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## THE ATHENIAN PROCEDURE OF DOKIMASIA OF ORATORS

There were several Athenian procedures which went by the name *dokimasia*, which is sometimes translated ‘vetting’. Most of them were procedures for checking that a man had the required qualifications for some position which he was about to hold. Either he was about to become an adult Athenian citizen, or he was about to become a member of the Boule, or he had been appointed to hold some office, for instance as an *arkhon*. Before he actually entered upon the privileges and duties of this position he was required to appear either before the Boule or before a jury in a court, or in some cases both. He had to answer some routine questions about his birth and status; he might also have to make a speech in his own defence if anyone made an accusation against him; and then the Boule or the jury voted to accept or to reject him, so that the proceedings were similar to a trial. If they voted in his favour, he could then enter upon the status of citizen, or *arkhon*, or whatever it was.<sup>1</sup>

The procedure called *δοκιμασία ῥητόρων*, ‘vetting of orators’, worked rather differently. Any adult male Athenian citizen, unless disfranchised, could attend a meeting of the *Ekklesia* and make a speech, responding to the herald’s call ‘Who wishes to speak?’ Anyone who spoke in the *Ekklesia* could be called a *ῥήτωρ*, and that term is not restricted to those who spoke frequently.<sup>2</sup> Provided that he had been accepted as a citizen at his *dokimasia* when he reached the age of eighteen, he did not normally have to undergo any further vetting before making a speech. But whenever he came forward to speak, even if he had already spoken many times before, it was possible for another citizen to challenge him by asserting that he was in some way disqualified to be a speaker; and then he had to undergo a *dokimasia* before he could speak again.

The only surviving text which gives much information about it is Aiskhines’ speech *Against Timarkhos*. He quotes some sentences from the relevant statute. The

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<sup>1</sup> For discussion of *dokimasia* generally see J. H. Lipsius *Das attische Recht und Rechtsverfahren* (Leipzig 1905-15) 269-85, A. R. W. Harrison *The Law of Athens* (Oxford 1968-71) 2.200-7, D. M. MacDowell *The Law in Classical Athens* (London and Ithaca NY 1978) 69, 167-69, S. C. Todd *The Shape of Athenian Law* (Oxford 1993) 285-89.

<sup>2</sup> On the definition of *ῥήτωρ* see M. H. Hansen in *Greek, Roman and Byzantine Studies* 24 (1983) 33-55, reprinted with addenda in his *The Athenian Ecclesia II* (Copenhagen 1989) 1-24.

date of this law is not known: Aiskhines says it was made ‘long ago’ (πάλαι, Ais. 1.33), which perhaps means only that he does not remember when it was; and he refers to its author simply as ‘the legislator’, which does not necessarily mean Solon even though he mentioned Solon only a few lines before.<sup>3</sup>

The legislator stated explicitly who should make public speeches and who must not speak in the assembly. He does not bar from the platform anyone whose ancestors have not held office as generals, nor indeed anyone who practises some trade to support those whom he needs to maintain. On the contrary, he particularly welcomes them; that’s why he repeatedly asks ‘Who wishes to speak?’

Who did he think must not speak? Men who have lived a disgraceful life; those are the ones he forbids to make public speeches. Where does he show that? ‘Dokimasia of orators,’ he says. ‘If anyone speaks in the assembly who strikes his father or mother, or does not maintain them, or does not provide housing for them,’ he forbids that man to speak. That’s certainly good, I say. Why? Because a man who behaves badly towards those whom he ought to honour as highly as the gods, what treatment, he says, will that man give to non-relatives, and to the city as a whole? Whom did he next forbid to speak? ‘Or’ he says ‘who has not served on all the military expeditions prescribed for him, or has thrown away his shield.’ Quite right, isn’t it? You, man: if you don’t take up arms on the city’s behalf, or because of cowardice are unable to defend it, don’t presume to advise it either. Whom does he address third? ‘Or who has been a prostitute or a catamite.’ He thought that a man who has sold his own body for violation<sup>4</sup> would be ready to sell the city’s interests too. Whom does he address fourth? ‘Or’ he says ‘who has consumed his ancestral property, or any that he inherits.’ He thought that any man who had managed his private estate badly would treat the city’s property in a similar way.

(Aiskhines 1.27-30)

So Aiskhines tells us that there was one statute, headed δοκιμασία ῥητόρων, which listed certain types of activity regarded as disqualifying a citizen from speaking in the Ekklesia. The words quoted from the law include ἐν τῷ δήμῳ, ‘in the assembly’; this law was not concerned with speakers in lawcourts. The four categories of activity which disqualified were: maltreatment of one’s parents; failure to perform military service satisfactorily; prostitution; and squandering one’s ancestral property. A man who was guilty of any of those four kinds of behaviour

<sup>3</sup> A sceptical view of this law is taken by Robin Lane Fox in *Ritual, Finance, Politics* (ed. R. Osborne and S. Hornblower, Oxford 1994) 149-51, but I cannot see any grounds for his suggestion that it was ‘all but obsolete until Aeschines revived it’. Many good comments on its details are made by Nick Fisher *Aeschines: Against Timarchos* (Oxford 2001) 157-63.

<sup>4</sup> Fisher *Aeschines: Against Timarchos* 160 translates ἐφ’ ὕβρει as ‘in *hybris*’, and takes this as an example of ‘dishonour or outrage being self-inflicted’. But surely ἐπί here means rather ‘with a view to’, ‘for the purpose of’ violation which the purchaser inflicts. Cf. Thuc. 1.38.2 ἐπὶ τῷ ὑπὸ τούτων ὑβρίζεσθαι.

was regarded as an unsuitable person to advise the other citizens on matters of public policy. I suppose that these activities were considered to be signs that a man had weak judgement or a poor moral character, so that any advice which he gave to his fellow-citizens was likely to be unreliable or immoral.

Aiskhines speaks as if he were giving a complete list. We cannot be certain that he has not omitted one or two other types of behaviour which were included in the law, but there is no positive evidence that it included others. Lipsius suggests one other, on the basis of a sentence of Deinarkhos.<sup>5</sup> Deinarkhos says (1.71) that the laws prescribe to the orator and to the general that he should 'produce children in accordance with the laws and possess land within boundaries' (which presumably means within the frontiers of Attika); and Lipsius infers that a citizen making a speech in the Ekklesia would be subject to dokimasia if he did not possess a landholding in Attika and live in lawful wedlock. But even Lipsius seems uncomfortable with Deinarkhos' words, for he has departed from them. Lipsius writes of lawful wedlock ('in gesetzlicher Ehe'), but Deinarkhos actually writes of producing children (παίδοποιεῖσθαι), and it is not easy to believe that men who had no children were banned from addressing the Ekklesia; Andokides, for example, addressed the Ekklesia in his speech *On his Return*, although he was still childless at the time of his speech *On the Mysteries* a few years later (And. 1.148). I am therefore inclined to agree with those scholars who regard this statement of Deinarkhos about orators as untrue, or at least misleading in some way;<sup>6</sup> and I think it unlikely that possession of land and legitimate children was mentioned in the law about dokimasia of orators.

After listing the types of misconduct which disqualified a citizen from speaking in the Ekklesia, the law quoted by Aiskhines goes on, as Athenian laws usually do, to specify the procedure to be used for accusing offenders.

He says 'Let any Athenian who wishes, of those permitted, announce a dokimasia', and he then bids you decide the matter in the court. It is in accordance with that law that I have now come before you.

(Aiskhines 1.32)

The accuser must be an Athenian 'of those permitted'; that means that he must be an Athenian citizen not barred by atimia from prosecuting. That is a common requirement for public prosecutions by graphe, but in this instance the procedure is not graphe; the law says not γραφέσθω, but ἐπαγγειλάτω.<sup>7</sup> That verb is normally

<sup>5</sup> Lipsius *Das attische Recht* 280.

<sup>6</sup> Harrison *The Law of Athens* 1.19 n.1, 2.205 n.4, Josiah Ober *Mass and Elite in Democratic Athens* (Princeton 1989) 119, Ian Worthington *A Historical Commentary on Dinarchus* (Ann Arbor 1992) 235, Fisher *Aeschines: Against Timarchos* 159.

<sup>7</sup> Ais. 1.32; cf. 1.2, 1.81. However, the distinction is not always clearly maintained, for in the speech *Against Androtion* we find ἐπαγγέλειν (Dem. 22.23) and ἐπαγγελία (Dem. 22.29) used with reference to the γραφή ἐταιρήσεως. Cf. MacDowell in *Revue Internationale des Droits de l'Antiquité* 42 (2000) 26.

used of announcing or giving notice of something that will be done in the future. Evidently what is meant is that, if a man who has maltreated his parents or committed any of the kinds of misconduct listed in the law starts making a speech in the Ekklesia, any other citizen at the meeting can jump up and say that he intends to proceed against the offender by dokimasia. Whereas for other offences the accuser goes to the arkhon or other official to initiate his prosecution after the offence has been committed, for this offence the accuser is to give notice at the time of the offence that he intends to prosecute afterwards. The purpose of this provision must have been to stop the offending speaker from making his speech, and thus to preclude his presumably bad advice from being given to the citizens in the Ekklesia. The offending speaker must have had to break off his speech as soon as this notice of a dokimasia was given, and must have been forbidden to address the Ekklesia again, either at the same or at any subsequent meeting, until the trial of the dokimasia was held. But some means must have been found of preventing indiscriminate use of this device; otherwise every politician might have cut short all his rivals' speeches by threatening a dokimasia without good reason. Probably the accuser had to swear an oath that he would proceed with the dokimasia,<sup>8</sup> and was liable to the usual penalty for a prosecutor in a public case who did not go ahead with it or who failed to obtain one-fifth of the jury's votes.<sup>9</sup>

Aiskhines says explicitly that this is the procedure by which he accuses Timarkhos in the extant speech (1.32), which belongs to the year 346/5;<sup>10</sup> and he gives a description of the meeting of the Ekklesia at which he announced his intention to prosecute (1.81-85). It appears that Timarkhos had previously made some proposal about some houses located on the Pnyx hill, and it had been referred to the Areopagos. The details of his proposal are not known. Carey has suggested that it was a proposal to clear the area around the Pnyx, and that it was referred to the Areopagos because some of the buildings in the area were shrines.<sup>11</sup> But that does not affect my present subject. At the meeting of the Ekklesia with which I am concerned the Areopagos' report on the proposal was presented by one of the members of the Areopagos, a dignified gentleman named Autolykos; and Aiskhines describes at some length how the Athenians laughed because they took Autolykos'

<sup>8</sup> This is suggested by Lipsius *Das attische Recht* 281.

<sup>9</sup> On this penalty in public cases generally see Edward M. Harris 'The penalty for frivolous prosecutions in Athenian law', *Dike* 2 (1999) 123-42.

<sup>10</sup> The date of Aiskhines' prosecution of Timarkhos is discussed by E. M. Harris *Hermes* 113 (1985) 376-80, H. Wankel *Hermes* 116 (1988) 383-86, E. M. Harris *Aeschines and Athenian Politics* (New York 1995) 102 with 202 n. 52, Fisher *Aeschines: Against Timarchos* 6-8, and briefly in my edition of Demosthenes *On the False Embassy* (Oxford 2000) 21 n. 59. But I was wrong to say in that book (20) that Aiskhines took as the basis of his prosecution a speech which Timarkhos had made some months previously; it must have been a speech which Timarkhos attempted to make at the same meeting at which Aiskhines announced his intention to prosecute.

<sup>11</sup> C. Carey *Aeschines* (Austin 2000) 52 n. 88.

innocent mentions of Timarkhos' knowledge of the Pnyx area to be unintentional references to his debauched activities in a district with a bad reputation. Aiskhines omits to say at what point in the debate Timarkhos himself attempted to speak. Perhaps the likeliest guess is that at the end of Autolykos' speech Timarkhos stood up to reply to it, and it was then that Aiskhines objected and announced his intention of accusing him at a dokimasia of being unfit to be an orator. The laughter which greeted Autolykos' speech would have encouraged Aiskhines to believe that he had a good chance of winning such a case against Timarkhos. In fact he did win it, and the atimia or disfranchisement which Timarkhos suffered as the penalty was the reason why Timarkhos was afterwards unable to accuse Aiskhines at his euthynai in the case of the False Embassy.

Aiskhines in the same speech also mentions other laws about orators in the Ekklesia, but those should be regarded as separate. There were laws about orderly conduct (εὐκοσμία), which Aiskhines calls on the clerk of the court to read out to the jury; the transmitted document, which may or may not be genuine, mentions such offences as interrupting, using bad language, and manhandling the chairman, and specifies payment of a fine as the penalty (Ais. 1.34-35). There was also a new law giving the members of one tribe (φυλή) responsibility for maintaining order at each meeting of the Ekklesia. Aiskhines says that this law was introduced as a result of Timarkhos' misbehaviour at a recent meeting, when he threw off his cloak while speaking and appeared undressed, like a pancratiast (Ais. 1.26); however, Timarkhos and others initiated proceedings against the law as being 'unsuitable' (μὴ ἐπιτήδευον εἶναι), so that it was suspended, and it was not yet in force at the time of his trial (Ais. 1.34). But anyway those laws about conduct at meetings were quite distinct from the law about dokimasia of orators. The dokimasia of orators was concerned not with their conduct at meetings, but with their past life.

Apart from Aiskhines' prosecution of Timarkhos, no other instance of the dokimasia procedure is quite clear, but it has been reasonably suggested that another case is alluded to at the beginning of the speech of Lysias Against Theomnestos. The speaker says that Lysitheos asserted that Theomnestos made a public speech when he was not permitted to do so, having thrown away his arms (Lys. 10.1). According to the received text, Lysitheos εἰσήγγελλε, but Gernet and Bizos in their edition propose the emendation ἐπήγγελλε, making this an example of ἐπαγγελία in the sense of giving notice of dokimasia. The conjecture is rightly rejected by Hillgruber on grammatical grounds;<sup>12</sup> but I agree with Hillgruber and others that εἰσήγγελλε here is not a technical term referring to the procedure of eisangelia but is just a general word for 'reported', and that we do have here a case of dokimasia of an orator. We hear of one other potential case: Aristophon threatened to make an

<sup>12</sup> Michael Hillgruber *Die zehnte Rede des Lysias* (Berlin 1988) 31. Because ἐπαγγέλλω refers to announcements or instructions about the future, the conjecture ἐπήγγελλε would produce the sense 'Lysitheos ordered Theomnestos to make a speech' (cf. Thuc. 6.56.1).

ἐπαγγελία δοκιμασίας against Hegesandros, but it appears that the threat was not carried out (Ais. 1.64).

The next step in the procedure was for the accuser to put his accusation in writing. Aiskhines, for example, wrote that Timarkhos was making a public speech although he had been a prostitute and had consumed his ancestral property (Ais. 1.154). He must then have delivered the written accusation to the appropriate official or magistrate; no text tells us who that was, but scholars have guessed that it was the thesmothetai, who were the officials in charge of other kinds of dokimasia.<sup>13</sup> The case then went to a jury for trial; the procedure at the trial was presumably the same as for any other public case. Aiskhines says that the law ordered the jury to decide the case. That the accused man had attempted to speak in the Ekklesia was of course already known; what the jury had to decide was whether he had maltreated his parents, or had been a prostitute, or whatever the accusation was. There may have been some cases in which the accused man had already in a previous trial been found guilty of that offence, and then the decision in the dokimasia should have been straightforward. But I presume that in most cases of dokimasia the jury had to consider from scratch whether he had maltreated his parents, or whatever. Certainly when Aiskhines accused Timarkhos by dokimasia there was no previous court verdict that Timarkhos was a prostitute (for, if there had been, Aiskhines would have mentioned it in his speech).

If the jury did decide that the accused man was guilty, what followed? Did that verdict simply confirm that he was not permitted to speak in the Ekklesia? In the case of Timarkhos it is known that on being convicted he suffered atimia (Dem. 19.257, 19.284). Furthermore, one passage of Aiskhines' speech prosecuting him refers to what one of his defenders is likely to say, and makes clear that both sides were expecting that atimia would be the penalty on conviction (Ais. 1.134); so it is reasonable to infer that atimia was specified in the law about dokimasia rhetoron and it was not left to the jury to assess the penalty.

Disqualification from speaking in the Ekklesia by itself would constitute partial atimia (And. 1.75), and it has been suggested that the consequence of a defeat in the dokimasia of orators was not really a conviction and penalty at all, but simply a confirmation that the accused man was subject to the restrictions prescribed by law. Thus Todd says, 'The grounds of his defeat would necessarily be that he was already atimos, and the defeat would actualize this already existing status'.<sup>14</sup> Carey agrees, saying, 'The penalty is merely the confirmation of the formal restrictions automatically attaching (in most cases) to the activities it addresses'.<sup>15</sup> But the penalty imposed on Timarkhos was not just confirmation that he must not speak in the Ekklesia. Aiskhines insists on the importance of imposing a punishment (κολάζητε, Ais. 1.177), and Demosthenes laments that Aiskhines wanted the jury to

<sup>13</sup> Lipsius *Das attische Recht* 281, Harrison *The Law of Athens* 2.205 n.2.

<sup>14</sup> Todd *The Shape of Athenian Law* 116 n.15.

<sup>15</sup> Carey *Aeschines* 20.

show no pity for Timarkhos' mother, who was an elderly lady, nor for his children (Dem. 19.283). It is unlikely that the old lady would have been much inconvenienced if her son had simply stopped making speeches, and we should therefore take it that the penalty prescribed in the law about dokimasia rhetoron was not just loss of the right to speak in the Ekklesia, but total atimia. That was not just a confirmation of the offender's existing status.

We have here an example of a distinction which Wallace has discussed in a recent article.<sup>16</sup> He points out that certain unconvicted offenders 'were subject to many or all of the restrictions associated with atimia. If they violated these restrictions and were prosecuted for it, the sentence was official, formal atimia.' Wallace calls men subject to such restrictions 'unconvicted or potential atimoi'; previously Hansen had used the expression 'automatic atimia'.<sup>17</sup> It is difficult to think of a better label, though those ones are not ideal. In the case of the men subject to dokimasia rhetoron I should rather say that someone who had done any of the things listed in the law (striking his parents, wasting his inherited property, and so on), and thus was disqualified from speaking in the Ekklesia, was actually – not potentially – under partial atimia, but this partial atimia had not been formally confirmed by a court. Such a man was therefore in a different position from one on whom atimia had been imposed by a court. If a man on whom atimia had been imposed by a court attempted to speak in the Ekklesia, he could be prosecuted, probably by endeixis or apagoge, and at the trial it would be necessary only to prove that a previous court had indeed imposed atimia. But if a speaker in the Ekklesia had not previously been sentenced by a court but was suspected of being disqualified from speaking (because he had struck his parents or whatever), what was required then was an examination of his life in order to discover whether he was indeed an unfit person to address the people of Athens. Such an examination was a dokimasia.

Most of the offences concerned were mentioned also in other laws besides the law about dokimasia rhetoron, and we can compare the penalty of atimia which seems to have been prescribed by this law with the penalties prescribed by other laws.

First, maltreatment of parents. A man who struck his parents or who failed to provide them with food and housing in their old age could be prosecuted by anyone who wished; such a prosecution is sometimes called graphe, but more correctly eisangelia, because the prosecutor was not subject to any penalty if he lost the case.<sup>18</sup> There are two pieces of evidence for the penalty for maltreatment of parents. A law about imprisonment, quoted in Demosthenes' speech Against Timokrates,

<sup>16</sup> R. W. Wallace 'Unconvicted or potential "átimoi" in ancient Athens', *Dike* 1 (1998) 63-78.

<sup>17</sup> M. H. Hansen *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense 1976) 66. Cf. also U. E. Paoli *Studi di diritto attico* (Florence 1930) 330, Harrison *The Law of Athens* 2.171-72.

<sup>18</sup> Isai. 8.32, Dem. 24.107, Arist. *AP* 56.6, Harp. e 7 (under εἰσαγγελία).

mentions the arrest of anyone who, after being convicted of maltreatment of his parents, went into a place where he ought not to go (Dem. 24.105); that implies that the penalty was *atimia*, either total or partial. But a passage of Lysias' speech *Against Agoratos* implies that the law specified death for a man who struck his father (Lys. 13.91). So probably death was the penalty for striking a parent, and *atimia* for other kinds of maltreatment of parents.

Second, a man who failed to perform military service, or who deserted and ran away, 'throwing away his shield', could be prosecuted by *graphe*, and the penalty was *atimia*.<sup>19</sup>

Third, prostitution. I have recently discussed Athenian laws about homosexuality in another paper,<sup>20</sup> and so I shall not go fully into them here. The essential point is that being a prostitute or a catamite in itself was not an offence, but such a man was liable to prosecution if he went to certain places or engaged in certain activities: if, being a prostitute, he spoke in the *Ekklesia* or the *Boule* or a lawcourt, or held any public office, or entered public temples or the *Agora*, then he could be prosecuted by *graphe*.<sup>21</sup> This means that the partial *atimia* from which a prostitute suffered without having been convicted was quite extensive; it makes a contrast with the partial *atimia* of an unconvicted man who had maltreated his parents or who had failed to perform military service, for in their cases it seems that the only activity forbidden was speaking in the *Ekklesia*. The prostitute's penalty on conviction in the *graphe* is not stated explicitly in any surviving text, but Aiskhines speaks of 'the greatest penalties' (τὰ μέγιστα ἐπιτίμια, Ais. 1.20), which appears to mean death, perhaps combined with confiscation of property.

Fourth, squandering one's ancestral property. This is an obscure subject. It seems to have been thought right that, if a man inherited land from his ancestors, he should pass it on in due course to his heirs and not dispose of it in any other way; but there is no clear evidence that a law on this subject existed.<sup>22</sup> If there was a law about the offence of squandering ancestral property, we do not know what it said or what penalty it prescribed. But I find it surprising, if there was such a law, that it is never mentioned in the numerous speeches that we have about inheritance cases, and I think it more likely that there was no such law.

It seems, then, that the penalty of *atimia* prescribed in the law about *dokimasia rhetoron* was more severe than those prescribed in other laws in the case of some offences, and less severe in the case of other offences, while for others it was just the same. If a speaker in the *Ekklesia* had failed to perform his military service, or had maltreated his parents (short of striking them), it made no difference to the penalty whether you proceeded against him by *dokimasia* or by *graphe*, since the penalty

<sup>19</sup> And. 1.74, Ais. 3.175-6, Dem. 15.32, 21.103, 59.27.

<sup>20</sup> D. M. MacDowell 'Athenian laws about homosexuality', *Revue Internationale des Droits de l'Antiquité* 42 (2000) 13-27.

<sup>21</sup> And. 1.100, Ais. 1.19-20, 1.164, Dem. 22.73, 24.126, 24.181.

<sup>22</sup> Cf. Harrison *The Law of Athens* 1.233.



would be atimia either way. If he had struck his parents or had been a prostitute, you might be able to get him put to death if you proceeded by graphe or eisangelia, instead of merely making him atimos by using dokimasia. If, on the other hand, he had squandered his ancestral property, it may be that using dokimasia when he spoke in the Ekklesia was the only way in which you could get him punished at all.

When we look at the situation in that way, the laws seem very inconsistent. That is a good reason for thinking that the Athenians did not look at it in that way. I suspect that, when they made the law about dokimasia rhetoron, they were not thinking about its consistency with other laws. They were simply thinking that men who conducted their personal affairs badly, in certain ways, were not fit to tell the Athenians how to conduct their public affairs. 'It did not seem to the legislator,' says Aiskhines, 'to be possible for the same man to be personally bad and publicly good, and the legislator thought that an orator should not come on to the platform having previously taken trouble over his speech but not his life' (Ais. 1.30). Orators do not always analyse the motives of legislators correctly, but in this instance perhaps Aiskhines has done so.

