

THE ATHENIAN AMNESTY AND SCRUTINY OF 403

In late 403 the brutal oligarchy installed a year earlier in the wake of Athens' capitulation and defeat was overthrown and replaced by an interim government of twenty instructed to govern the city by its traditional laws until new legislation was carried.¹ The victory of the democratic leader Thrasybulus at Piraeus marked the return of fugitives, of whom many would have left Athens under the Thirty, but some before the fall of democracy in 404. To prevent further infighting, an oath of reconciliation was sworn, promising to refrain from vengeful action provoked by the memory of past wrongdoing (*mê mnêsikakein*). This solemn pledge became the foundation on which the democracy was reconstructed.

The only surviving account of these events comes from a passage in the first speech of Andocides' *On the Mysteries* (81–7), part of a broader argument that certain legal measures under which former exiles might have been liable under the old democracy no longer had binding force (71–105). In or around 400, Andocides was arrested and tried for unlawful trespass in a sacred precinct. His enemies claimed that the scandals of 415, in which he had been implicated, disqualified him from entering sacred areas. In support of their case, they cited a decree moved by Isotimides in 415, barring religiously tainted persons (*asebeis*) from temples and other sacred places. According to the prosecution, the decree of Isotimides was still valid, and, by ignoring its sanctions, Andocides had acted illegally. In reply, Andocides refers to the events of 403 to show that Isotimides' decree was now null and void.²

Andocides' account of events that ensued on the victory at Piraeus contains some of the most historically difficult and controversial material in the entire oratorical

¹ This article is written primarily as a reply to E. Carawan, 'The Athenian amnesty and the "scrutiny of the laws"', *JHS* 122 (2002) 1–23. Carawan's paper contributes to a longstanding discussion of the very complex evidence for legal review at the end of the fifth century. Earlier contributions include J.H. Oliver, 'Greek inscriptions: laws', *Hesperia* 4 (1935), 5–32; J.H. Ferguson, 'The Athenian law code and the old Attic tritities', in *Classical Studies Presented to E. Capps* (Princeton, 1936), 144–58; S. Dow, 'Greek inscriptions: the Athenian law code of 411–401 BC', *Hesperia* 10 (1941) 31–7; A.R.W. Harrison, 'Law-making at Athens at the end of the fifth century BC', *JHS* 75 (1955), 26–35; E. Ruschenbusch, 'Der sogenannte Gesetzcode vom Jahre 410 v. Chr.', *Historia* 5 (1955); S. Dow 'The law codes of Athens', *Proc. Mass. Hist. Soc.* 71 (1959), 3–36; S. Dow, 'The Athenian calendar of sacrifices: the chronology of Nikomachos' second term', *Historia* 9 (1960), 270–93; S. Dow, 'The walls inscribed with Nikomachos' law code', *Hesperia* 30 (1961), 58–73; A. Fingarette, 'A new look at the wall of Nikomachos', *Hesperia* 40 (1971), 330–5; K. Clinton, 'The nature of the fifth-century revision of the Athenian law code', in *Studies in Attic Epigraphy...presented to E. Vanderpool* (*Hesperia* Supplement 19 (1982), 27–37; G. Kuhn, 'Untersuchungen zur Funktion der Säulenhalle III. Die Stoa Basileios in Athen', *JdI* 100 (1985), 200–26; N. Robertson, 'The Laws of Athens, 410–399 BC: the evidence for review and publication', *JHS* 110 (1990), 43–75; S. Todd, 'Lysias against Nikomachos: the fate of an expert in Athenian law', in L. Foxhall and A.D.E. Lewis (edd.), *Greek Law in its Political Setting* (Oxford, 1996), 101–31; S.D. Lambert, 'The Sacrificial Calendar of Athens', *BSA* 97 (2002), 353–99.

² For the view that Andocides was still liable in 403/2 under the terms of the decree of Isotimides, see D.M. MacDowell, *Andokides and the Mysteries* (Oxford, 1962), 200–3.

corpus, and, to avoid prejudicial paraphrasing, it is essential to quote the most relevant sections *verbatim* (*On the Mysteries* 81–7):

(81) When you returned from Piraeus, having it in your power to exact vengeance, you decreed to let go of the past, and you thought it better to think of the safety of the city than of your own private grievances, and a decree was issued to forget past wrongdoing (*mê mnêsikakein*). When you had decreed these things, you chose twenty men. These were to govern the city until other laws had been ratified. Meanwhile they were to use the laws of Solon and the ordinances of Dracon. (82) When you had chosen a council by lot and appointed lawgivers, they began to discover that there were many of the laws of Solon and Dracon under which many of the citizens were liable for things that had happened before. Calling an assembly you deliberated concerning them and voted, having vetted all the laws, to write up in the Stoa those of the laws which were vetted. Read out to me the decree ... (85) The laws then were vetted, gentlemen, in accordance with this decree, and they wrote up in the Stoa the ratified laws. When they had been written up, we passed a law which you all use. Read me out the law. LAW. Magistrates are not to use an unwritten law on any matter. (86) Is it at any rate possible either that a magistrate bring a case to court or for one of you to take action concerning anything that was left over other than in accordance with the written up laws? If then it is not permitted to use an unwritten law, surely in every sense must we not use an unwritten decree. When we saw that misfortunes had befallen many of the citizens, some because of laws, others because of decrees carried previously, we made these very laws for the sake of what is being done right now, so that none of this should happen and nobody be able to slander. Read me out the laws. (87) LAWS. Magistrates are not to use an unwritten law on any matter. No decree of the council of demos is to have higher authority than a law. It shall not be permitted to pass a law against an individual, unless the same law is passed against all Athenians or unless it is decreed by six thousand voting secretly. What then was left? This law here. Read it out to me. LAW. Judgments and arbitrations are to be valid which were passed while the city was a democracy. The laws are to be used from the archonship of Eucleides (403/2).

The interpretative problems that arise out of this passage are three. (i) What was the meaning of the oath *mê mnêsikakein*? (ii) What was the extent and scope of the amnesty? (iii) What was the nature of the crisis that followed the restoration of the fugitives, and (iiib) how did the legal scrutiny seek to address it?

(i) Andocides attests that the oath *mê mnêsikakein* was sworn immediately after the democratic victory. He says nothing of its content but that it was sanctioned by a decree of the people. The normal assumption has been that it functioned as a standard guarantee of political forgiveness. On that view, it marked an attempt to draw a line under the past and bring the warring factions of Athens together.³

In recent times, however, the traditional reading has met a challenge. Comparing the oath sworn at Athens with other parallel cases, E. Carawan argues that the oath prohibited redress of former crimes not in the first *but in the second instance*. It did not offer blanket immunity for all past offences but stated in a much more limited sense that specific liabilities now expunged should not be redressed. The oath was geared to protect the claims of former disfranchised citizens (*atimoi*) restored again to citizen status. It was now impossible to pursue a former *atimos* for misdeeds already tried and punished.

The parallel cases Carawan adduces are: (a) the Athenian alliance of 422 with the Bottiaeans (*IG* I³ 76 = Tod 68); (b) the decree of 362 regarding Ioulis on Ceos (*IG* II²

³ For the standard view that *mê mnêsikakein* carried the sense of forgetting old enmity, see: N. Loraux, *La Cité Divisée. L'oubli dans la mémoire d'Athènes* (Paris, 1997); A. Wolpert, *Remembering Defeat. Civil War and Civic Memory in Classical Athens* (Baltimore, 2001).

111 = R/O 39); and (c) the agreement between the warring parties of Tegea (*SIG*³ 306 = R/O 101).

(a) *IG* I³ 76 = Tod 68. In spring 432 the Bottiaeans revolted on the instigation of Perdiccas. Even though Potidaea had been a Corinthian colony and received regular magistrates from Corinth, she was tributary to Athens. When she revolted, demands were made to pull down her fortifications and expel the Corinthian magistrates. Appeals reached Perdiccas, a former friend of Athens, to stir up the Chalcidians in Thrace and the Bottiaeans. When negotiations between Potidaea and Athens broke down, the Chalcidians and Bottiaeans made a common cause with Potidaea.⁴

Ten years later, some of the cities of Bottiaea came into alliance with Athens.⁵ The decree of 422 cemented the compact. The first five lines are extremely fragmentary but seem to have dealt with suits (*dikai*). At the point at which confident reconstruction of the text begins, provisions for an oath to be sworn between the signatory parties are legible. On the Athenian side, a pledge was taken to defend the Bottiaeans and preserve the alliance according to what had been agreed, and to forget wrongs committed in the past (*mê mnêsikakein*) (lines 6–16). On the Bottiaean side, a promise was undertaken to have the same friends and enemies as the Athenians, not to assist the enemies of Athens, and to let go of all past grievances (*mê mnêsikakein*) (lines 17–21). The remainder of the decree provides for its publication (lines 21–30) and the appointment of commissioners for the administration of the oaths (lines 30–4).

Carawan notes that the details for lawsuits precede those for the oath taking, and infers that the oath *mê mnêsikakein* sealed an earlier compact to refrain from arbitrary violence; it states not that crimes are to be forgiven outright but that outstanding grievances are to be pursued by legal process.⁶ It is true that the early part of the decree seems to have touched on the question of litigation, but its preservation is far too sparse to permit any firm understanding of what was concluded and how it related to the oath. The most that can be assumed is that both sides saw it to be in their mutual interest to forget the events of a decade earlier.⁷ *Prima facie*, the text as preserved does not elucidate the nature of the oath sworn.

(b) *IG* II² 111 = R/O 39. In the archonship of Charicleides (363/2) a decree was carried on the motion of Aristophon to extract moneys owed by Ioulis on Ceos.⁸ Literary sources inform us only sparsely of the background. According to Diodorus, the previous year saw the launching by Epameinondas of a Theban naval programme to wrest control of the sea from Athens.⁹ The decree says nothing of Theban involvement, but we are informed that Ioulis had revolted from Athens and later been beaten

⁴ Thuc. 1.57–8.

⁵ Not all of them, however; Spartolus was still unaligned with Athens by the time of the Peace of Nicias in 421 (Thuc. 5.18.5). For the date of 422 of the present treaty, see G. Busolt, *Griechische Geschichte* III.592, 1171; B.D. Meritt, *SEG* 3.16; M.N. Tod, *Greek Historical Inscriptions*,² (Oxford, 1946), 167.

⁶ Carawan (n. 1), 5.

⁷ The fact that hostages were restored in 422 suggests that the enmity had still not been resolved until that time. The oath of treaty and alliance is naturally geared towards its resolution.

⁸ D.M. Lewis, 'The federal constitution of Keos', *BSA* 57 (1962), 1–4; J. Cargill, *The Second Athenian League. Empire or Free Alliance?* (Berkeley, 1981), 134–40; E. Ruschenbusch, 'Eine Bürgerliste von Iulis und Koresia auf Keos', *ZPE* 48 (1982), 175–88; P. Brun, 'L'île de Keos et ses cités au IV^{ème} siècle av. J.C.', *ZPE* 76 (1989), 121–38.

⁹ Diod. 15.78.4–79.1; cf. also Isoc. 5.53.

into submission; Theban intervention seems a probable cause of conflict. The defeat of Ioulis marked the expulsion of the anti-Athenian party, which returned shortly afterwards and regained control. Once more, the partisans were driven out, their property confiscated, and their names proscribed.¹⁰

The decree has three principal concerns. First, Ioulis is to repay an outstanding debt of three talents (lines 5–9). Secondly, the oath sworn by Chabrias to the Ceians is to be published at Ioulis (lines 17–26). And thirdly, those citizens of Ioulis who had organized the revolt are to go into exile (lines 27–48). The subsequent portions spell out the terms of the oaths. The Athenians pledge not to harbour grudges (*mê mnêsikakein*) (lines 58–9). No Cean who abides by the oaths is to be exiled (lines 60–1). Every effort is to be taken to prevent subversive activities in future (lines 62–4). Any Cean who chooses not to live on Ceos might live wherever he wishes and enjoy his own property (lines 64–5). The Ceans, on their side, promise to be loyal to the Athenian alliance (lines 71–2), to make lawsuits of over one hundred drachmas subject to appeal (lines 73–4), and to protect former Cean fugitives, as well as Athenians and allies, from reprisals (lines 75–8).

Carawan argues that the pledge *mê mnêsikakein* seals a settlement to which both sides must swear. Specific terms of reconciliation are laid down, and then the promise ‘not to dredge up the past’ guarantees that the terms of settlement will not be reneged on.¹¹ Is this an accurate reading?

The promise *mê mnêsikakein* is not reciprocal, as Carawan claims.¹² In this case, it is the winning side only that makes the pledge. Whatever it means, it cannot function as a pledge of mutual recognition of terms of settlement. It is a one-sided commitment, and is linked specifically to Athenian grievances. Close reading of the Athenian oath does not permit the inference that *mê mnêsikakein* seals terms of settlement. The oath consists of independent commitments, one of which is *mê mnêsikakein*. The concomitant undertakings – to honour law-abiding Ceans, to suppress revolution, to allow any Cean who so wishes to live away from Ceos in an allied city – are self-contained. It is misleading to read into *mê mnêsikakein* commitments in theory separate.

What does *mê mnêsikakein* here mean? First, it cannot mean that Ceans who commit to the terms of settlement are to be free from further reprisal. That promise is made in the subsequent lines of the oath (59–60). The force of *mê mnêsikakein* is not future looking but retrospective. It relates not to those who choose in future to respect this settlement but rather to those who, in the past, decided to support those who had violated the terms set out by Chabrias. Excepting those directly answerable for the rebellion, all are to be let off the hook. It is, in fact, a pledge of forgiveness.¹³

¹⁰ For a general discussion of the decree, along with relevant bibliography, see P.J. Rhodes and R. Osborne, *Greek Historical Inscriptions 404–323 BC* (Oxford, 2003), 200–3.

¹¹ Carawan (n. 1), 6

¹² ‘These agreements show the pledge *mê mnêsikakein* in its proper reciprocal force: even where the settlement is imposed by imperial Athens, the pledge functions as a commitment by both parties to close their dispute.’ But the very absence of reciprocity is what is so striking about *mê mnêsikakein*, as attested in this decree.

¹³ Lines 58–68: ‘I shall not harbour grudges for what is past against any of the Ceans, nor shall I kill or make an exile of any of the Ceans who abide by the oaths and this agreement, but I shall bring them into the alliance like the other allies. But if any one commits an act of revolution in Ceos contrary to the oaths and agreements, I shall not allow him by any craft or contrivance as far as possible. If any one does not wish to live in Ceos, I shall allow him to live wherever he wishes in the allied cities and enjoy his own property. To this I shall be steadfast in my oath, by Zeus, by Athena, by Poseidon, by Demeter; to him who keeps the oath there shall be much good, but to him who breaks the oath ill.’ Translation in Rhodes and Osborne (n. 10), 200–1.

The leaders of the pro-Athenian party are restored, and the Ceans swear to refrain from harming them. Much of the Cean oath is reconstructed, but the phrase *mê mnêsikakein* does not feature in it.¹⁴ Unlike the grievances of the Athenians, Cean grievances are not seen in the context of the oaths to be legitimate. Though the Ceans may well have felt aggrieved, in the language of the decree they have suffered no wrongdoing; there are no 'wrongs' for the Ceans to dredge up. This has crucial implications for our understanding of *mê mnêsikakein*. In theory, it binds the wronged side from taking retributive action. In practice, this normally means the winning side in a violent conflict. In return for laying down arms, it grants the vanquished reprieve.

There is an important distinction to be noted between its use in the decree of Aristophon and in the decree of alliance with Bottiaea. In the decree of 422 both parties pledge *mê mnêsikakein*; its implications there are clearly reciprocal.¹⁵ But the circumstances under which the compact with Bottiaea was drawn up were rather different. In the case of Bottiaea, the oaths were not designed to bring to an end a festering war between Bottiaea and Athens, as the revolt of Bottiaea was over ten years old. The compact in 422 was contracted on a theoretical principle of equality, where it lay in the interest of each party to forgive the other for what had been done a decade earlier. In the case of Ioulis, the peace is manifestly unequal, and the pledge *mê mnêsikakein* is taken unilaterally.

The unequal nature of the pledge discourages the view that it sealed terms of an earlier settlement. Its force is to put a close once and for all to a conflict in which one side had gained the upper hand and, if it so chose, could have pursued violently (and litigiously) to the bitter end.

(c) *SIG*³ 306 = R/O 101. In 324/3, in the wake of the Exiles Decree of Alexander, a decree was issued at Tegea recalling former exiles and restoring them to their ancestral property.¹⁶ The full history is not known. One remark of Quintus Curtius indicates that Tegea had participated in the revolt of Agis some seven years earlier and had received pardon.¹⁷ It is not unlikely that the beneficiaries of the decree of 324/3 were those who had originally led Tegea into conflict with Macedon.¹⁸

The decree guarantees fugitives on their return full rights to paternal (or maternal) possessions (lines 4–8). Each returned exile is promised a house, and it lays down provisions for adjacent plots of land (lines 9–14). Monetary compensation is stipulated for those to whom property is returned (lines 15–20). A court of adjudication is established in neighbouring Mantinea, where property disputes are to be resolved within sixty days (lines 24–9). Special provisions are made for those who

¹⁴ Lines 71–81: 'I shall be an ally of the Athenians and the allies, and I shall not defect from the Athenians and the allies myself nor shall I allow another to defect as far as possible. All private and public lawsuits against the Athenians I shall make subject to appeal in accordance with the agreement, as many as are for more than a hundred drachmas. If anyone dares to wrong those of the Ceans who have returned, or the Athenians or any of the allies, contrary to the oaths and the agreement, I shall not allow him by any craft or contrivance, but shall go in support with all my strength as far as possible. To this I shall be steadfast in my oath, by Zeus, by Athena, by Poseidon, by Demeter: to him who keeps the oath there shall be much good, but to him who breaks the oath ill.' Translation in Rhodes and Osborne (n. 10), 201.

¹⁵ Tod 68, lines 6–16, 17–21.

¹⁶ R. Lonis in P. Goukowsky and P. Brixhe (edd.), *Hellenika Symmikta* (Nancy, 1991), 91–109; I. Worthington, 'The date of the Tegea decree: a response to the diagramma of Alexander III or of Polyperchon?', *AHB* 7 (1993), 59–64; A. Maffi in H.-J. Gehrke (ed.), *Rechtscodifizierung und soziale Normen im interkulturellen Vergleich*, (Tübingen, 1994), 113–33.

¹⁷ Curt. 6.1.20.

¹⁸ Thus, Rhodes and Osborne (n. 10), 530. For general discussion and bibliography, cf. *ibid.* 530–2.

return after the sixty-day period and who wish to reclaim from a recalcitrant holder (lines 29–36). Complex specifications follow for the paying of sacred moneys (lines 37–48) and for the property rights of wives and daughters of former exiles (lines 49–56). The decree ends with an oath of goodwill to restored fugitives and a pledge not to dredge up the past (*mê mnêsikakein*) against them for what was done (lines 57–61).

Carawan claims that the oath *mê mnêsikakein* does not protect restored exiles from further prosecution; it merely seals the agreements reached in the earlier portions of the decree.¹⁹ But there is little in the text that supports his reading. While it is fair to point out that the oath here follows the stipulations of the terms of restoration, the terms of the oath itself connect it not with the provisions of repatriation but with what was done earlier, presumably in 331/0.²⁰ The pledge ‘not to dredge up the past’ is tantamount to a guarantee that anything the restored exiles might have done in former time to injure the welfare of the city was not to become grounds for retaliation after the exiles returned. The legal practicalities of repatriation have been dealt with in the previous portions of the decree. The oath is a simple promise on the part of potentially embittered Tegeans not to plunge the city into civil war.

The historical parallels do not support Carawan’s case. In each instance *mê mnêsikakein* entailed a commitment to forget the past and move on. The oath is implicitly connected with the need to reconcile two sides previously at loggerheads. In the first example, it is reciprocal and cements new friendship and alliance between Athens and the cities of Bottiaea. In the second, it acts as reassurance to the losing side in a war that no harm will come if hostilities cease. In the third, it restrains a naturally hostile citizenry from yielding to vengeful instincts. None of the examples suggests that it amounted to a pledge not to go back on specific covenants; that is a prejudicial interpretation based on questionable statements of Andocides.²¹ Rather, they indicate that the oath prohibited relentless pursuit of old vendettas, be it by legal or by violent means.²²

(ii) When the political fugitives returned to Athens in 403, it lay in the collective interest of both sides to end the internecine conflict. As at Ioulis and Tegea, at Athens *mê mnêsikakein* called a halt to war; it was an assurance by the winning to the losing side that all would be forgiven.²³

¹⁹ Carawan (n. 1), 7.

²⁰ The connection with past wrongs is made absolutely plain in lines 59–60 (‘I shall not harbour grudges against any of them for what he may have [plotted]’; translation by Rhodes and Osborne [n. 9], 531).

²¹ The claim that *mê mnêsikakein* entailed a promise not to pursue erstwhile *atimoi* is founded on a single statement of Andocides (1.109), which, if chronological, might make it look as though the Athenians swore the oath immediately after the disfranchised were restored to their rights. However, Andocides does not draw an explicit connection between the two undertakings, even though for rhetorical reasons he harps on the spirit of the oath as an attempt to build up new solidarity in the city. In reality, the contents of the oath had little bearing on his case.

²² I leave this an open question. The evidence, as it stands, suggests simply that *mê mnêsikakein* provided against redress for former offences; it does not clarify whether the type of redress prohibited is legal or extra-legal.

²³ This is the very inverse of Carawan’s formulation, which envisages a commitment of ‘no reprise’ in cases where former decisions of *atimia* were annulled in keeping with the terms of the amnesty. That legal redress for past grievances was, in special cases, allowed is clear from the provisions made for trial of the governors at Piraeus; cf. [Arist.] *Ath. Pol.* 39.6. But these were exceptional cases; the terms of the amnesty of 403 forbade legal as well as violent pursuit of most political crimes.

There are notable differences between the respective situations of Athens, Ioulis and Tegea. In the last, *mê mnêsikakein* was sworn by a resident population to protect the interests of a returning minority. In the second, it was sworn by a victorious foreign power to protect a resident population. And in the first, it was sworn by returning fugitives to protect a resident population, which, after the expulsion of the Thirty and the Ten, was now a sitting duck, from retaliatory measures. These dissimilarities should warn against overuse of comparanda. Importantly, only one of the oaths upholds the rights of restored exiles, that sworn at Tegea. In Athens, by contrast, it was the returning fugitives from the Thirty who promised to desist from hostilities against those they defeated. In the Athenian example the oath has nothing to do with restoration of *atimoi*. Its aim is to restrain a victorious party that had reasserted its power and political position by force of arms.

The uniqueness of the Athenian case is vital in assessing the nature of the amnesty and the reasons why subsequent litigation arose. These questions are treated together, as they represent two sides of the same coin. Carawan claims that the Athenian amnesty was about restoring the rights of former *atimoi*. So as not to misrepresent his argument, it is only fair to quote directly:

‘Andocides regards the pledge *mê mnêsikakein* as a standard guarantee that reinforces other, more specific covenants of reconciliation. It is naturally linked with the cancellation of *atimia*. He tells us that a similar amnesty was devised on the eve of Marathon, and that the purpose was to restore to their rights those who had been exiled or disfranchised after the Peisistratids were driven out. ... And in both the ancient example and the recent parallel, the rule *mê mnêsikakein* serves as a safeguard for the former *atimoi* who are restored to their rights.’²⁴

Now there is an important conceptual distinction to be made at the outset. *Atimia* implies the passage of a legal injunction cancelling citizen rights; those who had committed crimes were deprived of their rights and made *atimoi*.²⁵ At Ioulis and Tegea, the repatriation of exiles was tantamount to the reversal of earlier decrees of *atimia*. Former *atimoi* were invited back to the city, and the legal injunctions enforcing *atimia* were annulled. The situation in Athens is somewhat different. Though, as is evident from the speech of Andocides, some of those who returned to Athens were former *atimoi*, the majority were fugitives of a different kind. Even if *mê mnêsikakein* respected special covenants, the formulation that it served ‘as a safeguard for the former *atimoi* ... restored to their rights’ blurs the issue.²⁶

If we look at Andocides’ account closely, it is far from clear that the oath, sworn as it was by the returning fugitives, had anything to say about the *atimoi*. Andocides states that the chief motive was *to save the city* (81). The context in which he frames the oath of reconciliation is decidedly political. His words suggest that it designed to bring to an end what would otherwise have been an incessant civil conflict. It is linked in an obvious way to the strife that had arisen under the Thirty. The natural

²⁴ Carawan (n. 1), 3.

²⁵ The earliest known attestation from Athens occurs in the Solonian ‘amnesty law’ quoted by Plutarch (*Sol.* 19.4). The precedent was repeated in the time of the Persian Wars (Andoc. 1.106–8). For a general discussion of the nature of *atimia*, see M.H. Hansen, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes. A Study in the Athenian Administration of Justice in the Fourth Century B.C.* (Odense, 1976), 55–90; cf. also M.D. Hall, ‘Sanctions in Athenian practice and thinking’, in Foxhall and Lewis (n. 1), 73–89, esp. 79–80.

²⁶ The provisions for cancellation of *atimia* were made by Patrocleides in 405 (Andoc. 1.77–9); it is this decree, and not the decree of *mê mnêsikakein* in 403, which presents the best parallel to the case of Tegea.

implication of the passage is that the oath was taken by the returnees to reassure the partisans of the old oligarchy that, if they put down their weapons, they would not be massacred in cold blood. The oath was not about the rights of former fugitives; it was about the rights of those who had remained.

This statement needs some qualification. It is true that the amnesty entailed some benefits for returning fugitives. The stipulation that each return to his own had practical benefits for those who had lost their property under the Thirty, as presumably might the cancellation of public debts and financial liabilities.²⁷ But the scattered testimony indicates that the reconciliation primarily provided for those who, in all other respects, would have stood to lose from it. Isocrates attests that informers and denouncers in the time of the Thirty were granted full immunity.²⁸ The patchy account in the Aristotelian *Ath. Pol.* mentions that moneys borrowed by the Thirty from Sparta were to be paid off collectively.²⁹ Summary arrest to the Council was prohibited.³⁰ The only category of killer that could be prosecuted was the kind that had committed murder by his own hand (*autocheir*); accessories to murder were expressly declared immune.³¹ Strikingly, the oath of reconciliation granted protection to any of the governors at Piraeus who remained to stand trial.³² None of these provisions pertains to *atimoi*. Though they affected the legal standing of those who had inflicted injustices in the time of the oligarchy, they had nothing to say of those who had lost their ordinary rights by earlier legal decision. The beneficiaries are political criminals; litigation is blocked in the first instance.³³

The sources indicate that the focus of the amnesty was to pardon crimes committed in the time of the Thirty in the interest of re-establishing civil concord. The ban is on legal retribution. Unless a halt is called to the relentless pursuit of all but the most egregious crimes, lingering grudges will escalate into renewed civil conflagration. It is true that *mê mnêsikakein* prohibited violent redress. Plato in his *Seventh Letter* defines *mnêsikakein* as the act of bloodthirsty retaliation, a view borne out in other literary testimony.³⁴ But care must be taken not to overplay its significance. The recognition that the oath banned violent retribution does not *a fortiori* mean that it did not set barriers also to retribution by legal processes. The historical evolution from settlement of disputes through self-help to settlement by litigation should not in this connection be overlooked. No doubt, the victorious democrats expressly forbade forceful reprisals against supporters of the Thirty who came to terms in autumn 403. But the full effect of the reconciliation could only be felt if further measures were taken to prevent a spate of litigation from germinating.

(iii) Combined with external testimony, Andocides' account creates the strong impression that the terms of the amnesty amounted to an almost universal pro-

²⁷ Isoc. 16.46; Lys. *Against Hippotherses* 30–5; [Arist.] *Ath. Pol.* 40.3.

²⁸ Isoc. 18.20

²⁹ [Arist.] *Ath. Pol.* 40.3–4; in other words, it was not just down to the Thirty's supporters to pay off the debt.

³⁰ Andoc. 1.91; Isoc. 18.22.

³¹ [Arist.] *Ath. Pol.* 39.5; see also E. Carawan, *Rhetoric and the Law of Draco* (Oxford, 1998), 125–33.

³² [Arist.] *Ath. Pol.* 39.6.

³³ Carawan (n. 1), 8–9 understands these provisions to be among the 'specific covenants' entailed in the amnesty of 403; the oath *mê mnêsikakein* was a commitment to abide by them. If true, the oath would, with one or two notorious exceptions, in practice be prohibiting prosecution of partisan crimes.

³⁴ Plat. *Ep.* 336e–337a; Thuc. 4.74.2–3; 8.73.6; Diod. 15.40.1–2.

clamation of political forgiveness. Nevertheless, after the oaths were sworn, a new crisis arose.³⁵ Andocides is clear as to the cause. Because laws of Dracon and Solon had been flouted in former time, some citizens were still liable under their provisions (82). If the amnesty had forgiven all past crimes, these liabilities require explanation.

Among the returning fugitives were men who had left Athens *before* the time of the Thirty, when Athens was a democracy. These were not political exiles, in any proper sense, but citizens who had fallen foul of the law and lost their rights by democratic edict. Andocides in a later section draws an implicit connection between the oath and the cancellation of *atimia* (109), and it is perhaps tempting to think that the amnesty dealt with the claims of former *atimoi*. But careful reading of the order in which Andocides recalls events in the earlier sections (81–2) suggests that the oath *mê mnêsikakein* did not take their situation into account. The repatriation of exiles resulted in a quandary that had nothing to do with the amnesty itself. This new crisis concerned liabilities for offences against the laws of Dracon and Solon.³⁶ Even if *mê mnêsikakein* had brought about the restoration of outstanding *atimoi* not forgiven two years earlier under the terms of Patrocleides' decree (1.77–9), it is difficult at first glance to see what relevance the scrutiny of laws in 403 might have had to the problem of *atimia*.³⁷

Some have puzzled over the meaning and relevance of the scrutiny. Notably the decree of Teisamenus, on which our understanding of the scrutiny is founded, has nothing to say on the subject of the *atimoi*.³⁸ From a different point of view, Carawan has argued that the scrutiny was designed to build into laws affecting *atimia* limitation clauses that granted the beneficiaries of the amnesty of 403 exception from their sanctions.³⁹ The orator himself has an axe to grind. He needs to argue that the decisions of 403 took special consideration of his situation. It is natural that his account should make the scrutiny of 403 look as if it were geared towards the *atimoi*. Yet the decree of Patrocleides gives the distinct impression that the problem of *atimia* had been dealt with already in 405 and that, insofar as Teisamenus and the lawgivers of 403 contrived to protect former *atimoi*, their goal was to ensure that reprisals against them find no foundation in law.⁴⁰ The laws scrutinised under the terms of Teisamenus' decree were not ones affecting *atimia* but the entire corpus of Athenian

³⁵ Implied by Andocides (82), when he refers to the liabilities that surfaced in 403.

³⁶ The question of *atimia* had been dealt with by the decree of Patrocleides, as is clear when Andocides states (1.80) that under its terms *atimoi* were restored to their rights in 405. It has been argued by some (e.g. MacDowell [n. 1], ad loc.) that Patrocleides only dealt with specific classes of *atimoi*, notably those who had been disfranchised for debt, and did not cover all categories of *atimia*. But this takes a 'fundamentalist' reading of the text. Notably, the decree includes the clause *mê mnêsikakêsai* (79), which, as argued here, is to be understood as a blanket measure of forgiveness for past offences. If so, though Patrocleides listed specific instances, the reversal of *atimia* need not have been confined to the instances he mentions.

³⁷ I am, of course, applying my own understanding of *mê mnêsikakein* as a blanket measure of forgiveness. If Carawan is correct that it was only about specific liabilities, then the ongoing legal difficulties facing the *atimoi* might in one sense be comprehensible. But that is a very strained interpretation by itself and rests on the questionable claim that the *atimoi* were the chief point of consideration when the oath of *mê mnêsikakein* was sworn.

³⁸ MacDowell (n. 2), 201; cf. also id., *Athenian Homicide Law* (Manchester, 1963), 138; *The Law in Classical Athens* (London, 1978), 121–2. For a detailed discussion of the decree, see N. Robertson (n. 1), 1990.

³⁹ Carawan (n. 1), 12–19. In the final part of his paper (pp. 19–22), he maintains that the decree of Teisamenus is an editorial insertion.

⁴⁰ See above, n. 36.

laws. The aim was to produce a coherent statement of valid law and to filter out decrees, like that of Isotimides, by excluding them from the final assemblage of laws.

The claim that the laws scrutinised in 403 under the terms of Teisamenus' decree were confined to ones governing *atimia* is open to two essential objections. First, Andocides states that the decision of the assembly was to scrutinise *all* the laws (82). The suggestion has been made that in the context of the passage Andocides must mean all laws pertaining exclusively to *atimia*, but this is special pleading.⁴¹ The more natural reading is that the laws scrutinised were the laws of Dracon and Solon that had been violated, and in consequence of which old cans of worms were being reopened.⁴² Secondly, Andocides does not imply that the problem of restored exiles was resolved in the scrutiny of older laws. Far more important to his particular case are the five supplementary laws that followed the scrutiny (87). It is these laws, not revisions to older laws, on which he bases most of his legalistic arguments.⁴³

The scrutiny of older laws was relevant to the *atimoi* insofar as it created a distinction between a law (*nomos*) and a decree (*psêphisma*).⁴⁴ Any statute not written in the compilation was to be excluded from the concept of 'law' and was to have no further effect. The traditional view has been that the decree of Teisamenus resulted in a complete re-codification of the laws of Athens. This has come into question in recent times, but revisionist objections have centred on the more technical matter that if such a statement had been compiled its final publication almost certainly would not have been in the Stoa, despite the implications in Andocides that this was where they were published.⁴⁵ Even if they did not appear in the Stoa, however, this does not mean that they were not displayed somewhere, and the growing evidence for systematic archival preservation of legal documents in the fourth century would itself suggest that Athenians kept methodical records of their laws and statutes.⁴⁶ Even if the term 'code' seems inappropriate, it is not unlikely that, as Andocides implies, Athenians at the end of the fifth century made a definitive list of laws that separated valid statutes from invalid ones. If so, there is little reason to doubt that Teisamenus' decree resulted in a complete and exhaustive statement of the valid laws of Athens or that Andocides had a good legal case that, because the decree of Isotimides was not included, it was therefore not a 'law' and could not be adduced against him.

The five supplementary laws carried by the newly created board of lawgivers are more important still, as they constitute Andocides' main body of proof. Though the citations are cursory, they inform us more clearly of the attitude of the restored democracy to the repatriation of former *atimoi*, and show decisively that the effect of Teisamenus' decree was to invalidate statutes like the decree of Isotimides. They are:

- (1) No unwritten law may be used.

⁴¹ Thus Carawan (n. 1), 12–19.

⁴² Andocides (82) makes the connection absolutely clear. The assembly called in 403 was about the laws of Dracon and Solon under which some citizens were still liable; the scrutiny was aimed at all of those laws. Some (e.g. Clinton [n. 1]) have taken the expression to mean the historical laws of the seventh and sixth century recorded on the axones, but this is unnecessary. More naturally in context, Andocides uses the expression in its more common rhetorical sense to mean simply 'the laws of Athens'.

⁴³ As MacDowell (n. 2), 121 and 127–9 implicitly recognized.

⁴⁴ For the distinction between a law and a decree, see M. Hansen, *The Athenian Ecclesia* (Copenhagen, 1983), 179–206.

⁴⁵ The most important contribution is Robertson (n. 1).

⁴⁶ See, *inter alios*, J.P. Sickinger, *Public Records and Archives in Classical Athens* (Chapel Hill and London, 1999).

- (2) No decree is to have higher authority than a law.
- (3) No law may be passed against an individual.
- (4) Legal decisions and arbitrations taken in time of democracy are to remain valid.
- (5) The laws are to apply from the year of Euclides' archonship (403/2).

Together, the laws cap the decree of Teisamenus by making it impossible to apply any statute that did not appear in the new compilation of 'laws'.

The first of the two supplementary laws are different sides to the same coin.⁴⁷ The decree of Isotimides cannot have force, because it is a decree and does not appear in the collection. The inference used often to be made that Isotimides' decree had no validity because it was not written in the Stoa, though that interpretation, as has been shown by revisionist scholars, entails logistical difficulties.⁴⁸ Still, regardless of whether laws were written in the Stoa or in another place, the obvious inference to be drawn from the first two laws is that the decree of Teisamenus had resulted in a legal compilation of some kind, and that because Isotimides' decree did not feature in it the decree could no longer be used against those convicted of religious crimes in 415.

The third law, which has been formulated in different ways, emphasizes the same fundamental point that, because Isotimides' decree targeted individuals, it could not be thought of as a law.⁴⁹ The fourth, of which we have a far more complete and more reliable representation in a later speech of Demosthenes, was geared to protect former victims of the oligarchy.⁵⁰ As is plain from Demosthenes, its main concern was to annul decisions taken under the Thirty, when many citizens lost their homes and possessions. Though at face value it might be taken to imply that legal decisions before the collapse of democracy in 404 were to remain, the meaning is surely that no decision taken when Athens was not a democracy was to stay in force. The fifth law stated that the laws were to be in force from 403/2. As MacDowell pointed out, this means that retroactive litigation for offences committed in the time of Thirty was banned.⁵¹ In that sense it reciprocates the fourth law, which annulled legal decisions taken by the Thirty against victims of the political terror. However, it also means that only laws that appeared in the compilation were to be applied as laws.

The conclusion to be drawn from the evidence, tenuous though it is, is that the amnesty of 403 put an end to the civic discord that had torn Athens asunder and aimed to reconcile two sides in a sharply partisan struggle. Though a superficial reading of Andocides might lead one to infer that the amnesty was geared toward repatriating those previously convicted for offences committed in the time of democracy, close reading of the available testimony gives rise to a very different impression. The true motive was to put an end to civil war. After the victory of Thrasybulus, some men like Andocides claimed that a total annulment of all past offences had been granted; this had come about not through the effect of the amnesty of 403 but, in their case, through the decree of Patrocleides some two years previously. It was then

⁴⁷ The conventional understanding of the first of these measures has been that 'no unwritten law' must mean 'no law unwritten in the Stoa', but this depends on the problematic view that Teisamenus enjoined a re-codification of the laws in the Stoa. More simply, it means that written laws, not customary 'rules', are to be the legal basis of all civil cases. For scattered ancient references to the existence of unwritten social customs observed at Athens, see Thuc. 2.37.3; Soph. *Ant.* 450–7; Xen. *Apom.* 4.4.19; Plat. *Laws* 792c–793d.

⁴⁸ See Robertson's paper (n. 1), as well as Clinton (n. 1).

⁴⁹ For different formulations, see Dem. 23.86; 24.59; 46.12.

⁵⁰ Dem. 24.56.

⁵¹ MacDowell (n. 2), 128.

that objections began to surface. In 403 the Athenians resolved the matter by declaring the laws of Solon valid, as previously, and that offences against the laws of Solon were still punishable. However, a distinction emerged between a law and a decree, which was to remain in force throughout the fourth century. From now on, the 'laws of Solon' meant not, in its former vague sense, every law and statute that had ever been carried but, in a more limited and precise sense, those laws assembled in 403 and supplemented over time by the boards of *nomothetai*. The scrutiny of the laws capped a guarantee to former *atimoi* provided not by the sweeping amnesty of that year but by the more limited amnesty two years earlier. The amnesty and scrutiny of 403 were to that extent mutually unrelated.

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