Geschichte des biblisch-talmudischen Eheschließungsrechts

Eine rechtsvergleichend-historische Studie

Von

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History of biblical-Talmudic law of marriage ceremony

A comparative law-historic study

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Introduction

The aim of this book is to process the research issue from a critical historical perspective of the sources and present a continuous legal development chain from the times of king Hammurabi and the old-biblical and Talmudic sources until the middle ages. It will be analysed what kind of role the Jewish diaspora played as an intermediary between oriental and western culture in context of legal life. It will be reviewed in what way the legal history and the "folk spirit" reflect the unique emanations of Israel's religion. Judaism as the mother religion of Christianity is the basis for the European cultural development and it will be studied, how much influence the biblical-Talmudic system of law had on the canon law, which was a significant factor for the German legal development.

Chapter 1

There are no legal regulations about entering a marriage in biblical sources. In order to find more information on this topic, Talmudic sources will be analysed, meaning the Jewish oral law, the Mishna, both Talmuds, and agatic Midrashim from Tanaaic and Amoraic times. The oral law, meaning all norms of Judaism outside of Holy Scripture was solely reserved for the oral tradition. Gradually, fragmentary notes were prepared for support of the memory, which formed the core for the oldest collection of the Mishna. The function of this collection was not to create a systematic text book but to help memorise the traditional works. That is why the Mishna assumes and expects a lot of knowledge on the part of the reader. The modifications and additions to the Mishna are called Gemara, which is a collection of discussions and negotiations from academies of the Amora in Palestine (i.e. the Jerusalem Talmud) and in Babylon (i.e. the Babylonian Talmud). The final redaction of the Talmud happened in the 6th century. The Jerusalem Talmud however, seemed to have had his last additions until about 150 years later, but we are poorly informed on its destiny and probably significant parts of it are missing.

Chapter 2

The starting point for the Talmudic laws of marriage is the well-known Mishna in Kiddushin 1:1)

> *"A woman is acquired in three ways and acquires herself in two: She is acquired by money, by document, or by intercourse. "By money": Bet Shammai says: a denar or the equivalent of a denar; Bet Hillel says: a perutah or the equivalent of a perutah. And she acquires herself by divorce or by her husband's death. A yevamah is acquired by intercourse. And she acquires herself by halitzah or by the yavam's death."*

A woman is acquired through three ways for marriage and acquires herself in two ways. She is acquired with money (kesef), with a contract (shtar) and intercourse (bia). With money: The school of Shammai says with a denar or its worth; the school of Hillel says with a perutah or its worth. The woman acquires herself with a bill of divorce (get) or with the death of her husband. The levirate-obligatory woman is acquired with intercourse and acquires herself by taking off her shoe (chalitza) or with the death of the levirate (jabam).

The Mishna goes on to explain in more details and examples about the course of events of an engagement. If a man says to a woman: "With this fig or with this cup of wine you will be engaged to me", so it was one of the three ways to engage a woman and he pronounced the sentence with which engagements are made, then this woman is engaged.

Chapter 3

The fact that the woman is "acquired" can be reason for some controversial thinking which could mean that the woman is being bought. If this was a true purchase then the buying price would have to be equal with the worth of the buying object, i.e. the woman.

The second Mishna deals with expressions of error and if the engagement is valid even though the groom made a mistake. As an example:

> *[If a man says to a woman], "Be betrothed to me with this cup of wine," and it is found to be of honey, or "of honey" and it is found to be of*

wine; "with this silver denar," and it is found to be of gold, or "of gold" and it is found to be of silver… she is not betrothed."

Chapter 4

Usually, there was an approximate worth for an engagement. However, there might be some uncertainties regarding their expressions. As an example follows a breita, which is passed down in both Talmuds: "You will be engaged to me with this cup". So the bride is engaged to the groom in three situations:

I. By means of the cup with its content
II. By means of the cup without its content
III. By means of the content without the cup

The Gemara of the Babylonian Talmud discusses the fact that a fixed rule doesn't exist and that all the surrounding circumstances need to be examined. The use of wine as a means to engage a woman is found until the late-Amoraic times as seen by the Gemara Kidushin 9a:

> *There was **a certain man who was drinking wine in a store. A woman came** in and **said to him: Give me one cup** of wine. **He said to her: If I give you** a cup of wine will **you be betrothed to me** with it? **She said to him: Give to drink, give** it **to me to drink. Rav Ḥama said** that **any** use of the expression: **Give to drink, give** it **to me to drink, is nothing,** i.e., she certainly did not intend to accept the condition and she is not betrothed.*

Besides wine, also beer and fruits or other food items or even wool waste were used as a means of engagement. This shows that already to Tanaanic times it was customary to engage a woman with minimal gifts.

Chapter 5

The examples presented above, which spread out for about 500 years, make a discussion pointless on whether the values mentioned during an engagement are a real equivalent value for the woman. Only few dare to express an opinion that a woman equals the worth of a sip of wine or beer or a date. This assumption is untrue given the fact that the value of a slave was minimum a gold denar. In

addition, acquired slave or cattle are the property of the owner, which cannot be the case of a woman. However, a woman can be sold for servitude because of debt, and is then subordinated to the man in criminal law.

Chapter 6

In the conceptual world of the agadot, which often informs of family life, there is no reference to purchasing or something similar. A contract between a man and a woman can only be formed with the equality of both counterparties and their concurrence of wills. This must also be the case of marriage. The prophet Malachi believes that equality between the parties during the marriage ceremony should be the same in the event of a divorce. Hosea's engagement formula indicates a reciprocity of marriage responsibilities.

Chapter 7

A better understanding of the topic is possible through the dogma of the Talmud:

I. In a marriage through purchase the father of the bride and the groom are contracting parties; the bride is object of the legal transaction. The price for the bride is paid by the groom (buyer) to the father of the bride (seller). Whereas the Talmudic engagement is entered by the groom and the bride herself. The formula for the engagement is pronounced directly to the bride: "Hereby you are engaged to me" הרי את מקודשת לי. Also the engagement (kiddushin) gift is given directly to the bride. Solely in the case of a minor bride does the father act with the authority given to him as the head of the family and receives the engagement gift and his consent is required.

II. At least since the last century BC does the institution of the ketubah exist as an obligatory wedding gift (which is agreed upon in the marriage contract), in case the marriage will end in divorce or as a provision for the widow. An empirical principle in comparative legal studies sates however, that a gift for marriage and bride buying cannot exist next to each other. It

would be paradox for the woman to be subject and object of the marriage contract at the same time.

Hereby is nature of the Talmudic legal marriage indisputably clear: it is not a bride buying.

Chapter 8

Jewish marriage is based on a contract, which means a consensus between the parties. It is a question if the marriage based on a contract formerly was a marriage through robbery. For example, the conquests of victors, who searched for a bride amongst the female prisoners. (compare Dt. 21:10 et seq.) The number of women who were brought to the Israelites through such a way was not low. However, due to the history of Dina and Shechem such acts were not very tolerated by the Hebrews.

Chapter 9

When concluding a marriage ceremony, then we speak about “to give away the bride” (from the perspective of the father or brother) or to “take a bride”, from the perspective of the groom; phrases which place the bride as an object. This can be understood by mentioning that it was in deed customary for the father to give away the bride, as they were usually minors.

Chapter 10

The Mishna brings serval examples for engagements through money or a document but it remains silent on the option of intercourse, which was unusual in practice. After discussing the details first with the father of the bride and the groom, the bride was then given to the groom. Only afterwards did the act of intercourse take place. In times when people and items were no opposites, it is not clear whether girls were given to the man for slavery, adoption or marriage. In Babylonian

contracts and the ketubah it is stated that a woman is given as a wife for marriage. The Old Testament equates intercourse with marriage:

> *"So she gave him Bilhah her maidservant as a wife, and Jacob consorted with her." (Gen. 30:4)*
>
> *"There Judah saw the daughter of a prominent merchant whose name was Shua; he married her and consorted with her." (Gen. 38:2)*

Also Lavan's deceitful exchange of Leah during the wedding night could only fulfil its purpose after the Jacob had spent the night with her, given that there was no prior engagement:

> *"And it was in the evening, that he took Leah his daughter and brought her to him; and he consorted with her."* (Gen. 29:23)

Similarly, it states in Deuteronomy referring to prisoners at war:

> *"…. thereafter you may come to her and live with her, and she shall be a wife to you." (Deut. 21:13)*

Chapter 11

There is not much difference between the process of the marriage ceremony under Babylonian law during times of Hammurabi and the conditions of the patriarchs in Biblical times. In Hammurabi's law the term for engagement appears for the first time about 100 years after his death, and it was also seen as a sort of payment before the marriage ceremony.

Chapter 12

The institution of the Talmudic marriage ceremony (nisuin or chuppah) is meant to bring the bride into the home of the groom, where the bride and the groom are together for the first time. For the chuppah to be legally valid there needs to be the ability of both parties to perform the act of coitus.

There are some indications that the chuppah took place right after the engagement. Mishna Ketubah I 5, 12b states that in Judea, the engagement meal used to be eaten alone by the bride and groom. Later, it became common to separate the chuppah and perform the two ceremonies one after the other.

Chapter 13

In this context it will be analysed how the New Testament relates to this topic. The nature of the relationship between Mary and Joseph was controversial in the catholic interpretation. The New Testament identifies Mary and Joseph as a married couple, without exception. (Matthew 1, 16, 19, 24; Luke 2, 27, 33, 41, 43, 48) The young church proclaimed Mary's virginity, and the composers of the Gospels, as well as the early Christians understood the Jewish lines of though and must have been aware of the fact that it was impossible to have a marriage ceremony without the act of coitus. The position of the church was however, that the chuppah ceremony alone was sufficient for a couple to be married. It must also be taken into account that dominant parts of the early Christian community were Jews. Mary's continuous virginity was slowly strengthened as a dogma so that the brothers and sisters of the founder of the religion, could not be Mary's children. This also means that Mary and Josef could not have stayed a married couple.

Hereby began the conflict in the church's teachings of the wedding ceremony, for which the ideal of the "marriage of Virgin Mary" became the touchstone and starting point: If somebody – in the middle ages – saw this as a marriage then they had to reject the requirement for intercourse as a means to enter a marriage; if however one only saw an engagement between Mary and Joseph then they would advocate for the coitus as a means for a marriage.

Chapter 14

The clear information from the Mishna and Talmud state that nothing else is needed to enter a marriage than the act of coitus. On the other hand, until later times the wedding ceremony was performed with a legal transaction (engagement) and the fulfilment (wedding ceremony) was postponed. This was not the case because of moral motives but due to financial reasons, as the dowry needed to be prepared.

Jewish law does not know marriage through consensus. Both parties agreeing to enter a marriage is not enough for it to be legally binding. The breach of such an agreement is morally wrong but has no legal consequences. This shows the story in

Gen. 29:18 ff. when Lavan promises Rachel to be Jacob's wife but then deceitfully exchanges Leah for Rachel after Jacob had worked for her for 7 years. This would indicate that it was a bride buying, which is why Laban's daughters complain about his cold-heartedness:

> *"Are we not considered by him as strangers? For he has sold us and even totally consumed our money!"* (Gen. 13:15)

It seems though, that Rachel was promised to Jacob but not engaged to him which is more like an informal understanding.

Less clear is the story with Eliezer and his courtship of Rebecca, who gives gifts to her as well as her relatives. Legally it is not fully clear what kind of status those gifts were, but it is assumable that Rebecca was also in an interim stage before meeting Yitzhak (promised to him without being legally engaged to Yitzhak).

Chapter 15

In order to better understand the laws of engagement, Talmudic property law will be analysed. Talmudic contractual transactions equal transfer transactions. With the conclusion of a purchase agreement, the buyer becomes the owner of the item.

Chapter 16

The Talmud differentiates between purchase on credit (advance payment of the seller) and purchase on praenumeration (advance payment of the buyer). The Talmud expects an informal promise, its breach is a violation of good morals. A withdrawal after a payment has been made is viewed by the Mishna as highly objectionable and leads to a formal judicial intervention. The court would then issue a reprimand to the defendant – these measures, may they even just be moral, might have a strong effect on a religious person within the Jewish legal system as a respectable merchant would not want to risk his reputation.

Chapter 17

While in Babylon trading (and money transfer) arose early, in Israel on the other hand natural economy was usual. Similarly, in the second temple the contributions were made with benefits in kind. The real contract, from which Jewish law originates, was developed mainly through barter trading and had a lasting effect on the structure of purchasing. An important legal principle of the Talmud is: Only goods, but no monetary payments bind all counterparts.

Chapter 18

As mentioned earlier, a legal principle in Jewish law is that a buyer may withdraw from his intention to buy a certain item, even after it was paid in full and may ask for the money back.

I. Both Talmuds agree that in movable-assets business a deposit payment equates to only a moral connection while having no legal responsibility; each party can withdraw from the fulfilment of the purchase without any disadvantage.

II. In Tanaanic sources the term “eravon” (deposit) occurs only in connection with property purchase which indicates that it was unusual to have a deposit payment for the purchase of other objects.

Chapter 19

Discussing marriage ceremony in Jewish law means analysing a combination of purchasing law and marriage law. The “mohar” is the bride price, the groom needs to pay for the bride. How can the groom use the mohar in order to earn the right to acquire a bride, i.e. the legally binding engagement to come about? Admittedly, the Jewish marriage is a purchase marriage, which is why the rights when buying a bride should be the same as purchasing any other item. However, as mentioned earlier, in Jewish law, the payment for an object is insufficient for the conclusion of a contract and does not provide the right to it. This leads to a mismatch between the purchase and marriage law.

The Talmudic engagement (kiddushin) requires an obligation of both parties. Cancelling the engagement is only possible with the principles of divorce laws. Which means that this can solely happen with the passing away of one party or through the regular divorce which is carried out by the husband. There is no difference between a divorce document from an engagement and a divorce from a complete marriage. In Talmud there is not even a separate term for a divorce of an engagement; so similar is the act of divorce that the bride deserves the gift drawn up in the marriage contract (ketubah). Not the woman, nor her father have the right to resolve the marriage (or engagement), this right belongs exclusively to the husband.

Chapter 20

In antique times trade was made through exchange transactions; the objects of exchange were equivalent in worth or the counterparty performed an action for which he received an object in exchange. This is how lending businesses developed.

Chapter 21

When engaging a woman, the man must present her with an object of value. This present may not be worth less than a certain minimal value, otherwise the engagement will not enter into effect. Therefore, rabbis recommend to closely review the gift before giving it to the woman.

Chapter 22

The engagement gift is presented directly to the woman if she is of full age, i.e. older than 12 and a half years old. If, however, the bride is a minor (ktana or naara) then her father has the right to marry her off, with or without her agreement and it is the father who would then receive the engagement gift. Also, all kinds of businesses, instructions or authorisations can then exclusively be made by the father. Therefore, all minors, girls or boys, cannot enter an engagement

independently. The engagement and/or marriage of minor children can solely be performed by the father, who is their legal representative.

Chapter 23

In antique times the act of entering a marriage meant bringing the bride to the marital bed, without requiring any service in return on the husband's side. The separation from the wedding ceremony into an engagement first happened when the contract law was introduced and a symbolic deposit payment (kiddushin) was made. This meant entering an engagement in order to start a marriage. A marriage contains many obligations which have the character of a legal relationship.

Chapter 24

Another way of entering an engagement is via a marriage contract (kiddushei shtar). The husband (who is analogous to the buyer) must write the marriage contract and give it to the wife.

Chapter 25

The Jewish legal documents went through several developments through time, as well as the engagement contract (shtar kiddushin, shtar erusin). In its simplest form it contained the formula הרי את מקודשת לי or הרי את מאורסת לי: hereby you are my wife or hereby you are engaged to me. In earlier times, the husband's signature or the reference to the bride's name was not necessary. But soon arose the need for written specifications of the engagement, which are verifiably preserved from Palestine and Egypt from the 2nd century. The husband's signature, and the signatures from witnesses were added to the contract as well. By the time of Philo did each such contract contain the names of the bride and the groom and it became similar to the marriage contract (ketubah). This engagement contract contained (on the wife's or her father's part) the promise to marry the groom and the time of the wedding. It also indicated the value of the wedding gift which could be changed for

the bride's advantage or disadvantage, which would then require a new marriage contract.

Chapter 26

1. The engagement generates an obligation of faith on the side of the bride with legal consequences – the bride's unfaithfulness, according to biblical law, has the same status as adultery. Both offences are threatened with death.
2. The dissolution of an engagement happens under the same circumstances as the dissolution of a marriage. The engagement, as well as the marriage, are only dissolvable by the husband, not the wife.
3. Because a purchasing contract is acquisition of ownership in Jewish law, a second sale of the same product would not affect the rights of the first buyer. This means that when an "engagement competition" occurs is the first engagement valid, the second one has no effect.
4. The engaged woman is referred to as a full-fledged married woman. She is already called wife (eshet reehu).
5. The engaged woman is not only referred to as a wife, but she has also the same social position as a married woman. As an example would a woman who is engaged to a priest (Cohen) have the same rights and obligations as a married woman.
6. While a single woman is under the care of her father, and a married woman is under the care of her husband (who have the rights to veto her decisions), an engaged woman however, is cared for by the father and the husband and share the right of veto.
7. Likewise, with an engagement do matrimonial property law come into effect. When dissolving a marriage because of death of the groom or divorce, the bride is due the ketubah payment.

It is therefore no exaggeration to claim that a Jewish engagement and marriage are legally very similar.

Chapter 27

Despite the many similarities between contracts and engagements there is one essential difference. The buyer is owner of the acquired item. Legally, it is not important how the buyer becomes the owner of the item, if with or without consent of the seller. A marriage on the other hand needs the approval of the other party, i.e. the bride and is in its essence a bilateral legal transaction. Therefore, Jewish law does not know of forced marriages.

Chapter 28

The points discussed above applied most of all for pre-Talmudic times but not for the times of the Tanaaites.

1. An engaged woman was called “arusa”.
2. The permission to eat food of the priests (Cohanim) undergoes changes and was postponed to the time after the performed wedding.
3. In the Tanaatic period the bride would receive the wedding gift (ketubah) also when the engagement was dissolved.

Chapter 29

The impossibility of bride buying in Jewish law has been discussed above. There are, however, respectable researchers who seemingly found irrefutable proof of bride buying in certain biblical sections. Either each marriage is a bride buying and paying the price for the bride would then be essential, or payment for the bride is unnecessary and would have no legal disadvantages, in which case there would not be a bride buying at all. Comparative law teaches that in tribes which practice bride buying, a true and valid marriage cannot exist without the payment for the bride. In ancient Israel however, no gift was necessary in order to enter a valid marriage. In pre- and old-Talmudic law exists an engagement certificate which indicates no payment or any equivalent. This shows that there was no bride buying in biblical times.

Chapter 30

This chapter deals with the explanation of the word "mohar" (bride money or dowry) for a Jewish wedding. The world "mohar" appears one time in the Bible in Ex. 22:15:

> *"And if a man entice a virgin that is not betrothed, and lie with her, he shall surely pay a dowry for her to be his wife."(Exodus 22:15)*

If the father of the bride refuses to give his consent for him to marry the girl, then the perpetrator must pay a fine in the amount of "mohar habetulot" (dowry for the virgin). Interestingly, it is not stated who will be the recipient of the payment, the bride or her father.

Another legal principle referring the payment for the bride (although it is not called that) is found in the Bible in Dt. 22:28 ff:

> *"If a man comes upon a virgin who is not engaged and he seizes her and lies with her, and they are discovered, the man who lay with her shall pay the girl's father fifty [shekels of] silver, and she shall be his wife. Because he has violated her, he can never have the right to divorce her." (Deuteronomy 22: 28-29)*

The rapist is fined to pay 50 silver shekels for taking the girl's virginity and this payment has no relation with any dowry payment.

Chapter 31

Ending

When analysing Jewish sources, it became clear that the Jewish purchasing right can in no way be used to explain Jewish engagement laws and customs.

- In earlier times there was only one Jewish marriage step: the handover of the bride into the marital bed.
- A special engagement was yet unknown; a mere promise was moral but had no legal validity.
- The standardisation of a wedding ceremony took more times with the Israelites than it did with the Babylonians.

- There is no knowledge of a payment equivalent to the bride before, during or after the wedding ceremony.
- Changing cultural requirements brought about the separation of the Jewish wedding ceremony into a legally binding engagement and later into the marriage.