The Intricacies of Natural Law & Marriage

A Review of a Review

Ziskind, Jonathan R.(ed): "John Selden On Jewish Marriage Law" The *Uxor Hebraica*; Brill, Leiden: 1991.

by Friedrich Hansen (May 2022)

John Selden (1584-1654)

The picture above is by an unknown artist. It depicts John Selden as a Renaissance humanist. He was often called an Erastian betraying the fact that Erasmus, other than Selden, was not a Hebraist. Selden’s understanding of natural law also

differs from Hugo Grotius, namely for his claim that natural law is divinely given and “discovered by man’s reason” only.

It was not least thanks to John Selden that England took pride in its unique “common law” tradition. He would insist that we mortals cannot “bind ourselves” let alone “between each other”; instead we need “natural law as a universal law given to all mankind at creation” by “a superior power, even God almighty.” (“Table Talk”, Ziskind, p. 11).

Selden obviously believed in divine revelation and accepted the Torah as the word of God. But he saw no scriptural or divine basis for church government; hence bishops were always “subject to temporal authority.” Natural law was for Selden God-given: first as the Noahide code for all of humanity, second as Mosaic code from Sinai, given exclusively to the Jewish people. It was only they who received not only natural law (universal) but also their “civil laws” (particular), at least part of it, from their God.

On the other hand he did not see any biblical authority or mandate supporting the Catholic-universal claims of the pope or bishops for imposing canon law on England, a country that already had its own particular civil law. The church could not claim any “succession” of the Jewish Sanhedrin. For the Sanhedrin under Roman occupation dealt with *Spiritualia* (supervising the Temple, marriage, and the religious calendar, etc.) as well as *Temporalia* (criminal cases, etc.). No religious body or “ecclesia” but only the Sanhedrin could excommunicate a person, for instance. Selden successfully challenged the powerful Presbyterians, “who gulled the laity most”; he questioned their claims to biblical evidence vindicating their calling. The role of the Jewish Sanhedrin would, according to Selden, fall naturally to the modern state.

An interesting matter was regarding the *Karaites*, self-appointed *Scriptuarii* later emulated by the Lutherans. For

both had succumbed to the pull of visible evidence or, in his words, “scriptural fundamentalism.” That anomaly emerged in the 8th century CE when the *Karaites* challenged the Jewish Exilarch in Babylonia. They wanted to put their own careful reading of Scripture against the Rabbinic normative reading, as transmitted through the Talmud.

For instance, they wanted to determine the beginning of New Moon on “visual observation” rather than on mathematical calculation as in Rabbinic tradition. This would risk confusing the holy days. Even in ancient Israel—a supposed “theocracy” —the civil Sanhedrin held the highest authority, not the priests of the Temple, according to Selden. In this civil outlook the Israelite society persevered over millennia as a nation without a state of its own.

Selden warned against the powers of “presbyters” and their penchant for excommunication, the predecessor of today’s cancel culture. Both are performances lacking any higher “ius divinum” on their side and thus utterly human inventions. He saw clearly that the *Karaites* were merely emulating the old Sadducees who were also attending to the written word and therefore the treasonous visual paradigm rather than customs and traditions under the auditive paradigm. Interestingly in *Uxor Hebraica* it took Selden four chapters alone to deal with the Karaites’ difficult and inconsistent rules on incest. On this occasion he demonstrated that “scriptural fundamentalism,” just as later with Luther, was to blame for this calamity. For there could always be found opposing views on incest in the texts and as a result exegetical consensus would collapse.

Only the oral Jewish tradition by implication using the associative leeway of the auditive paradigm can fully utilize the broader and open range of associations. Only in this manner could contradictions be resolved (“Table Talk”, Ziskind, p. 21) This confirms the rule of thumb that under the

Jewish auditive paradigm, as opposed to the Greek visual paradigm, conflicts can be resolved peacefully. Because only with divine revelation learned by heart, the rich associations beyond the narrow rationalist domain – for ever the mark of transcendent reasoning as opposed to mere metaphysical (dialectical) mirror thinking – could be accessed for conflict resolution. This provides the most convincing evidence of the intellectual superiority of the auditive paradigm of Judaism. Is this not reflected in the wisdom of the rabbinical dual traditions: oral and scriptural? The former being learned by heart since Moses' times, as opposed to the more narrow scriptural tradition.

Heeding the role of transcendent orality, Selden explained the meaning of natural law: "the human race must be instructed, administered, and ordered." (Ibid., p.11) He also tells us in his *Uxor Hebraica* "what we call Natural Law is simply what the Author of nature himself by his most sacred will ordained and impressed at creation upon the human heart and has been a law that has been regularly and continuously." For example, the fifth commandment of the Noahide code was meant to regulate all forms of sexual immorality while the seventh forbids cruelty to animals.

Selden made marriage a part of natural law, but also kept the right to divorce to both partners (Ibid., p. 23). He clearly limited the natural law to the human part of the animal kingdom. Marriage is divinely ordained but its implementation is entirely a human matter. To him marriage is but a civil contract like all others. Yet at the same time it was about marriage law that England broke with Rome.

Selden points out that with the exception of the New Testament all ancient cultures accepted divorce (Ibid., p. 25). This rigidity I tend to blame on *Hellenism* and its metaphysical concept creep extending onto Christian Trinity. Now we are regrading Judaism and the famous first century scholarly controversy. Back then it was the conservative Shammai who

allowed for divorce only in the case of adultery, the more liberal Hillel, however, did not make this stipulation. Little wonder that it was Hillel's rule, which was adopted by ancient Israel. It was the enlightened Rabbi Maimonides, capable to curb his Hellenistic leanings, who conditioned divorce in his *Mishneh Torah* on the consent of the wife.

By contrast the Christian denominations were far more rigid and rarely allowed for divorce. Instead, they introduced the legal separation *a mensa et thoro* (of table and bed) without granting the right to remarry. This represented a collapse of ecclesiastic form all together. It has survived with allegedly "liberal" couples, married or not, who are neither capable of living together nor to completely separate by accepting formal divorce. Many rather prefer to make do with all sorts of physical separations known as "wars of roses".

Modern couples living in these arrangements even at times divide their houses or flats into zones with mutually restricted access for the other party—a visual externalization of unbearable inner tensions. This comes close to same sex couples who do not allow any daylight between their impeccable outward arrangements concerning the exhortation of harmony as visible sexual "Identity". Since they have to live with inner antagonism anyway the whole environment, so it seems, has to share their mortifications and absurd sensibilities, and swallow the tyranny of "anti-discrimination".

The problem with Selden's extensive use of Maimonides' *Mishneh Torah* as well as the commentary *Magid Mishneh* written by the 14the century Vidal Tolosa is, according to the Jerusalem scholar Ofir Haivry, that it exposes Selden's dependency not only on the *Magid* but even more so on the *Jerusalem Talmud* which is much less comprehensive and authoritative than its counterpart from *Babylonia* (Ziskind, p. 20).

Selden's *"tangential"* use of sources also extends to the *Shulchan Aruch*—a vast legal compilation, written later and

even more authoritative than the *Misheh Torah.* Selden also quoted extensively the controversial Christian patriarch *Tertullian*, who was discredited lately by another Jerusalem scholar, Yoram Hazony, with regard to biblical Judaism. Not for nothing did the *Karaites* as scriptural fundamentalists provide the strictest rules. Their rulings on issues related to marriage such as incest and divorce Selden has proved to be unworkable. We are inclined to conclude that strictness of rules are an indication of moral weakness and reliance on Hellenistic metaphysical concepts rather than Jewish transcendental leeway. Mosaic guilt culture enjoys access to virtually unlimited transcendent resources for conflict resolution thanks to its insistence on repentance/Teshuvah, confirmed by deeds and its intellectualization of shame.

Metaphysical Creep

The argumentative dialectics in Catholicism associating incest with divorce are evidence of a metaphysical creep within the originally Jewish concept of marriage. For marriage is divinely ordained through revelation but it is also normative and rooted in transcendent arguments. By contrast the sort of Hellenistic metaphysical thinking speaks to the heavy weight of visualized thinking and might be a consequence of Christians discarding the oral tradition. The Jewish oral tradition is transmitted in the Mishneh Torah and the Talmud and both are regularly called for in rabbinic resolution of exegetical strictures. Christians by relying on scripture alone, Selden observed, are naturally encumbered with the dialectical problem of the karaite persuasion, similar problems which later manifested themselves even more vigorously in Lutheran and Protestant “scriptural fundamentalism”.

More specifically, the permit for divorce in canon law, which was still the basis of the Anglican Church in Selden’s time,

had been for a very long time undermined by an abuse of the concept of “consanguinity” or incest in the Catholic as well as Anglican church. This takes heed of the common observation that with declining medieval religiosity sexual transgressions or adultery often happened within the extended family (p. 24). Visual separation *a mensa et thoro* was the answer of the church to fornication. Strangely enough the more recent gay maxim of “never shit where you eat” (“shit” means: having sex) seems to follow this tradition yet paradoxically serves gay promiscuity and throws some shadow on the issue of gay marriage.

Already John Milton in his treatise *Doctrine and Discipline of Divorce* of 1643 demanded a divorce simply on the grounds of mutual consent. The early Christians were much closer to this regarding divorce from pagans or from Jews than the later much more regulated church. In the reading of Mosaic law it suffices that every *man and woman* are equal in the sense of a basic human right to a spouse and divorce does not impinge on this. This is a transcendent and mutual rather than a matter of visual control involving metaphysical and hierarchical concepts of partnership.

There is little doubt about adultery as the foundation of Christian divorce law being combined with a ban on re-marrying. This is counterproductive and betrays a Catholic “animal bias” in terms of mistaking the spouse as “personal property”. Deuteronomy 24:1-4 by comparison maintained that a man could divorce his wife “for any reason he wishes.” According to Ziskind “Selden correctly noted that this law is according to Hillel” (p. 25). The “stumbling block” for Christian divorce Selden detected in the term “porneia”, understood by Catholics and Protestants alike to mean only “illicit sex” (Mathew 5:32). This was stated despite the fact, as Selden could demonstrate, that the term had many different meanings.

Here again a Christian “exegetical error” can be traced back

to the difference between open or transcendent Rabbinic traditions as opposed to closed, metaphysical Christian readings of scriptural fundamentalists. Selden insisted that marriage was a human institution subject to change throughout history. He also observed that the old Christians and Nazarenes stuck to the more flexible rules of the Jews and that only "Christianized barbarians grafted their own marriage customs onto the teaching of the Church" (Ziskind, p. 26). By this he wanted to point out that it was false to base the law of divorce solely on biblical exegesis.

Selden concluded that western Churches, Catholic and Anglican alike, suppressed divorce simply to control lust and to monopolize order that was alien to monotheist tradition (Ziskind, p.26). His reliance on Maimonides, however, biased toward permissiveness of polygamy and controversial in late medieval times, limits the value of Selden's account on marriage. He seems to have been unaware of the importance of *Rashi,* Shlomo Yitzchaki (1040-1105), as Jewish commentator and also of the Babylonian Talmud.

Selden was first to detect the fatal consequences of the "organic turn" of monotheism in ancient Rome through Jesus Christ the once visible (son of) God. Due to the Hellenistic influence of visualization in Late Antiquity Christ represented a de-sublimation of sorts for any religious person. The long-term effect would be in the world of ideas which in the West, at least, became marked by decisive organic and deterministic drift or a gravitational pull which seems behind the downward trajectory of Christianity. It would also seem that scriptural suprematism paved the way for the organic traps corrupting original transcendental monotheism.

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