

THE ANCIENT CODES AND MODERN SCIENCE

By G. W. BARTHOLOMEW*

The title of the world's earliest code of laws, which was conferred on the laws of Hammurabi soon after their discovery in 1901,¹ has long since passed to new holders. Recent work in this field of enquiry, however, has done far more than merely to deprive the laws of Hammurabi of their coveted title; it has necessitated a revision of many of the fundamental assumptions concerning the position of the so-called "codes" in the development of law in general, and our purpose here is to draw attention to some of the more recent developments in this field and to discuss their implications.

The first point which needs briefly to be noted concerns the date of the laws of Hammurabi. The date usually given by earlier authorities was 2,000 \pm 100 B.C. The better opinion today places the date at 1800 \pm 100 B.C.² In considering this reduction it is important to realise that there are few fixed points in early Mesopotamian chronology. Every date is an inference based upon such evidence as is available, including such synchronisms as can be established with other chronological systems. New discoveries in many parts of the world, therefore, affect, sometimes quite drastically, the received Mesopotamian chronology. We have no space here to discuss the problems of chronology: it must suffice to say that modern methods have resulted in the production of the new or short chronology under which Hammurabi's dates have been reduced by some 200 years.

We turn, therefore, to consider the historical context of the laws of Hammurabi. It must, of course, be remembered that any reconstruction of Mesopotamian history is necessarily as speculative as its chronology. The starting point for most archaeologists and ancient historians, however, has been the theory, elaborated by de Morgan in 1900,³ to the effect that the head of the Persian Gulf gradually retreated during the earlier phases of human history owing to the deposition of silt carried down by the Tigris-Euphrates river system. It was thus assumed that at the beginning of the historical period, the Persian Gulf extended very much

* B.Sc. (Econ.), LL.B. (Lond.), LL.M. (Tasmania). Lecturer in Law, University of Malaya.

¹ For English translations of the code see Driver and Miles, *The Babylonian Laws* (2 vols.), 1952-55; Edwards, *The World's Earliest Laws*; and Johns, *The Oldest Code of Laws in the World*.

² A list of suggested dates has been collected by Driver and Miles, *op. cit.*, vol. 2.

³ *Délegation en Perse, Mémoires* (1900), vol. 1, pp. 4-8.

further north than it does today—the post-glacial shore-line being thought to have been some 600 miles further north.

This geological assumption had considerable significance in the reconstruction of early Mesopotamian history because it implied that the whole of the earliest phases of human history—the palaeolithic and mesolithic—were not represented in southern Mesopotamia. As the plain was formed it was assumed that it was occupied by peoples who had already developed to a considerable extent elsewhere.

Recent work, however, has suggested that, in using this theory as their starting point, archaeologists have been building upon very uncertain foundations. Thus Lees and Falcon, who have recently challenged de Morgan's theory, claim that "the older archaeological theories are based on an unjustifiably simple assumption".⁴ Regarding the problem of the position of the head of the Persian Gulf they write:⁵

"The geological evidence conflicts with archaeological reconstructions and it seems certain that the real course of geographical history has been for more complex than the archaeologists have assumed. The most recent event has been, contrary to archaeological opinion, an advance of the head of the Persian Gulf and it is probable that advance has alternated with retreat throughout historic and pre-historic ages."

Their conclusion is that at the dawn of revealed history the head of the Gulf may even have been seaward of its present position.

This is not the place to discuss the geological evidence upon which this view rests. It must be sufficient to state that, on this view, it is subsidence and not sedimentation that has been the major factor operating in determining the geographical history of the region.

The implications of this theory, which obviously rests on a very much more satisfactory basis than did de Morgan's, are clearly very far reaching. It may ultimately cause a complete re-casting of the received construction of Mesopotamian history. It is not within our province to attempt any such re-casting, but it seems reasonably clear that any such re-casting as takes place will affect profoundly the historical context in which we have become accustomed to see the ancient "codes" and this recent work is, therefore, germane to any discussion of the ancient "codes".

One example, to which we shall have occasion to refer later, of the effect of the findings of Lees and Falcon must suffice for the present. Most people are familiar with the startling discoveries made by Sir Leonard Woolley whilst excavating at Ur in 1929. Digging deeper and deeper into the mounds he found that, to quote his own words:⁶

"Suddenly the character of the soil changed. Instead of the stratified pottery and rubbish we were in perfectly clean clay, uniform throughout, the texture of which showed that it has been laid there by water."

⁴ *Geographical Journal*, 118 (1932), 38.

⁵ *Ibid.*, p. 24.

⁶ *Ur of the Chaldees* (1950), p. 20.

Although his first impression was that they had reached the river silt of which the delta had been formed, he felt that they were still too high above sea level for that to be the explanation and so digging was recommenced. After digging for a further eight feet the clay stopped again abruptly and the stratified pottery and rubbish recommenced, but the pottery was of a totally different type below the clay from that found above. Sir Leonard Woolley concluded that the bed of clay marked, if it did not cause, a complete break in the continuity of history. He was prepared, however, to go even further and he concluded that:⁷

"Taking into consideration all the facts, there could be no doubt that the flood of which we had found the only possible evidence was the flood of Sumerian history and legend on which is based the story of Noah."

This conclusion, however, finds no favour with Lees and Falcon. They claim that the evidence is insufficient to justify such a generalisation, and they point out that floods in Mesopotamia are endemic rather than exceptional. On their view that subsidence rather than sedimentation has been the dominant factor in the geographical history of the area they conclude that:⁸

"Geologically, therefore, one can visualise a whole sequence of 'floods', not necessarily catastrophic in pace, but certainly catastrophic in eventual result."

The only possible conclusion is that the flood of which Sir Leonard Woolley had found the evidence is but one of many such floods which must have occurred and it is therefore quite impossible to identify it as the flood which gave rise to the Sumerian and Semitic legends.

Consideration of the reports of Sir Leonard Woolley and of the researches of Lees and Falcon give rise, however, to an interesting speculation. Sir Leonard Woolley justified the resumption of digging at Ur on the ground that they were still above sea level. If, however, as Lees and Falcon claim, subsidence has been the major factor determining the geographical history of the area, it seems quite possible that Sir Leonard Woolley was still above what had been the sea level when he reached the bottom of his second layer of artifacts. On reaching the bottom of this second layer he concluded that "evidently this was the bottom of Mesopotamia".⁹ One is perhaps justified, in the light of the work of Lees and Falcon, in suggesting that he had perhaps merely reached the ground floor below which, buried beneath another layer of mud, was a still earlier basement awaiting discovery.

To turn from speculation to fact we must now consider the archaeological evidence upon which the reconstruction of Mesopotamian history rests.¹⁰ In doing this, however, it is not possible to start from the

⁷ *Ibid.*, p. 22.

⁸ *Supra*, p. 55.

⁹ *Antiquaries Journal*, 10 (1930) 335.

¹⁰ For reconstructions of Mesopotamian history see Gordon Childe, *New Light on the Most Ancient East* (1958); and Hall, *The Ancient History of the Near East*, 11th ed. (1950).

beginning and to trace the history of the region chronologically. The further back in time one goes the more uncertain does the historical reconstruction become. It is preferable, therefore, to start from the known and to proceed backward in time towards the unknown. We may take as our starting point, therefore, the establishment of the Sargonid empire c. 2,300 B.C. This empire was formed when Sargon of Akkad established suzerainty over the Sumerian cities of the delta. Prior to the formation of the Sargonid empire, southern Mesopotamia consisted of a relatively large number of more or less autonomous city-states, those in the north—in Akkad—being Semitic in character whilst those in the south were Sumerian in character. This distinction between Semite and Sumerian,¹¹ which appears at the very outset of Mesopotamian history, poses one of the crucial problems in any reconstruction of the history of the region, namely—where did the Sumerians come from? The Semites present no particular problem. The traditional home of the Semites has long been assumed to be Arabia, from whence they are known to have emerged periodically in great migratory waves drawn by the lure of the “fertile crescent”.¹² The Sumerians, however, could not be so easily accounted for. De Morgan’s theory necessitated the view that even if they were the original inhabitants of the delta they could not have developed there since the delta was not formed until relatively late; hence they must have come from somewhere, and the problem was—Where?¹³

The answer to this question depends very largely upon whether it is assumed that there is historical continuity between the earliest and the later archaeological remains in the delta. The earliest identified culture in Sumer is that found at al 'Ubaid which appears gradually to have spread northwards to replace the earlier Halafian culture of northern Mesopotamia.¹⁴ Now ceramic evidence suggests that the al' Ubaid culture was introduced from southern Iran,¹⁵ and if it is therefore

¹¹ The distinction between Semite and Sumerian must not, however, be exaggerated; see Jacobsen in *J.Am.Or.Soc.*, 59 (1939) 485.

¹² See Hitti, *History of Syria* (1951).

¹³ The complexity of the “Sumerian problem” is well illustrated by the attempts of philologists to discover the parentage of the Sumerian language. The following possibilities have been suggested: (a) Japhethite influence; Bork in *Orient. Lit.*, 27 (1924) 169, and Tseretheli (1913-16) *J.R.A.S.*; (b) Turkish influence; Hommel (1928) *Festschrift . . .* Schmidt and Opitz, *Reallexikon der Vorgeschichte*; (c) Indo-European influence; Autren (1925) *Sumerian et Indo-European* and Hein (1920) 23 *OLZ* 250; (d) Bornu influence; Drexel (1919-20) 14-15 *Anthropos*; and Schmidt (1926) *Die Sprachfamilien und Sprachenkrise der Erde*; (e) Hamatic influence; Christian (1928) 36 *Weiner Zsch. f. die Kunde des Morgenlandes*, 197; (f) Polynesian influences; Jeremias (1929) *Handbuch der altorientalischen Geistesgeschichte*; (g) Bantu influence; Kluge (1921) *Versuch einer Beantwortung der Frage . . .* and Wanger (1928) *Festschrift . . .* Schmidt. It may be further noted in connection with the last suggestion, that some authorities see a relationship between Bantu and Sumerian art: see Clark, *The Prehistory of Southern Africa* (1959), p. 263. It should also be noted that Schaeffer has recently shown that Hurrian is an agglutinative language with similarities to both Turkish and Sumerian: see Albright, *Archaeology of Palestine* (1956), pp. 133-34.

¹⁴ The earliest culture yet identified in Northern Mesopotamia is that discovered by Braidwood at Jarmo; see *Antiquity*, 24 (1950) 190. The exact status of this culture seems still to be uncertain: see Gordon Childe, *op. cit.*, pp. 104-5.

¹⁵ See Frankfort, *The Birth of Civilisation in the Near East* (1951), p. 45, and Ghirshman, *Iran* (1954), p. 33.

assumed that the bearers of the al 'Ubaid culture were Sumerians the problem of the provenance of the Sumerians is solved. This is the view taken by Frankfort¹⁶ and in general supported by Gordon Childe,¹⁷ although the latter comments:

"If, then, by 'Sumerians' we mean the authors of the distinctive polity and religion of historical Sumer, we might safely follow Frankfort and call the Ubaid farmers 'Sumerians'. But, since nothing is yet known of the language they spoke, the epithet 'Proto-Sumerians' might be safer. . . . At the same time, since the Ubaid temples at Eridu are erected directly over, and encase, the foundations of the earliest shrines the religious tradition was continuous from the foundation of the settlement. So, despite changes in pottery, it might be legitimate to assume continuity of population too, and accordingly to extend the label, Proto-Sumerian, to the first colonists of Sumer."

On this view, however, it appears that undue stress cannot be laid on the distinction between the Sumerians and the earlier occupants of northern Mesopotamia, for, using a ceramic criterion, it appears that the earliest levels of the al 'Ubaid culture, at Eridu, do not display the characteristic features of the classic southern al 'Ubaid culture, but show rather resemblances to the northern Halafian and Samarra cultures. This similarity is explained by Gordon Childe as follows:¹⁸

"Admitted similarities to Halafian and Samarra patterns on their vases should merely indicate that all three groups are sprung from a common ancestral stem."

If all three groups are derived from a common ancestral stem, and if the al 'Ubaid culture is derived from southern Iran one would perhaps be justified in assuming that the bearers of the Hassunan and Halafian cultures had a similar provenance and developed their distinctive cultures in northern Mesopotamia.

If, however, a lack of continuity is assumed in Sumeria then all that can be said is that the earliest settlers in Sumer were probably of Iranian provenance, whilst some other provenance must be sought for the Sumerians, for the latter are associated with the culture which appears after the assumed breach in continuity. This was the view taken, as we mentioned earlier, by Sir Leonard Woolley, although he assumed that the earliest settlers in Sumer were in fact Semites who had moved southwards from the Semitic settlements in Akkad.¹⁹

More recently a totally new theory has been propounded by Kramer.²⁰ This theory is based upon an analysis of the Sumerian epic tales from which Kramer finds evidence upon which to postulate the existence of a Sumerian "Heroic Age" similar to that passed through by the Teutonic peoples and first described by Chadwick.²¹ Kramer thus

¹⁶ *Op. cit.*, p. 119.

¹⁷ *Ibid.*, pp. 113-4.

¹⁸ *Ibid.*, p. 115.

¹⁹ *Op. cit.*, p. 16.

²⁰ See *A.J.A.*, 52 (1948) 156.

²¹ *The Heroic Age* (1912).

postulates a *Volkwanderungskeit* for the Sumerians with Mesopotamia as its culmination;²²

"In short, as a result of determining the existence of a Sumerian Heroic Age, we seem justified in drawing the very significant conclusion that the Sumerians were not the first settlers in Mesopotamia. Indeed, the Sumerians must actually have been preceded by a civilised power of some magnitude, certainly one which was far more advanced culturally than the Sumerians who, at the time they superseded it, that is, in the centuries immediately preceding the Sumerian Heroic

Age, must still have been a primitive people."

Kramer's view is that the pre-Sumerian culture in Lower Mesopotamia was introduced from Iran by the folk who introduced the painted pottery cultures into Mesopotamia; that these were followed by the first of the Semitic waves of migration and that the first urban civilisation in Mesopotamia was the result of the fusion of these two elements, *i.e.*, the first urban civilisations in Mesopotamia were Irano-Semitic and not Sumerian. It was the expansion of this Irano-Semitic culture which brought it into contact with the nomadic Sumerians who erupted from either Transcaucasia or Transcaspia and descended into Mesopotamia.

The result of this discussion is merely to emphasise the fact that the early history of Mesopotamia remains uncertain. What is certain, however, is that at the beginning of revealed history we find cities in Lower Mesopotamia displaying features which may be described as Sumerian—whatever may be the foundations upon which these Sumerian characteristics rest—whilst in the north in Akkad, we find cities displaying more specifically Semitic features; although whether those features represent merely the development of the dominant Semitic strain of the original Irano-Semitic culture or are derived from a second wave of Semitic migration appears uncertain. The fact remains, however, that there is a pronounced growth of a Semitic polity in Akkad until at length, under Sargon of Akkad, they overwhelmed the Sumerian cultures of the south and established, possibly for the first time, a single dynasty in southern Mesopotamia with a more or less uniform culture which was predominantly Semitic but with a substantial Sumerian foundation.

Before considering the history of Mesopotamia in the post-Sargonid period, there is one point in relation to the "Sumerian problem" which needs to be stressed, namely, that it is misleading and even quite erroneous to ask, save in a purely colloquial sense, whence did the Sumerians come. The Sumerians can only be defined as a people who occupied a certain region in Mesopotamia at a certain period of time and who were characterised by certain cultural, religious, linguistic, social and political traits. So defined they constitute an historical reality. To the formation of this reality various ethnic, linguistic, religious and cultural elements contributed. The provenance of each of these elements may be discussed, but not the provenance of the Sumerians. As Sumerians, they did not

²² *Op. cit.*, p. 159.

come from anywhere; they developed in the land of Sumer. To say that the Sumerians came from Iran, Transcaucasia or Baluchistan means no more than to say that the English came from Denmark, that is to say, it implies no more than an ethnic continuity.²³

Most of the categories employed by archaeologists and ancient historians are, however, not ethnic categories.²⁴ In the pre-literate period, flint-knapping, ceramic and metallurgical techniques are the criteria employed together with religious criteria as evidenced by burial customs and the like. Similarity in such techniques and customs does not, however, necessarily imply ethnic continuity,²⁵ for without going to the lengths of authorities such as Elliott-Smith²⁶ it may be asserted that cultural diffusion has been known to take place. Likewise in the literate period, linguistic categories are employed but here again it cannot be said that linguistic relationship implies necessarily any ethnic relationship. If, however, we waive the problems of the provenance of the various elements which contributed to the formation of the Sumerian civilisation we may say with some confidence that the place of the formation of that civilisation was Lower Mesopotamia.

We turn, therefore, to consider the development of Mesopotamia in the post-Sargonid period. The picture is very confused, but fortunately the details need not detain us. If we consider the period between Sargon and Hammurabi, the general picture is one of a relatively large number of city-states contending for mastery over each other with fairly frequent incursions by peoples from beyond the delta.

The Sargonid empire itself fell under attacks by an Asianic people known as the Gutians. With the empire broken the Sumerian cities of the south appear to have recovered some of their strength and prosperity, but while they were doing so another of the great Semitic migrations was taking place: the Amorites arrived and founded cities such as Isin and Larsa which continued the tradition of mutual rivalry, until one of those cities, Babylon, established a general suzerainty over the whole region. Hammurabi, a member of the first dynasty of Babylon, was largely responsible for the final establishment of this general suzerainty.

We thus reach the time of Hammurabi himself and can see that the establishment of the Babylonian empire was the culmination of many centuries of historical development. It would be quite unreasonable to suppose that those centuries of highly cultured if rather sanguinous life had existed without a legal framework, and we may therefore suppose

²³ See Schmidt, *Handbuch der Methode der kulturhistorischer Ethnologie* (1937). For a discussion of the distinction between the evolutionary and historical cultural methods see Pallotino, *The Etruscans* (1955), p. 32.

²⁴ The use of differential anthropometric measurements and, more recently, of blood group evidence is, of course, evidence of a more specifically ethnic character.

²⁵ See Speiser, *Mesopotamian Origins*—"absolute homogeneity of language, culture and race is virtually impossible in a civilised community that is in touch with the outside world" (at p. 4).

²⁶ *In the Beginning* (1928), and *The Ancient Egyptians* (1923); see also Perry, *The Growth of Civilisation* (1924).

that Hammurabi was preceded by a lengthy legal tradition. Into the making of that tradition we can see that many elements entered. There are Semitic elements derived from at least two, and possibly three, distinct sources and representing different stages in the development of the Semitic legal tradition. There is the very early Iranian element which may also have been drawn from several different sources representing different stages in the development of that tradition, and there is finally the possibility of a third, and quite distinct, Sumerian tradition. All these went into the making of the Babylonian legal tradition as represented by the laws of Hammurabi. The question that immediately arises is whether it is possible to disentangle these various elements in the laws of Hammurabi.

The only real possibility of being able to do so is to discover earlier legal materials derived from periods before the introduction of the various strands. This possibility has recently been at least partially realised. In 1948 substantial fragments of an earlier collection of laws, promulgated by King Lipit-Ishtar of Isin, were recovered and published.²⁷ The fragments of this "code" had been recovered from Nippur as early as 1897 and had passed to the University of Pennsylvania. These were re-discovered in 1947 by Professor Steele. On translating the fragments he realised that there was a relationship between these fragments and four others, translations of which had been published as early as 1920.²⁸ Three of these other fragments were also in the possession of the University of Pennsylvania, the fourth being in the Louvre. Immediately all eight fragments were collated and a substantial portion of the "code" was reconstructed and it was at once realised that it bore a striking resemblance to the laws of Hammurabi. In the words of Professor Steele:²⁹

"From even a cursory examination it is quite clear that the Babylonian code is in large measure derived from the Sumerian."

Attempts to date the reign of Lipit-Ishtar are as difficult as those to date that of Hammurabi. Whatever his absolute dates may be it seems to be generally agreed that he reigned about 150 years before Hammurabi which would put the "code" at the very beginning of the second millennium B.C.

The laws of Lipit-Ishtar were significant in that they were written in Sumerian rather than in a Semitic language—as had been the laws of Hammurabi. It would be tempting to say, therefore, that the laws of Lipit-Ishtar represent the Sumerian legal tradition. This, however, would be an unwise assumption, for the Sumerian language survived in Mesopotamia rather as Latin survived in mediaeval Europe. The fact that the laws of Lipit-Ishtar are written in Sumerian is no more evidence that it represents a specifically Sumerian legal tradition than the fact that the

²⁷ See *A.J.A.*, 51 (1947) 158, and *ibid.*, 52 (1948) 426.

²⁸ See Langdon in *J.R.A.S.* (1920) 489.

²⁹ *Op. cit.*, p. 430.

Lex Burgundonium having been written in Latin implies that it represents the Roman law tradition. Lipit-Ishtar, it should be remembered, was himself an Amorite.

More recent work, however, has even cast doubts on the authenticity of this body of law. Miles and Driver, speaking of the "code", write as follows:³⁰

"Its drafting does not resemble that of the Old Akkadian Laws of Bilalama or that of the Sumerian laws and indeed that its text is almost verbally identical with that of Hammurabi's Laws, which are considerably later, is highly suspicious. The suggestion, therefore, that the tablet containing the law ascribed by the writer of the colophon to Lipit-Ishtar is but one of many attempts to attribute a spurious antiquity to a text or document deserves serious consideration; for this was a common literary device in the ancient east."

Whether authentic or not it soon lost its title of the world's earliest code of laws to another contender known as the laws of Eshnunna or the "code" of Bilalama. The tablets on which these laws are inscribed were discovered at Tell Harmal in 1947 and were originally classified as pre-Hammurabic on palaeographic grounds.³¹ One of the tablets, however, appears to carry the name of Bilalama—although this reading has been disputed—and since Bilalama is known to have reigned as king at Eshnunna before Hammurabi, the pre-Hammurabic date seems to be established, assuming, that is, that we can rely on the authenticity of the tablets. In terms of relative dating Bilalama may be placed approximately two centuries before Hammurabi.

The laws of Eshnunna, like those of Hammurabi, are written in a Semitic language, but in an earlier form than that employed by Hammurabi's scribe: a form known as Old Akkadian. Some sixty provisions of the "code" have been reconstructed, all of which bear a considerable resemblance to those of the laws of Hammurabi. In the opinion of Professor Driver,³² "all but a quarter of Bilalama's laws are reproduced more or less directly in the laws of Hammurabi."

We turn finally to consider briefly the current champion in the world's oldest law stakes. This is a "code" known as the laws of Ur-Nammu.³³ The tablets on which these laws were inscribed were discovered, like so many others, for all practical purposes, in the basement of the Pennsylvania University Museum, it having been deposited there some fifty years ago after having been excavated at Nippur. It was re-discovered by Professor Kramer in 1954 and although the tablets were in a very damaged condition he succeeded in reconstructing part of the prologue and some twenty provisions. The laws were written in Sumerian, as were those of Lipit-Ishtar. Since the prologue contains the name of Ur-Nammu identification is not really in question assuming, of course, that there are no grounds for doubting the authenticity of the tablets. Since Ur-Nammu

³⁰ *Op. cit.*, p. 307.

³¹ Goetze in *Sumer*, 4 (1948) 63.

³² *Op. cit.*, p. 9.

³³ *Orientalia* (N.S.), 23 (1953) 40.

is known as the first king of the third dynasty at Ur it can be deduced that he reigned about 320 years before Hammurabi, which, on one version of the short chronology, places his reign at 2044-2027 B.C.

Although the laws of Ur-Nammu are written in Sumerian and are from the great Sumerian city of Ur they nevertheless display similarities to the laws of Hammurabi. In the words of Professor Kramer:³⁴

"The interesting fact about them is that by and large they can be readily recognised as prototypes of similar though by no means identical laws in the Hammurabi code."

We have no space here to work through all the known remains of legal significance from the ancient world. It must suffice briefly to remark that in addition to the laws mentioned above there is also a body of Assyrian laws regarding which Professor Driver remarks:³⁵

"The Assyrian laws are a series of amendments of the existing laws which were either the Babylonian code itself or a body of laws of a closely related character."

Finally, of course, mention should be made of the Hebrew laws whose similarities with those of Hammurabi were recognised almost immediately the latter were published.³⁶

The fact that so many of the legal remains from Mesopotamia display such a remarkable family resemblance has been responsible for reconsideration of the place of those early "codes" in the development of Mesopotamian law. The laws of Hammurabi no longer stand out as a unique and isolated phenomenon; they take their place in a well established legal tradition. Considering the evidence as a whole, the conclusion, in the words of Professor Driver, is that:³⁷

"the conclusion that there was a common customary law throughout the fertile crescent seems irresistible; and this common law was to a considerable extent written law. . . . the chief interest of the Old Akkadian laws is that they, taken together with the Sumerian, Babylonian and Assyrian laws, prove the existence of a common Mesopotamian law in the third millennium B.C. for the principles underlying them all are in a general sense the same."

Speaking of the laws of Eshnunna, Miles and Gurney write, in much the same vein:³⁸

"There is no doubt that Southern Mesopotamia in the early second millennium B.C. was a cultural unity, despite its political divisions into several warring kingdoms, and it is not surprising to find in these laws

³⁴ *Ibid.*, p. 42.

³⁵ Driver and Miles, *The Assyrian Laws* (1935), p. 15.

³⁶ See Johns, *The Relations Between the Laws of Babylonia and the Laws of the Hebrew Peoples* (1917). The use of Babylonian law to explain Abraham's treatment of Sarah is a classic example of this relationship; see Woolley, *Abraham* (1936). Hebrew law also shows traces of Hurrian influence as shown by Gadd in his explanation of the story of Rachael's theft of her father's *terraphim*; *Rev. d'Assyr. et Arch. Orientale*, 23 (1926) 49. See also Smith, *The Origins and History of Hebrew Law* (1931). For the Hittite laws see Neufeld, *The Hittite Laws* (1951).

³⁷ *Op. cit.*, p. 9.

³⁸ *Arch. Orient.*, 17 (1949) 174 at p. 179.

evidence of the same customs and institutions as in Babylonia. . . . Evidently there was not only a common customary law but also a common tradition of written law derived from the Sumerians. . . . In fact we can say that with the exception of the laws about assault any one of the Eshnunna laws might be inserted in the Code of Hammurabi without causing any anomaly or repugnancy."

It is necessary, however, to guard against taking an over-simplified view of the relationship between these various laws. The relationship cannot be interpreted, as some writers seem to suggest, as being simply one of borrowing from earlier laws. To quote Professor Driver again:³⁹

"The ordered arrangement of Hammurabi's Laws as contrasted with the disorder which is so marked a feature of the Old Akkadian (as also of the Sumerian) Laws is a witness to his (Hammurabi's) originality, whilst the different order in which the subjects are treated as an argument against any direct borrowing. . . . the draftsman of the Laws of Hammurabi cannot have used them as they stand, but he may well have used the original collections from which they are selected; for every lawgiver uses existing materials, he does not invent a code of laws *de novo*, but amends existing law and introduces new conceptions to meet new conditions."

Accepting the conclusion that these "codes" reflect a law which was common to Mesopotamia, we must turn to consider the reasons for the appearance of "codes" at this phase of human history. The more recent work has rendered, we would submit, the traditional explanation quite untenable, although we will further submit that the traditional explanation was unacceptable from the point of view of general principle quite apart from the more recent discoveries.

The most commonly held explanation for the appearance of "codes" at the end of the third and the beginning of the second millenium B.C. is that expounded by Dr. Diamond.⁴⁰ On this view the appearance of codes merely reflects the attainment of a given degree of social and economic development. Once this legislative Rubicon is crossed there arises, apparently in the minds of those responsible, a quite irresistible impulse to codify law: "Legislation at or about this stage is inevitable".⁴¹ In Dr. Diamond's scheme the whole history of the world is neatly classified into four stages: Savagery; Barbarism; Early Civilisation; and the Modern Age. The so-called "codes" are likewise classified into Early, Central and Late categories, this classification applying alike to the empires of Mesopotamia, China and India as well as to the tribes of Africa and Polynesia. It is perhaps significant, however, that Ancient Egypt appears to be omitted from Dr. Diamond's formulations, for a theory which purports to explain the history of law in all parts of the world except Egypt loses some of its impressive universality.

There is, of course, a wonderful breadth and sweep about such universal formulations, but this hardly compensates for the fact that they do

³⁹ *Op. cit.*, p. 11.

⁴⁰ *Evolution of Law and Order* (1951).

⁴¹ *Ibid.*, p. 138.

not correspond with what is known of historical reality. Renier's comment upon Toynbee's *Study of History* — an attempted universal formulation which suffers from the same defect — applies equally well to Diamond's work:⁴²

"Sometimes we dream that we understand at last the mystery of life, that we have solved the riddle of human relationships. We awake and say: 'This is great, I must preserve it.' In the morning we remember the formulae. It is inane. Toynbee had a vision. He dreamt that he could formulate the human universe. His mistake is that he remained faithful to the hypnological revelation and worked it out in millions of words. He should have sighed '*mirum somniavi somnium*' and written a poem about his experience. Preferably in Greek."

Frankfort has likewise exposed the fallacies upon which attempts such as those of Toynbee and Diamond rest. Speaking of Toynbee's work, he comments:⁴³

"And so we find Toynbee, like Spengler, doing violence to the evidence and forcing each civilisation into a preconceived system of categories. In his case the system is not, like Spengler's, an imaginative construction; but it is derived from the crucial period of western history when the Roman Empire disintegrated. His generalisation of particular circumstances results not in historical errors but in irrelevancies."

Concepts such as those employed by Dr. Diamond are really relics of the nineteenth-century liberal concept of progressive evolution, which is simply an application to the field of human history of Coue's dictum: "*Tous les jours, a tous points de vue, je vais de mieux en mieux.*" As knowledge of pre-history, ancient history and anthropology has accumulated, however, the universal categories employed by the exponents of this method have had to become wider and wider until they finally became meaningless. What possible meaning can be attached to such concepts as Savagery, Barbarism and Civilisation?

In fact, of course, such concepts, as employed by Dr. Diamond, involve the fallacy of anachronism, for such concepts are interpreted by reference to contemporary western European values and standards: the greater the similarity to contemporary western European ideals the more civilised a people are considered to be. The fallacy involved here was exposed by Collingwood when he wrote that each period of history is for the historian⁴⁴

"a form of life having its own problems, to be judged by its success in solving those problems and no others. Nor is he assuming that the two different ways of life were attempts to do one and the same thing and asking whether the second did it better than the first. Bach was not trying to write like Beethoven and failing; Athens was a relatively unsuccessful attempt to produce Rome."

⁴² *History: Its Purpose and Method* (1950), p. 219. For similar criticisms of Toynbee's approach see Geyl, *Debates with Historians*.

⁴³ *Op. cit.*, pp. 26-7.

⁴⁴ *The Idea of History* (1946), p. 329.

The fallacy of anachronism as seen in Dr. Diamond's work is well illustrated by the use of the concept of a "code": The laws of Hammurabi were referred to at the time of their discovery, probably for want of a better description, as a code and discussion of those laws has become embroiled in questions of whether they really were codes (in the modern sense of the term) and whether they were really legislation (also in the modern sense of the term). Diamond insists that they are really legislation:⁴⁵

"Almost universally history and tradition relate that the Codes of which we read constituted legislation, and according to tradition in almost every nation law begins with the written legislation of a first great national law-giver."

Having thus established that tradition supports his thesis he explains in a footnote that there are certain exceptions such as the XII Tables and the ancient laws of Ireland and Wales. According to tradition those laws began as a collection of existing laws made by a commission with various amendments. Dr. Diamond hastens to add, however, that those traditions are of doubtful reliability!

Not only do Dr. Diamond's formulations depend upon explaining away such facts as do not fit into his categories but also ignoring known historical facts. Thus, speaking of the Kentish "code" of Aethelbert, Diamond merely remarks that "legislation at or about this stage is inevitable." Plucknett, however, has pointed out that:⁴⁶

"The very first Anglo-Saxon law we possess is largely concerned with making provision for a completely new class of society, namely, the clergy, which previous to this date had not existed."

It seems not unreasonable to suggest, therefore, that the conversion of Aethelbert was a factor leading to the production of the Kentish "code", and unless one is prepared to assume that the conversion of Aethelbert was inevitable it seems difficult to see how the appearance of his laws can be considered inevitable.

We may consider also the Burgundian "code" which Dr. Diamond assigns to his Central Codes. It is surely not difficult to see some of the factors which led to the production of this code. It has thus been pointed out that:⁴⁷

"When the Germans entered the Empire their unwritten customary law associated with the individual German conflicted with the written statutory law of the Romans where the law was the same for all people within a certain territory. . . . As the barbarian kingdoms became more firmly established it became evident that the laws for both Romans and barbarians must be defined more explicitly in order to be applied with any uniformity by the judges. Accordingly there developed two kinds of law within the barbarian kingdoms; the *leges romanae* for the Roman people and the *leges barbarorum* for the Germanic people."

⁴⁵ *Op. cit.*, p. 139.

⁴⁶ *Concise History of the Common Law* (5th ed., 1956), p. 317.

⁴⁷ *The Burgundian Code* (trans. Fischer, 1949), p. 4.

Again, therefore, it seems not unreasonable to suggest that the appearance of the various Germanic and Frankish codes is to be traced, at least partially, to the challenge presented to these peoples by the decaying institutions of Rome with which they had come into contact, and this was not a factor which arose inevitably in the economic and social development of these peoples.

The conclusion we would submit is that the appearance of written law among a people is to be explained by a consideration of the particular facts of that people's history and not by the application of *a priori* universal formulations. The only general proposition that could be put forward is that legislation often represents a response to some sort of challenge in the legal sphere—a proposition which really says nothing because the challenge may take, and probably does take, every conceivable form.

The question that arises at this stage is whether the known facts of Mesopotamian history give any clue as to the reason for the appearance in Mesopotamia at the end of the third millenium of unwritten laws. It is submitted that recent work has suggested a possible explanation.

The first point to bear in mind is that when the light of history first begins to shine on Mesopotamia we find a number of autonomous city-states each consisting of two interlocking institutions; a political institution, the city, and an economic-religious institution, the temple community. The latter, which comprised the economic structure of the state, was organised in a manner vaguely reminiscent of a European feudal manor with the 'god' taking the place of the manorial lord.⁴⁸

The political organisation, at least in the early period, can only be described as democratic. To quote Frankfort:⁴⁹

"Political authority seems originally to have rested with the citizens; sovereign power under the city god lay in an assembly—presumably consisting of all free males—guided by a group of elders who seem, moreover, to have been in charge of current affairs. Since the terms for 'assembly' and 'elders' occur already in the Protoliterate tablets, we can surmise that these peculiar political institutions existed as long as the cities themselves."

The history of the pre-Sargonid period, however, seems to have been one of a decline of this early freedom. Originally, in times of emergency, a "dictator"—after the Roman style—was appointed. This official, usually known as an *ensi*, was supposed to lay down his office once the emergency had passed, but the office gradually became almost permanent in most cities—presumably because the mutual rivalry of the cities made a state of emergency more or less continuous. To describe the position of the *ensi* we may again quote Frankfort:⁵⁰

"Whether *lugal* or *ensi*, the city ruler in Mesopotamia did not derive his position from any innate superiority or right of birth. He acted

⁴⁸ See on the structure of Mesopotamian cities; Frankfort, *The Birth of Civilisation in the Near East* (1951).

⁴⁹ *Ibid.*, p. 68. See also Evans in *J.Am.Or.Soc.*, 78 (1958) 1, and Jacobsen in *J.N.E.S.*, 2 (1943) 159.

⁵⁰ *Op. cit.*, p. 70.

either on behalf of the assembly, or as steward of the real sovereign, the city god. In theology, personal rule was sanctioned by a doctrine of divine election which remained the foundation of kingship down to the end of the Assyrian empire. Divine approval could be withdrawn at any time, and the formation of a dynasty, the succession of the son to the throne of the father, although known in Early Dynastic times, had no basis in the theory of kingship but was interpreted in each case as a sign of favour bestowed by the gods."

We gradually see, therefore, in the pre-Sargonid period the emergence of an at least *de facto* secular element in the government of the Mesopotamian city-states, i.e., the more or less permanent institution of the *ensi*. The growth of this concept seems to have been assisted by the mere fact of the mutual rivalries of the cities. The establishment of a temporary sovereignty by one city over another as a result of conquest would naturally result in the ruler of the conquering city becoming the ruler also of the conquered city. But as a conqueror he would not have, and would not be able to claim that special relationship to the city god which had been attributed to the *ensi* whom he had displaced. This distinction was recognised by the fact that a ruler who had acquired his position by force or usurpation tended to assume the secular title of *lugal* (usually translated as "king") rather than the title of *ensi*.

It is in this period that we find the first evidence of what may be referred to as "legislation". This, as Jacobsen has pointed out,⁵¹

"falls within the province of 'special law' in the sense of commands issued by the state, enforced by its authority, and aimed at some specific and immediate situation. Here belong orders instituting the building or re-building of specific temples at specific times and places, repairs and digging of canals, waging of wars, etc. For such achievements the ruler gets—or takes—sole credit in the inscriptions. The main body of the 'general law' which regulated Sumero-Akkadian society was presumably unwritten common law. Here, too, however, the ruler may intervene, as is evidenced by Urukagina's sweeping changes in the existing legal order. . . . The ruler's power's however, though autocratic, were not absolute. The authority for new special law as well as for new general law was the will of the god of the state as communicated to the ruler through dreams and omens."

The reference in the above quotation to the reforms of Urukagina is a reference to what is probably the most outstanding piece of "legislation" in the pre-Sargonid period. Urukagina was the *ensi* of Lagash and he appears to have attempted to reform the administration of the city and to restore the old theocratic form of government. This attempt, whether successful or not, was short-lived, for Urukagina was attacked and defeated by Lugalzagesi, the ruler of Umma, who is notable not merely for this achievement but also for the fact that he appears to have been the first Mesopotamian ruler to adopt the title "King of the Land", the first explicit recognition of the fact that sovereignty could be exercised over an area other than a city.

⁵¹ *Op. cit.*, p. 160, n. 3.

Lugalzaggesi was himself, however, defeated by Sargon of Akkad. We thus reach the Sargonid empire having established that some form of legislative tradition actually preceded the formation of the empire. Although it appears that no specific legislation can be directly attributed to Sargon he was responsible for the introduction of a development which was of momentous significance. This was the adoption by Sargon of the royal name in the formula for oaths alongside that of the god. If an agreement thus sworn was broken the king was therefore involved. As Frankfort has put it:⁵²

"The new oath formula put the king in the position of the patron of all who swore by his name; in practice he constituted a court of appeal for the whole land, independent of the cities—a step of the greatest importance in the development of Mesopotamian law and society."

It was not so long after these developments that we find the first of the so-called ancient "codes" appearing, and we may therefore ask whether the factors outlined above give any clue as to the reasons for the appearance of the codes. It is submitted that they do.

The developments in the pre-Sargonid and immediately post-Sargonid period show what may be described as the gradual *de facto* secularisation of government and administration together with constant attempts to establish some sort of political unity in the region. This latter was the *leitmotif* of early Mesopotamian history. Speaking of the gradual development of autocracy within the city-states Jacobsen writes:⁵³

"The momentum of the autocratic idea was still far from spent with the realisation of this idea within small separate areas. It drove Mesopotamia forward relentlessly towards the more distant aim; centralisation of power within one large area."

The fact of secularisation of rule coupled with the attempt to establish a single uniform state within Mesopotamia would surely be potent causative factors in the production of the more ambitious legislation of the "codes". In Mesopotamia codes seem to appear as the concomitant of conquest, and it may be pointed out that most of the rulers to whom legislation is ascribed are also known as great conquerors. It does not, of course, follow that conquest is the only factor from which legislation in Mesopotamia may be expected to arise, the example of the legislation of Urukagina is sufficient to remind us of that, but it seems reasonable to conclude that conquest was one of the more potent factors underlying the appearance of the codes in Mesopotamia.

It is pertinent to point out the significant difference between the history of Egypt and Mesopotamia in this respect. We have already drawn attention to the fact that Egypt is omitted from Diamond's reconstruction of legal history, and it is significant that although Egypt presumably passed through similar phases of economic and social development to those of Mesopotamia there is no suggestion, despite the tremendous amount known about Egyptian development, of the existence of any

⁵² *Op. cit.*, p. 75.

⁵³ *Supra*.

"codes". A comparison of the political history of the two regions, however, perhaps gives some indication of why there should be this discrepancy. In the first place the nature of kingship was very different in Egypt from that found in Mesopotamia: In the words of Frankfort:⁵⁴

"Behind Pharaoh we can discern a primitive conception of a chieftain endowed with power over natural forces. . . . But in Mesopotamia monarchical rule had no such foundation and kingship remained to some extent problematical. It arose under the pressure of circumstances in a community which had originally not acknowledged authority vested in a single individual."

In the second place, and perhaps even more significant, the geography and therefore the history of the Nile valley was very different from that of the Mesopotamian plain. Mesopotamia does not possess the geographical cohesion that Egypt does, and in Mesopotamia "there are no boundaries from which power may recoil to concentrate at the centre." In Egypt a "unitary" system was established almost from the very beginning and the legendary unification under Menes, despite the varying fortunes of the Egyptian history, was never really disrupted. If, therefore, we are correct in ascribing the legislation and "codes" of Mesopotamia to the existence of inter-city rivalry and conquest, as part of the long drawn out struggle to achieve some sort of political unity in the region, we need not be surprised to discover that Egypt did not show the same legislative phenomenon; for Egypt never experienced the same sort of challenge.

We would therefore submit that a coherent account of ancient legal history is more likely to emerge from a study of the detailed facts of that history rather than from the application of *a priori* generalisations which rest on nothing more substantial than the imagination of those who formulate them. Modern science is making available techniques which when applied in this field enable us to discover the facts upon which a reconstruction of legal history can be based, and that being so it is most important that those techniques should be used for this purpose and the facts thus made available employed in the reconstruction of ancient legal history from which, even today, we may still learn much that is of value.

⁵⁴ *Kingship and the Gods* (1948), p. 215. The literature on the subject of divine rule in early culture is very extensive: see also Labat, *Le Caractere Religieux de la Royaute Assyro-Babylonienne* (1939); Engell, *Studies in Divine Kingship in the Ancient Near East* (1945), and Gadd, *Ideas of Divine Rule in the Ancient East* (1945).