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## THE ATHENIAN LEGAL SYSTEM AND ITS PUBLIC ASPECTS\*

In the wake of the cultural historical turn, many researchers have put an emphasis on the symbolic side of some aspects of human behavior and ritual practices. Before we can treat symbolic messages of Athenian procedural law, we have to focus on the pre-condition that made the transmission of such messages possible—i.e., the fundamentally public character of the Athenian legal system, ranging from the commitment of offenses up to their treatment in court and their punishment.

Anyone who has been following German news in 2013 may be struck by a discussion that has been ongoing for quite some time now: the thorny question of which press agencies and journalists are guaranteed seats during the trial against Beate Zschäpe, a neo-Nazi activist who was involved in the killing of Turkish and Greek immigrants. Beyond the sensitive topic related to the German past, the issue at stake in this debate is immediate access to the lawcourt proceedings. To an Athenian audience the answer would have been crystal clear: it was a fundamental principle of Athenian democracy that legal proceedings were public,<sup>1</sup> held in buildings (the *dikastēria* for the most part) but open for bystanders to watch and listen to what was happening on the dikastic stage.<sup>2</sup> What is more, Athenian culture was, in many aspects, a culture of public display.<sup>3</sup> The immediacy of the circumstances of living and the highly democratic system contributed to this culture of conscious openness and the accessibility of many social practices. Performance studies have recognized this fact and many studies have been devoted to this

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<sup>1</sup> The same is true for the US: Amendment 6 of the American Constitution stipulates that all trials must be public. In principle, the same is true for the German legal system (cf. § 169 of the *Gerichtsverfassungsgesetz*), apart from cases where special circumstances might make it preferable for the accused and/or the victim that court proceedings be held behind closed doors. Cf. the commentary on § 169 GVG by Wickern, in: Löwe-Rosenberg, Vor § 169 GVG and the commentaries on Art. 6 of the European Convention on Human Rights and Art. 14 of the International Covenant on Civil and Political Rights by Esser, in: Löwe-Rosenberg, EMRK Art. 6 and Art. 14 IPBPR Rn. 377–390.

<sup>2</sup> On the central role of the bystanders in court proceedings, cf. Lanni 1997.

<sup>3</sup> On the aspect of display with regard to the lawcourts specifically, cf., e.g., Hall 1995; Slater 1995. With regard to other social and cultural aspects, cf. Bonanno 1997; Cartledge 1997; Gentili 1997; Schmitz 2004, 403; Liddel 2007.

phenomenon, mainly pertaining to theatrical performances, but also the lawcourts.<sup>4</sup> And nevertheless, the public character of the entire Athenian legal system is normally taken for granted by most scholars so that an in-depth study of what this kind of public aspect actually means is still missing. This paper seeks to show that this public aspect of law is not self-evident when we compare the Athenian legal system to that of other pre-modern societies, and that much more significance is involved here than just the general assumption that Athenian democracy insisted on the public accessibility of their legal proceedings.

As I will show, the public was relevant to all aspects of the Athenian system of law, ranging from the *perpetration* of misdeeds (if they were supposed to make sense), to their *definition* in the absence of legal experts who could have defined the facts of an offense, to the *treatment of the offense* in the lawcourts proper, and, last but not least, to the *execution of many penalties* meted out to convicted offenders. Thus, openness and visibility lay at the heart of the Athenian understanding of justice and democracy, and not just because the Athenian body politic assumed that a trial could only be fair if it was watched and supervised by the people, but because accessibility of facts ensured communication. Thus, symbolic messages could be conveyed to all parties involved, including the opponent in court, the jurors, the presiding magistrate, and the broader public. In a semi-oral society without mass media, the sending and correct receiving of messages were crucial to the functioning of the political and social system. Athenians believed that this decisive communication could only be upheld by making as many aspects of life as public as possible,<sup>5</sup> including the cosmos of the law. And because this goal was largely achieved in the legal system, it could become a cornerstone of Athenian democracy, as Aristotle writes.<sup>6</sup>

We modern observers are not the only ones who are struck by the extremely public character of the Athenian legal system. In *Clouds*, Aristophanes mocks the Athenian fondness for litigation. Athens, according to Strepsiades, is recognizable from above only by its lawcourts in the heart of the city. (“Student: And this is a map of the whole world. Do you see? Here’s Athens. Strepsiades: What do you mean? I don’t believe you; I don’t see any jurors on their benches.”)<sup>7</sup> Strepsiades could have picked the Assembly of the People to characterize the city of Athens. But meetings of the *Ekklēsia* were “only” held approximately every ten days, whereas trials took place almost every day, apart from holidays. And many people knew what was going on before and during a trial. So, if one thought of Athens, the courts came

<sup>4</sup> E.g., the contributions to Harris–Leão–Rhodes 2010.

<sup>5</sup> Exemplary Athenian sources are D. 18.10; Hyp. *Lyc.* 14; ideologically Isoc. 3.52. But also Spartans put strong emphasis on leading life in public so as to avoid gossip and slander, e.g. Agesilaus, as described in X. *Ages.* 5.7; 9.1–2. The examples could be multiplied.

<sup>6</sup> Arist. *Ath. Pol.* 41.2. Cf. *Pol.* 1275a22–33 (= 3.1.4–5); 1275b15–21 (= 3.1.8).

<sup>7</sup> Ar. *Nu.* 206–208 (transl. by Sommerstein); cf. Ar. *Av.* 40–41.

to mind immediately. According to Aristophanes, they were conspicuous even from above, and thus symbolized the city and its litigious and garrulous citizens.<sup>8</sup> The Old Oligarch even complains that one of the reasons why the Athenians hardly have time to attend to important state affairs properly and deal with all requests is the fact that they decide more private and public suits and account renderings (*euthunai*) than all other people taken together do.<sup>9</sup>

The Perpetration of Misdeeds, the Definition of Violent Acts as (Il)legitimate, and the Definition of *hubris*

As far as violence is concerned, the dichotomy of public versus hidden violence charged a violent act with semantic meaning.<sup>10</sup> For violence to be acceptable and, in the lawcourts, to be judged as legitimate, it had to be committed in public, open for all to see and assess. Bystanders and passers-by could join the fracas, comment on it, or intervene.<sup>11</sup> The perpetrators could summon them as witnesses later in court. So it was vital for the person who deemed himself in the right to constitute a certain public for his act of violence. Exposing an act of violence to public scrutiny facilitated communication about it and certainly also restricted the level of violence. Only the presence of a public enabled the perpetrator to convey a symbolic message to an audience, i.e., that he was in the right and was the stronger party, and that his rival was a weakling deserving to be ridiculed and shamed in public. In this game for power and even physical supremacy, the audience fulfilled a vital function: ideally it would condone, if not legitimate, the violent act and, most of all, it would immediately construct meaning and thus make sense of the violence perpetrated.

If we regard this dichotomy of public versus hidden violence as a semantic marker, we also come to a better understanding of what hidden violence meant. If a perpetrator committed a violent act away from the public limelight, he had something to hide. There was not only no message to be transmitted to a discerning audience, but the perpetrator had a bad conscience and therefore could not justify his actions. By removing his violence from the public gaze and adjudication, he actually admitted that his behavior was unacceptable. There is, of course, the vast domain of domestic violence to which women, children, and especially slaves were subject. This kind of violence was taken for granted by Athenian male citizens and therefore deemed irrelevant. The *kurioi* regarded this kind of hidden violence as justified

<sup>8</sup> Athenian envoys speaking before the Spartan Assembly address the fact upfront that many of Athens' allies regarded Athenians as litigious (Thuc. 1.77.1).

<sup>9</sup> Ps.-X. *Ath. Pol.* 3.2: ἔπειτα δὲ δίκας καὶ γραφάς καὶ εὐθύνας ἐκδικάζουσιν ὅσας οὐδ' οἱ σύμπαντες ἄνθρωποι ἐκδικάζουσι ... . Christ 1998 discusses in detail the complex discussions Athenians had about their legal system and its abuse. On litigation and its consequences for Athenian culture, cf. Johnstone 1999, 126–133.

<sup>10</sup> On the following, cf. Riess 2012, 51–65.

<sup>11</sup> A good example is Lysias 3.12; 16–18, where a kind of street fight is described. On the frequency of such batteries, cf. Lys. 3.39; 42.

paternalistic coercion of human beings under their power. The Attic orators abound with examples of open violence. To enumerate just a few:

Alcibiades allegedly dragged his wife by her hair across the Agora as she was about to file for divorce with the Archon *basileus*.<sup>12</sup> In doing so, he ignored her rights as a citizen woman, expressed his utter disrespect for Athenian democratic institutions, and reasserted his power as a *kurios* over his wife. Two weeks later she died under mysterious circumstances and her family did not dare file charges for homicide against Alcibiades. He could have acted otherwise but wanted to make it abundantly clear to the Athenian public what amount of power he wielded, over his wife as well as over Athens' political and legal institutions.

In another instance, we see how deliberately Alcibiades sought the public scene in order to construct himself as superior in relation to a colleague. When he served as *chorēgos* together with Taureas, he punched the latter and/or one of his chorus boys in the face and drove them out of the theater of Dionysus during the performance of the play.<sup>13</sup> Choregic competition was normal, but this violent breach of social conventions was certainly not. More than a generation later, Demosthenes suffered the same fate at the hands of Meidias. Through Demosthenes' famous speech we are well informed about this incident.<sup>14</sup> It is obvious that Alcibiades and Meidias did not act on the spur of the moment, but chose the theater of Dionysus very deliberately to dramatize their superiority. In both cases, we learn that the audience did not agree at all with the aggressors, and yet they tried their luck, as if to test what kind of bullying behavior they could get away with. Both aggressors assessed their situations and their immense social capital correctly: Alcibiades still won the prize in the choregic competition and Demosthenes was successful only in his *probolē* action against Meidias, but eventually might not have delivered his speech in court at all.<sup>15</sup> Maybe he was bribed or came to the conclusion that his loss of face in public was more severe than Meidias' daring punch.

Conon and his sons attacked Ariston in the Agora at night and deliberately established an audience to dramatize their rowdy behavior.<sup>16</sup> Most of all, Conon performed a rooster dance in order to mock Ariston brutally in front of onlookers.<sup>17</sup> Ariston does not tell us to what extent he was responsible for the escalation of the long-term conflict, but obviously his opponents did not shrink from attacking him in plain view of other people in the Agora, because they felt they were in the right.

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<sup>12</sup> Ps.-And. 4.14; Plu. *Alc.* 8.4; indirectly Lys. 14.42; Antiphon fr. 67 (Thalheim-Blass).

<sup>13</sup> Ps.-And. 4.20–21; D. 21.147; Plu. *Alc.* 16.5–8; cf. Th. 6.15–16 (indirectly).

<sup>14</sup> D. 21, mainly 21.74.

<sup>15</sup> On the discussion of whether or not Demosthenes delivered the speech, cf. most recently Dreyer 2000.

<sup>16</sup> D. 54.

<sup>17</sup> D. 54.9. On the meaning of ancient Greek cock-fighting, cf. Csapo 1993; in reference to Aeschines 1 in particular, cf. Fisher 2004.

In cases of homicide, things got more serious and difficult. After having been cuckolded by his wife for quite some time, Euphiletus famously gathered a posse of friends to lend legitimacy to his killing of the adulterer Eratosthenes, to achieve a theatrical effect, and to stage his private revenge as an execution on behalf of the laws of the city.<sup>18</sup> Although this excessive kind of revenge was almost certainly obsolete and frowned upon at the end of the fifth century, it might still have been legal because it was in accordance with Athenian laws.<sup>19</sup> Euphiletus could have acted otherwise,<sup>20</sup> but by flaunting his physical prowess in front of friends he might have intended to regain some of his social standing that he had lost as a husband who had been cheated by his wife. To what extent Euphiletus tried to construct himself as a tyrannicide by killing Eratosthenes, who might have been a very well-known aristocrat, remains a matter of interpretation.<sup>21</sup>

Very clearly, the killing of the oligarch Phrynichus in broad daylight by the metics Thrasybulus of Calydon and Apollodorus of Megara (Lysias, Lycurgus), if we want to follow Thucydides' version,<sup>22</sup> is constructed as a tyrannicide modeled after the killing of Hipparchus by Harmodius and Aristogeiton. Political assassinations followed cultural, constitutional, and semantic rules revolving around visibility. I distinguish two categories, each of them conveying a specific symbolic message: in the democratic hoplite polis, male citizens wanted to assess everything, including homicide. The murder of another citizen could only be acknowledged as a tyrannicide if the assassin approached his victim in public and had the courage to kill him in front of discerning onlookers. The public display of the deed helped the citizens to define its legitimacy and determine whether or not it constituted tyrannicide. In monarchies and established tyrannies, however, the rulers were protected by bodyguards. The *dēmos* was in no position to adjudicate the legitimacy of their monarch's rule. Power-mongers at court and family members killed these rulers behind closed doors. These dynastic murders did not need the people to condone them. The assassins did not even try to present these killings as tyrannicides.<sup>23</sup>

Let us have a look at the other side of the coin: is it true that hidden violence versus an Athenian citizen was normally regarded as unacceptable? Again, the

<sup>18</sup> Lys. 1.4; 23–24; 26–27; 29; 34; 41–42; 47; 50.

<sup>19</sup> The *nomos tōn kakourgōn* (Lys. 1.28), the lawful homicide statute (Lys. 1.30), and the *dikē biaiōn* (Lys. 1.31); cf. Todd 2007, *ad loc.* with detailed discussion of older literature on whether or not the first law could also be the one on *moicheia* and the third one a *dikē blabēs*. Cf. Omitowoju 2002, 98–105.

<sup>20</sup> He deliberately refused to accept Eratosthenes' money in compensation (Lys. 1.29).

<sup>21</sup> Cf. Riess 2012, 76, n. 242, based on Perotti 1989/90, 47–48.

<sup>22</sup> Th. 8.90–92; Lys. 13.70–76 (unspecific as to time); Lycurg. 1.112–115. Cf. Lys. 7.4; 20.11–12; 25.9; Plu. *Alc.* 25; HGIÜ I 140. According to Lycurgus, the assassination happened at night, near the well close to the willows. This completely different setting decisively alters the meaning of this coup.

<sup>23</sup> Cf. Riess 2006, 85–86.

evidence is overwhelming and corroborates the thesis presented so far. Take, for example, the case of Teisis, who detained Archippus in his house and had him whipped by his slaves a whole night long.<sup>24</sup> Under Athenian law, an Athenian citizen could not be detained; furthermore, it was a terrible offense to subject him to the horror of whipping. In this case, the fact that slaves whipped an Athenian citizen not only turned the world upside down but also severely breached Athenian social codes. When Archippus was finally carried out of the house on a litter and displayed to onlookers at the samples market, a highly performative act, the bystanders were utterly shocked. Even Teisis' friend Antimachus was horrified when he heard what was going on inside the house and demanded the immediate release of Archippus.<sup>25</sup>

Apolodorus relates in court that his long-term enemy Nicostratus tried to kill him outside the city, at night, by trying to push him into a quarry. The jurors were so appalled that they were on the verge of sentencing Nicostratus to death.<sup>26</sup>

In Antiphon 1, a son prosecutes his stepmother for having poisoned his father many years ago. We only hear his side of the story, but the fact that the woman killed her husband by giving him a potion to drink is especially heinous. As a rhetorical strategy, the speaker appeals to mythological exempla by evoking the insidious Clytemnestra's murder of Agamemnon upon his glorious return from Troy.<sup>27</sup> The message is clear: it is shameful for a man to die not in an open fight where he can look his enemy in the eyes, but by the scheming hands of a malicious and cowardly woman.

Antiphon 2.1 is one of Antiphon's fictional tetralogies, but these cases, probably rhetorical exercises, are telling because they had to be plausible. A rich man was killed in the street at night together with his slave, a heinous crime because he could not defend himself. His opponent was a coward, had lost in court several times, and was up for another trial, which he presumably would have lost. Because he wanted to prevent this looming court case, but most of all because he knew no other way out, he resorted to murder, committed away from the public gaze because he had no arguments to justify his shameful deed.<sup>28</sup>

But it was not just violence that was charged with meaning through the presence or absence of a public. The notorious lack of concise definitions of what factors constituted an offense appears in a somewhat different light, if we take into consideration that the meaning and significance of misbehavior were also discussed and interpreted in public, most of all in cases in which the misconduct was on display, open to the gaze of all. The notion of *hubris* shall suffice as an example. The important *concept of hubris* is not comprehensible without considering its performative aspect. A certain behavior can best be assessed as *hubris* by others if

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<sup>24</sup> Lys. fr. CXXIX 279 (numbered according to Carey 2007).

<sup>25</sup> Lys. fr. CXXIX 279.4–6.

<sup>26</sup> Ps.-D. 53.17–18.

<sup>27</sup> Antiphon 1.17.

<sup>28</sup> Antiphon 2.1.6–7.

and when it is displayed and performed. The very visibility of hubristic behavior is also, among others, a defining factor for *hubris*. Research has focused for a long time on the question of whether or not hubristic behavior always required a direct object, a victim who was humiliated by the *hubristēs*. Fisher's definition, which states that *hubris* is "the committing of acts of intentional insult, of acts which deliberately inflict shame and dishonor on others," has become classic.<sup>29</sup> Other scholars disagree, and argue that excessive self-assertion alone figured as *hubris*—that is, there was no need for a victim who could be affected by this kind of "thinking big."<sup>30</sup> As important as these points are, they neglect an even more important factor: Athenians could do without a precise definition of *hubris* because they saw and experienced *hubris* whenever it occurred. And in the lawcourts they verified whether or not what they had seen corresponded to their cultural preconceptions of what *hubris* was all about. This means that in order for a behavior to be assessed as *hubris*, it normally had to be performed in public. The sources imply this performative aspect of *hubris*, with and without a victim affected:

*It was not the blow that aroused his anger, but the humiliation. Being beaten is not what is terrible for free men (although it is terrible), but being beaten with the intent to insult. A man who strikes may do many things, men of Athens, but the victim may not be able to describe to someone else even one of these things: the way he stands, the way he looks, his tone of voice, when he strikes to insult, when he acts like an enemy, when he punches, when he strikes him in the face. When men are not used to being insulted, this is what stirs them up, this is what drives them to distraction. No one, men of Athens, could by reporting these actions convey to his audience the terrible effect of outrage in the exact way that it really and truly appears to the victim and those who witness it. (D. 21.72, transl. by E. Harris)<sup>31</sup>*

*Will you be the only person in the world who has the greatest reputation for being stuffed with so much arrogance toward everyone that even those who have nothing to do with you get irritated when they see your pushiness, your shouting, the way you strut around with your entourage, your wealth, and your abuse—and then find yourself pitied the minute that you are on trial? (D. 21.195, transl. by E. Harris)<sup>32</sup>*

<sup>29</sup> Fisher 1992, 148; similarly, Fisher 1992, 1; 25; 56; 493, etc. Gagarin 1979, 230 and Cantarella 1983 follow Fisher.

<sup>30</sup> Hooker 1975; Michellini 1978; Dickie 1984; MacDowell 1990, 18–23; Cairns 1996, 1.

<sup>31</sup> D. 21.72: οὐ γὰρ ἡ πληγὴ παρέστησε τὴν ὀργήν, ἀλλ' ἡ ἀτιμία. οὐδὲ τὸ τύπεσθαι τοῖς ἐλευθέροις ἐστὶ δεινόν, καίπερ ὄν δεινόν, ἀλλὰ τὸ ἐφ' ὑβρεῖ. πολλὰ γὰρ ἂν ποιήσειεν ὁ τύπτων, ὃ ἄνδρες Ἀθηναῖοι, ὧν ὁ παθὼν ἐνὶ οὐδ' ἂν ἀπαγγεῖλαι δύναιθ' ἐτέρῳ, τῷ σῆματι, τῷ βλέμματι, τῇ φωνῇ, ὅταν ὡς ὑβρίζων, ὅταν ὡς ἐχθρὸς ὑπάρχων, ὅταν κονδύλοις, ὅταν ἐπὶ κόρρησ. ταῦτα κινεῖ, ταῦτ' ἐξίστησιν ἀνθρώπους αὐτῶν, ἀήθεις ὄντας τοῦ προηλακίσεσθαι. οὐδεὶς ἂν, ὃ ἄνδρες Ἀθηναῖοι, ταῦτ' ἀπαγγέλλων δύναιτο τὸ δεινὸν παραστήσαι τοῖς ἀκούουσιν οὕτως, ὡς ἐπὶ τῆς ἀληθείας καὶ τοῦ πράγματος τῷ πάσχοντι καὶ τοῖς ὁρῶσιν ἐναργῆς ἡ ὑβρις φαίνεται (emphasis added).

<sup>32</sup> D. 21.195: σὺ μόνος τῶν ὄντων ἀνθρώπων ἐπὶ μὲν τοῦ βίου τοσαύτης ὑπερηφανίας πλήρης ὢν [πάντων ἀνθρώπων] ἔσει φανερώτατος, ὥστε καὶ πρὸς οὓς μηδὲν ἐστὶ σοῦ

Although these passages do not explicitly mention an audience, they might imply onlookers. D. 21.195 mentions people *seeing* Meidias' pushiness. In these passages, we may assume that the *hubristēs* might have displayed his self-indulgent state of mind. An impertinent look or gesture could be symbolically charged with the notion of *hubris*, because it may have been performed in front of an audience, however small.

But the public and performative aspect of misconduct refers not only to its actual perpetration, but also to its ensuing *negotiation* and *judgment* in court. From the archaic days on, the judgment of offenses was considered a public affair. Most famous, perhaps, among archaic sources is the description of a trial scene on Achilles' shield, as presented in Homer's *Iliad*.<sup>33</sup> In this scene, it is a group of elders, referred to as "knowers" (*histores*), who judge the case. They are more or less dependent on a crowd, which voices its opinion loudly. It would be rash to say that the *histores* are the precursors of the later Attic magistrates who presided over the various lawcourts, and that the onlookers are the precedents of the Attic jurors, but it seems obvious that at least some communities somewhere in the archaic Greek world discussed and judged disputes in front of a public interested in fair trials and successful conflict resolution.<sup>34</sup>

If we move forward in history to the Athenian court system, we see that the public aspect was at the heart of all stages of the legal process. For the trial itself, this is self-evident. The courts were located in or near the Agora.<sup>35</sup> The only exceptions were the homicide courts: the Prytaneion aside, the Areopagos, the Palladion, the Delphinion, and the court at Phreatto were located outside the Agora proper, in all probability in order to avoid pollution. If we want to follow Stroud's thesis, Draco's and Solon's wooden *axones* originally stood on the Acropolis, the religious center of the city, probably within a building because of their perishable material. We do not know when these foundational texts were inscribed on bronze *kurbeis*, stele-like monuments. If this measure was taken around 480 BCE, as Stroud proposes,<sup>36</sup> it might have been related to the implementation of an increasingly democratic political system. It took a small step for Ephialtes to bring the revered monuments down into the Agora, the civic heart of the city, around 461 BCE. The

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πράγμα, λυπεῖσθαι τὴν σὴν θρασύτητα καὶ φωνὴν καὶ [τὸ] σῆμα καὶ τοὺς σοὺς ἀκολούθους καὶ πλούτον καὶ ὕβριν θεωροῦντας, ἐν δὲ τῷ κρίνεσθαι παραχρῆμ' ἐλεηθήσει; (emphasis added).

<sup>33</sup> Hom. *Il.* 18.497–508.

<sup>34</sup> MacDowell 1978, 18–23. According to Cantarella 2005, 346, we see here "une procedure dont l'origine va conduire à la nécessité du pouvoir public de soumettre à son contrôle la violence privée."

<sup>35</sup> Thompson–Wycherley 1972, 52–72, esp. 52; Boegehold 1995, 10–16, and figures 1–10; Knell 2000, 96–105. Lanni 1997, 185, emphasizes, based on older literature, that around 340 the different courts were centralized in one building in the Agora, in front of the later Stoa of Attalus.

<sup>36</sup> Stroud 1979, 43.



wooden *axones* were kept, for better protection, within the Prytaneion, and the *kurbeis* might have been put up near the Royal Stoa, open for all to see. When the *anagrapheis* undertook the great project of revising the laws of Athens at the end of the fifth century, they inscribed the laws onto “walls” at the Royal Stoa. It was the common understanding of democratic-minded Athenian citizens that the laws should be on public display.<sup>37</sup> And we know that Aristotle could read the old *kurbeis* which were still on display in front of the Royal Stoa.<sup>38</sup> While it is certainly true that Athenians kept more and more written records in the Metroon, the state archive, they still inscribed important laws and decrees as well as treaties in stone and put up these inscriptions either in the Agora or on the Acropolis, clearly with the intent to preserve these decisions by the People for all times and make them accessible to the entire citizenry.<sup>39</sup> And although recording decrees in stone might well have been the exception, owing to the expense and the labor involved, the pieces of major relevance were easily accessible. What is more, Athenians obviously had easy access to the texts kept in the Metroon; at least we never hear that there were any difficulties retrieving texts from that archive.<sup>40</sup>

Oratory emerged in and through the necessity to plead successfully in the courts and in the Assembly of the People.<sup>41</sup> If the trial had not been public, there would have been no need to excel in public speaking. We do not hear of anything comparable to the sophistication of Attic forensic oratory in ancient Near Eastern cultures, for example. But the litigants and their supporting speakers not only spoke to the jurors and presiding magistrates, but also to many people watching and listening on the side. There were bystanders, and we do not hear of any restrictions

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<sup>37</sup> Gagarin 2008 *passim* convincingly shows that, from the early days on, writing was used to make the laws available to a broad public, but that litigation itself preserved its predominantly oral character. More focused on the emergence of institutions alongside the genesis of the law is Hölkeskamp 1999. Most recently, Hawke 2011 has questioned the *communis opinio* that the writing of laws ensured fairness and guaranteed the lower social classes access to the law. According to him (190–197), the elite members of society initiated the legislation process as a means of conflict resolution among themselves. Once writing calcified the Homeric epics, thus making them obsolete and unsuitable as normative codes of social behavior, the upper echelons strove to clarify and draft new rules for their social interactions, i.e., their fierce competition for prestige and power. And since literacy was in the hands of a small expert elite at first, it was they who profited most from the new medium. It was only in a second step that the people in general learned to understand the significance of written laws as the “guarantor of the power of the *demos*” (197).

<sup>38</sup> Arist. *Ath. Pol.* 7.1.

<sup>39</sup> Gagarin 1986 *passim* describes the public enactment of laws in impressive terms, e.g. 144: “Thus from its beginning Greek law exemplifies the fundamentally public character of Greek culture, of which Athenian democracy was just the most extreme manifestation.”

<sup>40</sup> Sickinger 1999, 194–195.

<sup>41</sup> Cf. the contributions by Gagarin, Bons, Cooper, and Worthington to Worthington 2010.

for their participation. Possibly foreigners, metics, women, children, and even slaves might have been present. We cannot gauge the extent to which they influenced the outcome of a trial, but from what we know they were not a silent crowd, but hissed, booed, laughed, and shouted, and thus clearly expressed their opinions on the case in question.<sup>42</sup> We cannot go into detail concerning ritual theory, but it is obvious that court proceedings then and now bear many characteristic traits of civic rituals, a fact that recent research has brought out clearly.<sup>43</sup> And rituals only work when there is a public in attendance.

Even before an actual trial took place, the procedure of choosing the judges to staff the various lawcourts had to happen in the open and was thus subject to public scrutiny. From the fifth century on, Athenians constantly reformed and refined the system.<sup>44</sup> They must have been obsessed by the specter of someone's tampering with the integrity of the selection process, mainly by bribery. This constant mistrust of one another led to the selection process being held in plain view of all interested citizens. At some time around 410 the Athenians designed a complicated allotment machine (*klērōtērion*) that assigned the individual judges to the lawcourts on a particular day at random. Two fragments of such *klērōtēria* have been found in the Agora. Aristotle describes the procedure at length and modern scholars have tried their best to explain it to their readers, and have thereby run into inconsistencies and considerable vagueness.<sup>45</sup> We do not have to go into all the intricacies of this

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<sup>42</sup> At least nineteen speeches mention spectators or address them directly (Lanni 1997, 184). Thus, the onlookers became informal witnesses of the trial. Their lively reactions may have put pressure on the jurors in some way or other. Since the jurors were not subject to rendering account, the bystanders served as an informal *euthunai* (Lanni 1997, 188–189). In my opinion, we can even go one step further: without onlookers no proper courtroom ritual was possible. It was the bystanders only that enabled this courtroom ritual to actually take place. The allotment procedure framed the solemn ceremony of rendering justice. Cf. the next footnote. In theory, a trial could unfold without an audience, but this must have been highly unusual. Normally, at least some relatives and close friends, the social entourage of a litigant, were present to lend support to their speaker. If a trial was deliberately organized *in camera* without a very good reason, it was deemed invalid and illegitimate by the Athenians. The death sentences the Thirty issued in the Boulē were considered judicial murders, and not just because the Thirty had democrats executed, but also because to the Athenians, non-public trials were a *contradictio in adiecto*.

<sup>43</sup> In his multi-volume work *Rationale of Judicial Evidence: Specially Applied to English Practice*, J. Bentham was one of the first to term the courtroom a “theatre of justice.” many should follow, e.g., Humphreys 1988, 482; Ober–Strauss 1990, 238; 270; Wilson 1991/92; Hall 1995 *passim*; Slater 1995, 144–147; Lanni 1997, 183; Bers 2000; Cohen 2005, 22; Hall 2006, 14; 353–390; Harris–Leão–Rhodes 2010; Riess 2012, 22–32, based on Victor Turner’s theory of the social drama.

<sup>44</sup> Boegehold 1995, 21–42, vividly describes three court days in different epochs.

<sup>45</sup> Arist. *Ath. Pol.* 63.4–66.3; 63.2 mentions twenty lot machines, two for every tribe. Cf. Thompson–Wycherley 1972, 53–55; Boegehold 1995, 32–34; 58; 230–231; plate 6; Knell 2000, 97–98.

procedure; instead I would like to emphasize the inordinate amount of time that up to 6,000 adult men devoted every morning to the highly complicated public selection of jurors, a process that Athenians insisted had to be conducted in the fairest possible way in order to prevent even the suspicion of bribery. These citizens gathered at dawn to “play” for maybe up to an hour with the lot machine before they knew on which jury they would serve on that particular day.<sup>46</sup>

But even before the start of the trial and the jury selection process, the public was involved to some degree. The choice of procedure, too, happened in a semi-public so that many people already knew what was coming up in court and by which procedure a particular case was framed and tried. To file charges against an offender, the plaintiff had to address an archon in his office. As the initiator of the lawcourt proceedings, the plaintiff will have made sure to disseminate what had been spoken in the archon’s office. He had to gather evidence and muster witnesses, he talked to friends and family so that the law-court proceedings appear to be the final stage of a long-term attack strategy. When the magistrate was confronted with a case, he listened to the complaints and verified whether the procedure suggested was appropriate to the case in question and whether he or another official was the right person to initiate lawcourt proceedings. This means that the magistrate held preliminary hearings, *anakriseis*, or, in the case of homicide, three *prodikasiai* in three consecutive months, where the circumstances of the crime, as well as the procedure, were discussed and the magistrate was chosen by the plaintiff. The applicability of the procedure chosen was crucial, for Athenian procedural law was highly complicated. For many offenses, a variety of procedures was at the plaintiff’s disposal. To give just one example: in order to seek redress in a case of *moicheia*, illegitimate sex, a *kurios* had many options. He could request ransom money from the *moichos*, subject him to the painful and humiliating radish-and-ash treatment (*rhaphanidōsis*),<sup>47</sup> lead him away to the Eleven by *apagōgē* or *endeixis*, or launch either a *graphē moicheias* or a *graphē hubreōs*. An *eisangelia* or the private suit of a *dikē biaion* (in case of rape) could also be brought against a *moichos*.<sup>48</sup>

Every procedure had its pros and cons. With the public suit of a *graphē*, one could aim for a more severe penalty (preferred in political trials). But bringing a *graphē* also entailed a certain degree of risk: if one failed to win one-fifth of the votes, one had to pay a fine of a thousand drachmas. So, in many instances, bringing a *dikē* might have been safer and preferable, because there was less risk involved and the outcome was more lucrative. The penalty the defendant had to pay went to the victorious plaintiff! So, it was social expedience, above all, that influenced a plaintiff’s decision on which procedure to take. In other words, the more social and

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<sup>46</sup> Huizinga <sup>4</sup>1964, 76–88, famously emphasizes the ritualistic “play” elements inherent in pre-modern court proceedings. His observations apply to Athenian court practice particularly well.

<sup>47</sup> On the humiliation of the adulterer, cf. Kapparis 1996.

<sup>48</sup> Riess 2012, 53, n. 145.

economic capital or the more power the prosecutor held, the more risky procedure he could choose.<sup>49</sup> And the speakers are frank about it: Ariston opens his speech by saying that he should have brought a public suit against Conon and his sons, but that, advised by his friends and given his young age, he preferred to bring a *dikē* only:

*But when I unexpectedly recovered and was out of danger, I initiated this private case for battery (dikē aikeias) against him. All the friends and relatives whom I asked for advice were saying that for his deeds Conon was liable to summary arrest (apagōgē) as a cloak stealer, and to public suits for hybris (graphai hubreōs). But they advised me and urged me not to involve myself in greater troubles than I could handle; and also, not to be seen to complain more than a young man should about what was done to me. I have acted accordingly and, because of those advisors, have instituted a private case, but I would, with the greatest pleasure, men of Athens, have put him on trial on a capital charge. (transl. by Bers)<sup>50</sup>*

The speaker in *Against Androtion* is also candid about the social capital and expediency involved in the choice of procedure:

*You are strong and confident in your own ability: arrest him and risk a fine of 1,000 drachmas. You are weaker: lead the magistrates to him, and they will do it. You are also afraid of this: bring a public charge. You do not feel confident, and since you are poor, you would not be able to pay the fine of 1,000 drachmas; bring a private action before the arbitrator, and you will run no risk. (transl. by E. Harris)<sup>51</sup>*

Thus, self-confidence on the part of the plaintiff played a decisive role in the procedure chosen. According to Todd, the choice of procedure was all about social rank, prestige, and power, because the whole purpose of Athenian litigation was to “reassess the relative social position of the two litigants,”<sup>52</sup> so that the choice of procedure was a statement about both the defendant and the prosecutor. Todd explains: “It is for this reason that Athenian law granted to the would-be prosecutor a wide range of procedures for use in a given case; and also that the latter’s choice of

<sup>49</sup> Todd 1993, 284: “the choice of procedure was determined less by substantive considerations than by the relative circumstances of the two litigants.” Cf. also *ibid.* 160–163; 271; and Osborne 1985 *passim*.

<sup>50</sup> D. 54.1: ... ὑγιάνας καὶ σωθεῖς ἀπροσδοκῆτως ἔλαχον αὐτῶ τὴν δίκην τῆς αἰκείας ταυτηνί. πάντων δὲ τῶν φίλων καὶ τῶν οἰκείων, οἷς συνεβουλευόμην, ἔνοχον μὲν φασκόντων αὐτὸν ἐκ τῶν πεπραγμένων εἶναι καὶ τῇ τῶν λαποδυτῶν ἀπαγωγῇ καὶ ταῖς τῆς ὕβρεως γραφαῖς, συμβουλευόντων δέ μοι καὶ παραινούντων μὴ μείζω πράγματ’ ἢ δυνησομαι φέρειν ἐπάγεσθαι, μηδ’ ὑπὲρ τὴν ἡλικίαν περὶ ὧν ἐπεπόνθειν ἐγκαλοῦντα φαίνεσθαι, οὕτως ἐποίησα καὶ δι’ ἐκείνους ἰδίαν ἔλαχον δίκην, ἥδιστ’ ἂν, ὃ ἄνδρες Ἀθηναῖοι, θανάτου κρίνας τουτονί.

<sup>51</sup> D. 22.26–27: ἔρωσαι καὶ σαυτῶ πιστεύεις: ἄπαγε: ἐν χιλίαις δ’ ὁ κίνδυνος. ἀσθενέστερος εἶ: τοῖς ἄρχουσιν ἐφηγοῦ: τοῦτο ποιήσουσιν ἐκείνοι. φοβεῖ καὶ τοῦτο: γράφου. καταμέμφει σεαυτὸν καὶ πένης ὧν οὐκ ἂν ἔχοις χιλίας ἐκτεῖσαι: δικάζου κλοπῆς πρὸς διαιτητὴν καὶ οὐ κινδυνεύσεις. Cf. also Isoc. 20.2.

<sup>52</sup> Todd 1993, 161.

procedure (inevitably in some sense a political choice) determined both the penalty faced by the defendant and the risk faced by the prosecutor."<sup>53</sup> But this is not all. In the absence of any clearly defined facts that constituted an offense, the prosecutor partly shaped the meaning of an offense through his choice of procedure. It served as a point of orientation for all those who had to deal with the case in the subsequent weeks and months. So, while it is true that mainly reasons of social expediency stood in the foreground in choosing an appropriate procedure, the selection process was also guided by the personal assessment of a misbehavior, of which the jury should be convinced. The circumstances of a case all converged and crystallized in the choice of procedure. By opting for one, the plaintiff sent a polyvalent message to a diverse audience, the message being his subjective framing of the case, which was all-important in want of precise definitions of crimes and other misdeeds. Although Athenian procedural variety has been the object of frequent study and many explanations have been advanced,<sup>54</sup> one obvious reason, it seems, has been neglected so far: from a more general perspective, we could say that the Athenians' concentration on procedural law served to counterbalance the weakness or, let us rather say, the underdevelopment of Athenian substantive law. By allowing the prosecutor to choose from a variety of options, this system enabled him to shape the case according to his assessment and intentions.<sup>55</sup>

The final phase of this complex decision-making process, its presentation to the magistrate and the involvement of family, friends, witnesses, and, ultimately, the opponent and his entourage, enabled the assessment of the crime on the part of an interested public. The choice of procedure already sent important messages to the presiding magistrate, the jurors, the broader public, and, most of all, to the opponent in court. In other words, the choice of procedure was a form of symbolic communication, an aspect that has not been treated in sufficient detail in research. It

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<sup>53</sup> *Ibid.* 162–163.

<sup>54</sup> Osborne 1985, 43–44, by speaking of the “open texture of Athenian law,” emphasizes the aspect of procedural flexibility, now taken up by Carey 2004, esp. 112, with 132, n. 2, whereas Harris 2000, 30, n. 8, means by this term the flexible application of generally acknowledged substantive law. In the context above I refer to Osborne’s usage of the term.

<sup>55</sup> Riess 2008, 92: “Speaking of Athenian procedural flexibility in general, we should begin seeing the various procedures in relation to each other. Behind the choice of procedure lay important decision-making processes that not only influenced the initiation and unfolding of the trial, but also conveyed symbolic messages to the audience concerning the self-image of the prosecuting party. The choice of procedure itself, including the preceding decision-making process, framed a positive self-image and was already the first step in the denigration of the opponent’s character. Choosing one procedure out of many was not only a question of legal expediency and social propriety, but also an integral part of the performative actions taken against a criminal. Athenian law was far from being user-friendly, but through its immense procedural flexibility it enabled prosecutor and defendant to craft images of self and other with suggestive force and thus to express opinions and biases that go far beyond legal technicalities.”

was, in itself, already part of the juridical spectacle, part of the Social Drama about to unfold, not merely an intrinsic part of the attack strategy chosen by the plaintiff. We should try to close this gap in research by a close reading of those forensic speeches for which we know the procedure chosen. In these cases we should wonder why a particular procedure was chosen and what kind of intentions on the part of the plaintiff might have underlain the decision-making process, a large-scale undertaking, indeed.

One example shall suffice in this context. It is transmitted within Demosthenes' famous speech against Meidias.<sup>56</sup> Although Nicodemus of Aphidna was not killed in public in 348 BCE, the spectacular mutilation of his corpse, which reminds one of a *maschalismos* (Nicodemus was found with his eyes put out and his tongue cut off) suggests a political motive. Contemporaries suspected that Demosthenes was involved in the affair. Nicodemus was a friend of Meidias'. Meidias, however, was an archenemy of Demosthenes. Nicodemus had slandered Demosthenes and intended to prosecute him for desertion. Shortly before filing suit, Nicodemus was killed. Meidias and the victim's family suspected that Demosthenes had commissioned the murder for political reasons. Aristarchus, a young friend of Demosthenes', was suspected to be the murderer.<sup>57</sup> Interestingly enough, this is the only case, as far as I know, which was tried in two different procedures and for which we have evidence, a particularity which is nowhere treated in detail in the secondary literature. By probing into this case we might come to a better understanding of how and why an Athenian plaintiff might prefer a certain procedure over another, and what kind of strategies he might pursue. It would have been the moral obligation of the victim's family to initiate a *dikē phonou* before the Areopagos. This was the normal procedure, expected by everyone. But Meidias pressed ahead, certainly in agreement with Nicodemus' family. He filed an *ephēgēsis*, followed by an *apagōgē*, and thus brought the case before the Boulē.<sup>58</sup> The *ephēgēsis* was a public procedure, a type of *graphē* that could be brought by anyone, by *ho boulomenos*. Facing this aggravated procedure, the defendant would have been barred from going into exile. He would have had to wait for the proclamation of the sentence and, if found guilty, he would be executed on the spot.<sup>59</sup> This procedure is rarely attested and shows that Meidias, who was actually not involved in the case, intended to send a strong signal to a public interested in politics. He wanted to make it abundantly clear that this was a political murder

<sup>56</sup> D. 21.104–122 and scholia 21.102; 104; 116; 205.

<sup>57</sup> Aeschin. 1.171–172; 2.148; 166 with scholia; Din. 1.30–31; 47; Rhet. Gr. (Walz) VIII 48 (Sopath. Rh.); Idomeneus *FGrHist* 338 F 12; Arist. *Rhet.* 2.23 (1397 b 7–8).

<sup>58</sup> Hansen 1976, 135–136, nr. 23; Riess 2008, 84–86, nr. 14.

<sup>59</sup> Cf. the classic study on the *apagōgē* procedure by Hansen 1976; with special reference to its application in homicide cases, cf. Evjen 1970 and Volonaki 2000. According to Volonaki 2000, 170–173, the *apagōgē phonou* as a procedure distinct from the *apagōgē kakourgōn* may have been introduced either after 404 or 410–404. It allowed the plaintiff to operate within the parameters of the Amnesty.

which affected the whole community of Athenians, not just the victim's family. By having the suspect physically dragged off to the magistrates, Meidias would have ensured a high level of publicity.<sup>60</sup> But his theatrical attempt failed in the Boulē, after which the victim's relatives filed a *dikē phonou*. Aristarchus went into exile, which his opponents must have taken as a tacit admission of guilt. Demosthenes' opponents took the case very seriously and time and again tried to involve the highly politically active orator in it. The reasoned suspicion that he might have been responsible for the murder would have turned Demosthenes into an *atimos*, someone who was deprived of most of his citizen's rights. Thus, he would have been excluded from public speaking, a severe restriction for Demosthenes, who pursued his politics mainly via public speeches. And while Nicodemus' friends saw his killing as politically motivated, the hit man acted expressively and full of hatred. The signal character of the mutilation is in need of explanation. Why was a less drastic removal of Nicodemus not enough for his killer(s)? Private hatred cannot, of course, be excluded, but the fact that Demosthenes' opponents tried to involve him in the affair again and again should make us think. It suggests that at least some political motives underlay the crime.

The legal process was concluded by finding the defendant innocent or guilty. A verdict of guilt entailed various kinds of punishment, ranging from monetary fines to execution. According to procedure the penalty was either fixed by statute (*atimētos*) or the jurors had to vote on it, following either the prosecutor's recommendation or the culprit's suggestion (*timētos*). It is striking that the *execution of* some well-known *penalties* often happened in full view of the people so that the public could guarantee the proper conclusion of the legal process. The names of state debtors, for example, were inscribed in stone so as to expose them to public shame.<sup>61</sup> Sarah Forsdyke and Winfried Schmitz have shown in their works that methods of popular justice such as charivari, standing at the pillar, or subjecting a *moichos* to the radish-and-ash treatment (inserting a large radish into the seducer's anus and burning his pubic hair with hot ashes) oscillated between private vengeance and sentences meted out by the state.<sup>62</sup> These shaming measures (*Schandstrafen*) were, at least, condoned by the state and more or less integrated into the penal system of many cities. According to Forsdyke, formal and informal ways of social control and punishment were inextricably intertwined, with no recognizable linear development from

<sup>60</sup> Gernet 1981, 262–263, briefly mentions the public aspect of the *apagōgē* procedure. On the symbolic meaning of known *apagōgē* cases in Athens, cf. Riess 2008, 62–71; 91–92; 91: “The *apagōgē* procedure with its summary arrest preserved the old notion of self-help even more clearly than the *dikē phonou*.”

<sup>61</sup> Cf. MacDowell 1978, 164–167; Todd 1993, 118; 143–144; 283; 301.

<sup>62</sup> See Forsdyke 2008 *passim*, who calls this and other forms of popular justice “street theater” owing to their public aspects and their frequent embeddedness into festive contexts; Schmitz 2004, 277–280 (charivari); 309 (development from popular justice [Rügebrauch] to private vengeance that was more and more perceived as a problem); 402–406 (historical development from shaming to punishment by state authorities).

informal to official, state-inflicted punishments. But it was of prime importance that these shaming punishments, whether formal or informal, be executed in public; otherwise, they would not have achieved the goal of shaming the perpetrators. Schmitz, who is willing to assume a chronological development from shaming practices to state-issued punishments, vividly describes how the Agora turned from a public space where culprits were humiliated to a political space where magistrates of the city exacted shaming punishments on offenders.<sup>63</sup> Even gathering legal evidence from slaves by torture had to occur in public, in front of the Hephaisteion in the Agora.<sup>64</sup> And before drinking hemlock became the standard capital punishment for respectable citizens at the end of the fifth century,<sup>65</sup> stoning,<sup>66</sup> throwing from a cliff (*barathron*),<sup>67</sup> and *apotumpanismos* (a form of bloodless crucifixion)<sup>68</sup> were conducted in plain view of the people,<sup>69</sup> although we cannot speak of a “theater of horror” as in Medieval or in Early Modern times.<sup>70</sup> Lysias 1 preserves an atavism for us, so to speak. Although Euphiletus could have applied the *apagōgē* procedure and ensured that the Eleven would execute Eratosthenes on the cross as a *kakourgos*, he took the law into his own hands and established a public for his private “execution” of the *moichos* in order to demonstrate to his friends his manliness and thus re-establish his reputation.<sup>71</sup>

*To conclude:* the Athenian system of law was fundamentally public. This publicity (or maybe publicality) underlines the democratic character of the Athenian legal system and ranges from the perpetration of crimes, to their ensuing definition and judgment in court, to parts of the penal system. Historically speaking, the hitherto unknown openness and theatrical character of illegal and legal social practices guaranteed the immediate accessibility of questions and negotiations of

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<sup>63</sup> Schmitz 2004, 406.

<sup>64</sup> Flaig 2006, 32–33, rightly observes that the citizens, by seeing slaves being tortured and hearing their cries, became acutely aware of the fundamental difference between slaves and free men.

<sup>65</sup> Barkan 1936, 73–78. Cantarella 1991, 106–116, points out that, pace Barkan 1936, 81–82 (see below), the other forms of capital punishment did not become obsolete. Drinking hemlock was a last concession to political opponents, who were still respected as citizens and were granted a death outside the public limelight, if they could afford the expensive poison.

<sup>66</sup> Barkan 1936, 41–53; Cantarella 1991, 73–87. Rosivach 1987 emphasizes that we only know of two cases of stoning in Athens, that of Lycides and his family and that of Alcibiades, cousin of the famous Alcibiades. In both cases, stoning was considered the appropriate capital punishment for treason. These instances shaped the perception of all ensuing authors, most of all the Attic orators.

<sup>67</sup> Barkan 1936, 54–62; Cantarella 1991, 91–105.

<sup>68</sup> Barkan 1936, 63–72; Cantarella 1991, 41–46.

<sup>69</sup> Barkan 1936, 81.

<sup>70</sup> Schmitz 2004, 406–407. The term was coined by Van Dülmen <sup>2</sup>1988.

<sup>71</sup> According to Euphiletus, he “only” executed the laws of the city: Lys. 1.4; 26–27 (cf. Todd 2007 *ad loc.*); 29; 33–34; 47; 50.



substantive and procedural law. Although Athenians took the public character of their legal system for granted, we should not do so, but should continue to investigate what this public character actually meant. It seems safe to say that publicity fulfilled vital functions for and within the fabric of the Athenian cosmos in general. It not only guaranteed fairness (from the point of view of contemporaries) by the presence of many citizens at crucial junctions of the legal process, but also allowed the transmission of symbolic messages to all parties involved, and thus facilitated the resolution of conflicts by legal means in a political system that was based on a very high level of participation, compared to the standards of modern representative democracies.

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