

The Biblical Covenant as the Foundation of Justice, Obligations and Rights

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In the January 1995 issue of *Commentary*, Paul Johnson provided readers with an extensive and detailed analysis of the American commitment to religious norms and belief as the foundation of the American regime. In that article he struck a blow for reconsidering the by-now-seen-as-traditional American attitude toward the problem of rights and obligations in a free society, challenging the exclusivist "rights as trumps" approach rampant in contemporary American society. The phrase is Ronald Dworkin's, one of its leading exponents among constitutional law specialists today.

Rightly pointing to the biblical sources of the American Judeo-Christian religious tradition, Johnson suggested that the present American concept of rights flows out of an earlier concept of obligations on the part of people to God and to one another as the foundation of justice in the body-politic. He correctly identifies the source of this concern with obligations and of the obligations themselves as the Bible, most especially the Hebrew Scriptures, what Christians refer to as the Old Testament. He suggests that the Puritans and other Reformed Protestants of the earliest centuries of the settlement of what is now the United States had developed a systematic theory of obligations resting on the idea of covenant, a morally informed pact of public character between God and humanity based upon voluntary consent and sealed with mutual oaths or promises, whereby the people recognize God's sovereignty and God provides them with protection and the law under which they are to live. The partners to the covenant voluntarily consent because although they aren't equal, they share a certain basic equality for purposes of their shared task, i.e., the settlement and improvement of the world -- and sufficient independence of choice in assuming that task.

Pursuant to those original covenants with God, humans entered into subsequent pacts with each other, first with God as a party, later with God as a witness, to establish political and legal orders capable of delivering on that original covenant, culminating in modern constitutionalism.

The Three Dimensions of Covenant

Much has been written about covenant (*brit*) as the political foundation of biblical thought, law and history, to the point where it appears to be superfluous to further argue the point.¹ Covenant served as the organizing principle of the Jewish people and its polity (the *edah* or, more fully, *adat bnei yisrael*) and those who followed in its steps, most particularly the Reformed Protestants on the Continent of the British Isles. The Bible describes how God sets Israel aside for His religio-political purposes through covenant. Covenant is not just a device but shapes the whole worldview of the Jewish people. In part it does so through the

very idea that humans establish partnerships with God, even if they are the junior partners, in order to reinforce this idea.

As the Puritan theologians of the sixteenth and seventeenth centuries pointed out, the whole idea of covenant is a most daring one. The omniscient and omnipotent God, creator and ruler of the universe, chooses to limit Himself through a pact with his creatures, human beings, to both enable and to require them to take more control over their lives and the world created for them. In a sense, the biblical story can be read as the progressive transfer of power and responsibility in this world from God to humanity, beginning with God's covenant with Noah in which God was the initiator, and culminating in the covenant between the Jewish exiles returned to Judea from Babylonia with God, in which the Jewish settlers were the initiators, in such a way that humans assume that power and responsibility only after they have assumed their obligations to Him, but still the transfer is made.

The covenantal worldview and mindset are reinforced by an extensive terminology and language of covenant. That terminology enables us to introduce nuances and subtleties in the use of concept, for example, to distinguish between kinds of covenants, especially constitutional covenants that create new partnerships (in Hebrew, *b'nai brit*, literally sons of the covenant) or limited covenants between entities that remain separate (*baalei brit*, literally, masters of the covenant), such as international covenants; or *hesed* -- loving covenant obligation -- which provides for covenantal dynamics, and *shalom* from the Hebrew *shalem*, which defines peace as a covenantal coming together into completeness.²

There remains much to be explained in understanding the meaning for this now-conventional view of Scripture and its application in the Bible and in the Jewish political tradition. One critical question that must be asked is whether *brit* also is the foundation of justice, with its concomitant obligations and rights, according to the biblical worldview, or is justice built in to the world from its creation, i.e., is not natural? Is there a natural law of justice in the biblical worldview? This excursus begins the examination of the multidimensional character of the biblical idea of *brit*, especially as it relates to issues of *tzedakah u'mishpat*, best translated as acting/doing justly through law, or what moderns refer to as obligations and rights.

Biblical covenants have three-dimensions. They contain a theological dimension, either a direct connection with God or with God as a witness; a national-political dimension relating to Israel as a people (*am*) or an organized body politic (*edah*); and a normative dimension dealing with foundation or maintenance of justice, either *tzedakah u'mishpat* or *hok u'mishpat* (law and justice) which includes within it a framework of obligations and rights.³ This is particularly true of those covenants which establish new frameworks, in Hebrew the covenants of *b'nai brit*. It is somewhat less true but still frequently true of those covenants which regulate international relations, where the covenant remains subordinate to its partners, i.e., covenants of *baalei brit*.

One may find in the Bible references to three possible positions. In Genesis, Chapter 4, the story of Cain and Abel suggests that there is such a thing as natural justice built into the world. Verse 10 is the proof text. After Cain asks God whether he is his brother's keeper, God turns to him and says: "What hast thou done? The voice of thy brother's blood cries to me from the ground." (*Kol damai akhikhah tzoakim elai min ha-adamah*). This is by far the most significant biblical passage speaking on behalf of the existence of natural justice and has been quoted to that end by generations of commentators.⁴

Far more ambiguous are passages such as that beginning in Job, Chapter 38, Verse 4, when God, speaking out of the whirlwind, asks Job the famous question: "Where were you when I founded the world," and then proceeds to set forth a description of God's creation and systematization of the natural order. However, the upshot of God's answer is to suggest that while there is a natural order, there is no natural justice; that God behaves according to His own will in ways that may seem to humans capricious in meting out justice. The closing verses of Ecclesiastes (especially *Kohelet* 12:13) suggests the same but in a more positive tone, that God has ordered the world and therefore has redeemed humanity from the desperately cynical conclusion that all is vanity, presented throughout the rest of the book.

Apparently refuting the claim that the Bible rests on natural law is Genesis 9, which describes God's first explicit covenant, with Noah and his descendants after the flood.⁵ That covenant sets down the basic rules that God expects humans to live by and provides for the establishment of means of enforcement of those rules.⁶ It binds all humans forevermore.

One can conclude from the foregoing that while there may be natural justice built into the universe, there is no natural law; that law is entirely a product of God's commandments, which, except for a few basic commandments that God gave Adam such as to be fruitful and multiply, to be His steward in the Garden of Eden, and not to eat of the fruit of the forbidden trees, are all mediated through God's covenants, first with all humanity through Noah and then through segments of humanity beginning with Abraham. Thus *brit* is required for the ordering of the world (for humans) in matters of *tzedakah u'mishpat*. This, indeed, is the conclusion in *Kohelet* 12:13, referred to above.

From reading the first chapters of Genesis one can theorize that it is possible that God tried natural justice before the flood and found that it did not work, that human nature itself included too much egoism, appetite and self-interest for humans to act justly without the necessity to do so, and that, prior to His covenant with Noah, God had to intervene personally in every instance to assure just behavior or to punish injustice. In order to eliminate the necessity for such massive personal Divine intervention, God acted, through His covenant with Noah, to establish an order that included requirement for human enforcement of *tzedakah u'mishpat*. This would make God's initiation of His covenant the first major step in the transfer of His active authority in this world to humans, essentially providing that in matters of ordinary law humans would be responsible, with His involvement confined to extraordinary situations or where

human institutions failed to perform according to the terms of the covenant and God's justice.

Covenanting is a most appropriate instrument for this transition. The putative covenant with Adam, upon which Reformed Protestantism anchored its covenanted edifice, refers to him as God's *shomer* (steward) in the world (Genesis 2:16) and the covenant with Noah (Genesis 9) where the specific terms are not used, examples of the retribution necessary to maintain justice are given. In the first covenant with Abraham (Genesis 15) the term *tzedakah* is used. The second covenant (which does use the word *shamor*) is followed immediately by the story of Sodom (Genesis 18) in which one of the most famous justice-related verses in the Bible is presented: Abraham's query of God, *Hashofet col haaretz lo ya'aseh mishpat* (Will the judge of the whole world not do justice?) The culmination is in the Sinai Covenant which provides the details of what constitutes *tzedakah*, *hok u'mishpat*. This pattern continues in Joshua's covenant (Joshua 24) which refers to *hok u'mishpat* and David's (I Chronicles 16:7-43), in which David refers to *mishpatay piv*, the justice or just judgements from God's mouth.

Every *brit* is an agreement that requires from both parties *shmiya* (hearkening) and *shmira* (observing). Hearkening, a good English word now unfortunately considered obsolete, expresses in a single word the act of hearing and responding, implying consent, while observing involves taking action. The combination of *shmiya* and *shmira*, hearkening and observing, is the way that humans are expected to respond to God's *mitzvot* (commandments). The Bible holds that human beings are free to hearken to God or not, and to observe or not, which is why covenant is needed to bind them by sworn promise to do so. Since every *brit* includes the obligation to justice through law (or just judgement), in Hebrew *tzedakah u'mishpat*, whether there is natural justice or not, becomes a moot question after God's covenant with Noah.

Three Forms of Justice, Obligation, and Rights

Political philosophers and political scientists alike have identified three models or archetypes of political organization (constitution or regime) in the world, governing political (including social) behavior -- hierarchical, organic, or covenantal.⁷ Each can be said to establish a different basis for justice and obligation and source of rights. In hierarchies, one is obligated to those senior to oneself in the hierarchy and ultimately to the person or institution at its top. Under such circumstances one's rights are derived from one's place in the hierarchy. Feudalism is an excellent example of constitutionalized hierarchy where both obligations and rights are clearly demarcated.

In organic polities, one is obligated to one's primordial group, which has developed organically out of kinship over time and one's rights are based on one's standing in that primordial group. Tribal societies are excellent examples of the organic model, with tribal custom fixing one's obligations and rights. We are more familiar with medieval English society, an organic polity that pioneered in

the development of individual rights in Europe. In its view, this meant the development of the idea of the rights of Englishmen, rights that the English and other Europeans understood adhered to Englishman because they were Englishman and were different than the rights, say, of French men or Germans, if such existed. Mozart's aria, "The Abduction from the Sangleo" makes the point when at the beginning of the second act, one of the heroines cries out to her captor, *lid bin an Englander in frieheit geborner* (I am English, born free).

In covenantal polities, justice is determined by the moral principle upon which the covenant is based. One's obligations are to one's covenant partners and one's rights are derived from and defined by the covenant itself. Thus all humans have obligations to each other through the Noahide covenant and derive rights from those obligations unless they reject the terms of that covenant, in which case they are essentially outlaws. Smaller groups of humans have obligations and rights that derive from covenants subsidiary to that first one, as in the case of the Jews who are bound by God's covenants with Abraham and with the Assembly of Israel at Sinai.

While each of these models can be seen as an ideal type, in the real world models are often, perhaps usually, mixed. Thus, the Bible presents Israel as a combination of kinship and consent, beginning, if you will, with God's covenant with Abraham, to produce a family of nations which would be blessed through him. Abraham's immediate descendants form such a family, with Israel emerging out of the line of his grandson Jacob and his twelve offspring who are reunited around a common commitment to God's justice and moral law through the Sinai Covenant, which provides the specifics missing from the Noahide Covenant.

In keeping with the organic character of the twelve-tribe kinship group, before Sinai the tribes were governed by customary law. Through the Sinai Covenant God changes the moral basis of the Israelites' obligations and rights as much as He changes their content.⁸

In general, covenants are pervasive in the Bible. The major ones are multipurpose, providing for a connection between God and the relevant human group, a just ordering of relationships between the covenant partners. They are also dynamic, not mere contracts or agreements designed to be as minimally interpreted as possible, but embodying *hesed*, which requires the partners to behave generously toward one another, beyond the more letter of the *brit*, and having as their end *shalom*, itself a dynamic state.

Spinoza, for example, implicitly if not explicitly following the teachings of the Hebrew Bible, saw the foundations of true religion in justice and charity, *iustitia* and *caritas*, which give every indication of being a Latin translation of *zedakah v'hesed*, a prepolitical formulation of the covenantal framework within which justice belongs.⁹

The biblical history of the covenants between God and humans suggests a trend from hierarchical to fully covenantal relations between God and man. At first, God takes the lead in initiating His covenants, establishing His covenant with the patriarchs, perhaps Adam, certainly Noah and Abraham.¹⁰ It is clear from the

biblical account that Abraham's role as father of multitudes includes Israelites and others, for example, the Ishmaelites, descended from his son by Hagar. But the Bible carefully distinguishes between the *brit* that Isaac is to reaffirm and continue, and the *brakhah* (blessing) that Abraham confers on Ishmael and the other peoples (or religious communities) descended from him. The book of Genesis describes such covenants.

In the second stage God seeks to gain popular consent to covenants that He initiates through His designated servant (*Eved Adonai*) who is the principal leader of the people. God's first attempt to do this can be found in Exodus, Chapter 6, where He has Moses approach the governing elders of the Israelites enslaved in Egypt to renew the covenant of their forefathers, a step which they reject.¹¹ This technique is successful at Sinai where God initiates the covenant but through Moses requires the popular consent of the Israelites expressed three separate times before the pact is made (Exodus 19:9, 24:3-8).

In the third stage, the principal leader turns to God and to the people to covenant or recovenant. Moses is present as initiating this process in the Plains of Moab at the end of his tenure (Deuteronomy 28:69-33:47). Joshua's initiative is of this type in Joshua, Chapter 24. Indeed, it may be an older account of that type of initiative than the one we have in Deuteronomy. David does the same after he brings the Ark of the Covenant to Jerusalem (I Chronicles 16), as did Hezekiah after the destruction of the northern kingdom (II Chronicles, Chapters 29-31), and Josiah in the seventh century (II Kings).

In the fourth stage the people themselves initiate a covenant renewal. This occurred in the days of Ezra and Nehemiah, as described in Nehemiah, Chapter 8. They turn to their leaders who simply act as organizers of the act. While God is the object, the description of the event does not involve His direct intervention as it does not in any of the covenants after Sinai. Applying the themes of our initial model, we see that the Bible portrays God's initial covenants with humans in a hierarchical mode. God initiates and acts through patriarchs. Covenanting then enters an organic mode; God covenants with a kith, presented as descending from common ancestors, that becomes a people through the combination of kinship and consent. Only in the final stages does covenanting itself become fully covenantal, that is to say, initiated by all of the partners. Thus, even within the covenantal model there are echoes of the other models.

Covenantal Justice Based on Obligation

Sinai, the democratic covenant, makes clear what has been the critical primal element of covenantal partnerships from the first, namely that covenants establish justice through mutual obligations, indeed, systems of mutual obligations, from whence are derived (in modern terms) the partners' rights. Under the covenantal system there are no rights that are not derived from obligations. As I have discussed elsewhere, the primary covenantal obligations are to God, Hence are those of being holy and being just.¹² Hence they are excellent sources of what moderns define as rights, but covenant also keeps

rights conditional on one's maintaining one's covenant with God which establishes basic morality, justice and law, at the very least, transforming natural justice into law.

Just as covenants establish different levels of obligation, so, too, they make possible differentiation in rights among those who are covenant partners or those who are partners to different covenants or covenants of different scope. As in the case of the biblical view of covenant obligation, this is not designed to invidiously discriminate among humans but to allow humans to decide for themselves by which covenants they are bound, which obligations they take upon themselves, and hence, what rights are available to them.

In the biblical worldview, all humans are expected to be bound by the Noahide covenant which obligates them and also endows them with all the basic human rights. Those who refuse to be bound by accepting the obligations of the Noahide covenant are thereby not entitled to those basic human rights because they have proclaimed themselves outlaws. But it is their choice. Although they can be punished for violating the terms of the covenant, as humans, they cannot be outlawed by others except perhaps for the most blatant causes (what contemporaries would describe as seriously "inhuman").

All human beings can also accept the covenant of Abraham, that is to say, join one of the monotheistic faiths and accept its obligations and gain certain rights thereby. They may also accept the Sinai Covenant and become Jews, thereby taking on even greater obligations and winning the right to be numbered among God's singular people (*am segula*), that is to say, to have the full *brit* and not merely benefit from Abraham's *brit* and *brakhah*. These are all matters of individual human choice.

In sum, the Bible sets forth a comprehensive covenantal system, establishing a framework for both justice and rights in this world, one that offers the civil and social protections of contemporary rights theory without succumbing to the excesses of that theory. It does so by providing constitutional means for guaranteeing rights and controlling the demand for rights by tying them to obligations. The fundamental constitution is the Torah which defines a person's obligations to God, one's neighbors, those in need of special consideration such as widows and orphans, aliens, strangers, and many others. The "rights" of those parties do not exist *ex cathedra* but flow from the obligations of the God-fearing to them as a result of their obligations to God. These rights, then, are reinforced by a double guarantee.

The Puritans referred to this as "federal liberty" from the Latin translation of *brit*, *foedus*. Federal liberty is the liberty to live up to one's covenants once made. In 1629, John Winthrop, the leader of the Puritan settlers in Massachusetts, defined federal liberty and contrasted it with natural liberty, the liberty to do whatever one pleases, which he saw as a false liberty. It was on the rock of federal liberty that Puritan New England was built.

One hundred and fifty years later, James Wilson, originally from Scotland and a product of the Scottish Enlightenment, who had moved to Pennsylvania where he

became one of the leading figures in the drafting and ratification of the United States Constitution of 1787, applied the idea of federal liberty to define the mutual obligations between the federal government and the states. While the term subsequently fell into disuse, whenever the U.S. Supreme Court holds the actions of individuals or governments in the United States up to higher constitutional standards, it does so essentially in the name of federal liberty, which indeed can "trump" other "rights." Thus, declaring racial discrimination unconstitutional even in the face of peoples' property rights was an example of how federal liberty in the eyes of the Supreme Court trumps even natural rights of property. Unfortunately, the U.S. Supreme Court has been very selective in its application of the concept of federal liberty (of which its justices are probably unaware in any case) and, rather than use it to reinforce standards of decency and the basic norms upon which the United States was founded, has, instead, used the principle of constitutionality to undermine those norms. Perhaps what we need to do is to reexamine the Bible and the obligations flowing from its prescribed norms to learn how to reconstruct our own civil society.

Notes

1. Moshe Greenberg, *Understanding Exodus* (New York: The Jewish Theological Seminary, 1969); Albrecht Alt, *Essays on Old Testament History and Religion*, Trans. R.A. Wilson (Garden City, NY: Doubleday, 1968); Martin Noth, *Exodus: A Commentary* Trans. J.S. Borden (Philadelphia: Westminster Press, 1974); *idem*, *The History of Israel* (New York: Harper and Row, 1960); Harry M. Orlinsky, *Ancient Israel* (Ithaca, NY: Cornell University Press, 1954).
2. Norman Snaith, *The Distinctive Ideas of the Old Testament* (New York: Schocken Books, 1964).
3. Moshe Greenberg, *op. cit.*
4. Walter Brueggemann, *Genesis* (Atlanta: John Knox Press, 1982); Umberto Cassuto, *A Commentary on the Book of Genesis*, trans. Israel Abrahams, Vol. 1 (Jerusalem: Magnes Press, 1961); Klaus Westermann, *Genesis: A Commentary*, trans. John J. Scullion (Minneapolis: Augsburg Publishing House, 1984-1986), 3 vols.
5. There are those, especially Christians, who argue that God established an implicit covenant with Adam, which is only reaffirmed by the covenant with Noah. They base their argument on Genesis 2:16, but that conclusion must be derived by heavy interpretation of the verse in question. It would, of course, moot the question of natural justice since all other references come after Adam.
6. The requirement that thereby human mechanisms for the punishment of murderers is embodied in the plain text (Genesis 9:5-6). The sages of the Talmud concluded from these verses that God required institutional mechanisms, i.e., the establishment of courts of justice. They derived from this chapter the seven Noahide commandments, holding that God's covenant with Noah bound all humanity to a set of basic Divine commandments, ranging from the practice of monotheism to the prohibition of theft and the establishment of a just polity. See

Sanh. 56-60. A good discussion of the Noahide commandments can be found under the entry of that name in the *Encyclopedia Judaica*.

7. Daniel J. Elazar, *Exploring Federalism*, *op. cit.*

8. The Bible indicates that the beginnings of the process of the transformation from customary to covenantal law are to be found at Marah (Exodus 16:23-26). See Verse 25: *sam lo hok u'mishpat* (there He made for them a statute and an ordinance), cf. Nachmanides Commentary on Exodus 16:25).

9. Douglass J. Denuyl, "Power, Politics and Religion in Spinoza's Political Thought," *op. cit.*, Vol. 6, No. 1.

10. In general, God's chosen patriarch rather quickly understands the purpose of the covenanting. Where a patriarch does not, as in the case of Jacob, who sees God's first initiative at Beth-El as contractual rather than covenantal (see Genesis 28:10-28), God works him over through a series of tests covering many years, culminating in Jacob's wrestling with Him, until Jacob understands the difference (Genesis, Chapters 29-33).

11. Here God also introduces a dimension of popular involvement in the initiating by indicating that He is responding to the people's groaning (*Shamati et naakat b'nai yisrael...v'ezkor et briti* -- I will remember by covenant, Exodus 6:5). In other places in the Bible, God's response is triggered by the people's *zaakah* or crying out, whereupon God remembers His covenant and comes to their aid.

12. Daniel J. Elazar, "Deuteronomy as Israel's Constitution," *op. cit.*