

any structure of human rights guarantees . . . and the choices bear socially and politically significant consequences. The problem is that rights discourse itself does not provide neutral decision procedures with which to make such choices. . . . In order to resolve rights conflicts, it is necessary to step outside the discourse'.

Apply these observations to a conception as basic as the 'right to life'. What 'choices' about the meaning of this conception are before treaty-makers, legislators, courts or advocates elaborating this right, and through what methods or processes can those choices be resolved? What different issues are posed by, say, a 'right to health care'?

3. Kennedy, Klare and Sunstein all stress the significance of the indeterminacy of rights-based argument, including the problem of conflicting rights. Kennedy notes that these features of 'open texture or indeterminacy' are open to the same analysis 'as legal argument in general'. That is, they are not particular to rights. Give some examples, other than those stated in the preceding writings, of pressing and difficult issues raised by the ICCPR, CEDAW or the ICESCR that stem from the indeterminacy of the texts or contradictions among rights? How would you start to go about resolving a concrete issue about the content and reach of a right that involves indeterminacy or contradiction (say, right to speech and right to privacy)? Bear in mind that for many international human rights issues, it will be impractical or impossible to invoke the jurisdiction of a court that could issue a 'binding' precedent.

#### COMMENT ON DUTIES

The following readings describe and analyze duty-oriented rather than rights-oriented social ordering through law and cultural tradition. Robert Cover comments on the legal culture of Judaism with its stress on obligations imposed by God rather than on rights. He suggests historical reasons why Western states and Judaism developed in these different ways. Jomo Kenyatta describes aspects of the education of the young in the Gikuyu people in Kenya, particularly the inculcation of elements of social obligations and duty. Although the cultural and religious contexts and the content of the duties referred to are radically different in these readings, they both suggest important consequences of an orientation towards duty/obligation and the gap between such an orientation and the liberal political culture that influenced the human rights movement.

Note that the duties/obligations referred to in these readings are *not* the same as duties within a *scheme of rights* that are correlative to the described rights. For example, the individual's basic right to be free from torture imposes a correlative (corresponding) duty on the state not to torture. The following readings talk of duties imposed on *individuals* rather than on the state or some other collective entity. Article 29(1) of the UDHR offers an analogy to such use of duties, as does the preamble to the ICCPR. But explicit language of individual duty to other individuals (other than the implied, traditional correlative duties), to society, or to the state in the universal human rights system is rare. A closer analogy to the present readings, particularly the excerpts from Kenyatta, is provided by the African Charter on Human and Peoples' Rights, examined at p. 354, *infra*.

#### ROBERT COVER, OBLIGATION: A JEWISH JURISPRUDENCE OF THE SOCIAL ORDER

5 J. of Law and Relig. 65 (1987)

##### I. Fundamental Words

Every legal culture has its fundamental words. When we define our subject this weekend as human rights, we also locate ourselves in a normative universe at a particular place. The word 'rights' is a highly evocative one for those of us who have grown up in the post-enlightenment secular society of the West. . . .

Judaism is, itself, a legal culture of great antiquity. It has hardly led a wholly autonomous existence these past three millennia. Yet, I suppose it can lay as much claim as any of the other great legal cultures to have an integrity to its basic categories. When I am asked to reflect upon Judaism and human rights, therefore, the first thought that comes to mind is that the categories are wrong. I do not mean, of course, that basic ideas of human dignity and worth are not powerfully expressed in the Jewish legal and literary traditions. Rather, I mean that because it is a legal tradition Judaism has its own categories for expressing through law the worth and dignity of each human being. And the categories are not closely analogous to 'human rights'. The principal word in Jewish law, which occupies a place equivalent in evocative force to the American legal system's 'rights', is the word 'mitzvah' which literally means commandment but has a general meaning closer to 'incumbent obligation'.

Before I begin an analysis of the differing implications of these two rather different key words, I should like to put the two words in a context—the contexts of their respective myths. For both of us these words are connected to fundamental stories and receive their force from those stories as much as from the denotative meaning of the words themselves. The story behind the term 'rights' is the story of social contract. The myth postulates free and independent if highly vulnerable beings who voluntarily trade a portion of their autonomy for a measure of collective security. The myth makes the collective arrangement the product of individual choice and thus secondary to the individual. 'Rights' are the fundamental category because it is the normative category which most nearly approximates that which is the source of the legitimacy of everything else. Rights are traded for collective security. But some rights are retained and, in some theories, some rights are inalienable. In any event the first and fundamental unit is the individual and 'rights' locate him as an individual separate and apart from every other individual.

I must stress that I do not mean to suggest that all or even most theories that are founded upon rights are 'individualistic' or 'atomistic'. Nor would I suggest for a moment that with a starting point of 'rights' and social contract one must get to a certain end. Hobbes as well as Locke is part of this tradition. And, of course, so is Rousseau. Collective solutions as well as individualistic ones are possible but, it is the case that even the collective solutions are solutions which arrive at their destination by way of a theory which derives the authority of the collective from the individual. . . .

The basic word of Judaism is obligation or mitzvah. It, too, is intrinsically

bound up in a myth—the myth of Sinai. Just as the myth of social contract is essentially a myth of autonomy, so the myth of Sinai is essentially a myth of heteronomy. Sinai is a collective—indeed, a corporate—experience. The experience at Sinai is not chosen. The event gives forth the words which are commandments. In all Rabbinic and post Rabbinic embellishment upon the Biblical account of Sinai this event is the Code for all Law. All law was given at Sinai and therefore all law is related back to the ultimate heteronomous event in which we were chosen-passive voice.

...  
What have these stories to do with the ways in which the law languages of these respective legal cultures are spoken? Social movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another a 'Rights' movement is started. Civil rights, the right to life, welfare rights, etc. The premium that is to be put upon an entitlement is so coded. When we 'take rights seriously' we understand them to be trumps in the legal game. In Jewish law, an entitlement without an obligation is a sad, almost pathetic thing. . . .

Indeed, to be one who acts out of obligation is the closest thing there is to a Jewish definition of completion as a person within the community. A child does not become emancipated or 'free' when he or she reaches maturity. Nor does she/he become *sui juris*. No, the child becomes bar or bat mitzvah, literally one who is of the obligations. Traditionally, the parent at that time says a blessing. Blessed is He that has exonerated me from the punishment of this child. The primary legal distinction between Jew and non-Jew is that the non-Jew is only obligated to the 7 Noachide commandments. . . .

#### *The Uses of Rights and Obligations*

The Jewish legal system has evolved for the past 1900 years without a state and largely without much in the way of coercive powers to be exercised upon the adherents of the faith. I do not mean to idealize the situation. The Jewish communities over the millennia have wielded power. Communal sanctions of banning and shunning have been regularly and occasionally cruelly imposed on individuals or groups. Less frequently, but frequently enough, Jewish communities granted quasi-autonomy by gentile rulers, have used the power of the gentile state to discipline dissidents and deviants. Nonetheless, there remains a difference between wielding a power which draws on but also depends on pre-existing social solidarity, and, wielding one which depends on violence. . . .

In a situation in which there is no centralized power and little in the way of coercive violence, it is critical that the mythic center of the Law reinforce the bonds of solidarity. Common, mutual, reciprocal obligation is necessary. The myth of divine commandment creates that web . . . . It was a myth that created legitimacy for a radically diffuse and coordinate system of authority. But while it created room for the diffusion of authority it did not have a place for individualism. One might have independent and divergent understandings of the obligations imposed by God through his chosen people, but one could not have a world view which denied the obligations.

The jurisprudence of rights, on the other hand, has gained ascendance in the Western world together with the rise of the national state with its almost unique mastery of violence over extensive territories. Certainly, it may be argued, it has been essential to counterbalance the development of the state with a myth which a) establishes the State as legitimate only in so far as it can be derived from the autonomous creatures who trade in their rights for security—i.e., one must tell a story about the State's utility or service to us, and b) potentially justifies individual and communal resistance to the Behemoth. It may be true as Bentham so aptly pointed out that natural rights may be used either apologetically or in revolutionary fashion, and there is nothing in the concept powerful enough analytically to constrain which use it shall be put to. Nevertheless, it is the case that natural right apologies are of a sort that in their articulation they limit the most far-reaching claims of the State, and the revolutionary ideology that can be generated is also of a sort which is particularly effective in countering organic statist claims.

Thus, there is a sense in which the ideology of rights has been a useful counter to the centrifugal forces of the western nation state while the ideology of mitzvah or obligation has been equally useful as a counter to the centripetal forces that have beset Judaism over the centuries.

... [T]he Maimonides system contrasts the normative world of mitzvah with the world of vanity—hebel. It seems that Maimonides, in this respect, as in so many others has hit the mark. A world centered upon obligation is not, really cannot be, an empty or vain world. Rights, as an organizing principle, are indifferent to the vanity of varying ends. But mitzvahs because they so strongly bind and locate the individual must make a strong claim for the substantive content of that which they dictate. The system, if it's content be vain, can hardly claim to be a system. The rights system is indifferent to ends and in its indifference can claim systemic coherence without making any strong claims about the fullness or vanity of the ends it permits.

#### JOMO KENYATTA, FACING MOUNT KENYA: THE TRIBAL LIFE OF THE GIKUYU (1965), at 109

[These excerpts are taken from a description by Kenyatta, who later became the first post-colonial president of Kenya, of the Gikuyu people (often rendered in English as 'Kikuyu') in that country. The excerpts stress elements of duty inculcated in Gikuyu children, and appear in Ch. 5, 'System of Education.']

[The children] are also taught definitely at circumcision the theory, as it were, of respect to their parents and kinsfolk. Under all circumstances they must stay with them and share in their joys and sorrows. It will never do to leave them and go off to see the world whenever they take the notion, especially when their parents are in their old age. They must give them clothes, look after their garden, herd their

cattle, sheep and goats, build their grain stores and houses. It thus becomes a part of their outlook on life that their parents shall not suffer want nor continue to labour strenuously in their old age while their children can lend a hand and do things to give them comfort.

This respect and duty to parents is further emphasised by the fact that the youth or girl cannot advance from one stage to another without the parent's will and active assistance. The satisfaction of all a boy's longings and ambitions depends on the father's and family's consent. . . .

The teaching of social obligations is again emphasised by the classification of age-groups to which we have already referred. This binds together those of the same status in ties of closest loyalty and devotion. Men circumcised at the same time stand in the very closest relationship to each other. When a man of the same age-group injures another it is a serious magico-religious offence. They are like blood brothers; they must not do any wrong to each other. It ranks with an injury done to a member of one's own family. The age-group (*riika*) is thus a powerful instrument for securing conformity with tribal usage. The selfish or reckless youth is taught by the opinion of his gang that it does not pay to incur displeasure. He will not be called to eat with the others when food is going. He may be put out of their dances, fined, or even ostracised for a time. If he does not change his ways he will find his old companions have deserted him.

. . . The age-groups do more than bind men of equal standing together. They further emphasise the social grades of junior and senior, inferior and superior. We see the same principle in evidence all through the various grades. . . .

Owing to the strength and numbers of the social ties existing between members of the same family, clan and age-group, and between different families and clans through which the tribe is unified and solidified as one organic whole, the community can be mobilised very easily for corporate activity. House-building, cultivation, harvesting, digging trap-pits, putting up fences around cultivated fields, and building bridges, are usually done by the group; hence the Gikuyu saying: '*Kamoinge koyaga ndere*', which means collective activities make heavy tasks easier. In the old days sacrifices were offered and wars were waged by the tribe as a whole or by the clan. Marriage contracts and ceremonies are the affairs of families and not of individuals. Sometimes even cattle are bought by joint effort. Thus the individual boy or girl soon learns to work with and for other people. An old man who has no children of his own is helped by his neighbour's children in almost everything. His hut is built, his garden dug, firewood is cut and water is fetched for him. If his cattle, sheep or goats are lost or in difficulties the children of his neighbour will help to bring them back, at great pains and often at considerable risk. The old man reciprocates by treating the children as though they were his own. Children learn this habit of communal work like others, not by verbal exhortations so much as by joining with older people in such social services. . . . All help given in this way is voluntary, and kinsfolk are proud to help one another. There is no payment or expectation of payment. They are well feasted, of course. This is not regarded as payment, but as hospitality. The whole thing rests on the principle of reciprocal obligations. It is taken for granted that the neighbour

whom you assist in difficulty or whose house you help to build will do the same for you when in similar need. Those who do not reciprocate these sentiments of neighbourliness are not in favour. . . .

. . . The selfish or self-regarding man has no name or reputation in the Gikuyu community. An individualist is looked upon with suspicion and is given a nickname of *mwebongia*, one who works only for himself and is likely to end up as a wizard. He may lack assistance when he needs it. . . .

In the Gikuyu community there is no really individual affair, for every thing has a moral and social reference. The habit of corporate effort is but the other side of corporate ownership; and corporate responsibility is illustrated in corporate work no less than in corporate sacrifice and prayer.

In spite of the foreign elements which work against many of the Gikuyu institutions and the desire to implant the system of wholesale Westernisation, this system of mutual help and the tribal solidarity in social services, political and economic activities are still maintained by the large majority of the Gikuyu people. It is less practised among those Gikuyu who have been Europeanised or detribalised. The rest of the community look upon these people as mischief-makers and breakers of the tribal traditions, and the general disgusted cry is heard: '*Mothongo ne athogonjire borori*', i.e. the white man had spoiled and disgraced our country.

. . . The striking thing in the Gikuyu system of education, and the feature which most sharply distinguishes it from the European system of education, is the primary place given to personal relations. Each official statement of educational policy repeats this well-worn declaration that the aim of education must be the building of character and not the mere acquisition of knowledge. . . .

#### QUESTIONS

1. 'A duty-based social order seems inherently less subject to universalization (with respect to the duties imposed on individuals) than a rights-based social order (with respect to the rights attributed to individuals). That is, the content of duties (obligations toward elders, toward the community, toward God) seems to be very particular and bound to a given context, a product of a given religion or political or social culture, whereas individuals' rights seem to be more divorced from a particular context and can therefore be stated more abstractly.' Do you agree? Any examples?
2. "Individual rights" necessarily imply equality among all rights holders, which is to say among all members of society. This in fact is what the contemporary human rights instruments declare. To the contrary, duties can be (and frequently are) defined so as to impose hierarchy, status, and discrimination in a given social order'. Do you agree? Any examples?
3. 'Different from a regime of rights, a regime of duties intrinsically exerts an inward, centripetal force. It draws individual duty-bearers into the society, connects them

intricately with other individuals and the community in a variety of ways, blurs the separate identity of the individual from society, and leads to a more communal and collective structure of life.' Do you agree?

4. Note that Article 2(3) of the ICCPR requires states to provide all persons whose rights have been violated with 'an effective remedy', and to develop particularly the possibilities of 'judicial remedy'. Do rights imply a preference for or even require individual (judicial or other) remedies against the state, whereas a regime of individual duties is less likely to provide such remedies?

### COMMENT ON DUTY PROVISIONS OF NATIONAL CONSTITUTIONS

In modern constitutions, as in human rights treaties, provisions conferring rights on individuals far outnumber those imposing duties. There appear below English translations of articles in a number of state constitutions that, as of recent dates, expressed such duties. Presented here in isolation from the context of the constitutions and political societies in which they take meaning, these articles serve merely to illustrate the range of such duties. Within their national contexts, they may be understood or interpreted to impose slight or significant duties, which moreover may be viewed merely as hortatory or may be subject to enforcement by civil or criminal actions brought by the state or by nonstate parties.

#### Belarus

Article 53: Everyone shall respect the dignity, rights, liberties, and legitimate interests of others.

Article 55: It shall be the duty of everyone to protect the environment.

#### Cambodia

Article 47: Parents shall have the duty to take care of and educate their children to become good citizens. Children shall have the duty to take good care of their elderly mother and father according to Khmer traditions.

#### China

Article 42: (3) Work is the glorious duty of every able-bodied citizen. All working people in state enterprises and in urban and rural economic collectives should perform their tasks with an attitude consonant with their status as masters of the country. . . .

Article 49: (2) Both husband and wife have the duty to practice family planning. (3) Parents have the duty to rear and educate their minor children, and children who have come of age have the duty to support and assist their parents.

Article 54: It is the duty of citizens of the People's Republic of China to safeguard the security, honour, and interests of the motherland; they must not commit acts detrimental to the security, honour and interests of the motherland.

#### India

Article 51A: It shall be the duty of every citizen of India . . . (b) to cherish and follow the noble ideals which inspired our national struggle for freedom; . . . (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women; . . . (g) to protect and improve the natural environment . . . and to have compassion for living creatures. . . .

#### Iraq

Article 10: Social solidarity is the first foundation for the Society. Its essence is that every citizen accomplishes his duty in full, and that the Society guarantees the citizen's rights and liberties in full.

Article 32: (2) Work is an honor and a sacred duty for every able citizen, and is indispensable by the necessity to participate in building the society; protecting it, and realizing its evolution and prosperity.

#### Italy

Article 4: The Republic recognizes the right of all citizens to work and promotes such conditions as will make this right effective. (2) Every citizen shall undertake, according to his possibilities and his own choice, an activity or a function contributing to the material and moral progress of society.

#### Poland

Article 86: Everyone shall care for the quality of the environment and shall be held responsible for causing its degradation. The principles of such responsibility shall be specified by statute.

#### Portugal

Article 49: (1) All citizens who are over 18 years old have the right to vote. . . . (2) The exercise of the right to vote is personal and constitutes a civic duty.

Article 58: (1) Everyone has the right to work. (2) The duty to work is inseparable from the right to work. . . . (3) It is the duty of the State, by implementing plans for economic and social policy, to safeguard the right to work. . . .

Article 78: (1) Everyone has the right to cultural enjoyment and creation, and

the duty to preserve, defend, and increase the cultural heritage. [Subsequent provisions in Article 78 spell out the state's duties.]

#### Saudi Arabia

Article 12: The consolidation of national unity is a duty, and the state will prevent anything that may lead to disunity, sedition and separation.

#### Spain

Article 45: (1) Everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.

#### Thailand

Article 68: Every person shall have a duty to exercise his or her right to vote at an election. The person who fails to attend an election for voting without notifying the appropriate cause of such failure shall lose his or her right to vote as provided by law.

#### Uganda

Article 39: The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly, it shall be the duty of every citizen . . . (c) to foster national unity and live in harmony with others; (d) to engage in gainful employment for the good of himself, the family, the common good and to contribute to the national development; . . . (f) to contribute to the well-being of the community where the citizen lives; (g) to protect and safeguard the environment; and (h) to promote democracy and the rule of law.

### QUESTIONS

1. Which if any of the preceding provisions are inconsistent with, or indeed threaten, the basic human rights declared by the leading international instruments? Which if any do you view as implicitly incorporated in those instruments?

2. How do you understand, and would you support for your own country's constitution, the provisions relating to work, to environment, and to voting?

### A UNIVERSAL DECLARATION OF HUMAN RESPONSIBILITIES

Proposed by InterAction Council, 1997

in Hans Küng and Schmidt (eds.), *A Global Ethic and Global Responsibilities* (1998), at 6

[The InterAction Council consists of about 25 former heads of state and government who have been addressing long-term global issues. The members (who endorsed the proposed Declaration) included Helmut Schmidt (Germany), Lord Callaghan of Cardiff (UK), Jimmy Carter (United States), and other former heads of state from such countries as Australia, Brazil, Costa Rica, Cyprus, Israel, Japan, Lebanon, Singapore, Thailand, and Zambia. The Council submitted the proposed Declaration to the UN Secretary General for consideration for its proclamation by the UN General Assembly as a 'common standard for all peoples and all nations'.

The introductory text to the Declaration notes that 'traditionally we have spoken of human rights, and indeed the world has gone a long way in their international recognition and protection since the Universal Declaration of Human Rights . . . [I]t is time now to initiate an equally important quest for the acceptance of human duties or obligations'. The concept of human obligations 'serves to balance the notions of freedom and responsibility; while rights relate more to freedom, obligations are associated with responsibility'. The two are 'interdependent'. Since the enlightenment, the West has been associated with rights and individualism. In the East, 'the notions of responsibility and community have prevailed'.

Without a proper balance, unrestricted freedom is as dangerous as imposed social responsibility. Great social injustices have resulted from extreme economic freedom and capitalist greed, while at the same time cruel oppression of people's basic liberties has been justified in the name of society's interests or communist ideals.

Excerpts from the Declaration follow.]

...

#### Article 1

Every person, regardless of gender, ethnic origin, social status, political opinion, language, age, nationality, or religion, has a responsibility to treat all people in a humane way.

...

#### Article 3

No person, no group or organization, no state, no army or police stands above good and evil; all are subject to ethical standards. Everyone has a responsibility to promote good and to avoid evil in all things.

#### Article 4

All people, endowed with reason and conscience, must accept a responsibility to