

ARISTOTLE AND THE LAW COURTS

David C. Mirhady¹

Abstract: In the *Politics*, Aristotle recognizes participation in law courts as an essential element in citizenship, yet there has been relatively little scholarship on how he sees this participation being realized.² References to law courts are sprinkled widely through the *Politics*, *Rhetoric*, and *Ethics*, as well as the *Athenaiôn politeia*, where their importance is revealed most clearly. Ernest Barker took great pride in the English administration of law: if he had returned to write a more thorough treatment of Aristotle's political thought, he might well have focused on the courts.

Why is the politics of a law court so important? If the role of the judge is simply to determine truth and justice, it would seem unimportant whether there was democratic participation. Indeed, in modern legal systems — many of them in otherwise democratic states — judicial decisions are almost exclusively left up to professional lawyers, experts in the law. Lay members of juries are allowed only to make determinations of fact, and then only after presentations of evidence that are tightly controlled by the professionals.³ In his subdivisions of the aspects of *phronêsis*, however, Aristotle divides *politikê* into *bouleutikê* (deliberative) and *dikastikê* (*Nic. Eth.* 6.8 1141b30), suggesting that *dikastikê*, which we might understand as 'judicial (practical wisdom)', might have received greater attention within Peripatetic studies, though the closest we come to finding discrete works on the subject are two titles in Diogenes Laertius' list of Aristotle's works: *Peri dikaiôn* and *Dikaiômata* (5.24, 26). In this paper, I hope to reconstruct a coherent account of the law courts, the *dikastêria*, from Aristotle's works, including the *Athenaiôn politeia*.

¹ David C. Mirhady, Department of Humanities, Simon Fraser University, Burnaby BC V5A 1S6, Canada. Email: dmirhady@sfu.ca

² A.L. Boegehold, 'Aristotle and the *Dikastêria*' (Diss. Abstract), *Harvard Studies in Classical Philology*, 63 (1958), pp. 526–8, concentrates on *Ath. pol.* 63–7, where the mechanics of jury selection are described in great detail. See his now magisterial *The Lawcourts at Athens: Sites, Buildings, Equipment, Procedure and Testimonia* (Princeton, 1995).

³ Terminology is difficult in this paper. Its subject matter is the *dikastai* and *dikastêria*. The former may be translated as 'judges' or 'jury', since the modern distinction between judges who determine issues of law and juries who determine issues of fact does not hold in ancient Greek legal systems. In Athens, and presumably elsewhere, the *dikastai* swear an oath — so they are 'sworn' — to vote 'according to the laws' and by their most just understanding (*gnomei dikaiotatei*). The *dikastêria* are the law courts, or 'people's courts', as Mogens Hansen, *The Athenian Democracy in the Age of Demosthenes* (Oxford, 1991), p. 178, calls the Athenian law courts. Aristotle takes for granted that they consist of panels of numerous judges.

Ernest Barker took great pride in the English court system, which produced its system of law,⁴ and justifiably so. It has been one of the great export items from Britain. But his interrupted work on Aristotle's political thought, begun in 1906⁵ and continued through his introduction, translation, and notes on Aristotle's *Politics* in 1946,⁶ gives only passing attention to the *dikastēria*, despite their importance. He accepts without qualification the view of another scholar, Gilbert, that 'a 'general uncertainty in the administration of justice' is one of the greatest defects of Athens'.⁷ If he had continued his studies of Athens and ancient political theory as intensively as he studied Britain and its political and legal institutions, I suspect that he might have left a more generous interpretation.

In one particularly vivid passage, Aristotle describes a judge as the personification of justice, who mediates and thus achieves a mean = justice = equality between disputants (*Nic. Eth.* 5.4 1132a5). In so doing, of course, he disregards the differences between a judge and an arbitrator⁸, as well as the notion of punishment. An arbitrator, a *diaitētēs*, tries to work out an equitable settlement between disputants. In classical Athens the judge, the *dikastēs*, has to choose between one side and the other, making one side a winner and the other the loser. There seem two different notions of justice in play, which Aristotle is content at this point to ignore. His attempt at etymology, seeing the *dikastēs* as a *dichastēs*, a halver (1132a29–32), puts emphasis on the arithmetic aspect of the corrective justice in which the judge participates. Unlike his notions of distributive justice, which acknowledge differing statuses with differing distributions of money and power, corrective justice's arithmetic equality follows the democratic notion that all free people receive equal justice. In this Aristotle's judges follow a distinctly democratic principle.

Hippodamus and Solon

Aristotle considers several ideas of the Milesian Hippodamus regarding legal systems, but rejects them all.⁹ The first is that all laws be divided under only

⁴ E. Barker, *National Character and the Factors in its Formation* (London, 1927), ch. 4, deals at length with these issues, as he does, at somewhat less length, in the *Ideas and Ideals of the British Empire* (Cambridge, 1951), pp.61–71.

⁵ E. Barker, *The Political Thought of Plato and Aristotle* (London, 1906).

⁶ E. Barker, *The Politics of Aristotle* (Oxford, 1946).

⁷ Barker, *Political Thought*, pp. 457–8.

⁸ Arist. *Rh.* 1.13 1374b 21–22, 'the arbitrator looks at equity (*to epieikes*), but the dicast looks (only) at the law, and the reason why an arbitrators was invented was that equity might prevail'.

⁹ Hippodamus is most famous for his contributions to town planning, and he is said to have accompanied the colonization of Thurii in 443BC. Aristotle says that he was the first person not active in politics to speak about the best form of constitution (*Pol.* 2.8 1267b29–30).

three headings: *hybris*, damage (*blabē*), and killing (*Pol.* 2.8 1267b37–9), the second that there should be an appeal court manned by chosen elders (1267b39–41), and the third that judges should specify a specific penalty if voting for conviction rather than give a simple verdict (1268a1–5). These three areas touch almost exactly on the tripartite system Aristotle constructs for considering law courts in *Politics* 4.16, namely, what they consider, who is on them, and how they proceed.

The division *hybris*, *blabē*, *thanatos* clearly leaves out a great deal of law, though perhaps Hippodamus may be excused for leaving out laws regulating the state. His three areas all cover wrongdoing between private people, what in classical Athens came under the heading *dikai*, which is also Aristotle's term (1267b38). *Hybris* presumably covers wrongdoing against persons, short of killing, and *blabē* covers wrongdoing regarding property.¹⁰ The victims of the wrongdoing may pursue both of these, but killing clearly has to be pursued by someone other than the victim. For Aristotle in the *Politics*, however, wrongdoing that threatens the *polis* is of much greater interest.

Aristotle makes no comment about Hippodamus' appeal court of chosen elders. What would he likely have thought? Such a court would severely limit the authority of the other, presumably popular, courts. Athens' Areopagus and courts of the *ephetai* may at times have performed this role. They included only a select number of men, and were certainly older, but Solon limited them to homicide cases. Aristotle sees the popular courts as an important mechanism for power within the *polis*. He would not want them to have been limited to a small and exclusive group of judges.

With regard to Hippodamus' third idea, Aristotle says that Hippodamus thought the judges should not commit perjury by making a judgment (under oath) that did not conform to their precise belief. Aristotle deals with this question at greater length than the other two, and in doing so reveals several of his ideals for the law courts. First, Aristotle does see a difference between a judge and an arbitrator, a *dikastēs* and a *diaitētēs*. The arbitrator, or even a panel of arbitrators in discussion, can make an independent decision to settle a dispute, as Hippodamus suggests, but judges have to choose between alternatives offered by the disputants (1268b4–11). Aristotle notes with approval that most legislators forbid discussion among judges (though I cannot see how this could be done in practice). Moreover, each judge deciding a different award would create confusion (1268b11–17). But Aristotle does make a concession: Hippodamus' idea forces Aristotle to insist that the statement of claim be written clearly, so that the judges will not fear the risk of perjury (1268b17–22).

¹⁰ There has, of course, been a great deal of scholarship devoted to the Greek notion of *hybris*, and it no doubt played a significant role in Greek thinking about justice. See N.R.E. Fisher, *Hybris: A Study in the Values of Honour and Shame in Ancient Greece* (Warminster, 1992).

Solon takes an important place in both the *Politics* and in the *Athenaiôn politeia*. He was the original architect of the Athenian democratic constitution, and in the *Politics* Aristotle is keenly interested in whether Solon actually intended democracy. Did democratic power in Athens result from Solon's decision to make the law courts democratic? Aristotle argues against the notion in the *Politics*, preferring to credit Ephialtes' docking of the power of the (oligarchic) Areopagus, Pericles' jury pay, and the increasing influence of the *dêmos* resulting from its role in the naval victories over the Persians and in establishing Athenian rule over the Aegean (*Pol.* 2.12 1274a1–12).

Many scholars have suspected the account of Solon in *Pol.* 2.12 as un-Aristotelian, but that hardly matters for this discussion of the relevance of the law courts to political theory. The account in 2.12 attempts to see Solon as the author of a mixed constitution, with oligarchic (the Areopagus) and aristocratic (elected officials) elements, as well as the democratic law courts (1273b). It seems almost axiomatic to Aristotle that the law courts, like the Assembly, should be constituted by all the citizens. It seems integral to the Greek idea of freedom. But that in itself could hardly have accounted for popular sovereignty. So long as the questions posed to the courts were circumscribed, for instance to the three areas identified by Hippodamus, the *dêmos* could hardly have had much power.

In the *Athenaiôn politeia* Aristotle points to other reasons for popular ascendancy that were due to Solon. Along with other popular measures, such as the prohibition of loans secured by the person and the right of volunteer prosecutors to intercede on behalf of wronged third parties, Aristotle lists as the chief basis for democratic power 'the right of appeal (*ephesis*) to the law court; for the *dêmos*, being sovereign over the vote, becomes sovereign over the *politeia*' (*Ath. pol.* 9.1). Plutarch expands slightly on this account, explaining that appeals were made against the judgments of the magistrates (*Sol.* 18.2), and both Aristotle and Plutarch explain the role played by the laws being unclearly written, which left it up to the *dikastêria* to decide between differing interpretations.

For Solon, the most basic elements in democratic participation were the Assembly and the law courts. His lowest property class, the *thêtes*, were restricted to these institutions alone (*Ath. pol.* 7.3). For Solon as for Aristotle himself, the Greek ideal of freedom was expressed through these two institutions. Why this was so should become clearer in the next few pages, as several of the issues that have been identified by looking at the evidence for Hippodamus and Solon are investigated. After the connections between the law courts and citizenship, I follow Aristotle's own method for treating the law courts, dealing with several related questions about the *dikastêria* under the headings, from whom?, about what?, and how?.

Citizenship

A citizen is defined simply by nothing other than participation in judgment and rule (*Pol.* 3.1 1275a22–23).

In this barest definition Aristotle makes the terms *metechein kriseōs kai archēs* carry a large load. Aristotle is envisioning rotating participation in which all free adult males of the *polis* share, though he gives consideration to superannuation and so on. *Krisis* is his term for judging cases, there being no suitable noun to describe the activity of being a judge that is cognate with the word for judge, *dikastēs*. Likewise, *archē* has to stand in both for the activity of being a magistrate, an *archôn*, and for taking part in deliberative bodies, such as the Athenian *boulê* and *ekklesia*.

In response to Plato's description of the essential parts of a *polis*, Aristotle claims that the deliberative and forensic aspects are essential:

It is necessary that there be somebody to return and to decide justice; if indeed one would count the soul of an animal to be more a part of it than the body, one must also count such parts of *poleis* parts of them more than those parts that contribute to necessary utility, the military and the part that participates in judicial justice, and in addition the deliberative part, deliberation being a function of political intelligence (*Pol.* 4.4 1291a23–28; cf. 6.8 1322a5–6, 7.8 1328b13–14).

Schütrumpf points out that Aristotle puts special emphasis on the necessity for justice and law courts because in his critique of Plato he can here catch Plato leaving justice out of his ideal *polis* whose purpose is to promote justice.¹¹ Those who perform these essential functions within the *polis* were for Aristotle the truest *politai*.

As a negative example against his own preferred definition of citizenship as consisting in participation in deliberative and judicial bodies, Aristotle points to Sparta, where

suits for breach of contract are tried by different ephors in different cases, while cases of homicide are tried by the elders and likewise other suits by some other magistrate. The same method is followed at Carthage, where certain magistrates judge all the lawsuits (*Pol.* 3.1 1275b9–12).

Sparta and Carthage are not democratic, so citizenship is more limited there. Aristotle sticks with his definition, however, since none of the offices in Sparta or Carthage are permanent; they are all for limited terms. When Aristotle suggests a correction of his definition it becomes *exousia koinônein archēs bouleutikēs kai/ē kritikēs* (3.1 1275b18–19).¹² The substitution of *exousia koinônein* for *metechein* seems to emphasize that actual participation

¹¹ E. Schütrumpf, *Aristoteles, Politik* (Berlin, 1996), vol. III, p. 271.

¹² There are disagreements over the reading. Most now follow Aretinus in substituting *kai* for *ē*, 'and' for 'or', which is what appears in the manuscripts. With the Spartan and Carthaginian example focusing on judicial functions, the 'or' seems possible.

is not as significant as the ability or possibility of participating, as in limited term offices.

Why Aristotle thinks that participation in both deliberative and judicial bodies is important for citizenship is not fully explained. After all, I have never served on a jury — perhaps I never will — and yet I do not doubt my citizenship. For Aristotle, it seems, these two functions were the essential elements of the *polis*: the *polis* made decisions about what was beneficial for the entire citizen body, and the *polis* had the sovereign power to resolve disputes and punish wrongdoers. These functions could not be delegated. A select body, like a Council, might manage day-to-day affairs, but the Assembly was sovereign. Likewise, the *dikastérion* was the *dēmos* in judicial matters. It policed behaviour within the *polis* with the authority of the *polis*.

From Whom?

At the end of book 4 of the *Politics*, after treating the Assembly in ch. 14 and the magistracies in ch. 15, Aristotle turns to the law courts in ch. 16. He divides his treatment into questions of who mans the courts, whether from all citizens or from a certain class, what kinds of court there are, and whether selection to them is by election or lot.

Although in the *Rhetoric* Aristotle includes considerations against popular courts as being more easily manipulated than single judges, in the *Ath. pol.* and *Politics* he inclines more toward large juries, ‘for a few are more easily corrupted by gain and by influence than the many’ (*Ath. pol.* 41.2; cf. *Pol.* 3.5 1286a31–40). There is a close identification between the *dēmos* acting through decrees passed in the Assembly and the *dēmos* acting through the law courts (*Ath. pol.* 41.2). Through these two institutions the *dēmos* made itself lord of everything. So the question of whether an individual judge or a massed panel of judges is better amounts in many ways to the same question as whether an individual ruler or massed panel of rulers, like a popular assembly, is better.

Aristotle needs to answer the objection that the many, considered individually, are ethically worse than the few, the elite, and thus should be denied a part in decision-making. He answers the objection in a number of ways. First, although the many are individually worse ethically, collectively they generally have greater ethical worth than the better few (*Pol.* 3.11 1281b1–14). Second, the many collectively make up a body, coming at issues from different perspectives and having different parts of goodness and wisdom, and thus have better judgment (1281b11–25; cf. 3.15 1286a24–30, 3.16 1287b25–30). Third, if the many are denied a share in decision-making, they become enemies to those who do have a share (1281b27–35). As with food, a mixture of highly nutritive food with less nutritive food is better than only the highly nutritive food alone, so long as both are in the mixture (1281b35–38). Fourth, like patients, the many are able to judge the results of a doctor’s ministrations

(the statesmen's proposals/the litigants' claims), even if they cannot be doctors (statesmen/legislators) themselves (1282a14–23). Fifth, although property qualifications for executive offices mean that such officials are richer than average individual members of the *dēmos*, collectively the worth of the *dēmos* is greater than that of any official (1282a30). Finally, sixth, as has been mentioned, the many are less corruptible than the few. By 'corruptible' Aristotle has particularly in mind the susceptibility to emotion (1286a31–35; cf. 2.9 1270b12 on the corruptibility of the Spartan ephors).

Robinson argues that Aristotle nowhere says that the many have a right to sovereignty.¹³ His arguments in favour of broad participation all centre on what is objectively good. While it is true that his arguments centre on what is objectively good, Aristotle does argue that 'those who are by nature equals must have the same right by nature and the same worth according to nature' (*Pol.* 3.16 1287a12–13). He makes this argument against the inequality of kingship rather than in favour of popular juries, but this is a passage in which some of his strongest arguments appear for the rule of law. Rulers, *viz.* judges, are only to be 'guardians of law and servants to the laws' (1287a21–22).

In the *Athenaiōn politeia* several considerations are introduced that have a further bearing on the question of who mans the law courts. Courts in Athens, or instance, had different sizes depending on the value of dispute: 'claims within 1000 drachmas came before a court of two hundred and one judges, and claims above that before one of four hundred and one' (*Ath. pol.* 53.3). The principles involved here are on the one hand obvious, on the other somewhat obscure. A more important case should demand the attention of more judges. But there is no sense that a more just judgment might result. There has to be some limit to the need for greater size, and that limit would seem far below even four hundred and one. Aristotle also recognizes that there are cases whose worth does not justify the assembling of a large court (*Pol.* 4.16 1300b34–35).

In his discussion of how oligarchies are maintained, Aristotle lists five pretexts (*prophaseis*) that are made in response to the *dēmos*, that is, methods of excluding it from power. Among these is the imposition of fines for those who do not participate in the law courts, which would compel the rich more than the poor to participate (it being understood that there is no jury pay). Whether on not it seems likely to us that the rich would be more compliant to fines than the poor, what Aristotle takes from the idea is clear. He wants 'to mix justly' the rich and poor in the deliberative and judicial bodies by achieving the right balance between paying the poor for attendance and fining the rich for non-attendance. Underlying these recommendations, of course, seems an implicit cynicism about the class allegiances of those participating in these bodies. That aside, it seems a practical issue for Aristotle to adjust the levels of payment/fines in order to achieve his preferred mixture (*Pol.* 4.9

¹³ R. Robinson, *Aristotle, Politics Books III and IV* (Oxford, 1962), pp. 39–40.

1294a41–b1). This mixture, he supposes will be best able to decide what is objectively best or most just for the entire *polis* rather than for one of its constituent parts (cf. 4.14 1298b13–25).

One of Aristotle's four kinds of kingship he characterizes as heroic, and he includes the role of judge under this form of kingship, along with military and religious leadership, making a king as general/judge/high priest, who decided lawsuits on oath or without (*Pol.* 3.14 1285b5–12, 21–23). These kings are not quite the same as the Homeric, let alone the Hesiodic, kings, who often work by committee.¹⁴ For Aristotle they represent only historical relics.

In the *Athenaiôn politeia* Aristotle raises the issue of the local judges (*dikastai kata dêmous*). Peisistratus originally sent them out from the city. Aristotle claims that their purpose was that 'men might not neglect their agriculture by coming into the city' (*Ath. pol.* 16.5). It seems more likely that Peisistratus was interested in extending the power of the *polis* against the prerogatives of local aristocrats, who may formerly have decided disputes among locals. We learn nothing about how these judges were selected. In 453/2 Pericles followed Peisistratus' lead in reinstating these judges, numbering thirty at the time, presumably one from each Cleisthenic *trittys* (*Ath. pol.* 26.3). Pericles' reasoning is also unclear: he had no need to assert centralized control in the way Peisistratus did; perhaps he wanted to relieve pressure on the central courts by having minor disputes settled locally. In the 4th century, after the number thirty had been disgraced, the number was increased to forty, and they stayed put in Athens, deciding disputes valuing less than ten drachmas (*Ath. pol.* 48.5, 53.2). At that point, the need for Athens to assert judicial authority throughout Attica must have been taken for granted; perhaps transportation to and from the *asty* had also become commonplace enough for worries about losses in agricultural time to be no longer a concern. Aristotle seems to acknowledge a need for a court like the Forty, the Local Judges, in his discussion of petty transactions, which do not fall to a large court, even if they do require judgment (*Pol.* 4.16 1300b32–35).

About What?

Aristotle names eight kinds of courts *eidê dikastêriôn* (*Pol.* 4.16 1300b19). But it is unclear where he got the number. His list is clearly more inclusive than that of Hippodamus, but he leaves us wondering where Hippodamus' category *hybris* should fall. Presumably it would be under private transactions, though in Athens it was treated under the *graphê* procedure, making it a matter of public, rather than simply private, interest. Indeed the Athenian distinction between *dikai* and *graphai* is entirely absent from Aristotle's account.

¹⁴ See Homer, *Il.* 18.497–508, 23.566–613, *Od.* 11.543–51; Hesiod, *Theog* 80–93, *Op.* 27–39.

Aristotle's eight-fold listing is not as systematic as we could have hoped for, but it is nonetheless worthwhile to investigate how it is articulated (1300b19–34).

1. audit (*euthyntikon*) (end of magistrate's term)
2. public interest (*ta koina*) (in particular situations)
3. constitution (*politeia*)
4. disputes about penalties, for both magistrates and private individuals
5. private transactions (*idia synallagmata*) beside these
6. homicide (deliberate, involuntary, justifiable, exiles)
7. suits involving foreigners
8. petty transactions

Along with Solon's 'appeal to the *dikastérion*' and Pericles' payment for jury service, Ephialtes' contribution to the role of the *dikastéria* in Athenian democracy is significant, although much harder to define precisely. In 462/1 he stripped the Council of the Areopagus of many of its powers 'to safeguard the constitution' and transferred them to the Council of Five Hundred, the Assembly and the courts (*Ath. pol.* 25.2). The powers transferred to the courts are likely to have included those that regulated oversight of officials. *Ath. pol.* 48.4 and 54.2 both refer the auditing of officials, processes that had to be brought before the law courts. At first glance, it might seem odd that the law courts conducted such oversight inasmuch as the Council carried out most executive responsibility. But final authority over the audits of the magistrates appears to have rested with the *dikastéria*. In Athens, the *dikastérion* often works as an appeal court, e.g., against the demes regarding their membership (*Ath. pol.* 42.1).

'Public interest' seems a hugely vague area. Plato, *Laws* 767b–c, sees a distinction between private individuals making claims on each other and people making claims against other on behalf of the common good, and this seems the distinction here. In Athens the *graphê* procedure instituted by Solon, by which a voluntary prosecutor might intervene, entailed recognition that private individuals might dispute not only their private matters, but also matters of concern to the integrity of the *polis*. But what seems to be envisioned here are acts against the *polis*, refusal of military service, and so on, for which, in Athens, either a *graphê* (against individuals) or the *eisangelia* ('impeachment', against those in an official capacity) might be used.

As Shütrumpf notes, the *eisangelia* was also the primary procedure used against those who would 'subvert the *dêmos*'.¹⁵ This is the sort of thing Aristotle has in mind when he writes about things that 'bear on the constitution'

¹⁵ Schütrumpf (see note 11), vol. 3, p. 421. According to the *Lexicon Rheticum Cantabrigiense*, s.v. *eisangelia*, Aristotle's colleague Theophrastus (636B FHS&G) dis-

(*eis tēn politeian pherei*). Hyperides, *Lyc.* 12, notes that such broad charges are easily abused, for instance by those who would use impeachment against those involved in sexual improprieties.

Disputes about penalties ‘for both magistrates and individuals’ (1300b21–22) are at first not entirely clear, and other passages in the *Politics* (5.4 1304 a13–17 and 6.5 1320a9–11) are not especially helpful. But *Ath. pol.* 45.1 tells the story of Lysimachus who was sentenced to death by the Council, until Eumelides objected that he could only be sentenced to death by a *dikastērion*. So began the law that only the law court could pass such sentences. More importantly, this is an instance of that Solonian principle of allowing appeal to the law court, whether for a magistrate accused of malfeasance or for a private individual. Many such instances of appeals are mentioned in the *Ath. pol.* (*Ath. pol.* 45.1–3, 46.2, 48.2, 54.2, 55.2, 56.1, 61.2).

Aristotle makes useful distinctions between voluntary and involuntary transactions. Under the former he includes buying and selling, lending, under the latter theft, adultery, poisoning, and so on, including violent acts, such as assault and killing (*Nic. Eth.* 5.2 1131a1–9). With the exception of the last two, these would all seem to fall under Hippodamus’ *blabē*. They would probably fill the majority of the courts’ activities.

Aristotle describes the first five of his categories as much more important than the last three. When he describes what democratic law courts in particular should interest themselves in, he says ‘everything, or on the majority and the most important and the most authoritative matters, such as audits, the constitution, and private transactions’ (6.2 1317b25–28). He describes these matters as *politika*, ‘which when not well conducted cause conflicts and constitutional changes’ (1300b37–38).

Aristotle’s last three matters with which judges may concern themselves do not seem exhaustive at first. Homicide, suits involving foreigners, and petty transactions do not cover everything, but we should recall just how widely his notion of transaction (*synallagma*) goes. Athens’ law courts certainly handled what we would now consider criminal matters, thieves and so on, as well as contractual disputes (*Ath. pol.* 52.1, 3, 56.1, 57.1). As well as contract disputes, however, Aristotle’s *synallagmata* include theft, violence, abuse of parents, even adultery. His expanded discussion of Athens’ various homicide courts may be undertaken as an answer to discussion of Sparta’s various courts (2.9). The method of selection to the Areopagus, for instance, was profoundly different from that of the other, popular courts.

Within a discussion of what matters are decided in courts, the question of the courts’ fidelity to the laws must also arise. Aristotle is without a doubt an advocate of the subordination of all executive and judicial power to the rule of

cussed *eisangelia* in the fourth book of his *On Laws*. Besides ‘subversion of the democracy’, Theophrastus says it also applied if an orator took bribes and gave less than his best advice, or if someone betrayed a position or ship or army, and so on.

law. He champions the view already early in the *Politics*: ‘just as a human once perfected is the best of animals, so also, if separated from law and justice is worst of all’ (*Pol.* 1.2 1253a31–33; cf. 2.10 1272b5–7). He treats the issue of the rule of law first through the question of whether it is better to be ruled by any one citizen, so the question of the rule of law is not at first related to that of democratic *dikastēria* directly: ‘the rule of law (*ton ... nomon archein*) is preferable to that of any one citizen’ (3.16 1287a18–20cf.) But when Aristotle takes up the different forms of democracy, all those in which ‘the law rules’ seem to get approval (4.4 1291b30–1292a4), but that in which popular decrees (*psēphismata*) are sovereign and laws are not invites rule by demagogues. The *dēmos* becomes despotic. Its receptiveness to accusations against magistrates leads to the subversion of their authority (1292a28–30).

One essential part of the judges’ oath in Athens contained the formulation that the judges vote ‘according to the laws’.¹⁶ While this formulation certainly agrees with the spirit of Aristotle’s arguments, it also departs somewhat. The plural ‘laws’ is important for the Athenians. The oath refers to the statutory laws (plural) of the Athenian *polis* rather than to any abstract notion of law.¹⁷ Aristotle suggests that customary laws (*kata ta ethē*) had more authority than written laws, a suggestion that does not appear in the approximately one hundred surviving courtroom orations from Athens. The second essential part of the Athenian dikastic oath entailed that the judges vote *gnomēi dikaiotatēi*. There is debate whether the Athenians understood that this phrase refer simply to areas where there are gaps in the laws or if it referred to receptivity to equity argumentation in general.¹⁸ In the *Politics*, Aristotle says that ‘the law, having educated suitable people, appoints (some of them) to judge by their *most just understanding* (what it has not defined)’ (*Pol.* 3.16 1287a25–26). His emphasis seems to be throughout that magistrates, including judges, are needed because laws cannot decide the facts of particular situations. Here it also seems likely that he is referring to particular situations, to questions of fact, rather than to gaps in legislation.

In his famous formulations Aristotle’s sees law as ‘reason without appetite’ (*aneu orexeōs nous* 3.16 1287a32), and as ‘the mean’ (*to meson* 1287b4). These are advanced as part of his arguments favouring the sovereignty of law over sovereignty of men. As an example of appetite he gives friendship, the single ruler compromising justice because of his friendship with an individual. The democratic *dikastērion* would obviously not be as susceptible to

¹⁶ See D.C. Mirhady, ‘The Dikasts’ Oath and the Question of Fact’, in *HORKOS: The Oath in Greek Society*, ed. A.H. Sommerstein and J. Fletcher (forthcoming, Bristol Phoenix Press).

¹⁷ E.M. Harris, ‘Open Texture in Athenian Law’, *Dike*, 3 (2000), pp. 27–79, makes this point convincingly.

¹⁸ J.O’Neil, ‘Was the Athenian *gnome dikaiotate* a principle of equity?’, *Antichthon*, 35 (2001), pp. 20–9.

friendship, but Aristotle notes some of its own weaknesses, that some people have treated the *dēmos* like a tyrant in order to have influence (*Pol.* 2.12 1274a5–7). Aristotle also recommends that when the court is asked for a judgment about whether personal property should be confiscated, the confiscated property should not go into the purse of the polis (from which the judges draw their payment) but for religious purposes (6.5 1320a6–9). Aristophanes' *Wasps* makes a great deal of the dangers of an almost symbiotic relationship between the judges and *sycophantai*, the malicious prosecutors who could be encouraged by the judges' convictions to prosecute more (cf. *Pol.* 5.5 1304b20–24).

In the *Athenaiôn politeia* Aristotle appears to see the democratic judges acting largely without the controls of laws, inasmuch as they are not drafted simply or clearly, but he rejects the notion that Solon intentionally empowered the *dēmos* by drafting his laws vaguely (*Ath. Pol.* 9.2). As examples, however, Aristotle puts emphasis on inheritance laws and the law regarding heiresses (9.2), and, indeed, the ambiguity of these laws is raised again as something that the Thirty tyrants wished to eliminate (35.2). He makes a point of identifying the abuses of both the Four Hundred in 411/10 and of the Thirty in 404/3 with restrictions of the powers of the law courts (*Ath. pol.* 29.4, 35.2). The Thirty abolished the sovereignty of the *dikastai* by removing ambiguities in the law (*Ath. pol.* 35.2). It seems remarkable that they could do so, since the legislators would presumably have eliminated ambiguities themselves if they could have done so. But the example Aristotle gives is the restrictions on the absolute power of a testator to decide to whom his estate should go. Of course Athenian law traditionally demanded that estates go to children of the deceased, but, for those without children, there were restrictions against men who made wills while sick, drunk, or under the influence of a woman (!). These latter restrictions gave occasion to malicious litigators (*sykophantai*) to challenge wills. It seems remarkable that Aristotle would choose this area as exemplary of the Thirty's actions against the law courts, since the courts could hardly have derived much political power from the administration of wills.

When we reflect that on the identification of the *dēmos* in both the Assembly and the law courts, questions arise regarding just how differently the same people could vote. What was it about the *dikastérion* that prevented the judge from voting in the same way that he might in the Assembly? What facilitated a distinct realm for dikastic rather than deliberative thought? A partial answer is offered at *Ath. pol.* 49.3, even though it hardly seems to concern a judicial matter: 'at one time the Council used also to judge the patterns for the Peplos, but now this is done by the *dikastérion*, which is selected by lot, because the Council was thought to show favouritism in its decision.' The suggestion seems to be again that the *dikastérion* was more immune to favouritism.

Unlike in the Assembly, even when it played a quasi-judicial role, the *dikastēria* used only a secret ballot. The *probolē* procedure illustrates its use. By it a prosecutor attempted to get a preliminary conviction by means of a show of hands in the Assembly or Council. There was no official consequence to this vote, except that it led to the charge being introduced into the law court, which then voted by secret ballot (*Ath. pol.* 43.5, 59.2). Whether a vote is open or secret would seem to have some importance for political theory, but Aristotle does not discuss the issue.

Issues of *evidence* also fall under the heading of what matters the *dikastēria* are to judge. As was pointed out at the beginning of this paper, in modern law the professional jurists, who decide what the juries may know and consider, tightly control issues of evidence. In Athens there were also controls on evidence: 'the litigants are not permitted to use laws or challenges or evidence other than those passed on by the Arbitrator, which have been put into the evidence-boxes' (*Ath. pol.* 53.3). This limitation on evidence is probably more important for the empowerment of the arbitrators than it is for the *dikastai*. The litigants have to take the arbitration seriously by presenting all their evidence there.¹⁹ Another way in which evidence can have a political implication is in determining who can appear as witnesses. In Athens only free, adult males could give testimony before a *dikastērion*. Women, children, and slaves were excluded.²⁰

The description of the *dokimasia* reveals an interesting area of responsibility for the *dikastēria*. This was the formal scrutiny of the magistrates for office in the Council:

the official puts the question to a show of hands in the Council or to a vote by ballot in the Jury-court; but if nobody wishes to bring a charge against him, he puts the vote at once; formerly one person used to throw in his ballot, but now all are compelled to vote one way or the other about them, in order that if anyone being a rascal has got rid of his accusers, it may rest with the *dikastai* to disqualify him. (*Ath. pol.* 55.4)

Most judicial proceedings in Athens depend on a prosecutor. Here there is an acknowledgment that the court can act without one.

¹⁹ The arbitrator himself is likely to be an experienced *dikast*. The arbitrators were selected by lot from a list of all the Athenian 59-year olds, those in their last possible year of military eligibility, men who have been qualified to serve as judges for exactly half their long lives (*Ath. pol.* 53.4). This aspect of the Athenian constitution seems to give some small acknowledgement — along with the general requirement for judges to be at least thirty years old — to the need for experience in deciding legal cases.

²⁰ See D.C. Mirhady, 'Athens' Democratic Witnesses', *Phoenix*, 56 (2002), pp. 55–74.

How (are Courts Selected)?

And necessarily all the people judge all the cases divided by election or by lot, or all the people (judge) all the cases, some by lot and others by election, or (they judge) some cases, the same ones, some judges (appointed by lot) and others by election. (*Pol.* 4.16 1300b38–42)

Aristotle's permutations of judges selected by election or lottery baffles the mind, but he actually prefers a mixture of judges selected by lot and by election as 'aristocratic and constitutional' (1301a14), that is, conforming with his best constitution. Although he offers no explanation here, it seems to result from his belief in a healthy mixture of rich and poor as constituting, from a practical point of view, the best governing body, the one most likely to come up with objectively just judgments.

The procedures for jury selection that are detailed in *Ath. pol.* 63–7 are quite elaborate; their detail goes beyond the scope of this paper. But a couple of points are worth noting. First, there is random selection by tribes, so that each of the ten Cleisthenic tribes is represented equally at each trial (63.1–2). We do not find out how each of the three geographic regions within each tribe, its three *trittyes*, is represented, but it seems likely that they all were. There is here the continuing attempt of the Cleisthenic constitution to achieve a geographic cross-section of the Athenian population. Second, within each tribe, steps are taken to break up groups, there being ten equal groups within each of the ten tribes (63.2, 4). The lottery process systematically divided them.

All the judges are older than thirty (*Ath. pol.* 59.1). This provision contrasts somewhat with Aristotle's view that in a democracy officials should be 'from all' (*Pol.* 6.2 1317b19). Athenians from the age of eighteen were enrolled in their demes and could participate in the Assembly and fight in wars, so for twelve years their citizenship was limited by the exclusion from the courts, but Aristotle makes no comment about this. Our impression from Aristophanes' *Wasps* is that the *dikastai* were generally poor old men, and no young men were pining to join them. At *Pol.* 6.2 1316b21 Aristotle concedes that some offices call for 'experience and skill'. He is probably thinking of the generalship, but to some extent the age restrictions for jury service may also reflect the need for experience (*empeiria*), if not for skill (*technē*). Athens appears to have had no upper age limit for service as a *dikastēs*. However, Aristotle objects to the Spartan elders having life-tenure over important judgments partly because 'there is old age of mind as well as of body' (2.9 1270b40).

The *Ath. Pol.* suggests that Aristides created a food supply from the Delian League funds, in part in order to feed 6,000 judges (*Ath. pol.* 24.3). Two things give pause: first, this is the first we hear of the number 6,000, although

it appears also in Aristophanes, *Wasps* 662.²¹ Second, Pericles has not yet introduced pay for jury service, so the need to feed the jury could not have been a motive for Aristides. The limitation of the pool of jurors to 6,000 seems to contradict several pieces of evidence that indicate that the only criteria for jury service were Athenian citizenship, an age over 30, and freedom from debt to the *polis*. It seems likely that the number 6,000 represents an approximate number of those who generally participated in the *dikastēria* rather than a limit.

Aristotle explains Pericles' introduction of jury pay as a move of political strategy, under the advice of Damonides or Oea, against Cimon, who, with his vast personal wealth, could curry favour in the *dēmos* with his own money (*Ath. pol.* 27.3; cf. *Pol.* 2.12, 1274a8–9, 4.6 1293a4–9, *Plut. Per.* 9.2–3). The payment was a half-drachma, which compares with one to one and a half drachmas for Assembly meetings and 5/6 of a drachma for Council meetings (*Ath. pol.* 62.2). The amounts seem inversely related to how often each panel met. The *dikastēria* met much more often than the Assembly, but only somewhat more often than the Council. Aristotle approves of the notion that all citizens should participate in jury service, but since it requires jury pay, where there is little money for such pay, either a representative Council might take on some judicial responsibilities (6.2 1317b30–32), or the large *dikastēria* might meet only for a few days, but more efficiently (6.5 1320a22–27).

Aristotle says that 'some critics' — certainly including Plato,²² but not limited to him — claim that jury pay resulted in a deterioration in the law courts, since the run of the mill (and thus ethically worse) people were more zealous about getting their names entered for participation in the juries (*Ath. pol.* 27.4). He also claims that jury bribery began soon after the introduction of jury pay, although the event that he mentions, Anytus' bribery of the court after his command at Pylos, must have been at least forty years later (*Ath. pol.* 27.5). Despite the size of the jury, if a case were close, successful bribery might result even if it influenced only a handful of jurors. On the other hand, the stringent procedures for mixing judges among various courts outlined in *Ath. pol.* 63–67 suggest that any attempts at bribery would see a great deal of money going to judges who would not even sit on the case in question.

Aristotle's *Rhetoric*

The beginning of Aristotle's *Rhetoric* includes several comments critical of rhetoricians and of the law courts. The law courts were the paradigmatic venue for orators trained in rhetorical theory, and Aristotle accuses the handbook writers of teachings devoted more to emotional manipulation of judges

²¹ And. 1.17 mentions that a case was tried before 6,000 judges, but he gives no indication that this number exhausted the supply of them.

²² Cf. Pl. *Gorg.* 515e2–4: Pericles has made the Athenians idle, cowardly, talkative, and avaricious, by starting the system of public fees.

than to speaking logically and to the point: ‘for it is wrong to warp the dicast’s feelings, to arouse him to anger, jealousy or compassion, which would be like making the rule crooked which one intended to use’ (*Rhet.* 1.1 1354a24–25). It seems clear that Aristotle includes these comments not because he embraces their dismissal of rhetoric — their point of view is so entirely different from what is said in the *Politics* and in book two of the *Rhetoric*, where emotions are discussed in great detail — but as a sort of dialectical challenge for *Rhetoric*. The points of this challenge are worth noting:

- It is easier to find one good legislator than many competent judges (1354a33–b1)
- The judgment of the legislator is universal. (1354b5–8)
- Judges decide on the spur of the moment. (1354b3)
- The influence of emotions prevents judges from seeing the truth. (1354b9–11)

Therefore,

- The judges must decide, as much as possible, only questions of fact. (1354b14–16)
- The orator must not arouse prejudice or emotions in the judges. (1354b16–20)
- Where questions of law are left unclear by the legislator, the judge is not to take instruction from the litigants. (1354a28–31)

As has been observed above, Aristotle embraces the rule of law unambiguously, and the reasons for his support of the decisions of legislators over the decisions of judges in the *Rhetoric* are consistent with those he gives in the *Politics*. In the *Politics*, however, he is more realistic about the great range of issues that are not foreseen by the legislator. In the *Rhetoric*, for instance, the phrase in the dikastic oath, *gnomēi dikaiotatēi*, is seen as giving license to judges to vote contrary to the law (*Rhet.* 1.15 1375a29–30). In the *Politics*, it is only seen covering what the laws do not. At the beginning of the *Rhetoric*, the judges of the popular court are seen as vulnerable to emotional manipulation in contrast with the legislator (or perhaps also with the practitioner of dialectic). In the *Politics*, the contrast is made with the single judge, who would be more susceptible to emotion, the beast (*Pol.* 3.16 1287a30), than a large panel of judges would be.

The limitations of the judges’ decisions to questions of fact is likewise consistent between the *Rhetoric* and *Politics*, but a severe limitation would diminish the democratic aspect of the law courts. The judges in Athens in fact had a great deal of freedom to judge cases as they saw fit; they were accountable to no one, except in their oath. The nature of ancient legislation left an enormous amount of room for judgment. The law against *hybris*, for instance, had no

definition of what *hybris* was, and scholars today still debate the issue. It was left to the judges to decide what *hybris* was, as well as whether someone punched someone else and whether that constituted *hybris*.

To Govern and be Governed in Turns

But one factor of freedom is to rule and be ruled in turn; for democratic justice is to have equality according to number, not worth, and if this is justice, the multitude must be sovereign and whatever seems best to the majority this must be final and this must be justice, for they say that each of the citizens ought to have an equal share (*Pol.* 6.2 1317b2–7).

It has been the goal of this paper to review Aristotle's views on law courts, especially the democratic law courts, and to identify issues for political theory. Aristotle's identification of participation in judicial decisions as an integral part of citizenship begins a series of interesting issues: the lack of experts in ancient Greek jurisprudence, the need for a balance of rich and poor, the use of jury pay, a secret ballot, the range of cases and issues to be decided by law courts, fidelity to the law, methods of jury selection and so on. There seems a great deal of room for further investigation. Ernest Barker had a life-long sympathy with Aristotle and shared with him beliefs in the priority of the rule of law over that of 'men' and reason over passion in the adjudication of law. His own grounding in such Aristotelian political theory led him on to research English law and politics, where questions about law courts and judges are not framed in the same ways as they can be for the democratic Athenian courts, but which were not dissimilar in the ends they pursued.

David C. Mirhady

SIMON FRASER UNIVERSITY