

I

LAW AND
CONSTITUTIONAL
HISTORY

I.1 SOLON AND THE SPIRIT OF THE LAW IN ARCHAIC AND CLASSICAL GREECE



THE SCATTERED REMAINS OF THE LAWS ENACTED BY THE GREEK *POLEIS* (CITY-states) during the Archaic and Classical periods hardly appear to form a unified body of law.¹ Most of our evidence for Greek Law in this period comes from two *poleis*, Athens and Gortyn on the island of Crete. Several statutes from the collection of laws created by Solon in 594 have been preserved, but many of these are found in late sources such as Plutarch and lexica compiled by scholars during the Roman Empire or the Byzantine period, and it is often difficult to tell how much of the information they provide is reliable.² There are two main problems encountered when studying the laws attributed to Solon. On the one hand, a law attributed to Solon may have been a genuine law dating from the Archaic or Classical period, but not a law that Solon himself enacted. One thinks for example of the laws about the appointment of *nomothetai* attributed to Solon by Demosthenes (20.93–4). These were actual laws that were in force at the time, but we know that these *nomothetai* were not created until after 403 BCE.³ On the other hand, a law attributed to

¹ I would like to thank Josine Blok and André Lardinois, the organizers of the Solon conference, for inviting me to present an oral version of this essay in Soeterbeeck and for their help in revising it for publication. An earlier version of this essay was presented to the American Society of Legal History in San Diego, CA (November 2002), to the Department of Classical Studies, University of Michigan (November 2002), and to the Classics Department, Tulane University (October 2003). A slightly different French version was presented to the Centre Glotz, Université de Paris I (Panthéon-Sorbonne) in January of 2003. A shorter version was presented in Italian to a class at the Istituto di Diritto Romano at the University of Milan in October 2004. I would also like to thank several friends and colleagues who have read various versions of this essay and offered help and encouragement: Eva Cantarella, Alberto Maffi, Lorenzo Gagliardi, Lene Rubinstein, Fred Naiden, Donna Wilson, Robin Osborne, Jean-Marie Bertrand, Pauline Schmitt-Pantel, and Pierre Fröhlich. I owe a special debt of gratitude to Raymond Westbrook for his advice about the Near Eastern material and his timely gift of the two volumes of Westbrook (2003). All translations of the poems attributed to Solon are my own.

² The problem of determining which laws are genuinely Solonian has been discussed by Ruschenbusch (1966), but see now the essays by Blok, Gagarin, Rhodes, and Scafuro in Blok and Lardinois (2005).

³ See Hansen (1991) 167–8.

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Solon may have been a forgery completely invented by a later author. For instance, Aeschines (1.6–23) discusses several laws of Solon about schools for boys, the prosecution of *hybris*, and the penalties for male prostitutes. In the manuscripts of his speech we find inserted several documents purporting to be the texts of these laws of Solon, but it has long been recognized that these are all forgeries.⁴

For Gortyn there are two major inscriptions containing laws on property and the family. The longer inscription, often called “the Gortyn Lawcode,” is hardly a code in the modern sense, that is, a complete and systematic collection of all the main laws governing the life of a community; for instance, missing from its provisions are any statutes about homicide and public crimes like treason.⁵ What is more, we know nothing about the historical context that produced this collection of laws nor about the aims of the legislators at Gortyn. The evidence for laws in other Greek *poleis* comes mainly from inscriptions, many of which are preserved only in fragments or are hard to interpret. Moreover, we often know little or nothing about the circumstances surrounding the enactment of these laws. At first glance, the possibility of discerning any single living spirit in this heap of dry bones seems quite remote.

M. I. Finley once went so far as to claim that one cannot speak of “Greek Law” in any meaningful sense since Greece was divided into hundred of different *poleis*, each with its own laws and institutions.⁶ Yet though there certainly existed significant differences among these *poleis*, they were all united by certain values that enabled them to share a common Greek identity. Prominent among these values was the ideal of the “rule of law.”⁷ Even if one cannot speak of early Greek law as a unified legal system, we can still discover several common features in the statutes of the Greek *poleis*, which, taken together, reflect a unified set of principles shared by many of these different communities in the period 650–400 BCE. As P. J. Rhodes has recently observed, “There is enough similarity between what is attested for different states (...) to suggest that, in spite of justified protests against the use of inference from one place at one time to fill gaps in our knowledge of another

⁴ See Drerup (1898) 305–8.

⁵ On the meaning of the term “lawcode,” see Westbrook (2000) 33–4 and the essays in Lévy (2000). For objections to calling any of the collections of early Greek laws a lawcode, see Hölkeskamp (1999).

⁶ Finley (1975) 134–46.

⁷ For the importance of the ideal of the rule of law in Greek identity, see E. Hall (1989) 198–200. In J. Hall (2002) I can find no discussion of the role played by the ideal of the rule of law in the formation of Greek cultural identity.

place at another time, some valid generalizations can be made about Greek law and Greek judicial procedures.”⁸ It is this underlying set of general principles that I call “The Spirit of Greek Laws.”⁹

Despite the many problems created by our sources, historians of Greek Law are fortunate in one regard: they have the poetry attributed to Solon, the most famous lawgiver of the period. We may never be able to determine who is the actual author of these verses; they may have been written by the person who created a set of laws for the Athenians in 594 or be the product of a tradition of poetry that created the persona of an ideal lawgiver.¹⁰ What is important for legal historians is that this poetry expresses the aims and values of the Archaic Greek lawgivers and therefore helps us understand the spirit in which the Greek *poleis* created their laws. The Greeks also circulated many myths about their lawgivers, which, if used with caution, also provide valuable information about contemporary attitudes.¹¹ These stories, though generally worthless as evidence for actual events, can still reveal Greek views about the role of the ideal lawgiver and the aims of legislation.

The first section of this essay begins with a study in contrast. I start by examining the way in which the Near Eastern lawgivers such as Hammurabi and Lipit-Ishtar envisioned their role in society and their relationship to the laws that they created. Their attitude is then contrasted with the way in which the poems of Solon present the task of the lawgiver and also with the image of the lawgiver found in several traditional stories. This will help us understand not only what is distinctive about the Greek attitude toward the role of the lawgiver, but also what is original about the persona of the lawgiver found in the poems attributed to Solon. The second part of the essay studies how these contrasting views about

⁸ Rhodes with Lewis (1997) 529–30 note 2. In a careful study of territorial claims in Classical and Hellenistic Greece, Chaniotis (2004) has demonstrated that the Greeks attempted to follow a set of common principles when settling territorial disputes between *poleis*. Despite the differences between their legal systems, the Greeks appear to have recognized the validity of basic modes of conveyance in determining the ownership of land belonging to a *polis*. Three of these modes of conveyance find parallels in the private law of the Greek *poleis*. On the “established laws” recognized and followed by the Greek *poleis*, see Harris (2004a) 26–33.

⁹ When I use the word “spirit,” I do not mean to contrast the “spirit of the law” with the “letter of the law.” Nor do I wish to promote the idea that there existed a transcendent *Geist* that united all the Greeks and pervaded their institutions.

¹⁰ On this issue see the essays of Blaise, Lardinois, and Stehle in Blok and Lardinois (2005).

¹¹ On these legends see Szegedy-Maszak (1978).

the role of the lawgiver and the place of law in society affected the shape and form of laws in the Greek *poleis* of the Archaic and Classical periods.

I. THE IMAGE OF THE LAWGIVER IN THE ANCIENT NEAR EAST AND ARCHAIC GREECE

Perhaps the best way to appreciate what is original about the Greek view of the lawgiver and his role in society is to contrast it with the manner in which the lawgivers of the Ancient Near East viewed their relationship to law and justice. Although the collections of laws discovered in the Near East and those of the Greek *poleis* treat many of the same topics (e.g., adoption, theft, slavery and debt-bondage, leases, homicide), the Near Eastern kings had a very different conception of their position in the community from that of the early Greek lawgivers.¹² Monarchs like Hammurabi acted both as lawgiver and as the supreme judge in their kingdom at the same time. They did not just lay down laws but also administered these laws either directly or through their subordinates. As we will see, they did not grant permanent powers to magistrates, who had the right to administer the law by virtue of holding an office. This had a profound impact on their view of the law and its role in society and set them apart from the image of the Greek lawgivers.

The preface that Hammurabi (ca. 175 BCE) placed at the beginning of his laws provides the best evidence for his view of his role.¹³ Hammurabi does not tell us that he had his laws inscribed on a stele in response to a request by his people; he claims to have been appointed king by the gods Anu and Enlil to bring justice to his subjects:

The gods Anu and Enlil, for the enhancement of the well-being of the people, named me by name Hammurabi: the pious prince, who venerates the gods, to make justice prevail in the land, to abolish the wicked and the evil,

¹² For instance, both the law collections of Hammurabi and Lipit-Ishtar as well as the laws of several Greek *poleis* contained regulations about slavery and debt-bondage. See Harris (2002a) with the literature cited there.

¹³ For the laws of Hammurabi and Lipit-Ishtar, I have used the translations and system of reference found in Roth (1995). This is not the place to enter into the debate about the extent to which Hammurabi's laws were actually followed in practice. Bottéro (1992) 156–84 argues that his “lawcode” is “a work of science devoted to the exercise of justice,” not a set of actual laws. Finkelstein (1961) 102 calls them “pious hopes and moral resolve rather than effective law,” but see now Westbrook (2000) and especially Lafont (2000). For a brief summary of the debate see Roth (1995) 4–7, who analyzes several cases where subjects appealed to the provisions in Hammurabi's laws and clearly expected them to be followed.

to prevent the strong from oppressing the weak, to rise like the sun-god
 Shamash over all humankind, to illuminate the land.

(i 27–49)

In a similar way, Lipit-Ishtar (ca. 1930 BCE) says Anu and Enlil called upon him to bring justice and order to his kingdom:

At that time, the gods Anu and Enlil called Lipit-Ishtar to the princship of the land, Lipit-Ishtar – the wise shepherd, whose name has been pronounced by the god Nunamnir – in order to establish justice in the land, to eliminate cries for justice, to eradicate enmity and armed violence, to bring well-being to the lands of Sumer and Akkad.

(i 20–37)

Rendering justice is only one of Hammurabi's many roles: he is a king (ii 22–31), a military leader who defeats his enemies in battle (ii 68–iii 16; cf. iii 70), and a religious leader who builds temples and offers prayers and sacrifices to every god in the pantheon (ii 22–31, iii 55–64, iv 7–22, 32–52, etc.). Hammurabi is thus not an outsider who comes from abroad merely to resolve disputes as an impartial arbitrator. He is an absolute monarch who rules all aspects of his subjects' lives. Like Lipit-Ishtar, he compares himself to a shepherd who takes good care of his flock (i 50–62; xlvii 9–58): "I am indeed the shepherd who brings peace, whose scepter is just." Hammurabi does not concern himself with the details of administering justice; in his laws he does not assign different kinds of cases to various magistrates or grant specific powers to individual officials. The laws on his stele are *his* laws, and they demonstrate that the verdicts he renders as king are just:

Let any wronged man who has a lawsuit come before the statue of me, the king of justice, and let him have my inscribed stele read aloud to him, thus may he hear my precious pronouncements and let my stele reveal the lawsuit for him; may he examine his case, may he calm his (troubled) heart, (and may he praise me) saying: Hammurabi, the lord, who is like a father and begetter to his people, submitted himself to the command of the god Marduk, his lord, and achieved victory for the god Marduk everywhere. He gladdened the heart of the god Marduk, his lord, and he secured the eternal well-being of the people, and provided just ways for the land.

(xlvi 3–38)

Hammurabi does not place his laws in the hands of his people for them to administer their own affairs. Although Hammurabi delegated tasks to his officials, “(a)ll these officials were appointed by the central administration and reported ultimately to the king. Hammurabi’s correspondence with his high officials shows him intervening directly in day-to-day administration, frequently giving instructions on individual cases.” In the judicial sphere, Hammurabi “had jurisdiction both at first instance and on appeal.”¹⁴ The only other person who can administer his laws is his successor, who will assume his multiple duties as king and judge (xlvi 59ff.). If another king does not abide by Hammurabi’s rules, the only ones who can punish him are the gods; Hammurabi’s laws contain no measures that would enable his human subjects to hold their rulers accountable. In answer to the question “quis custodiet custodes?” (who will guard the guardians?), Hammurabi has no other answer than “the gods.”

But should that man not heed my pronouncements, which I have inscribed on my stela, and should he slight my curses and not fear the curses of the gods, and thus overturn the judgments that I rendered, change my pronouncements, alter my engraved image, erase my inscribed name and inscribe his own name (in its place) – or should he, because, out of fear of these curses, have someone else do so – that man, whether he is a king, a lord, or a governor, or any person at all, may the great god Anu, father of the gods, who has proclaimed my reign smash his scepter and curse his destiny.
 (xlix 18–52)

Of course, if Hammurabi were to give others the power to discipline the king, this would undermine his entire conception of monarchy. After all, one cannot have the sheep telling the shepherd he is wrong.¹⁵

¹⁴ Westbrook in Westbrook (2003) 365–6. Cf. Bottéro (1992) 165: “We know that in Mesopotamia the rendering of justice was a royal prerogative. The ruler often delegated the duty to his representatives, even to professional judges, but it belonged to him in his own right. The procedural accounts, as well as the royal correspondence, that have survived, show more than once how lower authorities refer certain difficult or unusual cases to the royal tribunal.” The situation was similar in Pharaonic Egypt during the New Kingdom – see Jasnow in Westbrook (2003) 289, 295. In *Exodus* Moses also serves as chief judge and lawgiver, but the books of *Judges* and *Kings* are more critical of kings – see Frymer-Kenski in Westbrook (2003) 981–3 and 991–2.

¹⁵ As Josine Blok points out to me, the prophets of the Hebrew Scriptures often criticize the kings of Israel for not upholding the law in the same way as Greek *mantis* could object when a king or other powerful men did not obey *themis* and *dike*. But the laws in *Exodus* and *Deuteronomy* do not provide

The Greeks saw the justice of the Near Eastern kings in a more sinister light. The story told by Herodotus (1.96–100) about the rise of Deioces to power among the Medes reveals their suspicions about such an approach to law.¹⁶ According to Herodotus, the Medes lived independently (*autonomon*) in scattered villages after they won their freedom from the Assyrians. Ambitious to unite the Medes under his rule, Deioces set about gaining a reputation for honesty. The men in his village grew to trust him and invited him to settle their disputes. As his reputation grew, more and more people submitted their disputes to him until he finally declared he had had enough and would judge no more lawsuits. His withdrawal plunged the country into lawlessness (*anomia*) and forced the Medes to make him king. Once in office, Deioces demanded that his subjects build him a vast palace at Ecbatana. When the palace was complete, Deioces remained inside to keep himself safe from plots and communicated with his people through messengers. He continued to judge lawsuits, but all cases were now submitted to him in writing so that he could keep his distance from the people.

In Herodotus' story about Deioces, there is a contrast between independence and lawlessness, on the one hand, and monarchy (*basileia*), which brings law and order (*eunomia*), on the other. But the Greeks considered kingship tyranny (*tyrannis*), the absolute power of one man who is not accountable to the people whom he rules. Deioces' constitutional position is symbolized by his physical distance from the people: he rules from his palace, hidden behind seven high walls. Deioces does not view the achievement of law and order as an end in itself, but as a means to gain power. And just as law and order is associated with tyranny, lawlessness is associated with the independence of the villages before Deioces' accession to power.

In the eyes of the Greeks, the *tyrannis* of Deioces was the very antithesis of the rule of law. According to the Herodotus (7.104), the Spartan exile Demaratus told the Persian monarch Xerxes that their countries were very different from each

legal procedures for bringing formal charges against the king, and the Hebrew Scriptures do not record any trial of a king of Israel similar to the trials of the Spartan kings in the Archaic and Classical periods. On the trial of the Spartan kings, see David (1985).

¹⁶ On the historicity of the story of Deioces, see Briant (2002) 26: "The institutions set up by Deioces (capital, personal guard, audience ritual, Eyes and Ears of the king) are strangely similar to Achaemenid institutions frequently described in Greek authors, so much so that we are tempted to think that Herodotus (...) applied, or could have applied what he knew of the Persian court practices of his own day as a veneer over an entirely imaginary Media." The story therefore tells us more about Greek attitudes toward the Near Eastern kings than about actual historical events.

other. Whereas the Persians feared their king as their master (*despotes*, the word for one who owns slaves) and did his commands, the Spartans had the law alone as their master. When violence and disorder gave the Athenian lawgiver Solon the chance to seize power for himself, he acted in a very different way from the Near Eastern kings. To begin with, Solon (or the persona of the lawgiver presented in Solon's poetry) refused to accept the position of tyrant:

If I spared the land of my country,
 and did not grasp after tyranny and violence, which
 would have defiled and dishonored my reputation,
 I am not ashamed. Thus I think my fame will surpass that of all men.

Solon fr. 32 [West]

For Solon monarchy does not bring about law and order, but is associated with violence and is equivalent to slavery:

From a cloud come the might of snow and hail,
 Thunder from shining lightning,
 By the powerful men a city is destroyed, and into the slavery
 Of a single ruler (*monarchou*) the people falls through its folly.
 Once you raise a man up too high, it is not easy to restrain
 Him later; right now you must heed this advice.

Solon fr. 9 [West]

Unlike Hammurabi, Solon does not hand down his laws and judgment to the people from his position as ruler or as a member of the ruling class. He never compares himself to a shepherd guarding over his flock or a father looking after his children.¹⁷ Solon stands apart from both the people and its leaders and acts as an impartial arbiter. In one poem Solon compares himself to a boundary stone: "I

¹⁷ The image of the leader as the shepherd of his people is frequent in Homer (e.g., *Il.* 1.263; 2.85, 105, 243, 254, 772; 4.296, 413) — see, however, Haubold (2000) 28–32, who argues that in Homer "The shepherd is a failed ideal, exposing to scrutiny a social world without effective social structures." In democratic Athens by contrast we never find a politician who describes his role in this way. The image of the shepherd is replaced by the image of the watchdog, who looks after the interests of his master and obeys his commands, or of the captain, who steers the passengers on his ship to safety. For the image of the watchdog, see Dem. 25.40; 26.22 and the parody of the image by Aristophanes (*Eq.* 1017–35). By contrast, the image of the shepherd appears to have acquired negative associations. In Plato's *Republic* (1.343b–c) Thrasymachus compares the ruler to a herdsman who keeps sheep and cattle with a view only to his own profit and that of his master. When Socrates discusses the character of the Guardians

stood between them, like a boundary stone in the middle ground” (fr. 37.9–10 [West]). He places himself on the same level as the Athenians but in an impartial position, apart from each side. In another poem he compares himself to a wolf surrounded by dogs that threaten him on all sides. Had Solon favored one side or another, the result would have brought destruction for the city (fr. 36.22–7 [West]).

Solon does not hand down just decisions from an impregnable position of authority as Hammurabi and Lipit-Ishtar did. Justice is achieved when there is a proper balance of power between the people and their leaders. To create this balance, Solon distributes power to each group while protecting both from injustice.

To the people I gave as much privilege as was sufficient
 Neither removing nor granting more honor.
 As for those who have power and excel in wealth,
 I saw to it they suffered no harm.
 I stood casting a mighty shield over both sides,
 I allowed neither group to win an unjust victory.

Solon fr. 5 [West]

The best way would be for the people to follow its leaders,
 Neither too unrestrained nor forced by violence.

Solon fr. 6.1–2 [West]

In contrast to Deioeces, Solon did not use his position as lawgiver to gain a position as absolute ruler. Nor did he attempt to combine the roles of king and judge. According to legend, once Solon finished setting down his laws, he made the Athenians swear to abide by his laws, then left Athens for ten years (Hdt. 1.29). In similar fashion, the Spartan lawgiver Lycurgus was not one of the kings, but served merely as guardian and regent for his nephew King Leobotas during his youth (Hdt. 1.65). Several of the lawgivers mentioned by Aristotle in the *Politics* (2.9.5–7.1274a) were complete outsiders in the communities to which they gave laws. Philolaus, who formulated many laws for the Thebans, was an exile from Corinth. Charondas gave laws to his native Catana, but also to other colonies of Chalcis

in Callipolis, he compares them to watchdogs (*R.* 2.375e–376b). For the imagery of political leadership, I am indebted to a forthcoming essay by Roger Brock.