[英 汉 对 照]

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古代法

ANCIENT LAW

[英]亨利·萨姆奈·梅因 著

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出版说明

在西方学术思想的发展流变中，出现过很多影响深远的经典著作，这些著作穿越时空，为人们长久研读，有的甚至影响了整个人类文明的发展进程。这套《西方学术经典文库》（英汉对照本），精选了其中最有代表性的一些名著，计划达到一百部，将陆续分批出版直至全部完成。

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为加以区别，原文中的英文注释，注释号用①、②……形式表示；中文译者注释则以〔1〕、〔2〕……形式表示。至于英译本中出现的原文页码和特殊索引等问题，中文译者在“译者后记”中将予以解释、说明。另外，在英文原著中，有一些表示着重意义的斜体或大写等字体，考虑到读者可以在对照英文阅读中看到，因此在中译文中，没有照样标出，还望读者理解。

九州出版社

Ancient Law

By *Henry Sumner Maine*

本书根据 Henry Holt And Company 版本译出

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CHAPTER I

Ancient Codes

The most celebrated system of jurisprudence known to the world begins, as it ends, with a Code. From the commencement to the close of its history, the expositors of Roman Law consistently employed language which implied that the body of their system rested on the Twelve Decemviral Tables, and therefore on a basis of written law. Except in one particular, no institutions anterior to the Twelve Tables were recognised at Rome. The theoretical descent of Roman jurisprudence from a code, the theoretical ascription of English law to immemorial unwritten tradition, were the chief reasons why the development of their system differed from the development of ours. Neither theory corresponded exactly with the facts, but each produced consequences of the utmost importance.

I need hardly say that the publication of the Twelve Tables is not the earliest point at which we can take up the history of law. The ancient Roman code belongs to a class of which almost every civil ised nation in the world can show a sample, and which, so far as the Roman and Hellenic worlds were concerned, were largely diffused over them at epochs not widely distant from one another. They appeared under exceedingly similar circumstances, and were produced, to our knowledge, by very similar causes. Unquestionably, many jural phenomena lie behind these codes and preceded them in point of time. Not a few documentary records exist which profess to give us information concerning the early phenomena of law; but, until philology has effected a complete analysis of the Sanskrit literature,

第一章　古代法典

世界上最著名的法律制度始于一部法典的出现，也随着它而结束。从罗马法历史的开始到其结束，它的解释者们一直都在运用语言暗示着，他们制度的实体是以《十二铜表法》为基础的，因此也就建立在成文法的基础之上。在罗马，除非某一特殊情况，《十二铜表法》以前的一切制度都是不被承认的。罗马法的理论传承来自一部法典，而英国法律的理论归于古老的不成文的惯例，这也就是它们法律制度的发展之所以不同于我们法律制度的主要原因。这两种理论与事实情况都不尽相符，但各自却都产生了极为重要的结果。

毋庸多言，《十二铜表法》的公布并不能作为我们开始研究法律史的最初起点。古罗马法典属于这样一种类型，是世界上几乎所有文明国家都可以提出的一个范例，并且就罗马和希腊而言，它们的法典在两个彼此之间相距并不遥远的时代中都得到了广泛传播。它们产生于几乎相同的环境，而且就我们所知，也是由于非常相似的原因。毫无疑问，在这些法典的后面，存在着许多法律现象，而且在时间上这些法律现象的存在要早于法典的出现。现在有许多文件记录可以提供给我们关于这些早期法律现象的信息；但是在语言学家对梵文文学做出一个完整的分析之

our best sources of knowledge are undoubtedly the Greek Homeric poems, considered of course not as a history of actual occurrences, but as a description, not wholly idealised, of a state of society known to the writer. However the fancy of the poet may have exaggerated certain features of the heroic age, the prowess of warriors and the potency of gods, there is no reason to believe that it has tampered with moral or metaphysical conceptions which were not yet the subjects of conscious observation; and in this respect the Homeric literature is far more trustworthy than those relatively later documents which pretend to give an account of times similarly early, but which were compiled under philosophical or theological influences. If by any means we can determine the early forms of jural conceptions, they will be invaluable to us. These rudimentary ideas are to the jurist what the primary crusts of the earth are to the geologist. They contain, potentially, all the forms in which law has subsequently exhibited itself. The haste or the prejudice which has generally refused them all but the most superficial examination, must bear the blame of the unsatisfactory condition in which we find the science of jurisprudence. The inquiries of the jurist are in truth prosecuted much as inquiry in physics and physiology was prosecuted before observation had taken the place of assumption. Theories, plausible and comprehensive, but absolutely unverified, such as the Law of Nature or the Social Compact, enjoy a universal preference over sober research into the primitive history of society and law; and they obscure the truth not only by diverting attention from the only quarter in which it can be found, but by that most real and most important influence which, when once entertained and believed in, they are enabled to exercise on the later stages of jurisprudence.

The earliest notions connected with the conception, now *so* fully developed, of a law or rule of life, are those contained in the Homeric

前，古希腊的荷马史诗无疑才是我们知识的最佳来源。当然它不能被看作实际事件的历史记录，但是，它可以被看作是对作者所了解的一种社会状态的并不完全是纯粹想象化的描写。虽然诗人的想象力可能夸大了那个英雄时代的某些特征，如战士的勇猛和神的超凡能力，但我们没有理由相信他的想象力受到了道德或者形而上学概念的影响，因为这些概念在当时还没有成为意识观察的对象。考虑到这一点，可以说荷马文学远比那些相对晚期的文件更具有可信性，因为那些文件虽然也试图对同样较早时期的情况进行说明，但他们的编纂都受到了哲学或神学的影响。如果我们可以通过某种方式确定法律概念的早期形式，那将具有无法衡量的价值。这些基本观念对法学家来说，就像原始地壳对于地质学家一样意义重大。这些观念可能包含了法律后来的一切表现形式。而我们对这些观念，除了一点最肤浅的研究以外，统统采取了拒绝的草率和偏见态度。因此，我们就不得不忍受我们的法律科学如此不近人意的现状了。在观察法取代假设法之前，法学家采取的调查方法确实和物理学及生理学一样，对那些看似合理的内容丰富的却丝毫未经证实的理论，譬如自然法或者社会契约，人们往往兴趣很大，但对社会和法律的早期历史却不愿进行冷静的考察；这些貌似合理的理论，不但使人们的注意力从唯一可以发现真理的地方转移开，而且当它们一旦被接受和相信之后，就足以对法学研究以后的各个阶段发生最现实而重要的影响，从而模糊了真理。

一些最早期的观念，与现在如此充分发达的法律的和生活规则中的概念有着关联，它们就包含在荷马史诗中的“忒米

words"Themis" and"Themistes." "Themis," it is well known, appears in the later Greek pantheon as the Goddess of Justice, but this is a modern and much developed idea, and it is in a very different sense that Themis is described in the Iliad as the assessor of Zeus. It is now clearly seen by all trustworthy observers of the primitive condition of mankind that, in the infancy of the race, men could only account for sustained or periodically recurring action by supposing a personal agent. Thus, the wind blowing was a person and of course a divine person; the sun rising, culminating, and setting was a person and a divine person ; the earth yielding her increase was a person and divine. As, then, in the physical world, so in the moral. When a king decided a dispute by a sentence, the judgment was assumed to be the result of direct inspiration. The divine agent, suggesting judicial awards to kings or to gods, the greatest of kings, was *Themis*. The peculiarity of the conception is brought out by the use of the plural. *Themistes*, Themises, the plural of Themis, are the awards themselves, divinely dictated to the judge. Kings are spoken of as if they had a store of "Themistes" ready to hand for use; but it must be distinctly understood that they are not laws, but judgments, or, to take the exact Teutonic equivalent,"dooms." "Zeus, or the human king on earth," says Mr. Grote, in his History of Greece,"is not a lawmaker, but a judge" He is provided with Themistes, but, consistently with the belief in their emanation from above, they cannot be supposed to be connected by any thread of principle; they are separate, isolated judgments.

Even in the Homeric poems, we can see that these ideas are

斯”[1]和“忒米斯特”[2]这些词语中。众所周知，忒米斯在后期希腊万神庙是作为司法女神的意义出现的，但这是一个现代的并且充分发展的观念，同《伊里亚特》中把忒米斯描述为宙斯的陪审官的意义是完全不同的。所有对于人类的原始状况进行过忠实观察的人们现在都可以清楚地看到，在人类的最初时代，人们对那些持续的或定期循环发生的活动，只能假定一个人格化的代理人来加以解释，因此吹拂着的风是一个人，而且理所当然的是一个神圣的人；初生的、升到绝顶的、落山的太阳是一个人，并是一个神圣的人；孕育万物的土地也是一个人，也是一个神圣的人。在物质世界如此，在精神世界也同样如此。当一个国王通过一个判决解决纠纷时，他的判决被假定为直接灵感的结果。这个将司法审判权交给国王或神灵的神圣代理人，万王中最伟大者就是忒米斯。这个概念的独特性表现在它的复数用法，忒米斯特或者忒米西斯，即忒米斯的复数形式，其含义是审判本身，是由神赋予法官的。国王被认为有着丰富的“忒米斯特”，可以随时使用；但我们必须清楚地知道忒米斯特并不是法律而是判决，或者可以更准确地理解为日耳曼语中的“判定”一词。格罗特先生在他的《希腊史》中说过：“宙斯或地球上的人类之王，不是一个立法者而是一个法官。”他拥有忒米斯特，虽然始终相信忒米斯特来自上天，却不能由此判定所有的忒米斯特之间，有任何原则贯串着；它们是个别的、单个的判决。

甚至在荷马史诗中，我们也可以看到上述这些观念只是暂时

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〔1〕 希腊万神庙中的“司法女神”，即 Gooddess of Justice。

〔2〕 Themis 的复数，意指审判本身，是神授予法官的。

transient. Parities of circumstance were probably commoner in the simple mechanism of ancient society than they are now, and in the succession of similar cases awards are likely to follow and resemble each other. Here we have the germ or rudiment of a custom, a conception posterior to that of Themistes or judgments. However strongly we, with our modern associations, may be inclined to lay down à *priori* that the notion of a Custom must precede that of a judicial sentence, and that a judgment must affirm a Custom or punish its breach, it seems quite certain that the his torical order of the ideas is that in which I have placed them. The Homeric word for a custom in the embryo is sometimes "Themis" in the singular —more often "Dike," the meaning of which visibly fluctuates between a "judgment" and a "custom" or "usage." *Νόμος*, a Law, so great and famous a term in the political vocabulary of the later Greek society, does not occur in Homer.

The notion of a divine agency, suggesting the Themistes, and itself impersonated in Themis, must be kept apart from other primitive beliefs with which a superficial inquirer might confound it. The conception of the Deity dictating an entire code or body of law as in the case of the Hindoo laws of Menu, seems to belong to a range of ideas more recent and more advanced. "Themis" and "Themistes" are much less remotely linked with that persuasion which clung so long and so tenaciously to the human mind, of a divine influence underlying and supporting every relation of life, every social institution. In early law, and amid the rudiments of political thought, symptoms of this belief meet us on all sides. A supernatural presidency is supposed to consecrate and keep together all the cardinal institutions of those times, the State, the Race, and the Family. Men, grouped together in the different relations which those institutions imply, are bound to celebrate periodically common rites and to offer common sacrifices; and every now and then *the same duty is* even more significantly recognised in the purifications and expiations which they

的。在古代社会的简单机构中，类似情形的出现可能比现在还要普遍，而在一系列类似的案件中，就可能采取彼此近似的判决。这也就是“习惯”的胚胎和最初萌芽，是继忒米斯特或判决之后出现的另一个概念。然而，我们可能会根据现代联想，想当然地认为“习惯”这种观念必然先于司法判决的概念，认为判决必然是对一种习惯的肯定或者是对违反这种习惯的惩罚，但是由上面的分析，我们可以十分确定地看出，这些观念先后出现的历史顺序，实际上是和我上面陈述中所排列的一样。在荷马史诗中，对“习惯”的早期形态进行描述时，有时用的字眼是单数形式的“忒米斯”——但更多时候使用的是“迪克”一词，其含义明显的介于“审判权”和“习惯”或“习俗”之间。至于“Nōμōs”，指一部法律，是后期的希腊社会政治词汇中一个伟大而著名的术语，但在荷马史诗中并未提到。

这种所谓的神圣代理人的观念，暗示着忒米斯特，其自身又人格化于忒米斯，但这种观念应当与原始社会的其他观念区别开来，这是一个肤浅的研究者容易混淆的。有种观念认为“神”指导着整部法典或法律的主体，例如印度的摩奴法典，这种观念似乎属于比较新近和先进的思想。忒米斯和忒米斯特同人们长久以来顽固坚持的一种信念有着密切关系，这种信念认为神的影响力是每一种社会关系及社会制度的基础，并支撑着它们。在每一种早期法律及政治思想的初步形态中，处处都可以看到这种信念的表征。那时候，人们认为有一种超自然的神圣力量主宰着国家、民族、家族这些根本制度，并将它们组合在一起。人们按照这些制度所包含的各种关系结合在一起，要定期举行公共祭礼并进贡公共祭品；他们要时时举行涤罪和赎罪，以消减因无意或疏忽的

perform, and which appear intended to deprecate punishment for involuntary or neglectful disrespect. Everybody acquainted with ordinary classical literature will remember the *sacra gentilicia*, which exercised so important an influence on the early Roman law of adoption and of wills. And to this hour the Hindoo Customary Law, in which some of the most curious features of primitive society are stereotyped, makes almost all the rights of persons and all the rules of succession hinge on the due solemnisation of fixed ceremonies at the dead man's funeral, that is, at every point where a breach occurs in the continuity of the family.

Before we quit this stage of jurisprudence, a caution may be usefully given to the English student. Bentham, in his "Fragment on Government," and Austin, in his "Province of Jurisprudence Determined," resolve every law into *a command* of the lawgiver, an *obligation* imposed thereby on the citizen, and a *sanction* threatened in the event of disobedience; and it is further predicated of the *command*, which is the first element in a law, that it must prescribe, not a single act, but a series or number of acts of the same class or kind. The results of this separation of ingredients tally exactly with the facts of mature jurisprudence; and, by a little straining of language, they may be made to correspond in form with all law, of all kinds, at all epochs. It is not, however, asserted that the notion of law entertained by the generality is even now quite in conformity with this dissection; and it is curious that, the farther we penetrate into the primitive history of thought, the farther we find ourselves from a conception of law which at all resembles a compound of the elements which Bentham determined. It is certain that, in the infancy of mankind, no sort of legislature, not even a distinct author of law, is contemplated or conceived of. Law has scarcely reached the footing of custom; it is rather a habit. It is, to use a French phrase, "in the air." The only authoritative statement of right and wrong is a judicial sentence after the facts, not one presupposing a law which has been violated, but one which is breathed for the first time by a higher power into the judge's mind at the moment of adjudication. It is of course extremely difficult for us to realise a view so far removed from us in point both of time and of association, but it will become more credible when we dwell more at length on the constitution of ancient society, in which every man, living during