Heinz Barta, *"Graeca non leguntur"? Zu den Ursprüngen des europäischen Rechts im antiken Griechenland*. Harrassowitz Verlag, Wiesbaden, 2011. Vol. II – *Archaische Grundlagen*. Part I pp. XVIII + 766, ISBN 978-3-447-06278-7; part II pp. XVI + 522, ISBN 978-3-447-06587-0.

These two volumes are the second instalment[1] of the author's ambitious project aimed at rehabilitating, as it were, ancient Greek law as the real forerunner of Western legal thought.[2] Heinz Barta (= B.), emeritus professor of law at Innsbruck University (Austria), argues for the importance of ancient Greek law in the development of Western legal culture, thus going – in a very outspoken manner – against the mainstream of today's legal history with its infatuation with Roman law.

B. repeatedly attacks the widespread idea that the Greeks had neither a legal science nor real legal doctrine, although he intends to deal with this topic in a volume to come. Greek law was much more advanced than especially Romanist prejudice would have it. B. postulates that legal thought does not require legal science to develop but is often created through the actual practice of law. He even argues that Roman law was influenced by the Greeks as early as the time of the Twelve Tables (584–88).[3] In many respects the Greeks themselves only developed what they had learned from older civilizations, both indigenous (Mycenae) and Oriental (Egypt and Mesopotamia). The Greeks, however, were the first to come up with ideas such as human dignity, expressed especially by the Athenian law against *hybris* as well as the introduction by Solon of actions that anyone could file on behalf of the weak, and to develop subjectivity and individual autonomy as legal concepts to an extent unknown to other ancient cultures.

B. does not really enter into the debate about the authenticity of figures such as Solon and Draco. He is very well-read and acquainted not only with the scholarly literature of the last two or three decades but also with much older scholars such as Lipsius and Maschke; he considers every major work before 2001.[4] However, he lacks the methodology of an ancient historian, which is especially evident in his mostly second-hand engagement with the sources. When reconstructing events and personalities he bases his arguments mainly on what the older literature says about them; the reader should also consider some more recent works challenging the traditional views.[5] His views on Solon, in particular, may seem highly speculative. He contends for instance

[1] Technically they constitute volume II of the entire work. In the following I will refer to them as half-volumes.

[2] For a review of the first volume see http://bmcr.brynmawr.edu/2011/2011-12-61.html.

[3] Where not otherwise indicated, the numbers refer to pages in the first half-volume.

[4] At one point (p. 442) he does refer to J.H. Blok & A.P. Lardinois, eds., *Solon of Athens. New historical and philological approaches* (Leiden/Boston 2006), but he never really deals with the very skeptical ideas expressed in many of that volume's contributions.

[5] Esp. G. Anderson. "Before *Turannoi* Were Tyrants: Rethinking a Chapter of Early Greek History", *Classical Antiquity* 24/2 (2005), 173–222; J. Hawke, *Writing Authority: Elite Competition and Written Law in Early Greece* (DeKalb, 2011).

that Solon sought his friends' advice on his reform plans and shared with them his vision for the future of the state (605). He seems to base this on Plutarch *Solon* 15, although elsewhere (597 n. 3937) he agrees with Ruschenbusch in rejecting the anecdote reported there as a late fabrication. B. is thus not a historian but a jurist, and one can appreciate a different take on the subject. He is a firm believer in interdisciplinarity; he even cites authors such as Konrad Lorenz and Malinowksi.

After expounding his ideas in the Introduction, B. provides a description of Solon's life and career. The famous statesman is credited, among other things, with creating the concept of legal personality. Human rights, human dignity, and the like, B. argues, were not invented by Christianity but have their roots in Archaic Greece (49). The development toward democracy initiated by Solon led to the citizen being regarded as an active agent capable of legal action (*Rechtssubjekt* – a being possessed of legal personality in a wider sense). There follows a comparatively short chapter dedicated to Solon's alleged understanding of law as a tool to create social justice and stability. B. speculates about the origin of statute law, which he – likely enough – sees as coming from the Orient, and rightly draws attention to its early sophistication.

A big part of the book explores the development of criminal law down to the fourth century, focusing on the concept of legal culpability (77–292). Draco's introduction of the distinction between intentional and non-intentional homicide, B. argues, started a process that eventually saw the Classical thinkers, beginning with the speechwriter Antiphon (130–212), break free from religious ideas and separate mere causality (such as the throwing of a javelin that accidentally kills a boy) from actual responsibility based on culpable behaviour. B. does not cite Ant. 3.2.7, the most striking parallel to modern European doctrine, which 'nails' the legal question by pointing out that the thrower behaved exactly as he was supposed to according to society's norms; instead, he claims that Antiphon already knew the technical use of ἀτυχία/ἀτύχημα found in Aristotle (*Rhet*. 1.13 1374b) to designate sheer chance as opposed to negligence. In the passage he cites (Ant. 3.4.5), this interpretation is far-fetched; his handling of the topic in general is unsatisfying from a philological point of view, and the etymology he proposes for ἀτυχία (178) is bizarre: the word's basic meaning is hardly "something not happening out of sheer chance" but "bad luck" or "failure". Finally, B. himself (208) admits that we have no direct evidence that the Romans took their concept of *culpa* from the Greeks.

The following part (213–292) focuses on the so-called 'enlightenment' that took place in the 5th century BC and in his view brought about the emancipation of legal thought from religion. B. expands on the concept of responsibility and then addresses Draco's homicide law, in a manner heavily dependent on W. Schmitz's work, according to whom the famous lawgiver did not, in fact, replace vendetta with legal procedure but only regulated some aspects of it;[6] the credit for introducing the rule of law in such matters is taken, again, by Solon. It is however totally unwarranted to assume that Solon

[6] W. Schmitz, " 'Drakonische Strafen.' Die Revision der Gesetze Drakons durch Solon und die Blutrache in Athen", *Klio* 83 (2001), 7–38.

was appointed arbitrator and lawgiver because Draco's statute was unsatisfactory (292), especially as the ancient sources claim that Solon replaced all of Draco's laws *except* the one on homicide. Moreover, an arbitrator tasked with solving a political crisis is unlikely to have reviewed all the laws from a purely juridical point of view. When analyzing archaic legislation it is imperative to ask what political and social issues were at stake rather than looking for points of legal doctrine that might have needed fixing.

B. continues by pointing out the shift toward ever greater legal empowerment of the individual, which he links with the growth of democracy. This section culminates in a long chapter dedicated to the much-debated question of the nature of Greek contracts (374–438).[7] Freedom of contract is indeed an important element of private autonomy. B. strongly disagrees with H.J. Wolff's contention that Greek law had no concept of contractual obligations. He subscribes instead to Pringsheim's thesis that the dispositive formal element is the presence of witnesses (379–80). This idea seems unwarranted. If we accept, with B. and others, that the isolation of law as a separate category is a product of Roman culture (440), in classical Greece there could hardly be a clear distinction between "simple" promises and contracts and the Greeks could hardly have been interested in singling out one particular element, formal or otherwise, on which the "validity" of an agreement hinged.[8] Pringsheim justified his thesis by defining "legally binding" as "enforceable in court" and claiming that unwitnessed contracts could not be enforced because there was no other way to meet the burden of proof. This argument confuses questions of fact and questions of law. Not always is proof necessary: both litigants may admit to the contract, for instance, when the dispute turns not on its existence but on its interpretation or on who broke it first. Stating that there was a legal rule that declared unwitnessed contracts invalid is tantamount to claiming that a Greek jury would have had to throw out even a contract whose existence it did not doubt solely on the grounds that it lacked witnesses and thus failed to meet this formal requirement. There is not the slightest hint in our sources that this is how things actually worked. On the other hand, B. may well be right in his criticism of Wolff's thesis that Greek law knew no obligations at all, and he certainly is right in insisting on terminological clarity in investigating such matters and complaining about the confusion of concepts that one sometimes comes across in the scholarship on this topic. He is also probably right to criticise Wolff's subdivision into contractual and delictual liability and his subsequent attempt to prove that in the Greeks' minds breach of contract was only actionable when it could be viewed as causing damage to another's property. In truth, he argues, these two fields were not distinguishable from the beginning but the distinction came about only in the fourth century. (That it was known at that point is seen in Plato and

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[7] B. here cites, as usual, an astounding number of publications, but leaves out P. Kussmaul, Synthekai. *Beiträge zur Geschichte des attischen Obligationenrechts* (Basel, 1969); among English-speaking scholars he does not consider Carawan (except in the unrelated field of homicide), whose work on contracts is closest to Wolff's ideas.

[8] For similar criticism of Pringsheim's thesis see e.g. Kussmaul (n. 6), 80–1; L. Gernet, *Droit et société en Grèce ancienne* (1955), 219.

Aristotle.) Another worthwhile point is his criticism of the concept of "pre-law" (Gagarin even holds a threefold division: pre-law, proto-law and law proper), which is based on the dubious assumption that we can truly speak of law only if there is writing (463–71).

The second (shorter) half-volume deals mainly with Solon's contribution to the development of the polis and the measures taken to protect an individual's rights and dignity. Among the latter B. includes those statutory norms, again attributed to Solon, which outlawed insulting the memory of the deceased. Between these two he inserts a discussion of the important concept of *epieikeia*/equity, which gave birth to Roman *aequitas*. B. stresses the importance of equity as a corrective of the shortcomings of statute with its immutability and possible injustice in some cases; at the same time, he warns against the abuse of this concept to sidestep actual law in favor of some particular agenda, as despotic regimes have been all too keen to do (II 78–9; 135–7). On this note he points out that equity is a part of the law, not something opposed to it. However, he seems to overestimate its importance in actual judicial practice (II 101): in *Against Athenogenes* Hypereides bases his argument not on equity but on the spirit of the law. B. himself admits (II 118) that *epieikeia* is seldom (actually: never) referred to in the orators (except in the negative sense that culprits should instead be punished to the full extent of the law: see e.g. Isocr. 18.34). In the same context he also cites Jhering to point out the strengths and weaknesses of statutory law.[9] One of its weaknesses is the fact that, when it proliferates, it becomes a matter for specialists and creates a gulf between the ordinary people's sense of justice and state law, a problem from which the Greeks stayed remarkably free (II 95).

The author's learning and his enthusiasm for the topic, as well as his strong ethical concern, command respect and even admiration. What deserves criticism is his presentation of the material. The first thing is the sheer size of the book (almost 1000 pages, indexes and bibliography excluded). B. says several times that he cannot exhaust the subject or provide a complete list (e.g. 2–4; 58). One would think that, with so many pages, he should at least attempt to achieve completeness, especially since most of the book is about archaic Greece, hardly a period overflowing with evidence. However, the book's length in itself need not deter anyone interested in Greek law or the history of Western legal thought from making as much use of it as he or she wishes. B. himself states in the Introduction that the reader can study any chapter independently, and the reader can also take advantage of the indexes to use the book in a topical way, notwithstanding the author's declaration that it is not a reference work (4). But even so, the author's disquisitions are too long-winded and it is hard to understand his principles of organization. The subtitle itself speaks of "the archaic basis", whereas in much of the actual text one finds a great deal about fifth-century orators (Antiphon) and fourth-century philosophers (Plato, Aristotle, Theophrastus). Certainly these people developed

[9] R. von Jhering, *Geist des ro mischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. 2 (Leipzig 1866/1921), 33–36.

what they had inherited from Solon and other archaic lawgivers, but need this really be addressed within a single volume? B. seems to be trying to pack into each chapter as much of his whole argument as he can, so that Solon, for instance, is referred to again and again. There is a tedious recounting of Wolff's ideas (400–5), and elsewhere too B. goes to unnecessary lengths to relate one or another scholar's views. He has two different subchapters on "further points addressed by Solon's legislation" (494–6 and 556–61; compare II 78–9 and 135–7); there is hardly any use in giving a summary of a topic, the existence of a legal science in Greece (491–4), to which a large part of a later volume will be dedicated anyway. Useful information (as in 278–9: the literary sources portraying the dilemma raised by involuntary killing) should often come earlier. In order not to miss it, the reader has to sift through whole chapters; doing so, however, often amounts to an exercise in patience.

Another problem is that, when dealing with views different from his own, B. is at times overly polemical (413 n. 2518: a new understanding of Greek contracts would deprive Romanists of a weaker "sparring partner" to look down to!), or in his attack on Wolff's pupils for being too uncritical of their master's ideas (436) instead of taking to heart a supposedly Aristotelian dictum to which he refers (ibid. n. 2677) as *Amicus Platon* [sic], *sed magis amicus* [sic!] *veritas*.[10] I would not mind such things too much in a short pamphlet, but in a book of this magnitude such digressions are an effective hindrance for a reader. On the whole, the book reads like a word-for-word transcript of the author's *Vorlesungen*. As a consequence of these shortcomings, his many insights are in danger of failing to achieve the intended impact.

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[10] The chestnut *Amicus Plato sed magis amica veritas* is loosely based on Arist. *EN* 1096a 10–17. The sentiment itself, however, is even older.