PART A

# Ancient Mesopotamia and Egypt

## INTRODUCTION FOR PART A

This first part of my work on ancient legal thought is about the legal thought of certain ancient peoples in the Near East, principally in Mesopotamia and Egypt, and to a lesser extent Anatolia (contemporary Turkey) and Israel. Mesopotamia and Egypt share the reputation of being the oldest civilizations to use writing. And so in my project in examining the history of legal ideas, I will begin with the two societies where writing was first employed. The main reason for starting with literate societies is that there are texts to examine – an institutional recording that can be examined and matched against what seems to be the thinking about law at the time.

What is fascinating is how extensive a written record has survived of ancient legal thought that preceded the Greeks and Romans. The Code of Hammurabi is well known, and has been on display in the Louvre for many years. But there is now much more ancient written material than anyone could possibly master in a lifetime. Since I assume that most of my readers will be unfamiliar with this written record, I will provide many examples of these texts, along with my own attempt to draw inferences from the texts, in the chapters that follow.

In ancient Mesopotamia, the most famous legal text, and the one I will most often refer to, is the Babylonian Code of Hammurabi from roughly 1750 BCE. But there were similar, if shorter, "codes" as far back as the late third millennium that I will also examine. In ancient Egypt records have survived of trials that are very relevant for this part of my study. In addition there are texts, especially treaties, from the Hittites in Anatolia and there are important texts from ancient Israel, especially the Code of the Covenant. We have second millennium BCE texts from Assyria as well, which will play a part in what follows.

Theoretical writings about law develop late in most societies. So, the question emerges of whether we can infer legal thought in societies that had just recently developed a written code or collection of laws. And can we meaningfully discuss

legal thought in societies that did not have theoretical writings about law? Much of what follows in this first part of my work attempts to develop arguments to show that we can infer significant legal thinking in societies long before there were treatises by legal theorists or political philosophers. While we do not find lengthy arguments, we do find reasoning and attempts to justify various laws and treaties. Indeed, some of the earliest writings are treaties and statements of how prisoners are to be treated, even though millennia will go by before treatises are written and discussed in humanitarian or international legal thought.

As we will see in more detail as this part of my work proceeds, legal thought in ancient Mesopotamia and Egypt fits several of the categories of legal thought. There certainly are edicts issued by ancient kings extending nearly as far back as writing itself. There are codes that seem to be issued top-down. Yet there is also evidence that assemblies made law, or at least there was discussion of law in assemblies, not just in the court of kings. Law does not seem to be autonomous from other norms in ancient society, especially moral norms. But the question remains, and is the first we will consider, of whether there is abstract thinking about law, perhaps a necessary condition for legal thought.

SECTION I

# Ancient Procedural Law

# 1

# Ancient Legal Reasoning

In this chapter I argue that ancient law of Mesopotamia and Egypt employs a conception of law and a type of reasoning that is easily characterizable today as a form of *legal* conceptualization and reasoning. Ancient thought is often characterized as primitive in that magical thinking was at its core. The world was full of gods and spirits who could influence the affairs of humans in ways often unfathomable to most people. There was thus, in this view, a constant search for ways of making sense of the mysteries of life so that some sort of control could be had over the supernatural forces. Today we seemingly know better, and this has been true since the time of the Greeks and Romans, although even for them there was at least lip service paid to the view of the world as controlled by supernatural forces. Some Greek and Roman thinkers pushed back in favor of a secular worldview – giving accounts of this-worldly phenomena in naturalistic terms. The idea was that in later societies, but not in Mesopotamia or Egypt, there were laws of nature that were not a matter of menacing or benevolent spirits but simply the way the world is. And the task was to understand the natural order so that it could be controlled. I will dispute this idea as the chapter develops.

In this first chapter I will introduce the main texts I will rely on from ancient Mesopotamia – the "codes" of law, the collections of laws from this period, as well as the edicts of kings. The texts do not appear to be religious or magical texts. In Section 1.2 I will begin to explain why I do not see law in Mesopotamia and Egypt, after the development of writing, to be primitive. In Section 1.3 I talk about legal reasoning "by example" in ancient times and show its similarity to that of today. In Section 1.4 I then move on to discuss how ancient ideas of justice influenced the conceptions of law extant in ancient times. I also point to the even richer accounts of equity that we can glean from ancient legal texts – not at all a primitive account. And in Section 1.5 I set out some reasons to think that ancient legal thought was at least in part understood as secular rather than religious, as down-to-earth, not overly

dependent on what is spiritual – indeed Hammurabi is pictured on the cover of this book as giving his laws to the gods, not receiving laws from the gods.

## 1.1 "CODES," EDICTS, AND DECREES

The most striking sources of law that come down to us from ancient Mesopotamia are the law "codes" of various kings. Throughout the chapters that follow, these will be often the main sources that I refer to in order to understand ancient legal thought about various matters, such as slavery or debt forgiveness. As many scholars have noted, one of the most intriguing puzzles about these "codes" is that judges do not seem to have referred to them in their decisions. And in addition, they are hardly comprehensive or systematic, but seem, at least at first sight, to be almost random collections of laws.

Here are the first few laws of the earliest of the "codes," the Laws of Ur-Namma (2100 BCE):

> LU #1 If a man commits a homicide, they shall kill that man.
> LU #2 If a man acts lawlessly, they shall kill him.
> LU #3 If a man detains another, that man shall be imprisoned and he shall weigh and deliver 15 shekels of silver.[1]

All of the law collections employ roughly the same form as these Laws of Ur-Namma.

A rough consensus has emerged that the collections of laws, Hammurabi's being the best known because of the magnificent stone stela upon which they are now displayed in the Louvre in Paris, are not properly statutes. In their commentary, *The Babylonian Laws*, the British scholars, Godfrey Rolles Driver and J. C. Miles, provide three different but related ways to view Hammurabi's laws:

> The Laws must not be regarded as a code or digest, but as a series of amendments to the common law of Babylon …
>
> it is a series of amendments and restatements of parts of the law in force when he wrote.
>
> [They are] mere super-structures on a much larger base of custom.[2]

Here is a way to connect unwritten customary law with the law "codes."

Coming from a very different legal tradition to that of Driver and Miles, the French scholar, Jean Bottero, argues:

[1] *Laws of Ur-Namma* [LU], *Law Collections from Mesopotamia and Asia Minor*, second edition, translated by Martha Roth, Atlanta, GA: Scholars' Press, 1997, p. 15.
[2] Godfrey Rolles Driver and J. C. Miles, *The Babylonian Laws*, Oxford: Oxford University Press, 1952, Vol. I, pp. 41, 45.

> in the eyes of its author the "Code" was not at all intended to exercise by itself a univocal normative value in the legislative order. But it did have value as a model; it was instructive and educative in the judicial order. A law applies to details; a model inspires – which is entirely different. In conclusion what we have here is not a law code, nor the charter of a legal reform, but above all, in its own way, a treatise, with examples, on the exercise of judicial power … it is clearly centered upon the establishment, not of a strict and literal [written] justice, but of equity that inspires justice but also surpasses it.[3]

And so here we have a connection suggested between equity and natural law on the one hand and the "codes" of law on the other.

My own view is similar to that of Marc Van De Mieroop, who argues that there is no reason not to regard these "codes" as law codes in various important senses of that term.

> The code represents the culmination of developments that had started centuries earlier. It is the high point of a tradition in which kings asserted that they protected their people from legal abuse, a tradition that started with Ur-Namma and ended with Hammurabi, some three hundred years later.[4]

As will be clear, I also support the following conclusion reached by Samuel Jackson:

> We cannot rule out the possibility that the legal cases presented in collections such as LH [Laws of Hammurabi] were discussed in the courtroom or at least influenced the reasoning of judges in making their decision. It may be that this reasoning process has not been recorded. Whatever the situation was, it could be unwise to make too many conclusions based on the lack of citations to LH.[5]

The codes were not statutes but rather either past judgments or models for use by judges (much like the US Model Penal Code), and for the training of students. And it is also likely that the codes were records of additions or changes of the customary law.

Regardless of how exactly they functioned at the time, the codes are the best source we have of how ancient Near Eastern rulers thought about law, both specific laws and law in general, and they will be the most important source I will refer to in the chapters that follow in the first part of this work.

In addition to the codes of law we also have good evidence of edicts issued by various ancient rulers. Specific edicts were issued by kings in ancient times in

[3] Jean Bottero, *Mesopotamia: Writing, Reasoning, and the Gods*, translated by Zainab Bahrain and Marc Van De Mieroop, Chicago: University of Chicago Press, 1992, pp. 167, 183.

[4] Marc Van De Mieroop, *Philosophy Before the Greeks*, Princeton, NJ: Princeton University Press, 2016, p. 148.

[5] Samuel Jackson, *A Comparison of Ancient Near Eastern Law Collections Prior to the First Millennium* BC, Piscataway, NJ: Gorgias Press, 2008, pp. 77–78.

order to address a specific issue, such as debt forgiveness. Westbrook gives us the following account: "The constitutional convention was that the king issued decrees in the form of personal orders, although that authority was sometimes delegated to subordinates."[6] If ancient law is thus a matter of many decrees issued for very particular reasons, one can see how the law codes would fill a needed role of providing judges as well as the general populace with more generalized guidance. It is my view that the ancient law codes are like such things today as the Model Penal Code in the United States. The edicts that we will examine in this section seem to have served a more specific purpose in guiding the work of judges.

Here is an account of the very earliest records of an edict, issued by Irikagina, ruler of Lugash in the middle of the third millennium in Mesopotamia.

> He cleared the prisons of indebted children of Lagash, of those having committed *gur-gub-* and *se-sig*-offenses [tax or rental payment offenses], of those having committed theft or murder. He established their liberation (*ama-r gi*). Irikagina made a contract with (the god) Nin-girsu.k, that he will not deliver to the powerful the orphan or the widow.[7]

This edict lists very specific cases where an amnesty is declared for child offenders, an especially humane thing to do even in our own times.

Next consider the best known of the ancient edicts, the Edict of Ammisaduqa in Babylonia several centuries after Hammurabi's reign.

> Section 4. Whoever has given barley or silver to an Akkadian or Amorite as an interest bearing loan or as fees, and had a document drawn up – because the king has established equity in the land, his document is voided; he may not collect the barley or silver on the basis of his document.[8]

Here past debts incurred through loans extended by certain public sector creditors, and perhaps also some "private" individuals, are cancelled.

The Irikagina edict from the third millennium BCE and the Ammisaduqa edict from the second millennium BCE thus address very specific conditions that are to be covered according to their amnesty measures (the *misarum*). Claus Wilcke urges that we regard these edicts as if they were pieces of legislation insofar as kings "issued edicts binding the commoners and officials of their state or city-state."[9] Wilcke

[6] Raymond M. Westbrook, "Introduction" to his edited book, *A History of Ancient Near Eastern Law*, Vol. I, Leiden: Brill, 2003, p. 27.

[7] Translated by Claus Wilcke, "Early Dynastic and Sardonic Periods," in *A History of Ancient Near Eastern Law*, Vol. I, edited by Raymond M. Westbrook, Leiden: Brill, 2003, pp. 142–143.

[8] Translated and quoted in Jacob Finkelstein, "The Edict of Ammisaduqa," *Ancient Near Eastern Texts Relating to the Old Testament*, third edition, edited by in J. B. Pritchard, Princeton, NJ: Princeton University Press, 1969, pp. 526–527. I have revised the translation from justice to equity since the term in question is *misharum*.

[9] Wilcke, "Early Dynastic and Sargonic Periods," p. 147.

calls them "legislation" and he is right insofar as the edicts and decrees of kings in Mesopotamia and Egypt are the closest ancient equivalents to legislation.

## 1.2 PRIMITIVE LEGAL REASONING

Many scholars now believe that the invention of writing gives us some of our best evidence for thinking that ancient legal thought advanced to involve abstraction. As Jack Goody has argued, when people move from a largely oral society to a literate one, there is inevitably also a move to more abstract thinking. When a rule gets written down it already is removed from the particular circumstances that gave rise to the initial articulation of the rule.[10] Writing something down fixes it and moves it out of a particular space and time. This is clearly already an abstraction. Here is part of Goody's argument:

> written statements of law, of norms, of rules, have had to be abstracted from particular situations in order to be addressed to a universal audience out there, rather than delivered face-to-face to a specific group of people at a particular time and place. The communicative context has changed dramatically both as regards the emitter and as regards the receivers, with consequent implications for the nature of the message. In written communication a universal injunction "thou shalt not kill" tends to replace the more particular phraseology of "thou shalt not kill other Jews," or perhaps "thou shalt not kill except under the orders of leader, party or nation."[11]

In this and later sections we will explore more fully why this abstraction is so important.

As I said, it is important to note that there are no theoretical treatises on law, as in the texts of the ancient Greek and Roman philosophers. And it is also important to note that many scholars think that ancient Mesopotamia and Egypt suffered from a paucity of abstract reasoning – hence making it odd to think that there was legal thought in these societies where writing was first invented. In addition, what laws there were are often characterized as inhumane, because of the extensive use of cruelty (such as, in the form of *lex talionis*, "an eye for an eye") and death sentences. I will argue though that there was significant legal thought in Mesopotamia and Egypt, and that the laws were more humane than what seems true at first sight.

At the end of the very impressive book, *Before Philosophy: The Intellectual Adventure of Ancient Man*,[12] the Frankforts argue that ancient Near Eastern people, such as those in Mesopotamia, were incapable of abstract considerations because of

[10] See Jack Goody, *The Logic of Writing and the Organization of Society*, Cambridge: Cambridge University Press, 1986, especially chapters 1 and 4.

[11] Ibid., pp. 12–13.

[12] Henri Frankfort and H. A. Frankfort, "The Emancipation of Thought from Myth," in *Before Philosophy: The Intellectual Adventure of Ancient Man*, edited by Henri Frankfurt, H. A. Frankfurt, John A. Wilson, and Thorkild Jacobsen, Baltimore, MD: Penguin Press, 1949. Also see F. M. Cornford,

their inability to break free from "the prescriptive sanctions of religion."[13] They base this conclusion on the examination of myths and hymns, not legal texts. And Henry Sumner Maine, in his monumental book *Ancient Law*, likewise says that ancient peoples did not conceive of law as distinct from religion and morality, and hence law remained in its infancy.[14] While I will not take a stand on what is primitive and what not, I will dispute the idea that ancient people before the Greeks failed to think abstractly about the law.

Abstraction, or abstract reasoning, admits of several meanings and so it is important to get clear on precisely what the charge is against the ancient legal thinkers of the Near East. The kind of abstraction that is involved in abstract reasoning is not necessarily ruled out when conducted in the context of religion. The relevant sense of "abstract" is "withdrawn or separated from matter, from material embodiment, from practice, or from particular examples." And the idea of abstractness then is "the quality of being … withdrawn and separate from the actual, the concrete or the common."[15] It is the inability to think beyond the concrete case in front of one that is thought to be the hallmark of those who cannot engage in abstract reasoning. Or, to put it in a slightly different way, those who cannot engage in abstract reasoning fail to be able to move beyond the particular to the general or universal.

The abilities to form abstract ideas and engage in abstract reasoning are supposed to be what characterizes a development out of the primitive society. There is the sense that primitive people are irrational or at least do not act on the basis of reason but on the basis of superstition and magical thinking. And yet superstition and magical thinking can be abstract in the sense that they are somewhat divorced from the concrete and particular insofar as the irrational could involve a belief in an omnipresent force that was not particular or concrete at all.

There is here also only a loose connection between abstract reasoning and nonreligious thinking. Religion can recognize a god that is not merely a personification of a particular being – indeed there is a Greek idea of the world as being full of gods – which seems to make the gods not particular any more. We will see some ideas of this sort predating the Greeks by nearly a thousand years.

What is the object of this attack on so-called primitive societies is the idea that they are somehow insufficiently developed mentally and hence incapable of understanding the world the way it is, in terms of laws of nature for instance. And in the legal domain, the critique is supposed to be that ancient legal thinking is also incapable of generalizing in a way that moves away from the specific facts at the moment

*From Religion to Philosophy: A Study in the Origins of Western Speculation* (1912), New York, NY: Harper & Row Publishers, 1957.

[13] Ibid., p. 262.

[14] Henry Sumner Maine, *Ancient Law*, London: John Murray, 1861, chapter one.

[15] OED.