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The Crown Trial and Athenian Legal Procedure in Public Cases against Illegal Decrees

Abstract

This essay discusses several aspects of the legal procedures relating to Aeschines' prosecution of Ctesiphon in 330 BCE. First, the essay demonstrates that through an improved reading of the law at Demosthenes 23.92 that Ctesiphon's proposal had not expired when Aeschines brought his case to court in 330. Second, the essay shows that the penalty Aeschines would have suffered for not gaining one fifth of the votes at the trial was not the loss of the right to bring the same kind of cases again but the loss of the right to bring any public cases in the future. Third, the essays analyzes the phrase 'trials brought by decree' (Aeschin. 3.4) and proves that the phrase refers to trials in the Assembly brought on the basis of an *ad hoc* decree and not to trials in the courts with procedures modified by a decree of the Assembly.

In questo saggio vengono discussi alcuni aspetti della procedura relativa all'azione intentata da Eschine contro Ctesifonte nel 330 a.C. Prima di tutto si intende dimostrare, attraverso una corretta interpretazione della legge riportata in Dem. 23.92, che la proposta di Ctesifonte non era scaduta quando Eschine agì in giudizio nel 330. In secondo luogo si vuole dimostrare che la penalità in cui Eschine rischiava di incorrere, qualora non avesse ottenuto un quinto dei voti dei giudici, era la perdita del diritto di intentare in futuro non soltanto lo stesso tipo di azioni ma ogni tipo di azione pubblica. In terzo luogo viene analizzata la locuzione 'azioni intentate sulla base di un decreto' (Aeschin. 3.4) allo scopo di dimostrare che essa si riferisce a processi della cui decisione viene investita l'Assemblea sulla base di un apposito decreto, non a processi di competenza dei tribunali seguendo procedure modificate in forza di un decreto dell'Assemblea.

Introduction

During the month of Thargelion, 338/7 BCE, Demosthenes proposed that the tribes meet on the second and third day of Skirophorion and that each tribe elect a teichopoios, a commissioner for the repair of the walls (Aeschin. 3.27). At these elections, Demosthenes was elected commissioner from his tribe Pandionis for the year 337/6 (Aeschin. 3.24. Cf. Dem. 18.119). As commissioner, Demosthenes received ten talents for the work on the walls (Aeschin. 3.23. Cf. 31). From his own resources, Demosthenes contributed one hundred *mnai* (Aeschin. 3.17. Cf. [Plut.] X orat. 845f). At the same time Demosthenes was also commissioner of the Theoric Fund (Aeschin. 3.24). Before Demosthenes submitted his accounts for these offices, Ctesiphon proposed to honor Demosthenes with a gold crown and to have his honors announced in the theater of Dionysus (Aeschin. 3.24). As Aeschines (3.219) states, this motion was made during the lifetime of Philip.[1] Ctesiphon stated that Demosthenes deserved these honors not only for his contribution of ten mnai for the work on the walls, but also for 'constantly speaking and doing what is best for the Athenian people' (Aeschin. 3.237. Cf. 3.49). Before the proposal was put to the vote in the Assembly, Aeschines charged that the proposal was illegal and prevented it from being submitted to a vote by bringing a *hypomosia* (cf. Xen. *Hell*. 1.7.34; Dem. 18.103). This is clear from the fact that Demosthenes several times calls Ctesiphon's proposal a probouleuma, which implies that it had not been ratified by the Assembly (Dem. 18.9 [προβουλεύματος], 53 [προβεβουλευμένων], 118 [προβουλεύματος]). In another passage, Aeschines (Aeschin. 3.213) says that Ctesiphon is the author of the 'opinion' submitted to the Assembly, not the decree enacted by the Assembly (γράψαντος τὴν γνώμην).

Even though Aeschines brought his charge against the proposal of Ctesiphon during the year 336, the case did not come to trial until six years later in the middle of 330.[2] Several remarks by Aeschines in his speech against Ctesiphon confirm this date for the trial.[3] First, Aeschines (3.162) mentions an Athenian embassy to Alexander, which can be dated to this

1 For discussion of other dates in the sources see Wankel 1976: 11, note 14.
2 Dion. Hal. *Letter to Ammaeus* 1.12.
3 For the date of the speech see Wankel 1976: 31-33.

time.[4] Second, Aeschines (3.132) mentions that the Persian king was no longer fighting for his kingdom but to save his life, which clearly alludes to his circumstances after his defeat at the battle of Gaugamela in the summer of 331.[5] Third, Aeschines (2.252) alludes to the trial of Leocrates, which took place in 331.[6] Fourth, Aeschines (3.165-7) mentions the revolt of Agis III of Sparta, but Aeschines (3.131) clearly implies that the revolt was over because the Spartans had sent hostages to Alexander.[7] Fifth, Aeschines (3.254) states that the Pythia at Delphi will take place in a few days (ἡμερῶν μὲν ὀλίγων). This clearly alludes to the Pythia of 330, which took place during the summer.[8]

In his speech at the trial, Aeschines (3.153-156) predicts that if the court votes to acquit Ctesiphon, the terms of his decree will be carried out, in particular the announcement of Demosthenes' honors in the theater (τὴν ἐκ τοῦ ψηφίσματος ἀνάρρησιν). Later in the speech, Aeschines (3.253-4. Cf. 259) states that by acquitting Ctesiphon they will have the honors of Demosthenes announced in the theater and that their verdict will give him a crown. Demosthenes (18.85. Cf. 266) also believes that if the vote goes in his favor, he will receive a crown.

In the nineteenth century Arnold Schaefer claimed that Ctesiphon's proposal would no longer have been valid after a year ('Zudem trat, als das Jahr abgelaufen war, der auf Ktesiphons Antrag gefaßte Ratsbeschluß außer Kraft') and cited a law in Demosthenes' speech *Against Aristocrates* (23.92), which appears to state that *probouleumata* expired after a year.[9] Schaefer accordingly believed that the proposal must have been revived ('der Ratsbeschluß erneuert ward') on the grounds that Aeschines in his speech takes it for granted that if Ctesiphon is acquitted, the crowning of Demosthenes would take place at the next Dionysia ('Aeschines in seiner ganzen Rede es als selbstverstanden annimmt, daß, wenn Ktesiphon freigesprochen werde, an den nächsten Dionysien die Bekränzung des Demosthenes stattfinde'). Goodwin also noticed that 'The προβούλευμα of the Senate concerning the crown had legally expired at the end of the year 337-336. This was probably

4 See Arr. *An*. 3.6.2; Curt. 4.8.1 with Wankel 1976, following the analysis of Schaefer 1887, 224, note 1.
5 For the date of Gaugamela see Bosworth 1988: 79-85.
6 For the date of the trial of Leocrates see Harris 2013a: 233, note 54.
7 For discussion of the revolt of Agis and the chronology see Bosworth 1988: 198-204.
8 For the date of the Pythia see Wankel 1976: 33, note 83.
9 Schaefer 1887: 225-227.

not renewed until after the trial. The offence for which Ctesiphon was indicted was committed when he proposed his bill in 336, and this offence was in no way mitigated by the subsequent expiration of the act of the Senate. A renewal of the same decree would probably been illegal while it was suspended under indictment; the proposal of a new decree in a different form would have required a new indictment to prevent it from being carried to the Assembly and passed like any other προβούλευμα.'[10] Goodwin also cites the law at Dem. 23.92 for the view that Ctesiphon's proposal would have expired after a year. The problem with Goodwin's proposal is that both Aeschines and Demosthenes state that if Ctesiphon is acquitted, the terms of his decree will go into effect without any new decree.[11] In his book on the procedure against illegal decrees, Hansen also believed that Ctesiphon's decree would have expired by the time of his trial: 'Ktesiphon is acquitted by the court, but Demosthenes cannot now be crowned because the decree is time-barred.'[12] MacDowell thought that Demosthenes could have been crowned, but that after Ctesiphon was acquitted, the expired *probouleuma* would then have to be proposed again with identical form and content and voted on again in the Council before being submitted again to the Assembly.[13] In an essay on the time-limit in the *graphe paranomon*, Giannadaki has a similar view: 'Dem. 23.92-93 suggests that a *probouleuma* which had not been enacted within a year became invalid; it was not merely suspended or 'frozen', as the speaker never challenges this in his anticipation of the argument of Aristocrates.' She then speculates that 'Though it is impossible to determine with certainty how expired *probouleumata*, which were then declared legal by the court, were ratified, the most obvious and economical explanation would be that the court ruling would automatically reinstate the *probouleuma*.'[14] Giannadaki provides no evidence to support this view.

10 Goodwin 1901: 329-30.

11 Wankel 1976: 19-20 sees the procedural problem, but does not propose a solution.

12 Hansen 1974: 38.

13 MacDowell 2009: 197, note 120. Cf. Cawkwell 1969: 166: 'The case was not proceeded with until six years later in the early weeks of the year 330/29, although by then the προβούλευμα would have long lapsed.' Cawkwell rightly notes however that there is no reason to believe that the proposal of Ctesiphon was revived in 330.

14 Giannadaki 2014, 30. Cf. Giannadaki 2014, 31: 'it is possible that if the decision was not made within a year, the *probouleuma* would be deemed to have expired and therefore, it would have to be reintroduced.'

In a recent essay, E. Carawan revives Schaefer's proposal, but adds several new details and a new scenario.[15] According to Carawan, 'the council of 330/29 resurrected the old *probouleuma* and thus the measure was at last introduced in the assembly, for the people to decide upon the old decree *de novo*.' When the measure was finally introduced to the Assembly, Aeschines then 'reasserted his challenge to it.' At this meeting, the Assembly then passed a decree that 'the issue be decided at trial: whoever challenged the measure as unlawful would face an assessed penalty, if he failed to win one fifth of the votes.' Carawan further claims that this penalty set forth in the decree was different and greater than the standard penalty for accusers who did not gain at least one fifth of the votes.

This essay is divided into three parts. The first part re-examines the law at Dem. 23.92 and shows that it makes decrees of the Council valid for only one year, that is, any decree of the Council expired after one year. The speaker claims that this law applied to *probouleumata*, but this must be a misinterpretation of the law. Because only decrees that had been enacted could be valid and because a *probouleuma* could not be valid before it was enacted by the Assembly, the law had nothing to do with *probouleumata*. This means that because there was no time-limit for submitting a *probouleuma* to a vote in the Assembly, there is no need to believe that Ctesiphon's proposal was somehow brought back to life in 330. The second part of this essay examines the penalties for frivolous prosecution and shows that there is to need to believe that the Assembly created a new *ad hoc* penalty for Aeschines at the trial of Ctesiphon. What Demosthenes claims Aeschines would suffer for not gaining one fifth of the votes was the standard legal penalty. In the third part, trials created by decrees mentioned by Aeschines (3.4) are discussed. This phrase refers to trials heard in the Assembly and initiated by decrees, not to *ad hoc* arrangements for trials in court created by decrees. Trials in the courts were regulated by laws proposed in the Assembly and ratified by the *nomothetai*, not by decrees.

[15] Carawan 2019. Carawan's view that Demosthenes compelled Aeschines to bring the case to court is similar to that of Burke 1977, but see Harris 1995: 173-4 for a detailed refutation.

I

When analyzing the statements about laws presented in the speeches of the Attic orators, it is very important to distinguish between the actual terms of the law and the interpretation a litigant may give to this law. Take, for instance, the law about the award of crowns the subject of one of Aeschines' charges in his indictment of Ctesiphon. This law forbade the award of a crown to an ἀρχή that was still subject to the procedure of *euthynai* (Aeschin. 3.31: ἕτερος [sc. νόμος] δ᾽ἀπαγορεύει ἀρχὴν ὑπεύθυνον μὴ στεφανοῦν). Aeschines (3.11: ἀπαγορεύει τοὺς ὑπευθύνους [sc. ἄρχοντας] μὴ στεφανοῦν. Cf. 26) assumes that the term in the law ἀρχή means 'official' and that the law made it illegal to award a crown to any official during his term of office before he passed the review of his conduct after his term of office. In his speech defending Ctesiphon, Demosthenes gives a different interpretation of the law. Demosthenes (18.113) notes that he was praised not for those duties for which his conduct was subject to review, but for his contribution (οὐ περὶ τούτων γε οὐδενὸς ὧν ὑπεύθυνος ἦν, ἀλλ᾽ἐφ᾽οἷς ἐπέδωκα). Demosthenes (18.117) then sums up his argument: 'I made a contribution. I am praised for that reason. I am not subject to audit for what I gave. I was a magistrate. I underwent an examination for my term of office, not for what I contributed (ἐπέδωκα).' Demosthenes clearly argues that the law applied only to decrees of praise for a magistrate's overall performance of his duties in office and not to decrees of praise for individual acts of generosity during a term of office. One should also note that Demosthenes (18.114) cites several decrees in which the Assembly clearly followed his interpretation of the statute. Demosthenes (18.117) observes that 'Each of these men, Aeschines, was subject to examination for the office which he held (τῆς μὲν ἀρχῆς ἧς ἦρχεν), but was not subject to examination for the actions for which he was awarded a crown.' Finally, there are several inscriptions recording honorary decrees that confirm Demosthenes' interpretation of the statute.[16] If one had only the speech of Aeschines, one might assume that Aeschines' interpretation was the standard interpretation of this statute, but fortunately Demosthenes' speech has also survived as well as several inscriptions, which corroborate his interpretation and contradict that of Aeschines. This is

16 See Harris 2017.

a very important point of methodology when analyzing the evidence about statutes presented by Athenian litigants.[17]

One should also bear in mind that the legal case brought by Euthycles against the proposal of Aristocrates rests on a deliberate misinterpretation of a key legal term in the latter's proposal. Euthycles quotes the key clause in the proposal: 'After writing: "If someone kills Charidemus" and omitting how he does it, whether in our interests or not, he has immediately afterwards written: "he is subject to arrest from the territory of the allies".' (Dem. 23.16: "ἂν γὰρ ἀποκτείνῃ τις Χαρίδημον" γράψας καὶ παραβὰς τὸ τί πράττοντα εἰπεῖν, πότερ᾽ ἡμῖν συμφέροντα ἢ οὔ, γέγραφεν εὐθὺς "ἀγώγιμον ἐκ τῶν συμμάχων εἶναι." Cf. 34). Euthycles interprets the word *agogimos* to mean that whoever catches the person who kills Charidemus can do anything to him he wishes: 'He passes over the legally designated court and hands him over without trial to his accusers for them to do whatever they want to him, even if his guilt is not obvious. Those who catch him have the right to torture, maim, and collect money' (Dem. 23.27-28). As several scholars have noted, this is not the standard meaning of the term *agogimos*, which normally means 'subject to extradition' (cf. Xen. *Hell*. 7.3.11: ἐψηφίσασθε δήπου τοὺς φυγάδας ἀγωγίμους εἶναι ἐκ πασῶν τῶν συμμαχίδων). The proposal of Aristocrates only meant that anyone who killed Charidemus would be arrested and extradited to Athens where he would be put on trial.

This is not the only passage in the speech in which Euthycles gives a fallacious interpretation of a statute. Later in the speech Euthycles has the law about *ad hominem* legislation read out: 'no law shall be passed regarding an individual unless it applies to all Athenians alike.' Euthycles then observes that all decrees should conform to the laws and argues that the decree of Aristocrates is illegal because it applies only to Charidemus and not to all Athenians. The argument is fallacious because the law applies only to laws (*nomoi*) and not to decrees, which often contained provisions about individuals.[18] If this interpretation of the law were correct, all the decrees of the Assembly awarding citizenship

17 For other examples of trials in which litigants disagree about the meaning of a statute see Harris 2013a: 175-245.

18 See Canevaro 2013a: 74-5.

would have been illegal. If Euthycles is capable of misinterpreting the key word in a statute in these two passages, he is capable of doing the same elsewhere in his speech.[19]

It is important to present the full text of the passage from Demosthenes *Against Aristocrates* (23.92).

I think that he will also present the following argument and attempt in this way to mislead you: the decree is not in effect. It is a preliminary motion, but the law provides that decrees of the Council are in effect for one year. As a result, if you vote against it, the city will not suffer any serious harm.

οἴομαι τοίνυν αὐτὸν κἀκεῖνον ἐρεῖν τὸν λόγον, καὶ σφόδρα ταύτῃ ζητήσειν ἐξαπατᾶν ὑμᾶς, ὡς ἄκυρόν ἐστι τὸ ψήφισμα. προβούλευμα γάρ ἐστιν, ὁ νόμος δ᾽ἐπέτεια κελεύει τὰ τῆς βουλῆς εἶναι ψηφίσματα, ὥστε κἂν αὐτοῦ νῦν ἀποψηφίσησθε, ἥ γε πόλις φλαῦρον οὐδὲν πείσεται κατὰ τὸ ψήφισμα τοῦτο.

First, it is important to distinguish what the law states and how Euthycles interprets the law. As Euthycles states, the law provides that decrees of the Council are in effect for one year. Euthycles then claims that this law applies to preliminary motions, which were moved in the Council and presented to the Assembly for confirmation or rejection. According to this view, if a preliminary motion was sent by the Council to the Assembly, but was blocked by a *hypomosia* in a public action against an illegal decree, it would expire after a year if the accuser did not bring his case to court within that period. In fact, Euthycles explicitly states that his delay in bringing his case to court has made the decree invalid (Dem. 23.93: οἱ δὲ γραψάμενοι καὶ χρόνους ἐμποιήσαντες καὶ δι᾽οὓς ἄκυρον ἐστιν). As a result, if a proposal was indicted by an accuser, but the court voted against the accuser and to uphold the proposal, the proposal could not be put to a vote in the Assembly if the trial did not occur within a year after the proposal was moved in the Council.

The argument that the law about decrees of the Council applied to preliminary motions (*probouleumata*) must be fallacious. Because the speech of Aristocrates has not survived, it is impossible to know if he actually made this argument or not. Accusers were quite capable of claiming that their opponents would make a certain kind of argument, which they did not in fact make. For instance, Aeschines (3.13) claims that Demosthenes

[19] See Gernet in Gernet and Humbert 1959: 99-103; Lonis 1988; MacDowell 2009: 199-202; Harris 2018: 24-25. On the arguments in this speech in general see now Esu 2020.

will argue that he was not an official when Ctesiphon proposed his decree of praise and that therefore the law about crowns did not apply to his proposal. In fact, Demosthenes does not use this argument in the published version of his speech, but as we have seen above, uses a different argument. But this makes no difference for the analysis of Euthycles' point. The law cited by Euthycles applies to decrees of the Council, but could not have applied to preliminary motions. Preliminary motions could not be valid for a year or be made invalid by the passage of time if they were never enacted in the first place. The only motions that could be made invalid were the decrees voted by the Assembly (Dem. 20.44; 24.9).[20]

Second, the accuser in a public action against an illegal decree submitted as a *probouleuma* to the Assembly for a vote did not bring his action against a decree of the Council, but against a preliminary motion, which was an 'opinion' (γνώμη) of the Council introduced to the Assembly for a vote.[21] 'Opinion' (γνώμη) is the term Aeschines (3.213) uses to denote Ctesiphon's proposal, which is never called a decree of the Council (cf. Dem. 24.13). The precise terminology is very important in this case. When the Assembly invited the Council to make a proposal, it did not ask the Council to present a decree of the Council but an opinion for the Assembly to consider. For instance, before the trial of the generals after Arginousai in 406 BCE, the Assembly invited the Council to draft a preliminary proposal about the trial and to introduce it at the next meeting of the Assembly (Xen. *Hell*. 1.7.7: τὴν δὲ βουλὴν προβουλεύσασαν εἰσενεγκεῖν ὅτῳ τρόπῳ κρίνοιντο). At this meeting Callixeinus introduced the opinion (γνώμη), which had been drafted in the Council (Xen. *Hell*. 1.7.9: ἐντεῦθεν ἐκκλησίαν ἐποίουν, εἰς ἣν ἡ βουλὴ εἰσήνεγκε τὴν ἑαυτῆς γνώμην Καλλιξείνου εἰπόντος). After this proposal was introduced, Euryptolemus then attempted to stop the proposal from going forward by charging that it was illegal (Xen. *Hell*. 1.7.12: τὸν δὲ Καλλίξεινον προσεκαλέσαντο παράνομα φάσκοντες συγγεγραφέναι Εὐρυπτόλεμός τε ὁ Πεισιάνακτος καὶ ἄλλοι τινές). This is also the language one finds in

20 The very confused scholion on the passage sees this point: τὸ δ' ὅτι ἐπέτεια ὡς πρὸς τὰ ψηφίσματα τοῦ δήμου, ἐψεύσατο. ἄκυρον μὲν γὰρ διὰ τὸ μήπω κυρῶσαι τὸν δῆμον. For a complete text and translation see the Appendix. On the use of the term *akyron* in inscriptions see Dimopoulou 2014.

21 It appears to have been possible to bring a *graphe paranomon* against a decree of the Council, but that would have been against a proposal about actions to be carried out by the Council about their duties ([Dem.] 47.34), not about a preliminary motion introduced to the Assembly by the Council about general matters to be decided by the Assembly.

probouleumatic decrees of the Assembly.[22] For instance, in a decree of the Council and Assembly dated to 375/4, the Assembly invited the Council to submit its opinion about the Corcyreans, the Acarnanians and the Cephallenians (IG II^2 96, lines 11-13: γν[ώ]μ[η]|ν δὲ ξυμβάλλεσθαι τῆς β[ουλῆς ὅτι δοκεῖ] τῆι βουλῆ|ι). There are dozens of examples, and in each case the proposal submitted to the Assembly is never called a decree of the Council, but an 'opinion of the Council.' In fact, the evidence from the trial of Ctesiphon reveals that this law clearly did not apply to preliminary motions (probouleumata) because both Aeschines (3.153-6, 253-4, 259) and Demosthenes (18.85, 266) assume that if Ctesiphon is acquitted, his proposal to crown Demosthenes and to have his honors announced in the theater can go into effect. The problem identified by earlier scholars turns out to be non-existent.

There is another case in which an accuser indicted an honorary decree and the case did not come to trial for several years. Demosthenes (18.222-3) mentions a decree of honors indicted by Diondas, who did not receive one fifth of the votes at the trial, and mentions Demomeles and Hyperides as the proposers (cf. [Plut.] *X orat*. 848e-f). The new Hyperides papyrus has now provided information about the case. Hyperides proposed his decree before the battle of Chaeronea, but the case did not come to court until four years later.[23] Despite the delay, the decree of Hyperides still went into effect because Demosthenes had it read out to the court in 330.[24] Diondas appears to have brought his case against the decree of Hyperides before it was put to a vote in the Assembly as in the case of the decree of Ctesiphon because Hyperides refers to his proposal as a *probouleuma* (144v8: προεβούλευσα). This provides another example in which a *probouleuma* was indicted, but the trial did not take place until several years later. After the accuser lost his case, the proposal was enacted by the Assembly.

The law about decrees of the Council clearly applies to decisions enacted by the Council about the activities of the Council, not about motions to be introduced to the Assembly.[25] The law was clearly aimed at defining the powers and jurisdiction of the

22 On probouleumatic decrees see Rhodes 1972: 52-82.

23 See Horvath 2008: 27-28. For the text see Horvath 2014.

24 If the proposal was not passed, there would have been no copy kept in the archive. See Harris 1995: 14.

25 Rhodes 1972: 63 believes that the limit of one year applying to *probouleumata* was the bouleutic

Council. The Athenians were very concerned about delineating the powers and jurisdictions of various political bodies and magistracies. For instance, the Areopagus was allowed to impose fines, but only up to a certain amount ([Dem.] 59.80). The Council was also restricted to imposing fines of no more than five hundred drachmas ([Dem.] 47.43 Cf. IG I^3 34, lines 38-9). The powers of the Council were strictly circumscribed also by the oath members swore. The members of the Council promised not to put any Athenian who provides three sureties in prison except in cases of treason, plotting against the democracy or failing to make payments for collecting taxes (Dem. 24.144). In the decree about Chalcis the members of the Council and the judges swear not drive out Chalcidians from Chalcis, to destroy the city, to punish anyone with exile or put to death or confiscate property without the approval of the Athenian people (IG I^3 34 [446/5?], lines 3-10). This law limited the powers of the Council by limiting the validity of their decrees to one year. Unlike the Assembly, which could enact decrees or laws that were valid indefinitely, this law restricted the Council to passing measures whose validity expired after a year. This is certainly consistent with the attested decrees of the Council in the sources.[26] In 415, the Council voted to have the generals summon citizens in Athens in arms to the *agora*, those living within the Long Walls to the Theseum, those in the Piraeus to the agora of Hippodamus and the cavalry to the Anakeion (Andoc. 1.45). A little after 403/2 the Council voted to have the decree of the Assembly about the proxeny of the sons of Apemantus reinscribed because it had been destroyed by the Thirty (*IG* II^2 6). In the winter of 370/69 the Council passed a decree to call a meeting of the Assembly immediately (Xen. *Hell*. 6.5.33). In 357 the Council voted to allow trierarchs to recover naval equipment by any means necessary ([Dem.] 47.44). This decree was passed to implement a general decree of the Assembly ([Dem.] 47.20, 44). In 346 Demosthenes moved in the Council that Philip's ambassadors be assigned front-row seats (*proedria*) in the theater at the Dionysia (Aeschin. 2.55, 110; 3.76). He also passed a decree awarding crowns of wild olive to the members of the First Embassy to Philip (Aeschin. 2.46). A little later Demosthenes passed a decree in

year, but Giannadaki 2014: 22, note 42 rightly rejects this because it would make decrees voted at different times valid for different lengths of time.

26 For the decrees of the Council in the fourth century see Liddel 2020: 966-71. See also Rhodes 1972: 82-87. One should not include in this group the decree of the Council about Antiphon and others ([Plut.] *X orat.* 833d-834b) because this document is a forgery. See Harris 2021.

the Council instructing the members of the Second Embassy to proceed to Philip and to have him swear the oaths to the peace treaty with the Athenians (Dem. 19.154; Aeschin. 2.91). In each case the decree was to take effect immediately and did not enact a rule for the future. One should also note that when the Assembly delegated powers to the Council or gave the Council an order, it was always to do something immediately.[27] As Rhodes has observed, 'In times of democratic government the decrees of the boule remained subsidiary to those of the ecclesia.'[28] One can see this principle enunciated in a decree of the Assembly delegating powers to the Council about preparing the fleet 'provided that the Council does not cancel any of the decisions voted by the people' (IG II^2 1629 (325/4), lines 264–69 (τὴν βουλὴν | κυρίαν εἶναι ψηφίζεσθαι | μὴ λύουσαν μηθὲν τῶν | ἐψηφισμένων τῶι δήμωι). Like the restrictions expressed in the oath of the Council, this law restricted the powers of the Council by limiting the duration of its decrees to one year. But this had nothing to do with the preliminary motions (probouleumata) submitted to the Assembly.

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27 *IG* II^2 127 (356/5), lines 34–5 (τ[ὴ]ν [β]ουλ[ὴν] κυ[ρ]ίαν εἶναι); *IG* II^2 204 (352/1), lines 85–6 (τὴν βουλὴν κυρίαν εἶνα|[ι ψηφίζεσθαι ὅτι ἂν αὐτῆι δ]οκῆι ἄριστον εἶναι); Dem. 19,154 (τὴν βουλὴν ποιήσαντος τοῦ δήμου κυρίαν); IG II^2 435 (after 336), lines 7–9 (τὴν β[ουλὴν κυρίαν εἶναι ψηφίζ]||[εσθαι ὅτι ἂν α]ὐτῆι δοκῆι ἄριστ[ον εἶναι).

28 Rhodes 1972: 87. One referee observes: "è vero che un probouleuma viene presentato come una gnome, ma rimane il fatto che nel prescritto di un decreto probuleumatico la formula è edoxe tei boulei kai toi demoi, il che parrebbe porre le delibere dei due organi sullo stesso piano." Pace the reader, the formula does not indicate that the two bodies were on the same footing. The phrase means in effect that the following measure was voted by the Council as a proposal, which was then submitted to the Assembly, which then ratified the proposal and thereby transformed what was only proposal without legal force into a decree, which was legally binding. One needs to bear in mind that the Assembly did not just ratify proposals made by the Council, but often added riders, which supplemented the provisions of the decree of the Council and had not been approved by the Council. Conversely, the Council did not have the power to add riders to decrees of the Assembly, which demonstrates that the two bodies were not on the same footing. The interpretation of the formula edoxe tei boulei kai toi demoi should not be used as evidence that the proposals of the Council introduced to the Assembly were on the same footing as decrees of the Assembly. See IG II^2, 1 [405/4], lines 52-54: ἐψηφίσθαι δὲ Ἀθηναίων τῶι δήμωι κύρια |
[εἶναι τὰ ἐψηφισ]μένα πρότερον περὶ Σαμίων καθάπερ ἡ βολῆ προβολεύσασα | [ἐς τὸν δῆμον ἐσ]ήνεγκεν). This shows very clearly that what made the proposal introduced by the Council legally binding (kyria) was the vote of the Assembly, not the vote of the Council and the vote of the Assembly combined. The referee also observes the phrase ὅτι δο[κ]εῖ τῆ[ι] βου[λῆι (IG II^2, 96, lines 12-13. Cf. 103, line 18). This phrase does not refer to a measure that is legally binding on the Athenian people, but only that whatever the Council decides to introduce as a proposal to the Assembly will be introduced as a proposal. The phrase does not indicate that the decision of the Council was binding. The Assembly is inviting the Council to make a proposal; the Assembly is not granting to the Council the power of making a legally binding proposal. The formula for that is very different - see note 29.

A correct understanding of the law about decrees of the Assembly shows that there is no reason to believe that the Council 'revived' the decree of Ctesiphon in 330 as a way of forcing Aeschines to bring his case to court. As Euthycles states (Dem. 23.93), it was the accusers who could delay a trial, not the defendant and his allies.[29] As Cawkwell, has rightly observed, Demosthenes (18.308) clearly implies that Aeschines was the one who decided to bring the case to court because recent events favored an attack (εἶτ᾽ ἐπὶ τούτῳ τῷ καιρῷ ῥήτωρ ἐξαίφνης ἐκ τῆς ἡσυχίας ὥσπερ πνεῦμα ἐφάνη).[30] The event that clearly made Aeschines (3.132) think that the moment had arrived was the decisive defeat of Darius at Gaugamela in 331. This is the reason why one of the most serious charges Aeschines (3.156, 173, 239-40, 257-9) makes against Demosthenes is that he has accepted Persian gold.[31] When analyzing the reasons why the case against Ctesiphon came to court in 330, therefore, one needs to examine the advantages for Aeschines and his motives.

II

In his speech at the trial of Ctesiphon, Demosthenes twice mentions the possibility that the judges will punish Aeschines with a form of *atimia* (loss of rights).[32] First, Demosthenes (18.82) replies to Aeschines' charge that he keeps silent after receiving money. He replies by attacking Aeschines for never stopping his chatter and complains that nothing will shut him up unless the judges stop him from talking by inflicting *atimia* on him (ἐὰν μή σ᾽οὗτοι παύσωσιν ἀτιμώσαντες τήμερον).[33] Later in the speech Demosthenes (18.266) accuses Aeschines of being a sycophant (σοὶ δὲ συκοφάντῃ μὲν εἶναι δοκεῖν

29 *Pace* Carawan 2019.

30 Cawkwell 1969: 167.

31 There is no reason however to follow Cawkwell 1969, who believes that it was Demosthenes' failure to support the revolt of Agis and the king's defeat that caused Aeschines to bring his case to court. See Harris 1995: 173.

32 I discussed the evidence for the penalty imposed for frivolous prosecution in Harris 1999, which was reprinted in my book Harris 2006: 405-422. For some reason, Carawan 2019 does not cite either the article or the book. The analysis of the article has been endorsed by Daix and Fernandez 2017: 355, note 364 ('les exposés convaincants de Harris') and Horváth 2019: 135, note 13. Wallace 2006 follows my analysis but claims the penalty for not following through was only the fine of one thousand drachmas. See however the detailed refutation in Harris 2006b.

33 Yunis 2001: 156-7 sees that Demosthenes is alluding to the penalty for failing to gain one-fifth of the votes, but mistakenly follows Hansen 1991: 192 in believing that this only barred the accuser from bringing the same type of charge again.

ὑπάρχει), that is, a person who brings false charges in court.[34] According to Demosthenes, the risk Aeschines runs at this trial is whether he will be able to continue this activity (δεῖ σ᾽ ἔτι τοῦτο ποιεῖν) or will be forced to stop by not gaining one fifth of the votes (πεπαῦσθαι μὴ μεταλαβόντα τὸ πέμπτον μέρος τῶν ψήφων). This clearly implies that the penalty Aeschines will suffer will put an end of his career of bringing public charges, not to some more serious form of *atimia*.

Carawan however claims that 'Demosthenes is insisting upon a more radical loss of rights; for if Aeschines faced only the fine and the bar to *graphai* of one sort or another, it would hardly silence him in the assembly and at trial for other remedies.'[35] This is not convincing for two reasons. First, Demosthenes is clearly referring to Aeschines' activities in court, not to his political activity in general. Second, the penalty for failing to gain one fifth of the votes was the loss of the right to bring any public actions in the future, not just the loss to bring one or two kinds of public prosecution. It is important to review the all the pertinent evidence, because Carawan selects only one passage and pays no attention to other relevant passages.

First, there is a fragment of Theophrastus preserved in a scholion to Dem. 22.3 (13b Dilts): Ἀθήνησι οὖν ἐν τοῖς δημοσίοις ἀγῶσιν, ἐὰν μὴ μεταλάβῃ τὸ πέμπτον μέρος, χιλίας ἀποτίνει καὶ ἔτι πρόσεστί τις ἀτιμία οἷον τὸ ἐξεῖναι μήτε γράψασθαι παρανόμον μήτε φαίνειν μήτε ἐφηγεῖσθαι.

At Athens in public cases, if someone does not gain a share of one fifth [of the votes], he owes a fine of one thousand drachmas and there is in addition a certain loss of rights such as the ability to bring a public action against an illegal action or a *phasis* or an *ephegesis*.

It is important to have the correct text with the reading of the manuscript.[36] This fragment clearly shows that the unsuccessful accuser lost the general right to bring public cases, not just the right to bring certain types of cases. Like the passage of Demosthenes,

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34 On the term sycophant see the excellent study of Harvey 1990, who decisively refutes Osborne 1990.

35 Carawan 2019: 119.

36 The reading παρανόμον is the reading of A, the only manuscript which has this scholion. Reiske proposed emending this to παρανόμων, but the emendation is unnecessary; see Harris 1992: 79-80. Carawan 2019: 114 claims that I rely on a 'variant in schol. Dem. 22 (at §3)' but this is not true. This is not a variant, but the only reading in the only manuscript carrying the scholion.

the fragment of Theophrastus shows that the penalty was automatic once an accuser did not gain one-fifth of the votes. It was not imposed by another vote afterwards. This is confirmed by Apollodorus in his *apographe* against Nicostratus ([Dem.] 53.1): he states that if he loses his case, he runs the risk of never bringing another public case (τοῦ μηδέποτε μηδένα αὖθις ὑπὲρ ἐμαυτοῦ γράψασθαι). The second speech *Against Aristogeiton* in the demosthenic corpus is a forgery probably composed in the Hellenistic period,[37] but the author had some knowledge of Athenian law, because he states that when the prosecutor does not gain one-fifth of the votes in a public case, he loses the right to bring a *graphe*, an *apagoge* or an *ephegesis* in the future ([Dem.] 26.9: τὸ λοιπὸν μὴ γράφεσθαι μηδ᾽ἀπάγειν μηδ᾽ἐφηγεῖσθαι). These passages also indicate that the penalty was automatic; it was not imposed by a vote of the judges.

Other sources also mention the *atimia* as a penalty without indicating what right is lost. Hyperides (*Eux*. 34) states that Tisis of Agryle failed to gain one fifth of the votes and suffered *atimia*. Andocides (1.33) makes a similar statement and later mentions a form of *atimia* in which the person is not allowed to bring public actions (75: οὐκ ἦν γράψασθαι). Pollux (8.53) provides similar information, but does not specify what rights the accuser loses.

καίτοι γε ὁ Θεόφραστος τοὺς μὲν ἄλλας γραφὰς γραψαμένους χιλίας τ᾽ὀφλισκάνειν, εἰ τὸ πέμπτον τῶν ψήφων μὴ καταλάβοιεν, καὶ προσατιμοῦσθαι, τοὺς δὲ εἰσαγγέλλοντας μὴ ἀτιμοῦσθαι μέν, ὀφλεῖν δὲ τὰς χίλιας.

On the other hand, Carawan pays no attention to these passages but relies on another version of the law from Theophrastus (fr. 636c Fortenbaugh) found in *Lex. Cant*. s.v. πρόστιμον.

ἔκειτο τῷ μὴ μεταλαβόντι τὸ πέμπτον τῶν ψήφων, ὡς Θεόφραστος ἐν πέμπτῳ Περὶ νόμων. ἐν δὲ τοῖς δημοσίοις ἀγῶσι ἐζημιοῦντο χιλίαις καὶ πρόσεστί τις ἀτιμία, ὥστε μὴ ἐξεῖναι μήτε γράψασθαι παρανόμων μήτε φαίνειν μήτε ἐφηγεῖσθαι. ἐὰν δέ τις γραψάμενος μὴ ἐπεξέλθῃ, ὁμοίως. περὶ δὲ τῆς εἰσαγγελίας, ἐάν τις μὴ μεταλάβῃ τὸ πέμπτον τῶν ψήφων, οἱ δικασταὶ τιμῶσιν.

There was a penalty for the one who did not gain one-fifth of the votes as Theophrastus states in his *On Laws*. In public cases they were penalized one thousand

[37] For the evidence against authenticity see Harris 2018a: 193-229.

drachmas and there was in addition a certain form of *atimia* so that it was not permitted to bring public actions against illegal proposals or a *phasis* or an *ephegesis*. If anyone who brought a public charge did not follow through (i.e. bring the case to court), there was a similar penalty. As for *eisangelia*, if anyone did not gain one-fifth of the votes, the judges evaluated the penalty.[38]

This evidence is similar to that of the other version of the fragment, but gives the impression that the loss of rights was more limited. But this is contradicted by the evidence of the other version of the fragment, which is confirmed by the evidence from the orators, especially Dem. 53.1 and [Dem.] 26.9. And the information given in this passage about *eisangelia* is contradicted by the evidence from Pollux (8.53). This version of the fragment is clearly not reliable and should not be used to argue for a more limited form of *atimia*.

Carawan then draws attention to the evidence from several lives of Aeschines. The first is from the life of Aeschines in the *Lives of the Ten Orators* ([Plut.] *X orat.* 840c0d).

χρόνῳ δ᾽ ὕστερον, Φιλίππου μὲν τετελευτηκότος Ἀλεξάνδρου δὲ διαβαίνοντος εἰς τὴν Ἀσίαν, ἐγράψατο Κτησιφῶντα παρανόμων ἐπὶ ταῖς Δημοσθένους τιμαῖς: οὐ μεταλαβὼν δὲ τὸ πέμπτον μέρος τῶν ψήφων ἔφυγεν εἰς τὴν Ῥόδον, χιλίας δραχμὰς ὑπὲρ τῆς ἥττης οὐ βουληθεὶς καταθέσθαι. οἱ δ᾽ ἀτιμίας αὐτῷ προστιμηθῆναι λέγουσιν οὐ θέλοντι ἐξελθεῖν τῆς πόλεως, καὶ ἐλθεῖν εἰς Ἔφεσον ὡς Ἀλέξανδρον.

Sometime later, after Philip died and Alexander crossed to Asia, he brought a charge of proposing an illegal decree against Ctesiphon for the honors for Demosthenes. Not gaining one-fifth of the votes, he left for Rhodes, not wishing to pay the one thousand drachmas for his defeat. Others state that he was given an additional loss of rights that forced him to leave the city against his will, and he went to Alexander at Ephesus.

The reliability of this passage is called into question by the assertion that Aeschines brought his charge against Ctesiphon after Philip's death. In fact, we know that the charge was brought during Philip's lifetime and before Alexander crossed to Asia (see above). This source then states that Aeschines did not gain one fifth of the votes, but did not wish to pay the fine of one thousand drachmas and left for Rhodes. This is consistent with the

[38] Sato 2015: 45-46 claims that the penalties for not following through on public cases 'were not automatically inflicted in addition to the original one,' but this is contradicted by the evidence of Dem. 21.103, which shows that the penalty was automatic and thus confirms the evidence of Theophrastus. Cf. Dem. 58.8 where the penalty is also automatic without being voted by a court.

information about the penalty for not gaining one fifth of the votes examined above. The alternative version claims that Aeschines suffered some loss of rights that forced him to flee to Alexander at Ephesus. This information is also suspect because by the time Aeschines lost his case against Ctesiphon in 330, Alexander was far away from Ephesus. This in turn casts doubt on the information about the additional penalty, which appears to have been invented to explain why Aeschines left Athens.[39]

The *Life of Aeschines* attributed to Apollonius has a different version of events.

καὶ ὁρίσαντος τὸ πρόστιμον ἐὰν μὴ δείξῃ αὐτὸ παράνομον καὶ ἡττηθέντος καὶ διὰ τὸ μὴ δύνασθαι καταβαλεῖν τὴν καταδίκην, ἣν αὐτὸς ὥρισε, φυγῇ χρησαμένου.

He set a penalty if he did not prove that it (the decree) was illegal and defeated and unable to pay the judgment, which he had set, he went into exile.

This version has Aeschines set a penalty for himself if he did not prove the charge, but there is no parallel in Athenian law for an accuser setting a penalty for himself. This version has something in common with the life of Aeschines in the *Lives of the Ten Orators* by stating that he could not pay the fine, but otherwise the two versions cannot be reconciled. The passage says nothing about a penalty set by the court.

Photius (Bibl. I. 59 Henry) has still another version of events.

καὶ ὁρίσας τὸ πρόστιμον αὐτὸς ἑαυτῷ, ἐὰν μὴ δείξῃ παράνομον, μὴ δείξας ὡς ὑπέσχετο ἐξέπεσε τῆς πατρίδος.

And he set the penalty for himself if he did not show that the decree was illegal, and when he did not show this as he promised, he was expelled from the country.

As for the previous life of Aeschines, there is no evidence for an accuser in Athenian law ever setting a penalty for himself for not proving a charge. This passage certainly cannot be used as evidence to show that a special *ad hoc* penalty was created for Aeschines at the trial of Ctesiphon.

In short, there is no reason to believe that the penalty of *atimia* for not gaining one-fifth of the votes threatened by Demosthenes was any other than the standard penalty in the laws, which was the loss of the right to bring any public actions in the future. Demosthenes is not alluding to any special penalty created on an *ad hoc* basis by a decree of the Assembly.

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[39] Similar information is found in *Vita Aeschinis* 2 and is suspect for the same reasons.

III

Carawan has drawn attention to a passage in which Aeschines (3.4) complains about certain corrupt practices in the Assembly and courts.[40] Aeschines alleges that some people carelessly make illegal proposals and others, who were not selected honestly to serve as *proedroi* but through a plot, put these proposals to a vote. If a member of the Council does obtain his position by lot and honestly declares votes, men who consider the constitution not the common possession of all citizens, but their own private property threaten charges to denounce them, making slaves of private citizens and seizing power for themselves. These same men overturn the trials established by the laws and judge cases with decrees through an appeal to anger.

Aeschines makes a contrast between trials conducted according to the laws and trials according to decree. Carawan claims that the latter are trials in court regulated by *ad hoc* decrees passed by the Assembly. This is very unlikely, and Carawan provides no parallels to support his view. On the other hand, it is well known that the procedures about trials for homicide were regulated by the laws of Draco, which were protected by a strict entrenchment clause (Dem. 23.62). The early laws of Solon were also protected by strong oaths and probably by entrenchment clauses (Hdt. 1.29; Plut. *Solon* 25). In fact, when the Athenians reformed their basic institutions in 411, they had to place a ban on public charges against illegal decrees, which would suggest that the important laws governing the Council, Assembly and courts were guarded by harsh penalties against changing their basic provisions (Thuc. 8.67.2). After the new procedures for legislation enacted in 403, new laws about substantive and procedural matters had to follow several steps.[41] First, a preliminary vote in the Assembly could take place at any time during the year to permit proposals for new laws (Dem. 24.25). Second, all new proposals for laws had to be placed in front of the monument of the Eponymous Heroes so that everyone could read them (Dem. 24.25; Dem. 20.94). Third, the secretary was to read out all proposals submitted at

40 Carawan 2019: 116 (the passages 'describes just the sort of rule-bending required to bring Ctesiphon's proposal back to life').

41 For the procedure in *nomothesia* see Canevaro 2013b, who shows that the document at Dem. 24.20-23 is a forgery. Cf. Canevaro 2013a: 80-104. Hansen 2016 has attempted to defend the authenticity of the document, but for a detailed refutation of Hansen's analysis see Canevaro 2018. The reply of Hansen 2019 is not convincing and repeats his previous mistakes. See Canevaro 2020.

every meeting of the Assembly until *nomothetai* were appointed (Dem. 20.94). Fourth, during the third meeting of the Assembly after the preliminary vote, the people were to discuss the selection of *nomothetai* and pass a decree appointing them (Dem. 24.25; Dem. 20.92). Fifth, *synegoroi* were to be elected to defend any laws to be repealed before the new laws could be enacted (Dem. 24.36; Dem. 20.146). Sixth, any laws contrary to the new proposals for laws had to be repealed by a public action against inexpedient laws (Dem. 24.32; 34–5; Dem. 20.93). Seventh, if the person who proposed a new law did not follow these rules, anyone who wished could bring a public action against him on a charge of enacting an inexpedient law (Dem. 24.32). Eighth, the Assembly sitting as *nomothetai* enacted the new law (Dem. 20.94. Cf. Aeschin. 3.39).[42] If the legal procedures of the courts were regulated by the laws, what were trials conducted according to decrees?

For the vast majority of cases, trials were held in the courts, but according to Aristotle in the *Politics* (4.1298a) the deliberative part of the state, that is the Council and Assembly, has authority in matters pertaining to sentences of death and exile, confiscation of property and the accountability of officials. The law of Cannonus authorized trials for treason in the Assembly and set the penalty of death confiscation of property with one-tenth given to Athena (Xen. *Hell*. 1.7.20, 34). Later in the fifth century, Aristarchus was tried for betraying the fort at Oenoe in the Assembly through this procedure (Thuc. 8.98; Xen. *Hell*. 1.7.28). In other cases, however, it was possible to create an *ad hoc* procedure for a trial in the Assembly by decree. The best known example of such a trial is the case against the generals after the battle of Arginousai in 406. The generals had instructed the trierarchs to rescue those shipwrecked and to recover the dead, but a storm prevented them, and many Athenians drowned. On their return to Athens, the generals made a report to the Council about the storm. Timocrates proposed that the generals should be imprisoned and handed over to the Assembly for trial. The Council accepted this proposal (1.7.3: μετὰ δὲ ταῦτα ἐν τῇ βουλῇ διηγοῦντο οἱ στρατηγοὶ περί τε τῆς ναυμαχίας καὶ τοῦ μεγέθους τοῦ χειμῶνος. Τιμοκράτους δ᾽ εἰπόντος ὅτι καὶ τοὺς ἄλλους χρὴ δεθέντας εἰς τὸν δῆμον παραδοθῆναι, ἡ βουλὴ ἔδησε). The Council was acting on its power to imprison individuals accused of wrongdoing (Dem. 24.144). The Council did not prescribe any procedure at this

[42] On the identity of the *nomothetai* in legislative procedure see Harris 2018b: 207-8 and Canevaro 2020: 27, note 4. Cf. Canevaro and Esu 2018.

point about a trial. It is clear that the Council placed the matter of the generals on the agenda of the next meeting of the Assembly. There is no indication that it was making any recommendation. There is also a clear distinction made between the case of the generals and the case involving Erasinides about embezzlement, which was tried in court.

At the meeting of the Assembly, many speakers attacked the generals. The word κατηγόρουν is used, but this need not mean a formal accusation at this point. These are speeches made in a normal debate in the Assembly. In the context of this debate, the generals reply to the criticisms but rather briefly (οἱ στρατηγοὶ βραχέως ἕκαστος ἀπελογήσατο). Xenophon (*Hell*. 1.7.) adds that they were not given the amount of time to speak in accordance with the law (οὐ γὰρ προυτέθη σφίσι λόγος κατὰ τὸν νόμον). At the next meeting of the Assembly, Callixeinus argued that these speeches were in effect their answers to the charges. They also provide witnesses that the storm prevented the recovery of the bodies (Xen. *Hell*. 1.7.6).

At this point, several people volunteered to act as sureties (ἐγγυᾶσθαι) for the generals, which would allow them to leave prison until the next meeting (1.7.7.). There was then a formal vote to delay a final decision until the next meeting (ἔδοξε δὲ ἀναβαλέσθαι εἰς ἑτέραν ἐκκλησίαν) and an order given to the Council to propose a introduce a *probouleuma* at the next meeting about how to judge the generals (τὴν δὲ βουλὴν προβουλεύσασαν εἰσενεγκεῖν ὅτῳ τρόπῳ οἱ ἄνδρες κρίνοιντο). This would appear to indicate that what had happened so far is not part of a trial, which would take place at the next meeting. This turns out to be a key point, because at the next meeting Callixeinus claims that the previous meeting of the Assembly afforded the generals a chance to make their defence. Euryptolemus objects to this argument on the grounds that the amount of time was not sufficient. It is important to note what is implicit in this decree of the Assembly, namely, that the Assembly has the right to ask the Council to create an *ad hoc* judicial procedure to try people in the Assembly. This is similar to the request of the Assembly in the Eretria decree (340s) in which the Assembly creates a crime (IG II^3 399, lines 9-11: ἐὰν]| δέ τις τοῦ λοιποῦ χρόνου ἐπιστρα[τεύσηι ἐπὶ Ἐρέ]|τριαν ἢ ἐπ᾽ ἄλλην τινὰ τῶν συμμαχί[δων πόλεων) and a penalty (IG II^3 399, lines 12-15: θάνατον αὐτοῦ]| κατεγνῶσθαι καὶ τὰ χρήματα δ[ημόσια εἶναι καὶ τ]|ῆς θεοῦ τὸ ἐπιδέκατον· καὶ εἶν[αι τὰ χρήματα αὐτοῦ]| ἀγώγιμα ἐξ ἁπάσων τῶν πόλεω[ν τῶν συμμαχίδων), then invites the

Council to introduce a proposal about how to enforce this rule and impose this penalty (*IG* II^{3} 399, lines 6-9: περὶ μὲν τῶν ἐπιστρ[ατευσάντων ἐπὶ τ]||[ὴ]ν χώραν τὴν Ἐρετριέων τὴν βουλ[ὴν προβουλεύσα]||σαν ἐξενε[γ]κεῖν εἰς τὸν δῆμον εἰ[ς τὴν πρώτην ἐκκ]||λησίαν, ὅπως ἂν [δ]ίκην δῶσιν κατὰ [τὰς σπόνδας). It is also crucial to note that no one objected to the Assembly's right to create an *ad hoc* procedure for trying people in the Assembly.

Between the two meetings the Apaturia took place, and Theramenes had the relatives of the victims dress in mourning. In Diodorus (13.101-2) this takes place in the Assembly at the final meeting. At the meeting of the Council certain people allegedly bribed Callixenus to accuse the generals (Καλλίξενον ἔπεισαν ἐν τῇ βουλῇ κατηγορεῖν τῶν στρατηγῶν). Is this a formal accusation or just an attack on the generals? If it is a formal accusation, the previous charges in the Assembly cannot have been formal accusations. At the next meeting of the Assembly, Callixenus introduces the motion of the Council as instructed by the Assembly at the previous meeting. This proposal starts with a clause of justification giving the grounds for the proposal (ἐπειδὴ τῶν τε κατηγορούντων κατὰ τῶν στρατηγῶν καὶ ἐκείνων ἀπολογουμένων ἐν τῇ προτέρᾳ ἐκκλησίᾳ ἀκηκόασι). This is a key part of the proposal because it claims that the defendants have had the right to answer the charges at the previous meeting. This is of course misleading because no formal charges had been made at the previous meeting. There was only a discussion of the matter on the agenda. After Callixeinus made his proposal in the Assembly, Euryptolemus threatened to bring a *graphe paranomon*. Later in the debate, Euryptolemus states that if the Athenians try the generals following the proposal of Callixeinus, they will be violating the law requiring that no citizen be put to death without a trial (Xen. *Hell*. 1.7.25: τούτους ἀπολλύντες ἀκρίτους παρὰ τὸν νόμον).[43]

Hansen has claimed that the trial of the generals in the Assembly was a case of *eisangelia* for three reasons: 1) the generals were removed by *apocheirotonia*; 2) the Council was involved, and 3) the case was tried by the people.[44] There are several decisive objections against Hansen's view. First and above all, the noun *eisangelia* and the verb

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43 For this law see Lys. 22.2; Dem. 23.27, 36 with Harris 2013: 241-3. Cf. *IG* I^{3} 40, lines 8-10. Carawan 2010:37 claims that 'Euryptolemos cannot point to any language in law that expressly bars or preempts Kallixeinos' procedure', but these passages show that this view is mistaken.

44 Hansen 1975: 84-86.

eisangellein are not found in the accounts of Xenophon and Diodorus. Second, the actions of the general do not fit into any of the categories of the *eisangelia* law (Hyp. *Eux*. 7-8; Lex. Cant. s.v. εἰσαγγελία; Pollux 8.52): 1) attempting to overthrow the democracy, 2) treason, that is, betraying forts or military units to the enemy, and 3) taking money for not giving the best advice to the people. Third, the motion of Callixeinus must be an *ad hoc* procedure because if Callixeinus were following an established law, there would be no need to specify the manner of voting. For instance, when the accuser indicated the procedure selected in this plaint, he did not need to set out the steps to be followed because they were already established by law. It also appears that this is no secret ballot because everyone was to be given one pebble and to place it in one urn or the other. The proposal also sets the penalty; if Callixeinus were following an established law, the penalty would have been fixed (or a *timesis*), and there would have been no need to specify it. And if Callixeinus were following an established legal procedure, no one could accuse him of proposing an illegal decree.[45] On the other hand, because the procedure was an *ad hoc* measure created by a decree, it is easy to see how Euryptolemus could bring a *graphe paranomon*.

After Euryptolemus threatened to bring a charge against the proposal of Callixeinus, the people then shouted that the Assembly should be able to do whatever it wishes. No one challenges the right of the Assembly to pass a motion creating a legal procedure for a trial in the Assembly. The objection is that this motion violates rules about procedure, not about the powers of the Assembly. Euryptolemus does not argue that the trial cannot take place in the Assembly because the Assembly does not have the power to try such cases (Xen. *Hell*. 1.7.12-13).

The main objection of Euryptolemus is that the procedure proposed in this *ad hoc* measure should follow standard legal procedure but does not (Xen. *Hell*. 1.7.23-25).
This also makes it clear that this is an *ad hoc* procedure, not one according to established law. In standard procedure, the day is divided into three parts and the defendant receives one third to answer the charges. This objection is also made in Xenophon's account of the

[45] The fact that the proposal was illegal is confirmed by other sources. See Xen. *Mem*. 1.1.18; Plat. *Apol*. 32b-c; *Gorg*. 473e

previous meeting of the Assembly. The important matter is that the incident reveals that the Assembly could create an *ad hoc* trial by decree just as Aeschines (3.4) says.

In his account of the trial of Phocion, Plutarch (*Phoc*. 34-35) provides a detailed account of another trial held according to a decree in 318. Phocion had gone to meet Alexander and Polyperchon in Phocis, but the Athenians passed a decree proposed by Hagnonides denouncing him and sent an embassy to join them (Plut. *Phoc*. 33.1-7). Phocion and his associates were arrested and sent back to Athens (Plut. *Phoc*. 34.1). Plutarch appears to be drawing on a source favorable to Phocion and hostile to Athenian democracy, which claims that the meeting of the Assembly was filled with foreigners and slaves, but the account of the legal procedure appears to be accurate. The magistrates convened a meeting of the Assembly in the theater of Dionysus. The letter of the king was read out, which accused Phocion and his associates of treason, but granted the Athenians as free and independent the right to try their own citizens (Plut. *Phoc*. 34.2-3). Hagnonides then read a decree according to which the Assembly was to vote about the guilt of Phocion and the others by show of hands (Plut. *Phoc*. 34.4). Because this was an *ad hoc* procedure created by a decree, the method of voting had to be specified. Some asked for a clause to be added ordering the torture of Phocion before his execution, but Hagnonides refused (Plut. *Phoc*. 35.1). The reason of Hagnonides for rejecting this rider is interesting: he considers it awful and barbarous, but does not believe that the Assembly does not have the power to enact such a proposal about a trial. The proposal of Hagnonides was then put to the vote and approved (ἐπικυρωθέντος δὲ τοῦ ψηφίσματος), and the vote to condemn the defendants followed (τῆς χειροτονίας ἀποδοθείσης [. . .] κατεχειροτόνησαν αὐτῶν θάνατον) (Plut. *Phoc*. 35.2). It is important to note that the vote to enact the decree for the trial and the vote at the trial were formally separate: the decree created the procedure for the trial, and the vote about guilt was taken later. The condemned were then led to the prison and ordered to drink hemlock (Plut. *Phoc*. 36.1-4). After Phocion's death, another decree was passed that his body be carried outside the boundaries of Attica and that no Athenian should light a fire at his funeral (Plut. *Phoc*. 37.2) . This was the standard penalty for traitors (Xen. *Hell*. 1.7.20-23), but once more the Assembly voted an *ad hoc* measure to impose a punishment on an individual. This incident is similar to the trial of the generals

in several ways and shows that the practice of arranging trials by decree continued into the late fourth century.

Demosthenes (19.276-81) reports another trial by decree, which is probably to be dated to 387/6. In his case against Aeschines, Demosthenes (19.276) recalls men condemned for their conduct on embassies and has a decree read out. By the terms of this decree, several men were sentenced to death (Dem. 19.277). One was Epicrates who had earlier helped to restore the democracy. Demosthenes (19.278) reads a clause from this decree: 'Because they conducted their embassy contrary to their instructions (παρὰ τὰ γράμματα).' Demosthenes then compares the conduct of these ambassadors with the conduct of Aeschines and his colleagues. Demosthenes (19.279) next quotes other clauses: 'And they were proved to have made false reports to the Council' and 'telling lies about the allies and receiving gifts.' Finally Demosthenes (19.280) repeats that Epicrates was punished despite helping to restore the democracy. A fragment of Philochorus reveals that along with Epicrates, three others were condemned because they did not remain for their trial (*FGrHist* 328 F 149a).[46]

There are several other examples of trials in the Assembly, which may have also been instituted by a decree. In the same speech, Demosthenes (19.31, 137, 191) recalls that Timagoras was charged with taking bribes from the Great King, sentenced to death in the Assembly (31: Τιμαγόραν, οὗ θάνατον κατεχειροτόνησεν ὁ δῆμος) and executed (cf. Xen. *Hell*. 7.1.33-8).[47] The trial must be dated around 367. Apollodorus ([Dem.] 49.9-24) reports that Timotheus was turned over to the Assembly for trial on a serious charge made by Callistratus and Iphicrates (9: ἐπὶ κρίσει δὲ παρεδέδοτο εἰς τὸν δῆμον αἰτίας τῆς μεγίστης τυχών), but acquitted.[48] His treasurer Antimachus was also tried in the Assembly and condemned to death with confiscation of his property ([Dem.] 49.10: κρίναντες ἐν τῷ δήμῳ ἀπεκτείνατε καὶ τὴν οὐσίαν αὐτοῦ ἐδημεύσατε).[49] Thrasybulus of Kollytus is also reported

46 For discussion see Harding 2006: 165-77 though his date of 392 for the trial is questionable. Hansen 1975: 87-8, followed uncritically by MacDowell 2000: 323 believes that this was a case of *eisangelia*, but the term is not found in Demosthenes' account of the trials.

47 *Pace* Hansen 1975: 92, followed uncritically by MacDowell 2000: 221, there is no reason to believe that this was a case of *eisangelia*, which did not cover cases involving the conduct of ambassadors while abroad.

48 *Pace* Hansen 1975: 91 there is no reason to believe that this trial in the Assembly were cases of *eisangelia.* The term is not used by Apollodorus to describe the proceedings.

49 *Pace* Hansen 1975: 91-2 there is no reason to believe that this trial was a case of *eisangelia*. Note that this term does not occur in sources for the trial.

to have been tried twice in the Assembly (Dem. 24.134: δὶς δεθέντα καὶ κριθέντα ἀμφοτέρας τὰς κρίσεις ἐν τῷ δήμῳ).[50] The is also evidence for a trial and acquittal of Phedias in the Assembly reported by Plutarch (*Per*. 31.2-3), but it is difficult to evaluate the reliability of this information. The earliest attested trial in the Assembly is the accusation of Miltiades by Xanthippus reported by Herodotus (6.136.1: Ξάνθιππος ὁ Ἀρίφρονος ὃς θανάτου ὑπαγαγὼν ὑπὸ τὸν δῆμον ἀπάτης εἵνεκεν Μιλτιάδεα ἐδίωκε), but there is no evidence about the procedure followed. This trial shows however that the Assembly retained the authority to try serious crimes from very early in the fifth century. All this evidence demonstrates that when Aeschines (3.4) refers to trials by decree, he must be referring to trials in the Assembly initiated by a decree, not trials in the courts whose procedures were modified by decrees as Carawan claims.[51]

IV

The findings of this essay can be briefly summarized. The first finding is negative: there are strong grounds for rejecting Carawan's hypothesis that the proposal of Ctesiphon to crown Demosthenes expired a year after it was made and had to be renewed in 330. The evidence also shows that when Demosthenes hopes that the court will impose *atimia* on Aeschines by not giving him one-fifth of the votes, he is referring to the standard legal penalty for frivolous prosecutions, not to a penalty created by a decree of the Assembly. The Assembly did not have the power to modify legal procedures in court by decree. Carawan's account of the way the case of Ctesiphon came to court must therefore be completely rejected.

On the other hand, there have been several positive findings in this essay. First, this essay has shown that Euthycles presents a false interpretation of the law about decrees of the Council. This law had nothing to do with preliminary decrees, but applied only to decrees passed in the Council about the activities of the Council. The law was designed to limit the powers of the Council in comparison with the Assembly and sheds light on the

50 *Pace* Hansen 1975: 89 there is no reason to believe that this trial was a case of *eisangelia*. Note that this term does not occur in sources for the trial.

51 There is an example of the Assembly prescribing a procedure for a trial of Pericles on the Acropolis with the judges placing their balltos on the altar of Athena, but this was changed to a normal procedure (Plut. *Per*. 32.3-4). But Plutarch does not name a contemporary source for this proposal, which is without parallel in Athenian law and therefore suspect.

nature of decrees enacted by the Council. Second, this essay has clarified the nature of the *atimia* suffered by accusers in public cases who did not receive one-fifth of the votes. This *atimia* took away the right to bring any public cases in the future. Finally, it is now possible to understand what Aeschines (3.4) means by trials by decree: these are cases heard in the Assembly according to *ad hoc* procedures created by a decree. From the early fifth century down to the end of the fourth century, the Assembly had the authority to hold trials either by virtue the law of Cannonus or according to its own decrees. These trials had nothing to do with the legal procedure of *eisangelia*. The powers of the Assembly did not decrease in comparison with the powers of the courts after 400. Nor was there a gradual transition from popular sovereignty to the rule of law during the fourth century. Democracy and the rule of law went hand in hand in the fourth century as they had in the fifth century.[52]

Appendix

The scholion on Dem. 23.92

ὡς ἄκυρον ἐστι τὸ ψήφισμα προβούλευμα γάρ ἐστιν] ἄλλη ἀντίθεσις ὡς ἀπὸ Ἀριστοκάτους. ἔστι δὲ ὑπὸ τοῦ ῥήτορος πεπλασμένη (ὥσπερ ἂν οὐδεὶς ἑκὼν ὁμολογήσειεν ἀδικεῖν), ἵνα τῇ οἰκείᾳ γλώττῃ καταγνωσθῇ ὥσπερ ἡττημένος ἀπὸ τῶν πρώτων, ὁμολογῶν ἄκυρον εἶναι τὸ ψήφιμσα, πῶς ἀκυροῦν τὸ προβούλευμα σοφίζεται. οὐ γὰρ πάντα ἐπαινεῖ αὐτοῦ. ἀλλ᾽ ἃ μὲν ἡ βουλὴ ἐκύρου χωρὶς τοῦ δήμου, ἕως ἦρχεν, ἐπεκράτει καὶ ἦν ὄντως ἐπέτεια. τὰ δὲ ὑπὸ τοῦ δήμου γιγνόμενα καὶ πλείονα μένει χρόνον, ἐπειδήπερ τὰ προβουλεύματα τῆς βουλῆς οὐκ εἰσήγετο εἰς τὸν δῆμον, ἀλλ᾽ ἦν κύρια καὶ χωρὶς τοῦ δήμου, ἦν δὲ ἐπέτεια ἀντὶ τοῦ ἐπ᾽ ἐνιαυτόν, ὡς πρὸς τὴν βουλὴν δὲ ἔλαβεν ὅτι οὐκ ἦν κύριον καὶ μή πως εἰσαχθῇ εἰς τὸν δῆμον. τὸ δ᾽ ὅτι οὐκ ἦν κύριον καὶ μή πως εἰσαχθῇ εἰς τὸν δῆμον. τὸ δ᾽ ὅτι ἐπέτεια ὡς πρὸς τὰ ψηφίσματα τοῦ δήμου, ἐψεύσατο. ἄκυρον μὲν γὰρ διὰ τὸ μήπω κυρῶσαι τὸν δῆμον, οὐ μὴν παραμένει γὰρ πολλάκις καὶ πολὺν χρόνον.

Translation: Another objection from Aristocrates. This is invented by the speaker (just as no one would agree that he willingly did wrong) so that he is condemned by his own words

[52] See Harris 2016. I would like to thank Mirko Canevaro and Alberto Esu for reading over drafts of this essay and offering useful suggestions. The editors of the journal also sent me three reports by referees, which helped me to strengthen the arguments in this essay.

(i.e. tongue) as if defeated by the previous arguments agreeing that the decree is invalid he makes sophistic arguments about how to nullify the probouleuma. For he does not approve everything. But what the Council ratified without the people, as long as it was in office, was in effect, and was thus valid 'for a year.' The decrees enacted by the people remain in effect for a longer time when the preliminary motions of the Council were not introduced to the people, but were valid even without the (approval of the) people, but were for a year (instead of *ep'eniauton*), since he took it to the Council because it was not valid and was not introduced to the people. It was not valid because it had not yet been introduced to the people. He is misleading that the reason is 'in effect for a year' in regard to the decrees of the people. For it was not in effect because it was not yet ratified by the people, but not without effect completely on the grounds it was in effect for a year, but did not often remain in effect for a long time.

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