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Orientation

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Introduction

Over the last two decades or so, comparative lawyers and legal theorists have begun to look more globally at legal phenomena, moving away from the almost exclusively 'Western' focus of most work in the subjects.[1] Legal historians have started to follow.[2] All are still feeling their way.

The quest for a definition of law adequate to encompass the phenomena we might wish to call 'law' in diverse societies and cultures has thus far proved fruitless. Most contemporary legal theories, explicitly or implicitly, adopt a top-down state-based model which might be appropriate to modern 'Western' societies but which does not fit easily with, say, Micronesia.[3] Typical is the influential theory of H. L. A. Hart's *Concept of Law*, seeing law as a union of primary and secondary rules, a system of norms identified and enforced by officials. Systems consisting solely of primary rules are described as 'primitive' or 'pre-law'; more accurately, perhaps, they are seen as operating in societies without the same problems of co-ordination found in modern 'western' states.[4] It may be said that such societies do not have law, but that does no more than solve the problem by defining it out of existence. Analogously, Thomas Duve has pointed to the need to avoid Eurocentric – or Sinocentric – assumptions about the nature of law when attempting to understand legal history globally.[5]

The comparative history of ancient law raises yet bigger problems. We cannot go along the path trodden by Sir Henry Maine, whose *Ancient Law*

1 For example, Donlan and Heckendorn Urscheler 2014; Twining 2009; and Menski 2006.
2 Tate, de Lima Lopes and Botero-Bernal 2019 and Duve 2020.
3 Tamanaha 2001: xi–xii, 91. 4 Hart 1961: 91–97, with xlix–li. 5 Duve 2020: 88.

looked only at the law of 'progressive' societies, that is, Roman law (together with early English law) with only passing references to Greece and India.[6] Nor can we comfortably follow Louis Gernet, whose 'Law and Prelaw in Ancient Greece' draws a dividing line between irrational and rational modes of dispute settlement.[7] If we are to try to get to grips with law in early societies, we cannot arbitrarily exclude those societies which were not 'progressive'; nor can we exclude those which allow the resolution of disputes by oath-taking (formally abolished in England, we might note, only in 1833, and a practical reality until the end of the sixteenth century) or other non-rational means, nor those reliant on custom, nor those where we cannot draw a sharp line between legal, moral and social norms.

The problem of ancient law is not dissimilar to the problem of identifying a conception of law appropriate to modern transnational regulatory regimes, a range of mechanisms with different characteristics.[8] In connection with these, Cotterrell has written: 'A concept of law will need to be adequate to structure a project as an inquiry related to law, but not so fully elaborated as to close off inquiry in advance about diverse phenomena that it might be illuminating to treat as legal in some sense.'[9] All the more is this so with ancient legal systems. With these we have the problem that not only might the frameworks be different, which they almost certainly were, but the surviving evidence too is very patchy. In these volumes, therefore, we adopt no fixed model of law but recognize that boundaries may be fuzzy. Some chapters look at institutions which would commonly fall within a functional approach to law:[10] for example, courts and other mechanisms for the resolution of disputes, 'state' or community bodies exercising social control, experts having or claiming to have knowledge of the way things ought to be. Some chapters look at features which may, or may not, be dealt with by law: such things as property, personal status, contracts. Yet others look at factors which may have conduced to the emergence of phenomena falling within the idea(s) of 'law': the formation of states, the use of writing. We hope through this method to shed some light on the 'legal' in the ancient world.

What follows in the present chapter is, first, a description of the type of evidence that survives and of which we make use, and secondly, a brief chronological orientation into the principal geographical regions we examine.

6 Maine 1861. 7 Gernet 1981. 8 On which see Cotterrell 2014.
9 Cotterrell 2014: 194. 10 Twining 2009: 88–121.

Types of Source Material

When dealing with ancient law, we are inevitably constrained by the surviving source material; in practice, that means written sources. Each type of written evidence raises its own problems of interpretation, especially when we are reliant on evidence considerably later in date than the source it purports to reproduce: the Roman Twelve Tables, for example, probably date from around 450 BCE, but the evidence we have of the contents comes from four or more centuries later.[11] Moreover, written sources exist against a background of non-written contexts which we cannot know. This is a necessary limitation of the work.

The types of written material that we use fall into seven rough categories with somewhat fluid boundaries.

Normative Texts

Normative texts typically take the form of rules laid down by some higher authority, including the community or an assembly representing the community. The rules might be mandatory, directed towards 'subjects', indicating how they were to act in some circumstance, without any necessary assumption that there existed any mechanism equivalent to a court or other executive agent which would (or could or should) enforce the rules. They might presuppose the existence of some such mechanism, where the enactment of the rule both obliged the 'subject' to act in a particular way and also authorized the court or executive agent to intervene where there was an infraction. Without having independent evidence of the social context, it can be difficult, or impossible, to distinguish between these.

A particular type of legislation is a code or collection of precepts. These may claim divine authority (for example, the Hebrew Decalogue, the Babylonian Laws of Hammurabi); they might have a religious source and include provisions applicable to the secular ruler (for example, the Hindu Manavadharmasastra); they might be purely secular (for example, the Cretan Laws of Gortyn, the Roman Twelve Tables). Such texts might serve a variety of functions: they can contain mandatory precepts; they can be aspirational; they can be fundamentally symbolic, showing the power and authority of the lawmaker.

11 Crawford 1996: 356–57.

Commentaries

A normative system could consist of nothing more than a set of rules or procedures, written or oral, but alongside these rules there may also be writings about the system by people recognized as having (or claiming to have) some special expertise; these may be isolated individuals (for example, Zhang Fei, collector of the Jin Code, in China) or substantial groups (as the Roman jurists, or the Jewish rabbis, or the Indian Brahmins). Where the system they are commenting on is clearly a legal system, we can call these commentaries 'juristic writings', but it may well be better to avoid that terminology in general so as not to force a particular definition of 'law' onto the evidence and so as not to ignore any relationship that might exist between 'legal' commentaries and commentaries on 'religious' texts and the like. The ancient (Indian) Dharmaśāstra tradition, for example, produced scholastic commentaries from around 700 CE to around 1800 CE.

The status of these commentaries will depend to some extent on the status of those writing them, but the fact that they exist at all is an indication that the system has reached a sufficient level of sophistication that there can be experts. Slightly paradoxically, this is clearer where the authors of the commentaries do not have any particular position which gives them a power to interpret authoritatively. Equally, the status of commentaries depends on the weight which is given to them, and this is something that might change over time.

Although we would probably not naturally call them commentaries, alongside these we need to take into account writings on ethics, whether seen from a religious or secular standpoint (the ethical works of Aristotle or Confucius are prime examples). These share an important characteristic with commentaries, in that they purport to identify (rather than create) norms of behaviour. However, even more than is the case with commentaries, they can only be seen as indications of norms which might have been more generally recognized. Similar considerations apply to what might be called political or constitutional writings: on the one hand these might reflect existing structures, but on the other they could merely be statements of what some individual thought an ideal structure would be.

Documentary Records

Any normative system may come to involve the production of written records, especially in a society with widespread literacy. These may take many forms: formal records of the result of lawsuits or of evidence presented

as part of a lawsuit; contracts; transfers of property; wills; and, in an international context, treaties. They may be on stone, such as boundary markers; on bronze, as the Chinese oracle bones; on wood, for example the triptychs preserved by the eruption of Vesuvius; clay, as in Mesopotamia and Anatolia; or papyrus and paper where climatic conditions allowed their preservation (Egypt, western China).

Documents such as these testify to a legal system in action, though we must always be alert to the risk of forgeries. Moreover, they raise their own problems of interpretation. First of all, these documents presuppose the rules and practices of the system in which they operate, without describing them. In order to get beyond the bare bones of the documents themselves, we need texts of a different type to provide the context for them, or imagination to provide a hypothetical reconstruction of that context. Moreover, even a large sample will rarely shed light on anything more than a small part of any system. Secondly, documentary forms may be conservative, repeating formulae that are known (or expected) to achieve the desired end. Hence, there may be cases when their wording cannot be interpreted literally with any degree of confidence. Thirdly, we cannot assume the typicality of the documentary forms: the very fact that they have been put in writing may mark them out from more typical transactions which were carried out orally but which have left no record.

'Reports' or 'Records' of 'Cases'

As well as formal documents recording their outcome, lawsuits might generate a variety of informal documents. A litigant or other person might record a decision privately as a memorial for the future. Alternatively, or additionally, they could be recording the reasons for decisions, perhaps reflecting a framework within which at any rate some decisions were seen as generating more abstract rules, whether these were seen primarily as ways of regulating behaviour or as the basis of future decisions in similar cases. Distinct from these are descriptions of trials, in which we can read what was being said and done, especially when we can read the speeches of advocates (Cicero, Demosthenes and so forth), as well perhaps as what was decided; though it may not be easy, and is perhaps not important, to discern real trials from fictitious ones.

These texts have inherent limitations. A record of a decision in a boundary dispute, for example, will rarely if ever tell us how the decision was reached, though (assuming it is genuine) it will tell us that there existed a process for resolving such cases. A record of a reasoned decision will point to the result of

the instant case; the way in which the decision is justified will give some indication of the type of reasoning that is acceptable; and the fact that the reason is recorded may suggest that the reasoning and decision in one case is expected to have some influence on future cases. 'Reports' and 'records' of actual cases may be valuable in confirming, or questioning, the status of normative texts, if they reveal that the formal norms were or were not applied. However, it is important to bear in mind that the recorded case may be untypical – that it is recorded at all may make it so by definition – or may have contained features which we cannot now know; there may have been a purpose behind the text, such as the desire to portray a person in a good or bad light, which has influenced its writing; and there may have been conventions as to how the text should be written which mean that it cannot be taken be taken as a straightforward description of what was said or done. No less importantly, what is not said may be as important as what is, and there will all too frequently be assumptions obvious at the time but unknowable today.

Portrayals of Legal Processes, and Model Forensic Speeches

Fictional texts, which do not even purport to portray genuine events, may nonetheless be of considerable value. Descriptions of trials, or more generally of legal process, in plays, myths, or other literary genres, cast light on actual legal processes and expectations. A trial scene in a dramatic work, for example, is perhaps unlikely to misrepresent too radically what went on in a real trial, though it may not reflect details with any degree of precision; and it is always possible that in the particular context a departure from normal practice might have been exactly what was being described.

The use of technical legal language in non-legal contexts may similarly be illuminating. In a comedy, for example, the humour may depend on words or phrases being used outside the legal context, but the fact that they are used at all may reveal facets of their legal meaning. In particular, they may assist in dating the introduction of the terminology into the law.

A particularly valuable source may be model forensic speeches such as those of the Greek Antiphon and Isaeus. These provide illustrations of legal rhetoric and so give information about forms of legal reasoning; they can also be a source of knowledge about substantive law. As with other sources, however, care is needed in their interpretation. We cannot simply assume that exercises in a school of rhetoric are necessarily wholly accurate reflections of genuine legal argument, either as to their form or as to their

substance. However, that said, in so far as their function depends on forensic plausibility they can hardly have strayed too far from reality.

Ritual Forms

Law is not merely about the resolution of disputes. It also has an important part to play in achieving results such as the transfer of property, the restructuring and creation of family relationships, the formalization of contracts or treaties. These may involve the use of ritualized forms of language, gesture or ceremonial, and where we have evidence of such rituals they can enable us to penetrate beneath the bare facts of the transactions themselves. They may carry on their face some meaning as well as the explicit legal one. If the same ritual is used to achieve what appear to be different ends, such as the adoption of a child and the transfer of property in early Roman law, it might reasonably be supposed that the transactions were (at least at some time) seen to be related to each other, and any common feature so identified may help to reveal something about the perceived nature of the transactions concerned. Some systems, such as that of ancient China, placed enormous reliance on correct ritual forms.

These ritual forms may be immensely conservative, and may continue to be used as ways of doing things and to employ language to describe what is being done long after those ways and that language have ceased to be current. On the one hand, this means that later evidence can sometimes be read back to a much earlier period, but on the other hand, it means that we cannot assume that the use of some ritual at a particular time should be interpreted in the way that it might have been in an earlier period.

A further feature of this type of evidence is that it may be provided in non-written forms. Rituals, because of the importance in them of visual elements, may be commemorated in painted or sculpted images; they may also create distinctive artefacts. It may, perhaps, enable us to draw links between different systems, and with cultures which have not themselves left any written evidence.

'Law' in Other Forms of Text

Finally, we may be able to find material of relevance to law in other forms of text: political, ethical, religious, works of grammar and lexicography, etc. Such texts may be especially valuable in revealing ways in which law split off from other forms of normative discourse. All such evidence, of course, needs to be carefully evaluated.

The Principal Legal Traditions: An Overview

The Ancient Near East

'Ancient Near Eastern Law' encompasses all of those legal systems of Mesopotamia, Anatolia, Egypt and Syro-Palestine between the middle of the third millennium BCE and the end of the fourth century BCE. Although each of these systems had an independent existence, there are sufficient similarities among them that they can fairly be treated as representative of a broadly unitary legal culture. Moreover, as well as jurisprudential similarities it is possible to find detailed parallels which point to direct borrowings between systems, as when identical clauses are found in contractual documents emanating from very different times and places.

Although a substantial amount of evidence survives, it is very patchy. Hence, even in Mesopotamia, whose baked clay tablets were very durable, there are a few periods about which we know a great deal and long periods about which we know very little: much depends on the chance of excavations. The Hittites, too, used clay tablets, but we know rather less about their law since practically all of our information comes from a single site in central Anatolia. Information about Egypt at this time is very sparse, and what we know about the law of the Hebrews is largely derived from the Hebrew Bible.

The most important surviving texts are 'law codes', i.e. unitary texts which deal with a variety of legal materials. In Mesopotamia these are represented by two relatively brief Sumerian texts, the earliest dating from around 2100 BCE, followed by the very substantial codes of Eshnunna and Hammurabi dating from 1770 and 1750 BCE, respectively. After this, we have the Middle Assyrian Laws (fourteenth century BCE) and the Neo-Babylonian Laws (seventh century BCE). The Anatolian Hittite Laws date from between the sixteenth and twelfth century, showing signs of development over this period, while the Hebrew Covenant and Deuteronomic Codes date from between 1000 and 600 BCE. Nothing comparable survives from Egypt. It is probable, though not undisputed, that these codes were designed to regulate individuals' behaviour and in all probability to provide a framework within which disputes could be resolved; whether disputes were in fact generally resolved by reference to them is unprovable, though we do find some explicit references to cases having been decided according to the words of a text, and provisions specifying that in some circumstance a person might exonerate himself by swearing an oath are focused more on the trial process than on the substantive rule of liability or norm of behaviour. It may be that some of the

codes, in particular the Babylonian ones, had a dual existence, beginning as bodies of rules regulating behaviour but then mutating into texts used as exercises in scribal schools, preserving the wording of the original codes at the same time as allowing the practical law to develop.

A common feature of the codes is their casuistic form, specifying what the result would (or should) be in a specific situation, as, for example, where the Hittite Laws deal successively with sexual activity with pigs, dogs, oxen, horses and so on; that said, there is occasional evidence of some generalization taking place, as where the circumstances which would mitigate liability for killing another person could be stated at an abstract level.

Alongside these codes, we find a handful of specific acts of legislation, the earliest being the twenty-sixth-century BCE Edict of the Sumerian King Irikagina, as well as occasional instructions to royal officials. Some records of trials survive, created either as records of decisions or as aides-mémoire of evidence, and glimpses of trial process can be caught from a small number of descriptions of trials, either genuine or hypothetical.

By far and away the largest amount of surviving material evidence is in the form of documents recording legal transactions of many different types. These presuppose legal ideas rather than stating them directly, though the sheer number of surviving texts makes it possible to get some sense of the fundamental ideas found in the different legal systems. More importantly, the mere fact of their existence in such quantities means that we can be reasonably sure that writing played an important part in these systems, though we cannot, of course, know how common were transactions which were not made or recorded by the use of writing.

Several features of the law of the Ancient Near East point to the existence of some form of intellectual tradition: the use of writing to record transactions only makes sense in a world in which the outcome of future disputes was to a substantial extent predictable; the use of the casuistic form in the codes presupposes a process whereby the proper result in a *casus omissus* could be found; the indications in some texts of a process of generalization of rules or adaptation of earlier forms to new circumstances indicate a degree of reflection on the relationship between legal forms and social rules; and structural parallels between legal texts and other forms of specialist literature suggest that there might have been some individuals who were regarded as having a special legal expertise. However, we do not have any evidence that these legal experts, assuming they existed, generated any form of literature of their own, identifying common abstract features lying behind apparently

disparate rules, drawing analogies between clear rules and ambiguous situations, or using any 'scientific' method to develop the law.

Similarly, although it is possible to see elements of secularization in the Ancient Near Eastern texts and in their legal processes, we should not be too quick to conclude that the law in these systems was divorced from religious values. This was clearly not the case with the Hebrew codes, and a millennium earlier the Babylonian Code of Hammurabi referred expressly to the divine origin of the text. It is probably better to see the law as a set of normative rules for behaviour existing against a background of religious beliefs and taking a good deal of their colour from them.

As the first five books of the Hebrew Bible (the Pentateuch) came to be treated as the actual words of God in orthodox Jewish thought, the Covenant and Deuteronomic Codes obtained something like statutory force. From around 70 CE they attracted substantial exegetical commentaries, *midrashim*, from rabbinic scholars. The biblical basis of these commentaries, and hence their religious nature, was transparent. By contrast, the Mishnah, a form of Jewish law perhaps with a primarily educational function, was not so explicitly tied to the biblical texts; it was intensively studied in Babylonian academies and attracted its own learned commentaries.

India

Historical sources in India date back to approximately 1200 BCE in the form of the Vedas, hymns and poems of praise to the deities of the Vedic pantheon, which shares figures with other Indo-European mythologies. Later texts, extensions of the early Vedic collections, focus primarily on the details of sacrificial rituals at the centre of religious life for Brahmins and kings of the Ārya communities of northern India. The final layer of the Vedic corpus, the Upaniṣads, was composed beginning in the sixth century BCE as philosophical and religious speculations on the inner nature of the ritual. Like the Upaniṣads, competing religious ideals focused on liberation from transmigratory bondage and contributed to the founding of both Buddhism and Jainism also in the fifth century BCE, the canonical sources for which claim contemporary antiquity. Along with archaeological evidence from early historic India, the Vedic corpus in Sanskrit and the suggestive canonical texts in Pāli (Buddhist) and Ardhamāgadhī (Jain) provide the basis for all that we know of India prior to the foundation of the first large political formation in Indian history, the Maurya dynasty, in c. 321 BCE; though the dating of individual texts is highly uncertain, some almost certainly dating to periods after the Mauryas.