Sociological Reality and Textual Traditions:

Their Tension in the *Ketubbah*

RABBIS JOEL ROTH AND DANIEL GORDIS

This paper was adopted as a Minority Opinion on April 27, 1983 by a vote of 6 in favor, 9 opposed and 5 abstentions. Members voting in favor: Rabbis Kassel Abelson, Ephraim L. Bennett, Wolfe Kelman, Mayer E. Rabinowitz, Joel Roth and Harry Z. Sky. Members voting in opposition: Rabbis Isidoro Aizenberg, Jacob B. Agus, Morris Feldman, Edward M. Gershfield, David H. Lincoln, David Novak, Barry S. Rosen, Morris M. Shapiro and Israel N. Silverman. Members abstaining: Rabbis Ben Zion Bokser, David M. Feldman, Robert Gordis, Henry A. Sosland and Alan J. Yuter.

Note: "The Text of the Ketubbah," a paper by Rabbi Morris M. Shapiro, was adopted as the Majority Opinion of the Committee on April 27, 1983 by a vote of 13-6-1. "A Proposal for the Text of the Ketubbah," a paper by Rabbi Robert Gordis, was adopted as a Minority Opinion by a vote of 5 in favor, 10 opposed and 5 abstentions. These papers also appear in this volume.

In any legal tradition predicated primarily on precedent, the fact that law occasionally lags in the process of reflecting social reality is unavoidable. This seemingly unfortunate result of a precedent-based system may, in fact, at times prove positive. Since precedent offers a relatively constant standard against which to judge the changing norms of one's own time, the perspective demanded in considering an apparently "archaic" ruling may ultimately lead one to reaffirm the social norms upon which it is predicated. In such cases, the need or even the value of changing the law code to coincide with a new realia would be contraindicated.

The tension between currently popular social notions and legal precedent is often felt in the realm of halakhah, particularly as modern *posekim* strive to preserve the system as religiously valid, yet in tune with modernity. Among the areas of the halakhah often discussed in the context of this tension is the *ketubbah*. Attention has been focused on many facets of the

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

ketubbah, including the disparate roles of the two sexes which the *ketubbah* text reflects. Other factors have evoked discussion as well. Of late, for example, it has been suggested that the use of the word *betulta* (virgin) in the standard *ketubbah* for a previously unmarried woman makes a farce of a legal document that ought to be perceived as meaningful and significant. The document becomes laughable when it posits as true a description which all know to be untrue in so many instances.

We propose to discuss a change in the text of the *ketubbah* which we hope will respond to this particular inadequacy of the text. However, it is important to stress that our willingness to suggest this alteration stems not from the alleged sexism of the document in detailing whether the bride is a virgin -- while ignoring the same issue regarding the groom -- but rather from our conviction that as a serious (if mainly symbolic) document, the *ketubbah* should reflect the truth.[1] The respective roles of men and women in the institution of Jewish marriage, an issue worthy of careful attention, is a completely separate matter, with which we do not propose to deal in this paper.

Any discussion of the use of the word *betulta* in the *ketubbah* must address several basic halakhic issues. First, as we will demonstrate, since usage of appellative technical terms to describe the woman in the *ketubbah* has legal as well as descriptive purposes, and since the legal status of the woman has direct bearing on the amount of the *ketubbah*, it is therefore essential to investigate whether deletion or replacement of the word *betulta* would belie the legal purposes implied by its use or would affect the amounts of the *ketubbah*. Second, if one ultimately concludes that the term may be changed or omitted, one must decide between the alternatives of a suitable replacement or omitting the word altogether. Finally, consideration must be given to whether changing the term used in the *ketubbah* would imply a specific attitude to the changed social reality, and if so, whether one wishes to make such an implication.

The standard *ketubbah* for a virgin, the amount her groom agrees to pay directly should they divorce, or from his estate if he predeceases his wife, is two hundred zuz. For a divorcee and a widow the amount is one hundred zuz. For a convert to Judaism and a Jewish woman who has been kidnapped and ransomed, the amount is also one hundred zuz, since these are legally presumed not to be virgins. What would the amount be for a previously unmarried woman who was not a virgin at the time of her marriage? It is worthwhile to note at this point that although intercourse before marriage (not for the sake of consummating betrothal) is called *be'ilat zenut*, an unmarried woman who is not a virgin does not fall under the halakhic category of *zonah*. The Shulhan Arukh, *Even Ha'ezer* 6:8 states that a woman halakhically becomes a *zonah* only after having intercourse with someone she would not have been permitted to marry.

The same source explicitly notes that if a *penuyah* (an unattached single woman) has intercourse with a man she would have been permitted to marry, she does not become a *zonah,* and is still eligible to marry a *kohen.* From these two perspectives, at least, pre-marital sexual intercourse does not have legal ramifications. Therefore, while it is conceivable that a small percentage of relationships would indeed fall into the category of *zenut,* most would not, and as a result, the answer to the legal question at hand can be sought without an investigation of that category.

Several caveats should be noted, however. First, the viewpoint expressed here in the Shulhan Arukh is by no means a unanimous one.[2] Second, this view of the *Meḥabber* serves only to illustrate that the woman in question does not become a *zonah;* it says nothing regarding the status of the amount of her *ketubbah.* Finally, even those authorities who view this sexual encounter as legally insignificant in the ways mentioned must not be construed as permitting it before the fact. In *Even Ha'ezer* 68:1, some of the legal consequences of this union, even when the two people have had *erusin,* are explicitly delineated.[3]

Having determined that the solution to the issue at hand does not lie within the halakhic discussion of the classification of *zonah,* we return to the agenda outlined above. Numerous sources illustrate that the appellation of the bride in the *ketubbah* has legal as well as descriptive purposes. Indeed, the legal purposes are of primary importance. To cite only a few examples, the Rema, in his gloss on *Even Ha'ezer* 66:11, lists some of the categories used, and describes the implications of a few of them. He says:

בכתובת גרושה כותבין מתרכתא כדי שידעו שהיא גרושה ואסורה לכהנים.

The *Be'er Hetev, ad loc.*, makes almost the identical point, noting:

ואם היא אלמנה כותבין ארמלתא ואם היא בעולה כותבין בעולת׳

Finally, the *Naḥalat Shiva* (12:15:1), a much later source, shared the same concerns and stated:

ואם היא אלמנה כותבי׳ ארמלתא ואם היא חלוצ׳ כותבין חלוצת׳ ואם היא גרושה כות׳ מתרכתא כדי לגלויי ולפרסם שהיא אסורה לכהן.

Clearly, then, the bride's appellation can, and often does, have legal implications. However, other sections of the *ketubbah* are also potentially affected by the suggested emendation or omission of this. As noted above, the *ketubbah* amount for a virgin is twice the sum of the other categories of brides. Concomitant with the distinction in sum is the nature of the

of the *ketubbah*, specifically whether it is considered *de'oraita* or *derabbanan*. The Rema (66:6) notes the Ashkenazic *minhag* to write *deḥazei likhi mide'oraita* for a virgin, but not for other classifications. Will the absence of the descriptive word *betulta* affect the *de'oraita* status of the *ketubbah*?

Commenting on this statement of the Rema, the Beit Shmuel, *ad loc.*, notes that although Rabbeinu Tam differs, the vast majority of *posekim* do not view the term *de'oraita* in the *ketubbah* as a statement regarding the whole *ketubbah*. They claim, rather, that *de'oraita* refers only to the currency with which the *ketubbah* is to be paid. That is, the amount of the *ketubbah* must be paid in *de'oraita* currency -- *kesef tzuri*, as opposed to *kesef medinah* (the latter being one half the value of the former). This statement is made explicitly by the Helkat Mehokek, *ad loc.*, no. 26.

That the classification as *de'oraita* or *derabbanan* refers only to the currency and not to the document in general does not yet obviate the issue here, for it is still unclear whether the *posekim* cited by the Beit Shmuel would insist on *kesef tzuri* for a never previously married non-virgin, nor has it been determined what, if anything, should replace the phrase *mohar betulaikhi*. Clearly, what is essential to the flow of this discussion is some definition of *betulta* which would specifically include or exclude the woman in our case.

To the best of our knowledge, the case under discussion here is not discussed explicitly in the halakhic sources. The closest case we are able to find is that of the *be'ulat atzmo*, i.e., a case in which a man marries a woman with whom he has had intercourse before marriage, but was the first and only man to have done so. Our case, *be'ulat aḥerim*, is apparently not discussed.

Several sources indicate that a *be'ulat atzmo* should be considered a virgin for halakhic purposes. The Hatam Sofer (*Even Ha'ezer* 133, s.v. "*ule'inyan*"), referring to this case as *nose mefuttat atzmo*, says that the name of the woman without any further appellation should be used, yet that her *ketubbah* should remain at 200 zuz.

The same issue is also discussed by Rabbi Moses Feinstein in a lengthy and complex responsum (*Iggerot Moshe, Even Ha'ezer* I, no. 101) in which he also states that a woman of this nature may halakhically be considered a virgin. However, the most germane discussion of *be'ulat atzmo* appears in David Z. Hoffman's *Melammed Leho'il* (section 3, no. 23), in which he makes several points:

(1) One should not write *betulta*, presumably since, as we noted at the outset of our discussion, the statement is known to be untrue.
(2) The term *be'ulta* (= not a virgin) should not be substituted, because of the negative impression it gives of the woman.
(3) Several other changes in language (regarding the status of the

ketubbah itself) have to be made in such a case.

(4) Finally, the *ketubbah* for a never married *be'ulat atzmo* should be for 200 zuz and include the clause *dehazei likhi de'oraita.*

However, the case of *be'ulat atzmo* does not logically include that of *be'ulat aḥerim.* In order to make a statement similar to that made by Hoffman about the former case, some means of including the latter in the classification of *betulah* must be sought. Obviously, the usual definition of *betulah* does not include non-virgins under any circumstances, whether previously married or not.

However, precedent can in fact be found for including the bride in our case in the classification of *betulta.* In the Palestinian Talmud, *Ketubbot* 25b, Rabbi Meir suggests that the classification of the bride ought not depend on her physical virginity. Rather, the question is whether her *ḥen,* or societal attractiveness, has been affected in any way. In support of his view, he notes that a previously unmarried *bogeret,* who is considered by definition a non-virgin, receives a *ketubbah* of 200 zuz, while a married woman who had never consummated her marriage would receive only 100, despite her physical status as a virgin.

Given the support of Rabbi Meir's precedent, we feel that a defensible case can be made that in our sociological reality, a bride who is a *be'ulat aḥerim* should be considered a virgin within the context of her *ketubbah.* It seems likely to us that although Rabbi Meir clearly did not have the category of *be'ulat aḥerim* in mind when he made his statement, had he known of our sociological status quo, in which having sexual relations with other men prior to marriage, does not necessarily affect a woman's societal attractiveness, he might well have included this category in his statement. Therefore, we find a revision of the *ketubbah* to omit the appellation *betulta* acceptable.

Clearly, however, several other aspects of the *ketubbah* require discussion. With regard to the amount of the *ketubbah,* no change should be made. In addition to the support offered by David Hoffman, the Helkat Mehokek, *ad loc.*, refers to the principle of *matneh bedavar shebemamon, tena'o kayyam.* Given this principle, even if a *be'ulat aḥerim* should get only 100 zuz, a groom who gives her a *ketubbah* for 200 could be considered as making a *tenai* to that effect, a *tenai* which would be valid because it deals with monetary matters.

If we are going to include never previously married non-virgins in the classification of virgins with regard to the amount of the *ketubbah,* while at the same time omitting the appellation *betulta,* several others changes in wording are necessary. The phrase *mohar betulaikhi* should be omitted as well, and the text of the *ketubbah* should simply read *kesef ketubbatikh zuzei matan* (cf. Hoffman). Also, accepting the view of most *posekim* that *de'oraita* refers to the currency, and applying the principle that *matneh*

bedavar shebemamon, tena'o kayyam, the phrase *dehazei likhi mide'oraita* can be retained. And no appellation should be substituted for *betulta.*

Another possible appellation, *panyeta*, appears in Mordechai Friedman's *Jewish Marriage in Palestine -- A Cairo Geniza Study.* He notes that in several cases this word was used as the appellation. However, other information which Friedman offers suggests that this term is probably inappropriate here. He suggests[4] that since, of the four cases he found of this term,[5] one (29:5) was clearly a divorcee, and two of the other three were from very respectable families, the term *panyeta* may have been used to describe previously married women whose "availability" had been thoroughly researched. If this was the case, the word *panyeta* is surely inappropriate to the case under discussion.

While, as has been illustrated, the appellation *betulta* in the case of a never previously married woman is not halakhically essential, the corresponding terms for other women must be retained. Several sources mentioned earlier spoke of the import of those terms regarding a divorcee, who could not marry a *kohen.* Similarly, there are legal reasons to retain appellations for proselytes, *ḥalutzot* and women who remarry the man from whom they have been divorced. (In fact, the only other regularly used appellation that we might consider deleting is that for widows. The legal reason for its inclusion is to indicate that she is prohibited to a *kohen gadol.* Since, in our day, that is not a real concern, the appellation could be deleted. Nonetheless, we see no reason to advocate such a position. Since there is no social stigma attached to widowhood, and since it is not false to refer to a widow as a widow, there is no compelling reason to advocate any change in the accepted formula. The changes we have recommended are to ensure that the *ketubbah* document not contain blatant falsehoods.)

Additionally, although it is true that for a *be'ulat atzmo* one could write *mohar betulaikhi*, it is preferable in our opinion that no distinctions between groups of previously unmarried women be introduced into *ketubbot.* Furthermore, the status of the woman in this regard would be almost impossible to determine definitively, and therefore, using only her name without any description seems the most appropriate course of action in all cases of previously unmarried women.

Just as distinctions in the *ketubbah* between the categories of *be'ulat atzmo* and *be'ulat aḥerim* seem to us inappropriate, so would we discourage the use of the traditional formula of the *ketubbah*, even in cases when the woman is, in fact, a virgin. We feel this way for several reasons. First, the truth of the matter could not easily be verified. Second, a distinction between actual virgins and previously unmarried non-virgins would invite dishonesty in both directions -- by virgins who would be embarrassed to have that fact publicized in our society, and by non-virgins who would be reluctant to have that fact publicized in a religious document because they

assume the religious desideratum to be virginity. Finally, if our recommendation is accepted for all previously unmarried women, regardless of their actual virginity, the formula of the recommended *ketubbah* would not imply anything at all about the bride's virginity or prior behavior patterns. Reaffirmations of the ideal of virginity until marriage should be made through study sessions, private discussions, sermons and writings, and not in the deliberate falsification of the *ketubbah.*

Traditional texts retain their religious significance largely because they remain constant throughout generations and social conditions which often change rapidly. For that reason, emendations of texts such as the *ketubbah*, everything else being equal, are essentially undesirable. However, in the case we have discussed, we are convinced that emendation is necessary. Religious texts may tend to lose their significance through unwarranted or unnecessary change, but they are bound to do so when they describe as true facts and circumstances which are generally known to be false. Ultimately, our willingness to emend the *ketubbah* in this instance stems from our insistence that we do all we can to keep it a serious and respected document.

NOTES

1. The *Paḥad Yitzḥak*, s.v. *mefuttah* IV, quotes several sources who permit writing *betulta* even when the woman is not a virgin. These sources, however, deal with *be'ulat atzmo* (which we will address later) or with writing *armalta* instead of *be'ulta.* The former is inapplicable to our major concern, which is *be'ulat aḥerim*, and the latter is obviated by our recommendation. In the final analysis, we favor truth in the *ketubbah.*

2. For a discussion of the varying views on this subject, see the *Talmudic Encyclopedia*, s.v. "*zonah.*"

3. In the context of this paper, we are consciously ignoring the fact that halakhically a woman who has intercourse with a non-Jew and as a result becomes a *zonah* is not permitted to marry a *kohen.* We do not deal with this issue for three basic reasons. First, statements that a woman has or has not slept with non-Jews are essentially unverifiable. Second, no appellation in the *ketubbah* would convey the legal implications and indicate the prohibited nature of the marriage except calling her a *zonah*, and that is unacceptable. Finally, the marriage is halakhically valid *bede'avad*, even with a sum of 200 zuz and the use of the clause *deḥazei likhi mide'oraita*, as we shall demonstrate. This is not to deny that the issue is a real problem and that marriage between a *kohen* and *zonah* is *assur mide'oraita lekhatḥilah.* While we do not deal with it here, this is a subject worthy of further consideration and careful thought.

4. Mordechai A. Friedman, *Jewish Marriage in Palestine: A Cairo*

Geniza Study, vol. I, p. 118.

5. We were unable to find any examples of this term in the Babylonian Talmud. Cf. *Otzar Leshon HaTalmud*, vol. XXXI, 304.

XII.

PESAH