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## Greek Law and Modern Jurisprudence<sup>1</sup>

### I

THE somewhat haphazard way in which the domain of human knowledge is increased may be compared not inaptly to the gradual spread of water over an irregular surface. It trickles now this way and now that, here gliding easily into a little depression which it fills, here finding its way blocked by some tiny barrier, tracing as it goes a dissolving figure whose outlines are incongruous, grotesque, fortuitous, without a hint of rational design or ordered symmetry. Were one disposed to pursue the comparison, he would be led to speculate on the possibility that some day men may come to conduct that "licour of which vertu engendred is the flour" by more direct and better ordered channels throughout the whole field of human life, and perhaps to reap a richer harvest. At present, however, I propose to discuss a single rather striking instance of this casual process, the modern jurist's almost complete ignorance of ancient Greek law and legal theory. Here is a deficiency in the data of jurisprudence which results primarily from an accidental combi-

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<sup>1</sup> The place of Greek law in the study of comparative jurisprudence has been discussed in several interesting papers, which cover approximately the same ground as Part II of the present study. Even here, however, I hope this paper will be found to present a somewhat different point of view from others, and occasionally to develop a new phase of the problem. The reader is advised to consult Lipsius, *Von der Bedeutung des griechischen Rechts* (Leipzig, 1893); Hitzig, "Die Bedeutung des altgriechischen Rechts für die vergleichende Rechtswissenschaft," *Zeitschrift für vergleichende Rechtswissenschaft*, XIX, 1-28; and especially the valuable treatise of Glotz, "L'étude du droit grec," in *Études sociales et juridiques sur l'antiquité grecque* (Paris, 1906). My confidence in the correctness of the evaluations attempted in the following pages has been greatly increased by finding that in many instances Glotz and myself, approaching the problem from distinct points of view, have come independently to identical conclusions, conclusions which have doubtless often been reached by other students of Greek law though seldom formulated. Whatever value the present paper may possess will lie not so much in its new matter as in the brief presentation of established facts for the consideration of English-speaking jurists and students of the law.

nation of circumstances rather than conscious selection. It is, moreover, a deficiency of such proportions that its continuance gravely impairs the justness of the jurist's claim to be considered a scientist. Nor are its effects restricted to the sphere of comparative and historical jurisprudence; they extend to the speculations of the analytical school and to the more practical activities of the legislator and of the judge.

The passive acceptance of tradition which has permitted this ignorance to endure in an age of scientific inquiry, the failure to apply elementary critical tests or to profit by recent investigation and discovery, is really astounding. For the oft repeated dictum that jurisprudence is an invention of the Romans<sup>2</sup> is a priori improbable as well as demonstrably false. There is little inherent likelihood that the Greeks, whose nervous curiosity impelled them to explore every bypath in the broad realm of philosophy and science, lacked inclination to investigate the fundamental principles of law, least of all the Athenians, with whom the enactment of law and its application entered into the daily life of the individual citizen in greater measure than at any other time or in any other society of which we know.<sup>3</sup> We cannot entertain seriously the opinion that a people who, in little more than a century, conducted the other arts and sciences from rude beginnings to degrees of perfection in some instances still unsurpassed by modern culture, in others not since again attained, were incapable of producing or applying a genuine science of law; that the basic principles of directness, simplicity, proportion, truth, which they followed with conspicuous success in every other department of human activity, were neglected or discarded when they faced these tasks. Nor again, to view our problem from a somewhat different angle, can we reasonably believe that the race which created the science of politics and carried it almost to the point where it stands today was estopped by some mysterious inhibition from proceeding to the consideration of jurisprudence, and that this branch of political science could be brought to birth only by the Roman mind. It is equally difficult to reconcile this dictum with the general record Rome has left behind her. In art and architecture, in literature, philosophy, science, in every department of thought save this alone, the Romans were content to borrow from the Greeks and unable to extend or improve materially what they received; they were virtually destitute of native originality and

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<sup>2</sup> *Infra*, p. 297.

<sup>3</sup> Botsford, *Hellenic History* (Macmillan, 1922) 248-57; Gilbert, *Constitutional Antiquities of Athens and Sparta* (London, 1895) 285-310, 376-416.

incapable of giving to the world a new idea. Yet, we are asked to believe, they were miraculously endowed—possibly by way of compensation for this general poverty of genius—with a subtle power of analysing and criticising legal concepts; minds which followed dully and slavishly in other disciplines leapt to the fore when the realm of law was reached, and Jurisprudence sprang suddenly full-grown and panoplied from the brains of the jurisconsults, as Athena from the head of Zeus.

This statement of the case, it must be freely confessed,<sup>4</sup> is not without an element of rhetorical exaggeration, but an exaggeration which has its purpose and possibly its justification. The purpose is to throw into clear relief the inherent absurdities of the assumption that jurisprudence began with Rome; the justification—if exaggeration can be justified—is found in the way this assumption, in all its naked absurdity, is flaunted before our faces in various handbooks and never once seriously called in question. To take the most obvious illustration, Holland, in the work on jurisprudence which is the vade mecum of countless students of the law, gives the jurisconsults credit, without reserve or qualification, for the “beginnings of the science.”<sup>4</sup> He then goes on, within a few pages,<sup>5</sup> to extract from Greek authors, who wrote long before Rome had any law worthy of the name, definitions of “positive law” that cannot be matched for scientific precision until we come to Hobbes or Austin—definitions upon which the most acute thinkers of the analytical school have scarcely been able to improve. This glaring inconsistency, which fails to cause the author—or his readers—the slightest misgiving, is indicative of the attitude toward Greek law adopted by students of jurisprudence almost without exception.<sup>6</sup> Yet we may well question a scientific method which assumes that the history of

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<sup>4</sup> Jurisprudence, 11 ed., 2 ff. Holland's insistence on this supposed fact is no more striking than the unanimity with which other writers on jurisprudence tacitly regard it as a fundamental postulate.

<sup>5</sup> *Ibid.*, 43 ff.

<sup>6</sup> The exceptions are, unfortunately, found almost exclusively on the continent, where many distinguished jurists, for the most part professors of law in the universities of France, Belgium and Germany, have enriched their scholarship and broadened their theoretical background by investigations into Greek law. Their work, however, even when it is strictly juristic in character, does not meet the need for study of the subject from the point of view of Anglo-American law. In England we have the work of the late Charles Rann Kennedy, professor of law in Queen's College, Birmingham, and in America of Robert J. Bonner, professor of Greek in the University of Chicago and former member of the Toronto bar. (NOTE: This paper was written before the publication of Vinogradoff's valuable treatise, *The Jurisprudence of the Greek City*, a fact which should be kept in mind in reading the remainder of this section.)

"the formal science of positive law"<sup>7</sup> begins with the age of the jurists, several centuries after the Greeks were quite familiar with the very definition of positive law which is still the cornerstone of analytical jurisprudence.

Holland himself defines a law as "a general rule of external human action enforced by a sovereign political authority."<sup>8</sup> Xenophon, writing early in the fourth century before Christ, formulates the following definition: "All rules of conduct enacted by the sovereign power in the state after due deliberation are called law."<sup>9</sup> Xenophon represents the intelligent layman, rather than the speculative analyst, and the definition is reached in the course of a discussion fairly typical of those in which the more thoughtful Athenians of the fifth and fourth centuries habitually engaged. It may therefore not unreasonably be classed with the familiar concepts so frequently subjected to the criticism of the Socratic dialectic in the pages of Plato and Xenophon. When the entire discussion is pondered, we become aware that the formulation and analysis of legal concepts had made very considerable progress by this time.

Holland might have found further reason for doubting the validity of his assertion had he studied in its entirety another interesting passage from which he quotes a few phrases, curiously enough omitting the essential part of the definition—that in which Demosthenes contrasts law with nature.<sup>10</sup> Law, we are told by the orator, is of general, not singular, application. . . . Law aims at the discovery of what is just and fair and useful, and embodies this when determined in a command applying in the same way and in equal measure to all alike; such a command is a law. . . . Every law is at once the device and gift of God and the decree of thoughtful men; it is a corrective of wrong conduct, whether intentional or unintentional, and a compact of the whole state, by which all citizens ought to regulate their lives.

Although it is not my purpose in this brief discussion to marshal the numerous passages which show how far the Hellenes had progressed either in analysing legal concepts or in considering the more immediately practical aspects of jurisprudence, I cannot refrain from transcribing a few lines from one of the political essays of Isocrates.<sup>11</sup> Here is the advice he offers to the legislator: "Change or abolish whatever either of law or custom is not good. If possible

<sup>7</sup> Holland, *op. cit.*, 13.

<sup>8</sup> *Ibid.*, 42.

<sup>9</sup> *Memorabilia*, I, ii, 43.

<sup>10</sup> XXV, 15-16 (Against Aristogiton).

<sup>11</sup> II, 17.

discover for yourself what is best; failing that, imitate the good institutions of other communities. As regards the general character of your laws, they should be just and beneficial and consistent with one another; in addition they should be such as are likely to reduce disputes among your citizens to a minimum, while at the same time providing for the prompt adjustment of those that do arise. Laws that are properly enacted ought to exhibit all these qualities." What a boon the knowledge of this clear-cut program of legislative reform and the capacity fully to appreciate it would have been to the Romans when they were trying to develop out of the jumble of primitive formalism that hampered transactions between individuals something that might be called a law of contract, or to disentangle a law of property from that Gordian knot the *patria potestas*. Even today it might do no harm were this bit of ancient wisdom graven on the walls of our legislative chambers. It is certainly unscientific and perhaps unwise to ignore completely the legal notions of a people who were able to conceive the practical and theoretical problems of the legislator in this scientific and philosophic spirit.

Here and there, scattered through the great mass of writing that has to do with the law of ancient Hellas, are interesting and valuable discussions of certain phases of jurisprudence, or of notions of law and justice found in certain authors.<sup>12</sup> Occasionally we find various points of legal doctrine related to Greek thought.<sup>13</sup> But we are unfortunately still far from anything that may be called a complete or systematic treatment of the field from the juristic point of view. This lack results in great measure from the misconception just discussed; the student of jurisprudence who might have undertaken to fill the gap did not know that there was anything worthy of his investigation; the philologist who was actually studying the facts was unaware of their full implication. Yet here is a fruitful field for important researches which must await the advent of a generation of scholars who know both Greek and law before it can be adequately explored. We cannot, unfortunately, be very hopeful, since the law—especially in America—is a jealous mistress. Although the systematic works on law produced by Greek writers are in great part

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<sup>12</sup> For example, Dareste's discussion of the writings of Plato, Aristotle and Theophrastus in *La science du droit en Grèce* (Paris, 1893), Hirzel's study of certain legal concepts in *Themis, Dike und Verwandtes* (Leipzig, 1907), Bonner's exposition of the Attic law of evidence in *Evidence in Athenian Courts* (Chicago, 1905).

<sup>13</sup> A good example is found in 31 *Harvard Law Review*, 1059, where Pound shows how a doctrine of the Roman law is founded on the Aristotelian theory of form and substance.

lost, there is a wealth of material available in the orators, the historians, the political writers, and even the poets,<sup>14</sup> for the subject matter of jurisprudence was in Greece a matter of common knowledge and enlightened general interest to an extent we now can scarcely realize.<sup>15</sup> If ever this complete investigation be made, I venture to predict, the Greeks will be found to have anticipated the work of the analytical school in every essential particular and yet to have given to the material aim of law the attention which is properly demanded by critics of the Austinians.<sup>16</sup> That they consistently and consciously followed the historical and comparative method in studying juristic problems is of course too familiar to need repetition here.<sup>17</sup>

The causes underlying this inattention to an important field are too many and complex to be more than suggested. One of them certainly is the tendency of the historian to divide history into successive stages, in each of which some race or nation plays its leading part and makes its particular contribution to the evolution of culture; Rome is too huge to be passed over in such schemes, and the special mission assigned her is generally the foundation of statecraft and jurisprudence. Another, perhaps, is the circumstance that "jurisprudence" is a Latin word.<sup>18</sup> Again there is the fact that in govern-

<sup>14</sup> Prior to the fifth century before Christ the political writings of the Greeks were in verse. Solon published his ideas on current political and social problems in elegies.

<sup>15</sup> "*C'est un sujet sur lequel les Grecs aimaient à discourir, et depuis Hérodote jusqu'aux rhéteurs de l'époque romaine c'est un plaisir qu'ils se sont donné souvent.*" Dareste, *op. cit.*, 315.

<sup>16</sup> See Vinogradoff, *Historical Jurisprudence*, I, 118 ff., for this criticism of the analytical school.

<sup>17</sup> Aristotle, in preparing his famous treatise on the science of government (the *Politics*), produced with the collaboration of his pupils no fewer than 158 detailed monographs upon particular governments. Of these nearly 100 titles are known. They treated of some non-Hellenic states, and in the *Politics* Aristotle often compares Hellenic with non-Hellenic institutions. If we may judge from the single extant example—the Constitution of Athens—the judicial branch was not neglected either in the historical or in the systematic parts. Theophrastus, the successor of Aristotle, composed a scientific treatise on Law, of which a few precious fragments enable us to trace the general outline. According to Dareste (*op. cit.*, 301 ff.), the first three books were devoted to the general principles of jurisprudence, the legislative, and the judicature, books IV-VII to criminal and civil law and procedure, VII-XI to the civil and political rights and status of persons, XIII-XVI to laws on homicide, XVII-XVIII to contracts, XX to national festivals, public games and kindred topics. We hear also of a treatise by Theophrastus on non-Hellenic custom which may have formed part of the larger work just described. The magnitude of this activity, which was primarily actual research rather than the mere learning by rote that later took its place, is apparent not merely from the number and extent of these studies but also from the tradition that at one time there were more than 2000 students working in the school in various fields under the guidance of Theophrastus.

<sup>18</sup> As Holland puts it, we get the word "by an accident of Latin philology"

ment and law the traditions of European nations derive in great part from Rome, having their roots in a time when the empire was dominant and the decadent Greek world merely a group of subject provinces. Under these circumstances, when the historical study of jurisprudence was revived, scholars naturally turned first to investigation of the Roman law, where they found abundant materials for reconstructing the later Roman law, accessible, compact, and expressed in a language with which they were thoroughly familiar. What little of Greek law was extant in those times—for few inscriptions had been recovered—was so fragmentary and so widely dispersed that only the classical scholar could deal with it;<sup>19</sup> as a result, it has been studied almost exclusively from the antiquarian point of view and published in technical periodicals or handbooks into which the jurist seldom thinks of looking. Between the Hellenist and the jurist is the barrier of language, bristling on either side with *chevaux de frise*; as has been said, the former is commonly unfamiliar with the present state and the past tradition of the law, while the latter has never looked upon the classic beauty of Themis. When all this is taken into account, the jurist cannot well be chid for the low estimate he puts upon Greek law. What it is less easy to condone, from the standpoint of those whose studies have taught them that the essential qualities of the Greek genius are present in their law as truly and as fully as in their art and architecture or their literature and science, is the passive acceptance of this low estimate by classical scholars. When one of the greatest living Hellenists cries out, "*Römisches staatsrecht wird, gott sei dank, etwas besser begriffen als attisches*,"<sup>20</sup> we suspect he is but re-echoing the traditional dictum, that he has for the moment forgot what a little reflection upon the orderly development of law in Athens, conjoined with a critical scrutiny of the Roman potpourri of laws and rescripts, would speedily make clear. A more striking testimony to this inertia of tradition is presented by two notable expositions of ancient culture recently undertaken in England<sup>21</sup> and in the United States,<sup>22</sup> which completely

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(op. cit., 3). He of course regards the absence of a Greek name for the science as irrefutable proof that it was invented by the Romans, and fails to perceive the rather obvious circumstance that it had no distinctive appellation in Greek because the thoroughgoing analysis of Greek thought merged the science of law in the greater science of which it is properly a part, politics.

<sup>19</sup> Even today, when inscriptions have been recovered literally by thousands, our knowledge of Greek law is still in great part the result of years of patient research in the pages of the Attic orators. This source, consisting chiefly of the ex parte statements of litigants or counsel, has to be utilized with extreme caution and nice discernment.

<sup>20</sup> Wilamowitz, *Aristoteles und Athen* I, 60.

<sup>21</sup> The Legacy of Greece (Oxford University Press, 1921).

<sup>22</sup> Our Debt to Greece and Rome Series, edited by Hadzits and Robinson.

omit Greek law from the topics to be discussed. Thus the responsibility for this ignorance of the Hellenic contribution rests in the last analysis with classical scholars, who have been content to view their subject from academic and antiquarian standpoints, without any serious attempt to explore fully its implications or to estimate its potential values for modern thought.

## II

When we approach our problem from the historical and comparative side, we find ourselves on more familiar ground. Here we have to do in greater measure with objective facts, rather than abstract principles, and, what is more, with facts that have already received considerable attention in special investigations. Two phases of the subject require attention, the relation of Greek law to Roman and its value to the student of Indo-European legal institutions.

The general trend of historical investigation is favorable to the view that national or racial ideas and institutions are rarely to be regarded as isolated or strictly independent creations, but rather as products of long and often complex tradition. Thus with increasing knowledge of the actual processes by which the Roman law was gradually evolved it is becoming clearer that the influence of Greek thought and practice cannot be dismissed as negligible.<sup>23</sup> We need not credit the ancient tradition that the commission which drew up the Twelve Tables sent emissaries to Athens to study the "Laws of Solon," or unduly stress occasional correspondences between clauses from the Tables and Greek enactments on similar subjects.<sup>24</sup> Nor should we be too ready to prostrate ourselves before the statue to Hermodorus of Ephesus which Pliny assures us stood in the Roman Forum.<sup>25</sup> Yet we may feel reasonably certain that Roman law, in the early stages of its development, was materially influenced by its contact with the superior Hellenic culture of Southern Italy and Sicily.<sup>26</sup> These western centers of Greek life and thought were wealthy, powerful, highly disciplined cities when Rome was still scarcely distinguishable from the barbarous tribes around her, and

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<sup>23</sup> In the following paragraphs reference is mainly to the article "Roman Law" in the Encyclopedia Britannica by Henry Goudy, Regius Professor of Civil Law, Oxford, where references to special studies will be found.

<sup>24</sup> Goudy, *op. cit.*, 537-38. Cuq (*Les institutions juridiques des Romains* [Paris, 1891] 125) accepts the account in which a commission visited the cities of Southern Italy and Sicily, and discusses a number of matters which are in his opinion of Hellenic origin.

<sup>25</sup> Cuq, *op. cit.*, 132 ff.

<sup>26</sup> *Ibid.*, 131 ff. Cf. Gibbon's account of the Twelve Tables in the earlier part of his famous chapter on the Roman law.



to them Rome certainly owed a great deal besides the protection from Carthaginian aggression that kept her from being strangled in infancy. The legal institutions of these states were reputed to be the work of the most illustrious among the early "lawgivers," and their development had been both rapid and sustained. It is undeniably significant that it was precisely these communities which afforded the Romans their first experience of Hellenic culture and were being brought constantly into closer relations with Rome in the course of the centuries that saw the development of the *jus civile*. In the next period, which is associated with the *jus gentium*,<sup>27</sup> it is admitted that Rome began to learn much about law and its administration from other peoples, and much that she learned bears incontestably the stamp of Grecian origin.

During the latter half of the republican era the *jus gentium*, originating apparently as a body of Mediterranean commercial law first administered in Rome by the *praetor peregrinus*, was gradually supplanting the *jus civile*. It is impossible to do more than mention a few far-reaching changes in which the influence of Greece may be discerned or credibly inferred. The greatest of these was unquestionably the enactment of the *lex Aebutia*, which permitted the *praetores urbani* to substitute for the rigid and unwieldy procedure *per legis actiones*, even in suits between citizens, the simpler and more flexible formulary procedure that had been developing in the court of the *praetor peregrinus*.<sup>28</sup> This seems rapidly to have replaced the *legis actiones* in actual practice and to have been made compulsory in all courts under Augustus; its appearance was of tremendous import to the future evolution of both adjective and substantive law. In general the prominent part taken by the peregrine praetor throughout this period in the reshaping of the law is regarded as the result mainly of the wide experience of other systems and usages that came to him by the very nature of his jurisdiction,<sup>29</sup> and we know of no other source upon which he could have drawn comparable in extent or scientific character to the Hellenic law which had long regulated the transactions of the Mediterranean world.<sup>30</sup> One is tempted to believe that the formulary procedure, in particular, may very well owe something of its character to the Roman magistrate's observation of the simple and effective system of pleading

<sup>27</sup> Goudy, *op. cit.*, 526, 553 ff.

<sup>28</sup> *Ibid.*, 553 ff.

<sup>29</sup> *Ibid.*, 554.

<sup>30</sup> A good part of the Greek "law merchant" was unquestionably derived from the East, but it had become thoroughly Hellenized long before this time.

which the Athenians had perfected as early as the fourth century before Christ.<sup>31</sup>

Among the various innovations that make their appearance during this period are some whose sources are unquestionably Greek, as, for example, the hypothec, the emphyteutic tenure of land, and the so-called Rhodian law of general average.<sup>32</sup> More important, however, than any particular institution is the prevailing tendency to emphasize considerations of general equity as opposed to strict law and to regard substance rather than form in the application of legal remedies.<sup>33</sup> To this trend of juristic thought, more than to any single factor, must be attributed the process of transformation by which Roman law was at last freed from its long bondage to primitive formalism and enabled to assume the philosophic and scientific character that distinguishes its maturity. And this trend, in the praetor's edict as in the responses of jurists, in consuetudinary law as in legislation, must be ascribed in no slight measure to the influence of Greek thought, the study of Greek literature and philosophy, and increasing acquaintance with a system of law that had, centuries earlier, successfully reconciled the conflicting claims of equity and strict law, substance and form, simplicity and security, flexibility and stability.

An interesting chapter, though less important for our purpose, might be written on the subsequent interrelations between the Roman law and the cosmopolitan Hellenism that pervaded the empire, especially in the East. It would take account of the growth and formulation of the so-called *jus naturale*. It would discuss the indebtedness of the later jurisconsults and commentators to Greek thought, their study of Greek institutions and use of Greek sources, the famous law school at Beirut, and the whole process that culminated in the collections made under Justinian. An entirely new vista has been opened to the student of this period by recent extensive discoveries of papyri, from which we learn that in the eastern provinces of the empire three systems of law, Roman, Greek and native, often existed and functioned side by side in the same communities with a very perceptible reciprocal effect.<sup>34</sup>

Interesting as are these and kindred topics, they may not be pursued further in this brief discussion. Enough has been said to show clearly that a critical study of Roman law worthy of the name cannot disregard the Greek law of either Hellenistic or earlier times. It is

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<sup>31</sup> *Infra*, pp. 309 f.

<sup>32</sup> Goudy, *op. cit.*, 554.

<sup>33</sup> *Ibid.*, 554-56.

<sup>34</sup> Mitteis-Wilcken, *Grundzüge und Chrestomathie der Papyruskunde* (Leipzig, 1912), II, i, xvi ff.

unfortunately a fact that hitherto—possibly because of a passing sneer at the Greeks in the writings of Cicero<sup>35</sup>—the student of the Roman law has not given to the theory or practice of the Greeks the measure of attention they deserve and scientific method demands. We need more comparative study of the right kind. This will not be the work of men who deal superficially with many systems, gleaning bits of knowledge from handbooks, too often misled by chance resemblances, but of scholars thoroughly grounded in both the Greek and the Roman law, or, still better, of specialists working together, each in his field, and communicating their results for mutual criticism.

In the comparative study of Indo-European legal institutions the ancient record of the Hellenic peoples is probably the most important body of data we possess. Nowhere else were primitive notions of justice developed into a system of law under conditions so favorable to the scientific observer; nowhere is the general evolution of legal concepts more clearly illustrated. In the first place, the Hellenes were pioneers in the realm of politics from the very start, and their law, like their other political institutions, was singularly independent and homogeneous. It was the work of a people endowed with peculiar intellectual ability and critical power, influenced by a strong feeling of racial unity, intent upon the solution of new problems and the adjustment of new relationships they had themselves created, a people with whom the state and the business of state were ever the paramount interest in life. In the second place, the rich array of sources in which we can trace with but few serious breaks the whole process of evolution in the Greek world, from tribal custom to perfected scientific law, antedates by centuries, in some instances by milleniums, the comparable records of other Indo-European races. For example, we have in the Homeric poems a remarkable portrayal, fairly complete in general outline and not devoid of detail, of "Aryan" tribal institutions, still distinctly visible in the elementary city-state and still virtually uncontaminated by borrowings from without.<sup>36</sup> Our earliest records of the Romans come from a time when they are already in contact with Hellenic culture; of the Germanic peoples we know little before they in turn have begun to learn and to borrow from Rome; when first we glimpse the tribal institutions of the Scandinavians and Celts we are far down in the Christian era,

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<sup>35</sup> *De Oratore*, I, 44. Romans, like others, might sneer even while they copied. However, the comparative merit of the Twelve Tables, or other achievements *maiorum prudentiae*, and of the primitive law traditionally attributed to Lycurgus, Dracon, or Solon, is quite impertinent to our inquiry. Gibbon's remarks on the passage are still the best commentary.

<sup>36</sup> Maine, *Ancient Law* (4 Am. ed.) 2 f.

studying societies which have seldom escaped the influence of contact with more advanced civilization.<sup>37</sup> In brief, Greek law attained its maturity and left its fullest records in an age when the law of Rome was shrouded in an obscurity we cannot hope to penetrate, when other Indo-European peoples, if they had indeed made their appearance upon the stage of history, were still in the most primitive cultural stages.

Last, but not least in its importance, the attitude of the Hellenes toward religion prevented their law from being enmeshed in the toils of ritualistic ceremonial or subjected to the overlordship of a superstitious hierarchy.<sup>38</sup> In India, to take an obvious illustration, primitive notions of justice were lost in the labyrinth of religious formalism imposed by a priestly caste, as may be seen from the Laws of Manu. But in Hellas law was the master, rather than the servant, of religion. The Attic law was reaching the acme of its perfection during the very years when the old superstitions were being subjected to rational criticism and breaking down and being cast aside. Its presiding genius was not the ancient religion, but the new science, the new ethical philosophies of Socrates and his contemporaries, the intellectual awakening of the late fifth century with its fine freedom of thought. These were the influences that set their stamp upon the law of Athens. Along with art and architecture, science and philosophy, and all the chief modes of literary expression, it belongs to that noble progeny of the Periclean age which has put succeeding generations of mankind under an obligation that can scarcely be exaggerated.

### III

Up to this point the considerations that have been urged are chiefly such as would appeal to those whose interest in jurisprudence is mainly theoretical or historical. They cannot be expected to carry great weight with men intent upon practical applications of the science to specific problems and difficulties of our own day and generation. Yet there is much to be said for a reasonable emphasis upon the more immediately practical aspects of jurisprudence as opposed to the purely academic, and a plea for the study of Greek law cannot afford to disregard this point of view.

In fact what first impresses the student of Greek law is its intrinsic

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<sup>37</sup> This appears clearly when the various sources drawn upon by Vinogradoff in his account of "Tribal Law" (*Historical Jurisprudence*, I) are studied.

<sup>38</sup> Glotz, *op. cit.*, 293.

excellence and the essentially modern character revealed by its congruity with present tendencies in Anglo-American theory and practice. It is a product of circumstances which probably will never be duplicated in the history of the human race. We have spoken of its rapid and homogeneous development, in an environment of political and spiritual freedom, by a profoundly philosophic people.<sup>39</sup> This has given it a character so entirely distinctive, so admirable in many respects, that a careful study of its underlying principles and the details of its administration is a good starting point in the criticism of any modern system,<sup>40</sup> especially that which prevails in a more or less modified form throughout the Anglo-Saxon democracies. To be convinced of this, one need consider only the fact that the political conditions under which it developed were more nearly akin to those of the English-speaking peoples today than were those amid which the predominant elements in Anglo-American law took shape. This may seem startling, but it is none the less true. The complex development of English law covers long ages of monarchy founded on the doctrine of divine right, centuries in which feudalism usurped the place of anything that could be termed political organization, periods when legal thought and practice were subjected to a succession of dominant influences utterly incompatible with democracy. During the comparatively short time that our law has been effectively submitted to democratic influences, it has offered considerable resistance to change, both in England and in America, and the process of adjustment has been both slow and irregular. On the other hand, the major development of Greek—which for us means Attic—law was contemporaneous with the rise of democracy. With the Athenians the law was not the conservative factor, the element of stability, which resisted change; it was, instead, one of the important instruments of change and of reform, and the laws were usually in the forefront of political progress. As a result, we have in Attic law a straightforward, consistent, logical embodiment of the political principles of democracy that finds no parallel in history, and if we are to look to history for instruction in approaching our own judicial problems, we should turn first and foremost to ancient Athens. As a matter of actual fact, it may be said with little fear of contradiction that the general trend of the changes now being made or considered in law and procedure, both in this country and in the British empire, is toward the practice, and perhaps the theory, of the Attic law.

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<sup>39</sup> *Ibid.*, 279 ff.

<sup>40</sup> *Ibid.*, 288.

This will become clear if we consider the way in which the Athenians approached various problems that still exercise our bar associations and our legislative bodies.

At present statutory legislation tends to supersede other sources of law, with the result that its defects and difficulties are the subject of considerable discussion. The needless multiplication of statutes, the faulty formulation due to haste, carelessness, or inexperience, these and similar defects apparently put heavy burdens upon our executive and judiciary, and yet are not cured. It is worth while to observe how Athens exercised the necessary restraint upon legislation without resorting to executive veto.<sup>41</sup> The ordinary legislative bodies of Athens could pass resolutions (*psephismata*), distinguished from statutes or laws (*nomoi*) and of inferior authority; none of them, not even the sovereign assembly of the citizens, might enact, modify, or repeal a law (*nomos*). But once in each year, at a specified session of the assembly, the question of statutory revision was in order, and it might be voted to subject the statutes on any particular subject to revision. If so voted, the appointment of a special legislative commission became a special order for the third following session. In the meanwhile any citizen was at liberty to publish proposed changes in the statutes under revision by posting in a specified place and filing a copy with the proper official. At the time set, after the proposed amendments had been read in the assembly, a resolution was introduced providing for the appointment of a legislative commission, strictly defining the extent of its powers, and appropriating funds for its expense. If the resolution passed, five advocates were appointed to defend the statutes it was proposed to amend or repeal in the hearings before the commission. Only citizens who had qualified to sit as judges in the popular courts might be appointed to the commission. It was further a duty of certain superior magistrates annually to examine the statutes and make recommendations to the assembly touching the advisability of revision. Even after a statute had finally been enacted by a commission duly constituted, it was still subject to review by the courts if any citizen saw fit to bring an action to test its constitutionality. If it was found unconstitutional within one year of its enactment, the author was subject to a penalty. By this procedure, no more cumbersome or expensive than that employed today to fix a freight charge or a village gas rate, the Athenians succeeded in giving their statute law a distinct element of stability

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<sup>41</sup> For a brief outline of the process of legislation in Athens, cf. Gilbert, *op. cit.*, 300 ff.

without sacrificing the flexibility and capacity for adjustment to changing conditions so essential in a progressive political society. If an ancient Athenian could be brought back to life today, he would be scandalized to see one of our state legislatures in the last hours of a session, turning back the clock and sitting up all night to pass a hotch-potch of hundreds of statutes, many of which will slip quietly into executive waste baskets while others go to increase the burdens of our courts.

Another group of problems which has received much attention without a thoroughly satisfactory solution centers in the simplification of procedure. The scientific, yet practical, way in which the Athenians addressed themselves to these can be demonstrated very simply, by inviting attention to a remarkable correspondence between the conduct of civil litigation in the courts of Athens and the civil procedure that has been established by the enactment of codes in many of our states.<sup>42</sup> After summons (served by the plaintiff in the presence of witnesses) and appearance, the complaint was formally presented to an examining magistrate, who might accept or dismiss it, or suggest an amendment to cure a technical defect. If it was accepted, the defendant was called on for his pleading, which might be simply an answer traversing the allegations of the complaint or a special pleading demurring to the complaint or stating new matter by way of defense. The magistrate's authority to dismiss complaints or special pleadings was apparently limited to such issues of fact as could be decided without taking testimony, and such questions of law as did not involve interpretation. If a litigant felt that this authority had been exceeded, he could have recourse to a special form of pleading which would bring the question before a popular court. After an examining magistrate had accepted the pleadings and received court fees, he held a preliminary hearing (or several if necessary), and, when he felt the case was ready for decision, sent it to a popular court for trial, which occupied a single day. Judgment could be entered by default at any stage of the proceedings, but could be set aside by petition to the court within a specified time. Otherwise the judgment of a popular court was final and could not be appealed or set aside except in the case of perjury established by judgment of court. In ordinary civil cases the preliminary hearings were not conducted by the examining magistrate, but by a public arbitrator, whose first duty was if possible to effect a settlement out of court on

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<sup>42</sup> *Ibid.*, 406 ff. On the differences between the account of pleading given in the text and those found in the handbooks, cf. my "Athenian Magistrates and Special Pleas," *Class. Phil.*, XIV, 338-50.

equitable grounds. Failing this, he took testimony, listened to argument, and rendered a sworn decision, which became final when not appealed to a popular court within a specified time. New evidence could not be introduced at the trial on appeal. Execution of judgment rested with the successful litigant, but resistance could be met by a quasi-criminal action involving, in addition to the judgment, a fine of equal amount.

The particular problem of cheap and speedy justice for poor litigants was satisfactorily solved in Athens, in part by permitting an examining magistrate to decide cases involving claims for trivial amounts without reference to a popular court, in part by the system of public arbitration just described.

The criminal law of Athens also will bear comparison with other systems.<sup>43</sup> In general it was a logical, coherent, and rather complete body of statutory law, enforced by processes very similar to those just described. The successful erection of such a system was favored not only by the character of the people and their political institutions, but also by the circumstances of their history. As early as the seventh century before Christ the superior magistrates and the Council of the Areopagus had created a customary criminal jurisdiction of nearly as advanced a type as that exercised much later in Rome by the *quaestiones perpetuae*, though it did not provide so completely for the punishment of offenses against individuals. At the beginning of the sixth century Solon introduced a simple, flexible and effective criminal process, capable of being extended merely by statutory enactment to crimes of every description. This extension constituted an important part in the legislative activity of the fifth century, B. C., by the close of which Athens possessed a body of criminal law far more orderly and scientific than that of Rome or even our inherited English criminal law, and probably quite as effective within its limits. One among the many problems confronting us today, that of determining what offenses should entail the forfeiture of civil rights in case of conviction, it dealt with simply and on the whole justly.

Attention might be directed to many other features of the Attic law which are eminently worth consideration, but limitations of space forbid. To sum up briefly, it was empirical in the better sense, avoiding undue insistence upon theory, but grounded in the thoroughgoing criticism of political science; its administration was not

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<sup>43</sup> Portions of this paragraph are based upon my yet unpublished study on "Criminal Law in Ancient Greece," of which some earlier chapters are briefly summarized in Proceedings of the Classical Association (of England and Wales) XVIII, 86-104.



entrusted to a trained professional class, but to a very large number of citizens of mature years, who, by reason of their constant preoccupation with legislative and judicial problems, cannot properly be stigmatized as laymen; considerations of equity and general justice were not subordinated unduly to strict law or precedent; the means was not allowed to dwarf the end, nor purely formal defects to defeat obvious intentions; the principles of justice were not buried under ponderous accretions of formal phraseology or shrouded in the obscurity of a technical vocabulary, and in general their administration was not hindered by complicated and antiquated machinery. With the Athenians equity never crystallized into rules of law; they were seldom compelled to resort to legal fictions, and they set the world a very fair example of statute law entirely adequate to the ends of justice.

Nothing is farther from my intention than to maintain that Athens was a legal Utopia and Attic law free from faults and imperfections. Its faults are glaringly revealed in the pages of the great forensic orators; they were manifold, in many instances probably more serious than those of our own day. But faults as well as virtues can teach much that is of value, and the important thing for us to observe is that in general the defects of Attic law are not those of our own. In the quest for a *juste milieu* we cannot fail to profit from acquaintance with a body of law singularly free from the involved formalism and cumbrous procedure that have intruded into many modern systems here and there in the long course of their development.

After a brief but glorious existence, the democratic city-state of the Hellenes, confronted by problems with which it could not cope without totally changing its character, passed out of political existence. But its spirit and doctrines lived on in the pages of forgotten volumes, ready, like the sleeping heroes of popular legend, to come forth and play their part when the world should again be ready for constitutional government. In the same way the laws that made a great part of that fine tradition had to give way to institutions better suited to empires, or monarchies, or feudal polities. These are in general the institutions that our Anglo-Saxon democracies have inherited and are now attempting gradually to bring into conformity with new political principles and new conditions. All that can aid in the performance of this delicate and momentous task should be sought after diligently, even the long forgotten heritage of law that Greece has left behind. The time has come to realize that the race which taught us much of all we know today—of government, philosophy and

science, art and literature—may perhaps have something to teach us also in the realm of law.<sup>44</sup>

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<sup>44</sup> A very brief account of the history of law in Greece and of the judicial system and procedure of Athens in the fifth and fourth centuries before Christ will be found in the *Encyclopedia Britannica*, s. v. "Greek Law." Readers should be cautioned against the confusion that results from the unfortunate practice, which is quite general with English and American scholars, of calling the Athenian judges (*dicasts*) "jurors." For the functions and powers of the Athenian court see my study cited *supra*, n. 42.