

A Study on the Germination and Status of Due Process in Primitive Society and Ancient Greek Society

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Abstract

The concept of due process was formally put forward in the form of theoretical system in the modern West, but there must be a consideration of whether the procedure itself is reasonable and just since the establishment of the dispute settlement procedure in human society. Although this consideration may be primitive and non-systematic, it still has room for reference and thinking for us to explore the theory of due process. This paper analyzes the concept and practice of due process in dispute resolution in primitive society and Greek society in order to have a more intuitive and systematic understanding of the judicial situation at that time.

Keywords

Due process, primitive society, ancient Greece.

1. Introduction

The concept of due process was formally put forward in the form of theoretical system in the modern West, but there must be a consideration of whether the procedure itself is reasonable and just since the establishment of the dispute settlement procedure in human society. Although this consideration may be primitive and non-systematic, it still has room for reference and thinking for us to explore the theory of due process.

Another unavoidable budding period in the process of due process is the ancient Greek era. The reason why it can not be avoided is that the far-reaching impact of the cultural heritage of this period on Western civilization has penetrated the bone marrow. Although procedural law is not a concept independent of substantive law in these two times, the theory of due process can only be seen through a few words of thinkers or some chapters of their works. We can not even find the theoretical focus of due process, but in the context of such a lack of theoretical research to form a set of relatively complete procedures for the settlement of disputes and disputes. Looking at today's vast system of procedural law books and works, a large number of sources of procedural law come from these procedures, so the author believes that. The discussion of people's view of due process in this era is of great significance to the development and deepening of the theory of due process.

2. The Development of Due Process in Primitive Society

Law is the theory of justice, and the justice studied in the theory of law can be divided into substantive justice and due process. Since human beings broke away from the primitive wilderness and entered the primitive society, the idea of due process has begun to sprout. Although in primitive society, there is no concept of public relief, people often choose wrestling, fighting songs, dueling and other ways to seek relief in front of disputes. But they usually tend to refer the dispute to an institution or a particular individual for resolution only if it is not resolved or is not satisfactory. Will take personal revenge and other extreme measures [Sun Yongxing primitive social justice function-A cultural anthropological interpretation of Ningxia Social Sciences, January 2008, No. 1]. The research of Edmund Hobel,

a famous legal anthropologist in the United States, shows that it seems to be a completely conscious act for human beings to be judged by authority after the occurrence of disputes. He mentioned such a case in his book *the Law of the first people*:

A Cheiner named Stump Horne, whose wife eloped with a man. But he remained the same for a long time, as if nothing had happened. After a while, a leader led a horse to give him, and hoped that he would not get into trouble, and he did not say anything to the leader. The leader asked Stump Horne if he could accept the horse and stop. Stump Horne said to him, "well, forget about that." So they smoked together, and Stump Horne got the horse, and the other married Stump Horne's wife. Hobel. *The laws of the first people* [M]. Beijing: China Social Sciences Press, 1993.]. In this case, Stump Horne's first reaction after discovering that his wife eloped was not to resolve the dispute on her own, but "as usual, as if nothing had happened". From this abnormal attitude we can draw two inferences:

First, Stump Horne believes that it is inevitable for authoritative figures to come forward to resolve this dispute;

Second, Stump Horne believes that it is the best choice for authoritative figures to resolve existing disputes.

Subsequent developments have also confirmed these two inferences. Similar cases appear in Malinovsky's "crimes and Customs in primitive Society", Khobel's "primitive Law", "how to think" by Marinovsky, "primitive Law" by Khobel, "how to think" by Marinovsky, Morgan's "Ancient Society" and other works on the scene of human life in the original city. Especially after human society entered the stage of the clan commune, Sacrifice rules, war rules, labor product distribution rules, commodity trading rules, property inheritance rules, marriage and family relations, as well as various forms of adjudication and trial have gradually become human beings to solve each other and even tribes. An important form of conflict between groups, With the germination of justice in human society, the simple view of due process has sprouted. The mechanism of this simple view of due process can be summarized as follows: the predictability of program startup and the expectation of program effect.

The expectability of the so-called procedure initiation can be the spontaneous effect of the procedure, such as the "necessity" mentioned in case inference 1, or it can also be that the parties initiate the procedure through a particular behavior. For example, the prosecution behavior of the parties in civil proceedings and the reporting behavior of the victims in criminal cases. The expectability of the initiation of the procedure is not only the basis of due process, but also the watershed between due process and case justice. Because meeting the expectation of the initiation of the procedure means that the procedure has become the norm of resolving a certain kind or type of dispute rather than occasional case justice. In the case of Stump Horne, Stump Horne's "as if nothing had happened" after discovering that his wife eloped with others also showed that he lived in an environment. It has become a norm for the authoritative "leader" to take the initiative as the procedure for the third party to coordinate the settlement of disputes.

The expectability of the program effect requires that the program has three characteristics: objective authority, negotiation of the process and subjective fairness. In the case of Stump Horne, the "leader" as a dispute resolver is an authoritative and convincing third party, who gives objective authority to the procedure. In primitive society, this authority is often given by the status or strength of the individual; In the process of resolving the dispute, the authoritative leader consulted with Stump Horne, although we are not sure that in the process of such negotiation, As a party, Stump Horne accepted the outcome of the negotiation or was forced to do so by the authority of the "leader" based on his own approval, but this did not affect the negotiation of the procedure itself. Stump Horne acknowledged the final outcome and did not retaliate against his eloping wife, suggesting that the outcome was fair in his subjective

perception. However, this kind of fairness can only be shown as subjective justice in the primitive society, which is mainly due to the influence of the level of productive forces, custom, religion and other factors, which leads to the fact that the primitive society has not formed a unified value rank, which is the value of the same dispute. People of different regions, different tribes and different religious beliefs often have different standards, and it is precisely because of the diversity of values that the requirements for the subjective fairness of the procedure force the existence and development of dispute negotiation.

Due to the limitation of productivity level, cognitive ability, custom and many other factors, it is difficult to form a relatively unified value system in primitive society. The difference of this value system also makes the simple view of due process has distinct characteristics of negotiation and subjectivity.

However, with the development of productive forces and social progress, at the end of primitive society, human beings have gradually moved from scattered tribes to integration. With the continuous running-in and blending, human society has gradually developed the embryonic form of the country. The relatively unified value system is also gradually taking shape in the process of blending, and the emergence of classes and the development of social organizational forms are calling for a set of unified rules to adjust the relationship between people, so the law came into being in this period. The Urnam Code in West Asia, the Hammuraby Code in ancient Babylon, the Twelve Bronze Table Law in ancient Rome, the Dragu Law in Athens, the ancient legislation of the Spartan oligarchy and Gao Tao's punishment in the Xia Dynasty of China, The important legal texts such as Yao Dian in the Yin and Shang dynasties were born in this period. In this historical context, people's understanding of due process has also undergone profound changes. Wife to others

3. The Theory of Due Process in Ancient Greece

In ancient Greece, the initial concept of the word "justice" had the meaning of "order". The "justice" referred to by the ancient Greeks first refers to the order of nature, followed by the order of human society. In Homer's Epic, Homer's use of Justice.

It presupposes a premise that the universe has a single basic order that gives nature and human society a corresponding structure. Zhou Zhan on the changes of the early Greek View of Justice from Homer to Solon, edited by Yang Shi, Greek original Wisdom, Social Science Literature.

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This fully reflects the ancient Greeks' worship of the natural order. In ancient Greek mythology, the goddess of order was also given the title of "god of justice".

The ancient Greeks' worship of the natural order was embodied in the worship of natural law in law, from the wise Antiphonic to Plato and Aristotle. And the stoic school founded by Zeno, a fat Niki, has continuously deepened and expanded the theory of natural law. However, in ancient Greece, there were few monographs on due process, and the relevant theories were occasionally mentioned in the monographs of substantive justice or ethics and philosophy. For example, Aristotle put forward in his ethics focus on "Nicomac Ethics" that the way to achieve natural justice should be through the judiciary, and judicial justice requires the neutrality of judges. In "Politics," he points out that "each person makes his own judgment in his own interests, and if most people want them to judge their own cases, In fact, they are all bad judges. [Ancient Greece "Aristotle" Politics, translated by Wu Shoupeng, Commercial Press 1965, p. 136.].

It is not difficult to see from the discussion here that Aristotle opposes the individual trial of his own case, which is also the meaning of due process.

In sharp contrast to the lack of theoretical focus, many due process institutional arrangements are actually reflected in the legal activities of the Greeks. Of course, the term "legal activities of the Greeks" here mainly refers to the legal activities of the Athenian city-states. Greece, as a collection of city-states, has not formed a unified institutional norms and legal system throughout the territory. There are great differences in the ways adopted by different city-states in the face of disputes and the settlement of disputes. This paper takes the system and case of Athens as an analysis model, which is mainly based on the development of Athenian civilization and its influence on later generations.

4. Cases of Due Process in Ancient Greece

Among the many precedents recorded in the existing literature, the most influential case is the trial of Socrates. The trial has long been regarded as the biggest tragedy of western democracy, and it is inevitable that a thinker was executed for his speech in a free-speech city-state. Later scholars will often reverse the case for Socrates from the perspective of substantive law, but the author hopes to put aside the analysis of the entity and the compassion for the wise. Objectively analyze which concepts of due process have been embodied or violated in this case from the course of the trial, and compare them with the "simple view of due process" put forward in the previous chapter. Thus, it outlines the practical picture of due process in the city-state of Athens.

Like the trial practice of later generations, the trial of Socrates also originated from the prosecution of the plaintiff. In the case, the prosecution was three Athenian citizens, Meletus (Meletus), Anitus (Anytus), and Lukon (Lycon), who charged them with two counts, one of disrespect and the other of corrupting young people.

According to the litigation system in Athens at that time, a total of 501 citizens formed a jury, which was not only responsible for the trial of facts, but also responsible for sentencing. In Athens at that time, there was no uniform stipulation on what kind of punishment should be imposed for criminal acts, but after determining the guilt of the accused party, each party proposed a form of punishment, and the jury decided which side of the punishment should be adopted. The final verdict of the jury is not as unanimous as the jury system in common law countries today, but more than half of the jury finds the accused guilty and guilty. In addition, in the Athenian public prosecution system, if the number of guilty votes is less than 1/5 of the jury number, the prosecutor will be sentenced to 1000 drachmas [drachma, Athens's main monetary unit. The equivalent of RMB "yuan", by weight, 1 drachma is about 4.31 grams, so the currency of 1 drachma is 4.31 grams of silver.]. The fine. Based on this procedural design, the Socrates trial proceedings are also divided into two stages:

The first stage of the trial is the statement of both the prosecution and the defense and the jury vote on the conviction. The specific trial procedure is first stated by the prosecution, then by the prosecution, and then by the prosecution. The prosecution and the defense will make two rounds of statements. There are strict rules on the timing of statements by the parties. There will be a water time meter on the scene of the trial. The water hour meter "has a small water supply pipe from which the water is injected to determine the length of time to plead." [Ancient Greece] Aristotle's Athenian political system, translated by Nikki and Richiro, 1959 edition of the Commercial Press, p. 69] at this stage of the trial, both sides stated the issue of substance, but there was one detail worth mentioning. That is, the maturity of the accused Socrates did not revolve around the charges charged by the prosecution. The final vote of the jury was 280 to 221, and Socrates was found guilty;

The second stage of the trial was the sentencing stage, and the process was more or less the same as the first stage, except that at this stage, the accused Socrates made a more offensive statement, declaring to and even to the panel of judges who convicted him that he was not afraid

of the death penalty. "the difficulty, my friend, is not to avoid death, but to avoid injustice because it haunts us more than death," he said. "For sentencing, he reluctantly imposed a penalty of 1 Minna [unit of weight in ancient Greece, 1 Minna is about 434 grams.]. Silver coins, and he suggested that the court should declare him a civic hero of Athens and declare his right to three free meals a day at city hall for the rest of his life. In the end, the jury sentenced Socrates to death by a vote of 366 to 140.

Throughout the process of Socrates' trial, we can have a more intuitive understanding of the judicial practice of the Athens city-state, but also through the process of judicial practice to analyze the content of due process at that time.

First, compared with the simple view of due process, the expectability of procedure initiation needs to be emphasized in the Athens city-state, which is also the inevitable result of the evolution of the form of social organization. In primitive society, because of the fragility and instability of social organization, whether there can be a preset procedure to resolve conflicts and disputes has become the basis of due process, but at the stage of city-state civilization, the preset procedure has become the norm. And from the many details of the trial of Socrates, we can see that people have made logical and strict rules on the tasks and times at different stages of the procedure. All these reflect the basic role of preset procedures in conflict and dispute resolution.

Second, the predictability of procedural results depends more on confrontation than negotiation. In the simple view of due process, the negotiation of the procedural process directly determines the outcome of the procedure, but by the time of the Athens city-state, the negotiation of this process has been replaced by antagonism. In the course of Socrates' trial, it can be clearly seen that, limited by the lag of substantive law, the two stages of conviction and sentencing still rely on the subjective opinions put forward by the procedural participants and launch the procedure on this basis. However, it has been difficult to see the shadow of negotiations at all stages of the procedure, and the outcome of the procedure has been achieved entirely through confrontation. It also shows that the concept of due process in the city-state of Athens is no longer a subjective and consultative due process, but an objective and antagonistic due process.

Third, both parties should have the opportunity to express their views, but whether or not to participate effectively has not become the meaning of the topic. The establishment of adversarial procedures inevitably requires program participants to fully express their views, which is also an important part of objective due process. However, in the trial system in Athens, the effective expression of the will of the two parties has not become the consideration of due process. From the trial process of Socrates, we can see that in the first stage of the trial, Socrates, as the accused, did not make a meaningful statement to the trial, but was still found guilty. This result has a lot to do with the adversarial procedure. In the adversarial procedure, both sides of the prosecution and defense are actually reaching their demands in a competitive way, which makes the procedure itself indifferent to the party who is passively involved in the confrontation. The result of this attitude is an important reason for the tragic outcome of the Socrates trial.

Fourth, the neutral status of the adjudicator has become an important part of due process, but it has not been well guaranteed by the procedure. There were no professional judges in the course of Socrates' trial, which was also in line with the judicial establishment of the Athenian city-state at that time. There were no professional judges in Athens, but in the form of democratization of the judiciary. According to the system founded by Solon, in Athens, "anyone over the age of 30 who has not owed debt to the treasury and has not lost his civil rights has the right to act as a juror." [ancient Greece] Aristotle's Athenian political system, translated by Nikki and Richiro, 1959 edition of the Commercial Press, p. 66. In order to prevent jury favouritism or bribery, Athens mainly uses two ways. One is the oath that all jurors trusted in

Athens must take an oath on Mount Adidas, southeast of Athens, which will say, "I will judge in accordance with the laws and decrees of Athens, where there are no provisions of the law." I will rule from the most impartial point of view." [Demosthenes, Demosthenes I, James H. Vince (trans), Harvard University Press, 1930, p. 596]; The second is the establishment of the rule of drawing lots. Before the trial, the jurors will be determined by three lots, the judges who will appear in court on the same day will be selected by the first draw, the court to which the judges should go will be decided by the second draw, and the court to be presided over by the palace members will be decided by the final draw. Athens through the above two ways to prevent judicial fraud, but the author doubts whether it can achieve the fairness of jurors. On the one hand, although jurors swear to "judge according to the most just point of view", in Athens, where the substantive law is not perfect, what kind of point of view is a just point of view, which itself is a concept with strong subjective color; On the other hand, the lottery system seems random, but it is also impossible to avoid the factors outside the trial affecting the fairness of the trial itself. Take the Socrates case as an example, if we extend the perspective to the context of the trial, it is not difficult to find that the trial of Socrates is not just because Socrates committed the charges, but has other political roots. Before the trial of Socrates, the 30-year war between Athens and Sparta, another Greek city, ended with defeat, and the defeated Athenian political system collapsed. An autocratic (Critias) of foot Cretia established an oligarchy called the Group of 30 tyrants, turning Athens into a police state. [England] Sadakat. The History of the trial-from Socrates to Simpson, translated by Yang Xiong, Contemporary China Press, 2009, p. 6] in the eight months of 403BC, about 1500 people were executed on the spot without trial. That number is almost as high as the number of people who have died in the war in the past decade. [Aristotle. Constitution of Athens 35.4; Hellenica. P.129 (2.4.21)]. The later re-established democracy announced amnesty for political prisoners for peace, but many Athenians were still eager to settle the bill. Socrates is one of those who have been avenged and paid a heavy price. For many of the principles that were placed in his name were consistent with the thoughts of the tyrants. [England] Sadakat. The History of the trial-from Socrates to Simpson, translated by Yang Xiong, Contemporary China Press, 2009, p. 7] although all the factors can not be denied in the Athenian understanding of due process, The neutrality of the judge is a necessary condition, but its procedural guarantee is far from being able to guarantee the realization of this condition.

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