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Author(s): Gertrude Smith

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## THE JURISDICTION OF THE AREOPAGUS

BY GERTRUDE SMITH

The Areopagus was the lineal descendant of the Homeric council of elders.<sup>1</sup> Up to the time of Draco there existed only this one council at Athens, consisting, after the institution of the annual archonship, of ex-archons who had successfully passed their audit.<sup>2</sup> As the direct descendant of the Homeric council it had control of practically the entire government of the state. Hence its functions are found to be threefold—administrative, judicial, and religious. As the democracy developed it was inevitable that new bodies should be created to deal with the increasing business of the state. The old council was primarily aristocratic, selected, as it was, at first wholly on the basis of birth and later on the basis of wealth and birth,<sup>3</sup> and the tendency naturally was that the Areopagus with its somewhat vague and indistinctly defined duties should give way gradually to the new democratic bodies with their sharply defined powers. The weakening of the Areopagus, therefore, was to a large extent the natural and gradual result of the development of democracy. The loss of power was confined in the main to judicial and political functions. The democracy could gain no appreciable advantage by transferring religious duties from the Areopagus to a more democratic body. Furthermore, as is repeatedly illustrated in their history, the Athenians were extremely conservative in matters of religion and were reluctant to make changes.

According to the accounts of ancient writers, the Areopagus from very ancient times enjoyed a position of the greatest prestige throughout Greece. Several mythical trials for homicide were said to have been held in Athens before this body.<sup>4</sup> A story told by Pausanias

<sup>1</sup> Cf. Gertrude Smith, *Administration of Justice from Hesiod to Solon*, pp. 11 ff.; for the antiquity of the name of the council cf. *ibid.*, p. 12, n. 5, and Busolt, *Griechische Staatskunde*, II, 795.

<sup>2</sup> Aristotle *Const. of Athens* 3.6. If the Draconian constitution (*ibid.* 4) is rejected, the Areopagus was the sole council up until the Solonian reforms (cf. Sandys, *ad loc.*).

<sup>3</sup> Aristotle *op. cit.* 3.6.

<sup>4</sup> For the details of these trials cf. Gertrude Smith, *op. cit.*, p. 13.

represents the Messenians, during a quarrel with the Spartans in 742 B.C., as offering to submit their differences to the Athenian Areopagus.<sup>1</sup> Its reputation for fairness was never lost even after the powers of the council were seriously curtailed, and the prestige and honorable position which the body continued to have account for many of the things which happened in its history.

The weakening of the Areopagus began very early. It originally had control of all the business of the state and of the magistrates and in addition unlimited power to punish all who disobeyed the laws, which as yet had not been reduced to writing. The institution of such officials as the thesmothetae<sup>2</sup> and their practice of recording legal decisions early weakened the Areopagus.<sup>3</sup> Subsequently Draco's codification and writing down of the laws further lessened its power. It henceforth had to apply written laws rather than to declare unwritten laws.<sup>4</sup> Under Solon in turn the laws were made much fairer and more definite.<sup>5</sup> Wilamowitz noted that the Areopagus apparently had no part in the legislation of Draco or of Solon.<sup>6</sup> But it is not strange that men should have been appointed for these tasks who were not members of the Areopagus. In each case the purpose of the innovations was to reconcile the various classes in the state, and it would have been unwise to delegate such a task to a member of a distinctly aristocratic and conservative body. Neither lawgiver materially weakened the body directly. In fact, Solon in some respects strengthened it. But one of his innovations led in succeeding generations to a change in the character of the body. In early times the council selected the magistrates. Accordingly it chose the archons who on the expiration of their terms became members of the council. Solon introduced the selection of the nine archons by lot from a larger number elected by the tribes, and he also gave to the people the power

<sup>1</sup> 4.5.1.

<sup>2</sup> Cf. Gertrude Smith, *op. cit.*, pp. 24 ff.

<sup>3</sup> Cf. Wilamowitz, *Aristoteles und Athen*, II, 49. Wilamowitz' statement that the institution of the *epêrai* weakened the council is of course wrong. These courts were merely sections of the Areopagus itself (cf. Gertrude Smith, *op. cit.*, pp. 16 ff.).

<sup>4</sup> Cf. Botsford, *The Athenian Constitution*, p. 151.

<sup>5</sup> Cf. Freeman, *The Work and Life of Solon*, p. 76.

<sup>6</sup> *Op. cit.* If my theory about the composition of the court of three hundred who tried the Alcmaeonidae is correct (*op. cit.*, p. 21), Wilamowitz is wrong in including here the attempt of Cylon.

to superintend the audits of magistrates.<sup>1</sup> This was an important step. It not only made the Areopagus ultimately a more democratic body, but it took away from it the right of self-perpetuation inasmuch as it was henceforth composed of ex-archons who had been selected by the people. It thus lost an important means of controlling the state by selecting the men who were to govern it. It could no longer even control the policy of these men through exercising the power of audit. In spite of this, however, there was probably no appreciable actual change in the character of the body until the archonship was thrown open to the lower classes; so that the Areopagus did not immediately suffer greatly in prestige or importance. In fact, the account of Aristotle shows that the Areopagus occupied a very important position under Solon's constitution.<sup>2</sup>

He assigned to the Areopagus the duty of superintending the laws, so that it continued, as before, to be the guardian of the constitution in general. It kept watch over the citizens in all the most important matters, and corrected offenders, having full powers to inflict either fines or personal punishment. The money received in fines it brought up into the Acropolis, without assigning the reason for the punishment. It also tried those who conspired for the overthrow of the state, Solon having enacted a process of impeachment to deal with such offenders.<sup>3</sup>

It is noteworthy that the Areopagus continued to punish and fine with final authority although Solon granted the people the right of appeal from the decisions of the magistrates.<sup>4</sup> The institution of the *δικαστήριον* by Solon can have had no immediate effect on the Areopagus, for it seems to have been instituted merely for the hearing of appeals from magisterial decisions.<sup>5</sup> Solon apparently considered the

<sup>1</sup> Aristotle *op. cit.* 8.1-2; *Politics* 1281 B 31 (cf. Lipsius, *Das Attische Recht*, p. 30).

<sup>2</sup> *Const. of Athens* 8.4. Kenyon's translation. Cf. Plutarch *Solon* 19. Grote, *History of Greece*, III, 122, maintained that Solon really enlarged the powers of the Areopagus by giving to it the supervision of the laws, the censorial duty of inspecting the lives and occupations of the citizens, and the duty of punishing the idle and dissolute. But it exercised these functions before the time of Draco (cf. Aristotle *op. cit.* 3.6). Solon reassured the body of these functions.

<sup>3</sup> I have shown elsewhere ("The Prytaneum in the Athenian Amnesty Law," *Class. Phil.*, XVI, 349 ff.) that the Solonian amnesty law (Plutarch *loc. cit.*) refers to the Areopagus' jurisdiction over would-be tyrants. This is contrary to the view of some scholars, who posit a court at the Prytaneum for the trial of such cases. The amnesty law was repeated at the time of the Persian Wars, at which time the phrase about tyrants must have had reference to the Peisistratidae. For the amnesty law of 405 B.C. cf. *infra*, p. 75, n. 1.

<sup>4</sup> Aristotle *op. cit.* 9.1.

<sup>5</sup> *Ibid.*

conservative Areopagus a safeguard of his constitution. He doubtless felt that by giving to the body which represented the aristocracy its old prerogatives he would strengthen the nobility in its hold on the government.<sup>1</sup> At the same time by introducing the *δικαστήριον* he gave the people recourse from magisterial oppression.

In the so-called constitution of Draco there is a provision that whoever considered himself to have been wronged could bring an *είσαγγελία* before the Areopagus, *ἐξῆν δὲ τῷ ἀδικουμένῳ πρὸς τὴν τῶν Ἀρεοπαγιτῶν βουλὴν εἰσαγγέλλειν ἀποφαίνοντι παρ' ὃν ἀδικεῖται νόμον*.<sup>2</sup> The process described by *εἰσαγγέλλειν* could be used against any wrongdoer. It would surely include, then, the denunciation of a magistrate for an unjust decision. In this case the action would be in effect an appeal from a magisterial decision,<sup>3</sup> for the denunciation of the magistrate might frequently involve a complete revision of the case. It has often been maintained that the constitution of Draco is not genuine.<sup>4</sup> But whether it be genuine or not, the procedure described here must have been the one actually in practice. The Areopagus had the power of supervising the laws in the pre-Solonian period. It was therefore the body to which a citizen who was the victim of an unjust legal decision would naturally bring his grievance. Furthermore, part of this function of the Areopagus consisted in the audit of magistrates, and during the audit in a much less formal way a citizen could easily bring complaint if he felt that he had been unjustly treated. Accordingly, in the period before Solon a citizen had recourse from an unjust magisterial decision—in effect an appeal—to the body which held the magistrates to account. Likewise under the Solonian constitution which intrusted to the people the selection and audit of the magistrates the injured person was granted the right of appeal from the decision of a magistrate to the people, to whom the magistrates were now accountable.

Under Peisistratus there was no constitutional alteration in the Areopagus. Naturally under a tyrannical régime it had less power in practice than formerly, and it may have performed its functions some-

<sup>1</sup> Botsford, *op. cit.*, pp. 172 ff.

<sup>2</sup> Aristotle *op. cit.* 4.4.

<sup>3</sup> Gilbert, *Constitutional Antiquities*, p. 123, understands *εἰσαγγέλλειν* to be used only of a sort of appeal to the Areopagus from the unjust decision of a magistrate.

<sup>4</sup> Cf. Botsford, *op. cit.*, p. 145.

what irregularly. It is not unlikely that it had jurisdiction in criminal cases generally. It continued to act as a homicide court, for Peisistratus himself was brought before it on such a charge.<sup>1</sup> In theory Peisistratus kept the constitution intact, and the Areopagus would suffer in practice only during his rule.

As the guardian of the constitution the Areopagus had been intrusted by Solon and also before his time with jurisdiction over those who attempted to overthrow that constitution. Solon at least made a law providing for a process of impeachment before the Areopagus against subverters of the government.<sup>2</sup> Under Cleisthenes the introduction of ostracism transferred in part from the Areopagus to the people the duty of guarding against dangerous and ambitious citizens. At least the introduction of ostracism is ascribed to Cleisthenes in the year 508-507, but it seems to have been used for the first time two years after the battle of Marathon in the case of Hipparchus.<sup>3</sup> Henceforth it is to be supposed that there were two methods of dealing with would-be tyrants. The process of ostracism was a political weapon in the hands of the people to be used at will against any citizen who was suspected of ambitious designs. Or such persons could be denounced before the Areopagus. So Aristotle tells us that at the time of Ephialtes' attack on the Areopagus Themistocles led the council to believe that he would point out to them certain persons who were forming a conspiracy to overthrow the government.<sup>4</sup>

There is no reason to believe that at the time of Cleisthenes the Areopagus did not have jurisdiction in other cases of treason as well, just as it did in later times.<sup>5</sup>

It is doubtful if any measures were passed by Cleisthenes definitely limiting the powers of the Areopagus. Under the rule of the tyrants the body must have become filled with sympathizers of Peisistratus.

<sup>1</sup> Aristotle *op. cit.* 16.8 (cf. Bonner, "Administration of Justice under Peisistratus," *Class. Phil.*, XIX, 360).

<sup>2</sup> Aristotle *op. cit.* 8.4. For the period before Solon cf. Plutarch *loc. cit.*

<sup>3</sup> Aristotle *op. cit.* 22.3-4. Bury, *History of Greece*, pp. 261 ff., maintains that this transference of power from the Areopagus to the sovereign people deprived the Areopagus of its most important political function. For the date of the introduction and first use of ostracism cf. Carcopino, *Histoire de l'ostracisme athénien*, pp. 97 ff., "Bibliothèque de la faculté des lettres," XXV.

<sup>4</sup> Aristotle *op. cit.* 25.3.

<sup>5</sup> Cf. *infra*, p. 78.

After the expulsion it would naturally have remained in the background until it gradually became filled with new and more democratic ex-archons.<sup>1</sup>

By the time of the Persian Wars, then, the Areopagus had already lost considerable power. It had been deprived of its right to select the magistrates and to conduct the audits of officials, these powers having been assigned to the assembly. Further, *δοκιμασία* of officials had come to be handled entirely by the senate and assembly. Cases of *εἰσαγγελία* were brought before the senate and assembly. And appeals from the decisions of magistrates were made no longer to the Areopagus, but to the *δικαστήριον*. The introduction of ostracism had to some extent curtailed its power of trying those who attempted to overthrow the government.

When danger threatened the state before the battle of Salamis the council suddenly resumed many of its earlier unrestricted powers. At this time quite unconstitutionally it assumed the leadership of the state, *οὐδενὶ δόγματι λαβοῦσα τὴν ἡγεμονίαν*.<sup>2</sup> Apparently the Areopagus displayed great activity in military matters at this time, and by its donation of money to the crews of the ships was responsible for their embarkation for the battle of Salamis. It thus aided Themistocles greatly in his plans and contributed much to the victory at Salamis. Kenyon has compared the supremacy of the Areopagus during this period to the increase of power which the Roman senate gained by its display of military ability at the time of the Punic Wars. It was virtually a dictator. It must have regained almost as great prominence as that which it had in the age of Solon. It thus became guardian of the constitution in general, with complete supervision of the laws, with final authority to punish and to fine, with jurisdiction over would-be tyrants and in addition supervision of the state finances and various military and executive powers. Its military activity must have consisted largely in determining the policy of the state on various occasions and granting state money for military enterprises. Aristotle states that Themistocles expected to be tried by the Areopagus for treasonable actions.<sup>3</sup> It would seem that at this period such cases were dealt with by either the Areopagus or the assembly; for Themis-

<sup>1</sup> Cf. Botsford, *op. cit.*, p. 201.

<sup>2</sup> Aristotle *op. cit.* 23.1; *Politics* 1304 A 20; Plutarch *Them.* 10; Cicero *de off.* 1.75.

<sup>3</sup> *Const. of Athens* 25.3. This story of a trial preliminary to Themistocles' ostracism is not inconsistent with the account of Diodorus, who represents him as being brought to trial and acquitted on a charge of treason (xi. 54).

toes' final banishment was certainly decreed by the assembly. After the Persian Wars the Areopagus continued to hold sway for seventeen years, although it gradually declined in power.<sup>1</sup> This period would extend then from 478–477 (the Confederacy of Delos) to 462–461 (the archonship of Conon), when Ephialtes made his attack on the council. The formation and establishment of the Athenian Empire were, then, carried out under the guidance of the Areopagus. As soon as the danger occasioned by the Persian Wars was past it was inevitable that the council should again to a certain extent be driven into the background in the interest of more democratic bodies. The attention called to it by its wartime supremacy must have made a vivid impression upon the Athenians as to what a menace it might become to democracy. The growing popular distrust of the body and the increasing confidence of the people in their ability to manage their own affairs culminated in the attack of Ephialtes on the Areopagus in 462 B.C.

There are various stories about the associates of Ephialtes in his undertaking, but Ephialtes is always represented as the leader in the attack. In Aristotle's *Constitution of Athens*<sup>2</sup> Ephialtes is said to have brought to completion by the overthrow of the Areopagus the constitution which was sketched by Aristides. By admitting the lower classes to greater privileges he began the democratic movement which was furthered by Ephialtes. The work of Ephialtes and of Pericles with regard to the Areopagus must be considered separately. The *Constitution of Athens* clearly shows that Pericles' attack on the Areopagus was some ten years subsequent to that of Ephialtes, and was brought about in order further to please the democratic party.<sup>3</sup> In Aristotle's description of the activity of the Thirty Tyrants he says, "They took down from the hill of Areopagus the laws of Ephialtes and Arches-tratus relating to the Areopagite Council."<sup>4</sup> Arcestratus was evidently a supporter of either Ephialtes or Pericles, and put forward some of the laws.<sup>5</sup> According to the very circumstantial account of Aristotle, Themistocles played a prominent part in the reforms of Ephialtes. It is difficult to reconcile his presence in Athens at this time with the hitherto accepted chronology of Thucydides, but the

<sup>1</sup> Aristotle *op. cit.* 25.1.

<sup>3</sup> 27.1 (cf. *Politics* 1274 A 7).

<sup>2</sup> 41.2 (cf. Sandys, *ad. loc.*).

<sup>4</sup> *Const. of Athens* 35.2.

<sup>5</sup> Kenyon, *ad loc.*, suggests that he was a supporter of Ephialtes and that some of the laws appeared in his name, while Busolt, *Griechische Geschichte*, III, 1, 270, supposes that Arcestratus put forward the law by which Pericles deprived the Areopagus of power.



discussion of this involved question is beyond the scope of the present investigation.<sup>1</sup>

In depriving the council of power Ephialtes at first proceeded as follows. He brought actions against individual Areopagites in regard to their administration. Aristotle says that in this way he contrived the ruin of many of them. Doubtless this made easy the final denunciation of them before the Council of Five Hundred and the assembly.<sup>2</sup> The laws of Ephialtes relating to the abolition of the rights of the Areopagus were apparently passed by the assembly as a decree and were set up on the Areopagus, where they remained until the rule of the Thirty Tyrants.<sup>3</sup>

It is an exceedingly difficult problem to determine which functions of the Areopagus were affected by the changes of Ephialtes.<sup>4</sup> Aristotle says, *ἅπαντα περιεῖλε τὰ ἐπίθετα, δι' ὧν ἦν ἡ τῆς πολιτείας φυλακή, καὶ τὰ μὲν τοῖς πεντακοσίοις, τὰ δὲ τῷ δήμῳ καὶ τοῖς δικαστηρίοις ἀπέδωκεν*.<sup>5</sup> According to Sandys, *τὰ ἐπίθετα*, or "additional rights," include practically everything except jurisdiction in homicide cases. There seems to be no reasonable doubt but that the council retained its jurisdiction in homicide cases. According to Demosthenes, *τοῦτο μόνον τὸ δικαστήριον οὐχὶ τύραννος, οὐκ ὀλιγαρχία, οὐ δημοκρατία τὰς φονικὰς δίκας ἀφελέσθαι τετόλμηκεν*.<sup>6</sup> An anonymous biography represents Thucydides as defending Pylilampes before the Areopagus<sup>7</sup> on a charge of homicide. Pericles was the prosecutor. There is a fragment of Philochorus to the effect that Ephialtes left only homicide cases to the Areopagus.<sup>8</sup> Added to these notices is the fact that the Athenians

<sup>1</sup> He is mentioned as Ephialtes' associate in Aristotle *op. cit.* 25.3, and in the argument to Isocrates' *Areopagiticus*. For the possibility of his presence in Athens at the time cf. Ure, "When Was Themistocles Last in Athens?" *J.H.S.* (1920-21), pp. 165 ff.

<sup>2</sup> Cf. Plato *Rep.* 565E.

<sup>3</sup> Aristotle *op. cit.* 25.3; 35.2 (cf. Vinogradoff, *Historical Jurisprudence*, II, 130).

<sup>4</sup> Cf. Busolt, *loc. cit.*; *Griechische Staatskunde*, II, 894 ff.

<sup>5</sup> *Op. cit.* 25.2.

<sup>6</sup> xxiii. 66. For the great age and immutability of Athenian homicide laws, cf. Antiphon v.14 and vi.2.

<sup>7</sup> Didot, Vol. II, p. 10, sec. 19.

<sup>8</sup> *FHG* i.407. Cf. Plutarch *Cimon* 15; *Pericles* 7; Pausanias 1.29.15; Xenophon *Mem.* iii. 5.20, where Socrates describes the Areopagites as deciding cases most lawfully and justly. Meier-Schömann, *Att. Process*, p. 143, advanced the theory that homicide cases were taken from the Areopagus and restored to them under the Thirty. Boeckh and O. Müller agreed. Grote, V, 268. n., refuted the theory and was followed by Philippi, *Der Areopag und die Epheten*, p. 265; Caillemer, article on the Areopagus in *Daremberg-Saglio*, p. 401; Lipsius, *op. cit.*, p. 34; and others.

felt that the Areopagus held this authority in homicide cases by divine right.<sup>1</sup> Another point raised by Caillemer is the fact that it is inconceivable that the Areopagus could have risen to a position of such importance again at the end of the fifth century if it had lost all of its functions and prerogatives sixty years before. It would have disappeared entirely.<sup>2</sup> The jurisdiction of the Areopagus in the *γραφὴ πυρκαιᾶς* is closely connected with its jurisdiction in homicide cases because arson might involve the loss of life, and this function was not disturbed by the reforms of Ephialtes.

Closely connected with the jurisdiction of the council in homicide cases is its jurisdiction in cases involving religion.<sup>3</sup> It may be said that in general the jurisdiction in cases of *ἀσέβεια* passed to the *δικαστήρια*. The council, however, appears to have kept surveillance of the sacred olives and jurisdiction over those who were accused of cutting them down. Further, they had charge of the cultivated land sacred to Demeter and Core on the borders of Megara and Attica.<sup>4</sup>

A very significant thing which is mentioned by Aristotle for the period before Solon and also in the Solonian period is the Areopagus' general oversight of laws and the constitution. This was given by Ephialtes to a new group of officials called *νομοφύλακες*. The institution of this body is recorded in a fragment of Philochorus: *ἑπτὰ δὲ ἦσαν (οἱ νομοφύλακες) καὶ κατέστησαν, ὥς Φιλόχορος, ὅτε Ἐφιάλτης μὴν ἀκατέλιπε τῇ ἐξ Ἀρείου πάγου βουλῇ τὰ ὑπὲρ τοῦ σώματος*.<sup>5</sup> Keil, in his edition and interpretation of a Strassburg papyrus which contains some fragments of history of the Periclean age, argues very plausibly on the basis of a notice about the *νομοφύλακες* that they must have been instituted under Ephialtes and dissolved under the Thirty.<sup>6</sup> If this is the case the history of *νομοφυλακία* at Athens can

<sup>1</sup> Cf. Aeschylus *Eumenides* 684, and Demosthenes xxiii.66, quoted above.

<sup>2</sup> *Loc. cit.*

<sup>3</sup> Philippi, *op. cit.*, pp. 267 ff., thinks that the reforms of Ephialtes were not concerned with cases involving religion. Lipsius, *op. cit.*, p. 366, states that cases regarding the sacred olives were the only impiety cases which continued to come before the council.

<sup>4</sup> *IG*, II, Suppl. 104a; Ditt.,<sup>2</sup> II, 789; cf. De Sanctis, "Αἴθρις, *Storia della Repubblica Atene*, p. 423, n. 3.

<sup>5</sup> *Lex Cantabr.* 674. The reliability of this passage has been questioned. Gilbert, *op. cit.*, p. 155, thinks that the body was instituted later. The number "7" causes difficulty inasmuch as it corresponds to nothing in Athenian institutions. The notices of the lexicographers are of no value, as they all deal with the *νομοφύλακες* of the end of the fourth century. Philippi, *op. cit.*, p. 193, believes that the institution of the body was connected with the reforms of Ephialtes, but that it was of little importance.

<sup>6</sup> *Anonymus Argentinensis*, pp. 170 ff. (cf. Vinogradoff, *op. cit.*, pp. 136 ff.).

be traced very clearly. At first it was in the hands of the Areopagus, then it was given to the νομοφύλακες, who were dissolved by the Thirty, and at the end of the fourth century there was an attempt to re-establish the νομοφύλακες apparently after the model of those of the fifth century. It is not to be supposed that these officials had anything to do with legislation. Doubtless the power of the Areopagus to arrest any citizen is connected with νομοφυλακία, and was lost at the same time.<sup>1</sup> The actual legal process of dealing with illegal legislation would be by the γραφή παρανόμων which doubtless also was established at the time of Ephialtes.<sup>2</sup>

The Areopagus had had a general censorship of the morals and education of the people. It undoubtedly lost it at this time. For example, the γραφή ἀργίας, which had formerly come before the Areopagus,<sup>3</sup> in later times came before a Heliastic court.<sup>4</sup> It can be seen that Ephialtes introduced certain concrete laws which took care of more or less vague functions of the Areopagus. Philippi has well said that the Athenians could henceforth call themselves masters of the courts not so much because of the actual legal jurisdiction which the Areopagus lost as because it ceased to be ἐπίσκοπος πάντων καὶ φύλαξ τῶν νόμων.

Philippi maintained that the Areopagus retained its police oversight of building. This, however, seems doubtful in view of a passage in the Pseudo-Xenophontic *Constitution of Athens*. The author in enumerating the variety of cases which came before the courts writes δεῖ δὲ καὶ τάδε διαδικάζειν εἴ τις τὴν ναῦν μὴ ἐπισκευάζει ἢ κατοικοδομεῖ τι δημόσιον.<sup>5</sup> As Kalinka observes on the passage, διαδικάζειν seems to be used here as a general word of bringing a case into court and not in its older, technical sense. The writer is speaking about the congestion of business in the city and the difficulty of getting settlements. He would scarcely include business which came before a more or less isolated body such as the Areopagus was at that time. It can hardly have been congested at this period. It is not inconceivable that the assembly occasionally appointed the Areopagus a commission to

<sup>1</sup> Cf. Wilamowitz, *op. cit.*, II, 188 ff.

<sup>2</sup> Cf. Wyse in Whibley's *Companion to Greek Studies*, p. 445; Lipsius, *op. cit.*, p. 36; Botsford, *op. cit.*, p. 222.

<sup>3</sup> Athenaeus iv. 19. p. 168A.

<sup>4</sup> Cf. Gilbert, *op. cit.*, p. 284.

<sup>5</sup> iii.4.

deal with building regulations just as it was empowered by them to make other investigations from time to time.<sup>1</sup>

This raises the question of the Areopagus as a special commission of inquiry. Its activity in this regard must be due to the prestige and moral influence which the body undoubtedly continued to have even after it had lost its direct supervision of morals. Before the reforms of Ephialtes the Areopagus could hold an inquiry and make a report entirely on its own initiative, and there is no reason to suppose that this ceased to be the case.<sup>2</sup> It was true at least during the time of the orators. It was also especially intrusted with commissions by the assembly and made reports of these investigations to that body. So in 424-423 B.C. the Areopagus was charged with the drawing up of a list of tribute to be imposed on the allies.<sup>3</sup> At the end of the Peloponnesian War the Areopagus was occupied with a search for means of saving the state.<sup>4</sup> This raises the question of the jurisdiction of the body over subverters of the democracy after the time of Ephialtes. Citizens suspected of designs on the government would continue from time to time to be dealt with by ostracism. But ostracism takes care only of those who are suspected of too ambitious ideas. Other means had to be employed against those who were actually guilty of attempting to subvert the government. It seems only natural that such a matter should be dealt with as a rule by the sovereign people just as ostracism was. Thus Antiphon was tried and convicted by a popular court. On the other hand, it is quite natural that as other special tasks were given to the Areopagus, so also it might be intrusted with the trial of a would-be tyrant.

Under Ephialtes the range of appeal from the decisions of magistrates to the heliastic courts was much widened. This reform is more closely connected with the limitation of the power of the archons than with that of the Areopagus.<sup>5</sup>

<sup>1</sup> Cf. Gilbert, *op. cit.*, p. 284, n. 2.

<sup>2</sup> Cf. Gilbert, *op. cit.*, p. 284; Philippi, *op. cit.*, p. 269, maintains that in this capacity the Areopagus was, after Ephialtes, always subject to the will of the people (cf. Caillemet, *op. cit.*, p. 402).

<sup>3</sup> CIG 75.

<sup>4</sup> Lysias xii. 69.

<sup>5</sup> Dugit, *Aréop.*, p. 153 (cf. Philippi, *op. cit.*, p. 285; Vinogradoff, *op. cit.*, p. 77). Appeal from the decisions of the Areopagus was possible in the fourth century, and heliastic courts sometimes acquitted persons condemned by the Areopagus (Dein. in *Dem.* 57).

In 457 B.C., the sixth year after the death of Ephialtes, the archonship was finally opened to the third class of citizens or *zeugitai*.<sup>1</sup> At this date the preliminary selection by vote was still in use—*ἀλλ' ἔκτω ἔτει μετὰ τὸν Ἐφιάλτου θάνατον ἔγνωσαν καὶ ἐκ ζευγιτῶν προκρίνεσθαι τοὺς κληρωσομένους τῶν ἐννέα ἀρχόντων*.<sup>2</sup> The earliest known date when the preliminary selection as well as the final appointment was made by lot is at the time of Lysias' speech for the cripple, about 400 B.C., where the defendant says, *καίτοι εἰ τοῦτο πείσει τινὰς ὑμῶν, ὦ βουλὴ, τί με κωλίζει κληροῦσθαι τῶν ἐννέα ἀρχόντων*.<sup>3</sup> At some point between these two dates, then, the change took place. De Sanctis maintained that the preliminary election had been abolished at the time of the Peloponnesian War.<sup>4</sup> He supports his view by a phrase, *πάλῳ μὲν ἀρχὰς ἄρχει*, in Herodotus' famous description of the virtues of democracy.<sup>5</sup> But the passage is very general and proves nothing. Herodotus could have used it of the system which is known to have existed in 457. Another passage used by De Sanctis in support of his theory is a statement of Socrates in criticism of electing officials by lot, *λέγων ὡς μῶρον εἶη τοὺς μὲν τῆς πόλεως ἄρχοντας ἀπὸ κνάμου καθιστάναι, κυβερνήτη δὲ μηδένα θέλειν χρῆσθαι κυαμευτῷ*.<sup>6</sup> The dramatic date of this treatise of Xenophon's is during the Peloponnesian War, and it seems certain that preliminary lot was in use at that time. Indeed, it appears altogether probable that it was adopted soon after the reforms of Ephialtes. After the fall of the Areopagus under Ephialtes it lost its veto over the assembly. The assembly controlled the state and passed decrees as it willed. The archons naturally suffered along with the Areopagus. As the position of an Areopagite which awaited them on the expiration of their office became less important, the office of archon became increasingly less

<sup>1</sup> Plutarch's statement that Aristides *γράφει ψήφισμα κοινὴν εἶναι τὴν πολιτείαν καὶ τοὺς ἄρχοντας ἐξ Ἀθηναίων πάντων αἰρεῖσθαι* (Aristides 22) can mean only that Aristides gave all classes a share in office holding. He must have retained the restriction of Solon, who gave to each class in proportion to the value of their rateable property (Aristotle *op. cit.* 7. 3).

<sup>2</sup> Aristotle *op. cit.* 26.2. I think that the use of *προκρίνεσθαι* here precludes the possibility of Wyse's suggestion, *op. cit.*, p. 445, that the introduction of the preliminary lot dates from the reforms of Ephialtes. For a summary of the methods of selecting the archons prior to 457 cf. Kenyon, on Aristotle, *Constitution of Athens*, *ad loc.*

<sup>3</sup> xxiv. 13.

<sup>4</sup> *Op. cit.*, p. 349.

<sup>5</sup> iii.80.

<sup>6</sup> Xenophon *Mem.* i.2.9.

dignified.<sup>1</sup> It seems extremely likely, then, that the preliminary lot was not long in being adopted. It may have been the result of the measures of Pericles.<sup>2</sup>

After his return from exile Cimon attempted to undo Ephialtes' work of depriving the Areopagus of power, but without avail.<sup>3</sup> And ten years later Pericles, in pursuance of his policy of pleasing the people, further stripped the Council of power.<sup>4</sup> The character of this curtailment of the Areopagus' powers is not far to seek. The *ἐφέται* who composed the homicide courts of the Palladium, the Delphinium, and in Phreatto were originally commissions of the Areopagus.<sup>5</sup> In seeking to determine the date at which heliastic jurors were substituted for *ἐφέται* in these courts it is natural to connect it with the lessening of the jurisdiction of the Areopagus. Ephialtes limited the jurisdiction of the body largely to homicide cases. Subsequently Pericles further limited its jurisdiction by restricting it to cases of premeditated homicide and arson by substituting heliastic jurors for the commissions of the Areopagus in the other homicide courts. He had an adequate motive in his desire to increase the business of the dicasteries, for which he had instituted pay. It is part of his attempt to gain the popular favor.<sup>6</sup> Furthermore, it is consistent with the general trend of Athenian constitutional development. After Solon more and more power was thrown into the hands of the popular courts.

It may plausibly be assumed that during the four months' rule

<sup>1</sup> Cf. Botsford, *op. cit.*, pp. 169, 227.

<sup>2</sup> A second possibility is that the change took place during the early part of the Peloponnesian War, when the Athenian populace was confined within the walls of Athens and assumed more and more a part in the administration of the state (cf. Aristotle *op. cit.* 27.2). Plato's *Apology* 35b might seem to indicate that the preliminary election was still in force in 399 B.C.: οἱ ἐμοὶ δοκοῦσιν αἰσχύνῃν τῇ πόλει περιάπτειν, ὥστ' ἂν τινα καὶ τῶν ξένων ὑπολαβεῖν ὅτι οἱ διαφέροντες Ἀθηναίων εἰς ἀρετήν, οὓς αὐτοὶ ἑαυτῶν ἔν τε ταῖς ἀρχαῖς καὶ ταῖς ἄλλαις τιμαῖς προκρίνουσιν, οὗτοι γυναικῶν οὐδὲν διαφέρουσιν. But Socrates is not using *προκρίνουσιν* here technically, but is thinking of the foreigners as seeing certain men raised to office over others, and is not considering the archons especially. He may have been thinking rather of demagogues and such officials as generals, who were very important.

<sup>3</sup> Plutarch *Cimon* 15.

<sup>4</sup> Aristotle *op. cit.* 27.1.

<sup>5</sup> Gertrude Smith, *Administration of Justice from Hesiod to Solon*, pp. 16 ff. (cf. S. B. Smith, "The Establishment of the Public Courts at Athens," *TAPA*, LVI, 111, and Freeman, *op. cit.*, p. 53).

<sup>6</sup> Cf. Gertrude Smith, "Dicasts in the Ephetic Courts," *Class. Phil.*, XIX, 358.

of the Four Hundred in 411–410 B.C. the popular courts ceased to act. The committee selected at the beginning of the revolution immediately proposed the abolition of all indictments for illegal proposals (*γραφὰι παρανόμων*), all impeachments, and all public prosecutions. If anyone summoned another into court on such a charge he was to be haled before the generals and condemned to death.<sup>1</sup> Such measures as these would naturally cause the suspension of the business of the courts. If they functioned at all at this period it would be with extreme irregularity. Not that any of them were actually abolished. It was simply a case of disuse. It is quite possible, however, that the Areopagus continued to function as a homicide court.

In the alarm resulting from the disaster at Aegospotami the Areopagus was engaged in finding some means of safety for the state, *πραττούσης τῆς ἐν Ἀρείῳ πάγῳ βουλῆς σωτήρια*.<sup>2</sup> This is reminiscent of the prominence acquired by the body immediately after the Persian Wars, but its influence and powers can hardly have been so extensive as at that time, when they amounted virtually to a dictatorship. It is comparable to the extraordinary powers which it assumed after the battle of Chaeronea. Just what its powers included at this time it is difficult to say. It joined the opposition to Theramenes' request for unlimited power and must have been chiefly concerned with attempting to keep the democracy on the old basis and fortified against a recurrence of the events of 411 B.C. This authority was probably invested in the Areopagus as a special commission. It is only natural that at a period of disturbance and disaster the state should look for assistance to a body which had always had prestige and had always proved itself both helpful and trustworthy. The Areopagus by this time must very largely have lost its highly aristocratic character and was hardly to be feared on that account. It was recognized as a body which upheld the democracy and gave fair judgments. Such instances as this and the above-mentioned making of the tribute lists render it probable that there were many occasions on which the council was intrusted with some particular commission of inquiry, and that during a specified period it might have considerable power although its regu-

<sup>1</sup> Aristotle *op. cit.* 29.4 (cf. Bonner, "The Administration of Justice under Athenian Oligarchies," *Class. Phil.*, XXI, 211).

<sup>2</sup> Lysias xii.69. Cf. Frohberger, *ad loc.*, and Philippi, *op. cit.*, pp. 184 f.

lar duties had been so much curtailed by the reforms of Ephialtes and Pericles.<sup>1</sup>

When the Thirty had become established in power one of their first measures was to remove from the Areopagus the laws of Ephialtes regarding the council. This amounted virtually to a repeal of these laws and would mean that the prerogatives were restored to the Areopagus of which it had been deprived by Ephialtes. This was in pursuance of the policy which the Thirty adopted at first of ruling according to the ancient constitution.<sup>2</sup> Their purpose evidently was to curry favor with the people by destroying some of the abuses of the very extreme democracy. The Thirty were anxious to weaken the popular courts. Hence it is natural that they should assign to the Areopagus in its character of *φύλαξ τῆς πολιτείας* some of the most fruitful sources of litigation, e.g., *δοκιμασία, εὐθυνα, γραφή παρανόμων*.<sup>3</sup> In addition the Areopagites may have recovered for this period the right to sit as *ἐφέται* in the minor homicide courts, although it is difficult to say whether the Areopagus functioned at all as a homicide court after the reign of terror began. But it probably was not suspended. The theory that it was suspended rests chiefly on a passage of Lysias, *αὐτῶ τῶ δικαστηρίῳ τῶ ἐξ Ἀρείου πάγου, ᾧ καὶ πάτριόν ἐστι καὶ ἐφ' ἡμῶν ἀποδίδεται τοῦ φόνου τὰς δίκας δικάζειν*.<sup>4</sup> If the reading *ἀποδέδοται* is retained the passage must mean that jurisdiction in homicide cases was restored to the council after the expulsion of the Thirty. All laws were in abeyance under the Thirty, and it was therefore impossible for the Areopagus to hold meetings. The re-establishment of the democracy gave back to it its customary functions. It is quite probable, however, that the suggested reading *ἀποδίδεται* is correct and that it means that "it was the ancestral function and still is in our time the function of the Areopagus to try homicide cases."

<sup>1</sup> The amnesty law of this period (Andocides i.78), which is practically a restatement of the Solonian law, mentions the Areopagus' jurisdiction in homicide cases and in cases of attacks on the government. It can hardly have acted in this latter capacity at the end of the Peloponnesian War (cf. Gertrude Smith, "The Prytaneum in the Athenian Amnesty Law," *Class. Phil.*, XVI, 345 ff.).

<sup>2</sup> Aristotle *op. cit.*, 35.2 (cf. Sandys, *ad loc.*).

<sup>3</sup> Cf. Bonner, *op. cit.*, p. 213.

<sup>4</sup> i.30 (cf. Philippi, *op. cit.*, p. 266; Bonner, *op. cit.*, p. 214; Rauchenstein, *Philologus*, X, 604 ff.; Curtius, IV, 16; and Frohberger, *Lysias*, II, 180, for conflicting views on the passage).



The restored democracy after the Thirty gave the Areopagus oversight of the laws by the decree of Teisamenes, *ἐπιμελείσθω ἡ βουλὴ ἢ ἐξ Ἀρείου πάγου τῶν νόμων, ὅπως ἂν αἱ ἀρχαὶ τοῖς κειμένοις νόμοις χρωῶνται*.<sup>1</sup> Caillemer contends that it is not likely that such power should be restored to an essentially aristocratic body. This fact, together with the absence of any reference to such authority in fourth-century history, has led him to question the authenticity of the decree.<sup>2</sup> His objection does not, however, seem wholly tenable. The Areopagus assumed considerable importance again apparently at the end of the fifth century, and it is not strange that its ancient prerogative of *νομοφυλακία* should be in some measure restored to it. It is interesting to see how this body whose reliability and justness were constantly recognized was used both by the oligarchs and by the restored democracy.

There is considerable information about the Areopagus in the fourth century. Many of the privileges and functions which it had during this period may have belonged to it in the period of the Peloponnesian War also, but definite evidence is lacking on some of these points for that period.

A word should be said about eligibility to membership in the Areopagus in the fourth century. As formerly, the body was composed of ex-archons who had successfully passed their audit.<sup>3</sup> Aristotle says that an archon could not take his place in the council at the end of his year of office until he had delivered to the treasurers of Athena the full amount of olive oil due for his year.<sup>4</sup> In addition the Areopagus was subject to an *εὐθυνα* before the Logistae. This could only have been at the end of a certain period of time or on the completion of a particular task.<sup>5</sup> The Areopagus could expel any of its members provisionally, but the expulsion became final only on the confirmation of a heliastic court.<sup>6</sup> Athenaeus cites Hyperides to the effect that a man

<sup>1</sup> Andocides i.84.

<sup>2</sup> *Op. cit.*, p. 402 (cf. Westermann in Pauly, I, 1502).

<sup>3</sup> Pollux viii.118. For the reputation of the Areopagus at this period cf. Isocrates vii. 37-39.

<sup>4</sup> *Op. cit.* 60.3.

<sup>5</sup> Aeschines in *Ctes.* 20; cf. Gilbert, *op. cit.*, p. 282.

<sup>6</sup> Dein. in *Dem.* 56. 57; Aeschines *op. cit.* 20.

who had been seen dining in a public house could not enter the Areopagus.<sup>1</sup> According to Plutarch, the Areopagites were prohibited from writing comedies.<sup>2</sup> From all of these passages it is clear that the body preserved its reputation for dignity and uprightness.

The council retained its jurisdiction in cases of premeditated homicide, wounding with intent, poisoning if death resulted, and arson.<sup>3</sup>

In the matter of religion, aside from homicide, the Areopagus continued to have oversight of the sacred olives and it had jurisdiction in cases involving them.<sup>4</sup> It appointed the men who managed the sacrifices of the Eumenides.<sup>5</sup> As before, the council had the duty of caring for the consecrated land of the Eleusinian goddesses. In 352-351 B.C. by a popular decree the Areopagus received general oversight of religion for all time, a prerogative which it still retained in Roman times.<sup>6</sup> But general jurisdiction in cases of impiety was restored to the body only by Demetrius of Phaleron at the end of the fourth century. Between that time and the reforms of Ephialtes these cases were in general tried before heliastic courts.<sup>7</sup> An interesting example of the participation of the Areopagus in religious matters occurred in 343 B.C. The Delians were contending with the Athenians about the right to administer the temple of Apollo at Delos. The Athenian assembly chose Aeschines as their advocate when the case came before the Amphictyonic council, but gave the Areopagus authority to revise the election. The Areopagus rejected Aeschines and chose Hyperides in his place,<sup>8</sup> with the result that he argued the case.<sup>9</sup>

As the Areopagus became more active after the Peloponnesian War it played a greater part again in the control of the conduct and

<sup>1</sup> xiii. 21. p. 566.

<sup>2</sup> *De Gloria Athen.* 5, Didot, p. 426.

<sup>3</sup> Aristotle *op. cit.* 57.3; Demosthenes xxiii.24; cf. Lucian, *Anacharsis* 19; Aeschines *F.L.* 93; *Ctes.* 51.212; Plato, *Laws* 877B. As Sandys says on Aristotle, *ad loc.*, only wounding with intent was classed as *φόνος*. It was necessary that the poisoning also be with intent.

<sup>4</sup> Aristotle *op. cit.* 60.2; Lysias vii.

<sup>5</sup> Schol. on Demosthenes *Meidias* 115 (cf. *Neaera* 80 f.).

<sup>6</sup> Cf. Keil, "Beiträge zur Geschichte des Areopags," *Berichte über die Verh. der sächs. Akad. d. Wissenschaften* (1919), p. 57.

<sup>7</sup> Cf. Lipsius, *op. cit.*, p. 129. It is interesting to note that Origen, *g. Cels.*, IV, 67; V, 20, places Socrates' trial before the Areopagus.

<sup>8</sup> Demosthenes xviii. 134.

<sup>9</sup> Hyperides, *Δόγος Δηλιακός*.

morals of the citizens. Apparently the *γραφὴ ἀργίας* came sometimes before the Areopagus and sometimes before a heliastic court.<sup>1</sup> Doubtless the council had charge of the education of the youth only in the sense that it had general supervision of public morals. Public physicians exercised their functions under the control of the Areopagus.

The Areopagus is found also acting in this period as commissioner of public works.<sup>2</sup> There may well have been other isolated functions of which there is no record.

The Areopagus during this period was sometimes intrusted by the people with some special commission of inquiry. The results of this *ζήτησις* or investigation were brought before the assembly in the form of an *ἀπόφασις*. The people might deal with the case themselves or appoint prosecutors to handle the matter before a heliastic court. The case of Aeschines, mentioned above, was of this nature. On another occasion it made an investigation as to whether buildings could be erected in the neighborhood of the Pnyx.<sup>3</sup> Again the council was intrusted with investigating the action of one Polyeuctus in joining some exiles in Megara.<sup>4</sup> The Areopagus also made an inquiry into the disappearance of part of the stolen money which had been taken from Harpalus, the absconding treasurer of Alexander, and deposited in the Acropolis. This body also investigated the bribing of various citizens by Harpalus.<sup>5</sup>

The council might also institute an investigation on its own initiative, but the subsequent procedure was the same. So, when the assembly was on the point of discharging Antiphon, who was accused of attempting to set fire to the docks, the Areopagus intervened and after making an investigation forced him to stand trial before a heliastic court.<sup>6</sup>

Occasionally the Areopagus was intrusted with independent jurisdiction. Immediately after the battle of Chaeronea the council tried and condemned to death those who had deserted Athens.<sup>7</sup>

<sup>1</sup> Cf. Caillemer, *op. cit.*, p. 402; for control of conduct and morals by the Areopagus cf. Athenaeus iv. 64. p. 167; Diog. Laert. vii. 5, sec. 169.

<sup>2</sup> Caillemer, *op. cit.*, p. 402; Heracl. Pont. in Didot, *FHG*, II, 209; Aeschines *Timarch.* 81 ff.

<sup>3</sup> Aeschines *ibid.*

<sup>5</sup> Dein. iv. 10.

<sup>4</sup> Dein. *in Dem.* 58.

<sup>6</sup> Demosthenes xviii. 133.

<sup>7</sup> Lycurgus *Leoc.* 52; Aeschines *in Ctes.* 252.

The Areopagus continues to be mentioned up until the fourth century A.D., and under the Romans became again an exceedingly important body.<sup>1</sup> Ex-archons no longer automatically became members, but all of the places were filled by election. The inscriptions show what a great rôle the council played in the government and that it retained all of its erstwhile dignity and prestige. But the study of institutions in Greece during the Roman domination lies quite outside of the scope of this paper, and mention is made of the Roman period merely to show how an important body of long standing was continued under the Romans with all of its old reputation, even though differently organized.

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<sup>1</sup> For the privileges and duties of the council in Roman times cf. Caillemer, *op. cit.*; Philippi, *op. cit.*, pp. 309 ff.; Keil, *op. cit.*