

THE LAW OF TALION AN ANCIENT LAW OF JURISPRUDENCE

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There is much misunderstanding about the law of talion, which many consider a relic of barbarity. In the history of penal law, however, it marked progress in justice. It was common to several cultures. It was a principle of justice conceived in terms of arithmetical equality and was adopted as a law of jurisprudence in the Old Testament. Jesus did not abolish or modify it but taught a moral law proper to the children of God. Canon law retains its essence in the concept of just or congruent penalty.

“An eye for an eye, a tooth for a tooth.” This is the usual formula of the law of talion. There is much misunderstanding about this law. Many think that Jesus cited the law of talion from the Old Testament, abolished or changed it and gave his followers the law of love in its place. This is a misunderstanding. The law of talion was common to several civilizations of the East and of the West. The Old Testament borrowed it from the Babylonians. It is cited in the New Testament, but there is much confusion among scholars about its interpretation.

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William Foxwell Albright wrote: "The *lex talionis* ... is often pointed out by modern critics as an example of the savage ruthlessness of the Law of the Old Covenant, contrasted with the "law of charity" of the New Covenant...."¹ A commentary on the Book of Exodus states: "This stipulation has often been described as 'primitive' element within the biblical law and used as evidence for the crassness of Israel's early legislation."² Savage, primitive, ruthless, crass and more are among the synonyms commonly used to qualify the law of talion. This is to misunderstand it and malign it. As a matter of fact its appearance marked decisive progress in the history of penal law and jurisprudence.

In the following study I shall first explain the term talion and make a rapid survey of its extra-biblical prehistory. This will provide the setting for a closer look at the law of talion in the Old Testament (section 2). Then, thirdly, I shall examine how it was handled by Jesus in the New Testament. It will be seen that for a proper understanding of the law of talion it is important to study it taking into account its historical and sociological dimension (section four). Finally, I shall show in a *scholion* or scholium how the modern trend for inclusive language can betray the truth about the law of talion (section five).

1. Terminology and Prehistory

The English word "talion" is derived from the Latin "*talio, talionis*," which is a substantive, the meaning of which becomes clearer in the adjective "*talis*," meaning "such." It may be noted that "*talis*" and "*qualis*" are correlatives, as in the saying "*qualis pater, talis filius*" (like father, like son). In antiquity justice was conceived in terms of equality: "*qualis culpa (injuria), talis poena*" (like offence, like punishment). Hence the symbol of justice as a balance held in her hand by a blind lady. It represents the fundamental axiom that a punishment must be equal to the fault or injury: *talis, qualis*. This idea surfaces in the word "retaliation" (< Late Latin "*retaliare*" < "*talis*"), which is to return like for like, especially injury for injury, tit

¹ W. F. Albright and C. S. Mann, *Matthew*, The Anchor Bible (Doubleday: Garden City, NY) 1971, p. 68.

² Brevard S. Childs, *The Book of Exodus* (The Westminster Press: Philadelphia) 1974, p. 470.

for tat. The law of talion conceives justice in terms of mathematical equality. It forbids excess in response to an offence committed or injury inflicted.

The law of talion is very old and is found in many ancient cultures. For example, it was codified in the Babylonian Code of Hammurabi (§§ 196-198)³ in a form analogous to and substantially identical with its citations in the Old Testament. A late Punic inscription contains a parallel law. The law of talion was also part of the ancient Roman law represented by the Twelve Tables. Sextus Pompeius Festus, a Latin grammarian (fl. ca 150 A.D.) makes mention of it as follows by citing the authority of Verrius Flaccus (4 B.C. ?), an earlier grammarian.

According to Verrius the law of talion is mentioned in the Twelve Tables as follows; if an injury has been caused and there has been no peaceful settlement, let there be talio. But Verrius gives no further explanation, probably because the meaning is all too well-known."⁴

In other words, if a bodily injury has been inflicted and the case has not been settled by the parties but has been brought to the judiciary, the solution to be given is according to the principle of *talio*: that is, the culprit is to be punished with a bodily injury that is equal to the injury he caused. Such was the norm of the ancient Roman penal jurisprudence. Talio was a principle of criminal law imposing equal retributive punishment for an offence committed. Penal justice was conceived in terms of mathematical equality: like offence, like punishment, *talio, qualis*. Such was the ancient principle of the law of talion.

The law of talion marked progress in the history of penal law. An illustration may be of help to understand this. Today guillotine evokes a gory scene of heads rolling of hapless victims condemned to capital punishment. At its invention, however, guillotine was hailed as a progressive step in the execution of the death penalty. It was invented by a French parliamentarian Dr. J. I. Guillotin, an ex-

³J. B. Pritchard, ed., *Ancient Near Eastern Texts Relating to the Old Testament*, 2nd ed., Princeton, 1955 [3rd ed., 1969], p. 175.

⁴"Talionis mentionem fieri in XII ait Verrius hoc modo: si membrum rupit, ni cum eo pacit, talio esto; neque id, quid significet, indicat; puto, quia notum est" (K. O. Müller, ed. p. 363).

Jesuit. He proposed a motion in the French Convention (Parliament) to change the then current methods of executing persons, which were unnecessarily cruel. He said he had invented a cleaner and more efficient method which was also more humanitarian: a sharp, weighted blade is released from a height and made to slide down between two upright posts neatly cutting off the head of the condemned culprit in an instant. Simple, sure, quick, efficient. "If anyone has doubts, he is welcome to a test for himself to be convinced," concluded Guillotin with a chuckle. The French Convention passed the motion and adopted the new method of capital punishment. Guillotine marked progress as more humanitarian than most of the past or current methods in use: strangulation or suffocation, breaking on the wheel, burning alive at the stake (Joan of Arc), crucifixion (Jesus, Peter), stoning (Stephan), roasting (Lawrence), exposition to wild beasts (Ignatius of Antioch), drowning, boiling, quartering and dragging (that is, the condemned person is cut into four parts and dragged along the public streets (practised in Britain), crushing under an elephant's leg (a method used in India), starving (Maximilian Kolbe), etc. Against this creepy backdrop of methods of capital punishment guillotine marked progress in the seventeenth century. Today the guillotine spells horror as the preference goes for less gory methods such as the electric chair, lethal injection, hanging, or execution by a platoon. But when it was introduced in the seventeenth century, it was hailed as marking progress as a method of executing death penalty. Similar is the case of the law of talion: it marked progress vis-à-vis an earlier period of unchecked vengeance. This will be seen clearly from a study of the law of talion in the Old Testament.

2. The Old Testament

The first mention of the law of talion in the Bible is in the Book of Exodus. But in the Book of Genesis there is a veiled reference in the P source to the state of affairs obtaining in the beginning before the law of talion came into vigour. Lamech, son of Methuselah, calls his two wives and boasts before them of his exploits through acts of vengeance as follows:

Adah and Zillah, hear my voice;
 you wives of Lamech, listen to what I say:
 I have killed a man for wounding me,
 a young man for striking me.
 If Cain is avenged sevenfold,

truly Lamech seventy-sevenfold (Gen 4:23,24).

Lamech had received a minor offence (a wound, a strike), which he paid back with death. There is no equality or proportion here between the offence and the response. This is more than tit for tat, nor is it vengeance sevenfold but seventy-sevenfold, that is, vengeance unlimited. Cain, who had murdered his brother Abel, became a fugitive, but he feared being killed in turn [but by whom? – evidently the narrative is not historical]; but he was promised sevenfold vengeance by God (Gen 4:15). Lamech will go beyond that measure for seventy-sevenfold. That is vengeance without limit or measure or proportion.

The law of talion introduces limit and measure in terms of equality of response to the offence: an eye for an eye, a tooth for a tooth. But its field of application is not private justice but public justice, that is, jurisprudence, as we shall see.

The Old Testament cites the law of talion three times: Ex 21:22-25; Lev 24:19-20; Dt 19:21. Each time the context is judicial. The law of talion was not addressed to private individuals as a norm inculcating the practice of justice. It was a judicial principle constituting a norm of justice for the judiciary in the administration of penal law. This is clear from the casuistic nature of the law in the Covenant Code (Ex 21:22-25). The following precepts are given to the judges.

“You shall not deny justice to any of your poor in a lawsuit. Keep away from falsehood in the law court. You shall not slay the innocent or the just, nor shall you acquit the guilty. And you shall not take a bribe, for a bribe blinds the eyes of the clear-sighted and perverts the case of the innocent” (Ex 23: 6-8).

In Israel justice was administered by the local courts of elders and later also by the central judicature of the king and of the priests. Roland de Vaux writes:

In every town disputes and trials were settled by the Elders, that is, the heads of families in the clan, the leading citizens of the place. They sat at the gate of the town, where all the community affairs were discussed (cf. Gen 23: 10, 18; Jb 29:7; Pr 24: 7; 31:23.⁵

⁵Roland, de Vaux, *Ancient Israel: Its Life and Institutions*, trans by John McHugh (Darton, Longman & Todd: London) 2nd ed., 1965 (5th imp. 1980), p.

One case brought before the judges is as follows (Ex. It is expounded in four conditional clauses in the first part, and alternatively in one clause in the second part, as follows (Ex 21:22-25).

- I. 1. When men are fighting, (a)
 2. if a pregnant woman is injured (b)
 3. and there is a miscarriage (c)
 A 4. but no further harm follows, (d)
 the one who caused it shall be fined (e)
 as demanded by the woman's husband (f)
 paying the sum determined by the judges. (g)
- II. B If, however, some harm follows, (h)
 then you shall give life for life, (i)
 eye for eye, tooth for tooth, hand for hand, foot for foot,
 burn for burn, wound for wound, stripe for stripe."

The case before the judiciary involves an abortion suffered by a woman. She went to help her husband who was locked in fight with his adversary (a, b). She was injured and had an abortion. Now the judges have to hand out a sentence (g). They should consider two hypotheses (A, B).

A. The first hypothesis. The woman had a miscarriage, but beyond that she is not physically hurt (d). In this hypothesis, the just solution is a compensation for property loss: the compensation is due only if the husband (the man, not the woman, in as much as the foetus or embryo is his property, his "seed sown" in the woman's "field") demands it (f). But it is not for him to *determine* the amount to be paid; that is the competence of the judges (g). If he freely renounces his due, however, the case ends there.

B. The second hypothesis is that besides having a miscarriage the woman has been physically hurt (h). This hurt may range from death to loss of a limb (eye, tooth, hand, foot) or suffering a burn, or wound or stripe. The solution of the case then does not depend on her husband, much less on the woman. It is for the judges to see to it that justice is done through the application of the law of talion: that is, life for life, eye for eye, etc. Hence if the woman was mortally injured and she died, the judges must impose capital punishment on the aggressor. In case, however, she only lost an eye, tooth, hand, or

152. See chapter 10: "Law and Justice" (pp. 143-163) [Original: *Les institutions de l'Ancien Testament*, Paris: Cerf, 1958].

foot, the sentence must be that he too should suffer the loss of an eye, tooth, hand, or foot. This enumeration is only exemplificative, not exhaustive. Hence, if the harm caused was the loss of a finger, the aggressor is liable ("you shall give") to the loss of a finger. And so on.

Moreover, the law of talion is not created by the present law, which only invokes a pre-existing law and applies it to a concrete case. There is no question here of any *right* of the plaintiff to vengeance but of the *duty* of the judges to administer justice. Note that the woman had no personality in ancient Jewish law, and her husband conducted her case. The law of talion is a penal law, not a right or obligation of private individuals. There is no right for vengeance, which is explicitly excluded by the Torah: "You shall not take vengeance or bear a grudge against any of your people, but you shall love your neighbour as yourself" (Lev 19:18). But who is one's neighbour? Do aliens come under the category of neighbour? Is vengeance against aliens allowed?⁶

The law of talion of the Covenant Code was further refined in the Holiness Code and was made to apply also to aliens, that is, to proselytes who resided in the land of Israel. The context is again judicial (Lv 24:10-12). An alien blasphemer is sentenced to death by stoning, the same punishment foreseen for Israeli citizens guilty of blasphemy (16). That is equality before the law.

But between man and beast there is no equality: "He who kills a man shall be put to death (17). He who kills a beast shall make it good, life for life" (18 RSV). This is repeated in the inverse order in v. 21: the killer of a man is to be killed, the killer of a beast should compensate by giving a beast. Hence the addition "life for life" to the formula "eye for eye, tooth for tooth" in the law of talion can be misleading.

Similarly the law prescribes compensation in kind for the harm done to another's property like ox: "ox for an ox" (Ex 21:26). But the killing of a man is an offence of a different order. So, too, maiming a man: "If anyone maims his neighbour, it shall be done to him as he has

⁶According to Werner H. Schmidt, the law of talion was originally the rule used for dealing out justice for aliens: *Old Testament Introduction*, trans. Michael J. O'Connell (Crossroad: New York). Cited from St Paul Publication, Bombay, 1992: Chapter 9: "Old Testament Law," pp. 36, 37, 130.

done: fracture for fracture, eye for eye, tooth for tooth – as he has maimed a man so shall be done to him” (19, 20).⁷ Such is the application of the *lex talionis*, the law of talion. Clearly it was a norm of jurisprudence, a law for the courts, which functioned in their primitive form in the assembly of elders “at the gate” (Dt 21:19; 22:15; Ruth 4:1).⁸ For the administration of justice there were to be judges and officials in every town. They were not to accept bribe (Dt 16:18-20); they were to refer intricate cases to the higher court of “priests and the judge” of the royal court in the time of the monarchy in Jerusalem (17:9).

The third time the law of talion is cited in the Pentateuch (Dt 19:21) is again in a judicial context. In an extensive interpretation of this law, it is made to apply also to false (“unjust”) witnesses, even if they have not actually caused any injury to a man’s life or limb. To start with, in order to convict a person on the evidence of witnesses, there must be at least two witnesses (Dt 19:15). Malicious witnesses must be sorted out by “the judges who are in office” (17) after making “a thorough inquiry. An “unjust witness” (that is one who has deliberately sought to pervert justice by bearing false witness) is liable to the same punishment as the crime he tried to father on an innocent defender. This can have a deterrent and preventive effect (18-20). “Show no pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot” (21). The imperative “show no pity” is addressed to the judges, who are not to be swayed by pity, that is, by the consideration that “the unjust witness” is after all not actually guilty of murder or any other crime against physical integrity. Instead, the reasoning is that, if his false accusation were really acted upon, an innocent victim would have suffered. And he knew it and deliberately went for it. That is as good as deed done. Hence the penalty for him is life for life, eye for eye, etc.

The law of talion was not always enforced literally in practice by the judiciary in ancient Israel with mutilation of limbs, although as regards the death penalty or capital punishment the same sensibility

⁷This is a literal version of the LXX text made in the interests of precision and legal clarity but not giving priority to inclusive language at the expense of accuracy (see Scholion at the end of this study).

⁸G. Liedke, *Gestalt und Bezeichnung alttestamentlicher Rechtssätze* (Wissenschaftliche Monographien zum Alten und Neuen Testament, 39), 1971.

was not perhaps shown as obtains worldwide today. Roland de Vaux writes.

The law of retaliation, however, the *lex talionis*, is expressed in all its crudeness: 'life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, bruise for bruise, wound for wound' (Ex 21:23-25; cf. Lv 24: 219-20; Dt 19:21). But this formula seems to have lost its force, merely asserting the principle of proportionate compensation.⁹

A woman who seized a man by his genitals who was locked in fight with her husband is to have her hand cut off (Dt 25:11-12). Here a mutilation is prescribed where no mutilation was involved. In the case of the law of the *Sharia*, too, which is enforced in certain Muslim countries a thief can have his hand cut off, the hand he used to steal (usually "the left hand," according to the submission of the accused). This causes a permanent social stigma and pathetic sight where the aim of punishment is chiefly deterrence, not retribution. On the law and practice in ancient Israel Christopher Marshall writes:

In cases of culpable homicide, the "life for life" provision was intended literally (Gen 9:5-6; Ex 21:12; Lev 24:21; Num 35:31. As well as underscoring the unique value of human life, the principle ruled out vicarious or collective punishments that might trigger spiralling blood feuds between families or clans (Deut 24:16; 2 Kgs 14:6; Ezek 18:1-32)... In instances of lesser physical injuries, the "like for like" statements in the *lex talionis* typically were understood to mandate not actual physical mutilation but compensation of equivalent financial (or moral) value to the loss suffered (cf. Es. 21:18-25; Dt 19:15-21). Notwithstanding its vivid concrete language, therefore, the *lex talionis* represented a canon of proportionate restitution, not a sanctioning of imitative retribution.¹⁰

⁹Roland de Vaux, *Ancient Israel: Its Life and Institutions*, trans. John McHugh (Darton, Longman & Todd: London) 1961, pp. 149-150. See Part II, "Civil Institutions", chapter 10 "Law and Justice", pp. 141-209.

¹⁰Christopher Marshall, "Crime and Criminal Justice," *Dictionary of Scripture and Ethics*, Baker Academic: Grand Rapids, 2011, pp. 193-194, at 193. Another article in the same dictionary (Thomas W. Ogletree, "Law, Civil and Criminal," pp. 469-474), however, states the law but does not report the practice when it says: "Perpetrators of permanent injuries are subjected to comparable harm, "life for life, eye for eye, tooth for tooth,

Today there is worldwide interest in and concern for the practice of death penalty. The Amnesty International with its unremitting crusade succeeded to move Pope John Paul II to modify somewhat the traditional teaching of the Catholic Church on death penalty.¹¹ Ancient Israel (or “eternal Israel,” to use Jacob Neusner’s favourite term), however, did not evince the same sensibility regarding death penalty, which was imposed not only for murder but also for several other abominable crimes. For example, whoever strikes or curses his father or mother shall be put to death (Ex 21:15, 17). So also a disobedient son is to be put to death (Dt).

The death penalty is imposed for intentional killing (Ex 21:12-14; Lev 24:17, 21); kidnapping (Ex 21:16; Dt 24:7; assaulting or cursing parents (Ex 21:15-17); and abominable sexual practices including adultery, incest, lying with an animal, and lying with a male as with a female (Ex 22:19; Lv 20:10-21; Dt 22:13-21.... The death penalty is also mandated for idolatry, sorcery, defamations of the Lord’s name, and false prophecy (Ex 22:18; Lv 20:1-3, 27; 24:16; Dt 12, 13; 13:5, 12; 17:2-5).¹²

Life and law always do not correspond. Life can be better or worse than what may be read in laws and law books. The law of talion has been much maligned and the Old Testament law in general has been widely misunderstood. Werner H. Schmidt writes as follows.

Contrary to a widespread false impression, OT criminal law is by no means based universally on the principle of talion, that is, “the principle of requital for an injury by an exactly similar injury done to the offender” (Alt, p. 135). Requital of like with like – a life for a life, an eye for an eye, a tooth for a tooth – comes into play only in connection with particular crimes among particular persons (Ex 21:22f; Lev 24:17ff; cf Dt 19:15ff). This was already the case in Babylonian law (Code of Hammurabi, §196ff.), though it was restricted even more in Israelite law. In the case of bodily injury to a slave the principle is expressly not applied (Ex 21:25f). Both the

hand for hand, foot for foot burn for burn, wound for wound, stripe for stripe (Ex 21:23-25)” (472).

¹¹*Catechism of the Catholic Church*, 2267.

¹²Christopher Marshall, “Crime and Criminal Justice,” p. 471. See also C. Marshall, *Beyond Retribution: A New Testament Vision for Justice, Crime and Punishment*, Eerdmans, 2001.

exceptional character of the talion principle and the strict form in which it is expressed betray the fact that it came into the OT from an earlier, probably pre-Israelite time. In the nomadic society, which had as yet no regular system for the administration of justice, the principle of strict requital may have checked the arbitrary exercise of unimpeded retaliation (see Gen 4:23f.) or the endless continuation of vendetta and thus provided some degree of protection.¹³

Some OT penal laws were clearly borrowed from the Code of Hammurabi (1728-1686), the sixth king of the Old Babylonian (Amorite) dynasty. For example, "If a son has struck his father, they shall cut off his hand" (§195) is the likely source of Ex 21:15. Similarly the OT has borrowed also the following laws of the Code of Hammurabi. "If a seignior has destroyed the eye of a member of the aristocracy, they shall destroy his eye (§196). "If he has broken another seignior's bone, they shall break his bone" (§197). "If he has destroyed the eye of a commoner, he shall pay one mina of silver" (§198).¹⁴ The law of talion "an eye for an eye" applied to the aristocracy, not to the commoner.¹⁵ However, the law of talion "life for life" was not convertible: the death penalty was awarded not only for murder but also for many other offences.

In sum, in the Pentateuch the law of talion appears always in a judicial context, which is a clear sign that it was a norm for judges, not for others. It was not a general licence for private individuals to retaliate, measure for measure, eye for an eye, tooth for a tooth. However, if private individuals did retaliate, and the retaliation kept to the norm of the law of talion, the judges could consider that justice

¹³Werner H. Schmidt, *Old Testament Introduction*, trans. Matthew J. O'Connell, (St Paul Publications: Bombay < Crossword: New York) 1992, p. 130. See also I. Drapkin, *Crime and Punishment in the Ancient World*, Lexington, 1989; S. Mendelsohn, *The Criminal Jurisprudence of the Jews*, Sepher-Hermon, 1991.

¹⁴J. B. Pritchard, ed., *Ancient Near Eastern Texts Relating to the Old Testament*, 2nd ed., Princeton, 1955 [3rd ed., 1969], p. 175.

¹⁵The Babylonian term *awēlum* "is literally "man," but in the legal literature it seems to be used at least in three senses: 1) ... a man of the higher class, a noble; 2) ... a free man of any class; and 3) ... a man of any class, from king to slave" (Pritchard, *Ancient Near Eastern Texts*, p. 166, n. 39).

was already done, even if the law forbidding vengeance (Lv 19:19) was violated.

In conclusion then we have to say that the law of talion was not *jus privatum* conferring on private individuals a personal right to retaliate. This would be to misunderstand the law of talion, which belonged under *jus publicum*. It was not a moral law but a law of jurisprudence. But people generally did not make this distinction nor did the rabbis and Pharisees of Jesus' time distinguish between morals and jurisprudence. What was a norm for the judges in law had become in life a right of vengeance, measure for measure, a right of private individuals. Jesus addressed this life situation, not the law itself.

3. The New Testament

In the New Testament the law of talion is quoted by Matthew, who places it on the lips of Jesus during the Sermon on the Mount: "You have heard that it was said, An eye for an eye and a tooth for a tooth" (Mt 5: 38). This is the fifth of six citations in the Sermon on the Mount, each beginning with "You have heard that it was said...." There is multiplicity of opinions in the NT exegesis of this catena of citations depending on whether they are from the Torah or from the halaka.

Jesus declares at the outset: "Do not think I have come to abolish the law or the prophets; I have come not to abolish but to fulfil" (Mt 5: 17). Taking him on his word we have to say that Jesus did not abolish the law of talion, but perfected it. But how? First of all Jesus keeps to the OT distinction between *jus publicum* and *jus privatum* without an explicit declaration. The *lex talionis* was, as we saw, a norm for tribunals to determine the just proportion between the offence committed and the penalty to be imposed. Jesus did not abolish this law of jurisprudence. He did not deal with public law or penal law at all, but with ethical law; his concern was not politics and jurisprudence but with morals and spirituality, a stance which comes to the fore in his question to the man who requested him to intervene in his dispute with his brother over the division of property: "Man, who set me up as judge or arbiter in your case?" (Lk 12:14). Asking "Give to Caesar the things that are Caesar's and to God the things that are God's (Mt 22:21; Mk 12:17; Lk 20:25) Jesus also steered clear of current politics. Claude G. Montefiore, a Jew who sought to reclaim Jesus for Judaism, commented: "Jesus was not

thinking of public justice, the order of civil communities, the organization of states, but only how the members of religious brotherhood should act towards each other and towards those outside their ranks. Public justice was outside of his purview."¹⁶ This view is endorsed by *The Oxford Bible Commentary*.

While in the Pentateuch the *lex talionis* belongs to the judiciary process, this is not the sphere of application in Matthew. Jesus does not overthrow the principle of equivalent compensation on an institutional level – that question is not addressed – but declares it illegitimate for his followers to apply it in their private disputes.¹⁷

Jesus asks his disciples to practise a righteousness that surpasses the righteousness of the scribes and Pharisees, which is based on the observance of the Torah "His demands surpass those of the Torah without contradicting them."¹⁸ It is his Messianic mission to fulfil the law and the prophets, not to abolish them. What is fulfilled is not abolished but brought to its perfection. What Jesus demands of his disciples is a righteousness that surpasses the observance of the Torah, which is thus preserved and hedged in. In spite of Jesus' explicit declaration to the contrary not a few see Jesus as abrogating the Mosaic Law on six counts, others on three counts. Here is one of several deviant interpretations. "Again he formally abrogates an Old Testament command in order to intensify and internalize its

¹⁶Claude G. Montefiore, *The Synoptic Gospels*, New York: Ktav Publishing House, 1968, p. 71 (1st ed., London: Macmillan, 1909; 2nd ed., 1927). Jacob Neusner, the leading American Jewish rabbi and scholar, cites with approval Montefiore: *A Rabbi Talks with Jesus*, McGill-Queen's University Press, 2000, p. 28.

¹⁷Dale C. Allison, Jr., "Matthew," *The Oxford Bible Commentary*, ed. by John Barton and John Muddiman, (Oxford University Press: Oxford) 2001, p. 855.

¹⁸W. D. Davies and Dale C. Allison, *The Gospel According to Saint Matthew*, 3 vols., (T & T Clark: Edinburgh), 1988., vol. 1, p. 508. For the thesis of abrogation of the Mosaic Law in this matter, see J. P. Meir, *Law and History in Mathew's Gospel*, (Analecta Biblica, 71), Rome, 1976. Meir maintains his thesis of abrogation in his more recent work on Jesus, *A Marginal Jew*.

application.”¹⁹ A correct interpretation can be had only if we keep to Jesus’ horizon.

While in the Pentateuch the *lex talionis* belongs to the judiciary process, this is not the sphere of application in Matthew. Jesus, to repeat, does not overthrow the principle of equivalent compensation on an institutional level – that is not just addressed – but declares it illegitimate for his followers to apply it to their private disputes.²⁰

Jesus excluded personal vengeance, paying back evil for evil, and counselled to conquer evil with good (Mt 5:38-42). To Peter’s question “How many times am I to forgive my brother who offends me? As many as seven times? Jesus replied, “I do not say seven times but seventy times seven” (Mt 18: 21, 22), that means, without keeping counts. This is to overturn Lamech’s code of vengeance (Gen 4:24). Vengeance is dissolved in benevolence.

Jesus did not prescribe any norm for the judges to follow because he did not deal with public law. Strictly speaking, his teaching was not concerned even with private law, that is, *ius (diritto, Recht)* but rather with ethical or moral law. More precisely, spirituality was his sphere of concern. Inasmuch as people easily took the law of talion for a norm for settling scores privately, Jesus gave a counsel of perfection. It is addressed to the children of an infinitely merciful Father in heaven, who does not set limits to his benevolence and pardon. God the Father in heaven is the ideal or norm of human behaviour. “Be perfect as your heavenly Father is perfect” (Mt 5:48). Thus Jesus “perfected the law and the prophets” (5:17) with the law of love. Whereas law tends to be minimalist, love soars up to be maximalist.

Jesus’ mission was “not to destroy the Law and the Prophets but to fulfil them” (Mt 5:17), as indeed the Messiah was generally expected to do. This “fulfilling” means realizing to the fullness. According to Paul “all the law is fulfilled in one word: You shall love your neighbour as yourself” (Gal 5:14). This is no human achievement in the condition of sinful humanity: the law is fulfilled in those who live according to the Spirit (Rom 8: 4), and “one who loves another has fulfilled the law” (13: 8). Love is the new law, the new

¹⁹Craig L. Bloomberg, *The New American Commentary*, vol. 22, Matthew (Broadman Press: Nashville) 1992, p. 113.

²⁰Davies – Allison, *Matthew*, p. 542.

commandment of Jesus, who told his disciples: "I give you a new commandment, that you love one another. Just as I have loved you, you also should love one another" (Jn 13:34). Such love, however, is no human achievement but a charism, a gift, the supreme gift of the Holy Spirit (1 Cor 13:13)

4. The Law of Talion and the Historical Dimension of Law

The relationship between the OT and the NT as regards the law of talion is not of opposition but of progress through history and spiritual perfection. Inasmuch as this law was a principle of jurisprudence regulating justice in civil society in the OT, it was left untouched by Jesus in the NT as was said above.

Biblical revelation took place progressively through step-by-step development. The initial "law of Lamech" describes the human propensity for personal vengeance without proportion: It is moderated by customary law with the norm of arithmetical proportion (*talis qualis*). In the Torah personal vengeance is altogether excluded and the administration of justice is regulated by transferring it from the private realm to the public sector, in which the law of talion is set as a norm for the judges to abide by. This norm articulates an ancient principle of philosophy of law that justice is a matter of arithmetical equality. In the final phase, law itself is transcended by love, by the "new commandment" of the Messiah, "the royal law," called "the law of liberty" or the law of the children of God.

All Christian Churches and their collections of canons or codes of canon law as well as all textbooks of theology of law recognize Holy Scripture as the first source of the law of the Church. However, there is no canon either in the CIC or in the CCEO enshrining the law of talion textually. This is neither because Jesus abolished it nor because the codifiers forgot to include it. However the principle expressed by the law of talion is preserved in both the codes, namely that punishment must be proportionate to the offence. And this principle is contained in expressions like "*iusta poena*" (just punishment) or "*congrua poena*" (appropriate punishment): for example, see the latter in CCEO, cc. 1115, 1129 § 2, 1147, 1418 § 2, 1436 § 2, 1438-1440, 1443-1449, 1451, 1453 § 3, 1454, 1455, 1456 §1, 1458-1466 and their corresponding canons in CIC.

Although among the sources of canon law the Holy Scripture figures in the first place, this does not mean that all the laws contained in the

Scripture must be taken over into a modern code of canon law. Even in a professedly Christian republic or state today (if any such really exists) you are not likely to find the law of talion (“eye for an eye, tooth for a tooth”) figuring in the penal code. Historically, as we have seen, the law of talion was a progressive law, replacing the “the law of Lamech” and enshrining the principle of arithmetical proportion – it was not a savage law as it is often pilloried without regard for history or for proper hermeneutics. It was a progressive law for its time. For today’s sensibility the law of talion strikes as unnecessarily cruel or gory or even barbaric in some of its applications. Just as it replaced the law of Lamech, it has been replaced by further progress in the same sense of justice. Its destiny thus underscores the importance of a historical approach to law. Indeed, the historical dimension is one of the seven dimensions of law in the Church.²¹ Both civil law and canon law regulate life, which is subject to change and growth with the progress of society. Law is a sociologically and historically conditioned cultural product and needs to be interpreted taking into account the sociological and historical dimensions of law. Many today see in the capital punishment the last survival of the law of talion (“life for life”), a survival that is generally felt to be a concession to custom and sentiment rather than supported by reason or the strict requirement of justice. Statistically, the number of countries keeping the capital punishment on the statute book, or *de facto* abstaining from applying the capital punishment, is progressively diminishing.

Lastly, in the Gospel of Matthew, the law of talion is encrusted in the Sermon on the Mount, in which it is presented as addressed to the *palaioi* (Greek), usually rendered as “ancients” in English. “Here the generation in the wilderness is pre-eminently in view.”²² This is a questionable translation. An Aramaic approach to the Sermon on the Mount can yield surprising and fruitful novelties. But that has to be the subject of another study.

5. *Scholion*: Fidelity vs. Inclusive Language

By way of conclusion, it seems useful to add a *scholion* or scholium on the problem of the use of inclusive language in the translation of

²¹George Nedungatt, “Dimensions of Law in the Church,” *Iustitia* 2 (2011) 39-82; see pp. 74-78: “The Historical Dimension.”

²²Davies-Allison, *Matthew*, p. 511.

the law of talion. A literal translation of the law of talion in the LXX text (corresponding to the Hebrew original) would be as follows. "As for man (*anthropos*) whoever smites a man (*anthrōpou*) to death is to be put to death" (Lev 24:17). In the use of the word *anthropos* (man) is implied the distinction between humans and animals. But the "man" is the legal man, not "human being" as such. Our concern today to avoid the use of sexist language and to use instead inclusive language is laudable but it was no concern of antiquity. Nor of the Bible. The same verse Lev 24:17 is rendered as follows in NRSV: "Anyone who kills a human being shall be put to death." This translation takes care of inclusive language, but it does so at the expense of the historical truth. Masters could kill their slaves without being liable to capital punishment, because "slaves are a man's property" (Ex 21:20,21). Likewise, wives and children were also a man's property. Unwanted children were exposed and abandoned to be eaten by wild beasts, but the father was not liable to punishment either in the Greek law or in the Roman law. In the prohibition to kill a "man" in OT, or for that matter in the other laws of antiquity including Greek and Roman law, "man" does not mean "a human being" as such, or "a male human being," but the *legal* man. Here are a few modern translations of Lev 24:17.

"Anyone who kills a *human being* shall be put to death" (NRSV, NOAB);

"Whoever takes the life of any *human being* shall be put to death" (NAB);

"Anyone who strikes down any other *human being* will be put to death" (NJB);

"If a *person* strikes another and kills *him*, he must be put to death" (REB).

"Whoever wounds a *person* fatally shall be executed" (RBV)

"Death is also the penalty for murder" (CEV)

"Whoever kills a human being shall be put to death" (NCB)

These translations do take care of inclusive language and are attentive to the right to life as understood today. But they are not faithful to the historico-juridical truth about the legal man as were the earlier versions: "He who kills a man shall be put to death" (RSV); "And he that killeth any man shall surely be put to death" (KJV). These earlier versions did not strain after inclusive language, but rendered faithfully the original meaning and expressed the historical and legal truth: to kill a man, the legal man, is a crime

deserving the death penalty — *not* killing a woman, or a child, or a slave, although these are also “human beings.” As we saw above, the source of Lv 24: 17 was the Code of Hammurabi, “If a seignior has destroyed the eye of a member of the aristocracy, they shall destroy his eye” (§196). The law of talion “an eye for an eye” applied to the aristocracy, not to the commoner, “a human being.” Our concern here of course is not to reinstate the law of talion, but fidelity in the translation of the law of talion.

In Biblical usage the same word “man” can stand for “human being” (whether male or female) or for “human male” (exclusive of the female gender). But there is a third meaning of “man,” the legal meaning, which is less known. Let us illustrate these three senses in order. First, “man” may be used in the *anthropological* sense of “human being.” For example, in the prayerful exclamation of wonder, “O Lord, what is man that you regard him, or the son of man (Hebrew, *ben adam*) that you think of him!” (Ps 144:3), by “man” the psalmist obviously means “a human being.” The use of inclusive language in modern Bible versions makes that clear. Thus *The New Revised Standard Version* (NRSV) renders the above verse: “O Lord, what are *human beings* that you regard them, or *mortals* that you think of them!” This is clearly a legitimate and even necessary use of inclusive language.

The second sense of “man” is *biological*, and means “male” exclusive of “women.” Actually, in many OT contexts even the term “people,” under which we would normally include both men and women, is a collective noun meaning really “men,” exclusive of women. Thus, for example, “Moses said to the *people*, ‘Prepare for the third day: do not go near a woman’” (Ex 19:15). This restrictive meaning of “people” may not satisfy those who want to bank on the biblical concept of the “people of God” for a democratic or feminist break-through. To do so they would have to ignore OT history and law. There is indeed a lawful use of the inclusive language like changing “brethren” in certain NT texts into “brothers and sisters” (1 Cor 16:20; Col 4:15 ...). But such attempts should not modify the original sense. Thus, for example, children will be punished for “the iniquity of their fathers” (Ex 20:5, Dt 5:9); this is not the same as “... the iniquity of their parents” (NRSV). Inclusive language should not make the Bible say what it does not.

The third sense of “man” is *legal*, and is even more restrictive. Thus, for example, when war negotiations were carried out by “all the men of Jabesh-gilead”(1 Sam 11:1), women were not involved as they would be in a modern parliamentary democracy. Instead, these “men” of OT were in fact the same as the “elders (*andres*, in Greek) of Jabesh” (11:3), a male preserve. Hence “men” cannot be rendered using inclusive language as “the *inhabitants* (11:9, 10, NRSV). Again, the men who went to Gilgal after a military victory to “renew the kingship” by having Saul anointed by Samuel, are only the army consisting of male soldiers, although they are collectively called “people” (*ho laos*) or even “all the people”(*pas ho laos*, 1 Sam 11:11, 12, 15). Similarly, David went up to Hebron together with his two wives and “the men (*andres*) who were with him”, each one with his household, and settled down there; and then “the men (*andres*) of Judah” [not “the people of Judah” (NRSV)] came and anointed David king over the house of Judah” (2 Sam 2:4). Our modern sensibility for the equal dignity of man and woman as well as for the fundamental rights of all human beings was not the concern of antiquity or of the Bible. The law did not protect all human life with the sanction of capital punishment but only the life of “men.” And in ancient Hebrew law, “men” did not always include all human beings, not even all human males on the sexual divide. As Werner H. Schmidt has written,

The ‘men’... were the full citizens who had legal competency and were capable of bearing arms. These are the people often meant when reference is made to ‘a man’ (Exod 21:12ff; 1 Sam 11:1, 9f., 15; 2 Sam 2:4: etc.) ... In this ancient understanding of things, women, children, and slaves (captured in war or gotten through trade) were regarded more or less as the ‘property’ of the man (see Exod 20:17)”²³.

A man could dispose of or deal with his property as he pleased, using his authority as *paterfamilias*, which extended over the life and death of his children (legally his ‘property’), within the limits of certain decencies (Ex 21:21). It may be repugnant to our modern sensibility that certain human beings could be someone’s legal property, or that men and women were not socially and legally equal. But we may not so modernise the language of the Bible as to modernise the Bible itself. In the example cited above, “Anyone who

²³Werner H. Schmidt, *Old Testament Introduction*, p. 39.

kills a human being shall be put to death" (Lev 24:17 NRSV), the concern for inclusive language has changed "man" into "human being." But it misrepresents the historical truth and the law. To avoid such pitfalls, we must ask in which of the three senses (anthropological, biological, and legal) the word "man" is being used in any particular context in the Bible. The use of the inclusive language in a legal context can involve a serious falsification, although in some other contexts it can be innocuous or even welcome.

Finally, we must also remember that the biblical revelation took place progressively through successive stages of development. In our modern concern for inclusive language or for human rights, we should not force the pace of the biblical revelation, much less purge the Bible.

The English language is burdened with the problem of inclusive language unlike some other languages. Greek has *anthropos* and *aner*, Latin has *homo* and *vir*, German has *Mensch* and *Mann*, and Malayalam along with several other Indian languages has *manush* and *purush*, borrowed from Sanskrit. But English, which has indeed a very rich vocabulary having derived or borrowed many words from other languages, is regrettably and surprisingly poor as regards inclusive language. Readers of the Bible in certain modern English translations need to be warned.