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'Umdena as a Ground for Marriage Annulment: Between Mistaken Transaction (*Kidushey Ta'ut*) and Terminative Condition

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A. Introduction

Retroactive cancellation of marriage due to a mistake in its creation (*kidushey ta'ut*) has been increasingly discussed since the Talmudic era up to our days, and prompts deep halakhic and meta-halakhic disputes. The use of terminative conditions as a possible solution to the *agunah* problem is no less discussed and no less accompanied by halakhic and meta-halakhic debate, sometimes quite emotional. Both remedies seek to render the marriage void retroactively, but with an important difference between them. Whereas retroactive cancellation due to a mistake is based on a fact which existed at the time of the marriage, a terminative condition (in our context) is based on an event which will occur only later.

In the Babylonian Talmud we find a case which is introduced (as *hava amina* only, although later *poskim* applied it in practice in some circumstances) as a possible case for retroactive cancellation of marriage. In that case a new circumstance which did not exist at the time of the marriage is the reason for voiding the marriage, and this ruling is justified by a legal presumption: had she known that this circumstance would develop she would never have married her husband (״אדעתא דהכי לא קדשה נפשה״, literally: on this assumption she did not get married).[1] Such a case is defined in the rabbinic literature as a case of *'umdena* (literally: assessment).

'Umdena is a concept commonly used by halakhic writers to fill gaps in a wide range of halakhic fields: civil law (*dine mamonot*), criminal law (including *dine nefashot*), family law etc.[2] It can be applied as an assumption of factual events or as an assessment of the intentions of the parties. By applying *'umdena*, a variety of legal constructions becomes applicable, according to the nature of each case. Thus, *'umdena* can replace the actual evidence, *'umdena* can be the ground for validating constitutive acts and so on.[3]

In our case the object of the *'umdena* is to reveal retroactively the intention of the wife at the time of the marriage. But exactly which legal construction is created by applying the *'umdena*?[4] Suppose we do accept the assessment (*'umdena*) that "on this assumption she did

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1 Bava Kamma, 110b – 111a; see below, section C1.

2 See **Talmudic Encyclopaedia**, vol. 1, eds. R. S.Y. Zevin and R. M. Berlin, Jerusalem: the Talmudic Encyclopaedia Press and Mossad Ha-Rav Kook, 1973, entry "*'umdena*", pp. 295-302 (hereinafter: Talmudic Encyclopaedia).

3 See Yehoshu'a Ben Me'ir, "Re'aya Nesibatit Ba-mishpat Ha-Ivri", **Dine Israel**, 18 (1995-1996), pp. 95-108, regarding *'umdena* in betrothal and divorce. Ben Me'ir's research (following H.S. Hefetz) focuses on *'umdena* in the law of evidence, which is beyond the subject of this paper and therefore has a limited contribution to the current discussion (see next note).

4 It should be emphasized that the current paper does not seek to analyze *'umdena* as a general concept, as is done in some researches (see supra, notes 2-3). The object of the current paper is the study of a specific *'umdena*:

not get married", does it mean that we assume the presence of an implied condition which retroactively annuls the marriage?[5] Or might the *'umdena* reflect the occurrence of a mistaken transaction: the marriage was initially based on a mistake and therefore has never taken place? We deal here with a future event which was not in existence at the time of the marriage, therefore *a priori* there was no mistake in the creation of the marriage. So is the *'umdena* some kind of implicit condition? On the other hand, the Talmudic presumption quoted above is described as generating a mistaken transaction. So can we analyse the legal situation in such a way as to define the case as one of *kidushey ta'ut* even though it applies to an occurrence which at the time of the marriage was no more than a possibility?

We find in halakhic literature three conceptual understandings of the discussed *'umdena*: an implicit condition, a mistaken transaction, and, very surprisingly, an integration of both these notions. This paper explores each approach at length, and discusses the main halakhic writings which adopted each view. One responsum will be examined separately in the final section of the paper: a responsum of Rabbi Moshe Feinstein, who makes a unique and in my view brilliant use of the integrated approach to *'umdena*.

This paper focuses on the three conceptual understandings of the *'umdena* of "*'ada'ata de-hachi lo kidsha nafsha*". It is therefore a dogmatic analysis rather than an historical one. The object of the examination is to explore the meanings of the three concepts within the halakhic literature and not to discuss the place and time of each one's creation and evolution. The rabbinical sources cited are therefore those which clarify these notions and hence can contribute to a conceptual understanding of them, thus the presentation does not necessarily accord with their chronological order and historical importance.

A further preliminary remark. Classic *Kiddushei Ta'ut* and the use of *tenay* have been extensively discussed in past researches[6] and this paper does not seek to repeat well known conclusions. The focus here will therefore be the case of *'umdena*, which as yet lacks any full conceptual clarification. Nevertheless, *'umdena* in our context in many of its aspects is found both on the borderline between *Kiddushei Ta'ut* and the use of *tenay*, and to some extent within both of them. Therefore, analysis of its conceptual meaning may shed new light also on *ta'ut* and *tenay* themselves, both in regard to their meaning and their use in the practical *halakhah*.

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ada'ata de-hachi lo kidsha nafsha (and similar cases in other fields of the halakhah). However, the discussion has broad implications for the study of marriage and divorce in Jewish Law.

[5] Berachyahu Lifshitz argues that the Palestinian tradition as reflected in the Tosefta and the Yerushalmi, and which was adopted by Rambam and the Geonim, distinguishes between two kinds of conditions: conditions of the type "if" (תנאי "אם") and conditions of the type "in order that" (תנאי "על מנת"). The legal function of the two is different: "if" means that the legal validation of the action is not completed until the condition is fulfilled (for example: the couple is not fully considered married), whereas "in order that" means that the action is legally valid from its beginning (the couple is absolutely married), but if the condition is not fulfilled, the action is retroactively annulled (see Berachyahu Lifshitz, **Asmachta**, Jerusalem: Magnes, 1988, pp. 140-148 [hereinafter: Lifshitz, Asmachta], and see *ibid*, chap. 2, for more implications of the distinction. For the linguistic meaning of "על מנת" see *ibid*, pp. 162-169). Accordingly, our case is similar to a case of the type "in order that" (על מנת): the marriage was fully valid, but there is an implied condition (condition subsequent) that a later event can retroactively annul it.

[6] For kidushey ta'ut see for example Michael J. Broyde, **Marriage, Divorce and the Abandoned Wife in Jewish Law**, Hoboken, NJ: Ktav, 2001, pp. 89-102 (hereinafter: Broyde, Marriage); Aviad HaCohen, **The Tears of The Oppressed, An Examination of the Agunah Problem: Background and Halachic Sources, New Jersey: Ktav, 2004** (hereinafter: HaCohen, Oppressed). For terminative conditions, see Eli'ezer Berkovits, **Tenai Be-Nissu'in Uv-Get**, Jerusalem: Mossad Ha-Rav Kook, 1966 (hereinafter: Berkovits, Tenay); Yehudah Abel, "The Plight of the *'Agunah* and Conditional Marriage", **Working Papers of the Agunah Research Unit**, 2006, http://www.mucjs.org/MELILAH/2005/1.pdf, pp. 1-41 (hereinafter: Abel, Conditional Marriage).

B. Mistaken Transaction and Terminative Conditions

Marriage in Jewish law is a private contract. It requires the consent of both spouses and without such consent there is no marriage. Consent here means informed consent: when consent is based on misleading facts, there is no real consent and thus no marriage.[7]

This is the core of the notion of *kidushey ta'ut*. More specifically, according to many halakhic authorities,[8] when a marriage is based on an error which existed at the time of the marriage, and one spouse – for present purposes, the wife[9] – was unaware of it, the marriage is void *ab initio*, and is regarded as if it had never been valid. From a conceptual viewpoint, the basis for *kidushey ta'ut* is the same as for any other commercial transaction. When the transaction is based on a mistake there is a fatal error in the creation of the contract, and it is void from its beginning. In this case the transaction is considered as if it had never taken place (*ab initio*).

The concept of conditional marriage is different. It should be made clear first that I refer here to a condition in regard to a future event (conditions subsequent), the occurrence (or non-occurrence, if the condition is formulated in a negative manner) of which retroactively voids the marriage, which originally was valid.[10] There is another kind of a condition: a condition in regard to facts at the time of the marriage (conditions precedent), which is a branch of the concept of mistaken transaction, for example:[11] "המקדש את האשה על מנת שאין עליה נדרים, ונמצאו עליה נדרים" (one who betroths a woman under a condition that she is not subject to vows [i.e.: she hasn't made in the past any vows which she at present is still committed to], and she was found to be subject to vows). Although in both cases the idiom "על מנת" is used, its meaning is different: one makes the transaction subject to the occurrence of the future event while the other refers to a present situation.[12] The latter type of condition, as in the case of "she is not subject to vows", is an integral component of the transaction. Breaking it means that there was a mistake in the creation of the transaction, which in our context is *kidushey ta'ut*.[13] In addition to the conceptual distinction between these two kinds of conditions there are implications for practice. For example, the fear of forgoing the condition between *kiddushin* and *nisu'in*, according to some writers cited by Berkovits, is relevant only in a condition

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7 See Broyde, *supra*, note 6. See also ibid, pp. 33-35 (implications of private law model of marriage).

8 See David Bass, "Hatarat Nisu'in Be-Ta'anat Mekah Ta'ut", **Tehumin** 24 (5764), pp. 201-217 (hereinafter: Bass, Mekah Ta'ut). Some *poskim* reject it due to various considerations: some because of halakhic policy, others because of a broad adoption of Resh Lakish's presumption of *tav le-metav*, see Bass, ibid, pp. 195-201, and see the discussion regarding Resh Lakish, below, text to notes 21-23.

9 In principle these claims are relevant to both spouses. However, according to some *poskim* it is harder to apply to the husband since he has the option of unilateral divorce without paying a *ketubbah*, an option which does not exist for the wife. Therefore the claim of *mekah ta'ut* was more easily applied in her favour: see Noda Bihuda, Mahadura Tinyana, Even Ha-ezer, 80 (last paragraph of the responsum). See also Matityahu Broyde, "Kidushey Ta'ut Bi-zmanenu, **Tehumin** 22 (5762), p. 214 and p. 215 note 24, who ascribes this view to Rabbi Haim Ozer Grodzenski and Rabbi Moshe Feinstein.

10 See supra, note 5, and see further below.

11 Bavli, Ketubbot, 72b-75a.

12 Lifshitz, Asmachta (supra, note 5), pp. 166-167 points out that "על מנת" has several meanings. In a way slightly different to that presented here, Lifshitz distinguishes between cases in which "על מנת" means an *obligation* to do (or not to do) any act ("על אמונת"), and "על מנת" that refers to an agreement that the transaction depends on an objective situation in the present or in the future ("על דעת כך").

13 Therefore the term *ta'ut* is widely used in the Talmud and by Talmudic commentators in this context, see Ketubbot, 73b ("טעות"), and Rif, Ketubbot, 34a: "קידושי טעות". This is also the meaning of *kidushey ta'ut* in Rav Yehuda *amar* Shemuel *mi-shum* Rabbi Yishma'el: "זו שקידושיה קידושי טעות", see ibid, and Rashi, Ketubbot, 51b, s.v. קידושי טעות: "על תנאי, ולא נתקיים התנאי".

which refers to the present status of the wife and not to a condition which refers to a future event.[14]

In our case, the case of conditional marriage, the marriage was created properly. Both spouses were aware of every important fact and fully agreed to the marriage. The marriage is therefore halakhically valid. However, the spouses made a condition which may lead to cancellation of the marriage. The continuing validity of the marriage therefore depends on that condition, even after the marriage took place. This kind of condition may be defined as a "terminative condition". Indeed, not all of the conditions regarding a future event necessarily lead, when broken, to cancellation of the marriage. There are conditions which include an agreement on acts to be done or not to be done, but do not involve the validity of the marriage.[15] We will deal with such conditions later on, when discussing some unique approaches to *'umdena*.[16] However, for the conceptual basis of our discussion and in particular for comparison of the concepts of *kidushey ta'ut, tenay* and *'umdena*, we focus on terminative conditions.

According to such conditions, if some event, act or any other requirement does or does not occur, it will retrospectively terminate the marriage. The last century witnessed great debates, generated by a variety of halakhic problems and halakhic policy, as to whether conditional marriage could be entered into *le-ma'ase*.[17] However, the conceptual basis of conditional marriage was generally accepted, at least *la-halakah*, and we shall focus on this dimension, while not taking into account for the moment the problems of its concrete application. The latter question is mainly one of authority: are the *poskim* of our days allowed to adopt such a solution despite its possible problems?

The basic difference between a conditional marriage and a mistaken marriage is that the former was originally valid while the latter was not. In a conditional marriage, the transaction was completed and both sides agreed on its content. Only later did the conditioned event cause a *post factum* cancellation of the marriage. In *kidushey ta'ut*, on the other hand, there never was a marriage, neither in the present nor in the past, even at the time of its apparent creation.[18]

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[14] See Abel, Conditional Marriage (supra, note 6), p. 16. According to this view, *eyn tenai be-nisu'in* is a descriptive statement: people usually make conditions which refer only to the *kiddushin*, and will be resolved (as in the case of vows) before the *nisu'in*, see Tosafot, Ketubbot, 73a, s.v. לא.

[15] Those conditions are mainly monetary, dealing with *ketubbah*, alimony etc. Some Prenuptial Agreements are based on such conditions, for example: if the husband refuses to give a *get* to his wife, he will pay a large sum of alimony. We may include in this kind of condition even the monogamy condition (תניית "המונוגמיה"), which sometimes includes *inter alia* an agreement for a coerced *get* when the husband takes another wife: see Elimelech Westreich, **Temurot Be-ma'amad Ha-'isha Ba-mishpat Ha-'Ivri**, Jerusalem: Magnes, 2002, pp. 26-28.

[16] See section C, text to notes 38-41.

[17] See Abel, Conditional Marriage (supra, note 6), pp. 10-14; 23-25 (this objection is defined by Rabbi Abel as "halakhic argument", but it is in fact one of halakhic policy) and elsewhere. Two halakhic scholars recently published a set of articles which aimed to reject any use of conditional marriage: see Zvi Gertner and Bezalel Karlinski, "En Tenay Be-nisu'in: Ha-ma'avak 'al Kedushat Ha-yihus Be-Israel", **Yeshurun** 8 (5761), pp. 678-705; **Yeshurun** 9 (5761), pp. 669-704; **Yeshurun** 10 (5762), pp. 711-750. These articles emphasize the fact that the main arguments are of halakhic policy, while substantive issues are hardly mentioned, and most can be halakhically solved. See for example the writers' objection to Rabbi Berkovits's suggestion, a suggestion which was supported in principle by Rabbi Y.Y. Weinberg. Their objection is total, no matter which halakhic basis may be found for it (see the final conclusion at the third and last article, s.v. בירורם של דברים).

[18] One possible practical implication of defining a case as a condition rather than a *ta'ut* is that it may lead to some formal halakhic requirements, to which conditions are subjected (see Me'il Zedaka, 2, p. 4b, end of s.v. והנה). However, this is not a necessary conclusion, as shown by Acharonim who define *'umdena* as a condition (see below), but ignore these formal requirements: see for example Bet Ha-Levi, 3, regarding *'umdena de-muchah*; Talmudic Encyclopaedia (supra, note 2, entry "'umdena"), pp. 296-297.

C. *'Ada'ata De-hachi Lo Kidsha Nafsha* (*'Umdena*)

1. *'Umdena – Ta'ut* or *Tenay*?

What is the *'umdena* of *'ada'ata de-hachi lo kidsha nafsha*? Its definition is much more complicated than the two other concepts, and largely disputed by Rishonim and Acharonim. We turn now to its analysis.

We find this *'umdena* in a well known Talmudic source (Bavli, Bava Kamma, 110b–111a). The *sugya* deals with a few different transactions: sanctifying a beast for an offering, marriage (or betrothal, according to Tosafot) etc.[19] In each one of the cases here discussed a later event occurs, and we are to assume that if this occurrence had been known at the time of the transaction, the transaction would have not been taken place. The term that is used here is "דאדעתא דהכי לא...", i.e. on this assumption (the assumption that such kind of occurrence would take place) he or she would not have entered into the transaction. As to marriage, the concept is discussed with reference to the case of a levir who is *mukeh shehin*, i.e. has a severe disease of boils (or: leprosy[20]):

> אלא מעתה, יבמה שנפלה לפני מוכה שחין תיפוק בלא חליצה, דאדעתא דהכי לא קדשה עצמה!
>
> But still, according to your argument why should a deceased brother's wife on becoming bound to one affected with leprosy not be released [even] without the act of *halitsah*, for surely she would not have consented to betroth herself upon this understanding?

The assumption: "אדעתא דהכי לא..." is a legal presumption – one that claims to discover the implicit thoughts which were part of the transaction. In Rabbinic literature this presumption is defined as *'umdena*.[21]

Before exploring the meaning of *'umdena*, one comment should be made. The *sugya* rejects the wife's claim by citing Resh Lakish:

> התם אנן סהדי דמינח ניחא לה בכל דהו, כריש לקיש, דאמר ר"ל: טב למיתב טן דו מלמיתב ארמלו.
>
> In that case we all can bear witness that she was quite prepared to accept any situation, as we learn from Resh Lakish; for Resh Lakish said: it is better [for a woman] to dwell as two than to dwell in widowhood.

Resh Lakish presumes that a woman always prefers to be married, and thus can never claim "אדעתא דהכי לא...". However, a long list of Rishonim and Acharonim[22] argue that this presumption is not always applicable, and that there are cases where women do prefer to remain unmarried. In such cases it is legitimate therefore to claim "אדעתא דהכי לא...".[23]

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19 These cases are not the classic mutual contracts; see below, the discussion on Tosafot, text to notes 50-53.

20 *Mukeh shehin* literally means afflicted with boils, and probably refers to a kind of leprosy.

21 The term is common in the *Acharonim* who discuss the conceptual basis for this Talmudic *sugya* (Bet Halevi, R. Shim'on Shkop and others, see below), but it is also found in earlier sources: see Rosh, Ketubbot, 9, with regard to the *sugya* of Ketubbot 47b, who defines the approach which accepts the claim of "שלא כתב לה אלא על מנת לכונסה" (Hebrew equivalent to "אדעתא דהכי לא...") as: "אזיל... בתר אומדנא".

22 See Broyde, Marriage (supra, note 6), pp. 98-100 and pp. 175-176 note 62; HaCohen, Oppressed (supra, note 6), pp. 45-92. The specific arguments are beyond the subject of this paper.

23 One of the well known opponents of the (wide?) use of "אדעתא דהכי לא..." in practice is Rabbi J.B. Soloveitchik, who suggests an ontological understanding of Resh Lakish's presumption, according to which it is not subject to sociological or psychological changes, and cannot be disregarded: see J.D. Bleich, "Survey of Recent Halakhic Literature: Kiddushei Ta'ut: Annulment as a Solution to the Agunah Problem", **Tradition** 33 (1998), pp. 106-107; and note 28 at pp. 124-125 (hereinafter: Bleich, Kiddushey Ta'ut). Broyde, Marriage (supra, note 6),

Nevertheless, it is difficult to propose a conceptual definition of the *'umdena*. On the one hand, *'umdena* refers to the moment of the transaction (for our purposes: marriage) by arguing that if the event or the changed fact – although occurring in the future – had been known at that moment, the spouse would never have agreed to the marriage. From this aspect *'umdena* is a kind of *kidushey ta'ut*.[24] On the other hand, the fact that we deal here with a future event brings the notion near to the concept of condition, i.e.: the marriage is valid, but a future occurrence changes its status retroactively, based on an implicit stipulation of the couple at the time of marriage. In other words, we need to ask whether *'umdena* is a kind of *kidushey ta'ut*, according to which we assume that the marriage was based on a mistake (albeit one which occurred only later) and therefore was never validly created, or whether the marriage was indeed validly create, but with an implicit (presumed) condition, which (when broken) invalidated it *post factum*.

My impression is that many writers – maybe most – define the *'umdena* of our case as an implicit condition,[25] even though there are some who define it as a mistake, and in our case: *kidushey ta'ut*.[26] Alongside these two groups we also find an integrated concept, a very important view which will be discussed at length below.

A clear conceptual discussion is offered by Rabbi Shim'on Shkop in his *Sha'are Yosher*,[27] where the two possible analyses of *'umdena* are clearly evident throughout his discussion. What makes his analysis of great importance for our discussion is the fact that Rabbi Shkop applies his conceptual arguments to our *sugya*, i.e. to the claim "אדעתא דהכי לא קדשה עצמה" in the case of a leprous levir.

Rabbi Shkop criticizes the view that identifies *'umdena* as a mistaken transaction, ascribing it to Maharit El-Gazi. Maharit deals with a mistaken donation of a firstborn beast (*bekhor behema tehora*) to a priest (*kohen*), in a case which the owner was not obliged to give his firstborn to the priest. He then compares this case to *'umdena* regarding a future event:

> וכן בשוכר את הספינה וטבעה לו בחצי הדרך... גם כן אדעתא דהכי לא נתן !
>
> The same is when a person rents a boat and it (the boat) sinks in the middle of the journey (i.e. during its rental)… [Here] also he did not give [the payment] on this presumption [that it would sink].

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p.174 n.55, argues on the basis of a complex of halakhic sources that total rejection of "אדעתא דהכי לא..." cannot be accepted and that even Rabbi Soloveitchik would agree with this. His view is therefore "limited to opposing the wholesale abandonment of the principle [=of Resh Lakish] rather than merely asserting that it did not apply in any given case or set of cases" (Broyde, ibid). In any case, according to Broyde, many poskim (see above, note 22) do view this presumption as subjected to socio-cultural changes (see also the analysis of Rabbi Y.E. Spector's and Rabbi M. Feinstein's view in regard to Resh Lakish's presumption: R. Halperin-Kaddari, "Tav Lemeitav Tan Du Mi-Lemeitav Armalu: An Analysis of the Presumption", **Edah** 4 (2002), pp. 21-24 [hereinafter: Halperin-Kadari, Tav Lemeitav]). It is noteworthy that Broyde has a similar argument in regard to Rabbi Yosef E. Henkin (i.e. interpreting Rabbi Henkin's objection of kidushey ta'ut in a limited way and not as an objection on principle), an argument which was rejected by Bass; see Bass, Mekah Ta'ut (supra, note 8), p 197 n. 12.

[24] See Shut Shoel U-meshiv, *Mahadura Kamma*, 1:197: "ובאמת שסברת הש"ס היא דאף דמתחלה לא עלה על דעתה שתפול לפני יבם, מכל מקום כל שכבר נפלה לפני יבם מוכה שחין נימא שאדעתא דהכי לא קדשה נפשה ותהיה קידושי טעות למפרע". Further sources which adopt this view are cited below.

[25] This seems to be a widespread view regarding *'umdena* in cases similar to our case in various fields of the halakhah. See for example Shut Ha-Rosh, 34:1 (below, note 36). See further Talmudic Encyclopaedia (supra, note 2, entry "'umdena"), pp.295-302, according to which *'umdena* is an implicit alternative to an explicit condition (different kinds of *'umdena* are discussed in the Talmudic Encyclopaedia, and the relevant one for our discussion is the '*umdena* which is an assessment of the intention of the actor; see supra, text to notes 2-3); see especially ibid, pp. 296-297, section c ("אומדנא בגילוי דעת בממונות"). A clear definition is found in Rabbenu Yeruham, **Sefer Mesharim**, Netiv 9, 1 (see also Rosh, ibid, on the name of Ri): "ג' חלוקים בתנאים: יש דברים שהדעת מכר כל כך דאזלינן בתר אומדנא דדעתא ולא בעינן גלוי דעתא... ויש דברים שצריכין גלוי דעתא... אבל בכל מילי דבעינן תנאי בעינן תנאי כפול..." (There are three types of conditions: (a) there are situations where the intention [of the participants] is so obvious that we follow our assessment [='*umdena*] thereof, and we do not require any other indication [*giluy da'ata*]... (b) and there are situations where an additional indication is required... (c) but in all [other] cases, an [explicit] condition is required, [and] it must be doubled [etc.]).

[26] See below.

[27] Sha'are Yosher, 5:18, pp. 68-70.

In the last case we will not accept the claim that he didn't pay in order to use it only for half a journey (״אדעתא דהכי לא נתן״). This case is the basis for Maharit's argument that one cannot claim for a mistaken giving of a firstborn to a *kohen*.[28]

However, the mistake regarding the firstborn takes place at the time of its being given, and therefore it is a pure *mekah ta'ut*, so how can it be compared to a sunken boat? Rabbi Shimon Shkop thus deduced that Maharit identifies *'umdena* as a mistaken transaction, and does not make a distinction between a mistake in regard to an existing fact and a mistake in regard to a future one. But R. Shimon rejects this view. According to him, the case of the firstborn is a mistaken transaction, in which the transaction was based on an error[29] and is cancelled *ab initio*, while the sinking boat cannot be regarded as a mistake, of which one was unaware, since there was no error at the moment of the transaction (״שאי אפשר לדעת העתידות״, i.e.: it is impossible to know the future). *Umdena* can therefore only be regarded as an implicit condition.[30]

R. Shimon applies the distinction between *'umdena* and mistaken transaction to marriage:

> דהנה, מה שאמרו בגמרא לדון ביבמה שנפלה לפני מוכה שחין שתיפוק בלי חליצה, דאדעתא דהכי לא קדשה נפשה, בעל כרחך אין הכוונה דאיגלאי מילתא למפרע שהיה טעות בקידושין, דאיך שייך לומר דמעיקרא היה טעות, אלא שהדין שהיה תלוי ועומד כעין קידושין על תנאי.
>
> Regarding that which is stated in the Talmud where it is proposed that a *yevamah* who found herself bound to a leprous levir should be free without *halitsah*, because on this assumption she did not get married, it is not possible to explain that it means that it becomes retrospectively clarified that there was an error in the marriage, for how is it possible to say that there was an original error?! What it means is that the [marriage] was in suspense, as if it had been a conditional marriage.

R. Shimon's argument seems to be convincing: one cannot claim that there was a mistake at the time of the marriage due to a fact not then in existence. Nevertheless, there are a number of authorities who take the opposite view and define *'umdena* as a mistaken transaction.[31] The most explicit is Shut Me'il Zedaka.[32] Discussing the case of a levir,[33] he writes:

> אבל הנראה לי דגם המקשה לא הקשה דתיפוק בלי חליצה להיות כאלו התנה, אלא דהוי ליה כעין מקח טעות וקידושי טעות, כאלו אמר לה על מנת שאני כהן ונמצא לוי.
>
> It seems to me that the questioner [in the Talmud] also did not mean to ask whether she should go free without *halitsah* because it is considered as if there had been a condition [in the marriage]. What he meant was that it was like a mistaken transaction, a marriage in error, like when he says to her "[I marry you] on the understanding that I am a *Kohen*" and he was found to be a Levi.

Thus, disregarding the fact that the significant event occurred only later than the moment of transaction, this approach defines the whole transaction as a mistaken one.

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28 Maharit ascribes this view to Ramban and Rosh, contrary to Rema, Yore De'a, 315, and Shach, Tekafo Kohen, 62.

29 In his words: ״טעות דמעיקרא, דבשעת נתינה לא היה צריך ליתן, וטעה בדין שכבר היה״.

30 In his words: ״אינו בגדר טעות, רק יש לדון מדין אומדנא, דאדעתא דהכי, אילו היה יודע העתידות, לא היה עושה כן״, and later, regarding marriage: ״כעין קידושין על תנאי״.

31 In addition to the cited writers below see Sho'el 'U-meshiv, *supra* n. 24, who probably holds this view. However, Shoel U-meshiv is not completely clear in his conceptual approach, since at the same time he discusses the relation between *'umdena* and a regular condition, and seems to understand *'umdena* as a form of the latter (see ibid.).

32 Meil Zedaka, 2, p. 3b. Meil Zedaka (p. 4a) ascribes this view also to Maharam Me-Rothenburg, according to the version of Maharam's response in Shut Maharam, 564, but this conclusion is questionable.

33 Bava Kamma, 110b, quoted above.

In fact, this view is found in sources much earlier than Me'il Zedaka. Ra'aviyah[34] defines '*umdena* as a mistaken transaction, and applies it to the case of a leprous brother in law: "דהתם נמי בטעות נתקדשה" (there [in the case of a leprous levir] also she was betrothed in error). According to Ra'aviyah, '*umdena* is not considered as a condition since he or she was not aware of the future occurrence that might require a condition. Therefore they did not think about making a condition, and it is only "we" – the *poskim* or court – who assess his or her intention.[35] We accordingly assume that he or she would not have agreed to the transaction had he or she contemplated that occurrence, and it is therefore considered a mistaken transaction. Astonishingly, Ra'aviyah supports his view with the same argument and even uses the same terminology as that used centuries later by R. Shim'on Shkop in support of exactly the opposite view, namely that '*umdena* is a condition and not an error! Ra'aviyah writes:

> אבל אומדנא היינו נתינה בטעות... והכי נמי בכל אומדנות הוי בטעות, ואינו יודע בשעת מעשה מן העתידות.
>
> But '*umdena* is a mistaken transaction (literally: a giving in error) ... and so is it in all cases of '*umdena* – an error, [because] no one knows the future at the time of the transaction.

So, whereas R. Shkop argues that the fact that she didn't know the future at the time of marriage ("שאי אפשר לדעת העתידות") makes it impossible to define the case as a *ta'ut*, Ra'aviyah argues that this very fact makes it impossible to define the case as a condition.

However, many other writers, whether Talmudic commentators or *poskim* in their responsa, define our *'umdena* as an implicit condition and by this reject the equation of *'umdena* and *ta'ut*. This view can also be found already in the Rishonim, but not always expressed as clearly as by R. Shimon Shkop. For example, it is found in Tosafot (at least in some respects, as will be discussed at length below), as we may conclude from the following version of Tosafot Ha-Rosh:[36]

> ...דאם היתה רוצה להתנות בשעת אירוסין שאם ימות קודם שישאנה שיהו הקידושין בטלין כדי שלא תפול לפני אחיו מוכה שחין לא היה הבעל מעכב על ידה, הלכך חשוב כאילו התנית.
>
> For if she had wanted to make a condition at the time of betrothal that if he would die before he would marry her that the betrothal should be annulled so that she should not find herself bound to his leprous brother, the husband would not have objected. Therefore it is considered as if she had made such a condition.

What is the content of this implicit condition? The most widespread interpretation sees the implicit condition as follows: if a future event occurs, the marriage will be regarded as invalidated from its beginning, although it was properly created.[37] In this notion *'umdena* is comparable to a terminative condition. However, we also find a different view, which understands *'umdena* as a normal (non-terminative) condition, without any retrospective

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34 Rabbi Eli'ezer ben Rabbi Yo'el Ha-Levi, Shut Ra'aviyah, 1032, s.v. ואשר כתבת.

35 "דאומדן דעתא לא היה בלב להתנות, ובשעת מעשה לא היה מחשב על התנאי... אלא אנן אומדין דעתו... הילכך מה היה לו להתנות?!" ([in cases of] '*umdena* it is not in the person's mind to make a condition, so at the time of the transaction he did not consider making any condition... but we assess his [subconscious] intention... therefore what reason could he have had to make a condition [as he was unaware of future developments]?!).

36 Cited in Shitah Mekubetset, Bava Kamma, 110b. This is an expanded version of Tosafot, Bava Kamma, 110b, s.v. דאדעתא, see below, text to notes 50-56. Rosh himself holds the same view, see Shut Ha-Rosh, 34:1, regarding a case of breaching a marriage agreement due to conversion of the bride's sister ("אנן סהדי שאם היה יודע שדבר זה עתיד לעשות לא היה משדך בנו לבתו, הוי כאלו התנה מעיקרא בשעת מעשה").

37 See the quotation from Sha'are Yosher above: "שהדין שהיה תלוי ועומד כעין קידושין על תנאי". Many Acharonim interpret it in this way, following Mahari Bruna as opposed to Terumat Ha-Deshen, see below, text to notes 43-47. Basically, this view follows the definition of condition of the type "על מנת", see supra, note 5.

invalidation, comparable to standard conditions in respect of some of the details of the marriage contract. This view is found in Terumat Hadeshen,[38] who defines the *'umdena* in our *sugya* as:

> גילוי דעת הוא דאין בדעתו לחול הזיקה שתתייבם...
>
> This indicates that his intention is that the levirate bond should not take effect.

Accordingly, the *'umdena* here does not invalidate the marriage, but releases from the levirate obligation. Thus, the marriage is valid even if the *'umdena* is applied, and only the duty of levirate (*zikah*) is terminated.[39]

But there is an even more far reaching view of the function of the implicit condition. In Shut Binyamin Ze'ev[40] we find the view that the *'umdena* that there is an implicit condition refers only to the *act* of levirate marriage and not even to the halakhic *status* of the levirate bond (*zikah*). Accordingly, the implicit condition was that if such circumstances occur the wife would not be obliged to enter into a levirate marriage with her apostate brother in law. Yet, although she is not obliged to have *yibbum*, she has in principle the duty to undergo *halitsah*, but is exempted due to a different halakhic principle: "כל העולה לייבום עולה לחליצה וכל שאינו עולה לייבום אינו עולה לחליצה"[41]. According to this view, *'umdena* of *ada'ata de-hachi lo kidsha nafsha* is a regular condition, and – quite unlike *kidushey ta'ut* – it does not invalidate the marriage at all, but only avoids the obligation of *yibbum* and consequently the obligation of *halitsah* as well.

Analysing Terumat Hadeshen is important also for the issue of the justification of explicit terminative conditions.[42] In this responsum, Terumat Hadeshen informs us of a concrete custom in his days of making an explicit condition at the time of marriage in order to avoid levirate marriage in the case of an apostate levir (*yavam mumar*). Later, this condition was rejected by Rabbi Yosef Karo in the Shulhan Aruch, but Rema accepts a very similar one in the name of Mahari Bruna:[43]

> נפלה לפני יבם מומר, יש מי שמתיר אם היה מומר כשנשאה אחיו, ואין לסמוך עליו. הגה: ...והמקדש אשה ויש לו אח מומר, יכול לקדש ולהתנות בתנאי כפול שאם תפול לפני המומר ליבום שלא תהא מקודשת (מהרא"י ברי"ן).
>
> If she found herself bound to an apostate levir, there is someone who permits [her release without *halitsah*] if he (the brother-in-law) had been an apostate when his brother married her, but one should not rely on this.
>
> Gloss: …and a person who wishes to marry and has an apostate brother, is permitted to marry with a double condition[44] stating that if she finds herself

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38 Terumat Ha-Deshen, 223.

39 This is the conclusion derived from Terumat Ha-Deshen by a large group of Acharonim, see below, n. 45. See for example Shut Maharam Shik, 70, p. 35, who deduces it from the phrase quoted above. However, some Acharonim argue that even Terumat Ha-Deshen deals with a condition which invalidated the marriage, see for example Rabbi Avraham Brode, cited in Shut Me'il Zedaka, 1. In my opinion, however, the first approach is more persuasive.

40 Shut Binyamin Ze'ev, 71.

41 I.e.: "whoever is subject to the obligation of levirate marriage is also subject to *halitsah* and whosoever is not subject to the obligation of the levirate marriage is not subject to *halitsah*". This principle explains why a woman who is forbidden to the levir on the grounds of incest (more accurately, in the specific Talmudic context: the wife of the forbidden woman; i.e. the second wife of the dead man – "צרת הבת") is exempt not only from the act of levirate (*yibbum*), but also from *halitsah*; see Bavli, Yevamot, 3a and elsewhere.

42 For full and detailed discussion regarding Terumat Hadeshen's condition vs. Mahari Bruna's condition (below) see Avraham H. Freiman, **Seder Kidushin Ve-Nisu'in Aharey Hatimat Ha-Talmud**, Jerusalem: Mossad Ha-Rav Kook, 1964, pp. 386-394 (hereinafter: Freiman, Kidushin); Berkovits, Tenay (supra, note 6), pp. 29-32.

43 Shulhan Aruch, Even Ha-'ezer, 157. Mahari Bruna is cited fully by Rema in Darkhe Moshe on Tur, Even Ha-'ezer, 157, 5.

44 A "double condition" (i.e.: If A then B and if not-A then not-B) is required due to the formal rules of conditions, in order to make it identical to *tenay Bene Gad u-Vene Re'uven* (see Rambam, Ishut, 6: 1-6; 14). This is

> bound to the apostate brother then she will not have been married [in the first place].

Many Acharonim make a distinction between Terumat Hadeshen and Mahari Bruna.[45] According to the former, the condition cancels the duty of levirate, and thus is problematic from the aspect of *matne 'al ma she-katuv ba-Tora*. The latter, on the other hand, suggests a condition which explicitly invalidates the marriage,[46] and therefore is not *matne 'al ma she-katuv ba-Tora*, and the condition is valid. The interpretation of Terumat Hadeshen's condition as cancelling the levirate bond is supported by his view on the *sugya* of *'umdena* described above, which in fact involves the same condition (but here not explicit). Accepting the distinction between Terumat Hadeshen and Mahari Bruna supports the halakhic legitimization of terminative conditions in order to prevent cases of *agunot*,[47] as suggested by some writers in our days.[48]

To conclude this section, both Rishonim and Acharonim are divided in defining *'umdena*. On the one hand we find writers who compare it to *kidushey ta'ut*, arguing that had the bride known about this fact at the time of the marriage (although it did not yet exist in reality), she would not have married her husband, and therefore the whole transaction is regarded as mistaken. On the other hand, we find writers who classify *'umdena* as an implicit condition, according to which the marriage is valid at the moment of its creation, but can be invalidated retrospectively by this condition.[49]

2. The Integrated Approach

Alongside the two basic approaches to *'umdena*, there is a third, which integrates both together. Revealing this approach requires a close reading of different passages of Tosafot, to which we now turn. This integrated approach has been accepted in practice in our days by Rabbi Moshe Feinstein, as will be shown in the final section.

At first sight, Tosafot to the *sugya* of *yavam mukeh shehin*[50] points to an understanding of *'umdena* as a condition. At s.v. דאדעתא (Bava Kamma, 110b), after making a typical *'ukimta* by interpreting the Talmudic *hava 'amina* as referring only to the betrothed wife (*'arusa*), Tosafot raises the following question:

> ואם תאמר: אדם שקנה מחבירו שום דבר ונתקלקל יבטל המקח, דאדעתא דהכי לא קנה!

> And if you ask: when a person buys any item from another and it [eventually] breaks, could he cancel the sale [and get the money back] because [he can claim] that he did not buy it on this understanding (that it would eventually break)!

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however not the core of the distinction between this condition and that of Terumat Hadeshen; see Berkovits, Tenay (supra, note 6), p.31, citing Shut Zela'ot Ha-ba'it, and see below.

45 See for example Bach, Even Ha-'ezer, 157, s.v. כתב רב שרירא. Some writers reject it for various reasons, see Rabbi Avraham Brode, cited in Shut Me'il Zedaka, *supra*, note 39.

46 See Rema, above: "if she finds herself bound to the apostate brother then *she will not have been married* [in the first place]" (emphasis added).

47 A few Sphardic Acharonim (Rabbi Yosef Shmuel Modi'ano from Saloniki; Hikrey Lev) argue that even the opponents of Terumat Ha-deshen's condition (including Rabbi Yosef Karo) would have changed their mind had they seen the sources which support the distinction between Terumat Ha-deshen and Mahari Bruna: see Freiman, Kidushin (supra, note 42), p.387.

48 See mainly Berkovits, Tenay (supra, note 6), pp. 49-51.

49 A (rejected) minority of the Acharonim views it as a condition in relation to the duty of levirate and not in relation to the validity of marriage: see Terumat Ha-Deshen and Binyamin Ze'ev above.

50 See *supra*, text to notes 19-21.

> ויש לומר: דהתם לאו בלוקח לחודיה תליא מילתא אלא כמו כן בדעת מוכר, ומוכר אקנה ליה אדעתא דהכי. אבל הכא דקדושין בדידה קיימא, והוא אינו חושש היאך דעתה להתקדש, וכן גבי מקדיש נמי בדידיה קאי, וכן נותן הגזל בדידיה קאי.
>
> The answer is that there the matter is not dependant only on the buyer but equally on the vendor and the vendor sold it to him on that understanding [that if it is broken in the future, that is the buyer's risk]. But here, however, the betrothal depends on her as he is not concerned how (=under what conditions) she wants to become betrothed. Similarly regarding the person who sanctified [an offering], everything depends on him, and so is it with one who restores money that was stolen from a proselyte [who died], it all depends on him.

According to Tosafot, *'umdena* of *ada'ata de-hachi* cannot stand on its own, but, being a term of the contract, requires the agreement of both parties of the transaction. Therefore in a normal commercial transaction the buyer cannot cancel the sale based on the argument "אדעתא דהכי לא קנה" when something happens after the transaction. Nevertheless in the cases discussed in the *sugya* (giving to priests money that was stolen from a *ger* who died later,[51] sanctifying something as an offering and a leprous levir) such agreement is either not required (in the two former, which are not a mutual transaction, but a unilateral act[52]) or is assumed implicitly to exist (in the case of a levirate wife[53]).

From a conceptual viewpoint, as already noted,[54] in order to determine that a transaction is mistaken one needs only to consider the viewpoint of one of the parties to it: if that party was not aware of any important fact relating to the transaction, the transaction is regarded as mistaken and is invalidated *ab initio*. On the other hand, a condition reflects an agreement between both parties to an initially valid transaction. Every condition must therefore be made with the agreement of both parties.

According to Tosafot, we can claim that "*ada'ata de-hachi lo*" only when we assume that both sides have agreed to it. This requirement clearly reflects the view of *'umdena* as an implicit condition: the demand that the marriage will be invalidated on such an occurrence must be based on a preliminary mutual agreement, i.e. it should be part of the "contract" between the two parties to the transaction. If one spouse does not agree, the marriage remains valid but is unconditional – unlike, for example, the case where the wife was not aware of a serious disease of her husband, in which she could claim *kidushey ta'ut* without her husband's consent.

The basis of Tosafot's discussion is therefore the understanding of *'umdena* as a condition and in principle we need at least the implicit agreement of both parties to the transaction. We find this view almost explicitly in Tosafot Ha-Rosh,[55] which at this point may be regarded as a broader and more fully explained version of our Tosafot.[56]

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51 This is the mishnaic case, see Bava Kamma, 110a, which is compared in the *sugya* to the other cases.

52 See Tosafot, Ketubbot, 47b, s.v. שלא: "אינו תלוי אלא בנותן" (i.e.: [the transaction] depends only on the giver).

53 According to Tosafot, ibid, we deal here with a betrothed woman and not a married one, and therefore the husband does not mind invalidating the betrothal in the event of his death, when his brother is a *mukeh shehin*. In case of marriage the husband might resist this option due to a fear of *bi'at zenut*.

54 See section B.

55 "דאם היתה רוצה להתנות... לא היה הבעל מעכב על ידה, הלכך חשוב כאילו התנית", see full quotation above, text to note 36.

56 Tosafot Ha-Rosh is a collection of some corpora of earlier Tosafot: Those of R"i, Rash mi-Sens and others. On the redaction of Tosafot by the Rosh (the "Tosafot Ha-Rosh"), compared to "our" Tosafot (which are cited in the printed editions of the Bavli), see Efraim E. Urbach, **Ba'ale Ha-Tosafot**[5], Vol. 2, Jerusalem: Bi'alik Institute, 1995, pp. 585-599.

However, the interpretation of *'umdena* as a condition is not the only analysis found in Tosafot. Elsewhere,[57] we find an additional element, which reflects a more complicated conception of the *'umdena*.

In Bavli, Ketubbot 47b, the *sugya* deals with a betrothed woman who got divorced or became a widow. Rabbi El'azar Ben 'Azarya argues that the betrothed wife receives her basic *ketubbah* (100 or 200 *zuz*), but is not entitled to any additions that her husband guaranteed. Rabbi El'azar Ben 'Azarya's reasoning is that the husband obligated himself only on the assumption that he would marry her ("שלא כתב לה אלא על מנת לכונסה"), and therefore if the *nisu'in* does not take place (whether because of death or divorce), his wife does not receive any of these additions.

Tosafot (s.v. שלא) raises a question similar to that in the *sugya* of *yavam mukeh shehin*:[58]

> ואם תאמר: אם כן, כל אדם הלוקח פרה מחבירו ונטרפה או מתה, אנן סהדי שלא על מנת כן לקחה!
>
> And if you ask: If so, [when] anyone buys a cow from another and it becomes *terefah* or dies, we can testify that he did not buy it on that understanding [and he should therefore always be able to obtain a refund].

But contrary to Bava Kamma, Tosafot here suggests a different answer:

> וי"ל (=ויש לומר) דהתם אנן סהדי שבאותו ספק היה רוצה ליכנס, ואפי' אם אומר לו אם תטרף יש לך לקבל הפסד היה לוקחה. אבל הכא לא כתב כלל כי אם על מנת לכונסה, ואין דעתו כלל להכניס עצמו בספק...
>
> The answer is that there we can be sure that [the buyer] would have been willing to take that chance (literally: he would have been willing to enter into that doubt [=the doubt that the cow might die]). Indeed, even if the [vendor] were to say to him: "If it becomes *terefah* you must accept the loss", he would have bought it. Here, however, he wrote [the addition to the *ketubbah*] only on the understanding of marrying her, and he had no intention whatsoever of entering into a doubt[ful situation]

The *'umdena* here depends on the following argument. We ask whether the party to the contract would accept the agreement if he knew that a future event might occur (="אותו ספק"): If we assume that he would (like any normal transaction), he cannot cancel the transaction on the basis of "אדעתא דהכי לא קנה". But if we assume that he would not accept it due to that future possibility, he can claim "אדעתא דהכי לא קנה".

This explanation is not conceptually clear. Is it an implicit condition or a sort of *mekah ta'ut*? And what is the relation between this concept and the mutual agreement required by Tosafot in the *sugya* of the leprous levir in Bava Kamma? Are they comparable or two different or contradictory approaches?[59]

Further on in Ketubbot, Tosafot (ibid) discuss the need for mutual agreement, in terms similar to their argument in Bava Kamma. But in Ketubbot the discussion regarding the need for mutual agreement is related to the previous discussion, i.e. to the question whether the

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[57] The following source is "our" Tosafot of Ketubbot while the former is Tosafot of Bava Kamma. According to Urbach, ibid., pp. 625-629; 639-645 (especially at p. 642), both were redacted by Rabbi Eli'ezer of Touques (ר' אליעזר מטוך), but for Bava Kamma Rabbi Eli'ezer based his text on Tosafot Rabbi Yehuda Sirleon, whereas for Ketubbot (and usually) he based it on Tosafot Rash of Sens.

[58] See *supra*, text to notes 50-53.

[59] Below I support the view that the two explanations are not contradictory but rather form an integrated concept which was developed by Tosafot on Ketubbot. Historically, Tosafot may be based on different sources, i.e. different Tosafists, Sages or different compositions that were in front of the redactor of our Tosafot (probably Rabbi Eli'ezer from Touques, see *supra*, note 57). However, the redactor harmonized those sources together, and at least in his view we are dealing with an integrated concept which ought to be clarified. The method that is used here is therefore compatible with the purpose of this paper, which is the conceptual-dogmatic understanding of the notions here discussed.

party to the contract would accept the agreement even if he knew the possibility that such an event might occur:

> והא דפריך בסוף הגוזל קמא "במה שנפלה לפני מוכה שחין תיפוק בלא חליצה דאדעתא דהכי לא קידשה", אע"ג דבאותו ספק מסתמא היתה נכנסת בשעת קדושין, אומר רבינו יצחק... דהואיל ואינו תלוי אלא בנותן יש לנו ללכת אחר דעתו, וכיון שבו תלוי ודאי אינו רוצה ליכנס בשום ספק.
>
> ולא דמי ללוקח חפץ ואירע בו אונס דלא אמרינן דאדעתא דהכי לא קנה ומבטל המקח, דאינו תלוי בדעת הקונה לבדו, דהא איכא נמי דעת מקנה שלא היה מקנה לו לדעתו אם לא יפרש.
>
> And that which [the Talmud] asks at the end of the first [chapter] "*Ha-gozel*": "a *yevamah* who found herself bound to a leper should be released without *halitsah*, because she did not [agree to] marry on that understanding" – although she would probably have taken that risk (literally: she would have entered into that doubt) at the time of betrothal, Rabbenu Yitzhak explains... that since it is dependant only upon the one who gives (i.e. the wife), we should follow her[60] intention, and since it is dependant upon her, [we may say] that she certainly does not want to take any chances (literally: he does not want to enter into any doubt).
>
> This can not be compared to one who buys an object to which an accident occurs, where we do not say that he did not buy it on that understanding so that he can annul the transaction, because [in that case, the matter] does not depend on the mind of the buyer only, because there is also the mind of the vendor, who [we presume] would not sell to him in accordance with his (the buyer's) intention unless he expressly [agrees].

The *yevamah*, according to Tosafot both here and in Bava Kamma, is in a different position to the normal buyer, who cannot cancel the transaction after a new occurrence. The *yevamah* can claim that "אדעתא דהכי לא קידשה" due to an implicit consent of her husband, which does not exist in regular commercial transactions. However, Tosafot in the *sugya* of *Ketubbot* links it linearly to the earlier discussion: mutual consent (although implicit) becomes a significant element in the case of the *yevamah* only since we assume that "באותו ספק מסתמא היתה נכנסת בשעת קדושין", i.e. if she were asked at the time of betrothal, she probably would have accepted the marriage even with the possibility of being obliged to a leprous levir.[61] Because of the assumption that she may have accepted that possibility, Tosafot argues, we need to base her claim for voiding the betrothal on mutual agreement. And in the case of the *yevamah*, contrary to normal commercial transactions, this mutual agreement implicitly exists.

This analysis leads to the following conclusion: if we know that had she known about the possibility of this future event, she would not have got married (to paraphrase the previous quotation: "באותו ספק לא היתה נכנסת"), her claim to reject the marriage will be accepted even without her husband's (even implicit) agreement. This has an extremely significant conceptual implication: the question of whether she had or had not known about the possibility of this future event brings us back to the concept of *kidushey ta'ut* – it focuses only on one party to the transaction and on that party's assumption at the moment of the creation of the contract.[62] But isn't this a mistake in relation to a future event? Isn't it the same as the argument that we

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60 In this paragraph Tosafot uses masculine forms where the feminine is intended ("שבו", "דעתו" etc.). In the English translation I use only the feminine forms.

61 Tosafot assume ("מסתמא") that she would accept the marriage probably because of the remote possibility that she might become subject to levirate, and to this levir in particular (we cannot explain Tosafot's argument on the basis of "tav le-metav" since Tosafot discusses here the question of the *sugya* on Bava Kamma 110b, and "tav le-metav" was raised as a consideration only at a later stage).

62 For a different view see Me'il Zedaka, 4, 6b-7a, who suggests, *inter alia*, that *ta'ut* also required the agreement of both parties.

have found in Maharit El-Gazi and Meil Zedaka?[63] I would claim here that the answer to these two questions is negative.

Maharit El-Gazi and Me'il Zedaka deal with a future event, lack of knowledge about which makes the transaction mistaken.[64] Tosafot on the other hand does not deal with that event on its own, but rather with the party's perception of its possibility: would she accept the possibility that this event might happen. This difference is of the utmost importance. According to Tosafot, the discussion relates to the pure present: in the present we can have only a doubt that such an event may occur, or we may be aware that there is a statistical possibility that this kind of thing might happen. Both here and in Bava Kamma, the version of Tosafot in Tosafot Ha-Rosh makes this argument clearer:[65] "ואם היו אומרים לו שמא תטרף לא היה נמנע בשביל זה ליקח", i.e. if he had been known of this possible fact, he would not have abstained from the transaction. A case of *ta'ut* exists then only when one party was unaware of this statistical option, and when, had he known of it, he would have abstained from the transaction, or, in Tosafot's terms: "אין דעתו כלל להכניס עצמו בספק".

Maharit El-Gazi and Me'il Zedaka present a problematic view, as Tosafot argues: how can anyone claim a *ta'ut* on the basis of an event that has not yet happened? But Tosafot's view solves this problem: the mistake is in regard to the way each side views the present. In the present what exists is a doubt or a statistical possibility that an event might happen. If he or she were aware of this future possibility, the transaction is not a *ta'ut*, but if they were not, and we assume that knowing this option would have prevented the transaction, the transaction is regarded as a *mekah ta'ut*.

However, the present perception of the parties (at the time of making the contract) is not the only element to be considered. In the future, when the event does actually occur, we may invalidate the transaction. But then it cannot be done on the basis of the concept of *ta'ut*, but only on the basis of an implicit condition. And this latter concept requires the consent of both parties to the transaction.

To summarize and clarify the above discussion: *'umdena* of *ada'ata de-hachi lo kidsha nafsha* according to Tosafot is an integrated concept. When one says: the wife claims "*ad'ata de-hakhi*" and wishes to void the marriage, we must ask two questions: (1) Is it a mistaken transaction? (2) If it is not a mistaken transaction, is there an implicit condition? In (1) we deal with the "doubt" or possibility at the time of making the contract (the *kiddushin*): was she then aware of the chance that such an occurrence might happen? If she were not, the transaction is void for mistake. If she were aware of this option but nevertheless accepted the marriage, the transaction is valid. Yet, in this latter case we must also ask question (2): was there an implicit condition? The answer to this question depends on the kind of transaction. In a regular commercial transaction there is no implicit condition, since the seller would never agree to cancel the transaction in a case where, for example, his cow becomes *terefah*. But in a case of a betrothed widow when the levir is a leper, according to the *hava amina* on Bava Kamma 110b, there was such an implicit agreement. In that case, therefore, we can in principle invalidate the marriage, since, in Tosafot Ha-Rosh's words: "חשוב כאילו התנית".

In practice, however, it is problematic to apply *'umdena* in marriage, according to the final conclusion of the *sugya* in Bava Kamma 110b:

> התם אנן סהדי דמינח ניחא לה בכל דהו, כריש לקיש, דאמר ר"ל: טב למיתב טן דו מלמיתב ארמלו.

However, the Rishonim and Acharonim distinguished a large group of cases where they did apply *ta'ut*, implicit conditions and *'umdena* while Resh Lakish's assumption was viewed as irrelevant to these cases, as briefly discussed above.[66]

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63 See *supra*, section C1, text to notes 27-36.

64 *Ibid.*

65 Tosafot Ha-Rosh, Ketubbot, 47b, s.v. שלא.

66 See *supra*, text to notes 22-23.

The next section will examine one interesting responsum, which is remarkable in its practical use of the integrated approach of Tosafot.

3. 'Igrot Moshe: an Application of the Integrated Approach

One famous *posek* who accepted *le-ma'ase* the claim of *kidushey ta'ut* is Rabbi Moshe Feinstein.[67] This fact is well known and has been discussed by a number of scholars.[68] However, it is usually claimed that Rabbi Feinstein accepted only a limited version of *kidushey ta'ut*, which demands *inter alia* that the basis for the wife's claim is a fact which had been in existence at the time of the marriage,[69] similar to our conceptual analysis of *kidushey ta'ut* above.[70] Nevertheless, the responsum discussed here reveals a more complicated approach, closer in many aspects to Tosafot's integrated view.[71]

The *teshuvah*[72] deals with a communist levir, who refused to perform *halitsah* for his sister in law. As a background to this responsum, we must summarise the halakhic debates regarding the apostate levir.

According to some Geonim, where the levir is an apostate there is no obligation of *yibbum*.[73] Traditionally – until Maharam me-Rothenburg – this was explained as a result of the fact that the apostate (having converted out of the faith) is not considered Jewish and is therefore not bound to his "brother's" wife.[74] Some Rishonim discussed the significance of the date of the brother's conversion – whether before his brother's marriage or after. This is related to the halakhic dispute as to when the legal relationship (*zikah*) between the brother-in-law and the wife is created: is it at the moment of the brother's marriage or at his death (״נישואין מפילין״ vs. ״מיתה מפלת״)? If it is created at the moment of the brother's marriage, the brother-in-law must already be converted at the moment of marriage for the widow to be exempt from *yibbum*; if he converted after the marriage but before the brother's death, the obligation of *yibbum* would exist. On the other hand, if the *zikah* is created only at the moment of the brother's death, then provided that he converted before this moment (even after marriage) the widow would be exempt from *yibbum*.[75]

Rashi strongly objected to this gaonic view. According to him, an apostate is considered as Jewish and there is a levirate obligation in either case. But Maharam Me-Rothenburg, 250 years later, suggested a different explanation of the gaonic view: the reason there is no levirate obligation is not the halakhic status of the apostate. The reason, rather, is that ״אדעתא דהכי לא קידשה נפשה״: the widow did not marry her husband on the assumption that she may be subject to a levirate bond with an apostate. The Talmud indeed rejects this claim in the case of the leprous levir, based on Resh Lakish's presumption of *tav le-metav*, but an apostate

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67 See 'Igrot Moshe, Evan Ha-Ezer, 1: 79; 80 and elsewhere (see references in the following note).

68 See Broyde, Marriage (supra, note 6), pp 89-102; Bass, Mekah Ta'ut (supra, note 8), pp.208-213; Halperin Kadari, Tav Lemeitav (supra, note 23), pp. 19-24; Ha-Cohen, Oppressed (supra, note 6), pp. 57-60.

69 See Broyde, Marriage (supra, note 6), p. 90; Michael J. Broyde, "Error in the Creation of Marriages in Modern Time under Jewish Law", **Dine Israel** 22 (5763), pp. 51-52 note 34 (English section).

70 See section B.

71 In correspondence between the Agunah Research Unit and Rabbi Prof. Broyde he argues that R. Feinstein uses *'umdena* regarding a future event only in order to cancel a levirate bond, as in the responsum below, but not in order to release a married wife without a *get*. Although this might be true in practice, from a theoretical point of view there is no difference between marriage and levirate: in both cases the marriage is retroactively annulled. Indeed, the practical hesitation in applying *'umdena* to a married wife is intelligible due to the fear of *mamzerut* and *humrat 'eshet 'ish*.

72 'Igrot Moshe, Even Ha-'Ezer 4, 121.

73 See Shut Maharam me-Rothenburg, Prague print, 564; 22.

74 See ibid.

75 See Hagahot Mordechay, Yevamot, 107.

husband, according to Maharam, is worse than a *mukeh shehin*, and therefore Resh Lakish's presumption is not applicable when the levir is an apostate and the widow's claim is valid.[76]

This is a clear case of *'umdena* – the *yibbum* occurs after the marriage, and only then does the wife claim that had she known that it would happen she would not have married her husband.[77] Defining this case as an *'umdena* regarding a future event is not influenced by the timing of the conversion since even if the brother were already converted at the time of the marriage the *yibbum* occurred only later. It is not a standard *mekah ta'ut* since the widow's claim is related to the later obligation of *yibbum* ("דאנן סהדי דלא ניחא לה להתייבם לו")[78]. However, Maharam's students do discuss the implication of the time of the conversion,[79] but this, as correctly analysed by Rabbi Yoel Sirkes in his commentary to the Tur (Bach), is in relation to the *strength* of the *'umdena*:[80] if the brother converted only after the marriage, the wife's claim is as follows: had I known that (a) this brother would convert and (b) that I might become subject to a levirate marriage, I would never have married my husband. This is quite a weak argument since the occurrences are very rare, unlike the case where the brother was already converted at the time of the marriage and the wife claimed that had she known (b) that she might become subject to a levirate marriage to him, she would never have married her husband. However, even in the former case some sources[81] argue that Maharam's *'umdena* is valid as well.[82]

Neither Maharam nor later halakhic authorities accepted the claim of "אדעתא דהכי" in practice, and it was rejected almost totally from the *halakhah*.[83] Furthermore, according to Hagahot Mordechay, based on Tosafot, Maharam's rule is valid only for a betrothed woman and not for a married one.[84] However, in some cases it was applied in practice, even for a married wife.

In his responsum, Rabbi Feinstein distinguishes his case from that of the Maharam:

> אבל בעובדא זו דמשונה מסתם מעשה נישואין בעולם, דהרי ניסת לו אחרי שכבר היה לו ולה ולהעדים ולכולי עלמא ידוע שהוא צריך לילך לצבא שהוא ספק גדול שימות, וכיון שיש לו אח זה הרי היה ידוע ממילא שתהא זקוקה ליבם זה באם ימות במלחמה, וכיון שהוא חבר המפלגה וכופר בכל עניני התורה ולא יפטרנה בחליצה... וגם כפי שהשיב לה ניכר שהוא בעצמו איש רע ומומר להכעיס ובודאי היתה מכרת אותו...

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76 See references *supra*, note 73.

77 See Bet Ha-levi, 3; 'Igrot Moshe, Even Ha-Ezer, 79 (section A).

78 See Shut Maharam, *supra*, note 73; Teshuvot Maymoniot, Nashim, 29.

79 See Hagahot Mordechay, Yevamot, 107, and Shut Maharam, 1022: "גם לא חזי' בדברי מהרר"ם שחילק בדבריו בהדי' בין היכא דהוי משומד בשעת קידושי' לאחרי כן", contrary to Teshuvot Maymoniot, Nashim, 29: "היכא דמשומד היה בשעה שנתקדשה לאחיו".

80 See Bach, Even Ha-'ezer, 157, s.v. כתב רב שרירא.

81 See supra, note 79.

82 According to the present analysis, the dispute between Michael Broyde and Aviad HaCohen which followed the publication of *The Tears of the Oppressed* was mistakenly connected to the question of the time of conversion in the case of the apostate brother-in-law according to Maharam's view (see HaCohen, Oppressed [supra, note 6], pp. 39-41; Michael J. Broyde, "Review Essay – An Unsuccessful Defense of the Beit Din of Rabbi Emanuel Rackman: The Tears of The Oppressed by Aviad Hacohen", **Edah** 4 [2004], pp. 8-9), since it is not the apostasy which is the ground for annulling the marriage but the levirate bond (which occurred after the marriage took place). Nevertheless, HaCohen is right that Maharam did accept such an *'umdena* (but only *la-halakha* and not *le-ma'ase*, see below). However, according to Maharam it is probably not a mistaken transaction but an implicit condition (as later explained by his students, see for example Teshuvot Maymoniot, Nashim, 29: "כאילו התנתה על מנת שלא תתייבם לו", and the discussion regarding Terumat Hadeshen, supra, text to notes 38-39). Broyde, ibid, p. 9, is aware of the distinction between a mistaken transaction and an implicit condition, and ascribes the latter concept to Rabbi Moshe Feinstein's response. Yet, this responsum is more complex, and in fact uses both condition and mistaken transaction, following the integrated approach regarding *'umdena*; see below.

83 See Shulhan Aruch, Even Ha-'ezer, 157, and Rema, ibid. Even Maharam himself did not rely on it in practice: see Mordechay, Yevamot, 29. However, this was the basis for the explicit condition in a case of a converted levir, which was partly accepted, see *supra*, section C1, text to notes 43-48.

84 See Hagahot Mordechay, Yevamot, 107, based on Tosafot, Bava Kamma 110b, s.v. דאדעתא .

> This case is different from usual acts of marriage in general because she was married to him after it was already known to him and to her and to the witnesses and to everyone that he had to go to the army, where there was a great likelihood that he would die. Since he had this brother it was obvious that she would be bound to this levir if her husband died in battle, since he was a member of the [communist] party and denied all matters of Torah and would not release her through *halitsah* ... Besides, from the manner in which he responded to her it is clear that he is a man of bad character and an apostate out of spite, and she surely knew him [as such] ...

This case, he argues, is extraordinary since the danger of the husband's death was well known and actually real. Accordingly, Rabbi Feinstein argues that the Talmudic conclusion based on Resh Lakish's statement of "טב למיתב טן דו מלמיטב ארמלו" is irrelevant in this case and thus that the wife may claim "אדעתא דהכי לא קדשה נפשה". Rabbi Feinstein explains:

> ברור לכל שבשביל זמן מועט דימים ואפילו חדשים לא תתרצה שום אשה לינשא אף שטב למיתב טן דו.
>
> It is clear to everyone that no woman would agree to get married for the sake of so short a period – days or even months – even though [as a rule] "it is better to live as two people" (*tav le-metav tan du*).

Hence, it is legitimate to claim "אדעתא דהכי" here, and it will not be rejected on the grounds of Resh Lakish's presumption. At this point Rabbi Feinstein discusses two arguments. The first is in relation to the wife and to her assumptions regarding her marriage:

> ולכן כיון דבעובדא שהיו נישואיה בימים שידעה שאיכא ספק גדול שיקחוהו לצבא וימות במלחמה, מוכרחין לומר שלא ידעה שתהא זקוקה ליבם זה ליבום וחליצה, ומחמת שרחוק לומר שלא ידעה שאיכא כלל זיקת יבום וחליצה שהוא דבר מפורסם אף לנשים ועמי הארץ, היה זה משום שהיתה סבורה שלא נחשב כישראל בזה שנעשה חבר המפלגה, כמו שהוא עצמו וגם העדה מחזיקים אותו נבדל מכלל העדה, שלכן היתה סבורה שאח זה אינו זוקק ליבום, ואילו היתה יודעת שזוקק ליבום לא היתה ניסת גם לאח הכשר בשביל איזה ימים אף כפליים מעשרים יום וגם יותר.
>
> And therefore, since in [our] case [she knew] her marriage was [merely] for days, because she knew that there was a great likelihood that they would take him to the army and [that] he would die in battle, we are forced to say that she did not know that she would be bound to this levir for levirate marriage or *halitsah*. Since however it is far-fetched to say that she did not know that there is such a thing as a bond of *yibbum* and *halitsah*, which is a matter well known even to women and ignoramuses, [we must say that] it (i.e. her assumption that there would not be a levirate bond) was because she thought that [the levir] was not considered a Jew due to the fact that he had become a member of the [communist] party – since he himself and also the [Jewish] community regard him as separated from the general communal body – for which reason she thought that such a brother [of her husband] does not forge a levirate link. Had she known that he does forge a link, she would not have got married even to the kosher brother for a [mere] few days – even twice twenty days – and even [for] more.

The second argument is in relation to both sides:

> ומסתבר דאף מצד הבעל איכא אומדנא זו, דגם הוא הרי ודאי יודע שבשביל ימים המעטים לא היה מוצא שום אשה בעולם שתנשא, אם לא על תנאי שאם ימות בלא בנים לא קדשה והוי אומדנא הברורה שהוא רק על תנאי משני הצדדין.
>
> And it is logical to say that also on the husband's side this '*umdena* applies, because he also certainly knew that for the sake of a few days [of marriage] he would not find any woman in the world who would marry [him], unless it were on a condition that if he should die childless she would not have been

> married to him. There is a clear assumption, that [the marriage] was only on a condition [agreed to] by both sides.

This last argument views *'umdena* as an implicit condition ("על תנאי משני הצדדים"), that if the husband dies childless the marriage is retrospectively invalidated. So why do we need the previous argument, which claims that the wife did not know that she would be obliged to go through levirate with her brother-in-law? Isn't it sufficient to say that although she knew these obligations, she made an implicit condition that the marriage is invalidated if that would happen? It is indeed an acceptable condition since the husband agrees, as indicated by the second argument!

I suggest that these two arguments are necessary in order to confront both aspects of Tosafot's *'umdena*. In the first argument, Rabbi Moshe Feinstein deals with *ta'ut*, addressing the position of the wife only, whose claim for a mistake is that she was unaware of the possibility of *yibbum*. But here there is a great *hidush*: whereas Tosafot deal with unawareness of the possibility of a real fact (in a normal case of *yibbum*, it could be for example unawareness of the possibility that she might be left a childless widow and be subject to levirate; a claim that will not be accepted), Rabbi Feinstein extends this to a mistake concerning the law.[85] According to Rabbi Feinstein, in this unique case, in Tosafot's terms, the wife was unaware of "this doubt" (the possibility that she may be subject to the levirate obligation), since she thought that such a brother would not be regarded in *halakhah* as a levir.[86] But had she known at the time of the marriage that this apostate brother remained in principle subject to the obligation of *yibbum*, she would never have agreed to the marriage. Therefore the marriage is based on a mistake, and is void *ab initio*. It should be emphasized, according to our previous discussion,[87] that this is not a mistake with regard to a future event, but rather a mistake with regard to the present. Rabbi Feinstein finds the *ta'ut* to be a mistake regarding her current knowledge of the law – a very sophisticated analysis.

In the second argument, Rabbi Feinstein deals with an implicit condition. When the husband died the widow became subject to levirate marriage. This occurrence was not present at the time of marriage (only its statistical possibility), so it cannot be regarded as a mistaken transaction. But was there an implicit condition which invalidates the marriage when this occurs? Maharam tried to raise such an argument regarding an apostate brother, but his view was rejected by the *halakhah*.[88] However, Rabbi Feinstein distinguishes his case from those of Maharam and Tosafot ("דמשונה מסתם מעשה נישואין בעולם") and argues that since the marriage was only for a short period, we assume that "אדעתא דהכי לא קדשה עצמה", and the marriage is retroactively invalidated.

Rabbi Feinstein hence uses a double argumentation in order to support his claim to annul the marriage, based on the two aspects of *'umdena*. But his two arguments appear at first sight to contradict each other: his first is the definition of a mistake regarding knowledge of the obligation of *yibbum*; his second is that an implicit terminative condition (if she needed *yibbum*, the marriage would be cancelled) may be upheld in practice. But how may the couple make a condition for a case of *yibbum*, if they thought that this obligation was halakhically irrelevant?

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85 A mistake concerning the law was introduced as a support for the practice of R. Rackman's *bet din* in cancelling marriage due to *kidushey ta'ut*, as defined by Susan Aranoff: "Kiddushei ta'ut III emphasizes that a woman would not knowingly consent to a domestic partnership based on *gufah qanui*..." (quoted from her response to Rabbi Broyde, **Edah** 5 (5765), p.2). Rabbi Feinstein's argument is quite different, since he applies it in a specific case, where the mistake was of a specific detail of the *halakhah*, whereas a general mistake which broadly applies cannot be accepted as a ground for annulling the marriage; see the following note. See also the criticism of Rabbi Bleich, Kiddushey Ta'ut (supra, note 23), pp. 108-116, on Aranoff's above argument.

86 It is quite a sophisticated argument: her mistake is not simple unawareness of a specific *halakhah*, since it is hard to assume less knowledge of the basic law of *yibbum*. Her mistake is in adopting the gaonic view regarding the Jewish status of the converted brother, which frees the wife from the levirate obligation (see *supra*, text to notes 73-75).

87 *Supra*, sections B; C2.

88 See *supra*, text to notes 73-84.

The last paragraph of Rabbi Feinstein's responsum answers this question:

> ופשוט שאף אם זה שניסת לו בסתם ולא התנו כלום היה משום שלא ידעו שאיכא זיקת יבום וחליצה כלל, ולא משום שידעו מעניני תנאים, נמי בטלו הקידושין כידעו מדיני תנאים, *דאין לנו צורך שידעו דינים אלא שלא היה רצון להתקדש ע"ד זה שתצטרך באם ימות חליצה מאיש זה*, שאם הוא באופן אנן סהדי ברור, נחשב כהתנו ובטלו, דהא בעובדות דאיתא בגמ' באומדנות בכל מקום לא הוזכר חלוק בין אינשי דעלמא לת"ח.
>
> It is obvious that even though she married him just like that and no condition was made because they did not know that [in this case] there is a levirate bond, and not because they knew of the rules of conditions (i.e. that the '*umdena* would make the marriage conditional), even so the marriage is annulled just as if they did know of the laws of conditions. [This is because] *we do not need them to be knowledgeable of the law, but [all we need to know is that] there was no desire to get married on the understanding that she would need halitsah from this man* if her husband died [childless]. If [the situation] is such that we can clearly assume this, it is considered as if they made a condition and the [marriage] is annulled. This is because in the cases of assumptions ('*umdena*) mentioned in the *gemara* nowhere is a difference made between ordinary people (who do not know the details of the law) and scholars. [Emphasis supplied]

Rabbi Feinstein's conclusion takes the definition of an implicit condition a step forward: not only do we deal with a condition which was not made explicitly by the two spouses (but one which, we may assume, they would have adopted had they been asked), but also with a condition the need for which was rejected by the couple. It is therefore quite a complex situation: there is an implicit condition regarding cancellation of marriage in a case of *zikah* to a heretic levir, but making it explicit is not possible, because as stated in the first argument they were unaware of the levirate bond, and so did not know that there is anything to make a condition about. It is therefore a condition implied by the law: it is sufficient, says Rabbi Feinstein, that the couple did not want the result (being bound to the apostate levir), while the legal construction of the condition and its imputation to the couple (unawareness of the obligation on the one hand; awareness but an implicit condition to cancel this obligation on the other) is the work of the *posek*.

D. Epilogue

Three concepts have been discussed above: (a) "terminative conditions", i.e. a case where an event which occurs during married life makes the marriage retrospectively void, based on an explicit stipulation of the spouses at the time of marriage; (b) "mistaken transaction", i.e. a fact which was in existence at the time of marriage, but one spouse was unaware of it, and if he or she had been aware of it he or she would not have married. In this case, the awareness of that fact at a later time reveals the actual status of the marriage: the marriage is based on a mistake, and therefore has never been valid; (c) "*'umdena*" of *ada'ata de-hachi lo kidsha nafsha*. This case lies between the previous ones: it is based on a fact which we assume could lead one of the spouses to cancel the marriage. But this fact was not in existence at the time of the marriage so no "mistake" actually occurred at that time. Consequently, the commentators do not agree how to define this case: as an implicit condition, as a kind of mistaken transaction or, in a quite sophisticated way, as both: (a) a mistake in regard to the "fact" that was in existence at the time of the marriage, that is a mistake regarding the statistical possibility of any given future occurrence (was he or she aware of the "doubt"?); and (b) an implicit condition in regard to the later actual occurrence of that fact.

Beyond the conceptual discussion, these three concepts are in fact variations in legal construction with one common aim: nullifying the marriage. In some cases – and *aginut* is a typical one – there is a quest for a solution which will void the marriage without a *get* (for a married *agunah*) or *halitsah* (in a case of levirate). The formal halakhic way which is used varies from case to case; sometimes even in one case we can use two contradictory arguments (as by Rabbi Feinstein above) but the goal is identical.

But discovering the three concepts and finding their legitimation in the Talmudic literature and the *poskim* is not the end of the quest for a solution. Although there is a wide halakhic basis for accepting them, the move from theory to practice is not always an easy one. *Kidushey ta'ut* and *'umdena* were accepted in practice by some *poskim*, but many others rejected them, and this is also the common practice in the rabbinical courts in Israel. As regards conditional marriage the rejection is almost total. It is not used today at all, although it is sometimes discussed theoretically. Nevertheless, this paper reveals that in its implicit appearance – as the basis for *'umdena* according to some views – we do find a use of conditional marriage, both in theory and in practice.

There is another possible step to reach the same result. The three concepts here discussed reflect (in different measures) a declarative function of the rabbinical court. The same outcome, i.e. annulling the marriage, can be achieved in a different way: by a constitutive act of the court. This act is the well known *hafka'at kidushin*, based on the Talmudic statement: "כל דמקדש אדעתא דרבנן מקדש". An explicit, constitutive, *hafka'at kidushin* is the ultimate means of voiding marriage without a *get* in exceptional (tragic) cases. Yet, this concept is much more radical, and its application, both in theory and in practice, is largely disputed since the *Rishonim* to our days.[89]

[89] See Avishalom Westreich, "Annulment of Marriage (*Hafka'at Kiddushin*): Re-examination of an Old Debate", **Working Papers of the Agunah Research Unit**, 2008, http://www.mucjs.org/Annulment.pdf.

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