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'SECOND' THOUGHTS ON AISKHINES 3.252[1]

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Lykourgos *against Leokrates* was a trial for treason on the grounds that Leokrates fled Athens as news of Philip's victory at Khaironeia in 338 B.C. reached the city. At that time, the Assembly passed a hasty decree defining flight as treason, but the trial only took place eight years later when Leokrates finally returned to Athens. The only reference in the sources to the outcome of the case is Aiskhines 3.252:

Ἕτερος δ' ἐκπλεύσας ἰδιώτης εἰς Ῥόδον, ὅτι τὸν φόβον ἀνάνδρως ἤνεγκε, πρώην ποτὲ εἰσηγγέλθη καὶ ἴσαι αἱ ψῆφοι αὐτῷ ἐγένοντο· εἰ δὲ μία ψῆφος μετέπεσεν, ὑπερώριστ' ἄν.

Another private individual, terrified to the point of cowardice, sailed to Rhodes and was prosecuted only the other day. The votes turned out to be equal but if one vote had been changed, he would have been cast out.

The implication is that the defendant was acquitted on the legendary precedent of Athene's acquittal of Orestes,[2] and scholars have unanimously concluded that there is no doubt that the jury's vote was tied and that Leokrates escaped execution by the one casting vote. The issue may not, however, be so clear cut and unambiguous.

Lykourgos' prosecution of Leokrates took the form of an *eisangelia* to the *dikasteria*. By 330 B.C., all *eisangeliai* were heard either by the courts or the *Boulē*: the latter generally heard cases of impropriety or misconduct of officials, and its jurisdiction was limited to a maximum fine of 500 drachmas; the *dikasteria* heard cases of what we would recognize as high crimes and misdemeanours (hence the usual translation of *eisangelia* as impeachment).[3] It is unclear when exactly the *Ekklesia* stopped trying *eisangeliai* itself, but the last known cases are prosecutions of Kallisthenes and Ergophilos in 362.[4]

Eisangeliai heard by the *dikasteria* involved bringing a case before the

[1] A version of this paper was presented at the Classical Association Conference in Manchester 2001.

[2] Aiskh. *Eu.*752f.

[3] [Arist.] Ath. 45.2 with P. J. Rhodes, *A Commentary on the Aristotelian* Athenaion Politeia (Oxford, 1993); P. J. Rhodes, *The Athenian Boule* (Oxford, 1972), 156, 164; M. H. Hansen, *Eisangelia* (Odense, 1975), 22–8.

[4] Hansen 1975, 93f., with references cited.

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Ekklesia. If it accepted the impeachment, the assembly ordered the *Boulē* to draw up a *probouleuma*, perhaps translatable here as a formal charge, which was discussed and ratified at the next *Ekklesia*. The case was then referred to the courts. In the fifth century and the first half of the fourth, penalties did not have to be fixed in advance; the punishment was either proposed in the normal way with the jurors voting twice, an *agōn timētos* (the process familiar from Sokrates' trial), or a penalty was pre-set, usually at death or death with additional penalties, and became automatic in the event of a guilty verdict, an *agōn atimētos*.[5] The position in the second half of the fourth century is not, at first glance, so clear. Lipsius argued that from the middle of the fourth century, the procedure was reformed with *eisangeliai* becoming wholly *agōnes atimētoi*, carrying an automatic, pre-set death penalty, along with confiscation of property and loss of right to burial in Attika.[6]

Twenty-eight *eisangeliai* are recorded between the trial of Timotheos in 356 B.C., in which the general was fined 100 talents, and the year 322 B.C., and these cases provide a clear window of opportunity for the reform for which Lipsius argued.[7] Hansen has looked in detail at these twenty-eight cases: in nine of them the result is unknown, and four other *eisangeliai* were withdrawn prior to trial; eight more resulted in acquittal, one in a guilty verdict (though the sentence is unknown); and five more are known to have carried the death penalty. That is a total of twenty seven. The one remaining case is that of Lykourgos against Menesaikhmos, a case obviously prosecuted before 325, since that was the year in which Lykourgos died. We know that Lykourgos got his guilty verdict but it absolutely could not have resulted in the death penalty, because Menesaikhmos succeeded Lykourgos as *ho epi tei dioikēsei*, loosely translatable as Chancellor of the Exchequer, and he went on to prosecute Lykourgos' sons after their father died. Menesaikhmos must, therefore, only have been fined and this one case proves Lipsius wrong. As Hansen concludes, all the evidence which Lipsius uses to argue for a reform can equally be explained on the assumption that *eisangeliai* remained *agōnes timētoi* down to 322 B.C.[8]

[5] In one case, the penalty was death with confiscation of all property, demolition of house, denial of burial in Attika, and hereditary *atimia*: see [Plut]. *Mor.* 833D–834B. See too Aiskhin. 3.224; D. S. 13.102; [Plat]. *Ax.* 368E; Xen. *Hell.* 1.7.34 f.; Hansen 1975, 33 ff., 84 ff., 103, 113 ff.; W. R. Connor, 'The Razing of the House in Greek Society', *TAPA* 115 (1985), 79–102.

[6] J. H. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig, 1905), i. 192 ff.

[7] Timotheos' fine: Nepos, *Timotheos* 3.5, *Iphikrates* 3.3; Isok. 15.129; Dein. 1.14, 3.17; Plut. *Mor.* 605F.

[8] Hansen 1975, 33–6.

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Lykourgos' prosecution of Leokrates in 330 would, therefore, have been subject to either a variable penalty or a punishment pre-set in a *probouleuma*, though this would not necessarily have been the death penalty. There is at least one *eisangelia* from the second half of the fourth century where the penalty was pre-set by the *Boulē* and ratified by the *Ekklesia*: Demosthenes successfully proposed a decree which included the provision that, if a certain Anaxinos was found guilty, the death penalty was to be imposed.[9]

It is probably fair to argue that the *Ekklesia* might have been inclined to accept any penalty recommended in a *probouleuma* issued by the *Boulē*. However, such a clause was optional, and throughout the course of the fourth century, when the powers of the courts had been increased, any decision concerning an appropriate penalty would be much more likely to be left to the *dikasteria*, who would decide between penalty proposals from prosecution and defence, with a second vote following a guilty verdict. Hansen catalogues several fifth-century *eisangeliai* where the penalty was pre-set, but in the fourth century, there was *timēsis*, as mentioned above, in Timotheos' *eisangelia* in 356 B.C., and in the *eisangelia* of Kephisodotos in 359 B.C., as well, we know that the matter was left to the *dikasteria* because Demosthenes tells us that the jurors had to take a second vote to determine the sentence.[10]

To return to Lykourgos against Leokrates, the unanimous conclusion that the defendant was acquitted as a result of a tied vote was reinforced by Hansen's claim that Aiskhines 3.252 proves that there was only one vote taken by the jury.[11] However, a penalty may not have been specified in this *eisangelia* and if it had not been, Aiskhines could, in fact, be referring to the second vote on whether the death penalty should be applied to a man who had already been found guilty, rather than to a first ballot which resulted in acquittal by one vote, and it is this scenario that is worth investigating in some detail.

Aiskhines had, in fact, every reason only to refer to a second vote; he is attempting to create the greatest possible distinction between the punishment of the crime committed by Leokrates and the proposed reward for the crimes he claims were committed by Demosthenes. He would not, anyway, need to refer to a first vote which resulted in a guilty verdict since this would be common, and recent, knowledge because the cases were separated by only a few weeks at most. If we look at the way

[9] Aiskhin. 3.224; see too Hansen 1975, 103.
[10] Kephisodotos: Aiskhin. 3.52; Dem. 23.167; Hansen 1975, 98f.
[11] Hansen 1975, 34f.

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he refers to Leokrates, the tenor of what he is saying does not indicate that Leokrates was found Not Guilty, even by a single vote. For whilst Aiskhines is minimizing the crime Leokrates has committed, a crime judged seriously enough for the *Ekklesia* to ratify an *eisangelia* eight years after Khaironeia, his rhetoric implies that Leokrates is someone who has been punished for committing an offence which Demosthenes has exceeded by far, and for which it is proposed he should be rewarded.

On one particular occasion, Aiskhines uses the thrust that Demosthenes is a coward and a deserter:

> Imagine for me for a little while that you are not in court, but in the theatre and envisage the herald coming forward and getting ready to make the proclamation under the decree. Consider whether you believe that the families of the dead will weep more over the tragedies and the heroes' sufferings which will then be performed on stage than over the senselessness of the city. For what Greek would not grieve, having been brought up in freedom, as he sat in the theatre and remembered this, if nothing else, that once, on this very day when, as now, the tragedies were about to be performed, when the city had better laws and better leaders, the herald came forward and placed before you orphans whose fathers had been killed in the war, young men kitted out in full armour, and he pronounced that beautiful proclamation which is so conducive to courage, that these young men, whose fathers were brave and died in war, the state has nurtured to manhood and now, in full battle gear, they go their own way with our best wishes and take the seats of honour in the front row. That was the proclamation then, but not now, for having presented the man responsible for their orphanhood, what can he announce? What can he say? For if he goes through the exact ordinances of the decree, the shame of the truth will not be silent but will voice its opposition to the herald's voice, that this man, if indeed he is a man, the Athenian demos has crowned for excellence – the vilest of all, and for nobility – a complete coward and deserter of his post.[12]

Aiskhines is setting up a vivid comparison between the city's heroes and cowards. This line of attack makes a mockery of using as an example a man who had been acquitted of cowardice. It is perhaps even arguable that Aiskhines is actually trying to mimic Lykourgos' successful prosecution of a few weeks earlier. The speeches have a similar emphasis on cowardice and desertion, both hark back to the past, and Aiskhines uses decrees, poetry, oaths and so on, in a style that is not obviously his own if we consider his two other extant speeches.[13]

Aiskhines' contrast between Leokrates' case and Demosthenes' crown is a crucial one, because it would make little sense if Leokrates had been found Not Guilty. Moreover, Aiskhines is arguing in the context of the erosion of democracy:

[12] Aiskhin. 3.153–5.
[13] See too D. S. Allen, *The World of Prometheus* (Princeton, 2000), 159.

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You should be on guard against those who call themselves public guardians and philanthropists but who are untrustworthy in character. For goodwill and the name of democracy are in the public domain, but those who are the first to escape to them in speech are those who are furthest away from them in deed. When you get an orator, then, who desires crowns and proclamations amongst the Greeks, tell him to bring his argument back, like the law requires one to give security for property, to a worthy life and a temperate nature. But if he cannot testify to these assets, do not confirm the praise for him, but have a thought for the democracy which is already slipping away from you. Does it not seem dreadful to you that the Boulē and the people are ignored but the letters and ambassadors come to private houses, not from just anyone either, but from the foremost people in Asia and Europe? And those things which carry the death penalty, certain men do not deny doing them, but confess to the people and compare their letters amongst themselves. Some of them tell you to look at their faces as the guardians of the democracy and others demand gifts for being saviours of the city. But the people, discouraged by what has happened, as if the worse for old age or convicted of madness, retain only the name of democracy whilst yielding the workings to others. And so you leave the assemblies without having debated anything, but as if from a picnic where you were given a share of the leftovers.[14]

Private citizens are held to account for their misdeeds, however trivial, whilst politicians, *rhētors* and the like, do as they please and even seek to be rewarded for things which should carry an automatic death penalty. Even foreign policy, Aiskhines claims, is done with these big-wigs privately rather than with the assembly. Thus, how can you punish private individuals for minor offences but crown politicians who do far worse? That this happened frequently is, in fact, bitterly lamented by Hypereides too, who expressly says that ordinary people face execution or exile for a simple mistake whereas politicians who commit great crimes get off scot-free.[15]

In the context both of his speech and of our investigation, Aiskhines 3.252 can only mean that Leokrates would have been executed and cast out without burial if Lykourgos' penalty had been accepted but that, in the event, Leokrates was given an alternative punishment, perhaps exile or a large fine as proposed by the defence. Indeed, the other example Aiskhines uses in 3.252 of behaviour which contrasts with Demosthenes' own is of a citizen who was only trying to sail to Samos and was executed by the Areopagos that very day. It would seem to undermine his argument profoundly if his other example, Leokrates, had received no punishment whatsoever, and especially if he was actually found Not Guilty.

A hung jury, however, is remarkable especially considering the number of jurors who could be involved in public trials, but there is a precedent for a guilty verdict being followed by an extremely close

[14] Aiskhin. 3.248–51. [15] Hyp. *Dem.* 52.

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penalty vote. In Kephisodotos' *eisangelia* of 359 B.C., a guilty verdict was followed by a penalty vote in which Kephisodotos escaped execution by just three votes: Demosthenes says that the defendant was fined five talents instead of being put to death.[16] Hansen also quotes four other examples of *eisangeliai* where the accused was found Guilty and fined despite the prosecution's demand for the death penalty. The first two, Miltiades and Perikles, are from the fifth century, but the latter two, Ergophilos and Timotheos are from 362 and 356, tried by the *Ekklesia* and the *dikasteria* respectively.[17]

We have been considering the scenario that Lykourgos against Leokrates was an *agōn timētos*, that Lykourgos succeeded in securing a guilty verdict and that Aiskhines 3.252 is referring to the second vote on the penalty, which was tied and therefore resulted in the lesser penalty being imposed on the basis of the Athene principle.[18] It could also be argued that although Lykourgos would probably still have urged the imposition of the death penalty even if the *probouleuma* had contained a pre-set death-penalty clause,[19] he might also have claimed that if a crime was deemed severe enough to warrant an automatic death penalty, it would be criminal to acquit Leokrates on the slightest of doubt. This argument is conspicuous in its absence. It is also questionable whether what was surely an extraordinary result, a hung jury of perhaps fifteen hundred or so, would be ignored by commentators, but both Hypereides and Plutarch not only fail to mention such an event, they are at pains to imply that Lykourgos hardly ever lost a case.

Kennedy argued that the case should have been a foregone conclusion. He claimed that Lykourgos' *failed* prosecution of Leokrates was 'an act of rhetorical irresponsibility and indulgence, and a fine example of unreasonable prosecution built on the confidence of rhetorical technique'. None the less, he concluded that Lykourgos had a great chance of success as a result of his rhetorical skill, and of the emotional atmosphere in Athens at the time of Khaironeia, and in the jury during the trial.[20] What is more, the case had a basis in fact whether or not it was grounded firmly in law, and was reinforced both by Leokrates' apparently open admission that he had left Athens, and by

[16] See n. 9, above.
[17] Hansen 1975, 69, 71, 94, 101.
[18] In this respect, it can perhaps be inferred that the Athene principle was applied across the board and formed the basis for determining tied penalty votes, which is a subject no ancient source, nor modern commentator, seems to deal with.
[19] See n. 5, above.
[20] G. A. Kennedy, *The Art of Persuasion in Greece* (London, 1963), 251.

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the precedent of Lykourgos' conviction of the Areopagite Autolykos in 338 for secreting his wife and sons out of Athens, not even for leaving the city personally. Moreover, since Leokrates' defence was based on leaving to trade in corn with cities other than Athens, an illegal activity which carried the death penalty, Lykourgos would have been extremely unlikely to have exchanged the opportunity to prosecute on concrete grounds for a specious *eisangelia* unless he was confident of success.

The procedural arguments outlined above show, at the very least, that the case was not necessarily an *agōn atimētos*, and that there may have been provision for at least one further vote on the penalty. On the basis of legal, procedural, and rhetorical arguments, moreover, it is possible to put together a strong argument that the case was an *agōn timētos* and that Lykourgos gained a conviction, failing only on the second vote on the penalty and even then, by the hairsbreadth of Aiskhines' hung jury. The traditional understanding of Aiskhines 3.252, therefore, cannot continue to be considered safe.

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