

# ETHICAL NORMS IN THE JEWISH LAW OF MARRIAGE

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Do ethical considerations really play the dominant role in the evolution of Jewish law? Many make the boast. Few substantiate the claim. Even when they do offer isolated illustrations of the manner in which moral values influenced the Halakhah, the illustrations are usually peripheral to the mainstream of Halakhic development. The consequences are deplorable.

Jewish youth in whom we seek to induce a respect for Talmudic learning is nurtured on generalizations, without authentic illustrative materials. Even students in Rabbinical seminaries are taught to become expert in the analysis of Talmudic legal concepts without reference to their ethical significance. Furthermore, while most Zionists, even secularists and laborites, agree that the legal system of the State of Israel ought to be rooted in the lofty principles of traditional Jewish law, few scholars articulate the ethical and moral postulates of that law. The hope of Zionists has inspired very little creative analysis and synthesis. Even the religious parties have done very little in this connection. Lastly, there is a decided trend today in the philosophy of law to divorce ethical

norms from legal norms. Austin in Anglo-American legal thought, and Kelsen on the Continent, gave impetus to this movement. Jewish apologists must therefore be more convincing than ever that ethical considerations should be of paramount importance in legal development.

This essay proposes to illustrate by reference to only one simple problem how rewarding the effort can be. The problem represents but one wave in the sea of the Talmud and all references are limited to a single tractate, *Qiddushin*.<sup>1</sup>

*Qiddushin* is still the principal source for the Jewish law of betrothal. Its folios discuss the manner in which a Jew takes a wife. The marriage status itself, and the rights and privileges thereunto appertaining, are discussed elsewhere. *Qiddushin* is concerned principally with the manner of bringing the status into being. However, one discovers early in one's study that though today all Rabbinic—Orthodox, Conservative and Reform—require the groom, with the presentation of the wedding ring, to recite the same words to his bride, the Talmud itself is far less formalistic. The Talmud provides for considerable variation both in the words recited and the object given.

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<sup>1</sup> All page references are to the Tractate *Qiddushin*.

What our sages sought to assure was not a rigid form for the ceremony but rather the unequivocal character of the parties' consent. *Marriage was to be consensual. This was the ethical value that the law sought to fulfill.* As a matter of fact, because of this preoccupation with consent, the modern law of contract in European and American law could have been, and was, derived principally from the Talmudic analysis of consent to marry.

That the Bible made the woman's consent to marry of paramount importance the Rabbis gleaned from the verse in Genesis which revealed that Rebecca was asked whether she wanted to marry the patriarch Isaac. Halakhic exegesis, however, found a better source, a legal argument. In connection with the contract to marry, the Bible used the term *Qihā*, a term employed to describe Abraham's contract to buy land from the Hittites. Mutual consent is a prerequisite for a sale. It must therefore be a prerequisite for a marriage (2a and b).

Conceivably, this analysis might be challenged by pointing to the fact that Jewish law permitted a father to give his daughter away in marriage without her consent. Jewish law apparently did not deny the father all of the powers he enjoyed over his daughters in primitive society. This would imply that the woman's consent was hardly the ethical value to be conserved. It must be remembered, however, that in such a case at least the father's consent was a prerequisite. The father's consent then became the historical antecedent for the woman's consent when the father's rights over his daughter were virtually abolished. The abolition, though accomplished long ago, involved a slow process. The father's power was originally

restricted to the daughter's minority—until she reached twelve and one half years of age (3b). Then the Rabbis expressed their opposition to marriages before the daughters reached puberty (41a). The father's power was thus reduced to a maximum period from puberty to age twelve and one-half. Even the Biblical right of the father to sell his daughter as a slave when she was a minor was understood to be a step that would be consummated by the marriage of the daughter to the master. And this too was frowned upon, for the father who exercised this right was considered a sinner—his need to sell his daughter was regarded as the consequence of his non-righteous living to which a father would hesitate confessing (20a). Even when she was thus sold, her bondage lasted only until she reached puberty (14b). She was then completely emancipated unless she had wedded her master or his son. If, in the middle ages, the marriage of young children was re-instituted, it was as the Tosafists explain (41a), because life was very precarious for Jews, and fathers wanted to see their children settled before poverty, exile, or murder overtook them.

That our sages regarded child marriages arranged by the father, as the exception, rather than the rule, can be gleaned from an examination of almost all the illustrative case material of the tractate *Qiddushin* in which the woman herself, and not the father, is regarded as the contracting party. And so far as the woman herself was concerned, it can be said that it was her consent to marry that was the value our sages sought to advance. Thus, when the State of Israel recently made the contracting of child marriages a crime, and raised the age at which consent could be given, it fulfilled a Talmudic purpose. Furthermore,

when a millenium ago Rabbi Gershon made the wife's consent a prerequisite to divorce, he was also extending a Talmudic value.

In view of the fact that the woman's consent to marry, as well as the man's is essential, the Rabbis found that the law of sales was most relevant. It was not that they regarded women as chattel who could be bought and sold. It was rather, as already noted, that in sales of property one finds maximum insistence on mutual consent and understanding. That is why they chose to link the law of betrothal with the law of sales.

This can be gleaned from one apparently far-fetched hypothetical question discussed in *Qiddushin* (7a). The Rabbis had considered the possibility of applying to the contract to marry analogies from the law of consecrated things. In a sense, when a man takes unto himself a wife, she becomes consecrated to him alone, and forbidden to others. Thus she could be compared to things that had been consecrated to Temple service and could therefore be used only for restricted purposes. The rules of law pertaining to consecrated things—called *Heqdesh*—could have played a part in the development of the legal concept of betrothal as did the law of sales. The titles of the first two chapters of *Qiddushin* are revealing in this connection. The first chapter is called, "A Woman Is Acquired." The second chapter is called, "A Man Consecrates." Now, the Talmud poses this hypothetical question: "What if a man, using the correct form in every other respect, should nonetheless say that he consecrates only half of the woman?" If the law of sales is applicable, one can acquire half ownership in a thing. If, however, the law of consecrated things applies, then if one

consecrates half of an object, the whole of it becomes holy and is subject to all the relevant prohibitions. And which rule shall be employed in the case of the betrothal of part of a woman? The initial impulse of any modern would be to say that in the interest of womanly dignity one should avoid the concept of sale wherever possible and resort to the other more refined analogy of consecration. Our sages, however, ruled otherwise—and precisely out of respect for the ethical value of consent. Their decision was that the rules of sale would apply. Precisely because they respected the rights of women, they said that when the woman had consented to only partial betrothal, one dare not—without her express will—impute any more than that to her. Her consent must be real, not constructive. Therefore, having consented to only half marriage, we cannot automatically regard her as wholly wedded. However, since there can be no partial sale of a thing which cannot be shared by partners, and we know that two men cannot share the same woman, there can therefore be no partial betrothal at all and the whole act of the husband is null. Thus by the mundane-sounding law of sale, rather than the lofty-sounding law of consecrated things, a further safeguard was built around the woman's unequivocal consent.

Sales consummated by mistake with regard to the object sold or the price paid, or sales consummated on conditions which remain unfulfilled, can be rescinded. Marriages, too, which involve misunderstanding or unperformed promises, or unfulfilled conditions, were null and void. The parties must themselves be what they represented themselves to be, or must own what they represented they had, or do what they promised to do (49b).

However, parties might so take advantage of the great latitude permitted them with respect to conditions and representations that the institution of marriage may become very unstable. Two people might agree to wed on condition that the husband never absents himself from his wife for any prolonged period. They bear children and decades later the husband deserts. The marriage would be automatically annulled by this act. The children would be regarded retroactively as born out of wedlock. The wife would no longer be prohibited from marrying members of her husband's family, who heretofore, because of her marriage to her husband, had been within prohibited degrees of consanguinity. She could now marry her brother-in-law or her father-in-law. The stability of Jewish family life would be in jeopardy if family relations were to be contingent upon conditions whose fulfillment was never certain.

Such considerations impelled our sages to formalize and institutionalize the marriage contract which heretofore could have involved whimsical and frivolous aspects. They had to impose limitations on the area of consent. They had to make marriage not only a matter of contract but a matter of status.

This is especially interesting because the distinguished legal historian, Sir Henry Maine, regarded the movement of progressive societies, as distinguished from static societies, as a movement "from status to contract."<sup>2</sup> Status signified personal conditions which were not the result of agreement. They flowed rather from the fact of family dependency. Members of the family remained tied to the family nexus dominated by the

head—the father. However, with the gradual dissolution of family dependency and the growth of individual obligation in its place, we find that it is the individual who is steadily substituted for the family as the unit of which the law takes account, and arrangements entered into by individuals constitute contracts.

By Maine's standard, Jewish law was exceedingly progressive. At an early stage Jewish law changed the position of woman in the creation of a marriage from status to contract. However, Maine's thesis is presently regarded as faulty because in more complex societies there is often a reversion from contract to status. The law in modern industrial states tends to protect the rights and duties of weaker groups by viewing them as if they were bound to "status" instead of free to contract as they please. The protection of labor unions in America, for example, required this reversion. In Jewish law, too, the protection of women required a reversion to the concept of status and a curtailment of the scope of the free contract. There had to be a limitation on conditions. And the process of limiting conditions—whose beginning the Talmud reveals—so developed in post-Talmudic times that the Rabbis ultimately prohibited all conditions.

The principal limitation on conditions which the Talmud prescribed was that they shall not negate Biblical requirements. If husband and wife stipulated that their marriage would obligate neither to cohabit with each other, the stipulation was null. Certain property rights which the marriage status involved could be waived, but never that which was of the very essence of the marriage relationship. Furthermore, purely whimsical conditions—"I thee

<sup>2</sup> *Ancient Law* (ed. Pollock), p. 174.

wed if thou wilt ascend to heaven"—are null.

In addition to nullifying certain conditions the Rabbis decided that the language used in conditions must be given the meanings commonly held in the community. The parties could not argue that they had entertained unusual meanings. Even if a man contracted to marry on condition that he was wise or strong or rich, neither he nor she could maintain that standards of wisdom, strength or wealth, superior or inferior to those held in the community were intended (49b). Too much regard for the subjective would defeat the ultimate end of the definiteness and stability of the marriage relation.

On ethical grounds, however, two exceptions were made to this rule and the subjective was taken into account. If the man stipulated the state of his own mind as a condition to the marriage—his being a righteous man or a villain—the condition was null. If he stipulated that he was righteous, the marriage was valid even if he had the foulest reputation in the community. "Perhaps he had repented for one moment" (*ibid*). If he stipulated that he was wicked, even if he were a saint, the marriage was also valid. Perhaps he was an idolater in one of his thoughts (*ibid*). His subjective state could not become the basis for a condition. Its truth or falsehood could not be subject to legal proof. Jewish law would not require a man to prove that he was righteous or wicked. The privacy of states of mind was inviolable and conditions with respect to them were nullities. Even present day America can use a reminder of the inviolability of states of mind.

Thus we see that while the ethical value of mutual consent was basic in the development of the Jewish law of

betrothal, some limitations had to be imposed on the latitude which the parties enjoyed in creating the marital status to suit their own whims. However, the Talmud had already indicated at least two important areas in which conditions would be null and void. These areas suggest two added ethical postulates. First, a marriage cannot be contracted so that it does not fulfill its most natural aim—sexual gratification. Second, a marriage cannot be contracted the establishment of whose validity would involve the invasion of the privacy of a person's state of mind. The Rabbis simply ignored such conditions as if they had not been made at all.

To create a marital status, the declaration of intent to marry must needs be accompanied by the performance of any of three formal acts in the presence of witnesses. The formal act "clinched" the contract. (1) The parties could immediately cohabit. However, to do so with two persons present was hardly chaste and consequently this method was held to be morally objectionable. (2) The husband could deliver to the wife a written instrument constituting the marriage. Where there was a dearth of scribes, this method was not popular. (3) The husband could deliver to the wife an object of value. This became the usual procedure, culminating in the modern practice of marrying with a ring.

The object of value might even be an intangible delight. To such an extent did the Rabbis expand the scope of the object of value that they ruled that the marriage could be contracted even by the bride's giving of a gift to the groom. If the groom were a distinguished person and his acceptance of her gift was a delight to her, that delight would be sufficient to fulfill the requirement that

she enjoy a gain. This is analogous to our modern situation when a famous person honors a university by accepting its honorary degree. Moreover, the instantaneous performance of a valuable service stipulated by the bride would be sufficient. The object of value was not necessarily a physical thing, but included any valuable privilege as well.

One's study of *Qiddushin*, however, reveals that while the concept of a thing of value was an exceedingly broad one in Halakhic exegesis, the Talmud was equally concerned to eliminate a loan from the concept's scope. The groom could not create the marital status by waiving a debt due him from the bride (6b). Certainly the waiver was a gift she would appreciate. It requires little imagination to realize this. Yet, ostensibly because the bride received nothing tangible at the time of the marriage, no marriage was consummated. But why was not her delight in the waiver of her debt as good as other intangible delights which were held to be sufficient consideration? Many Rabbis in post-Talmudic times so held, but required that the husband make it explicit that the marriage was consummated with the delight of the waiver of the debt as the thing given. Maimonides, on the other hand, construed the Talmudic text differently and eliminated the debt altogether as a possibility for the consummation of a marriage. He does approve of the use of a debt as the consideration for the sale of property. The waiver of a pre-existing debt by the purchaser to the seller is sufficient to pass title. Not so, however, for marriage. Was it not because the Talmud, without saying so, regarded a marriage predicated on the waiver of a debt by the creditor-husband as peonage? No more than a person could be enslaved for debt could a

woman become bound in marriage for the same consideration. If the Rabbis frowned upon fathers selling their daughters because they were in debt, would they not also frown upon a woman contracting to marry, in lieu of paying her creditor? Furthermore, Maimonides derived from *Qiddushin* a prohibition to marry in consideration of the groom's loaning money to the bride. This resembled the taking of interest.

The modern law of contracts derived most of its concepts of *causa* and consideration from the Talmudic analysis of the manner in which a marital status is accomplished. Even the Talmudic problem of pre-existing debts has its analogues in modern legal texts. But the legal systems of Europe and America which long tolerated the sale of a debtor for his debt, and ignored the Talmudic injunction against it, also found it difficult to grasp the implied taboo against peonage which the Talmud revealed in its folios on the marriage of women debtors to their male creditors.

One other important species of property could not be given by the husband to the wife in order to fulfill the requirement of a thing of value. These were things which neither the husband nor the wife could consume—things in which either might have a proprietary right but only for the purpose of giving them away to those who could consume them. For example, heave offerings due to the priests were items which a non-priest could not eat. The farmer who had set them aside could, however, name the priest who was to receive and enjoy them. Yet if he wanted to betroth a woman by transferring that privilege to her so that she, instead of he, could name the person who would become the owner, his act would be a nullity. The transfer of that privilege is not the gift

ing of a thing of value—even if one would pay a considerable sum for it (58a).

This Talmudic ruling, however, reveals a philosophy of property which has profound ethical significance. Property generally might be defined in terms of rights for use and enjoyment. Or property might be defined in terms of power. Morris Raphael Cohen once defined property as nothing more than the power to exclude others. For that reason he regarded the concepts of property and sovereignty as kin. The owner exercises sovereignty over others by excluding them from the enjoyment of that which is his. Upon this type of lordship Jewish law frowned. Lordship over the earth and all its contents belongs to God. God gives man the right to consume and enjoy His bounty. Incidental to man's right to consume and enjoy is an almost unavoidable right to share and to give away. When, however, one's power over a thing is limited to its disposal, Jewish law hesitated to regard such power as property. That too closely resembles the exercise of lordship or sovereignty and man should not act the part of God.

The Jewish philosophy of property still begs for thorough analysis. Yet in *Qiddushin* we have one insight which only the Halakhah can make clear. The emphasis in the Jewish concept is that of use and enjoyment and not lordship. *Property is intended to help make life more abundant and must therefore not be turned into an instrument for tyranny over one's fellow-man.* Hence, marriage cannot be constituted by a transfer from husband to wife of a power which sustained his ego and shall now sustain hers.

Very few modern states permit marriage by proxy. In *Qiddushin*, we find

not only that the Rabbis sanctioned such marriages, but also that they had the advanced conception of agency which prevails in modern law, a conception unknown to Roman law.

Roman law held that an agent who buys property for his principal is regarded as having made the purchase for himself. The principal acquires title when the agent resells to him. Precisely because Jewish law was broad enough in its scope so that it included matters religious, criminal and civil, and students of the Law became proficient in all its phases, it was easy to enrich each field with concepts borrowed from the other. And in the law of sanctuary offerings one finds a theory of representative capacity which is suitable for an advanced conception of agency. Moderns usually generalize that a system of law is primitive when it fails to differentiate between religious, criminal and civil law, or between divine, public and private law. Jewish law had all of these distinctions but regarded all as parts of the one Law.

The Rabbis thus remembered that the person who offers the Paschal lamb for his family group acts in a representative capacity (41b). His act for all is credited to each individually. This could, therefore, apply to any and all situations. Any man may choose to act through a representative.

What is particularly impressive is that the agent is a representative. Popular understanding to the contrary notwithstanding, a man's agent is not identical with himself. The Talmud was careful to point this out, for if the agent—when acting for the principal—is vested with the personality of the principal, then like the principal, he would be incompetent to testify with regard to the transaction. The Rabbis held instead that

the agent's act is a representative act, while his person is not the principal's person. Therefore, he would not be incompetent to testify (42a). Furthermore, he can contract to marry a woman on behalf of his principal but may never consummate the marriage by sexual intercourse. That also explains, as later Rabbis have indicated, why a Jew cannot make an agent for himself to perform such commandments as involve the performance of a physical act—the placing of phylacteries on hand and head, the eating of *Matzoh* and *Moror* on Passover, or the taking of a *Lulab* on Tabernacles.

The conception that the agent is the principal's representative was borrowed by the canon lawyers of the middle ages and introduced into European law. In origin, however, the concept is religious. As in religious living, Jews are responsible for each other, so generally they ought to have the capacity to represent each other. The concept also had political implications. The land of Israel, it was argued, was divided among the tribes with the head of each tribe acting in a representative capacity for his constituents (*ibid*). And thus even government of the people by their representatives has its roots in the same Talmudic discussion.

The most remarkable ethical insight to be gleaned, however, from the Talmudic discussion on agency is the exception to the rule. One cannot create an agent to commit a crime or a sin. The agent alone is responsible for his misdeed. The principal is not punished. Judaism recognized no accessory before the fact. Thus, if one hires another to commit a murder, only the actual murderer is tried for the offense. The rationale of the Talmudic rule is religious

in origin. The agent is a free moral agent. He should not have chosen to ignore God's will and heed his principal's instead. Therefore, he alone shall answer to the law. And from the point of view of human behavior, this emphasis on the individual responsibility of the agent may have been a great deterrent to crime. Too often criminals conspire in groups and act in defiance of the law as they derive moral support and strength from co-conspirators. Jewish law reminded them that only he who consummates the murder or theft will be punished.

Returning to the law of betrothal, however, one finds marriages by proxy permitted, but not recommended (41a). A woman particularly should be protected from hurt and embarrassment. Her husband should see her before they are bound to each other. If a marriage is consummated without his having previously seen her, he may find himself wedded to one whom he will come to hate in his heart, thus creating a situation in which he will violate the Biblical injunction to *love one's friend as one's self*.

In *Qiddushin* a multitude of legal problems other than the creation of the marital status are discussed. Many of these pertain particularly to the law of persons and warrant a separate analysis. In this essay only one issue was examined—the formal manner of taking a wife. One would not have expected so simple an issue to evoke so much attention. Yet when ethical considerations absorb the jurist-theologian, he probes to fulfill the will of God for any act he undertakes to do and the taking of a wife is hardly one of the least important.