

DOUGLAS M. MACDOWELL (GLASGOW)

## THE ATHENIAN PENALTY OF *EPOBELIA*

The penalty imposed in public cases in Athens on a prosecutor who failed to win his case, obtaining fewer than one-fifth of the jury's votes, has been thoroughly discussed in recent years by two of our colleagues, Edward Harris and Robert Wallace.<sup>1</sup> But there has been little recent discussion of a penalty imposed on a failed prosecutor in private cases, *epobelia*. One aspect of *epobelia*, the date of its introduction, has been considered by David Whitehead,<sup>2</sup> but I have found no detailed treatment of the whole topic since the one in the second volume of Harrison's *The Law of Athens*.<sup>3</sup> This was the volume left incomplete when Harrison died in 1969. When it was published, the references in the footnotes were mostly supplied by myself, but the text remained as Harrison left it. His account of this topic has never seemed to me very satisfactory, and so in this paper I am trying to improve on it.

*Epobelia* means a payment of one obol per drachma, in other words one-sixth of a sum of money. It is obvious, therefore, that there can be *epobelia* only when a sum of money is under consideration. Thus in a case in which the matter in dispute or the penalty demanded was not monetary, for example the death penalty, there could not be *epobelia*, because one could not pay one-sixth of that penalty. *Epobelia* would seem most appropriate when the prosecutor was claiming a sum of money from the defendant: if the prosecution failed, he would have to pay the defendant one-sixth of the amount he had demanded, as compensation for the trouble he had caused him.

The earliest instance known is one mentioned in Isokrates' speech *Against Kallimakhos*. The date of this case is probably 401/0.<sup>4</sup>

Isok. 18.11-12. λαγχάνει μοι δίκην μυρίων δραχμῶν, προβαλλομένου δ' ἐμοῦ μάρτυρα ὡς οὐκ εἰσαγωγίμος ἦν ἡ δίκη διαίτης γεγεννημένης,

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<sup>1</sup> E.M. Harris, *Dike* 2 (1999) 123-42, reprinted with afterthoughts in his *Democracy and the Rule of Law in Classical Athens* (Cambridge, 2006) 405-22; R.W. Wallace, *Symposium 2003* (2006) 57-66, with a response by Harris on pp. 67-72.

<sup>2</sup> D. Whitehead, *Mus. Helv.* 59 (2002) 86-9.

<sup>3</sup> A.R.W. Harrison, *The Law of Athens* 2 (Oxford, 1971) 183-5. There is a summary of the subject in C. Carey and R.A. Reid, *Demosthenes: Selected Private Speeches* (Cambridge, 1985) 208-9. For earlier discussion see J.H. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig, 1905-15) 937-9.

<sup>4</sup> I have argued in favour of this date in *RIDA* 18 (1971) 267-73. Whitehead, *Mus. Helv.* 59 (2002) 71-84 argues for 403/2. The exact date is not important for my present purpose.

ἐκεῖνῳ μὲν οὐκ ἐπεξήλθεν, εἰδὼς ὅτι, εἰ μὴ μεταλάβοι τὸ πέμπτον μέρος τῶν ψήφων, τὴν ἐπωβελίαν ὀφλήσει, πείσας δὲ τὴν ἀρχὴν πάλιν τὴν αὐτὴν δίκην ἐγράψατο, ὡς ἐν τοῖς πρυτανείοις μόνον κινδυνεύσω. “He initiated against me a case for 10,000 drachmas. When I brought forward a witness to testify that the case was not admissible because an arbitration had taken place, he did not proceed against the witness, because he knew that, if he did not obtain one-fifth of the votes, he would incur the *epobelia*. After persuading the magistrate, he prosecuted the same case again, intending to risk only the *prytaneia*.”

This is an example of the old procedure of *diamartyria*. The speaker tried to bar Kallimakhos’ prosecution by bringing forward a witness to testify that it was not admissible because the dispute had already been settled by arbitration. Kallimakhos could have countered this by prosecuting the witness in a case for false witness (*dike pseudomartyrion*); but if he had done that and had obtained fewer than one-fifth of the jury’s votes, he would have had to pay the *epobelia*, one-sixth of 10,000 drachmas, amounting to 1,666 drachmas 4 obols. So instead he let that case lapse, and brought a new prosecution for 10,000 drachmas (probably in the following year), in which he would risk only the *prytaneia*, the court fee of 30 drachmas.<sup>5</sup> From this we see that *epobelia* was payable in a case of false witness, when a litigant was claiming a sum of money from a witness as compensation for loss of a case, but not when he was simply prosecuting an opponent to claim a sum of money.

The next instance arises from the case in which Kallimakhos is prosecuting the speaker to claim 10,000 drachmas for the second time. This is the case for which the extant speech *Against Kallimakhos* is written. Again the speaker wishes to block the prosecution, but this time he is using a different method. He begins his speech by explaining to the jury that this is the very first trial under a new procedure called *paragraphe*, recently established by a law proposed by Arkhinos in support of the oaths which were sworn by the Athenians to defend the reconciliation in the year 403.

Isok. 18.2-3. εἰπόντος Ἀρχίνου νόμον ἔθεσθε, ἂν τις δικάζεται παρὰ τοὺς ὄρκους, ἐξεῖναι τῷ φεύγοντι παραγράψασθαι, τοὺς δ’ ἄρχοντας περὶ τούτου πρῶτον εἰσάγειν, λέγειν δὲ πρότερον τὸν παραγράψαμενον, ὀπότερος δ’ ἂν ἡττηθῆ, τὴν ἐπωβελίαν ὀφείλειν, ἵν’ οἱ τολμῶντες μνησικακεῖν ... παραχρῆμα ζημιοῖντο. “On the proposal of Arkhinos you made a law that, if anyone brings a case contrary to the oaths, the defendant is to be permitted to bring a *paragraphe*, and the magistrates are to bring this into court first, and the man bringing the *paragraphe* is to speak first,

<sup>5</sup> The figure of 30 drachmas is given in Isok. 18.3.

and whoever loses is to owe the *epobelia*, so that those who dare to recall the troubles ... are to be punished immediately.”

As a method of barring a prosecution that was in some way illegal, the new procedure of *paragraphe* effectively replaced the old procedure of *diamartyria*,<sup>6</sup> but the penalty of *epobelia* was applicable in the new procedure too. The speaker says “whoever loses is to owe the *epobelia*”; so in this new procedure the penalty was to be paid not only by a prosecutor who failed to win his case but also by a losing defendant. Nothing is said here about one-fifth of the votes; the speaker seems to imply that *epobelia* had to be paid by the losing litigant in every *paragraphe* trial.

The speech *Against Kallimakhos* tells us nothing about the earlier history of *epobelia*, but it has been suggested that its origin can be deduced from a scholium on Aiskhines.

Schol. to Ais. 1.163 (329b Dilts). ἐπωβελία οὖν τὸ ἕκτον μέρος τοῦ τιμήματος, ὃ προσώφειλεν ὁ ἀλούς. ἐνομοθέτησε δὲ τοῦτο ὁ Ἀρχίνος ἐγγράψας τῷ νόμῳ τὰ μὲν πρυτανεῖα εἶναι τοῖς δικασταῖς παρὰ τοῦ ἀλόντος, ὃ ἐστὶν ἐπιδέκατον τοῦ τιμήματος, τὴν δὲ ἐπωβελίαν τῷ δημοσίῳ παρὰ τοῦ μὴ ἐλόντος. “*Epobelia* was one-sixth of the assessment, which the convicted man owed in addition. This legislation was due to Arkhinos, who wrote it in the law that the *prytaneia*, which is one-tenth of the assessment, goes to the jurors from the convicted man, and the *epobelia* goes to the public treasury from the man who has failed to convict.”

This scholium clearly contains some mistakes or confusions. The writer first says that *epobelia* was paid by ὁ ἀλούς, the convicted defendant, but at the end he says it was paid by τοῦ μὴ ἐλόντος, the failed prosecutor; perhaps he means that it was paid by whichever litigant lost the case, but if so he has hardly made that clear. He says that *prytaneia* were one-tenth of the assessment, but that is wrong; the speech *Against Kallimakhos* shows that the *prytaneia* were only 30 drachmas for a case concerning 10,000 drachmas.<sup>7</sup> So I would not place much trust in the other information given by this scholium. However, Whitehead has suggested that the reference to Arkhinos means that Arkhinos proposed the law which first introduced *epobelia*; since, as we have seen, *epobelia* existed before the institution of the procedure of *paragraphe*, that would mean that Arkhinos proposed two laws, one introducing *epobelia* and another, perhaps in the next year, introducing *paragraphe*.<sup>8</sup> This suggestion cannot be proved wrong, but I think that it is really too much to build on an unreliable scholium. It seems to me likely that Arkhinos’ law about

<sup>6</sup> An exception is a *diadikasia* with several claimants for an inheritance, for which *diamartyria* continued to be used.

<sup>7</sup> Isok. 18.3; cf. Dem. 47.64.

<sup>8</sup> Whitehead, *Mus. Helv.* 59 (2002) 86-9.

*paragraphe* included a provision that *epobelia* should be payable under that procedure, and that the scholiast may simply be referring to that when he says that Arkhinos “wrote it in the law”. So I prefer to say that we do not know when, before 401, *epobelia* was first introduced.

We can now pass on to the next reference to *epobelia*. This occurs in Demosthenes’ first speech *Against Aphobos*, of which the date is 364/3. Aphobos was one of the three guardians of the young Demosthenes, and when Demosthenes came of age they failed to hand over to him the money which he believed was due. He therefore prosecuted them, claiming 10 talents from each. This is not a *paragraphe* case; it is simply a claim for money.

Dem. 27.67. ἂν γὰρ ἀποφύγη μ’ οὗτος, ὃ μὴ γένοιτο, τὴν ἐπωβελίαν ὀφλήσω μνᾶς ἑκατόν. καὶ τούτῳ μὲν, ἐὰν καταψηφίσῃσθε, τιμητόν, κοῦκ ἐκ τῶν ἑαυτοῦ χρημάτων ἀλλ’ ἐκ τῶν ἐμῶν ποιήσεται τὴν ἔκτεισιν · ἐμοὶ δ’ ἀτίμητον τοῦτ’ ἔστιν, ὥστ’ οὐ μόνον ἔσομαι τῶν πατρώων ἀπεστερημένος, ἀλλὰ καὶ πρὸς ἠτιμωμένος, ἂν μὴ νῦν ἡμᾶς ὑμεῖς ἐλεήσητε. “If Aphobos gets off – as I hope he won’t – I shall have to pay *epobelia* of 100 minas. If you convict him, his penalty is to be assessed, and he’ll make the payment not from his own money but from mine; but that penalty for me is a fixed one, so that I shall not only lose my patrimony but be disfranchised as well, if you don’t take pity on me today.”

Demosthenes means that, if he loses the case, he will be required to pay Aphobos 100 minas because that is one-sixth of the 10 talents which he is claiming; but actually, if he fails to recover the 10 talents, he will be left with very little money and so will not be able to pay the 100 minas, and he will consequently suffer *atimia*, disfranchisement. This is an interesting point, overlooked by Harrison.<sup>9</sup> Elsewhere we hear of *atimia* imposed for failure to pay money owed to the state treasury. But *epobelia* was not paid to the state treasury but to the successful opponent. That is clear in the Aphobos case from a passage in Demosthenes’ second speech.

Dem. 28.18. ποῖ δ’ ἂν τραποίμεθα, εἴ τι ἄλλο ψηφίσαισθ’ ὑμεῖς περὶ αὐτῶν; εἰς τὰ ὑποκείμενα τοῖς δανείασσιν; ἀλλὰ τῶν ὑποθεμένων ἐστίν. ἀλλ’ εἰς τὰ περιόντ’ αὐτῶν; ἀλλὰ τούτου γίγνεται. τὴν ἐπωβελίαν ἐὰν ὀφλωμεν. “Where can I turn, if you vote for any other verdict [than conviction] on them? To the property given as security to my creditors? But that belongs to those creditors. To what is left over? But that goes to this man [Aphobos], if I incur the *epobelia*.”

<sup>9</sup> See, however, M.H. Hansen, *Atimistrafen i Athen i Klassisk Tid* (Odense, 1973) 120.

So we must accept that failure to pay *epobelia* to an opponent, like failure to pay a debt owed to the state treasury, led to *atimia*. The other point to notice in these texts is that there is no mention of failure to obtain one-fifth of the votes. Demosthenes implies that he will incur *epobelia* if he loses the case, by however narrow a margin.

These passages show that *epobelia* was payable in a case in which an orphan, on coming of age, claimed his inheritance from a guardian. Should we say that that is evidence for inheritance cases only, or may we conjecture that *epobelia* had now become payable in all claims for money? Harrison takes the former view, and tries to compile a list (a rather short list): he says “The fine is vouched for in the following suits ...”<sup>10</sup> It seems to me unlikely that orphans were one of only a few types of prosecutor made subject to this penalty, and more likely that it was now extended to all financial claims; but the question cannot be answered with certainty.

The next instance of *epobelia* is in the speech *Against Euergos and Mnesiboulos*, dated around 354. The speaker, who had been appointed to be a trierarch, had a protracted dispute with Theophemos about some naval gear which Theophemos was due to hand over, and at one point, when the trierarch tried to seize some property from Theophemos’ house as security, a fight broke out between them. Afterwards each accused the other of starting the fight, and each brought against the other a prosecution for battery (*dike aikeias*). The case in which Theophemos prosecuted the trierarch came to trial first, and Theophemos won it, so that the trierarch had to pay him compensation or damages.

Dem. 47.64. ἐκτίνοντος δέ μου τῷ Θεοφήμῳ, ᾧ ὠφλήκειν τὴν δίκην, ἐπειδὴ ἐξέτινον πολλῶν παρόντων μαρτύρων χιλίας μὲν καὶ ἑκατὸν δραχμὰς (τὴν καταδίκην, ὀγδοήκοντα δὲ καὶ ἑκατὸν δραχμὰς) καὶ τρεῖς καὶ δύο ὀβολῶ τὴν ἐπωβελίαν, τριάκοντα δὲ τὰ πρυτανεῖα (τῶν γὰρ ἄλλων οὐδὲν αὐτῷ ἐπιτιμίων ὄφλον), λαβὼν τοίνυν παρ’ ἐμοῦ ἐπὶ τῇ τραπεζῆι χιλίας τριακοσίας δέκα τρεῖς δύο ὀβολῶ τὸ σύμπαν κεφάλαιον ... “When I was paying Theophemos, to whom I had lost the case, as I was paying, in the presence of numerous witnesses, 1,100 drachmas <as damages, and 183 drachmas> 2 obols as the *epobelia*, and 30 as the *prytaneia* – for I incurred no other assessed payment to him – so after getting from me at the bank a total of 1,313 drachma 2 obols ...”

The words in angled brackets were supplied by Boeckh, and it seems that they must be correct, to make the arithmetic fit; a scribe must have omitted them by jumping from one instance of *δραχμὰς* to the next. So here we have a case in which the convicted defendant had to pay *epobelia* to the successful prosecutor. This case was not a claim for money owed; it was a prosecution for battery, and the *epobelia* was

<sup>10</sup> Harrison, *The Law of Athens* 2.183.

calculated as one-sixth of the sum awarded as damages. Presumably this sum was the penalty which had been proposed by the prosecutor.

In the first speech *Against Stephanos* we find Apollodoros referring to an earlier case in which he prosecuted Phormion, and Phormion barred the prosecution by bringing a *paragraphe*.

Dem. 45.6. προλαβὼν δέ μου ὥστε πρότερος λέγειν διὰ τὸ παραγραφὴν εἶναι καὶ μὴ εὐθυδικία εἰσέναι, καὶ ταῦτ' ἀναγνοὺς καὶ τᾶλλ' ὡς αὐτῷ συμφέρειν ἡγεῖτο ψευσάμενος, οὕτω διέθηκε τοὺς δικαστάς, ὥστε φωνὴν μηδ' ἠντινοῦν ἐθέλειν ἀκούειν ἡμῶν · προσοφλῶν δὲ τὴν ἐπωβελίαν καὶ οὐδὲ λόγου τυχεῖν ἀξιωθεῖς, ἀλλ' ὑβρισθεῖς ὡς οὐκ οἶδ' εἴ τις πώποτ' ἄλλος ἀνθρώπων, ἀπήειν βαρέως, ὃ ἄνδρες Ἀθηναῖοι, καὶ χαλεπῶς φέρων. "He was able to speak before me, because it was a *paragraphe* and he was not facing a straight trial, and by reading these [testimonies], and by the other lies which he considered were to his advantage, he so influenced the jurors that they refused to listen to a single word of ours. So I incurred the *epobelia* and wasn't even given a hearing. I don't know if any other person has ever been so insulted, men of Athens, and I went away indignant and upset."

That confirms that *epobelia* was paid by the loser in a *paragraphe* trial, and does not add anything more to the passages which we have already looked at.

Two further instances of *epobelia* in the fourth-century orations are both in mercantile cases. The mercantile laws establishing a special procedure for trials involving merchants importing and exporting goods to and from Athens were passed soon after 355, and the speech *Against Lakritos* is probably to be dated around 351. Androkles had lent 3,000 drachmas to a merchant named Artemon, who had since died, and so Androkles was claiming repayment from Artemon's brother Lakritos by the mercantile procedure, but Lakritos tried to bar the prosecution by a *paragraphe*.

Dem. 35.46. ἀλλὰ τί κελεύεις, ὦ Λάκριτε; μὴ ἰκανὸν εἶναι ἡμᾶς ἀποστειροῦσθαι ἃ ἐδανείσαμεν χρήματα ὑμῖν, ἀλλὰ καὶ εἰς τὸ δεσμοτήριον παραδοθῆναι ὑφ' ὑμῶν προσοφλόντας τὰ ἐπιτίμια, ἐὰν μὴ ἐκτίνωμεν; "What is it you're demanding, Lakritos? That it should not be sufficient to deprive us of the money we lent you, but that we should also be thrown into prison by you if we fail to pay the penalty which we incur in addition?"

Here τὰ ἐπιτίμια must refer to *epobelia*, and so once again we see that the loser in a *paragraphe* trial was liable to that penalty. But the new feature here is the reference to imprisonment if the *epobelia* is not paid. We find this again in the speech *Against Dionysodoros*. This is not a *paragraphe* case, but simply a claim for money owed.

The speaker and his partner are claiming repayment of a loan of 3,000 drachmas. Instead of paying up, Dionysodoros is resisting the claim in court.

Dem. 56.4. ἀλλὰ δεύτερον ἔτος τουτὶ καρπούμενος τὰ ἡμέτερα, καὶ ἔχων τὸ τε δάνειον καὶ τὴν ἐργασίαν καὶ τὴν ναῦν τὴν ὑποκειμένην ἡμῖν, οὐδὲν ἦττον εἰσελήλυθεν πρὸς ὑμᾶς, δῆλον ὡς ζημιώσων ἡμᾶς τῇ ἐπωβελίᾳ καὶ καταθησόμενος εἰς τὸ οἴκημα πρὸς τῷ ἀποστεινῆν τὰ χρήματα. “For more than a year he has had the use of our money, and while retaining the loan and the proceeds and the ship given to us as security, he has nevertheless come into your court, evidently intending to punish us by the *epobelia* and imprison us besides depriving us of the money.”

If the prosecutors lose the case, they will not only be required to pay *epobelia* but will also be liable to imprisonment. This was a feature of the mercantile laws: we know from the speech *Against Apatourios* (Dem. 33.1) that anyone condemned to make a payment in a mercantile case was imprisoned until he paid it. Otherwise it would have been too easy for a merchant, especially if he was not an Athenian, to sail off from Athens without paying.

That completes the catalogue of actual cases known to us in which *epobelia* was payable, but a couple of other texts should be briefly mentioned. First, a passage in which Aiskhines imagines that a man has hired a male prostitute and made a written agreement with him, but then prosecutes him for failing to do what had been agreed.

Ais. 1.163. ἔπειτα οὐ καταλευσθήσεται ὁ μισθούμενος τὸν Ἀθηναῖον παρὰ τοὺς νόμους, καὶ προσοφλῶν ἄπεισιν ἐκ τοῦ δικαστηρίου οὐ τὴν ἐπωβελίαν μόνον, ἀλλὰ καὶ πολλὴν ὕβριν; “Then won’t the man be stoned for hiring an Athenian illegally, and leave the court after incurring not just the *epobelia* but also a charge of outrageous insolence?”

In this imaginary case the prosecutor is claiming either a refund of the fee he has paid to the prostitute, or perhaps compensation for failure to carry out the agreement. He is claiming a sum of money, and will pay *epobelia* if he loses the case.

The other passage is an entry in the lexicon of Polydeukes (Pollux) for the procedure of *phasis*.

Pol. 8.47-8. φάσις ... καὶ τὸ μὲν τιμηθὲν ἐγίνετο τῶν ἀδικουμένων, εἰ καὶ ἄλλος ὑπὲρ αὐτῶν φήνειεν · ὁ δὲ μὴ μεταλαβὼν τὸ πέμπτον μέρος τῶν ψήφων τὴν ἐπωβελίαν προσωφλίσκανεν. ἦν δὲ ἕκτον τοῦ τιμήματος. “*Phasis* ... And the assessed amount went to those who suffered wrong, even if someone else brought the *phasis* on their behalf. The litigant who did not obtain one-fifth of the votes incurred *epobelia* in addition. It was a sixth of the assessment.”

If that statement is true, it is the only evidence for payment of *epobelia* in a public case. But I think there must be some confusion. *Phasis* was a prosecution on behalf of the state, not of individuals who suffered wrong; and if the prosecution was successful, half of the assessed penalty went to the prosecutor and half to the state. So I believe Polydeukes has confused *phasis* with a private prosecution, and I do not accept this evidence that *epobelia* was payable in *phasis*.<sup>11</sup>

I will now give a summary of the stages by which the use of *epobelia* may have developed. But I stress that not all these stages are firmly attested by the surviving evidence; the discovery of further evidence might easily change the picture.

(1) Before 401 *epobelia* was payable by the prosecutor in a case for false witness (*dike pseudomartyrion*) if he failed to obtain one-fifth of the jury's votes. We do not know whether it was payable in any other cases at this time.

(2) A law proposed by Arkhinos, probably in 401/0, made *epobelia* payable by either litigant losing in a *paragraphe* trial, by however small a margin.

(3) At some time between 400 and 364 a law was passed making *epobelia* payable by the unsuccessful litigant, whether prosecutor or defendant, in any private case. Until he paid, he was subject to *atimia*.

(4) Soon after 355 the mercantile laws authorized imprisonment of the unsuccessful litigant in a mercantile case until he paid the *epobelia*.

Finally there are two questions to which I can only guess the answers, because I have found no relevant evidence.

(a) Many private cases were referred to a public arbitrator (*diaitetes*), and if both litigants accepted the arbitrator's verdict, the case never went to a trial by jury. Did *epobelia* have to be paid by the litigant whom the arbitrator decided against? My guess is that it did not, especially since the arbitrator's decision could be a compromise with no outright winner or loser. One purpose of the institution of *epobelia* must have been to deter litigants from putting the state to the trouble and expense of providing a trial by jury. If they accepted the arbitrator's verdict and thus made a jury trial unnecessary, it was reasonable to let them off the *epobelia*.

(b) How was the *epobelia* calculated in a case in which the proposed penalty was not a payment of money? Possibly the answer is that in private cases, unlike public ones, it was virtually unknown for the penalty to be anything other than a payment of money or surrender of some property which could be valued, so that the question never arose.

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<sup>11</sup> It is likewise rejected by Lipsius, *Das attische Recht* 937 n. 26, and Harrison, *The Law of Athens* 2.184.