FRANCESCO COCCO

The Torah as a Place of Refuge

Forschungen
zum Alten Testament 2. Reihe
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Mohr Siebeck

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Herausgegeben von

Konrad Schmid (Zürich) · Mark S. Smith (New York)
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Biblical Criminal Law and the Book of Numbers

Mohr Siebeck

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In loving memory of my father, Tonino
זיכרונו לברכה

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January 28th, 2015 Francesco Cocco

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Introduction

"*I thought I had already read this!*". These could be the words expressing the reaction of someone who is venturing to read the Bible for the first time. Right from its very first pages (see Gen 1–2), he bumps into texts which recall each other to the point of inspiring the reader with a sense of *déjà lu*.

In fact, if one reserves a shrewder examination for the 'doublets'[1] present in the Bible, it immediately becomes apparent that what appear, superficially, to be negligible discrepancies between accounts that are basically similar, can make all the difference when it comes to interpreting the text.

The case of Num 35,9–34 is a good example of this phenomenon: in fact, the majority (if not the totality) of commentators sees there a kind of mere repetition – perhaps furnished with some additions or adaptations – of the law on the so-called "cities of refuge", which has already been laid down in at least two Pentateuchal traditions (Ex 21,12–14 and Deut 19,1–13) and even repeated in implementing form in the book of Joshua (20,1–9).

What is lurking at the basis of this preconception is easily told: despite the fact that it has recently leapt to the centre of interest in biblical studies, as demonstrated by the numerous monographs and studies which continue to sprout on the subject,[2] the fourth book of the Torah – in which our text is situated – has never enjoyed great popularity among the readers and commentators of the Bible.

This is principally due to the organisation of the literary material in the book which sees the alternation of interminable lists and censuses – giving rise to the Greek name of the book, 'Numbers' – with glimpses of narratives which can be reduced to a linear and clear sequence only with difficulty; of prescriptions of an essentially cultic character to various civil or penal norms to the point that the entire book seems to have been considered basically as a mass of traditions lacking in homogeneity with regard to their origin, style

[1] For a systematic presentation with examples of the phenomenon of different versions of the same events, cf. J.L. SKA, *Introduction to Reading the Pentateuch* (Winona Lake, IN 2006) 53–60.

[2] For an update on the literature (ancient and recent) relating to the book of Numbers, cf. the recent contribution of J.L. SKA, "Old and New in the Book of Numbers", *Biblica* 85 (2014) 102–116.

and literary form, traceable, for the most part, to rather late period compared with the other books of the Pentateuch.[3]

My claim is that it is precisely this bias, which generally accompanies the book of Numbers, that has also had negative repercussions on the understanding of the pericope of Num 35,9–34, resulting in its downgrading as a simple repetition of legal content that is basically already present in the biblical legislation of the previous canonical books.

But is this really a case of sterile repetition or are we rather faced with a case of reformulation?

I anticipate at once that my response to this question – as those who are patient enough to read this book thoroughly will be able to observe – is that we find ourselves here before a case of reformulation the implications of which are extremely interesting for the understanding of the biblical penal legislation which, in this particular fragment, exhibits traces of modernity so surprising as to be as good as the defence of civil liberties in the legal systems currently in force in the majority of democratic states.

My enquiry takes its starting point and develops, therefore, from the novel contribution which the legislation in Num 35,9–34 confers on the entire biblical law of a penal character. Precisely in starting out from this presupposition, the logical path which I am putting forward is structured in a way entirely opposite to that normally followed by the exegetes who deal with the theme of the legislation relating to the cities of refuge on the basis of the canonical order of the traditions which refer to them, and, in addition, taking as basically given that this order is also reflected in the relationships of dependency of the individual legal provisions.

The arrangement of the material follows the scheme contained in the words which form the subtitle of this book: *Biblical Criminal Law and the Book of Numbers*.

The first two chapters, which are of a clearly introductory nature, seek to understand what biblical law is, in what terms it is distinguished from other ancient legal systems and, on the other hand, in what way it corresponds to them. After these general preliminaries, the field of research is confined to the biblical penal legislation by means of the highlighting of criteria useful

[3] As an example of the general impression which the book of Numbers makes on its readers – in the broadest sense of the term – it is sufficient to quote some words of M. Noth: "There can be no question of the unity of the book of Numbers, nor of its originating from the hand of a single author. This is already clear from the juxtaposition of quite varied styles and methods of presentation, as well as from the repeated confrontation of factually contradictory concepts in one and the same situation" (M. NOTH, *Numbers. A Commentary* [The Old Testament Library; London 1968] 4). For the convenience of the reader, I shall make use of the English translation of this work the original edition of which is in German: M. NOTH, *Das vierte Buch Mose. Numeri* (Das Alte Testament deutsch 7; Göttingen 1966; *Numbers: A Commentary* (OTL; London 1968).

for the distinction (as far as this is possible) between 'civil' and 'criminal' laws. The last part of this introductory section consists of a progressive familiarisation with the book of Numbers, general context of the pericope being studied here, with particular attention to the legislative material present in it and to the possible criteria for understanding the organisation of this material.

With the exegetical analysis of Num 35,9–34, the third chapter enters directly into the heart of the argument by means of the complementary use of the diachronic and synchronic methods, allowing the demarcation of the pericope; the determination of an internal arrangement which structures the argument; the analysis of the key words and expressions; the development of the overall meaning of the text; and the general contribution which the law being studied offers to the entire biblical legislation relating to the different cases of homicide.

Finally, in the fourth chapter, the text of Num 35,9–34 is compared with the biblical traditions held to be parallel: we start off, therefore, with the exegetical analysis of the individual pericopes of Ex 21,12–14; Deut 19,1–13 and Josh 20,1–9 in order to reach a rationale of the possible relationships of interdependence, thematic and formal, which bind together all these traditions relating to the "cities of refuge". It is precisely from this comparison with the other parallel traditions that there emerges, with extreme clarity, the novel contribution of the legislation of Num 35,9–34: something which justifies our working hypothesis on the basis of which it is claimed that the legal reformulation contained in this text represents a milestone in the history and evolution of biblical criminal law in particular and biblical law in general.

Chapter I

The Law in the Bible and in the Ancient Near East

The scholastics held that the adequate specification of the terms of the question that was to be treated (what they called the *explicatio terminorum*) represented an excellent way of undertaking a demonstration or a scientific discourse. Since the general object of our research is the study of the penal legislation relating to the cases of homicide which appear in Numbers 35, the aim of this first chapter will be that of clarifying the fundamental concepts, proceeding deductively from the definition of the general notion of 'law' within the Bible in order to consider its concrete application to the penal laws contained in the book of Numbers.

1. "Biblical law": ambiguities, problems and challenges of a definition

1.1. "Does it make sense to speak of 'biblical law'?". Epistemological problems

> It is consistent with human nature and with the special motives of their authors that codes like that of Manu should pretend to the highest antiquity and claim to have emanated in their complete form from the Deity […] The Roman Code was merely an enunciation in words of the existing customs of the Roman people. Relatively to the progress of the Romans in civilization, it was a remarkably early code, and it was published at a time when Roman society had barely emerged from that intellectual condition in which civil obligation and religious duty are inevitably confounded.[1]

The basic idea which shines out from this short passage of the juridical eloquence of Sir Henry J.S. Maine[2] represents a problem not least for the object

[1] H.J.S. MAINE, *Ancient Law. Its Connection with the Early History of Society and Its Relation to Modern Ideas* (London, UK [10]1908) 15–16.

[2] Sir Henry James Sumner Maine (1822–1888) was a famous English jurist, held today as a milestone in the evolution of Anglo-Saxon jurisprudence. Beyond the successful attempt to make known his material widely by means of a gentle style, immediately comprehensible even to laymen, he is ascribed with the merit of having demonstrated the profound link which connects the law with the other human sciences, particularly history and sociology. Reading his magisterial work (quoted above), one has the sense that, rather than simply highlighting the link between human sciences and law, Maine tends to empha-

to our research to the extent that it has contributed to creating – or else to consolidating – a prejudice which confines the Jewish law in general and biblical law in particular[3] to an area foreign to that scientific discipline which goes under the name of Legal History.

From Maine's words, indeed, one gathers that the signs of the social progress and of the cultural evolution of a specific community are uniquely recognisable in the ability which the community itself has of emancipating itself from the idea that law and religion are two sides of the same coin. This idea would represent none other than an archaic conception, founded deeply on prejudice: according to Maine's analysis, authentic progress consists in embracing a system of thought alternative to this prejudice on the basis of which law and religion are conceived as two independent systems of reference. Something that, according to Maine, is typical of advanced and developed social groups.[4] From this it follows that, since biblical law comes within the area of religious systems by virtue of recognising its own origin in YHWH, by its very nature it would be excluded from the aims and objectives of a discipline such as the history of law.[5]

If one takes this theory to its extreme consequences, one finds oneself compelled to maintain that the biblical law does not belong among the scientific disciplines, as if to say that it does not even exist. A discussion like this of its epistemological status seems to us a good starting point for understanding what and how big are the challenges which await whoever wishes to tackle the study of biblical law.

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sise the law itself to the detriment of other elements, specifying the primitive history of society and the law as "the only quarter in which it [i.e. *the truth*] can be found" (MAINE, *Ancient Law*, 3). For further information on Maine, cf. R. COCKS, *Sir Henry Maine. A Study in Victorian Jurisprudence* (Cambridge Studies in English Legal History; Cambridge, UK 1988).

[3] Given the nature of the present research, which will turn upon an analysis of a text of the book of Numbers, when we speak of biblical law we are referring to the legislation contained in the Old Testament and especially in the Pentateuch (if not specified otherwise).

[4] B. Jackson summarises this passage of Maine's thought well: "[…] The development from law-religion to law-and-religion becomes regarded as an evolutionary progression. Since Jewish law is a "religious system", it represents the law-religion 'stage', and so falls outside the interest of the legal historian" (B. JACKSON, *Essays in Jewish and Comparative Legal History* [Studies in Judaism in Late Antiquity 10; Leiden 1975] 1).

[5] Let me explain immediately that, given the nature of the present study which is admittedly always a study in biblical exegesis and not in Law, we shall utilise the terms 'Law' and 'law' synonymously. For a distinction and definition of the two concepts, cf. J.L. SKA, "Il diritto e la legge: una distinzione fondamentale nella Bibbia", *Civiltà Cattolica* 157 (2006) 468–479.

1.2. Methodological difficulties: the problem of the sources

Certainly the problems go way beyond the purely philosophical question: in fact, beyond causing the difficulty we have already signalled of recognising the biblical law as enjoying the rank of a scientific discipline, the marriage between the religious and legal elements which lies at the basis of the biblical precepts invests the much more empirical area of the study of sources and of methodology, creating not a few problems in the systematisation of the material. A rapid comparison with two sets of laws – Roman and Anglo-Saxon – will prove to be useful in clarifying the nature of the difficulty referred to.[6]

1.2.1. Comparison with roman law

Having recourse, inevitably, to a simplification, we can state that the ancient Roman law rested on the general principle of the authority of the one who exercises justice to the point that the magistrate – in the very different levels of the judicial function – came to enjoy also the function of legislator to the extent to which his application of determinate principles to concrete situations survived him as patrimony for universal law under the form of jurisprudence. That allows the statement that, for the Romans, the authority of the law derived and descended from that of the legislator which, in the nature of things, coincided with the magistrate who was administering justice.

Given these premises, whoever intends to study the history of Roman law does so starting from sources the origin of which can be reconstructed with a reasonable degree of certainty, since the legal texts have generally been transmitted with a precise indication of the author in question. The attention paid by the compilers of the various collections of Roman laws to recording the origin of each legal provision derives from the fact that the authority of the provision leant on the authority of the magistrate who had pronounced it: it thus became anything but indifferent to know who was at the origin of a particular sentence or juridical act.[7]

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[6] On this subject, cf. J.L. SKA, "Biblical Law and the Origin of Democracy", *The Ten Commandments: The Reciprocity of Faithfulness* (ed. W.P. BROWN) (Library of Theological Ethics; Louisville, KY 2004) 154–155.

[7] Cf. JACKSON, *Essays*, 2; SKA, "Biblical Law", 154. It will be necessary to pay attention to the monumental codification undertaken by the Roman Emperor in the East, Justinian (482–565), to find juridical material which goes beyond jurisprudence to open itself up to theoretical speculation on the law. In fact, in the work of Justinian, alongside the works which collect the jurisprudence, past and present (gathered together in the famous *Corpus Iuris Civilis*), we also find the *Institutiones*, a kind of manual in four volumes aimed at education in the law. The structure of these volumes is very careful: it presents subdivisions with titled rubrics favouring the memorisation of the contents by pupils.

Now, if there is one characteristic common to the collections of laws contained in the Bible – collections that are in other ways so unlike and variegated – it is precisely the anonymous nature of the individual precepts and regulations which, in the best of the hypotheses, are simply referred to Moses[8] but which always have their origin and foundation in God, with all the problems that such an attribution involves, as we have had the opportunity to see. It is clear that such a scenario, characterised by anonymity in the very *locus* which the Roman legislation recognised as the source of law, is marked by the absence of one of the taxonomic criteria which form the basis of the classification of laws, namely, the attribution of authorship to the individual legal acts.

1.2.2. Comparison with anglo-saxon law

From another point of view, where the principle of Roman law invokes the authority of the magistrate as the foundation and authority of the law, the Anglo-Saxon tradition is proud to recognise the roots of its own juridical civilisation in the common law or customary law, founded on the acceptance of the principle on the basis of which jurisprudence – understood as the corpus of the judicial precedents of the various cases – is the source of law. It will not be necessary to emphasise the subject in order to understand how fundamental here are the circumstances of place and time, as also how considerable the possibility of attributing to concrete persons the various cases as well as the related juridical provisions adopted.

None of all that (or at least very little) can be found in the biblical legal texts the literary production of which is subjected – in a way entirely similar to what happens with the narrative texts – to the so-called principle of "predominance of action":[9] in other words, the text tends systematically to omit (or at least to put in second place) information on the interior world of the characters and of the circumstances of their lives in order to make room almost exclusively for the role which they take on in the events which are being narrated. As if to say that the biblical narrative generally privileges the instrumental function of the character rather than indulging in the description of circumstantial or interior aspects which characterise the actors in a way that is unique and unrepeatable. It is clear, on the other hand, that, for an historian

[8] On the role of Moses, to whom the biblical text often seems to attribute authorship of the Law, speaking of the "Torah of Moses, cf. J.L. SKA, "'La scrittura era parola di Dio, scolpita sulle tavole' (Es 32,16). Autorità, rivelazione e ispirazione nelle leggi del Pentateuco", *Ricerche Storico Bibliche* 12 (2000) 18–23.

[9] On the concept of "predominance of action" in biblical narrative and on the characterisation of the actors, cf. J.L. SKA, *"Our Fathers Have Told Us". Introduction to the Analysis of Hebrew Narratives* (Subsidia Biblica 13; Roma 1990) 83–93.

of Roman or Anglo-Saxon law or of whatever other cultural matrix, such aspects turn out to be fundamental.[10]

In the face of these multiple difficulties, should we, therefore, join Maine in decreeing the isolation of biblical law from the assembly of scientific disciplines on account of the epistemological and methodological problems which we have just outlined? Perhaps there is another way which passes through the remodelling of the very concept of 'law' by means of the attempt to liberate our judgement – as far as humanly possible – from the influence which some modern juridical models exercise on our way of looking at the legislative corpus contained in the Bible, thus creating a real *pre*-judice (in the literal sense of the term).

1.3. Juridical models of the 19th century: between 'evolutionism' and 'diffusionism'

As is suggested wisely by B. Jackson,[11] a good way of bringing about the liberation from the prejudice spoken of above is that of demonstrating the contours of the said influence with the object of limiting their conditioning effects: we shall seek, therefore, to summarise the contents and principal authors of the chief juridical models of the nineteenth century which, as far as we can see, continue to exercise a certain influence on the general perception of biblical law.

1.3.1. The 'evolutionist' model

In the second half of the nineteenth century, the emergence and affirmation of the classic theory of evolution as the dominant theoretical paradigm contributed to the establishment of a conviction which, to simplify in the extreme, could be reproduced thus: human history is deployed along the line of a constant progress, understood as the superseding of the previous theoretico-cultural paradigm by the acceptance of the subsequent paradigm.

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[10] Well-known is the Ciceronian hexameter in which the formula "*quis, quid, ubi, quibus auxiliis, cur, quomodo, quando*" summarises the circumstances of place, time and case which form the starting point for any kind of investigation into the truth of an event. Cf. MARCUS TULLIUS CICERO, *Rhetoricorum, seu de inventione rhetorica* (cited by THOMAS AQUINAS, *Summa Theologiae*, Ia–IIae, q. 7, a. 3).

[11] Cf. B. JACKSON, "Models in Legal History: The Case of Biblical Law", *Journal of Law & Religion* 18/1 (2002–2003) 1–30; ID., *Wisdom-Law. A Study of the* Mishpatim *of* Exodus *21:1–22:16* (Oxford, UK 2006) 3–39. In dealing with this subject, I shall make ample reference to this study as also to the recent work of J. BERMAN, "The History of Legal Theory and the Study of Biblical Law", *The Catholic Biblical Quarterly* 76 (2014) 19–39.

Such a presupposition very quickly crosses beyond the limits of ethno-anthropology to be claimed as a kind of interdisciplinary gain, valid across sciences quite different from one another but sharing the fact of having the human being as their subject. Basically, Maine's assessment of the backwardness or not of the different legal models cited at the beginning of this chapter represents none other than a variation in the juridical key of this evolutionist theoretical principle.

In the German sphere, a similar approach to that of Maine was advanced by the German philosopher and jurist, Friedrich Karl von Savigny (1779-1861): he was the founder of the "Historical School" of law, characterised by the study and the systematic re-elaboration of customary law which the Germans describe as "Das gemeine Recht", an expression which corresponds to the common law in the English mould. Savigny is also commonly considered the precursor of modern pandects, subsequently developed and systematised by his disciple Georg Friedrich Puchta.[12]

1.3.2. The 'diffusionist' model

The other great anthropological model of the nineteenth century, which is set alongside and in competition with the evolutionist one is known as 'diffusionism'. Whereas the classical evolutionist theory states that cultural progress occurs in stages common to each human being, the diffusionist approach maintains the possibility of identifying some fundamental cultural aspects[13] which occur in identical form in the most disparate areas of the world: originating in a particular place, these cultural aspects would have been diffused or spread into different regions, supplanting others of an endogenous nature.[14]

As is clear from even an analysis as superficial as this, the greater difference between the two theoretical models of anthropology is evident in their overall valuation of human society and its concrete possibilities of progress: for evolutionism, in fact, the human group is open to a constant and potentially unlimited state of development,[15] while diffusionism exhibits considerably

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[12] For further information on Savigny, cf. I. DENNELER, *Friedrich Karl von Savigny* (Preußische Köpfe 17; Berlin 1985).

[13] *Kulturkreise* ("cultural circles"), according to the German definition.

[14] One of the most classic examples is constituted by the use of the bow which would have very quickly superseded the spear in different and widely separated cultures on account of its versatile characteristics.

[15] This romantic ideal is a concept which seems to me well expressed by a famous passage of a canto by Leopardi in which the poet of Recanati professes his almost unlimited faith in social progress: "Dipinte in queste rive / son dell'umana gente espresse / le magnifiche sorti e progressive" ("The magnificent and progressive fate / of the human race / is depicted in this place". G. LEOPARDI, *Canto XXXIV: La ginestra, o fiore del deserto*).

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