3 Religion and Ethics

From today's perspective, it is not always easy to understand why the discovery of objects from the ancient Near East had such a profound impact on late nineteenth and early twentieth century religious discourse. In a general sense, it should be noted that Christianity remained a central force in that period, shaping European cultures, societies and politics to a much greater extent than it does today. Then, the discovery of a past not mentioned in the Bible and difficult to reconcile with its narratives appeared much more problematic. However, important transformations and trends, often described as secularisation or de-Christianisation, were already active at the time, alongside the emergence of new religious practices and movements. These developments provoked endless debates regarding the significance of religion in general – for society, culture, law, politics, science, etc., and of Christianity in particular.[261]

Moreover, there were additional reasons for the specific importance of religion in the field of Ancient Near Eastern Studies.[262] One of these was the personal and disciplinary background of many scholars, a high proportion of whom were trained theologians or were employed by theological institutions. But more important was the subject itself: as Christianity had its origins in the ancient Near East, the study of religion and religious practices in the context of the biblical world proved delicate. Due to the overlap with central narratives of the Hebrew Bible, German Jewish scholars were actively involved in these debates. They often found themselves caught between the conflicting positions of the Christian apologists and the secularists and were required to defend themselves against these stances as well as the anti-Jewish tropes and narratives prevalent on both sides.[263] This became evident when the discovery of the Code of Hammurapi immediately raised the question of its relationship to biblical law. There were two issues at stake: Firstly, the historical relationship between Hammurapi and Moses needed to be defined; behind this problem stood the question of to what extent Babylonian law was a source for biblical law. The second issue hinged on whether biblical law was ethically superior to other legal traditions. This latter

261 For an overview with a focus on the German context (among many others), see Nipperdey 2013 [1990], 428–530; Graf 2004, 133–78.

262 On the importance of religion in the field of German oriental studies, see in general Marchand 2009. With a focus on Britain, see Holloway 2001; Malley 2012.

263 On German-Jewish scholars in the fields of Ancient Near Eastern Studies, see Renger 2001. The topic of German-Jewish Orientalism has been well researched over the last two decades. See among others Efron 2004; Peleg 2005; Aschheim 2010; Heschel 2018; Wittler 2019.

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issue was closely related to the broader question of the relationship between positive law and morality; a topic that continues to be extensively debated in legal theory and the philosophy of law to this day. The entire issue resurfaced in the philosophical debate between Kant's concept of morality and Hegel's concept of *Sittlichkeit.* Notably, both sides of the debate – those seeking to establish a completely secular form of law and morality, and those insisting on the religious foundation of both – were interested in ancient Babylonian law and its connection to the Bible.

3.1 Hammurapi and Moses

Before the discovery of ancient Mesopotamian legal sources, biblical law was thought to be the oldest written law in human history. For this reason alone, the Code of Hammurapi provoked comparisons with biblical law, believed by the faithful to have been handed directly to Moses from God.[264] The question of the relationship between Hammurapi and Moses becomes even more inescapable when considering the significant parallels between the two sources.[265] The most notable example is the law of retaliation, also known as the *lex talionis*, which is encapsulated in the biblical phrase "an eye for an eye and a tooth for a tooth" (Ex 21:23–27). This idea of reciprocal justice is also the fundamental principle of the penal regulations in the Code of Hammurapi (see LH §§1–5), but, as we know from earlier legal codes such as the Code of Ur-Nammu (LU §1), it has much older origins.[266]

Upon its discovery, there was no doubt that the Code of Hammurapi was much older than the Mosaic Law; even the most orthodox theologians did not question this fact. The commonly accepted chronology (no longer considered accurate today) placed the era of Hammurapi in the early third millennium BC. In contrast, the Exodus, the mass migration led by Moses, was usually dated to the reign of the Egyptian pharaoh Ramses II in the thirteenth century BC. For this reason, the similarities between the two law collections were potentially grist for the mills of certain fervent Orientalists who tried to decentralise Christianity (and Judaism) in history in favour of the pre-biblical ancient Near East.[267] In this respect, there was certainly a triumphant edge to the subtitling of Winckler's edition of the Code

264 This chapter is based on an article that has already been published. See Wiedemann 2024a.
265 For an overview of the parallels, see the tables by Wright 2009, 7–11.
266 On the *lex talionis* in Babylonian law, see (among others) Harke 2007; on the *lex talionis* in the Bible, see Jacobs 2014, 68–189; additionally Otto 1996; Westbrook 2009b [1986].
267 See in general Marchand 2009, 212–51.

of Hammurapi as "the world's oldest statute book," as before 1902, this epithet had been reserved for Mosaic law. Delitzsch's rhetorical question as to whether the "Israelite laws" had been influenced by, or even copied from, the much older Babylonian laws was heading in the same direction.[268] With regard to both scholars, it is reasonable to suspect that their scorn was motivated by antisemitism and anti-clericalism, sentiments which often went hand in hand during the Wilhelmine era. However, the frontlines of this debate were more complex and did not follow specific ideological and political lines of thinking.

One might expect those Christian and Jewish scholars who insisted on the uniqueness and authenticity of the Hebrew Bible and the historical truth of its narratives to have taken a hostile view of assertions concerning parallels between Babylonian law and biblical law, given the potential of such claims to detract from the glory of the latter. Quite the opposite was true, however. At least initially, conservative theologians were among those who particularly welcomed the discovery of the Code of Hammurapi. To understand this positive reaction, it is important to take into account the relationship that existed between Assyriology and the Bible *before* the eruption of the Babel-Bible controversy. Until the late nineteenth century theologians usually welcomed the sensational discovery of ancient Near Eastern monuments and texts because they saw these as corroborating the authenticity and historical truth of the biblical narratives. The search for external proofs of the Bible had a long history and went hand in hand with the rise of modern Biblical Studies in the middle of the eighteenth century. The most famous example of such proof-seeking is the Danish expedition to Arabia between 1761 and 1767, of which the German mathematician and cartographer Carsten Niebuhr (1733–1815) was the only survivor. The project was initiated and planned by the Göttingen biblical scholar Johann David Michaelis (1717–1891) who wanted to use empirical knowledge of the languages, geography, and ethnography of the (modern) Middle East to illuminate the biblical past.[269] The further exploration of the Middle East over the course of the nineteenth century went hand in hand with its imperial penetration by European powers and led to an explosion of knowledge regarding the ancient Near East.

For Biblical Studies, sources dating from the mid-second to the mid-first millennium BC were of special interest, because this was the period illuminated by the so-called historical books of the Bible. It was during this time that the stories of the biblical Patriarchs, the Exodus of the Israelites from Egypt, the so-called

268 Delitzsch 1903, 25.

269 On Niebuhr and his expedition, see Rasmussen 1986; Wiesehöfer and Conermann 2002. On Michaelis and the formation of modern German Biblical Studies, see Rauchstein 2017; for more general perspectives see Sheehan 2005, 182–217; Carhart 2007, 27–68; Legaspi 2010, 79–155.

Landnahme (the conquest and settlement in Canaan), the Kingdom of David and Salomon, the division of the United Monarchy into Israel and Judah, attacks by the Assyrians and Babylonians, and the Babylonian Exile occurred. In the early twentieth century, scholars were particularly fascinated by the geographical and political position of ancient Israel and Judah, as they lay between the major powers of the ancient Near East: Egypt, Assyria, Babylonia, and Persia. They sought to analyse this constellation using geopolitical concepts and the narratives established by contemporary imperialist geographers and historians. The geohistorical narratives they developed in turn significantly reshaped imperial perceptions of the Middle East. One notable example is the concept of the 'Fertile Crescent,' a term originally coined by the American Egyptologist James Henry Breasted (1865–1935).[270]

As the archaeological exploration of Egypt preceded that of other Middle Eastern countries, the hopes of biblical scholars had initially rested on excavations centring on the Nile. With the story of Joseph and his brothers, as well as that of the Exodus, Egypt seemed to have been the historical setting of some of the most important biblical narratives. Even in the seventeenth and eighteenth centuries, European scholars speculated on the connection of Joseph and Moses to the history of Egypt and looked for external evidence of events like the Exodus. Biblical Egypt remained a central topic of scholarship in the nineteenth century.[271] However, neither the modern excavations there nor ancient Egyptian texts seemed to testify to the veracity of the biblical narratives.[272] Disappointed by Egypt, European scholars hoped that Mesopotamian remains would prove to be more useful for Biblical Studies. Especially the later parts of the Old Testament, the prophets and writings, include a lot of concrete and detailed references to Assyrian, Babylonian and Persian places, names, and historical events dating to the middle of the first millennium BC, when the kingdoms of Israel and Judah were influenced, or outright controlled, by Eastern Empires. In 722 BC, Israel became part of the Assyrian Empire and ceased to exist as a political entity; Judah suffered the same fate in 587 BC when it was conquered by the Neo-Babylonian empire.

270 Breasted 1916, 100–101. On the background of this metaphor, see Scheffler 2003; on the influence of geopolitics to Ancient Near Eastern Studies, see with further references Wiedemann 2020, 256–84.

271 See among others Assmann 1998.

272 The most important object in this respect was the Merneptah Stele, also known as the Israel Stele, excavated in 1896 by the British archaeologist Willliam Matthew Flinders Petrie (1853–1942) in Thebes. The text on the stele – an account of the victories of pharaoh Merneptah (ca. 1213–1203 BC) over his enemies – represents the oldest mention of Israel as a collective entity but remained the only textual reference from ancient Egypt at all. See among others Hasel 2008; Nestor 2015.

With the following Babylonian Exile the entire setting of the biblical narrative shifted from Palestine to Babylonia. For this reason, the spectacular excavations led by Paul-Émile Botta and Austin Henry Layard that took place at various Assyrian sites in the 1840s were closely followed by biblical scholars, who generally became convinced that these confirmed the biblical narratives. What is more, discoveries such as the famous Lachish reliefs from the South-West Palace of Sennacherib at Nineveh, which depicts the Assyrian siege of the Judean city in 701 BC, seemed to shed light on incidents that the Bible only briefly mentioned (2 Kings 18:13–15).[273] As a result, these discoveries have been viewed as extra-biblical sources for interpreting the text.[274] In a certain sense, though, ancient Near Eastern archaeology practiced during the nineteenth and early twentieth centuries was in fact always 'biblical archaeology,' although most of the scholars involved did not pursue any direct apologetic goals.[275]

For conservative Christians of the late nineteenth century however, uncovering material evidence to corroborate the biblical text became particularly urgent, as it could be used as a weapon against their major adversary in the field of Biblical Studies: philological or 'higher' criticism.[276] As has rightly been emphasised, biblical criticism is one of the modern sciences that undermined modern Europeans' sense of certainty, thus contributing heavily to the crisis of historicism in the field of theology at the turn of the twentieth century.[277] The application of the same methodological tools to the Bible as to any other textual source appeared to be an inevitable path to its disenchantment. Thus, when Nietzsche argued in his polemic against historicism, that Christianity, "under the influence of historical treatment" became "denaturalised" and resolved into "pure knowledge about Christianity," something he believed would ultimately lead to its destruction (a process he welcomed), he was undoubtedly primarily referring to biblical criticism.[278] Already in the eighteenth century, scholars had begun to distinguish the Old Testament into different textual layers and to develop a chronological schema that differs from the traditional order of the books. In

273 The reliefs were discovered by Layard during his excavations between 1845–1847. He ordered them to be completely removed, after which they were transported to England, where they remain on display in the British Museum.

274 See Ussishkin 1980.

275 See Zink MacHaffie 1981. On the history of biblical archaeology, see (among others) Thompson 1999; Davis 2004; Cline 2009.

276 On the history of biblical criticism in the nineteenth century, see (among others) Thompson 1970; Frei 1974; Kraus 1982; Rogerson 1984; Reventlow 2001; Sæbø 2013.

277 Otto 2010, 1. On the reactions to historicism in contemporary German theology, see (among others) Nowak 1987; Graf 1997.

278 Nietzsche 1991, 96 (original German Nietzsche 1988, 297).

the late nineteenth century, philological criticism was most prominently associated with Julius Wellhausen (1844–1918) whose textual criticism of the Old Testament became the starting point of a new narrative that revolutionised the historiography of ancient Israel. Following this, central biblical events like the Exodus or the conquest of Canaan, were called into question and began to appear more mythical than historical.[279] However, it was the traditional view of biblical law that was most challenged by Wellhausen's new arrangement of the text. Instead of being revealed to Moses on Mount Sinai, biblical law now appeared to be a late product of textual composition, written during the Babylonian exile or even later.[280]

The rejection of Wellhausen and his supposed attack on the foundation of Christian faith was particularly strong among conservative Protestants in Great Britain. Significantly, his most prominent scholarly opponent was an Anglican cleric who was at the same time one of the founding fathers of British Assyriology. Archibald Henry Sayce (1845–1933) wrote several monographs (some of them translated into German) on the contemporary discoveries in the Middle East that were aimed at refuting biblical criticism in general. According to Sayce, the "verdict of monuments" came down entirely on the side of the biblical narratives.[281] The most influential German scholar with a similar agenda was Fritz Hommel. Due to his Pan-Babylonian theory, Hommel's exegesis of the Old Testament was considerably less literal than that of other conservative scholars; nevertheless, like Sayce, he completely rejected decontextualised philological criticism.[282]

Against this backdrop, the initially positive reactions of conservative Christians to the discovery of the Code of Hammurapi are not surprising. For instance, Eduard König (1846–1936), an Old Testament scholar and a fierce opponent of Wellhausen and Delitzsch, argued that the Hammurapi stele demonstrated not only that complex legal systems existed in the early periods of Near Eastern his-

279 Wellhausen 1878, 1894. There is a huge body of literature on Wellhausen and his school. Most recently with further references Kurtz 2018, 19–166; on his biography Smend 1989, 99–113; Bauer 2005.

280 Wellhausen 1885. In many respects, Wellhausen built on the work of Wilhelm Martin Leberecht de Wette (1780–1849) who had already shown that the Book of Deuteronomy could only have been written much later than other biblical books. For short information, see (among others) Smend 1989, 38–52; Huwyler 2013. For more on the highly negative impact this new perspective had on the Protestant view of Jews and Judaism, see Pasto 2003.

281 See Sayce 1884a; Sayce 1884b; Sayce 1894. See on these writings Zink MacHaffie 1981. On Sayce and his intellectual context, see Belton 2007.

282 His attack was published in German and English at the same time. See Hommel 1897a; Hommel 1897b.

tory but also that the ancient Hebrews were not primitive nomads before settling in Canaan. Instead, he believed that they had long before attained a high level of cultural achievement.[283] In this respect, there was no difference between König's views and those of Jewish Orthodox scholars like Seligmann Meyer (1853–1925), another active participant in the Babel-Bible-controversy, who expressed the hope that the Babylonian code would contribute to a better understanding of what he termed "Jewish antiquity" and confirm the historical truth of the Hebrew Bible.[284] Hommel went even further: whereas Wellhausen and the liberal biblical scholars placed 'the Law after the Prophets' Hommel used the Hammurapi Code as evidence for a longstanding tradition of written law in the ancient Near East.[285] Early on in his polemical attack on Wellhausen, he adopted the identification of Hammurapi as the biblical King Amraphel, a theory initiated by French scholars that was pivotal in establishing the strong connection Hommel drew between Babylonia and the Bible.[286] Once the Code was found, Hommel became convinced that Abraham was responsible for bringing elements of Babylonian law to the Holy Land – an argument which fit in with his Pan-Babylonian convictions very well as adherents of this school of thought contended that all cultural achievements stemmed from ancient Mesopotamia.

The strategy of conservative scholars to use objects and texts from the ancient Near East as a weapon against the supposed dangers of liberal biblical criticism was subject to pitfalls, however. It could only work if these objects were accepted as sufficient evidence for the historicity of biblical narratives, and certain of the new finds were proving ambivalent in this respect. Prior to the excavation of the Hammurapi stele, the most significant case was the discovery of clay tablets containing fragments of the Epic of Gilgamesh by the British Assyriologist George Smith (1840–1876) in 1872. The eleventh tablet contains a story about a big flood that is very similar to the account of the Flood in the Book of Genesis (Gen 6–9). The unmistakable parallels between these two accounts allowed for the possibility of regarding the Bible as merely reproducing an older Mesopotamian myth.[287] While conservative Christians and advocates of biblical archaeology saw the biblical version of the Flood story as being verified by an external source, Delitzsch, in his lectures on Babel and the Bible, supported the primacy of the Mesopotamian narrative. For most scholars the parallels he drew upon were any-

283 König 1903.

284 Meyer 1903, 8.

285 Hommel 1904, 238.

286 See the references to "KHammurapi" in the index of Hommel 1897b. On this identification see above.

287 See Smith 1876. On the contemporary debate, see Cregan-Reid 2006; McGeough 2015, 392–406.

thing but new, but the sharpness of his questions and his polemical tone was unknown before. "Is it any wonder," Delitzsch asked with reference to the parallels between the Mesopotamian and biblical Flood accounts, "that a whole series of biblical stories now suddenly emerge from the night of the Babylonian treasure hills in a *purer* and *more original* form?"[288] By insinuating that parts of the Old Testament were based on older Mesopotamian sources he undermined the Bible's theological and philological value. Neither a divine revelation nor a primary source, the Bible was now a mere copy of something 'purer' and 'more original'.

For conservative Christians and Jews however, placing the Bible within the context of the ancient Near East, as Delitzsch did, appeared to confirm Nietzsche's prediction that a consistent "historical treatment" of religion would ultimately lead to its destruction.[289] The antiquity of the Code of Hammurapi thus posed a similar problem in this respect, as it could be perceived as questioning the originality of biblical law. As the theologian Eduard König stated, the origin and authenticity of the laws outlined in the Pentateuch were at stake.[290] Thwarting the argument that Moses, was a mere copyist, adorned with laurels that rightly belonged to Babylonia, was of great importance to the Christian and Jewish defenders of the Bible, who needed to demonstrate that biblical law did not depend on Babylonian law. If the parallels could not be ignored, they needed to be explained by other means than via direct borrowing. One such possibility was to deny the existence of historical connections between the two codes and to explain any similarities as being due to ideas universal to the history of law. In this vein, the German-Jewish legal historian Georg Cohn (1845–1918), president of the University of Zürich, referred to the theory of general "elementary ideas" (*Elementargedanken*), developed by the German ethnologist Adolf Bastian (1826–1905).[291] However, there were few other scholars who followed this line of argument, as reference to universals did not seem to convincingly explain certain of the detailed similarities recognised between Babylonian and biblical law. Furthermore, even among German anthropologists and ethnologists, Bastian's ideas became increasingly unpopular after the turn of the century and were ultimately replaced by the paradigm of cultural diffusion, which sought to explain cultural similarities through direct borrowing.[292] The version of diffusionism prevalent in Ancient Near Eastern Studies had its own name, the aforementioned 'Pan-Babylonism'.

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288 Delitzsch 1902, 29 (emphasises mine).

289 Nietzsche 1991, 96–97.

290 König 1903, 172.

291 Cohn 1903, 39. On the concept of *Elementargedanken*, see Bastian 2007 [1895].

292 On the rise of cultural diffusionism, see (among others) Smith 1991; Müller 1993.

A much more convincing means of explaining the parallels between the Code of Hammurapi and biblical law was an elegant solution put forward by the Austrian-Jewish Orientalist David Heinrich Müller (1846–1912). In his 1904 investigation *Die Gesetze Hammurabis und ihr Verhältnis zur mosaischen Gesetzgebung* ("The Laws of Hammurapi and their Relation to Mosaic Law"), via analogy with the methods of comparative linguistics, Müller developed a new approach for the systematic comparison of different law codes:

> Wie in der vergleichenden Sprachforschung der grammatische Bau hauptsächlich für die Verwandtschaft zweier Sprachen entscheidend ist, so müssen bei der vergleichenden Rechtsforschung nicht Einzelbestimmungen, sondern ganze Komplexe von Gesetzen in Betracht gezogen werden.[293]
>
> [As in comparative linguistics, grammatical structure is the main factor in determining the relationship between two languages, therefore in comparative legal research it is not individual provisions that need to be considered, but entire complexes of laws.]

During his studies, Müller had become more and more convinced that the Laws of the Twelve Tables, the legislation that was the foundation of Roman law, was also heavily influenced by the "old-Semitic" tradition of written law.[294] This argument was presumably a general revaluation of the ancient Near East, but of course did little to clarify the question of the relationship between the two Near Eastern codes involved in the debate. To facilitate systematic comparisons, Müller created tables juxtaposing the provisions contained in the laws of Hammurapi, in Mosaic law and in the Twelve Tables. At first glance, his findings were contradictory: he emphasised the close connection and the strong parallels between law collections while at the same time arguing that the Code of Hammurapi could not have been the source of Mosaic law because the formulation and arrangement of the biblical laws seemed more "original".[295] For these reasons, Müller concluded that there were no direct historical links between the two codes, but that both stemmed from a common source – an "original law" *(Urgesetz)* laid down at an earlier time.[296] Some years later, this idea was taken up by the Austrian legal historian Paul Koschaker, although he did not assume the existence of a single original law but considered it more likely that the Code of Hammurapi was a compilation of many different ancient sources.[297] Moreover, unlike Müller, Koschaker went to

293 Müller 1903, 6.
294 Müller 1903, 7.
295 Müller 1903, 241.
296 Müller 1903, 7.
297 See Koschaker 1917, 3–5.

great lengths to avoid discussing the relationship between biblical and Babylonian law. In fact, the crux of Müller's argument was his claim that the rules of the *Urgesetz* were better preserved in the Bible than in the Babylonian tradition: "The legislation of Moses took the whole system of the *Urgesetz* and faithfully preserved the wording, arrangement and order where it had no reason to make changes."[298] Within this framework, it became possible to concede that the Code of Hammurapi was indeed the oldest written text ever found and at the same view Mosaic law as more original and more authentic. What now appears to have been an awkward compromise became widely accepted by Christian and Jewish scholars of the time.

The debate regarding the historical relationship and possible dependency of biblical law on Babylonian sources was only one aspect of the discourse surrounding Hammurapi and Moses. Even more important was the question of the meaning and relative positions of the two codes in the wider history of human civilisation. Therefore, the relationship between law and ethics, especially the question of whether both developed separately or not, quickly became focus of the discussion.

3.2 Law, Morality and *Sittlichkeit*

A concession that biblical law was, to a certain degree, influenced by Babylonian law, did, of course, not necessarily imply a cultural and religious devaluation of biblical law. Such a conclusion was drawn only by certain fervent Orientalists, anticlericalists, and antisemites who certainly did not represent the majority of the German academic world during the Wilhelmine era. Thus, the preference of scholars like Winckler, Kohler, and Delitzsch for Hammurapi at the expense of Moses was far from uncontested. Theologians and biblical scholars were by no means alone in their attempts to uphold the unique importance of the biblical lawgiver. What they desired was a definite assessment of the cultural and ethical implications of Babylonian law versus biblical law. More broadly, this problem concerned the general relationship between law, ethics and religion, as discussed not only in theology but also within studies of legal philosophy and theory.

The main line of argument in this respect was developed again by Müller in his seminal work on the relationship between biblical law and the Code of Hammurapi. As mentioned above, Müller conceded that Moses had taken over the "entire systematic" of the original Semitic tradition.[299] What mattered to the Austrian

298 Müller 1903, 242.
299 Müller 1903, 242.

Orientalist however, were what he saw as the "substantive amendments" Moses had made in certain areas. Noting that the treatment of slaves under biblical law was far more lenient than that advised by the Code of Hammurapi, he argued that Moses was responsible for introducing certain key elements that had not existed in law before him, namely "wisdom, mercy, and ethical greatness."[300] At this point in time, it becomes clear that the early twentieth century Hammurapi vs. Moses debate encompassed broader questions about the normative and religious foundations of modern law. In a long review of Müller's book published in the *Monatsschrift für Geschichte und Wissenschaft des Judentums*, Rabbi David Feuchtwang (1864–1936) of Vienna expanded on this point, highlighting a moral gulf between the codes of Hammurapi and Moses and strongly denying any ethical continuity between them:

> Unendlich gross ist die Ähnlichkeit und Übereinstimmung in beiden Gesetzen; unendlich tief ihr Gegensatz; viele Fäden spinnen formell hinüber und herüber, kein Steg führt aber über die sittliche Kluft, die Moses von Hammurapi trennt [...] Von hier aus hätte kein direkter Weg zur Blüte aller Gesetzgebungen, zum weltbezwingenden Dekalog geführt.[301]
>
> [Infinitely great is the similarity and agreement in both laws; infinitely profound their contrast; many threads formally spin back and forth, but no bridge spans the moral chasm that separates Moses from Hammurapi [...] No direct path would have led from him to the flowering of all laws, to the world-transcending Ten Commandments.]

It is worth noting that there was no division between Christian and Jewish religious scholars regarding the *cultural* achievements of the Babylonians: neither group had any difficulty accepting the priority of the Babylonians over the ancient Israelites in the fields of science, technology, economy, and politics, as this view aligned well with the biblical narrative. However, while 'modernist' scholars such as Kohler, Winckler, Delitzsch, and Lehmann-Haupt interpreted this as indicating a general Babylonian superiority over the Hebrews, Jewish and Christian scholars distinguished between cultural achievements and ethical and religious ones. They asserted an ethical and moral exceptionalism of the Israelites, which ultimately led to a similar notion of supremacism. The superiority of biblical law was especially emphasised by Samuel Oettli (1846–1911), a protestant professor of Old Testament studies at the University of Greifswald:

> Ohne Frage spiegelt sich im C[odex]H[ammurapi] ein viel entwickelteres staatliches Leben, als im Bundesbuch; aber ebenso unzweifelhaft ringt sich in diesem und in den späteren Gesetzessammlungen der Thora ein anderer, ein wahrhaft humaner Geist empor, der seinen

300 Müller 1903, 242.

301 Feuchtwang 1904, 393–94.

> Quellort in dem unvergleichlich reineren und sittlich fruchtbareren religiösen Glauben Israels hatte. […] In allen diesen Beziehungen und zumal in der durchaus religiösen Fundierung der Einzelforderungen hat eben in der Thora Israels der Geist gewaltet der freilich nicht auf den Bau eines festgefügten, Völker bezwingenden Weltreichs, aber auf die Gründung einer Gottesherrschaft des Friedens und der Gerechtigkeit unter den Menschen hin arbeitet.[302]
>
> [There is no question that the civil life reflected in the Codex of Hammurapi is far more developed than that reflected in the Covenant Code; but it is equally beyond doubt that a different, a truly humane spirit struggles forth in this [latter] and in the later law collections of the Thora, one whose source lies in the religious faith of Israel, which is incomparably purer and more fruitful ethically. […] In all these relationships, and especially in the thoroughly religious foundation of the individual demands, it is precisely in the Torah of Israel that the spirit has prevailed, which, of course, does not work towards the construction of a firmly established empire that conquers nations, but towards the founding of a divine rule of peace and justice among people.]

In fact, the main intention of many of the Christian scholars engaging in these debates was not to defend the ancient Israelites (let alone the modern Jews). Their apologia was rooted in a Christian-centred narrative in which the alleged ethical exceptionalism of the Israelites was seen as their central contribution to human history, as it ultimately led to the Christian mission of the world.

At the core of this debate were fundamental questions regarding the religious foundations of both ancient and modern law. The relationship between the Old Babylonian king and the gods became central in this respect. Various deities are mentioned on Hammurapi's stele, but the sun god Shamash stands out as the most significant, being named eight times in the prologue and epilogue to the laws. In the ancient Mesopotamian pantheon, Shamash was responsible for justice and was revered as the divine judge and protector of the law.[303] It is likely that Hammurapi's stele had been erected at the main temple of Shamash in the southern Babylonian city of Sippar and stood there for five hundred years before it was stolen by the Elamites. The scene depicted on the stela is highly illustrative of an Old Babylonian king's role as law-giver (fig. 4). Hammurapi stands before Shamash, who sits on a throne, and receives the god's insignia of justice, the rod and ring.[304] At first glance, this scene appears to be similar to the common

302 Oettli 1903, 88.

303 For short information with further references, see Krebernik 2006–2008; Krebernik 2009–2011.

304 On the iconography of this relief, see with further references Elsen-Novak and Novak 2006; on Mesopotamian representations of Shamash, see Kurmangaliev 2009–2011; on the meaning of the rod and ring, see Wiggermann 2006–2008.

Figure 4: The relief of the stele of Hammurapi shows the Babylonian king standing in front of the sun god Samas.

conception of the divine revelation of Mosaic Law to Moses on Mount Sinai (Ex 19–20); a fact emphasised by Delitzsch.[305] However, the striking difference between the two stories is that Moses receives the written law itself directly from God, and delivers these to the Israelites, whereas Hammurapi only receives insignia that authorises him to administer justice himself. Unlike the Bible, the Ham-

305 Delitzsch 1903, 23–24.

murapi stela makes no claim that its laws were of divine authorship; in ancient Mesopotamia, it was the kings who set down the law, not the gods.[306] Theologians noticed this distinction early on and used it as a basis for asserting fundamental theological and ethical differences. The Leipzig pastor Johannes Jeremias (1865–1942), for example, drew a sharp distinction between the Babylonian and Biblical revelation narratives, arguing that the relief on the Hammurapi stele demonstrated the pagan character of Babylonian law by illustrating a despotic relationship between God and man: "This pagan revelation lacks the spiritually and morally free acceptance of faith; it does not rise above the forms of ancient Oriental despotism."[307] Following Jeremias, Babylonian law remained despotic, while only Moses, and ultimately, of course, Jesus, were considered to have reveal a truly ethical law that superseded despotism.

Like Jeremias, the overwhelming majority of Christian scholars who engaged in discussions of Hammurapi vs. Moses had Protestant backgrounds. Catholic scholars were much less involved in these debates. Hubert Grimme, then professor of Semitic studies at the University of Fribourg in Switzerland, was an exception in this respect, though his arguments do not seem to reflect any distinctly Catholic theological positions. As a specialist in Islamic history and a renowned biographer of Muhammad, he adopted a broader perspective on 'Oriental law,' which allowed him to develop a new argument for the alleged moral superiority of the Israelites.[308] In his 1903 book *Das Gesetz Chammurapis und Moses* ("The Law of Hammurapi and Moses"), he adopted Müller's theory that Babylonian and biblical law had a common ancestor and identified this supposed shared source with the customary law practiced by the ancient Semitic tribes of the desert.[309] In keeping with the European variant of the myth of the noble Bedouin and widespread narratives of cultural pessimism in fin-de-siècle Europe, Grimme contrasted the supposedly pure and noble customs of desert nomads with those of the decadent Babylonian civilisation.[310] Grimme then argued that Mosaic law was closer to this original Semitic law, which in his view ruled out any direct connec-

306 On this important difference, see with further references Naiden 2013.

307 Jeremias 1903, 56–57. This is one of the rare instances in which Hammurapi is associated with (oriental) despotism. It should be noted however, that it was not the Babylonian king but the sun god Shamash who Jeremias considered to be the despot.

308 See Grimme 1892; Grimme 1895; Grimme 1904.

309 Grimme 1903, 25.

310 See Grimme 1903, 27. On the romanticisation of the Bedouin in European writings, see Tidrick 1981. As Isabel Toral-Niehoff has shown, the myth of the 'noble Bedouin' emerged from a mixture of European and Middle Eastern imagination, and clearly drew on Arabic sources. See Toral-Niehoff 2002; on its relevance for Ancient Near Eastern Studies of the time, see Wiedemann 2012.

tion between Moses and Hammurapi. Furthermore, he considered the Code of Hammurapi, with its detailed rules for trade and commerce, as only suitable for a feudal society based on a slave-holding economy. In contrast, he believed that Mosaic law reflected an egalitarian society of free nomads.[311]

The association of Moses with nomadic life was anything but new in Biblical Studies, and can be traced back to Michaelis' works in the late eighteenth century.[312] This theme continued to play a central role in German Biblical Studies throughout the latter part of the twentieth century. For instance, the Old Testament scholar Albrecht Alt (1883–1956) aimed to differentiate the 'casuistic' elements of biblical law, which he believed were adopted from surrounding civilisations, from the 'apodictic' sections that he traced back to the supposedly original laws of Semitic nomads.[313] The notion of a stark contrast between city dwellers and nomads was almost always morally charged in philosophical and theological writings. For Grimme, the nomadic background of the Israelites became the central criterion for his claim that Moses was ethically superior to Hammurapi; which he said ultimately "paved the way for the Christian law of morality."[314] Thus, Grimme attributed Moses' superiority not in terms of the divine revelation granted him, as other scholars did, but to a purer way of life, undistorted by civilisation – in contrast to the hyper-civilised and decadent Babylonians:

> Babels Gesetz hat niemals die bis an die Babels Tore streifenden Beduinen bezwungen: trennte doch beide eine Welt von Anschauungen und Lebensbedingungen. Ähnlich muß man sich das Verhältnis zwischen Babel und Altisrael denken. […] Betrachtet man daher endlich den Geist, welchen die israelitische und babylonische Gesetzgebung atmet, so erscheint selbst das hüben und drüben äußerlich Verwandte durch eine tiefe Kluft getrennt.[315]
>
> [Babel's law never prevailed over the Bedouins, who grazed their flocks as far as the gates of Babel: the two were worlds apart in terms of outlook and living conditions. We must think of a similar relationship between Babel and ancient Israel […]. If we consider the spirit that breathes through Israelite and Babylonian legislation, even what appears to be superficially related, was in fact separated by a deep chasm.]

311 Grimme 1903, 29.

312 Michaelis' work on Mosaic Law appeared in six volumes and went through several editions. See for the first edition Michaelis 1770–1775. There is a huge body of literature on Michaelis and his studies of the Mosaic law. See among others Hess 2000; Neis 2003, 507–49; Carhart 2007, 27–68; Sheehan 2005, 182–217; Legaspi 2010, 79–155; Rauchstein 2017.

313 Alt 1934. For a critique of this thesis, see (among others) Crüsemann 2005, 18–20.

314 Grimme 1903, 45.

315 Grimme 1903, 27.

By pitting the civilised against the non-civilised, Grimme employed a classic strategy that historian Rainer Kipper aptly termed the "reassessment of primitiveness in morality" *(Umwertung von Primitivität in Moralität).*[316] Its similarity to German national myths of the nineteenth and early twentieth centuries were all too evident, as the Bedouins (standing in for the Israelites) were cast in the same role as the ancient Teutons in relation to the 'civilised' Romans.

The anchoring of Mosaic law in Bedouin customs and a supposedly ethically purer nomadic way of life led to the emergence of another problem for German philosophical discourse related to ethics and religion: the distinction between *Moralität* (morality or ethics) on one hand and *Sittlichkeit* on the other. At the turn of the twentieth century, when German scholars were writing about morality or ethics, they often used the word *Sittlichkeit*, a term which is quite difficult to translate into other languages. Derived from the German word *Sitte* (meaning a custom or tradition), *Sittlichkeit* combines the ideas of morality and custom and could thus be used to refer, as Hegel did, to customary morality as opposed to reflective morality.[317] Today, even native speakers of German would find it difficult to understand the meaning this term once conveyed, because it has nearly vanished from modern German-language discourse regarding culture, history, or politics.[318] The complexity of *Sittlichkeit* in the late nineteenth and early twentieth centuries becomes evident when one looks at the Hammurapi vs. Moses debate. *Sittlichkeit* was employed as a term both by those who argued for the moral or ethical superiority of Mosaic law and the Israelites as well as by the modernists who insisted on the cultural (technological, economic, secular etc.) superiority of Hammurapi and the Babylonians. The Moses vs. Hammurapi debate thus reflects various, and even contradictory, understandings of *Sittlichkeit* within German discourse of the time. While most seemed to believe that the meaning of the term was obvious, its usage was often contradictory and sometimes contested, making it resistant to simple definitions. Similar to the concept of the *Rechtsstaat* analysed above, *Sittlichkeit* was omnipresent in contemporary discourse but rarely explained.

For several reasons, *Sittlichkeit* was particularly important to discourse regarding history, religion, and (ancient) law.[319] Roughly understood as a form of morality shaped by custom, the concept of *Sittlichkeit* was always surrounded

316 Kipper 2002, 272–74.

317 For more on the history of the concepts of customary vs. reflective morality, see Ilting 1983, 238–84; Ilting 1984.

318 The term is still present in juridical language. The best known examples are *Sittlichkeitsvergehen* (acts of indecency) or *Sittlichkeitverbrechen* (sex crimes).

319 See for instance Gierke 1916/17.

by questions of its historical genesis, its variations across different eras and cultures, its connection to religion and religious practices, and its relationship to written law. The forms these questions took were certainly shaped by the highly influential philosophical distinction between *Moralität* and *Sittlichkeit* Hegel made in his critique of Kant's moral philosophy.[320] Kant had used the two terms more or less synonymously to characterise actions that are motivated solely by duty *(Pflicht)* to the moral law; thereby contrasting duty with mere conformity with law.[321] But the most important aspect was that Kant's principles of morality were universal, unconditional, and formal, based on the idea of rational agents who autonomously impose moral law upon themselves. This Hegel criticised as being too abstract and only formal, calling it "an empty principle of moral subjectivity," and thereafter introducing a sharp distinction between *Moralität* and *Sittlichkeit* in his own work.[322] He reserved the term *Sittlichkeit* for a more objective form of ethics, referring to those moral obligations that people have to the communities of which they are a part, something he then contrasts with abstract and subjective morality. Thus, Hegel took social entities like the family, civil society, and the state as expressions of this highest form of moral life: "The ethical is a subjective disposition, but of that right which has being in itself."[323] There were two aspects of Hegel's concept of *Sittlichkeit* that were of particular relevance to German discourse regarding history, law and religion in the nineteenth century; firstly, an insistence on concrete social and historical contexts, and secondly, the historisation of moral beliefs and values that results from this dependence. Hegelian *Sittlichkeit* differs not only from one society to the next but also from one era to another. Moreover, as Hegel's followers were convinced, it evolved over the course of history.

320 Most famously expressed in his "Philosophy of Right;" see Hegel 1991 [1820], 133–275 (German original: Hegel 1986 [1820], 203–91). There is a huge body of literature on Hegel's distinction. See (among others) Ritter 1977 [1966]; Amengual 2001; see also the articles in Kuhlmann 1986. This differentiation is still at work in more recent social and moral philosophical debates. See (among others) Habermas 2021; Honneth 2021.

321 Kant 1907a [1797], 219. Consequently, in the English of edition of *Metaphysik der Sitten*, the terms *Moralität* and *Sittlichkeit* are both translated as morality. See Kant 2017 [1797], 23.

322 Hegel 1991 [1820], 191 (§ 148, see also §135). In English editions the term *Sittlichkeit* is usually translated as "ethics" or "ethical life." See the remarks of the translator (pp. 403–404); also Charles Taylor 1975, 376–78; others prefer to use the German term as a loanword. See, for example, Kain 2018, 83–137. On Hegel's critique of Kant's concept of morality, see with further references Wood 2017.

323 Hegel 1991 [1820], 186 (§ 141). German original: "Das Sittliche ist subjektive Gesinnung, aber des an sich seienden Rechts." (Hegel 1986 [1820], 287).

As a result, in later nineteenth century writings, differences in the way the term *Sittlichkeit* was used across various topics, such as culture, statecraft, law, religion, etc. became increasingly vast, leading to the term ultimately losing its connection with ethics. This can be demonstrated by examining how *Sittlichkeit* was used in historiographical works. The most influential contribution in this respect came from the historian and neo-Hegelian Johann Gustav Droysen (1808–1884) who, alongside Ranke, is considered one of the founding fathers of German historicism. Compared to other historians of the nineteenth century, the level of theoretical reflection in Droysen's still-relevant *Historik* is certainly extraordinary. Although his epistemology primarily followed that of Kant, some of his key concepts were clearly borrowed from Hegel. Most important in this respect was the idea of *sittliche Mächte* (which roughly translates to "ethical powers"), a term Droysen coined to refer to the historical 'powers' that shape individuals into social units, including family, nation (*Volk*), religion, and the state. Highly sceptical of notions such as progress or development, which since the Enlightenment have conventionally served as foundations for the concept of continuity and the belief in a unified history, Droysen maintained that the *sittliche Mächte* were the only fundamental and universal categories that allowed historians to write coherent history.[324] Unlike Droysen however, most historians of the time used the term *Sittlichkeit* without further clarification. For them, the concept's appeal lay in the possibility of identifying different stages or levels in various societies and epochs, thereby elevating *Sittlichkeit* as an indicator of cultural progress. Against this backdrop, scholars who insisted on the modernity and superiority of Babylonian law often found evidence of a high level of *Sittlichkeit* within it, viewing Babylon as the cradle of civilisation and the most advanced society of the ancient Near East.[325]

Sittlichkeit remained a contested concept in scholarly writings, however. Furthermore, with the rise of philosophical neo-Kantianism in the late nineteenth century, the use of the term as a synonym for morality (in the sense of universal ethic) gained new currency. For some scholars, Kant's internal moral law of reason appeared to be an enlightened and modern variant of the idea of divine law revealed to Moses. For this reason, neo-Kantianism proved particularly attractive to Jewish scholars, especially those who were highly assimilated into German bourgeois culture (as a consequence, this school of thought was increasingly identified by its antisemitic opponents as a Jewish school of philosophy).[326] The most

324 Droysen 1977, 290–362. On Droysen's theory of history, see (among others) Rüsen 1993, 226–75.

325 See, specifically, Lehmann-Haupt 1905, 6.

326 On the Jewish contribution to Neo-Kantianism, see with further references Daub 2016.

important neo-Kantian thinker at the turn of the twentieth century was the German-Jewish philosopher Hermann Cohen (1842–1919). When, in his remarkable article *Religion und Sittlichkeit* (1907), he identified the "nature of God" with the "nature of human *Sittlichkeit*" and calls God himself an "archetype and model" *(Urbild und Vorbild)* of human *Sittlichkeit*, it is clear that Cohen is using the term to denote a universal concept of morality in the Kantian sense of the word.[327] Although Christian theologians like Hommel, Jeremias, or Oettli would certainly not have concurred with Cohen's insistence on the originally Jewish character of ethical monotheism, from which Christianity deviated in some respects, they shared his understanding of *Sittlichkeit* as a synonym for universal ethics.[328]

Remarkably, all German scholars, whether religious or non-religious, progressives or conservatives, agreed that the cultural superiority of the Babylonians was not accompanied by superior morality (in the sense of a humane and universal ethic). This can be best demonstrated through the writings of Josef Kohler, who is not only regarded as one of the forerunners of the so-called neo-Hegelian school of law but who also paved the way for comparative studies on the ethnology of law.[329] Though very interested in the customs and rules of so-called primitive or natural peoples, Kohler was convinced that progress was present in the history of law (the final stage of which was modern Western law), progress that corresponded to general social and economic development. To Kohler, it was beyond doubt that Babylonian law was more highly developed than that of the Bible, not least because of Babylonia's perceived modernity in other respects. Thus, in a highly critical review of Oettli's book on Hammurapi and Moses, Kohler explicitly linked economic progress with the rise of private property and self-interest. He further asserted that it would be unhistorical to consider the more altruistic and humane (in terms of modern morality) provisions of biblical law to be indications of its 'higher' character:

> Mit diesem Kommunismus sind natürlich eine Menge altruistischer Wendungen verbunden, die man als humane Züge hervorzuheben pflegt, und auf die auch der Verfasser [Oettli] aufmerksam macht. Allein unrichtig ist, wenn man behauptet, dass derartige menschenfre-

327 Cohen 1924.

328 See for instance Jeremias 1903, 25; Oettli 1903, 88; for Jewish scholars, see Feuchtwang 1904, 393. On the debates among Jewish scholars regarding the biblical foundations of ethics see Krone 2012, 327–74.

329 See for instance Kohler 1885; Kohler 1904a [1899]. On Kohler as a forerunner of the neo-Hegelian school of law, see Spendel 1983, 5. On the neo-Hegelian school of law in general, the main proponents of which became strong supporters of the Nazis, see (among others) Hurstel 1996; Mährlein 2000; Großmann 2010.

> undliche Einrichtungen eine gesteigerte höhere Kultur bezeugten, sondern im Gegenteil: die Kultursteigerung drängt zunächst zu einer scharfen Ausgestaltung des Privatvermögens und, damit verbunden, zum Egoismus des Vermögens- und Geschäftsverkehrs. Dieser scharfe Vermögensegoismus ist das charakteristische Zeichen einer bestimmten hervorragenden Kulturstufe. […] Es ist daher ungeschichtlich, wenn man von dem entwickelten babylonischen Rechte die sog. Menschenfreundlichkeit, d. h. die kommunistischen Züge erwartet, die sich in der Thora finden.[330]
>
> [Of course, this communism [of the Mosaic law] is associated with a lot of altruistic phrases, which one tends to regard as more humane, and which the author [Oettli] also draws attention to. But it is not correct to say that such philanthropic institutions would evidence a more advanced culture, on the contrary: the progress of culture initially pushes towards a well-defined form of private property, and, as a result, towards the egoism of property and commercial transactions. This decisive egoism in the use of property is characteristic of a more advanced stage of civilisation. […] It is therefore unhistorical to expect the so-called philanthropism (i. e. the communist features), of the Thora within highly developed Babylonian law.]

The modernist Kohler's exclusion of ethics from the concept of historical progress led him to a conclusion similar to that of religious scholars: though Babylonian law was less egalitarian and less just than biblical law, it represented a higher level of civilisation. Where these two groups differed was in their historical judgements; religious scholars were repulsed by Babylonian civilisation while Kohler and others were attracted to it. A central aspect of their fascination was that Babylonia appeared to them to be an almost secular society, characterised by an almost secular form of monarchical rule.

3.3 Babylonian Secularism

The relationship between the Old Babylonian ruler and the gods, along with his religious function in society, were central aspects of the debate over Hammurapi in the early twentieth century. In some respects, such questions also reflected political issues that were highly controversial in contemporary Germany, as the religious function of the German Kaiser and his constitutional position within the structure of the Protestant Church were complex problems, which, fuelled by his own religious pronouncements, remained the subjects of constant political debate.[331] At the national level, the Emperor had no religious or ecclesiastical functions; however, the German Emperor was also King of Prussia, where the situation

330 Kohler 1903, 1547.

331 See in general the articles in Samerski 2001.

was different. As previously mentioned, the religious legitimacy of the ruler – his divine right – was explicitly stated in the preamble of the Prussian constitution of 1849/1850. Furthermore, the Prussian king (and thus the German Kaiser) served as the supreme bishop *(summus episcopus)* of the "Evangelical State Church of Prussia's Older Provinces" and in this role exercised what was known as ecclesiastical government *(Kirchenregiment).*[332] Thus, in Prussia (as in other Protestant German states), state and church, throne and altar, were not separate but closely interwoven, and the Prussian kings were determined to maintain their monarchical prerogatives and sovereign control over the Church.[333] Wilhelm II however, adopted a stance that went beyond traditional claims to the divine right of kingship and ecclesiastical government, and it was in this context that Hammurapi became relevant to him. As discussed above, the monarch conceived of the Babylonian king as at the beginning of a series of extraordinary historical figures through whom God had revealed himself.[334] It is clear that he saw in this heroic lineage not only his revered grandfather, but also himself. This perspective, clearly influenced by Chamberlain, was far less traditional and therefore a subject of public dispute.[335]

Among those who saw these matters differently from the German emperor were undoubtedly most of the scholars. They were not interested in a genealogy of divine rulers stretching from the present back to the Old Babylonian kings. Instead, scholars such as Winckler, Kohler and Lehmann-Haupt were fascinated by the supposedly non-religious or even secular aspects of Hammurapi's kingship. It was again the concept of enlightened absolutism that served as the narrative framework for his view. The historian Roscher had previously emphasised that the subjugation of the church to the reason of the state was one of the central aims of enlightened rulers.[336] Frederick II of Prussia and Joseph II of Austria had both pursued purely pragmatic policies of religious tolerance that should not be confused with the actual acceptance of those who were religiously differ-

332 The *Evangelische Kirche der altpreußischen Union* was an important Protestant ecclesiastical body, created in 1817 via a series of decrees by Frederick William III (1770–1840) of Prussia which united both Lutheran and Reformed denominations. Although not the first of its kind, the Prussian Union was the first to be established in a major German state. It grew to become the largest independent religious body in the German Empire and later within Weimar Germany, with some 18 million parishioners. The term 'Old Prussia' thus refers to the territory of Prussia before 1866, as neither the churches of Hesse-Kassel, Nassau and Frankfurt, nor the Lutheran churches of Schleswig-Holstein and Hanover, were incorporated into the Prussian state church after the annexations of 1866.

333 See the short description in Nipperdey 2013 [1990], 480–86.

334 Wilhelm II 1903, 495. See also above chapter 1.

335 See Markschies 2021.

336 Roscher 1874, 381.

ent. These policies were based solely on state interests. Frederick, who was widely regarded by his contemporaries as an atheist, intervened in church politics on several occasions.[337] Such actions were much easier in Protestant Prussia than in Catholic Austria, where Joseph II nevertheless took decisive action against the influence of the Catholic church and pursued a determined policy of secularising church property.[338] Similar deeds were performed by other historical rulers to whom the extended version of enlightened absolutism was applied. In particular, Frederick II of Sicily was known for his constant battles with the Church and the Pope, while his policies towards his Muslim subjects (and Islam in general) earned him a reputation as a tolerant ruler. Popular accounts, clearly infused with nationalism and anti-clericalism, even praised his "hatred of the omnipotent priesthood," something which had aligned him with the German national will (despite the fact that Frederick's struggles with the Pope were centred on his Sicilian state).[339]

In this way, Hammurapi's appeal in the early twentieth century for modernists was largely attributed to his supposedly anti-religious policies and his portrayal as a thoroughly political realist *(Realpolitiker)*, a perspective noted appreciatively by Wilhelm II.[340] Scholars such as Winckler and Kohler went even further, characterising Hammurapi's rule as being just as non- or even anti-religious as that of Frederick of Sicily and other so-called enlightened rulers. The famous Law Code Stele itself seemed to bear witness to this. The relief depicting Hammurapi receiving the insignia of justice from Shamash was commonly interpreted as showing the Babylonian king as the god's "equal," which was then contrasted with the supposed subservience of Moses, as the biblical God passed the tablets down to him.[341] According to Winckler, Hammurapi's reference to numerous gods in his Code was merely traditional, as the king was clearly the one who promulgated the law and introduced new principles to legitimise his rule:

> Trotz aller Betonung seiner Berufung durch die Götter und seiner Ergebenheit, zeigt sich Hammurapi damit doch als ein König, der seine Macht auf andere Dinge stützt als die Anerkennung durch die Priesterschaft allein. Er läßt den weltlichen Teil seiner Aufgabe stark hervortreten und ordnet die weltlichen Angelegenheiten in seinem eigenen Namen, im Namen der königlichen Gewalt, nicht in dem der Gottheit. Seine Gesetze sind daher ein Ergebnis praktischer Bedürfnisse, ein Erzeugnis der Entwicklung der Dinge, nicht ein solch-

337 See with further references Kerautret 2012.
338 See with further references Pranzl 2008.
339 Schirrmacher 1865, 340 – 42. On this author, see Thomsen 2005, 138, 164 – 65.
340 Wilhelm II 1938, 28.
341 See Lehmann-Haupt 1905, 46.

> es der geistigen und geistlichen Spekulation mit Idealforderungen, wie sie Teile der biblischen Gesetzgebung darstellen.[342]
>
> [Despite all the emphasis on his divine appointment and his devotion to the gods, Hammurapi shows himself to be a king who bases his power on other things than the recognition of the priesthood alone. He emphasises the secular nature of his duties, ordering secular affairs in his own name and in the name of royal power rather than in the name of a deity. His laws are therefore a result of practical needs, a product of the development of things, not of spiritual and intellectual speculation with ideal demands, as is the case with some parts of biblical legislation.]

Hammurapi was believed to have maintained a strong opposition between the ruler and the "old religion" of his country, particularly that upheld by the priests of the temple of Marduk, the chief Babylonian god. For Winckler, Hammurapi's laws stood in sharp contrast to the irrational and highly complex rules that he believed were typical of oriental religions and oriental thought: "His legislation is purely practical and mundane; it avoids all ideals and theories and is secular in nature."[343] In his view, it was Hammurapi's secularism that ultimately distanced him from the ancient Near East and aligned him with the enlightened rulers of European modernity. However, Winckler's portrayal may also be seen as a de-orientalisation of the exceptional Babylonian king; one that does not contradict stereotypical views of oriental history but ultimately confirms them.

The legal historian Kohler made a similar argument to that of Winckler, but went even further by elevating the supposed contrast between Hammurapi and his oriental context to the level of moral and legal philosophy. Adopting key assumptions from the German historical school of jurisprudence *(Historische Rechtsschule)* established by Carl von Savigny (1779–1861) in the early nineteenth century, Kohler argued against deriving law from nature or reason.[344] As a legal historian and legal ethnologist, he focused on the diverse historical origins of positive law and its varied manifestations across different societies and found that in its empirical form, law proved to be something constantly changing, depending on the historical and cultural context. This result appeared to challenge the normative concept of law, thus raising the issue of relativism; also a topic of concern in other areas of historicism. Consequently, the historical approach provoked much debate in legal studies and led to an anti-historicist revolt in the 1920s,

342 Winckler 1904, XXXI.

343 Winckler 1904, XXXII.

344 On the German historical school, which experienced a kind of revival in the 1870s and 1880s, see (among others) Haferkamp 2018.

akin to that which occurred in the discipline of theology.[345] What mattered most for Kohler's analysis of ancient Babylonian law however, was his strict distinction between law and morality, which, along with his rejection of natural law, somewhat resembles conceptions of legal positivism developed later in the twentieth century by scholars such as Hans Kelsen (1881–1973) and Herbert L. A. Hart (1907–1992).[346] The crucial point was that Kohler viewed any fusion of law and morality – or law and religion – as the indicator of either a pre-modern legal system or an oriental one, characterising oriental systems as those containing both theocratic and despotic elements. For him, it was the separation of law and morality, which he believed the Code of Hammurapi had achieved, that emancipated ancient Babylonian law from its oriental context and rendered it superior to it. The following section deserves attention:

> Bei einem orientalischen Gesetze kommt vor allem die Frage in Betracht, ob das Gesetz ein reines Rechtsgesetz ist oder ob es einen theokratisch-religiösen, das ganze Leben des Menschen erfassenden Charakter in sich trägt. [...] Völlig theokratischer Art und Recht und Sittlichkeit miteinander verbindend sind die indischen Gesetzbücher, theokratisch sind aber insbesondere auch die gesetzlichen Bestimmungen des israelitischen Rechts, namentlich des sogen. Bundesbuches, des Deuteronomiums und des priesterlichen Gesetzes. Hier wechseln Rechts- und Sittlichkeitsvorschriften mit einander [...]. Diese theokratische Art findet sich noch viel später im Koran. Ganz im Gegensatz dazu steht das Gesetz Hammurapis. In geradezu moderner Weise ist das Juristische aus dem Gesamtlebensvorschriften herausgenommen, und alles, was die Morallehre angeht, insbesondere die Erörterungen über den sittlichen und unsittlichen Gebrauch des Rechts sind vollkommen bei Seite gelassen, denn dies sollte der religiös sittlichen Betrachtungsweise anheim gestellt bleiben.[347]
>
> [With an Oriental law, the primary question to be considered is whether the law is a purely legal act or whether it is of a theocratic-religious character, addressing the whole life of human beings. [...] The Indian law books are of an entirely theocratic type and link morality and law together; but the legal provisions of Israelite law, specifically those of the so-called Covenant Code, the Book of Deuteronomy and the priestly law, are also theocratic. Legal provisions alternate with ethical prescriptions therein [...]. This theocratic type [of law] appears again, much later, in the Koran. The law of Hammurapi is quite the opposite of this. In an almost modern way, the juridical has been extracted from the prescriptions governing other aspects of life and anything to do with moral doctrine is left out entirely, particularly the debates on the moral and immoral use of law, because these should be left to the purview of religious morality.]

345 On the debate of the problem of historicism and relativism in legal studies at the turn of the twentieth century, see with further references Wittkau 1992, 80–95.

346 See Hart 1958; Hart 1961, 181–207; Kelsen 1967 [1960].

347 Kohler and Peiser 1904, 137–38.

Therefore, Kohler's association of theocracy with the Orient should not be reduced to a mere strategy of othering. The mixture of law and ethics he rejected was not limited to Oriental societies but encompassed significant portions of European legal history as well. However, it is significant that, with regard to the biblical confluence of ethics and law, his views did not differ greatly from those of religious scholars who asserted the moral superiority of the Bible. While Kohler saw the lack of distinction between law and morality in Mosaic law as a sign of its backwardness and Oriental inferiority, many religious scholars argued that the same lack of distinction demonstrated its progressiveness and superiority. The issue here was the theologisation and ethicisation of law, which indeed is a central feature of biblical law and is alien to older conceptions of law in the ancient Near East wherein the law was given by the king, not the gods.[348] Nevertheless, the claim that Babylonian law was secular in contrast to biblical law, a contrast that has been put forward until recently, remains highly problematic.[349] Such a claim presupposes the modern distinction between the religious and the secular, an idea that was entirely foreign to the ancient Near Eastern world.

In a more general sense, the scorn directed against biblical law by Kohler and Winckler clearly reflects a tradition of European antinomism; a school of thought that rejects laws, morality and social norms in the name of complete freedom.[350] Within this perspective, the law is seen as an imposition that undermines individual autonomy. Writings involving antinomism often also involve antisemitism, as the revelation of Mosaic law to the people of Israel as narrated in the Bible seems to symbolise an original subjugation of humanity to external principles imposed by God. A negative portrayal of Jewish legalism, in contrast to a supposedly Christian freedom from the law, is therefore deeply rooted in Christianity and has been emphasised particularly strongly in German Protestantism. Even philosophers such as Kant denounced Judaism as "the epitome of mere static laws."[351] Kohler's assessment of the Talmud, published in a short article in 1907, followed the same line of thinking and was largely negative. Although he managed to distance himself from antisemitism, Kohler's description of the Talmud nevertheless contains numerous anti-Jewish tropes. It reinforced the stereotype of 'dry Jewish legalism'

348 On this difference, see (among others) Albertz 2003; Schmid 2021; Brague 2007.

349 As a more recent example see Paul 1970, 6–8.

350 See in general Palmer 1999; most recently Zwiep 2024.

351 Kant 1907b [1793/94], 125. Antinomism, although recognized by many scholars as a central motif of European antisemitism, remains under-researched as a phenomenon. See the numerous references to this trope in Nirenberg 2013.

and portrayed the Talmud as exhibiting the flaws of oriental law while negatively contrasting it with the Western tradition, as first demonstrated by Roman law.[352]

The overall negative view of oriental theocracy (from which Hammurapi's Babylonia was said to be so different) had also long been shaped by anti-clerical and anti-Catholic ideologies which portrayed the (Catholic) Church as a purely theocratic, and, in this respect, truly oriental institution. Contemporaries certainly recognised the anti-clerical insinuations in the negative descriptions of priesthood and theocracy by scholars such as Kohler and Winckler, who themselves had been influenced by the era of anti-Catholic *Kulturkampf* the German state had engaged in during the 1870s and 1880s.[353] While Winckler repeatedly made anti-clerical statements, but otherwise does not appear to have engaged in religious debate, Kohler was an outspoken representative of the 'free religion' movement *(freireligiöse Bewegung)* and advocated for the establishment of purely secular rituals and cultic practices.[354] In particular, he campaigned for the right to cremate the dead, which was not legalised until the late nineteenth century.[355] A growing rejection of theocratic rule, with its supposed conflation of morality and law, mirrored the position of these two scholars in the debates regarding the status of (Christian) religion in contemporary German society and underpinned the ideological formation of German secularism.

352 Kohler 1907, 163 – 64.

353 See (among many others) M. Gross 2005; Borutta 2010; Dittrich 2014.

354 On the formation of German secularism, see (among others) Weir 2014; Weir 2015; Habermas 2019.

355 See Spendel 1983, 45.