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## Prophecy and Constitutionalism in the Political Imagery of Axial Age Civilizations



*Abstract: Axial age civilizations, over a relatively short period of time surrounding the first century C.E., developed radically new conceptions of the relationship between the mundane and the transcendental. These conceptions became defining elements of these civilizations, giving rise to new conceptions of the accountability of rules to a higher, transcendental principle. Prophecy played an important role in the crystallization and dynamics of these civilizations.*

*Delivered as the keynote address of the conference, 'Political Hebraism: Jewish Sources in the History of Political Thought,' Jerusalem, December 26–29, 2006, this paper connects these dynamics with the development of constitutionalism through an analysis of the Jewish case. It thereby emphasizes the importance of axial age civilizations, and in particular the Jewish case, in forming modern understandings of law, legal frameworks, and constitutionalism.*

### 1. INTRODUCTION

The title of my lecture is “Prophecy and Constitutionalism in the Political Imagery of Axial Age Civilizations.” The title may be a little surprising, though not due to the inclusion of prophecy. Prophecy and the axial age are closely related. The connection between constitutionalism and the axial age, however, is not always strongly emphasized. I think that it should be, and this lecture will try to show why, and in what ways.

### 2. THE POLITICAL IMAGERY OF AXIAL CIVILIZATIONS: THE DEMISE OF THE GOD-KING AND THE EMERGENCE OF THE MANDATE OF HEAVEN

The starting point for my lecture will be some very simple facts about the axial age and about axial civilizations. I refer by “axial civilizations”

to great world religions, especially those studied by Max Weber, in which radically new conceptions of the relationship between the transcendental and the mundane world crystallized.

In many parts of the world, these radically new conceptions of the relationship between the mundane and transcendental became hegemonic and defining elements of the civilizations that developed them. This is true of ancient Israel, Second-Commonwealth Judaism and Christianity, ancient Greece, early imperial China, Hinduism, and Buddhism, it is very partially true of Zoroastrian Iran, and later it is true of Islam. With the exception of Islam, the crucial developments took place in the first millennium B.C.E. and in the first centuries of the common era. It was the relative synchronicity of these processes that gave rise to the notion, first formulated by Karl Jaspers, of an “axial age”—a notion imbued with strong, if sometimes implicit, evolutionary orientation and premises.<sup>1</sup> The Axial Age was conceived as a distinct, basically universal, irreversible stage in human history. However, although the emergence and institutionalization of these civilizations heralded revolutionary breakthroughs which developed in parallel or similar directions in different societies, the concrete constellations thereof varied greatly between civilizations.

What, then, constitutes the revolutionary change in political imagery that characterized axial civilizations as they appeared on the intellectual scene and persisted once institutionalized? In an attempt to simplify, I would say that two closely related elements are important. These are the disappearance of the god-king, and the change in the framework of customs and law that spurred on the development of kernels of constitutionalism.

One of the major outcomes of the institutionalization of axial civilizations is the almost total disappearance of the god-king, an extremely pervasive figure throughout certain stages of human history—for the most part in the pre-axial age but in some societies, like Japan, also beyond that. This does not mean that kings, where they still reign, no longer have sacred or divine attributes. They have retained many of these. That acknowledged, the god-king—the pharaoh of Egypt or the Japanese emperor—has for the most part disappeared.

Instead, in the axial civilizations, there developed a conception of kingship that is perhaps put best in the Chinese formula translated into

<sup>1</sup> On the Axial Age, see Karl Jaspers, *The Origin and Goal of History* (London: Routledge and Kegan Paul, 1953 [1949]); Eric Voegelin, *Order and History* (Baton Rouge, La.: Louisiana State University Press, 1956–1987), 5 vols.; Voegelin, “The Age of Transcendence,” *Daedalus* 104:2 (Spring 1975); Shmuel Noah Eisenstadt, “The Axial Age: The Emergence of Transcendental Visions and the Rise of Clerics,” *European Journal of Sociology* 23:2 (1982), pp. 293–314.

English as “the mandate of heaven.” This means that the king or emperor rules by virtue of a mandate of heaven. He may still be a sacred figure, but he is not the epitome or incarnation of sacredness, and he no longer has a monopoly over the sacred. There is something above him—heaven—to which he is accountable. One may consider that perhaps China, not being a religious, monotheistic civilization, is not the best illustration of this concept. However, I think that while China may not be the only or the best example, the Chinese phrase is still very apt. For the combination of these two characteristics—that is, the disappearance of the god-king and the notion that the king (or ruler) is under the mandate of heaven—epitomizes a truly radical transformation of political imagery and conceptions of political dynamics. The core of both is that legitimation is no longer immanent, embodied in a single person, group, or collective. Legitimation is somewhere beyond any person or group of people; it is rooted in a transcendental vision. This, by now, is accepted as almost normal in most societies, especially modern ones, yet it is important to recall just what a great innovation it was in the history of mankind.

The transformation of kingship from pre-axial to axial involves very simple and at the same time powerful conceptual shifts. The king and the community are each rendered accountable in some way to criteria or transcendental visions beyond their routine, immanent ways of life and customs. The community is also accountable, unlike in many pre-axial societies (such as those described in the very interesting accounts, increasingly available, of many African or South Asian kingdoms and chiefdoms), even if one finds within them an element of communal supervision of the king, in which he is judged by the customs of the community and may even be dethroned based on his noncompliance with these customs. But the customs themselves are self-legitimizing, immanent. There is no standard beyond them and the individual who encounters them—not even the king, chief, or ruler—according to which they can be judged and to which they are accountable.

I want to be cautious, though, and to acknowledge the possibility that to some extent the idea of external or transcendental accountability can also be found in many if not most pre-axial civilizations which developed into axial ones. It can especially be recognized in some Greek and also later Roman conceptions and institutions. Here, a community begins as the bearer of some immanent legitimization, which then becomes transformed once an axial, transcendental vision enters. I am far from an expert on this, but I still remember that one of the first lectures I was privileged to hear at the Hebrew University—sixty-five years ago—was given by my late, great teacher Martin Buber on *Antigone* and moral protest. In *Antigone* (fourth century B.C.E.) you already have a very

interesting dynamic, which develops from a deep-rooted tension between the law of the political realm and the customs of the community. The entire story of Antigone revolves around this. This, of course, became much more widespread once the axial civilizations were fully established. In all of them, in one way or another, the idea developed that there is a moral or transcendent order above the mundane order—including the ruler and the community—according to which the mundane order is judged and to which it is accountable.

We have all grown up in civilizations in which this conception is more or less taken for granted. It is therefore difficult for us to appreciate the force of this revolutionary change brought on by axial civilizations. This revolutionary change brought about new political dynamics which have become inherent and fundamental components of the histories of all of these societies, up to the modern age.

As far as I know, there was only one society that, although surrounded by axial civilizations, managed to remain non-axial and, throughout a long period, retain the idea of a god-king and not adopt the framework of the mandate of heaven. I refer to Japan, which I can only just touch upon here. Japan was heavily influenced by two great axial civilizations: Buddhism and Confucianism, and through both of these was confronted with the idea of the mandate of heaven. Japan was hence compelled to do something with the encounter between heaven and the emperor. The Japanese solution was simple, or so it seems: the emperor *is* heaven. It took some intriguing grammatical and semantic gymnastics to square this solution with the original Chinese conception, but this seems to have been successfully achieved and maintained up to and including the modern age. There is some controversy as to whether this still holds, or whether and to what degree the Japanese solution was rendered obsolete by Hirohito's announcement on the radio that he is no longer heaven. (Those who know Japanese tell me that if you read the Japanese text, and not the English, you may not be sure whether this is really what he said.)

Nonetheless, Japan is a very unique case. It managed to remain non-axial but without being relegated to the margins of the civilized world. Japan has always been a vibrant, continuously developing society and civilization, and it was the first non-Western modern society that managed both to be modern and to hold and maintain its non-axial imagery. Japan, though, is an exception. The more common situation has been that while many societies, social sectors, groups, and individuals retain some of the pre-axial repertoire and confront the political imagery of the axial society or world in which they live, they never take over the major components of that imagery. Most such societies and individuals remain

on the margins of their respective civilizations. Japan is, in this context, a notable exception.

As an aside I might note here that the process of transformation of which I speak, which may be termed “axialization,” usually took a very long time. China was not born Confucian—it took a long time for it to become “Confucianized.” India did not come into being with Brahmanism, and one may even dispute the date and extent to which ancient Israel really became axial. In any case, these were usually very long processes. The only case where the process was relatively swift, and the axial vision was adopted relatively quickly, is Islam. Even in the case of Islam, however, the process was probably longer than the way it is presented in the canonical texts and in the accepted scholarship.

### 3. THE MULTIPLICITY OF ELITES AND CLAIMS TO REPRESENT THE TRANSCENDENT ORDER

The emergence of the idea that the monarch is accountable to heaven changed the political dynamics of axial societies, and now we must proceed to ask about some of the consequences of this change. The immediately apparent outcome, while not entirely incorrect, is often presented in an overly one-sided and simplistic way. It focuses on confrontations that developed between rulers (whether kings, emperors, or others) and those groups that claimed to represent the mandate of heaven, and to call the kings to account in its name, and on the fact that the king had to cope with these demands. No doubt, this emphasis highlights a very important element in the transformations that all the axial civilizations underwent. It should not, however, be interpreted as though in all these civilizations the ruler really remained, or tried to remain, a pre-axial figure. The situation was much more complicated. The idea of Oriental despotism that developed in fifteenth- and sixteenth-century Europe was mistaken in portraying these despots as though they were really trying to be god-kings. In fact, it was not only the challenge presented to the ruler by his being perceived to be under the mandate of heaven that transformed these civilizations. Alongside this, some additional crucial changes took place that affected political dynamics of those civilizations:

Almost all elites—those individuals and groups working in the courts of rulers, the members of which might previously have been mere scribes, experts in magic, and the like—started, as did the rulers themselves, *not* to deny the legitimacy of axial legitimation. Rather, they sought to claim that they themselves were the real bearers of that legitimation. They did not claim that the transcendental visions were

false. Whatever they actually thought, they acted as though they could be legitimate bearers of this vision, as much as or even more than the priests or prophets could be.

Consider the best-known historical conflict in Christian society, that of the relations between church and state, between pope and emperor. This was not mainly a conflict between the king—the mundane ruler—and the priesthood about the autonomy of the latter from the former. Rather, it was an ongoing, continuous series of confrontations between many groups, where each claimed to be the legitimate bearer of this vision. Each group denied the monopoly of any other group, sometimes even denying the possibility of its participation in the transcendental nation. If one looks at the history of the confrontation between church and state in Christian civilization, then at the very interesting developments in Islam, and comes back to the Jewish case, it becomes evident that the quarrel was never only, or even mostly, over whether a political ruler should or should not be allowed to supervise religious institutions. The realms were not so separate in the eyes of the conflicting parties. The rulers claimed themselves to be the carriers of divine, transcendental legitimization, representing heaven on earth. The other groups claimed not just the right to autonomy and noninterference in their realm on the part of the ruler, but also the right to exercise political authority, justified by their being the bearers of this vision that covers mundane affairs as well as “spiritual,” transcendental ones. Each, moreover, wanted a monopoly—or at least an autonomous claim to legitimacy—over the mundane and political, and each sought to take advantage of the results of that claim. So when emperors and popes quarreled, it was not just about the extent to which emperors would be allowed to interfere in religious matters or vice versa. They quarreled in all Christian civilizations, even in Byzantium, about the legitimacy of the other groups’ standing in both the sacred and the mundane (or political) spheres, and about their influence on the relations between these spheres.

Here we must remember that the distinction between the mundane and transcendental spheres is the result of our applying our own analytic categories to a historical reality that is not necessarily best conceived in this way. Medieval Christendom certainly would not have portrayed the mundane and the transcendental as distinct spheres, in modern, secular terms, and neither would the major elites in other axial civilizations, because they were aware of the close relationship between the two.

Thus, in all of these civilizations there developed a multiplicity of elites: groups and individuals, each claiming autonomous access both to their particular field of specialization and also to the transcendental vision. This crucial transformation occurs in all these civilizations,

sometimes quickly and sometimes much more slowly. The process, as mentioned above, assumes different forms in different places and different civilizations, but it is a crucial component in all of them.

#### 4. THE EMERGENCE OF SECTARIANISM AND HETERODOXIES

At this juncture, another essential element comes into play, which may be considered simply an extension of the former point, but it constitutes a crucial elaboration and indeed a distinct component in the cultural and political dynamics of these civilizations. I speak of the rise of sectarianism and heterodoxies.

From the very onset of the axial visions, and part and parcel of their institutionalization in axial civilizations, there quickly developed what we would call heterodoxies. (Of course, heterodoxy is essentially a Christian term derived from Christianity's unique fusion of biblical and Greco-Roman civilizations, and we don't have to adhere exclusively to it. Sectarianism may be a better term.) This is because in all of these societies there developed conflicting approaches to interpreting the transcendental and the proper way of instilling it in the world. These heterodox, or sectarian, standpoints do not represent purely academic exercises in religious doctrine (though in many cases they are that as well, or they began as that). Rather, they also claim the right to rewrite or challenge the regnant interpretation of the transcendent realm and its bearing on the mundane, above all challenging the sort of coalition, or *modus vivendi*, which developed in all these societies between hegemonic religious "groups" and rulers. They often claim that such alliances contaminate the transcendental vision that they alone fully represent. They consider themselves its true bearers, not only in terms of dogma but also in terms of mundane affairs, in particular how to organize societal life.

The great merit of Max Weber's books on religion (which sound much better in the original German, *Gesammelte Aufsätze zur Religionssoziologie*, literally, *Collected Essays on the Sociology of Religion*), of which *The Protestant Ethic* is but a short, however crucial, introduction—in the English translations they are called *The Religion of China: Confucianism and Taoism*, *The Religion of India: The Sociology of Hinduism and Buddhism*, and so on—is the way in which sectarianism developed and tried to reshape the world. Not just to dictate new dogmas, but to actually reshape the world. The Protestantism about which Weber wrote was a very, very recent heterodoxy in Christianity. I cannot say in Catholicism, because Catholicism can be spoken of as a distinct category only after the Counter-Reformation. According to Weber's interpretation, and I am

not currently interested in whether he was right or wrong, this factor not only created new religious visions, but shaped the modern world. Weber's analysis of Indian, Chinese, ancient Jewish, and Buddhist civilizations was not just in terms of doctrine or religious orientations but in terms of their impact on institutional change. He claimed that crucial institutional changes developed differently in different civilizations. Unlike many of the so-called Orientalists, who, according to their opponents, saw all of these civilizations as being very static and even frozen (just as Toynbee viewed Jewish civilization), and asserted that they really did not change greatly (except in externalities) throughout their respective histories, Weber saw them as very dynamic. They moved, however, in different directions and with different dynamics than did Western society. In his detailed interpretation of these civilizations, Weber emphasizes the crucial importance of the heterodox, sectarian groups, and makes a very strong case that these were of great consequence in instituting the dynamics of these civilizations. The heterodoxies frequently portrayed themselves as possessing true prophetic visions, confronting the rulers and the coalitions between them and the existing religious and political leadership. This brings us, however, to the second topic to be dealt with in my talk: constitutionalism and the transformation of the law.

##### 5. THE KERNELS OF CONSTITUTIONALISM IN AXIAL CIVILIZATIONS: POSSIBILITIES FOR THE SOVEREIGNTY OF THE COURTS

We now come to a very interesting problem which has not yet been fully analyzed in scholarly literature and which is also closely related to the major topic of this conference, to Hebrew, Hebraic, or Jewish political thought. I refer to great transformations, attendant on the institutionalization of the Axial Civilization, in regnant conceptions of custom and often explicit laws. Of course, all pre-axial societies had both customs and laws. Among certain pre-axial societies it is even possible to identify very strong and arguably forceful legal codices. You may recall a certain gentleman by the name of Hammurabi. He was certainly not an axial monarch, but he promulgated an important legal codex. We find in Hammurabi just one example of where legal norms, customs of the community, traditions of the community, and laws of the community are not necessarily the same.

Communities often have customs, codified to different degrees, which do not become full legal codices. The legal sphere also does not always exist distinctively and autonomously. In some the law is even morally autonomous. Some scholars will say that autonomous institutionalized law emerges forcefully in the Greek and especially the Roman traditions.

Though this tendency to codify law emerges very strongly in axial civilizations, it does not emerge immediately or with the same force in them all. It certainly emerges very strongly in ancient Israel. On the other hand, for reasons we will not enter into in this analysis, it does not emerge in China. In China there are many powerful legal codices, yet there is no idea of the law as something distinct or autonomous, certainly not in the political arena. The tendency emerges when, under the challenge of new transcendental visions, the customs and laws of different communities also come to be viewed, organized, and criticized according to these visions.

The most apt illustration of this transformation is often said to be one of Judaism's great contributions to humanity: the idea of Shabbat, the weekly day of rest. This contention is both correct and incorrect. The idea of a periodic day of rest is not unique to the Jews. Periodic days of rest existed among numerous neighboring peoples. Prior to the Jewish, or Hebrew, case, however, one does not find that the day of rest was legitimated by something beyond the community: by a transcendental claim, as in the Jewish case, for example, that it is because God rested on the seventh day that man must too. It is not clear that the day of rest was a contribution made by Judaism, but the method of legitimizing law through reference to God—to a transcendental vision—certainly was. With the institutionalization of axial civilizations there is a change, not necessarily in specific customs, but in their legitimization. A new dimension of legitimization emerges when customs and laws are judged according to a transcendent vision. At the same time, these customs and laws may be reorganized in more complex legal frameworks that claim more autonomy.

This brings us to a problem of constitutionalism: What are the implications of the fact that many of these civilizations, and in fact all of them to some degree, develop a tendency to view these customs or laws as an autonomous sphere, which directly relates to the transcendental? This is an entirely new dimension of legitimation; it elevates such legal codices, and in fact the entire system of law, by imbuing these with a direct relation to the transcendental realm. It makes it possible to view these as more than technical factors in the political game and in the life of the community. They become autonomous ideological actors. This is, I think, a development—I don't want to make a stronger claim—pointing in the direction of constitutionalism as it later develops. This is why so many of the papers at this conference discuss whether various aspects of the Hebraic political tradition—whether the earlier, Deuteronomic portrayal of this tradition or that in the Mishna and Tosefta—have any bearing on problems of constitutionalism and why these sources have an

impact on political and constitutional debate, especially in sixteenth- and seventeenth-century Europe.

These discourses are so important because the Israelite experience is perceived by sixteenth- and seventeenth-century thinkers (not necessarily by the Jews themselves) as bearing some of the elements and characteristics of constitutionalism and of law as an autonomous dimension. Interestingly enough, this was more important in the sixteenth and seventeenth centuries, at the onset of modernity, than it had been in earlier periods in Christian civilizations or in Byzantium, or even later.

The bearers of such constitutionalism in the Jewish case, especially in the later Jewish sources, are the courts, which are perceived as the main carriers of the transcendental vision. What are the implications of the fact that courts take on this status in the Jewish tradition and that this idea is later reinforced by the Greek and especially Roman conceptions of law? It is here that new dynamics developed, creating a new relationship between the bearers of constitutional ideas and other political actors: tensions developed not only between the rulers, on one side, and the different would-be prophets, individuals (whether these were Greek orators or Jewish prophets), heterodoxies, and sectarianisms, on the other. In addition to the main confrontation between the rulers who wanted to remain semi-sacred (or at least autonomous and independent), would-be “prophetic” bearers of a transcendent vision, another element became crucial, and this is the legal-communal component, which is the root of constitutionalism and of constitutional dynamics.

This legal-communal component does not confront only the ruler. Increasingly, the constitutional order—the courts and not necessarily the rulers—confronts the prophets or would-be prophets, and this is almost as though the constitutional order were confronting potentially sectarian tendencies.

## 6. PRINCIPLED POLITICAL ANARCHISM

Of special interest in this context is that in all of these civilizations there emerges a very strong potential for what I call “principled political anarchism.” This is a very strong tendency in the Jewish case, and also develops much later in the United States, and we will return to this. This component is crucial in the political imagery and dynamic of these civilizations. Though it differs in importance in different civilizations and periods, it is always there.

Here I return to Weber and to another of his many important insights. He studied the Prophets (*Nevi'im*) very closely. In one place in his work

he defines the prophets not as the bearers of a great ethical vision, as they have become in much of the Christian tradition and also the modern Jewish one, but as political demagogues. What he meant, of course, was not only that they made political claims and demands, but that they did so while claiming a direct relationship to the transcendental—to God, or to transcendental principles—hence promulgating the new dynamics. Those with direct access to the sacred have a duty to challenge the ruler and even to replace him, whether or not he is a despot, if he fails to live up to those standards and laws that are legitimated by God. In the later Jewish sources which I suggested you examine, you will see that the confrontation between the prophets and the bearers of constitutionalism may be much stronger than the confrontation with the rulers as such.

“Principled political anarchism” means that there are groups or individuals who claim that because of their direct relationship to the sacred or transcendental, they can challenge any rule or existing order. Of course, there is a minor problem here. If anybody or everybody can be such a prophet, this makes running a state difficult if not impossible. All of these societies, then, had to cope with this strong potential of principled anarchism which was common among the different axial civilizations and probably most fully developed in post-monarchial, post-Second Temple Judaism, later (even if in a different mode) in Christianity, and above all in Protestantism. In this context, you may be surprised that one of the more interesting commonalities between the United States and South African political imagery lies in the strong emphasis that both place on the relative autonomy of the courts. The relative autonomy of the courts is directed not only against the ruler but also—and sometimes above all—against these would-be political anarchists. In the United States, the founding fathers knew that if a state cannot somehow deal with the potential of principled political anarchism in an organized way, only two paths lie open. The first is military dictatorship, which was clearly not desirable to the United States. The second is not parliamentary constitutionalism, because a parliament would probably just be a conglomeration of these groups, each claiming to have a direct relation to God. The second path, then, is the legal system—and this is one of the fundamental elements of constitutionalism.

Principled political anarchism is a crucial element in the political dynamic and imagery of all of these civilizations, though how strongly this is expressed, and the identity of the political anarchist, differs from civilization to civilization. The anarchist is not even always the sectarian. Let me provide one illustration, which may seem paradoxical. Most people will tell you that principled political anarchism was very weak in Confucian China. Some scholars of China, for instance William Theodore de Bary,

however, have claimed that there is a very strong prophetic element in Confucianism, only that it does not pose a challenge to the political order. There is a story from the Ming dynasty which may be a folktale, but folktales can be key indicators of political imagination. The story tells of a Chinese official who was working in the censorate. In Confucian China, the censorate was not what we might think today; it was an office in the imperial bureaucracy which registered the edicts of the emperor. (It was very similar to what many of the *parlements* in France had to do before the French Revolution, and, interestingly, one of the great controversies before the revolution was between the parliament and the king, when the former refused to register royal edicts.) The censor in our story was Confucian. I couldn't say he was a true believer, as that would almost be a contradiction in terms, but he certainly took the moral vision of Confucianism very seriously. This official had refused to register an edict and was required to go to the emperor and explain why. He asked his servant to go with him and carry his coffin, because there was a very good chance that once he said what he had to say to the emperor, he would be beheaded. We do not know whether the emperor beheaded him or not, but one thing is certain: While the emperor could do away with any single censor, he could not do away with the censorate. The emperor's legitimacy was already dependent on the censorate, on officials who were, seemingly, under his supervision. This story portrays a novel element of a very mild sort of principled anarchism, which works in an entirely different way from the way it works in other places. Still, it does work. I could give other illustrations, even from India, but time will not allow this.

#### 7. THE COVENANT, COMMUNITY, UNMEDIATED ACCESS TO THE SACRED, AND JUSTIFIABLE LAW AS KERNELS OF JEWISH CONSTITUTIONALISM

All of these elements—the multiple elites that claim autonomous access to the sacred and by virtue of this also seek to shape the mundane sphere; the place of heterodoxies; the potential for principled political anarchism—exist in all axial civilizations. They exist, however, in different forms and in different strengths. They are most visible, and visible for the first time, in the Jewish, Hebraic, or Jewish-Hebraic tradition.

What is it about the Jewish historical experience that made the potentialities of constitutionalism—and indeed these are only potentialities—relatively strong within it? In an attempt to provide an answer to this question, I will emphasize a few important aspects and basic premises of the Jewish tradition, without pretending that I could possibly do justice to them all in the context of this talk.

The first is the idea of the covenant. The covenant is a crucial political component of Jewish tradition. Jewish tradition has two dimensions, and this was, again, taken up in a very interesting way by Puritans in the United States. One dimension is that there is a covenant between the people and God. This does not imply total submission to God, as in Islam. Of course, God is the more powerful party in this semi-contractual covenant, but the fact that there is a possibility for negotiation, even if God is known to be the stronger party to the covenant, is of crucial importance in terms of political dynamics. Among other things, the contractual elements greatly intensify the potential for principled anarchism.

The second aspect of the Jewish tradition on which I will focus here is the fact that the covenant is made with the community. It is not purely individual, and this grants the community distinctly autonomous status. This may compete and conflict with other conceptions of the way in which the community is defined—be they primordial or territorial elements. To jump a few centuries (millennia, actually) forward to contemporary Israel, this problem of different bases of community, and in this case the place of the community as an entity in its own right and a party to the covenant, and the relative place of the land of Israel in this covenant, plays a considerable role in the country's political controversies. I would just mention one very important aspect of this, exemplified by one of the greatest sages of ultra-Orthodoxy, the late Rabbi Eliezer Menachem Schach, who challenged the entire idea of the primordial sanctity of territory as a central component of Judaism. For R. Schach, it is the covenant idea that makes the community an autonomous social entity. He said that the Jewish people was not created in this land; it was created because of the covenant with God. Its attitude to the land is therefore through this covenant, and is not simply primordial. Rabbi Schach was taking a side in a continuous debate in Jewish political thought between viewing the land of Israel as the "land of your fathers," or as the "Promised Land." These two conceptions of the land of Israel have the potential to greatly contradict each other.

The third element in the Jewish religious vision and political imagery is an emphasis on the direct access of all members of the community to the sacred, and the denial of the monopoly of such access by any person or institution, as has been the case in Catholicism and Eastern Christianity. This is true also, in principle, of Islam—but it is only in the Jewish and Protestant cases that such direct access to the sacred goes together with the covenantal, semi-contractual component. This combination greatly increases the tendency toward principled political anarchism.

The fourth element in Jewish political imagery, which probably developed relatively early, is what Professor David Weiss-Halivni called

“justifiable law.” The law is not just customs—there are laws which have justifications beyond their status as customs. For many historical reasons, some of which may be pure historical accidents, this emphasis on justifiable law became, very early on, a rather central element in Jewish political imagery.

Taking these elements—the covenant, the emphasis on the community as bearer of the covenant, the direct and immediate access to the sacred, and the importance of justifiable law—we have four crucial foundations of Jewish political imagery. Ironically, perhaps, these elements become even more important in Jewish thought once Jewish political independence disappears. As mentioned earlier, many of the papers have to do with the role of the kings and the role of rulers in the life of the community as discussed in the Mishna, Tosefta, and even in earlier texts from the different sects of the Second Temple period, sources composed at times when there were not really Jewish rulers. The whole discussion of the place of the Jewish rulers in the story of Ben Shetah and Alexander Yanai, from which derives the famous saying *Hamelech lo dan v’lo danin oto*<sup>2</sup>—the king does not participate in passing judgment, and neither can he be judged—was probably a purely theoretical debate. I doubt that the king really held such a limited role in any of the societies about which these Sages and other Jewish thinkers wrote. The story of Herod is in dramatic contrast to the conclusion regarding the role of the king in the story of Ben Shetah. What I want to emphasize here is that the very interesting disputations about the role of the kings in the Jewish political tradition were for the most part purely theoretical or academic arguments. They most likely started to develop before, at the time when there were Jewish rulers, and hence could have had political import, but even purely academic disputations can greatly enrich our understanding of the political dynamics conceived in Jewish political thought. We find that there is first of all a strong emphasis on the importance of the rulers in the political imagery. There are indeed some contradictions between the later views of rulers as being entirely under the moral legal order, something found in the writings of Maimonides and other medieval philosophers. But in those sections of the Mishna that discuss the greatness of the *nesi'im*, such as R. Yehuda Hanasi, one finds an emphasis on power and authority which may be closer to reality than the more theoretical discussions in later texts.

It is interesting that the problem hinges not just on whether the theoretical king behaves well or badly, but also on the different dimensions of legitimacy, and the autonomy of this legitimacy. In this context, another

<sup>2</sup> *Mishna*, Sanhedrin 2:2; *Babylonian Talmud*, Sanhedrin 19a–b.

element that also comes through very strongly is the possibility that the king may be exempt from the laws and rules by which the community is governed. The king inevitably enjoys a certain level of formal immunity because of the realities and the importance of power. This problem of the potential immunity of the king recurs later in the Jewish tradition with respect to the *kahal*. There are many discussions of this in Jewish literature, and these have been nicely compiled in a book edited by Michael Walzer and others: the first volume of *The Jewish Political Tradition*, which focuses on the *kahal*. The *kahal* is basically the community; at least this is its organizational form, without which it cannot exist. It is often immune to the interference of the Sages of the court, and so the problem of sovereign immunity comes up over and over.

At the same time, another element accompanies these disputes in the later Jewish tradition, which is the dispute on legitimacy, where discussion centers on the extent to which each of these groups meets the criteria for legitimacy. Who, if anyone, has a monopoly over the criteria? Who holds the monopoly over judging whether the behavior of each social element is really legitimate? This is the beginning of what might be the most important dispute and discussion which leads to constitutionalism.

## 8. THE SOVEREIGNTY OF THE COURT

As time is short, I would now like to turn to some of the texts I handed out and then to conclude with a couple of points. The first text, Mishna, Rosh Hashana, I consider most fascinating for the topics at hand.<sup>3</sup>

The story told is of R. Yehoshua, who was a member of the court of Rabban Gamliel. The court was calculating the day of Yom Kippur, and the decision was made that it was, let's say, on a Tuesday. After the decision is made, the rabbis leave.

<sup>3</sup> The text being referred to is *Mishna*, Rosh Hashana 2:8-9:

Rabban Gamliel had the shapes of the moon engraved on a tablet and on the wall of his upper chamber. He would show them to the unlearned [witnesses] and say: "Did you see something like this, or like this?" It once happened that two [witnesses] came and said: "In the morning, we saw it in the east, and in the evening, in the west." Said R. Yohanan ben Nuri: "They are false witnesses!" When they came to Yavneh, Rabban Gamliel accepted them. On another occasion, two came and said: "We saw it at its proper time. However, on the following night it did not appear." Rabban Gamliel accepted them. Said R. Dosa ben Harkinas: "These are false witnesses. How can they testify that a woman gave birth, and the next day 'her belly is between her teeth'?" R. Yehoshua said to him: "I agree with you."

Rabban Gamliel sent [a message to R. Yehoshua]: "I decree that you come to me, carrying your staff and your money, on the Day of Atonement according to your calculation." R. Akiva went and found him distressed. He told him: "I can prove that whatever Rabban Gamliel does is legally binding. It is written: 'These

Some time passes, and R. Yehoshua returns and says something to the effect of: “We were wrong. I know. I can demonstrate it. Yom Kippur is Wednesday.” In actual fact, R. Yehoshua was right, and his calculation of Wednesday as the day of Yom Kippur was accurate. The Mishna leaves no doubt about it. And yet the court’s response to R. Yehoshua was: “Sorry. The court has made its decision. Yom Kippur is on Tuesday.” Rabban Gamliel then orders R. Yehoshua to come with his rucksack on that day which he had calculated to be Yom Kippur. R. Yehoshua protests but is persuaded to obey by the following reasoning: “You must do it, because otherwise you challenge the legitimacy of all the courts of Israel, from the court of Moses down.”

This is a very important text. It emphasizes not the sovereignty of the law, but the sovereignty of the court as the promulgator and interpreter of the law. The court may be objectively wrong, but its decision is law. Challenging the court’s decisions challenges the legitimacy of Moses. Of course, Moses is not a court, and his legitimacy is not the legitimacy of a court, but to an extent it is, for it is Moses’ legitimacy that legitimated the courts he appointed, and all courts since then draw legitimacy from that historical moment.

This and many other stories attest to the Sages’ caution with regard to prophecy and its potential to claim authority superseding that of the court.<sup>4</sup> In the example discussed here, prophecy is represented by the

are God’s festivals, sacred holidays which you shall proclaim’ (Leviticus 23:4)—whether at their proper time or not, I have no other festivals but these.”

[R. Yehoshua] then went to R. Dosa ben Harkinas, who told him: “If we start questioning Rabban Gamliel’s court, we will have to reassess every single court from the days of Moses to the present. It is written: ‘Moses then went up, along with Aaron, Nadav, and Avihu and seventy of Israel’s elders’ (Exodus 24:9). Why weren’t the names of the elders mentioned? To be more precise, it comes to teach that any three who convene as a court in Israel are as the court of Moses.”

He then took his staff and his money in his hand and went to Yavneh, to Rabban Gamliel, on the Day of Atonement according to his reckoning. Rabban Gamliel arose and kissed him on his head. He said to him: “Welcome, my master and my disciple: my master in wisdom, and my disciple in that you accepted my words.”

<sup>4</sup> Another example handed out was from the *Babylonian Talmud*, Bava Metzia 59a–b:

It has been taught: On that day R. Eliezer brought forward every imaginable argument, but they did not accept them. Said he to them: “If the halacha agrees with me, let this carob tree prove it!” Thereupon the carob tree was torn a hundred cubits out of its place—others affirm, four hundred cubits. “No proof can be brought from a carob tree,” they retorted.

Again he said to them: “If the halacha agrees with me, let the stream of water prove it!” Thereupon the stream of water flowed backward. “No proof can be brought from a stream of water,” they rejoined.

Again he urged: “If the halacha agrees with me, let the walls of the *bet midrash* prove it!” Thereupon the walls inclined to fall. But R. Yehoshua rebuked them,

objective truth discovered by R. Yehoshua. The Sages could not do away with prophecy, and neither could they make the prophets part of the official kings' courts. In fact, those prophets who were canonized were certainly not royal officials. Perhaps they are best seen as great potential political anarchists, even when they came from priestly families and as such posed a great challenge to constitutional institutions.

The Sages took control over the prophets and would-be prophets through two courses of action: First they canonized the prophets, so that while the latter retained their symbolic importance, the Sages decided which of these prophets would indeed enjoy importance. By canonizing the prophets, the Sages took away their institutional autonomy. Second, the Sages decided that there would be no more prophecy. The encounter with *bat kols*, echoes, "objective truths," and the like in the many stories of the Sages—sometimes even such signs as the river rising—continues, and yet the law remains unaffected by supernatural occurrences, as it is "not in heaven."<sup>5</sup> Instead of going into the details of such particular stories, I'll tell you just one very relevant and powerful story that has found its way, in various versions, into folklore:

The president of the court—the *av beit din*—convened the court. He put a question before it in the standard formula: "Here is the question. We have to decide. Let's meet in a week." They meet in a week, and he puts forth his view. Ten people agree with him. One obdurate person does not. The next time they meet, the obdurate one becomes even more extreme in his objection. The river rises, other wonders occur, and other judges appear who support the obdurate one's position. There is even a Bat Kol which announces that the obdurate one is right. And according to this folkloristic story, the *av beit din* announces: "We have a new situation, and we shall meditate on it—as of today the vote is eleven to two." The Bat Kol, the prophetic voice, is just one more voice with an equal vote.

There are many versions of this story, but in all its mutations it always lays a very strong emphasis on the full monopoly of the court to interpret

saying: "When scholars are engaged in a halachic dispute, why do you interfere?" Hence they did not fall, in honor of R. Yehoshua, nor did they resume their upright position, in honor of R. Eliezer; and they are still leaning.

Again [R. Eliezer] said to them: "If the halacha agrees with me, let it be proven from heaven!" Thereupon a *bat kol* [heavenly voice] cried out: "Why do you dispute R. Eliezer, since in all matters the halacha agrees with him?" But R. Yehoshua arose and exclaimed: "It is not in heaven!" (Deuteronomy 30:12).

What did he mean by this? Said R. Yirmeyahu: "Since the Torah has already been given at Mount Sinai, we pay no attention to a heavenly voice, because you [God] have long since written in the Torah at Mount Sinai, 'one must follow the majority' (Exodus 23:2)."

<sup>5</sup> See previous note.

the law. Whether the events described actually took place or not is irrelevant. The story presents a crucial element which existed for many years and for long periods in the Jewish tradition, so long as the problems of political reality, of the realities of a state, did not have to be faced.

Here we can identify the ingredients of constitutionalism, even though this is far from being modern constitutionalism.

To conclude, I would like to turn to a modern case, that of the United States. I mentioned earlier that many elements of the Jewish case are echoed in Protestantism, especially in the sectarian brand of Protestantism which flourished in the United States. In contrast to Catholicism and Eastern Christianity, in Judaism and in Protestant Christianity there is no institution which has a monopoly over mediating between the people and God. Every individual can meet God directly. This, of course, increases the potential for political anarchism, and this is recognized in Judaism, but even more in Protestantism, and combated. As mentioned earlier, the combat can be either military or through a strong emphasis on courts, where the latter option comes through most strongly in the American case.

At the same time, the American Constitution, which is probably the first modern constitution, is as such significantly different from more ancient models, including the Jewish one. Here I will mention two essential differences: The first is that modern constitutions may be held accountable by something which legitimizes them—"We the people," some conception of rights, or some other image. The constitution cannot legitimize itself entirely, although *de facto* it very often does, especially in the United States. There is another element, which I consider to be the greatest contribution of American constitutionalism, and which is specifically modern. This is not, as one might expect, the idea of the separation of powers, as this existed prior to the full development of modern constitutionalism, and the way in which this separation is organized in the U.S. Constitution is specifically American. The greatest contribution of the American Constitution, in my mind, is the idea of fully institutionalized constitutional amendments. What does this mean? Why did the United States Constitution promulgate and institutionalize amendments? There are very simple explanations which are of crucial importance to understanding the difference between pre-modern and modern societies. One is that there was a recognition that the constitution was written by human beings and was, as such, fallible. Men should be open to the possibility of correction. The other crucial element is that by institutionalizing constitutional amendments, the authors of the American Constitution ensured that there would not be another revolution. Only institutionalizing a mechanism for change in the constitution can assure continuity. This is

something entirely modern. You cannot find this idea in the Jewish cases, as there the right of interpretation remains with the court. The court cannot change itself. The idea of amendments means the constitution can change itself through specific constitutional arrangements. I think this is something extremely important which has its roots in the biblical and Hebrew imagery but goes far beyond it, taking into account modern experience and modern problems.

I have taken up much too much time, so I will end here. Thank you.

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