Translation of excerpts from Angelo Tosato, *Il Matrimonio Israelitico*, Rome: Biblical Institute Press, 1982, Chapter VI: "On the Matrimonial Procedure"

2. The first phase of the matrimonial procedure: the "espousals"

The Israelite matrimonial procedure is divided normally into two phases: a first, initiating one and a second, completing one.

The first, initiating phase of the marriage takes places when a man (and/or, if necessary, the one who has power over him, or who acts for him) presents himself in the house of the desired bride to ask for her as his wife (from the one who has power over her, or from the woman herself, if she be *sui iuris* [in her own power]) and, having her consent, concludes the matrimonial agreement (draws up the contract).

This phase is designated by Rabbinic Judaism with proper terms: both with *qîddûšîn* (= "sanctification", "consecration") and with *'ērûsîn*. This second term is in harmony with the linguistic usages of the Old Testament, which, precisely to make reference to this first phase of marriage, have recourse above all to the verb *'rś* (in the piel and in the pual [Hebrew grammatical forms]). In Italian, and similarly in the other modern languages, an exact corresponding term is lacking. This is not surprising, given that our juridical arrangements lack the marked distinction between the two phases of which marriage in Israel is composed. The less inadequate term—one has to give one—seems anyway that of "espousals" [*sposalizio*] (and the corresponding terms: "wedding", "épousailles", "Verheiratung"); not that of "engagement" [*fidanzamento*] (and the corresponding terms: "betrothal", "fiançailles", "Verlobung"). For, although it is the first and initiating phase, and therefore in necessary relation with a second and completing one, this phase still plays an essential function in the establishment of the marriage bond [*coniugio*]. For, even if a man took possession of a woman, making her a prisoner and reducing her to slavery, even if a man has been joined carnally to a woman and engages in a sexual relationship with her—following on and dependent on these facts alone there is not yet a marriage bond between these two, as long, that is, as the conclusion of the matrimonial agreement does not intervene. And, on the other hand, it is already from the conclusion of the matrimonial agreement—and not from the successive nuptial celebrations, nor, even less, from the subsequent cohabitation of the two—that a man "espouses" (*'rś*) a woman. He "espouses" her in the sense that he takes this woman to himself juridically as his wife, that he establishes her juridically as his wife.

Let us read the biblical texts. "Is there someone who has espoused (*'rś*) a woman, and has not yet taken her?", begins a norm of the Deuteronomic code, ordering that, in such a case, he should be exonerated from military service. The motive is also adduced: "Lest he should have to die in battle, and another take her (for his wife)."[1] The fact of having "espoused" a woman brings with it the acquisition of a right to "take her." A right which the law itself recognizes and protects, so much so that it goes to the point of establishing that this has to prevail in case it should find itself in conflict with other civic duties. In the narration about the beginnings of the Davidic dynasty one reads: "David sent messengers to Ishbaal, son of Saul, saying: Hand over to me my wife Mikal, whom I espoused to me (*'eraśtî lî*) for one hundred foreskins of Philistines."[2] The fact of having "espoused" (*'rś*) Mikal to himself is recalled by David as the foundation of his legitimate right over this woman. Correspondingly, the legislative language distinguishes between "a virgin who is not espoused" (*b^{e}tûlâ ^{a}šer lō' 'ōrāśâ*) and an

[1] Dt 20:7; Dt 22: 23, 25, 27
[2] 2 Sm 3:14

"espoused young woman" (*na'ᵃrā meᵉ'ōrāśâ*).[3] Their juridical situation proves to be rather different. In case of seduction, the first acquires a right to be espoused by the seducer; the second, on the other hand, is considered (as an adulteress) liable to death along with her seducer.

With the "espousals", then, some of the fundamental rights and duties of marriage come into being for the "spouses": for the "groom", that of beginning, at its proper time, cohabitation with the woman whom he has "espoused"; for the "bride", that of fidelity to the man who has "espoused" her. So much is this the case that for the *meᵉ'ōrāśâ*, "bride", the qualification of *'iššâ*, "wife", is already appropriate. At the end of the seven years of service, agreed to as *mōhar* [dowry], "Jacob said to Laban: hand over (to me) my wife, because my days are completed, and I will be joined to her." "My wife" (*'et-'ištî*), he says, referring evidently to her whom he considers as his legitimate wife, now that the conditions of the matrimonial contract, drawn up at its proper time, have been satisfied.[4] No differently, David calls Mikal "my wife" (*'et-'ištî*), considering her as such from the moment in which he furnished the foreskins of the kind and number fixed as the bridal condition.[5] In the Deuteronomic law, the death penalty is fixed for him who has been joined "with a virgin espoused (*me'ōrāśâ*) to a man". The motivation is the following: "Because he has dishonored the wife (*'et-'ēšet*) of his neighbor."[6]

Therefore, it turns out in fact that there exists a first, distinct phase in the matrimonial procedure; that it has a fundamentally juridical nature (in the sense that it produces a modification of the rights and duties of the contracting parties); that it plays an essential function in the establishment of the marriage bond; that it is appropriately designated with the term "espousals". These are important results. From them comes the appropriateness of analyzing more in detail, especially under the juridic aspect, this first decisive phase. In particular, it can be interesting to come to know better: a) what is the act which concretely begins this first phase; b) who are the parties in this procedure; c) what is the object (or the objects) about which the parties treat and on which the parties agree; d) what is the form in which the matrimonial agreement is drawn up; e) what is the specific nature of the procedure.

A. *The beginning of the procedure*. The act which concretely begins the first phase of the marriage is the formal request to have this woman as a wife, a request brought forward on the part of the interested person (and/or the one who acts for him) in the house of the woman desired as a bride. This request opens a negotiation, it tends towards an agreement. To have Dina as a wife, Shechem and his father Hamor go to ask for her in the home of Jacob and his sons.[7] To obtain as a wife the beloved Philistine, Samson goes down to Timna with his parents.[8] To find a wife suitable for Isaac, Abraham's steward goes to Aram-Naharaim, and in the house of Bethuel he asks for Rebecca for the son of his master.[9] David sends his messengers to Abigail, widow of Nabal, to have her as a wife.[10] And so on.

Before the request for marriage is brought forward, a whole series of acts has certainly taken place, which have led to the decision to take this one as a wife. These are acts that are subjectively determining, but objectively irrelevant; I mean in relation to the establishment of the marriage bond, which is the *obiectum* [object] of the procedure in question. The procedure under discussion gets under way only when it passes beyond the sphere of the

[3] Dt 22: 28; Dt 22: 23, 25, 27
[4] Gen 29:21
[5] 2 Sm 3: 14; 1 Sm 18: 25-27
[6] Dt 22:24
[7] Gn 34
[8] Jdg 14
[9] Gn 24
[10] 1 Sm 25

subjective or the inter-subjective and crosses the threshold of the objective (social-juridical). This is verified precisely in bringing forward the specific request for marriage, which, precisely because of its important function, is, so to speak, solemnized with a thoroughly public and official character.

It is not by chance that at the beginning of the procedure for the establishment of the marriage bond one finds a formal act. As we will have occasion to see by and by under various aspects, marriage, while directly regarding two individuals, a man and a woman, actually involves two families, or rather, entire social groups, even the entire community to which the two belong. The reference to this intrinsic connection of the individual and the social, of the private and the public, in marriage, is intended here only to clarify that it is in the very nature of the institution of marriage to demand that the procedure be placed on the public and official level. It seems to me that one could say: there is no drawing up of the matrimonial agreement without a formal request.

*** [skipping "B. *The parties in the procedure*"]
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C. *The object of the negotiation*. It is necessary above all to distinguish between essential objects and accessory objects of the matrimonial negotiation and agreement. In the first category are included those contractual provisions which constitute the structure of the matrimonial agreement, on whose presence, therefore, whether explicit or implicit, depends the very coming to be of the marriage. In the second category are included those contractual provisions which the parties may want added and inserted in the matrimonial contract; from whose presence, therefore, juridical effects certainly arise, but by whose absence the matrimonial contract is not invalidated in the least. Here we leave aside the investigation of the cases of the possible accessory objects, of which the sources (in particular the Elephantine Papyri) nonetheless give us rich glimpses. It should suffice to know of their existence and their capacity to occur. We, on the other hand, are dealing (in a partial way) with the essential objects. Among them, too, it is necessary to distinguish. There are: a) a primary object, related to the personal status; b) a secondary object, related to the control of the patrimony.

a) *The personal status*. The *primary* essential object is related to the personal status of the two spouses. This consists on one side in the "giving", on the other side in the "taking" of this woman as a wife to this man. The object about which one negotiates and draws up the contract is that this man and this woman become reciprocally husband and wife. As has already been seen above on a broad scale with the principal linguistic expressions related to marriage, and as will be seen again below on a reduced scale with the actual formulas of the drafting of the agreement, the whole complex procedure for the establishment of the marriage, considered in its totality as well as merely in its first and initiating phase of the "espousals", tends essentially and principally to the realization of this effect. This appears very evidently. But it is necessary to realize, in addition to its existence, also the effective juridic significance of this agreement to give and take this woman as a wife to this man, of this becoming wife and husband on the part of a woman and a man. This implies understanding what was the juridic state of the wife and the husband in Israel. Chapter IX is dedicated above all to this understanding. It seems opportune, however, in order to give concreteness of content to the object of the matrimonial agreement, to anticipate already here, even in summary terms, the most striking elements among those which characterize becoming husband and wife in and through the espousals. These are the following. (a^1) The commitment to give this woman as a wife brings with it, on the part of the one who has power over

her (supposing that there is such a one), the obligation to recognize his own power over the bride as extinct, and the power of the groom over the bride as now existing; the obligation, furthermore, to make the cohabitation of the spouses begin at the established time. On the part of the bride, the commitment is to recognize herself no longer as subject to the power of her father or of the one who acts for him (supposing that it is still exercised over her), but rather as subject now to the power of her groom. This should be understood in the sense that the bride, for the present, while remaining still, and until the time of the nuptials, as if in custody in her father's house, is already obliged to belong exclusively and in a stable manner to her groom. Exclusively: this belonging precludes the faculty to have sexual relations with third parties; stably: in itself this belonging knows no limits of time. Furthermore, for the future, more or less immediate according to the agreements, the bride commits herself to begin cohabitation with her groom, for a communion of life. (a^2) The commitment to take this woman for a wife brings with it, on the part of the one having power over the groom (supposing that there is such a one), the obligation to recognize him as no longer subject to that one's power, and now as head of the family to be established*. On the part of the groom, the commitment is to recognize himself as no longer subject to the power of his father (or of the one who acts for him; and supposing such power exists), but rather now as head of the family to be established. This should be understood in the sense that the groom, for the present, while not yet taking possession of the bride, already is assured of her belonging exclusively and in a stable manner to him. For the future, then, more or less immediate according to the agreements, the groom is committed to begin cohabitation with the bride for a communion of life.

***[skipping "b) *The control of the patrimony*"]
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D. *The form of the agreement.* We are not well informed about the form in which the matrimonial agreement was drawn up. We can, however, suppose, on the basis of the very nature of the object of the matrimonial agreement, that it represents the constitutive element of the espousals, and that there are at least two indispensable characteristics of it: its solemnity and its public nature. This is so apart from its individual concretizations in time and space. I think here above all of the demands of form imposed by the primary object, in particular by the desired juridic reservation of the bride to belong exclusively to the groom. For this purpose, it is absolutely necessary that the existence of the juridic act carried out by the spouses should appear unequivocal to the social environment in which they live; and, on the other hand, it is necessary that the recognition of the juridic efficacy of their act should appear certain to them.

The written document of the matrimonial contract is demonstrated in use at the end of the 5th century B.C., in the Israelite colony of Elephantine. The book of Tobit speaks of its being drawn up, around 200 B.C.[11] For the preceding period, in Palestine, there are no testimonies. But it does not seem rash to think that the written document could have been used in Judea before the Babylonian exile, arguing from the fact that at that time a written document was used for divorce. In any case, it seems that such a document should be attributed a probative value, not a constitutive one. That is, it would always refer back to a non-written form of stipulation (which *is* constitutive), done with the carrying out of symbolic gestures and/or with the juridically effective enunciation of solemn words, in the presence of witnesses. But we know in fact very little about all this, and that little in an indirect way. As far as the symbolic gestures, there is only one fleeting indication, that of covering with one's own mantle, done by the groom towards the

[11] Tob 7:12-14

bride.[12] As far as the solemn words, we have some more indications. It seems to be understood, that is, that the establishment of the espousals is carried out by means of an appropriate bilateral declaration of will, more concretely with the enunciation of a double formula, of the type: "You are my wife", said by the husband, and "You are my husband", said by the wife. It should be thought that this would have happened at the very act of the espousals (and not of the "nuptials"), in the house of the bride. There would probably not be lacking, furthermore, a formula and/or a gesture suitable to express, with juridic efficacy, the reciprocal approval regarding the regulation of the patrimony.

E. *The juridic nature of the agreement*. There should not be any doubts, after what has been written up to this point, about the juridic nature of this first phase of the matrimonial procedure. There remains now only to summarize and to underline that which seems most important. It is the intention of the contracting parties, who participate in the negotiation and arrive at the matrimonial agreement, to bring about the "taking of a woman" not just in any manner, but rather in the entirely special manner which brings the "taken" woman into the juridic state of "wife" and the "taking" man into the juridic state of "husband", both with a new, adequate patrimonial arrangement of their own. They intend, therefore, to carry out an act with multiple juridic effects. The juridic ordering recognizes, regulates, and safeguards this subjective interest, guaranteeing for its part that the act duly carried out is really productive of its juridic effects. It carries this out with the whole ensemble of regulations, of custom and of law, which hitherto we have only glimpsed, but which we will have occasion, going forward, to see still better. To give an example: to safeguard the personal rights of the groom/husband over the bride/wife, the juridic ordering recognizes the crime of "adultery". The espousal is therefore a true and proper juridic transaction, which creates rights and obligations.

It was seen above that this represents, in the complex matrimonial procedure, the first, necessary phase. We can specify here that this necessity of the espousals, now better understood as a juridic transaction, should be regarded as characteristic of "taking a woman" in marriage. Certainly, one can come to possess a woman as one's slave by means of the drawing up of an agreement, with a contract of buying and selling made with the current master. But it is not necessary to arrive at this by this way. One can obtain a woman as one's slave also in war, with the sword. One can obtain her also with her birth from one's own slave; etc. Likewise, one can come to use a woman as a prostitute by means of the drawing up of an agreement, however informal it might be. But it is not necessary to arrive at this by this way. One can obtain the desired union also with violence, or with flattery; or one can even undergo a union in a stupor brought about by wine. On the other hand, one cannot take a woman as a wife without the previous drawing up of the matrimonial agreement. Without espousals (without matrimonial contract), no marriage and no marriage bond. One can draw from this a conclusion which is obvious, but no less important for that reason: marriage, at least Israelite marriage, is an essentially juridic institution. Beyond the juridic sphere it simply does not exist.

3. The second phase of the matrimonial procedure: the "nuptials"

We come now briefly to the second and concluding phase of the matrimonial procedure. This takes place when, the established time having come, full execution is given to the matrimonial agreement, drawn up previously by the parties. It is the moment of the nuptial ceremonies and festivities, to which are

[12] Cf Ez 16:8; Ruth 3:9

connected: the departure of the bride from her father's house, accompanied by the blessing of the father; the leading of the bride into the house of the groom; the beginning of cohabitation. We can designate this second moment with the name of "nuptials", in order to better distinguish it from the first which we have designated with "espousals".

Compared to the first moment, which bears a foundational function, this second moment bears a completing function. Nothing new is now stipulated with the nuptials. There is only the carrying out of the commitments undertaken with the espousals. It is true that this simple carrying out also has its own juridic relevance, however small. It can be said that now, with it, the marriage is completely concluded and the marriage bond is fully placed in being.

The groom, with the nuptials, "takes possession, dominion" (*b^{e}l*) of his bride, in the sense that he now begins to exercise fully towards her his powers (but also his duties) as a husband. He is a man who, now also in fact, possesses a wife; a man who is now, also in fact, "wived" (*ba'al 'iššâ*). And she is a woman who, now also in fact, belongs to the husband; a woman who is now, also in fact, "husbanded" (*b^{e}ūlat ba'al*).[13]

[13] [Translator's note] The terms "wived" and "husbanded" are used here to translate the Italian *ammogliato* and *maritata*, both of which can also be translated simply as "married". However, the translation "married" would obscure the fact that in Italian the two words are clearly related to the words *moglie* ("wife") and *marito* ("husband"). Furthermore, as the author has shown, the man and woman are already juridically "married" from the time of the espousals: the point being made here is that after the nuptials the spouses begin *de facto* to exercise the rights and duties of husband and wife which they already assumed at the espousals.