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## *An Essay on the Hebrew Civil Code*

*by David C. Bayne, S.J.\**

When lofty Enlil, lord of heaven and earth, who determines the destinies of the land, committed the rule of all mankind to Marduk, and named me, Hammurabi, the exalted prince, to cause righteousness to prevail in the land of Babylon, to go forth like the sun over the black-headed race, I established law and justice in the land, and promoted the welfare of the people.

**T**HUS DID HAMMURABI, the greatest of ancient lawmakers, begin his code. In his capital seat of Babylon in the lush Euphrates valley the great Babylonian king drew up with his own hand the code that was to be the base and foundation for the law of the adjacent cultures of the ancient world—of the Hittites, the Assyrians, the Canaanites. Hammurabi wrote in the year 1729 B. C., and though the greatest, he was yet not the first, nor fully original. To the southward, down the Euphrates valley, in the ancient city of Ur, some 150 years earlier, the law-code of Lipit-Ishtar, the Sumerian king of Isin, gave Hammurabi his form and beginnings. The Sumerians in turn had borrowed from the Accadian work of 1950 B. C., but before that, there is no known code of law.

On to this legal scene walked Moses, the lawmaker of the Hebrews, the leader of the Chosen People, the Servant of Yahweh. And what did Moses, and the Mosaic code, borrow from these predecessors, from Hammurabi, from Lipit-Ishtar, from the Hittites, the Assyrians, the Canaanites? This, of course, is difficult to say. Something, certainly, but how little or how much is another matter. Perhaps the chief evidence, beyond occasional parallelism in content, comes in the frequent recurrence of the standard formula for each law, beginning with "if" and concluding with an apodosis. Thus the first law in the Code of Hammurabi states: "If a man accuse a man, and charge him with murder, but cannot convict him, the accuser shall be put

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to death." Throughout all the earliest eastern codes this formula is found. Accadian:—*Shumma*; Sumerian:—*Tukundi-bi*; Hittite:—*takku*; the Pentateuch:—*ki*. So, too, it became in later years with the Roman formulary and to a modified extent with the very earliest Anglo-Saxon writs.

In general it must be said that, as with all laws, the Hebrew found its base in the milieu in which it arose. Customs, usages, practices, the codes of neighboring nations, of predecessor cultures—all perforce impinged on the Hebrew law. But the Hebrew code was the product of the Hebrew genius, molded to the Hebrew mind and spirit. Whatever was absorbed went through the intimate process of a substantial change, was impregnated with the Yahwism of the nation, became purely Hebrew, with the Hebrew ethico-religious stamp, suited to Hebrew needs, attitudes and psychology, and above all to the moral, spiritual heritage from Moses and Yahweh. Whatever was taken from Hammurabi, from Assyrian, Hittite and Canaanite (and in the main the strain can be traced through the neighboring Canaanite) was made purely and fully Hebrew.

### *The General Nature of the Hebrew Code.*

Before one begins to dissect the Hebrew Code, constituent element by element, a house-top view of the whole law of the Pentateuch is in order. When one considers the Torah—from the earliest ethico-religio-moral pronouncement of Yahweh to Moses in the Decalogue of Sinai, through the Covenant, Deuteronomic, Holiness, and Priestly Codes—there are many features that warrant thought, that set it off from its ancient eastern forbears.

It is not our place to enter into the niceties of conflict over the exact meaning of the word "Torah." It has, in fact, been variously used to signify: "any and all priestly instructions," or "the decisions of Moses," or "Deuteronomy" alone, or instructions on ritual, or prophetic instruction. For us, as for most writers, the Torah is synonymous with *huqqim*—the law—and is coterminous with the whole collection of the laws of the Pentateuch.

And yet this is not strictly accurate, for to us the Torah is the Hebrew Civil Code, and hence includes as well that oral tradition that antedated the written codes of the Pentateuch and persisted alongside it as customary law. Prescinding, then, from

further dilation on the finer distinctions, the Torah—the ancient Hebrew Civil Code—embodies the written law, the law of Exodus, Leviticus, Numbers, Deuteronomy, as well as the oral tradition, anterior, and yet collateral as well, to the Pentateuch.

This double nature of the Hebrew Code, the oral and written, the codified and customary, leads logically to thoughts of the law of the present-day. Take the law of the United States, since it, too, partakes of this same double nature, albeit from a different aspect. Whereas the Torah could be said to be primarily a code compilation, and only secondarily customary law, the reverse is true of the American common law. The foundation of our law was unwritten, and grew, and grows, by the continuous declarations of the courts as to what the law is. Precedent heaped on precedent builds the corpus, so that today the years' accretions of customary law tell us, with remarkable accuracy, what the totality of the common law of the land is, and will be, under ascertained facts. Concurrent to this our busy legislators have been building up a written law, a code. We call them statutes, but even then we codify them, so that today the 48 states, as well as the Federal law, have codes. Another way to look at it is this. The written law of the Pentateuch is comparable to the law of the Codex Juris Canonici, or to the codes of the civil law countries of today which stem from the Justinian Code through the Code Civile of Napoleon—France, Germany, Switzerland, Austria, and the rest, whereas the oral part of the Torah is comparable to the Anglo-Saxon common law of England and the United States.

### *The Distinctively Religious Character of the Torah.*

The one element alone above all others that sets off the Torah from the law of any other peoples is its religious nature. The Prophet Amos related the Torah directly to God: "Juda has rejected the Torah of Yahweh, has not kept the *huqqim*." (Am. 2:4) and Isaias predicted: "\* \* \* for from Sion will go forth the Torah, the word of Yahweh from Jerusalem." It would be incorrect to think of Israel as a secular state. The Hebrews were, first of all, the Chosen People of Yahweh, the subjects of the promises to Abraham, Isaac and Jacob. And most of all, they were the people who covenanted with God at the foot of Mount Sinai. By a solemn contract, sealed in the sprinkling of blood on altar and people, Israel was Yahweh's and Yahweh was

Israel's. Once our thinking is founded on this base of a religious covenant, all else slips rightly into place. Yet there are commentators who would have the Mosaic Code merely a positive-law enactment, not divine; local not universal. J. M. Powis Smith of the University of Chicago makes a revealing comparison. Hammurabi claims to have received his laws direct from the God of Justice, the Cretans attributed theirs to Jupiter, the Spartans to Apollo, the Romans to Numa, the Etruscans to Tages, the Sumerians to Hani and Nisaba. With these, Smith groups Moses as "having received his laws directly from Yahweh on Mount Sinai." Over against such an opinion, more recent authorities see the idea of a wholly revealed law as rather peculiar to Israel, with little genuine evidence of a claim for a supernatural law in the other primitive codes. The question of the exact authorship, under Yahweh, is by no means settled. As the Pontifical Biblical Commission stated: "Moses, in order to compose his work, made use of written documents or oral traditions, \* \* \*" There was "\* \* \* a progressive development of the Mosaic laws due to social and religious conditions of later times \* \* \*" Thus, too, certain among the rabbis conceive the complete body of Hebrew law as revealed to Moses, passed on by oral tradition, and set down in certain stages of development into the various codal divisions of the Pentateuch. This would account for both the divine and Mosaic character of the whole body of the Hebrew law, oral and written. If we cannot look to Moses for the source, certainly we can find it in the revelations of later prophets. This subject, however, is by no means closed. The Biblical Commission suggests continued study and investigation.

This central fact—that the Hebrews were the Chosen People of Yahweh—accounts for the nature of the Torah as the expression of the religious, moral, ethical life of the nation. Our later analysis will show that the non-religious elements in the Pentateuch are far in the minority, that the Hebrew Code concerned itself rarely with the non-religious governance of the people. And why was this so? There are two very plausible reasons: (1) The elemental and simple nature of the culture demanded very little positive-law regulation. Certainly there was no need for elaborate business and commercial law. The law of contract was rudimentary. In general, in the passage from the semi-nomadic, to the primitive agricultural, to the more

advanced but still fundamentally agricultural society, there were few non-religious laws needed; (2) What little legislation of this non-religious nature was necessary was excellently cared for by the customary law, the general usages and practices. No need to write down such obvious and well-known rules.

In the end, therefore, the collected, written laws of the Pentateuch are exactly what would be expected of a religious state, in covenant with Yahweh and concerned with law only in so far as it regulated moral, religious, ethical life. Thus Isaiah complains that Juda has “\* \* \* rejected the Torah of Yahweh of hosts, despised the word of the Holy One of Israel” (Is. 5:24). “It is a rebellious people, faithless sons, sons who will not listen to the Torah of Yahweh.” (Is. 30:9.)

### *The Physical Makeup of the Torah.*

Over the last twenty years there has been intensive study of the laws of the Pentateuch and a growing tendency to condemn the traditional categories of the Decalogue and the four separate codes—Covenant, Deuteronomic, Holiness and Priestly. As a type of the modern approach consider the theory of two German exegetes, Alt and Jirku. By internal study principally, Alt and Jirku found in the four books ten primitive and separate codes. Their basis for distinction was founded on what they termed an “iron” law, postulating that all the articles of a code drawn up by one author must be characterized by the same style, the same mode of expression. Alt and Jirku, therefore, would simply rearrange the four traditional codes into ten separate sets of laws. It must be admitted that all of the four codes, scattered as they are throughout four books of the Pentateuch do not give evidence of being complete in themselves and indicate that they might well have been parts of wholes, or that parts of these four codes were smaller and lesser codes in their own right, absorbed by the writers into the larger codes of the Torah.

What then is to be said of the schematic makeup of the Torah? Only this, that internal study of style and form will yield us little more than we have now seen, that if we are to gain a fuller view of the constituents of the Hebrew Code we must go to the Torah and there analyze systematically the contents of the traditional collections such as we find them, keeping in mind the while that (1) There is great evidence of non-written, customary law outside these codes, that (2) there is also

evidence of possible written law no longer preserved, and (3) that the traditional, oral law is confined, in the main, to the non-religious areas of Hebrew life.

### *The Decalogue.*

To list the Decalogue as part of the Hebrew Code is somewhat inappropriate. It does not strictly contain any positive law at all. The Decalogue is really much more clearly understood by layman and scholar alike as just simply the well-known Ten Commandments. As such it is the capital spring and fount of the Hebrew, and the Christian, moral and religious life. When viewed, however, as part of the Hebrew Code, it can be considered more as setting the tone for all the law that is to follow. Amidst the smoke and flame of Sinai, it was handed to Moses by Yahweh, and hence was clearly the will and word of God, is characterized by the eternal covenant between Yahweh and His people Israel. The Decalogue is, therefore, divine, and purely religious. The different versions of the Commandments in Exodus and Deuteronomy are of slight importance—in whatever form they are considered they effect the same substantial result, they are the foundation stone for the whole of the Hebrew law. From the legal aspect the chief onus of the Decalogue, apart from the primary function of a basic code of morality and elementary social life, is to establish a spirit and an attitude, to pervade the entire Hebrew Code with its religious outlook, its union with Yahweh. For those who maintain the Mosaic source of the Decalogue the date of origin is in the 1300s B. C.

### *The Covenant Code.*

Those prescriptions contained in various parts of the Book of Exodus and grouped in the traditional category denominated the "Covenant Code" present us with the first peculiarly legal materials in the Hebrew Code. They preserve, however, the religious nature which characterizes the whole Hebrew law, but less emphatically, and do have many positive-law enactments, as we shall see.

The Covenant Code is variously dated. It is perhaps advisable to summarize the many opinions by saying broadly that the Covenant Code was pre-monarchic, but how many years before 1000 B. C. is best left unsaid. From internal evidence it is clear that the Israelites were yet in a simple and undeveloped

state, not as some have said, however, semi-nomadic, but rather herdsmen and farmers and vinedressers. That the society was rude, almost primitive, is deducible from the study of the laws. Comparison with the legal structure of the Angles and Saxons that greeted William in 1066 would indicate an even more primitive legal system than the early Anglo-Saxon.

Implicit to the Covenant Code is the Decalogue. Thus occasionally sanctions are laid down for violation of the commandments, as when death is imposed for idolatry. The Decalogue is assumed as existent; its spirit pervades the Covenant Code. Also presumed is the co-existent body of customary law, passed on, even memorized, by oral tradition.

The Covenant Code has been extracted in the main from four chapters of the Book of Exodus, 20 through 23. There are fifty laws in the Covenant Code, in comparison to 282 in the Code of Hammurabi, which indicates at once the more advanced state of the Babylonian society and also the presence of complementary unwritten Hebrew law. Using the current categories of the common law of the United States there can be found in the Covenant Code certain areas of the law of Domestic Relations, Torts, Personal Property, Criminal Law, and some elementary Contract Law in the nature of breach of trust.

In breaking these divisions down, the Criminal Law of the Covenant Code concerns itself with what today would be considered the more gross or cruder crimes—murder, kidnaping, abortion, bestiality, ill-treatment of slaves resulting in death, mayhem. The Tort law, as would be expected, is more extensive, as it was in the earliest Anglo-Saxon law. There is provision made for restitution in the form of damages for injury to property caused by negligence in keeping-up the property, e.g., injury from a fall into an open cistern, injury from animals. All of the elementary types of injury due to negligence, which is the principal content of tort law today, are mentioned in the Covenant Code. The interesting parallel between the action at law issuing from the service of the writ *Quare Clausum Fregit* in early Anglo-Saxon law (ca. 1239 A. D.), and the provision in the Covenant Code (ca. 1100 B. C.), for reparation for the injured vineyard could divert us for a moment.

The Covenant Code reads: "If a man \* \* \* burns another's field, he must make restitution with the very best of his own field." And the writ *Quare Clausum Fregit* states: "If the plain-



tiff shall make you secure of prosecuting his claim, then put defendant before us to show wherefore he broke and entered the field, and with his feet in walking, trod down, trampled upon, and spoiled the grass and herbage there growing \* \* \* of great value \* \* \*

On the purely religious side the Covenant Code prescribes moral, religious and social conduct. Idolatry in many aspects, magic, the cursing of Elohim, the boiling of a kid in its mother's milk, are all outlawed. From the moral aspect, calumny is forbidden, and surprisingly perhaps, honesty and justice in lawsuits is prescribed. And finally a humane attitude to the weak,—widows, the poor, orphans,—and to the enemy is specified.

### *The Deuteronomic Code.*

An estimated and rough 400 years after the Covenant Code and designed no longer for the herdsman and farmer, the Deuteronomic Code, promulgated for a town dwelling people both national and religious, presents a body of law more complete and developed than the Covenant Code and reflecting a more central government and a more highly organized religion. For this reason, among others, the Code of Deuteronomy is classed in the monarchic period.

Again the commandments of the Decalogue are presupposed, as well as the Yahwism of the nation, Israel. It is Moses who speaks throughout: “\* \* \* the commandments of Yahweh and His laws which I ordain.” (Deut. 10:13.) The religious nature of the Code is predominant for the reasons already adduced.

Now, however, the positive law, the non-religious, is more in evidence, especially in the field of Domestic Relations, where certain aspects of marriage, divorce and the Levirate law are treated. In the law of Property, Personal and Real, prescriptions are made (1) For setting the limits of the field, the vineyard, (2) For treatment of lost possessions, and (3) For governing pledges of personalty, e.g., the pledge of the essential millstone of the poor farmer. What could be termed International Law appears in the law for the conduct of war, as when it is naively proclaimed that cruelty must be avoided, but that the Canaanites nonetheless must be exterminated. Much of the humane and social legislation of the Covenant Code is repeated. In the area of religious legislation the greatest advance is made. The prescription against idolatry, magic and sorcery are restated,

but new laws appear prescribing the collection of tithes, listing the names of clean and unclean animals, and, perhaps most revolutionary, imposing the celebration of the three principal feasts in a *common* sanctuary, thus effecting a centralization of cult. Laws governing the administration of justice, the Levites and Prophets, and, more notably, the king himself, show further advance over the Covenant Code. There remain, however, many evidences of the primitive state of Hebrew culture, e.g., the persistence of the blood feud, the vendetta, the prohibition against drinking blood, and the gruesome slaughter of the firstborn. It is generally held that this consecration at times extended in practice to the human firstborn.

#### *The Holiness Code.*

The prescriptions designated as the Holiness Code are generally placed in the monarchic period in point of origin. In type and spirit they add nothing particularly revealing to our knowledge of the Hebrew character. Again the same fundamental religious foundation is present, the Decalogue is presupposed and the legislation against idolatry is restated, with specific commands against the sacrifice of children to Moloch (thus indicating, as do other prescriptions, that the Holiness Code was truly ancient in its customary observation and unwritten origin). Religious regulation of the Sabbath, the feasts of Passover, Pentecost, Trumpets, Day of Expiation, Tabernacles; and the sabbatical and jubilee year, are given with particularity. The *lex talionis* persists.

#### *The Priestly Code.*

The Priestly Code is the last of the compilations of Hebrew law, generally conceived to be first reduced to codification and writing in the exilic period, but how long after 600 B. C. is not known. Many exegetes group the Priestly and Holiness Codes together. The thought is that the Priestly Code, which is spread throughout the books of Exodus, Leviticus, and Numbers, includes and absorbs the Holiness Code. The Code generally is associated with the name of Ezra, who gathered a group of priests and Levites around him, located himself at Jerusalem and instituted priestly reform. When considered as a unit with the Holiness Code, the Priestly Code treats of the strictly priestly functions and duties while the Holiness Code regulates the people in the religious and moral conduct of their life.

*Conclusion.*

Reviewed as a legal unit the written law of the Torah in the Pentateuch adequately regulates the religious, moral and ethical life of the Chosen People, reflects fully the divine calling of the nation of Yahweh and Moses. However, the written legislation of a purely *civil* nature is incomplete, and confirms other evidences of customary, unwritten law of equally ancient origin. But, upon the entire Hebrew Civil Code, written and unwritten, Yahweh, Moses and the prophets have, at whatever date of promulgation, left the stamp of divinity, of a revealed law of the God of the Chosen People; and at the base of all is the Decalogue, permeating the whole with the morality of the Lord God of Israel.