ON THE HISTORICAL BACKGROUND OF THE TALMUDIC LAWS REGARDING GENTILES

by ZE'EV W. FALK

Among the contributions made by our teacher, Professor Yitzḥak Baer of blessed memory, to the study of Jewish history, was the way in which he showed us how to complement historical data by means of halakhic sources and how to interpret the halakhah against the background of actual circumstances. He thereby gave new life to the study of the Mishnah and the Talmud, liberating it on the one hand from the dryness of the traditional dogmatic method of study and, on the other, from the narrowness of literary-philological criticism associated with certain scholars. In this respect he continued in the tradition of such scholars as Rabbi Yitzḥak Isaac Halevi author of *Dorot ha-Rishonim,* who accepted the authenticity of historical reports found in the Talmud, and of Abraham Büchler and Gedalyahu Allon, who discovered previously unrecognized connections between certain halakhot and *aggadot* and the social reality of the Jewish people. However, it was Baer in particular who integrated Jewish law within the spiritual history of the classical world and of medieval Christian culture, distinguishing himself in this sphere more than any previous historian. In this he revealed the strength of a vital and active Judaism, capable of assimilating or rejecting elements from its environment in order to better the lives of every generation of the Jewish people, leaving its imprint on the entire world. This article constitutes an

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Ze'ev W. Falk is Jacob Berman Professor of Family Law at the Hebrew University of Jerusalem. This article originally appeared in the special volume honoring the late Prof. Yitzhak F. Baer, *Zion* 44 (1979), pp. 57–65.

זאב פלק, "על הרקע ההיסטורי של הלכות נוכרים", מתוך ספר הזכרון ליצחק בער, ציון, מ"ד (תשל"ט), 57-65. Translation by Eliezer Segal.

attempt at applying Baer's methods to three laws concerning Gentiles,[1] in order to determine thereby their time and place of origin. May this be a humble tribute to the beloved teacher who left his treasures to three generations of disciples who drank thirstily from the wellsprings of his wisdom.

I

A question which continues to preoccupy the public in Israel today, "Who is a Jew?" is a very ancient one, particularly with regard to the case of a child of a non-Jewish mother and a Jewish father.[2] The Mishnah formulated a guiding principle for determining personal status: "If her *kiddushin* (betrothal, the formal aquisition of the wife by the husband) would not be valid either with this man (i.e., the father) or with another man, then the offspring takes on her status. Such is the case where the offspring is by a bondswoman or a gentile woman" (Kiddushin 3:12).[3] The assumption here is that *kiddushin* cannot be effective between a Jewish man and a gentile woman, just as there can be no *kiddushin* in the opposite case. The result is that the child receives his status from the mother and not from the father. Various traditions have been recorded as to the reason for this ruling which merit examination and comparison. In the Babylonian Talmud we find the opinion of Rabbi Simeon bar Yoḥai: "Scripture stated 'For he will turn away your son from following me' (Deut. 7:4) — Your son born from an Israelite woman is called 'your son', but your son born of a gentile woman is not called 'your son', but rather 'her son'."[4] Rashi explains the passage:

> "For he will turn away your son" — Since the verse does not state "*she* shall turn away", it may be concluded that its meaning is this: You shall not give your daughter to his son, because your daughter's husband will turn away the [grand-]son whom your daughter will bear you from following me. However, the verse does not go on to forbid taking his daughter for your son, and we do not apply to him a verse: "For the daughter of gentiles will turn away the son which she will bear him from following me". Hence, your [grand-]son from a gentile, to whom your daughter bore a child, is called "your son", but your [grandson] from your son and a gentile woman is not called "your son"[5]

The difficulty in this interpretation lies in the fact that the verse speaks only of the "seven nations", and not of women from other peoples. It is true that whoever first interpreted the text in this manner wished to extend its application and claim that women from other peoples can also endanger the fidelity of the Jew to his God. Another difficulty which arises from this exposition stems from the multiplicity of instances of marriages to gentile women mentioned in the Bible, the

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1. Concerning gentiles in the halakhah, see the literature cited by N. Rackover, *Oẓar ha-Mishpat*, Jerusalem, 1975, pp. 344–349.
2. See Rackover *op. cit.* p. 363.
3. Kiddushin 3:12; cf. Yebamoth 2:5.
4. Yebamoth 32a; Kiddushin 68b; see also Yebamoth 17a, in the name of Samuel.
5. Rashi s.v. "*ki yasir*", Yebamoth 23a.

most famous of these being the union of Boaz and Ruth, which eventually produced King David. It is worthwhile to examine the parallel passage in the Palestinian Talmud, which appears to be both more original and more comprehensive.

> As for a gentile woman — Rabbi Yoḥanan said in the name of R. Simeon ben Yoḥai: It is written (Deut. 7:3) "Neither shall you make marriages with them." And it is also written (v. 4) "For he will turn your son away from following me". Your son from an Israelite woman is called "your son", but your son from a gentile woman is only called "her son".

Concerning this statement, we find the following discussion emanating from the academies of Eretz-Yisrael:

> Jacob of Kefar Neboria went to Tyre. They came and asked whether it was permissible to circumcise the son of an Aramean woman (born of an Israelite) on the Sabbath. He thought to permit it, basing himself on the verse (Num. 1:18) "And they declared their pedigrees after their families according to their fathers' houses". Rabbi Ḥaggai, having heard it, ordered that Jacob be brought and whipped. Said [Jacob] to him: On what are you basing yourself in whipping me? [R. Haggai] replied: On the verse (Ezra 10:13) "Let us make a covenant with our God to put away all foreign women and such as are born of them". Jacob asked: Can it be that you are striking on the basis of a "tradition" [i.e. a non-Pentateuchal law]? R. Haggai said: It is because it is written "and let it be done according to the Law" (*ibid*). And what is the text in the Law [i.e. the Pentateuch]? He said: From that which is stated by Yoḥanan in the name of R. Simeon ben Yoḥai: "Neither shalt they make marriages with them" (Deut. 7:3), and it is also written (*idem*) "for he will turn away your son from following me." — Your son from an Israelite woman is termed "your son", but your son born from a gentile woman is not termed "your son", but rather "her son". Said Jacob: Give me your blows, it is good that I should receive punishment.[6]

We must distinguish here between the first part of the discussion and the second part. In the first part, Rabbi Haggai relies on a verse from Ezra which stands in its own right as an alternative to the verse from Deuteronomy. It is likely that Rabbi Haggai was aware of the difficulty we have mentioned; i.e. that a proof was required concerning a woman who was not of the "seven nations", and it was for this reason that he preferred the verse from Ezra; moreover this text explicitly states that children born of gentile women must be sent away together with their mothers, while the text in Deuteronomy only shows this indirectly, in the way indicated by Rashi. Nor does the question of the non-Pentateuchal status of the verse[7] necessitate a complete refusal to rely on the verse from Ezra. It states there "and let it be done according to the Law", which could be interpreted, in our own opinion, as meaning that this prohibition has the authority of Pentateuchal law to such an extent that its transgressors may be flogged. Rabbi Haggai thus claimed that the sages enforced their own words as if they were prohibitions of the Torah

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6. PT Yebamoth 2:6 (4a); the pericope was transferred to PT Kiddushin 3:14 (64d).
7. See the entry, '*divre kabbalah*", in the *Encyclopaedia Talmudica* [Heb.], VII: 106 ff.

itself,[8] and hence he who transgresses such a decree may be flogged as though he had transgressed a statute of the Torah. The conclusion of the passage does not follow from it automatically. It represents an alternative formula reconciling the tradition of Rabbi Haggai with that of Rabbi Simeon bar Yoḥai.[9] The harmonistic purpose of the conclusion is evident in another sense as well, in that it brings Jacob to accept the judgement.

However, it appears that Jacob of Kefar Neboria was already familiar with the interpretation (or at least the halakhic arguments) of Rabbi Haggai even before the latter's decision, and took issue with the halakhah which declared the son of a gentile woman to be unfit. His logical argument, that the Torah attributes children to their fathers, serves, on the fact of it, to disprove the halakhah; this reasoning is not contradicted by arguments of the kind employed in the exposition of Rabbi Simeon and Rabbi Haggai.

We thus have evidence that in the 3rd century C.E. this halakhah was still a subject of controversy and that it was necessary to threaten dissidents with punishment by flogging.[10] Perhaps Jacob's opinion was the result of a general criticism of the halakhic method, and for this reason it provoked such a strong reaction. In this spirit, Rabbi Isi of Caesarea applied the verse "but the sinner shall be taken by her" (Eccles. 7:26) to Jacob's heresy.[11]

If the question of the disqualification of the children of gentile women remained a controversial one until the third century C.E. one may assume that it had been a controversy around the time of the edict in Ezra's day. This fact emerges from an examination of the scriptures. The ministers who approached Ezra spoke only of the women: "The people of Israel and the priests and the Levites have not separated themselves from the peoples of the lands... for they have taken of their daughters for themselves and for their sons, so that the holy seed have mingled themselves with the proples of the lands..." (Ezra 9:2). Perhaps there were in the community those who opposed extreme action, arguing that it was not right to

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8. For example cf. Yebamoth 36b.

9. The reference to the statement of R. Yoḥanan in the name of R. Simeon ben Yoḥai is not found in the version of Genesis Rabbah 7, s.v. "Yishreẓu ha-mayim" (ed. Theodor-Albeck pp. 50–52). See also Pesikta de-Rav Kahana 36a; Pesikta Rabbati, Sec. *Parah* ed. M. Ish-Shalom (L. Friedman) 61b; Tanḥuma, *Ḥukkath* s.v. "Va-yedaber 'al ha-behemah ve-'al ha-of"; Ecclesiastes Rabbah 7:23.

10. See Rackover (above, n. 1) pp. 287–288.

11. Ecclesiastes Rabbah 7:26; cited by Theodor in his note to Genesis Rabbah 7, and see the literature mentioned there. Other statements of Jacob appear to contain criticisms. See: PT Shabbath 19:5 (17b) — against warrying about farfetched possibilities; PT Bikkurim 3:3 (65d) — against rabbis who are unworthy of their positions; PT Berakhoth 9:1 (12d) — against verbose homilies.

send away the sons. Some of the conflicts are hinted at by a passage at the end of the book: "All these had foreign wives and some of them had wives by whom they had children" (Ezra 10:44). It was no doubt difficult to send away gentile women who had already borne children to their husbands. The proposal of Shechaniah ben Yehiel was an extreme one: "Now therefore let us make a covenant with God to put away all the wives and such as are born of them, according to the counsel of the Lord, and of those that tremble at the commandments of our God, and let it be done according to the Law" (Ezra 10:3). He feared that the women would be permitted to remain by virtue of their children, the fathers being unable to look after them, and he therefore favored a general expulsion. Even Ezra himself only referred to sending away the women: "...Now therefore make confession unto the Lord the God of your fathers and do His pleasure; and separate yourselves from the peoples of the land and from the foreign women" (Ezra 10:11). The investigation only concerns "all the men that had married foreign women" (Ezra 10:17), and the obligation was limited to them: "And they gave their hand that they would put away their wives" (Ezra 10:19). These contemporary sources reflect the problematic nature of the family relationships and disputes that accompanied this halakhah.

II

As we have seen, the Mishnah makes the personal status of the child of gentile woman depend on the mother, as she is not subject to *kiddushin,* either with the father or with any other Jew.[12] One may ask the question: Why did the sages state that a gentile woman is not subject to *kiddushin*, and what support can be brought from the Torah for such a position?

We are immediately struck by the fact that the halakhah does not recognize the validity of marriages between gentiles unless consummated by cohabitation. Let us examine this matter, and then return to the question of *kiddushin*:

> Our Rabbis taught (in a *baraitha*): "'A man, a man shall not approach to any that is near of kin to him to uncover their nakedness' (Lev. 18:6). What is taught by the repetition 'a man, a man'? This comes to include gentiles, that they too are forbidden incest (including adultery)." [Regarding this *baraitha* the Talmud remarks:] Now is this law deduced from this verse? Is it rather not deduced from a different text, viz. ["And the Lord God commanded...] *saying*" (Gen. 2:16) — which refers to adultery? [The solution:] The latter text refers to adultery with a woman of their own [i.e. with a gentile married woman], while the former refers to adultery with one of ours [a Jewish married woman], for the second clause teaches: "If he committed incest with a Jewess he is judged according to Jewish law." What is the practical application?... R. Yohanan answered thus: It is necessary with regard to a betrothed Jewish maiden, whose violation by gentile law is not a capital offense; hence they are judged by Jewish law. But if their offense was against a fully married woman are they

12. Kiddushin 3:12.

judged according to their law?... Rabbi Naḥman b. Isaac answered: By a "married woman" this *baraitha* means one whose *ḥuppah* ceremony has been performed, but without the marriage being consummated. Since by their law her violation is not a capital offense, they are judged according to ours. For R. Ḥanina taught: They recognize the inviolability of a woman whose union has been consummated, but not if she merely entered the *ḥuppah* without the union having been consummated.[13]

Rashi explains the passage as follows:

If he violates a betrothed maiden he is subject to death by stoning, as an Israelite would be according to their law, since by their law he is to be put to death by the sword because for the "sons of Noah" the sword is the only form of death penalty... "If she entered the *ḥuppah* but the union was not consummated" — By Jewish law he would be subject to strangulation, as with all married women, since with regard to stoning it is written 'a betrothed virgin, a maiden" (Deut. 22:23) and we expound this verse as follows (Keth. 48b): "'A virgin' — who has not had intercourse; 'betrothed' — and not married. And what is meant by 'married'? If one should suppose that it refers to a woman who is married and has had intercourse, this was learned from 'a virgin' — who has not had intercourse. Hence we must suppose that it refers to a woman who has entered the *ḥuppah* but has not consummated the union" Scripture has excluded her from the category of stoning and subjected her instead to strangulation. Since all were subsumed under the general category of "adulterer and adulteress", the betrothed woman was mentioned separately because she constitutes a special case. But this one [who has entered the *ḥuppah* but has not had intercourse] who was not excepted, is still subsumed under the general rule. One who has had intercourse with her husband is mentioned explicitly (Gen. 20:3): "And she has had intercourse with her husband"; the verse does not state "and she is married" — hence we may conclude that in the other case the death penalty is incurred on account of intercourse with the husband, rather than account of his *kiddushin* or *ḥuppah*

In this passage, we must first of all isolate the oldest stratum; i.e. the *baraitha* of Rabbi Ḥanina which was taught about 100 C.E.: "They recognize the inviolability of a married woman whose union has been consummated, but not if she merely entered the *ḥuppah* without the union having been consummated." The style indicates a Midrashic source which expounded the Biblical verse (Gen. 20:3) as explained by Rashi. The halakhah sees as the determining factor in relationships between gentiles and their wives not *kiddushin* or *ḥuppah*, but rather cohabitation. It is also said of a Jewess that she becomes a wife through cohabitation;[14] however, in addition to this form of betrothal we find the more prevalent forms, i.e., of money or deed. With regard to gentiles, on the other hand, the halakhah only recognizes one method of betrothal. Hence one may understand the second element in the passage, Rabbi Yoḥanan's statement that "...with regard to a betrothed Jewish maiden, whose violation is not a capital offence in gentile law they are judged by Jewish law; but if their offense was against a fully married woman, they are judged according to their law." He is referring to a gentile who has sexual relations with a betrothed Jewish maiden: here the halakhah

13. Sanhedrin 57b.
14. Kiddushin 1:1, though betrothal by this means is forwned upon. Kiddushin 12b.

recognized only its own law, as in its opinion gentiles cannot be betrothed; therefore, it rules that the Torah-law must be applied to the gentile. On the other hand, if the gentile cohabits with a Jewish married woman, the Noachide law applies to him, as the halakhah declares the law concerning adultery to be incumbent on gentiles as well. While R. Yoḥanan only denies the validity of betrothal in gentile law, R. Naḥman bar Isaac, who lived close to his time, reverts to the earlier view of R. Ḥanina who distinguished between marriages which had not yet been consummated through cohabitation, and marriages which had been thus consummated. Only the latter are considered binding among the gentiles, while the former are binding upon Jews, but are not part of Noachide law.[15]

Similar opinions are cited in the Palestinian Talmud: "[How is a wife aquired] by gentiles? — 'R. Abbahu in the name of R. Eleazar said: It is written "Behold, thou shalt die because of the woman whom thou hast taken, for she is married to (literally: has had intercourse with) a husband" (Gen. 20:3) — Thus [gentiles] are punishable for relations with women whose marriages have been consummated, but not with ones who have only been betrothed.'"[16] This is the opinion of Rabbi Yoḥanan, which was received from him by R. Eleazar ben Pedat and R. Abahu. Similarly, R. Mana expounded the verse, "'He shall cleave unto his wife' (Gen. 2:24) and not to that of another man... We have learned that gentiles are not subject to *kiddushin*."[17] This opinion parallels that of R. Yoḥanan, except that R. Mana employs the term *kiddushin* in place of *erusin* to denote betrothal.

Of the two approaches — the one that believes that gentiles have no betrothal but only marriage and the other, that gentiles have no marriage without cohabitation, but only marriage through cohabitation — the first is apparently the older. It is mentioned in the Mishnah and lies at the basis of the halakhah that the child of a gentile woman does not claim descent from its father. On the other hand, the view which speaks of the need for cohabitation to give validity to a marriage was voiced only in theoretical matters, and only from the generation of Yavneh onwards. The first approach also conforms to the principles of Roman law, which was doubtless known to the sages of the Talmud. While the law of the Torah demands that *kiddushin* be performed through money, deed or cohabitation, Roman law in the time of the Empire was satisfied with a promise of marriage given verbally or in writing, and saw this promise as constituting the essence of

15. The paradox is that the medieval Church denied the validity of Marriages which had not been consummated by cohabitation, basing itself on Jewish law! G.H. Joyce, *Christian Marriage*, London 1948², pp. 39ff.

16. See PT Kiddushin 1:1 (58a); Genesis Rabbah 18 s.v. "ve-davak be-ishto", ed. Theodor-Albeck p. 167.

17. See PT Kiddushin 1:1 (58c).

the betrothal.[18] In their laws it was not even possible to collect a fine stipulated in advance in the case of breach of promise, as such a fine was regarded as being not in accord with good conduct (*non secundum bonos mores*) in that it limits freedom to make a decision about the marriage.[19] Consequently, in Roman law they did not regard an annulment of the betrothal as constituting a betrayal of the marriage, as was the prevalent view in the Bible and the halakhah.[20] Accordingly Diocletian (284–305) permitted a betrothed woman to annul her engagement and marry another man.[21]

The influence of these concepts was felt also among the Jews and drew the attention of the halakhic sages. For example, we may recall the decision of Hillel the Elder, who expounded the text of the *ketubbah* in a midrashic manner in order to prevent a situation whereby the offspring would be deemed unfit for marriage (*mamzerim*):

> When the Alexandrians would betrothe a woman, afterwards someone else would come and grab her right out of the street. Such an incident came before the Sages and they considered declaring the children *mamzerim*. Hillel the elder said to them "Show me the marriage-contracts of their mothers." They produced them, and written in them was the following: "*When you enter my house* you will be my wife in accord with the law of Moses and Israel..."[22]

We find here a description of a conflict between cultures, between the customs of Hellenised Jews and the Palestinian legal tradition. The seizing of the women by someone else in the street apparently refers to the informal annulment of *kiddushin* and subsequent remarriage to another man. This practice was, as we have seen, acceptable in Roman law at the end of the Republic and the beginning of the Empire, whereas Jewish law demanded a valid writ of divorce; for in the absence of such a divorce, the woman would still be bound to her first husband and her children by the second "husband" would be deemed illegitimate.[23]

Statements denying the validity of betrothals of gentiles were, as we have seen, the reaction of the sages of Israel to what they regarded as overpermissiveness

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18. *Digesta* 23, 1; M. Kaser, *Das römische Privatrecht*, I, Munich 1955, p. 274. Concerning the relationship between Hellenistic and Roman law and the halakhah, see Rackover op. cit. pp. 138–140.
19. Paulus, *Digesta* 45, 1.134 pr.; Kaser loc cit.
20. Paulus, *Collatio Legum Mosaicarum et Romanarum* 4.6.1; f. Kaser, loc. cit.
21. *Codex Iustiniani* 5.1.1; cf. Kaser, op. cit.
22. Tosefta Ketubbot 4:9, ed. Zuckermandel, Jerusalem 1963, pp. 164–265. See also S. Leiberman, *Tosefta ki-Feshutah*, ad. loc.
23. See also: E.E. Urbach, *The Sages*, Jerusalem 1975, p. 590ff. Urbach presumes that it was Hillel's decision which gave him the authority to rule afterwards in the "*semikhah*" [laying of hands] controversy.

and a danger to Judaism. When they stressed that a gentile had no kiddushin, they intended to convey thereby that a Jew ought to appreciate the halakhah, which gives him an institution not to be found among other peoples. After they had expressed their view concerning *kiddushin*, the sages extended this idea somewhat and denied the validity of marriage among gentiles without cohabitation. These limitations were imposed in order to emphasise the far greater sensitivity of the halakhah when compared with foreign legal systems, the former giving validity to betrothal and to marriage, whereas the latter recognized as valid only a marital relationship accompanied by cohabitation. Perhaps we may regard this approach as a defense of the halakhah and as propaganda in favour of Judaism. The Sages of the Talmud whose dicta have been cited above were sensitive to the threat of assimilation which endangered many Jews, and attempted by this means to drive a wedge against it.

III

When the Talmudic sages dealt with the question of the *kiddushin* of gentiles, deciding that gentiles were not subject to *kiddushin,* they proceeded to inquire: "Are they subject to divorce?"[24] — again from the standpoint of the halakhah. This question is also to be understood against a background of practical circumstances, especially in light of the doubt surrounding the possibility of involving gentiles in the writing and delivery of Jewish bills of divorce.

The Mishnah did not take a clear-cut position on this question. On the one hand they allowed gentiles to be witnesses to a bill of divorce and to write it. "No writ is valid which has a Samaritan as witness, except for a writ of divorce or a writ of emancipation [of a slave]. They once brought a bill of divorce before Rabban Gamaliel at Kefar Othnai and its witnesses were Samaritans, and he pronounced it valid."[25] Similarly, they declared: "All are qualified to write a bill of divorce, even a deaf-mute, an imbecile or a minor... since the validity of the writ depends only on the signatories."[26] On the other hand, they stated, "A gentile is not qualified [to write a bill of divorce]"[27] and "All are qualified to deliver a bill of divorce, except a deaf-mute, an imbecile, a minor, a blind man or a gentile."[28] Likewise:

> Any writ is valid that is drawn up in the registries of the gentiles, even if they that signed it were gentiles, except for a writ of divorce or a writ of emancipation. R. Simeon says: These

24. See: PT Kiddushin 1:1 (58c); Genesis Rabbah 18 s.v. "ve-davak be-ishto", ed. Theodor-Albeck pp. 166–167.
25. Gittin 1:5.
26. Ibid. 2:5.
27. Gittin 23a.
28. Gittin 2:5.

too are valid; they are mentioned [as invalid] only if they were prepared by such as were not authorised judges.[29]

The invalidation of a gentile from participating in a Jewish divorce was interpreted by the Babylonian sages of about the 5th century as "invalid according to the authority of the Torah"[30] or because the gentile "is not himself a party to release".[31] Rashi explained this as follows: "Because they are not subject to divorce or *kiddushin*,"[32] or: "because *kiddushin* and divorce do not apply to them."[33] In light of their assumptions, and because the essence of the divorce lies in its signatures, special reasons were given for the sanctioning of Samaritan witnesses, who were not deemed gentiles, and to allow bills of divorce to be written by gentiles.

At any rate, this matter appears more complicated in the corresponding pericope in the Palestinian Talmud:

> R. Judah ben Pazi, said R. Ḥanin in the name of R. Ḥunah the Great of Sepphoris: Either they do not divorce at all or else the two parties divorce one another equally. Said R. Yoḥanan in Sepphoris, Said R. Aḥa: R. Ḥanina in the name of R. Samuel b. Naḥman quoted the verse "For I hate putting her away, said the Lord God of Israel" (Mal. 2:16) — from which it may be inferred that the institution of divorce was given to Israel, but not to the nations of the world. R. Ḥaniniah in the name of R. Pinḥas [said]: In the whole chapter [of Malachi] God is called "the Lord of Hosts", while in this verse he is referred to as "God of Israel". This comes to teach you that when speaking of divorce, God's name was singled out to be mentioned only in connection with Israel. From R. Ḥiyya's statement we may understand that gentiles have no divorce, since R. Ḥiyya taught [in a *baraitha*]: "If a gentile sends away his wife and she goes on to marry another man, who in turn sends her away, and then the two of them convert to Judaism, we do not apply to her the precept 'Her former husband who sent her away may not taie her again to be his wife' (Deut. 24:4)." Indeed it has been taught: "Such a case was brought before Rabbi [Judah ha-Nasi], who authorized the new union."[34]

Among the various traditions which have been assembled in this talmudic passage, the earliest ones are the decision of Rabbi Judah ha-Nasi, about 200 C.E., and the halakhah which R. Ḥiyya deduced from that case. This halakhah is composed of various elements which are unconnected with the question of whether or not gentiles can divorce. First, there is a difference between the marriage which the gentile made before his conversion and the marriage men-

29. Ibid. 1:5.
30. Gittin 9b.
31. Ibid. 23a.
32. Ibid. 9b s.v. "ḥuz mi-gitte nashim".
33. Ibid. 32a s.v. "lav bar hettera have".
34. See: PT Kiddushin 1:1 (58c); Gen. Rabbah 18 s.v. "ve-davak be-ishto", ed. Theodor-Albeck p. 167.

tioned in Scripture. This difference constitutes a sufficient grounds for permitting the woman to remarry, even if one were to assume that gentiles can divorce. Second, the marriage which the second gentile made is also different from the one spoken of in Scripture, and this too would be a sufficient reason not to apply the prohibition against remarrying a divorced wife in this particular instance. Thirdly, the permission to remarry may be deduced from the assumption that a convert is considered like a new-born child. Therefore the statements of Rabbi and R. Ḥiyya do not determine whether or not gentiles are capable of divorcing. Only the "anonymous *Gemara*", based upon the aforecited traditions, interprets the statement of R. Ḥiyya in this manner: "From R. Ḥiyya's statement we may understand that gentiles cannot divorce."

> Only one generation after them, the halakhah was formulated explicitly: R. Yoḥanan in Sepphoris, said R. Aḥa, Said R. Ḥanina in the name of R. Samuel bar Naḥman: "For I hate putting her away, said the Lord God of Israel" (Malachi 2:16) — from which it may be inferred that the institution of divorce was given to Israel, but not to the nations of the world.

The dicta of R. Ḥuna the Great of Sepphoris and R. Pinḥas, cited in the same Talmudic passage, were subsequently formulated in line with this exposition. In fact, while R. Samuel bar Naḥman and R. Pinḥas based the halakhah on a Biblical verse, R. Ḥuna the Great of Sepphoris came to that conclusion without any Scriptural support. It is probable that he based himself on the known practice, and saw no reason to prove it from the Bible. In fact, the two approaches — "either they have no divorce or both parties divorce each other" — were found in practice among the gentiles in the surrounding environment.

According to the Gospels of Mark (10:2–12) and Luke (16:14–18), and I Corinthians (7:10–11), no divorce is to be permitted.[35] One must assume that the Jewish Christians also attempted to base their opposition to divorce on Scriptural evidence, and that the Jewish sages were responding to such arguments when they argued that only Jews have the right to divorce, whereas gentiles have no divorce. If we are correct in this assumption, then the invalidation of gentile divorce is to be regarded as a reaction to the Christians, on their terms, and as an additional means of differentiating between Israel and the nations of the world.

On the other hand, the Sages of the Talmud were aware that pagan society recognized the validity of a divorce instituted by either of the sides, the husband or the wife. This stage in the development of Roman law is described in the latter half of the second century C.E. in Gaius' *Institutiones.*[36] He distinguishes be-

35. See: Joyce (note 15 above), p. 304ff., and the voluminous literature concerning the Christian attitude to divorce.

36. Gaius, *Institutiones* 137a; Kaser (above, n. 18), p. 279.

tween the case of a daughter, who can be removed from her father's jurisdiction only with his consent, and that of a wife, who can compel her husband to remove her from his jurisdiction. Hence a bill of divorcement can be issued not only by the husband, but by the wife as well. This practice also found its way to Jewish circles which had been assimilated to the foreign culture. Already in the 5th century B.C.E. the Jews of Upper Egypt gave the woman the right to dissolve the marriage-bond.[37] The same arrangement was in force at the court of Herod and among the Greek-speaking Jews of Alexandria.

Here too the Sages of the halakhah strenously opposed the penetration of these outside customs. The description of this situation as regards the gentiles was intended less as a historical account of the precepts actually commanded to the sons of Noah, than as a warning to Jews against conducting themselves according to gentile practices. These two possibilities, the Christian and the Roman-pagan, are suitable for gentiles, but no Jew ought to adopt them.

* * *

Thus, we have found a possible way of understanding three *halakhot* relating to gentiles against the background of the historical reality which existed in Israel and the surrounding region. It would seem that the halakhah that the child of a Jewish woman from a gentile is considered Jewish is also based upon the historical reality of frequent capture and rape of Jewish women. The authors of the halakhah worked in a logical manner to accept into the fold the childen born from such unions. From these *halakhot*, as from halakhic rulings in general, one may learn about the historical reality of their times. Only in this way can they be properly appreciated as the vital expression of the living Torah.

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37. See Z. Falk, *Introduction to Jewish Law of the Second Commonwealth*, Leiden, 1972–78, p. 310; idem, "*Teviat gerushin mi-zad ha-isha be-Dinei Yisrael*", Jerusalem, 1973, p. 17ff.