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## **Women in Old Testament Legal Procedures<sup>1</sup>**

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Zusammenfassung:

Wie weit waren rechtliche Vorgänge in der altisraelitischen Gesellschaft durch Gender-Vorstellungen geprägt? Wir wissen leider recht wenig über Gerichtsverfahren gegen Frauen, und die überlieferten Gesetzestexte spezifizieren selten weibliches Verhalten. Dennoch können wir aus den alttestamentlichen Informationen zum Thema folgern, dass Frauen (wie auch Kinder und Sklaven) bis zu einem gewissen Grad der inner-familiären Gerichtsbarkeit unterworfen waren und vor öffentlichen Rechtsgremien qualitativ anders beurteilt wurden als Männer. Die manchmal erhobene Forderung nach „gleichem Recht für alle“ (vgl. Exodus 12,49) bezieht sich auf Männer und war unter den patriarchalen Lebensbedingungen der Antike auf eine nach Gender-Kriterien konstruierte Gesellschaft nicht anwendbar. Unsere heutigen sozialetischen Entwürfe müssen davon ausgehen, dass Geschlechtsunterschiede rechtlich und sozial irrelevant sind; darum ist der notwendige Dialog mit den biblischen Zeugen nur bei gebührender hermeneutischer Vorsicht möglich.

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### **1. Communal jurisdiction**

It is a well-known fact that in Ancient Near Eastern history legal procedures (legislation as well as jurisdiction) predominantly have been under male control. In fact, this heavily lopsided gender-balance has swapped over into and been seriously intensified by Jewish, Christian and Muslim traditions to the effect, that in many societies (if not in most of them) until this very day the sphere of Law is dominated by males, especially in the highest ranks of the legal hierarchies. I seriously do not know, how many women, if any, have served so far in the Supreme Court of the USA, for example. And the fact, that you occasionally do have a lady Foreign Secretary may not compensate this omission. This means to say: Whenever we are dealing with biblical testimony in regard to legal procedures we are automatically touching problems of gender and that unbalanced position of women in public domains still are extant in present day societies.

I like to focus my attention in this paper on a small segment of Old Testament legal texts and conceptions as well as on some concomitant rituals.<sup>2</sup> Judges in antiquity as

well as today ever so often have to call on subsidiary means in order to arrive at well-founded verdicts in given cases of disorderly conduct. Ritual performances, as it were, did play a rather important role in ancient courts of justice, and quite frequently, although not exclusively so, such additional procedures were employed to ask for the help of God in determining guilt or innocence of an accused person. Thus, males and females charged with a crime might be subjected to an “Ordeal”, a divine trial, or other circumstantial evidence was being adduced to clarify a case. The nature of such proceedings added to normal court-hearings may reveal the gendered structure of law and society. In the absence of Old Testament court-protocols concerning indicted women (there are examples from Mesopotamia, however) we may learn something about the importance of gender from such subsidiary requests for divine intervention and hopefully draw some conclusions as to the modern construction of law and jurisdiction.

## **2. Accused and accusing women**

What did the old Israelite community do, when persons were accused of some criminal action and there were no witnesses available to testify to the truth of the charges? We do have accounts of at least one male and one female suspect and measures taken in specific cases. The most elaborate male story is that of Achan, who took personal advantage of the spoil won in a holy battle against Jericho (Joshua 7). God himself triggers the investigation, and it is performed probably by throwing lots, that is, some yes-no-tokens which revealed God’s decision in regard to the guilt or innocence of clans, families, and individuals (vv. 14-18). Lot casting seems to have been popular also in non-criminal contexts to explore the will of God (cf. 1 Samuel 10,20-21; Joshua 16,1; 17,1; 18,11; 19,1-48; Psalm 16,6 etc.). Unknown criminals, on the other hand, may have been persecuted by a simple yet powerful curse (cf. Judges 17,2; Deuteronomy 27,14-26; possibly Deuteronomy 21,1-9).

While male infractions to be clarified by extra-judicial means belonged in the realm of property damages and physical violence women were held responsible mainly in other fields of behavior. Suspicion of infidelity, non-existent in regard to husbands, brought about the most elaborate ritual text we have got in the Hebrew Scriptures: Numbers 5,11-31. A husband overcome by “a spirit of jealousy” (v. 14) may take his wife to the (local?) priest, “bring the offering required for her” that is, “a grain offering of jealousy, a grain offering of remembrance, bringing iniquity to remembrance” (v. 15), and the priest has to perform a specific ritual designed for women only.<sup>3</sup>

Then the priest shall bring her near, and set her before the Lord; the priest shall take holy water in an earthen vessel, and take some of the dust that is on the floor of the tabernacle and put it into the water. The priest shall set the woman before the Lord, dishevel the woman's hair, and place in her hands the grain offering of remembrance, which is the grain offering of jealousy. In his own hand the priest shall have the water of bitterness that brings the curse. Then the priest shall make her take an oath, saying, 'If no man has lain with you, if you have not turned aside to uncleanness while under your husband's authority (שְׁחָטָה אִתְּךָ) be immune to this water of bitterness that brings the curse. But if you have gone astray while under your husband's authority, if you have defiled yourself and some man other than your husband has had intercourse with you,' – let the priest make the woman take the oath of the curse and say to the woman – 'the Lord make you an execration and an oath among your people, when the Lord makes your uterus drop, your womb discharge; now may this water that brings the curse enter your bowels and make your womb discharge, your uterus drop!' And the woman shall say, 'Amen, Amen.' Then the priest shall put these curses in writing, and wash them off into the water of bitterness. He shall make the woman drink the water of bitterness that brings the curse, and the water that brings the curse shall enter her and cause her bitter pain ... (Numbers 5,16-24).

We cannot discuss this extraordinary text in all its details. Suffice it to state: Case and treatment of this case are specifically designed for married or betrothed women. Gender thus is the cause for particular laws and subsidiary rituals. The accused woman is completely under the "authority" of husband and priest. Patriarchal rights and fears dominate the juridical construct, and this is, to our knowledge, the direct outcome of societal order regarding the status of husband and wife in the public sphere. Domestic distribution of power may have been quite different. But law and law-enforcement have been the traditional privileges of males. Astonishing to see the archaic methods of the ritual test (ordeal) which amount to a physical aggression against the female suspect. Most important: The ritual subsidiary does determine female identity in terms of that feminine mystique which always has been an obsession of males. Magic water, oath, disheveling the woman's hair, conjuring up an abortion, assuming from the beginning her guilt instead of conceding provisional innocence – all this winds up to a stereotype gender diagram of femininity dear to males, because it vehemently asserts male dominance. And, for its part, this stereotype seems to have been used among Israelites (of which period or region?) for the construction of reality in the legal and public realms.

In some other passages mentioning legal procedures against female suspects we find a lesser degree of magical connotations. Since the problem of female fidelity was a particularly sensitive issue for heads of family we are not too surprised to encounter a text oriented towards the same goal of controlling female sexuality. Here the woman is in a slightly better position to prove her innocence. A newly married husband may accuse his wife not to have entered marriage as a virgin (Deuteronomy 22,13-21). The parents of the bride step in producing the bed-linen of the first marital night which shows the blood stains caused by defloration (a custom still alive among some Arab people today). In this instance the irresponsible husband is fined and flogged and may not dismiss his wife ever (V. 18-19) thus securing her livelihood. – And one more example along this line comes to mind: A childless woman did have a legitimate claim after the death of her husband to be taken into the family of her brother-in-law, as an additional wife but with hopes to continue the lineage of the deceased man. Apparently, the willingness on the part of responsible males to realize the rights of the widow often was quite low (cf. Ruth 4,5-6; Genesis 38). Was it so, the widow could take legally relevant steps to exert pressure on her brother-in-law:

... if the man has no desire to marry his brother's widow, then his brother's widow shall go up to the elders at the gate and say, 'My husband's brother refuses to perpetuate his brother's name in Israel; he will not perform the duty of a husband's brother to me.' Then the elders of his town shall summon him and speak to him. If he persists, saying, 'I have no desire to marry her,' then his brother's wife shall go up to him in the presence of the elders, pull his sandal off his foot, spit in his face, and declare, 'This is what is done to the man who does not build up his brother's house.' Throughout Israel his family shall be known as 'the house of him whose sandal was pulled of.' (Deuteronomy 25,7-10).

A rare case of a woman being allowed to appeal directly to the court of elders who pronounce "justice"! Legally the brother-in-law or any other relative in the male line of the family cannot be obliged to take on another wife. But public disdain for the refuser may sometimes have helped to settle such cases in favor of some unprovided widows. The book of Ruth does give a splendid example even overcoming the problem of a woman foreign to Israel. On the whole, however, civil rights of women are taken care of only precariously. Widows received a minimal amount of protection as human beings in old Israelite society. The same kind of care for human dignity apparently was granted to enslaved girls: They were allowed to mourn their families for one month before they had to take over their regular duties for their captors (Deuteronomy 21,10-14).

### 3. Women under male tutelage

The foregoing observations suggest that family-jurisdiction played a much larger role in ancient Israelite societies than we can imagine. Families and clans have been, at the time in question (and well into present days), the age old, firmly established social units. Chiefs of family apparently did exercise juridical functions, sometimes levying even capital punishments on dependent family members. Basically, the male head of family, occasionally in conjunction with his wife, is responsible for all the dependents of his group, especially for the female members (cf. Exodus 22,15-16; Deuteronomy 22,13-29; 24,1-4). Of course, we do not have full contemporary accounts of either legal theories behind family customs or of actual legal practices. Also, we cannot determine the exact border-lines of public and private jurisdiction. And possible modifications of the administration of justice along the centuries covered by Old Testament witnesses for the most part do escape our attention as well. Still, there are traces of a far reaching domestic authority exercised by the male family leadership. “Discipline your children while there is hope; do not set your heart on their destruction” (Proverbs 19,18) runs a traditional advice to the father. A slave-owner could dispose of his subordinates with little restraint, since they were “his property” (Exodus 21,20-21). Judah, according to Genesis 38,24, quite naturally claims authority of pronouncing a death-sentence against a widowed daughter-in-law who allegedly became pregnant by a non-clan member. Absalom hushes the legal cause of his violated sister Tamar against Amnon and uses it to eliminate him as a contender to the throne (2 Samuel 13). – There have been various efforts, nevertheless, to bring capital offences committed in inner family circles out into the public realm. Deuteronomy 21,18-21 obligates parents (!) to take a “stubborn and rebellious son” to the council of elders, so that he may be sentenced to death. The daughter of a priest found guilty of prostitution “profanes her father; she shall be burned to death” (Leviticus 21,9), probably by some constitutional body of judges (passive voice!). Likewise, the erratic verdict “You shall not permit a female sorcerer to live” (Exodus 22,17 [Revised Standard Version 18]) apparently does address a communal group, not the chief of a household.

All the passages adduced, of course, represent antique Israelite ideologies about what the roles of women and men, family-bosses and dependents were in society, and how deviations from established rules of behaviour should be properly dealt with. Day-to-day reality always may be a long shot removed from dreamed-of ideals. Patriarchal authority, in fact, quite probably always stood on much softer grounds in Israelite homes than purportedly claimed,<sup>4</sup> as stories like 1 Samuel 25, Judges 4-5 or Numbers

12 demonstrate. Yet, the ideological background of social action certainly does affect roles and standings of persons<sup>5</sup>, even if only spuriously. In this regard, females are considered and treated not quite as chattel – there are some basic human rights granted to them. We should rather say that custom and law do rate women according to their mentally assumed, conventional social roles, with ample margins of divergence in real life-situations. Gender qualifications obviously are of major impact whenever females are dealt with in one or the other jurisdictional context. Maleness, ethnic background, old age or any other specifications are comparatively much less important while dealing with persons in court or family.

#### **4. Gender construction of society**

I have touched upon quite different cases of women undergoing or instigating public as well as familial jurisdictional procedures. They all demonstrate, although in varying degrees, how wives and females in general have been treated, by patriarchal societies, in a gender-specific way. The common denominator is the construction of female identity within the customary and legal frames. Women – both as public figures and in their domestic roles, although both spheres need to be distinguished from each other – are primarily seen and valued because of their reproductive capacities. The means of coping with the powers of reproduction<sup>6</sup> invariably include magical substances and ceremonies, because the very manifestations of female nature especially from the male perspective are in themselves mysterious. Thus the priest in the jealousy ritual of Numbers 5 is operating with potent waters, enriched with the dust of the temple soil. He likewise employs cursing formulas and written down imprecations to bring out the hidden truth. The dishevelled hair has strong demonic connotations (cf. Leviticus 10,6). The bridal linnen stained by vaginal blood and kept as a proof of virginhood in itself is vested with ominous powers. And the spittle of the unattended widow in conjunction with the symbolic pulling off the man's sandal also has some magical dimensions. Israelite jurisdictional (male) tradition, so it seems, has created a female counterpart to a "normal" male profile of human beings, because contemporary societies were, indeed, structured along gender-lines. If the creation reports are considered normative we get the basic model of social organisation right there: "Male and female he created them" (Genesis 1,27); "It is not good that the man should be alone; I will make him a helper as his partner." (Genesis 2,18). Humans and other living beings are bifurcated into two sexes. Therefore, society was largely built up as a bipolar organism, too.<sup>7</sup>

We also have to realize, then, some implications of ritual in legal proceedings. They are necessary to construct, maintain and restore female identity in the realm of public order.

There are hardly any comparable male activities to this immediate effect, unless we want to draw on circumcision (a “rite of passage”, which certainly had its female counterpart of “crossing into a new phase of life”, cf. Judges 11,37-40; 21,19) or the exceptional proofs of manhood with hallowed nazirites (Numbers 6: there is an inner relationship on this note to Numbers 5, and 6,2 opens the status to women also). Of course, there may have been more rites than we are aware of in ancient Hebrew society revolving around female fertility, as hints in various passages of the Scriptures indicate (cf. Hosea 2,4-10; Jeremiah 2,20-25; 44,15-19). If we furthermore look at various modes of executing “justice” against female infractors as hinted at e.g. in Ezekiel 16; 23; Zechariah 5,7-8 we get the impression that women are primarily modelled in their reproductive functions. Which, naturally, is nothing new at all, but still lacks proper evaluation in our modern ways of constructing reality. Construction of maleness revolves around the ideal figures of warrior, king, and priest. We would have to look for appropriate ceremonial embellishments in these sectors, in order to stage a well-founded comparison between the two genders.

### **5. Conclusions for today’s reconstruction of society<sup>8</sup>**

A hermeneutical debate now is in order: How can we possibly see any relevance in such a gender-bound construction of society? The biblical text seems to evade our reality because it presupposes such a different grid of values from that one basic to our own social organisation. We simply cannot accept any more a gender-based construction of society. Our declarations of human rights, our constitutions and basic laws postulate the irrelevance of gender in terms of legal procedures and social standing. The ancient world was sexually bipolar; ours is considered sexually homogeneous. All human beings are created equal. The basic norms prohibit discriminations on account of gender, race, creed, state of health, age, nationality (??), political convictions etc. They define the individual stripped of all particularities to be the normative copy of humankind, and the object of all legal and jurisdictional considerations. Law has to be administered as if we all were standardized homunculi, one-sex, one-creed, one-nationality that is, devoid of all these attributions. Especially gender categories, formerly so powerful elements of discretion in all kind of pre-industrial societies, must not enter basic discussions of human rights and responsibilities any more.

Now, if our social constructions in biblical times and today are so basically different, what are we going to do with biblical witnesses concerning male and female roles and behaviours? To sketch this problem is tantamount with touching one fundamental hermeneutical configuration in biblical exegesis. As interpreters of the Bible we have to

take seriously the parameters of modern life, especially and definitely the declarations of human dignity and rights passed through the last centuries. We know from experience and from our depth perception of human history, that nothing on earth is absolute and everlasting, and that nothing among humans is perfect and unchangeable. That means, we do not have an absolute or final commitment with present day values. But we have to respect them as the positive and actual groundwork for human beings, not to be tampered with light-heartedly. If this is so, as theologians we have to look for ways of dialoguing with our biblical parents about God, world, woman and man, without betraying the modern convictions of equality, justice, responsibility, autonomy (although we may discover here and there shortcomings within present day social systems; constant critical evaluation is necessary).

To my mind, the necessary dialogue between our spiritual forebears and ourselves about values and concepts of constructing reality must be held and can be fruitfully held to the benefit of modern people. We have to recognize the underlying intentions and formative impulses in ancient societies including their gender-orientation. Our patriarchally minded ancestors did not want to create hell on earth, when they constructed bi-polar gendered social organisms under the leadership of males. Basically, this construct emerged from a division of labor during millenia, entrusting males with the outer and females with inner choruses in small, autonomous bands and groups of people. In other words, they did organize their little social worlds in such a way as to secure best survival conditions for all concerned. That women in the long run became notoriously underprivileged and exploited by males was the lamentable outcome of changing living conditions, male greed for power and satisfaction, and a good deal of human inertia to cope with new situations, to develop further and increase the benefits of freedom for every and all living creatures. To recognize abuse of institutionalized rules and serious failures in the functioning of social relationships should not impede basic intentions to build up a just convivium of people in our case under the authority of Yahweh, the all-encompassing God of Israel.

If such a good intention may be postulated in ancient patriarchal societies, then the logical and responsible conclusion would be: Let us try to create an equally just living-space for all under the conditions of present day values and statutes. I do not want to say, that these said values and statutes are absolutely superior and everlasting, as I already indicated. On the contrary: They also cause a lot of pain and frustration and do not make everybody happy all the time. Our doctrine of individual autonomy and responsibility, e.g. leaves hundreds of millions of people forlorn and destitute, because

this principle has not only granted freedom to many, but – implanted into an increasingly greedy economy – has impoverished masses of humans, and killed them by famine, diseases, and hideous wars around the globe. In the last instance, the doctrine of individual happiness also has stimulated all the destructive forces which ruthlessly consume natural resources, poison and destroy the very elements of our lives (water, air, soil). Still, we cannot, by no means, abstain from those good, basic values of freedom, emancipation, equal rights for all, banning of discriminations, doing away gender criteria for social constructs etc. We cannot withdraw from present day hopes and possibilities to really create a more just and peaceful world, under the rules of self-determination and democracy. Going back to the main concerns of our Old Testament investigation: Perhaps we have to find new, compatible rituals for creating this world, emancipating ourselves from the old rites of gender-oriented, binary ceremonies to stabilize and re-create our worlds. We should go ahead also with this task of ritual reconstruction, which may help the administration of social justice on all levels of human organisation. The biggest problem of an individualistically emancipated, non-gendered society, in which all kinds of production (including that of human progeny) and consumption can be geared to isolated, monadic persons, will be how to generate meaningful social entities so necessary to promote humane living conditions for all.

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<sup>1</sup> Paper given at the SBL Conference in San Antonio, Texas, November 2004; revised.

<sup>2</sup> The huge amount of Mesopotamian legal documents certainly constitutes valuable material for comparisons (see Tikva Frymer-Kensky; Martha T. Roth).

<sup>3</sup> There is a very simple oath of innocence for males in Exodus 22,9f.

<sup>4</sup> See Erhard S. Gerstenberger, *Yahweh the Patriarch*, Minneapolis 1996, 55-66.

<sup>5</sup> See Saul M. Olyan, *Rites and Rank*, Princeton 2000.

<sup>6</sup> Carol Meyers’ use of such anthropological and sociological categories proves quite illuminating in gender-studies, cf. eadem, *Procreation, Production, and Protection*, *Journal of the American Academy of Religion* 51, 1983, 569-593; eadem, *Discovering Eve*, New York and Oxford 1988.

<sup>7</sup> See Elisabeth Badinter, *L'un est l'autre*, Paris 1986 (German translation: *Ich bin Du*, München 1988).

<sup>8</sup> See E.S. Gerstenberger, *Theologies in the Old Testament*, London and Minneapolis, 2002, 283-306.

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