

Chapter One: The Code of Hammurabi and Sumerian Precursors

The Code of *Hammurabi*¹⁰, circa 1700 B.C., was the first largely comprehensive codification within the Near East (*Vorderer Orient*). This code consists of 282 legal regulations (articles) concerning predominantly civil law and, to a quarter, criminal law. Still today, *Hammurabi's* code has often been characterized as the oldest known codification of mankind. However, there are Sumerian precursors. So, the author will start with some remarks on such a precursor.

I. The most Important Sumerian Precursor: Code of Ur-Nammu

1. General Overview

At the beginning of the 3rd millennium B.C. the development of the first Sumerian cities took place, and this occurred in the south of Mesopotamia, situated between the rivers Euphrates and Tigris.¹¹ Here, the first states arose, characterized with attributes of statehood like a city ruler, a public administration, and municipal law. Such law already was written down, namely on clay tablets with cuneiform script (in German: *Keilschrift*). Thus, one should not talk about a mere transition to statehood when discussing the early Sumerian city states.¹²

a) Around 2100 B.C., the so called Code of *Ur-Nammu* was created. This law, discovered in 1948, nowadays is denoted as the oldest codification of mankind, the wording of which became known.¹³ *Ur-Nammu*, the then-ruling King of *Ur* (being an important Sumerian city state at that time) has been designated as the creator of that code. Unfortunately, there is no complete copy (complete version) of his code – in contrast to the Code of *Hammurabi*. Compared with the latter, the preserved parts of *Ur-Nammu's* Code consist of much less regulations than *Hammurabi's* one.¹⁴

However, in equal measure as later on the Code of *Hammurabi*, already *Ur-Nammu's* Code started with a prologue, praising the king as being the creator of justice and welfare for the poor and the weak on order of the gods.¹⁵

b) As regards the preserved criminal law provisions (Art.) of *Ur-Nammu's* Code,¹⁶ the following hints shall be sufficient:

(1) The Code of *Ur-Nammu*, being around 400 years older than *Hammurabi's* one, appears much more ancient than the latter. Obviously, the transition from the old private criminal law to public criminal justice still was not completed at that time.¹⁷ This may be illustrated by the fact, that there still were private sanctions like monitory compensation (punitive damages) instead of criminal punishment in cases of offences like bodily injury, accusation of sorcery, accusing a married woman of adultery, damage to someone else's field (farmland). The code's respective provisions read as follows:

10 6th King of Babylon, the so called Old-Babylonian Empire.

11 Regarding the following text see Wesel (supra note 1), side note 32, 50 et seq.

12 Insofar questionable Wesel, side note 67.

13 See Wesel (supra note 1), side note 54 et seq.

14 A little more than 30 regulations (articles); see the text below, b).

15 Wesel, side note 55, 56. As regards historical sources see below, footnote 16.

16 The historical sources for the code's articles are inter alia cited in Google: The Code of Ur-Nammu, Wikipedia (English); The Ur-Nammu law code – Realhistorywww; both in the august 2017 version.

17 Wesel (supra note 1), side note 64.

Chapter One: The Code of Hammurabi and Sumerian Precursors

18. *If a man knocks out the eye of another man, he shall weigh out ½ a mina of silver.*
19. *If a man has cut off another man's foot, he is to pay ten shekels.*
20. *If a man, in the course of a scuffle, smashed the limb of another man with a club (a mace), he shall pay one mina of silver*
21. *If someone severed the nose of another man with a copper knife, he must pay two-thirds of a mina of silver.*
22. *If a man knocks out a tooth of another man, he shall pay two shekels of silver.*
31. *If a man flooded the field of a man with water, he shall measure out three kur (apparently a unit of measurement) of barley per iku (apparently a square measure) of field.*

Such provisions illustrate that the code's penal law still was shaped by private criminal justice.

However, the urgent question that arises here is the following one: What happened to those perpetrators, who were absolutely unable to pay the respective compensations (punitive damages)? Presumably, the consequences for such perpetrators would be unpleasant.

(2) The mentioned regulations of *Ur-Nammu's Code* for *accusation of sorcery* respectively for *accusing a married woman of adultery* say:

13. *If a man is accused of sorcery, he must undergo ordeal by water, if he is proven innocent,¹⁸ his accuser must pay three shekels.*

Here, it seems surprising, that the penalty for the offender of such a serious crime as being regulated in the Code's Art. 13 was so lenient, although that accusation was absolutely life-threatening for the accused victim concerned. In contrast, the Code of *Hammurabi* ordered capital punishment for such cases of accusation.¹⁹

14. *If a man accused the wife of a man of adultery, and the river ordeal²⁰ proved her innocent, then the man who has accused her must pay one-third of a mina of silver.*

Here again, the threatened punishment is surprisingly lenient, considering the acute danger for the life of the accused woman due to the threatening water ordeal.

2. Crimes threatened with the Death Penalty

- 3 The decisive difference between the Code of *Ur-Nammu's* criminal law and the respective part of *Hammurabi's* Code has been reduced by *Wesel* to the simple formula:

Hammurabi's Code insofar was much harsher than *Ur-Nammu's*.²¹

This statement is convincing to a great extent, particularly with regard to the death penalty:

In this respect, the Code of *Ur-Nammu* all in all can be characterized as exceptionally lenient because only very few criminal offences should be punished with death, namely the following:

Firstly, **murder** pursuant to Art. 1.

1. *If a man commits a murder, that man must be killed.*

Secondly, **robbery**, Art. 2.

2. *If a man commits a robbery, he will be killed.*

¹⁸ The **ordeal by water**, being a judgement of God, meant at that time: If the river will seize the accused (i.e.: if he drowned), he was found guilty by the God of the river. However, if the God will consider him innocent he will let him go away unscathed. Thereto e.g.: *Wesel*, side note 64 at the end; *Krey* in: *Festschrift* for *Lindacher* (supra note 6), p. 236 (regarding the Code of Hammurabi, for which the same applied).

¹⁹ Thereto *Krey* in: *Festschrift* for *Lindacher* p. 236; also see the following text, II 2.

²⁰ See supra note 18.

²¹ *Wesel* (supra note1), side note 76.

I. The most Important Sumerian Precursor: Code of Ur-Nammu

Thirdly, a very serious case of adultery committed by a man other than the husband, pursuant to Art. 6.

6. *If a man violates the right of another and deflowers the virgin wife of a young man, they shall kill that male.*

This rule seems astonishing because wives, still being virgins, might be rare. However, the code might have had cases of **child marriages** in mind, where the marriage still was not consummated. Here, the code has considered the deflowering of a **married** virgin by a man other than her husband as a very serious misdeed.

Fourthly, a case of adultery committed by a wife, Art. 7.

7. *If the wife of a man followed after another man and he slept with her, they shall slay that woman, but that male shall be set free.*

This provision seems to be extraordinarily misogynist, moreover inconsistent. This is because from the perspective at that time, the criminal offence of adultery, committed by a wife, violates the **right of her husband**. However, such violation has been committed by both, the wife and the adulterer. Therefore, it seems to be inconsistent, that only the wife shall be slayed, whereas the adulterer shall be set free without any punishment.

Furthermore, Art. 7 looks strange for an additional reason: As already mentioned, adultery committed by a wife then was considered as offence against her husband's rights. Therefore, the cuckold consequently should have the right to forgive his wife and so to save her life. Such a regulation also might have been expected because *Ur-Nammu's Code* still was shaped by private criminal justice.²²

Here, a reference to the Code of *Hammurabi* may be allowed: On the one hand, Art. 129 of this Code reads:²³

Wenn die Ehefrau eines Bürgers beim (Zusammen-)Liegen mit einem anderen Mann ergriffen worden ist, so bindet man sie beide und wirft sie ins Wasser.

Near translation by the author: If a wife is caught in the very act of committing adultery, both, she and the adulterer, shall be bound with fetters and thrown into the river.

On the other hand, Art. 129 continues:

Wenn der Herr der Ehefrau (gemeint: ihr Ehemann) seine Ehefrau am Leben lässt, so lässt auch der König seinen Knecht (gemeint: den Ehebrecher) am Leben.

Near translation by the author: If the **husband** of the wife²⁴ concerned keeps her alive, the King also keeps the adulterer²⁵ alive.

Such a private settlement of adultery being a typical relict of the old private criminal law is lacking in *Ur-Nammu's Code*. This holds true even when considering that the Code is not completely preserved, since at least the relevant Art. 7 seems to be fully preserved.

Anyhow, I suspect that there may have been *de jure* or *de facto* a chance for the husband to save the life of his adulterous wife.

As regards the criminal liability for adultery, an additional information seems to be necessary: A **husband** being unfaithful was never ever punishable for adultery.

22 See the text above, Chapter One, I 1 b (1) with footnote 17.

23 Source: Eilers, Codex Hammurabi. Die Gesetzesstele Hammurabis, translated by Wilhelm Eilers (revised version of the 1932 published 5th edition), 2009. The paper at hand follows the version of 2009 and its enumeration of the Code's articles (Art.).

24 Hammurabi's Code here designated him as "master of his wife".

25 Hammurabi's Code here called him "the king's servant".

Chapter One: The Code of Hammurabi and Sumerian Precursors

3. Contrast to the Code of Hammurabi

4 As will be shown below,²⁶ the Code of *Hammurabi* in numerous criminal law provisions has stipulated capital punishment, and in addition often has aggravated such punishment by torturous methods like burning or death by impaling. By contrast, pursuant to *Ur-Nammu's code* only very few criminal offences should be punished with death, and in addition, there were no barbaric methods of capital punishment like burning or impaling to death ordered *expressis verbis*.

However, that fact does not necessarily mean that there were no barbaric penalties as the mentioned ones, but we don't know. Anyhow, a typical method of executing the death penalty might have been drowning in the river.²⁷

4. A brief Summary

5 Firstly, the Code of *Ur-Nammu* with its very few Articles is far away from any codification of the law. This particularly holds true for the criminal law provisions. Secondly, there are very few cases of crimes, for which death penalty was stipulated. Thirdly, there is no case of barbaric forms of executing the capital punishment like burning or impaling to death, being *expressis verbis* ordered in such code. Fourthly, the ancient criminal law principle "an eye for an eye, a tooth for a tooth" (*lex talionis*, meaning the law of talion, in German: *Talionsprinzip*) can be found in *Ur-Nammu's Code* only in its Art. 1 (death penalty for murder). In contrast, this principle particularly did not apply to the above cited provisions of this Code on bodily injury (Art. 18 to Art. 22). Fifth, such Code is anything but bloodthirsty; rather, in total it is lenient. All of this distinguishes *Ur-Nammu's Code* significantly from the later **Code of Hammurabi** which shall be discussed in the following.

II. Code of Hammurabi

1. General Overview

6 The Code of *Hammurabi*,²⁸ coming from the Age of the Old Babylonian Empire, was the first largely comprehensive codification. This Code is engraved on a more than human-sized diorite stele which was discovered at the beginning of the 20th century. It starts with the so-called prologue and ends with the epilogue, denominating inter alia the purposes intended by *Hammurabi's Code* as follows:²⁹

Firstly, on behalf of the Gods, introducing law and justice.

Regarding this purpose, the prologue states e.g.:³⁰

Als Marduk (assyrischer Gott) mich beauftragte, die Menschen gerecht zu leiten und dem Land Ordnung zuzuweisen, habe ich Recht und Gerechtigkeit in den Mund des Landes gelegt ... Ich, Hammurabi, ... der das Recht verwirklichte.

Near translation by the author: *When the God Marduk mandated me, to lead the people justly und to impose law and order in my kingdom, I laid down law and justice, accessible for the country ... me, Hammurabi, who realized justice.*

26 Chapter One, II 2.

27 This at least applied for the execution of death penalty pursuant to Hammurabi's code. See below, II 2.

28 Source: Eilers (supra note 23). Secondary literature: see inter alia Eilers, p. 7-17, 18-25; Wesel (supra note 1), side note 68 et seq.; also see Krey, Interrogational Torture in Criminal Proceedings. Reflections on Legal History, Vol. I (supra note 6), p. 14-18; Krey, Keine Strafe ohne Gesetz. Einführung in die Dogmengeschichte des Satzes nullum crimen, nulla poena sine lege (Publishing Company de Gruyter, Berlin), 1983, side note 4, 5, 12, 123.

29 Source Eilers. Secondary literature: see inter alia Krey, Interrogational Torture (supra note 28), p. 14, 15; Krey, Keine Strafe ohne Gesetz (supra note 28), side note 4, 5; Wesel, side note 69.

30 See Eilers, p. 27 et seq., 30 and 31.

In addition to this, the *epilogue* inter alia says:³¹

Rechtssprüche der Gerechtigkeit, die Hammurabi, der tüchtige König festgesetzt hat, ... Worte der Gerechtigkeit, die ich auf meinen Denkstein (gemeint: die erwähnte Diorit Stele) geschrieben habe ... Hammurabi, der König der Gerechtigkeit ..., dem der Gott Marduk sein Volk anvertraut hat.

Near translation by the author: Legal regulations pursuant to justice, carried out by Hammurabi, the competent King, ... words of justice, I have written down on this diorite stele ... Hammurabi, the King of Justice ... to whom Marduk has entrusted the people.

Secondly, *den Ruchlosen und den Bösen zu vernichten* (i.e. eliminating the nefarious and evil ones).³²

This purpose might have been one of the reasons for the character of the Code's criminal law as bloodthirsty and cruel, which will be discussed below.³³

Thirdly, protection of socially deprived persons.

As regards such purpose, the Code states inter alia:

Der Codex bezwecke auch, vom Starken den Schwachen nicht entrechten zu lassen (prologue), ihm sowie der Witwe und Waise Recht zu verschaffen (epilogue).³⁴

Near translation by the author: *The Code also had the purpose to ensure that the deprived shall not be disenfranchised by powerful ones, and to give justice to widows, orphans, and disenfranchised people.*

Such social element as one of the Code's purposes is confirmed inter alia by several provisions on socially acceptable prices and wages³⁵, e.g. Art. 258, 261, 269, 272.³⁶

Additionally, Hammurabi's Code in its epilogue emphasized:

Der entrechtete Bürger ... trete vor mein Bildnis "König der Gerechtigkeit"³⁷ und lese meinen Schriftstein ... und mein Denkstein kläre ihm seinen Rechtshandel ...

Near translation by the author: *The disenfranchised citizen shall come before my effigy³⁸ as King of justice and there shall read my Code engraved on the diorite stele, which may explain to him the legal case concerned.*

2. Crimes threatened with the Death Penalty

The penal provisions of Hammurabi's Code include numerous Articles covering a wide range of classic penal law. A great many of these penal provisions ordered the use of the **death penalty**; here, in particular the following types of such criminal offences ought to be named:³⁹

Art. 1 False accusation of murder

Art. 2 False accusation of sorcery⁴⁰

Art. 3 False accusation before a court responsible for capital crimes

Art. 6 Theft (and receiving) of property of the temple respectively of the King/royal court

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31 Eilers, p. 91 et seq., 92, 93.

32 Eilers, p. 27.

33 Thereto the following text, II 2.

34 See Eilers, p. 27 (prologue) and 92 (epilogue).

35 This is also pointed out by Wesel (supra note 1), side note 69.

36 Regarding inter alia: wage for a farm labourer taking care of cattle (Art. 258); wage for a herdsman who let the cattle and/or small domestic animals graze (Art. 261); payment for rent a donkey (Art. 269); payment for rent a cart (Art. 272).

37 Meaning the picture of Hammurabi engraved on the top of the diorite stele, on which his Code is engraved.

38 See supra note 37.

39 Source: see supra note 23. Already see Krey, Interrogational Torture Vol. I (supra note 6), p.15 footnote 14.

40 Thereto Krey in Festschrift for Lindacher (supra note 6), p. 236.

Chapter One: The Code of Hammurabi and Sumerian Precursors

Art. 14 Deprivation of liberty (kidnapping) against the “little son” of a citizen
Art. 15 Allowing/helping servants of the King/royal court or of citizens to escape
Art. 16 Hiding of escaped servants of the King/royal court in spite of the herald’s calling
Art. 21 Burglary into a house/home – *death by hanging* –
Art. 22 Robbery
Art. 25 Theft in case of using a fire – *death by burning* –
Art. 26 A soldier’s refusal to obey an order to participate in a military campaign of the king
Art. 34 Theft committed by military leaders against subordinated soldiers
Art. 108 Fraudulent conducts leading to overcharged prices committed by female inn-keepers when selling beer – *death by drowning* –
Art. 109 A female innkeeper, in whose house fraudsters have gathered, fails to betray them to the King
Art. 110 *Naditu*-priestess or *Entu*-priestess, living outside of a monastery, opens the entrance door to an inn (pub) or even enters in order to have a beer – *death by burning* –
Art. 129 Adultery, unless the husband of the adulterous wife keeps her alive (as already discussed above)⁴¹ – *death by drowning* –
Art. 130 Rape of a citizen’s wife who still has been a virgin before that criminal offence and still was living in her father’s house⁴²
Art. 143 A wife, not being respectable, who regularly leaves the house, squanders the households appliances, and neglects her husband, shall be *drowned*
Art. 153 A wife’s instigation to murder her husband for another man – *death by impaling* –
Art. 155 Sexual intercourse with the wife of his son, if the latter already had slept with her – *death by drowning* –
Art. 157 Sexual intercourse of a man with his mother after his father’s death – *both shall be killed by burning* –
Art. 209 in connection with Art. 210: Beating the pregnant daughter of a citizen, resulting in the loss of her foetus and the daughter’s death – *punishment of the offender by killing his own daughter instead of him* –
For clarification: This penal provision illustrates the *lex talionis*⁴³ (here, *a life for a life*), in a terrible connection with clan liability in its appearance: *the life of your daughter for the life of my daughter*.⁴⁴
Art. 229 If a contractor has built a house not being stable enough and which therefore has collapsed resulting in the house owner’s death, such contractor shall be killed.
Art. 230 If the house owner’s son has been killed by the collapse of that house the son of its constructor shall be killed.
This Article as well illustrates the mentioned connection of the *lex talionis* with clan liability, here saying: *the life of your son for the life of my son*.

3. Capital Punishment, aggravated in a cruel manner

8 In addition, the outlined frequent use of capital punishment was made even worse by the fact that in many cases such punishment was **aggravated in a cruel manner**, namely by *burning to death* or by *impaling* as already mentioned.⁴⁵

41 See the text above, I 2 with footnote 23–25.

42 As to a wife as virgin see above Chapter One, I 2, thirdly (regarding Art. 6 of Ur-Nammu’s Code).

43 See the text above, I 4.

44 A further example for this provides Art. 230 of Hammurabi’s Code (see the text below).

45 Thereto the aforesaid Articles 25, 110, 157 (burning), 153 (impaling).

4. Further Cruelties: Corporal Punishment

Finally, there were numerous cases of awful *bodily mutilation* respectively *whipping/flogging* ordered by Hammurabi's Code, both penalties also being elements of a cruel criminal law.⁴⁶ 9

Here, particularly the following penalties on the offender concerned ought to be named:

- Cutting off his tongue (Art. 192)
- Pulling out or destroying in other ways one of his eyes (Art. 193, 196)
- Cutting off the breast of a female offender (Art. 194)
- Cutting off one of his hands (Art. 195, 218)
- Breaking a bone of his (Art. 197)

In this context, often the *lex talionis*⁴⁷ is involved (Art. 196, 197, in addition Art. 200).

- Whipping/flogging by 60 lashes with a whip (Art. 202)⁴⁸, being awful and life threatening.

5. Reasons for the Cruelty of Hammurabi's Code

Wesel describes Hammurabi's criminal law as "bloodthirsty", and rightly so; in this context, he states: *as regards the reasons for such blood lust one only could speculate.*⁴⁹ However, in my opinion there are some grounds, at least being plausible:

Firstly, the cruelty of this criminal law might have aimed at replacing private revenge, in particular blood vengeance, clan feud and generally private criminal law by means of the predominance of public criminal law.

For such purpose, it might be helpful to carry out a harsh criminal law which meets the victim's respectively his relatives' desire for getting satisfaction.⁵⁰

Secondly, Hammurabi's criminal law also was so terribly harsh, because his Code carried the authority of this mighty King in his capacity as supreme ruler of justice. Thus, serious breaches of his penal provisions might have been considered as contempt of his authority, so to say as **crime against the crown**.

Thirdly, as already mentioned, the prologue and epilogue of Hammurabi's Code praise the King as representative of the Gods with the divine mandate to create justice among the people: The Gods had chosen him to be King of Righteousness. Therefore, serious breaches of the Code's penal provisions at the same time were acts of sacrilege against the Gods.

46 Krey, Interrogational Torture (supra note 6), p. 16 with footnote 18, 19.

47 Thereto the text above, Chapter One, I 4, II 2 at the end.

48 See Krey (supra note 46), p. 16 footnote 19.

49 Wesel (supra note 1), side note 76.

50 Concerning the text above see Krey (supra note 46), p. 17, 18.