

THE THESMOTHETAI AND THE EARLIEST ATHENIAN TYRANNY LAW

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Aristotle tells us (*Ath. Pol.* 3.4) that originally "the Thesmothetai were selected in order that they might write down *thesmia* and keep them for the deciding of disputes."¹ There is general agreement among scholars that Aristotle understands this office to have been created before Draco gave Athens her first written laws (see *Ath. Pol.* 41.2), that by *thesmia* he means the results of particular court cases, whether the actual decisions or the rules reflected in decisions, and that these were preserved (in Aristotle's view) in order to have some established standards for deciding future cases.² Some scholars, however, question whether Aristotle's understanding of this office is correct.³ I believe it is and shall advance two arguments in its favor, the first a brief general consideration and the second a more detailed argument based on the evidence of the early Athenian law against tyranny.

The first consideration is that the literary evidence indicates that even before the introduction of writing into Greece in the second half of the eighth century, and certainly before the introduction of written laws, the Greeks had established traditional procedures for settling disputes.⁴ It is unlikely *prima facie* that the Athenians stood apart from this development, and the report of the Cylonian conspiracy, in which the conspirators were apparently lured away from their sanctuary by the promise of a trial,⁵ confirms the existence of some sort of legal procedure in Athens at least a decade before Draco enacted his laws c. 621. Given the existence

¹ θεσμοθέται . . . ἤρέθησαν . . . ὅπως ἀναγράφαντες τὰ θέσμια φυλάττωσι πρὸς τὴν τῶν ἀμφισβητούντων κρίσιν. For the text of *Ath. Pol.* I use Kenyon's OCT.

² C. Hignett, *A History of the Athenian Constitution* (Oxford 1952) 76-77; M. Ostwald, *Nomos and the Beginnings of the Athenian Democracy* (Oxford 1969) 174-75 (henceforth = Ostwald, *Nomos*; cf. below, note 8).

³ E.g., R. S. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle*, vol. 1 (Chicago 1930) 85-86; Hignett (above, note 2).

⁴ I shall discuss this literary evidence in my work (in progress) on the development of law in early Greece.

⁵ Plut. *Sol.* 12.1. On the date of the Cylonian conspiracy see below, note 18.

of early trials, it seems likely that once writing became known the officials who settled disputes would keep written notes or records of at least some of their important decisions for use in future cases. These *thesmia* would be a strong indication of what was “law” in the realists’ sense of the probable outcome of future legal cases, though they might not have the full authority of publicly inscribed statutes.

Confirmation of this view as well as some indication of the nature of these *thesmia* is given, I believe, by the Athenian tyranny law cited in *Ath. Pol.* 16.10: “they had the following *nomos*: ‘the following are ancestral *thesmia* of the Athenians: if any people establish a tyranny or if anyone assists in establishing a tyranny, he shall be outlawed (*atimon*), both he and his family.’”⁶ The fact that Aristotle cites the *thesmion*⁷ against tyranny as an Athenian *nomos* implies that two stages of transcription are involved, first the recording of the *thesmion* and then at a later date the recording of a law stating that “these are the ancestral *thesmia*.” In a full treatment of the Athenian laws against tyranny Martin Ostwald has argued that the original law was probably enacted by Draco, was replaced by a different law by Solon, and later (in about 510) was reenacted as the law in *Ath. Pol.* 16.10 by the anti-Peisistratid forces in Athens.⁸ Though perhaps not impossible, this view raises certain difficulties and I should like to argue for a different reconstruction: namely, that the original *thesmion* was recorded before Draco by the Thesmothetai and that Solon later incorporated it as part of his revised tyranny law.

One difficulty with Ostwald’s view is that if the law was originally Draco’s, one would expect him to be cited by name in any restatement of it, as he is named in the republication of his homicide law in 409/8.⁹ If the law was part of Draco’s homicide law, moreover, as Ostwald suggests (108), not only would it have been remembered as his but it should not have needed to be reenacted, since Draco’s homicide laws remained in

⁶ νόμος γὰρ αὐτοῖς ἦν ὅδε· θέσμια τάδε Ἀθηναίων ἐστὶ καὶ πάτρια· ἐάν τις τυραννεῖν ἐπανιστῶνται [ἐπὶ τυραννίδι] ἢ συγκαθιστῇ τὴν τυραννίδα, ἀτίμον εἶναι καὶ αὐτὸν καὶ γένος. Some scholars would delete τυραννεῖν rather than ἐπὶ τυραννίδι (see P. J. Rhodes, *JHS* 99 [1979] 104, note 9). Perhaps we should rather retain both expressions; neither is likely to have been inserted as a gloss, since neither expression alone needs explanation, and we know too little about early usage of these terms to rule out the possibility of this apparent redundancy (see Ostwald [below, note 8] 121, note 97). Also a τις is sometimes supplied as the subject of συγκαθιστῇ. Neither of these textual disputes affects the sense of the law: I take θέσμια as a noun because of the presence of the genitive Ἀθηναίων, and I translate θέσμια καὶ πάτρια as a hendiadys.

⁷ The plural *thesmia* may have been used to designate the single preserved provision against tyranny, or else one or more other provisions may have followed this one in the original.

⁸ *TAPA* 86 (1955) 103–28 (esp. 106–09). Hereafter references to “Ostwald” are to this article unless otherwise indicated (see above, note 2).

⁹ *IG* I².115 (= *IG* I³.104), line 5.

force until at least the fourth century.¹⁰ It thus seems unlikely that the tyranny law could have been included among Draco's homicide laws. The wording of the law, moreover, supports this conclusion; as part of the homicide law proclaiming it lawful in certain cases to kill a wrongdoer, the tyranny law ought to have made specific reference to this lawful homicide; in other words, it should declare that the wrongdoer *νηπιουέι τεθνάναι vel sim.*, as in Dem. 23.60 (= Draco's law, line 38), rather than *ἄτιμον εἶναι*, even though both expressions may have had the same practical effect.¹¹

If, on the other hand, the original tyranny law was Draco's but was not part of the homicide law, it would have been superseded by Solon's laws.¹² Though I agree with Stroud¹³ and others that Draco did indeed enact laws other than his homicide laws, I do not see how any of these could have survived long after Solon's new code. True, the *axones* with valid laws probably survived for many centuries,¹⁴ but there would be no reason to preserve and good reason to destroy those *axones* whose laws not only were invalid but were quite different from currently valid laws on the same subjects. In fact all the later references to Draco's laws on matters other than homicide can be traced to the single tradition of the severity of his laws, which reportedly prescribed death as the penalty for every offense. No ancient writer shows any knowledge of the precise wording of these laws.¹⁵ Thus it seems unlikely that the precise text of a Draconian law could have been known some eighty years after being repealed, and if it did somehow survive, the knowledge of Draco's authorship should have survived as well.

One must also object to Ostwald's argument that since, according to Aristotle (*Ath. Pol.* 41.2), Draco was the first to write laws for the Athenians, the tyranny law "cannot antedate Draco in the form in which we have it" (106). This conclusion overlooks Aristotle's report about the Thesmothetai and their pre-Draconian *thesmia*. The difficulties concerning

¹⁰ See *Ath. Pol.* 7.1 and my *Drakon and Early Athenian Homicide Law* (New Haven 1981) 21–29.

¹¹ Cf. R. S. Stroud, *Drakon's Law on Homicide* (Berkeley 1968) 80. In *GRBS* 19 (1978) 119–20 I included the tyranny law from *Ath. Pol.* 16.10 as an example of a provision for lawful homicide, but all the other examples cited there make a direct reference to homicide; the tyranny law should thus be excluded from this category.

¹² See *Ath. Pol.* 7.1 and other references in Stroud (above, note 11) 76, note 44.

¹³ Above, note 11, 75–82.

¹⁴ See E. Ruschenbusch, *ΣΟΛΩΝΟΣ ΝΟΜΟΙ* (*Historia Einzelschriften* 9, Wiesbaden 1966) 23–38.

¹⁵ See Stroud (above, note 11) 77–82. The fine of twenty oxen mentioned by Pollux (9.61) may be from the homicide law, even if it is not specifically related to wergild, and the oaths mentioned by Lucian (*Cal.* 8; very unreliable as evidence for Draco) and in a scholion to *Il.* 15.36 (Schol. Venet. B) may also be part of the homicide law. The other evidence cited by Stroud is, as he admits (81, notes 65–66), of dubious value.

Draco's authorship of the tyranny law disappear if we connect *thesmia* in *Ath. Pol.* 16.10 with the early *thesmia* mentioned in 3.4.¹⁶ The term itself provides some ground for accepting this connection; when referring to Draco's laws Aristotle uses either Draco's own term, *thesmos* (*Ath. Pol.* 4.1, 7.1; cf. 35.2), or the later term *nomos* (41.2). *Thesmion*, though apparently interchangeable with *thesmos* in some senses, is very rarely used in the sense of a specific written statute;¹⁷ in *Ath. Pol.* it occurs only in the two passages I am arguing should be linked, namely 3.4 and 16.10. Thus Aristotle appears to be making a distinction between the *thesmoi* of Draco and the pre-Draconian *thesmia*. By itself this semantic argument is not conclusive, but it points the way to a more plausible reconstruction of the history of the tyranny law.

If the Thesmothetai recorded a *thesmion* concerning tyranny before Draco, they must have done so after some actual trial for attempted tyranny, most probably in connection with the Cylonian conspiracy, usually dated a decade or so before Draco.¹⁸ Though the Cylonians were apparently either killed or driven out of Athens without benefit of the trial they had been promised, there may well have been a trial after the fact at which they, together with their descendants, were pronounced *atimoi*. Solon's amnesty decree (Plut. *Sol.* 19.4) restored all those previously declared *atimoi* with three exceptions, including those judged guilty of tyranny, probably by the Areopagus.¹⁹ Thus at least someone before Solon must have been tried (even if *in absentia*), found guilty, and declared *atimos* for attempted tyranny, and it is plausible that the Thesmothetai recorded the result of this trial as the *thesmion* preserved in *Ath. Pol.* 16.10.²⁰

¹⁶ The connection between *thesmia* in the work of the Thesmothetai and in the tyranny law was noted in passing by G. Busolt (*Griechische Staatskunde*, vol. 1 [Munich 1920] 234, note 1).

¹⁷ See Ostwald, *Nomos* 12–19 (esp. 15–16). In the early-fifth-century charter for the colony of Naupactus (Meiggs-Lewis 20, line 46) *θέθμιον* refers to the charter itself as a fundamental constitution document rather than a simple statute (see Ostwald, *Nomos* 170–73).

¹⁸ E. Levy (*Historia* 27 [1978] 513–21) has recently revived the effort to date the conspiracy to the mid-590s. I do not find his arguments against the generally accepted date (632 or 636) convincing, but if he is right, then I would have to postulate some other pre-Draconian tyranny attempt, of which no recollection has survived.

¹⁹ ἀτίμων ὅσοι ἄτιμοι ἦσαν πρὶν ἢ Σόλωνα ἄρξαι, ἐπιτίμους εἶναι πλὴν ὅσοι ἐξ Ἀρείου πάγου ἢ ὅσοι ἐκ τῶν ἐφέτων ἢ ἐκ πρυτανείου καταδικασθέντες ὑπὸ τῶν βασιλέων ἐπὶ φόνῳ ἢ σφαγαίῳ ἢ ἐπὶ τυραννίδι ἔφευγον ὅτε ὁ θεσμός ἐφάνη ὄδε. For trial by the Areopagus see Th. Lenschau, *RE* 7A.2 (1939) 1805–06, with references to earlier literature.

²⁰ I cannot account for the odd change from the plural in the first half of the protasis to the singular in the second half and in the apodosis. I know of no support for Ostwald's claim (106) that the change is archaic (though the claim may be true), and J. K. Davies' suggestion (*CR* n.s. 23 [1973] 225) that the first verb was a later addition leaves one wondering why the original law would have punished those who assisted the conspirators but (apparently) not the conspirators themselves.

If this is the correct origin of the *thesmion* against tyranny, when was it reenacted as the publicly inscribed law recorded by Aristotle? One possibility is that it formed part of Draco's law code. Even though it was formulated only a decade or so earlier, Draco might possibly have designated the *thesmion* "ancestral" either because he really thought it was an older rule or simply as a means of emphasizing the importance of the law. The difficulties raised above, however, with regard to the survival of Draco's laws other than the homicide law make it more likely that the tyranny law was not part of this code. He must have been aware of the *thesmion* but, perhaps seeing no need to alter it, he did not inscribe it as a law on his *axones*.

The next candidate would of course be Solon. Aristotle tells us (*Ath. Pol.* 8.4) that the Areopagus "judged those who conspired to overthrow the *demos*, Solon having established a law providing for *eisangelia* in such cases."²¹ On the basis of this report Ostwald argues that the tyranny law in *Ath. Pol.* 16.10 could not be Solon's since "the procedure prescribed by Solon was an impeachment involving a trial and not a declaration by which the offender was proclaimed an outlaw" (106). Even if the information in *Ath. Pol.* 8.4 is in essence correct and Solon did institute a new procedure (whether named *eisangelia* or not), Ostwald's argument is invalid.

First, though the tyranny law in *Ath. Pol.* 16.10 does not mention a trial, it certainly does not preclude one. It is perfectly possible that the statement of the penalty for attempted tyranny was followed by some procedural regulation providing for a trial.²² Thus there is no incompatibility on this score between the substantive law in *Ath. Pol.* 16.10 and the procedural law reported in 8.4. Second, Solon's amnesty decree indicates, as we have seen, that those who had been declared *atimoi* for attempted tyranny before his time had been convicted by a court and not simply made the object of a proclamation. Indeed, it is hard to see how one could become officially *atimos* without there being at least the possibility of a trial at some point. It may be that the *thesmion* as recorded by the Thesmothetai did not mention a trial, but it is unlikely to have ruled one

²¹ τοὺς ἐπὶ καταλύσει τοῦ δήμου συνισταμένους ἔκρινεν, Σόλωνος θέντος νόμον εἰσαγγελίας περὶ αὐτῶν. Ostwald (104–05) argues that Solon did enact such a law, though not in precisely the language used by Aristotle, since the words ἐπὶ καταλύσει τοῦ δήμου (probably equivalent to ἐπὶ τυραννίδι) must be later than Solon. M. H. Hansen doubts that Solon used the actual term εἰσαγγελία (See *Eisangelia: The Sovereignty of the People's Court in Athens in the Fourth Century B.C. and the Impeachment of Generals and Politicians* [Odense 1975] 17–19 and *JHS* 100 [1980] 90–91; cf. Rhodes [above, note 6] 103–06); see also N. C. Conomis, *Hellenika* 16 (1958–59) 7.

²² In *Ath. Pol.* 16.10 Aristotle speaks of οἱ περὶ τῶν τυράννων νόμοι and then proceeds to cite a single provision. This may indicate that he is citing only one of a number of provisions concerning tyranny that were all part of the same law. Ruschenbusch (above, note 14) 81–82 considers both *Ath. Pol.* 16.10 and 8.4 part of the same law (F37a–b) and also cites the testimony of Plut. *Publ.* 25.4 (F37c).

out, especially if it was recorded for the purpose of deciding future disputes (*Ath. Pol.* 3.4). Aristotle tells us that Solon instituted the procedure of *eisangelia* for cases of attempted tyranny, but he neither says nor implies that before Solon there was no established procedure for judging such cases. Solon could easily have enacted a new procedure in conjunction with the existing substantive rule, either to replace or to supplement the traditional procedure.

If the report of a new procedure in *Ath. Pol.* 8.4 provides no obstacle to the hypothesis that the reenactment of the tyranny law cited in 16.10 was Solon's work, neither does the use of the much debated term *atimos*. A full treatment of this issue is neither possible nor necessary here, but a few observations can be made. First, it is generally accepted that at some time *atimia* changed from its early (pre-Solonian) sense of "outlawry" to a milder "loss of rights," and that Aristotle (probably mistakenly) relies on this later sense in describing the tyranny law as "mild" (*πραῖτοι*, *Ath. Pol.* 16.10).²³ However, even if the change of meanings occurred at one specific time, we do not have the evidence to date it precisely.²⁴ And even if the meaning of *atimos* had changed completely by Solon's time (which seems unlikely), it is nonetheless possible that he reenacted the traditional tyranny law *verbatim*, even though the penalty would now be far milder. I think it unlikely, however, that one who refused to extend his amnesty to those earlier outlawed for attempted tyranny and who constantly spoke and worked against the establishment of tyranny in Athens, would institute a much milder penalty for the offense. Indeed Solon's known anti-tyrannical views and actions make him a thoroughly suitable candidate for the reenactment of the tyranny law,²⁵ and his new procedural regulation may have been intended to make the law more effective, since *eisangelia* was a relatively easy procedure to employ.²⁶

Ostwald argues (109) that the old law was reenacted by the enemies of the Peisistratids, some eighty years after Solon, and that it replaced the less severe Solonian law.²⁷ If, however, as I have argued, Solon's law was no less

²³ See most recently M. H. Hansen, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense 1976) 75–82.

²⁴ The law against neutrality (*Ath. Pol.* 8.5) is of too uncertain date; see the opposing views of V. Bers (*Historia* 24 [1975] 493–98) and K. von Fritz (*Historia* 26 [1977] 245–47). Hansen (above, note 23) dates the change in meaning of *atimos* to c. 500; D. M. MacDowell to the mid-fifth century (*The Law in Classical Athens* [London 1978] 73–74; see also *CR* N.S. 28 [1978] 175).

²⁵ I see no need (*pace* Ostwald 107) for an actual experience of tyranny to have preceded the reenactment of the law. The threat of tyranny seems to have been constant at this time.

²⁶ Anyone could use the procedure of *eisangelia* and there was no penalty for dropping the case or for failing to obtain one-fifth of the votes.

²⁷ On the post-Solonian history of the tyranny law see also A. E. Raubitschek, *AJA* 55 (1951) 221–29 (esp. 224–25). He argues that the Solonian law was in force until 410, though not actually used after 490.

severe than the traditional *thesmion*, then there would be no reason to reenact the earlier *thesmion*.²⁸ It is possible that the Solonian law was officially reaffirmed after the end of the tyranny, since it had obviously fallen into disuse,²⁹ but the likelihood remains that the reenacted tyranny law in *Ath. Pol.* 16.10 is Solon's.

I suggest then that the most plausible reconstruction of events is, first, a trial of the Cylonians *in absentia* after their attempted takeover and expulsion *c.* 632; second, the recording of the *thesmion* in that case by the Thesmothetai; and third, Solon's official reenactment some forty years later of this ancestral *thesmion* together with a new, more readily available procedure for the prosecution of cases of tyranny. If this reconstruction is correct (and I emphasize that it remains largely speculative), we have some significant information about the transition to written laws in Athens. We see that at least in one instance the Thesmothetai did not record the particular judicial decision (i.e., "Cylon was outlawed for attempted tyranny") but the general rule implicit in that decision ("if anyone attempts tyranny, he shall be outlawed"), and they recorded it in precisely the conditional form in which Draco would later begin his homicide law. Though these *thesmia* were not laws in the full sense, this is an important step toward an officially published set of laws, and the early Thesmothetai should thus be credited with making a significant contribution to the development of law in Athens.³⁰

²⁸ As Ruschenbusch notes (*Gnomon* 43 [1971] 414), Peisistratus would have had no reason to repeal Solon's tyranny law.

²⁹ It is possible, as Ostwald argues (109), that after the expulsion of the Peisistratids the Areopagus was not used to try their cases; but see Raubitschek (above, note 27) 224 and 228, note 24. Even if no trial took place during this "revolutionary situation" (Ostwald 109), the Solonian law providing for *eisangelia* would have remained valid.

³⁰ A version of this paper was read at a panel on Athenian Law at the annual meeting of the APA, December 28, 1980. I would like to thank Martin Ostwald for reading and commenting on an earlier draft. When the paper was already in press, P. J. Rhodes kindly sent me a copy of the relevant portions of his forthcoming commentary on *Ath. Pol.* His views differ from mine on certain points of detail, but the reconstruction I offer is still, in my opinion, the most plausible.