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The institution of betrothal in the early rabbinical literature

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THE INSTITUTION OF BETROTHAL IN THE EARLY RABBINICAL LITERATURE

BY

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ABSTRACT

This study is a detailed examination of the institution of betrothal in the early rabbinical literature. The primary sources for the study include the Mishnah, the Tosefta and the Babylonian Talmud. Part One of the thesis examines the procedural elements of betrothal: how a valid betrothal is contracted; the relative powers in that process of the three primary participants (the woman, her father and the man doing the betrothing); the significance of the betrothal; invalidating and terminating the betrothal. Part Two examines the rights and obligations which are associated with the betrothal period, especially in regard to the woman. The issues include: the levirate obligation; adultery; vows; the right to eat the priestly Heave-offering; and, the marriage contract. The primary aim of the study is to determine the status and rights of the woman who is betrothed and to assess the relative authority of the institution of betrothal.

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ABBREVIATIONS

Bek:	Bekhorot (First Born) from the Order KODASHIM (Holy Things)
C.H.	Code of Hammurabi
Cowley, A.P.	Cowley, A., Aramaic Papyri of the Fifth Century B.C., Clarendon Press, Oxford, 1923
Gitt	Gittin, the 6th tractate in the Sefer Nashim, the Order of Women
HMLW	Neusner, J., A History of the Mishnaic Law of Women, Vols.1, 3 & 4, EJ Brill, Leiden, 1980
Ket	Ketubah, the 2nd tractate in the Sefer Nashim, the Order of Women
Kidd	Kiddushin, the 7th tractate in the Sefer Nashim, the Order of Women
Kraeling, B	Kraeling, E., The Brooklyn Museum Aramaic Papyri, Yale University Press, New Haven, 1953
M	Mishnah
Ned	Nedarim, the 3rd tractate in the Sefer Nashim, the Order of Women
Sanh	Sanhedrin, from the order NEZIKIN, (Damages)
Son.Tal.	Soncino Talmud: Nashim Volumes 1-4, I. Epstein (Ed.), The Soncino Press, London, 1938
Sot	Sotah, the 5th tractate in the Sefer Nashim, the Order of Women
T	Tosefta
Yeb	Yebamot, the 1st tractate in the Sefer Nashim, the Order of Women

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INTRODUCTION

The institution of marriage has always played a central and significant role in the life of Judaism. From the earliest period in the history of the Hebrew people, marriage acted as a binding force between families as well as individuals. The marital relationship was understood to provide the primary means for satisfying the human need for intimacy and companionship. But more than this, the institution of marriage supplied the legal setting in which procreation could occur. The need for a man to have children, especially sons, who would bear his name and inherit his property was compelling. Likewise, the greatest honour for a woman was to marry and bear children for her husband. One cannot adequately understand the nature of the Jewish marital institution without an appreciation of the deep-seated desire to produce an heir and the priority given to the issue of succession.

These motives for marriage are, of course, not peculiar to the Jewish people. Nevertheless, each and every culture, including Judaism, develops its own particular traditions and regulations governing the form and focus of its marital institution. Like many other cultures, the Israelite-Jewish tradition recognized two stages in the act of marriage: betrothal (**erusin**) and nuptials (**nissu'in**). These two stages are evident in the Hebrew Bible (Tanakh) and are found again in the later

rabbinical literature. Much of the modern study of Jewish marriage deals with the theoretical (i.e. Biblical) basis of marriage, the nature of the husband-wife relationship, role divisions and the process whereby the marital union is dissolved. Relatively little scholarly research has focussed on betrothal which, in the rabbinical literature, is regarded as a distinct legal institution which conferred upon the betrothed couple a peculiar status relative to each other and to society generally. The state of betrothal was also attended by certain rights, obligations and privileges. In particular, betrothal affected the rights and status of the woman, even though to a considerable extent she was a passive participant in the entire process. Throughout the rabbinical literature are recorded the debates and discussions by the early Rabbis who attempted to delineate the peculiar legal position of the **arusah**, the betrothed woman.

The term 'rabbinical literature' refers to the primary legal texts which provide the laws, instructions and regulations which are to govern and guide the Jewish community. The earliest of these texts is the Mishnah ('repetitions') which is a brief, succinct codification of the most significant rulings up to about 200 C.E. Soon after the Mishnah was created, a collection of additional rulings was prepared in order to present those viewpoints which were partially or totally neglected by the Mishnah. This second document was the Tosefta ('additions') and

was, like the Mishnah, prepared by the Sages in Palestine. Soon after its completion, the Mishnah, and to a lesser extent the Tosefta, became the source of considerable scholarly debate both in Palestine and Babylon, the two major centres of Judaism in the early centuries of this era. Eventually these discussions and the rulings which they prompted were written down in the form of **gemara** (commentary) on the Mishnah. Together the Mishnah and **gemara** form the Talmud, the principle Jewish legal text. Two Talmuds were created, one in Palestine (mid-fourth century) and the more extensive, elaborate and detailed Babylonian Talmud, which has been by far the more influential of the two and which forms the basis of the current study. The major redaction on the Babylonian Talmud was completed around 500 C.E.

The **halakot** (accepted rulings) presented in these three documents represent the teachings of important Sages covering a period of some 600 years. In regard to the issue of marriage, the earliest ruling of significant consequence was that made by Simeon b. Shetah (c. 100 B.C.E.) concerning the **mohar** (bride-price; see Chapter One). This act and the completion of the major work on the Babylonian Talmud form the temporal boundaries of the current study (i.e. c. 100 B.C.E. to 500 C.E.). However, other significant and relevant rulings outside this time frame will also be noted.

The Talmud devotes an entire division to the issue of

women and from the topics which it chooses to discuss it is evident that the primary concern of the Sages in regards to women was marriage - its formation, course and termination through either divorce or death. Of the seven tractates which make up the **Sefer Nashim** (Order of Women), six have something significant to say regarding betrothal. These include: **Yebamot** (Sisters-in-law), **Ketubot** (Marriage Contracts), **Nedarim** (Vows), **Soṭah** (the Suspected Adulteress), **Gittin** (Writs of Divorce), and **Kiddushin** (Betrothal). It is clear from this list of titles that the Talmud's concern regarding women encompassed various aspects of marriage. According to the rabbinical way of thinking and perceiving the world, a woman acquired her self- and social-identity from her married state, from her relationship to her husband and her children. The institution of betrothal was significant partly because it initiated the woman's identity as a 'wife' and partly because the nature of the relationships between the woman and her father, and the woman and her **arus** (betrothed husband) were in a stage of transition and, therefore, potentially disruptive. The Sages endeavoured to formulate clear, precise rules in order to make the woman's transition into marriage orderly, reliable and smooth. It is with these rules, and their implications for the woman, that this study is concerned.

PART ONE: THE PROCESS OF BETROTHAL

Chapter One: THE PROCEDURE FOR EFFECTING KIDDUSHIN

As a legal institution, **erusin** was enveloped in a complex weave of rules and regulations which governed the process whereby a woman became bound to a man. The rules specified the proper procedure which had to be followed in order to effect a valid betrothal. They also defined the relative powers exercised by each of the participants in the process, including the woman, her father and the man who desired to take her in **kiddushin**. The literature, however, is not satisfied with a mere explanation of how a betrothal was to be effected. Indeed, the primary concern of the Sages was to identify the ways in which a betrothal could be impaired and invalidated, their intent being to prevent the individuals involved from becoming entangled in an illegal or doubtful relationship.

The Rabbis insisted that the betrothal process be initiated by **shiddukin**, preliminary negotiations between the man and the father of the woman whom he has chosen to marry. The most significant elements of the negotiations included the content and value of the dowry to be given by the woman's father as well as the 'additional **mohar**', the money and goods which the man pledged to give to the woman over and above the minimum 'statutory **mohar**' required of him by law.[1] The preliminary negotiations gave all the participants an opportunity to express their interest and willingness to consent to the betrothal arrangements and,

consequently, made the entire betrothal process less confusing. Indeed, **shiddukin** were regarded as having legal implications. For instance, if a **ketannah** (minor female), who had no legal powers to act on her own behalf, accepted betrothal without her father's knowledge, the betrothal was judged to be valid on the assumption that preliminary negotiations had been conducted with the father who indicated his consent at that time.[2] The later **Amoraim** (commentators on the Mishnah) became quite insistant that preliminary talks be conducted, declaring that if a man attempted to betroth a woman without **shiddukin**, he was to be flogged.[3]

Having begun the betrothal process, the tractate **Kiddushin** enumerates three methods whereby the man could actually contract the betrothal: "A woman is acquired by three means.....by money, by deed, and by sexual intercourse".[4] The usual, and most widely accepted method of betrothal was for the man to give the woman some money or some object which had monetary value. There was some dispute between Beth Shammai and Beth Hillel as to the minimum amount of money which could legally effect **kiddushin**. Beth Shammai, the more conservative school, specified a **denar** or something worth a **denar**.[5] They taught that for a woman to be betrothed with something worth less than a **denar** was derogatory to her status. They felt that some effort and sacrifice ought to be involved in the acquisition of a wife, that she ought not

to be viewed or treated as **hefker**, i.e. as property which had no owner and which was readily and easily acquired by anyone.[6] According to R. Zena: "A woman is particular about herself and will not become betrothed with less than a **denar**".[7] Resh Lakish refutes this statement in his classic pronouncement: "It is better to dwell in grief with a load than to dwell in widowhood".[8] The point of this statement is that a woman prefers an unhappy marriage to a happy single life [9] and is, therefore, willing to have even a very little.[10] For a woman to be in an unmarried state was tantamount to social disgrace, since a woman acquired her social status and identity from the man to whom she was married. The woman's identification as a 'wife' began, not with **nissu'in**, but with her betrothal which established a legally binding **kinyan** (acquisition) between the man and woman. Accordingly, it was desirable, from the woman's point of view, to make the act of betrothal as easy as possible. It was for this reason that Beth Hillel stipulated that only a **perutah**, the smallest coinage in circulation, or something worth a **perutah** was necessary to effect **erusin**.[11] The Sages were quite emphatic that something of value be given as a token of betrothal. Consequently, anything worth less that a **perutah** was not able to effect a valid **kiddushin**.[12] Nor could the woman forego the money of **kiddushin**.[13] While the value of the token need not be great, the need for some money or object to be given to the woman was a strong

and necessary obligation upon the man. He could even give a token which had been acquired through robbery or violence.[14] Further, it was necessary that the token be of some immediate value to the woman. Consequently, the man could not betroth the woman with a debt which she owed to him. Money previously lent was considered to to have passed into her possession before the time of betrothal and did not qualify as a token of **kiddushin**.[15] Likewise, a man could not betroth a woman with a pledge which must be returned and was not, therefore, of immediate benefit to her.[16] The literature also specifies a number of articles which could not be used to effect **kiddushin** since these were not actually the possession of the man and, therefore, could not be used by him for personal purposes.[17] For example, a priest could not use holy food which belonged, not to himself, but to God.[18]

It was not necessary that the money or token of **kiddushin** pass directly from the man who betroths to the woman who is betrothed. For instance, a man might say: "Take this **maneh** and be betrothed to So-and-So" and she is betrothed.[19] Or, should the woman say to a man: "Give a **maneh** to So-and-So and I shall become betrothed to you", she is betrothed, even though she herself derives no direct benefit from the money.[20] The woman presumably was able to forego the benefit she derived from the token of **kiddushin** although she could not forego the token itself.

Scripture grants the authority to effect **erusin**

exclusively to the man when it states: "when a man takes".[21] Consequently, it was necessary that the man give the money or token of betrothal to the woman and not vice versa.[22] The only exception which the Sages made to this rule was in the case of an eminent man. If a woman declared to a man of prominence: "Here is a **maneh** and I will be betrothed to you"[23], and he accepted it saying: "Be betrothed to me therewith"[24], she is betrothed.[25] The Sages permitted this case on the argument that "in return for the pleasure she derives from his accepting a gift from her she completely cedes herself".[26] The woman's pleasure was deemed to be equivalent to financial benefit.

The money or object which was given in the act of **kiddushin** was nothing more than a token, a symbolic gesture of acquisition. The practice of giving a token was introduced around the first century B.C.E. Prior to this time, betrothal could only be contracted when the man presented the **mohar** to the woman's father. During the early Tanakh period, **mohar** was not necessarily money. For instance, David obtained 100 Philistine foreskins which he presented to King Saul in order to receive his daughter Michal as his wife.[27]. Caleb promised his daughter to the man who captured the city of Kirjath-Sephar.[28] Jacob laboured for Laban in order to obtain Rachel.[29] The only Tanakh reference to a **mohar** which involved money is found in the Pentateuch which refers to the '**mohar** of virgins',[30] the sum of money which the seducer of a virgin

(**bethulah**, a young woman of marriageable age) was obliged to pay to the woman's father. This fine equalled the amount which the father would otherwise have received for his daughter if he had married her as a virgin. The '**mohar** of virgins' was, then, a compensation to the seduced woman's father for her loss of virginity. It would appear that the **mohar** payment became standardized at 50 shekels, the penalty which had to be paid in cases of rape,[31] during the late monarchical period (7th century B.C.E.). A reference to the **mohar** 600 years later in the very early rabbinical era indicates that men were having difficulty making the payment and, consequently, were growing old before they were able to contract a marriage. By this time the **ketubah** (marriage contract) was an established part of Jewish marriages. Using the **ketubah**, the Sage, Simeon b. Shetah, instituted the practice of placing a lien on the property of the husband as a pledge that the woman would receive the **mohar** payment in the event that she was widowed or divorced.[32] What this meant was that the traditional **mohar** payment, which had been the decisive element in making the betrothal legal and binding, was no longer required as a physical actuality. The actual transfer of the **mohar** from the man to the woman, or her father, was no longer necessary.[33] Instead, the **mohar** became a pledge, a promise to be fulfilled at some future date. The token of **kiddushin** was then introduced as a symbol of the **mohar**, a symbol of

acquisition and a reminder of the promise which the man makes to his **arusah.**[34] Thus the practice of giving something of value in order to legalize an act of betrothal was based on the very ancient traditon of the **mohar** and the token became a mere symbol of what had previously been a concrete and decisive transaction.

A second, but less common method of effecting **erusin** was by the use of a legal document which the man wrote out and presented to the woman whom he wished to betroth. There were no monetary requirements when a deed was employed and even the paper on which the document was written need not have been intrinsically worth a **perutah** in order for it to be valid.[35] There was, however, some debate among the Sages as to whether or not the deed need be written expressly for the sake of a specific woman. Resh Lakish presented one view when assimilated betrothal to divorce.[36] He concluded that, just as the deed of divorce (a **get**) is valid only if written expressly for the woman so the deed of **kiddushin** likewise must be written specifically for her. The practical implications of this view are presented in a Mishnah concerning the **get**. Substituting the word 'betrothal' for 'divorce' one learns how a deed could be written which was not expressly for a particular woman:

> ".....if a man was passing through the market and heard the scribes calling out, 'Such a man is divorcing such a woman of such a place', and he said, 'That is my name and that is the name of my

> wife', it is not a valid document wherewith to divorce his wife. Moreover, if he had drawn up a document wherewith to divorce his wife but he changed his mind, and a man of his city found him and said to him, 'My name is like your name and my wife's name like your wife's name', it is not a valid document wherewith to divorce his wife; moreover, if he had two wives and their names were alike and he had drawn up a document wherewith to divorce the elder, he may not therewith divorce the younger; moreover, if he said to the scribe, 'Write it so that I may divorce therewith whom I will', it is not a valid document wherewith to divorce any one."[37]

According to Resh Lakish a deed of **erusin** not written specifically for the woman for whom it is intended was not valid. The opposing view, presented anonymously in the literature, assimilated betrothal by deed to betrothal by money. Thus, just as money was not minted in order that the man could use it expressly to betroth a particular woman, so the document need not be created specifically for her.[38] This teaching was not accepted, however, and the final ruling on the question was that the deed must be written specifically for the woman for whom it was intended.[39]

An almost identical dispute arose over the question of whether the document could, or could not, be written without the knowledge of the woman. At the root of this debate is again the tendency to assimilate the **erusin** deed with the **get**. If the document was written for the sake of a particular woman but without her knowledge, is she or is she not betrothed? Raba and Rabina pronounced the betrothal valid on the ground that "just as a [deed of] divorce must be written for her sake but without her

consent [i.e. knowledge] so must [the deed of] betrothal be for her sake yet without her consent [i.e. knowledge]"[40]. R. Papa and R. Sherabia opposed this view and declared the betrothal invalid since "as in divorce the giver's [i.e. the husband's] knowledge is required, so in betrothal, the giver's [i.e. the woman who gives herself in marriage] knowledge is required".[41] A third ruling taught that the deed of **erusin** could only be written with the express knowledge and consent of both parties, and this was the accepted **halakah**.[42]

While there was some debate as to the need for the woman's consent in the writing of the deed of **erusin**, all agreed that its acceptance required the consent of either herself, if she was legally empowered to act on her own behalf, or of her father, who was the legal guardian of his minor daughters.[43] In the case of the **naᶜarah**, who had legal authority but who was still under her father's guardianship, she could accept the deed herself, but only with her father's prior consent. Alternately, her father could accept it on her behalf, but only with the prerequisite that the woman, the **naᶜarah**, had given her consent to the betrothal.[44]

The third and final means whereby a woman could be acquired in **kiddushin** was through an act of sexual intercourse (**bi'ah**). This method, however, was valid only if the man declared both to the woman herself and before witnesses that his intent in having sexual contact with

her was to effect **erusin.**[45] An unmarried man who had sexual relations with an unmarried woman not for the sake of betrothal was committing an act of wickedness and harlotry,[46] which was Pentateuchally prohibited.[47] It was, therefore, imperative that a man who genuinely intended to effect **kiddushin** with his act of intercourse make these intentions public knowledge or else it would be condemned as purely promiscuous. For this reason, two witnesses were required to verify the fact that the man had both declared his intention and been alone with the woman long enough for intercourse to have occurred. This procedure had inherent in it the potential for moral deterioration since the witnesses were more or less required to observe the act of intercourse.[48] It was because sexual contact as a means of effecting **kiddushin** bordered so closely on the line between acceptable and prohibited actions, between legality and transgression that the Rabbis severely discouraged its practice.[49] Indeed, Rab apparently punished any man who betrothed a woman by intercourse and did not accept it as a valid means of contracting **erusin.**[50]

Betrothal through sexual relations is the first of several examples in the literature of the rabbinical attitude toward issues which center around potential impurity in the relations between men and women. The Sages tended to discuss in great detail those issues which were legal but which could easily, and unwittingly, become

transgressions if the individuals involved were not careful. The concern of the Sages was to maintain the purity of the people, to lead them away from situations and relations which would cause them to transgress the Torah of YHWH. The basic function of the Talmud was to provide guidelines by which the individual and the entire Jewish community could live in purity before their God.[51]

It is almost certain that sexual intercourse did not effect betrothal in the Tanakh period. The function of cohabitation in this earlier period was to consummate the marriage while the basis of Israelite betrothal was the **mohar** payment which the man made to the woman's father.[52] Sexual contact with an unmarried woman was viewed as a transgression against the woman (and her father), if done in a context other than the consummation of marriage. The Pentateuch presents the legal ruling on this issue[53] while the narratives of the rapes of Tamar[54] and Dinah[55] reflect the law in practice. At what point between the Tanakh and rabbinical periods cohabitation became an accepted means of effecting **erusin** is not clear. But this development obviously occurred. Indeed, in the rabbinical literature it is noted that intercourse, like money, was sufficient to effect **kiddushin** but not to complete the marriage.[56] The woman was brought into a fully married state only by **huppah**, i.e. by her entry under the bridal canopy which represented a symbolic act of cohabitation.[57] The only instance in which cohabitation was able to effect **nissu'in**

was the levirate marriage in which any act of intercourse, even if by force, completed the marriage.[58]

Betrothal by cohabitation was permitted to all adult males except a High Priest who was prohibited due to the Biblical ordinance that he marry a virgin.[59] If the High Priest[60] had intercourse with a woman in order to betroth her, he thereby took away her virginity and rendered her unfit to marry him.[60]

The three methods whereby betrothal could be effected were valid only if accompanied by a declaration by the man to the woman in order to ensure that she knew precisely what his intentions were. It has already been noted that, in the case of sexual relations, the declaration was of particular importance if the act was not to be construed as mere licentiousness.[61] However, a formal declaration was also required if money or a deed were employed.[62] In all cases, the form of the declaration varied little: "Behold you are betrothed to me". The key word 'betrothed' could be substituted by other words or phrases which conveyed the same idea. For instance, the man could declare: "Behold you are 'consecrated' (or, 'a wife', or, 'an **arusah**') to me".[63] The most important consideration concerning the form of the declaration was that it have the woman as its point of reference.[64] That is, it was the new status of the woman which had to be emphasized. Hence, the declarations noted above are all valid since they center around the woman's status in relation to the

man. However, were the man to declare: "Behold I am your arus, or 'husband' or 'master'" his act of **erusin** would not be valid and the woman would be free to become betrothed to another man.[65] The Scriptural basis for this point of reference in the declaration is, 'when a man takes (a woman)'.[66] The implication of this text is that it was the man who took the woman as his wife; he did not give himself as a husband. The woman acquired her status in relation to the man and not vice versa. Both the text and the form of the declarations emphasize the active role of the man in defining the status of the woman and the corresponding passive role which the woman played.

The active role of the man is noted also in the ruling that it was essential that the man both give the money of **kiddushin** and make the declaration in order for the betrothal to be valid.[67] Should the woman give the money and declare: "Behold I am betrothed to you", no **erusin** would be effected since the woman had no legal authority to contract a betrothal.[68] Scripture gives this authority exclusively to the man when it states, 'when a man takes', and not, 'when a woman takes'.[69]

In the event that the man gave the money and the woman made the declaration, the betrothal was doubtful; that is, the woman was 'betrothed and not betrothed'.[70] In all instances of doubtful betrothal only an imperfect **kinyan** was established between the man and woman. In these cases, the bond was not strong enough to completely

forbid the woman to another man but it was sufficiently valid to require a formal divorce document, a **get**, if it was to be terminated.[71] Consequently, if another man were subsequently to betroth the woman this second betrothal would have some degree of validity but, because of the first **erusin**, it too would be imperfect. The woman was now attached to two men by two incomplete bonds. Since it was not clear which of the two men was her rightful **arus**, she was forbidden to both and had to be divorced by both.[72] Clearly, failure to follow the proper legal procedure in the process of effecting **erusin** could cause considerable complication and shroud the relationship in a veil of uncertainty. It was precisely this situation of doubt which the Sages attempted to prevent by their extensive elaboration of the **halakot**. They also wanted to provide rules and regulations for dealing with these oblique situations in order that the participants not transgress the laws of valid and proper marital relationship.

As noted above, the primary function of the declaration was to ensure that the woman was aware that the man, by his actions, intended betrothal. This knowledge was required so that the woman could give, or withhold, her consent to the **kiddushin**. Consequently, if the declaration was lacking, no legal betrothal could be contracted. The only instance in which most of the Sages permitted **erusin** without the declaration was when the

couple were involved in a discussion about their own betrothal.[73] That is, if the couple were discussing some aspect of **kiddushin** and the man handed the woman a token, but made no formal declaration, the **halakah** accepted the betrothal as valid. Only R. Judah disputed this ruling, maintaining that the man must, at all times, make an explicit declaration in order to ensure beyond any doubt that the woman understood the significance of the token being given to her.[74] All agreed that if the man and woman were not discussing **erusin**, even if they had been at some earlier point in their conversation, and the man gave a token but made no declaration of betrothal, she was not betrothed.[75] In order to ensure that the declaration was in fact made, the Sages required that two witnesses be present at the time the betrothal was contracted.[76]

The woman's consent to the betrothal was a fundamental and primary requirement for the formation of a valid **kiddushin** and represented her most significant role in the betrothal process. The significance of the woman's consent is noted in the form of the Mishnah which states that 'a woman is acquired in three ways.....'.[77] The form is noteworthy because it reverses the usual expression 'a man betroths a woman',[78] in which the stress is on the man's activity in the acquisition of a wife. Here the emphasis is on the woman because the Mishnah wishes to make the point that a woman could not be acquired without her full consent.[79]

If the woman consented to the betrothal she had to indicate her approval by a clear, verbal statement of affirmation; she had to say a decisive 'yes'.[80] In this instance, silence was a sign that she did not consent.[81] The only situation in which silence was accepted as consent was that in which the couple had been discussing their betrothal when the man handed her the token and made the declaration.[82] The woman could show clear signs of refusal by throwing the money or token into a fire or the sea so that it was lost, or simply throw it on the ground before the man.[83] Such aggressive action was interpreted by the Sages only as an act of refusal and the woman was not held liable to replace the lost money or article.[84] She could, of course, express her refusal by saying 'no' to the proposal.[85] Irrespective of the manner in which she showed her refusal, the consequences were the same - no betrothal was effected.[86]

The consent of the woman was imperative in all cases of betrothal. Even a Jewish girl (a minor) who had been sold as a handmaiden by her father to a Jewish man was required to give her consent if her master designated her for marriage to either himself or his son.[87] In this case, the money used to purchase the girl was used as the money of **kiddushin** since her father was entitled to both.[88]

While the consent of both parties to the betrothal was of essential significance, the matter was not so

simple and clear-cut as it would appear from this discussion. The issue of consent was complicated by the age and legal status of the woman involved and cannot adequately be examined without reference to her father. In the following chapter the issue of consent will be discussed further in the context of the relative powers exercised by the woman and her father during the betrothal process.

NOTES

1. see for example, Gen.24.32ff;29.15ff;34.1ff; Josh.15.16ff; Judg.1.12ff; I Sam.18.17ff; Ket 102a; Cohen, 1966, 282; Mace, 1953, 24; Elman, 1967,68f; The 'statutory mohar' was 200 zuz for a virgin, 100 zuz for a non-virgin (MKet 1.2).
2. Kidd 6a,44b; Cohen, 318f
3. Kidd 12b; Yeb 52a; Son.Tal.-Yeb p.xxxii; Cohen, 318; Elman, 69
4. MKidd 1.1
5. ibid
6. Kidd 12a
7. Kidd 11a
8. Kidd 7a; Ket 75a
9. Son.Tal.-Kidd p.24,n.8; TKet 12.3; Owen, 1967,130
10. Kidd 7a; TKet 12.3
11. Kidd 11b; TKidd 2.3
12. Kidd 12a-b;46a-47a;50a-b; TKidd 4.4; Ket 73b
13. Kidd 7a; Son.Tal.-Kidd p.24.n10
14. Kidd 13a; TKidd 4.5
15. Kidd 6b,48a; TKidd 3.1
16. Kidd 8a-b,9a
17. Kidd 52b-56b; Neubauer, 1920, 152
18. Kidd 52b; Neusner, HMLW-Kidd, 1980, 236f
19. Kidd 7a
20. Kidd 6b-7a
21. Deut. 24.1
22. Kidd 4b,5b,6a,9a; TKidd 1.1
23. Kidd 7a
24. Son.Tal.-Kidd p.24,n.1
25. Kidd 7a
26. ibid
27. I Sam 18.25

28. Josh. 15.16; Judg. 1.12
29. Gen 29
30. Ex. 22.15
31. Deut. 22.29
32. Ket 82b; Initially the **ketubah** was written at the time of betrothal and the **mohar** clause came into effect immediately. The other clauses became valid only after **nissu'in**. Even after it became the custom to write the **ketubah** at the time of marriage, the statutory **mohar** clause continued to be valid from the moment **kiddushin** was effected. Thus the **arusah** who was divorced or widowed was always guaranteed the **mohar** payment. See further, Chapter Ten.
33. Friedman, 1980, 257f
34. Kidd 11b-12a;50a-b; TKidd 4.4; Ket 73b; Friedman, 1980, 206, 239,257f,284
35. Kidd 9a; TKidd 1.2
36. Kidd 9a-b,48a
37. MGitt 3.1
38. Kidd 9a-b,48a
39. Gitt 10a; Son.Tal.-Gitt p.34,n.1
40. Kidd 9b,48a; During the Tanakh and rabbinical periods it was possible for a man to divorce his wife without her consent. It was not until the Medieval era that Judaism amended this **halakah**, making the woman's consent a necessary prerequisite to the divorce (Son.Tal.-Yeb p.xix; Kidd p.35,n.2).
41. ibid
42. Kidd 9b; Ket 102b
43. Kidd 9a
44. ibid
45. TKidd 1.3; Gitt 25b
46. TKidd 1.4
47. Lev. 19.29
48. Blackman, 1963, p.451,n.5
49. ibid; Kidd 12b; Elman, 71
50. Kidd 12b; Yeb 52a; Elman, 71; Friedman, 1980, 204f
51. Neusner, 1973, 72ff; Neusner, 1975, 30ff; Elman, 66
52. Burrows, 1938, 20; Cohen, 285; Mace, 172ff
53. Deut. 22.29
54. II Sam. 13.12-14
55. Gen. 34
56. Kidd 10a-b
57. Kidd 5a,10b; Elman, 67,70,71; The history of the ceremony of **huppah** is not clear. What is evident from the literature is only that **huppah** at some point became the essential element in effecting the marriage (Son.Tal.-Kidd p.5,n.7).
58. MYeb 6.1; Kidd 13b-14a
59. Lev. 21.13
60. Kidd 10a; Son.Tal.-Kidd p.38,n.11
61. TKidd 1.3
62. Kidd 5b,9a; TKidd 1.1; Cohen, 292; The need for a declaration at the time of betrothal is a tradition

which extends back into the Tanakh period. While not a standardized formula, the basic phrasing of the declaration in this early period appears to have been, 'I shall betroth (*'araś*) you to me forever' (Hos. 2.21; Falk, 1961,147f). In the Elephantine **ketubot**, the formula was standardized, 'She is my wife and I am her husband from this day and forever' (Cowley, A.P.15, 1923; Kraeling, B-2, B-7, 1953).

63. Kidd 5b,9a; TKidd 1.1
64. Kidd 5b; Friedman (1980, 155ff) notes that the proposal formula written in the Cairo Geniza **ketubot** emphasizes the two primary aspects of the woman's marital status-her role as wife and mother. 'Be my wife and the mother of children'.
65. Kidd 5b
66. Deut. 24.5
67. Kidd 4b,5b; Neubauer, 154ff; Friedman, 1980, 148f
68. Kidd 5b; Cohen, 292
69. Deut. 24.5; Kidd 4b
70. Kidd 5b
71. Son.Tal.-Kidd p.48,n.1
72. ibid
73. Kidd 6a; TKidd 2.8
74. ibid
75. ibid
76. Kidd 19b,43a,65a-b,66a; TKidd 4.1; Ket 22b; Cohen, 287,292; Friedman, 1980, 204
77. MKidd 1.1
78. see for example, MKidd 2.1,5-10;3.5,6
79. Kidd 2a-b
80. Kidd 12b-13a
81. ibid
82. Kidd 13a
83. Kidd 8b; TKidd 2.8
84. ibid
85. Kidd 13a
86. ibid
87. Kidd 19a; A man could sell his daughter to another Jew while she was a minor, i.e. under the age of 12 years (Ex. 21.7; Ket 29a,40b; Kidd 18b). With the sale, the girl's master acquired the right to either marry her himself or permit his son to marry her (Kidd 19a). The master could not designate the girl to marry his son while the boy was a minor (less than 13 years old) but had to wait until he reached legal maturity and consented to the designation (ibid). However, if the girl herself began to show signs of physical maturity (i.e. when she grew two hairs, around the age of 12 years), she immediately acquired her freedom and was subsequently subject neither to her master or to her father (ibid; Ket 29a).
88. Kidd 11b-12a,16a,19a; Son.Tal.-Kidd p.45,n.n.7,9s

Chapter Two: THE RELATIVE POWERS OF THE PARTICIPANTS

The rabbinical literature identifies three participants in the process of betrothal: the woman being betrothed, her father, and the man doing the betrothing. While the man's role and powers were fairly straightforward, the relative powers of the woman and her father were considerably more complex. As noted previously, the primary role of the woman was to give her consent to the betrothal. However, while her consent was a very significant element in the process it was valid only if the woman had a recognized legal status. Consequently, if the woman was a **ketannah**, who had no legal powers, her consent meant nothing. Rather, she was under the control of her father and it was his consent which was required. Since women tended to marry at quite young ages, the father played a central role in the entire process of betrothal and marriage. However, his role derived not only from the age of the woman but because he held the legal right over, and responsibility for her. The authority of the father was deeply entrenched in the Jewish social structure by an old and strong tradition based in the ancient patriarchal order. During the Tanakh period, **patria potestas**, especially in relation to daughters, was so strong that the father could contract betrothal without the consent, or even the knowledge, of the woman.[1] Women had virually no legal say in their

marriages and there are numerous Biblical examples of betrothals being arranged in their absence.[2] Even as late as 200 B.C.E., we find an example of the father acting unilaterally on behalf of his daughter. The Book of Tobit from the Apocryphal literature records that Raguel contracted his daughter's marriage with Tobias without at any point obtaining her consent.[3] While the Sages recognized and confirmed the traditional **patria potestas** they did not, generally, grant the father such extensive and absolute authority in regard to his daughter's **erusin**. The primary and most significant curb to his power was the requirement that the woman must consent to the betrothal. This requirement gave to the woman a considerable base of power in relation to her father and ensured that she had a voice in a process which affected her on a very personal and meaningful level.

In order to properly examine the relative powers of the father and his daughter in the formation of **ḳiddushin** it is necessary to divide the discussion into three parts. The division is based on the legal status of the woman, a status which was derived exclusively from her age. Jewish legal practice distinguished three legal categories for females: the **ḳeṭannah**, the **naʿarah**, and the **bogereth**.

The **ḳeṭannah**, a minor under the age of twelve years, had no legal powers and consequently could not act on her own behalf,[4] nor could she appoint an agent to act for her.[5] Her father acted on her behalf in legal matters and

she was under his jurisdiction and complete control. Since she had no legal powers, the **ḳeṭannah** was not able to accept **ḳiddushin** whether it was effected by money, deed or intercourse, unless her father authorized her to do so.[6] Only her father, or someone appointed by him, could accept her **ḳiddushin**. That is, if betrothal was effected by money, or something worth money, the father, not the girl, was its recipient.[7] If by deed, the acceptance of the document by the father effected the betrothal. Finally, the father was empowered to deliver his minor daughter (if over three years plus a day[8]) to the man in order to effect **ḳiddushin** by an act of sexual intercourse.[9]

The degree to which the **ḳeṭannah** was under the authority of her father is evidenced by the fact that he could legally sell her into slavery, as long as he had not already betrothed her.[10] He could also betroth her without her consent, although this was increasingly frowned upon by the Sages. Indeed, after the third century C. E. in Babylon, the Rabbis strongly discouraged the practice of fathers giving their daughters in marriage while minors. They ruled: "A man may not give his daughter in betrothal when a **ḳeṭannah**, [but must wait] until she grows up and says, 'I want So-and-So'".[11] In spite of this prohibition, if the father did betroth his minor daughter, with or without her consent, her betrothal was Pentateuchally valid and she required a formal divorce

for its dissolution.[12]

In the event that the father of the **ketannah** had died, responsibility for her fell to her mother and/or brothers. These individuals did not, however, enjoy the same degree of authority over the girl, and while they were able to contract her betrothal and marriage, these were valid only by rabbinical, not Pentateuchal, sanction.[13] The mother or brother could act with or without the knowledge and consent of the **ketannah**, but if at any time during the betrothal, or even following the marriage, she declared her refusal of the man chosen for her, the betrothal or marriage was immediately terminated.[14] The process whereby the betrothal or marriage of an orphaned **ketannah** could be dissolved is called **mi'un** (refusal) and will be examined more closely in Chapter Five. The point here is that if a minor rejected the arrangement she need only make a verbal declaration of refusal in order to have it terminated. A formal divorce was not necessary. Even if the girl originally consented to the betrothal/marriage she could exercise her right of **mi'un** and have it dissolved. An anonymous ruling taught that if she was betrothed or married without her consent, not even **mi'un** was required; she could simply leave her 'husband' without making any declaration.[15] This appears not to have been the accepted ruling however. Rather, only a **ketannah** who was so young that she could not take care of her token of betrothal was

able to forego the formal process of **mi'un.**[16] It is clear that the betrothal/marriage of a **ketannah** whose father was dead was exceedingly unstable and insecure. This is because it had only rabbinical authority. Neither the mother nor the brother of the orphaned **ketannah** had Pentateuchal permission to contract a fully valid betrothal/marriage for her. Nor, was the minor able to contract a fully valid betrothal on her own authority. Her **kiddushin** had only rabbinical validity.

The marriage of an orphaned minor acquired full legal status through the first act of cohabitation after the girl reached legal maturity at the age of twelve and a half.[17] Nevertheless, during the interval between her marriage and her maturity, the **ketannah** was regarded as the wife of the man in every respect and the man was, therefore, granted by rabbinical law the full rights of a lawful husband.[18] For example, her husband was entitled to anything which she found, to the work of her hands, to be her heir and, if he was a priest, to make himself unclean by burying her if she died.[19] He also was entitled to the usufruct on her property while the girl herself was permitted to eat **terumah** (a special Heave-offering eaten by priests and their dependents) and she received a **ketubah** (marriage contract).[20] R. Eliezer opposed this view, teaching that since there was no validity whatsoever in the act of a minor she was not in any way to be regarded as the man's wife and the man,

therefore, had no legal privileges in regard to her. Rather, the **ketannah**, according to R. Eliezer, continued to be a member of her (deceased) father's household until the time when her marriage was legally consummated.[21] This ruling was not accepted and the **halakah** states that the orphaned **ketannah** was entitled to be maintained out of her dead father's estate only until she married, or until she reached legal maturity.[22] Either marriage or adolescence freed the woman of the father's authority and, whether he was dead or alive, he ceased being responsible for her maintenance.[23] Consequently, if the woman was a minor, but married, she was not considered to be a member of her father's household. Likewise the woman who had reached legal maturity, but who was still not married, was not entitled to be supported out of her father's estate, whether the father was alive or not. The Sages had some difficulty in deciding whether an orphaned **ketannah** who became betrothed was to be considered as married, and therefore, ineligible for continued maintenance from her deceased father's estate. No final ruling was reached on this issue and the Sages remained divided in their teachings, some permitting her to be maintained until she actually married and other forbidding this.[24]

The **ketannah** who was deemed to be an 'orphan in her father's lifetime' was in an even more precarious position than the natural orphan. This was the girl who had been married by her father and who subsequently was either

divorced or widowed, leaving her outside the control of both her husband and her father.[25] Once the father had given his minor daughter in marriage, she passed forever out of his control. Consequently, even if she returned to his house as a divorcee or widow, he no longer had any authority over her. He could not, therefore, contract a second betrothal or marriage for her. Nor was she, as a minor able to effect **kiddushin** on her own behalf, and if she did the betrothal was not regarded as being fully legal.[26] It is interesting to note, however, that if the couple proceeded with the marriage while the girl was still a minor and she then became of age, the marriage was deemed to be valid on the strength of the first act of intercourse after she reached legal maturity. This suggests that her betrothal and marriage had rabbinical approval and that once she became of age, cohabitation with her was sufficient to effect a fully valid **kinyan** of marriage.[27]

Since the **ketannah** had no legal authority to act on her own behalf even if her father was deceased, she clearly would have had none if her father were still alive. This point has already been made and goes uncontested in the rabbinical discussions. Consequently, if the **ketannah** were to become betrothed, on her own initiative, without the knowledge of her father, her **kiddushin** would be invalid: virtually nothing of a legal nature had taken place and there was no change in the

status of the girl. In light of this, it is most curious that some of the Rabbis required that if the betrothal were to be dissolved one, or both, of the legal procedures of separation were to be performed.[28] That is, the girl could either exercise her right of **mi'un** and/or the man could give her a **get**, a bill of divorce. Why should it be necessary to formally and legally terminate a transaction which had no legal force whatever? On the basis of the rabbinical discussion, it would appear that the reason is that of uncertainly. The Rabbis feared that the father may have previously given his consent to the betrothal, even though he had no knowledge of the **kiddushin** having been formalized. Should this be the case, the betrothal would be valid and would require a **get** in order to terminate it. R. Nahman elaborates on this position by stating that if **shiddukin** had previously taken place between the man and the girl's father, who at that time consented to the **kiddushin**, the betrothal could become retrospectively valid if the father consented subsequent to learning that it had been effected without his knowledge. In this case, the betrothal would be Pentateuchally valid and, therefore, would require a **get** for its dissolution.[29] If no negotiations had occurred prior to the act of **erusin**, or if one assumes that the father had not consented, then the girl would be able to exercise her right of **mi'un**.[30] Some of the Sages taught that she would require both a **get** and **mi'un**: a **get** in

case her father had consented to the betrothal and **mi'un** in case he had not.[31] But why, seeing that her father was still alive and had not consented to the betrothal, would even **mi'un** be necessary? Only one Rabbi, Ulla, ruled that a **ketannah** who betrothed herself without her father's knowledge has done nothing of legal consequence and, therefore, does not require any formal act of dissolution.[32] This is the ruling which one would expect considering that the actions of a minor had no legal effect. It is, presumably, because of the uncertainty as to whether the father did, or did not, consent to the betrothal which created the problem. This uncertainty was magnified in the later period of the **Amoraim** because by this time **shiddukin** were an obligatory element in the betrothal process. In order to ensure that no **kinyan** existed between the girl and the man, the Sages required one or both forms of dissolution. In this way there would be no doubt surrounding the girl; she would be completely free of the man and would legally be able to enter into a valid betrothal with someone else. Alternately, if the father gave his consent to the first betrothal, there was no doubt that it was valid. Unfortunately, the Rabbis did not discuss the manner in which the father must indicate his consent. Did this have to be a verbal action, or did his silence or lack of protest indicate consent? If silence was an acceptable means of expressing consent, then the betrothal, and even the marriage of a **ketannah**

without her father's knowledge could be valid if he did not protest it when he did finally hear about it. Indeed, R. Huna recognized as valid the betrothal and marriage of a **ketannah** who acted without the knowledge of her father. He treated the girl as 'as orphan in her father's lifetime'.[33] This is taken to mean that, since the father was present and saw his minor daughter becoming betrothed and married, and did not protest, he must either have renounced his authority over her or, by his silence, tacitly consented to her actions.[34] Clearly then, the problem centered around the confusion and doubt as to whether or not the father in one way or another consented to the betrothal of the **ketannah** and the need for a formal termination of the bond arose out of this doubt. This is one of the many instances illustrating the concern of the Sages that the woman not remain in a relationship whose validity was in doubt. It was better to ensure that the **kinyan** was completely severed rather than for it to continue in an imperfect or questionable form.

The **ketannah** moved somewhat out of the sphere of her father's control when she became a **na^{c}arah**, a woman between the ages of twelve and twelve and a half. The **na^{c}arah** was in a short transition stage between having virtually no legal authority and the complete authority of an adult. During this stage the woman had the legal authority to act on her own behalf but she remained under the protective jurisdiction of her father until she

reached full maturity at the age of twelve and a half. As a legally responsible individual, the **naʿarah** could execute valid transactions on her own behalf, acquire property and accept her own **ḳiddushin**.[35] However, because she was not yet fully freed of her father's control, her **ḳiddushin** became valid only if it had the consent and approval of her father.[36]

The **halakah** states that 'the father has authority over his daughter in respect of her betrothal [whether it is effected] by money, deed or intercourse'.[37] Although it appears to be clear-cut, this **halakah** was problematic to the Sages when it referred to the **naʿarah** since in her case the father did not have absolute control over her betrothal. Because the **naʿarah** was legally responsible, her consent to the betrothal was required. The **halakah** applies more closely to the **ḳetannah** who, having no legal powers, was fully under the control of her father, who could arrange her betrothal without her knowledge and consent, as noted above. In the case of the **naʿarah**, however, a rabbinical injunction demanded that she give her consent to the **ḳiddushin**, although this injunction is not supported by a Pentateuchal law.[38] In this regard, the Rabbis limited the power of the father in that, while his authority was necessary for the **ḳiddushin**, he could no longer act unilaterally in arranging and finalizing the betrothal of his daughter who was a **naʿarah**.

Not only was the consent of the **naʿarah** required in

effecting **erusin** but, because she had the legal power to execute valid transactions, she could accept the money or token of **kiddushin** on her own behalf, thereby indicating her consent to the betrothal.[39] The repeated use of the statement, 'if a man gives her [the woman] money or its equivalent....',[40] by the Rabbis confirms that the woman could herself accept this token. Likewise, with a deed, it is noted, 'whether [she accepts it] through her father or herself'.[41] There is nothing in the text to suggest that the **naᶜarah** could, or could not, deliver herself to the man in order to effect **kiddushin** through an act of sexual intercourse. Presumably, considering the seriousness of the act, she could do so only with the prior consent of her father. Although the **naᶜarah** could accept these tokens, her acceptance apparently was sufficient only as proof that she consented to the betrothal. Her acceptance was not sufficient to completely effect **kiddushin** which ultimately required the authority of her father. That is, her father must have the final say in the contracting of **erusin** since the **halakot** state, 'the father has authority over his daughter in respect of her betrothal'[42] and, 'a man may give his daughter in betrothal when a **naᶜarah** either through himself or through his agent'.[43] The **gemara** which accompanies this latter Mishnah appears to contradict the earlier statement that the **naᶜarah** could accept her own **kiddushin** for here it is stated: "R. Johanan

maintained:.....as for kiddushin, all agree that her father [alone can accept kiddushin on her behalf] but not she herself".[44] The reason given is that, since kiddushin frees her from paternal authority, only the father has the right to accept it. While R. Johanan's statement is problematic, it is suggested that the point he is making is that the father has final authority over the betrothal of his daughter who is a **na^{c}arah**. The **na^{c}arah** is thus forbidden to contract her betrothal unilaterally, without the consent and authorization of her father. Clearly then, the **na^{c}arah** is in a peculiar position relative to **patria potestas**, and the haziness of her position is repeatedly noted in the rabbinical discussions. The uncertainty and apparent contradiction noted in regard to the question of who was entitled to accept the **kiddushin** of the **na^{c}arah** is but one example of this haziness. The problem arose because in the rabbinical era under discussion the **na^{c}arah** was caught between two authorities: her own legal responsibility and **patria potestas**. In most issues the Rabbis granted the father greater legal power over his daughter than the woman herself could actually exercise. Such is the case in the issue discussed above, where ultimate authority to contract the betrothal lay in the hands of the father, not the **na^{c}arah**. In a later discussion it will be noted that the father had the right to annul any vows made by his daughter, thus providing another example of the father's legal power to over-ride

the actions of his daughter who was a **na^{c}arah**.

The predominant position of the father relative to the daughter is noted also in the rabbinical ruling that the money of **kiddushin** belonged, not to the **na^{c}arah**, but to her father. Thus, although the woman could accept the money or token of betrothal, she was not entitled to keep it but had to turn it over to her father.[45] Although this was the **halakah**, the dispute recorded in the Talmud suggests that the Sages were not completely at ease with it. There appear to be two reasons for this: first, from a purely logical viewpoint, it seems reasonable that because the **na^{c}arah** was empowered to accept the token[46] she should be able to keep it for herself; second, the Sages had some difficulty in satisfactorily supporting this **halakah** from a single Scriptural text. A number of texts are mentioned but rejected as inappropriate. For example, it is suggested that the ruling which gives the money of **kiddushin** to the father may be inferred from the law of fines[47] which prescribes that a man who rapes or seduces a young unmarried woman must pay a fine (of 100 shekels) to the woman's father, not to the woman herself. This comparison is rejected on the basis that monetary matters cannot be inferred from the law of fine.[48] Nor can they be inferred from the law of indignity and blemish which required the violator or seducer to pay fifty shekels to the father for the humiliation which he has caused the man's daughter.[49] In both these cases the

rights of the father, as well as the daughter, have been infringed upon since he could no longer marry her as a virgin. It is for this reason that the father has a claim, a right to the money which must be given by the violator as a fine. There is, however, no such inherent reason why the father should receive the money or token of **kiddushin**. The cases are not comparable and, consequently, neither the law of fine nor the law of indignity and blemish could be used to support the ruling that the father receives the money of **kiddushin**.[50]

A third text, which is also rejected, is, 'being in her youth in her father's house'[51] which the Sages interpret to mean that all the advantages of the woman's youth belong to her father.[52] The weakness of the text is noted immediately by the Sages. In its proper context, the verse refers to the father's right to annul the vows of his daughter who is a **na^carah**, an issue which belongs to the area of ritual law. The question as to whom the money of **kiddushin** belongs is a matter dealt with by civil law. The Sages rejected the text as invalid since civil law could not by deduced from ritual law.[53]

The primary Scriptural basis for the **halakah** that the money of betrothal belonged to the father seems to be: 'I gave my daughter to this man'[54], a text which implies that the privilege of betrothal rests entirely with the father and that he, therefore, was entitled to the money.[55] Again the Rabbis went back to the ancient tradition which

recognized the authority of the father over the daughter and, because of the strength of **patria potestas** in the Tanakh writings, they were almost compelled to decide in favour of the father, not the **naᶜarah**, as the legal recipient of the money of **ḳiddushin**, even though they cannot provide a specific text to support their ruling that the money did in fact belong to him.

In light of the discussion on the **halakah** that the father was entitled to the money or token of **ḳiddushin** it is curious to note those cases in which the man betroths the woman with dates or some other kinds of fruit or edible item. These texts state that if the woman immediately eats the fruit, 'she eats her own' and the betrothal is valid.[56] If the money or token of **ḳiddushin** belonged to the father, why was the woman entitled to eat the fruit, or other foods, given as a token? Did these tokens not belong to the father? The problem with these, and other similar texts, is that they do not specify the category of the woman involved. If the text is referring to a **bogereth**, who had full authority and was completely freed of her father, then the fruit clearly belonged to her and she was entitled to consume it. If, however, the **naᶜarah** was also included in these texts, for she could accept the token of **ḳiddushin**, then it would appear that she could exercise more responsibility in practice than was granted to her in law. No conclusive statement can be made concerning this observation, however, since there is

no way of determining precisely what the authors of the text meant when they spoke of 'woman' as a general category without being more specific. The observation is noted only to raise the point that the **naᶜarah** may in fact have been able to exercise more power than is apparent in the **halakah**. It may also have been the case that, although the father had the legal right to the token of betrothal, in practice this was handed over to the woman to be her own possession. This theory finds some support in the historical development of the **mohar**. Initially this payment was given to the father of the woman to be his possession for his own personal use. In a subsequent development, noted in various Near Eastern documents, the father received the **mohar** payment but no longer kept it for himself. Rather, he gave the sum back to the couple as part of his daughter's dowry.[57] Something similar may have occurred in regard to the token of **kiddushin**. While the father was the legal recipient of this token, in practice it was given to the daughter for her own use.

The final point to be examined regarding the **naᶜarah's** powers relative to her father concerns the issue of the woman's rape or seduction. In the Pentateuch the ruling is presented that if a man violated or seduced a young woman who was not betrothed he was compelled to marry her[58] unless her father refused to give her to him.[59] The Sages extended the right of refusal to include both the father and the woman herself. That is, either

the father or the **naᶜarah** were able to reject marriage with the man who violated or seduced the woman.[60]

The **naᶜarah** became completely independent upon the death of her father. Unlike the **ketannah**, the orphaned **naᶜarah** did not come under the lesser authority of her mother and/or brothers. Consequently, the **naᶜarah** whose father had died was able to contract her own **erusin** without the assistance or consent of any other person, unless she appointed someone to act as her agent.[61] Neither the mother nor the brother of the **naᶜarah** had any legal right to effect **kiddushin** on her behalf, since they did not inherit the father's authority over her.[62]

The orphaned **naᶜarah** was like the **bogereth** to the extent that both were recognized as having full legal authority to act on their own behalf in all transactions, including betrothal and marriage. When the **naᶜarah** reached the age of twelve and a half years, she passed out of the control of her father and became a **bogereth**, a legally mature individual.[63] As in the case of the **ketannah**, there was no dispute about the legal rights of the **bogereth** relative to her father. The **ketannah** had no legal rights and was fully under the control of her father while the **bogereth** had complete legal authority and was independent of her father's control. The **bogereth** was able to contract her betrothal completely by herself, requiring no assistance from her father, unless she chose to appoint him as her agent.[64] Each of the three means

whereby betrothal could be effected, applied also to the **bogereth** who, however, was empowered to receive the money or deed of **kiddushin** without the knowledge or consent of her father.[65] Likewise, she was able to deliver herself over to the man to participate in an act of sexual intercourse if that method was to be used to effect the betrothal. Because the **bogereth** accepted her own **kiddushin**, the money or token belonged to herself, not to her father.[66]

Any adult male had the legal authority to contract betrothal for himself either directly or indirectly through an agent.[67] It is interesting that the Sages evidently disapproved of a son appointing his father to act as his agent. This disapproval is reflected in the statement: "A man is not so insolent as to appoint his father as agent".[68] Indeed, in theory the father had no rights whatever over his son's betrothal and marriage, irrespective of his age and legal status.[69] Unlike the situation with the **ketannah**, the father was not permitted to betroth his minor son but had to wait for the boy to reach legal maturity[70] so that he could arrange his own **erusin**.[71] In practice however, it would appear that the more ancient tradition which permitted the father to marry off his (minor) son was still accepted.[72] There is a ruling which states that if a father gave his son in marriage while still a minor, his wife had a valid claim to her **ketubah**, even though the **katan** (minor male) had no

authority to write a legal document.[73] The Rabbis also taught that a good father is one who arranges for his sons and daughters to be married near the period of their puberty.[74] Nevertheless, the Tannaim grew increasingly skeptical of betrothals and marriages of boys, arranged by their fathers, during their minority and began to rule that these were invalid.[75] Thus, if a minor male died without children, his wife was exempt from the levirate obligation.[76] Likewise, a man could not be found guilty of committing adultery with a woman whose husband was a minor.[77] While it is not specifically stated that the marriage of the ḳaṭan in each of these instances was arranged by his father, the implication is clearly that any marriage involving a minor male had no legal validity. This would include also any marriage arranged by the ḳaṭan himself since, like his female counterpart, he had no legal status or authority. If he attempted to betroth a woman, his act had no legal force and the **erusin** was invalid.[78] This ruling is illustrated by the **halakah** which states that if the ḳaṭan were to betroth a woman and, upon reaching maturity, send gifts to her as his **arusah**, the betrothal nonetheless remained invalid[79] since 'when a ḳaṭan betroths, all know that such betrothal is nothing'.[80] The Sages were unwilling to give rabbinical validity to the betrothal/marriage of a minor male since 'in due course he would be able to contract [a Penteuchally valid] marriage'.[81] They did, however,

recognize as rabbinically valid the betrothal/marriage of a minor female in order that 'people might not treat her as **hefker**', as ownerless property.[82]

Once he became of age, the initiation of any act of betrothal became the role of the man. Almost the entire procedure of **kiddushin** was the responsibility of the man, including the initial choosing of the woman. "It is the way of a man to go in search of a woman, but it is not the way of a woman to go in search of a man".[83] The man chose the woman whom he wanted to marry then proceeded with the formal aspects of effecting the betrothal. While he was permitted to employ an agent to act on his behalf in contracting **erusin**, the Sages preferred him to 'act for himself.'[84] There were several reasons for this. First, the Sages wanted to ensure that the man had at least seen the woman so that he would not be able to say later that she was repulsive to him and, therefore, he wanted to divorce her.[85] Secondly, the use of an agent increased the possibility that something could go wrong during the betrothal process and the **erusin** would be rendered invalid. That is, if the agent did not follow the man's instructions precisely, the betrothal was invalid. For example, if the man specified a particular place where the agent was to betroth the woman, but he betrothed her at some other place, the **erusin** was not valid.[86] Finally, if the man asked his neighbour to betroth a certain woman on his behalf and the man went and betrothed her for himself,

the agent's betrothal was valid.[87] The Rabbis condemned such acts of deception noting that, 'he (the neighbour-agent) has behaved toward him as a cheat'.[88] Nevertheless, they ruled the betrothal to be valid and the man who appointed him has lost out.[88]

Besides approaching the woman, the man was responsible for giving the money or token of betrothal to the woman, or for the writing of a deed if **erusin** was to be effected by document. He was also required to make the verbal declaration stating his intention to become betrothed to the woman. These two points have already been extensively discussed so nothing further need be said here. In summary, the primary role of the man in contracting **erusin** was to ensure that the proper procedures were carried out. Since any breach or irregularity in the process could invalidate the betrothal, it was necessary for the man to proceed with care. His primary concern was to ensure that the woman and/or her father consented to the betrothal or else his actions would be null and void.

NOTES

1. de Vaux, 1961, 29; Bracker, 1962, 29; Mace, 1953, 166; Friedman, 1980, 216
2. for example, Achsah, daughter of Caleb (Josh.15.16); Saul's daughters Merab (I Sam. 18.17,19) and Michal (I Sam. 25.44)
3. Tob. 7.9ff
4. Ket 69b
5. Kidd 44b
6. Kidd 3b,19a; Ket 29a,46b
7. ibid; Son.Tal.-Kidd p.260,n.3; Neubauer, 1920, 159
8. sexual intercourse with a girl under the age of

three years had no legal consequences since it did not impair her virginity Ket 11a-b,29a; Kidd 10a; Son.Tal.-Kidd p.p.39f,n.11; Yeb 57b; cf.TKet 1.2; Epstein, 1967, 204,211; Cohen, 1966, 298

9. Kidd 3b,10a; Ket 46b; Yeb 57b
10. Ex. 21.7; Ket 29a,40b; Kidd 18b; Son.Tal.-Kidd p.p.84f,n.11; see Chapter One, Note 87
11. Kidd 41a,81b; cf. Ket 57b; Berkovits, 1983, 32f; Rackman, 1954, 222
12. Friedman, 1980, 216; Kidd 44b,64a; Son.Tal.-Yeb p.739,n.9; Falk, 1978, 278; Neubauer, 159ff
13. Yeb 107a; Ket 43a; Gitt 55a; TKet 6.8; Berkovits, 45; Falk, 1978, 278, 324f; Neusner, 1979, 146
14. Yeb 107b-108a; Owen, 1967, 129f; Falk, 1978, 278f
15. MYeb 13.2
16. Yeb 107b,108a; Falk, 1978, 278f
17. Ket 73b-74a; Son.Tal.-Ket p.462,n.n.1,5,12; Yeb 109a-110a
18. Yeb 89b-90a,108a;Ket 101a; cf. Gitt 55a
19. ibid
20. Yeb 89b-90a,107a
21. Yeb 108a; TYeb 13.3; Falk, 1978, 279f
22. Ket 52b,53b,68b; TKet 4.17
23. Ket 39a,43b; Kidd 18b,45a; TKet 4.17; Falk, 1978, 323f
24. Ket 53b,68b
25. Ket 73b; Yeb 109a; Son.Tal.-Yeb p.756,n.12
26. Ket 73b; Son.Tal.-Yeb p.756,n.12;p.757,n.2
27. ibid; see Note 76
28. Kidd 44b,45b-46a
29. Kidd 44b
30. ibid
31. ibid
32. Kidd 44b; cf.TYeb 13.2
33. Kidd 46a
34. Son.Tal.-Kidd p.229,n.1
35. Kidd 3b; Son.Tal.-Kidd p.7;n.2
36. Kidd 9a; Friedman, 1980, 217,222
37. MKet 4.4
38. Kidd 41a,44a; Precisely when the consent of the woman became a necessary prerequisite to betrothal is not at all certain. However, it would seem reasonable to presume that this development was closely related to, and influenced by, two factors: (1) the recognition of three legal classes of women, and; (2) Simeon b. Shetah's enactment which both transformed the **mohar** payment into a pledge and made the woman herself, not her father, its legal recipient. Although there is virtually no indication as to when Jewish law began to distinguish women, according to their age, into legal classes, the three divisions are found in the literature to be well established tenets of Jewish law and practice. This suggests that they were established either

prior to, or very early in, the rabbinical era. Presumably, the right to voice an opinion in all transactions, including betrothal, which involved her was inherent in the legal status and authority granted to the **bogereth** and, to a lesser extent, the **naᶜarah**. Simeon b. Shetah's enactment was significant because it totally excluded the father from the most fundamental element of the betrothal process and simultaneously drew the woman herself into a more central position. The **mohar** payment was now exclusively a matter between the man and the woman. This tendency to view betrothal as a transaction between the man and woman is reflected also in the form of the written marriage contract. In the Elephantine documents the contract had been between the man and the woman's guardian; the woman herself was referred to in the third person. However, by the early second century C.E., she was addressed directly by the **arus**, as evidenced in two Aramaic **ketubot** from the Judean Desert collection (Benoit et al, 1961, 110ff). With this changing attitude about the woman's position in the betrothal process went, presumably, the requirement that she give her consent to it. On the basis of these observations, it seems reasonable to conclude that the issue of consent was both raised and resolved very early in, if not prior to, the rabbinical era under discussion.

39. Kidd 3b
40. for example, Kidd 5b
41. Kidd 9a
42. MKet 4.4
43. MKidd 2.1
44. Kidd 43b
45. Kidd 3b; Ket 38a,46b,102b
46. ibid
47. Deut. 22.19
48. Ket 46b; Kidd 3b
49. Deut. 22.29
50. Ket 46b; Kidd 3b
51. Numb. 30.17
52. Ket 46b; Kidd 3b
53. ibid
54. Deut. 22.16
55. Kidd 3b; Ket 46b
56. Kidd 47a; cf. TKidd 2.3
57. Yaron, 1961, 48; Mendelsohn, 1959, 352f; Levine, 1968, 274
58. Ex. 22.15; Deut. 22.28f
59. Ex. 22.16
60. Ket 39b
61. Kidd 44b; Friedman, 1980, 217
62. TKidd 2.1; cf. MKidd 2.1
63. Ned 70b; Ket 39a,43b

64. Kidd 51b,64b; Neubauer, 157,158; Cohen, 298; It was customary for a woman who was 'within her own jurisdiction' to appoint a man, usually her father, to act on her behalf in making all marital arrangements (Friedman, 1980, 217ff).
65. Kidd 9b
66. Ket 102b; Son.Tal.-Kidd p.260,n.3; Neubauer, 158
67. MKidd 2.1
68. Kidd 45b
69. TKidd 2.1
70. a boy reached legal maturity at the age of thirteen years: Kidd 16b; Son.Tal.-Ket p.55,n.1; Cohen, 297; Epstein, 1967, 210; de Vaux, 1961, 29
71. Sanh 76b; Cohen, 297; Falk, 1978, 278
72. Ket 52b; Kidd 19a,59a,71b; Falk, 1978, 278, 323; Cohen, 297; Neubauer, 159ff; Indeed, the very ancient tradition empowered the father to marry off his son, irrespective of his age, and even without his consent. Thus Abraham sent his servant to choose a wife for Isaac (Gen. 24) who reportedly was 40 years old when he married (Gen. 25.20). Likewise, Judah chose the bride and arranged the marriage of his eldest son (Gen. 38.6).
73. MKet 9.9
74. Yeb 62b
75. Yeb 69b,96b,112b; Cohen, 297; Precisely when this transition occurred is not clear. The Mishnah shows some discrepancy on the matter (MKet 9.9 vs. MYeb 10.8) but the Tosefta (Kidd 2.1) clearly states that the man has no authority over his son's betrothal and the **gemara** fairly consistently follows this ruling (e.g. Kidd 45a-b). The problem, however, centered only around the father's rights in regard to his minor son; once the boy reached adulthood, there was no question but that the father had no authority in regard to his betrothal, just as he had none in relation to the **bogereth**.
76. Yeb 69b, 96b,112b
77. Kidd 19a
78. Kidd 50b; Ket 73b; TKidd 4.4
79. Kidd 50b; Ket 73b
80. ibid
81. Yeb 112b
82. ibid
83. Kidd 2b; cf. Elman, 70
84. Kidd 41a; Berkovits, 32; Friedman, 1980, 220
85. Kidd 41a
86. MKidd 2.4; TKidd 4.2; Kidd 50a
87. Kidd 58b-59a; TYeb 4.4
88. Kidd 58b; cf. TYeb 4.4
89. Kidd 58b-59a

Chapter Three: THE ḲINYAN OF ḲIDDUSHIN

The discussion thus far has focussed on the process of **ḳiddushin** and the relative roles and powers of those who participated in that process. Having contracted a valid **erusin** a legal **ḳinyan** of **ḳiddushin** was effected. The literal meaning of **ḳinyan** is 'acquisition'. It was a term which was used not only in the acquisition of a wife but of slaves and property as well. The Sages recognized this threesome - wife, slave, property - as being something of a unit whose common point of reference was that each could be acquired by a man who would then become **baᶜal** over them. The term **baᶜal**, like **ḳinyan**, emphasized the idea of acquisition for it meant both 'owner' and 'master' or 'lord'. Thus the word **baᶜal** had inherent in it the notion of both ownership and authority. **Baᶜal** also meant 'husband' when used in the context of marriage but the other nuances of the word did not disappear. However, the idea of ownership did not apply so strongly in relation to a wife as it did in relation to property and slaves. This is clear when the Sages state that the wife does not belong bodily to her husband but a slave did,[1] and also, 'the wife's person is her own possession'.[2] Although it is quite possible that in the very remote past the husband did purchase the woman and there was the sense of ownership involved in that purchase, by the time of the rabbinical era this was by no means the case. A brief

examination of the history of the **mohar**, the bride-price, will support this statement.

The institution of **mohar** goes far back into antiquity and was practised in Babylon and other parts of the Ancient Near East well before the nation of Israel was even formed.[3] During the Tanakh period, the **mohar** payment was the basis of Israelite marriage, it was the decisive transaction in finalizing the betrothal.[4] There are two major views concerning the precise meaning of the **mohar** in its earliest stages. One view is that the **mohar** represented an economic transaction which implied purchase and ownership.[5] This is the oldest view of the **mohar**, i.e. that is was a purchase-price. In this transaction the man paid a sum of money or gave an object of value to the father in exchange for the girl, whose role was totally passive and who need not even know that the transaction was taking place.[6] The second viewpoint treats the **mohar** as a compensation gift given to the father for the loss of his daughter to the family.[7] As a compensation gift, the **mohar** did more than just 'buy' the woman. It created and cemented an alliance between two families, established the prestige of the husband and his family, granted him authority over his wife and made the contract binding on both parties.[8] The differences between the two views are subtle and the dividing line between them is thin and fine. It is questionable whether the ancient mind would have been conscious of any

distinction between the two. The main points are that the **mohar** was paid to the father, not the girl herself, and that the girl need not participate actively in the formation of her betrothal. These two conditions gave the entire process the aura of purchase even if that was not in actual fact the intent.

A major development occurred at some time in the post-Biblical period in which the **mohar** was given, not to the father, but to the girl herself.[9] This development was presaged by the earlier Near Eastern practice in which the father received the **mohar** payment but, rather than keep it for himself, he handed it over to his daughter as part of her dowry.[10] In this subsequent development, the man paid a lump sum of money which was held in trust for the girl by either her father or the husband himself and was given to her if she was divorced or widowed. Thus, the **mohar** became a financial protection for the woman, a sort of insurance policy in case of death, or alimony in the event of divorce. This new, and very significant development seriously weakens the notion that the man purchased, and therefore owned, his wife. Instead, the development established his financial responsibility to protect her if the marriage was terminated by either death or divorce. Prior to this, the husband was able to simply send his wife out of his house, empty handed, if he no longer wanted to continue the marriage. Likewise, if he died the woman could be left poor and destitute if neither her

husband's nor her own family was willing to take her in. However, in spite of the development, it was just as easy for the husband to divorce his wife since the sum of money was always available and he need only give it to her and send her away.[11] It was also impractical to have a large sum of money around the house which could not be employed to meet the daily expenses of the family. Finally, during the post-Biblical period economic conditions were apparently arduous and it became increasingly difficult for the man to marry since he had to provide the total **mohar** payment at the time when he arranged the betrothal. All three of these problems were eliminated with Simeon b. Shetah's enactment in the first century B.C.E. which ruled that no money need be paid in order to effect betrothal but rather, that a lien be placed on the husband's property as a guarantee that in case of divorce or widowhood, the woman would receive the full **mohar** payment.[12] This not only made marriage easier,[13] it also entitled the husband to use the money, as if on loan from his wife, in his business affairs.[14] While making marriage easier, the enactment simultaneously made divorce a more costly and unattractive option for the husband who was required to pay her a large sum of money in a single payment. Consequently, the husband was compelled to think twice about divorce since it would make a serious dent in his property investments.[15] Marriage thus became more secure for the woman. Indeed, all of the developments in

the institution of the **mohar** favoured the woman, raising her status and making her financial position more secure and stable. She was by no means an object to be disposed of according to the whims of the husband. Rather, the husband had very definite financial responsibilities toward his wife, responsibilities and obligations which did not extend to his slaves or property. These developments indicate clearly that the wife was not 'owned' by her husband and that the process whereby a wife was acquired did not imply purchase and ownership. This viewpoint is further supported by the fact that, while a man could acquire a woman, he could not do so without her consent. Contrary to this, a man could purchase a slave without that individual's consent.[16]

If the **kinyan** of betrothal did not give the man the right of ownership over the woman, it did bestow upon him authority over her. The authority of the father over his daughter passed to the husband at the time of marriage.[17] Except to a limited extent, the man did not acquire authority over the woman at the time of betrothal. While he was called her **baᶜal**, her husband, and she his wife from the moment the betrothal was effected this did not, generally, involve the immediate activation of his authority over her, nor of the rights and obligations which each had towards the other. What the **kinyan** of betrothal meant was that the man had acquired the woman to the extent that she was forbidden to have a sexual

relation with other men; she was recognized as his wife and no other man could make a claim upon her.[18] One of the rabbinical terms for betrothal is **kiddushin** which means 'consecration'. The Sages understood that when a man acquired a woman in betrothal he consecrated or sanctified her for himself; she became bound to him by a bond of holiness and she was set apart solely for the man who betrothed her. The primary implication of this sanctification was that the woman was forbidden to other men in her sexual relations. The right to know her sexually belonged exclusively to her **arus**, even though this right did not take effect until **huppah**, the marriage canopy under which the marriage was symbolically consummated.[19] The woman was, through her sanctification, to keep herself pure in her relations with other men. The process of acquiring a wife was thus brought into the realm of the sacred,[20] although in purely practical terms it was a contractual agreement and had many parallels to other types of acquisition. The procedural parallels in the different types of acquisition fade into relative insignificance when one considers the act of acquiring a wife in terms of the sacred rather than the secular.

A very brief examination of the parallels between the different types of acquisition will serve to indicate that, in spite of the similarities, the differences are significant and that the Sages did not equate the acquisition of property with the acquisition of a slave or

of a wife. Each form of acquisition was seen as distinctive. For instance, while a wife, a slave and property could all be acquired through money or deed,[21] the declaration which accompanied each of these acquisitions was different.[22] Although money could acquire both a slave and a wife, in the case of the slave, money had compulsory powers; that is, it could acquire her even against her will. This was not the case in matrimonial relationships for, as noted earlier, a man could not use money to acquire a woman if she did not consent to the betrothal.[23] Neither a slave nor a wife could be acquired by barter, although movable property could.[24] "'Barter' is a system of symbolic exchange, the article with which it is effected symbolically represents the larger article or the money which is actually the purchase price. Consequently, the article may be worth less than a **perutah**. When the acquisition is effected through money itself, or an article valued as money, 'what is not worth a **perutah** does not rank as such".[25] Only money, or an object which was given as money, could be used to acquire humans. In the case of a wife, the money or token need only have the value of a **perutah** since it was a symbolic replacement of the **mohar** payment which was promised to the woman. Slaves, however, could not be purchased with less than a **perutah**.[26] Neither a slave nor a wife could be purchased with a pledge.[27] Finally, a wife could be acquired through an act of sexual intercourse but a slave could

not.[28] In the levirate situation, cohabitation was powerful enough to effect a complete **kinyan** of marriage.[29] Clearly then, there were significant differences between the three types of acquisition and although there were parallels on a global scale, when one examines each one separately, the particulars were quite distinctive.

NOTES

1. Kidd 6b,16a; Gitt 40a,85b
2. Ket 59a; Pedersen, 1926, 70; Mace, 1953, 190ff; Driver and Miles (1935, 159) suggest that the same attitude prevailed already in the Tanakh period. The husband may have possessed his wife as a sexual being but he did not possess her person.
3. Bracker, 1962, 30; Levine, 1968, 274; Yaron, 1961, 48; Mendelsohn, 1959, 352; Burrows, 1938, 3ff; Driver and Miles, 142ff
4. Burrows, 1938; Cohen, 1966; 285; Falk, 1964, 147 Bracker, 1962, 30; Mace, 168; Neufeld, 1944, 94, 142
5. Burrows, 1938, 1, 16ff; Elman, 1967, 73; de Vaux, 1961, 26f; Mace, 168f; Driver and Miles, 142ff
6. Burrows, 1938, 24ff
7. ibid, 9ff; Elman 73; de Vaux, 27; Mace, 24, 170; Driver and Miles, 159
8. Burrows, 1938, 13; de Vaux, 27; Mace, 172; Pedersen, 67f
9. the developments in the institution of the **mohar** are noted in Ket 82b; cf. TKet 12.1; Elman, 73f; Falk, 1978, 295ff; Epstein, 1973, 19ff
10. Yaron, 1961, 48; Mendelsohn, 352f; Levine, 274; Mace, 25, 176; Geller, 1978, 228; This practice is evidenced in two Elephantine **ketubot** (A.P. 15, B-7) where the sum of the **mohar** payment is included in the list of dowry items. There is no Biblical record of the practice during the Tanakh period.
11. Steinsaltz, 1976, 131; TKet 12.1; Geller, 232f
12. Ket 82b; TKet 12.1; Geller, 233f; Elman, 74
13. Epstein, 1973, 23f; Friedman, 1980, 258
14. Epstein, 1973, 22; TKet 12.1
15. ibid, Epstein, 23f; Elman, 75
16. Kidd 14b
17. MKet 4.5; Neubauer, 157; Burrows, 1940a, 8, 15
18. Rackman, 1954, 223; Neubauer, 186,188; Mace, 190ff, 227; Pedersen (1926, 70) notes that the wife is "first and foremost a sexual being, and as such she

entirely belongs to her husband". This applied equally to the betrothed 'wife'.

19. Ket 7b; Cohen, 319, 322; Friedman, 1980, 192
20. Neubauer, 169f,194; Cohen, 289f; Friedman, 1980, 161
21. Kidd 2a,4b,14b,22b,26a; Cohen, 290
22. Kidd 9a
23. Kidd 5a,5b
24. Kidd 3a,6b,8a,13a,28a-b; Son.Tal.-Kidd p.p.5f,n.9; p.28,n.5
25. Son.Tal.-Kidd p.p.52f,n.5
26. Kidd 11b-12a
27. Kidd 8a-b
28. Kidd 4b,9b
29. MYeb 6.1

Chapter Four: INVALIDATING THE BETROTHAL

The Sages were careful to identify circumstances which would result in an invalid betrothal. Included in the list were procedural irregularities. For example, if the token given by the man was not worth' at least a **perutah** the betrothal would be rendered invalid.[1] Likewise, if the man failed to participate in **shiddukin**,[2] or to make a declaration,[3] or to betroth the woman before two witnesses[4] his actions were nullified.

A betrothal could also be rendered illegal if the couple were of an incestuous degree of relation to each other.[5] In this case, no **kinyan** was established, no formal procedures were required to terminate the relationship and the woman was free to become betrothed to another man. She was under no obligations and enjoyed none of the rights of an **arusah**. Should the couple proceed with the betrothal and marry, their marriage likewise was judged to be invalid and none of the rights and obligations of a legal marriage came into effect.[6] If they continued in their 'marriage' the couple were committing a grave transgression, the penalty of which was **kareth** (lit.: 'cutting off').[7] That is, these individuals became subject to the direct punishment of YHWH who would suddenly or prematurely send death to them.[8] Because the judgment of the couple was in the hands of God, no human punishment was prescribed for them.[9] The couple became

subject to **kareth** with their first act of cohabitation, an act which marked their relation as incestuous, and the woman became a **zonah**, a harlot.[10] Any children born of the union received the derogatory title of **mamzer(eth)**, a bastard.[11] A **mamzer** and his offspring were forbidden to enter the Jewish community, the 'assembly of Yhwh' for all time.[12] This meant that they could not marry one of pure Israelite or priestly stock,[13] although if he (she) did the union would be 'valid but prohibited'.[14] It would appear that these matrimonial restrictions were the primary penalty paid by the **mamzer** and his descendants since in other matters such as inheritance, the levirate obligation[15], the right to a **ketubah** and subjection to a penalty for violating a **naᶜarah**, the **mamzer(eth)** had full legal status.[18]

While betrothals and marriages involving incestuous relations were invalid by Pentateuchal injunction,[19] there were other unions which were prohibited but which the Sages judged to be valid nonetheless. Several types of valid but prohibited betrothals can be identified, including those which involved a second degree of incestuous kinship as enumerated by the Rabbis.[20] A second type was the betrothal/marriage between a High-Priest and widow, a union forbidden by the Pentateuch.[21] It made no difference whether the woman became a widow during the period of **erusin** or after **nissu'in**; the High-Priest was forbidden to marry any widow.[22] Likewise, no

priest could betroth or marry a divorcee or **ḥalugah**[23]. (a woman who has participated in the rite of **ḥaliṣah**, the ritual by which the levirate bond is terminated) or a proselyte.[24] These prohibitions were made in order to maintain the purity of the priesthood.

The third category of valid but prohibited betrothals/marriages involved individuals who, by birth, belonged to social classes which were forbidden to intermarry.[25] For example, a **mamzer(eth)** was forbidden to betroth someone of pure Israelite stock.[26] Finally, a man was forbidden to remarry his wife who, during the interval of their divorce, had been betrothed/married to and divorced by (or widowed from) another man.[27] Neither could he betroth a woman with whom he had performed **ḥaliṣah**[28] (the ritual 'taking off of the shoe' in order to sever the levirate bond), or her relatives.[29]

In spite of the prohibition attached to each of these relationships, the betrothal was judged by the Sages to be valid in every way.[30] Thus the normal rights and obligations of **erusin** came into effect and a formal divorce was required to terminate the bond. The only dissenting voice to this ruling was that of Akiba who considered every betrothal prohibited by a negative injunction to be invalid.[31] His teaching was rejected, however, in favour of the majority opinion.

The negative consequences of the union were not manifest until after **nissu'in** and were felt, not only by

the woman, but by any offspring born of the marriage. In most cases, however, even the marriage was deemed to be valid, although it was not permitted to continue. In these cases, the woman was able to 'become' the man's wife, but she was not able to 'remain' his wife.[32] Consequently, the first act of cohabitation which the couple had was valid and legally consummated the marriage. The second act, however, was prohibited and brought with it the penalties levied against the participants.[33] The penalties varied somewhat depending on the precise nature of the relationship. For instance, in valid but prohibited unions involving the priesthood both the betrothal and marriage were fully valid and the woman enjoyed the full rights of a wife.[34] However, she became a **ḥalalah**, a 'profaned' woman and her offspring were also **ḥalalim**.[35] By marrying a woman forbidden to him, the priest 'profaned his seed among the people'.[36] The primary punishment of the **ḥalal** (male offspring) was that he was rendered unfit for the priesthood[37] nor were his female children, grandchildren, etc. permitted to marry a priest.[38] He was, however, permitted into the Jewish community[39] and was able to marry a woman of pure Israelite stock.[40] Likewise, the **ḥalalah** (female offspring and forbidden wife of the priest) was permitted to marry an Israelite but she was forbidden to enter into the priesthood through marriage to a priest.[41] However, the female offspring of a marriage between a **ḥalalah** and

Israelite were fit to marry into the priesthood.[42] The priestly impairment was, therefore, passed on through the male line. In this situation, it was primarily the offspring who suffered the brunt of their parents' transgression. This occurred also when the forbidden union involved individuals from social classes which were not permitted to intermarry. The betrothal and marriage were fully valid but the offspring were penalized by having to bear the status of the inferior parent.[43]

In those cases in which the man remarried his divorced wife, his **halugah** or her relative, there were virtually no penalties to either the couple themselves or their children. Thus, both the betrothal and marriage were fully valid, all rights and obligations came into effect, and their children were legitimate.[44] Finally, those related by a second degree of kinship were penalized only to the extent that the rights which they enjoyed one toward the other were impaired. For example, the woman was not entitled to a **ketubah** nor to maintenance and the husband was not able to take possession of the things which his wife found or produced by her own hands, or to annul her vows. He did, however, inherit her estate and was obligated to bury her, even if he was a priest.[45]

There are three significant conclusions which can be drawn from this brief examination of the legal consequences of forbidden unions. First, except for those relationships which involved a first degree of incestuous

kinship, the betrothal was deemed to be fully valid, in spite of the prohibition attached to it. Second, in all cases, the penalty associated with the prohibited union did not become active until after **nissu'in**.[46] More specifically, the penalty was dependent upon physical cohabitation between the couple.[47] To this extent, **nissu'in** was a far stronger and more consequential act, in terms of its legal implications, than was **kiddushin**. Finally, in some, but not all instances, the offspring of the couple suffered the negative repercussions of the transgression of their parents. The primary penalty of the offspring was an inferior social status which required them, and often their own children, to be stigmatized and degraded. "The fathers have eaten sour grapes and the children's teeth are set on edge".[48] While the couple was compelled to terminate their betrothal/marriage, the fact that the legal implications of their union were discussed suggests that in practice the couple were able to continue in their valid but prohibited relationship. As part of the process of compulsion, those guilty of such transgressions were to be whipped.[49] However, the Beth Din ('house of law', the Jewish court) was not always in a position to enforce its rulings.

Either the man or the woman could render their betrothal invalid through any intentional act of deception one towards the other. The deception would occur during

the process of effecting the betrothal. For instance, the man might deceive the woman concerning the nature of the token with which he was contracting **erusin**: "[If a man says to a woman], 'Be betrothed to me with this cup of wine' and it is found to be honey, or 'of honey' and it is found to be wine; 'with this silver **denar**' and it is found to be gold or 'of gold' and it is found to be of silver....she is not betrothed".[50]

Deception was most likely to occur in what may be termed 'conditional betrothals' in which the man states: 'Be betrothed to me on condition that....'. This statement could be completed in any number of ways. The man could make himself the subject of the condition in which case deception would occur if he said something about himself which he knew to be false. For example, the man could attempt to deceive the woman about his financial status: "'Be betrothed to me on condition that I am wealthy', and he is found to be poor, or 'poor' and he is found to be wealthy, she is not betrothed".[51] He could also deceive the woman about his social-economic position which would include matters such as the quantity and quality of his real estate,[52] his occupation,[53] where he lived (city or village) and whether or not he had children or servants.[54] Finally, deception could occur in the area of social class which was dependent on which group one was born into. Thus, if the man made the betrothal conditional on his being a priest but he was actually a

Levite (or vice versa); or a **nathin** (a descendent of the Gibeonites) and he was found to be a **mamzer** (or vice versa) then the betrothal would be made invalid by his misrepresentation.[55]

There was unanimous agreement among the Rabbis that in all cases of deception involving matters of birth or social class the betrothal was invalid even if the woman declared, "It was my intention to become betrothed to him notwithstanding".[56] Indeed, it was by far the majority opinion that any intentional act of deception, whether by the man or the woman, was sufficient to invalidate the betrothal. The only dissenting voice was that of R. Simeon who taught that, 'if he deceives her to her advantage, she is betrothed'.[57] This ruling applied to monetary matters only and was not extended to an advantage in birth, in which case he concurred with the majority view that she was not betrothed.[58] However, even in situations involving economic advantage, R. Simeon appears not to have applied his principle consistently. For instance, he would judge as valid a betrothal in which the man stipulated 'on condition that I am poor' and he was in fact rich, because this would be to the monetary advantage of the woman.[59] However, in matters involving the man's social-economic position, R. Simeon agreed that under no circumstances was the betrothal valid, even though these may be viewed as matters which might be of financial advantage to the woman.[60]

The basic principle in conditional betrothals was that any condition which was true at the moment of betrothal, even if it was annulled later, resulted in a valid kiddushin. Hence, if the man said, 'on condition that I am poor' and he was poor but subsequently became rich, the betrothal remained valid since no deception had taken place.[61] Alternately, in the event that the condition was not true at the moment of betrothal, even though it was validated later, the betrothal was not valid. Consequently, if the man said, 'on condition that I am poor' but he was in fact wealthy and only later became poor, the betrothal was invalid.[62]

Clearly it was important that the man be precisely what he represented himself to be since any intentional act of deception on his part was sufficient to invalidate the betrothal. However, it could also happen that the woman was deceived unintentionally by the man. That is, she could accept his token of betrothal thinking that he was rich even though he made no statements concerning the matter one way or the other. If it turned out that the man was actually poor, the betrothal remained valid[63] because a 'mental stipulation' was not recognized as legally valid.[64] Likewise if the man declared that he betrothed the woman thinking she was, for example, the daughter of a priest but she was in fact the daughter of a Levite, the betrothal was nonetheless valid.[65] The guiding principle in cases of unintentional betrothal,

where no condition was verbally attached to the betrothal although one of the participants may have made a mental stipulation, was that once the tokens of betrothal had fallen into the woman's hand, a valid **kiddushin** was effected.[66] In all cases of conditional betrothal the man was required to give something worth a **perutah** in order to make the **erusin** a legal transaction, even if it was later made invalid because the condition was not fulfilled.[67]

It was also possible for the woman to be made the subject of a conditional betrothal. In this case the statement would be, 'be betrothed to me on condition that you....', followed by the stipulation. Any condition which the man could place upon himself could also be placed on the woman. Thus, the condition could involve the woman's financial status, birth class or her social-economic position, which again could include facts about offspring or servants. Should the woman intentionally deceive the man about the stipulation, she would thereby invalidate the betrothal.[68] In order for the woman to be said to have intentionally deceived the man, the man must have clearly verbalized the condition which he was placing on the woman. A mental stipulation, as noted above, had no legal effect.

In addition to the various types of stipulation which could be placed on either the man or the woman, there were three which applied specifically to women and had no application whatever in relation to men. The first of

these concerned vows: "If a man betrothed a woman on condition that she was not subject to vows and she was found to be under a vow, her betrothal is invalid".[69] If the man did not learn of his wife's vows until after their marriage, the Mishnah teaches that her deception and the unfulfilled condition combined to form just grounds for divorce and that the woman lost the rights prescribed for her in her **ketubah**.[70] The later Rabbis disputed the need for the woman to be formally divorced by her husband. Rab voiced one opinion when he taught that even though the betrothal was invalid, the consummation of the marriage by an act of cohabitation made the marriage itself valid. Rab based his argument of the assumption that the man's intent is having sexual contact was to complete the marital **kinyan** and that 'no man treats his intercourse as a mere act of prostitution'.[71] Since the marriage was recognized by Rab as legal, the woman required a **get** in order for it to be terminated. Samuel, however, was of another mind for he taught that the power of the intercourse to effect a perfect **kinyan** of marriage was fully dependent on the validity of the original betrothal. Since the betrothal was invalid, the intercourse likewise had no legal force.[72] Therefore, the marriage was not legal, the betrothal was not valid and the woman did not require a **get**.[73] In whose favour was the dispute settled? "R. Kahana stated in the name of Ulla: If a man betrothed a woman on a certain condition [which was not fulfilled]

and then had intercourse with her, [if the union is to be terminated] she requires a **get** from him. Such a case once occurred and the Sages could find no legal ground for releasing the woman without a **get**".[74]

The issue of vows was so important in the eyes of the Rabbis that they taught, even if a man betrothed and married a woman without stipulating the condition that she not be under any vows, and she was subsequently found to have vows upon her, she could be divorced and forfeited her **ketubah** rights.[75] The woman in this case was deemed to have deceived her husband by her silence. The presumption by the Rabbis seems to have been that men generally did not want to live with a woman who was in the habit of putting herself under the restriction of vows.[76] Whether the man made his discontent with such a practice known at the time of the betrothal or only after the marriage was irrelevant to many of the Rabbis. If the man did not speak his mind until after marriage, the Sages treated his statement as if he had made it as a condition at the time of **erusin** and since the condition went unfulfilled, the betrothal was retrospectively invalid.[77]

During the period under discussion, an individual could have his vow annulled by the Sages in a court of law. There was some debate whether this option was open to a woman whose betrothal depended on her not being under any vows. R. Meir taught that if the woman went to a Sage after her betrothal and he annulled her vow

retrospectively, it would be as if she was under no vows at the time of betrothal and the **kiddushin** would, therefore, by valid. R. Meir was of the opinion that a man did not object to his wife being exposed to the disgrace of appearing before a court.[78] R. Eleazar, who held the opposite view, attempted to discourage a woman from appearing before the courts by declaring the betrothal invalid even if she did have her vows annulled retrospectively.[79] As far as R. Eleazar was concerned, no legal recourse was open for a woman whose betrothal was invalid because she was under a vow; no matter what she did her **kiddushin** would remain invalid.

The second major issue which applied specifically to women involved physical defects or blemishes. The situation involving defects was almost identical to that of vows. Should the man make the betrothal conditional upon the woman not having any physical blemishes and she was found to have something wrong with her, the betrothal was invalid.[80] If the woman failed to tell the man about her defects and not only accepted betrothal but also married the man, she could be divorced and forfeited her **ketubah**.[81] If the defects were discovered during **erusin**, it was up to the father to prove that they arose after the betrothal. If he failed to do so, and it was shown that the defects were present when the man betrothed the girl, the betrothal was judged to be invalid since the man had been deceived.[82] Alternately, if the man did not

learn of her defects until after nissu'in, the onus was on him, not the father, to prove that they had been present prior to their betrothal and that his bargain had been in error.[83] The general principle was that 'he in whose domain the doubt first arose must produce the proof'.[84] This situation applied only to concealed defects; if her defects were visible the man could bring no charges against her.[85] Indeed, the Sages were quite restrictive about accepting defects as a valid issue around which to have a condition. If the woman's defects were visible or if there was a bath-house in the town where the man's female relatives could examine the woman, he was not permitted to claim that he was deceived concerning her physical blemishes.[86] Further, there were only a finite number of defects which the Sages accepted as sufficient to invalidate the betrothal. The man himself was not the judge to determine what did or did not constitute a defect. The Pentateuch stipulates which physical defects disqualified a woman from marriage. These were the same as those which disqualified a priest from serving at the altar.[87] In addition to these, the Talmud also includes excessive perspiration, moles, offensive breath, unsightly scars, repulsive voice and misshapen breasts as defects in women.[88] Under no circumstances could a betrothal which was invalid because of the woman's defects become valid, even if she went to a physician and was healed after the betrothal. Unlike vows, which R. Meir permitted to be

annulled retrospectively, a defect could not be cured retrospectively.[89]

A third type of deception which applied exclusively to women concerned her virginity. A **naᶜarah** being married for the first time was assumed to be a virgin and the **arus** did not have to make this a formal stipulation in order for it to be an effective condition of **erusin**.[90] Indeed, the matter was so important that the woman was tested for her virginity on her wedding night.[91] If the 'signs of virginity'[92] were absent, the man could bring a claim of non-virginity against her and declare that his betrothal/marriage had been based on a deception.[93] Two practical issues were involved in this claim: first, was the woman entitled to any statutory **mohar**, and if so, how much - the 200 **zuz** to which a virgin was entitled, or only 100 **zuz** which non-virgins received;[94] second, was the woman permitted to her husband, or was he required to divorce her?[95]

The Sages determined that a woman could lose her virginity through an accident or through sexual intercourse. They also distinguished between a loss of virginity prior to **erusin** and during the betrothal period in making their rulings. The most crucial distinction, however, was whether the woman told her **arus** about her loss, or not. Thus, if the woman lost her virginity through injury or intercourse prior to her betrothal, and she told her **arus** about it, she was entitled to a **mohar** of

100 zuz.[96] If she deceived him by not revealing her loss, she received nothing.[97] In all cases, the woman was permitted to her **arus**.

The loss of virginity subsequent to **erusin** was somewhat more complex. If the woman was injured and told her **arus** that she had thereby lost her virginity, she was not penalized but received the full **mohar** of virgins.[98] If she did not tell him, again she forfeited her total **mohar** but remained permitted to him nonetheless. Likewise, if the woman was forcibly raped, she was not penalized whatsoever, even if her husband did not learn of the incident until after **nissu'in** when he made a claim against her.[99] However, if the woman was seduced or otherwise consented to the intercourse with another man, and there were witnesses to it, she was condemned as an adulteress: she was forbidden to her husband who was compelled to divorce her and she received nothing.[100] In sum, the general rule regarding a woman's deception about her (loss of) virginity was that she forfeited her **mohar** but continued to be permitted to her **arus**, except in the case of a woman who was seduced after **erusin**.

In the cases of conditional betrothal discussed so far, it has been assumed that the specified stipulation was true at the time it was made. However, it was also possible for a betrothal to be based on a condition which was to be fulfilled at some future date. Probably the most common type of condition in such instances would

involve a promise to do something which would be of advantage or benefit to the woman. For instance, the man might promise to give the woman a gift of money at some specified, or unspecified, future date. "Be betrothed to me on condition that I give you 200 zuz", she is betrothed and he must give it.[101] "'On condition that I give you within thirty days from now': if he gives her within thirty days, she is betrothed; if not, she is not betrothed".[102] The promise could also be to perform some service on behalf of the woman or to do some labour for her. If he performed the service or task, she was betrothed, if not, she was not betrothed.[103]

Several major questions arose in relation to betrothals dependent on a condition which was to be fulfilled in the future. First, when did the kiddushin become valid? The most widely accepted and practiced ruling, especially in Palestine, was that taught by Rabbi (R. Judah the Prince),[104] "he who says 'on condition' is as though he says 'from now'".[105] That is, the betrothal became effective immediately but the condition had to be fulfilled. By judging conditional betrothals to be valid immediately, Rabbi was making the process of kiddushin easier for the couple and presuming that they were serious enough in their intent to marry that they would ensure that the condition would be fulfilled as quickly as possible. He was also recognizing conditional betrothals as a valid and legal means of effecting kiddushin. Rab

Judah appears not to have concurred with Rabbi on the basic legality of conditional betrothals since he ruled that **kiddushin** became valid only when the condition was fulfilled.[106] While Rab Judah's ruling was not the accepted **halakah**, it nonetheless found strong support, especially in Babylon.[107]

A second question with which the Rabbis had to contend was, what is the legal status of the relationship if the condition remained unfulfilled? How much time was permitted to elapse before the betrothal was rendered invalid due to the unfulfilled condition attached to it? It would appear that it was possible to maintain the **kiddushin** without making any attempt to fulfill the condition. Indeed, it evidently was possible for the couple to become married and have children without the condition being met. In such cases of 'mistaken betrothal'[108] several more problematic questions were raised: what was the legal status of the marriage considering the betrothal was in fact invalid due to the unfulfilled condition? Was a **get** required if the union were to be terminated? What was the legal status of the offspring? The accepted **halakah**, based on majority opinion, was that the marriage was deemed to be valid in spite of the invalid betrothal. The Rabbis ruled that the couple's first act of intercourse was effective to form a legal **kinyan** of marriage since their intent was to consummate their marriage.[109] By acknowledging the

marriage to be legal it followed that a formal divorce was required if the union was to be terminated and the children had full legal status.[110] A minority of other Rabbis taught that, since the betrothal was invalid, the marriage was not legal and, therefore, a **get** was not required and the offspring were illegitimate.[111] Because of the confusion such a situation would create, this was not an acceptable, or accepted, ruling.

Rab Judah's ruling that the betrothal was not valid until the condition was met, eliminated even the potential for such complications. There was no doubt or uncertainty regarding the validity of the relationship. It would appear that Rab Judah, and his supporters, were attempting to ensure that individuals did not become involved in marital relationships which were shrouded in uncertainty, deception or doubt and which had the potential for being judged as improper or impure. To this extent Rab Judah's ruling reflects the essential corner-stone of rabbinical teaching: to encourage and ensure the purity of Judaism and Jews; to guide their people away from situations or relationships which could cause them to transgress the Torah, and to ensure that no-one stands in a position in which their legal status is in question or doubt.

Many Teachers in the Mishnaic/Talmudic period accepted conditional betrothals as a legitimate means for effecting **kiddushin**. Nevertheless, they evidently were aware of Rab Judah's basic concern that conditions not be

such that they caused individuals to transgress the Torah. Consequently, the Sages began to limit the use of conditional betrothals. Rab Judah's ruling that the betrothal was not valid until the condition has been met was one form of limitation. The Sages also attempted to limit the type of condition which would be considered acceptable. The principle limitation was that the condition not negate Biblical requirements.[112] Thus, if the man were to stipulate, 'on condition that you not be subjected to the Levirate marriage', the condition was null but the betrothal was nonetheless valid.[113] Likewise, were he to state, 'on condition that you have no claim against me for food, clothing or sex'.[114] In both these examples, the stipulations contravened a Biblical injunction[115] and were, therefore, rendered null and void. In such instances, the law merely ignores the condition as if it had never been made and rules the kiddushin to be valid.[116] The process of limiting conditional betrothals reached its peak in the post-Talmudic period when the Rabbis prohibited their use altogether.[117]

NOTES

1. Kidd 12a-b,50a-b; TKidd 4.4; Ket 73b
2. Kidd 12b; Yeb 52a; Son.Tal.-Yeb xxxii; Cohen, 1966, 318
3. Kidd 5b,6a,9a; TKidd 1.1,3
4. see Chapter One, note 85
5. Kidd 45a,46b,50b-52a,66b,67b; Yeb 20b,44a-b; TYeb 2.2; Gitt 85a; First degree incestuous relations include: his mother and step-mother, his daughter, his granddaughter, his wife's daughter and grand-

daughter, his daughter-in-law, his wife's mother and maternal and paternal grandmothers, his maternal and paternal sister, his father's and his mother's sister, his wife's sister, the wife of his maternal and paternal brother, and the wife of his brother who did not live at the same time as he, his father's brother's wife (MYeb 1.1,3).

6. Kidd 66b; TYeb 2.2;Pearl, 1967, 20f;Owen, 1967, 129
7. Ket 29a,36a; Son.Tal.-Ket p.159,n.16; Yeb 45a; TYeb 1.10; Kidd 67b,74b,75b
8. Ket 29a,36a; Son.Tal.-Ket p.159,n.16; Yeb 45a
9. Son.Tal.-Ket p.194,n.n.4,13; But Resh Lakish taught that those subject to the penalty of **kareth** were to be punished by whipping (Ket 35b).
10. cf. Kidd 77b-78a; Son.Tal.-Kidd p.400,n.3
11. Kidd 66b,74b,75b; Son.Tal.-Kidd p.p.345f,n.7; Yeb 44a-b,45a,49a; TYeb 1.10;2.2;6.8;Berkovits, 1983, 28; Pearl, 22; Passamaneck, 1966, 121; A child born of an adulterous relation was also a **mamzer** (Neufeld, 1944, 225f; Berkovits, 28; Passamaneck, 121).
12. Deut. 23.3; Yeb 49b,78b; Kidd 73a,74a-b; TKidd 4.16
13. Kidd 74a-b,69a; Son.Tal.-Ket p.70,n.12; Pearl, 22; Passamaneck, 123
14. Ket 29b; Son.Tal.-Ket p.163,n.n.1,4
15. Yeb 22a,84a
16. Yeb 84a
17. Ket 29a
18. Passamaneck, 124
19. Lev. 18.6ff
20. TYeb 3.1; Yeb 21a; The second degree forbidden relations include: the mother of his mother and father, the wife of his paternal and maternal grandfather, the wife of his mother's paternal brother, the wife of his father's maternal brother, the wife of his grandson.
21. Lev. 21.14; MYeb 6.4;9.2; TYeb 2.3; Kidd 13b
22. MYeb 6.4; Yeb 20a
23. MYeb 2.4; TYeb 2.5; The prohibition against a priest marrying a **halugah** had only rabbinical force; it is not found in the Pentateuch.
24. Kidd 21b
25. MKidd 4.1; Kidd 66b; MYeb 9.2; TKidd 5.1-2
26. ibid; Ket 29b; Son.Tal.-Ket p.163,n.n.1,4; Passamaneck, 123
27. Deut. 24.1-4; Jer. 3.1; Yeb 11b,44a-b; TYeb 6.4-5; Berkovits, 5; Pearl, 21; Owen, 123;Yaron, 1966,2ff; Falk, 1964, 142f; Falk, 1978, 290; de Vaux, 1961, 35; This law was peculiar to Israelite-Jewish legal practice, not being found in other Near Eastern or Roman law codes (Yaron, 1966,4). The reason for its inception into Jewish law is not clear. The Deuteronomic legislator says it is because the woman,

by her second marriage became defiled to her first husband (24.4), but some modern scholars have some difficulty in understanding how a fully legal and valid (second) marriage could make the woman a source of defilement (Yaron, 1966,5ff; Berkovits, 5). Several theories have been proposed as the rationale underlying this peculiar law, none of which are fully convincing: 1) the desire to prevent hasty divorce; 2) an affinity between re-marriage after divorce with adultery; 3) 'natural repulsion' against such a union, and; 4) a desire to ensure the stability and continuation of the second marriage (Yaron, 1966, 5ff).

28. Yeb 10b,44a-b; TYeb 6.4-5
29. ibid; Kidd 45a
30. Kidd 51a-52a,66b; Yeb 20b,23a,44b-45a; TYeb 2.3,4; 6.5; Gitt 85a; Son.Tal.-Gitt p.409,n.6; Pearl, 20f
31. Kidd 64a,68a; Yeb 10b,52b,69a; TYeb 6.5; Ket 29b; Sot 18b
32. Ket 29b,77a
33. Kidd 21b,77b-78a; Yeb 20b; Ket 29b
34. TYeb 2.3; Ket 100b
35. Kidd 77a-78b; Yeb 44a-b,84a
36. Lev. 21.15
37. Son.Tal.-Ket p.78,n.15
38. Kidd 77a; Neusner, HMLW-Kidd, 1980, 256
39. Ket 14b; Son.Tal.-Ket p.79,n.9
40. Kidd 77a; Yeb 84a-b,85a
41. Kidd 77a; Yeb 44b; Son.Tal.-Yeb p.288,n.13
42. Kidd 77a; Neusner, op.cit.
43. Kidd 66b; TKidd 4.15
44. TYeb 6.5; Yeb 44b; Kidd 77a; Ket 100b
45. TYeb 2.4; Yeb 84a,85a-b; Ket 100b,101a
46. Yeb 84a
47. Yeb 69a,84a; Kidd 77b-78a; TYeb 10.2
48. Ezek. 18.2
49. Ket 29b,77a; Son.Tal.-Ket p.161,n.6
50. MKidd 2.2; cf. TKidd 3.10
51. ibid; cf. MKidd 3.2; TKidd 3.2-3
52. MKidd 3.3; TKidd 3.4
53. TKidd 2.2
54. MKidd 2.3; TKidd 2.4; Ket 73b
55. MKidd 2.3; Ket 73b; Falk, 1978, 287
56. MKidd 2.3; Ket 73b
57. MKidd 2.2; TKidd 2.5
58. Kidd 49a; MKidd 2.3; TKidd 2.5
59. MKidd 2.2
60. MKidd 2.3; Kidd 49a
61. TKidd 2.4
62. ibid
63. TKidd 2.5
64. Kidd 49b; Rackman, 1954, 225; Cohen, 1966, 304
65. Kidd 50a; Falk, 1978, 287
66. TKidd 2.5

67. Kidd 63a; cf. TKidd 3.2
68. MKidd 2.3
69. MKidd 2.5; MKet 7.7; TKet 7.8; see Chapter Eight
70. ibid
71. Ket 73a
72. Ket 72b-73a
73. ibid
74. Ket 74a
75. Ket 73b; TKet 7.8
76. ibid
77. ibid; Son.Tal.-Ket p.457,n.10
78. Ket 74b; TKet 7.8
79. ibid
80. MKet 7.7; MKidd 2.5; TKet 7.8; Falk, 1978, 287f
81. ibid
82. Ket 75a-76b; TKet 7.10
83. ibid
84. Ket 76b
85. Ket 75a-b
86. ibid
87. Lev. 21.17ff; TKet 7.9
88. Ket 75a; TKet 7.9
89. Ket 74b; TKet 7.8
90. Likewise, if the **na'arah** had become a widow, a divorcee or a **halusah** after **erusin** her second husband could bring a claim of non-virginity against her since no intercourse was deemed to have occurred between her and her first **arus** (Ket 10b; Son.Tal.-Ket p.52,n.12; cf.Ket 11a-b,12a). The **bogereth** was not subject to a claim of non-virginity since her virginity could be lost simply through maturity (Ket 11b,30a-b). Nor could a man bring a charge of non-virginity against a **ketannah** since she was not subject to any penalties because she was not a legally responsible individual (Ket 40b,44b;Kidd 10b).
91. Ket 2a,9b,10a-b,11b; Deut. 22.13ff
92. The 'signs of virginity' were the blood spots on the cloth which was placed under the woman at the time that the couple engaged in their first act of intercourse on their wedding night (Ket 9b,10a-b).
93. Ket 2a,9b,10a-b,11b
94. MKet 1.2,4; Ket 9b,10b
95. Ket 9a-b
96. Ket 11a-b,13a,16a
97. Ket 11b
98. Ket 16a; Son.Tal.-Ket p.67,n.8
99. Ket 9a,12b,14b,16a; Son.Tal.-Ket p.43,n.18;p.68, n.n.5,6; Ned 90b-91a
100. Ket 9b,11b; Ned 90b-91a; In theory, the woman who committed adultery during **erusin** was to be stoned to death; in practice, however, she was divorced and forfeited her **ketubah**. See Chapter Seven.
101. MKidd 3.2

102. ibid
103. MKidd 3.6; TKidd 3.2
104. Kidd 60b; Gitt 74a
105. Kidd 8a,60b; Gitt 74a
106. Kidd 60a
107. ibid
108. Ket 51b,74a-b; Yeb 100b
109. Ket 72b-73a,74a
110. ibid; Falk, 1978, 287f
111. Ket 51b,74a-b; Yeb 100b; Rackman, 224
112. TKidd 3.7-8; MKet 9.1; ibid, Rackman
113. TKidd 3.7
114. ibid; cf. MKet 9.1
115. Levirate obligation, Deut. 25.5; maintenance, Ex. 21.10
116. TKidd 3.7
117. Rackman, 224

Chapter Five: TERMINATING THE BETROTHAL

Perhaps the clearest indication that the **kinyan** of betrothal had the power to grant the couple a quasi-marital status was the fact that it could only be severed by a formal writ of divorce, a **get**.[1] Just as **nissu'in**, a fully consummated marriage, could not be terminated except with a **get**, so a valid **kiddushin** required the **get** if the **arusah** was to be free to become betrothed to another man. The laws concerning the proper writing of a **get** and the legal procedure for divorce were the same, irrespective of whether it was a divorce following **erusin** or divorce following **nissu'in**. Thus, there was nothing in the formal, procedural aspects of divorce to distinguish the termination of betrothal from marriage.[2]

There are several elements whose presence on the **get** were essential if it was to be judged a valid document of divorce. First, the deed had to be properly dated[3] in order that a definite point be established at which the rights of the husband and wife terminated.[4] The woman's name was, of course, also required[5] but this was not sufficient. It was essential that the **get** be written with 'special intention'; that is, that it be written expressly for the sake of the woman for whom it was intended.[6] The Biblical basis for this ruling was, 'he will write for her'[7], indicating that the document be specifically 'for her'.[8] This meant that it was not sufficient merely to

fill the woman's name into a blank space on a pre-written form.[9] Nor could the husband use a get which had been written for some other woman with the same name as his wife.[10] This situation was identical to that involving deeds of betrothal, as noted in Chapter One.

In order to ensure that the husband himself had requested the get and that he had instructed it to be written for his wife, it was necessary that the preparation of the document be attested by two witnesses.[11] While the signatures of these witnesses were not required to make the get effective, the Sages demanded them in order to prevent abuses.[12] Indeed, both the dating and the witnessing of the writing of the get were rabbinical requirements instituted to avoid confusion and abuse. The Sages declared invalid a get which had witnesses but no date.[13] In spite of the invalidity, however, if the woman remarried (or became betrothed) and had children the offspring were legitimate and most, but not all, of the Rabbis permitted her to remain with her second husband, indicating that the get was nonetheless accepted as valid.[14] The same situation arose if the man had written the get himself but it was not attested by witnesses, or if the get had a date but the signature of only one witness.[15] Although these three types of get were ruled to be rabbinically invalid[16], in actual practice most of the Sages accepted them as valid, indicating that the date and signatures of witnesses were

demanded but were of secondary significance. The main dissenting voice to this ruling was R. Meir who taught that 'wherever any alteration is made in the form prescribed by the Sages for bills of divorce, the child is **mamzer**'.[17] That is, the **get** was invalid and a subsequent remarriage on the strength of it was illegal. However, in regard to issues involving **gittin**, the rulings of R. Eleazar were always accepted as the **halakot**. His rulings are those presented above.[18]

The element which was most critical to the divorce process were the signatures of those who were present at the delivery of the **get** to the woman or her agent.[19] Two witnesses, besides the bearer of the **get**, were required to confirm that the woman had received the document.[20] If the divorce was terminating a marriage, the woman herself, irrespective of her age, received the **get**. Thus, even a minor could accept her own divorce since, with her marriage, she was no longer under the authority of her father. She could not, however, appoint an agent to accept it on her behalf.[21] Nor could a **ketannah** be divorced if she was too young to be able to take care of her **get**.[22] The receiving of the **get** was a purely passive action and did not require the woman to have legal status, but she had to be able to understand the significance of the document being given to her.[23] If the woman was only betrothed the situation was somewhat different. The **bogereth** and orphaned **na'arah** were able to accept the **get**

themselves. In the case of the **naʿarah** whose father was still living, there was some dispute as to who was entitled to receive her **get**. One viewpoint states that either the girl or her father could accept the deed and it would be a valid divorce, while the second view permits only the father to accept the document.[25] No final ruling is presented to this dispute. With the **ḳeṭannah** all agreed that only her father was authorized to receive the **get**, with or without her knowledge, since the girl was still fully under his control.[26]

The **get** became valid at the time of writing but there were several ways in which it could be invalidated before it actually reached the hands of the woman.[27] For instance, if the husband sent the **get** to his wife via an agent, then changed his mind, he was permitted to intercept the bearer and retract the **get**.[28] He was able to cancel the document as long as it had not yet reached his wife's hand,[29] but once in her possesion it was fully valid.[30] However, it seems that his actions did not actually invalidate the document; they only cancelled the authority of the agent to deliver it.[31] Consequently, if the husband changed his mind again, he could use the same deed to effect the divorce,[32] but only on one condition: that he had not, in the interval, been 'closeted' away with his wife long enough for intercourse to have occurred.[33] If after writing the **get**, but before its delivery to the wife, the husband cohabited with her, he

invalidated the document. It became an 'old **get**' unable to effect a divorce[34], but if she remarried on the strength of it she was permitted to remain with her second husband.[35] This situation applied only to a fully married woman. If the couple were merely betrothed there would be no danger that they would be closeted away together since this was forbidden.[36]

The **get** could also be invalidated if the husband had it cancelled before a Beth Din of three (two) men.[37] The Mishnah records that in an earlier period the husband had been able to cancel the **get** in this way without informing the agent who was delivering the document to the wife.[38] This practice had serious, and negative, consequences for the woman who would remarry on the strength of the **get**. Her second marriage was, of course, invalid and any children born of the union were **mamzerim**.[39] In order to prevent such abuses, Rabban Gamaliel the Elder put an end to this practice and required that if the husband were to cancel the **get** before a Beth Din he must inform the agent and/or his wife.[40]

Finally, if the agent who had been assigned to deliver the **get** failed to follow the precise instructions of the husband, the document was invalidated.[41] Likewise, if the husband did not properly present the document to his wife, it was invalidated. For instance, if he threw it to her into <u>his</u> house or courtyard she was not divorced because he did not deliver it into her hand.[42] If he

threw it to her in her house or courtyard, the get was valid.[43] Or, if he failed to declare, 'That is your get', the divorce was not valid because the woman had to understand the significance of the document being given to her, even though her consent to it was not required.[44] Also, if there were no witnesses to the delivery of the get it was rendered invalid.[45] Thus, the get had been valid when written but because of irregularities in its delivery to the woman, it was nullified, against the wishes of the husband. Clearly then, both the writing and the proper delivery of the divorce document were required to make it effective, although its actual validity began with its writing.

The essential declaration, written in the get was: 'Lo you are free to marry any man'.[46] R. Judah required the addition of the words: 'And this will be to you from me a writ of divorce and a letter of release and a bill of dismissal wherewith you may go and marry any man that you please'.[47] These additional words were necessary as proof that it was the get which effected the complete severance of their marital bond.[48] The document was not merely proof that the divorce had occurred; it actually dissolved the bond. Consequently, Jewish law requires the longer form of the declaration to be written in the get.[49]

It should be noted that the essence of the declaration which freed a slave was different from that which freed a wife. The essential elements in the deed of

manumission were, 'behold you are a free woman, behold you belong to yourself'.[50] This declaration emphasizes anew that the slave belonged bodily to her master and, with her emancipation, she became the possessor of her own physical self.[51] The husband could not use these words in reference to his wife, nor could he use the declaration of divorce in reference to the emancipation of his slave.[52] The slave could also be freed by money, but a wife could not.[53]

The function of the get in both the rabbinical and Tanakh periods was to free the woman to marry another man. The husband did not require a formal severing of the marital bond since he was permitted, in a polygamous society, to take a second wife. However, the woman could not have two husbands simultaneously. For this reason, the wife, and not the husband, was made the point of reference in the divorce document, both in the requirement that it be written specifically for her and that the written formula declare her freedom from the betrothal or marriage. Just as the declarations required in the formation of the betrothal emphasized the new status of the woman, so the declaration in the get had also to center on her changed status relative to her husband.[54] Considering that she was the central figure in the divorce drama, it is ironic to learn that the woman played a completely passive role. Neither her consent nor even her knowledge were required in order for the husband to

proceed with the writing of the get.[55] Nor was the woman, under most circumstances, legally empowered to initiate a divorce if she was the one who wanted to terminate the betrothal or marriage.[56] It was the husband's consent which was required and it was he who played the active role in initiating and concluding the divorce.[57] This situation arose because the Pentateuch put the authority for divorce exclusively in the hands of the husband when it declared, 'he will write her a deed of divorcement and give it into her hand and send her from his house'.[58] The Sages accepted this ruling and were not willing, as a general principle, to permit the woman to have any active role in her own divorce. It was not until the Middle Ages that Jewish law amended this situation somewhat by requiring that the wife consent to the divorce.[59] If she does not give her consent, the get is invalidated. The early Sages demanded that the betrothal could not be effected without the express consent of the woman, or her father, but they were unwilling to extend this prerequisite to the termination of the betrothal, or marriage, by divorce.

While Jewish law never granted the woman the right to divorce herself[60], it did increase her rights in the whole procedure by two significant steps, both of which involved the ketubah. First, the Rabbis penalized the husband if he wanted to divorce his wife without providing justifiable cause for doing so. The law permitted the

husband to divorce his wife for no valid reason whatever. Even if he no longer found her attractive or if she no longer pleased him, he could divorce her. This unlimited scope was implied in the Torah[61] and the rabbinical law was hesitant to dismiss it.[62] However, while they allowed the husband to divorce his wife without just cause, they did not permit him to do so gratis. If he wanted a divorce, he was required to pay to his (married) wife the full value of her marriage contract. If they were only betrothed, the **arus** was required to pay the 'statutory **mohar**', the minimum amount of money which the 'husband' had to pledge to give to his **arusah** in the event of divorce or widowhood: 200 **zuz** to a virgin, 100 **zuz** to a non-virgin.[63] The statutory **mohar** was the most significant clause in the **ketubah**, and was the only obligation which became effective at the time of **erusin**. This financial penalty had the effect of making divorce a less attractive and viable option for the husband and he became less willing to undergo the expense of divorce.[64] In addition, the penalty provided the woman with some financial security if the husband went ahead with the divorce. The **ketubah** payment could be viewed as a sort of al[redacted]ny obligation upon the husband.

The second way in which the **ketubah** increased the rights of the woman in the issue of divorce was that it provided her with the opportunity to specify that if certain provisions were not met by the husband, he would

be obliged to give her a divorce. A special clause of this nature which was occasionally inserted into the **ketubah** was that the husband must divorce his wife if he wanted to take a second wife in addition to her. The standard phrasing of the clause read: "That if he marry another wife in addition to this one, he will release her (the present bride) by a valid instrument of divorcement".[65] While it was possible for a man to marry as many wives as he could support, in the Talmudic period monogamy was customary; polygamy was permitted but not often practised nor even socially condoned.[66] The stipulation in the **ketubah** guaranteed the woman a monogomous bond with her husband and ensured that all **ketubah** obligations would be honoured in case he did not meet the provision. Post-Talmudic **ketubot** attempted to circumvent the legal restrictions against what has been termed 'unjustifiable divorce' in a similar manner. A divorce stipulation was inserted stating that if the husband hates his wife he shall divorce her and pay her her **ketubah**, and if she hates him, he shall be obliged to divorce her and pay part or all of her **ketubah**.[67] The marriage contract was, therefore, a significant tool which could be used to increase the wife's status and make her more equal with her husband in terms of her rights in obtaining a divorce.

Besides these two methods of making divorce more equitable for the woman, the Rabbis also recognized that

she could have a legitimate reason for wanting to terminate the marriage and that in cases of just cause, the husband could be compelled to divorce her and pay her her **ketubah**. The Rabbis accepted as just cause the refusal by the husband to have regular conjugal relations with his wife[68] and his refusal, after certain disciplinary measures by the Beth Din, to maintain her.[69] Other examples of what would be considered cruel and unreasonable behaviour toward the wife include instances in which the husband prohibited her, under vow, from enjoying certain pleasures such as eating various kinds of fruit or wearing ornamented clothing, jewelry, cosmetics or visiting the bath-house for a specified time.[70] Restricting her social liberties such as attending weddings or funerals,[71] or ordering her to be totally idle or to engage in useless tasks also constituted valid grounds for divorce.[72] The husband did not have the right to blemish the reputation of his wife and was repeatedly admonished to treat her with respect, kindness and affection. There were apparently no just grounds for an **arusah** to request that the courts compel her 'husband' to grant her a divorce. Each of the grounds presented above applied only to a fully married woman who had certain rights which it was incumbent for the husband to meet. None of these rights, or obligations, took effect until after **nissu'in**. Presumably however, if the **arusah** had some reason for wanting out of the betrothal, a reason

which centered on some aspect of her **arus**, she could at least present her case to the courts. There were certain defects in the man, such as his physical appearance or his occupation, which the courts recognized as valid grounds for divorce by the wife.[73] It is likely that the **arusah**, as well as a full wife, could demand a divorce on the basis of her inability to tolerate these defects, even though she initially thought she could.[74] If the wife's request for a divorce was based on recognized legal grounds, the courts could verbally pressure the husband to write out a **get** for her. If this failed they could, at least theoretically, resort to corporal punishment or fines in order to compel him to write the document.[75] In practice, however, the Jewish court has not always had the political authority to enforce its rulings.[76]

In each of the above two situations, the ruling of the Sages favoured the woman. That is, if the husband wanted to divorce his wife without just cause, he would be penalized for doing so by being compelled to pay her the full amount of her **ketubah**, and if the woman showed just cause for requesting a divorce she too would receive her full **ketubah** payment with the divorce. In both of these cases the husband was judged to be the guilty party and, consequently he, not his wife, was penalized. In the event that the woman was the guilty party, she would be penalized by the forfeiture of part or all of her marriage contract. The woman could be judged to be the guilty

party in exactly the same way as the husband. That is, if she demanded a divorce solely on the grounds that she no longer wanted to be betrothed or married to her husband, i.e. for no justifiable cause, the husband could divorce her (if he wanted to) but she would forfeit her **ketubah**. Alternately, if the wife was guilty of some behaviour which constituted just grounds for the husband to divorce her, she again would be penalized. The rabbinical literature enumerates a number of claims which the husband could bring against his wife. Since most of these did not apply to the **arusah**, but only to a fully married woman, they will only be briefly noted. Cruelty was a ground for divorce but the woman was not penalized and did not lose any of her **ketubah** rights since a man was not permitted to bring charges of assault against a woman.[77] Divorce was optional although 'it is a meritorious deed to divorce an evil wife'.[78] Nor was a woman found to be sterile after ten years of marriage penalized.[79] The only exception here was the woman who had already been married twice without bearing children and who married for a third time without informing her husband that she was unable to bear children.[80] The forfeiture of her **ketubah** in this instance was not so much for sterility as for deception.[81] Indeed, a woman who had already been divorced two times because of sterility could not marry again except to a man who already had children.[82] If any of the husbands already had children by another wife, divorce was

optional; otherwise he was compelled to divorce his sterile wife who prevented him from fulfilling his Biblical obligation to 'be fruitful and multiply'.[83] Sterility was not considered to be a defect in the wife, unless otherwise proven, but the result of sexual incompatibility.[84] It was for this reason that the woman did not forfeit any of her **ketubah** rights.

Further grounds for divorce included the wife's laxity in certain religious observances such as giving her husband untithed food, having sexual intercourse with him during menstruation, or making vows and not fulfilling them.[85] She could also be guilty of committing offences against Jewish custom. Examples of such offences would include going out with her hair down, spinning in the street, speaking so loud about private family matters that her neighbours hear her, speaking with a man on the street and cursing her husband's parents in his presence.[86] Divorce for these misdemeanors was optional with the husband and she forfeited her total **ketubah** only if she had been given a warning by her husband, before witnesses, to correct her behaviour but she disregarded it.[87] The husband could also divorce without penalty a wife who had socially restricted herself by putting herself under any number of vows; for example, a vow not to lend or borrow household utensils, not to attend weddings or funerals or not to make new clothes for his children.[88] A wife who failed to observe her religious

duties or who was unsociable reflected negatively upon the husband himself and gave him a bad name in the community.[89] Rather than suffer the loss of his reputation, the husband could, justifiably, divorce his wife if she was unwilling to change her attitude and behaviour.

The husband could also divorce his wife who was a **moredeth**, a 'rebellious wife'. The **moredeth** was a wife who refused to have conjugal relations with her husband either because she wanted to hurt him or because she found him repulsive.[90] The **moredeth** who acted out of spite and maliciousness was divorced, after a separation of twelve months without maintenance, and forfeited her **ketubah** rights.[91] While some prescribed the same penalty for the woman who genuinely was repulsed by her husband, others were more lenient, granting an immediate divorce or compelling her to wait a year but with maintenance. The delay in this case was to give the couple the opportunity to reconcile their differences. Should this fail, the husband could grant her a divorce if and when he so chose and the woman forfeited part or all of her **ketubah**.[92]

An **arusah** who refused to marry her **arus** was treated as a **moredeth**.[93] In her case, however, an attempt was made to persuade her to change her attitude. An announcement concerning her behaviour was made on four consecutive Sabbaths. If this failed, she was divorced without her **ketubah**.[94] Both the **arusah** and the full wife

who were divorced as a **moredeth** were given a 'certificate of rebellion' as a continual reminder, and stigma, of their behaviour.[95]

The most significant and serious cause for divorce by the husband was unfaithfulness by his **arusah** or wife. Three types of unfaithfulness are delineated in the law, each of which follows the same scheme in terms of penalizing the wife. In all cases where there was no doubt that the woman had committed adultery, the husband had the religious duty to put away his wife because she had become unclean to him.[96] This ruling applied equally to the **erusin** and **nissu'in** wife. Forfeiture of her **ketubah** rights was the penalty paid by the woman caught in the act of adultery.[97] If doubt existed, due to the absence of witnesses to the actual act of adultery, divorce was optional. However, if the husband who suspected his wife of unfaithfulness warned her not to be secluded with a particular man, and she disregarded his warning, she became prohibited to him, was divorced and forfeited her **ketubah**.[98] More will be said regarding both definite and suspicious adultery in Chapter Seven which considers the issue of adultery during the period of betrothal. The third type of unfaithfulness was that in which the evidence against the woman was weak and inconclusive.[99] In this case the husband had the option of divorcing or keeping his wife, but if he decided to send her away he had to pay the **ketubah** in full; if she

was subsequently found guilty after an examination of the testimony of at least two witnesses, she had to forfeit all her **ketubah** rights.[100]

That the Sages distinguished between divorce with justifiable cause and divorce with no justifiable cause is clear. The principle underlying the former case was that the individual penalized was the plaintiff, the one demanding the divorce. In the case were the plaintiff could produce sufficient cause for divorce, it was the offender who was penalized, although there are many instances in which the husband could provide sufficient cause for divorce but the woman did not forfeit any of her **ketubah** or only lost part of it. If the woman was to lose her **ketubah** rights it was only because she herself had been guilty of some serious, willful breach of her marital obligations. If innocent, the woman was always guaranteed a marriage contract. In comparison to the situation during the Tanakh period, in which the husband could divorce his wife for no good reason without penalty, the situation in the rabbinical law was a significant development in favour of the woman. Not only did the Sages discourage indiscriminant divorce by penalizing the husband, but they also provided the wife with the opportunity to request a divorce from her husband, even if she did not have a justifiable cause for terminating the betrothal or marriage. It was the introduction of the **ketubah** into Jewish law which provided the instrument

whereby the entire divorce process could become more equitable and fair to the woman by making divorce a less viable option for the husband and by ensuring that she would not be financially destitute in the event that her husband did divorce her. As noted above, however, the woman was never granted sufficient authority to actually initiate and finalize the divorce. She could never divorce her husband.[101]

Besides these major developments in the area of divorce which were associated with the ketubah the Sages made several other rulings concerning procedural matters which favoured the woman. First, they accepted as valid any divorce document which originated in an authorized, non-Jewish court.[102] Likewise, the get was valid if it had non-Jewish signatures, even of Samaritans who were otherwise not acceptable witnesses to legal transactions among Jews.[103] The significant witnesses, as noted above, were those present at the delivery of the get, and these had to be Jewish.[104]

Another ruling which favoured the woman was that, if her husband had moved to another part of the the diaspora community, the Sages accepted as valid a get which was brought by a single bearer[105] who was able to declare: "In my presence it was written and in my presence it was signed".[106] The bearer was required to make this declaration in order to ensure that the get had been written with 'special intention' and to forego the

requirement of verifying the signatures on the document before accepting it as valid.[107] The declaration also prevented the husband from subsequently coming to invalidate the get.[108] If the bearer was unable to make the declaration in its entirety, the genuineness of the signatures had to be established before the validity of the get could be determined.[109] However, for some reason if the bearer was able to acknowledge only one of the two parts of the declaration, the Sages stated that the get was deemed to be fully invalid[110] and no attestation of the signatures was sufficient to make it valid.[111] Thus, if the bearer declared: 'It was written but not signed in my presence' (or vice versa),[112] or, 'The whole of it was written in my presence but only one witness signed in my presence',[113] the get was permanently invalid. If two bearers were to bring the document, the declaration was not required.[114]

The fact that only one bearer could bring the get was a significant concession favouring the woman. Under normal circumstances any situation which would result in a 'prohibited sexual relationship' required two witnesses.[115] That is, if the woman was to become prohibited to her husband, two witnesses were required. Thus, two signatures were required as witnesses to the writing of the get[116] and two to its delivery[117]; and two witnesses were necessary to prove that a woman had committed adultery, an act which prohibited her to her

husband.[118] Consequently, it is significant that the Sages permitted only a single person to bear the get from one region to another. Likewise, a declaration by only one person[119] that the woman's husband (arus) was dead was sufficient to allow the woman to remarry.[120] The wife herself could even be this witness.[121] In virtually all of these cases, the ruling was made to make the entire process of divorce easier with one intention in mind: to prevent the woman from becoming an **agunah**, a deserted wife.[122] The **agunah** was a woman who was tied to an absent husband and who was forbidden to remarry because she either was not divorced, if her husband was still alive, or she was uncertain whether her husband was dead or alive.[123] If the husband decided to divorce her and sent the divorce document via an agent, the Sages wanted to be certain that the get would be effective and, therefore, made the process as easy and fool-proof as possible. If the husband was dead and even one person could testify to his death, they accepted this witness as sufficient. The Sages made all possible concessions in order to prevent a woman from being married without a husband.[124]

It was noted in the previous chapter that the Sages recognized conditional betrothals as valid, whether a time limit for the fulfilment of the condition had been specified or not. In regard to divorce, the Rabbis also accepted that a condition could be attached to it, however, they demanded that a specific time limit be

placed on its fulfilment. For instance, the husband could make the get conditional upon his wife not drinking wine, or visiting her father for thirty days and the document would become valid after the thirty days, provided the condition was met.[125] However, if he were to say: ,"Here is your get on condition that you never drink wine, that you never go to your father's house", the get was not valid.[126] The reason for the time limit was that it was necessary for the get to completely 'cut off' the woman from her husband.[127] A condition which had no definite or specific end point did not meet the requirement of 'cutting off'.[128] There was no way in which the woman could fulfill the condition except by her own death. Consequently, she remained tied to her husband by the unfulfilled condition.[129] It was for this reason also that the Sages would not permit a man to declare when he divorced his wife: 'You are hereby free to marry any man but So-and-So'.[130] The husband could not in any way make restrictions upon whom his wife was to marry subsequent to their divorce since this condition meant that she was still attached to him, albeit imperfectly.[131]

Not only did the Sages judge as invalid any divorce whose condition did not completely sever the bond between the man and woman, but they also forbad the get to be conditional upon the man's death. For example, if the man was ill he could not say, 'Here is your get when (after) I die'[132] since, according to the Rabbis, 'there is no

divorce after death'.[133] However, he could say, 'from now, if I die' and the **get** would be retrospectively valid, if he died.[134] A man who was in danger of dying could attach such a stipulation to the **get** in order to free his wife from the levirate obligation if he did in fact die.[135] The **get** would become retrospectively valid at the time of his death but during the interval between the writing of the document and his death, his wife would still be recognized as his legal spouse.[136] If the man did not die the **get** would become invalid.[137] It was, however, essential that the man not be definite about his death. That is, he could not say 'when' or 'after' I die because this would imply that the divorce was effected only when he has died and this was not possible. It was necessary to say both 'from now' and 'if' in order to make it retrospectively valid. Likewise, if the man was going away on a journey or to war and there was a possibility that he might not return, he could give his wife a conditional **get** at his departure. The condition stated that if he did not return at a specified time, the **get** would become effective. The Sages permitted such a **get** in order to prevent the woman from becoming an **agunah**.[138]

Several restrictions were placed on the couple whose betrothal or marriage was terminated by divorce. First, they were forbidden to marry each others' relatives.[139] The woman also became disqualified to marry into the priesthood since a priest was forbidden to marry a woman

who had been divorced.[140] The woman was also required to wait a period of three months from the date of the **get** before she remarried in order to ensure that she was not pregnant.[141] Although this reason did not apply to a woman who was divorced from **erusin**, the Sages nonetheless required her to wait the three months in order to prevent confusion as to who could and who could not immediately be remarried.[142] While the divorced woman could not immediately remarry, she could become betrothed within the three month waiting period.[143] If she had already been divorced twice in a row she was forbidden to remarry again because it was assumed she was a difficult woman with whom to live.[144] Finally, the man and woman were permitted to remarry only if the woman had not been betrothed/married to and divorced by another man during the interval.[145] Nor could a man remarry a wife whom he had divorced because of an evil name[146] or because she had put herself under vows which required a court for their dissolution[147] or which were made publically[148] or because she was a **soṭah**[149].

THE RIGHT OF MI'UN

It was noted in an earlier discussion that the betrothal and marriage of an orphaned **ketannah** had only rabbinical validity since the mother or brother who contracted these for her did not have Pentateuchal authority to do so. Regardless of whether the girl had

initially consented to the betrothal/marriage or not, rabbinical law permitted her to terminate the union simply by indicating that she no longer desired to be attached to the man chosen for her. The formal procedure for exercising her right of **mi'un** (refusal) required the girl to declare before three witnesses[150]: 'I do not like you (him) and I do not want you (him)',[151] or some similar declaration.[152] The witnesses would then draw up a 'certificate of **mi'un**' which would testify that: "On the Nth day, So-and-so, the daughter of So-and-so made a declaration of refusal in our presence".[153] Even if she did not make a formal statement of refusal before a court but went ahead and betrothed or married herself to another man, her actions would indicate her refusal of the first man.[154]

The right of **mi'un** could be exercised only by the orphaned **ketannah**, or one who was an 'orphan in her father's lifetime' whose betrothal or marriage, contracted by her own authority, had only rabbinical validity.[155] **Mi'un** could be used to terminate either the betrothal or marriage of the **ketannah** throughout the period of her minority or as soon as she became of age, but before the marriage was consummated.[156] As noted in Chapter One, the marriage of an orphaned **ketannah** acquired full legal status with the couple's first act of cohabitation upon her reaching legal maturity. Subsequent to this point, the woman required a **get** if the union was to be

terminated.[157] If the girl had been betrothed or married by her father, who died immediately thereafter, the betrothal/marriage had full Pentateuchal validity and could, therefore, only be terminated by a formal divorce document.[158]

Once the girl exercised her right of **mi'un** it was as if the betrothal/marriage had never occurred. She was not entitled to a **ketubah**[159] nor did the restrictions placed on the divorced couple apply to those whose marital bond was severed by **mi'un**. Thus, the man and girl were permitted to marry each other's relatives, the girl was permitted to marry a priest, and they were permitted to remarry even if she was married to and divorced by another man in the interval.[160] Nor was the girl required to wait three months before contracting a new marriage.[161]

The Sages disputed the question: is the orphaned **ketannah** who exercised her right of **mi'un** then returned to her father's house entitled to maintenance or not?[162] The principle underlying this issue was that once the girl left her father's house to marry, she lost her right to be maintained from his estate. The difference of opinion regarding the orphaned **ketannah** was whether her exercise of **mi'un** after **nissu'in** nullified the fact that she had left her father's house, or not. One viewpoint assumes that just as a woman who was widowed or divorced during **erusin**, and who therefore had not left her father's house, was entitled to maintenance, so the **ketannah** who exercised

her right of refusal was entitled to maintenance. Once the girl exercised her right of refusal she was restored to the status of one who had never been married and had always been in her father's house. Therefore, she was entitled to maintenance.[163] R. Judah, however, rejected this view. He taught that since the girl had left her father's house to marry, even though she subsequently terminated the marriage by **mi'un**, she has lost her right to maintenance.[164] No final decision was reached concerning this question. However, if the **ketannah** exercised her right of refusal during **erusin** and, therefore, did not leave her father's house, all agreed that she was entitled to maintenance.

It is interesting to note that in the case of divorce it was the man who played the active role in the process whereas in regard to **mi'un** he was completely passive, and the girl took all the initiative.[165] It was the girl's consent, not the man's, which was required to terminate the relationship by **mi'un**.[166]

NOTES

1. Kidd 3b,13b,14a; Elman, 1967, 67; Neubauer, 1920, 185; Cohen, 1966, 320
2. Gitt 26b,77b; Neubauer, 194
3. In order to be 'properly' dated, the **get** had to include the reign of the government corresponding to the country in which it was written (Gitt 79b; Son.Tal.-Gitt p.382,n.4). If the wrong date was used the **get** was invalid; the woman was forbidden to remarry and if she did she had to be divorced by both husbands; her children of both marriages were, however, legitimate (according to the Sages;

R. Meir judged them to be illegitimate), and; she forfeited all her **ketubah** rights (Gitt 79b-80a; cf.TGitt 6.3). The reign of the current local or national ruler was required for the sake of keeping on good terms with the government (Gitt 80a-b).

4. Gitt 17a-b,26b,72a
5. If the woman's name was written incorrectly on the **get**, it was an invalid document and all the conditions in Note 3 applied, except that in this case all agreed that the offspring were illegitimate. Likewise, if the husband's name or the name of the town were incorrect, the same situation arose (Gitt 79b,80a).
6. Gitt 2a,3a,4a,16b,23a,24a-b,26a,26b; TGitt 2.7,10; Kidd 9b,48a
7. Deut. 24.1
8. Gitt 26a; TGitt 2.7
9. Gitt 21b,24a-b,26a,26b; Neusner, HMLW-Gitt, 1980, 139,140,142
10. Gitt 24a-b
11. Gitt 9a-10a,17a,18b,65b,71b-72a,86b; Son.Tal.-Gitt p.417,n.n.10,11; TGitt 2.7; Neusner, op.cit., 141, 175; Falk, 1978, 311f,314f
12. Gitt 3a-4a,34b,36a; TGitt 6.9; Falk, 1978, 314
13. Gitt 3b,17b,86a-b; TGitt 7.6
14. ibid
15. Gitt 3b,17b,86a-b; TGitt 7.7
16. Pentateuchally each of these **gittin** was valid (Gitt 86b; Son.Tal.-Gitt p.418,n.6)
17. Gitt 5b,80a,86a
18. Gitt 4a,24b,26a
19. Gitt 3a-4a,5b,9b,21b,22b,23a,26b,36a,63b,64a,86b
20. Gitt 5b,63a-b
21. Gitt 65a
22. Kidd 43b; Gitt 64b; cf.TGitt 4.2-3 Likewise, an insane woman could not be divorced since she was unable to understand the significance of the **get** or to care for it. The Sages also prevented divorce in this instance as a protection against abuse of women who were unable to care for themselves (Gitt 71a;Yeb 110b,113b;Son.Tal.-Yeb p.p.770f,n.10; Berkovits, 1983, 33f; Owen, 1967, 129; Cohen, 398ff; Paterson, 1932, 163).
23. Kidd 43b; Gitt 64b
24. Kidd 44b, Ket 46b
25. Gitt 64b; Ket 44a,46b, Kidd 43b
26. Gitt 21a,62b; Ket 46b; Kidd 10a,44b
27. Gitt 18a; Owen, 124,126; Neusner, op.cit., 166; Neusner, 1979, 151
28. Gitt 11b,32a,62b,65a; Kidd 59a; TGitt 3.3
29. Gitt 32a,62b,65a; Neusner, HMLW-Gitt, 150
30. Gitt 18a; cf. Gitt 77a-b
31. Gitt 32b
32. ibid

33. Gitt 76a,76b; cf. Gitt 79b
34. Gitt 76b,79b; TGitt 6.3; cf. Gitt 18a,81a; Son. Tal.-Gitt p.67,n.3;p.365,n.1
35. Gitt 79b,86a; Falk, 1978, 316
36. cf. Gitt 81a,81b
37. Gitt 33a; The Rabbis were divided on whether two or three men were required to form the court which invalidated a **get**.
38. MGitt 4.1; Berkovits, 43; Falk, 1978, 316
39 Gitt 33a; Son.Tal.-Gitt p.131,n.2; ibid, Berkovits; ibid, Falk
40. MGitt 4.1; Neusner, HMLW-Gitt, 150; ibid, Falk; ibid, Berkovits
41. Gitt 65a; Neusner, HMLW-Gitt, 166
42. Gitt 77a; cf. Gitt 78a; Neusner, HMLW-Gitt, 188f
43. Gitt 77a-b; cf. Gitt 78a; Neusner, 1979, 151
44. Gitt 78a; Kidd 6a-b; TGitt 6.1; Neusner, HMLW-Gitt, 190
45. Gitt 3a-4a,9b,36a,64a,86b; Neusner, 1979, 151
46. Gitt 26a,85a; Kidd 6a; Ned 5b; Falk, 1978, 313; The formula for divorce during the Tanakh period seems to have been: "she is not my wife and I am not her husband" (Hos. 2.4), the exact opposite of the betrothal declaration recorded in the Elephantine **ketubot**. The divorce formula in the latter documents was: "I divorce X my wife, she shall not be to me a wife", or, if the wife was divorcing her husband: "I divorce you, I shall not be to you a wife" (Kraeling, 1953, B-7).
47. Gitt 85b
48. ibid
49. ibid
50. ibid; Kidd 6b
51. ibid
52. Kidd 6a-b
53. Kidd 4b,14b; Gitt 21b
54. Kidd 5b
55. Kidd 9b; Yeb 113b; Gitt 21a,49b,55a,71b
56. Ket 59b; de Vaux, 1961, 35; Paterson, 165
57. Yeb 113b; Gitt 21a,49b,71b; Elman, 70; Falk, 1978, 308,311; Friedman, 1980, 312f; Owen, 125
58. Deut. 24.1
59. Son.Tal.-Kidd p.35,n.2; Berkovits, 45,102; Owen, 125; Rackman, 1954, 223
60. Ket 59b
61. Deut. 24.1; This unlimited scope, and one-sidedness of divorce was a common feature throughout the Ancient Near East. Babylonian and Assyrian laws both recognized the absolute right of the husband to divorce his wife, with or without, just cause. The woman enjoyed no such privilege (Driver and Miles, 1935, 268,270f; Pedersen, 1926, 71,549). This contrasts with the practice of the Egyptian (Yaron, 1961, 53; Yaron, 1958, 36,38) and Greco-

Roman environments where the woman was legally empowered to divorce her husband (Cohen, 378f,384, 402; Neufeld, 1944, 184f)

62. Gitt 90a-b; Owen, 127; de Vaux, 34f; Mace, 1953, 256f; Paterson, 164f; Beth Hillel ruled in accordance with the apparent meaning of the Deuteronomic text. Beth Shammai would interpret 'defiled' in the very limited sense of sexual uncleanness, i.e. that adultery by the wife against the husband was the only permissible grounds for divorce (Gitt 90a). This view accords with that taught by Jesus in the Matthew account (5.32).

63. Ket 54b,55b-56a,89b; Yeb 29b,43b

64. Ket 11a,39b,54a,82b; Berkovits, 33; Elman, 75; Falk, 1978, 298

65. Epstein, 1973, 222; cf. Berkovits, 33; Falk, 1978, 277; A similar clause was found in a much earlier **ketubah** from Nuzi. Here also the husband was required to pay the woman the sum stipulated in their marriage contract since he had violated a marriage agreement (Levine, 1968, 274f). Subsequent to the Elephantine documents, two of which contain the provision, this clause was found in Greco-Egyptian marriage contracts, possibly under the influence of the earlier Jewish practice (Rabinowitz, 1933, 94f,96).

66. Yeb 65a; Epstein, 1942, 16ff; Pearl, 27f; Mace, 135ff; Baron, 1952, 223ff; Lowy, 1958, 115,117ff

67. Friedman, 1980, 328ff; Falk, 1978, 311; The insertion of a divorce clause which gave the woman equal opportunity to divorce her husband is found for the first time in the Elephantine **ketubot** (Appendix D; Yaron, 1961, 53; Yaron, 1958, 14,36,38; Friedman, 1980, 313ff). This, however, was the result of Egyptian influence and did not represent the accepted Jewish practice which gave the right of divorce exclusively to the husband (Yaron, 1961, 53; Yaron, 1958, 36,38). Friedman (1980) suggests that as early as the 4th century C.E. in Palestine it was possible to insert such a divorce clause into the **ketubah** (p.p.316ff), although the Judean Desert **ketubot** had no such clause (Benoit et al, 1961, 110ff,248ff, 254ff).This suggests that only some circles of scholars permitted a divorce clause to be written into the contract (Friedman, 318f). However, by the 11th century most of the Cairo Geniza **ketubot** had a divorce clause, indicating that it had become customary practice to insert it when writing the **ketubah** (ibid, 313,327ff). Indeed, Friedman maintains that the custom was by this time so deeply entrenched in Jewish legal practice that the stipulation was in effect whether it was actually written in the contract or not (325f, 339f). It should be noted that this clause permitted

the wife to sue for divorce but did not give her the legal power to actually write the get. This authority remained solely with the husband. The benefit of the divorce clause was that it legally compelled the husband to grant a divorce requested by his wife, with or without just cause (346).

68. Ket 61b; TKet 5.6; Epstein, 1973, 218f; Berkovits, 36; Falk, 1978, 290f
69. Ket 70a; Epstein, 1973, 220; ibid, Falk
70. Ket 70a,70b; TKet 7.2-3
71. Ket 71b; TKet 7.5
72. Ket 59b,61a;
73. Ket 77a;TKet 7.11;Epstein, 1973, 222; Berkovits, 34
74. Ket 77a; ibid, Epstein
75. Gitt 88b; Epstein, 1973, 218; Berkovits, 34
76. Epstein, 1973, 218; Berkovits, 104
77. ibid, Epstein, 207
78. Yeb 63b
79. Yeb 64a; TYeb 8.5; Ket 77a; cf. TGitt 3.5; The custom of not penalizing a woman who was divorced because of barrenness is noted already in the Babylonian law code, where such a woman was paid a special sum of (divorce) money equivalent to her marriage price (Pritchard, C.H. 138-139; Driver and Miles, 1935, 267). Under no other circumstances was the woman entitled to the divorce-money.
80. Ket 100b,101b; Yeb 64b; TYeb 8.6
81. Ket 100b,101b
82. Yeb 65a; TYeb 8.6
83. Yeb 64a,65a,65b; Owen, 128; Mace, 251; Cohen, 391
84. Yeb 64a,65a; TGitt 3.5; TYeb 8.5-6
85. Ket 72a-b
86. ibid; TKet 7.6,7; Falk, 1978, 308f
87. Ket 72a; TKet 7.7; Epstein, 1973, 212f
88. Ket 71b-72a;
89. Ket 72a; TKet 7.4
90. Ket 63b; Epstein, 1973, 147f; Friedman, 1980, 321f; Berkovits, 36ff
91. Ket 63b-64a; Epstein, 1973, 148
92. ibid; Berkovits, 36ff
93. Ket 64a
94. Ket 63a-b; TKet 5.7
95. Ket 64a
96. Sot 3b,5b
97. Ket 101a; Ned 90b-91a
98. Sot 2b,3b-4a,5a,31b; Ket 9a
99. Yeb 24b; Sot 31a-32b
100. Epstein, 1973, 210
101. Ket 59b
102. Gitt 10b,11a; Son.Tal.-Gitt p.34,n.1; TGitt 1.4
103. Gitt 9b-10b,11a; Son.Tal.-Gitt p.34,n.1; TGitt 1.4
104. ibid
105. Gitt 2b-3a; The only individuals who were not permitted to act as bearers of a get were a lunatic, a

blind person, a deaf-mute, a minor and a non-Jew. None of these individuals had any legal status in Jewish law and, therefore, their declaration would have no legal effect (Gitt 5a,9a,23a-b). Although rare in practice, the woman for whom the **get** was intended was able, legally, to act as bearer of her own **get** as long as she could make the declaration (Gitt 23b,62b;TGitt 2.6). Indeed, she was even able to write the **get** herself, with the consent of her husband, as long as there were witnesses to sign it (Gitt 21a,22b).

106. MGitt 1.1; Gitt 4a-b,15a-b
107. Gitt 2a,3a,4a,16b,26b
108. Gitt 3a,5a,5b; Neusner, HMLW-Gitt, 123,124
109. Gitt 5a,9a; TGitt 1.1-3; ibid, Neusner
110. MGitt 2.1
111. Gitt 15b; TGitt 2.2
112. MGitt 2.1
113. ibid
114. Gitt 2b,16a-17a
115. Kidd 66a; Ket 9a; Sot 31a-b; Gitt 2b,64a; Yeb 88a
116. Gitt 9a-10a,17a
117. Gitt 5b,64a; cf. Ket 22b-23a
118. Ket 9a,11b
119. Even the word of a non-Jew, speaking without ulterior motive, was accepted. If, however, the individual was somehow connected with the husband's death, he was not believed (Gitt 28b;TYeb 4.5).
120. Ket 22b; Yeb 87b-88a; MYeb 16.7; Gitt 3a; Owen, 128; Berkovits, 42; Falk, 1978, 305f; Paterson, 169; If, however, the husband goes away and does not return, Jewish law does not presume him to be dead. The woman in this instance becomes an **agunah** (Gitt 26b,28a,28b; Son.Tal.-Gitt p.106,n.3)
121. Gitt 23b; MYeb 15.1-3
122. Gitt 3a,26b,33a; Ket 3a; Son.Tal.-Ket p.6,n.7; Yeb 88a; Owen, 128f; Berkovits, 41f,72,101
123. Gitt 26b; Ket 3a; Son.Tal.-Ket p.6,n.7; Berkovits, 11; Owen, 128
124. One of the greatest problems faced by modern Judaism is that of the **agunah**. This is a woman whose husband has divorced her through the secular courts but who has not, or will not, write for her a formal **get** in order to meet the requirements of the Jewish court. The woman is not, therefore, free to remarry according to Jewish law and practice (Berkovits, 102; Levy, 1967, 36; Owen, 126).
125. Gitt 21b; TGitt 5.11; Kidd 60b; cf.Gitt 29b-30a,34a, 74a-76b,83b; Ket 2b; TGitt 4.9
126. Gitt 21b; TGitt 5.11
127. Gitt 83b
128. ibid; Gitt 82b; Kidd 60a
129. Gitt 83b; TGitt 5.12
130. MGitt 9.1; TGitt 7.1-5; cf.Yeb 52a

131. Gitt 82a-85a
132. Gitt 72b; Ket 2b-3a
133. Gitt 66a,73b; Kidd 59b,60b; Ket 2b,3a; Neusner, HMLW-Gitt, 130,175,177
134. Gitt 25b,72a; Kidd 60a
135. Gitt 60a,72a-77a; Ket 2b,3a,9b; Son.Tal.-Gitt p.311, n.8; Son.Tal.-Ket p.45,n.15
136. Gitt 25b,73b-74a; Neusner, HMLW-Gitt, 179
137. Gitt 66a
138. Gitt 76a-7[illegible]a; Ket 2b-3a; Owen, 129; B[illegible]kovits, 44
139. Yeb 40b-41a,44a,108a-b
140. MYeb 2.4; TYeb 2.5
141. Yeb 34b-35a,42a; Gitt 18a; Son.Tal.-Gitt p.66,n.7
142. Yeb 42b; TYeb 6.6; Cohen, 300
143. Yeb 43a-b; TYeb 6.6
144. Yeb 26a; Son.Tal.-Yeb p.159,n.1
145. Yeb 11b,44a-b,108a; TYeb 6.4-5; see Chapter Four, Note 27
146. Gitt 45b-46a; Ket 74b-75a; TGitt 3.5
147. ibid; Neusner, HMLW-Gitt, 154f; Paterson, 166
148. Gitt 45b-46a; Ket 74b-75a
149. Yeb 11b; Paterson, 166
150. Yeb 25b,101b; TYeb 13.1; Cohen, 320
151. Yeb 107b,108a
152. Yeb 108a; TYeb 13.1; Falk, 1978, 279
153. Yeb 108a
154. ibid; Yeb 107a
155. Yeb 107b-108a,109a; Son.Tal.-Yeb.2,n.6;p.756,n.12; Neusner, HMLW-Yeb 1980, 166
156. Yeb 107a; Son.Tal.-Yeb p.2,n.6
157. Ket 73b
158. Son.Tal.-Yeb p.739,n.9; Kidd 44b,64a; Gitt 65a
159. Ket 100b; Yeb 113a; TYeb 13.3
160. Yeb 108a-109a; Ket 100b-101a; TYeb 8.3
161. Ket 100b
162. Ket 53b
163. ibid; Son.Tal.-Ket p.316,n.1
164. Ket 53b; Son.Tal.-Ket p.316,n.2
165. Yeb 107b
166. Son.Tal.-Ket p.639,n.3

PART TWO: THE RIGHTS AND OBLIGATIONS OF BETROTHAL

Chapter Six: THE LEVIRATE OBLIGATION

Historical narrative and legal texts of the Tanakh both indicate that the Israelites were aware of, and practised, the ancient tradition of the levirate marriage in which the brother of a deceased man would take the widow for his own wife. The roots of the custom are to be found in the ancient patriarchal ordering of the family in which all persons, animals and material goods were considered to be the property of the patriarch, the oldest living, male member of the extended family. The entire clan lived a communal existence rather than one which recognized the absolute independence of individual family units.[1] This did not mean, however, that wives were the shared property of all the males of the family. Quite to the contrary, when one of the male members took a wife she became part of the corporate body but she was recognized as the wife of only that one man and they lived together in a physically separated abode. But they both were part of the extended family unit and should the husband die the woman continued to live as a member of that family which had certain rights of possession over her.[2] The widow could not, however, be a burden on the family, an unproductive member of the group. Because women were recognized almost exclusively in their roles as wives and mothers, a widow did not remain for long without a husband, especially in a society which practised polygamy.

Since the widow was already part of the corporate family she simply was given to one of its male members who took her as his wife. An early motive behind the practice of levirate was to ensure that the widow maintained a productive and useful role as a member of her deceased husband's family.[3] Presumably in this early stage there were no restrictions or stipulations governing which of the males married her, although perhaps a brother was given preference.[4] Nor does there seem to be any reason for limiting this obligation to women who had no children, as became the later custom. If the widow was still capable of child-bearing, even if she already had children by her deceased husband, it would be beneficial to the family if she were remarried to another member and continued bearing offspring.[5] This does not mean that women were viewed only as vessels to create children without any inherent value in and of themselves. Child-bearing and rearing were highly honoured activities not only by the male members of the group but also by the women. The Biblical stories of Sarah[6], Rachel[7] and Hannah[8], all barren women, reflect the personal shame and sense of unworthiness which women themselves felt if they were unable to bear children. To produce offspring meant that the family name would continue and also that its property and wealth would not be lost to outsiders. The need to carry on the family name and to provide an heir for its property became significant not only on the

corporate level but also on the individual. That is, it was important that the name of a single member not be cut-off, which would happen if the man died without offspring. From this situation arose a special function of levirate marriage: to provide a child who would be considered the child of the deceased, in regard to the inheritance of his property.[9] This concept is expressed in the Biblical phrase, 'raising seed' for the deceased brother.[10] The logic inherent in this concept did not require the man to marry the widow; he had only to cohabit with her in order to make her pregnant.[11] If he did marry her, however, the first child which they conceived together was declared to be the 'ficticious descendent' of the deceased.[12] This child would receive the share of the family estate to which the deceased would otherwise have been entitled. In this way, his name would not be cut-off from the family. With time the levirate obligation became restricted to include only the widow whose husband had died childless. This was the practice within Judaism as revealed in the Tanakh[13] and rabbinical literature.[14]

A third and final motive for the levirate tradition may be identified; the need to provide care, protection and sustenance for the widow.[15] The law codes of the Ancient Near East all recognize the peculiar plight of the widow, whose insecurity and helplessness set her apart as requiring special care and consideration by the society at large. The widow who was childless was particularly

vulnerable since the family of her deceased husband was not obliged to keep her and she might become a burden on her own family should she return there.[16] When the need to protect and maintain the widow is viewed in conjunction with the obligation to raise up seed for the deceased, it precluded the possibility of fulfilling the levirate duty by cohabitation alone. A full marriage was required to meet the obligations to both the widow and the deceased.[17]

The Israelite laws concerning the levirate obligation indicate that a combination of all three motives was operative in their formulation. Clearly however, the most prominent motivation for the practice of levirate marriage during the Tanakh period was to prevent the name of the deceased from being cut-off.[18] The Deuteronomic law code elucidates this as the primary motive and rationale behind the levirate custom as it was understood around the seventh century B.C.E.

> "If brothers live together, and one of them die, and have no son, the wife of the deceased will not marry a strange man. Her **yabam** (brother-in-law) will go in unto her and he will take her to himself for a wife and he will do unto her the duty of the **yabam**. And it will happen that the first-born which she bears he will stand upon the name of his brother who is dead and his name will not be wiped out from Israel."[19]

The man who refused to marry the childless widow had to submit to the ritual of **halisah**, the 'loosening of the shoe' during which the woman declares: 'My **yabam** refuses to raise up for his brother a name in Israel'.[20] She also decrees that the ritual must be performed against any man 'who will not build the house of his brother'.[21]

During the interval between the writing of the Deuteronomic law and the writing of the Talmudic literature the concern that the name of the deceased not be obliterated was de-emphasized. This is expressed in the later **halakah** which recognized the first born child of the levirate marriage to be the legal offspring of the **yabam** himself, not the 'fictitious descendent' of the deceased.[22] Further, the levir (latin: brother-in-law), not the first born child, was the legal heir of the property of the deceased.[23] The focus in the later period is no longer on the deceased but on his childless widow. The Rabbis emphasized that phrase which prohibited the woman from marrying a 'stranger', someone other than the deceased's brother. The new emphasis in the later literature is that the widow of the man who died childless was not free to leave her husband's family until the levirate obligation was somehow fulfilled, either through marriage or through the ritual of **haliṣah**.[24] **Yibbum**, levirate marriage, re-affirmed the woman's membership in the family of her deceased husband. **Haliṣah** on the other hand freed her to leave that family and to marry into another. From the rabbinical point of view the performance of **haliṣah** did not carry with it the degree of shame and social disgrace evident in the Deuteronomic reading. The man was no longer condemned to bear an unsavoury and humiliating name because he had submitted to **haliṣah**. Indeed, during the rabbinical era under

discussion, a school of thought developed which preferred the dissolution of the levirate obligation by **haliṣah** rather than **yibbum.**[25] The reasons for this development with be examined later in this chapter. The points to be made here are simply that the rabbinical literature emphasizes that the widow whose husband died childless was forbidden to marry anyone except one of his surviving brothers until the levirate bond was severed by **haliṣah** and that this represents a shift in emphasis from that presented in the Deuteronomic legislation where the concern was with the preservation of the name of the deceased.

Traces of the origin of the levirate custom in the patriarchal family system are evident in the qualifying phrase, 'if brothers live together'.[26] Presumably as this system began to decay and the individual family units became more prominent and authoritative, the levirate obligation would cease to exist. Indeed, there is evidence throughout the books of Leviticus and Numbers that this did in fact occur. The references in these texts suggest a total disregard of the levirate practice. A widow who had no children was told to return to her father's house as in her youth,[27] and the estate of her deceased husband was to be inherited by his brothers and uncles.[28] There is no regard whatever in these texts for the levirate custom, no concern that the deceased be provided with an heir through his brother to continue his

name and inherit his property. Indeed the writer of Leviticus went so far as to condemn a levirate marriage as incestuous when he declared: "and if a man takes his brother's wife, it is impurity; he has uncovered his brother's nakedness; they will be childless".[29] It has been suggested on the strength of these texts that the levirate practice may have ceased for a time in the post-Biblical period, with the exception of one case which met the Deuteronomic requirement that the brothers live together. This would be the case of the man who was merely betrothed and consequently was still living in his father's house. Should this man die during the period of betrothal, the levirate obligation would fall upon one of his surviving brothers who was also still living in the family home.[30] It is interesting in this regard that the later rabbinical literature makes no distinction in applying the levirate obligation to the brother of a man who was either fully married or only betrothed.[31] However, there is no evidence in the Jewish literature to support the idea that the levirate rite ceased to be practised except in the case of betrothal. Indeed, even with the weakening of the patriarchal system upon which the rite was based and in spite of the texts in Leviticus and Numbers, it is difficult to accept a near-total cessation of the practice. It may have been weakened and modified but the fact that one reads about it in the Tanakh and again in the rabbinical, and Christian,[32]

literature leads one to assume that the thread runs unbroken from one source to the other. Further, not only was the rite deeply and firmly ensconsed in the traditions of the people, it was also confirmed in the highly regarded Deuteronomic law code. In the post-exilic period when the law acquired a new significance in the practice of Judaism, it would have been difficult to totally ignore or over-rule the Deuteronomic legislation concerning the levirate obligation. Admittedly the rules set out in Leviticus and Numbers were in contradiction to those in Deuteronomy and some sort of solution was required to this discrepancy. While scholars can only speculate about the process which the Jewish religious leaders went through to formulate one consistent ruling out of disparate texts, the outcome of the process is found recorded in the rabbinical literature. First, the Rabbis redefined the qualification 'if brothers live together', to mean that the brothers were contemporary; that is, that they lived at the same time and that they had the same father as the deceased.[33] The underlying principle in this redefinition is that the levirate obligation falls upon those surviving brothers who were entitled to inherit the property of the deceased.[34] This would exclude half-brothers who were born to the same mother but different fathers since only those brothers with the same father were able to inherit each others' property.[35] In this way the levirate obligation came into effect irrespective of whether the

brother died during **erusin** or after **nissu'in** since the requirement that the brothers physically live together no longer applied. The only stipulation which the rabbinical literature makes is that the brother must have lived during the lifetime of the deceased.[36]

In order to make the Leviticus text compatible with the Deuteronomic laws regarding the levirate institution, the Rabbis simply made levirate marriage an exception to the rule. That is, they declared that when a **yabam** marries his sister-in-law in order to meet the levirate obligation, this was not incest.[37] Otherwise, the man was prohibited from marrying his brother's wife under the laws of incest.[38]

With their deeply ingrained sensitivity to the issue of purity, it is not surprising to discover that the Rabbis were very concerned about the fine line which divided levirate marriage from incest. If a man effected marriage with the wife of his deceased brother not primarily to fulfill his levirate obligation but because he found the woman physically desirable or because she was wealthy, would his act be incestuous?[39] The Rabbis realized that the law could not judge a man's mental intent, but the danger that the levir might act from an impure motive was very real. The movement by some Rabbis to prefer **haliṣah** to **yibbum** was a direct result of the affinity of levirate marriage to incest. A third century ruling declares: "Now that the levir's intention is not

for the fulfilment of God's command, it is decided that **haliṣah** is preferable to marriage".[40] Because the levirate obligation was an ordinance stipulated in the Torah, and therefore divinely decreed, it could not be abolished altogether.[41] Consequently, the Rabbis attempted to maintain the levirate institution in as much purity as possible by legal means. The tension surrounding levirate marriage in the Tanakh is reflected in the detailed and complex treatment which it receives in the rabbinical literature.

That the levirate obligation was a divinely decreed ordinance was based on the fact that the entire situation was created by circumstances whose origin was divine. Not only was the death of a man a matter of heavenly perogative[42] but so was the fact that he had died without having been blessed with children. These two factors - the death and childlessness of the man - were identified in the Deuteronomic legislation as the essential elements in the formation of the levirate situation. However, it was not only necessary that the man die without offspring, male or female, legitimate or illegitimate,[43] but he must also have been physically capable of begetting a child. Thus, if the man was a eunuch from birth, his wife was automatically exempted from the levirate obligation since her husband never was capable of reproduction.[44] However, the wife of a man who became a eunuch by accident, a 'man-made eunuch', was bound by the levirate obligation since

there was a period during her husband's lifetime when he was potent.[45] The situation was similar if the wife proved to be the one incapable of procreation. The sterile woman was exempt from the need to either perform **halisah** or **yibbum** and upon the death of her husband was immediately free to marry a stranger.[46]

Under normal circumstances, i.e. where this was the first marriage of the man and woman, the issues of childlessness and physical capacity to procreate did not exempt the widowed **arusah** from the levirate obligation. Only if the man already had a wife, or was divorced from a previous wife, who had born him children would the **arusah** be freed from **zikah**, the levirate bond. Further, natural sterility in the man could not be proved until he was at least twenty years old, when suspicions concerning his potency would be aroused if he were not yet exhibiting the physical signs of manhood.[47] Sterility in a woman was not suspected until after ten years of childless marriage,[48] so the young **arusah** was unaffected by this issue.

The third criterion for the formation of the levirate situation was that the marriage of the couple be recognized as legally valid. Likewise, if a woman became widowed during **erusin**, the betrothal had to be valid in order for her to become bound by the levirate obligation.[49] The circumstances which gave rise to invalid marriages and betrothals were discussed in Chapter Four and need not be repeated here. In those cases which

involved 'valid but prohibited' unions, if the husband died childless the levirate situation arose as usual. The status of the original betrothal/marriage was not sufficient to nullify the levirate obligation, even though the woman had been forbidden to her husband.[50] The significant criterion in these cases was not the original husband-wife relation but the relation between the widow and the levir. That is, if the levir was related to the widow in a 'valid but prohibited' degree of relation, he had to submit to **halisah** from her and could not contract **yibbum**.[51] For example, if an Israelite was betrothed or married to a **mamzereth** and had a brother who was an Israelite, the widow was forbidden in marriage to both her husband and her levir.[52] If there were no such prohibitions attached to the relation between the widow and levir, they could either perform **halisah** or enter levirate marriage. This was the case in which the woman was forbidden in marriage to her husband but permitted to her levir.[53] For instance, if an Israelite betrothed or married a **mamzereth** and had a brother who was also a **mamzer**, the widow would be able to enter levirate marriage with the surviving brother. Likewise, if a **mamzer** betrothed or married the daughter of an Israelite and had a brother who was an Israelite, the widow and levir would be permitted to enter levirate marriage.[54]

The final type of betrothal/marriage to be considered is that which involved an individual who had no recognized

legal powers but whose marriage had rabbinical validity. Included in this group were the deaf-mute, the insane[55], the minor male and the minor female who was a natural orphan or 'an orphan in her father's lifetime'.[56] In all cases involving one or more of these individuals the levirate situation arose, based on the rabbinical validity of their betrothal/marriage. However, the manner in which the levirate situation could be handled varied somewhat depending on the precise nature of the relationships involved. In the event that the deceased husband was a minor or insane, no levirate situation arose and the widow was exempt from the need to either perform **haliṣah** or enter levirate marriage.[57] If he was a deaf-mute, the levirate situation arose as usual.[58] If, however, the widow was a deaf-mute the **yabam** was compelled to take her in marriage and could not submit to **haliṣah**.[59] The reason for this action was that a deaf-mute was incapable of performing **haliṣah** which required verbally pronouncing the ritual formula specified in the Deuteronomic text.[60] Further, if the levir himself were a deaf-mute, insane or a minor, he was required to enter into levirate marriage because **haliṣah** with these individuals was invalid.[61] The rite of **haliṣah** demanded legal authority for its transaction and since these individuals had virtually no legal powers their participation in **haliṣah** was null and void.[62] **Yibbum**, on the other hand, did not require legal authority since the bond uniting widow and levir was said

to be created by an act of God and, therefore, was quite independent of the choice or willful action of the people involved.[63] Finally, the orphaned **ketannah** had the option of either contracting levirate marriage or performing **haliṣah**. If she chose the latter option and performed **haliṣah** while still a minor (under the age of eleven years[64]) she was advised to repeat the ritual when she became of age in order to ensure its legality, but this was not absolutely required.[65]

The final point to be discussed as a criterion for the formation of **zikah** was the need for there to be a brother to the deceased who was legally able to either enter levirate marriage or perform **haliṣah**. As noted earlier, only paternal brothers who were also contemporary with the deceased came under the levirate obligation.[66] Further, the requirement that the original marriage be capable of creating offspring extended also to the levirate marriage. Consequently, if the widow was sterile no levirate situation arose. This applied also if the levir was a natural eunuch.[67] However, if the **yabam** was a man-made eunuch he became subject to the levirate obligation and if he married the widow his action was valid, but prohibited.[68] The levir who was incapable of reproduction could not enter **yibbum** since he was physically incapable of fulfilling the command 'to raise up unto his brother a name'.[69] Nor was an Israelite woman permitted to have sexual relations with a man who could

not enter the 'assembly of the Lord', and the man-made eunuch was included in this group.[70] As in all cases in which the marriage was rabbinically valid but prohibited, **halisah** was the prescribed means of terminating **zikah**.

The most significant prerequisite concerning the **yabam** was that he not be connected to the widow in one the fifteen degrees of incestuous relation specified in the Torah.[71] For instance, if his **yebamah** (sister-in-law) was also his daughter, his grand-daughter, his daughter-in-law, his mother-in-law, etc., no levirate situation arose and both the widow and her co-wives were exempted from having to perform **halisah** or enter **yibbum**.[72] The most important forbidden relation, the one used constantly by the Rabbis in their illustrative case studies, was that between a man and his wife's sister. That is, a man could never be betrothed or married to his wife's sister as long as his wife was alive, even if he had divorced her.[73] Consequently, if two brothers were betrothed/married to two sisters and one of the brothers died, no levirate situation arose since the widow was forbidden to the levir by virtue of her being his wife's sister (Appendix B).

The situation was made somewhat more complex if there was more than one levir. The widow who was forbidden to one of the levirs by virtue of an incestuous relation with him, was nevertheless bound to the others to whom she was not forbidden. Likewise with her co-wives: they were exempted from one of the levirs as the co-wives of the

widow who was of an incestuous degree of kinship to him,[74] but they were permitted to the other surviving brothers. The existence of an incestuous degree of relation did not totally dissolve the levirate obligation if there were other levirs. Only the brother involved in the forbidden relation was completely eliminated from that obligation.[75]

The Rabbis presented, discussed and ruled upon numerous complex cases involving a levir and widow who are in an incestuous degree of relation to each other. The primary concern of the Sages in their extensive examination of various types of levirate situation was to ensure that the widow and levir did not, unwittingly, become involved in an incestuous marriage. As noted earlier, the line between levirate marriage and incestuous marriage was rather fine. That line became even more fragile when the men and women involved in the levirate situation were related in particular ways to each other not only through kinship but also through marriage. It was because the levirate situation could, at least theoretically, be so complex, the risks of creating a forbidden marriage so great, that the Sages were so concerned with the relationship between the levir and widow.

As noted earlier, those levirate situations involving a 'valid but prohibited' degree of relation between the **yabam** and widow had to be terminated by **haliṣah**. The couple could not contract **yibbum**. Thus, if the levir was

a High-Priest he had to submit to **haliṣah** since he could not marry a widow.[76] Likewise, if the levir and widow were prohibited to each other because they belonged to social classes which could not intermarry, **zikah** had to be terminated by **haliṣah**.[77] The same ruling applied if the widow and levir were among those listed as second degree forbidden relations.[78]

In summary, four criteria have been identified as necessary for the formation of **zikah**, the levirate bond:

1) the original betrothal/marriage had to be legally valid and the couple had to be capable of procreation;
2) the deceased had to be childless;
3) there had to be a surviving brother, and;
4) the marriage between the levir and the widow had to be legally valid and capable of reproduction.

If each of these criteria were met, the widow became bound to the levir(s) by the levirate bond, a bond which carried with it legal rights and obligations for both the **yebamah** and the levir(s).

The rabbinical term for the levirate bond, **zikah**, means 'being chained'.[79] The word itself re-emphasizes the by-now familiar notion that the widow was chained to her deceased husband's brothers and was not free to marry a 'stranger'. The state of **zikah** was understood to have been established by heaven so that, according to some Rabbis, those tied by the levirate bond were to be viewed as husband and wife.[80] None of the scholars would, however, grant the levir the same kind of rights and degree of authority which the full husband enjoyed. For instance, if a woman acquired property during the period

of **zikah** all agreed that she was able to dispose of it as she chose.[81] The levir had virtually no rights over her property. The husband, however, had an absolute right of possession over his wife's property. Consequently, if she tried to sell property which she acquired during her marriage, her husband could confiscate it from the buyer and the sale would be deemed null and void.[82] Indeed, in the view of Beth Hillel, the levir had even fewer rights than the **arus**. Beth Hillel prohibited the **arusah** from selling property which she acquired during the period of betrothal since her **arus** had a partial claim to it. However, Beth Hillel conceded that if she did sell it, the sale was nonetheless valid.[83] Beth Shammai permitted the **arusah** to dispose of her property in any way she chose; they did not grant the **arus** any rights over it.[84] Both schools agreed that **zikah** was a far weaker bond than **kiddushin** and, therefore, agreed that the levir had no property rights in relation to the **yebamah**.[85] With **kiddushin** the **arus** fully acquired the woman and was able to exercise a limited legal authority over her, an authority which was most evident by the fact that she was completely forbidden to all other men.[86] The **yabam**, however, did not acquire the woman; he only acquired a right of ownership,[87] a right which was shared equally by each of the levirs. While it is true that the widow was forbidden to 'strangers', she was nevertheless permitted to each levir. In the normal state of **zikah** no one levir

had a greater claim to the woman than the others, even though the duty fell most heavily upon the eldest.

Although all agreed that **zikah** was weaker than **kiddushin**, there was some debate concerning the actual strength of the levirate bond. Some scholars maintained that there was essentially no levirate bond. That is, the sole importance of **zikah** was that the woman could not marry a stranger, but there were no accompanying legal implications nor ought the levir and widow to be viewed in any way as husband and wife.[88] On the other side were those who maintained that the levirate bond was real, that it had been established by divine decree and that the levir and widow were bound together in a quasi-marital relation.[89] This latter view ran into some serious theoretical problems when there was more than one levir, since then it was unknown which of the surviving brothers would marry the widow. When the levirate bond had to be applied to a number of levirs it was necessarily weaker than when there was only one and it was impossible to determine which, if any, of the brothers had the right to exercise the legal authority which these Sages granted to the **yabam**.[90]

Although the actual bond was weak, the levirate obligation itself was strong upon the levir. The following case study illustrates this point:

"If a woman awaited levirate marriage with a man whose

[younger] brother betrothed her sister, the Sages said ....: They must say [to the younger brother], 'Wait until your elder brother shall decide'. If the elder brother submitted to **haliṣah** or consummated the marriage the younger brother may consummate the marriage with his [betrothed] wife. And if the sister-in-law died, the younger brother may consummate the marriage with his [betrothed] wife. But if the elder brother died, he must put away his [betrothed] wife by a bill of divorce and submit to **haliṣah** from his brother's wife."[91]

In this case, a potential incestuous relation is created by the younger brother's betrothal to the sister of his **zeḳuḳah**, the woman with whom he is chained by the levirate bond. To consummate the betrothal is forbidden on the principle that the levir could not marry the relative of his **zeḳuḳah** (see Appendix A). The young man was advised to wait until one of his brothers either submits to **haliṣah** or enters **yibbum** with the widow, thereby freeing him to proceed with the marriage to his **ărusah**. It is clear from this example that the levirate obligation upon the levir was very strong, strong enough to over-ride even the **ḳinyan** of **erusin**.

The real debate between the Sages developed not so much in regard to the **zikah** itself, but around the issue of the legal effect of what was called **ma'amar**. **Ma'amar**, or 'bespeaking' was essentially the levirate parallel to betrothal. When the levir addressed a **ma'amar** to the widow he was promising to contract **yibbum** with her. Like betrothal, the **ma'amar** was effected by money or a token of value or by a writ, accompanied by a declaration in which the **yabam** pronounced his intentions.[92] If a writ was

used, the following formula was written in the document: "I So-and-so, take upon myself responsibility for So-and-so, my deceased childless brother's wife, to care for her and to supply maintenance for her in an appropriate way. This is with the proviso that the payment of her **ketubah** is the obligation of the estate of her [deceased] first husband".[93] The entire procedure had to be executed before witnesses and, as with regular betrothal, required the consent of both parties.[94]

The debate arose, however, not in matters of procedure but in regard to the issue of legal consequences. Beth Shammai and a minority of other Sages who recognized **zikah** as a quasi-marital bond, maintained that **ma'amar** effected a perfect **kinyan**, i.e. a **kinyan** which was virtually as strong as that produced by an act of **kiddushin**.[95] The primary difference between **ma'amar** and **erusin** was that, should the levir decide to dismiss the **yebamah**, he required not only a **get** which was sufficient to dissolve the betrothal bond (**ma'amar**), but also **halisah**.[96] That is, the **kinyan** created by **ma'amar** was not strong enough to dissolve the levirate bond - only **yibbum** or **halisah** could do that - and the **yebamah** remained bound to all the levirs even after one of them bespoke her. However, **ma'amar** was sufficiently effective, according to Beth Shammai, to keep out her rival.[97] Her rival was her sister or another relative who, if she subsequently came under the levirate bond, could cause the

first widow to become forbidden to the levir by virtue of an incestuous degree of kinship (Appendix B). If the levir addressed a **ma'amar** to the widow, her sister would be exempt from the levirate obligation on the grounds that she was the sister of the levir's 'wife'.[98] The following case study illustrates this point:

> "If two of three brothers were married to two sisters and the third was unmarried, and when one of the sisters' husbands died, the unmarried brother addressed to her a **ma'amar**, and then his second brother died, Beth Shammai say: His 'wife' (i.e. the widow to whom he addressed the **ma'amar**) [remains] with him while the other [second widow] is exempt as being his wife's sister."[99]

Beth Hillel opposed this view:

> "Beth Hillel, however, maintain that he must dismiss his 'wife' by a letter of divorce and by **ḥaliṣah**, and his [second] brother's wife by **ḥaliṣah**."[100]

Beth Hillel, and the majority of the Rabbis, declared that the **ma'amar** effected only a partial and imperfect **kinyan** and did not, therefore, constitute a proper marriage, nor even a perfect betrothal.[101] Consequently, when the second brother died, the **yabam** became equally bound to the second widow as to the first. The **ma'amar** was not in any way sufficient to exempt the second widow from the levirate obligation. With or without **ma'amar**, the levir who became bound to two sisters had to perform **ḥaliṣah** and could not enter into levirate marriage[102] (Appendix B). The Rabbis did not accept **ma'amar** as an effective measure with significant legal implications. It did not, like a regular act of betrothal, effect a complete **kinyan** and, therefore, did not dissolve the

levirate bond between the widow and the other levirs. The **ma'amar** did not significantly alter the status of the widow, except that she now was tied to the levir by an imperfect bond which required a **get** for its dissolution. In this respect she was tied a little more closely to the **yabam** who bespoke her and none of the other brothers was subsequently permitted to enter levirate marriage with her. However, the **ma'amar** created only a partial and imperfect bond, a very weak quasi-marital relationship. The weakness of the bond is evident in the fact that it could be invalidated if one of the other levirs addressed to her a **ma'amar**, cohabited with her, gave her a **get** or submitted to **halisah** with her.[103] Were one of these to occur, neither the original levir nor any of the others was permitted to the widow and she was required to perform **halisah** with him and receive a **get** in order to dissolve the **ma'amar**. Briefly, the rationale behind the ruling that the levir's **ma'amar** became invalid if another levir forestalled him in any of these four ways is as follows: first, if a second levir were to address another **ma'amar** to her, the widow would then be partially bound to both men. Obviously she could not marry both and in order to sever one of the bonds she required a **get** from one of the brothers. However, a **get** had the effect of setting aside part of the levirate bond and the Sages ruled that no levirate marriage was permitted, with any of the brothers, if the widow has been given a **get**.[104] Consequently, the

widow was required to receive a **get** from both levirs to dissolve each **ma'amar** and to perform **halişah** with any one of the brothers in order to fully break the levirate bond.[105] This same situation would occur if there were several levirs and only one widow or many widows and one levir. R. Gamaliel, who was of the opinion that the **ma'amar** effected a perfect **kinyan**, disagreed with this **halakah**.[106] He taught that the second **ma'amar** could not be valid or effective since the first one was sufficient to break the levirate bond between the widow and the other levirs (or between the levir and the remaining widows).[107] His viewpoint was not accepted. The ruling upon which the **halakah** was based was that which taught that the **ma'amar** established only a partial **kinyan** and, therefore, the subsequent **ma'amar** was also able to produce a partial **kinyan**, ad infinitum.[108] When more than one **ma'amar** was addressed, the situation arose in which the second **ma'amar** constituted an incestuous relation, i.e. a man could not betroth or marry his brother's 'wife'. In the event that there was one widow and two or more levirs, the brother who first bespoke the widow had a certain claim on her, a claim which was violated when the second **ma'amar** was made. The brother who addressed the second **ma'amar** was then approaching the woman who was his brother's quasi-wife and, therefore, his act of bespeaking had an incestuous tinge to it. If there were several widows but only one

levir, and the levir bespoke two of the widows, each **ma'amar** had some validity and he, therefore, was bound to each of the widows by an imperfect **kinyan**. The second **ma'amar** touched on incest, however, since the levir was permitted to marry only one of his brother's widows and the **kinyan** with the second widow was akin to marrying his (deceased) brother's wife.

The situation was almost identical if cohabitation with a second **yabam** were to follow the **ma'amar**. In the levirate institution, cohabitation between the levir and widow constituted marriage and terminated **zikah**.[109] If one of the levirs was to bespeak the widow and a second brother subsequently cohabit with her, the marriage formed by the act of cohabitation was valid, but rabbinically prohibited as an incestuous union.[110] The cohabitation was a violation of the original **ma'amar** which had formed a partial, but valid **kinyan**. Likewise, if there were many widows and only a single levir, and the levir bespoke one of the widows then cohabited with another, the marriage was deemed to be incestuous and, therefore, forbidden. Both the levirate marriage and the **ma'amar** had to be severed by a **get** to each woman and one act of **halisah** was required to dissolve **zikah**.[111]

In the event that a **get** followed the **ma'amar**, the **ma'amar** was invalidated and no levirate marriage was possible with any of the brothers. The levir who bespoke the **yebamah** had to provide her with a second **get** in order

to sever the bond created by the **ma'amar** and one act of **ḥaliṣah** was necessary to dissolve **zikah**.[112]

Finally, any valid act of **ḥaliṣah** was effective to dissolve the levirate bond between the levir(s) and widow(s), even if a **ma'amar** had previously been addressed. Consequently, if one **yabam** bespoke the widow and another submitted to **ḥaliṣah** from her, the **ma'amar** was invalidated and had to be fully severed by a formal divorce document. The same situation arose if there were several widows and one **yabam**. A second act of **ḥaliṣah** was not required since one was sufficient to completely dissolve the levirate bonds between each levir and each widow.[113]

From these illustrations it is evident that **ma'amar** was only a weak and imperfect form of betrothal which could easily become invalidated by a subsequent act. Even a **ḳaṭan** (over nine years of age)[114], who cohabited with the widow was able to spoil her for his brother who had bespoken her.[115] The act of cohabitation by a **ḳaṭan** had only the same legal force as **ma'amar** by an adult but this was nonetheless sufficient to cause the widow to become prohibited to every levir.[116] No other act by the **ḳaṭan**, for example, giving a **get**, submitting to **ḥaliṣah** or addressing a **ma'amar**, had any effect on **zikah** but was completely null and void.[117]

The debate concerning the effectiveness and strength of an act of **ma'amar** was not merely theoretical. It also involved the practical questions relating to the rights

and obligations of the levir in regard to his **yebamah**. Beth Shammai, it may be recalled, considered **ma'amar** to be a sufficiently strong act to form a perfect **kinyan**. Did this **kinyan**, inquired Rabbah, constitute betrothal or marriage?[118] If it was like marriage, the levir would acquire the right to inherit her property should she die, and to annul her vows. But no one, not even Beth Shammai, was able to grant such rights to the levir. Indeed, it was generally accepted that the **ma'amar** had virtually no legal implications in regard to the rights of the levir over the **yebamah**. **Ma'amar** had not even the same legal effect as **kiddushin**. This was necessarily so since **ma'amar** was only a rabbinical enactment while **kiddushin** was firmly rooted in the Pentateuchal law and, therefore, must be stronger and bestow upon the **arus** greater rights than those which the levir enjoyed.[119] Not everyone was in full agreement with this statement for there were Rabbis, like Rabbah, who maintained that 'whenever a levir has addressed a **ma'amar** to his **yebamah** the levirate bond disappears and she comes under the bond of betrothal'.[120] Consequently, some debate was generated around each of the rights which the Talmud identifies as significant in the relations between husbands and wives. Each of the different types of rights and obligations as they applied to the levirate situation will be discussed in the appropriate places throughout this study. Generally, however, the **halakot** grant fewer rights to the levir than

to the **arus** since the majority of Sages did not recognize that any legal privileges were attached to either **zikah** alone or to **zikah** with **ma'amar**. The primary concern regarding the state of **zikah** was that the widow was chained to the levirs and, therefore, was forbidden to betroth or marry a stranger.

The levir acquired the full rights of a husband only when he contracted levirate marriage with his **yebamah**.[121] As noted earlier, **yibbum** was effected by any act of cohabitation.[122] In each levirate situation only one marriage was permitted. The Biblical basis for this ruling is that the **yabam** was commanded to 'build the house of his deceased brother'.[123] That is, one house only may be built, not two or more.[124] Were a second levir to marry one of the other widows he would be entering an incestuous relation, transgressing the law prohibiting marriage with the wife of his brother.

The duty to contract **yibbum** (or submit to **halisah**) devolved first upon the eldest brother who could choose any of the widows.[125] If the woman refused to marry a levir who wanted to enter levirate marriage she had to have a valid reason or else she was penalized by being declared a **moredeth** and forfeiting her **ketubah**.[126] However, unlike the **arusah** or full wife who was judged to be a **moredeth**, the **yebamah** did not receive a 'certificate of rebellion'.[127] Her offence evidently was not

considered to be so serious.

Should the eldest brother refuse to act, one of the other levirs could do so.[128] Since it was irrelevant which of the brothers acted, those brothers for whom the whole process was somewhat complicated could be excluded entirely from having to respond to the levirate obligation. Thus a deaf-mute, insane person or minor who could not participate in **haliṣah** could nevertheless be exempted from **yibbum** if one of the other brothers acted. Likewise, a High-Priest who could not marry a widow and therefore could not enter levirate marriage, could be exempted from having to submit to **haliṣah** if another brother was able to do so.[129]

The woman who became a widow following **nissu'in** was required to wait a period of three months before contracting levirate marriage in order to ensure that she was not pregnant with the child of her deceased husband.[130] Her pregnancy and the subsequent birth of a healthy child would dissolve completely the entire levirate situation and the widow would be prohibited to the levir as his brother's wife. If the child was born but died within thirty days of birth, it did not qualify as the deceased husband's offspring and **yibbum** was thereafter permitted.[131] In the event that the levir had addressed a **ma'amar** to the **yebamah** and she was found to be pregnant, the couple had to wait to determine if the foetus would be born healthy.[132] If the child survived,

the **ma'amar** was rendered null and void.[133] If the couple went ahead and contracted levirate marriage knowing the woman was pregnant, they were compelled to terminate the union by divorce whether the child lived or not. The reason for the divorce if the infant died was that when the marriage was contracted it was of doubtful validity owing to the pregnancy of the **yebamah**. The Sages ruled that any marriage which was of doubtful legality when contracted must be terminated.[134] This ruling differs from the earlier **halakah** in the Mishnah which permitted the union to continue if the infant died within the thirty days.[135]

During the three month waiting period, the widow was maintained out of the estate of her deceased husband.[136] After this period she was dependent upon the mercy of the **yabam** who was not obligated to support her until he contracted levirate marriage with her. However, if he delayed in making his decision, he could be compelled by the court to settle the levirate obligation one way or the other. If he then continued to delay, he was compelled to support the **yebamah** out of his own estate.[137] Once the marriage was actually effected, the levir became the heir to his deceased brother's estate[138] except that portion which was required to cover the woman's **ketubah** which was paid out of the property of her first husband.[139]

The rationale underlying the ruling that a woman who was widowed following **nissu'in** must wait three months

before contracting levirate marriage did not apply to the **erusin** widow, i.e. the woman who was widowed during the betrothal period. Since sexual intercourse was prohibited during **erusin**, there was less possibility that she would be pregnant and that the levirate obligation would not thereby arise. Nor was the waiting period prescribed in order to ensure that the **erusin** widow would be maintained for at least three months following the death of her **arus** since a woman was never maintained during **erusin** from the estate of her future husband.[140] The **erusin** widow was not even obliged to observe the mourning period for her deceased **arus**.[141] There was not any logical reason why the **erusin** widow should wait three months before entering **yibbum**, but the Sages required her to do so nonetheless.[142] The **halakah** that the **yebamah** must wait for a three month period following the death of her husband before contracting levirate marriage applied to all widows, married or betrothed, who came under the levirate obligation.[143]

Unlike the usual process of marriage, levirate marriage could be effected with or without the consent of the woman[144] since the levirate bond was a penalty to her which 'comes from heaven'.[145] Theoretically it was possible for the **yebamah** to be taken in marriage against her will through an act of forced cohabitation by the levir.[146] Such an action was permitted since the Deuteronomic text related to levirate marriage reads: 'her

husband's brother will go in to her and take her....'.[147] Because the text completely excludes the desire or will of the woman, the Sages ruled that her consent was not necessary.[148] In practice however, this was not actually the case. The levir was required to first address a **ma'amar** to the woman. Because **ma'amar** was only valid if the woman consented to it, the act provided her with the opportunity to show her approval of the union.[149] As noted earlier, she could not easily refuse without having some plausible reason, especially if the eldest **yabam** desired to contract levirate marriage with her. The courts could compel the man to submit to **haliṣah** from her if she did refuse, but the woman herself was penalized by the loss of her **ketubah**.[150]

In order to terminate a valid levirate marriage all that was required was a **get**.[151] Since the marriage completely dissolved **zikah**, it was viewed as a regular marriage with no further traces of the levirate bond.[152] Hence, **haliṣah** was not necessary.[153] If the levirs decided not to enter into levirate marriage with the widow, one of them could dissolve the bond by submitting to **haliṣah** in the presence of three witnesses.[154] In terms of his right to share in the inheritance of his deceased brother, the **yabam** who submitted to **haliṣah** was not penalized. He received an equal share of the property.[155] The only penalty which he received was that he was forbidden to subsequently marry his **haluṣah**[156] or

her relatives.[157] The relatives of her co-wives were, however, permitted to him[158] and the near of kin of all the widows were permittd in marriage to the other levirs.[159] Only the widows themselves were forbidden to each of the levirs since they once refused to build up their deceased brother's house and were all consequently subject to the prohibition against marrying their brother's wife.[160]

Of all the actions which could be performed in the levirate institution, **haliṣah** was the most definitive. There was no disagreement among the Sages that 'nothing is valid after **haliṣah**'.[161] Consequently, a **ma'amar** could be invalidated by a subsequent act of **haliṣah**. Likewise, if the levir submitted to **haliṣah**, no subsequent **ma'amar**, **get** or cohabitation had any validity.[162] This was not the case with cohabitation. That is, if a valid act of cohabitation came first and some other action second then this second act had no validity since a valid cohabitation severed the levirate bond. If, however, a **get** or **ma'amar** or **haliṣah** were to be effected first, then the subsequent cohabitation produced a valid but prohibited levirate marriage. Something of the levirate bond remained, even after cohabitation, by virtue of the actions which preceded it, and consequently, some combination of **get** and/or **haliṣah** was required.[163]

It is not known precisely to what extent levirate marriage occurred during the rabbinical era under

discussion. As noted earlier there is evident in the literature itself the growing tendency for the Sages to prefer **haliṣah** to **yibbum**.[164] For instance, the teachers at Jabneh (c.70-132 C.E.) seem to have preferrred marriage to **haliṣah** for they taught that an act of cohabitation, irrespective of what went before it, was able to effect a valid levirate marriage. They taught that 'there is no validity in any act after cohabitation or **haliṣah**'.[165] In response to the question, 'how is the release from **zikah** effected?', they ruled that if the levir addressed to the **yebamah** a **ma'amar** and cohabited with her, 'behold this is in accordance with the prescribed precept'.[166] The preference of the Jabneh Rabbis was clearly on the dissolving of **zikah** through levirate marriage since they failed to present **haliṣah** as a viable and acceptable alternative. Subsequently, the Sages from Usha (c. 140-225 C.E.) took issue with their teaching concerning the effectiveness of cohabitation.[167] As noted above, the later ruling was that cohabitation was valid only if it came first, but if it followed some other action it did not have the same force to either effect levirate marriage or to completely dissolve **zikah**.[168] The Ushan group stripped the act of cohabitation of some of the power and effectiveness granted it by the earlier Sages at Jabneh. The preference for **haliṣah** by the Ushans is revealed in a slip which is made in one of the rulings: "If the levir submitted to **haliṣah** and then addressed to her a **ma'amar**,

gave her a **get** or cohabited with her; or if he cohabited with her and then addressed to her a **ma'amar**, gave her a **get** or submitted to her **halisah**, no act is valid after **halisah**."[169] The fault lies in the underlined ruling 'no act is valid after **halisah**'. According to the accepted practice this ruling can only apply to the first part of the Mishnah. The latter half should be completed with the statement, 'no act is valid after cohabitation'. The mistake is discussed in the **gemara** and attributed to the preference of the Tanna (a Rabbi quoted in the Mishnah) for **halisah** in order that the **yebamah** be freed to marry the man of her choice.[170]

The danger that the **yabam** would not act in the true spirit of the levirate institution but would desire marriage with the **yebamah** because of physical desire or personal gain was one reason for the shift in preference to **halisah**.[171] As noted earlier, the need to prevent incestuous relations was a major factor in the rabbinical rulings concerning the levirate situation. However, not everyone accepted this trend. There were Sages who continued to view **yibbum** as the most acceptable fulfilment of **zikah**, primarily because it was ordained by heaven. But under most circumstances the Rabbis, no matter what their preference, did not compel the levir to act one way or the other.[172] The decision to enter levirate marriage or participate in **halisah** was left to the levir(s) and widow(s) themselves, but it was imperative that they act

in order to free everyone involved from the bond of **zikah**.

The levirate institution has been examined quite extensively in this section because its rules and regulations applied with equal force to the **erusin** widow as well as to the **nissu'in** widow. This fact is a good indication of the strength of the betrothal bond and clearly confirms that a valid **kiddushin** fully acquired the woman. The **arusah** was forbidden to all other men and, should the **arus** die, she was treated as a full wife to the extent the she came under the levirate obligation if the deceased died childless.[173]

One of the particularly significant concepts in our discussion was that of the **ma'amar**, the levirate parallel to **kiddushin**. The relative legal status of both **ma'amar** and **kiddushin** was examined with the conclusion that **ma'amar** was both weaker in terms of its legal implications and less secure than regular betrothal. The primary importance of the **ma'amar** was to provide the **yebamah** with a formal opportuntiy to consent to the levirate marriage with one of the levirs. It was also the levir's opportunity to formally promise the widow that he would accept her as his wife and thereby fulfill his levirate obligation.

A second issue which was of particular significance was the discussion of the forbidden relations. This issue is important since it underscores a primary tenet of the entire rabbinical literature: that the function of the

halakot was to build a fence around the levirate institution in particular, and the entire marital institution in general. The prohibited relations, whether Pentateuchal or rabbinical, were of concern to the Sages as a prime source of impurity. They felt that people found in the levirate situation could easily become involved, unwittingly, in a forbidden marriage. The Sages attempted to prevent such unintentional, or intentional, impurity in the marital relations of men and women. The rules and regulations were intended as guidelines for the people, to ensure the purity of those within the betrothal, marriage and/or levirate institutions.

NOTES

1. Epstein, 1942, 77,83; Mace, 1953, 65f,95,118
2. ibid, Epstein, 77; Driver & Miles, 1935, 139,161, 166,175f; Burrows, 1940a, 7f; Neufeld, 1944, 31
3. ibid, Epstein, Burrows, Neufeld
4. ibid, Epstein, 78; Driver & Miles, 240; Belkin, 1969-70, 278
5. ibid, Epstein, 77f
6. Gen. 16.2
7. Gen. 30.1
8. I Sam. 1.5-8
9. Epstein, 1942, 78; Driver & Miles, 244f,249; Mace, 68,72f,112f; Belkin, 275f; Neufeld, 47; Pearl, 1967, 16; de Vaux, 1961, 37,38; Thompson, 1968, 85ff; Burrows, 1940a, 2; Burrows, 1940b, 28; Davies, 1981a, 139ff; Davies, 1981b, 257
10. Gen. 38.8
11. Epstein, 1942, 78; Driver & Miles, 243; Davies, 1981a, 143; An example of this is found in the story of Tamar (Gen. 38) where it would appear that the sole obligation of the levir was to 'raise seed' for his deceased brother; marriage was not necessary. Consequently, when Tamar conceived by her cohabitation with Judah the levirate duty was fulfilled and 'he knew her again no more' (vs.26; Belkin, 278f;Thompson, 95). This, however, appears

to be the more ancient tradition. The later practice, expressed in the Deuteronomic code, required the levir to actually marry the widow.

12. Epstein, 1942, 79; Belkin, 279
13. Deut. 25.5
14. Yeb 20b
15. Thompson, 85,96; Belkin, 288; Mace, 108; Burrows, 1940a, 7; Davies, 1981a, 142f; Davies, 1981b, 257; Neufeld, 29
16. Epstein, 1942, 79f; cf. Driver & Miles, 212,217f; Friedman, 1980, 427
17. ibid, Epstein, 80; Mace, 108
18. Bracker, 1962, 36; Thompson, 84ff; Driver & Miles, 242f; Belkin, 275ff; Mace 97,101ff; Pedersen, 1926, 78; Burrows, 1940a, 2; Burrows, 1940b, 31; Davies, 1981a, 139f; Davies, 1981b, 267f
19. Deut. 25.5f; cf. Bracker, 36
20. Deut. 25.7; It is generally acknowledged that the shoe symbolized the right of possession (Mace, 97; Driver & Miles, 244; Davies, 1981b, 262; Thompson, 92f). In taking the shoe from her **yabam**, the widow acquired her independence, the right to her own person, while the **yabam** forfeited his right to her and, possibly, to the property of his deceased brother (ibid).
21. Deut. 25.9
22. Belkin, 290ff
23. Yeb 40a; ibid, Belkin
24. Yeb 23b,110b,114b; Kidd 13b,52a; Epstein, 1942, 109f; Neusner, HMLW-Yeb, 1980, 2; Falk, 1978, 320
25. Yeb 3a,39b,109a; Ket 64a; Epstein, 1942, 123; Berkovits, 1983, 9,74,103; Pearl, 1967,17; Mace, 110
26. Deut. 25.5; Driver & Miles, 243; Thompson, 90
27. Lev. 22.13
28. Numb. 27.8-11
29. Lev. 20.21; cf. Lev. 18.16; Driver & Miles, 249, n.4; Mace, 161f
30. Epstein, 1942, 89; The Samaritans evidently ruled that the levirate situation applied only to betrothed women; married women were completely exempted because of the Leviticus law which made brother's wife one of the prohibited degrees (Kidd 75b-76a; Falk, 1978, 317f).
31. Yeb 38a-b
32. Matt. 22.24ff
33. Yeb 17b,20b; Belkin, 280f; Neusner, HMLW-Yeb, 2
34. Yeb 17b,22b; Epstein, 1942, 100,n.69; Belkin, 280f
35. Yeb 17b,20b,24a; ibid, Epstein,; Although there is the view expressed in the Talmud that the father is the sole heir of the deceased (MYeb 4.7;TYeb 6.3), he is excluded from the levirate obligation by the laws of incest. These laws probably are much older than the Leviticus text which declares as incest the marriage of a man with his brother's wife. Further,

both tradition and the Deuteronomic law had shown preference for the brother of the deceased to fulfill the levirate obligation. Although in the very earliest period it would appear that the father could fulfill this duty, this did not develop into the accepted custom. The only reference in the Tanakh in which the father is involved is the story of Judah and Tamar (Gen. 38). This situation was peculiar, first in that Judah only cohabits once with Tamar and does not marry her (15-18) and, secondly, because even this one act of intercourse is accomplished through the deception of Tamar (14). Judah's son was originally obliged to fulfill the levirate duty but he refused to raise up seed on behalf of his deceased brother (8-9). For this act of refusal he was slain by YHWH (10). Consequently, Tamar had to wait for the youngest brother to become of age so she could marry him. However, when the boy reached maturity, Judah failed to give Tamar to him (11,14). It was because of this that Tamar deceived Judah into lying with her and making her pregnant. When he learns of the deception, Judah acknowledges that Tamar has acted more righteously than he, for he failed to fulfill both Tamar's right to be married to the brother of her deceased husband and the right of the dead son to have his seed raised up (26). Clearly then, even in this instance the brother was obliged to fulfill the levirate duty and the fact that the father did so was neither the accepted nor the customary practice.

36. MYeb 2.1
37. Yeb 3b; Berkovits, 9; Pearl, 15; Falk, 1978, 318; Driver & Miles, 249,n.4; Mace, 162; Neufeld, 43
38. Yeb 3b; Epstein, 1942, 93f; Neufeld, 43
39. TYeb 6.8
40. Bek 13a; Yeb 39b,109a; Epstein, 1942, 123
41. Yeb 17b,18a,24a
42. Neusner, HMLW-Yeb, 1980, 18; Neusner, 1979, 146f
43. Yeb 22a-b; Epstein, 1942, 99; Falk, 1978, 322f; The only offspring who did not qualify to exempt the woman from the levirate obligation were those born to a slave or non-Jewish woman. In each of these cases the offspring had the status of the mother and were not recognized as belonging to the man (Yeb 22a-b).
44. Yeb 79b-80a; TYeb 2.5,11.2
45. MYeb 8.4; TYeb 11.2; Yeb 20b,79b
46. MYeb 1.1;8.5; Yeb 20a; Belkin, 289f
47. Yeb 80a
48. Yeb 64a,65b; Ket 77a
49. Epstein, 1942, 94
50. MYeb 9.2,3; TYeb 2.3;6.5
51. MYeb 2.3
52. MYeb 9.2

53. ibid
54. ibid
55. Epstein, 1942, 94f; Yeb 112b-113b
56. Yeb 107a,112b-113b
57. Yeb 69b,96b,112b
58. Yeb 112b
59. Yeb 104b,112b; TYeb 2.5
60. Yeb 104b; TYeb 2.6; Neusner, HMLW-Yeb, 1980, 184
61. Yeb 105b; Epstein, 1942, 101
62. Gitt 23a
63. ibid; Yeb 105b; Epstein, 1942, 101, 124f
64. Gitt 65a; The Rabbis considered that a **ketannah** over the age of eleven years understood the significance of her actions and, therefore, they accepted her **haliqah** as valid.
65. Yeb 104b,105b; TYeb 12.12
66. Yeb 20b
67. Yeb 79b; TYeb 2.6
68. Yeb 20b,79b-80a; TYeb 11.2
69. Deut. 25.7
70. Deut. 23.2; Son.Tal.-Yeb, p.539,n.5; MYeb 8.2
71. TYeb 1.1; Lev. 18.6-17; Belkin, 313
72. MYeb 1.1; TYeb 2.5-6; Neusner, HMLW-Yeb, 21ff
73. Yeb 2b,8b,40b,41a; TYeb 5.3; Lev. 18.18
74. The basic principle that the co-wives of a widow who was in a forbidden relation with the levir were exempted along with the widow from the levirate obligation was formulated by the Beth Hillel at the end of the Second Commonwealth (c. 70 C.E.). The older practice, maintained by the Shammaites, permitted levirate marriage between the co-wives and the levir (Yeb 13a-14a;TYeb 1.9; Epstein, 1942, 103; Falk, 1978, 318f). The debate apparently raged until the middle of the second century when, as usual, the ruling of Beth Hillel prevailed and became the accepted **halakah** (Epstein, 1942, 103; TYeb 1.13).
75. Yeb 3b,9b; Epstein, 1942, 102f
76. Yeb 20a
77. ibid
78. ibid
79. Epstein, 1942, 104
80. Yeb 18b,96a; Sot 24a-b
81. Yeb 38a; Ket 80b
82. Ket 78a; Yeb 38b; TKet 8.1
83. ibid
84. ibid
85. Yeb 38a-b; TYeb 2.1b
86. TYeb 2.1b
87. Epstein, 1942, 104
88. Sot 24a-b; Falk, 1978, 319; Belkin, 307
89. Sot 24a-b
90. Yeb 17b-19a,26a-27a,30a,95b-96a
91. MYeb 4.9

92. Yeb 52a; Belkin, 308
93. TYeb 2.1; cf. Yeb 52a
94. Yeb 19b; TYeb 2.1; Kidd 44a; Belkin, 308,309; Friedman, 1980, 133; Rabbi maintained that the consent of the **yebamah** was not required in order for the levir's **ma'amar** to be valid. His reasoning was that since the levir could cohabit with her against her will and thereby effect a valid **yibbum**, he could also bespeak her and become legally betrothed to her. His ruling was not accepted. The Sages required the woman's consent, since her consent was necessary in ordinary **erusin** and they likened betrothal in the levirate situation to regular betrothal. If the girl was a **ketannah** widowed during **erusin**, the consent of her father was required to the **ma'amar**. If a **na'arah**, either she or her father could consent (Kidd 44a).
95. Yeb 18a,29a
96. Yeb 29a,29b,50a
97. ibid
98. Son.Tal.-Yeb, p.181,n.17; Belkin, 312f
99. MYeb 3.5; cf. Yeb 51b
100. ibid
101. Yeb 29b,51a; Epstein, 1942, 118; Belkin, 313
102. Yeb 29a-b
103. Yeb Chapter 5; TYeb 7.2
104. Yeb 51a; Neusner, HMLW-Yeb, 89
105. MYeb 5.4
106. MYeb 5.1
107. Yeb 51a
108. Yeb 50a-51b; TYeb 7.3
109. Yeb 53b-54a; TKet 4.3
110. Epstein, 1942, 118; Yeb 50b
111. MYeb 5.4
112. MYeb 5.2
113. ibid
114. The sexual intercourse of a **katan** over nine years of age was considered by law to have some, imperfect, effect. It was at this age, according to the Rabbis, that a male was able to engender (Son.Tal.-Kidd, p.85,n.11;Kidd 19a;cf.TKet 1.2;Epstein, 1967, 211).
115. Yeb 96a; TYeb 11.10
116. Yeb 51b,96b; TYeb 11.10
117. ibid
118. Yeb 29b
119. Belkin, 309
120. Yeb 29b
121. Yeb 38a,39a
122. Yeb 53b-54a; Kidd 13b-14a,44a; TKet 4.3
123. Deut. 25.5
124. Yeb 18b-19a,44a; Son.Tal.-Yeb p.106,n.4
125. TYeb 4.3; Yeb 8b
126. Ket 63a-b,64a; Epstein, 1942, 122; Berkovits, 39ff
127. Ket 64a

128. MYeb 4.5
129. TYeb 8.3; cf. TYeb 11.1
130. Yeb 41a-b; TYeb 6.7
131. Yeb 36a,80b; TYeb 6.2; Epstein, 1942, 99,n.63
132. TYeb 6.3
133. MYeb 4.1; TYeb 6.1
134. Yeb 36a-b; Son.Tal.-Yeb p.228,n.n.9,10; TYeb 6.2
135. MYeb 4.2; TYeb 6.2
136. Yeb 41b; TYeb 6.3,7; Ket 81a
137. Yeb 41b; TYeb 6.7
138. Yeb 40a; TYeb 6.3
139. Yeb 38a,39a,91a; Ket 82b; If the widow was unable to obtain her **ketubah** from her first husband's estate the court made provision for her by putting her **ketubah** to the charge of the levir.
140. Yeb 41b; Son.Tal.-Yeb p.269,n.7; Ket 70b
141. Yeb 43b
142. Yeb 41a-b
143. ibid; cf. TYeb 6.6
144. Yeb 8b,53b-54a; Kidd 13b-14a,44a; TKet 4.3; TYeb 7.2; Belkin, 283
145. Yeb 41b
146. Yeb 8b,53b-54a; TKet 4.3
147. Deut. 25.5
148. Yeb 54a
149. Yeb 19b,50b,52a; TYeb 7.2
150. Ket 63a-b,64a
151. Yeb 8b,39a
152. Ket 82a; Yeb 8b
153. ibid; Yeb 39a
154. Yeb 25b,101a,105b; TYeb 12.9
155. MYeb 4.7
156. ibid; Yeb 10b,52b; TYeb 6.4-5
157. Yeb 40a-b,41a; Kidd 45a; TYeb 6.5; Neusner, HMLW-Yeb, 35,49
158. Yeb 40b
159. ibid
160. Yeb 10b,18b-19a,53a; Lev. 18.16;20.21; Son.Tal.-Yeb p.50,n.14
161. MYeb 5.1
162. MYeb 5.5; Yeb 53a
163. Yeb 50b
164. Yeb 3a,39b,109a; Ket 64a; Epstein, 1942, 123f; Mace, 110; Pearl, 17; Berkovits, 9,74,103
165. MYeb 5.1
166. MYeb 5.2
167. Neusner, HMLW-Yeb,.1980, 88
168. MYeb 5.6
169. MYeb 5.3b
170. Yeb 53a
171. Yeb 39b,109a; TYeb 6.8; Berkovits, 9,103f; Mace, 112; The shift in emphasis away from **yibbum** to **halisah** grew in strength in the post-Talmudic period partly due to the increasing concern that

motives other than a desire to fulfill the levirate command might be at the root of a person's desire to contract **yibbum**. Also, **yibbum** became less feasible after R.Gershom's enactment prohibiting polygamy in the 10th century C.E. (Berkovits, 45; Pearl, 27,117). Since that time to the present, **ḥaliṣah** has been the predominant means of terminating **zikah**. While **yibbum** is not absolutely prohibited, it is definitely the exception to the rule and permitted only in those instances when it is clear that the couple wish to marry to fulfill their levirate obligation. Finally, problems have arisen even in relation to **ḥaliṣah**. If the levir is unwilling to perform **ḥaliṣah** with the **yebamah**, she remains tied to him and is unable to marry another man within the laws and traditions of Judaism (Berkovits, 103f; Levy, 1967, 36). This problem is comparable to that of the **agunah**.

172. TYeb 6.7
173. Cohen, 1966, 321

Chapter Seven: ADULTERY

When a woman became betrothed, she became bound to her **arus** by a bond which consecrated her to him. With her **kiddushin**, the woman became forbidden to all other men. The primary significance of this prohibition was not only that the woman could not become betrothed to another. More significantly, the woman was forbidden to have any kind of sexual contact with another man. She was to keep herself sexually pure for her **arus**. Consequently, if the **arusah** was caught having sexual relations with another man, she was condemned as an adulteress.[1] An act of adultery represented a violation of the husband's exclusive privilege of sexual intimacy with the woman, a threat to his paternity rights[2] and a transgression of the covenant bond established by the betrothal. Consequently, the woman caught in a clear act of adultery was severely punished. The Pentateuch proclaims the punishment for willful adultery to be death for both the man and the woman, and in this regard the **arusah** was no different from the full wife.[3] While the Pentateuch does not specify the method whereby the married woman must die, it does declare that the **arusah** was to be stoned to death.[4] It also makes a distinction between the **arusah** who was forced and one who apparently was a willing partner in the forbidden act.[5] The **arusah** who was forced was not penalized; she was judged to be innocent of any wrong-doing.[6] The

willing participant was, of course, guilty of committing adultery against her 'husband' and was sentenced to die by stoning. In both cases, the man who seduced her was judged to be guilty of 'humbling his neighbour's wife' and was stoned to death.[7] No distinctions were made in the Tanakh literature concerning the willingness of the married woman. Presumably however, if she was forcibly violated she also was judged to be innocent of any wrong-doing and only her violator was put to death.[8]

The rabbinical literature reveals some changes in penalties against the woman caught in the act of adultery. First, it specifies that the married woman was to be strangled to death.[9] In another place, however, the Sages ruled that 'if there are witnesses that she committed adultery while she was living with him she is to be stoned'.[10] Stoning for the adulteress is also expressed in the New Testament narrative in which the scribes and Pharisees bring a woman to Jesus and declare: "Teacher, this woman was taken in the act of committing adultery. Now our law of Moses commanded (us) to stone such a one".[11] While there is no indication as to the actual marital status - betrothed or married - of the woman, it would appear that the law, as presented here, prescribed stoning in all cases of adultery.[12] In the rabbinical literature, however, the Sages do make a distinction in the penalty, although as noted above there seems to be some inconsistency in their rulings.

The distinctions in the law were based on both the age and marital status of the woman involved. If she was a **ḳeṭannah**, irrespective of her marital status, she was not penalized for her act of adultery since, not having any recognized legal authority, the **ḳeṭannah** was never subject to punishment.[13] The betrothed **naᶜarah**, and only the **naᶜarah** was subject to the penalty of stoning if she was a virgin and if she was caught committing adultery.[14] The married **naᶜarah** and the **bogereth**, whether married or betrothed, were both punished by strangulation for adultery.[15] The only exception here was the daughter of a priest who was married (to either an Israelite or a priest). In this case the woman was burned if she committed adultery.[16] In all cases, the Rabbis applied these penalties only to women who had consented to the adulterous act.[17] If forced, the woman was judged to be innocent and, with the exception of a woman betrothed/married to a priest, she was permitted to remain with her husband.[18] More stringent rules were applied to the priestly wife who, once defiled, could not continue to live with her husband.[19] The priestly wife who was forced did not, however, forfeit any of her **ketubah** rights.[20]

In spite of the fact that the Sages discussed these penalties for adultery as if they were actually in practice, these discussions were actually nothing more than academic and theoretical.[21] Because the Pentateuch prescribed these penalties, they were acknowledged by the

Rabbis in theory but not in practice. Throughout most of the rabbinical period under discussion, the Jewish leaders were not in a political position to be able to carry out any death sentence. Indeed, they admit that:

> "From the day the Temple was destroyed (70 C.E.), although the Sanhedrin ceased to function, the four modes of execution did not cease. But they did cease! -[The meaning is:]The judgment of the four modes of execution did not cease. He who would have been condemned to stoning either falls from a roof [and dies] or a wild beast tramples him [to death]. He who would have been condemned to burning either falls into a fire or a serpent stings him. He who would have been condemned to decapitation is either handed over to the [non-Jewish] government [who execute him] or robbers attack him. He who would have been condemned to strangulation either drowns in a river or dies of quinsy (tonsillitis)."[22]

The woman who was an adulteress, whether during **erusin** or **nissu'in** was not put to death. Rather, she became prohibited to her husband, who was compelled to divorce her, and she forfeited her **ketubah** rights.[23] For the **arusah** this meant that she was not entitled to receive the statutory **mohar**. In both cases the husband had the religious duty to put away his wife, because she had become unclean to him.[24] The adulteress was also forbidden to subsequently marry her lover[25] and any offspring born of the adulterous relation were **mamzerim**.[26]

Like the betrothed or married wife, the woman bound by the levirate obligation was forbidden to all men, except the surviving brothers of her deceased husband. Because she was chained to the **yabam** in a quasi-marital bond, especially if he had addressed a **ma'amar** to her, the **yebamah** was prohibited to have sexual contact with a

'stranger'. If she did, the **yebamah** was treated as a harlot, an adulteress, and became forbidden to contract **yibbum** with the levir.[27] The levirate bond had to be severed by **halisah**. The only voice raised in objection to this ruling was that of Samuel who maintained that the **yebamah** did not have the status of a married woman and therefore did not become prohibited to the **yabam** if she had sexual contact while under the levirate bond.[28] In all cases, however, the Sages agreed that the **yebamah** who had sexual relations with a 'stranger' was not guilty of a capital offence and was not, therefore, sentenced to death by stoning or strangulation. Thus, while the woman became prohibited to the **yabam** she was not sentenced to death since, "the **yebamah** is not as completely united to her [betrothed] husband as an **arusah** to her [betrothed] husband".[29] If she betrothed or married the 'stranger', he was compelled to divorce her unless children were born of the union in which case the levir was to release the woman by **halisah** and the marriage proceeded as usual. The children were not **mamzerim** and indeed, it was to protect their legal status that the marriage was permitted to continue.[30]

A peculiar ruling, which applied only to the **naᶜarah** who was being married as a virgin,[31] permitted the groom to bring a charge of non-virginity against his new bride if he did not find the 'signs of virginity' in her.[32] This situation was discussed in regard to the issue of

deception, but applies also to the issue of adultery. Thus, if the signs of virginity were not found in the woman, and she made no prior claim to having lost her virginity through an accident, the man could reasonably presume that she had committed adultery against him. If her sexual contact with another man had occurred prior to her betrothal, the husband could not lay a charge of adultery against her. However, because of her deception, the woman was not entitled to any statutory **mohar**.[33] If there were witnesses that she had been unfaithful to him during **erusin**, and therefore her virginity lost, the husband's claim of non-virginity would be tantamount to a charge of adultery.[34] Without witnesses, however, the woman's own explanation regarding her non-virginity was accepted as true.[35] Thus, if she said she had had an accident during **erusin** she was believed, even though she had not informed her husband of it sooner. Her only penalty was that her **mohar** payment was reduced from 200 to 100 **zuz**.[36] Likewise, if she confessed that she had been forcibly violated during the betrothal period she was believed and virtually no penalties were brought against her.[37] Further, if the **arus** had at any time been secluded with the woman, he could not subsequently bring a claim of non-virginity against her since he might have had sexual contact with her.[38]

The discussion thus far has focussed primarily on those instances in which a definite, verifiable act of

adultery has been committed. The woman was caught in the very act by at least two witnesses and there was no doubt about her adulterous behaviour.[39] The literature, however, recognizes a second category of unfaithfulness; that in which the woman was suspected of having adulterous relations with a man but doubt prevailed because there were no witnesses to the actual act of adultery. The suspected adulteress came under special consideration in Jewish law and an entire tractate of the **Sefer Nashim** is devoted to her. She was given the derogatory title of **soṭah** which meant 'to turn aside'. The **soṭah** was a woman who had 'turned aside' from her husband. The Pentateuch elucidates the fate of the woman whose husband expresses jealousy concerning her, a jealousy which was aroused by suspicions of unfaithfulness.[40] Such a husband was empowered to cause his wife to undergo the ordeal of the 'waters of bitterness', a test conducted by priests in the Temple which would prove the guilt or innocence of the woman. The ordeal consisted of several stages. First, the upper part of the woman's body was stripped bare to reveal her shame. The Tanakh reference merely required the uncovering of her head[41] but the rabbinical writings demanded a greater degree of shame.[42] Throughout the ordeal she was required to hold a vessel full of dry, unsifted barley, the 'offering of jealousy', which had been prepared by her husband.[43] Rabban Gamaliel explained that 'since her deed was the deed of cattle, her offering

is the food of cattle'.[44] Next, the priests filled a sacred vessel with holy water and mixed in it the dust from the floor.[45] The significance of the dust is explained in the **gemara**:

> "If she be innocent, there will issue from her a son like our father Abraham of whom it is written, 'Dust and ashes'[46]; and if she be not innocent, she reverts to dust (i.e. dies)."[47]

The priests then pronounced the charge against her and the curse which was upon her head if she was guilty of the crime. The precise words which the priest was to speak are recorded in the Numbers text as follows:

> "If no man has lain with you, and you have not turned aside to uncleanness with another instead of your husband, be free from this bitter water that causes the curse. But if you have turned aside to another instead of your husband, and if you are defiled, and some man has lain with you beside your husband; YHWH make you a curse and an oath among your people, when YHWH makes your thigh to rot, and your belly to swell; and this water that causes the curse will go into your bowels, to make your belly to swell and your thigh to rot."[48]

These words were then written, in ink,[49] on a scroll which was dipped into the bitter waters until the ink was blotted out.[50] The barley jealousy-offering was then waved in the air and part of it burned.[51] The woman was then compelled to drink the bitter waters.[52] If her face turned yellow, eyes bulged and veins swelled, she was guilty of adultery and became barren by the bitter waters. If there were no physical repercussions, the woman was innocent of the charge against her, she returned to her husband and suffered no barrenness. Indeed both her

health and her fertility were said to improve.[53]

While the rabbinical teachings concerning the suspected adulteress and the test of the bitter waters follow very closely the procedure elucidated in the Tanakh, there are some significant differences which made the entire situation more just for the woman. First, the husband could not force his wife to undergo the ordeal unless he had warned her, before two witnesses, not to be alone, in private, with a clearly specified man.[54] The husband himself did not qualify as a witness to his own warning since he might lie about having made it.[55] Second, he was required to bring evidence against her that she had defied his warning and been alone with the forbidden man. R. Joshua ruled that two witnesses were required to state that they had seen the woman secluded with the man.[56] R. Eliezer was satisfied with the testimony of a single witness[57] and the **halakah** was that one witness was sufficient.[58] The Sages did not permit the husband to act as a witness to his wife's seclusion, again because he might lie.[59] This two-stage process prevented the husband from bringing sudden and arbitrary charges against his wife. His unsupported suspicions were no longer sufficient justification for compelling the wife to suffer the ordeal of the water.[60] It also informed the wife of her husband's jealousy and let her know who it was to avoid.[61]

At stage one, the warning stage, the wife was still

fully and validly married.[62] At stage two, however, their relationship became uncertain and the husband was forbidden to have sexual relations with his wife, although he personally was not stringently penalized if he did.[63] The woman was also forbidden to eat **terumah** if her husband was a priest.[64] Their relationship was temporarily in suspense and remained so until after the ordeal of the bitter waters. Then, if she was found guilty she suffered the same plight as an adulteress, i.e. she became forbidden to her husband, was divorced and forfeited her **ketubah**.[65] If she was innocent, she was free to return to her husband. In the event that the husband had sexual relations with the woman prior to the bitter waters, while their marriage was uncertain, he was no longer permitted to make her undergo the ordeal but he had to divorce her and pay her her **ketubah**.[66] The suspicion which the husband had towards his wife compelled him to divorce her even though the charge of adultery could not be proven beyond doubt.[67] However, if the husband caused the cancellation of the ordeal, he was required to pay her her **ketubah**.[68] If the husband divorced his wife on the charge that she was a **soṭah**, he was forbidden to ever remarry her.[69] Further, the **soṭah** was forbidden to marry her lover, even after her divorce.[70]

If the husband died (childless) while his wife was waiting to undergo the ordeal, she was forbidden to enter levirate marriage but had to perform **ḥaliṣah** in order to

terminate **zikah**.[71] If there were children, the wife was compelled to either drink the waters or forfeit her **ketubah**.[72] If she drank and was found to be innocent, there was no change in her status; she was the legitimate widow of the deceased who was entitled to her **ketubah** rights as a widow. If guilty, the woman forfeited her **ketubah**.

It should be noted that if the husband warned his wife not to seclude herself with a certain man and a witness subsequently testified that she not only was secluded but that she actually misconducted herself, the woman did not drink the bitter waters.[73] Such a woman was no longer a **sotah**, a suspected adulteress, but a verified adulteress,[74] and therefore, was not required to undergo the test of bitter waters. While in most cases two witnesses were necessary to prove adultery, if a valid warning had been given then a single witness to the woman's misconduct was sufficient to render her permanently forbidden to her husband on the grounds of adultery.[75]

A second modification which the Sages made to the procedure was to permit the immediate termination of the ordeal if the woman confessed her guilt at any point prior to the blotting out of the scroll.[76] There is no evidence in the Tanakh that, once begun, the ordeal could be stopped.

A third modification, which did not favour the woman,

determined that if there were no immediate physical reactions to the drinking of the water some external factor was at work which delayed the effects. Several factors were identified. First, if there were witnesses against the woman, but these were in a distant country and, therefore, unavailable to testify against her, the bitter waters would not take immediate effect.[77] Second, if the husband cohabited with his wife prior to the ordeal,[78] or if the husband was otherwise guilty of some iniquity, the effects would be suspended.[79] Another factor for the immediate ineffectiveness of the waters was the personal merit of the woman. "Merit [in the woman] causes the waters of bitterness to suspend its effect, and she never bears a child or thrives, but she gradually grows ill and finally dies through that death."[80] Merit is defined as the study of Torah.[81] In relation to the woman this meant that she either studied herself, although she was not obliged to do so, or that she encouraged and supported her sons and/or husband in their study of Torah.[82] The fact that personal merit was able to suspend the effects of the bitter waters meant that the innocence of the woman could not be proven with absolute certainty. Thus, if the waters produced no physical reaction, people could say she was nonetheless guilty but her merit had suspended the effects.[83] Finally, the effectiveness of the waters was annulled due to general moral weakness within the society at large.[84] The function of the bitter waters

was to bring to light secret acts of adultery. Consequently, when the moral fabric of the community was so thin that adultery was a visible, public spectacle, the waters became devoid of their powers.[85] The suspension of effects was, then, attributed to various factors including the husband's guilt, the wife's merit and the community's moral degeneration.

The husband could compel only his full wife to undergo the ordeal of the bitter waters. Consequently, the **arusah** could never be subjected by her 'husband' to the ordeal. It is interesting that the Sages do not fully accept this ruling since they consider the **arusah** to have the status of a wife and, therefore, she should be compelled to undergo the ordeal if she is suspected of having committed adultery during the betrothal period.[86] However, they were forced to accept the **halakah** because the Tanakh clearly specified that only a wife who is 'under her husband' could undergo the ordeal.[87] This excluded the **arusah**, as well as the woman awaiting the decision of the levir, both of whom were bound to their respective 'husbands' (i.e. the **arus** and levir) but neither of whom were yet under his full authority.[88] However, in these instances the man could warn his 'wife' (i.e. **arusah** or **yebamah**) that she was forbidden to be alone with a certain man. This warning remained in effect even after the marriage has occurred so that if the woman was later found to have defied her husband's warning, she

could be forced to undergo the ordeal.[89] Or, if having been warned during the period of betrothal the woman was found to have defied the warning, she was to be divorced without receiving her **ketubah**.[90]

A third group of women who could not be subjected to the bitter waters were those who were involved in a prohibited betrothal or marriage.[91] This would include, for instance, the widow married to a High-Priest, a **mamzereth** married to an Israelite, etc. Nor, however, were these women entitled to receive their **ketubah** payments since their marriages were forbidden.[92] Finally, women who were pregnant by a former husband, or who were nursing infants born to a former husband or who were unable to bear children neither drank the waters nor received their **ketubah** payments if they were suspected of having illicit sexual relations.[93] The general principle was that if the woman was unable, or refused, to undergo the ordeal, but the **sotah** situation had been established, she was divorced and forfeited her **ketubah**.[94]

It is interesting that the Sages concerned themselves at all with the topic of the ordeal of bitter waters. First, the ordeal could not be practised without the Temple and priesthood to administer it and for almost the entire period under discussion there was no Temple. Following the destruction of the Temple it became impossible to continue the practice and it was about this time that R. Johanan b. Zakkai abolished it altogether.[95]

Considering that the Mishnah was not compiled until c. 200 C.E. it is a wonder that the test of bitter waters, by this time abolished for over a century, would even receive an honourable mention in the literature. Throughout most of the period then, the ordeal was not in practice, and the plight of the sotah, the suspected adulteress, who had been warned and against whom evidence was available, suffered the same fate as the certain adulteress. That is, she became forbidden to her husband who was compelled to divorce her without having to pay her her ketubah.[96] If the evidence against the woman was weak, the husband could decide whether or not to divorce her, but if he did send her away, he was required to pay her her ketubah.[97] Some of the Amoraim attempted to eliminate the sotah situation completely by prohibiting a husband from giving the warning.[98] The rationale behind this ruling was that since the woman could no longer be tested by the bitter waters, if warning and seclusion occurred she would automatically become forbidden to her husband for all time.[99] If no warning was given, no divorce would be demanded. It evidently was with the same intent that the husband was permitted to retract his warning, even after seclusion had occurred.[100]

In conclusion, it should be noted that the issue of adultery was one which affected only the woman in the betrothal, marriage or levirate relationship. Neither the arus, or husband, or levir could be charged with adultery

nor could he legally be punished if he were unfaithful to his wife. The restriction that the wife was forbidden to other men did not apply, in law, to the husband. He did not become forbidden to other women, a point which is self-evident in a polygamous society. This did not mean, however, that a husband, **arus** or levir was permitted to have casual relations with other women. Certainly he could not have sexual relations with a woman who was betrothed, married or bound by the levirate obligation for this would be a violation of the rights of the men to whom these women were bound. A man could not commit adultery against his own wife, but he could violate the marital rights of another man.[101] But even if the woman was free, casual sexual relations with her were socially, if not legally, forbidden. The Sages severely condemned such relations as licentious and wicked and potentially dangerous to the well-being of the community.[102] Nevertheless, it is clear that the more stringent restrictions were placed upon the woman who received not only the socially degrading title of adulteress but was penalized with divorce and financial loss through the forfeiture of her **ketubah**. Further, in regard to the **sotah**, it is clear that the law condemned her as guilty until she could present proof of her innocence. With the abolition of the test of bitter waters, no means were left to her to prove that she was innocent of any sexual wrong-doing against her husband.[103] However, to the credit of Jewish women,

the Sages proclaim that, in their day, adultery was a rare and exceptional occurrence.[104]

NOTES

1. Babylonian, Assyrian, Hittite and classical Roman law all recognized sexual contact between a betrothed woman and a man other than her affianced to be adulterous (Epstein, 1967, 196ff;Cohen, 1966, 378). Egyptian law did not (Cohen, 378).
2. Phillips, 1981, 7
3. Lev. 20.10; Deut. 22.22,24; Neubauer, 1920, 185; Mace, 1953, 243
4. Deut. 22.24; It is possible that in an earlier period the penalty was death by burning. Judah condemned his daughter-in-law, Tamar, to be burned alive (Gen.38.24) because he thought she was guilty of lying with a man while she was waiting to fulfill her levirate bond with the youngest brother of her deceased husband, Judah's son (de Vaux, 1961, 36). Burning also seems to have been the penalty for the daughter of a priest who committed adultery (Lev. 21.9; Epstein, 1967, 202,203f; Mace, 247).
5. Deut. 22.23f
6. Deut. 22.26
7. Deut. 22.24,25
8. Epstein, 1967, 201; Bracker, 1962, 42; Phillips, 1981, 11
9. Ket 45a,48b; Epstein, 1967, 202
10. Ket 46a
11. John 8.4f
12. Epstein (1967) would disagree with this statement. He teaches that the Rabbis viewed stoning as one of the most difficult forms of execution and, therefore, attempted to apply this penalty to as few cases as possible, limiting it to the betrothed **naʿarah** (p.p.204f). The texts presented in my examination of the issue nevertheless stand to cast some shadow of doubt on Epstein's theory. The Sages may have felt a natural repulsion to stoning, in preference of strangulation, but in practice stoning may have been the more common of the two, a point which even Epstein concedes (p.199).
13. Ket 44b; Kidd 10b; Ket 40b; Epstein, 1967, 204,210f
14. Ket 44b-45a; Kidd 9b; ibid, Epstein, 204f
15. Ket 45a,48b,49a; ibid, Epstein; Epstein declares that the Rabbis preferred strangulation as a more humane method of execution (p.202). Strangulation caused the least disfigurement and left the person with a closer appearance of natural death. For this

reason, the Sages prescribed strangulation in all death penalties where the Tanakh fails to mention a specific method of execution (ibid). They support this ruling by declaring the penalty of strangulation to be part of the tradition of the Oral Torah (ibid).

16. Epstein, 1967, 203f; Sanh 50b-51a
17. ibid, Epstein, 209,210
18. Ned 90b-91a; Ket 12b
19. Ned 90b-91a; Sot 3b; Son.Tal.-Ned p.280,n.9; Epstein, 1967, 213,215
20. Ned 91a
21. Epstein, 1967, 144,209,211
22. Sot 8b
23. Ned 902b-91a;Ket 101a-b; Sot 2a-b,3b,31a; Son.Tal.-Sot p.152,n.4; Yeb 11a;Epstein, 1967, 234;Mace, 250
24. Sot 3b,5b; ibid, Epstein, 212f
25. Sot 25a,27b,28a; Yeb 24b; ibid, Epstein, 232; Owen, 1967, 127; Pearl, 1967, 21; Falk, 1978, 294; Mace, 250,258
26. Berkovits, 1981, 28; Passamaneck, 1966, 121; Neufeld, 1944, 225f
27. Yeb 81a,92b,95a; Gitt 80b; Sot 18b
28. Yeb 96a
29. Ned 75a; Cohen, 326;Neusner, HMLW-Ned, 1980, 87,89
30. Yeb 92a-b; Passamaneck, 126ff
31. see Chapter Four, note 61
32. Ket 2a,9b,10a-b,11b
33. Ket 11b
34. Ket 9b,11b,40a-45b; Kidd 9b; Ned 90b-91a
35. Ket 10a-b,12b,13a; cf. TKet 1.6
36. Ket 11b,13a
37. Ket 12b
38. Ket 12a
39. Sot 3b,31b; Ket 9a,11b; Falk, 1978, 293
40. Num. 5.11-31
41. Num. 5.18
42. Sot 7a-b,8a-b
43. Num. 5.15; Sot 14a
44. Sot 15b
45. Num. 5.17; Sot 15b,16b
46. Gen. 18.27; 'And Abraham answered and said, Behold now, I have taken upon me to speak to YHWH, which am but dust and ashes.' Because of his humility, Abraham was deemed worthy to be approached by YHWH.
47. Sot 17a
48. Num. 5.19-22
49. Sot 17b
50. Num. 5.23; Sot 17a-b
51. Num. 5.25f; Sot 19a; Kidd 36b
52. Num. 5.26; Sot 19b
53. Num. 5.27f; Sot 20a; TSot 2.3; Epstein, 1967, 230
54. Sot 2a,2b,5b; ibid, Epstein, 220f; Neusner, HMLW-Sot, 1980, 10,11

55. TSot 1.1; Sot 2b; ibid, Neusner, 12
56. Sot 2b; ibid, Neusner, 11
57. Sot 2a-b; ibid, Neusner
58. Sot 2b,3a,3b,9a-b,31a-b; Ket 9a
59. Sot 2b
60. ibid; Epstein, 1967, 219ff
61. Neusner, HMLW-Sot, 12
62. ibid, 10
63. Sot 2b,7a,9a-b; Yeb 11b; ibid, Neusner, 10,11; Epstein, 1967, 226; The husband was not penalized in the sense that he did not come under the penalty of **kareth** or some other severe punishment for a capital offence. He was violating only a mere prohibition, not a Biblical ordinance.
64. Sot 5b; ibid, Neusner, 10
65. Sot 7a; Son.Tal.-Sot p.29,n.5
66. Sot 6a,7a,25a
67. MSot 6.1; Owen, 127; Epstein, 1967, 233; Neusner, HMLW-Sot, 58
68. ibid, Epstein; ibid, Neusner, 43
69. Yeb 11b
70. Sot 25a,27b-28a; Yeb 24b; Falk, 1978, 294
71. Sot 5b-6a
72. Sot 24a
73. Sot 2a-b,3a,3b,31a-b; Epstein, 1967, 223
74. Sot 6a; ibid, Epstein
75. Sot 2a-b,3a,3b,31a-b; ibid, Epstein; Neusner, HMLW-Sot, 59f
76. Sot 7b,20a; TSot 2.2
77. Sot 6a-b
78. Sot 6a,7a
79. Sot 28a,47b; Epstein, 1967, 231
80. Sot 6a; cf. Sot 20b-21a
81. Sot 21a
82. ibid
83. Sot 6a
84. TSot 14.2,9; Epstein, 1967, 231
85. ibid
86. Sot 24a-b
87. Num. 5.29; Sot 24a-b; Neusner, HMLW-Sot, 27
88. Sot 23b,24a-b
89. Sot 25a; TSot 5.1
90. ibid; TSot 5.4; Neusner, HMLW-Sot, 41; Cohen, 322
91. Sot 23b-24a,25a
92. ibid; Neusner, HMLW-Sot, 41
93. Sot 24a; TSot 5.5
94. Sot 24a;Neusner, HMLW-Sot, 41,42; Epstein, 1967,233
95. Sot 47a; ibid, Epstein, 232
96. Sot 2b
97. Sot 31a-b
98. Sot 2b; Epstein, 1967, 222
99. Sot 2b
100. Sot 25a; Epstein, 1967, 225
101. Epstein, 1967, 194; Mace, 227,241; Neufeld, 163;

Pedersen, 1926, 70; de Vaux, 1961, 37; Bracker, 40

102. TKidd 1.4

103. Epstein, 1967, 216,232f

104. Gitt 17b

Chapter Eight: NEDARIM

It is generally difficult for the twentieth century western thinker to appreciate the seriousness with which the ancient world confronted the issue of vows. Our rational minds do not permit us to acknowledge the real power of the spoken word as a creative force. In the ancient mind, however, to speak was tantamount to bringing into being; whether the creation was positive, as in a blessing, or negative, as in a curse. To put oneself under a personal obligation to do something by swearing an oath, or under the restriction of a vow was a serious matter, for the words bound one absolutely to fulfill the oath or vow. Failure to fulfill one's word was judged to be a grave moral transgression.[1] It was far better to not vow at all than to vow and not be able to fulfill it. Indeed, the Rabbis deemed the making of vows to be such a serious matter that they declared: ' 'Whoever makes a vow is called a sinner, even though he fulfills it'.[2]

In making a vow the individual placed himself under a restriction, by forbidding himself to make use of, or to benefit from, an object or person. Thus a person could vow not to eat certain foods or to benefit from certain types of people or animals, or to make use of public services or places.[3] The vow may or may not have had a specified time limit attached to it.[4]

The basis of the laws concerning vows made by women

derives directly from a chapter in the Tanakh. Here the laws are elucidated in relation to three categories of women: the woman who is 'in her youth, in her father's house'[5]; the married woman living in the house of her husband[6]; and the widow and divorcee[7]. The primary criterion for this three-fold classification is; who has authority over the woman? Whoever exercised authority over her had the legal power to annul or to confirm her vows. It is in the issue of the annulment of vows that the reality of a woman's legal dependence on a man is most clearly recognized. For most of a woman's life she was not granted a full and perfect independent status in the eyes of the law, but was under the authority of first her father and then her husband.

The Tanakh consistently recognizes the authority of the father over his daughter who is 'in her youth, in her father's house'. The Tanakh does not, however, make distinctions regarding the degree of **patria potestas** in relation to the age of the woman, as does the rabbinical literature. It would appear that so long as the woman remained in her father's house she remained under his authority, irrespective of her age. The Tanakh does not recognize a strict legal distinction based on the age of the individual, as did the later rabbinical literature. The significant criterion in relation to vows was that she still be living 'in her father's house'; her age was irrelevant.

A different situation is met in the Talmudic literature where the Sages distinguish three categories of women in terms of their legal status and position relative to their fathers. These three classifications, the **ketannah**, **na^{c}arah**, **bogereth** have already been introduced and discussed in relation to the roles which they were legally able to play in the formation of their own betrothals. In regard to the question of vows, the issue is relatively simple. Because the **ketannah** had virtually no legal power, any vow which she made was null and void and, therefore, did not require annullment.[8] The **bogereth**, who stood in complete independence of her father and who had full legal authority to act on her own behalf, was able to make vows which were legally binding and which could not be annulled by her father.[9] Finally, the **na^{c}arah** had full legal power to make a valid vow but, because she was still under the control of her father, he was the ultimate authority to decide if the vow would stand or be annulled. The Talmud understands the Tanakh phrase 'in her youth', to apply specifically and directly to their own legal definition of the **na^{c}arah**, which was in fact a far more limited application than that evidenced in the Tanakh. However, the laws enumerated in the Numbers chapter regarding the girl 'in her youth, in her father's house' were applied specifically to the **na^{c}arah** in the rabbinical discussions. Both the Tanakh and the rabbinical literature acknowledge the right of the father

to annul the vows of his daughter who is a **naᶜarah** and who was still living in her father's house. The Sages added the further stipulation that the girl was not yet betrothed. In this case, the father had the legal power to unilaterally annul or confirm any vow which his daughter might make.[10] In the event that the **naᶜarah** was betrothed, he lost some of his authority in that he could no longer act unilaterally but could annul his daughter's vows only in conjunction with her **arus**.[11] This case will be discussed more fully below.

Once the woman married she passed out of the authority of her father into the control of her husband.[12] In respect to the annulment of vows, the Talmud teaches that the point of transition occurred when the father, or his agent, delivered the woman over to the husband's agents. It was not, in this case, necessary that the woman have entered **huppah** before she entered the full control of her husband.[13] From this point onward, the husband had full authority to annul his wife's vows. This authority ceased only if the man divorced his wife and sent her out of his house. The husband's right over his wife's vows derived partly from the fact that he was responsible for her maintenance[14] but primarily from the Biblical text which explicitly granted him this authority. However, while the right was Pentateuchally granted, it was also limited by the text which specifies that he could annul only those vows which involved 'self-affliction'.[15]

The Talmud interprets this limitation as referring to vows which involved restrictions on what she ate or drank, on personal hygiene such as a refusal to bathe, and on self-adornment, the neglect of which was detrimental to her personal appearance.[16] These restrictions not only caused personal affliction to the woman herself but had broader consequences in that they could make her unattractive socially, thereby bringing embarrassment to both herself and her husband. Therefore, included under the general heading of vows of 'self-affliction' were any restrictions which might result in the husband or wife developing a bad name among their neighbours. Thus, if the woman vowed not to weave beautiful clothing for their children, or to neither lend nor borrow household items with her neighbours, the husband had the option of either annulling the vow or even divorcing his wife without having to pay her her **ketubah**.[17] Clearly, such restrictions could cause serious disruptions within the home and create tensions between the husband and wife. In order to avoid such internal family stress, the Sages expanded somewhat on the Biblical restrictions regarding a woman's vows which her husband was able to annul. The rabbinical literature teaches that the husband could annul any of his wife's vows which affected their intimate relations.[18] This definition broadened the field considerably although subsumed within it were the original restrictions concerning vows of self-affliction. The Rabbis thus

permitted the husband to annul any vow which caused tension and discord to arise between them.

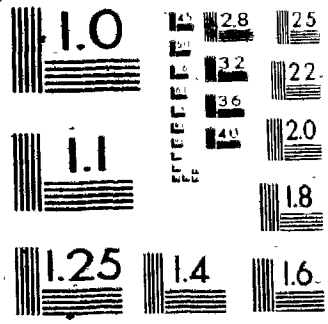
There were certain duties which it was incumbent upon a wife to perform for her husband. Included among these duties were the performance of household tasks on behalf of her husband (e.g. .grinding flour, baking, washing, cooking, etc.[19]) as well as private intimate acts such as making his bed, washing his face, hands and feet and mixing his drinks.[20] She was also obligated to have regular conjugal relations with him.[21] In relation to these duties, the wife had no legal power to make a vow against their fulfilment. Such vows were null and void, and therefore it was unnecessary for the husband to annul them. However, the Rabbis often advised him to make a formal statement of annulment nonetheless.[22] The reason for this was that, should the husband subsequently divorce his wife, he would not be permitted to remarry her because her vow, which became valid with the divorce,[23] would prevent her from any of the services which a wife must perform for her husband and the remarriage would not be valid.[24] Irrespective of whether the husband actually did formally annul such vows or not, he was able to force her to perform the service even against her will since these were duties which were incumbent upon her.[25]

On the basis of this discussion it is hardly surprising that vows made by married women were normally opposed by their husbands. But the problem went beyond

the fact that a wife's vows could create conflict and discord within the home. There was also the danger that the woman would fail to fulfill her vow, in which case the husband was responsible for the guilt incurred, and the welfare of the entire family was put into jeopardy. R. Judah taught that 'one's children die on account of the sin of making vows' and neither fulfilling them nor having them annulled.[26] This judgment was not extreme in the eyes of the Rabbis considering the seriousness with which they viewed the making of vows. Although the husband had the power to annul his wife's vows, he could do so only if he knew about them. That is, neither the husband nor the father were permitted to make a general, all-inclusive statement annulling whatever vows the woman might be under. The process of annullment had to be applied to specific vows. Further, the husband (or father) was required to make his statement of disallowal within twenty-four hours of hearing about the vow.[27] This did not mean that the husband (or father) had to annul the vow within twenty-four hours after the woman had made it. If she made the vow but the husband (or father) did not learn of it until a period of time later, the vow stood as valid during that interval. The husband (or father) could, of course, also confirm the vow of the woman by either verbally declaring the vow to be valid or simply by remaining silent. In relation to vows, silence was always a sign of confirmation. However, having once confirmed the

vow the man was not subsequently permitted to annul it.[28] Thus, if the man wanted to disallow the vow, it was incumbent upon him to actually verbalize his intent.[29] Taking all these factors into consideration it becomes evident that the husband would not always be able to invalidate every vow which his wife might make, no matter how diligently he tried. Because it was troublesome and dangerous to have a wife who was in the habit of making vows and then breaking them, the Rabbis ruled that the man was able to divorce such a wife.[30] They declared: 'No one can live with a serpent in the same basket', the serpent in this case being the wife who continually made, then broke, vows. Because the woman was at fault, she could be divorced without receiving her **ketubah**.[31]

The Talmud recognizes the reverse-side of the coin involving the issue of the vows of a wife. That is, not only could a woman put herself under the restrictions of a vow, but her husband could likewise impose upon his wife such restrictions. The introductory phrase, 'a man forbade his wife by vow...' could be completed with essentially the same restrictions already noted above, restrictions which applied to the woman personally, to her relations with other people and/or to her relations with her husband.[32] For instance, the husband could place his wife under the vow that she would not derive any benefit from him, which meant that she would not expect to be maintained by him,[33] or that she would not have sexual



contact with him[34]. In each of these cases, should the woman comply with the vow or should it persist for an extended period of time, the man would be placing both of them into a position in which they were neglecting their conjugal duties: Just as the wife was forbidden to totally abstain from performing certain tasks for her husband, even if she had slaves to work for her,[35] so the husband was Biblically compelled to maintain his wife.[36] Further, just as the husband could not impose upon his wife any vow which would affect their personal relations, so he could not place himself under such a vow. That is, he could not, under vow, refuse to have regular sexual contact with his wife.[37] Even if no vow was involved, this refusal was prohibited since it was a direct contravention of a Biblical obligation incumbent upon the husband.[38] In all cases where the husband imposed such restrictive vows upon his wife, she was permitted to request that her husband give her a divorce and pay her her **ketubah** payments.[39]

The relevant Tanakh text concerning the vows of women states clearly that the issue of vows was a matter 'between a man and his wife and between the father and his daughter being a youth in her father's house'.[40] No specific reference is made to the **arusah** in respect of her vows. Under whose authority did she fall? An examination of the text would lead one to conclude that the father maintained the right to annul his daughter's vows as long

as she remained in his house. Since the **arusah** lived in her father's house during the betrothal period, she must fall under his authority. On the other hand, the text states that if the woman vowed 'in the house of her husband'[41] her husband could either confirm her vow or nullify it.[42] This would appear to set the **arusah** outside the valid realm of control of her 'husband'. The Rabbis, however, were reluctant to completely dismiss the **arus** from the process of annulling or confirming the vows of the woman with whom he has contracted **kiddushin**. The Sages did not view the **arusah** as belonging exclusively to her father, but as falling under the authority of both the father and the **arus**. Even before the marriage was consummated the woman was acknowledged as the 'wife' of the **arus**, a tradition which reached far back into the Tanakh period. Although the woman did not come into the full control of her husband, nor did she acquire the complete rights and status of a wife, until **huppah**, she was nonetheless socially and legally recognized as belonging to the **arus** from the moment the **kiddushin** was effected. Consequently, the rabbinical scholars felt compelled to acknowledge this relationship by extending to the **arus** the right to participate in the process whereby the woman's vows were annulled or confirmed.[43] However, is so doing, they were limiting the right of her father who, prior to the betrothal, had been able to act unilaterally in response to his daughter's vows. The

Talmud clearly teaches that both the father and the **arus** must act together to annul or confirm the vows of the **arusah.**[44] Nevertheless, the greater degree of authority rested with her father. The Sages discussed the hypothetical question, what would happen to the vow if either the father or the **arus** were to die without having heard about it? For instance, if the father died without hearing of the vow, would the **arus** have the authority to annul or confirm it unilaterally? There was unanimous agreement that, no, the **arus** did not inherently have that much authority, nor did he acquire it upon the death of the woman's father. The law granted the **arus** only the right to act in conjunction with the father. Consequently, should the father die, the **arus** had no power to act on his own.[45] This ruling did not, however, apply to the father. That is, if the **arus** were to die without having heard of the vow of the **arusah**, her father would be legally empowered to either annul or confirm the vow unilaterally.[46] The power of the **arus** passed over to the father who regained his original full authority in respect to his daughter's vows. In this regard, the power of the father exceeded that of the **arus**.

The Mishnah records a peculiar practice of the scholars which suggests that the father and the **arus** could make a general, all-inclusive annulment of the **arusah's** vows at the time when she was to be transferred from one to the other. The teaching states:

> "It is the practice of scholars, before the daughter of one of them departs from him [for **nissu'in**], to declare to her, 'All the vows which you vowed in my house are annulled'. Likewise the husband, before she enters into his control [for **nissu'in**] would say to her, 'All vows which you vowed before you enter into my control are annulled'; because once she enters into his control he cannot annul them."[47]

This is the only reference to this practice in the entire literature, nor are there any allusions to it elsewhere.[48] The **gemara** records that the **Amoraim** soundly rejected the implications of the practice, insisting that only those vows which the father and the **arus** have heard may be annulled.[49] The teaching emphasizes, however, the seriousness with which the vows of women were taken, especially in the matrimonial home. The preference was that a woman enter the house of her new husband with a clean slate, that is, not burdened by the restrictions of vows. Further support for this preference is found in the ruling that men could make their betrothals conditional upon the woman not being bound by any vows.[50] This issue has already been discussed and is noted here only to emphasize that men did not want women who had restricted themselves by vows or who were in the habit of doing so.

It would appear that the **arus** was more limited in the type of vows which he could annul than was the full husband. That is, the **arus** was able to annul only those vows which involved self-affliction, but not those affecting their intimate relations. Indeed, in relation to the **arus**, even the vows of self-affliction were more strictly defined to include only a vow not to eat meat,

drink wine or adorn herself with coloured garments.[51] Thus, the power of the **arus** was limited not only by the fact that he could not act unilaterally but by being empowered to annul only a very restricted group of vows.

Although the primary thrust of the discussion thus far has been to show that women were under the authority of either their fathers, their husbands, or in the case of the **arusah**, both, there were several categories of women who were legally independent of all men. The Tanakh recognizes only the widow and the divorcee as having legal independence.[52] The rabbinical literature adds two other groups to this list: the **bogereth** and the orphaned **naᶜarah**.[53]

It has already been noted that once the woman married she passed forever out of the control of her father. Consequently, should she become divorced or widowed she could return to her father's house but not to his control.[54] Having no husband and standing outside the authority of her father, the woman was recognized as having a full and independent legal status. Thus, she was able to execute all legal transactions on her own behalf, including her own re-marriage, and her vows were legally binding upon her.[55] Included in this category was the **naᶜarah** whose father was living but who was recognized as 'an orphan in her father's lifetime'.[56] With her marriage the **naᶜarah** had passed outside the control of her father

and her subsequent divorce or widowhood left her free to act on her own authority. This was the case irrespective of how long the girl had been outside her father's authority. For instance, the Sages discussed the hypothetical case of a girl whose father had just delivered her into the hands of her husband's agents. The agents had been assigned the task of bringing the girl to the house of her husband where she would enter **huppah** and symbolically consummate the marriage. While they were still en route, however, they learn that the husband has either died or changed his mind and divorced the girl. At the point when the father had delivered his daughter to the agents, she passed completely and permanently out of his control, for this act was recognized as being equivalent to entering **huppah**, at least in respect of vows.[57] Consequently, even though she had been out of his control for only a very short period of time, she nonetheless became permanently independent of him and he could no longer annul her vows.[58] The same ruling applied in the case of a woman who had been married, divorced and remarried, even to the same man. Even if the period of divorce was very short, any vows which she might make in that brief interval could not be annulled by the husband when they (re)married.[59] In all cases, a husband had no legal authority to annul his wife's pre-marriage vows once **nissu'in** had been contracted.[60]

A **na'arah** whose father was alive did not acquire full

legal independence if she was divorced or widowed during the period of **erusin**. Rather, she returned to the full authority of her father, re-assuming the status which she had prior to her betrothal. The father again was able to exercise the sole right to annul or confirm his daughter's vows.[61]

The **bogereth**, a legally mature individual, and the orphaned **na'arah** were like the widow and divorcee in that they were recognized as having full legal authority to act on their own behalf. The **bogereth** became independent of her father by virtue of her age so that he was not able to annul her vows.[62] However, the relation of the **bogereth** to her **arus** was a debated point. R. Eliezer taught that if the girl had waited the twelve month waiting period allotted for virgins to prepare for their marriage,[63] the **arus** could then annul her vows since he became responsible for her maintenance, even though **nissu'in** had not yet been contracted.[64] This view was rejected by the Sages who ruled that the girl must first enter into his control, at **huppah**, before the man could annul her vows. The **halakah** was in accordance with this majority rule.[65] Only when **nissu'in** was effected was the husband able to annul the vows of his wife who was a **bogereth**.[66] Likewise, the orphaned **na'arah** acquired complete legal independence with the death of her father.[67] As noted earlier, the **arus** did not inherit the father's authority to annul the girl's vows. Since he could act only in conjunction with the

father, the **arus** was powerless to annul his **arusah's** vows if her father was deceased.[68]

The final class of women to be examined in regard to vows is the **yebamah**, the woman who was awaiting the decision of the levir regarding the levirate marital obligation. There was, by no means unanimous agreement concerning this issue. Three distinct rulings are presented in the Talmud regarding the right of the levir to annul the vows of his **yebamah**.[69] The first represents the teaching of R. Eliezer who declared that the levir could annul the woman's vows.[70] R. Eliezer, in agreement with Beth Shammai, recognized the existence of not only a levirate obligation but of a legally binding levirate bond which chained together the levir and his deceased brother's widow in a quasi-marital relationship. The levir and **yebamah** were, therefore, to be considered as husband and wife and the levir had the authority to annul the vows of the woman to whom he was bound. Problems arose, however, when there was more than one levir since each one was equally chained to the widow and it was not known which of them would contract levirate marriage with her. Who then, if anyone, had the right to annul the vows of the **yebamah**? Because of this theoretical problem, both R. Eliezer and R. Ammi, who spoke in his name, were compelled to qualify the broad ruling that the levir could annul the **yebamah's** vows. They restricted this right only to the levir who addressed a **ma'amar** to the woman and who

also was maintaining her out of his own estate.[71] It may be recalled that if the levir delayed in making his decision, he could be compelled by the courts to support the widow from his own estate.[72] The primary objection to this revised ruling was that if one of the levirs (assuming there was more than one) bespoke the widow, she could become forbidden to him if one of the other brothers either cohabited with her, gave her a **get** or submitted to **halisah** from her. Considering the insecurity and weakness of the bond, why should one of the levirs have the right to annul the vows of the **yebamah** when he may be forbidden to her at some future date?[73]

The second ruling was presented by R. Joshua who taught that the vows of the widow could be annulled only if there was a single levir. If there were two or more surviving brothers, none of them were permitted to annul her vows.[74] R. Joshua acknowledged that the levirate bond was extremely weak when there was more than one levir.[75] Consequently, he refused to grant any of the brothers the right to annul the vows of the **yebamah**. Only in the case of a single levir was there certainty that he would be able to follow through on the levirate marriage. There is no indication in the text that R. Joshua required the levir to address a **ma'amar** to the widow before being permitted to annul her vows.

The final ruling discussed in the Talmud is that of R. Akiba who taught that under no circumstances could a

levir annul the vows of the **yebamah**. It was all the same whether there were one or two levirs or whether a **ma'amar** was addressed or not. R. Akiba did not recognize the existence of a levirate bond. That is, while the levir had an obligation to his deceased brother's widow, there were no legal privileges or rights which accompanied that obligation.[76] The levir acquired the right to annul the woman's vows only after he had entered into levirate marriage with her. It was not sufficient that the levir bespeak the widow since even then the bond between the two was not as strong as that between the **arusah** and her **arus**.[77] Since the **arus** did not have the legal power to unilaterally annul the vows of his **arusah**, why would the levir be able to make void the vows of the **yebamah**? The **halakah** was in agreement with R. Akiba.[78]

The rabbinical literature presents two methods whereby the vows of a woman could be annulled: by her husband and/or father, or by a religious authority.[79] There was a distinct difference between the two, including the terminology associated with each. The action of the father and/or husband was expressed by the term, 'annulling (**prr**) vows' which signified that the vow became void at the time that the father and/or husband declared it to be so. Prior to this point, the vow had been binding. However, when a Sage was requested to disallow a vow he did so retroactive to the time when it was initially made. The term used to describe the Sage's

action was 'releasing (ntr) vows'.[80] Thus, when a woman whose betrothal was conditional upon her not being under any vows had her vows released by a Sage, her betrothal became valid (according to R. Meir) with the retroactive nullification of her vows.[81] Further, a Sage was able to annul a wider range of vows than could a husband. Consequently, should the wife make a vow which her husband was not permitted to invalidate, she could go to a Sage to have it disallowed. However, should the husband divorce his wife because of a vow, he was permanently forbidden to remarry her.[82] Several reasons are presented for this prohibition. First, it was possible that once divorced, the woman would have herself released from the vow by a Sage and marry another man. If her first husband subsequently regretted his action he could conceivably put into question the validity of the woman's second marriage by claiming that if he had known her vow could be annulled by a Sage he never would have divorced her.[83] By forbidding the remarriage of the wife, the Sages hoped to induce the husband to consider his course of action very carefully and to enquire into what courses were in fact open to him.[84] A second reason for forbidding remarriage was to penalize women who were in the habit of putting themselves under the restrictions of vows and to warn other women from doing so.[85]

In conclusion, it should be re-emphasized that the issue of vows is an especially clear and good example of

the extent to which women were legally dependent upon the men who exercised authority over them. The vows of young, unmarried women were valid only if their fathers confirmed them, while husbands had legal power in regard to the vows of their wives. Of particular importance to this thesis was the legal position of the **arusah** who was caught between these two authority figures. The Rabbis granted both the father and the **arus** the right to act co-operatively in response to the vows of the **arusah**. Although the authority of the father was stronger than that of the **arus**, the Rabbis nevertheless felt compelled to acknowledge the **kinyan** of **kiddushin** which bound the **arusah** to the **arus** as his 'wife'. Consequently, the Sages were willing to lessen the power of the father in order to increase the legal rights of the **arus**. Betrothed women were, therefore, dependent upon both men in relation to their vows. Only those betrothed women who were no longer under the authority of their fathers were able to legally act on their own behalf, fully independent of both their father and their **arus**. Since the **arus** had authority to annul vows only in conjunction with the father, he was completely without legal power to respond to his **arusah's** vows if she was free of **patria potestas**. Consequently, only freedom from her father allowed the **arusah** to also be freed from the authority of the **arus**, in respect to her vows.

NOTES

1. Deut. 23.22f; Koh. 5.4; Friedman, 1980, 232; cf. Neusner, HMLW-Ned, 1980, 5
2. Ned 77b
3. see Ned chapts. 1-7; The vow itself was introduced by the word **konam**, an intentional corruption of the Hebrew word, **korban**, offering. The implication of the vow was that the object prohibited to the person had the same status as an object being employed as a Temple offering (Son.Tal. Ned, p. xi)
4. Ned chapt. 8
5. Num. 30.4-6
6. Num. 30.7-9,11-15
7. Num. 30.10
8. The Rabbis accepted as valid the vow of an 11 year old who, upon questioning, indicated that she understood the significance of her action (Gitt 65a).
9. Ned 89a-b; TNed 6.4
10. MKet 4.4
11. Ket 46b; Ned 66b-67a; TNed 6.4; Cohen, 1966, 322f; Neusner, op.cit.,81,83; Neubauer, 1920, 187; Elman, 1967, 67
12. Ket 48b-49a
13. ibid; TKet 4.4; As with vows, so with inheritance, i.e., once the father delivered his daughter into the hands of the husband's agents, he lost his right to be her heir, a right which was transferred to the husband. In respect to the eating of **terumah**, the woman must first enter **huppah** (MKet 5.3;TKet 4.4; Ket 48b).
14. MNed 9.5; Maintenance involved the basics of food, clothing and conjugal relations, three rights given to the wife in the Torah (Ex. 21.10; Ket 47b-48a).
15. Num. 30.14
16. Ned 79a-b; Ket 71a-b,72b; TNed 7.1-3
17. Ket 72a; TNed 7.1; The husband could annul vows which involved his wife's relations with other people and which simultaneously caused self-denial and affected their marital relations. However, he could not annul those vows which were between his wife and other people but which neither caused self-affliction nor affected their intimate relations (TNed 7.1; Neusner, op.cit.,95).
18. Ned 68a; TNed 7.1; Ket 71a-b; based on the phrase, 'between a man and his wife' (Num. 30.17;Ned 79b)
19. MKet 5.5; TKet 5.3
20. Ket 61a
21. Ket 71b; Epstein 1973, 144f
22. Ned 85a-b;TNed 7.1;Ket 59a,66a,70a;Falk, 1978, 292f
23. Ned 79b,85a
24. Ned 85a-b; Ket 59a,66a; Neusner, op.cit., 96

25. Ket 71b; TNed 7.1; Falk, 1978,293
26. Ket 72a; Son.Tal.-Ket p.450,n.3; cf.Friedman, 1970-71, 223
27. Num. 30.6,15; Ned 76b
28. Num. 30.16; TNed 7.5; Ned 69b-70a
29. Ned 78a-79b; TNed 7.5
30. Ket 72a; Friedman, 1970-71, 223
31. ibid
32. Ket 71a-b,71b-72a; TKet 7.2-6
33. Ket 70a-b
34. Ket 61b
35. Ket 61a
36. Ex. 21.10; Ket 47b
37. Ket 61b-62b; TKet 5.6; Epstein, 1973, 218f
38. Ex. 21.10
39. Ket 70a; TKet 7.2-6
40. Num. 30.17
41. Num. 30.11
42. Num. 30.13
43. Ned 67a; TNed 6.4
44. ibid; Elman, 1967, 67; Neubauer, 187; Cohen, 322f; Neusner, op.cit., 81,83
45. Ned 70a-b; TNed 6.2; ibid, Neusner,83
46. Ned 70a-b; TNed, 6.2; ibid, Neusner
47. MNed 10.4
48. In his examination of some 65 Palestinian Ketubot from the Cairo Geniza (11th century C.E.), Friedman (1970-71) believes he has found a clause dealing with the annulment of the **arusah's** vows by the **arus**. The main support text (p.p. 225f) reads:
17) I, Such-and-such, the groom, willingly release
Such-and-such, the virgin, the bride, of all
18) vows, bonds, oaths and vows by **herem** (to ban, prohibit) which will be upon her from this day
19) until the time that she will be under my jurisdiction. They are all forgiven and pardoned
20) by the Merciful and by me, I Such-and-such, her husband, as it is written: 'Her husband has
21) annulled them, and the Lord will forgive her.
This however refers to a somewhat different issue than that referred to in the text which concerned an all-inclusive annulment of the vows by which the woman was restricted at the time of her transfer from the house of her father to the house of her husband. The text referred to by Friedman, written at the time of **kiddushin**, relates to the question of whether or not the **arus** was legally able to annul, in advance, the vows which his **arusah** might make at a future date. In the rabbinical literature, this was permissible only in the view of R.Eliezer, the majority of the Sages ruling that vows could only be annulled at the time the husband hears about them (Ned 72b,75a-b; Friedman, 1970-71, 227). This ruling applied equally to the father in relation to his

daughter and to the father and **arus** in relation to the **arusah**.

49. Ned 72b
50. Ket 72b-73a
51. Ket 72b
52. Num. 30.10
53. Ned 70b
54. Yeb 87a
55. Ned 88b-89a
56. Ned 89b
57. ibid; Ket 48a-49b
58. Ket 49a; Yeb 87a; cf. TNed 6.4
59. Ned 72a,88b-89a
60. Ned 72b; Gitt 35b; Friedman, 1970-71, 223
61. Ned 70a-b
62. ibid; Ket 39a
63. MKet 5.2
64. Ned 73b; cf. MKet 5.2; Friedman, 1970-71, 228f; Büchler, 1973, 146f,153; Neusner, op.cit., 81,86
65. Ned 73b
66. Ned 70b; Friedman, 1970-71, 228
67. ibid
68. Ned 70a-b; TNed 6.2
69. Ned 74a-75a; Yeb 29b; TNed 6.5
70. ibid; Neusner, op.cit., 87
71. Ned 74a-75a; Yeb 29b
72. Yeb 41b
73. Ned 74a
74. ibid; Yeb 29b; TNed 6.5; Neusner, op.cit., 87
75. Yeb 29b
76. Ned 74a,75a; Yeb 29b; TNed 6.5
77. Ned 74a,75a; Neusner, op.cit., 81,87,89
78. Epstein, 1942, 105
79. Ket 74b-75a; Friedman, 1970-71, 227
80. ibid, Friedman
81. Ket 74b
82. Ket 74b-75a; TGitt 3.5; Neusner, HMLW-Gitt, 1980, 154f
83. ibid
84. Son.Tal.-Ket p.467,n.6
85. ibid

Chapter Nine: TERUMAH

In spite of the fact that there was neither Temple nor priesthood for most of the period under discussion, the rabbinical literature focuses a considerable amount of attention on the betrothal and marriage of priests and daughters of priests. The Sages were not willing to neglect the cult and those directly involved in it simply because there was no longer a cult. The hope that the Temple would one day be rebuilt made it incumbent upon the Sages to preserve the traditions and **halakot** governing the Temple, its practices and its personnel. Consequently, the laws regulating the betrothal/marriage of the priesthood are included in the rabbinical literature. Primarily these laws were adopted from the Pentateuch which declares that the common priest was forbidden to marry a woman who had been divorced[1] while the High-Priest could marry neither a divorcee nor a widow.[2] Indeed, the High-Priest was restricted to marrying a 'virgin of his own people'.[3] In addition to these two categories of women, the rabbinical literature further forbids any member of the priesthood to marry a **ḥalugah**, a woman who had participated in the ritual of **ḥaliṣah** with her levir.[4] The betrothal and marriage of these individuals was judged, as noted earlier, to be 'valid but prohibited'.[5] The betrothal/marriage between one from the priestly class and a non-Israelite, a proselyte, a freedman, a

mamzer(eth) or one from the impaired priestly class (i.e. the offspring of a union forbidden to those of priestly stock[6]) had no validity whatever. Consequently, those who belonged to the priestly class, whether the priest or the daughter of a priest, were permitted to marry only a person of priestly, levitic or Israelite stock.[7]

Members of the priestly class enjoyed the special privilege of being permitted to eat **terumah** (Heave-offering). **Terumah** means 'that which is lifted or separated' and referred to a special offering given from the yields of the yearly harvests, from certain sacrifices and from the shekels collected in a special chamber in the Temple. The **terumah gedolah** (great offering) was the first levy on the produce of the year which was given to priests.[8] This was an offering the amount of which depended solely on the generosity of the owner. The priest who enjoyed the right to eat **terumah** was able to confer this right upon all the members of his household including his wife, his children and his slaves. Any person who was an acquisition of the priest, or who was deemed to be his possession, was able to partake of **terumah**.[9]

According to the Pentateuch, the **arusah** was included in this group and the Sages unanimously agreed that, by Biblical law, an **arusah** was permitted to eat **terumah**.[10] It would appear that in the early years of the rabbinical era the Sages acknowledged the right of the **arusah** to eat

terumah and permitted her to do so.[11] In a subsequent development, the Sages limited this right to the **arusah** whose alotted twelve month preparation period had expired without the **arus** contracting **nissu'in**. In this instance, the **arus** became obligated to maintain the woman and, therefore, if he was a priest he could confer upon her the right to eat **terumah**.[12] Ultimately, however, even this ruling was revised and the later Sages ruled that the **arusah** could not eat until she had entered **huppah**.[13] The reason which they gave for this blatant, and uncharacteristic, renunciation of the Biblical law was the fear that the woman would mix **terumah** in with the food eaten by her father's household, thereby giving the sacred food to those who were not entitled to eat of it.[14] This is the case in which a priest became betrothed to the daughter of an Israelite. In the event that the betrothal was between the daughter of a priest and an Israelite, the woman would cease to be eligible to eat **terumah** from the moment the betrothal was effected because she would then be the 'wife' of a man who had no right to eat the Heave-offering.[15] In each of these cases then, the **arusah**, contrary to Biblical law, was prohibited from eating **terumah**.

It is not at all clear what the ruling was concerning an **arusah** who was the daughter of a priest betrothed to a priest. Logically, there was no reason why the woman should not have been permitted to continue eating **terumah**,

a right which she had, through her father, prior to her betrothal and one which she would continue to have following her marriage, through her husband. No where, however, is a definitive statement made concerning this situation and the lack of clarity within the literature makes it impossible to reach any kind of final conclusion. For instance, there is a Mishnah[16] which discusses the betrothal of a (priestly) widow, divorcee or **halusah** to a High-Priest or common priest. An anonymous ruling declares that, because these unions were prohibited, the woman became ineligible to eat **terumah**.[17] Does this mean that, if no prohibition was attached to the **erusin**, the priestly **arusah** betrothed to a priest was able to eat **terumah**? No answer is given. R. Simeon and R. Eleazar permitted even the **arusah** in a prohibited betrothal to eat the sacred food, as long as actual marriage had not taken place, on the strength of her relationship to her father, a priest.[18] Certainly then, they would have also allowed those whose betrothals were permitted to eat **terumah**. The controversy within the text, however, was not resolved.

A second text discusses specifically the priestly **arusah** betrothed to a priest, in the context of a betrothal whose preparation period has expired without marriage being contracted.[19] In this instance, the Sages debated, not the question of the **arusah's** right to eat Heave-offering, but whether or not she was entitled to a full portion of the sacred food. That is, some Rabbis

would allow only one half (or two-thirds) of her food to be **terumah**. The remainder had to be unconsecrated foodstuffs.[20] This text suggests that, during the actual preparation period of betrothal, the woman was not entitled to eat, and even after this period she was permitted only a partial share of **terumah**, according to some Rabbis.

Finally, those texts which state that the **arusah** was not permitted to eat **terumah** consistently fail to mention the case of the daughter of a priest betrothed to a priest. Instead, they focus on the daughter of a priest betrothed to an Israelite and the daughter of an Israelite betrothed to a priest, neither of whom were permitted to eat Heave-offering during the betrothal period.[21] What is the significance of the exclusion? Does it mean that the daughter of a priest betrothed to a priest was the exception to the rule, or not? No final, conclusive answer is available.

Under normal conditions the priest had the power to confer the right to eat **terumah** upon his wife once she has entered **huppah** and consummated the marriage.[22] However, he lost this power if his marriage was with a woman forbidden to him. Thus, if the union was of the 'valid but prohibited' category, his wife was forbidden to eat the Heave-offering,[23] although in every other respect she was deemed to be his wife.[24] Likewise, the **sotah** and the adulteress, both of whom were forbidden to their husbands,

were not permitted to eat **terumah**.[25]

The daughter of a priest regained her right to eat **terumah** if she was divorced either during the period of betrothal or even following her marriage to an Israelite, as long as no children were produced from the union. With her divorce, the woman returned to her father's household and thereby became eligible again to eat **terumah**.[26] If she was widowed at any time during the betrothal or marriage, and the man died childless, the woman came under the levirate obligation. If she entered levirate marriage with the (Israelite) levir, she would, of course, not be eligible to eat **terumah**. However, if the bond were severed by **haliṣah**, and the woman returned to her priestly father's house, she would again be permitted to eat. The underlying principle for this was, 'If she is returned to her father's house, as in her youth, she shall eat of her father's bread'.[27] If there were children born of the marriage, they disqualified the woman from returning to her father's house and, therefore, from eating **terumah**.[28]

In the event that the betrothal was between a priest and the daughter of an Israelite, divorce would have no effect since the woman had never had the right to eat **terumah**. Divorce following marriage, however, would return the woman to the status of an Israelite and she would cease to be eligible to eat the Heave-offering, a privilege which she had enjoyed as the wife of a priest.[29] In the event of widowhood which brought the woman under

the levirate bond, 'wherever the husband entitles her to eat, the levir also entitles her to eat; and wherever the husband does not entitle her to eat, the levir also does not entitle her to eat'.[30] This meant that if the woman became subject to the levirate obligation during **erusin**, the levir could not confer upon her the right to eat **terumah** since her 'husband' had not had the power to do so.[31] If, however, she became a widow following **nissu'in**, the levir could confer upon her the right to eat since she had been eating it before under the authority of her now deceased, priestly husband.[32] Both a **ma'amar** and levirate marriage permitted even the widowed (Israelite) **arusah** to eat **terumah** through the new **kinyan** formed with her levir (a priest).[33] This is one of the few instances in which the **ma'amar** was considered effective enough to confer some rights upon the **yebamah**.

If the original marriage between the priest and Israelite woman had produced offspring, they not only freed the woman from the levirate obligation but also entitled her to continue eating Heave-offering.[34] Even if the priest's child was illegitimate or the result of the rape or seduction of the daughter of an Israelite, the woman was given the right to eat **terumah**.[35] Alternately, if the daughter of a priest bore a child that was conceived through an act of seduction or rape by an Israelite, that child had the power to deprive the woman of the right to eat **terumah**.[36] It was the actual birth of

the child which granted or deprived the woman of the right to **terumah**; neither the act of intercourse nor her pregnancy were sufficient.[37]

The Sages took very seriously the priestly privilege of **terumah** and were careful to delineate who was and who was not qualified to enjoy that privilege. They wanted to ensure that those who were not entitled to Heave-offering did not partake of it, thereby profaning the sacred food and infringing on the right which belonged exclusively to the priesthood and their dependents.[38] Of particular importance were the rights of women who had been brought into the priestly realm either as daughters or wives of priests. The transfer of women into and out of the priestly domain through the marital process affected their right to eat **terumah** and the Sages were careful to clarify their rights at various stages of the process: betrothal, marriage, divorce, widowhood, and legitimate and illegitimate childbirth. The right of a woman to **terumah** was dependent upon her father, her husband and/or her child, but never herself. Since a woman could never be a priest, it was impossible for her to acquire or lose the right to eat the Heave-offering solely on her own independent status. It was only through her relationship to her father, husband or offspring that a woman was judged eligible or ineligible to eat **terumah**. As often seems to have happened, it was the **arusah** who stood in the most peculiar position in respect to the question of

terumah. Not only did the Sages blatantly reverse the teaching of the Pentateuch, which permitted the **arusah** to eat **terumah** if she was betrothed to a priest, they also applied their rulings inconsistently. That is, the **arusah** who was the daughter of an Israelite betrothed to a priest lost her right to eat **terumah** because of her relationship, not to her 'husband', but to her father. However, the daughter of a priest betrothed to an Israelite lost her right to **terumah** because of her relationship to her 'husband' and not her father. It was only when the father and **arus** were both priests that the **arusah**, possibly, was qualified to eat the sacred food. The Sages accepted the inconsistency in order to prevent abuses and by and large the general rule was that the **arusah** was not entitled to eat **terumah**. This is one of the areas in which the limitations of the **arusah** as 'wife' are noted, indicating that she did not in fact have the full status of a wife. In this issue, **huppah** had far more authority to bestow privileges than did **kiddushin**, a situation which will be met again in the following discussion of the **ketubah**.

NOTES

1. Lev. 21.7
2. Lev. 21.14; Ezek. 44.22
3. ibid
4. MYeb 2.4
5. TYeb 2.3
6. Lev 21.1ff
7. MKidd 4.1
8. Num. 18.8ff
9. Lev. 22.11

10. ibid; Kidd 5a,10b; Ket 57b
11. Kidd 58b; TKet 5.1; Büchler, 1973, 150f,159
12. Ket 57a,57b; ibid, Büchler, 145ff,159; Falk, 1978, 288f; Neubauer, 1920, 193
13. Kidd 5a,10b; Ket 48b; TKet 4.3-4;5.1; ibid, Büchler, 145f,152ff,159; ibid, Neubauer
14. Kidd 5a,10b; Ket 57b; Son.Tal.-Yeb p.455,n.2; ibid, Büchler, 154f
15. Yeb 67b-68a,85b
16. MYeb 6.3
17. Yeb 5[illegible]b
18. Yeb 56b-57a; Son.Tal.-Yeb p.380,n.17;p.381,n.1
19. Ket 58a; TKet 5.1
20. ibid; Büchler, [illegible]49
21. Yeb 67b-68a,85b; Ket 48b,57a-b; Kidd 10b
22. Kidd 5a,10b; Ket 48b,57a-b; TYeb 10.1-2,
23. Yeb 66a,69a; Son.Tal.-Yeb p.442,n.6; TYeb 10.2
24. TYeb 2.3
25. Sot 5b,6a; Yeb 11a
26. Lev. 22.13; Yeb 68a-b,86b-87a; TYeb 9.4
27. ibid
28. Yeb 67a,87a
29. Gitt 65a-b; TGitt 1.5; Yeb 87b
30. Yeb 56a; Ket 57a; TKet 5.2
31. ibid
32. ibid
33. Yeb 58b
34. Yeb 67a,67b,86b-87a
35. Yeb 69b
36. Yeb 69a-b
37. ibid; Yeb 67a,67b,87a
38. Büchler, 146

Chapter Ten: THE KETUBAH

From the earliest times Jewish law and custom treated the act of betrothal (and marriage) as a business transaction, a contractual agreement between two families[1] and, later, between the man and woman themselves. The marital institution fell within the realm of civil law, and was not viewed as essentially religious in nature. By the end of the Tanakh period marriage had begun to take on some religious significance to the extent that it was viewed as a covenant between two people, a covenant similar to that between YHWH and his bride, Israel.[2] The couple were to treat each other with **hesed** - kindness, gentleness, respect and loyalty. The rabbinical leaders brought betrothal further into the realm of the sacred when they spoke of it as an act of **kiddushin**, sanctification.[3] However, in spite of this tendency to cloth betrothal in religious garb, it nonetheless remained essentially a business transaction. Nothing emphasizes this point more clearly and succinctly than the fact that Jewish law from the earliest rabbinical period required that a **ketubah** be employed in all marital unions.

The **ketubah** was a legal marriage contract drawn up by the husband and presented to his 'wife' at the time of their betrothal, or just prior to the nuptials. It was a 'memorandum of guarantees'[4] which the husband made to his wife, guarantees centering most significantly around the

financial well-being of the woman both during the marriage and after it dissolution.[5] Should the marriage be terminated by the death of the husband, the **ketubah** guarantees took the form of a support settlement for the wife; if divorce severed the marriage relationship, then the **ketubah** was seen essentially as alimony which it was obligatory for the husband to pay, according to the agreements in the contract.

As was noted in the discussion on divorce, the primary function of the **ketubah** was to protect the woman from potential arbitrary and unjust behaviour on the part of her husband. Theoretically, if the husband was displeased with his wife he could simply send her, empty-handed, out of his house. The **ketubah** made this kind of act impossible. If he wanted her to leave, he was compelled to pay a sum of cash specified in their marriage contract and to return to her whatever goods she had brought in with her (see Appendix C which summarizes the clauses of the **ketubah**). Clearly then, the **ketubah** not only protected the wife financially in the case of divorce, it also made divorce a less attractive and viable option for the husband.[6]

The history of the **ketubah** as a legal document in Jewish law is unclear. There is no mention whatever of a marriage instrument in the Tanakh. There is, however, a single reference to a writ of divorce[7] which provides no further details than that the writ was written by the

husband and presented to his wife should he decide to terminate the marriage. The passage seems to suggest that the form of the writ was part of the general knowledge of the people. Some modern scholars have drawn the logical conclusion that where there is a formal, legal, written divorce instrument there must also have existed a corresponding marriage instrument.[8] If this reasoning is sound and valid, the only statement which can be made regarding the historical origins of the marriage document is that it was in use by the end of the First Commonwealth.

Other references in the Tanakh argue against the existence of a writ of marriage during the pre-exilic period. For example, in spite of the numerous details provided regarding the marriage of Isaac and Rebecca, there is no mention of a marriage document being drawn up.[9] Jacob's first marriage to Leah, rather than to Rachel, involved a degree of misrepresentation and deception which would have been impossible if a writ outlining the stipulations of the marriage had been available.[10] Nor are there references to a **ketubah** in the marriages of Samson,[11] David,[12] or Ruth.[13] Indeed, the need for a writ of marriage would not in fact have been as essential as a formal divorce document which was required to verify that the woman was free to marry another man.[14]

The Talmud declares the **ketubah** to be a non-Jewish institution which was incorporated into the Jewish

tradition in the post-Biblical period.[15] The adoption of this legal document may have occurred during the period of the Jewish exile in Babylon. The **ketubah** had an extensive and long history of use in ancient Babylon and most likely had its origins there as well. The Code of Hammurabi corroborates its use and significance in Babylon. If a Babylonian man took a woman as his wife but did not draw up a contract for her, that marriage was not recognized as legal under Babylonian law.[16] The marriage contract was, then, from an early period an essential element in establishing a marital union in Babylon.

Direct Babylonian influence for a written marriage contract does not, however, account for the written **ketubot** discovered in the military outpost of Elephantine in Egypt (5th century B.C.E.).[17] If the Jews who originally established this colony left Palestine prior to or around the time of the exile, which seems likely, they would have had no direct contact with the Babylonian legal system. It is more probable that the Jews at Elephantine started to write out their marriage agreements under the influence of the Egyptian environment where such documents had been in use for some time.[18] Indeed, it has been suggested that the <u>form</u> of the rabbinical **ketubah** was significantly influenced by the Egyptian environment.[19] Babylon may have supplied the Near East with the <u>idea</u> of a written marriage contract but the Greco-Egyptian environment possibly provided some of its substance (Appendix C).

In any case, the Jews in exile in Babylon and those living in Egypt were brought into contact with cultures which employed written marriage contracts as an essential element in their marital arrangements. How extensively the **ketubah** was used in the post-exilic Jewish tradition, and whether it was a necessary element in the formation of the betrothal cannot be answered conclusively. Unfortunately, the only extant **ketubot** from this period are those found in Elephantine (see Appendix D). Reference is made to a written agreement between Tobias and Raguel in the Book of Tobit suggesting that the **ketubah** was employed in the Jewish community of Ecbatana (Persia).[20] Both of these instances occur outside Palestine, among cultures whose native populations were in the habit of writing marriage contracts. There is virtually no direct, internal evidence that the Jews in Judea employed the **ketubah** as part of their marriage process prior to the first century B.C.E. when Simeon b. Shetah instituted the practice whereby it was no longer necessary for the husband to pay the **mohar** as a cash sum at the time of betrothal but rather, a lien was placed on his property as a guarantee that the woman would be provided for in case of divorce or widowhood.[21] This highly significant reform was discussed previously (pages 11 and 53) and will not be further elaborated here. The point to be made now is that the need for the reform suggests that the **ketubah** had been in use for some time

but that some alterations were necessary due to changing economic conditions. It is interesting to note that the **mohar** in this enactment was called the **ketubah**. The **ketubah** was often equated with the **mohar** payment in the rabbinical writings, underscoring the central and essential role of the **mohar** in establishing the legality of the betrothal. Even though the actual **mohar** payment was now only a pledge, a promise to give the woman the specified sum of money, it nonetheless remained the effective element in contracting the betrothal. The use of the term **'ketubah'** (writing) itself indicates that a written document was being referred to.

In spite of the dearth of actual documents, it is reasonable to conclude that the **ketubah** was an essential element in the formation of the betrothal during the post-exilic period in Judean as well as Babylonian, Persian and Egyptian Jewish communities. This conclusion is based on three observations: first, marriage contracts were part of the traditions of the cultures with which the Jews came into contact during this period. Of particular importance was the Babylonian culture.[22] It is evident from the books of Ezra and Nehemiah that the Jews in Babylon were influenced by the legal traditions of that society, especially with regard to the writing out of legal documents. It is not unreasonable to suppose that the Jews who returned to Judea brought with them the legal practices of the Babylonians and incorporated those

practices into their own traditions. Of particular significance was the growing concern that Jews not intermarry with the non-Jewish peoples within the population.[23] Indeed, the need for the individual to be able to prove his identity as a Jew, through his parentage, became an important matter. The marriage contract would have provided concrete and irrefutable proof of one's ancestry.[24] The heightened concern for pure Jewish marriages as well as the growing emphasis which the law had in the lives of the people would have made the adoption of the more sophisticated Babylonian legal system in general, and the practice of the written marriage contract in particular, a strong likelihood.

A second basis for concluding the use of the **ketubah** in the post-exilic period are the writings of the early rabbinical period, which refer to the **ketubah** as if it had a history of use in Jewish tradition prior to the first century B.C.E. The final point has to be the evidence of the **ketubot** which are extant and also the reference to a written marriage agreement in the Book of Tobit. These indicate that the **ketubah** was in use at least in the Egyptian and Mesopotamian diaspora communities.

During the post-Biblical and early rabbinical periods the **ketubah** was written at the time of betrothal and was not part of the marriage ceremony.[25] It is clear from the Tannaic sources that the writing of the **ketubah** was an element of the betrothal stage.[26] Further, there is no

indication that it had been the custom of earlier times to write the **ketubah** at the marriage.[27] Indeed, it is not until a much later period that the rabbinical writings begin to suggest that the **ketubah** could in fact be written at either the betrothal or at the time of marriage.[28] The primary reason for this shift was that it seemed senseless to write the document at betrothal when the majority of its stipulations did not take effect until after the woman had entered **huppah**.[29] In the early period of the **Tannaim**, the only clauses which became effective at **erusin** were those involving the 'statutory' and 'additional' **mohar** payments. The statutory **mohar**, as noted elsewhere, was 200 **zuz** for a virgin and 100 **zuz** for a non-virgin.[30] The additional **mohar** (called **mattan**) included any money or gifts which the **arus** gave over and above the minimum amount required of him.[31] Originally the **mattan**, like the statutory **mohar**, was given at the time of betrothal and immediately became the property of the woman. Even after Simeon b. Shetah's enactment which transformed the **mohar** into a pledge, the **mattan** continued, for a time at least, to be given when the betrothal was contracted. Eventually even the **mattan** became a pledge in the marriage contract but apparently the older practice which granted the **arusah** the right of ownership to this additional **mohar** prevailed.[32] This tradition, however, ceased with Eleazar b. Azariah's ruling that the widowed or divorced **arusah** could claim only the statutory **mohar**.[33] This ruling may

reflect either poorer economic conditions, making the extra payments burdensome, or it might indicate a tendency among the Sages to shift the legal weight and emphasis away from **erusin** and onto **nissu'in**. In any case, the ruling meant that any betrothal gifts had to be returned to the **arus**, or his heirs, if he died or if divorce severed the bond.[34] This, however, was the case only if the **ketubah** was written at the time of **nissu'in**. In those communities where the marriage contract was written at **erusin**, the **arus** became immediately responsible for the additional **mohar** payment in the event of his death or divorce.[35]

Returning to the statutory **mohar**, there was unanimous agreement that in all cases the **arusah** was entitled to receive this payment in the event of divorce or widowhood.[36] This was considered to be an obligatory stipulation which took effect at the time of betrothal, whether a **ketubah** was written or not. This was both the official written **halakah** and the accepted practice among Jewish communities.[37] With the increasing tendency for the **ketubah** to be written at the time of marriage, the **arusah** lost one of the rights to which she had traditionally been entitled - the right to keep the gifts and additional money which the **arus** gave to her. The Sages, however, would not permit her right to the statutory **mohar** to be annulled. As in the more ancient tradition, the Rabbis acknowledged the **mohar** to be the

most significant element in contracting and sealing the betrothal, even though it was now merely a pledge. Consequently, the statutory **mohar** stipulation remained in effect from the moment of **kiddushin**, whether a **ketubah** was written or not. Further, the minimum amounts stipulated by the Rabbis as statutory **mohar** could not be decreased. That is, if the man attempted to give less, his betrothal was invalid and any subsequent intercourse was judged to be mere prostitution.[38] If the **arusah** was guilty of some transgression, such as adultery, which required her to be divorced with the forfeiture of her **ketubah**, it was the statutory **mohar** which she lost. Only if a **ketubah** had been written for her at betrothal did she also forfeit the **mattan**.[39] It should be noted that if the **arusah** was a **ketannah** or **na'arah**, the statutory **mohar** belonged to her father, not herself, if she was widowed or divorced during **erusin**.[40] The **bogereth** received the money for herself.[41]

It is not clear to what extent the woman herself participated in the actual negotiation and writing of the marriage contract. In the Elephantine community, the **ketubah** was evidently a contractual agreement between the man and the **arusah's** agent who acted on her behalf.[42] Presumably the agent would normally be the woman's father or some other trustworthy adult male who would act in her best interest. It is unlikely that the woman, even if she was a **bogereth**, would participate actively and directly in the drawing up of the contract, although she would have

the legal power to do so.[43] Nonetheless, the document was, according to rabbinical law, designed specifically to detail the obligations incumbent upon the man as her husband. In general practice, the contract was one-sided; that is, it listed the husband's obligations to his wife, not vice versa.[44] Thus, irrespective of the woman's role in its actual formulation, she was nonetheless the central focus of concern in the marriage document.[45]

There are some definite statements in the rabbinical literature which indicate that in some communities the men did not write out a **ketubah** for their wives.[46] Irrespective of whether a **ketubah** was written or not, all of its main clauses were nonetheless incumbent upon the husband for fulfilment. The wife was always guaranteed the rights of the **ketubah** even if no document was actually in her possession. Thus, she was guaranteed the statutory **mohar**,[47] maintenance both during the marriage[48] and as a widow,[49] redemption if taken captive and medical expenses if ill,[50] burial if she dies,[51] and support for her male and female children.[52]

It should also be noted that the **arus** had virtually no claims to the property of the betrothed woman during the period of **erusin**. Thus, he had no rights of inheritance over her dowry, the money and goods which she was going to bring with her into the marriage.[53] Likewise, his right to use and benefit from his wife's dowry and private property began only after the marriage had

been consummated.[54] Beth Hillel, however, attempted to extend the husband's rights over his wife's private property (called **melog**) from the time of their betrothal. They taught that the woman who inherited goods or property during the period of **erusin** could not sell them.[55] The rationale behind this ruling was that, since the man acquired the woman at the time of betrothal, he should also acquire a right to her property.[56] Since the husband had the right to the usufruct on her property during their marriage, the woman's sale of the property would deprive him of this right. Nevertheless, the Sages, including those of Beth Hillel, were hardpressed to justify this ruling and declared that if the woman sold the property, or gave it away, her action was legally binding and could not be reversed by the **arus**.[57] Later Rabbis qualified this ruling by declaring that if the woman sold, after her marriage, property which she had received before or during **erusin**, the husband was entitled to take it away from the buyers. Thus, they permitted the woman to sell her property only during the period of betrothal, not after marriage when the husband had acquired the right of usufruct over it.[58]

Nor did the **arusah** have any rights in regard to the estate of her future husband. That is, she was not entitled to be maintained by him.[59] The only exceptions to this were in the case that the woman's family was poor and the **arus** took it upon himself to support her during

the betrothal period,[60] or the time allotted for marriage preparations had passed but **nissu'in** was not yet contracted. The **arus** then became responsible for the maintenance of the woman.[61]

In summary, it is fairly clear that the property and monetary rights defined in the **ketubah** did not come into effect until after the woman had entered **huppah**. The only exception to this rule was the statutory **mohar** to which the **arusah** was always entitled if she was divorced or left a widow during the betrothal period. Unless the **ketubah** was actually written at the time of betrothal, the **arusah** lost her claim to the additional **mohar**. As noted, the **ketubah** became very much a document associated with marriage, not betrothal. Did this shift in emphasis represent a weakening of the institution of betrothal? Was it the result of difficult economic conditions or did it more accurately reflect an increasing unwillingness by the participants to invest money and goods into a betrothal relationship whose outcome was not certain? The Sages themselves defined betrothal as 'doubtful marriage', since it was not certain that the couple would actually enter **huppah** and consummate their union.[62] For this reason, the Rabbis limited the financial rights of both the **arus** and **arusah**. Clearly, in terms of the **ketubah**, **huppah** was far more significant than **kiddushin**. The financial rights and obligations of the couple did not, by and large, commence until after **nissu'in**. But this was no

different from the traditional practice of the Tanakh period. While in the earlier period the formal, (verbal) contractual elements of marriage were concluded at the time of betrothal,[63] financial rights did not become effective until after the woman entered her husband's home at marriage. What differed in the later rabbinical era was primarily that the (written) contract of marriage was not finalized until **nissu'in**. Negotiations (**shiddukin**) occurred at betrothal but they were neither formalized nor finalized until the **ketubah** was written at the time of marriage. It would appear that the shift in emphasis from **erusin** to **nissu'in** involved not so much the rights of the couple as the legal, contractual aspects of the process, symbolized by the writing of the **ketubah**. The only 'right' which the Rabbis took away from the **arusah** was her claim to the additional **mohar**, a claim which they made dependent on the writing of the marriage contract. The statutory **mohar**, the most essential element of the marital process, continued to be the (sole) right of the **arusah**.

NOTES

1. Burrows, 1938, 13; Pedersen; 1926, 67f; Mace, 1953, 25f; Neubauer, 1920, 165; see for e.g. Gen. 24;34
2. Mal. 2.14; Hos. 2.14ff; Neubauer, 169f
3. Falk, 1978, 285; Neubauer, 194ff
4. Epstein, 1973, 6; Elman, 1967, 78; Friedman, 1980, 19,134,189
5. Steinsaltz, 1976, 131; Berkovits, 1983, 33
6. Ket 11a,39b,54a,82b; Berkovits, 101; Falk, 1978, 298
7. Deut. 24.1
8. Epstein, 1973, 28f; de Vaux, 1961, 33
9. Gen. 24

10. Gen. 29
11. Judg. 14
12. I Sam. 18:25
13. Ruth 4
14. Falk, 1964, 153; Phillips, 1973, 354f
15. Ket 10a,56a-b; cf. Ket 110b; Driver & Miles (1935, 171f,220) suggest that the primary function of the marriage contract in Assyrian and Babylonian law was to provide documentary proof that a marriage had been effected. The use of the contract as a 'memorandum of guarantees' was of secondary importance and was probably a late development (Neufeld, 1944, 158).
16. Pritchard, 1958, C.H.#128, p.152;Bracker, 1962, 31; Mace, 175; Driver & Miles, 170f
17. These are reproduced in Cowley, 1923 and Kraeling, 1953. In all there are 3 reasonably complete documents only one of which is reproduced in Appendix D. Other extant early **ketubot** include 5 fragments discovered in the Judean Desert and which date from the early 2nd century C.E. (Benoit et al, 1961), and some 65 contracts, again fragmentary, found in the Cairo Geniza, dating to the 11th century C.E. (Friedman, 1980).
18. Yaron, 1961, 49
19. Rabinowitz, 1933, 91ff; Geller, 1978, 240ff
20. Tobit 7.14
21. Ket 82b; TKet 12.2
22. Neufeld, 162
23. Ezra 10; Neh. 13.23ff
24. Gaster, 1974, 6f; This would have been particularly true if the marriage contract was primarily a document providing proof of marriage. See Note 12
25. Buchler, 1973, 138ff; Elman, 78; Falk, 1978, 283f; Neubauer, 179,193; Cohen, 1966, 294f,304; Friedman, 1980, 194f; Epstein, 1973, 15
26. Ket 43b,52b-53a,89b; TKet 4.9; Yeb 29b,43b
27. Büchler, 138ff; Epstein, 1973, 15
28. ibid, Epstein; Ket 43b,54a,89b; Kidd 50b; Son.Tal.-Ket p.247,n.10; Elman, 78; Neubauer, 182,193f
29. Son.Tal.-Ket p.317,n.4; Cohen, 304f
30. Ket 10b,11a,54b
31. Ket 54b; Elman, 77f
32. Ket 47a-b,54b; Epstein, 1973, 80ff; Elman, 77; Cohen, 320f
33. Ket 47a-b,54b,55b-56a; Cohen, 321
34. Cohen, 309f; Neubauer, 193f
35. Ket 53a,89b(and notes); Yeb 29b,43b; Son.Tal.-Ket p.312,n.17;p.317,n.3
36. Ket 47a-b,53a,54b,89b,90a; Yeb 29b,43b
37. Ket 56a
38. Ket 54b,56b
39. Ket 101a
40. Ket 43b

41. Son.Tal.-Ket p.247,n.10
42. Yaron, 1961, 45ff; In the Elephantine contracts the woman is always referred to indirectly, in the third person.
43. Friedman, 1980, 218ff
44. Falk, 1957, 217; Friedman, 1980, 189;Some ketubot from the Cairo Geniza collection are peculiar in that they list mutual obligations. That is, they include a clause which stipulates the wife's duties towards her husband as well as the more usual obligations of the husband to the wife (Falk, 1957, 216; Friedman, 1980, 189f).
45. By the early rabbinical period the form of the marriage contract had changed to reflect the woman's central position. Beginning with the Aramaic Judean Desert documents, the woman was addressed directly; she was no longer a silent third person (Benoit et al, 110f,114ff). This development also reflects the new requirement that the woman consent to the betrothal.
46. Ket 16b,51a-52b,89a; Sot 7b
47. Ket 51a; Owen, 1967, 122
48. Ket 46b,47b; Owen, 121f
49. Ket 52b; Owen, 122
50. Ket 51a; ibid, Owen
51. Ket 46b,47b; ibid, Owen
52. Ket 52b
53. Ket 47a-b,48b; cf. Ket 53a,89b
54. Ket 46b
55. Ket 78a; Yeb 38b
56. ibid
57. Ket78a-b; TYeb 8.1
58. ibid
59. Ket 70b; Yeb 41b; Son.Tal.-Yeb p.269,n.7
60. Ket 67a-b
61. Ket 2a-b,48b,57a-b,70b
62. Ket 78a; Son.Tal.-Ket p.491,n.10
63. Cohen, 282

CONCLUDING COMMENTS

An attempt has been made throughout this study to present the institution of betrothal in the comparative lights of both the earlier legal traditions of the Tanakh and the state of marriage, **nissu'in**. Not only does this provide a background from which to view the rabbinical conception of betrothal, it also elucidates the fact that betrothal was an institution in transition. Betrothal in the rabbinical era was not the same as betrothal in the Tanakh period. But what was the extent and nature of the development? Epstein proposes that the institution of betrothal weakened throughout the rabbinical era and that the authority once inherent in it was transferred to the time of nuptials.[1] Falk, on the other hand, sees the development taking the opposite direction, i.e. betrothal became increasingly authoritative, "having the effect of making the bride already the bridegroom's wife".[2] The adoption of the term, **'kiddushin'** for betrothal is also held by Falk to be evidence of the increasing value placed on the institution.[3] Which viewpoint is more accurate? On the basis of this study it seems certain that the literature supports Epstein's contention that the institution of betrothal gradually weakened and that **nissu'in** became more authoritative. The introduction of the **ketubah** into Jewish legal practice had much to do with this shift in emphasis. With the aid of the **ketubah**, the

once decisive **mohar** payment was transformed into a pledge. All that was now required to effect **kiddushin** was a meagre token, a symbolic representation of the once more substantial **mohar**. The **mattan** likewise became a pledge, a promise to which the **arusah** was no longer entitled. As the **ketubah** increasingly became a document associated with **nissu'in**, betrothal ceased to be the point at which the critical contractual elements of the marriage were formulated.

While it was true, as Falk notes, that the **arusah** took the title 'wife', she was by no means legally endowed with all the rights of a full, **nissu'in** wife. Except for the **mohar** clause, none of the other rights granted in the **ketubah** could be claimed by the **arusah**. Nor did she have the right to eat **terumah**. In this issue the **arusah** of the rabbinical period was even less a 'wife' than in the Biblical era when the betrothed woman had been permitted to eat the sacred food. Nor was the **arusah** so fully under her 'husband's' authority that he could compel her to drink the bitter waters of the suspected adulteress. He could, however, create the **soṭah** situation by warning her not to be secluded with a particular man. Defiance of this warning would make the **arusah**, like a full wife, forbidden to her husband and she would forfeit her **ketubah** (**mohar**) payment. It was in this area of sexual matters that the **arusah** was most deemed to be a 'wife'. Like the full wife she was forbidden to have sexual relations with

a man other than her husband who had exclusive rights to her sexual intimacy. Violation of the husband's rights condemned both the **erusin** and **nissu'in** wife as an adulteress.

The **arusah** was also a full wife to the extent that she came under the levirate obligation if her **arus** died childless during the betrothal period. Virtually no distinctions were made in this regard between the betrothed and full wife. Likewise, in the matter of terminating the betrothal, the **arusah** required a **get**, just as did the **nissu'in** wife.

It would appear that the Sages were willing to recognize the **arusah** as a 'wife' when they considered her obligations, but not her rights, to the **arus**.[4] Of particular importance to them was the issue of sexual purity where the most stringent rulings were made. Purity was an underlying, basic motive guiding many of the rabbinical rulings in the marital institution. Betrothal was brought within the realm of the sacred and, just as the priests were to be pure in their duties within the Temple, so the people were to be pure in their marital relationships. Hence the significance of the term '**kiddushin**'. However, the Sages' concern for purity was not limited to the relations between men and women. They brought virtually every mundane aspect of daily life within the bounds of the sacred, demanding holiness and purity in all dimensions of the life of the Jewish

people.[5] Thus, if betrothal was brought into the realm of the sacred it was not because the Sages deemed it to be of greater authority than in an earlier age. Rather, betrothal took on religious significance as part of a grander scheme in which all of life's activities became coloured with sacred hues.

While purity was a major concern of the Sages it was not the sole consideration guiding their rulings. They were also very much aware of the basic legal weakness of women and the ethical implications of this position.[6] In an attempt to elevate and strengthen the woman's legal status several modifications were made to the law. The earliest of these was the introduction of the **ketubah** into Jewish legal practice. The importance of this document to women, in increasing their financial security and general legal position, cannot be underestimated. Especially in the area of divorce, where the woman was at a severe disadvantage to her husband, the **ketubah** provided the means of greatly increasing her status and rights. The Rabbis made other significant concessions around the issue of divorce, making the process easier for the woman who has been deserted, in order to prevent her from becoming an **agunah**. A still later, post-Talmudic amendment required the consent of the wife in all cases of divorce. In spite of all these modifications, however, the Sages would not grant the woman the right to actually write the **get** and thereby divorce her husband. The right of divorce

remains exclusively in the power of the man.

Another significant development which increased the status of the woman was the requirement that she consent to the betrothal. This represents her major role in the betrothal process. Although the woman was the central and critical figure in the marriage drama, she was nonetheless its most passive participant.[7] The right to at least say 'yes' or 'no' was, then, a significant contribution.

A final consideration of the Sages was the ordering and stability of the community generally.[8] The rights of the individual occasionally had to be made secondary to the overall well-being of the community. Thus, offspring of incestuous and adulterous relations were condemned as **mamzerim** in an attempt to dissuade individuals from entering such relationships.[9] Sexual impurities of this nature could not go unpunished for fear of wearing away the moral fibre of the community. Even though the offspring of these forbidden relations can be seen as innocent victims, it nonetheless was necessary to prevent them from entering the community through marriage in order to prevent the type of moral decay of which they themselves were a witness. They were the result of a transgression which could not be condoned in any way.[10]

All of these considerations - maintaining purity within the marital institution, increasing the legal status of the woman and fostering the health and stability of the community - contributed to the rabbinical rulings

concerning betrothal. In general, the Sages tended to weaken the authority of the institution of betrothal in favour of **nissu'in**. However they simultaneously raised the status of the woman from what it had been in the earlier Biblical period. Nevertheless her identity and status continued to be defined primarily on the basis of her relationship to the men who had legal authority over her. "She remains under the authority of her father until she enters under the authority of her husband at marriage".[11] The Sages attempted to make the woman's transition from the domain of her father to that of her husband as smooth as possible in order to ensure that her betrothal and marriage would be fully legal, without any traces of doubt and confusion regarding her status at any point in the transfer. They regarded marriage to be the most natural and ideal state for women. They understood her divinely decreed role in life to be the wife of a man and the mother of his children. The woman's realm was the home and within those bounds she was much honoured.

NOTES

1. Epstein, 1973, 13f; cf. Neubauer, 1920, 193f
2. Falk, 1978, 289
3. ibid, 285
4. cf. Neubauer, 194f,197
5. Neusner, 1973, 72ff; Neusner, 1975, 30ff
6. Berkovits, 1983, 32ff
7. Neusner, HMLW-Yeb, 1980, 18f; Neusner, 1979, 140f
8. Cohen, 1966, 344
9. Passamaneck, 1966, 124; Berkovits, 28
10. ibid, Passamaneck
11. MKet 4.5

APPENDIX A

Special Laws Governing the Levirate Institution

In order to make the discussion concerning the levirate institution less confusing several basic principles must be understood. These are presented below.

1. Since polygamy was legal during the rabbinical era under discussion it was possible to have more than one widow come under the levirate obligation at the death of the (childless) husband. In order to sever the levirate bond between each levir and each **yebamah** it was necessary for only one of the widows to either perform **ḥaliṣah** or enter into levirate marriage with one of the surviving brothers. Her co-wives would then be freed to marry anyone they pleased, excluding one of the other brothers (Yeb 10b). The remaining levirs would likewise be freed of **ziḳah**.

2. The widow who participated in **ḥaliṣah** was forbidden to marry into the priesthood since a common priest could not marry a **ḥaluṣah** and a High-Priest could not marry a widow (MYeb 2.4). Nor could this widow marry a relative of the man with whom she performed **ḥaliṣah** and, vice versa, the levir could not marry her near of kin (MYeb 4.7,12). The other levirs were, however, permitted to marry her relatives. Further, every levir, including the one who had submitted to **ḥaliṣah**, was permitted to marry the relatives of the co-wives, but not the co-wives themselves (Yeb 40b).

3. In the event that there was more than one widow but only one surviving brother, he could marry any one (but not all) of the widows, or submit to **ḥaliṣah** from one, thereby dissolving the levirate bond with all. The situation was essentially the same if there was one widow and more than one levir. The widow could be taken into **yibbum** by any one of the brothers, although the levirate duty fell first upon the eldest surviving brother (MYeb 2.8;4.5). Likewise she could perform **ḥaliṣah** with one of the levirs and thereby free them all from **ziḳah**. In this case, the levirs who did not participate in **ḥaliṣah** were permitted to marry the widow's relatives.

4. During the period of **ziḳah** the widow is known as a **zeḳuḳah**, one who is chained to the **yabam** by the levirate bond. The **zeḳuḳah** is forbidden to marry someone outside her deceased husband's family and every levir is prohibited, during this interval, from marrying a woman who is related to his **zeḳuḳah** (Neusner, HMLW-Yeb, 35).

5. If a woman at one moment is prohibited from contracting **yibbum** with a man, then at no subsequent time may she do so (Neusner, HMLW-Yeb, 57; MYeb 3.7a,9b)

6. In the event that two brothers, with unrelated wives, died childless, the surviving brother(s) become tied to their widows by two separate levirate bonds. In order to dissolve these bonds if there is only one levir, he must submit to **ḥaliṣah** from both of these widows, or he may submit to **ḥaliṣah** from one and contract **yibbum** with the other, or he may marry both since they are not related. If there is more than one levir, **ḥaliṣah** by one with one of the widows dissolves that levirate bond for all the other brothers but a second act of **ḥaliṣah** by the same or another levir is also required with the second widow to sever the second bond. It does not matter if one levir acts in response to both bonds either submitting to **ḥaliṣah** from both, or performing **ḥaliṣah** with one and marrying the other, or entering into levirate marriage with both - or if two levirs act, each submitting to **ḥaliṣah** from a different widow, or one submitting to **ḥaliṣah** with one widow and the other entering levirate marriage with the second widow, or each levir contracting **yibbum** with two different widows. The point is that **ḥaliṣah** and/or **yibbum** effects a total dissolution of **zikah** and this may be accomplished by one or two levirs when they are bound by two distinct bonds to two, unrelated widows. The situation is more complex when the widows are related because the potential for forming an incestuous relation increases (see Appendix B1).

7. If the **yebamah** is related to the levir in a first degree incestuous relation, she and her co-wives are exempt from the need to perform either **ḥaliṣah** or levirate marriage (MYeb 1.1). That is, no levirate situation arises.

8. If the **yebamah** is related to the levir in a secondary degree of incestuous relation or in a 'valid but prohibited' relation, she must perform **ḥaliṣah** and may not enter levirate marriage (MYeb 2.3-4)

APPENDIX B

Case Studies Involving the Levirate Institution

1. The Creation of an Incestuous Relation Between the Levir and **Yebamah**

The potential for creating an incestuous bond arose when the widows involved in the levirate obligation were related to each other. The basic underlying principle which made this situation potentially incestuous was that a man was forbidden to marry his wife's relatives, however a complex of rules had to be applied depending on the exact nature of the levirate relationships. Several illustrative case studies are presented below.

a) "If a man betrothed one of two sisters and he does not know which of them he betrothed, he must give a bill of divorce to each of them; if he died and had but one brother, such a one must submit to **ḥaliṣah** from each of them; if he had two brothers, one of them must submit to **ḥaliṣah** [from the one] and the other may [then] contract levirate marriage [with the other]; though if the two brothers had already taken them in marriage none can take them from them". (MYeb 2.6)

b) "If two [unrelated] men betrothed two sisters' and neither of them know which of the two he betrothed, each of them must give two bills of divorce. If they died, and each had a brother, each of these must submit to **ḥaliṣah** from the two sisters. If one had one brother and the other two brothers, the one brother must submit to **ḥaliṣah** from both sisters, and of the two brothers one must submit to **ḥaliṣah** [from the one] and the other may [then] contract levirate marriage [with the other]; but if the two brothers had already taken them in marriage none may take them from them. If each of the two men [that died] had two brothers, then a brother of the first must submit to **ḥaliṣah** from one of the sisters and a brother of the second must submit to **ḥaliṣah** from the other of the sisters; and the other brother in each case may then contract levirate marriage with the sister at whose hands his brother submitted to **ḥaliṣah**; though if the two brothers of the first man had already submitted to **ḥaliṣah** the other two brothers may not then both contract levirate marriage, but the one must submit to **ḥaliṣah** and the other man [then] contract levirate marriage; but if they had already taken the two sisters in marriage none can take them from them." (MYeb 2.7)

The only instance in which a man could simultaneously

be bound to two sisters is in the case of confused betrothal noted in these two illustrative studies. Each of these case studies makes the same points: if there is only one levir he must submit to **ḥaliṣah** from both women since (a) he may not marry the sister of his **zeḳuḳah**, and; (b) he may not marry the sister of his **ḥaluṣah**, which means that even if he submits to **ḥaliṣah** from one widow he is still forbidden to marry the other, and, therefore, must submit to **ḥaliṣah** from her as well. The reason for requiring two acts of **ḥaliṣah** in these cases is that it is not known which woman is actually the **yebamah**. In order to ensure that the levirate bond is actually broken, two separate acts of **ḥaliṣah** are demanded.

If there are two (or more) levirs, one is permitted to contract **yibbum** with one of the widows only if the (real or possible) levirate bond with the second widow is dissolved by the other levir prior to **yibbum**. **Ḥaliṣah** must precede **yibbum**, otherwise, the levir will be marrying the sister of his **zeḳuḳah**, which is forbidden. Once one of the bonds has been dissolved, the levir who did not submit to **ḥaliṣah** is now free to marry the widow who likewise did not participate in **ḥaliṣah**. If she is the real **yebamah**, he may marry her in response to his levirate duty; if she is not the real **yebamah**, he may marry her as a stranger who is permitted to him.

c) "If two of four brothers married two sisters, and the two that married the two sisters died, the sisters must perform **ḥaliṣah** and may not contract levirate marriage; and if the brothers had already married them they must put them away." (MYeb 3.1)

d) "If two of three brothers married two sisters, or a woman and her daughter, or a woman and her daughter's daughter, or a woman and her son's daughter [and the two brothers died childless], the two widows must perform **ḥaliṣah** and may not contract levirate marriage [with the third brother]." (MYeb 3.4)

In both these cases levirate marriage is forbidden because (a) a man may not marry the relative of his **zeḳuḳah**, and (b) the woman who is forbidden to enter **yibbum** for even a single moment is forever forbidden to do so.

2. The Effect of **Ma'amar**

The rabbinical literature provides several case studies illustrating the effect of **ma'amar** upon the levirate bond. In each of the following examples, note the difference in outcome under the conditions of (a) levirate marriage, (b) **ma'amar**, (c) neither.

1. "If two of three brothers were married to two sisters and the third was married to a stranger, and one of the sisters' husbands died and
(a) the brother who was married to the stranger married his wife and then died himself, the first [widow] is exempt [from the levirate obligation] as being a wife's sister and the second [widow] is exempt as being her co-wife".
(b) If, however, he had only addressed to her [the first widow] a **ma'amar** and died, the stranger is to perform **haliṣah** but may not contract the levirate marriage [with the third surviving brother]."(MYeb 3.6)
(c) The **gemara** teaches that if he had not even addressed to her a **ma'amar**, the stranger could either perform **haliṣah** or enter into levirate marriage with the third suriviving brother (Yeb 30a).

At stage (c) the 'stranger' was not in any way linked to the first widow and, therefore, came under the levirate obligation which could be resolved in either of the two possible ways. At (b), however, the **ma'amar** created a partial and imperfect bond between the 'stranger' and the first widow. Consequently, when the second levir dies, she has the imperfect status of a co-wife to the first widow who herself is exempt from the levirate obligation because she is the sister of the wife of the remaining **yabam**. The 'stranger', however, is not completely exempt but because of her partial co-wife status she is forbidden to enter levirate marriage and must, therefore, perform **haliṣah** with the third surviving brother. The same rationale applies to the following case study.

2) "Three brothers, two of them married to two sisters and one of them married to an unrelated woman - if the one who is married to the unrelated woman died
(c) if one of the husbands went and did not suffice to address a **ma'amar** to his **yebamah** before he died, this unrelated woman either effects **haliṣah** or is taken into levirate marriage [with one or the other of the two surviving brothers - she is free to marry either];
(b) if he addressed to her a **ma'amar** but did not suffice to marry her before he died, this unrelated woman performs **haliṣah** and does not enter into levirate marriage;
(a) if he married her and afterward died, this unrelated woman is exempt from **haliṣah** and from the requirement of levirate marriage" (TYeb 5.5b).

APPENDIX C

The Ketubah Clauses

Many of the clauses written in the ketubah were 'court stipulations'. That is, they represented obligations which were legally binding on the husband whether they were written into the contract or not. These stipulations are presented below.

1. The 'Statutory **Mohar**'
   "The **ketubah** (i.e. **mohar**) of a virgin is 200 **denars**, a of a widow (i.e. a non-virgin) one **maneh** (=100 **denars**)" (MKet 1.2; cf. MKet 4.7).

This sum represents the minimum amount of money which the husband must pledge to pay to his wife if she is divorced or widowed. The statutory **mohar** obligation became effective from the moment the betrothal was contracted, whether the **ketubah** was written immediately or later, at the time of marriage (Ket 54b,89b,90a). As noted in the text, the statutory **mohar** clause was the most significant element in the **ketubah**, and in an earlier period the payment of the mohar represented the most decisive and binding component of the betrothal process. In the Talmudic period, with the delayed payment, the **mohar** became primarily a 'divorce price' rather than a marriage price (Owen, 1967 75; Epstein, 1973, 58).

2. **Mattan** ('gifts')
   "Although they have said: 'The **ketubah** of a virgin is 200 **denars** and of a widow one **maneh**', if a man is minded to add thereto, even a hundred **manehs**, he may do so" (MKet 5.1).

Mattan included any gifts or money given by the **arus** to the **arusah** over and above the statutory **mohar**. The **mattan** were 'additional **mohar**' which in the Biblical and early rabbinical periods were given at the time of betrothal and became the immediate possession of the woman (Epstein, 1973, 80). Ultimately, however, **mattan**, like **mohar**, became a pledge in the **ketubah** to be fulfilled only if the marriage was terminated by divorce or widowhood (ibid, 80ff). In the early Tannaic period, the **arusah** could claim both the **mohar** and **mattan** if the betrothal was terminated (Ket 47a-b,54b). R. Eleazar b. Azariah however, ruled that she was entitled only to the statutory **mohar** and with this ruling the **arusah** lost her right to the **mattan** (ibid; Ket 55b-56a). The only exception would appear to be the case in which the **ketubah** was written at the time of betrothal, when she would be entitled to receive both the **mohar** and **mattan** payments (Ket 53a,89b).

3. The Dowry

MKetubah 6.3-6; TKetubah 6.4ff

The dowry included property and goods which the woman brought with her when she married and which were given to her by her father in lieu of an inheritance (Ket 66a-67a). Property which was part of the dowry was termed '**gon barzel**' (lit.: 'iron-sheep') property. Owen (1967,122f) notes the significance of this term when he declares that "**tzon barzel** assets consisted of the wife's estate held by her husband which, in the case of her death or divorce, he must restore in specie, being responsible for any loss or deterioration. These assets were like a "flock of sheep" because they produced a yield which the husband enjoyed, but they were also like "iron" in that they remained the wife's indestructible property guaranteed by the husband". Thus, the husband had usufruct rights to his wife's dowry (TKet 9.2) but if she was divorced he was required to return all property at its original value, or its equivalent in money (MYeb 7.1; Friedman, 1980,291f; Geller, 1978, 238f). The dowry items and their values were recorded in the **ketubah** in order to avoid any future conflict regarding their nature or value. Neither the husband nor the wife could sell these assets since each held certain rights to it: the wife had the right of possession while the husband had the right of usufruct. In the event that the wife predeceased her husband, her dowry was inherited by her offspring, although her husband continued to enjoy usufruct rights over it and they could not, therefore, gain possession of it until after his death (Epstein, 1973, 129). If the woman died childless, her property was inherited by her husband (Ket 83b-84a). The Cairo Genizah **ketubot** often had inserted a clause stipulating that the husband was not entitled to receive the full value of his wife's dowry if she predeceased him and there were no children born of their marriage. Some contracts permitted him to receive half, some none, of this property. Rather than go to the husband these assets were returned to the woman's father or his heirs. The rationale behind this development was that the father was unwilling to bestow a large dowry on his daughter if that property was lost to his family by her premature death (Friedman, 1980, 394ff).

A second type of property owned by the wife was '**melog**' (lit.: 'plucking'). **Melog** property was the woman's personal, independent estate and, consequently, it was not listed in the marriage contract (Friedman, 1980, 292; Geller, 1978, 237f). Like **gon barzel** assets, the husband had usufruct rights over his wife's **melog** property, hence the significance of 'plucking' (Ket 78a-79a,83a; Levine, 1968, 272; Owen, 1967,122). In exchange for usufruct rights the husband was expected to ensure the upkeep of this property (MYeb 7.1). However, he was not responsible for the loss or deterioration of

melog property nor did he benefit from any increase in its value (Ket 79a-80b; Owen, 122). **Melog** assets were inherited by the husband if his wife predeceased him (Ket 83b-84a; TKet 9.2).

4. Maintenance, Burial, Redemption, Medical [illegible]
   ".....and he [the husband] is liable for her maintenance and for her ransom and for her burial" (MKet 4.4; cf MKet 4.8,9)
   "If she received injury, he is liable for her healing" (MKet 4.9).

In exchange for property rights over his wife's estate, the husband was obliged to ensure that she was properly maintained (Ket 47b; Geller, 244). Maintenance included food, clothing and conjugal relations (Ket 47b-48a; TKet 10.1; Ex. 21.10). He was also required to redeem her if taken captive, pay her medical expenses and bury her.

5. **Benin Dikrin** (male children)
   "Male children which you will have by me will inherit your **ketubah** besides the portion which they receive with their brothers" (MKet 4.10).

It has already been noted that if the wife dies with children, her dowry property was to be inherited by her sons. Thus, while the husband had usufruct rights to these assets as long as he lived, when he died this property reverted to the full ownership and control of his wife's children. Any offspring of another marriage had no claim to this property. This clause ensured that the property belonging to the wife's family would not be lost to the family of her husband or to offspring which he had by another wife (Friedman,1980, 379ff;Epstein,1973, 128f).

6. **Benan Nukban** (female children)
   "Female children which you will have by me will dwell in my house and receive maintenance from my goods until they marry husbands" (MKet 4.11).

The insertion of this clause into the **ketubah** ensured that female children would be maintained out of their father's estate both during his lifetime and following his death. Female children were entitled to maintenance until they married or reached maturity at the age of twelve and a half years (Ket 53b). , The stipulation also ensured that the girl would receive a dowry, valued at ten per cent of her father's estate (if he was dead), in order to enable her to marry (Ket 52b,68a-b). This provision, along with the **benin dikrin** clause and the provision for the widow, was written in the **ketubot** fragments found in the Judean Desert (Benoit et al, 1961, 110f,114ff,248ff,254ff) indicating these were in practice by the early rabbinical period.

7. Provisions for the Widow

"You will dwell in my house and receive maintenance from my goods so long as you remain a widow in my house" (MKet 4.12).

In the event that the marriage was terminated by the death of the husband, the wife was guaranteed continued support from his estate until her death or remarriage, or until she cashed in her **ketubah** (Ket 54a,103a-104b). If she remarried, the widow would cease to be maintained from her deceased husband's estate but she would then be permitted to collect the total amount of her **ketubah** (Ket 54a,103a; Friedman, 1980, 429ff). This clause applied equally to all widows, irrespective of whether or not they had children by the deceased. The provision for the continued maintenance of the widow was necessary because in Jewish law the wife was never granted the right to be her husband's heir (Friedman, 1980, 427; Epstein, 1973,175f).

8. The Lien

"All my goods are surety for your **ketubah**" (MKet 4.7). In order to ensure payment of her **ketubah**, a lien was placed by the courts on the husband's property which guaranteed the wife priority over other creditors in the case of either divorce or widowhood.

Sources of Origin of the **Ketubah** Clauses

The following clauses probably had a Babylonian (eastern) origin: 1) **mohar**, 2) **mattan**, 3) dowry.

Several clauses appear to have been influenced by the Egyptian environment. These include:

1) the lien clause (Rabinowitz, 1933, 92f; Geller, 1978, 243);

2) the maintenance clause (ibid). There is no such provision in either the Neo-Babylonian (2nd century B.C.E.) or Elephantine marriage contracts but it does appear in purely Egyptian documents (Geller, 237,243f; Rabinowitz, 92f), and in Greco-Egyptian documents dating from the 4th century B.C.E. and onward (Rabinowitz, 95) Rabinowitz, however, proposes that the maintenance clause in these documents was inserted under the influence of the Biblical text (Ex. 21.10) and, therefore, was essentially of Jewish origin (p.p. 93,95ff).

3) the relative rights of the husband and wife in regard to the wife's property parallel those found in Egyptian contracts (Geller, 244).

APPENDIX D

A Sample Ketubah

The **ketubah** translated below is from Cowley, 1923 - Aramaic Papyrus #15. It is dated c. 441 B.C.E.

"On the ...(date)...of the king, said Ashor b. Zeho, builder to the king, to Mahseia Aramean of Syene, of the detachment of Warizath, saying: I came to your house that you might give me your daughter Miphtahiah in wifehood. She is my wife and I am her husband from this day and forever. I have given you the **mohar** for your daughter Miphtahiah the sum of five shekels royal weight; it is accepted by you and your heart is content therewith. Your daughter Miphtahiah has brought in to me in her hand ... (list of dowry items and their values ...), all the money and the value of the goods amounting to ... (sum) .... I have received and my heart is content therewith ... (list of items not valued) .... Tomorrow or any other day, if Ashor should die and there is no child male or female belonging to him by Miphtahiah his wife, Miphtahiah has the right to the house of Ashor, his goods and his chattels and all that he has on the face of the earth, all of it. Tomorrow or any other day, if Miphtahiah should die and there is no child male or female belonging to her by Ashor her husband, Ashor will inherit her goods and chattels. Tomorrow or any other day, if Miphtahiah should stand up in the congregation and say, I divorce (lit: hate) Ashor my husband, the money of divorce is on her head; she will return to the scales and weigh out to Ashor 7 shekels 2 R, and all that she brought in in her hand she will take out, both shred (?) and thread, and she will go away whither she will, without suit or process. Tomorrow or any other day, if Ashor should stand up in the congregation and say, I divorce my wife Miphtahiah, her **mohar** will be lost (i.e. forfeited by Ashor), and all that she has brought in in her hand she will take out, both shred (?) and thread, on one day and at one time and she will go whither she will, without suit or process. But if he should rise up against Miphtahiah to drive her out from his, Ashor's, house and his possessions he will give to her silver 20 kerashin, and he will do to her the law of this document. And he will not be able to say, I have another wife beside Miphtahiah and other children beside those which Miphtahiah bore to me. If he says, I have children and a wife beside Miphtahiah and her children, I shall give to Miphtahiah 20 kerashin royal weight, and I shall not be able to separate my goods and my possessions from Miphtahiah, but if I remove them from her I shall pay Miphtahiah the sum of 20 kerashin royal weight. ... (name of scribe and witnesses)....

GLOSSARY OF TERMS AND NAMES

TERMS:

AGUNAH: (ᶜᵃgûnāh) A deserted wife, tied to an absent husband and unable to remarry. From the Hebrew root, ᶜgn, to be restrained, anchored, tied.

AMORA: (ʾᵃmôrāʾ; pl. ʾᵃmôrāʾîm) The name given to those Rabbis who provided the **gemara**, the commentary, on the Mishnah. From the Hebrew root, ʾmr, to speak.

ARUS: (ʾărûs) The technical name for the husband of a betrothed woman. From the Hebrew root, ʾrs, to betroth.

ARUSAH: (ʾᵃrûsāh) The betrothed woman. From the Hebrew root, ʾrs, to betroth.

BAᶜAL: (baᶜal) 'Lord' or 'master' or 'owner'; in relation to marriage it is a technical name for 'husband'.

BENAN NUḴBAN: (bᵉnān nûḵbān) Lit.: female children. In relation to the **ketubah**, a special clause ensuring the maintenance of daughters.

BENIN DIKRIN: (bᵉnîn dikrîn) Lit.: male children. In relation to the **ketubah**, a special clause ensuring that the woman's male offspring inherit her property.

BETHULAH: (bᵉṯûlāh) A young woman of marriageable age.

BIʾAH: (bîʾāh) Sexual intercourse, one of the methods by which **ḳiddushin** could be effected.

DENAR: (dînār) A gold or silver coin.

BETH DIN: (bêṯ dîn) 'House of law'; the Jewish court which may be composed of three or more learned, adult males.

BOGERETH: (bôgereṯ) A woman over twelve and a half years who has full legal power to act on her own behalf.

ERUSIN: (ʾerûsîn) A formal betrothal, which cannot be annulled except by a bill of divorce. From the Hebrew root, ʾrs, to betroth.

GEMARA: (gᵉmārāʾ) Commentary on the Mishnah found in the Talmud. From the Hebrew root, gmr, to complete.

GET: (gēṭ; pl. giṭṭîn) An Aramaic word meaning deed or document. It generally denotes the bill of divorce.

HALAKAH: (hᵃlākāh; pl. hᵃlākôt) The final rulings on legal issues based on the accepted majority opinion. From the Hebrew root, hlk, to walk or go.

ḤALAL: (ḥālāl) The male offspring of a marriage between a priest and a woman forbidden to him. From the Hebrew root, ḥll, to be profaned.

ḤALALAH: (ḥᵃlālāh) The wife or female offspring of a marriage between a priest and a woman forbidden to him. From the Hebrew root, ḥll, to be profaned.

ḤALIṢAH: (ḥᵃlîṣāh) The ceremony in which the **yebamah** removes the shoe of her levir, thereby severing the levirate bond. From the Hebrew root, ḥlṣ, to draw off.

ḤALUṢAH: (ḥᵃlûṣāh) A woman who has performed **halisah**. From the Hebrew root, ḥlṣ, to draw off.

HEFḲER: (hefḳēr) Property which has no owner and which is readily and easily acquired by anyone.

ḤEREM: (ḥērem) In reference to vows, it denotes that benefit will be prohibited from the person or thing so designated. From the Hebrew root, ḥrm, to ban.

ḤUPPAH: (ḥûppāh) The bridal 'canopy'; entry into the canopy represents a symbolic consummation and completion of the marriage.

KARETH: (kārēṯ) Divine punishment for a number of sins, including incestuous marriage, for which no human penalty was prescribed. The penalty involved sudden or premature death, sent by God. From the Hebrew root, krt, to cut off.

ḲAṬAN: (ḳāṭān) A minor male under the age of 13 years. From the Hebrew root, ḳtn, small or little.

ḲEṬANNAH: (ḳᵉṭānnāh) A minor female under the age of 12 years.

KETUBAH: (kᵉṯûbāh; pl. kᵉṯûbôt), The written marriage contract specifying the financial obligations of the husband toward his wife. From the Hebrew ktb, to write.

ḲIDDUSHIN: (ḳiddûšîn) The act of affiancing or betrothing; the money or token used to effect the betrothal. From the Hebrew root, ḳdš, to consecrate.

ḲINYAN: (ḳinyān) An acquisition of property, slaves, or a wife. From the Hebrew root, ḳnh, to acquire.

KONAM: (ḳônām) The term used to introduce a vow of restriction. A corruption of the Hebrew word, **ḳorbān**, offering.

LEVIR: The latin term for brother-in-law.

MA'AMAR: (ma'ᵃmār) The act of 'bespeaking' which is the levirate parallel to betrothal. From the Hebrew root, 'mr, to speak.

MAMZER: (māmzēr) A male child born from a union which was punishable by death or **kareth**.

MAMZERETH: (mamzereṯ) A female child born from a union which is punishable by death or **kareth**.

MANEH: (māneh) One hundred **zuz**.

MATTAN: (mattān) Any additional 'gifts' or money given or pledged by the man to his betrothed wife.

MELOG: (mᵉlôg) The private, independent property of the wife over which her husband has the right of usufruct but for which he neither gains the benefits nor suffers loss.

MISHNAH: (miš̌nāh) The collection of oral laws compiled by R. Judah the Prince, c. 200 C.E. From the Hebrew root, š̌nh, to repeat.

MI'UN: (mî'ûn) A declaration of 'refusal' made by an orphaned **ḳeṭannah** who has been given in betrothal or marriage by her mother or brothers. The declaration states her refusal of the man chosen for her and terminated the relationship without the necessity of a **geṭ**.

MOHAR: (mōhar) The 'bride-price' originally paid by the man at the time of betrothal, it became a pledge in the **ketubah** to be paid only if the wife was divorced or widowed.

MOREDETH: (mōredeṯ) A 'rebellious wife', a wife who refused to have conjugal relations with her husband. In the case of the **arusah** and **yebamah**, the **moredeth** was a woman who refused to marry her **arus** or levir, respectively.

NAᶜARAH: (naᶜᵃrāh) A woman between the age of twelve and twelve and a half.

NATHIN: (nāṯîn) A descendant of the Gibeonites who deceived Joshua (Josh. 9.3ff) and with whom an Israelite was not to intermarry.

NEDARIM: (n^{e}dārîm) Vows.

NISSU'IN: (niśśû'în) A fully valid, consummated marriage. From the Hebrew root, ns', to carry, take.

PERUṬAH: (p^{ê}rûṭāh) A copper coin, the smallest coinage in circulation.

SEFER NASHIM: (sefer nāšîm) The 'Order of Women'; the division in the Talmud which examines the legal issues involving women.

SHIDDUKIN: (šiddûkîn) The negotiations which precede the contracting of betrothal.

ṢON BARZEL: (ṣôn barzel) The wife's 'iron-sheep' property which she brings in with her to the marriage as her dowry. The husband has full usufruct rights to this property. He is liable for any decrease in value but also receives the profit from any increase in value.

SOṬAH: (sôṭāh) The married woman whose husband suspects her of having illicit sexual relations with another man and who, having been formally warned not to seclude herself with the specified man, has defied this warning. From the Hebrew root, sṭh, to turn aside.

TALMUD: (talmûd) The Jewish legal text composed of both the Mishnah and the **gemara**, the commentary on the Mishnah. From the Hebrew root, lmd, to study.

TANAKH: The Hebrew Bible

TANNA: (Tannā'; pl. Tannā'îm), a Rabbi or scholar quoted in the Mishnah; the name given to the Sages prior to the completion of the Mishnah. From the Aramaic root, tnh, to repeat.

TERUMAH: (t^{e}rûmāh) 'That which is lifted or separated'; a special 'Heave-offering' which priests and their dependents were entitled to eat.

TOSEFTA: (tôseftā') A second, 'additional' collection of **halakot** compiled in Palestine shortly after the Mishnah.

YABAM: (yăbām) The Hebrew word for brother-in-law. Specifically, it denotes a brother-in-law who has come under the levirate obligation.

YEBAMAH: (y^{e}bāmāh) The Hebrew word for sister-in-law. A widow whose husband died childless.

YIBBUM: (yibbûm) Levirate marriage with a brother's childless widow.

YHWH: the tetragrammaton which represents the divine name of the God of Israel, a name which could not be spoken.

ZEḴUḴAH: (z^{e}ḳûḳāh) The widow who is tied to the levir by the levirate bond. From the Hebrew root, zḳḳ, to chain.

ZIḴAH: (zîḳāh) The levirate bond. From the Hebrew root, zḳḳ, to chain.

ZONAH: (zônāh) A harlot; a woman who has sexual relations with a man who is of an incestuous degree of kinship to her.

ZUZ: (zûz) A coin the value of a denar.

NAMES:

R. Akiba: c. 50-135 C.E., a Tanna in Jerusalem

R. Ammi: c. 300 C.E., a Palestinian Amora

R. Eleazar: c. 130-160 C.E., a Tanna in Usha

R. Eleazar b. Azariah: c. 90-130 C.E., a Tanna in Jerusalem

R. Eliezer: c. 90-130 C.E., a Tanna in Jerusalem

R. Gamaliel: c. 90-130 C.E., a Tanna in Jabneh

R. Gershom: a 10th century Jewish scholar known for his legislation which marked the end of polygamy and who made it necessary for the wife to consent to her husband's divorce.

Hillel: c. 30 B.C.E.-10 C.E., a leading Palestinian scholar and legislator, he opened a school which bore his name and whose rulings became the accepted halakot.

R. Huna: c. 200 C.E., a Babylonian Amora

R. Johanan: c. 250 C.E., a Palestinian Amora

R. Johanan b. Zakkai: d. 80 C.E., a Tanna in Jabneh

R. Joshua: c. 90-130 C.E., a Tanna in Jabneh

R. Judah: c. 130-160 C.E., a Tanna in Usha

R. Judah the Prince: c. 200 C.E., compiled the Mishnah. Also known simply as Rabbi.

R. Kanaha: c. 250 C.E., Palestinian Amora

R. Meir: c. 130-160 C.E., a Tanna in Usha

R. Nahman: c. 350 C.E., a Palestinian Amora

R. Papa: d. 375 C.E., a Babylonian Amora

R. Samuel: c. 225 C.E., a leading Babylonian Amora

R. Sherabia: probably contemporary with R. Papa

R. Simeon: c. 130-160 C.E., a Tanna in Usha

R. Zena: probably a Tanna from Beth Shammai, pre-70 C.E.

Rab: c. 225 C.E., a leading Babylonian Amora

Raba: 299-352 C.E., a Babylonian Amora

Rabbah: d. 339 C.E., Rabbah bar Nahmani, a Babylonian Amora

Rabban Gamaliel the Elder: pre-70 C.E., a Tanna in Jerusalem

Rabbi: R. Judah the Prince. See above.

Rabina: c. 420 C.E., a Babylonian Amora

Rab Judah: d. 299 C.E., a leading Babylonian Amora

Resh Lakish: c. 250 C.E., A Palestinian Amora

Shammai: c. 30 B.C.E.-10 C.E., a contemporary and rival with Hillel, Shammai also opened a school which bore his name. Generally more conservative in his rulings than Hillel, his teachings did not become the accepted **halakot**.

Simeon b. Shetah: c. 80 B.C.E., a leading Jewish legislator in Palestine

Ulla: c. 300 C.E., a Babylonian Amora

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