

DEMOSTHENES' AREOPAGUS LEGISLATION—YET AGAIN

In 330 B.C., Lycurgus prosecuted a certain Leocrates for treason. His charges were based partly on Leocrates' flight from Athens in the wake of Athens' defeat at the battle of Chaeronea in 338 B.C. The defendant's behaviour violated a decree passed by the demos at that time which categorized flight as *prodosia*, though the *eisangelia* is defined more generally, and not specifically based on that decree, for the demos' decree is the third of three precedents which Lycurgus uses in §§52–4, and which he argues should be judicially binding upon the jurors. The first precedent singles out the Areopagus Council for the exemplary provisions of its judgement. Its use, however, requires the orator to interpose a request not to be interrupted.

Σκέψασθε δ', ὦ ἄνδρες, ὅτι οὐδ' ἐν ὑμῖν ἐστὶν ἀποψηφίσασθαι Λεωκράτους τουτονί, τὰ δίκαια ποιοῦσι. τὸ γὰρ ἀδίκημα τοῦτο κεκριμένον ἐστὶ καὶ κατεγνωσμένον. ἡ μὲν γὰρ ἐν Ἀρείῳ πάγῳ βουλή—καὶ μηδεὶς μοι θορυβήσῃ· ταύτην γὰρ ὑπολαμβάνω μεγίστην τότε γενέσθαι τῇ πόλει σωτηρίαν—τοὺς φυγόντας τὴν πατρίδα καὶ ἐγκαταλιπόντας τότε τοῖς πολεμίοις λαβοῦσα ἀπέκτεινε.

Consider, gentlemen, that it is not actually open to you to acquit this Leocrates if you act justly, for his offence has already been judged and condemned. For the Areopagus Council—and you need not shout me down, because I contend that it was the greatest security the city had at that time—arrested and executed those who fled the country and abandoned it to the enemy.

Lycurgus has, none the less, already mentioned the Areopagus with no such plea for forbearance (Lycurg. 1.12). His request here, therefore, seems specifically to relate to the Areopagus' judgements and actions in the immediate aftermath of Athens' defeat at Chaeronea. It is not possible to identify the individuals whom the Areopagus executed in 338 B.C., but in respect of at least one individual who attempted to flee to Samos, the Council's punishments were evidently carried out with reference neither to the Ecclesia nor to the Dicasteria (Aeschin. 3.252).

This exercise of power was clearly deemed deeply undemocratic and it raises questions concerning the measures which formed the basis of the powers to which the Areopagus apparently considered itself entitled. It seems clear from Dinarchus 1.50 that at some point in the 350s or early 340s, the Ecclesia passed a decree, proposed by Demosthenes, conferring the powers of *apophasis* on the Areopagus Council.¹ Under the terms of this decree, the Areopagus acted as a commission of enquiry for the Ecclesia and Dicasteria, though it was also empowered to act on its own initiative: the two procedures have been respectively labelled as *apophasis kata prostaixin* and *apophasis aute proelomenē*, and it is generally accepted that the Areopagus was not permitted, in either case, to inflict punishment, but was to compile a report.²

¹ See too R. W. Wallace, "Investigations and Reports" by the Areopagos Council and Demosthenes' Areopagos Decree', in P. Flensted-Jensen, T. H. Nielsen, and L. Rubinstein (edd.), *Polis & Politics* (Copenhagen, 2000), 586.

² Din. 1.50 with I. Worthington, *A Historical Commentary on Dinarchus* (Michigan, 1992); see too E. M. Carawan, 'Apophasis and Eisangelia: the role of the Areopagus in Athenian political trials', *GRBS* 26 (1985), 115–40; R. Sealey, *The Athenian Republic: Democracy or Rule of Law?* (Pennsylvania, 1987), 56–7, 137; R. W. Wallace, *The Areopagos Council to 307 B.C.* (Baltimore, 1989), 113–19, 126–7, 179–80, 195ff.; M. H. Hansen, *The Athenian Democracy in the Age of*

Dinarchus is, however, also commonly interpreted as implying in 1.62 that Demosthenes was further responsible for a separate decree empowering the Areopagus to enforce the laws and punish lawbreakers, a measure that we may perhaps call *criminal-behaviour* legislation. This is indeed the impression gained at first sight, but the situation which Dinarchus is describing may not allow such a straightforward interpretation, not least because the examples which he proceeds to give all appear to be cases of *apophasis*.³

This *criminal-behaviour* legislation of Demosthenes has been notoriously difficult to date. Prevailing recent opinion has placed it in the immediate aftermath of Chaeronea, but Wallace has comprehensively demolished this dating, not least by taking account of the outrage expressed by the jurors in the above passage of Lycurgus' prosecution: why, Wallace asks, would the dicasts be so outraged even eight years later by the Areopagus' exercise of powers which had only just been expressly granted to it?⁴ Wallace therefore places the measure 'earlier, under different circumstances, and for different purposes': it was the result of an unknown but *sudden crisis* where criminal behaviour was the concern, not treachery, hence the outrage when the powers that the measures bestowed were abused and used to punish traitors.⁵ This seems illogical, however, for the use of powers originally intended to permit the punishment of criminals would hardly occasion outrage when used against traitors in a civic emergency.

None the less, the Areopagus patently did overstep the mark in a way which led the Athenians to assess its actions as an abuse of power. Wallace had, however, perhaps already resolved the confusion with his earlier suggestion that Demosthenes' *apophasis* legislation and criminal-behaviour decree may be identified as one and the same measure, an explanation which benefits from needing neither *an unknown sudden crisis* nor any particular date. It is, therefore, worth briefly revisiting this suggestion and considering the arguments which make it remain highly attractive.⁶

First, although Dinarchus states that the Areopagus was empowered by Demosthenes to punish lawbreakers, he is at pains to emphasize the power of the Council and Demosthenes' own part in its empowerment: this is especially so since he is prosecuting Demosthenes in particular, and he may thus be exaggerating the scope of the Areopagus' jurisdiction.⁷ Secondly, if a date earlier than 338 B.C. is posited for the

Demosthenes (London, 1991), 292ff.; P. C. Millett, 'Mogens Hansen and the labelling of Athenian democracy', in Flensted-Jensen et al. (n. 1), 341; Wallace (n. 1), 581–95.

³ See too Din. 1.6; M. H. Hansen, *Eisangelia* (Odense, 1975), 18; D. M. MacDowell, *The Law in Classical Athens* (Ithaca, 1978), 191; O. de Bruyn, 'La compétence de l'Aréopage en matière de procès publics', *Historia Einzelschriften* 90 (1995), 117ff.; Millett (n. 2), 339, 341 and n. 7; Wallace (n. 1).

⁴ Wallace (n. 1), 583, 590; see too R. Sealey, 'On penalizing Areopagites', *AJP* 79 (1958), 74; C. Mossé, *La Fin de la Démocratie Athenienne. Aspects sociaux et politiques du déclin de la cité grecque au IV^e siècle aJC* (Paris, 1962), 280ff.; J. Ober, *Mass and Elite in Democratic Athens. Rhetoric, Ideology, and the Power of the People* (Princeton, 1989), 101ff.; Wallace (n. 2), 113–19; Worthington (n. 2), 357–62; R. Sealey, *Demosthenes and His Time: A Study in Defeat* (Oxford, 1993), 186–7; cf. MacDowell (n. 3), 191; M. H. Hansen, 'Did the Athenian Ecclesia legislate after 403/2?', *GRBS* 20 (1979), 38 = M. H. Hansen, *The Athenian Ecclesia* (Copenhagen 1983), 190; Carawan (n. 2), 129–30, 135–6; Hansen (n. 2), 291–2; P. J. Rhodes, 'Judicial procedures in fourth-century Athens: improvement or simply change?', in W. Eder, *Die athenische Demokratie im 4. Jahrhundert v. Chr.* (Stuttgart, 1995), 313; Millett (n. 2), 338–9, 341 with n. 7.

⁵ Wallace (n. 1), 583, 585, 588, 590.

⁶ Wallace (n. 2), 118–19, 179ff.; see too Millett (n. 2), 359, n. 7.; cf. Wallace (n. 1), 584, 587ff.

⁷ Din. 1.6, 62–3, with Worthington (n. 2); cf. Dem. 59.80. See too Wallace (n. 2), 118–19, 179ff.; de Bruyn (n. 3), 118, n. 33, 119, n. 35; Rhodes (n. 4), 313; Wallace (n. 1), 584–9, citing Din. 1.56–7 and Dem. 18.132ff.

criminal-behaviour legislation, then, as Wallace acknowledges, it is datable to about the time of the *apophasis* measures and the Ecclesia was unaccountably responsible for two pieces of legislation for effectively the same purpose and at almost the same time; one measure is far more plausible.⁸

Moreover, a requirement for the Areopagus to refer to the courts any *apophaseis* warranting a penalty above a certain amount is strongly implied, if not demonstrated, by its attempt secretly to fine Theogenes, the *Basileus*, for failing to divorce his wife as required by law; the Council's covert action 'at least suggests that the Areopagites were acting in a way that exceeded their legitimate authority when they imposed that fine'.⁹ This is, as Wallace notes, consistent with Demosthenes' claim that the Areopagus did not have final authority to punish as it saw fit; the complexities of variously dating the *criminal-behaviour* legislation, Demosthenes' *Against Neaira*, and Theogenes' case at least strongly suggest that the *Basileus*' case took place shortly after the Areopagus was so empowered.¹⁰ Wallace's argument is further supported, perhaps, by the procedural parallel of the Boule's power to impose penalties of up to 500 drachmae in *eisangeliai* which fell within its jurisdiction, but its requirement to refer to the courts any cases deemed to warrant a heavier penalty.¹¹

Wallace now suggests, however, on the basis of the foregoing arguments, that since Demosthenes' *criminal-behaviour* legislation must belong to a period in the 350s or early 340s, and since this brings it into conflict with the putative dating for the *apophasis* legislation, and since it is also difficult to reconcile 'the power to punish any Athenian' to 'the power to investigate and report', there was no general *apophasis* legislation at all; he argues that '*apophasis* was not instituted by either law or decree' but that each incident of investigation was separately decreed as deemed appropriate by the demos.¹² He concludes that the Areopagus, in cases of *apophasis*, was acting on the basis of its traditional rights, hence its powers of instigating investigations on its own authority—as it did in the case of Theogenes—and that its executions in 338 B.C. were actions in excess of the powers bestowed by Demosthenes' specific *criminal-behaviour* legislation.

There is clearly an advantage in denying the existence of one of the two legislative items, but Wallace might have chosen to reject the wrong measure. Thus it is significant that Lycurgus fails to mention any particular decree at the root of the Areopagus' executions in §52, despite explicitly citing the demos' decree in §53 and despite a legal basis, however restricted, to the Councillors' actions. Indeed, the second precedent he introduces is the case of Autolycus, an Areopagite who had secreted his wife and children out of Attica in the days of crisis in 338 B.C., and whom Lycurgus himself prosecuted, presumably for *prodosia* under the terms of the *Nomos Eisangeltikos*. The Areopagus was perhaps, at least on this occasion, not prepared to prosecute one of its own; perhaps, however, public reaction to its spontaneous executions was such that further actions against alleged traitors were impossible. It is also possible that the Council was strictly interpreting the terms of the demos' decree categorizing flight as

⁸ Wallace (n. 2), 118–19, 179ff.

⁹ D. Allen, *The World of Prometheus* (Princeton, 2000), 45 citing Dem. 59.80ff.; see too Wallace (n. 1), 586–7; cf. Hansen (n. 2), 190, with n. 24.

¹⁰ Wallace (n. 1), 583, 586.

¹¹ [Arist.] *Ath.* 45.2 with P. J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia* (Oxford, 1993); Dem. 24.63, 47.32ff., 41ff., 59.80ff.; *IG I³* 105.32; P. J. Rhodes, *The Athenian Boule* (Oxford, 1972), 156, 164; Hansen (n. 3), 22–8; M. H. Hansen, 'Eisangelia at Athens—a reply', *JHS* 100 (1980), 91; Hansen (n. 2), 222, 258; Wallace (n. 1), 583, 586.

¹² Wallace (n. 1), 587, also citing Din. 1.4.

prodosia, and was unwilling to act against an individual who had not personally fled Athens.¹³ Lycurgus does, indeed, insist upon the Areopagus' legal rectitude, and his reference to Autolycus conveniently paves the way for the third precedent of the demos' decree itself. The jurors were clearly assumed to be prepared to interpret the laws more widely than the Areopagus, something that in his present prosecution Lycurgus is relying upon.

Lycurgus' precedents are patently more comprehensible if the Areopagus was acting on the basis of specific legislation when it conducted its executions, even if it had exceeded its powers by far. Such an excess was clearly a matter of interpretation, however, for Lycurgus presents the needs of the moment as justification for the executions, despite recognizing that the jurors and surrounding audience will probably not share this view. This, indeed, probably accounts for his silence over the actual legal measures that were evidently widely interpreted as seriously abused. There is, however, no need for the elaborate scenario Wallace posits of a 'possibly isolated emergency sometime in the years 346–340, apparently unrelated to the struggle with Macedon, and for which Athens' cumbersome procedure of *nomothesia* was judged too slow'; there is also no need to imagine such an emergency being concealed by the 'absence of any record of daily events inside Athens, especially events unrelated to foreign policy'.¹⁴

The troublesome criminal-behaviour decree may instead simply be a mirage concealing a process whereby the Areopagus, specifically under the terms of Demosthenes' *apophasis* legislation, was permitted to punish lawbreakers to a certain limit, but was required, similarly to the Boule, to compile a report for the Ecclesia about any cases deemed to merit a heavier penalty than it was permitted to impose; the Ecclesia would then refer the case to the courts for due process. It is more plausible to deny the existence of this *criminal-behaviour* decree, lacking as it does both date and context, than the reality of the *apophasis* legislation.¹⁵ Thus the Areopagus' investigation of Theogenes, conducted under the *apophasis* measures, implies that even shortly after the legislation was passed, the Council felt that the powers it bestowed were too limited.¹⁶ It would therefore have been the Council's recourse to execution in 338 B.C., a punishment well beyond its jurisdiction, which occasioned such outrage both at the time and even at its mention in 330 B.C. at Leocrates' trial.

The Areopagus' abuse of its powers may well have motivated the decree passed by the demos in 338 B.C. which defined flight as *prodosia* (Lycurg. 1.53). Hansen has claimed that this decree of the demos empowered the Areopagus to pass sentence on all Athenians who fled the country in the immediate aftermath of Chaeronea.¹⁷ He is, however, conflating it with Demosthenes' *apophasis* legislation; the separate nature of the two legislative items being demonstrated not least by Lycurgus' listing of them as individual precedents for the jury to follow; Demosthenes' *apophasis* decree did not in any case confer any such powers onto the Council. The demos' decree, however, although having no apparent effect on the Areopagus' existing powers, seems to have been intended in the immediate aftermath of Chaeronea and perhaps, of the Council's executions, to bring *hoi pheugontes* within the terms of the *Nomos Eisangeltikos* and, as

¹³ Carawan (n. 2), 132, suggests that the procedure under which Autolycus was tried was an *apophasis*: Lycurgus could therefore have been appointed as prosecutor. Yet this is implausible, for as Hansen (n. 3), 40, 104, argues, none of the sources mention the Areopagus in this context, and since they were so prominent in the procedure, it is extremely unlikely that they would be invisible in this instance.

¹⁴ Wallace (n. 1), 588–9.

¹⁶ Wallace (n. 1), 586; notes 9, 10, above.

¹⁵ See note 12, above.

¹⁷ Hansen (n. 3), 108.

a result, to facilitate the execution of those deemed to be cowards in and after the crisis: to reappropriate for the Dicasteria, therefore, powers equal to those which the Areopagus had just usurped.¹⁸

The demos' decree was quickly followed by Eucrates' law in 337/6 B.C., a measure that was itself closely modelled on Demophantus' anti-tyranny decree of 410/9 B.C., with one particular difference: Eucrates' proposals expressly prohibited Areopagites from holding office or sitting in council in the event of the democracy being overthrown.¹⁹ Lycurgus clearly had good reason to request an uninterrupted hearing, and to plead for the jurors to refrain from shouting him down when he referred in positive terms to actions by the Areopagos which abused the powers granted to it by Demosthenes' *apophasis* legislation, and which seem to have resulted in two consecutive pieces of legislation to redress the juridical balance in favour of the Dicasteria. Lycurgus' argument that the Areopagus had been the city's greatest security at the time of Chaeronea was patently still contentious, and the passage of eight years seems to have made little difference to the demos' fury at the way in which the Council had exceeded its authority. Such sustained anger was perhaps also directed at those who had abandoned Athens in 338 B.C., and may have resulted in Lycurgus' success in this prosecution despite his unpopular view of the value of the Areopagus' behaviour.²⁰

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¹⁸ See too Aeschin. 3.252; Din. 1.62–3; Poll. 8.52; Carawan (n. 2), *passim*; Ober (n. 4), 101–2; Wallace (n. 2), 115–19, 176–84; Hansen (n. 2), 291; Rhodes (n. 4), 314–15; Millet (n. 2), 341.

¹⁹ And. 1.96ff.; SEG 12.87; B. D. Meritt, 'Greek inscriptions', *Hesp.* 21 (1952), 355–9 = #5; M. Ostwald, 'The Athenian legislation against tyranny and subversion', *TAPA* 86 (1955); Sealey (n. 4); A. E. Raubitschek, 'Demokratia', *Acta of the Fourth International Congress for Greek and Latin Epigraphy* (Vienna, 1964), 332–7; C. Mossé, 'A propos de la loi d'Eucratès sur la tyrannie (337/6 av. J.-C.)', *Eirene* 8 (1970), 71–8; C. J. Schwenk, *Athens in the Age of Alexander: The Dated Laws and Decrees of 'The Lykourgan Era' 338–322 B.C.* (Chicago, 1985), 33–41 = #6; Wallace (n. 2), 179ff.; Millet (n. 2), 338, 341; Wallace (n. 1), 583.

²⁰ See J. Sullivan, '"Second" thoughts on Aiskhines 3.252', *G&R* 49 (2002), 1–7.