Levirate in Ancient Israel: Overlapping Frames with Early Indian Practice of Niyoga

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ABSTRACT
Surrogacy was a well-known practice in ancient societies. Its application was rare but mandated when the matter of threatened lineage surfaced. Since very early times and particularly within patriarchal societies, sons were regarded as natural inheritors of property, holders of lineage and on many occasions performers of rites for ancestors. Hence, the absence of a male issue was viewed as a solemn social anomaly. Corrective solutions had to be worked out and many ancient societies came up with their alternative paradigms. In ancient Israel the practice of *yibbum* emerged and ensured lineage continuity. Its ancient Indian counterpart was the practice of *niyoga* that came under what is largely understood as *apaddharma* or the law of exigency. In both societies childless widow/wife was made to cohabit with a man, generally from within the family and the son produced furthered the lineage of her husband. The consent of the widow/wife was not really sought for the practice to get its social sanction. In the paper we shall study the issue from a gendered perspective and explore whether the practices of *Yibbum* and *Niyoga* implied exploitation of women. Further what was the class and caste location of the practice respective cultures and who eventually stood to benefit from it in two different parts of ancient world.

Key words: Levirate*, Niyoga, Yibbum, Haliza*, Torah, *Dharmashastra, Kshetraja,*

Procreation of male child preoccupied complex societies since times immemorial. The emergence of complex set up brought with itself issues of land occupation and inheritance and when this got combined with consolidation of patriarchy demand for a male child converted into an obsession. In any patriarchal set up sons were looked upon as promoters of lineage, inheritors of property [especially land] and performers of ancestral rites. The absence of a male issue was regarded a serious aberration and alternatives were worked out to surmount the problem. One such way was resorting to levirate or what was called the niyoga in early India. G.Robina Quale defines levirate as treating the sons sired by the deceased husband's brother as the son of the deceased [1]. The term is also used to describe husband –succession, or having the wife's son by a second husband inherit the estate of the first [sonless] one, as well sharing in the estate of their actual father with any other sons he might have by other wives. The expression is also used for widow inheritance, or merging of the estate of a sonless deceased husband with that of a second kinsman-husband. On the other hand P.V.Kane has defined niyoga as the 'appointment of a wife or a widow to procreate a son from the intercourse of with an appointed male'[2]. It clearly came within the fold of apaddharma or the law of exigency, something that could be resorted to only in the time of emergency.

The paper intends looking at the practice in two distinct contexts of ancient world; primarily in ancient Israel especially within the context of ancient Judaism and trace parallels in Ancient Indian brahmanical tradition. In Judaism, a levirate marriage (yibbum) was mandated by the Torah [Jewish legal system, Deuteronomy 25.5-10] which obliged a brother to marry the

widow of his childless deceased brother, with the first born child being treated as that of the deceased brother. There are several Biblical examples of Levirate. The stories of Tamar and that of Ruth are given a rough date of eight or seventh century BCE. We shall discuss these subsequently. In the Indian early texts, too, such as the Manusmriti and Brhaspatismriti, women were allowed cohabitation with a male relative in case the husband was impotent or dead. Even as the practice was institutionalized in the so called post Vedic period and first reflected in the Dharmasutras, the earliest references to it can be traced back to the earliest of the texts:the Rksamhita. In both these contexts religious texts provided a sort of social and later legal frame for the practice. It may be worth looking at how the institutions evolved in two traditions, their points of commonality and divergences. Our point of enquiry is whether this kind of practice, legalized in the scriptures, ever took a woman's and other participant's point of view into its reckoning? Did it bring them some solace or turn out to be an exploitative way of controlling their sexuality? Did the woman have the right to reject it? Did the practice also have caste and class angles to it? How did men of upper and lower castes view the practice? Who eventually stood to benefit from the practice? Does the practice continue in oblique way even today?

Scholars generally agree that there are at least three common characteristics to all levirate unions; union with husband's kinsmen [although non kinsmen can also become levirs with social approval], the progeny of such unions are considered legitimate and finally the children are considered to be the descendants of the deceased and not the levir [3].

SOCIAL CONTEXT OF THE PRACTICE OF LEVIRATE

Interestingly levirate is also pervasive in contemporary traditional societies. Studies conducted by anthropologists have recorded the occurrence of the practice among groups and tribes of North America, Australia, Africa and the Middle East[4]. These show that the societies that employ levirate tend to have a number of common features which overlap with ancient societies. Apart from the fact that most of the adherents of the custom belong to pastoralist groups or those who practice simple agriculture, the cultures following it are largely patrilocal and patrilineal. A woman is transferred to her husband's family at the time of marriage. She lives among her husband's kin and is under the control of his family. The death of the husband implies a 'reassigning' of the widow whose bride price had been paid. It allows the family to make use of her reproductive faculties and physical labour. This may also allow the widow a comparatively safe future though it does circumscribe her right to explore alternative avenues of existence. Levirate also appears to be closely linked to inheritance, with the surviving brothers 'inheriting' the widow because she has no rights to her husband's estate. Though in most of such cultures a woman is expected to fall in line with her husband's family's demands, there are cultures that give her an option to enter or reject a levirate union.

A childless widow, however, has fewer options. Her husband's property would revert to his family. Her failure to provide an heir would leave her destitute. She would be in a sense without a family and this implied 'disaster in societies where economic rights were based on kinship ties'[5]. A levirate union may then allow her an opportunity to reintegrate herself with the family and enjoy a part of family fortunes. As a result even if she is technically allowed the option of refusing a levirate union she may end up entering it for the absence of viable options. Another factor that could prompt a widow into levirate union could be the fact that it would provide an avenue for legitimate sexual union especially in a set up where any kind of union outside marriage would be frowned upon.

In this paper we are largely concerned with ancient societies of Israel and India. The point of focus is evolution of levirate within ancient Judaism and then a comparison with Indian *Niyoga* practice.

LEVIRATE IN ANCIENT JUDAISM

Ancient Israel featured most of the features described above. The Israelites engaged in simple agriculture based on family labour. Their society was patrilocal and patrilineal. Continuity of family and preservation of family land were important; inheritance was patrilineal, and wives were not recognized as their husband's heirs. The only characteristic absent from ancient Israel was exogamy; while the laws of Leviticus prohibit sexual relationship between various members of extended family, marriage between cousins was permitted. Given the nature of ancient Israelite society evolution of levirate is not difficult to trace.

A levirate marriage (*yibbum*) was mandated by the *Torah* [Jewish legal system, Deuteronomy 25.5-10][6]. which obliged a brother to marry the widow of his childless deceased brother, with the first born child being treated as that of the deceased brother. There are several examples of Levirate in Hebrew Bible. The Hebrew Bible is one of the primary sources of discussions about the family in ancient Israel. While the legal aspect of the institution is spelt out in Deuteronomy 25.5-10, the narrative substantiation comes from Gensis.38. The stories of Tamar and that of Ruth are given a rough date of eight or seventh century BCE [7]. These stories deal with the issue of levirate that have been doubted, questioned or debated upon. One can sight double standards in operation. The law was formulated from the vantage of men. It informs us what a man can do if he sought to wriggle out of the relationship but we do not get to know what a woman could do if she was uncomfortable with the arrangement. The stories address only the former situation, 'in two permutations: the problem of the man who refused the levirate and the problem of the woman who has to deal with such a man' [8].

The story in Genesis 38, is an account of the widow Tamar whose brother-in-law reneges on his levirate duty to sire children on her in his brother's name. Tamar is then compelled to seduce her father-in-law, Judah, by cunning, in order to discharge her procreative duty towards her husband's family. In the first part of the story, Tamar marries Er, Judah's first born so. When Er dies Judah orders his next son Onan, 'Lie with your brother's wife and fulfill your duty as a brother-in-law, providing seed for your brother'. But Onan, knowing that the child born of his seed would not his let his seed go waste in the ground whenever he lies with his brother's wife. This displeases God, who takes Onan's life too. When Judah keeps postponing Tamar's marriage to his third son, Shelah, Tamar takes matters into his own hand. She takes off her widow's garments, covers her face, pretends to be a harlot [*Zona*] and waits by the road to lure Judah. Judah, who had lost his wife Rachel and was in a state of sexual readiness, mistakes her to be a cult priestess [*qedesa*] and persuades her to sleep with him. Tamar, takes away his possessions [seal and cord and staff] as a pledge which she reproduces when her pregnancy is confirmed to gain social legitimacy for her act of cheating her father-in-law. The Jewish law calls such an act a sin. The Leviticus [18.15, 20.12] prohibits the father from entering into an incestuous relationship with his daughter and adds, 'If any man lies with his daughter-in-law, both of them would be put to death'. However, Middle Assyrian law gives a father-in-law the right to beget children from his son's dead widow. Judah knew that the deed that he did was evil and he condemned himself for that. But Judah was forced to adopt the Assyrian view on it because recognized the merit of her argument as he had himself postponed the marriage of his third son to her, which by Jewish law was her legitimate right.

Judah had made a double error; not only could he not recognize his daughter-in-law, and taking her for a whore and not a cult priestess which could have accorded her greater

respectability as *qedesas* were distinct personas and often associated with temple priestess. He does pay for it by granting social legitimacy to the children born but for Tamar, the situation is far from being unproblematic. She truly witnessed numerous shifts in her social position. As Mieke Bal sums up her shifting status,' She starts as a virgin, becomes, but ambiguously a wife, only to be widowed immediately, she then acts as ritual prostitute, and is considered a whore- a significant error- and ends up a mother without a husband. Her sexuality is clearly rendered problematic by the men in her life'[9]. The story, however, is a fairly complex one. Even when the emphasis is always given to a woman's need to have sons to secure her future, we would find on a closer examination of Judah's story that he needed Tamar as much as needed him. She actually healed his barrenness by giving him sons/ grandsons that he otherwise could not have. He had tried to protect his third son by postponing his marriage to Tamar. However, in doing that he made him as powerless as his other two sons. His own lineage was clearly threatened. His act which was luminally poised between incest and quasi levirate actually helped achieve an attractive symmetry. He had lost two sons and now the twins were born-'a sign that Judah had been forgiven' and possibly Tamar too.

The other significant example of Jewish levirate is the *Book of Ruth,* in which the eponymous widowed heroine is given in marriage by her mother-in-law to a distant kinsman [10]. When Ruth was left a childless widow, the nearest kinsman was unable to redeem her land and marry her. So drawing of his shoe [a ritual that frees her to marry someone else] he left her free to marry a richer and more distant relative, Boaz, who bought the land left by the father-in law and married Ruth to raise up the name of the dead upon his inheritance so that the name of the dead be not cut off from among his brethren and from the gates of his place'[11]. Scholars disagree whether the events described in Ruth 4 relate to levirate. While according to Boaz in Ruth 4.10, the 'marriage will perpetuate the name of the deceased upon his estate', the marriage between Ruth and Boaz does not seem mandated by Deuteronomy 25.5-10, nor does the genealogy in Ruth 4 credit Ruth's son on her deceased husband's line [12]. In some ways the transaction described resembled the redemption process of property outlined in Leviticus 25. However, there is no indication in Leviticus that a relative who redeems the property should marry the widow of the deceased kinsmen to whom the property belonged. Yet it may be worthwhile to scrutinize the passages as even if it were not a case of a recognized levirate, it did appear to be its modified version. In fact, in the Book of Ruth, marriage is seen to be a solution to two problems; a dead man's lack of offspring and support provided to two widows. It seems interesting that the former motivation is voiced by a man and the latter concern by a woman. Naomi, Ruth's mother-in-law, promotes her daughter-in-law's marriage to Boaz so that Ruth could have a home and 'be happy'. She may have been concerned about providing an heir for the family, she does not mention so. Naomi is portrayed as having concern different from Tamar whose primary aim was to procure a son. It was Boaz who claims that acquisition of Ruth along with the family's estate reflects the need to perpetuate Mahlon's [Ruth's husband] lineage and 'that the name of the deceased might not disappear from among the kinsmen and his hometown'. As in Genesis 38, there is reluctance on the part of the preferred surrogate to fulfill his responsibilities to the deceased. The closest relative of her dead husband is willing to redeem her dead husband property but not willing to marry her as 'it could threaten his own estates'. In the mind of the relative, marriage to Ruth, would perpetuate her husband's lineage but somehow threaten his own inheritance because despite being the genitor, the child would belong to someone else. Boaz may have married her because of his previous dealings with her and because of his esteem for her. Moreover, the child born of the union was recognized not just Ruth's son but Naomi's redeemer as well.

The story of Judah and Tamar served to emphasize the importance of levirate marriages in the days when the Jews were a family kinship group. Levirate marriages were practiced in a strong

clan structure wherein exogamous marriages were restricted. However, Ruth's story does demonstrate that the practice could be opened up to a wider kinship group if the brothers were unavailable. As mentioned above in both cases the genitors were reluctant to enter into the relationship but the Bible does not condone their unwillingness. While acknowledging their reluctance, the Bible offers support for the unions, suggesting that the fears of men regarding this custom were baseless. Interestingly, even as the children were supposed to carry on the name of their mother's legal and dead husband, the fact remained that within the Bible itself no one is allowed to forget who the real father is.

RATIONALE OF LEVIRATE

What could be the logic behind the levirate alliance? Levirate marriage served to protect the widow, ensure the continuation of the family line and preserve property. By and large it appeared that in ancient Jewish traditions where levirate was largely mandated only after the death of a husband that had produced no son, the device of levirate was utilized to preserve a man's property by providing him an heir posthumously. However, Naomi's words in Ruth's story also make it evident that the welfare of widow was equally important in making her remarry.

There are certain points of convergence and differences between the Hebrew and early Indian traditions of levirate and *niyoga*. The utilization of a woman's [widow's] procreative capacity by working out a relationship with the brother-in-law and subsequently ensuring the succession of lineage and preservation of property appeared to be common to both the cultures.

LEVIRATE (NIYOGA) IN ANCIENT INDIA

As was the case in ancient Israel, ancient Indian brahmanical societies cited the brother-in-law as the most preferred surrogate. *Gautama Dharmasutra*, a text of the post Vedic period informs us, 'A woman whose husband is dead and who desires offspring may secure a son from her brother-in-law [*devara*]. She should obtain permission of the elders and have intercourse only during the menstrual period [excluding the first four days- *nartumatiyat*]...'[13]. *Asvalayana Grhyasutra* also states that at the time of the death of a man, the mourning wife should be placed in charge of her brother-in-law or a close relative, 'Her brother-in-law, being a representative of her husband, or a pupil [of her husband], or an aged servant, should cause her to rise [from that place] with verse,' Arise, o Wife, to the world of life' [*Riksamhita*, X.18.8] [14]. But on non-availability of the brother-in-law, the search for levir could extend to extended family, clan or even a Brahman! The *Dharmasutras* inform us that a surrogate could also be a *sapinda* [a kinsman], *sagotra* [of the same lineage] or a *sapravara* [exogamous kinship grouping] or one who belongs to the same caste, if the brother in law is not available [15]. *Gautama Dharmasutra* does allow a woman to cohabit with other kinsmen but also states that '[declare that she shall co habit] with no body but a brother-in-law [16]. Some texts such as *Visnusmrit,* a work not earlier than third or fourth century CE, contain an innovation which is not found in the sutras of Gautama and Vasistha viz the '*ksetraja*   [the son born of *niyoga* union]is the one who is procreated on the appointed wife or a widow by a *sapinda* of the husband or by a brahman. Brahmans presumably stood in for kshatriya rulers in the *niyoga* assignations described in the *Mahabharata.*

Another issue worth considering is whether the alliance was sought as a security measure for the woman concerned. The alliance could provide a certain kind of security to the woman but it could also amount to denial of autonomy and restraint on life. Both the cultures did not provide the woman the right to exercise her free will in the choice of her mate. However, there are some significant differences here. The instances of actual marriage between the widow and

the brother-in-law are rare in early Indian context. *Riksamhita* does allude to one such case where the brother-in-law takes away the sorrowing widow from the husband's pyre, presumably to marry her [17]. This does appear to be a rare example. Generally speaking the early normative literature envisaged a short-term relationship just till the progeny had to be secured, especially as *niyoga* could be practiced even when the husband was alive. His impotency was an acknowledged rationale for the practice in the early Indian context. The relationship between the woman and her levir was supposed be very clinical and dispassionate, without emotions creeping in and to be terminated once the purpose of the alliance was achieved that is once the son was born.

The welfare of the widow did not seem to be the prime concern for early Indian norm- setters. Marriage of the daughter was something that was envisaged as an event that happened only once. Manu stated, 'The settlement of the inheritance happens once; they say a promise is made once and the daughter is given in marriage only once. These three things must occur but once [18]. On the other hand, ancient Jewish tradition purposely sought to reintegrate the widow into the family out of concern apart from the need to utilize her procreative faculties. Naomi was concerned about Ruth's welfare on demise of her son. The status of the Early Indian widow was certainly on decline as patriarchy consolidated and aspersions were cast on her multiple sexual relations which *niyoga* had allowed. Incidentally there was another point of divergence in the two traditions. Within the Jewish tradition, there was a provision of *Haliza* [19] within *Torah* that allowed the brother-in law to get out of his responsibility of marrying the widow of his brother and allow her then the right to marry again.

As it happened in the case of early Indian socio-religious context, the practice of levirate also came to be condemned within the later Jewish tradition. In the later Talmudic literature levirate was considered objectionable as many a times the marriage between a brother-in law and the widow happened for reasons other than that of 'establishing the name unto his brother'. The Talmud is the record of rabbinical pertainings to Jewish laws, biblical interpretations, ethics customs and history. There were Jewish religious heads that began equating it with incest and allowed levirate only under dire circumstances. Differences of opinion occurred among later legal authorities such as the Alfazi, Maimonids and the Spanish school on the issue of upholding of the custom. Gradually *Haliza* was encouraged more than *Yibbum.* The judges and councillors encouraged the brother-in-law not to marry the widow and to, 'look for a wife suitable for him and not bring trouble in the house'. The advice is directed at the levir and couched in terms of his happiness. It is beyond the purview of the paper to discuss the rationale in detail but could the questioning on the issue be related to the breakdown of close clan relation in an expanding agrarian society where inheritance of land became family issue? Let us look at the parallels in the early Indian situation.

From the beginning of the Common Era, there was a gradual decline in the practice of *niyoga* in India especially among upper caste women and this seemed to be connected to changes in the material milieu. The 'post Mauryan' [c.200BCE- c. 300CE] period was an age of agrarian expansion, enhanced artisanal activities, commercial extension at both local as well as global levels, along with growth of money economy. Many more areas had come under tillage and resource collection increased and even allowed urban expansion. Therefore, the picture that emerged around this time was one of relative prosperity.

GENDER RELATIONS AND LEVIRATE

How did it translate in the context of gender relations within the upper castes? Did greater availability of resources imply a concomitant growth of a woman's control over her sexuality? That was not the case. On the other hand, we detect a greater social control over a woman's

sexuality. Notions of virginity and chastity gained grounds with men being advised to make their women 'dependent day and night, and keep them firmly under their control'[20].[i] The practice of *niyoga* came to be associated with problems at both social and individual levels. Socially speaking it had once sought to provide a solution to the problem of faltering lineages but changed material and social environment implied its turning into a social and a moral problem for a new patriarchal set up. The inheritance rules acquired new meaning with the availability of landed property and so did the issue of paternity. Access to procurement and distribution of resources by men of upper castes and their need to confirm the paternity of progeny implied that their women be removed from productive actives and public spaces and confined to home with the ostensible occupation of reproduction only. Even within the framework of reproduction norms, some changes appeared. Relative stability in population growth implied that some women could be spared an optimum utilization of their reproductive functions; something that *niyoga* had primarily aimed at. Some wombs could, now be dispensed with, especially when these ceased to be of a wife. The death or impotency of the husband among such social groups could then actually spell out social death for widows. Somewhere the principle of *niyoga* that allowed women multiple sexual partners came to be gradually contrasted to the concept of monogamy and chastity.

It appears that both in ancient Israel and in ancient India practices akin to levirate had their genesis in a particular kind of social formation largely pastoral or practicing simple agricultural where women were considered significant productive and reproductive units to be controlled by the marital family. Both their labour and ability to reproduce had significance in a set up where there may have been the need to preserve family and family land through production of son who could inherit the land. However, as the situation might have become more stable both in terms of availability of food supply and population growth and early agrarian societies would have given way to more complex set up with emerging legal delineations and growing patriarchy, the practice may have lost its primary worth especially in the minds of custodians of society and they found ways to proscribe it; an act they were not entirely successful at.

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[8] Ibid.

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[19] *Old Testament*, Deuteronomy Chapter 25, 7 And if the man like not to take his brother's wife, then his brother's wife shall go up to the gate unto the elders, and say: 'My husband's brother refuseth to raise up unto his brother a name in Israel; he will not perform the duty of a husband's brother unto me.'8 'Then the elders of his city shall call him, and speak unto him; and if he stand, and say: 'I like not to take her'; 9 'then shall his brother's wife draw nigh unto him in the presence of the elders, and loose his shoe from off his foot, and spit in his face; and she shall answer and say: 'So shall it be done unto the man that doth not build up his brother's house.' 10 'And his name shall be called in Israel the house of him that had his shoe loosed'.

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