Norman Lamm

The author is associate rabbi of the Jewish Center in New York City, instructor in Jewish philosophy at Yeshiva University's Teachers Institute, and Editor of TRADITION. The last issue contained his article on "Separate Pews in the Synagogue: A Social and Psychological Approach."

RECENT ADDITIONS TO THE KETUBAH
A Halakhic Critique

The "amendment to the Ketubah" announced some five years ago by the Conservative movement has been hailed by its leaders as "something which may very well place the Rabbinical Assembly not only on the map of the world, but also on the map of history."[1] That the world has not been shaken by this action is already evident from the more recent pronouncements from Conservative sources indicating that their project is not meeting with the desired success, and that even many Conservative rabbis have decided not to make use of the "amended Ketubah."[2] As for history, no one can accurately predict what the judgment of the future will be on the merits of this endeavor. But certainly history will record that its introduction generated sufficient controversy to rock to its foundations a Jewish community already sadly distinguished by its divisiveness and disunity. To this day most Jews remain confused, uninformed, and unenlightened by the polemics, for that is the only possible result when issues of religious moment are presented with immodest ex-

1. Rabbi Louis Finkelstein in *Proceedings of the Rabbinical Assembly of America*, XVIII (1954), 71.

2. Reported in the *National Jewish Post & Opinion*, May 24, 1957. As late as September, 1957, only one case of a refusal to grant a *get* had come before the Conservative tribunal in which the Conservative Ketubah was used. No "compensations" were imposed upon the husband, and the case was not reviewed before the secular courts, for the husband had yielded to the tribunal's moral persuasion (*Conservative Judiasm* [July, 1958], 33, 34).

aggeration and met with immoderate emotion, all in the public press.

The Orthodox opposition to this innovation is based mainly on two factors: The competence of the proposed Beth Din (religious court), and the halakhic validity of the amendment itself. The first matter is serious indeed. How can Orthodox Jews – or, for that matter, any intellectually honest person – be expected to recognize the authority of an ecclesiastical court which denies (or, at the very least, seriously questions) the origin and hence the authenticity of the very Halakhah in whose name it presumes to speak and whose tenets it seeks to interpret? There are rules which guide us in choosing the officers of the law, just as there are rules for applying the law itself. Nevertheless, we shall in this essay restrict ourselves to the somewhat more impersonal and dispassionate second factor: the amendment proper. The appeal of the Conservatives for the acceptance of its amended Ketubah is based upon the absolute confidence of its members in the halakhic integrity of the document and the eminence of its author.[3] While such implicit faith is often praiseworthy, we must not allow ourselves to be deterred by sentiment, and must proceed to investigate with vigorous objectivity the halakhic validity of the proposed *tekanah.*

The leaders of Orthodoxy in America have stated unequivocally that the amendment is not halakhically valid. Unfortunately, no detailed refutation by a competent scholar has been published to date. This essay, without laying claim to scholarly thoroughness, is an attempt to make good, in an elementary and popular manner, a debt that the Orthodox rabbinate owes to the American Jewish public. This is done despite the fact, that, as previously indicated, the whole issue may soon be academic because of the lack of public acceptance of the revised Ketubah. We shall limit ourselves to a critical halakhic analysis of the suggested amendment in a manner intelligible to the interested layman who may not be able to follow the argument in Hebrew but is still willing to risk an adventure in the deep "valley of the Halakhah."

The Ketubah

Jewish marriage, in addition to its many other aspects, has specific

3. Cf. Rabbi Judah Goldin, *Proceedings, ibid.*, 81.

legal and contractual implications. When a man and woman marry, they accept certain obligations and are awarded certain privileges. Biblical law imposes three obligations upon the husband: to provide his wife with food, clothing, and conjugal rights. Rabbinic law adds seven obligations to this list and confers upon him four privileges.[4] First among these seven obligations is the "Principle of the Ketubah" *(ikkar ketubah)*. This is an obligation by the husband for a certain fixed minimum sum which is placed under lien to his wife, so that in case of his death or of divorce, that amount is transferred to his wife, and is collected from his estate, real or chattel (and, in the case of real estate, even if it had been sold or gifted since the wedding). The reason the Rabbis ordained this "Principle of the Ketubah" is the protection of the wife. The Ketubah thus accomplishes two things: First, it discourages hasty divorce action by the husband, and second, it provides for the financial welfare of the woman who has been left a widow or divorcee.[5]

These legal relationships between husband and wife are presumed to be automatically effective from the time of the wedding, whether or not they were specifically agreed to, orally or in writing. Nevertheless, and because of a variety of reasons, it was deemed necessary to draw up a Marriage Contract (commonly referred to as the "Ketubah") which enumerates some of these obligations by the husband. Most prominent among these is the aforementioned "Principle of the Ketubah." Although it is understood that the sums mentioned are to be placed under lien to the wife for the specific eventualities of death of husband or their divorce, no explicit mention of death or divorce as the causative factors is made in the document.[6]

There are, in addition, two more parts to this Ketubah document. First is a provision for the bride's dowry *(nedunya)*, whose principle the husband guarantees to return to his wife in case of death or divorce. And then there is the *Tosefet Ketubah*, literally the "addi-

4. There is a body of opinion which holds some of these have biblical and other rabbinic sanctions.

5. This is one of three of the 14 obligations and privileges that cannot be forfeited even by the couple's mutual consent. The other two are conjugal rights of the wife and inheritance rights of the husband. See Maimonides, *Hil. Ishut* 12:6, 9.

6. The only mention of death is the husband's statement, in the document, that he recognizes his wife's claims on his estate as valid not only during his lifetime but even afterwards.

tion to the Ketubah," which means the amount by which the husband voluntarily increases the value of the Ketubah proper from the minimum fixed at 200 zuzzim for virgins and 100 for non-virgins.[7]

The Ketubah document we use nowadays is generally a printed form, with blank spaces provided for the names of the bride and groom, for the minimal sums, depending on the previous marital status of the bride, and for the signatures of two reliable witnesses. The Ketubah mentions only the obligations of the husband and not his privileges, i.e. the wife's obligations to her spouse. It is therefore a unilateral document and requires the explicit consent only of the husband. Although mere verbal permission to draw up the document would suffice, we require the husband to perform a *kinyan* to indicate his unqualified consent. The term *kinyan* refers to the grasping of a handkerchief or other such article by the groom, generally handed to him by the marriage performer, and is a concretized symbolic act of consent. *Kinyan* is that which effectively binds the contract, and its equivalent in our contemporary American society would be the handshake; a physical act, in itself meaningless perhaps, which symbolizes consent to a contractual relationship. After this *kinyan*, the two witnesses sign the document.

What this institution of Ketubah achieves, therefore, is a kind of combined life insurance policy and alimony guarantee. It protects the woman's financial status at a time when she is in a most precarious personal and economic condition and in greatest need of legal safeguards, and, by providing this form of alimony, it discourages hasty divorce.

The form of Ketubah which we use today has, with minor changes, been employed for at least over a thousand years. It represents, in its very legalism, the deep concern of our Rabbis for the protection and honor of the woman and, consequently, for the inviolate sanctity of the Jewish home.

7. While the latter two parts were originally determined by the husband on a voluntary basis, they later became fixed amounts. Their total value, in terms of modern currency, has been estimated as varying, in different eras, between $2,000 and $10,000. Our modern Ketubot fix the dowry and additional jointure each at 100 silver zekukim, giving a total of 200 silver zekukim, which is worth today approximately $4,000. V. Irving Agus, "Sheiur Ha-ketubah" in *Horeb*, (1939). Cf. Rabbi Joseph E. Henkin in *Ha-pardes*, (Oct. 1957) who calculates the 200 zekukim at over $2,000.

The Problem

The Conservatives have seen fit to amend this Ketubah in order to solve certain distressing problems. Since a *get* (divorce) according to Halakhah is a document which must be issued by the husband and received by the wife, then if either party is missing or refuses to consent to a divorce, no such action is possible. A woman placed in this particular predicament of being classified as a married woman, thus unable to marry anyone else, and yet not living with her husband, is called an *agunah*. The classical case of *agunah* occurs when the husband has disappeared, there being no reliable witnesses as to his being dead or alive. The Halakhah, from the earliest times on, has been preoccupied with alleviating the distressing problem of *agunah*. From the Mishnah until the very latest works of Responsa, our rabbis have dealt sympathetically with this tragic matter. Much has been done, and probably much will yet be done, within the halakhic framework, to alleviate the problem even further.

Another type of *agunah* has appeared in recent years and was largely unknown in earlier times. This is an *agunah* who has received a civil divorce, but whose husband refuses to issue her a religious divorce. The reason for his refusal can be anything from obstinacy, spite, or blackmail to simple unwillingness to be divorced. While, from the point of view of civil law, the power to grant divorce rests with the court, which also has the power of coercion, Jewish law places the right of issuance of the divorce not with the court but with the husband. In addition, Jewish courts are, in most cases, prevented by the Halakhah from coercing either party to consent to a *get*.[8] And even where theoretically coercion by a Beth Din would be permitted, practical conditions in the Diaspora usually make it impossible to exert anything but moral pressure. In the State of Israel, where rabbinic courts can enforce their decisions in this area of law, the situation is a much happier one than in the Diaspora.

The Conservative Amendment

The Conservative amendment is addressed to this particular *agunah*-problem. It attempts to set up a rabbinic court (their "Beth

8. There are certain exceptions when coercion is permitted. See Maimonides *Hil. Ishut*, Chaps. 14 and 21, and *Sh. Arukh, Even Ha-ezer*, 77 and 154.

Din"), and endow it with the power of coercion by getting both husband and wife to accept voluntarily, at the time of marriage, the authority of the court to impose fines. This recognition of the Conservative Beth Din is accomplished by the addendum to the Ketubah, and presumably will be backed by the civil courts as a binding agreement. Following is the English text of the Conservative amendment (which differs in many respects from the Aramaic text which will be used as the basis for halakhic criticism later):

> And in solemn assent to their mutual responsibilities and love, the bridegroom and bride have declared: as evidence of our desire to enable each other to live in accordance with the Jewish law of marriage throughout our lifetime, we, the bride and bridegroom, attach our signatures to this Ketubah, and hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.[9]

By thus obligating husband and wife to submit to the authority of its Beth Din, with its right to impose financial penalty, the Conservative movement hopes to be able to coerce an unwilling partner to submit to divorce proceedings.

The Conservative amendment has essentially no bearing on the classical case of *agunah* where the husband has disappeared or is missing in military action. In its approach to the new type of *agunah,* it has nothing to do with "strengthening the Jewish home." It is certainly not calculated to discourage what some Conservative spokesmen have unfortunately called "frivolous" divorces. On the contrary, the effect of the amendment is to put their Beth Din in the position of forcing an unwilling spouse to consent to divorce, not preventing one.

9. V. *Proceedings, ibid.,* 67. Cf. *New Provisions in the Ketubah* by A. Leo Levin and Meyer Kramer (New York: Yeshivah University, 1955) for a critique of the proposed amendment from the point of view of its enforcibility in the secular courts.

The Conservative Ketubah, therefore, does few of the things that have been claimed for it. Orthodox Jews recognize that there is indeed a problem, a grave human problem, and one which we shall have to solve by genuine halakhic means. But the Conservative proposal cannot even pretend to fulfill the role of a legal panacea for the *agunah*. Were the Conservatives to concentrate their efforts upon personal suasion and the bringing to bear of social pressure on the recalcitrant husband, we certainly would have no objection. Any constructive work they might have done so far in this manner is praiseworthy. The trouble is, however, that they began with the bold step of setting up their own "court" and formulated their approach in a manner publicly proclained as an "innovation" in Jewish law. It is our contention that, as a halakhic instrument, this amendment is invalid. It is a failure in its avowed purpose.

In attempting to demonstrate the halakhic weakness of this document, we must make it abundantly clear that we have no objection to an amendment *per se*. The Ketubah was meant to be a working and workable instrument, and it was not unusual to append conditions to it or otherwise amend it – provided, at all times, that the additions were halakhically valid. Furthermore, our objections both to the legality of the document and the competence of the proposed Beth Din neither detracts from the seriousness of the problem, nor in any way releases Orthodox scholars of the Halakhah from the sacred obligation to find relief for fellow human beings in distress.

For purposes of this analysis it will be necessary to use, as our basis, the Aramaic version of the amendment, since the English text is truncated, with the main body of the Ketubah missing from it. While the English version carries the amendment as one long clause, the Aramaic has it in three distinct clauses, each prefixed by a statement of acceptance on the part of bride and groom. The three clauses are as follows:[10]

1. The bridegroom and the bride agree to enable each other to conduct themselves all the days of their life in the way of Torah according to Jewish law.

2. Of their own free will they agree to recognize the court of the Rabbinical Assembly and the Jewish Theological Seminary of Amer-

10. Where alternate translations of individual words or phrases were possible, we have followed the "official" Conservative English text. See *Proceedings, ibid.*, 67.

ica, or its representatives, as the sole authority to teach them to go in the way of the Torah and to love and respect one another during the entire course of their marriage.

3. Each one agrees to empower the other to summon him to the court mentioned above, should there occur any dissension between them, in order that each of them shall be able to live, as he may desire, according to the laws of the Torah all the days of his life. They have authorized the above court to impose indemnities on the one who will refuse to come before it for judgment or will not consent to obey its court decision.

The First Clause

The first clause, as stated, is the one in which husband and wife promise to enable each other to live according to Torah. Halakhic considerations aside, this seems completely unnecessary and even somewhat amusing. What did the Conservative rabbinate expect to accomplish with this piece of piety, especially when it is no secret that most young couples, unfortunately, neither do nor expect to "conduct themselves all the days of their life in the way of Torah?" Will this clause ameliorate the situation in any perceptible way?

Halakhically, the clause is entirely superfluous. It is true that the Halakhah permits the taking of an oath to perform the *mitzvot* or any one *mitzvah*.[11] Yet it is unnecessary to do so, since the Halakhah recognizes every Jew as being under prior oath to observe all of the Torah.[12] Hence, an additional oath or promise serves no real purpose. The Conservative first clause, not being in the form of an oath, is certainly superfluous. One seeks in vain for a valid reason for including a clause which is both unrealistic and ineffective in an "amendment" addressed to a serious, real, and pressing problem.

But there is an even more serious objection than irrelevancy or ineffectiveness. If we accept the Conservative amendment, then this clause becomes an integral part of the Ketubah, the violation of which entails forfeiture of the rights of the Ketubah by the violating spouse. Thus, for instance, if a day after the wedding, the young bride, in her first culinary venture, should serve her husband a non-kosher dish, the husband would legally have the right, upon suing

11. *Nedarim* 8a; Maimonides, *Hil. Shevuot* 11:3.
12. *Ibid.*

for divorce at some later date, to refuse to honor his financial obligations to his wife, as stipulated in the Ketubah, because she did not "enable" him to live in "the way of Torah." Considering the present low level of religious observance and living according to "the way of Torah," this clause actually threatens to deprive the woman of the rights granted to her by the traditional Ketubah. What we have here, therefore, is an absurdity — because, practically speaking, it negates the entire intention of the Ketubah, which is the protection of the woman.[13]

The first clause is thus seen to be irrelevant, ineffective, and absurd in that it defeats the whole purpose of the Ketubah which is the safeguarding of the woman's rights.

13 The halakhic point here requires some clarification. It is true that where the husband can prove that his wife has transgressed the Law (*overet al dat*), she forfeits all the rights of her Ketubah. (See *Ketubot* 72, *Shulchan Arukh Even Ha-ezer* 115). However, when the husband is himself non-observant and transgresses these same laws, his wife does not lose her Ketubah rights. (See Rama on *Sh. Arukh, ibid.*). The reason for this is that a non-observant wife forfeits her rights only when her transgression is deceitful and adversely affects husband or children, such as in the case of representing herself to her husband as ritually clean when in point of fact she is not, or serving him untithed bread under the pretense of having tithed it. (See *Bet Shmuel, E. Ha-ezer, ibid.*, and commentary of R. Asher on *Ketubot* 72.) Where, however, the husband himself does not observe such laws, the wife cannot be accused of willful deceit (*makhshellet*), and hence does not forfeit her Ketubah.

It is extremely doubtful, however, if these considerations will hold true in the case of the Conservative amendment, where both parties promise to "enable each other" to live in accordance with the Torah. Consider the case mentioned, where the wife serves her husband non-kosher food or allows herself to be approached while ritually unclean, and where the husband is himself non-observant. At no time in the future can he, under the normal law of *overet al dat*, deny her the rights of her Ketubah, since she never was a *makhshellet*, that is, there never was any *willful deceit* on her part in religious matters. Under the terms of the Conservative document, however, this same husband can refuse to honor his obligations to his wife, since she defected too; she had agreed to "enable him" to observe, and while it is true that she did not *deceive* him, it is equally true that she did not *enable* him (*le-mishvak*) to observe by serving non-kosher food or indulging in the marital act while in a state of *niddah*. The point may be nice, but it is valid.

Proof can be adduced from a similar case which we find in a responsum of Maimonides concerning a decree, relating to the Ketubah, enacted by the Egyptian Rabbinate about 790 years ago. A considerable number of Jewish women had abandoned the ritual immersion prescribed for purification from the state

THE SECOND CLAUSE

Before proceeding to a critique of the next two clauses, it is necessary to present some background material on how contracts become halakhically valid and binding.

Any sale, gift, or obligation involves a contract between two parties. Now before such a contract (written or oral) can be regarded as effective and authoritative by the Halakhah, it is necessary that both parties fully and completely agree to the contract. There must be nothing in the minds of either party which prevents a complete knowledge of and unqualified consent to all the terms of the contract. Frequently, in order to ascertain and reenforce this exclusive focus of attention, awareness, and consent of both parties on the contract (that is, to make sure that the agreement is not in the category of a mere promise) we insist on the performance of a *kinyan* which, as we previously explained, is a physical act indicating that

of *niddah* in favor of a form of a shower that was clearly Karaite in origin and nature. Leaders of the Jewish community, headed by Maimonides, agitated against this practice and legislated a *tekanah* whereby the bride must abide by the halakhic rules for *niddah,* and desist completely from the heretical customs then in vogue, under penalty of forfeiture of all rights of the Ketubah. (See *Responsa of Maimonides,* ed. Alfred Freiman, No. 97. From No. 194 it would seem that the essence of the *tekanah* was occasionally written into the Ketubah.)

Subsequently, a host of inquiries were directed to Maimonides concerning this *tekanah,* asking when the Ketubah is to be regarded as forfeited as a result of its violation. When the wife deceives her husband as to the state of her ritual purity, Maimonides rules that she reverts to the status of *overet al dat,* under which category the case would normally be subsumed even without the special enactment, and the wife loses her Ketubah protection. (*Ibid.* 194). Now, where it is ascertained that the husband was aware of her impurity and nevertheless willingly acquiesced to the transgression, Maimonides again rules that she forfeits her Ketubah (*ibid.* 193 and 194. In addition, he advises the inquiring courts to fine the husband for the amount of the Ketubah.) Here, then, was a case in which the wife is not a *makhshellet,* since there was no deceit, and so she cannot be regarded as an *overet al dat.* Yet the ruling of Maimonides, *after* the enactment of the new provision, is that the wife cannot collect.

The same reasoning applied to our hypothetical — yet probable — case would similarly result in the forfeiture of the Ketubah by the wife even when the husband is not observant, whereas the same would not hold true without the Conservative amendment. This Conservative action, therefore, in their first clause, is clearly against the best interests of the non-observant Jewish wife, whose protection is the pretext for the Conservative action.

both parties hereby unreservedly agree to all terms of the contract and henceforth are so bound that they will not and cannot revoke. This *kinyan* can take the form of actual transfer of the object sold or gifted from the property of the giver to that of the receiver, or of a written note certifying sale, or of money paid, or of a purely symbolic act such as the grasping of the kerchief previously discussed or its equivalents depending on local custom. Each of these examples of *kinyan* may bind a contract, some being valid in general, others more specifically for individual kinds of contract.

Kinyan thus assures the *subjective* validity of any transaction. It focuses the mind and volitions of the parties upon the transaction and assures us of what we may call the psychological integrity of the contract. But obviously, if we are going to concentrate the attention and focus the intention of parties to a transaction, there has to be a transaction; that is, there has to be an immediate, objective, physical reality, whose legal status we are concerned with, at which we are to direct these subjective considerations of both parties. In short, there must be an *objective reality* at which we aim the *subjective* effect of *kinyan.*

Let us cite an example from the Talmud itself.[14] Two partners own, in common, a courtyard. They decide to divide it (to "divide" in this case meaning not to build a fence, but simply to agree to the idea of division, with details to be determined at a later date). In order to reenforce their decision, they participate in a *kinyan,* such as the grasping of a kerchief. Is the agreement binding so that each partner is legally forbidden to revoke without the other's consent? The ruling of the Talmud is clear: the contract is not binding, and either partner may revoke. The reason: *kinyan devarim be-alma hu,* it is a "mere *kinyan* of words." For *kinyan* to be of any effect, there has to be a concrete and physical reality – such as the sale or gifting of a table or other object, or a lien upon real estate – with which we are to concern ourselves. In this case, however, the *kinyan* was effected on an abstraction – "to divide" – which in itself lacks the objective basis for *kinyan* to work. "To divide," without stipulating what, where, and how much, is insubstantial, and so *kinyan* is meaningless here.[15]

14. *B. Batra* 3a.

15. Maimonides (*Mekhirah* 5: 14), following this talmudic principle, formulates the rule: Those matters which are insubstantial cannot be contracted

In addition to such insubstantial matters as are based on the verbs "to divide," "to become partners," and "to go," there are opinions of early authorities that "to give" and even "to build" are insubstantial abstractions upon which *kinyan* cannot be performed.[16] It is obvious, therefore, that "to recognize" or "to accept the authority of" are certainly in the category of those matters too insubstantial to be the objects of *kinyan.*

With this introduction, it will become self-evident that the second clause of the Conservative amendment is invalid. The second clause is the one in which bride and bridegroom accept and recognize the authority of the Conservative Beth Din. Now for the clause to be binding and legally valid there must be some legal procedure by which that binding is effected, and by which bride and groom submit themselves to the authority of this Beth Din. If there is no special act of commitment, the whole clause is invalid, since if it is to be enforceable it must be more than mere promissory language; it requires legal, halakhic formulation which indicates clear intent to contract. The only possible act of legalization is through the *kinyan* of the grasping of the handkerchief which the marriage performer has the groom (and now the bride) engage in for the Ketubah proper. Thus, it might be argued, by virtue of this symbolic act of consent by which the groom accepts the financial terms of the Ketubah itself, he also accepts the authority of the Beth Din and its sole jurisdiction in all matters affecting the married life of this couple.

But the mistake in this reasoning is obvious. You simply cannot perform a *kinyan* on a matter which is objectively insubstantial. "To recognize" is a mental process and is certainly no stronger than "to divide"; both are overly abstract, and therefore in both cases *kinyan* is ineffective even when performed. Since there was no acceptance of this Beth Din by this couple, the Beth Din can never exercise its authority over them at any later date.[17]

through *kinyan.* For instance, if a man write a contract and say in it that he has participated in a *kinyan* to "do business" with another, or that they will "divide a field" between them, or that they will become "partners in business," and similar matters, these are mere verbal promises and *kinyan* has no effect, for he has not contracted for a known and well-defined object.

16. *Tur* and *Bet Yosef, Choshen Mishpat* 157.

17. It is true that the Talmud (*Sanhedrin* 24) permits two parties to a dispute to agree mutually upon a judge or witness who is unqualified either because of

We thus see that the second of the three major clauses of the Conservative amendment is invalid and ineffective, and, in effect, their amendment and Beth Din both fall at the same time.

consanguinity with litigants or unreliability or other reason. This extra-legal procedure is recognized through the performance of a *kinyan*. It might be argued, then, that since the recognition of this unqualified court is valid and is not regarded as *kinyan devarim* (mere verbal promise), so too should the bride and groom, in our case, by virtue of the *kinyan* of the grasping of the kerchief, be able to accept the Conservative Beth Din, without such action being regarded as *kinyan devarim*.

The problem is a theoretical one and exists even without recourse to our present situation. How does one reconcile the law of *kinyan devarim* and the acceptance of an unqualified court by *kinyan?* The problem is already considered by early authorities. While the position of *Nimukei Yosef* (on *Sanhedrin* 24) is anomolous, in that he seems to accept the validity of a *kinyan devarim* in many instances despite the talmudic aversion to it, others are not prone to dismiss the matter so lightly. Raavan, quoted by *Siftei Kohen* on *Sh. Arukh Choshen Mishpat* 22:4, maintains that mere recognition or authorization (i.e. a *kinyan* not to revoke) is not sufficient because it remains too abstract in nature. He requires an outright and explicit statement that both parties *will act in accordance with the edict of the judges*. It is a fine semantic distinction, but there is a real difference, for one remains an abstraction, a mere *kinyan devarim*, while the other is sufficiently concrete to be valid. A careful perusal of the Conservative Ketubah in both its Aramaic and truncated English versions — especially the second clause per se — will reveal that it remains *kinyan devarim* according to Raavan.

More early authority can be cited in support of this opinion. See Rabenu Simchah quoted by Mordecai on *B. Metzia* 108, and Mordecai as quoted in *Chidushey Anshey Shem* on *Sanhedrin* 24. Compare too the decision of the author of *Responsa Chut Ha-shani*, No. 36, who would agree with our classification of the second clause as *kinyan devarim* despite his tendency towards a more restricted definition of this concept. It might be added that secular law also recognized this distinction. See reference in *New Provisions in the Ketubah supra* n. 9.

Other pertinent differences can be pointed out. In the case of the acceptance of an unqualified court, at least we have a specific court ready to hear an actual case being presented to it now, at the time of *kinyan*. In our case, however, we ask the couple to accept and carry out the decisions of an essentially unspecified court which is to decide a case at present neither real nor expected and which might never occur. Certainly this is a *kinyan devarim*. What is more abstract than a situation, which we ask the couple to imagine, in which they are bitter litigants before unknown judges in an unspecified place, but which situation does not exist yet? See too *infra* n. 20.

The Third Clause

The third condition or clause is the one in which each partner allows the other in advance to summon him or her to appear before the Beth Din in case of marital discord, and to permit the Beth Din to impose penalties in case of failure to respond to the summons or failure to carry out its decisions. This is the most complicated point (halakhically speaking) of the entire Conservative Ketubah. Whereas in our discussion of the second clause we showed that the Conservative amendment lacked the *objective* basis on which to perform *kinyan*, we shall now see that even if we should grant its objective validity, which we cannot, nevertheless there are grave deficiencies in the *subjective* aspects of *kinyan* performed on this Ketubah.

We stated at the outset that the Halakhah demands of both parties to a contract the complete and total knowledge of and consent to what is being transacted. Both parties must have full knowledge of what they are doing and must agree to the proceedings without reservation. *Kinyan*, when present, assures us of this subjective or psychological validity of the transaction.

Now there is a kind of contract which, by its very nature, precludes this complete and undivided focusing of, commitment to, and reliance on the terms of the contract to the exclusion of any and all outside factors. This contract is such that because of some element in it, it is improbable that there will be achieved this total psychological awareness of all the consequences of the matter. This element of *unsureness* or distraction is called אסמכתא [18], a word which defies easy definition. A contract which partakes of the nature of *asmakhta* is deemed invalid, although there are prescribed ways of neutralizing or circumventing a state of *asmakhta* by reenforcing the psychological integrity of the contract. There are several kinds of *asmakhta*, as well as several different definitions of this sometimes elusive legal concept. We shall mention the more important ones and, with them, test the validity of the Conservative third clause.

1. *Contracts Involving Undetermined Sums*

In this category we can place all transactions in which the amounts

18. From the root סמך which means "to rely upon," i.e. there is an external factor which stimulates unfounded overconfidence.

concerned are undetermined. Even when *kinyan* is performed upon such transaction, the opinion of Maimonides is that it is invalid, since the sum is undetermined and, hence, it is impossible for either party to have full and exact knowledge and consent. Thus, in the 11th chapter of *Mekhirah*, where he discusses a series of such cases of *kinyan* where there is doubt as to the totality of the commitment, he writes:[19] "If a person obligated himself for an undetermined sum, i.e. if he said 'I obligate myself to feed or clothe you for five years,' even though a *kinyan* was performed, there is no obligation." Notice that Maimonides regards even an obligation for a fixed time (five years) as an undetermined sum, since it is not clear how much food or clothing will be consumed in this five-year period; and such unfixed amounts invalidate the contract despite *kinyan*. The unsureness that is attendant upon the indeterminate nature of the sums involved characterizes the entire contract as an *asmakhta* which is, hence, invalid.

Certainly, therefore, our case is, on the same principle, invalid. Here bride and groom obligate themselves to pay, at the demand of the Beth Din, penalties of undetermined sum.[20] And this is to be done only if they become involved in controversy, and if they summon each other to Beth Din, and if they fail to appear or if Beth Din finds against one of them. And then the amount of the fine is undetermined at present, when the young couple are preparing for the supreme moment of marriage. Complete awareness of and consent to a contract of an undetermined sum in an improbable situation is a virtual impossibility. Hence, *kinyan* under such conditions is a meaningless act.

However, this would not in itself be a sufficiently valid point of criticism. Although a legal opinion of Maimonides is never to be treated lightly, in this case most other medieval authorities are in opposition to Maimonides. Raavad, Rashba, and Ramban maintain that *kinyan* in the case mentioned by Maimonides would bind the obligating party. But even then, not all those opposed to Maimonides make use of the same reasoning. Thus, while the majority maintain the effectiveness of *kinyan* in principle at every occasion of

19. *Hil. Mekhirah* 11:15.

20. It is interesting to note that this third and crucial clause was *purposely* planned as a vague and undefined commitment. See Rabbi Jacob Agus, *Proceedings,* XVII (1953), 77, and the response of Prof. Lieberman, *ibid.,* p. 78.