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Parashat Ki Tese Part III Concerning Judicial Standards on Establishing Guilt

In Judaic Seminar 2:69/3, the poster states:

One can determine the general attitude towards rape on the part of the group addressed by Moshe as one that saw the woman as culpable. This is seen by the fact that the Bible [in exonerating the woman] goes out of its way to explain that she was forced to have relations, comparing the rape to murder: “But you shall do nothing to the girl... for this case is like that of a man attacking another man and murdering him. He came upon her in the open; though the engaged girl cried for help there was no one to save her” (Deut. 22:26-27, NJPS). Such an explanation of the girl’s innocence would hardly be needed today to calm her groom or the community.

Rabbi Shamah’s Response (Judaic Seminar 2:71, slightly expanded):

Unquestionably, society’s attitude toward rape has changed, particularly in very recent times. However, it appears to be a misreading of these verses to infer that the essential message was to counter the mindset of the group addressed by Moshe that saw the woman as culpable. The legislation of this passage is designed to establish a broad, precedent-setting standard in administering justice, negating an all-too-common disposition, common even today. Even basically honest people sincerely committed to see justice done often over-rely on the “probable” interpretation of circumstances and do not place sufficient weight on a “possible” exonerating explanation. The pressure to see justice done and the desire to move on tend to prompt people to believe the probable as factual. Underestimating the public being addressed may obfuscate the advance the Torah puts forward in these verses.

The backdrop of this case has nothing to do with people seeing the woman as culpable; it has everything to do with people who may not fully appreciate the importance of exploring all possible explanations so as not to put a possibly innocent person to death.

Firstly, the NJPS translation of the girl’s status as “engaged” is misleading. She was an *arusa*, “betrothed” in other translations. Although while in this state a woman did not normally live with her husband, she was considered as legally married. In verse 24 she is termed *eshet re’ehu*, “the wife of his fellow man.” The NJPS note on verse 23 amplifies “engaged” with: “I.e., for whom a bride-price had been paid; see 20:7.” In the latter reference, which concerns one who has contracted such a relationship with a woman but has not yet “taken her,” the note states: “Thereby making her his wife legally, even though the marriage has not yet taken place.” Accordingly, use of “engaged” in this context does not really translate the ancient practice of “betrothal.” The latter was the “transactional” part of contracting a marriage, generally followed by consummation on another day. (Such a time interval provided certain sociological benefits that then obtained.)

Thus, our case is essentially one of a married woman caught in an adulterous union for which the Bible’s penalty – when consensual – is death. (It must be borne in mind that the issue in this discussion is not the Bible’s mandating the death penalty for consensual adultery, nor the treating of a young teenage girl as an adult, matters which reflect a different society than ours and complicate comparisons with present-day outlooks.) The woman’s claim of having been forced must

necessarily be assumed as the starting point for her possible exoneration since that is the only explanation that can save her life. (As Jewish law was elaborated, regardless of her claim, the court would claim it for her, as it was obliged to investigate all possible angles and try to save the defendant, especially when a life was at stake.)

A minimum of two witnesses are needed to put someone to death, as clearly established in the introductory passage to the *mishpatim* section of Deuteronomy that deals with judicial procedure. It states: “A person shall be put to death only on the testimony of two or three witnesses” (Deut. 17:6). This principle is repeated in the introduction to the discussion denouncing false testimony: “A single witness may not validate against a person any guilt or blame for any offense...; only on the testimony of two witnesses or on the testimony of three witnesses may a matter be validated” (19:15). Accordingly, in our case we must assume there are two witnesses.

Obviously, the witnesses in our case did not see force or any evidence of force; had they seen such evidence there would be no case against the girl. Neither did they clearly see consent, for there would then be no question of guilt.

The witnesses may have observed the end of what appeared to them to be a loving sexual tryst. Not seeing the female protesting and for whatever other reasons they may have had (people often have all types of subjective reasons), the witnesses felt justified in assuming that the act was consensual. Nonetheless, the law informs us, if the case occurred in the field, it is possible that the girl had protested and shouted for help before the witnesses arrived but there had been no one around to help her (or to now prove that she shouted). We should therefore assume she was forced and did shout, and she should be presumed innocent. That is the essential lesson being taught here.

In other words, we are being told to assume whatever is consistent with a reasonable possibility to help the accused. This explanation of the girl’s innocence – when it surely is probable that she is really guilty – is the revolutionary proclamation that even in the absence of evidence to exonerate the possibly guilty

party we are required to give the benefit of the doubt where possible. The suspect is innocent until proven guilty.

That this lesson is taught in a context of rape is a function of the peculiar variables of such a case and does not betray an attitude on the part of those being addressed that the woman in a rape case is culpable. Even today, with our modern mindset and without the death penalty, a married woman in such a case would be grateful to the Torah for demanding she be given the benefit of the doubt.

The posting continues:

What remains hard to understand considering the contemporary moral sense is the law that if the woman is raped in the city she is assumed to be guilty. Had she screamed she would have been heard, the fact that she did not scream makes her guilty and liable to capital punishment. It is true that this position is mitigated somewhat by the Sifre which explains that if there was no one to save her, then even in the city she is not culpable. Nevertheless, the assumption is that she did not try to resist unless it can be proven otherwise.

Rabbi Shamah’s Response:

The “city” case is the first of a couplet, qualified by the following case of the “field.” It must be borne in mind that Israelite cities were relatively small towns with closely quartered populations. In such a city, where there is no reasonable possibility that the girl shouted, as she would surely have been heard, she must be assumed to have consented, given that the witnesses did not see any evidence of force and the court cannot find a reasonable possibility of it. A woman cannot legally vindicate herself with merely a claim that she was forced against witnesses who saw no evidence of it and against the overwhelming circumstantial evidence that neighbors heard no shout.

However, the Sifre is absolutely the *peshat*, that even in the city, if a reasonable explanation can be proffered to counter the implication of the witnesses’ testimony, her consent will not be assumed and she will be assumed innocent. The court’s obligation is to thoroughly investigate the details of each case and not

to find one guilty until they are convinced of the veracity of the accusation beyond a reasonable doubt, particularly in a capital case. This aspect of the law was emphatically established in previous passages: וְדַרְשֶׁתָּ וְהִקְרַתָּ וְשָׁאַלְתָּ הַיָּטֵב וְהִנֵּה אָמֵת נִכּוֹן הַדָּבָר (“You shall search, you shall investigate, you shall inquire well, and if, behold, it is true, the fact is established...”, Deut. 13:15).

A sociological feature in this passage that has significantly changed from the Torah’s days to ours is the assumption that a woman who does not consent

necessarily shouts for help. What about the quiet rape in the city, the woman who may have had a knife held to her throat, threatening her if she shouted, who feared for her life? A school of law-enforcement experts on rape today advise women not to shout under certain circumstances. In ancient times the reality was such that a rape victim invariably shouted. When the reality is different, it goes without saying that the court must take that into account.

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