Course Reading

Westbrook, Raymond. “Introduction: The Character of Ancient Near Eastern Law.” In *A History of Ancient Near Eastern Law*, edited by Raymond Westbrook, 1-90 (selection: 35-44). Leiden; Boston: Brill, 2003.

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3.2.5.4.1 The first type of oath is almost universal in its application. It invokes the name of a god and is taken at the temple or before a symbol of the god. It is imposed by the court upon one of the parties only, and/or his witnesses. The oath is deemed irrefutable proof, so much so that records of litigation often end with the court's decision to send a party or witnesses to the oath. The theory was that fear of divine retribution would constrain the oath-taker to speak the truth. (If later uncovered, a false oath could also lead to punishment by the court.) Indeed, so great was the fear in practice that persons sometimes refused to take the oath, or the parties reached a compromise rather than proceed with the oath. In earlier records, particularly from the Neo-Sumerian period, much of the court's adjudication is directed toward deciding on which side to impose the oath. It should be noted, however, that by the Neo-Babylonian period the courts, even the temple courts, seem to show a marked reluctance to proceed beyond rational evidence.

3.2.5.4.2 The second type of declaratory oath is much less common. It is an oath taken at the litigant's initiative during the trial, usually invoking the king only. Apparently, it could be taken by both parties. Its function is not altogether clear; it was not decisive proof but may have been persuasive evidence. It may also have indicated a preliminary to the ordeal.

3.2.5.5 *Ordeal*[27]

The ordeal was not so much a means of giving evidence as a referral of the issue to a higher court—that of the gods. Clear examples are found only in Mesopotamia and Anatolia, where it took the form of a river ordeal, the river being conceived of as a divinity. The trial could involve one or both parties. The mechanics are not well documented, but it seems that ordeals were carefully monitored and could involve swimming or carrying an object in water a certain distance. At Mari, the use of substitutes for the parties is attested. Drowning indicated guilt, but the unsuccessful subject could be rescued prior thereto and punished. The issue need not be criminal; already in the third millennium, disputes over property could be settled by ordeal.

[27] Frymer-Kensky, The Judicial Ordeal . . .; Durand, "L'ordalie."

3.2.5.6 *Oracle*

The oracle was a divinatory procedure, a means of consulting a god on a specific question—in principle, one that could be answered yes or no. It could thus be used in non-judicial contexts as well as trials. Oracular procedures to decide judicial matters are attested for certain only in Egypt and Israel. In Egypt, it involved interpreting the movements of an image of the god carried on a litter; in Israel, the casting of lots.

3.2.5.7 *Presumptions*

The court might avoid resort to supra-rational procedures by use of evidentiary presumptions. A number are found in the law codes: a buyer is presumed a thief if he cannot identify the seller (LE 40); a woman is presumed to have consented to intercourse in the city (because she could have cried out) but not in the country (HL 197; Deut. 22:23–25); a baby is presumed abandoned, not lost, if it has not been cleaned of amniotic fluid (LH 185).

4. Personal Status

The first historian of ancient law, Sir Henry Maine, observed that the progress of law "has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place."[28] In his celebrated dictum, it was "a movement *from Status to Contract.*"[29] The notion of such a movement is not borne out by the evidence from the ancient Near East, where a dense network of contracts between individuals existed alongside status, some even impinging upon the rules of status (as in marriage and adoption) in a way that would be unacceptable to modern systems. Nonetheless, Maine's observation contains a profound insight: in ancient law, the role of status was altogether more important and far-reaching in its consequences.

The societies of the ancient Near East were strongly hierarchical in structure, with little social mobility. The place of an individual in the hierarchy determined his legal rights and duties not only with

[28] Maine, *Ancient Law* . . ., 163.
[29] Ibid., 165.

respect to public and family law but also in areas that modern law would regard as incongruous, such as contract and criminal law.

The basic unit of society was the household. Ideally, it comprised an extended family that could cover three generations and additional dependants, such as slaves, apprentices, and persons in debt bondage, although in practice it might exist with only fragments of these components. The head of household was typically the father (a household is often called "house of the father"), but again there were many variations according to circumstances. The head of household himself might be ranked by class, feudal tenure, or profession.

Society was in some sense a coalition of households, but it would be a mistake to apply the analogy of international law and to regard the household as replacing the individual, as Maine and many others have.[30] Nor is the image of a paterfamilias with arbitrary power of life and death over his family at all appropriate. The walls of the household were not, legally speaking, impermeable. The law applied to individuals; it regulated inner-household relations as well as relations between heads of household. What the hierarchy within the household meant was that the head of household could to some extent use the subordinate members of household, even the free ones, as the objects of legal transactions. He could certainly enter into legal obligations on their behalf. By the same token, the subordinate members had limited legal capacity when acting on their own behalf but could, as agents, create rights and duties in the head of household. They might also suffer the consequences of his criminal acts, through the doctrines of vicarious and collective liability (see 8 below).

4.1 *Citizenship*

4.1.1 There was a definite notion of belonging to a political unit, which, if not having the clear-cut contours of citizenship in the modern sense, was associated with privileges and duties, and attended by legal consequences. It was expressed from two perspectives: a broad and a narrow concept of citizenship. Where monarchy was

[30] "Ancient jurisprudence, if a perhaps deceptive comparison may be employed, may be likened to International Law, filling nothing, as it were, except the interstices between the great groups which are the atoms of society. In a community so situated, the legislation of assemblies and the jurisdiction of Courts reach only to the heads of families, and to every other individual the rule of conduct is the law of his home, of which his Parent is the legislator" (ibid., 161).

the constitutional form, citizenship in the broad sense meant being a subject of the ruler. The subjects of rulers were called their "slaves," even when they were personally free. Within this broad perspective, a narrower definition was that of freeborn native, as opposed to foreigner. The native population was described in two ways:

1. by place of birth, for example, "son of Idamaraz," "daughter of Ugarit," "sons of the land," or as an abstract, for example, "Hanigalbatship";
2. by ethnicon, for example, "Akkadian," "Amorite," "Assyrian" or "Assyrianess," "Hebrew," or "son of X" (a tribal ancestor).

The importance of the distinction is that freeborn natives had citizenship by right (and did not lose it merely by the fact of being enslaved). Foreigners, chattel slaves, and others lacking citizenship by right could acquire it by the king's discretionary power. In theory, they could be included simply by virtue of becoming a subject of the ruler. The ruler, however, might choose to assimilate them artificially into the category of freeborn natives, for example, by granting "Hanigalbatship." Private arrangements could also lead to inclusion in an ethnic group, through marriage or adoption. They were thus indirect means of acquiring citizenship.

4.1.2 The difference between the "native" and "subject" perspectives is illustrated by the contrast in the practice of imperial Persia and Deuteronomic Israel. In the latter, citizenship was strictly on an ethnic basis, with foreign residents being given a separate status, albeit with limited possibilities of acquiring citizenship by ethnic assimilation, for example, by marriage. By contrast, in the Persian garrison of Elephantine in Egypt, Jews, Aramaeans, Khwarezmians, and other ethnic groups were all regarded as subjects of the Persian emperor and, as such, on an equal footing with the native Egyptians.

4.1.3 A non-citizen had no protection under the local law, except insofar that as a foreign citizen of a friendly state, he was protected by the rules of international law. A citizen, by contrast, was entitled in theory to expect protection under the law and the respect of his legal rights even by his monarch. A ruler could grant special protection to resident aliens (Akk. *ubaru/ubru*; Heb. *ger*). Once granted resident status, foreigners appear to have had equal access to the local courts. Separate courts for foreigners were a Hellenistic innovation, as with the separate Greek and Demotic courts in Egypt.

The Old Assyrian trading colonies in Anatolia were a special case in that they obtained extra-territorial status, including the right to constitute their own courts, through treaties made with local rulers. Native Anatolians, it should be noted, had access to the Assyrian courts in their disputes with Assyrian merchants.

4.1.4 There are very few legal rules recorded that distinguished between citizens and non-citizens. The most important were provisions for the relief of debt and debt slavery, and for the protection of debt slaves or pledges from further abuse. These social justice measures, found in a number of systems, often limited their benefits exclusively to citizens. Another possible area of distinction was in landholding. In some systems there are indications that foreigners needed permission of the ruling authorities in order to acquire landed estates. Thus in Genesis 23 Abraham as a resident alien in Hebron seeks the intermediary of the city council in order to purchase land from an individual. The king at Ugarit makes a royal land grant to a beneficiary designated as an Egyptian (RS 16.136).

4.2 *Class*

4.2.1 Laws did not generally distinguish between social classes. A notable exception is LH, in which a distinction is sometimes made between a gentleman (*awīlum*) and a commoner (*muškēnum*). In particular, the penalties for physical injury differed according to the respective class of the victim and the perpetrator.

4.2.2 In many periods we encounter "serfs," persons somehow tied to the land and owing loyalty to the landowner. There are cases, as in Middle Assyrian documents, where serfs pass with ownership of the land. The sources do not provide any other information as to their legal status.

4.3 *Gender*[31]

As far as the legal systems were concerned, the archetypal "person" was a male head of household. Women as a class had no special

[31] Lafont, *Femmes* . . .; essays in Matthews, ed., *Gender and Law* . . .; Johnson, "Status of Women . . ."; Müller, *Stellung der Frau* . . . (bibliography).

status in the law; rather, all subordinate members of a household, whether wives or male or female children, had more limited rights and duties. Legal capacity was therefore more a function of one's position in the household than of one's gender or age, and the patriarchal household was by no means the sole configuration possible. A household might be headed by a widow or divorcée, either alone or together with her adult sons, or brothers might together form a joint household, or a single person, male or female, might be entirely independent.

4.3.1 In theory, women had the legal capacity to own property, make contracts, litigate, and give evidence in court. In practice, they were restricted in these activities by their status as daughter or wife. Married women did act on their own account but more frequently together with or on behalf of their husbands. Examples of independent action tend to be confined to widows, divorcées, or members of the few professions open to women: priestess, prostitute, wetnurse, or taverness. Documents from Syria in the late second millennium recognize the normal disadvantage of women when applying legal fictions such as "father and mother" to a widow in order to strengthen her legal position.

4.3.2 The one area of law from which women appear to have been excluded on principle was the public sphere. Women are almost entirely absent from public office. The only public positions reserved for women were queen, queen mother, and priestess. With rare exceptions, women are not found as witnesses to contracts.

4.4 *Age*

The legal sources give no clear age of majority. MAL (A 43) mentions the age of ten for a boy, but for special purposes. Individual puberty was probably a common measure of adulthood. Although a child, especially a male child, took on more legal responsibilities with age, a legal age of majority was less important than in modern law. The vital question of whether a person was independent or a subordinate member of household did not depend on biological age. A grown man remained the son of a man in status as long as his father remained head of household, namely, until the father's death or division of his estate inter vivos. A woman remained the daughter of a

man until she married, when she assumed the status of wife of a man. If the man she married was still the son of a man, then her primary status would be that of daughter-in-law. Only where a mother was head of household did her position cease when her children came of age.

4.5 *Slavery*[32]

4.5.1 *Definition*

Freedom in the ancient Near East was a relative, not an absolute state, as the ambiguity of the term for "slave" in all the region's languages illustrates. "Slave" could be used to refer to a subordinate in the social ladder. Thus the subjects of a king were called his "slaves," even though they were free citizens. The king himself, if a vassal, was the "slave" of his emperor; kings, emperors, and commoners alike were "slaves" of the gods. Even a social inferior, when addressing a social superior, referred to himself out of politeness as "your slave." There were, moreover, a plethora of servile conditions that were not regarded as slavery, such as son, daughter, wife, serf, or human pledge.

A better criterion for a legal definition of slavery is its property aspect, since persons were recognized as a category of property that might be owned by private individuals. A slave was therefore a person to whom the law of property applied rather than family or contract law. Even this definition is not wholly exclusive, since family and contract law occasionally intruded upon the rules of ownership. Furthermore, the relationship between master and slave was subject to legal restrictions based on the humanity of the slave and concerns of social justice.

4.5.2 *Property Law*

Slaves could be purchased, inherited, hired and pledged like any other property. The purchaser of a slave had remedies for hidden defects—medical (e.g., epilepsy), moral (e.g., tendency to run away), or legal (defective title). Slaves, being owned, could not own property themselves (but could hold a *peculium*: see 4.5.4 below). The

[32] Chirichigno, Debt-Slavery . . .; Westbrook, "Slave and Master . . ." and "The Female Slave."

property aspect of slavery is most in evidence in laws protecting the owner's rights against third parties. Causing the death of or injury to a slave gave its owner a right to compensation as for loss of or damage to an economic asset, no different than for an ox. The same applied to the defloration of another's slave woman, which was treated as an economic rather than a sexual offense.

4.5.3 *Servile Conditions*

4.5.3.1 *Pledges*

At first sight, the situation of a free person given in pledge to a creditor was identical to slavery: the pledge lost his personal freedom and was required to serve the creditor, who exploited the pledge's labor. Nonetheless, the relationship between pledge and pledge holder remained one of contract, not property. Since the creditor did not own the pledge, he could not alienate him, nor did property of the pledge automatically vest in the creditor. It was in the nature of a pledge that it could be redeemed by payment of the debt, at which point the human pledge would go free. During the period of his service, failure by the pledge to fulfill his duties led to contractual penalties, not punishment under the general disciplinary powers of a master.

4.5.3.2 *Family*

Native terminology did not distinguish between "master" and "owner"; a husband was sometimes called the "owner" of his wife (and a king the "owner" of his subjects). Indeed, many of a husband's powers over his wife and children overlapped with ownership: he could sell them into slavery (but apparently only under economic duress), pledge them for debt, and discipline them. Nonetheless, a wife or son sold into slavery retained their original status and received some protection from it. Apart from this extreme case, a wife could own property independently (including slaves), and a son had a vested right to inherit his father's estate that could only be taken away for cause. Wives and children were heirs, not the object of inheritance. Causing death or injury to a wife or child or committing a sexual offense against a wife or daughter gave rise to different rights in the head of household, rights that were more than mere compensation for economic loss (see 8 below).

4.5.4 *Contract*

As with other conditions of status, slavery was frequently accompanied by ancillary contracts. When persons sold themselves or members of their family into slavery, contractual terms might be added to alter the conditions of service and of release. Those terms could considerably improve the lot of the slave or make it harsher.

A slave could act as agent for his master. In this capacity, he could make contracts with free persons and litigate. He could also manage property on his own behalf, in the form of a *peculium* given him by his master.

4.5.5 *Humanity and Social Justice*

In determining who should benefit from their intervention, the legal systems drew two important distinctions: between debt and chattel slaves, and between native and foreign slaves. The authorities intervened first and foremost to protect the former category of each—citizens who had fallen on hard times and had been forced into slavery by debt or famine. The tendency was to assimilate them for these purposes into the class of pledges, that is, persons whose labor might be exploited under a contractual arrangement but who remained personally free in terms of status. At the other end of the scale, foreigners who had been acquired by capture, purchase abroad, or some such means received little succor from the local legal system. The benefits of the law related to enslavement, length of service and conditions of service.

4.5.5.1 *Enslavement*

A citizen could not be enslaved against his will if independent or without the permission of the person under whose authority he was if a subordinate member of a household. The only exception was enslavement by court order for commission of a crime or civil wrong. Although in practice economic circumstances would often force a person into slavery, in law his act was, strictly speaking, voluntary. The foreigner, by contrast, could be enslaved through capture in war, kidnapping, or force, unless protected by the local ruler or given resident alien status. In the latter case, protection still might only be partial. As a proverb puts it: "A resident alien in another city is a slave."

4.5.5.2 *Length of service*

Three means were available for the debt-slave to gain his freedom:

1. Through redemption, that is, payment of the original debt. Where found, this appears to have been a legal right, which attached to the slave, binding subsequent purchasers. It vested in both the slave himself and in close relatives, and possibly also the king.
2. Through manumission after a period of service. The law codes where this means is attested set different periods of service, one as short as three years, which, if it had applied automatically, would have made all other measures superfluous. Probably it was not a right like redemption, but a discretion of the authorities to intervene in individual cases and free a debt slave after a reasonable length of service in relation to his debt. The fixed periods in the codes would be attempts to set a "fair" standard.
3. Through release under a general cancellation of debts. This was the most radical measure but was unpredictable, being entirely dependent on the king's equitable discretion (except in the Bible, where it is stipulated every seventh and fiftieth year). It was confined to native debt slaves.

4.5.5.3 *Conditions*

The slave was protected against three forms of maltreatment:

1. Excessive physical punishment. Even chattel slaves appear to have benefited to some extent from this protection.
2. Sexual abuse. Sexual intercourse with a woman amounted to an offense in the ancient Near East when it was an infringement of the rights of the person under whose authority she was, for example her father or her husband. Ownership of a chattel slave eliminated that authority but not entirely so in the case of a debt slave.
3. Sale abroad. Only native debt slaves were protected by this prohibition, which must in any case have been difficult to enforce in practice.

4.5.6 *Family Law*

A natural conflict existed between family law, which applied to slaves as persons, and property law, which applied to slaves as chattels. Sometimes the one institution prevailed, sometimes the other, and sometimes the rules represented a compromise between the two.

4.5.6.1 The marriage of slaves was recognized as legitimate, whether with other slaves or with free persons. Although their different rules led to conflicts, marriage and slavery were not legally incompatible. The slave's legal personality was expressly said to be split: "to X she

is a wife; to Y she is a slave." (The one exception was that a person could not be both spouse and owner of the same slave.) Where a slave owned by a third party was married to a free person, married status provided some protection against the owner's property rights. For example, LH 175–76 rule that the offspring of the marriage remain free, although this principle was often overridden by contractual clauses (cf. LU 5). Where a married couple were enslaved for debt, they would be released together, but if the master had given the slave a female slave of his own as wife, property law prevailed and he would have to leave without her (Exod. 21:2–6; LU 4).

4.5.6.2 Since a female slave was property, her owner could exploit her sexuality and her fertility like any other beneficial aspect of property. She could thus be made her owner's concubine. Where concubinage resulted in motherhood, the slave might be accorded some qualified protection from the consequences of her status as property. She and her offspring might even gain their freedom on the death of the master/father (LH 171). The intention appears to have been to accord the slave concubine some of the rights of a married woman, not including, the sources emphasize, the right of inheritance for her children.

5. Family Law

5.1 *Marriage*

Marriage was a private arrangement, involving neither public nor religious authorities. Intermarriage between different societies and cultures was not seen as anything out of the ordinary. It is not until the Persian period that the question of a religious or ethnic bar on intermarriage is raised in certain Biblical texts. A man could marry more than one wife, but in practice the incidence of polygamy (strictly speaking, polygyny) varied greatly between cultures. Slaves could make a valid marriage, either to another slave or to a free person.

5.1.1 *Formation*

There were at least three possible stages in the formation of marriage:

1. An agreement between the person(s) under whose authority the bride was (i.e., parent or guardian) and the groom (or his father, if the groom was still young). The bride was the object of this agreement, the purpose of which was her release from the authority of the former into that of the latter. If the bride was independent, for example, a divorcée or a widow, she could contract on her own behalf. Provisions in several law codes declare a formal contract between the parties a necessary condition to the validity of the marriage (LE 27; LH 128).
2. Betrothal, indicated by payment of the "bride-price," an amount usually in silver or other metals, which had perhaps been settled in the preceding agreement. The consequence of the "bride-price" was to create what has been called "inchoate marriage": the couple were deemed married as far as outsiders are concerned, but the arrangement was still subject to rescission by the parties to the contract. The nature of the "bride-price" has been much debated. It is intimately linked to the nature of marriage itself, which will be discussed below. As well as initiating betrothal, the "bride-price" acted as a measure of damages (*in simplum* or in multiples) for breach of betrothal, and, in some systems, for divorce without cause. At the end of our period, in Demotic and subsequent rabbinic law, this last function takes over entirely: the bride-price is transmuted into a fictional payment, becoming in effect agreed damages payable to the bride if the husband should divorce her.
3. Completion, the point at which the bride passed *de facto* into her husband's authority. The ancient sources are remarkably reticent on the subject of what is regarded in modern cultures as the most important stage—the wedding itself—perhaps because of the prominence of betrothal in establishing the legal context. There were, it seems, religious ceremonies and elaborate celebrations, but they were not legally dispositive. It would seem that there were several alternative ways of completing marriage, according to the different circumstances of the parties:

   (a) by a speech act, such as is recorded in a marriage contract from Elephantine: "She is my wife and I am her husband from this day (and) forever" (*EPE* B28:4; cf. MAL A 41).
   (b) by entry into the husband's house, as is mentioned in Demotic marriage contracts. In LH 151–52, entry is significant as the point at which a wife becomes liable for her husband's debts. A widow is often referred to as entering the house of her second husband. A wife could, however, continue to live in her father's house, being visited by her husband occasionally (MAL A 32–34, 38).
   (c) by consummation. LH 155–56 marks consummation as the point at which marriage is complete also as regards the contracting parties, but in special circumstances: the bride had moved into her father-in-law's house already on betrothal (and evidently before puberty).
   (d) by cohabitation for a minimum period (LE 27; MAL A 34). For a widow, this can repair the lack of a formal contract (MAL A 34).