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Law and Society in Classical Athens

Richard Garner



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Law and Society in Classical Athens, first published in 1987, traces the development of legal thought and its relation to Athenian values. Previously Athens' courts have been regarded as chaotic, isolated from the rest of society and even bizarre. The importance of rhetoric and the mischief made by Aristophanes have devalued the legal process in the eyes of modern scholars, whilst the analysis of legal codes and practice has seemed dauntingly complex.

Professor Garner aims to situate the Athenian legal system within the general context of abstract thought on justice and of the democratic politics of the fifth century. His work is a valuable source of information on all aspects of Athenian law and its relation to culture.

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LAW & SOCIETY IN CLASSICAL ATHENS

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Foreword

This book is aimed at a varied audience. I have tried to keep it accessible to all educated readers including those with no Greek. I hope particularly that it will be of use to those interested in the history of ethics and the history of law. Still, it is meant to be used most by classicists, and for this reason I have tried to include all the references, both to primary and to secondary materials, that a specialist might want or need.

The result is inevitably a text in which any given reader is almost certain to find some sections which are either too general or too specialized. Nevertheless, I feel that the material deserves to be presented to both audiences.

David Grene, James Redfield, and Arthur Adkins encouraged my earliest efforts in this work. The manuscript would never have materialized without a luxurious Fellowship in the Society of Fellows at Harvard University. In this atmosphere I gained immensely from the company of Peter Galison, Donald Reid, Terry Castle, Alec Marantz, Nita Krevans, Susan Blaustein, and Denis Feeney. Lillian Doherty, Victor Bers, and Elizabeth Meyer all read the manuscript and provided valuable comments. From the beginning to the end my greatest debt is to Anne Burnett. Her detailed criticism and suggestions are responsible for countless improvements in the text. The Greeks, who were so interested in quantity and who used quantification so much, would not have been able to measure what she has done or what I owe her in return. But then, they would not have needed to: they could simply call it *charis*.

Abbreviations

Abbreviations in the Text and Notes

- FGrH *Fragmente der griechischen Historiker*, F. Jacoby. Berlin and Leiden, 1923–58.
- FHG *Fragmenta Historicorum Graecorum*, 5 vols., C. Müller. Paris, 1841–70.
- GHI² *A Selection of Greek Historical Inscriptions*, 2nd edn, M.N. Tod. Oxford, 1946–48.
- IG *Inscriptiones Graecae*
- LSJ *A Greek English Lexicon*, 9th edn, Oxford, 1940.
- N² *Tragicorum Graecorum Fragmenta*², ed. A. Nauck. Leipzig, 1889.
- Σ Scholiast
- SIG *Sylloge Inscriptionum Graecarum*, ed. W. Dittenberger. Leipzig, 1915–24.

Titles of Journals Abbreviated in the Notes

- AJAH American Journal of Ancient History
- AJP American Journal of Philology
- CJ Classical Journal
- CP Classical Philology
- CQ Classical Quarterly
- CR Classical Review
- GRBS Greek, Roman and Byzantine Studies
- HSCP Harvard Studies in Classical Philology
- JHS Journal of Hellenic Studies
- TAPA Transactions of the American Philological Association
- ZPE Zeitschrift für Papyrologie und Epigraphik

References to classical authors and works generally use the abbreviations of LSJ. However, where doubt might arise, fuller forms have been used.

1 Justice, Traditional Values and Law

1. Introduction

In recent years there has been a great deal of writing and almost as much disagreement about popular values and moral thought in ancient Greece. One of the better known and more controversial books in this area is devoted entirely to the topic of justice. The review of the book which the author most liked included one particular criticism which he found the most interesting: the book does not deal with law.¹ The decision not to treat the topic is understandable. In any society the relationship between law and morality — and in particular between law and justice — may be complex and difficult to characterize. For example, the legal and moral uses of our word *justice* overlap but are not identical. Thus when we use the word to refer to an abstract ideal we may mean something very different from what is designated by the same word in the phrase ‘the administration of justice’.

The development of legal thought in classical Greece and its relationship to Greek values and society have remained relatively unexplored. The great work by Gernet, cited by the reviewer and author above, is discussed at some length below; but it has called forth little response since it appeared almost seventy years ago. In part, the splendor of the Roman legal system has long eclipsed the importance of Athenian law and contributed to its neglect. Even excellent handbooks of Greek law have tended to go out of print quickly. The business of Athenian courts has often been treated or regarded as a chaotic or relatively isolated part of the society. In his *Rhetoric* Aristotle tried, after his fashion, to separate and systematize forensic oratory and the matters appropriate to law: accusation and defense should properly be made about the just and the unjust with regard to the past. He opposed this to two other types of oratory: deliberative rhetoric, which dealt with exhortation to the expedient or dissuasion from the inexpedient with regard to the future; and epideictic, which, in a timeless way, praised the noble and blamed the base.

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Yet Aristotle was well aware that this was merely an ideal division (*Rh.* 1.1.5–6). Most courts admitted presentation of all sorts of materials; and the topic of expediency was one of the most common in fourth-century court speeches — even Aristotle allows that it must sometimes be considered (1.15.25). He acknowledges that there are those who consider justice unimportant (1.7.37–8) and that those most likely to break the laws are the eloquent and wealthy who have legal experience and many friends, all of which advantages make acquittal more likely (1.12.1–3). And he notes that success at competition in the law courts provides great pleasure just as it does in sports and games (1.11.15–16). All these observations indicate that law as practiced was not neatly separated along abstract conceptual lines.

Now as will become clear in the course of this study, by Aristotle's time legality was far more autonomous and clearly defined than it had ever been in Athens before. Nevertheless, many peculiarities had been inherited from a system which had developed under much different circumstances. In order to understand the Athenian popular courts and the administration of justice in them it is necessary to go back to their genesis in the mid-fifth century and the forces which shaped their formation and growth.

For the same reason that a book on justice would profit from a consideration of law, a book on Athenian law must come to grips with the topic of justice. This first chapter outlines the nature of the concept so that the degree of its relevance to the courts can be made clearer. However, the remainder of the book examines the nature of Athenian law and its place in society by approaching the topic in other ways. The second chapter concentrates on historical factors in the development of the popular courts which affected their place in the city. The third chapter characterizes Athenian law by identifying some unusual formal patterns in legal procedure and substantive law. The fourth chapter examines literature as one way of tracing the development of attitudes toward law. And the final chapter describes fundamental changes which occurred in law and legal thought in the fourth century BC.

Aristocratic leaders struggling for honor brought endless woes to the Greeks. Thus begins the *Iliad*. The quarrel of Achilles and Agamemnon is not settled by the rule of law. Theirs is a society of traditions and customs which apply to narrowly defined categories of persons and relationships rather than to general classes. These

customs, *nomoi*, regulate the competition for honor and aristocratic rank. There are behaviors characteristic of various types of men. These may be called *dikai*; and the *dike* of even the 'best' men, the people's leaders, is not impartial (*Od.* 4.687–92). By the mid-fifth century BC in Athens, disputes were settled in court by large democratic juries. Customs had been supplemented with written laws, but the traditional competitive aristocratic value system had not been replaced or systematically augmented by a new moral or legal order of values. The words *nomoi* and *dikai* were used but had not been clearly redefined in terms of democratic institutions.

In Athenian law, therefore, we confront a great paradox. On the one hand, we find a high degree of institutional autonomy in the form of courts which probably involved a greater portion of the citizen body in more hours of court adjudication than in any society before or since. On the other hand, this activity occurs in a society in which the concept of justice is far from clearly defined. Athenian law had almost no methodological autonomy; there was no legal reasoning or style distinct from moral or political discourse.² As a result, the language of the democratic courts was peculiarly tied to a traditional aristocratic value system which at times placed competitive ideals above justice. Another way of describing the situation would be to say that 'justice' in some senses was not in clear conflict with competition or aggression.

In addition, Athenian legal procedure was linked to aristocratic competition by a pervasive isomorphism in Athenian public activities. Athletic competition, assembly meetings, dramatic festivals, and court cases all involved large groups of citizens who were the audience for a very small number of individuals competing against each other. In some cases, the law courts served merely as a forum for the extension of political conflict and power struggles.

Yet even though the administration of justice in Athens was remarkably susceptible to traditional competitive values, and the courts resembled other competitive institutions, the legal order was structurally committed to a cooperative resolution of conflict and was more general and autonomous than custom. The Athenians were quite proud of their laws which guaranteed a degree of civic equality in court.³ And since the courts played such a large role in Athenian life, the formal aspects of the legal order had an effect on popular values and ethics. The effects may have been magnified by a general crisis in values in the late fifth century. At any rate, the laws and courts influenced the moral climate of the city, and the

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moral climate in turn determined how the laws and courts were used in the society.

In order to see how the legal processes grew out of the value system we will turn first to the uses of the word *dike* and the question of the traditional notions of justice. This will lead to a brief consideration of some other aspects of popular morality and values in mid-fifth-century Athens which are relevant to social behavior. Finally, we will consider the word *nomos* and attitudes towards law and laws.

2. *Dike and Justice*

The recent volume of work and intensity of debate on the notion of justice in ancient Greece stems at least in part from apparently deep disagreements on the subject.⁴ It is difficult to identify an aspect of the topic which is not bitterly disputed. Some studies have focused on the use of certain words — the so-called lexical approach; others claim that this is too limited to be a satisfactory method. Some have held that ideas of justice change radically between the time of Homer and the classical period; others defend basic continuity. And it is even maintained by some that *dike*, the word often translated as ‘justice,’ is not a moral term at all in early Greek. In fact there is much less distance separating the various positions than many of their defenders claim.

The contention that *dike* does not have a general moral sense in early Greek derives from a fact on which everyone agrees: at least some uses of *dike* are non-moral. Specifically, in the *Odyssey* and later Greek, *dike* is often the order of nature, the way some group or class of people or things normally behaves. Various patterns and properties of society and nature may provoke various responses: the Greeks considered the world far from perfect, and the structure of society was obviously more pleasant for some members than for others. But each element of the standing order, if it is a mark or a characteristic of a group, is unquestionably *dike*. The common man does not commend or take comfort in the fact that kings behave out of bounds and act on partialities. But this is nonetheless the *dike* or the way of kings (*Od.* 4.687–93). Similarly, no one would claim that it is ‘good order’ or ‘justice’ when men lose their flesh and bones at death and the soul flies away. It is simply the way things are (*Od.* 11.216–22).⁵

Another meaning of *dike*, found in both the *Iliad* and *Odyssey* and potentially more important for moral usage, is 'ruling' or 'settlement'. It can be the decision itself or the process of peacefully settling a dispute whether by arbitration or higher command. Of this usage there are many instances. There is more to be said about Homeric usage, but there is also a point of non-usage stressed by those who make the case for the absence of moral connotation in *dike*. That is that *whatever* the word *dike* means, it is not important in Homer.

No important character is called *dikaios*; no one ever appeals to *dike* when he has been wronged; no warnings or threats mention *dike*; and none of the major actions of the epics, such as the avenging of Paris' theft, or the punishment of the suitors, or of Aegisthus, is ever spoken of as *dike*.⁶

Such analysis has been criticized both for its characterization of Homeric usage and for limiting its approach to the occurrence of specific words. Indeed, even using this lexical approach one finds that elsewhere in early Greek poetry, specifically in the works of Hesiod, *dike* figures much more prominently. Here, as in Homer, *dike* may sometimes simply mean 'settlement' or 'legal process'. But other uses, as well as the general framework of Hesiod's narrative, indicate that *dike* may mean more than this. Even as legal process, it is clear that it is a highly valued process which should help peacefully to protect a man from having his rights transgressed by another.⁷ Moreover, there are Homeric uses for which the translations 'legal process' and 'settlement' seem forced and artificially restrictive (*Il.* 16.387–8, *Od.* 14.81–4). In these and similar passages, *dike* words seem to have a moral force as terms for evaluating the appropriateness of various human behaviors. Such a finding should not be surprising: other Homeric words such as *themis* and *hybris* are also used to approve or disapprove of men's actions. And yet this in itself indicates very little. As Plato's Protagoras explains so eloquently, no human society is possible without some orderly restraints on behavior (*Prt.* 322–3). But it is crucial to establish *what* guidelines for action the society sets. It is true that *dike* entails respecting a set of traditional limitations and commends the due order of Homeric society, perhaps even in a fairly abstract way. But it must be remembered that this due order need not necessarily include a

commitment to a legal or democratic order which would apply equally to the community members with respect to their actions toward each other. In fact, in the aristocratic world of the Homeric poems *dike* even as a moral term will mean very different things for different men since rights and appropriate behaviors vary greatly from individual to individual.

In part, then, the modern confusion and disagreement over the meaning of *dike* have stemmed from this original range of Homeric and early usage which includes both the moral and the non-moral. As we shall see, both these senses continue into the classical period and at times partially fuse. This creates special difficulties in the uses of *dike* in reference to the gods. That is, the topic of theodicy, which might be of particular interest in a legal system, actually involves a number of complicated ideas rather than one clear one.

In turning to fifth-century usage, we find that '*dike* is used in prose predominantly in the senses "lawsuit", "settlement", "satisfaction", "penalty", i.e. the readjustment of a contested balance of gain or loss'.⁸ In fact, as has been recently re-emphasized, '*dike* in the sense of "justice" is not an Attic usage'.⁹ Poetic usage in the period is far more complex. But before examining poetry in detail, it is worth noting that *dikaiosyne*, a word which in the fourth century becomes common and is then the regular word for 'justice', is found only once in extant Greek literature before Herodotus and less than a dozen times before the fourth century.¹⁰ Of these, the five which occur in Herodotus generally concern great men upholding specific agreements, and the remaining instances are mainly from sophistic fragments. *Dikaiosyne* seems not to have been a popular word in any sense. In tragedy it is confined to one Euripidean fragment (486N²).¹¹ Finally, it is noticeable that no rhetor cared to use it in any of the extant court speeches from the fifth century.

If we turn to tragedy, we find that the usage of *dike* and its related adjectives shows a general continuity and conformance with Homeric usage. For example, the chorus in *Medea* uses *dike* at line 411 in its common Homeric sense of 'natural order' ('both *dike* and all things are turning back'). As Verall explains (*ad loc.*):

To give *dika* here its later sense of *justice* is exactly contrary to the meaning, for the women are arguing that justice is about to be satisfied, and women to have their rights through a signal contradiction of common experience.

A similar use of the *dike* words relates statements, appearance or behavior to the facts of the situation. In such passages the English should usually contain a phrase such as 'in fact' or 'really.' So when Jocasta explains that Apollo's oracle can never be fulfilled *dikaïos orthon*, it makes no sense to import any moral terms into the phrase. It simply means 'as stated' or 'corresponding to actual events' (Soph. *O.T.* 852ff., 1282; cf. *Trach.* 347). Similarly, *dike*, especially in the phrase *pros dikes*, often has nothing to do with approval or disapproval of action. Rather it is used to clarify the sole logical response in a given situation. In these passages, the English would run something like, 'Given these facts, there is no need to fear/sigh etc.'¹²

This non-moral equation or weighing of two quantities is also found with the adjective *dikaïos*. The regular construction for this sense uses *dikaïos* applied to a person coupled with an infinitive followed by a finite form of *einai* (Eur. *Supp.* 186, *Herac.* 142, 775), something like Aeschylus' *kyrios eimi throein* (Ag. 104). Perhaps the best single word for this usage is 'competent'. This was noted by Paley, who was more anxious than most to find justice in his Greek.¹³ The adjective *axios* is used in the same way to indicate the required equivalent in totally matter-of-fact situations (Eur. *Hipp.* 236).

All this calculated balancing is likely to make us think of equity and the scales of Justice. Moreover, such associations are encouraged by passages such as *Agamemnon* 250 — '*Dike* weighs out understanding to those who have suffered.' But it will be almost impossible to obtain Greek sense from the Greek by using modern ideas of justice and of what things may be appropriately weighed against each other in the scales. More helpful material for comparison may be found in Greek poetry where we find that Bacchylides, Pindar and Aeschylus obsessively match various actions and events as the required or fated equivalents of each other. In epinician poetry and the tragic choral ode responsion, the existence of metrically equivalent positions which can be used for echoes is particularly suited for juxtaposing and relating quantities we would have considered neither commensurate nor commensurable.¹⁴

Now Greek tends to label these correspondences *dike*, and we are apt to confuse ourselves if we call the acts of birds which require the sacrifice of a child *justice*. Nevertheless, when something is called forth by something else, it is *dike*; and as we noted at the beginning