

## FROM THE BANKS OF THE SEINE TO THE BAY OF CHESAPEAKE: CROSSGLANCES ON ANCIENT NEAR EASTERN LAW\*

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It is well known that historians are influenced by their own time and culture. We are all molded within the framework of our academic training and our education.

Raymond Westbrook and I are both jurists, but we learned law in countries with very different legal traditions, namely England and France. It seems to me that our differences on several subjects dealing with Assyriology might reflect, at least partially, our own cultural and legal backgrounds.

I wish to illustrate this intuition on the basis of a very bold and controversial article of Raymond Westbrook, entitled "The Nature and Origins of the Twelve Tables," published in 1988.<sup>1</sup> There, he took a position that opposed both legal historians of continental Europe, as to the legislative value of Mesopotamian codes, and scholars of Roman law, as to the interpretation of the law of the Twelve Tables.

I would like to address our contrasting opinions on these two complex issues, in order to show how stimulating Westbrook's work was in opening so many fruitful viewpoints. This paper was intended to open a dialogue with him, and like everybody here, I deeply regret that he cannot

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<sup>1</sup> R. Westbrook, "The Nature and Origins of the Twelve Tables," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 105 (1988): 73-121.



answer with the pertinent and refined arguments he was accustomed to present, always kindly but firmly.

I will investigate first the question of the nature of Mesopotamian law collections, and then turn to the law of the Twelve Tables.

# I. THE LEGISLATIVE VALUE OF MESOPOTAMIAN LEGAL COLLECTIONS

The first part of the article under discussion stresses the similarities between law collections and the various products of scientific activities in Mesopotamia (medicine, divination, astrology and so on). There is no doubt that the codes belong to this scientific tradition, as was already observed by F. R. Kraus,<sup>2</sup> B. Landsberger<sup>3</sup> and J. Bottéro.<sup>4</sup> All of them, including Westbrook, argued on this basis that the codes were not normative statutes.

I would raise three considerations against this view.

First, it is not surprising that science and law share common features. In many ancient and modern societies, both fields are very close. Such is the case, for instance, in Rome: classification of the various legal categories, the basis for many legal systems nowadays, was achieved thanks to the method used by Aristotle in his works about zoology or botany.<sup>5</sup>

Second, these similarities certainly point to a common training of scribes, as well as to the oral culture of Mesopotamian scholars. Casuistic style denotes a pragmatic science, which states general principles through narrow and specific formulations. It expresses the secondary value of written statements, in a civilization based on orality. C. Wilcke has shown that the formula "from this day on," which introduces the provisions of the codes, alludes to the proclamation of the laws, at

<sup>2</sup> F. R. Kraus, "Ein zentrales Problem des altmesopotamischen Rechtes: Was ist der Codex Hammu-rabi?" *Geneva NS* 8 (1960): 283-296.

<sup>3</sup> B. Landsberger, "Die babylonischen Termini für Gesetz und Recht," in *Symbolae ad iura orientis antiqui pertinentes Paulo Koschaker dedicatae* (T. Folkers et al., eds.; *Studia et documenta ad iura orientis antiqui pertinentia* 2; Leiden: Brill, 1939): 219-234.

<sup>4</sup> J. Bottéro, "Le 'Code' de Hammu-rabi," *Annali della Scuola Normale Superiore di Pisa* 12 (1982): 409-444. English edition: "The 'Code' of Hammurabi," in *Mesopotamia: Writing, Reasoning, and the Gods* (Z. Bahrani and M. Van De Mieroop, trans.; Chicago: Univ. of Chicago, 1992): 156-184.

<sup>5</sup> About the method of classification of Aristotle see A. Zucker, *Aristote et les classifications zoologiques* (Louvain-la-Neuve: Peeters, 2005). His notes on botany are lost but his pupil Theophrastus inherited his library and unpublished work and continued his master's work.



least on the day of their promulgation.<sup>6</sup> The laws of the codes were uttered, pronounced, in a very practical way because they were considered paradigms.

Third and most important, none of the peculiarities rightly observed in Westbrook's article and in others call into question the very nature of the law collections as statute law, because legislation is defined not by its form but by its origin. Statute law is the legal act issued by the authority that has the power to do so, namely, the king in the ancient Near East. This sounds tautological but it is not! This definition helps to distinguish statute law from other sources of law like judgments or customary law. In this definition, there is no need to consider the efficacy of the rule, nor its innovative purpose.

Westbrook's analysis of the Mesopotamian codes from this standpoint is also epistemologically interesting. He read the Code of Hammurabi as a jurist of common law and consequently he analysed its provisions as a collection of case-law designed to guide the judges in difficult cases. As is well known, the system of common law relies on the activity of the courts of justice, structured by the rule of precedent and by the concept of equity. The famous saying "remedies precede rights" summarizes the process of issuing law: it is the legal action before the judge that creates rights: no judge, no rights. Even though statutory law has developed from the nineteenth century on in England, the historical basis of the British legal system remains oral and judicial. England is not a country whose legal culture is based on written law.

All in all, approaching the Code of Hammurabi as a collection of royal judgments warranted by the equity of the ruler matches the British legal culture.

The interpretation of continental jurists, based on the Roman and German legal tradition, is quite different. In France, statute law has tended to cover the entire field of law for more than two centuries. It was venerated in an almost neurotic way during the Revolution, expressing victory over absolutism and warranting equality between citizens. This devotion increased during the nineteenth century so far as to become a kind of "fetishism" at the beginning of twentieth century. Statute law creates rights that the judge has to enforce, which is exactly the opposite of what happens in common law. To a French jurist, it seems difficult to figure out how the decision of a judge, who has no democratic legitimacy (because he is not elected), can become a rule of law as a precedent.

I understand the Code of Hammurabi against this background. The fact

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<sup>6</sup> C. Wilcke, "Der Kodex Urnamma (CU): Versuch einer Rekonstruktion," in *Riches Hidden in Secret Places: Ancient Near Eastern Studies in Memory of Thorkild Jacobsen* (T. Abusch, ed.; Winona Lake: Eisenbrauns, 2002): 291–333.



that Hammurabi calls his provisions “just judgments” (*dīnāt mīšarim*) at the beginning of the epilogue, means that statute law is based on the judicial activity of the king. Once reformulated by the academic lawyers of the palace, the judgment becomes a normative statute; it is neither better nor worse, just technically different.

The expression “just judgments” looks like a pleonasm: as a king, Hammurabi has the duty to protect the poor and the weak, and so he appears to be the judge *par excellence*. His decisions are normative because they have a general and impersonal impact. This point is made very clearly in a wonderful Old Babylonian letter from Sippar,<sup>7</sup> where Samsu-iluna gives a consultation to the judges of this town about two issues dealing with the *nadītum*-nuns. The questions are particular and give factual details, but the answers of the king are formulated as general rules. This legislative technique, called rescript,<sup>8</sup> using the Roman term, illuminates how judgments were transformed into statute law. The judicial pronouncement of the king has a universal scope in and of itself, unlike the verdict of an ordinary judge which applies only to the facts of the case.

It is therefore quite logical that a French jurist acknowledges the legislative nature of the Mesopotamian codes. It is equally logical, in the country of Napoleon and of the Code Civil, to deny the designation “code” for the law collections, because they are not exhaustive.

The Code of Hammurabi is not a code, but its content is statutory law. Now the special feature of these law collections is their subsidiarity, which means that local law takes precedence, except when one party or both refuse it and resort to national law.<sup>9</sup> This mechanism was first used in canon law during the Middle Ages in Europe, but was supplanted by the development of the legislative and centralizing tradition, aimed at building unity. Subsidiarity, on the contrary, means pluralism, which is at stake in the Mesopotamian legal system: the rulers maintained local, customary law as long as people were satisfied with it; but if somebody felt wronged, he could resort to royal legislation and neither the opposing party nor the judge would object to it. This is what Hammurabi means in

<sup>7</sup> C. Janssen, “Samsu-iluna and the Hungry *nadītums*,” *Northern Akkad Project Reports* 5 (1991): 3–39.

<sup>8</sup> S. Démare-Lafont, “Les actes législatifs des rois mésopotamiens,” in *Auctoritates Xenia R.C. van Caenegem oblata* (S. Dauchy et al., eds.; Iuris Scripta Historica XIII; Bruxelles: Koninklijke Academie voor wetenschappen, letteren en schone kunsten van België, 1997): 3–27.

<sup>9</sup> S. Démare-Lafont, “Codification et subsidiarité,” in *La codification des lois dans l'Antiquité* (E. Lévy, ed.; Travaux du Centre de Recherche sur le Proche-Orient et la Grèce antiques 16; Strasbourg: de Boccard, 2000): 49–64.



the epilogue of his code when he refers to the "wronged man" (*awilum hablum*) who has a lawsuit: he should come before the stela and read the solution of his case.<sup>10</sup>

Thus I would explain the minimal visibility of statute law in Mesopotamian legal life by this old European concept of subsidiarity, revived recently in European law. I would love to have learned Westbrook's opinion on this hypothesis, typically continental and perhaps whimsical to a British scholar.

I now address the second part of his article, dealing with the relationship between archaic Roman law and the legal collections of the ancient Near East.

## II. ARCHAIC ROMAN LAW AND THE MESOPOTAMIAN CODES

For scholars who specialize in Roman studies, the law of the Twelve Tables is a turning point. Yet there were statutory laws before the middle of the fifth century B.C.E., in Greece and in the ancient Near East. The question therefore is to decide whether they were independent developments or expressions of a common legal tradition. In other words, are the Twelve Tables the first step in a new legal process or the last example of oriental legal science?

This discussion is not new<sup>11</sup> and had strong political implications at the beginning of the twentieth century, when people wondered whether European civilization owed something to this fascinating and at the same time frightening Orient. Actually, the point was still a matter of debate recently in France, in the controversial notion of French identity, which the former president raised for political purposes.

But one should try to understand the subject from an historical point of view, as Westbrook did.

Dismissing the idea of a link between Rome and the ancient Near East on an *a priori* basis is absurd; but bringing evidence for the existence of such a link is another matter. Here again, the differences in legal cultures lead to different approaches to the subject.

In his article, Westbrook concludes that there was a continuity between oriental laws and the Twelve Tables, which for him belong to the same scientific tradition originating, in Mesopotamia and spreading through the rest of the ancient Near East.<sup>12</sup>

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<sup>10</sup> Ibid., 53–56.

<sup>11</sup> See the bibliography in Westbrook "Nature" (N 1): 78–80.

<sup>12</sup> Ibid., 119–120.



This diachronic approach provokes three methodological observations:

There is first the question of similarities between oriental and Roman archaic laws: casuistic style and common legal principles may be found in other legal sources, that have never been compared to ancient Near Eastern tradition. For instance, the salic law (*lex salica*) of the salian Franks, from the beginning of the sixth century C.E., is likewise written in a casuistic form, which seems to be the standard formulation for old German law.<sup>13</sup> Another example is provided by French customary law about abortion by battery: many collections record the local punishment for this offense, whose description and punishment are close to what we read in the Code of Hammurabi.<sup>14</sup> This means that the same problems receive the same legal solutions in various civilizations, at least when it comes to property and family law.

The second point concerns transmission of legal tradition from the Orient to Rome. Any connection between them is necessarily late, around the ninth–eighth century B.C.E. Now this is exactly the time when cuneiform culture is fading, replaced by alphabetic script and Aramaic language. This competition has probably affected the legal sphere. The collection of legal formulae *Ana ittišu*, written in Neo-Babylonian times, records obsolete contractual clauses, which were in use in Old Babylonian Nippur.<sup>15</sup> The academic tradition thus became ossified. What would be the purpose for transmitting a fossilized body of law?

The last problem is that comparing texts without their context might be misleading. We know very little about the motivations of oriental legislators, apart from stereotyped pronouncements about social justice. Why did some kings compose a law collection and not others? Political and ideological reasons are not always obvious. We have a body of laws but no indication of their historical background.

For the Twelve Tables, on the contrary, we have plenty of information about their political context but no direct evidence for the laws themselves, which have to be reconstructed from the quotations of classical Roman jurists, especially Gaius. Cicero says that law students at the end

<sup>13</sup> See the edition of K. A. Eckhardt, *Pactus legis salicae* (Leges nationum Germanicarum IV/2; Hannoverae: Impensis Bibliopolii Hahniani, 1962). For instance Title XXVIII §§4–5: “If someone strikes a pregnant woman and she dies: 28000 *denarius* which makes 700 *solidi*. If the child dies in the belly of its mother: 8000 *denarius* [more] (200 *solidi*).”

<sup>14</sup> See for instance the customary law for the area of Angers (West of France, thirteenth century C.E.), as in P. Viollet, ed., *Etablissements de Saint Louis* (Paris: Renouard, 1881): 241–242.

<sup>15</sup> Edition by B. Landsberger, *Die Serie Ana ittišu* (MSL 1; Rome: PBI, 1937).



of the Republic learned the Twelve Tables by heart.<sup>16</sup> If this text was such an important reference for classical Roman jurists, that is certainly because it represented a major stage in the development of Roman Law. Until 450 B.C.E., law (*ius*) arose from judgment. Only the consul was able to render justice on the basis of his *imperium*. The creation of a right depended on this discretionary power, which allowed him to turn a fact into a legal act. With the publication of the Twelve Tables, it is the *lex*, the statute law, which becomes the only source of law. The goal of the decemvirs was to create a law prior to the initiative of the magistrate, in other words, a compelling law. This domination of statute law over the *imperium* of the consuls lasted two centuries; then another magistrate, the *praetor*, broke the monopoly of legislation and restored the creative power of the *imperium*.<sup>17</sup>

So I read the Twelve Tables as the product of Roman history, while Westbrook linked them to the body of ancient Near Eastern legal tradition.

Both of these opposing analyses are based on a comparative method. But where Westbrook favored a diachronic approach, I prefer a synchronic one: the similarities between oriental and archaic Roman laws reflect paradigms of interpretation rather than cultural transmissions. The academic comparativism of continental jurists contrasts with the practical comparativism of Common-law jurists. The former have a positivist attitude while the latter are more concerned with pragmatism.

Just as Westbrook suspected the classical Roman jurists of imposing their legal culture on archaic law, current-day jurists read the ancient Near Eastern texts with reference to their own legal culture. I am sure that Westbrook would have found new ideas to enrich the discussion. It is a pity that I must have the last word.

<sup>16</sup> *De Legibus* II, 23, 59: *Discebamus enim pueri XII ut carmen necessarium, quas iam nemo discit.*

<sup>17</sup> M. Humbert, "La codificazione decemvirale: tentativo d'interpretazione," in *Le Dodici Tavole. Dai Decemviri agli Umanisti* (M. Humbert, ed.; Pavia: IUSS, 2005): 3–50.