‘BACK THEN IT WAS LEGAL’

THE EPISTEMOLOGICAL IMBALANCE IN READINGS OF BIBLICAL AND ANCIENT NEAR EASTERN RAPE LEGISLATION

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The article examines the epistemological imbalance that currently exists in the area of biblical and ancient Near Eastern rape laws. The imbalance reflects a larger development in western intellectual discourse in which we are moving from an empiricist-positivist epistemology to a postmodern epistemology. The former is characteristic of the modern western worldview and assumes objectivity, value neutrality, and universality. It is primarily interested in the historical quest. The latter recognises the contextualised, particularised, and localised nature of all exegetical work, and emphasises the readers’ responsibilities in the meaning-making process. Three sections structure the investigation. The first section examines how empiricist-positivist readings present Deut. 21:10-14 as a law on marriage and not on rape. The second section analyses Deut. 22:22-29, and shows how this biblical passage emerges as adultery laws within the modern paradigm of interpretation. The third section focuses on ancient Near Eastern legislation to demonstrate that the laws address the rapes of women, children and certain kinds of animals when a reader, living in the contemporary global rape culture, searches for rape in the ancient legislative materials. A conclusion acknowledges the current impasse between modern and postmodern epistemologies in reading biblical and ancient Near Eastern legislation and suggests that currently this imbalance cannot be evened out.

Even though the influential thinker of postmodernity, Jacques Derrida, passed away on October 8, 2004, the postmodern era is here to stay.[1] ‘Master narratives’ do not convince anymore, and so they have to be asserted over and over again since their authority and power are gone, as is the consensus about history, identity, and core cultural values (Lyotard 1984). We are living under a new configuration of politics, culture, and economics, which is sometimes called ‘late capitalism’ (Jameson 1991). In this new configuration transnational economies, based on the global reach of capitalism, dominate human life and organisation almost everywhere.

Ours is the early stage of a new period that subsumes, assumes, and extends the modern. This is the time after the modern age in which hybridity and the postcolonial flourish. We mix styles of different cultures and time periods, whether in the arts, literature, architecture, language, or food. We know there are many ways of doing things, an insight which fundamentalist movements resist worldwide, trying to suppress or ignore the drive toward multiplicity, diversity, and alternative ways of seeing and living life. Although most of humanity is excluded from the benefits of our era’s advances due to incredible levels of global poverty, Planet Earth has become a ‘global village’ in which the nation-state is redefined, human networks of communication are mediated by technology, and ecological changes affect humans everywhere. We live in huge and complex networks of relations, interdependent from each other and this planet’s ecology. Accordingly, most earthlings know that they could go somewhere else if they had the money or the opportunity, and more people are refugees now than ever before.[2] They leave home due to economic, political, or cultural devastation and sometimes they succeed in making a better living elsewhere. Little remains stable. Ours then is a time of remarkable tensions between the raw forces of social, political, economic, and religious conservatism on the one hand and openness and the need, even sheer necessity, for change on the other hand.

In biblical studies the tensions between conservatism and change play out primarily on the level of textual interpretations grounded in empiricist-positivist[3] or postmodern epistemological assumptions. The former is characteristic of the modern western worldview and assumes objectivity, value neutrality, and universality; it is primarily interested in the historical quest.[4] The latter recognises the contextualised, particularised, and localised nature of all exegetical work, and emphasises the readers' responsibilities in the meaning-making process. The trouble is that biblical interpreters are not always conscious of their epistemological assumptions, which makes them claim as fact what is only an assertion of 'truth' according to modern conventions.[5] This article examines the particularities of this epistemological dynamic in the area of biblical and ancient Near Eastern rape laws. There, an imbalance prevails because many exegetes continue interpreting the ancient legal texts primarily within the modern paradigm. They define the task of reading ancient legislation as historical, and so they search for authorial meaning.[6] Contextualised readings based on a postmodern epistemology are rarely found.

Different epistemological assumptions lead to different views on ancient rape laws, a situation that has serious implications for people living in a global rape culture.[7] The empiricist-scientific epistemology erases rape from the analysis because it considers rape a contemporary category that does not fit the ancient legislation. It accepts androcentric meaning as historically accurate and rejects connections between interpretations and readers. The ancient laws become rules on marriage, adultery, or seduction. Yet when readers take seriously that we live, work, and interpret in a global rape culture, different meanings for the same laws emerge. They turn into rules on various rape situations when rape is understood as forced sexual intercourse without the consent of one of the partners – mostly of girls and women. Such a move makes scholars often nervous because they fear that suddenly 'anything goes'. This, however, is not the case. What is required is that readers acknowledge their interpretative interests and look critically at the social, political, economic, or religious implications of their readings. In the context of a global rape culture, it is crucial to uplift ancient rape legislation and to identify past and present strategies that continue obfuscating the prevalence of rape even today.

Accordingly, this article is not an exercise in authorial meaning and in fact rejects such meaning as unattainable. It subscribes to the conviction that readers create textual meaning even when they claim to reiterate only positions of the original writers (Mailloux 1998). Interpreters who look for rape legislation in the ancient codes find it there, and readers who do not bring this interpretative interest to the texts raise other issues, depending on their assumptions. It is futile to argue over the appropriateness or insufficiency of each other's interpretations when the underlying issue is a difference in epistemology. If one subscribes to the principles of an empiricist-positivist epistemology, one will identify readings grounded in postmodern epistemology as biased, circular, or subjective. There is no middle ground for a compromise because it would come across as contrived, awkward, and false.

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legislative materials. A conclusion acknowledges the current impasse between modern and postmodern epistemologies of reading and suggests that currently this imbalance cannot be evened out.

1. A CASE FOR MARRIAGE? THE LAW OF THE ENEMY WOMAN (DEUT. 21:10-14)

When scholars of an empiricist-positivist epistemology interpret the case of the enemy woman (Deut. 21:10-14), they present this law as a ruling about marriage during or after war. Accordingly, the law is often characterised as a rule about 'Marriage with a Woman Captured in War' (Christensen 2002, p. 471; Tigay 1996, p. 194). When the passage is discussed as part of the larger literary unit in Deut. 21, exegetes sometimes classify it more generally as a text on 'Issues of Life and Death: Murder, Capital Offenses, and Inheritance' (Clements 1994, p. 443) that regulates the 'treatment of a woman taken as a captive in war and subsequently married by her captor, or purchaser' (Clements 1994, p. 445).[8] Empiricist-positivist epistemology advances androcentric ideology.

Since commentators do not usually elaborate on their hermeneutical perspectives, except perhaps to say that they rely on historical and literary methodologies, interpretations take on the aura of objectivity and inevitability. They claim to present 'the' meaning of the law as it was understood in its original context, a position that usually softens the soldierly claim for the 'enemy woman' and emphasises the need for marriage as the law's noble intention. That the marriage is coerced does not become a problem. For instance, one interpreter, Duane L. Christensen, appreciates the law as advice on abstinence in pre-marital consensual relationships. He explains that the law stresses 'the importance of a husband and wife sharing common spiritual values as the proper basis of a lasting union'. He also suggests: 'We would do well to follow the example here in deliberately delaying commitment in marriage for a period of time to assure that the decision to marry is not based primarily on physical lust' (Christensen 2002, p. 475). By asserting the law of Deut. 21:10-14 as morally and spiritually commendable, Christensen not only ignores its particularities – a soldier 'desiring' an enemy woman, but also that the woman has no choice but to convert to the soldier's habits and religion. His interpretation mutates this rape law into a benign and even desirable ruling on marriage.

Ronald E. Clements, another exegete, also minimises the coercion in the biblical law when he writes: 'Even when the marriage was to a woman who had been taken as a captive and turned into a slave, that marriage could never be reduced simply to a master/slave relationship' (Clements 1994, p. 448). To Clements, marriage rather than coercion is the important lesson although he does not give a reason for the claim. Writing from an empiricist-positivist epistemology, the commentator assumes the omniscient stance of an objective, universal, and value-neutral observer who does not disclose his interpretative interests. Hermeneutical assumptions remain hidden, and a particular perspective appears as objective information. In the case of Deut. 21:10-14, it is the perspective of the male soldier.

To some interpreters who assume a modern epistemology, this law regulates a specific kind of marriage, in which a male soldier wants to marry an enemy woman when the war is over. This position is perhaps most extensively and comprehensively developed in Carolyn Pressler's study on women in Deuteronomic law (Pressler 1993, p. 10-15). Pressler asserts that Deut. 21:10-14 does not regulate a rape situation during war – a position she claims dominated earlier

scholarly treatments (p. 11). Instead, she explains that the law regulates the marriage between a male soldier and a foreign captive woman after the war. To Pressler, therefore, the law provides the legal means for marriage when 'normal procedures for contracting marriage are impossible' (Pressler 1993, p. 11; Anderson 2004, p. 47). It also depicts a ritual necessary for the 'former captive' (Pressler 1993, p. 12) so that the soldier is legally qualified to marry her. Pressler stresses that the law refers only to this particular constellation and does not prohibit a 'man from engaging in sexual relations with the woman without marrying her' (p. 43).

As typical for readers grounded in an empiricist-scientific epistemology, this commentator does not disclose her interpretative interests. She proceeds as if reading from 'nowhere', wanting to read the text as a 'window to historical reality' (Schüssler Fiorenza 1999, p. 43) but only illuminating the perspective of the male soldier and the original legislators. Her reading therefore is grounded in the modern fallacy of objective literalism, scientific value-neutrality, and apolitical detachment. Interestingly, Pressler also hints at the possibility that the law is a rape law. Firmly rooted in the reconstruction of authorial meaning, Pressler suggests that the law's drafters might have viewed the marriage as an imposition on the woman. It violated the woman 'in some way', Pressler writes, and the original authors used the verb *'innah* in v. 14 to indicate the violation (Pressler 1993, p. 22). In other words, the original writers might have acknowledged that the woman does not consent to the marital act. They might have regarded the law as a regulation on rape.

Another interpreter writes from a more tentatively argued empiricist-positivist framework and clearly defines Deut. 21:10-14 as a rape law. In a study on violence in biblical narrative, Harold C. Washington maintains that readings are always located 'somewhere' even if they presume to read from 'nowhere'. Accordingly, he attempts to connect contemporary lawsuits with biblical constructions of rape law when he writes: 'My aim…is to contribute to the genealogy of this peculiar legal subject who appears in the courts even today – the man who by 'virtue' of his violence confirms his control of a feminine subject… My interest is not in the juristic application of these laws in ancient Israel… Instead I am concerned with the discursive capacity of these laws to construct gender' (Washington 1998, p. 186). This is not a historical reconstruction of the legal practice on rape cases in ancient Israel, but a more broadly conceived study on the historical discourse of gender as it emerges from the ancient laws. Washington writes from a 'poststructuralist view of gender as a discursive product' (p. 92) and examines the ancient laws as 'foundational texts of Western culture… [that] authenticate the role of violence in the cultural construction of gender up to the present day' (p. 187).

The interpretation covers several legal texts in the Hebrew Bible, but it also investigates Deut. 21:10-14. According to Washington, this law has the following purpose: 'The primary effect of the law is to assure a man's prerogative to abduct a woman through violence, keep her indefinitely if he wishes, or discard her if she is deemed unsatisfactory…' (Washington 1998, p. 207). Unlike other interpreters, Washington recognises the violence to which the woman is exposed in the situation described by the law. He names clearly that she is the object of the soldier's action, and he emphasises the effect of the law on the woman's ability to be in control. Washington is even clearer about the effect of this law when he writes: 'The fact that the man must wait for a month before penetrating the woman… does not make the sexual relationship something other than rape… Only in the most masculinist of readings does the month-long waiting period give a satisfactory veneer of peaceful domesticity to a sequence of defeat, bereavement, and rape' (p. 205).

To Washington, the law is unambiguously about rape. Other readings are 'masculinist', and Washington charges them with favoring the soldier's perspective.

Yet despite this clear language and the interpretative focus on gender as a 'discursive product', Washington locates the legal meaning of Deut. 21:10-14 primarily within the ancient text. The law is the agent, and so Washington writes: 'By authorizing the violent seizure of women, this law takes the male-against female predation of warfare out of the battlefield and brings it to the home'. The law creates the meaning as if it advanced male violence in the home, ignored the women's perspective, authorised androcentric bias, and were not the basis for a reader's opposition to androcentric policy. In other words, Washington succumbs to an empiricist-scientific epistemology in which the reader is not in charge when Washington addresses the particularities of Deut. 21:10-14. Nevertheless, Washington's reading is a rare example for exposing androcentric bias in other readings, recognising the need for writing from a woman's perspective, and illustrating the potential for multiple meaning in biblical law. In contrast to other interpretations, Washington does not promote Deut. 21:10-14 as a marriage law and uses the contemporary term of rape. He claims postmodern assumptions even though he falls back to empiricist-scientific convictions. His reading thus struggles with the epistemological imbalance prevalent in interpretations of the ancient rape legislation.

2. THE DEATH PENALTY FOR ADULTERY? THE LEGISLATION IN DEUTERONOMY 22:22-29

The epistemological imbalance also appears in studies on another set of legislation found in Deut. 22:22-29. The debate about the meaning of these laws is contested, but most scholarly interpreters search for authorial intent and distance themselves from characterising these laws as rape legislation. Reconstructing the views of the ancient legislators, interpreters rely on androcentric assumptions that, according to them, prevailed in those days. The legal meaning that they reconstruct emerges as undisputed and fixed. Deut. 22:22-29 contains four rulings that modern-scientific interpreters often characterise as cases on adultery. The verses are part of a larger section on – what interpreters call – 'family and sex laws' (Rofé 1987, pp. 131-159), 'Marital and Sexual Misconduct' (Tigay 1996, p. 204; Christensen 2002, p. 510), 'Miscellaneous Laws, relating chiefly to Civil and Domestic Life' (Driver 1965, p. 244), or 'a subset of the general law of adultery preceding them in Deut. 22:22' (Washington 1998, p. 208). In the history of interpretation the four rulings are rarely, if ever, regarded as rape legislation.

The first case appears in v. 22. There a man and a wife of another man receive the death penalty after they are found 'lying' together. The question is if their 'lying' was consensual, an ambiguity that the literature does not emphasise. Many interpreters assume that the law addresses consensual sex, and thus they characterise it as a rule on adultery. For instance, Jeffrey H. Tigay entitles his interpretation on the law as 'Adultery with a Married Woman' (Tigay 1996, p. 206). He relates the law to a ritual procedure, described in Num. 5:11-31, when a husband suspects his wife's adultery. Tigay also relates the Deuteronomic law to Lev. 20:10 which orders capital punishment for adulterous behavior. Similarly, another interpreter, Tikva Frymer Kensky, follows Tigay's lead and characterises Deut. 22:22 as a law against adultery (Frymer-Kensky 1998, p. 63; Engelmann 1999, p. 73; Anderson 2004, pp. 43-44).

Yet the situation is not that simple. The prose in Deut. 22:22 is terse and does not provide conclusive information on the precise nature of the relationship between the man and the woman. The law focuses on the punishment and not on the description of the crime; it does not specify if the 'lying' is consensual or forced, and it elaborates only on the consequences of him lying with her. Did the woman consent? It is possible to conjecture that the man threatened or forced her, but the focus is on the penalty. Both the woman and the man are to be killed. Why do both receive the penalty? Most interpreters believe that the punishment indicates the guilt of the woman. To them, she consented and receives the appropriate penalty as an adulterer. It is, however, possible to argue that the penalty does not indicate her guilt but rather androcentric jealousy, which blames the woman whether or not she consented.

A comparison with ancient Near Eastern laws in cases of assumed adultery shows that sex between a man and a married woman does not always merit the death penalty. Several laws prescribe a range of penalties, leaving it to the husband to determine the severity of the penality. For instance, Middle Assyrian Law 15 stipulates:

> 15. If a seignior has caught a(nother) seignior with his wife, when they have prosecuted him (and) convicted him, they shall put both of them to death, with no liability attaching to him. If, upon catching (him), he has brought him either into the presence of the king or into the presence of the judges, when they have prosecuted him (and) convicted him, if the woman's husband puts his wife to death, he shall also put the seignior to death, but if he cuts off his wife's nose, he shall turn the seignior into a eunuch and they shall mutilate his whole face. However, if he let his wife go free, they shall let the seignior go free (Pritchard 1969, p. 181).[9]

Like the Deuteronomic law, this law focuses only on the moment when a husband finds his wife with another man. The emphasis is on the post-discovery phase. Similarly, MAL 15 does not specify the nature of the crime or the consent of the woman. Yet unlike the biblical parallel, MAL 15 authorises the husband to determine the form of the penalty ranging from the death penalty for both, cutting off the woman's nose and the other man's testicles, or no penalty at all.

A similar case appears in §129 of the Code of Hammurabi which also contains various penalty options that range from drowning to leniency. It, too, emphasises the post-discovery phase and does not detail whether the woman consented. The scholarly literature classifies this law as one on adultery although it does not name the actual crime.

> 129. If the wife of a seignior has been caught while lying with another man, they shall bind them and throw them into the water. If the husband of the woman wishes to spare his wife, then the king in turn may spare his subject (Pritchard 1969, p. 171).

Again the emphasis is on the penalties, and the law offers the husband the option to spare his wife and consequently the other man. In other words, ancient Near Eastern laws do not exclusively prescribe the death penalty for cases that scholars usually view as laws on adultery. Unlike Deut. 22:22, they offer several penalty options. The biblical law is therefore more limited and orders much harsher punishment than comparable ancient Near Eastern laws.[10] Yet none of the biblical