

## XXIV. Lysias and the Law

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Many and varied inferences about Lysias' character and beliefs have been drawn from his speeches.<sup>1</sup> The most recent investigation of this kind which has come to my notice is in Erik Wolf's survey and analysis of Greek attitudes toward law.<sup>2</sup> It is on the basis of Wolf's evidence and conclusions that I wish to raise some questions about Lysias and the "social task" of his rhetoric.<sup>3</sup> My own answers will, I believe, reconcile to some extent the conflicting evaluations of Lysias as an unscrupulous opportunist and as a zealously democratic upholder of law and order.

Beginning with the assumption that the peculiarities of Athenian legal procedure allowed the non-citizen Lysias to introduce into his speeches his own ideas and judgments on the political and social problems underlying many of his cases, Wolf proceeds to investigate the word families of *nomos* and *dikē* in order to assess their implications for Lysias' *Rechtsdenken*. One could immediately object that Lysias' words should not be taken at their face value, that they are only accommodated to the ideals and beliefs of his audience. Wolf recognizes this objection, but prefers to state it in an antithesis between a degenerate lip-service to the ideals underlying these words and an honest statement of a genuine legal system held by the people.<sup>4</sup> And Lysias is the spokesman of this system. By so identifying the speechwriter with his audience, Wolf is able to confute Lysias' detractors and ignore their evidence. Although Wolf's method is philologically unsatisfactory here, his evidence is, nevertheless, accurately interpreted and consistent in the picture it presents of this system and the attitudes

<sup>1</sup> See Friedrich Ferckel, *Lysias und Athen* (Wurzburg 1937); Walter Voegelin, *Die Diabole bei Lysias* (Basel 1943); Eduard Meyer, *Geschichte des Altertums* (Berlin 1902) v. 19 ff.; Ulrich v. Wilamowitz-Moellendorf, *Aristoteles und Athen* (Berlin 1893) II. 218 ff. A partial bibliography and survey of studies on Lysias in this century has been made by Umberto Albini in *Atene e Roma* 14-16 (1954) 56-67.

<sup>2</sup> *Griechische Rechtsdenken* (Frankfort A. M. 1950-6). The chapter on Lysias is in III. 2. 176-200, which is entitled *Die Umformung des Rechtsgedankens durch Historik und Rhetorik*, referred to below as Wolf.

<sup>3</sup> *Ibid.* 200.

<sup>4</sup> *Ibid.* 181 f.

to the law which it suggests. Wolf draws the following conclusions from the evidence. The law (*nomos*) in its written form is a datum which determines the legality of the point at issue which alone is arguable. Illegality is a departure from the provisions of the law. Justice (*to dikaion*) is the satisfaction of the rights (*ta dikaia*) of the individual or the state in a particular situation on which a decision has to be reached by the dikasts. Lysias, however, is not a positivistically inclined adherent of a rigid belief in the letter of the law but is ever ready to weigh the considerations of utility (*to sympheron*), ignoring—probably on the grounds of irrelevancy—the philosophical conflict between right and expediency.

Ohne diese reale Dialektik zu leugnen, aber auch ohne sie zu übertreiben; ohne sich zu widersprechen, aber auch ohne den Ehrgeiz, immer das Gleiche zu sagen; ohne den Anspruch, die Rechtswirklichkeit theoretisch-systematisch fassen zu können; endlich ohne falsches, nur-rhetorisches Pathos hat Lysias die Einheit von *nomos*, *dikē* und *politeia* in Verhältnissen aufgewiesen, wo durchschnittlicher sozialer Erwartung gemäss gelebt wird.<sup>5</sup>

Although Wolf makes some questionable judgments about Lysias' political beliefs and interest in the administration of justice, it is very difficult to quarrel with this statement which fits in so well with many other aspects of Lysias' work. Otherwise, one must admit that the speeches are completely artificial, and any search for Lysias himself in them is fruitless. I myself hesitate to make such an admission. It would make nonsense of a great deal of classical scholarship. But Wolf's picture is incomplete; the other side must be heard.<sup>6</sup>

I cannot go along with Wolf in ignoring the rhetorical side of Lysias' *Rechtsdenken*.<sup>7</sup> In three of his speeches—*On the Death of Eratosthenes*, *Against Theomnestus*, *Against Alcibiades I*—Lysias deals concretely with the laws which bear on his case. His treatment of most of the laws which he cites in these speeches has a common element: it is fundamentally sophistical.

Three laws are cited in Oration 1. The first two—the laws

<sup>5</sup> *Ibid.* 200

<sup>6</sup> The principal advocates of the anti-Lysias side are Wilamowitz, Meyer, and Ferckel; cf. above, note 1.

<sup>7</sup> The material presented here is more fully set forth in my unpublished doctoral dissertation for the Graduate School of Cornell University, *A Study of the Arguments in the Speeches of Lysias* (1958).

on adultery and murder—prove the legality of the defendant's summary punishment of Eratosthenes; the third—the law on assault—is used to justify this punishment. Lysias here points out that the penalty for assault is a fine, except where the woman is of such a status that capital punishment is applicable. This distinction in penalties is used to maintain a distinction in the crimes of rape and seduction (i.e. adultery) in order to magnify the importance of the latter. Lysias' argument ignores the existence of various legal courses and penalties that could be taken against an adulterer, and also the fact that a rapist could be punished by death.<sup>8</sup>

An apparently well-defined legal situation is similarly obfuscated in Oration 10. In order to deny the propriety of Theomnestus' appeal to the law on *kakêgoria*, the speaker contends that the intention of the lawgiver is more significant than the actual phrasing of the law. It is probably true that Theomnestus is not guilty of libel.<sup>9</sup> To prove that he is, Lysias resorts to a fallacious description of the legal situation: "you all know that whoever are killers are also murderers" (§ 7).<sup>10</sup> The subsequent arguments from analogy and the examples of obsolescent terminology in the laws all serve to bolster the contention that what the lawgiver actually wrote ought to yield to what he allegedly intended. While there is doubtless nothing reprehensible in Lysias' tactics here, there is nothing commendable in his attempt to deny Theomnestus his rights.

A sophism is also perpetrated in Oration 14.5–6, where the argument and the prosecution(!) rest on a deliberate misinterpretation of the wording of the law.<sup>11</sup> The defense has contended,

<sup>8</sup> Cf. Ugo E. Paoli, "Il reato di adulterio (*moicheia*) in diritto attico," *Stud. et doc. hist. et iur.* 16 (1950) 123–82. Paoli (164 f.) points out that while the distinction Lysias makes between the two crimes is reasonable and would probably be accepted by the dikasts, the law itself did not make this distinction between seduction and rape. The death penalty and financial compensation (as well as other cruder penalties; cf. Aristophanes, *Nub.* 1083) were equally applicable to either situation.

<sup>9</sup> Cf. J. Sykutris, *Gnomon* 9 (1933) 79–88.

<sup>10</sup> The particular fallacy involved, conversion of subject and predicate, was pointed out by Friedrich Solmsen in his "Die Entwicklung der Aristotelischen Logik und Rhetorik," *Neue Philol. Unters.* 4 (1929) 142, note 2. The inadmissibility of this conversion was early known to Plato and also, it seems, to Protagoras (*Protagoras* 350c–351a).

<sup>11</sup> Cf. Albert Röhlecke, *Zur Erklärung der vierzehnten und fünfzehnten Reden des Lysias* (Magdeburg 1905); Theodor Thalheim, "Das attische Militärstrafgesetz und Lysias 14. 7," *Neue Jahrb. f. Philol. u. Paed.* 115 (1877) 269–72.

correctly perhaps, that Alcibiades committed no crime because the requisite legal conditions for the crime with which he has been charged did not obtain. The prosecution counters this interpretation of the legal situation by maintaining that the phrase in the law, ὅσοι ἂν ἐν τῇ πέζῃ στρατιᾷ μὴ παρῶσι, prohibits transferring from the infantry to the cavalry. Lysias would have the dikasts believe that πέζῃ here refers to the hoplite force, although it was surely meant to refer to the army as distinct from the navy. He conceals this distortion of the meaning of the words through the disturbing *diabolê* in §7: Alcibiades is guilty of all three crimes of which the law takes cognizance. Having thus manipulated the law, Lysias proceeds to argue for a strict interpretation and application of it in this case. He concludes his portrait of Alcibiades as the brazen scofflaw and his arguments on the law, on Alcibiades' actions, on the position of the defense, and on the advantage to the state of a condemnation (§ 5–21) with the following statement:

Therefore, I ask you to acquit Alcibiades if his supporters prove that he served with the hoplites or was a lawfully examined cavalryman. If without a shred of right on their side they bid for favor, you must remember that they are telling you to break your oaths and to disobey the laws. You ought also to remember that in their excessive zeal to aid criminals they will make many men eager to commit the same crimes (§22).

The position of the defense is described as wrong, and its appeal for pity is contrary to the provisions of the Heliast's oath.<sup>12</sup> The attitude taken toward the law here is at variance with the rationalistic arguments about the intention of the lawgiver in Orations 1 and 10.<sup>13</sup> The intention of the lawgiver is whatever the logographer can establish with adequate probability; and so, too, it seems, is the letter of the law.<sup>14</sup>

<sup>12</sup> This argument is a commonplace in Lysias, and also in the hand-books of rhetoric. See Aristotle, *Rhet.* 1375b 16 f.; [Cicero] *Rhet. ad Her.* 2. 48, the fourth locus, and Harry Caplan's note on this passage, and note B, page 146 f., in the Loeb Classical Library edition (London 1954).

<sup>13</sup> Cf. 1.29, 31, 32 f.; 10.7 ff.; 13.71.

<sup>14</sup> This contrast in treatment of the law is rather at variance with Wolf's attribution to Lysias of a "strenge Gesetzlichkeit" (above, note 1, 183 and 187). Lysias, however, does not stand alone in this treatment of a law. The author of Or. 9 in the Lysian corpus handles the legal situation of his case in much the same way as Lysias; cf. Marcel Bizos' introduction to this speech in the Budé *Lysias* (Paris 1924), especially page 182, note 1.

There is a legal enactment which looms large in several of the trials in the twenty years or so after the restoration of the democracy. This is the Amnesty of 403, of which the principal operative provision seems to have been expressed by the phrase *καὶ οὐ μνησικακήσω τῶν πολιτῶν οὐδενί* (I will not remember wrongs done by any of the citizens).<sup>15</sup> The main purpose of the Amnesty was to obliterate, with certain exceptions, the memory of all crimes committed before its acceptance, and thus assure some stability for the new government. The situations in which Lysias faced the Amnesty compelled him to discover arguments for and against its application to his cases. Two of these trials are *dokimasiai* (Orations 25 and 26), where the Amnesty was probably not strictly pertinent, though it was always possible to argue in (or contrary to) the spirit of the Amnesty. Oration 25 presents the case for, Oration 26 the case against, recourse to the Amnesty. In 25 the Amnesty is first mentioned in conjunction with an argument on the need and benefit of *homonoia* in the state (§ 23). A little further on it provides an element in an argument from the authority of those men who were responsible for it and were guiding their political activity by it (§ 28).<sup>16</sup> Although the decree itself is used only as confirmative evidence, the whole argument on political harmony and stability is fully within the spirit of the Amnesty, and, indeed, is founded on it as a real element in Athenian life. In Oration 26, however, Lysias devotes a special argument to attack his opponent's appeal to the Amnesty (§ 16–20). The burden of the argument is that the *dēmos* did not intend the Amnesty to protect all those who remained in the *asty* but only the guiltless. This view is attested by the example of those who have been honored for their efforts in preventing wide-scale murder of citizens and in bringing about the restoration of the democracy. These notions might be the legitimate belief of a group of citizens, but they are here beside the point, and, as far as we can judge, contrary to both the meaning and the purpose of the Amnesty. Lysias caps his arguments by contending that the Amnesty was a gift to the good oligarchs, and the institution of the *dokimasia* a countermeasure to criminals. This is patently false, but indicative of the degree to which Lysias thought it safe to try to deceive an audience.

<sup>15</sup> Andocides 1.90; Aristotle, *Ath. Pol.* 39.6.

<sup>16</sup> Cf. Isocrates 18.23–4.

A similar contrast in the use of the Amnesty as a factor in the trial is seen in Orations 13 and 18. In 18.14–19, it is implied that the prosecution's case violates the Amnesty, and the dikasts are rebuked for having allowed the adverse verdict to be given. The pattern of the argument is similar to that in Oration 25. Recourse to the Amnesty is made through oblique suggestion rather than direct appeal. The natural inference is that, as in Oration 25, so in this case, the Amnesty was not juridically applicable. Such perhaps was also the situation in the trial of Agoratus<sup>17</sup>; nevertheless, as in the speech against Evander, Lysias felt the need of a specific argument against appeal to the Amnesty. Two arguments are raised. First, the speaker charges that Agoratus' appeal to the Amnesty is an implicit admission of guilt because he has no confidence in his case. Furthermore, the dikasts are there to hear his defense against the accusation that he laid an information which was the direct cause of the judicial murder of the dead men. This device of insisting that the defendant prove such and such (usually what he cannot and does not have to prove) is simply an attempt to distract the dikasts from the real issue.<sup>18</sup> The second argument likewise fails to deal with the real point at issue. Lysias seizes on the accidental fact that the Amnesty was formally an oath-bound agreement between two parties. On this external factor Lysias constructs the reasonable argument that, if the oaths were taken between two different parties, and Agoratus and his accusers were members of the same party, there is no oath or agreement between them. The argument, of course, is refuted by the wording of the oath.<sup>19</sup> This interpretation is of a kind with that of the law on military service in the speech against Alcibiades.

<sup>17</sup> The legal problems of this trial have yet to be satisfactorily explained. Cf. Ugo E. Paoli, "Il processo di Agorato," *Riv. di filol. e d'istr. cl.* 10 (1932) 289–308; *idem*, *Studi sul processo attico* (Padua 1933) 139 ff.; Albert Schweizer, *Die 13. Rede des Lysias* (Leipzig 1936) 91 ff.

<sup>18</sup> Cf. §49 f.; also 12.34; 22.6; Franz Laemmli, *Die Attische Prozessverfahren in seiner Wirkung auf die Gerichtsrede* (Paderborn 1938) 62 f. That the avoidance of the facts of a case by shifting attention to related issues is an essential part of Lysias' argumentative technique was made abundantly clear by Karl Schön in his *Das Scheinargumente bei Lysias* (Paderborn 1918).

<sup>19</sup> This argument has come in for heavy fire from Lysias' editors and critics; cf. Schweizer (above, note 17) 91. It is his handling of the Amnesty, along with his alleged distortions of factual evidence, that has furnished his detractors with their main evidence against him. The case against Lysias is put thoroughly, though tendentially, by Friedrich Ferckel (above, note 1) 119–35.

I do not outline this evidence in order to denigrate Lysias, though I believe he justly deserves criticism, but to demonstrate the curious antinomy in his *Rechtsdenken*. If the evidence gathered by Wolf is a true index of Lysias' attitude toward the law, then his handling of legal issues must be due to courtroom tactics reinforced by the precepts of his rhetoric. The implications of this conclusion are not pleasant. If his treatment of the law mirrors his beliefs about it, then he is little more than the facile spinner of phrases castigated by Plato in his *Phaedrus*. Neither inference seems wholly admissible. I believe a more satisfactory conclusion can be reached.

The intellectual background of these apparently incompatible attitudes toward the law is easily discernible. The *Rechtswirksamkeit* which Wolf espies in Lysias' work is essentially the traditional *dikaïosynê* of the city-state.<sup>20</sup> That it comes forward more in Lysias' speeches than in Antiphon's and Andocides' is probably a result of the distortions in the administration of justice, which were one of the fruits of the Peloponnesian war, and the result also of the need to reassert the traditional (and democratic) concept of justice, as well as of the intellectual conflicts about the nature and function of laws, which the Sophists stimulated. We see this conflict clearly delineated in the fragments of Antiphon the Sophist, the Anonymus Iamblichi, and the Anonymus *Peri nomôn*.<sup>21</sup>

Antiphon attacks the popular definition of justice as obedience to the laws: "justice is not to transgress the legal prescriptions of the state in which one lives" (DK 87B 44, I, Frag. A, Col. 1, 6 ff.). The inadequacies of this conception of justice are shown by the very human fact that men are more likely to act for their own advantage than from their belief in justice (*ibid.* 12 ff.). Besides, the laws often fail to protect the individual in his relationships with his fellow citizens (cols. 5 and 6), while action in accordance with the law is harmful both to the object of the action and to the doer himself (II, cols. 1 and 2). Antiphon's conception of justice, based on nature (*physis*), reduces the city-state *eunomia* to *anomia*, which he interprets not as anarchy but as the autonomy

<sup>20</sup> Cf. Werner Jaeger, *Paideia*, Engl. ed. (Oxford 1954) I.104 ff.

<sup>21</sup> Diels-Kranz, *Die Fr. d. Vors.* 87B 44, and 89; [Demosthenes] 25.15-35, 85-91, 93-6 (cf. Mario Untersteiner, *The Sophists*, Engl. ed. (Oxford 1954) 336-9, and Max Pohlenz, "Anonymus *Peri nomôn*," *Nachr. v. d. Gesellsch. d. Wissensch. z. Gött.* (1924) 19-37, which I have been unable to obtain).

of the individual.<sup>22</sup> This aristocratic notion is opposed by the democratically inclined Anonymus Iamblichii and Anonymus *Peri nomôn*.<sup>23</sup> The former synthesizes the dialectic of *nomos* and *physis* by insisting on the natural basis of the laws which are a prerequisite of society and state (DK 89, 6, 1). He attempts to solve the problem of right as opposed to advantage by positing *eunomia* as the true source of advantage (7.1–3). The Anonymus *Peri nomôn* keeps the antithesis of *physis* and *nomos* but implicitly denies that nature is the source of good. Quite the contrary, he makes it the source of evil, and the laws the source of justice, goodness, and utility (§ 15–16). The aim of the law is twofold: the prevention of injustice and the improvement of the citizenry through punishment of the criminal (§ 17). The existence and operation of the state depend on the existence of laws and obedience to them. Unilateral, arbitrary action results in the collapse of the state and the reduction of human society to the bestial (§ 20). So much then for *anomia* and the autonomy of the individual. The natural order of things, say these two authors, is the rule of law, which becomes in practice the “popular system of law” that, according to Wolf, underlies Lysias’ legal terminology. But this solution scouts the issue raised by Antiphon. Right and expediency frequently collide, and when they do, expediency was only too likely to win out. The demands of public policy and the needs of the individual litigant (or even a witness: note the sorry role of Anytus in the speech against the grain dealers) had to be satisfied.<sup>24</sup>

The missing element in both the oligarchic and the democratic attitudes toward the law at this time is not willingness to obey it but respect (*aidôs*) for it.<sup>25</sup> The ordinary Athenian, unlike

<sup>22</sup> Cf. Mario Untersteiner (above, note 21) 246 ff.; Wilhelm Schmid, *Geschichte d. Griech. Literatur (Handb. d. Altertumsw., Abt. 7)* 1.3.1 (Munich 1940) 161 f.

<sup>23</sup> It is irrelevant for my immediate purpose here whether these authors were expressly opposing Antiphon. They probably were not.

<sup>24</sup> There is hardly any need to cite examples; reference to Thucydides is sufficient. But see Lysias, Orations 12, 14, 22, 28–30; Isocrates, 17 and 21; Isaeus, 1–6 and 8–11.

<sup>25</sup> Cf. Werner Jaeger, *Paideia*, Engl. ed. (Oxford 1947) III.122 and 237; Isocrates, *Areop.* 48; Plato, *Laws* 69B, 5 and 699c, 4; Thucydides 2.37.3, and A. W. Gomme’s note on this passage in his *Historical Commentary on Thucydides* (Oxford 1956). In view of the very common tendency to view the *dêmos* in Athens as a perverter of its aristocratic values, it is worth reiterating that it was the aristocratic oligarchs (Critias *et al.*) who went farthest in destroying the *dikaioσynê* of the state and in rationalizing this policy.



Socrates, would have accepted the opportunity to escape from prison. The Athenians fully recognized the need for laws and, if need be, were willing to obey them. Tens of thousands of them died for their belief in Athens and the rule of law.<sup>26</sup> Of whom besides Socrates are we told that he died because of his *aidôs* for the law? It is not altogether right either blindly to praise Lysias for his adherence to his belief in the democratic rule of law or, with equal blindness, to condemn him for his readiness to subvert a law for his immediate advantage. We are here dealing with a discordance in Lysias' *Rechtsdenken* which seems also to have been present in that of his clients. Wolf is certainly right. Lysias did have a high regard for the values of the law and the proper administration of justice. But at the same time he has that Athenian disrespect for the specific law, which Aristophanes caricatures in the figure of Strepsiades. A single example of this tension or dialectic between *dikaïosynê* (in its fullest meaning for the city-state) and *to sympheron* should suffice. In his speech for Euphiletus who was charged with illegally executing his wife's lover Eratosthenes, Lysias grounds his defense on a rigid adherence to the principle that obedience to the law is just and right.<sup>27</sup> He sums up his position in the statement:

I think that all states institute their laws for the following reason. If we are in doubt about what action to take, we may go to the laws and see what we must do (1, 35).

Euphiletus, Lysias argues, did follow the guidance of the laws when he put Eratosthenes to death, and is now in mortal peril because of his obedience to these laws (§ 50). This is precisely the paradox which Antiphon uses to justify the superiority of the dictates of nature to the fetters of man-made law (DK 87B 44, 1, Frag A, cols. 4–6). Lysias, of course, could not use such an answer in this context, even if he believed it correct. It is significant, however, that he does not really question the validity of the laws but rather the human factors which brought about this paradoxical situation. He defends the legality and justness of Euphiletus'

<sup>26</sup> Cf. [Lysias] 2.25; Hyperides 6.25 f.

<sup>27</sup> The tactics here are, as usual in Lysias, designed to shift the attention of the dikasts from the actual charge which seems to have been laid—the way, not the fact, in which Euphiletus killed Eratosthenes was illegal. Cf. Franz Laemmli (above, note 18) 64–6; Kurt Latte, *Hermes* 66 (1931) 132 f.

act and contrasts his attitude to the laws with the machinations and consequent distortions of the legal situation being practised by the prosecution (§28). Throughout the speech, he insists on the juridical position of the defendant rather than the wider question of its justness which, nevertheless, stems directly from it. Compare this approach and its implications for Lysias' *Rechtsdenken* with his arguments on the laws which he cites (§ 29–33). There the laws are the inviolable mentors of social action; here they are only springboards from which to launch his arguments. These highly rational and skilfully articulated arguments are the sole center of interest. This kind of legal argument is by no means reprehensible (except where it descends to sophistry as in §32), but it is far removed from the reverential awe for the law demanded by Euphiletus' conduct.<sup>28</sup> I do not know how far these two attitudes are compatible, nor whether this tendency to rationalization was truly disruptive, as Aristophanes supposed. I do suggest, however, that it was not a wholly auspicious introduction to a new era in Athenian forensic oratory nor an adequate conception of the social task of rhetoric.<sup>29</sup>

<sup>28</sup> I would lay this deficiency in Lysias to his lack of feeling for Athenian tradition and his falling back on a rationalistic approach to life in the polis, a result perhaps of his own legal position in Athens. Cf. Karl Jost, *Das Beispiel und Vorbild der Vorfahren bei den attischen Rednern und Geschichtschreibern bis Demosthenes* (Paderborn 1936) 100 f., 108, 118 f. Andocides, whose attitude to the place and use of law in a trial is the same as Lysias', handles his legal arguments altogether differently; compare his speech *On the Mysteries*, 82–9, with Lysias 1.28–33. Antiphon (5.14 and 6.2–6) still maintains the traditional respect for the law. An oligarchic answer to Lysias, if one is wanted, is given by Critias (Diels-Kranz, *Vors.* 88b 22) who would also support Antiphon the Sophist against the Anonymus *Peri nomôn*.

<sup>29</sup> Wolf (above, note 1) 200. I prefer Plato's view of the use of rhetoric, given in *Phaedrus*. Aristotle's rejoinder, which is essentially that of Gorgias (*Gorgias* 457A–B), begs the question. I wish to thank Professor Harry Caplan of Cornell University for his useful criticism of this paper.