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Öffentliches Recht und Administration
in den griechischen Poleis

Sklaverei und Freilassungen

LAURA PEPE (MILAN)

MOIXEIA, UNITY, AND UNIQUENESS OF GREEK LAW: RESPONSE TO DAVID D. PHILLIPS

David Phillips's essay, *Moicheia and the Unity of Greek Law*, is the second contribution devoted by the American scholar to the unity of Greek law (or at least of the law of the πόλεις), with the aim of showing that such unity may be found not only within the field of procedure – according to the well-known thesis by Michael Gagarin –[1] but also within the substantive field. He presented an earlier study on this topic, concerning ὕβρις (*Hybris and the Unity of Greek Law*), at the *Symposion* held at Harvard Law School in 2013.[2] I think that it is important to revisit briefly that contribution, since Phillips starts out, correctly, by addressing a methodological issue, asking what criteria need to be fulfilled in order to speak with good reason of the unity of Greek law.

By making good use of the arguments brought forward by Moses Finley against said unity,[3] and after making it clear that in order to demonstrate said unity it may not be enough to identify those "basic principles, shared by otherwise differing legal systems", mentioned by Biscardi,[4] Phillips wrote that "in order to discover meaningful unity in Greek law, we must be able to demonstrate instances in which these common basic principles […] are specifically manifested in actual law, whether substantive or procedural".[5] His conclusion was that, to this end, it was necessary to apply three criteria. The first of these is "the attestation of a significant similarity in the laws of two or more independent *poleis*. […] Obviously, the greater the number of *poleis* that exhibit a common legal principle, the stronger the argument for unity".[6] The second criterion lies in the "presence of a substantive or procedural phenomenon in a community composed of Greeks from different *poleis*" (in those colonies, for example, or in other communities, including "fictitious" or "virtual" ones, made up of individuals coming from different πόλεις).[7] A final criterion is to be found in "evidence that spans both a significant sample of communities for which evidence exists and a significant period of time".[8]

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1 GAGARIN 2005.
2 PHILLIPS 2014.
3 FINLEY 1966.
4 BISCARDI 1982, 8-9.
5 PHILLIPS 2014, 77-78.
6 PHILLIPS 2014, 78.
7 PHILLIPS 2014, 79-82; an example of a "virtual or fictitious community" – as explained by the author – is to be found in Plato's *Laws*.
8 PHILLIPS 2014, 83.

Indubitably, the bulk of sources collected by Phillips, first in his essay on ὕβρις and now in the present one on μοιχεία – sources which largely meet the three abovementioned criteria, even though they are not always equivalent in terms of their reliability –,[9] on a par with the learned and erudite analysis of them offered by this scholar, brings a considerable, undeniable contribution to the arguments in favor of the unity of Greek law. As regards specifically the study on μοιχεία, evidence demonstrates without a doubt that in all city-states for which documents are available μοιχεία was sanctioned; these sanctions are linked by Phillips to a relatively stable model, albeit an indubitably heterogeneous one arising from the presence of several local varieties. All the same, although in general terms I share the main thesis underlying Phillips's line on μοιχεία as an argument in support of unity, I think it is necessary to shed more light on some of the issues touched upon by Phillips.

As mentioned above, the profusion of sources presented by Phillips proves that μοιχεία was considered an offense in many πόλεις, and as such was subject to more or less uniform repression. One must wonder, however, whether all this is sufficient to demonstrate the unity of Greek law, since Phillips himself, at the very beginning of his essay, remembers that "prohibitions and sanctions against illicit consensual sex between a man and a woman are as old as law itself".[10] In trying to answer this question, I think it appropriate to add, to the criteria singled out by Phillips, further, equally fundamental guidelines, which had already been suggested by Finley at the time and were later reconfirmed by Michael Gagarin in his essay on procedural unity and again by Adriaan Lanni, in her *response* to Phillips's essay at the 2013 *Symposion*. Firstly (see *infra*, § 1), the question arises as to what should or may be considered a "source" of Greek law; in other words, whether only laws should be numbered among "sources", or customary law[11] as well. Moreover: assuming that customary law may also have contributed to forming the notion of Greek law, it is necessary to verify whether the various sanctions for which there is evidence for the repression of μοιχεία – whether they are prescribed by law or by social custom – may be considered negligible, that is to say, such that they do not invalidate the idea of unity (see *infra*, § 2). Finally, one must establish whether the repression of

[9] In addition to the well-known debate regarding the existence, in Athens, of the practices known as ῥαφανίδωσις and παρατιλμός – for which see, among others, CAREY 1993; KAPPARIS 1996, 65-67; SAUNDERS 1991, 82 – Phillips himself marks as dubious Aelianus' testimony in relation to Gortyn (Ael. *VH*. 12.12); the same may be said with regard to the aetiological anecdote referring to Tenedos (Arist. fr. 593 Rose), as well as to Zaleucus (Arist. fr. 611.61 Rose), whose legislation is known only through indirect and very late sources (on this, see PEPE 2006, part. 26-27, and the bibliography cited there).

[10] For a bibliography and sources on the repression of illicit sex in the ancient world, see COHEN 1991, 98 and nt. 1.

[11] As to what may count as a "source" of law, at least in the *corpus* of orators, see TALAMANCA 2008.

μοιχεία in the Greek world is "distinctive in some interesting or important way", that is, "different from at least some other legal systems in a way that tells us something about the Greeks"[12] (see *infra*, § 3).

1. In an attempt to demonstrate a number of flaws in the conviction – never before then in dispute – held by Ludwig Mitteis with regard to the unity of Greek law,[13] Finley highlighted how non-chalantly Mitteis moved "from *Recht* to *Sitte*", something certainly made easy and in part justified by the ambivalence of the Greek term νόμος, which, as is well known, "may mean 'law', or even more narrowly 'statute'", but may also mean "'custom' or 'institution' in the broadest and vaguest possible sense".[14] This tendency may be noted also, in fact, in Phillips's essay: a few examples relating to the payment of the ransom that was demanded of the μοιχός in many πόλεις will suffice to demonstrate it.

When Homer, in the *Odyssey* (*Od*. 8.266-369) tells about the capture of Ares, caught by Hephaestus *in flagrante* with the latter's wife, Aphrodite, he is obviously describing a practice that was, in all likelihood, widespread in many parts of Greece, at a time when written laws were still unheard of. A practice that stayed alive, however, for a long time in several cities. For example, it must have been – as admitted by Phillips himself – "a venerable custom" in Boeotia, if we are to believe the comic poet Laon (Laon, fr. 2 K.-A., quoted by Phillips). The same may be said for Athens. In Lysias' first speech, Euphiletos claims to have acted on the basis of those laws – first of all Draco's law on homicide – granting the wife's κύριος the right to kill the μοιχός caught *in flagranti delicto*. It is true that it was definitely no longer habitual in fifth and fourth-century Athens to kill a μοιχός (to such an extent that not only did many μοιχοί caught *in flagrante* survive, they did not think twice about continuing in their wicked ways: see Is. 8.44). However, those laws, albeit obsolete, were still in force, given that Euphiletos can refer to them as τοὺς... κειμένους νόμους (Lys. 1.48), and consider them at the same time more stringent, hierarchically superior (κυριώτερον), compared to the monetary compensation (τίμημα) offered by the μοιχός Eratosthenes (Lys. 1.29). Without a doubt Lysias' speech represents a tendentious source, in the light of Euphiletos' aim of bringing grist to his mill thereby procuring an acquittal at all costs in a trial where he was risking his life.[15] All the same, since we are not aware of any law in Athens

[12] Lanni 2014, 100.

[13] Mitteis 1891.

[14] Finley 1966, 129.

[15] The relatives of the man killed, Eratosthenes, accused Euphiletos of φόνος ἐκ προνοίας, not so much because he had plotted the killing – the defendant himself had confessed to a plan to catch his own wife's μοιχός in the act, highlighting the fact that under Athenian laws the culprit's killer was allowed to go scot-free ᾧτινιοῦν τρόπῳ, regardless of the circumstances in which the culprit had been caught: cf. Lys. 1.37-38 –, but rather because, as they claimed, he had put the make on Eratosthenes as a μοιχός, by dragging him from the street into his home (Lys. 1.27), so that he could, in this way, eliminate a

providing for a financial penalty against the seducer,[16] we may rightfully believe that, in Athens also, the payment of a ransom price was simply the result of a custom,[17] a voluntary agreement between the parties, to which the μοιχοί caught *in flagrante* would willingly agree in order to avoid a likely trial that could end very badly –[18] and this, provided they had not been killed on the spot by the woman's κύριος: the specific suit for μοιχεία, the γραφὴ μοιχείας, was indeed an ἀγὼν τιμητός in which the prosecutor could definitely ask for a capital sentence.[19] The

political enemy. As regards the reconstruction of the case for the prosecution, see also PEPE 2012, 210-211, 223-224.

16 It is true that Euphiletos ends his speech by pointing out that the laws "command that whosoever catches a μοιχός may do with him anything he wishes" (κελεύουσι μέν, ἐάν τις μοιχὸν λάβῃ, ὅ τι ἂν οὗν βούληται χρῆσθαι, Lys. 1.49). In "doing anything they wish" may well for sure be included a request for a ransom price. As to the authenticity of those laws which Euphiletos generically refers to as he ends his speech, one may, however, raise serious doubts (*pace* COHEN 1991, 115, who holds that Euphiletos is referring to the first of the laws he has mentioned in his speech). It is, at the very least, singular that they should not be held as evidence in the βεβαίωσις, where they may have helped in promoting the defendant's case; one must also rule out – *pace* PHILLIPS 2016, 50 note 90 – the possibility that they are to be identified precisely with those laws mentioned by Euphiletos at that point, in particular with Draco's law, which does not at all provide for the lawfulness, for one who catches the μοιχός, of doing with him whatever one wishes; in fact, it merely sets down that it is lawful to kill a man caught in the act with the woman. The law Euphiletos is here referring to may well be the law relating to the μοιχός who is unsuccessful in his suit as a result of the γραφὴ ἀδίκως εἰρχθῆναι ὡς μοιχόν, which he, however, only mentions in part. On the basis of [Dem.] 59.66 we know that the law, by allowing the κύριος to do with the seducer whatever he wished, also added that he should have acted "in court and without a knife" (ἐπὶ τοῦ δικαστηρίου ἄνευ ἐγχειριδίου). Even assuming that the law mentioned by Euphiletos is genuine, it still does not prescribe payment of ransom money: this would have been simply one of the possible consequences; another, as mentioned by PHILLIPS 2016, 50, consisted in subjecting the seducer to humiliating treatments, among which the so-called ῥαφανίδωσις or depilation by ashes (assuming, for argument's sake, that the sources from Comedy relating to such treatments are reliable; for this, see *supra*, note 9).

17 The term "custom" is also used by COHEN 1991, 118.

18 On the contrast between written law and custom which Lysias, by way of Euphiletos' words, intends to highlight, see PEPE 2012, 216-218. It is noteworthy that not even [Dem.] 59.65 – which relates the sting operation by Neera and Stephanos against Epenetos, caught in the act with the former's daughter, Phano – mentions any law requiring the μοιχός to pay ransom money.

19 On γραφὴ μοιχείας, see HARRISON 1968, 35 and (with a less dramatic and more plausible hypothesis) HARRIS 1990, 374. I am not convinced – unlike Phillips – that in Athens further suits could be brought against the μοιχός. As regards the inclusion of the μοιχοί in the category of the κακοῦργοι, who were liable to ἀπαγωγή (cf. COHEN 1984, 157-158), I refer the reader to the doubts raised by HARRIS 1990, 376-377. Recourse to a γραφὴ ὕβρεως is likewise dubious, since in the passages mentioned by Phillips μοιχεία is never referred to as ὕβρις; in particular, from Lys. 1.25 (ἠρώτων διὰ τί ὑβρίζει εἰς τὴν οἰκίαν τὴν ἐμὴν εἰσιών; cf. also Lys. 1.4: [Ἐρατοσθένης] ἐμὲ αὐτὸν ὕβρισεν εἰς

payment of compensation was, instead, laid down by the law, as is well known, in the Law Code of Gortyn, which established its amount on the basis of the identity of the seducer and of the victim, as well as (at least in a few cases) of the place where the crime had been perpetrated (*IC* IV 72 col. II 20-45). Now, it is remarkable that, when Phillips compares the situation in Gortyn to that in Homer or in Athens, he should confine himself to highlighting that "as opposed to the situation in the Odyssey and in Athens, the ransom amount is fixed", passing over in silence the fact that only in the Cretan city was the penalty fixed by a written law.

2. Let us assume, however, that it may not be necessary to lay down too fine a line between written law and custom. The latter may, indeed, also provide useful information relating, if not to "law" itself, at least to the culture and the juridical experience of Greek cities. Let us try and understand whether the evidence presented by Phillips in his essay actually proves the existence of a uniform treatment of μοιχεία in Greece. Let us go back briefly to his conclusions: "The most compelling evidence for unity in the treatment of *moicheia* – predictable local variation notwithstanding – lies in the practice of detaining for ransom the seducer caught *in flagrante* and/or humiliating, physically or otherwise, in private and/or in public, the seducer and/or his paramour". I shall start by emphasizing that in itself such a list appears to be rather multifarious, as it highlights differences in treatment of no small weight,[20] and which may largely be traced back, once again, to the dichotomy *law* vs. *custom*.

Be that as it may, out of Phillips's own review there arise some local variants that do not fall in any way under the general overview, but which should not, however, be neglected on this account. One may think of Lepreum, where seducers were supposed to be deprived of their civic rights (Arist. fr. 611.42 Rose); this, if we are to believe Claudius Aelianus, must also have been the case at Gortyn (Ael. *VH* 12.12). Well then, the μοιχός being sentenced to ἀτιμία is something without parallel elsewhere (in fact, it differs significantly from what, for example, happened in Athens, where the ἄτιμος was not so much the μοιχός, but rather the man who continued to live with his wife after discovering her unfaithfulness: cf. [Dem.] 59.87). This detail is of no small importance, in view of the fact that ἀτιμία is a sanction that may not be subsumed under the category of "public humiliation". Furthermore, a significant exception is represented by the law that was presumably in force on Tenedos, under which both the μοιχός and the woman, if caught *in*

τὴν οἰκίαν τὴν ἐμὴν εἰσιών), it is clear that it consists in the act of trespassing. Lastly, as to εἰσαγγελία, Hyperides himself, in his speech for Lycophron, demonstrates that it was inappropriate to make recourse to it in μοιχεία cases (Hyp. *Lyc*. 12).

[20] One is reminded here of the *caveat* in Finley 1966, 132, not to take into consideration that which lies outside the rule, seeing it as a trifle, a *nuance*: "If that is all that is meant by the unity of Greek law, there can be no argument – but there is equally nothing worth discussing anyway".

flagrante, were to be killed (Arist. fr. 593 Rose). In fact, if this was the case, such a treatment of μοιχεία would make Tenedos much more similar to Augustan Rome than to the other Greek cities for which we have documents, where the killing of the woman was explicitly forbidden, and where – but I shall return to this later – men and women were subject to a different treatment. If we exclude custom and take into consideration the laws alone, it seems to me that there exists considerable distance between Athens and Gortyn. In the former, as is well known, the μοιχός could lawfully be killed under Draco's law, or – if we assume that in the fifth and fourth centuries the section of Draco's law relating to taking the law into one's hand against the μοιχός was dead letter – could be sentenced to death as a consequence of a γραφὴ μοιχείας (obviously if the prosecution had suggested a death sentence as punishment and judges had voted in its favor instead of the sanction proposed by the μοιχός defendant). In Gortyn, instead, the situation was very different; even if we concede that the sentence "it is incumbent on those that caught [the μοιχός] to do with him as they wish" (ἐπὶ τοῖς ἐλόνσι ἔμεν κρῆθθαι ὅπαι κα λείοντι, ll. 35-36) "means exactly what it says" – as Phillips comments, rightly – it is significant, however, that the death of the seducer in the Cretan city should be represented only as a last resort.

3. Let us, all the same, assume that the abovementioned variants are exceptions confirming the rule, and let us move to the third question. In what way can the common denominator encountered in the treatment of μοιχεία in the various πόλεις reveal a characteristic feature of Greek law – something, that is to say, distinguishing it from other legal systems? In fact, by virtue of the very fact that unlawful sexual relationships are punished everywhere, and not only in the ancient world, one may well come across marked similarities even in widely differing places or times, and yet this does not imply any "unity". To say nothing of the fact that the lawfulness of killing the seducer (under certain conditions),[21] or to detain him in order to inflict humiliating punishment on him, is also demonstrably found in the *lex Iulia de adulteriis coercendis*: *sed qui occidere potest adulterum, multo magis contumelia poterit iure adficere* (D. 48.5.23.3 Pap. 1 *de adult*.).

This being the case, rather than in the sanctioning customs present in the various πόλεις, the unity and at the same time uniqueness of Greek law may stand out more markedly if further elements are taken into consideration. In my view, three aspects are particularly relevant.

Firstly, the documents collected by Phillips demonstrably show – albeit with a few exceptions – the tendency in Greece, both as a legal rule and as a social custom, to punish first and foremost the μοιχός, or to punish him in a more serious way than the woman with whom he commits the offence; to such an extent that, unlike what happens elsewhere, "nel diritto greco la μοιχεία era commessa solamente dall'uomo

[21] See, *infra*, note 26.

(μοιχός): la donna, infatti, era sempre considerata μεμοιχευμένη".[22] In other places, instead, this tendency is not present: either the sanction is the same for both, or it is the woman that is punished more severely. Once again, I shall confine myself to a few examples, purposefully taken from very distant situations, in space and time. In *Deuteronomy* adulterous people (a man and a married woman) or lovers (a man and a betrothed woman)[23] were sentenced to death by stoning. In Republican Rome – or according to tradition ever since the times of Romulus – the main concern was with the woman's *pudicitia*: had the woman been found *impudica*, she could be put to death by her *paterfamilias* or by her husband (who could, in any case, also lawfully kill the seducer)[24]. In later times – in particular when, under Augustan legislation, adultery was made a *crimen* – both the man and the woman were sentenced to the *relegatio in insulam*, while part of their wealth was subject to confiscation[25] (unless the two lovers had been killed, which could only take place under specific circumstances).[26] Abandoning both lovers (not just the man) to the mercy of the betrayed husband is a frequently recurring *cliché*, also in more recent times. For example, in sixteenth-century Spain, the adulterous couple was *in potestatem mariti*, who could "do with them what he wished", up to and including killing the culprits or imposing on them any *offensa vel iniuria*, including the cutting off of a limb. The public or private humiliation of the lovers and especially of the woman, sometimes with more or less severe physical abuse, is well attested in the *ius commune*: a particularly widespread custom was that of cutting off the nose of the adulterous woman, or exposing her with a shaved head and her garments rent.[27]

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[22] Thus CANTARELLA 1976, 154.

[23] *Deuter*. 22.22-24.

[24] Cf., *e.g.*, Dion. Halic. 2.25.6; Gell. *N.A.* 10.23.4-5. As for the lawfulness of also killing the woman's accomplice, see Hor. *Sat*. 1.2.41-46; 2.2.61. For a detailed treatment of all these cases, see CANTARELLA 1976, 175-183.

[25] Paul. *Sent*. 2.26.14.

[26] In particular, it was lawful for the father to kill the seducer and the daughter, provided that: the daughter was *in potestate* (D. 48.5.21 Pap. 1 *adult*.); the lovers had been caught in the act (*in ipsa turpitudine, in ipsis rebus Veneris*) in the father's home or in that of the father-in-law (D. 48.5.23.2 Pap. 1 *adult*. e D. 48.5.24 *pr*. Ulp. 1 *adult*.); that the killing of both was immediate, *uno icto et uno impetu* […] *aequali ira adversus utrumque sumpta* (D. 48.5.24.4 Ulp. 1 *adult*.), since the killing of only one of the adulterous pair would have consisted in a homicide (*Coll*. 4.2.6). As for the woman's husband – whose *ius occidendi* was decidedly more limited compared to that of the father –, he was allowed to kill the seducer alone, not the wife (cf. *Coll*. 4.10.1; Paul. *Sent*. 2.26.4 = *Coll*. 4.12.3), provided that the seducer was of a lowly condition (D. 48.5.25 pr. Macer 1 *publ*.; *Coll*. 4.2.1-4), and that he had been caught in the husband's home; after killing the seducer he had to repudiate his wife, and, had he not done so, he was accused of proxenetism (D. 48.5.25.1 Macer 1 *publ*.). The literature on this is, understandably, very extensive; I shall confine myself to CANTARELLA 1976, 163-175 (and 183-189 for developments later than the *lex Iulia*); CANTARELLA 1992 [2011], 557-562; RIZZELLI 1997, especially 9-35.

[27] For sources relating to these and other customs, see MASSETTO 1994, 98-99 and notes. For non-restrictive interpretations of the *lex Iulia de adulteriis* in the *ius commune*, and,

The second aspect that I feel the need to highlight in order to explain the differences between the Greeks and the "rest of the world" lies in the very meaning of the term μοιχεία. Phillips follows – to my mind correctly – the theory according to which the term does not indicate adultery,[28] but, in a wider sense, the "seduction of a woman, irrespective of her marital status" (thus in his note 3); this is evident – as is well known – especially in Athens and Gortyn.[29] However, though he makes his thought manifest in several circumstances – albeit mostly incidentally –, the author never states that it is precisely the concept of μοιχεία that distinguishes the culture and the law of the Greeks.[30] Let us think once again of the Old Testament. *Deuteronomy* distinguishes between the offense committed with a married woman, with a betrothed virgin or again with a virgin not betrothed, providing different penalties for different types of crime. In the first two cases the lovers were sentenced to death; in the third case, unlike the other two, the man was to pay a fine to the father of the woman and take her as his wife, without the option of repudiating her (*Deut*. 22: 28-29). One may think, again, of the Romans, who cut a very clear line between *adulterium* and *stuprum*; even though these two terms are often used interchangeably in sources (both in literary works and in juridical ones, as well as in the very *lex Iulia de adulteriis*),[31] the well-known definition by Modestinus clarifies that they were two distinct crimes: *adulterium in nupta admittitur; stuprum in vidua vel virgine vel puero committitur* (D. 48.5.35[34] Mod. 1 *reg*.; cfr. D. 48.5.6.1 Pap. 1 *adult*.).[32] The two crimes, at least after Augustan legislation, were subject to two separate treatments:[33] the *lex Iulia de adulteriis* – which definitely also dealt with

in particular, for an extension of the lawfulness of the killing of the woman, see CANTARELLA 1992 [2011], 562-571.

28 In accordance with the well-known thesis in COHEN 1984 (cf. also COHEN 1991, 98-109).

29 With regard to Sparta, see MACDOWELL 1986, 82-88.

30 As is well known, Cohen used precisely the argument of similarity with other ancient societies to show that, for the Greeks too, μοιχεία could be an offense only if perpetrated with a married woman: COHEN 1991, 102-103.

31 Cf., *e.g.*, D. 48.5.6.1 Pap. 1 *de adult*.; D. 50.16.101 Mod. 9 *diff*. On the relationship between the two terms, see, among others, RIZZELLI 1997, 171-183; TORRENT 2002, 128.

32 Said distinction lies, of course, at the basis of subsequent developments. Within the *ius commune*, as regards adultery, secular law restricts the canon law notion (on the basis of which adultery takes place any time a man or a woman has intercourse with someone other than their spouse), by presupposing that the woman is in any case married; therefore, a man having intercourse with a married woman is adulterous, as well as a woman having intercourse with a person other than her own husband; as a result, carnal congress between a married man and an unmarried woman does not constitute adultery either for the man or for the woman and, consequently, the penalties for it are not applicable (this is, at least, the *communis opinio*; in this regard, and for divergent opinions, see MASSETTO 1994, 93-94 and note 147). Intercourse with a virgin, with a widow, or also with a child, constitutes, instead, the crime of *stuprum* (on which see, again, MASSETTO 1994, 208).

33 As regards the Republican age, it is plausible that the *stuprum*, as well as of course the *adulterium*, was also punished within the *familia*, which could sentence the guilty woman

stuprum – allowed, under certain conditions, for the killing of the man and of the woman guilty of *adulterium*, which was not instead possible in the case of *stuprum* (punishable only by the *relegatio in insulam* and the confiscation of half of their wealth).[34] It goes without saying that such a distinction perpetuated and radicalized itself in the following age.[35]

Moreover, there is a third detail that may further corroborate the idea of the unity of Greek law within the scope of the repression of sexual crimes. According to the documents available, in Greece μοιχεία was considered on a par, at least from the point of view of sanctions, with sexual violence. This appears very clearly from Draco's law on homicide, which considered lawful the killing of anyone found with (*rectius*: ἐπί) a woman from the οἶκος, whether it was a wife, a mother, a daughter, a sister, a free-status concubine (Dem. 23.53). The proviso – we need not return to this subject here in too much detail – refers therefore not only to consensual intercourse, to μοιχεία (as seemingly understood by Phillips, when he holds Demosthenes' passage on a par with a similar one, though not entirely identical, in *Ath*. *Pol*. 57.3), but also to an act committed with violence.[36] In the Athens of later times – for which reference should be made to Harris's essay of a few years ago – those guilty of sexual violence continued to be punished by Athenian laws with the same severity as the μοιχός (and not more mildly, *pace* Euphiletos who so purports: cf. Lys. 1.32-33).[37] It is significant that also in the Code of Gortyn the (financial) penalty should

to death; it is also plausible, on the basis of D. 47.10.94 Ulp. 57 *ad ed*., that before the *lex Iulia* the *stuprum* could be prosecuted as *iniuria*, for the offence of *adtemptata pudicitia* (Molè 1957, 583 e nt. 13).

34 On this, see Cantarella 1992 [2011], 557-558.

35 Still within the *ius commune*, adultery continued to be punished more severely compared to intercourse with an unmarried woman. The former, at least in principle, provided for capital punishment (and, in other respects, the dictate of the *lex Iulia de adulteriis* allowed the father having the woman *in potestate* to kill the seducer and, *eodem impetu*, the daughter, provided that the lovers were caught *in flagrante* in the father's home or in that of the father-in-law), although later statutory legislation quite often provided for different penalties, sanctioning the man with financial penalties, and the woman with the *detrusio in monasterium* or with corporal punishment (typically flogging and nose-cutting, above all). However, in the case of intercourse with an unmarried woman, whereas canon law prescribed the provision of a dowry and, if appropriate, marrying the virgin, civil law mostly provided financial penalties (confiscation of property), and sometimes *relegatio* (in accordance with prescriptions already in *Inst*. 4.18.4). On this, as regards both documents and doctrine, reference is once again made to Massetto 1994, 95-104 and 208-212.

36 As for the content of the passage (Dem. 23.53), relating the text of Draco's Law (whosoever kills ἢ ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπ' ἀδελφῇ ἢ ἐπὶ θυγατρί, ἢ ἐπὶ παλλακῇ ἣν ἂν ἐπ' ἐλευθέροις παισὶν ἔχῃ may go scot-free) and in respect of which *Ath*. *Pol*. 57.3 must be taken as a summary (since there the long periphrasis is replaced by the phrase οἷον μοιχὸν λαβών), see Harrison 1968, 34, and, on the basis of that, Harris 1990, 372.

37 Harris 1990, openly polemicizing with the conclusions in Cole 1984.

be the same for the rapist as for the seducer, as shown by the comparison between col. II 2-10 (dealing with rape) and col. II 20-45 (on μοιχεία).[38] The similarity in treatment in two city-states which in many other respects presented quite significant differences leads us to believe that, as far as sexual crimes were concerned, the other πόλεις acted in the same way. This too may be a characteristic distinguishing Greece from other legal systems, where a consensual relationship is punished in a different way from one committed with violence.[39] In Roman law, for example, sexual violence – apparently regulated at first by the *lex Plautia*, subsequently by the *lex Iulia de vi* – fell under the *crimen vis*, a crime which provided for capital punishment (let us remember that, in accordance with the *lex Iulia de adulteriis*, the adulterous man – that it to say someone guilty of *stuprum* without violence – was instead sentenced to the *relegatio in insulam*).[40] Within the *ius commune*, the difference in treatment for the rapist and for the seducer, respectively, continued to be striking: the former still risked capital punishment, which was mostly not applied in regard of the latter.[41]

The foregoing, evidently, cannot but corroborate, on the strength of the above additional arguments, the correct hypothesis underlying Phillips's work. I have no doubt that my clarifications will only reinforce, and in no small measure, his claim that "*moicheia* clearly constituted a specific substantive offense at law in numerous Greek cities".

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[38] On this, see MAFFI 1997, 21-29.

[39] On the possible reasons for this equality of treatment, see COHEN 1990.

[40] On this, see especially D. 48.6.3.4 Marc.14 *inst*. (*praeterea punitur huius legis* [*scil. Iuliae de vi publica*] *poena, qui puerum vel feminam vel quemquam per vim stupraverit*), as well as D. 48.5.30.9 Ulp. 4 *adult*. (*eum autem, qui per vim stuprum intulit vel mari vel feminae, sine praefinitione huius temporis accusari posse dubium non est, cum eum publicam vim committere nulla dubitatio est*). On this, see BOTTA 2004, 21-79 and, in particular, for an analysis of the passages quoted and a discussion of previous doctrine, 29-38.

[41] For this, *supra*, note 35.

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