

ORPHANS AND AFFIRMATIVE ACTION

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The Torah commands us to treat orphans with special care, leading to an important halakhic question: Who is an orphan? The answer has, I believe, an important ethical message that still resonates today.

IN SEARCH OF A DEFINITION

We are prohibited from causing harm to a widow or orphan even more than others: *You shall not afflict any widow or orphan. If you afflict them in any way – for if they cry at all to Me, I will surely hear their cry . . .* (Ex. 22:22-23). There are repeated warnings in the Torah to treat orphans justly, *You shall not subvert the rights of the stranger or the orphan* (Deut. 24:17), *Cursed be he who subverts the rights of the stranger, the orphan, and the widow* (Deut. 27:19).

These verses imply that orphans should receive the same treatment as everybody else, and that God will hear their cry if they are wronged. However, we find in halakhic literature that while we should treat every individual with care, widows and orphans receive preferential treatment. For example, if two cases come before a court at the same time, the orphan's case goes first (*Shulhan Arukh, Hoshen Mishpat* 15:2). Additionally, an orphan, or his trustee, may charge rabbinically prohibited interest (*Shulhan Arukh, Yoreh De'ah* 160:18). Effectively, the rabbis mandate affirmative action for orphans. In order to properly apply these rules, we must define the category of an orphan.

How are we to define the term "orphan"? Perhaps anyone who loses a parent is considered an orphan. The pain of losing a parent leaves a permanent scar, even for an adult whose parent passes away. But if this is the case, nearly everyone becomes an orphan eventually (except those who sadly predecease both parents). This would create a system of preferential treatment for the older generation and effectively undermine rabbinic prohibitions of charging interest. One might argue that this is indeed the intention of the laws, but it seems farfetched. It seems more likely that only a small minority

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of people ever fall into the category of orphans that receives preferential treatment.

THE FIRST DEFINITION

Rambam (*Mishneh Torah, Hilkhot Deiot* 6:10) sets down what seems to be the earliest definition of an orphan. He writes that a child who loses a mother or father is classified as an orphan until he no longer needs an adult to take care of him but can take care of himself like other adults. With this, Rambam limits orphanhood to children. Similarly, Rambam writes elsewhere (*ibid., Hilkhot Nahalot* 7:5) that a court only appoints a trustee (*apotropus*) for a child orphan, not an adult. Note that Rambam includes the phrase “like other adults.” No one is completely self-sufficient; everyone needs help from friends and family. An orphan is mainstreamed when he becomes as self-sufficient as his peers.

Characteristically, Rambam provides no sources for his rulings. The second ruling about appointing a trustee is explicit in the TB *Bava Metzia* 39a. However, the earlier and more detailed definition confounded commentators for centuries until its source was conclusively identified in the early twentieth century, which I will delineate below.

Other authorities adopted Rambam’s definition. *Sefer Ha-Hinukh* (65) paraphrases the Rambam’s definition: “Until they do not need an adult in their matters but take care of all their own needs like other adults.” Similarly, among Ashkenazim, R. Moshe of Coucy (*Semag*, prohibition 8) paraphrases Rambam’s definition, as does Rabbenu Peretz in his glosses to *Semak* (87). These post-Maimonidean scholars could have known Rambam’s source or they may have accepted his definition on his substantive authority. Alternatively, perhaps they found the definition intuitively compelling.

R. Yisrael Isserlein (*Terumat Ha-Deshen* 1:300) addressed a case of the converse situation. Is someone who cannot manage his own affairs and whose parents will not help him considered an orphan even if his parents are still alive? A young married couple received dowries and the groom was then cut off by his parents. However, the groom was incapable of managing his own affairs. The bride’s father asked whether he could establish for them a fund that lends money with rabbinically prohibited interest, since the groom was effectively an orphan. R. Isserlein replied that since the groom’s father is

alive, the groom cannot be considered an orphan. Youth, lack of parental support and inability to manage, define the limits of orphanhood but do not constitute an independent definition to have someone be considered an orphan.

MODERN DEFINITIONS

Rambam's definition was effectively codified in *Magen Avraham* (156:2) and was subsequently quoted by *Mishnah Berurah* (156:4). Similarly, R. Meir Eisenstadt (Maharam Esh, in *Panim Me'erot* 1:37 sv. *ve-tzarikh*) writes that a self-sufficient adult, or a married woman whose husband provides for her, is no longer considered an orphan.

However, a slight modification of the definition was offered by an important Turkish authority. R. Binyamin Pontrimoli (*Responsa Shevet Binyamin*, no. 229, last paragraph) points out that an orphan is allowed to independently sell the land he inherits when he reaches the age of twenty. He suggests that this is a general definition of an orphan: The status ends at the age of twenty. R. Pontrimoli's grandson and namesake rules likewise in his *Petaḥ Ha-Devir* commentary on *Shulḥan Arukh* (156:5). R. Yaakov Chaim Sofer of Baghdad (*Kaf Ha-Hayyim* 156:14) quotes the *Petaḥ Ha-Devir* approvingly.

I have found that these two definitions are quoted by contemporary authorities in conjunction.¹ To qualify halakhically as an orphan, an individual must have lost one parent, must be incapable of managing his own affairs like other adults, and must be younger than twenty.

THE SOURCE

In 1905, R. David Tzvi Hoffmann published an annotated edition of the long-lost *Mekhilta De-Rashbi*. R. Hoffmann points out in a footnote that a comment of this ancient midrash seems to be Rambam's elusive source for his definition of an orphan (Ex. 22:21, p. 150 n. 70). The *Mekhilta De-Rashbi* asks: "Until when are they called orphans? Until they can stand on their own." This implies financial self-sufficiency, as Rambam and subsequent authorities ruled.

In his *Avodat Ha-Melekh* commentary (*Deiot* 6:10), R. Menachem Krakowski agrees with R. Hoffmann and adds that a similar statement appears

in *Tanna De-Vei Eliyahu Rabba* (ch. 27, p. 143 in the Ish-Shalom edition). The midrash refers to orphans in their times (*yetomim bi-zmanan*), implying that the status is limited by age or phase of life. Subsequent commentaries accept these sources, including R. Yosef Kafach's edition (ad loc., n. 59) and R. Nachum Rabinovich's *Yad Peshutah* (ad loc.). R. Menachem Kasher (*Ha-Rambam Ve-Ha-Mekhilta De-Rashbi*, pp. 160-161) also agrees that the *Mekhilta De-Rashbi* is Rambam's source.

IMPLICATIONS

This limited definition of an orphan has profound implications. Life is full of challenges. If we offer preferential treatment to everyone who has suffered setbacks or encountered difficult or even traumatic circumstances then the preference would be nullified by abundance. As many have pointed out, if everyone is special, no one is special. A child separated from his parent or whose parent is unable to raise or assist him is not an orphan but still must overcome difficult challenges. Why doesn't he receive preferential treatment? The Torah reserves this treatment for the unique, tragic case of an orphan. Everyone else receives our sympathy and encouragement, as well as our charity and support, but not preferential treatment.

Additionally, and perhaps important for contemporary discussion of affirmative action, adults must take responsibility for their situations. The disadvantages and setbacks of our upbringing do not entitle us to perpetual special treatment. Even those who seem to come from charmed backgrounds carry emotional baggage. Children, in general, need guidance and support, and therefore orphaned children receive preferential treatment. Adults, regardless of being orphans or not, need to take control of their lives. While we must deal with every individual sensitively, we have no Torah-based affirmative action for adults.²

NOTES

1. See, for example, R. Simcha Rabinowitz, *Piskei Teshuvot* 156:11 and R. Yitzchak Ya'akov Fuchs, *Halikhot Bein Adam Le-Chaveiro*, 18:11.

2. At least for adult men. Widows are in a different category because they lost their caregiver.