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Why the rule of law? A historical perspective

Fernanda Pirie *

Why do we expect law to bring about better and more just societies? Around the world, systems of accountability are weak and dictators find ways to avoid the constraints of both national and international laws. Yet we continue to call for better laws and for aggressors to be tried for war crimes. This article brings a historical approach to this puzzle, considering some of the earliest known laws, from Mesopotamia, Rome, the Hindu and Islamic worlds and China. Drawing analogies with anthropological analysis of ritual, I suggest that such laws may portray an imagined world, one that people feel it worth invoking in the face of threats to the social order, uncontrolled aggression and the abuse of power. The paradox is that we believe in the rule of law and that we insist it should constrain power in practical and effective ways to be worth creating at all.

Keywords: rule of law; ritual; ancient law; anthropology

I. Introduction

The basic idea of the rule of law is that those who exercise political power should act according to the law.[1] In practice, if laws are to act as a check on the exercise of arbitrary power there must also be an 'ethos' of accountability. As Gerald Postema puts it, suitable laws and standards must be promulgated, publicised and accepted, and the powerful must actually be subject to effective judgement and sanctions.[2] Viewed against these criteria, many laws fail to meet their objectives. Around the world, systems of accountability have proven weak and dictators regularly find ways to avoid the constraints of both national and international laws. Attempts to promote the rule of law, not least in the 'law and development' movement, have largely foundered: as Martin Krygier

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[1]This is the rule of law in a formalist sense. Brian Z Tamanaha offers a useful historical account although he does not go back in history beyond classical Athens: Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) ch 1.

[2]Gerald Postema, 'Law's Ethos: Reflections on a Public Practice of Illegality' (2010) 90 *Boston U L Rev* 1847.

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comments, little has been achieved from the billions spent to promote the rule of law worldwide.[3]

So why do we continue to place faith in the rule of law to bring about better and more just societies? This is not a new phenomenon. Many of the earliest codes of law, formulated over 4,000 years ago, ostensibly sought to constrain the powerful. As I describe in this article, laws written in Mesopotamia were presented as explicit standards against which rulers ought to be held to account and since then, kings, religious lawmakers and citizens' assemblies have all created laws that could, at least in principle, have placed limits on the exercise of political and judicial power. The jurist Hersch Lauterpacht argued for enhanced international laws, even as German bombs were raining down on London; early in the Russian invasion of Ukraine in 2022 commentators began calling for Vladimir Putin to be tried for war crimes; and in 2024 the prosecutor at the International Criminal Court applied for an arrest warrant for Israeli Prime Minister Benjamin Netanyahu.

If the despotic and ruthless continue to defy such laws, waging murderous wars, expropriating citizens' resources and failing to guarantee justice to their citizens, why do, and should, we believe in the rule of law? Maybe an even more interesting question is the opposite one: why should we expect an ethos, let alone systems, of accountability to accompany the laws that tell the powerful how to behave? Why are we disappointed when laws do not, in fact, constrain our rulers? Maybe to assume that they should, that laws were always or ever supposed to be enforced on the most powerful, is to approach the rule of law in the wrong way. What if we accepted that at least some of these laws were only ever supposed to make clear how the powerful ought to act, not actually to constrain them?

It is generally agreed that a well-functioning modern state should support an independent judiciary and institutions that can ensure its judgments are enforced so that governments are held to account. But there is a danger that we project the ideals of the modern state onto all times and contexts. Other societies had different ideas of accountability: divine intervention, contracts between ruler and ruled or simply the ability of priests or ordinary citizens to articulate a set of explicit moral standards against which the ruler's activities could be judged. Maybe at least some of the standards expressed as laws were supposed to guide rulers who wanted to act well, rather than to constrain those who were determined to act badly. Can this explain the apparent paradox that we still seem to believe in the rule of law despite all the evidence to the contrary? Maybe, implicitly, we actually expect different things from our laws.

In this article I take a historical, comparative and anthropological approach to these questions. I examine some of the laws that people have made in very different eras and contexts and ask what people may have expected of them. Ultimately, I suggest that the anthropological analysis of ritual may offer a useful approach to

[3]Martin Krygier, 'Why Rule of Law Promotion is Too Important to be Left to Lawyers' in Raimond Gaita and Gerry Simpson (eds), *Who's Afraid of International Law?* (Monash University Publishing 2017) 147–76, 133–34.

understanding why we have historically addressed the problem of arbitrary power through the formulation of laws.[4]

II. Law and the subjunctive

Many laws, not least modern human rights standards, envisage a society guided by higher moral and social principles. So did many ancient laws, most obviously systems with religious aims. Although it may not have been expressed in exactly these terms, the idea of the rule of law was implicit in such contexts. But we need to take care to distinguish the idea that laws should guide the ruler from the idea that he or she should be held to account according to such laws. It seems unlikely that the authors – and those who preserved, collated and disseminated them – really believed that their rules would be enforced, given the absence of institutions for enforcement. So what were these laws supposed to achieve? Many, as I seek to show in this article, seem to have been more like attempts to present an ideal, and effectively unachievable, vision for a just and ordered society.

The question is why this might have seemed worth the effort. Why should anyone make laws without much hope of enforcement or practical measures of accountability? Adam Seligman and others ask similar questions of the performance of ritual. The anthropologist Jonathan Z Smith had described the ritual that preceded the bear hunt performed by circumpolar hunters. It seemed to represent an ideal event in which a polar bear submitted willingly to its fate.[5] But, as Smith pointed out, no one could have thought this would actually happen, nor that the ritual would make it more likely. The performance was not thought or intended to have practical consequences. Yet, Smith had concluded, it was significant for what it represented, the vision of a successful event that it invoked. As Seligman and others explain, many rituals, from elaborate religious ceremonies to mundane performances, create an imagined world, a 'subjunctive' state of affairs, as they put it.[6] This world is necessarily in tension with lived reality. Yet a ritual may have meaning and importance precisely in the gap between what it represents and the world that everyone knows they live in. Even daily greetings, Seligman and others suggest, can be understood as rituals, ones that invoke a subjunctive world.[7] By asking if someone 'would like' or 'could' do something when we are, in fact, telling them to do so, we invoke the idea that they have agency to refuse. It is a marker of respect, if not a reflection of the social reality.

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[4]For the sake of brevity, here and in what follows, I use 'laws' to refer to those that ostensibly provide standards for the conduct of those in power. Many other laws, of course, have different objectives.

[5]Jonathan Z Smith, *Imagining Religion: From Babylon to Jonestown* (University of Chicago Press 1982) 61–65.

[6]Adam B Seligman and others, *Ritual and its Consequences: An Essay on the Limits of Sincerity* (OUP 2008) 26–27, 31.

[7]*Ibid*, 21–23.

Seligman and others conclude that it is a mistake to approach these, or any, rituals too literally, to assume that they create detailed maps for how the world actually could and should be. We cannot be too 'sincere' in our reading of ritual texts and performances.[8] At the same time, it is not meaningless to perform a ritual without sincerity, to act out performances of politeness to those we may not like or respect or to participate in the bear hunt ritual without expecting success in the ensuing chase. Such rituals are still doing important work in evoking an ideal world, allowing us to live together and offering patterns with which to make sense of lived reality.

We might, I would suggest, understand the promulgation of many laws, including those that are supposed to guide the actions of the most powerful, in a similar way. They may be symbolic as much as practical. Laws can legitimate the exercise of autocratic power – they 'launder brute power in a wash of legitimacy', to use the Comaroffs' memorable phrase.[9] But we should resist the temptation to be wholly cynical about their symbolic effects. Laws that seek to constrain political power may also represent an ordered world in a more positive way: they may promise answers to the problems of disorder and the arbitrary exercise of power; and, by creating a shared vision, they may make it easier for people to articulate their hopes and dissatisfactions with the exercise of power, something that can be of value in and of itself. This may explain why, in the face of despotism and war crimes, the idea of the rule of law seems more important than ever. In the following sections I turn to some of the earliest examples of law-making to explore these ideas.

III. Mesopotamia

The earliest known laws were made by Mesopotamians in the third millennium BCE.[10] In around 2112, Ur-Nammu seized power in the city of Ur and, as then expected of new rulers, he declared that he would be a just king and intercede with the gods for the benefit of his people. He established new systems of taxation and government. He also made a grand statement, which his scribes recorded on clay tablets, in which he claimed that he was delivering justice to rich and poor alike, so as to eliminate 'enmity, violence and cries for justice'.[11]

Ur-Nammu followed this statement with a set of written laws, the oldest to survive from anywhere in the world. They direct punishment or compensation

[8] *Ibid*, 8.

[9] John L Comaroff and Jean Comaroff, 'Law and Disorder in the Postcolony: an Introduction' in Jean Comaroff and John L Comaroff (eds), *Law and Disorder in the Postcolony* (University of Chicago Press 2006) 1.

[10] For background context see Amanda H Podamy, *The Ancient Near East: A Very Short Introduction* (OUP 2014); Jerrold S Cooper, *Sumerian and Akkadian Royal Inscriptions Vol 1* (Brill 1986).

[11] His inscription and laws are reproduced and translated by Martha Roth, *Law Collections from Mesopotamia and Asia Minor* (Scholars Press 1995) 13–22. It is possible that his laws followed earlier, now lost, precedents.

for murder, injury, false imprisonment and sexual offences; they specify what should happen to slaves who have relations with their owners; and there are rules for divorce and marriage, oaths and accusations and agricultural disputes. The rules take a casuistic form (if … then …): 'if a man (wrongfully) detains another he shall be imprisoned and he shall weigh and deliver fifteen shekels of silver'.[12] Ur-Nammu was making a public statement about how justice should be meted out. He clearly felt that such a statement was needed in order to secure his legitimacy as an invading conqueror. And if the rules became widely known, read out to others by the literate, as seems to have been the intention, then ordinary people would have been able to quote them in cases of dispute, including against those richer and more powerful. We know very little about how these rather basic laws were ever put into practice or even how widely they were known – among the fragmentary records of legal cases, there are no references to the laws – but the ruler was promising that his officials would act justly.[13]

Ur-Nammu was not, then, establishing the rule of law, that his rules would constrain his own power or that of his successors. But evidence of this idea emerges not much later. Over the following centuries other Mesopotamian rulers followed Ur-Nammu's example and ordered their own legal codes. In around 1930 BCE, Lipit-Ishtar made more detailed laws on similar subjects and, in an epilogue, invoked blessings on future kings who honoured his laws.[14] The laws were intended to outlive his own reign and by invoking the gods, it seems, Lipit-Ishtar was suggesting that his laws should actually constrain later rulers.

A similar purpose was made clear in the much longer set of laws commissioned by Hammurabi, king of Babylon, some 200 years later. Hammurabi spent most of his reign waging war, largely successfully, against the armies of rival rulers, besieging their cities and enslaving their populations. But towards the end of his life, Hammurabi turned to his own city, adorning Babylon with elaborate palaces and splendid temples and creating laws that would, he declared, ensure justice in the region for generations to come.[15] In a prologue to his laws, which he had inscribed on tall stones and erected around his territories, Hammurabi presented himself as a divinely inspired ruler, whose military successes were due to the favour of the gods.[16] He described how he had provided for his people

[12] *Ibid*, 17.
[13] *Ibid*, 5.
[14] *Ibid*, 23–25.
[15] Norman Yoffee, *Myths of the Archaic State: Evolution of the Earliest Cities, States and Civilizations* (CUP 2004) 104.
[16] Hammurabi's laws are presented and translated by Roth (n 11) 71–142. Debates about how to interpret these laws are summarised by Yoffee (n 15) ch 4; Pamela Barmash, *The Laws of Hammurabi: At the Confluence of Royal and Scribal Traditions* (OUP 2020). Some have argued that they were primarily literary exercises: Jean Bottéro, *Mesopotamia: Writing, Reasoning, and the Gods* (Zainab Bahrani and Marc Van De Mieroop trs, University of Chicago Press 1992). My analysis, which largely follows that of Barmash, is that they were based on historic cases, but shaped by scribal traditions.

and guaranteed them justice. And, on the grandest of these stones, his masons carved a picture of Hammurabi standing before the god of the sun, clearly receiving authority to create his laws.

Hammurabi's laws are far more detailed and elaborate than the rules of Ur-Nammu, but they take the same casuistic form and their content clearly reflects the sorts of practical problems faced by Babylonian citizens. There are rules on cultivation, irrigation and other agricultural activities.[17] Farmers' lands and fields could be bought, sold, rented or mortgaged, leading to different problems and Hammurabi also tried to give a measure of protection to farmers who got into debt and had to take out loans.[18] The laws contain a long set of rules about interest rates, profits, debt, distraint and the custody of goods and they prescribe harsh penalties for anyone who tried to cheat their partners.[19] The laws also make detailed provisions for dowry, bridewealth, support for widows and children's inheritance.

More than just guidance for judges, the laws also gave structure to social relations by dividing people into three classes – free people, dependent citizens and slaves – who had different rights and privileges.[20] Like the laws of Ur-Nammu, the rules do not ever seem to have been referred to in legal cases. The surviving records never make direct references to the laws; in fact, they show little direct correspondence with what the rules provide.[21] But the laws ostensibly established principles for the future enactment of justice by providing examples, specifying limits and establishing exceptions.[22]

The code concludes with a long epilogue, in which the king makes grand promises for the effects of his laws:

> These are the judicial decisions that Hammurabi, the king, has established to bring about truth and a just order in his land … Let any wronged man who has a lawsuit come before my image, as king of justice, and have what is written on my stele read to him, so that he may understand my precious commands; and let my stele demonstrate his position, so that he may understand his case and calm his heart.[23]

The laws seem to have reflected past cases, then, telling the Babylonians how justice had already been handed out. But Hammurabi seems genuinely to have

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[17]Rr 42–65.
[18]For example r 48.
[19]Rr 65–107.
[20]For example in rr 215–17 which specify the payment for doctors, depending on the class of the patient.
[21]Yoffee (n 15) 107; Seth Richardson, 'Before Things Worked: A "Low-Power" Model of Early Mesopotamia' in Clifford Ando and Seth Richardson (eds), *Ancient States and Infrastructural Power: Europe, Asia, and America* (University of Pennsylvania Press 2017) 28.
[22]Sophie Démare-Lafont, 'Judicial Decision-Making: Judges and Arbitrators' in Karen Radner and Eleanor Robson (eds), *The Oxford Handbook of Cuneiform Culture* (OUP 2011) 334.
[23]Roth (n 11) 133–42.

tried to create rules that his citizens could rely upon to seek justice. He also demanded that his laws should be respected by future rulers, by any 'who has discernment and is capable of providing just ways for his land'.[24] Subsequent kings should use them as examples to provide justice for their subjects, the epilogue continues, as Hammurabi had done for his. And he calls down a series of terrifying misfortunes on any ruler who does not respect his laws: the gods should 'break his sceptre', 'curse his destiny', 'destroy his land by famine and want', 'shatter his weapons', 'create sedition' and 'strike down his warriors'.[25]

Hammurabi's laws were supposed to last forever. It was not just his own officials whose activities should be constrained by the law but also successive rulers. Of course, Hammurabi was hardly establishing the structures by which future leaders could be held to account. His statements were largely an exercise in image-building and everyone must have expected that a new ruler would make his own decisions, that court processes would continue to be imperfect and that the strong would continue to take advantage of the weak. But the rules indicated in some detail how citizens ought to be treated and how justice should be meted out and that these were matters future rulers should respect.

We should not underestimate the effect that the invocation of the gods may have had on Babylonian citizens and their rulers. In a society in which the kings claimed divine sanction, invoking their wrath would not have been done or understood lightly. But there may have been more in the promises of justice and the image of a fair and ordered world that they evoked. As Seth Richardson describes, however successful a Mesopotamian ruler might have been in military terms, to administer a large territory during this period they had to win the acceptance, if not the loyalty, of the conquered populations.[26] And there were large communities, often nomadic pastoralists, living beyond the cities' walls, who provided food supplies for the urban population and controlled the trade routes, who were much more difficult to win over. Urban rulers had to persuade these populations to accept the ruler's dominion. One way to do this was to promise them benefits, including justice. This would explain why Hammurabi had his laws carved on stones, copied onto clay tablets and widely distributed throughout his empire. The law stones were a very visible indication of the fact that Hammurabi cared for his citizens. Marginal groups in a land riven by conflict and uncertain fortunes may have found the idea of a stable social order attractive, whilst also knowing that they could retreat to the desert if the king failed to live up to his promises. Law making was an aspect of state-building then, and the promises had to be plausible if the laws were to do any symbolic work for the ruler.

[24] *Ibid*, 135.
[25] *Ibid*, 136–40.
[26] Seth Richardson, 'Early Mesopotamia: The Presumptive State' (2012) 215 *Past and Present* 3.

In fact, Hammurabi's laws were respected, copied and recopied over generations, including by later Persian invaders.[27] And they almost certainly inspired the authors of the Mishpatim, the laws in the Old Testament book of Exodus.[28] The ideal of a society in which the Babylonian judges would mete out justice must have meant something to the people at large, in the same way that the bear-hunt ritual represented a subjunctive world, which the circumpolar hunters felt it worth invoking.

IV. The classical world

The idea that laws should restrain the exercise of political power was expressed and, to some extent, put into effect by Hellenic and Roman societies over a millennium later. But in these contexts it was not the ruler promising justice to his people but the citizens themselves who claimed justice from those who ruled them.

The earliest Athenian laws were attributed to Drakon in the sixth century BCE.[29] He supposedly drew them up after a popular revolt and at the behest of citizens demanding protection against future abuses of rulers' power. Just a few years later, after continuing unrest, they were replaced by another set of laws, attributed to Solon, a popular ruler who also pronounced a debt amnesty and promised to relieve agricultural poverty and debt. His rules took the casuistic form of Hammurabi's laws, possibly inspired by the now-ancient Mesopotamian tradition.[30] Hammurabi's legal vision for an ordered and just society clearly resonated in this very different context, with citizens seeking to establish a fair social order.

Over the following decades and centuries laws were made in other Greek cities, although the Athenians themselves made few further laws, at least in the form of explicit codes. They seem, rather, to have relied upon democratic processes, sortition and the dramatic technique of ostracism as means to limit and control the exercise of power.[31] These were quite different from processes of legal accountability, whereby powerholders would be judged against explicit

[27] See later examples in Roth (n 11); Barmash (n 16) ch 7. On the later Persian laws: Hannah Harrington, 'Persian Law' in Brent A Strawn (ed), *The Oxford Encyclopedia of the Bible and Law* (OUP 2015) <www.oxfordreference.com/view/10.1093/acref:obso/9780199843305.001.0001/acref-9780199843305-e-108> accessed 19 June 2024.

[28] David P Wright, *Inventing God's Law: How the Covenant Code of the Bible Used and Revised the Laws of Hammurabi* (OUP 2009).

[29] On early Athens and its laws see A Andrewes, 'The Growth of the Athenian State' in John Boardman and NGL Hammond (eds), *The Cambridge Ancient History Vol 3 Pt 3* (CUP 1982) 360.

[30] Raymond Westbrook, *Ex Oriente Lex: Near Eastern Influences on Ancient Greek and Roman Law* (Deborah Lyons and Kurt A Raaflaub eds, Johns Hopkins University Press 2015) 59.

[31] Rosalind Thomas, 'Writing, Law, and Written Law' in Michael Gagarin and David Cohen (eds), *The Cambridge Companion to Ancient Greek Law* (CUP 2005) 41.

standards. But the idea that laws should guide the exercise of power had taken hold, and had been discussed and developed in the writings of Plato and Aristotle.[32]

The Hellenic tradition, in turn, inspired the first law-making in Rome, in the 450s BCE.[33] The Twelve Tables were promulgated in similar circumstances to the first Athenian laws, in the aftermath of a popular revolt against tyranny.[34] By the beginning of the fifth century, the Romans had deposed their king and established an oligarchy, led by a number of consuls. But the citizens continued to make demands for better conditions and in 494 BCE they established their own assembly with their own leaders, tribunes.[35] After a series of strikes, during which the citizens sought relief from both hunger and debt, the tribunes demanded that newly conquered territories should be distributed fairly amongst all Roman citizens. They also demanded laws that would apply to everyone and which would be written down for all to see. Responding to the commoners' demands, in around 451 BCE, the consuls suspended normal political offices and appointed a board of ten men, the *decimviri*, to collect, draft and publish a set of laws.[36]

The subjects and content of the Twelve Tables, as they came to be known, were rather mundane and mostly concerned private, rather than public or constitutional issues.[37] They made procedural rules for court cases and dealt with the sorts of subjects that probably gave rise to feelings of injustice in the normal course of Roman life: compensation for injuries, theft and minor crimes, wills and inheritance, debt, other obligations and damage to property. The citizens obviously wanted court processes to be just and that debtors should enjoy at least some safeguards. There was clearly a sense that writing out the laws would give ordinary people more protection and some sort of rights. The consuls are said to have agreed that the Twelve Tables would be inscribed onto bronze tablets and nailed up in the Forum, the public centre of the town.[38]

[32]Tamanaha (n 1) 7–10. As he points out, Plato placed more emphasis on the need for wise kings for whom law could even be a hindrance.

[33]Raymond Westbrook argues for Mesopotamian influence via the trading and diplomatic missions of the Phoenicians to Italy: Raymond Westbrook, 'The Nature and Origins of the Twelve Tables' (1988) 105 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 74.

[34]For general background see Tim Cornell, *The Beginnings of Rome: Italy and Rome from the Bronze Age to the Punic Wars (c 1000–264 BC)* (Routledge 1995); Kathryn Lomas, *The Rise of Rome: from the Iron Age to the Punic Wars (1000–264 BC)* (Profile 2017).

[35]A Drummond, 'Rome in the Fifth Century II: The Citizen Community' in A Drummond and others (eds), *The Cambridge Ancient History Vol 7 Pt 2* (CUP 1990) 172.

[36]There is extensive debate about these events: Cornell (n 34) ch 11; Drummond (n 35).

[37]For the text as partially reconstructed from later sources see Michael Hewson Crawford, *Roman Statutes Vol 2* (University of London, Institute of Classical Studies 1996) 555–721.

[38]Later Roman historians claimed that the Twelve Tables established parity between plebeians and patricians, but this indicates the significance they later acquired, rather than the historical reality: Drummond (n 35); Andrew Lintott, *The Constitution of the Roman Republic* (Clarendon Press 1999); David Ibbetson, 'Sources of Law from the Republic

In theory, citizens should have been able to refer to the new laws to restrain the activities of mendacious witnesses, corrupt judges and rapacious creditors. But simply writing them out would hardly have established practical systems of accountability, even if the magistrates respected and applied them faithfully. Political power largely remained concentrated in the hands of a small ruling elite. So why should it have been important for the citizens to persuade the consuls to endorse rules which addressed their concerns and why might these laws have come to acquire such importance in the writings of later historians? Creating these laws seems to have been an explicit recognition of the issues that mattered to them in the context of a larger battle for constitutional change.[39] Indeed, the Twelve Tables were shortly succeeded by laws that gave official recognition to the plebeians' assembly and recognised that its decisions should have the force of law.[40]

The consuls continued to manage Rome's affairs; in practice they were responsible for most legislation but now they had to convene an assembly to approve it. Over the next centuries, citizens' assemblies were held periodically, vast gatherings in which they considered important issues and made new laws.[41] The tribunes persuaded the assemblies to enact new laws to address the problems of poverty and debt. Other laws concerned constitutional matters, such as decisions to go to war, make peace or change legal procedures.[42] They also continued to agitate for constitutional reforms, eventually persuading the Senate to set up a commission to investigate allegations of official misconduct.[43]

Private cases, meanwhile, were heard by specialist judges and the substance of the law they applied was developed by the annually elected praetors, the officials who specified the ways in which legal claims had to be formulated. Later, the jurists, specialist legal scholars, further rationalised and developed Rome's laws, issuing opinions that were relied upon by ordinary people, orators and judges alike.[44] But for centuries the Twelve Tables were revered as the foundation of Roman law, even when they had ceased to have much practical relevance. They represented a foundational moment in Roman history, a public statement that citizens had rights and were entitled to explicitly stated standards of justice. And this very act does seem to have laid the ground for

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to the Dominate' in David Johnston (ed), *The Cambridge Companion to Roman Law* (CUP 2015) 25.

[39]Drummond (n 35).

[40]These were the Valerio-Horatian laws: Lintott (n 38) 35; Cornell (n 34) 276–78.

[41]On early law-making see Ibbetson (n 38); Callie Williamson, *The Laws of the Roman People: Public Law in the Expansion and Decline of the Roman Republic* (University of Michigan Press 2005).

[42]Cornell (n 34) 276; Seth Bernard, 'Debt, Land, and Labor in the Early Republican Economy' (2016) 70 *Phoenix* 317.

[43]Williamson (n 41) 301–2.

[44]Lomas (n 34) 296–97; T Corey Brennan, *The Praetorship in the Roman Republic* (OUP 2000).

the constitutional reforms that followed; it certainly remained a foundational moment in the imagination of later generations of citizens. The act of writing out explicit laws, limited though they were, was significant.

At around the turn of the first millennium, the political structures of the Republic were undermined in a series of tumultuous upheavals, which eventually led to the establishment of more imperial rule under Augustus. This prompted the great orator, Cicero, to reflect on the role of law in Roman society and to formulate his famous pronouncements on the rule of law.[45] He insisted that the judges who decided legal cases were themselves subject to the laws and that not only should a judge act in accordance with the laws, but that so, too, should a king. He contrasted the Republic's rule of law and order with the rule of 'the strong'. It is not surprising that it was when a more autocratic form of rule was on the horizon that the idea of the rule of law should have crystalised in Cicero's writings. He realised the importance of the legal dynamics that had developed amidst the complexity of Republican politics over the previous five centuries and he also realised that they were threatened by the contemporary turn towards imperialism, even if the emperor was promising to rule justly.[46]

The citizens of Republican Rome did develop practical legal mechanisms for limiting political power and holding corrupt officials to account. But from the earliest demand for public laws, it is clear that they also felt their laws were symbolic in the quest for a fairer society. It was important that the citizens could make laws to specify how justice should be done and how they should be treated as citizens. The very act of having laws written out and publicised was an important step in the negotiation of constitutional change. The Twelve Tables represented the will of the people as the ultimate lawgiver and created a shared vision for a just society.

V. Religious legal systems: the Hindu world

The religious legal systems of the Hindu and Islamic worlds all included provisions that were supposed to guide the administration of justice and the exercise of political power, at least to some extent. In each case, the laws were founded on a religious vision for the world: a divine cosmology and God's path for his people, respectively.[47] It was religious experts, not rulers, who had the authority to

[45]Cicero, *The Republic and the Laws* (Niall Rudd tr, OUP 1998). Cicero's views are helpfully summarised by Tamanaha (n 1) 11–12.

[46]It took several centuries, but the emperors gradually undermined the independence of the judges and the status of the jurists: Bruce W Frier, *The Rise of the Roman Jurists: Studies in Cicero's pro Caecina* (Princeton University Press 1985). As Karen Turner puts it, the shift to monarchy represented a serious break with the past, comparable to the rise of imperial rule in Qin China (which I consider later in this article): Karen Turner, 'Law and punishment in the formation of Empire' in Walter Scheidel (ed) *Rome and China: Comparative Perspectives on Ancient World Empires* (OUP 2009) 52.

[47]The Jewish legal tradition could be added to this list: Neil S Hecht and others (eds), *An Introduction to the History and Sources of Jewish Law* (Clarendon Press 1996).

interpret that vision for everyone. The priests, brahmins and jurists came to consider themselves, and to be accepted as, lawmakers responsible for specifying the ways in which rulers ought to wield their authority and mete out justice. But there were generally no direct systems of accountability by which corrupt or inadequate rulers could be sanctioned or forced from office.[48]

In northern India, Aryan warriors ruled the central plains in the first millennium before the common era. Priestly specialists established themselves as guardians of the ritual tradition and they created what became revered and authoritative texts, the Vedas.[49] Both political rulers and army commanders looked to these priests to keep them safe in battle and to intercede with the gods in their favour. The priests gradually formed a hereditary class, calling themselves brahmins, 'those who knew the secrets of ritual efficacy', and they preserved the wisdom of the Vedas in mantras and invocations. Their most elaborate rituals, meanwhile, developed into lengthy ceremonies, on which the kings lavished extensive resources.

Gradually, the brahmins expanded their textual activities, writing the Dharmasūtras, texts that used aphorisms to present ideas about the meaning and philosophy of the dharma.[50] This concept invoked a sense of cosmological order and the duties on all people to act appropriately, according to their position – caste, age, gender and stage of life. The Dharmasūtras claimed to be rooted in the ancient Vedas, which gave them a sense of timeless authority. Effectively, the brahmins were redescribing the practices of the upper classes in terms of a higher morality, creating an ideology that would dominate Indian social thought for centuries to come.[51] The new texts also ventured into politics and the role of the kshatriyas, the caste that provided the warriors and rulers. The duty of the king, the brahmins declared, was to protect his people against enemies and those who disturbed the social order, the 'thorns' in society.[52]

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[48]These 'systems' obviously covered very large areas and long periods of time and in what follows considerable generalisation is necessary.

[49]General historical details have been drawn from: Romila Thapar, *From Lineage to State: Social Formations of the Mid-First Millennium* BC *in the Ganga Valley* (OUP 1984); Hermann Kulke and Dietmar Rothermund, *A History of India* (Routledge 1986); Wendy Doniger, *The Hindus: An Alternative History* (OUP 2009).

[50]On the Dharmasūtras and Dharmaśāstras see Robert Lingat, *The Classical Law of India* (J Duncan and M Derrett trs, University of California Press 1973); Patrick Olivelle, *Manu's Code of Law* (OUP 2004); Patrick Olivelle, 'Dharmaśāstra: A Textual History' in Timothy Lubin, Donald R Davis and Jayanth K Krishnan (eds), *Hinduism and Law: An Introduction* (CUP 2010) 28.

[51]On the brahminical ideology see Richard Gombrich, *Theravada Buddhism: A Social History from Ancient Benares to Modern Colombo* (Routledge and Kegan Paul 1988) ch 2.

[52]These texts were almost certainly inspired by the Arthaśāstra, a much earlier text which advised the king how to rule: Patrick Olivelle, 'Manu and the Arthaśāstra: a study in Śāstric intertextuality' (2004) 32 *Journal of Indian Philosophy* 281.

By the second century of the common era the brahmins were writing more legalistic texts, the Dharmaśāstras.[53] These combined rules, principles and narratives on moral conduct with a set of legalistic rules that told kings how to mete out justice. The brahmins, in this way, asserted their authority to declare both who was entitled to be a king and also how the king ought to exercise his power. The earliest (known) Dharmaśāstra text was attributed to the mythical sage Manu. It opens with a long section that concerns the brahmins and how they should behave – as students, householders and guardians of the ritual tradition.[54] The next section details rules for the kshatriya: it starts with matters of personal and ritual conduct. It also specifies, in some detail, how kings should conduct legal cases.[55] The rules in this section spell out the requirements for evidence, witnesses and legal procedures, while more substantive rules concern the forms that property transactions should take and the circumstances in which creditors could sue or resort to debt bondage. There are rules about compensation, contracts, land tenure, finance and legal procedures. Over the following centuries, Indian writers produced at least 100 Dharmaśāstra texts, along with collections and commentaries, many of which were probably ordered or sponsored by different kings.[56]

According to the Dharmaśāstras, then, it was for the brahmins to declare what the law was and for the kings to enforce it. In reality, most Indian rulers must have been concerned about maintaining power, confronting their rivals and establishing a stable economic base from which to raise taxes and secure services. And the stronger and more war-like kings probably issued authoritarian commands and directed their officials to punish anyone who defied them. But in the chronicles they wrote and the inscriptions they made on stones and pillars, Hindu rulers almost invariably claimed to be giving orders, hearing petitions and resolving disputes in accordance with the requirements of the dharma.[57] They acknowledged the content of the brahmins' texts as the standards by which they ought to rule. Medieval stories and poems describe kings handling disputes and consulting councils of brahmins on difficult points of textual and legal interpretation. Accounts of legal practice from this period are rare, but there is evidence that judges did follow legal procedures based on the Dharmaśāstras' rules for evidence.[58]

[53]On the Dharmaśāstras see also Olivelle, 'Dharmaśāstra' (n 51); Donald R Davis, *The Spirit of Hindu Law* (CUP 2010).
[54]Olivelle, *Manu's Code* (n 50) 23–105.
[55]*Ibid*, 123–54.
[56]Ten Dharmaśāstra texts have survived, most in later editions and collections: ibid.
[57]Richard W Lariviere, 'A Sanskrit Jayapattra from 18th Century Mithilā' in Richard W Lariviere (ed), *Studies in Dharmaśāstra* (Firma KLM 1984) 49–65; Donald R Davis, 'Recovering the Indigenous Legal Traditions of India: Classical Hindu Law in Practice in Late Medieval Kerala' (1999) 27 *Journal of Indian Philosophy* 159.
[58]Bajadulal Chattopadhyaya, '"Autonomous Spaces" and the Authority of the State: The Contradiction and its Resolution in Theory and Practice in Early India' in Bernhard Kölver (ed), *Recht, Staat und Verwaltung im klassischen Indien* (De Gruyter Oldenbourg 1997) 1.

The idea that the brahmins, as ritual specialists, had higher legal authority than the kings inevitably gave rise to tensions. The brahmins' influence gradually extended beyond the Aryan heartlands, where they established themselves as religious authorities, converting local populations and their rulers to Hindu ritual ways and beliefs.[59] As new groups of people were drawn into their cultural orbit, the brahmins insisted that non-Aryans could only ever be shudras, members of the lowest caste. In the seventeenth century, one prominent scholar even expressed the view that the Rajputs, the leaders of the large and warlike clans of western India, were of mixed race and should be treated as shudras.[60] This opinion hardly undermined the Rajputs' power, but it did trouble them and in the mid-seventeenth one leader, Shivaji, having assumed the title of king, decided to secure brahminical approval for his status.[61] He not only wanted to claim the respect of the notoriously orthodox local brahmins but also hold his head high next to the Moghul emperor, Aurangzeb. Therefore, Shivaji turned to a renowned brahmin and expert in Hindu law and commissioned a genealogy that, as he made clear, should confirm his kshatriya heritage. He offered a substantial material reward to the brahmin, who duly complied and delivered an opinion to the effect that Shivaji was descended from a high-status Rajput clan whose members were proper kshatriya.[62] The king was, in this way, able to manipulate the law to his purposes, but he had not been able simply to ignore it. He had needed a brahmin to demonstrate his status as kshatriya and king.

In Hindu India, then, there was a separation of powers between king and brahmin. The brahmins promoted a vision of a hierarchical order in which legal and moral rules were closely aligned and in which justice would be ensured by proper personal and ritual behaviour. Everyone had to act in accordance with their own dharma, including the kings. It was the brahmins' duty to specify ritual and legal requirements and how the kings should enact them, and it was the kings' duty to act in accordance with their own dharma. This meant establishing political systems in which they could rule and mete out justice in accordance with the brahmins' laws. In practice, the brahmins did develop something like a common Hindu law and their texts remained authoritative, particularly on matters of procedure. The rulers had, at least, to pay lip-service to brahminical authority: the ritual consequences of denying or defying it would have undermined their positions. None of this prevented powerful rulers, like Shivaji, from manipulating the system to their advantage, but Shivaji's actions confirmed the legal authority of the brahmins and the cosmological vision of an ordered world that their legal texts upheld.

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[59] Doniger (n 49) ch 13.

[60] Ananya Vajpeyi, 'Excavating Identity Through Tradition: Who was Shivaji?' in Satish Saberwal and Supriya Varma (eds), *Traditions in Motion: Religion and Society in History* (OUP 2005) 240.

[61] *Ibid*.

[62] *Ibid*.

In the ideal world presented by the Dharmaśāstras, along with the brahmins' other ritual texts, then, the role of the king was an aspect of the overall cosmological order, defined by the requirements of the dharma. In practice, kings did seek advice from brahmins, convene councils of religious experts and seek confirmation opinions on matters of status, even if there were no practical and political systems of accountability. But enforcement and constraint were not the point. The brahmins had constructed an edifice of ritual imperatives, which all had to respect if they were to call themselves Hindu.

VI. The Islamic world

In the Islamic world, there was a similar separation of authority between political rulers and religious legal specialists and the latter always maintained their moral superiority over the former.[63] Here, too, there were few, if any, systems of accountability, but some religious specialists were so reluctant to become involved in the sphere of political power that they almost lost any influence over the political rulers. These experts practically rejected the idea of the rule of law – that their legal interpretations and texts should have direct bearing on political processes and that they themselves should mediate between the two. The issue here was not so much lack of systems for enforcement as lack of a will to control power. In the end the legal and political were brought together as much by rulers and their judges as by scholars trying to control their activities. Nevertheless, as in the Hindu world, there was a practically unquestioned ideal of a divinely sanctioned legal order, to which all, however powerful, should aspire.

Practical legal texts took time to develop in the Islamic world.[64] Muhammad did not authorise any codes of law and nor does the Quran contain many explicitly legal rules.[65] But as the new religion spread from the seventh century onwards, under the Umayyad and Abbasid caliphates, religious scholars developed legal expertise. They created the fiqh texts, a body of legalistic rules whose purpose was to make clear, for a human audience, the content of the Shari'a, God's path for the world. Like the brahmins, Islamic scholars concentrated on duties and categorised activities as compulsory, prohibited, recommended, discouraged or neutral.[66]

[63]The relationship between them has been highly theorised by Islamic scholars and here I concentrate on just some of the fundamental dynamics and related ideas.
[64]On the history of Islamic law see Marshall GS Hodgson, *The Venture of Islam: Conscience and History in a World Civilization Vol 1* (University of Chicago Press 1961); Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 1964); Wael B Hallaq, *The Origins and Evolution of Islamic Law* (CUP 2005); Wael B Hallaq *Shari'ah: Theory, Practice, Transformations* (CUP 2009).
[65]The hadith, sayings of the Prophet, did contain decisions on legal matters which could be regarded as forms of precedent. But these were not legalistic rules, while the Shari'a, God's path for the world, was regarded as something ultimately unknowable by humans.
[66]Each of the schools into which Muslims divided developed its own *corpus* of legal texts, albeit that these took similar forms.

From the earliest days, the scholars, the ulama, regarded themselves as playing distinct roles from those of the caliphs. The latter promoted the scholars' institutions, supported their activities and relied on the legitimacy this gave them, but the ulama developed as an independent community of religious experts.[67] Over time, as the Umayyad and Abbasid caliphates expanded and then declined, the ulama came to regard political engagement as inherently corrupt and corrupting.[68] They recognised the need for rulers, armies and their activities, while also deploring the injustices meted out by many of the caliphs. Keeping themselves at a distance from politics, the ulama developed the ideal of a pious and otherworldly life, during which they would be guided by the Shari'a and remain innocent of power and its machinations. In the true caliphate, they maintained, a righteous ruler would promote a unified form of religious and political life.[69] This vision may have been highly idealistic, but integral to it was the idea that law and its experts were superior to politics and its actors.

The decline of the Abbasid caliphate in the thirteenth century led to a period of disillusionment with politics among the ulama.[70] The Mamluk rulers who replaced the Abbasids in Egypt and the surrounding areas were originally Turkic slaves, brought in from the north and trained in the arts of warfare and government. The ulama, for the most part, regarded the Mamluks as invaders, from whom and from whose institutions they should keep themselves firmly apart. But around the turn of the thirteenth and fourteenth centuries, the influential scholar Ibn Taymiyyah developed a new theory of Islamic politics, *siyāsa shar'iyya*, which became highly influential. Ibn Taymiyyah argued that political authority was grounded in the revelation in the general obligation on all Muslims to command the right and forbid the wrong. This could and should be the foundation of proper political activities, he maintained. The institutions of the state could, then, be justified as representing the Islamic community, the umma, the ultimate source of political authority. The purpose of the state and its representatives was to fulfil the mission of the umma, as set out in the Quran. The ruler was, in consequence, neither infallible nor superior to common Muslims and stood as much in need of advice and criticism as they did. Critically, this meant that the caliph and his officials could be judged according to their adherence to the Shari'a, which the community and its ulama upheld. It was a basic sense of the rule of law.

Ibn Taymiyyah elaborated his ideas by developing sophisticated philosophical theories about, among other things, the relationship between reason and revelation.[71] The result was an elaborate account of the relationship between scholars, commoners and rulers, of sources of knowledge and protection, of the

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[67] Hodgson (n 64) book 1, ch 3; Schacht (n 64) ch 6.

[68] Ovamir Anjum, *Politics, Law, and Community in Islamic Thought: The Taymiyyan Movement* (CUP 2012) 4.

[69] *Ibid*, 5–6.

[70] This and the following paragraph largely draw upon Anjum (n 68) Conclusion.

[71] *Ibid*, 268.

circumstances in which it might be legitimate for a ruler to disregard a ruling of the ulama and those in which ordinary people might reject a ruler's commands. Ibn Taymiyyah supported the Mamluk state, but he also asserted the supremacy of the Shari'a, not just as law, but as the source of political norms.[72] Ibn Taymiyyah has been described as a revolutionary thinker, but it is clear that practically unquestioned within his theories was the idea that the ruler was subject to a superior set of norms, found in the Shari'a and worked out by legal scholars in the fiqh. The issue was not so much how to assert the supremacy of the law as how to bring together the normative world of the Shari'a and the practical world of politics that were, for many of his contemporaries, almost completely unrelated.[73] The most cynical, who felt they had to construct a parallel world, enclosed by the walls of their madrasas, rejected the idea that they should have a direct influence on politics. This was to deny even an ethos of accountability. But Ibn Taymiyyah offered those who believed in the Shari'a and tried to live as good Muslims the sense of a world in which their rulers, however autocratic, were subject to the same legal and moral rules as everyone else.[74]

Of course, the Islamic world was complicated and politically fragmented throughout most of its history. In practice, the Mamluks, like other powerful rulers, may largely have been able to resist legal constraints. But elsewhere, Islamic law acted as a constraint on government in two distinct ways. Firstly, like many Hindu kings, the caliphs and sultans generally felt the need to be seen to have the support of senior jurists. During the Ottoman era, for example, when the sultans expanded and centralised their political authority, the rulers patronised the Hanafi ulama and maintained a chief mufti (Shaykh al-Islam) who could even, on occasion, declare that an unfit sultan ought to be deposed.[75] In the late nineteenth century, the ruler of the modernizing state in Egypt followed the Ottoman tradition and appointed a State Mufti.[76] Islamic legal scholars have continued to hold influential positions within political regimes and, in the contemporary world, have been able to intervene in global

[72]Baber Johansen, 'Signs as Evidence: The Doctrine of Ibn Taymiyyah (1263–1328) and Ibn Qayyim al-Jawziyya (d 1351) on Proof' (2002) 9 *Islamic Law and Society* 168.
[73]Previous Islamic scholars, notably the eminent Shāfiʿite Sunnī jurist Al-Māwardī, had discussed Islamic rulership and politics extensively but the nature of Ibn Taymiyyah's theories was original.
[74]In practice, it has been the rise of the modern state that has undermined the dynamics by which traditional religious and legal authorities might actually hold political powerholders to account, leading to extensive debates about the nature of Islamic law in the contemporary world. See Wael B Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (Columbia University Press 2013); Baudouin Dupret, *What is the Sharia?* (Hurst 2018).
[75]On the Ottoman empire see Hodgson (n 64) vol 3, book 5, ch 3; Wael B Hallaq, *An Introduction to Islamic Law* (CUP 2009) ch 6.
[76]Jakob Skovgaard-Petersen, *Defining Islam for the Egyptian State: Muftis and Fatwas of the Dār al-Iftā* (Brill 1997).

events.[77] Meanwhile, a second channel of influence was maintained by the muftis, often the same people, who offered and still offer, direct advice to ordinary people. Their authority on the law and the administration of justice was largely recognised by judges, appointees of political regimes, especially in the very local contexts in which most legal disputes were, in practice, resolved.[78]

Not unlike the Hindu kings, then, Islamic rulers were supposed to maintain political order according to their own rules and institutions, but within the framework of a moral world whose parameters and principles were defined by the religious scholars. At one point, a deepening divide between religious and political leaders threatened to make the laws of the religious specialists practically irrelevant to the conduct of politics. The most extreme legal experts held themselves too much apart from politics, too unsullied by its practices to wield much practical influence, which meant that the vision of a divine order, represented by the Shari'a and worked out in their legal texts, risked losing all connection with the social and political reality.

The Islamic scholars were probably not wrong to fear that proximity to power and engagement with powerholders might give rise to tensions, competing interests and the possibility of corruption. But Ibn Taymiyyah was successful in bringing together the worlds of law and politics in a theory that allowed legal specialists to advise political rulers while retaining their own independence. He linked the subjunctive world of the Shari'a with the inevitably corrupt and imperfect world of Mamluk politics. And his theoretical account of the relationship was made more real by the caliphs and sultans who looked to religious leaders to support them and the Muslims who everywhere went, and still go, to their muftis for practical moral and legal guidance. It has hardly been doubted, anywhere in the Islamic world, that everyone, including the most politically powerful, should be guided along God's path by religious experts.

VII. China

Imperial China apparently offers a counter-example to the idea that political rulers should be guided by explicit legal rules. For almost two millennia, Chinese dynastic emperors enjoyed a position at the top of a social and political hierarchy and maintained the idea that, as representatives of Heaven, they were the source of all laws. The elaborate legal codes, which developed from the second century BCE,

[77]Notable among them is the Shi'i cleric Sayyid Ali al-Husseini Al-Sistani, who commands a following of millions and intervened effectively during the US invasion in Iraq: Ahmed H al-Rahim, 'The New Iraq: The Sistani Factor' (2005) 16 *Journal of Democracy* 50; Morgan Clarke, 'Neo-Calligraphy: Religious Authority and Media Technology in Contemporary Shiite Islam' (2010) 52 *Comparative Studies in Society and History* 351.

[78]Brinkley Messick, 'The Mufti, the Text, and the World: Legal Interpretation in Yemen' (1986) 21 *Man* 102; David S Powers, *Law, Society, and Culture in the Maghrib, 1300–1500* (CUP 2002).

were practical tools of discipline and political control, the basis for vast bureaucracies, which oversaw empires established by the most successful Chinese dynasties. But these laws also evoked a ritualised vision of an ordered world. They promised a stable, if ultimately unachievable, society, like the other examples discussed here.

Chinese attitudes to the nature of government can be traced back to the era of the Zhou kings, who swept onto the central plains in 1027 BCE.[79] The first Zhou king appointed his brother to govern one of the conquered polities and wrote him a letter of advice, the Kang Gao, in which he insisted that the governor should impose punishments on any offences committed by Zhou people.[80] A number of treatises on politics survive from the following centuries. Some rulers established bureaucracies and began to write down laws and in 620 BCE a governor in the state of Jin drew up plans for wide-ranging administrative reforms. These would systematise official posts, 'rectify' laws and offences, as he put it, institute the use of contracts and standardise legal processes. We know little about any of the laws, but documents refer to scribes writing out orders and rules on bamboo slips, which they pinned up on large boards for the general population to see. Their 'books of punishment' clearly presented different penalties for different crimes and classes of offender.[81] This was to insist on the power of law to map out an orderly society, worked out through a system of punishments.

A number of influential thinkers expressed severe reservations about the activities of the Zhou kings and their harsh methods of government. Confucius (Kong Fuzi) offered a radically different view of the state.[82] Rather than a strong and authoritarian king, he argued, social stability depended upon harmonious relations between ruler and ruled, father and son, elder and younger brother, friend and friend and husband and wife. Social order arose from the behaviour of individuals who followed codes of morality, conducted rituals and ceremonies properly, pursued education and, above all, were loyal to their parents.[83] On his view, order should flow from a stable social hierarchy, rather than general laws. One of the disciples of Confucius also pointed out that exemplary rulers had

[79]For general background on the early development of law in China see Yongping Liu, *Origins of Chinese Law: Penal and Administrative Law in its Early Development* (OUP 1998); Ernest Caldwell, *Writing Chinese Laws: The Form and Function of Legal Statutes Found in the Qin Shuihudi Corpus* (Routledge 2018).

[80]It has survived in a collection of documents that claims to be based on material from this period: Liu (n 79) 43, 122–24; Geoffrey MacCormack, 'Law and Punishment in the Earliest Chinese Thought' (1985) 20 *Irish Jurist* 335. For the text see James Legge, *The Chinese Classics Vol 3* (Hong Kong University Press 1960) 48.

[81]Much of what we know about this period is found in the commentary to a set of Annals written later by Confucius: Ernest Caldwell, 'Social Change and Written Law in Early Chinese Legal Thought' (2014) 32 *Law and History Review* 1–30: 1, 5–6; Liu (n 79) 128–38. For the text see Legge (n 80) 710.

[82]Caldwell (n 79) ch 2.

[83]*Ibid*, 20.

not made laws, lest it encourage people to be litigious. Rather, they had 'restrained them with rightness, bound them with [good] governance, and raised them with humanity'.[84] Rulers could use rewards and punishments but these, he continued, should be deployed humanely and firmly and not reduced to written texts. For the great philosopher and his followers, then, it was not the system of rewards and punishments that was problematic – and Confucius did not explicitly criticise the hierarchy formed by a centralising ruler – but the act of writing down laws, making them publicly available. The result was an explicit rejection of the idea of the rule of law, that laws should exist independently of and constrain the powerholders.

The fifth and fourth centuries BCE saw prolonged warfare in central China. The Qin state was one of those paralysed by power struggles and when a new ruler assumed control in 361 BCE, he sought expert guidance on how to govern.[85] His adviser, Shang Yang, took the view that social problems arose from the gap between law and reality, which led to inconsistent practices, a corrupt administration and unaccountable ministers. Clear and consistent legal norms were, therefore, essential. He poured scorn on the ideas of Confucius and advised the Qin ruler to create new written statutes, which would use rewards and punishments to ensure that farmers worked hard and soldiers were loyal.

The Qin duly restructured their government, persecuted Confucian scholars and created an impersonal bureaucracy of salaried officials. They standardised weights and measures, controlled the language of administration and introduced laws to define powers and duties within their bureaucracy, demanding that officials apply them exactly.[86] Officials had to follow correct procedures in all things, from receiving and considering reports to arresting suspects and confiscating and evaluating the property of the most severe offenders. Further rules applied when they interrogated a suspect. Local magistrates were not independent professionals but civil servants, whose primary duties were to the higher government authorities. There was no separation of powers between the government and the judiciary, and all officials had to observe a complex set of bureaucratic rules.

Through this system of tight controls, the Qin increased their power, establishing the first Chinese empire in 221 BCE. This lasted for less than two decades, however, after which rebels brought down the government and established what became the Han dynasty. Drawn to the philosophy of Confucius, whose scholars they rehabilitated, the new rulers styled themselves 'Sons of Heaven' and 'Leaders of the East' and they made much of the fact that their regime was

[84] *Ibid*, 14–18. The image of the ideal lawgiver in the writing of Confucius has been compared to that of Plato: Turner (n 46) 59–60.
[85] On the Qin and the Shangjun Shu, said to be the work of Shang Yang see Caldwell (n 79) ch 3; Liu (n 79) ch 6, especially 175–77.
[86] Ibid.

more merciful than that of their predecessors.[87] In reality, they only gradually relaxed the harshest Qin laws and maintained many of the existing institutions. The laws remained essentially penal in form, following the model of Shang Yang. The idea that any form of natural law should act as a check on power was barely articulated in contemporary debates.[88] Over the next 400 years, Han governments alternated between policies inspired by Confucian thought and the stricter laws that seemed more appropriate at times of unrest and disorder.[89] But all the while they passed new statutes and regulations which, by 94 CE, specified almost 5,000 offences.[90]

The Han regime fell in 220 CE, eventually succeeded by the Sui and then, after a series of rebellions, the Tang in 618 CE. The Tang also styled themselves 'Sons of Heaven' and sought to expand their empire and unify its government.[91] They commissioned a team of legal experts to draft a code of laws and, in time-honoured tradition, they declared that their laws would be more lenient than those of their predecessors.[92] In fact, the drafters based their new code firmly on the laws of the Sui and officials continued to develop and improve those laws over the next three decades until they had created a substantial penal code.

The Introduction to the Tang Code reveals much about how the new rulers had come to see their legal system.[93] The great rulers of the past, it claimed, had been chosen by the people and made laws in accordance with the highest moral standards. But after a golden age, when morality alone could maintain order, the rulers had had to introduce punishments to inspire awe and dread amongst 'those who acted stupidly, whose knowledge declined, and who offended criminally'.[94] Nevertheless, they had ensured that penalties were appropriate, recognising 'heaven's great statute'. Like the Hindu brahmins, the Chinese lawmakers were invoking a sense of cosmological order as the foundation of their laws. In this way, the emperor would enact principles of morality and justice and demonstrate his 'wide and great mercy'. But, unlike the Dharmaśāstra texts, the Chinese laws were the creation of the ruler. He was not supposed to be constrained by those same rules himself.

The Tang Code, based as it was on much previous law, set the scene for almost all later Chinese legal codes.[95] It was largely adopted by the subsequent Song

[87]On this period and its laws see Anthony J Barbieri-Low and Robin DS Yates, *Law, State, and Society in Early Imperial China: A Study with Critical Edition and Translation of the Legal Texts from Zhangjiashan Tomb Number 247* (Brill 2015).
[88]Turner (n 46) 60.
[89]On the Han, Sui and Tang laws see Geoffrey MacCormack, 'The Transmission of Penal Law from the Han to the Tang' (2004) 51 *Revue internationale des droits de l'antiquité* 47.
[90]*Ibid*, 54–55.
[91]*Ibid*, 73–74.
[92]For a translation of and commentary on the code see Wallace Johnson, *The T'ang code*, 2 vols (Princeton University Press 1979–1997).
[93]*Ibid*, 49–54.
[94]*Ibid*, 49.
[95]Geoffrey MacCormack, *Traditional Chinese Penal Law* (Edinburgh University Press 1990) 14.

(960-1279), Ming (1368-1644) and Qing (1644-1911) regimes, supplemented by new laws to deal with changing social issues. Chinese scholars continued to talk about their law in Confucian terms and the codes emphasised Confucian values, but it was presented as a system of norms created by their rulers to bring order to a great empire. In 1740, the Qianlong ruler declared that he had relied upon his 'estimations of heavenly principles and considerations of human compassion' to ensure that his code would embody universal and unchanging moral principles.[96] He was recognising universal principles, while insisting that he was the source of all law.

For almost two millennia, then, Chinese emperors resisted the idea that they could themselves be judged according to their laws.[97] As Jack Dull puts it, there was a deep prejudice not against law but against public law that could take a life of its own and be used to challenge the authority of official policies and values.[98] In the context of the global history of laws, this was a remarkable achievement, an exception to the ideas developed in the Mesopotamian, Roman, Indian and Islamic traditions. If anything, it is the exception that proves the rule. Yet this difference should not be over-emphasised. In China, as in the other contexts, the laws embodied a vision for a civilised world. Apparently practical and constraining laws promised order, justice and moral guidance as means to maintain an ideal social order. They conjured up a subjunctive world in which everyone would act correctly to maintain the order guaranteed by the emperor. Law was supposed to induce orderly behaviour. The distinctive feature of the Chinese ideal was that ultimate responsibility for enacting that vision lay with the emperor. In the subjunctive world represented by the complex legal codes, they presided over a Confucian hierarchy, the source but not the subject of a vast system of practical rules.

VIII. Conclusions

The creation of laws ostensibly as a means to control or restrain power has recurred with remarkable frequency over the course of human history. Autocratic rulers in ancient Mesopotamia claimed that their laws should constrain their successors; citizens' assemblies in Athens and Rome set out their rights in sets of

[96]Philip Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford University Press 1996) 225.

[97]Jérôme Bourgon suggests that the legal system and its officials may have tempered the rigours of autocracy, but considers it would be going too far to suggest that they exercised a check on the emperor's power: Jérôme Bourgon, 'The Principle of Legality and Legal Rules in the Chinese Legal Tradition' in Mireille Delmas-Marty and Pierre-Étienne Will (eds), *China, Democracy, and Law* (Brill 2012) 185–86.

[98]Jack L Dull, 'Epilogue: The Deep Roots of Resistance to Law Codes and Lawyers in China' in Karen G Turner, James V Feinerman and R Kent Guy (eds), *The Limits of the Rule of Law in China* (University of Washington Press 2000) 325.

laws and procedures; the lawmakers of the major religious systems crafted rules to specify how the politically powerful should behave. The recurrent idea is that a ruler should act in conformity with at least some laws.

We should certainly not underestimate the practical significance of such laws, especially if we allow that they may have been intended to guide the good as much as restraining the bad. As HLA Hart asked 'why should law not be understood as offering advice to the puzzled man as much as restraining the bad man?'[99] The historic laws considered here do seem to have had social effects, creating moral imperatives for those who had reasons to act well, who needed to secure the loyalty of potential and actual citizens, who had to quell popular unrest and who relied on the support of ritual specialists.

EP Thompson's surprising defence of the rule of law at the end of his *Whigs and Hunters* may seem idealistic – the laws in question, the eighteenth-century Black Acts, were tools of discipline, not supposed to constrain the wealthy and powerful.[100] But Thompson saw other dynamics in the body of English law that at least some of the provisions of what was, by then, a complex legal system, could be quoted against the powerful. The Black Act was part of a legal edifice that included Magna Carta, procedural rules and the principles of *habeas corpus*. Those concerned to exercise power morally could not ignore it. Maybe Thompson was going too far when he suggested that all were constrained by the edifice of the law, but he must be right that at least some powerful people believed enough in their laws to feel so constrained.[101] There are modern equivalents. US president George W Bush and UK prime minister Tony Blair made strenuous efforts to prove that their invasion of Iraq in 2003 was in conformity with international law. They may have manipulated the process, but they did seek legal endorsement. They did (apparently) feel accountable to international legal standards.

The creation of explicit laws may, in these ways, make an ethos of accountability more likely, laying the ground for systems by which the powerful can actually be held to account. But this is not the only way in which to understand what such laws are supposed to achieve. By specifying the ways in which power should be exercised, I have argued here, a set of laws conveys the sense of an ideal social and moral world. The idea that the laws have ancient roots or are divinely ordained reinforces the sense that they have an independent existence, they represent ideals that are more fundamental than the decisions and commands of any particular ruler. And people do place faith in their laws. The Athenian and Roman citizens demanded laws during struggles for constitutional changes and Muslims everywhere have sought practical guidance from their muftis. Laws that define

[99]HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 40.
[100]EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Allen Lane 1975).
[101]As EP Thompson puts it, 'some of the rulers believed enough in these rules, and in their accompanying ideological rhetoric, to allow, in certain limited areas, the law itself to be a genuine forum within which certain kinds of class conflict were fought out': *Ibid*, 265.

what officials should and should not do offer words in which ordinary people can make demands and express grievances. Laws provide resources for argument; they allow us to make statements by reference to explicit standards.

The paradox, I suggest, is that people are disappointed when rulers are not held to account in direct and practical ways – not least during the Israeli offensive in Palestine in 2024 – when systems for accountability are weak and when modern attempts to promote the rule of law do not create more effective constraints. Disappointment reflects a literal view of the rule of law, that it cannot be effective without systems for direct enforcement. Such attitudes are closely associated with the ideals of the modern state and the systems of enforcement that are now central to the way it should operate and what it should achieve.[102] They obscure older and arguably more fundamental attitudes to law, ones that may be more prevalent, even today, than we commonly recognise.

IX. *Ritual and the rule of law*

An expectation that the law must rule literally, that its words must be enforced to be effective, sets up a tension between the ideal and the real. There are parallels, I am suggesting here, in the expectations we have of ritual. Laws, like rituals, evoke an ideal order, they create a subjunctive world. But we cannot expect that performing a ritual will make that world come about, that it must have practical effects to be of value. We should not, Seligman and others point out, understand rituals too literally.[103] In the way that the bear hunt ritual was not expected to make a successful chase more likely, so also we should not expect that laws must always be able to constrain power in a direct sense. The importance of many laws, like those of a ritual, lies in the tension between the subjunctive world they represent and the real one that we live in.

Ritual operates in a world that is fragmented and fractured, as Seligman and others put it.[104] The subjunctive world created by ritual is always doomed to fail; the ordered world of flawless repetition can never fully replace the broken world of experience. Why, for example, do people vote in US states like Massachusetts, where their ballots will never make a difference in a presidential election?[105] Voting is a ritual, they suggest, with no practical value, but one that allows citizens to create an imagined world, in which they do control the government. By

[102]Much contemporary scholarship on the rule of law argues that a legal system must do more than place limits on the exercise of power; it must also promote basic standards of equality, democracy and human rights. Among many others see Tom Bingham, *The Rule of Law* (Penguin 2010); Christopher May and Adam Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar 2018). But these are the concerns of the contemporary world and none attracts universal approval.
[103]Seligman and others (n 6).
[104]*Ibid*, 30.
[105]*Ibid*, 11–12.

voting, they recreate a vision of democracy and prevent it from collapsing into one of coercion and self-interest. So too, we know it is inevitable that rulers will fail to respect law, but the work of making and citing explicit rules constantly recreates a more ordered world.

Autocratic rulers have repeatedly ignored and undermined processes that would hold them to account, yet the fact is that faith in law recurs: rulers promise constraining laws, classes of legal experts are established with the authority to declare political acts illegal and philosophical ideas about the rule of law are elaborated in multiple different traditions. Lauterpacht invoked international law as German bombs rained down on London and there were repeated calls for war-crimes charges against Netanyahu and others during Israel's offensive in Palestine. There must be a reason that this seems worth the effort.

All of this complicates the idea of the rule of law. The substantive idea, as it has come to be invoked in the contemporary world, is regularly associated with ideas of democracy, due process and equality. But in the historic cases I have described here, the law makers did express what can only be called an idea of the rule of law – that the gods would punish a disrespectful ruler, that corrupt officials ought to be held to account and that kings who failed to respect their dharma and caliphs who ignored the Shari'a would face cosmological or divine consequences in the next world, if not in this.

It would be a mistake to see such laws as failing because they do not, in fact, restrain abuses of power. When Russians missiles rain down on Ukraine and Israeli rockets bombard Palestine, commentators the world over turn to law to specify the exact ways in which they consider these actions to be illegal. The more threatening the situation, the more uncontrolled the aggression, the more flagrant the abuse of power, it seems, the more we feel the need to specify the laws these actions infringe. It gives us a sense that there is a proper way for states to behave, that we do have a shared sense of legal limits. Whether the idea of a civilised world is rooted in a divine or cosmological vision, a sense of higher morality or internationally agreed standards, that vision is made concrete in sets of laws. This is the promise, and the enduring appeal, of the rule of law.

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