

DEMOCRACY AND  
THE RULE OF LAW IN  
CLASSICAL ATHENS



ESSAYS ON LAW,  
SOCIETY, AND POLITICS

EDWARD M. HARRIS

# DEMOCRACY AND THE RULE OF LAW IN CLASSICAL ATHENS

---

ESSAYS ON LAW, SOCIETY,  
AND POLITICS



EDWARD M. HARRIS  
UNIVERSITY OF DURHAM



CAMBRIDGE  
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

40 West 20th Street, New York, NY 10011-4211, USA

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9780521852791](http://www.cambridge.org/9780521852791)

© Edward M. Harris 2006

This publication 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 2006

Printed in the United States of America

*A catalog record for this publication is available from the British Library.*

*Library of Congress Cataloging in Publication Data*

Harris, Edward Monroe.

Democracy and the rule of law in classical Athens : essays on law, society, and politics / Edward M. Harris.

p. cm.

Includes bibliographical references and index.

ISBN 0-521-85279-x (hardback)

1. Constitutional history – Greece – Athens. 2. Rule of law – Greece – Athens – History.

3. Democracy – Greece – Athens – History. 4. Law, Greek. I. Title.

KL4361.32.A75H37 2006

340.5'38 – dc22 2005029329

ISBN-13 978-0-521-85279-1 hardback

ISBN-10 0-521-85279-x hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

## DEMOCRACY AND THE RULE OF LAW IN CLASSICAL ATHENS

This volume brings together essays on Athenian Law by Edward M. Harris, who challenges much of the recent scholarship on this topic. Presenting a balanced analysis of the legal system in ancient Athens, Harris stresses the importance of substantive issues and their contribution to our understanding of different types of legal procedures. He combines careful philological analysis with close attention to the political and social contexts of individual statutes. Collectively, the essays in this volume examine the relationship between law and politics, the nature of the economy, the position of women, and the role of the legal system in Athenian society. They also show that the Athenians were more sophisticated in their approach to legal issues than has been assumed in the modern scholarship on this topic. At the same time, several of the studies warn against importing anachronistic ideas into the analysis of Athenian Law.

Edward M. Harris is Professor of Classics and Ancient History at the University of Durham. A scholar of Athenian Law, economy, and social history, he is the author of *Aeschines and Athenian Politics* and coeditor (with Lene Rubinstein) of *The Law and the Courts in Ancient Greece*.

TO ARIELLE

# PREFACE



SEVERAL YEARS AGO COREY BRENNAN SUGGESTED THAT I COLLECT A NUMBER OF my essays on Athenian Law and publish them in a single volume. With his encouragement, I submitted a proposal to Cambridge University Press, which agreed to publish this volume. I have not included every article that I have published on the subject of Athenian Law, but only those that fall into one of four general categories: Constitutional Law, Law and Economy, Law and the Family, and Aspects of Procedure. In general, these essays focus on specific laws and legal procedures and attempt to place them in their political, social, and economic contexts. They therefore pay less attention to the ways in which the Athenians interpreted, applied, and enforced the law in their courts. This topic will be the subject of another book on *The Rule of Law in Action: The Nature of Litigation in Classical Athens*. Aside from a few minor stylistic changes, I have not revised the essays. I have tried to take account of recent work on Athenian Law in the sections entitled “Afterthoughts” that follow most of the essays.

I am writing these words at the University of Durham in the United Kingdom, but the work on these essays was done while I was a member of the Department of Classics at Brooklyn College and the Graduate School of the City University of New York. I could never have done this work without the encouragement and support of my former colleagues in New York, for which I am deeply grateful. I wish to express my thanks to Dee Clayman, Roger Dunkle, Hardy Hansen, Ellen Koven, Gail Smith, Philip Thibodeau, John van Sickle, Craig Williams, Donna Wilson, Howard Wolman, and Peter Zaneteas.

Several scholars who helped me by reading over drafts of these essays and offering advice are thanked in the notes, but I would like to single out two people who were especially supportive during the past decade: Fred Naiden and Lene Rubinstein.

I have been very fortunate to work with Beatrice Rehl at Cambridge University Press, Katie Greczylo at TechBooks, and Brian Bowles. I deeply appreciate their kindness, efficiency, and patience. This volume has also benefited from the perceptive comments of the two anonymous readers for the Press.

The work on this book was completed while I was an NEH Fellow at the American School of Classical Studies in Athens. I would like to thank the NEH for its support and Steven Tracy, the Director of the School, and his staff for making my stay in Athens both productive and enjoyable.

I would also like to express my gratitude to my family for their support and understanding over the past two decades.

My interest in law has been part of a family tradition: my great-grandfather and grandfather on my mother's side were lawyers, and my father was General Counsel at Pitney Bowes until his retirement in 1988. I think there was an expectation that I too would go to law school, but something seems to have gone wrong, and I ended up teaching Classics and Ancient History. But the family tradition persists: my daughter is now studying to become a lawyer. This book is dedicated to her.

Durham, November 2005

# ACKNOWLEDGMENTS



- I.1) "Solon and the Spirit of the Law in Archaic and Classical Greece" was originally published in J. Blok and A. Lardinois, eds. *Solon of Athens: New Historical and Philological Approaches*. Leiden: Brill, 2006.
- I.2) "Pericles' Praise of Athenian Democracy" was originally published in *Harvard Studies in Classical Philology* 94 (1992) 57–67.
- I.3) "Antigone the Lawyer, or the Ambiguities of *Nomos*" was originally published in E. M. Harris and L. Rubinstein, eds. *The Law and the Courts in Ancient Greece*. London: Duckworth, 2004: 19–56.
- I.4) "How Often Did the Athenian Assembly Meet?" was originally published in *Classical Quarterly* 36 (1986) 363–77.
- I.5) "When Did the Athenian Assembly Meet? Some New Evidence" was originally published in *American Journal of Philology* 112 (1991) 329–45.
- I.6) "Demosthenes and the Theoric Fund" was originally published in R. Wallace and E. M. Harris, eds. *Transitions to Empire: Essays in Greco-Roman History, 360–146 B.C. in Honor of E. Badian*. University of Oklahoma Press: Norman, OK, and London, 1996: 57–76.
- II.1) "Law and Economy in Classical Athens: [Demosthenes] *Against Dionysodorus*" was originally published at the Web site [www.stoa.org/projects/demos/home](http://www.stoa.org/projects/demos/home).
- II.2) "When Is a Sale Not a Sale? The Riddle of Athenian Terminology for Real Security Revisited" was originally published in *Classical Quarterly* 38 (1988) 351–81.
- II.3) "*Apotimema*: Athenian Terminology for Real Security in Leases and Dowry Arrangements" was originally published in *Classical Quarterly* 43 (1993) 73–95.
- II.4) "The Liability of Business Partners in Athenian Law" was originally published in *Classical Quarterly* 39 (1989) 339–43.
- II.5) "Did Solon Abolish Debt-Bondage?" was originally published in *Classical Quarterly* 52 (2002) 415–30.



- II.6) "Notes on a Lead Letter from the Athenian Agora" is to be published in *Harvard Studies in Classical Philology* 102 (forthcoming).
- III.1) "Did the Athenians Regard Seduction as a Worse Crime than Rape?" was originally published in *Classical Quarterly* 40 (1990) 370–7.
- III.2) "Did Rape Exist in Classical Athens? Further Reflections on the Laws about Sexual Violence" was originally published in *DIKE* 7 (2004) 41–83.
- III.3A) "Women and Lending in Athenian Society: A *Horos* Re-Examined" was originally published in *Phoenix* 4 (1992) 309–21.
- III.3B) "Notes on a *Horos* from the Athenian Agora" was originally published in *Zeitschrift für Papyrologie und Epigraphik* 131 (2000) 101–5.
- III.4) "The Date of Apollodorus' Speech against Timotheus and Its Implications for Athenian History and Legal Procedure" was originally published in *American Journal of Philology* 109 (1988) 44–52.
- III.5) "A Note on Adoption and Deme Registration" was originally published in *Tyche* 11 (1996) 123–7.
- IV.1) "'In the Act' or 'Red-Handed'? *Apagoge* to the Eleven and *Furtum Manifestum*" was originally published in G. Thür, ed. *Symposion 1993: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*. Boehrlau: Cologne, Weimar, and Vienna, 1994: 129–46.
- IV.2) "How to Kill in Attic Greek: The Semantics of the Verb (ἄπο)κτείνειν and Their Implications for Athenian Homicide Law" was originally published in E. Cantarella and G. Thür, eds. *Symposion 1997: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*. Boehrlau: Cologne, Weimar, and Vienna, 2001: 75–88.
- IV.3) "The Penalty for Frivolous Prosecution in Athenian Law" was originally published in *DIKE* 2 (1999) 123–42.
- V.1) "Pheidippides the Legislator: A Note on Aristophanes' *Clouds*" was originally published in *Zeitschrift für Papyrologie und Epigraphik* 140 (2002) 3–5.

I would like to thank the publishers of these books and journals for permission to reprint these essays in the present volume.

# ABBREVIATIONS



AESCHIN.	Aeschines
AESCHYLUS	Aeschylus
EUM.	<i>Eumenides</i>
PR.	<i>Prometheus Bound</i>
SUPPL.	<i>Supplices</i>
AND.	Andocides
AR.	Aristophanes
ACH.	<i>Acharnenses</i>
AV.	<i>Aves</i>
EC.	<i>Ecclesiazousai</i>
EQ.	<i>Equites</i>
LYS.	<i>Lysistrata</i>
NUB.	<i>Nubes</i>
PL.	<i>Ploutos</i>
RAN.	<i>Ranae</i>
TH.	<i>Thesmophoriazousai</i>
VESP.	<i>Vespae</i>
ARIST.	Aristotle
ATH. POL.	<i>Constitution of the Athenians</i>
NE	<i>Nicomachean Ethics</i>
RHET.	<i>Rhetoric</i>
POL.	<i>Politics</i>
DEM.	Demosthenes
DIN.	Dinarchus
D. H.	Dionysius of Halicarnassus
AMM.	<i>Letter to Ammaeus</i>
D. S.	Diodorus Siculus
EUR.	Euripides
HIPPO.	<i>Hippolytus</i>
IT	<i>Iphigenia among the Taurians</i>
HARP.	Harpocration

HDT.	Herodotus
HOM.	Homer
IL.	<i>Iliad</i>
OD.	<i>Odyssey</i>
HYP.	Hyperides
ATH.	<i>Against Athenogenes</i>
DEM.	<i>Against Demosthenes</i>
EUX.	<i>Against Euxenippus</i>
IS.	Isaeus
ISOCR.	Isocrates
LYCURGUS	Lycurgus
LEOCR.	<i>Against Leocrates</i>
LYS.	Lysias
MEN.	Menander
PAUS.	Pausanias
PL.	Plato
AP.	<i>Apology of Socrates</i>
LG.	<i>Laws</i>
POL.	<i>Politicus</i>
R.	<i>Republic</i>
PLB.	Polybius
PLU.	Plutarch
DEM.	<i>Demosthenes</i>
MOR.	<i>Moralia</i>
TH.	Thucydides
XEN.	Xenophon
ATH. POL.	<i>Constitution of the Athenians</i>
CYR.	<i>Cyropaedia</i>
HELL.	<i>Hellenica</i>
LAC. POL.	<i>Constitution of the Spartans</i>
MEM.	<i>Memorabilia</i>
BGU	<i>Aegyptische Urkunden aus den königlichen Museen zu Berlin. Griechische Urkunden.</i> Berlin 1895—.
FGRHIST	F. Jacoby, <i>Die Fragmente der griechischen Historiker.</i> Leiden 1957—.
ICRET	M. Guarducci, <i>Inscriptiones Creticae I–IV.</i> Rome 1935–50.

- IERYTHRAI H. Engelmann and R. Merkelbach, *Die Inschriften von Erythrai und Klazomenai*. Bonn 1972.
- IG i<sup>3</sup> D. M. Lewis, L. Jeffery, and E. Erxleben, *Inscriptiones Atticae Euclidis anno anteriores*.<sup>3</sup> Berlin 1981–98.
- IG *Inscriptiones Graecae*. For bibliographical details see L-S-J p. xlii.
- LIMC *Lexicon Iconographicum Mythologiae Classicae*, Zürich and Munich 1981–99.
- L-S-J Liddell/Scott/Jones, *A Greek-English Lexicon*.<sup>9</sup> Oxford 1940.
- P. OXY. *Oxyrhynchus Papyri*. London 1898–.
- SEG *Supplementum Epigraphicum Graecum*.
- SIG<sup>3</sup> W. Dittenberger, *Sylloge Inscriptionum Graecarum*. Leipzig 1915.

# INTRODUCTION



THIS VOLUME BRINGS TOGETHER ESSAYS THAT I HAVE PUBLISHED ON ATHENIAN LAW over the past two decades. As a whole, I believe the essays contribute not only to our understanding of Athenian Law, but also to the study of the constitutional history of democratic Athens, the nature of the Athenian economy, and the position of women in Athenian society. The essays are also unified in terms of their method. In contrast to much recent work that emphasizes questions of procedure, these essays turn our attention to the substantive aspects of Athenian Law. This approach places greater stress on careful philological analysis of key terms in statutes as well as a more sophisticated awareness of legal issues. Many modern scholars give the Athenian legal system low marks and compare it unfavorably with Roman Law. These essays aim in part to show that the Athenians were more sophisticated in legal matters than many have assumed. On the other hand, one should not exaggerate the level of development attained by Athenian Law. Several of the essays therefore warn against importing anachronistic ideas (e.g., Roman ideas about real security, the notion of corporation, the concept of rape, and the modern distinction between larceny and embezzlement) into the study of Athenian Law.

But these essays do not concentrate exclusively on the minutiae of individual statutes or on narrow technical questions. Many of the essays attempt to place Athenian laws in their broader political, economic, and social context. The essays in the first section on “Law and Constitutional History” examine the laws of Athens in the light of Athenian ideas about the role of law in preventing tyranny and about the relationship between the rule of law and democracy. The essays in the second section on “Law and Economy” show how the Athenians developed the legal infrastructure needed to support the growth of formal credit relations, which formed the basis of a rudimentary market economy. As a whole, the essays of this section question assumptions held by several scholars about the “primitive” nature of the Athenian economy. Several of the essays in the third section concerning “Law and the Family” deal with the question of women’s agency in Athenian society. The first two essays examine not only the legal procedures that could be used in cases of sexual violence, but also how social attitudes about women shaped

these statutes and the way that they were enforced. Another pair of essays in this section look at the restrictions on women's financial activities and to what extent they actually limited women's role in economic decisions. The essays in the fourth section on "Aspects of Procedure" challenge a recent view that the Athenian legal system did not aim to provide a set of substantive norms but only to provide an arena for citizens (primarily rich and powerful ones) to pursue private feuds. The first two essays demonstrate the importance of analyzing the substantive aspect of Athenian laws and show how the substantive differences shape their procedural aspect. The last essay in this section shows that the Athenians had serious reservations about citizens who abused the legal system to pursue private vendettas and established severe penalties for those who did so.

## I. LAW AND CONSTITUTIONAL HISTORY

Several scholars have assumed that the Greeks in general and the Athenians in particular considered popular rule incompatible with *eunomia* or "the rule of law." For instance, Ostwald (1986) and Hansen (1974) argue that the Athenians upheld the doctrine of popular sovereignty in the fifth century BCE, but after the Peloponnesian War they abandoned this ideal and upheld the sovereignty of law. Ober (1989), on the other hand, thinks that the rule of law was an oligarchic slogan promoted by conservative philosophers like Aristotle and was contrary to democratic ideology. Yet Sealey (1987) claims that the Athenians never aimed at achieving democracy, but instead tried to achieve a republic ruled by law.

Several of the essays in this section question the assumption held by these scholars that the Athenians found democracy and the rule of law antithetical. They show in part that the Athenians believed that the two ideals went hand in hand, with each supporting the aims of the other. The first two essays show how the Athenians sought to achieve the rule of law by dividing the functions of government and by creating a system of checks and balances. The essay on *Antigone* turns to the question of the sources of legitimacy and the relationship between law and religion in democratic Athens and studies the figure of the tyrant, the man who is the antithesis of the rule of law. The final essay shows how the Athenians used the laws about ownership and the distribution of public funds to balance the differing interests of the rich and the poor and promoted a democratic ideal of social harmony between classes.

The first essay on “Solon and the Spirit of the Law in Archaic and Classical Greece” analyzes the Greek conception of the rule of law found in Solon’s poetry and in the laws of Archaic and Classical Athens, and falls into two parts. The first part examines the way the Near Eastern lawgivers such as Hammurabi envisioned their role as lawgivers and their relationship to the law and contrasts it with the different approach of Solon and other Greek lawgivers. Such a comparison helps to illustrate what is distinctive and original about Solon’s view of his task. Hammurabi and other Near Eastern lawgivers were monarchs; establishing laws for their kingdoms was just one of their tasks. They did not hand down their laws to the people for them to administer. The laws they created were their laws and demonstrated their justice and right to hold power. They were accountable to the gods alone, not to other mortals. Solon, by contrast, viewed monarchy as tyranny, the very opposite of the rule of law. Solon did not impose his laws from an impregnable position as ruler, but portrayed himself as a neutral arbiter who stands between competing factions. Instead of using the law to gain power or justify his position, Solon distributed power to various parts of the community to administer his laws, then departed for exile. Other Greek lawgivers were often outsiders who did not, or could not, hold power in the *poleis* for which they created their laws.

The second part of the essay shows how an understanding of the different approach taken by the Greek lawgivers helps to explain why Greek laws took on a different shape and form from those of the Near Eastern kings. The laws of the latter do not generally indicate who has the power to punish various offenses because the laws belong to the king and are his to administer. By contrast, the laws of Solon and of other early Greek *poleis* often go into detail about which bodies or officials have the power to enforce the laws. To prevent tyranny, the laws of Solon and of other Archaic *poleis* often impose term limits or divide powers among different magistrates to prevent anyone from accumulating too much power. To curb abuses of power and the failure to uphold the law, the statutes of Greek *poleis* often contain penalties for magistrates. These two features are absent from the laws of the Near Eastern kings. Finally, several early Greek laws contain entrenchment clauses to ensure that the laws remain stable and are not overturned by those in power; such clauses are not found in the laws of Hammurabi and other Near Eastern kings. These types of clauses are found not only in laws from democratic communities, but also from aristocratic *poleis*. Despite their political differences,

therefore, the Greeks were united by a common belief in the rule of law, which is reflected in the shape of their statutes.

Modern political thought divides government into three parts: executive, legislative, and judiciary. Each part performs different tasks and to some extent operates on different principles. All three parts form a system of checks and balances, which ensures political stability. The next essay in this section, "Pericles' Praise of Athenian Democracy," analyzes a passage from Thucydides (2.37) to show how the Athenians also divided their government into three parts, but in a different way. According to Aristotle and other authors, these parts were the deliberative (the Council and Assembly), the magistracies, and the courts. The deliberative combined some of the functions of the modern legislative (e.g., passing laws) and executive branches: it decided all major questions regarding public administration and held elections for office. It operated on the principle that the vote of the majority was binding on the entire community. The courts dispensed justice for individuals and followed the principle that all men are equal before the law. In Athenian democracy there were two methods of appointing magistrates: election and appointment by lot. When electing officials, the Athenians did not consider social class, but the candidate's ability. Offices filled by lot were a way of allowing less wealthy citizens to participate in public administration. This essay shows that Aristotle's division was not a philosophical idea, but was developed by the Athenians themselves as early as the fifth century BCE. It shows in greater detail how the Athenians implemented the Solonian ideal of distributing power to parts of the community and avoiding the concentration of power, which helped to promote political stability.

The third essay in this section, "Antigone the Lawyer, or the Ambiguities of *Nomos*," examines the problem of legitimacy (what makes a given rule a law [*nomos*]?) and the relationship between democracy and the rule of law in Classical Athens through a study of Sophocles' *Antigone*. The essay starts with a review of the basic features of a law, then studies the sources of legitimacy in Greek thought. It shows there was no conflict between divine and human law in Classical Athens: the laws of the gods were the laws of the *polis* and vice versa. The conflict between Antigone and Creon in Sophocles' play is therefore not between two types of law, but two conceptions of law. Antigone and her fiancé Haemon believe that a *nomos* requires the approval of the gods and the consent of the community. For them there is no conflict between the rule of law and popular sovereignty; on the contrary, the two go hand in hand. Since Creon's order forbidding the burial



of Polynices lacks the support of both the gods and the community, it is only the order of a magistrate and does not supersede the universal law that requires burial for all free persons. Creon, on the other hand, thinks a *nomos* is whatever the ruling power decides. His view is close to that of the Near Eastern monarchs, who are discussed in the first essay. But toward the end of the play, Creon recognizes that he must follow the “established laws,” those that fulfill all the criteria of legitimacy.

The following pair of essays, “How Often Did the Athenian Assembly Meet?” and “When Did the Athenian Assembly Meet? Some New Evidence,” deal with a central issue in constitutional law, namely, the number of meetings held by the Assembly, where all major decisions were made. M. H. Hansen has argued that in the fifth century the Athenians based their constitution on the idea of popular sovereignty and made the Assembly the supreme body. In the fourth century, by contrast, they subordinated the Assembly to the law courts and upheld instead the ideal of the rule of law. One of Hansen’s main arguments for this view is that around 350 the Athenians limited the number of times the Assembly could meet to four times a *prytany*. Since they could not call extra meetings, they tended to save one or two meetings for late in the *prytany* in case an emergency arose. This reform was part of a movement to limit the power of the Assembly in comparison with that of the lawcourts. Hansen also argued that the ancient scholia that defined the term *ekklesia synkletos* as an extra, emergency meeting of the Assembly were not reliable. In his view such a meeting was one of the four regular meetings called on short notice. The first essay analyzes the evidence for the term *ekklesia synkletos* and shows that there is no reason to doubt the meaning found in the scholia. The second essay examines one of these scholia that states the Assembly normally met on the eleventh, around the twentieth, and around the thirtieth of every month. A study of all the preserved prescripts in Athenian decrees in the Classical and Hellenistic periods proves this information to be roughly correct. Taken together, these essays support the conclusion of “Antigone the Lawyer” that there was no shift from popular sovereignty to the rule of law around 400 BCE. On the contrary, the Athenians considered the two ideals to be perfectly compatible with one another. In fact, the Athenians believed that democracy was the only form of government where the rule of law could exist.

The final essay in this section, “Demosthenes and the Theoric Fund,” studies the laws about the distribution of public funds in the fourth century and the way the laws balanced the interests of the wealthy and average citizens. According to