

NOMOS

*Essays in Athenian law, politics
and society*

edited by

PAUL CARTLEDGE

PAUL MILLETT

&

STEPHEN TODD

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

© Cambridge University Press 1990

This book is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 1990

Reprinted 1993

First paperback edition 2002

A catalogue record for this book is available from the British Library

ISBN 0 521 37022 1 hardback

ISBN 0 521 52209 9 paperback

Contents

	<i>Notes on contributors</i>	page ix
	<i>Preface</i>	xi
	<i>List of abbreviations</i>	xiv
1	Law, society and Athens STEPHEN TODD and PAUL MILLETT	1
2	The purpose of evidence in Athenian courts STEPHEN TODD	19
3	Fowl play: a curious lawsuit in classical Athens PAUL CARTLEDGE	41
4	Plato and the Athenian law of theft TREVOR SAUNDERS	63
5a	Vexatious litigation in classical Athens: sykophancy and the sykophant ROBIN OSBORNE	83
5b	The sykophant and sykophancy: vexatious redefinition? DAVID HARVEY	103
6a	The law of <i>hubris</i> in Athens NICK FISHER	123
6b	The Solonian law of <i>hubris</i> OSWYN MURRAY	139
7	The social context of adultery at Athens DAVID COHEN	147
8	Sale, credit and exchange in Athenian law and society PAUL MILLETT	167
	<i>References</i>	195
	<i>Glossary–Index</i> : STEPHEN TODD	215
		vii

Law, society and Athens

STEPHEN TODD AND PAUL MILLETT

THE STUDY OF ATHENIAN LAW

In what turned out to be his last book, Moses Finley (1985: 99–103) devoted several pages to ‘the problem of Greek law’. In doing so, he was returning to one of the earliest interests of his career (cf. Finley 1951 and 1952). It would perhaps be fair to describe Finley, along with the classicist and sociologist Louis Gernet,¹ as pre-eminent among the very few exponents of the ‘law and society’ approach to Greek law for which we are pleading. It is striking, therefore, that both Gernet and Finley in major works lamented the lack of attention which the subject has received from the scholarly world. In the introduction to his first volume of essays, Gernet (1955: 1) complained that Greek law was studied by two groups only: philologists, who took no interest in questions of law; and Roman lawyers, who were constrained by inappropriate categories of thought. Borrowing an apt phrase from Hans-Julius Wolff, Finley (1985: 99) described Greek law as ‘notoriously a stepchild in modern study’.

One might perhaps take Finley’s point, and also the metaphor, a stage further. The problem of Greek or, to be more precise, Athenian law (see section II of this chapter) is that it is not simply a stepchild, but a stepchild overawed by several overbearing (not to say ugly) sisters. It is not just that more work needs to be done, though it has to be admitted that the Attic Orators, the central source for Athenian law and legal procedure, remain relatively under-researched.² Rather, the relationship between Athenian law and other kindred subjects needs to be re-examined. Indeed, part of the reason

¹ For a convenient introduction to Gernet’s work, see Humphreys (1978: 76–106).

² Absence of interest in the Orators is symptomatic of a wider neglect of the fourth century B.C. as compared with the earlier centuries of Greek history. As a recent illustration, there is Garner 1987: despite its title, *Law and Society in Classical Athens* (i.e., fourth century as well as fifth), the concluding chapter on ‘The Fourth Century’ is restricted to a mere fourteen pages (see the reviews by Osborne 1987 and by Cartledge 1988). A glance at Garner’s table of contents gives a correct impression of the very limited overlap between his book and the present volume.

for the low scholarly profile of Athenian law may be that it has traditionally been studied on the basis of questions and categories of thought derived from inappropriate disciplines. This point deserves to be discussed in more detail, considering the relationship of Athenian law first with Roman law, then with Greek law, and finally with law in general.³

I ROMAN LAW AND ATHENIAN LAW

The legal systems of the modern west are divided broadly into two groups: the civil-law systems of France, Germany and the bulk of continental Europe; and the common-law systems of England and the United States. There are of course exceptions: Scots law for instance is a hybrid, containing elements of both systems (Robinson, Fergus & Gordon 1985: 258–79, 377–405).

The influence of Roman law in continental Europe is not surprising. Civil law, after all, derives its name from the *ius civile*, the ‘law that pertains to citizens’, of ancient Rome. The connecting link between Roman *ius civile* and modern civil law is the codification of Roman law in the name of the emperor Justinian in the sixth century A.D. The body of texts issued under Justinian is described collectively as the *Corpus Iuris Civilis* (corpus of civil law), although it was never as complete and systematic as the name suggests. Most important was the Digest, also commonly known as the Pandects, issued in 533, an authoritative compilation of excerpts from the leading classical jurists of the second and third centuries A.D. The Institutes (also 533), an introductory textbook for law students, was likewise made up of quotations from similar but older works; and the *Corpus* was completed in 534 by the promulgation of a second Code of imperial constitutions (i.e., statute law), superseding an earlier Code of 529 (see Wolff 1951: 158–76; Nicholas 1962: 38–45). Roughly half a millennium later, in the eleventh and twelfth centuries, the Digest began to be adopted as the basis of study by the emerging law schools of northern Italy, most notably that of Bologna; and the prestige of these law schools attracted students not only from Italy itself but from the whole of northern Europe, in particular Germany and France. University-trained lawyers, therefore, studied law according to categories of thought derived from Justinian. They took what they had studied back to their own kingdoms, where it seemed so much more sophisticated than the local customary law that they applied it in their pleadings and their judgements. This process culminated in what is called the Reception, by which a revived Roman law was ‘received’ (accepted) as the basis of national law in place of local custom.⁴

³ In what follows, emphasis has been placed on citation of more recent work on Athenian law. For a comprehensive list (but without comment) of materials available down to c. 1925, see Calhoun & Delamere (1927). A further list, covering the years c. 1925–c. 1965, may be found in Berneker (1968: 697–770), although the organisation of this bibliography is rather confusing.

⁴ For details of the Reception of Roman law in medieval Europe, see Vinogradoff 1909, with Wolff (1951: 177–206), Nicholas (1962: 45–54) and Robinson, Fergus & Gordon (1985:

In England on the other hand the situation was different. Romanist ideas were not unknown (Vinogradoff 1909: 97–118; Nicholas 1962: 46), but there was no Reception. Instead, it was customary law, extended and made uniform ('common') throughout the country, that formed the basis of English (and indirectly American) common law (Robinson, Fergus & Gordon 1985: 208–58). Nobody has ever satisfactorily explained why the Reception should have happened throughout Continental Europe but not in England; but it should be emphasised that the spread of Romanist thinking was a gradual process, and its progress was determined by complex factors (Wolff 1951: 183–206; Nicholas 1962: 48–50). Reception took place more easily within the Holy Roman Empire than outside it, because the Digest presupposed the jurisdiction of the Emperor. Where customary law was already perceived to be sufficiently sophisticated to meet the needs of society, this will have reduced the pressure for change. The way in which the law was taught may also have played a part: English lawyers have traditionally been trained by practising lawyers at the Inns of Court rather than by academic lawyers at universities or law schools.

It was therefore predictable that Roman law would have traditionally had a firm hold on the legal scholarship of continental Europe. What is at first sight more surprising is that Roman law has had a considerable impact on English legal thinking also. This may in part derive from the sheer dominance of Roman law as an effort in systematic thinking: whether we agree or disagree with it, we cannot get away from it. Roman law remains a traditional though declining component in law degrees in English universities.⁵ But the dominance of Roman law may also be connected with its own inherent ambiguities: different sides in the same dispute can both look back on Roman law as their spiritual progenitor. Thomas (1968: 1–3) for instance uses Roman law of the classical period before Justinian in order to attack the Reception: he praises it as a creative system in which rulings were made to meet practical problems, rather than a fossil in which doctrines are expanded with ruthless logic to cover future eventualities. This is the language in which the case-based common lawyer berates his code-based civil-law colleague; and it is done by appealing to Roman law.

The dominance of Roman law in Anglo-American as well as Continental legal scholarship therefore helps to explain the traditionally low profile of Athenian law as an intellectual discipline. This was by implication the thrust of Finley's lament: the study of Greek law is a 'stepchild' in the sense that it

71–121). For a comparative perspective, examining the reception of systems other than Roman law, see Watson 1974.

⁵ Roman law in England has traditionally been studied from a strictly theoretical perspective, almost as a form of jurisprudence, because its relevance to English law is purely intellectual. The jurisprudential tradition has been particularly strong at Oxford, as suggested by several of the books in the Clarendon Law Series: Hart 1961, Sawyer 1965, Raz 1980. The relationship between modern jurisprudence and Athenian law is discussed further in section III of this chapter.

has had that of Roman law as a stepmother. The strength of this link can easily be demonstrated, in terms of the restricted opportunities for the former both in employment and in publication. The number of scholars studying Greek law has never been large; and many of these, at least on the Continent, have held posts in departments of Roman law. Hans-Julius Wolff, for instance, the most distinguished German scholar of his generation in the field, was Professor of Roman and Civil Law at Freiburg; Arnaldo Biscardi, the most eminent contemporary Italian expert, is Professor of Roman Law and Director of the Istituto di Diritto Romano in Milan. The context in which a scholar works will necessarily have implications for his methods of study.

The restricted opportunities for publication are even more striking. There are perhaps four journals which might be expected to show a specialist interest in articles on Greek law: none of these, we note with regret, is published in an English-speaking country.⁶ Of the four, the Belgian *Tijdschrift voor Rechtsge-schiedenis* (*TR*: sometimes known by its alternative French title as the *Revue d'histoire du droit* or *RHD*) and the French *Revue historique de droit français et étranger* (*RDFE*) are both concerned with legal history in general; the latter contains few articles on Greek law with the exception of a very useful critical bibliography of the subject, which appears annually, edited most recently by Alberto Maffi. The other two journals however do specialise in ancient law: these are the French *Revue internationale des droits de l'antiquité* (*RIDA*) and the German *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (*ZSS*: sometimes *ZRG*). For the Greek lawyer, *RIDA* would at first sight appear the best prospect. Each issue is divided into three or four sections: the ancient Orient; classical and hellenistic Greece (combined or separated in different years); and Rome. But the relative size of each section is striking: we conducted a rough survey of the thirty-three volumes of the third series available to us (1954–86); we counted both number of articles and number of pages, and the two sets of figures varied by only three or four percentage points in each case. During that period the ancient Orient filled roughly 25–30 per cent of the whole; Rome filled 55–60 per cent; and Greece (even adding classical and hellenistic together) was confined to a mere 10–15 per cent. The picture becomes even sharper with *ZSS*, which does indeed publish work on Greek law. But *ZSS* is divided into three simultaneous series, independently edited, with one volume of each appearing annually: Roman law, German law, and Canon law. If an article on Greek law is published, it will appear in the *Romanistische Abteilung*. This has a powerful symbolic significance.

The dominance of Roman law therefore helps to explain the 'stepchild' status of Greek law. But it has also had an effect on the way in which Greek law is studied. As Gernet (1955: 1, cited above) complained, when Roman lawyers study Greek law, they tend to impose inappropriate categories on it.

⁶ This is of course an oversimplification, because it ignores the willingness of general classical and even legal journals, both in Britain and in the United States, to publish work on the subject. But the point remains: it is impossible to name a specialist journal published in this country.

This is best illustrated by examining the structure which authors of systematic textbooks have given to their work.

Sir Henry Maine, who introduced to this country the comparative study of ancient law,⁷ observed in a famous phrase that in the early stages of legal development 'substantive law [is] secreted in the interstices of procedure' (Maine 1883: 389; see further n.12 below). To the modern mind, this may seem surprising: we would tend to assume that substantive law ('what are my rights and my duties?') has a logical priority over procedural law ('how do I go about defending my rights?'); after all, you need to know what your rights are before deciding whether to go to court to protect them. This, however, has not always been so. In Athens, so far as we can tell, procedural law held both a chronological and a logical priority: the reason for example why the Athenians had no proper concept of a distinction between ownership and possession is that they had no procedure whereby absolute ownership could be asserted; instead, they had only a series of procedures by which you could assert a better right than a particular opponent.⁸ Procedures came first, and a substantive right could only exist where there was a procedure available to create that right.

Now this of course has implications for the structure of textbooks and general works of reference. If we are correct in applying Maine's dictum to Athens, then a general textbook on Athenian law should give priority to legal procedure rather than to substantive law. There are not very many such textbooks;⁹ a total of seven may be listed. These, are, in chronological order: Beauchet (1897),¹⁰ Lipsius (1905–15), Vinogradoff (1922), Bonner & Smith (1930–8), Harrison (1968–71), MacDowell (1978), and Biscardi (1982). Vinogradoff and Bonner & Smith are to some extent attempting a different

⁷ The influence on Maine of Savigny and the historical school of German lawyers is an important topic; but it is beyond the scope of this chapter, and it does not substantially detract from Maine's own originality: for details, see Kuper (1988: 20–3).

⁸ This is a disputed point: it is rejected by Kränzlein (1963), who devoted his work on the law of property to a search for the concept of ownership. Harrison (1968: 205 n.2) appears to agree with Wolff that this search has proved ultimately unsuccessful. Harrison himself (1968: 201 n.2) suggests that the absence of a concept of ownership was the reason for the limited nature of the remedies available to a would-be Athenian claimant of property; but this is surely to mistake cause for effect.

⁹ We leave on one side here a number of very useful short introductions, many of them articles in encyclopaedias or general introductions to the Classical world (Wyse 1916, cf. n.26 below; Weiss 1933; MacDowell 1988); because of their brevity, these do not have to face the problem of organising their material in the same way as do the full-scale textbooks. Also deserving of passing reference are the entries on specific legal topics in the standard Classical dictionaries. The articles in the *OCD* (2nd edn, 1970) are useful for immediate reference, but they are generally too brief to be of great significance. The entries in *RE* (1894–1972) are for the most part highly technical, though normally comprehensive and often definitive. Perhaps the most penetrating, though inevitably the most dated, are the pieces in the French lexicon edited by Daremberg & Saglio (1875–1919): many of these were the work of Exupère Caillemer, himself the author of a series of important short studies (Caillemer 1865–72; cf. Caillemer 1879).

¹⁰ Beauchet was not the first writer to be interested in the subject, but no earlier work has the comprehensiveness and accessibility required of a textbook. Even the great manual by Meier & Schömann 1824 is better described as a work of legal antiquities.

sort of exercise; and discussion of their work will be postponed until section III of this chapter. This leaves us with five books to consider.

Lipsius' interests at first sight appear to be procedural, but he was in fact writing not so much a work on procedural law as a catalogue of legal procedures: the second volume, which itself appeared in two parts (1908–12) and together is longer than the other two volumes combined, consists of a separate study of every attested type of prosecution, catalogued in terms of the presiding magistrate. As Gernet complained (1938a: 266–8), the result is brilliant on questions of detail but conveys no unified conception of how Athenian law hangs together.¹¹

The remaining authors all adhere more or less closely to a pattern derived not from Athenian but from Roman law. Beauchet indeed confines his attention ruthlessly to 'private law', a category unknown in Athens, and one which he himself found it increasingly difficult to sustain throughout four volumes (Harrison 1968: vi–vii). Biscardi's introduction (1982: 6) protests against his predecessors' use of inappropriate Roman categories; but he then devotes 19 pages to sources of law, 37 to public and 159 to private substantive law, with only 19 pages allowed for legal procedure and a further 36 for the early history of criminal law. Similar priorities are displayed by Harrison: substantive law takes up the first of his two volumes, and was originally intended to fill the first half of the second volume also (Harrison 1971: v–vi). Much of Harrison's vocabulary is similarly derived from Roman law, which at times results in a certain obscurity. The work is indispensable to the specialist, but rarely consulted by more general readers.

A reaction against Harrison's uncompromising austerity came from MacDowell, who had himself been the literary executor for Harrison's posthumous second volume. MacDowell's own book studiously avoids the technical terminology of Roman law: it is admirably lucid and accessible to the non-specialist. Indeed, MacDowell (1978: 9) virtually rejects on principle the use of other legal systems for comparative evidence, preferring to devote his attention to Athens itself. But we may doubt whether such a manifesto can really be maintained. Historians who reject the explicit use of comparative evidence tend in practice to use it implicitly and subconsciously; and for a British legal historian, the natural starting-point is an amalgam of English, possibly Scots, and a bit of Roman law. The plan of MacDowell's work is indeed very similar to that of Harrison's: the only major change is the addition of an introductory section on the development of the courts (57 pages); substantive law (136 pages) once again fills the bulk of the book, and is again considered ahead of procedure (57 pages).

To sum up: our society's emphasis on substantive and in particular private substantive law should not be regarded as somehow 'natural' and therefore

¹¹ Lipsius' second volume (1908–12) is itself based on his 1883–7 revision of Meier & Schömann 1824. He may, as Gernet (1938a: 266) suggests, have been to some extent a prisoner of this earlier work of legal antiquarianism (cf. n. 10 above).

intrinsically correct; it is an assumption derived indirectly from the priorities of the Roman jurists. The historian of a legal system earlier than, and consequently independent of, classical Roman law should perhaps look instead to other ancient societies to gain an understanding of other possible categories of thought. The immensely creative work of Maine (esp. 1861) on ancient law, though by no means as unsophisticated as some of his modern critics seem at times to imply, is now rather dated.¹² Much the same must now be said of other early scholars in the comparative tradition: Fustel de Coulanges (1864, with Momigliano & Humphreys 1983) and Glotz (1904, 1906, 1928). The most recent extensive work, that of Diamond (1971) is weakened by a certain economic determinism; and for our purposes it focuses on communities considerably more 'primitive' than any of the Greek *poleis*. But it would perhaps be worth strengthening the links between Greek law and the legal systems of the ancient Near Eastern kingdoms, about which we are relatively well-informed (Driver & Miles 1952–5; Boecker 1980). Indeed, as a corrective to the Romano-centricity of European legal thought, the perspective of independent modern systems such as Islamic (Pearl 1979) or Communist (Hazard 1970) law should not be ignored. Islamic law for instance consciously and deliberately seeks to impose a particular social and religious framework upon society; and in Communist law the court has an overtly political rôle. Both cases may supply closer analogies for an ancient Athenian court than does modern European law (at least in the eyes of modern European lawyers). Similarly our understanding of the law-code of Solon may be illuminated by consideration of ancient Near Eastern codes: such codes were 'interstitial' rather than 'exhaustive' (Sawer 1965: 58); their rôle was to fill in gaps in pre-existing customary law rather than to replace it. Their function was therefore far closer to that of statute in a common-law system than to that of a modern civil-law code.

II GREEK LAW AND ATHENIAN LAW

The study of Greek law, as a discipline distinct from Athenian law, was invented by Ludwig Mitteis at the end of the nineteenth century. Before that date, attention had been focused on Athens, as the source of virtually all our literary evidence. During the nineteenth century, however, two new bodies of non-literary evidence began to come to the attention of ancient legal his-

¹² Particularly questionable, when viewed from an Athenian perspective, is Maine's emphasis on the concept of legal evolution (see Stein 1980: 69–98). For its unsuccessful application to one aspect of the law in ancient Greece, the origins of the putative concept of 'crime', see Calhoun 1927 (more generally, Calhoun 1944). Maine himself had strikingly little to say about ancient Greece, in spite of an interest in legal and social systems that ranged far beyond ancient Rome (e.g. Maine 1871; 1875; 1883). It may be that the democratic aspect of classical Athens proved uncongenial to his essentially conservative temperament (see Maine 1885, with Feaver 1969: 227–50). On the other hand, Maine's emphasis on the importance of procedure in early law has often been wrongly criticised: but what has been refuted is Maine's belief that such procedure was formalistic, not that it was important (see generally the discussion in Sawer 1965: 62–4).

torians: inscriptions¹³ and papyri.¹⁴ Of Greek inscriptions, only a few are of much legal significance in the narrow sense, and the majority even of these came from Athens itself; but the picture was different with the papyri. For reasons of climate, virtually all the papyri that have survived have been found in Egypt, a country which was first opened up to Western scholars by the campaigns of Napoleon; by the end of the nineteenth century, scholars had begun to be deluged by Greek documentary papyri, recording the activities of the non-native population of Egypt during the millennium that it was under Graeco-Roman rule.¹⁵ Mitteis was one of the first legal historians to realise the possibilities of this material; and it was he who revealed a very striking phenomenon. Just as Greek rather than Latin remained the normal language of the immigrant population of Egypt (indeed, of the eastern Mediterranean in general) even under the Roman empire, so the law which was there applied at ground level showed far greater conceptual affinities with what was known of Athenian law than with the civil law of Rome itself. Mitteis (1891) described this as the survival of Greek *Volksrecht* ('popular law') in the face of the official Roman *Reichsrecht* ('imperial law'). Mitteis and his followers¹⁶ concluded that Greek law should therefore be seen as an entity in its own right, ranging in time from Homer to the Arab conquest, and covering the whole of the Greek-speaking world; differences between the law in Homer, in classical Athens and in the papyri should be seen as local variants at particular stages of development.

Mitteis' thesis was persuasive and, for more than half a century, commanded very wide if not total acceptance. It formed the basis of many important works, including for instance Fritz Pringsheim's book on the law of sale (Pringsheim 1950). It was, indeed, in an extended review of Pringsheim's book that Finley (1951) mounted one of the first serious challenges to the validity of the concept of Greek law. Finley's major objection was that statements about Greek law were of two kinds: those which had to be qualified

¹³ There are a number of standard general collections of inscriptions (for details see Woodhead 1981: 94–107); specifically juridical texts are collected in *JG*.

¹⁴ A good impression of the range of surviving documentary papyri can be gained from the Loeb selection edited by Hunt & Edgar (1932–4: two vols. of a promised five-vol. collection, of which only three were ever published; the third vol., edited by Sir Denys Page, contains literary poetic texts).

¹⁵ Egypt was ruled by the Ptolemies (a Graeco-Macedonian dynasty) from soon after the death of Alexander in 323 B.C. until the death of the last Kleopatra in 30 B.C. From then until the Arab conquest in the seventh century A.D., it remained part of the Roman or Eastern Roman empire. By the end of this process, the law applied in the papyri appears to have consisted of a multiplicity of layers: Roman imposed on Graeco-Macedonian imposed on native Egyptian law.

¹⁶ Mitteis himself was cautious, and fully aware of the perils of his thesis: 'Indeed, there is the danger that we may carry too much over from the papyri to ancient Greek law, that is to say, that we date back to ancient Greek law phenomena which are the products of a later development. Further, in using such later sources, we must always reckon with the possibility of local or temporary legal variations.' This passage was cited with a certain irony by Finley (1952: viii), but his bibliography here is incomplete and we have not been able to identify the quotation.

out of existence to allow for exceptions to the rule; and those which were of such a general nature that they became banal (see further Finley 1986: 134–46). Either way, Greek law was a concept of no analytical utility.

The issue is still contentious. Scholars have divided along broadly national lines, with the Anglo-American world generally following Finley (thus Harrison 1968: vii; and see further the comments of Millett in chapter 8 below) and most German and Italian scholars continuing to speak of Greek law (thus cautiously Wolff 1979: 31 n.72, and more outspokenly Biscardi 1982, criticised by Stroud 1985). But there have been many exceptions.

Nobody would wish to deny the close relationship between the legal systems of the various Greek *poleis*. After all, as Wolff (1979: 31 n.72) pointed out, they did speak the same language. And much valuable comparative work has been done. On the question of marriage, for instance, it is notorious that a woman in classical Athens (or at least, the sort of woman who is mentioned in our sources) had far less control of her property than did either her Homeric predecessor or her Hellenistic successor. The details of this are well set out by Schaps (1979: cf. Ste. Croix 1970), and some of the underlying reasons are explored by van Bremen (1983). But an important further contribution has been made in a paper by Modrzejewski (1983), a firm believer in Greek law, who has done much to isolate those features of the law of marriage which remained constant throughout the Greek world from those which did not.

It is certainly a valid and often a fruitful exercise to undertake a comparative study of a legal institution in different parts of the Greek world. But it is dangerous to go further than this, for two reasons. In the first place, there is a great temptation to use what we know about Graeco-Roman Egypt to fill in the considerable gaps in our knowledge of classical Athens, and *vice versa*; this point is well made at the outset by both Harrison (1968: vii) and MacDowell (1978: 8). But classical Athens and Graeco-Roman Egypt are the two areas about which we are relatively well-informed: if we wish to discuss the legal systems of other *poleis*¹⁷ or the early law of Athens,¹⁸ we are dependent almost

¹⁷ After Athens, the classical *polis* about which we know most is of course Sparta, and Spartan law has been the subject of a recent book by MacDowell (1986). This book represents a brave attempt, but it ultimately founders on the lack of evidence. MacDowell is finally driven to do what he has himself sharply criticised elsewhere (1978: 8): he fills in the gaps by declaring that 'as a working hypothesis, it would really be better to assume that Spartan law was much the same as Athenian law on all topics . . . on which we are not told that it differed' (1986: 152). See the criticisms by Cartledge (1986: 142–3).

¹⁸ Early Greek law has recently been the subject of an important book by Gagarin (1986, with forthcoming rev. by Todd 1990b). This is full of pertinent and provocative observations, most notably concerning the relationship between the early history of writing and the origins of law. But since Gagarin has to rely for his information on a few chance references in Homer, on a fifth-century Cretan text which is deemed to be 'primitive' in outlook, on a fifth-century Athenian inscription that purports to repeat a seventh-century text, and on such etymological speculations as *Ath. Pol.* 3.4 (cf. Gagarin 1986: 56), the book remains something of a *tour de force*, and his ideas can never have a status higher than that of attractive suggestions. Gagarin's previous work on the origins of *dikē* (Gagarin 1973; on *dikē* see further n.25 below) confined itself to a specific problem; and given the nature of our evidence for early law, this may be a more secure approach. The alternative is to follow MacDowell (1963) in his outstanding study

entirely on a combination of snippets of information and guesswork-by-analogy.

A second problem concerns the relationship between law, society and politics. For those who accept the proposition that 'law' is an entirely autonomous activity, there is no difficulty here: it becomes perfectly legitimate to assume, in default of hard evidence to the contrary, that the function of a named institution in a democratic *polis* like Athens will have been essentially the same as its function in a dynastic state like Ptolemaic Egypt. But the moment we admit that law has an organic relationship with its social and political context (see the discussion of the word '*nomos*' in section III of this chapter), then we must admit also that the practical differences between places and across time were probably greater than the continued use of the same legal vocabulary might imply. Classical Athenian law for instance appears to have paid more attention to ways of calling to account public officials (for details, see Roberts 1982) than to ensuring the orderly devolution of property-rights. For this it has been extensively criticised; but the Athenians would presumably have replied that the function of law in a democracy is to protect the weak against the excesses of the strong, and to prevent socially indefensible concentrations of landed property. Are we really to assume that the same applied in an oligarchy such as fifth-century Thebes, let alone in a monarchy such as the Ptolemaic kingdom?¹⁹ The changing social context of a single legal concept (*hubris*) in archaic and classical Athens is examined in the papers by Fisher and Murray which together make up chapter 6 of this volume.

The question of Greek law and its conceptual validity has tended to divide English and American scholars working in the subject from their continental European colleagues. But their methods and interests have divided them still further. English and particularly American scholars have traditionally shown a great interest in the legal ramifications of inscriptions, stemming in part from the work of the American School at Athens in excavating the Agora, with regular publications in the journal *Hesperia* and its Supplements. Another major American speciality has been constitutional history, with important recent publications by Stroud (1968), Ostwald (1969, cf. n.23 below; 1982; 1986) and Sealey (1987).²⁰

of Athenian homicide law, and to restrict any attempt at a general synthesis to the age of the Orators (c. 420–320 B.C.), the only period for which we have adequate information.

¹⁹ It was, in our opinion, precisely this diversity which inspired a man like Theophrastos to write his *Laws* (c. 320), a work which appears from the surviving fragments to have comprised a comparative study of those different legal systems which were known to him, after the model of Aristotle's comparative study of different *poleis* in the *Politics*. Szegedy-Maszak 1981, in his useful edition and commentary on the few surviving fragments, nevertheless argues from the existence of the *Laws* that Theophrastos believed there was sufficient common ground between the legal systems of the Greek *poleis* to justify modern use of the term 'Greek law'. But one of the legal systems which Theophrastos discussed is that of Carthage: are we to suppose that he believed this to be a Greek *polis*?

²⁰ It is perhaps significant that the impulse behind Sealey's book arguing that (1987: 146) 'Athens was a republic, not a democracy' should have come from (1987: ix) 're-reading H. S. Maine's *Ancient Law*' (see above, n. 12). For Sealey's work, see further n. 31 below.

A fair impression of the work now being done by continental scholars may be gained by consulting the *Symposion* volumes. These contain the proceedings of a conference on Greek and Hellenistic legal history, held at roughly triennial intervals since 1971 at a range of venues in Germany, Italy, France, Greece and Spain. Four volumes have so far appeared (Wolff 1975a, Biscardi 1979, Modrzejewski & Liebs 1982, and Dimakis 1983): they reveal a considerable interest in Homer and in the papyri, and much attention is also paid to legal concepts and doctrines; but relatively little is said about the social context of Greek and *a fortiori* classical Athenian law.

The discontinuity between English-speaking and continental European scholarship is, fortunately, by no means complete. There are a few English-speaking scholars who work on the law of the papyri: Naphthali Lewis for instance is both an expert papyrologist (Lewis 1983), and also (it is interesting to note) one of the few English-speaking scholars to have contributed a paper to one of the *Symposion* volumes (Lewis 1982). Similarly, there are a few Continental scholars interested in fields which have traditionally attracted their English and American colleagues: Eberhard Ruschenbusch for example is a specialist in among other things constitutional law (e.g. Ruschenbusch 1966, 1978). And there are one or two scholars who are equally at home in both intellectual worlds: Mogens Hansen, for instance, has published in both German and English in addition to his native Danish. But it is striking, and a matter for regret, that only three of the eighty-four papers in the four published volumes were delivered by English-speaking scholars;²¹ it is even more regrettable that no *Symposion* volume has ever been reviewed in an English-speaking journal.²²

III ATHENIAN LAW AND THE STUDY OF LAW

The final relationship to be discussed is that between Athenian law and law as an intellectual discipline. The word 'law' is notoriously difficult to define, and jurists from Austin to Hart have bartered rival analyses for generations. (For discussion of the theories of Austin, Kelsen and Hart, see Raz 1980; a useful introduction to the thought of Hart and his predecessors is found in MacCormick 1981.)

For the ancient Greek world, the problem is compounded by the cluster of meanings that hang around the word *nomos*. Although the common rendering of *nomos* as 'law' is often appropriate, alternative translations offered by the

²¹ The statistics are *Symposion* 1971 – 5 French, 10 German, 3 Italian; *Symposion* 1974 – 5 French, 3 German, 11 Italian; *Symposion* 1977 – 2 English, 11 French, 10 German, 3 Italian; *Symposion* 1979 – 1 English, 7 French, 8 German, 5 Italian; giving a grand total of 3 English, 28 French, 31 German, and 22 Italian. There is some indication that the picture may be beginning to change: two papers were delivered by English-speaking scholars in 1982 and four in 1985 (as yet unpublished, but see notices in *RDFE* 60 (1982) 548–9 and 63 (1985) 463–4).

²² This tendentious assertion is based on negative evidence (that of *L'Année philologique*), and there may therefore be exceptions.