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## Transforming Disputes into Cases: Demosthenes 55, “Against Kallikles”

### SUMMARY

This article was originally written for the online discussion series “Athenian Law in its Democratic Context,” organized by Adriaan Lanni and sponsored by Harvard University’s Center for Hellenic Studies. (Suggested Reading: Demosthenes 55, “Against Kallikles.”)

When you read even a few speeches of Athenian litigants, when you closely follow the arguments of any one, when you consider that witnesses but not litigants were under oath, when you reflect that we don’t have the opponent’s presentation, you begin to develop a persistent suspicion that what you’re hearing is not the whole truth and nothing but the truth. You’ve got to wonder: Is this guy telling the truth?

The question of the relationship between a litigant's speech and the truth is important for how you understand and evaluate the Athenian legal system, for what you can learn about Athenian society from these speeches, and, in the end, for how you read them. I would like to talk about the question of the truth of litigants' speeches though the example of Demosthenes 55, "Against Kallikles."

Here's how such a lecture might go....

#### THE DISPUTE

Sometime in the middle of the 4th century BCE, an Athenian farmer whose name we do not know (though his father was named Teisias) was sued by his neighbor Kallikles for damages resulting from a flood. In this case, we have the defendant's speech and I would summarize it like this:

The son of Teisias argued that Kallikles was a scheming, litigious neighbor, and this suit was just the latest of his harrassments. Though Kallikles claimed that his land had been flooded because a wall on the property of the son of Teisias had diverted a natural arroyo onto his land, Teisias (the defendant's father) had in fact put up the wall many years before and neither Kallipides nor his son Kallikles had objected either at that time or since. Moreover, the wall did not block the path of the arroyo, Kallikles had himself put up a similar wall (and had obstructed the road), and, besides, the damage wasn't nearly as much as

Kallikles said. The son of Teisias emphasized again to the jurors that this suit itself was part of an ongoing pattern of harassment. Kallikles had earlier suborned his cousin to claim the son of Teisias' land (a suit the son of Teisias says he won), had persuaded his brother to sue him, and had himself twice sued the son of Teisias' slave, Kallaros (the first of which Kallikles apparently won). All of this, the son of Teisias argued, was part of Kallikles' plot to get his land and drive him out of the neighborhood.

We do not have Kallikles' speech, but by careful attention to the son of Teisias' speech you can infer what he must have minimally argued. Kallikles would have argued that although the road between their land was a natural arroyo, at some point it diverged from the road and flowed onto the son of Teisias' land – and this must have been the point at which Teisias had earlier put up the wall. Kallikles must have claimed that the arroyo ran naturally through the son of Teisias' land. Although years had passed since the wall was put up, the passage of time didn't erase the liability of the son of Teisias. You may suspect that Kallikles quoted or at least alluded to the law which was the basis of his suit – Athenian prosecutors often did this – though there can be no certainty here since the son of Teisias made no arguments about the law. Kallikles may have made arguments well beyond this minimum – he may, for example, have claimed that the son of Teisias was the bad neighbor – but we cannot know.

## FACTS & TRUTH

Ferretting out the truth behind competing claims is not easy, especially when we have only one of them. While we can be reasonably certain of some facts, those that the son of Teisias granted as true – that his father built a wall, that there was a flood which caused some damage to Kallikles' farm – there are others which must remain in doubt, critically, whether the natural course of the arroyo had ever flowed through the son of Teisias' land. Notice how the son of Teisias' attempted to refute this. First (sections 12–15), he offered “proofs (*tekmeria*) stronger than testimony”: there are tombs and cultivated trees on the land, and no one would put these in a public watercourse. The argument here is indirect and inferential, what the Greeks would call an argument from probability. It goes like this: people don't put such things in arroyos, such things exist on his land, therefore it's not an arroyo. He then attacked the reasonableness of the idea that his land is a natural arroyo by saying that dry washes never run parallel to roads (sections 16–17). (This is another argument from probability.) Finally, he tried to reduce Kallikles' position to absurdity: if he let the water onto his land, he'd get sued by the person whose land it ran out onto – unless he drank it all up himself (sections 17–19). Reviewing these arguments, a skeptical modern reader might begin to suspect that the fault did indeed lie with the son of Teisias. After all, these are all indirect evidence for the absence of an arroyo, and

none of the witnesses seem to actually have said that no arroyo existed on the land. (In his recapitulation of their testimony – section 15 – the son of Teisias said that they testified to the presence of tombs and cultivated plants, not directly to the absence of a wash.)

Though skepticism is a reasonable approach to any Athenian litigant's arguments, I would temper it in this case for two reasons. First, the son of Teisias was not alone in endorsing *tekmeria* (circumstantial proofs) over direct testimony. Though such endorsements were often self-serving (because they justified the argument the litigant was making at the time), the fact that some litigants provided circumstantial proofs in addition to direct testimony suggest that Athenian jurors would have found them compelling. Second, in a society where objective, written records were rare, people often relied on the persistence of physical objects to help remember the past. (This is how Herodotus proceeded in Book 1 to reconstruct the early history of the Lydians and Greeks, by relying on stories attached to physical objects, especially dedications at religious sanctuaries.) Note that the son of Teisias attempted to prove the antiquity of the state of affairs by saying that the trees were established and the tombs old already when his father bought the land. Still, even-tempered skepticism may be enough to doubt the son of Teisias on this point.

It is fairly clear, however, that the son of Teisias included a lot of irrelevant information: whether Kallikles was plotting against him, after all, doesn't matter to the question

of whether he's at fault for the damages. The conspiracy narrative which frames the speech sheds light on Athenian social relationships – on antagonisms and the ways they could turn into feuds, and on the ways that litigation might be used in pursuit of these (especially because all prosecution was private) – but it offers little to help decide where the truth lay. Indeed, many scholars have concluded that the persistent inclusion of such irrelevant material by Athenian litigants demonstrates the fundamental weakness, the capriciousness, of the Athenian legal system. The son of Teisias said nothing about the law, provided no direct testimony to the crucial fact in dispute, and attempted to inflame the jurors against the prosecutor by impugning his motives. It is difficult to decide whether this tells more poorly for the son of Teisias' case or the common operation of the Athenian courts. Discovering the truth behind the litigants' speeches is not only a problem for us, but must have been for Athenian jurors as well.

Well, that's how a lecture on the subject of the truth behind litigants' speeches might go.

## DISPUTE THEORY

But that's not the lecture I want to give. The approach I've just outlined is fundamentally flawed for three reasons. First, rather than attempting to analyze litigation in Athens, it aims to judge it. Judging it *per se* is not the problem, but in this case judgment has superseded understanding.

Second, it bases this judgment on standards which are essentially our own. It assumes that the Athenian legal system should have operated like ours (ideally) does, and then condemns it for failing to. Third, by framing the object of study as the speech rather than the system of litigation it encourages us to substitute ourselves for Athenian jurors. It's not that with most Athenian legal speeches it's impossible to determine with certainty who's right; rather, the question who's right? is itself a distraction from the more important question, how did this system operate?

I would like, then, to sketch an alternative framework for approaching the study of Athenian litigation, one which does not put historians in the positions of jurors (attempting to determine guilt or innocence) but rather analyzes the relationships between legal speeches and the jurors' verdict, one which does not judge the system but understands it with relatively neutral categories, one which makes Athenian litigation seem both more foreign and more reasonable. To do this I will use a framework developed by legal anthropologists, dispute theory.

Dispute theory focuses not on legal cases but on disputes. A dispute is an intentionally broad concept and could be defined as a conflict between people. Disputes, however, can take many different forms: feuds, vendettas, passive-aggressive behavior, vandalism, insults, etc. – and, of course, legal cases. Dispute theory approaches all possible forms equally, not assuming that any of them are the proper form a dispute should take. More than this, dispute

theory analyzes not merely the way that a dispute can take on a particular form, but the ways that a dispute can, in time, take on different forms, the ways it can be transformed.

Indeed, the idea of the transformation of disputes is key and I want to consider four important features of this idea. First, transformations don't just happen; they are the result of choices made by parties. Thus, we should understand litigation not as the result of the violation of a law, but as the result of a party deciding to turn a dispute into a legal case. (After all, even if all legal cases come out of a violation of the law, many violations of the law never end up as legal cases.) Second, transforming a dispute from one form to another changes the roles of the parties involved and may introduce new ones. Consider this situation: two people involved in a fight have relatively undifferentiated roles, but in a legal case one might be a defendant and the other a witness or (in Athens) the prosecutor. (Since in Athens all cases were initiated privately and litigants spoke for themselves, I'll refer to the litigant who brought the case as the prosecutor. Though derived from Latin, the word prosecutor is parallel in etymological meaning to the Greek term for the man who initiated the case, *ho diokon*, "the one who pursues.") Litigation also involves the introduction of new parties: for example, jurors (or, in our system, public prosecutors who are meant to be disinterested). Third, linked to the transformation of roles, different forms of disputes endow disputants with different resources. Thus, while

in a brawl a much bigger person may have an advantage over a smaller one, in an Athenian lawsuit the ability to speak well was more important than stature. Fourth, the initiation of litigation dichotomized a dispute. Whereas in a melee several people may have been involved (think of the street fight in Demosthenes 54, “Against Konon”), a lawsuit pitted a prosecutor against a defendant and made everyone else, at most, witnesses. Disputes, however, often have many more than two sides.

Understanding that disputes can be transformed entails at least two significant consequences. The first is that since (for Athens, at least) the evidence for disputes comes entirely from the courts (in the form of legal speeches), this evidence may not fully represent the dispute in earlier stages. The second is that, since the transformation of a dispute also involved the transformation of the resources available to the parties, some disputants may have resisted certain transformations. Just because one party decided to initiate litigation doesn’t mean another party wouldn’t resist or contest this. Indeed, I would say that often what was at stake in a dispute was what form the dispute might take. It is precisely because part of a dispute can be a struggle over the form the dispute takes that we should not make judgments (explicit or not) about which of these is the proper form. Specifically, just because one disputant has tried to make a dispute into a legal case doesn’t mean that other parties should or will acquiesce.

## NARRATIVES IN DISPUTE

There is much I could say about how the transformation of a dispute into a legal case affected the parties involved in Athens, but for now I want to concentrate on the particular resources available to the parties involved. Because Athenian litigation depended upon the speeches of the prosecutor and defendant, the primary resources of litigation were rhetorical resources. And because much of what litigants had to say was to tell about the dispute, many of these rhetorical resources were narratological, that is, they were about the kinds of stories litigants told. (There were other rhetorical resources as well – for example, the means by which litigants made arguments about the meaning of a law – but I will concentrate on narrative.)

Prosecutors' stories exhibited several characteristics. 1. In conjunction with the institutional setting of the courts, they dichotomized the dispute. They made one party the perpetrator, one the victim, and reduced all others to secondary status. 2. Because only men spoke in court, and usually only citizen men, prosecutors tended to tell stories in which the conflict happened between two male citizens. 3. Prosecutors singled out a specific action as a focus of their stories; loosely we might call this the "crime." (I would put this word in quotation marks because our notion of a crime involves a violation of criminal, but not civil, law. Since Athenians had no such division of law, I use the word to denote any action which could be claimed

as the basis of litigation.) 4. Prosecutors evaluated this action in light of laws; the ethical categories they invoked were legal.

These characteristics were essential to a prosecutor's story, but they were minimal. Because no judge prevented a speaker from going beyond such legal narratives, they could add more. In addition to legality, they might judge the defendant's action in light of its good for the polis, or beyond the "crime" they might tell of other bad actions by the defendant (e.g., Ariston in Demosthenes 54, "Against Konon"). Although some prosecutors did not limit themselves to these features, all of them usually included at least this much.

You should also note that this form of story was contingent and contestable. There could be other ways of narrating a dispute which changed the parties involved, the acts in question, or the proper field of judgment. As I noted before, part of a dispute may be a struggle over the form the dispute takes. And, in fact, defendants frequently resisted the prosecutor's assertion that the dispute should be understood as a legal case.

Defendants had many rhetorical resources at their disposal: they could deny the narrative coherence of the prosecutor's story (e.g., Antiphon 5, "On the Murder of Herodes") or offer an opposing story of their own; they could ask for the jury's pity; and they could contest the appropriateness of the prosecutor's legal narrative – to resist, that is, the prosecutor's decision to transform the dispute

into a legal case. It is precisely here that I will remind you of the need to refrain from judging what the proper form of a dispute should be. To evaluate an Athenian defendant's speech only in terms of the law, however, is to already endorse – to judge appropriate and right – the prosecutor's decision to transform the dispute into a legal case. You should forebear from such a judgment.

In light of these considerations, then, I would give a rather different lecture about speeches and truth; it might go something like this....

#### SPEECHES & TRUTH

When the son of Teisias rose to respond to Kallikles' accusations, more than the legally defined facts were at issue. Kallikles' had blamed the son of Teisias for flood damage to his farm: a wall built by Teisias years before had blocked an arroyo and during a particularly heavy rain the obstructed waters had flooded Kallikles' farm. The son of Teisias denied at least one of these facts: he claimed there was no natural watercourse across his land. But much of his speech resisted Kallikles' attempt to make their dispute into a legal case; jurors should not vote for Kallikles not merely because the legal facts didn't support him, but also because in this case litigation was inappropriate.

The son of Teisias devoted much of his speech to resisting Kallikles' attempt to transform the dispute into a legal

case. This strategy entailed at least four tactical moves in the story he told.

1. The son of Teisias attempted to shift the subject from a single act of his (or, in this case, his father's) to a series of actions by Kallikles. This involved not merely denying the "facts" of the crime; even more it meant showing that the more meaningful way of understanding the dispute was as a series of interrelated, ongoing events, some of them legal, some not. The conflict was not about a single incident, but a whole series.

2. In a parallel shift, the son of Teisias put Kallikles in the spotlight as the responsible actor. It was not so much that the son of Teisias blamed Kallikles for the dispute as a whole, but that he impugned his motives for turning the dispute into a legal case. He claimed that the prosecution was motivated by greed (section 1) – a desire to get a greater compensation than damage suffered, or to get his land – or by a desire to drive him out of the neighborhood (section 35). But the son of Teisias denounced Kallikles' motives for prosecuting in a much more specific way: he accused him of sykophancy. (He used variants of this word 12 times.) While this word had a range of meanings, defendants often used it to call into question the decision to transform the dispute into a legal case.

3. Just as the dispute should not have been transformed into a legal case, so legality was not the proper ethical field in which to judge Teisias' walling of his property. Instead, the son of Teisias suggested that such an action was

in keeping with the reasonable steps any farmer would take – indeed, the fact that Kallikles had also walled off his property (sections 20, 22, 27) showed that it was reasonable. This is why others had not complained about the son of Teisias’ wall (section 22). Therefore, just as the son of Teisias had not complained when Kallikles walled his land, so the reverse should be the case (sections 29–30).

4. Finally, the son of Teisias argued that jurors were not the party best situated to make a judgement on this matter. This was an argument he had to handle with some tact – after all, he didn’t want to offend the jurors. His claim was not that jurors were incapable of making a fair judgment, but that impartial neighbors knew the facts much better (sections 9 and 35). This was a variation on a common argument that litigants used, that they had been driven to the law only because their opponent had refused to settle the case within the family or local community.

The son of Teisias thus offered a series of arguments which may seem irrelevant to the legal case – but that’s precisely because they were arguments about the question of what context ought to determine relevance. In response to Kallikles’ legal story, he offered not merely a refutation but a competing story which challenged the way a merely legal story gave meaning to these events. The dispute, he implied, should not be understood simply as a legal case – this was Kallikles’ assertion – but as an ongoing conflict between neighbors in which Kallikles behaved unfairly and invoked the law for illegitimate purposes.

I am not arguing that the son of Teisias gives a more complete or truer picture of the dispute. Whether his version is better than Kallikles' is not our job to figure out – that's what the jurors did. The point I've tried to make here is that while Athenian jurors had to decide what the dispute was really about and who was telling the truth, no such burden lies on us. Instead, we should be trying to understand the strategies and resources available to different disputants as they pursued their disputes, without worrying about which were the right ones.

From this perspective, the story of the son of Teisias can be seen, whether true or not, as a highly conventional one. Indeed, studying the range of speeches by Athenian litigants makes it clear that the resistance to litigation was, in a sense, "legalized"; that is, there were conventional and expected arguments used in the courts to make the claim that the dispute should not have been made into a case in the first place. Far from being irrelevant to the legal contest, the question of the appropriateness of the legal setting was always a potential legal issue.

## CONCLUSION

Because it was conventional, because, that is, the kind of story he told was determined by the context in which he told it, the son of Teisias' story cannot be said to capture the whole truth of the dispute. If a dispute is always in part a dispute about what form the dispute should take, about

how to narrate the conflict, then no story can be complete, including the son of Teisias'. This was not simply because it did not narrate the dispute the way his opponent did, but even more because it, too, was determined by the context of litigation. For example, it accepted the dichotomization of the dispute, it took the prosecutor and the defendant as the two primary parties. Along the way, however, the son of Teisias had mentioned other people involved: the mothers of both litigants, his slave Kallaros, Kallikles' brother and cousin, and (at an earlier time) their fathers. Even though we have only the speech of the son of Teisias, we should not assume that any or all of these parties would have understood the dispute in the way he (or Kallikles) narrated it. It is possible, for example, to imagine that Kallaros thought of the dispute as primarily between himself and Kallikles, even if his legal position as a slave didn't allow him to fully pursue it. Or that the mothers of the litigants (who the son of Teisias says were friends) remained friendly and saw the conflict between themselves on the one hand and their bickering sons on the other as the most important. Because slaves and women could not litigate, we never get to hear their voices, never get a story from their perspective. So, for example, Ariston in Demosthenes 54, "Against Konon," makes no attempt to understand the perspective of the slaves who were mistreated, instead interpreting this from his own vantage. Or, Euphiletos in Lysias 1, "On the Murder of Eratosthenes," includes women in his story – his slave, his wife, and an older woman who

tipped him off – entirely as subordinate to his conflict with Eratosthenes, making no attempt to understand how they interpreted the dispute.

Thus, when reading an Athenian legal speech more important than the question, Is this guy telling the truth? – the question the jurors must have asked themselves – are the historians’ questions: How is this guy narrating his story? What stories would other people involved have told? How do I account truly for the shape of the dispute, the conflict over what kind of story to tell?



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