

**Chris Carey, Ifigeneia Giannadaki and Brenda Griffith-Williams (eds.). *Use and Abuse of Law in the Athenian Courts*. Leiden: Brill, 2019. Pp. xvi, 385. EUR 5. Abuse of Law in th**

This is a very rich volume, and specialists in ancient Greek law will find much to engage with. As the title suggests, the contributors address the question of whether litigants regularly “abused” the law in the Athenian courts. A key preliminary issue, however, is what can be labeled as “abuse” in a system without professional judges? As noted by Arnaoutoglou “the concept of abuse requires an authoritative voice to expound on what constitutes an admissible use of law” (p.185). In other words, in the absence of legal experts, a hierarchy of courts or jurisprudence, there is no authoritative standard for “correct” or “incorrect” uses of the law. Is it even possible to speak of “abuse” in such a system? Beyond the fairly obvious citation of a non-existent law (prohibited according to Dem.26.24), or partial citation so as to radically distort the meaning of a law (discussed by Rubinstein), what constituted “abuse”? One definition, offered by Arnaoutoglou is “any treatment of the legal rules by a litigant so as to confer a unfair? advantage to his case.” (p.186).

While a few chapters deny the appropriateness of the concept of ‘abuse,’ (Gagarin, Arnaoutoglou) others line up on either side, claiming abuse (Griffiths-Williams) or its absence (Harris, Osborne, Volonaki, Hatzilambrou). Some line up in the middle (Kremmydas, Rubinstein). A few do not directly relate their contribution to the issue of abuse (Carey, Horvath, Sato, Phillips).

In his contribution, Michael Gagarin argues that despite the frequent accusations in Greek oratory that an opponent is abusing the law, there is no objective way of determining what constitutes an ‘incorrect’ use of the law. As he notes, even in a modern system such as the US common law system, it is still possible to debate the correct interpretation of the law. All the more so, in a system without a “judge or other official...who could judge authoritatively on the validity or meaning” of a law. Of course there was the jury, but it was composed of ordinary citizens, not legal specialists. Gagarin observes that “we do not know on what grounds the jury reached their verdict” but this wording is misleading since it implies that the jury must have reached a unanimous verdict as in a modern criminal trial. In fact, ancient Greek juries were not required to reach a unanimous verdict and did not even deliberate after arguments were finished. Each juror cast his vote secretly on the basis of his own assessment of the arguments, and it is quite possible that jurors who rendered the same verdict did so for different reasons. Nevertheless, Gagarin rightly argues that in many cases, substantive laws were ambiguous and litigants made plausible arguments for different interpretations. In regard to procedural law, Gagarin observes that even when litigants claimed that their opponents were misusing certain procedures such as *apagoge* or *eisangelia*, it is a fact that the officials in charge let the cases come forward, implying that plausible arguments had been made in the preliminary hearing that the act in question fell under a certain procedure.

Robin Osborne considers how the ‘elasticity’ of the laws was policed. He argues that both the range of possible actions through which a case could be prosecuted and the pre-trial procedures served the function of setting limits on the interpretation of the law. Drawing on his now classic 1985 article, Osborne argues that prosecutors chose which action to bring based on their assessment of the types of behaviors that were considered to fit particular laws in previous cases. One might stress here the existence of disincentives to bring a weak case in which the law had to be ‘stretched,’ such as the thousand-drachma fine for prosecutors who brought public suits (with the exception of *eisangelia*) and won less than one-fifth of the jurors’ votes.

Once prosecutors made the choice of which action to bring, the pre-trial procedures – bringing of charges, preliminary hearing and arbitration – provided opportunities for both defendant and prosecutor to consider the strength of their position in relation to possible counter-arguments. If they judged that their interpretation of the law to be insufficiently strong, they could either abort an action or settle out of court. Finally, Osborne observes that the requirement that victims prosecute in their own person also served to limit the elasticity of the law, since less-experienced litigants would be less skilled at manipulating the law and persuading jurors in weak cases. Of course, a certain inequality must be noted in relation to this last point, since wealthy litigants could pay skilled speech-writers to compose persuasive arguments and thus stretch the law more easily than ordinary or poor litigants.

Edward Harris analyses the evidence for why Athenian courts made their decisions, concluding that they determined guilt or innocence “based on their knowledge of the facts and the relevant laws” (p.54). Summarizing much of his earlier work, he argues that the plaintiff was crucial in constraining the litigants to establish a relevant law that was transgressed. Furthermore, he reviews the cases for which verdicts are known and shows that litigants viewed just verdicts of conviction or acquittal as ones in which the litigant demonstrated, respectively, the violation or lack of violation of a law. He observes that litigants never cite honor, enmity or emotions as the reason for just or unjust verdicts. While Harris is right that an important part of Athenian trial was the determination of whether a relevant law had been violated, he neglects the central fact that lay judges made this determination. Even in modern judicial systems, law needs to be interpreted and ancient Greek jurors will have based their votes on a variety of factors including the relevance of the law(s) cited, their judgment of the facts and the credibility of the litigants (Forsdyke 2018). How else are we to explain the arguments for different interpretations of a law (analyzed by Gagarin above), not to mention the elaborate arguments from character, appeals to honor, anger and other emotions?

Furthermore, while Harris is right that litigants rarely claim that Athenian jurors made bad decisions based on factors irrelevant to the laws, it is pertinent to ask, why they would insult in this way the jurors and system under which they were about to be judged? Finally, Harris acknowledges that Athenians accepted that notions of fairness (*epieikeia*) allowed judgments about intent and extenuating circumstances to moderate the strict application of the law. However, Harris has a fairly narrow understanding of the Athenian

notion of fairness, and I have argued for its wider applicability in acknowledging the need for interpretation of the law in adapting general laws to particular circumstances (Forsdyke 2018).

Chris Carey examines actions that blur the boundaries between private and public suits and argues that these often involved private suits in which the interests of the polis were implicated in some way. His prime example is the private suit for ejectment (*dike exoules*) in which a person who has proven his claim on a property sues as a response to his disbarment from the property by its occupant. If the person wins the suit, the person barring access must pay the plaintiff a sum assessed by the court, as was typical for private suits, and an equivalent sum to the state, as was characteristic of public suits. The rationale for the public fine was the state's interest in preserving the authority of the courts and enforcing compliance with its rulings. Carey adduces several further examples and argues that this flexibility allowed for practical solutions that efficiently made use of existing structures with only minor adjustments. Implicit in this argument is the idea that such suits did not stretch the law unreasonably, since the polis was in fact impacted by non-compliance with court verdicts.

Griffith-Williams looks for examples of procedural abuses and finds one in Isaeus 6, a suit for false-witnessing that arises from the lodging of a claim to an estate. Griffith-Williams argues that by using the procedure of *diamartyria* – or formal statement of a witness, instead of a *euthudikia* (“direct trial”) the claimant had put his opponent at a disadvantage and was thereby abusing procedures. The argument is too complex to repeat here, but the overall point is that procedural abuses did happen but can only be understood through the substantive facts of the case, rather than a strict set of procedural rules that the Athenians lacked. This is a fair point, but it is perhaps worth noting that not all scholars accept the procedural open texture of Athenian law (cf. eg., Harris above pp.48-49; contra Osborne 1985).

Christos Kremmydas seeks to shed light on the process and aims of the pre-trial preliminary hearing (*anakrasis*) before a magistrate. He argues that its primary role was to determine the admissibility of the suit and set a date for the trial, and hence it consisted of a presentation of the relevant documents and key arguments, along with questions and answers by the presiding magistrate and by opposing litigants. Although he agrees that the overriding effect of this preliminary hearing was to create a level playing field for litigants so that they could anticipate arguments and prepare their responses, he shows that it did not prevent either side, and particularly the prosecution, from introducing new arguments, and even sometimes new evidence (e.g., slave testimony extracted as a result of a challenge proffered at the preliminary hearing).

Laslo Horváth, who has written a critical edition of the Hypereides palimpsest containing the speech *Against Diondas*, uses this speech to reconsider the evidence for postponements of trials in public suits, especially the suits regarding the proposal of illegal decrees (*graphe paranomon*). He argues that many such suits would have been postponed for legitimate reasons, including the existence of pressing public business, and the illness or

absence of the prosecutor due to military service. Hypereides' speech *Against Diondas* was itself delayed by four years before coming to trial, just as the more famous example of the case *On the Crown* which was delayed for six years. There was, apparently, no statute of limitations for such cases, unless one wished to prosecute the person and not just the decree or law, in which case the indictment had to be filed within a year of the declaration on oath of intention to prosecute (*hypomosia*). Horváth further highlights Hypereides' statement that Diondas boasted that he had brought 50 indictments and never won a single one. He compares this statement to Aeschines' claim (3.197) that one Aristophon boasted to have been indicted 75 times and never been convicted. Rather than discounting these extraordinary numbers as exaggerated as do most scholars, Horváth explains that many of these indictments may have been postponed or let go completely. While there were penalties for failing to follow through after lodging an indictment in most public cases, Horváth cites the evidence of Dem. 58 to show that in some suits, including indictments for illegal proposals, the parties could settle out of court without any penalty.

Noboru Sato examines the procedures and strategies for delaying a trial, as well as the reasons why litigants might seek a delay. He argues that litigants made use of the oath for postponement (*hypomasia*), the special plea to block a case as inadmissible on legal grounds (*paragraphe*), as well as public arbitration to delay a trial. Reasons for delaying a trial include a desire to strengthen one's case by seeking more witnesses or supporting speakers and attempting to influence public opinion before the start of the trial, as in the case of Hegesandros who made public speeches in the Agora to increase his credibility and standing (Aeschines 1.62-64). Such delays also offered an opportunity to seek an out of court settlement. However, Sato notes that at least in the case of public arbitration, the defendant would have to obtain the plaintiff's consent to delay the trial by this means. In sum, Sato concludes that the period between the filing of a case and the beginning of the trial was a crucial stage for strategic negotiation between litigants.

Lene Rubinstein examines how litigants quote statutes, and notes that litigants often prefer to incorporate parts of a statute within their speeches rather than asking that the full law be read out by an attendant. She observes that, although both Aeschines and Demosthenes express some concern for the potential distortion of the law through partial citation, nevertheless, we hear surprisingly few complaints about the practice. Rubinstein proposes that this absence of protest can be explained at least in part because litigants were probably only required to present in advance the laws that they intended to have read out formally and therefore would not be prepared to counter any partial quotations that their opponents brought into their speeches during the trial. That said, Rubinstein observes that partial quotation without formal recitation is integral to Athenian court practice and therefore implicitly the Athenians had a high tolerance of the practice – and even of the 'creative' interpretations that could ensue. One might further observe that there was not one 'correct' interpretation of the law and that the jurors were themselves the authority on what was a legitimate interpretation of the law. This fact in itself would explain the tolerance of various proposed interpretations. In other words, there was very wide latitude before an interpretation was considered 'abusive.' In closing, Rubinstein also

astutely notes that the disagreement in the rhetorical manuals (Aristotle's *Rhetoric* and the *Rhetorica ad Alexandrum*) about whether laws were 'artless' (*atechnoi*) or 'artful' (*entechnoi*) proofs can be explained by the difference between formal recitation by the clerk and 'artful' incorporation of parts of a statute.

As mentioned in the introduction to this review, Ilias Arnaoutoglou asks what it meant to "distort the laws" (*tous nomous diastrephein*)? He stresses that without a supreme court and legal experts there was no authoritative use of the law beyond what the jurors decided on hearing the arguments put forward by each side. He ultimately argues that although we can identify a number of ways that litigants used the law strategically, the line between use and abuse was so thin so as not to matter much. Ultimately, he concludes that the Athenian jurors decided what was a correct interpretation.

Ifigeneia Giannadaki examines how litigants create a "story about the law" that presents it as a coherent and unified system, despite the reality of lack of systemization. She shows very effectively how litigants make use of two competing narratives of procedural flexibility and fixity to further their persuasive goals. Interestingly she concludes that Athenian law acquires something akin to a "jurisprudence" through this rhetoric of a law. She suggests that the Athenians were able to accommodate the tensions between two models ideologically since they never developed formal legal doctrines. That said, she is at pains to stress that she is not suggesting that rhetoric was all-powerful in the Athenian courts. She emphasizes that cases could not be brought without legal foundation in the first place.

Kostas Apostolakis examines the twisting of the laws on *antidosis* (challenge to exchange properties) in the sole surviving speech relating to this law, pseudo-Dem 42. He outlines the stages of the procedure and traces the themes of 'revealing' vs. 'concealing' (wealth) in the speech. He demonstrates how the speaker provides an interpretation of the law based on partial citation and paraphrase, and how his opponent could advance a different interpretation based on the same law.

Victoria Wohl demonstrates how Demosthenes deploys 'spatial rhetoric' to challenge a decree proposed by Aristocrates to protect an agent of the Thracian King, Cersobleptes. She shows that Demosthenes relies on a tendentious interpretation of Draco's homicide law in order to appeal to the principle of trial by jury, and then follows with a tour of the topography of the law courts in Athens to impress the jurors with the transgressive nature of Aristocrates' decree. Wohl further argues that Demosthenes sidesteps the question of jurisdiction by including rhetorically Thrace within the spatial boundaries of the city, in particular through the move of equating Thrace with the other civic monuments bequeathed to the Athenians by their ancestors.

Steven Todd examines the uses of words relating to theft and argues that the concept of theft was particularly useful for its ambiguity since crimes of theft (perhaps uniquely) could be subject either to a private suit or a public one. Therefore, even when the offence involved fairly minor pretrial misappropriation of witness testimony, a prosecutor could

insinuate more serious crimes against the community such as theft of public or sacred money.

Mirko Canevaro points to a tension between the ideology of legislation and democratic legislative institutions. Specifically, he points out that the theme of the unchanging and fixed nature of the law (through the figure of Solon and the idea of *patrios nomos*) is in tension with the democratic institutions that allowed the Athenians to create new laws. In attempting to resolve this apparent contradiction, Canevaro argues that the Athenian ideology of legislation did in fact allow for new laws but required any new laws to be proposed through proper procedures and not be in conflict with any existing laws. The latter point is key, since as Canevaro shows, the authoritative role of Solon and the idea of the *patrios nomos* are preserved by the requirement that new legislation conform to the spirit of Solonic legislation. In this way, the Athenians ideologically justified democratic legislative institutions while grounding them in the remote past.

Eleni Volonaki examines cases in which the law of *eisangelia* ('impeachment') is stretched to cover offences that were not obviously linked to the usual categories of treason or attempts to overthrow the democracy. Most particularly, she draws attention to the case of Leocrates, who left the city in the aftermath of Chaeroneia and was charged by Lycurgus with treason. The question that the jury had to answer was whether flight constituted treason. While Lycurgus makes a powerful rhetorical case (see e.g., 1.147), it seems that Leocrates was acquitted. According to Aeschines, Leocrates was acquitted by only one vote, a claim that we might conjecture to be a rhetorical spin on the basic fact of acquittal, namely to present the acquittal in the worst possible light (Aeschines 3.252; cf. Dem.21.71, 73-5 where a defendant is also convicted by only one vote). The jury apparently did not think Lycurgus' interpretation (or 'stretching') of the law justified, perhaps especially since the penalties were so great. In other words, this is a good example of the jury interpreting the law in conformity with the community's judgment of fairness in the particular situation. Volonaki concludes that the Athenians held a consistent view of the law of *eisangelia* through the fifth and fourth centuries, in particular that it should be used only for major offenses by public figures.

David Phillips uses the Model Penal Code promulgated by the American Law Institute in 1962 to examine the ways that Athenian homicide law dealt with culpability. He suggests that the Athenians used corresponding criteria (e.g., purposeful, knowing, reckless and negligent), but had trouble apportioning liability in cases in which it was shared by the victim and the defendant. A key example of this latter scenario is Antiphon 3 and 4, a case in which a boy kills another boy who ran into the space where the first boy was throwing a javelin. Phillips argues that in this pair of speeches Antiphon was anticipating a critique of the inflexibility of Athenian law that was made more thoroughly in the fourth century by Plato and Antiphon.

Rosalia Hatzilambrou argues –contrary to Wyse - that Isaeus did not distort the law in applying it to various cases of adoption and citizenship. She examines suspected cases of distortion and concludes, with one exception, that Isaeus stuck very closely to the letter of

the law and, where laws were ambiguous, provided interpretations that were plausible based on other evidence from other orators. Nevertheless, she acknowledges that he suppressed parts of laws when paraphrasing, if these parts were irrelevant to his case. The single exception, moreover, of abuse of the law involves a misinterpretation of the law on succession in 7.20, where Isaeus states that the principle of male precedence is valid only for estates of a cousin or more distant relatives, contrary to Dem. 43.51.

To reiterate, this is a rich volume with many excellent contributions. It clearly demonstrates that, while there were certainly some abuses of the law in the Athenian courts (as in any legal system), nevertheless the Athenians managed to carve out a consistent range of interpretations of laws and rules of procedure that allowed for a broadly predictable and transparent legal process. Most impressively, they did this without the help of legal experts. It seems that a legal system that relied on ordinary citizens, convened regularly and in large numbers, can deliver justice.

### References

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