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"Taking Responsibility for Torah"

IS MARRIAGE WHAT BRINGS US TOGETHER?

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The Torah does not present itself as a comprehensive legal code. Essential information is clearly missing – for example the mechanics of ritual slaughter, or the color and shape of t'fillin. Yet the Torah demonstrably cares about such minutiae, as we are given the mechanics of bloodsprinkling in detail, and the color of tzitzit.

Our mesorah has a variety of approaches to these gaps. Some are filled by *Halakhah l'Mosheh miSinai* = regulations whispered to Mosheh at Sinai aside from the public Revelation, and others by *Midrash Halakhah* = the system of deriving law by textual interpretation of Torah (which may itself have been whispered at Sinai). Some – perhaps most – are understood to be deliberately left to Rabbinic discretion = *mesaran hakatuv lachakhamim*. Finally, some gaps seem intended almost as tests. The correct way to fill them is discoverable only by human reasoning = *sevara*.

These categories interact, so that almost every area of halakhah results from their interplay. For example, the rule that one may not murder to save a life is derived by *sevara* – who says that your blood is redder than his? Midrash Halakhah takes the product of that *sevara* as the basis for legal exegesis – adultery is compared to murder to teach us that one may also not commit adultery to save a life. Anyone lacking the capacity for accurate moral reasoning will therefore misinterpret Torah as well.

Our topic this week is marriage. The Torah never defines marriage generally and directly. However, the laws of the daughter-sold-as-maidservant (Shemot 21:7-11, specifically 9-10) contain relevant information.

וְאִם-לָבָן יִיעָדָהּ
כֹּה מִשְׁפָּט הַבָּנוֹת יַעֲשֶׂה-לָּהּ:
אִם-אֶחָד יִקַּח-לָּהּ
שְׂאֵרָהּ כְּסוּתָהּ וְעִנְיָתָה לֹא יִגְרַע:

*If he (the master) marries her to his son –
he (the son) must do for her as is the law for daughters
(mishpat habanot).*

If he (the master or son) marries an additional wife –

he must not diminish her sh'er, k'sut, and onah.

The “law for daughters” seems to point to a set of obligations that husbands have toward wives. No details are given. However, from the Torah’s prohibition against diminishing *sh'er*, *k'sut*, and *onah* if a second wife is subsequently taken, it seems reasonable to see those three as contained within the set, and possibly as comprising it.

Rabbi Samson Raphael Hirsch suggests compellingly that the Torah chooses to present the general laws of marriage in this context in order to show that all wives are protected by these laws, regardless of their social status relative to their husbands and/or their co-wives. He does not however explain why the Torah chooses to define the “law for daughters” by implication rather than directly.

Rashi records the standard definitions of *sh'er* = food, *k'sut* = clothing, and *onah* = sex with appropriate frequency. Each of these can be challenged as a matter of pshat – e.g. Rashbam identifies *onah* as housing (cf. מַעוֹן), and Targum Yerushalmi translates *k'sutas tachsheeteha* = cosmetics and/or jewelry. As a matter of law, the Talmud records a dispute as to whether the husband’s obligations to provide food and/or clothing are Biblical, or rather Rabbinic (and negotiable between the parties). Barring the introduction of new and otherwise unknown husbandly obligations, the latter position appears to require understanding all three terms in the verse as relating to intimacy.

This position is taken by Ramban.

ובגמרא (כתובות מז): אמרו על מי שאמר כך
והאי תנא סבר מזונות דאורייתא ...
והמובן בסוגית הגמרא שהם דברי יחיד,
והלכה מזוני תקינו לה רבנן ...
והנה שארה - קרוב בשרה. וכסותה - כסות מטתה ...
ועונתה הוא עונה שיבא אליה לעת דודים ...
וכך אמרו חכמים: שארה - זו קרוב בשר,
שלא ינהג בה כמנהג פרסיים, שמשמשין מטותיהן בלבושיהן.
וזה פירוש נכון, כי דרך הכתוב בכל מקום להזכיר המשכב בלשון נקי
ובקצור,

ולכן אמר באלו ברמז שארה כסותה ועונתה, על שלשת הענינים אשר
לאדם עם אשתו בחבורן ...

*Ketubot 47b says regarding one who interprets sh'er as food that
"That Tanna holds that providing food is a Biblical obligation" ...*

It is understood from the flow of the gemara that this is a minority position,

whereas the halakhah is that providing food is a rabbinic enactment.

So sh'er = "closeness of flesh", and k'sutah = bedcoverings . . . and onatah = having sex at romantically appropriate intervals . . . so the Sages say: 'She'er = closeness of flesh, meaning that he should not act with her the practice of the Persians, who have sex while dressed.'

This is a correct interpretation,

as the way of Scripture throughout is to refer to sex euphemistically and cleanly.

Therefore, it gives these hints of sh'erah k'sutah v'onatah to the three conditions of marital intimacy . . .

The Vilna Gaon in Aderet Eliyahu takes a radically opposite approach to the text.

"עונתה" - זו דירה, דלשמש לא צריך קרא

"Onatah" – *this refers to housing, as (the obligation to have) sex does not require a verse.*

In other words, the Vilna Gaon believes that the husband's obligation can be derived via *sevara*.

Ramban and Vilna Gaon can easily be made to agree substantively. We can say that the fact of a sexual obligation is derived from *sevara*, and then the details of that obligation are derived from the text.

On this basis, we can suggest that *mishpat habanot*, the normative framework for marriage, is not spelled out in the Torah because it must be developed via the interaction of *sevara*, Rabbinic discretion, and textual interpretation. *Mishpat habanot* reasonably differs in polygamous and monogamous contexts. The Torah therefore specifies that a second marriage cannot diminish the first wife's rights – as defined by the *mishpat habanot* for monogamous relationships - on three specific axes.

According to Ramban, each of these axes relates to sexual intimacy. Rambam, however, adopts the position that *sh'er* and *k'sut* refer to food and clothing. I suggest that this dispute is ultimately about the fundamental nature of marriage. For Rambam, marriage is by definition a broad relationship in many areas of life. For Ramban, marriage is about the norms of a sexual relationship. Depending on various circumstances, those norms may extend to food and clothing obligations, but one can conceive of a valid and holy marriage relationship that regulates only the sexuality of the partners.

Rambam may also see all aspects of the sexual relationship other than frequency as negotiable, and perhaps as socially dependent. By contrast, Ramban has the Torah give specific content to the *mishpat habanot* on all three axes. I have not yet found a standard for *k'sut*, but

with regard to *sh'er*, he refers us to a specific regulation on Ketubot 48a (which Rambam does not cite).

תני רב יוסף:

שארה- זו קרוב בשר

שלא ינהג בה מנהג פרסיים, שמשמשין מטותיהן בלבושיהו

מסייע ליה לרב הונא, דאמר רב הונא:

– האומר 'אי אפשי אלא אני בבגדי והיא בבגדה' –

יוציא ונותן כתובה

Rav Yosef taught a beraita:

Sh'erah – *this refers to closeness of flesh*

meaning that he must not act with her the practice of the Persians, who have sex while dressed.

This supports Rav Huna, for Rav Huna said:

One who says "I do not want (to have sex) except in my clothes and with my wife wearing hers" –

he must divorce his wife and pay her ketubah.

Rav Yosef taught that the *mishpat habanot* requires undressing; in other words, it takes time and an effort at intimacy, rather than the mere satisfaction of desire. This is very likely to be threatened by the pressures of polygamy, so the Torah specifically forbade its diminution. Rav Huna correctly derives from Rav Yosef that a husband who unilaterally limits sexual intimacy to the immediate physical act is in breach of the *mishpat habanot*, and can therefore be sued for divorce. Rashba to Ketubot 63a cites the possibility that physicality without intimacy is an ultimate breach, because it enables men to avoid pain while inflicting it on women. Rashba to Niddah 15a similarly understands that the husband's *mitzvah* of *onah* derives from a prior sexual obligation that is part of the definition of marriage. Therefore, the *mitzvah* has no application whenever the underlying obligation has been suspended, for example by an oath not to derive pleasure from one's partner's body. Conversely, it may be possible to completely fulfill the *mitzvah* and yet be in breach of one's sexual obligations under *mishpat habanot*.

The idea that halakhah regulates and expands the marriage relationship, rather than constructing it from scratch, may have broader philosophic and legal implications. For example, while the *mitzvot* of *sh'er*, *k'sut*, and *onah* are all one-way, from the husband toward the wife, it seems clear from Niddah 15a that some and perhaps all elements of *mishpat habanot* are reciprocal. Perhaps these *mitzvot* are intended to compensate for the practical factors that often undermine the fundamentally reciprocal nature of marriage. It is also possible that some aspects of the *mishpat habanot* are socially contingent, which would explain why the Torah never defines the halakhic marriage relationship directly.