The Transformation of Torah from Scribal Advice to Law

Anne Fitzpatrick-McKinley

JOURNAL FOR THE STUDY OF THE OLD TESTAMENT
SUPPLEMENT SERIES
287

Sheffield Academic Press

This page intentionally left blank

The Transformation of Torah from Scribal Advice to Law

Anne Fitzpatrick-McKinley

Journal for the Study of the Old Testament
Supplement Series 287

For Peter, Theo, Rivkah and 'Freddie'

Published by Sheffield Academic Press Ltd
Mansion House
19 Kingfield Road
Sheffield S11 9AS
England

Printed on acid-free paper in Great Britain
by Bookcraft Ltd
Midsomer Norton, Bath

British Library Cataloguing in Publication Data

A catalogue record for this book is available
from the British Library

ISBN 1-85075-953-7

CONTENTS

This page intentionally left blank

ACKNOWLEDGMENTS

This study was originally submitted as a PhD thesis in the Departmen of Hebrew, Biblical and Theological Studies, Trinity College Dublin, i 1993.

Very special thanks are due to my supervisor, Professor A.D.H Mayes, for his expert advice, encouragement and support.

I would also like to thank the staff of the Department of Hebrew, Bib lical and Theological Studies: Professor S. Freyne, Dr W. Jeanrond an Professor J.R. Bartlett.

Finally, very special thanks to Catherine Maunsell and to Peter.

ABBREVIATIONS

AHw	Wolfram von Soden, *Akkadisches Handwörterbuch* (Wiesbaden: Harrassowitz, 1959–81)
ANET	James B. Pritchard (ed.), *Ancient Near Eastern Texts Relating to the Old Testament* (Princeton, NJ: Princeton University Press, 3rd edn, 1969)
AnOr	Analecta orientalia
ArOr	*Archiv orientální*
BWANT	Beiträge zur Wissenschaft vom Alten und Neuen Testament
BWL	W.G. Lambert, *Babylonian Wisdom Literature* (Oxford: Oxford University Press, 1959)
BZAW	Beihefte zur *ZAW*
CAD	Ignace I. Gelb *et al.* (eds.), *The Assyrian Dictionary of the Oriental Institute of the University of Chicago* (Chicago: Oriental Institute, 1964–)
CCT	*Cuneiform Texts from Cappadocian Tablets in the British Museum* (London: British Museum Press, 1921–56)
CRAIBL	*Comptes rendus de l'Académie des inscriptions et belles-lettres*
CT	*Cuneiform Texts from Babylonian Tablets in the British Museum* (London: British Museum Press, 1896)
FRLANT	Forschungen zur Religion und Literatur des Alten und Neuen Testaments
JAOSSup	*Journal of the American Oriental Society*, Supplements
JBL	*Journal of Biblical Literature*
JCS	*Journal of Cuneiform Studies*
JEOL	*Jaarbericht ... ex oriente lux*
JNES	*Journal of Near Eastern Studies*
JSOT	*Journal for the Study of the Old Testament*
JSOTSup	*Journal for the Study of the Old Testament*, Supplement Series
KAI	H. Donner and W. Röllig, *Kanaanäische und aramäische Inschriften* (3 vols.; Wiesbaden: Harrassowitz, 1962–64)
KTS	J. Lewy, *Keilschrifttexte in den Antiken-Museen zu Stambul: Die altassyrischen Texte vom Kültepe* (Constantinople, 1926)
Ludlul	*Ludlul bel nemqi* (see *Anatolian Studies* 4 [1954], pp. 65-74)
MDP	*Mémoires de la Délégation en Perse*
NCB	New Century Bible
NTS	*New Testament Studies*
OBO	Orbis biblicus et orientalis
OTL	Old Testament Library
OTS	*Oudtestamentische Studiën*

RB	*Revue biblique*
RIDA	*Revue international des droits de l'antiquité*
SAIW	J. Crenshaw (ed.), *Studies in Ancient Israelite Wisdom* (New York: The Library of Biblical Studies, 1976)
SAT	*Die Schriften des Alten Testaments*
SBL	Society of Biblical Literature
SBS	Stuttgarter Bibelstudien
SJT	*Scottish Journal of Theology*
Surpu	E. Reiner, *Surpu: A Collection of Sumerian and Akkadian Incantations* (Archiv für Orientforschung, 11; Graz, 1958)
TDNT	Gerhard Kittel and Gerhard Friedrich (eds.), *Theological Dictionary of the New Testament* (trans. Geoffrey W. Bromiley; 10 vols.; Grand Rapids: Eerdmans, 1964–)
VT	*Vetus Testamentum*
VTSup	*Vetus Testamentum*, Supplements
WMANT	Wissenschaftliche Monographien zum Alten und Neuen Testament
ZA	*Zeitschrift für Assyriologie*
ZTK	*Zeitschrift für Theologie und Kirche*

This page intentionally left blank

INTRODUCTION

In a recent study Otto has argued for the development of Israelite law from a secular basis to a foundation in the will of Yhwh (Otto 1988). The impetus behind this process is to be seen as an increase in social differentiation brought about by conditions of the monarchic period. Eventually the unity of society could no longer stand as the basis for the observance of law as it had done in the pre-monarchic and early monarchic periods. In sum, a crisis in legal legitimation, brought about by the increased stratification of Israelite society, lies behind the grounding of the law in the will of Yhwh.

This study, firmly rooted in a redactional history of the texts, has far-reaching consequences for the study of Israelite law. This is so above all in its contention that the process is one of a development from secular to sacral law. Such a view is soundly supported by the texts and by other studies.[1]

Despite the detailed examination and analysis of the texts in Otto's work, there are two questions of fundamental importance to be raised. The first concerns the correlative relationship which Otto assumes to exist between law and society. The lawcodes are seen to originate as a reflection of society.[2] The second is an even more fundamental question relating not just to Otto's study, but to our understanding of ancient lawcodes in general. It concerns the classification of the Book of the Covenant as a lawcode intended to legislate for monarchic Israel, and functioning therefore to regulate society.

1. *The Question of a Correlative Relationship between Law and Society*

According to Otto the history of the Book of the Covenant reflects social developments in which monarchic Israel became a hierarchic

1. Cf. Mayes 1981.

2. In Chapter 1 below a similar view of the relationship between law and society is shown to lie behind the studies of Schwienhorst-Schönberger (1990), Halbe (1975) and Crüsemann (1988).

state. Because of the introduction of this type of social organization, issues and problems could no longer be dealt with adequately by the old casuistic conflict law. This casuistic law had functioned in pre-monarchic and early monarchic Israel less as a means of social control than as a means of dispute settlement. The function of this law was to restore relations to an earlier state. Thus, it had an integrative and normalizing effect rather than a 'coercive' effect. Later in the monarchy a sanction is introduced into this old casuistic law, and this law is then set alongside apodictic law, a type of law which had originally been set in the context of familial relationships.

These developments in the legal sphere are directly reflective of developments in ancient Israel's social system. With the increased centralization of the monarchic period the administration of law became a way of maintaining the hierarchic state. The content of legislation is increasingly concerned with the needs of the property owning classes and, as a consequence of these needs, there is an emphasis on laws concerned with the protection of private property and a development from a concern with reparation to a concern with punishment. Otto thus considers crime to be a phenomenon which is the creation of special interest groups (in this case the propertied classes of monarchic Israel) who, with their definition of rectitude, create the laws of society. With the increased social heterogeneity and its accompanying divisions of society into rich and poor, the unity which had once served to ensure obedience to the law was severely undermined. This led to the development, in the first place, of an emphasis on laws designed to protect the marginalized in society; and in the second place, to the placement of those laws in a theological context where they become law of Yhwh.

What is the relationship between law and society underlying this view? If developments in Israelite law are the direct result of changes in Israel's social structure, then it must be concluded that Otto assumes law and society to exist in a correlative relationship. Hence, law may be seen to develop parallel to and in step with current social developments, social development providing the stimulus to development in the legal sphere. This is so insofar as Otto maintains that the legal development which places all law under Yhwh's will and the increased emphasis on social protection laws are both to be seen as the result of a social crisis in monarchic Israel. An alteration in the legal sphere successfully meets the needs of society. Hence, a study of law will reflect the problems and needs of the society regulated by that law.

This understanding of the relationship between law and society has long persisted in legal sociology and is evident in numerous works on legal change in both contemporary and ancient societies.[3] Recently, however, this assumption of the correlativity of law and society has been questioned.[4] Watson, using examples from diverse societies, including early Roman and ancient Near Eastern societies, convincingly argues that this view may no longer be upheld.[5] Rather, argues Watson, law, even customary law of simple societies, is to be seen as a structurally independent organization which develops under its own momentum, a momentum which is to be described as the general legal tradition available to the legal élites who are responsible for expanding, copying, editing and commenting on law (Watson 1985: Chs. 1–3). Although Watson seems at times to be speaking of an independence which is virtually absolute, he elsewhere points to some convergence of law and society. If Watson's findings are to be applied successfully, these points of convergence must be emphasized in order to establish the degree of independence involved. In the first place, an obvious point, legal institutions will not exist without corresponding social institutions. Hence, generally speaking, laws on slavery indicate the existence of slavery in society (Watson 1985: Ch. 1). Watson's point, however, would seem to be that the slavery laws in themselves tell us very little about how slavery actually operated in everyday life. What Watson overlooks is that in written systems of law, laws which have long become obsolete will not

3. Cf. Gagarin 1986. This homogeneous relationship between law and society is the result of the so-called *Volksrecht* theory. The ideas embodied in this theory are well illustrated by the following quote from the early theorist Savigny:

'Positive law lives in the common consciousness of the people, and therefore we have also to call it the law of the people (*Volksrecht*). But this should not be so understood as if it were the individual members of the people through whose arbitrary will the law is brought forth ... Rather it is the Spirit of the People (*Volksgeist*), living and working in all the individuals together, which creates the positive law, which is therefore, not by accident but necessarily, one and the same law to the consciousness of each individual' (cited in Watson 1977: 1). For a more contemporary application of the *Volksrecht* theory cf. Fallers 1969: 315.

4. For similar results arrived at in a different way cf. Kovacs 1976. In this excellent paper Kovacs questions the existence of a direct correlation between social setting and literary expression. He points out that such a correlation is often assumed by biblical scholars attempting to determine the *Sitz im Leben* of a particular text or tradition (see below, Chapter 3, for further discussion of Kovacs's objections to this approach).

5. Watson 1985; cf. Goody 1986: 131, 143.

be removed from the statute books. So, for example, in England a statute which prescribes the death penalty for cursing God and King has not been removed although it is clearly anachronistic. Goody would explain the persistence of this obsolete law by the law's general characteristics as text; one of these characteristics is rigidity.[6] Moreover, practices which operate in society on an everyday level are often not found reflected in legislation. To illustrate: coinage was not introduced in Rome until 275 BCE. Until then a barter system must have been the most common type of commercial transaction. Yet barter as a legal institution is centuries later than the contract of sale and was never fully accepted into the Roman system of contracts. These examples illustrate that a direct reading of the laws as reflective of social circumstances could be misleading.

The lack of direct relation between law and society arises because of the dependency of the law on the legal tradition rather than on social conditions in general. Hence, although legal institutions may emerge because of societal needs, they develop at a pace and with characteristics dictated by legal reasoning (Watson 1985: Chs. 1–3, 115-19). If this is so, then developments in Israelite society, such as an increase in social differentiation, would not have made as extensive an impact on legal development as Otto has proposed. The development from a secular grounding of law to a sacral grounding in the will of Yhwh may not be seen as the direct result of social changes. Other factors, notably the contribution from the legal tradition must be given at the very least equal consideration.[7] This issue becomes even more important when one takes into account the lack of information for social conditions and development in the monarchic period. Do for instance the social protection laws really reflect an increase in social stratification and a resultant social and ethical crisis? If the existence of such law does reflect such a crisis, then we would have to assume a similar crisis to lie behind other ancient lawcodes, most of which also include an emphasis

6. Cf. Goody 1986: 136-40. The fixity of texts means that ways of altering the law must be invented. This may be achieved through the application of legal fiction, equity or legislation. But the rigidity which is achieved through writing means that these procedures have to be applied in ways which do not undermine the earlier laws. So, although writing increases the amount of information in store and enhances clarity, the problem of erasure is created. Furthermore, written law is far less flexible than oral law.

7. See further below, Chapter 2.

on the protection of the weak in society.[8] Yet none of the scholarly commentaries on these extant codes has interpreted these laws in this way. Why should this be so? Is it perhaps due to the tendency of biblical scholars to view Israel's pre-monarchic history rather idealistically? Pre-monarchic Israel represents an egalitarian ideal, an ideal which is later threatened by the imposition of the monarchic form onto a segmentary structure. The monarchy is seen as introducing social divisions which in essence are 'non-Israelite' and fundamentally opposed to the true nature of Israel which is egalitarian. The laws of the biblical codes are then seen as reflective of the development of Israelite society viewed in this rather idealistic way. It is this view that Israel's law reflects its social development which will be challenged in this study.

2. *The Influence of Writing on Law*

The issue raised by Watson is echoed in a study by Goody.[9] Goody argues that early legal codes, such as the Twelve Tables, had, initially at least, little or no effect on social norms and legal practice.[10] While arguing for a minimum efficacy of these early codes in general, Goody nonetheless acknowledges that these 'codes' will eventually influence social norms and legal procedure. The process is slow and early on, perhaps for as long as centuries, influence is negligible. In the main, argues Goody, this is to be explained by the aims of the codifiers, aims which did not include the creation of a complete digest of laws which would operate on a daily basis in social life. The process whereby these 'codes' come to influence social norms takes place only much later. It is a process which is the result of the autonomy achieved once the laws have been given written form. It is the mechanism of writing and its virtually immediate effect of decontextualization that over time open these texts (unlike speech) to reformulation, critical attention, reflection

8. Cf. Code of Hammurabi (*CH*) Prologue i, 30ff.; 113; 117; 137; 171; 175; 176; 190; 191; 280; Epilogue xxiv, 10, 25, 60; Lip. Ish. 14, etc..

9. Goody 1986 and cf. 1990: 409-15.

10. Cf. MacCormack 1979: 173-87. Discussion here of the effects of law on sixth-century BCE Roman society (Twelve Tables) corroborates Goody's findings. Despite the developed political organization with central government and writing, MacCormack doubts any extensive use of statements of written law at this early stage.

and commentary. In the end they result in the autonomy of the legal-scribal organization itself.[11]

The question of the impact of writing on law is a question of fundamental significance and will be returned to in greater depth later in this study.[12] For the present it may be noted that the most far-reaching effect achieved is the autonomy of the text. This *partial* autonomy, variable in different societies, eventually gives rise to the creation of expert literary classes (scribes, etc.) and ultimately to the autonomy of the organization itself (Goody 1986: 172).[13]

3. *The Classification of the Book of the Covenant as a Lawcode*

Watson's findings illustrate that the view that law develops as a response to social needs and desires may not be as accurate as Otto assumes. Goody and others have argued for a minimal effect of these early codes on social norms and judicial procedures. Others, however, have made even more radical suggestions going so far as to dispute the description 'lawcode' for these early texts. An examination of the Code of Hammurabi led Bottéro to reclassify this text as a 'list' of judgments rather than as a lawcode (Bottéro 1982), for once law is defined as rules binding on the population, imposed by a legitimate authority by which all members of society are bound (Bottéro 1982: 416), and lawcodes defined as the complete collection of law which regulates a country, the totality of its legislation (Bottéro 1982: 414), one cannot find the necessary characteristics or evidence which would merit the designation 'lawcode' for Hammurabi's text. The text is incomplete, had no legislative value and was recopied unchanged for various reasons, which were more than likely educational.[14] Furthermore, the statements of the

11. Cf. Ricoeur 1976. Ricoeur argues similarly for an autonomy of the text which is achieved by virtue of its 'textuality', namely by virtue of the application of the mechanism of writing. To explain this autonomy, Ricoeur speaks of the distanciation of the text. In the first place, the text is 'distanced' from the author, whose original intentions quickly become obscured, and, in the second place, the text is 'distanced' from its original audience and hence from its original social setting. See below, Chapter 2.

12. See below, Chapters 2, 5.

13. See below, Chapter 5.

14. Goody points out that some 'codes' are more appropriately designated 'literary exercises', used to teach reading and writing and as a means of general education (Goody 1986: 135). Dixon has pointed to a 'biblical' rather than a legal

'code' are neither general nor universal but derive from specific situations. They contain numerous contradictions.[15] What makes the Code of Hammurabi not a code is primarily its content, its manifest inefficiencies, its inadequacies and its contradictions (Bottéro 1982: 416). Further doubt is raised about its status as a code by the lack of any reference to the 'code' in texts which deal with legal matters deriving from the same period.[16]

But what about the form of the 'code', the uninterrupted succession of conditional propositions introduced by 'if' and formed of a protasis and apodosis, a schema usually taken to be a characteristic of lawcodes exclusively? Bottéro, however, has pointed to the existence of the conditional schema in other Mesopotamian texts. It is a general feature of the 'scientific list' genre. More particularly the Mesopotamian medical list, generally classified as belonging to this 'scientific list' genre, is pointed to.[17] This treatise on medicine, like the so-called 'Code' of Hammurabi, is composed of an uninterrupted succession of conditional propositions introduced by 'if' and formed of a protasis and apodosis. So the form of the medical treatise illustrates that this conditional schema is not sufficient to designate a text as 'lawcode'. It may well have represented for the ancient Mesopotamians the proper way to frame and present their rational and scientific knowledge (Bottéro 1982: 427). Thus, in this form, knowledge about medicine, mathematics, divination, and it would seem law, was collected. Hence, concludes Bottéro, the Code of Hammurabi is a list of judgments collected not in order to initiate a legal reform at the beginning of a king's reign[18] nor to influence social norms or judicial procedure. Rather, the list was intended to illustrate the equity of a king's reign. It was a piece of political propaganda recopied by the ancients[19] as an exemplary piece which embodied the ideal of nobility and equity (Bottéro 1982: 444).

Moreover, the prologue and epilogue are essential to the real meaning

function of the Twelve Tables (Dixon 1985: 520-22).

15. Bottéro 1982: 416, 417, 419-22.

16. See further below, Chapter 3, for full discussion of Bottéro's findings.

17. For this list see Labat 1951.

18. Internal evidence indicates that the Code was not completed at the beginning of Hammurabi's reign. The Code speaks of the take-over of the city of Eshunna and this did not in fact take place until the 38th year of Hammurabi's reign (Bottéro 1982: 420).

19. There are many copies of the Code of Hammurabi deriving from a span of about 450 years (Bottéro 1982: 410).

of the work. It is here that the reason behind the listing of judgments may be discerned. In the prologue and epilogue Hammurabi claims military and political successes, but as a counterbalance to this he lists the equitable judgments which furnish the proof of the wisdom and justice of his administration, judgment and government (Bottéro 1982: 423). Our so-called 'lawcode' thus functions as the most durable monument to Hammurabi's merit and glory.[20] What regulated Mesopotamian social life were the oral laws not the Code of Hammurabi (Bottéro 1982: 441). In fact law in the way in which it is defined in Bottéro's study, as rules which are binding on the population and which are backed up by legitimate authority, is not found until the Greeks.[21] The scientific treatises of the ancients are, however, the forerunners of Greek legislation realizing as they did the importance of observation, criticism and order (Bottéro 1982: 427)

At this point it will have become obvious that Bottéro's analysis of the Code of Hammurabi must prompt us to question the description 'lawcode' for the Book of the Covenant. Clearly the prologue and epilogue to the Book of the Covenant have undergone a more complex history than those of Hammurabi's Code. Yet should the possibility of reclassifying it as a 'list' of judgments be considered? Does it also contain internal contradictions, inadequacies and inefficiencies? Furthermore, is there any extant reference to the Book of the Covenant in legal contracts, texts and stories in the prophets or other pre-deuteronomic material which might indicate its use for practical legal purposes?[22] Moreover, Goody has insisted that law is characterized by 'a form of social control embedded in one of the specialized 'great organi-

20. Cf. Finkelstein 1961. Finkelstein concludes that primarily these codes were 'Royal apologia and testaments' (1961: 103).

21. The argument against this view is that all societies, especially centralized monarchic societies, do need some definitive way of structuring and regulating social life. In relation to Israelite society, Weingreen has argued that a developing society needs written law and that a corpus evolved in the monarchic period (Weingreen 1976). Such a view, however, which argues for the necessity of a written code is the result of a bias which tends to elevate the written over against the oral. As Goody has pointed out, unwritten does not mean unknown. Oral law functions quite efficiently in society and may even raise less difficulties for legal specialists (judges, wise men, etc.) because of its flexibility and its ability to adapt to changing circumstances (Goody 1986).

22. See below, Chapter 3, for further discussion of the contradictory ways in which this absence of extant reference has been explained.

zations' and operating through the medium of courts, constables and codes' (Goody 1986: 134). Is there any conclusive evidence for the existence of this medium in monarchic Israel? Unfortunately, information which would allow us to arrive at any conclusive answer to this question is lacking. The argument of this study is that, while formal means of dispute settlement most likely did operate in pre-exilic Israel, there are no indications that it was the legal texts of the Bible which formed the literary basis of these means. On the contrary, as shall be shown in Chapter 3 of this study, indications are that the 'legal' texts of the Old Testament were not in fact applied in Israel's law courts.

4. *Summary*

To summarize the arguments so far:

1. The relationship between law and society is not one of correlativity. Legal development does not reflect social development; nor, as a corollary, does social development reflect legal development.
2. Law is largely a structurally autonomous organization; hence the direct link between a society and its law is tenuous (Watson 1985). Watson, however, has not sufficiently emphasized that this autonomy is variable in degree and dependent on specific circumstances (Goody 1986).
3. This autonomy is achieved through the very codification of law, through the mechanism of writing (Goody 1986, 1990; Ricoeur 1976).
4. Finally, the form, genre and ethos of the text will depend upon and be shaped by the general legal tradition available to its codifiers and commentators. This is so whether or not this tradition is 'borrowed' from outside the codifying society or is a development from within (Watson 1974).[23]

These conclusions invite an examination of ancient Israel's law from an alternative angle to that proposed by Otto.

23. On all of these four points see further below Chapter 2.

5. *The Contribution of Inner-Scribal Exegesis to the Development of Israelite Law*

Yet to return to Otto's contention that the development of Israelite law is one of a process not of secularization but of sacralization, it must be admitted that his close reading of the texts generally supports this view.[24] At the same time, findings so far indicate that the route to understanding this progression may not proceed from an analysis of Israel's legal texts with the aim of establishing how these legal texts reflect social development. Furthermore, as will be illustrated in later discussion of the studies of Halbe (1975), Schwienhorst-Schönberger (1990) and Crüsemann (1988), neither may we proceed from an examination of social development to an analysis of legal texts in order to establish how social life is reflected in these texts.[25] Given our conclusion that a distance, admittedly variable in degree, exists between a society and its law by virtue of the law being in a written form, then indications are that attempts to establish the impetus behind this development from a secular to sacral basis for law should proceed from an alternative direction.

Thus, it will be shown in Chapter 5 of this study that the development which saw a shift from the view of the king as the authoritative source behind Israel's 'lawcodes' to the view that Yhwh alone was the sole source of Israel's law was primarily the result of scribal exegesis of Israel's literary, 'legal' traditions. Moreover, it will be shown that this exegetical work arose, for the most part, out of 'inner scribal processes of textual transmission, legalistic musings and generalizations and diverse historiographical imaginings and biases'.[26] This viewpoint stands, of course, in sharp contrast to that of Otto who views developments in Israelite law as primarily the result of social and economic factors.

Law and culture in general develop through a system of borrowing or transplant; thus scribes in Israel will have reflected on the legal material available to them from neighbouring cultures.[27] But what was the nature

24. Some doubt must be expressed here with regard to Otto's absolute separation of the secular from the sacral. As Mayes (1989: 65-67) has pointed out, however, this separation does not affect the essentials of Otto's argument.

25. See below, Chapters 1, 2.

26. Fishbane 1985: 16; cf. Goody 1986.

27. See below, Chapters 2 and 4, for fuller discussion.

of this material? Chapter 4 of this study explores this question, concluding that the biblical concept of torah, the Babylonian concept of *kittum* and the ancient Indian concept of dharma may not be properly understood on the basis of the legislative model after all. They are not law properly speaking but constitute the moral advice of scribes. This advice was backed up not by judicial means proper (namely, by some sort of policing force, courts and judges) but by the authority of the gods. The background to this scribal advice is to be found, not in the law court, but in the general Near Eastern wisdom tradition.

6. *The Transformation of Scribal Advice to Law*

Given that the 'legal' texts of the Old Testament constituted advice which was based on the wisdom-moral teachings of a scribal élite (and not law which was to be applied in courts)[28] how can the phenomenon which took place probably during the time of Ezra (at the earliest) and which demanded that reality adjust to the requirements of a written corpus be explained? Wisdom-rules, once put forward as advice, are now put forward as divine demand and command. As yet, however, the privileged status claimed for the wisdom-torah[29] rules is non-legal; it remains moral and sacral.[30] Ezra and his scribes are not concerned with matters of law properly speaking. Rather they are concerned with matters of religious duty, purification and expiation. Indeed, not until the identification of torah with *nomos* (law), in the Hellenistic period, may we speak of torah as law in anything like our modern sense of the term.[31] Yet there is no question that by the time of the formation of the Sanhedrin,[32] rabbinic Judaism understood the wisdom-moral advice of earlier scribes as law to be applied in everyday life. In this study the process behind this development may be outlined briefly as follows.

Torah began not as legislation but as moral teaching of scribes. Its

28. See below, Chapters 3 and 4.

29. For this association, see Chapter 4 below.

30. See below, Chapters 4 and 5.

31. Cf. Jackson 1975.

32. Hengel (1974) sees the Sanhedrin as developing in the Ptolemaic period. While its origins may go back to Persian times, 'where we find the nobility, the heads of large families or even the elders as an influential group' (1974: 25), the Sanhedrin did not form a strictly demarcated nucleus in the Persian period. Its boundaries did not become determinate until at least the Ptolemaic era (Hengel 1974: 25; and cf. Lohse 1971).

association with divine authority was present from the very beginning. Through the association of this moral teaching with royal authority and with the material of the royal edicts the authority of torah was enhanced. This association of torah with the royal court represents the beginnings of the development which interpreted the moral advice of scribes as legislation. The process continues during the centuries of rabbinic exegesis of the torah texts when through exegesis the authority of these teachings is enhanced to such a degree that they become not just morally but legally binding on the covenant communities.

To turn first, however, to the problem of the relationship between law and society.

Chapter 1

SOME RECENT APPROACHES TO OLD TESTAMENT LAW

In this section some recent approaches to Old Testament law are outlined. The intention is not to criticize these approaches on the basis of textual analysis, but to uncover the sociology of law which has informed them. The relationship between Old Testament law and society has in general been understood in a way which is reflected in the studies of Halbe (1975), Schwienhorst-Schönberger (1990), Otto (1988) and Crüsemann (1988). At the basis of this assumption lies the understanding of law as a rational response to social change. Common aims and assumptions of these writers may be outlined as follows:

1. An attempt is made to establish the relationship between profane and sacral law in the Book of the Covenant.
2. The development of the Book of the Covenant is viewed as a response to socio-economic change. An underlying assumption is that law is always a rational response to social need.
3. The studies develop within a Weberian model of social change.
4. Within varying degrees each study assumes that law reflects the *Volksgeist*, that is the underlying ethical, social and philosophical norms of the society at large.

Finally, Patrick's study has been selected because of the shift it reflects away from author- or redactor-centred approaches to approaches which attempt to preserve the integrity of the text; in his terms, to allow 'the text to be the best text it can be' (Patrick 1989b: 29). By adopting this stance towards the text, along with a hermeneutic which is informed by certain legal principles, a coherent legal system emerges from biblical law. Furthermore, this coherent legal system is reflective to a very large degree of the ethos and moral systems of the society which it regulated. Hence, Patrick assumes the correctness of the *Volksrecht* theory.

Patrick's approach, and that of his fellow contributors to the *Semeia* volume, the central concern of which is to develop a methodology for the study of biblical law as a humanities, reflects a dissatisfaction with traditional redactional methods. As will be illustrated, however, it incorporates a simplistic understanding of the relationship between law and social norms and ethos, as well as failing to give sufficient weight to the ideological aspect of all texts.

1. *Halbe*

The focus of Halbe's study is the so-called 'cultic decalogue' (Exod. 34.10-26). Halbe aims to establish the origin and the tradition-history of the various functions of this collection.

From a thorough literary-critical examination of the text of the cultic decalogue, it is concluded that the collection is pre-deuteronomic; that it was conceived from the first as *Privilegrecht* and that its original setting was in the cult. Basically the text is a unity (Halbe 1975: 107-46). Its oral history may be traced back to pre-settlement times. Verses 10aβb-11 were originally orally promulgated as speech of Yhwh reenacted in the cult and framed by the concept of covenant (Halbe 1975: 230-53, 316-40).

The *Hauptgebot*, or central commandment, is contained in vv. 11b-15a which prohibit, as the centre of the collection, interaction with the inhabitants of the land (Halbe 1975: 96-97). The danger of assimilation, which arose once Yhwh's community had entered the land, lies behind this commandment (Halbe 1975: 147).

Verses 15b-16 are a secondary interpretation of 15a and are set against the background of family-clan based organization. They serve as a warning to Yhwh's community about the dangers of sexual promiscuity in the cults of the Baalim (Halbe 1975: 147-60).

Hence, the earliest form of the *Privilegrecht* reflects the problems and dangers of the community of Yhwh when it comes to settle in the land. It is thus from the very beginning constitutive of Israelite identity, values and morals. This early date for the *Privilegrecht* is supported by reference to two other pre-monarchic texts. The first, Judg. 2.1-5, which has its roots in the pre-monarchic period, has been influenced in a fundamental way by the cultic decalogue. Judges 2.1-5 presupposes the entire unit of the *Privilegrecht* with its individual stipulations (Halbe 1975: 346-91). This may be seen through a comparison of Judg. 2.1-5 with Exod. 34.10-26.

לא אגרש אותם מפניכם	Judg. 2.3aβ
אגרש ... מפניך	Exod. 34.11b
ואתם לא תכרתו ברית לישבי הארץ הזאת	Judg. 2.2aα
פן תכרת ברית ליושב	Exod. 34.12a.15a
	(cf. Halbe 1975: 363-64)

The second text, Josh. 9.3-15a, also presupposes the cultic decalogue. Behind Joshua 9 lies the prohibition of making a covenant with the inhabitants of the land (Halbe 1975: 341-46). While there is no evidence to indicate a direct dependency of Joshua 9 on Exodus 34, there is nothing to indicate the contrary and a basic influence may be assumed (Halbe 1975: 346).

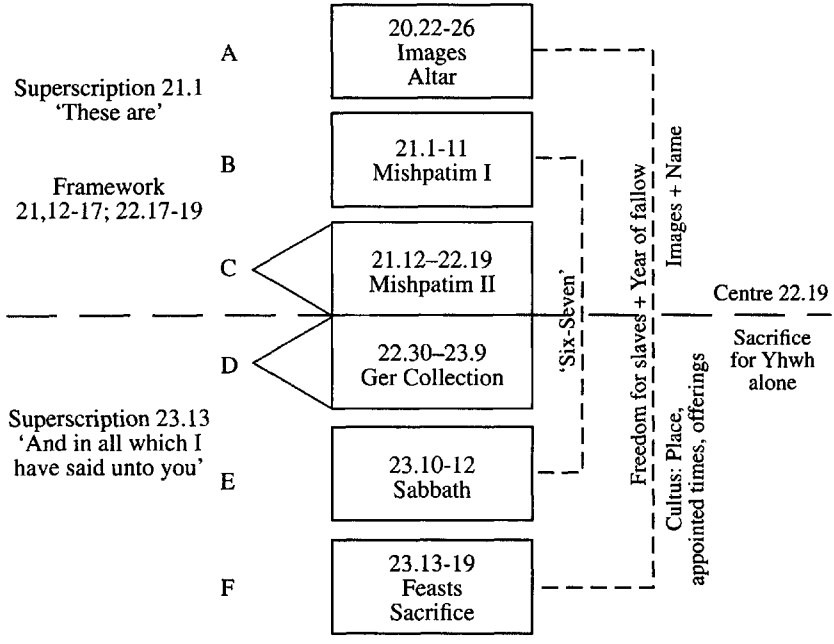
Both Judges 2 and Joshua 9 were transmitted in Benjamite-Ephraimite circles. Both have roots in the pre-monarchic period and are dependent upon and in full agreement with the stipulations of Exod. 34.10-26. Thus, the antiquity of the cultic decalogue is demonstrated. Moreover, it is likely that the cultic decalogue was transmitted in early times within Benjamite-Ephraimite circles and within a cultic context. The earliest date for its origin is the completion of the settlement; the latest the end of the period of the judges.[1]

The hand of the Yahwist may be seen in Exod. 19.9a, 10-11a, 12-13a, 14-16aα, 18 and 34.4aα, 5, 8, 10-26, 27 (Halbe 1975: 302-15). Working against the backdrop of the Davidic period the Yahwist adapted the cultic decalogue, so central to Israelite identity from early times, to the needs of his day. David's expansionist policy, which had resulted in the incorporation of foreign peoples into the Israelite Empire, renewed the dangers of assimilation. Thus, the cultic decalogue regained significance. Making the cultic decalogue central to his kerygma, the Yahwist emphasizes Israel's separateness from the earlier inhabitants of the land warning the people not to enter into a covenant with these peoples lest they be led into worship of foreign deities (Halbe 1975: 307-10, 315).

Hence, according to Halbe, the cultic decalogue, which was basic to Israelite faith and identity from early times, is an ancient pre-monarchic cultic tradition. Not only has it influenced such texts as Joshua 9 and Judges 2, as well as playing a vital role in the kerygma of the Yahwist, it has also shaped the Book of the Covenant.

1. Halbe 1975: 510; cf. 341-46, 363-64.

a. *The Influence of Exodus 34.10-26 on the Book of the Covenant*
The focal point of the Book of the Covenant is Exod. 22.19 (English versions [EVV] 22.20) which emphasizes sacrifice for Yhwh alone. The centrality of this law within the collection reveals the dependency of the Book of the Covenant upon Exodus 34 (Halbe 1975: 391-423). The structure of the book may be outlined as follows:



The structure of the collection shows that it is divided into six sections which are complete in themselves with 21.12–22.19 [EVV 22.20] (C) and 22.20 [EVV 22.21]–23.9 (D) standing at the centre (Halbe 1975: 421). This central section is surrounded by two further collections (21.1-11), which deals with manumission of slaves in the sabbatical year, and 23.10-12 with a corresponding emphasis on the observance of the year of fallow. In both of these sections thematic unity is achieved by the catchwords: six—seven. In A/F thematic unity is achieved through the alternation of שֵׁם הזכיר (20.24b; 23.13) and through (מזבח זבח) (20.24a; 23.18a).

Halbe (1975: 438; cf. 436) also uncovers a *Grundzusammenhang*, or original core, to the Book of the Covenant which is structured as follows:

20.22-26

22.20aα.22b.24-30 [EVV 22.21aα.23b.25-31]
23.1-7(8), 10-12a.13

23.14-19

Within this text Halbe uncovers a layer which he identifies as *A Schicht*. It is composed of Exod. 20.24aα, 26a + 22.27-29 [EVV 22.28-30] + 23.10-12a + 23.14-19 (Halbe 1975: 448-51). The layer is related to the cultic decalogue; for example, there is a parallel of terms: (23.15b parallel to 34.20bβ), (23.19a.b parallel to 34.26a.b); or a shortening of formula (23.15a, 17 is a shortening of 34.18, 23ff.); or modification of expression (23.12a, 16a.b., 18a, b is a modification of 34.21a, 22.a, b, 25: a, b).

The so-called *A Schicht* then underwent further development: the first designated *Ausbau I* is found in Exod. 22.20aα, 22b, 24-26, 30 [EVV 22.21aα, 23b, 25-27, 31]; 23.1-7(8), 13.[2] Through this first expansion the old protection laws become part of the *Privilegrecht* of Yhwh. The background to this layer is the loss of Israelite identity in the monarchic period which brought about not just social differentiation, but also the threat of assimilation. Understood against the principle of Yhwh's *Privilegrecht*, social protection laws gained the emphasis which was required if the people of Yhwh were to survive social differentiation and religious assimilation (Halbe 1975: 457). Through the work of the writer behind *Ausbau I* (the first expansion) the Book of the Covenant became an authoritative document which was recited in the cult (Halbe 1975: 455).

The second stage in the development of the book is designated by Halbe *Ausbau II* (second expansion). Through the redactor responsible for this layer the casuistic parts of the Book of the Covenant (Exod. 21.1–22.19 [EVV 22.20]) were integrated into the Book of the Covenant structured around the *Privilegrecht*.[3] Through such a process the Book

2. Cf. Halbe 1975: 451, 459, 500.

3. Childs similarly views the process as one wherein 'the fusion of the two halves of the Book of the Covenant occured at a literary stage. The משפטים were joined to the cultic laws which already had received a place within the Sinai narrative' (Childs 1974: 458); and cf. also Beyerlin 1965. Otto views the process to have occurred in the opposite direction, namely an incorporation of sacral law into an already existing body of profane law (Otto 1988) and cf. also Schwienhorst-Schönberger (1990).

of the Covenant became a book of law for the community which was personally bound to Yhwh (Halbe 1975: 477; cf. 459-82).

Hence, it was through the influence of the cultic decalogue that the Book of the Covenant was created. This concern with the *Privilegrecht* of Yhwh remains central and it is for this reason that Exod. 22.19 (EVV 22.20) stands at the centre of the collection; the entire collection is built upon this central verse.

Thus, for Halbe the oldest covenant legal text is Exod. 34.10-26. It has had a basic influence on passages such as Joshua 9 and Judges 2, but more importantly for our concerns on the Book of the Covenant. The basis of the Book of the Covenant (*A-Schicht*) contained only this type of cultic law framed by the concept of covenant. The casuistic laws were subsequently inserted into this framework.[4]

While the influence of the cultic decalogue may have waned with the increasing encroachments of the monarchic form and their resultant social crisis, it once again gained renewed significance from the end of the eighth century. A revival of the values of the *Privilegrecht* was seen by the Deuteronomic writers as the only hope for an Israel suffering the repercussions of the transition from *Gemeinschaft* (community) to *Gesellschaft* (society) (Halbe 1975: 507). It is these old values and the Book of the Covenant itself which stand as the basis of opposition to the institution of monarchy and the crisis which it had created (Halbe 1975: 507, 522-26).

b. *Summary*

Thus, Halbe views the development of Israelite law, and particularly the way in which sacral law comes to incorporate profane law, against the background of historical and socio-economic developments in monarchic Israel. The history of the cultic decalogue and the fundamental influence which it has had on the formation of the Book of the Covenant reflects social developments in which the once egalitarian, covenant community of Yhwh became a hierarchic state. Transition to statehood brought two major changes which were at basic variance with the values and ideals of the earlier covenant community: the first was the incorporation of foreign peoples into the Israelite empire which led to the threat of religious assimilation; the second was an increase in social differentiation. A combination of these factors brought about a crisis of identity for the covenant people of Yhwh, a crisis which

4. And cf. also Beyerlin 1965.

threatened the very sense of community so essential to its continuance (Halbe 1975: 505). The creation of the Book of the Covenant, the ideals of which were based on the ancient values of the cultic decalogue, stood as a response to this crisis.

Halbe's understanding of social change stands clearly in the tradition of Weberian sociology. Weber views the development of society in typological form as a development from clan to tribal to patrimonial to patriarchal to feudal and finally to bourgeois society.[5] Transition from primitive types to more complex types, a transition for example from tribal to monarchic Israel, results in serious and dramatic social consequences. The most far-reaching effect is the loss of intimacy which occurs in the transition from *Gemeinschaft* (community) to *Gesellschaft* (society). For Weber social differentiation appears as the division of labour and the development of classes and their ideologies based on conflicting interests. Halbe notes that in Israelite society social differentiation also appears in the form of a religious pluralism which initially resulted out of the inclusion of non-Yahwistic peoples into the Davidic-Solomonic empire (cf. Halbe 1975: 302-303, 505). Such loss of intimacy is also the result of the creation of conflicting interests of rich and poor and the appearance of alien and marginalized groups in society. The unity and identity of society is severely undermined. But this 'dialectic opposition' can be transcended in a new social thesis: in a 'charismatic breakthrough'. At times such 'charismatic breakthrough' can take the form of a repristinization movement as it does in the case of the reassertion of the older values of the cultic decalogue. These ancient values now function as the 'basis of opposition' to the monarchic form and its accompanying social crises.[6] Eventually this reassertion of native Israelite values involves the unification and idealization of all of Israel's law (both secular and sacral) as law of Yhwh. Secular law is now incorporated into an already existing collection of sacral law.

5. For discussion of Weberian sociology see Mayes 1989: 18-27.

6. Boecker (1980: 121-23), Childs (1974: 456-57) and Paul (1970: 44) argue for a pre-monarchic date on the grounds of the absence of reference to political institutions in the Book of the Covenant. Crüsemann (1988: 29), however, contends that to argue that a lack of reference to political institutions indicates a period before the monarchy is questionable. Moreover, it is possible that the absence of reference to political institutions could be explained by dating the text to the post-monarchic period. Alternatively, the monarchy may have been deliberately ignored. The sociological principle which holds that 'What is objectively taken for granted is assumed, not stated' may also be relevant (cf. Kovacs 1976: 26).

Halbe's understanding of the relationship between law and society can be summarized as follows:

1. Halbe views the legal development which brought about the incorporation of profane law into an already existing body of sacral law as the direct and rational response of law to changed social and economic circumstances. Traditional values are reintegrated into an Israelite society which was becoming increasingly differentiated. Developments in Israelite law are the direct and rational response to crises and changes within society. Hence, law is shaped by societal needs and desires.
2. Legal development reflects socio-economic development.

2. *Otto*

In a recent study Otto has viewed the process of the theologizing of Israel's profane law against the background of its socio-economic development (Otto 1988). Rather than viewing the process as one wherein profane law is incorporated into an already existing body of sacral law, Israelite law is seen to develop from a secular basis to a foundation in the will of Yhwh. The impetus to this development is seen to lie in a crisis in legal legitimation which resulted from increasing social heterogeneity in monarchic Israel (Otto 1988: 69). Such developments are reflected within the recoverable editorial layers of the Book of the Covenant.

The pre-Deuteronomistic Book of the Covenant is a combination of two originally independent collections: (1) Exod. 21.2–22.26 [EVV 22.27]; and (2) Exod. 22.28 [EVV 22.29]–23.12.

a. *Exodus 21.2–22.26 (EVV 22.27)*

The first collection was redacted into a unit by an editor from the Jerusalem priesthood in the late pre-exilic period (Otto 1988: 9-10, 44). Originally it consisted of four independent units:

Exod. 21.2-11
Exod. 21.12-17
Exod. 21.18-32
Exod. 21.33–22.14 [EVV 22.15]

In order to form a chiastic structure the redactor has added to these: 22.15ff. (EVV 22.16ff.); 22.17-19a (EVV 22.18-20a); 22.20-26 (EVV

22.21-27). The central section of casuistic laws of reparation in 21.33–22.14 (EVV 22.15) is surrounded by laws on bodily injury. The structure may be outlined as follows (Otto 1988: 9-10):

Exod. 21.2-11	Laws for the protection of slaves
Exod. 21.12-17	Crimes carrying the death penalty
Exod. 21.18-32	Laws on bodily injury
Exod. 21.33–22.14	שׁלם laws
Exod. 22.15ff.	Laws on bodily injury
Exod. 22.17-19a	Crimes carrying the death penalty
Exod. 22.20aa-26abαβ	Laws for the protection of the poor and alien

The reparation laws in Exod. 21.33–22.14 (EVV 22.15) combine laws requiring simple restoration with laws requiring double restitution (Otto 1988: 13-14). Reflected in this combination is a tendency of casuistic law to develop from a simple concern with regulating conflict between equal families by return to a previous situation to a concern with punishment (Otto 1988: cf. 29, 30-32, 61-66). Punishment presupposes the development of society as a state, the need to maintain its class structure, and also reflects the authority of the community (Otto 1988: 23; cf. 33-35). The function of casuistic law now becomes the safe-guarding of vertical-hierarchical divisions based on wealth (Otto 1988: 21-22). In terms of the relationship between law and society, Otto assumes a 'logical interdependency' (Otto 1988: 21, 65). The more complex the structure of society becomes, the more complex its legal forms become (Otto 1988: 22).[7]

In these developments which resulted in the first collection (Exod. 21.2–22.26 [EVV 22.27]) is reflected a rationalization, systemization and abstraction of law.[8] Apodictic, casuistic, criminal and civil law are now found standing together. The originally independent units are now qiven the overall theological motivation of Exod. 22.26bγ (EVV

7. Cf. Otto 1988: 19-22. Here it is argued that the laws on hire may not be dated to pre-monarchic times because the concept of hired labour is alien to an egalitarian structure. Since landless day labourers would first have appeared with the development of the state form (the transition from a subsistence to a surplus economy) the creation of the law must also be dated to the monarchic period. The introduction of a social institution results in legislation on that institution (cf. also, Crüsemann 1988; Schwienhorst-Schönberger 1990).

8. Otto 1988: cf. 17, 18-19, 30-32, 40.

22.27bγ) כי חנון אני ('for I am merciful') (Otto 1988: 10). The background to this theology is the idea of Yhwh as king who has an open ear for the complaints of his subjects.[9]

The understanding of social protection law as Yhwh's law sets limits on the power of human beings over each other and transforms the law into an ethical requirement (Otto 1988: 40, 43). These developments which gave what was originally profane law a theological motivation, are to be related to developments in Israelite society. In the pre-monarchic period obedience to the law had been ensured by the unity of Israelite identity.[10] With the introduction of the monarchic form, however, the intimacy of family/clan communities was lost. The unity of society could no longer stand as the basis and legitimation of law since society itself is now the root of conflict and oppression (Otto 1988: 41). Increased social differentiation and the resultant crisis of legal legitimation necessitated an emphasis on social protection law which was now led back to Yhwh as its founder. In this is reflected the reaction of rural communities to the increased impoverishment of small landowners in the monarchic period (Otto 1988: 37; cf. 69-75).

To summarize Otto's views on the development of the first collection (Exod. 21.2–22.26 [EVV 22.27]), within the unification and rationalization of casuistic and apodictic law, now understood as law of Yhwh, social protection law is given a sacral basis and at the same time sacral law gains a social reference (Otto 1988: 65-66, 75). Such a process was necessary if the crisis of legal legitimation, which had arisen as the result of the loss of intimacy in the transition to *Gesellschaft*, was to be overcome. The theology of the redactor of this first collection is rooted in the idea of Yhwh as a merciful god who will hear the cry of the oppressed. Behind this idea lies the concept of Yhwh as king. Hence, it is most likely that the redactor is to be located in the Jerusalem priesthood in the late pre-exilic period (Otto 1988: cf. 43-44).

b. *Exodus 22.28 (EVV 22.29)–23.12*

The second unit also displays a chiastic structure. The command to care even for one's enemies is surrounded by laws for the safeguarding of legal institutions and specification of what is to be set aside for Yhwh (Otto 1988: 45-51).

9. Cf. Pss. 86, 103, 145; Otto 1988: 40.
10. Cf. Otto 1988: 41.

Exod. 22.28ff. Commands on what is to be set aside for Yhwh
Exod. 23.1-3 Laws on the safeguarding of legal institutions and procedures
Exod. 23.4ff. Demand for solidarity with one's enemies
Exod. 23.6-8 Laws on the safeguarding of legal institutions
Exod. 23.10-12 What is to be set aside for Yhwh

As in the first unit the redactor has taken up existing legal collections, bringing them together and structuring them around the framework which expresses the idea of human being's power over nature and other human beings as standing under the limits of Yhwh's rule (Exod. 22.28a, 29 [EVV 22.29a, 30]; 23.10-12; Otto 1988: 46-48).

Laws on legal procedure in Exod. 23.1-3, 6-8 reflect the need to safeguard legal procedure which, with increasing social differentiation, is in danger of becoming the manipulative tool of the privileged. By setting these procedural demands under the will of Yhwh these laws now also stand under Yhwh's authority and any danger of corruption is diminished (Otto 1988: 48-51).

This unit is centred around the ethical demand of care for one's enemies. With the theologizing of process law, through its binding with laws on what is to be set aside for Yhwh, sacral and profane law are combined with ethical demand (Otto 1988: 49-51).

The redactor of this collection is not to be located in Jerusalem cultic circles. His theology is not expressed through the idea of Yhwh as king with an open ear for the complaints of his subjects. Rather this redactor is to be located among rural, priestly or levitical circles in Judah (Otto 1988: 50). The *terminus a quo* for the work of this redactor is the eighth century.

c. *Combining the Two Units*

Once the two units had been combined with an outer framework in Exod. 21.2-11, 23.10-12, and an inner framework in 22.20-26 (EVV 22.21-27), 22.28ff. (EVV 22.29ff.), the theological emphasis shifts from the idea of Yhwh's kingship (Otto 1988: 57). Now the combination of sacral and social protection law becomes the overall theme of the Book of the Covenant (Otto 1988: 53). Legal collections which were originally unconnected and contained diverse legal forms are now considered as a singular body of law having Yhwh as its source.

The work of the Deuteronomistic redactor is to be found in Exod. 20.22ff. which serves as a prologue, and Exod. 23.13-33 which serves as an epilogue. At the heart of the epilogue and prologue lies the

prohibition against images. It is the Deuteronomistic redactor who makes the law explicitly covenant law. Israel's status as the chosen people of Yhwh may only be assured by its obedience to Yhwh's law (Otto 1988: 58-60). This emphasis, and an insistence on the obligation of an Israelite towards the weak in society (including the requirement for aid to the גרים) is understood as being implicitly required and legitimated by the Exodus experience.[11] Exodus 3.9 reflects the same theological idea as 22.20aβ (EVV 22.21aβ) and 23.9. Just as Yhwh had heard the cry of the oppressed Israelites in Egypt, so in the social crisis of monarchic Israel Yhwh would hear the cry of those oppressed by social injustice (Otto 1988: 59). The Deuteronomistic interpretation of the Book of the Covenant is intended as part of its reform programme for postexilic Israel.

d. *Summary*

The Book of the Covenant has achieved its present form through a unification and rationalization of what were originally independent legal collections. The background to this development is the ongoing complexity of Israelite society. In the pre-monarchic period egalitarian relations had ensured that social identity in itself would guarantee observance of the law. But the institution of monarchy created vast economic differences manifested in urbanization, the division of labour, the diminishment of the importance of genealogical relations and the transition from a subsistence to a surplus economy (Otto 1988: 65). The sense of unity and intimacy which had characterized pre-monarchic Israel was now lost. The creation of an economic hierarchy had resulted in a change from laws intended to regulate conflict between equal families to laws which were intended to protect the needs of the property owning classes (Otto 1988: 65). Emphasis shifted from reparation to punishment. As social differentiation increased the unity of society was further fractured. No longer could social identity ensure obedience to the law. Only a theologizing of this social protection law could ensure its observance. Law is now conceptualized as law of Yhwh and obedience to Yhwh required observance of his law which demanded that the poor, the weak and the estranged of society be protected.

Hence, Israel's legal history is to be seen as the history of the integration of law into the will of Yhwh. Behind this development lies the

11. Cf. Exod. 22.20b (EVV 22.21b) 'Because you were strangers'; cf. Otto 1988: 58-59.

transition of Israel from a segmentary to a monarchic society, a transition which was accompanied by an increase in social differentiation. Such social differentiation led to a crisis of legal legitimation which could only be met by transcending society in a grounding of the law in the will of Yhwh (Otto 1988: 72). From a theological perspective the history of the development of Israel's law is to be seen as the expression of the increasingly explicit universality of Yhwh's rule over Israel's day to day life (Otto 1988: 72).

Otto assumes that the relationship between law and society is correlative:

1. Developments in Israelite law are to be viewed as a rational response of law to socio-economic changes.
2. Consequently, a study of biblical law will reflect the problems and socio-economic circumstances of Israelite society: the increasing complexity of Israel's law reflects the increasing complexity and heterogeneity of monarchic Israel (Otto 1988: 65).
3. As for Halbe, Otto's theory of social change is Weberian.[12] Society evolves from simple forms to more complex forms. The transition from primitive forms, where relationships are communal, results in a crisis which is fundamentally the result of the loss of intimacy or community. Attempts at a new social thesis take the form of a 'charismatic breakthrough'. Such a 'breakthrough', contends Otto, occurs in the Deuteronomic/Deuteronomistic reform programme which attempts to replace lost intimacy by stressing the unity of Israelite society and its law which are now understood to stand under the authority of Yhwh. While Halbe has consistently followed Weber by arguing that Israelite society was from the beginning a sacral, covenant community whose unity lay in its self-understanding as the people of Yhwh, Otto has argued that the earliest form of Israelite law was secular law which only later came to be understood as sacral law within an overall covenant perspective.

12. Cf. Mayes 1989: 64-67 for discussion of Otto's work as Weberian.

3. *Crüsemann*

Like Otto, Crüsemann views Israel's legal history against the background of its socio-economic development. At the outset the question of the relationship between the משפטים (Exod. 21.1–22.16 [EVV 22.17]) and the apodictic-paranetic sections of the Book of the Covenant is raised (Crüsemann 1988: 31-33).

Noting that the משפטים collection is dominated by laws on slavery, Crüsemann reasons that the collection must have been created at a period in Israel's history when slavery became an institution requiring extensive legislation (Crüsemann 1988: 31). Pre-monarchic Israel was organized on the basis of segmentary communities within which social relations were egalitarian, centring around the unity of the extended family. In a society so structured the existence of slavery would have been at odds with the community's basic values and presuppositions. There is little mention of slavery in texts which reflect the pre-monarchic period (1 Sam. 8.16; Judg. 6.27; 2 Sam. 9.10-11) and in any case the terminology used here (נער, עבד) refers not to a person holding the status of a slave deprived of all liberty, but to individuals who are serving of their own free will (Crüsemann 1988: 31). The term עבד occurs frequently in texts reflecting the early monarchic period (cf. 1 Sam. 25.10, 39, 40) but again here they do not refer to persons deprived of liberty. 1 Samuel 30.13 refers not to Israelites but to foreigners or prisoners of war who in any case would not have comprised a typical element in society. Neither would they have posed a serious problem which might have necessitated legislation in this early period (Crüsemann 1988: 22). In fact, there is no real evidence for the enslavement of Israelites by Israelites until the time of Jeshoshaphat. In 2 Kgs 4.1-7 a widow pleads with the prophet Elisha to prevent her sons being taken into slavery by a creditor. Slavery continues to appear as problematic in the prophetic texts from Amos onward.

Further indication of a late monarchic date for the creation of the משפטים collection is the collection's presupposition of the usage of currency. Such usage is not attested for the pre-monarchic period (cf. Exod. 21.11, 21, 32, 34).[13]

13. Paul (1970) argues in a similar vein but reaches very different conclusions: 'A societal framework of a non-monarchic tribal polity is indicated in several ways: the corpus reflects a pastoral-agricultural, non-urban society; laws pertaining to commercial dealings are completely absent; there are no class distinctions charac-

A similar exploration of the etymology of the term גר, which occurs frequently in the משפטים, indicates a late date for the entire collection (Crüsemann 1988: 33-35). Alongside the social protection laws which demand protection for the widowed, the orphaned and the poor (groups which had suffered considerably with the economic exploitation of the monarchic period), legislation on the גרים stands in a central position (Crüsemann 1988: 33). When, asks Crüsemann, would such extensive legislation on the have become so urgent. Although the root גור is found in texts which Crüsemann regards as reflective of the pre-monarchic period,[14] the designation גר as a term of status does not appear in these early sources. Nor indeed, does it occur with any frequency from Joshua through to 2 Samuel (Crüsemann 1988: 34). Thus, it may be concluded that the term was not in use in pre-monarchic times. At such times the status most likely did not exist and, if it did, it evidently posed no legal problem. In fact it is not until texts as late as Jeremiah (7.6; 14.8; 22.3) and Ezekiel (14.7; 22.7, 29) that the status of the גר appears as problematic. The book of Deuteronomy also gives considered attention to the place of the גר in Israelite society (cf. Deut. 10.18, 19; 14.21, 29, etc.). At the same time the גרים are not one of the groups for whom the eighth-century prophets express concern (Crüsemann 1988: 34). By considering the time of creation of these texts in which the term גר does occur, the time of the creation of the legislation in the משפטים may be inferred. Socially the גרים problem arose with the arrival of Northern refugees into Judah sometime after 722 BCE (Crüsemann 1988: 34).

Thus, while legislation on the גרים is the response to an influx of Northern Israelites after 722 BCE, legislation on the עבד is a response to the crisis of the eighth century which had arisen out of the economic exploitation of the monarchic period. In Hos. 8.12 Crüsemann identifies an eighth-century North Israelite tradition which associated law with the will of Yhwh:

> Though I have written for him my many rules (תורתי) they are treated as strange.

On the basis of this text and a comparison of it with Exodus 34 Crüsemann associates the older kernel of the apodictic parts of the Book of the Covenant with a North Israelite tradition which was brought to Judah with the refugees of 722 BCE. It was the contribution from this

teristic of a monarchic, bureaucratic state' (1970: 44).

14. Cf. Judg. 5.17; 17.7, 8, 9; 19.1, 16; 2 Sam. 4.3.

originally North Israelite association of law with Yhwh which gave momentum to a process which eventually incorporated all of Israel's laws into the will of Yhwh (Crüsemann 1988: 39).

The institutional background to this development is not to be seen in the institution of kingship; and it is this aspect of Old Testament law which differentiates it from the general Near Eastern legal tradition. Rather, in the Israelite situation we encounter the unique office of the 'high judge' whose office was instituted in Jerusalem in the time of King Jehoshaphat (Crüsemann 1988: 36).

Thus, the Book of the Covenant in its present form was created through a combination of North Israelite and Judean tradition. The combination of profane and sacral law had already occured before the creation of the book of Deuteronomy (Crüsemann 1988: 35). This combination was the result of the profound social crisis of the eighth century and of the crisis which was created by the Assyrian takeover of the Northern state in 722 BCE (Crüsemann 1988: 41)

Presuppositions regarding the relationship between law and society in Crüsemann's study are similar to those which have already been outlined as features of Otto's work. They may be summarized as follows:

1. Law is a rational response to social need. Social problems, such as those created by the introduction of slavery into an egalitarian society, will be reflected in the laws of that society.
2. Absence of legislation indicates absence of social institution. Hence, the absence of legislation or concern in pre-monarchic texts for the legal rights of slaves is taken as indicating that pre-monarchic Israel did not engage in the practice of slavery.
3. As a corollary, legal institutions necessarily have a real-life referent in society. Moreover, the frequency or infrequency of their occurence within lawcodes is a measure of the problematic status of that social institution.

4. *Schwienhorst-Schönberger*

While agreeing with Otto that the process is one wherein sacral law is incorporated into an already existing body of profane law, Schwienhorst-Schönberger doubts that the Book of the Covenant may simply be seen as the setting together of two originally independent legal collections within a sacral framework (Schwienhorst-Schönberger 1990: 15-22).

a. *The Basis of the Book of the Covenant*

Schwienhorst-Schönberger's main concern is with the casuistic parts of the Book of the Covenant and their institutional background. The basis (*Grundbestand*) of the book is to be found in the 'casuistic lawbook' of Exod. 21.12–22.16 (EVV 22.17). It is the oldest part of the collection and originally contained neither a sacral framework nor a theological motivation. This original casuistic lawbook arose and developed in the context of legal administration and juristic scholarship. Influences on it from the general Near Eastern legal tradition were mediated through scribal schools which existed in Israel and also in Syria and Mesopotamia.[15] Exodus 21.28ff., 21.32 stand clearly in the tradition of *CE Code of Eshnunna* 53-55 and *CH Code of Hammurabi* 250-52. But Schwienhorst-Schönberger insists that the casuistic lawbook is no 'mere copy' of these extant codes. Being not simply a copy of foreign law it is related to the society within which it originated (Schwienhorst-Schönberger 1990: 268).

The original verses of this casuistic lawbook are to be seen in Exod. 21.12, 18ff., 22aαbα, 28ff., 32, 33aβb, 34aα, 37; 22.3, 9ff. (EVV 22.10ff.), 13aββ (EVV 22.14aββ) (Schwienhorst-Schönberger 1990: cf. 44-234). The collection is not abstract in its formulation but is formulated from concrete cases which were intended to be used analogically (Schwienhorst-Schönberger 1990: 415-17). It was intended to regulate the type of community which it reflects; a settled or 'settling' community which kept livestock and engaged in agriculture. Its population lived in open villages and was organized on the basis of a kin-related egalitarian structure. Reflecting as it does this type of village-based community, the casuistic lawbook is most probably to be dated to premonarchic times (Schwienhorst-Schönberger 1990: 268-71). This date is indicated, in the first place, by the terminology of the book and, in the second place, by archaeological investigation, which indicates that in the period prior to the Israelite monarchy Canaan was characterized in its rural backland areas by a type of village-based organization (Schwienhorst-Schönberger 1990: 238-76).

In contrast to the book of Deuteronomy, the casuistic lawbook makes no reference to urban culture. The terms עיר (which occurs 34 times in Deuteronomy 12–26) and שער (which occurs 26 times) are absent (Schwienhorst-Schönberger 1990: 268). Even where a law reveals

15. Schwienhorst-Schönberger 1990: 250-52, 267, 280-81, 415-17.

dependency on an extant code,[16] the Israelite version shows a marked lack of reference to urban ethos (Schwienhorst-Schönberger 1990: 269). The casuistic lawbook presupposes a settled or 'settling' agricultural community living in open villages (Schwienhorst-Schönberger 1990: 270-71). The frequency of agricultural terms is noted and indicates the ethos of the collection. There is mention of households (בית), of domestic animals (שור), of fields planted with cereal, of vineyards and of cisterns (בור) (Schwienhorst-Schönberger 1990: 269). Furthermore, in contrast to the Code of Hammurabi and to later redactions of the casuistic lawbook, social differentiation is unknown (Schwienhorst-Schönberger 1990: 270).[17] Further indications that the casuistic lawbook is pre-monarchic are its absence of reference to any political institution (Schwienhorst-Schönberger 1990: 270).[18] Hence, the casuistic lawbook is to be dated to pre-monarchic times for two reasons. First, it frequently uses terminology related to an agricultural, kin-based community. Secondly, there is an absence of terms related to social differentiation, urban culture and political institutions

This thesis, which dates the casuistic lawbook to the pre-monarchic period and is based mainly on a study of terminology, is further supported by archaeological investigation. The casuistic lawbook is to be dated to the eleventh century, a period which Weippert (1988) has found to be characterized by a movement towards deurbanization and the decay of the city-state system which was accompanied by a resultant protest in the coastal plains. There is also evidence of an overwhelming increase in village-based communities which settle at a distance from decaying urban areas in the mountainous and agriculturally inferior landmasses (Schwienhorst-Schönberger 1990: 272-73).

Of particular interest is the great number of pits found. Indications are that while a small percentage of these pits served as cisterns a larger number were used as storage places for cereals. The existence of such vast numbers of storage facilities is directly related to the type of society which utilized them. In this clan-structured community each clan

16. Cf. Exod. 21.29; *CE* 54; *CH* 251.

17. And cf. also Paul (1970: 44) who notes lack of class distinction.

18. Likewise Paul argues that the Book of the Covenant is geared towards a nation about to settle in its own land, towards a new political entity. This is indicated not only by the concerns of the laws but also by the lack of reference to political institutions (1970: 44-45); and cf. also Schwienhorst-Schönberger (1990: 270); Childs (1974: 456-57); Boecker (1980: 121).

had its own storage facilities and privately organized its storage and distribution. The presence of such a vast number of pits explains the fact that the law which provides for the negligence of the owner of the pit is not found outside the Old Testament. The existence of this peculiar law is to be explained by the peculiarity of Israel's social structure (Schwienhorst-Schönberger 1990: 274).

Two types of relationship existed between these village communities and the urban culture.[19] The first was one of autonomy, of economic and cultural self-sufficiency. This characterized those villages which were situated at a distance from urban areas. The second, which was characteristic of Israel's relationship, was one of economic and cultural symbiosis. It was through this symbiotic relationship that the influence of the scribal schools was mediated. Thus, the parallels and affinities between Israel's casuistic lawbook and other extant codes may be explained (Schwienhorst-Schönberger 1990: 275-76).

Hence, the basis of the Book of the Covenant is the casuistic lawbook. It is characterized by the use of the participle formula. It included: Exod. 21.12, 18ff., 22aαbα, 28ff., 32, 33aβb, 34aα, 37, 22.3 (EVV 22.4), 9ff. (EVV 22.10ff.), 13aββ (EVV 22.14aββ) (Schwienhorst-Schönberger 1990: 284). It is to be dated to the pre-monarchic period in the eleventh century. It functioned to regulate the society which it reflects: a segmentary-egalitarian, village-based community. While it may have been influenced by a general Near Eastern scribal tradition which was mediated through limited contact with urban culture, it was nonetheless peculiarly Israelite, expressing an ethos which was native to that community and which stood in direct opposition to the values which appear in the extant codes.[20] This original lawbook contained no theological sanction, motivation nor sacral, authoritative basis (Schwienhorst-Schönberger 1990: 282); for neither motivation nor

19. Cf. Weippert 1988: 133-34.

20. Cf. also Gottwald (1979) who, in his contention that pre-monarchic Israel was vehemently opposed to the urban principles of Canaan and its environs, argues that the content of the Book of the Covenant: 'is of inestimable value for constructing a sociology of Israel's religion, for it gives an unmistakable skeletal structure to the religion of Yhwh as the religion of a particular egalitarian social system. To worship Yhwh, to be an Israelite, meant above all else to practice a way of life in separation from and in overt opposition to time-honoured established ways of life regarded throughout the ancient Near East as inevitable if not totally desirable' (Gottwald 1979: 59).

legitimation was required in a community whose law was directly reflective of its way of life and values.

b. *Redactional History of the Book of the Covenant*

It is clear that this casuistic lawbook has undergone redaction. Indications of redaction are to be seen especially in the introduction of terminology and ideas which would be out of place in a segmentary, kin-based, rural community. Further redactions took the form of systematic and often selective reception, modification and amplification of this original collection (Schwienhorst-Schönberger 1990: 282). Each stage of redaction was informed by, and intimately related to, changing socio-economic circumstances. A dramatic change in terminology and content is to be seen as the direct result of the intrusion of the monarchic form into this village-based community. Indications that a law was first formulated in the monarchic period are again evident in the terminology.

In the early monarchic period the appearance of social differentiation, unknown in the village-based communities which the casuistic lawbook regulated, results in the response which sees the creation of legislation on the hired labourer and on slaves. While admitting that slaves may have been found in pre-monarchic Israel, the appearance of legislation on hired labour indicates a state-organized society.[21]

The first stage of redaction of this casuistic lawbook is a proto-Deuteronomistic contribution, the *Gottesrecht* redaction. Even before this first main redaction, an extension of the original casuistic lawbook had already been undertaken. This process is evident in Exod. 22.6-8, 11ff., 13b, 14 (EVV 22.7-9, 12ff., 14b, 15), the laws of which are indicative of social differentiation (Schwienhorst-Schönberger 1990: 27-37). As part of the major work of the *Gottesrecht* redactor Schwienhorst-Schönberger reckons: Exod. 21.31, 33aαβγ, 34aβb-36; 22.4ff (EVV 22.5ff.), 6-8 (EVV 22.7-9), 11ff. (EVV 22.12ff.), 13bα, 14 (EVV 22.14bα, 15) (Schwienhorst-Schönberger 1990: 234). The second stage is the basis of a later Deuteronomistic redaction and the third is an amplification and widening of this.[22]

21. Schwienhorst-Schönberger 1990: 270 n. 111, 270-72, 312-13; cf. Otto (1988).

22. For discussion of the casuistic lawbook cf. Schwienhorst-Schönberger 1990: 40-234; for discussion of the *Gottesrecht* redaction see 282-86, 309-13, 416-17; for outline and concerns of Deuteronomistic redaction see 285-86, 332-35, 407-14.

From a literary-stylistic point of view the work of the *Gottesrecht* redactor is characterized by the second person singular form of address and the identity of the speaker of the law by the first person singular pronoun. Within the context of this redaction, the concern of which is to combine sacral and social traditions, this first person is certainly to be identified as Yhwh (Schwienhorst-Schönberger 1990: 235-38). Hence, Schwienhorst-Schönberger's designation of this redactor as the *Gottesrecht* redactor.

The redaction has a humanitarian character which is reflected, for example, in its concern to limit the right of blood-revenge (Exod. 21.13-17, 20-21) and in Exod. 21.30 which allows for the substitution of a money payment in redemption of the ox owner's life (Schwienhorst-Schönberger 1990: 235).[23] Also evident is a rationalization of law. In the *lex talionis,* which was introduced by this redactor, legal prin–ciples which are divorced from specific circumstances become a feature of law (Schwienhorst-Schönberger 1990: 236). It must be stressed, however, that the concerns of this redactor are humanitarian and not explicitly theological. Its character is not paranetic but strictly judicial (Schwienhorst-Schönberger 1990: 236).

The laws in themselves indicate the social location of this redactor. A series of laws which deals with debt slavery can only have been created as a response to social need. Hence, the redactor is to be placed within a period when debt slavery became a social issue in Israel; according to Schwienhorst-Schönberger, around the ninth century and most definitely by the eighth.[24] A comparison of Exod. 21.2-6 with Deut. 15.12-18 indicates that the Exodus passage is older. In Deut. 15.15 the motivation is freedom from Egypt; but the earlier text Exod. 21.2-6 had in fact prepared the groundwork for this emphasis (Schwienhorst-Schönberger 1990: 312, 348-50). Behind Exod. 21.2-6 lies an implicit reference to the Exodus: 'six years ... in the seventh year'. Social protection law becomes implicitly connected with the Exodus experience.[25]

In summary, the earlier casuistic lawbook has undergone a proto-Deuteronomistic redaction at the hands of the *gottesrechtliche* redactor. The attitudes of this redactor are to be seen as a response to increasing

23. Cf. Exod. 21.26-32; 22.15-16 (EVV 22.16-17), 20α, 22b, 24a, 25ff. (EVV 22.21a, 23b, 25a, 26-27).

24. Schwienhorst-Schönberger 1990: 312; cf. 236; cf. also Otto (1988) and Crüsemann (1988).

25. Schwienhorst-Schönberger 1990: 313, cf. 285; cf. also Otto 1988: 35-40.

social differentiation in early monarchic Israel. Although the concerns of this editor are to be described as humanitarian, in his implicit combination of the Exodus theme and social protection law, the first attempt at combining sacral and profane law has been made. Nonetheless, the relationship between sacral and profane law has not yet been fully worked out and remains implicit. Not until Deuteronomy and the Deuteronomistic writers does this relationship between theology and social protection law become fully explicit. [26]

From a literary-stylistic point of view the Deuteronomistic redaction is characterized by the use of the second person plural form of address. A second characteristic of this redaction is to refer to texts outside the Book of the Covenant. For example, Exod. 21.25 is to be viewed as an allusion to Gen. 4.23. The contribution of this redactor is to be seen in the following verses (Schwienhorst-Schönberger 1990: 237-38, 386):

1. Prohibition of images (Exod. 20.23)
2. Instructions on what is to be offered to Yhwh (Exod. 20.24a[β])
3. Superscription (Exod. 21.1)
4. (עבדי) + ceremony at the doorpost (Exod. 21.2aα 6aβγ)
5. Prohibition against selling a female slave to a foreigner (Exod. 21.8b)
6. Supplementation of the *lex talionis* (Exod. 21.25)
7. Worship of Yhwh alone (Exod. 22.19b [EVV 22.20b])
8. Strangers in Egypt, command for the protection of widows and orphans, prohibition of lending money at interest (Exod. 22.20aβa, 21, 22a, 23, 24a [only את עמי] [EVV 22.21aβa, 22, 23a, 24, 25a])
9. Prohibition against eating flesh which has been torn by beasts (Exod. 22.30 [EVV 22.31])
10. Prohibition against bribes and command for the protection of the stranger in legal procedure (Exod. 23.8, 9)
11. Warning against the worship of foreign gods Exod. 23.13
12. 'as I have commanded you' (Exod. 23.15a)
13. Epilogue (Exod. 23.20-33)

At the centre of the concerns of the Deuteronomistic redactor stands the commandment for the worship of Yhwh alone (Schwienhorst-

26. Cf. also Otto 1988: 284-86.

Schönberger 1990: 397-400). His most impressive contribution was to provide the laws with a prologue and present the entire collection as part of a covenant relationship which Yhwh had made with the people of Israel and which had been mediated through Moses (Schwienhorst-Schönberger 1990: 417). Thus, what had remained an implicit relationship between law and theology at the hands of the *Gottesrecht* redactor of the early casuistic lawbook is now fully worked out, and in its explicitness encloses and governs the entirety.[27] The Deuteronomistic redaction interprets the Book of the Covenant in terms of the decalogue and makes the centre of the collection the prohibition against idols (Exod. 20.23) and the prohibition against the worship of foreign gods (Exod. 22.19b [EVV 22.20b], 23.13).[28]

The final stage of editing of the Book of the Covenant is to be seen in the work of the Priestly writer who worked in the postexilic period. It is the contribution of this writer which brings to its fullest consequence the association of the Book of the Covenant with the decalogue. The decalogue of Horeb is now brought to Sinai and provides an overture for the entire Sinai legal collection.[29]

Like Otto (1988) and Crüsemann (1988), Schwienhorst-Schönberger (1990) regards the relationship between law and society as correlative. More specifically:

1. Changes in legal texts are to be understood as reflecting a direct and rational response of law to social developments and needs.
2. A study of law reveals the social development of the society regulated by that law.
3. In his study of the terminology of the casuistic lawbook Schwienhorst-Schönberger assumes a simple correlation between legal institutions and social institutions. What is present in a lawcode would not be present unless it were of direct relevance to social needs and circumstances.

5. *Biblical Law as a Coherent System*

So far concentration has been restricted to redaction studies of the Book of the Covenant. Such studies sought to uncover the main intention of

27. Schwienhorst-Schönberger 1990: cf. 285, 412, 414.
28. Schwienhorst-Schönberger 1990: 284-85, 397-400.
29. Schwienhorst-Schönberger 1990: cf. 286, 397, 413-17.

the author, usually by identifying and concentrating on repeated or central themes or formulae. Once the redactor's intention was identified it was then related to an historical situation which would have evoked such a response. So, for example, Otto identified the central intention of the collection as being expressed in terms like כי חכון אני. Such emphasis was then related to socio-economic circumstances in Israelite society. Halbe saw in Exod. 22.19 (EVV 22.20) the central command of the Book of the Covenant. If this was the centre around which all other rules were chiastically structured, then it was expressive of the fundamental concerns of the redactor: namely to preserve the unique relationship of Israel to Yhwh. Such concern may be related to a period when this unique relationship was at risk: during the period of the Davidic-Solomonic empire when Israel was faced with the inclusion of non-Yahwistic peoples into its membership.[30]

Then, we looked at studies which relate specific rules (for example, those on the גרים) to a specific socio-historical background; assuming that rules are always a response to societal needs and desires.

More recently, however, and earlier reflected in the movement towards canon criticism, dissatisfaction has been felt with traditional redactional methods. In the first place, such methods were seen to be guilty of destroying the flow of the text and thus depriving the reader of any coherent meaning.[31] Secondly, the influence from a movement in literary criticism which deemed the author's intentions irretrievable and concentrated instead on the text as an autonomous work which created its own world has contributed to the shift away from author-centred studies.[32] According to Childs, attempts to reconstruct the social matrix out of which a text arose are certain to fail. The process by which the text was reworked, updated or edited remains in almost total obscurity because those responsible for the final form of the text intended their contribution to remain imperceptible. It is the canon itself which formed the *Sitz im Leben* for the community's life, blurring any sociological evidence (Childs 1979: 79).[33] Childs consequently concludes

30. See above, Section 1 on Halbe.

31. Cf. Childs 1979: 74-77.

32. For discussion see Barton (1984: 140-201). Childs notes the influence of 'new criticism' on canon criticism insofar as, like new criticism, canon criticism of the Old Testament attempts 'to do justice to the integrity of the text itself apart from the problem of diachronistic reconstruction' (Childs 1979: 74).

33. 'When critical exegesis is made to rest on the recovery of these very socio-

that, although the social milieu is lost to us, what is important is the placing of the decalogue and law in its present form. It is this which is decisive for the canonical approach (Childs 1979: 174). The combined narrative is far more than the sum of its parts (Childs 1979: 176).

a. *Patrick*

A recent edition of *Semeia*, the purpose of which is to develop a methodology for studying biblical law as a humanities, would also assess the importance of the combined narrative over against the sum of its parts.[34] By concentrating on the text in itself, rather than attempting to identify different stages in its growth, Patrick contends that biblical law can be recovered as 'a coherent and comprehensive system of thought' which reveals the nature, theology, social philosophy anthropology and ethics of Israelite society.[35] Patrick assumes that law reflects the *Volksgeist*, the spirit of a people.[36] Allying biblical scholarship to

logical distinctions (for example, pro-monarchic versus anti-monarchic, apocalyptic versus theocratic circles) which have been obscured, it runs directly in the face of the canon's intention' (Childs 1979: 78).

34. Other studies in the *Semeia* issue are also synchronic in character and also presuppose the importance of the combined narrative over against the sum of its parts as an indicator of Israel's culture and philosophy. Knierim, for example, points to gaps and deficiencies in form-critical approaches to Old Testament law. Such approaches, he contends have failed to account for the 'prescriptive' nature of the legal texts. In other words we do not know what it is which makes the judgments, commandments and rulings of the Old Testament law (Knierim 1989). Haas notes that unfortunately law, especially biblical law, is rarely studied with a larger humanistic agenda. He suggests that, in the case of the study of the law in general, this is to be explained by an innate prejudice which views law as the result of conscious, human, political activity 'designed to address specific problems and so not useful for the study of how larger worlds of meaning are produced' (Haas 1989: 67). He attributes the marked reluctance of biblical scholars to assess biblical law with a humanistic agenda to 'the ancient idea that biblical legislation is not of human origin but reflects divine revelation' (1989: 68). Knierim (1989) discusses the interdependence between ethos, adjudication and lawgiving. Buss's study applies modern symbolic logic to exhibit the logical structure of Old Testament law (Buss 1989). Haas uses methods from cultural anthropology to uncover a coherent system of thought behind biblical law (Haas 1989). Frymer-Kensky discusses biblical law as reflective of Israel's intellectual culture and the history of Israelite society (Frymer-Kensky 1989).

35. Patrick 1989a: 1-2; 1989b: 27.

36. Elsewhere Patrick similarly argues that: 'Legal systems are the creation of the community in which they operate. Each community has its own law, which is

current legal philosophies can assist in overcoming a non-humanistic understanding of law. This non-humanistic approach is the result of traditional biblical methods. Defects in these methods are seen in two of its features. First, the diachronic approach dominates to the exclusion of synchronic approaches. Secondly, by concentrating on tracing the continuity of the tradition through literary trajectories, redactional studies have shifted attention away from the text as a conceptual system (Patrick 1989b: 28-29). Furthermore:

> One suspects that the practitioners of these methods have not been trained in law and/or have come under the influence of defective accounts of legal reasoning (Patrick 1989b: 29).

Moreover, study of biblical law has tended to regard it as primitive, based on magic or superstition rather than on sound legal principles and methodologies. Patrick insists that gaps and obscurities which have traditionally been explained by reference to the transmission of the text or by assigning them to 'meddling' redactors are not gaps at all. In order to understand the text one must project oneself into the role of an ancient judge seeking solutions to a legal problem (Patrick 1989b: 29). But how may one confirm one's interpretation within a plurality of interpretations which will inevitably arise out of the assignment of such a central role of interpretation to the reader? This impasse, claims Patrick, may be resolved by hermeneutical principles:

> The legal texts would be better texts if they constituted a comprehensive, consistent system of principles and concepts, and interpretation should be committed in principle to *interpreting texts as the best texts they can be*. If the search for a conceptual scheme regularly yields inconsistencies and gaps, then we will have to conclude that the legal texts of the Torah are not very good, or are best interpreted as something other than law. If, on the other hand, a sophisticated, profound conceptual system can be constructed which accounts for the legal statements of our texts, the conceptual synchronic mode of interpretation will be vindicated.[37]

binding upon it alone. Thus law is what a community, with its religion, values, political and economic systems and experience of living requires of its members. It is embedded in the fabric of the society and is instilled by preaching and practice' (Patrick 1985: 6).

Phillips (1970) also views law as an index of the society. Cf. also Frymer-Kensky (1989: 89), Paul (1970).

37. Patrick 1989b: 29, emphasis added. Greenberg argued similarly for the importance of the role the reader assumes. Again the reader should place him or herself in the role of an ancient jurist or draftsman (Greenberg 1960). Patrick's pro-

An example of the application of 'conceptual exposition' to a legal text is provided by Patrick's discussion of the law on the goring ox (Exod. 21.28-35). A first reading of the text reveals a complexity of problems and contradictions as well as some strange aspects. For example:

1. The ox which has killed a human being is killed by stoning.
2. An owner who has failed to restrain an ox known to gore is liable to the death penalty.
3. Yet there is a possibility for ransom of the life of the negligent owner.
4. The law is applicable to the case of the goring of a child but the goring of a slave is a different matter.

Patrick contends that by reconstructing the intellectual system behind these rules, the peculiarities of the law may be explained and set within a coherent, conceptual system.

The question of the guilt of an animal is one peculiar aspect of the law. Patrick considers Finkelstein's explanation of this phenomenon to be well suited to a methodology which treats biblical law as a humanities: the ox must be destroyed because it is guilty of violating the hierarchy of being: God—Humanity—animals—plants (Finkelstein 1981: 26-29). The guilt of the animal is not a moral but a metaphysical violation. Rather than being evidence of supernatural and primitive concepts, the law which seems to attribute guilt to an animal is evidence of a 'sophisticated understanding of causation and guilt' (Patrick 1989b: 31).[38]

Viewed in the light of other Old Testament legal texts which view accidental homicide as deserving a punishment less severe than the death penalty (cf. Exod. 21.12-14), the question is raised: why should the owner of the ox in this case be subject to such severe penalty? In

posal that one projects oneself into the role of ancient judge allowing the texts to be 'the best texts they can be' is entirely unsatisfactory. It fails to recognize the complexities of interpretation such as the social, historical, psychological and ideological stance of the interpreter. Moreover, the interpreter always approaches a text with a preunderstanding; he or she is informed by the history of interpretations of the text. Patrick's approach, overall, does not constitute a methodology.

38. Childs has incorrectly argued, according to Patrick, that the idea of an animal holding guilt is evidence of supernatural or primitive concepts (Childs 1974: 473).

other Near Eastern codes monetary payment is sought in reparation for negligence leading to injury or death. Finkelstein, notes Patrick, has correctly argued that the Bible refuses in principle to place a monetary value on human life (Finkelstein 1981: 32-35). Consequently, the only possession which the negligent owner of the ox has, which may be compared to the value of the loss of a human life, is his own life. Patrick insists that despite this, the text is only intended to initiate negotiations between the owner and the victim's kin. A literal application of the *lex talionis* is not intended (Patrick 1989b: 32).[39]

Patrick proposes that viewing these rulings against the intellectual system of biblical law leads to an understanding of its rulings which shows them to be neither strange nor illogical but in keeping with the Bible's intellectual system. From this 'marginal' and on first examination 'peculiar' law, Patrick proceeds to an exposition of the conceptual system behind the rest of Old Testament law.

The very idea of law involves the principle that 'like cases should be treated alike'. Thus, it may be assumed that the drafters of biblical law intended to produce a coherent and consistent system (Patrick 1989b: 33). This is a principle of all legal systems and as such must be assigned to the ancient drafters; failure to do so involves a prejudice of modern interpreters. Moreover, the compilers of biblical law had an even more urgent need to aspire toward a consistent and uniform legal system; biblical law is first and foremost Yhwh's law:

> Since the unity and consistency of God was a fundamental principle of Israelite theology, the drafters of that law would surely take care to exemplify His unity and consistency in law and the interpreters of the text would have understood the lawbooks as calling for the kind of reasoning that constructs such a consistent unity (Patrick 1989b: 33).

But biblical law does not cover all possible cases. Rather it tends to deal with the particular rather than the general. This makes it unlikely, admits Patrick, that it had the force of binding, codified law. Rather it is suggested that the laws:

> were designed to inculcate the concepts and principles of Israelite law for judges and the community at large. A selection of cases would be sufficient to set forth this intellectual system, and in that sense it is exhaustive (Patrick 1989b: 33).

39. Contrast *CH* 229-30.

Consequently, it is possible to set forth the concepts and principles set out in the provision on the goring ox in other collections of laws and legal narratives.

An important principle of biblical law is the distinction between intentional and unintentional killing (Exod. 21.13-14). It thus recognizes the same fundamental legal principle as is recognized in any Western legal system: the distinction between murder (felonious homicide) and accidental homicide. Grey areas in this Exodus law are illumined by Exod. 22.1-2 (EVV 22.2-3). Deut. 19.4-5 expands on it, while Num. 35.16-21 looks for evidence of intention (Patrick 1989b: 37).

An important metaphysical concept which informs the entirety of biblical law is the hierarchy of being. At the summit of the hierarchy of being in the Old Testament stands Yhwh; secondly, the human race is elevated above all other creatures. The case of the goring ox represents a situation wherein a creature has violated that hierarchy (cf. Gen. 9.5). It is in order to restore the hierarchy that the criminal (the ox) must be destroyed. The first commandment places Yhwh at the summit of this metaphysical order and cultic laws, insofar as they demand respect for the deity, protect this hierarchy (cf. Exod. 20.8-11, 24-26; 22.28-30 [EVV 22.29-31]; 23.10-19). Hence, the presence of these cultic laws is not to be explained by their having been secondarily placed within a civil code. Moreover, cultic law reflects similar concerns:

> Far from being an extraneous subject within a civil code, the proper comportment of the people of Israel to the holy is a constituent feature of its identity as the holy people (Patrick 1989b: 38; cf. Exod. 22.30 [EVV 22.31]).

Thus, the hierarchy of being is the conceptual scheme which unifies all of Israel's law: it is the 'deep background' of biblical law (Patrick 1989b: 39).

Another basic legal priciple which informs biblical law but which is not evident in other ancient Near Eastern codes is found in Exod. 21.29: no monetary value can be assigned to human life. The solution of the Bible is 'life for life', and is evident throughout biblical law (cf. Num. 35.26-28, 32; Exod. 22.2 [EVV 22.3]). Numbers 35.31 prohibits ransom for intended killing but here, in the case of a negligent owner, payment is possible but is negotiated on the basis of how much the owner is willing to pay for his own life. In other words the value of life is only equal to the value of another life (Patrick 1989b: 40). Similarly, theft of a person is subject to the death penalty (Exod. 21.16).

6. *Conclusion*

Thus, biblical law emerges as a coherent and consistent system. Furthermore, it is more than a technical enterprise embodying as it does principles of a 'philosophical order'. The hermeneutic which will reveal the conceptual legal system of the Old Testament is that which allows the text to be 'the best text it can be'. This is achieved through the reader's projection of him or herself into the role of a judge seeking solutions. In this way, through the application of the legal principle which states that 'like cases be treated alike' (a principle which in fact lies at the heart of biblical law) one succeeds in bringing what appear to be contradictory statements in the Book of the Covenant into harmony and also in filling in what are usually treated as gaps and inconsistencies.

If, points out Patrick, this approach appears *anathema* to critical scholarship, then it should be remembered that such a procedure is a standard one of practitioners of the law; and after all it is to practitioners of the law that the biblical compilers addressed themselves (Patrick 1989b: 42).

A feature of the law of the goring ox which is at odds with the metaphysical order of being, however, is the provision which indicates that a slave was thought of as property and not person. How may the interpreter in his or her role as judge deal with this discrepancy? Patrick insists that it must be considered:

> a mistake on the part of the framer of the lawbook, for it does not cohere with his treatment of the slave elsewhere in the book (Patrick 1989b: 42).

Yet, it is an understandable mistake: slavery was not after all compatible with Israel's metaphysical order. Nonetheless, it was a social reality and as such it was necessary for the lawgivers to provide for it. The tensions which remain illustrate the difficulty of doing 'public philosophy' (Patrick 1989b: 43).

With regard to the relationship between law and society Patrick assumes the following:

1. He assumes that a coherent and consistent system is present in all lawcodes. Ancient lawcodes are founded upon sound legal principles and methodologies which are comparable to those found in modern legal systems. It is the failure to set such codes within the context of a reconstructed conceptual system

which results in the modern interpreter's view of these codes as inconsistent.

2. The intentions of early codifiers were similar to those of present legislators; to create a coherent set of legal precedents for a society's legal specialists who would in turn transmit these values to the community.
3. a. The philosophy, ethics, nature and values of a society are reflected in its lawcode that to some extent may be described as 'public philosophy'.
   b. As a corollary, the values and ethos of a society dictate its laws as regards content, form and overall conceptual scheme.
4. Furthermore, if law arises out of the needs and desires of a society, then legal texts reflect the society which they regulate.
5. Finally, where law is out of keeping with the general intellectual scheme extracted from a consideration of the texts, it may be concluded that the ruling does not belong within the classification 'law' but is a mistake.

Chapter 2

THE INDEPENDENCE OF LEGAL DEVELOPMENT

In the previous chapter it became clear that, despite variations in conclusions, studies of Old Testament law generally view law as a rational response to socio-economic circumstances. Hence for Otto (1988), Crüsemann (1988) and Schwienhorst-Schönberger (1990) the sacralization of law is the result of a social development which led to a crisis of legal legitimation. According to Otto the first rational response of law to changed socio-economic circumstances, which had arisen as the result of the introduction of the monarchic form into an egalitarian *Gemeinschaft*, was in the area of private property. Increased socio-economic differentiation necessitated legislation which would protect the needs and interests of the newly created property owning class; more and more law became an instrument which maintained the hierarchic state and protected its vertical relations. Within this transition from *Gemeinschaft* to *Gesellschaft* the social intimacy and unity, which had once ensured observance of the law, was undermined. This crisis in legal legitimation led to two developments. In the first place, it gave rise to an emphasis on laws designed to protect the marginalized of society: the poor, the widowed and the גרים. In the second place, it led to the placement of this social protection law within a theological context within which all law came to be understood as law of Yhwh. Alterations in the legal sphere are thus shown to have successfully responded to the needs of society. Moreover, Otto assumes that in a segmentary-egalitarian *Gemeinschaft*, law reflects the needs, values and basic concepts of the community, while in a more complex society, law no longer reflects such concepts.[1]

Halbe's study, which similarly views law as directly reflective of social development, diverges from that of Otto. According to Otto the process is one wherein profane law is given a sacral basis in a situation

1. See above, Chapter 1 Section 2.

where observance of law is threatened. According to Halbe, however, the process is one wherein profane law is incorporated into an already existing body of sacral law (namely Exod. 34.10-26). Both studies, however, operate within a Weberian model of social change. According to Halbe, the incorporation of non-Yahwistic peoples into the Israelite empire during the Davidic-Solomonic period resulted in a social crisis. More specifically the crisis involved a loss of social identity a 'depersonalization'. In order to overcome this crisis the ancient sacral law, or *Privilegrecht* of Yhwh is given renewed emphasis. At the same time profane law is incorporated into this original body of sacral law. This sacral law (the so-called cultic decalogue [Exod. 34.10-26]) is innately Israelite and reflects the true concerns of that society. Thus, the loss of intimacy is counteracted not in the creation of new ideals but in the reassertion of ancient Israelite values. Once profane law becomes incorporated into an already existing body of sacral law, the Book of the Covenant is created. This collection functions as the 'basis of opposition' to the monarchic institution reacting to the crisis of social identity which kingship had caused.[2]

Despite the diverging conclusions of Otto (1988), Crüsemann (1988) and Schwienhorst-Schönberger (1990), on the one hand, and those of Halbe (1975), on the other, the following methodological assumptions are common to all. First, each study seeks first of all to identify the central concerns of the redactor and then to relate these concerns to a specific socio-economic situation which would have evoked such a response. Secondly, Otto (1988) and Halbe (1975) (and less explicitly Crüsemann [1988] and Schwienhorst-Schönberger [1990]) work within a Weberian sociology. Finally, it is assumed that law is a rational response to social circumstances and as such may be said to reflect the values and needs of the society which it is designed to regulate.

Patrick's methodology differs from those discussed so far. Rather than the concern of his study being to relate legal development to social development by considering the former as a rational response to the latter, Patrick is concerned to reconstruct the overall legal conceptual system of the ancient compilers. By allowing the text to be 'the best text it can be', something which is achieved when one projects oneself into the position of an ancient judge seeking solutions to a legal problem, one can reconstruct this conceptual legal system. The results of this procedure are far reaching for, by reconstructing such a system, the

2. See above, Chapter 1 Section 1.

nature, theology, social philosophy, anthropology and ethics of ancient Israelite society become apparent.[3] Therefore, not only does Patrick assume that the relationship between law and society is correlative, he further assumes that law reflects the *Volksgeist,* the fundamental spirit of a people.[4]

Discussion of studies of Old Testament law so far reveal the following assumptions. In the first place, law is a rational response to social requirements. Legal development thus reflects social development and, as a corollary, social development reflects legal development. In the second place, the form, values and norms of legal texts are dependent upon and shaped by the values and norms of the society for which the laws had been specifically designed. The stimulus to legal history is social change.

This understanding of the relationship between law and society has long persisted in legal sociology and is evident in numerous works on social change in both contemporary and ancient societies.[5] It is evident for example in A.S. Diamond's work which is criticized by Watson for allowing evolutionary views of social development to inform his views of legal history (Watson 1974: Ch. 2).[6] It is again evident in the work of

3. See above, Chapter 1 Section 5.a.

4. According to Frymer-Kensky ancient law is: 'a record of the socio-economic system of that society: what are the social classes, who holds the property and how, what are the economic concerns addressed by the laws?' (1989: 89). Law is also to be seen as an intellectual mirror of the philosophical principles of a given society. 'Through a culture's laws, we can see its values and some of its basic ideals about the world. Sometimes our only access into the mind-set of a culture is through its laws' (Frymer-Kensky 1989: 89). Similar assumptions about the relationship between a society and its law lie behind Haas's study: 'the rules and regulations found in Scripture comprise a systematic structuring of human social relationships which is susceptible to academic analysis and which reflects the symbolic universe of ancient Israelites' (1989: 68). Furthermore 'the contents of any legal system grow out of an inherent, although usually unarticulated, logic that operates behind overt legislative activity by influencing how individual judges and lawyers perceive—and so define and adjudicate—conflicts' (1989: 68).

5. Cf. Gagarin (1986).

6. Watson suggests that the greatest peril of the comparative law approach is the desire to see a particular legal pattern common to most systems. This desire is especially evident among historians of ancient societies. For example, Maine takes Roman law as a typical system of ancient law and from a study of that system draws, according to Watson, a disproportionate number of examples. Watson contends that a general theory of legal development applicable to all societies is not

Savigny who has had a tremendous impact on legal philosophy. His so-called *Volksrecht* theory is well illustrated in the following quotation:

> Positive law lives in the common consciousness of the people, and therefore we have also to call it the law of the people (*Volksrecht*). But this should not be so understood as if it were the individual members of the people through whose arbitrary will the law is brought forth ... Rather it is the spirit of the people (*Volksgeist*), living and working in all the individuals together, which creates the positive law, which is therefore, not by accident but necessarily, one and the same law to the consciousness of each individual.[7]

Hence, it appears that the assumptions of Otto (1988), Crüsemann (1988), Schwienhorst-Schönberger (1990), Halbe (1975) and Patrick (1989b) are firmly in line with contemporary mainstream sociological approaches to law. But how accurate are these views? In the first place, can law be conclusively shown to reflect the ethos of the society which it supposedly regulates, the *Volksgeist*? Secondly, to what degree, if any, is law a rational response to specific socio-economic and political requirements? Studies of biblical law outlined so far have, at the very least, assumed that law and society develop along parallel lines, the

possible (Watson 1974: Ch. 2). Otto could be criticized for taking for granted a primitive to complex model of legal and social development. While an evolutionary scheme may well have contributed to Otto's understanding of legal development his methods are primarily to be identified as those of source, form and redaction criticism. But Patrick may well be correct in directing the same criticism at Niehr's work. Niehr views legal development as beginning with the jurisdiction of the elders and the *pater familias*. During the early monarchical period the king took on some jurisdictional powers; however, these were restricted to the realm of authority which dealt with military matters. Not until Josiah's reform was there any extensive alteration in jurisdiction. Priestly jurisdiction was limited to Jerusalem while the king became increasingly the administrator of justice over the kingdom. Eventually lay judicial power was completely eroded (Niehr 1987).

7. Cited in Watson 1977: 1; cf. Fallers 1969: 315. The following quotations illustrate the acceptance of this view of the relationship between law and society among biblical scholars.

'Law is an index of a civilization which reflects the underlying value concepts inherent within that civilization' (Paul 1970: 1).

Phillips, a lawyer and a biblical scholar, contends that:

'The criminal law of any one state is therefore peculiar to that state and like any other national features can indicate much about it, both concerning its political and religious ideologies, as well as the value it places on the individual within the state' (Phillips 1970: 2).

needs and prescriptions of one being intimately related to and bound by the needs and prescriptions of the other. In order to test these assumptions the following would have to be demonstrated. It would need to be shown that law (i.e. written law)[8] has its roots in, and has directly developed out of patterns of behaviour which characterize the codifying society. It would need to be demonstrated that these rules were rooted in Israel's long-established practice and furthermore that this long-established practice was rooted in the deep convictions of the people.[9] As a corollary, it would need to be shown that an alteration in a rule reflects a change in society's values. Furthermore, it would be necessary to show that social change is automatically accompanied by a corresponding change in the legal system, be that in legal practice (that is to say in how law is enforced) or in how rules are actually formulated or created. For if law reflects the needs and values of a society then it ought, as a corollary, to be shown to adjust at a pace with, and according to, changing circumstances of a people.

8. Throughout this study the only distinction made is that between written and oral law. The term customary law has been avoided because there is no definitive definition of it and, while sometimes it simply implies law which is not in a written form, it may also incorporate an idea of indigenous law which may be written or unwritten.

9. In fact these two aspects, *longaevus usus* (long-established practice) and *opinio necessitatis* (the conviction that this is rooted in common conviction) form the two elements which have framed definitions of customary law (cf. van de Bergh 1969). For the following reasons the term 'customary law' has been avoided in this study:

(1) An overwhelming lack of consensus as to how customary law is to be defined and of how it differs from 'law'.
(2) A general failure in legal theory to assess the impact of writing on law.
(3) The monism which results from differentiating between customary law, usually thought of as 'living law' and reflective of the *Volksgeist*, and law in the real sense; namely, according to most definitions, state law. Such monism fails to recognize the pluralism of law in actual operation. Local systems often operate and persist alongside state imposed law.
(4) Finally the distinction between 'law' and 'customary law' is of limited use since it has arisen out of anthropological studies which try to assess the influence of imposed colonial law on non-Western, modern, tribal societies.

1. *The Independence of Law*

A critique of the view that law is a rational response to social change is the focus of Watson's work (Watson 1977, 1985). Using examples from diverse societies, including early Roman and ancient Near Eastern societies, Watson contends that law (even law of simple societies) is to be seen as a structurally autonomous institution which develops under its own momentum. This momentum is to be described as the general legal tradition available to the legal élites who are responsible for expanding, copying, editing and commenting on law.[10] By identifying the impetus to legal development as the legal tradition itself (rather than socio-economic requirements) any simple correlation of social development and legal development is excluded. Nonetheless, Watson's theory does not result in the view of the relationship between law and society as one of absolute independence:

> though there is an historical reason for every legal development, yet to a considerable extent law in most places at most times does not progress in a rational or responsive way, and ... the divergence between law and the needs or wishes of a people involved or the will of the leaders of the people is marked (Watson 1977: 5).

Consequently law is not simply to be seen as responding to the needs of the people in general. Nor is it to be understood in a Marxist sense which would view law as the manipulative tool of the leaders and upper classes. While there is a degree of relationship between law and society, legal institutions emerge at a pace and with characteristics dictated by legal reasoning.[11] If this is so, then developments in Israelite society, such as an increase in social differentiation, would not have made as extensive and as direct an impact on legal history as Otto (1988), Crüsemann (1988) and Halbe (1975) have proposed. Other factors, notably the contribution from the legal tradition, must be given at the very least equal consideration. What obstacles prevent a simple correlation of social development and legal development? How is the divergence between law and society to be accounted for?

10. Watson 1985: Chs. 1–3, 5; 1977: 98-99.
11. Watson 1985: 32, 42, 93, 117ff.

a. *Inertia*

Law in general exhibits the characteristic known as inertia. Legal rules tend to persist even when they have lost any real relevance (Watson 1977: 29-43, 130). The explanation for the persistence of obsolete law lies in juristic fascination with technicalities. On the face of it this may seem to be a characteristic of law found only in contemporary societies where law has reached an intense level of rationalization. The point is better explained by Goody who examines the roots of this so-called juristic fascination (Goody 1986). Fundamentally, it is related to the law's characteristic as text. One of the features of textuality is rigidity. The rigidity and fixity of texts means that ways of altering law must be invented. This may be achieved through the application of a legal fiction,[12] through equity[13] and less often through new legislation. Yet the rigidity which is present when rules exist in a written rather than an oral form means that these procedures have to be applied in ways which do not undermine the earlier law. In other words, although writing increases the amount of information in store and enhances clarity, the problem of erasure is created.[14] As a consequence, rather than legal development occuring at a pace with social development and its requirements, legal development tends to lag behind. In fact it may lag behind by centuries. The effect of the capacity of a rule or a body of rules for survival on the relationship between law and society is often underestimated (Watson 1977: 8). This last point is well illustrated by the following example.[15]

The law of *patria potestas*[16] is usually traced back to the early days of the Twelve Tables; that is to say, to the fifth century BCE. The extensiveness of the father's power over the son appears in this legislation as very great indeed. In the first place, the father has the right to punish his son for crimes and misdemeanours to the extent that he may

12. A legal fiction is any assumption which conceals, or tries to conceal, the fact that a rule has been altered, its letter remaining unchanged, its operation being modified.

13. Equity is an additional body of rules which exists alongside the main body of law.

14. See below for examination of the effects of the application of writing to law in oral societies.

15. For the persistence of the law prescribing the death penalty for the crime of cursing God and king, despite its obvious obsolescence, see above p. 14.

16. The term relates to the extensive power and authority of the head of a family over those dependent upon him.

sell his son into slavery and even impose upon him the death penalty. Secondly, a son could own no property, although generally he was granted a *peculium* or an allowance by his father. This allowance, however, could be confiscated at the discretion of the father. Since the son could not by law own property he could not enter into a contract and consequently could not be held liable. Moreover, a man remained under the *patria potestas* until the death of his father (Watson 1977: 26-29).

It would appear that certain social and legal conventions pertaining to familial relations in early Roman society may be gleaned from these legal stipulations. Watson has pointed out that given the extensive restrictions placed upon a man by his status as *filius familius*, one would expect the most important fact about a Roman to be whether or not he was under the *patria potestas*. Yet non-legal Roman notes or biographical accounts hardly ever state whether or not the subject of the account exists in, or is free of, the status. In a rare instance, the status of the governor of Sicily, Caius Verres, is stated to be that of a *filius familias*. Yet the account of his activities is completely at variance with what a man under *patria potestas* was permitted to do according to the legal prescriptions of the Twelve Tables. Caius Verres is said to have 'amassed great fortune'. But the Twelve Tables prohibited ownership of property by a man still living under *patria potestas*. Furthermore, the extreme powers of the father are hardly in evidence at all (Watson 1977: 27-29). Clearly in this instance, to proceed to draw conclusions regarding the socio-economic position of a Roman living under *patria potestas* in early Rome from legal texts would prove extremely misleading. Law, in this case, therefore, did not reflect social reality. Moreover, it cannot be assumed that rules relating to *patria potestas* reflect the needs and desires of the Roman psyche if, in effect, these very rules were of little consequence in everyday life. Thus, the *Volksrecht* theory is undermined and studies like that of Patrick which contend that law is in a sense 'public philosophy' must be subjected to similar criticism.[17]

How is the persistence for centuries of a rule which had so limited relevance in everyday life to be explained? Watson views it as the result of inertia and indifference which he contends 'operates both to prevent

17. While accepting the sociological maxim, 'What is objectively taken for granted is assumed, not stated' (Kovacs 1976: 26), this maxim does not affect the argument here since the text contradicts that which one might assume to have been taken for granted.

a legal rule from developing to a satisfactory state and to inhibit change when society changes' (Watson 1977: 131).[18]

b. *Efforts of Pressure Groups or Powerful Individuals*

Additional evidence that law does not reflect the *Volksgeist* is the fact that often when the history of a law is examined it becomes evident that what is reflected is the interest of a small pressure group or a powerful individual.[19] Consequently, requirements or statements of law have very often little or no relation to society as a whole (Watson 1977: 130). This observation is not intended to suggest a Marxist approach to law wherein all law is understood as the manipulative tool of the upper classes created by them to distort a situation of social inequality by giving it the appearance of being lawful or right. The difference between Watson's view and a Marxist approach to law is that while Marx views all law as the creation of groups attempting to impose their rule and ensure their continued economic prestige, Watson is merely pointing out that particular laws may be at times the creation of a powerful interest group or individual. Under such conditions law will in no way be an index of that civilization reflecting the needs and desires of the people as a whole. What law reflects in this instance is the needs and desires of small interest groups or powerful individuals.[20]

The personally motivated input of a powerful individual may be illustrated once again using an example from the earliest Roman code (Watson 1977). The Twelve Tables, created in the fifth century BCE and providing Roman society with its rules for centuries, prohibited marriage within the degree of an uncle–niece relationship. The rule included both marriage with a brother's daughter and with a sister's daughter. After 49 CE, however, and for the next three centuries a change in this law occurs. This change legalized marriage of a man to

18. See further below, on this aspect of law.

19. Goody points out that once law receives written formulation its content may depend upon 'the specialist's interpretation of popular will, of political dominance, of bureaucratic convenience or of the internal logic of legal reasoning' (Goody 1986: 144).

20. Gusfield has pointed out that the aims of legislators may be symbolic rather than instrumental (Gusfield 1963). Symbolic legislation often comes about as the result of pressure from conservative religious groups who are concerned with having their religious and moral dominance publicly endorsed. Instrumental aims of legislators, in contrast, are concerned with altering behaviour systems in society especially in the area of economics.

his brother's daughter, while marriage to a sister's daughter remained illegal. The illogicality of the new ruling is obvious. Yet can it be assumed that the new legislation reflects a change in Roman ideas of kinship? Moreover, does our historical remoteness from the situation prevent us from comprehending the logic underlying the new development? Often, with regard to biblical law, it is suggested that, were we not so far-removed from the socio-historical circumstances of the ancient compilers, apparent illogicalities and gaps within the Old Testament code could be overcome.[21] Fortunately, in the case of the new Roman law on marriage the historical context of the legislation is known (Watson 1977: 39). In 49 CE Claudius changed the law in order to make his marriage to his brother's daughter legal. Marriage with a sister's daughter remained unlawful. Innovation in law in this instance was solely personally motivated. Furthermore, despite no evidence for an alteration in Roman ideas of kinship (the introduction of the rule did not result in a spurt of uncle–niece marriages) the rule remained as written law for three centuries.[22] Thus, with Watson, it may be concluded:

> Not only do we know why it was introduced, but we can see that from the outset the distinction was neither rational nor in tune with the outlook of society, but was due entirely to the efforts of a pressure group (Watson 1977: 40).

So while the emergence of this marriage law in 49 CE was historically conditioned, in its continuing lifetime it had no 'inherent close relationship with a particular people, time or place' (Watson 1977: 43). Moreover, while it persisted for three hundred years, it was in fact at variance with the values of both the ordinary people and the ruling élite (Watson 1977: 43-44).

This example from early Roman law, which illustrates that apparent illogicalities in law are often illogicalities *de facto* undermines methodologies like those of Patrick which suggest that by allowing the text to be 'the best text it can be', illogicalities and gaps in biblical law can be overcome and a coherent and consistent conceptual scheme constructed.[23]

21. See above, Chapter 1 Section 5.a, for Patrick's suggestions.

22. After three centuries change in the law came about when the distinction was finally abolished and marriage with a brother's daughter once again became illegal (Watson 1977: 39-40).

23. This criticism also applies to the studies of Haas (1989), Buss (1989) and

c. *Legal Transplants*

The idea that the laws of the Old Testament are to some extent the result of 'borrowing' from other systems is not new and has been recognized and debated since the discovery of Hammurabi's Code in 1902. Views of the extent of the relationship between the Book of the Covenant and extant codes range from parallel legal development to direct literary dependency. How do these theories stand up against the wider background of legal theory?

Legal philosophers generally accept that in the main, at most periods of history and in most places, law develops through a process of borrowing.[24] If this is so then what is the innate connection between a people and its law? Examples from contemporary, medieval and ancient societies indicate that frequency of borrowing and the high survival rate of rules 'together mean that usually legal rules are not peculiarly devised for the society in which they now operate'.[25] The effects of this observation on the relationship between law and society are often underestimated. Essentially the effects are as follows. First, legal rules do not reflect the underlying ethos of a people. Secondly, legal rules do not arise out of common practice and common experiences of the society within which they are found. Rather legal rules arise out of a system of borrowing or transplant. Finally, the relationship between law and society is not one of correlativity but one of relative independence.[26]

Of course, there may be exceptions to the rule that law develops through transplant from one system to another. Often Roman law is

Frymer-Kensky (1989) who similarly attempt to overcome gaps and illogicalities by reconstructing the intellectual system behind biblical law (see above Chapter 1 n. 38).

24. Roscoe Pound concluded that the: 'History of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law' (cited in Watson 1974: 22).

Lowie arrives at similar conclusions: 'cultures develop mainly through borrowings due to chance contact' (Lowie 1920: 441 cited in Watson 1974: 22). Watson 1977: 98; see further Watson 1974: Ch. 4. Examples include the reception of Roman law in Scotland and its earlier reception in tribal Germany.

25. Watson 1974: 96; cf. 1974: Ch. 16. By 'high survival rate of rules' Watson simply means the way in which obsolete rules persist in written collections of law.

26. The degree of autonomy between law and society is always dependent upon specific circumstances.

cited as a rare example of independent native creativity.[27] The Book of the Covenant, however, shows marked similarities to other ancient Near Eastern codes. Watson cites the case of the goring ox and in fact deems it an excellent and indisputable example of transplant in the ancient world (Watson 1974: Ch. 4). The *Code of Eshnunna* provides that:

> If an ox (was) a gorer and the ward (authorities) have had it made known to its owner, but he did not guard his ox and it gored a man and caused him to die, the owner of the ox shall weigh two thirds of a mina of silver. If it gored a slave and caused him to die, he shall weigh out 14 shekels of silver (*CE* 54, 55; *ANET* 163).

The Babylonian Code of Hammurabi similarly rules that:

> If a man's ox (was) a gorer and the ward (authorities) have had made known to him that (it was) a gorer, but he did not screen its horns (or) did not tie up his ox and that ox gored a son of a man and caused him to die, he shall give a half mina of silver. If the victim was the slave of a man he shall give a third of a mina of silver (*CH* 251, 252; *ANET* 176).

The provision of Exod. 21.28-32 may be compared:

> If an ox gore a man or a woman, and he died, the ox shall surely be stoned and his flesh shall not be eaten; but the owner of the ox shall be quit. But if the ox was a gorer from before times, and it has been testified to his owner and he did not keep him in and he killed a man or a woman, the ox shall be stoned and his owner also shall be put to death. If there be laid upon him a sum of money then he shall give for the ransom of his life whatsoever is laid upon him. Whether he gored a son or gored a daughter, according to this rule shall it be done to him. If the ox gore a slave or a slavewoman, he shall give to his master thirty shekels of silver and the ox shall be stoned.

Similarities are obvious in terms of substance and of formulation. As regards substance, they relate to a situation where the owner was officially notified of the danger, a feature which Watson notes is common neither in the ancient nor in the modern world (Watson 1974: Ch. 4). A further comparison may be drawn between *CE* 53 and Exod. 21.35:

> If an ox gored an ox and caused it to die, both ox owners shall divide the price of the live ox and the carcass of the dead ox (*CE* 53; *ANET* 163).

27. Nonetheless, it should be pointed out that ancient traditions which attribute the creation of the Twelve Tables to a process of borrowing from Greece do exist. Their authenticity is, however, disputed.

> And if a man's ox gored his fellow's ox and it died, then they shall sell the live ox and divide the silver of it; and the dead (ox) also they shall divide (Exod. 21.35).

These provisions from Eshnunna, the Code of Hammurabi and Exodus exhibit such similarities that some connection must have existed between them. The degree of similarity of style and substance is such that the possibility of parallel legal development is surely unlikely. It is far more likely that they share a common source (Watson 1974: Ch. 4).

Yet despite indications of a common source, scholars of biblical law have reached varying conclusions with regard to the extent of borrowing involved in the creation of the Book of the Covenant. The issue centres around the question of the relationship of the Book of the Covenant to general ancient Near Eastern legal culture.[28] This relationship has been expressed in different ways.

1. *Independent Parallel Development.* The relationship between the Book of the Covenant and extant codes has been described as one of independent, parallel development. This view is based on the idea that similar societies existing under similar economic, social, climactic and environmental conditions, are likely to develop similar legal systems due to the frequency of certain legal problems. For example, agricultural societies may find similar solutions to the problem of a dangerous domestic animal straying into inhabited areas.[29]

Once borrowing is accepted as the main impetus to legal development, however, some degree of literary dependency seems likely. To some extent reluctance on the part of biblical scholars to accept literary dependency is due to an insistence on Israel's creativity in the creation of its covenant law.[30] For example, van Selms is loath to acknowledge any dependency of the biblical compilers on the work of the legislators of Bilalama's law (*CE*). For how could it be that the Code of Eshnunna, which was after all

28. For an extensive survey (on which the present survey is based) see Schwienhorst-Schönberger 1990: 240-52.

29. Cf. Driver and Miles 1952; van Selms 1950; Preiser 1961.

30. Haas (1989: 68) points out that often a prejudice which views biblical legislation as of divine rather than of human origin inhibits an extension of the scope of comparative study.

> proclaimed for the small kingdom of Eshnunna alone, influenced the Book of the Covenant. And yet in some respects ... its rules are nearer to biblical laws than those of Hammurabi. The less have we reason to suppose influence of Hammurabi on Hebrew laws, at least in the case of the goring ox! (van Selms 1950: 326).[31]

Van Selms further ascertains that the Book of the Covenant is in no way dependent upon extant codes. It is quite clear to him that the Israelite conception of law is more 'primitive' than the Babylonian which in its elimination of blood revenge and its specifications of places and authorities looks by far the more 'modern' of the two (compare Exod. 21.28-32 to *CH* 250-52). The comparative 'primitiveness' of the Exodus code should 'make us very loath to mention a dependence of biblical on Babylonian law' (van Selms 1950: 325).[32]

2. *Relationship to a General Near Eastern Legal Culture.* Alt (1934) proposed the existence of a common Near Eastern legal culture which was transmitted through literary form.[33] Finkelstein, for example, admits the difficulty of explaining the verbal identity between sources as much as centuries apart and geographically far removed:

> the fact of this identity is incontrovertible and compels us to postulate an organic linkage between them even if this linkage cannot be reconstructed (Finkelstein 1981: 19).

And similarly Paul argues that:

> A study of the legal collection of Exodus in the light of these traditions reveals that early biblical law remained within the legal orbit of its cuneiform predecessors. This eclectic compilation appears to have been influenced by several extra-biblical substrata, many of which are still contextually and linguistically identifiable (Paul 1970: 102).

Once dependency of the Book of the Covenant on the extant codes is accepted, the question of direct or indirect literary dependency arises.

Gressmann (1921), for example, has argued that the authors of the Book of the Covenant knew the Code of Hammurabi in its written form and were directly influenced by it through a general Near Eastern literary tradition. Given the parallel verbal formulations of Exod. 21.35 and

31. Cf. David 1950: 153.

32. Evolutionary ideas should not be allowed to determine the relative age of rules (cf. van der Bergh 1969; Watson 1974: Ch. 2; Goody 1986: 132-33).

33. Cf. Paul 1970; Finkelstein 1981; Westbrook 1985, 1989.

CE 53, Exod. 21.28-32 and *CE* 54/55 and *CH* 251-52, it certainly seems necessary to accept some degree of direct literary dependence of at least some of the rulings. Literary dependency of one rule may indicate that only parts of a borrowed system were available; for example, the compiler may have had a school-book copy of some rulings rather than the entire code at his disposal. Watson notes that intermediary sources, such as a schoolbook, may be less complicated and more widely disseminated than original and complete copies of a code (Watson 1974).

Proponents of the view of the relationship between the extant codes and the Book of the Covenant as one of 'indirect literary dependency', to some extent, take this last point into account. They argue that while there may have been a literary dependency of the Book of the Covenant on the Code of Hammurabi, it was an indirect dependency (cf. Jepsen 1927; Jirku 1927).

Yaron (1969), Boecker (1976) and most recently Otto (1989) and Schwienhorst-Schönberger (1990) contend that the parallels between the Book of the Covenant and the Code of Hammurabi have arisen as the result of exposure to a general Near Eastern legal culture mediated, not through literary sources alone, but through a common legal practice and procedure.

3. *The Relationship of Borrowed Material to the Borrowing Society.* Schwienhorst-Schönberger views the influences on the earliest parts of the Book of the Covenant (namely the 'casuistic lawbook' within Exod. 21.12–22.19 [EVV 22.20]) as the general Near Eastern legal tradition mediated not just through legal practice but also through scribal schools. But while much of Old Testament law may have developed through a process of borrowing, the 'casuistic lawbook' is no mere copy of these codes (Schwienhorst-Schönberger 1990: 267).[34] The Book of the Covenant is related to the society in which it existed and for which it was composed (Schwienhorst-Schönberger 1990: 268).

But how closely are lawcodes which have been introduced into a society through a system of borrowing related to the recipient society? It could be argued that the donor system selected for borrowing will

34. Cf. Paul 1970: 102; Otto 1989: 138. Otto's recent study (1989) is noteworthy insofar as that, while the editorial techniques of the covenant code belong to a general Near Eastern tradition, he contends that influence was not simply one sided. In particular, examples of chiasmus in the Code of Eshnunna may be dependent upon the biblical technique.

surely bear much in common with the borrowing society in terms of socio-economic development as well as moral, religious or ideological values. Hence, if similarity in form and in substance between the donor society and the borrowing society is accepted, then the laws in themselves (although borrowed) will reveal much about the socio-historical and economic, as well as the moral and ideological values, of the borrowing society. Watson, however, has illustrated that it is not similarity of socio-historical or moral values which determines choice of a donor system. Rather the real determinants are:

1. That the donor system be held in some esteem by the legal specialists responsible for borrowing. This requirement is related to the common psychological need for authority in establishing legal rules.[35]
2. That the legal materials of the donor system are accessible: that is that they exist in written form and in a language which is accessible to the legal specialists (and not necessarily to that society as a whole) of the borrowing society.[36]
3. Absence of plausible rivals to the chosen donor system.

In fact, quality of law, but even more surprisingly, suitability of rules, does not play a determinative role when the decision to transplant is being made for 'once a system is regarded with enough respect, its rules will be borrowed even when the particular rule is inefficient and inappropriate' (Watson 1977: 99). Transplant of legal rules is in fact 'socially easy'. This is so even when the donor system is socially, historically and economically far removed from the recipient system.[37] Generally legal rules make little impact on individuals and very often what is important is that a rule exists. What rule is adopted, however, is of 'restricted significance for general human happiness' (Watson 1974: 96).[38]

35. Watson 1974: 57, 88-90, 95-101; 1985: 116-19.

36. At the same time, however, it is possible that a bias towards borrowing from a particular foreign system can prevent transplant (e.g. national aversion to a foreign culture).

37. For examples of transplant of laws between diverse societies which are often centuries removed from each other as well as socially and economically heterogeneous, see Watson 1974.

38. This point of view stands in marked contrast to the views of Otto (1988); Schwienhorst-Schönberger (1990); Halbe (1975) and Crüsemann (1988) who believe that it was the desire to maintain Israelite identity (both social and religious)

Thus, Schwienhorst-Schönberger, while acknowledging that Israel's legal tradition developed through a process of borrowing, has failed to draw out the full implications of the process. The implications have already been outlined and may be summarized as follows.[39]

1. Legal rules of any society are likely to have been greatly influenced by rules borrowed from another system. Thus, they most likely do not reflect in any definitive way the underlying ethos of a people.
2. Since legal rules do not arise out of common or established social practice, nor out of the experiences of the codifying society, they are not particulary related to that society's social practices or norms.
3. The relationship between legal development and social development is not one of correlativity. It is more accurately described as one of relative independence.

These observations suggest strongly that a legal code may not be the rational response to social circumstances which Otto (1988), Crüsemann (1988), Schwienhorst-Schönberger (1990) and Halbe (1975) assume.[40] Moreover, it will certainly not reflect a society's underlying philosophical system to any similar degree to that proposed by Patrick (1989b).[41]

d. *Summary*

The fact that legal systems generally develop holistically or in part through the practice of borrowing from other systems implies that the impetus to legal development may not be located in the needs and desires, both socio-economic and ideological, of the borrowing society. Rather the impetus to legal development may be found in the legal tradition from which the legal specialists borrow.

Moreover, transplant of a legal system presupposes the presence of a class of legal élites. In modern societies these élites become concerned with the technicalities of law. It is this specialist knowledge and preoccupation with technicalities which makes them élite. In an ancient society the creation of an élite stems from the limitation of literacy

which generated the ethical rules of the Book of the Covenant (see above, Chapter 1).

39. See above, Chapter 2 Section 2 and Section 3.
40. See above, Chapter 1.
41. See above, Chapter 1 Section 5.a.

skills to specialist groups of scribes (cf. Goody 1986: 143-44).[42]

Because the influences on legal development are to be located, in the first place, within the general legal tradition available and, in the second place, in the input of élites who alone are responsible for interpretation and reformulation of this general tradition, legal development is to be seen as determined by the 'lawyers' culture' (Watson 1985: Chs. 1–3, 118-19). Although social, economic and political factors may impinge on the development of law, this occurs in a limited way through the consciousness of these specialized members of society, the legal élite (Watson 1985: 118). Even if once a system has been successfully borrowed a change in the law is called for,[43] once again the tendency of legal élites is to turn to another system for a solution. Often modifications may be made but such modifications are generally not governed by consideration of local needs and conditions. Such alterations in a rule will depend on the 'lawyers' culture'. Hence, although society may have an input, it often bears little relation to the literary productions of the legal élites. It may thus be concluded that the direct link between a society and its law is tenuous. In order to understand the relation between a society and its laws the investigator must be fully aware of the legal tradition (Watson 1985: 115-19).

Obviously this understanding of the relationship between legal development and social development undermines the studies of Otto (1988), Halbe (1975), Schwienhorst-Schönberger (1990) and Crüsemann (1988) which view Israel's legal history against the background of, and as a direct and rational response to, specific socio-economic changes in monarchic Israel. But before examining the full implications of Watson's critique of the *Volksrecht* theory, a further question may be raised. Despite Watson's use of examples from early Roman and ancient Near Eastern societies (Watson 1977, 1974), to what extent is the description of the relationship between law and society as one of independence applicable to ancient societies? In a contemporary, west-

42. See further below, on creation of élites.

43. Finley (1983: 108) has pointed out that inequality before the law is generally accepted even in modern societies. It is even more unlikely that one should understand a reform in ancient law as the result of a demand for reform. If any such call for a reform in law did take place in ancient societies it is likely to have been restricted to powerful political pressure groups or individuals rather than coming from society as a whole. The level of political participation in ancient societies is limited. Only the élite consulted documents and books. The population at large relied exclusively on oral communication (Finley 1982: 10).

ern context the independence of law is evident; its remoteness from society's needs and from its ethos which in any case has become increasingly pluralistic, its technicality which increases this remoteness and its varieties of specialist and élitist fields, all are aspects of modern, western legal systems which leave the layperson in awe of a system which bears little resemblance to his or her everyday social experiences.[44] Furthermore, the reluctance of legislators to alter rules which clearly no longer fit social circumstances is evidently often the result of inertia.[45] At other times the remoteness or 'out of stepness' with society may be related to ideological and political concerns which operate to prevent change.

Such conditions and aspects seem remote from what may be envisaged of an ancient system such as that of ancient Israel. Yet in an examination of the influence of writing on law, Goody has mapped the development of law as a process of increasing independence, a process which is fundamentally the result of the application of the mechanism of writing (Goody 1986; cf. 1990). Consideration of Goody's findings illustrates that Watson's description of the relationship between law and society as one of basic independence may be just as relevant to ancient as it is to modern societies.

2. *Characteristics of Written Law*

Goody has shown that in ancient societies the relationship between written law and society is tenuous. It may no longer be upheld that law is cultural and social, concerned with the institutionalization of values 'to which the people themselves are sufficiently committed to be willing to impose them upon themselves in an authoritative manner' (Fallers 1969: 2, citing Goody 1986: 131). The homogeneity such a view assumes may be reasonably well suited to acephalous, unstratified societies but it must be acknowledged that even for simple states it does not adequately characterize a judicial process which is neither always popular nor always accessible (Goody 1986: 131). Simplicity of social

44. In fact, it is a similar observation of the remoteness of law and social reality in modern Western Germany which informs Otto's methodology (1988: 1-3). The plurality and heterogeneity of Western Germany is noted. The needs of such a society are not met by the monolithic body of law. The result is a 'crisis of legal legitimation'. Otto proposes a similar crisis in ancient Israel (but see above, n. 43).

45. See above, Chapter 2 Section 1.a.

organization does not imply homogeneity of law and society in the case of a society's rules being in written form. But what of societies where law remains at the oral level? In such societies rules are transmitted through legal specialists, remembrancers or judges. Transmission is through the oral channel. As a consequence of oral transmission a relatively closer link is maintained between rules and society than in situations where law has been given a written form. This is so because, in the first place, rules may last only as long as the lifetime of the individual judge and, secondly, because aspects of a rule may be lost in oral transmission and new aspects added without there appearing to be any real or radical alteration in law. This means that gradually adjustments may be made as new social situations arise. Consequently, law transmitted in an oral context may be said to be more flexible than law transmitted in a literary form (Goody 1986: 136). For where transmission of rules is oral the process of adaptation is imperceptible because norms have only a verbal, an oral existence. Thus, 'rules that are no longer applicable tend to slip out of the memory store' (Goody 1986: 139).

But what of a situation where codification involves simply the written expression of such oral rules and practice? In such a case would not law and society converge? If such a procedure were envisaged in Israel, then the laws of the acephalous, pre-monarchic Israel would be reflected in its written codes and hence these codes could be taken as reflective of early Israel's values and socio-economic circumstances as well as of its legal practice. To some extent this is what Halbe (1975) is proposing when he suggests that Exod. 34.10-26 is a pre-monarchic text which contains rules from Israel's earliest period. What is contained in later codes (such as the Book of the Covenant) is simply an updating of what were essentially Israelite legal concepts.[46] It is important to note, however, that Watson has pointed out that codification hardly ever involves simply the codification of oral rules and traditions. Of course to some extent it may do so, but generally speaking codification involves 'wholesale borrowing'. Moreover, in the case of Israel's code there are indisputable indications of transplant.[47]

46. See above, Chapter 1 Section 1 and cf. Gottwald who also views the Book of the Covenant as a revival of pre-monarchic ideals in a period of social crisis which had been initiated by the introduction of the monarchy (1979: 58-59).

47. See above, Chapter 2 Section 1.c.

What are the effects of the introduction of a written code of law on society in general? In an oral situation Goody noted adaptation of norms to be an 'imperceptible process', adjustment being facilitated by the shorter lives of rules. Once, however, society adopts a written code, the possibility and relative ease of such adjustment no longer exists. Thus, the gap between law and society widens (Goody 1986: 139).

Why should this be so? The process is specifically related to the presence of writing.[48] The mechanism of writing, contends Goody, eventually gives rise to the autonomy of the text and in the end to the creation of an autonomous institution (Goody 1986: 172). What gives rise to this condition? A virtually immediate but unintended effect of the application of writing is decontextualization. Once a rule has been given written form it may be contemplated visually as well as orally. The consequences of this are of fundamental significance, for reading permits:

> a greater distancing between individual, language and reference than speech, a greater objectification which increases the analytical potential of the human mind (Goody 1986: 142).

The rule in itself becomes decontextualized. That is to say, the rule becomes distanced, first, from the situation in which it was originally formulated: from the context of its production, from the context of its setting and from its original audience. Secondly, the rule becomes distant from the original creator or author whose intentions become immediately obscured. Since the text now lacks the context of speech it may become more difficult to understand. It may be abbreviated, cryptic and generalized. Moreover, it may not even relate to the present at all. By virtue of its textuality the rule becomes subject to critical attention, reformulation, reflection and commentary. The creation of a legal text involves, first, a formalization, for example, a numbering of the laws. Secondly, it involves a universalization, for example, an extension of their range by an elimination of particularities. Finally, the creation of a legal text involves an ongoing rationalization. This rationalization is not to be understood as something which is opposed to the modes

48. While Watson's description of the relationship between law and society as one of autonomy is based solely on discussion of written law, he does not make explicit the influence of writing which is described by Goody as 'a major contributory mechanism' (Goody 1986). Likewise, Maine recognized the end of the spontaneous adjustment of law to society once codification had taken place. Again, however, Maine fails to make explicit the influence of writing (Maine 1931).

of thought of oral communities. Rather, rationalization involves a reordering and a reclassification of rules.[49]

Moreover, while positively writing increases the amount of information in store and can aid towards clarification of rules, negatively this 'rationalization' may result in a lack of clarity which is the direct result of decontextualization. Additional negative consequences of the application of writing to rules are, in the first place, the creation of the problem of erasure and, in the second place, a lack of flexibility.

The problem of erasure has already been raised in the discussion of the adaptation of rules to changing circumstances in oral societies.[50] Basically it is related to the authority which a statement of rule enjoys once it has been given written form. This respect for the written form over against the oral creates the problem of erasure, that is to say, the problem of how a rule is to be eliminated and replaced by one more suited to changed circumstances.[51] While in a situation of oral transmission such elimination and substitution is facilitated by the shorter lives of rules (i.e. their endurance in a specific form being only as long as the memory of a judge) the written word endures for generations. Thus, a rule may persist in the statute books centuries after it has become obsolete. Watson, for example, explained the persistence of Claudius' marriage law for three centuries despite its inappropriateness, as the result of inertia or indifference. It seems likely, however, that while indifference may have been a factor, the primary reason for the endurance of an obsolete law is to be seen in the law's characteristic as text by virtue of which the 'problem of erasure' is created.

Not only does the application of writing to rules result in the problem of erasure, it also gives rise to a lack of flexibility. This lack of flexibility is related to the generalization and universalization involved in the process of codification. The elimination of complexities and particulars results in a situation where norms 'often remain guides to ideal rather than to practical action' (Goody 1986: 167). So, for example, in the case of homicide, assessment would depend on context and category in a real-life situation. The judge would have to take all mitigating

49. While Otto has observed this process of rationalization, he has not seen it as directly related to the presence of writing (Otto 1988).

50. See above, Chapter 2 Section 1.a.

51. Significantly the transition from oral to written forms can effect a change in the symbols; for example from mouth to hand. This is so especially in the case of symbols of legal authority.

circumstances into consideration as well as his assessment being dependent upon whether or not the victim is inside or outside the group or kinship group (Goody 1986: 167). But in early written codes these complex set of factors often become simplified in a general rule: *Thou shalt not do so and so.*

These factors when taken together suggest that rather than codification involving a narrowing of the gap between law and societal needs and circumstances, it involves a widening of this gap.[52] Rules become encapsulated within a system which allows little flexibility. Moreover, obsolete rules may remain in law books for centuries. Thus, legal development lags far behind and is often completely out of step with social development:

> The relationship of law to society becomes formalized with the advent of writing. Since there is no longer a quasi-homeostatic adaptation of norms, the written law achieves a kind of autonomy of its own, as do its organs. The judicial court gradually becomes separate from the royal or chief's court, acquiring its own highly literate specialists (Goody 1986: 142-43).

a. *The Creation of Literary Experts and the Autonomy of the Organization*

In an ancient society, where literacy skills are restricted to a minority of specialists, the creation of a text, be it the writing down of religious ideas, codification of rules, or even simply listing of weights and measures,[53] inevitably results in the creation of a class of literary specialists who become responsible for maintaining, copying and editing the text (Goody 1986).[54] Written records require clerks. In the case of law, if rules were ever the property of a lay person or even of a specialist judge, they now become the property of the specialist scribe. As editing and elaboration of texts occurs at the hands of the specialist, law becomes something which is embedded in documents which can be disinterred only by specialists of that written word (Goody 1986: 143).

52. Often the codification of law is regarded as meeting the requests of the people who ask for rules to be introduced since the oral rules do not meet their needs. As has been pointed out, however, it is possible for rules to be more suited to society when rules are oral.

53. See Goody 1986: Chs. 1, 2.

54. Cf. also MacCormack 1979: 173-87. MacCormack notes the creation of literary experts as an important change which occurs once laws have been written down. Cf. Finley 1982: 10.

Often the interests of these specialist groups, while perhaps originally identifiable or at least approximate to those of the state, diverge. This process is enhanced by the growing autonomy of the organization and its institutions:

> Any divergence between the domain of priest and king that one finds implicit in oral societies now becomes explicit and can take on an 'ideological' dimension. For the written tradition articulates beliefs and interests in a semi-permanent form that can extend their influence independently of any particular political system (Goody 1986: 172).

The ability of texts, and the organizations involved in their preservation and reproduction to develop ideologies independently of a particular political system is highly significant for any understanding of how law-codes develop. It will be returned to in greater detail in Chapter 5 when it is considered as a factor in the process within which the authority of Israel's law came to be expressed in the idea of Yhwh as the source of all of Israel's law.

> Hence, two factors come into play once rules have been given written form; the autonomy of the text and the creation of specialist scribes. Combined, these factors '... promote the structural autonomy of the "great organizations"' (Goody 1986: 172).

To return to the question raised earlier. How relevant is Watson's understanding of the relationship of law and society as one of independence to ancient societies which could not have attained anything resembling the modern western level of rationalization? Goody's study illustrates that the independence of law is not simply an aspect of modern legal systems. It is not simply to be explained as the result of extreme technicality and complexity of a system. The independence of lawcodes is the result of their being in written form. They are the work of specialist scribes who often operate in specialist scribal organizations. In fact, it could be argued that the degree of independence between law and society is greater in ancient societies than it is in contemporary, Western societies. This is so for the following reasons. First, in an ancient society limitation of literacy skills deprives most of the population of access to the legal codes. Without opportunity to reflect upon the content of the codes, the majority of the population are not in a position to call for amendment in law or to point out its deficiencies as social circumstances change. Secondly, and perhaps more importantly, in pre-Enlightenment societies political participation is restricted to a

literate élite who usually enjoy access to the capital. Thus, the law's independence of social and economic circumstances in an ancient society is as much the result of the inability of the general population to reflect in a political and critical way as it is the result of the law being the property of a literate élite whose creation of law is determined by the literary, legal tradition available to them.[55]

Thus, in general, lawcodes may originate through processes which are independent of, and often unconcerned with, society's everyday legal needs. These legal needs tend, in simple societies, to be filled by oral law.

3. *Conclusion*

At the beginning of this chapter it was noted that the studies of Otto (1988), Halbe (1975), Crüsemann (1988) and Schwienhorst-Schönberger (1990) were informed by an understanding of the relationship between law and society which viewed law, in the first place, as a rational response to socio-economic development, and in the second place, as reflective of the ethos of Israelite society. Patrick's (1989b) study, insofar as it described law as 'public philosophy', was seen to be extreme in its acceptance of the *Volksrecht* theory. Furthermore, studies of biblical law were seen to be in line with mainstream sociology of law. Seeking to test these mainstream theories, an attempt was made to demonstrate that law develops out of patterns of behaviour which characterize the codifying society, and, as a corollary, that alterations in a rule reflect a change in society's values and norms. The idea that law is a rational response to changing socio-economic circumstances adjusting

55. Watson is correct in viewing the relationship between law and society as one of independence in contemporary, Western societies insofar as the written word of law is notoriously difficult to alter since alteration must take place without there appearing to be any change in the letter of the law. This reluctance to change the letter of the law is, I would argue, due to the existence of the law in a written, and therefore in a fixed and authoritative, form. It may be, however, that Watson has not sufficiently stressed the relativity of the independence of law and society in modern contexts. For example, in a contemporary, Western society, the population in general has greater access to legal texts, a greater ability to reflect politically and the mechanisms and formal means to call for amendment in the law. In this way society does have an input. At the same time, amendment in law is in general a slow and arduous process because the texts of law are regarded as authoritative and at times, it would seem, as virtually transcendent.

at a pace with, and according to, newly created situations was also examined.

What emerged was that rather than socio-economic conditions and the underlying value systems of the codifying society providing the stimulus to legal growth, law may develop through the momentum of the general, legal tradition available to the legal élites. Law does not converge with society. This is so because, while law develops certainly because of societal needs, it develops at a pace and with features dictated by the legal tradition. Moreover, the general tendency of legislators, both ancient and modern, is to turn to a foreign, more developed and highly esteemed system when seeking solution to a legal problem. Apart from the pre-requisite that the donor system be accessible, namely that it exists in a literary form and in a language accessible to the legal élites (but not necessarily to the society as a whole), there are no requirements or special conditions for transplant to be successful. Diversity of socio-economic circumstances and historical and geographical distance do not preclude transplant which is 'socially easy'. Moreover, as long as a rule is held to be authoritative, it may be borrowed even if it is not particularly suited to its new context. Since law generally develops through a process of borrowing from foreign systems, law is not peculiarly devised for a particular people and may not be said to reflect the values or philosophical system of that people. Furthermore, individual rules may not be seen as a response evoked by a specific social or economic problem.

Goody also argued for the independence of written law and society for the following reasons:

1. Rules in a written form are rigid and fixed; with the generalization and universalization which is involved in codification, particulars and complexities, which will normally be present in a 'real-life' legal situation, are eliminated. Law can no longer adapt as it may in an oral system. Rules, because they are fixed in a written form, become inflexible.
2. The authority which the written word (over against the oral) enjoys results in the 'problem of erasure', that is to say the problem of how a rule may be eliminated and replaced by one more suited to changed circumstances. Hence, legal development often lags far behind social developments and is often completely out of step with social needs.

Goody notes the emergence of a class of literary experts or specialists as a consequence of the creation of a text. In an ancient society where literacy is restricted, the creation of literary experts has far-reaching consequences. Law now becomes the property of the specialist scribe and becomes further removed from society as a whole. Moreover, the decision as to what rules are borrowed is a decision made by the legal élites who operate not in accordance with 'social need' but in accordance with legal reasoning.

Furthermore, since the creation of a text involves a decontextualization or a distancing of the text from its original author, its original context of production, and its original audience, it may eventually develop independently of the ideological system within which it was created, creating alternative ideologies. This independent development is facilitated by the specialization of scribes who tend to maintain their own guilds or organizations. In the last analysis, the autonomy of the text results in the autonomy of the organization and its institutions.[56]

56. See further below, Chapter 5, for a development of this point.

Chapter 3

THE LEGISLATIVE MODEL AND ITS ALTERNATIVES

In the previous chapter it was shown that the relationship between written law and society is tenuous; law neither adapts to society nor society to law. Moreover, law may not be seen as reflective of the values and philosophy of the society within which it was codified. The explanation for this degree of independence between legal development and social need was found in the following characteristics of written law. First, it is the legal tradition, rather than societal concerns, which provides the impetus to legal growth. Secondly, given the frequency of legal borrowing, this legal tradition may not be related in any specific way to the borrowing society. Thirdly, the fact that the laws are in written form means that they develop, under a momentum which derives from the authoritativeness of the written word, independently of social concerns and needs. This development is undertaken and its course is dictated by élites who alone, as specialists of the written word, can disinter texts and make decisions as to what rules or code should be borrowed.

The question remains: even if Israelite law at the stage of its codification was largely autonomous, dependent for its content more on the general legal tradition available to the legal élites than on socio-economic circumstances within Israel, once codified, were the rules conceived of as practical law which was imposed on the population as a whole? In other words, did people voluntarily or under coercion, orientate themselves towards these rules or did they remain peripheral to the underlying fabric of Israelite society? Were the biblical codes understood as a source of legislation which was binding upon judges, the decisions of which were backed up by courts and a force which operated to ensure observance of the courts' rulings?[1]

1. See above, Chapter 2 Section 2 for the definition of law accepted in this study. The presence of a code which is verbally binding and which is backed up by

While there is no doubt that studies of biblical law in general no longer consider the introduction of the Book of the Covenant as comparable in degree of influence to legislation in contemporary societies, they do nonetheless assume that to some degree the codes were intended to function as law, and hence to influence social norms and practice and to provide a binding source of law which was to be applied by judges. Patrick assumes that the intention of the biblical compilers was to provide precedents for judges and to inculcate the values of the legal system in the community (Patrick 1989b: 33). Otto (1988), Schwienhorst-Schönberger (1990), Halbe (1975) and Crüsemann (1988) also assume that the intention of these early codifiers was to provide legal precedent for practical application.[2] Phillips contends not only that the laws were intended to be observed by the general population, but also that in fact it was the giving of the law at Sinai which provided the unified value system which brought the people of Israel into existence (Phillips 1970: 1). While Boecker acknowledges that the biblical codes may not have functioned as comprehensively as a modern code, they were nonetheless intended for practical purposes:

> An ancient Near Eastern code did not regulate legal matters comprehensively and systematically, it contained certain cases which may roughly be described as cases of conflict (Boecker 1976: 76).[3]

Westbrook observes that, although it has long been recognized that the Code of Hammurabi lacks the comprehensiveness that would allow it to be considered a 'lawcode' in any comparable way to a code such as the Napoleonic code, scholars have failed to appreciate the full implications of the differences between modern and ancient codes (Westbrook 1985: 248). Scholars acknowledge that the codes contain too many contradictions, inconsistencies and gaps to have functioned as sources of legislation and yet at the same time continue to make comparisons between the ancient codes and modern legislation (cf. Driver and Miles 1952).

1. *The Ancient Near Eastern Codes as Legislation: Some Recent Proposals*

Proponents of the legislative model can no longer assume the correctness of their views but must defend them against the increasing

constables and courts is fundamental to the definition.

2. See above, Chapter 1.
3. Cf. Boecker 1976: Ch. 3; and Fishbane (1985) concludes similarly.

consensus that the codes were not legislation but rather formed part of a scientific tradition.[4] While the discussion has focused mainly on a study of the Code of Hammurabi, its results are assumed to apply to the ancient Near Eastern codes in general. Westbrook has outlined some recent arguments in favour of the legislative model (Westbrook 1989: 202-15). Insisting that the law is not merely a scientific-academic exercise, Petschow points to some of the closing remarks of Hammurabi's text (1986: 21-22):

> Let any oppressed man who has a cause come into the presence of the statue of me, the king of justice,
> And then read carefully 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 (*CH* Epilogue xxv, 3-17; *ANET* 178).

Petschow contends that these lines imply that a person with a legal case to make had access to the Code of Hammurabi and could read through it until he found the relevant statute. But, as Westbrook points out, Hammurabi's text continues to show how the man consulting the Code would be led only into praising the king (Westbrook 1989: 203). Moreover, this takes place not in a judicial court but in the temple where the stele was erected. Paul has questioned whether the population had access to the temple at Esa'gila where the stele was erected. Moreover, he doubts that the population were literate and questions whether they had the competence to interpret and apply the norms (Paul 1970: 24 n. 1).

Klima (1972) and Demare (1987) propose that the rules of Hammurabi are proven to have been enforceable in the courts by the curse formulae which threaten calamity upon those who disregard the rules or attempt to alter or damage the text.[5] As Westbrook points out, however, these curses are directed against future kings[6] and not against judges. Moreover, the threat against anyone attempting to erase Hammurabi's name replacing it with his own[7] 'shows that the binding authority of the provisions was not uppermost in the promulgator's mind, since that action by a future king would not detract from their authority and might even enhance it' (Westbrook 1989: 203).

4. For the latter view, cf. Kraus 1960; Bottéro 1982; Jackson 1975, 1989.
5. *CH* Epilogue xxvi, 20–xxviii, 90; *ANET* 178-79.
6. *CH* Epilogue xxvi, 59-63; *ANET* 179.
7. *CH* Epilogue xxvi, 33-35; *ANET* 179.

Klima (1972) points to the political context as a second piece of evidence for the legislative character of the Code of Hammurabi. Faced with the problems of holding together an empire which comprised peoples of different origin, race and nationality, Hammurabi saw the need to provide a unified judicial system.[8] It was this which prompted the king to draw up the legislation of the Code (Klima 1972: 306-307 n. 9).[9] Hammurabi believed that the unity of his empire was undermined by the presence of conflicting, local judicial systems. There is, however, no evidence that such a sophisticated move would have been necessitated. Friedmann points out that in pre-enlightenment societies limited communication, which results from the limitation of literacy skills to minority élites and the inaccessibility of outlying regions to capitals, severely limits the influence which institutions like law and religion may have (Friedmann 1967: 44). In any case there appears to have been relatively little substantial difference between legal practice from region to region.[10]

Eilers (1932) argued that the many discrepancies between the Code of Hammurabi and contract law proved that the lawcode had no influence on legal practice and is to be described as an 'academic exercise'. But, Petschow (1984) has recently concluded that there are no discrepancies between the Code of Hammurabi and documents of practice. Again, however, even if this were so (and it is not)[11] it still does not prove the legislative nature of the Code; that is to say, it does not prove that the contracts were based on the legislation of Hammurabi. In fact, Westbrook contends that the Code is dependent upon the contract and not vice versa: the Code describes contract law (Westbrook 1989: 204).[12]

Other arguments, including Westbrook's earlier thesis (1985), insist that if the lawcodes were not intended to influence and alter existing

8. Weingreen (1976) suggests that a similar need to unify the new kingdom of Israel would have necessitated the creation and enforcement of a legal code.

9. Cf. Petschow 1984: 21 n. 5 and Demare 1987: 346 n. 10 who follow Klima. While arguing against the legislative model (Jackson 1975, 1989), Jackson, nonetheless, points out that torah as a unified concept served a political purpose: the unification of the tribes on the basis of a single torah is a pervasive theme in the Bible (Jackson 1975: 500).

10. See further, Westbrook 1989: 204.

11. Cf. Driver and Miles 1952: i, 53, 401 and see further below, Chapter 3 Section 2.

12. See further below, Chapter 3 Section 3.

practice, then amendments to the rules which are evident within the codes themselves are inexplicable. For example, the Hittite lawcode contains such amendments. Paragraph 59 provides that:

> If anyone steals a ram, they used to give *formerly* 30 sheep, *now* he shall give 15 sheep (specifically) 5 ewes, 5 lambs (and) 5 rams (*ANET* 192).

Significantly diverging from his 1985 thesis,[13] Westbrook (1989: 205) points out that, while such amendments may indicate that the codes were related to practical law, they do not prove that the lawcodes were the actual source of amendment.

The greatest obstacle to an understanding of the lawcodes on the basis of a legislative model is the lack of reference to the lawcodes in documents of practice. If the law was intended to be statute by which judges were bound, why do the documents of practice never appeal to the regulations of the codes? Klima has suggested that citation was not required in ancient legal procedure (Klima 1972: 308 n. 9). But Westbrook has pointed out that in the post-cuneiform period of classical antiquity statutes were indeed cited either by quotation or simply by name and number (1989: 214 n. 47).[14] The second proposed solution to the problem of the silence of the contracts is that cuneiform trial records never give the legal grounds for the decisions recorded. Nonetheless, it is significant that we do find contractual references to the royal edicts. Royal edicts are solemn proclamations of the king, the intention of which is to reform some aspects of the existing law. While there is no evidence of the practical effect of the so-called 'lawcodes', there is evidence of the practical effect of the royal edicts.[15] The effect of the edicts is evident from changes in economic documents which follow their promulgation (Westbrook 1989: 215). The edicts are referred to indirectly in contracts insofar as contracts point out that the agreement post-dates the edict. Moreover, the edicts are the subjects of lawsuits and petitions. Their introduction is recorded in year names and in historical narratives (cf. Jer. 34.8-11). From the time of their introduction

13. Westbrook (1985) argues that these examples testify to the practical (i.e. legislative) function of these codes. If a legislative function is not accepted, argues Westbrook, then the updating and amendment of legal texts is inexplicable.

14. Cf. Mishnah, *Ket.* 3, 5: 'If there be found in her unchastity or if she is not fit to enter the congregation of Israel, he is not permitted to marry her, as it is said: "And she shall be to him for a wife". (This means) a wife who is fit for him' (citing Deut. 22.29) and see Westbrook 1989: 214 n. 47 for further examples.

15. Cf. Westbrook 1989: 215; Jackson 1989.

the royal edicts may be regarded as forming an authoritative source for the courts.

Alternatively, it would be incorrect to assume that the royal edicts were similar in function either to modern legislation or to the so-called lawcodes. Their spheres of influence were extremely restricted; they tended to deal with royal administrative reforms (which would be of little or no relevance to the population as a whole) or with the fixing of prices and debt releases (both of which would have been of restricted influence only). Important areas of the law such as family, matters of inheritance, property and contract are ignored in these edicts, while such matters form the bulk of the subject matter of the codes (see Westbrook 1989: 216, 217).

Even if the royal edicts were of restricted influence to the general population, they may nonetheless be described as legislation. The evidence for the legislative function of the edicts may be compared to the paucity of evidence for the legislative function of the so-called 'law-codes'. The differences are due to the different intentions lying behind the compilation of the texts. The edicts lay down a series of rules that come into force at a specific time and must be obeyed by the courts (Westbrook 1989). This, however, does not describe the intentions of the compilers of the codes. The royal edicts cannot serve as a general indicator of the function of the codes.

Although previously maintaining that the biblical codes could only be studied as law, Jackson has recently raised further objections to the application of the legislative model to the biblical codes (Jackson 1984; 1989: 186). If modern law is understood within the framework of a semiotic model the following elements feature:

1. First, there are the people between whom messages are exchanged (the sender and the receiver). In modern contexts the sender is the legislator, the receiver is the judge.
2. Secondly, within a communications model, the medium of communication must be taken into account. In a modern context the medium of communication is the written word.
3. Thirdly, there is the code in which the message is expressed, namely a particular, natural language and more often a particular register of that language, in the case of law, legal jargon or technical legal terminology which is used to decipher the meaning of the words of legislative texts. Of modern legislation it can be said that it has 'a peculiar form of force where

> every word is of binding character. The judge must take into account all the canonical words and cannot substitute as his primary source of authority words from any other source. So law is a message in a particular code' (Jackson 1989: 187).

On the basis of a semiotic model, the biblical codes, at least until the time of Ezra, cannot be understood as law. In the first place, the semiotic model of modern law outlined by Jackson requires that the medium of communication be the written word. But as Jackson notes of the Israelite context, when communication takes place between the legislator (whether the king or the divinity) and the judges, there is no indication that the medium of the written word is used. Secondly, even where there is communication of a written text of law, it is not judges who receive it. Finally, there is no evidence that the texts of the biblical codes possessed that form of force (where every word is of binding character) which Jackson has described in relation to modern legislation (Jackson 1989: 187). A non-legislative function for the biblical codes may be deduced from an examination of two texts which provide instructions for judges (2 Chron. 19.5-7 and Deut. 16.18-20):

> You shall appoint for yourselves judges and officers in all your towns which the Lord your God gives you, according to your tribes; and they shall judge the people with righteous judgment. You shall not pervert justice; you shall not show partiality; and you shall not take a bribe, for a bribe blinds the eyes of the wise and subverts the cause of the righteous. Justice and only justice you shall pursue, that you may live and inherit the land which the Lord your God gives you (Deut. 16.18-20).

Similar in tone are the instructions of 2 Chronicles:

> be careful what you do: you are there as judges, to please not man but the Lord, who is with you when you pass judgment. Let the dread of the Lord be upon you, then; take care what you do, for the Lord our God will not tolerate injustice, partiality or bribery (2 Chron. 19.5-7 [EVV 6-7]).

Neither text instructs judges to consult or comply with a written corpus of rules. The instructions are rather generalized; to do justice and to avoid corruption.

Thus, biblical law fails to conform to the communicational model of modern legislation. Jackson, through the application of semiotics finds alternatives in didactic, sapiential and monumental functions.[16] Before examining Jackson's findings, some alternatives to the legislative

16. See further below, Chapter 3 Section 3.b.

model require attention. These have been proposed by Bottéro (1982), Kraus (1960) and Goody (1990, 1986).

2. *Alternatives to the Legislative Model: the Scientific-Academic Treatise Model*

Goody contends that early legal codes, such as the Twelve Tables, had, initially at least, little or no effect on social norms and legal practice (Goody 1986; 1990: 409-15).[17] In the last analysis these codes may indeed influence social norms and legal procedure. In the main, however, this process is slow and influence remains largely imperceptible following the first few years of codification (Goody 1986; 1990: 409-15). Moreover, the influence of these early codes on legal practice and procedure may remain insignificant for as long as centuries. This limited efficacy is to be explained by the aims of the codifiers, aims which did not include the creation of a complete digest of laws which would operate on a daily basis in social life (Goody 1990: 410). In so far as there is an eventual influence of these early codes on legal practice, it is an influence which is the result of the authority which the texts gradually attain. This authority is the result of the autonomy which the texts achieve as the result of their being in written form.[18] It is the mechanism of writing and its virtually immediate effect of decontextualization which over time opens these texts (unlike speech) to reformulation, critical attention, reflection and commentary. Eventually it gives rise to the autonomy of the organization itself.

Yet another reason arises which ought to caution against understanding ancient lawcodes as intended to legislate for the society within which they were compiled. In pre-industrial or pre-Enlightenment societies limited communication, which arises out of the limitation of literacy skills to specialist élites, and the inaccessibility of outlying regions to capitals, severely limits the degree of influence which centralizing institutions like law and religion may have.[19] As Friedmann notes:

17. Cf. Maqueen (1986) and MacCormack 1979: 173-87. Discussion here of the effects of writing on law in sixth century BCE Roman society (Twelve Tables) corroborates Goody's findings. Despite the developed political organization with central government and writing, MacCormack doubts any extensive use of statements of written law at this early stage.

18. See further below, where the authority of texts is viewed as a result of their autonomy.

19. Cf. Nörr 1981: 'The efficacy of legislation in antiquity is attended by its

> Generally in primitive societies the reach of authority, and therefore of law, is limited by physical conditions and social tradition. Most of social life moves beyond the law which is concerned with minimum order, defense, a rudimentary system of justice and police, and a minimal revenue system, sufficient to maintain government (Friedmann 1987: 44).

While Goody and Friedmann have insisted on the minimal efficacy of the 'lawcodes' on social norms and legal practice, others have questioned the appropriateness of the designation 'lawcode' for these early texts.[20] Bottéro defines a lawcode as a complete collection of the law and its prescriptions which regulate a country and which is backed up by legitimate authority (Bottéro 1982: 416). Similarly Goody's definition requires the presence of organized courts, a force which operates to back up the laws and the existence of a body of written law. Law is characterized by 'a form of social control embedded in one of the specialized, "great institutions" and operating through the medium of courts, constables and codes' (Goody 1986: 134).

Hammurabi's text, contends Bottéro, is incomplete and had no legislative value (1982: 415). Many essentials remain untreated. For example, *CH* 195-214 deal with the case of an injury inflicted on a father by a son but cases of infanticide and parricide are untreated. Furthermore, the statements of the code are neither general nor universal but derive from specific situations. They contain numerous contradictions and inconsistencies (Bottéro 1982: 419-21). For example, *CH* 8 provides that anyone who steals an ass or an ox should make thirtyfold restitution. Should the thief not have the means of fulfilling this demand, then he should be put to death. But compare *CH* 259: if a thief steals a plough, he must pay five shekels. Moreover, *CH* 7 provides that if a man receives goods for safe keeping without the existence of any contract between him and the owner, then if subsequently the goods are stolen the man entrusted with their safe keeping shall be put to death. In contrast, *CH* 123 states that if a man gives goods to another man for safe keeping without the signing of a contract, then in the case where the goods are stolen the owner's case is not subject to claim. Materially, the cases appear the same, why then should their treatment be so contradictory?

special problems, not only in respect of the inadequate technique, but also—especially in a large territory ... in respect of the "sparseness" of the state organisation' (363) and Watson 1985: Ch. 4.

20. Cf. Kraus (1960); Maqueen (1986: 74-77).

Significantly, Bottéro notes that in texts which deal with legal matters from the same epoch, we find no reference to the Code of Hammurabi.[21] Moreover, Oppenheim points out that sales of animals, boats and other items are only sporadically contracted for in writing in spite of the provision of the Code of Hammurabi requiring this practice (Oppenheim 1964: 282). What makes Hammurabi's text not a code is, in the first place, its subject matter, and, secondly, the illogicality, inconsistency and inefficiency of its rules (Bottéro 1982: 416).

Immediately, objections to this conclusion may be preempted. In the first place, is the modern reader really in a position to judge these rules for their internal reasoning? Is it not possible that we are too far removed from the original context of the law's production to judge conclusively that various rules are inconsistent, illogical and ineffective? Patrick, for example, argues that the historian must project him or herself into the position of an ancient judge seeking solution to a legal problem. Only by adopting this approach can these illogicalities be overcome. Rules must be related to the overall conceptual scheme (Patrick 1989b).[22] But Patrick's methodology is questionable. How satisfactory is an approach which chooses to treat an illogicality as a 'mistake' on the part of the biblical compilers simply because these inconsistencies do not fit neatly into the overall conceptual scheme extracted from the texts? Moreover, Watson has pointed out that often illogicalities may be related to the historical creation of a rule; they may for example have found their way into codes through the personally motivated creation of rules or through the transplant of rules which are inappropriate to the needs of the recipient system. Thus, Bottéro's arguments must be given serious consideration and the appropriateness of the description 'lawcode' for these ancient texts, including the Book of the Covenant, reviewed.

If the importance of Hammurabi's text did not lie in its contribution to legislation, why was it recopied unchanged so many times by the ancients? Bottéro contends that the texts were educational.[23] Likewise

21. Cf Jackson (1975: 27 n. 15) who also notes lack of reference to the *CH* in extant texts where reference would be expected.

22. See above, Chapter 1 Section 5.a. Westbrook (1990) suggests that since the biblical codes form part of the general cuneiform legal tradition, then gaps and inconsistencies can be filled out by 'combining the versions, using the information from one code to fill in gaps in the others' (556).

23. Eilers draws the opposite conclusion suggesting that the existence of

Goody points out that some texts are more appropriately designated 'literary exercises' which were used in the teaching of reading and writing skills, as well as a means of general education.[24] Dixon has suggested a 'biblical' function, that is to say, an educational function, for the Twelve Tables of the fifth century BCE (Dixon 1985: 520-21). The function of the codes and the adequacy of the designation 'literary exercise' will be returned to in Chapter 4.

The form of Hammurabi's Code comprises an uninterrupted succession of conditional propositions introduced by 'if' and formed of a protasis and apodosis. This schema has usually been taken to be a specific characteristic of the genre 'lawcode'.[25] Yet Bottéro has noted the presence of this literary form in other Mesopotamian texts.[26] For example it appears in a Mesopotamian scientific treatise on medicine:

> If a man has a fever and his stomach burns, and he does not want drink or food, and besides this his body is yellow; then this man is in the grip of a venereal disease.[27]

> If, while walking, a man suddenly falls forward, his eyes dilated and he is incapable of restoring them to their normal state, and if at the same time he is unable to move his arms and legs; then he is having an epileptic fit.[28]

These texts were not intended to provide analysis and subsequent therapy. Rather they represent 'scientific judgments' of medicine on the nature of the illness and on its evolution. Their form corresponds to that found in Hammurabi's Code, an uninterrupted succession of conditional propositions introduced by '*if*' and formed of a protasis and apodosis: 'if ... then'. Consequently that form which seemed a peculiarity

numerous copies of *CH* suggests that it was binding on the population: 'it is possible to infer that *CH* is a legal compilation of customary law which incorporates reforms and amendments and which in addition, selects from several extant traditions the one legal prescription that is to become authoritative. That it might have had some impact on the populace is evidenced by its attested popularity and constant recopying' (Eilers 1932 cited in Paul 1970: 24).

24. Goody 1986: 135; and cf. Westbrook 1985.

25. Yaron points out that although the casuistic form is usually introduced by 'if' other forms are possible (Yaron 1962: 137-53).

26. Cf. Kraus (1960) who notes the presence of the form in the omen series.

27. Translated from Bottéro 1982: 427 as from Labat 1951. Labat says the particular area of the stomach is the epigastrium.

28. See above, n. 27.

and indicator of the genre 'lawcode' is not such. This conditional schema may well have represented for the ancient Mesopotamians the proper way to frame and present their rational and scientific knowledge (Bottéro 1982: 427). Hence, in this form knowledge about medicine, mathematics, divination and, it seems, law was compiled.[29] In these scientific treatises were included not only the common but also the uncommon and the exceptional (Bottéro 1982: 433). It is thus possible to view Hammurabi's text as a scientific treatise. The intention of its compilers was not to provide legislation nor to influence legal practice in any deliberate or direct fashion. The compilers' aims were to reach a 'scientific grasp' of their subject.[30] These treatises were recopied, studied, re-edited and revised as part of the educational programme of scribes and specialist scribes who would become perhaps exclusively concerned with divination, medical or legal texts (Bottéro 1982: 426-27, 435-43).[31]

a. *Lawcodes, Contracts and Judicial Procedures*

We start with our definition of law as, first, the complete collection of the law and its prescriptions which regulate a country (Bottéro 1982: 414) and, secondly, as a form of social control embedded in one of the specialized 'great organizations' and operating through the medium of courts, constables and codes (Goody 1986: 134). The Code of Hammurabi does not satisfy these prerequisites. Neither its form nor its content indicate conclusively its use as legislation or social control. In fact, Bottéro contends that 'law' as it is here defined, does not appear until the Greeks (1982: 437). The 'scientific treatises' of the ancients may, however, be seen as the forerunners of Greek law insofar as they recognize the importance of observation, criticism and order (Bottéro 1982: 437). What regulated Mesopotamian life was its oral laws not the Code of Hammurabi.[32] The Code of Hammurabi was a work of science

29. See above n. 27 for medical texts. For omen series see Bottéro 1974: 70-96.

30. So for example Bottéro notes that in *CH* 268-70 an ass is assigned to the work of threshing. Being an ungovernable and difficult animal this is unusual. It is included, however, because the compiler with his 'scientific' interests wanted to cover all possible variations (Bottéro 1982: 435).

31. See above, Chapter 2, on the autonomy of literary élites and their contribution to the legal tradition.

32. Maqueen (1986) also doubts the practical application of Hittite laws and views judgments to have been based on customary (here he means oral) rules (Maqueen 1986: 74-77).

devoted to the excercise of justice (Bottéro 1982: 438). Moreover, Goody estimates the influence of writing on law to be far greater in the area of contract than in the area of code (1986: 144-47). That is to say, long before codes were used as a source of practical law, contracts became increasingly widespread in commercial and marital transactions. This proposal is supported by the large number of legal contracts found throughout the ancient Near East and also by the absence of reference within these contracts to the codes which existed contemporaneously. In the Yabneh Yam letter, for example, a harvester's mantle is stolen. The harvester complains to his master, appealing on his own behalf on the basis of his innocence; his mantle should be returned because it had been taken over a misunderstanding. He points out that his rights of ownership had been violated; he does not point out that Pentateuchal law had been broken.[33] Given the fact that Pentateuchal legislation exists which expressly forbids such a seizure, the absence of any appeal to it is pertinent (cf. Exod. 22.25-27 [EVV 22.26-28]; Deut. 24.10-13). Here it appears, as in the eighth century prophetic literature, no appeal is made to Pentateuchal legislation despite the fact that such an appeal would clearly have given force to the plaintiff's case. Moreover, even in a text as late as Nehemiah 5, where the lending of money or provisions at interest is condemned, reference to Pentateuchal law is not made (Exod. 22.25 [EVV 22.26]).[34] In Ruth 4, Boaz wishes to carry out a legal transaction at the gates of the city. While it seems that all those involved in the transaction took the legal procedure and its results for granted, no legal text is cited or referred to. More importantly, a comparison between Ruth 4 and those laws dealing with the levirate

33. The letter reads: 'Let my Lord commander hear the case of his servant. As for thy servant, thy servant was harvesting at Hazarsusim. And thy servant was still harvesting as they finished the storage of grain, as usual before the Sabbath. While thy servant was finishing the storage of grain with his harvesters, Hoshaiah son of Shobai came and took thy servant's mantle. All my companions will testify on my behalf—those who were harvesting with me in the heat ... all my companions will testify on my behalf. If I am innocent of guilt, let him return my mantle, and if not, it is still the commander's right to take my case under advisement and to send word to him asking that he return the mantle of thy servant. And let not the plea of his servant be displeasing to him'. (Translation from *KAI*, I: 36, cited in Dearman 1988: 105.)

34. Cf. Dearman 1988: 106.

and goel institutions in the Pentateuch reveals a number of discrepancies.[35] The evidence of the Yabneh Yam letter and Nehemiah 5 permits two possible conclusions. Either the legal texts of the Pentateuch are later than these texts or the laws did not have an influence which extended into everyday life but remained at an idealized level and were circulated and maintained within the scribal schools. Consequently, they were not accessible to the public but remained within the specialist culture of the legal élites.[36]

To return to Bottéro's definition of the Code of Hammurabi: it is to be seen as a list of judgments formulated in the scientific list genre. It was not intended to regulate social norms or judicial procedure. It is often thought that the Code of Hammurabi was introduced at the beginning of a king's reign as the basis for a reform programme. Internal evidence, however, indicates that the Code could not have been completed at the beginning of Hammurabi's reign. The Code boasts of the takeover of the city of Eshnunna which did not take place until the thirty-eighth year of Hammurabi's reign. Thus, the earliest possible date for the compilation of the Code is the thirty-eighth year of Hammurabi's reign (*CH* Prologue, iv, 20-30). It is not to be associated with a legal reform intended to remedy social ills. As indicated by the prologue and epilogue, both of which are essential to the real meaning of the work, this 'scientific treatise' functioned secondarily to illustrate the equity of a king's reign. It was a piece of political propaganda which was recopied by the ancients not to provide legal precedent, but simply

35. For full discussion of these discrepancies see Leggett 1974 (this study is unavailable but is recommended by Dearman 1988).

36. See further below, Chapter 4, on this latter alternative. Alternatively von Rad (1965) explained the absence of reference to the Book of the Covenant and the Deuteronomic code in the prophets by concluding that while the prophets knew the Decalogue and recognized its significance, they also recognized its inadequacies. The prophets never appealed to specific commandments because they were incapable of defining precisely the moral behaviour required by Yhwh (1965: 190-91). More recently Davies (1981) has attempted to buttress von Rad's thesis arguing that: 'it will be our contention that not only the Decalogue but the law as a whole was such a limited and imperfect instrument that serious doubts may be entertained concerning the dependence of the prophets on Israel's legal tradition' (Davies 1981: 26). This explanation is, however, unsatisfactory and does not account for the absence of reference to the lawcodes in extant legal documents such as the Yabneh Yam letter.

as an exemplary piece which embodied the ideal of nobility and equity (Bottéro 1982: 444).

While the codes may not be viewed as legislation, the introduction of written contracts did result in the formalization and elaboration of procedures for the transmission of contracts by the scribes (Goody 1986: 58-59).[37] Moreover, it is evident that the terminology and correct procedure for the transmission of contracts was taught in scribal schools. An eighth-century tablet from Nineveh provides a late copy of an Old Babylonian list of legal words and phrases. It is written in Sumerian, the classical language in disuse by the eighth century BCE, and in Akkadian (Goody 1986: 80). Thus, it is clear that the use of contracts led to training and eventually to the formal development of the academic, 'decontextualized' study of legal matters (Goody 1986: 80). Eventually writing led to the rise of specialist lawyers as well as to specialists in the teaching of law which was often made necessary by the preservation of legal texts in a language which after centuries was no longer spoken or understood.

Thus, two very different functions have been proposed for the ancient Near Eastern lawcodes: either the text was intended to legislate (that is, the codes were an authoritative source of law the regulations of which judges were bound to observe) or the code was a literary academic exercise formulated in the scientific treatise genre which was not binding on judges nor influential in any matters of practical law.[38] Rather, the legal codes developed at a remove from society and from the law courts in the scribal schools. The aims of the compilers were not practical or instrumental but intellectual; their purpose was to reach a scientific grasp of their subject. The texts were secondarily used in the teaching of reading and writing[39] and also at times, as is the case with the Code of Hammurabi, they may have been secondarily associated with the monarchy, functioning as political propaganda.

37. Cf. Veenhof 1972.

38. Cf. Finkelstein 1961; Petschow 1984, 1986; Klima 1972. Significantly Klima (1972: 312-13) argues for both a legislative and a literary function for the codes. His conclusion is based on the observation that the Code of Hammurabi represents a combination of ideal and positive law and an 'incomplete' correlation of the codes with the documents of practice. But, it may well be that the less idealized rules (which Klima views as positive law) merely reflect areas where the scribes have taken an interest in oral practice and contract law where it happened to complement their own ideals of kittum or wisdom (see further below, Chapters 4 and 5).

39. Bottéro 1982; Kraus 1960; Goody 1986, 1990.

3. *The Codes as Scientific Treatises*

The description of the codes as 'literary exercises' or 'scientific treatises' raises a number of questions. In the first place, did the compilers simply copy texts in a mechanistic way unaware of what they were copying? Secondly, were they aware of any relationship between these lists of judgments and the everyday legal practices around them? Finally, did these scribes think of these treatises as legislation; were their aims to influence, regulate and alter social and legal relations?

a. *Scientific Treatises which Reflect Legal Practice*

In his 1985 study Westbrook argued for the practical function of the ancient Near Eastern codes. While acknowledging that the codes formed part of a scientific tradition, he argued that these texts did have a practical purpose; they were consulted by judges (probably the king or royal judge) in deciding difficult cases (Westbrook 1985). Thus, while they did not have as extensive an influence as modern legislation, they were legislation of a kind.[40] In a more recent article (1989), which in fact represents a significant departure from the earlier study, Westbrook differentiates between the practical and legislative functions.[41] His

40. While Westbrook (1985) does not use the term 'legislative' this function would certainly seem to be implied by the term 'practical' in the way in which he uses the latter (cf. Jackson [1989] who also takes Westbrook's 'practical' to be equivalent to 'legislative'). Evidence for the practical function of the codes may be deduced from the fact that if the codes originally existed without a prologue and epilogue (Westbrook argues that they did, although clearly this can not have been so in every instance), then royal apologias cannot have been their primary purpose (Westbrook 1985: 250). Secondly, evidence for the legislative function of the codes is provided by a comparison with the function of the omen series which, argues Westbrook, were formulated in the same genre as the lawcodes (further information on this comparison is provided in the additional note at the end of this chapter). Westbrook, however, overlooks the fact that these omen lists were generally only consulted by advisers to kings and not by society as a whole. The fact that the Hittite Laws were found in the gatehouse of a city is also taken by Westbrook as evidence of the practical function of these early codes. The gatehouse, claims Westbrook, was the normal place for legal affairs. But, the gatehouse was also the public building *par excellence* of ancient Israel and the neighbouring countries of the ancient Near East. In fact, as Herzog points out, together with the temple, it constituted the only well developed type of public building. As well as serving as a locale for juridical functions, it served as a locale for military, political, commercial and religious public assemblies (Herzog 1986).

41. What finally constitutes Westbrook's views regarding the function of the

findings here will be presented as representing an interesting attempt to define the function of the scientific treatise.

Westbrook (1989) differentiates between a practical and a legislative function. To describe the codes as legislation implies that they be understood as a *source* of law; the courts are bound to obey the regulations of the code. This obligation on the part of the courts begins the moment when the codes are promulgated (Westbrook 1989: 202). If, however, the codes are to be thought of as academic exercises, then they are not an authoritative source of law. Nonetheless, insists Westbrook, they do provide evidence of the law in practice. In this sense they are 'descriptive treatises' on the law and reflect the workings of law at a contractual level. Insofar as Westbrook believes that these treatises actually reflect the practical law, while not being a source of law (that is to say they are not legislative), he departs from the work of Bottéro (1982) and Kraus (1960) who do not view these texts as related to, and certainly not as reflective of, the law in practice.[42]

To support his case, Westbrook points to recent studies which contend that there are no discrepancies between the codes and the contracts (cf. Petschow 1984).[43] While accepting a large degree of conformity of contracts to codes, Westbrook insists that while this proves a practical relationship between the codes and the documents of practice, it does not prove that the codes were the authoritative source on which contracts were based, that is, that the codes were legislative. It may well be that the code was conforming with practice, and not that practice was conforming with the code (Westbrook 1989: 204). After all, contends Westbrook, 'the least that one could expect from an academic treatise on law is that it accurately describe the law in practice' (1989: 204).[44]

biblical codes is made difficult to ascertain by the fact that in the more recent article (1989), which argues for a qualified version of the scientific treatise model, he does not discuss nor reassess his earlier and seemingly contradictory views, which argued in favour of the legislative model (1985).

42. Although the view that the codes are in some way related to practical law would not be excluded by Bottéro (1982) and Kraus's (1960) findings.

43. But see above, Chapter 3 Section 2 on discrepancies between codes and practice.

44. The evidence of Assurbanipal's correspondence suggests that texts dealing with every subject were often collected by royal scribes for 'academic' purposes. They were stored as valued objects but had no practical application (see further below, Chapter 5, for further discussion).

This contention is, Westbrook believes, a useful qualification to the 'academic treatise' theory. The drafters of the code did not invent law but described the positive law, a description which may of course involve at times idealization and deviation (Westbrook 1989: 205 n. 18).

Other arguments for the practical function of the codes (including Westbrook's earlier arguments [1985]) insist that references to changes in the law evidence their practical function.[45] If law were merely an academic exercise then such changes would be unnecessary.[46] Nonetheless, Westbrook points out that while such changes may indicate that the codes do bear a relationship to the law in practice, it cannot be concluded that the codes are the source of these changes. Such changes may have come about through some other process.[47] Rather than being the force behind the changes the codes may simply reflect the change (Westbrook 1989: 205).[48] Hence, the cuneiform lawcodes, including the Book of the Covenant, are to be understood as descriptions of legal precedent rather than as sources of law. The compilers of the codes

45. Westbrook points out that while copies of the Hittite Laws show an updating of language and of substantive law, the Code of Hammurabi lacks such amendments (1985: 255). This difference in the development of the codes is significant: the Hittite Laws were regularly amended to keep abreast of changes in the law (1985: 256). The Code of Hammurabi, however, was copied for more than a millennium after the date of its creation. These copies adhere strictly to the original text with no changes or amendments either of language or of substance. It is this fixed character of the Code of Hammurabi which illustrates the different functions of the royal apologia of Hammurabi and the Hittite Laws: 'The local scribes saw no reason to alter Hammurabi because for them it was only a scribal exercise and not part of their positive law. Their own lawcodes, however, had a practical purpose and therefore had to reflect the local law, which meant also regular amendment to take account of changes in the law' (Westbrook 1985: 256).

46. Cf. Hittite Laws (*HL*) para. 59.

47. Westbrook sees an example of such a process in paragraph 55 of the Hittite Laws (1989: 205): 'When the Hattian feudal tenants came and bowed down to the king's father and said: "No one pays us a wage and they belittle us (saying), 'You are feudal tenants", then the king's father (...) in the assembly and sealed a document (saying) "Go, be like your colleagues" ' (*HL* para. 55 cited Westbrook 1989: 205).

48. Gurney (1952: 89), however, argues that the 'formerly' rules of the Hittite laws such as *HL* 59 do not evidence an updating and amendment of law but simply indicate that the law varied in different parts of the country. For an example of a 'formerly' law see above, p. 85.

based their descriptions on this precedent as they found it reflected in legal contracts. Related as it is to the cuneiform codes of the second millennium,[49] the Book of the Covenant is the earliest biblical code and may be characterized as 'a provincial reflection of the cuneiform, legal tradition' (Westbrook 1989: 219).

By relating the law codes to a practical purpose Westbrook maintains the ideological context within which texts are created and recognizes the role of the compiler. Carmichael also points out that the role of human agency, operating within an ideological context, must not be ignored (1974, 1985). Acknowledging that the Book of Deuteronomy is possibly the work of a writer who was influenced by educational activity (probably in the wisdom schools), Carmichael insists that too narrow a concentration on the academic setting may

> diminish the importance of the ideological, reforming aim of the book indicated in the general but comprehensive treatment of the judiciary, the prophetic office, the priesthood, the monarchy and the military... Nonetheless, the highly developed literary interests of the author also reveal an element of distance from the active political life of his time (1974: 259).

Moreover, Carmichael contends that suggestions regarding the way in which biblical law was created should restore 'the human dimension of intelligence and imagination to its formulator' (1985: 15). Only by considering this dimension can it be claimed that the laws of the biblical codes are not simply the deposits of a process of borrowing from foreign systems within the context of scribal schools which have arisen accidentally and mechanically. While the lawcodes may not have been created with the purpose of altering social norms and legal practice, they nonetheless represent a serious intellectual and ideological tradition.[50]

Despite Westbrook's insistence that the description 'academic exercise' is incomplete and his subsequent attention to the reasons behind the compilation of the codes, some objections to his theory that the lawcodes are descriptive treatises on the law in practice must be raised.

1. In the first place, given our lack of evidence (most notable in the case of Israel) of precisely what the law in practice was, it is impossible to ascertain whether or not the codes reflect such

49. Cf. Paul 1970: 102-105.

50. See further below, Chapters 4, 5.

practice. Moreover, given the contradictions and inconsistencies between the codes and the documents of practice at our disposal, it would seem that they are far from an accurate reflection of the law.[51]

2. Furthermore, the assumption that the cuneiform codes reflect the law in practice ignores the effects of the application of the mechanism of writing. Even if it may be assumed that the intention of the codes' compilers was to describe the law, it should not be assumed that this was achieved with any accuracy. It has already been noted that one of the effects of the application of writing is to 'fix' texts. The authority which the written word enjoys makes erasure and adaptation of obsolete rules difficult. Thus, the text will fall behind practice, eventually no longer reflecting legal operations on an everyday level.[52] By taking into account the impact of writing, inconsistencies and contradictions within the codes may be explained.
3. Westbrook's model fails to explain how these 'descriptive treatises' came, in the case of biblical law, to be understood as legislation in the rabbinic period.

b. *The Semiotic Understanding of Scientific Treatises*

Jackson's application of a semiotic model to the biblical codes raises another possible function for these codes understood as scientific or academic treatises.[53] Jackson defines semiotics as 'the study of systems of signification (how meaning is constructed) and communication (how meaning is transmitted) (Jackson 1989: 199 n. 2). A semiotic analysis involves, firstly, an examination of the people between whom the messages are exchanged (the sender and the receiver) and, secondly, a consideration of the medium of communication, for example, writing, inscription on stone, book, etc. Finally, a semiotic model considers the medium in which the message is sent, which can be a linguistic code, a particular register of that code or a non-linguistic code, such as a colour

51. Of course, despite an overall consensus that these discrepancies and contradictions do exist, Westbrook insists that there is a large degree of conformity between the documents of practice (contracts) and the codes.

52. See above, Chapter 2.

53. As has already been shown, Jackson (1989) excludes a legislative function for the biblical codes because they do not conform to our modern communicational pattern of law; see above, Chapter 3 Section 1.

code or a numerical code (Jackson 1989: 186). It is this last aspect (i.e. consideration of the medium in which the message is sent) which Jackson sees as most significant for understanding the biblical codes.

Through an examination of the various media within which the biblical codes are communicated, Jackson arrives at four possible functions for the biblical codes: monumental, ritual, archival and didactic.

The monumental function of the codes presupposes as its medium of communication the stone inscription. Stones were often erected for monumental purposes (cf. Josh. 4.1-7). Generally speaking their function was to commemorate a victory or to mark off a boundary. Eventually such stones were inscribed. After the victory over the Amelekites, Yhwh instructs Moses to record in writing that he would blot out the memory of the Amelekites (Exod. 17.14). This function of recording victories is eventually complicated to include the recording of laws on stone. The development is a natural one; the military victor has shed blood and must now redress the balance by establishing peace. As Jackson explains: 'the ideological form of the promotion of peace is the establishment of law and order' (Jackson 1989: 191). In fact, the Decalogue illustrates the development from simple victory stele to the recording of laws. It begins with an allusion to victory: 'I am the Lord your God who brought you out of the land of Egypt' (Exod. 20.2). The introduction is followed by prescriptions. In the case of Exodus 20–24 the inscription of law on stone is serving a monumental purpose. This has also been recognized in the Code of Hammurabi and may also be identified as the function behind Deut. 27.2-4 and Josh. 8.32-33 (Jackson 1989: 190-91).

Another medium used to convey the lawcodes is the ספר (book). While Moses wrote the laws on stone (Deut. 27), he also wrote the laws in a ספר (Deut. 31.24) which was to be deposited in the ark (Deut. 31.9) and the contents of which were to be read out at the Feast of Tabernacles in the hearing of all Israel (Deut. 31.11). Similarly, while Joshua had inscribed the laws on stone at Mount Ebal, he subsequently reads the law publicly. The medium here, however, is a ספר (book) (Josh. 8.34-35). Thus, the narrative combines the monumental function of law inscribed on stone with the ritual function of reading from a holy book (Jackson 1989: 192). The purpose of the ritual reading of the law is fulfilled by the act of public reading itself. The ancient lawbook bears no similarity of function to modern lawbooks which are 'permanent records of the authoritative wording of the rules to be consulted whenever

needed by both the subjects of the law and by those charged with its administration' (Jackson 1989: 195). The ritual function of the law is also evident at Sinai (Exod. 24.3-9) and in 2 Kgs 23.1-3 on the occasion of Josiah's public reading of the law (Jackson 1989: 195).

The archival function of biblical law also presupposes as its medium the ספר. This function can be seen in Samuel's act of writing the משפט המלכה (1 Sam. 10.25) and subsequently depositing it in the sanctuary where it is stored for future reference. Again in Jeremiah 36 the priests and officials are so impressed by the contents of Jeremiah's texts that the texts are deposited in the room of the scribe Elishama. Jeremiah's scroll has thus been 'planted' in the temple with the connivance of the temple officials. Blenkinsopp also suggests that the book of the law found in the temple during the time of Josiah may have been a 'plant' (1983: 96). On all three occasions the ספר has an archival purpose: a text which is addressed or directed against an individual is stored with the expectation that it will eventually have political effect.

The fourth function of the biblical codes is a didactic function. Once again the medium presupposed is the ספר (cf. Deut. 17.14-20). The book is not read simply for its own sake; rather any reading of it is designed to teach the king to fear the Lord and accordingly to keep the law and statutes of Deuteronomy (Jackson 1989: 192).

It is not until the time of Ezra that these functions are combined. Ezra is a religious reformer but he is also a royal administrator. His purpose is to have the words of the law placed permanently in the public domain. But this is not in order that they fulfill a simply monumental function (as is the case with Josh. 8). Ezra's intentions are to combine the traditional ritual reading of the law (which is fulfilled simply by the act of a public reading) with a didactic function. Not only are the words to be recited publicly, but also they are to be explained (cf. Neh. 8.7-8; Jackson 1989: 192). Significantly, once the public reading and explanation of the law are completed, Ezra summons a smaller group, comprising the heads of families, the priests and the Levites, to study the text further (להשכיל אל דברי התורה, Neh. 8.13). Here with Ezra there begins a process of specialization (Jackson 1989).

While Jackson is not willing to say conclusively that with Ezra law begins to function as legislation, he does speculate as to the historical origin of the statute, a text whose very words as opposed to whose meaning are conceived to be authoritative, transmitted to judges in the process of dispute settlement. This phenomenon, which possibly arose

with Ezra, also emerged at the same time in classical Greece. In classical Greece it was associated with a democratic ideology, in ancient Israel with the affirmation of a sacred text (Jackson 1989: 201 n. 20).[54]

Innovative as Jackson's semiotic approach is, it is of limited worth for the study of Old Testament law. This he acknowledges when he points out that while narrative texts such as Joshua 8 and 2 Kings 23 do provide information about senders and receivers, as well as about the medium used, they do not inform us as to what text is being read out ritually, or stored for archival or didactic purposes (Jackson 1989: 196). At the same time, where we are provided with the legal code, we have no access to the history of its pragmatics. We can only hypothesize about the identities of the senders and receivers, the media used and the purposes of the codes' application.[55] While we do possess narrative accounts, they express the message of the final authors which should be treated seriously but tells us little of the history of the codes' pragmatics. Moreover, a communicational or semiotic model assumes that we can deduce the cultural and communicational significance of a norm. But this, as Kovacs has shown, is fraught with difficulties. Kovacs (1976) points out that the groups behind texts (in the language of semiotics, 'senders' as well as 'receivers') are difficult to identify because of the complex, numerous and latent ways in which texts can function. For example, texts may be the output of advantaged groups ('senders' in this case) attempting to compensate marginalized groups (in this case 'receivers') so that these dominant groups can enjoy the benefits of their status without fear of protest or rebellion from the marginalized.[56] In contrast, texts may function as 'compensatory survival

54. See further below, Chapter 5, on the significance and consequences of this speculation.

55. Jackson promises to develop his views in a forthcoming work 'Wisdom-Laws'.

56. For example, a text such as Exod. 22.21-27 (EVV 22.22-28) which seems to have as its basis a desire to restore or to introduce egalitarian relations into monarchic Israel (cf. Otto 1988, see above, Chapter 1 Section 2, for outline of Otto) may in fact be functioning to compensate. By emphasizing the merciful attitudes of Yhwh and his special interest in the weak and socially deprived, the exclusion of the marginalized, the poor, the גר, etc. becomes legitimized. Being poor or alien comes to stand for community with Yhwh. While the marginal groups are compensated, the dominant groups can get on with their enjoyment of full participation in a society which exploits the poor. In this case the groups behind the texts are the better-off classes who attempt to preserve the *status quo* by convincing the poorer classes

mechanisms', in which case such texts are the output of the marginalized (now seen as the 'senders') who are attempting to devalue the advantages of dominant groups ('receivers') from which they are excluded.[57] In fact, in an earlier study Jackson acknowledges the difficulties of deducing the communicational and cultural significance of a norm when he asserts that:

> The cultural significance of a norm, going beyond the meaning of the words used to express it, may become so internalised in a society that the norm evokes a particular feeling of significance without reflection or interpretation; the significance becomes—in that cultural community—wholly conventional (Jackson 1984: 33).

This conventional and assumed, yet unexpressed, status of a rule cannot be reconstructed from our texts. It simply remains unexpressed. What the sociologist, or the semiotician in this case, most wants to know (the 'everyday') remains unexpressed. As Kovacs observes: 'What is objectively taken for granted is assumed, not stated' (Kovacs 1976: 26).

Furthermore, a semiotic approach cannot proceed without attention to the communities (the semiotic groups) within which biblical law was communicated (Jackson 1984: 43): on the one hand, the sender of the message and, on the other, the receiver of the message. These semiotic groups, however, will be difficult to identify. Jackson proposes that an attempt to identify them may be made through cultural semiotics, that is to say, through a study of typical characteristics of cultural communication in different types of groups. Secondly, such groups may be

that in their closeness to Yhwh they are compensated for their suffering. Moreover, any danger which may exist in the threat of rebellion by the disaffected is defused.

57. In this case, where a text functions as a 'compensatory survival mechanism' (e.g. Exod. 22.21-27 [EVV 22.22-28]), the marginalized of society are consoling themselves and allaying any frustration at a limited opportunity to participate with the dominant of society by creating texts which show them, in the last analysis, to be the favourites of Yhwh, thus devaluing the advantages of the dominant groups. At any rate, 'where literary historians materials become explicit, it strongly suggests the existence of incommensurable worldviews in close proximity' (Kovacs 1976: 26). Moreover, groups behind texts are difficult to identify because people can and do hold to inconsistent belief systems and patterns of conduct which are kept apart through what is known as 'institutional differentiation' (Kovacs 1976). Thus, separation of groups behind texts on the basis of the identification of inconsistent ideologies is difficult. Any attempt to deduce the cultural and social significance of a norm must bear Kovacs's findings in mind.

identified on the basis of internal evidence (Jackson 1984: 43). Jackson thus assumes that texts (although not overtly) reflect the communicational group to whom they are addressed. Again Kovacs's misgivings about such a procedure are relevant. The groups behind texts (the senders of the message) and those in front of texts (the receivers) are difficult to identify because of the complex and numerous ways in which texts can function.[58]

c. *Scientific Treatises and Narrative Traditions*

Carmichael's view of the process by which the lawcodes were created represents a highly distinctive and innovative approach and presents another way in which the function of the codes, viewed as scientific or academic treatises, may be understood (Carmichael 1974, 1985). The Deuteronomic compiler based his laws on an examination of Israel's historical traditions contained in the Pentateuch and in earlier historical sources on the monarchy. Significantly, Carmichael reckons that the Deuteronomic code was compiled within a wisdom setting and that the laws did not arise out of Israel's practical, judicial life or out of socio-economic circumstances.[59] Rather, the Deuteronomic laws arose out of an academic and ideological reflection on Israel's historical traditions:

> The laws in both Deuteronomy and the Decalogue arise not as a direct, practical response to the conditions of life and worship in Israel's past, as is almost universally held, but from a scrutiny of historical records about these conditions. The link is between law and literary account, not between law and actual life.[60]

Studying the ancient narrative and historical traditions of Israel, the Deuteronomic compiler explores their ethical and legal implications (Carmichael 1985: 20). For example, Deut. 21.1-9 represents an ethical and legal exegesis of 2 Sam. 20.1, 2, 4-13. The narrative text describes how Joab, in pursuit of Sheba, wrongfully slays Amasa whose body was cast into a field. The problem of the blood-guilt of a wrongfully slain man whose killer is unknown is the legal problem which the Deuteronomic compiler extracts from the narrative. The Deuteronomic writer's solution is that an offering to Yhwh be made in order to ensure that Israel is not tainted by the shedding of innocent blood (Carmichael

58. Kovacs (1976) illustrates a number of complex and misleading ways in which texts can function; see above nn. 56-57.

59. See further below, Chapters 4, 5, on wisdom schools setting.

60. Carmichael 1985: 17, cf. 340ff.; 1974: 256ff.

1985: 136ff.). Likewise, the narratives which recount how the hero Joseph experienced the perverting of justice at the hands of Potiphar's wife (Gen. 39.17-20) and the injustice done to Tamar by Judah (Gen. 38.14-18, 24-26) generate the Deuteronomic rule about perverting the justice which is due to the sojourner and the fatherless, and also the rule about taking the garment of a widow in pledge (Carmichael 1985: 278ff.). Hence, the process of creation envisaged for the Deuteronomic code is:

1. Narrative history or tradition.
2. Academic (but also ideological, cf. Carmichael 1974: 259) reflection on the narrative from a specifically ethical and legal perspective which leads to
3. the formulation of a rule or law by the Deuteronomic compiler. Such laws are intimately related to the narratives and their formulation is a response to issues within these narratives (Carmichael 1985: 25). The rules are new constructions by one author or scribal school, living at one particular time, possibly the period of Josiah's reign or possibly later (Carmichael 1985: 26).

Thus, the determining relationship is that between law and narrative and not that between law and practical life.[61] But this is not to deny that the Deuteronomist was familiar with existing law and custom. Nonetheless, he did not have before him a collection of laws whose original form can be deduced by historical and literary analysis, and which the Deuteronomist worked over and presented in his own distinctive way (Carmichael 1985: 25). What critics have traditionally taken to be different sources in the material do not indicate layers of legal traditions but are the background narratives that are used in formulating the laws. The narratives describe different periods in Israel's history, and the laws, because they are a response to the narratives, seem to reflect these distant and varied periods. It is this factor which accounts for the mistaken view that the laws contain old material. In reality the laws are new constructions created by one author or perhaps by a scribal school.

61. In fact, recent semiotic approaches to law have begun to explore the relationship between law and narrative, arguing that law can transmit a narrative message, and conversely that narrative can transmit a legal message. Cf. Greimas 1976; Jackson (1984: 37) who also acknowledges a narrative function for law, and a legal function for narrative.

Most distinctive and innovative about Carmichael's approach to biblical law are the following features. He refuses to take for granted that with the biblical codes we are dealing with law. As Jackson insists, 'the designation of rules as "legal" is a matter of pragmatics not semantics' (Jackson 1984: 44). Carmichael consequently does not accept that the prescriptions in Deuteronomy and the Decalogue arose as a direct and rational response to conditions in Israel. The texts are not of a practical legal character, they are rather of a literary character. The relationship to be studied is that between law and literary account and not that between law and actual life. Furthermore, while many accept that the attribution of laws to Moses is a literary technique, they nonetheless proceed to discuss the law as originating in the Mosaic period. Carmichael, in contrast, does not take this view, but sees the laws as having been secondarily projected back into the idealized time of Moses. Finally, Carmichael views the scribal schools as the setting for the laws' production. He views the impetus to growth of the codes to lie in the literary activities of exegesis and evaluation of earlier texts within Israel's scribal schools.

Chapter 5 of this study will explore the view that scribal exegesis, and not the practical, socio-economic conditions of Israel's life, as Otto (1988), Schwienhorst-Schönberger (1990), Halbe (1975) and Crüsemann (1988) have proposed,[62] is to be viewed as the primary impetus to the development of Israel's legal texts, when these texts are understood as scientific or academic treatise and not as legislation.

d. *Summary*

While the view that the codes are scientific treatises, rather than sources of legislation, was accepted, this was seen to be an incomplete description. It fails to give any reason for the copying and circulation of codes within the scribal schools. It seems unlikely that the codes had no other purpose than the teaching of reading and writing.[63] Moreover, they must have arisen out of specific intellectual, ideological and perhaps religious and moral milieus. These milieus are deserving of further attention.[64]

62. See above, Chapters 1, 2.

63. Goody (1986), Dixon (1985) and Bottéro (1982) have described the function of the ancient codes as 'educational'; they were used in the teaching of reading and writing.

64. See further below, Chapters 4, 5.

In order to find some function for these codes when they are understood as academic treatises, the studies of Jackson (1989), Westbrook (1989) and Carmichael (1974, 1985) were examined. Given the difficulties involved in any attempt to identify the groups behind texts, Jackson's communicational model was deemed of limited worth.[65] Westbrook (1989) acknowledged that the codes were not legislation in the modern sense: that is they were not a binding source of law, but were nonetheless related to the law in practice. The codes are to be regarded as 'descriptive treatises of the law'. While these treatises described the law which regulated Israelite society, the treatises themselves were not a source of legislation. The Book of the Covenant is a provincial descriptive account of the law in practice. Reasonable as this alternative is, it must be stressed that there are considerable discrepancies and outright contradictions between contract law and the codes. Thus, if the codes were intended to describe the law in practice, it must be concluded that they are not very accurate descriptions. Nonetheless, Westbrook's views cannot be dismissed out of hand. The discrepancies between the contracts and the codes may be the result of the application of writing, the effects of which have already been outlined.[66] A major effect is the tendency of writing to fix or freeze rules, making adaptation difficult and thereby increasing the gap between the written law and the law in practice. Thus, it would be inevitable that eventually the codes' regulations would not appear in the practice laws of contract, the written codes having lagged behind, losing pace with the ever-growing and always adaptable body of oral law which is reflected in part in the documents of practice. Westbrook's proposals are consequently not impossible.

Carmichael's view that the setting for the production of Israel's codes is the scribal school, rather than the practical life of Israel, is an appropriate starting point. As we have seen, Watson (1985; 1977; 1974) also contends that law is the production of literary élites and does not arise out of everyday social situations. Leaving aside the contribution of scribal exegesis for the moment, the biblical codes, understood as scientific treatises, will be explored on the basis of an analogy with the Indian concept of dharma.

65. See above, Chapter 3 Section 3.
66. See above, Chapter 2.

4. *Additional Note*

According to Westbrook rules achieve a literary form in a way analagous to the omen series. The following stages of development may be outlined:

(1) The initial observation and interpretation: for example, if a mare gives birth to a hare, the diviner interprets this as meaning that the king will die in battle. If the king subsequently dies in battle, the decision becomes a precedent for similar omens in the future. A similar initial stage may be conjectured for legal rules (Westbrook 1985: 258). For example, a situation requiring judgment, which is unlike any previous situation, arises. A leader, judge or elder makes a judgment designed to alleviate the situation. If this judgment proves successful, it may become a legal precedent for similar situations which arise in the future.

(2) The first stage of generalization is anonymity. Originally the questions will have concerned a particular person but in this first stage of generalization, the name of the individual is replaced by ' a man' or ' a son of so and so' (Westbrook 1985: 259).[67]

(3) At the second stage of generalization the precedent receives a casuistic formulation (Westbrook 1985: 259).

(4) The third stage involves the compilation of a list of these new casuistically formulated rules with the addition of their logical variations.

(5) The fifth stage has been reached when the lists are consulted by diviners or judges who accept the rules as binding. If the judge seeking solution to a legal problem discovers a new feature of his case (or the diviner a new omen) then the new feature may itself become a precedent by undergoing the two stages of generalization and finally becoming incorporated into the series (Westbrook 1985: 259).

While evidence of the procedures by which a legal code was created is lacking in cuneiform codes, the Bible does provide evidence that its codes were compiled through procedures which are similar to the cycle of creation proposed for the omen series. Evidence of the cycle is,

67. Further detail on this stage is provided by Lambert 1966.

according to Westbrook, provided by consideration of four difficult cases (Westbrook 1985: 260-62).

1. *Numbers 15.32-37.* Here a man is found gathering wood on the Sabbath. Apparently no precedent existed as Moses had to go and consult Yhwh. While the grounds for the decision that the man should be stoned, and the fact that the case is intended to provide precedent are implicit, neither receives express mention (Westbrook 1985: 261).

2. *Numbers 31.* Moses is ordered by Yhwh to divide the spoils between those who had gone out to war and the congregation (vv. 25-28). There is, however, no indication that the case is to serve as precedent. Yet, in 1 Samuel 30, the same principle is formulated in terms of an anonymous rule (v. 24). Moreover, the decision was to stand as future precedent (v. 25).

3. *Numbers 27.1-11.* The daughters of Zelophehad, since their father had no sons, claim a share of their father's inheritance. Moses consults Yhwh (v. 7) and it is decided to share the estate among the women. Following the decision there is a casuistically formulated rule (v. 8). The same solution to a similar problem is found in a Sumerian fragment which probably belonged to Codex Lipit Ishtar: 'If a man died and he had no son, (his) unmarried daughter shall become his heir'.[68] The daughters of Zelophehad were also unmarried. Westbrook suggests that the biblical law had been strongly influenced by the earlier Lipit-Ishtar provision and that the biblical compilers are here taking a rule which had been introduced into the biblical code from the Code of Lipit Ishtar and projecting it back into the time of Moses, thus showing the rule to have been based on earlier precedent (Westbrook 1985: 262).

4. *Numbers 9.6-11.* Moses is faced with the problem of persons who were unable to observe the Passover on the normally designated day. Moses consults Yhwh but here the decision is, from the beginning, formulated in a generalized, casuistic style (vv. 11-12). Verse 13 then goes on to consider the case's logical opposite. Although this expansion was not necessary to the case in point, it is typical of the scientific list genre to continue a rule by considering possible variants. Verse 14 furthers the application by considering the case of the גר.[69]

Westbrook reasons that since the biblical code adheres to the same

68. Text cited in Westbrook 1985: 262.

69. Cf. Lev. 24.10-13; vv. 10-13 a specific decision; vv. 15-16 provide the generally casuistically formulated rule and vv. 17-21 provide consideration of the variants (Westbrook 1985: 253-54).

cycle of creation as that proposed for the omen series (texts which, according to Westbrook have been conclusively shown to have had a practical application), it may be concluded that biblical law was also related to the law in practice, perhaps as lists which were to be occasionally consulted by the king or royal judge in deciding difficult cases.[70]

A close analogy to this process suggested by Westbrook may be seen in Fishbane's view of the way in which the biblical codes emerged. Within an explicitly Weberian typology of law, Fishbane (1985) has identified Num. 9.1-14, 15.32-37, 27.1-11, and Lev. 24.18-23 as examples of formally irrational law-making. This is charismatic law-making: it involved the consultation of oracles and is associated with a charismatic figure (Fishbane 1985: 236-44). Fishbane also identifies Joshua 6–7 and 1 Sam. 14.36-44 (where lots are consulted) as also typical of this type of law-making.[71] All cases 'resort to a divine *responsum* where the case had no precedent in the *traditum*, or where the normal 'rational' procedures of judicial inquiry were stalemated or otherwise inadequate' (Fishbane 1985: 238). 1 Samuel 30.22-25 is considered by Fishbane as an example of the creation of *ad hoc* laws. Westbrook sees

70. Westbrook (1985) outlines three possible secondary functions of the codes:

1. Royal Inscriptions designed to praise the king's activity as judge (*Codex Ur-Nammu* [*CU*], *Code of Lipit Ishtar* [*CL*], *CH*) characterized by the addition of a prologue and an epilogue. In this case a legal corpus, which had been originally compiled for practical purposes, was set within the framework of a prologue and an epilogue which praised the king's activity (Westbrook 1985: 254, 258). It seems just as likely, however, that the practical function may have been derived from a work that was intended from the outset as a piece of political propaganda (see below, Chapter 5, on the development which transformed wisdom rules of torah to legislative texts).
2. School texts (*CU*, *CL*, *CH*, *CE*, *Neo-Babylonian Laws* [*NBL*]) which took on an independent existence as part of the scribal curriculum. It is not necessary to accept Westbrook's thesis that this function was only secondary to a practical function. The texts may have originally been compiled as scientific or intellectual exercises which also served as literary exercises in the scribal schools, only much later being used as legal precedent (see below, Chapter 5).
3. Part of a religio-historical narrative (the Covenant and Deuteronomic codes) in which the king is replaced by the deity as a source of law. Nonetheless, Westbrook contends that the Book of the Covenant was never associated with the royal court functioning as a piece of political propaganda (Westbrook 1985: 250). But against this negative conclusion of Westbrook, see below, Chapter 5.

71. Cf. Exod. 22.8, 10 [EVV 22.9, 11]; Num. 5.11-31.

the rules of lawcodes as evolving through the following stages:

1. specific event or legal problem,
2. a famous figure resolves the problem by making a judgment,
3. the judgment is formulated as a general rule,
4. the judgment serves as legal precedent for judges (Westbrook 1985).

While such an evolution is possible, the process may have occurred in the opposite direction, that is to say, from a general, casuistically formulated rule,[72] to a relating of that rule to a specific event (as Westbrook suggests for Num. 27.1-11). What is envisaged in this study is that a rule is copied from a foreign system. This has been shown to be the usual way in which a society acquires its law.[73] A later stage of development is provoked by the question: what makes this rule or judgment authoritative? This question may be raised from an academic perspective, not necessarily arising out of the practical application of a rule which raises questions of legitimacy. The answer provided in all four cases (Num. 15.32-37; 31; 27.1-11; 9.6-11) is that the rule is Mosaic. Fishbane (1985) also suggests that the process may be at times one wherein a general rule is later related to the specific decision of an authoritative figure. Fishbane suggests that texts such as Numbers 36 and Numbers 9 may in fact reflect resolutions of a later stage 'now anachronistically legitimated by divine oracle' (1985: 238). Thus, an alternative process behind the creation of the biblical codes is possible. It involves:

1. the borrowing of a law/laws from a foreign system;
2. transmission of the law/laws in scribal schools;
3. reflection and commentary on the law/laws leading eventually to academic or, perhaps later in the history of law, to practical questions of their authority or legitimacy;
4. the answering of such questions by vesting the rule/rules with Mosaic authority;
5. eventually by conceptualizing all of Israel's rules as direct or indirect speech of Yhwh.[74]

72. But also from a rule formulated in the apodictic form. Westbrook's proposals do not account for apodictic law.

73. See above, Chapter 2.

74. See further below, Chapters 4, 5, on the importance of scribal schools, foreign influence and exegesis on the development of Israelite law.

Chapter 4

TORAH AND DHARMA: MORAL ADVICE OF SCRIBES

1. *Torah as Sacred Moral Text*

Thus far, no entirely satisfactory explanation of the function of the codes, understood as scientific treatises, has been found. A further possible function for the scientific treatises is suggested when they are understood on the basis of an analogy with the Indian concept of 'dharma'.

In ancient India there existed no term for law. There was, however, the concept of dharma. This term signifies a type of moral obligation. Neither the compilers and caretakers of dharma (namely the Brahmins) nor the general Hindu populace understood dharma in the sense of our modern understanding of law. Dharma was revealed morality. The introduction to the Code of Manu, for example, portrays the great seers (the predecesors of the Brahmin scribes) approaching the deity and requesting that the rules of the castes be revealed to them.[1] Dharma was adhered to not because of judicial or other coercion, but because of a religious desire for grace. It was the error of the Moslem, and later the British conquerors, to mistake the texts of dharma for case law. Thus, dharma came to be misrepresented by foreign conquerors as law conceived of in terms of our modern legislative model. Eventually, dharma, through foreign misrepresentation, came to function as legislation (Lingat 1973).[2]

The concept of dharma may indeed, as Jackson (1975) notes, be compared to that of torah. Dharma, explains Lingat, is derived from the idea of duty and indeed dharma may be translated by the term 'duty'. The following piece of advice from the Garuda Purana requires the observance of dharma as a religious duty not as legal requirement:

1. See the Code of Manu as in Ballou 1940: 77.
2. See further below, Chapter 5, on the transformation of dharma and torah to legislation.

> Forgiveness, self-restraint, compassion, charity, want of avarice, simplicity, want of jealousy, visiting sacred shrines, truthfulness, contentment, faith in the existence of God, the subjugation of senses, the adoration of the deities ... these are the duties of the various orders of the four castes (citation from Ballou 1940: 114).

Dharma expresses conformity with what Hindus regard as 'the natural order of things' (Lingat 1973: xiii). Thus, when the great seers approach the deity requesting the rules which will ensure social order (namely the rules for the castes) they say: 'For thou, Lord, alone knowest the true sense of the objects of this universal, self-existent system, unattainable by (simple) reason, not to be reasoned out'.[3] Nonetheless, dharma has no constraining power: 'It puts itself forward, it shows the way which one should follow, but it does not impose that way' (Lingat 1973: 258). The books of dharma are instructional writings designed to train human beings to observe their duty as it is defined by the Brahmins. Dharma rules human activity. None can escape dharma and consequently everyone tries to conform to it, but in itself dharma has no constraining power. Conformity to dharma is, in actual terms, virtually unrealizable. It is realized only in the picture of an ideal participation of all Hindus (Lingat 1973).

The concept of dharma finds a parallel in Egypt. The Egyptians had no word for law. Instead the term 'ma'at' was applied to legal procedure but also to an ideal which could be translated as 'order, right, right-dealing, rightfulness, righteousness, truth or justice'.[4] Ma'at as justice involved right relations between the ruler and those whom he ruled. Ma'at belongs to a religious order being the substance which sustained the gods. It was a spirit 'which properly pervaded the civil carrying out of government and justice for the ends of religion'.[5]

Similarly, in Old Babylonia there existed no term for law. Hammurabi is the guardian of kittum (the eternal truths upon which the cosmos was created) and *mesharum* (usually translated 'Equity').[6] Kraus identifies the notion of kittum with the Babylonian wisdom tradition. Hammurabi is described as '*emqum*', a wise man and a '*sar mesharum*', a king of justice. Typically '*emqum*' is an appellation used of the scribe not of the judge. Most likely then, here the wisdom circles

3. From the introduction to the Code of Manu as in Ballou 1940: 77.
4. Jackson 1975: 496; cf. Wilson 1954.
5. Wilson 1954: 6-7, citing Jackson 1975: 496; cf. Whitelam 1979.
6. Cf. Speiser 1954; Whitelam 1979.

which had drafted the laws of Hammurabi presented the king in their own image.[7] Solomon too is portrayed as a wise king. It is possible that in the literary complex of 1 Kings 3 the scribes of Solomon's court were adopting Egyptian practice.[8] The judicial wisdom of Solomon, which results in the preservation of משפט (justice) and צדקה (righteousness) is presented as the gift of Yhwh.[9]

It is evident that the term torah corresponds somewhat to that of kittum and indeed also to that of dharma:

> the moral, non-legal nature of the authority of torah, comparable to that of dharma (and, one may conclude, to that of kittum too), is indicated by the very etymology of the word itself; for the primary meaning of the noun torah is 'instruction, teaching' (ירה) rather than nomos, law (Jackson 1975: 497).[10]

Weinfeld has made clear the wisdom orientation of torah in Deuteronomy and moreover has pointed out how the kings tended to patronize the wisdom scribes (Weinfeld 1972).[11] Jackson, however, doubts that every component part of the torah was intended as a collection of wisdom-laws. While the Deuteronomic laws are undoubtedly the work of wisdom scribes, the earliest collection, the משפטים of Exodus 21–22, may have been intended as 'a statement of positive law if not a statute of which the wording was verbally binding' (Jackson 1975: 505). It has already been seen, however, that the use of the legislative model for the biblical codes, and indeed the ancient Near Eastern codes in general, raises numerous problems. Moreover, through an understanding of torah on the basis of dharma, many of these problems may be circumvented.

7. Cf. Jackson 1975: 497; Weinfeld 1972: 151 n. 18; Kraus 1960.

8. Compare the Sphinx Stele of Thutmose; cf. Whitelam 1979.

9. Cf. Whitelam 1979: 165; see further below, Chapter 5, on wisdom-torah, scribes and monarchy.

10. In fact, משפט which may be translated as 'manner' or 'government' is probably closer in some respects in meaning to the term 'dharma' than is torah. But, as overall concepts, dharma and torah may be compared.

11. See further below, Chapter 5, on royal patronage of scribes and cf. Fishbane (1985) who surmises that even if jurists made 'quasi-statutory, analogical or referential uses' of the ordinances of torah, the publication of agglomerate collections primarily served to make available 'digests of the divine requirements for justice and righteousness, which served as the contractual basis for the Israelite covenant' (Fishbane 1985: 95). The legal codes are 'a literary expression of ancient Israelite legal wisdom; exemplifications of the righteous laws upon which the covenant was based' (1985: 95).

a. *The Potential of the Analogy with Dharma*

Once kittum, dharma and torah are viewed as essentially synonymous concepts, many of the questions raised when the biblical codes are described on the basis of the legislative model are circumvented. Some of the particular objections raised against the use of the legislative model suggest that the analogy of dharma may have more potential.[12] First, Fishbane has noted that if one approaches the biblical legal materials with an interest in detailed statements concerning legal procedure or the constitution of the courts, one will find gaps and contradictory statements (Fishbane 1985: 91-92). Secondly, sanctions required for legal enforcement are often vague and non-juridical. For example the formula used with regard to capital punishment (מות יומת) 'he will be killed' often leaves the manner of death unspecified. Moreover, the phrase may be construed in an optional sense: 'he may be killed' (Fishbane 1985: 91-92). Finally, in other cases a formal indication of court enforcement is lacking.[13] Instead, legal sanctions appeal either to a subjective state of moral sensibility (for example Exod. 22. 24 [EVV 22.25]; Deut. 15.18; 24.11, 13) or to an extra-legal threat of divine punishment (for example כרת).[14] Similarly the dharmic texts appeal to both moral sensibility and to divine punishment. It is with regard to this aspect of the biblical codes that the analogy with the texts of dharma is striking. They too appeal to both moral sensibility and to divine punishment.

Yet another serious objection to the use of the legislative model for explaining the Old Testament codes was raised by Jackson who noted that where instructions are given to judges (cf. 2 Chron 19.5-7; Deut. 16.18-20) neither text instructs the judges to consult or comply with a written body of rules. Their instructions are rather generalized: to do justice and to avoid corruption (Jackson 1989). Even as late as the time of Ezra emphasis is placed upon teaching, reading, study and interpretation (Ezra 7.10).[15] Thus, like dharma, torah is something to be followed, to be lived by; it is a religious duty which is not sanctioned by legal

12. These objections have already been discussed in Chapter 3 above.

13. Again, even occasionally where the rules of dharma include a sanction (for example the death penalty) there is no indication as to how the penalty is to be imposed. Neither is there any indication of court enforcement.

14. Cf. Fishbane 1985: 92. For further examples of lacunae and ambiguities, see Fishbane 1985: 92-94.

15. Cf. Fishbane 1985: 35-36.

institutions (that is by courts and a force which operates to ensure observance of the court's rulings).[16] Moreover, the fact that contractual documents do not appeal to torah as an authoritative legislative source[17] may also be explained when one understands torah as embracing non-juridical ideals similar to those embraced by dharma. Torah is not appealed to because it is of a different order to law; it has no constraining power other than that of its own moral authority.[18] Torah, kittum and dharma did not regulate legal relations. Legal relations were regulated in all of these societies by the oral law and by written contract.[19] At the same time the oral rules, which are constantly changing to meet changed social circumstances, may in fact be reflected in part in the moral rules of the sages. This is so because the sages (or Brahmins), where they approved, may have included oral rules in their written instructional texts. This explains why so many scholars have concluded that many of the provisions of torah read as though they grew out of 'precedent law' which was practised in Israel. They might well have grown out of such precedent, but to describe torah as legislation is nonetheless incorrect. The incorporation of oral rules by the scribes into the texts of torah (or dharma) will only have occurred where the oral rules were thought to conform to the scribes' notion of torah.[20] They were incorporated for their value as wisdom morality not as law to be enforced by judges. Nonetheless, it is important to point out that oral rules did not form the basis of torah. The basis of torah was a literary tradition (much of which was shared by Israel's neighbours) which was developed by literary élites.[21]

Through this secondary incorporation of oral rules into the text of torah, the ideal of the scribes (the moral rules) and the actual (oral practice) may overlap. Once, however, a rule is incorporated into the texts of torah, it will become fixed in that particular formulation, no

16. See above, Chapter 3 Section 2 for Goody's definition of law. To speak of law there must be evidence of the existence of courts, constables and codes which are enforced by the former.

17. In order for the description 'legislative' to be appropriate the codes must show evidence of having been understood as a source of law which was binding upon judges (Jackson 1989).

18. Cf. Lingat 1973: xii-xiii, 257ff., 258 n. 3.

19. The introduction of written contracts is the first area where writing influences law (Goody 1986; see above, pp. 93-95).

20. Cf. Lingat 1973; Jackson 1975: 499.

21. See above, Chapter 2.

longer enjoying the flexibility and adaptability of oral rules.[22] Thus, while the texts of torah and dharma may at times have incorporated oral law (which functioned in everyday social situations), this oral law, once it has been written down, will eventually cease to reflect social practice. It is this aspect of the influence of writing which both Lingat and Jackson have overlooked.

Thus, torah is a non-legal concept. Its authority is not legal; rather it exercises a moral and a religious authority comparable to the authority exercised by kittum and dharma. It was compiled by scribes in the wisdom circles who presented their moral rules as duty.[23] While rules of torah may have contained existing oral law, it did so only where such rules conformed to current notions of wisdom or torah. By virtue of its textuality, however, even these oral rules tended to lose pace, eventually failing to reflect oral practice at all and instead developing under the momentum of the authoritativeness of the written word.

2. *A Common Ancient Near Eastern Wisdom-Moral Tradition*

It has already been suggested in this study that law, but also culture in general, develops largely through a system of borrowing or transplant. Direct literary dependency of the Book of the Covenant on the ancient Near Eastern tradition is now widely accepted. Influence of Israelite ideas and formulas on other ancient Near Eastern cultures has also been recently demonstrated by Otto (1989). Otto suggests that the chiastic structure which is found in the Code of Eshnunna (15-35) is based upon the literary technique of chiasmus found primarily in the biblical material. While it has been argued in this study that the analogy of dharma is better suited to the Israelite codes than the legislative model, the similar concerns of ancient Near Eastern moral rules and the moral rules of Israel are still apparent. Moreover, these moral concerns are found outside of texts which have been traditionally defined as lawcodes as well as within these codes. This general moral tradition is especially evident in wisdom texts.

In the following section it will be demonstrated, first, that the ideals expressed in Israelite wisdom-morality were shared by its neighbours. Secondly, that, as is the case with dharma, this wisdom-morality, found

22. See above, Chapter 2, for discussion of the differences between oral and written rules.

23. See further below, on wisdom and torah.

for example in the Code of Hammurabi and the Book of the Covenant, was enforced in a non-judicial manner. As with dharma, the motivating factor which encouraged observance of these rules was the desire to please the gods who were viewed as the guardians of these sacred texts. Before turning to these issues, it is important to emphasize that the aim of this section is to show that a common ancient Near Eastern moral tradition existed; and that this tradition was independent of any implementation of law in court. It is not suggested that a legal system which was presided over by a judiciary did not exist. The point is, however, that the sacred moral texts, found for example in the Code of Hammurabi and the Book of the Covenant, did not form the literary basis of this system.

a. *A Common Ancient Near Eastern Ideal of a Moral Order*

In a recent study van der Toorn has made a thorough and comparative survey of ancient Near Eastern and Israelite moral ideals. Using the full range of texts available, the biblical and cuneiform codes, the omen texts, medical texts and prayers of petition from sufferers, van der Toorn organizes his exploration into ancient Near Eastern morality around the five apodictic moral commands of the Ten Commandments (Exod. 20.12-16). Despite the fact that the Mesopotamian rules do not show any similarity of formulation to the biblical apodictic form, van der Toorn is convincing in his contention that the Israelite moral code 'remained materially co-terminous with the moral views held by neighbouring civilizations' (van der Toorn 1985: 39). Van der Toorn's second contention that 'the protection of the moral order consisted of a social, a religious and a magical component'[24] (1985: 54) is also pertinent, since it has been argued in this study that evidence for the judicial enforcement of the biblical and cuneiform codes is lacking.

1. *Honour thy father and thy mother.* According to van der Toorn the five apodictic moral commands of the Ten Commandments are general precepts concerning social conduct and can be considered 'programmatic statements which bring in their train a set of related rules' (1985:

24. Van der Toorn (1985) makes a distinction between religious protection and magical protection of the moral order. But in this study no differentiation will be made between the two as both are concerned with the supernatural. Furthermore, van der Toorn assumes an evolution from magical to religious concepts which is by no means certain.

13). While it is by no means certain that the development of the commandments can be traced with anything like this degree of accuracy, van der Toorn's organization of the moral precepts around these five apodictic statements functions well heuristically. Mesopotamian morality can also be understood within these categories. The primary setting for the individual's first experience of the hierarchical structure of society was the family. Indeed, submissiveness of a son to his parents was the paradigm of all relationships of authority. So fundamental to the entire social unit was the family unit, that its destruction could have catastrophic effects upon the entire social fabric. For example King Esarhaddon describes the chaos which existed in Babylon prior to his reign in the following terms: 'the son cursed his father in the street, the slave (did not obey) his mother (the slave-girl) did not heed (the command) of her mistress'.[25] Similarly in Israel the correct relationship between a king and Yhwh is expressed through the application of the father–son metaphor (cf. 2 Sam. 7).

Exod. 21.15 warns against the physical or verbal use of force against one's parents. A middle Babylonian document speaks of a man who is in custody because he has beaten his mother (van der Toorn 1985: 14). In Mesopotamia a curse against one's parents was considered a serious offence punishable by death. In Israel too the cursing of one's parents merits the death penalty (Exod. 21.17 and cf. Isa. 3.4-5). Even more obvious parallels between Mesopotamian and Israelite morality are found in the duty of a son to aid his father when the latter is in a state of drunkenness. The Ugaritic King Dan'el longs for a son 'to hold his hand when he is drunk, lift him up when he is sated with wine' (van der Toorn 1985: 14). Isaiah describes Jerusalem as drunken with the wrath of the Lord who has 'none to take her by the hand among all the sons she has brought up'.[26]

The demand for filial loyalty and obedience expressed in this commandment and elsewhere may be extended to include all those who hold a position of authority. For example in the Sumerian wisdom tale of 'the father and disobedient son', respect towards one's superior is strongly advised.[27] A lack of respect could cause social chaos on a larger scale. While this is clear in Mesopotamian texts, it is also clear in the biblical texts where a warning against cursing prince or king is

25. Cited van der Toorn 1985: 14; and see *CH* 192, 193, 195.
26. Isa. 51.17-18; and cf. Gen. 9.20-27; the Wisdom of Amenemope, Ch. 20.
27. Cited van der Toorn 1985: 15.

made (Exod. 22.27 [EVV 22.28]). It seems here in the Exodus passage to be on a par with cursing God (cf. 2 Sam. 16.9; 1 Kgs 2.8-9; 21.10-11; Eccl. 10.20). Conversely a king should not abuse his powers nor look contemptuously upon his subjects (Deut. 17.14-20; 1 Sam. 8.10-18; 10.25).[28] A similar fear is voiced in Mesopotamian texts offering advice to a king.[29]

2. *Thou shalt not kill.* The second main moral principle is embodied in the commandment 'Thou shalt not kill'. To enhance the idea of the value of human life, both in Israel and in Mesopotamia, the notions of purity and defilement were introduced.[30] Similarly in Mesopotamia a murderer is 'polluted with blood', a notion which extends even where royal involvement in the killing is apparent (van der Toorn 1985: 15). In Israel, hands which shed innocent blood are described as an abomination to the Lord (Prov. 6.16-17; cf. Deut. 19.10; 1 Kgs 2.9).

Perhaps a little arbitrarily, as van der Toorn himself admits, the protection of the weak in society, the widow, the orphan and the foreign alien can be linked to this commandment which prohibits the taking of life (van der Toorn 1985: 15). The prohibition of taking a life indicates the value of the life of each member of society. It presupposes concern for all members of society. Thus, any individual existing under 'life-diminishing circumstances' must be cared for (van der Toorn 1985: 15). Care for those weakened members of society is found as a general moral principle throughout the ancient Near East. More especially it formed part of the royal ideology.[31] The sufferer of Surpu confesses that he had oppressed the weak woman, had failed to free a captive and to clothe a naked young man.[32] A Babylonian wisdom text demands that the feeble be honoured and the oppressed given food and drink (*BWL* 102, 61-62). Similar demands are found in the Old Testament (Lev. 25.35-55; Isa. 58.7; Ezek. 18.7-9, 16-17; Ps. 41.2; Job 29.12-17; 31.16-21; Prov. 14.31; 19.17). The principle of protecting the weak in society is especially evident in the Book of the Covenant (cf. Exod.

28. Van der Toorn 1985: 15.

29. Cf. *BWL* 112.15ff.; 114.41-43; cf. Prov. 28.16a.

30. Van der Toorn 1985: 15; cf. Lev. 17; Deut. 21.1-9. See further below, 'The Protection of the Moral Order', p. 129.

31. Cf. Fensham 1962.

32. *Surpu* II 18.; *Surpu* II 29ff., 51; texts cited in van der Toorn 1985: 160 nn. 61-62.

20.14; 21.20, 26; 22.20-26 [EVV 22.21-27]; 23.3, 6, 9, 10-11). It is clear that the rules laid down in the Book of the Covenant concerning the weak in society are entirely in keeping with the general ancient Near Eastern ideals of morality.

Care for the גר is in Israel, as in Mesopotamia, commonly advised (Deut. 10.19; 14.29; 16.11; 24.14, 17, 19; 26.12; cf. Exod. 22.20 [EVV 22.21]; 23.9; Lev. 19.20, 34; Jer. 7.6; 22.3; Ezek. 22.7; Zech. 7.10; Mal. 3.5). The notion of strangers living under sacral protection is known in Mesopotamia (van der Toorn 1985: 16). *Ubaru* was a term meaning 'resident alien enjoying special protection' (van der Toorn 1985: 16). Eventually the notion of foreigners disappeared from these terms and in both societies the term alien was used to describe the relation between an individual and his god (cf. Lev. 25.23; Ps. 15.1; Isa. 33.14; Ps. 39.13; 119.19; 1 Chron. 29.15).[33]

3. *Thou shalt not commit adultery.* The commandment 'Thou shalt not commit adultery' expresses a moral ideal common to the ancient Near East in general. Just as respect for one's parents ensured respect for all authority encountered outside of the family, so too respect for the bonds of marriage maintained the cohesion of the community (van der Toorn 1985: 17). Akkadian 'apocalyptic' prophecies describe future anarchy when 'husband will abandon wife, and wife will leave husband'.[34] Marriage was based on reciprocal trust and faithfulness. Thus, neglect at this level could lead to the dissolution of all other relations which were based on reciprocal trust and faithfulness (van der Toorn 1985: 17).

Similarly in Israel the respect for marriage vows stands as central to the maintenance of the social order (Exod. 20.14):[35] A breach and upheaval of the covenant relationship is depicted in terms of the husband betrayed by his adulteress wife (Hos. 1.2-11). The maintenance of

33. Regarding Mesopotamia, cf. personal names with *ubar* as an element, for example Ubar-Utu.

34. Cited van der Toorn 1985: 17.

35. Adultery laws in Israel differed from those of other ancient Near Eastern societies insofar as only women could be accused of adultery. While recognizing that differences may have existed, the purpose of this chapter is to illustrate how Israel and its neighbours shared common, general concerns. Moreover, it should be pointed out that differences between rules of one society and another may well be the result of exegesis and need not necessarily reflect different social conventions and norms.

the marriage ethos in Mesopotamia and in Israel also ensures trustworthiness in analogous relationships (van der Toorn 1985: 17).

Sexual ethics in Israel and Mesopotamia are also similar. In both societies sexual scandal brings disgrace. A middle-Babylonian letter tells of efforts to cover up such an event in a family.[36] The biblical proverbs warn against libertinism which has serious social consequences bringing shame upon the guilty parties (Prov. 2.16-19; 5; 6.20-27; 27). Babylonian behavioural omens see similar consequences for those engaging in licentiousness.[37] One such omen decrees: 'If he is a fornicator what he owns will decrease, he will become poor'.[38]

The Old Testament attitude towards illicit sex is dominated by the notions of purity and defilement (Gen. 34.9, 13, 27; Lev. 18.20, 23, 24-30; Ezek. 18.6, 11, 15; 22.11; 33.26; Hos. 5.3; 6.10). Similarly in Mesopotamia sexual promiscuity is a desecration, a violation of a taboo. For example in the Sumerian myth of Enlil and Ninlil, Enlil is deemed sexually tabooed after his rape of Ninlil. He is consequently outcast from the council of the gods (van der Toorn 1985: 17).[39]

Another force of social cohesion, apart from marriage, was friendship. Its values and its duties are evidenced in Mesopotamian wisdom texts and also in Israelite wisdom literature (Job 17.5; Prov. 3.29). Friends could turn to strangers when one suffered some misfortune. Such behaviour was contemptible and amounted to a breach of the moral code.[40] Stirring up trouble between friends could bring the wrath of the gods upon the troublemaker.[41] A united group should not be broken up.[42] Prov. 6.14c, 19b announce that the wicked man who 'sows discord' between brothers is repulsive to the Lord.

4. *Thou shalt not steal.* The commandment 'Thou shalt not steal' is also expressive of a moral precept which concerned not the juridical system but part of a code of conduct which was enforced in non-juridical ways.[43] Related to this general precept in both Israel and Mesopotamia

36. For texts see van der Toorn 1985: 161 n. 78.
37. *CT* 51, 147; Reverse 21; cited van der Toorn 1985: 161 n. 80.
38. Cited van der Toorn 1985: 161 n. 80.
39. See further below, Section 3 'The Protection of the Moral Order'.
40. *BWL* 34.84-88; Ps. 41.10; 55.12-15, 21; cf. 7.5c.
41. *Surpu* II 27ff.; cited van der Toorn 1985: 162 n. 95.
42. *Surpu* II 53.71ff.; cited van der Toorn 1985: 162 n. 96.
43. See further below, Section 3 'The Protection of the Moral Order'.

are precepts governing indirect theft. For example, in a Babylonian penitential prayer, the sufferer laments that he is treated 'like one who ate to himself the food he found ... who drank to himself the water he found ... like one who took the hallowed name of his personal God in vain' (cited van der Toorn 1985: 18-19). It appears that the sufferer is referring to the unethical behaviour of denying the finding of property lost by someone else. The same behaviour is also deemed unethical, but not unlawful,[44] in the Old Testament (Exod. 22.8 [EVV 22.9]; Lev. 5.22, 23) where it is associated with the appropriation of cattle or valuables entrusted into one's care (Exod. 22.7-10 [EVV 22.8-11]; Lev. 5.20-24).

Another form of indirect theft condemned by the ethical codes of both societies is the use of false weights and measures.[45] A changing of a neighbour's boundaries to enclose one's own land was a subtle form of theft abhorred by the moral-wisdom rules of both societies.[46] Usurping was considered an economic sin in Israel (van der Toorn 1985: 19).[47]

5. *Thou shalt not bear false witness.* Another set of moral evils designated by van der Toorn 'Sins of the Tongue' are extensions of the commandment 'Thou shalt not bear false witness'. In Mesopotamia the theme of the false and the reliable witness is common.[48] Those who bear truth are rewarded while those making false accusations are severely punished, not by judicial means but by the wrath of the gods.[49]

Similarly in the Old Testament the false witness is an abomination to Yhwh (Prov. 6.16, 19). Social ethics also condemned slander which appears frequently as a theme in Mesopotamian confessions and sapiential admonitions.[50] Proverbs warns against careless talk and admires

44. No legal sanction is mentioned. The owner of the house is simply to be brought to swear an oath before God. The ruling is divinely sanctioned.

45. Cf. *Surpu* II 37, 42ff.; *BWL* 132.107-211; Deut. 25.15; Prov. 11.1; 20.10; 23.10; Wisdom of Amenemope Ch. 16 for Egypt; texts cited van der Toorn 1985: 162 n. 105.

46. Cf. Deut. 19.4; Job 24.2a; Wisdom of Amenemope for Egypt Ch. 6b; *Surpu* II 45ff.; texts cited van der Toorn 1985: 162 n. 106.

47. Exod. 22.24 [EVV 22.25]; Lev. 25.36-37; Deut. 23.20; Ezek. 18.8, 13, 17; Ps. 15.5; Prov. 28.8.

48. *CT* 47, 31; 47, 63.48; *CH* 4, 11; cited van der Toorn 1985: 163 n. 108.

49. Cf. *Surpu* II 14ff., 60; cited van der Toorn 1985: 163, n. 109.

50. *Surpu* II 7–9, 12f, 40f., 81; IV 9; *BWL* 100.26-30; 104.130-34, 148ff.; texts cited van der Toorn 1985: 163 n. 115.

guarded lips (Prov. 10.18; 11.9, 13; 26.20-22).[51] The wicked who encourage gossip resulting in the question of a person's righteousness are also condemned (Ps. 64.4; 94.4; 140.4). Of course there is no way in which judicial measures could guard against false witness: there is no way of determining what is a false and what is a true testimony. Appeal is made to Yhwh who abhors lies and falsehood which constantly threaten the righteous (Exod. 23.1; 23.2; 23.6-8; Ps. 5.7; 31.18; 40.5; 58.4; 62.5; 109.2; Prov. 6.16-19; 10.18; 12.19, 22; 17.7; 19.5, 22; 21.6; 26.28).

Unkept promises met with strong disapproval in the behavioural codes which stated that an unkept promise would bring downfall sent by the gods upon a man.[52] In the Psalms we encounter a similar ideal: a man, who even when the fulfillment of his vow turns to his disadvantage keeps that vow regardless, is a man worthy of praise (Ps. 15.4; cf. Deut. 23.22-24; Eccl. 5.3-5).

The behavioural codes of the ancient Near Eastern wisdom schools often contained 'professional codes of honour' which were watched over by the patron deities of the respective offices (van der Toorn 1985: 21).[53] For example, with regard to judges, we find in both Mesopotamian and Israelite moral rules a warning against the acceptance of bribes.[54] It was the moral duty of a judge to aid the weak in society not to function as a protector of the powerful.[55]

Similarly the king was portrayed in idealized terms in both Israel and Mesopotamia as a defender of the weak in society ensuring the continuation of the social order which had been sanctioned by the gods.[56] But the scribes who composed these texts were also aware that the king could pursue personal interests to the detriment of his subjects.[57] Upon the accession of a king in Israel his rights and duties were written down

51. See Wisdom of Amenemope Ch. 8.

52. Cf. *Surpu* II 6.38ff.; *BWL* 104.150; cf. *Surpu* III 23, 54ff.; texts cited van der Toorn 1985: 163 nn. 128, 130.

53. See further below, Section 3 'The Protection of the Moral Order'.

54. Cf. *BWL* 132.97-102; 218.8-10; *Surpu* III 24; Exod. 23.8; Deut. 10.17; 16.19; 27.25; Mic. 7.3; Zeph. 3.3; Ps. 15.5; 2 Chron. 19.7; texts cited van der Toorn 1985: 164 n. 133.

55. *BWL* 132.99ff.; Exod. 23.3, 6.

56. Cf. Prologues to lawcodes.

57. *BWL* 112.15ff.; 114.41-43; texts cited van der Toorn 1985: 164 n. 139; Prov. 28.16a; Deut. 17.14-20.

in a book which was placed before Yhwh.[58] The Assyrian and Babylonian gods would also look unfavourably upon a king who breached the behavioural code laid down by the wisdom scribes.

b. *Rules of Etiquette and the Gods*

Separate, but nonetheless related to the social ethics of the ancient Near Eastern moral codes are rules of etiquette (van der Toorn 1985: 21). Their concern is somewhat different; it is not a question of right or wrong but of proper and improper, seemly and unseemly, fitting and unfitting. Again in the sphere of etiquette there are many similarities between the cultures of Israel and Mesopotamia. Rules of religious behaviour were modelled on social principles. The attitudes which the good citizen was to adopt towards the gods were not at odds with the lines of conduct to be followed in human intercourse. For example, in the Book of the Covenant, Exod. 22.28 [EVV 22.29] warns against reviling God, which would seem to be on the same level as cursing a ruler of the people (van der Toorn 1985: 24). Just as the human ruler could have likes and dislikes which demanded the sensitivity of his subjects, so too the gods had likes and dislikes. Malachai 1.8 compares the sacrifices for Yhwh with gifts given to the governor. For example certain odours and certain foods might please the gods, while others were abhorrent to them. The gods also demand purity of kind, above all in the dietary rules which form a part of etiquette rather than ethics. In Leviticus (19.19) the breeding of one type of cattle with another type is condemned. Also prohibited is the sowing of a field with two kinds of seed. In Deuteronomy (22.9-11) it is prohibited that garments be made of two kinds of fabric. Just as there were 'sins of the tongue' such as slander, gossip and false witness in human relations, the frivolous swearing of an oath or the blasphemous utterance of a god's name were also 'sins of the tongue' (van der Toorn 1985: 24-25).

Theft of a god's valuables was a grave crime. A Babylonian penitential prayer contains the confession: 'I cast longing eyes on your abundant property, I coveted your precious silver'.[59] King Asa took the silver and gold from the temple and sent them to Benhadad to persuade the latter to come to his rescue (1 Kgs 15.18). The Code of Hammurabi

58. 1 Sam. 10.25; and cf. Prov. 28.16; 29.12, 14; 31.2-9 on the just king. See further below, Section 3 'The Protection of the Moral Order'.

59. Cited van der Toorn 1985: 25 as from Lambert 1974: 282.141ff.

and the Middle Assyrian Laws also discuss this form of robbery (*CH* 6, 8; Lev. 5.14-16; 22.14).

c. *The Ideal Citizen*

Again similar in both cultures was the ideal of the citizen. The good citizen showed self-restraint, level-headedness and temperance.[60] Irascibility is frowned upon.[61] Careless talk and improper speech can bring trouble to the good man.[62]

The most important virtue is 'fear of the lord'. This ideal is common throughout the ancient Near East (van der Toorn 1985: 38). Fear of the Lord entails reverence, obedience, humility and trust (Gen. 20.11; Deut. 4.10; 5.29; Ps. 22.26; 31.20; Prov. 16.6).[63] Reverence for the god/s is expressed in formulae of praise in the Akkadian and Hebrew prayers.[64] While the righteous man 'knows' God, the wicked forget their God and do not know the 'fear of the Lord' (Ps. 28.5a; 36.2b; 86.14c; Job 8.13; 18.21). Humility is a cardinal virtue of the righteous. Mesopotamian kings describe themselves as weak and humble.[65] King Nabopolassar of Babylon describes himself as 'a weak man, a beggar, who constantly seeks the lord of lords' (cited van der Toorn 1985: 37). Biblical prophets condemn the human hubris (cf. Isa. 2.10-18; 9.7-11; 10.12-15; Zeph. 3.11, 12). As in Mesopotamia the righteous man is modest, he does not hide his crime nor slight his sins (cf. Prov. 21.23; 29.23; Job 11.4; 31.33).

Akkadian royal inscriptions value trust in the gods above trust in oneself. Similarly the biblical prophets advocate trust in Yhwh as the only way out of a political crises (Isa. 30.15). These attributes of the righteous man outlined above are inherent in the 'fear of the Lord' which is the essence of all wisdom (Isa. 11.2; 33.6; Prov. 1.9, 10, 29). Thus, it can be said that outside humble devotion to the gods these human qualities were unrealizable (van der Toorn 1985: 38). Religious ideals and social ethics merge against the background of the belief, not

60. Cf. *CT* 51, 147 Rev. 14-18; Prov. 17.27.

61. *Surpu* II 58; *CT* 51; Prov. 14.17; 20.3; 29.22.

62. *CT* 51; 147.35; Prov. 6.2; 13.2-3; 15.23; 18.20-21.

63. Van der Toorn 1985: 37.

64. Cf. *Surpu* II 11, 33, 73; cited van der Toorn 1985: 175 n. 376; Ps. 36.1; Ps. 115.1.

65. *AHw* 1132b; *CAD* A/2 455b; cited van der Toorn 1985: 175 nn. 379-80.

just in Yhwh's ordering of the natural world, but also in the belief of his ordering of social relations. Perdue similarly observes that:

> For the sages, moral reasoning was not isolated self-contained mental activity, but rather a process that occurred within an integral system of cosmology, social institutions and human nature. Actions and words have a meaning that reaches beyond the observable results for the individual agent to have impact on the anthropological, social and cosmic order originating within primordial beginnings (Perdue 1990: 470).

Finally, Gemser (1953) points out that the rule prohibiting the taking of bribes by officials is motivated by a proverb of 'classical rhythmic form' (Exod. 23.8; Gemser 1953: 57). In Exod. 23.8, says Gemser, we find a 'striking example of the intrinsic coherence of legal practice and wisdom in Proverbs' (Gemser 1953: 64; cf. Prov. 17.15). This is not surprising since in many African cultures proverbs have the force of legal maxims[66] (Gemser 1953: 64). The force of quoting a proverb is also evidenced in 2 Samuel 14 where the wise woman of Tekoa cites a proverb to David (2 Sam. 14.14).

d. *Summary*

Van der Toorn's work illustrates that a common ancient Near Eastern wisdom-morality existed. In Israel this wisdom morality is reflected not just in the so-called wisdom texts, proverbs, etc. but also in what have been considered Israel's legal texts. Moreover, the values set forth in the behavioural codes pertain to the realm of wisdom.[67] Both civilizations had an ideal of god-fearing humanity which should permeate the entire range of human conduct and behaviour (cf. Perdue 1990).

It has already been shown in this study that the biblical and cuneiform lawcodes were not legislation. We have no evidence for the existence of courts and a force which operated to back up enforcement of the codes. From van der Toorn's study it becomes apparent that the moral ideals of the wisdom tradition were associated with the gods and that this association, sometimes implicit, sometimes explicit, formed a part of ancient Near Eastern wisdom-morality from the very beginning. Moreover, van der Toorn contends that the protection of the moral

66. For fuller discussion of the use of proverbs in legal proceedings in traditional African societies cf. Junod (1913) and Smith and Murray-Dale 1920: 311.

67. Jackson (1984) expresses doubt that the משפטים of the Book of the Covenant are the work of wisdom scribes, a description which he (following Weinfeld 1972) accepts as apt for the Deuteronomic code. But see further below, Chapter 5.

order 'consisted of a social, a religious and a magical component' (van der Toorn 1985: 54).

It is commonly realized that the laws of the Book of the Covenant now stand in a secondary context where a covenant framework has been inserted probably by the Deuteronomistic writers. While this is probably correct, it is nonetheless clear that within the Book of the Covenant and within the other biblical 'lawcodes', together with the wisdom and the prophetic literature, there is in evidence an ideal of morality. The rules of this ideal, like its ancient Near Eastern counterparts and like the Indian concept of dharma, had always fallen under the protection of the gods. Thus, the quest for evidence of human judges and human courts in our text has overlooked the nature of the sanctions. In the discussion that follows it will be shown that like dharma, the moral codes of the Bible, including the Book of the Covenant, were protected by Yhwh and not enforced by legislative means properly speaking.

3. *The Protection of the Moral Order*

In the discussion of the social enforcement of moral rules van der Toorn distinguishes between 'the power of persuasion which was used to buttress a moral code' on the one hand and the 'motivation of the social actors to observe it' on the other. The power of persuasion, he contends furnishes the rules of conduct with an objective validity, while the motivation aspects concern 'the stirring of the heart which moved the individual to act accordingly' (van der Toorn 1985: 40).

Both in Mesopotamia and in Israel utilitarian motives form a part of the social enforcement of the moral rules. Sapiential admonitions in the Bible point to the positive effects of correct behaviour often appealing to the hope of profit as an incentive to virtue. Thus, while moral considerations play an important role they go hand in hand with utilitarian motives. Laziness, for example, is condemned not because it is in itself wicked but because it leads to poverty.[68]

The decalogue promises long life to those who fulfil the duty of honouring one's parents. In Mesopotamian letters the incitement to fulfill one's duty is often supported by a reference to the social status and to

68. Prov. 6.6-11; 13.4; 19.15; 20.4, 13; 21.25; 24.30-34; cf. Exod. 21.20 'because it is worth money to him' and *BWL* 277.8-9.

the self-respect of the individual (van der Toorn 1985: 40).[69]

Social consensus is viewed by van der Toorn as a persuasive force: 'The social consensus supports the group identity and provides a strong deterrent against difficult behaviour' (van der Toorn 1985: 4). For example the objection that 'such a thing is not done in Israel' enforces the rule (2 Sam. 13.12). While social consensus may be an effective force in relatively unstratified and decentralized societies such as pre-monarchic Israel, the evolution of such a society into a hierarchical, stratified and centralized system leads to the corrosion of social boundaries. The dissolution of the primary social units, be they clan or tribe, leads to a situation where the argument of social consensus loses much of its force (van der Toorn 1985: 40). Mesopotamia evolved in a similar, although more rapid, movement from an unstratified to a stratified society. Thus, both societies found themselves lacking the force of social consensus which had up until then assured the preservation of order through the observation of the wisdom-rules. In order to fill this vacuum, local and national judicial bodies were created to ensure observance of these rules.

At this point van der Toorn's study seems to be following a similar pattern of legal development to that followed by Otto.[70] The transition from *Gemeinschaft* (community) to *Gesellschaft* (society) results in something of a social crisis which is primarily a crisis of identity. Society could no longer rely on itself as a source for unity, thus necessitating the creation of a formal judicial system. Where this judicial system failed, however, both Otto and van der Toorn propose that the gods or Yhwh were introduced as a force who was called upon to remedy the imperfections of human law-making and administration. Van der Toorn, for example, points to the limitations of the judicial system; crimes may go unnoticed, false witness is difficult to detect and perpetrators may escape the courts. Under such circumstances, there was a demand for 'a referee with faculties of vision and action that transcended those of the king and his officials. The heavenly council had to be called to the rescue to remedy the imperfections of human jurisdiction' (van der Toorn 1985: 41). Thus, legal procedure in Mesopotamia and in Israel was never totally secular, but was always permeated by religious concepts.

69. 'Act like a gentleman' *KTS* 1b.11; cited van der Toorn 1985: 175 n. 1.

70. See above, Chapter 1.

Thus far, it seems as if van der Toorn is proposing that in early pre-monarchic Israel social consensus is sufficient to assure observance of the moral code. In this way he would appear to be following a similar pattern of development from profane to sacral motivation as Otto (1988), Brueggemann (1990) and Schwienhorst-Schönberger (1990). Van der Toorn, however, provides a corrective to the latter by pointing out that the judicial process in Mesopotamia and in ancient Israel was never purely secular but always permeated by religious concepts.[71] In fact, van der Toorn would certainly not agree that the sacral protection of law was simply introduced where social consensus and motivation could no longer function:

> The order followed in this study might suggest that the divine consolidation of the moral order was a late development in which a religious superstructure was added to fill the holes left by social institutions. Such an impression does not correspond with the facts. In reality the defence of the reigning ethos had always religious overtones (van der Toorn 1985: 41).

Nonetheless, in times of crisis the gods were more readily evoked when 'Social strife heightened the need for an articulation of the inarticulated premisses' (van der Toorn 1985: 41).

a. *Affective Involvement of the Gods*

The normative values of Mesopotamia and Israel lay under the protection of the gods who were viewed either as being 'emotionally involved' in the protection of these principles or involved as observers in the capacity of impartial judges. In the latter case, the gods might serve as witnesses of a contract that had been made between two people, threatening, implicitly or explicitly, their curse upon the party which would breach the contract (van der Toorn 1985: 41).[72]

The religious emotivity of the gods in contrast denotes the idea according to which 'divine approval or disapproval determines the permissibility of a specific line of conduct' (van der Toorn 1985: 41). Here

71. See also Mayes 1989: 67 who criticizes Otto for overlooking the possibility that law had from the beginning an implicit religious basis.

72. For example, condemned in the moral codes of Mesopotamia and Israel is the moving of boundaries (Deut. 19.14; Job 24.2a; Wisdom of Amenemope Ch. 6b; Gen. 31.51-54; *Surpu* II 45ff.). During the original demarcation of territory the gods were often called upon as witnesses of the rightful boundaries.

the notions of 'taboo' and 'abomination' play an important role (van der Toorn 1985: 42). In Akkadian the term *ikkibu* (abomination, taboo) is frequently used to stigmatize deviations from the moral rules and also deviations from rules of religious etiquette (van der Toorn 1985: 43). The explanation for dietary rules is that the gods hold certain dishes as an abomination. Similarly on the ethical plain a vain promise is an abomination to Marduk. Sumerian proverbs list actions which are 'abominations of Utu'. While other gods also protected the moral order Samas (Utu) played a primary role (van der Toorn 1985: 44).[73] The protection of the moral order by Yhwh is clearly evidenced in Prov. 6.16-19.

> There are six things which the lord *hates*, seven which are an *abomination* to him; haughty eyes, a lying tongue, and hands that shed innocent blood, a heart that decides wicked plans, feet that make haste to run to evil, a false witness who breathes out lies, and a man who sows discord among his brothers.

Thus, the moral principles which have already been outlined, sins of the tongue, including false witness, lie clearly here under the protection of Yhwh.[74] Prov. 20.10 condemns the use of unfair balances as תועבה (abomination) (cf. Prov. 30.15-16, 18-19, 21-23; 11.1).[75] Deceit, lies and false witness (sins of the tongue) and anti-social behaviour are also described as abominations (Ps. 5.7; 31.18; 40.5; 58.4; 62.5; 109.2; Prov. 6.16-19; 10.18; 12.19; 17.7; 19.5; 21.6; 22; 26.28). A man who sows disunity among a united group, thus fracturing the social order, is an abomination to the Lord (Prov. 6.19). Anyone who stirs trouble between two friends must count on the wrath of the gods.[76] Prov. 6.19b and 14c warn the wicked man who sows discord between brothers that he is repulsive to Yhwh (van der Toorn 1985: 18). As a primary social unit, the family also enjoyed divine protection. The outsider who separates a father and his son or a mother and her daughter is guilty before the gods.[77] The arrogant man is also described as תועבה (Prov. 16.5).

73. Cf. Lambert 1957–58: 184-96 esp. 188-89.

74. Cf. Prov. 12.22; 14.25; Ps. 27.12; Ps. 35.1-26; cf. 1 Kgs 21 for an example of the procedure described by this psalm, Ps. 69.5; Ps. 94.20-21.

75. A text not included by van der Toorn is the Shamesh Hymn 115ff. 'The honest merchant who weighs out loans of corn by the maximum standard, thus, multiplying kindness. It is pleasing to Shamesh, and he will prolong his life.'

76. *Surpu* II 27ff. cited van der Toorn 1985: 162 n. 95.

77. *Surpu* II 20–26; cited van der Toorn 1985: 162 n. 98; cf. Mic. 7.5-6.

Those failing to meet the ideal of care for the poor insult the gods.[78] The personal god of a man is displeased with him when 'he says "how happy" to a person in need, without helping him'.[79] Significantly, while תועבה was used to describe a breach of social ethics and of social etiquette it was also used to condemn breaches of religious etiquette (cf. Deut. 14.3; 17.1; Isa. 41.24; Prov. 11.20; 16.5; 17.5).

The affective meaning of תועבה is indicated by the synonymous parallelism with שנא (to hate) (Amos 5.10; 6.8; Ps. 5.6; 119.163) and by the antithetic parallelism with רצון (pleasure) (Prov. 11.1, 20; 12.22; 15.8). The pleasure and displeasure of Yhwh lie at the core of the idea of certain actions being תועבה (van der Toorn 1985: 44).

Similarly in Mesopotamia, Samas is omni-present and omniscient. He guarantees the control of the moral order. Often admonitions are reinforced by reference to his pleasure. Social ethics such as the care of the poor and the downtrodden in society must be upheld because the observance of this virtue pleased Samas. Autocratic behaviour, in contrast, was abhorred by Samas.[80] Often he is mentioned in letters as the one who will punish wrong behaviour: 'For Samas sake, if you lie ... act so as to please Samas'.[81]

While adultery is considered a property offence it is also considered a taboo or a desecration in Mesopotamia (van der Toorn 1985: 17).[82] Enlil is considered 'sexually tabooed' after his rape of Ninlil and is expelled from the council of the gods. The Old Testament attitude towards sexual promiscuity is also dominated by the notions of purity and defilement, abomination and taboo (Gen. 34.5, 13, 27; Lev. 18.20, 23, 24-30; Ezek. 18.6, 11, 15; 22.11; 33.26; Hos. 5.3; 6.10).

Yhwh's affective involvement in human behaviour is evidenced by his abhorrence of deceit and falsehood and also by his love for צדקת (righteous actions), צדקה([deeds of] justice) and observance of משפט ('legal' norms) (cf. Isa. 61.8; Ps. 11.7; 33.5; 37.28; 99.4; Hos. 6.6; Prov. 11.1). Thus, in both Israel and Mesopotamia there was not only a confluence of moral rules but also a common belief in the divine

78. Prov. 17.15; cf. Prov. 14.31; *Surpu* II 18; IV 10 cited van der Toorn 1985: 160 nn. 61, 63.

79. Cf. Winton-Thomas 1958: 105.

80. *BWL* 100.57; 102.65; cited van der Toorn 1985: 178 n. 51.

81. Cited van der Toorn 1985: 44 as from Veenhof 1978: 186-88.

82. Cf. the Sumerian myth of Enlil and Ninlil.

enforcement of these rules which is based on an emotional interest of the gods in the moral values (van der Toorn 1985: 44).

b. *The Moral Order as an Expression of Divine Justice*

Van der Toorn also suggests that as protectors of the moral order the gods in both cultures could act in a slightly different way. Aside from affective involvement in the ideals of the wisdom-moral rules, they could also be involved in a more judicial capacity. In this latter capacity they are viewed as witnesses or judges. A Sumerian proverb that predicts the victory of justice says 'let the lawless exert themselves, Utu is the bringer of every day'.[83] Another Sumerian proverb declares: 'The one who attacks a just verdict, the one who loves an unjust verdict' was an abomination to Utu.[84]

The social order demanded by the wisdom-moral teachings, but also by the so-called 'legal codes', was protected not by a judicial system but by the watchful eye of the gods. Especially important here was the taking of an oath before the deity which could result in blessing or curse. An oath confers reliability on human statements. False witness, lies and unfulfilled oaths, or oaths made lightly, endangered the entire social system and resulted in punishment by the gods.[85] Oath and curse are inseparable; breach of an oath brings the curse of the gods. Oath and curse are important in two areas; in legal proceedings and in human relations.

1. *Legal proceedings.* In Mesopotamian courts the oath functioned to establish the truth of a case. An Akkadian document tells how the accused is cross-examined 'before god' in a case where the original agreement concerning a certain amount of silver had been destroyed.[86] An accused person could also take an oath pleading his innocence before the gods.[87] The efficacy of this procedure rested on the conviction that an act of perjury would bring the curse of the gods. Thus, the oath was often accompanied by an ordeal which was designed to test

83. Cited van der Toorn 1985: 45.

84. Cited van der Toorn 1985: 45.

85. Hos. 10.4; Ps. 139.20; Exod. 20.7; and cf. Lambert 1974: 274.24, 278.87, 289.12; cf. *Ludlul* II 22; Eccl. 5.1-7; and cf. van der Toorn 1985: 24-25.

86. *MDP* 23, 275.12; and cf. *CH* 20, 23; *CAD* B 127b; cited in van der Toorn 1985: 179 nn. 72, 73.

87. *CCT* 5 14b; cit. van der Toorn 1985: 179 n. 75.

the trustworthiness of the person under oath. For example the water ordeal is attested in the Code of Hammurabi.[88] In Babylon the practice of administering poisonous substances was quite common (van der Toorn 1985: 46) and finds a parallel in Israel in the administration of wormwood (Isa. 51.22; Ps. 75.8-9; Jer. 8.14; 9.14; 23.15).

The importance of the oath in Israel is illustrated by the case of a wife suspected of adultery in Num. 5.11-31. In the absence of any tangible proof the suspected wife is taken to the sanctuary. The husband presents 'a vegetal offering that brings iniquity to remembrance' that is to the attention of Yhwh (v. 15). The priest makes the wife take an oath and she is then given ' bitter water that brings the curse' (v. 24).[89] If the wife is in fact guilty of adultery then the administration of the 'bitter water' will make her ill and render her sterile. If, in contrast, she is innocent, no curse will follow and she will conceive children in the future (van der Toorn 1985: 47).[90]

Similarly the importance of the oath is attested in 1 Kgs 8.31 where a man who wrongs his neighbour should be brought to the altar to swear an oath. In the case of the man's guilt then Yhwh will judge him from heaven (cf. Ps. 82.1-4).

In Mesopotamia, despite an elaborate judicial system, the protection of private property extended beyond the range of the courts and judges to the gods. Where a thief escapes human justice the gods will curse him.[91] In Israel robbery and extortion also fall within the realm of the concerns of Yhwh (Exod. 20.15; Lev. 19.11, 13; Ezek. 18.7, 12, 16, 18; Ps. 35.10; 50.18; 62.11; 69.5; and cf. Exod. 21.7-11).

2. *Human Relations.* In human relations whether political, commercial or personal, the oath stood as a guarantee of faithfulness. In a non-judicial personal sense it was possible for an individual to imprecate his oppressor (cf. Judg. 9.57; 2 Sam. 3.29; Ps. 109.6-19; Prov. 30.10). There were also promissory oaths. In the ancient Near East relations other than those of consanguinity were conceptualized as covenants

88. Other forms of ordeal included situations where the person under oath was given some sacred substance to eat the consumption of which could prove fatal if the oath taker was lying. Neo-Assyrian private legal documents speak of oaths by water, smoke and scorpion.

89. Cf. Exod. 32.20-24.

90. See below on oath in the Book of the Covenant.

91. *Surpu* II 61.83-85; *Surpu* III 58; cited van der Toorn 1985: 162 n. 100.

which could be economic, matrimonial, political or juridical (van der Toorn 1985: 47). Whatever the type of covenant, each was protected by the entrance into a pact which stood under an oath. Breach of the covenant brings the curse of whatever deities had stood as witness to the covenant (van der Toorn 1985: 48). The covenant was an important means of regulating social relations in Assyria, Babylon and also in Israel. Similar proceedings seem to have been common among Hittites, Arameans, Canaanites, Phoenicians and Elamites.[92]

In the story of Jacob and Laban where Yhwh is said to keep watch between the two parties when one is absent from the other, the divine protection of covenants is also evident. As van der Toorn observes: 'Where social control fails he is their witness and will judge the one who breaks the pact' (Gen. 31.43-54). Other Old Testament texts where promise of friendship is protected by an oath include Gen. 21.22-32; 26.26-31; 1 Sam. 18.3; 20.16-17; 22.8; 23.18; 2 Sam. 3.12-13, 20-21, 29. International relations also took the form of covenants which stood under the protection of the deities (Josh. 9; 2 Sam. 21.1-14; 1 Kgs 5.26; 20.34; Ezek. 17.11-21). Similarly in Assyria the rulers complained that their vassals who attempted rebellion or resistance had 'sinned' against the agreement sworn by the great gods and thus sworn frivolous oaths (van der Toorn 1985: 49).

In Mesopotamian religion the notion of covenant did not feature as central even though the moral code was validated by *mamitu*, a term which means oath as well as curse. In Israel, in contrast, covenant became the central notion. The language and form of covenants made between human partners comes to be used to express the relationship between Yhwh and his people (Deut. 28). Since Yhwh had always been involved as witness or judge in human covenants, the extension of the notion of covenant to describe the relationship between Yhwh and his people is a natural one. While the terminology may be new, it is introduced into a context which is 'well prepared to receive it' (Mayes 1979: 66). The entire range of moral rules (which had in any case always stood under the watchful eye of the gods or Yhwh) comes to be understood within the framework of a covenant relationship between Yhwh and Israel.[93]

92. Cf. McCarthy 1975.

93. The historical conditions which led to the scribes' understanding of the observance of the moral rules as conditional to Israel's continued existence will be

c. *Summary*

The function of the oath and the curse was that they provided 'an *ad hoc* sanctification of a restricted moral code within a clearly defined relationship' (van der Toorn 1985: 52). Ultimately though, throughout the ancient Near East, the curse of the gods was considered as the typical retribution for any infringement of the general principles of morality. A specific line of conduct often needed to be explicitly connected with an oath in order to enforce its adoption (Judg. 21.1, 5, 7, 18; Jer. 34.8-9; Ezra 10.3-5; Neh. 10.30; 2 Chron. 34.31).

The 'logical structure' of the entire behavioural code is exemplified in explicit references to the divine protectors of morality. The authority of the codes is derived from the gods who inflict their curse or reward their blessings on perpetrators and observers respectively (van der Toorn 1985: 52). Thus, the behavioural codes of the Bible and the ancient Near East were protected by a social and a religious component. As we have seen, however, these two spheres cannot be separated.[94]

Where no evidence of legal enforcement of the biblical and cuneiform codes was found, the texts themselves indicate how the codes were not enforced but protected.

> The gods then, are viewed as the ultimate moral agents, who *ex natura* and *ex officio*, uphold the commonly endorsed code of conduct. Their interventions were provoked by crime or elicited by the supplications of maltreated individuals (van der Toorn 1985: 45).

The Book of the Covenant has been deemed by many the most likely candidate for a biblical legal code which actually regulated Israelite society. In this study, however, it will be shown that the Book of the Covenant (even before its present Deuteronomistic setting as covenant law) also stood under the protection of Yhwh and was not intended to be enforced by judges.

4. *The Protection of the Moral Order in the Book of the Covenant*

a. *Oaths*

In the Book of the Covenant the efficacy of the oath is just as evident as it is in the so-called wisdom texts. Exod. 22.9-10 [EVV 22.10-11]

discussed below. Two basic influences may be noted: first, the rejection of Assyrian overlordship which had been expressed in terms of a vassal relationship with Israel (Mayes 1979: 87-88) and, secondly, the situation of exile.

94. See above, Chapter 4 Section 3.

declares that for every 'breach of trust' concerned with deposits or lost property where dispute arises, the matter falls under the jurisdiction of Yhwh. Thus, agreements in general between parties may be supposed to have been protected by the oath and curse falling under the protection of the gods. For example where a man has given his neighbour goods for safekeeping which subsequently go missing with no evidence of theft from outside, then the owner of the house and the owner of the missing goods 'shall come near to Yhwh, to show whether or not he has put his hand to his neighbour's goods' (Exod. 22.8 [EVV 22.9]). The reference is, of course, to the taking of an oath. Similarly Exod. 22.9, 10 [EVV 22.10-11] prescribe the taking of an oath before Yhwh where there is dispute arising over the protection of goods left for safe keeping (cf. 1 Kgs 8.31).

The Law of Eshnunna (37) prescribes similarly the taking of an oath when a depositors' property goes missing. The protector of the property shall declare saying: 'Together with your property, my property was lost; I have done nothing improper or fraudulent'.[95] One can imagine a similar declaration being made in an Israelite context. Of course, the truth or falsity of the declaration could not be proven but the making of a false oath would result, in time, in a curse. It is also possible that some means of indicating the guilty party were available; perhaps these concerned signs or sacred oracles. In any case, the one whom the god/s had condemned was liable to pay double to the man who had lost out. A specific parallel is found in the Code of Hammurabi (120) where here also the holder of the deposit is liable to restore double. Similarly in the Code of Hammurabi where a case of dispute over lost property arises 'witnesses' shall declare what they know in the presence of the god (*CH* 9; cf. 20, 23, 103, 106, 107). No doubt in disputed cases of culpability oaths would have been called upon to settle situations arising out of the entire range of casuistically formulated rules of Exodus 21 and 22. Under such circumstances oaths would have played a crucial role given the absence of formal methods of judicial enforcement and processes. For example Exod. 22.5 [EVV 22.6] rules that a man who starts a fire which subsequently destroys a neighbour's crops shall make restitution to his neighbour. No doubt where dispute arose as to who was responsible for the kindling of the fire, resort to the oath was made.

95 Cited from *ANET* 163. This is the only occurrence of an oath in *CE*. This type of declaration seems also to be present in 1 Sam. 12.3b.

In Exod. 21.6, the case where a slave, despite the situation occurring in the sabbatical year, does not wish to be released but prefers to remain with his master, is treated. The master and the slave shall finalize the agreement of lifelong servitude by bringing the slave to God. This is certainly reference to an oath. [96]

b. *Sins of the Tongue: False Testimony and Bribery*

In Exod. 23.1-3, 6-8, in line with the general social ethics which condemn the false witness, the rule against giving false witness is formulated apodictically. False witness and corrupt judges threaten the righteous and pervert justice. While it is not stated that Yhwh is explicitly, affectively or judicially involved, it is clear from the overall context that Yhwh is concerned with this area. Moreover, it has already been shown that Yhwh abhors lies and falsehood which threaten the righteous (cf. Ps. 5.7; 31.18; 40.5; 58.4; Prov. 6.16-17; 10.18; 12.19). The acceptance of bribes is condemned also in Deut. 10.17; 16.19; 27.25; Mic. 7.3; Zeph. 3.3; Ps. 15.5.[97]

c. *Yhwh's Affective Involvement*

In Exod. 22.24-26 [EVV 22.25-27] Yhwh's affective involvement is clear. Here warning is given against loans exacted at interest to the poor man 'among my people'. This latter phrase is an implicit indicator of Yhwh's emotional involvement which is more directly illustrated in vv. 26-27 [EVV vv. 27-28]: if a poor man's cloak is taken in pledge, Yhwh will hear the cry of the poor man. Because he is compassionate, he shall act accordingly; presumably bringing curse and punishment upon the man who took the cloak. Similarly Exod. 22.21-22 [EVV 22.22-23] illustrates how the supplications of maltreated persons could elicit a response from Yhwh, who is the ultimate moral agent and the endorser of the moral code, bringing curse upon breachers of the code.

Observance of the code could also be encouraged in a more positive way. Right treatment of a slave brought blessing from Yhwh. The taking of a poor man's cloak in pledge is advised against although no judicial sanction is pronounced. Right treatment will bring blessing and 'it will be righteousness to you before the Lord' (Deut. 24.11, 13).

96. Cf. *CH* 282, where the rebellious slave has his ear cut off in order to confirm his slavery.

97. See above, Chapter 4 Section 2.

d. *Appeal to a Subjective Sense of Moral Sensibility*

In Exod. 22.20 [EVV 22.21] the command not to oppress a stranger is protected by an appeal to a state of moral sensibility which the Israelite has learnt through the historical experience of slavery in Egypt. The ideal of care for the downtrodden and marginalized in society has already been shown to be an ideal common to the ancient Near East. Oppression of the poor or marginalized displeased the gods. Again in Exod. 23.9 appeal is made not to judicial sanction but to a subjective state of moral sensitivity. In Exod. 23.9 the basis for this appeal is Israel's historical experience with Yhwh. Exod. 23.10-11 is surely also reliant upon the individual Israelite's sense of moral duty.

The cultic rules of the Book of the Covenant also fall under the theme of the affective involvement of Yhwh insofar as they are also concerned with what is pleasing to Yhwh. Van der Toorn argues that, in general throughout the ancient Near East, two categories of rules are to be found: the one dealing with behaviour, the other with demands made by the gods. They may be dealt with under the rubrics of ethics and etiquette respectively (van der Toorn 1985: 27). Thus, the cultic rules of the Book of the Covenant should be classified as rules of etiquette. Divine approval or disapproval determines the permissibility of a specific line of conduct. Human actions are promoted or prohibited in as much as the deity is pleased with or repelled by them. The notion of 'abomination' (תועבה) or 'taboo' plays a vital role in the formulation of these ideals and lies implicitly behind rules such as Exod. 22.30 [EVV 22.31] which prohibits the eating of flesh which has been torn by beasts, Exod. 23.18 which prohibits the offering of blood with unleavened bread in sacrifice to Yhwh, and Exodus 23.19b which prohibits the boiling of a kid in it's mother's milk. Such mixtures were forbidden because they were disliked by Yhwh. The pleasure of Yhwh stands as the standard by which rules of etiquette are validated. Moreover, as we have seen, infringements of the behavioural code with regard to human relations (ethics) also brought the strong disapproval of Yhwh. Yhwh's disapproval could be affective as well as judicial:

> *In religionibus*, then, ethics and etiquette converge, notwithstanding the fact that the two realms may be differently perceived by man, because some of the divine desires are echoed by his sense of justice, while others can only be respected out of consideration for the personal likes and dislikes of the gods (van der Toorn 1985: 27).

Thus, the mixture of cultic rules (rules of religious etiquette) and behavioural rules (ethics) in the Book of the Covenant is in conformity with the wisdom-moral teaching of the ancient Near East and would not have appeared as odd to the ancient compilers. For the ancient Israelite religious ideals and social ideals merge.

5. *Conclusion: Rules of Torah and Cosmic Reality*

The nature of the sanctions in the Book of the Covenant, even when the Book of the Covenant is considered in isolation from its secondary covenant setting, shows that the Book of the Covenant was never enforced by judicial means. Like the Indian dharmic texts the Book of the Covenant was never intended to legislate; it was rather a series of moral rules backed up by nothing other than their own moral authority (cf. Exod. 23.9) and by extra-legal or non-legal divine threat and protection.[98]

The background to the rules laid down in the Book of the Covenant is not the lawcourt but the wisdom-morality of Israel's scribes.[99] The clearest evidence for the identification of wisdom with torah is, of course, provided by Ben Sira (24). While this is a late text, Perdue argues that Psalms 19 and 119 provide earlier evidence for the identification of torah with wisdom (1990: 462). At the same time, these 'torah psalms' are postexilic texts. In contrast, Jer. 8.8 may well specifically testify that, even earlier in Israel's history, scribes from the wisdom tradition were involved in the transmission of torah texts. Indeed, Gerstenberger (1965) and Weinfeld (1972) argue that wisdom sages were probably heavily involved in formulating torah texts in both tribal and monarchic settings in the pre-exilic period.[100]

If the function of these scribes was not to provide legal precedent to be applied in Israel's courts, what then was their function and what were their concerns? Perdue argues that the wisdom scribes in ancient Israel were involved in the 'social construction of reality' (1990: 458).

98. It has already been argued that oral law and contract law were the common means of regulating disputes in ancient Indian Society and in ancient Israel.

99. Although, as has already been noted, the compilers of torah would have incorporated some oral rules but only where they conformed to their notion of wisdom—morality. It is important to point out, however, that such rules were incorporated as wisdom—morality and not as law.

100. Cf. Fishbane 1985: 95.

The phrase was construed by Berger and Luckman (1979) who argue that human thought produces social reality by the process of externalization, internalization and legitimation. Externalization refers to the way in which human beings recognize social institutions as external reality and 'go out' and learn about them (Berger and Luckman 1979: 78). This is a normal part of the socialization process experienced by all members of society. Internalization involves the retrojecting into consciousness of the objectivated social world. Again, this is a normal part of the socialization process experienced by all members of society. Legitimation of social institutions is designed to ensure the continuance and maintenance of such institutions. Legitimation is not carried out by all members of society but only by élitist theoreticians; in a modern context, politicians and media. In the case of Israel the wisdom scribes may be seen in the role of élitist theoreticians.

Prior to such 'theoretically sophisticated legitimations' the primary knowledge about the institutional order is knowledge on a 'pre-theoretical level', that is, 'the sum total of what everybody knows about the social world' (Berger and Luckman 1979: 83). This may be contained in maxims, morals, values and myths, etc. which circulate throughout society. It is important to point out that the torah rules do not represent this 'pre-theoretical knowledge', but are the output of theoreticians operating from a specific world-view which may or may not have been shared by society at large. Even if such a world-view was shared in its general presuppositions and principles by society as a whole, the torah texts represent a specifically literary and expert version of it. These torah texts were influenced more by a literary tradition shared by Israel's neighbours and mediated through the scribal schools than by any special Israelite practical knowledge common to all Israelites.[101] The following example further illustrates the divergence between popular belief and the literary, theoretical constructions of élites. The Pharaoh Akhenaten of the New Kingdom introduced a new faith based on the worship of Aten. Central to the new faith was the idea of 'living on ma'at', a term which in general meant the divinely ordained cosmic order[102] (Winton Thomas 1958: 144). Despite Akhenaten's enthusiasm for his new faith, it won little or no approval from the people as a whole who continued to worship popular deities in popular fashion. It was only Akhenaten's circle of courtiers and close supporters who shared

101. See above, Chapter 2, for critique of *Volksrecht* theory.

102. See above, Chapter 4 Section 1, on ma'at.

his enthusiasm for the new faith (Winton Thomas 1958: 143-44). It was, after all, the creation of expert theoreticians and evidently, given its rejection by the population, did not reflect their belief.

The world-view of the scribes may be outlined briefly. For the scribes social order originated like cosmic order, within primordial beginnings (cf. Perdue 1990). The scribes assume that a benign creator god has created a beneficial world whose order must be actualized by righteous and wise actions and words (Perdue 1990: 470). The function of the sages and the outcome of obedience to the moral rules of torah was the extension and sustenance of the life-giving orders of creation and society: 'The human response to the world and the divine commission is active ordering not passive submission' (Perdue 1990: 420). According to the wisdom of the scribes a stable and righteous society is ensured by the observance of their advice on proper behaviour, both in social relations and in relations with Yhwh. Only through such observance could the cosmic order be activated.[103] Failure to observe the advice of the scribes could bring a curse to the individual and chaos on a larger scale (cf. Exod. 22.22-23 [EVV 22.23-24]; 24-27 [EVV 25-28]; Prov. 30.21-23; Job 9.6; Isa. 13.13). As Berger and Luckman (1979) observe, the ideas behind a world-view are representative of a cosmic reality which maintains society by bringing to expression a set of rules. Human relations, relations with the gods, crime and deviance (both sexual and moral) are protected by the rules of torah which are presented as the rules of the gods in order to maintain society and in order for society to reflect a cosmic reality. Even relatively minor social misdemeanours may appear as major when they are understood as a 'violation of the divinely constituted order of the universe' (Berger and Luckman 1979: 117). For example the taking of a neighbour's cloak in pledge may have been acceptable in general, but the failure to return the garment is presented as a violation which concerns and moves Yhwh himself (Exod. 22.26 [EVV 22.27]). Everyday roles and social behaviour are legitimated and ordered within the framework of the symbolic universe which was given literary expression by the scribes (Berger and Luckman 1979: 117).

It will be shown that, in the ancient Near East and in Israel, the maintenance of society also involved the legitimation of the role of the king. The scribes become the theoreticians of monarchic power, describing its function and its origins in idealistic terms against the backdrop of

103. Perdue 1990; cf. Schmid 1973.

their world-view. It will be shown in Chapter 5 that the potential for a change in the relationship between the theoreticians of power and the practitioners of power occured in Israel when the scribes' ideals of kingship came to be binding upon the king (cf. Deut. 17.14-20).

Finally, it is important to note that while it is argued that the Book of the Covenant was not a lawcode (that is to say, it was not applied in courts under the supervision of judges who were supported by some sort of policing force) but was instead a list of wisdom-moral rules, it is not at the same time suggested that Israel and its neighbours were completely without any formal means of administering justice. The point is that these means of administering justice will not have relied on the text of the Book of the Covenant or on the texts of the cuneiform lawcodes such as the Code of Hammurabi to provide them with precedent. Furthermore, as this chapter has shown, judicial sanctions are not the only means of deterring and punishing deviant behaviour. The taking of an oath was regarded as a serious undertaking, breach of which would bring curse from the gods. At other times, appeal was made to utilitarian considerations in order to persuade the individual to conform to the socially accepted behaviour. Bechtel (1991) has shown how, in a group-oriented society, social sanctions can prove just as effective as formal judicial means. The public act of 'shaming', for example, works as an effective social sanction which can deprive the deviant individual of both social status and identity.[104]

Moreover, the proposal that the Book of the Covenant was a moral-wisdom text to be understood on the basis of an analogy with dharma

104. Bechtel (1991) has shown how in a group-oriented society, where the people's main source of identity comes from their belonging to a tightly knit group, 'shaming' works as an effective social sanction. Anyone in society had access to shaming sanctions: parents, family members, villages, towns and even armies. It could be used publicly and informally in everyday life. In the extreme, 'shaming' can lead to the rejection by the group. Such rejection has serious consequences which can easily escape the contemporary interpreter who functions in an increasingly individual-centred society. Rejected by the group the individual is deprived of his/her primary source of identity and of the social unit upon which they are dependent economically and socially. The act of 'shaming' can be carried out in various ways which are subject to the conventions of the society (in the Bible there are examples of 'making someone a laughing stock', slandering, taunting, mocking, scorning [2 Chron. 30.10; Job 12.4; Pss. 22.6-8; 44.14; Isa. 57.4; Jer. 20.7], spitting [Num. 12.14; Job 17.6; Isa. 50.6], hissing [Job 27.23; Jer. 1.16; 25.9]) (Bechtel 1991: 242). See also Carmichael 1977.

does not rule out the possibility that the areas of scribal morality and law often overlapped with influences moving in both directions. In fact, such an overlap is attested by the very presence of rules in the Book of the Covenant which seem as though they must have arisen out of actual, legal situations. Lingat (1973) has observed the presence of some practical law in the dharmic texts and has raised the question of how texts which reflected the moral advice of scribes (and not legislation) came to incorporate rules of a practical nature. In Chapter 5 an explanation for the presence, in both the dharmic and torah texts, of the peculiar mix of rules of religious duty, practices of a purificatory and expiatory character and a limited content of law properly speaking will be sought.

Chapter 5

FROM SACRED MORAL TEACHING TO LAW

1. *The Progression from Non-Legal, Sacred-Moral Texts to Legislation*

In the previous chapter it was shown that torah is best understood on the basis of an analogy with the Indian concept of dharma. Understood in this way, many of the questions and problems which arise when torah is understood on the basis of a legislative model are circumvented.

Torah was enforced not by judicial means but primarily by a desire for grace and uprightness. The rules of torah are to be seen as the work of scribes who believe that it is only through the observance of these rules that order in creation can be ensured. In the view of the scribes this created order is reflected in the ongoing life of society, in its political institutions, in its acceptable norms of behaviour, in its definition of crime and deviance and even in accepted practices of etiquette.

Yet how did rules which were copied in the scribal schools and bore little and only indirect relation to the practical law,[1] which remained at an oral and contractual level, come to achieve the status of authoritative and binding legislation? Oppenheim notes the uniqueness of the development in Israel which saw a text become binding upon an entire people:

> the fateful concept that reality should adjust to the requirements of a written corpus remains unknown in Mesopotamia and probably to the entire ancient Near East. Only in a late and definitely peripheral development that sprang from the desire to create, for ideological reasons, a specific social context did Judaism succeed in creating such a pattern of behaviour (Oppenheim 1964: 231-32).

1. See further below, Chapter 5 Section 1.b, on the indirect relationship between torah and law properly speaking.

Significantly, it is the observation of the transformation of dharma (religious and moral duty which is non-legal) to law (wherein the statements of dharma are reconceptualized as case law and enforced by courts, judges and a force which operates to back up the latter) which leads Lingat into an exploration of the origins and development of dharma. How, asks Lingat, could non-legal, instructional texts come to be construed as legislative texts? The original compilers of dharma (the Brahmins) were uninterested in the regulation and determination of disputes. They were not interested in the methods to be followed in hearing and disposing of cases (Lingat 1973: 70). Such regulations were governed by oral custom. Yet there is a gradual increase in the juridical content and technique of the sacred texts (Lingat 1973: 71-72). Nonetheless, the texts never aim to cover the whole field of law. Neither do the laws appear with any order or with any apparent connecting link between them.[2] So how is the gradual increase in the juridical content and technique of these originally non-legal, sacred moral texts to be explained? Lingat views the roots of this progression to lie in the following areas: the association of dharmic texts with royal authority, the impact of writing and the influence of foreign conquerors. The last of these may be dealt with briefly, for while it was an important influence in the transformation of dharma to law,[3] it is not to be regarded as primary in the identification of torah with law.

a. *The Influence of Foreign Conquerors*

The use of the sacred, moral teachings of dharma as legal codification is largely to be attributed to the British judiciary. A modern legal model is imposed on an ancient compilation leading to a gross misrepresentation of the original functions and intentions of the ancient collection. Significantly, it is under the instruction of Darius I, who showed a keen interest in the 'legal' traditions of conquered peoples that torah is regenerated after a possible degeneration of this scribal-priestly tradition in the exilic period (cf. Fishbane 1985: 37).[4] It is often held that it

2. Bottéro has observed a similar lack of coherence in the Code of Hammurabi (1982: 417-19) and Fishbane has noted a similar lack of organization in the biblical codes (1985: 91-92)

3. Although Lingat describes it as a secondary and not a primary influence, he does regard it as an important contributory factor.

4. Upon his accession Darius also assembled 'the wise among his adversaries, the priests and scribes' of Egypt and requested a collection of their laws. Cf. Diodorus Siculus, 1.95.4.

was the Persian Imperial decree that enforced the religious laws of Israel as the civil and crininal law of Judah. It is unlikely, however, that Persian influence may be compared in extent to British influence in India which brought about the virtually complete identification of dharma with law. Persian notions of 'law' were similar to those found throughout the ancient Near East. Justice (and not 'law')[5] was the duty of the king, a duty which he fulfilled, at least ideally, to placate the gods in fulfillment of his duty to bring justice 'so that the strong do not harm the weak through fear of his law'.[6] Thus, it would seem that the Persians had no notion of law in the modern sense but instead held similar notions and ideals to the Babylonian kittum and the biblical torah. The complete identification of torah with law had not yet been made in the Persian period. The Hellenistic equation of torah with *nomos* is often regarded as a significant factor.[7] While this may have been a contributing factor, the influence of foreign conquerors cannot be held to have played as significant a role in the identification of torah with law as it played in the identification of dharma with law. The British, after all, held an understanding of law which conforms to the definition of law adopted in this study and it was this which they imposed on dharma. While modern biblical scholars also have this understanding of law, the Persians did not. How influential were the other factors identified by Lingat as primary in the transformation of dharma to law?

b. *The Association of Dharmic Texts with Royal Authority*

In India a close relationship existed between the king and the dharmic scholars. The king provided financial support for the scribes who in turn

5. The term used is *data* = to arrange, to put in order.

6. Cf. Frye 1962: 105. On the concern of Darius with justice see discussion of inscriptions attributed to him in Frye 1962: 105-106.

7. Mc Dowell (1978: 44) has pointed out that *nomos* has a wider meaning than our term law. It may mean 'way of life' or the 'right thing to do'. By the fourth century it had become the normal term used for a written statute. Cf. Jackson 1975: 505. Jackson has tentatively suggested that the progression from dharma to law, or from torah to law, probably commenced early in Israel (1975: 505). It is suggested by the account of Josiah's reform. Yet, as Jackson admits, even here there is no indication that the text of the rediscovered book was given to the judiciary to be used by them as a source of law (Jackson 1975: 505; cf. 1989). The progression continued in the constitution of the postexilic community (Ezra 7.10). But again here it must be said that the emphasis remains strictly speaking on instruction (Ezra 7.10, cf. Fishbane 1985: 35-36). Later generations completed the identification of torah with law.

meditated on the problem of the role of the king in relation to the sacred, moral knowledge of which they were the guardians.[8] Law, properly speaking, was first introduced into the moral, instructional texts of dharma where the scribes were dealing with this subject of the duties of the king. It is here that the connection between wisdom laws and monarchical authority is made. In the early dharmasutras,[9] the Brahmins attempt to provide rules for the king's justice and to incorporate it into their already learned system for the expiation of sins (Lingat 1973: 68). The king has a mission and a function which is itself a dharma, a religious duty (Lingat 1973: 208). The king is a soldier but also a protector of the people (Lingat 1973: 209-10). The king must maintain order because it is only within the context of order that dharma can function (Lingat 1973: 225-26). Yet these Brahmin works dealing with the duties of the king were not a source of law and cannot be considered as though they were collections of precedents: 'They are simply intended to teach the art of sound judgment to the king' (Lingat 1973: 272). They express 'the science of kingship *par excellence*, that which teaches the king to pass equitable judgments' (Lingat 1973: 272). Moreover, through the association of the king with the dharmic scribes, the king is portrayed not only as the protector of his people but also as the defender of their religion and morality (Lingat 1973: 272). While the king was not a legislator, he may on occasion be observed interpreting the rules of dharma. On such an occasion his ruling may have enjoyed the double sanctity of secular law and of religious morality, serving as a model for future kings (Lingat 1973: 272).

Weinfeld has already argued for a relationship of patronage between the Israelite king and the scribe (1972: 158ff.).[10] As has already been noted Solomon was portrayed (probably by court wisdom scribes) as wise and discerning in judgment. To recall Bottéro's description of the Code of Hammurabi: the code, formulated in the scientific list genre,

8. Cf. Goody (1986: 18-19) on the need of scribal schools for financial support in the form of endowments from the royal court. See further below on the relationship between the scribes and the royal court.

9. Dharmasutras are works on dharma written in the *sutra* form: namely in the form of aphorisms which condense the teaching of a master. They were probably intended to be learnt by heart by his students (Lingat 1973: 18).

10. See further below on Israelite scribes and the monarchy; cf. Fishbane (1985: 26) who argues that court scribes provided the king from probably as early as the time of David with 'diplomatic skill' and 'sage wisdom'. Often the court scribe was primarily a sage counsellor, a repository of traditional wisdom.

was compiled by scribes to illustrate the equity of the king's reign. It was an exemplary piece which embodied the ideals of nobility and equity (Bottéro 1982: 444). It appears that a parallel ideology is found in ancient India where the work of Brahmin scribes receiving royal patronage came at times to serve royal-propaganda purposes.

The king's patronage of dharma and torah scribes did not go unrewarded. Often the king gained the reputation of being pious and wise, devoted to dharma. Sometimes the works of the dharmic scholars appear in their final form bearing the name of the king as author rather than the name of the actual author/scribe (Lingat 1973: 229). Again here a possible parallel exists in the attribution of psalms and wisdom to King Solomon.[11] Thus, it was the royal patronage of dharmic scholars in India, and of torah-wisdom scribes in ancient Israel, which assured the originally non-legal works of dharma and torah a measure of official status and consequently a certain authority (Lingat 1973: 230).[12] This further contributed to the increased legal status of what were originally non-legal, moral duties and led to the confused notion, arising from subsequent interpretations of the texts, that dharma (but also torah) was originally law which was enforced by the king.[13] Yet in India, contends Lingat, this relationship between dharma and law was simply a loose, conceptual relationship, for the norms of dharma continued to convey advice and not law. The authors were keen to teach religious custom along with practices of an expiatory and purificatory nature. They touch law properly speaking only 'in an indirect and accessory manner' in connection with rules having a bearing on the duty of the king or on their religious custom (Lingat 1973: 71). Yet they already contain the seed of what will later have all the apparent characteristics of law-giving. These originally non-juridical, moral texts moved closer to the appearance of modern legislation.

A similar mix of religious duty, practices of a purificatory and expiatory character, and what appears as a limited content of law properly speaking, has long puzzled students of biblical law. It may well be that through the association of torah with the king the juridical content of the wisdom rules increased. Nonetheless, the laws are easily recognizable as religious or wisdom rules. But, how is the presence of what may

11. See further below, and cf. Brueggemann 1990.

12. See further below, on Israel.

13. A confusion which has arisen especially at the hands of modern biblical scholarship.

be described as positive law (e.g. Exod. 21.33-37 [EVV 21.33–22.1]; 22.4 [EVV 22.5]) to be explained? It has already been noted that the scribes may have incorporated oral practice but not as law. Rather it was incorporated as wisdom teaching. The presence of positive law may also be accounted for by the secondary association of moral rules of torah with royal authority.

It has already been established that the ancient Near Eastern *mesharum* acts, including those in Israel, were legislative texts proper which were intended to be implemented.[14] Through these edicts the king in Israel and in the ancient Near East, like the kings in ancient India, did play a legislative role. It was, however, a role so limited in its scope that it may not be compared in the extent of its influence with the role of legislators in a modern context. The so-called 'lawcodes', in contrast, are not to be viewed as legislation. They are rather moral, instructional texts composed by scribes from the standpoint of a specific world-view, the belief in a divinely created order which can only be activated and maintained through observance of the scribes' advice on morality.[15] At the same time, the ideals of this world-view which came to expression in the moral rules of the scribes influenced and shaped the edicts of the kings.[16] This comes to expression in the prologues and epilogues to the edicts. The king's *mesharum* act was itself an implementation of kittum or of dharma.[17]

As well as the moral rules of the scribes influencing and shaping the edicts of the king, the *mesharum* acts probably influenced torah texts. Moreover, it is not unlikely that, anxious to fulfill his duty or his dharma (or מִשְׁפָּט) the king consulted those scribes under his patronage often arriving at isolated decisions to real problems or even at *mesharum* acts. Parts of these *mesharum* acts, which conformed to the scribes' ideals of morality, may well have been incorporated into the torah and dharma texts. Through this incorporation of positive law into the dharma and torah texts, there was created the peculiar picture of rules of an expiatory, purificatory and moral character existing alongside rules of an apparent judicial nature.[18] It is important to point out,

14. See above, Chapter 3 Section 1.

15. See above, Chapter 4.

16. The king was after all the promulgator of the *mesharum* acts and the patron of the scribes.

17. Cf. Jackson 1975: 502-503; cf. 2 Sam. 8.15.

18. A mixture also found in the Book of the Covenant: see further below.

however, that this positive law was incorporated as teaching and not as law to be implemented in courts. In Deut. 17.19 the king is advised to read from the book of the torah so that he will learn to fear the Lord and to be wise in judgment. Undoubtedly then, the king was not opposed to the idea of consulting his court wisdom scribes when faced with the resolution of disputes. This gave the scribes the opportunity to become involved in disputes of a legal nature. In fact, it is not unlikely that the scribes set forth rules designed to deal with the most common cases in order to ease their own mission as well as that of the king. Lingat suggests that this may have occurred in the case of the Brahmin scribes (Lingat 1973: 70). The result of this process is that a 'civil law' carved itself a place alongside, but in the margin of, dharma and torah. The space which this 'civil law' occupied was still small 'where the most diverse propositions succeeded each other with no order at all' (Lingat 1973: 70). A lack of order and legal precision has already been noted of the biblical codes.[19] The association of torah scribes with the royal court as a factor which led to the ongoing identification of torah with law will be discussed in greater detail below.

c. *The Impact of Writing*

Lingat suggests that the influence of writing also played a role in the identification of dharma with law. While the order in which these influencing factors have been presented in this study may suggest that writing played a less important role, Lingat maintains that it was a primary factor. The transformation of dharma to legislation is, he insists, first and foremost a literary phenomenon. Despite this insistence, Lingat does not explain or outline in any explicit way how writing transformed dharma to law. Briefly, he states that the transformation of dharma to law was an aspect of the textuality of dharma and of the exegetical techniques of its scribes. With regard to biblical torah it will be shown, however, that the very existence of torah in a written form led to a long and rich period of exegesis of torah texts.[20] This exegesis tended to

19. See above, Chapter 3.

20. It is difficult to date the beginnings of this period of exegesis. While it is claimed that Solomon promoted the collecting of wisdom texts (see further below on Solomon and wisdom-torah) it is unlikely that any formal exegesis took place this early (although some association of Solomon with wisdom morality should not be ruled out). Exegetical techniques will have developed gradually over the centuries following Solomon's rule extending into the rabbinic period. Indeed, exegesis of torah is an ongoing phenomenon of present-day Judaism.

identify torah with legislation, thus strengthening an association which had already been established through the relationship of royal authority with torah texts.

Despite objections that no evidence exists to show that the Book of the Covenant ever originated in a royal inscription,[21] it is very probable that the Book of the Covenant was originally a list of moral rules which was attributed to the king in order to portray him as wise and conforming to the ideals of torah. The fact that these moral rules existed in written form had unintended consequences, the most dramatic of which was the achievement of an autonomy of the text which left it open to critical attention, reformulation and reflection. Above all, this autonomy, achieved through the written medium, resulted in the distancing of the text from its original author/speaker and from its context.[22] Ultimately this meant a separation of the משפטים from the guardianship and fictional authorship of the king, setting in train a process of reflection and exegesis which eventually strengthened the authority of the texts in a legal sense. The משפטים become the property of the scribes. Often the interests of these specialist groups (of priests or scribes) while perhaps originally identifiable, or at least approximate, to those of the state, diverge. This process is enhanced by the growing autonomy of the scribal organization and its institutions.[23] Financial independence results from the endowments of land and currency which the court of the king had originally bestowed upon the organization in what was once a symbiotic relationship (cf. Goody 1986: 19-21). Moreover, with the emergence of two distinct organizations (the scribal school and the monarchy) the domination of one by the other (for example the domination by priest/scribe of monarch or vice-versa) becomes a distinct possibility (Goody 1986: 33):

> Any divergence between the domain of priest and king[24] that one finds implicit in oral societies now becomes explicit and can take on an 'ideological' dimension. For the written tradition articulates beliefs and interests in a semi-permanent form that can extend their influence independently of any particular political system.[25]

21. Cf. Westbrook 1985: 250.

22. See above, Chapter 2.

23. See above, Chapter 2; and see further below, for a more complete treatment of these ideas.

24. Or scribe.

25. Goody 1986: 172.

The beginnings of this political independence of the scribal organization from royal ideology may be seen in both India and Israel. The Brahmins attempted to provide rules for the king's justice and to define his duty. While originally such texts may have presented the king in idealized terms, once authoritative they may in fact be used as an authoritative description of the duty of the king which ultimately sets limits on his power. The biblical law of the king (Deut. 17.14-20) expresses what Lingat has described in the dharma as texts 'intended to teach the art of sound judgment to the king', an expression of 'the science of kingship par excellence' (Lingat 1973: 272). Samuel's warning of the pitfalls of monarchy (1 Sam. 12) may also be seen as a scribal composition intended to show that as long as the king abides by the 'way' (here the term is דרך) the people will be secured an orderly, peaceful and prosperous existence. In other words, the texts do not simply legitimate the king but eventually set limits on his powers.[26] The scribes had described in highly idealistic terms the role of the king. Now this idealized description comes to serve as the very definition of kingship. As Berger and Luckman have observed, 'definitions of reality have self-fulfilling potency' (1979: 145). Once the role of the king as the guardian of Yhwh's created order is finally diminished, the moral rules could survive independently of royal power. This survival was possible since, from the very beginning, torah was enforced primarily by a desire for grace and uprightness and perhaps only secondarily, if indeed at all, by the Israelite king. The scribal schools were now the guardians of their own literary *corpus* and body of specialist knowledge (Goody 1986). Above all, we should reckon with an increasing interest in exegesis of these moral rules. As Goodrich notes, the principle of exegesis is:

> a psychologistic theory of language, a view of language in which the signified exceeds the signifier, in which the physical text or code is endlessly scrutinised for signs of the intention that underlies it, the will and word of God (Goodrich 1985: 104).

In other words, the authoritative, but also the legal, status of the biblical codes is not the cause but rather the effect of the exegetical techniques used to interpret them.[27] That is to say: the biblical codes were

26. This is of course hypothetical. These texts may have functioned in many different ways. It is more than likely that 1 Sam. 12 reflects a much later period than the period of the early monarchy.

27. Similarly, Oppenheim notes of Mesopotamian practice that with the appli-

not held in high esteem at the outset because it was believed that they were the direct word of Yhwh; rather they come to be thought of as the direct word of Yhwh through the exegetical techniques applied to them.[28] Continuing exegesis of these authoritative written texts led to a number of possibilities. One question raised by the scribes was this: if the king is not the author of these rules then what is their source and origin? Reflecting on an association which had always been made between torah and the divine, the rules were construed as the words of a national hero and holy man Moses. Further exegesis concludes that the words of torah were the direct words of Yhwh. These texts, now seen as the words of Yhwh, become binding on the community understood as living under a covenant relationship with Yhwh. Society must conform to the ideals of the texts which come to be seen by the Rabbis as legally binding on every Israelite. The texts come to be understood on the basis of a legislative model. As we have seen, the roots of this process go back to the association of torah-scribes with the royal court in Jerusalem. It is to an examination of this association that we now turn in order to explore in greater detail the general arguments so far proposed in this chapter.

2. *The Association of Torah Scribes with the Royal Court*

Given the variety of opinions which exist with regard to the social background of wisdom, the association of torah scribes with the royal court in Jerusalem cannot be assumed but must be demonstrated. Two divergent opinions exist. First, there is the view that wisdom was primarily a court activity designed to promote the interests of the state (cf. Perdue 1990). Secondly, the roots of wisdom have been seen to lie in the domestic setting of clan and tribal structures which existed in premonarchic Israel but the influence of which continued into the monarchic period. Proponents of this view have pointed to the typical form of

cation of writing to omens, for example, divination moves from the realm of folklore to the level of scientific activity (Oppenheim 1964: 210). That is to say, writing does not record the 'scientific', but actually, in the end, writing results in the conferral of the status 'scientific' upon what it has recorded.

28. Compare this view to the view of Otto (1988) already outlined (see above, Chapter 1 Section 2) that the increased status of the legal texts, culminating in a view of them as directly given by Yhwh to his covenant people, was the result of a crisis in legal legitimation, a crisis which arose as the result of an increase in social differentiation in a society whose basic ethos had been originally egalitarian.

address 'my son', to the practical moral advice and to the overall concern with behaviour within the household and within society. Such features, it is argued, show the popular and generally rural background of much proverbial wisdom (cf. Fontaine 1982). Alternatively, as evidence of an association of wisdom with the royal court, scholars point to the sophisticated outlook of many proverbs, to the positive and favourable attitude towards the monarchic institution, to the concern to seek social advancement and to the ascription of some collections of proverbs to kings.[29]

To point to a rural ethos of the texts in order to prove the rural and domestic background of Proverbs, or indeed to isolate an urban and pro-monarchic ethos to indicate a court setting, is to exaggerate the separateness and distinctiveness of the urban and the rural in an early society where it is more than likely that the city and the surrounding rural areas existed in a relationship of mutual interdependence.[30] Lemaire (1990) has pointed out that we need to take seriously the fact that ancient Israelite society was somewhat diversified. While some Israelites and Judeans lived in farms or in village communities, others resided in towns or in the capital. Consequently there is reflected in the wisdom literature a mixture of a rural and an urban ethos. Thus, subject matter alone offers a dubious criterion for determining the social setting of a given aphorism (cf. Crenshaw 1990: 214-15).[31]

While the mixture of rural and urban norms cannot be taken to indicate either an urban or a rural setting for wisdom, a rural setting for the compilation and study of wisdom literature seems highly unlikely for the following reasons. Much of Israelite wisdom literature shows evidence of influence from international wisdom.[32] The compilers of Israelite wisdom texts must consequently have enjoyed access to the literary productions of the royal courts of other countries. These scribal

29. Cf. Perdue 1990: 476. Cf. Prov. 8.14-16; 12.28, 35; 15.22; 16.10-15; 17: 7; 19: 10, 12; 20: 2, 8, 18, 28; 21: 1, 22; 22.11, 29; 23: 1; 24: 5-6, 21-22; 25.1-7, 15; 27: 23-27; 28.2, 15-16; 29.2, 4, 12, 14, 26; 30.1-9.

30. In this interdependent relationship the urban centres relied on the countryside for food and the countryside relied on the well-fortified cities for protection and for the provision of a market for their produce.

31. Despite this observation, Crenshaw goes on to say that the address 'my son' points first and foremost to a family context for Proverbs (Crenshaw 1990).

32. For example the influence of the Egyptian Wisdom of Amenemope on Prov. 1–9. On Prov. 22–24, cf. McKane (1970: 369-71).

figures must therefore have been of some social and diplomatic standing and have attained a high level of education.[33] In the activities of the Assyrian king Assurbanipal (668–631 BCE), a contemporary of Hezekiah/Manasseh of Judah, we have evidence of how texts were dispersed throughout the ancient Near East. In the palace of Assurbanipal were found 25,000 tablets.[34] The vast collection of texts had been compiled at the instigation of King Assurbanipal who had sent some of his court scribes on a widespread search for literary and scientific works. The king's concerns in sending his court scribes on these expeditions were intellectual: no evidence exists to suggest that the king intended to implement these texts on a practical, everyday level. It appears that the king was concerned to equip himself with the vast library, in order to enhance his reputation as a patron of culture. It is evidenced from the letters that in both the borrowing and the donating culture the royal court and its scribes were instrumental:

> When you receive this letter (Assurbanipal writing to his scribe Shaduna) take with you these three men ... and the learned men of the city of Barsippa, and seek out all the tablets, all those that are in their houses and all those that are deposited in the temple (cited Roux 1964: 296).
>
> Hunt for the valuable tablets which are in your archives and which do not exist in Assyria and send them to me. I have written to the officials and overseers ... and none shall withhold a tablet from you (cited Roux 1964: 296).

These excerpts testify that there was co-operation and access given to foreign scribes, provided, it would seem, that the authority of their monarch lay behind them. Granting access to scientific and literary works to foreign scribes may well have been a feature of international

33. As Perdue concludes. 'Farmers, laborers and artisans may have possessed admirable skills along with the wisdom to perform their tasks well, but they were not among the sages who produced the wisdom tradition. Some of the wisdom teaching may have been universal in appeal and possessed practical benefit for molding the character of human beings in general, but the wisdom tradition was written by and intended for educated sages' (Perdue 1990: 476). Cf. Lemaire (1990) who takes Sir. 38.24, 39.11 (although late texts) as indicating that the scribe needed leisure in order to pursue his tasks.

34. Generally, scholars divide the collection into two types of literature. First, there are texts of an archival nature, such as letters, contracts, economic and historical inscriptions. The second category is composed of literary documents proper: literary, religious and scientific compositions much, indeed, of which could be assigned to the wisdom genre (cf. Roux 1964: 296-97; Oppenheim 1964: 244-45).

diplomacy.[35] It seems highly unlikely that an ordinary, country scribe who enjoyed no prestige in the royal court, would be granted access to literary collections which were clearly of such immense importance.[36] Thus, while the individual stipulations of wisdom may well extend beyond the narrow concerns of one particular class, the collecting and recording of wisdom was most likely carried out by court scribes.[37] The

35. Perhaps the visit of the Queen of Sheba to Solomon's palace and her expression of humility before Solomon's wisdom also reflects such international diplomacy (1 Kgs 10.1-13). Cf. Deut. 4.6 for the idea that the possession of wisdom by Israel evokes the admiration of foreign nations. In the Solomonic tradition, however, wisdom is a direct charismatic gift and Solomon's astuteness is its evidence. In Deuteronomy, on the other hand, it is the torah which is the source of wisdom and the obedience of Israel as a whole is the evidence of the presence of wisdom (cf. Kyle-McCarter 1990: 290).

36. The status of these texts is illustrated by Assurbanipal's orders to his scribes to seek rituals and tablets even ones which were as yet unknown to King Assurbanipal and to bring them back to his palace if the scribe thought that they would be 'profitable' to the royal court (see Roux 1964: 296). What could Assurbanipal have meant by 'profitable'? Perhaps it meant that the king would gain the reputation of being wise and of fostering learning as Solomon apparently had (cf. 1 Kgs 3, 10 and cf. *CH* Prologue and Epilogue). Therefore Assurbanipal's purpose in collecting texts would have been primarily ideological: to gain the reputation of being wise among his subjects, among foreign nations and also among the gods.

37. Paucity of evidence makes the precise location of scribal schools in Jerusalem virtually impossible to ascertain. Two possible locations must be reckoned with, temple and palace. Since, however, the temple was clearly originally a royal institution, from the Solomonic period such scribal circles were probably to have been found in some part of the temple, operating with the interests of the court and the king as foremost. Lemaire suggests that these scribal circles may well have functioned from an outbuilding or corner of the temple (Lemaire 1990). This is made all the more likely given that the association of schools, libraries and temples is well attested in Egypt. Moreover, the discovery of the Book of the Law in the 'House of the Lord' by the High Priest in Josiah's time could well indicate the existence of such a library in a room of the Jerusalem temple (2 Kgs 22.8, 11, 23). Jer. 36 is also associated with the temple (Cf. Isa. 28.7-13; 2 Chron. 22.11; cf. 2 Kgs 12.3.). Given the close relationship of palace and temple in Israel, testified from the time of Solomon to the time of Josiah, it is important to recognize that temple school does not necessarily imply priestly school but could also indicate a royal or wisdom school. Whybray points out that in the ancient Near East, the royal court was an intellectual centre, but temples with their priests and with their own scribes were also centres of intellectual activity. Of course, in Jerusalem, the court and the temple were closely connected, the chief priests being listed among the high officers of state (Whybray 1990: 137).

fact that such wisdom included rules for 'rural' life is not surprising. As has already been noted, the descriptions 'rural' and 'urban' imply a divide which did not exist in ancient societies in the same way as it exists in contemporary societies. The presence of rules relating to 'rural' life does not therefore indicate that such wisdom was compiled in a rural setting. Nor, in contrast, should the presence of rules on the lending of money at interest be taken to indicate an urban society.

Goody (1986) provides other evidence that the setting for the creation of wisdom texts was in the cities. The scribal profession in early societies, and specifically in ancient Near Eastern early societies, is rooted in the economy of centralized, urban capitals.[38] The organization of monarchy requires clerks to record and to maintain economic and administrative records.[39] Moreover, with the growth of the scribal profession, its influence often extended beyond administrative concerns into the religious sphere as well as becoming involved in the creation of texts designed to legitimate the royal court (of which such scribes are a

38. The possibility that scribal schools existed outside Jerusalem in urban centres should not be ruled out. Roux has pointed out that in Assyria all of the capital cities and the main provincial towns had temple libraries and perhaps even private libraries (cf. Roux 1964: 297). Whether or not such libraries were similarly spread throughout Israel during the monarchic period remains impossible to ascertain. As Lemaire (1990) notes, however, the gradual spread of literacy will have seen the emergence of scribal schools outside the capital. While early on paleo-Hebrew inscriptions are few and fragmentary and were found in close proximity primarily to the capital but sometimes also in close proximity to the great sanctuaries and in chief towns, from the eighth century on there is in evidence an increase in inscriptions which Lemaire takes to be indicative of an increase in the number of schools. For example schoolboy exercises are found in royal outposts (Kuntillet 'Ajrud) and in fortresses (Qadeshbarnea and Arad) as well as in major towns (Lachish). In the rural areas, however, schools will have been concerned with basics: buying and selling, etc. In Jerusalem, in contrast, international languages, Hebrew literature, history, geography and law and moral and civic teaching (namely wisdom instruction) will have been taught to future high officials (Lemaire 1990: 172-73). Sweet notes with regard to Mesopotamia that later in the old Babylonian period tablets containing literary texts and scholarly compilations are found in private houses. This he suggests is indicative of private, familial settings as a locus for learning (Sweet 1990: 107). Despite this, Sweet accepts that the palace always provided the main source of patronage for private individuals and temple schools (1990: 107). It should be noted, however, that the assessment of inscriptional evidence should be undertaken with caution given the arbitrariness of the material available.

39. Goody 1986; and cf. Oppenheim 1964: 243.

part) and the king (on whom the scribes rely for financial support).

In order to ensure the continuity of the scribal profession, buildings, temples, personnel (teachers and pupils) need to be supported (Goody 1986: 18). Perdue agrees with Goody and surmises that the intellectuals who produced such knowledge either possessed political power and wealth or were supported by those who did (Perdue 1990: 476). Such support may be received in the form of individual endowments, or in cases where the scribal school is co-terminous with the temple (as it often is) in the form of daily offerings by worshippers (Goody 1986: 55-56). Nonetheless, the most important means of support issues from the royal court.

Evidence which directly attests to court sponsorship of scribes is found in Prov. 25.1 where the men of Hezekiah, presumably at his request, collected or transmitted the proverbs of Solomon. Fishbane assumes that the men (אנשי) of Hezekiah were teachers of wisdom whom he thinks consolidated during the Hezekian period.[40] Scribal activity may not as yet have been differentiated into specific areas.[41] For example we have no evidence that only scribes from the priestly guilds transmitted torah texts or indeed that only scribes from within prophetic or wisdom circles worked on their corresponding material (Fishbane 1985: 78). Jeremiah 8.8 specifically testifies that scribes from the wisdom tradition were involved in the transmission of torah texts.[42] Moreover, it is likely that prophetic groups and attitudes were involved in the transmission and creation of historiographical material (Fishbane 1985: 78). Nonetheless, concludes Fishbane:

> it is reasonable that those groups most familiar with certain types of literature would have had primary involvement in their transmission, and in the development of distinct stylistic features (Fishbane 1985: 78).

Thus, while some scribes may have been better versed in the moral rules of torah, others in different areas of wisdom-science (for example omens) and others in historiographical texts, we cannot assume that such scribes organized themselves into distinct and separate units. As yet there was no specialization of roles. This fact accounts for the cross-fertilization of ideas which, for example, has already been illustrated by Weinfeld with regard to wisdom and torah (Weinfeld 1972). The

40. Isa. 5.21; 29.14; Fishbane 1985: 33.
41. Cf. Oppenheim 1964: 242; Fishbane 1985: 78.
42. See above, Chapter 4, for this association.

scribes' views would have been shaped by the cumulative content of a variety of genres of text. The role of the scribe was diversified, serving a variety of administrative and state functions. While some served the military (2 Kgs 25.19; Jer. 52.25), others, probably Levites,[43] served as overseers of priestly rotations (1 Chron. 24.6) and saw to the administration of the temple (2 Chron. 34.13; cf. Neh. 13.13). As has already been seen, scribes also served in the royal court 'providing the king with diplomatic skill and sage wisdom' (Fishbane 1985: 25-26).[44] Moreover, scribes will have been involved in the maintenance, transmission and collation of literary records, a function attested for Mesopotamia, in the letters of Assurbanipal.

a. *Torah and the King*

The proposal that the moral-behavioural codes were composed by court scribes raises the question of the function of these texts.[45] In return for royal support the scribes attend not just to the scribal-administrative needs of the king but also often function to promote and to protect the established order, often composing texts designed to praise the king and his regime (cf. 1 Kgs 3; 2 Sam. 7; *CH*). Sweet (1990) points out that the substance of the claim in Mesopotamia that the king was 'wise', was rooted in the fact that the king was supreme head of a government organization that commanded the services of the best available science, technology and craftsmanship. The king was wise insofar as he displayed good judgment by commanding the use of science, technology and craftsmanship for the execution of deeds thought pleasing to the gods. Especially important was the upkeep of the temples and the good government of the people whom the god had entrusted with his care

43. The existence of Levites as a distinct group cannot be taken as certain prior to the exilic period.

44. A close association between the royal court and the scribe is also found in Sumeria (Kramer 1990): 'Just as the sages shaped and developed the ideological and religious concepts that governed the temple, so they shaped and developed the symbolic constructs and inspirational statements, that governed the palace, and especially its dominating figure the king' (Kramer 1990: 40). Regarding the scribe and royal court in Mesopotamia and their close association, cf. Sweet 1990: 99. In fact, Jonathan (1 Chron. 27.32; cf. vv. 33-34) is viewed by Fishbane as primarily a sage-counsellor, a repositor of traditional wisdom: he was an adviser (יועץ), a man of understanding (מבין) and a scribe (סופר) (Fishbane 1985: 26).

45. This has already been dealt with in general terms, see above, Chapter 4, on the analogy with dharma.

(Sweet 1990: 99-100). Moreover, even if the king in Mesopotamia was illiterate (a possibility which should not be ruled out in Israel, especially with regard to the early period of the monarchy) he could nonetheless be portrayed as a shrewd judge and a skillful ruler who deserved the epithet wise (Sweet 1990: 100). Even the king's illiteracy would not prevent the ascription to him of the creation or authorship of texts.

Just as Hammurabi was presented in his code as a king who pursued justice and equity, earning him the reputation of being wise,[46] so too Solomon is portrayed as a patron of wisdom. The main texts which associate Solomon with wisdom and the pursuit and administration of justice and righteousness are: 1 Kgs 3.3-14, 16-28; 1 Kgs 5.9-14 [EVV 4.29-34]; 1 Kgs 10: 1-13; and, from the book of Proverbs, Prov. 1.1; 10.1; 25.1. The texts in Kings are indisputedly Deuteronomistic and this has led Crenshaw (1981) to discount on the whole these texts as allowing us any historical insight into the relationship of Solomon to wisdom. The superscriptions in the book of Proverbs are also taken by Crenshaw (1990) to be late and unhistorical.[47] More recently, however, Brueggemann has suggested that the Deuteronomist and the authors who provided the superscription to the book of Proverbs were appealing to some 'abiding memory of the connection between Solomon and wisdom' (Brueggemann 1990: 119). While acknowledging that this connection will not of course be represented with much precision, being more 'impressionistic', the connection between Solomon and wisdom is a real connection and not simply a literary construction (Brueggemann 1990: 119).

Brueggemann suggests that the scribal intelligentsia in Solomon's day exercised specific functions which are only understandable against the backdrop of the social transformation brought about by the Solomonic era. Solomon's empire was characterized by 'advanced

46. Bottéro 1982; Sweet 1990: 103; Kraus 1960. See above, Chapter 3.

47. Crenshaw (1990: 212-13) wonders how a connection between royalty and 'folk wisdom' was made (cf. Prov. 25.1). He points out that 'No amount of special pleading will erase the harsh fact that Solomon's regime was oppressive and bloodletting. Reconciling these practices with "enlightenment" mentality requires considerable mental reservation' (Crenshaw 1990: 213). Crenshaw, however, overlooks the importance of viewing the relation forged between Solomon and wisdom as primarily ideological in function. The separation between the ideal of the texts and the realities of Solomon's regime would surely only have resulted in greater attempts to legitimate the king by portraying him as wise (cf. Whitelam 1979 on gap between the ideal and the actual of royal power).

technology, highly developed social organization and bureaucratic ordering of governmental power' (Brueggemann 1990: 123). Solomon's new social enterprise required religious justification and legitimacy realized in the building of a temple and the provision of a cult which reaffirmed the legitimacy of Solomon and his dynasty. On an intellectual plane the intelligentsia turned to wisdom. Specific social functions were performed by the scribal intelligentsia against the backdrop of Solomon's new political domination and economic surplus.

There is evidence that Solomon aimed to create an intellectual climate comparable to and in competition with the sapiental activity of other kingdoms, especially Egypt. 1 Kgs 5.10-11 [EVV 4.30-31] mentions wisdom practices outside Israel. These were viewed by Israel's scribes as models but also as competitors. This intellectual enterprise of the scribes 'emancipated' Israel from the categories of Israel's 'tribal', 'peasant' and 'sectarian' modes of knowledge, allowing it to share in 'more universalizing and perhaps more speculative intellectual activity' (Brueggemann 1990: 125). So the pursuit of wisdom functioned in a twofold fashion: first, it achieved Solomon's cultural ambition to 'be like Pharaoh' (cf. 1 Sam. 8.5-20); secondly, it may have been 'emancipatory', providing the kind of 'intellectual emancipation' needed for a new regime which was eager to operate effectively, legitimately and prestigiously as a state.

Brueggemann suggests that the study of creation which took place within the wisdom schools is congenial to the new Solomonic state because politically and economically 'the whole world' becomes available for study. Prior to the new social order created by Solomon such a pursuit was not possible because survival and struggle occupy too much time and because the 'limited technology of the marginal'[48] 'excludes much of the world from one's horizon' (Brueggemann 1990: 126).

The pursuit of wisdom may not be simply congenial to a new state but, according to Brueggemann, may also be necessary. Scientific investigation establishes predictability which leads to control 'and such control is not incompatible with the fresh assertion of human centrality' (Brueggemann 1990: 126). New knowledge brings new power. This does not mean, however, that these intellectual pursuits were embarked upon solely for ideological reasons. The ideological use of this knowledge may be secondary; its original pursuit on the part of the scribes

48. For example in pre-monarchic Israel and under David's chieftaincy.

may genuinely reflect wonder and awe at Yhwh's creation (Brueggemann 1990: 127).

Thus, wisdom had an emancipatory function (insofar as it broadened Israel's intellectual horizons) but it had also a clearly ideological function. Observing that creation (human life, nature, behaviour, astrology, etc.) is an ordered system which is both regular and durable, the scribes present Solomon's monarchy as an extension and reflection of this created order (Brueggemann 1990: 127). The political, social and economic changes brought about by Solomon are not to be questioned or criticized, for they are part of Yhwh's created order.

Thus, the wisdom scribes perform an important function in Solomon's day exercising at times 'both emancipatory and ideological functions; on the one hand channelling the energies of the regime in bold exploratory directions, on the other hand justifying present arrangements' (Brueggemann 1990: 128).

It is uncertain whether Brueggemann is right in allowing for some degree of historicity to the canonical memory of Solomon as a patron of wisdom. 2 Samuel 14.1-20 also presents David as a man of wisdom. One may question whether, in the time of David or Solomon, scribal activity was so literary. It may have been more concerned with administrative matters, scribes being occupied with economic documents, with documents of trade and exchange, only later branching out into more literary activity.[49] At the same time in Mesopotamia from as early as the third millennium many literary records were kept particularly those extolling the king. By the first millennium elaborate literary compositions were commonplace (Sweet 1990: 103). Recent archaeological findings, however, seem to indicate that the view of Solomon as an international diplomat heavily engaged in building projects and foreign trade is an exaggeration (cf. Jamieson-Drake 1991). In fact, many of the achievements of Solomon, such as the establishment of trade, extensive building projects, economic and political control extending well beyond Jerusalem, the establishment of Jerusalem as a city upon which the entire region depended, do not appear in the archaeological record until the time of Hezekiah and Josiah.

Weinfeld argues that 'wisemen' do not appear as a class or profession before the period of Hezekiah and that consequently Hezekiah may be considered as the historically true patron of wisdom (1972: 162). Proverbs 25.1 may well, according to Weinfeld, testify to a programme

49. Cf. Weinfeld 1972: 162.

undertaken by Hezekiah of 'compiling' and 'resuscitating' ancient traditions (1972: 161).[50] Weinfeld's suggestion seems all the more likely given the general literary renaissance throughout the ancient Near East during the Hezekian-Josianic periods.[51] Nonetheless, Weinfeld acknowledges that the tradition ascribing wisdom to Solomon goes back earlier than the days of Hezekiah. There is no reason to reject the antiquity of 1 Kgs 5.9-14 [EVV 4.29-34], which in the light of onomastic catalogues encountered in Egyptian and Mesopotamian literature appears to be of greater antiquity than the Deuteronomic (Weinfeld 1972: 255). While the Hezekian period is not to be regarded as the period in which the tradition concerning the wisdom of Solomon first emerged, the period of Hezekiah does 'mark an historical turning point in the development of the Israelite conception of wisdom' (Weinfeld 1972: 255). Working at this time the Deuteronomist no longer presented wisdom as meaning cunning, knowledge or pragmatic talent[52] 'but held it to be synonymous with the knowledge and understanding of proper behaviour and with morality' (Weinfeld 1972: 255).

While Weinfeld's contentions may be correct, it is not impossible that we could reckon with a tradition which ascribed a non-secular wisdom to Solomon even during his own lifetime. Weinfeld's view that during the early days Solomonic wisdom was secular is incorrect. As we have seen in our discussion of ancient Near Eastern morality, wisdom morality was never secular but had lying behind it a creation theology. The order in the world (moral, social, or order of kind [scientific]) was always protected implicitly or explicitly by the deities.[53] This of course does not rule out the possibility that the Hezekian scribes re-emphasized this traditional association of moral order with divine authority in their reworking of the traditions about Solomon.

While there is no direct evidence that the promulgation of moral behavioural codes was ever attributed to the king in Israel, it seems possible that such a list (such as the Book of the Covenant) was once ascribed through a now displaced prologue and epilogue to a just king (possibly Solomon, although Hezekiah and Josiah seem far more

50. Fishbane (1985: 33) suggests that the men of Hezekiah were more than royal scribes, and actually comprised those teachers of wisdom whom he suggests consolidated at this time and against whom Isaiah fulminated (Isa. 5.21; 29.14).

51. Cf. Roux 1964; Oppenheim 1964.

52. Cf. 1 Kgs 5.9-14 [EVV 4.29-34]; 10.1-9, 23-24.

53. See above, Chapter 4.

likely).[54] Such a prologue and epilogue are no longer to be found in its present context. The Book of the Covenant is in a covenant setting with its authorship ascribed to Yhwh. How may this be explained? Most likely it is to be explained as a result of inner-scribal exegesis during a time when the scribal institution could assert its independence of the royal court.[55]

b. *The Developing Autonomy of Written Torah and the Scribal Organization*

Brueggemann (1990) may be correct in recognizing two functions, an emancipatory and an ideological, for scribal wisdom compositions. The emancipatory function of wisdom is to be seen in the opportunity, provided by the study of international wisdom, to see beyond the 'narrow' concerns of Israel's tribalism (Brueggemann 1990).[56] The emancipatory function of wisdom, however, may be viewed in quite different terms. It may be viewed in terms of the increasing independence of the scribes from the political and ideological concerns of the royal court. Scribes increasingly compose, study and interpret the moral texts of torah within the system of the texts' own internal meaning. It is the authority and inner coherence of the texts in themselves which provide the criterion for meaning. The texts are no longer interpreted in ways designed to legitimate the monarchy and justify present power arrangements. Goody agrees that writers may influence the political by supporting regimes but their influence can be emancipatory insofar as they extend the range of criticism and opposition (Goody 1986: 119).

While the association of wisdom-torah rules with royal authority may be seen as the first stage in the ongoing identification of the moral

54. Cf. Whitelam 1979; Phillips 1970.

55. Whitelam concludes that the ascription of the lawcodes to Yhwh through his specially chosen prophet Moses led to the displacement of the king (1979: 207-208). According to Whitelam, however, this displacement is not the result of scribal exegesis but of the failure of kings to meet the ideals of kingship (see further below for consideration of this aspect).

56. Brueggemann is of course making a value judgment insofar as he assumes that universal knowledge is emancipatory whereas 'peasant', 'rural' modes of knowledge are restrictive. What is meant in this study by the emancipatory aspect of wisdom texts will become clear. Overall what is meant is the potential of the written word to achieve an autonomy from its original author/speaker and consequently from its original ideological association, in this case the ideology of the Israelite royal court (see above, Chapter 2 Section 2).

advice of torah with legislation, the further development of this process was facilitated by the increasing independence of torah from the royal court. This independence was made possible, first, by the autonomy of the text which is the result of the text being in a written form and, secondly, by the financial independence of the scribal organization from the royal court.[57]

It has already been argued in this study that one of the results of the application of writing is the conferral of an autonomous status upon the written word.[58] This eventually gives rise to the autonomy of the text and in the end to the creation of an autonomous institution (Goody 1986: 172).[59] An immediate effect of the application of writing is decontextualization. The rule becomes decontextualized from the situation in which it was originally formulated, namely from the context of its production. In the case of the wisdom-moral rules of the Book of the Covenant this context is to be seen as the royal court.[60]

The rules also become distanced from the context of their original audience. In the case of the Book of the Covenant the original audience will have been composed of the god, royal officials, the king himself, prestigious groups in Israelite society who operated close to the centre and the international community to all of whom both politics and diplomacy necessitated an ideological presentation of the basis for kingship.[61]

57. It would be incorrect to assume a continuous and inevitable progression from scribal dependency on the royal court to scribal independence. The relationship between the two organizations will have varied depending on the relative strength of both institutions at a given time. Cf. Whitelam 1979 for discussion of the ideal king in the ancient Near East.

58. See above, Chapter 2.

59. See above, Chapter 2 Section 2.a.

60. Nonetheless, the idea that the observance of moral ideals ensured the continuation of an order created by Yhwh will have existed independently of any setting in the royal court. It is likely, however, that it was first given written form in Israel within a royal court setting. As Goody (1986) has noted the introduction of the monarchic form is generally accompanied by the emergence of scribes (see above, Chapter 2).

Wisdom-morality may well have circulated orally throughout Israel as popular folk wisdom, although what relation this oral wisdom bears to the written form is difficult to ascertain. Other series of wisdom rules and sayings may well have been taken over entirely in literary form from foreign scribal schools (e.g. Prov. 1–9 and the wisdom of Amenemope and cf. *CE*, *CH* and Exod. 21.28-32, discussed above Chapter 2.

61. That the king was awarded the epithet 'wise', in order not only to legitimate

Finally, the rules may become distanced from their original creator or author; in this case the Book of the Covenant had been fictionally attributed to the king. The משפטים now became separate from the king and took on an existence in their own right. Moreover, with the displacement of the king, the intentions of the 'real', original authors (i.e. to legitimate the king) also became obscured.

Once decontextualized the text becomes more difficult to understand. It may be abbreviated, cryptic and generalized. By virtue of its textuality the rule now becomes subject to critical attention, reformulation, reflection and commentary. The scribe becomes increasingly occupied with the text for its own sake, interpreting it within the boundaries set by the inner logic of the text.

Related also to the autonomy of the written word is the problem of erasure which writing creates. While oral rules may adjust imperceptibly to new situations, once written down rules become frozen. The authority which accompanies the conferral of writing on rules makes alteration in a rule difficult. Thus the scribe, faced with the authoritativeness of the written word, which it has gained by virtue of its textuality, must get around the problem of erasure by applying highly specialized means of exegesis and commentary.[62] Moreover, over time a discrepancy may develop between the scribe's language and that of the texts which he copies. Explanatory glosses become necessary and eventually only experts can disinter the meaning of texts (Goody 1986: 38). In other words, the texts develop less and less in line with the needs and changing views and interests of the scribes and instead develop increasingly under their own momentum. This momentum is the increasingly authoritative wisdom-torah tradition available to the scribes. The ideological needs of monarchy no longer exert the same influence since the texts have acquired a virtually transcendent value.[63]

The most significant result of the autonomy of texts is the increase in the authoritative status of such texts. Is there evidence for the authoritative status of texts in ancient Israel? The most obvious example is Jeremiah 36. The prophet Jeremiah is instructed by Yhwh to write

his rule but also to present him to the 'diplomatic community' as 'wise', may be seen in 1 Kgs 10.1-13. Assurbanipal's attempts to assemble a great library for himself may have been similarly motivated (see above).

62. Goody 1986; cf. Oppenheim 1964: 292; Baines 1983.

63. See further below, on the transcendent value of texts.

down the words which Yhwh had revealed to him (Jer. 36.4). Jeremiah enlists the help of Baruch, a court scribe who is to read the words of the scroll publicly in the temple (Jer. 36.4-6). Upon learning of the contents of the scroll, Micaiah the son of Gemariah reports what he had heard to the שָׂרִים (officials). The officials informed the king of the contents of the scroll, advising Jeremiah and Baruch to go into hiding. The scroll is then deposited in the temple in the room of Elishama, the secretary, where it is later collected, brought to the king and its words and its prophecies read out (Jer. 36.21-23).

What is important for our concerns is that the story of Jeremiah's scroll illustrates not just that the written word was held in high esteem but that texts in themselves were thought of as powerful objects. It is not enough for the king simply to disregard the words of the scroll, he must destroy it because the text is an object which has power and existence in its own right. Further evidence that the text was regarded as autonomous, the authoritativeness of which was foremost in the scribes' mind is provided by the later text of Daniel 9. Here Daniel struggles to interpret the text of Jeremiah 25, which he sees as having a powerful and crucial role to play in the future of Israel.[64] Moreover, Fishbane points to the fact that problematic letters or words were not deleted by Israel's scribes, a fact which he takes as indicative of the growing authoritative character of the biblical texts (Fishbane 1985: 38). Outside Israel, one may note that King Assurbanipal's scribes who undertook an extensive literary programme on behalf of the king rarely deviated, out of respect for the written word, from the original text from which they copied even when meanings must have been irrelevant and obscure. So dedicated in fact were Assurbanipal's scribes to reproducing the original text without deviation that where words or sentences had been destroyed in the original, the scribes left blank spaces or wrote in the margin (*ul idi*) 'I do not understand', or (*hepu labiru*) 'old break'.[65]

Writing promotes not just the autonomy of the text but also the autonomy of the scribal organization, which develops its own corpus of written tradition, its own specialists and possibly its own system of support.[66]

64. See further below on Dan. 9. Similarly the autonomy of the text is illustrated by the basing of a reform on the rediscovered lawbook in the time of Josiah (cf. Blenkinsopp 1983: 96).

65. For texts, see Roux 1964; Oppenheim 1964.

66. See above, Chapter 2.

As has been shown, the more authoritative and specialized the text becomes, the more expertise is required to disinter it. In an ancient society, where literacy skills are restricted to a minority of specialists, the creation of a text, whether it involves simply listing of prices or weights, or the copying of a series of moral stipulations, inevitably results in the creation of a group of literary experts who become responsible for preserving, copying, sometimes editing and correcting, and later for interpreting the text (Goody 1986). In the end, texts can be disinterred only by specialists of the written word (Goody 1986: 143).

The autonomy of the scribal organization is promoted also by the possibility of increased financial independence of the scribal school from the royal court (Goody 1986). Initially, the temple school will have been virtually entirely dependent upon royal endowments which are more lucrative than the returns of its agricultural investments and the gifts and offerings of its worshippers (cf. Sweet 1990: 101 n. 8). Over time, however, the scribal organization may have been significantly buttressed by incomes from taxes allocated it by the royal court, by tribute demanded for it by the king and by large endowments of land bestowed upon it by the monarch. Eventually, financial independence may become a possibility. Indeed, the extent of financial power and influence enjoyed by the scribal organization may allow it to demand resources not just from the general population but even from the king. This financial independence will facilitate the continuing growth of the independence of the scribal organization from the royal court. No longer primarily concerned with the continuity of the state and its hierarchy, the scribal organization becomes instead a force for the continuity of the written word itself and for the scribal organization which has developed around it.

It is significant that Josiah's reform was supposedly prompted by the finding of a book in the temple. Blenkinsopp suggests that the book may have been a 'plant' (1983: 96). Indeed, the book may have been 'planted' by scribes who were no longer content simply to legitimate the monarchy and its institutions, but now demand that the king listen to their advice and act upon it. Josiah's reform may well have been prompted by a scribal organization which was enjoying an increasing amount of independence from the royal court upon which it had once been so dependent for support.

No doubt the failure of the king to meet the ideals of justice (ideals which had been set forth by the scribes) was recognized as early as the

eighth century and is reflected in the criticisms of Amos and Hosea. It is more explicit, however, in Deuteronomistic passages such as 1 Samuel 8, 1 Samuel 12 and in Deuteronomy (17.14-20). In this last passage it is recognized that the powers of the king must be set within limits. More significantly, the success of the king and his administration is made dependent upon his acceptance of the teaching of the scribes and his observance of the teachings of torah. Thus, by the exilic period, and perhaps in the years leading up to it, there is reflected in the literature an attempt to deal with the failure of kingship as a force which would maintain the created order, including the rightness of social relations. It becomes possible for the scribes to criticize the monarchy within the ideals of their own world-view, because by now the scribal institution enjoyed a large measure of independence from the royal court and its ideology.

Thus, a scribal literary tradition which had once supported a political regime (although the roots of its values and beliefs may have arisen earlier out of concerns other than the support of the monarchy) gains independence, develops its own ideology and eventually comes to function as a model of society which is accepted no longer just by the élitist *literati* but often, given conducive conditions, by the society as a whole.

This last point is significant. Goody has noted that once, as the result of the mechanism of writing, the texts acquire an autonomous status, no neat structural or functional dependency of religion and society is acceptable (Goody 1986: 22). The written word, according to Goody, ceases simply to reflect the social system instead often influencing it (Goody 1986: 22). On this last point it needs to be emphasized that the written word can never simply reflect the social system, its values and norms, etc., since writing results in an immediate decontextualization from the original context of production and the intentions of the original authors. Moreover, the written word is always and above all, in a society where literacy skills are restricted to specialists, representative of the viewpoints of élite *literati* and of course of any powerful individuals, such as the king, or groups, such as the political hierarchy, who can for a long time exert significant influence over the scribes. While the written word becomes a force for its own continuity it can also in the end come to influence the social system (Goody 1986: 21).

In other words, Oppenheim's observation that reality adjusts to the requirements of a written corpus becomes pertinent. Such a development within Judaism is, however, late and peripheral arising from 'the

desire to create for ideological reasons a specific social context' (Oppenheim 1964: 231-32).[67]

3. *The Basis for the Authority of Scribal Teaching*

Facilitated primarily by the potentialities of writing, but also by the possibility of financial independence and the failure of kings to meet the ideal, the scribal organization responsible for promoting the ideological concerns of kingship in their attribution of wisdom to the king have succeeded in emancipating themselves from the very ideology to which they themselves had given literary form. The king is displaced as a source of moral wisdom and, moreover, as is the case in Deut. 17.14-20, becomes subject to the criticism and constraints of the wisdom ideals espoused by the scribal organization. Just when the king was displaced as a source of moral wisdom knowledge is difficult to ascertain. Given, however, that in the book of Deuteronomy there is no question of the king applying the law, by the time of the composition of Deuteronomy in the seventh century, the movement which saw the displacement of the king by Yhwh and Moses as the authority behind torah must have been well under way.

The existence of torah in a written form allowed it to continue even when it became dissociated from royal authority. Moreover, this dissociation resulted in a long period of exegesis and a search for the authoritative basis of torah which was no longer to be found in the Israelite king. In fact, the existence of torah in a written form ensured its fixity and permanence, enhancing its authority to such a degree that eventually in the rabbinic period the texts become not just morally but also legally binding on an entire community.[68] The wisdom-torah advice of Israel's early scribes was reconceptualized as legislation. Thus, we come to the final influence which brought about the identification of torah with legislation, that is the practice of exegesis.

Once the king's role in the creation and guardianship of wisdom-moral rules became diminished and eventually forgotten, exegesis within the scribal schools becomes preoccupied with the search for the legitimate source of the rules.

Scribal activity in Israel, as throughout the ancient Near East, involved the preservation and collation of texts as well as the exegetical

67. See above, Chapter 4.

68. The roots of such a process go back to Ezra.

tasks of reflection, critical commentary and, ultimately, a search for the deeper levels of meaning in texts whose original meanings and ideological functions are no longer apparent. As has already been seen this loss of apparent meaning is due to the gap, which is created by virtue of the mechanism of writing, between the actual world and the written word.[69]

The technical and less creative side of scribal activity which involved the collation, preservation and indexing of texts is in fact evident in the biblical texts. Fishbane takes as a general indicator of such activity the numerous references in Kings and Chronicles to the chronicles or archives of the kings of Israel and Judah from which the Deuteronomistic writers have excerpted their historical reports[70] (Fishbane 1985: 27). From the annotations to the priestly laws in the books of Leviticus and Numbers, further scribal activities may be detected. Here are found both superscriptive titles (e.g. Lev. 6.2, 7; 7.1, 11) and summary colophons (Lev. 7.37-38; 11.46-47; 12.8; 15.32-33; Num. 5.29-31; 6.21) both of which are found in other ancient Near Eastern documents (Fishbane 1985: 27). As in the ancient Near East in general, in Israel the biblical regulations were often collated into short collections (e.g. Lev. 1–7; 11–15). Such annotations and collections are to be taken as formal conventions of an established scribal tradition in Israel (Fishbane 1985: 27).[71]

Ecclesiastes 12.9-12, although a late passage, actually reflects scribal practice in Israel which was well known long before the writing of Ecclesiastes and represents conventional scribal texts well known in ancient Israel (Fishbane 1985: 31-32).

> Besides being wise (חכם), the Preacher also taught the people knowledge, ordering (אזן) and examining (חקר) and fixing [or editing] (תקן) many proverbs (Eccl. 12.9).[72]

Fishbane sheds light on the meaning of Eccl. 12.9-12 by reference to similar formulae found in Assyrian and Babylonian colophons: *satirma uppus, u bari* ('written, composed and collated'); *astur asnig abrema* ('I have written, checked and collated'; *asra baria salima* ('arranged,

69. See above, Chapter 2.

70. Cf. 1 Kgs 11.41; 14.19, 29; 15.7; 1 Chron. 9.1; 2 Chron. 9.29; etc.

71. Colophons and colophonic blessings indicate the conclusion of a specific literary corpus in Psalms (e.g. Ps. 72.20) (כלו) completed here denotes the separate nature of Pss. 42–72. A corresponding expression (*qati*) is found in cuneiform colophons (Fishbane 1985: 28).

72. The translation of the terms in Hebrew here is Fishbane's (1985: 29).

collated, intact'). These references indicate, in the first place, that the activities described in the addendum to Ecclesiastes are part of an established ancient Near Eastern colophonic pattern. Texts were not simply 'summed up' but were often annotated with reference to the scribal activities performed on them (Fishbane 1985: 30-31). Secondly, the addendum in Ecclesiastes indicates what was a stylized and conventional description of ancient Near Eastern scribal tasks.[73]

Fishbane agrees with Goody that scribes, as well as being involved in preservation and collation of texts, played a creative role. The biblical scribes were no mere 'passive tradents':

> They were in fact, both students of and even believers in the materials which they transmitted, and so were far from simple bystanders in matters relating to their clarity, implication, or application (Fishbane 1985: 37).

This search for the 'meaning' of texts and the belief in their doctrinal status must be seen as a direct result of the use of the written word (Goody 1986; Goodrich 1985: 104). Once there exists a body of texts which are held in high esteem by scribes, the status of which is one of absolute validity, the scribes become engaged not simply in correlating and copying texts but also in more creative modes of exegesis. This exegesis is tied to or governed by the text and engages in a search for deeper levels of meaning (Goodrich 1985: 104). For example, what is the source of the text, who is the original author? The text points beyond itself to something greater and sometimes to something transcendent.

a. *Torah Texts as Divine Revelation to Be Used as Legislation*

Fishbane has proposed that classical Judaism, beginning with Ezra, began with an axial transformation which made a movement from a culture which was based on direct divine revelations to one based on their study and reintepretation[74] (Fishbane 1990: 440). While not pointing to writing as the mechanism which causes this axial shift, Fishbane on the whole agrees with Goody that the progression is one wherein a body of texts becomes canonical, or absolute, in its authority, leaving later scribes to interpret texts which now receive doctrinal status. The

73. And cf. Prov. 25.1: 'the proverbs which the men of Hezekiah (העתיקו) (transmitted)' (Fishbane 1985: 33).

74. Fishbane's study is Weberian insofar as it reflects the idea of the development from charisma to the routinization of charisma.

process begins, argues Fishbane, with Ezra whose 'textual task' is to seek from torah new divine teachings or to explain older teachings making them meaningful in the present.[75] Moreover, in his task Ezra is inspired by Yhwh (Ezra 7.6, 9; Ezek. 1.3) and is aided by the Levites who bring torah understanding (מבינים) to the people (Neh. 8.7, 9), explaining to them the sense (שׂכל) of the text (v. 8 cf. v. 13 להשׂכיל).[76]

Daniel 9–12 portrays the prophet as reading and studying earlier prophecies, yet unable to grasp their meaning until he receives divine guidance (cf. Dan. 9.2 where Daniel reports how he studied (בינתי) the books of the Prophets in an attempt to understand Jer. 25.5-11).[77] Fishbane thinks it likely that Daniel actually engaged in ritual practices designed to bring about exegetical illumination (Dan. 9.3, 20-21a, 21b-22, 24-25). Gabriel, the heavenly being, says to Daniel:

> At the beginning of your supplication the word (*dabar viz.* interpretation)[78] came forth, and I have come to tell you that you have found (divine) favour and (are graced with) the understanding of the word (*ubin baddabar*) (Dan. 9.23, Fishbane's translation, 1990: 443-44).

Daniel 10 portrays the prophets as engaged in ascetic practices in an attempt to invoke divine inspiration or illumination (Fishbane 1990: 445). Like Ezekiel (1.3-28), Daniel sees a heavenly figure and throws himself terrified to the ground (Dan. 10.9). When he is raised up he is told that his prayer has been heard, and (exegetical) understanding is granted him (Dan. 10.11-12, 14). The fruits of Daniel's efforts are found in Daniel 11, a text which is replete with reworked passages from earlier prophets.

It seems as if direct prophecy has ended, being replaced by a knowledge of past texts and their meaning for the future (Fishbane 1990: 444). Exegetical revelation has replaced direct prophecy and those who possess exegetical illumination are called 'knowers' (משׂכילים) who 'understand' (יבינו) the true sense of the texts (cf. Dan. 12.10; 11.33, 35).

75. Fishbane 1985: 441; cf. Ezra 7.1-5, 6, 11-10.

76. Ps. 119.18 reads: 'Open my eyes that I may behold wondrous things out of the law'. Again in Sir. 3.20-22, scripture has become the vehicle of divine revelation and exegesis has become a new way of gaining access to Yhwh's will. The scribe seeks from Yhwh the grace of an ongoing revelation through the words of the text as mediated through exegesis (Fishbane 1990: 442-43).

77. Cf. Fishbane 1985: 487-95.

78. For דבר as interpretation or explication, see Fishbane (1990: 443); cf. Gen. 37.8-10, especially v. 10.

By the postexilic period study and knowledge of torah and experience began to constitute new modes of religious experience (Fishbane 1990: 449).[79] Is there evidence that scribes studying torah texts in an earlier period engaged in similiar practices to Daniel?

While agreeing with Fishbane that as a body of texts emerges as authoritative and canonical, scribes become increasingly engaged in exegesis, it seems likely that even before the time of Ezra the roots or beginnings of such exegetical methods of dealing with texts will have been formed. The roots of the movement which saw the king displaced as the author of law, by Moses (Deuteronomy) and then by Yhwh, no doubt goes back to the late pre-exilic period.

The doctrinal status of the wisdom-moral rules will have become conventional among Israel's scribes in the monarchic period but, once the king's prestigious position in relation to the creation and preservation of wisdom rules (or other scribal texts) had been minimized and no doubt eventually forgotten, exegesis within the scribal organization[80] may have resulted in a search for the legitimate source of these rules. Such exegesis, which is tied to the text and its conventions but is nonetheless capable of formulating new ideologies and ideas, seeks a deeper meaning in the text. Who, for example, is the author or rule maker? If meaning is perceived as transcendent, then ultimately its author must also be transcendent. The physical text is endlessly examined for signs of its underlying intention (cf. Goodrich 1985: 104). In the case of the wisdom-torah rules such intention is found in the will and word of Yhwh.

The scribal movement which placed the Book of the Covenant in a covenant context, thereby making Yhwh rather than the king the authority behind scribal, moral rules (although law was always watched over by the gods)[81] is no doubt to be set among Deuteronomistic circles. It is important to point out, however, that, in arguing for a displacement of the king by Yhwh, an argument for a development from profane law to sacral morality is not being made. The king was from the beginning

79. Ceresko (1990: 230) sees in the literature of the psalter a focus on writing and reading and the written word as the medium of God's revelation as evidence of the scribe's self-consciousness as an author.

80. The scribal organization which, while relatively independent of the royal court, may still be located within the temple (although the temple itself may be relatively independent of the palace by now).

81. See above, Chapter 4.

portrayed as upholding the moral order of Yhwh and not a secular, moral order which the king himself had created. Proverbs, for example, provides instructions to kings on how to rule and how to conduct themselves properly. Brunner (1958) has pointed out that the basis for the political institution of kingship is the righteous order that underlies Yhwh's creation (Brunner 1958: 126-28). Prov. 16.12 reads 'the throne is established (כון) by Righteousness'. The same term (כון) is elsewhere used to denote the divine action of creating and preserving the cosmic order (cf. Prov. 3.19-20; 8.22; and cf. Perdue 1990).

Furthermore, as was shown in Chapter 4 of this study, throughout the ancient Near East, wisdom morality had always been protected both implicitly and explicitly by the deities, who in creating the world had also created the regularity of social relations. Wisdom morality was to be observed not because it was backed up by a juridicial body, courts and something akin to a policing force,[82] but because ignoring the advice of the wisdom ideals could bring the curse and disapproval of the gods, resulting ultimately in the destruction of society. Observance of the moral stipulations, in contrast, would bring prosperity and blessings which were bestowed by the approving gods. It has been shown that, even prior to the Deuteronomistic movement which placed all 'law' under Yhwh's will and authorship, Israelite wisdom ideals were also protected by Yhwh.[83] Thus, the development which set Israel's moral behavioural codes within a covenant framework, emphasizing the unity of all of Israel's law and its source in Yhwh, was a gradual development which arose out of scribal exegesis.[84] It involved a making explicit of what had always been implicit: namely that order in creation could only be sustained through the observance of the torah rules which were viewed by the scribes as expressive of a cosmic reality. The emphasis on Yhwh as the source of Israel's torah was not the result of, nor is it immediately related to, social and economic developments. It is a statement of the reality of Israel's torah which was at least an implicitly characteristic of it from the beginning.

82. Features which have been taken as indicative of the presence of legislation.

83. See above, Chapter 4.

84. Compare this to Otto's view, earlier critiqued in this study, where he argues that the background to the development which saw a movement from profane to sacral law is to be sought in the social divisions of monarchic Israel.

ISSUES AND PROPOSALS

There are three issues to be raised which deserve further attention but which, however, lie outside the range of this study. It is nonetheless necessary to deal briefly with them. The first relates to the insistence of this study that writing brings about a decontextualization from the original social setting and audience within which the text was first composed. The second issue relates to the idea that writing brings about a distancing from the intentions of the original author(s). The third issue is related to the proposal that torah was originally the work of élitist theoreticians operating from the royal court.

1. *The Effects of Decontextualization*

It has been shown that once the mechanism of writing has been applied to rules, the rules become distanced from their original social setting and original audience. The texts become autonomous. The continued growth of the text is dependent on inner-scribal exegesis which is constrained by the conventions of the text rather than by social and economic considerations.[1] It is clear that by emphasizing that texts become *decontextualized* the danger arises that this knowledge in texts will be misconstrued as being not *decontextualized* knowledge but *disembodied* knowledge. In order to avoid this distortion, it needs to be pointed out that while society at large may have a relatively small input, it is obvious that the scribes, though élites, are nonetheless members of their society.[2] As a micro-organization they are nonetheless actors within a macro-setting. Yet the relative weight of micro- and macro-influences cannot easily be determined (cf. Kovacs 1976). Consideration of this point requires detailed exploration but in brief it may be stated that

1. See above, Chapter 2.

2. Mayes has pointed out that in differentiated societies the specialist will possess not only 'specific knowledge belonging to his role' but also 'the more general knowledge by which his role relates and makes sense to society at large' (1989: 132).

while macro-conditions (i.e. social and economic circumstances) may impinge on the consciousness of the scribes, micro-influences (i.e. influences at the level of the scribal organization) most likely dominated. This is so because the scribe, no matter what the degree of his awareness of macro-social conditions, is always constrained by the durability and authoritativeness of the written word.[3]

2. *Authorial Intention*

The second issue arises from the emphasis placed upon distancing from authorial intentions. The intentions of the original authors become obscured.

While accepting the theory of authorial distancing, it is not accepted that the intentions of the authors are thereby rendered irrelevant to any understanding of how Israelite law developed. While intentions of the author/s may be irrecoverable in any precise formulation they are not thus rendered insignificant. The recognition of authorial distancing should not lead to a neglect of efforts to reconstruct what these intentions may have been. It is important, however, to recognize that because they have been obscured, we must be thorough in our efforts to reconstruct these intentions. When we are dealing with the wisdom-moral rules of the Old Testament, for example, it is well to remember Gusfield's findings that rules may have symbolic rather than instrumental force (Gusfield 1963). While instrumental aims of legislators are concerned with altering behavioural systems in society, symbolic 'legislation' often comes about as the result of pressure from conservative religious groups whose primary concern is to have their religious and moral dominance publicly endorsed even though they may realize that the adaption of their norms by society as a whole is an unrealizable goal.[4]

Thus, any attempts to reappropriate the intentions of the original authors must take into account that rules may function either symbolically or instrumentally. The function of rules can be even more complex and difficult to read. Hanson's findings that rules can have various functions may be restated (Hanson 1977: 138ff.).[5]

3. See above, Chapter 2.

4. Dunn has also noted that often the social function of the law as a marker of group identity is not taken seriously enough. Dunn identifies circumcision and the kosher laws as performing this function in the Graeco-Roman world (Dunn 1985).

5. See above, Chapter 3.

1. Rules may be archival, storing up past values for the future.
2. Rules may be used for argumentation. Citing a rule as a support for judging something to be moral or immoral involves using rules for argumentation.
3. Rules may be designed to initiate action. This function, however, should not be confused with a legislative function which of course rules may also serve. As already stated in this study, in order to designate rules as legislation, there needs to be in evidence the presence of a verbally binding code, and the existence of courts and constables who function to enforce that code.[6] Rules may, however, be used to initiate action without the backup of courts, constables, etc. Instead, for example, as has been illustrated with regard to biblical torah and Indian dharma, rules may appeal to the gods, threatening curse on perpetrators and promising blessing to those who comply.[7]
4. Rules may be used to awaken or moderate emotions; for example the utterance of rules may be intended to awaken admiration or to shock (Hanson 1977: 138).
5. Rules may be used to pose perspectives on relationships. This is achieved when rules classify acts. Rules may then, for example, function as creators of *outgroups* and *ingroups*. 'We are those who follow the rules, those are the ones who do not' (Hanson 1977: 138).
6. Rules may be used to express ideals. Of course by expressing ideals, perspectives may at the same time be posed. But Hanson insists that this function of setting up ideals should be considered separately since in setting up ideals something is also valued. After all, a perspective on a relationship may be presented without any ideal thereby being expressed. Moreover, since ideals have often an indirect effect on the person who cherishes the ideals, this function must be distinguished from the act-initiating function.

Thus, since the application of writing to rules involves an obscuring of the original intentions of the author/s, all of these functions must be considered as possibilities. Moreover, rules may perform more than one of these functions at the same time. Rules may pose perspectives on

6. See above, Chapter 3.
7. See above, Chapter 4.

relationships. For example Israelites follow Yhwh's rules and therefore are Yhwh's people (*ingroup*); Canaanites do not and therefore are not part of the people of Yhwh (*outgroup*). At the same time, these rules may also function to awaken emotions (e.g. love of Yhwh). In fact, as well as performing these two functions, rules could at the same time be archival (storing up past values) and act-initiating. Any combination of the functions of rules may represent the function of the torah rules at any given time. While the intentions of the authors may have been to express ideals, for example, new interpretations of the rules may misconstrue this intention, seeing instead a legislative role for future application of the rules. This fresh interpretation of the relevance of rules becomes possible because the mechanism of writing has obscured the original intentions of the authors.

While the wisdom-torah rules may have been internalized by generations of scribes and rabbis, and eventually by the population as a whole, such internalization is never straightforward but involves renewed interpretations of the original intentions of the original author/s. New interpretations of the original authors' intentions may result in renewed understanding of the function and meaning of the original rules. The texts in themselves may remain in their original verbal form, but how they are interpreted and internalized (by scribes, rabbis and the population as a whole) will always be in a state of change. Even though texts may remain in their *verbatim* form, the intentions of the original author/s may never be retrieved with any precision despite the convictions of later generations of interpreters that they have successfully done so.

3. *The Internalization of Wisdom-Morality by the Jewish Population at Large*

This study has proposed that biblical law did not function throughout Israelite society but was a morality whose content was meaningful to, and whose ideas were compelling to, only a subset of the population; namely the scribal élite. The question which now arises is this: how do we explain how this morality of a subset of the population came to be compelling to, and came to have directive force for, the Jewish population in general in the rabbinic period?

It is not sufficient to say that when the scribal élites became increasingly powerful, replacing the role of priests and political leaders, they were then able to impose their own version of reality upon a Jewish

population whose identity was threatened by the Hellenistic environment. The scribal élite may have been in a position to exploit a vacuum and expose people to their own élitist culture, that is to make their élitist culture public. But a model of reality may be public, dominant and persistent without it making any inroads into the psyche of the individual actor (Strauss 1992: 13). Culture may be public but that does not mean that it will be internalized and, more importantly, that it will come to have the motivational force which clearly biblical texts came to possess: 'shared cultural constructs do not automatically impart motivational force' (Strauss 1992: 13), even when they are learned. That is why some aspects of culture are ignored in private lives, remaining the stuff of official pronouncements (Strauss 1992: 1). Why do some aspects of culture such as the wisdom-moral rules of scribal élites acquire motivational force?

Strauss has insisted that in order to answer this question we must make reference to the psychology of the social actor (Strauss 1992: 5).[8] It is not enough to know what information people are exposed to; it is also necessary to study how social actors internalize this information:

> Knowing the feelings that people associate with different cultural models as a result of their life experiences is crucial in order to understand what motivates them (Strauss 1992: 14).

In dealing with Israelite history, or indeed history in general, where the empirical tests of social psychology cannot be applied, it may be impossible to carry out Strauss's directive with any precision. Nevertheless, it ought to be attempted if we are not to ignore the fact that human beings meaningfully order their lives and are more than passive recipients of ideologies which are imposed upon them by élites:

> learning cultural knowledge is an active, constructive process that continues throughout the life-span (Harkness, Super and Keefer 1992: 178).

It is hoped that this understanding of the appropriation of cultural knowledge, which takes into account the psychology of social actors, will form a basis for future research into the question of how Israel's wisdom-moral texts, which had originally reflected the morality of a scribal élite, came to be compelling to those who sought to define normative Judaism, and compelling also to those who chose to live by it.

8. And cf. the studies of D'Andrade (1992); Holland (1992); Harkness, Super and Keefer (1992); and Lutz (1992).

BIBLIOGRAPHY

Alt, A.

1934 'Zur Talionsformel', in *idem*, *Kleine Schriften zur Geschichte des Volkes Israel*, I (Munich: Beck): 341-44.

1976 'Solomonic Wisdom', *SAIW*: 102-12.

Baines, J.

1983 'Literacy and Ancient Egyptian Society', *Man* NS 18: 572-99.

Barton, J.

1984 *Reading the Old Testament: Method in Biblical Study* (London: Darton, Longman & Todd).

Ballou, R.O. (ed.)

1940 *The Bible of the World* (London: Routledge & Kegan Paul).

Bechtel, L.M.

1991 'Shame as a Sanction of Social Control in Biblical Israel: Judicial, Political and Social Shaming', *JSOT* 49: 47-76.

Berger, P., and T. Luckman

1979 *The Social Construction of Reality* (Harmondsworth: Penguin Books).

Bergh, G.C. van der

1969 'Legal Pluralism in Roman Law', *The Irish Jurist* 4: 338-50.

Beyerlin, W.

1965 'Die Paränese im Bundesbuch und ihre Herkunft', in H. Graf Reventlow (ed.), *Gottes Wort und Gottes Land* (Gottingen: Hertzberg): 9-29.

Blenkinsopp, J.

1983 *Wisdom and Law in the Old Testament: The Ordering of Life in Israel and Early Judaism* (Oxford: Oxford University Press).

Boecker, H.J.

1980 *Law and the Administration of Justice in the Old Testament* (London: SPCK).

Bottéro, J.

1974 'Symptômes, signes, écritures en Mésopotamie ancienne', in J. Vernant, *Divination et rationalité* (Paris: Leyde): 70-196.

1982 'Le Code de Hammu-rabi', *Annali della Scuola Normale Superiore di Pisa classe di lettere e filosofia* 12.3: 409-44.

Brueggemann, W.A.

1990 'The Social Significance of Solomon as a Patron of Wisdom', in J.G. Gammie and L.G. Perdue (eds.), *The Sage in Israel and the Ancient Near East* (Winona Lake, IN: Eisenbrauns): 117-32.

Brunner, H.

1958 'Gerechtigkeit als Fundament des Thrones', *VT* 8: 126-28.

Buss, M.J.
1989 'Logic and Israelite Law', *Semeia* 45: 49-65.
Carmichael, C.M.
1974 *The Laws of Deuteronomy* (Ithaca, NY: Cornell University Press).
1977 'A Ceremonial Crux: Removing a Man's Sandal as a Female Gesture of Contempt', *JBL* 96: 321-36.
1985 *Law and Narrative in the Bible* (Ithaca, NY: Cornell University Press).
Ceresko, A.R.
1990 'The Sage in the Psalms', in J.G. Gammie and L.G. Perdue (eds.), *The Sage in Israel and the Ancient Near East* (Winona Lake, IN: Eisenbrauns): 217-30.
Childs, B.
1974 *Exodus: A Commentary* (London: SCM Press).
1979 *Introduction to the Old Testament as Scripture* (London: SCM Press).
Crenshaw, J.L.
1981 *Old Testament Wisdom* (Atlanta: John Knox Press).
1990 'The Sage in the Proverbs', in J.G. Gammie and L.G. Perdue (eds.), *The Sage in Israel and the Ancient Near East* (Winona Lake, IN: Eisenbrauns): 205-16.
Crüsemann, F.
1988 'Das Bundesbuch: Historischer Ort und institutioneller Hintergrund', in J.A. Emerton (ed.), *Congress Volume: Jerusalem 1986* (VTSup, 40; Leiden: E.J. Brill): 27-41.
D'Andrade, R.
1992 'Schemas and Motivation', in R. D'Andrade and C. Strauss (eds.), *Human Motives and Cultural Models* (Cambridge: Cambridge University Press): 23-44.
David, M.
1950 'The Codex Hammurabi and its Relation to the Provisions of Law in Exodus', *OTS* 7: 149-78.
Davies, E.W.
1981 *Prophecy and Ethics: Isaiah and the Ethical Traditions of Israel* (JSOTSup, 16; Sheffield: JSOT Press).
Dawson, J.
1968 *The Oracles of the Law* (Ann Arbor: University of Michigan Press).
Dearman, J.
1988 *Property Rights in the Eighth Century Prophets* (Atlanta: SBL).
Demare, S.
1987 'La valeur de la loi fais les droits cunéiformes', *Archives de Philosophie du Droit* 32: 335-46.
Diamond, A.S.
1971 *Primitive Law: Past and Present* (London: Methuen, 3rd rev. edn).
Dixon, S.
1985 'Breaking the Law to Do the Right Thing: The Gradual Erosion of the Voconian Law in Ancient Rome', *Adelaide Law Review* 9: 519-34.
Driver, G.R., and J.C. Miles
1952 *The Babylonian Laws* (Oxford: Clarendon Press).

Dunn, J.
1985 'Works of the Law and the Curse of the Law (Gals. 3: 10-14)', *NTS* 31: 523-42.
Eilers, W.
1932 'Die Gesetze Chammurabi', *Der Alte Orient* 31: 3-4.
Fallers, L.A.
1969 *Law without Precedent* (Chicago: University of Chicago Press).

Fensham, F.C.
1962 'Widow, Orphan and the Poor in Ancient Near Eastern Legal and Wisdom Literature', *JNES* 21: 129-39.
Finkelstein, I.
1988 *The Archaeology of the Israelite Settlement* (Jerusalem: Israel Exploration Society).
Finkelstein, J.J.
1961 'Ammisaduqa's Edict and the Babylonian Law Codes', *JCS* 15: 19-104.
1981 'The Ox that Gored', *Transactions of the American Philosophical Society* 71: Part 2.
Finley, M.I.
1982 *Authority and Legitimacy in the Classical City-State* (Copenhagen: Munksgaard).
1983 *Politics in the Ancient World* (Cambridge: Cambridge University Press).
Fishbane, M.
1985 *Biblical Interpretation in Ancient Israel* (Oxford: Clarendon Press).
1990 'From Scribalism to Rabbinism: Perspectives on the Emergence of Classical Judaism', in J.G. Gammie and L.G. Perdue (eds.), *The Sage in Israel and the Ancient Near East* (Winona Lake, IN: Eisenbrauns): 439-56.
Fontaine, C.
1982 *Traditional Sayings in the Old Testament* (Bible and Literature, 5; Sheffield: Almond Press).
Friedmann, W.G.
1967 *Legal Theory* (London: Stevens & Sons).
Frye, R.N.
1962 *The Heritage of Persia* (London: Weidenfeld & Nicholson).
Frymer-Kensky, T.
1989 'Law and Philosophy: The Case of Sex in the Bible', *Semeia* 45: 89-102.
Gagarin, M.
1986 *Early Greek Law* (California: University of California Press).
Gemser, B.
1953 'The Importance of the Motive Clause in Old Testament Law', in G.W. Anderson *et al.* (eds.), *Congress Volume: Copenhagen, 1953* (VTSup, 1; Leiden: E.J. Brill): 50-66.
Gerstenberger, E.
1965 *Wesen und Herkunft des 'apodiktischen Rechts'* (WMANT, 20; Neukirchen–Vluyn: Neukirchener Verlag).

Goodrich, P.
1985 'Language, Text and Sign in the History of Legal Doctrine', in D. Carzon and B.S. Jackson (eds.), *Semiotics, Law and Social Science* (Rome: Gangemi): 95-120.
Goody, J.
1986 *The Logic of Writing and the Organization of Society* (Cambridge: Cambridge University Press).
1990 *The Oriental, the Ancient and the Primitive* (Cambridge: Cambridge University Press).
Gottwald, N.K.
1979 *The Tribes of Yahweh: A Sociology of the Religion of Liberated Israel, 1250–1050 B.C.E.* (London: SCM Press).
Greenberg, M.
1960 *Some Postulates of Biblical, Criminal Law: Yehezkel Kaufmann Jubilee Volume* (Jerusalem: Magnes Press).
Greimas, A.J.
1976 'Analyse sémiotique d'un discours juridique', in A.J. Greimas and E. Landowski (eds.), *Sémiotique et sciences sociales* (Paris: Editions du Seuil): 79-128.
Gressmann, H.
1921 *Die alteste Geschichtsschreibung und Prophetie Israels (von Samuel bis Amos und Hosea)* (Die Schriften des Alten Testaments in Auswähl, 2.1; Göttingen: Vandenhoeck & Ruprecht).
Gurney, O.R.
1952 *The Hittites* (Harmondsworth: Penguin Books).
Gusfield, J.R.
1963 *Symbolic Crusade* (Chicago: University of Illinois Press).
Haas, P.
1989 '"Die he shall surely die": The Structure of Homicide in Biblical Law', *Semeia* 45: 67-87.
Halbe, J.
1975 *Das Privilegrecht Jahwes Ex.34,10-26: Gestalt und Wesen, Herkunft und Wirken in vordeuteronomische Zeit* (FRLANT, 114; Gottingen: Vandenhoeck & Ruprecht).
Hanson, B.O.
1977 *Application of Rules in New Situation: A Hermeneutical Study* (Lund: C.W.K. Gleerup).
Harkness, S., C.M. Super and C.H. Keefer
1992 'Learning to Be an American Parent: How Cultural Models Gain Directive Force', in R. D'Andrade and C. Strauss (eds.), *Human Motives and Cultural Models* (Cambridge: Cambridge University Press): 163-79.
Hengel, M.
1974 *Judaism and Hellenism: Studies in their Encounter in Palestine during the Early Hellenistic Period* (London: SCM Press).
Herzog, Z.
1986 *Das Stadttor in Israel und in den Nachbarländern* (trans. M. Fischer; Mainz: Phillipp von Zabern).

Holland, D.C.
1992 'How Cultural Systems Become Desire: A Case Study of American Romance', in R. D'Andrade and C. Strauss (eds.), *Human Motives and Cultural Models* (Cambridge: Cambridge University Press): 61-90.

Jackson, B.S.
1975 'From Dharma to Law', *The American Journal of Comparative Law* 23: 490-512.
1984 'The Ceremonial and the Judicial: Biblical Law as Sign and Symbol', *JSOT* 30: 25-50.
1989 'Ideas of the Law and Legal Administration: A Semiotic Approach', in R.E. Clement (ed.), *The World of Ancient Israel* (Cambridge: Cambridge University Press): 185-202.

Jamieson-Drake, D.W.
1991 *Scribes and Schools in Monarchic Judah: A Socio-Archaeological Approach* (JSOTSup, 109; Sheffield: Almond Press).

Jepsen, A.
1927 *Untersuchungen zum Bundesbuch* (BWANT, 41; Stuttgart: W. Kohlhammer).

Jirku, A.
1927 *Das weltliche Recht im Alten Testament: Stilgeschichtliche und rechtsvergleichende Studien zu den juristischen Gesetzen des Pentateuchs* (Gütersloh: C. Bertelsmann).

Junod, H.A.
1913 *The Life of a South African Tribe*, I (Neuchâtel: Attinger).

Klima, J.
1972 'La perspective historique des lois hammourabiennes', *CRAIBL*: 297-317.

Knierim, R.
1989 'The Problem of Ancient Israel's Prescriptive Legal Traditions', *Semeia* 45: 7-25.

Kovacs, B.
1976 *Contributions of Sociology to the Study of the Development of Apocalypticism: A Theoretical Survey* (St Louis: SBL Consultation on the Social World of Ancient Israel).

Kramer, S.N.
1990 'The Sage in Sumerian Literature: A Composite Portrait', in J.G. Gammie and L.G. Perdue (eds.), *The Sage in Israel and the Ancient Near East* (Winona Lake, IN: Eisenbrauns): 31-44.

Kraus, F.R.
1960 'Ein zentrales Problem des altmesopotamischen Rechts: Was ist der Kodex Hammurabi?', *Aspects du Contact sumero-akkadien, Genava* NS 8: 283-93.

Kyle-Mc Carter, P.
1990 'The Sage in the Deuteronomistic History', in J.G. Gammie and L.G. Perdue (eds.), *The Sage in Israel and the Ancient Near East* (Winona Lake, IN: Eisenbrauns): 289-93.

Labat, R.
1951 *Traité akkadien de diagnostics et de pronostics medicaux* (Paris: Leyde).
Lambert, W.G.
1957–58 'Morals in Ancient Mesopotamia', *JEOL* 15: 184-96.
1959 *Babylonian Wisdom Literature* (Oxford: Oxford University Press).
1966 *La divination en Mesopotamie ancienne* (14th Rencontre Assyriologique; Paris: Leyde): 119-23.
1974 'Dinger. sa.dib.ba Incantations', *JNES* 33: 267-322.
Leggett, D.A.
1974 *The Levirate and Goel Institutions in the Old Testament* (Cherry Hill, NJ: Mack).
Lemaire, A.
1990 'The Sage in School and Temple', in J.G. Gammie and L.G. Perdue (eds.), *The Sage in Israel and the Ancient Near East* (Winona Lake, IN: Eisenbrauns): 165-80.
Lingat, R.
1973 *The Classical Law of India* (California: University of California Press).
Lohse, E.
1971 'Sanhedrin', *TDNT*, VII: 860-71.
Lowie, R.H.
1920 *Primitive Society* (New York: Boni & Liveright).
Lutz, C.
1992 'Motivated Models', in R. D'Andrade and C. Strauss (eds.), *Human Motives and Cultural Models* (Cambridge: Cambridge University Press): 181-96.
MacCormack, G.
1979 'Anthropology and Early Roman Law', *The Irish Jurist* 14: 173-87.
Maine, H.S.
1931 *Ancient Law* (Oxford: Oxford University Press [1861]).
Maqueen, J.G.
1986 *The Hittites and their Contemporaries in Asia Minor* (London: Thames & Hudson).
Mayes, A.D.H.
1979 *Deuteronomy* (NCB; London: Oliphants).
1981 'Deuteronomy, Law of Moses or Law of God?', *Proceedings of the Irish Biblical Association* 5: 36-54.
1989 *The Old Testament in Sociological Perspective* (London: Marshall Pickering).
McCarthy, P.J.
1975 *Treaty and Covenant* (Rome: Biblical Institute Press).
McDowell, D.M.
1978 *The Law in Classical Athens* (London: Thames & Hudson).
McKane, W.
1970 *Proverbs: A New Approach* (OTL; Philadelphia: Westminster Press).
Niehr, H.
1987 *Rechtsprechung in Israel: Untersuchungen zur Geschichte der Gerichtsorganisation im Alten Testament* (SBS, 130; Stuttgart: Katholisches Bibelwerk).

Nörr, D.
1981 'The Matrimonial Legislation of Augustus: An Early Instance of Social Engineering', *The Irish Jurist* 16: 350-64.
Ong, W. J.
1982 *Orality and Literacy: The Technologizing of the Word* (London: Methuen).
Oppenheim, A.L.
1964 *Ancient Mesopotamia: Portrait of a Dead Civilization* (Chicago: University of Chicago Press).
Otto, E.
1988 *Wandel der Rechtsbegrundüngen in der Gesellschaftsgeschichte des Antiken Israel: Eine Rechtsgeschichte des Bundesbuch Ex. 20,22–23,13* (Studia Biblica, 3; Leiden: E.J. Brill).
1989 *Rechtsgeschichte der Redaktionen im Kodex Esnunna und im 'Bundesbuch'* (OBO, 85; Freiburg: Universitätsverlag; Göttingen: Vandenhoeck & Ruprecht).
Patrick, D.
1985 *Old Testament Law* (London: SCM Press).
1989a 'Introduction', *Semeia* 45: 1-5.
1989b 'Studying Biblical Law as a Humanities', *Semeia* 45: 27-47.
Paul, S.M.
1970 *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* (VTSup, 18; Leiden: E.J. Brill).
Perdue, L.G.
1990 'Cosmology and the Social Order in the Wisdom Tradition', in J.G. Gammie and L.G. Perdue (eds.), *The Sage in Israel and the Ancient Near East* (Winona Lake, IN: Eisenbrauns): 457-78.
Petschow, H.P.H.
1984 'Die 45 und 46 des Codex Hammurabi—Ein Beitrag zum altbabylonischen Bodenpachtrecht und zum Problem: Was ist der Codex Hammurapi', *ZA* 74: 181-212.
1986 'Beiträge zum Codex Hammurapi', *ZA* 76: 17-75.
Phillips, A.C.J.
1970 *Ancient Israel's Criminal Law: A New Approach to the Decalogue* (Oxford: Basil Blackwell).
Preiser, W.
1961 'Zur rechtlichen Natur der altorientalischen "Gesetze" ', in P. Bockelmann, A. Kaufmann and U. Klug (eds.), *Festschrift für Karl Engisch zum 70. Geburtstag* (Frankfurt): 17-36.
Pritchard, J.B. (ed.)
1950 *Ancient Near Eastern Texts relating to the Old Testament* (Princeton, NJ: Princeton University Press).
Rad, G. von
1965 *Old Testament Theology*, I (New York: Harper & Row).
1972 *Wisdom in Israel* (Nashville: Abingdon Press).
Ricoeur, P.
1976 *Interpretation Theory* (Fort Worth: Texas Christian University Press).

Roux, G.
1964 *Ancient Iraq* (London: Allen & Unwin).
Schmid, H.H.
1973 'Schöpfung, Gerechtigkeit und Heil', *ZTK* 70: 1-19.
Schwienhorst-Schönberger, L.
1990 *Das Bundesbuch (Ex.20,22–23,33): Studien zu seiner Entstehung und Theologie* (BZAW, 188; Berlin: W. de Gruyter).
Selms, A. van
1950 'The Goring Ox in Babylonian and Biblical Law', *ArOr* 18: 321-30.
Smith, E.W., and A. Murray-Dale
1920 *The Ila-Speaking Peoples of Northern Rhodesia* (London).
Speiser, E.A.
1954 'Authority and Law in Mesopotamia', *JAOSSup* 17: 8-15.
Strauss, C.
1992 'Models and Motives', in R. D'Andrade and C. Strauss (eds.), *Human Motives and Cultural Models* (Cambridge: Cambridge University Press): 1-20.
Sweet, R.F.G.
1990 'The Sage in Mesopotamian Palaces and Royal Courts', in J.G. Gammie and L.G. Perdue (eds.), *The Sage in Israel and the Ancient Near East* (Winona Lake, IN: Eisenbrauns): 99-107.
Toorn, K., van der
1985 *Sin and Sanction in Israel and Mesopotamia* (Studia Semitica Neerlandica; Assen: Van Gorcum).
Veenhof, K.
1972 *Aspects of Old Assyrian Trade and its Terminology* (Studia et documenta ad lura Orientis Antiqui Pertinentia, 10; Leiden: E.J. Brill).
1978 'Aššum Šamaš, "By Šamaš", and Similar Formulas', *JCS* 30: 186-88.
Watson, A.
1974 *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press).
1977 *Society and Legal Change* (Edinburgh: Scottish Academic Press).
1985 *The Evolution of Law* (Oxford: Basil Blackwell).
Weinfeld, M.
1972 *Deuteronomy and the Deuteronomic School* (Oxford: Oxford University Press).
Weingreen, J.
1976 *From Bible to Mishnah: The Continuity of Tradition* (Manchester: Manchester University Press).
Weippert, H.
1988 *Palästina in vorhellenistischer Zeit* (Handbuch der Archäologie, 2.1; Munich: Beck).
Westbrook, R.
1985 'Biblical and Cuneiform Law Codes', *RB* 92: 247-64.
1989 'Cuneiform Law Codes and the Origins of Legislation', *ZA* 79: 201-22.
1990 'Adultery in Ancient Near Eastern Law', *RB* 97.4: 542-80.

Whitelam, K.W.
1979 *The Just King: Monarchical Judicial Authority in Ancient Israel* (JSOTSup, 12; Sheffield: JSOT Press).
Whybray, R.N.
1990 'The Sage in the Israelite Royal Court', in J.G. Gammie and L. Perdue (eds.), *The Sage in Israel and the Ancient Near East* (Winona Lake, IN: Eisenbrauns): 133-39.
Wilson, J.A.
1954 'Authority and Law in Ancient Egypt', *JAOSSup* 17: 1-7.
Winton Thomas, D.
1958 *Documents from Old Testament Times* (London: Thomas Nelson).
Yaron, R.
1962 'Forms in the Laws of Eshunna', *RIDA* 9: 137-53.
1969 *The Laws of Eshnunna* (Jerusalem: Magnes Press).
Zimmerli, W.
1964 'The Place and Limit of the Wisdom in the Framework of the Old Testament Theology', *SJT* 17: 146-58.

INDEXES

INDEX OF REFERENCES

OLD TESTAMENT

OTHER ANCIENT REFERENCES

INDEX OF AUTHORS