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φιλοδικεῖν δοκοῦμεν:
Law and Paradox in the Athenian Empire

By *Richard I. Winton, Sheffield*

‘καὶ ἐλασσούμενοι γὰρ ἐν ταῖς ξυμβολαίαις πρὸς τοὺς ξυμμάχους δίκαις καὶ παρ’ ἡμῖν αὐτοῖς ἐν τοῖς ὁμοίοις νόμοις ποιήσαντες τὰς κρίσεις φιλοδικεῖν δοκοῦμεν.’

Thucydides I 77, 1 remains problematic: the two most recent of the many discussions of this sentence disagree radically¹. It seems possible that understanding of 77, 1 may have been hampered by an assumption common, as far as I am aware, to all who have discussed the passage: the assumption that whatever the Athenians’ point is, they are in their expression of it speaking literally. The interpretation I offer has as its basis the suggestion that the force of 77, 1 lies in the Athenians’ use of the term φιλοδικεῖν as a metaphor; a metaphor structural to a thesis that forms the focus of the Athenians’ argument from the latter part of Chapter 76 to the end of Chapter 77.

At 75, 1 the Athenians, having argued that victory in the Persian War had been due above all to Athens, suggest that recognition of this should temper the hostility the Greeks feel towards her on account of her ἀρχή. They make the point that Athens had accepted ἀρχή at the invitation of her allies, on Sparta’s withdrawing; having acquired ἀρχή, Athens had found herself obliged to retain it, above all by fear for her security. Sparta has arranged matters in the Peloponnesus to suit her interests; and had she continued to lead the Greeks against Persia, she would herself have faced the dilemma of either ruling with a firm hand or putting herself at risk. There is then nothing remarkable in Athens’ having held on to her ἀρχή; it has, rather, always been the rule for the weak to be subjugated by the strong. The Athenians consider themselves worthy of their position; a view the Spartans have shared, ‘until through calculation of advantage you now advance the principle of Justice’².

The relative clause that follows is generally taken to dismiss such an appeal as Utopian; Jowett, for example, translates: ‘Did justice ever deter any one from taking by force whatever he could?’³ This interpretation seems open to query. First, the Athenians have emphasized at 75, 2 that Athens acquired her ἀρχή not by force but by invitation, a point repeated earlier in the sentence that the

1 G. E. M. de Ste. Croix, *Cl. Quart. n.s.* 11 (1961) 96ff.; Russell Meiggs, *The Athenian Empire* (Oxford 1972) 228ff. For references to earlier discussions, see R. J. Hopper, *JHS* 63 (1943) 35, and Gomme ad loc.

2 This translation is designed to reflect the word-play of λογιζόμενοι / λόγω.

3 B. Jowett, *Thucydides translated into English ... I* (Oxford 1881) 49.

clause we are considering concludes (ἀρχήν ... διδομένην); the Athenians have indeed admitted that Athens has used force to retain her ἀρχή, but the concluding relative clause of 76, 2 speaks of acquisition, not retention: κτήσασθαι as opposed to κεκτῆσθαι. Secondly, the Athenians go on to imply that in her relations with her subjects Athens does to a degree respect Justice; and at 77, 3 imply that νόμος has restrained her from unabashed aggrandizement at her allies' expense. One may then wonder whether their remark at the end of 76, 2 has not been misconstrued. The Athenians' concern here, I suggest, is not to reject considerations of justice as irrelevant to the realities of power, but to assert that in her exercise of power Athens uniquely recognizes their force. I take the relative ὃν as adversative⁴, the phrase οὐδείς πω to mean not 'no one ever' but 'no one hitherto'⁵, and punctuate with a colon after χρῆσθε and a comma after ἀπετράπετο (as against the Oxford text's comma and full-stop respectively)⁶: 'But no one hitherto, finding himself in a position to acquire something by might, allowed this principle the greater weight, and desisted from aggrandizement; and praise is merited by those who, holding dominion over others in accordance with man's natural propensity, respect Justice to a greater extent than, given their power, they are obliged to.' The Athenians thus deftly exploit the Spartans' disingenuous espousal of the principle of Justice against the Spartans themselves: not merely is it the case that Athens does in fact respect this principle, but the Spartans transgress it in failing to reward Athens' unprecedented self-restraint with the praise it deserves.

'Should others acquire what is ours', the Athenians continue, 'they would we think provide excellent evidence as to whether we conduct ourselves with some degree of moderation.' The Athenians are clearly aware that, as things stand, their claim is not obviously plausible; they go on to account for this by means of a paradox: it is precisely the fact that Athens does exercise moderation that makes her claim to do so seem implausible: 'But for us, the fruit of our very reasonableness has, unreasonably, turned out to be obloquy rather than praise'⁷: 77, 1, as the γάρ indicates, is intended to elucidate this paradox. How does it do so?

The verb φιλοδικεῖν and adjective φιλόδικος are, as Turner pointed out, of 'surprisingly rare occurrence': he was able to find 'only six [other] instances ... to the end of the fourth century'. Turner argued that analysis of the other instances of these words shows that what makes a man φιλόδικος 'is that he rushes to prosecute at law on a trifling pretext, to gain however slight an advantage or to avenge a fancied wrong'; φιλοδικεῖν δοκοῦμεν at 77, 1, then, 'can mean no more than <we have a reputation for entering on (vexatious or trifling) litiga-

4 So Classen-Steup; cp. I 39, 4, and Kühner-Gerth II 435.

5 Cp. I 37, 2 (where, however, the context precludes ambiguity).

6 Classen-Steup adopt this punctuation, but follow the conventional interpretation.

7 This translation is designed to reflect the word-play of ἐκ τοῦ ἐπιεικοῦς / οὐκ εἰκότως.

tion,⁸ This view is now generally accepted⁹. However, an alternative interpretation is perhaps possible.

In the case of five of the other instances of these words¹⁰, 'litigious' provides an excellent sense. At [Dem.] LVI 14, however, this meaning seems difficult. The speech is that against Dionysodorus¹¹. The plaintiff, Darius, and his partner Pamphilus had lent Dionysodorus 3000 drachmae, at interest, for a voyage from Athens to Egypt and back; should Dionysodorus violate the agreement, he was to pay double the sum of the loan. When Parmeniscus, Dionysodorus' agent, sailed from Athens, the price of grain was high; when subsequently it fell, Dionysodorus sent a messenger to Rhodes, where Parmeniscus would call on his return voyage. Having received the message, Parmeniscus sold his cargo at Rhodes, thus violating the agreement, which stipulated that the cargo be brought to Athens. When Darius and Pamphilus learnt of this, they complained to Dionysodorus and requested payment of the sum agreed upon in case of default. Dionysodorus proving intractable, they asked that he at least repay the principal plus the interest originally agreed. Dionysodorus offered to repay the principal plus the interest as far as Rhodes. Darius and Pamphilus were advised to accept what was offered, and sue for the difference between the interest offered and that originally agreed.

The sentence that concerns us is that in which Darius explains why he and his partner accepted this advice: it was not that they did not know what the agreement entitled them to; they thought they ought ἐλαττοῦσθαι τι καὶ συγχωρεῖν, ὥστε μὴ δοκεῖν φιλόδικοι εἶναι. Now an essential element of the course they proposed to adopt to avoid being thought φιλόδικοι was taking their opponent to law; it is then difficult to suppose that the word φιλόδικος here means 'litigious', since taking someone to law is precisely what may occasion a charge of litigiousness. Now Turner points out that φιλόδικος / φιλοδικεῖν is used only of a *plaintiff*. A plaintiff is, typically, someone seeking to enforce his legal rights, or to obtain legal redress for a wrong he has suffered. Thus a word normally used to denote 'overfondness of going to law' could, without too much strain, be used to denote 'overfondness for obtaining one's due'; and φιλόδικος is, I suggest, so used here¹². Darius' point will be that while the agreement stipulated payment of double the principal in case of default, he and his partner did not intend to press for payment of this, but would be content to receive less than

8 E. G. Turner, Cl. Rev. 60 (1946) 5.

9 Both de Ste. Croix and Meiggs accept it, as does Philippe Gauthier, *Symbola* (Nancy 1972) 164.

10 The references are: Lys. X 2; [Dem.] XL 32; Aristotle *Rhet.* 1373 a 35. 1400 a 19; [Aristotle] *Rhet. ad Alex.* 1444 a 30.

11 The following summary of the opening section of the speech considerably condenses its argument.

12 It is perhaps worth noting that this sense would fit excellently at Lys. X 2 and Aristotle *Rhet.* 1373 a 35.

they were strictly entitled to, in order not to seem to insist intransigently on their rights.

Turner notes that while in the Demosthenes passage the speaker says 'we thought we ought ἐλαττοῦσθαι τι καὶ συγχωρεῖν, in order not to seem φιλόδικοι', the Athenians, though ἐλασσούμενοι, do not escape such an imputation. Turner comments: 'Thucydides is in fact propounding a paradox.' I should prefer to say that 77, 1 expounds a paradox, since it is intended to elucidate the paradox of 76, 4; the paradox that Athens' self-restraint has generated not praise but obloquy. Consider now 77, 3–4: 'But they [that is, Athens' subjects], having become accustomed to associating with us on an equal footing, should they, notwithstanding their thinking it wrong, by virtue of some decision of ours or of the power we derive from our empire suffer even the most trifling loss, they do not feel gratitude for their not being deprived of the major part of what is theirs, but in respect of what they miss feel more hard done by than had we from the first set law aside and frankly exploited our advantage; in that case, not even they would have disputed the proposition that the weaker must yield to the strong. The experience of injustice, it seems, provokes greater resentment than does that of *force majeure*: the one is thought tantamount to being taken advantage of where the parties are equal, the other to being coerced where the balance is uneven.'

One might gloss this passage as explication of how Athenian moderation has generated obloquy – that is, of the paradox stated at the end of Chapter 76 and (somehow) elucidated in 77, 1: it is, the Athenians argue, precisely because Athens has observed νόμος in her relations with her subjects that the latter feel such resentment. Now whatever the exact meaning of the participial clauses of 77, 1, it seems clear that the first of these refers to some abnegation on Athens' part in regard to legal relations with her allies. This hint of connexion between 77, 1 and 77, 3–4 seems worth pursuing.

At 77, 3–4 the Athenians maintain that Athens' forbearance is responsible for her subjects' resentment of her exercise of power, and their refusal to acknowledge the principle that 'the weaker must yield to the strong'. This principle the Athenians have already adduced at 76, 2, where they assert that Athens' subjugation of her allies does not lack precedent; it has, on the contrary, 'always been the rule for the weaker to be held down by the more powerful'¹³. I suggest that the phrase φιλοδικεῖν δοκοῦμεν in 77, 1 is to be understood in terms of this principle, φιλοδικεῖν having the force φιλόδικος, as I have argued, has in the Demosthenes passage: 'we are thought to insist obdurately on our prerogative' – that is, the Athenians are thought to enforce to the uttermost their rights as the stronger power; *this* is the obloquy referred to in the preceding sentence: repu-

13 Cp. Gomme's comment ad loc.: 'The first frank expression of selfish imperialism, the natural right of the stronger to act as he would, in the *History* ... There are many others, culminating in the Melian Dialogue.'

tation as ruthless imperialists. So understood, the phrase constitutes further connexion between 77, 1 and 77, 3–4, where the Athenians speak of the sense of *undue* oppression experienced by Athens' subjects. Here, however, a complication arises. The obloquy Athens suffers comes above all from her subjects. Now a crucial element of the argument of 77, 3–4 is that Athens' subjects fail to acknowledge the principle that 'the weaker must yield to the strong'. But the phrase φιλοδικεῖν δοκοῦμεν, on the interpretation proposed, implies that they do accept this principle; their complaint will be that Athens is too ruthless in applying it. To meet this point, I suggest that at 77, 1 the Athenians are expressing the reproach brought against Athens – the charge of ruthless imperialism – *in their own terms*; a manoeuvre whose force may emerge from consideration of the participial clauses that precede it.

If the main clause of 77, 1 specifies the obloquy Athens suffers, these clauses will specify the moderation from which it results. It is, I think, agreed that the ξυμβολαῖαι δίκαι referred to in the first clause are the δίκαι ἀπὸ ξυμβολῶν referred to in, for example, the Phaselis decree; that these ξυμβολαῖαι instituted reciprocal arrangements between Athens and individual allies for judicial settlement of disputes between Athenian citizens and citizens of the allied city; and that there is no evidence elsewhere to suggest that Athens required all δίκαι ἀπὸ ξυμβολῶν to be tried at Athens¹⁴. What remains controversial is the criterion determining place of trial: the usual view is that trial was in the city of the defendant; Gauthier¹⁵ has recently made a strong case for the view that trial was in the city where the dispute arose.

Now at 77, 3 Athens' subjects are said to have become accustomed to associating with the Athenians on an equal footing, as a result of Athens' not having set law aside in her dealings with them. The second participial clause of 77, 1 concerns trials at Athens, and on a straightforward reading these trials will be of lawsuits of the class referred to in the first clause – ξυμβολαῖαι δίκαι between Athenians and allies. I suggest that the participial clauses of 77, 1 specify Athens' reasonableness at first, the derogation in principle involved in lawsuits between Athenian citizens and their *subjects*; secondly, Athens' administration of ξυμβολαῖαι δίκαι held at Athens – these are tried precisely as are lawsuits in which both parties are Athenian, before juries comprising Athenian citizens and according to Athenian law. I propose the following translation: 'For the consequence of our *abnegation* in the covenanted lawsuits with our allies, and of our having established trial of these before juries on which we ourselves sit, according to the laws by which cases between ourselves are judged – the consequence is that we are felt to insist obdurately on our prerogative.' Some comments on this translation. (i) I take the initial καὶ to emphasize ἐλασσούμενοι: cp. Denniston, *Greek Particles* 110. (ii) I take ἐλασσούμενοι as middle, not

14 See de Ste. Croix 95ff.; Meiggs 229ff.; Gauthier 174f.

15 175ff. (references for the usual view, 175 n. 8).

passive¹⁶: cp. Plato, Rep. 549 c 5, [Dem.] LVI 14 (and n. 18 below). (iii) I take the force of *παρ'* ήμιν αὐτοῖς to be that δίκαι ἀπὸ ξυμβολῶν at Athens are tried before Athenian juries: for this judicial sense of *παρά* with the dative, see H. T. Wade-Gery, *Essays in Greek History* (Oxford 1958) 185f. (iv) I take the word ὅμοιος in the phrase ἐν τοῖς ὅμοιοις νόμοις to mean 'according to the same laws', i.e. the laws that apply in cases between Athenians; for ὅμοιος in this sense, cp. I 86, 2; V 16, 3¹⁷. (v) The present participle ἐλασσούμενοι I take to denote a continuing circumstance – the Athenians' abnegation has been and is manifested in each δίκη ἀπὸ ξυμβολῶν; the aorist participle ποιήσαντες denotes the Athenians' having arranged how δίκαι ἀπὸ ξυμβολῶν at Athens are to be dealt with (cp. Classen-Steup ad loc.). (vi) I take both participles to be causal, not concessive: in 77, 1 the Athenians are amplifying their paradoxical assertion that the ἀδοξία Athens suffers *is the result of* her reasonableness (ἐκ τοῦ ἐπιεικοῦς, 76, 4).

The paradox, thus specified, is clear: the Athenians' *condescending* to litigate with their subjects in ξυμβολαῖαι δίκαι, and their administration of those ξυμβολαῖαι δίκαι held at Athens on the same basis as lawsuits in which their own citizens alone are involved – this has had the result that Athens' subjects regard her as excessively exacting¹⁸: the allies' parity with Athenian citizens in respect of access to Athenian courts and Athenian law having bred illusion of parity tout court, and thus furious resentment of the slightest exercise by Athens of her actual superiority¹⁹.

The Athenians' analysis of the paradox does not immediately follow their statement of it; 77, 2 intervenes, and itself requires discussion. Before I turn to this, two points concerning the proposed interpretation of 77, 1. First, the force of the Athenians' metaphorical re-statement of the obloquy Athens suffers

16 With the scholiast, and, e.g., Jowett and de Ste. Croix.

17 So, e.g., Jowett and Gauthier 189. (On the significance of (non-metic) foreigners' access to Athenian courts see Gauthier 155.) de Ste. Croix takes the force of ἐν τοῖς ὅμοιοις νόμοις to be that Athenian courts, unlike those in allied cities, give impartial verdicts (98ff.). But (i), the Athenians refer not to verdicts (or courts), but *laws*; it is difficult to believe that the actual *laws* by which δίκαι ἀπὸ ξυμβολῶν were tried in allied cities discriminated against Athenians. (ii) It is surely implausible to suppose that allied courts *regularly* gave unfair verdicts in δίκαι ἀπὸ ξυμβολῶν involving Athenians; apart from the circumstance of the imbalance of power between the allies and Athens, such conduct could readily be countered by similar conduct on the part of the Athenians.

18 Cp. Aristotle's discussion of whether it is possible to wrong oneself at *Eth. Nic.* 1163 b 19ff.: εἴ τις πλέον αὐτοῦ ἔτέρῳ νέμει εἰδὼς καὶ ἔκών, οὐτος αὐτὸς αὐτὸν ἀδικεῖ· ὅπερ δοκοῦσιν οἱ μέτριοι ποιεῖν· ὁ γάρ ἐπιεικῆς ἐλαττωτικός ἐστιν· ή οὐδὲ τοῦτο ἀπλοῦν; ἔτέρου γάρ ἀγαθοῦ, εἰ ἔτυχεν, πλεονεκτεῖ, οἷον δόξης ή τοῦ ἀπλῶς καλοῦ. The Athenians' grievance is that in their case the reverse has occurred.

19 The interpretation of the Athenians' argument proposed implies that Athenians were involved in δίκαι ἀπὸ ξυμβολῶν with citizens of at least a significant number of allied cities; cp. on this point Gauthier 201.

becomes clear: they are juggling with the concept of law, using it literally in the participial clauses of 77, 1, metaphorically in its main clause²⁰. Secondly, the interpretation I propose is, I think, viable on either view as to place of trial; though it is worth noting that on the view that δίκαιοι ἀπὸ ξυμβολῶν were tried in the city where the dispute arose, one supposes that the majority of δίκαιοι ἀπὸ ξυμβολῶν will have been tried at Athens.

To turn now to 77, 2. Most translators take the antecedent of τοῦτο in the clause διότι τοῦτο οὐκ ὄνειδίζεται to be φιλοδικεῖν; I suggest the following translation: 'And none of them considers why it is that for those elsewhere who hold dominion, and exercise less moderation than we towards their subjects, *this* is not made a matter of reproach; the reason being that those to whom it is open to use force *majeure* have no need at all to make use of law.'²¹ For τοῦτο referring to a preceding element of the same sentence, cp. III 45, 2; for ὄνειδίζεται with the sense 'be made a matter of reproach', cp. Plato Tim. 86 d 7.

In 77, 3–4 the Athenians, I have argued, explain how Athens' abnegation has engendered such bitter hostility among her subjects; at 77, 5 they reinforce their argument by maintaining that these same subjects suffered harsher treatment under the Persians, and tolerated it. At this point the Athenians suddenly shift their argument: 'Under the Persians they received harsher treatment than this, and put up with it; while our rule seems severe – understandably: the present yoke is always heavy.' The Athenians' position here is inconsistent: if subjection is always experienced as oppressive, subjection to Persia will have been experienced as oppressive. Consideration of 77, 6 may elucidate this abrupt shift in argument, which seems to cast aside the analysis of the ideology of empire expounded at 77, 3–4.

In 77, 6 the Athenians argue that *Spartan* rule would prove unpopular: 'Should you establish dominion, having overthrown us, you would soon effect a reversal of the goodwill you have acquired as a result of fear of us – if the principles intimated by your conduct during your brief tenure of command against the Persians are those that you will now also act upon.' The second sentence of 77, 6 comprises two clauses; the first refers to Spartans at Sparta, the second to Spartans when outside Sparta. I suggest that ἀμεικτος in the first clause has the sense 'unapproachable' (cp. Isoc. Euag. 67; [Dem.] XXV 63), and translate: 'For access to the ordinances²² that obtain among yourselves is barred to others; and moreover, every one of you who goes abroad observes neither these nor those established elsewhere in Greece.' I take the Athenians' point to be that should Athens' allies become subject to Sparta, they will lack means of legal redress for

20 The preceding word-play (see nn. 2 and 7 above) is perhaps intended as a linguistic parallel to this conceptual dexterity.

21 So the scholiast: οὐκ ὄνειδίζεται τὸ βίαιον τῆς ἀρχῆς παρ' ἄλλοις, ἀλλὰ μόνοις παρ' ἡμῖν.

22 Cp. the Athenians' reference to Spartan conduct at Sparta at V 105, 4: Λακεδαιμόνιοι γὰρ πρὸς σφᾶς μὲν αὐτοὺς καὶ τὰ ἐπιχώρια νόμιμα πλεῖστα ἀρετῇ χρῶνται.

the wrongs individual Spartans can be predicted to perpetrate against them, since legal process at Sparta is open only to Spartans (and Spartans would be unlikely to submit to jurisdiction elsewhere). The Athenians' assertion may be strictly speaking false²³; their claim may rest imply on the Spartan practice of ξενηλασία (so the scholiast: οὐδενὶ γὰρ ξένῳ μετεδίδοσαν τῶν παρ' αὐτοῖς νομίμων οἱ Λακεδαιμόνιοι, ἀλλὰ καὶ ἐξενηλάτουν)²⁴.

Now on the Athenians' analysis at 77, 3–4, Spartan harshness would in fact be ideologically beneficial to Sparta: uncompromising imperialism, the Athenians have argued, generates less resentment than does the temperate variety practised by Athens. I suggest that at 77, 5 the Athenians, perceiving this unwelcome implication of the extravagantly paradoxical analysis they have put forward, adroitly switch to a far more straightforward explanation of Athens' unpopularity, an explanation that permits reference to the uninhibited imperialism that can be predicted of Sparta as a policy certain to produce odium. This consideration evidently outweighs, for the Athenians, the inconsistency in argument their manoeuvre involves.

It may be useful, in conclusion, to give a consolidated translation of the entire section of the Athenians' speech that embodies the interpretations proposed:

'But no one hitherto, finding himself in a position to acquire something by might, allowed this principle the greater weight, and desisted from aggrandizement; and praise is merited by those who, holding dominion over others in accordance with man's natural propensity, respect Justice to a greater extent than, given their power, they are obliged to. Should others acquire what is ours they would, we surmise, provide excellent evidence as to whether we conduct ourselves with some degree of moderation; but for us, the fruit of our very reasonableness has, unreasonably, turned out to be obloquy rather than praise. For the consequence of our *abnegation* in the covenanted lawsuits with our allies, and of our having established trial of these before juries on which we ourselves sit according to the laws by which cases between ourselves are judged – the consequence is that we are felt to insist obdurately on our prerogative. And none of them considers why it is that for those elsewhere who hold dominion, and exercise less moderation than we towards their subjects, *this* is not made a matter of reproach; the reason being that those to whom it is open to use force majeure have no need at all to make use of law. But they, having become accus-

23 See Andrewes' note on Thuc. V 79, 4. However, the incident reported by Plutarch at *Pelop.* 20, 3f. and, in greater detail, at *Amat. Narr.* 733 b ff. (a Leuctran father's fruitless attempt to obtain redress at Sparta for the rape and murder of his daughters by two Spartans) lends weight to the Athenians' assertion.

24 Strict accuracy in regard to Spartan judicial arrangements cannot be expected from speakers capable of erasing the Ionian Revolt from the historical record, as the Athenians have just done (77, 5).

tomed to associating with us on an equal footing, should they, notwithstanding their thinking it wrong, by virtue of some decision of ours or of the power we derive from our empire suffer even the most trifling loss, they do not feel gratitude for their not being deprived of the major part of what is theirs, but in respect of what they miss feel more hard done by than had we from the first set law aside and frankly exploited our advantage; in that case, not even they would have disputed the proposition that the weaker must yield to the strong. The experience of injustice, it seems, provokes greater resentment than does that of force majeure: the one is thought tantamount to being taken advantage of where the parties are equal, the other to being coerced where the balance is uneven. Under the Persians they received harsher treatment than this, and put up with it; while our rule seems severe – understandably: the present yoke is always heavy. Should you establish dominion, having overthrown us, you would soon effect a reversal of the goodwill that you have acquired as a result of fear of us – if the principles intimated by your conduct during your brief tenure of command against the Persians are those that you will now also act upon. For access to the ordinances that obtain among yourselves is barred to others; and moreover, every one of you who goes abroad observes neither these nor those established elsewhere in Greece.²⁵

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