

## JURISPRUDENCE AND THE OBLIGATIONS OF THE COVENANT

The essence of Old Testament Judaism is the Covenant, the parties being God on the one hand and the chosen people on the other. There is grave question whether cultured persons today can accept this essence. Both of the original parties are gone. God has evolved in theology and He is no longer what He was depicted as in the Bible. Similarly, the Jews who are alive today are many centuries removed from the ancestral commitment to the Covenant, even assuming that an actual Covenant episode occurred.

On the assumption that Moses actually existed as a leader of the tribes of Israel, a good contemporary view is that he did not ever confront God but that he had the mystic feeling that he did. In this view, it was Moses who chose the chosen people. Had Moses been politically unsuccessful in imposing the choice, he would have been just another odd ball. As it was, he used a juridical concept - the idea of a Covenant with a sovereign - as an effective unifying social device.

The device is remindful of the unifying juridical concept of the United States of America. The 18th Century's prevailing political philosophy involved the theory of the social contract, which posited

that men, living in a state of nature, transferred a portion of their individual freedom to a government. The process and purpose are well exemplified in the Preamble to our Constitution:

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity do ordain and establish this Constitution for the United States of America."

The parties are unequal in both the Covenant and the social contract. In particular, the Covenant has been likened to the arrangement of suzerainty which appears to have been a contemporaneous form of tribal affiliation between unequal powers. Although God as a party is ineffable and tending toward the mystic, the point is that the Covenant is not only a religious but also a political doctrine.

A community's organizing juridical concept always gives rise to subsequent juridical consequences which are specifically consistent with the concept. For example, in the Marxist-Leninist system, the concept is that the state is a preservative instrument of the dominant class, an instrument which will become unnecessary when classes are eliminated. Thus, the development of Soviet law has had to reckon with the increasing quantity of regulation which arises in an

industrializing society, and in 1938 A. Y. Vyshinsky formulated a new concept to enable the incorporation of workers' rules into the body of national law. In the United States, because of our organizing notions that there was a limited grant of enumerated powers to the federal government, our constitutional history has had to deal heavily with such issues as states rights versus federal powers. Thus, the recent civil rights legislation has had to be justified under interpretations and extensions of the commerce clause, which empowers Congress, rather than under general governmental authority, much of which is conceived of as being reserved to the states under the 10th Amendment.

It would be interesting to do something which is not done in this paper and that is to study the cumulative Talmudic interpretations of God as though they were constitutional cases evolving the scope and authority of the sovereign. Very likely a distinct developmental pattern would emerge and would identifiably resemble our United States constitutional pattern.

This paper has a far more limited objective. It is to consider some aspects of the Covenant from the point of view of one particular school of jurisprudence.

1. The Nature of Law

There are four major so-called "schools" of jurisprudence: (1) natural law, (2) historical, (3) analytical, and (4) sociological. Of these, the analytical school is most harmonious with the study of the Covenant as a political-religious concept. The reason is that the analytical school regards law as a set of demands flowing from the sovereign to the populace in order to enable the sovereign to carry out the functions of government.

The natural law school regards law as flowing from the intrinsic qualities of man. Consequently, whereas analytical jurisprudence infers law from the nature of the sovereign, natural law makes the inference from man himself, as in psychology, for example.

The historical and sociological schools are more empirical than deductive. In historical jurisprudence, law is treated as an evolutionary phenomenon, the particular laws at any time being the surviving norms of the community. In sociological jurisprudence, law is the means by which persons and groups advance or defend their interests.

Choosing one particular school for the point of view results

in a biasing of the study. For example, there are two modern definitions of law which grow from the historical and sociological schools and which greatly reduce the significance of normative factors. The first is from Oliver Wendell Holmes: "The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law." The second is from Hugh Goitein: Law is "the sum of the influences that determine decisions in courts of justice." With these relatively mechanistic definitions, it is not surprising that there is a good deal of modern interest in experimental jurisprudence in which man is regarded as a manipulable phenomenon.

This paper's choice of the analytic school results in a bias from emphasizing the demands placed by God in order to carry out his sovereign functions. That is, man is an imperfect but perfectable creature, and law is the means by which God requires perfection to further His own purposes.

## 2. The Codification of God's Law

This paper limits its analysis to the Covenant Code specified in Chapters 21-23 of the Book of Exodus. The limitation is a serious inadequacy.

### 3. Categories within the Covenant Code

By analogy to modern systems of legal classification, the Covenant Code contains four principal categories of law. Also, there are fifth and sixth categories which will be examined in the following section.

The first four categories are (1) criminal law, (2) tort law, (3) domestic relations law, and (4) property.

The criminal law category includes prohibitions against sodomy, homicide, kidnapping, assault, robbery, and perjury.

The tort law category provides for a system of restitution for damages from such things as fighting, keeping vicious animals, digging pits, and setting fires.

The domestic relations law category establishes limitations on the treatment of slaves, regulations concerning marital rights and sexual behavior, and requirements of respectful treatment of parents.

The property law category deals primarily with problems of possession.

The general characteristic of these categories is that their demands are enforceable by specifically prescribed sanctions.

#### 4. Categories Relating to the Sovereign

The four categories discussed in the foregoing section may be sufficient to establish orderly existence in an economic community based on agriculture and animal husbandry. If there were nothing more, the Covenant Code could be examined adequately from the point of view of historical or sociological jurisprudence. However, the fifth category relates specifically to the sovereign, and the sixth relates to compassionate demands which transcend the minimal requirements for communal existence.

The fifth category requires allegiance to the sovereign, including affirmative acts such as feasting and sacrificial offerings and negative acts such as forswearing other gods. Capital punishment is threatened for sacrificing to another god.

The sixth category consists of moral demands, demands which transcend the ordinary functional requirements of society and which invoke man's compassionate capabilities. These include the following:

21:2 "When you buy a Hebrew slave, he shall serve six years, and in the seventh he shall go out free, for nothing."

22:21 "You shall not wrong a stranger or oppress him, for you were strangers in the land of Egypt."

22:22 "You shall not afflict any widow or orphan."

22:25 "If you lend money to any of my people with you who is poor, you shall not be to him as a creditor, and you shall not exact interest from him."

22:26-7 "If ever you take your neighbor's garment in pledge, you shall restore it to him before the sun goes down; for this is his only covering, it is his mantle for his body; in what else shall he sleep? And if he cries to me, I will hear, for I am compassionate."

23:4 "If you meet your enemy's ox or his ass going astray, you shall bring it back to him."

23:5 "If you see the ass of one who hates you lying under its burden, you shall refrain from leaving him with it, you shall help him to lift it up."

In general, there are no specific sanctions for disobedience of the demands in the sixth category.

##### 5. Interpretation

Although the six categories have been treated here as sovereign demands, they may be translated into reciprocal form. That is, they may be viewed as behavioral obligations or responsibilities.

The term "responsible" is used to express the potentiality of being bound to respond in case of a transgression. There are four



senses of "responsible." The first is to be the cause of. The second is to be obliged to see to it that. The third is to be accountable for. The fourth is to be capable of.

The Covenant Code categories of criminal, tort and property law generally have to do with "responsible" in its first sense. That is, they identify the person who is the cause of an offense, and they impose punishment on him or demand restitution from him. The domestic relations law category generally has to do with "responsible" in its second sense. That is, it obliges a person to see to it that his slave or his wife is suitably treated. With respect to the third sense, there is only a rudimentary treatment. For example, a man is accountable for the behavior of his ox.

The sixth category, specifying affirmative compassionate demands, has to do with "responsible" in its fourth sense. That is, a man is capable of compassion and therefore is required to be compassionate. Except for some aspects of equity and exemption jurisprudence, there is no parallel in the law of the United States. We draw a distinction between misfeasance (doing a thing wrong) and nonfeasance (doing nothing). There is legal liability for the former but not for the latter. Thus, a doctor may watch a stranger

bleed to death. A man need not call the police if he sees a woman being stabbed.

The four modes of "responsible" are rendered clearer by illustrative applications from the treatment of the Nazi war crimes. In particular, there has been inconclusive discussion concerning the guilt, if any, of the German people as a whole. The guilt of the people as a people lies in the fourth sense. That is, we may believe that they were capable of preventing the massacres, and, if so, they were "responsible." Similarly, both the Pope and American Jewry arguably were capable of doing more than they did, and, if so, they were "responsible." It is significant that no formal punishment was visited on any persons who were "responsible" in the fourth sense. All formal punishment was imposed for transgressions of obligations in the first three senses. Thus, (1) guards who actually killed were punished because they were the cause of the deaths; (2) Eichmann and other administrators were punished because they saw to it that the deaths could occur; and (3) the major criminals, such as Goebbels, were punished because they were accountable for the deaths, partly on a theory analagous to that of employer liability for the wrongs of an employee.

## 6. Argument

The distinctive essence of Judaism is a demand upon men to act affirmatively to the extent of his capability. Although the demand arises under the juridical concept of a covenant with an ineffable sovereign, disciplines such as psychology might find the demand attributable to the developmental nature of man. Even if so, Judaism would hold the demand to be vested with the force and authority of law.

Christianity, which is no less moral than Judaism, demands that man love and seek absolution from sin. While there is the force and authority of law, such as in the threat of damnation, perfection of man is achieved through faith. It is Judaism which requires perfection through deeds.

A Jew may well be defined as any person who feels that he is "responsible" to do everything of which he is capable.