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Annulment of Marriage (*Hafka'at Kiddushin*): Re-examination of an Old Debate

Dr. Avishalom Westreich

1. Introduction

Annulment of marriage is mentioned in various contexts in the Babylonian Talmud. A number of famous talmudic *sugyot* discuss the concept of *hafka'ah*: אפקעינהו רבנן לקידושין מיניה, i.e. the Sages have "expropriated" the marriage from the husband, or: the Sages annulled the marriage. In a similar way the Yerushalmi, when discussing a case where the *get* was halakhically void but validated by the Sages, mentions the notion of: דבריהן עוקרין דברי תורה (their [i.e. the Sages'] words uproot the words of the Torah), according to which the Sages might[1] have the authority to annul the marriage in certain circumstances.[2]

From Geonim to Rishonim and Aḥaronim, from classic commentators to modern Jewish Law scholars, the character of *hafka'at kiddushin* has been much debated. In particular, what is the legal construction of *hafka'ah* and what are the conditions for its application: does it always entail retroactive annulment of the marriage or may it be "only" prospective, and if so based on what authority? Does a *get*, which is found in several talmudic *sugyot* of *hafka'ah*, have a significant role in this process?[3]

These debates revolve around the appropriate reading of talmudic sources. Nevertheless, textual analysis of the main *sugyot* reveals support for almost all the competing opinions. Typically for layered talmudic *sugyot*, there is no homogeneous meaning; each reading exposes one or more possible aspects of the *sugya*. Indeed, some scholars have pointed in the past to the contribution to the issue of the ultimate talmudic redactor, especially in interpreting *hafka'ah* as a retroactive annulment.[4] But in my opinion the picture which has been drawn is still incomplete, as regards both the development of the concept and the question of the authority of the Sages in relation to it. A re-reading of the sources is therefore required.

It should be emphasized that the advantage of revealing the talmudic strata is not merely for the purposes of historical research. This kind of tension between talmudic layers is a classic ground for creating contradictory interpretations amongst talmudic commentators.[5] This discussion is therefore necessary for analysis of the dogmatic status of *hafka'at kiddushin*.

An examination of the talmudic basis of *hafka'ah* enables us to reach a deeper understanding of the later rabbinic literature. Proposals for practical implementation of *hafka'at kiddushin* are an emotional issue which very frequently results in total rejection.[6] Revealing the various approaches throughout the

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1 This depends on the exact context of this passage; see below.

2 Yerushalmi, Gittin, 4:2, 45c.

3 For the moment see Avraham H. Freiman, *Seder Kiddushin Ve-Nisu'in Aḥarey Ḥatimat Ha-Talmud*, Jerusalem: Mossad Ha-Rav Kook, 1964 (hereinafter: Freiman, *Seder Kidushin*), and the classic literature cited by him (e.g. Rashba and Rosh, pp. 66-72); Eliezer Berkovits, *Tenay Be-Nissu'in Uv-Get*, Jerusalem: Mossad Ha-Rav Kook, 1966, Ch.4 (hereinafter: Berkovits, *Tenay*); Eliav Shoḥetman, "Hafka'at Kiddushin", *Shenaton Ha-mishpat Ha-Ivri*, 20 (1995-1997), pp. 349-397 (hereinafter: Shoḥetman, *Hafka'at Kiddushin*). Additional sources and references to modern debates are cited below.

4 See Shmuel Atlas, *Netivim Ba-mishpat Ha-Ivri*, New York: American Academy for Jewish Research, 1978, pp. 206-224 (hereinafter: Atlas, *Netivim*) = Shmuel Atlas, "Kol De-mekadesh 'Ada'ata De-rabanan Mekadesh", *Sinai* 75 (1974), pp. 119-143; *ibid.*, *Sinai* 79 (1976), pp. 102-116; Shoḥetman, *Hafka'at Kiddushin* (*supra*, note 3), pp. 352-355.

5 See Shamma Y. Friedman, *Tosefta Atikta*, Ramat Gan: Bar Ilan University Press, 2002, p.149.

6 See Rabbi Zalman N. Goldberg, "Hafka'at Kiddushin Eynah Pitaron La-aginut", *Teḥumin* 23 (5763), pp. 158-160; "Eyn Hafka'at Kiddushin Lelo Get", *ibid.*, pp. 165-168, as opposed to Rabbi Riskin's proposal: Rabbi Shlomo Riskin, "Hafka'at Kiddushin – Pitaron La-'aginut", *Teḥumin* 22 (5762), pp. 191-209 (for an English version, see Rabbi Shlomo Riskin, "Hafka'at Kidushin: Towards Solving the Aguna Problem in Our Time", *Tradition* 36 [2002], pp. 1-

talmudic sources is essential for establishing the actual basis for such proposals. The context of the present discussion is however not limited to radical proposals whose object is enactment of constitutive annulment as a solution for the *agunah* problem. Annulment is frequently cited as an additional support for other means of terminating the marriage, such as a compelled *get*, and the basis for those cases requires clarification too.

2. Talmudic Cases of *Hafka'at Kiddushin*

Two "prototypes" of constitutive annulments are found in the Babylonian Talmud. The first is annulment granted shortly after the marriage and taking effect from the moment of the marriage, due to some fault in the marriage procedure. The second is annulment issued long after the marriage took place. All cases in the last group include a *get* which was written, delivered (perhaps to an agent) and sometimes even given to the wife, but which for some reason was invalidated. The *hafka'ah*, applied in these sources due to a variety of reasons, makes the couple practically divorced, despite the formal fault in the *get*.

Two cases are included in the first group:

(a) The case of Naresh (עובדא דנרש)[7] – a minor orphan girl was (rabbinically) married to a man who sought to marry her after she became adult,[8] but a second person "kidnapped" her and married her;[9] and

(b) תליוה וקדיש[10] – a case in which the woman was forced (lit. "hanged") and then willingly (from a formal point of view[11] rather than a moral point of view[12]) gave her consent.

In both cases (a) and (b), the Talmud records that the marriage was annulled due to the misconduct of the "husband" when betrothing his wife:

הוא עשה שלא כהוגן, לפיכך עשו בו שלא כהוגן ואפקעינהו רבנן לקידושיה מיניה.[13]

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36) [hereinafter: Riskin, *Hafka'at Kidushin*], criticized by Rabbi Jeremy Wieder, "Hafka'at Kidushin: A Rebuttal", *ibid.*, pp. 37-43 [hereinafter: Wieder, Rebuttal]). Another debate is between Rabbi Uri'el Lavi and Prof. Berachyahu Lifshitz: see Uri'el Lavi, "Ha'im Nitan Lehafki'a Kiddushin Shel Sarvan Get?", *Teḥumin* 27 (5767), pp. 304-310 (hereinafter: Lavi, *Ha'im*), as opposed to Lifshitz's proposal: Berachyahu Lifshitz, "Afke'inhu Rabanan Le-kiddushin Minayhu", *Mi-perot Ha-kerem*, Yavne: Yeshivat Kerem Be-Yavne, 2004, pp. 317-324 (hereinafter: Lifshitz, *Afke'inhu*).

7 Yevamot, 110a.

8 When she attained her majority he placed her upon the bridal chair (וגדלה ואותביה אבי כורסיא), an act which is probably similar to a *ḥuppah*.

9 Her agreement is not mentioned, but she probably gave it, at least after being kidnapped (otherwise the marriage was not valid and no *hafka'ah* was required, by contrast with the progress of the *sugya*): see Ran, 38a in Rif (in the Vilna edition); Ritba, Yevamot 110a, s.v. *hu*, and compare Ramban, *ibid.*, s.v. *Rav Ashi*.

10 Bava Batra, 48b.

11 The formal validity of the marriage is based on an expansion of Rav Huna's statement: תליוהו וזבין זביניה זביני which was made by Amemar: תליוה וקדיש קדושיו קדושין (Bava Batra, 47b). Rav Huna's statement is discussed by Binyamin Porat, "Ha-ḥoze Ha-kafuy Ve-ikron Ha-tzedek Ha-ḥozi", *Dine Israel* 22 (5763), pp. 49-110 (hereinafter: Porat, Ha-ḥoze Ha-kafuy), at pp. 102-106 (regarding betrothal).

12 The moral problem with the husband's act is obvious and is therefore a reason for responding to his act even in contradiction to the formal laws of marriage and divorce; see next note. This explanation rejects the assumption that formal rules of the *halakhah* and moral rules are tautologous (for further discussion, see Avi Sagi and Daniel Statman, *Religion and Morality*, Amsterdam: Rodopi, 1995, pp. 5-8). Accordingly queries 1, 3 and mainly 4 in Porat, Ha-ḥoze Ha-kafuy (*supra*, note 11), p. 103, are not difficult at all.

13 Yevamot, 110a; Bava Batra, 48b. This reasoning is mentioned in the case of Naresh by Rav Ashi, and his sources will be discussed below. In the second case it is mentioned by Mar bar Rav Ashi according to the following textual witnesses: Mss Oxford, Florence, Munich, Vatican 115 and print editions, while according to others (Mss Hamburg, Paris and Escorial) it is Rav Ashi here as well (see also below, note 50). Following the version of "Mar bar Rav Ashi" (see below, note 50), we may consider it as a "transferred" statement, but there is no reason to ascribe the transmission to a later editor (compare Hanina Ben Menahem, "Hu 'Asa Shelo Ka-hogen", *Sinai* 81 (1977), p. 157 [hereinafter: Ben Menahem, *Hu 'Asa*]; Eliav Shoḥetman, "Kiddushin Mehamat 'Ones", *Sinai* 105 (1990), pp. 118-120 [hereinafter: Shoḥetman, *Ones*]; Porat, Ha-ḥoze Ha-kafuy [*supra*, note 11], p. 106 note 148). In my opinion it is reasonable to assume that Mar bar Rav Ashi used his own father's *memra*, which fitted properly his case: According to Rav Huna and Amemar's reasoning, the betrothal is formally valid though immoral. Therefore the response is שלא כהוגן, i.e. beyond the formal borders of the *halakhah*. In fact, by contrast with H. Ben Menahem's view (*ibid.*), שלא כהוגן is a

He acted improperly; they, therefore, treated him also improperly, and deprived him of the right of valid betrothal.

Three cases are included in the second group. In all of these cases a valid *get* was written and submitted but some external events invalidated it:

(c) The first is a case of conditional divorce.[14] The husband initially made a condition whose fulfilment would invalidate the *get*, and then tried to fulfil the condition (i.e. to invalidate the *get*) but an unexpected accident prevented him from doing so. In principle the claim אונס (i.e. an unforeseen event) is acceptable, and in this case it means that the condition is considered as fulfilled and the *get* is annulled. However, Rava, according to one tradition in the Bavli, argues that the claim for אונס cannot be accepted here and the wife is divorced. The Talmud explains that Rava’s reasoning is that in order to prevent extreme results the Sages enacted *hafka‘ah* and the marriage is annulled despite the claim of אונס. The results which the Sages were afraid of are (i) the wife's second marriage when she was not properly divorced, if indeed it was an unexpected accident and the *get* was invalidated; or (ii) *aginut* when it was not אונס and the *get* was valid, but a “chaste” observant woman would fear that the *get* is invalid and therefore would not remarry.[15]

(d) A dying person (שכיב מרע) who gave his wife a *get* (in order, for example, to exempt her from being bound to a levir) but later recovered from his illness.[16] According to Rav Huna, the *get* is annulled, since it was given under the assumption that he would die but he didn’t (a legal assumption – an *’umdena* – that it was a conditional *get*). Both Rabbah and Rava disagree with Rav Huna in cases which he hasn’t explicitly stipulated it, due to a fear of a mistake: שמא יאמרו יש גט לאחר מיתה, i.e. people would mistakenly think that in the above case the *get* becomes valid only after the husband’s death and this is the reason for its annulment when the husband recovered. Because of that fear, explains the Talmud, although the *get* is *mi-deorayta* invalid (since he recovered), according to Rabbah and Rava she is divorced. Here too, the Sages enacted *hafka‘at kiddushin*.

(e) A case[17] in which the husband sends the *get* to his wife by a messenger, but cancels the *get* (as he is entitled to do) before the messenger delivers it. In order to prevent extreme results, such as the wife’s remarrying unaware of the cancellation,[18] Raban Gamliel the Elder enacted that no one should cancel a *get* before a *bet din*, unless in the presence of the messenger or his wife, before she receives the *get*. His descendants, Raban Shimon ben Gamliel and Rabbi (i.e. Rabbi Yehuda Hanasi), disputed the status of the *get* where the husband ignores Raban Gamliel’s decree and cancels the *get*. According to Rabbi, the *get* is void so that the wife is not divorced, but according to Raban Shimon Ben Gamliel the *get* is not void and the wife *is* divorced. The reasoning behind Raban Shimon Ben Gamliel’s view is the authority and validity attributed to the Sages’ decrees – שאם כן מה כוח בית דין יפה (lit. “how is the power of the Bet din (i.e. the Bet din of Rabban Gamaliel who made the regulation) [left] unimpaired”). But, the Talmud asks, if the *get* is annulled *mi-de'orayta*, how can the Sages regard a married woman as a divorcee? The authority for that, explains the Talmud, is based on the concept of *hafka‘at kiddushin*.

What is *hafka‘at kiddushin*? As indicated above, this is subject to fundamental dispute amongst halakhic writers and scholars. *Hafka‘ah* in cases (a) and (b) takes effect at the time of the betrothal and annuls the betrothal *ab initio*. A reasonable explanation for this is that the Sages invalidate the *act* of marriage (by

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modification of a common expression (see below, note 38), used for *hafka‘ah* by both Rav Ashi and Mar bar Rav Ashi, so it is hard to derive any proof from its literal meaning.

14 Ketubbot, 2b-3a.

15 “On account of the chaste women and on account of the loose women” (משום צנועות ומשום פרוצות; Ketubbot, *ibid.*).

16 Gittin 72b-73a.

17 Gittin 33a; Yevamot 90b.

18 See further Gittin 33a, the various explanations of Rabbi Yoḥanan and Resh Lakish to מפני תיקון העולם, and compare Yerushalmi, Gittin 4:2, 45c. Interestingly, Resh Lakish explains it as מפני תקנת עגונות, i.e. to forestall the problem of *agunot*, and according to Rashi *agunot* here has the modern meaning: a married woman, whose husband (after canceling the first *get*) refuses to divorce her; see Rashba, Gittin 33a, s.v. *ve-ha*.

making the money ownerless or declaring the cohabitation to be promiscuity)[19] and thus the *hafka'ah* prevents the betrothal from becoming valid. Annulment in cases (c), (d) and (e) takes place a long time later. So we may ask whether a similar legal construction is to be applied to these cases, i.e. is the betrothal annulled *ab initio*, resulting in retroactive annulment of the marriage? Or is *hafka'ah* here prospective, i.e. taking effect only from that time on? According to the second possibility, annulment would refer to the *status* of marriage and not to the *act* of marriage, in contrast to the previous reasoning.

A related question is the role of the *get* in this process. If annulment is indeed prospective, a reasonable understanding of the ruling is that it validates a *get* which was not valid *mi-de'orayta*. The *get* on this analysis is a substantive element in the process of *hafka'ah*. If annulment is retroactive, a *get* is not necessarily required. As mentioned above, however, all the talmudic cases do involve a *get*. Many Rishonim (but not all) regard this as supporting the view that demands a *get* in the process of *hafka'ah*. However, this does not necessarily mean that a *get* is an essential component of the process of annulment. We may argue that though a *get* is indeed necessary, and *hafka'ah* is thus limited to cases in which a *get* was given, this is due to various "external" reasons (such as preventing a "slippery slope" in the use of *hafka'ah*, which will damage the stability of Jewish marriage), while conceptually the *hafka'ah* remains a retroactive annulment of the marriage.

We may summarize the issue as follows: when a *get* is given, does *hafka'ah* still annul the marriage retroactively or does it operate only prospectively, from the time of the giving of the (faulty) *get*? And is the *get* an essential element in the process? This issue in particular involves questions of both history and dogmatics, and will conclude the discussion in this paper.

An additional issue is the authority of the Sages to enact *hafka'ah*. One possible view is that the Sages have by definition the authority to annul marriages by virtue simply of their jurisdiction. Another possibility is that the basis for *hafka'ah* is not the *a priori* authority of the Sages, but rather the agreement of the spouses. The latter view, although conceptually less radical than the former, is significant for both the historical analysis (as a possible bridge between the Gaonic and the Palestinian traditions of unilateral divorce[20]) and for the dogmatic analysis, by expanding the normative basis for any suggested terminative condition as a possible solution for the problem of *agunot*.

Thus both the normative basis of the talmudic concept of *hafka'ah* and the manner of its application in the various cases are critical. Analysis of the historical development of the talmudic concept of *hafka'ah* may assist us in answering these questions.

3. Analysis of the Talmudic Sources

(a) The Foundation of *Hafka'at Kiddushin*

It seems that all the possible approaches mentioned above regarding both the character of *hafka'ah* and the authority of the Sages to enact it may already be found in the talmudic sources. As a starting point however, we should analyze the earliest talmudic source which discusses *hafka'ah*. Amongst the five cases which mention *hafka'ah*, one (e) refers to a tannaitic source: the dispute between Rabbi and Rabban Shimon ben Gamliel regarding cancellation of a *get* which was sent by a messenger. Here, Rabban Shimon ben Gamliel (against the majority) ruled that the wife is divorced despite the cancellation of the *get*. This is interesting from a conceptual point of view, and both Talmudim discuss it.

The Bavli[21] on the Mishnah (Gittin 4:1-2) which describes the decree of Rabban Gamliel, that a *get* once delivered should not be cancelled, cites the concept of *hafka'ah* in the following way: כל דמקדש אדעתא דרבנן מקדש ואפקעינהו רבנן לקידושין מיניה ("When a man betroths a woman, he does so subject to the consent / willingness of the Rabbis, and in this case the Rabbis annul his betrothal"). We don't have yet any indication of the date of this explanation, i.e. whether it is the source of the concept of *hafka'ah* or has been transmitted from the other cases ((a)-(d) above). However, the authority for *hafka'ah* is derived here

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19 See Lifshitz, *Afke'inho* (*supra*, note 6), pp. 318-319. In the talmudic *sugyot* however we find different approaches; see below.

20 See Avishalom Westreich, "Annulment, Coercion and Terminative Conditions: Historical and Dogmatic Interaction", *Working Paper of the Agunah Research Unit* (in preparation) (hereinafter: Westreich, Terminative Conditions).

21 See Gittin 33a. A parallel to this sugya will be discussed below.

from a kind of preliminary consent: the husband betroths subject to the willingness of the sages,[22] and such a stipulation gives the Sages the authority to annul the marriage. There is more than one possible understanding of the exact meaning of the couple’s preliminary consent: it may reflect the consent of the husband derived from his saying: “*ke-dat Moshe ve-Israel*”, viewed as a form of condition, according to which the betrothal depends on the Sages’ willingness, or form part of the unique character of marriage as a legal and social institution, which was subject to the consent of the Sages.[23] As to the meaning of the concept of *hafka‘ah*, this is not completely clear at this stage. We will return later to its interpretation.

The discussion regarding Rabbi and Rabban Shimon ben Gamliel’s dispute is found also in the Yerushalmi:[24]

> עבר וביטלו – נישמעינה מן הדא: אם ביטלו הרי זה מבוטל דברי ר’, רבן שמעון בן גמליאל או’ אינו יכול לבטלו ולא להוסיף על תנאו.
> יאות אמר רבן שמעון בן גמליאל, מאי טעמא דרבי? דבר תורה הוא שיבטל והן אמרו שלא ביטל, ודבריהן עוקרין דברי תורה?!
> וכי שמן על זיתים וענבים על היין לא תורה הוא שיתרום מפני גזל השבט והן אמרו שלא יתרום, ולא עוד אלא שאמרו עבר ותרם אין תרומתו תרומה.

The Yerushalmi cites the discussion between Rabbi and Rabban Shimon ben Gamliel. Rabbi wonders: how can you, Rabban Shimon ben Gamliel, say that the *get* is valid – can the Sages uproot the words of the Torah? The next passage is Rabban Shimon ben Gamliel’s answer. He doesn’t state explicitly that the Sages do have that authority but proves it from a different case in which what was regarded according to the Torah as *terumah* could be cancelled (and defined as *ḥullin*) by the Sages.[25] We may conclude that the core of the dispute between Rabbi and Rabban Shimon ben Gamliel is whether the Sages have the authority to rule against the Torah, including declaring a married woman to be a divorced one. According to Rabban Shimon ben Gamliel, this authority *does* exist, here as well as in other cases, and does not depend on any preliminary consent of the spouses (which is irrelevant to the case he compares: *terumah*).

The Yerushalmi here deploys a concept similar to *hafka‘ah*.[26] This finding has a significant contribution to the quest for dating the development of this concept: it is earlier than the redaction of the Palestinian Talmud (app. 400 CE), and thus earlier than Ravina and Rav Ashi, whose discussion regarding *hafka‘ah* is found in all of the *sugyot* cited above.

Where do we find the earliest source of *hafka‘ah*? Surprisingly, the roots of the concept of *hafka‘ah* are not in the Yerushalmi, nor in any of the above *sugyot* which are directly related to the issue, but rather in a Babylonian *sugya* which discusses this concept only incidentally.[27] In a different context,[28] Rav Ḥisda and Rabbah, two third generation Babylonian Amoraim,[29] discussed whether the Sages have the authority to uproot the laws of the Torah (בית דין מתנין לעקור דבר מן התורה). According to Rav Ḥisda, the Sages do have

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22 The wife probably does the same, otherwise it might be considered as a mistaken marriage, see Shita Mekubetset, Ketubbot 3a, s.v. *kol hamekadesh*.

23 Ritba explains the statement “*ke-dat Moshe ve-Israel*” as a form of condition (כאילו התנה עמה על מנת שירצו חכמים). It might also be the view of Rashi: see Riskin, *Hafka‘at Kiddushin* (*supra*, note 6, English version), pp. 12-14. Others dispute this: see Berkovits, *Tenay* (*supra*, note 3), pp. 120-121 (including Rashi, see Berkovits, *ibid.*, pp. 134-135). In the definition of the second view as part of the character of *kiddushin* as a social institution, I follow Atlas, *Netivim* (*supra*, note 4), pp. 207-209 (cited below, note 39). The common denominator of the various explanations is that the authority to annul marriage is unique to marriage and divorce, and not part of a wider authority of the Sages.

24 Yerushalmi, Gittin 4:1, 45c.

25 The consequence of this act is far reaching: after the ruling of the Sages there is a permission for a regular person (a *zar*, i.e. not a priest) to eat the fruits (assuming that another *terumah* was made), while according to Torah law they are considered as a *terumah*, forbidden to a *zar* and their eating results in the severe punishment of *mitah bide shamayim* (death performed by heaven).

26 The precise meaning of the *hafka‘ah* in the Yerushalmi (which we may also define as: “quasi *hafka‘ah*”) will be discussed below.

27 Yevamot 89b-90b.

28 The context is the laws of *terumah*: a case in which according to the Torah the act of *terumah* was valid, but the Sages invalidated it. The similarity between the Bavli and the Yerushalmi is apparent; see further below.

29 See Ḥanoch Albeck, *Mavo Le-Talmudim*, Jerusalem: Dvir, 1969, pp. 289-290, 307-308 (hereinafter: Albeck, *Mavo*). The generation is significant: teachings of third generation Babylonian Amoraim are still found in the Yerushalmi, while those of later generations rarely exist; see Yaakov Zussman, “Ve-shuv LiRushalmi Nezikin”, *Mehkere Talmud* 1 (1990), pp. 98-99, and notes 178a, 179.

such an authority, while Rabbah challenges his view.[30] One of Rav Ḥisda's proofs is Rabban Shimon ben Gamliel's view in the case of a cancelled *get*. Rabbah then replies:[31] מאן דמקדש אדעתא דרבנן מקדש, ואפקעינהו רבנן לקידושין, i.e.: the Sages do not have the authority to uproot the words of the Torah. Rather, their authority to rule that the wife is divorced is derived from the preliminary agreement: the betrothal was made subject to the consent of the Sages.

The similarities between the Bavli and the Yerushalmi cannot be overstressed. Both discuss "uprooting the words of the Torah", almost in the same words. And in both the *sugya* has a similar structure, which includes the precedents for both invalidating *terumah* and validating a cancelled *get*. Since the Bavli is based on an actual debate between sages[32] and the debate is there much more complete, I prefer to identify it as the source for that *sugya*. The structure of the *sugya* and process of its development is therefore as follow: Rav Ḥisda and Rabbah argued; both supported their views; Rav Ḥisda supported his argument from Rabban Shimon ben Gamliel's opinion; Rabbah rejected that support. This debate was partially transmitted to the Yerushalmi, which discusses the main argument citing some of the sources, but retains the simple meaning of those sources without Rabbah's final conceptual development. The view of Rabban Shimon ben Gamliel is thus explained in the Yerushalmi in the same way as Rav Ḥisda, but without Rabbah's response, which creates a different conceptual structure.[33]

Rabbah and Rav Ḥisda are the earliest Amoraim who discuss the concept of *hafka'ah*, and therefore their discussion may be regarded as the historical source of its definition. We may now describe more precisely the process by which the concept of *hafka'ah* was constructed: First, a tannaitic source – Rabban Shimon ben Gamliel's view – validated an invalid *get* based on a decree of the Sages. Then Rav Ḥisda based this on the Sages' authority to uproot the words of the Torah. This explanation was adopted in the Yerushalmi in its interpretation of Rabban Shimon ben Gamliel. Rabbah rejected this radical view. However, he agreed with Rabban Shimon ben Gamliel that the Sages have the authority to validate the divorce, but based this on a specific stipulation at the time of marriage. Rav Ḥisda's view gives a wide – almost limitless – authority to the Sages. Though this was rejected by Rabbah, it was revived a few generations later by Rav Ashi.

In the case of Naresh[34] ((a) above) Rav Ashi explains that the annulment of marriage is a result of the misconduct of the "kidnapper":

> הוא עשה שלא כהוגן, לפיכך עשו בו שלא כהוגן ואפקעינהו רבנן לקידושיה מיניה.
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> He acted improperly; they, therefore, treated him also improperly, and deprived him of the right of valid betrothal.

Rav Ashi's explanation is composed of two different parts: one completely in Hebrew (הוא עשה שלא כהוגן, לפיכך עשו בו שלא כהוגן) and one in Aramaic (ואפקעינהו רבנן לקידושיה מיניה). The shift from one language to another indicates that his teaching might be based on two different sources.[35] Obviously, the second – Aramaic – part is a quotation of Rabbah's explanation of the authority of the Sages to annul marriage in

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30 In the specific context in which Rav Ḥisda initially expressed his view it was Rav Natan bar Rabbi Hoshaya who was in dispute with him. However, the general discussion regarding בית דין מתנין לעקור דבר מן התורה was between Rav Ḥisda and Rabbah.

31 A possible argument is that this discussion is a later expansion of the basic Amoraic dispute, and was actually edited by later editors. However, here this is not the case. The discussion between Rav Ḥisda and Rabbah was indeed wide and complex and included several arguments for each side. It didn't happen on just one occasion but was a continuing debate: אמר ליה: בעאי לאותבך ערל, הזאה, ואזמל, סדין בציצית, וכבשי עצרת, ושופר, שלח ליה רב חסדא לרבה ביד רב אחא בר רב הונא ולולב (see Yevamot, *ibid.*). Therefore it is most reasonable to see our *baraita* as part of the actual discussion between these two scholars.

32 See *supra*, note 31.

33 We find other cases in which there are similar traditions in the Bavli and Yerushalmi, even in regard to anonymous strata which are normally considered a later part of the Talmud. For discussion of this phenomenon see Avishalom Westreich, *Hermeneutics and Developments in the Talmudic Theory of Torts as Reflected in Exceptional Cases of Exemption*, PhD, Ramat Gan: Bar Ilan University, 2007, p. 223 n.5 (hereinafter: Westreich, *Torts*).

34 Yevamot, 110a.

35 See S. Y. Friedman, "Perek Ha-'isha Rabbah Ba-Bavli Betseruf Mavo Kelali Al Derekh Heker Hasugya", *Meḥkarim U-mekorot* 1 (1978), p.301; Westreich, *Torts* (*supra*, note 33), p.52 n.60.

the case of the cancelled get.[36] But Rav Ashi omits the first part of Rabbah's teaching, which bases the authority to annul marriage on the previous consent of the husband (כל דמקדש אדעתא דרבנן מקדש). Instead, he cites a *different reasoning* whose sources are found in the teachings the Amoraim of earlier generations, such as Rav Hama's regarding the improper act of a debtor,[37] or even in tannaitic sources.[38]

The omitted part of Rav Ashi's teaching – the concept of אדעתא דרבנן מקדש – was restored by Rashi:[39]

> וקא אפקעינהו לקידושין מיניה: דכל דמקדש תולה בדעת חכמים הוא דהא כדת משה וישראל קאמרינן ורבנן אמרי דחוטף אשה מבעלה לא ניהוי קידושין.
>
> [The Sages] deprived him of the right of valid betrothal: since every one who betroths does so subject to the consent of the Sages, as we say: "according to the laws of Moshe and Israel" ("*ke-dat Moshe ve-Israel*"). And the Sages said that where one kidnaps a wife from her (intended) husband the betrothal is not valid.

If Rav Ashi had only shortened Rabbah's statement, Rashi's explanation would have been preferred. But Rav Ashi replaced Rabbah's reasoning by a different one. This fact is significant. Its meaning is that according to Rav Ashi, we do not need Rabbah's explanation since we have the alternative reason: הוא עשה שלא כהוגן, לפיכך עשו בו שלא כהוגן. As regards the authority of the Sages, Rav Ashi is close to Rav Ḥisda: the Sages have by definition the authority to annul marriage. In the case of Naresh they decided to use that authority due to the misconduct of the "kidnapper".[40]

One comment should be made here. Following Rav Ashi's ruling, Ravina agrees that when the betrothal was effected by money (*kiddushey kesef*) the Sages could annul it. Nevertheless he wonders how the Sages could annul the betrothal when it was effected by cohabitation (*kiddushey bi'ah*).[41] According to the present analysis, Ravina did not challenge the authority of the Sages to annul cohabitation by betrothal. Rather, he discusses the procedure, and thus the legal construction, by which the Sages annul the betrothal. Since we are dealing here with annulment of the *act* of the betrothal,[42] the act itself should

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36 *Supra*, text to note 31.

37 This concept is used by Rav Ḥama for explaining a verdict of Rava to Rav Papa; see Bavli, Ketubbot 86a.

38 The general idea that a שלא כהוגן act prompts a שלא כהוגן response is found in several sources. See for example Bavli, Yoma 75a. See also Ben Menahem, *Hu 'Asa* (*supra*, note 13), p. 157, who suggests that a dispute between Bet Shammai and Bet Hillel regarding *mi'un* (Yevamot 107a) is the source for that concept. His suggestion is based on a general substantive similarity; Bet Shammai do not in fact use there the language of שלא כהוגן.

39 Yevamot 110a, s.v. *ve-ka*. This view was challenged by Tosafot, since the mere act of betrothal was against the will of the Sages, so how can we say: כל דמקדש אדעתא דרבנן מקדש (see Tosafot, Bava Batra, 48b, s.v. *tenaḥ*. See also Ri in Tosafot, Yevamot 110a, s.v. *lefikhakh*, who leaves this issue without decision). Maharam me-Rothenburg (cited in Mordechay, Kiddushin, 522) explains, according to Rashi, that although he acted here in a rude way, he didn't mean to act against the will of the Sages (חוצפא בעלמא) and therefore we can say כל דמקדש אדעתא דרבנן מקדש. Nevertheless when he did intend to act against the will of the Sages, we cannot say כל דמקדש אדעתא דרבנן מקדש and we cannot annul the marriage. For a different explanation of Rashi's view see Atlas, *Netivim* (*supra*, note 4), pp. 207-209: עיקר תוקפם של הקדושין יסודו בדת משה וישראל, והחכמים הם שקבעו את אופן צורתו ותנאיו של המוסד קדושין, והעושה שלא כהוגן.. אעפ שאינו נוהג על פי דעת החכמים ואינו נשמע לרצונם, אי אפשר לו להחלץ ממרותם של החכמים בתיקון המתכונת ותנאי קיומו של המוסד קדושין). See also Arye Edrei, "Ko'ah Bet Din Ve-dine Nisu'in Ve-gerushin", *Shenaton Ha-mishpat Ha-Ivri* 21 (1998-2000), p. 34 (hereinafter: Edrei, *Ko'ah Bet Din*).

40 This explanation follows Tosafot, *supra* note 39, in that Rav Ashi is based on the authority of the Sages rather than on *kol de-mekadesh 'a-da'ata de-rabanan mekadesh*. Tosafot however do not say that Rav Ashi follows Rav Ḥisda, and the *sugyot* who mention *kol de-mekadesh* are in dispute and follow Rabba. Rather Tosafot harmonize Rav Ashi with the *sugyot* of *kol de-mekadesh* by arguing that even according to Rav Ashi when the betrothal was valid, and the annulment is applied only later, the concept of the authority of the Sages to uproot the words of the Torah is not sufficient and we need *kol de-mekadesh* as a support. As regards the expanded authority of the Sages see also Tosafot, Ketubbot 11a, s.v. *matbilin*, who ascribe this view to Rav Huna as well: in some circumstances a bet din may supply the consent in conversion of a minor, but according to Ri such a conversion is only *mi-derabanan* and not valid *mi-de'orayta*. The converted man may now marry a Jewish woman even though he is a gentile *mi-de'orayta*, since, explain Tosafot, the Sages have the authority to uproot the words of the Torah. The expanded authority of the Sages is suggested also by Rabbi Akiva Eiger (Gittin, 33a, s.v. *ve-'afke'inhu*) as an explanation of the view of Rabbi (!), who agrees to annul the marriage when the husband cancelled the *get* in the absence of any *bet din*, not based on "*kol de-mekadesh*" but rather on "uprooting the words of the Torah" (אין צריך לטעמא דאפקעינהו, אלא דבמקום טעם חשוב יש כח ביד חכמים לעקור דבר מן התורה).

41 For full citation and analysis of Ravina and Rav Ashi's discussion see below, section 2(b).

42 See *supra*, text to note 19.

be defined as an act which does not effect betrothal. There was less difficulty in the case of betrothal by money, since here the annulment could be was understood as due to the authority of the Sages to declare money as ownerless.[43] But in case of betrothal by cohabitation, Ravina challenged Rav Ashi: how (and not by what authority) could the Sages give the act a new meaning which would affect its legal validity?[44] Rav Ashi then answers that this is possible by declaring his cohabitation to be an act of mere promiscuity (see below).

The conclusion of this section is of the greatest importance. Rav Ashi is a later generation Amora, and his decisions are generally accepted. What makes it more decisive in our case is the possibility[45] that it was accepted also by his son, Mar bar Rav Ashi. The implication of the above analysis is therefore that the final talmudic stage significantly expands the authority of the sages as initially suggested by Rav Ḥisda and accepted by the Yerushalmi in its interpretation of the view of Raban Shimon ben Gamliel.[46]

(b) The Character of *Hafka'at Kiddushin*

How does *hafka'ah* work – is it a retroactive annulment of marriage or prospective, i.e. an act terminating the marriage from now on? And what if at all is the role of the *get* in this process?

In all of the above five talmudic cases of *hafka'at kiddushin*, after arguing for the annulment of the marriage, the Bavli cites the following discussion:

אמר ליה רבינא לרב אשי: תינח דקדיש בכספא, קדיש בביאה מאי? שויוה רבנן לבעילתו בעילת זנות.

> Said Ravina to Rav Ashi: [Your explanation is] satisfactory where the man betrothed [her] with money;[47] what [however, can be said where] he betrothed her by cohabitation? The Rabbis have declared his cohabitation to be an act of mere promiscuity.

If the Sages have indeed "declared his cohabitation to be an act of mere promiscuity", the marriage must be retroactively annulled. Prospective annulment of marriage does not require declaring the cohabitation to be *bi'at zenut*, but rather leads to termination of an actual marriage.

However, it is unlikely that this discussion occurred five times. Moreover, one of its occurrences ((b) above) refers according to many textual witnesses[48] to a statement of Mar bar Rav Ashi, who was the son of Rav Ashi — which makes the possibility of an original discussion between earlier Amora'im (his father, Rav Ashi, and Ravina) even less likely.[49] As scholars already indicated, the discussion occurred originally in the case of Naresh, where it follows a statement of Rav Ashi himself. Later, a talmudic redactor added this discussion to all other occurrences of the concept of annulment.[50]

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43 See Rashi, Yevamot, 110a, s.v. *tenah* (and in all the other occurrences of Ravina and Rav Ashi's discussion).

44 See for example Rashi, Yevamot 90b, s.v. kadish (and in slightly different words in the other occurrences): קדיש בביאה: מאי אפקעתא איכא למימר, האי ביאה מאי שויוה? (i.e. when he betroths by cohabitation, what [kind of] annulment can you apply here [lit. can be said], how did they define the cohabitation?).

45 Depending on the exact version of case (b); see *supra*, note 13, and below, note 50.

46 Tosafot try to harmonize Rav Ashi with the view of *kol de-mekadesh 'a-da'ata de-rabanan mekadesh* by contrast with the conclusion of this section. However, even according to their view the result is some expansion of the authority of the Sages to uproot the words of the Torah. See further *supra*, note 40.

47 *Kiddushey Kesef* (money) and *bi'ah* (cohabitation) are two of the forms of betrothal (Mishnah, Kiddushin 1:1). The Sages have the authority to confiscate a man's property (הפקר בית דין הפקר), so they might regard the money given by the husband as a mere gift to the girl.

48 See *supra*, note 13.

49 There were two or three Amoraim named Ravina. Ravina in our case is Rav Ashi's disciple-friend (5th generation and perhaps later, see below). As for the other Ravina, his dates are unclear and disputed amongst scholars (see Albeck, *Mavo* [*supra*, note 29], p. 421; Avinoam Cohen, *Ravina ve-Ḥakhme Doro*, Ramat Gan: Bar Ilan University Press, 2001, pp. 256-261). According to Albeck, the Ravina who had some relations with Mar bar Rav Ashi is a later Ravina, from the 7th generation (see Albeck, *ibid.*, pp. 448-450). According to him, the Ravina of our discussion certainly never met Mar bar Rav Ashi, and couldn't discuss his statement. According to Cohen, *ibid.*, the Ravina of our discussion (the "main" Ravina of the Talmud) died after Rav Ashi and had some relations with 6th and 7th generation Amoraim, including Mar Bar Rav Ashi. However, even according to Cohen it is unlikely in my opinion that Ravina and Rav Ashi had a discussion regarding a statement of Rav Ashi's son, Mar bar Rav Ashi.

50 See Shoḥetman, *Hafka'at Kiddushin* (*supra*, note 3), pp. 354-355; *idem*, "Kiddushin Me-hamat Ones", *Sinai* 105 (1990), p.118-119; David Halivni, *Mekorot U-masorot*, Nashim, Toronto: Otsreinu, 1994, p. 530 n.2 (hereinafter: Halivni, *Mekorot*). I. Franzus argues that the proper version here should be "Rav Ashi" and not "Mar bar Rav Ashi"

We clearly need the explanation of שויוה רבנן לבעילתו בעילת זנות in the first two cases: the annulment is required to invalidate the improper act of betrothal of the "husband". The legal construction here is therefore *hafka'ah* by expropriating the betrothal money or by declaring the cohabitation to be promiscuity (*bi'at zenut*). But for the last three cases ((c) to (e) above) it is not necessarily required.[51] Indeed, the later talmudic redactor did understand *hafka'ah* in this way, and we will discuss his motivations below. Nevertheless other talmudic strata reflect different approaches with several variations, which have not been given enough attention by writers in the past.

In order to examine this issue I would like to return to the case of a messenger of a *get*, which provides us with the earliest source for annulment.[52] According to Rabban Shimon ben Gamliel, the husband cannot cancel a *get* which was already given to an agent to deliver to his wife in the absence of the agent or wife. In his words:[53]

אינו יכול לא לבטלו ולא להוסיף על תנאו שאם כן מה כוח בית דין יפה.

> He (the husband) can neither cancel it nor add any additional conditions, since if so, what becomes of the authority of the bet din?!

This is quite explicit: the husband cannot cancel the *get*, so the *get* is valid. The Sages act here by validating the *get*[54] rather than by actively annulling the marriage. This view seems to be shared also by the Yerushalmi, which merely discusses the cancellation of the *get* and its validation by the Sages.[55]

But the Bavli explains Rabban Shimon ben Gamliel's ruling in a slightly different way:

כל דמקדש אדעתא דרבנן מקדש *ואפקעינהו רבנן לקידושין מיניה*.

> When a man betroths a woman, he does so subject to the will of the Rabbis, and [in this case] *the Rabbis annul his betrothal*.

The judicial act here is not by validating the *get*. The *get* is not valid since it was cancelled by the husband. However the couple are divorced since the *marriage* is annulled.[56]

Why should the Talmud make such a shift in explaining Rabban Shimon ben Gamliel's ruling? As we have argued above, this case is the source of the concept of *hafka'at kiddushin*, and its development is a result of the discussion between Rav Ḥisda and Rabbah.[57] The current shift between validating the *get* and annulling the marriage is part of that dispute: according to the first approach we need to assume that the Sages have the authority to uproot the words of the Torah, as Rav Ḥisda argues. Rabbah therefore explains Rabban Shimon ben Gamliel's ruling as a result of the unique structure of Jewish marriage[58] and thus rejects the view that the Sages can uproot the words of the Torah. Nevertheless, if the authority of the

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(see supportive textual witnesses *supra*, note 13), and the source for the *memra* and the following discussion is this case (the case of the "hanger", Bava Batra 48b); see Israel Franzus, "Od Le-'Kol De-mekadesh 'Ada'ata De-rabanan Mekadesh'", *Sinai* 77 (1975), pp. 91–92. His view was later accepted by Atlas, *Netivim* (*supra*, note 4), p. 242. However, all these scholars agree that the discussion originally occurred in none of the second group of cases ((c) to (e) above). The discussion below is therefore consistent with both approaches.

51 It even creates some interpretative difficulties, see Tosafot, Ketubbot 3a, s.v. *tenah*: Tosafot implicitly ask why we need the explanation of שויוה רבנן לבעילתו בעילת זנות only for betrothal by cohabitation (*kidushey bi'ah*), since it is surely necessary also for betrothal by money (*kidushey kesef*), since after betrothal there would have been some cohabitation which needed to be declared to be promiscuity! (For explanation of this Tosafot see Maharam Shif, *ibid*.)

52 See section 2(a) above.

53 Gittin 33a; Yevamot 90b.

54 This can be done by removing the power of the husband to cancel the messenger.

55 See *supra*, text to notes 24-26. Edrei, *Ko'ah Bet Din* (*supra*, note 39), p.34 n.121, identifies this view as the view of the Yerushalmi, but argues for a different view in the Bavli (which is in fact the second stage of the development of the concept; see below).

56 See Edrei, *ibid.*, pp. 34-35.

57 See *supra*, section 2(a). Yevamot 90b is the source of this dispute. In Gittin 33a Rabbah's view is summarized in the talmudic question: ומי איכא מידי דמדאורייתא בטל גיטא ומשום מה כח בית דין יפה שרינן אשת איש לעלמא?! ("Can it be the case that where a *get* is cancelled according to the Torah we should nevertheless allow a married woman to marry another, (merely) in order to save the authority of the Beth din?"); compare Tosafot, Ketubbot, 3a, s.v. *tenah*; *ibid.*, Bava Batra, 48b, s.v. *tenah* (discussed *supra*, note 40).

58 See note 23 above.

Sages is (only) in relation to the marriage, and not wider (including for instance cancellation of a messenger), we must explain Rabban Shimon ben Gamliel's ruling as annulling the marriage, since these are the limits within which the Sages may act. Fascinatingly, although Rabbah's explanation reduces the authority of the sages, the result (uprooting the whole status of marriage) is conceptually more radical than the previous view (validating an existing *get*). But Rabbah prefers this approach due to the wide and general dispute between him and Rav Ḥisda.

When Rabbah speaks about annulling the marriage there is no reason to interpret it as a retroactive annulment, which is much more drastic both conceptually and practically (declaring cohabitation to be promiscuity; the possible effect on the status of the children,[59] etc.). Normally, expropriation (of property) means that an object in one's possession is prospectively excluded from his possession. Status is no different: the status of marriage is prospectively "excluded" from the couple.[60] But the transfer of Ravina and Rav Ashi's discussion to cases (c)–(e), as described at the beginning of this section, entails our explaining *hafka'ah* as a retroactive annulment.

Interestingly, while the first development in understanding *hafka'ah*, i.e. from validating the *get* to annulling the marriage, is the result of a conceptual process (i.e. the debate between Rav Ḥisda and Rabbah), the second move, from prospective to retroactive annulment, is merely a result of a redactional work. Nevertheless, I assume that it was done with awareness. Transmitting the discussion to a group of cases reflects a quest for harmonization: since a similar concept is mentioned in these few cases, the later talmudic view sought harmony in its meaning and implications. Thus *hafka'ah* became a process which refers to the act of marriage even in the cases of improper divorce. In those cases the meaning of *hafka'ah* thus became retroactive annulment of the marriage.[61]

(c) The Various Talmudic Approaches as Bases for the Later Disputes: Does *Hafka'at Kiddushin* Require a Get?

Within the talmudic text we observe a tension between different approaches. This tension is reflected in the contradictory interpretations of the concept of annulment amongst both later *poskim* and modern scholars.[62] Some *poskin* follow one approach, others take an opposite view, explaining the contradictory parts of the *sugya* by means of several different hermeneutical approaches.[63] While total rejection of other views is common in this kind of debate,[64] the present analysis shows that this would be incorrect.[65]

The different approaches found in the Talmud may be summarised as follows:

(a) The simple meaning of Rabban Shimon ben Gamliel in the *baraita*, adopted by Rav Ḥisda in the Bavli and by the Yerushalmi, is that the Sages validate the [externally flawed] *get*.

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59 I.e. declaring them not to be *mamzerim*, see Tosafot, Gittin 33a, s.v. *ve-'afke'inhu*, and elsewhere.

60 Compare Halivni, *Mekorot* (*supra*, note 50), p. 530, according to whom *hafka'ah* at this stage is retroactive, but there is still a distinction between this stage and the discussion of Ravina and Rav Ashi: here, since annulment is based on the prior consent of the husband (כל דמקדש אדעתא דרבנן מקדש), we do not need the Sages to declare his cohabitation as promiscuity.

61 See Lifshitz, *Afke'inho* (*supra*, note 6), p. 317 n.1; pp. 317-319. The shift between annulling the status of marriage and annulling the marriage act was first made by Rav Ashi who applied Rabbah's concept to the case of Naresh. Yet, he didn't apply it to the previous cases. However, his move made the next step of the talmudic redactor possible: viewing *hafka'ah* in all the five cases in a similar way, and thus understanding it as a retroactive annulment.

62 The dispute continues since the redaction of the Talmud, not only amongst classic commentators but even in modern days, amongst rabbis and dayanim, as well as Jewish Law Researchers. See Riskin vs. Goldberg and Lifshitz vs. Lavi, *supra* note 6; Berkovits vs. Shoḥetman, *supra* note 78.

63 See Westreich, *Torts* (*supra*, note 33), p.122 n.82.

64 Especially when the possibility of practical use of *hafka'ah* is under discussion; see Rabbi Goldberg and Rabbi Lavi, *supra*, note 62.

65 As opposed to Shoḥetman, *Hafka'at Kiddushin* (*supra*, note 3), p. 397. Shoḥetman's conclusion is neither historically nor dogmatically decisive. Historically, it may reflect a specific stratum of the Talmud, but is not unanimous, as I have shown, so that the opposite view cannot be ignored. Dogmatically his view reflects Ri Halavan's approach (see below), but many other Rishonim understand *hafka'ah* as a retroactive act, while both are rooted in the ambiguity of the talmudic text, as shown here. As a matter of fact, from a dogmatic point of view the last talmudic stage, which is rejected by Shoḥetman, is many times more authoritative (Shoḥetman doesn't accept it in our case, following his analysis of Rambam's view regarding coerced marriage, according to which late talmudic strata cannot stand against "*Talmud arukh*": see Shoḥetman, *Ones* [*supra*, note 13], pp. 117-121).

(b) The Talmud, following Rabbah, explains Rabban Shimon ben Gamliel's ruling as annulling the marriage. At this stage the meaning of the annulment is a prospective annulment.
   i. Rav Ashi applied *hafka'ah* where the betrothal was improperly done (at the time of betrothal). As clarified in his discussion with Ravina, *hafka'ah* refers now to the act of betrothal.
   ii. As regard to the authority of the Sages, although Rav Ashi uses the same concept as Rabbah (אפקעינהו רבנן לקידושין מיניה),[66] he accepts Rav Ḥisda's expanded view as to the authority of the Sages.

(c) Finally, as a result of later redactional work, *hafka'at kiddushin* becomes retroactive annulment of the marriage.
   i. The talmudic redactor transferred Ravina and Rav Ashi's discussion to all cases of annulment. The discussion occurred originally in a case of improper betrothal which was annulled by *hafka'ah*. After this redactional transfer, all cases of annulment came to be understood as annulment of the act of betrothal (שויוה רבנן לבעילתו בעילת זנות). For the three cases which discuss annulment long after the time of this act, this means retroactive annulment.

All three approaches are found in the Rishonim and Aḥaronim. While recent debates frequently discuss how *hafka'ah* was interpreted by Rishonim and Aḥaronim, the conceptual distinction between the various views has not always been clearly defined. The following discussion contributes to a more accurate understanding of the approaches amongst classic writers and their basis in the Talmud.

The last view (c) reflects the final talmudic stage, and is therefore the dominant view amongst Rishonim and Aḥaronim.[67] Indeed, some elements vary within writers of this group, as will be shown below. Nevertheless, the basic attitude (i.e. viewing *hafka'ah* as a retroactive annulment of the betrothal, being interpretatively influenced by Ravina and Rav Ashi's discussion) is common to them. Although (c) is the dominant view, we do find some Rishonim who suggest different interpretations for the concept of *hafka'ah*, focusing on other talmudic stages.

Stage (a) is found in Ri Halavan's commentary for *hafka'at kiddushin*: ורבנן בתקנתם העמידו כשרותם מן התורה, i.e.: the Sages in their decree made [the *get*] valid *mi-de'orayta*.[68] He was followed by some scholars, who were influenced in their analysis by that talmudic stage.[69]

This view should be distinguished from the view of Rashbam, followed by some Rishonim.[70] Rashbam argues that in the three talmudic cases the *get* in fact is valid and the marriage is not retroactively annulled, since the husband fears that his marriage may be annulled, and therefore cancels the annulment of the agency (Gittin 33a), forgoes his condition (Ketubbot 3a) or, in the case of a dying person (Gittin 73a), agrees that the *get* should not be annulled even if he recovers. Although according to Rashbam the *get* is valid, in principle Rashbam admits that annulment of marriage is retroactive: if the Sages did have

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66 See *supra*, note 61.

67 See for example Rashi, Gittin 33a, s.v. *tenah* and *shavyuha*; Tosafot, *ibid.*, s.v. *ve-'afke'inhu*; Ramban, Ketubbot, 3a, s.v. *shavyuha* and elsewhere. The Rishonim however were partly influenced by stage (a): see the discussion below on Rashi's commentary and the discussion regarding the demand for a *get* in the process of *hafka'ah*.

68 See *Tosafot Ri Halavan*, London, 1954, Ketubbot 3a, s.v. *kol de-mekadesh*.

69 See Atlas, *Netivim* (*supra*, note 4), pp. 211-214; Shoḥetman, *Hafka'at Kiddushin* (*supra*, note 3), p. 355. This view is found also in *Teshuvut Be-'anshe 'Aven*, 13 (cited by *Mar'e Kohen*, Yevamot, 90b; Atlas, *ibid.*). The interpretative difficulty of this interpretation is in integrating the other parts of the *sugya* with the suggested understanding for *hafka'ah*. An interesting reflection of this difficulty is found in *Teshuvut Be-'anshe 'Aven*, 13, who suggests that we amend the Talmusic text and read: כל ד מ ג ר ש אדעתא דרבנן מגרש ("everyone who *divorce*s [his wife] does it subject to the will of the Sages" [who can prevent him from canceling the *get*]). This suggestion has no basis in any textual witnesses or any of the Rishonim (as correctly mentioned by Atlas, *ibid.*), and of course – as analyzed here – the text should not be amended since it views the *hafka'ah* in quite a different way. By contrast, the simple meaning of כל דמקדש is the basis for *Teshuvut Be-'anshe 'Aven*'s critic, R. Yitzhak Z. Margireten (*Tokef Ha-Talmud*, Ofen: Konigl Ungarischen Universitats Buchdruckerei Print, 3:1; 3:4), who argues that *hafka'ah* must be understood as retroactive annulment (see also *Shitah Mekubetset, Ketubbot* 3a, end of s.v. *ve-'od katav*).

70 See Ramban in the name of Rashbam ("Rabbi Shmuel Ramrogi"; i.e. from Ramerupt), Ketubbot, 3a, s.v. *shavyuha*; *ibid.*, Gittin, 33a, s.v. *kol* (Ramban however seems not to accept this interpretation); Rashba, Ketubbot, 3a, s.v. *kol*; *ibid.*, *Responsa*, 1162 (regarding his view see note 78). See also *Pene Yehushu'a*, Ketubbot, 3a, s.v. *'afke'inhu* and s.v. *kol*.

the need to use *hafka‘ah* (which they do not) it would be applied retroactively. Therefore from a conceptual point of view, Rashbam’s view follows stage (c).

Some Rishonim cited by Ritba in the *Shitah Mekubetset* followed stage (b) in their understanding of the concept of *hafka‘ah*.[71] This interpretation is also discussed by *Ḥatam Sofer*,[72] and I assume that it was also the understanding of Rashi’s teachers.[73] Amongst Jewish Law scholars it was recently suggested by Arye Edrei.[74] It is not clear according to this interpretation why the Sages should declare the cohabitation to be promiscuity.[75]

Based on the analysis of the different talmudic meanings of the concept, we can now understand better the motivation behind some integrated – and more complex – approaches, such as that of Rashi. Thus Rashi on the one hand explains *hafka‘ah* as a retroactive annulment, while on the other still regards a *get* as a necessary element in this process. While Rashi’s view is not completely clear, for our purposes it is sufficient to emphasise the two elements which Rashi integrates together: the *get* on the one hand and the retroactive annulment on the other. One quotation from Rashi sharply reflects this integration:[76] שויוה רבנן להההיא ביאה למפרע על ידי גט זה –, i.e. the retroactive (למפרע) declaration of the cohabitation as promiscuity is effceted by the *get*. His view accordingly is a result of mediation between different views which are found in the talmudic text itself: one which bases *hafka‘ah* on (validation of) the *get*; the other which bases it on retroactive annulment of the act of marriage.[77]

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71 *Shitah Mekubetset*, *Ketubbot* 3a, s.v. *ve-chatav ha-Ritva*, in the name of אית דמתרצי: דכי אמרינן אפקעינהו רבנן לקידושין מיניה לאו משעת קידושין אלא השתא משעת מעשה (“when we say that the Sages annul his betrothal, it does not [apply retroactively] from the time of betrothal but [it applies] now, at time of the act”). The *get* mentioned later in the Ritba (אין הקידושין בטלין כי אם מכאן ואילך ובגט) has a similar meaning according to the view that *hafka‘ah* is a retroactive annulment (discussed earlier by the Ritba): it is an element required for applying *hafka‘ah*, but this doesn’t mean that the Sages validate the *get* (as according to Ri Halavan).

72 *Ḥiddushe Ḥatam Sofer*, Gittin, 33a, s.v. *tenah*.

73 Rashi’s teacher’s view is cited — and strongly rejected — by Rashi in the various *sugyot* of *hafka‘ah*. Rashi indicates that according to his teacher’s (mistaken) understanding the betrothal is prospectively annulled, as opposed to his interpretation, see Rashi, Ketubbot, 3a, s.v. *shavyuha* (על כרחך צריך אתה לפרש כמו שפירשתי שהקידושין נעקרין מעיקרן ולא מכאן ולהבא, i.e. you must interpret that the betrothal is retroactively annulled and not from now on [as his teachers argue]). Rashi’s teacher’s view requires more investigation and is beyond the scope of the current paper.

74 See Edrei, *Ko'ah Bet Din* (supra, note 39), pp. 34-35. Edrei claims that this view is not found in previous writings, Rishonim as well as modern scholars. The sources above show some examples of sources which did discuss this view.

75 See *Ḥatam Sofer*, Gittin, 33a, s.v. *tenah*. Harmonizing all the parts of the *sugya* is quite difficult according to this approach and would apparently (like Ri Halavan’s, above) need to use an historical approach, according to which Ravina and Rav Ashi’s discussion is explained as a transferred part of the *sugya*, and therefore isn’t consistent with its meaning (as argued by all the above writers: *Teshuvut Be-’anshe ‘Aven*, Atlas and Shoḥetman, *supra*, note 69). Nevertheless, a harmonious solution is possible but quite complicated. See the view of Rashi’s teachers, *supra*, note 73, and their explanation of the declaration of the cohabitation as promiscuous, cited by Rashi, Ketubbot, 3a, s.v. *shavyuha* (and more).

76 Rashi, Gittin, 33a, s.v. *shavyuha*.

77 Rashi’s approach is ambiguous, and I assume that this is the interpretative “price” that he is willing to “pay” for integrating contradictory parts of the *sugya*. The exact object of the *get* according to Rashi is still disputed. Rashi mentions the existence of a *get* several times: see Rashi, Ketubbot, 3a: על ידי גט זה, which can be understood as: “[the annulment is effected] by this get”. Rabbi Uriel Lavi seems to understand Rashi in this way, see Lavi, Ha’im (*supra*, note 6), p. 306: בכל המקומות ביאר רש"י שהפקעת הקידושין נעשית על ידי הגט – אע"פ שמעיקר הדין היה פסול, בכל זאת חכמים תקנו להכשירו; וטעם הכשרו הוא הפקעת הקידושין. However, other passages of Rashi indicate that the *get* is (merely) described in the cases in which the Sages enacted *hafka‘ah*, but is not a necessary element in the legal process of *hafka‘ah*: see Rashi, *ibid.*, s.v. ואפקעוה רבנן לקידושין: כשיבא גט זה אחריהם (i.e. the sages annulled the marriage *when* it is followed by such a *get*); see Shoḥetman, Hafka‘at Kiddushin (*supra*, note 3), p.360. Accordingly it is possible to say that Rashi does not refer to a *get* as a necessary condition for applying *hafka‘ah*, but merely says that *hafka‘ah* is applied in such a case. However it can be applied in some other cases as well: see Berkovits, *Tenay* (*supra*, note 3), pp. 133-141; Riskin, *Hafka‘at Kiddushin* (*supra*, note 6, English version), pp. 12-14; pp. 33-34, notes 23-26; *ibid*, pp. 46-47 (a response to Wieder, Rebuttal [*supra*, note 6], pp. 39-40). Nevertheless, following the citation at the beginning of this note, it is hard to say that a *get* doesn’t have any role according to Rashi. On the other hand, Rashi could not be taken as far as is done by Rabbi Lavi. It seems that Rashi sees the *get* as a supportive element for the process of *hafka‘ah*, which is indeed required (see possible reasoning below), but could be replaced by other elements (since the *hafka‘ah* does *not* validate the *get*). Therefore *hafka‘at kiddushin* could be initiated with the “support” of one witness, without any *get*: releasing a wife on the basis of one witness to her husband’s death is, according to Rashi (Shabbat, 145b, s.v. *le-‘edut*), based on *hafka‘at kidushin*.

Indeed, one major implication of the range of conceptual constructions encountered in the Talmud is the question of the necessity of a valid *get* for the process of *hafka'ah*. According to the first stage ((a) above), in order to perform *hafka'ah* there should obviously be a valid *get*, which became invalid only due to external reasons, such as being cancelled by the husband. This I assume is the view of Ri Ha-lavan and his followers.[78] But at the second and third stages ((b) and (c) above), in principle there is no need for a *get* in order to annul the marriage.

Historically the mentioning of a *get* in the various *sugyot* could result from the integration of the different talmudic stages — both the first stage, according to which the *get* is a substantial element in the process of *hafka'ah*, and the later stages, which negate it. Purely historically it was possible to argue that for the second and third approaches the *get* was not necessary at all. Some Rishonim held this view, as explicitly stated by Me'iri.[79]

However, from a classical dogmatic point of view, all parts of the *sugya* are meaningful, even if different in their origin. Thus, the main challenge becomes integrating the different meanings of the talmudic text into one harmonious approach. Since a *get* is mentioned in all of the talmudic cases of *hafka'ah*, many writers deduced that a *get* is always needed for the process of *hafka'ah*.[80]

Thus many commentators, even though following the second or third stage in their interpretation of the concept of *hafka'ah*, claimed that a *get* is a necessary element in this process. Nevertheless, *hafka'ah* does not mean that the *get* is validated. So, by contrast to the first approach, a *get* according to the present analysis is not an essential element of *hafka'ah* itself. It may be necessary, but this is due to external reasons, for example prevention of a "slippery slope" in the use of *hafka'ah*[81] or creation of a similarity between *hafka'ah* and the normal halakhic way of terminating marriage.[82] Accordingly, we would not necessarily demand a proper *get*, which was merely externally flawed (i.e. due to cancellation, an unexpected event in case of conditional divorce, etc.) in order to apply *hafka'ah*. On the contrary, every גט כל דהו[83] can fulfil those objectives, and it could even be replaced by other halakhic devices. Therefore, according to both Rashba and Rashi,[84] *hafka'ah* is applied when one witness testifies to the husband's death: the additional required element for *hafka'ah*, which normally means a *get*, is replaced here by one witness.[85] Had *hafka'ah* been conceived as a means of validating an externally invalid *get*, this would not have been possible.

In modern discussions, *hafka'at kiddushin* is often suggested to be assisted by other means of terminating the marriage, as described in the epilogue that follows. Thus, the above discussion becomes significant for practice: do these means fulfil the demand for an additional supportive element in the process of *hafka'ah*?

4. Epilogue

Can *hafka'ah* be applied today?

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78 As regards Rashba, Berkovits and Shoḥetman dispute whether he held the view that *hafka'ah* is effected *by* the *get* (Shoḥetman, *ibid.*, pp. 359-360), or rather is used in cases *when* a *get* exists (Berkovits, *ibid.*, pp. 123-133).

79 See Me'iri, *Ketubbot* 3a, s.v. *kol she-'amru*. Berkovits (*supra*, note 78) argues that the mention of a *get* by other Rishonim (Rashi and Rashba) is not essential to the process of *hafka'ah*, but rather contingent, i.e. a descriptive element of the cases in which *hafka'ah* was applied, while it can be applied in other cases as well.

80 Rashi according to some; Ri Migash; Ramban and his disciples: Ra'ah and Rashba, and more.

81 The fear of the "slippery slope" is described in *Shut Mishpetey Uzi'el*, Part 2, *Even Ha-'ezer*, 87.

82 This might be the reasoning of the view that explains the demand for a *get* by the mere fact that the marriage was properly effected, see for example Ra'ah (*Shita Mekubetset*, Ketubbot 3a, s.v. *ve-chen katav ha-Ra'ah*): אבל היכא דמקדשא ברצון חכמים אי אפשר להוציאה בלא גט (for the term לגט זה שהוא כשר used by Ramban in this context, see Lifshitz, *Afke'inho* [*supra*, note 6], p.320). I assume that this view is also the rationale of the argument that after *hafka'ah* the couple is still bound by rabbinical marriage, and this is the formal reason for a *get*. See Rav Ovadya Yosef, *"Kol Ha-mekadesh 'Ada'ata De-rabanan Mekadesh Ve-'afke'inhu Rabanan Le-kidushin Mine*", *Torah She-be'al Peh* 3 (5761), pp 100-101 (hereinafter: R. Yosef, *Kol Ha-mekadesh*).

83 I.e. any *get* [is sufficient for applying *hafka'ah*], see Ri Migash, cited in Me'iri, *Ketubbot* 3a, s.v. *kol she-'amru*, as "Ge'one Sefarad". Similar is Rashba's term: סרך גיטא, See Rashba, Ketubbot, 3a, s.v. *kol demekadesh*.

84 See Rashba, *ibid.* Rashi, Shabbat, 145b, s.v. *le-'edut*. Rashi's view here contributes to the uncertainty about the exact meaning of his approach regarding *hafka'ah*. See *supra*, note 77.

85 See Berkovits, *Tenay* (*supra*, note 3), pp. 127-139 (discussing Rashi and Rashba's views).

As already mentioned, this question has been repeatedly debated amongst writers in the last decades. The present paper contributes to the discussion by revealing the basis for the contradictory approaches as residing within the talmudic texts themselves. Indeed, the origin of the concept was quite limited in its application (stage (a) above), but was expanded in a process of several steps which culminated at a late talmudic stage. As regards the authority of the sages, late Amoraic generations re-enforce their authority to annul marriages which are valid according to the Torah.

In practice, however, *hafka'ah* was hardly used. Halakhic sources deal extensively with *hafka'ah* in cases of improper betrothal, such as fraud or betrothal in breach of requirements of *takkanot hakahal,* etc. While the main halakhic writers rejected the practical use of *hafka'ah*,[86] some did accept it, at least where other considerations were involved.[87]

The question now arises as to whether we can take *hafka'ah* a step further, and apply it also long after the marriage took place. Indeed, this application is much more radical and much harder to use in practice. It is also doubtful whether it was ever used in practice at all.[88] Nevertheless, some classic writers have mentioned retroactive *hafka'ah* as a supportive argument for problematic rulings.[89]

This latter approach, which accepts in principle a wide use for *hafka'ah*, appears to be a potential way for using *hafka'ah* in the quest for a remedy to the problem of *agunot*. Yet many writers demand that its practical use not be on its own but rather with some support, though not necessarily that of an "externally flawed" *get*. *Hafka'ah* therefore could be accompanied by different (but still otherwise halakhically problematic) forms of termination of marriage. It could serve as a complement to a compelled *get*, making the latter a (permitted) form of coercion.[90] We may suggest that annulment may also be accompanied by other forms of termination of marriage, such as conditional marriage or *kiddushei ta'ut.* However, as in many other issues, *hafka'ah* still awaits the proper halakhic authority for its application in practice.

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86 See *Rema*, *Even Ha-'ezer*, 28:21, who negates the practical use of *hafka'ah* (אפילו הכי יש להחמיר לענין מעשה).

87 See the famous case of the Egyptian enactment, 1901, Freiman, *Seder Kiddushin* (*supra*, note 3), pp. 338-344.

88 See Westreich, Terminative Conditions (*supra*, note 20), section 3.

89 The most famous examples are Rosh regarding the Gaonic *moredet* (Shut Ha-Rosh, 43:8; see Westreich, *ibid.*); Ran regarding *teme'ah 'ani* (Nedarim 90b, s.v. *ve-'ika*) and Rema regarding the Austrian pogroms (*Darkhe Moshe, Even Ha-'ezer*, 7:13).

90 As Rosh argues, see above. In some cases Rosh supports coercion on this basis even in practice, although he usually rejected the Gaonic view which enacted coercion: see Shut HaRosh, 35: 2 (Westreich, Terminative Conditions [*supra*, note 20], section 3). On the issue of *hafka'at kiddushin* as a support for a coerced *get* see Rav Ovadya Yosef, *Kol Ha-mekadesh* (*supra*, note 82), pp. 96-103.