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Some Humane Features of Pentateuchal Law

La ciencia de las leyes es como fuente de justicia, e aprovechase de ella el mundo mas que de otro ciencia. (The science of law is, as it were, the fountain of justice, and the world derives more benefit from it than from any other science).—Alfonso the Wise, Las Sieta Partidas, Pt. II, Lib. xxi, Ley 8.

It has been said that the development of Hebrew law was not in advance of the race amongst which it existed and that "that race was not advanced in culture beyond many which have been long since forgotten", but was "comparatively low in the scale of civilization". However this may be (and probably none has been as frank as the Hebrew in admitting national shortcomings), it is conceived that Israel's contribution to modern civilization in the fields of literature, practical wisdom and ethics is priceless. True, she never attained the commercial success of the Phoenicians, the engineering skill of the Romans, or the architectural ability of the Greeks, and in these particulars may be conceded to have been "comparatively low in the scale of civilization", but it is believed that she excelled all her contemporaries in the humane spirit of her jurisprudence; and when we realize that the old common law of the Anglo-American system never contained any principles prohibiting cruelty to animals, we may be permitted to dissent from the conclusions of those writers on comparative jurisprudence who have allowed themselves to write disparagingly of the law of the Hebrews. At the same time it must be admitted that to the man in the street and even to Macauley's erudite schoolboy, the title of this paper may sound ironical, for it is not uncommon to find critics who designate Jewish law as a harsh and cruel system. So prevalent is this conventional impression that the writer once heard an eminent divine concede the cruelty of Israelitish law and defend the system on the ground that it was the most humane system of its day.

If these far-spread beliefs are correct, and, as previously noted, they are reflected even in the pages of some writers on comparative jurisprudence, the tiny nation in southern Syria, (midway between Connecticut and New Jersey in size), birth-place of two religions and perennial source of literary inspiration for nearly two thousand years, has failed lamentably in the most extensively published system of law known to mankind. Why this almost ineradicable feeling of prejudice? When pressed for an explanation, the conventional answer is a quotation of the familiar "eye for an eye" etc., early expressions of *lex talionis*, an ancient Semitic principle laid down in almost startlingly Pentateuchal terms in the Code of Hammurabi, contemporary of Abraham, and, so far as can be ascertained, just as prevalent at one time among Aryan peoples as it was with the Semitic and non-Semitic peoples from whose traditional usages the Code of Hammurabi drew the bulk of its material. Looking at the matter dispassionately from the standard of abstract justice and fair-play, there is nothing excessive or disproportionate in deciding that with what measure a wrong-doer shall mete shall it be meted unto him. Apart from this, we must not overlook that at a very early era abuse of right was scrupulously guarded against by prohibition of vengeance (Ex. 4, 5). Furthermore there are unmistakable traces of *wergeld*, so firmly established that it was found necessary to regulate it and restrict its application to cases which did not amount to capital offences. Thus we find it ordained that "ye shall take no satisfaction (ransom) for the life of a murderer". (Num. 35, 31). It is submitted that in many particulars the ancient law of the Hebrews would not be considered savage at the present day. On the contrary, some of its provisions raise a standard of legal duty whose humanity is far in advance of our time. Unhappily the left wing of the Puritan revolutionists, in their mechanical and indiscriminating adoption of Biblical texts as the law in Massachusetts and Connecticut, overlooked many fundamental principles such as the privilege against self-crimination, and failed to observe such post-Pentateuchal texts as

Proverbs 3, 3, Zechariah 7, 9, and others extolling the quality of mercy. This historic experiment in the colonies of Massachusetts Bay, Plymouth, New Haven and Connecticut, had such unfortunate consequences that a deeply-rooted prejudice has spread among many people against Hebrew law. It is hardly necessary to remark that after the amalgamation of New Haven with Connecticut, and of Plymouth with Massachusetts Bay, the old experiment was permanently abandoned.¹

An outstanding feature of the law of Israel was its careful eradication of all temptation to resort to the "third degree" and other form of torture to extract confession of crime. "No man can make himself out wicked", is a maxim repeatedly cited in the Talmud—an admirable shorthand statement of the ancient Jewish law against self-crimination; which was that at the mouth of two or more witnesses, (not of one only), could an accused be convicted of crime whether capital or of less degree. (Deut. 17, 6; Num. 35, 30; Deut. 19, 15). Contrast this state of affairs with the savage cruelty inflicted by police officials in our National capital, as set forth in terms of studied moderation by Mr. Justice Brandeis in the case of *Ziang Sung Wan v. United States*.² Apart from the inhumanity and unconstitutionality of such outrages, the practices of "all-night grillings" and other inquisitional practices too often reported as taking place without any disclaimer from government authority, are opposed to the teachings of experience, as shown by Judge Cooley in his masterly work on Constitutional Limitations in which he says,

"Under the excitement of a charge of crime, coolness and self-possession are to be looked for in very few persons; and however strongly we may reason with ourselves that no one will confess a heinous offense of which he is not guilty, the records of criminal courts bear abundant testimony to the contrary. If confessions could prove a crime beyond

¹Thorpe, Constitutions and Charters (1909) 529, 533; 3 Ibid. 1870, 1882.

²266 U. S. 1 (1924).

doubt, no act which was ever punished criminally would be better established than witchcraft; and the judicial executions which have been justified by such confessions ought to constitute a solemn warning against the too ready reliance upon confessions as proof of guilt in any case."

Fanatical self-inflicted torture—a practice still extant in some parts of Asia and America—was flatly forbidden. (Deut. 14. 1, 2; Lev. 19. 28; Lev. 21. 5.). Man-stealing—regarded by Christopher Columbus and many other famous people as a mere peccadillo—was punishable with death (Ex. 21. 16; Deut. 24. 7). Manumission of bond-servants was compulsory after six years service (Deut. 15. 12; Ex. 21. 2), except where the servant refused his freedom (Ex. 21. 6); and upon emancipation the servant was entitled to be furnished liberally (Deut. 15. 13, 14). Another safeguard was the rule that harsh treatment by a master amounting to maiming was ground for freedom (Ex. 21. 26, 27). It has been asserted that the slave code of Abyssinia was copied from the ancient Jewish law, but the present writer has had no convenient opportunity of verifying this interesting suggestion. Hired servants, whether native or foreign, were likewise under the protection of the law.

Thou shalt not oppress a hired servant that is poor and needy, whether he be of thy brethren, or of thy strangers that are in thy lands within thy gates;

At his day thou shalt give him his hire, neither shall the sun go down upon it, for he is poor, and setteth his heart upon it; lest he cry against thee unto the

Lord, and it be sin unto thee.—(Deut. 24: 14, 15).

It is submitted that the foregoing is an admirably succinct statement of a rule of law, clarified by soecific illustration accompanied by an illuminating exposition of its basic policy. Not only were slaves and hired servants placed under the protection of the law, but in addition, poor and needy freemen were objects of special solicitude, anything savoring of extortion being proscribed, whether under the guise of interest (Ex. 22. 26; Lev. 25. 36, 37; Deut. 23. 19)

or of collateral security for loans (Ex. 22. 26; Deut. 24. 6, 10, 13, 17). Further protection was afforded by what appears to have been a moratorium for poor debtors at the end of six years (Deut. 15. 1-7). Repeated references to the "stranger" exhibit care that, in general, aliens should receive equal treatment with native sons; with the exception that interest could be charged against foreigners (Deut. 23, 20), foreign-born slaves were not entitled to emancipation (Lev. 25. 44-46; Deut. 15. 12), and the moratorium previously referred to did not apply to aliens (Deut. 15. 3).

Active charity was incumbent upon land-holders who were commanded to refrain from wholly reaping the corners of the field, and forbidden to gather the gleaning, the overlooked sheaf and fallen fruit, all of which were allotted to the poor and the stranger (Lev. 19. 9, 10, 23, 22; Deut. 24. 19). Nor was this all, for the tithes of every third year belonged to the Levite, the fatherless, the widow and the stranger (Deut. 26. 12), and in the fallow year, the poor were to have what they required of the produce, after which the animals were to have the remainder. It is difficult to see anything "backward" or "comparatively low in the scale of civilization", in such thoughtful and considerate provisions for the relief of the needy. What may be termed mental cruelty was made an offence against the law of Israel. Accordingly the passage "thou shalt not go about as a tale-bearer among thy people" (Lev. 19. 16) was construed not only to cover slander but in addition the evil-speaking discountenanced in the Book of Common Prayer of the Episcopal church.³ Perhaps the noblest of all the provisions in regard to the treatment one should accord his fellow man, are those foreshadowing the "good turn" of the Boy Scouts, by enacting that a man should take care of the lost property of another, even though the latter hate him (Ex. 23. 4; Deut. 22. 1-3).

³The basic principle of this last cited law of the Hebrews was applied in the Canadian case of *Zielitzki v. Obadisk*, (1921) 3 West. Wkly. 229, which laid down the rule that negligent dissemination of falsehood resulting in private injury is actionable.

Humanitarians scanning the pages of the Pentateuch would find little material for adverse comment in the Hebrew law dealing with the treatment of animals—sentient beings with no legal rights as they have been termed by a modern jurist. No less than three times it is commanded that beasts of burden and all domestic animals be given rest on the Sabbath day (Ex. 20. 10, and 23. 12; Deut. 5. 14). Twice it is ordained that help be given to raise a fallen beast of burden. As previously mentioned the fallow land produce was partly dedicated to the feeding of domestic animals (Ex. 23. 11), and finally thoughtless and unnecessary cruelty was unequivocally forbidden such as muzzling the ox at work on the threshing-floor (Deut. 25. 4); working together animals of different species (Deut. 22. 10); and untimely separation of mother and young (Ex. 22. 30; Lev. 22. 27).

“When one is immersed in his own law, in his own country, unable to see things from without, he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things which are simply due to historical accident or temporary social situation . . . To see things in their true light, we must see them from a certain distance as strangers, which is impossible when we study any phenomena of our own country. That is why comparative law should be one of the necessary elements in the training of all those who are to shape the law for societies in which every passing day brings new discoveries, new activities, new sources of complexity, of passion, and of hope”.⁴

In other words, we frequently arrive at a better understanding of our own law by the light of the analogies and contrasts which are presented by a different system. Modern public policy has been permeated by a new spirit which is expressed in the term “public welfare”. Some speak of it as State Socialism leading to Bureaucracy, others dub it Liberalism or Progressivism; but it is any

⁴Pierre Lepaulle, *The Function of Comparative Law*, 35 *Harv. L. Rev.* 838, 858 (1922).

thing other than a belated attention to the phrase "general welfare" of the Preamble of the Constitution of the United States? The principle has been embedded in many municipal organizations which consider a department of public welfare as vital as a department of public works. It is having its effect in legislation, administration and judicial decisions. Fruitful suggestions may be derived from the Old as well as the New Testament, for the contents of the Bible are a subject of judicial notice.⁵ Various jurists have referred to that Book, in times past, as the revealed law of God;⁶ and many writers have consulted it for parallel illustrations of concepts or customs which are the historic antecedents of peculiarities of modern law.⁷ It is submitted that for many generations much of the doctrine of *mala in se* has been buttressed by a deep-seated feeling that its concepts are confirmed by passages in Holy writ. Occasionally passages of Scripture have been drawn on for legislation. Thus the Statute Hen. VIII, c. 22 sects. 2 & 3 (1540), revived by the Statute 1 Eliz. c. 1 sect. 3 (1558), restricted the degrees within which marriage was prohibited to those laid down in the Eighteenth chapter of Leviticus. As this statute was enacted prior to the settlement of Jamestown, it is conceivable that it may be law in some of the American jurisdictions which include inherited Acts of Parliament as part of their common law.⁸ Another borrowing from Hebrew law is found in an interesting plan for coping

⁵Vidal v. Girard's Executors, 2 How. 126, 200 (U. S. 1844); Grand Lodge v. Johnson, 107 Misc. Rep. 249, 177 N. Y. S. 500 (1919); Spark v. Union Passenger Ry. Co., 54 Pa. 401, 433-435 (1867); State v. School Dist. 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330 (1890).

⁶Vidal v. Girard's Exrs. supra n. 5; Irons v. Reyburn, 11 Ark. 378, 382 (1850); Orr v. Quimby, 54 N. H. 590, 610, 611; Lanier v. Lanier, 5 Heisk. 462, 472 (Tenn. 1871); Forbes v. Cochrane, 2 B. & C. 448, 471 (Eng. 1824) Austin, Jurisp. Lect. 8 sect. 8. A seventeenth century view went further and ascribed a divine origin to the law of England-Lilburne's Case, 4 How. St. Tr. 1307 (1649); Manby v. Scott, 1 Mod. 126 (1663).

⁷Cf. Holmes, The Common Law.

⁸Cf. McKean, British Statutes in American Jurisdictions, 78 U. Pa. L. Rev. 195 (1929).

with the evil of perjury enacted under William Penn⁹ providing that "in case any person . . . called to evidence, shall be convicted of wilful falsehood, such person shall suffer and undergo such damage or penalty as the person against whom he or she bore witness, did or should undergo, etc." This statute was manifestly based upon Deuteronomy 19. 16-19.¹⁰ It is not suggested that modern courts will cite Genesis or the Pauline epistles as binding authority in questions of temporal law; but it has been observed that courts occasionally make reference to passages of Scripture as persuasive authority in the support of propositions laid down in charges to juries or in decisions on questions of law. Probably the most familiar instance of Biblical citation is that to be found in the case of *Omychund v. Barker*¹¹ where the question arose as to the validity of the oath of a non-Christian. Other examples of Biblical reference resorted to in the solution of legal problems in various branches of law such as trusts;¹² pleading;¹³ title to real estate;¹⁴ murder;¹⁵ easements;¹⁶ contracts;¹⁷ libel;¹⁸ and jurisdiction;¹⁹ may be found by a little patient research; and sufficient material brought to light as will demonstrate that the saying of a modern writer that the Bible is the Book which nobody knows, does not apply to judges in the Anglo-American system of law.

⁹Act of May 5, 1682, sect. 26; re-enacted as chapter 36 of "The Great Laws" for Pennsylvania (Act of Dec. 10, 1682).—Linn, *Charter of William Penn*, 102, 116 (1879).

¹⁰Compare sect. 1 of the Code of Hammurabi: "If a man bring an accusation against a man and charge him with a (capital) crime, but cannot prove it, he, the accuser, shall be put to death."—Harper, *The Code of Hamurabi, King of Babylon about 2250 B. C.*, 11 (1904).

¹¹1 Atk. 21, 44 (Eng. 1744).

¹²*Dascomb v. Marston*, 80 Me. 223, 232 (1888) and *Day v. Essex Co. Bank*, 13 Vt. 97, 102 (1841).

¹³*Schoonmaker v. Dutch Church*, 5 How. Pr. 265, 269 (N. Y. 1850).

¹⁴*Ex parte Schneider*, 21 Dist. Col. 433, 436 (1893).

¹⁵*Stein v. Hauck*, 56 Ind. 65, 69 (1877).

¹⁶*Thomas v. Thomas*, 24 Ore. 251, 256-7, 33 Pac. 565 (1893).

¹⁷*Giles v. State*, 6 Ga. 276, 283 (1849).

¹⁸*Miller's Estate*, 159 Pa. 562, 572 (1894); *King v. Cambridge University*, 1 Stra. 457, 567 (Eng. 9 Geo. 1).

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