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ADEIA IN FIFTH-CENTURY ATHENS

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Abstract: This article discusses the rationale of *adeia* (immunity) in the fifth-century Athenian legal system. It argues that *adeia* was designed to grant a temporary suspension of the effect of a law in exceptional circumstances without allowing for any permanent legal change. This article explores the origin of *adeia* and the relevant ideology underpinning the legal procedure. It provides a comprehensive reconstruction of the legal procedure and analyses the extensive use of *adeia* for collecting information during the investigation of the profanation of the Mysteries and the mutilation of the herms in 415 BC. This article also discusses the implications of the use of *adeia* for public investigation and emergency powers in Classical Athens.

Keywords: immunity, Athenian law, democracy, rule of law

I. Introduction

One of the foundational principles of the rule of law is the concept of equality before the law for all people. Such a principle is shared by most of the several definitions of the 'rule of law' formulated by legal scholars.[1] Several studies have shown that the notion of equality before the law was clearly understood by the Athenians as a crucial value of their democracy.[2] In Pericles' funeral speech in Thucydides, Pericles lists the principle according to which 'disputes involving individuals all share equality before the law' (Thuc. 2.37.1) as one of the features of Athenian democracy. In *Against Meidias*, Demosthenes affirms that in a democracy each man believes that he has a share of equality and justice (Dem. 21.67: τῶν νόμων ἴσον μετέχειν πάντας). The same concept is expressed in Demosthenes' *Against Aristocrates* in which he says: 'just as each man has an equal share in the rest of the political life, the man who made this law thought that all must have an equal share in the laws' (Dem. 23.86: τῶν νόμων ἴσον μετέχειν πάντας ὁ θεὶς αὐτόν). The equality of everyone before the law and the importance of enforcing the statutes are not just found in the abundant evidence from forensic oratory.[3] These principles were also formally enshrined in Athenian legal procedure. Two of the clauses of the judicial oath explicitly bound Athenian judges 'to vote according to the laws and the decrees of the Athenians' and 'to listen to both parties equally'.

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[1] On the rule of law, see Bingham (2010); for 'thick' accounts of the rule of law, see Tamanaha (2004); Møller and Skaaning (2014). For 'thin' and formalist definitions of the rule of law, see Fuller (1969); Tamanaha (2004) 91–101, ranging from the thinnest definition of 'rule by the laws' to 'democracy and formal legality'.

[2] For studies recognizing the rule of law in Classical Athens but with different nuances and approaches, see Ostwald (1986); Sealey (1987); Hansen (1991) (these three scholars see the rule of law as a way to temper democracy in the fourth century); Rubinstein (2000); Rhodes (2004); Harris (2006); (2013); Herman (2006); Sickinger (2008); Canevaro (2016); (2017). In a recent study, Forsdyke (2018) acknowledges that Athens had a form of rule of law, but underestimates the capacity of Athenian institutions in assuring legal certainty and sees an incompatibility between the rule of law and arguing about the law in court. On this latter point, see MacCormick (2005). For the rule of law from new institutional economics and game theory perspectives, see Carugati (2019).

[3] For an example in Athenian tragedy, *cf.* Eur. *Supp.* 433–34, 437.

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These two pledges, the most cited by fourth-century orators, compelled Athenian judges to make their decisions on the basis of the law alone and to apply the statutes equally to everyone.[4]

One of the problems with enforcing norms is that statutes cannot cover all individual cases and specific circumstances. As the legal theorist H.L.A. Hart points out, a law must be general and refer to a broad class of persons, acts or things.[5] According to Leopold Pospisil's definition of a law, a law must apply to all similar cases in the future, which means that a law cannot be specifically directed against an individual or apply in *ad hoc* circumstances.[6] These features were true of Classical Athens. Andocides reports that it was forbidden to enact a law for an individual unless it was directed to all of the Athenians (Andoc. 1.89), and as a consequence the courts could not uphold *ad hominem* legislation.

However, Edward Harris shows in his analysis of the 'open texture' of Athenian laws that occasional problems might arise when the courts had to adhere strictly to the statutes, because the legislator could not predict all possible circumstances.[7] In order to combine legal certainty and equality with exceptional circumstances, the Athenians adopted the principle of *epieikeia* (fairness), which allowed the judges to take into account extenuating circumstances when making their decisions in court (Arist. *Rh.* 1.13.1374a; *Eth. Nic.* 5.3.1130b–38a). The use of *epieikeia* did not mean that Athenian courts rejected the law, but that a case presented an unpredicted exception to the general rule as expressed in the written statutes. In this case, other legal considerations took precedence. As a result, this legal notion allowed judges to take a more flexible approach that allowed for the interpretation of the laws and also took into consideration extenuating circumstances.[8]

Yet, the principle of *epieikeia* was only applied to cases before judges. Did the Athenians ever pre-emptively allow for an exception, rather than leave it to the *epieikeia* of the courts? Were there circumstances in which *epieikeia* was used in a procedurally definite fashion by other institutions of the polis? We know that the Athenian magistrates swore an oath to apply the written laws (Andoc. 1.85, 89), but what happened when the strict application of the law was impossible during an emergency or during extraordinary events? Could an exception to the rule occasionally coexist with the rule of law? To tackle such unusual situations, the Athenians designed the legal procedure of *adeia* (immunity or authorization). In Athenian law, *adeia* was an institution for granting two types of immunity: (1) immunity from legal prosecution for informants during criminal investigation and (2) authorization to introduce *ad hoc* changes to an entrenched norm without incurring the relevant sanctions. The assembly conferred *adeia* through a voting process requiring a quorum of 6,000 votes, as one can extrapolate from a reliable document inserted in Demosthenes' *Against Timocrates* (Dem. 24.45).[9]

When it comes to defining their legal system, the Athenians envisaged their laws as a coherent whole, and assumed that the statutes of the city were created by Draco and Solon.[10] Thus the authority of the laws rested on the higher authority of the first lawgivers. During the Archaic period and until the end of the fifth century, such an ideology did not allow for any legal change or suspension of the laws authorized by the people since the people had no official law-making power. In my interpretation, the origin of the legal procedure of *adeia* is closely linked to the cultural and ideological context of fifth-century legal thinking. *Adeia* did not emerge as an abstract principle or a comprehensive law, but as a specific legal tool to deal with *ad hoc* cases within an ideology

[4] See, for example, Aeschin. 2.1, 3.6; Andoc. 1.2, 1.9; Dem. 18.2, 18.121, 20.101, 22.20, 23.19; Lys. 15.1. For a complete list of mentions of the judicial oath in the orators, see Harris (2013) 351–56.

[5] Hart (1961) 13–17.

[6] Pospisil (1974) 11.

[7] Harris (2013) 175–212, 213–45. For the interpretation of the *gnomē dikaiotatē* clause inserted in the judicial oath as 'the best legal reasoning', see Pelloso (forthcoming).

[8] On the application of *epieikeia* in Athenian courts, see Harris (2013) 274–301. For *epieikeia* in Aristotle, see Brunschwig (1996); Horn (2006) 142–66; Poddighe (2014) 275–303.

[9] For a discussion of the authenticity of the document, see Canevaro (2013b) 127–31.

[10] See Canevaro (2015). For Athenian constitutionalism, see Canevaro (2019) 65–98.

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that made legal change very hard to implement. Yet, the practice of *adeia* was one of the first attempts to grant the *dēmos* the power of changing a law or suspending its effect during exceptional circumstances without undermining the rule of law.

Adeia, however, has received little attention from modern scholarship.[11] The most comprehensive 19th-century treatment of *adeia* by Maximilian Goldstaub is now outdated and does not place the legal institution in its full historical perspective.[12] The understanding of the nature of Athenian institutional and legislative practices during the Classical period has advanced over the last century with new discoveries and new editions of epigraphical texts and more recent studies of documentary practice. For example, Goldstaub does not distinguish *adeia* from the procedure for enacting a νόμος ἐπ' ἀνδρί (a law for a specific individual), a procedure described in the provisions of a document in Demosthenes' *Against Timocrates*.[13] A more recent but less exhaustive work by Larry McElwee traces the history of the word *adeia*. Yet McElwee fails to reconstruct the word's legal use in Classical Athens. McElwee confuses *adeia* with the institution of amnesty by building on documents found in Andocides' *On the Mysteries*, such as the decree of Patrocleides.[14] All these documents have recently been revealed to be later forgeries and are untrustworthy sources for Athenian law and legal procedure.[15]

Since the aforementioned studies on *adeia* are generally inaccurate in their reconstructions of the use of the procedure, this article provides a new comprehensive study of *adeia* and its function in the Athenian legal system within the political context of the fifth century. Section II of this article explores the origin of the terminology of *adeia* by connecting it with dominant nomothetic ideology and paves the way for understanding the design of the legal procedure. Section III reconstructs the legal procedure of *adeia* showing how it was designed to suspend the effect of a law without clashing with the nomothetic ideology. Section IV focuses on the most extensive use of *adeia*, which is found in the investigation following the profanation of the Eleusinian Mysteries and the mutilation of the herms on the eve of the Sicilian expedition in 415 BC. Finally, Section V draws important conclusions about emergency power and the suspension of the laws in Classical Athens.

II. 'Absence of fear': the expressive terminology of immunity

The noun *adeia*, the literal meaning of which is the 'absence of fear', is a relatively recent occurrence, as the word is not attested before the fifth century. However, cognate words are found in the Homeric poems.[16] In the *Iliad* (8.117), during a discussion with his brother Menelaus, Agamemnon refers to Hector as a fearless man (ἀδειής).[17] Herodotus provides the first literary

[11] For brief studies of *adeia*, see Paoli (1933) 122, n.2; (1953) 139; Biscardi (1982) 70; Miller (2007) 307–09. Later commentators glossed *adeia* with the Roman *abolitio* (Cic. *Phil.* 1.1; Dio 60.3.5), and this juxtaposition was formalized by Mommsen in his *Römisches Strafrecht* (1899) 458, but the identification of these two institutions is incorrect. The Roman *abolitio publica* was granted during festivals or joyful public events, and suspended a charge presented to a magistrate for 30 days. When the prescribed period of time elapsed, the accuser could bring forward another charge. For a recent study of *abolitio* in Roman law, see Gamauf (2013) 299–317.

[12] Goldstaub (1889) 1–8 for the definition of *adeia*, 10–87 *adeia* as general immunity, 88–110 *adeia* as immunity from prosecution.

[13] Goldstaub (1889) 109–10; Dem. 24.59; *cf.* Andoc. 1.89.

[14] McElwee (1975) 19–62. Most of McElwee's dissertation deals with amnesty in Classical Athens.

[15] Canevaro and Harris (2012) 98–129; (2017); Canevaro (2013b) 145–50; Harris (2014); Dilts and Murphy (2018); Liddel (2020) vol. 1. All the documents of sections 78–96 in Andocides' *On the Mysteries* are forgeries (decree of Patrocleides; decree of Tisamenus; law establishing the hierarchy of *nomoi* and *psēphismata*; law about private suits and arbitrations; decree of Demophantus) *pace* Sommerstein (2014); Hansen (2015) 884–901. For the difference between immunity and amnesty, see Paoli (1933) 122, n.2; for remission of convictions in Classical Athens, see Pecorella Longo (2004) 85–111.

[16] McElwee (1975) 130; Chantraine (1977) *s.v.* δείδω. *Adeia* is the only word derived from the stem *δ*F*ει/δ*F*οι-. Other words from the same stem are, for example, δείδω (to fear), δεινός (fearful), δειλός (worthless).

[17] *Cf.* also Hom. *Il.* 8.423, 21.481. See Zaborowski (2002).

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attestation of *adeia*, and uses the term with the prevalent meaning of 'security' or 'safety'. At 8.120, for example, describing the Persian withdrawal from Greece, Herodotus declares that Xerxes was safe only when he reached Abdera (ὡς ἐν ἀδείῃ ἐών).[18] The term *adeia* with the meaning of safety is paralleled in fifth-century tragedy. In Sophocles' *Oedipus at Colonus* (447), Oedipus discloses that Antigone and Ismene supplied his daily food as well as the concession of a safe place to stay (γῆς ἄδειαν). Thucydides employs it with a more nuanced meaning, including both general and technical connotations of the word. For example, he says that a group of Thasians, exiled by the Athenians, along with their supporters in the city were plotting a revolt in Thasos with 'security about their acts' (8.64.5: ἄδειαν τῶν πρασσομένων).[19] In another passage (8.76.7), Thucydides says that Thrasybulus persuaded the Athenians in Samos to grant immunity and the right to return to Alcibiades (ἦν αὐτῷ ἄδειάν τε καὶ κάθοδον). All fifth-century literary occurrences unanimously show that the term is closely related to the semantic field of individual or communal security and safety.[20]

From Homer to Thucydides, *adeia* and its cognates shared their origin in the emotional language of fear and apprehension. The use of emotional and psychological terms to indicate a Greek legal procedure is not new and is paralleled in other institutions of Greek law. For instance, the Greek noun for amnesty (ἀμνηστία) appears for the first time in two Hellenistic inscriptions dated to 196–180 BC.[21] Throughout the Classical and most of the Hellenistic period the Greeks referred to the institution of amnesty with expressions such as *mē mnēsikakein* (not to begrudge), describing a legal act of the civic community with emotional and psychological language.[22] In the case of the word *adeia,* the basic meaning of the term is linked to the emotion of fear, which bears important implications on the meaning of the word as a legal term.[23]

The fact that the word for the legal institution of immunity was conceptualized by directly referring to the emotion of fear cannot be a coincidence.[24] The term *adeia* conveys, through the institutionalization of emotional language, the multifaceted relationship between fear, law and political community. The word *adeia* communicated fear of the established laws into official legal terminology. In a way, this is similar to other expressive and emotional elements, such as the concern for pollution (*miasma*) in homicide cases and the procedure of supplication, which combined legal and religious elements.[25] Such procedures, created in the Archaic period, were

[18] See also Hdt. 2.121, 9.42.

[19] *Cf.* Thuc. 3.58.3, 8.91.3.

[20] *Adeia* word occurrences in Classical literary sources: Hdt. (ἀδείη) 2.121, 8.120, 9.42; Thuc. 3.58.3, 4.92.6, 4.108.4, 6.60.3, 6.60.4, 7.29.3, 8.64.5, 8.76.7, 8.81.1, 8.92.1; Soph. *OC* 447; Antiph. 5.77.3; Andoc. 1.11–12, 1.15, 1.20, 1.34, 1.77, 2.22, 2.23, 2.27; Hellan. (*FGrH* 31); Xen. *Mem*. 2.1.5; Isoc. 3.56, 14.24; Pl. *Leg.* 701; Lys. 1.36, 1.48, 2.15, 6.23, 6.36, 6.43, 12.85, 13.55, 16.13, 22.19, 25.28, 29.13, 30.24; Dem. 5.6, 5.8, 7.15, 8.64, 10.66, 13.17, 16.5, 18.222, 18.286, 19.149, 19.191, 19.272, 19.289, 21.33, 21.210, 22.25, 22.42, 23.12, 23.94, 23.125, 23.128, 23.133, 23.159, 23.192, 24.9, 24.31, 24.45–47, 24.88, 24.102–03, 24.106, 24.205, 44.63, 51.15, 54.21, 58.6, 58.65, 59.111, 59.113; Aeschin. 1.108, 2.183, 3.162; Hyp. 5.8; Lycurg. 1.104; Arist. *Eth. Nic.* 1132b.15; *Pol.* 1297a.22; *De Virt.* 1250b9. *Adeia* occurrences in Athenian epigraphical sources: *IG* I^3 52B.16–17 (see below), 370.15, 28, 30, 33, 64. For extra-Athenian epigraphical evidence, see *IG* IX.1.119.7 (Elateia, fourth century BC); Schmitt, *SdA* 429.6, 12, 14 (Theangela, 310 BC); *IG* XII.9.211.23, 212.16, 231.10 (Eretria, third century BC); *Milet* 148.62 (Miletus, 196/175 BC).

[21] *Milet* 148.62, 150.36.

[22] *Cf.* for example, Thuc. 8.73; *IG* I^3 76.15, 21; *IG* II^2 111.58, 281.3; *IPArk* 5.59. See also the expression μὴ μνασιχολῆσαι ('not to remember with hate') in *IPArk* 24.5. On amnesty and emotions, see Chaniotis (2013) 47–70.

[23] For law and emotions, see Deigh (2008); essays in Sellers (2017). For ancient emotions, *cf.* Konstan (2006); essays in Chaniotis (2012); Chaniotis and Ducrey (2013); Cairns and Fulkerson (2015); Cairns and Nelis (2017); Cairns (2019b) with survey of different methods.

[24] *Adeia* can be defined as an institution according to MacCormick's definition of 'institution-arrangement' (for example, contracts, trust, property or marriage). These are institutions that are the result of acts of persons or agencies. See MacCormick (2007) 35–36.

[25] For ancient supplication, see Naiden (2006); for pollution in homicide cases, see Parker (1983) 104–43; Harris (2015) 22–28. For other studies on pollution, see Chaniotis (2012) 123–39 and the recent study on purity in early Greek religion by Petrovic and Petrovic (2016) with a review by Cairns (2019a) 481–88.

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then formalized and enshrined in the legal system of the polis and kept throughout the Classical and Hellenistic periods. Through the lexicalization of the 'absence of fear', the Athenians connected a broader cultural value system about legislation with actual legislative practice. This was an ideological feature of many Greek communities that is clearly confirmed by an analysis of the ancient evidence. In Aeschylus' *Eumenides* (690–98), when establishing the new council of the Areopagus, Athena declares: 'Upon this hill, the respect (*sebas*) and inborn fear (*phobos*) of the citizens will prevent any wrong be done, alike by day and night (tr. Sommerstein (2008), adapted). The goddess then invites the Athenians not to drive fear wholly out of the city (καὶ μὴ τὸ δεινὸν πᾶν πόλεως ἔξω βαλεῖν) because no mortal acts justly without fear.[26] There is a similar usage in Sophocles' *Ajax* (1074–76), when Menelaus explains why Ajax is a *hubristēs*. He says that the laws could never rule a city without the presence of fear (*deos*), which promotes *aischunē* (shame) within the community.[27] In one of the most famous passages of his *Histories* (7.104.4), Herodotus describes the discussion between the Spartan Demaratus and Xerxes during the Persian invasion of Greece. Speaking about the Spartans, Demaratus states that they are free men having the law as their master, which they fear (ὑποδειμαίνουσι) more than the king's subjects fear him. Similarly, in the funeral speech (Thuc. 2.37.3), Pericles affirms that the main reason that Athenians do not break laws in the public sphere is for fear of the penalties (τὰ δημόσια διὰ δέος μάλιστα οὐ παρανομοῦμεν).[28]

This picture of a close connection between fear and the laws drawn by the ancient sources is consistent with the legal practice of fifth-century Athens. In Classical Athens, the most common word referring to a general and unchangeable law was *nomos* as opposed to *psēphisma*, an *ad hoc* decision of the council and the assembly.[29] In a seminal article Mogens Hansen demonstrated that in fifth-century sources before 403 BC the two terms could often be used interchangeably to indicate the same regulation either as *nomos* or *psēphisma*.[30] The Athenian assembly only passed decrees, but these enactments often had the features of laws, which were approved without any explicit and restrictive rule of change. As a result, legislative activity was often incoherent. Only after the restoration of democracy in 403 BC was the principle of a hierarchy between laws and decrees finally formalized and enforced by the public action against illegal decrees (*graphē paranomōn*) and by the public action against unsuitable laws (*graphē nomon mē epitēdeion theinai*).[31] A standard procedure for law-making (*nomothesia*) was set up; new laws were, therefore, enacted by the *nomothetai* (lawmakers) according to a distinct procedure different from decree-making.[32]

All these legal innovations were the product of reforms begun at the end of the fifth century. In a recent essay, Mirko Canevaro reconstructs the development of Athenian legislative practice and ideology and shows that, during the fifth century, Athenian legislation was based on the ideological assumption that the laws of the city had been created by the first lawgivers Draco and Solon.[33] This attitude is consistent with the Greek distinction between ordinary administration and legislation, in which the latter was not undertaken by the institutions of the polis but by special

[26] For the relationship between fear, *sebas* and *aidōs*, see Cairns (1993) 213–14.

[27] Cairns (1993) 228–41.

[28] The passage is important because it shows no dichotomy between formal penalties expressed by the laws and emotional response, *pace* Lanni (2016) 77–118.

[29] On *nomos* and *psēphisma*, see Quass (1971) 14–15; Hölkeskamp (2002) 115–46. On the different forms of decrees and local terminology across the Greek world, see Rhodes and Lewis (1997) 550–56. For a new in-depth study of fourth-century Athenian decrees in literary sources, see Liddel (2020) vols 1–2.

[30] Hansen (1978) 315–30.

[31] For fifth-century *graphai paranomōn*, *cf.* Andoc. 1.17, 22; Antiph. *fr.* 13.47. See MacDowell (1962) 76–77; Wolff (1970); Hansen (1987) 63–73. For the use of the *graphē paranomōn* as a political weapon, see Hansen (1974), who stresses too much the political nature of *graphē paranomōn* trials. On the procedure of the *graphē nomon mē epitēdeion theinai*, see Kremmydas (2012); and especially Canevaro (2016) 39–58; (2019).

[32] For *nomothesia* in fourth-century Athens, see Canevaro (2013a); (2016); *pace* MacDowell (1975) 62-74; Rhodes (1984); Hansen (1985) 345–71. For the identity of *nomothetai*, see Canevaro and Esu (2018) 130–36.

[33] Canevaro (2015).

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and authoritative lawgivers at exceptional times.[34] Since the authority of the statutes did not derive from the people's legitimate deliberation, but from the personal prestige of the lawgiver, the laws were conceived and made in order to be kept unmodified. This principle is clearly found in fifth-century sources (for example, Hdt. 1.29.1–2; Thuc. 3.37.3–4; Ar. *Thesm.* 352–71) and has key implications for Athenian legislative practice before 403 BC. The institutional ideology of the polis did not in fact allow for any form of legal change, as far as the real laws of Draco and Solon were concerned. Although fifth-century Athenians did legislate in the assembly, they never acknowledged that they were creating statutes on par with those of Draco and Solon or that they were potentially contradicting them. They legislated through 'tacit legal change', meaning that new laws were actually enacted without changing or repealing previous statutes even if those enactments were contradictory. There was no explicit recognition that what was being done was a form of nomothetic activity.

The legal remedies used in Archaic and Classical legislation to ensure the immutability of laws and their perpetual implementation have been termed by scholars as 'entrenchment clauses'. David Lewis defines an entrenchment clause as a provision inserted in a piece of legislation for the purpose of preventing any change to the law.[35] These clauses included provisions stating that the decree or the law should be valid for all time, and entailed very serious penalties or threats. The emotion of fear played a fundamental role in implementing the immutability of the laws implied by the nomothetic tradition.[36] These laws envisaged heavy penalties and curses, sometimes sealed by a solemn oath to the gods, for those who would amend or repeal the measure.[37] Epigraphical evidence shows that this kind of clause was widespread in the legislative documents of several poleis across the Greek world. A sixth-century law (*tethmos*) from a city of western Locris, perhaps Naupactus, regulates land division, and its provisions are entrenched by listing several penalties and a curse (*IG* IX.1^2 3.609).[38] Whoever proposes a change in the law is cursed for all time, both he and his descendants; his property is to be confiscated and his house demolished (lines 9–14). The law is sacred to Apollo, who supervises its observance. A law of 575–550 BC from Argos punishes those who would erase the law with exile, confiscation of his property and curses (*IG* IV.506).[39] Similarly, a fifth-century law from Teos (*ca*. 475 BC) known as *Dirae Teiae* confirms the wide use of public curses to entrench legislative texts.[40] The curse envisions the destruction of the wrongdoer and his descendants as well as providing penalties against several different typologies of crimes against individuals (for example, poisoning a Teian), but especially against the community and its leader, the *aisumnētēs*.[41] The law ends by addressing this curse to anyone who

[34] Harris (2006) 8–14.

[35] Lewis (1997a) 136–49.

[36] The repeal of legislative texts often consisted in the removal of the stelae: see Culasso Gastaldi (2003) 241–43; Dimopoulou (2014) 249–79 with several epigraphical examples.

[37] For a general treatment of curses in the Greek world, see Eidinow (2007) 139–55; for the role of curses in oaths, see Konstantinidou (2014) 7–47. For curses in the Athenian assembly, see Dem. 19.70. This practice is also well attested in some fourth-century lead tables reporting curses against opponents in Athenian lawsuits: see Jordan (1995) 55–57.

[38] *Cf.* Camassa (2009) 82–83, who argues that the first instance of this legislative practice might be already found in the first Greek law from the Cretan polis of Dreros (Van Effenterre and Ruzé (1994) 1.48). The law contains regulations for the office of *kosmos*, which could not be iterated before a period of ten years. The ending formula θιός ὅλοι ὅν can be interpreted as 'may the god destroy him', therefore a curse against anyone who modifies the written statute. *Cf.* Gagarin and Perlman (2016) 203–05; Seelentag (2016) 139–63.

[39] For a discussion on this law, see Körner (1993) 79.

[40] Osborne and Rhodes (2017) no. 10. For the analogies between the law of Teos and the biblical Deuteronomy, see Hagedorn (2005) 127–50. For a study of legislative practice in the Near East and Archaic and Classical Greece, see Harris (2006) 5–16; Camassa (2011).

[41] For the *aisumnētēs* in the Greek poleis, see Faraguna (2005) 321–38. Religious imprecations and curses in Greek legislative texts are broadly attested from the Archaic to the Roman periods: see Rubinstein (2007) 269–86 with a list of the epigraphical evidence from late Classical and Hellenistic poleis. For continuity of religious features in Greek law, see Parker (1996) 256–81; (2005) 76–77. For further epigraphical evidence for penalties about the breaking of entrenchment clauses, see Gray (2015) 117.

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removes or breaks the stele with the entrenchment clause.[42] In the case of Athenian Archaic legislation, we know from a quotation in Demosthenes' *Against Aristocrates* that Draco's homicide law was entrenched by prescribing *atimia* (loss of rights) for whoever violated or modified the law (Dem. 23.42). It appears that a similar entrenchment clause existed for the laws of Solon. According to a fragment of Dio Chrysostom, the Athenians established a curse for those who attempted to overthrow the laws of Solon (Dio Chrys. *Or.* 80.6).[43] A fifth-century Athenian example is found in the Brea decree which orders the foundation of a colony (434 BC).[44] The text of the decree includes a provision (*IG* I^3 46 = Osborne and Rhodes (2017) no. 142, lines 24–29) prescribing *atimia* for the wrongdoer and his descendants and confiscating his property, if anyone would put to the vote or propose a change in the decree. Moreover, at the beginning of each Athenian assembly meeting, deterrent curses were cast against those who would try to change the democratic constitution.[45]

It is within this cultural and ideological context that one should place the origin of *adeia* as a legal institution. The possibility of calling it 'absence of fear', when referring to a legal institution, demonstrates that the Athenians labelled a legal procedure by associating it with an emotional experience, such as fear towards the laws. Nevertheless, what is important to stress is that *adeia* did not indicate the absence of respect for the authority of the law, but rather the temporary absence of fear for the legal penalty as granted by the community. An example of such a correlation is found in the way the Athenian oligarchs established the regime of the Four Hundred in 411 BC. Even when the oligarchs abolished the legal safeguards of the *graphē paranomōn*, the *eisangelia* and the *proklēsis* in order to implement their reforms freely, these revolutionary changes were justified as a restoration of the respect for the traditional laws (Thuc. 8.67.2–68.1; [Arist.] *Ath. Pol.* 29.4).[46] This enabled the conceptualization of immunity in terms of emotional language. Just as with many other Athenian legal expressions, there was no actual dichotomy between the extra-legal and legal meanings of *adeia*. The term *adeia* was both a state of personal security and a lexicalization for legal security against penalties. The latter had a decisive ideological meaning, since the legal context institutionalized the emotional state through a formal act of the *dēmos*, which managed this civic control of fear by giving democratic assent to immunity. Only the *dēmos* could enable someone to be unafraid of the laws: the normal and expected state was one of fear (and respect) for the laws. Thus it is not a surprise that the first occurrence of *adeia* as a legal term is found in an entrenched decree: the financial decrees of Callias, which help in reconstructing the procedural features of the *adeia* and its rationale within the development of the Athenian attitude towards legal change.[47]

III. *Adeia* as legal procedure: suspending a law in fifth-century Athens

In 434/3 BC, Callias proposed two financial decrees in close succession. The first decree established the new treasury of the Other Gods, which unified several sacred funds under the supervision of a single board (*IG* I^3 52A).[48] The second decree reported regulations passed by the Athenian assembly instructing the magistrates to supervise the works for the *propulaia* (gateways) of the

[42] On this epigraphical document, see Youni (2011) 399–410.

[43] *Cf.* Gell. *NA* 2.12.1. For a commentary, see Leão and Rhodes (2015) 149–50. For Solon's nomothetic tradition in Classical Athens, see Canevaro (2015); Loddo (2018) 18–37 with discussion of previous bibliography. For the reception of Solon in the fifth and fourth centuries, see Nagy and Noussia Fantuzzi (2015).

[44] For the date of the Brea decree, see Psoma (2009) 263–80; (2016) 55–57.

[45] For ritual curses in the Athenian assembly, see Ar. *Thesm*. 331–51; Dem. 18.282, 20.107, 23.97, 24.107.

[46] See discussion in Rhodes (1981) 378; Canevaro (2015). See also discussion below in section V.

[47] *IG* I^3 52 = Osborne and Rhodes (2017) no. 144. For an early date of the decree, see Samons (2000) 129–33 *contra* Kallet-Marx (1989) 94–113, who argues for a later enactment in 431 BC. Mattingly (1996) 215–22 makes the case for dating the decree at 422/21 BC. For the three-bar-sigma issue, see Chambers et al. (1990) 38–63; Rhodes (2008) 501–06; Papazarkadas (2009) 67–88.

[48] See Linders (1975); Rhodes (2013) 213–14.

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Acropolis (*IG* I³ 52B).[49] The decree prescribes at lines 12–17 that the money of Athena should only be used for this purpose, with 10,000 drachmas as a spending threshold, and adds an entrenchment clause. I reproduce the relevant section of the decree:

τοῖς δ]ὲ ἄλλοις χρέμα[σιν τοῖ]ς τῆς Ἀθεναίας το[ῖς τε νῦν ὄ̃σι]-
[ν ἐμ πόλει κ]αὶ *h*άττ' ἂν τ[ὸ] λο[ιπὸν ἀν]αφέρεται μὲ χρῆσ[θ]α[ι μεδὲ ἀπα]-
[ναλίσκεν ἀ]π' αὐτῶν ἐ[ς] ἄλλο μ[εδὲν ἢ] ἐς ταῦτα *h*υπὲρ μυ[ρ]ί[ας δραχμὰ]-
[ς ἢ ἐς ἐπισκ]ευὲν ἐάν τι δέε[ι·ἐς ἄλλ]ο δὲ μεδὲν χρῆσ[θ]α[ι τοῖς χρέμα]-
[σιν ἐὰμ μὲ τ]ὲν ἄδειαν φσεφ[ίσεται] ὁ δε̃μος καθάπερ ἐ[ὰμ φσεφίσετ]-
[αι περὶ ἐσφ]ορᾶς ἐὰν δέ τις [εἴπει ἢ] ἐπιφσεφί[σ]ει μὲ ἐ[φσεφισμένε]-
[ς πο τῆς ἀδεί]ας χρῆσθαι το[ῖς χρέμ]ασιν τοῖ[ς] τῆς Ἀθε[ναίας, ἐνεχέ]-
[σθο τοῖς α]ὐτοῖς *h*οῖσπερ ἐά[ν τι ἐσ]φέρεν εἴπει ἢ ἐπιφ[σεφίσει.]

The other monies of Athena, what is now on the Acropolis and whatever may be brought up in future, shall not be used or (have expenditure made) from them for any other purpose other than these, above ten thousand drachmas, or for repairs or completions or fittings-out if any are needed. The monies shall not be used for anything else unless the People vote immunity (*adeia*) as when they vote about capital tax (*eisphora*). If anybody proposes or puts to the vote when immunity has not been voted that the monies of Athena shall be used, let him be liable to the same penalties as when somebody proposes or puts to the vote that there shall be a capital tax. (tr. Lambert and Rhodes (https://www.atticinscriptions.com/))

As the text of the second decree of Callias shows at lines 16–17, the spending limit provision is entrenched. In order to override the entrenched 10,000 drachmas bar, the decree orders a vote of *adeia*, similar to the vote taken for the levy of *eisphora*, providing the same penalty in case of failure to secure a vote for *adeia*.[50] We do not know what kind of penalty was envisaged in the case of violation of the *eisphora* levy procedure.[51] Thucydides states that in 431 BC the Athenians provided new protections for the treasury of Athena by establishing a separate new fund for war expenditures, as well as imposing the death penalty on those who used money from this treasury for other purposes (Thuc. 2.24). Building on this passage, Lewis argues that a lesser penalty was possibly envisioned for those who failed to follow the procedure of *adeia*.[52] This kind of entrenchment clause was designed to make legislative change more difficult, rather than impossible. As a result, the decree of Callias represents a typical example of what Canevaro defines as fifth-century tacit legislation.[53] Even if the legal text takes the form of a decree, its provisions are not concerned with the daily administration of the polis, but rather establish permanent norms, which are subsequently applied to the whole community.[54] The

[49] Goldstaub (1889) 7–8 argues that the origin of *adeia* was a secular development of the religious institution of supplication. Yet, Naiden (2006) 171–218 demonstrates that there was no clear-cut distinction between the religious and legal aspects of supplication in Athenian law. Supplication bridged the religious and the civic spheres and was enforced by the relevant political bodies of the polis. *Adeia* was rather an institution that emerged path-dependently from the nomothetic ideology. Second, even the supposed procedural similarities between the two institutions are superficial. The Aristotelian *Athenaion Politeia* clearly states that supplications were part of the regular business of the Athenian assembly, which held specific meetings for discussing supplications ([Arist.] *Ath. Pol*. 43.6). Conversely, the request of *adeia* was not a standard item on the agenda of the assembly, but an extraordinary procedure.

[50] Van Wees (2013) 44–56 shows that a form of *eisphora* was already in force in the sixth century, but it was very different from the *eisphora* of the Classical period. For studies of *eisphora*, see Thomsen (1964); Brun (1983); Christ (2007) 53–69; Poddighe (2010) 97–118; Migeotte (2014). On the ideology of *eisphora*, see Liddel (2007) 276; *cf.*, for example, Dem. 28.4; Isae. 7.39–40; Lys. 19.43, 20.23, 21.3.

[51] For a study of penalties in fifth-century decrees, see Scafuro (2014) 299–326.

[52] Lewis (1997a) 139.

[53] Canevaro (2015).

[54] A similar fifth-century example is the Standards decree (*IG* I³ 1453) which establishes a general norm about coinage, weights and measures by decree to be applied across the Athenian Empire (and it even amends the bouleutic oath at line 10). The inscription is very fragmentary, but it is mocked in Aristophanes' *Birds* (1040–45) where is called *psēphisma* by the Decree-seller, but *nomos* by Pisthetaerus. For the relationship between Athenian legislation and empire, see Liddel (2010) 99–128.

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decree of Callias is therefore an entrenched law passed by the assembly. Remarkably, the second decree of Callias provides evidence for the ambiguous law-making practices of fifth-century Athens. On the one hand, the Athenians followed the nomothetic ideology of legislation by safeguarding the decree with an entrenchment clause, given its law-like contents. On the other hand, the entrenchment clause itself describes the legal procedure that made it possible to modify the relevant regulations. The procedure of *adeia* was already institutionalized when Callias proposed his decree, as the reference to *adeia* for the levy of *eisphora* suggests. Yet, in the extant epigraphical attestation, this is the first time in Athenian legislative practice that a procedure for authorizing legal change, even if imperfect and incomplete, can be seen in an entrenched piece of legislation. A vote of *adeia* authorized the proposal of new regulations that would modify the content of the entrenched decree by acknowledging the power of the *dēmos* to suspend the penalties of the entrenchment clause and introduce legislative changes to the existing statute. *Adeia* played an innovative role in fifth-century deliberative practice, as this procedure could override the ban imposed by the entrenchment clause, a device in keeping with the nomothetic tradition that underpinned Athenian legislative ideology.

It is important to stress that the *adeia* procedure was not retroactive. There is no evidence that *adeia* was understood as a general principle also applicable to other Athenian statutes for which it was not explicitly prescribed. The assembly could not change the old entrenched laws of Draco and Solon by voting for *adeia*, as the source of legitimacy for those statutes was the lawgivers' authority and not popular power. Conversely, the decree of Callias shows one of the first attempts to create a rule of change as well as some form of hierarchy in the enactments of the assembly, and in this way provides a compromise in the clash between nomothetic immutability and the people's law-making power. The novelty of *adeia* within the Greek legislative tradition is clear when one compares the *adeia* clause in the decree of Callias with the sixth-century law about land tenure from Naupactus mentioned above. There, the law forbids any motion or vote to change the statute to be held in the political bodies of the cities, the assembly (polis), the council of elders (*preiga*) and the *apoklesia* (lines 9–14: *h*όστ|ις δὲ δαιθμὸν ἐνφέροι ἢ ψᾶφον διαφέροι ἐν πρείγαι, ἐν πόλι, ἐν ἀποκλεσίαι| ἢ στάσιν ποιέοι περὶ γαδαισίας αὐτὸς μὲ|ν ϝερρέτο καὶ γενεὰ ἅματα πάντα, χρέματα δὲ δαμευόσθον|καὶ ϝοικία κατασκαπτέσθο κὰτ τὸν ἀνδρεφονικὸν τετμ|όν).[55] The people of Naupactus strictly followed the nomothetic ideology, and its entrenchment clause is very thorough in forbidding any attempt to change the relevant statute. All forms of legislative activity tampering with this law are completely banned.[56]

The use of *adeia* in deliberative procedure during the years following the second decree of Callias is attested by the records of the treasurers of Athena in 418–17 BC (*IG* I^3 370). This epigraphical document is fragmentary; nevertheless, three occurrences of *adeia* are legible on the stone (lines 15, 30, 63–64) and another two occurrences are restored (lines 28, 33). The formulaic expression φσεφισαμένο τõ δέμο τὲν ἄδειαν is consistent with the wording found in the entrenchment clause of the second decree of Callias, and it records the exact day of the prytany in which the vote was taken by the assembly.[57] A vote of *adeia* was therefore taken and carefully recorded, probably in the archival copies, to authorize changes in the financial regulations after the enactment of the second financial decree of Callias. Similarly, in *On his Return* (2.23), a speech delivered between 410 and 405 BC, Andocides reminds the Athenians that the decree granting him *adeia* in 415 BC was still valid, and a copy of the relevant decree was kept in the archive of the *bouleutērion*.[58] This is important in showing that the Athenians carefully followed this legal procedure. When presenting

[55] 'Should anyone request a land redistribution or cast a vote in favour of this matter in the council of elders (*preiga*), in the Assembly (polis), in the *apoklesia* or instigate discord for the purpose of land redistribution, he and his progeny shall perish forever, his property shall be confiscated and his house shall be demolished according to the homicide law.'

[56] Camassa (2011) 110–12.

[57] At line 64 it is stated that the vote of *adeia* took place during the third prytany of the tribe Aiantis, but the day is missing.

[58] For Athenian archival practice in the fifth century, see Sickinger (1999) 62–91. For archival and legal practice in Athens, see Pébarthe (2006); Faraguna (2009) 89–102; (2016). For a general overview of archival practice in the Greek world, see Boffo (2003) 5–85.

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their *euthunai* (final accounts), financial officials could provide written evidence that the payments were made in accordance with the law.[59] Extra payments made by the treasurers of Athena had to be instructed by a decree of the assembly which was passed after a vote of *adeia,* and provisionally overrode the entrenched spending limit of the second decree of Callias.

The *adeia* clause in the second decree of Callias, however, does not give any detail about the procedural steps for voting on the immunity. The only reference within the text of the decree is that *adeia* is to be voted on according to the same procedure employed for the levy of the *eisphora*. Despite its vagueness, the clause implies that *adeia* was to be voted on according to a distinct and more complex procedure, which was different from that normally used for votes in the assembly. This is also consistent with the excerpt of the law about deliberation on *atimoi* and public debtors quoted in Demosthenes' *Against Timocrates* (24.45).[60] According to this law, there could be no discussion of matters pertaining to an *atimos* without a preliminary vote of *adeia* taken by 6,000 Athenians by secret ballot (ἐὰν μὴ ψηφισαμένων Ἀθηναίων τὴν ἄδειαν πρῶτον μὴ ἔλαττον ἑξακισχιλίων, οἷς ἂν δόξῃ κρύβδην ψηφιζομένοις).[61] The information extrapolated from this document (as mentioned in the opening section of this article) seems to confirm that a successful grant of *adeia* required a vote by *psēphophoria* (secret ballot) in order to record a quorum of 6,000 votes. The same quorum was also prescribed for naturalization decrees, and the fact that this is not mentioned in the second decree of Callias and in *IG* I^3 370 is not surprising. The example of grants of citizenship provides a good epigraphic term of comparison. In his analysis of inscribed citizenship decrees in the fourth century, Michael Osborne shows that naturalization decrees never mention the quorum required to ratify the grant, even though the law doubtless prescribed it.[62] In addition, voting *psēphophoria* was not the standard voting system employed by deliberative bodies in Classical Athens.[63] The council and the assembly normally made their decisions by show of hands (*cheirotonia*) rather than by secret ballot, which was the system commonly used in judicial settings.[64] As Hansen has demonstrated, when the Athenian assembly voted by show of hands, these votes were never counted, but they were roughly assessed by the *prutaneis* in the fifth century and then by the *proedroi* in the fourth.[65] By contrast, Hansen shows that the use of *psēphophoria* was not intended to guarantee the secrecy of the vote. The votes were only counted when a formal quorum was required by the voting procedure.[66]

A formal quorum of 6,000 votes by secret ballot was needed not only for *adeia*. Two other procedures demonstrate the same requirement: (1) procedure of ostracism ([Arist.] *Ath. Pol.* 43.5; Philoch. *FGrH* 328 F30; Diod. Sic. 11.55; Plut. *Arist.* 7.6.)[67] and (2) grants of citizenship ([Dem.] 59.89).[68] By analysing the epigraphical evidence from several Greek city-states, Philippe Gauthier

[59] For *euthunai* and building accounts, see Epstein (2013) 127–41. For prosecution for financial offences in *euthunai*, *cf.* [Arist.] *Ath. Pol*. 48.3–5, 54.2 with Rhodes (1981) 560–64, 597–99; Migeotte (2014) 449–52.

[60] This law seems to be an authentic document inserted in the *Urexemplar* of the Demosthenic speech: see Canevaro (2013b) 127–32 for an analysis of the document.

[61] 'If immunity (*adeia*) is not granted by no less than 6,000 Athenians, who so resolve voting by secret ballot.'

[62] Osborne (1981–1983) 3–4.162 n.30. See the epigraphical instances in Osborne (1981–1983) vol. 1, with commentary in Osborne (1981–1983) vol. 2.

[63] Staveley (1972) 93–95.

[64] For a study of the voting system in the lawcourts, see Boegehold (1995) 21–41.

[65] Hansen (2004) 40–61; *cf.* [Arist.] *Ath. Pol*. 44.3 (τὰς χειροτονίας κρίνουσιν); *cf.* Rhodes (1981) 535.

[66] Hansen (1987) 48–50.

[67] Evidence about a formal quorum for ostracism is ambiguous. The figure of 6,000 votes is mentioned in Plutarch's *Life of Aristides* (7.5). When describing the procedure, Plutarch says that the archons counted first the whole number of *ostraka* cast (οἱ δ' ἄρχοντες πρῶτον μὲν διηρίθμουν τὸ σύμπαν ἐν ταὐτῷ τῶν ὀστράκων πλῆθος) and, if there were less than 6,000 voters, the ostracism was invalid (εἰ γὰρ ἑξακισχιλίων ἐλάττονες οἱ φέροντες εἶεν, ἀτελὴς ἦν ὁ ἐξοστρακισμός). That the figure of 6,000 votes for ostracism was a quorum was first proposed by Jacoby, followed by many other scholars: *cf.* Thomsen (1964) 66 n.3; Rhodes (1981) 270–71; Hansen (1983) 26 n.6.

[68] Osborne (1981–1983) 3–4.155–68. Traditional accounts about the quorum also include the νόμος ἐπ' ἀνδρί based on an unreliable document in Dem. 24.59. See Canevaro (2013b) 145–51; (2018b).

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has demonstrated that the quorum was designed to register formally the consensus of the whole civic body.[69] In the case of *adeia* and naturalization, the ancient evidence shows that the required quorum is well attested throughout the fourth century, whereas a parallel for a fifth-century quorum is provided by ostracism.[70] Hansen shows that in the fifth century a formal quorum was already required and was verified through a very simple mechanism. The so-called Pnyx I, the fifth-century meeting place of the assembly, could contain 6,000 participants; therefore, when the Pnyx was full, this showed that the quorum was reached.[71] Preserved *ostraka* show that in a single *ostrakophoria* the Athenian preferences were usually very fragmented, which also points out that the Athenians did not concentrate 6,000 votes on one candidate, but the number was a quorum prescribed by law to make the ostracism valid.[72] The figure of 6,000 was therefore a formal quorum already in force in fifth-century voting procedures and constitutes a contemporary parallel for the quorum necessary for *adeia*.

It should be highlighted that the Athenian notion of quorum did not conform to the modern parliamentary concept. According to the *Concise Oxford Dictionary of Politics*, a quorum is the 'minimum number of members that must be present to make proceedings of a political body valid'.[73] In the case of Greek democratic assemblies, the number of members was not fixed by a constitutional law, but rather coincided with the notional, symbolic and idealized number of citizens of the whole *dēmos*, since all enfranchised male citizens were members of the assembly. As Gauthier has rightly highlighted in his study of the quorum in Greek poleis, the figure of 6,000 was preserved over time regardless of the actual number of citizens.[74] The figure of 6,000 is consistent with the number of citizens that were selected every year by lot to serve as judges in the Athenian courts during both the fifth and the fourth centuries, and this panel embodied the Athenian *dēmos* in its judicial capacity.[75] The quorum of 6,000 votes necessary to pass a vote of *adeia* was designed formally to record the fact that the virtual totality of the Athenians was present and agreed to discuss the matter and participate in the deliberation which led later, in the same assembly, to a vote by show of hands expressing the consensus of the community to suspend the legal effects of an entrenchment clause.

In order to modify an entrenched decree with *adeia*, many institutional stages were needed. First, a vote of *adeia* was to be included in the assembly's agenda by a *probouleuma* (preliminary decree) of the council. *Adeia* was not a standard item on the assembly's agenda, since the Aristotelian *Athenaion Politeia* does not mention immunity among the regular subjects discussed during assembly meetings. As we know that no motion could be introduced to the assembly without the preliminary approval of the council, a *probouleuma* was needed therefore in order for the *dēmos* to put to the vote a grant of *adeia*.[76] A preliminary discussion on whether *adeia* should be voted on was then held in the council, which passed a *probouleuma* by *cheirotonia*. Second, the *prutaneis* introduced the vote of *adeia* to the next meeting of the assembly. There was no preliminary discussion in the assembly, but the Athenians voted by secret ballot when entering the Pnyx. Yet the vote did not enact any particular measure: it simply made debating the modification of the

[69] Gauthier (1990) 73–99.

[70] For the different stages of the Pnyx, see Hansen (1996) 25–29. For different figures for the Pnyx I, see Stanton (1996) 18–19, who sees a correlation between the quorum and the capacity of the Pnyx, although it is difficult to say when an open auditorium is full and his arguments on this specific point are mainly based on comparison with modern people's attitude to cramming together in trains and buses during peak hours. This interpretation also underestimates the power of *prutaneis* to check the attendance and to keep people in and out of the Pnyx as attested in Aristophanes' *Acharnanians* (19–20) and *Ecclesiazousae* (379). For the powers of the presiding magistrates during meetings of the assembly, *cf.* Aeschin. 2.84; Dem. 22.5, 9; *contra* Epstein (2009) 69–98.

[71] Hansen (1987) 48–50; Canevaro (2018a).

[72] On ostracism, see Brenne (2001) 23; Siewert (2002); Forsdyke (2005) 149 n.20, 283. For the regional distribution of ostracized citizens and *ostraka*, see Gouščhin (2009) 233–45; see Brenne (2018) for an in-depth study of the *ostraka* of the Kerameikos.

[73] McLean and McMillan (2009) *s.v.* quorum.

[74] Gauthier (1990) 81–82.

[75] Andoc. 1.17; Ar. *Vesp.* 662; [Arist.] *Ath. Pol*. 24.3; *Suda s.v.* πρυτανεία.

[76] [Arist.] *Ath. Pol*. 45.4 with Rhodes (1981) 543–44.

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entrenched provision possible, at the same time certifying that the virtual totality of the Athenians was present for the ensuing deliberation and the resulting vote by show of hands. The fourth-century vote for granting citizenship provides a basis for comparison with the vote of *adeia*. In *Against Neaera*, Apollodorus paraphrases the procedure prescribed by the law for granting Athenian citizenship. Apollodorus makes clear that a decree of citizenship passed by the assembly was not valid until it was ratified by a quorum of 6,000 secret votes in the next assembly meeting ([Dem.] 59.89–90). The law instructed the *prutaneis* to place the ballot urns outside the assembly in order that the Athenians could cast their secret votes when entering the assembly place.[77]

The vote for the *adeia* procedure would have, in all probability, followed a very similar process. Yet, the vote of *adeia* was not a ratification and occurred before the normal vote of the assembly, not afterwards as in the case of naturalization. As both the decree of Callias and the law at Demosthenes 24.35 show, *adeia* was to be voted on before the discussion of the decree in the assembly, otherwise the proposer could not have enjoyed legal immunity; his proposal would have been unlawful and he would have been punished according to the penalties envisaged by the entrenchment clause. This procedural detail is very important, and sheds light on the rationale behind the introduction of *adeia* in fifth-century democratic decision-making. The text of *Against Neaera* clearly reports that the ratification vote for a grant of citizenship was aimed at confirming that the candidate was worthy of receiving Athenian citizenship (εἰ ἄξιός ἐστι τῆς δωρεᾶς), on which the assembly had already deliberated ([Dem.] 59.90). When voting on *adeia*, the assembly instead suspended the validity of a legal provision and gave permission to a citizen to put forward a proposal for changes to entrenched, therefore supposedly unchangeable, legislation. Without previous debate, the assembly must have, in the vote on *adeia*, primarily taken into account the legal reasons that justified suspension of the legal effect of the entrenchment clauses, aggregating the unmediated opinions and preferences of the individual Athenians on the opportunity to do so, as was normal with *psēphophoriai* in the lawcourts: this in itself stresses the quasi-legal dimension of this vote. Deliberation and consensus-building came next: the assembly debated the motions and took a vote by show of hands in that very assembly meeting.

To summarize, the Athenian assembly could vote *adeia* in order to authorize *ad hoc* derogation to an entrenched norm. The *adeia* procedure differed from the normal votes in decree-making procedure and consisted of three stages. (1) After debate, the council passed an open *probouleuma* allowing a vote of *adeia* to be taken in the assembly (Dem. 22.5–7; [Arist.] *Ath. Pol*. 45.8). (2) The *prutaneis* introduced the vote to the following assembly meeting, at which the Athenians voted by *psēphophoria* requiring a quorum of 6,000 votes (*IG* I^3 52B; inferred from Dem. 24.45). (3) If *adeia* was successfully granted, the relevant topics 'authorized' by the vote of *adeia* were introduced and discussed in the same assembly (*IG* I^3 370). In this way, the vote of *adeia* played the role of framing the deliberation with respect to the established laws of Athens. The grant of *adeia* allowed for a temporary suspension of the law in order to introduce an *ad hoc* measure without repealing the norms.

IV. Suspending the law during an investigation: the case of the profanation of the Mysteries and the mutilation of the herms

After reconstructions of the cultural background (section II) and the procedural arrangement of *adeia* (section III), this section examines the evidence for *adeia* in action. The extraordinary and temporary nature of *adeia* is confirmed by its use to grant immunity from prosecution in court. In this case, immunity was not employed for a deliberative purpose, but the procedure had the same legal implications. A vote of *adeia* authorized *ad hoc* suspension of the legal force of a statute, and, as a result, the *adeia*-holder was not subjected to prosecution under the relevant laws.

[77] For the ratification vote in inscriptions, *cf. IG* II^2 103.34–35, the first epigraphical instance. For the procedure, see Osborne (1981–1983) 3–4.155–70, especially 161–64.

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The best account for the use of *adeia* is related to the crisis of the profanation of the Eleusinian Mysteries and the mutilation of the herms on the eve of the Sicilian expedition as detailed in Andocides' speech *On the Mysteries*.[78] In 403 BC Andocides returned to Attica, following the restoration of the democracy, believing he was protected by the recent amnesty ([Arist.] *Ath. Pol*. 38–40).[79] However, in 400–399 BC he was prosecuted by *endeixis*, a legal procedure aimed at accusing someone of illegally exercising a right.[80] Andocides was charged with having attended the Eleusinian Mysteries and of having placed a suppliant's crown on the altar at Eleusis illegally. He was prosecuted according to the decree of Isotimides, passed in 415 BC, which banned from all temples in Attica and from the Athenian agora anyone who committed impiety and confessed it (Andoc. 1.71).

In his defence speech, Andocides reconstructed the dramatic events of 415 BC and the investigation following the profanation of the Eleusinian Mysteries and the mutilation of the herms. We learn that, during the investigation, the procedure of *adeia* was extensively used to obtain information. I will summarize briefly the report of the people who gave information in addition to Andocides himself. According to Andocides' account, the assembly was gathered in order to appoint generals to send to Sicily, when Pythonicus accused Alcibiades of having performed the Mysteries in a private house and asked the assembly to grant *adeia* to a slave who could witness it (Andoc. 1.11: ἐὰν ψηφίσησθε ἄδειαν ᾧ ἐγὼ κελεύω, θεράπων ὑμῖν ἑνὸς τῶν ἐνθάδε ἀνδρῶν ἀμύητος ὢν ἐρεῖ τὰ μυστήρια).[81] Only after *adeia* was granted, the slave Andronicus reported that the Mysteries were performed at Polytion's house by Alcibiades, Nicides, Meletus and others who were present, including himself, his brother and Meletus' slave.

The second witness was a metic named Teucer, who had fled to Megara. He offered to be a witness to the council in return for *adeia* (Andoc. 1.15: Τεῦκρος ἦν ἐνθάδε μέτοικος, ὃς ᾤχετο Μέγαράδε ὑπεξελθών, ἐκεῖθεν δὲ ἐπαγγέλλεται τῇ βουλῇ, εἴ οἱ ἄδειαν δοῖεν, μηνύσειν περί τε τῶν μυστηρίων, συνεργὸς ὤν, καὶ τοὺς ἄλλους τοὺς ποιοῦντας μεθ᾽ ἑαυτοῦ, καὶ περὶ τῶν Ἑρμῶν τῆς περικοπῆς ἃ ἤδει. ψηφισαμένης δὲ τῆς βουλῆς – ἦν γὰρ αὐτοκράτωρ – ᾤχοντο ἐπ᾽ αὐτὸν Μέγαράδε).[82] The council, which had full authority (*autokratōr*) in the investigation, gave *adeia* to Teucer, who confessed to having taken part in the profanation of the Mysteries and accused 18 people of this crime as well as the mutilation of the herms. All his accomplices fled into exile. Similarly, Andocides himself was granted *adeia* by the council for revealing what he knew about the facts (Andoc. 1.60).

The third informant was Agariste, the wife of Alcmaeonides. She also accused Alcibiades and two other men and indicated that the Mysteries were performed in Charmides' house. From Andocides' account, it seems that she was not involved in the profanation, and *adeia* was likely not needed for her (Andoc. 1.16). The final informer was a slave named Lydus, who, under the protection of *adeia*, accused his master Pherecles of having desecrated the Mysteries in his house in the deme of Themacus (Andoc. 1.17).

[78] On the Sicilian expedition, see Gomme et al. (1970); Kagan (1981); Kallet (2001); Hornblower (2008). For an analysis of Andocides' speech *On the Mysteries*, see MacDowell (1962); Gagarin and MacDowell (1998). For a general overview on the events, see Furley (1996).

[79] For a discussion on the role of amnesty in the Greek poleis, see Joyce (2008) 507–18; (2014) 37–54; (2015) 24–45; Gray (2013) 369–401; (2015) 89, who show that the provisions of the amnesty laid down regulations for the future of the community; *pace* Carawan (2013) who argues against the idea that *mē mnēsikakein* in the Athenian amnesty of 403 BC encompassed a principle of forgiveness.

[80] For *endeixis*, see Harrison (1971) 172–75; Hansen (1976).

[81] 'If you vote to give immunity to the person to whom I tell you to, a servant of one of the men present here, though he is uninitiated, will tell you about the Mysteries' (tr. MacDowell in Gagarin and MacDowell (1998), adapted).

[82] 'Teucer, a metic in Athens, departed secretly to Megara, and from there made an offer to the Council that, if they gave him immunity, he would give them information about the Mysteries, being himself a participant, and about the others who performed with him, and would say what he knew about the mutilation of the Herms. The Council which had authority to act, voted in favour and went to Megara to fetch him' (tr. MacDowell in Gagarin and MacDowell (1998), adapted).

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The account of Andocides is important for understanding the general principle behind *adeia*. The first point to stress here requires singling out the institutional actors in charge of the investigation. Andocides' account starts in the assembly, but the informers obtained *adeia* from the council. The normal *adeia* procedure, as I have reconstructed it in section III, was in these cases completely overridden. The council could bestow *adeia* only because of the full powers (*autokratōr*) that the assembly had previously delegated to the *boulē*, a key institutional step that Andocides takes as understood in his account.[83] This means that no quorum of 6,000 votes was required and the immunity was granted by a simple vote of the council, which was in charge of the investigation along with a board of investigators (*zētētai*).

One should not interpret this as a mismanagement of the legal procedure. In his account of the events, Thucydides stresses (6.27) that the Athenians took the case very seriously (τὸ πρᾶγμα μειζόνως ἐλάμβανον), which helps explain the special unfolding of the procedure.[84] The first reason for the unusual application of the procedure is connected with the religious aspect. Thucydides comments that the profanation of the Mysteries was of course considered an act of impiety (*asebeia*) and thought to be a bad omen for the Athenian expedition to Sicily (τοῦ τε γὰρ ἔκπλου οἰωνὸς ἐδόκει εἶναι).[85] The profanation of the Mysteries did not only imply a simple act of impiety, but it also created problems with the investigation because of the secret nature of this religious cult.[86] Information provided in front of the whole *dēmos* in the assembly would also have been impious. Those who were not initiated were not allowed to hear the evidence given by the informers providing details about the rituals. As Andocides reports, as soon as Pythonicus accused Alcibiades, the *prutaneis* decided to clear the assembly of all the uninitiated before introducing the first informer to provide his testimony (Andoc. 1.12: ἔδοξε τοῖς πρυτάνεσι τοὺς μὲν ἀμυήτους μεταστήσασθαι). The Athenians faced the problem of identifying a public authority that could deal with the investigation more effectively than the assembly without affecting the democratic legitimacy of *adeia*. A smaller body like the Council of Five Hundred was institutionally more appropriate to lead such a delicate investigation, and at the same time could enjoy the democratic legitimacy to grant *adeia* without referring back to the assembly, in contrast to the Council of Areopagus, manned for life by former archons. Even during criminal investigation, *adeia* needed to be voted on by a democratic and deliberative body that could discuss the necessity of suspending the validity of a law.

The second reason is that the mutilation of the herms and the profanation of the Mysteries were also perceived to be constitutional emergencies and part of a conspiracy to overthrow democracy (Thuc. 6.27.3: ἐπὶ ξυνωμοσίᾳ ἅμα νεωτέρων πραγμάτων καὶ δήμου καταλύσεως γεγενῆσθαι). This is confirmed by Andocides, who reports that after Teucer gave information, two members of the investigating committee, Charicles and Pisander, declared that there was a plot to overthrow democracy (Andoc. 1.36). In this case, a strict application of the law would require that the mutilators of the herms and anyone who violated the Mysteries were guilty of both *asebeia* and of attempting to overthrow democracy (κατάλυσις τοῦ δήμου). These were two different substantive offences that were tried in court through the relevant legal procedures: the *graphē asebeias* and the *eisangelia*.[87] In normal circumstances, the application of the law would be straightforward and the penalty for such crimes was death. Those who were involved in the profanation and did not

[83] For the powers and prerogatives of the Athenian Council, see Rhodes (1972).

[84] On Thucydides' account of events, see Hornblower (2008) 367–81, with detailed discussion of previous bibliography.

[85] For a general overview of *asebeia*, see Bowden (2015) with full bibliography; for the epigraphical evidence of *asebeia*, see Delli Pizzi (2011).

[86] For the Eleusinian Mysteries, see the different approaches of Burkert (1987); Graf (2000) 611–15, who stresses the religious aspect of the Mysteries scandal; Parker (2005) 334–68; Bremmer (2014) 1–20. For the epigraphical evidence of the Eleusinian sanctuary of Demeter and Core, see Clinton (2005).

[87] Filonik (2013); Harris (2013). See also the detailed discussion of Alcibiades' trial in Loddo (2019) 12–28.

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enjoy the protection of *adeia* were indeed sentenced to death, their properties confiscated and sold, and priests and priestesses were instructed to cast curses on them (Thuc. 6.71.7).[88] Yet, the secret and sacrilegious nature of these offences made it more difficult to identify the several wrongdoers involved in the events. If the Athenians wanted to prosecute the criminals effectively, they could not rely exclusively on the strict application of the law and their regular system of volunteer prosecutors. Those who knew about or took part in the criminal events needed to be offered incentives to become involved with the investigation.

Accordingly, the Athenians delegated special powers to the council and to the investigating committee to use *adeia* to collect key information that the Athenian state might otherwise be unable to obtain. The suspension of the law through the grant of immunity was therefore justified by the necessity to prosecute several people for a single crime and to prevent a possible anti-democratic conspiracy that would have undermined the existence of those same democratic institutions. Both crimes were characterized by a secret intent and were therefore more difficult to prosecute through the normal channels of the Athenian judicial system.

Thucydides reports that the Athenians voted on a decree permitting the investigation and authorizing a grant of *adeia* for anyone who provided information about any act of impiety, whether he was a citizen, a metic or a slave (Thuc. 6.27: μηνύειν ἀδεῶς τὸν βουλόμενον καὶ ἀστῶν καὶ ξένων καὶ δούλων). None of the informers, with the exception of Agariste, would have been willing to provide information about the events because either they took part in the crimes or they were people with a subordinate legal status, such as slaves of citizens involved in the profanation of the Mysteries. For example, without the grant of *adeia*, the Athenian authorities would not have obtained key information from the metic Teucer who was involved in the profanation of the Mysteries and knew about the mutilation of the herms. Similarly, the Athenian state would not have been able to acquire the witness statements of the two slaves Andronicus and Lydus. Slaves could provide testimony only with the permission of their master and after being tortured.[89] In this circumstance, the two slaves accused their own masters and were not tortured, since they enjoyed the protection granted to them by *adeia*. It is also interesting to note that, in this exceptional case, *adeia* was not the only benefit-conferring instrument adopted by the Athenians to facilitate the investigation. Andocides reports that the informers claimed a substantial financial reward for their collaboration according to the decree of Cleonymus and the decree of Pisander, which awarded 1,000 and 10,000 drachmas to the informers, respectively (Andoc. 1.27–28). The assembly decided that the initiates had to decide about conferring the awards, which were eventually granted to Andromachus and Teucer.

An important aspect to stress is that of the potential abuse of *adeia*. One might argue that the procedure of *adeia* could easily be abused by people who wanted to use the judicial system for personal vendettas without any check on their conduct or on the quality of their information.[90] Although abuses of the procedure did occur, these cannot be imputed to the institutional design of Athenian law. Although *adeia* was an incentive to bring forward legal charges, such an incentive did not mean that informers under protection of *adeia* were free from any responsibility. The voluntary aspect of the procedure was counterbalanced by another legal provision that envisaged the death penalty for those who provided false information under the protection of *adeia* (Andoc. 1.19). This aspect of the law regulating *adeia* for informers is consistent with the Athenian approach to the abuse of public prosecutions. The Athenians set the very severe and automatic

[88] The names of those whose property was confiscated and sold were written on stelae set up in the Eleusinion: see *SEG* 13.12–22, 19.23–25. This evidence is discussed in Lewis (1997b) 158–72; Osborne and Rhodes (2017) no. 172.

[89] For torture of slaves, see Thür (1977) *contra* Gagarin (1996); Mirhady (1996); Osborne (2000); but see Lewis (2018) 45–46. Only Athenian citizens were protected against torture: see Dem. 18.132.

[90] For the view that the Athenian judicial system fostered personal feuds, see Cohen (1995); Christ (2005); Phillips (2013); but see also Herman (2006); Harris (2013) 21–98.

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penalty of *atimia* for malicious prosecutions in public cases.[91] The procedure of *adeia* was thus carefully designed to foster spontaneous collaboration with the public authorities for those who were directly or indirectly involved in a crime against the community.

The only evidence for the abuse of *adeia* in relation to witnesses and informers seems to be in Lysias' *Against Agoratus*.[92] Agoratus and Menestratus acted as informers for the Thirty during their tyrannical rule. In his accusation speech against Menestratus for collaboration with the Thirty (Lys. 13.55–56), Lysias gives an account of how *adeia* for informers was used and provided the relevant decree of *adeia* at the trial. Hagnodorus of Amphitrope proposed giving immunity to Menestratus, and the assembly gathered at Munichia granted him *adeia*, after which he provided information against some citizens. While the procedure seems to have been followed formally, the Thirty abused the spirit of *adeia* by entering false charges against innocent citizens whom they wanted to be prosecuted and put to death for political reasons. As shown through the analysis of the events of 415 BC, the rationale of *adeia* was not to deal with normal prosecution and with the day-by-day administration of justice, but to tackle exceptions within the framework of the rule of law. The ancient evidence suggests that Athenians always respected this use of *adeia* under democracy, and it is not surprising that the only documented abuse of *adeia* happened under the rule of the Thirty, which undermined other tenets of the Athenian legal system by abolishing the *graphē paranomōn* and the secret ballot during trials.

V. Public investigation and exception to the rule: a form of emergency powers

The evidence for the use of *adeia* in fifth-century Athens is consistent in showing that such a procedure triggered an exceptional and *ad hoc* suspension of the law. However, far from being just a small procedural detail in the history of Athenian law, the procedure of *adeia* allows us to elaborate broader constitutional reflections on the role of public institutions in investigating extraordinary crimes and the relevant conceptualization of emergency powers in the Athenian democracy. Scholarship has long recognized the importance of volunteer prosecutors (*hoi boulomenoi*) in the Athenian legal system and the absence of permanent public prosecutors who acted on behalf of the state in judicial cases.[93] In an important article collecting epigraphical evidence for volunteer prosecutors from outside Athens in the Classical and Hellenistic periods, Lene Rubinstein shows that the role of volunteer prosecutors was not only an Athenian phenomenon and points out a shared set of Greek procedural principles in the context of penal prosecution, which 'made volunteer prosecution desirable, if not essential' throughout the Greek world.[94] Although voluntary prosecution was the main way to introduce a criminal charge, especially in democratic poleis like Athens, Rubinstein rightly observes that the involvement of citizens in law enforcement does not always entail the necessity for citizens to be prosecutors in court. A famous and remarkable example comes from a fifth-century law from Thasos, encouraging both citizens and slaves to report information about potential plotting against the city government that at the time was probably an oligarchy (Körner (1993) no. 70 = Osborne and Rhodes (2017) no. 176). If the information provided was proved true, the law granted a reward of 1,000 staters from the polis treasury for citizens. The law seems also to envisage a form of immunity from prosecution (line 4) and freedom to slaves (lines 1–3). The law specifies that, in case of multiple informers, the Three Hundred decide who had the best claim to the reward (lines 2–5: ἢμ πλέος ἢ εἷς κατείπωσι,|τριηκόσιοι κρινόντων δίκην δικάσαντες· ἢν δέ τις τῶν μετεχόντων κατείπηι, τό τε ἀργύριον| ἰσχέτω καὶ κατὼμοτος κατ᾽αυτõ μὴ ἔστω μηδὲ δίκη μηδεμία ἰρὴ μήτε βεβήλη περὶ τότων| μηδὲ ἐν τῆι ἐπαρῆι ἔστω πλὴν ἑνός, τõ πρώτο βουλεύσαντος·).[95]

[91] Harris (2006) 405–22.

[92] On this speech, see Todd (2000) 137–40.

[93] Hansen (1991); Rubinstein (2000); Liddel (2007) 256–58.

[94] Rubinstein (2003) 111–12.

[95] 'If more than one man makes the denunciation, let three hundred decide after judging the case. If one of those who were part of the plot makes the denunciation, let him have the money and let him not be under oath against himself; let there be no case, either sacred or

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The Thasian law shows several similarities with the Athenian approach in the investigation following the profanation of the Mysteries and the mutilation of the herms. Like the case in Athens, the Thasian law regulating the report of information does not deal with normal offences, but was designed to prevent threat to the constitutional order by encouraging the involvement of every member of the community in the investigation. The enactment aimed to tackle a type of crime that potentially involved several actors and was characterized by deliberate planning and secrecy. Moreover, immunity from prosecution and protection from curses were used to encourage conspirators to provide information to the state authorities against their accomplices. Rubinstein notes that the Thasos regulation seems to suggest that the informers, whether citizens or slaves, were not required to stand in court as prosecutors, and that their role was limited to reporting to the authorities. Again, like the Athenian case, the investigation of a crime, such as a plot to overthrow the constitution, was delegated to a public institution and not to volunteer prosecutors as in the normal administration of justice.

This comparison is important because it makes clear that in Greek legal systems, both in democracies and non-democratic regimes, there was the possibility for a public institution to suspend the application of the law in cases that exposed the community to emergencies threatening the existence of the constitution and the legal order itself. While the Thasian law enshrined permanent rewards, including immunity from prosecution, for those denouncing a conspiracy, the Athenian case of *adeia* was different. The institution of *adeia,* and especially its application by the special delegation of powers to the Athenian council during the events of 415 BC, shows unique elements that configure *adeia* as a proper 'law of exception' to exercise emergency powers, according to the typical features of Athenian democratic practice.

In an insightful article, John Ferejohn and Pasquale Pasquino explain the conceptual foundation of the 'law of exception' as emergency power.[96] In the case of urgent danger to the state, as the profanation of the Mysteries was, there may be constitutional instruments to delegate special powers to a single authority to enact legislation, to censor information or 'to suspend legal process and rights'.[97] In a constitutional system based on the rule of law, like Classical Athens, the purpose of this special authority is, in Ferejohn' and Pasquino's words, 'fundamentally *conservative*'. This means that the emergency power should only restore the previous legal order, otherwise the power would turn into a constituent power. The emergency power is conceptualized as a temporary derogation or a suspension (and not an abrogation or introduction) of a norm in order to safeguard a high-order and entrenched normative level, which is the legitimate constitutional government. Such a derogation or suspension from the normal legal process must be justified, and must single out the higher principle to be shielded during the emergency. From the institutional point of view, modern constitutions adopt two different models of emergencies powers. (1) A model based on the Roman dictatorship in which emergency powers are constitutionalized provisions. The emergency is declared by a constitutional body, usually the legislative, that delegates special authority to a single official with wide powers for a fixed period of time.[98] (2) A 'legislative model' in which emergency powers are not envisaged in the constitution, but are enacted by an *ad hoc* measure by a deliberative body that delegates power to the executive to solve the emergency.

On a conceptual level, Ferejohn and Pasquino's definition of emergency powers is in line with the investigation of the profanation of the Mysteries in 415 BC as detailed by Andocides and discussed in section IV. The Athenians took extraordinary measures to solve a serious crime of impiety that could have polluted the community and to prevent the overthrow of democracy. On the institutional level, the Athenians seem to have been much closer to the so-called 'legislative

profane, about these things, and let him not be under the curse except for the one man who is the instigator of the plot' (tr. Osborne and Rhodes (2017)).

[96] Ferejohn and Pasquino (2004).

[97] Ferejohn and Pasquino (2004) 210.

[98] This is, for example, the model outlined at article 16 of the French constitution of 1958. For Roman emergency powers and constitutionalism, see Straumann (2016) 63–117. The dictator could, however, be prosecuted after his term of office: see Straumann (2016) 73.

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model' (2). The Athenians chose to deal with a constitutional emergency according to the general principles of their democracy by relying on the deliberative institutions of the polis. The Athenian assembly entrusted the council with emergency powers to act as public investigator and to grant *adeia* to suspend the 'legal process' for a higher purpose. While the use of *adeia* was regulated by law, as Andocides reports, the delegation of full power to the council was an *ad hoc* decree of the assembly, which defined the task that the *boulē* had to perform during the emergency.[99] Such a delegation procedure was not a default constitutionalized mechanism to deal with emergencies, such as the Roman dictatorship or the *senatus consultum ultimum*, but only one option within the normal powers of the assembly that the *dēmos* could employ to solve the crisis.[100]

The comparison with the Roman Republican model casts light on the rationale behind the emergency powers in Classical Athens. During the events of the 415 BC, the emergency powers rested with the Athenian *dēmos* and were not delegated to a magistrate. In case of an external or internal crisis, the Roman Senate could proclaim a state of emergency and the consuls could appoint a dictator, a single magistrate with full powers. Alternatively, the Senate could issue a *senatus consultum ultimum* to grant special authority to the consuls in order that the 'Republic suffer no harm'.[101] In both cases, the constitutional way to solve the emergency was to concentrate power in the hands of higher magistrates. Even if the Athenian *boulē* was formally an *archē*, and therefore a magistracy, it was a very special one. The council was a very large deliberative institution manned by 500 citizens selected by lot and representing the whole polis.[102] Just to draw a comparison with the institutions of two modern and well-established constitutional democracies, the Athenian *boulē* was larger the than US House of Representatives and slightly smaller than the French Assemblée nationale, with 435 and 577 members, respectively.

Thus, during an internal emergency and on the eve of a military campaign, Athens decided to revert to an extraordinary public investigator to protect its democracy and the cults of the polis. The supervisory power of the council to investigate the conduct of magistrates is well attested in Classical Athens, yet the Athenian choice to delegate the extraordinary powers and to grant *adeia* is unparalleled. In this case, the Athenian council was empowered not only to investigate through the normal procedures but also to suspend the effect of a law and even to arrest citizens without referring back to the assembly.

This is what Andocides implies when he recalls that, during the investigation, every time the herald announced that the council had to meet in the council chamber and took down the signal, the people in the agora ran away for fear of being arrested (And. 1.36: δεδιότες εἷς ἕκαστος μὴ συλληφθείη). Andocides confirms the exceptional power of the council to arrest citizens during this event at section 43 when he says that Pisander proposed to repeal the decree of Scamandrius forbidding the torture of Athenian citizens and to put to the wheel all those denounced by Dioclides. The council approved these proposals with shouts (Andoc. 1.43: ἀναστὰς δὲ Πείσανδρος ἔφη χρῆναι λύειν τὸ ἐπὶ Σκαμανδρίου ψήφισμα καὶ ἀναβιβάζειν ἐπὶ τὸν τροχὸν τοὺς ἀπογραφέντας, ὅπως μὴ πρότερον νὺξ ἔσται πρὶν πυθέσθαι τοὺς ἄνδρας ἅπαντας. ἀνέκραγεν ἡ βουλὴ ὡς εὖ λέγει).[103] The practice of torturing citizens was not allowed in Athens, and torture could only happen in court. Such powers were much wider than those normally delegated to other public investigators. For example, during the Harpalus affair, the Areopagus was instructed by the assembly to investigate the case. The Areopagus only presented a report to the assembly which elected prosecutors to bring

[99] The transfer of power to the council is attested in several decrees: *IG* I^3 72, 136, *IG* II^2 127, *IG* II^3 1.292, 370.

[100] On *senatus consulta*, see the essays in Balbo et al. (2015).

[101] See Straumann (2016) 88 n.144, with bibliography.

[102] *Cf.* the comment of a scholiast to Aeschines who defines the council as μικρὰ πόλις ('little polis'): Schol. A III Ctes. 4 (Dilts (1992) no. 14).

[103] 'Then Pisander stood up and said that the decree of the year of Scamandrius should be repealed and those listed should be put on to the wheel, to make sure that all men were discovered before nightfall. There was a shout of approval from the Council' (tr. MacDowell in Gagarin and MacDowell (1998)).

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the case to court.[104] The role of the council *autokratōr* in 415 BC was officially that of investigating, yet its exceptional powers and use of *adeia* made the council closer to a public prosecutor. The Athenians decided, nevertheless, to delegate these emergency powers to a large and highly representative institution, selected by lot and working by mass deliberation according to procedures and discursive protocols that did not differ much from those of the assembly.

Such a choice should not come as a surprise. It shows that the Athenian institutional approach to deal with emergencies was in line with the general design and spirit of its legal and constitutional system, which reflected a strong distrust of magistrates embedded in its institutions. Concentration of power in a small board of magistrates was usually discouraged in order to avoid bribery and the establishment of tyranny. Such an approach is attested by several features of the Athenian legal system, such as the limited power of magistrates in the ordinary administration of justice and in the process of legislation, where the leading role was played by a large panel of judges or by the council and the assembly, respectively. This is evident in the Athenian legislation that forbade magistrates from holding an office more than once; this covered all magistrates except military officials and councillors ([Arist.] *Ath. Pol*. 62.3), as well as the practice of organizing magistracies in boards of peers ([Arist.] *Ath. Pol*. 41.2, 50.1–62.3). As a result, a solution such as the Roman model would have been too controversial and in conflict with Athenian values. This Athenian distrust of magistrates seems justified. In 413 BC, when the news of the disastrous defeat in Sicily reached Athens (Thuc. 8.1–2), the Athenians were seized with fear. The assembly passed a decree for the institution of an extraordinary board of ten *probouloi* charged with the task of taking measures for the 'salvation of the polis' (Thuc. 8.1–2; [Arist.] *Ath. Pol.* 29.2). The *probouloi* formed a board of officials established to solve the war crisis and to operate within the democratic dynamics of the Athenian institutions. Yet, under pressure from oligarchic groups, they proved instrumental in paving the way for the establishment of the more powerful office of the *sungrapheis autokratores* (Thuc. 8.67). The latter board turned an emergency power into a constituent power and abolished democracy by establishing the regime of the Four Hundred in 411 BC.[105] In contrast, the council's power of voting for *adeia* was limited to the emergency and aimed at restoring public order according to the *conservative* purpose of operating in a state of emergency within the normal constitutional framework.

Athenian institutional practice shows a remarkable contrast with the Spartan practice during the plot of Cinadon (Xen. *Hell.* 3.3.5–11).[106] In 397 BC, an anonymous informant reported the details of a conspiracy to the Spartan ephors.[107] Cinadon was a young man who did not belong to the class of the Spartiates (οὗτος δ' ἦν καὶ τὸ εἶδος νεανίσκος καὶ τὴν ψυχὴν εὔρωστος, οὐ μέντοι τῶν ὁμοίων) who approached the informant in the Spartan agora in order to convince him to join his plan. Cinadon tried to capitalize on the dissatisfaction of those sections of Spartan society that lacked full rights to foment a revolt against the Spartiates. Like the case of the profanation of the Mysteries and the mutilation of the herms in Athens, Cinadon's plot was secret and aimed at subverting the constitutional order. Yet, the Spartan approach to this emergency was different from the solution adopted by the Athenians. The ephors, after thoroughly questioning the informer, realized that the plan was a real danger to public security. Having consulted with some members of the *gerousia*, but without gathering the 'little assembly' (Xen. *Hell.* 3.3.8), the ephors dispatched Cinadon with a group of *hippeis*, elite infantry troops, to carry out a mission to Aulon on their behalf.[108] According to Xenophon's account, the ephors had given orders to the young men of the

[104] Din. 1.45; Hyp. *Dem.* 5–6 with Harris (2016) 76–80.

[105] Mann (2007) 266; Bearzot (2013); Tuci (2013).

[106] For an analysis of the conspiracy, see David (1979) 239–59. For literary and historiographical perspectives on this episode, see Gray (1989) 39–45; Jehne (1995) 166–74.

[107] For informants in oligarchies, see Simonton (2017) 138–47.

[108] There is no other evidence for the Spartan 'little assembly', which might be another name for the *gerousia*.

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guard to arrest Cinadon outside the city and to learn from him the names of his accomplices, to write them down and to submit the document to the ephors. The emergency was considered so dire by the ephors that they felt compelled to use the squadron of *hippeis* to carry out the arrest (Xen. *Hell.* 3.3.10).[109] The ephors arrested all the other members of the plot; Cinadon himself confessed everything before the ephors and was executed along with his accomplices.

The fact that the board of five ephors was normally in charge of administering justice in Sparta allowed them to tackle the plot without the enactment of emergency measures and without addressing the people in the assembly.[110] Unlike Athens, where no board of officials enjoyed broad judicial powers, the ephors normally acted both as public prosecutors and policing officials. Athenian officials could not break into the private properties of citizens without a decree of the council or of the assembly and could not dispatch soldiers as the ephors did to arrest of Cinadon.[111] Although Cinadon's plot was, of course, secret and the ephors did not know how many people were involved (Xen. *Hell.* 3.3.10: τὸ πρᾶγμα οὐκ ᾔδεσαν ὁπόσον τὸ μέγεθος εἴη), the Spartan authorities did not need to suspend the law or to grant rewards to encourage more informants to collaborate. In contrast to the case of the Mysteries and the mutilation of the herms, Cinadon's plot did not get very far and the ephors did not have someone publicly report it to the assembly, as Pythonicus did by denouncing Alcibiades. The ephors, moreover, knew who the leader of the plot was and were dealing with people of subordinate legal status, rather than with members of the Spartan citizenry. The institutional design of the Spartan state and the different political culture that empowered magistrates vis-à-vis the popular assembly made it possible for the ephors to use their standard constitutional powers as prosecutors to supress the plot before it could be enacted.[112]

What emerges from the analysis of the evidence for *adeia* and the comparison with other ancient institutions is that this procedure was an innovative legal instrument, and yet it was consistent with the ideological tenets of the Athenian legal system and its democratic principles. *Adeia* implied a political act of the community to derogate the established laws, and such power was always exercised by deliberative bodies: the assembly and exceptionally the council, but not by the law courts or any magistrate. When the power to grant *adeia* was delegated from the assembly to the council, the *boulē* acted as a proper public investigator, yet its powers came close to those of a public prosecutor during an emergency without overstepping its constitutional powers. *Adeia* could be employed with different legal purposes, as the procedure was generally designed to suspend the effects of legal norms without repealing the statutes. The fifth-century instances of immunity in judicial cases and the use of *adeia* to change entrenched decrees share the basic principle of being 'exceptions to the rule'. The common principle behind all these uses of *adeia* was the common interest of the community, which might allow a degree of flexibility in the application of the law (in the case of the profanation of the Mysteries) or of nomothetic ideology (in the case of entrenchment clauses). When *adeia* was employed for criminal investigations, the analysis of fifth-century sources indicates that it was used only as an exceptional institution during emergencies in which a strict application of the letter of the statutes would have made it very hard for the state authorities to identify all those who had committed a serious offence against the community. This higher justification was the only reason for a temporary suspension of the law. This *ad hoc* use of *adeia* in unusual circumstances allowed for the coexistence of the rule of law and exceptions to the rules.

[109] For the Spartan *hippeis*, see Figueira (2006) 57–84.

[110] See Cartledge (1979) 273; (2000); Richer (1998). *Cf.* Gish (2009) for an interpretation of this episode as Xenophon's critique of Spartan justice.

[111] For the inviolability of private houses in Athens, see Hansen (1998) 92–93; Liddel (2007) 211–12, showing the conflicting ideology between domestic and polis life in Athens.

[112] This is clearly linked to the permanent concern of the Spartan authorities that the population of subordinate groups (for example, helots and inferiors) did not increase too much: see Hodkinson (2009) 434–35. For Spartan helots, see Luraghi (2002) 229–50; (2003) 109–41; Lewis (2018) 126–46.

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