

THE ANCIENT HEBREW LAW OF HOMICIDE

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The Ancient Hebrew Law of Homicide by Mayer Sulzberger

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BY
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THE following lectures were read before the Dropsie College for Hebrew and Cognate Learning in the months of March and April, 1913. They belong to a series of studies in Jewish Jurisprudence and Institutes of Government, two of which have been heretofore published, to wit, 'The Am Haaretz—the Ancient Hebrew Parliament', 1910, and 'The Polity of the Ancient Hebrews', 1912. My thanks are due to Dr. Julius H. Greenstone, who has prepared the careful indices to the volume.

M. S.

THE ANCIENT HEBREW LAW OF HOMICIDE*

I

THE law of homicide is an index to certain sides of national character. Where there is a small, powerful class able to monopolize rule and government, the rights of the great mass of common people are weak and ill-assured. In such a society there is much violence. Arrogant and turbulent spirits are in perpetual rivalry, and compete for mastery. The stronger steadily eliminate the weaker. Life is held cheap. The chiefs, who are always risking their own lives, compel their underlings, who have no great stake in the contest, to risk theirs. It is a kind of feudal system, in which each chief is the head of a clan or other organization with whose aid he hopes to retain or to achieve pre-eminence.

Out of such a condition the early laws of homicide arise.

Clans in juxtaposition are never quite at peace with each other. There may be a kind of truce, but this is liable to be broken at any moment. The murder of a clansman by a member of another clan is *casus belli*, for the sufficient reason that it weakens the assailed clan. If unpunished, the act tends to be repeated, and this process would, in a relatively short time, bring the weakened clan under subjection to the aggressor clan.

* A course of five lectures delivered before the DROPSIE COLLEGE FOR HEBREW AND COGNATE LEARNING, March 31, April 3, 7, 10, and 14, 1913.

In such a state of society the law of retaliation (the *lex talionis*) becomes inevitable. The assailing clan must be weakened as much as the assailed, if the latter is to retain its relative strength and position. What we call *lex talionis* is therefore, primarily, a means for the defence of the clan, an inter-clan rule. It is one of the early stages of what we now call international law, which even yet knows no final arbitrament but the sword.

The period when this rule began to be applied antedates even primitive history. We know of no stage in which men did not form a kind of society, however small or rude it may have been. And so soon as this point has been reached, individual action ceases to be unrestrained, and must accept limitations useful for society. A member of the blood-covenant may no longer slay his fellow-member. However determined his purpose, the *hatan damim* (member of the blood-covenant guild) must forgo it when he learns that the intended victim is also a member (Exod. 4. 24-6).¹

¹ The text, Exod. 4. 23-6, is of great antiquity. It refers to an early state of the law in which for certain offences the penalty of death is imposed on the eldest son of the criminal. If Pharaoh will not let the people go, if he will enslave JHVH's first-born (*bekor*), then JHVH will slay his first-born (*bekor*). This is the primitive *lex talionis*, traces of which are clear in the Hammurabi Code, §§ 116, 210, and 230.

This denunciation of punishment against Pharaoh by killing his first-born son brings to the writer's mind an incident in the life of Moses which he then proceeds to relate. Moses has been guilty of some delinquency which was doubtless plainly told in the old narrative but is here omitted. The Rabbis inferred that when Moses married the daughter of Jethro, the latter as a condition of his assent stipulated that the first-born son of the union should be brought up as a Gentile. Hence the boy Gershom was not circumcised (Ginzberg, *Legends of the Jews*, vol. II, p. 328). As JHVH claimed the first-born of all Israel as his, the failure of Moses to circumcise Gershom was to be punished by the death of the latter. The quick mother-wit of Zipporah saved the situation. She circumcised the boy, cast the foreskin at JHVH's feet uttering (for the boy) the proper formula: 'Now

From the very beginning of organized society, there must have developed two sets of laws, one for those within and the other for those without the clan. The latter is simple and short. A member of clan A has weakened clan B by killing one of its members. Clan B must retaliate by weakening the aggressor clan at least as much.

This policy, however wise as against another clan, would be ruinous if applied within the clan. One member has killed another, and has thereby reduced the strength of the clan. If the aggressor be killed, its strength is further reduced. The direct clan-interest is that the aggressor be kept alive, unless he is likely to further imperil the community. It is this contingency which creates a necessity for devising a lesser punishment than death for homicide within the clan, and hence is evolved the system of imposing a money penalty on the homicide—*wergild*. It is this contingency, too, which creates a necessity for ascertaining the circumstances of the tragedy and its underlying motive. Hence follows a subdivision of homicide into murder, which even within the clan may continue to be a capital offence, and manslaughter, which may readily be compounded for.

Two systems of homicide law are thus made more or less co-existent: an external homicide law, which is the *lex talionis*, a kind of war, and an internal homicide law, which seeks to ascertain the very right of each case—what we would call justice.

This co-existence of two discordant systems of law in each of the many clans composing a state or kingdom, tends

art thou of blood-covenant (*hatan damim*) with me! JHVH forbore his purpose. And then follows the explanation that circumcision constitutes blood-covenant, with the necessary implication that blood-covenantees may not for any cause kill each other.