the execution of a man caught committing adultery, with somebody's wife, concubine, daughter, mother, sister, it defined the groups of women with whom a relationship could be considered adulterous, and thus the murder justified. This definition is the only one known to us and solid evidence suggests that it remained unaltered throughout the classical period. The Solonian legislation was the first one to include a separate statute on adultery. It probably offered a less drastic alternative to the Draconian legislation, by allowing the insulted man to take his revenge through humiliation rather than execution of the adulterer. It also offered a negative definition of adultery, i.e. it

specified that the provisions of adultery could not apply to those women who practised some type of prostitution. In the classical period under the influence of a narrower, clearer and stricter definition of citizenship, the fear of illegitimate offspring of adulterous relationships intruding into the body of Athenian citizens prompted a new statute which made divorce mandatory after an adulterous affair was detected and also made the betrayed husband responsible to carry out this provision, under the threat of disfranchisement if he failed to do so. The same law, for the first time, mentioned the adulteress, as well, and imposed a ban from the public temples upon her, which in practical terms was equivalent to an almost total ban from public life. Another law, probably from the classical period and possibly from the same corpus of legislation, settled the procedures for cases of dispute where the alleged adulterer did not admit guilt and was prepared to engage in a legal battle to prove his case. This piece of legislation either revised previous provisions and brought them to line with the legal procedures of the classical period, or more likely, it was new legislation especially initiated in the classical period to deal with disputes over allegations of adultery. Finally, another piece of legislation might have been incorporated in the classical statute of adultery, covering cases in which the adulterer was not caught committing the offence, or he had succeeded in escaping after he had been caught. Compensation was a widespread alternative practice throughout and down to late antiquity.

The picture that one sees is that the legislation covering adultery in the classical period consists of several statutes

introduced gradually throughout the centuries, to cover new areas and reflect new attitudes. Because each one of these laws was a product of its time, reflected the attitude of its time and dealt with a different aspect of this offence, they do not present a large degree of uniformity in spirit and practice. However, some characteristics are universal. In all of them adultery is treated as a serious criminal offence, as far as the male party is concerned, and this should be interpreted in the context of the legal responsibility held, according to Athenian law, almost exclusively by men. The female party was not penalized by the law before the classical period, when concern about the legitimacy of citizens involved women in the legal procedures; sanctions, however, could have been imposed upon the females by the family at all times. Yet, the most striking peculiarity of Athenian law was the definition of adultery itself, which was not limited to conjugal relationships but was extended to include any woman under the legal protection of an Athenian man.

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