

RAPE AND INFIDELITY: THREATS TO THE ATHENIAN *Πόλις* AND *Οἶκος*

Jamie Pretorius*

ABSTRACT

In terms of sexually motivated transgressions, adultery is viewed by many modern Western legal systems as a matter dealt with only in the intimate realm of those entangled and subsequently attaches little legal consequence to its occurrence. Rape, on the other hand, is regarded as a heinous crime (and rightly so) for which severe punishment for transgressors awaits. Conversely, ancient Athenian law demonstrated a notable distaste for adultery, so much so that affairs involving a male citizen's wife, or any other woman under his *οἶκος*, constituted a crime and, by law, transgressors could be killed immediately by an affected male party if caught *in flagrante*. Committing rape, however, was not as severely punished as a rapist could only receive the death penalty in the event that he was so prosecuted by the Athenian judiciary consisting solely of male citizens. Under this ancient Athenian precedent, a victim of rape – a woman who was forced to have sexual intercourse – was, legally speaking, thought to suffer less than a woman who was seduced reflecting Athens' prejudicial social-legal view of women. Moreover, this view must be seen against the background of the threat of insecurity to the patriarch's *οἶκος* (that is, his household including his estate and, by extension, the members of his household that formed part of that estate) that the adulterous woman posed as well as the all-male Athenian judiciary whose members themselves were members of an *οἶκος* and, in most cases, were no doubt at its head.

Keywords: Rape; adultery; Athenian law; *οἶκος*; *πόλις*; *μοιχεία*; Demosthenes; Lysias; Euphiletus; Draco; inferior position of women in Athenian law

* Postgraduate student, Law school, Stellenbosch University.

1 Introduction

Ancient literary discourse demonstrates that, in Athenian law and oratory, the seduction of a citizen wife, widowed mother, unmarried daughter or sister was considered a far more serious transgression than rape. This notion implies, therefore, that the offender would be liable to receive a far more severe punishment (possibly even the death penalty) for seducing a citizen woman than if he would be for having forced her into having sexual intercourse. This contrasts markedly with modern Western society, in which rape is considered by law to be a serious criminal offence while adultery is not generally regarded as a criminal offence at all. As such, in modern Western society adulterers are generally not exposed to the risk of criminal prosecution. This contrast has sparked scholarly discussion over this ancient Athenian convention, namely, concerning the extent to which – and the social reasons why – adultery was in fact more harshly punished than rape and on the scope and interpretation of the word *μοιχεία*, commonly recognised as the most suitable Greek term for “adultery”.

Fuelling this debate is the fact that, with regards to the Athenian judicial system as a whole, evidence for many issues of legal ordinance and procedure is lacking, and the evidence that we do have is fragmentary, making it difficult to present firm statements on such a matter. Accordingly, the consensus that rape was not as culpable a crime as that of seduction has been challenged as not being a reflection of commonly held social attitudes in Athens at the time as many of the laws on adultery have not, for the most part, been preserved. However, one of the statutes cited by Demosthenes on justifiable homicide in his speech *Against Aristocrates* (which has been regarded as providing the definitional foundation of the law of adultery), makes it clear that it was *μοιχεία* to seduce the wife, or any other woman related to the offended head of the household, and that the adulterer could be killed by him if caught in the act.¹

The most pertinent piece of evidence available to us that substantiates the view that seduction was seen as a worse crime than rape and in which this statute was referred to, is the speech written by Lysias for his client Euphiletus in his defence for the murder of a man who had been caught *in flagrante* with his wife.² On the one hand, such a case has been argued to present merely a small window, or a “snapshot” on the Athenian legal system at a particular stage in its development,³ making it difficult to provide conclusive assertions about popular morality in Athens or ancient legal attitudes as a whole. On the other hand, this challenge does not eliminate the possibility of Euphiletus’ argument being valid in the eyes of his male contemporaries who would preside over his case and to whom legal procedure was exclusively designated.

1 Demosthenes *Against Aristocrates*: 23 53; see Dover 1974: 209, hereafter referred to as D 23 53.

2 Lysias’ speech *On the Murder of Eratosthenes* 1 32 (tr Lamb 1930), hereafter referred to as Lys.

3 Carey 1995: 407.

Under this ancient Athenian precedent, a victim of rape – a woman who was forced to have sexual intercourse – was, legally speaking, theoretically thought to suffer less than a woman who was seduced. However, on account of the fact that women in classical antiquity were for the most part excluded from legal activity, Athenian law must be viewed strictly through the lens of a male standpoint. Moreover, the notion that the seduction of a citizen woman was seen as a more severe crime than rape, must be regarded as an assertion of male responsibility over the οἶκος (household) and not as a legal measure of the suffering experienced by the victim. The role of women with regards to the legal and social attitudes towards rape and adultery was certainly discounted and has yet to be discussed in a scholarly light.

This article will demonstrate that the reason why adultery was seen in Athens as a more severe crime than rape was, for the most part, due to the subordinate nature of the female role in the legal and social spheres. The matter would have been considered purely from the perspective of the deceived husband, whose dignity and social status was perceived to be impaired more by the fact that he was cuckolded – in that his wife (who was regarded as part of his patrimony rather than an independent human being) – was seduced by another man (ie, she voluntarily succumbed to the sexual advances of another man and thus, by implication, preferred him to her own husband) than by the fact that she was raped (in which case she notionally remained faithful to her husband).

In order to do so, this article will consider the Greek institutions of the πόλις and the οἶκος and some of the moral significances attached to them so as to provide a societal background against which rape and adultery in Athens must be seen. Then, this essay will discuss the ancient Athenian legal-social interpretation of μοιχεία to the extent that available legislative evidence allows using the statute brought forward by Demosthenes regarding justifiable homicide as a starting point. Thereafter, in order to represent the justification of this decree outside of the theoretical realm, this essay will refer to an actual case of adultery as demonstrated in Lysias' speech for Euphiletus in his *apologia* for the murder of Eratosthenes. Moreover, due to the fact that this legal practice acknowledges the deceived male as the victim of the crime, the issue of gender will need to be examined to determine the extent to which male-dominated ideas and laws and the neglect of female views affected notions surrounding rape and adultery.

2 The Οἶκος and Πόλις

When speaking of the typical Athenian household and its characteristics, scholars routinely refer to Aristotle's interpretation of the οἶκος as being the basic social unit of the πόλις and the individual a unit of the οἶκος.⁴ MacDowell, in his examination of the οἶκος in Athenian law, identifies three main aspects of the οἶκος: first, the

4 Roy 1999: 1.

building that is the house; second, the household possessions in the form of property or the estate; and third the family.⁵ These last two aspects of the *οἶκος* have been used interchangeably so that the individuals of the *οἶκος* are sometimes seen to be an extension of the household belonging to the male head of the house. The composition of those that constitute the household is the nuclear family as well as the slaves belonging to the household, identified by Aristotle⁶ through their fundamental relationships as: (1) master and slave, (2) husband and wife, and (3) father and children. As is made evident by the presence of the male head in each relationship described by Aristotle, the nature of the household was such that it was wholly dominated by the patriarch, or *κύριος*, who was responsible for the *οἶκος*.

Like the modern term “family”, this third aspect of the *οἶκος* can indicate a range of parents and children over several generations, which serves as a reminder that the household existed in a network of kin.⁷ It is when these networks unite and their association aims at something more than the supply of daily needs that a community is established, first in the form of a village and, on a higher level, a city-state or *πόλις*, which was seen by Aristotle to be the obvious, natural form of society.⁸ Pomeroy posits that “family and kin groupings were fundamental to [Athenian] political structure ... citizens became members of a classical *πόλις* not as individuals ... they first had to be accepted as members of a family”.⁹ It is for this reason that the *οἶκος* must be seen as the basic unit of the greater *πόλις* and, in the same way that the *κύριος* is responsible for the well-being of the individuals in his household, the *πόλις* looks to protect the *οἶκος* as the pivotal building-block of society. Therefore, in the same way that the *κύριος* would impose certain principles on his household that would, in his view, be for the sake of its own welfare, the *πόλις* would pass legislation that it thought necessary for its own well-being, namely for that of the community. It has been suggested that an *οἶκος* belonged not to one individual but rather to the whole family. In relation to classical Athens, at the very least, this proposition is incorrect as, while *οἶκος* may itself have meant “family”, it also meant “property”, in which instance it referred to the entire household and its estate belonging to one individual.¹⁰ In such a way, however, the rights and needs of the family were regarded to be more important than those of one particular individual – a notion that the greater state would uphold in its own administration – and, in the same way that a small unit of male aristocrats dominated political power over the entirety of the *πόλις*, a central male authority would govern the *οἶκος*. Such a notion would then ensure that this central authority’s dominion permeated through both the *οἶκος* and *πόλις* and that this dominion lay in the hands of the patriarchs of Athens.

5 MacDowell 1989: 10.

6 In Aristotle’s *Politics* 1 3 (tr Jowett 1999), hereafter referred to as *Arist Pol*.

7 Roy 1999: 2.

8 *Arist Pol* 1 2.

9 Pomeroy 1996: 74.

10 MacDowell 1989: 11.

On account of the fact that the *πόλις*' main concern was the preservation of the *οἶκος*, legislation inevitably looked to uphold this preservation and would often result in the *πόλις* interfering with the *οἶκος*. Such legislation is most clearly seen in laws concerned with citizenship due to the fact that the state "relied on the nuclear citizen family to produce the new citizens of the *πόλις*".¹¹ Before Pericles changed the citizenship law, citizenship was acquired through descent from a citizen father. However, by 451 BC the *πόλις* came to interfere with the affairs of the *οἶκος* to a significant extent as Athenian citizenship was limited to those of Athenian parentage on both sides.¹² Such a legal stance then suggested that Athenian marriage be recognised as a union driven to or having as its goal the establishment of a new *οἶκος*.¹³ Therefore, it would be the will of the state, not only to perpetuate purely Athenian citizenship, but to safeguard and maintain the union of husband and wife as the source of Athens' new citizens.

It is clear that the Athenians held the *οἶκος* in very high regard as, unlike today, when the individual is acknowledged as an independent being, the Athenian individual was considered a unit of the larger *οἶκος*. Beringer holds that "a man who was a citizen belonged to a group (the *οἶκος* or family) and was as much protected by it as he himself was bound to maintain, support and defend it".¹⁴ Therefore, the individual's behaviour was thought to be a reflection on the family to whom the individual was connected and, therefore, the reputation of the *οἶκος* was held in higher regard than that of one particular member of the family. The importance of the *οἶκος* over the individual was reinforced by socially-accepted Athenian conventions exercised by the *κύριος*, who acted on behalf of the household. For example, Aristotle himself advises that the *κύριος* could dispose of an unhealthy or deformed infant if he deemed it to be a burden on the family:¹⁵ for example, if he felt it was simply too expensive to rear and educate or, otherwise, if he had reason to believe that the child was illegitimate in a patrilineal society where paternity was important for inheritance purposes.¹⁶ The killing of a child was undoubtedly believed to have religious ramifications and the ordinary Athenian citizen held that to murder was to bring a pollution (*μίασμα*) upon himself and his family, and so, by leaving the infant to die by exposure the *κύριος* would rid himself of guilt.¹⁷ Although infanticide was probably a very rare practice, the motif of the "exposed" infant is a recurring one in Greek mythology as well as in Greek theatre. What is, however, striking, is the lack of legislation prohibiting the exposure of an infant.¹⁸

11 Roy 1999: 4.

12 *Ibid.*

13 Patterson 1991: 60.

14 Beringer 1985: 41.

15 Arist *Pol* 8 16.

16 Carey 1995: 416.

17 Kapparis 2003: 12.

18 Roy 1999: 8.

What needs to be understood from the dynamics of the *οἶκος* is that, in the same way that a *κύριος* represented his household, the household was most fully manifested in the *κύριος* himself as the family was seen as an extension of the male head's *οἶκος*. This is confirmed by the fact that, when a woman married, she was transferred from the *οἶκος* of her father to that of her husband and it is further demonstrated through Athenian inheritance law.¹⁹ Pomeroy defines *οἶκος* as the familial estate which implies that the household could only exist with its financial estate and assets and would therefore, as Athenian law maintained, need to remain within the control of relatives of that household's male head so as to preserve the estate under his *οἶκος*.²⁰ In the case where a *κύριος* died without a male heir, but had a daughter, she would become an *ἐπίκληρος* and, by law, would have to marry the closest male relative on the paternal side of the family to ensure that the estate was inherited patrilineally.²¹ Thus, the *ἐπίκληρος* essentially became part of the estate that would come under the jurisdiction of the closest male heir. Moreover, another way to ensure the maintenance of the man's *οἶκος* if there was no male heir, was to adopt a son either during the man's lifetime or posthumously in his will.

It is apparent here that the preservation of the patriline took priority over the will of a household's individual simply due to the fact that its possibly-enduring nature prevailed over the inevitable mortality of the individual; or, as Pomeroy encapsulates it, the life expectancy of the *ἀγχιστεία* (relatives entitled to inheritance) was essentially unlimited, while the life expectancy of the individual was short.²² An *οἶκος* was the primary form of a citizen's identity and people's names, as in many families today, were constructed from the same stems as their ancestors, repeated over a number of generations.²³ A family clearly placed great emphasis on the continuation of the household legacy for as many future generations as possible and a son was therefore obliged to marry and produce an heir to keep the *οἶκος* alive, as eloquently expressed by Lacey in her illustration of the *οἶκος* as a "living organism ... required to be renewed every generation to remain alive".²⁴

At the crux of social and legal notions (made clear by the accepted practice of exposure of unwanted infants and the laws on citizenship and inheritance respectively) is the undeniable truth that individuals belonging to the *οἶκος* were subject to the will of the *κύριος* in his responsibility for the household's best interests as upheld by the *πόλις*. Legislation over such matters had to be considered by the Athenian assembly which, during the classical period, became the deciding body of state policy,²⁵ with

19 MacDowell 1989: 18.

20 Pomeroy 1996: 20.

21 Roy 1999: 10.

22 Pomeroy 1996: 19.

23 *Idem* 73.

24 Lacey 1968: 16.

25 Pomeroy 1999: 476.

hardly any limits on the extent of its power.²⁶ It is widely known in the study of classical Athens that the assembly consisted solely of male citizens who themselves were members of an *οἶκος* and, in most cases, were no doubt at its head.²⁷

Accordingly, unlike in typical modern Western families, women had very little say within the realm of the *οἶκος* and lacked altogether any social or political status in the greater *πόλις*. Apart from her primary role of marrying and bearing children,²⁸ a woman's function in the *οἶκος* then was to ensure that her husband would not have to concern himself with family affairs so that he could see to affairs outside the home. Therefore, her duties were to rear her children after their birth, look after the family, delegate domestic chores to slaves and make sure the household ran smoothly.²⁹ She could not represent herself in court and most probably did not have the education or skills required to earn an adequate living independently. Legislation, demonstrated in institutions such as that of the *ἐπίκληρος*, therefore, made certain that the citizen woman would always be under the protection of a male relative. A respectable woman was ideally expected to spend her time indoors at home as Greek standards of modesty required that women be sheltered from any sort of physical or visual contact with any man but her husband.³⁰ Moreover, a woman's fragile reputation was dictated by a wide range of socially demanded behaviour which, if disobeyed, would reflect adversely on the *οἶκος* to which she belonged. However, it must be noted that, in a society that segregated sexes, it is more than likely that boys and girls would have devoted great effort in defeating such social restrictions.³¹

One of the legal rights available to married citizen women was the right to divorce her husband, after which she would return to her former *οἶκος* to which the husband was also required to return the dowry. If children had been born before the divorce, they would however remain under the custody of the father,³² reiterating further the priority of Athenian inheritance law for patrilineage and the preservation of the *οἶκος* under the male head's dominion. As will be discussed in more detail below, social standards regarding adultery were firmly asserted by Athenian legislation, as a husband whose wife was found to be guilty of adultery was legally obliged to divorce her. More telling is the fact that, if proven that a husband was aware of his wife's infidelity and had not divorced her, a severe penalty would be imposed on him.³³ The adulterous woman would be barred from religious activity, the only area of Greek public life in which a woman could approach anything like the influence of a man, and if she ignored the bar could be beaten by anyone with

26 Thorley 2005: 57.

27 Roy 1999: 12.

28 Pomeroy 1994: 62.

29 Kapparis 2003: 11.

30 Cole 1984: 97.

31 Dover 1973: 62.

32 Pomeroy 1994: 65.

33 Roy 1999: 11.

impunity,³⁴ while the cuckold who had failed to divorce his adulterous wife was subject to disenfranchisement from his civilian rights.

3 *Μοιχεία*

Before discussing competing interpretations of *μοιχεία*, it must be noted that the starting point of debate surrounding the relative gravity of rape and adultery in Athenian society is the statute attributed to Draco, cited by Demosthenes, which is referred to in the speech written by Lysias, *On the Murder of Eratosthenes*. This statute will be dealt with in greater detail below.

It is a matter of controversy among scholars of Athenian antiquity whether adultery was, in fact, regarded as a more serious offence than rape. Although some scholars believe that this was indeed the case, it is not universally accepted that adultery was, in fact, viewed in a more serious light than rape. Much of the debate surrounding the rejection of the argument that, in Athens, adultery was seen as a worse transgression than rape stems from the scope and interpretation of the term *μοιχεία*.³⁵ Many scholars have understood *μοιχεία* as being the most suitable Greek term for “adultery”. While they would not be wrong in doing so, such a translation is inexact as the term referred to more than simply sexual intercourse with a person who is married to someone else (as the word “adultery” would imply in modern parlance). There is good reason to believe that the word was further-reaching in its implications: “not in terms of actions committed but in terms of circumstances under which a sexual act constituted *μοιχεία*”.³⁶ In another translation of the term formulated by Dover³⁷ in which he refers to Draco’s provision for justifiable homicide, *μοιχεία* was defined as “to seduce the wife, widowed mother, unmarried daughter, sister, or niece of a citizen; that much is made clear from the law by Demosthenes 23 53 5”. On this interpretation, *μοιχεία* is understood in more expansive terms than the modern conception of adultery, and includes the seduction not only of a husband’s wife, but the seduction of his other close female relatives as well.

The interpretation of *μοιχεία* that encompasses female relatives of a male citizen other than his wife stems originally, as Dover points out, from the statute in which the abovementioned individuals are included within the ambit of those women in respect of whose seduction an action for *μοιχεία* can be brought by the aggrieved male citizen. The use of this statute in an actual case of adultery is demonstrated by the assertion in Lysias’ well-known *On the Murder of Eratosthenes* (which will be discussed fully below) in which the speaker has the statute recited to the jury as part of his defence that he killed a man found *in flagrante delicto* with his wife. Despite the fact that

34 Carey 1995: 414.

35 *Idem*: 407-412.

36 *Idem* 407.

37 Dover 1974: 209.

the actual statute is not revealed, the speaker uses the Greek words for spouse, sister and daughter (including concubines as well) in his reference to it, substantiating that the cited statute is, in fact, that provided by Demosthenes.³⁸ As will be seen below, Aristotle in his own summary of the law of justifiable homicide provides additional supporting evidence of the more inclusive scope of the interpretation of *μοιχεία*.³⁹

Another speech that advocates Lysias' expanded scope of *μοιχεία*, namely *Against Neaera*, refers to a case in which Epainetos is held to ransom by Stephanos for having had sexual intercourse with a woman, Phano, alleged to be Stephanos' daughter. Stephanos' action is based on the claim that Phano is his daughter (as opposed to his wife), while Epainetos' defence refutes this claim, thus seeking to discharge himself of liability in an action under the law dealing with *μοιχεία*. Since Stephanos charges him on the basis that Phano is his daughter and not his spouse, in response to which Epainetos does not deny Stephanos' right to sue him on account of seduction of his daughter, but instead denies that Phano is actually his daughter, *Against Neaera* confirms that Athenian law recognised the right to bring a case of unsanctioned non-violent sex with persons other than a man's wife.⁴⁰

These four excerpts together form the basis upon which some scholars argue that *μοιχεία* extends beyond the bounds of the marital relationship. However, there is further debate over the scope of actions in respect of which a charge can be brought against an individual for *μοιχεία*. Despite the fact that some scholars have recognised the statute attributed to Draco as the actual law on adultery, most scholars rightly observe the statute as a law regarding justifiable homicide from which the basis of the law of adultery is inferred. Cohen's article entitled "The Athenian law of adultery" criticises the traditional view posited by Dover that *μοιχεία*, for legal purposes, indeed encompassed seduction of a citizen's wife or close female relative, and suggests that there are inaccuracies with extant conclusions drawn from the statute and examines it more closely.⁴¹ Here, I provide the translation of the relevant statement by Demosthenes:

If a man kills another unintentionally in an athletic contest, or overcoming him in a fight on the highway, or unwittingly in battle, or in intercourse with his wife, or mother, or sister, or daughter, or concubine kept for procreation of legitimate children, he shall not go into exile as a manslayer on that account.⁴²

As is plainly evident from its very formulation, this statute is part of the law on justifiable homicide and does not make a distinction between offences, but rather establishes conditions under which homicide can be condoned in a court of law. Accordingly, as Cohen argues, "the statute ... no more proves that adultery was

38 Cohen 1984: 149.

39 In Aristotle's *Constitution of Athens* 57 3 (tr Dymes 1891), hereafter referred to as *Arist Ath.*

40 Carey 1995: 408.

41 Cohen 1984: 151.

42 D 23 53.

an offense punishable by death than it proves that participating in athletic contests, assault, or fighting in a war were crimes punishable by death”.⁴³ Therefore, it is argued that the statute cannot constitute the actual adultery law, unless one were to assume that *μοιχεία* was, in fact, not a transgression at all, but was only concerned with extra-judicial self-help. Furthermore, when looking at the diction used by Demosthenes, neither in the statute itself nor in the extended analysis of it is the word *μοιχεία* used. He only discusses sexual intercourse without offering a distinction between rape or adultery which, from a legal perspective on homicide, is compatible as it is of no import whether or not the perpetrator in question raped or committed adultery – under the bounds of law he can be killed with impunity if found *in flagrante delicto* by a male family member of the raped / seduced woman.⁴⁴ Cohen proposes, therefore, that adultery was regarded as equally reprehensible as rape, which is why the abovementioned individuals (wife, mother, daughter, etc) are included in the statute.⁴⁵

Cole, in his *Sanctions Against Sexual Assault* (written in the same year as Cohen’s *The Athenian Law of Adultery*), is, however, confident that Athenian legislation, as well as its society at large, deemed *μοιχεία* as a more punishable offence than sexual assault.⁴⁶ Unlike Cohen, Cole posits that a distinction is, in fact, made between *μοιχεία* and rape by referring to legislation against rape mentioned in two sources:⁴⁷ one in a speech of Lysias, and the other in Plutarch’s writings about Solon.⁴⁸ Where Demosthenes fails to prescribe a penalty for *μοιχεία* (which, it will be argued below, is, in fact, what Demosthenes is referring to, contrary to what Cohen argues), both Lysias and Plutarch point out that the penalty for rape is a monetary fine.⁴⁹ Cole goes on to refer to three Athenian laws with which *μοιχεία* is correlated:⁵⁰ The first requires a husband to divorce his adulterous wife or face the risk of *ἀτιμία* (disenfranchisement); the second law is that of Demosthenes, already discussed, in which a man who kills an adulterer caught in the act is exempt from prosecution; and the third law protects an accused adulterer, allowing him to bring against the accuser a suit that, if unsuccessful, allowed the accuser any punishment (without the use of a knife) he chose to be performed on the accused in court.

Although Cohen claims that the statute quoted by Demosthenes is merely the law on justifiable homicide and does not actually focus on *μοιχεία*,⁵¹ Aristotle refers to the same law and includes the word *μοιχεία* which indicates that later Athenians

43 Cohen 1984: 151.

44 Carey 1995: 410.

45 Cohen 1984: 152.

46 Cole 1984: 100-103.

47 *Idem* 99.

48 Lys 3 6; and see, too, Plutarch’s *Solon* 23 (tr by Dryden 1683), hereafter referred to as *Plu Sol*.

49 D 23 53.

50 Cole 1984: 100.

51 Cohen 1984: 147.

themselves acknowledged this statute as the one dealing with *μοιχεία*.⁵² Plutarch also cites the same law but calls it the law of Solon, stating that it allowed a male relative who caught a *μοιχός* (ie the alleged seducer) to kill him with impunity.⁵³ As has been noted, Demosthenes makes no distinction between adultery or rape; likewise, the myth on which Draco bases this statute is that of Ares' acquittal from criminal liability for killing a man caught raping his daughter. Rape is not distinguished from adultery in the statute attributed to Draco, but it cannot go unheeded that Lysias, Plutarch and Aristotle took it to encompass both rape and *μοιχεία* and state clearly that *μοιχεία* was believed to be the far more serious crime.⁵⁴

Further speculation over the law referred to by Lysias has been offered by Todd,⁵⁵ to the effect that the law cited is not in fact the statute on homicide but is rather the law dealing with *κακοῦργοι* (malefactors) who were subject to *ἀπαγωγή* to the Council of Eleven and poses the possibility that *μοιχοί* were classed under this law. The only excerpt that can conceivably be referred to in aid of this perspective is from Aeschinus, which reads:

A clear way has been revealed whereby those guilty of the greatest wrongs will escape punishment. For what mugger or thief or adulterer or killer or any other of those who commit the most serious wrongs but do so in secret will be punished? For any of these who are caught in the act are punished by death at once if they confess, while those who go undetected and deny their guilt are judged in court and the truth is discovered on the basis of probability.⁵⁶

The only useful conclusion that can be drawn from this is the affirmation that adultery (and presumably cases of rape as well) is punished by death. However, Harris and Carey conclusively rebut this citation as misleading,⁵⁷ on the basis that Aristotle⁵⁸ informs us that *κακοῦργοι* were accountable only to summary arrest and referral to the Eleven and could not be killed on the spot, as Aeschinus would have us believe. Only if they confessed or were found guilty were they liable to execution. In addition to this, it is exceedingly unlikely for this to be the law cited by Lysias as Euphiletus' defence was based on the fact that, in killing his wife's seducer, he was acting as necessitated by law. Since he refers to the statute that allows him to do so, it is unlikely that the law referred to is that on *κακοῦργοι* which does not require nor permit the immediate killing of an adulterer.⁵⁹

Since the law cited by Lysias is not the law that deals with *κακοῦργοι*, the only alternative is the reference to that which stipulates actions in cases of *μοιχεία*,⁶⁰ as

52 Arist *Ath* 57 3.

53 Cole 1984: 100.

54 *Idem* 101.

55 Todd 1993: 276.

56 Aesch *Ep* 1 90; see, further, Carey 1995: 411.

57 Harris 1990: 376; Carey 1995: 411.

58 Arist *Ath* 52 1.

59 Carey 1995: 412.

60 *Ibid.*

will be demonstrated below. Moreover, if it is indeed the law on adultery, confirmed by Aristotle and Plutarch, then one can be certain that it did designate killing as a right accessible to the aggrieved party. Although the law on *μοιχεία* may have offered alternative punishments for the culprit, Lysias opted not to include them for obvious reasons as his aim was to defend a man charged with killing his wife's seducer. What is apparent from the statute, is that it was not merely used as a defence under the homicide law, as Cole assumes, but explicitly permitted killing as a legitimate measure in the case of *μοιχεία*.⁶¹

Therefore, according to post-Draconian law, there was a significant difference between *μοιχεία* and rape as *μοιχεία* not only gave an aggrieved *κύριος* or other male relative the right to a defence allowed under homicide law, supported by contemporary legislation, but also specified homicide as a legitimate option open to a male in the case where a person was caught in the act with a woman under his authority as *κύριος*. In contrast, Solonian legislation dealing with rape assigns "the penalty of one hundred drachmas"⁶² to be paid to the victim or the *κύριος*.⁶³

This seemingly contradictory notion will be demonstrated in the following section where the actual case of Euphiletus's defence under the homicide law – the speech *On the Murder of Eratosthenes* written by Lysias for him – after he killed a man caught in the act of having sexual intercourse with his wife, is discussed.

4 Euphiletus' *Apologia*

Most of the controversy around the subject of the Athenian notion that adultery was regarded as a far worse transgression than rape, for which the offender could ostensibly receive the death penalty (as has been made evident by the generally accepted interpretation of the term *μοιχεία* held by Lysias, Aristotle and Plutarch), revolves around the actual case in which Euphiletus was prosecuted for the murder of Eratosthenes after allegedly catching him *in flagrante* with his wife. Although we have no evidence that Euphiletus' argument was accepted by his jurors, a number of modern scholars such as Pomeroy, MacDowell and Cole have judged it valid and supported the verdict that Athenian legislation deemed *μοιχεία* a crime more reprehensible than rape.⁶⁴

Euphiletus' defence was written by Lysias in a speech, *On the Murder of Eratosthenes*, which is divided into four sections:⁶⁵ the preface (1 1-5), the narrative (1 6-26), the argument (1 27-46) and the conclusion (1 47-50). In the preface, the *prooimion*, Euphiletus introduces the case and appeals to his jurors on the basis of

61 Cole 1984: 97.

62 *Idem* 101.

63 *Idem* 412.

64 Pomeroy 1994: 86-87; MacDowell 1978: 124; Cole 1984: 103.

65 See Lamb 1930: 2.

the universal detestation of the transgression of adultery. He seems confident in his position, stating that

I should be only too pleased, sirs, to have you so disposed towards me in judging this case as you would be to yourselves, if you found yourselves in my plight. For I am sure that, if you had the same feelings about others as about yourselves, not one of you but would be indignant at what has been done.⁶⁶

His confidence presumably stems from his assumption (probably not unfounded) that his male jurors, who themselves were members of an *οἶκος* and in many cases, like Euphiletus, were *κύριοι*,⁶⁷ would share his distaste of those who threaten the marital union and the stability of the household as the basic unit of the *πόλις*. He then makes the point that, in seducing his wife, Eratosthenes corrupted her and inflicted disgrace upon his children as well as himself by entering his home. This, he says, is the only enmity between him and Eratosthenes and he had no motive or premeditated intentions of murdering him.⁶⁸

He then goes on to recount the *diegesis* or narrative of the events that led up to the murder for which he is being prosecuted. After his wife bore him a child, Euphiletus says, he trusted her wholeheartedly and placed all his affairs in her hands. He states further that she was an excellent wife; a clever and prudent housewife – but after the death of his mother his trouble began.⁶⁹ It was at his mother's funeral that Eratosthenes first became interested in his wife and, aided by his own unsuspecting nature and his wife's servant-girl, seduces her. After some time, Euphiletus is made aware of the seduction by an old woman sent by one of Eratosthenes' neglected mistresses who was angry that he was not visiting her as regularly as he used to. The old woman advises that he should find his wife's servant-girl (through whom Eratosthenes paid addresses to her mistress) at the market and torture her into confessing the whole story.⁷⁰ After Euphiletus has adopted this advice, the servant-girl agrees to betray Eratosthenes and informs Euphiletus one evening that he is in the house. At hearing this, he rounds up several friends and returns to the house where he breaks open the door of his wife's bedroom. There the scene of Eratosthenes lying naked with his wife presented itself to him.⁷¹ Thereafter, Euphiletus knocked his wife's seducer down, tied his hands behind his back and began interrogating him, in response to which Eratosthenes admits guilt and begs that his life be spared in return for compensation in the form of money.⁷² Before carrying out the seducer's fate, Euphiletus replies:

66 Lys 1 1.

67 Roy 1999: 12.

68 See Lamb 1930: 2.

69 Lys 1 6-7.

70 *Idem* 1 16.

71 *Idem* 1 24.

72 See Lamb 1930: 2-3.

It is not I who am going to kill you, but our city's law, which you have transgressed and regarded as of less account than your pleasures, choosing rather to commit this foul offence against my wife and my children than to obey the laws like a decent person.⁷³

Hereafter, Euphiletus commences the *pisteis*, his defence against the prosecution for murder made by the dead man's relatives against him. He begins by having the law attributed to Draco on *μοιχεία* recited to the court which (as discussed *supra*) stipulates that if a man kills another found *in flagrante* he will not be indicted as a manslayer.⁷⁴ He then goes on to note that Eratosthenes, after being struck down and restrained in his wife's bedroom, acknowledged his guilt as an adulterer and implored, as law authorises, that he was ready to provide compensation in money so that he not be killed. As pointed out earlier, Euphiletus declared that the legislation should have higher authority than the pleadings of Eratosthenes and that he would be satisfied in acting the way he did.⁷⁵ He then brings forward witnesses to the alleged crime. Their names are not disclosed but they are assumed to be the friends Euphiletus brought with him to his wife's bedroom. He also then has the "the law from the pillar in the Areopagus",⁷⁶ on which Draco based his own law, read out to the court. This law is not preserved but it has been established that it declared that, like the previous law cited, "whoever kills an adulterer caught *in flagrante* with his wife cannot be convicted of murder".⁷⁷

This law, as Euphiletus maintains, also applied the same penalty to the adulterous woman and is the law on which he concludes that Athenian legislation deemed seduction of a citizen woman as a worse offence than that where force is used. He posits in his speech that:

[the law] directs that, if anyone forcibly debauches a free adult or child, he shall be liable to double damages; while if he so debauches a woman, in one of the cases where it is permitted to kill him, he is subject to the same rule. Thus the lawgiver [presumably referring to Draco], sirs, considered that those who use force deserve a less penalty than those who use persuasion; for the latter he condemned to death, whereas for the former he doubled the damages.⁷⁸

He adds that those who used persuasion corrupted their victims' souls, therefore making the wives of others more intimately associated with the seducers than with their husbands, while also placing the husband's household under their own influence, thus causing doubt as to whose the children belonged to.⁷⁹ He eventually says in the *epilogos*, his conclusion of his defence, that he acted not upon private

73 Lys 1 26.

74 D 23 53.

75 Lys 1 29.

76 *Idem* 1 30.

77 Harris 1990: 370.

78 Lys 1 32.

79 *Idem* 1 33.

interests of spite, but rather in the interest of the city as indicated by Athenian law.⁸⁰ Euphiletus ends his defence declaring that, if he is found guilty of murder, he will have been enticed by the law, which he trusted and obeyed.⁸¹

It must be noted that Lysias' speech was not an impartial study of a legal scholar but rather an attempt to persuade Euphiletus' jurors of his innocence. The sources he used in order to do so may therefore have been distorted to create specific effects favouring Euphiletus. Harris rightfully brings into question a number of assumptions about this area of Athenian law and ethics.⁸² However, Carey, after a thorough examination of the sources brought forward in Euphiletus' defence, demonstrates that adultery was, in fact, deemed a more heinous crime than rape.⁸³ The summary of the law cited by Lysias above, has been accepted by a number of scholars already mentioned.⁸⁴ However, Lysias cleverly oversimplifies the formulation. The action open to those in cases of rape specifies damages for the victim whom Lysias explicitly mentions; his distortion lies in his suppression of other penalties which a rapist might receive.⁸⁵

As has been mentioned above, Harris points out that the passage referred to by Euphiletus is not concerned with definitions of *μοιχεία*, but rather deals with justifiable homicide.⁸⁶ This is because it would surely be problematic for someone who, for example, finds his wife with another man, to prove whether rape or *μοιχεία* took place. Only if physical violence was evident, and not simply threats of physical violence, would it be clear for the aggrieved party to tell the difference between the rapist and the adulterer. Moreover, the citation does not distinguish between rape and adultery which, as shown, was of little import as a defence could be offered under this provision of Draco's law, whether or not the man killed by the defendant was a rapist or adulterer.⁸⁷

Lysias chooses to omit alternative punishments available to the aggrieved party so as not to erode the precise contrast he postulates between rape and adultery as he intends to demonstrate that Euphiletus was correct in acting the way he did. Euphiletus was, of course, not obliged to kill, as Lysias tries to convey, and could have subjected Eratosthenes to physical abuse; other means of abuse that intended to gravely humiliate him; hold him to ransom; demand pecuniary compensation; or have him prosecuted in a court of law.⁸⁸ For this reason, Lysias chooses to refer to the law on justifiable homicide and not the extant laws on *μοιχεία* as the latter would

80 *Idem* 1 47.

81 *Idem* 1 50.

82 Harris 1990: 370-377.

83 Carey 1995: 407-417.

84 Lys 1 32.

85 Carey 1995: 409.

86 Harris 1990: 370.

87 Carey 1995: 410.

88 Forsdyke 2008: 8.

have brought to light his distortion. Carey claims that “to argue that a distinction is exaggerated is not to invalidate the distinction altogether”, and that it can be demonstrated that the acute case of Euphiletus “rests on a real distinction drawn by the Athenians”.⁸⁹

Carey goes on to provide his argument to substantiate this statement, firstly, by disputing Harris’ claim⁹⁰ that Euphiletus makes an effort to deceive the court by claiming that “the law from the pillar in the Areopagus”⁹¹ designates the penalty for adultery to be death. Carey does not deny this particular statement, but points out that this law is not, in fact, the only testimony for Euphiletus’ defence, as after the *diegesis* recounting the events of Eratosthenes’ death, he says: “[F]irst of all, read out the law.”⁹² The prospect that this law (unavailable to us) is that which substantiates Euphiletus’ actions appears inescapable: the words “the law” conveys that its authority in this context is axiomatic due to its reference directly after the *diegesis*, as well as the fact that Euphiletus asserts, forthwith, the legal penalty for adultery. This law is highly unlikely to be the same law cited in Lysias (1 30), firstly because the Greek word “καί” in Lysias (1 30) suggests that the citation quoted is in addition to that quoted in Lysias (1 28) and is not a repetition.⁹³ Therefore, if the law cited in Lysias (1 28) is not the homicide law, as maintained by Harris,⁹⁴ and is not the law on *κακοῦργοι* as asserted by Todd,⁹⁵ the only clear alternative would be a reference to the statute stipulating actions in cases of *μοιχεία*.

As has been mentioned above, if the statement by Lysias is in fact a reference to procedures revolving around *μοιχεία*,⁹⁶ we can be certain that it did give the aggrieved male the right, in cases of adultery, to kill those implicated, as acknowledged by Plutarch, Aristotle and Demosthenes.⁹⁷ We can be sure that punishments other than death were mentioned, but Euphiletus opted to withhold them so as not to detract from the effectiveness of his argument. What is essential is that the right to homicide in cases of *μοιχεία* was expressly given to an aggrieved male, not simply giving a person a defence under the homicide law. Moreover, there was a significant difference between *μοιχεία* and rape in Draconian law, which remained in effect throughout the classical period,⁹⁸ and due to the fact that Solonian legislation prescribes only pecuniary compensation in cases of rape, it can be confidently contended that *μοιχεία* was in fact treated more severely by Athenians than rape. Carey also raises the point

89 Carey 1995: 410.

90 Harris 1990: 374.

91 Lys 1 30.

92 *Idem* 1 28.

93 Carey 1995: 410-11.

94 Harris 1990: 374.

95 Todd 1993: 276.

96 Lys 1 28.

97 Plu *Sol* 23; Arist *Ath* 57 3; D 23 53.

98 Carey 1995: 410.

that, in this context, it is important to distinguish between the possibility of a rapist being executed – “conditional upon the jury accepting the extreme sanction proposed by the prosecutor,” as Aeschinus informs us – and the legally given right to homicide *without trial* “and without reference to any state official or body” regarding cases of *μοιχεία*.⁹⁹

5 The inferior role of women in Athenian law

As has been made clear by the aforementioned legal decrees, accounts by ancient contemporary notables and actual legal cases of *μοιχεία*, in Athens adultery was regarded as a crime and was treated as a far more grievous transgression than was the act of rape. If one considers the approximate life-spans of the notables from which these decrees, accounts and cases emanate (eg Draco, c 650-600; Solon, c 638-558; Lysias c 445-380; and Demosthenes and Aristotle c 384-322) and how long their points of view may have remained popular, it can confidently be posited that this convention, namely that adultery was a more serious crime than rape, both in legal terms and in terms of social perception, was prevalent for a considerable period of time in Athenian antiquity.

Modern Western opinion differs considerably from this ancient convention in that legislation (as well as social opinion) holds that the victim of rape suffers markedly more than one who is seduced outside of marriage (and significantly more than does the spouse of someone who is so seduced). The question that begs being raised by this decided contradiction is why ancient Athenian legislation deemed the suffering of a sexually assaulted person to be less than that of a woman who was adulterous (or that of her cuckolded husband) to the extent that the adulterous woman and her partner could be killed if caught *in flagrante* while the former victim’s offender was simply liable to a pecuniary penalty. The answer lies in the gender dynamics prevalent in Athens at the time of such laws and attitudes. These dynamics ensured that women were, without any doubt, seen as inferior to men in all spheres of life (social, legal, and economic) except religion, in which women’s status was ostensibly equal to that of men. To fully comprehend this detail in ancient Athenian gender dynamics, one must look at the role of women in its society, as will be discussed in detail below.

Very early in the academic attempt by Edwin Ardener to understand traditional societies as they are (or were) seen from the point of view of women, it was observed that the representations of a society made by most ethnographers tend to be models derived from the male sector of that society.¹⁰⁰ He pointed out that, as a consequence of the articulation of history in terms of a male world-position, women in history comprise a “muted group” and that “the study of women is on a level little higher than the study of the ducks and fowl they commonly own”. Since this study, there

⁹⁹ *Idem* 412.

¹⁰⁰ Ardener 1975: 1.

have been many like it that have made an effort to understand societies from the perspective of women so as to provide a more comprehensive representation of those societies instead of accepting male-shaped perceptions of societies in history.

With regards to classical Athens in the fifth and fourth centuries BC, one might think that modern scholars are better off than their ancient counterparts in terms of presenting a more conclusive or realistic model of Athenian society. This may be due to the fact that the ancient literature available to modern scholars seems to provide an accurate and holistic presentation of Athenian women and their role in society. However, this is a delusion: modern scholars have no direct access to the model of Athenian society to which women subscribed, even as it might have been expressed in the dominant language of men “for the evidence available to us is almost without exception the product of men and addressed to men in a male-dominated world”.¹⁰¹ One should make a constant effort to remember that the words of a Lysistrata or a Medea are, in fact, the product of a man’s perception speaking to other men.¹⁰²

While this statement might be more than three decades old, one must understand that very little, if any, new ancient material or evidence has been uncovered that would allow direct access to the model of Athenian society to which women subscribed. However, we are able to piece together components of that society that help illuminate women’s subjugated role in Athens and thus how they were perceived within specific spheres of that society. Before looking at legal attitudes towards women implicated in cases of *μοιχεία*, one must understand (as has been briefly noted above) that Greek girls were segregated, not only from the world outside the home, but from boys in particular. In court, a speaker may have attempted to proclaim his family’s respectability by stating that his sister and nieces are “so well brought up that they are embarrassed in the presence even of a man who is a member of the family”.¹⁰³

Since this article looks at the ancient Athenian phenomenon whereby women implicated in extra-marital sexual liaisons (or unmarried women who were found to be in a sexual relationship with a man without the consent of her *κύριος*) were, under legal precedent, punished far more severely than offenders in cases of sexual violence, one must look at Athenian legal attitudes towards women in that society. It has been suggested by some scholars¹⁰⁴ that, due to the fact that laws in antiquity were written only by men, legal status and social status in reality had very little or no correlation. However, it must be acknowledged, at least, that status before the law played, and continues to play, a large role in defining the position of women within the structure of a given society, even though from a male point of view. It is indisputable that the law is one of those sets of social institutions by which society

101 Gould 1980: 38.

102 Dover 1972: 158.

103 Lys 3 6.

104 For example, Gomme & Sandbach 1973: 28.

seeks to define its inner structure.¹⁰⁵ In other words, legal norms and principles reflect prevailing social norms and values. On the other hand, legal norms and principles also shape and influence social norms and perceptions, such that a dynamic and symbiotic relationship exists between law and society: they both reflect and influence each other. As such, by studying the laws of a particular society, one can learn a great deal about the social *mores* of that society.

In a society where segregation of the sexes was imposed, boys and girls (of any age) were likely to devote a great deal of time to defeating this restriction. However, Greek laws were not at all lenient towards adultery and *μοιχεία* (which entailed not only the seduction of a man's wife, but also the seduction of a widowed mother, unmarried daughter, sister, niece or any other woman whose legal guardian he was) because an offender (ie the male seducer) could be killed, physically abused or forcefully imprisoned until he purchased his freedom.¹⁰⁶ This article has already discussed this specific aspect of Athenian law in depth, but has yet to analyse, more broadly, how exactly women were regarded by the law. Examining Athenian law and its processes, when handling cases in which women were present, might shed some light on why it is that adultery was seen as a more heinous transgression than the act of rape.

According to Athenian law, as well as in the rest of classical Greece, this question is immediately answered by the juridical position of women, namely, the commonly known fact that, in court, a woman, regardless of her age or social class, or of her role as daughter, sister, wife or mother, was in essence a minor since throughout her life she was under the legal control of a male *κύριος* who represented her.¹⁰⁷ If she was married, either her husband or father would represent her in court, while if she was unmarried, her father, brother or paternal grandfather could take up that role.¹⁰⁸ In no circumstance could a woman have any semblance of legal personhood, as she was legally regarded to have been an extension of her *κύριος*' property. The status of an *ἐπίκληρος* demonstrates that, even in extreme cases, a woman had no control over any issue regarding her marriage as she was "assigned" a representative in the form of the nearest male kinsman in a fixed order of precedence. It thus becomes apparent that Athenian law connected women with property and this connection can be illustrated in laws regarding dowries, concisely summed up by Gould:

[A]ny dowry that went with the woman in marriage is controlled by her husband qua *κύριος* but cannot be disposed of by him; on the husband's prior death or on dissolution of the marriage the dowry passes with her to her new *κύριος*; on the death of the wife without children born to her, the dowry reverts to the original *κύριος*.¹⁰⁹

105 Gould 1980: 43.

106 Dover 1973: 62.

107 Gould 1980: 44.

108 Kapparis 2003: 9.

109 Gould 1980: 44.

What is most striking here is the fact that, legally speaking, women were not seen as citizens, as a male would have been, but as potential transmitters of property. This parallel drawn by Athenian law between women and property is articulated by the twofold use of the Greek word *ἐγγύη*, which could be used to denote “marriage” or “surety”, and the origin of which implied “transference with a reserved right to the transferor”.¹¹⁰ Her role in the transference of property was further encapsulated by the fact that she might have been required to produce a son in order to facilitate the progression of the *οἶκος* under her husband or father. In their role as transmitters of property as well as in their very necessary roles in the survival of a given *οἶκος*, Athenian society displayed interest in and extended protection to its women by articulating such interest within a framework of legal rules and institutions. This articulation, however, placed women in a position that lacked all agency and characterised them as incapable of independent thought. As such, Athenian women became “sub-citizens” excluded from the bounds of those who formed the community’s representative members while also defining them as precious and indispensable to the maintenance of social order and in particular, to the continuity of property.¹¹¹

The essence of women’s position in society, as seen by Athenian legal attitudes, thus equated her with property belonging to a man; and so, to seduce a man’s wife, thereby stealing away her affection and loyalty from him, was to threaten the stability of his estate. A woman who was seduced by someone other than her husband would have been regarded as being more deserving of blame as the Greeks “tended to believe that women enjoyed sexual intercourse more than men and had a lower resistance to sexual temptation”,¹¹² which the law quite explicitly recognised. As has been shown above, Athenian law stipulated clearly that if a woman committed adultery, she could be killed by her husband (or next male kinsman) if caught in the act; and the same steps could be taken if a man’s widowed mother, unmarried daughter, sister, or niece was caught committing the same offence. There was no such law that we know of that suggested any inclination towards the punishment of the husband of the same woman if he were to have engaged in sexual activity with someone other than his wife. Moreover, if such law existed, a woman was not legally permitted to take action against her adulterous husband anyway – the law was very harsh on adulterers, remarkably more so on women. A man could not receive any penalty if he were to engage in extramarital sex, as long as it was not with another man’s wife, or another citizen woman under the oversight of a *κύριος*. A further testament to Athenian men’s immunity from legal action, were they to have engaged in extramarital sex, is the lack of evidence of any law against brothels. In fact, after Solon’s reforms many Athenian brothels were believed to have been state-funded,¹¹³

110 Harrison 1968: 32.

111 Gould 1980: 46.

112 Dover 1972: 159.

113 Pomeroy 1994: 57.

showing just how socially-permitted it was for Athenian men to engage in sexual activity with someone other than their wives.

Ultimately, what all this demonstrates is the vastly different legal attitudes towards men, on the one hand, as Athenian citizens with full legal personhood, and, on the other hand, women, as legal “sub-citizens” unable to represent themselves in the court of law. Legal positioning of Athenian women must be seen in light of the fact that, in court, a case in which a woman was implicated was fought between a man and the *κύριος* of the woman over whom he looked. A woman’s personal sentiment was of no importance. Cases would be fought between men and thus held, in essence, only their intentions. By examining Athenian legal attitudes towards women, we are made aware of their undoubtedly inferior position in comparison to men. The ancient Athenian phenomenon, whereby adultery was considered as a crime worthy of significantly harsher punishment than rape, must be seen against the background of the inferior position of women before the law, due to the fact men comprised the sole agents in courts of law in which the jury would also be exclusively male, thus taking out of the equation any sentiments of women even if they were greatly implicated in the case at hand. With regards to this article’s aim of bringing to light the reason why adultery was seen as a worse crime than rape in classical Athens, one must understand that legal disputes were fought entirely by men, and so, the victimisation of women in cases of rape would not be recognised. Moreover, when focussing on cases of *μοιχεία*, Athenian action under the law must be seen as a reflection of the threat placed on a man’s estate, with significant blame placed on the culpable woman.

6 Conclusion

In recent years, there has been considerable scholarly debate around the topic of the ancient Athenian phenomenon in terms of which offenders, in cases of adultery, or *μοιχεία*, were punished more severely than rapists – a phenomenon that stands in stark contrast to modern Western attitudes to rape and adultery. Some commentators have argued that this anomaly was more apparent than real, contending that the circumstances under which a sexual act, in fact, constituted *μοιχεία*. These commentators have also highlighted the actions that were legally permitted to be taken by cuckolded husbands or male kinsmen of the woman implicated. This article, however, has maintained the conventional view that those guilty of *μοιχεία* could, in fact, be punished more severely than those who had raped, as was confirmed by Athenian law.

This article has endeavoured to substantiate this orthodox view by referring to essential excerpts from notable sources which form the basis upon which ancient Athenian attitudes around *μοιχεία* are established. These sources include the statute attributed to Draco, cited by Demosthenes, which stipulated that seducing a man’s wife

or female relative constituted *μοιχεία* and that legal action could not be taken against a man who killed those involved in such seduction. This statute did not attempt to define what constituted *μοιχεία* and dealt rather with justifiable homicide. However, Aristotle in his summary of the law on justifiable homicide referred to the same law and included the word *μοιχεία*, which indicates that later Athenians themselves acknowledged this statute as being the one dealing with *μοιχεία*. Lysias is thought to have used this same law in his speech in defence of his client Euphiletus, who was accused of having murdered a man found having sexual intercourse with his wife. Scholars have no evidence that the argument advanced by Lysias in Euphiletus's case was accepted by the jurors in that case, but modern scholars have judged that argument valid and support the verdict that Athenian legislation deemed *μοιχεία* a crime more reprehensible than rape. Lysias pointed out that the penalty for rape was simply a monetary fine, which Plutarch confirmed. Therefore, although rape is not distinguished from adultery in the statute attributed to Draco, it cannot go unheeded that Lysias, Plutarch and Aristotle understood it to encompass both rape and *μοιχεία* and stated clearly that *μοιχεία* was believed to be the far more serious crime.

After demonstrating that adultery was regarded as the more heinous and more punishable offence in Athens, this article has looked at the reasons why this was so, and posits that this was, for the most part, due to the subordinate nature of the female role in the Athenian legal sphere. Due to the fact that women were excluded from the legal realm and that men were the sole agents in courts of law, in which the jury was also exclusively male, cases were fought only between a man and another man, even in cases where women were significantly implicated or affected. Accordingly, the sentiments and opinions of the implicated or affected women would not have been acknowledged, thus positioning males as the only potential victims in legal courts. Therefore, to be in an adulterous relationship with a man's wife was thought to have posed many threats to the man's estate and his *οἶκος* whose institution, as this article has demonstrated, held great significance in the eyes of the greater *πόλις* as the building block of society. As such, the state made great efforts in the protection of the *οἶκος*, which would explain the harsh nature of punishments imposed in cases of *μοιχεία*. Thus, this article brings to light the remarkable relationship between the legal attitude towards women and why it is that Athenian law stipulated a harsher punishment for offenders in cases of adultery – which, in modern Western terms, is not seen as a crime at all – than for rapists, who are seen as some of the most despicable individuals in modern society.

BIBLIOGRAPHY

- Ardener, E (1975) "Belief and the problem of women" in S Ardener (ed) *Perceiving Women* (London): 1-17
- Beringer, W (1985) "Freedom, family, and citizenship in early Greece" in JW Eadie & J Ober (eds) *The Craft of the Ancient Historian* (London): 41-56

- Carey, C (1995) "Rape and adultery in Athenian law" *The Classical Quarterly* 45(2): 407-417
- Cohen, D (1984) "The Athenian law of sdultery" *Revue Internationale des Droits de l'Antiquité* 31(1): 147-165
- Cole, SG (1984) "Greek sanctions against sexual assault" *Classical Philology* 79(2): 97-113
- Dover, KJ (1972) *Aristophanic Comedy* (Berkeley)
- Dover, KJ (1973) "Classical Greek attitudes to sexual behaviour" *Arethusa* 6(1): 59-73
- Dover, KJ (1974) *Greek Popular Morality* (Oxford)
- Dryden, J (tr) (1683) *Plutarch. Solon* (London)
- Dymes, TJ (tr) (1891) *Aristotle's Constitution of Athens* (London)
- Forsdyke, S (2008) "Street theatre and popular justice in ancient Greece: Shaming, stoning, and starving offenders inside and outside the courts" *Past and Present* 201(1): 3-50
- Gomme, A & Sandbach, F (1973) *Menander: A Commentary* (Oxford)
- Gould, J (1980) "Law, custom and myth: Aspects of the social position of women in classical Athens" *The J of Hellenic Studies* 100(1): 38-59
- Harris, EM (1990) "Did the Athenians regard seduction as a worse crime than rape?" *The Classical Quarterly* 40(2): 370-377
- Harrison, A (1968) *Law of Athens* (Oxford)
- Jowett, B (tr) (1999) *Aristotle. Politics* (Kitchener)
- Kapparis, K (2003) "Women and family in Athenian law" in C Blackwell (ed) *Dēmos: Classical Athenian Democracy* (accessed 16 Jun 2016) available at www.stoa.org/projects/demos/women_and_family.pdf
- Lacey, WK (1968) *The Family in Classical Greece* (New York)
- Lamb, WRM (tr) (1930) *Lysias* (London)
- MacDowell, DM (1978) *The Law in Classical Athens* (New York)
- MacDowell, DM (1989) "The Oikos in Athenian law" *The Classical Quarterly* 39(1): 10-21
- Patterson, CB (1991) "Marriage and the married women in Athenian law" in SB Pomeroy (ed) *Women's History and Ancient History* (Chapel Hill): 48-72
- Pomeroy, SB (1994) *Goddesses, Whores, Wives, and Slaves: Women in Classical Antiquity* (London)
- Pomeroy, SB (1996) *Families in Classical and Hellenistic Greece: Representations and Realities* (Oxford)
- Pomeroy, SB (1999) *Ancient Greece: A Political, Social, and Cultural History* (New York)
- Roy, J (1999) "Polis and Oikos in Classical Athens" *Greece and Rome* 46(1): 1-18
- Thorley, J (2005) *Athenian Democracy* (New York)
- Todd, SC (1993) *The Shape of Athenian Law* (Oxford)