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## CODIFICATION OF THE LAW IN COLONIAL MASSACHUSETTS: A STUDY IN COMPARATIVE LAW†

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Since at least the time of Aristotle, students of political institutions have been aware that the legal systems of widely differing societies and cultures have many common traits and features. This phenomenon has, in recent times, attracted the attention of jurists and legal historians, who have made fruitful comparisons of the law and institutions of various countries and civilizations, and their studies have made more precise our understanding of the common features of different legal systems. It is beginning to be recognized in many quarters that these similarities are the outgrowth or consequence of certain underlying and recurring patterns in legal development, and it has become a special function of what we call comparative jurisprudence to investigate these general patterns with a view to describing their characteristics and, more particularly, their influence at particular stages of legal growth. Comparative law has thus acquired an assured and important position in jurisprudence generally and in legal history in particular.

Special interest attaches to the recurrence, in various societies, of certain *forms* of law, which appear and reappear in response to various currents, influences, and pressures which may be described as economic, political, social, or psychological, but which in fact are largely manifestations of uniformities in human drives or conduct. This recurrence of forms of law is of basic importance to an understanding of the development of legal systems generally and also to intelligent direction of contemporary efforts to improve the law. Recurring forms reflect persistences in human sentiments and attitudes which make intelligible the underlying patterns of legal development and, at the same time, help to explain by indirection certain of the influences and pressures responsible for social and political growth and change within particular societies.

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Something of the truth of these observations is apparent from comparative study of the form of law we know as codification. During the past hundred or more years, scholars have devoted considerable attention to particular codes of law and to codification generally. Some, like Sir Henry Maine, have been primarily interested in the historical or anthropological aspects of the phenomenon.<sup>1</sup> Others, like Bentham in England and David Dudley Field in the United States,<sup>2</sup> have been more concerned with codification as a device for the improvement of law and the administration of justice. Few, however, have attempted to study codification both analytically and comparatively, in time as well as in space. The purpose of this paper is to discuss two instances of codification and to suggest some of the influences and pressures which may bring about the employment of this form of law.

Analytically considered, codification has been of two general types, what may be described as "ancient" and "modern." The "ancient" codes were for the most part authoritative publications of traditional law, whereas the "modern" codes have had as their object the simplification of existing forms of law or the provision of fresh starting points for legal development. Obvious examples of the "ancient" codes are those of the East and of the early Mediterranean world—the code of Hammurabi and the Twelve Tables. It also seems proper to include in this classification such compilations as the *Lex barbara Burgundionum* and the *Lex Visigothorum* of the early Middle Ages, as well as the primitive Anglo-Saxon codes. By contrast, the "modern" code is normally associated with mature systems of law and generally contains what may be termed an ideal element. It is best exemplified in the European codes of the nineteenth century, of which the most notable is, of course, the legislation of Napoleon.

Professor Roscoe Pound has stated very clearly some of the considerations which differentiate the two types of codes, and has summarized generally the conditions leading to modern codification.<sup>3</sup> Among these conditions he has emphasized the exhaustion for the time being of the possibilities of legal development on the basis of traditional law, the unwieldiness or uncertainty of archaisms therein contained, and the need

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1. See especially MAINE, *ANCIENT LAW* c. 1 (7th Eng. ed. 1878).

2. 1 BENTHAM, *TRAITES DE LEGISLATION* 145 *et seq.* (1820); 3 *id.* at 181 *et seq.*; FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS: CODE OF CIVIL PROCEDURE (1848). See also 2 AUSTIN, *LECTURES ON JURISPRUDENCE* 116 *et seq.* (1875); CARTER, *LAW: ITS ORIGIN GROWTH AND FUNCTION* 269-288, 298-319 (1907).

3. POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE* 137-138 (5th ed. 1943).

for unified expression of law.<sup>4</sup> Consideration of the codes of modern times strengthens the force of these conclusions.

Speaking generally, "modern" codification tends to appear either in countries with well developed legal systems or in new countries where there has been little development but where an immediate basis therefor is required.<sup>5</sup> Usually, however, "modern" codification has been associated with mature systems of law, and it is therefore a widely held belief that conditions for this type of code did not exist until relatively recent times.<sup>6</sup> Although it is recognized that the project of Colbert in 1667-1670, and the Austrian and Prussian efforts of the eighteenth century, provide early examples of modern codification, study of "modern" codes generally begins with the legislation of Napoleon. This approach is not unnatural, for the Napoleonic codes are unquestionably the most significant of recent codes; yet the approach tends to obscure the fact that "modern" codification is not necessarily associated with mature systems of law.

If there is validity in the basic distinction drawn between "ancient" and "modern" codes, the credit for having produced the first "modern" code of the modern period belongs probably to the English colony of Massachusetts Bay in New England, which published a code of laws in 1648.<sup>7</sup> A special interest attaches to this appearance of a code in a country colonized by Englishmen, for with the striking exception of the borough customs of the Middle Ages, English law knew little of codification.

The Massachusetts Code of 1648 was the product of more than a decade of efforts to reduce to writing the laws of the Colony. When completed, it was believed by the colonists to be a complete and comprehensive statement of the laws, privileges, duties, and rights in force within the jurisdiction. The Code was not only an authoritative compilation of constitutional provisions—regulations for the conduct of administration, courts and their jurisdiction, trade, military affairs, and the relation between church and state—but it included also the substantive law of crime, of property, and of domestic relations.<sup>8</sup> Detailed provisions regulating prices and wages are also found,<sup>9</sup> as well as a number of laws

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4. In France, for example, the efficient administration of justice was impossible in the face of disparities existing between local customs long established in territories sharply separated from one another by historic boundaries.

5. POUND, *op. cit. supra* note 3, at 137-138.

6. See discussion in 1 GENY, *METHODE D'INTERPRETATION* 73 *et seq.* (2d ed. 1919).

7. *THE LAWS AND LIBERTIES OF MASSACHUSETTS* (Farrand ed. 1929).

8. For a general analysis of the Code, see Wolford, *The Laws and Liberties of 1648*, 28 B.U.L. REV. 426 (1948).

9. *THE LAWS AND LIBERTIES OF MASSACHUSETTS*, *supra* note 7, at 43.

governing individual behavior and affecting the moral welfare of the community. For example, gaming for money is proscribed,<sup>10</sup> and penalties are imposed for drunkenness, profanity, and the telling of lies.<sup>11</sup> Even a cursory inspection of its provisions make clear the comprehensiveness of its scope, and this conclusion is supported by our knowledge of the care with which the draft and its revisions were made. Indeed, together with additions and amendments, the Code remained the basic law of Massachusetts throughout the colonial period, and, in addition, was copied in other of the New England colonies.<sup>12</sup>

The Code reflects, on the one hand, the problems and pressures with which the colonists were immediately confronted, and, on the other hand, their general point of view toward law in relation to society. Among the striking features of the Code is not only its completeness of coverage but the fact that it represents in many areas of the law a very clear break with traditional law. Here was no mere compilation of English common law rules or of established custom, but a fresh and considered effort to establish new provisions which were suitable to new conditions in a frontier society and which would also provide starting points for future development in the community. For example, a new classification of crimes,<sup>13</sup> and the rights accorded debtors and creditors,<sup>14</sup> show marked advances on contemporary English law. Traditional elements are present, as they are in most "modern" codes. There are some rules of the English common law,<sup>15</sup> some customs of the towns or districts from which the colonists came,<sup>16</sup> and a few rules or precepts taken from the Mosaic code of the Old Testament.<sup>17</sup> But these traditional elements appear to have been consciously reworked into a carefully thought out and integrated pattern, and they were modified or ignored when inconsistent with the general plan envisaged, or when they appeared archaic or obsolete.<sup>18</sup> Thus, many antiquated forms of English judicial procedure were disregarded or

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10. *Id.* at 24.

11. *Id.* at 30, 35, 45.

12. I ANDREWS, *THE COLONIAL PERIOD IN AMERICAN HISTORY* 458 (1934).

13. *THE LAWS AND LIBERTIES OF MASSACHUSETTS*, *supra* note 7, at 5-6. *Cf.* Wolford, *supra* note 8, at 460-462.

14. *THE LAWS AND LIBERTIES OF MASSACHUSETTS*, *supra* note 7, at 3, 17, 34.

15. *Id.* at 17-18. *Cf.* Haskins, *A Problem in the Reception of the Common Law in the Colonial Period*, 97 U. OF PA. L. REV. 842 (1949).

16. *THE LAWS AND LIBERTIES OF MASSACHUSETTS*, *supra* note 7, at 13-14. *Cf.* Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U.L. REV. 281 (1941); Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 YALE L.J. 1280 (1942).

17. *THE LAWS AND LIBERTIES OF MASSACHUSETTS*, *supra* note 7, at 5-6.

18. For example, provisions relating to the law of descent. Haskins, *supra* note 16.

dispensed with.<sup>19</sup> That the Code contains a marked element of idealism cannot be doubted.

Although the foregoing lacks detail, it will perhaps provide a sufficient basis for the characterization of the Code as "modern." In this connection, a further feature of the Code may be noted, and that is the systematic arrangement of its provisions by title in alphabetical order.<sup>20</sup> The arrangement cannot, however, be described as analytical, and in this respect it is difficult to compare the Code with modern ones with which we are familiar.

The significant features of the Massachusetts Code as outlined serve to distinguish it from the compilations of other British colonies in North America—those, for example, of Virginia and the Bermudas—which preceded the Massachusetts Code in point of time. In these other codes traditional element is very marked, and no real attempt at comprehensiveness was made. Although such codes contain occasional provisions designed to meet new conditions in new settlements,<sup>21</sup> they are for the most part little more than a statement of the scheme of government, setting forth the duties of the colonial officers, the jurisdiction of courts, and so on.<sup>22</sup> Only in the 1636 Code of Plymouth Colony does there appear to have been a real attempt to reduce the whole law of the colony to writing;<sup>23</sup> but there the traditional element is too strong,<sup>24</sup> and the element of idealism largely lacking, so that it is difficult to term the code "modern."

No adequate understanding of the significance of the Massachusetts Code can be acquired without an explanation of the forces leading to codification and responsible for the character of the provisions in the Code as drawn up. In most of the British colonies, it was not only assumed that English law was applicable,<sup>25</sup> but substantial portions of that law—either local customary law or the common law of the central courts—be-

19. Wolford, *supra* note 8, at 437-447.

20. This arrangement may have been suggested by the order of titles in various of the English abridgements, such as Brooke's *Abridgement*, Coke's *Book of Entries*, or Dalton's *Countrey Justice*. These abridgements were certainly known to at least one or two of the colonists who had read law in England.

21. Thus, 1 MEMORIALS OF THE DISCOVERY AND EARLY SETTLEMENT OF THE BERMUDAS OR SOMERS ISLANDS, 1515-1685, 221-222 (Lefroy ed. 1877); 3 RECORDS OF THE VIRGINIA COMPANY 164-165 (1933).

22. *E.g.*, 3 *id.* at 340 *et seq.* (1933).

23. THE COMPACT AND THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 35 *et seq.* (Brigham ed. 1836).

24. *Cf.* Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COL. L. REV. 416 (1931).

25. Many of the charters contained provisions to the effect that the law of the colony should not be contrary or repugnant to the laws of England. *E.g.*, THORPE, FEDERAL AND STATE CONSTITUTIONS 1853 (1906).

came the substantive law of the Colony.<sup>26</sup> In Massachusetts Bay the controlling force of English law was repudiated in principle,<sup>27</sup> despite the fact that many of its rules were incorporated in the Code. Two complementary and interlocking forces may be singled out to explain the Massachusetts development. The first was the arbitrary power exercised by the small oligarchic group of colony leaders, the second was the nature of the colonial enterprise. The first resulted in the original demand for a code to make public the existing laws and to limit the discretionary power of the leaders; the second accounted for the scope of the Code and the nature of its specific provisions.

It must be borne in mind that the organization of the Colony of Massachusetts Bay was autocratic from the start. At the time of settlement in 1630, the government of several thousand persons was in the hands of the governor and his seven or eight "assistants" or "magistrates."<sup>28</sup> Their authority was buttressed by the power of the ministers of the churches, who, like the clergy of the Middle Ages, were regarded as both statesmen and political leaders and actively intervened in the affairs of the Colony. There was nothing in the political theory of this group which could be described as democratic. Winthrop, the first colonial governor, believed in the divine authority of the magistrates and in the necessity of obeying them.<sup>29</sup> He believed that the best part of a community is always the least, and, of this best part, the wiser is always the lesser. These few Puritan leaders looked upon themselves as instruments in the divine hand for carrying out a great religious mission. Their voice was supreme in judicial as well as in legislative matters, and, during the three years following settlement of the Colony, they inflicted fines and imprisonment, levied taxes, and granted lands entirely within their own discretion. Although the basic aims of these leaders were generally accepted, the absolute authority wielded by this small oligarchic group provided an immediate source of dissatisfaction to the great bulk of the colonists, and a movement was soon under way aimed not only at broadening the basis of government but at obtaining security against the arbitrary power of the magistrates. Although in 1634 the government was placed upon a wider basis through extension of the suffrage, absence of knowledge as to what justice might be expected continued to be a principal

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26. Cf. Plucknett, Book Review, 3 *NEW ENGLAND Q.* 156 (1930).

27. See Morris, *Massachusetts and the Common Law: The Declaration of 1646*, 31 *AMER. HIST. REV.* 443 (1926).

28. See generally 1 *OSGOOD, THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY*, 167-199 (1904).

29. Gray, *The Political Thought of John Winthrop*, 3 *NEW ENGLAND Q.* 681 (1930).

basis for complaint.<sup>30</sup> A considerable portion of the population felt that the magistrates, who sat as judges in every one of the courts of the Colony and whose judicial functions carried with them extensive administrative powers, could not be trusted to decide fairly unless the rules which were to guide their decisions were public property. In England, in the local communities from which the colonists came, customary rules of decision were familiar and were in the main adhered to. In some of the towns these customs had actually been reduced to writing.<sup>31</sup> But in the absence of such accepted customary rules, either written or unwritten, there was little assurance that inherited ideas of justice and fair play would not be disregarded in a particular case, especially since the discretionary power of the magistrates was so extensive.<sup>32</sup> There was, in addition, a traditional Puritan belief in the importance of the written word which is evidenced by literal use of the Bible as authority and by Puritan demand for explicit church canons which would leave no doubt as to what the law was.<sup>33</sup> Beginning, therefore, in 1635 pressure was brought for the appointment of a succession of committees to draft a code of laws,<sup>34</sup> but nothing concrete was accomplished for at least four years.<sup>35</sup> During that period, however, a number of specific laws were enacted with the consent of the small group of inhabitants admitted to the franchise and to a share in the government of the Colony.<sup>36</sup>

It seems clear from certain statements of Winthrop that the delay in preparing a code was intentional.<sup>37</sup> He refers to two principal reasons why the Colony leaders were not "very forward" in the matter, but these "reasons" were little more than excuses. He refers, first, to the want of sufficient experience in the nature and disposition of the colonists and suggests that it would be best for laws to arise *pro re nata* as customary law. Second, he expresses doubts as to whether to frame a body of laws might not transgress the powers conferred in the royal charter, and he suggests that custom, born of practical necessity, need not be repugnant to

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30. 1 WINTHROP, THE HISTORY OF NEW ENGLAND 322 (Savage ed. 1925).

31. See generally 2 BATESON, BOROUGH CUSTOMS (1906). Other collections of customals are listed in Goebel, *supra* note 24, at 430 n.25.

32. Puritan dislike of discretionary justice was not confined to New England. Compare the contemporary vicious attacks upon the amorphous nature of equity jurisprudence in 1 COCK, AN ESSAY OF CHRISTIAN GOVERNMENT 165 (1651); Robinson, *Anticipations Under the Commonwealth of Changes in the Law*, 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 467, 470 (1907).

33. Cf. 53 HISTORICAL MANUSCRIPTS COMMISSION: REPORT ON THE MSS. OF LORD MONTAGUE 32, 33 (1900).

34. 1 RECORDS OF MASSACHUSETTS BAY 147 (Shurtleff ed. 1853).

35. *Id.* at 174-175, 222.

36. These laws were not printed after enactment but kept in the minute book of the General Court.

37. 1 WINTHROP, *op. cit.* *supra* note 30, at 322-323.

the law of England which the words of the charter had specified should be followed. However, since the colony leaders had deliberately ignored certain provisions in the charter almost from the beginning,<sup>38</sup> his statement is not convincing. Perhaps what Winthrop meant was that the publication of a code might tend to call attention to this independence.

Pressure, however, continued, and two drafts were finally submitted: one, prepared by John Cotton, the other by Nathaniel Ward.<sup>39</sup> No action was taken on the former, which was little more than a restatement of Biblical precepts, purporting to be the laws of Moses and based on the Pentateuch.<sup>40</sup> Ward's draft, however, was approved by the General Court in 1641.<sup>41</sup> Known as the "Body of Liberties," this compilation was less a code of laws than a kind of modern state constitution, which it resembles. Its one hundred provisions were in no exact order, and they covered such matters as the relations between church and state, principles of town government, and the requirement of just procedure in judicial proceedings. With only an occasional exception,<sup>42</sup> none of the particular laws theretofore enacted was incorporated, and it may fairly be said that the Body of Liberties taken as a whole forms a sort of Bill of Rights of the type which was later to become a familiar feature of American constitutions.

The adoption of the Body of Liberties hardly satisfied the colonists generally and in fact increased their insistence upon having a comprehensive code of laws.<sup>43</sup> They wanted something more than generalities; they wanted specific rules, applicable to specific situations, which would bind the discretion of the magistrates. Committees of magistrates and of other leaders of the Colony were therefore appointed once again with a view to preparing a comprehensive compilation of all applicable laws and regulations.<sup>44</sup> Their work resulted in the detailed and comprehensive Code of 1648 already referred to, which was printed for distribution in 1649.<sup>45</sup> This Code incorporated, in revised form, most of the provisions

38. 1 COMMONWEALTH HISTORY OF MASSACHUSETTS 100 *et seq.* (Hart ed. 1927).

39. 1 WINTHROP, *op. cit. supra* note 30, at 322.

40. *Cf.* FORD, *Cotton's "Moses His Judicials,"* 16 MASS. HIST. SOCIETY PROCEEDINGS, 274 (2d ser. 1902); CALDER, *John Cotton's "Moses His Judicials,"* 28 MASS. COL. SOCIETY TRANSACTIONS 86 (1935).

41. MASS. COL. LAWS 1660, 8-9 (Whitmore ed. 1889). The Body of Liberties is printed *id.* at 32-61.

42. *E.g.*, provisions relating to judicial behavior and to relationship of masters and servants. Body of Liberties cc. 19-20, 85-88, in MASS. COL. LAWS 1660, *supra* note 41, at 37, 51, 53.

43. 2 RECORDS OF MASSACHUSETTS BAY, *supra* note 34, at 61.

44. 3 *id.* at 6.

45. 2 *id.* at 263, 273.



of the Body of Liberties,<sup>46</sup> together with the specific laws enacted in the Colony since the time of settlement, and it also included a substantial number of entirely new provisions.<sup>47</sup> In addition, curbs on the discretionary power of the magistrates were provided by defining the powers of civil-officers and the jurisdiction of the several courts<sup>48</sup> and by creating an embryonic system of checks and balances within the government.<sup>49</sup> The undertaking was therefore by no means a matter of scissors-and-paste, and was hardly the mere "arrangement of statutes" which a modern historian has termed it.<sup>50</sup> It satisfied the desires of the colonists and brought to an end the long struggle over the power of the magistrates.

If the preparation of the 1648 Code and the detail of its specific provisions are largely to be explained by the colonists' desire to curb the discretion of the magistrates, we must look elsewhere for an explanation of the comprehensiveness of the Code and its clear breaks with traditional law. This latter feature of the Code is, to a substantial degree, a reflection of the purposes and nature of the colonial enterprise. At the outset, it must be borne in mind that the Colony of Massachusetts Bay was not established by a band of adventurers for commercial profit but was an organized venture under grant from the English crown. Although many influences, both social and economic,<sup>51</sup> were responsible for the founding of the Colony, religion was the *leitmotif* of the undertaking.<sup>52</sup> Indeed, the Puritan outlook affected almost everything that the colonists thought and did. The announced purpose of emigration was to try an experiment in Christian living, to create a kingdom of God in the wilderness.<sup>53</sup> Not only did this purpose meet with the approval of the settlers generally, but the colonists apparently had confidence in the small group of earnest and zealous leaders—lay and clerical—who initiated and continued to direct the policy of the Colony. This acceptance of the basic aims of the enterprise was buttressed by a vivid community spirit and solidarity which sprang in part from the colonists' desire to achieve those aims and in part from the fact that settlement had been carried out by groups which

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46. A comparison of the provisions of the Body of Liberties with the 1660 revision of the Code of 1648 will be found in MASS. COL. LAWS 1660, *supra* note 41, at 21-24.

47. About one-third of the provisions or revisions date from the period 1641-1646, while another one-third are from the 1646-1647 period when the Code was being completed.

48. THE LAWS AND LIBERTIES OF MASSACHUSETTS, *supra* note 7, at 14-16, 36-37.

49. See Wolford, *supra* note 8, at 436.

50. MORISON, BUILDERS OF THE BAY COLONY 264 (1930).

51. For a recent summary of causes of migration, see GARVAN, ARCHITECTURE AND TOWN PLANNING IN COLONIAL CONNECTICUT 6-10 (1951).

52. MORISON, THE PURITAN PRONAOS 4 (1936).

53. 1 MATHER, MAGNALIA CHRISTI 219 (1820).

migrated as religious congregations.<sup>54</sup> Thus, neither the extension of suffrage which had been accomplished, nor the curbing of the discretionary powers of the magistrates, brought about any basic change in colonial policy which, in fact, most provisions of the Code were designed to promote.<sup>55</sup> But for the dominantly religious purposes of settlement it seems doubtful whether the Code would have departed so markedly from the secular law with which the colonists were familiar. At the same time, the strong sense of social solidarity which those purposes both fostered and fortified seems also to explain the willingness of the colonists to have their political rights curtailed and to subject themselves to detailed regulation of personal behavior in the interest of the community.<sup>56</sup> However, it must not be forgotten that new conditions in a frontier community required the adoption of laws suited thereto. Thus, the needs of younger children in an economy where money and personal goods were scarce help to explain the departure from rules of primogeniture obtaining in England.<sup>57</sup> In some instances dislike of, or dissatisfaction with, conditions in the homeland undoubtedly contributed to the formulation of provisions which departed from customary rules—for example, laws relating to procedure, to debtors and creditors, and to the registration of land titles.<sup>58</sup> Such departures from the laws of England were, of course, made easier by the distance which separated the Colony from the traditions and also from the administrative supervision of the mother country. The scarcity in the Colony of men trained in English law tended also to weaken the force of the traditional element and to facilitate the compilation of a code which reflected to a high degree the new needs and purposes of the Colony.

That a detailed and comprehensive code of the "modern" type, should make its appearance under the circumstances and conditions which have been described is the more remarkable when it is recalled that the only codes with which the Massachusetts settlers had any familiarity were of the "ancient" type—compilations of customary law which existed in some

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54. 1 OSGOOD, *op. cit. supra* note 28, at 425; WINSLOW, MEETINGHOUSE HILL 19-35 (1952).

55. In this connection it should be emphasized that the committee which prepared the Code was composed for the most part of magistrates and leaders in the church.

56. It was a widely held belief at this time that subjection to lawfully constituted authority was a religious duty. FIGGIS, *THE THEORY OF THE DIVINE RIGHT OF KINGS* 175 (2d ed. 1914). See also note 96 *infra*.

57. Haskins, *supra* note 16.

58. Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U.L. Rev. 281, 299-301 (1941).

of the English towns or manors from which the colonists came.<sup>59</sup> The development which took place in Massachusetts leads the comparative lawyer to inquire whether history affords any parallels to this development, or, to put it another way, whether similar circumstances and conditions are likely to bring about substantially similar results. Those familiar with British colonial history may perhaps think of the development of legislation in Australia and New Zealand in the nineteenth century,<sup>60</sup> which were similar in some respects to that in seventeenth century Massachusetts. An even closer parallel, however, is the codification movement in the Greek colonies of Sicily and Southern Italy in the seventh century B. C., which it is believed will afford an instructive comparison with the Massachusetts movement. What is especially noteworthy about the Greek movement is that it resulted in codes which were plainly "modern" by the tests announced, and which were at the same time comparable in many respects to the 1648 Code in Massachusetts. Although the latter has been referred to as probably the first "modern" code of the modern period, there is compelling reason to recognize that the first "modern" codes of which we have any knowledge are those of these western Greek colonies.

It is significant that the earliest codes of the Greek world were adopted not on the mainland but in the colonies.<sup>61</sup> So far as is known, the earliest of these compilations were the laws framed by Zaleucus for the inhabitants of Locri about 660 B.C.<sup>62</sup> Shortly thereafter a code of laws for Catana, in Sicily, was prepared by Charondas,<sup>63</sup> and this code is said to have been widely copied by other Greek cities in both Sicily and Southern Italy, much as the Massachusetts Code was copied in other New England colonies.<sup>64</sup> Unfortunately, neither of these codes survives, and we are compelled to rely for our knowledge of them on scattered fragments quoted by later writers.<sup>65</sup> Study of these fragments, together with the opinions of commentators writing more than two centuries later,<sup>66</sup> makes it plain that these western codes were not a mere perpetuation of

59. See references cited note 31 *supra*. There is considerable evidence tending to support the proposition that English customals motivated the use of a code in Plymouth Colony. Goebel, *supra* note 24, at 433-434. In certain respects there are also resemblances between the Massachusetts Code and some of the English customals.

60. Cf. 2 BRYCE, *MODERN DEMOCRACIES* 166-173, 322-330 (1927).

61. See generally, DARESTE, *ETUDES D'HISTOIRE DU DROIT* 12-30 (2d ser. 1926); Adcock, *Literary Tradition and Early Greek Codemakers*, 2 *CAMBRIDGE HIST. J.* 95 (1927); Mühl, *Die Gesetze des Zaleukos und Charondas*, 22 *Klio* 105, 432 (1928-1929); Smith, *Early Greek Codes*, 17 *CLASSICAL PHILOLOGY* 187 (1922).

62. ARISTOTLE, *POLITICS* II, 12.

63. Mühl, *supra* note 61.

64. See note 12 *supra*.

65. See the thorough study by Mühl, *supra* note 61.

66. Principally Aristotle, Diodorus, and Polybius.

customary law in written form, as were the ancient codes of the East, but were entirely new productions. Despite the religious conservatism of the period which might have tended to discourage innovation, new elements appear to predominate,<sup>67</sup> and many of them reflect dissatisfaction with what we know of the customary law of the homeland.<sup>68</sup> The exact fixing of penalties, so as to eliminate "interpretations" as well as arbitrary discretion, is a prominent feature of these codes,<sup>69</sup> as is the effort to humanize the old law by eliminating the death penalty for certain offenses.<sup>70</sup> Other provisions designed to meet new conditions and situations are of leading interest. Thus, a provision dealt with the problem of poor free-men who borrowed money and fell into a form of debt slavery;<sup>71</sup> another discouraged credit by forbidding the institution of proceedings by one against another whom he had trusted and who had failed to make payment.<sup>72</sup> A further interesting feature of these codes is that they prescribed detailed rules for the regulation of personal behavior; they proscribed, for example, excessive ornamentation of dress,<sup>73</sup> excessive drinking, and association with evil companions.<sup>74</sup> Although such legislation may appear to be in part the reflection of a democratic spirit, its primary purpose seems to have been the improvement of the morals of the citizens.<sup>75</sup> Such provisions, when viewed with others emphasizing the importance of family life<sup>76</sup> and forbidding the sale of real property,<sup>77</sup> suggest tightly knit communities not unlike early Massachusetts,<sup>78</sup> largely closed

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67. Cf. DIODORUS XII, 11, 12

68. *E.g.*, with respect to elimination of the death penalty for specified offenses and the revision of the law of divorce. *Id.* at XII, 12, 18.

69. ARISTOTLE, POLITICS II, 12, says that the provisions of Charondas' code in this respect were more exact and were more precisely expressed than in the legislation of even his own day.

70. *E.g.*, for cowardice in battle and for adultery. DIODORUS XII, 16. With respect to these provisions Mühl comments, *supra* note 61, at 451: "Wenn in dieser ältesten hellenischen Gesetzgebung, worauf ich oben schon hingewiesen habe, die Todesstrafe für Ehebruch abgeschafft war, die aus dem Geschlechtsrecht stammend in der historischen Zeit des hellenischen Rechtes noch häufig anzutreffen ist, so können wir daraus den Schluss ziehen, dass dieses Strafrecht durchaus kein primitives mehr gewesen ist, sondern dass diesem eine Entwicklung des Rechtes in der Richtung nach Humanisierung vorausgegangen ist."

71. Smith, *supra* note 61, at 199.

72. 2 STOBÆUS, FLORILEGIUM XLIV, 40.

73. Diodorus XII, 21.

74. *Id.* at XII, 12.

75. *Id.* at XII, 21. See also Smith, *supra* note 61, at 200. Mühl, *supra* note 61, at 455, speaks of the "rich statesmanship" of Charondas.

76. DIODORUS XII, 12 (second marriages visited with disabilities), 15 (provisions with respect to orphans). Cf. also ARISTOTLE, POLITICS I, 2.

77. *Id.* at II, 7.

78. The parallel is also remarked upon by Gwynn, *The Character of Greek Colonization*, 38 JOURNAL OF HELLENIC STUDIES 88, 115 (1918).

to outsiders, and fired by an intense community spirit, in which laws were adopted for the conscious good of the whole group.<sup>79</sup>

It remains to consider the probable reasons for the appearance of such "modern" codification at so early a time. What has been described as the "age of the aristocracies" in Greece (800-650 B.C.) was an age of relative overpopulation and of consequent land shortage.<sup>80</sup> The population had multiplied as an inevitable consequence of peaceful settlement, and the ancestral holdings of a family no longer sufficed to provide a living for those on the land. Although waste lands had been cleared, and pasturage put under tillage and cultivation, there was still not enough land for all. Possible further increases of holdings had been halted by the noble class of the population whose estates were being constantly enlarged at the expense of the small holdings. Thus, there came into existence, in an age when agriculture was the chief means of existence, a large group which found it next to impossible to provide themselves with a livelihood. This is the class whose hardships are described by Hesiod,<sup>81</sup> who believed that intense individualism offered the only solution of existing ills.<sup>82</sup> It was an "iron age,"<sup>83</sup> when family organization was breaking up and individuals were forced to strike out for themselves.<sup>84</sup>

The reaction of the pressure of population did not at once take a political direction but took instead the form of intense colonizing activity. Although in Hesiod's time the Greeks seem to have been timid about venturing away from land, within a generation they were swarming across the sea to found new city states along the Hellespont, the Black Sea, and in Sicily, Southern Italy, Sardinia, and the coasts of North Africa and France (750-600 B.C.).<sup>85</sup> Shortage of land seems to have been a principal reason for emigration, at least so far as the western colonies were concerned, but political grievances also played an important part, as we know from Hesiod's allusion to "bribe-devouring" kings and the depredations of the ruling class.<sup>86</sup> Chief among such political griev-

79. In early times in Greece, law was regarded as a restraint on individual action in the interest of the order of the whole group to which it applied. The promotion of good order in the community was believed to give individuals a wider freedom. Hence the statements throughout Greek literature that to obey the law is to be free.

80. HALLIDAY, *THE GROWTH OF THE CITY STATE* 30 (1923); MYRES, *GEOGRAPHICAL HISTORY IN GREEK LANDS* 191 (1953).

81. HESIOD, *WORKS AND DAYS*, 37-39.

82. *Id.* at 21-26. A principal purpose of the poem was to teach men how to live in a "difficult" world.

83. *Id.* at 176.

84. *Id.* at 182 *et seq.*, 192. At the time of Hesiod the only "normal" life was the self-sufficient life of mixed farming which produced practically all that was required. See MYRES, *op. cit. supra* note 80, at 192.

85. 3 *THE CAMBRIDGE ANCIENT HISTORY* c. 25 (1925).

86. HESIOD, *WORKS AND DAYS* 39, 264.

ances seems to have been the uncertain and capricious interpretation of judges who administered a vague body of customary law in a fashion to suit the interests of the noble class.<sup>87</sup>

Although we know little of the manner in which the Greek colonies came into existence in the seventh and eighth centuries, we have considerable information about the process at a somewhat later time,<sup>88</sup> and certain characteristics appear to have been common to all periods.<sup>89</sup> Actual foundation appears to have been a single enterprise in charge of a single leader and shared in by a definite number of settlers.<sup>90</sup> Although the bulk of the colonists were dissatisfied peasants, it seems probable that the leader was a member of the influential class in the town or village from which they came. The undertaking was never simply that of a band of adventurers without a leader.<sup>91</sup> Since each colony acquired from the start a distinctly individual character, with distinct national and local traditions,<sup>92</sup> it seems highly probable that the group came from one place; and, indeed, Greek tradition was unanimous in ascribing each colony to one or at most to two states. This fact also provides evidence that the colonies did not result from haphazard immigration. One stock, and the pressure of common necessity in the locale of settlement, made at once for a closely knit and compact community.

From the foregoing evidence, such as it is, certain conclusions with respect to the Greek codes may be drawn. First, pressure for the reduction of law to written form seems to have resulted in large measure from a desire to eliminate any element of discretion in the application of the law. It had been found that rulers who were the depositories of traditional law could not be counted on to decide each case fairly and according to fixed rules. In such a demand for written laws there is nothing very unusual, for many codes of the "ancient" type were sought and obtained as a protection against the frauds of a privileged oligarchy.<sup>93</sup> What gives significance to the demand in the Greek colonies is that unsatisfactory political and economic conditions obtaining in the homeland appear to have generated, in addition, a desire to improve and reform the law. The fact that the colonial settlements were small and of a homogeneous

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87. The dislike of written laws on the part of the aristocracies is voiced at a somewhat later time by Theseus in EURIPIDES' SUPPLIANTS 433-436. Cf. also THEOGNIS, 53 *et seq.*

88. Cf. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR I, 27.

89. Gwynn, *supra* note 78, at 100.

90. *Ibid.*

91. See generally THUCYDIDES, *op. cit. supra* note 88, Book VI, *passim*.

92. It has been pointed out that emigrating Greeks lost their citizenship in the mother city. SZANTO, DAS GRIECHESCHE BÜRGERRECHT 62-64 (1892).

93. See MAINE, *op. cit. supra* note 1, at 19.

nature, and that they were removed from the restraints of the homeland by distance and by the absence of regular communication, made it possible to carry out the desired reforms under the leadership of the early law-givers. Second, in what must be described as frontier communities, the need for deliberate construction was inescapable, for the old customary law was insufficient under entirely new conditions. When such construction was undertaken, it was only natural that the law-giver entrusted with the task should attempt to meet or to solve special problems created by these new conditions with a view to eliminating clashes of divergent interests within the community. Finally, it seems clear that the codes were not imposed upon a passive population but resulted directly from forces within the communities. This fact further distinguishes the early Greek codes from the codes of the ancient East, which were primarily the creations of a powerful king or priesthood firmly established in authority and which were designed to promote the policy of that authority.

Of wider interest are the several points of similarity between development of codification in Massachusetts and in the Greek colonies. In both communities there was a marked departure from the traditional rules with which the emigrants and their leaders were familiar, and in both there were established new provisions designed to meet new conditions and to further the aspirations and purposes of the particular colonies. In both, the provisions show evidence of a carefully conceived and integrated pattern, and the resulting compilations were on the whole comprehensive and unified expressions of law. Although the Greek codes do not appear to have been arranged in systematic form, they contained, as did the Massachusetts Code, a mixture of religious, civil, and governmental matters. The Greek and the Massachusetts codes also reflect theories about law which have many points in common. These codes suggest that, to a marked degree, law was viewed as a restraint on individual action in the interest of the order of the whole group to which it applied, and that, since an individual was only a member of the community, there was no aspect of his life—even his private conduct—that was free of the control of the law insofar as the law was designed to further effective organization and good order in the community. The sources of this view of law were, of course, different: in Massachusetts the theory grew out of, and helped to buttress, Puritan doctrine,<sup>94</sup> whereas in the Greek colonies it seems to have been connected with Delphic teaching that good order in the community promotes greater individual freedom.<sup>95</sup> But both approaches

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94. Gray, *supra* note 29, at 690-692.

95. Hence the recurring statements in Greek literature that to obey the law is to be free. Such a view of law made the regulation of personal conduct far more effective than it would have been had such convictions not prevailed.

fostered a community spirit and social solidarity which facilitated the enactment of laws for the primary good of the entire group.

A second major point of interest is that codification in Massachusetts and in the Greek colonies resulted from many of the same kinds of forces or pressures. In both colonies dissatisfaction with discretionary justice brought about a conscious demand for decisions according to fixed rules, and an insistence that those rules should be made public so that departures therefrom could be detected. In both there was dissatisfaction with political conditions in the homeland and with elements of the traditional law, and this dissatisfaction gave impetus to a movement for reform which new conditions in a new land made it possible to achieve. Like Massachusetts, the Greek colonies were organized ventures and had a separate political existence from the start. Each contained only a few thousand inhabitants, like-minded to a high degree, and possessed of a common heritage and traditions. In such simple and self-contained communities, appreciation and understanding of the need for common action easily comes about, and the conviction readily appears that the community has the power to shape its social life by voluntary regulation.<sup>96</sup> To some extent such attitudes must have been present at the outset in at least the Greek colonies because of their political heritage from the city-states of the mainland. In Massachusetts they are to some extent traceable to traditions of social solidarity fostered by the mediaeval guilds and the early trading companies.<sup>97</sup> But these attitudes, as they developed, were very considerably strengthened by the fact that both the Greek and New England colonies were largely isolated, and intercourse with other communities was only occasional and sporadic. Under such circumstances, radical reorganization of custom and habits was relatively easy.

From the discussion of codification herein presented certain general conclusions may be drawn. It should be clear that, if the function of this form of law in a given legal system is to be properly understood, it is essential to distinguish between types of codification. It is submitted that the terms "ancient" and "modern" are appropriate terms for distinguishing the two general types of codification, provided that they do not obscure the characteristics of those types as hereinbefore described; for it must be borne in mind that those types are not necessarily associated with particular epochs or periods of history, or indeed with particular stages

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96. Cf. Dickinson, *Economic Regulations and Restrictions on Personal Liberty in Early Massachusetts*, PROC. POCUMTUCK VALLEY MEMORIAL ASS'N. 485, 487 (1927). See also WINSLOW, *op. cit. supra* note 54, at 172: "In all matters of private conduct each member [of the congregation] had willingly at his admission made himself subject to 'holy watching' by all his fellow-members."

97. It is worth noting that in the English trading companies the governor and assistants were empowered to oversee the conduct of members in many ways.



of legal growth or development.<sup>98</sup> It should also be clear that the classification of a particular code depends upon an analysis not only of the content of that code but of the circumstances and conditions which led to its adoption. Such analysis serves the further and more important purpose of helping to determine the part which the code plays in a particular legal system.

From a broader standpoint, the two codification movements which have been discussed emphasize the importance of the comparative method not only in the study of legal development but in history generally. Legal history is concerned with determining how the law of the past grew out of social, economic, and psychological conditions, and how it accorded with or accommodated itself to them.<sup>99</sup> But the scope of legal history is enlarged, and its content enriched, through the employment of the comparative method, which permits us to view the common characteristics of the legal systems of various and differing societies and thus to acquire a better understanding of the processes which affect the development of a particular system.<sup>100</sup> What is needed for the better accomplishment of this end is an appreciation of the aims of legal history and comparative law on the part of historians and sociologists. It is they who are best suited to provide much of the data needed to trace with precision the relationships existing between social and legal developments. Such an appreciation would at the same time enlarge the vision of social scientists by impressing upon them the continuing significance of uniformities in human behavior in differing civilizations which give reality to comparative law and make history a coherent whole.

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98. The history of the common law illustrates the fact that a legal system may grow to maturity without the aid of or need for codification of any kind.

99. See KANTOROWICZ, *RECHTSWISSENSCHAFT UND SOCIOLOGIE* 30-34 (1911); Pound, *Scope and Purpose of Sociological Jurisprudence*, 25 *HARV. L. REV.* 489, 514 (1912).

100. In speaking of the importance of the historical and comparative methods in jurisprudence, BRUGELLES, *LE DROIT ET LA SOCIOLOGIE* 160 (1910), says: "Ces deux méthodes devront s'intégrer plus tard dans la science juridique, à laquelle elles prêteront un concours précieux."