

LAW AND THE ADMINISTRATION OF JUSTICE IN THE
OLD TESTAMENT AND ANCIENT EAST

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Library of Congress Catalog Card No. 80-65556

International Standard Book No. 0-8066-1801-9

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First published in 1976 by Neukirchener Verlag, Neukirchen-Vluyn.

To Hans Walter Wolff
on his 65th birthday
in gratitude

Manufactured in the United States of America

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ABBREVIATIONS

AASOR	Annual of the American Schools of Oriental Research
AJA	American Journal of Archaeology
ANET	Ancient Near Eastern Texts , ed. by J. B. Pritchard, 3rd ed. with supplement, 1969
AO	Der Alte Orient
AOT	H. Grebmann, Altorientalische Texte zum Alten Testament , 1926'
ARM	Archives Royales de Mari
ArOr	Archiv Orientalni
ATD	Das Alte Testament Deutsch
BASOR	Bulletin of the American Schools of Oriental Research
BBB	Bonner Biblische Beiträge
BC	Book of the Covenant
BHH	Biblich-Historisches Handwörterbuch
BhTh	Beiträge zur historischen Theologie
BK	Biblicher Kommentar
BWANT	Beiträge zur Wissenschaft vom Alten und Neuen Testament
BZ	Biblische Zeitschrift
BZAW	Beihefte zur Zeitschrift für die alttestamentliche Wissenschaft
CBQ	Catholic Biblical Quarterly
CE	The Code of Eshnunna
CH	The Code of Hammurabi
CL	The Code of Lipit-Ishtar
c u	The Code of Ur-Nammu
FRLANT	Forschungen zur Religion und Literatur des Alten und Neuen Testaments
GR	F. Horst, Gottes Recht . Gesammelte Studien zum Recht im Alten Testament (ThB 12), 1961
H	Heiligkeitgesetz, Holiness Code or Law of Holiness
HAT	Handbuch zum Alten Testament
HO	Handbuch der Orientalistik
HThR	Harvard Theological Review
HUCA	Hebrew Union College Annual
JCS	Journal of Cuneiform Studies
JJP	Journal of Juristic Papyrology
JJS	Journal of Jewish Studies
JNES	Journal of Near Eastern Studies
KuD	Kerygma und Dogma

I

THE ADMINISTRATION OF JUSTICE IN THE ANCIENT EAST

A. FALKENSTEIN, *Die neusumerischen Gerichtsurkunden*, I, 1956, II, 1956, III, 1957; A. GAMPER, *Gott als Richter in Mesopotamien und im Alten Testament*, 1966; R. HAASE, *Einführung*, esp. 119-27; J. G. LAUTNER, *Die richterliche Entscheidung und die Streitbeendigung im altbabylonischen Prozessrechte*, 1922; V. KOROSÉ, *Keilschriftrecht*; A. WALTHER, *Das altbabylonische Gerichtswesen*, 1917.

Scholars hold a variety of viewpoints on the subject of this chapter but agree that in the long period under discussion, there was a development in the forms in which justice was administered. The early phases in particular are difficult and therefore the most disputed. Here we must limit ourselves to a brief survey.

What led to the establishment of set judicial procedures? This question rests on considerations of philosophy of law. Two basically different hypotheses need to be mentioned here. The first starts from the idea that at the beginning, the individual helped himself without reference to higher authority. The law of the strongest prevailed. This type of self-justice, so this opinion goes, was then superseded by controlled self-help and ultimately by ordered process of law.

For the ancient east the second hypothesis carries more weight. It maintains that the process of law derived from the process of arbitration. How is this to be understood? If **conten-**

tion arose between two parties, they both submitted to arbitration. The “judgement” of the arbiter had no force in law. It was rather a recommendation to end the dispute—a recommendation which had to be ratified by both parties if the dispute was to be genuinely resolved. This gradually developed into a process endowed with force of law. Basically it was a natural process. Only persons with authority could function as arbiters. The more they exercised this office, the more their authority grew; and the higher their position in the social structure of society, the greater the weight of their judgement. Ultimately a *royal* pronouncement bringing hostilities to an end was considered to be even more than that: it was also understood as a judgement binding both parties without possibility of contradiction.

There was, however, no linear development from a judgement merely calling a halt to a dispute to a judgement with force of law. The history of law in the ancient east bears witness to several stages; it had its ups and downs often with no **recognisable** logic behind them. The same is true for our understanding of judicial sentencing. In neo-Sumerian times (c.2050-1955 BC), binding judgement seems to have been the rule already, while in the historically later period of ancient Babylon (c.1830-1530 BC), arbitration was still common. In both cases, however, we have to be content with accomplished facts, because there was understandably still no conscious articulation of such problems in ancient times.

What is the situation in periods to which we have access through the sources? The initiative for the commencement of judicial proceedings lay with the parties concerned. There was no public administration of punishment. Legal proceedings were inaugurated by the king or his officers only when royal interests were directly concerned. In such cases, however, the king was one of the parties. Before the case could be dealt with, the opponent in law was summoned; a whole series of protocols relating to summonses gives us a vivid picture of this. According to these texts, the summons consisted in a citation of the plaintiff issued before witnesses and a reply on the part of the defendant. Although such a summons is to be regarded as private, it still placed the defendant under an obligation expressed in the **termi-**

nology used. Translated literally, the technical expression constantly used in this connection means “to seize” or “to grasp.”

The defendant had to respond to the public summons. He could do so in such a way that he acknowledged and satisfied the plaintiff's claim. In this case a trial was avoided by an amicable agreement between the parties. At other times there was a trial, and quite often the defendant turned the tables and himself became the accuser. When we are dealing with a legal case in the ancient east, we cannot always say with total certainty who the plaintiff was and who the accused. If a person failed to obey a pretrial summons, he risked losing the ensuing lawsuit simply by default. This is shown, for example, by a text which A. Falkenstein includes in his edited collection of neo-Sumerian juridical texts. It concerns a lawsuit to clarify the ownership of a garden, and includes the following instruction :

On oath to the king! If you do not appear at the lawsuit over the garden within seven days (and) bring with you the tablet proving your purchase of the garden from Dudum, you shall not remain in this garden (NGU, II, 180).

The first official act of the juridical forum was to declare its competence and its readiness to deal with the pending case. Trial was always granted to both parties. The influence of arbitration can still be seen in this custom.

The judge then took his seat at the place of trial, cf. CH§5. We must assume that the contracting parties attended the trial standing. The purpose of the proceedings was to clear up the matter in dispute and come to a sentence of judgement or arbitration. Because the contracting parties usually had divergent ideas about the matter in dispute, the judicial forum was dependent on the consideration of means of proof. In the early period, the verbal testimony of witnesses took pride of place. Documentary proof also played a part, but it was not so important and in cases of doubt was not so highly prized as verbal testimony given to the court. **Oaths** were not absent from ancient oriental courts of law. Almost always it was the witnesses who confirmed their testimony with an oath. The oath of a single witness could also be accepted as sufficient. Only rarely do we encounter an oath taken by the parties themselves. There is a

case of this in the neo-Sumerian texts. The witnesses had died; there was therefore no choice but to demand an oath from the party concerned. The text runs:

Lugalemahe bought a slave for 4 shekels of silver. The witnesses are dead. Therefore if Lugalemahe swears to it, he can keep the slave (*NGU*, II, 373).

In certain special types of trial, an inspection of the site could be made as a means of proof, for example, in legal disputes about the purchase of land.

Ordeal is mentioned extremely rarely in the ancient eastern administration of justice. In the *CH*§2, ordeal is ordered in connexion with a case (cf. chapter IV, 3 below). The only other instance is in §132. A woman suspected of adultery could prove her innocence by ordeal. There is, however, no direct relation here to the formal administration of justice.

If the evidence was sufficient to justify a verdict, the judges could-and usually did-pass sentence. We have already mentioned the different values placed on the sentence in the history of ancient eastern law. Insofar as the sentence possessed force of law, it marked the end of the case. The arbiter's decision, on the other hand, had first to be accepted by the parties before it was legally effective. In this case, the trial came to an end with the acceptance of the verdict by the parties. There are a great many examples of this in ancient Babylonian texts. They were assembled and commented on for the first time by J. G. Lautner. Usually, however, the case never got as far as a verdict or reconciliation. An agreement of the parties was possible at any stage in the trial, and according to ancient Babylonian texts this was common practice, sometimes even before the formal opening of the trial. It is also possible that the impending cost of the suit persuaded the parties to come to a prior agreement.

There was no established legal remedy in ancient oriental law. There is no evidence for an appeal from one judicial authority to a higher one. Under particular conditions, however, a suit could be accepted again, and consequently there could be a second trial for the same thing. To exclude any abuse of this system, the parties were required in most cases to renounce the suit at the end of the trial.

We may also glance at the organization of the judiciary in the ancient east. Again we have to remember that our survey is not only of a large period but also of an extensive geographical area. We may distinguish three forms of justice, depending on whether it was administered by 1) the king, 2) the temple priests, or 3) the elders. They did not carry the same weight at all places and times.

The most important of them was undoubtedly justice administered by the king. In the neo-Sumerian period, it was already by far the weightiest. Falkenstein writes in this connexion: "The neo-Sumerian judiciary was determined by the surpassing importance of the king's jurisdiction" (*NGU*, I, 147). The king was both lawgiver-we shall have occasion later to mention the laws of the neo-Sumerian king Ur-Nammu-and judge. We can speak of royal jurisdiction, of course, not only where the king himself was actively involved but also where justice was administered in the king's name by royal officials.

In neo-Sumerian texts, the "city princes" seem to have been of considerable importance. They were the king's highest representatives who, in his name and by his mandate, played the decisive role in the administration of justice in the provinces. The same is true of royal justice in ancient Babylon. It has even been conjectured that the office of king in ancient Babylon is essentially to be understood as the office of judge. F. R. Kraus is of the following opinion in this regard: "The king was perhaps in principle simply the judge, and the authority of the other judges was delegated to them originally by the king" (*Genava* NS 8, 287). Even during the ancient Babylonian period, there was naturally more indirect than direct judicial activity on the king's part. The king delegated his legal authority to his officials who acted by his order. In important cities a chief justice was appointed who could also carry out other magisterial business.

Unlike the royal administration of justice, temple justice did not always play an essential part in ancient eastern law. For the neo-Sumerian period we have practically no evidence for justice administered by priests. Are we to see in this the influence of the monarchy tolerating no competition? We do not know, but such an assumption would not be improbable. Later on, the

temple grew in judicial importance. In the ancient Babylonian period, it was a main component of the judiciary, and not only because there was a jurisdiction proper to the temple. Its great influence on the administration of justice was also due to the fact that the solemnly sworn statement was possible only in the temple area ; and as we have seen, the oath was the decisive form of proof in the legal assembly.

Finally, we must mention the administration of justice by elders. Speaking quite generally, the justice of elders must go back to a developmental stage prior to the king's justice, But it was not fully suppressed by the latter. It is not easy to determine the relation of the administration of justice by elders to that by the king, particularly as the source material is so meager on this point. Courts of elders were particularly active in the smaller towns. The assumption that the local elders' court was appealed to in slight affairs, the royal court in more important affairs, is so much in the nature of things that it cannot be totally false. We have already stated that the royal court was not regarded as a court of appeal higher than the elders' court.

We learn practically nothing about the execution of sentence, in particular the administration of punishment. It is uncertain whether there were state organs to see sentence carried out. For the earlier period, there is very little likelihood that such organs existed, and even later it is doubtful. There is no evidence for them. It is certain, however, that the execution of the sentence was not the concern of the judge, although it is possible that the judge supervised the administration of punishment.

II

THE ADMINISTRATION OF JUSTICE IN THE OLDTESTAMENT

1. General features

H. J. BOECKER, *Redeformen des Rechtslebens im Alten Testament*, 1970 ²; A. GAMPER, *Gott als Richter in Mesopotamien und im Alten Testament*, 1966, esp. 172-202; F. HORST, "Recht und Religion im Bereich des Alten Testaments," 1956=*GR*, 260-91; L. KUHNER, *Hebrew Man*, appendix; G. LIEDKE, *Gestalt und Bezeichnung alttestamentlicher Rechtssätze*, 1971; D. A. MCKENZIE, "Judicial Procedure at the Town Gate," *VT* 14, 1964, 100-04; A. PHILLIPS, "Some Aspects of Family Law in Pre-exilic Israel," *VT* 23, 1973, 349-61; I. L. SEELIGMANN, "Zur Terminologie für das Gerichtsverfahren im Wortschatz des biblischen Hebräisch," in *Festschr. W. Baumgartner* (VTSup 16), 1967, 251-78.

There is neither doubt nor dispute among scholars over the enormous importance of law in ancient Israel. The law influenced the life and thought of Old Testament man to an amazing extent. A consequence of this is that even the theological concepts of the Old Testament were essentially moulded by Israel's thinking on law. G. Quell has expressed this in his dictionary article "The Concept of Law in the Old Testament" : "... law is the basis of the view of God in the Old Testament in so far as it is theologically developed, and ... conversely the endowment of legal concepts with religious meaning contributed to an ethicising of law" (*TDNT*, II, 174). Many scholarly works have dealt with

various aspects of these data, although it is not to our purpose to pursue them here. We are more concerned with the actual processes of law. How was the law administered? Who was involved? What was the aim and intention of the administration of justice?

It is more difficult than it might appear at first sight to bring together OT data on the administration of law. There are no OT "rules of court." We must remember above all that in its basic message the OT is not interested in conveying a picture of legal processes in Ancient Israel. Its concern lies elsewhere. Its purpose is to report God's activity in and with Israel and to demonstrate Israel's answer to this activity. This purpose is pursued in many ways, and in the course of it much is said about law, but unsystematically and in passing. This makes the matter so difficult.

The OT covers a period of some two thousands years. This on its own poses a problem, because over any such length of time we have to reckon with considerable changes in every area of life, whatever else may be said about it. This is especially aggravating in our case, because in the course of these millennia Israel's social fabric suffered upheavals with far-reaching effects on the law. F. Horst is right when he says: "Israelite law has been affected by the not inconsiderable economic, sociological and cultural changes that came about in decisive centuries" (*GR*, 204). We need not go into the details of this development. We are concerned only with its general outline.

The Israelites came basically from the eastern or southeastern and southern steppe countries and penetrated the cultivated areas of Palestine. They were not originally inhabitants of cultivated land; they were nomads, and their legal arrangements were typical of nomads. What were they like? Nomadic culture was based on the family. So was their law. Historians of law speak of tribal law. Frequently, however, they do not take sufficient *cognisance* of the fact that tribal law was not monolithic (*c.f.* for this and for what follows G. Liedke, 39f). It had its roots on the one hand in the family or house (Hebr. *bajit*), on the other in the clan. The family included members of three to four generations. It was not therefore a family in the modern sense, but an extended version. The head of it was the father

or paterfamilias (Hebr. '*ab*'). In ancient times he enjoyed unrestricted authority. Disputes within the family were decided authoritatively and absolutely by the paterfamilias.

In comparable systems of law, the same thing still holds today, cf. E. Gräf, *Das Rechtswesen der heutigen Beduinen*, 42: "The father has unlimited authority over both the property and the members of the family without being accountable to anyone." This type of law has been called simply "father-law" and described as follows: "The head of the household was the only master. His will, his person, his life were law, because all life came from him. ... The father gives part of his personality to his family, he gives them life and law. To come into one's own is to approach the father and be more closely associated with the line of descent" (E. Possoz, *Die Begründung des Rechtes im Klan*, 1952, 21).

In its narrative sections, the OT does not mention this form of jurisdiction very often. One case, and a clear one, in which it does is Gen. 16:5-6 (cf. Boecker, 59-61). The narrative concerns Hagar. In v. 5, Sarah appeals to the paterfamilias, who is the guardian of the family members' legal interests, with the words: "I have been wronged and you must answer for it" (the translation given by Luther, the Zurich Bible and the *RSV*, "may the wrong done to me be on you," is incorrect). In other words, you are responsible; as paterfamilias you must see to it that the wrong is put right and justice done. And Abraham does just that. He gives his decision; no discussion or further inquiry is necessary: "Your slave-girl is in your hands" (v. 6).

Another example of the absolute power of the paterfamilias is the story of Judah and Tamar in Gen. 38. Although the precise legal significance of the case as described in the narrative (vv. 24-6) is not totally clear, this much we can say with certainty: as head of the family, Judah exercised legal authority over the women who belonged to the family unit. A complaint is lodged with him (his daughter-in-law Tamar had behaved like a common prostitute, and through her wanton conduct was with child, v. 24a), and he pronounced judicial sentence: "Bring her out so that she may be burnt" (v. 24b).

The paterfamilias' absolute jurisdiction over the members of

his family did not continue. This is quite clear, for example, from the following text:

When a man has a son who is disobedient and out of control, and will not obey his father or his mother, or pay attention when they punish him, then his father and mother shall take hold of him and bring him out to the elders of the town, at the town gate. They shall say to the elders of the town, "This son of ours is disobedient and out of control ; he will not obey us, he is a wastrel and a drunkard." Then all the men of the town shall stone him to death !
Deut. 21: 18-21

This text shows that the concept of family justice which gave the paterfamilias sovereign power over the members of the family had disappeared by the time Deuteronomy was written. Although this text relates a case apparently confined to the family, the father's authority had passed to another institution. On the other hand, we cannot overlook the fact that the father retained far-reaching authority within the family for specific areas of law. This nevertheless excluded the power to pass the death sentence (cf. the article by A. Phillips, which deals with divorce, slavery, and adoption from this point of view).

In tribal law, the sib (Hebr. *mišpāhā*) was the highest body. A sib consisted of a number of blood-related family units. The resulting bodies could be very extensive. We must of course reckon with considerable fluctuations in the size of sibs, but as a general rule we can probably reckon twenty families to a sib (cf. Wolff, *Anthropologie*, 310). The legal authority of the sib was invested in the elders. The obvious assumption that the elders were the heads of the families that made up the sib must be basically correct. The college of elders managed the sib's affairs, and this meant in particular dealing with disputes. This sums up the tribal law of the nomadic period. The passage to settled living then brought with it an important development in legal structure. The nomadic jurisdiction of the family or sib gave way to the jurisdiction of the local community, which by now consisted almost wholly of permanent settlers. There arose the famous Hebrew legal assembly, no real parallel of which has yet been discovered in the ancient east. We can reckon with a

slow, organic passage from one legal structure to another as the sibs settled down together in local units.

The geographical reality of the countryside favoured the newly developing judicial organisation. Palestine is a mountainous country. It is cut by numerous valleys which, apart from the Jordan valley, nearly all run east to west or west to east. The natural result was a large number of semi-independent districts. They have been estimated at over forty (Köhler, 149). These districts formed natural, manageable areas in which the nomads, by then sedentary, settled and prospered. The nomadic origin of the Israelite sibs and the geographical realities of the country are thus the two main causes of the rise of the Hebrew legal assembly, which must be regarded as the most important legal institution of ancient Israel. It essentially moulded OT legal life. We must now consider it more closely.

How was the process of legal investigation conducted in the legal assembly? We can hardly imagine how unstructured and unbureaucratic it must all have been. There were no set times or places reserved for the processes of law. Judicial investigation was an important part of life. The place of law frequently mentioned in the OT is the "gate" (Deut. 21 :19;25:7; Amos 5:10; Ruth 4:1, 11). By this was meant the open space immediately behind the city gates, and also the inner recesses of the passageway where there was some seating accommodation. In pre-Greek times, this was the only large open space in the small, cramped cities of Palestine where the inhabitants could congregate (cf. Noth, *Old Testament World*, 151-2). It was not, however, a place reserved for legal events. It was simply the place of assembly for small cities. It was also the place through which the inhabitants had to pass on their way to the fields in the morning and on their way home in the evening. "The Lord will guard your going and your coming," says Ps. 121:8. The succession of exit and re-entry, which to us sounds strange, is explained by the daily rhythm of the Hebrew peasant's life. His social life centered on the gate. The city gate was, so to speak, the leisure area of the Palestinian town. It was also where the market was held (2 Kings 7 :1). People met and spoke there, travellers were received and news of the outside world learnt. And legal matters were settled there.

The system of local courts brought an extension of legal involvement in comparison with tribal law. In the local courts, all the citizens of the place concerned, and not just the sib elders, were entitled to take an active part in the trial and verdict. All citizens **were** therefore legally competent, which naturally does not mean that all potential participants had to be actively involved in any particular case. From the sheer practical point of view there had to be some selection. Taking part in such trials was felt to be not a burden but a privilege. Jeremiah lamented that elders had left off their sessions in the gate (Lam. 5 :14). This whole chapter is a lamentation which describes the frightful conditions some time after the conquest and destruction of Jerusalem and its environs in 587 BC. Everything that had once brought joy was at an end. It is significant that in this context, when talking about the elderly, Jeremiah should mention the assemblies at the gate. L. Köhler has described the social significance of participation in court proceedings as follows: "The supreme right, in which is experienced the pride and worth of a healthy man, who is of age, has his own property and is recognized by his fellows, is the right to take part and to speak in the legal assembly. It is the meeting place of those who really matter" (153).

It was one of the hardships and disadvantages of the alien not to have this privilege. Women and children and of course slaves were also excluded from any active part in legal trials. OT laws therefore stress again and again the duty not to withhold their right from precisely these persons. We may quote the following text by way of example: "You shall not deprive aliens and orphans of justice nor take a widow's cloak in pledge" (Deut. 24 :17).

Ruth 4:1-2 gives us a graphic picture of how a forum was constituted at the gate :

Now Boaz had gone up to the city gate, and was sitting there; and, after a time, the next-of-kin of whom he had spoken passed by. "Here," he cried, calling him by name, "come and sit down." He came and sat down. Then Boaz stopped ten elders of the town, and asked them to sit there, and they did so.

The particular case related in Ruth 4 does not concern us here.

We are more interested in the general procedure adopted, and it comes through quite clearly. To assemble a forum, the individual sat at the gate and called the passers-by. He asked them to sit at the gate. Without necessary cause no Hebrew would refuse such an invitation. In Ruth 4 ten elders are mentioned, called by Boaz. This is the only OT passage which specifically mentions the number ten in this connexion. It should not be accorded excessive importance. There must frequently have been more, and occasionally perhaps fewer, elders present. Many other OT passages also testify to the fact that the judges remained seated during the hearing (eg. Exod. 18 :13; Ps. 122 :5; Prov. 20 :8; Dan. 7 :9f), while the suing parties stood (Exod. 18 :13; 1 Kings 3 :16; Zech. 3 :1).

In Ruth 4 neither assembling the forum nor reaching a verdict occasion much difficulty. In other cases things would not have been quite so easy. Daily life is full of conflicts which often cannot be resolved except by a proper judicial verdict. Let us suppose that a dispute arose between two people, the one claiming as his property goods claimed also by the other. The usual place of assembly, the gate, would be the appropriate site to deal with such a matter. A dispute such as this one was primarily one of personal disagreement, of private accusation and rebuttal. However lively the difference of opinion, it would not necessarily require recourse to an official court; but on the other hand, little was needed for a private quarrel to issue in a formal trial. The wide agreement of terms used at different times shows how closely pre-judicial and judicial situations resembled each other. In rhetoric the pre-judicial quarrel was carried on much like a quarrel conducted according to the procedures of the official court (cf. Boecker, 25ff).

Finally, however, the point would come when one of the parties was not satisfied with informal proceedings. He would want the matter decided by a court of law. He would therefore appeal to a legal decision. The appeal could in fact be made by the accused or by the accuser. The particular significance of the appeal in the Hebrew administration of justice by laymen rests on the fact that it was not made to an already constituted court. The court was brought into being by the appeal. The **ap-**

peal transformed at best interested onlookers into responsible participants in a court of law.

An example may clarify this. Gen. 31:25-42 describes the quarrel between Jacob and Laban, presented at its complicated denouement as if it were an official suit (cf. Boecker, 41-5). Laban had accused Jacob of stealing his household goods and making off with them. Jacob, who did not know that Rachel had stolen them, prepared to contest the accusation. The matter proceeds up to v. 37, which reads: "What is my offence, that you have come after me in hot pursuit and gone through all my possessions? Have you found anything belonging to your household? If so, set it here in front of my kinsmen and yours." And then we read the crucial sentence: "Let them judge between the two of us." This is an appeal. A court thereby came into being, and the dispute could be dealt with and decided at a higher level.

The forum was constituted without any further act being necessary. F. Horst's suggestion (*GR*, 297) that the parties in law agreed on oath at the start of the proceedings to abide by the verdict lacks sufficient textual evidence. Horst cites Jer. 42 :5. The people promised the prophet that they would act according to the word of God however it turned out: "Whether we like it or not, we will obey the Lord our God to whom we send you . . . we will obey the Lord our God" (v. 6). In the context, however, the text is intelligible even without supposing that it records a judicial custom not mentioned elsewhere. It is self-evident that no special procedure is needed before the verdict of a regularly assembled court is accepted.

Although all those present who had citizens' rights were entitled to speak and vote, they did not retain the same functions throughout. To us, this is very disconcerting at first sight. We find it hard to imagine a system in which the functions of the individuals participating in the trial were not clearly defined, much less actually interchangeable. This, however, was the tradition of the Hebrews. Many people have commented on this peculiarity of Hebrew trials (cf. Boecker, 80-1, 86-9, and the literature and quotations given there). For example, the witnesses and the judge were not necessarily different people. A person could come forward during the trial and offer his testimony as a witness, and then at the end cast his vote as a judge. The same

thing applied, even more surprisingly, to plaintiff and judge. It was possible for the accuser to pronounce sentence as judge with others. Nothing was predetermined, everything was open, and it was this which gave the Hebrew legal assembly its vitality and colour, its-to use a modern term-democratic character. In consequence, Hebrew trials were fundamentally oral processes. There is only one case in the OT in which there is an allusion to a written form of trial (Job 31:35), but it clearly depends on Egyptian legal custom and so cannot be adduced for the OT administration of justice,

Not every legal suit could be decided by rational means of proof (that is, with witnesses or documents). If need be, non-rational proofs had to be advanced. These comprised the oath and the ordeal (or divine judgement).

The oath existed in Hebrew law only on the part of the accused. We do not know of any case of an oath taken by a witness. (For oaths, cf. Horst, "Der Eid im Alten Testament," *GR*, 292-314). In certain defined cases, an accused person could exculpate himself with an oath. The path was therefore purgative and usually took the form of a conditional self-cursing on the part of the accused. It was determinant; that is, it decided the case. There are examples of the use of oaths in trials in Exod. 22:8 and 22 :11 (cf. also Lev. 5:21-6). Exod. 22 :7-13 deals with goods entrusted to others and lost or damaged while on loan. If the neighbour to whom the goods were handed over and entrusted could not prove his innocence, he could vindicate himself by swearing an oath. The CH too mentions an extended use of the oath in law, and in most cases it was the purgative oath (§§20, 103, 131, 206, 227, 249, 266) ; in others it was a sworn statement "before god," usually in the context of property disputes (§§23, 106, 107, 120, 126, 240).

The oath brought the divinity into the process of legal investigation. So did the ordeal (etymologically, a [divine] dispensation of judgement). The ordeal, of which there are various forms in the OT, established the guilt or innocence of the accused, or investigated the perpetrator of a given deed. In Deut. 17:8-13, homicide, serious assault and disputes over ownership rights are named as cases in which ordeal could be used. The three crimes listed are certainly only examples. There is no men-

tion of adultery because it was probably the offence for which ordeal was most frequently invoked. This is demonstrated not only by the most detailed OT description of ordeal, Num. 5 :12-28, but also by the CH. In this particular code, however, the ordeal is very much less in evidence than in the OT.

Ordeal was not the responsibility of the local court itself. The priests at the temple were responsible. Hence Deuteronomy deals with trial by ordeal in the context of the centralisation laws. That priests administered the ordeal did not, however, mean that the judicial proceedings entered another realm and became cultic proceedings. In the administration of the ordeal, the priests were an auxiliary legal resource of the local court in whose competence the trial remained after as before.

What has been said must be completed by a point not so far mentioned. Local courts could evidently neither eliminate nor integrate into their own legal competence an important legal institution: the blood-feud, cf. E. Merz, *Die Blutrache bei den Israeliten* (1916) ; Koch, *Vergeltung*, 447-56. Continuing recourse to the blood-feud is frequently mentioned not only in the narrative sections of the OT, but also in legal formulas. The punishment of a murderer is even withdrawn expressly from the local court and assigned to the avenger (Num. 35 :19; Deut. 19:12). Theoretically the blood-feud persisted into the post-exilic period, in practice it continued at least into the time of the monarchy. It stemmed from a legal mentality that was fully group-oriented. If a group was weakened by the killing of a member, the other group must suffer equal damage by blood-revenge so that the balance between the two was maintained. On the subject of the blood-feud, H. von Hentig writes:

Its purpose was to compensate a clan or family group for a loss of power, The opposing collectivities suffered and acted as individuals. Groups were made responsible and accepted the responsibility without deliberation. ... The members of an Arabian tribe say on the occasion of a killing not, "the blood of this or that member has been shed," but "**our** blood has been shed" (*Die Strafe, I. Frühformen und kulturgeschichtliche Zusammenhänge*, 1954, 110).

To avoid misunderstandings, it must be stressed that the blood-

feud was a **judicial** act, it was not arbitrary. This point, however, is not enough to make it more intelligible to us. Koch is right when he says:

An institution like the blood-feud, with its frightful implications, is nothing less than gruesome; the westerner looks on such an arrangement, and the people who accepted it, with horror. This sentiment will be modified by cool historical consideration; the blood-feud was the most effective protection of human life where there was no well-organised national administration of punishment (454f).

In Deuteronomy we find a first OT reference to the suppression of blood-revenge. We read in Deut. 24 :16: "Fathers shall not be put to death for their children, nor children for their fathers; a man shall be put to death only for his own sin." Although it is not easily interpreted, this legal prescription is perhaps best understood as a renunciation of blood-revenge.

We return to local courts. What was their purpose? What did they hope to achieve? We may answer this first by saying what they did not hope to achieve: they did not intend to satisfy an abstract concept of justice. On a wider view, this was the intention of law as developed by the Romans, and it has also influenced German law. The well-known phrase **fiat justitia. pereat mundus** expresses this understanding of law in a classic formula. It was embodied in the impartial goddess Justitia, who fulfilled her duty blindfolded, scales in one hand, sword in the other. We do not, of course, maintain that this common view does full justice to the Roman or German concepts of law. H. H. Schmid has expressed some noteworthy thoughts on this (*Gerechtigkeit als Weltordnung*, 1968, 181f.). Unfortunately we cannot pursue the matter any further here. However it may be, such concepts are as foreign to the Hebrew mind as it is possible to be.

The purpose of a Hebrew trial was to settle a dispute between members of the community so that prosperous coexistence was possible. L. Köhler puts it tellingly: the legal assembly

is the organization for reconciliation. It grows up out of a practical need. It does not go beyond this in its actions nor in its outlooks. It intervenes when it must, but does not intervene any further than it must. It has no desire to provide systematic law.

Nor does it act in systematic legal ways, but its sole endeavor is to settle quarrels and to guard the well-being of the community. To judge means here to settle (156).

It is therefore understandable that in the Hebrew legal assembly there was no public prosecutor, that the one who had suffered brought the case himself and the witness of a misdeed became the accuser. As a witness he was duty-bound to report a crime (cf. in this connexion Lev. 5:1 and Prov. 29:24). The Hebrew word for witness therefore often meant the same as accuser (cf. Seeligmann, 261ff.).

This contradicts the thesis put forward by H. Graf Reventlow in his article "Das Amt des Mazkir," *ThZ* 15, 1959. He sees in the office of recorder, known from the list of David's and Solomon's officials in 2 Sam. 8:16-18; 20:23-6; 1 Kings 4:1-6, the most important of the Israelite legal officers, whose position "could stand comparison with the other Israelite offices of king, high priest and commander-in-chief" (175). In a first definition his function could be described as follows: "The recorder was the highest official in the country, responsible for law and order. . . . He was the public prosecutor, or, as we might also say today, the prosecutor general" (171). Further on, the office of recorder is described as amphictyonic, and finally the recorder is called "the federal prosecutor" (175). This thesis has found no other adherents (cf. the criticisms of Boecker, "Erwägungen zum Amt des Mazkir," *ThZ* 17, 1961; Halbe, *Das Privilegrecht Jahwehs*, 1975, 372; and Seeligmann, 260ff.).

The function of the sentence, which concluded the trial, accorded with the purpose of the trial. If we except suits concerning family or property law, where judgement served another purpose, the first and most important task of the court was to declare the accused guilty or innocent. This is the sense of Deut. 25:1 which establishes the role of the tribunal as publicly justifying the innocent and publicly identifying the guilty: "When two men go to law and present themselves for judgement, the judges shall try the case; they shall acquit the innocent and condemn the guilty."

In one place in the OT, just such a judgement is given verbatim: Prov. 24:24 (cf. also Gen. 38:26; 1 Sam. 24:18 and Boecker,

123-32). The verdict turns against a judge who falsely declares "you are innocent" to someone who has done wrong. This sentence is in the form of an exhortation. It addresses the accused directly. The accused is then freed from the blemish of the accusation in the sight and hearing of all, and this was considered of much greater importance in ancient society than it would be today. If, on the other hand, the verdict was guilty, the court had one further duty to undertake. It must establish the legal consequences of the verdict. An effective compromise between the parties demanded that the damage caused by the guilty one should be made good. Depending on the type of case involved, this could take either of two forms: compensation (making good in the narrower sense) or punishment (corporal or capital) as a sanction. This too lay within the court's competence. It was carried out by deciding on the legal penalty. The penalties imposed in OT law derive from this type of action.

Here we may briefly mention the most important penalties inflicted in OT law. By the death penalty, which is relatively rarely demanded by the law, was generally meant stoning. In two places, however, burning is mentioned for special cases. This was the punishment inflicted, according to Lev. 21:9, on the daughter of a priest who practised cultic (?) prostitution, and according to Lev. 20:14, a man who took both a wife and her mother was threatened with burning. The narrative sections of the OT refer more frequently to it, eg. Gen. 38:24; Josh. 7:25. Burning was in fact an ancient form of punishment which also occurs frequently in ancient eastern law.

Crucifixion occurs nowhere in the OT. It is mentioned for the first time in the Hellenic period for Palestine and later was practised above all by the Romans. Imprisonment does not occur in the OT either, nor do fines or damages. Repayment in money or kind is mentioned in OT law, but it is always to the injured party, never to the community or the state, and so cannot properly be described as a penalty. Mutilation, demanded frequently by the CH, is unknown in the OT apart from one rather curious passage in Deut. 25:11f. Flogging is touched on in Deut. 25:1-3, but really only to regulate its limits; there is no reference to a particular case in which it is used (but cf. Deut. 22:13-18; and also Jer. 20:2).

The form of capital punishment characteristic of OT law was stoning. It is frequently referred to both in legislation and in narratives and is also to be supposed wherever the death penalty is not further specified. Stoning was a community punishment. As the community as a whole took part in the trial, so it contributed to the sentence by stoning the culprit, cf. Lev. 24:14; Num. 15:35f; Deut. 21:21; 22:21. Stoning took place outside the town, cf. Lev. 24:14; Num. 15:35f; 1 Kings 21:13. If sentence was passed with the help of eye-witnesses, the witnesses had to begin the execution (Deut. 17:7). This was to discourage frivolous testimony in court. In OT law, stoning was not only a community punishment, however; it was also a form of excommunication. The victim was not permitted to be buried in the burial-place of his family, he was excluded from the community even in death. There is a great deal of material from the history of law and religions enabling us to understand how stoning was regarded as a curse (cf. H. von Hentig, *Die Strafe*, I, 1954, 355-69). For the ancients, the criminal was possessed of a real guilt which jeopardised the community. By covering the evil-doer with stones outside the town, the evil that he could spread was banished.

There was no possibility of appeal to a court superior to or other than the local one, because there was no such court. The local court decided the case definitively.

2. The functions of the king in the administration of justice

R. KNIERIM, "Exodus 18 und die Neuordnung der mosaischen Gerichtsbarkeit," *ZAW* 73, 1961, 146-71; G. C. MACHOLZ, "Die Stellung des Königs in der israelitischen Gerichtsverfassung," *ZAW* 84, 1972, 157-82; Id., "Zur Geschichte der Justizorganisation in Juda," *ZAW* 84, 1972, 314-40; R. de VAUX, *Ancient Israel*, 150-2.

The above remarks seem to ignore the undeniable fact that in many OT passages the king is attributed with judicial competence. This brings us to a highly controverted question. The judicial authority of the monarchy is dealt with in exegetical literature in different, indeed in many cases opposite, directions. On the one hand, the king is accorded decisive judicial compe-

tence; on the other, nothing could be further from the truth, in the minds of some. A few examples may be given. In his *Hebräische Archäologie* (1927³), I. Benzinger speaks of when "jurisdiction passed to the king" (263), and he even comes to the conclusion that "the king was quite simply the supreme judge. His function as ruler was essentially to act as judge" (278). Similarly A. Bertholet describes the monarchy as a court of appeal "which claimed jurisdiction" (*Kulturgeschichte Israels*, 1919, 195). For R. de Vaux too "the administration of justice seems to have been in the hands of the ruler" (15). On the other hand, we read observations like that of A. Alt: "Until very late in the period of the kings the Israelite state had so little to do with the practical administration of the law that one can scarcely attribute to it any essential part in the actual making of the law" ("The Origins of Israelite Law," 101).

How are such different opinions possible? It seems as if the authors have seized on various aspects and absolutised them, without taking into account other aspects of equal importance. Blanket theses will not improve the situation; only an examination of all OT passages which in some way deal with the monarchy's legal role can help us. In the two articles cited, G. C. Macholz has undertaken just such an examination. We need not repeat his researches in every detail. In many, although not all, points the following outline agrees with Macholz's theses.

We may begin with a basic observation: we must bear in mind that the OT nowhere refers to legislation on the part of the king. The laws of the OT were not promulgated by the king and therefore not by the state either. They were given by God. Jahweh, the God of Israel, was the sole legislator. This was essentially different from other ancient eastern countries. Although Hammurabi for example acted by divine commission, it was as king of Babylon that he wrote his code and expressly described himself as lawgiver. There is only one OT passage in which anything like a king-made law is mentioned. It is a solitary instance in a very definite context. During one of David's campaigns, the problem arose of sharing the booty. Were only those directly involved in the fighting or also the supply column to have a share? David decided that everyone was entitled to an equal share (1 Sam. 30:24), and the text continues: "From that time

onwards, this has been the established custom in Israel down to this day" (v. 25). David's decision was therefore regarded as setting a precedent, and it remained effective in law. It was a decision made in the context of war. David was acting not as king but as commander-in-chief of the army at the moment of this incident. He had far-reaching legal authority over his subordinates.

We have thereby drawn attention to a legal area in which the king was also active as lawgiver in Israel from the beginnings of the monarchy. As army chief, Saul exercised judicial authority over the soldiers. We may refer in this connexion to 1 Sam. 22:6-19 (cf. Boecker, *Redeformen*, 87-9; further material can be found in Macholz). In doing this, the king did not set out to compete with the jurisdiction of the local legal assembly, because his authority was limited in time and also to determined people. It fell into abeyance when the army disbanded and its members returned to their normal lives.

The kings of Israel succeeded to the army command of the pre-state period not only as the leaders of military expeditions; they also created for themselves a standing army and thereby went far beyond the prevailing fashion. With Saul, the professional army must have been a relatively small body (cf. 1 Sam. 14 :52); with David, the troops ("the king and his men" : 2 Sam. 5:6) became the decisive military and political power factor. There is no doubt that the king enjoyed a comprehensive jurisdiction over his soldiers. But he did not conflict with the permanent rights of the courts because these latter were not and could not be responsible for the newly arisen body. The soldier was essentially a non-Israelite institution. He was taken over from the world of the Canaanite city-kings, where the king had very extensive jurisdiction. The new institution in Israel required a new legal order.

The same may be said of another institution which likewise came into being with the monarchy. We refer to the royal court in the widest sense, that is, the members of the royal family and the officials of the king's administration. It is hard to imagine that the members of the court were subject to the jurisdiction of the local assemblies, and in fact there are numerous instances, particularly in the reigns of David and Solomon, of direct judicial

activity on the king's part with regard to the members of his court (cf. 2 Sam. 19 :16-24; 1 Kings 2:13-15, 16-17, 28-34). In terms of the history of law, the king acted as paterfamilias towards his family, harking back to the traditions of sib law. In the case of the royal officials, the king's authority must be a borrowing from the traditions of Israel's neighbours; we can detect both Canaanite, and Egyptian influence.

Finally we must mention a third area in which the king enjoyed extensive legal authority. It must be defined locally. When David and his personal troops took the Jebusite royal city of Jerusalem (2 Sam. 5 :6-10), he made Jerusalem his city. He took over the legal competence of his Canaanite predecessors. The same applies to Samaria. The founding of this city by Omri on a hill acquired from the king (1 Kings 16 :24) resulted in a special legal status for the capital of the northern kingdom (cf. Alt, "Der Stadtstaat Samaria," 1954=*Kleine Schriften, III*, 258-302, esp. 262ff). In Jerusalem the Judæan king was henceforth the supreme ruler who then increasingly delegated authority to officials; in Samaria the Israelite king was to possess comparable legal powers.

We have thus enumerated the three areas in which a jurisdiction of the king was developed in Israel. The OT passages in which a jurisdiction of the king is considered can be accommodated more or less clearly in this scheme. We also have to remember that the internal consolidation of the kingdom over the years led to an increase in the king's influence on the judicature. There was, however, no fundamental reorganisation of the law by the king. We must agree with Macholz when he writes: "In none of the recorded cases does the king's jurisdiction infringe on rights reserved to the local courts. Nor does it establish itself as a superior court to which appeal could be made against decisions of the city courts" (177). In the following paragraphs, we shall examine one or two particularly characteristic passages which support this thesis.

We begin with some examples concerning the royal jurisdiction in the capitals, Jerusalem and Samaria. In the famous story of Solomon's judgement (1 Kings 3 :16-27), the question of **historicity** is irrelevant to our purposes. That such a story could be related of a king in Jerusalem reflects the competence enjoyed

by the king in that city (cf. the analysis of the narrative from the point of view of the history of law in Boecker, *Redeformen*, 73f, 96, 150).

We must also refer in this context to the account of the trial of the prophet Jeremiah in Jer. 26:1-19. This passage and its literary context have recently been the subject of a surprising number of very different investigations including: H. Graf Reventlow, *ZAW* 81, 1969, 315-52; H. Schulz, *Das Todesrecht im Alten Testament*, 1969, esp. 118-23, and F.-L. Hossfeld and I. Meyer, *ZAW* 86, 1974, 30-50. We have in this text the most detailed description of a trial in the OT. Jer. 26 can therefore claim a special interest in the context of an OT inquiry conducted from the point of view of the history of law. This is true whether we deny the historicity of the account, as Hossfeld-Meyer do, or, as seems more reasonable, accept it. The trial of Jeremiah, in which we can clearly distinguish a pre-trial accusation (v. 9), a speech by the prosecution (v. 11), a speech by the defence (vv. 12-15), a proposal to bring hostilities to an end (v. 13) and a formulation of the sentence (v. 16), is a trial for blasphemy, begun in Jerusalem and taken to the royal temple. The royal court, represented by the officers of Judah was therefore in sitting, cf. v. 10 :

The officers of Judah heard what was happening, and they went up from the royal palace to the Lord's house and took their places there at the entrance of the new gate.

The phrase "officers [or princes] of Judah" is conspicuous; later on in the narrative the words "of Judah" are missing. It is clear that they were royal officials. According to v. 10, their normal place of work was the royal palace. It transpires from the same verse that the duties of the officers were not exclusively legal. To proceed with the trial, the officers moved to the appropriate place. The assumption that royal officers acted as judges of the king's court if the need arose may therefore not be totally improbable. The royal court was not, however, omniscient. Its sphere of jurisdiction was precisely determined. The OT also mentions these officials elsewhere, under various names (cf. Isa. 1:23, 26; 3:1-3; Hos. 5:1; Mic. 3:9-11; 7:3). We gather that

their competence was extended in the course of time to include local interests of the city-states.

The two latter texts cited refer to Jerusalem. Examples of a comparable royal jurisdiction in Samaria, capital of the northern kingdom, are rarer, but not altogether absent. 2 Kings 6:26-30 is a case in point. The narrative concerns the siege of Samaria. A disastrous famine was raging in the city, and the following event, unthinkable in other circumstances, is recorded:

One day, as the king of Israel was walking along the city wall, a woman called to him, "Help, my lord king!" He said, "If the Lord will not bring you help, where can I find any for you? From threshing-floor or from winepress? What is your trouble?" She replied, "This woman said to me, 'Give up your child for us to eat today, and we will eat mine tomorrow.' So we cooked my son and ate him; but when I said to her the next day, 'Now give up your child for us to eat,' she had hidden him." When he heard the woman's story, the king rent his clothes. He was walking along the wall at the time, and when the people looked, they saw that he had sackcloth underneath, next to his skin.

A gruesome episode! We may, of course, ask whether such cannibalism in fact took place, although the same thing is narrated of the siege of Jerusalem in Lam. 4:10. However that may be, there is hardly an occurrence thinkable which could describe the frightfulness of the famine in a beleaguered city more effectively, and it is related accordingly. We are concerned only with the legal aspects. The first point to note is that the woman turned to the king with her request for a verdict; her plea was in the form of a cry for help (cf. Excursus 1 below). She was the accuser. The other woman had not abided by their bargain. The king must force her to fulfil her side of it by passing sentence.

Why did the woman turn to the king? This is the question which concerns us directly. The answer is not altogether clear (thus also Macholz, 174). It is most probable that the woman in the royal city of Samaria turned to the judge who was responsible for all cases there. Another explanation is also possible, however. She reacted to a particular situation, one of war; she was in a city besieged by the enemy. The law of war therefore prevailed. The commander-in-chief was also the supreme judge. This could be why the king was approached by the woman.

Among the texts always cited on this question of the king's jurisdiction, 2 Sam. 15:1-6 must receive a particular mention. The facts related here belong to Absalom's rebellion against his father David. Absalom was making psychological preparations for his coup d'état :

After this, Absalom provided himself with a chariot and horses and an escort of fifty men. He made it a practice to rise early and stand beside the road which runs through the city gate. He would hail every man who had a case to bring before the king for judgement and would ask him what city he came from. When he answered, "I come, sir, from such and such a tribe of Israel," Absalom would say to him, "I can see that you have a very good case, but you will get no hearing from the king." And he would add, "If only I were appointed judge in the land, it would be my business to see that every one who brought a suit or a claim got justice from me." Whenever a man approached to prostrate himself, Absalom would stretch out his hand, take hold of him and kiss him. By behaving like this to every Israelite who sought the king's justice, Absalom stole the affections of the Israelites.

For those exegetes who accept the king's decisive jurisdiction, this story is an important passage. The following words of H. W. Hertzberg are perhaps characteristic: "Obviously the king regularly held court, perhaps especially for the northern tribes. . . . The king was the highest court of appeal" (ATD 10, 1956, 272). The matter is not, however, quite so obvious as this might suggest. The passage is one of the particularly difficult texts from the point of view of the history of law. We must try to gain as clear a picture as possible of the situation as it is described if we are not to be misled into false conclusions.

One explanation can be eliminated straight away. If the king's jurisdiction is appealed to in this episode, it is not to David as ruler of Jerusalem. It is explicitly stated that those seeking redress came from the tribes of Israel. They approached the king in the hope that he would resolve a dispute for them. Now what were the disputed matters submitted to the king's judgement? We are not told, and yet it is of decisive importance for a proper understanding. There is no doubt that they were matters of a particular kind and that we are not to suppose from the text

that the king judged every kind of legal case indiscriminately. Macholz therefore translates the text of v. 2 with a short paraphrase: "... every man who had a suit of the sort for which one went to the king for judgement . . ." (169). Alt had already suggested the type of thing the text had in mind. He mentions "military levy, enforced labour, and taxes" (*Essays*, 101n.46). The text would therefore refer to the king's military jurisdiction. In this we may also, following Alt, include 2 Kings 4:13.

The text of 2 Sam. 15:1-6 contains no direct proof for Alt's thesis. Nevertheless, we can offer a consideration which points in the same direction. If we try to visualise the events as here described, we realise that nothing is said about two parties going to the king's court and being received instead by Absalom. This could not in fact happen, because the demagogue Absalom could not meet both together in the manner depicted. It is quite simply impossible and unthinkable for a normal suit, in which two citizens were at loggerheads, to be decided without one of them being able to give his side of the picture. If only one person presented himself to the king, he had to be pursuing not a normal legal suit but one of the type suggested. In such a case, the king was himself one of the parties, and the dispute was between him and the Israelite who felt himself hard done by. Absalom could still make his demagogic promise to give every claimant justice without seeming incredible at the outset.

Finally, two other texts must be noted, both of them extensively treated by Macholz: 2 Chr. 19 :5-11 and Deut. 17 :8-12. 2 Chr. 19 takes place during the reign of the Judaeen king Jehoshaphat. Vv. 5-11 describe the various measures of Jehoshaphat's legal reforms. Earlier scholars generally regarded this text as an invention of the chronicler without a historical basis, but today the chronicler is increasingly thought to have drawn on an older tradition, so that some historically accurate information can properly be extracted. Two independent statements are made. The first is in v. 5:

He [Jehoshaphat] appointed judges throughout the land, one in each of the fortified cities of Judah.

The evaluation of this information from the point of view of the history of law offers no difficulties. This particular measure

of Jehoshaphat's concerns the fortified cities. The judges appointed therefore exercised their competence in the context of Israel's military system, where the king had always enjoyed judicial supremacy. The second statement is more difficult to understand. It comes in vv. 8-11, and its substance can be expressed as follows :

In Jerusalem Jehoshaphat appointed some of the (levites and) priests and some heads of families by paternal descent in Israel to administer the law of the Lord and to arbitrate in lawsuits, and they resided in Jerusalem. And he gave them these instructions: "... In every suit which comes before you from your kinsmen, in whatever city they live, whether cases of bloodshed or matters concerning the law or the commandments, the statutes or regulations, you shall warn them ... (cf. Macholz, 328, for this translation). Your authority in all matters which concern the Lord is Amariah the chief priest, and in those which concern the king it is Zebediah son of Ishmael, the prince of the house of Judah" (2 Chr. 19:8-11).

The most important thing that strikes the reader of these lines is that the college of judges in Jerusalem has a double function and is concerned with two basically distinct legal areas: the affairs of Jahweh and those of the king. These affairs were transferred from the judicial organs of the cities of Jerusalem, which certainly does not mean that they were handed over to a higher court. It means that the administration of justice remained ultimately in the competence of the local court, but that the college of judges in the capital was introduced as an auxiliary legal instance into the local administration of justice. This is reasonable for the "matters which concern the Lord." By that must be meant, for example, trials by ordeal, which had always been conducted by priests.

More problematic is the "matters which concern the king." We should think here of a similar process : the formulation ("law and commandments, statutes and regulations") itself suggests this. According to Macholz, what is meant is legal suits in which the application of particular prescriptions was unclear or doubtful. The college of judges set up by the king in Jerusalem was intended to offer the local court a kind of official assistance. The authority of the local court was not impugned. Only one term

does not fit in with this interpretation: "cases of bloodshed," which according to v. 10 were likewise to be submitted to the Jerusalem college. A decisive intervention of the king of Jerusalem in the administration of local justice is here **recognisable**, since a new competence of the Jerusalem college for capital crimes is being established. It is certainly not fortuitous that this kind of thing is mentioned in the southern kingdom, where the influence of its monarchy was stronger in every field. Nothing comparable is known in the northern kingdom.

Characteristically Deuteronomy tried later to abolish part of this judicial structure set up by the king in Judaea. Deut. 17:8-12 refers, sometimes with very similar wording, to the authorities in Jerusalem. In this, the Deuteronomic text is **unmistakeably** based on the conviction that the superior authority acts only as an aid to the local court. This applied even to capital crimes :

When the issue in any lawsuit is beyond your competence . . . go up without delay to the place which the Lord your God will choose. . . . You shall act on the pronouncement which they [the levitical priests or the judge then in office] make.

Finally we must mention Deut. 16 :18, which refers to the institution of judges and officers "who will dispense true justice to the people." No mention is made of the king: the people themselves are to appoint the judges. In both these passages, the Deuteronomian reform accepts the facts in question but moulds them to ancient Israelite conceptions. The king's judicial authority is finally abolished.

Excursus 1. The Old Testament hue and cry

H. J. BOECKER, *Redeformen des Rechtslebens im Alten Testament*, 1970², esp. 61-6; I. L. SEELIGMANN, "Zur Terminologie für das Gerichtsverfahren im Wortschatz des biblischen Hebräisch," in *Festschr. W. Baumgartner* (VTSup 16) 1967, 251-78, esp. 257-60.

Legal events were not confined to the official administration of justice. They also occurred independently of established courts. An example is the institution of the hue and cry. We can properly speak in this case of a legal institution by means of

which in a situation of need a wrong could be righted. The basic thinking behind the hue and cry was this. When a person found himself in a situation of acute need, he could raise an outcry and thereby oblige anyone within hearing to come to his immediate assistance. This is verified in nearly all legal cultures, and its effects can still be traced in German law today. There was a particularly intensive use of the cry in medieval Germany, from where the modern German term *Zeter* (outcry) derives (cf. F. Kluge-A. Goetze, *Etymologisches Wörterbuch der deutschen Sprache*, 1953¹⁶, under *xeter*: “In cases of sudden assault, murder, robbery or rape, the one in danger obliged his fellow-citizens to come to his aid immediately by uttering a special cry”). The cries were adapted to the particular dangers threatening.

The OT too includes numerous references to the hue and cry. A text from Deuteronomy is particularly instructive. It concerns rape. This is a crime which frequently became the cause of a hue and cry.

When a virgin is pledged in marriage to a man and another man comes upon her in the town and lies with her, you shall bring both of them out to the gate of that town and stone them to death; the girl because, although in the town, she did not cry for help, and the man because he dishonoured another man's wife: you shall rid yourselves of this wickedness. If the man comes upon such a girl in the country and rapes her, then the man alone shall die because he lay with her: This deed is like that of a man who attacks another and murders him. You shall do nothing to the girl, she has done nothing worthy of death, for the man came upon her in the country and, though the girl cried for help, there was no one to rescue her” (Deut. 22 :23-7).

The text, in which the order of words in vv. 25 and 26 has been slightly altered (cf. Seeligmann, 260), is in itself quite clear. In cases of rape (or attempted rape), uttering the cry was as much a duty in law as was intervention in favour of the victim. The prescription derives from the fact that in a city an assaulted woman could always cry for help with every chance of being heard. If she did not do so, the conclusion was that she was not assaulted but more or less actively acquiesced. The case was different if the crime occurred in the open country. The prescription then presumes that the woman did cry out. Her shout

for help went unheard, and she was therefore guiltless. This text illustrates very clearly the technical legal meaning of the Hebrew terms “to cry for help,” or “to cause a hue and cry.”

This technical use of “to cry for help” is illustrated in numerous other OT texts, where we can also discern a significant development of the hue and cry. This is the case, for example, in 2 Kings 8:1-6, which narrates an incident in the Elisha cycle:

Elisha said to the woman whose son he had restored to life, “Go away at once with your household and find lodging where you can, for the Lord has decreed a seven years' famine and it has already come upon the land.” The woman acted at once on the word of the man of God and went away with her household; and she stayed in the Philistine country for seven years. When she came back at the end of the seven years, she sought an audience of the king to appeal for the return of her house and land. Now the king was questioning Gehazi, the servant of the man of God, about all the great things Elisha had done ; and, as he was describing to the king how he had brought the dead to life, the selfsame woman began appealing to the king for her house and her land. “My lord king,” said Gehazi, “this is the very woman, and this is her son whom Elisha brought to life.” The king asked the woman about it, and she told him. Then he entrusted the case to a eunuch and ordered him to restore all her property to her, with all the revenues from her land from the time she left the country till that day.

The woman's need is clearly described. After spending seven years abroad, she returns to find her property in the possession of someone else. She has consequently lost her means of supporting herself and her family. She turns to the king for help and utters a cry for the purpose, although her need is not such that only an immediate intervention can save her. The hue and cry, as evidenced here, has become detached from its original situation and taken on a wider significance: it has become a call for legal assistance. We can therefore consider expressing this terminologically and referring in this context not to a cry for help but to a call for help. The origin of the cry is still in some respects determinative for the call. It is to be noted that from the OT examples, it is particularly the underprivileged who use the call for help as a means of obtaining justice. Those who

resort to it are chiefly women, and most of these again are widows.

The question remains for 2 Kings 8:1-6 of why the woman went to the king. Several answers are possible. It could be that the king was approached, as in other examples, not as king but as an influential person. But more probably the king had come into ownership of the derelict land himself and was therefore the party most immediately concerned (cf. Alt, *Grundfragen*, 383 ; Macholz, *ZAW* 84, 1972, 174f).

Another example of a hue and cry raised by a widow is in 2 Kings 4 :1 ; we have already referred to 2 Kings 6 :26-30.

The wife of a member of a company of prophets appealed to Elisha. "My husband, your servant, has died," she said. "You know that he was a man who feared the Lord; but a creditor has come to take away my two boys as his slaves" (2 Kgs. 4 :1).

After the death of her husband, the woman was so pressed by her creditors that she could see no other way out than to turn to the prophet Elisha with a call for help. She did so because Elisha had a special responsibility for his disciples, of whom her husband had been one. It is also possible that an additional motive in the woman's mind was that, as a well-known and influential person, Elisha could help her soonest.

The hue and cry as a basic cry for justice and assistance by the dispossessed, the threatened and the oppressed can also be found in the OT outside the narrative sections. We need refer here only to Gen. 4 :10, where the phrase, "your brother's blood is crying out to me from the ground" is to be understood as referring to a cry for help, and to Job 16:18, which records a cry of Job likewise best understood on the background of the legal institution of the hue and cry:

O earth, cover not my blood
and let my cry for justice find no rest!

Other examples are mentioned in Boecker and Seeligmann.

III

ANCIENT ORIENTAL LAW BEFORE HAMMURABI

R. HAASE, *Einführung*, 16-22; J. KLIMA-H. PETSCHOW-G. CARDASCIA-V. KOROSEC, "Gesetze," *RLA*, III, 243-97, esp. 246-55; V. KOROSEC, *Keilschriftrecht*, 56-94.

The oldest legal documents from the ancient east which we know and can decipher are Sumerian and date from the middle of the third millennium BC. They are in cuneiform, the script developed by the Sumerians and adopted by most of the ancient world. The relatively few extant sources provide an insight into the political and legal structure of the numerous Sumerian city-states. The priests at the temples exercised a dominant influence. The temples were the main, perhaps even the sole, landowners. Apart from their religious functions, they also had therefore a decisive economic importance. The political system of the ancient Sumerians has consequently been described as national religious socialism. Defects there were. Secular and spiritual power were amalgamated, individuals enriched themselves from the temple goods, and the socially weak were oppressed.

This prepared the ground for the appearance of the first social reformer known to world history, Urukagina of Lagash (acceded c. 2370 BC). According to his own testimony-and we have no other source for his reforms-Urukagina intervened in many ways on behalf of the underprivileged, for example by hindering the sale of houses, gardens, or asses (the most important beasts

of burden), or by reducing to a tolerable level the high charges which the priests used to demand for funerals. Urukagina says of his measures that they “freed the people of **Lagash** from drought, theft and murder.” Urukagina did not regard himself as a revolutionary in this. On the contrary, his aim was to restore the old godwilled ordinances which his predecessors had disregarded. A. Moortgat can therefore say of Urukagina’s career : “It was the last attempt of a conservative ruler to save the primitive Sumerian social system-theocracy-by social reform” (243).

Urukagina’s reform did not last long-he managed to stay in power for only seven years-but it illustrates a particular tendency of legal thinking which is a constant feature of ancient eastern legislation and administration of justice, at least on their own claims. We refer to the social bias apparent in many eastern codes. It was constantly stressed, particularly in the prologues and epilogues of ancient eastern codes, that the divinity had entrusted the present ruler with the legal protection of the oppressed and disadvantaged. Urukagina very clearly stated this as the intention of his reform at the close of one of his inscriptions :

Urukagina has come to an agreement with Ningirsu that the powerful shall do no wrong to the orphan and widow.

Another text also illustrates the importance accorded to an impartial judicial system in the ancient east. In the great hymn to the god **Shamash**, who was constantly celebrated as the protector of law, one passage, which dates from the end of the second millennium, reads :

You imprison the unjust judge, you punish the one who accepts bribes and acts unjustly.

The one who accepts no bribes, who intercedes for the weak, is pleasing to **Shamash** (and) gains long life. The prudent judge who passes just judgement will (even) complete a palace; he shall dwell in a royal court.

(From the German of A. Falkenstein-W. v. Soden, *Sumerische und Akkadische Hymnen und Gebete*, 1953, **243.**)

If we then ask whether there were special influences from ancient Sumeria which affected the course of later ancient east-

ern legal history, we have also to mention something else. This is the practice of making particular legal transactions valid by using written records. Solid systems were developed as early as Sumerian times for the various types of legal agreement, and surprisingly these remained essentially unchanged right up until neo-Babylonian times. A vast number of this type of legal document have come down to us from the ancient east. They are among the sources which are of vital importance for an understanding of ancient eastern law. We can refer to only a small selection of them here, however.

The earliest extant legal codes come from the Sumerian, or more exactly the neo-Sumerian, period. We must remove at once any misunderstandings which might arise in the mind of the modern reader when he sees references to codes and laws. Ancient eastern laws are not a code in the modern technical, juristic sense of the word. We refer to a code today when laws are set down with the aim of ordering comprehensively and with binding force the totality of the law or a particular, more or less extensive part of the law according to a consistent view of the law. Behind any such legal code stands the authority of the state which obliges its citizens to observe the regulations it has promulgated.

An ancient eastern code is different (and we include the OT examples). Never does it claim to regulate the citizens’ lives in their totality and in every respect. To our modern way of thinking, an ancient eastern code is always incomplete, fragmentary. This would be so even if such a code were extant complete and intact, which unfortunately is not the case. It is very noticeable that the codified prescriptions deal principally with exceptional cases and hardly at all with daily, common ones. Ancient oriental collections of laws provide only minimal information on marriage and divorce, inheritance and property, and the usual methods of conducting trials. Such information as there is is conveyed obliquely in the treatment of exceptions. This can be explained only on the supposition that the laws mainly record only what was disputed or seemed to be in need of reform.

We must still, however, reckon with the possibility that a code was influenced by predecessors in the choice and presentation of its material, so that we should be committing a fallacy to sup-

pose that everything included in a code was disputed at the time of its composition. This characteristic of ancient oriental legal texts has occasionally led writers to avoid the terms code or book of laws altogether and use instead the noncommittal phrase "collection of laws." On the whole, however, this practice has not been widely adopted, and we ourselves use the usual words without strict differentiation.

Another factor directly connected with this peculiarity of ancient eastern coded laws is the actual practical significance of the code and of the prescriptions that constitute it. We usually start as if it were a matter of course from the idea that a legal text is unconditionally valid from the day of its promulgation, that all legal decisions are thereafter found potentially in the new code and that in all its decisions a court will rely on and appeal to the text of the officially authorised law. None of this, however, was a matter of course in ancient eastern legislation. Because, as stated previously, not all of life's legal problems were covered by laws, a court could not usually fall back on a code, and even when it could, there was the further question of whether the authority of the legislator was sufficient to prevail against existing legal tradition. Furthermore, amongst the vast number of extant commercial and judicial records, there is not a single example of a legal decision based on a prescription of one of the codes known to us.

Evidently an ancient oriental judge was not bound in his verdict by the letter of any law he might have before him. It is also true that the ancient Babylonian language had no equivalent for our word "law" and no phrase like "observe the law" or "sentenced according to section x of law y" (cf. B. Landsberger, "Die babylonischen termini für Gesetz und Recht," in *Festschr. P. Koschaker*, 1939, 220). All this means that the reality envisaged by the word "law" in its modern juristic sense has no ancient eastern equivalent. "Law," "book of laws," "law-giver," and also "code" or "codification," all these words must be put in quotation marks when applied to ancient eastern conditions. We shall be touching on these questions again when we come to the particular case of the Code of Hammurabi, but for the moment we turn to the oldest extant law-book to come to us from the ancient east.

The Code of Ur-Nammu

We turn now to CU, the law-book of the Sumerian king Ur-Nammu (2064-2046 BC), which exists only in fragments.

J. J. FINKELSTEIN, "The Laws of Ur-Nammu," *JCS* 22, 1968/69, 66-82; R. HAASE, *Einführung*, 18-20; S. N. KRAMER-A. FALKENSTEIN, "Ur-Nammu's Law Code," *Or NS* 23, 1954, 40-51. Trans. *ANET*, 523-5 (J. J. Finkelstein).

The text of the code, which is in Sumerian, is known from a copy made at the time of Hammurabi. Most probably it is a practice tablet, because it is hardly likely that Ur-Nammu's code was still of practical importance in Hammurabi's time. When S. N. Kramer first published the fragmentary text, a certain overall view of the code became possible. J. J. Finkelstein later attempted a coherent text by combining the two partial texts. The code is preceded by an extensive prologue, which according to Kramer consists of three sections: theological, historical and ethical. We wish here simply to look at the social attitudes which according to his own words inspired the Sumerian king. He states :

The orphan was not delivered up to the rich man; the widow was not delivered up to the mighty man; the man of one shekel was not delivered up to the man of one mina.

(Shekels and minas were units of weight and currency. Their value varied enormously. For the older period we can assume that a mina was worth sixty shekels. A shekel was equivalent to about eight grammes.)

Of the code itself, which contains at least twenty-two prescriptions, only a few of its ordinances are in good enough condition for their meaning to be stated with certainty, but even these have not come down to us quite intact. We may refer to CU §10, which deals with persons accused of sorcery. The accused must undergo ordeal by water and so proclaim his innocence or guilt. We shall encounter the same case in the CH§2. There, it is also laid down what is to happen if the accusation proves groundless (cf. Chapter IV, 3 below). Because the CU§10 seems to lack its proper ending, it is impossible to say whether a similar penalty is stipulated here. But it is more than likely.

We must also point out that the interpretation offered here, developed by Kramer, has been questioned since by Finkelstein because of a new projected order of the text (cf. *JCS* 22, 68 and 74; *ANET*, 524).

Several of the extant prescriptions deal with bodily injury. For example :

If a man, in the course of a scuffle, smashed the limb of another man with a club, he shall pay one mina of silver (§17).

This stipulates a monetary payment by way of compensation for a bodily injury. Surprisingly, the CU does not follow the principle of the talion, which is overwhelmingly applied in the later CH in similar cases. This has frequently been interpreted as a regression in the history of law on the part of the CH, which can perhaps be explained by the particular intentions of that code.

In the text just quoted, we meet for the first time the form of legal principle characteristic of ancient oriental law. Ancient eastern laws, as this early example illustrates, were overwhelmingly formulated in the conditional. "If" is a typical feature. In Sumerian texts, accordingly, the individual principles are introduced by *tukumbi* (if), while in later Akkadian texts the word *šumma* fulfils the same function. The protasis, which presents the case, includes a statement of the facts, and the apodosis then spells out the particular legal consequences. Alt has called prescriptions constructed in this way "casuistically formulated law" (cf. Chapter V, Excursus 5).

Although only fragments of the code of king Ur-Nammu are extant, it can be regarded as a noteworthy feat of ancient oriental legislation, behind which we must suppose a considerable legal tradition. New finds may well show that the CU is by no means the oldest legal code.

The Code of Lipit-Ishtar

CL, the code of king Lipit-Ishtar of Isin (c.1875-1864 BC) was written barely two centuries later.

A. FALKENSTEIN-M. SAN NICOLO, "Das Gesetzbuch Lipit-Istars von Isin," *Or NS* 19, 1950, 103-18; R. HAASE, *Einführung*, 20-1; V.

KOROSEC, "Über die Bedeutung der Gesetzbücher von Ešnunna und von Isin für die Rechtsentwicklung in Mesopotamien und Kleinasien," *Proceedings of the 22nd Congress of Orientalists, Istanbul 15-22 Sept. 1951*, 1953, 83-91; F. R. STEELE, "The Code of Lipit-Ishtar," *AJA* 52, 1948, 425-50; E. SZLECHTER, "Le code de Lipit-Istar (I)," *RA* 51, 1957, 57-82 (transcription and translation) ; Id., "Le code de Lipit-Istar (II) ," *RA* 51, 1957, 177-96 (commentary). Trans. *ANET*, 159-61 (S. N. Kramer).

Like the CU, the CL was written in Sumerian. This makes its translation and interpretation basically more difficult than those of later codes written in Akkadian. The code has an extensive prologue and epilogue. In the prologue, Lipit-Ishtar calls himself a sage, and elsewhere a humble shepherd, whose aim is to remove abuses and enable the Sumerians and Akkadians to lead happy lives. The code itself, of which no more than a fifth is extant, deals with the most varied areas of law. The bulk of it concerns prescriptions governing persons and property. §§20-7, 31-3 deal with inheritance, while between them are a few prescriptions about marriage, §§28-30. Other sections deal with horticulture and the profanation of gardens, §§7-10.

Three paragraphs deal with suits over slaves. Throughout the entire ancient east, the regulation of questions arising from the institution of slavery was an important and much treated problem. As an example, we may quote CL§§12-13:

If a slave-girl or slave of a man has fled into the heart of the city (and) *it has been confirmed* that he (or she) dwelt in the house of (another) man for one month, he shall give slave for slave (§12).

If he has no slave, he shall pay fifteen shekels of silver (§13).

These prescriptions protect the property of the slave-owner and threaten those who shelter a runaway slave with the loss of one of his own slaves or with an appropriate payment. Another prescription in the same context offers the slave the possibility of buying himself out. He must pay his master twice the purchase price of a slave. Another prescription, finally, is of particular interest; it deals with false accusations. Even though the translation of this passage (§17) is still unclear, it is evident

at least that the false accuser is threatened with the same penalty which would have been imposed on the accused.

One prescription from the section on marriage laws may be quoted. Again, its interpretation is still disputed. It both gives a man the right to take a second wife and protects the first wife:

If a man has turned his face away from his **first wife** ... (but) she has not gone out of the [house], his wife which he married **as** his **favourite** is a second wife; he shall continue to support his **first** wife (§28).

Apart from the statements of punishment already referred to, the extant portion of the code includes few others. Desecration of a garden carries a relatively mild sentence: compensation to the tune of ten silver shekels (§9). The sum is trebled if the culprit fells a tree in somebody else's garden (§10. The same penalty is laid down in CH§59). In CL§11, a remarkable liability for damages is provided for. It is postulated that a property owner lets his property lie neglected, despite a request to do something about it, and thereby facilitates a break-in into the house of his neighbour. In this case the negligent householder must make good any damage suffered by his neighbour. Ownership therefore entails responsibilities. One may not do exactly as one pleases with one's own property; the effects on neighbours are to be considered.

The Code of Eshnunna (CE)

A. GOETZE, "The Laws of Eshnunna" (AASOR 31), 1956; R. HAASE, *Einführung*, 22; V. KOROSEC, "Über die Bedeutung der Gesetzbücher von Eshnunna und von Isin für die Rechtentwicklung in Mesopotamien und Kleinasien," *Proceedings of the 22nd Congress of Orientalists, Istanbul 15-22 Sept. 1951*, 1953, 83-91; H. PETSCHOW, "Zur 'Systematik' in den Gesetzen von Eshnunna," *Festschr. M. David*, II, 1968, 131-43; M. SAN NICOLO, "Rechtsgeschichtliches zum Gesetz des Bilalama von Eshnunna," *Or NS* 18, 1949, 258-62; W. v. SODEN, "Kleine Beiträge zum Verständnis des Gesetzes Hammurabis und Bilalamas," *ArOr* 17, 1949, 359-73; R. YARON, *The Laws of Eshnunna*, 1969. Trans. *ANET*, 161-3 (A. Goetze).

In 1945 and 1947, two clay tablets with the text of the CE were dug up at Tell Harmal, on the outskirts of Bagdad. Publi-

cation followed. The tablets are now in the Iraq Museum. For some time, this code was attributed to the reign of king Bilalama of Eshnunna, c.1920 BC. Since then, however, the CE is generally acknowledged to be older and to belong to the time of Hammurabi. It cannot be more than a few years or decades older than Hammurabi's code. It is the oldest book of laws written in Akkadian. The mere fact that the language is different, however, does not indicate a break with previous legal tradition; rather, the similarities with the foregoing Sumerian code are unmistakable.

More than the other ancient eastern codes, the CE has been accused of a lack of system and completeness. The CE, however, seems less untidy to the reader who is not looking for a modern system of laws and accepts that ancient eastern codes were very different from our own (H. Petschow). Also, the CE, like other comparable codes, has no pretensions to be complete. The material possesses great variety. It deals with tariffs and wages, family matters and assault, slave law, bonds and much else besides. Here we can specify only a small part of the sixty paragraphs of the code. The reader will bear in mind that not all the translations offered are undisputed.

The code begins unusually with a series of prescriptions governing prices and fixing the level of rents and loans. Other prescriptions on these same topics occur several times later in the text. The economy is therefore of special importance in the eyes of this code. Payments are specified sometimes in grain, sometimes in silver. Korosec has therefore suggested that the CE comes from a time in which "an economy based on payment in kind was giving way to an economy based on the use of money" (*Keilschriftrecht*, 87). We must note, however, that the code is dealing with an essentially agricultural population, and in this context the juxtaposition of two different economies is not really extraordinary (cf. Yaron, 148). To the modern way of thinking, the rates of interest on loans are surprisingly high. For loans in silver, the rate is 20% p.a., and in kind 33½% p.a. (§18A).

Eight prescriptions concern marriage cases. They presuppose marriage by purchase sealed with a contract, although this common procedure is not expressly mentioned in the code. §27 concerns the fundamental significance of the marriage contract

between the bride's parents and the groom. Even after one year's housekeeping, a woman is not regarded as a wife without the contract:

If a man takes a(nother) man's daughter without asking the permission of her father and her mother and concludes no formal marriage contract with her father and her mother, even though she may live in his house for a year, she is not a housewife (§27).

Among the prescriptions of the CE on marriage, the death penalty is envisaged in two cases. A woman taken in adultery is punishable with death (§28). The other case concerns the violation of a betrothed girl:

If a man gives bride-money for a(nother) man's daughter, but another man seizes her forcibly without asking the permission of her father and her mother and deprives her of her virginity, it is a capital offence and he shall die (§26).

One prescription in the CE deals with divorce. This is the much-discussed §59, the understanding of which is not made any easier by the fact that the defective text has been reconstructed by the experts in very different ways (cf. the detailed discussion in Yaron, 137-45).

If a man divorces his wife after having made her bear children and takes [ano]ther wife, he shall be driven from his house and from whatever he owns and may go after (the woman) whom **he loves**.

If the preceding translation is essentially correct, we are faced with a very surprising prescription in favour of the woman. It presumes, of course, that the woman herself is innocent; and she must have had children.

Apart from the two cases from the marriage laws just mentioned (§§26, 28), four other passages in the CE lay down the death penalty for certain crimes. Two concern particular acts which lead to a person's death (§§24, 58), and two protect property (§§12, 13).

A man who is caught in the field of a **muskenum** in the crop during daytime, shall pay 10 shekels of silver. He who is caught in the **crop** [at ni] ght, shall die, he shall not get away alive (412).

(For the concept of *muškēnum*, see pp. 78f below.)

A man who is caught in the house of a **muskenum**, in the house during daytime, shall pay 10 shekels of silver. He who is caught in the house at night, shall die, he shall not get away alive (§13).

The formulation of the penalty in these two legal principles has been much remarked on. The same phrases occur in the CE in one other passage: §28, referred to above. The impression is that none of these three cases concerns the processes of an ordinary court, that the guilty party is encouraged and empowered to help himself immediately and so achieve self-justice. This idea is expressed particularly clearly in Goetze's translation: "he . . . shall die, he shall not get away alive" (*ANET*, 162). The nature of the offence undoubtedly favours this interpretation (cf. also the discussion of this question in Yaron, 173).

§§12 and 13 suggest a comparison with an OT principle which also distinguishes a deed committed in the daytime from the same deed committed at night (this distinction is also drawn in completely different legal contexts, cf. Yaron, 182).

If a burglar is caught in the act and is fatally injured, it is not murder; but if he breaks in after sunrise and is fatally injured, then it is murder (Exod 22 :3a).

The differences between this and CE§12 should not, however, be overlooked. The OT prescription accepts the killing as justified self-defence, while the Eshnunna text seems to demand it directly. In another respect too, CE§§12 and 13 differ from Exod. 22:3a. The OT starts from the presupposition that a break-in has actually taken place; the intruder is specifically called a burglar. The Mesopotamian law, on the other hand, envisages only the intrusion into the house of another; there is no reference to theft. The general penalty of ten shekels is therefore understandable, although in the other case it would certainly depend on the value of the goods stolen. We could therefore say that in CE§§12 and 13 the protection of property is much more important than in the OT legal principle. The CE has a direct successor on this point in the CH.

As in the CU, the CE enumerates various cases of assault. From §§42-7, four may be quoted:

If a man bites the nose of a(nother) man and severs it, he shall pay 1 mina of silver. (For) an eye (he shall pay) 1 mina of silver; (for) a tooth ½ mina; (for) an ear ½ mina; (for) a slap in the face 10 shekels of silver (§42).

If a man severs a (nother) man's finger, he shall pay two-thirds of a mina of silver (§43).

If a man throws a(nother) man to the floor in an **altercation** and breaks his **hand**, he shall pay ½ mina of silver (§44).

If a man **hits** a (nother) man **accidentally** (?), he shall pay 10 shekels of silver (§47).

A factor common to all these prescriptions is that they relate to assaults of one citizen on another equal citizen. It is noteworthy that here too, as in the CU, a monetary compensation is laid down, whereas in similar cases the CH applies the principle of the talion (cf. below Chapter IV, Excursus 4). In §§42 and 43, the situations in which the injuries are inflicted are not specified. §44, on the other hand, refers to what must have been a very frequent case, a quarrel in which the participants come to blows. §47 does not specify the nature of the injury at all.

One final point may be brought to the reader's attention. In CE§48 it is decreed that suits with potential penalties of between a third of a mina and one mina are to be dealt with by the usual court, while capital crimes come under the king's jurisdiction. This determination of legal competence is unique in cuneiform legal tradition. We can, however, presume that it was more or less the universal practice. The CE itself refers a case to the competence of the royal court in one other place:

If a wall is threatening to fall and the authorities have brought the fact to the knowledge of its owner, (if nevertheless) he does not strengthen his wall, the wall collapses and causes a free man's death, then it is a capital **offence**; jurisdiction of the king (958).

(The Akkadian word *bābtum*, translated here as "the authorities," has a special meaning in the context of legal documents. The basic meaning "gate," in the sense of "city-gate," is extended. *Bābtum* is then taken to mean a whole district, quarter, or ward. The reference is to the organised community of the in-

habitants of a district round a particular gate to whom particular legal competence belongs. *Bābtum* is used three times in this sense in the CH, cf. §§126, 142, 251. For further information, cf. Driver-Miles, I, 241-5.)

It is clear from CE§58 that the king was directly responsible for judging certain cases.

IV

THE CODE OF HAMMURABI

1. The life and times of Hammurabi of Babylon

D. O. EDZARD, *Die zweite Zwischenzeit" Babylonians*, 1957; F. M. T. de LIAGRE BOHL, "King Hammurabi of Babylon in the Setting of his Time," *Opera Minora*, 1953, 339-63; A. MOORTGAT, "Geschichte Vorderasiens bis zum Hellenismus," in SCHARFF-MOORTGAT, *Ägypten und Vorderasien im Altertum*, 1950, esp. 290-317; H. SCHMÖKEL, *Hammurabi von Babylon. Die Errichtung eines Reiches*, 1971; W. v. SODEN, *Herrscher im Alten Orient*, 1954, esp. 45-58.

The CH is a high point in the history of ancient eastern law. This is true even though scholars' first enthusiastic judgments have had to be tempered. Hammurabi was not in fact, as he was for a long time thought to be, the world's first law-giver. Nevertheless, his importance for ancient oriental legal theory and practice, and consequently for the history of law in general, can hardly be overestimated. The Babylonian king Hammurabi belongs for all time to the great figures of world history.

A work like the CH does not arise at random. Certain conditions are needed. Hammurabi is known today to a wide public almost exclusively because of the code that bears his name, but he also deserves to be honoured as a considerable political figure in ancient eastern history. Because his legal code could be written, and can be understood, only in the context of the political conditions of the time, we must glance briefly at the history and

times of king Hammurabi before we consider his code in detail. Further information can be obtained primarily from **Schmökel's** book. The following bare outline of the most important dates in Mesopotamian history will serve to set the historical scene. The chronological table is taken from Schmökel, 109.

Shortly before 3000 BC Invasion of the Sumerians into Mesopotamia	
3000-2800	Uruk period
2800/2700	Djemdet Nasr period
2600	Mesilim period-first incursions of Semites, earliest legible Sumerian text
2500	1st dynasty of Ur (Ur I)
2350-2150	Empire of Akkad-first Semitic Kingdom
2150-2070	Gutian period-incursion of a barbarian people from the north
2050-1955	3rd dynasty of Ur (Ur III)
1970-1729	Dynasty of Isin-entry of "western Semites"
1960-1698	Dynasty of Larsa
1830-1530	1st dynasty of Babylon
1728-1686	Hammurabi
1530-1200	Kassite period-invasion of a foreign people from the north
1128-1105	Nebuchadnezzar I of Babylon
1100-612	Assyrian supremacy
625-539	Neo-Babylonian (Chaldean) empire-incursions of Arameans
605-562	Nebuchadnezzar II
555-539	Nabonid
12 October 539	Conquest of Babylon by the Persian king Cyrus

For the older periods, the chronology of ancient eastern history is still disputed. We need not go into that here. But we must just point out that placing the Babylonian king Hammurabi in the twentieth century BC (**1955-1913**), as Weidner does and as was common in older literature, is generally regarded today as being inaccurate. The dates 1728-1686 for Hammurabi, which we accept, were first proposed by W. F. Albright, **BASOR 88**, 1942, **28-36**. Although they are widely accepted today, some authors still dispute them.

When Hammurabi succeeded his father Sinmuballit on the throne in 1728 BC, he became king of a relatively unimportant

state. Babylon was then one of numerous little kingdoms in the Mesopotamian area. Hammurabi was the sixth representative of the so-called ancient Babylonian dynasty which began in about 1830 BC and which in the course of a century had achieved a certain consolidation of the small state surrounding the royal city of Babylon. All Hammurabi's considerable diplomatic and military skill was needed not merely to maintain the city in the midst of equally strong, indeed sometimes stronger, states, but eventually to attain supremacy in the eastern world of that time. This is achieved in the forty-three years of his reign.

The external political situation in the early years of **Hammurabi's** reign was primarily conditioned by the kingdom of Larsa to the south (where king **Rimsin** exercised considerable influence), and by Eshnunna and the Assyrian kingdom to the north. Under its capable king Shamshiadad, the so-called ancient Assyrian kingdom was at the height of its powers at the close of the eighteenth century. As far as Hammurabi was concerned, this necessitated the utmost restraint in his foreign policy. **Hammurabi**, who was undoubtedly an ambitious and determined ruler, understood the need to wait for the most suitable moment before taking any steps. He never hurried. In this he displayed a virtue that has been of decisive importance for politicians of all times. We hear nothing about military undertakings in the first years of his reign. Everything depended on holding his own and then slowly advancing with a judicious policy of coalition with the surrounding kingdoms, many of them as strong as his own. A contemporary text, which Edzard has called "the **locus classicus** for the significance of ancient Babylon's coalition policies," clarifies the situation beautifully :

There is no king powerful in himself; ten, fifteen kings follow Hammurabi of Babylon, as many again follow **Rimsin** of Larsa, Ibalpiel of Eshnunna, Amutpiel of Quatanum ; as many as twenty kings follow Jarimlim of **Jamchad** (Edzard, 183).

Hammurabi's early years were devoted to activities that were essentially **cultic**, economic and social. An important source for ancient eastern history is the date-formulae, according to which the ancient eastern kings named the years of their reign after particularly noteworthy events. The formula for the second

year of Hammurabi's reign reads: "He established law in the land." This formula certainly does not refer to the publication of his famous code, but it proves that from the very beginning of his reign Hammurabi was concerned for the internal order of his kingdom. He was aware that lasting success in the area of foreign policy could be achieved only on the basis of stability at home, and as innumerable documents testify, he was tireless in his concern for the most varied aspects of his kingdom. "Only rare and isolated rulers such as Charlemagne or Augustus can compare with him in their enormous capacity for work, in their sense of concerned responsibility," writes Moortgat, 295.

The first suggestion of a military event occurs in the *date*-formula for the seventh year of Hammurabi's reign. None the less, the indications are that it refers not to a confrontation with a neighbouring state but to a dispute with nomadic tribes. Such disputes affected more or less all Mesopotamian states at that time. They were a concomitant of the centuries-long movements of the western Semites who came from the north Arabian steppes to the Mesopotamian plains.

Hammurabi waited ten years before joining in the political power game among the Mesopotamian states. He timed his first move to coincide with the moment at which Assyrian supremacy began to crumble, and he is strengthened his advance when for all practical purposes it ceased altogether after the death of Shamshiadad. It was of particular importance over the next few years that Hammurabi succeeded in gaining an important ally in king Zimrilim of **Mari**. Hammurabi had been friendly with Zimrilim for twenty years, and the alliance enabled him, in undertakings of mutual but well-planned advantage, to become master of southern and central Mesopotamia.

The royal city of **Mari** has gained a special significance for research into the history of the ancient east in the last few decades in that we owe to it the most important sources for the Mesopotamian history of this period. Since the excavation of the royal palace of **Mari** began in 1933 (**Mari** is today's Tell **Harîri**, approximately 250 miles northwest of Babylon on the central Euphrates), the history of Mesopotamia has taken on quite a new complexion and lucidity. Countless royal letters, diplomatic reports and other documents were kept in the **Mari** archives

(cf. ARM, 9 vols., 1946-60). W. v. Soden, "Das altbabylonische Briefarchiv von **Mari**," **WO** 1, 1947-52, 187-204, gives an extensive account of the importance of this material. We cannot go into all this here, but we might just give ourselves some idea of how detailed the correspondence between royal residences was even at that time. The following text, for example, also shows that diplomatic concern for prestige is quite as old as diplomacy :

Zimrilim's envoy in Babylon is writing to his principal: 'As we sat down to the banquet in the court of Hammurabi's palace, we -Zimriadad, myself, Jarimadad and Jamchad's attendant-were given festive garments, although none was given to my Lord's attendants, the sikkum servants. I complained to Sinbelaplîm that we were being made an exception as if we were robbers. Whose servants were we? The sikkum servants were angry and left the court of the palace, after which Hammurabi was told. Then they were given festive clothes as well. ... Hammurabi still said: "I have festive raiment offered to whom I wish, and I shall no longer give festive clothes to the envoys who appear at the banquet!"' (ARM II, 76, quoted according to Schmökel, 10).

We return now to Hammurabi's foreign policy. The *date*-formulas for the thirtieth to thirty-third years of his reign record the decisive breakthrough. The king of Babylon succeeded in removing all his rivals and in becoming the undisputed master of Mesopotamia. He had to eliminate principally the kingdoms of Eshnunna to the north and Larsa to the south. The thirtieth year brought a first altercation with Eshnunna and its allies which ended in victory for Hammurabi, although Eshnunna was not destroyed. In the very next year Hammurabi turned south, and he won a decisive victory over Larsa, capturing the capital and making himself master of this formerly powerful southern Babylonian kingdom. Hammurabi thus became the undisputed ruler of southern Mesopotamia. He himself described his victory as follows in the *date*-formula for the thirty-first year of his reign :

By entrusting his army to An and Enlil, Hammurabi gained control of the country of Emutbal and its king **Rimsin**, by virtue of the strength which the great gods had granted him ... and brought Sumer and Akkad under his sway (text according to Edzard, 182).

(Emutbal is another name or Larsa.) “Sumer and Akkad” is the contemporary way of referring to Mesopotamia. The kings of Larsa called themselves-with less concern for reality than one might wish-“kings of Sumer and Akkad.”

From then on, Babylon’s expansion gathered momentum rapidly. In the following year, there was another military clash with Eshnunna and its allied troops. Hammurabi won an impressive victory which finally ousted this important rival to the north. In the following year again, Hammurabi extended northwards far beyond the territory of Eshnunna, because we learn of a victory over his one-time ally Zimrilim of **Mari** and simultaneously of successful expeditions against Assyria itself. It is still not clear how or why the long friendship between Hammurabi and **Zimrilim** came to an end. We do not know whether Zimrilim, regarding with agitation the growing strength of his ally to the south, perhaps tried to check Hammurabi, or whether, to remove the final obstacle to total control of Mesopotamia, Hammurabi unscrupulously wielded his increasing power without regard for a proven friend. However that may be, the result was impressive. Hammurabi had achieved an empire that stretched from the Persian Gulf in the south to Kurdistan in the north and embraced practically the whole of Mesopotamia with its **neighbouring** countries. Now he could properly call himself “king of Sumer and Akkad.” Numerous petty states had given way to an empire of which Hammurabi said in the prologue to his code that it had become “supreme in the world.”

Hammurabi’s empire did not last long. The process of disintegration and decline had already begun during the reign of his son and successor Samsuiluna. Internal difficulties, but especially external opponents brought the empire crashing down. In **Samsuiluna’s** ninth year, the Kassites are mentioned for the first time: a people that came from the east and were to have a vital influence on the history of Mesopotamia. The ancient Babylonian dynasty numbered five kings after Hammurabi. Not much is known about them beyond their names. None of them even remotely matched Hammurabi in importance.

Let us return once again to Hammurabi. In the last years of his life, Hammurabi turned his attention to the internal and **ex-**

ternal consolidation of his empire, which was very heterogeneous. We have already seen that at the beginning of his reign, **Hammurabi** attempted to achieve internal stability. This preoccupation was even greater in its closing years. It was also the immediate cause of his famous work, the code. This is not to say that work on the code began only in the last years of his life; but it was intensified, and the code itself was finished only shortly before his death. The precise date is not known, because strangely enough the completion of the code is not mentioned in any of the date-formulas. The definitive text seems to come from the last years of the king’s reign, but it is agreed that he worked on it over many years. It may even have been with him all his reign. It goes without saying that the king did not himself attend to all the minutiae necessarily demanded by the composition of such a work. He would entrust them to specialised jurists. Today we should speak of a commission of jurists. It is highly unlikely, although it has occasionally been maintained, that the code was the work of a single individual. Hammurabi, however, is credited with the decisive inspiration. We can also imagine that he continually interested himself in the progress of the work and helped where he could. And finally, as king, he published the completed code.

2. The significance and structure of the Code of Hammurabi

M. DAVID, “The Codex Hammurabi and its Relation to the Provisions of Law in Exodus,” **OTS** 7, 1950, 149-78; G. R. DRIVER-J. C. MILES, *The Babylonian Laws*, Vol. 1, 1952, Vol. II, 1955; R. HAASE, *Einführung*, 22-7; A. FINET, *Le code de Hammurapi. Introduction, traduction et annotation*, 1973; B. S. JACKSON, “Principles and Cases: The Theft Laws of Hammurabi,” 1972=*Essays in Jewish and Comparative Legal History*, 1975, 64-74; J. KLIMA-H. PETSCHOW-G. CARDASCIA-V. KOROSEC, article “Gesetze,” **RLA** III, 1957-71, 243-97, esp. Petschow’s contribution, 255-69; V. KOROSEC, *Keilschriftrecht*, esp. 94-118; P. KOSCHAKER, *Rechtsvergleichende Studien zur Gesetzgebung Hammurapis*, 1917; F. R. KRAUS, “Ein zentrales Problem des altmesopotamischen Rechts: Was ist der Codex Hammu-Rabi?,” *Genava* NS 8, 1960, 283-96; D. H. v. MULLER, *Die*

Gesetze Hammurabis und ihr Verhältnis zur mosaischen Gesetzgebung sowie zu den XII Tafeln, 1903, new impression 1975; D. NÖRR, **Studien zum Strafrecht im Kodex Hammurabi**, Diss. Munich, 1954; Id., "Zum Schuldgedanken im altbabylonischen Strafrecht," ZSS 75, 1958, 1-31; H. PETSCHOW, "Zur Systematik und Gesetzestechnik im Codex Hammurabi," ZA NS 23, 1965, 146-72; M. SAN NICOLO, **Beitrag zur Rechtsgeschichte der keilschriftlichen Rechtsquellen**, 1931; W. v. SODEN, "Kleine Beiträge zum Verständnis der Gesetze Hammurabis und Bilalamas," ArOr 17, 1949, 359-73; D. J. WISEMAN, "The Laws of Hammurabi again," JSS 7, 1962, 161-72. Trans. ANET, 163-80 (T. J. MEEK).

After millennia of oblivion, Hammurabi's code was again revealed to the world on steles dug up by a French expedition at Susa in the winter of 1901/02. A few prescriptions or extracts from the code had also been discovered elsewhere. But the most important of the discoveries was still the 7'4" diorite stele from Susa. This valuable document from the past is now in the Louvre, Paris. Many museums display exact replicas of it in their ancient eastern sections. That the stele was found at Susa shows that it had already had an eventful life in ancient times. Susa was the capital of the Elamite kingdom. This historic site is occupied now by an insignificant village, but the tell (excavated scientifically since 1897) is an impressive witness to the memorable history of the city that once stood there.

How did the basalt pillar come to be found at Susa, some 180 miles east of Babylon? V. Scheil, the editor and first translator of the code, conjectured, probably rightly, that it was carried off as a trophy of war to his own capital by the Elamite king Shutruknachchunte with other booty taken on a campaign in Mesopotamia at the beginning of the twelfth century BC. With the stele of the celebrated code, the plunderer evidently believed he could glorify himself and his campaign to Babylon in a particularly impressive way. Unfortunately, he was not content to set up the famous document in his capital. He also extolled his own deeds of victory on, of all places, the abducted pillar. He had seven columns wiped off the stele so that he could add an inscription of his own. Why the inscription was never in fact added we do not know. Since then, however, thirty-five to forty legal principles have been missing from the CH. Part of this gap

can be reconstructed from various fragments of clay tablets; the rest is lost to us.

The greatest part of the column is taken up by the characters of the text with its prologue and epilogue. The stele also displays, on the upper part of the front, a relief representing king Hammurabi being authorised to write a code by a divine figure seated in front of him. The theme of this well-known picture belongs to the tradition of initiation scenes inaugurated by the stele of Ur-Nammu and frequently illustrated on cylinder-seals. It is widely accepted that the divinity depicted is the sun-god Shamash, the guardian and source of law. There is, however, a new theory, not to be dismissed out of hand, which claims that it is the god Marduk.

Like earlier ancient eastern codes, the CH has a prologue and an epilogue. These sections especially have been regarded as highly poetic. They are certainly not the work of Babylonian jurists; they must have been written by court poets. In the prologue (a single sentence in the original text), Hammurabi mentions all the important gods of the country who had authorised him to write a code. Two gods in particular are mentioned, Marduk, god of Babylon, who gained a new importance by virtue of Hammurabi's success, and Shamash, guardian of the law and protector of the oppressed. The references on the borders to the king's deeds of war date the code to the last years of Hammurabi's life.

Among the many terms used by the king to indicate himself, one of the most conspicuous is the frequently used title "Shepherd," which was common as a royal epithet in the ancient east. Hammurabi says of himself that the gods had chosen him

to cause justice to prevail in the land,
to destroy the wicked and the evil,
that the strong might not oppress the weak.

The prologue ends with the phrase :

When Marduk commissioned me to guide the people aright,
to direct the land,
I established law and justice in the language of the land,
thereby promoting the welfare of the people.

The epilogue contains brief blessings for the kings who applied the laws and extensive curses for those who did not observe Hammurabi's code. Hammurabi again refers to the aims of his lawgiving and in doing so evidently realised that his own name had been glorified :

I, Hammurabi, the perfect king,
 was not careless (or) neglectful of the black-headed (people)
 [=the inhabitants of Babylon]
 whom Enlil had presented to me,
 (and) whose shepherding Marduk had committed to me;
 I sought out peaceful regions for them;
 I overcame grievous difficulties ...
 In order that the strong might not oppress the weak,
 that justice might be dealt the orphan (and) the widow ...
 I wrote my precious words on my stela.

Let any oppressed man who has a cause
 come into the presence of my statue as the king of justice,
 and then read my inscribed stela,
 and give heed to my precious words,
 and may my stela make the case clear to him ;
 may he understand his cause;
 may he set his mind at ease.

Although Hammurabi thus expresses the essence of his code, an exact definition of the nature of his legislation is still open. We have already drawn attention to the fundamental difficulties of applying the concept "law" to the ancient east (cf. Chapter III). An ancient eastern code did not regulate legal matters comprehensively and systematically, it contained certain cases which may roughly describe as cases of conflict. The same applies to the richest and juristically most important ancient eastern code, the CH. We are therefore obliged to consider the essence of these prescriptions even more closely.

A compilation of important definitions of the nature of the CH is given by Haase, *Einführung*, 23. In this connexion we may mention particularly the recent work by Kraus, quoted by Ha&e. Kraus concludes that the code contains not "laws" but "verdicts" of the royal judge Hammurabi. The collection of verdicts naturally has a purpose, and it would be nonsense to equate it,

without any modification, with the judgements as they had actually been delivered in court. Kraus himself writes: Hammurabi's "so-called laws are exemplary decisions, models of sound legal judgements" (291). This means that they were intended to influence future judgements, that they were intended to be taken seriously as legal patterns, that judges had to abide by **them**—compare the text quoted above from the epilogue—and therefore that they approximate what we call laws. We may therefore continue to use the usual terminology, but we must always bear in mind the reality of the ancient eastern theory and practice of law.

What was Hammurabi's purpose in engaging in normative legislation by publishing his code? It has become usual to classify his code as a reform. In a sense this is correct. The question of how far he achieved his aim is not important here. The CH is based on predecessors, although these are not expressly named, and insofar as we have material which we can compare with the CH, they are nowhere accepted unaltered. One purpose of the reform would have been to give a uniform law to the kingdom created by Hammurabi's political and military activity. Different legal traditions were standardised, and a greater degree of change would have been demanded of one part of the kingdom than of another. The purpose of the exercise was not only to unite different political entities but also to achieve a uniform law for the Sumerian and Akkadian populations of the empire. No distinction is made anywhere in the code between the two peoples. Where distinctions are made, as they frequently are, they concern members of the three strata of the population which the code keeps separate, the *awēlum*, the *muškēnum* and the slaves.

Of these three strata, the lowest, the slaves, is the easiest to define. There were slaves in the temple, at the king's court, and also in the households of free citizens. A large part of the slaves were recruited from amongst prisoners of war; others became slaves by being sold as children or by voluntary enslavement. There were also, of course, slaves by birth. The slave population in Babylon was an essential factor in the economy. It had hardly any rights. Slaves were regarded and treated as merchandise.

It was very much more difficult to define what must have been meant by the **awdlum** and the *muškēnum*. No one has yet managed to describe with any certainty the relationship in which these classes of society stood to each other. The definition of the *muškēnum* is particularly controversial.

F. R. KRAUS, *Ein Edikt des Königs Ammi-Saduqa von Babylon*, 1958, esp. 144-55; Id., *Vom mesopotamischen Menschen der altbabylonischen Zeit und seiner Welt*, 1973, esp. 92-125; T. J. MEEK, *ANET*, 166, nn. 39 and 44; W. v. SODEN, “*muskenum* und die Mawali des friihen Islam,” *ZA NS* 22, 1964, 133-41; A. SPEISER, “The *muskenum*,” *OR NS* 27, 1958, 19-28; R. YARON, *The Laws of Eshnunna*, 1969, esp. 83-93.

As far as the CH is concerned, a consensus seems to have been emerging over the last few decades. According to this, the *awilum* or **awdlum** was the normal free citizen, while the *muškēnum* was a member of a social group lower than that of the **awdlum** (thus, for example, v. Soden). He too was free, but he was socially and economically dependent, and in particular he was dependent on the crown. This explains why in one place the CH accords the *muškēnum* special protection.

Nevertheless this theory, accepted by most Assyriologists today, has its opponents. We must mention them, however briefly. A particularly committed opponent is Kraus. He is in basic agreement with Yaron and Meek. While the terms **awdlum** and *muškēnum* are usually regarded as permanent descriptions of particular social classes, Kraus considers that the terms are of relative significance only, that they cannot be explained a priori but depend on the context and situation. In a majority of cases, *awēlum* would therefore mean no more than an indeterminate “someone,” as opposed to the *muškēnum* or “member of the elite or of an elite in the state” (Kraus, *Vom mesopotamischen. Menschen*, 117). On the other hand, *muškēnum* in collective usage denotes “the free population of the state, seen from the point of view of the social summit,” in individual usage “a member of this society” (Kraus, 108). Kraus adopts Meek’s definition (private citizen) and expressly rejects other common translations of *muškēnum* such as “poor man,” “palace slave,” “a half-free man” or “subordinate.”

Scheil has divided the text of the CH into 282 paragraphs. Although his division has not been universally accepted in every detail, modern scholars have followed it in the main. And all translations have adopted Scheil’s paragraphing. The seven-column gap we mentioned earlier comprises §§66-100. Attempts to fill it have been made by drawing on the text of various fragmentary copies. It has to be said, however, that the reconstruction of the missing paragraphs on the whole remains highly uncertain as well as incomplete. The translations of this section adopt various methods of numbering the substituted items.

The modern reader of the 282 paragraphs of the CH is at first bewildered by the apparent lack of any system, by the erratic and incomplete treatment that characterises the work. And such an impression is not just the result of a first cursory perusal. The law historian M. San Nicolò put it in a nutshell: “All attempts to divide the code on the basis of strict logical or dogmatic principles are to be regarded as failures” (72). Why? We must refer back to our earlier remarks in Chapter III on the nature of ancient eastern codes in general to avoid a precipitate and unfair judgement. Once we have discarded the “modern” claims to have constructed logical legal systems (first introduced by the Romans), we can appreciate that the alternative is not simply a code built up arbitrarily and by chance. In his essay “Zur Systematik und Gesetzestechnik im Codex Hammurabi” already referred to, Petschow deals thoroughly with these questions where earlier research had almost unanimously deplored the lack of system and logic in the construction of the code. In what follows, we take up one or two of Petschow’s conclusions.

In the first part (§§1-41), the code deals essentially with legal subjects that concern public order. We find prescriptions on the ordered administration of justice, the protection of property, duties towards king and state, while the large section §§42-282 deals predominantly with the interests and concerns of the individual citizen: prescriptions about property and family law, inheritance, bodily integrity and problems that occur in the context of trade and agriculture. The two main sections indicated by Petschow are not rigidly distinct. This is a further sign that one may not justly apply modern standards to ancient oriental law.

However, even within the two main sections of the code, a meaningful and rational disposition of the material can be discerned. The arrangement and succession of the legal material frequently follows the areas and customs of ancient oriental life. For example, §§241-72 are chronologically arranged according to the temporal succession of the various agricultural duties. The order must have been as understandable and practical to the contemporary user as it is objectionable and irrational to the modern jurist.

The CH is worth quoting in greater detail than its predecessors as the most important collection of ancient oriental laws. In the following section, particularly significant and characteristic principles will be quoted and briefly explained. The English translation will be basically that of *ANET*, with modifications suggested by the German translations of Eilers and Haase.

3. A selection of legal principles from Hammurabi's code

In its first five prescriptions, the CH deals in turn with the most important people concerned in a trial apart from the parties themselves: the accuser, the witness and the judge. These five paragraphs have been called the rules of court. This is accurate to some extent. In accordance with ancient oriental legislation, the code does not deal with them systematically or according to some previous abstract scheme. Rather, each prescription represents a particular case to which fundamental significance is subsequently accorded. It is certainly not accidental that the opening paragraphs of Hammurabi's code have evidently been shaped by the effort to establish an ordered and just judicial process. The purpose of the legislation as expressed in the prologue and epilogue—"to cause justice to prevail in the land"—is incorporated into the code itself right from the beginning (cf. Petschow, 149).

The first ordinances concern false accusation and, related to that, false witness.

If a seignior [*awelum*] accused a(nother) seignior and brought a charge of murder against him, but has not proved it, his accuser shall be put to death (§1).

If a seignior brought a charge of sorcery against a(nother) seignior, but has not proved it, the one against whom the charge of sorcery was brought, upon going to the river, shall throw himself into the river, and if the river has then overpowered him, his accuser shall take over his estate ; if the river has shown that seignior to be innocent and he has accordingly come forth safe, the one who brought the charge of sorcery against him shall be put to death, while the one who threw himself into the river shall take over the estate of his accuser (§2).

If a seignior came forward with false testimony in a case, and has not proved the word which he spoke, if that case was a case involving life, that seignior shall be put to death (§3).

If he came forward with (false) testimony concerning grain or money, he shall bear the penalty of that case (§4).

A legal principle of great importance throughout the code is discernible in these opening prescriptions: the talion. It explains why false statements in oral accusation or testimony should be punishable as harshly and uncompromisingly as they are here. The false accuser or witness is threatened with the same punishment which would be meted out to the accused if found guilty. Unproven accusations and unproven testimony are therefore regarded as equivalent to false accusations and false witness. The possibility of a just and orderly trial does not depend ultimately on the statement of truth to the court. Every judicial process must try to exclude the possibility of false statements to the court. In the context of ancient oriental law, this principle is propagated here. (Cf. §17 of the Code of Lipit-Ishtar and a biblical parallel in Deut. 19 :16-19.)

The special form of ordeal in §2 deserves comment. There is an exact parallel in Code of Ur-Nammu §10. We should probably not be far wrong if we postulated a direct dependence of the CH on the older code at this point. Evidently if the accused sank he was guilty; he proved his innocence by swimming to safety. This same process has been verified in Africa. Because nothing is said about a special punishment of an accused shown by the ordeal to be guilty, we can assume that verdict and punishment coincided in the same process: the river carried the guilty person away and thus administered the death penalty. There is no

proof in the OT that ordeal by water was ever resorted to by the ancient Israelites. But the thesis has been proposed that certain OT sayings reflect the conception of ordeal by water. Prime examples are Ps. 18 :17-21 and Ps. 124:2-5 (cf. P. K. McCarter, "The River Ordeal in Israelite Literature," *HThR* 66, 1973, 403-12).

If a judge gave a judgement, rendered a decision, deposited a sealed document, but later has altered his judgement, they shall prove that the judge altered the judgement which he gave and he shall pay twelvefold the claim which holds in that case; furthermore, they shall expel him in the assembly from his seat of judgement and he shall never again sit with the judges in a case (§5).

Complete understanding of this prescription is hampered by a whole series of different problems, and we have no space to pursue them here. Be it said simply that the prescription presumes a special office of judge. It also suggests that legal decisions were recorded on documents. Any subsequent alteration of such a document (by bribing the judge?) was a misdemeanour which resulted in a heavy fine and life-long disqualification from holding judicial office.

§§6-25 concern a group of capital crimes which, with the exception of §8 (see below), all carry the death penalty. They were evidently crimes regarded as particularly dangerous to the existence of the state and society and therefore deserved so prominent a place in the code. The first are larceny and receiving stolen property. The CH lays down no general rule for the punishment of larceny but mentions particular cases. Here at the beginning of the code, the prescriptions concern particularly prominent objects of possible theft.

If a seignior stole the property of church or state, that seignior shall be put to death ; also the one who received the stolen goods from his hand shall be put to death (§6).

The first thing to notice about this prescription is that temple and palace property enjoy special legal protection. Behind the juxtaposition of temple and palace may lie the conception of the divine nature of the monarchy which played an important role

in the ancient east (albeit in different forms). Even so, the death penalty for theft and receiving is harsh. This was plainly felt at the time, because §6 is not the only prescription concerning theft of temple and palace property. §8 deals with basically the same thing. There, capital punishment is threatened only for the thief who could not pay, otherwise a fine (a heavy one, however) was imposed :

If a seignior stole either an ox or a sheep or an ass or a pig or a boat, if it belonged to the church (or) if it belonged to the state, he shall make thirtyfold restitution; if it belonged to a private citizen [*muskenum*], he shall make good tenfold. If the thief does not have sufficient to make restitution, he shall be put to death (§8).

The discrepancy between the last two paragraphs quoted has been interpreted in various ways, cf. the presentation of the different theories in Jackson, 71-3. One thesis has been generally abandoned, namely that the difference in penalties between §6 and §8 depends on the difference in stolen objects. Mtiller had already considered this possibility and suggested that in §6 "the temple or royal treasure" was meant—"objects not easily replaceable, the theft of which was almost equivalent to desecration or high treason"—while §8 referred to "objects that could readily be replaced." But then Müller himself rejected this thesis and offered an explanation based on the history of law (84-5) which has been adopted by many other writers, cf. Koschaker (75-6) and Jackson (73). According to this explanation, the two paragraphs record a development in law. It is a remarkable fact that two contradictory ordinances should stand almost side by side in the same code. This is a weighty indication of the nature of ancient eastern codes which were not constructed on the principles of legal system and could tolerate surprisingly ingenuous discrepancies of a historical origin.

In §8, therefore, we meet the discrimination so characteristic of the CH. The repayment for goods stolen from the temple or royal palace is laid down as *thirty* times the value of the goods taken; if, on the other hand, the property was taken from a *muškenum*, ten times was sufficient. Only the thief without means was, here again, to suffer the death penalty. §8 deals with the

theft of livestock and boats as cases apart. Such goods were specially protected by the law. At that time, as at other times, property meant essentially livestock, and for Babylon the boat was of particular importance. For other categories of property the CH is very much milder. According to §259, for example, the theft of a plough is punishable with a fine of a mere five shekels.

In our present context, §7 merits a final comment. Here we see how complicated, even in Hammurabi's time, a purchase could be. The prescription is concerned to prevent if possible the sale of goods suspected of being stolen. Certain precautions were laid down for a sale to which a minor or a slave were party:

If a seignior has purchased or he received for safekeeping either silver or gold or a male slave or a female slave or an ox or a sheep or an ass or any sort of thing from the hand of a seignior's son or a seignior's slave without witnesses and contracts, since that seignior is a thief, he shall be put to death (§7).

It is to be noticed here that the death penalty is laid down for negligence in the settlement of a sale. §7 is therefore one of the severest prescriptions in the entire code, and we may ask whether so harsh a punishment could ever in fact be inflicted in legal practice. Schmökel has called this prescription one of the "most striking and typical sections of the whole code" (*Hammurabi, 71*). It shows the interest in the protection of property which inspires the code, it shows the great importance accorded to the settlement of a contract with force of law, and it points to the rigorous punishment mentality of this particular code.

The OT laws put much less emphasis on crimes of theft than the CH does (cf. p. 166 below). There are in fact no comparable prescriptions governing reception of stolen goods or the purchase of goods suspected of being stolen. §7 is also therefore particularly instructive because it shows how much weight Babylonian law placed on the written contract. This can be illustrated by two further prescriptions. In CH§§122-6, the code deals with the regulation of disputes in connexion with the safekeeping of entrusted goods. The introductory prescriptions, which govern the entire section, run as follows :

If a seignior wishes to give silver, gold, or any sort of thing to a(nother) seignior for safekeeping, he shall show to witnesses the full amount that he wishes to give, arrange the contracts, and then commit (it) to safekeeping (§122).

If he gave (it) for safekeeping without witnesses and contracts and they have denied (its receipt) to him at the place where he made the deposit, that case is not subject to claim (§123).

The other one we might mention here comes from the marriage laws :

If a seignior acquired a wife, but did not draw up the written agreement for her, that woman is no wife (§128).

The code continues, in §§9-13, with a series of ordinances, in part very complex, which concern lost property and the proof needed in such cases. Quite abruptly next to these intricate prescriptions stands the terse ordinance :

If a seignior has stolen the young son of a(nother) seignior, he shall be put to death (§14).

Compare this with Exod. 21:16 and Deut. 24 :7. The explicit statements of these OT prescriptions certainly share the same background as CH§14. The man has been kidnapped in order to be sold into slavery. There is no doubt in the mind either of the Babylonian or of the Israelite legislators that the death penalty is the only appropriate punishment.

Under the heading protection of property, the following paragraphs of the CH deal with a series of cases concerning the ownership of slaves. Again the human property of the palace, that is of the king, is protected in a special way. It is noteworthy that §§15 and 16 give the *muškēnum* the same legal protection. The surmise mentioned above that a special relationship bound the *muškēnum* to the king is supported by both these prescriptions.

If a seignior has helped either a male slave of the state or a female slave of the state or a male slave of a *muskenum* or a female slave of a *muskenum* to escape through the city-gate, he shall be put to death (§15).

If a seignior has harbored in his house either a fugitive male or female slave belonging to the state or to a **muskenum** and has not brought him forth at the summons of the police, that householder shall be put to death (§16).

After §16 comes a series of prescriptions dealing with runaway slaves. They are couched in quite general terms, without any reference to the social status of the slave-owner. Again the death penalty is demanded, even for the person who conceals a runaway slave in his house (§19). In an opposite direction, the capture and return of a runaway slave is rewarded:

If a seignior caught a fugitive male or female slave in the open and has taken him to his owner, the owner of the slave shall pay him two shekels of silver (§17).

The problem of runaway slaves also plays an important part in other ancient eastern codes. The CU (§15) deals with it, and the other codes too, without exception (cf. CL§§12f; CE§§49ff). It was quite clearly a troublesome preoccupation throughout the ancient east, one which was not just a question of **property**—although it was also that—but which upset the balance of the social order as a whole.

It is all the more surprising that the laws of the OT contain no corresponding prescription. OT law concerns itself with runaway slaves in only one instance, and even there there is no comparison with the ancient eastern texts :

You shall not surrender to his master a slave who has taken refuge with you. Let him stay with you anywhere he chooses in any one of your settlements, wherever suits him best; you shall not force him (Deut. 23 :15-16).

Because slavery existed also in ancient Israel, these verses cannot refer to normal runaway slaves. Observance of the law on this point would in practice mean the end of slavery as an institution, and that is certainly not the intention here. When the text refers to “slave,” it must mean a foreign slave seeking refuge in the land of Israel. Such a slave must not be handed back over the border but must be given the right to settle wherever he pleased in the country. The **prescription** belongs to the

great number of OT and in particular Deuteronomic principles designed to protect the alien who of himself had no rights.

§§26-41 deal with the duties owed by military and civilian persons to their king and country. First of all they concern the rights which belong to the king's *feoffees* (this term must not be taken to imply a feudal social structure, cf. Petschow, 152). A great number of possible exceptions is discussed. The text mentions, for example, the case of a soldier who falls into the hands of the enemy while observing his military duties and can return home only after a long enforced absence abroad. His maintenance is assured once he has returned. Other prescriptions protect the subordinate from the arbitrary rule of his military superiors. One ordinance may be quoted in this connexion:

If either a sergeant or a captain has appropriated the household goods of a soldier, has wronged a soldier, has let a soldier for hire, has abandoned a soldier to a superior in a lawsuit, has appropriated the grant which the king gave to a soldier, that sergeant or captain shall be put to death (§34).

In an edict of king Ammisaduqa of Babylon, Hammurabi's fourth successor, which we shall not be dealing with in any more detail, there is a parallel to this prescription. The final ordinance of this edict punishes with death a provincial governor who forces a subordinate to perform certain works for him for money (cf. F. R. Kraus, *Ein Edikt des Königs Ammi-Saduqa von Babylon*, 1958, 180f).

It is consistent with the social structure evinced in the laws of the OT that there are no direct OT parallels to this group of prescriptions. Ever since Israel and Judah had kings, there were military and civil feoffees, and there arose consequently the type of legal problem tackled in this section of the CH. This is not in doubt, and the OT also demonstrates it clearly enough with countless indications. In the codes, however, the problem just does not appear. Unlike the CH, the OT codes are not directly interested in the political order, in its maintenance or conduct. The state is not a preoccupation of OT law.

As already mentioned, the biggest part of the CH deals with the legal interests of the individual without direct treatment of matters concerning the state. It is neither possible nor necessary

in the present context to mention even approximately all its prescriptions. In what follows, we shall be selecting some particularly characteristic principles.

It is not unimportant for an appreciation of the inspiration behind Hammurabi's legal reform to state that the largest section of the code deals with property. The protection of property is one of the pillars of this code. This does not mean, however, that the social side of things does not emerge clearly in the CH.

Because agriculture-husbandry, stock-farming, fishing-was the basis of the Mesopotamian economy, it is hardly surprising that the code has a lot to say about it. Land could, for example, be leased out :

If a seignior rented a field for cultivation, but has not produced grain in the field, they shall prove that he did not work on the field and he shall give grain to the owner of the field on the basis of the harvest of those adjoining it (§42).

If he did not cultivate the field, but has neglected (it), he [the tenant] shall give grain to the owner of the field on the basis of the harvest of those adjoining it; furthermore, the field which he neglected he shall break up with mattocks, harrow and return to the owner of the field (§43).

Because the rent was paid for the produce of the leased field, the leaseholder was responsible for cultivating the land and squeezing as high a harvest from it as he could. §§42-3 enforce this responsibility on the part of the lessee. If he fails to observe this responsibility, he must indemnify the lessor, even to the point of preparing the field for sowing. The reader will notice that there is no general declaration of the level of rent. Clearly the code does not wish to interfere in the individual contracts involved in letting a field (cf. also §46, p. 94 below).

Excursus 2. Old Testament law relating to real estate

A. ALT, "Der Anteil des Königtums an der sozialen Entwicklung in den Reichen Israel und Juda," 1955=*Grundfragen*, 367-91; K. BALTZER, "Naboths Weinberg (1.Kön.21). Der Konflikt zwischen israelitischem und kanaänäischem Bodenrecht," *WuD NS* 8, 1965, 73-88; W.

BOLLE, *Das israelitische Bodenrecht*, Diss. Berlin 1939; H. DONNER, "Die soziale Botschaft der Propheten im Lichte der Gesellschaftsordnung in Israel," *OrAnt* 2, 1963, 229-45; F. HORST, "Das Eigentum nach dem Alten Testament," 1949=*GR*, 203-21; Id., "Zwei Begriffe für Eigentum (Besitz) : Verbannung und Heimkehr," *Festschr. W. Rudolph*, 1961, 135-56; E. NEUFELD, "The Emergence of a Royal-Urban Society in Ancient Israel," *HUCA* 31, 1960, 31-53; M. NOTH, "Das Krongut der israelitischen Könige und seine Verwaltung," 1927=*Aufsätze zur biblischen Landes- und Altertumskunde*, I, 1971, 159-82; G. PRENZEL, *Über die Pacht im antiken hebräischen Recht*, 1971; G. v. RAD, "Verheissenes Land und Jahwes Land im Hexateuch," 1943=*Gesammelte Studien zum Alten Testament*, 1971³, 87-100; H. SEEBASS, "Der Fall Naboth in 1 Reg. XXI," *VT* 24, 1974, 474-88; R. de VAUX, *Ancient Israel*, 166-9; H. E. v. WALDOW, "Social Responsibility and Social Structure in Early Israel," *CBQ* 32, 1970, 182-204.

It is no great step from the leasing laws of the CH to an investigation into any corresponding ordinances of the OT. Such an investigation reveals that there are none. On OT law, there is no hint of renting out land. It is evidently a deliberate omission. The OT has so much on land and things connected with the land that it is almost inconceivable that only rent is accidentally omitted. In other words, according to OT law there should be no renting out of land. There must be some explanation for this, because renting of land was extremely common throughout the ancient east-of which the CH represents only a part.

The process of leasing land presupposes definite legal conditions. It presupposes that the lessor can do what he likes with land that belongs to him. He can work it himself, he can sell it, or he can rent it out. If there was to be no renting of land in Israel, it was evidently because there was no unrestricted ownership of land. What is the explanation for this?

The ultimate reason lies in the specifically OT concept of land. Land was in the last resort, Jahweh's. It was given to Israel to use as an inheritance, but it still ultimately belonged to Jahweh. This is formally expressed in Lev. 25:23a: "No land shall be sold outright, because the land is mine," which we could call the magna charta of the OT land-law. This conception is based on the conviction that the land was once given to the tribes by

Jahweh as their inheritance. The individual sib or family was assigned its land for cultivation. This ensured the livelihood of all. This is the basis for the OT principle that land could not really be sold, and it is therefore understandable that nothing is said in the OT laws about selling or renting land.

What are we to say, then, about the restoration of the relation of people to land as originally intended? After ordinances concerning the sabbath year (for which see below), Lev. 25 deals with the so-called jubilee year. The name comes from the ram('s horn) which was blown to herald the beginning of the jubilee year. Luther therefore called it the **Halljahr** (year of the blast). The essential content of the prescriptions in Lev. 25, which are neither a literary unit nor even from the same historical period, is summarised in v. 10:

You shall hallow the fiftieth year and proclaim liberation in the land for all its inhabitants. You shall make this your year of jubilee. Every man of you shall return to his patrimony, every man to his family (Lev. 25:10).

The jubilee year, to be called every fifty years, was declared a holy year. This meant that it was submitted in a special way to Jahweh's will. The verse quoted identifies what was the divine will. There was to be a general emancipation, which involved the return of land to its original occupier and ^{an} amnesty for those reduced to serfdom because of debts incurred: they might return to their sib. The thrust of Lev. 25 lies in the restoration of the relation of people to land as originally intended.

The question naturally arises of whether, given the lateness of the text, this is to be regarded as an ideal without relation to practice—even as such it would be important enough—or whether particular legal processes are not in the background. We cannot, of course, argue from a direct application of the jubilee laws to a specific time in Israel's history, but on the other hand the gestures described here cannot be relegated **to** the realm of pure fiction. Following Elliger, we can at least state that "the chapter undoubtedly reflects many customs and laws of the time of the monarchy which, in its original intention, was designed to impede the excesses of capitalism and the formation of a proletariat and protect the old custom (each **fam-**

ily on its own piece of land) " (HAT 4, 1966, 349). We need not go any further into other details of jubilee legislation. A prime commentary would be that by Elliger and the remarks of Horst (213-21). The jubilee laws are a fundamental and particularly impressive indication of Israel's characteristic view of Jahweh as the real owner of the land.

While we are on the subject of OT laws relating to the use and possession of land, we might also mention some surprising prescriptions governing the harvest.

When you reap the harvest of your land, you shall not reap right into the edges of your field; neither shall you glean the loose ears of your crop ; you shall not completely strip your vineyard nor glean the fallen grapes. You shall leave them for the poor and the alien. I am the Lord your God (Lev. 19:9-10).

A similar commandment is found in Deut. 24 :19-22. The background to it is most probably a pre-Israelite (and therefore Canaanite) use of harvested crops with a sacral significance. Harvest gifts had been offered to the god of agriculture. This custom was superseded. The commandment now expressed the fact that Jahweh had given the land to all Israel, and **everybody** must be able to enjoy its fruits. We may refer to another OT cultic prescription in this connexion :

For six years you may sow your land and gather its produce; but in the seventh year you shall let it lie fallow and leave it alone. It shall provide food for the poor of your people, and what they leave the wild animals may eat. You shall do likewise with your vineyard and your olive-grove (Exod. 23 :10-11) .

The practice of leaving land fallow mentioned in these verses is not based on considerations of agricultural rentability (cf. Alt, "The Origin of Israelite Law," 128-9). We know from other cultures that agricultural land was occasionally left unworked to maintain and increase its fertility. That is not the case here. There is a cultic purpose the original significance of which has been lost. Its OT meaning, however, is clear. It can be divined from the long twenty-fifth chapter of Leviticus which contains numerous ordinances on the so-called sabbath year. By leaving his land fallow, the Israelite farmer acknowledged that he was

not fully the owner of land which he held in fee from Jahweh. The argument from social ethics adduced in Exod. 23:11 is a later interpretation, although very characteristic of the OT. The produce dedicated to Jahweh benefitted the poor of the land. It is noteworthy that at the conclusion of this section animals are mentioned, meaning probably not domestic but wild animals.

Now there can be no question that this specifically OT view of property was handed down as an ideal but in practice fell all too soon into the background. We can establish the beginning of the change with historical accuracy. When, with the arrival of the monarchy, and especially with the institution of David's empire, sometimes quite considerable parcels of Canaanite land were incorporated into the Israelite states, Canaanite law relating to land naturally remained in force in those areas and was also increasingly applied in the primitive territory of the Israelite tribes.

Among the many additions to the jubilee year laws of Lev. 25, one section is quite evidently a reflexion of the opposition between Israelite and Canaanite law. The confrontation naturally arose more especially in the region of the towns, where Canaanite law was originally concentrated. Lev. 25:29-34 makes a striking contrast between house ownership in walled cities and house and property ownership in unwalled hamlets. Whereas in the latter case the jubilee law was fully applied ("Houses in unwalled hamlets ... shall revert at the jubilee," v. 31), in the former it was expressly set aside ("the house in ~~the~~ walled town ... shall not revert at the jubilee," v. 30b).

This reflects Canaanite law which provided for a perfectly normal and definitive purchase of land and houses. In the Canaanite understanding of things, the land was personal property which could be enlarged at will, but which therefore entailed also the sale of land and consequent impoverishment on the part of others. The fact that the royal administration consisted to a great extent of members of the Canaanite aristocracy, who not only retained their business practices but also provided a model for the activities of their Israelite counterparts, played a part in this connexion (cf. esp. **Donner**) .

And last but not least, the increasing possession of latifundia on the part of the king made a vital contribution to changes in

the social structure of Israel (cf. esp. Alt). The effects of the social differentiation which came into being with the institution of the monarchy were so marked that they have even left archaeological evidence. For example, excavations in the OT town of Tirza have revealed that the houses of the tenth century were all more or less equal in size and equally well (or ill) furnished, whereas in the archaeological layer of the eighth century, the larger and better built houses of the rich were quite distinct from the smaller, poorer houses of the less well-off (cf. de Vaux, 94-5). All in all, one can appreciate the remark of Neufeld, with reference to the social upheavals connected with the institution of the monarchy: "By its nature and by its effects, the monarchy was the most radical revolution in ancient Israel" (37).

All this then led to the situation which faced the prophets of the eighth century. On the one hand, many Israelites had become noticeably wealthy, enjoying a high standard of living and many luxuries, while on the other many people, all too many, had not been able to adjust to the new situation, had lost their land and were defenceless and legally unprotected in the face of the intrigues of the powerful. The old Israelite society based on the small farmer had been destroyed. This was the result of a development which ran totally contrary to the aims and intentions of OT law and which consequently attracted the implacable opposition of the prophets (cf. Isa. 5:8; Mic. 2:1-5, 6-10).

To return to the CH. After the prescriptions concerning the renting of land come a few ordinances governing the proper execution of **horticul** work undertaken in somebody else's behalf. Because starting an orchard demanded a great deal of work which paid little dividend in the early years, the gardener entrusted with such work paid no dues to the owner for the first four years; from the fifth year onwards, half the harvest belonged to the owner of the land.

If, when a seignior gave a field to a gardener to set out an orchard, the gardener set out the orchard, he shall develop the orchard for four years; in the fifth year the owner of the orchard and the gardener shall divide equally, with the owner of the orchard receiving his preferential share (\$60).

If the gardener did not set out the whole **field**, but left a portion bare, they shall assign the bare portion to him as his share (§61).

If he did not set out the field that was given to him as an orchard, if it was a cultivated field, the gardener shall pay to the owner of the field rent for the field for the years that it was neglected on the basis of the harvest of those adjoining it; also he shall do the (necessary) work on the field and return (it) to the owner of the field (§62).

These prescriptions are again orientated primarily to the interests of the estate owner, even though they do not leave the peasant unprotected. The main concern, however, is clearly to protect the owner of the garden by legally enforcing work stipulated in a contract. Furthermore, the owner also had the advantage in the choice of produce. All these prescriptions deal with exceptional cases. It is not surprising, therefore, that even the special situation of the destruction of or damage to the crop by an act of god is taken into consideration. In Mesopotamia the main possibility envisaged is flooding :

If a seignior let his field to a tenant and has already received the rent of his field, (and) later the god **Adad** has inundated the field or a flood has ravaged (it), the loss shall be the tenant's (945).

If he has not received the rent of the field, whether he let the field for one-half or one-third (of the crop), the tenant and the owner of the field shall divide proportionately the grain which is produced in the field (§46).

There is a certain tension between these two paragraphs and the ones cited previously. It could be from §45 (the meaning is not altogether clear) that the rental was prepaid-an arrangement which naturally favoured the lessor-but that the risk of loss through act of god was taken into consideration (cf. **Driver-Miles**, I, 140f for an opposite view). §46 on the other hand reckons with habitual post-payment of the rent. In this case the risk of crop damage from acts of god was shared equally by the owner and the lessee.

§48 contains a prescription which is clearly intended to favour the socially weaker debtor. A delay in the payment of his rent

is granted to the debtor in the case of an undeserved loss of his crop. In these special circumstances, the distraint that would normally be expected to follow was suspended:

If a debt is outstanding against a seignior and the god **Adad** has inundated his field or a flood has ravaged (it) or through lack of water grain has not been produced in the field, he shall not make any return of grain to his creditor in that year; he shall cancel his contract-tablet and he shall pay no interest for that year (§48).

In this case the debtor was even entitled to alter the written contract, which was washed off the clay tablet for this reason. The text of the contract could then be modified on the cleaned tablet.

§66, and §§49-52 which are to be interpreted in a similar way, go even further in their protection of an insolvent debtor. It is laid down that the previous cession of the crop to the creditor occasioned by a state of economic need is without legal force. This violates so to speak natural feelings of justice. The debtor is rather enjoined to gather in the crop himself and pay his debts from the proceeds.

When a seignior borrowed money from a merchant and his merchant foreclosed on him and he has nothing to pay (it) back, if he gave his orchard after pollination to the merchant and said to him, "Take for your money as many dates as there are produced in the orchard," that merchant shall not be allowed ; the owner of the orchard shall himself take the dates that were produced in the orchard and repay the merchant for the money and its interest in accordance with the wording of his tablet and the owner of the orchard shall in turn take the remaining dates that were produced in the orchard (§66).

Damage to crops does not arise only as a consequence of natural catastrophes, for which no one can be held responsible. A crop can be damaged through negligence or even, possibly, through malice. In these cases Babylonian law applied the principle of causality. The perpetrator of the damage was responsible for the consequences of his actions and must make good any damage. The CH sees itself induced to apply this legal **prin-**

ciple for example to the negligent or faulty use of irrigation equipment.

If a seignior was too lazy to make [the dike of] his field strong and did not make his dike strong and so a break opened up in his dike and he has accordingly let the water ravage the farmland, the seignior in whose dike the break was opened shall make good the grain that he let get destroyed (§53).

If he is not able to make good the grain, they shall sell him and his goods, and the farmers whose grain the water carried off shall divide (the proceeds) (§54).

If a seignior, upon opening his canal for irrigation, became so lazy that he has let the water ravage a field adjoining his, he shall measure out grain on the basis of the harvest of those adjoining his who are not affected (§55).

At the conclusion of these laws about damage to crops from faulty use of the irrigation system, the CH deals with the cases of crop damage from other people's livestock, which must have been a fairly common occurrence. The point of departure is the fact that herds were welcomed in the fields after the harvest, but there evidently had to be an agreement between the farmer and the herdsman, not least to fix the time at which the herds could start grazing. The CH obliged the herdsman to come to some arrangement with the owner of the field, otherwise a precisely defined tax was levied.

If a shepherd has not come to an agreement with the owner of a field to pasture sheep on the grass, but has pastured sheep on the field without the consent of the owner of the field, when the owner of the field harvests his field, the shepherd who pastured the sheep on the field without the consent of the owner of the field shall give in addition twenty *kur* of grain per eighteen *iku* to the owner of the field (§57).

This legal stipulation is also found in OT law, with certain modifications :

When a man uses his field or vineyard for grazing, and lets his beast loose, and it feeds in another man's field, he shall make

restitution from his own field according to the yield expected; and if the whole field is laid waste, he shall make restitution from the best part of his own field or vineyard (Exod 22:5, NEB alternative version).

The emphasis here is on the herdsman's negligence. Another difference is that it does not concern the professional herdsman. But the basic legal principle that the owner of livestock is responsible for any damage done by his beasts in somebody else's fields and must make compensation is the same.

So far we have roughly followed the order of the code. We now jump to the end of the gap we mentioned earlier, which begins after §65. The missing laws dealt with house-ownership, debts, rates of interest and similar subjects. But because the reconstructions of the text are uncertain and incomplete, we omit them here. We pick up the text again at the point where a section on the obligations of winesellers begin.

If a woman wineseller, instead of receiving grain for the price of a drink, has received money by the weight of the large stone and so has made the value of the drink less than the value of the grain, they shall prove it against that wineseller and throw her into the water (§108).

If outlaws have congregated in the establishment of a woman wineseller and she has not arrested those outlaws and did not take them to the palace, that wineseller shall be put to death (§109).

If a hierodule (**naditum**) or a nun (**entum**) who is not living in a convent has opened (the door of) a **wineshop** or has entered a **wineshop** for a drink, they shall burn that woman (§110).

(Note. **Naditum** and **entum** are particular classes of priestess. For **entum**, cf. J. Renger, *ZANS* 24, 1967, 134-49, for **naditum** 149-76. Both classes were expected to lead blameless lives. Going into a tavern to drink ale would be an unheard of crime.)

These prescriptions too are examples of the haphazard nature of the code. Basic questions of public house management are not dealt with. The code mentions only a few cases, which could naturally be multiplied at will. Why precisely these cases should

be selected is not clear. The importance of the wineseller in the economy of ancient Babylon can, however, be deduced also from the fact that three paragraphs are devoted to her (§§14-16) in king Ammisaduqa's edict (cf. J. J. Finkelstein, *JCS* 15, 1961, 99).

Distraint, slavery on account of debt, and the custody of goods consigned to somebody's care are some of the everyday commercial matters dealt with by the code (§§112-26). We mention here only the law governing bonds, which comes in §112 and §§120-6. The first case is that of the embezzlement of goods entrusted to a carrier. The temptation to commit irregularities must have been particularly great here. In certain circumstances a considerable amount of time could elapse before the owner became aware of the loss of his goods. The penalty envisaged by the law is correspondingly severe: the carrier must make restitution fivefold :

When a seignior was engaged in a (trading) journey and gave silver, gold, (precious) stones, or (other) goods in his possession to a(nother) seignior and consigned (them) to him for transport, if that seignior did not deliver whatever was to be transported where it was to be transported, but has appropriated (it), the owner of the goods to be transported shall prove the charge against that seignior in the matter of whatever was to be transported, but which he did not deliver, and that seignior shall pay to the owner of the goods to be transported fivefold whatever was given to him (9112).

More general laws on bonds come in §§120-6. First, there are regulations on the storing of grain in someone else's granary (§§120-1). The owner of the granary is responsible for the crops stored there and must make twofold restitution for any damage. An oath would have been demanded in practice.

If a seignior deposited his grain in a(nother) seignior's house for storage and a loss has then occurred at the granary or the owner of the house opened the storage-room and took grain or he has denied completely (the receipt of) the grain which was stored in his house, the owner of the grain shall set forth the particulars regarding his grain in the presence of god and the owner of the house shall give to the owner of the grain double the grain that he took (§120).

If a seignior stored grain in a(nother) seignior's house, he shall pay five *qu* of grain per *kur* of grain as the storage charge per year (§121).

The bond laws of widest application come in §§122-3, which we have already quoted (p. 85 above). A legally valid and therefore also actionable custody of somebody else's property required witnesses and a written contract. If the necessary conditions were fulfilled, the custodian carried full responsibility for all goods lodged with him. Even when he was the victim of theft, he had to make restitution. His only course of action then was to expose the thief and recover the damages from him.

If a seignior gave silver, gold, or any sort of thing for safekeeping to a(nother) seignior in the presence of witnesses and he has denied (the fact) to him, they shall prove it against that seignior and he shall pay double whatever he denied (§124).

If a seignior deposited property of his for safekeeping and at the place where he made the deposit his property has disappeared along with the property of the owner of the house, either through breaking in or through scaling (the wall), the owner of the house, who was so careless that he let whatever was given to him for safekeeping get lost, shall make (it) good and make restitution to the owner of the goods, while the owner of the house shall make a thorough search for his lost property and take (it) from its thief (§125).

If a seignior's property was not lost, but he has declared, "My property is lost," thus deceiving his city council, his city council shall set forth the facts regarding him in the presence of god, that his property was not lost, and he shall give to his city council double whatever he laid claim to (§126).

The bond laws of the OT are very similar.

§127 marks the start of a long section on family law. The section ends only at §193 and includes prescriptions on inheritance. Marriage law is particularly prominent. Despite the passable state of the documentary sources, the experts cannot define Babylonian marriage law with complete certainty.

DRIVER-MILES, The *Babylonian Laws*, I, 245-324; E. EBELING-V. KOROSSEC, art. "Ehe," *RLA* II, 281-99 ; D. NÖRR, "Die Auflösung der Ehe durch die Frau nach altbabylonischem Recht," *Studi in onore di Emilio Betti*, III, 1962, 505-26; P. KOSCHAKER, "Eheschliessung und Kauf nachalten Rechten, mit besonderer Berücksichtigung der älteren Keilschriftrechte," *ArOr* 18/3, 1950, 210-96.

In this case too it is annoying that the CH includes no general prescriptions from which we could clearly deduce the characteristics of Babylonian marriage. The prescription of widest application is §128, already quoted :

If a seignior acquired a wife, but did not draw up the written agreement for her, that woman is no wife (§128).

The "written agreement" certainly means a marriage contract prepared by the groom for his bride. We could interpret this as a means of protecting the woman from the man's arbitrary treatment, but it must also be clear that §128 gives no hint as to the form or content of the marriage contract. If we refer to extant marriage contracts, the woman does not seem to have benefitted from much protection. The bride had no say in contracting the marriage, her agreement was not necessary. The contract established only that a given man had taken a given woman to be his wife and occasionally contained some prescriptions in case the couple should ever separate.

The question of the importance of the "gifts" which the groom had to give the bride's father is significant if we are to understand Babylonian marriage properly. Were they a purchase price, something the groom had to hand over before he could take his bride home, or were they simply a wedding gift intended to emphasise the seriousness of the courtship, satisfying more a moral than a legal obligation? The uncertainty and variety in possible interpretations must be connected with the fact that the Babylonian view of marriage underwent a development on this point: the groom's money evidently lost the character of a marriage-price which it had once had and became more of a present.

The prescriptions in the CH which deal with this question, however, do not reveal this development. The legal nature of the gifts is still clearly presumed. In §§159-61, cited below, a betrothal gift is mentioned as well as a marriage price. It probably

meant the provision of food for the wedding feast. If the bride's father accepted the marriage price and the betrothal gift, he was as legally bound as the groom. The two parties to the contract-the bride was simply the object of the contract-could be released from their responsibilities only in the case of a heavy loss of fortune. The groom must pay for a change of heart with the loss of his gifts (§159), and the bride's father must restore the gifts twofold if he decided not to honour the contract (§§160, 161). Both partners could, with these limitations, back out of the marriage contract for no particular reason.

All this would certainly permit us to describe Babylonian marriage in Hammurabi's time as marriage by purchase. This, however, is a misleading term, because for modern western readers it carries overtones disparaging to the woman. We buy *things*, and the phrase marriage by purchase can lead all too easily to the view that the woman is reduced to the level of an object or piece of merchandise bought by the man. This used to be a widespread assessment of marriage by purchase, but it is certainly inappropriate in the case of Babylonian marriage. It would also be inappropriate for the OT.

The term "purchase" really refers to no more than the legal form for contracting the marriage. There is no devaluation of the woman; indeed, to the oriental mind the opposite is true. The extent of the marriage price was an indication of the esteem in which the man held his future wife: the higher the purchase price, the higher his esteem for her. Koschaker, who has strongly emphasised that juristically the contraction of a marriage in ancient Babylon was an emotional transaction, makes the important remark in this connexion that in describing the act by which a marriage was contracted the Babylonians very consciously avoided the terminology of purchase. "The place of the wife as the controller of household affairs and the mother of legitimate children was from earliest times so highly valued that the ancients refrained from applying the terminology of purchase to the process by which guardianship of her was acquired" (Koschaker, 234).

If a seignior, who had the betrothal gift brought to the house of his (prospective) father-in-law (and) paid the marriage price,

has then fallen in love with another woman and has said to his (prospective) father-in-law, "I will not marry your daughter," the father of the daughter shall keep whatever was brought to him (§159).

If a seignior had the betrothal gift brought to the house of the (prospective) father-in-law (and) paid the marriage price, and the father of the daughter has then said, "I will not give my daughter to you," he shall pay back double the full amount that was brought to him (§160).

If a seignior had the betrothal gift brought to the house of his (prospective) father-in-law (and) paid the marriage price, and then a friend of his has so maligned him that his (prospective) father-in-law has said to the (prospective) husband, "You may not marry my daughter," he shall pay back double the full amount that was brought to him, but his friend may not marry his (intended) wife (§161).

Apart from the marriage price, the CH also mentions other monies in the laws relating to the property rights of spouses: the dowry, the marriage gift and divorce money. The dowry was a gift which the bride held from her father and brought with her into the marriage. It is not apparent from the texts whether the daughter had a direct legal claim to a dowry from her father. However that may be, the dowry assured the wife's legal status because it remained her property and her children's. The dowry could be more than the marriage price (cf. §164 below). This is another proof that the purchase of a bride was not a purchase in the usual sense; it was even usual for the bride's father to suffer considerable loss by giving his daughter an expensive dowry. The CH devotes several prescriptions to the dowry in the event of the wife's death. If the deceased woman left children, the dowry went to the children. If, on the other hand, she died childless, her father had a legal right to property equal in value to the dowry, although the widower was entitled to deduct the marriage price from the dowry he was handing back. The thinking behind this was that the purpose of marriage was to be blessed with children.

If, when a seignior acquired a wife, she bore him children and that woman has then gone to (her) fate (that is, died), her fa-

ther may not lay claim to her dowry, since her dowry belongs to her children (§162).

If a seignior acquired a wife and that woman has gone to (her) fate without providing him with children, if his father-in-law has then returned to him the marriage price which that seignior brought to the house of his father-in-law, her husband may not lay claim to the dowry of that woman, since her dowry belongs to her father's house (§163).

If his father-in-law has not returned the marriage price to him, he shall deduct the full amount of her marriage price from her dowry and return (the rest of) her dowry to her father's house (§164).

The dowry was also important in the case of a divorce. In ancient Babylon, man could normally leave, that is separate from, his wife without any great difficulty. He merely incurred certain financial charges which in the case of a childless marriage were relatively small. The abandoned wife had the right to a divorce fee equal to her marriage price; she also retained her dowry (§§138-9). If there were children to the marriage, the man had also to provide a part of his movable and immovable goods for the education of the children (§137). If, however, the wife caused her husband to leave her because of her behaviour (cf. the interpretation of Nörr, 520-2), she lost her material security. The man was justified in leaving her without any indemnification. He also had the right to take another wife and treat the first wife as a slave. He could not, however, decree this of his own accord; the wife's lapses must be properly substantiated. §141 deals with this case.

If a seignior has made up his mind to divorce a lay priestess (*sugetum*), who bore him children, or a hierodule (**naditum**) who provided him with children, they shall return her dowry to that woman and also give her half of the field, orchard, and goods in order that she may rear her children; after she has brought up her children, from whatever was given to her children they shall give her a portion corresponding to (that of) an individual heir in order that the man who chooses her may marry her (§137).

(For **naditum**, cf. p. 97 above ; for **sugetum**, cf. J. Renger, *ZA NS*, 24, 1967, 176-9. The **sugetum** was also a member of the female priesthood. She was not so important as the **naditum**. She could marry and have her own children, which was forbidden to the **naditum**. A **naditum** "begot" children for her husband by a concubine, frequently a **sugetum**.)

If a seignior wishes to divorce his wife who did not bear him children, he shall give her money to the full amount of her marriage price and he shall also make good to her the dowry which she brought from her father's house and then he may divorce her (§138).

If there was no marriage price, he shall give her one mina of silver as the divorce settlement (§139).

If he is a peasant (**muskenum**), he shall give her one-third mina of silver (§140).

If a seignior's wife, who was living in the house of the seignior, has made up her mind to leave in order that she may engage in business, thus neglecting her house (and) humiliating her husband, they shall prove it against her; and if her husband has then decided on her divorce, he may divorce her, with nothing to be given her as her divorce settlement upon her departure. If her husband has not decided on her divorce, her husband may marry another woman, with the former woman living in the house of her husband like a maidservant (§141).

We have yet to define the marriage gift, dealt with in CH §§150 and 171f. It was a transfer of property which the man made to his wife in the eventuality of his death so that she should be provided for. A sealed document had to be drawn up. The widow's right to the marriage-gift could not be contested even by her children.

If a seignior, upon presenting a field, orchard, house, or other goods to his wife, left a sealed document with her, her children may not enter a claim against her (for this property) after (the death of) her husband, since the mother may give her inheritance to that son of hers whom she likes, (but) she may not give (it) to an outsider (§150).

We have already quoted the most important of the Babylonian prescriptions on divorce. They illustrate the absolute hegemony of the man in law. That is not, however, the whole picture, because in particular cases the wife could also successfully achieve a separation. We can speak of the woman's right to divorce, although it was effective only if the man could be proved to be failing in the marriage (§142). For more details on this, the reader is referred to Nörr. The woman, however, ran the risk of capital punishment if it was proved that she was not justified in wanting a separation (§143). It must be said that the exact interpretation of these two paragraphs is extraordinarily difficult and therefore controverted. The view occasionally voiced that §142 refers only to the time between the legal contraction of the marriage and the first act of intercourse cannot be correct. It concerns a process which can occur at any time in the marriage. The words in §142, "you may not have me," are a formula of separation that could be uttered by the woman.

If a woman so hated her husband that she has declared, "You may not have me (as wife any more)," her record shall be investigated at her city council, and if she was careful and was not at fault, even though her husband has been going out and disparaging her greatly, that woman, without incurring any blame at all, may take her dowry and go off to her father's house (§142).

If she was not careful, however, but was a gadabout, thus neglecting her house (and) humiliating her husband, they shall throw that woman into the water (§143).

The man's right to leave his wife was inoperative in the case of a serious illness on her part (§§148f). As well as the guarantees given to the woman by the laws of property and the possibility of a woman's limited right of separation, we have here the beginnings of an increase in rights won by women in ancient oriental legal theory and practice. It is worth remarking, however, that this tendency benefitted married women only and not women in general. There cannot either, of course, be any question of the legal equality of men and women. We have only to compare §142 and §143 to see how differently the same conduct in men and women was assessed.

When a seignior married a woman and the fever **la'bum** has then seized her, if he has made up his mind to marry another, he may marry (her), without divorcing his wife whom the fever **la'bum** seized ; she shall live in the house which he built and he shall continue to support her as long as she lives (\$148).

(**la'bum** perhaps meant malaria.)

If that woman has refused to live in her husband's house, he shall make good her dowry to her which she brought from her father's house and then she may leave (\$149).

The case of a very sick woman, decreed in \$148, had already been legally recorded in a neo-Sumerian document (cf. NGU, II, 8-10). This document gives us a deep insight into a similar case. Lallagula, the wife of a certain Urigalima, was seriously ill and therefore proposed that her husband take a second wife, provided only that he continued to provide for her (Lallagula) for as long as she lived. Urigalima agreed. This is given force of law in the document.

The approach to and legal treatment of divorce is of some importance for the valid understanding of marriage in a given culture. In the whole of the ancient east, including the OT, whenever adultery is mentioned it was adultery committed by a woman. By being unfaithful, a woman could break up her own marriage. The same conduct in a man was not seen as adultery. The man could only intrude into someone else's marriage (and be severely punished for it).

If the wife of a seignior has been caught while lying with another man, they shall bind them and throw them into the water. If the husband of the woman wishes to spare his wife, then the king in turn may spare his slave (\$129).

If a seignior bound the (betrothed) wife of a(nother) seignior, who had had no intercourse with a male and was still living in her father's house, and he has lain in her bosom and they have caught him, that seignior shall be put to death, while that woman shall go free (\$130).

If a seignior's wife was accused by her husband, but she was

not caught while lying with another man, she shall make affirmation by god and return to her (parents') house (\$131).

If the finger was pointed at **the-wife** of a seignior because of another man, but she has not been caught while lying with the other man, she shall throw herself into the river for the sake of her husband (\$132).

(Pointing the index finger was a gesture that symbolised slander.)

It transpires from \$129 that the adulteress caught in the act could expect to be condemned to death. She was drowned, that is thrown bound into water. This was the typical penalty for adultery and similar crimes in the CH (cf. §§133-55). The second part of \$129 is particularly interesting. It lays down that the deceived husband could pardon his wife. In other words, adultery was considered a private crime. The woman was regarded as a possession of the man with which he could deal as he thought fit. There was no public interest in seeing punishment administered, it was, rather, explicitly laid down that the king pardoned the adulterer in the case of similar conduct by the husband. When \$129 refers to the king's slave, it means the subject in relation to the king, not slave in the usual sense of the word.

Here it is interesting to recall the Middle Assyrian Laws, in which the private nature of adultery was emphasised even more strongly than in the CH. In MAL§§12-16, 23, the deceived husband not only decided in certain cases what punishment was to be meted out to the guilty couple, but he was legally entitled to administer the punishment himself. He could kill them both or apply penalties involving mutilation: blinding them, cutting off their noses, castrating the man. We cannot go into other differences between the CH and the MAL here. We need mention only that the location of the crime played a part in the administration of the penalty. The punishment was greater if the crime was committed in the other man's house than if it had been committed in the street or in the temple brothel. The reasons for this are understandable.

The case referred to in CH \$129 was an exceptional one. It must have been more common for the deed to have been committed in secret and only later-perhaps as a rumour-to have

come into the open. The woman could then allay the world's suspicions by an oath of purgation (§131) or by ordeal by water (§132). It is not surprising in the context of the code's marriage laws that the violation of a married woman carried the death sentence. §130 deals with the special case of a woman who was still actually a virgin but legally a married woman. Her position in law was that of a betrothed woman. Similar rules apply in the OT.

Excursus 3. Old Testament marriage law

M. BURROWS, *The Basis of Israelite Marriage*, 1938; R. GOEDEN, *Zur Stellung von Mann und Frau; Ehe und Sexualität im Hinblick auf Bibel und Alte Kirche*, Diss. Göttingen, 1969; C. KUHL, "Neue Dokumente zum Verständnis von Hosea 2, 4-15," *ZAW* 52, 1934, 102-09; D. R. MACE, *Hebrew Marriage. A Sociological Study*, 1953; U. NEMBACH, "Ehescheidung nach alttestamentlichem und jüdischem Recht," *ThZ* 26, 1970, 161-71; E. NEUFELD, *Ancient Hebrew Marriage Laws*, 1944; A. PHILLIPS, "Some Aspects of Family Law in Pre-exilic Israel," *VT* 23, 1973, 349-61; W. PLAUTZ, *Die Frau in Familie und Ehe. Ein Beitrag zum Problem ihrer Stellung im Alten Testament*, Diss. Kiel, 1959; Id., "Monogamie und Polygynie im Alten Testament," *ZAW* 75, 1963, 3-27; Id., "Die Form der Eheschliessung im Alten Testament," *ZAW* 76, 1964, 298-318; R. de VAUX, *Ancient Israel*, 24-38; H. W. WOLFF, *Anthropologie*, 243-58; R. YARON, "On Divorce in Old Testament Times," *RZDA*, 3rd series, 4, 1957, 117-28.

Compared with the innumerable prescriptions in the CH dealing with marriage in some way, the OT texts contain very little. We have to bear in mind that in the OT, marriage does not stand on its own. It is incorporated into the wider context of the sib. The Hebrew of the OT in fact has no word for the institution of marriage. If, remembering this, we wish to paint for ourselves a picture of marriage in the OT, we have to draw on the numerous direct and indirect references in narrative and other texts.

It is certain that Israelite marriage in OT times was marriage by purchase in the sense described earlier. There is admittedly no reference to the marriage contract in the legal texts, but it transpires indirectly from Exod. 22:16f that the payment of a bridal price to the bride's father was usual. This text treats

everything else as a normal marriage contract. It refers to the seduction of an unbetrothed girl who is still under the dominion of her father :

When a man seduces a virgin who is not yet betrothed, he shall pay the (usual) bride-price for her to be his wife. If her father refuses to give her to him, the seducer shall pay in silver a sum equal to the bride-price for virgins (Exod 22:16-17).

The seducer had to pay the girl's father the usual bridal price whether he was willing to give his daughter in marriage to him (v. 16) or not (v. 17). The thought behind this was that a girl who was no longer a virgin was very much more 'difficult to marry off.

It might seem strange to the modern reader that the girl herself was not consulted, but in fact she never was. On this point Israelite and Babylonian custom was identical: in Babylon the bride had no say in her own marriage. As an aid to understanding this fact, we must bear in mind the further fact that in the OT the man was consulted or took the initiative in his marriage only in rare cases: Samson did (Judg. 14). In OT times, marriage was a private contract entered into by two men: this was to safeguard the interests of the sib. But it is quite obvious that in the OT a price was payable before the marriage. Apart from the Exodus text, we must refer here to Gen. 34 :12 and 1 Sam. 18 :25. We cannot state with certainty the actual amount paid, but a comparison of Deut. 22 :29 and Exod. 22 :17 gives an indication. The fifty pieces of silver would be the bridal price. In view of the special circumstances in coming to an agreement on this price, we are probably not far wrong in supposing that it was a relatively high one. 1 Sam. 18 :25 illustrates for the OT the so-called marriage of service, which is not infrequently met in other cultures. The man paid the price for his bride by performing specific services for her father (cf. also Gen. 29:15-30; Josh 15:16f; 1 Sam. 17:25).

What about the other details of marriage property we know about from the CH? Do the dowry, the marriage gift and separation money figure in the OT? The laws of the OT mention none of these things, but there are hints elsewhere of a dowry and a marriage gift at least. We can probably regard the favour (lit.

a “blessing”) that Achsam asked of Caleb (Josh. 15 :19) and the gift of a slave-girl to Laban’s daughters (Gen. 29:24, 29) as a kind of dowry (cf. also Gen. 24:59, 61). The only indication of a present to the bride which might correspond to the Babylonian marriage gift is the story of the courtship of Rebecca in Gen. 24:53.

We may glance now at the OT laws relating to separation. Like the contracting of marriage, divorce is hardly mentioned explicitly in OT law. There are, however, numerous oblique references to it. A formula of separation is given in Hos. 2:2, for example : “She is no longer my wife nor I her husband.” The most important text in this regard is Deut. 24:1-4:

When a man has married a wife, but she does not win his favour because he finds something shameful in her, and he writes her a note of divorce, gives it to her and dismisses her; and ~~suppose~~ after leaving his house she goes off to become the wife of another man, and this next husband turns against her and writes her a note of divorce which he gives her and dismisses her, or dies after making her his wife-then in that case her first husband who dismissed her is not free to take her back to be his wife again after she has become for him unclean. This is abominable to the Lord.

This complex prescription-the conclusion does not come until v. 4-forbids re-marriage with a legally divorced woman who has in the meantime become the wife of another man. This gives some indications, incidentally as it were, of OT divorce laws. It seems that it was relatively easy for a man to get a separation. If he found “something shameful” in his wife, he could evidently obtain a separation without any great formalities. By something shameful was certainly not meant adultery, because that was punishable by death (Lev. 20 :10; Deut. 22 :22). At the time of Deuteronomy, it may have been clear what deserved to be called shameful in the meaning of this law. Later Rabbinic interpreters, however, were not at all agreed, some regarding it as a moral lapse, others accepting as grounds for divorce something externally repellent, and in the end any little thing was considered sufficient.

In his *Die jiidische Ehescheidung und der jiidische Scheide-*

brief (1911, newly printed 1970), L. Blau notes : “The Hillelites allowed a man to divorce his wife ‘even when the woman let his food burn’ ” (31). And in Jesus Ben Sirach we read : “If she will not walk according to your hand, separate her from your flesh” (25 :26), that is, If she will not do as you tell her, get rid of her. However that may be, divorce was usually up to the man. We hear nothing about protection, however small, of the woman, as in the CH. There does not seem to have been any divorce money. The only financial loss on the man’s part was that he had to write off the bride-price. The only protection for the woman was the need for a letter of separation which proved legal divorce and so enabled her to get married again. Nevertheless, this must have been a relatively late practice in Israelite law. Nowhere does the OT mention the man’s responsibility for materially providing for his divorced wife. On the other hand, OT law does not cover the case in which a man sells his wife to pay his debts, as the CH does (§117) (although it does not expressly forbid it either).

Unlike Babylonian law, Israelite law does not allow the woman to divorce her husband at all. None of the texts which mention separation records a woman’s initiative. Divorce is always the man’s work. Kuhl’s attempt to argue back from certain OT texts to an older phase of Israelite marriage law at which a woman could divorce her husband and therefore “enjoyed equal legal rights” (107) raises many problems. It could simply be that under certain conditions a woman was allowed to leave her husband’s house. At all events, the conjecture that the right accorded a slave or second wife (Exod. 21:7-11) was also granted to a man’s legal wife is not inept (cf. Plautz, Diss. 119f).

OT law knows only two cases in which a man could not divorce his wife. The first, according to Deuteronomic law, was when a man seduced his future wife while she was still an unbetrothed virgin and then married her after payment of the bride-price (Deut. 22 :28f), and the second was when he unjustly reproached his wife for entering marriage not a virgin (Deut. 22 :13-19).

We should, however, be drawing a false conclusion from these data if we assumed that in OT times divorce was normal and frequent. This was certainly not the case. No instance of divorce is recorded before the eighth century. There were not only eco-

conomic considerations which made divorce in practice, at least in earlier times, an exceptional event. This is confirmed by a later prophetic **pericope**, Mal. 2:14, 16. It was written at a period when divorce was perhaps common, at a time of uncertainty and collapse at which unrestrained use was made of the legal possibilities of divorce :

You ask why. Because Jahweh is a witness between you and the wife of your youth. You have been unfaithful to her, though she is your partner and your wife protected by contract. For Jahweh hates a man to pronounce separation and cover his cloak with outrage. And you should keep watch on your life and not act unfaithfully! (Mal 2:14, 16, translation from the German of F. Horst, HAT, 14).

Malachi is not elaborating a metaphysical understanding of marriage, although in his mind marriage affects one's relationship to God. It is noteworthy that this prophetic **pericope** almost seems to propose monogamy. Elsewhere, the OT mentions quite openly the possibility of polygamy (but not of polyandry), cf. Plautz, *ZAW*, 75. This form of marriage belonged to the sociological arrangements which ancient Israel adopted from its neighbours without finding them problematic. Marriage and love belonged in the OT to the profane area of life, although that area was not withdrawn from Jahweh's will (cf. Goeden, 10-14).

The extent to which polygamy was practised in OT times is not stated, and it is impossible to ascertain it exactly. A few conclusions are still possible, however (cf. esp. Plautz, *ZAW* 75, 15-19). We may accept a priori that highly placed individuals, especially the kings, enjoyed a particular status in this respect. There is no explicit case of a monogamous king. On the other hand, the figures related to Solomon—700 official wives and 300 concubines, 1 Kings 11:3—are certainly not representative. This piece of information, with its round figures, undoubtedly does not go back to original material. It is designed to underline Solomon's immeasurable wealth, and its historical accuracy is more than doubtful (cf. Noth, *BK*, IX/1, on 1 Kings 11:3). For the ordinary Israelite, matters were rather different. We have a large number of examples of the practice of monogamy. For

ordinary Israelites, polygamy is mentioned in the OT only in the form of bigamy. This does not, of course, exclude the possibility that polygamy was practised by the common people, but it cannot have been very usual. The rule was that a male Israelite had one wife and sometimes two. Economic considerations played an important part here, and the ratio of the sexes in a normal society would in fact have made extensive polygamy very difficult (cf. Mace, 129).

Finally, some remarks on adultery. Like ancient oriental codes in general, the OT condemns adultery in the sense described above as a capital crime, cf. Lev. 20:10; Deut. 22:22. And like ancient oriental codes in general, it also regards intercourse with a betrothed woman as adultery (Deut. 22:23f). The concept of betrothal is, however, to be distinguished here from the usual meaning of the word. If the bridal price had been paid, the woman was already a wife in law even though she might still live in her father's house and the marriage might not have been consummated. In another connexion, however, the OT view of adultery is remarkably different from other ancient eastern laws. There is no suggestion in the OT of a private judgment on adultery, such as is characteristic of other eastern codes (as we have seen). This is all the more surprising when we consider that the OT contains vestiges of the notion of private revenge in other fields, even on points where other ancient eastern codes had long since abandoned it, for example for manslaughter. It was different for adultery and other sexual crimes. One reason was that they were regarded as crimes not simply against individuals but against society as a whole. "You shall rid Israel of this wickedness" (Deut. 22:22). Safeguarding the marital relationship is particularly important for the viability of an ordered society. Adultery threatens that society. This was not, however, either the only or even the most important reason for the attitude to sexual crimes in the context of the ancient east. The basic reason was theological. Israel differentiated itself from Canaan and its orgiastic fertility cults. The religious **ideologisation** of sexuality, as we find it in Canaan, was not compatible with Jahweh's sovereignty, and this explains the particular critical attitude with which the OT approached sexuality.

It must be stressed, on the other hand, that the OT nowhere

condemns sexuality. We may note simply in this context that there is scarcely any reference to sexual asceticism (cf. Exod. 19:15b and 1 Sam. 21:5). The demand for lifelong or lengthy asceticism is unknown to the OT. If specific male groups adopted rules of abstinence, those rules never concerned sexuality (cf. for the Nazirites Judg. 13:4; 16:17; Num. 6:1-21; for the Rechabites Jer. 35:6-10).

Right of inheritance is included in the prescriptions which the CH devotes to family law.

DRIVER-MILES, I, 324-58; E. EBELING, art. "Erbe," *RLA*, II, 458-62; J. KLIMA, *Untersuchungen zum altbabylonischen Erbrecht*, 1940.

We do not intend here to deal at any great length with the many, and in part extremely complicated, prescriptions on this point. We shall therefore make a few comments only. Unfortunately, here again there is no one prescription that can be regarded as the basis of all the others. As in other cases, a lot is presumed and therefore not explicitly stated: only special cases are dealt with. The fundamental principles of the Babylonian laws concerning inheritance can be stated as follows.

1) Generally speaking, only sons could inherit. This may have been the only rule for the earlier periods. The CH still includes no information which would suggest a right of inheritance for daughters. The thinking behind this practice is that a daughter leaves her family when she gets married and becomes part of her husband's, whereas the family property is perpetuated in the son or sons. Further, the daughter was considered to have been fairly treated by being given the dowry. If she did not marry, she retained her right to be provided for by her own family.

2) The inheritance was divided equally among the eligible sons. The principle of primogeniture was therefore foreign to the CH. The paterfamilias could nevertheless observe it by granting one of his sons, although not necessarily the oldest, a pre-legacy not affected by any later division of the inheritance. According to our extant sources, the possibility of making a pre-

legacy occurs in Sumerian documents from southern Babylon, hardly at all in the north (Klima).

If a seignior, upon presenting a field, orchard, or house to his first-born, who is the favourite in his eye, wrote a sealed document for him, when the brothers divide (the inheritance) after the father has gone to (his) fate, he shall keep the present which the father gave him, but otherwise they shall share equally in the goods of the paternal estate (§165).

While Babylonian law, therefore, permitted a special grant to a particular son, it made disinheritance extraordinarily difficult. A son could not be disinherited without prior consent from a court; the court, however, could countenance such a course only if the son had committed some serious fault, and only then if he had committed it twice.

If a seignior, having made up his mind to disinherit his son, has said to the judges, "I wish to disinherit my son," the judges shall investigate his record, and if the son did not incur wrong grave (enough) to cut (him) off from sonship, the father may not cut his son off from sonship (§168).

If he has incurred wrong against his father grave (enough) to cut (him) off from sonship, they shall condone his first (offence); if he has incurred grave wrong a second time, the father may cut off his son from sonship (§169).

Hammurabi's code then deals with the inheritance rights of sons born to a man by two women. If the sons were born of normal, successive marriages, they were all equally the father's heirs (§167). If, on the other hand, they were children of a slave-woman claiming the inheritance in competition with legitimate sons, the father had to acknowledge them legally before they could inherit (§§170, 171). The dowry was a particular case. Legally, it remained the woman's property. After her death, only her own children had a claim on it.

A widow had as little claim on her deceased husband's estate as a daughter on her father's. Nevertheless, she was not totally without rights or protection. She was entitled, for example, to carry on living in her husband's house. The dowry and the

marriage gift if there was one ensured that she was provided for. If there was no marriage gift, a portion of the inheritance was set aside to support her (§172). Klima stresses that this does not allow us to deduce a widow's right to inherit her husband's property (56).

Another legal area closely connected with inheritance was adoption. In the CH, it is dealt with at the end of the long section of family law (§§185-93). These paragraphs also contain ordinances on guardians, without any direct connexion with adoption.

M. DAVID, *Die Adoption im altbabylonischen Recht*, 1927; H. DONNER, "Adoption oder Legitimation? Erwägungen zur Adoption im Alten Testament auf dem Hintergrund der altorientalischen Rechte," *OrAnt* 8, 1969, 87-119; DRIVER-MILES, I, 383-405; R. YARON, "Varia on Adoption," *JJP* 15, 1965, 171-83.

Adoption in Mesopotamia is documented from very early times, and it continued to play an extremely important part in Mesopotamian life. The relative paragraphs of the CH give only a partial picture, but this can be filled out to some extent from numerous other Babylonian sources. We shall concentrate on the specific legal significance of adoption and leave out of account other similar arrangements. Adoption meant that someone accepted as his own son or daughter, with all the legal consequences that that entailed, a person not of his own kith and kin—usually a child. This meant in particular that an adopted boy enjoyed full rights of inheritance as well as all the other rights and duties that accrued to natural children. The purpose of adoption was "to create artificial descendants for a man who had no legitimate ones so that the family should survive" (David, 1). Generally speaking, therefore, a man would adopt children only if, for whatever reason, he had none of his own. It met a need felt in many different kinds of society. Adoption is attested in remarkably similar forms in very diverse legal systems. The Roman system of *adoptio filii loco*, for example, is comparable with legal adoption in the ancient east, without our having to postulate any direct influence.

In the ordinances of the CH which deal with the adoption of foundlings, the main concern was to safeguard the natural parents' right to reclaim their child by withdrawing the adoptive parents' rights over him. Basically, adoption was a definitive step, but in certain cases it could be reversed. For example, if the adoptive father traced a foundling's natural parents, the child was legally entitled to return to his real family at any time (§186). In this case, therefore, he could sever the adoptive relationship. In other circumstances, the adoptive father retained this right—for example, when, after legal adoption, he had children of his own. But then he was obliged to pay the child he had adopted a third of the child's portion of the inheritance (§191). The adoptive relationship could not be arbitrarily severed from either side. The CH lays down heavy penalties of mutilation for an adoptive child who breaks off the relationship unilaterally and without sufficient reason (§§192, 193).

Because the prescriptions in the CH that deal with adoption are very fragmentary, it might be helpful just to clarify the procedure by referring to one of the numerous documents on adoption. We have chosen the document VAT 926, already quoted and discussed by David (43ff). The latest commentary is by Donner (94f). We are in substantial agreement with it. We quote the text in Donner's version (and following his arrangement, 116).

- I. Samash-apili has been adopted by Bunini-abi and Husutum, the **naditum** of Marduk and Bunini-abi's wife, from **Sahamatum**, **Marat-Istar** her daughter and Taribum (her) son (symbols 1-8).
- II. Even though Bunini-abi and Husutum should have ten children, Samash-apili is their eldest brother (9-12).
- III. If Samash-apili says to Bunini-abi and Husutum, "You are not my father, you are not my mother," they shall shave his head and sell him; and if Bunini-abi and Husutum say to their son Samash-apili, "You are not our son," they shall forfeit their house and household goods (13-27).
- IV. With regard to the suckling-money for [...] years, **Sahamatum**, **Marat-Istar** and Taribum her son are **satisfied** (27-36).
- V. (Witnesses, date.)

In this case, the adopted child is not a foundling. I. is the statement of adoption. The parties to the transaction are named : **Samash-āpili** is the adopted child. His mother-evidently a widow-is called **Sahamatum**. Also mentioned are her daughter **Mārat-Ištar** and her son-in-law. (?) **Taribum**. The adoptive parents are called **Bunini-abi** and **Hušutum**. II. contains the so-called statement of the right of inheritance. Even if **Bunini-abi** and **Hušutum** should have children of their own, the adopted **Samash-āpili** remains their child and will not be at a legal disadvantage in comparison with the natural children. This clause conflicts with CH §191, referred to previously. While such differences are not unusual, it could be that in this case §191 deals with the adoption of a foundling. In III, the clause safeguarding the adoptive relationship lays down the penalties for unilateral withdrawal. The sum of money mentioned in IV. for bringing up the adopted child does not appear in all adoption documents; the conclusion, relating the witnesses and date, does.

Excursus 4. The right of inheritance and adoption in the Old Testament

H. J. BOECKER, "Anmerkungen zur Adoption im Alten Testament," **ZAW** 86, 1974, 86-9; L. DELEKAT, art. "Erbe," **BHH**, I, 423-5; H. DONNER, "Adoption oder Legitimation?," **OrAnt** 8, 1969, 87-119; E. NEUFELD, **Ancient Hebrew Marriage Laws**, 1944, 259-66; M.-H. PREVOST, "Remarques sur l'Adoption dans la Bible," **RZDA** 14, 1967, 67-77; R. de VAUX, **Ancient Israel**, 51-5; Id., **Histoire Ancienne d'Israel**, 1971, 236-8 (E.T. **The Early History of Israel**, 1978).

Compared with the extensive treatment in Babylonian law, there is very little in OT law on the right of inheritance. Here again, such laws as there are deal with particular cases, but they enable us to discern the fundamental principles of OT thinking on inheritance. Briefly summarised, they are:

- (1) that only sons could inherit, normally speaking, and
- (2) that the eldest son received a double share.

Unlike the CH, therefore, the principle of primogeniture was observed. In the context of the history of law, this can perhaps

be explained by the fact that it was **encumbent** on the eldest son to provide for his mother and the unmarried female members of the family (Delekat). We may note that the presence of two or more women posed particular problems. In any case, the firstborn son had a special position in the family, as many instances in the narrative literature of the OT testify, for example Gen. 27 :19;35:23;43:33 (cf. Neufeld, 263f; de Vaux, **Ancient Israel**, 41-2).

One of the OT principles dealing with questions of inheritance treats of the case, which also occurs in Babylonian law, of a man with children by two women. Because, unlike Babylonian law, the OT is not monogamously based, a man could have two legally equal wives at the same time. He could not, however, apply the principle of primogeniture simply to suit himself. We may remark in passing that the mother's rights were safeguarded with those of the son :

When a man has two wives, one loved and the other unloved, if they both bear him sons, and the son of the unloved wife is the elder, then, when the day comes for him to divide his property among his sons, he shall not treat the son of the loved wife as his first-born in contempt of his true first-born, the son of the unloved wife. He shall recognize the rights of his first-born, the son of the unloved wife, and give him a double share of all that he possesses; for he was the firstfruits of his manhood, and the right of the first-born is his (Deut. 21:15-17).

The second OT text is Num. 27:1-11 (to which Num. 36:6-9 is complementary). The question here was whether a daughter could inherit when there was no sons. The problem was raised in connexion with a concrete case, and according to the narrative, Moses decided in favour of the daughters. The decision is explicitly accorded the status of a legal precedent, normative for Israel in the future. Because the precedent goes beyond this concrete case-childlessness is also included-it is probable that an older legal principle is here couched in terms of an event ascribed to Moses' time. This gives it a special prominence. We quote simply the legal formula :

When a man dies leaving no son, his patrimony shall pass to his daughter. If he has no daughter, he shall give it to his brothers.

If he has no brothers, he shall give it to his father's brothers. If his father had no brothers, then you shall give possession to the nearest survivor in his family, and he shall inherit (Num. 27:8b-11a).

Occasionally OT statements differ from the prescriptions of the legal principles quoted. This is hardly surprising. We may quote Job 42:13-15, where we are told that Job gave his three daughters as well as his seven sons a share in the inheritance. It must remain an open question whether this piece of information incorporates a later legal conception, as is sometimes thought.

While the right of inheritance occurs in OT law, adoption is mentioned in none of the OT prescriptions, a fact frequently remarked on with some surprise by scholars. It is even more surprising that not even the narrative parts of the OT refer to adoption in the strict sense of the term. Certain texts are constantly adduced as providing data on adoption in OT times, for example Gen. 30:1-13; 48:5, 12; 50:23, but none of these cases concerns adoption strictly speaking, as Donner has pointed out. His findings force us to ask why this practice, so richly documented for the rest of the ancient east, finds no echo in the OT. It is in the nature of things that there can be no fully satisfactory answer to such a question. This must not, however, deter us from attempting an answer.

We may start with some solutions that have already been proposed. A common one is based on the OT form of marriage: whereas the result of Babylonian marriage law, which was based on monogamy, was to encourage childlessness and so make the expedient of adoption much more attractive, OT marriage law, as is well known, allowed polygamy and so considerably reduced the likelihood of childlessness. Adoption was simply not necessary on this score (thus for example David, *OTS* 7, 1950, 1964). This explanation, however, is certainly not sufficient. For economic reasons, polygamy was anything but the rule, from the earliest times onwards. Also, it is not easy to see why polygamy and adoption should be mutually exclusive.

Another solution, based on the institution of the so-called *levirate* and proposed by Donner (112f), is ultimately insufficient too. The *levirate* was the practice whereby the marriage of

a man who died childless was continued by his brother (cf. Deut. 25:5-10). The firstborn son of this union was regarded legally as the dead man's son, even with respect to his right of inheritance. The custom of leviratical marriage was connected with the survival of the sib, cf. Deut. 25:5-6. Deuteronomic law, however, also reckoned with the possibility that a man might refuse to fulfil his leviratical duty. It is therefore basically correct that the problem of childlessness could be solved by the *levirate*, but the *levirate* seems to have been less and less resorted to. It arose only if a childless man died. There are only three texts in the entire OT in which the *levirate* plays a part: Deut. 25:5-10; Gen. 38; Ruth 4. And finally we should not forget that whenever the *levirate* is mentioned in the ancient east as a whole, which is seldom enough, it is always in addition to adoption. The custom of the *levirate* cannot fully explain the absence of adoption in the OT.

It is nearer the mark to suggest that "the Israelite family was fundamentally a blood-community," and therefore adoption was not allowed (J. Hempel, *Das Ethos des Alten Testaments*, 1964², 69, n. 16). Even this, however, is not totally satisfactory, because nothing is said about the reason for this practice. The ultimate reason for the absence of adoption in the OT must be theological. Having descendants was a sign and an expression of God's blessing in the OT mind. One could not and might not force God's hand. Adoption was clearly regarded as unlawful human manipulation designed to substitute by one's own means for God's blessing.

We cannot talk about adoption in the OT without referring to Ps. 2:7 ("You are my son ... this day I become your father") and 2 Sam. 7:14 ("I will be his father, and he shall be my son"). In recent exegesis, these two texts are widely regarded as formulas of adoption, which they are (cf. Boecker, 88f); but not of adoption in the usual sense. The texts refer to coronation in Jerusalem, at which Jahweh, the God of Israel, declares the new king to be his son and thereby installs him in office. This installation takes the form of an adoption formula which excludes the king's "natural" divine sonship and places all the emphasis on God's free decision in favour of the Davidic king. It is noteworthy that in this connexion the OT draws on con-

ceptions of a legal institution which, for the reason mentioned above, it refused for normal human adoption.

At the conclusion of its section on family law, after two transitional prescriptions, the CH deals in §§196-214 with various cases of bodily injury. By way of example some parts of the body are named for injuries to which penalties are specified. Here again the picture offered by the code is far from complete (cf. Driver-Miles, I, 406ff, who draw up a list of cases not covered by the CH). In many respects the older CE is more detailed (cf. Chapter III above). The CH names: eyes, bones, teeth and face. The purpose of the law is to protect a person's bodily integrity. In some of the prescriptions, however, the law seems designed to protect what we might call a person's honour (cf. Nörr, Diss. 5-16).

If a seignior has destroyed the eye of an **awelum**, they shall destroy his eye (§196).

If he has broken a(nother) **awelum's** bone, they shall break his bone (§197).

(In §196 and 197, the people involved are all free citizens. In the Akkadian text the word used is *awelum* in each case).

If he has destroyed the eye of a **muskenum** or broken the bone of a **muskenum**, he shall pay one mina of silver (§198).

If he has destroyed the eye of a slave or broken the bone of a slave, he shall pay one-half his value (§199).

If an **awelum** has knocked out a tooth of an **awelum** of his own rank, they shall knock out his tooth (§200).

If he has knocked out a **muskenum's** tooth, he shall pay one-third mina of silver (§201).

If an **awelum** has struck the cheek of an **awelum** who is superior to him, he shall be beaten sixty (times) with an oxtail whip in the assembly (§202).

If the son of an **awelum** has struck the cheek of a(nother) son of an **awelum** who is of the same rank as himself, he shall pay one mina of silver (§203).

If a **muskenum** has struck the cheek of a(nother) **muskenum**, he shall pay ten shekels of silver (§204).

If an **awelum's** slave has struck the cheek of a son of an **awelum**, they shall cut off his ear (§205).

The most striking point about these prescriptions is the fact that the penalties differ according to the social standing of the injured party. Injury to an **awelum** is punished differently from the same injury to a **muškēnum**. The CH applies the *lex talionis* only to injury to an **awelum** (§§196, 197, 200, but not §203), while the penalty for injury to a **muškēnum** is monetary (§§198, 201, 204). The basic thinking behind retaliation, the return of like for like, clearly requires the application of the principle only between members of the same social class, and that means only between holders of the same rights.

It is noteworthy that even bodily injury to a slave is treated in this context. This is an indication that the slave was not regarded only as a commodity, that injury to a slave was not put on a par legally with damage to property. Nevertheless injury to a slave also, and in fact essentially, had material consequences for the slave's owner. It represented a depreciation of his possessions, and consequently he was entitled to compensation (§199). The OT text Exod. 21:26-7 is occasionally compared with this paragraph (see pp. 161ff below). A straight comparison is impossible, however, because the texts are based on different premises. The OT principle presumes that the slave is injured by his master; the Babylonian that the slave is injured by another slave-owner.

In one case the difference of penalties is taken even further when a distinction is drawn between superior and equal members of the same class of **awēlim**: the case of a blow in the face. The penalty is harsher in the former than in the latter instance (§§202, 203). The modern reader suspects here, quite rightly, that a blow in the face, especially when a social superior is struck, represents almost above all else a blow to his pride. This might explain the extremely harsh penalty (sixty strokes), which far exceeds the principle of the talion. §202 is also the only case of corporal punishment in the CH. It also gives an

indication of the type of punishment: public administration is expressly ordered.

None of the prescriptions so far cited refers to the perpetrator's subjective guilt. They are all based on the legal principle that deeds are punishable—a principle of decisive importance for the CH. But in a few places the code goes beyond it. This is illustrated by the three following paragraphs which deal with injuries inflicted on one of the participants in a brawl. Even the case of death is envisaged :

If a seignior has struck a (nother) seignior in a brawl and has inflicted an injury on him, that seignior shall swear, "I did not strike him deliberately"; and he shall also pay for the physician (§206).

If he has died because of his blow, he shall swear (as before), and if it was the son of an **azoelum**, he shall pay one-half mina of silver (§207).

If it was the son of a **muskenum**, he shall pay one-third mina of silver (§208).

Although we remarked that these prescriptions seem to infringe the principle that deeds are punishable, we must also notice the discrepancies among them (cf. for what follows Nörr, ZSS 75, 1958, 22-4). The question arises of how a blow inflicted during a fight can be "unintentional" or, as some translations have it, "unperceived." It seems to contradict the very nature of a brawl, in which every blow is made with intent and consciously. Various attempts have been made to solve the difficulty, but none of them is really convincing. There is therefore much to be said for the idea that the paragraphs in question represent a legal development. At first the law envisaged only the fact of a brawl, without reference to the participants' intentions. For this situation the penalty was originally less than was usual in other circumstances. At a later level the intentions of the parties were taken into account, and this caused the discrepancy we mentioned earlier.

The section on bodily injuries is concluded by the treatment of a special crime in §§209-14: the procurement of a miscarriage

as the result of an act of violence. To make this clear it must be stated that the law here is not dealing with foeticide. Foeticide is the deliberate and conscious killing of the foetus. Neither the CH nor the OT mentions this (although MAL A §53 does). The penalties again depend on the woman's social standing. The application of the lex **talionis** in case of the woman's death in §210 is especially noteworthy. There is, however, no exact correspondence. For that the penalty would have to be inflicted on the perpetrator's pregnant wife.

If a seignior struck a (nother) seignior's daughter and has caused her to have a miscarriage, he shall pay ten shekels of silver for her foetus (§209).

("another **awelum's** daughter" is a class designation, like the "son of an **awelum**" in §207.)

If that woman has died, they shall put his daughter to death (§210).

If by a blow he has caused a **muskenum's** daughter to have a miscarriage, he shall pay five shekels of silver (§211).

If that woman has died, he shall pay one-half mina of silver (§211).

If he struck a seignior's female slave and has caused her to have a miscarriage, he shall pay two shekels of silver (§213).

If that female slave has died, he shall pay one-third mina of silver (§214).

The section that begins with §215 deals with various trades and professions. It has always attracted particular attention, not least because of its relevance to the history of culture. We may quote a few examples. The first paragraphs, §§215-23, concern the calling of physician, or more exactly surgeon. Roughly speaking, the surgeon was included among the manual workers. Driver-Miles remark on an Assyrian text in which the surgeon is actually described as a "knife-master" (II, 251, n. 1). The doctor or medicine-man, quite distinct from the surgeon, belonged to the

priesthood. The code says nothing about his profession, which is understandable in view of the peculiar nature of the **hieromedical** art of healing.

The surgeon's profession was lucrative, but not without its risks. The size of the medical honorarium, recorded in the code for some operations, depended on the eminence of the medic and the social position of the patient.' On ~~the~~ other hand, there were risks. A mistake on the part of the surgeon had serious consequences. If the patient died or was badly hurt because of an operation, the surgeon paid for it with the loss of a hand, for example, if the patient was a free citizen. The loss of hand was a symbolic punishment: the hand had carried out the ill-fated operation. It also prevented the surgeon thus penalised from performing any further operations. The rule was different if a slave died on the operating table: the surgeon had to make good the financial loss (§219).

If a surgeon performed a major operation on a seignior (*awelum*) with a bronze lancet and has saved the seignior's life, or he opened up the eye-socket of a seignior with a bronze lancet and has saved the seignior's eye, he shall receive ten shekels of silver (§215).

If it was the son of a **muskenum**, he shall receive five shekels (§216).

If it was a seignior's slave, the owner of the slave shall give two shekels of silver to the surgeon (§217).

If a surgeon performed a major operation on a seignior with a bronze lancet and has caused the seignior's death, or he opened up the eye-socket of a seignior and has destroyed the seignior's eye, they shall cut off his hand (§218).

If a surgeon performed a major operation on a **muskenum's** slave with a bronze lancet and has caused (his) death, he shall make good slave for slave (§219).

If he opened up his eye-socket with a bronze lancet and has destroyed his eye, he shall pay one-half his value in silver (§220).

If a surgeon has set a seignior's broken bone, or has healed a sprained tendon, the patient shall give five shekels of silver to the surgeon (§221).

If it was the son of a **muskenum**, he shall give three shekels of silver (§222).

If it was a seignior's slave, the owner of the slave shall give two shekels of silver to the surgeon (§223).

The OT has no parallels to these principles. It is debatable whether there was an independent profession of surgeons in ancient Israel; to my mind it is rather unlikely. Isa. **3:7** (not **NEB**) and Jer. **8:22** are relatively late texts and in any case do not prove the contrary. The OT has no instance of a personal physician to the king as in the courts of Babylon and Assyria. A comparison of CH §206 and Exod. **21:19** could be instructive, however (cf. Chapter V, Excursus 5). The situation is the same in both cases. But while the Babylonian principle requires a doctor's services to be paid for, the OT text refers in more general terms to the cost of a cure without defining more exactly what was meant. It certainly does not mention a physician (cf. on this whole subject Hempel, *Heilung as Symbol und Wirklichkeit im biblischen Schrifttum*, 1965').

After the section on the medical profession, the CH goes on to consider the veterinary surgeon, the builder, the boatman and shipwright, and, in one case, the shearer (§§224-40). Again the fees are laid down and liability for shoddy work regulated. In the paragraphs on builders, there are some striking applications of the law of the talion.

If a builder constructed a house for a seignior, but did not make his work strong, with the result that the house which he built collapsed and so has caused the death of the owner of the house, that builder shall be put to death (§229).

If it (the house) has caused the death of a son of the owner of the house (in this way), they shall put the son of that builder to death (§230).

If it has caused the death of a slave of the owner of the house, he shall give slave for slave to the owner of the house (§231).

If it has destroyed goods, he shall make good whatever it destroyed; also, because he did not make the house strong which he built and it collapsed, he shall reconstruct the house which collapsed at his own expense (§232).

If a builder constructed a house for a seignior and has not made his work secure so that a wall has become unsafe, that builder shall strengthen that wall at his own expense (§233).

The OT contains no direct parallels to these prescriptions. On the question of liability for negligence, we recall Exod. 21:33f, where the owner of a well is obliged to keep it covered. Otherwise he is liable for any damage that might arise. A passage closer in content to the CH prescriptions just quoted is Deut. 22:8, which also deals with building :

When you build a new house, put a parapet along the roof, or you will bring the guilt of bloodshed on your house if anyone should fall from it.

But what a gap separates the OT here from Babylonian law! Deuteronomy refers simply to a defilement of the house brought on by blood spilt innocently. The blood creates a situation of guilt which affects the building and its occupants.

The following section, §§241-72, looks at first sight like a particularly random collection of prescriptions on the general subject of agricultural work, principally the hire of livestock and rates of pay for services. Here again, however, Petschow has discerned a purposeful arrangement based on the temporal succession of agricultural jobs over the year which has dictated the layout of the section (166). From this group of prescriptions we shall select those for which there are certain OT parallels.

§§241-9 contain prescriptions governing particular cases in connexion with animal hire. The main animals they have in mind are beasts of burden, above all the donkey and oxen. First of all, in §§241-2, the tariffs for hiring stock are laid down. Then the code deals with the liability of the hirer:

If a seignior hired an ox or an ass and a lion has killed it in the open, (the loss) shall be its owner's (§244).

If a seignior hired an ox and has caused its death through carelessness or through beating, he shall make good ox for ox to the owner of the ox (§245).

If a seignior hired an ox and has broken its foot or has cut its neck tendon, he shall make good ox for ox to the owner of the ox (§246).

If a seignior hired an ox and has destroyed its eye, he shall give one-half its value in silver to the owner of the ox (§247).

If a seignior hired an ox and god struck it and it has died, the seignior who hired the ox shall (so) affirm by god and then he shall go free (§249).

It transpires from these prescriptions that the hirer of a beast of burden accepted the following obligations: he was responsible for the animal, he must treat it carefully. If, through his fault, the animal was killed (§245) or so badly injured that it was useless as a working animal (§246), the hirer must make full restitution to the owner: ox for ox. A less severe injury, which reduced the animal's capacity for work but did not destroy it, was subject to a correspondingly milder penalty. If there was an act of god, the hirer was held to be not liable. As an example the CH mentions (in §244) the case, which must have been quite common, of a lion savaging an animal in the open. §249 is harder to understand. What is meant by the act of god which kills an ox? Not simply lightning or sunstroke, as Müller thinks (164), but every unexplained death of a hired beast (cf. Driver-Miles, I, 437). In such a case (however we interpret it), the hirer must prove his innocence by taking an oath before the divinity. A similar thing is described in §266, quoted below. In the case envisaged by §244, it must have been necessary to produce proof in the form of the savaged animal, or at least remains. This, at all events, is the stipulation in a similar instance in OT law : Exod. 22:10-13, cf. pp. 167f below.

Next in the CH follow three prescriptions on goring oxen :

If an ox, when it was walking along the street, gored a seignior to death, that case is not subject to (actionable) claim (§250).

If a seignior's ox was a gorer and his city council made it known to him that it was a gorer, but he did not pad its horns (or) tie up his ox, and that ox gored to death the son of an **awelum**, he shall give one-half mina of silver (§251).

If it was a seignior's slave, he shall give one-third mina of silver (4252).

Compare Exod. 21:28-36 (for which see pp. 163ff below).

In the CH as in biblical law, something is said on what happened when animals entrusted to someone else were lost or injured. In §263, the text of which is slightly damaged, it is laid down that the herdsman has to repay in kind to the owner every lost animal. There are such things, however, as natural disasters, and in such a case the loss must be borne by the owner, once the herdsman has taken an oath of purgation. The corresponding laws in the OT are in Exod. 22 :10-13, for which see pp. 169ff below.

If a visitation of god has occurred in a sheepfold or a lion has made a kill, the shepherd shall prove himself innocent in the presence of god, but the owner of the sheepfold shall receive from him the animal stricken in the fold (§266).

The code then concludes abruptly with five paragraphs on slave law (§§278-82). They could be a later addition. Not everything has yet been clarified, but as with other examples, the intention of the law is discernible: the slave was the property of his master, and the law was designed to secure that position. The slave-buyer had a right to acquire a healthy slave, If it transpired within a month that the slave suffered from a specified serious illness-the Akkadian term has not yet been translated with total certainty, but it could mean epilepsy-the purchaser could call the transaction off (§278). Furthermore, the seller guaranteed that there were no other ownership claims on the slave from other quarters (§279). If a slave contested his

master's dominion over him, his master could cut off an ear as a punishment. That is the last prescription in the CH.

If a male slave has said to his master, "You are not my master," his master shall prove him to be his slave and cut off his ear (§282).

Severing an ear seems to have been a typical punishment of slaves (cf. also §205). The slave suffered considerable pain and a substantial injury, but his capacity for work was not seriously impaired.

A few summary remarks might now be helpful to bring our survey of the CH to a close (cf. also for the following Haase, "Körperliche Strafen in den altorientalischen Rechtssammlungen," *RIDA* 10, 1963, 55-75). It has ever been the subject of comment that the code contains some very harsh penalties. In twenty-five cases the death penalty is specified. Then there are punishments involving aggravated forms of death such as the stake, drowning, impaling and dragging behind oxen, so that in all there are thirty laws that demand capital punishment in one form or another. This is a very much larger figure than in the other ancient eastern codes. Numbers alone, however, do not mean a great deal, because the CH is by far the most extensive legal document from the ancient east. Nonetheless, the remark quoted above is to some extent valid. This can be shown from a comparison with previous and later codes.

It is particularly informative that often in the CE, which is only a little older, very much milder penalties are provided for than in the CH. The most probable explanation is that the greater severity of Hammurabi's penalties depends on the particular intention and situation of his legislation. The unification of his great and heterogeneous empire evidently demanded, in Hammurabi's estimation, a relatively brutal system of punishments. Then we have to remember that an increase in government necessarily entails an increase in public punishment. Much that previously belonged to the realm of private vengeance for crimes passes to the competence of the public administration of justice as the power of the state grows. This was the situation when Hammurabi founded his empire.

Another striking feature of the code is the use made of the talion. The CH applies the *lex talionis* to injuries which were avenged by monetary compensation in the CE. The precise explanation for the frequent application of the talion in the CH is debated. It is uncertain whether it is to be regarded as a step back in the history of law, as is often maintained. It is customary to describe the talion as a primitive and barbaric principle of law. Finkelstein ("Ammisaduqa's Edict and the Babylonian 'Law Codes,'" *JCS* 15, 1961, 91-104) offers another view, and Paul has followed him (*Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* 1970, 75ff). According to this view, the increased recourse to the principle of the talion in comparison with the earlier customary compensation in money signifies an amplification of the public punishment of crimes as opposed to private revenge, and inseparable from it is an intensification of equality before the law. Whereas previously the wealthy could pay their penalty with relatively little personal loss, with the use of the talion the rich man and the poor man were equally affected by the law, and to this extent -however strange it may sound at first-we can think of the increased application of the *lex talionis* as "an important advance in the history of jurisprudence" (Paul, 76). The question of the origin of the principle remains an open one. If it is correct that the *jus talionis* derived originally from western Semitic nomads, this could explain the origin of Hammurabi's dynasty, which has been connected with an immigration of western Semites (cf. on this Wagner, *Rechtssätze in gebundener Sprache und Rechtssatzreihen im israelitischen Recht*, 1972, 3-15). These are conjectures, however, which have yet to be more substantially proved.

The punishments involving so-called mirror mutilations belong to another category. The principle was that the offender was punished in the member in which his victim was injured. The CH mentions the scission of a hand, an ear, the tongue, a breast (in the case of a wet-nurse who suckles a false child and thus deceives the parents, §194) and the tearing out of an eye. Both this and the talion strike the modern reader as examples of primitive brutality. A comparison with Roman law or law in medieval Germany, however, would show that such cruelty was

not in any way unusual. Ancient eastern laws often compare favourably with Roman and medieval punishments and tortures. People have evidently drawn on vivid imaginations to think up cruel punishments at every age in human history. It must also be remembered in this context that there was hardly such a thing as imprisonment in our modern sense in the ancient east. It is unknown in the OT. Jer. 20 :2; 29 :26; 2 Chr. 16 :10 and similar texts are not relevant here. Imprisonment is mentioned in only one late text (Ezra 7 :26), but the reference here is to a practice commanded by Artaxerxes.

V

THE BOOK OF THE COVENANT

1. General introduction to the problems posed by the Book of the Covenant

W. BEYERLIN, "Die Paränese im Bundesbuch und ihre Herkunft," in *Gottes Wort und Gottes Land, Festschr. H.-W. Hertzberg*, 1965, 9-29; C. M. CARMICHAEL, "A Singular Method of Codification of Law in the *Mishpatim*," *ZAW* **84**, 1972, 19-25; W. CASPARI, "Heimat und soziale Wirkung des alttestamentlichen Bundesbuchs," *ZDMG* 83, 1929, 97-120; H. CAZELLES, *Études sur le Code de l'Alliance*, 1946; J. HALBE, *Das Privilegrecht Jahwes Ex 34,10-26*, **1975**, esp. 391-505; F. HORST, art. "Bundesbuch," *RGG*, I, 1523-5; A. JEPSEN, *Untersuchungen zum Bundesbuch*, 1927; S. M. PAUL, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law*, 1970; L. ROST, "Das Bundesbuch," *ZAW* **77**, 1965, 255-9; V. WAGNER, "Zur Systematik in dem Codex Ex 21,2-22,16," *ZAW* **81**, 1969, 176-82.

The so-called Book of the Covenant (BC) is the oldest collection of laws in the OT. We shall be treating it at some length; the later collections, Deuteronomy and the Law of Holiness (or Holiness Code), can be dealt with more briefly.

Unlike the other legal books in the OT, the BC is specifically named. Exod. 24 :7 refers to a "book of the covenant" read aloud by Moses to which the people of Israel then promised obedience. As the text stands, this book of the covenant, and "all the words of the Lord, all his laws" mentioned in v. 3, can only be the im-

mediately preceding proclamation of God's will, as set out in the so-called BC. It is questionable whether that is also the original point of reference of Exod. 24:3-8, but we need not pursue that here. There is something more important. Like all the rest of OT legal tradition, the BC is embedded in a historical tradition. OT law is not abstract or isolated from the rest of Israelite life. It is an integral part of the history of God with his people Israel as related in the OT. It was revealed at a specific historical moment. This has decisive consequences for the OT understanding of law and justice.

While law was unchangeable and eternal in the ancient east generally, we can say of OT law: "The Law is given to the people not as something eternal and immutable," but as a law which comes from a God "who is merciful and forgiving" (Rost, 258). Like practically all the rest of OT legal tradition, the BC is given in the context of Sinai; more precisely, it is inserted into the Sinai tradition between the theophany related in Exod. 19:1-20:21 and the conclusion of the covenant narrated in Exod. 24:1-11. OT law, which is consequently understood as a divinely given law, has its basis in Israel's relationship with God as constituted by God's election. This is a decisive and essential feature of OT law.

The BC was not conceived as part of the presentation of the Sinai event. There is no doubt that it already existed as an independent unit before being incorporated into the Sinai tradition in its present position. How precisely this happened is an extremely controverted question. It is not clear in particular whether the BC first belonged to one of the Pentateuchal sources which go to make up the literary complex relating to Sinai, and if so which one. The two sources are the Jahwist and the Elohist. Most scholars seem to favour the latter (thus recently Schüpphauß, *ThZ* 31, 1975, 199f), when, that is, they do not dismiss the question as unanswerable, as Noth does in *A History of Pentateuchal Traditions*, 1972.

Most scholars agree that the BC runs from Exod 20:22 to Exod. 23:33, although many regard Exod. 23:20-33 as a secondary appendix. These latter verses purport to be a divine discourse of dismissal, although from both content and style they cannot originally have been part of the BC. Exod. 23:10-19 is

also occasionally regarded as separate from the oldest form of the BC (cf. Fohrer, *Introduction*, 144). The passage contains a series of cultic prescriptions, most of them with counterparts in Exod. 34. This, however, persuades us that it should be included in the BC rather than otherwise, so that the text of the BC may be considered to be contained in Exod. 20:22-23:19.

Two connected questions, the construction and the nature of this code, have been answered by scholars in many ways. Halbe gives an extensive account of the history of research (391-413). The problem really arises from the observation that the BC contains very disparate elements. The lapidary remark of Horst is incontestable: "The BC is not an original unity from the point of view either of its style or of its matter" (1523). There are passages with a clear theological intention, others that seem to be purely juristic; legal parenthesis rubs shoulders with legal argument. Since Wellhausen, a common opinion has been that in the BC *jus* and *fas*, which were later separated, still stand together. Further discussion, finally, has led to a tripartite division of the material in the book: cultic law, *jus* and *ethos*. Although this choice of terminology might not be wholly satisfactory, the basic division does contribute to our understanding of the book, and so of OT law in general. Paul has made precisely this point: "These three realms, which in extra-biblical societies would be incorporated respectively in law collections, wisdom literature, and priestly handbooks, are here combined into one body of prescriptions" (37). Any assessment of the BC must take this peculiarity into consideration.

On the grounds of its varying matter, the question naturally arises of whether the BC was conceived from the beginning as it now stands in the OT, or whether it underwent a process of growth, and so of interpretation. A priori the latter hypothesis is more likely. It is supported by the observation that certain principles of assemblage are visible. These we shall deal with immediately.

We may start with the fact that Exod. 21:1 gives us a heading ("These are the laws you shall set before them") within the BC which distinguishes the prologue clearly from the principles proper. The prologue itself consists of two parts which are independent in both form and content. After a brief *intro-*

duction, it contains firstly a particularly ancient formulation of the commandment against making images of God (Exod. 20 :23), and then the so-called Law of the Altar (vv. 24-6). Balancing the prologue, a compilation of some cultic prescriptions concludes the book (Exod. 23 :10-19). This compilation contains an ordinance on sabbath years and days (Exod. 23 :10-12, 13), and an enumeration of three pilgrim-feasts (23 :14-19), which are here called by the oldest names handed down in the OT: the feast of unleavened bread (v. 15), the feast of harvest (v. 16a) and the feast of ingathering (v. 16b). The framing of the principles in the BC by the cultic sections we have mentioned is significant as a theological statement, however we may explain the precise origin of this arrangement. Laws designed to promote proper person to person relationships are sandwiched, in the oldest OT code, between laws intended to promote a proper relationship of man to God. We can also say that ordered observance of the law is possible, on the OT understanding of things, only if the relationship to God is right first.

The bulk of the book (Exod. 21:2—23:9), however, is not in the least homogeneous. It seems to fall into two main parts. Most commentators make the division at 22 :15 (end of first section, cf. Wagner, *ZAW*, 81). They base this on the observation that with the exception of 21:12-17, which *is* an evident interpolation, 21:2—22:15 is marked by principles formulated casuistically (cf. Excursus 5 for this term), while 22 :16—23:9 is less of a formal unity: it contains a large number of principles formulated apodictically (cf. Chapter VII), interrupted by prescriptions in other forms, mostly legal argumentation and legal parenthesis.

We begin with the first section. As with the ancient eastern codes, the reader seems to be faced with a random collection of disparate legal material. Such an impression, however, rests on a conception of systematic law in the modern sense. After Petschow had disclosed for the codes of Eshnunna and especially Hammurabi the principles on which those works were built up, Wagner, in direct dependence on Petschow, has done the same for Exod. 21:2—22:15. His conclusion is that the BC is a code “which has been put together deliberately and systematically”

(181), the “system” being that common to other ancient eastern codes. Petschow describes this system as follows:

The basic divisions of the material, and to some extent the lesser divisions too, are made, as the modern literature has acknowledged from the outset, not according to the viewpoints of modern scientific jurisprudence but according to groupings and areas of legal matter which reflect for the most part external areas of life, objects or situations, and in part sense perception (*ZA NS* 23, 1965, 170).

In the first section of the BC, there are four thematic areas, shaped according to a definite pattern. First comes slave law (Exod. 21:2-11). It occupies a special place not only because of its position in the code but also because no questions of guilt or compensation are dealt with (both occurring, however, in the following themes). Then *in* 21:18-32 follow laws relating to bodily injuries, in 21:33—22:15 laws relating to liabilities in agricultural and manual work, and finally, in 22:16-17, a small section on marriage law. As Wagner has demonstrated, the construction of subsections 1-3 is clear and logical. But then the last two verses of this first section, 22:16-17, are very surprising. A new theme emerges, with no relation to the immediately preceding material; it could, if anything, come under the previous heading of bodily injuries. If that is so, how do we explain its present position? The two verses concern the seduction of a virgin who is not yet betrothed and the legal consequences that ensue (cf. Chapter IV, Excursus 3 above). They are the only prescriptions in the BC which deal with marriage and the family, themes which occupy such a large part of the CH.

It is natural to ask why so little space should be devoted to the themes in the BC. We can only conjecture. If the historical formation of the BC outlined below is correct, the book was written at a time when the paterfamilias was still largely responsible for matters of marriage and family law. There was therefore little need to legislate in detail. Only one case was taken, potentially one of special conflict which required a firm ruling. Despite this, Exod. 22:16-17 offers only an example of possible prescriptions in this context. This is a further indication of the selectivity that *characterises* both the ancient eastern codes and the BC.

From Exod. 22:18, the reader feels transported to a different world. The casuistic style is dropped, the principles become apodictic. There are also legal parenthesis and argument. We shall have more to say on these in Chapter VII. Our present concern is merely with the structure of the pericope. It is noticeable that the additions mentioned, which Beyerlin has lumped together as parenthesis, do not occur in the first section of the BC. Beyerlin has concluded from this that "at the time when the commandments and prohibitions of Exod. 20 :22-6 and 22 :21—23:19 were put together as parenthesis," the casuistic principles had not been integrated with this tradition (20). He therefore accepts separate processes of historical growth for the two parts of the BC. Halbe agrees.

Halbe has tried to go further than Beyerlin by describing the text of the BC as it stands today as an entity precisely articulated according to definite rules of composition and consisting of six interrelated parts (413-23). His scheme is as follows:

A=Exod. 20 :22-6

B=Exod. 21:1-11

C=Exod. 21:12—22:20

D=Exod. 22 :21-23 :9

E=Exod. 23:10-12

F=Exod. 23 :13-19

By ending the first part of the BC at 22:20 instead of at 22:17, Halbe arrives at a basic division different from the one we accepted above. He interprets Exod. 22:20 as the "concluding principle of the previous structure" (418), even as the "central point" of the BC (421). This verse, the Massoretic form of which is almost unanimously rejected by the critics, is retained by Halbe, with its superfluous words and awkward style, as a principle deliberately placed here by the redactor of the BC as a conclusion in this particular context—that of the sovereignty of Jahweh: "Whoever sacrifices to any god but the Lord shall be put to death under solemn ban."

Halbe remarks in this connexion: "If we overconcentrate on polishing up the construction, we risk losing the sound which constitutes the music" (418). Halbe's division of the present

text of the BC, based on internal evidence, is impressive. It agrees with the remarks we reported earlier on the different historical provenance of the various parts. However, on grounds of form history and tradition history, as examined above, the main division must come at Exod. 22:17. This is not to say that Halbe's articulation, arrived at on the basis of a different set of questions, loses all validity.

It is possible to offer various explanations of how these differently structured parts were put together. Either we regard the parenetically formed and theologically fragmented section as a later framework of a casuistically formulated law collection, or, conversely, we see the casuistic principles as insertions into an existing structure of cultic prescriptions, commandments and prohibitions with parenetic additions. Beyerlin, and following him Halbe, take the second alternative and bring forward weighty arguments for it. We need not pursue that here. The result of the process of tradition is the BC as we have it today in the OT, with its unmistakable character due precisely to the combination of the various themes. The oldest OT code, even in its basic form and content, thus becomes a paradigm of OT law. It shows the extent of the area covered by this law, and beyond that how all law is understood by the OT as God-given.

Can we date the definitive redaction of the BC, and what was the purpose behind that original juxtaposition of legal principles? The first question is probably easier to answer than the second. But even to the first question exegetes have offered a wide variety of answers. These include pre-monarchical, even Mosaic, times as well as the early or late monarchy. It has even been suggested occasionally that we can identify the particular situation in Israel's history which prompted the formation of the BC. Menes, for example, has offered the thesis that the BC is the "programme of Jehu's revolution" and "became state law at that time" (*Die vorexilischen Gesetze Israels*, 1928, 43). Nothing in the text itself supports this view, and the hypothesis, although possible, is unlikely. Halbe too regards the existence of the state as the stimulus for the definitive conception of the BC, but unlike Menes he interprets the BC as a manifesto formulated **against** the state and its claims: "an exposition of the proven system, with validity for the practice of justice, of a society

which has as its basis and delimitation the will not of the king and the state but of **Jahweh**" (482). Halbe proposes the early monarchy as the time of the BC's origin.

On the whole, the view put forward by Jepsen in his research has greatly influenced biblical scholars: the BC dates from the period between settlement in Israel and the creation of the state. The state has no role, not even negative, but the ethos of nomadism is already forgotten. We can gain a clearer idea of this from Weber's fine description of the conditions reflected in this code. He says :

Nomadic law figures as little here as elsewhere in the laws that have come down to us. Neither wells nor camels nor date palms occur as objects of rights. Cisterns play a part in the Book of the Covenant only insofar as livestock can come to grief by falling in (Exod. 21:33). On the other hand, the law of the Book of the Covenant is not a law of semi-nomads or of people whose chief concern is the rearing of animals. Livestock are frequently mentioned as the main item of movable property, but the animals concerned are chiefly cattle, then sheep. ... The situation envisaged is evidently that of cattle-owning peasants who have to be protected from the incursions of other peasants' cattle. Damage to fields and vineyards by cattle is dealt with (22:5, **NEB** alternative version), but the owner of the cattle in question is evidently presumed to be a sedentary landowner, not a semi-nomad. The horse is not mentioned. Cattle and sheep constitute the livestock. The law deals almost exclusively with the interests of peasants living in villages and towns (**Gesammelte Aufsätze zur Religionssoziologie III, Ds antike Judentum**, 1966⁴, 66f).

That is a purely sociological description of the living conditions reflected in the BC. It is correct as far as it goes, but it needs to be filled out. The new situation in which Israel found itself when it settled in a land of its own was not simply the result of a transition from nomadism to sedentary existence that need be described only in terms of sociology. What has been called "the crisis due to the conquest" (v. Rad, **Old Testament Theology**, 1968, 15-35) had an important religious component for Israel. The new nation had to adjust to its environment and living conditions religiously as well as socially. Israel came up against Canaanism and its highly developed religion and culture

in all areas of its life, and it had to differentiate itself. The altar law of the BC is an eloquent example of this process of differentiation. The process was not wholly, however, one of rejection. Israel adopted a surprising number of institutions, ideas and customs. One of the important factors here was law. Jepsen has emphasised this point in his **Untersuchungen zum Bundesbuch** where he calls the BC "an attempt to mediate between Israel and Palestine." He says, "The author takes from Canaan as much as he possibly can in law and cult, provided only that the moral configuration of Jahweh's religion is preserved" (101).

It is practically hopeless to try to say anything definite about the person to whom we owe the BC in its final form. Jepsen is surely wrong in referring to the author in the singular (101). No one person had such authority in Israel at the time in question that he could have drawn up and promulgated a law collection like this one. Even later no individual, not even the king, could have done so either. It is one of the most remarkable peculiarities of the OT codes-remarkable, that is, in the context of ancient oriental legal texts-that none of them is ascribed to the authority of a king. In the ancient east the king's influence on legal practice was already little enough (cf. Chapter II, Excursus 2). In the OT, the king had no say whatever in legislation.

Although, then, no individual can be regarded as author and promulgator of the BC, we can say something on the circle in which the BC could have arisen. According to one thesis which is not uncontested today but which has not been positively refuted, there was in pre-monarchical Israel an office named in the BC, that of "judge of Israel," studied particularly by Noth in various publications. He has briefly summarised his conclusions in §8 of his **The History of Israel** ("The Institutions of the Confederation of the Twelve Tribes"). More recent scholarship, however, has found it difficult to say anything for certain about the position and function of this official, and his role as a pan-Israelite functionary is particularly disputed. Present research tends to ascribe to him a strictly limited field of influence (cf. the summary and bibliography of Herrmann, **A History of Israel in Old Testament Times**, 1975, 112-27). The judge's

field of activity could not be all Israel, which was a historically intangible entity in the pre-state period, but at best a particular district or tribal grouping. Given this limitation, however, the judge, later called the judge of Israel, was an individual who could have had a considerable importance in Israel's early history.

Noth has called the judge of Israel's decisive task the preservation and promulgation of the so-called divine law. But Noth's presentation is very vague as to what constitutes the divine law. Did it mean more than "the religious and moral prohibitions" which emerge more strongly in the BC from Exod. 22 :18 onwards (104) ? Or the apodictic law, which cannot be exactly defined? These are questions which cannot be answered as long as we regard the divine law as a particular form of law with particular objects. It is, however, a characteristic of OT law that the whole of life was claimed by God's will. OT law was fundamentally divine law. Given this, it was the judge's business—we may illustrate this from the Samuel tradition (1 Sam. 7:15-17)—to reinforce the jurisdiction of the local court by assisting in the verdicts; the purpose of this was to raise local verdicts to the status of law. The desire to standardise law on the basis of an understanding of law determined by belief in Jahweh could then have led to the conception of the BC.

2. The prologue of the Book of the Covenant

K. H. BERNHARDT, *Gott und Bild*, 1956; D. CONRAD, *Studien zum Altargesetz Ex 20:24-26*, Diss. Marburg 1968 ; G. v. RAD, "Aspekte alttestamentlichen Weltverständnisses," *EvTh* 24, 1964, 57-73 = *Gesammelte Studien zum Alten Testament*, 1971/3, 311-31; E. ROBERTSON, "The Altar of Earth (Exodus XX, 24-26) ," *JJS* 1, 1948/9, 12-21; W. H. SCHMIDT, *Alttestamentlicher Glaube in seiner Geschichte*, 1975, esp. 74-81; J. J. STAMM, "Zum Altargesetz im Bundesbuch," *ThZ* 1, 1945, 304-06.

We have already indicated above that the principles of the BC are interposed between two series of cultic ordinances. And we also drew attention to the basic theological significance of this arrangement. This consideration is lent additional weight by the fact that the other two great OT codes, the Deuteronomic

law and the Law of Holiness, are constructed in a similar fashion. The same may be said of lesser OT codes. For example, vv. 15 and 26 fulfil the same function in the final form of the so-called Schemite Decalogue, Deut. 27:15-26, cf. p. 193 below. The cultic framework of the Deuteronomic law is constituted by Chap. 12 on the one hand and Chap. 26 on the other; of the Law of Holiness by Lev. 17 and Lev. 26 :1-2. This cannot be mere chance; it must be a structural principle of OT codes.

The prologue of the BC, Exod. 20:22-6, must be examined more closely here by way of illustration. This section is not an original unity. Even in the text as it stands today, breaks in style and content are visible. But as the prologue to the BC, this juxtaposition of originally independent elements creates a new unity.

V. 22a is clearly a redactional introduction intended to place the BC in the context of the Sinai theophany. Moses thus appears as the transmitter of the BC: The Lord said to Moses, "Say this to the Israelites." V. 22b then lays the basis for what follows : "You know now that I have spoken to you from heaven."

The statement that Jahweh has spoken "from heaven" with Israel and not on Sinai with Moses does not wholly agree with the narrative of the Sinai event in which the BC is inserted, cf. 19 :18-20. This is another indication of the original independence of the BC. The idea that God's voice is heard from heaven recurs, in different terminology, in Deut. 4:36, but this should not lead us to conclude that Exod. 20:22, and perhaps even the BC as a whole, are dependent on Deuteronomy. We should not judge the idea too swiftly as a late transcendentalisation of God. The development of the OT understanding of God was not so rectilinear as is often suggested. There is a direct connexion in our case with the concluding prohibition of images:

You shall not make gods of silver to be worshipped as well as me, nor shall you make yourselves gods of gold (Exod. 20 :23).

The OT prohibition of images has no parallel in the history of religion. Its origin is correspondingly problematic. It is extraordinarily widely attested in the OT, not least in the various codes. We must probably accept that veneration of Jahweh

lacked images from the very beginning, but the strict **prohibition** of images must have arisen in an agricultural community and must have had an anti-Canaanite bias. This helps to explain the emphatic position of the prohibition of images at the beginning of the BC. It is as if to say: this collection of laws, which includes many formulations and conceptions taken from neighbouring peoples, does not derive from these peoples. On the contrary. This code stands under the authority of Jahweh who is incomparable in his being, as this prohibition of images demonstrates with peculiar force.

This statement, however, achieves its proper weight only when we are clear about the purpose of the OT prohibition of images. It has often been essentially misunderstood, particularly if it is regarded as the expression of a spiritual conception of God as opposed to a conception tied to material, palpable forms. Freud spoke in this connexion of a triumph of spirituality over sensuality. This undoubtedly does not do justice to the OT prohibition of images. The OT did not contrast the spiritual and the material.

We should be nearer the mark if we started from the idea that the divinity represented in, or rather by, an image can be controlled by man. Man can exploit it, it can be used and abused for mantic practices. Jahweh, however, is not at man's beck and call. In OT thought he is always the subject of action, he can never be downgraded to the level of object. There must therefore be no images of him.

Even this interpretation, however, does not get to the heart of the matter, because it starts from too facile an understanding of heathen images. Heathen theology did not postulate a straight identity of godhead and image, however much popular piety may in practice have done. "The veneration of the godhead in images is not religious infantilism" (v. Rad, 315) but is the expression of an understanding of the world which differs considerably from that of the OT. Rad expressly drew attention to this when he stressed that personified world powers were revealed in the images of deities. In Canaanite paganism, the world as a whole was basically a manifestation of the divine, and its highest expression was the divine image. The prohibition of images was directed precisely at that. Its basis was the

strict "distinction between God and the world" (Schmidt, 80). The consistent witness of the OT is that God is not immanent to the world, he stands over against it as the one who acts in history.

The second part of the prologue too, the so-called altar law or Law of the Altar, is anti-Canaanite in character. Whereas the prohibition of images expressed the radical distinction of OT belief in God from that of its neighbours, the altar law did the same with a special cultic application.

You shall make an altar of earth for me, and you shall sacrifice on it both your whole-offerings and your shared-offerings, your sheep and your cattle. Wherever I cause my name to be invoked, I will come to you and bless you. If you make an altar of stones for me, you must not build it of hewn stones, for if you use a chisel on it, you will profane it. You must not mount up to my altar by steps, in case your private parts be exposed on it (Exod. 20 :24-6).

It is already clear from the change of addressee that the altar law was originally separate from the foregoing prohibition of images. The altar law addresses an individual, the prohibition a multitude. Taken in themselves too, these three verses were not originally a unity, as Conrad's careful analysis has shown (S-20). The following discussion relies on Conrad's conclusions, which we can present only in outline.

It had already been accepted earlier that v. 24b did not belong to the primitive text of the altar law. This is established by Conrad. The statement in v. 24b ("Wherever ... bless you") has no direct connexion with v. 24a. Moreover it sounds like a polemic against the claims of Jerusalem to be the only legitimate place of cult by arguing for a multiplicity of places of cult on the basis of successive self revelations of Jahweh. Such anti-Jerusalem polemic is still unthinkable for the period of the BC's origin. Vv. 25b and 26b are also described as secondary by Conrad for reasons of form and content. The core of the altar law therefore consists of a series of three commands and prohibitions, the precise formal analysis of which need not detain us here. The series contains the following statements: 1) an altar of earth is to be erected for sacrifice (v. 24) ; 2) an altar of hewn

stone is forbidden (v. 25) ; 3) there must be no cult on a stepped altar (v. 26).

The first impression that these ordinances make on the reader is that the author's intention is to encourage a return to an ancient and simple style of worship against modern ostentation: an altar of earth against one of hewn stone. The altar law has in fact often been interpreted in this way, cf. for example Eissfeldt, *The Old Testament. An Introduction*, 1965, 218. Such a process is a constant occurrence in history, it is said; witness, for example, the Cistercian reform in the middle ages. While not wishing to deny all truth to this interpretation, we cannot admit that it focuses on the essential point.

To see this we must look somewhat more closely at the individual statements. Exegetes already disagree on the precise meaning of the first one. What is "an altar of earth"? If we take it literally, we should envisage an altar formed by a mound of earth, an extremely impractical version, one would have thought, as it would be defenceless against the vagaries of the weather. Because of this, other interpretations have been suggested. Conrad adopts the thesis that the Hebrew word for earth means rather "clay" or "mud" here, and that consequently the altar is one made of clay or mud bricks. One asks why the Hebrew word for brick, which occurs in the OT, is not used in Exod. 20:24 (thus Childs, *Exodus*, 1974, 466). It is more likely that by "earth" here is meant natural, unworked building material, in particular unhewn boulders (cf. among others Robertson).

This interpretation offers a close connexion of v. 24 with v. 25: the altars in the two verses are not two different altars but the same one. In any case, in v. 25 stones are expressly allowed provided only that they are not hewn. The understanding of this cultic ordinance depends on the last statement. Conrad has convincingly argued for the view that the verse does not refer to ashlar, which robs of its decisive point the idea that the law is forbidding ostentation. The purpose of the law here is rather to prohibit a particular treatment of the surface of the altar. This was the **chiselling** out of so-called bowl-holes, well attested archaeologically for Canaanite altars. These holes had a **particular** function in Canaanite worship. They **were** "used in the worship of the gods as well as in worship of the dead" (Conrad,

48), in the former, apparently, for blood rituals, in the latter for the offering of libations (Conrad, 46-50).

The purpose of the altar law of the BC, therefore, is not to argue for purity of cult against culture but to 'guard against foreign worship which was inimical to Jahweh in its forms and expressions. Detachment from heathen worship is a recurring theme in OT cultic prescriptions, which we can understand despite their frequently strange wording only on the background of the cultic polemic they express. Noth has described this state of affairs in the following words :

Where, however, the legal prescriptions deal with specific details, they are not orientated towards any general conception of an ideal with regard to worship and cult, or what might be regarded as therefore cultically legitimate or illegitimate; rather, they are framed against the specific manifestations of foreign cults and their consequences with which the Israelite tribes came into immediate contact-principally, therefore, the whole gamut of manifestations included in the Old Testament under the description "Canaanite" *The Laws in the Pentateuch and Other Studies*, 1966, 52, translation slightly emended).

The final prescription of the altar law, the prohibition of stepped altars, is also part of the polemic against foreign cults. V. 26 has generally been interpreted in this way by scholars over the years, although most of them have started from v. 26b and included it among the many sexual taboos. Noth, for example, in his remarks **on** this verse, suggests "that the sexual belongs to a dark sinister realm which played a prominent part in many ancient eastern cults but which, for that very reason, was not to penetrate the realm of the holy in Israel" (ATD, 5, 1959, 142). A slightly different picture emerges if, with Conrad, we regard v. 26b as an interpolation which does not interpret the prohibition's original intention with total accuracy. But even then the text retains its basic cultic anti-Canaanite significance, because the stepped altar was a characteristic phenomenon of Canaanite worship, as Conrad has proved in an extensive piece of research.

We cannot enter here into the details of Canaanite worship, in particular the use of the stepped altar, but we may remark

simply that a prominent Canaanite god seems to have been worshiped on a stepped altar, "the great heavenly God, who brought thunder, lightning and rain and therefore fertility" (Conrad, 83). The last verse of the prologue therefore fits into the general picture. The BC begins with a consistent demarcation of Israelite from Canaanite religion. At its very beginning, the code is placed squarely under the exclusive authority of Jahweh; all connexion with foreign gods is ruled out of court a priori.

Excursus 5. The style and character of casuistically formulated law

A. ALT, "The Origins of Israelite Law," *Essays on Old Testament History and Religion*, 1966, 79-132; F. C. FENSHAM, "Exodus XXI 18-19 in the Light of Hittite Law §10," *VT* 10, 1960, 333-5; R. HENTSCHKE, "Erwägungen zur israelitischen Rechtsgeschichte," *ThViat* 10, 1966, 108-33; G. LIEDKE, *Gestalt und Bezeichnung alttestamentlicher Rechtssätze*, 1971; D. PATRICK, "Casuistic Law Governing Primary Rights and Duties," *JBL* 92, 1973, 180-4; G. SCHMITT, "Ex 21,18f und das rabbinische Recht," *Festschr. K. H. Rengstorf* (Theokratia II) 1973, 7-15.

Like the overwhelming preponderance of ancient oriental prescriptions, OT law is to a large extent conditional. Alt has called this type of legal formulation **casuistic**. Since Alt, this terminology has become widely accepted. Occasional criticism has not removed it from scholarly use (cf. for example Hentschke, 109).

Alt has proposed as the decisive formal criterion of the casuistic style of formulating law the absolute supremacy of the objective "if-style." There is no "I" or "you," no address, no invitation. Wherever such stylistic elements occur within a casuistic legal formula, they are secondary. Stylistically pure casuistic law is based on a system of conditional majors and conclusions in which the legal circumstances are first described in the "definition of the facts." Then the legal consequences are spelled out. The definition of the facts and the statement of legal consequences constitute the casuistic law. In some cases, for example Exod. 21:18-19, it can be quite complicated. This text has been discussed by Alt in some detail (87f).

When men quarrel and one hits another with a stone or with a spade, and the man is not killed but takes to his bed ; if he recovers so as to walk about outside with a stick, then the one who struck him has no liability, except that he shall pay for loss of time and shall see that he is cured (Exod. 21:18-19).

The definition of facts distinguishes a primary and a secondary case. The primary is introduced by "when," the secondary by "if." This distinction is always to be borne in mind. G. Liedke, 31-4, gives an analysis of all the linguistic possibilities.

Altogether six prescriptions are set out in order to establish the facts precisely. Four refer to the primary case, two to the secondary. Only then is the legal consequence spelled out, positively and negatively, in three conclusions.

1) There is a scuffle.

2) One of the disputants strikes the other with a stone or spade (exact meaning uncertain). The intention here is to make it clear that the deed was not premeditated but perpetrated on a sudden impulse. The objects mentioned are those that might be to hand by chance, not deliberately brought along. In comparing Exod. 21:18 with CH§206, Nörr is not fully convincing when he says, "There is no trace of a consideration of the agent's intention" (*ZSS* 75, 1958, 24).

3) The blow is not fatal.

4) But there are visible results. The victim takes to his bed. Thus the primary case is set out. The secondary case follows in two further prescriptions :

5) The victim manages to rise from his sickbed after a period of time.

6) He is not back to normal straightaway but can leave the house and take part in public life.

The definition of the legal facts is not given with the desired precision until these last two prescriptions have been set out. Other conceivable cases, different from the present one in any respect, would lead to a different verdict.

The statement of legal consequences consists of a main clause, "the one who struck him has no liability" (v. 19), which excludes blood-vengeance and the talion, and two minor clauses in which compensation for the injured party is regulated. The **stri-**

er must first compensate for the victim's loss of time with a monetary gift, and secondly he has to provide for his cure.

Exod. 21:18-19 is a particularly complex example of a **casuistic** legal principle. Others are more straightforward because the cases in question are cluttered with fewer complications. The meaning and purpose of all these principles is the same. The vast majority of the casuistic principles of the OT follow this pattern. But a few constitute a group apart on the basis of their content. They do not describe a crime for which a penalty is then stipulated in the conclusion; their aim is to establish particular legal conditions. Patrick refers in this connexion to "casuistic law governing primary rights and duties." Patrick rightly mentions in the first place the slave laws of Exod. 21:2-6 and Deut. 15:12-18, to which we shall return shortly (cf. Section 3 below). The slave laws govern the legal relationships between a slave and his or her master.

The other examples offered by Patrick are not so clear. While Exod. 21:2-6 is casuistic in style, the same cannot be said, for example, of Exod. 22:25-7, which Patrick deals with in this context. To clarify this we may start with vv. 25a and 26 :

If you advance money to any poor man amongst my people, you shall not act like a money-lender (v. 25a).

If you take your neighbour's cloak in pawn, you shall return it to him by sunset (v. 26).

As required by the casuistic style, both verses begin with a conditional (introduced in Hebrew, however, with **'im** not *ki*). But the use of "you" immediately breaks the form. The conclusion does too by resorting to a prohibition (for which see Chapter VII, 2 below). Horst has referred to this style, in which two quite different forms are blended, as a "mixed style" (**RGG, I, 1525**), while Richter prefers "disguised prohibition" (**Recht und Ethos, 1966, 85**).

We return now to **pure** casuistry! How should we describe the intention of a casuistic principle, and what is its precise legal context or *Sitz im Leben*? This latter is the basic question asked by promoters of research into form history as defined by Gunkel, the doyen of OT practitioners. By "context" of a literary form

is meant the area of activity in which it first arose and in which it took on its characteristic linguistic shape. And before being written down as literature, a "literary" form was always oral.

Alt has given the following answer to the question of the context of casuistic principles, and in this all agree:

It can only have been the normal administration of justice. The description and demarcation of legal cases in the protasis lays down the guiding principles for the judicial investigation, while the statement of the legal consequences in the apodosis offers guidelines for the verdict that has now to be pronounced, when-**ever** the charges are wholly or approximately similar. In fact, even among the genuinely casuistic principles both inside and outside the BC, there is not one I know of which could not be used as it stands in a normal court of law, which could therefore not be thought formulated expressly for the court's directly practical use. The scope of the areas treated in casuistic law corresponds best to the character of the normal administration of Israelite justice (91, translation emended).

If normal justice is stated to be the context of this legal form, the question of its origin has still to be answered. The casuistic law which we read as a literary form in the OT is not the result of juristic scholarship ; it is not the product of learned juristic writing, but is rooted in the procedures of courts of law. The germ cell of casuistic principles is the formulated verdicts of actual trials. Liedke has defined this thesis, which had already been put forward (cf. Gerstenberger, **Wesen und Herkunft des "apodiktischen Rechts," 1965, 24, n. 2** and the bibliography given there), more precisely. He describes the history as follows (53-9) : the casuistic principle originally recounted a legal dispute and its settlement. That is to say, "the development of the **casuistic** principle began ... as the attempt to preserve and hand on, in written or oral form, a judicial sentence" (55f), with the aim of being able to come to a similar decision later in other similar situations. For the account of a suit to become a casuistic legal principle, it had to undergo a radical process of abstraction. Names and above all circumstances and details were excised. The only thing finally remaining was the case and its verdict raised by its conditional formulation to the level of universal validity. "These casuistic principles are therefore not, by

origin, laws deliberately composed; their authority rests on tradition and custom; they are common law" (56).

These remarks concern the development of casuistically formulated laws in general, and they do not tell us about OT casuistic law in particular. Since the discovery of ancient eastern cuneiform codes, the origin of OT law has been a recurring problem, but one that has yet to be satisfactorily solved. As could be expected, the first comments after the discovery of the CH stressed the harmony of the newly found code and biblical law. C. H. W. Johns gives a detailed survey of the older literature in his ***The Relations between the Laws of Babylonia and the Laws of the Hebrew Peoples***, 1917², 65-91. Later, scholars adopted a more restrained and nuanced viewpoint. A few remarks from the pen of Koschaker describe the altered situation:

The days when opinion concluded from the substantial agreement of legal principles in two different codes to the derivation of the later from the earlier code, without further qualification . . . are over, or, perhaps more accurately, should be over. The use of the comparative method in the history of law has taught us that we must generally reckon on independent parallel development, that this gives the likely explanation for concurrences in different codes, and that direct influences are to be accepted only where they can be actually proved or at least made probable. . . . It would in any case be a rather primitive idea to believe that people import laws like foreign goods ("Keilschriftrecht," **ZDMG 89, 1935**, 31f).

Legal principles that appear to be similar are therefore not necessarily directly dependent one on the other; rather the harmony that undoubtedly exists in many cases is the consequence of a "spontaneous similarity in the mode of thinking" (J. G. Lautner, **ZVR 47, 1933, 38**).

Today no one would claim a direct dependence of the BC on Hammurabi's code. Alt's conclusion that "despite the similarities in form and partly also in content, there are too many discrepancies" for there to be a direct appropriation in the Bible of the ancient eastern legal formulations known to us (97) is widely accepted. The following remarks, from the jurist W. Preiser, describe the present state of discussion :

A direct literary dependence on Hammurabi's "law" or on any other of the law collections from the near east which have since become known to us cannot be proved; in fact, given the enormous temporal and geographical distance, it is anything but probable. In any case, the repeated attempts to derive particular rulings of Israelite law from specific models from the legal world of the ancient near east have had no success. In saying this, we do not wish to deny that there are considerable similarities in quite a few cases-in relation both to the matter dealt with and to the way in which it is dealt with ("Vergeltung und Sühne im altisraelitischen Strafrecht," 1961=Koch, **Vergeltung**, 243f).

The answer to the question of mutual relationships or dependence has become more difficult. The reference to a legal theory and practice common to the ancient east is obvious and is basically accurate. But it remains to ask whether we cannot say something more about the origin of specifically biblical casuistic law. Alt accepts that casuistic law was adopted by the Israelites in connexion with colonisation-and that means in connexion with a change in social structure-from the Canaanites. This, according to Alt, is the best explanation for the fact that casuistic law makes such a totally profane impression that its basic tenor is more readily consistent "with polytheistic than with monotheistic thought" (98). The difficulty of this thesis lies in the fact that no original sources have so far been found for the alleged Canaanite law. That, however, is not really surprising. If reference is made here to Canaanite legal theory and practice, we should think not of the law practised in the Canaanite city-states, of which we might yet conceivably find documentary evidence, but of the law practised in the thinly populated wooded and mountainous areas in which the wandering Israelites first settled. There, however, legal tradition would have been oral for a very long time. We must refer the reader to Liedke's work (56ff) for arguments and more detailed discussion of these remarks.

3. Examples of casuistic law in the Book of the Covenant

P. HEINISCH, "Das Sklavenrecht in Israel und im Alten Orient," **StC 11, 1934/5**, 201-18, 276-90; N. P. LEMCHE, "The 'Hebrew Slave.'

Comments on the Slave Law Ex.XXI 2-11," **VT 25**, 1975, 129-44; I. MENDELSON, Slavery in *the Ancient Near East*, 1949; E. MEYER, "Die Sklaverei im Altertum," *Kleine Schriften zur Geschichtstheorie und zur wirtschaftlichen und politischen Geschichte des Altertums*, 1900, 169-212; J. P. M. van der PLOEG, "Slavery in the Old Testament," **VT**Suppl 22, 1972, 72-87; S. SCHULZ, *Gott ist kein Sklavhalter*, 1972; R. de VAUX, *Ancient Israel*, 80-90; H. W. WOLFF, *Anthropologie*, 289-97.

The casuistically formulated principles of the BC begin with laws on slavery. This is surprising, and there is no parallel in other ancient eastern codes. A convincing reason for this fact has not yet been proposed. But we might mention the attempt of S. M. Paul who interprets the slave law as an introductory section of the BC, structurally comparable with the introduction to the decalogue (Exod. 20 :2). Paul emphasises that both texts deal with the emancipation of slaves (*Studies in the Book of the Covenant*, 1970, 106f). On the other hand, it has occasionally been suggested that Exod. 21:2-11 is a later addition to the original BC (J. van der Ploeg, **CBQ** 13, 1951, 28f). This, however, seems unlikely (cf. also N. P. Lemche, **VT 25**, 1975, 129-44). It has often been remarked that the slave law is different in tone from the other casuistic principles of the BC, which specify a crime in the definition of the facts and a penalty in the statement of legal consequences (cf. H. Cazelles, *Études sur le Code de l'Alliance*, 1946, 117; G. Liedke, *Gestalt und Beseichnung alttestamentlicher Rechtssätze*, 1971, 51f). This, however, is not sufficient grounds to regard the slave law as a later component of the BC or to postulate another lost introduction to the BC (as Horst does, **GR**, 94, n. 208).

Slavery was known in the ancient east from earliest times and was universally practised. The ancient eastern economic and social order is unthinkable without it. Israel shared this universal social order. Nevertheless, the OT contains some noticeable peculiarities and some "progressive" tendencies. It is also important-and this must at least be mentioned here-that slavery, as practised in Israel and the rest of the ancient east, was quite different from the form known to Greek and Roman antiquity. There, slaves were treated with a brutality and an inhumanity foreign to the ancient east as a whole. Varro once said, in a

frequently quoted phrase, that the slave was an *instrumenti genus vocale* (a kind of instrument that can talk). The treatment of slaves reflected this attitude.

The majority of slaves were recruited from the ranks of prisoners-of-war. Others were born slaves. And others, finally, chose to become slaves when their financial situation left them no alternative. The slave law in the BC concerns this latter group.

When you buy a Hebrew slave, he shall be your slave for six years, but in the seventh year he shall go free and pay nothing.

If he comes to you alone, he shall go away alone ; but if he is married, his wife shall go away with him.

If his master gives him a wife, and she bears him sons or daughters, the woman and her children shall belong to her master, and the man shall go away alone.

But if the slave should say, "I love my master, my wife and my children; I will not go free," then his master shall bring him to God: he shall bring him to the door or the door-post, and his master shall pierce his ear with an awl, and the man shall be his slave for life (Exod. 21:2-6).

With the exception of the stylistically extraneous "you" in v. 2, interpolated here from 20:24ff, this is pure casuistic law. The primary case, introduced by "when," comes in v. 2, followed in vv. 3-5 by several secondary cases introduced by "if." The meaning of "Hebrew" is important for an understanding of v. 2.

A. ALT, "The Origins of Israelite Law," *Essays on Old Testament History and Religion*, 1966, 79-132, esp. 93-6; J. BOTTÉRO, art. "Habiru," **RLA** IV/1, 1972, 14-27; K. KOCH, "Die Hebräer vom Auszug aus Ägypten bis zum Grossreich Davids," **VT** 19, 1969, 37-81; M. WEIPPERT, *Die Landnahme der israelitischen Stämme in der neueren wissenschaftlichen Diskussion*, 1967, esp.66-102.

What is meant by a "Hebrew" slave? At a later period, the term denoted belonging to the people. This is what we usually mean by Hebrew or Hebraic. It is a synonym for Israelite. But this usage was not yet current at the time of the BC.

Ever since the term **habiru** first appeared in ancient eastern texts (in the **Amarna Letters**), there has been an extensive scientific discussion on its precise meaning, which must naturally remain outside the scope of the present work. One may start by accepting a connexion between **habiru** and *ibrīm*. How is the group of people thus designated to be defined? The thesis according to which neither term was originally a description of nationality is very important, even though the contrary is still sometimes maintained in recent publications, for example in the essay by Koch. The term is a **sociological** one. The **habiru** were an identifiable section of the population from economic, social and legal points of view. "In legal language," comments Alt, " (the term) occurs only as the designation of a man who sells himself to pay his debts ... it originally referred to the legal and social position in which a man normally placed himself by selling himself into slavery" (94-5). M. Weippert has proposed the English concept "outlaw" as the best translation for **habiru**, which he defines as follows: "a person who, for whatever reason, stands outside the acknowledged social order and therefore lacks the protection which the law accords to all the other members of society" (69).

When Exod. 21:2 refers to a "Hebrew" slave, therefore, it is not discussing a special privilege of Israelite slaves. The ruling expressed in the primary case benefits every slave by debt in Israel. He is to be emancipated in the seventh year, without having to pay anything for it. The six-year period of work is seen as sufficient economic substitute for the slave's debts. On the one hand, therefore, this legal prescription is concerned with a just arrangement between the two parties, while on the other it is clear that the legal good promoted by it is first and foremost the freedom of a man who has given himself into slavery.

There is a comparable prescription in the CH. It differs in that it deals with the sale or pledge of family members. The code demands the emancipation of the slave in the fourth year. The Babylonian ruling is milder here than the OT.

If an obligation came due against a seignior and he sold (the services of) his wife, his son, or his daughter, or he had been bound over to service, they shall work (in) the house of their

purchaser or obligee for three years, with their freedom reestablished in the fourth year (\$117).

Several secondary cases follow the primary in the OT prescription, but these have no counterparts in the CH. In fact, because of different circumstances, they would not be possible. The effective principle that they embody can be expressed as follows: everything that a slave brought with him into slavery he could take back with him when he was freed; everything he had acquired during his years of slavery remained the property of his owner. Because the slave by debt possessed no property, the ordinance refers to family means.

At first sight it is strange that a woman married by the slave during his period of slavery should remain in his owner's house even when he himself was set free. The reason was that a slave in the full sense of the word could not contract a marriage. The slave's owner, however, could simply establish a relationship resembling marriage between two of his subjects. Roman law referred to this arrangement as a **contubernium**, the only form of marriage permitted to slaves. Even then, the man and the woman had to be slaves of the same master. The legal principle in Exodus also extended to the children. Slave law on this point was stronger than normal marriage law, according to which the children belonged primarily to the father.

We may say a word on the final secondary case dealt with in vv. 5-6. There could be reasons for a slave by debt to refuse the emancipation due to him. This was a very important decision, because it bound him for the rest of his life. Such a definitive bond of slave to master and master's house was sealed by a symbolic legal act (cf. Z. W. Falk, **VT 9, 1959, 86-S**). We already encounter in the CH the ear as the characteristic symbolic organ for a slave (cf. p. 131 above). Noth comments on Exod. 21:5-6: "The pierced ear is the sign of a slave, perhaps because the ear was regarded as the organ of obedience (*ob-audire*) and the piercing as the removal of the integrity, and therefore original freedom, of the person's hearing" (ATD, 5, 1959, 144).

A section on female slaves follows that on male slaves. This differentiation is necessary because female slaves were not dealt with in the same way.

When a man sells his daughter into slavery, she shall not go free as a male slave may. If her master has not had intercourse with her, and she does not please him, he shall let her be ransomed. He has treated her unfairly and therefore has no right to sell her to strangers. If he assigns her to his son, he shall allow her the rights of a daughter. If he takes another woman, he shall not deprive the first of meat, clothes, and conjugal rights. If he does not provide her with these three things, she shall go free without any payment (Exod. 21:7-11).

We should not conclude from this that the female slave was worse off than her male counterpart. Although she was denied the emancipation after six years granted to slaves by debt-this is the meaning of the primary case-this was not simply an instance of the disadvantages suffered by women in the ancient world. The legal position of the female slave was different, and the legal principles had therefore to be different. The emancipation of a female slave was not provided for because she was usually bought as a concubine for her owner, his son or another slave, and she was sold by her father with this in mind. This is shown also by the protective prescriptions spelt out in the secondary cases, which protect all the female slave's interests against her owner. She was not to be treated like an object and sold again at will. The express prohibition to sell her to an alien was based on the fact that the regulations protecting the Israelite woman would no longer be observed.

The two final prescriptions in vv. 10 and 11 deserve a special comment. They establish that the basic needs of a female slave should not be neglected, even when her master took another concubine. Three things are specified: meat-the source of feasting and joy-clothes, and finally sexual intercourse. This last item especially merits our attention. On the whole, the OT thinks primarily of the man in sexual matters. That is not the case here. The sexual satisfaction of the female slave is singled out as one of her basic rights. If she was denied it, she could go free without any payment.

The BC refers to slaves in other contexts, namely bodily injury and especially injury to slaves.

When a man strikes his slave or his slave-girl with a stick and the slave dies on the spot, he must be punished. But he shall not

be punished if the slave survives for one day or two, because he is worth money to his master (Exod. 21:20-1).

When a man strikes his slave or slave-girl in the eye and destroys it, he shall let the slave go free in compensation for the eye. When he knocks out the tooth of a slave or a slave-girl, he shall let the slave go free in compensation for the tooth (Exod. 21:26-7).

These prescriptions raise a series of questions, not all of which can be answered with total certainty. In the context of the preceding verses, the reason given at the end of v. 21 ("because he is worth money to his master") is especially puzzling. If this is taken literally, the remaining prescriptions are not only superfluous but unintelligible.

If the slave was regarded as no more than a possession without personal rights, as the end of v. 21 regards him, his owner could do with him what he liked. This is never stated in the CH, although the slave in that code is treated much more like a possession than in OT law, cf. p. 123 and pp. 130ff above. A. Jepsen has therefore suggested that the reason given at the end of v. 21 is a later addition (32f). We may also imagine how such an addition, which accords very badly with the casuistic style, could come about. The cases in vv. 20 and 21 are not distinguished from each other with the desired clarity achieved elsewhere by casuistic law. Why is the act described judged so differently depending on whether the slave dies immediately or survives the maltreatment for a few days? This question, which cannot now be satisfactorily answered, may have led to the addition of the reasoning in the second case. The question of why the two cases should be treated differently of course remains. Exegetes usually argue that in the second case, the offender is exempted from punishment because the direct connexion between maltreatment and death cannot be established beyond doubt.

It is more likely, however, that the underlying distinction is between deliberate and accidental murder (Noth, ATD, 146). The statement of legal consequences, 'he must be punished' or 'he shall not be punished,' is often interpreted as a reference

to blood-vengeance, either demanded or forbidden (thus for example Cazelles, 54; Horst, **GR**, 274f; Noth, ATD, 146). But then the question immediately arises of who is to avenge the death of a slave. His family? Or the legal assembly acting for the family (thus Noth, cf. also the remarks of Liedke, 48f in modification of this thesis)? Because of the various difficulties, countless solutions have been proposed in the course of time, including the suggestion that the text of Exod. 21:20 and 21 originally carried another word somehow expressing the fact of a punishment (J. M. P. van der Ploeg, 80). The problem of the precise description of the demanded or forbidden punishment need not be pursued here; the important thing is that a penalty is provided for. If we accept the most probable solution, that ordinary blood-revenge is referred to, we are faced with the astonishing fact that in this case the life of a slave is placed on a par with that of a free Israelite.

This casuistic law too has a counterpart in the CH. We refer to §116, although this concerns neither exclusively nor even primarily gross ill-usage, but rather the possibility that a slave by debt might die during his period of service as a result of ill-treatment. The definition of legal consequences-and this is an aggravating distinction vis-à-vis the OT-differentiates according to the victim's social standing. If he was the son of a free man, the law required the application of the talion and therefore the death of the slave-owner's son; if he was a slave by birth, monetary compensation was enough.

There is no prescription in the CH comparable with Exod. 21:26-7. In fact no other ancient eastern code discusses an injury to his own slave by the slave's master. They all regard the slave essentially as a possession, damage to which reduces its value for the slave-owner. As far as the OT prescriptions are concerned, the question of whether the slave is supposed to be one by debt, as in Exod. 21:2-11, or whether all categories of slave are included is an open one. Because there is no express mention of slaves by debt, the normal conclusion would be that, as in Exod. 21:20-1, slaves in general are meant. This would give us a legal prescription of enormous consequence in the context of the ancient east. There is practically no trace here of the idea

that the slave is the property of his owner. He has rights of his own, particularly the right to bodily integrity.

As part of the section on bodily injury, the BC deals with death inflicted by a goring ox. This item has long captured the particular interest of the interpreters.

R. HAASE, "Die Behandlung von Tierschlden in den Keilschrift-rechten," *RIDA*, 3rd series, 14, 1967, 11-65; B. S. JACKSON, "The Goring Ox"=*Essays in Jewish and Comparative Legal History*, 1975, 108-52; A. van SELMS, "The Goring Ox in Babylonian and Biblical Law," *ArOr* 18/4, 1950, 321-30; R. YARON, "The Goring Ox in Near Eastern Laws," in H. H. COHN, *Jewish Law in Ancient and Modern Israel. Selected Essays, 1971, 50-60*.

This particular case is dealt with in a similar way not only by the CH (§§250-2) but also by the CE (§§54-5). It has therefore often been used to demonstrate either the close relationship or even direct dependence of the BC on Hammurabi's code; it has also been used, in the completely opposite direction, to demonstrate their independence because of the significant differences. Since its discovery, Eshnunna's code must also be included in the comparison. CE §§56-7 deal with a case not mentioned by the OT or the CH: fatal injury from a savage dog. The punishment is similar to that demanded for injury from a goring ox. This subsidiary case is missing in the OT and the CH because judgement in this and similar cases was to be based on the principles enunciated here. The text of the BC reads :

When an ox gores a man or a woman to death, the ox shall be stoned, and its flesh may not be eaten; the owner of the ox shall be free from liability. If, however, the ox has for some time past been a vicious animal, and the owner has been duly warned but has not kept it under control, and the ox kills a man or a woman, then the ox shall be stoned, and the owner shall be put to death as well. If, however, the penalty is commuted for a money payment, he shall pay in redemption of his life whatever is imposed upon him. If the ox gores a son or a daughter, the same rule shall apply. If the ox gores a slave or a slave-girl, its owner shall

pay thirty shekels of silver to their master, and the ox shall be stoned (Exod. 21:28-32).

To this we append a quotation from the corresponding prescriptions of the CE; for the CH, we refer the reader to p. 130 above.

If an ox is known to gore habitually and the authorities (lit. "gate") have brought the fact to the knowledge of its owner, but he does not guard(?) his ox, it gores an **awelum** and causes (his) death, then the owner of the ox shall pay two-thirds of a mina of silver (CE§54).

If it gores a slave and causes (his) death, he shall pay 15 shekels of silver (§55).

There is controversy among Assyriologists over what steps the ox's owner had to take to counteract the dangerousness of his animal according to the terms of §54. Haase (18f) agrees with v. Soden, who translates the salient word as "bow" or "bend" and comments: "When the beast was being taken through the streets, its head had to be held down with a rope so that it could not gore anyone" (*ArOr* 17, 1949, 373).

There can be no question that remarkable agreements exist between the Babylonian and the OT texts. Eshnunna's Law, the Codex Hammurabi and the Book of the Covenant agree on legally weighing the fact of whether the dangerousness of the animal was known to its owner or not. On this point, the three codes abandon the principle that deeds were necessarily punishable. Negligence—this modern legal concept is perfectly appropriate here—becomes actionable when the owner of an animal does nothing to repress his beast although he knows it to be dangerous. The three laws agree further that compensation must be paid to a slave-owner for the death of his slave. That is all, however. The other details are all treated differently.

The most prominent feature of the OT prescription is the triple occurrence of the stoning of the animal—a feature lacking in the other two codes. Haase remarks, however, that one may not draw any widely applicable conclusion from the absence of a particular ordinance from an ancient eastern code. He accepts

the possibility that the CH tacitly presumes that the animal must be sold, while at an earlier period it could have been usual, as in the BC, for the animal to be killed (39-42). This is a conjecture about the likelihood of which dispute is legitimate. Jackson comments pertinently on this difference between the Babylonian and OT law: "The fact that in practice the Babylonian owner would probably kill the beast eventually does little to remove this difference" (109).

In the OT, however, the ox who kills a man or a woman—the CH mentions only men—must be killed, not only and not primarily because it has shown itself a dangerous animal. Manslaughter brings a curse on the perpetrator. The beast is included in this curse, and hence its flesh cannot be eaten. The question of subjective responsibility is not posed, and indeed, as far as an animal is concerned, cannot be. It is superficial to dismiss this concept as primitive compared with Babylonian practice, as is often done. The text does express concepts about the external guilt-manifestations of deeds of blood, but such concepts are no longer unalloyed (cf. Horst, **GR**, 271; Jackson, 108-21, offers a completely different idea). The reality of guilt incurred by the animal does not automatically involve its owner. He is not to be punished if he has not been negligent.

The second essential difference between the OT and Babylonian law lies in the punishment of the negligent ox-owner. Whereas the latter imposes a relatively mild fine, the OT demands the death sentence for one who, by his conduct, at least did not prevent the death of another person. The prescription in v. 30, which allows the penalty to be commuted into a monetary payment, basically agrees with this. It is not stated who grants this and establishes the amount to be paid: perhaps the dead man's family or the legal assembly.

The case of an animal which gores another animal to death is dealt with in the OT and in the CE, but not in the CH.

When **one** man's ox butts another's and kills it, they shall sell the live ox, share the price and also share the dead beast. But if it is known that the ox has for some time past been vicious and the owner has not kept it under control, he shall make good the loss, ox for ox, but the dead beast is his (Exod. 21:35-6).

The legal principle is clear. Damage caused by negligence has to be compensated for by the one responsible. The statement of legal consequences is excessive. It is possible that it betrays a development in the practice of repayment. At an earlier period, compensation was in kind; later on, it could also be made in money.

Exod. 22:1 begins a new section in the BC. Up to v. 15 of this chapter, the subject-matter is property crimes of various kinds. The first prescriptions concern the theft of livestock.

A. ALT, "Das Verbot des Diebstahls im Dekalog," *Kleine Schriften*, I, 1953, **333-40**; F. HORST, "Der Diebstahl im Alten Testament," 1935=*GR*, 167-75; B. S. JACKSON, *Theft in Early Jewish Law*, 1972.

When a man steals an ox or a sheep and slaughters or sells it, he shall repay five beasts for the ox and four sheep for the sheep. But if the animal is found alive in his possession, be it ox, ass or sheep, he shall repay two (Exod. 22 :1, 4).

We have already indicated (pp. 84f) that in comparison with the CH, the OT laws put much less emphasis on crimes of theft. Even more striking, however, is the difference in punishment between the BC and the code from ancient Babylon. Originally theft carried the death penalty in Babylonian law. Gradually this was relaxed, although the penalties inflicted were still horribly exaggerated, cf. pp. 82f above. The question then arises of whether there was a similar development in Israel. Horst has shown that there was none. The OT demands death for theft only where God's property is taken. This legal principle also embraces kidnapping (Exod. 21:16; Deut. 24:7). Alt, moreover, has shown that the prohibition of theft in the decalogue (Exod. 20:15; Deut. 5:19) really means kidnapping. While that was punishable by death, ordinary theft generally required compensation in kind or money.

Compensation was therefore at a much lower level than in the ancient eastern laws, and we may justly speak of a characteristic leniency in the OT view of theft (J. Hempel, *Das Ethos*

des Alten Testaments, 1964², 126). To explain this fact, Hempel thinks that theft was regarded as the "typical crime of the hungry poor" (126), that here again, therefore, OT law betrays its social bias. This observation is certainly justified, particularly if taken in conjunction with Deut. 23 :25f (which exacts no penalty for theft in the interests of satisfying immediate bodily hunger), but it does not give the whole picture. The OT view of theft cannot be understood in isolation from the OT view of property. Unlike the CH, for example, the OT laws are still strongly marked by the nomadic view of property, which is characterised by being centered on the group rather than on the individual and so pays less attention to the property of the individual.

As a rule, the penalty for theft laid down in the OT consists of repayment twofold (eg Exod. 22 :4, 7, 9), that is, the thief had to restore the stolen item and also include something else of similar value. Higher penalties were laid down for the theft of livestock, but only when certain conditions were fulfilled. The stolen animal must have been already slaughtered or sold (Exod. 22 :1). This prescription has been the subject of untold explanations, but it is really not all that complicated. The simplest explanation for the increased rate of restitution is that livestock was the essence of the ordinary man's worldly possessions (Horst, 170, cf. p. 83 above). The quick slaughter or sale of the stolen beast, however, indicated deliberate theft and was therefore punished more severely (Noth ATD 5, 148).

Naturally it could happen that the thief was unable to make even the comparatively small restitution demanded by the law. He was not, as in Babylonian law, put to death, but sold into slavery : "He shall pay in full; if he has no means, he shall be sold to pay for the theft" (Exod. 22 :3b).

A few of the BC's prescriptions—the so-called bond laws—deal with entrusted goods. Similar prescriptions were written into both the CH (see pp. 98f. above) and the CE.

When one man gives another silver or chattels for safe keeping, and they are stolen from that man's house, the thief, if he is found, shall restore twofold. But if the thief is not found, the owner of the house shall appear before God, to make a **declara-**

tion that he has not touched his neighbour's property (Exod. 22:7-8).

According to this passage, the keeper was responsible for goods entrusted to him, but only to a certain extent. If he was the victim of a theft, he did not need to make restitution to the owner. Casuistic law then distinguished two subsidiary cases. If the thief was caught, he had to make the customary twofold restitution. If, however, he was never found, the keeper could, by taking an oath of purgation, free himself from the suspicion that he had touched his neighbour's property. The corresponding law in the CH is decidedly less favourable to the keeper and more favourable to the owner, because the former had always to make restitution, whatever the circumstances. This again demonstrates that the CH afforded much stronger protection to property than OT law. There are corresponding prescriptions in the CE too :

If a man gives property of his as a deposit to an out-of-town guest (cf. v.Soden, *ArOr* **17**, 1949, 371f for this translation) and if the property he gives disappears without the house being burglarised, the doorpost broken down or the window broken, he (the depositary) will replace his (the depositor's) property entrusted to him (CE§36).

If the man's (the depositary's) house either collapses or is burglarised and together with the (property of the) deposit(or) loss on the part of the owner of the house is incurred, the owner of the house shall swear him an oath in the temple of Tishpak saying) : "Together with your property my property was lost; I have not plotted or deceived." If he swears him (such an oath), he shall have no claim against him (§37).

Here again, we can see how close ancient oriental laws could be, even though there is no actual case of literal agreement. Like the BC, the CE provides for recourse to the godhead as a legal instance. By taking an oath, which he had to do in the temple, the keeper could clear himself of the suspicion of fraud. If he did so, the owner had no further legal claim of any kind on the missing goods. It is interesting that on this point there is a

greater measure of agreement with OT law than with the CH. Of the three codes, Goetze thinks that the OT prescriptions in this matter are the most primitive, but not all agree (e.g. Yaron, ***The Laws of Eshnunna., 1969, 167.***)

Bond law returns in the BC in another prescription :

When a man gives an ass, an ox, a sheep or any beast into his neighbour's keeping, and it dies or is injured or is carried off, there being no witness, the neighbour shall swear by the Lord that he has not touched the man's property. The owner shall accept this, and no restitution shall be made. If it has been stolen from him, he shall make restitution to the owner. If it has been mauled by a wild beast, he shall bring it in as evidence; he shall not make restitution for what has been mauled (Exod. 22 :10-13).

This prescription is basically parallel, as far as its main case (vv. 10-11) is concerned, with the deposit law contained in vv. 7-8. The only difference. is that the deposited goods are living animals, with a very much greater chance, all things being equal, of loss and injury. For this reason, and also because livestock were still an essential factor of economic life for the Israelites even though they were no longer nomadic, the safekeeping of animals was given special treatment. The keeper was answerable for animals entrusted to his care. He was not liable in cases of acts of god, which could be proved if necessary by an oath. The only question is what was meant by acts of god.

While the keeper of inanimate-objects was not liable in cases of theft, things were different-for the keeper of animals. Unlike things, livestock had to be watched and protected from escaping and from theft. If an entrusted animal was stolen, its keeper had been negligent and had therefore to make restitution (v. 12). A different case was when wild animals mauled the entrusted beast. If the keeper could produce the mauled corpse as evidence, he was released from his obligations (v. 13). We can gather from Amos 3:12 that it was enough if the herdsman could produce minimal remains of a mauled beast. This must in fact have been the usual thing. This interpretation presumes that the words "or is carried off" in v. 10 do not refer to normal theft, which is dealt with in v. 12. They refer to rustling. Unlike normal theft, rustling came under the category of acts of god.

There are equivalent prescriptions in CH §§263-7, for which see p. 130 above.

Between the two casuistic principles which deal with particular cases in bond law, there is a sentence which from its style alone is evidently not an original part of the text of the BC: Exod. 22:9. This is a generalised legal observation covering the whole area of property crimes. V. 9 therefore goes beyond the context of bond law (cf. the thorough investigation of R. Knierim, *Die Hauptbegriffe für Sünde im Alten Testament*, 1965, 143-84).

In every case of law-breaking involving an ox, an ass, or a sheep, a cloak, or any lost property which may be claimed, each party shall bring his case before God; he whom God declares to be in the wrong shall restore twofold to his neighbour (Exod. 22 :9).

This prescription takes us into the realm of the legal disputes carried on in the local courts of Israel. Something is lost, and its owner accuses someone else of having appropriated it. The owner can produce no proof, and there were no witnesses. The owner therefore proposes a verdict before the local court: "This man is guilty." The accused contests this. It is one man's word against another. Because means of proof are lacking, the only alternative is to call on the godhead who will pass sentence by ordeal. It is not absolutely clear from the text whether the god's sentence could be passed on the plaintiff if his accusation should turn out to be false. Knierim has proposed sound arguments for the view that in a case such as that presupposed by Exod. 22:9 the god's sentence could not be so passed, that therefore the question of guilty or not guilty was posed only with regard to the accused (154f).

There follow in the BC some prescriptions which deal with various aspects of hiring out animals.

When a man borrows (a beast) from his neighbour and it is injured or dies while its owner is not with it, the borrower shall make full restitution; but if the owner is with it, the borrower shall not make restitution. If he is a hired worker, the restitution shall be deducted from his wages (Exod. 22:13-14, ^{NEB} emended).

These principles must have been intended to deal mainly with working animals (asses and oxen). The risk of an injury to a hired animal was borne by the borrower. The owner was, for obvious reasons, better protected than in vv. 10-13 (the safe-keeping of animals). Only if the owner witnessed a mishap did the hirer avoid the need to make restitution. It was presumed that the owner could have intervened to save his animal. V. 15b adds, as a secondary case to the main case exposed in v. 14, a special prescription concerning a paid worker who hired a beast from his employer to perform his assigned work. If the animal came to harm, the worker was fully responsible. The compensation was deducted from his wages. The hiring out of animals is dealt with in the CH in §§241-9, see pp. 128f above.

Excursus 6. The talion formula in the Old Testament

A. ALT, "Zur Talionsformel," 1934=*Kleine Schriften, I*, 1953, 341-4; D. DAUBE, *Studies in Biblical Law*, 1947, esp.102-53; A. S. DIAMOND, "An Eye for an Eye," *Iraq* 19, 1957, 151-5; B. S. JACKSON, "The Problem of Exod XXI 22-5 (*ius talionis*)," *VT* 23, 1973, 273-304=*Essays in Jewish and Comparative Legal History*, 1975, 75-107; V. WAGNER, *Rechtssätze in gebundener Sprache und Rechtssatzreihen im israelitischen Recht*, 1972, esp. 3-15; J. WEISMANN, "Talion und öffentliche Strafe im Mosaischen Rechte," 1913=KOCH, *Vergeltung*, 325-406.

According to a widespread opinion, the principle of the talion, that is, "the principle of strictly comparable compensation for damage" (Alt, 341), is the essence of OT law. Or even worse, the principle embodied in the much quoted "eye for an eye, tooth for a tooth" is seen as the decisive principle not only of OT law but of OT religion, understood consequently as one of retribution. The following considerations on the talion formula in the OT are intended to show how wide of the mark such conclusions are.

First, it must be pointed out that the talion is not at all specific to the OT. Here we need mention only the CH. In that work, the talion has normative significance far beyond the relatively narrow area of bodily injury.

Even though the talion is not specific to the OT, runs the argument, it could still be a basic principle of OT law. But this will not do, either. Throughout the extensive OT legal writings, the so-called talion formula occurs in only three places, the third of which has undergone linguistic changes and is also for other reasons to be included only as a marginal occurrence. The three places are: Exod. 21:23-5; Lev. 24 :18, 20; and with limitations Deut. 19:21. Even apart from the specific formula, the talion principle is not generally determinative of OT law. It comes into effect only occasionally, for example in Exod. 21:36 in the context of the principles concerning the goring ox, cf. p. 165 above.

We turn now to the talion formula itself. As an illustration, we choose the passage from the BC, Exod. 21:23-5. The context begins in v. 22 in pure casuistic style but from v. 23b is transmuted into the quite different style of the talion formula:

When, in the course of a brawl, a man knocks against a pregnant woman so that she has a miscarriage but suffers no further hurt, then the offender must pay whatever fine the woman's husband demands; and he must pay it in front of arbiters.
If, on the other hand, hurt is done, then you shall give
life for life
eye for eye,
tooth for tooth,
hand for hand,
foot for foot,
burn for burn,
bruise for bruise,
wound for wound (Exod. 21:22-5, NEB emended).

The stylistic break at v. 23b is unmistakable. It is immediately announced by the use of "you," a formal element alien to casuistic law. The "you shall give" in that verse, however, is only a transitional **phrase**, linking what goes before, with the talion formula that follows, and it is foreign to the context in content as well because the first member of the series **could**, if need **be**, continue logically on from the case just described. It follows that the talion formula is a section on its own and must be interpreted as such.

Two brief exegetical remarks may be made at the outset. There is a break after the first five members of the series (cf. Wagner, 4) : the first member, which acts as a heading, is followed by four others in which wounded parts of the body are enumerated, and then come three more which specify types of injury. There is no parallel to this in corresponding ancient eastern laws (cf. Wagner, 7-9), and the obvious conclusion is that the last three phrases are a specifically OT extension. The second remark concerns phrases one to five. The statement of widest application comes first: life for life. The Hebrew word means basically "throat" but must be intended to mean "life" in the context. The first member of the series therefore functions as a general introduction or heading. The four phrases which come next embody no reference to the relative importance or worth of the parts of the body mentioned: the sequence is determined-as in the other ancient eastern codes-by anatomical considerations, from top to bottom of the human body (cf. Wagner, 7f for more details).

We must now inquire into the source and original meaning of the OT talion formula. Alt proposed a thesis that has found wide agreement. He compared the OT talion formula with a corresponding formula found among Latin inscriptions in North Africa, in what is now Algeria. The inscriptions date from around AD 200 and are cultic texts. They refer to a sacrificial lamb substituted for the real sacrifice demanded by the godhead: a first-born child. In this context there appears the following formula: ***anima pro anima, sanguis pro sanguine, vita pro vita***. The undoubtedly striking similarity to the OT talion formula induced Alt to explain the latter as a cultic phenomenon. It was originally, he claimed, a compensation to the divinity, but not one graciously allowed, as in the Punic texts, but one strictly demanded, "when the murder or injury of a man wrongs the divinity who gave him life and body and who therefore has first claim of possession on both" (Alt, 343).

The objections to this derivation of the OT talion formula, based on consideration from the history of traditions, do not concern primarily the considerable historical and geographical differences between the two subjects of Alt's comparison. There is no objection in principle to adducing even widely distant cul-

tic texts as an aid to understanding. But the insuperable difficulty here is the formula itself. The differences are so great that in fact no comparison is possible. The text of the Algerian votive steles talks of the sacrificial animal as an entity. *Anima*, *sanguis* and *vita* are not parts of the body. The texts refer to the life as a whole released by the sacrificial animal. This is not the case in the OT formula. Only the first item in the series refers to the life of an individual. The succeeding items specify either parts of the body or particular kinds of wounds. If we bear this in mind, and consider further that no OT text suggests a compensation to the divinity as the content of the *ius talionis*, as Wagner, 12, rightly points out, Alt's interpretation loses all probability. Rather, the talion formula must have belonged from the start to the context in which the text of the BC still includes it today, that of indemnification for damage, and that is a juristic, not a cultic, context.

What is the legal intention behind the talion? The purpose of the talion-like that of all law in general-is to maintain a proper balance in human relationships. We have solid grounds for thinking that the talion formula originated in the administration of justice characteristic of nomadic tribes. "We are faced with a legal principle applicable between societies, that is, with an international law" (Wagner, 14). The talion played a prominent part in legal thinking which moved much more in terms of groups than of individuals. If the member of a group was injured, the strength of the whole group suffered; the balance could be redressed only if the offending group suffered comparable damage. The intention of the talion was not, therefore, to *inflict* injury-as it might sound to us today-but to *limit* injury. The talion was meant to contain the mechanism of blood-revenge triggered off by an injury within limits which did not affect the survival of the group concerned. An example of what might happen when no such restraint was put on the desire for revenge is furnished by Gen. 4:23f, the so-called song of Lamech:

Lamech said to his wives:
 "Adah and Zillah, listen to me;
 wives of Lamech, mark what I say:

I kill a man for wounding me,
 a young man for a blow.
 Cain may be avenged seven times,
 but Lamech seventy-seven" (Gen. 4 :23-4).

The application of the talion was designed to prevent this spiraling of revenge, so vividly described in the song. We can therefore paraphrase the talion formula as follows: only **one** life for a life, only one eye for an eye, only **one** tooth or a tooth etc.

The talion formula was handed down even when nomadism was a thing of the past. But it covered only cases of bodily injury and therefore never became the overriding principle of OT law in general. It became a legal principle-in cases of bodily injury-on the basis of which judicial decisions were to be made. And because there are so many misconceptions on this subject, a further final remark might not be out of place : the talion is not in any way a principle for interhuman behaviour, it does not correspond to our modern "whatever you do to me I shall do to you." It was valid only as the official sentence of a properly constituted court.

VI

DEUTERONOMY AND THE LAW OF HOLINESS

Having dealt with the BC, the oldest and, for our present purposes, the most important of the OT law collections, we must say something on the other two, Deuteronomy and the Holiness Code or Law of Holiness. In chronological order of composition, we take Deuteronomy first.

1. Deuteronomy

A. ALT, "Die Heimat des Deuteronomiums," 1953=*Grundfragen*, 392-417; C. M. CARMICHAEL, *The Laws of Deuteronomy*, 1974; S. HERRMANN, "Die konstruktive Restauration. Das Deuteronomium als Mitte biblischer Theologie," *Probleme biblischer Theologie. Festschr. G. v.Rad*, 1971, 155-70; F. HORST, "Das Privilegrecht Jahwes. Rechtsgeschichtliche Untersuchungen zum Deuteronomium," 1930=*GR*, 17-154; S. LOERSCH, *Das Deuteronomium und seine Deutungen*, 1967; R. P. MERENDINO, *Des deuteronomische Gesetz*, 1969; G. NEBELING, *Die Schichten des deuteronomischen Gesetzeskorpas*, Diss. Münster 1970; G. v.RAD, *Studies in Deuteronomy*, 1963; Id., *Deuteronomy. A Commentary*, 1966.

Deuteronomy is one of those books that have particularly attracted the attention of OT exegetes. There are a number of reasons for this, but principally it is because it enables the researcher to come to grips with the core of OT theology as no

other book does. **Herrmann** has said that “the fundamental questions of OT theology are concentrated *in nuce* in Deuteronomy, and effectively a theology of the OT has to have its centre here” (156). The many problems posed by Deuteronomy, especially the changing stances characteristic of this or that period of research, can best be presented in the form of an account of recent research. Unfortunately we cannot undertake that here, but it is not in fact necessary to do so because it has been done in various introductions to the Old Testament and in a monograph by Loersch.

Our first question must be whether Deuteronomy can be compared with the BC as a book of law. There are many objections. Deuteronomy is in many ways so different that it could be said to constitute a new type of code. We must justify this remark in somewhat greater detail.

Before we do so, however, some basic problems of Deuteronomic research must be mentioned. When we refer to “Deuteronomy” as the most extensive OT collection of laws, the word is not identical with **Deuteronomy**, the fifth book of the Pentateuch. The legal corpus covers only Deut. 12-26, with the extended introduction in Deut. 4:44-11:32 and a postscript in Deut. 27:1-30:20. The rest of the book, Deut. 1:1-4:43 and Deut. 31-34, consists of texts from other literary genres; they do not concern us here. How they came to be attached to the Deuteronomic legal corpus is a much discussed question. Wellhausen regarded Deut. 12-26 as an autonomous entity, which he proposed to call **Ur-Deuteronomy**. In his view it was to be equated with the law of Josiah, 2 Kings 22-23 (cf. his **Die Composition des Hexateuchs**, 1963⁴, 189-93). In this Wellhausen was following de Wette, who suggested detaching Deuteronomy from the rest of the **Pentateuch** and regarding it as part of Josiah’s reform.

Despite occasional dissent, this thesis has survived intact to the present day. This is not to say, however, that **Ur-Deuteronomy** goes back directly to king Josiah as the manifesto of his cultic and political reforms. It certainly was not. Josiah’s cultic reform was based on the particular historical situation of his time. Its aim was to free the state of Judah from the visibly weakening Assyrian empire. It was initiated by Josiah without reference to Deuteronomy, but the discovery of this book gave it

new life. The question of the origin or, as Alt calls it, the “home” of Deuteronomy therefore remains an open one. There is much to be said for the view that Deuteronomy does not come from Jerusalem or even from the southern kingdom at all, but is a legal document from the north (thus especially Alt). It incorporates numerous traditions which do not reflect the particular circumstances of Jerusalem, and the one place of cult in Deuteronomy, never mentioned by name, could not originally have been Jerusalem.

The source of **Ur-Deuteronomy** and its transformation into the present text of Deuteronomy are still disputed questions. As far as the first question is concerned, there are sound arguments for the view that **Ur-Deuteronomy** not only consisted of the code but also included more or less extensive sections of the surrounding chapters (cf. Loersch, 36f). The answers to the second question have tended to divide into two camps: the supplementary theory and the documentary theory. Some exegetes have found a solution in the hypothesis that Deuteronomy was the result of successive additions or supplements to the **Josiah** book of laws. Others favour the hypothesis that Deuteronomy arose as the result of collecting together two or more documentary editions of **Ur-Deuteronomy**. We cannot say that the problems posed by Deuteronomy in the field of literary criticism have been satisfactorily resolved. Renewed efforts are needed, perhaps even completely different approaches.

Despite all the uncertainty over details, however, literary criticism has furnished some solid results. Among these is the fact that Deuteronomy has a history of growth behind it and consists of several parts; this refers not only to the outlying sections but to the legal corpus itself. The parts were assembled to form a new unity, and this new unity gives the book and its legal corpus their present characteristics. This brings us back to the question of whether we can compare the Deuteronomic code with the BC.

We may begin with a purely formal statement. Deuteronomy is presented as an oration delivered by Moses. In the other OT law collections, **Jahweh** is the speaker and Moses the first recipient of the divine ordinances; here, on the other hand, Moses addresses the people. Formally Deuteronomy is “the divine

charge given to the lay community at second hand” (Rad, *Studies*, 13, translation emended). The most striking peculiarity of Deuteronomic law is directly connected with this fact. It is that the laws in Deuteronomy are constantly filled out with legal interpretations in the form of personal address. In this connexion Rad has often spoken of a kind of Deuteronomic preaching and therefore regarded the book as essentially different from the older BC.

Only today are we beginning to see how accurate Klostermann’s diagnosis of the situation was years ago, when he declared that Deuteronomy 12ff was not a “law book,” but a “collection of material for the public proclamation of the Law.” So our task is to take the laws in Deuteronomy too and consider them still more critically from the standpoint of rhetoric and homiletics—as, indeed, is particularly appropriate to the parenetic form in which even the so-called law-code itself in chapters 12-26 appears. For, actually, the most elementary difference between the Book of the Covenant and Deuteronomy—a difference that is particularly striking just because the two books do contain so much common material—lies in the fact that Deuteronomy is not divine law in codified form, but preaching about the commandments (Rad, *Studies*, 15).

With regard to the relationship of the Deuteronomic law to the BC, both aspects mentioned by Rad in the above passage are to be borne in mind: an undoubted body of “common material,” which must still be further defined, and the unmistakable difference in form. To take the first one first. About half the legal prescriptions contained in the BC as it stands now are paralleled in Deuteronomy (cf. the list in Fohrer, *Introduction*, 1970, 172). The agreement is sometimes so extensive that a literary connexion becomes almost obvious. The other half, on the other hand, have no parallel in Deuteronomy. There is also a considerable amount of material specific to Deuteronomy. Finally we must remember that the sequence of legal topics only rarely coincides in the two law books. At best, then, we can concur with those exegetes who regard a direct literary dependence of Deuteronomy on the BC as unlikely (for example, Merendino, *Neubeling*) and accept that both codes draw on a common legal tradition in areas of common concern.

In our assessment of the Deuteronomic collection of laws, however, attention to the book’s form is even more important than a consideration of the material similarities between Deuteronomy and the BC. We have already seen that the BC contains more than just legal prescriptions, that it includes differently structured texts of a non-legal nature which Beyerlin has called collectively “parenetic texts.” In the Deuteronomic corpus of laws, these non-legal sections increase considerably in quantity, and in the context of the outlying sections, Rad’s description of Deuteronomic law is certainly accurate. The various parts of the corpus of laws have not all, however, undergone parenetic reshaping to the same extent.

The position is best clarified by comparing two texts. We choose for this purpose the slave law of the BC, Exod. 21:2-11, which we dealt with in Chapter V, Section 3, and its Deuteronomic equivalent :

When a fellow-Hebrew, man or woman, sells himself to you as a slave, he shall serve you for six years and in the seventh year you shall set him free. But when you set him free, do not let him go empty-handed. Give to him lavishly from your flock, from your threshing-floor and your wine-press. Be generous to him, because the Lord your God has blessed you. Remember that you were slaves in Egypt and the Lord your God redeemed you; that is why I am giving you this command today.

If, however, a slave is content to be with you and says, “I will not leave you, I love you and your family,” then you shall take an awl and pierce through his ear to the door, and he will be your slave for life. You shall treat a slave-girl in the same way.

Do not take it amiss when you have to set him free, for his six years’ service to you has been worth twice the wage of a hired man. Then the Lord your God will bless you in everything you do (Deut. 15:12-18).

First we may remark on one or two material differences. We can see that a different social situation is presumed from the fact that women can now possess property and are therefore subjects of legal rights. The lack of an express law on female slaves (cf. Exod. 21:7-11) might be connected with this, but it

does not necessarily follow from the altered circumstances. At any rate, a girl cannot, according to the Deuteronomic conception of slave law, be sold into concubinage. But this is not the decisive difference between Deuteronomy and the BC. The basic novelty lies in the stylisation. The Deuteronomic text is couched throughout in terms of “you”; this is no secondary lapse, as in Exod. 21:2, but a peculiarity of Deuteronomic law. Personal address, designed to convince, to win over, to persuade, has taken the place of the “pregnant, juristic formulation of the Exodus text” (Horst, 99). The casuistic “he” becomes the Deuteronomic “you” in many cases apart from the slave law, and is in fact an important characteristic of the Deuteronomic understanding of law. On the other hand, not all the casuistic prescriptions taken over by Deuteronomy have been subjected to this transformation. The second part of the legal corpus in particular includes examples where the pure casuistic style is retained (e.g. Deut. 21:15-17, 18-22; 22:13-29; 25:5-10).

The transformation of the purely juristic type of statement in Deuteronomic slave law does not affect only the form. There is also a change in the content, which equally extenuates the purely legal character of the prescriptions. For example, while the older principle simply lays down that the slave is to be set free without having to pay any compensation—his six years of work are sufficient to offset his debts—the slave-owner in Deuteronomy is urged to give lavishly to the freed slave. This embodies recognition of the fact that simply being emancipated is not enough to enable the former slave to return to a free life in the community. He needed something to start him off, and that should make available to him whatever his work as a slave over the years might have earned.

We may ask whether such a request was practicable. Would it not jeopardise the prevailing economic system? The Deuteronomic text does not ask itself these questions. The request, however, is based on argument, although not on economic argument. The reader is reminded (v. 15) that insofar as the slaveowner was a member of the people of Israel, he had been a slave in Egypt and had been freed by Jahweh. This is more than a humanitarian appeal to understand the needs of a man in distress. It is a reminder of the origin, and therefore essential na-

ture, of Israel as a people. Israel's existence as a people freed from slavery demanded a different view of slavery from that current elsewhere. It is particularly clear in the Deuteronomic slave law how law in the OT was interpreted and understood in an increasingly theological way. The awareness that emerged in slave law also impinged on many other areas of life. An essential feature of Deuteronomy is the theologisation of older legal prescriptions.

The slave law is also typical of the Deuteronomic code in another respect. The humanitarian and social orientation visible there can also be observed elsewhere in Deuteronomy. Deuteronomy prolongs a line of thought which had long existed but which had never been so explicit as in Deuteronomy. The book is decisively influenced by the thought of the people of God. It refers to one's brother who must not suffer injustice. Even the alien who lives in the land of Israel must be accepted into the community with full rights. Some further examples of Deuteronomy's humanitarian and social bias are given in what follows.

Deut. 24:10-13, cf. v. 6, deals with loans. All the prescriptions aim at protecting the debtor:

When you make a loan to another man, do not enter his house to take a pledge from him. Wait outside, and the man whose creditor you are shall bring the pledge out to you. If he is a poor man, you shall not sleep in the cloak he has pledged. Give it back to him at sunset so that he may sleep in it and bless you; then it will be counted to your credit in the sight of the Lord your God (Deut. 24:10-13).

The first prescription is unique in the OT. The creditor has no right to enter the house of a debtor to take his pledge. The debtor himself must choose the pledge. The second prescription compares with one in the BC, Exod. 22:25f. The basic needs of life must not be endangered by the giving of a pledge. Thus a cloak which also serves as cover at night must be returned by nightfall. Deut. 24:6, an apodictic principle, is on the same lines:

No man shall take a mill or a millstone in pledge; that would be taking a life in pledge (Deut. 24:6).

Vv. 10-13 are followed by a prescription on the payment of day-workers. The basic principle is apodictic. The two root types of the OT formulation of law intermingle much more in Deuteronomy than in the BC. This is the result not only of the transformation of the casuistic style into address but also of the disposition of the various prescriptions :

You shall not keep back the wages of a man who is poor and needy, whether a fellow-countryman or an alien living in your country in one of your settlements. Pay him his wages on the same day before sunset, for he is poor and his heart is set on them: he may appeal to the Lord against you, and you will be guilty of sin (Deut. 24 :14-15).

The day-worker belonged to the economically most disadvantaged of society. He possessed no land of his own and had therefore to sell his ability to work. Consequently he was especially vulnerable to discrimination. V. 15 concretises the general principle enunciated in v. 14. Withholding payment was certainly not the only possible means of discrimination, but one probably not seldom practised and particularly hurtful to the worker.

We have already referred, in other contexts, to the Deuteronomian prescriptions concerning the use of harvested goods, Deut. 24 :19-22—prescriptions largely in favour of the economically underprivileged—the treatment of runaway slaves, Deut. 23 :15f, and the theft of food by the hungry, Deut. 23:25f. The ordinance governing the administration of corporal punishment, Deut. 25:1-3, should also be mentioned in this context.

We have yet to specify the most important peculiarity of the Deuteronomian book of laws. It is to be seen in the many prescriptions to do with worship and in the way older prescriptions are taken over and theologically interpreted. The anti-Canaanite orientation of the cultic law is worthy of special attention. The most important chapter here is Deut. 12, with its famous centralisation of cult. Connected with Deut. 12 are the great number of prescriptions which apply the Deuteronomic centralisation of cult to the various areas of life. They are to be found scattered throughout the law collection: Deut. 14 :22-9; 15 :19-23; 16:1-22; 17:8-13; 18:1-8; 19:1-13. These texts may appropriately be called the centralisation laws. Despite the material

differences, Deut. 12 is to some extent a parallel to the altar law of the BC.

Our remarks on the absence of original unity in the Deuteronomian law collection as a whole apply in particular to Deut. 12. Scholars have variously tried to explain the origin of this chapter. We have no space to go into all that here, but we might just remark that the demand for centralisation in the present text is given in three versions. The commentaries of C. Steuernagel and G. v. Rad identify the versions as follows: vv. 2-7, 8-12, 13-19 (Rad, *Deuteronomy. A Commentary*, 1966, 89). The three versions express the same material with different emphases and with different intentions. It is disputed which of the three is the oldest. Because of its strange formulation, Rad thinks the third. However, the anti-Canaanite orientation, which is the real reason for the Deuteronomian call for centralisation, comes most sharply to the fore in the first, Deut. 12:2-7, and this must ultimately be why this version is placed first, to set the tone for all Deuteronomy's cultic prescriptions :

You shall demolish all the sanctuaries where the nations whose place you are taking worship their gods, on mountain-tops and hills and under every spreading tree. You shall pull down their altars and break their sacred pillars, burn their sacred poles and hack down the idols of their gods and thus blot out the name of them from that place.

You shall not follow such practices in the worship of the Lord your God, but you shall resort to the place which the Lord your God will choose out of all your tribes to receive his Name that it may dwell there. There you shall come and bring your whole—offerings and sacrifices, your tithes and contributions, your vows and freewill offerings, and the first-born of your herds and flocks. There you shall eat before the Lord your God; so you shall find joy in whatever you undertake, you and your families, because the Lord your God has blessed you (Deut. 12 :2-7).

How much more boldly the confrontation with the religion of the Canaanites is formulated here than in the altar law of the BC! Historical experience and theological reflexions have led Deuteronomy to this position.

The peculiar characteristics of the Deuteronomian law collec-

tion just enumerated make it sufficiently clear that the categories of jurisprudence are left far behind. The code is one on its own. All its special characteristics are already present in the BC, but what appears there in rudimentary form is fully mature in Deuteronomic law. Here, law is placed in the context of address and exhortation ; it has been finally shot through with theology.

2. The Law of Holiness

B. BAENTSCH, *Das Heiligkeits-Gesetz Lev. XVII-XXVI*, 1893; C. FEUCHT, *Untersuchungen zum Heiligkeitsgesetz*, 1964; R. KILIAN, *Literarkritische und formgeschichtliche Untersuchung des Heiligkeitsgesetzes*, 1963 ; W. KORNFELD, *Studien zum Heiligkeitsgesetz*, 1952 ; G. v. RAD, *Studies in Deuteronomy*, 1963; H. Graf REVENTLOW, *Das Heiligkeitsgesetz formgeschichtlich untersucht*, 1961; W. THIEL, "Erwägungen zum Alter des Heiligkeitsgesetzes," *ZAW* 81, 1969, 40-73; V. WAGNER, "Zur Existenz des sogenannten 'Heiligkeitsgesetzes'," *ZAW* 86, 1974, 307-16.

This OT corpus of law first saw the light of day as a distinct corpus in 1877, when, in his study "Beiträge zur Entstehungsgeschichte des Pentateuchs," *ZLThK* 38, 1877, 401-45, A. Klostermann recognised that Lev. 17-26 was an independent literary entity to which he gave the name *Heiligkeitsgesetz* (Holiness Code or Law of Holiness, H for short). This nomenclature has imposed itself on scientific usage since. The name was well chosen. It is derived from the text itself, in particular the formula: "You shall be holy, because I, the Lord your God, am holy" (Lev. 19:2; 20:26).

Most exegetes today accept that H was an original independent entity later inserted into the priestly writings (P). The minority view is that the material was part of P from the beginning and that consequently H was never an autonomous section (thus Elliger, in his extensive commentary *Leviticus* (HAT 4), 1966). Wagner also rejects an independent H. He sees Lev. 17-26 as part of a larger literary unit. This thesis, however, is less probable. Critics are generally agreed on the extent of H. They disagree mainly on Lev. 17. It is occasionally suggested, for example, that Lev. 17 was not originally part of H (Feucht, Kilian), but there seem to be stronger arguments in the oppo-

site sense. However, although the beginning of H is disputed, there is no contention over where it ends. Lev. 26 is quite clearly the conclusion to this corpus of law. Only the final verse, Lev. 26:46, did not originally belong. An analysis of the linguistic usage of this verse—"These are the statutes, the judgements, and the laws which the Lord established between himself and the Israelites on Mount Sinai through Moses" (Lev. 26 :46)—proves it to be a late conclusion.

What is the approximate date of composition of this code? Because it was subsequently incorporated into P, it must at any rate be older than P. On the other hand, a comparison with Deuteronomy shows that H builds on some Deuteronomic assumptions. The time-span between Deuteronomy and the priestly writings would therefore seem to be the period in which H was written. This agrees with the thesis of Baentsch, writing as long ago as 1893: "H is historically conceivable only as lying somewhere between Deuteronomy and P" (152). If we accept that the Deuteronomic law is connected in some way with Josiah's law (cf. 2 Kings 22:1-23:3) and that P dates from the fifth century BC, we are left with a time-span of some two hundred years. This, however, is not the real problem with which we are faced in dating H. It is much more important to find an answer to the question of its original form. There are almost as many theses as there are authors. All we can do here is mention the most prominent of them.

We begin with two observations which are presupposed by the majority of exegetes, explicitly or implicitly.

1) The present text of H evinces a series of additions which betray the mentality of P. There was therefore a final reworking which is to be dated either shortly before or at the same time as the incorporation into P. The latter hypothesis is more than probable particularly for Lev. 17, which would explain the differences between this chapter and the rest of the text (Thiel). As far as the assessment of H in its independent form is concerned, these additions can be disregarded.

2) For the most part, the legal material in H is very much older than the law collection itself. Ultimately it is likely that this older material formed several units before its incorporation into H.

Given these presuppositions, various hypotheses have been put forward to account for the origin of H. Kilian, for example, accepts a primitive law of holiness which formed the basis of the present code and in which the present form and content of the prescriptions in H were already essentially present in rudimentary form. But it contained as yet "none of the historical reminiscences or other historicising elements" (166) characteristic of the present text. Kilian dates this primitive law between Deuteronomy and the fall of Jerusalem in 586 BC. It was then extended by a later redaction to its present form, to include on the one hand new prescriptions and on the other parenetic and historicising material. Still according to Kilian, this final redaction, to which we owe H in its final independent shape, dates from the time of the exile.

Feucht puts forward another hypothesis. According to him, there were two part-collections, H1 and H2, of which the definitive H was composed. The question of the antiquity of H therefore depends, as a first step, on the antiquity of the part-collections. The first (H1=Lev.18-23*) is dated by Feucht prior to Deuteronomy, some time in the first decades of the seventh century BC, which the second (H2=Lev. 25-6) depends on Deuteronomy and according to Feucht dates from the time of the exile, and this dating, whatever may be said about the details of composition, is in fact the most likely (thus Baentsch in the last century, Thiel more recently).

A much discussed question is the relationship of H to the prophet Ezekiel. There is no doubt that there is a relationship between these two literary works, but it is too complex to be described adequately as one of mutual dependence. For a fuller treatment of this point, cf. Zimmerli, *Exechiel*, BK XIII/1, 70*-90*.

H is a late work. It comes from a period in which Israel was no longer a state. There is therefore no reference to the existence of the state. Unlike Deuteronomy, there is no king-law in H, cf. Deut. 17:14-20. The life of the community is variously regulated by the prescriptions in H. As in the BC and the Deuteronomic law, H begins, in Lev. 17, with a prescription on sacrifice. Then come legal and cultic prescriptions mixed. The material drawn on is mostly very much older than the book of laws itself. H.

shares with Deuteronomy the interweaving of the legal principles with parenesis, and in this respect it is "very closely akin to Deuteronomy" (G. v. Rad, 36). H is, on many other points, very different from Deuteronomy. Not the least difference is the formal one, which consists in the fact that H is again stylised as a divine discourse, not as a human one. Although the legal material is very diverse and in part rather disjointed, H gives an impression of unity and completion. This is associated with the fact that Jahweh's holiness is constantly being named as the background for the demand for holiness from the people, a holiness to be realised through both social justice and cultic effort. In their relation to the **holy** God and his **holy** name, the legal demands expressed in H seem to constitute an argument characteristic of no other law collection. H therefore thinks through and expresses theologically an element which has basic validity for OT law.

VII

APODICTIC LAW

A. ALT, "The Origins of Israelite Law," in *Essays on Old Testament History and Religion*, 1966, 79-132; J. BRIGHT, "The Apodictic Prohibition: Some Observations," *JBL* 92, 1973, 185-204; K. ELLIGER, "Das Gesetz Leviticus 18," *ZAW* 67, 1955, 1-25=*Kleine Schriften zum Alten Testament*, 1966, 232-59; G. FOHRER, "Das sogenannte apodiktisch formulierte Recht und der Dekalog," *KuD* 11, 1965, 49-74=*Studien zur alttestamentlichen Theologie und Geschichte*, 1969, 120-48; B. GEMSER, "The Importance of the Motive Clause in Old Testament Law," *VT* 1, 1953, 50-66; E. GERSTENBERGER, *Wesen und Herkunft des "apodiktischen Rechts"*, 1965; H. GESE, "Beobachtungen zum Stil alttestamentlicher Rechtssätze," *ThLZ* 85, 1960, 147-50; S. GEVIRTZ, "West-Semitic Curses and the Problem of the Origins of Hebrew Law," *VT* 11, 1961, 137-58; R. HENTSCHKE, "Erwägungen zur israelitischen Rechtsgeschichte," *ThViat* 10, 1966, 108-33; S. HERRMANN, "Das 'apodiktische Recht.' Erwägungen zur Klärung dieses Begriffs," *MIO* 15, 1969, 249-61; R. KILIAN, "Apodiktisches und kasuistisches Recht im Licht Ägyptischer Parallelen," *BZ NS* 7, 1963, 185-202; G. LIEDKE, *Gestalt und Bezeichnung alttestamentlicher Rechtssätze*, 1971; H. Graf REVENTLOW, "Kultisches Recht im Alten Testament," *ZThK* 60, 1963, 267-304; W. RICHTER, *Recht und Ethos*, 1966; W. SCHOTTROFF, *Der altisraelitische Fluchspruch*, 1969; H. SCHULZ, *Das Todesrecht im Alten Testament*, 1969; V. WAGNER, *Rechtssätze in gebundener Sprache und Rechtsatzreihen im israelitischen Recht*, 1972; M. WEINFELD, "The Origin of the Apodictic Law," *VT* 23, 1973, 63-75; J. G. WILLIAMS, "Concerning One of the Apodictic Formulas," *VT* 14, 1964, 484-9; Id., "Addenda to 'Concerning One of the Apodictic Formulas,'" *VT* 15, 1965, 113-15.

In his indispensable study on the origins of Israelite law, Albrecht Alt distinguished two groups of legal principles in the OT, and the arrangement of his essay reflects this distinction. After casuistically formulated law he deals with apodictically formulated law, called apodictic law for short. Whereas Alt's description of casuistic principles has found wide agreement, there has been considerable disagreement with his treatment of apodictic law. Discussion on this area of OT law is still not at an end.

There are two principal objections to Alt's exposition. The first is that apodictic law as he deals with it is not homogeneous but embraces a variety of proposition types. The uniformity in formulation which had been demonstrated so convincingly in the case of casuistic principles is completely lacking here. The second objection concerns Alt's thesis that apodictic law must be regarded as originally specific to Israel. On p. 123 of his essay we read the following passage: "There is not the slightest indication in the apodictic series of principles of a Canaanite origin, either in the views they express or even in the cultural background they presuppose. Everything in them is related exclusively to the Israelite nation and the religion of Yahweh even where their terse wording does not refer directly to either" (translation slightly altered).

This latter sentence must be the most quoted one in Alt's essay, perhaps even the most quoted in all Alt's oeuvre. Exegetes have constantly referred to it, but for different reasons. On the one hand, it has been used to prove the uniqueness of Israelite law. Apodictic law, as interpreted by Alt, seemed to be one of the few places which could demonstrate Israel's uniqueness. It was the bedrock, a jewel in the great quarry of ancient eastern religious and legal history, a proof of the uniqueness, the peerlessness, in fact the revealed character of Israelite law. But then this sometimes almost fanatical acceptance of Alt's conclusions has led to a reaction. It is pointed out that inferences are drawn from Alt's essay which are not justified. There was said to be a visible influence from Barth's positivism in the theology of revelation which was neither intended by Alt nor even justified by the data.

What is meant by apodictic law? To answer this question, we

may give a brief survey of the legal material intended, and in doing so we follow Alt's sequence. In first place he mentions an enumeration of legal principles on crimes worthy of death which end in a stereotyped manner by laying down the death penalty and which are therefore usually termed in OT scholarship the *môt jūmat* series (*môt jūmat* = he must be killed unconditionally). A typical case is furnished by Exod. 21:12. Closely related in form to this series is the series contained in the so-called Schemite dodecalogue, Deut. 27:15-26. Because of their stereotyped introductory phrase, they are also called the '*ārūr*' (= a curse upon) series. In third place, Alt mentions an elevenfold enumeration of grades of relationship within which sexual intercourse was forbidden, Lev. 18:7-17. This enumeration is in the you-style and is therefore formally distinct from the first two series. Finally, Alt refers in this connexion to the decalogue, Exod. 20:2-17; Deut. 5:6-18 (21).

These four groups of legal principles were included by Alt under the generic name of apodictic law. He chose to do so in full knowledge that there are essential formal differences between the groups. At the point in his investigation at which he passes from the second to the third group, he mentions a "significant change of form," and he is fully aware that the "objective style" of the first two groups contrasts with the "subjective you-form of direct address in the other two" (115). And yet a single generic term is not excluded! How are we to explain this? Alt regarded as an essential element the formation of series. The "overall formal similarity in particular parts of the principles" (115) enables him to apply one generic term to series which were otherwise very different. He recorded a "weight of expression" (111) which, on the one hand, is quite foreign to the casuistic style and, on the other, applies to all these particular forms of law.

In contrast with casuistic law, the first impression on the reader is of a certain uniformity. This impression, however, disappears on closer examination once one considers apodictic law without any reference to casuistic law. Scholars since Alt have considered apodictic law in this way many times, and they have made at least one basic subdivision in what Alt included under the generic heading of apodictically formulated law. This sub-

division had in fact already been seen and registered by Alt himself. On the one hand, we have the prohibitions and commands formulated as direct address, Alt's series three and four. On the other hand, we have legal principles formulated objectively (in the third person), Alt's series one and two. In Hebrew they begin generally with a participle. In the *mōt jūmat* series, for example, this participle describes the doer and his deed dealt with by the legal principle. A relative clause occasionally takes the place of the participle in principles which are otherwise constructed similarly, but this type is relatively rare and must have been secondary. The two groups are taken together as participial and relative formulations. We shall deal first with this particular feature of apodictic law.

1. Apodictic legal principles in participial and relative form

The very heading of this section reflects a prejudgment by calling the two types of law apodictic, a fact which has yet to be established. Learned critics have taken issue with Alt over this and preferred to call these types casuistic. And in fact there are considerations in favour of their conclusions.

We can illustrate this by returning to Exod. 21:12: "Whoever strikes another man and kills him shall be put to death." As in casuistic law, this prescription defines the legal circumstances and states the legal consequences. The idea expressed in casuistic law with a complex conditional clause is here concentrated in a participial construction. This had been noted by Gese, who described the phenomenon as follows: "The complex syntactical structure of the sentences in the *mōt jūmat* series is therefore to be regarded as no more than a mixed form: casuistic laws are metamorphosed in these particular instances by being adjusted to poetical or liturgical forms" (148f). Others have gone further and included all these principles under casuistic law (e.g. Kilian, 188), partly because they disagree with Gese on the way in which they developed (e.g. Gerstenberger, 25). Fohrer has even gone so far as to describe the principles under discussion, in a memorable phrase, as "casuistic law in apodictic formulation" (146). This whole argumentation can also be supported by the

observation that there is in fact in the OT a conditionally formulated principle which is not dissimilar in content to Exod. 21:12: "When one man strikes another and kills him, he shall be put to death" (Lev. 24 :17). Does all this not prove the closeness, if not actual identity, of the *mōt jūmat* principle in Exod. 21:12 with casuistic law ?

Not all OT scholars, however, endorse such a conclusion. The opinion persists that we are faced not with a particular form of casuistic law but with a form of law basically different from casuistic law. Authors who share this opinion include Herrmann, Liedke, Schulz and Wagner.

Our best approach to a balanced assessment of this law is to start from the fact that the principles under discussion were originally part of a series. This fact is not open to dispute. It is perfectly clear from Exod. 21:12-17, which is the first occurrence among the casuistic principles of the BC of this very different form of law. Only the first principle, v. 12, is wholly relevant to this section of the BC, evidently concerned with murder and manslaughter (cf. Alt, 109-14) ; the other three *mōt jūmat* principles are quite irrelevant in the context.

Whoever strikes his father or mother shall be put to death (v. 15).

Whoever kidnaps a man shall be put to death (v. 16).

Whoever reviles his father or mother shall be put to death (v. 17).

These three principles are placed here only because they were already associated with v. 12, and when v. 12 was inserted here for reasons of content, they were "brought in at the same time" (Alt, 111). This gives us four members of a series concerning crimes punishable by death which was once very probably much longer. How long it was exactly, whether it was always the same length or later changed are questions which none would claim to be able to answer with certainty. Wagner's attempt to assemble a series limited to exactly ten members from material scattered over the OT is too artificial (16-31). Alt himself is more cautious. He suggests "a good twelve principles in the original"

(113). It is certain, and it is readily deduced from Exod. 21:12, 15-17, that the series concerns matters from very different legal areas. This is clarified ultimately by the other *mōt jūmat* principle which in all probability belongs here :

Whoever has unnatural connection with a beast shall be put to death (Exod. 22 :19).

The same penalty, which has no place in the system of casuistic law, is laid down. And we must also consider the formal structure of the principles, the "weight of expression" which Alt rightly stresses and which can be fully appreciated only in the Hebrew original. Each principle is similarly constructed, each consists of five Hebrew words.

All these points taken together can lead to only one conclusion : the understanding of law here is quite different from that expressed in casuistic principles. Whereas the latter originally referred to an actual legal case, classified it, and made a judgement on it, the principles of the series under discussion are independent of any actual event. The case is described in quite general and abstract terms. There is no reference to the many particularities which are part of every concrete event and which the casuistic principle investigates as far as possible. These principles mark out a frontier which none may overstep. They outline an area of permissible behaviour. They are frontier prescriptions. They presuppose an authority which promulgates them, and this leads us to the question of their origin. G. Liedke, for example, has broached it and investigated corresponding legal principles which occur in narrative texts. He has come to the conclusion that the apodictic principle was issued by the highest authority of a legal domain, for example the king or army commander. This, however, does not help us in considering the examples in the BC. Liedke has proposed the paterfamilias as the authority who originally stood behind these principles, although Exod. 22 :19 is not in the same category (130-5). This means that we have to decide on the legal domain from which they derive. The answer is nomadic law (cf. Schottroff, 127 ; Wagner, 29). We are therefore dealing with a law which belongs to Israel's oldest legal state and dates from a period before the tribes settled in Canaan.

This statement, however, which is of historical and sociological importance in the study of law, is of only scant significance for the OT understanding of this form of law. In it—and we include the other features of apodictic law yet to be discussed—with its concentration on essentials, Israel experienced God's will. Here Israel felt itself confronted in a special way by Jahweh's will. Israel recognised the area of permissible behaviour outlined in these principles as the area offered by Jahweh. As far as the understanding, although not the origin, of this law is concerned, we are justified in speaking, with qualification, of divine law. We can certainly ask whether the description of apodictic law in contrast with casuistic law is happily chosen. In some sense we can also call a casuistic principle apodictic (Gerstenberger, 20) and interpret casuistically an apodictic principle of the participial or relative type. The decisive point is that the term "apodictic" is intended to refer to law which embodies a conception of law quite different from that embodied by "casuistry" : the purpose of apodictic law is "the formulation of a legal principles" (Herrmann, 260). We might therefore do better to talk, with Hermann, about "normative law" (261), but the term introduced by Alt is so common that no criticism of it will dislodge it from current usage.

These remarks on the *mōt jūmat* series incidentally cast our vote in favour of one side in a dispute in recent research. We refer to it in passing here. The concluding formula which gives the series its name, *mōt jūmat*, is by origin a formula of punishment expressing a death penalty inflicted by men. It is inaccurate to regard it as a curse (as Graf Reventlow, 288ff and Kilian, 192ff do). We may also refer here to the work by Schulz. In it he undertakes the most thorough investigation so far undertaken of the material under discussion. But it is doubtful whether his definition of the law which carries the death penalty as an independent form of law related to prohibitive law will be universally adopted. But we have no space here to offer a more detailed presentation and critique of this important thesis.

The so-called curse or '*ārūr*' series of Deut. 27 was juxtaposed to the *mōt jūmat* series by Alt and by many others since. Unlike the latter, which is a reconstruction by scholars, the '*ārūr*' series has survived in the OT as a unit. It did not originally, however,

consist of all twelve members. On grounds of form and content, it is clear that the first and final principles (vv. 15 and 26) are not original members of the series (cf. the arguments of Gese, *ZThK* 64, 1967, 129 and Schottroff, 57). It is perfectly understandable from the context why the ten should have been extended to twelve. In Deut. 27, the series is incorporated into a cultic ceremonial of the assembled twelve tribes. It was necessary for the proper literary effect to have twelve curses. We must also accept that a series of curses which originally belonged to a completely different context has been included here as part of an act of worship (cf. Schottroff, 220-4; Wagner, 32-9). This means that all the elements which relate to the cultic act described in Deut. 27 must be excised if we are to focus on the primitive series. The congregational responses to the curses, for example, must be ignored. We are left with a series of ten curses.

The number ten, which characterises several OT series of laws-the best known being the decalogue-was originally used as a mnemonic aid: the series could be counted off on the fingers. The curses in Deut. 27 were in this form. After the introductory *'ārūr* (= a curse upon) comes a participial description of who is to be cursed. In Hebrew, each curse consists essentially of four words, and this can still be seen in vv. 16, 17, 18, 23 and 24. In the course of time, small additions have been made to the other verses, and they can be relatively easily spotted. The following is the series as it stands today, with the obvious additions in brackets :

A curse upon him who slights his father or his mother (v. 16).

A curse upon him who moves his neighbour's boundary stone (v. 17).

A curse upon him who misdirects a blind man (v. 18).

A curse upon him who withholds justice from the alien, the orphan and the widow (v. 19).

A curse upon him who lies with his father's wife (for he brings shame on his father) (v. 20).

A curse upon him who lies with any animal (v. 21).

A curse upon him who lies with his sister (his father's daughter or his mother's daughter) (v. 22).

A curse upon him who lies with his wife's mother (v. 23).

A curse upon him who strikes another man in secret (v. 24).

A curse upon him who takes reward to kill a man with whom he has no feud (v. 25).

These curses concern various areas of crime. There are sexual prohibitions (vv. 20, 22, 23), with an unmistakeable parallel in Lev. 18, principles of social ethics (vv. 17, 18, 19, 25) and a group of principles with counterparts in the *mōt jūmat* series. The curses contain no principle not exemplified elsewhere in OT law. What brings them together into one unit? The key word occurs in v. 24: "in secret." All the curses concern crimes committed in secret and therefore undetected in the normal course of justice. All the crimes named, from moving the neighbour's boundary stone to misdirecting a blind man, from withholding justice to killing for reward, are hidden from the public gaze.

We must now inquire into the reasons for which the curses were composed. The use of the curse formula prompts us to think first of cult. And the series has often been interpreted as a cultic tool, especially since the first and last members of the extended series are both cultic. However, the series arises not in cult but "in an extraordinary situation of normal life" (Schottroff, 223). We can say this for the sake of greater clarity even though, naturally, at the time of which we are speaking there was no clear-cut division between cult and the rest of life. We are in fact speaking of Israel's nomadic period. The series of curses is "a collection of capital crimes for intertribal justice in nomadic law" (Wagner, 38). That this is now clear is due above all to the work of Schottroff, who has devoted extensive research to curses formulated with *'ārūr*.

The primitive significance of the curse formula is to be described as follows (cf. Schottroff, esp. 231ff): the curse effectively excluded a person from the salvific territory of a community ; it excommunicated. By being excluded from salvation, the one cursed was, by the same token, consigned to perdition. The

community in question could be a family, a sib or a tribe, depending on the context. The one who pronounced the curse could not be just any member of the community; he had to be the official spokesman, who was also invested with the decisive legal competence of that community. By pronouncing the curse, he avenged a crime non-judicially in cases in which the criminal was unknown and so could not be directly called on to answer for his misdeed. The underlying idea was that the unavenged crime of a member of the community tainted the community itself with guilt. The community must free itself from its burden. Deut. 21 :1-9 is an important illustration of this idea in the OT. A deed of blood committed by an unknown hand taints with blood-guilt the owner of the land on which the body is found. The Deuteronomic text records a complicated ceremonial for averting this blood-guilt ; in nomadic times, the same effect could be achieved by pronouncing a curse like that formulated in Deut. 27 :24 (Schottroff, 223).

The curses originally produced in nomadic times were then adapted in the OT to a new context. This is an excellent example of how the OT took over for its own purposes, and above all theologically interpreted, old legal material and principles. The extension of the ten curses to twelve is an instance of this. The series is now begun and ended with a principle which is theological in the strict sense :

A curse upon the man who carves an idol or casts an image, anything abominable to the Lord that craftsmen make, and sets it up in secret (v. 15).

A curse upon any man who does not fulfill this law by doing all that it prescribes (v. 26).

The ceremonial in which the curses are included in Deut. 27 makes it quite clear that they are to be pronounced in the name not of a family, sib or tribe only, but of the entire people of God. The ceremonial is of later, that is of Deuteronomic, origin, but the reworking of the transmitted law into divine law is essentially older, and in fact ultimately constitutes the essence of OT law. In the discussion on apodictic law, scholars have taken Alt's remark quoted above (pp. 192f) seriously and looked for ancient

eastern parallels. There are parallels, but only to some extent. On the one hand, legal matter as evidenced, for example, in the *mōt jūmat* series is more or less clearly discernible in other ancient eastern codes. Wagner has brought much of it together (28-9). However the apodictic style is interpreted, there are certainly instances of it in the laws of Israel's neighbours (cf. Kilian, Weinfeld, T. and D. Thompson, **VT** 18, 1968, 81f.) On the other hand, however, no ancient eastern series of laws is yet known to us which has assembled general and normative principles of law and behaviour for a people as the *mōt jūmat* and *'ārūr* series do.

2. The prohibitive form of apodictic principles

This section deals with the third and fourth series referred to previously (p. 194). We thereby express our conviction that the distance between these two and the first two is greater than on Alt's view. On the other hand, the use in the headings of both sections of this final chapter of the phrase "apodictic principles" means that the relation of the two forms of apodictic law is regarded as being closer than is generally done today. It depends on the questions to be asked whether one stresses more the agreement or the difference of the two groups of apodictic principles : the latter if we ask about their respective origins, the former if we ask about their form and use as the OT text now stands.

At first glance, the differences are more obvious than the points of similarity. Not only is the use of the second person quite new in relation to series one and two; there is no reference to a particular case. "In the prohibitions and commands there is no reference to any actual injustice as in genuine legal principles, but as it were an early warning. ... The citizen is invited to model his future life in a particular way" (Gerstenberger, 26). The question is whether we can strictly speak of law in this connexion. The answer is no if in law we include detection, judgement, sentence and punishment; the answer is yes if by law we understand legal principle or maxim.

We begin with part of a series in Lev. 18 :7-17 which Alt mentions first in this context. Again, the series originally had ten

members (Elliger). Clearly recognisable later additions are omitted in the translation :

You shall not bring shame on (lit. uncover the nakedness of) your mother (v. 7).

You shall not bring shame on your father's wife (v. 8).

You shall not bring shame on your sister, your father's daughter or your mother's daughter (v. 9).

You shall not bring shame on your son's daughter or your daughter's daughter (v. 10).

You shall not bring shame on your father's sister (v. 12).

You shall not bring shame on your daughter-in-law (v. 15).

Elliger, to whom we owe an exact analysis and investigation of this series from the point of view of the history of traditions, has rightly pointed out that the principles are not designed "to inculcate a general moral ideal or universal idea of modesty which rejects incest, marriage within prohibited degrees of relationship and such like" (240). They are designed rather to safeguard a given community. They deal with the problems of maintaining the health and purity of a family. The common life is not to lead to a sexual free-for-all. We have to bear in mind that normally a nomadic family would consist of four generations living together. The peace of the domestic community had to be assured. The prohibition not to expose somebody else's shame refers not to marriage but to sexual intercourse in general. The series clearly goes back to Israel's nomadic period. In fact, the nomadic family is even more clearly the source of this than of the other series (against Wagner, 40-6).

It too was handed down and finally introduced into a new framework. Such a development is seen principally in the numerous arguments that have been added and in the addition of two members which reinterpret the series. The purpose of the series now is not to ensure the well-being of the family but, as stated in the heading in v. 6, to forbid intercourse within certain degrees of relationship. In other words, the series has become

detached from its original moorings and applied quite generally. It is now part of the OT's sexual law which bears the imprint of anti-Canaanite polemic. The theological roots of the OT's particular vigilance in sexual matters are to be found in this confrontation.

Lev. 18:7ff consists of a series of basically very simple prohibitions : "You shall not bring shame." This is a form of law, of course, by no means limited to this series: one thinks primarily of the decalogue. Gerstenberger has defined it as "an unconditional, non-ritual commandment, usually formulated in the negative and as an address, and normative for daily life" (27). The term "prohibition" has become customary since Gerstenberger's work. Such forms of law are common in the OT. Gerstenberger has assembled them (28-42).

Here we intend to mention only a few examples from the BC, and in the first place Exod. 23:1-3, 6-9. There is debate as to whether these verses originally formed a ten-member unit, as J. W. McKay proposes (VI. 21, 1971, 311-25), or whether they were originally two independent series brought together because of their common theme (conduct in a court of law), cf. Gerstenberger, 83-4. For reasons of form and content, the latter seems more probable. At the beginning of the second series, in v. 6, the basic purpose of the series, which applies to the first series too, is expressed in a prohibition which functions as a heading:

You shall not deprive the poor man of justice in his suit (Exod. 23:6).

In a court of law, there must be no injustice and no one must be at a disadvantage. The socially weak were most likely to suffer in this respect. V. 9 mentions the stranger:

You shall not oppress the alien.

The alien was not to be at a disadvantage in the administration of justice. Alien does not mean foreigner, briefly sojourning in a country not his own. He was one who, because of political, domestic or other circumstances, had left his home and now lived in another community. He had no share in the land and so no legal representation of his own (cf. **THAT**, 409ff). V. 8 contemplates the basic evil of false testimony :

You shall not accept a bribe.

One further text from the BC :

You shall not wrong an alien, or be hard upon him; you were yourselves aliens in Egypt. You shall not ill-treat any widow or fatherless child (Exod. 22 :21-2).

The categories of people mentioned here-alien, widow, orphan-are, with the poor, the classic OT examples of groups which today we should call underprivileged. OT law is intended to protect them in particular, and in this it is in accord with ancient eastern law in general (cf. F. C. Fensham, *JNES* 21, 1962, 129-39 and H. Wildberger, BK, X/1, 48). The oppression forbidden by the prohibitions will have consisted principally in domestic exploitation. It was made possible by legal disadvantage.

As we can see in v. 21, reasons have occasionally been added to the prohibitions. The same thing occurs in Exod. 23:9: "for you know how it feels to be an alien; **you** were aliens yourselves in Egypt." These additions are not the work of a literary redactor. They constitute a process of living OT legal tradition which is characteristic of OT law and casts a significant light on the OT understanding of law. Such additions are absent from the purely casuistic parts of the BC. Gemser has remarked that this type of legal argumentation does not exist in ancient eastern codes. His conclusion is that "the motive clause is clearly and definitely a peculiarity of Israelite or Old Testament law" (52), (cf. also W. Beyerlin, "Die Paränese im Bundesbuch und ihre Herkunft," in *Festschr. H.-W. Hertzberg*, 1965, 9-29, and H. Rücker, *Die Begründungen der Weisungen Jahwehs im Pentateuch*, 1973).

The most important idea behind the OT additions is expressed in the two examples we have taken. They remind the people of their own historical experiences, and the motivation has a universal social character. The first-named argument is especially remarkable. It became particularly characteristic of Deuteronomy later. As the confession of redemption from Egypt by **Jahweh** can be called Israel's fundamental historical confession, the memory of their own slavery in Egypt is time and again the spur to Israel's social behaviour. That behaviour, therefore, is

based not on thoughts of universal humanity but on history. But the fact that legal principles are given reasons at all is an indication that the obedience they demand is to be an "intelligent obedience" (Beyerlin, 11). The motive deprives OT law of the authoritarian stamp which legal principles normally bear.

We cannot discuss here the decalogue, the most important of the series of apodictic laws in prohibitive form. The problems it poses are so varied that it needs special treatment. Also, the decalogue has been dealt with recently in considerable depth by a number of writers. It must therefore suffice to mention the most important of the recent works which deal with the decalogue as a whole and which have not already been referred to on the opening page of this chapter.

G. J. BOTTERWECK, "The Forum and Growth of the Decalogue," *Coneilium* 5/1 (Moral Theology, May 1975), 33-34; H. GESE, "Der Dekalog als Ganzheit betrachtet," *ZThK* 64, 1967, 121-38; E. NIELSEN, *The Ten Commandments*, 1968; A. PHILIPPS, *Ancient Israel's Criminal Law. A New Approach to the Decalogue*, 1970; H. Graf REVENTLOW, *Gebot und Predigt im Dekalog*, 1962; W. H. SCHMIDT, "Überlieferungsgeschichtliche Erwägungen zur Komposition des Dekalogs," *VTSup* 22, 1972, 201-20; J. SCHREINER, *Die zehn Gebote im Leben des Gottesvolkes*, 1966; II. SCHUNGEL-STRAUMANN, *Der Dekalog-Gottes Gebote?*, 1973; J. J. STAMM, "Dreissig Jahre Dekalogforschung," *TrR* 27, 1961, 189-239, 281-305; J. J. STAMM-M. E. ANDREW, *The Ten Commandments in Recent Research*, 1967; E. ZENGER, "Ein Wende in der Dekalogforschung? Ein Bericht," *ThRV* 64, 1968, 189-98.

The question of the context in which principles in prohibitive form arose has still not been finally answered. Fohrer writes with sobering truth: "The apodictic style-'you shall do this,' 'you shall not do that'-is as old as the first commandments and prohibitions formulated by man, and apodictic laws are among the most primitive forms of human discourse, so that it is meaningless to look for a common historical place of origin for the emergence of apodictic principles in the various ancient eastern literatures" (122f). This observation is certainly correct in prin-

ciple. But Fohrer does **not** mean that the question of the place of origin of the apodictic prohibitive is dismissed a priori as irrelevant. Other factors to be considered, apart from the bare form, are the content (cf. Herrmann, 257, with his reference to Alt) and also the compilation of principles (Fohrer, 122f). These legal principles formulate “maxims in their most condensed form” (S. Herrmann, 257), and this is something other than just “you shall do this” or “you shall not do that.”

Gerstenberger’s thesis, which interprets prohibitions in their original significance as “authoritative commands of the sib or family elders” (110), has therefore attracted considerable attention. As a direct example of this kind of competence to give orders on the part of sib elders in basically critical circumstances, he mentions Jonadab’s commands, Jer. 35:6f (110-12). This type of authoritative instruction of the sib is also found, of course, outside Israel. If the theses is valid, similar forms of discourse must be verifiable in other groupings similarly structured from the sociological point of view. Gerstenberger has succeeded in producing some, albeit relatively scanty, material of a similar kind from the ancient east.

If we bear Gerstenberger’s thesis in mind and accept that it is basically correct, we have a problem in the negative form of the so-called prohibition which occurs almost throughout the OT. Can we imagine instructions from sib elders formulated exclusively in negatives? Would not positive instructions be an essential part of them? This type of basic consideration is well in the background of Gerstenberger’s mind when he tries to demonstrate positive formulations of commands in OT legal prescriptions (43-50). The attempt is not very satisfactory. From the BC, Gerstenberger mentions only Exod. 23 :7a:

Avoid all lies.

From a purely formal point of view this is a positive formulation. It contains no negative. In content, however, it is a negative statement which can be expressed in positive form simply because the word “avoid” already includes the negative.

Gerstenberger then mentions positive commands of quite a different type. In Lev. 19:9f and Deut. 25 :13-15, positive com-

mands conclude a chain of prohibitions, and this suggests that the concluding commands are secondary. The two commandments in the decalogue which are positively formulated are also important. Gerstenberger maintains that here the positive formulation is the original one, whereas most scholars hold, not without justification, that even the commandments to observe the sabbath and honour one’s parents were originally formulated as negatives. These remarks are not intended to contest the origin of prohibitions in instruction of the sib. That must be basically correct, but the gap that separates OT prohibitions from this nomadic source is greater than Gerstenberger allows. It is precisely the almost invariably negative form of OT prohibitions which constitutes their peculiarity and reveals their specific nature (cf. G. v. Rad, *Old Testament Theology*, 1968, 195). There is no positive order here.

Confronted with these prohibitives, a person will not be invited to shape such an order. It is pre-given. It is limited and safeguarded by prohibitions. Signs are erected on the frontiers of daily life which are to be observed as long as people belong to Israel, that is to Jahweh. Negative prohibitions are not designed to elaborate an ethos, to make maximal demands to which one can work oneself up. They are intended to preserve the space granted by God, to show people the frontiers which enclose this salvific space which God has accorded them.

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