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Objekttyp: **Article**

Zeitschrift: **Museum Helveticum : schweizerische Zeitschrift für klassische Altertumswissenschaft = Revue suisse pour l'étude de l'antiquité classique = Rivista svizzera di filologia classica**

Band (Jahr): **59 (2002)**

Heft 2

PDF erstellt am: **23.09.2024**

Persistenter Link: https://doi.org/10.5169/seals-46006

Athenian laws and lawsuits in the late fifth century B.C.

By David Whitehead, Belfast

Part I: the suspension of private lawsuits

1. The archon-year 403/2 B.C. was an epoch-making one in Athenian history. The year of Eukleides, long-lasting in subsequent memory, saw an end to a ghastly twelve months of hyper-oligarchical extremism, repression, murder, and ensuing civil war. All this the Athenians, under the watchful eye of King Pausanias of Sparta, agreed to put behind them. They swore allegiance to a compact which modern scholars have tended to call an amnesty but which was actually – as is emphasized in the most recent monograph-length treatment of it, by Thomas Loening[1] – a multifaceted agreement of reconciliation, within which μὴ μνησικακεῖν, 'not bringing evils to mind', expressed one cardinal element.

Of itself, this compact of reconciliation was not, apparently, a law, a decree, or indeed anything with independent constitutional standing. Rather, it was simply what it said it was: articles of agreement (*synthêkai*) solemnized by oaths (*horkoi*); points mutually acceptable to political factions which had been at loggerheads with each other but were now desirous of being reconciled[2]. What the compact did – once it had been signed, sealed and delivered, in early October 403[3] – was to make possible once again the normal workings of a democratic constitution under which relevant laws could swiftly be passed.

2. One of these laws (or perhaps more than one: it is hard to be certain) is quoted, with variations, by Andokides and by Demosthenes:

Andok. 1.87, τὰς δὲ δίκας καὶ τὰς διαίτας κυρίας εἶναι, ὁπόσαι ἐν δημοκρατουμένῃ τῇ πόλει ἐγένοντο· τοῖς δὲ νόμοις χρῆσθαι ἀπ' Εὐκλείδου ἄρχοντος. 'All (*sc.* judgements in) lawsuits and arbitrations which were made while the polis had a democratic constitution are valid; but the laws are to be used (in-and-)from the archonship of Eukleides'.

1 Loening (1987) 20. Earlier monographs since the rediscovery of the Aristotelian *Ath. Pol.* – which marked a watershed in the history of the subject: see Stahl (1891b), after his (1891a) – are Cloché (1915) and Dorjahn (1946). Loening (1987) 17 calls the findings of Cloché and Dorjahn 'flawed' and 'simplistic', but later endorses at least some of them; for an example see the next note.

2 So Loening (1987) 28–30 (and already Dorjahn, 1946, 16–23, esp. 20–21).

3 12 Boedromion: Plut. *Mor.* 349F, with Loening (1987) 21–22 (and generally Mikalson, 1975, 53).

Demosth. 24.56, τὰς δίκας καὶ τὰς διαίτας, ὅσαι ἐγένοντο ἐπὶ τοῖς νόμοις ἐν δημοκρατουμένῃ τῇ πόλει, κυρίας εἶναι. [Here the speaker, Diodoros, interpolates a comment, before the quotation resumes.] Ὁπόσα δ' ἐπὶ τῶν τριάκοντα ἐπράχθη ἢ δίκη ἐδικάσθη, ἢ ἰδίᾳ ἢ δημοσίᾳ, ἄκυρα εἶναι. 'All lawsuits and arbitrations which were made in accordance with the laws while the polis had a democratic constitution are valid. [...] But all acts done and judgements delivered under the Thirty, whether in private or in public (suits), are *in*valid'.

The particular importance of the second clause (or law) in Demosthenes' version – a provision presumably omitted by Andokides because it had no bearing upon his own case[4] – is the proof it furnishes that both public (δημοσίᾳ) and private (ἰδίᾳ) lawsuits were indeed held under the Thirty[5]. It is therefore somewhat ironic that the same cannot be said of the restored democracy, under which, it seems, private lawsuits – *dikai* in the narrow sense of the term – were for a time suspended.

Again, two passages in forensic speeches attest to the point:

Isok. 21.7, πρὸς δὲ τούτοις ἀκαταστάτως ἐχόντων τῶν ἐν τῇ πόλει καὶ δικῶν οὐκ οὐσῶν τῷ μὲν οὐδὲν ἦν πλέον ἐγκαλοῦντι, τῷ δὲ οὐδὲν ἦν δέος ἀποστεροῦντι. 'Besides, when conditions in the polis were unstable and there were no *dikai*, the complainant [the speaker's friend Nikias] had nothing to gain and the appropriator [Euthynous] had nothing to fear'.

Lys. 17.3, ἐν μὲν οὖν τῷ πολέμῳ, διότι οὐκ ἦσαν δίκαι, οὐ δυνατοὶ ἦμεν παρ' αὐτῶν ἃ ὤφειλον πράξασθαι· ἐπειδὴ δὲ εἰρήνη ἐγένετο, ὅτε περ πρῶτον αἱ ἀστικαὶ δίκαι ἐδικάζοντο, λαχὼν ὁ πατὴρ παντὸς τοῦ συμβολαίου Ἐρασιστράτῳ, ὅσπερ μόνος τῶν ἀδελφῶν ἐπεδήμει, κατεδικάσατο ἐπὶ Ξεναινέτου ἄρχοντος. 'So during the war, because there were no *dikai*, we were unable to recover from them what they owed. But when peace came ...' (for the meaning of the remainder, see the discussion below).

Isokrates, then, alludes to a period of upheaval in the Athenian polis when there were no *dikai*. Lysias differentiates between 'war' (*polemos*) when there were no *dikai* and 'peace' (*eirênê*) when the hearing of *astikai dikai* – meaning, perhaps, lawsuits heard in the central courts of Athens, the *asty*[6] – had begun again.

4 So MacDowell (1962) 128–129, at 128.

5 Isok. 4.113 (περὶ τῶν δικῶν καὶ τῶν γραφῶν τῶν ποτε παρ' ἡμῖν γενομένων λέγειν τολμῶσιν, αὐτοὶ πλείους ἐν τρισὶ μησὶν ἀκρίτους ἀποκτείναντες ὧν ἡ πόλις ἐπὶ τῆς ἀρχῆς ἁπάσης ἔκρινεν) is vague but appears to refer to *dikai* and *graphai* before, not during, the time of the Thirty. Christ (1998) 241 n. 184 roundly asserts that '[u]nder the Thirty (404/3 B.C.) the popular courts did not meet'; cf. e.g. Krentz (1982) 62. In fact such limited evidence as we have points at most to various 'ways in which the Thirty may have weakened juries' (Rhodes, 1981, 442). See generally Bonner (1926) 212–217, esp. 216.

6 I owe this suggestion to Lene Rubinstein. As far as I know the phrase is unparalleled, and other translations of it include 'suits between citizens' (LS-J s.v. ἀστικός), 'civil suits' (Lamb, 1930, 393), and 'private suits' (Todd, 2000, 187).

The basic connection between Isok. 21.7 and Lys. 17.3 has long been noted[7]; and there can be no serious doubt that Lysias' talk of 'war' and a subsequent 'peace' anchors the *beginning* of the period in question in the second half of the archon-year 404/3, when the regime of the Thirty first toppled and then fell[8]. But how long did such a *iustitium*[9] go on to last?

Recent thinking on this question has been dominated by a short, robust article by Douglas MacDowell, published in 1971[10].

3. MacDowell begins with the two passages quoted above, Isok. 21.7 and Lys. 17.3, and he immediately claims an important and unappreciated difference between them: while Isokrates merely mentions the *iustitium*, Lysias enables us to calculate its ('clearly defined') length. After quoting Lys. 17.3, MacDowell writes[11]:

'The case was brought [by the speaker's father against Erasistratos] *as soon as* (ὅτε περ πρῶτον) trials were resumed. So the passage clearly implies that after the [civil] war no trials of private cases were heard until the year of Xenainetos (401/0). The consequences of this for the dating of other speeches, trials, and legal innovations around this time have not, as far as I know, been previously noticed'. (MacDowell then proceeds, accordingly, to spell these consequences – or some of them, at least – out, summarizing his conclusions with a time-chart[12] of the three archon-years 401/0, 400/399, and 399/8. At issue, as his title has suggested, are datings in two interrelated areas: certain trials from which speeches survive – he dates both Isok. 18 *Against Kallimachos* and Lys. 23 *Against Pankleon* somewhat later than have others; and 'legal innovations' in

7 See e.g. Gernet (1957) 156 n. 2, on Demosth. 45.4, which refers to another such suspension of *dikai*, in the 360s: δίκην μὲν οὐχ οἷός τ' ἦν ἰδίαν λαχεῖν (οὐ γὰρ ἦσαν ἐν τῷ τότε καιρῷ δίκαι, ἀλλ' ἀνεβάλλεσθ' ὑμεῖς διὰ τὸν πόλεμον), γραφὴν δ' ὕβρεως γράφομαι πρὸς τοὺς θεσμοθέτας αὐτόν ('I was not able to secure permission for a private suit, for there were no (such) suits at that juncture; you were postponing them because of the war; but I did indict him for *hybris* before the thesmothetai'). For the meaning of λαγχάνειν δίκην see below, at n. 23; and on this episode in general see further below, at n. 42.

8 For 'peace' as the accompaniment and effect of Pausanias' settlement see Xen. *Hell.* 2.4.38 and ?Aristot. *Ath. Pol.* 38.4 (with Loening, 1987, 20). The same two writers had written, not unreasonably, of the earlier and different 'peace' which ended the Peloponnesian War in 405/4 (Xen. *Hell.* 2.2.22, ?Aristot. *Ath. Pol.* 34.1–3), but that cannot be what is meant here.

9 I borrow the Latin term, for convenience's sake, from Gernet (1957) 156 n. 2 – see above, n. 7. There seems to be no Greek equivalent. (Charles Crowther has drawn my attention to τοῖς τε πολίταις κατιδὼν οὔσας δίκας πολλὰς καὶ μεγάλας, ἐκ πολλοῦ χρόνου ἀδικίας οὔσης διὰ πολέμου – where he suspects that ἀδικίας may be a corruption of ἀδικασίας – in [Aristot.] *Oik.* 1348b9, relating to Phokaia in c. 360. However, this Budé text of the passage, with van Groningen's οὔσης, is not secure; the Loeb edition retains τούτοις (and the comma after πολλάς), so that ἀδικίας is not genitive singular but accusative plural.)

10 MacDowell (1971).

11 MacDowell (1971) 267, with his emphasis.

12 MacDowell (1971) 273.

the specific shape of *paragraphê* and public arbitration – again his view is that conventional wisdom places them too early.)

MacDowell's article has won powerful adherents. For example, Peter Rhodes' *Ath. Pol.* Commentary refers to it three times, each time with approval: on a *iustitium* lasting until 401/0, on a 401/0 date for Archinos' *paragraphê* law (see Part II below), and on 400/399 as the year when the public arbitrators were created (with the first batch of them actually serving in 399/8)[13]. Josiah Ober's *Mass and Elite* cites MacDowell in its bibliography and appears to use him – though no criteria are anywhere explicit – in its catalogue of speeches and their dates, in respect of certain speeches by Isokrates and Lysias[14]. Virginia Hunter's *Policing Athens* expressly follows Rhodes in accepting MacDowell's chronology[15]. Adele Scafuro's *The Forensic Stage* likewise endorses and (where arbitration is concerned) develops MacDowell's datings[16]; and most recently Matthew Christ's *The Litigious Athenian* does the same in respect of a suspension of private suits 'until 401 B.C.'[17].

4. Amidst this chorus of approval I know of only one dissenting voice in the public domain – that of Thomas Loening, with whom I began[18] – but he has not framed his objections as effectively as he might.

In particular, Loening formulates what amounts to a *petitio principii* when he summarily asserts (as one anti-MacDowell consideration) that 'several civil actions may be dated to the period prior to the fall of Eleusis [in 401/0]'; that is to say, not in but before Xenainetos' year. The three cases Loening cites are those which gave rise to Isokrates 18 *Against Kallimachos* and 21 *Against Euthynous* and to Lysias' fragmentary *Against Hippotherses.* With regard to the dating of this last, we can look forward to an authoritative statement, in due course, in Stephen Todd's Lysias commentary; pending that, it must suffice here to say that there seem to be grounds for a dating after 394, which would of course take that trial completely out of contention for present purposes[19]. The

13 Rhodes (1981) 471, 473, and 588 respectively; cf. idem, *CAH* VI² 571 with n. 21 for the arbitrators.

14 Ober (1989) 341–349, at 346–348. He seems inconsistent, however, in placing (e.g.) Isok. 20 and 21 'soon *post* 403'.

15 Hunter (1994) 206 n. 17 and esp. 209 n. 32.

16 Scafuro (1997) 123–126, esp. 126 with n. 28, and again 392.

17 Christ (1998) 241 n. 184. – see already above, n. 5.

18 Loening (1987) 120–121. (*Un*published misgivings about MacDowell's chronology – on the part of Stephen Todd, amongst others [see summarily Todd, 2000, 188 n. 4, 361 n. 4] – have been circulating for some years; but in the light of continued adherence to it, as just exemplified, there is obviously a need, which I attempt to meet here, to commit them to print.)

19 See in brief Todd (1993) 236 n. 5, citing Lobel (1923) – a decidedly recherché item unknown, it would seem, to Loening (1981, 287–8; 1987, 89). The tiny papyrus fragment added by Lobel will figure, I am told, in the new Oxford Classical Text of Lysias being prepared by Christopher Carey. From a textual point of view it appears to guarantee the reading τῶν τ[ειχῶ]ν

same is not true of Isokrates 18 and 21, where late-fifth-century dates seem a certainty unless and until some spectacular new evidence proves otherwise. Nevertheless, it is one thing to say – as I myself will be saying, later – that they fit best into a year earlier than that of Xenainetos *ceteris paribus*; it is quite another to use that position as a tool of argument.

Loening seems to be on very much firmer ground, though, when he queries the fundamental construction that MacDowell puts upon his key item of evidence, Lys. 17.3. Loening writes: 'The Lysianic passage does not report how much time has elapsed between the initiation and adjudication of the suit against Erasistratos. One may infer that it required some time to resolve because of the circumstances surrounding the case'[20]. By these 'circumstances' Loening appears to mean such considerations as whether the action could embrace Erasistratos' two brothers, Erasiphon and Eraton, as well as Erasistratos himself ('the only one of the brothers who was in town', according to the speaker)[21]. Yet perhaps we do not need to invoke external circumstances at all when Lysias has expressed himself as he does.

Loening draws a distinction between this case's 'initiation' and its (ultimate) 'adjudication', and such a distinction does look, to me, precisely what Lysias intended.

The crucial sentence, again, is ἐπειδὴ δὲ εἰρήνη ἐγένετο, ὅτε περ πρῶτον αἱ ἀστικαὶ δίκαι ἐδικάζοντο, λαχὼν ὁ πατὴρ παντὸς τοῦ συμβολαίου Ἐρασιστράτῳ, ὅσπερ μόνος τῶν ἀδελφῶν ἐπεδήμει, κατεδικάσατο ἐπὶ Ξεναινέτου ἄρχοντος. Granted that the relative clause (ὅσπερ μόνος τῶν ἀδελφῶν ἐπεδήμει) elongates the sentence more than might otherwise have been necessary, there do seem to be two phases, or stages, of something being recalled here. The later (and concluding) phase is unambiguously described in the final four words, κατεδικάσατο ἐπὶ Ξεναινέτου ἄρχοντος; the speaker's father 'had the matter adjudicated in his favour[22] in the archonship of Xenainetos'. In plain terms, that is the archon-year – 401/0 – when the case against Erasistratos was heard in court and settled. If, however, Lysias had meant the jurors (and by extension ourselves) to understand that 401/0 was the archon-year when initial permission to bring suit had been obtained – when his client's father had been allocated a preliminary hearing (which seems to be what λαχών signifies)[23] –

ὠικ̣[ο]δομημένων, thereby confirming the original supplement of Grenfell and Hunt. And substantively speaking, talk of 'built walls' does sound like an allusion to the rebuilding of the Long and Peiraieus walls in 394, though Todd is now (2000, 368) more cautious on the point.

20 Loening (1987) 120.

21 See Loening (1987) 133–134, suggesting (at 133 n. 96) that Eraton and Erasiphon had joined the emigration to Eleusis.

22 On the meaning of καταδικάζεσθαι see Goligher/Maguinness (1961) 127.

23 On the meaning of λαγχάνειν δίκην see (e.g.) Harrison (1971) 88–89; MacDowell (1978) 239–240; Todd (1993) 125 with n. 4. Harrison held that it meant 'to apply for a hearing', rather than 'to get a day for the hearing allotted to one'. MacDowell and Todd, amongst others, prefer the interpretation rejected by Harrison. Lene Rubinstein suggests to me that the tense of the verb

then he expressed himself most obscurely. Is not the phrase ἐπὶ Ξεναινέτου ἄρχοντος just about as far as it could be from λαχών? The context of λαχών is ἐπειδὴ δὲ εἰρήνη ἐγένετο, ὅτε περ πρῶτον αἱ ἀστικαὶ δίκαι ἐδικάζοντο; the hearing was initially sought and granted 'when peace came, as soon as suits between citizens were being heard'. To my eye ἐπὶ Ξεναινέτου ἄρχοντος, positioned where it is, indicates the opposite of what MacDowell infers from it, namely that the initiation of this trial took place not in but before Xenainetos' year. The process merely, and perhaps surprisingly (hence the mention of the fact at all), lasted into that year.

5. Before becoming enamoured of this reading of Lys. 17.3, however, we need to raise a relevant substantive question: did the Athenian judicial system tolerate what my view implies, a *dikê*'s extending beyond the end of an archon-year and, by so doing, passing from the charge of one magistrate to his successor?

MacDowell believes not. Somewhat later in his article he writes: 'Athenian arkhons and other officials changed at the end of each [archon-]year, but (usually, at least) a legal case was conducted from beginning to end by the same officials, and was not passed on from one official to his successor'[24]. As he has been kind enough to clarify for me, in correspondence, the qualification 'usually, at least' is required because of two specific procedures which are not germane to the present question: *probolai* (preliminary accusations) and *euthynai* (scrutinies of the performance of officials). In each of these, after an initial verdict, the prosecutor had to approach a different magistrate to obtain a jury trial[25]. Setting such particularities aside, we see that MacDowell footnotes to his statement the following justificatory comment: 'Antiphon 6.42 gives a good example of an official's refusal to do this'[26], i.e. to hand a case on.

But is this example truly so 'good', if by that we mean one that warrants and supports a generalization? What is certainly true is that in Antiph. 6.42 there is an official constrained, apparently, not to 'hand on' (παραδοῦναι) a lawsuit. However, the official concerned is the *archôn basileus* and the suit is a *dikê phonou*, a homicide case, which, procedurally speaking, was *sui generis* in all sorts of ways (such as the three 'pre-trials', *prodikasiai*, which had to occur – once a month for three months – between the initial proclamations and the trial

could be important, with an imperfect describing the application and an aorist showing that it succeeded. Imperfects with conative overtones can certainly be found (see e.g. Isai. 11.13,27, 31), but in other passages it is hard to discern such a sense (e.g. Demosth. 41.4). In any event, aorist *participles*, as in the present instance, presumably have an aorist function.

24 MacDowell (1971) 268–269.

25 On *probolai* see generally (e.g.) Harrison (1971) 59–64; MacDowell (1978) 194–197, and (1990) 13–17; Todd (1993) 393. On *euthynai* see generally (e.g.) Harrison (1971) 208–211; MacDowell (1978) 170–172; Todd (1993) 112–113.

26 MacDowell (1971) 269 n. 4.

proper)[27]. Add to this the fact that Michael Gagarin in his commentary on the passages, expresses a reasonable doubt as to whether a *basileus* was *legally prevented* from passing on a homicide case to his successor (since the argument here appeals only to vague historical precedent, not to any such law) and it becomes very difficult to see in Antiph. 6.42 any secure basis for MacDowell's generalization[28].

What is more, if Athenian magistrates *had* been routinely obliged to see through, from start to finish, all cases that they initially accepted, would not that have made them procedural "lame ducks" for the last few weeks – even months – of their year?

I have put this point to Professor MacDowell, who concedes its force but draws my attention to a possible analogy in the public arbitrators (*diaitêtai*). According to chap. 53.5 of the Aristotelian *Ath. Pol.* 'it is obligatory for each man to complete the arbitration of the cases which fall to him' (ἀναγκαῖον ἃς ἂν ἕκαστος λάχῃ διαίτας ἐκδιαιτᾶν). The import of the verb *ekdiaitân* here is that same as that of *ekdikazein* (of jurycourts) in chap. 67.1 (and generally elsewhere): to see something – in this instance an arbitration, a *diaita* – through to its end.

So much then for the rule, where arbitrators were concerned; but how was it actually made to work? Here is Rhodes *ad loc.*: 'Having taken a case a διαιτητής must complete it, [1] perhaps even if it runs on after the end of his year of service ... It may be that arbitrators were required to complete their cases within the year, and [2] were not allowed to take new cases so late in the year that there was no possibility of this'[29].

As Rhodes' comments show, the aim of ἀναγκαῖον ... ἐκδιαιτᾶν was procedurally attainable in two possible ways. The two ways could have been combined (i.e. resort to option 1 if option 2 fails), but they are in essence and approach different.

Some scholars seem to countenance option 1 alone. Harrison roundly asserts that if proceedings were delayed beyond the end of the official year 'the arbitrator had to complete the case though his year of office was strictly over'[30]; and Rhodes himself, if we may judge from the version in his "editio minor", favours this too[31]. (The fact that the arbitrators were not, technically speaking, officials [*archai*] may be relevant here: if they go beyond the end of their year

27 The standard modern discussion of all this is of course the one by Douglas MacDowell himself: MacDowell (1963) 23–26 on the proclamations, 34–38 on the *prodikasiai.*

28 Gagarin (1997) 242–243. MacDowell himself (1963, 35–36), followed by Harrison (1971, 86–87) does believe in such a legal constraint on the *basileus*, and envisages him, accordingly, unable to accept homicide cases during the last quarter of his year. For this "lame duck" model of Athenian magistrates see further below.

29 Rhodes (1981) 594; the numbers added in square brackets are my own.

30 Harrison (1971) 67.

31 Rhodes (1984) 152.

they are extending a task, not an office.) But what I have labelled as option 2 – a cut-off point, before the year's end, in the arbitrators' actual ability to do their job – is what has been visualized by (e.g.) Wyse in his commentary on Isai. 12.11 ('If it be asked what happened if a suit was allotted to an arbitrator so late in the year that it could not be completed in the prescribed time, the answer is that we do not know that the contingency was allowed to arise')[32]. And latterly MacDowell in his commentary on Demosth. 21.86 suggests that the reason why, as we are told there, some of the arbitrators attended the last of their meeting-days but others did not (τὴν τελευταίαν ἡμέραν τῶν διαιτητῶν, εἰς ἣν ὁ μὲν ἦλθε τῶν διαιτητῶν, ὁ δ' οὐκ ἦλθε) is that it was a purely formal meeting, too late in the year for new cases to be assigned[33].

Here MacDowell's skill in making what appears to be good sense out of a difficult passage is very much to the fore, and if he is right about this particular one (exacerbated as it is by textual uncertainties) the public arbitrators did become, as I expressed it above, "lame ducks" for the final three-to-four weeks of their tenure. In any event, the inability of scholars to agree (in the absence of clearcut evidence) how the ἀναγκαῖον ... ἐκδιαιτᾶν doctrine actually operated in practice must not be allowed to obscure the fact that the doctrine did exist – *in this area.* So did it or did it not apply in the quite different area of *bona fide* officials?

Yet again I am indebted to Professor MacDowell for searching out a passage which suggests that it *might* have done. A law quoted in [Demosth.] 46.22 orders the eponymous archon 'to assign by lot days for the trial of claims to inheritances or heiresses in all months except Skirophorion', the twelfth and last (κληροῦν δὲ τὸν ἄρχοντα κλήρων καὶ ἐπικλήρων, ὅσοι εἰσὶ μῆνες, πλὴν τοῦ Σκιροφοριῶνος). MacDowell puts it to me that this may be evidence for a magistrate not taking on new cases too late in the year for him to complete them. And so, undeniably, it may. I will concede another point too: if one were to wonder why the device of a vacant final month of the year had to be specified in this particular area of the archon's responsibilities if it applied across the board to *any* kind of suit when handled by *any* magistrate, such a question

32 Wyse (1904) 721–722. Wyse was commenting on the phrase δύο ἔτη τοῦ διαιτητοῦ τὴν δίαιταν ἔχοντος in Isai. 12.11, a passage which some have seen as an example (unusually prolonged, to be sure) of my option 1; Wyse insists, as he must, that this does not mean two years in the hands of the *same* arbitrator.

33 MacDowell (1990) 310: '[p]resumably the main business at most of the arbitrators' meetings was to assign cases to them for arbitration, but it would be no use assigning a case to an arbitrator so near the end of the year that he had no hope of completing it before he ceased to hold the office ... D.'s comments make sense if we assume that there was a meeting every month, but the meeting in the twelfth month (Skirophorion) was badly attended because new cases were not assigned to arbitrators in that month and consequently it was usually just formal'. Note, however, that other scholars construe τὴν τελευταίαν ἡμέραν τῶν διαιτητῶν as the very last day of the archon-year (so e.g. Rhodes, 1981, 595); absenteeism then would perhaps be a more mundane and familiar phenomenon.

would stem from our own, modern ideas of logic rather than from ancient ones. The formulaic nature of Athenian procedural enactments frequently did entail repeated statements of the obvious. Nevertheless, as this particular device goes, it seems to me one calculated to make the completion of the archon's business before the end of his year *likely* but by no means inevitable. What would an archon do with a case initiated in late Thargelion (month 11) and still uncompleted at the end of Skirophorion? As pointed out *re* the arbitrators, the only way to ensure continuity of personnel would have been to stipulate precisely that: the magistrate who starts must finish. I remain to be convinced that ἀναγκαῖον ... ἐκδιαιτᾶν had its counterpart where magistrates were concerned.

Naturally, discussion of this procedural question could be foreclosed by one decisive example of a case initiated under one archon and concluded under another. I do not have such an example to cite. The best I can do is to draw attention[34] to a *possible* one, in Demosth. 30.15. Here Demosthenes says that Aphobos married the sister of Onetor in the final month of the archonship of Polyzelos (367/*6*), and that he himself, having come of age immediately after the marriage (thus either still late 367/*6* or else early 366/5)[35], ἐνεκάλουν καὶ λόγον ἀπῄντουν; the preliminary court hearing was then sought (ἐλάγχανον, § 15) and granted (ἔλαχον, § 17) in the archonship of Timokrates, 364/3.

Clearly all here hinges on what is meant by the phrase I have quoted, ἐνεκάλουν καὶ λόγον ἀπῄντουν: literally 'I began to complain and to demand a reckoning'. Does this mean *formal* complaining which, begun at once, then continued throughout the archonships of Kephisodoros and Chion (see again § 17), or simply informal beginnings? Frustratingly, the term itself gives no answer: see LS-J s.v.

6. Returning to Lys. 17.3, then, it lends itself to either of two (non-MacDowellian) interpretations, neither of which require the whole process from λαχών to κατεδικάσατο to be confined within 401/0, the year of Xenainetos. One is that the official(s) of a previous year – indeed presumably the preceding year (see below) – did pass it on to the next incumbent(s). Alternatively we could envisage an affair made episodic by the deliberate actions of the would-be plaintiffs.

For this, the background to another trial of this period may be compared: the one which gave rise to Isokrates 18 *Against Kallimachos*. In chaps. 11–12 there we hear of a lawsuit against the speaker being initiated – Kallimachos λαγχάνει μοι δίκην μυρίων δραχμῶν – but procedurally blocked, by a witness-plea (*diamartyria*); Kallimachos then, having 'persuaded the official' (πείσας δὲ τὴν ἀρχήν: presumably, in this instance, one of the Forty belonging to Kallimachos' tribe – see generally ?Aristot. *Ath. Pol.* 53.1–2), brings the suit afresh.

34 As my own has been drawn, by Lene Rubinstein.

35 See in brief Davies (1971) 125.

Where previous scholars had tended to understand 'persuaded' (πείσας) as an act of impropriety, with money changing hands[36], MacDowell suggests that the allusion is to nothing more sinister than a (necessary) approach to a newly-installed magistrate who is stepping into the shoes of his predecessor[37]. If πείσας does, *pace* MacDowell, indicate malpractice, the corrupt(ed) official does not absolutely have to be a second, new, one. (I return to this question below.) But on *either* view Kallimachos' actions were, as they are described here, episodic; and what is (comparatively speaking!) explicit in Isok. 18.11–12 might be implicit in Lys. 17.3.

In the Erasistratos case, anyway, the crucial point remains that the process was initiated ἐπειδὴ ... εἰρήνη ἐγένετο, ὅτε περ πρῶτον αἱ ἀστικαὶ δίκαι ἐδικάζοντο. And with the fact that the speaker's father first obtained his hearing (λαχών) at that time we may juxtapose not only Isok. 21.7 but, again, Isok. 18: this time chap. 7 of the speech, where an even earlier stage in the troubled relationship between Kallimachos and his unnamed opponent is being described. 'After the return of the exiles from Peiraieus', says the speaker, 'this Kallimachos made a charge against Patrokles and δίκας ἐλάγχανεν'. Now, the fact that Kallimachos apparently went on to settle out of court (διαλλαγεὶς δὲ πρὸς ἐκεῖνον κτλ)[38] is irrelevant for present purposes. What is important is that he had sought (and obtained?) permission to go to law. The passage is, admittedly, sketched with a broad brush; no hint here of any *iustitium* at all; but by the same token, an odd form of words if there had intervened a *iustitium* of the length posited by MacDowell.

Instead, the indications seem to be that it lasted between twelve and (at most) fifteen months.

The upper terminus, its starting-point, we have already seen reason (in Lys. 17.3) to place in the second half of the archon-year 404/3, the period of civil *polemos* which first precipitated and then followed the fall of the Thirty. More precision than that is beyond reach. Matters simply reached a point – probably no later than May 403 – when, amongst other manifestations of the situation being (in Isokrates' unusual word) ἀκαταστάτως, the hearings of court cases which are attested by Demosth. 24.56 had to be suspended. By this, incidentally, I think we should envisage a *total* suspension. At all events, out of the *polemos* came, in due course, *eirênê, synthêkai*, democracy again – but not, for the time being, the resumption of *private* lawsuits. That had to wait until, perhaps, the latter part of Eukleides' year, 403/2.

Such a date, I think, would be the natural corollary of MacDowell's interpretation (mentioned earlier) of πείσας δὲ τὴν ἀρχήν in Isok. 18.12. This phrase

36 Thus e.g. Calhoun (1918) 179 n. 2.

37 MacDowell (1971) 268–269.

38 The terminology does indicate this, *pace* Dorjahn (1946) chap. 3. See e.g. Steinwenter (1925) 128; Krentz (1982) 115; Loening (1987) 128 n. 78.

he sees as marking a change in archon-year *before which* the *iustitium* has ended. MacDowell's own chronology, with the *iustitium* lasting into Xenainetos' year, 401/0, obviously requires the new archon-year to be 400/399, the year of Xenainetos' successor Laches. But I believe I have shown that MacDowell's *iustitium* is too long; and if that is right, the new archon-year signalled in Isok. 18.12 must be either 401/0 (Xenainetos' year, with the *iustitium* having ended during the tenure of his predecessor Mikon) or else 402/1 (Mikon's year, with the resumption of private prosecutions under *his* predecessor, Eukleides).

Candour compels me to admit that I see no overwhelmingly powerful reasons either against 401/0 or for 402/1. I nevertheless do prefer the earlier option, 402/1 (and thus an end to the *iustitium* in late 403/2), and I do so on two, Isokratean counts. One, mentioned already, is that a *iustitium* of "only" 12–15 months (instead of 24–27) makes it marginally more reasonable that in Isok. 18.7 the speaker ignores the *iustitium* altogether (when he says ἐπειδὴ κατῆλθον οἱ φεύγοντες ἐκ Πειραιέως, <οὗτος> ἐνέκαλει τῷ Πατροκλεῖ καὶ δίκας ἐλάγχανεν κτλ). And the second consideration – here I anticipate discussion below – is the dating of Isok. 18 itself. As several scholars (including MacDowell himself) have pointed out[39], the speech contains certain quasi-purple passages – chaps. 25, 31, and especially 46 – in praise of the peace and harmony that the Athenians have so wisely and felicitously recreated for themselves. Such stuff would ring hollow, it is argued, in 401/0, a time of tension (and worse) between Athens and breakaway Eleusis; so either the case itself postdates that year or else the speech as we have it has been embellished, at that time, with the aforementioned material. If, however, the case came to trial in the early months of 402/1, there is no need for the re-editing hypothesis and no problem with the speaker's views on the blessings of *homonoia*.

One must not lose sight of the fact, though, that πείσας δὲ τὴν ἀρχήν does not absolutely demand to be understood as MacDowell understands it. As conceded above, simple *peithein* (without the addition of χρήμασι, 'by money', or the like) does sometimes need interpreting as bribery. This is so, for instance, in another Isokratean forensic speech, the *Trapezitikos* (17.23 and 34); and in his general analysis of the subject David Harvey declares the same of 18.12[40]. In point of fact, as Harvey rightly emphasizes, many *peithein* passages are enigmatic, often deliberately so; and I fear it has to be admitted that Isok. 18.12 is one of them. Thus, it is only a *possibility* that Kallimachos' two attempted suits against Isokrates' client straddled the two archon-years 403/2 and 402/1. If they did not, the 'official' in 18.12 is not (or not necessarily) a new one, but a man in office in *either* 403/2 *or* 402/1.

As regards Lys 17.3, the case against Erasistratos finally settled in 401/0 for which a hearing had been granted (or so I have argued) in an earlier year, that

39 MacDowell (1971) 268; cf. also e.g. Blass (1892) 214; Kühn (1967) 50–51.

40 Harvey (1985) 78–79 (esp. 79 n. 13) and 83.

year was obviously (again) either 402/1 or 403/2. If it was 402/1, the phrase ὅτε περ πρῶτον αἱ ἀστικαὶ δίκαι ἐδικάζοντο is perhaps over-emphatic but not, for all that, positively inappropriate or misleading. If it was 403/2, the delay – and *two* changes of magistrate – between that year and the year of Xenainetos starts to look odd, but the oddity can at least diminish and arguably disappear altogether if we invoke the second of the two scenarios outlined above, 'an affair made episodic by the deliberate actions of the would-be plaintiffs'; that is, the case was dropped and brought afresh, after an intermission of more than twelve months.

7. I have said nothing so far about possible reasons for the *iustitium*, but there I am in good company, for no-one else (ancient or modern) seems to say very much either. Can anything be usefully said, or surmised?

One thing that should certainly be noted is that there were more of these *iustitia* to come, in the fourth century; at least two more, if we set aside the special case of the year 322 (when Antipatros and the Macedonians closed down the Athenian jurycourts for what were evidently ideological and punitive reasons)[41]. Before that, the Athenians had twice of their own accord done the same thing or something similar. They heard no private suits for, apparently, several years in the 360s; and (it seems) they suspended the *dikastêria* altogether for a time in 348[42]. In the first of these emergencies it is implicit, and in the second explicit, that the problem was lack of money to pay the *dikastikos misthos*, the jurors' wage. The newly democratic Athenians of the year of Eukleides were certainly hard pressed for cash[43], and it may well be that that is a full and sufficient reason why they prolonged the situation they had inherited for as long as they did, at least as far as private suits were concerned. Associated with that, though, there might also have been a view that, after all the extraordinary and divisive events that had filled the preceding year or so, private litigation *per se* should take a back seat until the pressure of public cases – amnesty notwithstanding – had eased.

8. Before leaving the *iustitium* and turning to other matters, let me briefly summarize the chronological scene which results from what I have been arguing. (For a fuller summary, in tabular form, see Part III section 1.) Earlier on I

41 Suda s.v. *Demades*. See A. L. Boegehold in Boegehold et al. (1995) 41 n. 61, and Scafuro (1997) 14 n. 34.

42 Demosth. 45.4 (see already above, n. 7) and Demosth. 39.17, respectively; see in brief Hansen (1991) 189. Hansen (followed by Christ, 1998, 241 n. 184) envisages *both* episodes as suspensions of private suits only; but I would read Demosth. 39.17 (εἰ μισθὸς ἐπορίσθη τοῖς δικαστηρίοις, εἰσῆγον ἂν δῆλον ὅτι) differently – and the fact that desertion (*lipotaxiou*), the charge in question here, was a public suit surely confirms this. (I owe this final point to Lene Rubinstein.)

43 See generally Strauss (1986) 42–69.

criticized Thomas Loening for summarily suggesting, as he does, that the dates of certain private lawsuits from these years provide in themselves grounds for challenging MacDowell's "long" *iustitium*, one extending as far as 401/0. Nonetheless I myself have gone on to argue that Isok. 18 *Against Kallimachos* is most satisfactorily dated, from all points of view, either late in the archon-year 403/2 or else (if MacDowell is right on the change of year and officials) early 402/1. Indeed, the calendar year 402 is where several scholars had set it, before MacDowell claimed reasons why they should not[44]. In a more general way, Isok. 21 *Against Euthynous* too, which on MacDowell's chronology could not be earlier than 401/0, should be allowed to occupy its orthodox date of 403/2 or 402/1 – this in view of the impression it gives that the restoration of democracy is an event of recent memory.

Concerning the relevant speeches of Lysias, I have already commented that it would be prudent to await the appearance of Todd's commentary; but let me just venture a word here about Lys. 23 *Against Pankleon.* MacDowell dates it[45] to the same archon-year, 400/399, as Isok. 18, and (essentially) for the same reasons: that Archinos' law which instituted the *paragraphê* procedure – see Part II below – was enacted in the latter part of 401/0, and that what Lysias here calls an *antigraphê* (Lys. 23.10, with the cognate verb already in 5) is in reality a *paragraphê.* This second point might still be debated, it seems[46], but let it pass. What matters is the fact (discernible in chaps. 2–3 of the speech) that, whereas the Forty already seem to exist, the public arbitrators – 'so closely associated with the Forty in later times', as MacDowell reasonably says[47] – do not (for Pankleon, according to his opponent, is the defendant in suits 'in front of the polemarch'; that is, they have not been passed on by the polemarch to arbitrators). Consequently, MacDowell argues, the law which may be supposed to have created the system of public arbitration – τὸν νόμον τὸν περὶ τῶν διαιτητῶν, as it is called in a fragment (no. 16 Thalheim) of Lysias' lost speech *Against Archebiades* – cannot be earlier than 400/399 (and the first cohort of public *diaitêtai* not in office before 399/8). The implications of this, for the relationship between private arbitration and its newly-created public counterpart, MacDowell spelled out later, in his general survey of Athenian law[48], and just recently they have been accepted and developed by Adele Scafuro[49]. Essentially, the suggested picture is one in which the inadequacies of merely private arbitration – which was "binding" not legally but merely ethically, Scafuro argues – are exposed during the *iustitium*, and the need is identified for something more robust

44 For this date see e.g. Jebb (1893) 235; Münscher (1916) 2158; Mathieu (1929) 16; Van Hook (1945) 253.

45 MacDowell (1971) 269–271.

46 See e.g. Todd (1993) 138 with n. 19, 168 with n. 1.

47 MacDowell (1971) 270.

48 MacDowell (1978) 203–211, esp. 206–207.

49 Scafuro (1997) 122–127 and 392.

and more systematic (a problem not solved by the mere ending of the *iustitium* itself if, as surely happened, a rush to litigation then occurred). Unless I am missing the point, none of this is spoiled *if* – and I have no opinion on the matter either way – it happened a year or even two earlier, as my neo-orthodox chronology would once again allow.

Part II: the procedural law(?s) of Archinos

1. To begin the second part of the paper we return to Isokrates, to chaps. 2–3 of the speech *Against Kallimachos*:

εἰπόντος Ἀρχίνου νόμον ἔθεσθε, ἄν τις δικάζηται παρὰ τοὺς ὅρκους, ἐξεῖναι τῷ φεύγοντι παραγράψασθαι, τοὺς δ' ἄρχοντας περὶ τούτου πρῶτον εἰσάγειν, λέγειν δὲ πρότερον τὸν παραγραψάμενον, (3) ὁπότερος δ' ἂν ἡττηθῇ, τὴν ἐπωβελίαν ὀφείλειν, ἵν' οἱ τολμῶντες μνησικακεῖν μὴ μόνον ἐπιορκοῦντες ἐξελέγχοιντο μηδὲ τὴν παρὰ τῶν θεῶν τιμωρίαν ὑπομένοιεν ἀλλὰ καὶ παραχρῆμα ζημιοῖντο ('You enacted a law, proposed by Archinos, to the effect that the defendant in any trial which violated the oaths (of reconciliation) could lodge a *paragraphê*, and that the officials should bring it to court first, and that the man who had lodged the *paragraphê* should be the first speaker, (3) and that whichever party lost the case should pay the obol-levy – the object being that those audacious enough to bring evils to mind should not only be convicted of contravening an oath but also, without waiting for the gods' vengeance, suffer immediate punishment').

Since the classic monograph on the subject by Hans Julius Wolff[50], it has become generally accepted that the pre-emptive blocking procedure of *paragraphê* was not merely modified by this law of Archinos[51] but actually created by it[52]. On this basis (which I shall not be challenging in what follows), the speaker's opening remark that he would not have been obliged to cite and explain Archinos' law to the jury if previous litigants had employed 'such a *paragraphê*', τοιαύτην παραγραφήν, does not mean 'a *paragraphê* of this kind' (*sc.* as opposed to other, earlier kinds) but '*paragraphê*, this kind of procedure'[53]. And in consequence, what we fortuitously have in Isok. 18 is the very first instance of Archinos' law in operation in court.

50 Wolff (1966); for present purposes see esp. its section III.

51 As had been supposed by (e.g.) Calhoun (1918) 169–172; Hommel (1924) 541; Steinwenter (1925) 136 n. 4; Bonner/Smith (1938) 78; Dorjahn (1946) 35–36.

52 So e.g., in agreement with Wolff: Harrison (1971) 107; MacDowell (1971) 269 n. 6 (and again 1978, 214–216); S. Isager in Isager/Hansen (1975) 123–124; Rhodes (1981) 473; Katzouros (1989) 135–140; Hansen (1991) 196; Todd (1993) 136. Scafuro (1997) 125 appears agnostic.

53 On this specific point see Wolff (1966) 88 n. 3, echoed by (e.g.) Harrison (1971) 107 and Todd (1993) 136 n. 17.

2. This 'Archinos' is given no identifying patronymic or demotic here, but there cannot be (and never has been) any doubt that he is *LGPN* ii s.v. no. 15 (*PA* 2526, now *PAA* [Traill] 213880), Archinos from Koile, whose political star shone so brightly in and for a while after the year of Eukleides – the year in which, on his proposal, the Athenians formally adopted the Ionic alphabet for their public documents[54]. (His career in the longer run, before and/or after 403/2, has gone unrecorded save for the tantalizing mention, in Demosth. 24.135, of his election as general 'often', πολλάκις.) Archinos' concern for the 403 "amnesty", which, as we see, Isokrates gives as the motivation behind his law on *paragraphê*, is also attested in chap. 40 of the Aristotelian *Ath. Pol.*, where he foreshortens the time allowed for those of oligarchical sympathies to emigrate to Eleusis (40.1) and persuades the Council into summarily executing an individual who had *not* been willing μὴ μνησικακεῖν (40.2)[55].

The overall chronology, whether relative or absolute, of this concentration of political and legislative activity on Archinos' part can only be conjectural, and there are undeniable attractions in the brisk solution adopted by Robert Develin in *Athenian Officials*: he puts it all under 403/2 and, in effect, dares anyone to prove otherwise[56]. MacDowell, of course, might wish to say that he can prove otherwise in respect of the *paragraphê* law, assigning it as he does to the latter part of Xenainetos' year, 401/0. In my opinion – for reasons which have mostly emerged already – the correct date is either late 403/2 or early 402/1. That is the change of archon-year which, on MacDowell's own understanding of πείσας δὲ τὴν ἀρχήν in Isok. 18.12, occurs *between* two attempts by Kallimachos to sue his opponent, Isokrates' client. First of all, as we see in 18.11, the opponent's response is a *diamartyria*, a 'witness-plea'. (The noun *diamartyria* itself is not used, but a recognizable periphrasis for it is: προβαλλομένου δ' ἐμοῦ μάρτυρα, ὡς οὐκ εἰσαγώγιμος ἦν ἡ δίκη διαίτης γεγενημένης, ἐκείνῳ μὲν οὐκ ἐπεξῆλθεν; 'I brought forward a witness to testify that the suit could not come into court because an arbitration had taken place – and Kallimachos did not attack that witness'.) Then, while Kallimachos is, as MacDowell puts it, 'still wondering what to do'[57], the archon-year comes to an end, and Kallimachos has to approach the official(s) of a new year (402/1, on my chronology) before resuming his suit. Now, though, the opponent counters it not with a *diamartyria* but with a *paragraphê*. Why? The obvious and best explanation (in MacDowell and elsewhere)[58] is that Archinos' law had now, but not before, made the *paragraphê* procedure available. Hence, to reiterate, the date of the *paragraphê* law

54 Suda and Photios s.v. Σαμίων ὁ δῆμος (as conventionally emended), etc. See Harding (1985) no. 6.

55 On these two episodes see Rhodes (1981) 472–478.

56 Develin (1989) 200–201.

57 MacDowell (1971) 269.

58 Explicit in MacDowell (1971) 269; implicit in (e.g.) Bonner/Smith (1938) 77.

will be, on my chronology, either (late) 403/2 or (early) 402/1 – and *whether or not* MacDowell is right in his interpretation of πείσας δὲ τὴν ἀρχήν.

3. So much for dates, which are not my central concern in this part of the paper. Rather, I wish to consider Archinos' law itself, and specifically the relationship between Isokrates' description of it (quoted above) and what we find in a scholiast to Aischines.

Aischin. 1.163 had occasion to mention the *epôbelia*, the one-sixth (one obol in the drachma) levy that Isokrates also talks about, and one of the scholia on the passage (329b Dilts) runs as follows:

ἐπωβελία οὖν τὸ ἕκτὸν μέρος τοῦ τιμήματος, ὃ προσώφειλεν ὁ ἁλούς. ἐνομοθέτησε δὲ τοῦτο ὁ Ἀρχῖνος ἐγγράψας τῷ νόμῳ τὰ μὲν πρυτανεῖα εἶναι τοῖς δικασταῖς παρὰ τοῦ ἁλόντος, ὃ ἔστιν ἐπιδέκατον τοῦ τιμήματος, τὴν δὲ ἐπωβελίαν τῷ δημοσίῳ παρὰ τοῦ μὴ ἑλόντος ('*Epôbelia*, then, (was) the sixth part of the valuation-penalty, which the convicted man additionally incurred. The lawgiver in this matter was Archinos: he wrote in the law that the *prytaneia* [court deposit-fees] should go to/for the jurors from the convicted man, at a tenth of the valuation-penalty, but the *epôbelia* should go to the treasury from the unsuccessful plaintiff').

Quite a number of scholars who discuss Archinos' law on *paragraphê* (and/or, as a separate matter, the *epôbelia*) do not mention this scholion; those who do mention it fall into two groups. The majority view (exemplified by Kirchner, Rhodes, and Develin) supposes, explicitly or implicitly, that Isok. 18.2–3 and the scholion both relate to the same, single legislative enactment[59]. In the minority camp, so far as I can discover, is the solitary figure of Mogens Herman Hansen. Hansen's 'Updated inventory of Rhetores and Strategoi', published in 1989, lists under Archinos his proposal of *two* laws: '(1) on *paragraphe* 403/2 (Isoc. 18.2); (2) on *prytaneia* and *epobelia* ca. 403–399 (Σ *ad* Aeschin. 1.163)'[60]. Either way, there is some unpacking to be done here, if we are to separate out clearly – as must surely be attempted – the element(s) of innovation from what already existed.

To that end, here are four facts (of various kinds):

(i) No law or laws of Archinos in the late fifth century can have *instituted* the *prytaneia*, for they are attested much earlier: in Aristophanic comedy from the 420s, in the "Old Oligarch" from (in my opinion) that same decade, and in inscriptions on stone stretching back all the way to the mid 480s[61].

59 See Kirchner's entry on Archinos in *PA* (no. 2526); Rhodes (1981) 473; Develin (1989) 200.

60 Hansen (1989) 25–72, at 38. (The original version – Hansen (1983) 162 – mentions only the *paragraphê* law, from Isokrates.)

61 Aristoph. *Nub.* 1131–1200, at 1136 and 1180; Aristoph. *Vesp.* 659; [Xen.] *Ath. Pol.* 1.16; *IG* I^{3}4 (archon-dated to 485/4), A.7–8; *IG* I^{3}19 (orthodox date 450/49), 5–7; and restored in *IG* I^{3}21 (orthodox date 450/49), 36.

(ii) The *epôbelia*, by contrast, is nowhere mentioned before Isok. 18 – which mentions it four times in all: chaps. 3, 12, 35, and 37.

(iii) One of these four passages, Isok. 18.12, reveals (on standard assumptions mentioned earlier) that the *epôbelia* existed *before* Archinos' law which created the *paragraphê* procedure. 18.11, quoted above, continues (into 18.12) as follows: εἰδὼς ὅτι, εἰ μὴ μεταλάβοι τὸ πέμπτον μέρος τῶν ψήφων, τὴν ἐπωβελίαν ὠφλήσει, πείσας δὲ τὴν ἀρχὴν κτλ; 'since he knew that if he failed to obtain the (*sc.* required) one fifth of the votes he would pay the obol-levy; and having persuaded the official etc.'. It is in connection not with the *paragraphê* which Isokrates' client ultimately pursued but with the earlier *diamartyria* which he dropped that Kallimachos is alleged, here, to have been fearful of having to pay the *epôbelia.* (This would happen if Kallimachos chose to respond to the *diamartyria* with a *dikê pseudomartyriôn* – prosecuting his opponent's witness for perjury – and lost *that* by more than four votes to one[62].) MacDowell justifiably comments that such an account of Kallimachos' motivation in all this is 'quite unconvincing'[63]. How could it have been in his power to risk no *epôbelia* (but merely *prytaneia*), when any risks to him would flow from the procedural response adopted by his adversary? A good (rhetorical) question – but it does not alter the basic point that, as Blass put it, *epôbelia* was 'keine Neuerung' at the time of Archinos' *paragraphê* law[64].

(iv) The scholion to Aischin. 1.163 does not proffer (in Wilamowitz' famous phrase about chaps. 21–22 of the rediscovered Aristotelian *Ath. Pol.*) 'alles eitel gold'[65]; on the contrary, some of the individual assertions it makes seem to be shown by other, better evidence to be false. Concerning *prytaneia*: (*a*) according to Pollux 8.38, they were paid – where they were payable – by both of the litigants in advance, with the eventual loser having to reimburse his opponent at the end; and (*b*) rather than a sliding one-tenth (ἐπιδέκατον) of the sum at issue[66], they were levied at two fixed rates related to it – three drachmas for sums between 100 and 1000 drachmas, thirty for 1000+ (as here in Isok. 18.3: ἐν τριάκοντα δραχμαῖς κινδυνεύοντα, 'running a risk of [literally 'in'] thirty drachmas'). As to the *epôbelia* itself, the definition begins imprecisely in asserting that it was paid by 'the convicted man', ὁ ἁλούς, when more exactly – as in the eventual formulation – the man upon whom it fell as an extra blow (the thrust of *prosopheilein*) was 'the unsuccessful plaintiff', ὁ μὴ ἑλών. Also, the *epôbelia* has been envisaged as payable to the opposing litigant rather than 'to

62 See on this explanatory point (e.g.) Lipsius (1905–1915) 855; Calhoun (1918) 185 n. 2; Harrison (1971) 131; MacDowell (1971) 269 n. 5.

63 MacDowell (1971) 269 n. 5.

64 Blass (1892) 214 n. 2.

65 Wilamowitz-Moellendorff (1893) II 146.

66 Which was a feature not of the *prytaneia* but of the *parakatabolê*, a special up-front deposit payable by claimants in inheritance cases: so Harrison (1971) 93 n. 2, citing Pollux 8.39.

the treasury' as the scholiast avers[67], but we must revisit this point below (Part III section 3).

4. In the light of these four facts, or clusters of facts, what can be made of the question of whether Archinos was responsible – in this area – for one law or for two?

If there was just the one law, the law that created the *paragraphê* procedure, then it contained an ancillary clause, the wording of which could perfectly well have been as Isok. 18.3 expresses it: whoever is defeated pays the *epôbelia.* (We might note incidentally that since such a penalty was not an innovation of this law itself but was already in existence at the time, the definite article here – 'the' *epôbelia*, not 'an' *epôbelia* – will be precise language; and stipulating that the levy is paid 'whoever is defeated' obeys natural justice in this instance because he who blocks a prosecution against him with a *paragraphê* becomes for practical purposes a plaintiff himself.) From Isok. 18.2–3 *alone*, such a picture might naturally and unproblematically be conjured – unproblematically except in the sense of leaving unanswered such questions as who created *epôbelia* and when. Yet on the face of it the scholiast appears to answer those very questions; the 'who' directly (Archinos), and the 'when' by extension. His note seeks to gloss the word *epôbelia* – not *paragraphê*, which is never so much as mentioned; and it does so in two ways. First there is an opening definition: τὸ ἕκτὸν μέρος τοῦ τιμήματος, ὃ προσώφειλεν ὁ ἁλούς. Then there is supplementary material, introduced by the assertion ἐνομοθέτησε δὲ τοῦτο ὁ Ἀρχῖνος, 'the lawgiver in this matter was Archinos'. That does not strike me as a natural way of expressing the idea that "Archinos' law on *paragraphê* had something to say, in passing, about *epôbelia*" (even though in fact it did!). The scholiast's phrase ἐγγράψας τῷ νόμῳ ('he wrote in the law') does not, as far as I can see, carry any implications of adding something to a law that already exists. So I suggest we allow the scholion to mean what it appears to mean: that the *epôbelia* was the legislative creation of Archinos.

Part III: conclusions, comments, speculations

1. Let us at this point take a step back from textual argument and try to assess in broad terms the resulting picture.

The chronology of it all, first, will look like this *if* MacDowell is right about πείσας δὲ τὴν ἀρχήν in Isok. 18.12 (see above, Part I section 6; if he is wrong, there is even more uncertainty around the distribution of events between 403/2 and 402/1):

67 Harrison (1971) 185, citing (in n. 2 there) Demosth. 47.64, Harpok. s.v. ἐπωβελία, and Bekker, *Anecd. Gr.* 1. 255. 33f.

– 404/*3* (?spring): beginning of (?total) *iustitium*, when regime of the Thirty collapses.

– 403/2: democracy restored, but *iustitium* for private suits maintained.

– 403/2: private suits resume, but, either at once or soon afterwards, Archinos seeks to curb their number with a law introducing *epôbelia*. (See further discussion below.) Kallimachos brings suit against the speaker of Isok. 18, who blocks it with *diamartyria*; suit temporarily abandoned.

– either 403/2 or early 402/1: Nikias brings suits against Euthynous (Isok. 21); outcome unknown.

– either 403/2 or early 402/1: father of the speaker of Lys. 17 granted permission to bring suit against Erasistratos.

– either 403/2 or early 402/1: law of Archinos introduces *paragraphê*.

– 402/1: Kallimachos reactivates his suit; this time it is blocked by a *paragraphê*, which comes to court; outcome unknown.

– 401/0: case against Erasistratos finally heard; plaintiff wins.

Omitted from the above is the introduction of the public arbitrators, on which (to reiterate) I have no basis for a worthwhile opinion. It could have been as late as MacDowell and Scafuro have it – creation in 400/399, operation in and from 399/8 – but I know of no impediment to an earlier date, and I see no point in guessing. What appears in the chart above is more than guesswork (and of course less than certainty); I hope to have shown that it is reasonable inference and deduction from hard evidence.

2. Although, in the Part I of this paper, the length of the *iustitium* was the focus of my concern (for reasons of discontent with the ruling view on the matter), I will gladly concede that of greater substantive interest is what happened once that legal intermission – however long it lasted – came to an end and the full range of dispute settlement in court was, once again, available in Athens. During the *iustitium* period itself, very probably, some disputes which would otherwise have led to private litigation were resolved by private arbitration (as the one in Isok. 18.9–10 was meant to be), and others simply fizzled out. On the other hand, in speeches like Isok. 18 and 21 we see evidence – if any were needed – of an accumulation of disputes persistent and bitter enough to reach the courts as soon as they were allowed to. A balance therefore had to be struck between, on the one hand, the free play of private litigation and, on the other, (*a*) upholding the amnesty against suits which might breach it (Nikias' charge against his cousin Euthynous apparently being one that did *not* breach it, being entirely without "political" content)[68] and (*b*), in any event, keeping the renewed flow of lawcourt business at manageable levels.

Enter Archinos: a democrat, needless to say, but with no-nonsense authoritarian instincts. His first law on the subject created the *epôbelia*, its deterrent or

68 On this point see Loening (1987) 128–129.

restrictive thrust lying in the blanket discouraging of would-be plaintiffs – in certain areas: see below – who were less than fully convinced of their chances of success. His second law, the *paragraphê* law, took a different tack, starting from the position of defendants in suits which were, deterrent or no, brought against them.

Comparing *paragraphê* with the pre-existing *diamartyria*, Todd reasonably judges Archinos' new creation 'better suited to a democratic system of justice, because it ensured a court hearing rather than simply permitting one [if the witness was sued in a *dikê pseudomartyriôn*] by the back door'[69]. On the other hand, we seem bound also to agree with Harrison, who, after listing the accumulation of post-Archinian laws – there was apparently never a single consolidated one – under which a *paragraphê* was permissible, ends with the observation that *paragraphê* 'was conceived not so much as a positive weapon of protection put as such into the defendant's hands, but as a negative one (μὴ εἶναι δίκας) which left it to the defendant to prove that the δίκη was not maintainable'[70]. In any event, defendants who (like the one in Isok. 18) did opt for *paragraphê* and its attendant advantages of speaking first[71] had to be equally confident of their own ground, as Archinos had taken care to stipulate *epôbelia* for them too, if they initiated this special procedure only to lose it. That being so, the message once again seems to be: use with care – if at all.

3. As regards *epôbelia*, if I am right in arguing that it was created by a law of Archinos passed before his *paragraphê* law (which tied the new procedure into it), one obvious question becomes: to what processes did the first law, the *epôbelia* law itself, attach the sanction?

To this Isok. 18.12 seems to provide the only two solid ingredients of an answer, one positive and the other negative. The positive point is that *epôbelia* did apply in a *diamartyria* – or more exactly, in a *dikê pseudomartyriôn* generated by one. (Sooner or later, therefore, *diamartyria*, *paragraphê*, and *antigraphê* would constitute an interrelated procedural bloc – that of special pleas – in which *epôbelia* operated[72].) And the negative point is that *epôbelia* did *not*, it seems, arise in the category of suit originally brought by Kallimachos (where he risked 'only the *prytaneia*'): a claim for 10,000 drachmas which everyone takes, *faute de mieux*, to be a suit for damage(s), a *dikê blabês*.

69 Todd (1993) 137; for the *dikê pseudomartyriôn* point see above, at n. 62.

70 Harrison (1971) 119–123 (quotation from 123).

71 These advantages gave rise to a forensic topos: see e.g. Lys. 19.5, Aischin. 2.1, Demosth. 18.6–7, Hyp. *Lyk.* 9 and *Eux.* 10.

72 On *antigraphê* see Harrison (1971) 131–133 and (in relation to *epôbelia*) 184. Later Harrison (1971, 183–184) follows Lipsius and others in disbelieving the assertion of Pollux 8.48 that *epôbelia* was payable in a *phasis* (denunciation: see in brief Todd, 1993, 119); thus it does not arise in public suits.

If Kallimachos' suit was indeed a *dikê blabês*, we could reasonably feel some surprise at its not involving the *epôbelia*; *blabê* seems very much like the sort of self-indulgent charge that Archinos might have wished to make unattractive. Still, neither now nor later is there *clearcut* evidence of *epôbelia* in the *dikê blabês*[73]. Such hard evidence as we do have (in forensic speeches and the lexicographical comment they generated) on the *epôbelia* in ordinary private suits is in fact disappointingly meagre. The only known categories, besides the *dikê pseudomartyriôn* mentioned already[74], are *epitropês* (suing a former guardian for how he had behaved)[75], *chreôs* (suing for debt)[76], and the mysterious *synthêkôn parabaseôs* (suing for a breach of contract). If this last offence existed at all, which some experts doubt[77], it seems to be what is referred to in Aischines 1.163, the passage which gave rise to our scholion about Archinos' law, discussed in Part II above. And concerning that datum there is another suggestion by Hansen which it will be appropriate to mention here. In his study of '*Atimia* in consequence of private debts'[78] Hansen raises the possibility that when this scholiast says the *epôbelia* went τῷ δημοσίῳ, 'to the treasury' (so that non-payment would result in *atimia*, loss of civic rights), this is to be preferred to what other lexicographical material says – and to what [Demosth.] 47.64 has been construed as saying – about its going to the opponent. (The key phrase in [Demosth.] 47.64, better on Hansen's reading, is τῶν γὰρ ἄλλων οὐδὲν αὐτῷ ἐπιτιμίων ὤφλον: 'I owed nothing in the way of the other penalties to *him*', *sc.* but rather to the treasury.) If this is right, a corollary of it relevant to my argument here would be that the scholiast's definite errors relate only to *prytaneia*, not to *epôbelia*.

4. One thing the scholiast might have mentioned but, alas, does not is an associated aspect of *epôbelia* that we see in what Isok. 18.12 says about – implicitly – a perjury prosecution: Kallimachos 'knew that if he failed to obtain the (required) one-fifth of the votes, τὸ πέμπτον μέρος τῶν ψήφων, he would pay the *epôbelia*'. The importance of this is obvious, as it refines the procedural view of *epôbelia* that we would naturally have formed from the scholiast alone: the plaintiff who was compelled to pay *epôbelia* (in a perjury suit at any rate) was he who had secured less than 20% of the jury's votes; less catastrophic failure,

73 The nearest thing to it (as Lene Rubinstein reminds me) is the title βλάβης in some of the manuscripts of [Demosth.] 56 (where *epôbelia* is said to be a possibility: see 56.4). If this is accepted, we must presumably either posit a procedural change between the late fifth century and the late 320s or else classify Kallimachos' suit differently.

74 On the *dikê pseudomartyriôn* see generally (e.g.) Lipsius (1905–1915) 778–789; Harrison (1971) 127–131 and 192–199; Scafuro (1994).

75 See generally (e.g) Lipsius (1905–1915) 532–534; Osborne (1985) 57; Todd (1993) 103.

76 See generally (e.g.) Lipsius (1905–1915) 712; Harrison (1971) 79 n. 3.

77 For doubt see Harrison (1971) 79 n. 3, less categorical at 183; Todd (1993) 105. Accepted, from Pollux 8.31, by (e.g.) Lipsius (1905–1915) 663–664.

78 Hansen (1982) 119.

within the 20–50% zone, was exempt. Harrison argued, against Lipsius, that the same was true in a *dikê epitropês*, despite the impression rhetorically given in Demosth. 27.67 that initiating such a suit against a guardian only to lose it *by any margin at all* was enough to trigger the mechanism ('if this man [the defendant Aphobos] is acquitted, which heaven forbid, I will owe the *epôbelia*, a hundred mnai': ἂν γὰρ ἀποφύγῃ μ' οὗτος, ὅ μὴ γένοιτο, τὴν ἐπωβελίαν ὀφλήσω μνᾶς ἑκατόν)[79]. If that is right, it would be a plausible supposition that the 20% threshold was part and parcel of *epôbelia wherever* that sanction applied – as indeed Harrison himself later suggested[80]. However, since at least one procedural differentiation seems clear (concerning liability: normally the plaintiff only, but, as we have seen, either party in a *paragraphê*), other differences cannot be ruled out[81].

In any event, the fact that the 20% rule operated in connection with *epôbelia at all* prompts me to advance one final and avowedly speculative possibility. To put matters rather brutally: a law of Archinos on *epôbelia* could not be regarded as of surpassing importance (except to specialists in Attic jurisprudence) unless its writ ran further into the domain of private suits than the handful listed above; but there just might, in the shape of the 20% rule, be a link with something of undoubted significance. Here is Hansen on *atimia* again: ''Επωβελία is only attested in private actions but there is a striking resemblance [via Isok. 18.12] to the fine of 1000 dr imposed on a prosecutor in most public actions if he withdrew his indictment before the trial or at the trial obtained less than one fifth of the votes of the jurors'[82]. I agree, and I just wonder whether the 20% rule – a new and fundamental deterrent to frivolous or ill-founded litigation in public suits far more than (demonstrably, anyway) in private ones – might be Archinian too; that is to say, either literally the work of Archinos himself (in the *epôbelia* law or another law) or at any rate a product of these immediately post-Peloponnesian-War years.

The reason why this suggestion must be called 'avowedly speculative' is of course a methodological one, concerned with Isok. 18 and arguments from silence. Such an argument in relation to the *epôbelia* itself can be defended, I think, on two counts: the speech mentions it not once but repeatedly (four times in all), and there is anyway a link with Archinos via the scholiast. Neither of these things apply to the 20% rule: here there is a single allusion only (Isok. 18.12), and no external evidence pointing, likewise, to the late fifth century. For any argument from silence to be a strong one, it is obvious that there should be source-material in which *x* might have been mentioned but is not. Where the absentee is not the mention but the source itself, the cogency of the argument

79 Lipsius (1905–1915) 939; Harrison (1968) 120 n. 4.

80 Harrison (1971) 185; cf. MacDowell (1978) 253.

81 Cf. implicitly Hansen (1982) 115.

82 Hansen (1982) 116. For a convenient dossier of evidence on the 20% rule see Harrison (1971) 83 n. 2.

suffers accordingly. In the present instance it is necessary to ask where, before Isok. 18, the 20% rule *could* have been appropriately mentioned. Forensic speeches themselves are scarce; there is no point in denying it. On the other hand, as we saw with *prytaneia*[83], allusions to legal procedure can be found in a variety of other sources; if they are not (on any particular point) found there, it is reasonable to ask *why* not; and amongst possible answers must be that the procedure did not yet exist.

5. With that as methodological preamble, how far does the evidence warrant my suggestion?

The first thing to say is that the suggestion would have to be abandoned if the date of [Andokides] 4 *Against Alkibiades* is truly what it purports to be – 416 or 415 – because the 20% mechanism is referred to there, in connection with summary arrest (*apagôgê*), in chap. 18: 'for you to arrest and imprison even criminals (*kakourgoi*) is not safe, because of the rule that he who does not obtain the fifth part of the votes is fined a thousand drachmas'. However, while support for this face-value date of [Andok.] 4 has occasionally been voiced[84], the fourth century looks much more likely[85]. Authentic Andokides (1.33: Kephisios ὁ ἐνδείξας ἐμέ will suffer *atimia* 'if he does not obtain the fifth part of the votes') and Plato, *Apology* 36a8–b1 (if Anytos and Lykon had not joined in prosecuting Sokrates, Meletos 'would have been fined a thousand drachmas, for not having obtained the fifth part of the votes') each get us back to the very fifth/fourth century cusp.

Theophrastos dealt with the 20% rule in book 5 of his *Laws* (*Nomoi*), but surviving references to it[86] are no help on this particular point. Thus perhaps an even more grievous loss for present purposes – in that it would very probably have yielded prosopographical and chronological answers all in one – is Lysias' lost speech Πρὸς Διοκλέα ὑπὲρ τοῦ κατὰ τῶν ῥητόρων νόμου, Lys. no. XXXIX Thalheim.

According to Harpokration (s.v. ἐάν τις γραψάμενος κτλ), this too had things to say about the 20% rule, but even with such an information-rich title as

83 See above, at n. 61.

84 See Raubitschek (1948), reprinted in Raubitschek (1991) 116–131; Furley (1989).

85 See e.g. Rhodes (1994) 88–91, equally unconvinced by the post-classical dating advocated by Jebb and others. Rhodes himself (1994, 91) expresses the date as 'after the Peloponnesian War, when at best there were no recent memories of what [*sc.* precisely] happened at an ostracism'. If the composition date was in fact well into the fourth century there would also be no recent memory of when, in the fifth century, the 20% mechanism had been created. The speech's most recent editor, Ghiggia (1995) 69–121, argues for a date no later than 390; but see now Gribble (1997; summarized in 1999, 154–158) for a persuasive case that [Andok.] 4 is a product of the *late* fourth century and, as such, the earliest surviving example of an historical declamation.

86 Harpok. s.v. ἐάν τις γραψάμενος κτλ (E1 Keaney); Lex. Rhet. Cantabr. s.v. πρόστιμον; schol. Demosth. 22.3 (13a Dilts).

Against Diokles, in defence of the law against the speakers[87] we are left groping for enlightenment. The case seems to be a *graphê nomon mê epitêdeion theinai* ('public prosecution for having framed an unsuitable law'), that rarer equivalent of the *graphê paranomôn* which set out to attack a law (a *nomos*) rather than a decree[88]. (The procedure is best-known for having given rise, in the mid 350s, to Demosthenes 20 *Against Leptines* and 24 *Against Timokrates*.) The Diokles in question is dated 'c. 400–380 BC' in his *LGPN* ii entry (s.v. no. 10); the basis for that upper terminus, I imagine, is the orthodox modern assumption that the *graphê nomon mê epitêdeion theinai* 'was created after the revision of the νόμοι at the end of the fifth century'[89].

Nothing, of an explanatory kind, would be gained by succumbing to the temptation of identifying this Diokles – bearer of so very commonplace a name in Athens – with his namesake *LGPN* ii s.v. no. 9, whose late-fifth-century law about the coming-into-force of (other) laws is quoted in Demosth. 24.42[90]. All we can say – or more exactly: presume – is that the Diokles in Lysias has attacked this law 'against the speakers', κατὰ τῶν ῥητόρων, and that Lysias' unknown client (who is possibly, but not necessarily, the law's proposer)[91] has come forward in its defence[92]. But whose law was it? And, more important, what did the law lay down? What sort of measure, at this time, would be perceived and described as κατὰ τῶν ῥητόρων, something which in its overall thrust curtailed the freedoms of the city's politically and forensically active?[93] On present evidence we cannot answer these questions; but if ever we can (and whether or not along the lines I have hinted at here), a good deal about Athenian laws and lawsuits in – and from – the late fifth century B.C. should be clearer than it currently is.

87 From Theon *Progymn.* 69 Spengel; Harpok. has only τῷ <Ὑπὲρ τοῦ> κατὰ τῶν ῥητόρων νόμου.

88 See, to this effect, Hansen (1974) 47 n. 21. But see further below, n. 92.

89 Rhodes (1981) 545; for similar formulations see e.g. Hansen (1991) 165–166, 175, 212.

90 On Diokles' law see in brief MacDowell (1962) 197. This Diokles is, reasonably, kept distinct from the Lysianic one in all the standard prosopographies: besides *LGPN* ii s.v. nos. 9–10 see *PA* 3987/3989 and *PAA* 332245/332260, and cf. Hansen (1989) 43.

91 Later at least, as we see in Demosth. 20.146, a team of advocates (*syndikoi*) might be appointed by the *ekklêsia* to defend a law challenged in a *graphê nomon mê epitêdeion theinai* (if the law had already been ratified, at any rate).

92 Hansen (1989) 43 warns that '[i]t is in fact only an assumption that Lysias' speech ... was written for a client who defended a law about *rhetores* against a *graphe nomon me epitedeion theinai* brought by Diokles'. Which element(s) in the assumption he finds dubious is not clear: surely not all of them?

93 For a parallel to the phrase κατὰ τῶν ῥητόρων I can find only Hyp. *Eux.* 4, the impeachment law (*nomos eisangeltikos*) κελεύει κατὰ τῶν ῥητόρων αὐτῶν τὰς εἰσαγγελίας εἶναι περὶ τοῦ λέγειν μὴ {οὐ} τὰ ἄριστα τῷ δήμῳ, οὐ κατὰ πάντων Ἀθηναίων, and it is not illuminating; at issue is not an entire law but one aspect of it, and in any case kata here means something procedural, not perceptual.

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