

LORENZO GAGLIARDI (MILAN)

THE ATHENIAN PROCEDURE OF
DOKIMASIA OF ORATORS.
A RESPONSE TO DOUGLAS M. MACDOWELL

Introduction

Douglas MacDowell has provided a complete analysis of the *dokimasia rhetoron*. In particular, he has affirmed that the consequence of a defeat in a *dokimasia rhetoron* was not partial *atimia*, as commonly maintained¹, but total *atimia*. He has concluded that the complex of laws involving the four acts mentioned in the law about the *dokimasia rhetoron* (maltreatment of parents, military dereliction, prostitution², squandering one's ancestral property)³ seems very inconsistent, because a person could suffer a different penalty for committing the same act, according to the judicial action chosen (*eisangelia* or *graphe* on the one hand, *dokimasia* on the other).

In the case of the laws considered here, some observations raise doubt about the proposition that there were different penalties for the same act, depending on the legal action⁴. On the contrary, I shall argue that there were different penalties and, therefore, different actions, according to differences in the conduct for which individuals were prosecuted. For this reason, I shall propose a partly dissimilar hypothesis.

I shall discuss three main points in this response: (1) a comparison of the laws (which in my opinion are only apparently inconsistent); (2) the status of prostitution as an offence; (3) the consequence of a defeat in a *dokimasia rhetoron*. Finally, I will consider the case of Timarkhos.

1. A comparison of the laws.

Among the four acts that I have listed, I shall start my analysis with prostitution, as our information on this topic is the most extensive. Two different laws on prostitution exist in the sources, and the discrepancies between them have given rise

¹ See S.C. Todd, *The Shape of Athenian Law*, Oxford 1993 (repr. 1995), p. 116, n. 15.

² In this essay, in terms of the law, "prostitution" means "male prostitution".

³ See Aesch. 1.27-30.

⁴ The fact that for the same act a person could suffer a different penalty depending on the action by which he was prosecuted, seems strange to us, but was part of the system of Athenian law (see M.H. Hansen, "*Eisangelia*", Odense 1975, pp. 9ff.; R. Osborne, *Law in Action in Classical Athens*, in *JHS* 105 [1985], pp. 40-58). I mean, however, that this was not the case in the laws considered here.

to problems of interpretation. The first of these laws is documented in Aesch. 1.19-21 and Dem. 22.30-31: if a man who has prostituted himself speaks in certain public places (the assembly, the *boule*, a law court) or holds a public office, he can be prosecuted by a *graphe hetaireseos* and sentenced to death. Hereafter, following Aeschines, I will call this law “the Solonian law”⁵. The second law is documented in Aesch. 1.28-32: if a man who has prostituted himself comes forward to address the assembly, he can be stopped, subjected to a *dokimasia rhetoron*, and sentenced to *atimia*. Hereafter I will call this law “the law on *dokimasia rhetoron*”⁶.

The two laws seem to be very different⁷. The first law imposes a large series of disabilities⁸, the second concerns only the ability to speak in the assembly (*en toi demoi*⁹). Moreover, according to the first law, a person could be prosecuted and punished after having spoken in the assembly. According to the second law, a person could be subjected to a *dokimasia rhetoron* even before beginning to speak in the assembly¹⁰. It is already clear that the penalties are different. I shall argue that the kinds of conduct considered in the laws are also different¹¹.

⁵ This is a conventional denomination. We do not know if the law really was Solon’s, although we can at least say that it was thought to be ancient.

⁶ We do not know how old this second law was. Despite the absence of evidence, I am inclined to advance the hypothesis that it is more recent than the other one.

⁷ Scholars have generally considered the two laws identical or overlapping: Koch, *s.v.* “*Dokimasia*”, in *PWRE* V.1, Stuttgart 1903 (repr. 1958), coll. 1268-1273, at col. 1273; D. Cohen, *Law, Society and Homosexuality in Classical Athens*, in *Past and Present* 117 (1987), pp. 3-21, at p. 9; R. Lane Fox, *Aeschines and Athenian Democracy*, in *Ritual, Finance and Politics*, Oxford 1994, pp. 135-155, at p. 151; R.W. Wallace, *Unconvicted or Potential “atimoi” in Ancient Athens*, in *Dike* 1 (1998), pp. 63-78, at p. 69; N. Fisher, *Aeschines: Against Timarchos*, Oxford 2001, p. 144 (“both directed at the same issue”). C.D. Adams, *The Speeches of Aeschines*, Harvard 1958, pp. 2-3, and C. Carey, *Aeschines*, Austin 2000, p. 20, have attempted to distinguish these laws. For their contents, see J.M. Rainer, *Zum Problem der Atimie als Verlust der bürgerlichen Rechte insbesondere bei männlichen homosexuellen Prostituierten*, in *RIDA* 33 (1986), pp. 89-114; J.J. Winkler, *The Constraints of Desire*, New York and London 1990, pp. 54ff.; A. Ford, *Reading Homer from the Rostrum: Poems and Laws in Aeschines’ “Against Timarchus”*, in *Performance Culture and Athenian Democracy*, Cambridge 1999, pp. 231-256, at pp. 246-249. Concerning Lane Fox’s doubts (*loc. cit.*) about the efficacy of the law on the *dokimasia rhetoron*, I agree with MacDowell (see note 3 of his paper) that evidence is lacking for Lane Fox’s position. For an opinion similar to MacDowell’s, see L. Rubinstein, *The Athenian Political Perception of the “Idiotes”*, in “*Kosmos*”. *Essays in Order, Conflict and Community in Classical Athens*, Cambridge 1998, pp. 125-143, at p. 140.

⁸ Aesch. 1.19-20; see also Dem. 22.30, whose words *mete legein mete graphein* suggest that the passage refers to the Solonian law, not to the law on *dokimasia rhetoron* (*contra*, Wallace, *Unconvicted*, cit. [n. 7], p. 69).

⁹ Aesch. 1.27 and 28.

¹⁰ MacDowell does not mention this difference. Cf. esp. his article *Athenian Laws about Homosexuality*, *RIDA.*, 3^{ème} s., 42 (2000), pp. 13-27, at p. 25: “The offence....,

Aeschines prosecuted Timarkhos on the basis of this second law and not on the basis of the Solonian law. In fact, he does not ask that Timarkhos be sentenced to death¹². He mentions the Solonian law for other important reasons, as we shall see.

2. Prostitution as an offence?

MacDowell has said that prostitution in itself was not an offence at Athens. This statement deserves careful attention.

In regard to prostitution, we can think of three different hypothetical cases. First, a man prostitutes himself and leads a private life, far from political engagements: he cannot be prosecuted. Second, a man prostitutes himself and later speaks in the assembly, in the *boule*, or in the courts: he can be charged with violating the Solonian law and sentenced to death. Third, a man prostitutes himself and later asks leave to speak in the assembly, but is stopped by a fellow citizen who brings a *dokimasia rhetoron* against him and takes him to court: he can be charged and declared *atimos*. We should ask ourselves if, in the second and in the third case, a prostitute's liability arises from having spoken in the assembly (or having asked to speak), or from having prostituted himself. In other words, is the offence prostitution or speaking in the assembly?

It is only possible to answer this question after having first considered whether the judicial decision that pronounced the *status* of *atimos* was an enabling or merely

speaking in the Ekklesia after being a catamite, is exactly the same [*i.e.*, in the two laws]... but the procedure is different”.

¹¹ Another difference lies in the fact that the object of the Solonian law is only *hetairisis*, whereas *porneia* is also considered in the law on *dokimasia*. We do not know why there is this difference: whether, as I think, it depends on a defect in the tradition of the exact wording of the Solonian law (which originally included *porneia*), or whether *porneia* in the law on *dokimasia* is Aeschines' addition, or whether this is a substantive difference. I will not deal with these questions, which basically do not undermine my reconstruction. *Hetairesis* was considered in both laws and so we can observe that this same act could produce different consequences for an individual according to his subsequent behavior (that is: speaking or just asking to speak in the assembly). Hereafter I will use the English word “prostitution” to mean just *hetairisis* with regard to the Solonian law and both *hetairisis* and *porneia* with regard to the law on *dokimasia*. Anyway, as I will imply, if we can trust the texts at our disposal, both kinds of prostitution mentioned in the law on *dokimasia* (that is, both *hetairisis* and *porneia*) automatically brought the *status* of total *atimos* to an individual who had prostituted himself. Thus there was no difference between *porneia* and *hetairisis* in regard to the aspects that we are considering. On the distinction between *porneia* and *hetairisis*, see most recently Fisher, *Aeschines*, cit. (n. 7), pp. 36ff., with bibl.

¹² It is useful to remember (MacDowell has not emphasized this) that in his *dokimasia rhetoron* Aeschines prosecuted Timarkhos not only for prostitution but also for having squandered his ancestral property (as we can infer from Aesch. 1.94ff., 109, 154: so, also Fisher, *Aeschines*, cit. [n. 7], p. 40).

a declarative sentence. As we learn from And. 1.73ff. and from modern studies¹³, in Athens there existed archaic *atimia* (outlawry), total *atimia* (which prohibited entering the *agora* and exercising any public rights) and partial *atimia* (which deprived the individual of only one or some of his public rights). *Atimia* could either derive from a particular act of the individual, or be laid down by decree. The guilty person, unless he was the direct object of a decree, suffered *atimia ipso iure* simply because of an offence which he had committed. It follows that, if a man was declared *atimos* after a *dokimasia rhetoron*, it was not because of the judicial decision that he was *atimos*: rather he had already been *atimos* before, due to prostitution¹⁴. The type of *atimia* automatically suffered by prostitutes was total *atimia*, as we infer from the list of what they were excluded from in the Solonian law (Aesch. 1.19-20).

Now we can answer the question asked above: whether in the Solonian law the offence was prostitution or else speaking in the assembly (or the other places listed in the Solonian law) as a prostitute. Since we know that, if a man had prostituted himself, he would have suffered *ipso iure* total *atimia*, we cannot exclude prostitution as an offence. Therefore, prostitution was indeed an offence, but one that lacked an element that modern criminal law characterizes as the element of “prosecutibility”: it was a status offence that could not be prosecuted as a primary offence. Speaking in the assembly (or the other places listed in the Solonian law) was not in itself an offence, unless a person was already *atimos*. If a person was *atimos* (and was aware of this, having prostituted himself), and if, in spite of this, he spoke in the assembly (or the other places listed in the Solonian law), then he was committing an offence which was punished by death. To summarize, we can say that the Solonian law concerned the punishment of the offence of speaking in the assembly while being *atimos*. However, the death penalty for such an offence was based on the fact that a former automatic penalty of total *atimia* existed, although it had never been declared, against the person who was now being condemned¹⁵. This is my opinion about the Solonian law.

¹³ U.E. Paoli, *Studi di diritto attico*, Firenze 1930, pp. 310f.; A.R.W. Harrison, *The Law of Athens*. II. *Procedure*, Oxford 1971, pp. 169ff.; M.H. Hansen, “*Apagoge*”, “*Endeixis*”, and “*Ephesis*” against “*Kakourgoi*”, “*Atimoi*” and “*Pheugontes*”, Odense 1976, pp. 54ff.; R. Fiori, “*Homo sacer*”, Napoli 1996, pp. 73ff.

¹⁴ Similarly, Wallace, *Unconvicted*, cit. (n. 7), p. 70 (lines 3-4).

¹⁵ According to my reconstruction, therefore, I don’t agree with Wallace, *Unconvicted*, cit. (n. 7), p. 69, who interprets the last words of the Solonian law (as in Aesch. 1.21: *katagnosthentos autou hetairein*), as referring to a man who had already been convicted for prostitution before speaking in the assembly (or in the other places listed in the Solonian law) or before holding a magistracy. On the contrary, I think that they must refer to a judgment which declares that a man who has spoken in the assembly (or in the other places) or has held a magistracy, after having committed prostitution, is now deemed guilty of prostitution. We cannot deduce from those words that simple prostitution could be prosecuted as an offence, if not followed by the other acts listed in the Solonian law.

On this basis, we can now fully consider the law on *dokimasia rhetoron*. Here the case is that of a prostitute who goes to the assembly and asks leave to speak. At that moment, any citizen could ask that this person undergo a *dokimasia rhetoron* and be punished. This can be considered proof that prostitution was in itself an offence: the penalty, imposed through a *dokimasia rhetoron*, did not depend on anything the individual had done in the assembly, because in fact he had not done anything there, apart from asking to speak. Therefore, the penalty had to depend on a previous act, that is prostitution, from which *atimia* came automatically. Confirmation for this conclusion can be deduced from Lys. 10.1, where it is said that Lysitheos prosecuted Theomnestos for having made a public speech when he was not permitted to do so, because he had thrown away his shield. The verb used by Lysias is *eisangellein*, which some scholars have proposed to emend to *epangellein*, a verb which indicates the procedure of *dokimasia rhetoron*¹⁶. In reality, there is no need for such an emendation: the case must have been an *eisangelia*. It could not have been an *epangelia dokimasia*s, because Theomnestos had already spoken in the assembly.

3. The consequence of a defeat in the *dokimasia rhetoron*

We must now consider if the consequence of a defeat in a *dokimasia rhetoron*, for a person recognised as guilty of prostitution, was a statement of total or of partial *atimia*. Even if (as I have already stressed) a prostitute in Athens did suffer total *atimia* – automatically, for having prostituted himself –, nonetheless there are some arguments that if he lost his case in a *dokimasia rhetoron*, the judicial sentence would have been just partial *atimia*, not total *atimia*. In my opinion a person who failed a *dokimasia rhetoron* would have been excluded not from all other places but only from the assembly, and this would in fact have represented partial *atimia*.

The arguments supporting this hypothesis can thus be summarized:

1) *Dokimasia rhetoron* was a preventive procedure (examination), to evaluate whether an individual had a certain ability.

2) From the literal wording of the law on *dokimasia rhetoron*, it is possible to infer that its object was limited to the faculty of speaking *en toi demoi*, as already said. This procedure could forbid a prostitute from speaking only *en toi demoi*. Any judgment that went beyond this provision would have exceeded the terms of the law. This would have been inconceivable in a system like Athens', where every prosecution was the personal initiative of a fellow citizen.

3) It is useful to compare the *dokimasia rhetoron* with the *dokimasia* of magistrates (*Ath. Pol.* 55.3)¹⁷. In the *dokimasia* of magistrates, some aspects of individual conduct were considered. Two of these, maltreatment of parents and

¹⁶ For a different interpretation of this passage, see M. Hillgruber, *Die zehnte Rede des Lysias*, Berlin 1988, pp. 30-31.

¹⁷ See M.H. Hansen, *Seven Hundred "Archai" in Classical Athens*, in *GRBS* 21 (1980), pp. 151-173, at p. 153; G. Adeleye, *The Purpose of the "Dokimasia"*, in *GRBS* 24 (1983), pp. 295-306.

military dereliction, were relevant in the *dokimasia rhetoron* as well. As we know¹⁸, persons charged with either of these acts could be prosecuted by a *graphe* or an *eisangelia*, leading to a sentence of total *atimia*. If their guilt had been declared through a *dokimasia* of magistrates instead of through a *graphe*, they would not have suffered a sentence of total *atimia*, but only been excluded from the magistracy for which they were a candidate¹⁹. This can be inferred from the fact that in the four extant orations written for the *dokimasiai* of magistrates (Lys. 16, 25, 26, 31), a declaration of total *atimia* is never requested. In 31.26, during a hearing in a dikastery which followed a previous *dokimasia* of magistrates in the *boule*, Lysias affirms that it would have been right that a person who had “betrayed the liberty” of the Athenians had been judged by a law-court to determine not only if he could or could not hold a magistracy, but also whether he was subject to total *atimia*²⁰. This indicates that the procedure did not aim at total *atimia*, but was limited to a decision concerning admission to a magistracy. We must remember that exclusion from the ability to hold magistracies was in Athens a kind of partial *atimia*²¹.

At this point, we can concentrate again on the *dokimasia rhetoron* and outline a distinction. Even if the judgment in a *dokimasia rhetoron* against a prostitute was explicitly limited only to a statement of partial *atimia*, this judgment would nonetheless have stated that an individual had prostituted himself, and so would necessarily have contained an implicit declaration that he was a total *atimos*. In consequence of this, the individual would in fact have been barred from any of the acts listed in the Solonian law, unless he accepted the concrete risk of undergoing a *graphe* and of being sentenced to death²². This explains why, after his conviction in the *dokimasia*, Timarkhos was not only excluded from speaking in the assembly, but was also completely eliminated from political and judicial life in Athens²³. He was under a ban. This will explain his mother’s and his children’s desperation, which Demosthenes (19.283) mentioned, as MacDowell has noted. It will also explain why Aeschines mentioned the Solonian law.

¹⁸ See notes 16-17 of MacDowell’s paper to which I am responding.

¹⁹ See E. Caillemer, *s.v.* “*Dokimasia*”, in Daremberg-Saglio, *Dictionnaire des antiquités*, II.1, Paris 1892, repr. Graz 1969, pp. 324-328, at p. 326; S.C. Todd, *The Shape of Athenian Law*, cit. (n. 1), p. 116, n. 15; R.W. Wallace, *The Athenian Law against Slander*, in *Symposion 1993*, Köln 1994, pp. 109-124, at p. 119. A different opinion is stated by U.E. Paoli, *Studi*, cit. (n. 13), p. 328.

²⁰ See also Dem. 31.30 and 33.

²¹ See Arist. *Pol.* 1281a.28-32, with R.W. Wallace, *Unconvicted*, cit. (n. 7), p. 66.

²² This is, in my opinion, how to understand the scholium at Aesch. 1.3, *me legein en boulei med’en dikasterioi, med’ekklisiai*. These were limits that, for Timarkhos, did not directly derive from the law on *dokimasia rhetoron*, but – indirectly – from the Solonian law. On the quoted scholium, see, moreover, L. Spina, *Il cittadino alla tribuna*, Napoli 1986, p. 46.

²³ However, probably he could speak to defend himself in the *dokimasia rhetoron*. See Aesch. 1.123 and 174; Lys. 10.1.

Until now I have concentrated only on prostitution. But in the law on *dokimasia rhetoron* three other kinds of acts were considered. I have catalogued them in the table at the end of this response.

It seems to me that the rules regarding the request to speak in the assembly and the offence of actually speaking in the assembly were identical in all four cases: the mere intention of speaking brought, in case of a trial, an explicit statement of partial *atimia* (*rectius*, an explicit statement of the incapacity to speak in the assembly) and an implicit statement of total *atimia*. The commission of the offence of speaking could lead to death. Obviously there is a difference between the first two cases (maltreatment of parents and military dereliction) and the other two (prostitution and squandering one's ancestral property). In the first two cases, individuals could be prosecuted by a *graphe* or by *eisangelia* even if they had not come forward to speak in the assembly or had not engaged in any political activity. Evidently, these were considered more serious offences, against the community. The other two offences pertained to the private life of the individuals concerned, but signified such a disqualification that these individuals were thought to be incapable of advising fellow citizens. Therefore, in these last two cases, individuals could not be prosecuted if they continued to lead a private life.

Once more, the rules regarding the *dokimasia* of magistrates confirm what has so far been inferred in connection with the *dokimasia rhetoron*. In Dem. 20.156 it is stated that the penalty for somebody who had held a magistracy in spite of being *atimos* (in this case, while in debt to the treasury) was death. The analogy with the *dokimasia rhetoron* is evident. In the case of the orators, somebody who was subject to total *atimia* and did not pass his *dokimasia* suffered a sentence of partial *atimia* which prevented him from speaking in the assembly; if he spoke in the assembly he was sentenced to death. So in the case of magistrates, one who was subject to total *atimia* and did not pass his *dokimasia* suffered a sentence of partial *atimia* which prevented him from holding a magistracy; if he held a magistracy he was sentenced to death.

If we accept this description, the complex of laws does not seem inconsistent. *Graphai* and *eisangeliai*, as subsequent procedures, aimed at punishing an individual for having committed a punishable offence (such as maltreating parents, or speaking in the assembly while *atimos*). On the other hand, *dokimasiai*, as preventive procedures, had a completely different purpose: to preserve the community from the influence of some *atimoi* against whom the *dokimasia* could declare certain incapacities. The *dokimasia rhetoron*, in particular, had the aim of stopping these *atimoi* before they could contaminate the city by speaking in the assembly.

4. The episode of Timarkhos

Before concluding, one last question should be considered. Why did Aeschines choose to proceed against Timarkhos on the basis of the law on *dokimasia rhetoron*, and not on the basis of the Solonian law? In fact, Timarkhos had previously spoken several

times in the assembly²⁴, and he could have been prosecuted by a *graphe hetaireseos*. In my opinion, the reason behind Aeschines' choice lies in the fact that he was anxious to attack Timarkhos²⁵ in order to disqualify him and his allies, including Demosthenes, in the eyes of the public, and to exclude him from political life. Aeschines' main objective was not Timarkhos's death, but his elimination as a political opponent.

This episode is connected to the events of the false embassy. In July (or Skirophorion) 346, Demosthenes and at least two other men, presumably including Timarkhos, accused Aeschines at his *euthynai*, when the second embassy came back to Athens from Macedonia.

Aeschines had two options: either simply to defend himself at his *euthynai*, or to counterattack his enemies, who, all in all, were not persons of impeccable integrity. Aeschines chose to attack Timarkhos, who was the weak link in the chain²⁶. But how should he attack him? A *graphe hetaireseos* would have been very dangerous for Timarkhos, but it was useless for Aeschines. The *euthynai* had already started and a possible condemnation to death for Timarkhos would have come after Aeschines' own condemnation to death. Therefore, he chose the way of the *dokimasia rhetoron*. The penalty for Timarkhos, in case of conviction, would have been partial *atimia*, consisting only in being deprived of the faculty of speaking in the assembly. However, from the moment when the *dokimasia rhetoron* began, Timarkhos would not have dared to carry on the prosecution at Aeschines' *euthynai*, risking a later death sentence on the basis of the Solonian law²⁷. So, one day, Aeschines suddenly brought a *dokimasia rhetoron* against Timarkhos, at a moment when he had asked leave to speak in regard to a completely different matter. Aeschines won against Timarkhos, who suffered *atimia*. Demosthenes considered himself compelled, from the bad turn that events had taken, to give up for the moment the prosecution at the *euthynai*, which he resumed three years later. Aeschines, in the end, was acquitted by the narrow margin of thirty votes²⁸.

²⁴ See Dem. 19.286.

²⁵ Cf. E.M. Harris, *The Date of the Trial of Timarchus*, in *Hermes* 113 (1985), pp. 376-380; *Aeschines and Athenian Politics*, New York-Oxford 1995, p. 202, n. 52.

²⁶ Similarly, C. Carey, *Aeschines*, cit. (n. 7), p. 18.

²⁷ The risk existed anyway, because Timarkhos had already spoken in the assembly. But by withdrawing his attack against Aeschines at the *euthynai*, Timarkhos might have avoided provoking the revenge of Aeschines or of some of Aeschines' supporters (namely, a prosecution by means of a *graphe hetaireseos*).

²⁸ The trial of Timarkhos took place during the archonship of Archias, between August 346 and July 345 (for a detailed discussion, see D.M. MacDowell, *Demosthenes. On the False Embassy*, Oxford 2000). However, it is debated whether the trial took place in January 345 (as maintained by A. Schäfer, *Demosthenes und seine Zeit*, II², Leipzig 1885, p. 336, n. 1 and by H. Wankel, *Die Datierung des Prozesses gegen Timarchos (346/5)*, in *Hermes* 116 [1988], pp. 383-386) or in August-September 346 (as proposed by Harris, *loc. cit.* [n. 25]). Both hypotheses can be right, but the strong determination that Aeschines must have had to stop Timarkhos, makes the second of

Aeschines' choice of bringing the *dokimasia rhetoron* against Timarkhos had eventually rewarded him.

TABLE

KINDS OF ACTS CONSEQUENCES	(1) Maltreatment of parents	(2) Failure to perform military service – military desertion	(3) Prostitution	(4) Squandering one's ancestral property
Penalty for the commission of the act in itself (procedure: <i>graphe</i> or <i>eisangelia</i>)	YES - death or - total atimia	YES - total atimia	NO	NO
Penalty for the request of speaking in the assembly after the commission of the act (procedure: <i>dokimasia rhetoron</i>)	<i>(partial)</i> atimia	<i>(partial)</i> atimia	<i>(partial)</i> atimia	<i>(partial)</i> atimia
Penalty for the offence of speaking in the assembly after the commission of the act (procedure: <i>graphe</i> or <i>eisangelia</i>)	<i>death</i>	<i>death</i>	death	<i>death</i>

Note. I have indicated in bold those elements that can be considered certain, because they are confirmed by the sources, and in italics those which are subject of hypothesis.

those suppositions (August-September 346) more likely: it indicates a date closer to the *euthynai* (July 346).

