

KODAI

Journal of Ancient History

Volume 16 (2015)

古代

**Proceedings of the Second Euro-Japanese Colloquium of the
Ancient Mediterranean World : Social Norms and Public Sphere
(held at University of Tokyo in 2009.3.27-29)**

Published by the Editorial Board of KODAI, Tokyo

Out-of-Court Settlement and Public Opinion in Democratic Athens*

SATO Noboru (Kobe University)

Introduction

Out-of-court settlement played an important role in 'litigious' Athens and was legally binding in private disputes¹. In public cases, however, out-of-court settlement was often regarded as a betrayal of the public interest. According to Lysurgus,

Three things are most responsible for guarding and protecting the democracy and city's prosperity: first, the system of laws; second, the vote of the jurors; and the third, the trial, which bring crimes under their control. ... Neither the law nor the judges' vote therefore has any force without a prosecutor to bring the wrongdoer before them (Lyc. 3-4).

In classical Athens, however, there were no state prosecutors responsible for bringing charges in the interest of the polis, except in a few serious cases. Normally public charges were brought by volunteer prosecutors on their own initiative². How, then, did the Athenians deal with withdrawing a public charge? I shall start by considering the Athenian law code, and then move on to possible ways to 'withdraw' a public charge, paying attention to some procedures which have been often neglected: particularly dropping an *eisangelia* and making use of a *hypômosia*. Finally I shall discuss the role of public opinion in this problem³.

Laws against Withdrawing Public Charges

First of all, according to Theophrastus, prosecutors who failed to carry through a public case were penalized in Classical Athens. A fragment of Theophrastus' *On Laws* contained

* I owe thanks for helpful comments and suggestions to the participants of the second Euro-Japanese Colloquium at the University of Tokyo in 2009 and to Dr. B. Gray, Mr. M. Miyazaki, and Prof. P. J. Rhodes.

¹ D. 36.25; 37.1; [D.] 58.20; On arbitration and reconciliation in Classical Athens, see Scafuro 1997.

² D. 20.146; Aeschin.1.19; Harrison 1968-71: ii. 34-35; Todd 1993: 92; Christ 1998; Rubinstein 2000: *passim*.

³ At least from the strictly ethical point of view, would-be prosecutors who did not bring their cases to court were also regarded as neglecting the public interest. *e.g.* a *proedros* who did not prosecute his accused offender could be criticized for neglecting justice (D. 21.39). Partly because of limited space, however, in this paper I constrain my researches to withdrawing a public case once initiated.

in the *Lexicon Rhetoricum Cantabrigense* reports as follows:

Πρόστιμον· ἔκευτο τῷ μὴ μεταλαβόντι τὸ πέμπτον μέρος τῶν ψήφων, ὡς Θεόφραστος ἐν πέμπτῳ περὶ νόμων· ἐν δὲ τοῖς δημοσίοις ἀγῶσιν ἐζημιούντο χιλίας καὶ πρόσεστί τις ἀτιμία, ὥστε μὴ ἐξεῖναι μήτε γράψασθαι παρανόμων μήτε φαίνειν μήτε ἐφηγεῖσθαι· ἐὰν δὲ τις γραψάμενος μὴ ἐπέξελθῆ, ὁμοίως· περὶ δὲ τῆς εἰσαγγελίας, ἐὰν τις μὴ μεταλάβῃ τὸ πέμπτον μέρος τῶν ψήφων, οἱ δικάσται τιμῶσιν.

In Athens those who brought a public action (ἐν δὲ τοῖς δημοσίοις ἀγῶσιν) but failed to gain a fifth of the vote were liable to a fine of 1,000 drachmae and in addition a sort of disfranchisement (τις ἀτιμία), loss of the right to bring some sort of prosecutions, was also inflicted⁴. Those who brought a public case but did not follow it through were liable to the same penalties (ἐὰν δὲ τις γραψάμενος μὴ ἐπέξελθῆ, ὁμοίως)⁵. This fragment, therefore, gives us a general idea that prosecutors of most public cases were liable to punishment if they withdrew. Attic orations in the fourth century attest the legal regulations concerning those who did not follow through their public cases. In [D.] 58.5-6, for example, Epichares, prosecuting Theocrines at an *endeixis*, cited a law on prosecutors who did not obtain a fifth of the vote and on those who did not follow through with their cases. According to Epichares, it was enacted so that “no one should bring forward baseless charges (σικοφαντῆ) or make profit with impunity and abandon the interests of the state (καθυφιῆ τὰ τῆς πόλεως).” Presumably the latter part was thought of as the purpose of the regulation concerning those who did not follow through their public cases.

Despite Theophrastus’ explicit explanation, the penalty is not clear. No contemporary source states that both a fine and *atimia* were inflicted on those who did not follow through with a public case. Some mention only a fine of 1,000 drachmae. In the case of Theocrines, for example, Epichares brought an *endeixis* against him, partly because he had not paid a fine of 1,000 drachmae, which had been inflicted on him since he did not bring a *phasis* against Micon to trial ([D.] 58.6). The speaker does not claim that *atimia* was inflicted on Theocrines because of his withdrawal of this case. Aeschines also suggests that Demosthenes did not prosecute his *graphé* and was fined, but does not refer to *atimia* (Aeschin. 2.93)⁶. A fragment of Lysias refers only to the thousand-drachmae fine one has to

⁴ Latte 1965: 86 — and the text is quoted by Harrison 1968-71: ii. 83 n. 2. The meaning of *tis atimia* has been interpreted as loss of the right to bring the same type of prosecutions (Hansen 1976: 63-65; Todd 1993: 143; MacDowell 1990: 327-328). Harris argues that all public cases were prohibited (Harris 1999: 408-410).

⁵ On the fragment, see MacDowell 1990: 327-328; Harris 1992; Harris 1999. Harris’ argument is based on *Scholia to Dem. 19*, which slightly differs from *Lex. Rhet. Cant.* and which does not contain the regulation concerning not following through a public case, or the one concerning *eisangelia*.

⁶ On the matter of legal procedure concerning this case, Hansen 1983. Wallace 2006 states that “the constitutional facts must have made sense to the dikasts”(62).

pay when one fails to prosecute after filing a *graphē*. In the case of Euctemon, however, only *atimia* is mentioned. According to Demosthenes, Euctemon, having prosecuted the orator for desertion (*lipotaxiou*), did not appear at an *anakrasis*, a preliminary interrogation, and failed to bring the case to the law court. As a result, as Demosthenes says, Euctemon had made himself *atimos* (D. 21.103).

Two explanations have been proposed. On the basis of Theophrastus and the case of Euctemon, Edward Harris claims that those who failed to bring a public charge to the law court were liable not only to a fine of 1,000 drachmae but also to partial *atimia*, that is, loss of a right to bring a public case for ever⁸. He assumes that the sources mentioning only a 1,000-drachma fine do not tell the whole truth. As Wallace noted in his paper, however, if Theocrines was legally deprived of the right to bring a public case because of not following through with the case, “Epichares had every reason to mention it” at the *endeixis* against Theocrines⁹. The prosecutor, nevertheless, refers to a 1,000-drachma fine only and explains that the defendant had no right to prosecute because of his unpaid fine. Wallace, therefore, doubts the fragment of Theophrastus as a source and claims that *atimia* was inflicted only on prosecutors who failed to carry through a *graphē lipotaxiou*, as in the case of Euctemon.

It seems also possible to argue that *atimia* was an additional penalty, as suggested by the word “ἵπρῶσσι”¹⁰. In many cases, additional penalties were inflicted on those who failed to pay the standard penalty (D. 21.44) or those who did not meet the terms of the rules about *atimoi* ([Arist.] *Ath.Pol.* 63.3). In these cases, the council, the law court or magistrates usually decided further penalties, whether at the trials or later. We do not know how often additional penalties were inflicted. But presumably they were not automatically inflicted in addition to the original one. This may be also the case with those

⁷ τὰς χιλίας δραχμὰς, ἃς δεῖ ἀποτινεῖν ἂν τις μὴ ἐπεξέλθῃ γραψάμενος., *Lex. Rhet. Cant. s.v.* Ἐπιτιμῶν = Lys. fr. XI.19 Carey. This procedure is also controversial. On this trial, see Wallace 2006: 64; Carey 2007: 319-321.

⁸ Harris 1999; Harris 2005.

⁹ Wallace 2006: 60.

¹⁰ Additional penalties: D.21.44: “For how is it that if a man who has lost his case fails to pay, the law thereupon is not content with a private suit for ejection (*dikē exoulēs*), but directs the imposition of a further fine to the treasury (προστιμῶν ἐπέταξε τῷ δημοσίῳ)?”; D.24.83: “and so the debtor would have been obliged not only to pay in full the amount of the debt as recorded, but also to liquidate the penal payments legally added thereto (τὰς ἐκ τῶν νόμων προσούσας ζημίας).”; D.24.114: “If a man was found guilty on a private prosecution for theft, while the normal penalty was double reparation, the court was empowered to add to the fine the extra penalty of imprisonment (προστιμῆσαι δ’ ἐξεῖναι τῷ δικαστηρίῳ πρὸς τῷ ἀργυρίῳ δεσμὸν τῷ κλέπτῃ) for five days and as many nights, so that everybody might see the thief in jail.”; [Arist.] *Ath.Pol.* 63.3: “If any unqualified person sits on a jury, information is laid against him and he is brought before the jury-court, and if convicted the jurymen assess (προστιμῶσιν) against him whatever punishment or fine he is thought to deserve; and if given a money fine, he has to go to prison until he has paid both the former debt, for which the information was laid, and whatever additional sum has been imposed (προστιμήσῃ) on him as a fine by the court.”; Cf. Plat. *Laws* 767e, 943b.

who failed to follow through with the legal procedure. *Tis atimia* may not have been automatically imposed on them. Whether partial *atimia* was stipulated only for *graphê lipotaxiou* or occasionally incurred as an additional penalty, some prosecutors seem to have been punished with a fine of 1,000 drachmae only.

There seems to have been another limitation on the rule against withdrawal of public cases. The punishments did not seem to be applied to every sort of public suit. No extant source mentions any rule against dropping an *eisangelia*. Theophrastus, after reporting the penalties for other types of public cases, adds the special penalty on those who did not obtain 20% of the vote in the case of *eisangelia*, but does not mention any penalty on those who did not carry through an *eisangelia*¹¹. Although Hansen argues that a 1,000-drachma fine was inflicted on a citizen withdrawing an *eisangelia* or any other type of public case¹², Libanius' *Hypothesis on Demosthenes 25*. 2-3, on which his argument is mainly based, reports that Aristogeiton was fined one thousand drachmae when he prosecuted Hegemon and failed to get one-fifth of the votes, not when he dropped the case. On the other hand, several sources, although they are not explicit, suggest that prosecutors of any kind of *eisangelia* were not punished, even when they did not obtain 20% of the votes or withdrew the case, until shortly before 330¹³.

Even after that, [Arist.] *Ath.Pol.* 56.6 suggests that this sort of exemption was applied to the *eisangeliai* or *graphai* against various kind of maltreatment¹⁴. While *Ath.Pol.* uses the word *graphai*, scholars have generally agreed that this procedure was *eisangelia*. However, some keep a cautious attitude about this identification. Whatever the case may be, public charges against maltreatment of orphans or parents could be withdrawn without penalty, even after 330 BC.

So far we have looked at the law code relating to not following through a public case. On the one hand, the Athenian legal system clearly showed the polis' attitude towards not proceeding with a prosecution. From the legal point of view, Athenian prosecutors were

¹¹ *Lex. Rhet. Cant. loc.cit.*

¹² Hansen 1975: 107-108 assumes that the prosecution against Hegemon mentioned in this *hypothesis* was in fact an *eisangelia* mentioned at [D.] 25.47 and Aristogeiton did not lose but withdrew it, as the wording of the oration (τὴν καθ' Ἡγήμονος εἰσαγγελίαν ... ἀπέδοτο) suggests (cf. Hansen 1991: 214). His assumption is, however, refuted by Rhodes 1981: 630; Rubinstein 2000: 119-120.

¹³ *Ath.Pol.* 56.6; Hyp. 1. *Lyc.* 8, 12; Pollux 8.52-3; Rhodes 1981: 629-630. Cf. Rubinstein 2000: 115-117 argues that even after 330, *eisangelia* entailed no risk for a prosecutor. Whitehead 2001: 124 holds off on making a decision whether Hypereides (1. *Lyc.* 8, 12) refers to prosecutor's general advantage over defendants or exceptional feature of *eisangelia*.

¹⁴ *Graphai kakoseôs* mentioned here are usually taken as *eisangeliai kakoseôs*. On this identification, see Harrison 1968-71: i. 117-18; Rhodes 1981: 629-630. Todd 1993: 107-108, 114 n.10 keeps a cautious attitude. While accepting *eisangeliai* for various types of maltreatment, Avontins 2004 argues that *Ath.Pol.* 56.6 refers only to *graphai* and that only *graphê goneôn kakoseôs* was risk-free. His argument, however, does not refute that public charges against maltreatment of orphans or parents, whether an *eisanglia* or a *graphê*, could be withdrawn without penalty. See also n. 16 below.

supposed to follow though a public case, once they had formally initiated it. On the other, the laws had some limitations, too. First of all, at least in some cases, the punishment was, presumably, a 1,000-drachma fine only, less severe than partial *atimia*. Secondly, no penalty was inflicted on prosecutors who did not carry through an *eisangelia* and possibly a *graphê kakôseôs*.

Dropping a Public Charge

In spite of the existence of a law code prohibiting the withdrawal of a public charge, withdrawing a public charge seems to have been not entirely uncommon. In the trial against Theocrines, Epichares criticizes the defendant for withdrawing an indictment (*graphê*) against Polyeuctus for money ([D.] 58.31-32). Nothing suggests, however, that Theocrines was liable to a fine or partial *atimia* as a result of this withdrawal. Epichares' silence in the *endeixis* suggests rather that Theocrines withdrew his indictment but was not liable to any punishment at the time of the trial of the *endeixis* against him. The legal procedure against Polyeuctus was either a *graphê* or an *eisangelia kakôseôs orphanôn*¹⁵. Theocrines, therefore, legally dropped this case without any penalty, as we have seen, though this withdrawal is ethically criticised as abandonment of an orphan¹⁶.

According to Apollodorus, when Stephanus had brought a suit against Phrastor (ἔγγραφη Στέφανος οὐτοῖσι ὑπὸ τοῦ Φράστορος πρὸς τοὺς θεομοθέτας), the latter indicted the former for giving an alien woman to an Athenian citizen. When the defendant came to terms with the prosecutor and relinquished his claim, Phrastor dropped his case ([D.] 59.53). The prosecutor may have intended from the very beginning not to prosecute in court as long as the defendant would drop his claim. Stephanus was again prosecuted for unlawful imprisonment by Epaenetus (τὴν γραφὴν γεγραμμένου). This time the defendant submitted their dispute for arbitration and the prosecutor withdrew the indictment (τὴν γραφὴν ἀνελέσθαι τὸν Ἐπαίνετον. [D.] 59.68-69). In both of the cases, the prosecutors are not criticized for dropping their cases at all.

E. Harris assumes that prosecutors were formally allowed to withdraw their charges with impunity at the *anakrasis*, the preliminary interrogation by the magistrates. For

¹⁵ The procedure is often taken as an *eisangelia*. e.g. Harrison 1968-71: i. 118 n.1; Osborne 1985: 48; Rubinstein 2000: 109 n.81, 206; also see n. 14 above.

¹⁶ Harris 1999: 134-135 presumably takes this case as an example of withdrawing a *graphê* without penalty. Wallace 2006 claims that the prosecutors who withdrew their charges were punished only when they did this for payment and points out that financial gain is stressed in this case as well as others (61). Since this procedure is exempted from the penalties on withdrawal of the public cases, the alleged monetary gain here has nothing to do with the punishment. Avotins 2004 argues that only the *graphê goneôn kakôseôs* was *azêmios* and that the penalty-free *eisangeliai kakôseôs* were introduced possibly around the end of fifth century and the *graphai kakôseôs* were 'of no interest any longer to a prosecutor' (esp. 468). If he is right, Epichares may rhetorically choose the word '*graphê*' rather than '*eisangelia*' in order to obscure the fact that an *eisangelia* was risk-free.

Harris “follow through” (*epexelthein*) can cover both bringing the case to trial and turning up at the *anakrasis* and withdrawing the charge at that point, and for him it is only failing to turn up at the *anakrasis* or the subsequent trial which would count as abandoning the case. In fact, neither Euctemon nor Theocrines, who are mentioned as liable to punishment in forensic speeches, attended the *anakrasis* (D. 21.103; [D] 58.8). On the one hand, Harris’ theory is possible and may be supported by Hyperides’ *Against Diondas*, according to which one of Diondas’ friends asked him to stop his prosecution at the *anakriseis*¹⁷. Strictly speaking, on the other hand, it is only proved that prosecutors who did not attend the *anakrasis* were liable to penalties, not that they had a right to withdraw a public charge there.

Another possibility is that, if partial *atimia* was not automatically inflicted on all prosecutors who withdrew their own charges, some of them may simply have paid a fine of 1,000 drachmae. A fine of this magnitude was not necessarily too expensive for wealthy citizens to pay¹⁸.

Athenian prosecutors did not merely withdraw their public charges *de jure*, but made use of another way to drop a prosecution *de facto*. *Hypômosia*, an oath for postponement, seems to have been a common means¹⁹. It is true that the oath was just for postponing, not for withdrawing a legal action. But unless the prosecutor restarted the legal procedure, it was suspended and could presumably be hushed up in the end. Epichares, who in vain asked Demosthenes to help him to prosecute Theocrines, reveals that *hypômosia* was common for litigants as a means to avoid litigation in the law court ([D.] 58.43). According to him, Theocrines prosecuted Demosthenes for proposing an illegal decree (*graphê paranomôn*), fixing the penalty at ten talents. The prosecutor, however, allegedly then discharged him from the indictment by *hypômosia*. When the case was called (καλουμένης τῆς γραφῆς), someone made an oath for postponement on behalf of the defendant. The prosecutor neither made a counter-oath nor subsequently called the case for trial again. It is true that the speaker seems to exaggerate. When the speaker initiated the *endeixis*, he still thought of Demosthenes as an enemy of Theocrines, which means that Demosthenes must have made a *hypômosia* after the first step of the *endeixis* against Theocrines. Therefore, it cannot have been a very long time after the *hypômosia* was made for Demosthenes that the trial over the *graphê paranomôn* could be recognised as dropped, not just suspended. The strategy, nevertheless, seems possibly to have been common. Athenians could with impunity evade reopening the prosecution for several years once suspended. Aeschines reopened his prosecution against Ctesiphon on Demosthenes’ crown six years after it was initiated in 336 BC. Similarly Diondas delayed bringing his

¹⁷ “καὶ πρὸς ταῖς ἀνακρίσεσιν δεῖται αὐτοὺς (= prosecutions) παύσασθαι, ... (174r. 28 Carey et al: 2008).” Even in this case, however, it is uncertain how Diondas could ‘stop’ his case. He could suspend it with a *hypômosia*, an oath for postponement.

¹⁸ Cf. D.21.88.

¹⁹ On *hypômosia* generally, see Thalheim, in *RE*, s.v. ὑπόμοσια; Thür in *Der Neue Pauly*, s.v. Hypomosis; Harrison 1968-71: ii. 155-156.

prosecution of Hyperides to court from 338 to 334²⁰. Moreover, if a defendant made an oath of *hypômosia* under mutual agreement with the prosecutor, as told at [D.] 58.43, the latter was less likely to be accused of failing to carry through his public case, even if he did not reopen it, since the suspension was caused by his opponent²¹.

There may be another example of the same or similar tactics. When Demosthenes proposed a trierarchic law, he was prosecuted but won the case (D. 18.102-103). At the same time, the wealthiest citizens came and offered him a huge amount of money “not to propose the measure, or, failing that, to abandon and leave it alone with a *hypômosia* (καταβάλλοντ’ ἔαν ἐν ὑπόμοσιᾳ)”. The last part of the passage I have just cited is not clear enough, but it has been taken as follows: Demosthenes was asked to neglect his new law, once someone had initiated the legal action against him with an oath called *hypômosia*²². Although the oath to start a *graphê mê nomon epithêdeion theinai* could have temporarily suspended the law, the aim of the wealthiest citizens must have been complete nullification of the new law²³. In order to abolish it, they must have asked Demosthenes to do some further action. It may have been his defeat in a popular court, but this tactic was obviously insecure for the prosecutors and dishonorable for Demosthenes. Even defeat *in absentia* would have been disgraceful for the defendant, since public announcement of the result would have surely diminished the reputation of the politician, who was proud of this legislation²⁴. More attractive is an indefinite suspension (*i.e.* withdrawal *de facto*) of the trial with a *hypômosia* for ‘postponement’, as in the case of [D.] 58.43: the wealthiest citizens may have asked the defendant to make an oath to postpone the trial. If the defendant had agreed to this offer, the prosecutor would not have needed to do any more to nullify the new law, since it would be suspended forever unless the prosecutors themselves reopened the trial. Another possibility is that the wealthiest Athenians asked Demosthenes not to make a counter oath when they themselves make one for postponement.

When Apollodorus prosecuted Phormio, the charge was ‘evaded’ for a while (τῆς γραφῆς ἐκκρουομένης), according to the prosecutor (D.45.4). The defendant may have used a *hypômosia* in order to suspend the procedure, though we have no clue. Or the indictment may have been actually suspended by the magistrates for some reason. In the meantime,

²⁰ Horváth 2008; Horváth 2009; Rhodes 2009.

²¹ Indeed, as far as we know most of the oath for postponement mentioned in Attic orations were made by the defendant’s parties (D.21.84; 39.37; 47.39; [D.] 58.43). This must reflect a strategy of Athenian litigants, since it is unlikely that a prosecutor was legally prohibited from making an oath for postponement. An exception is D. 48.25, which refers to a *hypômosia* made before an *epidikasia* trial. Cf. Sato 2010.

²² Goodwin 1904: 62; Wankel 1976: 565-66; Hansen 1974: 36 (Cat. 25); Yunis 2001: 171.

²³ It seems strange at least to me that any citizen could suspend for ever (*i.e.* nullify *de facto*) any law which was once passed, by just making an oath to initiate a *graphê mê nomon epithêdeion theinai*. I argue elsewhere that the *hypômosia* mentioned at D.18.103 would be an oath for postponement (Sato 2010). Only later sources explicitly refer to the *hypômosia* to initiate a *graphê mê nomon epithêdeion theinai* or a *graphê paranomôn* (Pollux 8.56; Plut. *Moralia* 848D).

²⁴ D. 18.102, 107-108.

the litigants and Apollodorus' mother had a meeting about their reconciliation. The speaker does not mention what happened to the prosecution after that, but abruptly changes the topic. It is likely that it was either still suspended at the time of the trial against Stephanus for perjury or had been withdrawn by then, either *de facto* or *de jure*.

As we have seen, Athenian prosecutors could and did “withdraw” their cases and some of them clearly knew how to evade the penalty. Interestingly, in most of the cases mentioned above, some sort of private negotiations took place before the withdrawal (D.18.103; 45.4; [D.]58.31-32, 43; 59.53, 68-69). The private negotiation between the parties became most important when they tried to suspend a suit with a *hypômosia*. Otherwise, the opponent could make a counter oath²⁵. A number of accusations against prosecutors of being paid to drop a public suit presumably indicate that a prosecutor of a public case easily found opportunities for private negotiation with his defendant²⁶. In classical Athens, therefore, public suits, which usually depended on an unofficial volunteer prosecutor, could often be abandoned through litigants' negotiation in the private sphere.

The Athenian Attitude towards ‘Selling the Public Interest’

In this final section, I would like to survey Athenian attitudes towards dropping a public case. In some cases, the Athenians must have added more pressure on volunteer prosecutors by their pronouncements in the public sphere. In forensic speeches, many prosecutors are accused of ‘dropping cases’, as if they were damaging the public interest of the polis. A prosecutor of Epicrates explained why they came to the law court in spite of the defendants' pleas:

Now, we have refused to be traitors, and we expect no less of you: reflect that you would be highly incensed with us, and would punish us at any opportunity, as criminals deserve, had we come to terms with these men, either by taking payment or by any other means. Yet if you are incensed with those who do not go through with their suit as justice requires, surely you are bound to punish the actual offenders (Lys. 27.14).

The speaker makes it clear that popular opinion in the public sphere could create pressure on them to come to the law court. Although he may have rhetorically fabricated such ‘public opinion’ to win the lawsuit in this particular case, the statement suggests that

²⁵ D.48.25 (*epidikasia*); [D.]58.43 (*graphê paranomôn*). According to D.48.26, when Olympiodorus' *hypômosia* was rejected by an *antypômosia*, not only did he fail to suspend the trial, but his claim was struck out in accordance with the law. Beyond rejecting the suspension of the procedure, we do not know what happened when a *hypômosia* was rejected in the case of public suit.

²⁶ Not prosecuting or dropping a public suit for money (including dubious cases): *e.g.* Lys. 6.11; 20.7, 10, 15; 25.3, 9, 26; 27.14-15; 29.1; Aeschin. 2.93, 148; 3.52; D. 21.3, 39; 25.47, 49-50; 58.6, 8, 12-13, 32, 33, 35, 62; Din. fr. II.4 Conomis.

public indignation against withdrawal of the public case could be instigated, at least in cases which attract people's attention.

Demosthenes also refers to the importance of the people's opinion. According to him, when he was going to prosecute Meidias for his hybristic attack, Demosthenes was offered a large amount of money to refrain from prosecution, but he did not accept it (D. 21.3). At the same time, many fellow citizens came and urged him to prosecute the offender (D. 21.2). Towards the end of the speech, the prosecutor refers to the situation in which the *probolê* was held.

At the actual time of the offence it was obvious that you (= those in the assembly at the time of the *probolê*) all felt angry and bitter and severe so that, when Neoptolemus and Mnesarchides and Philippides and those very rich men one and all were making their pleas both to me and to you, you kept calling out 'Don't let him off,' and when Blepaeus the banker came up to me, you let out such a shout, thinking that I was going to take a bribe, 'the same old story!' that I was startled by your clamor, Athenians, and let my cloak drop so that I was half-naked in my tunic, trying to get away from his grasp, and when you met me afterwards, "Mind you prosecute the blackguard," you cried: "don't let him go; the Athenians will watch to see what you are going to do" (D. 21.215-216)

Demosthenes obviously exaggerates public indignation at Meidias' behavior against himself. This passage, nevertheless, suggests that public opinion was able to urge even would-be prosecutors to bring the case to trial²⁷.

When a case was attracting people's attention, the prosecutors would find it difficult to keep a low profile and tended to be under more pressure from public opinion. In the case of *eisangeliai* for major public offences, prosecutors may have been apt to feel more pressure. An *eisangelia* was initiated at the assembly or the council in public and was usually applied to a serious crime against the polis, which would presumably attract much attention. The issue was treated as an official public concern. Since an *eisangelia* for a serious crime did not admit postponement with a *hypômosia*²⁸, there would have been little time for the people to lose interest. The Athenians, therefore, may have felt it less necessary to legislate against withdrawing an *eisangelia* partly because of this

²⁷ This passage does not necessarily mean that popular opinion really prevented any prosecutor from dropping a public case. Actually, public indignation against Meidias' behaviour may not have been so strong or so lasting as to add serious pressure on Demosthenes to bring the case to trial. On the question whether Demosthenes brought this case to court or not, see MacDowell 1990: 23-28; Rubinstein 2000: 208-209; Harris 2008: 84-86.

²⁸ Hyp. 4 *Eux.* 7 mentions that a *hypômosia* for postponement of *eisangeliai* was not admitted. This means either that the litigants of an *eisangelia* were legally prohibited from suspending the suit with *hypômosia*, which seems more likely, or that public pressure may have made it difficult to postpone the case seriously detrimental to the public interest.

characteristic of the procedure²⁹. Public opinion could work as a coercive power for the prosecutor or the would-be prosecutor not to neglect the public interest but to bring the case to trial.

On the other hand, it would have been difficult for the citizens to keep their eyes on every prosecutor, let alone every would-be prosecutor. While an *eisangelia* was mostly brought before the council or the assembly in public and prosecutions against magistrates were brought at the *euthyna* in front of many citizens, most public charges were brought to magistrates with only a few witnesses. The two parties could easily make their deed less noticeable, when they mutually agreed with each other³⁰.

In his oration against Demosthenes, Dinarchus criticizes the defendant for cancelling an *eisangelia* (ταύτην τὴν εἰσαγγελίαν...ἀναιρούμενος) against Callimedon with intent to overthrow the democracy (Din.1.94)³¹. Here, however, Dinarchus accuses Demosthenes or mocks his continual change of policy, rather than bitterly reproaching the politician for neglecting the public interest, in spite of the fact that the cancellation of the *eisangelia* happened just before the trial against Demosthenes. It seems likely that the people paid more attention to the Harpalus affair than the matter concerning Callimedon and did not regard the cancellation of the *eisangelia* as seriously detrimental to the public interest.

Aeschines also criticizes Demosthenes for his judicial activities. When Demosthenes accuses him of being bribed by Philip, Aeschines says,

Do you today accuse me of having taken bribes, you who were once fined by the Council of the Areopagus for not prosecuting your suit for assault (οὐκ ἐπέξιδὼν τῆ τοῦ τραύματος γραφῆς), that time when you indicted (ἐγράψω) your cousin Demomeles of Paeania for the cut on your head that you gave yourself with your own hand? (Aeschin. 2.93)

Here Aeschines suggests that Demosthenes dropped his public charge (*graphê*) for money. Glancing at this episode, however, we see that Aeschines intended to mock Demosthenes' inconsistent attitude towards bribery, not to condemn his neglect of the public interest. At the trial of Ctesiphon in 330, Aeschines referred to the same trial again and to the *graphê hybreôs* against Meidias, as well. Concerning the latter case, Aeschines claimed that Demosthenes "sold (ἀπέδοτο) for thirty minas both the *hybris* to himself and the vote of

²⁹ Interestingly, the penalty was not inflicted on those who withdrew an *eisangelia* (or a *graphê kakôseôs*, which was brought before the *archôn eponymos*, not either the Assembly or the *boulê*. The reason is uncertain, but the polis apparently preferred lessening obstacles to bringing an *eisangelia* concerning maltreatment to prohibiting withdrawal.

³⁰ At least in some cases, mutual agreement was necessary to withdraw a case. And. 1.120-121 suggests that Cephisius could not drop an *endeixis* against Andocides, because the defendant (not the prosecutor!) did not agree.

³¹ In this case, it is not certain whether Demosthenes' *eisangelia* was withdrawn after the Assembly passed the decree about the case or cancelled somehow before it (Rubinstein 2000: 121 n.107). On the *eisangelia* against Callimedon, see also Hansen 1975: 111; Worthington 1992: 264-265.

censure (τὴν τοῦ δήμου καταχειροτονίαν) that the people had passed against Meidias” (Aeschin. 3.52). With this passage Aeschines suggests that Demosthenes neglected the public interest. After mentioning these trials, however, Aeschines clearly claims that these old incidents should be passed over and describes Demosthenes’ political activities concerning Philip in much more detail in order to prove that the politician did nothing good for the *polis* (3.54). Aeschines presumably intended to give the jurors a negative impression concerning Demosthenes’ judicial and legal activities, but did not bitterly denounce him for betraying the public interest. It is possible that these two ‘crimes’, though indicted with a ‘public’ charge, were not regarded as critical to the public interest by any means, so that Aeschines could severely accuse Demosthenes of betraying the people.

Aristogeiton is said to have “sold the impeachment of Hegemon (τὴν καθ’ Ἡγήμονος εἰσαγγελίαν ... ἀπέδοτο)”, and to have “thrown up his brief against Demades (τὰς κατὰ Δημάδου γραφὰς ... ἐξέλιπεν)”. The speaker also insinuates that Aristogeiton settled out of court with other defendants for payments (D. 25.46-47). While it is impossible to determine whether Aristogeiton himself initiated these procedures³², he is clearly accused of out-of-court settlements for payment. The speaker, however, does not criticize Aristogeiton for neglecting the public interest, but mocks him for his uselessness as a sycophant.

Epichares, the prosecutor of Theocrines, used a two-pronged rhetorical strategy. Citing a law concerning those who did not follow through with a public case, as mentioned above, he explains that the purpose of the regulation was to prevent prosecutors from abandoning the interests of the state ([D.] 58.6). A few sections later in this oration, Epichares also claims that if Theocrines compromised with the illegal trader he had denounced, he did wrong to all the citizens and would justly be fined a thousand drachmae ([D.] 58.12). Here the prosecutor obviously considers that private conciliation with the criminal was an offence against all the citizens.

At the same time, however, Epichares describes Theocrines as a sycophant and claims that the defendant kept writing indictments contrary to the laws and harassing many citizens with baseless and malicious actions (συκοφαντοῦντα πολλοὺς τῶν πολιτῶν), when he had no right to do so ([D.] 58.2). It is true that the speaker is clearly using rhetoric: no one had a right to commit ‘sycophancy’. But Epichares tries to include the jurors, in other words, the citizens among the victims and would-be victims of Theocrines’ continual judicial actions. In addition, Epichares explains that he was liable not merely to the fine of a thousand drachmae, but also to arrest (*apagôgê*) and to the other punishments which the law provided for anyone who committed *sycophancy* against merchants and ship-owners ([D.] 58.10). After citing the law on sycophancy against traders, Epichares says that if Micon sailed to a legitimate port and Theocrines nonetheless denounced him, he was bringing a baseless charge against the ship-owners ([D.] 58.12). Here Epichares seems to find it difficult to determine whether he should present Micon as a wrong-doer or as an innocent trader. Generally speaking, it was not easy for the third person to decide

³² Rubinstein 2000: 119.

whether the defendant of a dropped public case had really committed a crime or was a victim of sycophancy. Describing withdrawal of a public case as abandoning the public interest logically suggests that the defendant of the case was possibly a wrong-doer, even if he was actually innocent. Epichares' rhetorical strategy shows the difficulty in presenting a withdrawal of a public charge as straightforward detrimental to the public interest.

As we have seen, although out-of-court settlement with a suspect in a public trial was frequently described as detrimental to the public interest, it was often either retrospectively mocked as part of a politician's embarrassing past or associated with indiscriminately prosecuting many, especially innocent citizens. These examples suggest that it was difficult to complain about out-of-court settlement in a public case, unless would-be prosecutors were continuously active in politics or in legal activities.

To conclude: although dropping a public case in Classical Athens was penalised, the law code had some limitations and prosecutors presumably often withdrew their cases. Popular opinion in the public sphere could urge a volunteer prosecutor to bring a case to trial, especially when the case attracted the citizens' attention. However such cases do not seem to have been very common. In many cases, prosecutors and would-be prosecutors could keep a low profile. Only politicians or those who often participated in judicial activities could be criticized or mocked when they did not prosecute suspects in the law courts. In such a socio-legal environment, not a few litigants of public suits presumably made private negotiations taking into consideration the possibility of an out-of-court settlement, even after their cases were officially filed.

[Work Cited]

- Avotins, I. (2004) "Athenaion Politeia 56.6 and the Protection of the Weak", *CQ* 54: 461-469.
- Carey, Ch. (2007) *Lysiae Orationes cum Fragmentis*, Oxford.
- Carey, Ch., Mike Edwards, Zoltán Farkas, Judson Herrman, László Horváth, GyulaMayer, Tamás Mészáros, P. J. Rhodes and Natalie Tchernetska, (2008) "Fragments of Hyperides' "Against Diondas" from the Archimedes Palimpsest", *ZPE* 165: 1-19.
- Christ, M. R. (1998) *The Litigious Athenian*, Baltimore.
- Hansen, M.H. (1974) *Sovereignty of the People's Court in Athens in the Fourth Century BC and the Public Action against Unconstitutional Proposals*, Odense.
- Hansen, M. H. (1975) *Eisangelia: the Sovereignty of the People's Court in Athens in the Fourth Century B.C. and Impeachment of Generals and Politicians*, Odense.
- Hansen, M.H. (1976) *Apagoge, Engeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes*, Odense.
- Hansen M.H. (1983) "Graphe or Dike Traumatous?" *GRBS* 24: 301-320.

- Hansen, M. H. (1991) *The Athenian Democracy in the Time of Demosthenes*, Oxford.
- Harris, E. M. (1992) Review of MacDowell (1999) *CPh* 87: 71-80.
- Harris, E. M. (1999) "The Penalty for Frivolous Prosecutions in Athenian Law." *Dike* 2: 123-142 [in Harris, E.M. (2006) *Democracy and the Rule of Law in Classical Athens*, New York and Cambridge: 405-422].
- Harris, E. M. (2005) "Feuding or the rule of law? the nature of litigation in classical Athens: an essay in legal sociology", in M. Gagarin and R.W. Wallace (eds.) *Symposion 2001: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Vienna: 125-142.
- Harris, E.M. (2006) "A response to Robert Wallace", in H.-A. Rupprecht (ed.) *Symposion 2003: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*: 67-71.
- Harris, E. M. (2008) *Demosthenes, Speeches 20-22*, Austin.
- Harrison, A. R. W. (1968-71) *The Law of Athens*, II vols, Oxford [later reissued in Bristol].
- Horváth, L. (2008) "Dating Hyperides' Against Diondas", *ZPE* 166: 27-34.
- Horváth, L. (2009) "Hyperidea", *BICS* 52: 187-222.
- Hunter, V. (1994) *Policing Athens*, Cambridge.
- Latte, K.-Erbse, H. (ed.) (1965) *Lexica Graeca Minora*, Hildesheim.
- MacDowell, D. M. (1990) *Demosthenes: Against Meidias*, Oxford.
- Rhodes, P.J. (1981) *A Commentary on the Aristotelian Athenaion Politeia*, Oxford.
- Rhodes, P.J. (2004) "Keeping to the Point", in E.M. Harris and L. Rubinstein (eds.) *The Law and the Courts in Ancient Greece*, London: 137-158.
- Rhodes, P.J. (2009) "Hyperides' against Diondas: Two Problems", *BICS* 52: 223-228.
- Rubinstein, L. (2000) *Litigation and Cooperation: Supporting Speakers in the Courts of Classical Athens*, Stuttgart.
- Sato, N. (2010) "Hypomosis: On Dem. 18.103", in Y. Oshiba and N. Koike eds. *For Tomorrow of the Classical Studies*, Tokyo: 311-332 [Japanese].
- Scafuro, A. (1997) *The Forensic Stage: Settling Disputes in Greco-Roman New Comedy*, Cambridge.
- Thalheim, Th. (1921) "Υπομοσία", in *Paulys Realencyclopädie der classischen Altertumswissenschaft*, vol. IX-1, Stuttgart: 337-338.
- Todd, S. C. (1993) *The Shape of Athenian Law*, Oxford.
- Thür, G. (1998) "Hypomosis" in *Der Neue Pauly*, vol. V, München: 815.
- Wallace, R. W. (2006) "Withdrawing graphai in ancient Athens – A case study in "sycophancy" and legal idiosyncrasies" in H.-A. Rupprecht (ed.) *Symposion 2003: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*: 57-66.
- Wankel, H. (1976) *Demosthenes: Rede für Ktesiphon über den Kranz*. Heidelberg.
- Whitehead, D. (2000) *Hypereides: The Forensic Speeches*, Oxford.
- Worthington, I. (1992) *A Historical Commentary on Dinarchus*, Michigan.
- Yunis, H. (2001) *Demosthenes: On the Crown*, Cambridge.

Out-of-Court Settlement and Public Opinion (SATO)