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Author(s): Robert J. Bonner
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ADMINISTRATION OF JUSTICE UNDER ATHENIAN OLIGARCHIES

By Robert J. Bonner

The popular courts constituted the bulwark[1] of Athenian democracy. The constitutional history of Athens is largely a record of the various enactments that enlarged and consolidated their power, such as the restriction of the powers of the Areopagus, the limitation of the punitive power of the senate of Five Hundred, the γραφὴ παρανόμων, the law regulating impeachments (νόμος εἰσαγγελτικός), and the provision of pay for jurors. This movement encountered much opposition. "I should like to know," says Socrates in the *Gorgias*, "whether the Athenians are said to have been made better by Pericles or on the contrary to have been corrupted by him; for I hear that he was the first who gave the people pay, and made them idle and cowardly, and encouraged them in the love of talk and money."[2] The rejoinder of Callicles that Socrates must have heard that from the philo-Laconian set shows that these were the sentiments of the conservatives who, if not openly anti-democratic, were at least strongly opposed to the type of democracy developed under Pericles and his successors. The assassination of Ephialtes shows to what lengths they were ready to go.

Not much constructive contemporary criticism has survived. Indeed there could be little so long as the theory prevailed that those who governed should administer justice. There could be no real improvement until people were willing to intrust large judicial powers to men fitted by training and temperament to exercise them wisely. In the fourth century Plato maintained that justice could not be properly administered by butchers and bakers and candlestick-makers.[3] But he was far in advance of his time. Pseudo-Xenophon writing in 424 B.C. observes that "in their courts the Athenians are more concerned with what is to their advantage than what is just," and that "a

[1] Aristotle *Constitution of Athens* ix, 1.

[2] Plato *Gorgias* 515 E.

[3] Plato *Republic* 397 D.

bad man has a better chance of escaping justice in a democracy."[1] He rejects the suggestion that the congestion of the courts might be cured by providing more panels because the smaller numbers would be more easily bribed. "Any large modification is out of the question short of damaging democracy itself. No doubt many expedients might be discovered for improving the constitution, but if the problem is to discover some adequate means of improving the constitution while at the same time democracy is to remain intact, I say it is not easy to do."[2] The plain implication of such language is that the only way to improve the democratic administration of justice is to abolish democracy. In 355 B.C. Isocrates[3] charges the courts with laxity and advocates a return to the days when the Areopagus was guardian of the constitution and the laws. This proposal must have been familiar to Athenian conservative circles in the fifth century. There are indications in the pseudo-Xenophontic essay on the Athenian constitution[4] that the problem of restricting litigation had been raised. After giving a list of the different types of cases that came before the courts the writer inquires, "Must we not recognize the necessity of deciding all these matters? Otherwise let anyone mention one, the settlement of which is not compulsory." Some critics believed that the indefiniteness of the laws of Solon was responsible for much unnecessary litigation.[5]

Twice in the last quarter of the fifth century the oligarchs had an opportunity of putting into effect current suggestions for the improvement of the administration of justice. Both in 411 and 404 B.C. the oligarchs employed constitutional means to overthrow democracy by appointing commissions of thirty to draft a constitution based on the πάτριος πολιτεία. According to Thucydides[6] the commission of 411 merely recommended the abrogation of the γραφὴ παρανόμων. By thus destroying the greatest safeguard of the constitution the revolutionists rendered the courts powerless. Any proposal could be brought before the assembly. The government was put into the hands of the Four Hundred who took the place of the senate and filled the magistracies with their adherents.

[1] (Xenophon) *Constitution of Athens* i. 13; ii. 20. Dakyns' translation.

[2] *Ibid.* iii. 8 ff.

[3] *Areopagiticus* 34. Cf. *Antidosis* 142.

[4] iii. 6.

[5] Aristotle *loc. cit.*

[6] viii. 67. Cf. Aristotle *op. cit.* xxix. 4.

Criminal cases came before the Four Hundred as senators with power to inflict even the death penalty. Andocides[1] was arraigned before them charged with supplying grain and oar spars to the army at Samos which had espoused the cause of democracy. Thus the indictment was for trading with the enemy. At first the senate seemed disposed to put him to death but in the end sent him to prison. According to Thucydides an Argive implicated in the murder of Phrynicus was apprehended and "tortured by the Four Hundred."[2] The torture was applied for the purpose of procuring a confession. During their four months in power the Four Hundred put a few to death, imprisoned some, and banished others.[3]

No trials for homicide are reported, but there is no evidence that the Areopagus did not continue to function as a homicide court.[4] The intervention of the Four Hundred in the inquiry regarding the death of Phrynicus was to secure evidence.

Similarly there is no information regarding the disposal of civil cases. Popular courts could have been recruited from the ranks of the Five Thousand, but there is every reason to believe that this body existed only on paper until, upon the overthrow of the Four Hundred, the assembly voted to turn over the government to them. Whether the constitutions described by Aristotle belong to this transitional period or to the preceding oligarchic régime makes little difference, for they contain no definite provisions regarding the judiciary. The temporary or transitional constitution provided for a council of four hundred. "In all that concerned the laws, in the examination of official accounts, and in other matters generally it might act according to its discretion."[5] This section of the constitution undoubtedly gave the council a free hand in organizing the judiciary. In the definitive constitution which never came into effect there is not a word about the judiciary.

To a modern reader this seems to be a strange omission. There are two possible explanations. Either Aristotle omitted the matter in

[1] ii. 13 ff. [2] Thucydides viii. 92. [3] *Ibid.* viii. 70. 2.

[4] Demosthenes *Aristocrates* 66. *τοῦτο μόνον τὸ δικαστήριον οὐχὶ τύραννος, οὐκ ὀλιγαρχία, οὐ δημοκρατία τὰς φονικὰς δίκας ἀφελέσθαι τετόλμηκεν.*

[5] Aristotle *op. cit.* 31. Cf. Smith, *Athenian Political Commissions*, p. 66; Ferguson, "The Constitution of Theramenes," *Classical Philology*, XXI, 72.

his summary or the commission having provided the machinery of government left these and other details of administration to be worked out by the new government. This is what Plato did in the *Republic*.[1]

The Thirty did not, like the committee appointed in 411 B.C., report back to the assembly but deferred their report indefinitely. Meanwhile they filled the magistracies and the senate with their adherents. Such laws as they required they reported to the senate for ratification.[2] Xenophon[3] speaks of Critias along with Charicles as *νομοθέτης*. This simply means that these men because of their prominence were credited with initiating all the legislation of the Thirty. Owing to their longer tenure of power and their firmer grip on the situation the Thirty made a deeper impression on their own and the succeeding generation than the Four Hundred. Consequently more data are available for reconstructing the history of their rule. Some of their statutes known as "new laws"[4] (*καινοὶ νόμοι*) deal with the administration of justice. They are laws such as might have been promulgated by the governments provided for in the constitutions summarized by Aristotle in connection with his account of the Four Hundred.[5] In two instances the legislation reflects very closely current criticism of the democratic judicial system.

"They revised such of the laws of Solon as were obscure and so were responsible for much unnecessary litigation." As an example Aristotle[6] cites their "making the testator free once for all to leave his property as he pleased, and abolishing the existing limitations in case of old age, insanity, and undue female influence." He admits that the laws of Solon were not always drawn up "in simple and explicit terms" and cites the law regarding inheritances as an illustration. But he rejects the naïve view that Solon did this purposely "in order that the final decision might be in the hands of the people." His own view is that the obscurities were due to the "impossibility of attaining ideal perfection when framing a law in general terms."[7] The purpose of these changes was that "no opening might be left for the professional accuser."

[1] Plato *Republic* 425.

[2] Aristotle *op. cit.* 37.

[3] *Memorabilia* i. 2. 31. Cf. Demosthenes *Timocrates* 91.

[4] Xenophon *Hellenica* ii. 3. 51.

[5] Aristotle *op. cit.* 30 and 31.

[6] *Ibid.* 35. 2.

[7] *Ibid.* 9. 2. Cf. Aristotle *Politics* 1282 *b*.

Another law forbidding instruction in λόγων τέχνη[1] was really a blow at the courts. Xenophon says it was aimed at Socrates by Critias because of a long-standing personal grievance against him. But such an ordinance if enforced for any considerable period would not only destroy all higher education but would prevent young men from obtaining an adequate training for appearing before the courts. And courts could not function properly without competent accusers.

The Thirty rescinded the laws of Ephialtes and Archestratus regarding the Areopagus. Nothing is known of Archestratus in this connection. Aristotle, in his account of the legislation of 462 and 451–450 restricting the powers of the Areopagus, mentions only Ephialtes and Pericles. The former is said "to have stripped the Areopagus of all the acquired prerogatives from which it derived its guardianship of the constitution and assigned some of them to the council of the Five Hundred and others to the Assembly and the law courts." Some ten years later Pericles τῶν 'Αρεοπαγιτῶν ἔνια παρείλετο.[2]

In the meantime there may have been further legislation which is not mentioned in this summary account. It has recently been very plausibly argued that one of the privileges taken from the Areopagites at this time was the right to sit as ἐφέται in the minor homicide courts.[3]

By these various measures the Thirty τὸ κῦρος ὃ ἦν ἐν τοῖς δικασταῖς κατέλυσαν.[4] This purpose was effected partly by removing some of the causes of litigation by a simplification of the laws and partly by assigning to other bodies and officials some of the functions and prerogatives of the Heliastic courts. What these functions were can only be conjectured. The most prolific sources of litigation under the democracy were the δοκιμασίαι, εὔθυναι and γραφαὶ παρανόμων.

[1] Xenophon *Memorabilia* i. 2. 31. Cf. Grote, VIII, 229.

[2] Aristotle *Constitution of Athens* 25 and 27.

[3] The minor homicide courts—Palladium, Delphinium, Phreatto—were originally commissions of 51 *ephetae* (ἐφέται), "men sent out" (Gertrude Smith, *Administration of Justice from Hesiod to Solon*, pp. 16 ff.). One of the privileges of which Pericles deprived the Areopagus in 451–450 was the right to sit in the minor homicide court. They were henceforth manned by dicasts who continued in the spirit of religious conservatism to be called *ephetae* (Gertrude Smith, "Dicasts in Ephetic Courts, "*Classical Philology*, XIX, 353 ff.). His motive was to strengthen his political power by enabling more citizens to draw pay for jury service.

[4] Aristotle *op. cit.* 35.

Nothing could be easier than to transfer all questions relating to the magistrates and the laws to the Areopagus which had *τὴν τῆς πολιτείας φυλακήν*.[1] The restoration of the right of the Areopagites to sit as *ἐφέται* in the minor homicide courts would fit in admirably with the policy of the Thirty to eliminate the popular courts by leaving little or nothing for them to do.

There are no references to cases before the Areopagus and other homicide courts. Some scholars have interpreted a provision in the amnesty agreement to mean that the Areopagus as a homicide court was suspended *τὰς δὲ δίκας τοῦ φόνου κατὰ τὰ πάτρια εἰ τίς τίνα αὐτοχειρίᾳ ἔκτειεν ἢ ἔτρωσεν*.[2] But neither this passage nor the statement of a client of Lysias regarding the Areopagus *ᾧ καὶ πάτριόν ἐστι καὶ ἐφ' ἡμῶν ἀποδίδοται τοῦ φόνου τὰς δίκας δικάζειν* afford any justification for supposing that the men who restored large political powers to the Areopagus would think of depriving it of its most ancient judicial function particularly when they were seeking to give the impression that they were administering the state "according to the ancient constitution." The provision in question was inserted in the agreement to exclude from amnesty actual murderers who for any reason had escaped justice under the Thirty and to include any citizen forcibly implicated in the judicial murders of the Thirty for which they themselves were to be held responsible. Amnesty was never extended to murderers and other polluted persons. In the passage in Lysias *ἀποδίδοται* does not mean "restored" as Hermann pointed out long ago but rather *steht zu*, "is competent."[3] The most recent editors of Lysias render the passage as follows: "Le tribunal d'Aréopage lui-même qui, comme au temps de nos ancêtres, a aujourd'hui le privilège des affaires de meurtre."[4]

There are casual references to *εἰσαγγελία*, *ἔνδειξις*, *φάσις*, and *ἀπογραφή* in the time of the Thirty, but there is no indication of the tribunal before which they were brought except in one instance. During the rule of the Ten who succeeded the Thirty for a short time

[1] Aristotle, *op. cit.*, 25. 2.

[2] Aristotle *Constitution of Athens* 39. 5. For a full discussion of this passage see Bonner, *Classical Philology*, XIX, 175–76.

[3] Cf. Frohberger, *Lysias*, ii, 180.

[4] Gernet and Bizos. Paris, 1924. Lysias i. 30.

Patrocles, the king archon, met a personal enemy, Callimachus, carrying a sum of money. Patrocles at once stopped him and asserted that the money belonged to the state.[1] During the dispute Rhinon, one of the Ten, appeared. On hearing the details of the quarrel he took the disputants before his colleagues, presumably for a preliminary examination. The case came before the senate for trial in the form of a φάσις, and a verdict in favor of the treasury was rendered. Patrocles evidently acted as prosecutor. It was the senate that tried the sycophants who were put to death in large numbers at the begining of the rule of the Thirty. The form in which these cases were brought is not specified. It was probably εἰσαγγελία which was a normal form of procedure against sycophants. ἔνδειξις was also used in certain cases.[2] Just before the overthrow of the democracy the well-organized oligarchs procured the arrest of Strombichides and other prominent democrats charging them with plotting against the government. The senate brought them before the overawed assembly which voted that they should be tried by a dicastery of two thousand. After the Thirty were installed in power they had the men tried by the senate. Lysias quotes the verdict of the senate exonerating the informer Agoratus from complicity in the plot.[3] There is no reported case of ἀπογραφή but the process is so similar to φάσις that it also would naturally come before the senate.

The Thirty themselves exercised judicial functions. Like the democratic magistrates and boards they conducted the preliminary investigation (ἀνάκρισις) and presided at the trial. One of the "new laws" gave the Thirty the right to put to death any Athenian whose name was not on the catalogue of the Three Thousand. Theramenes was first brought before the senate, but when it became apparent that the senators could not be trusted to condemn him, Critias withdrew the case, struck Theramenes' name from the list of citizens, and had him condemned by the Thirty.[4] No doubt the Thirty were responsible for the majority of the judicial executions that made their rule a reign of terror.

[1] Isocrates xviii. 5 ff.

[2] Lofberg, *Sycophancy in Athens*, p. 92.

[3] Lysias xiii 35 ff.

[4] Xenophon *Hellenica* ii. 3. 51.

No civil cases are reported. In fact, a client of Isocrates[1] says that court sittings were suspended. *πρὸς δὲ τούτοις, ἀκαταστάτως ἐχόντων τῶν ἐν τῇ πόλει καὶ δικῶν οὐκ οὐσῶν τῷ μὲν οὐδὲν πλέον ἦν ἐγκαλοῦντι κ. τ. λ.* This statement does not necessarily mean that there was no provision for the trial of private suits (*δίκαι*) during the whole period of the tyranny; it may simply mean that toward the end of their rule the city was distracted by civil war and the courts could not sit. This situation occasionally arose under democracy in war time. Demosthenes[2] cites a law of restored democracy to the effect that *ὁπόσα δ' ἐπὶ τῶν τριάκοντα ἐπράχθη ἢ δίκη ἐδικάσθη, ἢ ἰδίᾳ ἢ δημοσίᾳ, ἄκυρα εἶναι.* It is of no consequence in this connection whether the law as quoted is genuine or not, for the text of the speech shows that it had to do with the annulment of "things done in the time of the Thirty."[3] That *res judicatae* are included is indicated by the words *πότερον (φήσομεν) τὰ δικαστήρια, ἃ δημοκρατουμένης τῆς πόλεως ἐκ τῶν ὁμωμοκότων πληροῦται, ταῦτ' ἀδικήματα τοῖς ἐπὶ τῶν τριάκοντ' ἀδικεῖν*; Demosthenes' words throw no light on the composition of the tribunals under the Thirty. By implication they are called *δικαστήρια*, but at the same time they are distinguished from the democratic *δικαστήρια* recruited *ἐκ τῶν ὁμωμοκότων*. Frohberger calls them *rechtswidrig zusammengesetzte Dikasterien*, meaning presumably panels drawn from the Three Thousand. The measures taken to suppress sycophants suggest that the Thirty planned some sort of popular court in addition to the senate, for sycophancy could flourish only where there were large courts. The Three Thousand along with the knights made up the court that tried and condemned the Eleusinians,[4] but they were not called upon to try Strombichides and other active democrats though there was a psephism that they should be tried by a dicastery of two thousand.[5] The trial of the Eleusinians was a travesty of justice in which the Three Thousand were required to participate in order that they might be implicated in the crimes of the tyrants.

[1] xxi. 7. Owing to doubts that have been cast upon the authenticity of this speech too much weight should not be attached to the statement that there were no court sessions (Drerup, *Isocratis Opera Omnia*, I, cxix).

[2] xxiv. 56 ff.

[3] *Ibid.* 57: *ὁ γοῦν νόμος οὑτοσὶ ἀπεῖπε τὰ πραχθέντα ἐπ' ἐκείνων μὴ κύρι' εἶναι.*

[4] Xenophon *Hellenica* ii. 4. 9–10.

[5] Lysias xiii. 35.

Provision could have been made for civil suits by withdrawing the right of appeal from the decisions of the magistrates. This was the system in vogue before the reforms of Solon and could be justified as a restoration of the πάτριος πολιτεία.

An expression of Lysias[1] suggests that arbitration was widely used under the Thirty. A client had been one of the Three Thousand. On this ground he was challenged as being anti-democratic on his δοκιμασία when selected for office under the restored democracy. He maintained that his conduct had been irreproachable though there had been plenty of opportunity for wrongdoing if he had been so disposed. For example, he had arrested no one, put no one on the list of proscribed, οὐδε δίαιταν καταδιαιτησάμενος οὐδενός.

The implication of this statement is not only that arbitration was an important feature in litigation but that adherents of the Thirty were in the habit of interfering in the process in the interest of themselves or their friends. Public arbitration[2] had not yet been instituted and it is not easy to see how there could have been any serious interference with private arbitral awards on the part of the Thirty and their friends. It is tempting to suggest that the Thirty like Pisistratus provided official arbitrators who in case of failure to induce the parties to compromise were empowered to render a binding decision. This could have been easily accomplished by withdrawing the right of appeal from decisions of the thirty rural justices appointed in 453–452. Nothing is known of the jurisdiction and methods of these judges. But it may fairly be assumed that like their predecessors, the Pisistratean Thirty, their first endeavor was to induce the parties before them to reach a compromise, and like their successors, the Forty, they handled a large proportion of the civil cases. Upon the restoration of democracy the thirty rural judges were changed to forty because of the unhappy memories associated with the number "thirty."[3]

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[1] *Ibid.* xxv. 16.

[2] Bonner, "The Institution of Athenian Arbitrators," *Classical Philology*, XI, 191 ff.

[3] Pollux viii. 101.