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HELEN SILVING: JURISPRUDENCE IN THE OLD TESTAMENT
STUDY GUIDE, 2011
Steven Alan Samson

Study Questions

1. How is the concept of a state contract set forth in the Old Testament? What are some of its underlying assumptions and practical effects? What is the biblical concept of citizenship?

2. How does the covenant form the basis of biblical law? What are the different varieties and purposes of law?

3. Identify at least six constitutional concepts expressed in the Old Testament.

4. What are some of the rules of evidence and psychological factors that are employed in biblical law?

Outline

A. INTRODUCTION: OLD TESTAMENT AS A POLITICAL DOCUMENT (1129)
  1. City of God
    a. From Elohim to Yahweh
    b. From tribes to statehood
  2. The Old Testament Belongs to Our Political Science and Jurisprudential Culture
    a. Neglect of Moses, Solomon, and Mordechai [**exceptions**: Daniel Elazar wrote several studies on the history influence of the biblical covenant tradition; the Puritans were influence by the biblical republicanism of the Hebrew Republic; Aaron Wildavsky wrote studies of Joseph and Moses]

I. THE STATE CONTRACT OF THE OLD TESTAMENT

A. THEOCRACY (1130-31)
  1. **Consent of the Governed**
    a. More far-reaching than the modern social contract
  2. Biblical Idea of State Contract
    a. Importance comparable to the appearance of monotheism in spiritual thought
  3. Democratic Migratory Communities
    a. Novelty of the biblical idea
      1) Combination of two elements: **state contract** is both a historical and an ethical foundation of all law and government
    b. Culmination of an intellectual evolution—from absolutism through constitutionalism to democracy

B. EVOLUTION OF THE STATE CONTRACT (1131-32)
  1. God as Absolute Ruler
  2. God's Self-Obligation: Renunciation of the Right to Destroy Creation (Gen 8:21)
  3. Reciprocal Obligation Imposed upon Man (Gen.9:5-6)
  4. Final Step: A Bilateral Formal Act Founding the State [in the manner of a suzerainty treaty] (Deut. 27:12-26; 26:17-18)
    a. Government the result of **mutual election**

C. MODERN STATE CONTRACT: A POLITICAL FICTION (1132)
  1. Unique Historical Occurrence: Once for All
  2. **Presumption of Consent** Is Not Rebuttable [Vicarious, "Manufactured," or Tacit Consent]
  3. Contrast: Biblical Covenant Is a Working Contract; It Is Not a Unique Occurrence But Repeated in Each Generation, Collectively and Individually [Timeless]

D. FUNCTIONAL NATURE OF THE BIBLICAL STATE COVENANT (1132-35)

1. **Sanctions** for Breach of Contract
    a. Violators cut off from the people [revocation of citizenship] (Lev. 26:25; Gen. 15:8-10))
2. Assumption of Free Will
    a. Suggestions of determinism in the idea of original sin (Gen. 8:21; Eccl. 3:14)
    b. These hints are overshadowed by the covenant of righteousness
    c. Contrast with **J.-J. Rousseau**'s original innocence and loss of freedom to the state [see p. 1140: cf. J. L. Talmon's critique of totalitarian democracy]
    d. Bible presents man as born bad; political originated in Egyptian slavery
    e. State contract follows the deliverance or **liberation from slavery**
    f. Thus the state contract means the acquisition rather than the abandonment of freedom
    g. **Immanuel Kant**: Moral laws presuppose moral choice
3. Biblical Utopias
    a. **Ovid**'s Anarchistic Utopia Contrasted: The Golden Age
    b. Isaiah's Prophecy (Isa. 11)
    c. Jeremiah's view (Jer. 31:31-34)
4. Application of Three Elements of the State to Israel
    a. God's exclusive **authority**
    b. **Territory**: Covenant conditionally extended throughout the Promised Land
        1) Punishment (sanctions) for forsaking the Law: barrenness and exile [wandering, as in the Land of Nod]
        2) Polluting (defiling) the land prohibited (Num. 35:34; Deut. 34:4)
    c. **People**: Israel became a nation by formal declaration [of dependence on God] (Deut. 27:9)
5. Citizenship
    a. Circumcision [ritual separation]
    b. Naturalization [cf. Rahab and Ruth] (Deut. 23:8)
    c. Exclusion of strangers
    d. Destruction of Canaanites due to wickedness *e.g.*, child sacrifice] (Deut. 9:5)
    e. Egyptians treated with benevolence (Deut. 23:7)

II. THE CONCEPT OF LAW

A. COVENANT BASIS OF LAW (1136-38)

1. **Positive** (Not Natural) **Law** (Deut. 31:9-13) [cf. Harold J. Berman: "The only morally defensible basis of punishment, according to Kant, is that of retribution for acts freely chosen. But on this point the Judeo-Christian tradition . . . is closer to modern positivism than to ethical idealism." *The Interaction of Law and Religion* (Nashville: Abingdon, 1974), p. 169.
2. **Statutory Law**
    a. Prohibitions must not be extended by analogy [**strict construction**] (Deut. 4:2; 12:32) and cannot be repealed
    b. Permissibility of interpretation [hermeneutics]
    c. Difficult questions resolved by judicial **precedent** (Deut. 17:8-12)
3. **Torah** = Learning (Deut. 4:1)
    a. Justice (Deut. 4:8; 30:11-14)
    b. Standard of good law
4. Knowledge of the Law: the Common Heritage (Num. 11:29)
    a. Thinking and talking about the law (Deut. 6:21-25)
5. **Case Law**
    a. Daughters of Zelophahad (Num. 27:1-8)
    b. David and the Spoils of the Battle of Ziklag (1 Sam. 30:23-26)
6. *In re* (in the matter of) Queen Vashti [in Persia] (Esth. 1:19-21)
    a. Dissemination of the law [cf. Ex. 15:25]

B. DISTINGUISHING FEATURE OF MATURE JURISPRUDENCE: LEGAL DIVERSITY (1138-39)

1. Tendency to Diversify and Classify [Legal Pluralism: cf. English Common Law]

a. Distinction between statute and judgment [code law vs. case law, *e.g.*, *khadi* law]
b. Distinction between Law and Fact [judges and juries often wrestle with this]

2. Equity Fortifies Law [cf. the English Distinction between Law and Equity] (Deut. 6:18)
3. No Conceptual Distinction between Procedural and Substantive Law [cf. American Controversy over Substantive Due Process]
   a. No distinction between criminal law, torts, and contracts
4. Law of Labor Relations
5. Law of Conflicts (Conflicts of Law)
   a. Status of aliens (immigrants)

III. CONSTITUTIONAL CONCEPTS

A. ETERNAL VALIDITY (1139-41)

1. Aversion to **Totalitarian Conformism** (cf. Resistance by Helmuth James and Freya von Moltke in Nazi Germany)
   a. Duty of each man to form his judgment independently (pluralism) (Ex. 23:2)
   b. Contrast with ancient Scandinavian laws that imposed punishment upon judges who voted against the majority [a form of what Erik von Kuehnelt-Leddihn called identitarianism; cf. J.-J. Rousseau's general will]
2. Tolerant Attitude toward Criticism of Governmental Action
   a. Kings frequently bowed to censure by prophets (even Ahab: 1 K. 21:20-29)
   b. Essence of freedom of thought
3. Elements of **Due Process**
   a, Provision for a hearing (Num. 35:12; Josh. 20:9)
   b. Fairness safeguarded by judicial standards: Bribery and favoritism enjoined (Ex. 23:3; Lev. 19:15; Deut. 1:17)
   c. Testimonial proof of homicide (Num. 35:30)
      1) Two or more witnesses (Deut. 19:15)
      2) Judges are instructed to conduct a thorough investigation and inquiry (Deut. 13:14; Deut. 17:4; Deut. 19:18)
   d. Prohibition of collective or family responsibility [*e.g.*, blood feuds and blood libel] (Deut. 24:16)
4. **Equal Protection of the Laws**
   a. Resident aliens [metics] (Ex. 12:49)
5. Equal Value of All Men
   a. **Ransom for the soul** Ex. 30:12-15)
   b. Younger sons [favor shown younger sons and others that lack status]
   c. Prohibition of demeaning punishments

B. NO EVIDENCE OF MAJORITY RULE (1141-43)

1. Unanimity Sometimes Required (Deut. 27:15-26)
2. Majority Rule: A Democratic Solution Rather Than a Democratic Ideal
   a. Remedy against Secession [*e.g.*, secession of Roman plebeians]
3. Popular Will Respected
   a. People designated their own judges (Deut. 1:13)
   b. God yielded to the will of the people
4. Demand for a King
   a. Saul
   b. Gideon (Judg. 8:22-23)
   c. Allegory of Jotham (Judg. 9:8-15)
5. God Yields to the Popular Will
   a. Contract with the people (2 Sam. 3:21)
6. **Rejection of Monarchy**
   a. Monarchy seen as a repudiation of God's rule
   b. It abridges freedom and courts despotism (1 Sam. 8:11-18)
7. God's Insistence on Constitutional Monarchy

IV. FACT FINDING AND PSYCHOLOGICAL FACTORS

A. THEORY OF KNOWLEDGE [EPISTEMOLOGY] (1143-45)

1. God Has Set Eternity in Our Hearts, But We Are Not Omniscient

2. Difficulty Finding or Determining the Facts
    a. Solomon's judgment (1 K. 3)
    b. His largeness of heart (1 K. 4:29)
3. Biblical Law of Evidence and Proof Is Not Formulaic
    a. Distrust of testimonial proof
    b. Corroboration by other witnesses (Deut. 17:6)
    c. Case of **Naboth** the Jezreelite (1 K. 21)
4. Rule of Free Evaluation of the Evidence (Deut. 17:4)
5. Psychological Factors
    a. Retributive purpose of punishment
    b. Deterrent effect
6. Appeals to Sympathetic Impulses (Ex. 23:9; Lev. 25:23)
7. Bible Sets a Paternal Example as a Pattern of Conduct [cf. René Girard's concept of mimetic desire] ((Deut. 10:17-18; cf. John 5:30)
8. Original Sin Is Mitigated (Gen. 8:21)

B. INFERRING CRIMINAL INTENT (1146-47)
1. Malice Aforethought (Ex. 21:15)
2. Lack of Intent: Accident, Ignorance ((ex. 21:13; Deut. 4:42)
3. Accidental Killing
    a. Rebuttable presumption
4. Killing in a Cruel Manner
5. Hatred Not Accepted as Proof of Murder
6. Lack of Knowledge
7. High-Handed Sin (Num. 15:30-31)
8. The Judging Congregation (Jury) Must Decide the Question of Guilt

V. CONCLUSION

A. MATURITY OF THE BIBLE'S JURISPRUDENTIAL WISDOM (1147-48)
1. All Interpretations Are Subject to Challenge
2. Moses Depicted as Wearing a Mask (Ex. 34:33, 35)
    a. Ultimate meaning of the law is veiled

Review

consent of the governed	state contract	mutual election
modern presumption of consent	sanctions	J.-J. Rousseau
liberation from slavery	Immanuel Kant	elements of the state
positive law	statutory law	Torah
case law	totalitarian conformism	due process
equal protection of the laws	ransom for the soul	rejection of monarchy
Naboth		