

**An Historical Overview of Some Overt Ideological Factors
in the Development of the *Agunah* Problem**

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Abstract

This thesis aims to give an historical overview of two maxims applied to women with regard to divorce, mainly when women want a divorce against the will of their husband. The first maxim is טב למיתב טן דו מלמיתב ארמלו (*tav lemeitav tan du milemeitav armelu*); a woman prefers to stay in a marriage, even if it is bad one, than to be single. The second maxim expresses the fear that any woman who claims that she does not want to remain married to her husband must have cast her eyes upon another man and wants the divorce for this reason only (“שלא תהא אשה נותנת עיניה באחר” (“ומקלקלת על בעלה”). This last maxim has been named the “moral fear argument”. Both maxims show that women are regarded mainly as sexual: either in need of marital relations or prone to immorality.

The subject of the thesis is to give an historical overview of the two maxims and to see how these maxims influence modern day divorce cases. Starting from their sources in either Mishnah or Talmud, the two maxims are used on a regular basis throughout history by the *poskim*. A majority of these *poskim* have been read and analyzed and changes in the use of the maxims have been highlighted. The centrepiece of this thesis lies in an analysis of forty five court cases heard by Israeli *batei din* between the fifties and seventies, which can be found amongst the *Piskei Din Rabbani'im* on the Bar Ilan Responsa database. These court cases provide some interesting insights into the history and the usage of the maxims and several changes were observed, such as the fact that the “moral fear argument” has been used against men as well from the time of the *takkanot* of Rabbenu Gershom onwards. It also became clear that a form of the *takkanat haGeonim* is still used, even though the Rishonim abandoned it. The necessity of proof is another aspect which became obvious in the *Piskei Din Rabbani'im*. To distinguish between the different modes of proof mentioned, a chapter is dedicated to evidence.

Halakhic change never happens in a vacuum, as becomes evident in the thesis. Changes regarding *agunot* occurred both due to internal halakhic debate and external (foreign) influences. The final chapter considers what all this means for the future: how do the two maxims influence modern day divorce cases? Is halakhic change a possibility in our days? Is a solution to the *agunah*-problem possible and if so, what needs to happen?

Declaration

Hereby I declare that no portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

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Table of Abbreviations

Ar.	Arkhin
BB	Baba Batra
BK	Baba Kamma
BM	Baba Metzia
E.H.	Even haEzer
Er.	Eruvin
Ex.	Exodus
Git.	Gittin
H.I.	Hilkhhot Ishut
JJS	Journal for Jewish Studies
M.	Mishnah
Ket.	Ketuboth
Kid.	Kiddushin
Lev.	Leviticus
Ned.	Nedarim
PDR	Piskei Din Rabbani'im
R.	Rabbi
Resp.	Responsa
SA	Shulkhan Arukh
San.	Sanhedrin
Shab.	Shabbat
Shut	She'eilot uTeshuvot
T.B.	Talmud Bavli
T.Y.	Talmud Yerushalmi
Y.D.	Yore Dea
Yeb.	Yebamoth

Chapter one

The problem of *igun*

1.1 Introduction

This thesis is primarily concerned with two maxims relating to the sexual behaviour of women, in the context of the problem of *igun*. These two maxims play a role particularly when a woman wants a divorce against the will of her husband. The first, *tav lemeitav tandu mileimetav armelu*, states that a woman prefers to be in a marriage, even if it is an unhappy one, than to be single, because a woman prefers the physical aspects of a marriage. The second maxim expresses the fear that any woman who claims that she does not want to remain married to her husband must have cast her eyes upon another man. Thus women are regarded as having sexual motives for both wanting to stay in a marriage and for wanting to get out of one. In this thesis I will explore the historical use of the two maxims and their influence on cases of *igun*. This introductory chapter sketches the general background of *igun* and indicates the particular context in which we encounter the use of these maxims.

One of the greatest problems in Jewish divorce law nowadays is the fact that there are men who refuse to give a *get*, a religious divorce, when the marriage is over. This refusing on the part of the husband is possibly due to the fact that in *halakhah* marriage and divorce can only be effected through an act of the man, though never against the will of the woman.¹ Whenever a husband is not capable or not willing to give a *get*, because of various reasons, a woman becomes an *agunah*, a chained woman. Chained to a marriage that only exists on paper and unable to remarry or start a sexual relationship with another man. Should she do this then she would be regarded as an adulterous woman² and all children born out of such a relationship would be

¹ Concerning *kiddushin*, betrothal, the Talmud (Kid. 2b) states “With her consent, yes; without her consent, no”. Concerning divorce the Mishnah (Yeb. 14:1) states “A woman is put away with her consent or without it”.

² An adulterous woman is liable to a *karet*-punishment, a Divine death penalty, and to *mitah bet din*, an actual death penalty by a *bet din*, usually in the form of strangulation, but this was only possible at the time of the *Sanhedrin*. *Mitah bet din* can however only be applied to cases where there are witnesses who testify that they saw the act and had warned (*hatra'ah*) the couple beforehand that they were about to transgress the *halakhah*. If however the adultery was *beshogeg*, unwilling and unknowing about the fact, then only a sacrifice had to be brought.

mamzerim.³ Due to Rabbenu Gershom's *takkanah* an Ashkenazi man⁴ cannot divorce his wife against her will, therefore a woman has the right to refuse a *get* and make her husband an *agun* (and at the same time bind herself voluntarily to this dead marriage). Even though this happens and even though every *agun* is one too many, an *agun* does not suffer the same consequences an *agunah* does. Although it would be against the spirit of the *halakhah* to do so, a man can still engage in sexual relationships with other women without having to worry that any children born out of such a union would be *mamzerim*, because according to the Torah (Deut. 21:15-17) a man can be married to more than one woman at the same time. Rabbenu Gershom made however a second *takkanah* in which he forbade a man to be married to two women at the same time, but since a rabbinical enactment can never override a *Torah-mitsvah* a man can ask a *bet din* to give him a dispensation⁵ to marry another woman if his current wife is not capable⁶ or not willing to accept a *get*, when according to *halakhah* she should accept one. The reasons why a woman might refuse to accept a *get* are the same reasons why men refuse to give a *get*: love for the partner and thus a desire to remain married; the hope for better divorce arrangements; disinterest in or opposition to the *halakhah*; or spite or blackmail of the partner.

Whereas in former days a woman would mainly become an *agunah* because her husband went missing and his death could not be proved, nowadays a woman is more likely to become an *agunah*⁷ because her husband refuses to give her a *get*. In former times it was much harder than it is nowadays to prove someone's death when (s)he went missing. Modern technology has made the world a whole lot smaller and people can now be traced more easily when they seem to disappear. Instances of husbands going missing when their deaths cannot be proved have however also occurred in the

³ A *mamzer* is a child born out of a forbidden relationship as mentioned in Lev. 18:6-23. A *mamzer* is a full Jew in every aspect of keeping *halakhah*, but (s)he is only allowed to marry another *mamzer* or a convert to Judaism. Their offspring till eternity will be *mamzerim*.

⁴ *Sephardi* men are not bound by this *takkanah* and can therefore in principle still divorce their wives against their will. However, in *Sephardic* circles men can contract and/or take upon themselves a *shevu'ah*, oath, that they will not be married to more than one woman at the same time.

⁵ Such a dispensation is called a *heter me'ah rabbanim*. A man would need the signature of a hundred different rabbis from three different countries stating that he can marry another woman while still being married, according to *halakhah*, to his first wife.

⁶ A wife is not capable to accept a *get* when she is, for instance, mentally ill or in a coma.

⁷ In Israel the term *agunah* is not used for a woman whose husband refuses her *get*. There the term *mesurevet get*, a woman who is withheld a *get*, is used.

past century. During the Holocaust, for instance, men got killed without any recording of that fact. The wars in Israel are another example of this.⁸

The problem of *igun* in cases where the husband refuses to give his wife a *get* is not just a modern problem. It has increased though in the past century. In an age where religion and religious affiliation are not that common anymore and where the role and influence of *batei din* have become smaller, the abuse of the *halakhah* has increased. That men can abuse the *halakhah* is due to the way in which marriage and divorce are implemented within *halakhah*. Within Judaism marriage and divorce are contractual agreements between a man and a woman. They certainly need two kosher witnesses⁹ to the agreement, but no rabbi is necessary to make the agreement legal. For the marriage agreement a *ketubah* is signed in which the husband accepts the obligations to support the woman, clothe her and fulfil her sexual needs¹⁰. In the *ketubah* also the amount is stated which a woman will receive upon either divorce or death of the husband. A woman, in accepting the marriage, obliges herself to be physically exclusive to her husband. Whenever a Jewish couple is getting divorced the husband has to write and hand over a *get* to his wife. Due to the fact that the writing of a *get* is a very complicated issue, the husband usually orders a *sofer* to write the *get* in his name and the actual writing is almost always done in the presence of one or more rabbis.

A *get* can only be given out of the free will of the husband and any halakhically impermissible coercion renders the *get* invalid and therefore the couple still married. There are unfortunately men who (ab)use their halakhic right to give or withhold a *get* for monetary gain or other reasons. When this happens a woman has three choices: she either gives in to the request of the husband or she remains an *agunah* as long as the husband is alive or she transgresses *halakhah* and starts a new relationship with another man and maybe even has children by this man. None of these three options are good solutions. When the wife gives in to the requests a husband makes she is basically buying her freedom. Her husband can however claim, in the light of the *halakhah*, that he is giving up a valuable asset and therefore wants to be compensated

⁸ In some cases army soldiers draw up a conditional *get* stating that if they are not back at a certain date, their wives will be divorced. For an extended explanation of a conditional *get* see paragraph 1.5.

⁹ Only men above the age of 13 who are living an orthodox life can be kosher witnesses.

¹⁰ T.B. Ket. 56a; Kid. 19b; B.M. 51a, 94a; B.B. 126b.

for his loss. Both Rabbenu Tam¹¹ and the Rosh¹² already urged women to give the husband money in order to get a *get* from him and this has ever since been common advice to women. When a woman remains an *agunah* for the duration of her husband's life she will be a living widow: she is halakhically married but is lacking all the comforts and fulfilment of a married life and will not have the chance to have more children. When a woman transgresses the *halakhah* by starting a new relationship with another man she becomes an adulterous woman and may add to the number of *mamzerim* in the world. Although some Jewish denominations accept civil divorce as the end of a Jewish marriage, according to *halakhah* a woman is only free to remarry when she has received a *get*.

The women who have been discussed so far are women who chose their husbands themselves. There are however also women who fall to *yibbum*, levirate marriage, because their husbands died without offspring. According to *halakhah* (Deut. 25:5) whenever a man dies childless his brother has the obligation to marry his brother's wife and to have a child in his name. If the brother-in-law does not want to or cannot marry his sister-in-law a special divorce ceremony called *halitsah* should be performed. *Halitsah* has in effect become the standard procedure for *yibbum*-situations. There are however brothers-in-law who refuse to perform either *yibbum* or *halitsah*, turning their sisters-in-law into *agunot*. These *agunah*-situations are even more painful because here the woman did not choose this marriage partner but is nevertheless forced by fate to wait for a release from him.

The *igun*-problem cannot be discussed without paying attention to the *moredet*, the rebellious wife, as will become clear in the course of this thesis. The *moredet* is a woman who refuses sexual relations with her husband, either because she wants to torment him or because she is repelled by him. When the latter is the case, the woman really wants a divorce from her husband and in the times of the *Geonim* it was possible for such a *moredet* to get a divorce against the will of her husband. When this was changed by the *Rishonim* a woman claiming *ma'is alay* did not have any possibility to get out of a marriage when her husband was unwilling to give her a *get*.

¹¹ Rabbenu Tam, Sefer HaYashar, 24:8.

¹² Rosh, *Responsa* 35:2, as quoted in Menachem Elon, *Jewish Law, History, Sources, Principles. Ha-Mishpat Ha-Ivri*, Volume II, Magnes Press, The Hebrew University, Jerusalem 1994, p. 850: "Nevertheless, the attempt should be made to appease him with money".

A more detailed survey of the history of the *moredet* is included at the end of this chapter.

A final part of this chapter deals with the way women's attitude towards sexuality is viewed. This is important because (the fear of) women's sexuality lies at the core of the two maxims dealt with in this thesis, and this fear has an influence not only on women in general but in particular on women who seek a divorce.

1.2 Solutions to the *agunah*-problem

Throughout history rabbis have worked hard in order to free women from a dead marriage, always in full awareness of the “*humra shel eshet ish*, the imperative to proceed cautiously in recognition of the gravity of releasing a married woman without a *get*”.¹³ The willingness to help women out of an *agunah*-situation differs however. In situations where the husband has gone missing and is presumed dead but this cannot be proved the rabbis apply a more lenient approach to freeing this woman than to a woman whose husband refuses to give a *get*. In the first case there is a (strong) doubt, *safek*, whether the husband is still alive. Since there is a chance that the husband is dead, the rabbis decided to be more lenient. In the second case, however, the husband is very much alive. The greater strictness here, in helping to release the woman, stems from the halakhic imperative that a *get* must be given with the free will of the man. There is discussion whether or not the rabbis should act leniently in situations where a levirate brother-in-law cannot or refuses to give *halitsah*: here the first husband has died and this could be a reason to rule leniently. This is however not always the case.¹⁴

1.2.1 The missing husband

The classical case of *igun* is where the husband has gone missing and his death cannot be proved. In the past men went missing during warfare or never returned from their

¹³ Michael J. Broyde, “Review Essay. An Unsuccessful Defense of the Beit Din of Rabbi Emanuel Rackman: *The Tears of the Oppressed* by Aviad Hacohen”, in: *The Edah Journal*, 4 (Kislev 5765) 2 <http://www.edah.org>.

¹⁴ E.g. Aviad Hacohen, *Tears of the Oppressed, An Examination of the Agunah Problem: Background and Halakhic Sources*, Ktav Publishing House, Inc. Jersey City, NJ, 2004: p. 2-4, Rabbi Zvi Hirsh Orenstein. In this case the husband died from epilepsy and the *yabam* is missing.

commercial travelling. The danger involved in both these situations and the lack of efficient communication resulted in many women becoming *agunot*. This was not always due to the fact that the husband actually died: husbands often just settled in a far away country without taking care of their families back home. Some men even started a completely new family in their new place of residence, sometimes abandoning this new family when returning home after several years.¹⁵ According to Grossman:¹⁶

Examination of the *responsa* of the early Spanish sages indicates that we are dealing here with a rather widespread phenomenon that troubled Jewish society in the Muslim countries and in Christian Europe during the tenth and eleventh centuries. The extensive involvement in international and local commerce and trade led to frequent journeys and changes in place of residence.

In trying to prevent husbands from abandoning their wives the Talmud¹⁷ discusses how long a husband may leave his wife behind, both with and without her consent, if he is going on a business trip or if needs to go to another city to study. The reason why this is discussed is because a husband has the obligation to fulfil his wife's sexual needs. Indeed, the Mishnah¹⁸ (Ket. 5:6) even prescribes how often a man is required to have intercourse with his wife when he is at home and makes this dependant on the husband's profession:

If a man vowed to have no intercourse with his wife, the School of Shammai say: [She may consent] for two weeks. And the School of Hillel say: For one week [only]. Disciples [of the Sages] may continue absent for thirty days against the will [of their wives] while they occupy themselves in the study of the Law; and labourers for one week. The *duty of marriage* enjoined in the

¹⁵ See: Avraham Grossman, "The Historical Background to the Ordinances on Family Affairs Attributed to Rabbenu Gershom Me'Or ha-Golah ("The Light of the Exile")", in: A. Rapoport-Albert & S.J. Zipperstein (eds.), *Jewish History, Essays in Honour of Chimen Abramsky*, Halban, London 1988, p. 3-23; Avraham Grossman, *Pious and Rebellious, Jewish Women in Medieval Europe*, Brandeis University Press, Waltham, Massachusetts, 2004, p.82.

¹⁶ Grossman, 2004, p. 82.

¹⁷ T.B. Ket. 61b-63a.

¹⁸ All translations of the Mishnah are from Herbert Danby, *The Mishnah*, Oxford University Press, 1949.

Law is: every day for them that are unoccupied; twice a week for labourers; once a week for ass-drivers; once every thirty days for camel-drivers; and once every six months for sailors. So R.Eliezer.

Whenever a man sets off to go on a journey, the Talmud¹⁹ dictates that he is obliged to have intercourse with his wife before he leaves. To prevent abandonment of women Rabbenu Tam made a *takkanah* that a man was not allowed to leave his wife for more than eighteen consecutive months and could only leave for such a period if it was necessary for economic reasons or for Torah study. It also obliged a man to go to the nearest *bet din* and make himself known after having been apart from his wife for more than twelve months. A man was however forbidden to leave his wife when there was a dispute between them, except when he had an explicit approval of a *bet din*. Upon returning home a man had the obligation to stay home for a minimum period of six months. The fact that Rabbenu Tam prohibited a man to leave his wife for a long period of time, without the permission of either the wife or a *bet din*, shows, according to Grossman, “that men did take the opportunity to stay away from home for a long time when there was a quarrel within the family”.²⁰ Rabbenu Tam was not the only Sage who implemented restrictions against men in order to prevent their wives becoming *agunot*. In order to prevent women in Egypt from becoming *agunot*, the Rambam made a ruling, as Grossman²¹ writes,

against foreign Jewish men who came to Egypt and wanted to marry a local woman. He did not allow them to marry unless they could prove that they were not married in another country. If they were married, they first had to give their first wives a *get*. Whenever they were allowed to marry a local woman, they were not allowed, not even with the consent of the wife, to leave the country without giving their wives a conditional *get*.

Notwithstanding the fact that men just abandoned their wives, commercial travel in itself was not free from risks and men did actually die. Men travelling on a ship, for instance, ran the risk of drowning. There is a whole discussion in the Talmud (Yeb.

¹⁹ T.B. Yeb. 62b.

²⁰ Grossman, 1988, p. 11-12.

²¹ Ibid. p. 13; Grossman, 2004, p. 75.

120-121) about how sure one can be that a man is really dead if he seems to have drowned. The discussion focuses on "מים שאין להם סוף", water that has no ending. If the surroundings of the water in which the man apparently drowned are visible, i.e. if the whole water is surrounded by land, then the man can definitely be considered dead, otherwise one would have seen him come onto land somewhere. If however the surroundings of the water are not visible, then there might be a possibility that the man came to land somewhere out of sight, therefore one cannot conclude that he has drowned. So if a ship was wrecked at sea it was very hard to prove that all men aboard actually died since it is impossible to see all the surroundings of the sea.

Men getting killed during warfare, in the absence of evidence, already constituted a problem in the times of the *Tanakh*, when the Jews had a land of their own they needed to defend. This problem has reappeared in modern time. Klein observes: "Cases of soldiers killed in battle or missing in action became [anew] a significant problem with the beginning of the period of emancipation, when Jews became eligible for military service along with all other citizens. The codes rule that a soldier cannot be assumed to be dead unless there is a witness to his death in battle or to subsequent burial (E.H. 17:50)".²²

To free an *agunah* whose husband had gone missing without his death being proved, the rabbis decided to be more lenient regarding evidence of death. Whereas normally to prove a fact the *halakhah* requires two kosher witnesses, the rabbis decided that in the case of an *agunah* the evidence of one witness would be sufficient. Even evidence given by a person who would normally not be accepted as a witness²³ would be regarded as reliable and the woman would thereafter be permitted to remarry. Also information about the death of the husband that was simply overheard would suffice as evidence as would written statements concerning the husband's death. In modern times medical evidence, like DNA-samples, is also accepted as proof of a person's death. The wife herself was also allowed to give evidence concerning her husband's death, because the Sages were sure that a woman would not bring herself into a

²² Isaac Klein, *A Guide to Jewish Religious Practice*, The Jewish Theological Seminary of America, New York, 1979, p. 454.

²³ An unreliable witness would normally be any person who is not a free, orthodox Jewish male over the age of 13. So, women, children, slaves, dishonest people, apostates and non-Jews are normally all excluded from giving evidence.

forbidden situation.²⁴ The Sages however restricted the possibility of a wife giving such evidence to situations where “there is peace in the world and peace between him and her”.²⁵ In times of peace in the world social control is high in a Jewish community and people within the community are aware of things happening within the community. Therefore it is quite easy to discover lies.²⁶ When there is peace between him and her the wife does not have a reason to lie. However, if the couple are having marital problems, the wife will not be trusted since she probably just wants to get rid of her husband. A counterargument to this is however T.B. Yeb 118b where the validity of a *get* given at the time of a quarrel is discussed, and the question is asked whether in such circumstances a *get* or a continuing marriage (with its sexual fulfilment) is more preferable to the woman. For an extensive discussion of this *Gemara* see chapter two.

1.2.2 The recalcitrant husband

When a woman becomes an *agunah* because her husband refuses to give her a *get*, it is more difficult to solve this situation. Finding a way to permit an *agunah* to remarry is nevertheless considered a great *mitsvah*.²⁷ Throughout history several solutions have been proposed, but all have smaller or larger halakhic problems attached to them. Different categories of solutions that have been discussed are:

1. *Kiddushin al tenai* (conditional marriage)
2. *Hafka'at kiddushin* (annulment of the marriage)
3. *Get al tenai* (conditional divorce)
4. *Kefiyah* (coercion)
5. Prenuptial agreements (PNA's)

All these solutions will be discussed briefly but this is not to be regarded as an exhaustive list of either possible solutions or their attached problems.

²⁴ T.B. Yeb. 119b/120a.

²⁵ M. Yeb. 15:1; T.B. Yeb. 116a.

²⁶ T.B. Yeb. 116a.

²⁷ Rosh, Responsa 51:2.

1.3 *Kiddushin al tenai*

A Jewish marriage ceremony consists of two parts: the *kiddushin* and the *nissu'in*. The *kiddushin* is the giving of an object of value, often a plain golden ring, to the bride by the groom while he recites “כדת מושה וישראלהרי את מקודשת לי”, behold you are betrothed to me according to the laws of Moses and Israel. The *kiddushin* constitutes an inchoate marriage and thereafter a woman needs a *get* to get out of it. Nevertheless, bride and groom are still sexually forbidden to each other. Only from the moment of the *nissu'in*, the actual “taking” of the bride, are bride and groom sexually permitted to each other. In former times there was a period of about twelve months between the *kiddushin* and the *nissu'in*. The *nissu'in* was in those days the bringing of the bride from her father’s house to the house of the groom. Nowadays the *nissu'in* is the time a bride and a groom reside in a secluded room, known as *yichud*, and this takes place right after the *kiddushin*.

According to the Talmud²⁸ a husband can attach conditions to the *kiddushin*. These conditions can however not contradict the *halakhah*. A husband could say, for instance, “Behold you are betrothed to me on the condition that you do not hold any claims towards me considering food and clothing”.²⁹ In such a case the betrothal is valid (even though the condition is void) because “contracting out of a Law contained in the Torah as to a monetary matter (*mamonah*) is valid, but to a non-monetary matter is void”.³⁰ Thus when a husband says “Behold you are betrothed to me on the condition that you shall not be subject to levirate marriage”³¹ the betrothal would not be valid. Such a condition relates to an *issurah* (prohibition) and one cannot opt out of such a law. A man can also attach a condition to the *kiddushin* that is neither an *issurah* nor a *mamonah*, but one that has to do with character traits of the woman. A famous example is found in the Talmud: “Behold, you are betrothed to me on condition that you are not the vowing type”.³² In the time between the *kiddushin* and

²⁸ T.B. Kid. 60a, 62a; Ket. 58b; B.M. 16b, 94a; Yeb. 92b, 93b, 94b, 107a, 110a.

²⁹ T.B. Ket 56a; Kid. 19b; B.M. 51a, 94a; B.B. 126b.

³⁰ Tos. Kid. 3:7-8.

³¹ Ibid.

³² The Talmud deals in connection to marriage on many occasions with the concept of a woman who is the vowing type. A man can stipulate at the *kiddushin* that his future wife is not the vowing type, meaning that she does not take upon herself, or has taken upon herself, vows of any sort. This because a vow could interfere with the duties a wife has towards her husband.

the *nissu'in* the man would either have satisfied himself that the condition was fulfilled or he would have foregone the condition.

According to many rabbis, however, no condition could be attached to the *nissu'in*, which involves an unconditional acceptance of each other as spouses. This is because “אין אדם עושה בעילתו בעילת זנות”³³, no man wants to make his sexual relations into improper relations. Thus the rabbis decided that whenever a man puts a condition to the *kiddushin* and then subsequently has intercourse with the woman, he either has foregone the condition at the time of the *nissu'in/ bi'ah* (intercourse) (Rif, Rashba) or he has the intention to make a new *kiddushin* with the *bi'ah* (Rashi, Rashban).³⁴ Rabbi Israel of Brunn however decided that when a man has an apostate brother he could add a condition to the *nissu'in* that if he died childless, his wife would not fall to *yibbum*.³⁵ Some rabbis have seen this as a precedent for *kiddushin al tenai*. One of the biggest halakhic problems in attaching a condition to *nissu'in* is that all conditions are nullified through marital relations. A possible solution to this problem is that the couple repeats the condition before (every) marital act.

One proposal for conditional marriages came

quelques mois après la loi de 27 juillet 1884, rétablissant le divorce en France, Moïse Netter, rabbin de Médéah en Algérie, proposait la suppression définitive du *get* pour le remplacer par le divorce civil, au nom de l'adage talmudique *Dinah de-malkhuta dina*, la loi du royaume est la loi.³⁶

This proposal was rejected by the orthodox world. Rabbi Michael Weil of Paris however accepted Netter's proposal and suggested in an article that the use of a *get* should be abolished in the light of alleviating an *agunah's* plight. This proposal was strongly rejected by Chief Rabbi Zadok Kahn of Paris (1823-1900) and Rabbi Isaac Elchanan Spector of Kovno (1817-1896). Notwithstanding this fact, in 1907

³³ T.B. Yeb. 107a; Ket. 73a; Git. 81b.

³⁴ See Eliezer Berkovits, *Tenai BeNissu'in uVeGet*, Mosad HaRav Kook, Jerusalem, 1967, chapter one.

³⁵ R. Moses Isserles, E.H. 157:4.

³⁶ Gabrielle Atlan, *Les juifs et le divorce. Droit, histoire et sociologie du divorce religieux*, Peter Lang, Bern, 2002, p. 213.

le Grand Rabbin Lehman proposait à son tour qu'au moment des *qiddushin*, le mari stipule qu'il se marie à condition qu'aucun tribunal civil ne vienne jamais prononcer le divorce car dans le cas contraire, le mariage serait nul et non avvenu.³⁷

Following this proposal a board of French rabbis decided, with the *takkanah* of rabbi Brunn as their basis, to make all marriages in France conditional. Strong opposition to this practice came from Rabbi Yehudah Lubetsky (1850-1910), who was supported by many leading rabbis in Europe. His views were published in 1930 in the book '*Ein Tenai BeNissu'in*'. A similar proposal to the French condition was introduced in 1924 by the rabbis of Constantinople. This proposal said that if a woman runs the risk of becoming an *agunah*, a civil divorce will render the *kiddushin* retroactively null and void. This proposal too was completely rejected. In 1967 Rabbi Eliezer Berkovits published a book entitled *Tenai BeNissu'in uVeGet*, in which he tried to revive the discussion about conditional marriages.³⁸

Although Berkovits's work is halakhically solid and could have been used as a new basis to rethink conditional marriages, his work has not been accepted by orthodox *batei din*. Whether or not this rejection is based on the actual reading of the book is not always clear. The fact that Berkovits's other work is considered to be too modern according to many orthodox opinions, and since modernity is taken by some to entail non-orthodoxy, his book on conditional marriages was not accepted by orthodox *batei din*. When the conservative movement in America decided to accept Berkovits's proposal in 1968 and to replace the 'Lieberman clause'³⁹ with it⁴⁰, it ruined any chance of the Berkovits proposal being taken seriously by orthodox *batei din*. According to the 'Lieberman clause' (1954), the parties agreed to recognise the

³⁷ Atlan, 2002, p. 214.

³⁸ For a full review of R. Berkovits' book in English see: R. Yehudah Abel, "The Plight of the '*Agunah* and Conditional Marriage", Working Papers of the Agunah Research Unit: [Http://www.mucjs.org/MELILAH/2005/1.pdf](http://www.mucjs.org/MELILAH/2005/1.pdf).

³⁹ See: Rachel Biale, *Women and Jewish Law. The essential texts, their history & their relevance for today*, Schocken Books, New York, 1995, p. 110.

⁴⁰ Moshe Meiselman, *Jewish Women in Jewish Law*, KTAV Publishing House, Inc./Yeshiva University Press, New York, 1978, p. 107-108.

authority of the *bet din* of the Rabbinical Assembly”;⁴¹ if either spouse ignored the *bet din*’s rulings then that spouse had to pay a fine, enforceable in a civil court. To add such a clause to a *ketubah* brings many halakhic difficulties. The first is the problem of *asmakhtah*: the clause is not defined clearly and therefore one can assume that neither party had any real intent in mind. The clause is thus not halakhically binding. The second problem is the concept of *kefiyah*: a financial fine attached to the giving of a *get* makes a *get* a *get me’useh*, a coerced *get*, and thus an invalid *get*. The conservative *bet din* realised the halakhic difficulties attached to this clause, dropped it and decided to accept Berkovits’s proposal in 1968. Daniels⁴² observes that nowadays the conservative movement has adopted a different solution to R. Berkovits’s proposal, as he writes:

Today, the solution used by the Conservative movement is to annul marriages, based on cases in the Talmud. In short, the concept is that all Jewish betrothals are done with the consent of the rabbis, and the annulment consists of the rabbis removing this consent if the recalcitrant husband refuses to grant a *get*. This differs from Berkovits’s solution, in that no additional conditions or agreements need to be signed.

Another proposal which has been made and which resembles the Lieberman clause is the one where “the parties take a solemn oath to seek a religious divorce should they become estranged”.⁴³ The problems with this proposal are twofold. First, as said earlier, marital relations nullify all conditions made with regard to a possible divorce. Next to that, an oath may render a *get* invalid since the *get* may now be regarded as coerced. Whether or not self imposed coercion (*onsa da nafshe*) still makes a *get* a coerced *get* has been the topic of discussion.

⁴¹ Bernard S. Jackson, *Agunah and the Problem of Authority: Directions for Future Research*, Publications of the Agunah Research Unit, No. 1, Centre for Jewish Studies, University of Manchester, February 2004, p. 12.

⁴² Daniels, “Potential Solutions to the *Agunah* Problem”, in: <http://www.myjewishlearning.com/lifecycle/Divorce/Issues/Agunot/AgunotSolutions.htm>

⁴³ Rabbi J. David Bleich, “Current Responsa, Decisions of Batei Din, and Rabbinical Literature, Refusal to Grant a Religious Divorce”, in: *Jewish Law Annual* 1, E.J. Brill, Leiden, 1978, p. 179.

1.4 *Hafka'at kiddushin*

Annulment of marriages is possible according to the Talmud, but only in certain circumstances. The Talmud discusses five cases:

1. In Yeb. 110a, a man seizes a woman who was betrothed as a minor to another man. Rav Ashi says that because this man acted improperly, they, the rabbis, will now act improper towards him and annul the marriage (הוא (עשה שלא כהוגן לפיכך עשו בו שלא כהוגן ואפקעינהו רבנן לקידושין מיניה) and if he had married her through sexual intercourse they will render his intercourse as fornication.
2. In B.B. 48b, a man forced a woman into marriage by threatening her with physical violence. Here again he acted improperly and therefore the rabbis deal with him in an improper way by annulling the marriage.
3. Gitt. 33a deals with a case where a man sends a *get* to his wife through a *shaliach*, a representative, but then annuls the *get* before it was delivered to the wife, without informing the wife about it. Rabban Shimon ben Gamliel decided that in such cases the rabbis will annul the marriage because “all who marry, marry in accordance with the conditions of the rabbis and thus the rabbis can annul the marriage” (כל דמקדש אדעתא דרבנן) (מקדש ואפקעינהו רבנן לקידושין מיניה).
4. Another reference to Rabban Shimon ben Gamliel’s decree can be found in Yev. 90b.
5. In Ket. 3a, a man gave a conditional *get* to his wife before he set off on a journey. The condition stated that if he had not returned by a certain date and time, the woman would be divorced. The Gemara notes the possibility that he may not have returned home on time because of *ones* (unavoidable accident). The divorce would thus be invalid. The Sages decided in such cases to annul the marriage, for both chaste and loose women. A chaste woman would tie herself to the marriage, expecting that her husband was held back by an accident, even though this might not be the case. A loose woman would get remarried immediately after the *get* came into effect because she expects her husband to stay away of his own free will, even though he might have had an accident. Her second marriage would therefore be an adulterous one and her children from this marriage

mamzerim. To mend either imperfect situation the rabbis decided to annul the marriage from the moment the *get* would have come into effect. They also decided that a man could never claim *ones* in the case of a conditional *get*.

The question has been raised whether marriages can be annulled whenever a man acts improperly, even though this ‘acting improperly’ might be totally different from the cases mentioned in the Talmud. David Novak⁴⁴ summarizes a discussion of *hafka’at kiddushin* in the Middle Ages. Although some rabbis thought that *hafka’at kiddushin* could be applied in some cases other than the ones mentioned in the Talmud, no one was actually willing to annul marriages without the approval of other rabbis (*halakhah welo lema’aseh*). This is also apparent in many of the rulings mentioned in Hacoen’s book.⁴⁵ Other rabbis however decided that *hafka’at kiddushin* was never possible except for cases mentioned in the Talmud. The problem with *hafka’at kiddushin* is that one declares that the relationship between two people, which was held in general opinion to be a marriage bond, is null and void *ab initio*, thus apparently rendering the sexual relations between the couple as promiscuous. This is hard to swallow, especially when there are children involved. The children would not be *mamzerim* but still carry the stigma of been being born out of wedlock.

Annulment is typically performed by the *bet din*’s retrospectively confiscating (*hefker bet din hefker*) the ring given to the woman in *kiddushin* by *kesef*. By taking away the ownership of the ring from the man, the marriage was not a valid transaction and thus no marriage came into being. In medieval times, a number of *takkanot hakahal* appear to have given authority to do this to organs of the *kahal* itself, rather than the *bet din*, in order to enforce additional requirements of *kiddushin*. From the fourteenth century onwards though annulment of marriages by way of a *takkanat hakahal* ceased to exist.⁴⁶

In an attempt to alleviate the plight of *agunot* Prof. Berachya Lifschitz suggested in 2004 that when in Israel a husband refused to give a *get* to his wife even though a *bet*

⁴⁴ David Novak, “Annulment in Lieu of Divorce”, in: *Jewish Law Annual* 4 (1981), p. 195-197.

⁴⁵ Hacoen, 2004, p. 48, 50, 53, 83, 86 and 89.

⁴⁶ Elon, 1994, volume II, p. 847.

din ordered him to do so, the *Knesset* can effect the *hefker* of the ring instead of the *bet din*. This would mean that the *bet din* would not have to perform the actual annulment. The proposal was, however, voted down in the *Knesset*, largely due to other priorities on the agenda.

1.4.1 *Kiddushei ta'ut*

A solution that resembles, and to some people is an instance of, *hafka'at kiddushin* is *kiddushei ta'ut*, a marriage based on a mistake. When a partner during the marriage discovers a salient defect in the other partner which was not revealed to him/her before the marriage, this partner may claim: “had I known of this defect I would never have married this person”. The marriage is therefore a mistaken transaction and thus never came into being. This represents a difference between *kiddushei ta'ut* and *hafka'at kiddushin*: in the latter, a marriage came into being, but the rabbis retrospectively annulled it; with *kiddushei ta'ut* no marriage ever came into being.⁴⁷ The woman does not need a *get* from her husband, but the rabbis still need to make an official statement that the marriage was based on *mekach ta'ut* and is thus null and void. The salient defect does not have to be hidden on purpose; as long as the other partner did not know about the defect at the time of the marriage, the marriage can be declared null and void. Examples of salient defects are mentioned in M. Ket 7:7-10, M. Kid. 2:2-3, T.B. B.K. 110b-111a. and T.B. Kid. 50a. Notwithstanding this difference between *kiddushei ta'ut* and *hafka'at kiddushin*, they both have the same problems attached to them.

As will become clear in this thesis, in our day and age the counter argument against *kiddushei ta'ut* is *tav lemeitav*, the first of our maxims. The initiative of some rabbis to free *agunot* by applying *kiddushei ta'ut* is highly criticized and their opponents use the maxim of *tav lemeitav* to explain why *kiddushei ta'ut* cannot be applied. This will be extensively discussed in chapter two.

⁴⁷ See e.g. Hacoen, 2004, p. 2-3.

1.5 *Get al tenai*

In the Talmud we can find a precedent for *get al tenai*. In Ket 9b and Rashi and the Tosafot ad loc. it is mentioned that, based on 1 Sam. 17:18, it was a custom for soldiers at the time of king David to write a conditional get for their wives whenever they went to fight a war. “The *get* was conditional because it only became retroactively valid when the man did not return from war before a certain date, usually a certain amount of time after the war had finished. If the husband was not back at the date mentioned in the *get* the woman was divorced from that day and free to marry any other man, without having to go through *yibbum* or *halitsah*, were this appropriate”.⁴⁸

The rabbis even extended the use of a conditional *get* to situations where the husband had to go on a business trip, especially when there was discord between the man and the woman. A woman who found herself in these circumstances could ask the *bet din* to order her husband to write her a conditional *get* before he left the country. The rabbis decided that a man could not claim *ones* if he did not return on time. Whether the man had not returned home before that particular date due to either his own free will or due to unfortunate circumstances was irrelevant: the only relevant fact was that the man was not back home. The rabbis decided thus, as mentioned earlier in case 5 in section 1.4, both for the virtuous and the not so virtuous women. A virtuous woman would remain a living widow because she expects that her husband is willing to return home but is probably held back through unfortunate circumstances. The not so virtuous woman will marry immediately when the *get* comes into effect since she cannot live without a man any longer. Conditional *gittin* were also used in modern day wars as, for instance, during the Russo-Japanese war (1905). “The eminent Rabbi Shalom Mordechai Schwadron of Brezan urged husbands about to go to the front to execute ‘conditional divorces’ for their wives, which would become effective should they be missing in action without proof of death”.⁴⁹ During “World War II various rabbinic bodies drew up legal documents to be signed by departing soldiers that would empower a court to issue a writ of divorcement to the soldier’s wife if he

⁴⁸ See: Ben-Zion Schereschewsky, “Agunah”, in: *Encyclopaedia Judaica*, Keter Publishing House Ltd., Jerusalem 1971, p. 432-435; Biale, 1995, p. 108.

⁴⁹ “Marriage Prisoners” in: *Jewish Spectator*, 49 (Winter 1984) 4, p. 6.

should not return within a specified time after the declaration of peace or the cessation of hostilities”.⁵⁰ Isaac Klein has collected in his book three documents that were issued by the Rabbinical Assembly of America, The Chief Rabbinate of Israel and the London *Bet Din*. The fact that conditional *gittin* have been used throughout the ages shows that a conditional *get* is a good option when men go to war. A conditional *get* works in these circumstances because the couple does not have intercourse and therefore the *get* cannot be annulled. For a *kohen* however a conditional *get* is problematic since he can never remarry his wife after he has divorced her. In cases of a recalcitrant husband this kind of conditional *get* does not work.

Rabbenu Tam interpreted the passage in *Ketubot* differently and argued that the *get* in question was an unconditional *get* accompanied by a promise that the couple will remarry when the husband returns from war. Such an unconditional *get* is definitely not an option for a *kohen*. A problem that can occur with this kind of *get*, as Rabbi S. Zevin⁵¹ asks, is what will happen if the woman refuses to remarry upon the return of the husband? Is the *get* valid in such circumstances or not, since the man gave the *get* with the intention (yet not explicitly stated as a condition) to remarry when he returned from war, and would this thus be a case of *gerushei ta'ut*, a divorce based on false premises?

The Talmud also lists other kinds of *get al tenai*; just as a man can attach conditions to the *kiddushin*, so too can he attach conditions to the *get*.⁵² The rabbis decided however that such conditions must be reasonable in terms of possible fulfilment. In Kid. 5a and Er. 15b we read:⁵³ “Behold here is your divorce, on condition that you do not drink wine or visit your father’s house forever, that is no divorce. For thirty days, that is divorce”. If the condition only applies to a certain amount of time, it is valid; if the condition is unreasonable (‘forever’) it is not valid. In B.M. 94a⁵⁴ several examples are given of unreasonable conditions. Nevertheless the rabbis decided that

⁵⁰ Klein, 1979, p. 455.

⁵¹ Rabbi S. Zevin, “War ‘Agunot’ in the Halakhic Literature”, in: *Sinai*, A Monthly for Torah, Science and Literature, V (December 1941-February 1942) 79, p. 23 (Hebrew).

⁵² See e.g. T.B. Er. 15b; Kid. 5a, 60a; B.M. 94a.

⁵³ All translations for the Talmud are taken from: *The Babylonian Talmud, translated into English with notes, glossary and indices* under the editorship of Rabbi Dr. I. Epstein, The Soncino Press, London, better known as the *Soncino Talmud*.

⁵⁴ “Here is thy divorce on condition that thou ascendest to Heaven or descendest to the deep, on condition that thou swallowest a hundred cubit cane or crossest the great sea on foot”.

in those cases the *get* given is valid, since the man only made the conditions to distress the woman. In modern times men often add conditions to the giving of a *get*, for instance payment of an exorbitant amount of money or custody of the children. One could claim that many of these conditions are unreasonable conditions even though they can be fulfilled, because they are meant to distress the woman and could basically be classified as pure blackmail. Unfortunately these conditions are regarded as valid and thus a woman often does not have any other options than either to pay the money or give up her children, or stay an *agunah*.

1.6 *Kefiyah*

As I have stated earlier, a *get* has to be given out of the free will of the husband. If the husband is forced to give a *get*, the *get* becomes a *get me'useh* and thus invalid. There are however also halakhically valid forms of *kefiyah*, coercion, that do not render the *get* invalid. *Kefiyah* will however only be used after the *bet din* has ruled against the husband and has told him that he should grant a *get* to his wife. In both the Mishnah and the Talmud⁵⁵ instances are found where it is written that one may compel a husband into giving a *get* until he says "It is my will". Maimonides⁵⁶ even went as far as saying:

If a person who is legally compelled to divorce his wife refuses to do so, an Israelite court in any place and any time may scourge him until he says 'I consent'. He may then write a *get*, and it is a valid *get*.

Why does even physical beating not render a *get* invalid? Surely this is one of the gravest forms of coercion? Maimonides⁵⁷ nevertheless says that

duress applies only to him who is compelled and pressed to do something which the *Torah* does not obligate him to do. .. [But] He whose evil inclination (*yetser hara*) induces him to violate a commandment or commit a

⁵⁵ M. Ar. 5:6; Git. 9:8; T.B. Yeb. 106a; Ar 21b; Kid. 50a.

⁵⁶ Rambam, Hilkhot Gerushin 2:20; all translations of the Mishneh Torah in this thesis will be taken from: Yale Judaica Series (Isaac Klein's translation), *The Code of Maimonides (Mishneh Torah)*, Yale University Press, New Haven and London, 1972.

⁵⁷ Ibid.

transgression, and who is lashed until he does what he is obligated to do, or refrains from what he is forbidden to do, cannot be regarded as a victim of duress; rather, he has brought duress upon himself by submitting to his evil inclination.

Nowadays however this form of *kefiyah* is not considered an option since most countries forbid corporal punishment. There are however stories of the ‘*haredi* (ultra-orthodox) police’ in parts of Jerusalem, Bnei Brak and New York threatening the recalcitrant husband with physical violence and sometimes actually applying it. These threats and actions help: the man in question almost always gives a *get* after the incident. This is why some people hold that *igun* is hardly a problem within *haredi* communities because they have their own way of dealing with things and to some extent that is true. But taking matters into one’s own hands is not free of risk as Aranoff⁵⁸ writes:

In the United States, violent self-help by rabbinical courts is unlawful and punishable. Several American rabbis are under investigation by government prosecutors because of suspected links to violence against recalcitrant husbands.

There are also other forms of valid *kefiyah* possible that do not involve the use of physical violence. Within Israel the *batei din* have extensive possibilities to use the civil law in applying *kefiyah* to a recalcitrant husband and this is halakhically valid because it is based on the *harkhakot* of Rabbenu Tam.⁵⁹ According to Israeli law a *bet din* can withhold a man’s wages, his passport and his visa cards (1995). According to the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 *batei din* even have the right to imprison a recalcitrant husband. According to Rachel Levmore⁶⁰

⁵⁸ Susan Aranoff, “Halakhic Principles and Procedures For Freeing *Agunot*”, <http://www.agunahinternational.com>,. First published in August 1997 in the New York Jewish Week.

⁵⁹ Even though Rabbenu Tam never awarded *kefiyah*, *hiyuv* or even *mitsvah* in cases where a woman claims *ma’is alay*, he did rule that as a community one can “withdraw” from a man, for instance by not calling him up to the Torah or refusing to give him a Jewish burial, so as to force him into giving a *get* by indirect ways.

⁶⁰ Information given by Rachel Levmore in an email of May 2004. Rachel Levmore is an *orech din* (a lawyer) and a *to’enet rabbanit* (lawyer in a rabbinical court) in Israel. She is also one of the composers of the *heskem likhvod hadodi*, the agreement of mutual respect, a pre-nuptial agreement used in Israel.

This law allowed for imprisonment for an indefinite period, but only after the Rabbinical Court ruled '*kefiyah*' — which is a very rare occurrence — and the order of incarceration had to be approved by the president of the *Bet Mishpat Mechozi*, the Civil Court. In 1995 an additional law was passed which gave the Rabbinical Court the power to issue an order of incarceration autonomously, without having to resort to the authorisation of any other body. Commonly known as the 'Sanctions Law' it provided for a list of restraining orders which can be issued by the Rabbinical Court, such as: rescinding of licenses – i.e. driver's license, professional license, bearing of arms etc. After 30 days, if the husband still does not give a *get*, then the Rabbinical Court can incarcerate him for up to five years. This can be done twice. A man is imprisoned immediately when the order is issued and he is released immediately upon the giving of a *get*.

Even though these forms of halakhically acceptable *kefiyah* exist they are not used on a regular basis, as Levmore already mentioned. A *bet din* must first rule that there is a *hiyuv* on the man to divorce his wife, and this itself is something they are relatively reluctant to do.

Outside of Israel Jewish communities cannot normally use the civil law to help to get a recalcitrant husband to give a *get*. The main form of *kefiyah* that is available to them is community pressure by breaking all bonds with the man, such as not calling the man up for a Torah reading in synagogue, not having any business dealings with him and not inviting him for a meal. Sometimes even outright shaming of the man is applied, by publicly announcing that he has defied the *bet din* and refuses to give a *get* to his wife. Shaming a person is a grave sin in Judaism and is compared to 'spilling someone's blood'. In the case of an *agunah* though it is an allowed practice and Maimonides' statement on physical beating in the case of a recalcitrant husband is used here as well to justify the shaming. For instance, the late Dayan Berkovits wrote "... every Jew wishes, at least at a subliminal level, to act in accordance with the *halakhah*, even if his judgement is sometimes clouded by extraneous subjective

factors”.⁶¹ Therefore one can make sure, by means of communal pressure, that a person acts in accordance with the *halakhah*. In some countries though the *batei din* have the possibility of making use of the civil law, such as in New York, where in 1983 the New York *Get* Law was passed. This *Get* Law states that no civil divorce will be proclaimed until all obstacles for remarriage are lifted. There is no mentioning of a *get*, since this would render the coercion invalid. A Second New York *Get* Law,⁶² enacted in 1992, was not accepted by the orthodox *batei din* because it made a direct connection between financial provisions (halakhically considered a fine) and the refusal to give a *get*. In England one can use the Divorce (Religious Marriages) Act 2002 when one partner refuses to give/accept a *get*. With this Act one can appeal to the judge not to convert the divorce *decree nisi* into a *decree absolute* until all obstacles to remarriage are lifted, i.e. until a *get* is given or accepted.⁶³ All these possible forms of *kefiyah* against a recalcitrant husband work, however, only in so far as a man is sensitive to the pressure applied to him. In the olden days there was much more respect for *batei din* than there is nowadays and exclusion from the community was felt more intensely; nowadays however *kefiyah* does not always work: a man can go to another community where he will still be accepted, or he might be incarcerated and still choose to deny his wife a *get*. The famous case of the Yemenite man who preferred to stay in prison for 32 years and die there instead of giving his wife a *get* is a classic example of this.

1.7 Prenuptial agreements

One of the most commonly used tools nowadays in trying to prevent *agunah*-situations is the use of a prenuptial agreement, a PNA. The majority of prenuptial agreements are aimed at the man: he promises to end the religious marriage when the marriage is irretrievably broken down and to give the wife money when he refuses to end the marriage. A PNA can have many halakhic problems attached to it and therefore if one wants a halakhic valid PNA one has to make sure that the PNA is clear in its wording (to prevent *asmakhtah*), the money the man is supposed to give

⁶¹ Dayan Berel Berkovits, “Divorce and *Gittin* in the 1990s”, *L'Eylah*, Spring 1992, p. 22-25.

⁶² For an extended discussion about this Second New York *Get* Law see: Rabbi Gedalia Dov Schwarz, “Comments of the New York State ‘Get Law’,” in: *Journal of Halacha and Contemporary Society* 27 (1994), p. 26-34.

⁶³ Deanne Levine, ‘How to get a *get*’; presentation on Sunday 11 September 2005, Parkhurst Suite, Radisson Edwardian Hotel, Manchester, Great Britain.

should be formulated as *tosefet mezonot* (to prevent *kefiyah* by a *kenas* and thus to prevent a *get me'useh*) and a *get* should not be mentioned at all although it is quite clear that this is what is hinted at (to prevent *kefiyah* and a *get me'useh*). As long as one takes these elements into consideration, a PNA has the possibility to solve an *agunah*-situation. Although the *ketubah* in itself is a form of PNA, an actual PNA often seems to be more effective than the *ketubah*. As I have found out from interviews with people dealing with the legal side of divorce cases, money works. Whenever a man knows that he will feel it in his pocket, he suddenly is very willing to hand over a *get*. On the other hand, money also works when women offer it to their husbands in order to receive a *get* and this is by far one of the least preferable solutions to the *agunah*-problem.

Susan Aranoff is not so convinced of the effectiveness of PNA's: "The deficiencies of prenuptials are many",⁶⁴ ranging from its uselessness in cases where the husband flees the country to the unenforceability of the PNA if the husband has no or hardly any income, and from the lack of halakhic weight of PNA's to the huge legal fees involved. Notwithstanding these deficiencies, a PNA is at present the most commonly used tool to prevent a woman from becoming an *agunah*.

A PNA should be accepted by the *bet din* of the country one lives in to be halakhically acceptable and some *batei din* have even drafted PNA's of their own. The Orthodox Caucus and the *Bet Din* of America, for instance, have drafted a PNA which is based on *tosefet mezonot* and which is accepted within civil law. According to Professor Broyde⁶⁵ this PNA is working very well: it is widely used, mainly also because several rabbis do not allow marriages to be performed in their synagogue without the signing of this PNA, but so far it has not been tested in court.

The situation in Israel is different from the United States, mainly because Rav Elyashiv, who is considered the *gadol hador*, is a strong opponent of the use of

⁶⁴ Susan Aranoff, "A Response to the Bet Din of America", <http://www.agunahinternational.com>.

⁶⁵ Interview with Prof. Michael Broyde at the JLA-conference in Boston, August 2004. Prof. Broyde is also a Dayan. This PNA has never been brought to a court case, and thus has never been tested in a court case. According to him this means that the PNA is strong and lawyers usually advise their clients to give the *get* instead of waiting for a judge to rule that he actually has to pay the money, which is quite a steep amount.

PNA's.⁶⁶ As may be expected, PNA's are therefore hardly used in Israel. This does not mean that there are no PNA's available: Rabbi Shear Yashuv Cohen, for instance, has drafted several PNA's. One of the most recent PNA's is the Agreement of Mutual Respect, drafted by Rachel Levmore together with Rabbi Elyashiv Knohl and Rav David ben Sasson. The novelty of this PNA is that it is aimed at the couple and not only at the man. In this PNA both husband and wife agree to end the religious marriage when required and accept to pay the other spouse money if they refuse to do so.

1.8 *Moredet*: two concepts of rebellion

As stated before, the problem of *igun* cannot be discussed without discussing the concept of a *moredet*, a woman who rebels against her husband. The obvious question that is dealt with in classic halakhic material is what does this rebellion consist of? Are the texts dealing with a woman who refuses to perform the household tasks she is obliged to do once being married⁶⁷ or does the rebellion mainly apply to her refusal to cohabit with her husband? Whereas according to the Torah⁶⁸ and the Mishnah⁶⁹ sexual relations are a right of the wife and an obligation of the husband⁷⁰, "the majority of Talmudic commentaries agree with the view of Rav Kahana that the wife is obligated to provide her husband with sexual relations. They derive this obligation from the *mutual* nature of the responsibility that both partners assume at the time of the marriage".⁷¹ A woman who thus withholds sexual relations from her husband is a rebellious wife. The discussions considering the *moredet* deal with two basic questions: what is the motivation for the wife's rebellion and, based upon her motivation, what are or will be the consequences of her rebellion? According to the Talmud⁷² a woman can have valid grounds to refuse marital relations, for instance when the husband has or develops a skin disease, when the husband suffers from a

⁶⁶ See e.g. Batya Segalovits, 'Bleak outlook for pre-nuptial agreements', in: *Jewish Tribune*, Thursday 24th February 2005, p. 8.

⁶⁷ As listed in M. Ket. 5:5.

⁶⁸ Ex. 21:10.

⁶⁹ M. Ket. 5:6

⁷⁰ Ibid. See also 1.2.1.

⁷¹ Shlomo Riskin, *Women and Jewish Divorce. The Rebellious Wife, The Agunah and the Right of Women to Initiate Divorce in Jewish Law. A Halakhic Solution*, Ktav Publishing House, Inc., Hoboken NJ, 5788/1989, p. 8.

⁷² M. Ket. 7:10; T.B. Ket.77a.

polypus or gathers dog excrement. When the woman cannot bring herself to sleep with her husband because she is repelled by one of these issues, she could come to the *bet din* and ask for a divorce on the basis of *ma'is alay*, i.e. he is repulsive to me. In the time of the Mishnah “in such circumstances, not only did the rabbis force the husband to grant the divorce, they also ensured that the woman would receive her full alimony. However, in any case, objective factors had to support the wife’s claim”.⁷³ By objective factors is meant actual proof of the repulsion. “The Tosefta⁷⁴ is even more explicit than the Mishnah about a woman’s right to a divorce and alimony in the case of a blemished husband”,⁷⁵ when it states:

Rabban Shimon ben Gamliel says: If he is lame in one of his legs or blind in one of his eyes, these are [considered] major blemishes and he must divorce her and give her the alimony provided for her by marriage contract...

When do [the Sages] say: He must divorce her and give her the alimony? At the time when he wishes [to remain married] and she does not, or when she wishes [to remain married] and he does not. If the two of them wish [to remain married], they stay together.

Regarding a person with a severe skin disease, even if they both wish [to remain married], they may not remain [married].⁷⁶

In the Talmud there are however also cases in which the woman refuses marital relations not because the husband suffers from a disease or has a smelly profession and the woman thus wants a divorce from him, but because the woman wants to vex, punish or blackmail the husband by denying him marital relations (בעינין ליה ומצערנא (ליה). In such cases the rabbis were not so lenient towards the woman and punished her in the first instance by subtracting money from her *ketubah*, as may be seen in M. Ket. 5:7⁷⁷: “if a woman will not consent to her husband he may reduce her *ketubah* by seven *dinarii* for every week. R. Judah says: seven *tropaics*⁷⁸”. The Gemara discusses whether the reduction of the *ketubah* applies only to the latter kind of *moredet*, who

⁷³ Riskin, 1989, p. 9.

⁷⁴ Tosefta Ket 7:10-11. See also Tosafot T.B. Ket. 77a.

⁷⁵ Riskin, 1989, p. 10.

⁷⁶ Riskin, 1989, p. 10 (translation by Riskin).

⁷⁷ The Mishnah does not make a difference between a *moredet mai's alay* and a *moredet be'einan lei umestarnah lei*. This distinction is only made in the Gemara.

⁷⁸ According to Soncino, Ket. 63a, p. 380, footnote 15, this is half a *dinar*.

withholds sexual relations because she wants to hurt her husband. The same Mishnah however also states that “if a husband will not consent to his wife, her *ketubah* may be increased by three *dinari* a week. R. Judah says: three *tropaics*”, thus equating the obligation of both partners to have marital relations. Although the steady reduction of the *ketubah* would eventually lead to the wife losing her entire *ketubah* — which would subsequently lead to the husband’s obligation to divorce his wife, since a married couple may not live together when there is no financial security for the woman,⁷⁹ — the increase of the *ketubah* because of the husband’s rebellion can go on indefinitely. The process of the decrease of the *ketubah* until it is completely exhausted would take more than half a year, although often much longer, because a woman does not receive only the standard 200 *zuz ketubah* payment; there are also additional amounts mentioned in the *ketubah* to which a woman is entitled. Since the amount can vary so will the amount of time vary after which the *ketubah* will be exhausted. In the Tannaitic period, the rabbis decided⁸⁰ that instead of a steady reduction of the *ketubah* money in the case of a *moredet* there should be a warning to the woman and a public announcement of the woman’s being a *moredet* for four consecutive weeks, twice a week. If the woman did not end her *meridah* within these four weeks she would lose her entire *ketubah* after this time. Whether or not the husband should be forced to give a *get* in such circumstances has been a matter of discussion. In the final decision of the Talmud⁸¹ Rabbanan Sabborai decided in the case where a woman leaves her husband because of *ma’is alay* to make her wait for twelve months for a divorce. During these twelve months the husband has no obligation to support his wife and the wife will also not receive her *ketubah* when she receives the *get*. It is however certain that after twelve months the wife “goes out”, which many interpret as authorising *kefiyah* in these circumstances.

1.8.1 The attitude of the *Geonim* to the *moredet*

Due to the financial hardship a woman endured during these twelve months, the *Geonim* decided that when a woman wants a divorce while her husband does not, the husband was to be coerced, if necessary, into giving a *get* immediately and even

⁷⁹ R. Meir (T.B. Ket.56b) held that a husband cannot live with a woman who does not have a *ketubah*. See also: M. Ket. 4:7; Rambam, H.I. 10:10.

⁸⁰ Tosefta, Ket. 5:7; T.Y. Ket. 5:10.

⁸¹ T.B. Ket. 64a.

provide her with the basic alimony.⁸² Although they were aware of the Talmud's twelve months waiting period, they would require her to wait only two weeks,⁸³ in the hope that she might change her mind. Rav Natronai Gaon, middle ninth century, explains that the immediate giving of a divorce is initiated "so that Jewish women should not stray towards lewdness and indecency".⁸⁴ To prevent a woman from trying to become free from her Jewish husband either by marrying a Muslim (which would automatically undo her marriage to her Jewish husband, according to Islamic law⁸⁵), or by turning to a Muslim court to coerce her husband into giving a *get*, which might lead to an invalid *get*, the rulings considering a *moredet* were changed.⁸⁶ An anonymous thirteenth-century Gaon sees in the twelve month waiting period "the danger of the woman's "coming to a bad end" (*tarbut ra'ah*); an even more explicit expression of the danger inherent in delaying the granting of a divorce to the woman who requests it".⁸⁷ 'Bad ends' means, according to the Gaon, either prostitution or apostasy. In a situation where a woman has no source of income or support, the chances that she will turn to other ways are highly possible, thus the *Geonim* sought to prevent this by changing the *halakhah* concerning a *moredet*. The rulings which the *Geonim* implemented at various stages⁸⁸ are called *takkanat haGeonim* and they brought about a new legal situation. If a woman came to a *bet din* and claimed divorce on the grounds of *ma'is alay* then her husband would be forced to give her a *get*. The husband had to pay his wife the basic *ketubah* and return to her all her remaining dowry, whether she had seized it upon leaving the marital home or not, and also any *niksei tzon barzel* (property which she had brought into the marriage but for which the husband had assumed full responsibility) that was no longer intact.⁸⁹

⁸² See e.g. Iggeret Rav Sherira Gaon, ed. Lewin, p. 99-102; Takkanot Geonim Harkavy, n. 230; Responsa of Maharam ben Barukh, Lemberg, n. 443.

⁸³ Rav Yehudai Gaon as cited in Riskin, 1989, p. 47-48, taken from Ch. Tykocinski, Takkanot Ha-Geonim, ed. Havatzelet (Tel Aviv and Jerusalem, 1959), pp. 11-12.

⁸⁴ As quoted in Riskin, 1989, p. 51.

⁸⁵ See e.g. Jackson, February 2004, *supra* n.41, at p. 28.

⁸⁶ See e.g. Ruth Lamdan, *A Separate People. Jewish Women in Palestine, Syria and Egypt in the Sixteenth Century*, Brill's Series in Jewish Studies vol. 26, Brill, Leiden-Boston-Köln, 2000, p. 138, 177, 179-181, 183, 190 and 264. Grossman, 2004, p. 241.

⁸⁷ Riskin, 1989, p. 52-53

⁸⁸ See: *Ibid.*, p. 69.

⁸⁹ *Ibid.*; see also footnote 92.

1.8.2 The attitude of the *Rishonim* to the *moredet*

The *Rishonim* were divided in their approach to a *moredet* who claims *ma'is alay*. In accordance with the Gaonic decrees most *Rishonim* held that a woman should not be forced to live with her husband if he is repulsive to her. Whether, however, coercion of the husband was possible became a matter of dispute, as was whether the woman would receive her *ketubah*. Maimonides,⁹⁰ for instance, held that

the woman who refuses her husband sexual relations – she is the one who is referred to as “the rebellious wife”. So we ask her why she is rebelling. If she says [she is rebelling] ‘because he is repulsive to me, and I am unwilling voluntarily to engage in sexual relationships with him,’ we force him to divorce her immediately for she is not a slave that she should be forced to have intercourse with one who is hateful to her. She must, however, leave with forfeiture of all of her *ketubah*, but may take her worn-out clothes that are still on hand, regardless whether they are part of the property brought by her to her husband, for which he had become surety⁹¹, or are *melug* property⁹², for which he had not become surety.

Thus, according to Maimonides, a *moredet ma'is alay* can only receive that part of her *nedunyah* which is still in existence, whether she seized it or not. All gifts from her husband she has to return. The *moredet* who wants to cause pain to her husband can only get that which she can lay her hands on.⁹³ So, if she left the house with nothing, she will receive nothing. This husband of the latter woman had, according to Maimonides, no obligation to divorce his wife immediately, but after having warned her privately “an announcement should be made about her in the synagogues and the houses of study, every day for four consecutive weeks.”⁹⁴ Then the woman receives a second private warning that she will lose her *ketubah* if she persists in her rebellion.

⁹⁰ Rambam, H.I. 14 :8.

⁹¹ This is known as *niksei tson barzel*, iron sheep property. The dowry comes under the husband's surety which makes him responsible for any loss or damage to it, no matter what the cause for the loss or damage is.

⁹² “*Melug* property is property that belongs to the wife and of which the husband has only the usufruct, without any right to the principal or any responsibility for loss or deterioration.” Yale Judaica Series (Isaac Klein's translation), Volume XIX, The Code of Maimonides (Mishneh Torah), 1972, p. 492.

⁹³ Rambam, H.I. 14:13.

⁹⁴ Ibid.

If after consultation with her she still does not give up her rebellion, she will have lost her *ketubah* and must wait twelve months for her *get*. In the meantime she will not receive any maintenance.

In contradiction to the Rambam, many *Rishonim* held that coercion of a *get* was an invention of the *Geonim* who did not have the authority to rule like this and thus coercion was not allowed. The Rosh (Resp. 43:8), for instance, writes strongly against the ruling of the Rambam:

... what kind of reason has he given for coercing the man to divorce [his wife] and to permit a married woman [to someone else]? [Rather,] let her not have sexual relations with [her husband] and let her remain chained all of her days, for after all, she is not commanded to be fruitful and multiply! Because she followed the dictates of her heart, [and] cast her eyes upon another and desired him more than the husband of her youth, do we then fulfil her lust and force the man who loves the wife of his youth to divorce her? Heaven forbid that any judge should judge thusly!

In his statement the Rosh expresses the fear that a woman who prefers not to remain married to her husband must have cast her eyes upon another man, which is one of the two maxims explored in this thesis. The moral fear argument is first found in M. Ned. 11:12 and was a response to a woman who, lusting for another man, sought to get out of a marriage without a valid claim. The Rosh argues along the same lines and does not want to apply coercion in the case of a *moredet* because he is afraid that women will use this possibility to get out a marriage when they fancy someone else. He prefers to let the woman remain an *agunah* for life rather than condone possible adulterous thoughts.

Several *Rishonim*⁹⁵ say that the Gaonic decree was based on *שעה/הוראת שעה*, the dangerous situation of that time, and since now, in the time of the *Rishonim*, there is no need for this decree any more, coercion of a *get* is not allowed. The strongest opposition to the Gaonic decree came from Rabbenu Tam and because he “spoke so

⁹⁵ See e.g. Riskin, 1989, 125-127; Jackson, February 2004, p. 26.

vehemently against the practice of coercing a husband to divorce his wife – even if she claimed she found him repulsive – subsequent legal authorities were reluctant to oppose him on so sensitive and far-reaching an issue.”⁹⁶ The rabbis were afraid that the coercion would render the *get* invalid and any subsequent relationship of the woman would render her an adulterous woman and children born from such a union *mamzerim*. Riskin maintains: “In effect, Rabbenu Tam single-handedly changed the course of the halakhic attitude towards *moredet*.”⁹⁷ Bernard Jackson argues however that there is “an apparent conflict in the Sefer HaYashar perhaps reflective of its collective, pseudepigraphical character”⁹⁸; maybe it was Rabbenu Tam’s students who altered the original opinion of Rabbenu Tam and thus it is not known to us what his opinion was. In Sefer HaYashar, siman 24, p. 39 (Rosenthal edition) it reads “דבכל ההשמועה אינו מזכיר כפיית הבעל אלא כפיית האשה” (in the entire [Talmudic] discussion there is no mention of forcing the husband only of forcing the wife), while a page later it reads “ת הגטשאנו שנינו בתלמוד שאין כופין עד תריסר ירחי שתא והם הקדימו טרם דין כפיי” (after all, we learned in the Talmud that [the Sages] did not force [a divorce] until twelve months, and they [the *Geonim*] advanced the forcing of the divorce before [the time which] the law [allows]). Where in the first place Rabbenu Tam seems to argue that coercion is not possible at all, in the second instance he says that coercion is possible only after twelve months. His problem with the *Geonim* seems thus not the fact that the *Geonim* enforced a *get*, but the fact that they enforced it before the twelve month period was finished.

Riskin⁹⁹ gives the impression that from Rabbenu Tam onwards the *takkanat haGeonim* was not accepted anymore. It is true that with Rabbenu Tam a change is visible in the attitude of the *Rishonim* towards the *takkanat haGeonim*, nevertheless there were some *Rishonim* who still applied them to a certain extent.¹⁰⁰ However, it is striking to see that in several divorce cases in the *Piskei Din Rabbani'im* the *takkanat haGeonim* are mentioned and applied, as will be discussed in chapter four.

⁹⁶ Riskin, 1989, p. 94.

⁹⁷ Ibid.

⁹⁸ Jackson, February 2004, p. 29. For an extended discussion of the apparent contradiction see p. 29-30.

⁹⁹ Riskin, 1989, p. 111.

¹⁰⁰ See e.g. Avishalom Westreich, “Compelling a Divorce? Early Talmudic Roots of Coercion in a Case of *Moredet*”, Working Papers of the Agunah Research Unit, May 2008, <http://www.mucjs.org/Moredet.pdf>.

1.9 Women, sexuality and *Torah*

It is apparent that within rabbinical literature a distinction is made between a *moredet* who rebels because her husband is repulsive to her and she thus does not want to engage in sexual relationships with him, and the *moredet* who uses (the withholding of) sexual relations as a bargaining tool. The punishment for the latter is graver than for the former. The rabbis placed such a severe punishment on the woman when she tried to vex her husband by denying him marital relations because, as is written in *Midrash Bereshit Rabbah*¹⁰¹, in its comment on Gen. 20:17 “And before all have you been proved right”, which leads to a discussion on the rebellion of a woman and the reduction of her *ketubah*:

R. Yohanan says: [it is because] the pain of a man is greater than the pain of a woman [when sexual relations are denied]. That is [the meaning of] what is written [Judg. 16:16]: ‘And it came to pass that she [Delilah] irritated him [Samson] with her words all the days, and vexed him’ [because] she would remove herself from beneath him ‘and his soul desired to die [since the sexual privation brought greater pain to him than her].’ And there are those who say: She fulfilled her [sexual] needs with others [and therefore was not as upset about the lack of sexual activity].¹⁰²

This *Midrash* shows two opposite opinions about how women are viewed as regards sexual gratification. On the one hand it is said that women do not have such a strong desire for sexual relationships as men and thus do not feel comparably pained by sexual privation. On the other hand when a woman is not hurt by the lack of marital relations it is claimed that this is because she finds sexual gratification somewhere else. This concept is not unique to Judaism and it has become a common view about women, which is called within feminist theology the Madonna-whore complex: women are either regarded as completely a-sexual and trusted (which puts them on a level of holiness), or they are regarded as loose, seeking sexual pleasure wherever they can, thus lowering them to the plane of prostitutes. At the basis of this Madonna-

¹⁰¹ Midrash Bereshit Rabbah 52:12; all translations for Midrash Bereshit Rabbah are taken from: *Midrash Bereshit Rabbah, Genesis*, The Soncino Press, London-Jerusalem-New York, undated.

¹⁰² M. Ket. 7:10. Translation by Riskin, 1989, p. 19.

whore complex, it is argued, lies a platonic dualist anthropology, adopted by Plato from earlier Greek thought and put into a table of opposites by Pythagoras¹⁰³, in which the male represents intellect, form, good, light, etc. and the female represents body (and thus sexuality), matter, bad, darkness, etc. According to Lloyd¹⁰⁴ Plato's dualism was to be applied more to

the relation [of] master to slave, rather than that of man to woman. ... But this Platonic theme recurs throughout the subsequent history of Western thought in ways that both exploit and reinforce the long-standing associations between maleness and form, femaleness and matter.

Boyarin maintains that in Plato's concepts a human being is identified

as his or her (universal) mind and not as his or her gendered, socially marked body. Lloyd has shown how this dualism became rewritten historically so that the universal mind came to be identified as male, while the gendered body became female.¹⁰⁵

In this historic concept men and women are regarded as complementary to each other, be it that the good qualities are all ascribed to men and all the bad qualities to women.

Within the dichotomy of man versus woman as good versus bad a further distinction is made between women as partners and women as 'the other'. A good, decent, modest woman will be a partner to her husband, helping him in all his endeavours. The untrustworthy, sexually active woman however is the other, the stranger, with whom it is better not to have contact. This distinction between regarding women either as partners or as the other is a common notion in literature and this can also be found in Jewish literature. One of the first stories of the Torah, the story of Adam and Eve, shows this. The interpretation of this story is varied. Philo's approach to the

¹⁰³ See Genevieve Lloyd, *The Man of Reason. 'Male' & 'Female' in Western Philosophy*, Routledge, London, 1995, p.3 where the ten opposites of the Pythagorean table are mentioned: limited/unlimited, odd/even, one/many, right/left, male/female, rest/motion, straight/curved, light/dark, good/bad, square/oblong.

¹⁰⁴ Lloyd, 1995, p. 5.

¹⁰⁵ Daniel Boyarin, *Carnal Israel. Reading Sex in Talmudic Culture*, University of California Press, Berkeley-Los Angeles-London, 1997, p. 237.

creation of mankind is a platonic one, thus dividing male and female into good-bad. Philo exhibits a strong misogyny in which woman represents essential misfortune:

But since no created thing is constant, and things mortal are necessarily liable to changes and reverses, it could not but be that the first man too should experience some ill fortune. And woman becomes for him the beginning of blameworthy life. For so long as he was by himself, as accorded with such solitude, he went on growing like to the world and like G-d, and receiving in his soul the impressions made by the nature of each, not all of these, but as many as one of mortal composition can find room for. But when woman too had been made, beholding a figure like his own and a kindred form, he was gladdened by the sight, and approached her and greeted her. She, seeing no living thing more like herself than he, is filled with glee and shamefastly returns his greeting. Love supervenes, brings together and fits into one the divided halves,¹⁰⁶ as it were, of a single living creature, and sets up in each of them a desire for fellowship with the other with a view to the production of their like. And this desire begat likewise bodily pleasure, that pleasure which is the beginning of wrongs and violation of the law, the pleasure for the sake of which men bring in themselves the life of mortality and wretchedness in lieu of that of immortality and bliss.¹⁰⁷

Although Philo sees that the physical reunion of a man and a woman makes them whole again, he nevertheless sees sexual relationships as the beginning of all evil, which has been the opinion of much Christian thought and some Western philosophy. Elsewhere¹⁰⁸ Philo, in accordance with Western metaphysics, equates man to *nous*, which was first created by G-d, and woman to *aesthesis*, sense-perception. *Nous* was created to rule over *aesthesis*, which gave it a sense of being more important.

¹⁰⁶ This quotation shows Philo's endorsement of an original androgyny theory, based on Gen. 2:24 where it is stated that man and woman will "become one flesh". The androgyny theory holds that G-d created an androgenic figure which he then split into man and woman. During life the two halves are in search of each other and when a man and a woman get married they become one again.

¹⁰⁷ Philo, *De Opificio Mundi*, 151-152, in: The Loeb Classical Library, T.E. Page, E. Capps, W.H.D. Rouse (eds.), London, Heinemann, New York, Putnam's Sons, 1929, volume 1, p. 119-121.

¹⁰⁸ Philo, *Op. Mund.* 165; *Leg. All.* II:73.

According to Boyarin, “the rabbinic portrayals of woman's origin and role are quite different from Philo and also quite varied internally”.¹⁰⁹ In Midrashim one can find a variety of opinions that offer both positive and negative attitudes to and opinions about women. This is already visible in the story of creation. First, starting with the two stories of creation of mankind, we find myths that speak about the creation of two different women: Lilith, who was the first wife of Adam, was a strong willed woman who wanted equal rights and who “wanted to be on top”¹¹⁰, i.e. who had a desire for uncommon ways of intercourse. Adam divorced this wife and Eve was created. In these myths Lilith is the whore and Eve the Madonna. Second, also the stories about Eve are twofold in their opinion. Eve is created as an *ezer kenegdo*, a helper to Adam; a phrase which has been explained in opposing ways as well. It has been written “if he is fortunate, she is a help; if not, she is against him” (Midrash Bereshit Rabbah 17:3). Considering the sin, Eve is portrayed in Midrash 19:12 as the victim in the story and Adam is criticized for his apparent ingratitude for receiving Eve when he says “the woman you gave me made me eat from the tree” (Gen. 3:12). Other, more misogynistic Midrashim depict Eve as the bringer of sin to the world. Due to her extinguishing the fire of the world¹¹¹ women are punished with a subordinate role in the marital relationship, as it is written: “and your longing shall be to your husband and he shall rule over you” (Gen. 3:16). An example of such a misogynistic Midrash is the diatribe of Rabbi Yehoshua:¹¹²

‘Why does the man go out bare-headed but the woman with her head covered?’ He said to them, ‘It is like one who has committed a sin, and he is ashamed in front of others; therefore she goes out covered’. ‘Why do they walk in front of the dead?’ He said, ‘since they caused death in the world, therefore they walk in front of the dead’. ... ‘And why was she given the Commandment of menstrual separation?’ ‘Because she spilled the blood of the First Adam, therefore she was given the Commandment of menstrual separation’. ‘Why was she given the Commandment to sacrifice the first portion of the dough?’ ‘Because she spoiled (שקילקה) the First Adam, who

¹⁰⁹ Boyarin, 1997, p. 80.

¹¹⁰ Ibid., p. 95.

¹¹¹ Midrash Bereshit Rabbah 19:7. The fire mentioned is the *Shekhinah*. Due to the sin of eating the forbidden fruit the *Shekhinah* departed from the earth. In Midrash Bereshit Rabbah 17:8 it is however said that she extinguished the soul of the first Adam thus making him mortal.

¹¹² Midrash Bereshit Rabbah 17:8

was the first portion of the world, therefore she was given the Commandment to sacrifice the first portion of the dough'. 'And why was she given the Commandment of lighting the Sabbath candle?' 'Because she extinguished the soul of the First Adam, therefore she was given the Commandment of lighting the Sabbath candle'.

In the Talmud (Shab. 31b-32a), however, we can find a different interpretation of the three commandments given specifically to women (*taharat mishpakhah*, lighting Shabbat candles, separating *challah*). There it is stated:

As a certain Galilean interpreted: I have put into you a portion of blood; therefore I have given you a commandment having to do with blood. I called you the 'firstling'; therefore I have given you a commandment having to do with the first [dough]. The soul which I have given you is called a candle; therefore I have given you a commandment to do with candles. If you keep them well and good, but if you not I will take away your soul.

Boyarin comments: Although an "[o]pen misogyny like that of Rabbi Yehoshua is rare indeed in the rabbinic corpus, ... [t]his sort of misogynistic catalogue would become, however, endemic in medieval Judaism, as it was in medieval culture generally."¹¹³ Many researchers¹¹⁴ have regarded the stories about women and sexuality in rabbinic literature as fitting the Madonna-whore complex and even in rabbinical stories where the distinction is not as clear cut as a woman being either a whore or a Madonna, there is a general and strong tendency of attributing negative qualities to women. "One of the negative qualities of women extensively mentioned by the Sages is their supposed *lightheadedness*; that is, their tendency to talk a lot and the ease with which they may be seduced."¹¹⁵ Hauptman however disagrees with these opinions, because even though

men in ancient societies, and even today, view women as Other. ... [T]hat

¹¹³ Boyarin, 1997, p. 90.

¹¹⁴ Jacob Neusner, Judith Wegner, David Biale, Judith Wegner and Michael Satlow are mentioned by Judith Hauptman in her book *Rereading the Rabbis, A Woman's Voice*, Westview Press, Colorado/Oxford, 1998, p. 30-31.

¹¹⁵ Avraham Grossman, 2004, p. 17. See also Lamdan, 2000, p. 1-4, 13-23.

does not necessarily imply that they impute evil or depravity to women. On the contrary, I find in the Talmudic sources three general principles or observations that recognize the complexity of sexuality: (1) ... men are easily aroused sexually by being in the presence of women, looking at them, dressed or undressed, or even just thinking about them; (2) women, in general, do not actively try to entice men; (3) sexual attraction in and of itself is considered to be normal and natural but, because it demands resolution, can easily lead to violation of social and religious norms.¹¹⁶

Although Hauptman has a valid point considering the complexity of sexual relations, and it is clear that we cannot accuse the rabbis of the Talmudic era of strong misogynist thought, the image of women portrayed in rabbinic literature is nevertheless at least ambiguous at times. On the one hand women are portrayed as the icons of moral standards; on the other hand women seem to have an insatiable lust for sexual activities and thus can never be trusted. The first woman is the image of how all Jewish women should be; the ideal image so to speak. This does not mean that the second image is what women in reality are like, but this image reflects women who truly are regarded as ‘the other’. Women are regarded as sexual either way; either because they, unwillingly, arouse sexual feelings in men, or because they, willingly, want to seduce men. The whole discussion about whether women can be trusted regarding sexual matters lies at the heart of the two maxims which form the core of this thesis and which will be discussed in the following chapters.

Two examples of a negative view on women’s morality which become evident in the Mishnah and the Talmud are (1) education of Torah for women and (2) the place of women within society. Considering education it was taught in the name of R. Eliezer (M. Sot.3:4) “Whoever teaches his daughter Torah teaches her lewdness [*tifluth*]”. A direct link is made between educating women and causing them to become immoral, which is accentuated even more by the continuation of the Mishnah by R. Yehoshua’s statement “that a woman ‘prefers one measure of food with *tifluth* to nine measures with sexual abstinence”.¹¹⁷ This view, which reflects a doubtful image of women’s morality, has been accepted throughout Jewish history. A famous example given in

¹¹⁶ Judith Hauptman, 1998, p. 31.

¹¹⁷ As quoted in Boyarin, 1997, p. 171, footnote 3.

the Talmud of the direct relationship between women learning Torah and their proneness to sexual activities is the story of Beruria. According to Rashi's comment on the *Gemara* in *Avodah Zorah* 18b, where it is said that R. Meir ran away because of the "incident of Beruria"¹¹⁸, it is said that

Beruria once made fun of the rabbinic dictum "women are lightheaded", [i.e. lewd]. He [her husband, R.Meir], said, "On your life! You will end up admitting that they are right". He commanded one of his students to tempt her into [sexual] transgression. The student importuned her for many days, until in the end she agreed. When the matter became known to her, she strangled herself and R. Meir ran away of the shame.

A great deal has been written about this text. Rachel Adler,¹¹⁹ for instance, researched the relationship between women studying Torah and their alleged proneness to lewdness. She writes:

Authority in rabbinic Judaism flowed through the medium of rabbinic relationships, and the rabbis could not imagine how to give Beruria authority without including her in the web of rabbinic relationships – the web of teachers and students and study partners. And they also could not imagine doing that without also imagining her sexuality as a source of havoc.

Also Boyarin¹²⁰ concludes that

If R. Eliezer's dictum is true, in the way that the Babylonian Talmud understood it – namely that there is an intrinsic connection between the woman studying Torah and sexual immorality – then Beruria's fall into license is a structural necessity. ... The horror of her end ... is once again a symptom of the extraordinary threat that the learned woman represented to the Babylonian (and later European) rabbinic culture, a power that threatened to

¹¹⁸ As quoted in Boyarin, 1997, p. 184.

¹¹⁹ Rachel Adler, "The Virgin in the Brothel and other anomalies: Character and Context in the Legend of Beruriah", in *Tikkun*, volume 3, 1988, p. 32, as quoted in Boyarin, 1997, p. 187.

¹²⁰ Boyarin, 1997, p. 189.

upset the whole apple cart of gender relations and social organisation and that had to be suppressed, therefore, by extraordinary means.

According to the Hida¹²¹ it was because of the tragedy of Beruria that the *halakhah* was changed and women were not allowed to learn Torah anymore, which implies that until that time it was allowed. After the period of the Talmud there have been other writings which dealt with the connection between women learning (even when it was not Torah learning) and sexual immorality. Another example of this can be found, for instance, in documents of the Hasidei Ashkenaz. The teachings of this community influenced subsequent Ashkenazi practice to a great extent. In one document a father's predicament about whether or not to teach his daughters how to write is discussed:

If they do not know how to write, they will be forced to request men to write their receipts for pledges when they lend money. They will be alone with those men who write for them and they may sin, and this will be my fault. ... And even if they do not sin, they might think about it. He taught them to write receipts for pledges.¹²²

Thus due to a chance that the daughters might come to sin if they could not write, they were taught how to write. Thus in a moment of *tsorech hasha'ah*, an hour of need, normal regulations can be adjusted.

That women should not be taught to read and write also had the advantage, according to Cohen, who wrote about women and the laws of *niddah*, that they had no power against rabbinic authority: "Knowledge was power, ignorant women were powerless to resist rabbinic authority."¹²³ Similarly, Lamdan writes: "In Judaism, as in Islam and

¹²¹ Hida, *Tov Ayin*, teshuva 4.

¹²² This passage from Hebrew MS 1566, Bodleian Library Oxford, p. 178a, is found in Joseph Dan, *Iyunim B'Sifrut Hasidut Ashkenaz*, Rama-Gan, Israel, 1975, p. 140. As quoted in Judith R. Baskin, "Rereading the Sources: New Visions of Women in Medieval Ashkenaz," published electronically in: L. Ehrlich, S. Bolozky, R. Rothstein, M. Schwartz, J. Berkovitz, J. Young (eds.), *Textures and Meaning: Thirty Years of Judaic Studies at the University of Massachusetts Amherst*, Department of Judaic and Near Eastern Studies, University of Massachusetts Amherst, 2004, p. 302.

¹²³ Shaye J.D. Cohen, "Purity, Piety, and Polemic: Medieval Rabbinic Denunciations of 'Incorrect' Purification Practices", in: Rachel R. Wasserfall (ed.), *Women and Water: Menstruation in Jewish Life and Law*, Hanover, NH, 1999, p. 98, as quoted in Baskin 2004, p. 309.

Christianity, the intellectual inferiority of women is axiomatic. In some respects, the Jewish sources relate to women in the same way as they relate to minors and slaves”.¹²⁴

Notwithstanding all the concerns about the direct correlation between women’s learning and sexual immorality, there are sources¹²⁵ which show that throughout history there have been women who had some kind of education, who knew how to read and write, who ran businesses and owned property, enabling them to provide for themselves and their families. A famous example of a woman who learned Torah and stayed on the right path was Hannah Rachel, the so called “Maid of Ludmir”.¹²⁶ This woman learned and prayed like a man and soon got a reputation of being able to perform miracles. People flocked to her house for blessings. This provoked however a negative response from the male *tsaddikim* of her town, some of whom even said that an ‘evil’ or ‘unclean’ spirit was speaking through her. She was then persuaded to get married but the marriage remained unconsummated and the couple divorced. She remarried and divorced again. Both marriages led to an end of her role as a female *tsaddik*. Even though she remained on the right path, the fact that she chose to learn Torah as a man, acquiring fame and followers, apparently had to be stopped. Men and women within orthodox Judaism have specific yet completely different roles to fulfil; a woman who chooses to take up the role of a man by immersing herself in learning Torah is regarded as crossing a border she should not cross. Although Hannah Rachel never became sexually active and can thus not be accused of immodesty, she did however attract attention which in itself is regarded as an act of immodesty.

Next to education, direct contact between men and women was also regarded as another source of possible lewd behaviour of women. An example is given by Berkovits:¹²⁷

¹²⁴ Lamdan, 2000, p. 2.

¹²⁵ See e.g. Lamdan, 2000, p. 110-126, Grossman, 2004, p. 111-122, 160-173.

¹²⁶ Ada Rapoport-Albert, “On Women in Hasidism, S.A. Horodecky and The Maid of Ludmir Tradition”, in: Ada Rapoport-Albert and Steven J. Zipperstein (eds.), *Jewish History, Essays in Honour of Chimen Abramsky*, Peter Halban, London, 1988, p. 502-504.

¹²⁷ Eliezer Berkovits, *Jewish Women in Time and Torah*, Ktav Publishing House, Inc., Hoboken, New Jersey, 1990, p. 16.

It was generally accepted that women were more easily seduced than men. Thus the Mishnah¹²⁸ teaches “A man should not isolate himself with two women, but two men may do so with one woman”. The explanation being: For women are light-minded (i.e. unreliable) and even two women in isolation with one man are easily seduced. Neither woman will be inhibited by the presence of the other, for each will readily act the same way.

To restrain women’s suspected proneness to immorality, social regulations were put into place within Jewish society. The most well known regulation has been the exclusion of women from society. Whether this was a widespread accepted regulation can be debated, because research shows that there are both examples of women being part of public life and women being restrained to the house. According to Kraemer, for instance, who writes about Jews in the Diaspora in Late Antiquity

there is ample evidence that ... Jewish women participated in the social, economic, and religious life of their communities across the Roman Empire. ... Yet some scholars contend that Jewish women were physically secluded within their houses, and there are ample literary references to such practices.¹²⁹

Reality and regulations might not always have coincided with each other. Kraemer continues:¹³⁰

What we should conclude from this contradictory evidence is that some Jewish women probably did live their lives in relative seclusion, rarely leaving their homes except under carefully defined circumstances. Social class, geographical location, and religious perspective may all have been factors in this.

¹²⁸ T.B. Kid. 80b

¹²⁹ Ross S. Kraemer, “Jewish Women in the Diaspora World of Late Antiquity”, in: Judith R. Baskin (ed.), *Jewish Women in Historical Perspective*, Second Edition, Wayne State University Press, Detroit, 1999, p. 54.

¹³⁰ Kraemer, 1999, p. 55.

According to Hauptman,¹³¹ however, the ideal of the rabbis in the Talmud, that a woman's role was to stay at home and look after her husband and children, was at least in part to prevent immoral conduct within society:

The reasons that the rabbis chose to maintain the status quo – that of a woman's confining herself to her home and not seeking fulfilment elsewhere – were both positive and negative. In order to preserve high standards of sexual morality they had to limit severely the social contact between men and women. With these same goals in mind, they also set down strict regulations for a woman's modesty in dress and behaviour.

As noted above, a woman upon marriage accepts certain duties towards her husband, which include various types of household work. According to M. Ket. 5:5:¹³²

These are the household duties a wife does for her husband: she grinds, bakes, and washes; she cooks and nurses her child; she makes his bed and spins wool.

If the woman brings into the marriage one or more maids, she is exempted from performing certain household tasks. However, the rabbis saw in this a danger as well. The Mishnah continues:

R. Eliezer says: Even if she brings in one hundred maids, he must force her to spin wool, for inactivity leads to lewdness. Rabban Shimon ben Gamliel says: If a husband makes a vow to keep his wife from performing any tasks, he must grant her a divorce and give her the alimony provided for by the marriage contract, for inactivity leads to boredom.

Thus a woman who stayed at home had to have tasks to fulfil otherwise she would become bored and boredom itself might lead to immorality. This was, most probably, mainly a problem within the upper classes, because only there women would have enough servants around to help them with their work. One might wonder how women

¹³¹ Judith Hauptman, "Images of Women in the Talmud", in: Rosemary Radford Ruether (ed.), *Religion and Sexism: Images of Women in the Jewish and Christian Tradition*, Simon and Schuster, New York, 1974, p. 208.

¹³² T.B. Ket 59b.

who were mainly confined to their homes would find men with whom to commit adultery. According to Lamdan¹³³ Jews in sixteenth century Palestine, Syria and Egypt lived together in courtyards which consisted of several houses, and daily domestic life was performed in a communal setting either in the courtyard or in and around the village/city. Laundry, for instance, had to be done in natural waters. Contact with men was possible in these settings, but gossip from neighbours was also a common event. Other opportunities to meet men were at family celebrations and (religious) festivities or if the woman was allowed to do the shopping (which often was done by her husband).

Maimonides is very direct about the seclusion of women. According to H.I. 13:11:

For every woman is entitled to go to her father's house to visit him, or to a house of mourning or a wedding feast ... for she is not in a prison where she cannot come and go. On the other hand, it is unseemly for a woman to be constantly going out abroad and into the streets, and the husband should prevent his wife from doing this and should not let her go out, except once or twice a month, as the need may arise. Rather, the seemly thing for a woman is to sit in the corner of her house, for so it is written, *All glorious is the king's daughter within the palace* (Ps. 45:14).

A modest woman thus stays at home and women who frequent the street are immodest. This generalising statement about women's morality reflects the control men have wanted to have over women throughout the ages. As Lamdan¹³⁴ writes:

Inequality between the sexes has always existed. Women have not only been the objects of discrimination in most societies, they were also almost totally deprived of legal or other rights Their inferiority and dependence on men was perpetuated from one generation to another, until it became a standard feature of the culture, education, and norms of society.

¹³³ Lamdan, 2000, p. 97-101, 127.

¹³⁴ Lamdan, 2000, p. 1.

To control women, men had to impose regulations on women's behaviour and dress. Whenever women tried to surpass their assigned place in society they were categorised as wanton and immodest. Thus, Kathleen Jones writes:

When women have acted publicly in ways that challenge the status quo, the official representation of their behaviour often has questioned their identity as women or has caricatured such women as sexually wanton and licentious.¹³⁵

Similarly, Elisabeth Schüssler Fiorenza holds that

as a rule, prescriptive injunctions for appropriate "feminine" behaviour and submission increase whenever women's actual social-religious status and power within patriarchy increase.¹³⁶

In a patriarchal society women are supposed to live according to a certain set of rulings considering their behaviour. Whenever women go beyond the limits of their domain, by either getting a voice of their own or by acquiring some sort of power, these rulings for their behaviour are tightened. This has two consequences: first, women's options and/or power are taken away and, second, it is very easy to silence a woman.

These two consequences have also become visible in the present research, specifically regarding the moral fear argument of M. Ned. 11:12: where the *halakhah* originally allowed women to claim for divorce in the three cases mentioned, at some point in time this was changed because women were suspected of using those claims as grounds for unilateral divorce. The same applies to the *moredet ma'is alay* who, according to the *Geonim*, should be divorced immediately and who even received her *ketubah*. The *Rishonim* changed this ruling also due to the fear that women would use it as grounds for unilateral no-fault divorce.

¹³⁵ Kathleen B. Jones, "Citizenship in a Woman-Friendly Polity", in: *Signs*, volume 15, nr. 4 (Summer 1990), p. 786.

¹³⁶ Elisabeth Schüssler Fiorenza, *In Memory of Her: A Feminist Theological Reconstruction of Christian Origins*, SCM Press Ltd., New York, 1983, p. 109.

Examples of silencing a woman have also become apparent in this research. Whenever Jewish women spoke out, started to get a voice of their own or sought to have more rights of their own, claims of women being loose are made. This might not be surprising because in tight-knit communities the claim that a woman is loose is the easiest way “to shut her up” or to prevent her voice from being heard within the community. No matter whether the claim is valid or not it will affect the woman’s status. The claim of being loose is a great threat to a woman and men employ it with ease, exactly because of its effectiveness, and this is apparent in many of the cases in the *Piskei Din Rabbani’im*. Claiming that a woman is loose silences her, which might result in women trying from the outset to avoid any suspicion, as is described by Sivan quoting Gilmore:¹³⁷

In societies where cultural concepts of masculinity dictate certain modes of female conduct in both public and private, a young woman must become ‘modest and upright’ if she is to allay fears and suspicions, whether founded or unfounded. Under a threat of exposure, and of worse things to come, the hegemony of gossip induces women to become exemplary models of the feminine probity.

Orthodox Judaism has a strict code for men and women as regards their behaviour and dress. *Tzniut*, modesty, is mainly a responsibility of women; they should make sure not to attract any male attention except their husband’s, because it is men’s nature to look at women and to be sexually attracted to women. Therefore a woman has to make sure that a man will not be tempted to have inappropriate ideas. Thus her clothing and behaviour should both avoid attracting attention.¹³⁸ A modest woman is dignified and feminine, yet not in a superficial way. Immodest women are the opposite; they do not dress or behave appropriately and are thus suspected of being sexually loose. Here again we see a reflection of the Madonna-whore concept. As we

¹³⁷ David Gilmore, *Aggression and Community: Paradoxes of Andalusian Culture*, Yale University Press, New Haven, 1990, p. 5 as quoted in: Hagith Sivan, *Between Woman, Man and God. A New Interpretation of the Ten Commandments*, Journal for the Study of the Old Testament Supplement Series 401/Bible in the Twenty-First Century Series 4T & T Clark International, London-New York, 2004, p. 7.

¹³⁸ See e.g. Rabbi Pesach E. Falk, *Modesty, An Adornment for Life. Halachos and Attitudes Concerning Tznius of Dress & Conduct*, Feldheim Publishers, Israel 1998.

will see in chapter five,¹³⁹ women who do not dress appropriately are the ones who have a particularly hard time in court to get their claims heard when they file for divorce, since they are definitely not trusted from the outset.

Tzniut also regulates everyday life: strict sex-segregation has been imposed in Jewish communities from the talmudic era onwards and this exists to the present day within orthodox circles. It is forbidden for a man and a woman to be alone in a secluded area when they are either not married or not related to each other in a first-degree family lineage. Strict rules are laid down to prevent a man and a woman being in *yichud*, thus preventing unwanted sexual relations from taking place. Although these rulings do help, to a great extent, to prevent unwanted relationships, we may ask why the responsibility for *tzniut* should always be on the woman? Placing the responsibility for a man's arousal on women prompts the question whether it is not men who are more sexual than women, since they apparently need to be protected from becoming aroused?

This then leads to a further question prompted by the Madonna-whore complex, namely whether these notions about women's sexual behaviour are constructed or whether they are part of women's essential nature? Is sexual immorality an intrinsic part of the essence of women or not? Or, as Ernest Jones asked,¹⁴⁰ is woman made or born? According to an essentialist point of view a woman is born not made; a woman is born with "a pure or original femininity, a female essence, outside the boundaries of the social and thereby untainted (though perhaps repressed) by a patriarchal order".¹⁴¹ Social constructionists on the other hand hold that a woman is made not born; it is society that determines a woman's essence. This question underlies specifically the maxim of *tav lemeitav*: can one really say that all women prefer to remain in a marriage, no matter how (un)happy that marriage is, than to remain single? Do women by nature need to be married or is it society which expects this of them regardless of the circumstances? These and other questions will be answered in chapter two.

¹³⁹ See chapter 5.5.

¹⁴⁰ Ernest Jones as quoted by Diana Fuss, *Essentially Speaking. Feminism, Nature & Difference*, Routledge, New York London, undated., p. 3, without any reference to the text she got this from. I have sent her an email asking about it yet never received a reply.

¹⁴¹ Diana Fuss, undated, p. 2.

1.10 Conclusion

From the material surveyed in this chapter it is clear that finding a solution to the *agunah*-problem is a difficult, but necessary, exercise. Due to the apparent insolubility of the problem women try to find other, albeit non-halakhic, solutions to become free again. Whereas in the past such behaviour has led *poskim* to find halakhic solutions to the *agunah*-problem, as will become clear in the following chapters, in our day and age the *poskim*'s response to this is a total refutation of any, even halakhically possible, solutions. This is due to a move to the right within *haredi* circles. Both positions have led to a polarisation which is not helpful. It seems that politics, particularly in Israel, have become more important than dealing with the actual problem. In our times we see on the one hand that women are becoming more educated and knowledgeable, with a voice of their own, and a willingness to address the *agunah*-problem, whereby they do not always adhere to halakhic boundaries. On the other hand we see a hardening amongst halakhic authorities and rabbinical courts, who struggle with the influences the outside world is bringing to orthodox Judaism, and who thus refuse to accept any proposals made by women's groups or more modern religious leaders. There is a significant move to the left on the one side and to the right on the other, thus making debate more difficult. This may be seen in the different opinions brought forward: whereas Rabbis Bleich and Broyde, for instance, hold that not all halakhic problems have a halakhic solution (as Rabbi Mordechai Willig writes: "As long as there is Jewish halakhic marriage, there are going to be cases of *agunah*. It is a by-product of halakhic Jewish marriage"¹⁴²), people like Susan Aranoff hold that finding a solution depends more on the attitude of the rabbis than on the lack of halakhic possibilities. As Blu Greenberg famously wrote: "when there is a rabbinic will, there is a halakhic way".¹⁴³

¹⁴² This quote was taken from a lecture R. Willig gave in April 1999 and was quoted in: Susan Aranoff, "Two Views".

¹⁴³ Blu Greenberg as quoted in Netty C. Gross, "A Horror Story – Ours", in: Jack Nusan Porter (ed.), *Women in Chains. A Sourcebook on the Agunah*, Jason Aronson Inc., Northvale, New Jersey London, 1995, p. 41.

Chapter two

Tav lemeitav: its history and its use throughout the ages

2.1 Introduction

When dealing with *agunah*-cases or with divorce cases within Judaism in general it becomes quite clear that there is a specific view on women within rabbinic thinking. Some of these views result in maxims, general statements, applied to women. Two of these statements are the subject of this dissertation. The first is טב למיתב טן דו מלמיתב (*tav lemeitav tan du mi lemeitav armelu*) which Jastrow¹⁴⁴ translates as “it is better to dwell in grief than to dwell in widowhood” and the other is that whenever a woman comes to the *bet din* to ask for a divorce, the immediate fear arises that she has cast her eyes upon another man: the so called moral fear-argument. This chapter will provide an historical overview of the use of the first maxim.

The principle of *tav lemeitav* can be traced back to Genesis 3:16 ואל אישך תשוקתך והוא ימשל בך, “And thy desire shall be to thy husband and he will rule over thee”. This curse was given to Eve after she committed the sins of eating from the fruit of the forbidden tree and giving the fruit to Adam to eat as well. One of the explanations of this phrase is that a woman will long for a husband and therefore will accept any man as long as she can get married. The maxim מלמיתב ארמלו is, however, first found in five places in the *Talmud Bavli* (Yeb. 118b; Ket.75a; Kid. 7a and 41a and B.K. 110b/111a). While looking at the various translations of this sentence some interesting observations may be made. First, the words טן דו in this phrase, which I have translated with “to live in grief”, are variously translated. According to Jastrow¹⁴⁵ it means “with a load of grief”, “in trouble”. Rashi¹⁴⁶ translates it as “two bodies” and Levy¹⁴⁷ compares it with the Persian *tandu* which means “two persons”.¹⁴⁸ According to Rashi and Levy the sentence should thus read: “It is better to dwell together than to dwell in widowhood”. However, in all the cases where the

¹⁴⁴ Jastrow, 1992, p. 541.

¹⁴⁵ Ibid., p. 540-541.

¹⁴⁶ Rashi, Kid. 41a.

¹⁴⁷ Jacob Levy, *Neuhebräisches und chaldäisches Wörterbuch über die Talmudim und Midraschim*, F.A. Brockhaus, Leipzig, 1879, 4 volumes, zweiter Band, p. 167/168.

¹⁴⁸ T.B., Yeb 118b in the Soncino translation, p. 839, footnote 5.

sentence is used the meaning of it is that a woman prefers to be in a marriage, even if she is unhappy, than to remain single. The next interesting point is why it mentions אַרְמֵלוֹ, which means ‘widowhood’¹⁴⁹; are we supposed to learn from this that the phrase *tav lemeitav tandu milemietav armelu* was originally aimed at a *yevamah*, for whom it would be better to be married to her brother-in-law than to remain a widow? Although there is no corroborating evidence for this, it could be that this was Resh Laqish’s intent. Of the five cases of *tav lemeitav* in the Talmud only one (B.K. 110b/111a) actually deals with a *yevamah*.

The five places in the Talmud where *tav lemeitav* is mentioned are very diverse in nature and *tav lemeitav* is used in them to justify different conclusions:

(1) In B.K. 110b/111a the rabbis discuss what should happen to a woman who becomes subject to *yibbum* while the levirate brother-in-law is afflicted with leprosy (*mukeh shehin*).

(2) In Kid. 7a the woman forgoes the prescribed *shaveh perutah* she is entitled to upon getting married, because she really wants to marry this man.

(3) In Kid. 41a there is a discussion of why a man ought not to get betrothed to a woman without having seen her, while a woman can be betrothed through an agent thus not knowing what the husband looks like. The reason the rabbis give is that a woman does not care about her future husband’s looks.

(4) Ket. 75a talks about the situation where a woman from a well-to-do background ends up marrying a man who has taken upon himself a vow that he wishes not to be forbidden to her relatives when it turns out that she is the vowing type. The man later annuls his vow and the *kiddushin* is then valid. If a woman would have made such a statement regarding a well-to-do man and later annulled it, the *kiddushin* would not be valid.

(5) In Yeb. 118b there is a discussion whether a *get* given at the time of a quarrel is valid.

The common factor in all five cases is that the rabbis end with “as Resh Laqish said: *tav lemeitav tandu mi lemeitav armelu*”; although the marriage situation in these cases is not ideal for the woman, either from the onset or from a specific moment onwards,

¹⁴⁹ Jastrow, p. 123; Levy, erster Band, p. 169.

the rabbis nevertheless maintain that the woman prefers this marriage to being single because of *tav lemeitav*.

Why do they hold this opinion and how is their opinion interpreted by the *poskim*? Do women really not care who they are getting married to as long as they can get married? What would be the underlying reason for this? Can *tav lemeitav* only be applied to these specific cases mentioned in the Talmud or is it applicable to all women in any situation? Do historical, economic and sociological changes influence women's attitude to marriage and choice of marriage partner? In order to answer these questions a closer look at the different passages in the Talmud and their interpretation by different *poskim* is necessary. Current discussions between different researchers will also be discussed.

2.2 Talmudic sources and their interpretation

To understand the specific cases of *tav lemeitav* in the *Talmud* it is appropriate to look closer at the different cases. The cases will be given in the English translation as they appear in the Soncino Talmud. It should be noted that the Soncino Talmud gives a translation of the *Talmud* by different translators which has led to an inconsistent translation of *tav lemeitav*. Where necessary, to understand the text in its full context, the Hebrew or Aramaic terms are inserted into the English translation.

2.2.1 Baba Kama 110b/ 111a

The first case is to be found in B.K. 110b/ 111a. In this case a woman falls to *yibbum*, while her brother-in-law is afflicted with leprosy. What is the status of the woman in this case?

BUT IF HE HAD ALREADY GIVEN OVER THE MONEY TO THE MEMBERS OF THE DIVISION etc¹⁵⁰. Abaye said: We may infer from this

¹⁵⁰ This passage in capital letters is only part of the whole Mishnah which is fully quoted on pages 641-642. The etc. refers to the rest of the sentence in that particular Mishnah, which reads as follows "But if he had already given the money to the members of the division and then died, the heirs have no power to make them give it up, as it is written, whatsoever any man giveth the priest it shall be his (Num. 5:10)".

that the giving of the money effects half of the atonement: for if it has no [independent] share in the atonement, I should surely say that it ought to be returned to the heirs, on the ground that he would never have parted with the money upon such an understanding (דאדעתא דהכי)¹⁵¹. But if this could be argued, why should a sin offering whose owner died not revert to the state of unconsecration (ליפוק לחולין), for the owner would surely not have set it aside upon such an understanding¹⁵²? – It may however be said that regarding a sin offering whose owner died there is a *halakhah* handed down by tradition that it should be left to die. But again, according to your argument, why should a trespass offering whose owner died not revert to the state of unconsecration¹⁵³, as the owner would surely not have set it aside upon such an understanding? – With regard to a trespass offering there is similarly a *halakhah* handed down by tradition that whenever [an animal, is set aside as] a sin offering would be left to die, [if set aside as] a trespass offering it would be subject to the law of pasturing. But still, according to your argument why should a deceased brother's wife on becoming bound to one affected with leprosy (מוכה שחין) not be released [even] without the act of *halitsah* (תפוק בלא חליצה), for surely she would not have consented to betroth herself upon this understanding (דאדעתא דהכי)¹⁵⁴? – In that case we can bear witness (סהדי אנו) [111a] that she was quite prepared to accept any conditions (בכל דהו), as we learn from Resh Laqish; for Resh Laqish said: It is better [for a woman] to dwell as two than to dwell in widowhood.

The discussion here deals with the situation where a person who bought an animal for a sin offering dies before the animal has been sacrificed, which effectually means that the sin offering is of no use to the deceased person anymore: sins during one's lifetime can only be atoned for during one's lifetime. The rabbis therefore argue whether the dead person, had he known that he would die before the animal would be sacrificed, would rather not have spent his money on a sin offering, but would have preferred to save it for his heirs, considering the fact that the sin offering would be of

¹⁵¹ "I.e., to obtain no atonement and yet lose the money.", in: Soncino Talmud, B.K. 110b, p. 647, n. 1.

¹⁵² "That it should be unable to serve any purpose and yet remain consecrated.", *ibid.*, n. 3.

¹⁵³ "Why then should it be kept on the pastures until it will become blemished.", *ibid.*, n.5, as a reference to something explained in *ibid.*, p. 642.

¹⁵⁴ "I.e., to become bound to (the husband's brother who was) a leper; cf. Ket. VII, 10", *ibid.*, n. 8.

no use to him. He did not pay for the sin offering on the understanding that it would be of no benefit to him. By the same token the deceased person did not intend the animal to be consecrated but in the end not sacrificed, which means that the animal cannot be used for any purpose, neither profane, such as using its meat, nor holy, being used as a sacrifice. All the animal can do is live until it dies. Although this is not a problem for the animal, it might cause a problem for the heirs who probably become the owners of the consecrated animal and who will have to make sure it can graze somewhere. Although there is no discussion about this situation at this point in the Talmud, we might understand that this situation causes a financial loss to the heirs while at the same time they cannot benefit from the animal in any way.

The rabbis then compare this situation to a situation where a woman falls to her levirate brother-in-law, who is afflicted with leprosy. Just as the consecrated animal should perhaps be returned to a status of unconsecration (ליפוק לחולין), which literally means ‘to go out to the profane’) since the owner died before the animal was actually sacrificed, the *yevamah* should perhaps also be regarded as being in a ‘status of unconsecration’ (תיפוק בלא חליצה), ‘she should go out without *halitsah*’), which means she was actually never married and does now not fall to *yibbum*. The rabbis discuss whether they can learn from the fact that the owner of a sin offering did not pay for the sacrifice on the understanding (דאדעתא דהכי) that the sacrifice would not be beneficial to him, that the woman also did not enter the marriage with the first husband on the understanding (דאדעתא דהכי) that she would end up marrying this leprous brother-in-law. In fact, had she known this, she might have preferred not to marry the first husband at all. The rabbis therefore ask whether this woman requires *halitsah* or whether she is free to marry anybody else. The basic question is whether the first marriage can be annulled on grounds of *kiddushei ta’ut*? The whole *sugyah* deals with “real intention”: on which grounds does a person pledge a sin offering and on which grounds does a woman enter into a marriage? The rabbis answer that the woman was very much willing to marry the initial husband without any conditions and thus she was even willing to accept the small chance of ending up marrying his brother who is a leper. By stating this, there is an underlying assumption that the brother-in-law was a leper at the time of the betrothal; otherwise the woman could not have had the intention at all to accept a leprous brother-in-law, when necessary, while marrying a healthy husband. Thus they say since “she was quite prepared to accept

any conditions, as Resh Laqish said *tav lemeitav tandu mi lemeitav armelu*,¹⁵⁵ she now is subject to *yibbum* and cannot leave the marriage without *halitsah*. Just as the consecrated animal cannot go back to a state of unconsecration so also the wife cannot be regarded as never being married. For the animal, his consecrated yet not sacrificed status is no problem, as mentioned earlier. The wife however is in a more difficult situation: she does not want to be married to this brother-in-law and requires *halitsah*. Although the animal does not have the option of getting out of its situation, the requirement of *halitsah* contains a twofold problem for the wife. Either the brother-in-law is willing to perform *halitsah* but then the woman can never marry a *kohen*, since she now is (the equivalent of) a divorcee, or the brother-in-law does not want to perform *halitsah*, and then the woman becomes an *agunah*. Neither situation will be appreciated by the woman, because it limits her options in marriage.

Still the question remains how the rabbis can be so sure that the woman was willing to accept her leprous brother-in-law when necessary? According to Aranoff¹⁵⁶ the use of the words אנן סהדי (we bear witness, we presume) is crucial here, as she writes, since

it is an example of the Talmudic view that when ‘words in the heart’, or unspoken intentions, are relevant to deciding a legal matter, the court has the authority to make presumptions about those intentions and decide the case accordingly.

In this case the rabbis presume that by marrying the healthy brother the woman had the unspoken intention to accept the leprous brother when necessary. Even on the risk of ending up with the *mukeh shehin* the woman would not want to have missed the time she spent with her first husband. The risk this woman took was however limited, since for *yibbum* to occur several conditions had to be met: the pair had to be childless, the husband had to die and the brother had to still be alive. How much weight can one therefore give to the final statement of *tav lemeitav*? Is it not likely that the woman in this case did not consider that she would end up in this situation, and therefore had no intention of accepting the leprous brother-in-law? However,

¹⁵⁵ T.B. B.K. 111a.

¹⁵⁶ Aranoff, Susan, “Two Views of Marriage – Two Views of Women: Reconsidering *Tav Lemeitav Tan Du Milemeitav Armelu*”, <http://www.agunahinternational.com/>, first published in *Nashim*, Spring/Summer, Number 3, 5760/ 2000, p. 199-227.

even if this particular woman accepted her healthy husband realizing that she ran the small risk that she would end up marrying his leprous brother, does that justify the assumption that women in general accept men with a defect, just in order to be married? The text clearly states that the rabbis presume “in that case etc.” which alludes to the fact that in a different case they might have ruled differently. This text deals with one specific case, i.e. with a widow falling to her leprous brother-in-law, and therefore one should not on this basis apply the maxim of *tav lemeitav* to all women.

The Tosafot hold that the wife knew the risk she was taking at the time of her marriage to the healthy husband and thus one cannot say that “she did not marry on this understanding”. Rashi¹⁵⁷ interprets B.K. 110b/ 111a in a more lenient way when he explains the words *שאם זה ספק על שלם שהוא לראשון להתקדש* as *דמינה ניהא לה* follows, the woman was willing to marry the man who was healthy, accepting that there is a remote risk that she will end up with his brother. According to Rashi the woman would not have wanted to miss out on the time she had with the first husband since there is only a remote possibility that she will fall to his brother who is a leper. Avishalom Westreich¹⁵⁸ comments that “Hacohen¹⁵⁹ notes that for Rashi the *hazakah* of “*tav lemeitav*” is relevant only when the *yavam* has the defect (*mukeh shehin*), but when the husband has it, the wife can say that she would have never agreed to the marriage and it is therefore *kiddushei ta`ut* (*Beit Halevi* 3:3 describes this as a “*kula gedolah*”, a major leniency based on Rashi)”. Rashi’s lenient position is held by several other *poskim* as well. The *Torat Hayim*, for instance, held that the *yevamah* did not marry her first husband on the understanding that she would fall to her brother-in-law who is a *mukeh shehin* because this was dependant on several factors and she did not consider these things likely to happen. The *Penei Yehoshua* discusses whether such a *yevamah* should be able to leave without *halitsah*, since some *Geonim* had ruled that a *yevamah*, who falls to an *ah mumar*, is free to marry without *halitsah* (דהוי כיון מחליצה פטורה מומר יבם לפני שנפלה דהיכא גאונים כמה כתבו גופא ביבמה דאפילו ועוד). (טובא אומדנא).

¹⁵⁷ Rashi on T.B. B.K. 111a.

¹⁵⁸ Avishalom Westreich, review of Hacohen’s book, in: *The Jewish Law Annual* XVII (2007), p. 306-313.

¹⁵⁹ Hacohen, 2004, p. 36.

However, other *poskim*, such as the Tosafot, disagree with the lenient position Rashi takes. Whereas Rashi ruled leniently in cases where the *yabam* was a *mukeh shehin* and where a *get* was given at the time of a quarrel, the *Tosafot* ruled stringently in both cases. Some *Tosafot*, such as the Ri, ruled leniently only in cases where the *yabam* was a *mukeh shehin*, but not in cases where the *yabam* had another blemish. Hacoen observes: “The Rambam adopted the lenient position of Rashi and ruled that defects in a levir are not limited to *mukeh shehin* but include any of the other ‘male’ defects¹⁶⁰. In such cases, the Rambam ruled [that] the levir must release the woman through *halitsah* and pay her *ketubah*”.¹⁶¹ The reason why others adopt a stringent position rests upon “the belief that the two Talmudic presumptions about women and marriage cited in [B.K. 110b/111a] are categorical truths that apply to all women: that a woman ‘is satisfied with anything’ and that ‘it is better for her to dwell as two than to dwell in widowhood’.”¹⁶² Two other reasons which Hacoen gives are the facts that “the Talmudic discussion on *mukeh shehin* deals with a defect in the levirate husband, [thus we should be more stringent with the woman as regards invalidation *ab initio* of her first marriage” and “the idea of mental reservation at the time of marriage – “on this understanding...” – should take into consideration not only the wife’s intention but also the husband’s”.¹⁶³ As to this last opinion, the Tosafot held that the first husband did not marry his wife on the understanding that he would die childless and that his wife would fall to his brother who is a *mukeh shehin*, thus it was the husband’s full intention to marry his wife unconditionally and thus one cannot say later on that there was a case of mistaken transaction.

2.2.2 Kiddushin 7a

In Kid. 7a there is a completely different scenario. Here a woman initiates the marriage negotiations by offering the husband-to-be a large sum of money.

¹⁶⁰ These include: “a polyp in the nose that gives off an offensive nasal emission, a smell from gathering dog dung or mining copper or tanning leather” M. Ket. 7:9 as quoted in Hacoen, 2004, p. 25.

¹⁶¹ Hacoen, 2004, p. 37.

¹⁶² Ibid., p. 34.

¹⁶³ Ibid.

Raba propounded: What [if a woman declares,] ‘Here is a *maneh*¹⁶⁴ and I will become betrothed (שְׂאֵקֶדֶשׁ) unto thee¹⁶⁵?’ Mar Zutra ruled in R. Papa’s name: She is betrothed (מִקְדוּשָׁתָּהּ). R. Ashi objected to Mar Zutra: If so, property which ranks as security [real estate] is acquired as an adjunct to property which does not rank as security [movables]¹⁶⁶; whereas we learnt the reverse: Property which does not rank as security may be acquired in conjunction with property which ranks as security by money, deed or *hazakah*. Said he to him: Do you think that she said to him, ‘Along with’? Here the reference is to an important personage (אָדָם חָשׁוּב) in return for the pleasure¹⁶⁷ (הֵנְאָה) [she derives] from his accepting a gift from her, she completely cedes herself (נִפְשָׁה מִקְנִיא לִיהָ)¹⁶⁸. It has been stated likewise in Raba’s name: The same applies to monetary matters¹⁶⁹. Now, both are necessary: had we been informed this of *kiddushin* [only], that is because a woman is pleased (נִיחָא לָהּ) [even] with very little (בְּכָל דְּהוּ), in accordance with Resh Laqish’s dictum, for Resh Laqish said: It is better to dwell in grief with a load than to dwell in widowhood; but as for money, I would say it is not so. And if we were informed this of monetary matters, that is because it is subject to remission (מִשׁוּם אֲשֶׁר מְוַנָּא, מְשׁוּם), but as for *kiddushin*, I would say it is not so. Hence both are necessary.

In this case the woman wants to marry a certain man so much that she gives him a present in order to get betrothed to him. The man accepts the gift and uses the honour she receives by his acceptance of the gift to betroth her, this in contrast to the gift of a *shaveh perutah* which a man normally has to give from his own money in order to betroth a woman. The man in this case is a man of great importance (אָדָם חָשׁוּב) and

¹⁶⁴ A *maneh* is, according to Jastrow, p. 797, a weight in gold or silver, equal to one hundred common or fifty sacred shekels.

¹⁶⁵ “And the man accepted it, saying: ‘Be thou betrothed unto me therewith’.”, in: Soncino Talmud, Kid. 7a, p. 24, n.1.

¹⁶⁶ “A creditor could collect his debt out of the debtor’s real estate, even if sold after the debt was contracted, but not out of movables, if sold; hence the former is termed property which ranks as security, the latter, property which does not rank as security. Human beings are on a par with the former, and R. Ashi assumed that the woman is acquired with the *maneh*.”, *ibid.*, n.2.

¹⁶⁷ Even though the Soncino Talmud translates הֵנְאָה with ‘pleasure’ it should really read ‘benefit’.

¹⁶⁸ “Though normally the man must give the money yet if he is eminent his acceptance confers pleasure, which in turn is considered of financial value.”, in: Soncino Talmud, Kid. 7a, p. 24, n. 5.

¹⁶⁹ “If A says to B, ‘Give money to C, in return for which my field is sold to you’, the sale is valid, by the law of surety: ‘Take a *maneh*, and let your field be sold to C’, C acquires it by the law of a Canaanite slave; ‘Give money to C and let him thereby acquire my field’, he acquires it by the laws of both – all as explained with reference to *kiddushin*.”, *ibid.*, n. 6.

therefore the honour that befalls her on his accepting her gift is worth more than the *shaveh perutah* she would normally receive. At the same time the woman also receives a lot in return, since the man is an “*adam hashuv*”, which can mean several things. The man is obviously well respected in the community either because of his wisdom, because he holds a high position, or because he has a lot of money. Therefore even if the woman gave him this large sum of money to get betrothed to him she will share in his influence or his wealth once being married to him. This is why the rabbis say that if the benefit (הנאה) could only be connected to *kiddushin* then they could use *tav lemeitav*, since women are pleased with very little (בכל דהו). It is however also applicable to monetary matters, since one can, for instance, sell a house by accepting a gift. One can derive הנאה by accepting the gift, which would be considered greater than the actual worth of the house. To such cases one cannot apply *tav lemeitav* since the person who accepts the gift can be a man. Since הנאה can thus be connected to both *kiddushin* and monetary matters *tav lemeitav* is not applicable to the case at hand.

In both the former Talmud passage and here it is said of women that they are pleased בכל דהו, which is either translated with ‘any conditions’ (B.K.110b/111a) or ‘very little’ (Kid. 7a) and literally means ‘with whatever’. The בכל דהו is closely connected to the טב למיתב טן דו מלמיתב ארמלו; the reason why a woman prefers to be unhappily married than to be (perhaps happily) single is because she is satisfied ‘with whatever’. It is held that women in general do not care about the man they are going to marry because any man will do. The underlying reason for this, however, is not clear. In both cases, moreover, it is also not clear that these general statements can really be applied to all women. The first case dealt with a woman in a specific situation and the second actually rejects the argument of *tav lemeitav* in the particular context. Thus we have no proof yet that the maxim is intended to apply as a general truth.

2.2.3 Kiddushin 41a

In Kid. 41a an inherent difference between men and women regarding marriage is discussed.

MISHNAH: A MAN CAN BETROTH (מקדש) [A WOMAN] THROUGH HIMSELF OR THROUGH HIS AGENT. A WOMAN MAY BE BETROTHED (מתקדשת) THROUGH HERSELF OR THROUGH HER AGENT. A MAN MAY GIVE HIS DAUGHTER IN BETROTHAL (מקדש) WHEN A NA'ARAH [EITHER] HIMSELF OR THROUGH HIS AGENT.

GEMARA: If he can betroth THROUGH HIS AGENT (בשלוהו), is it necessary [to state] THROUGH HIMSELF (בו)? Said R. Joseph: [This inclusion intimates that] it is more meritorious through himself than through his agent. Even as R. Safra [himself] singed an [animal's] head, Raba salted *shibbuta*¹⁷⁰. Some say that in this matter there is even a prohibition, in accordance with Rab Judah's dictum in Rab's name; for Rab Judah said in the name of Rab "A man may not betroth a woman before he sees her, lest he [subsequently] see something repulsive (דבר מגונה) in her, and she becomes loathsome to him (ותתגנה עליו), whereas the All-Merciful said: *but thou shalt love thy neighbour as thyself*.¹⁷¹ And as to R. Joseph's statement¹⁷², it relates to the second clause: A WOMAN MAY BE BETROTHED THROUGH HERSELF OR THROUGH HER AGENT. Now, if she can be betrothed through her agent, is it necessary [to state] through herself? - Said R. Joseph: [This inclusion intimates that] it is more meritorious through herself than through her agent. Even as R. Safra [himself] singed an [animal's] head, Raba salted *shibbuta*. But there is no prohibition in this case, in accordance with Resh Laqish who said, It is better to dwell with a load of grief than to dwell in widowhood.

The question discussed here is: if a man can betroth a woman through a *shaliach* and a woman can get betrothed through a *shaliach*, why then would either one of them want to betroth/ get betrothed by him/herself? First of all the *mitswah* is more upon the person himself than on the *shaliach* so therefore one should betroth/ get betrothed through oneself. Just as the two rabbis mentioned in the text undertook the *mitswah* of helping with the preparation for Shabbat themselves, even though they had other

¹⁷⁰According to Jastrow, p. 1556, *shibbuta* is the name of a fish, probably a mullet.

¹⁷¹ Lev. 19:18.

¹⁷² "That it is merely preferable, but there is no prohibition.", in: Soncino Talmud, Kid. 41a, p. 204, n. 5.

people who could do it for them, so too one should perform the *mitswah* of betrothing oneself rather than through a *shaliach*. However, regarding a man there is, according to R. Judah in the name of Rab, also an *issur* involved in betrothing through a *shaliach*. When a man wants to betroth a woman he really has to see her before he agrees to marry her “lest he sees something repulsive in her, and she becomes loathsome to him”. The man has “to assure [himself] that she is attractive to him, for otherwise he will be violating the command to “love his friend as himself”.”¹⁷³ If a man betroths his future wife through a *shaliach*, the *kiddushin* is nevertheless valid, but *lekhatila* one should not do it. Considering a woman there is no *issur* involved. Since a woman would be pleased with any man, no matter what he looks like, she does not need to see the man before the wedding and she can therefore get betrothed through a *shaliach*. To prove the fact that a woman does not care about the looks of her future husband, the maxim of *tav lemeitav* is applied.¹⁷⁴ This is the first of the three cases where *tav lemeitav* is applicable to all women generally. This text actually says that women in general do not care about the looks of their future husbands: they just want to get married and they will be happy with any man. What is remarkable though is that in this text the literal connection with *בכל דהו* is not made even though it is implied: all women are pleased ‘with whatever’ therefore they do not care what a man looks like, just as long as they can get married.

While discussing divorce the text in the Torah (Deut. 24:1) states “If it cometh to pass that she finds no favour in his eyes, because he hath found some transgression in her (ת דברואם לא תמצא הן בעיניו כי מצא בה ער), then let him write her a bill of divorcement, and give it in her hand, and send her out of his house”. The meaning of *ת דברוער* is discussed in M. Git. 9:10¹⁷⁵ and the three possible explanations are: any thing that a husband does not like in his wife’s conduct (Bet Hillel), sexual misconduct on the side of the wife (Bet Shammai) or the fact that another woman is more beautiful than the wife (R. Akiva). This last interpretation, allowing the husband to divorce merely on the grounds of the wife’s physical appearance, has never been commonly accepted, but it shows a remarkable connection to the *issur* mentioned in Kid. 41a, where it is said that a man should not get betrothed to a woman before he sees her “lest he sees

¹⁷³ Boyarin, 1997, p. 128.

¹⁷⁴ Thus reads also R. Caro, Bet Yosef 36:1.

¹⁷⁵ In the T.B. Git. 90a.

something repulsive in her, and she becomes loathsome to him” (שמה יראה בה דבר) (מגונה ותתגנה עליו¹⁷⁶). Although דבר מגונה and ת דברוער are not from the same root they contain similar concepts when one reads it as R. Akiva did: a man cares about the way his wife looks and a woman can become loathsome in the eyes of her husband if her looks are not his taste or if her looks degenerate and thus she becomes less attractive in his eyes.

In his commentary on Kid 41a Rashi explains that the quotation of Resh Laqish means that women say about their husbands, no matter what he is like, that it is good to sit with him together as two people than to sit in widowhood. Rashi reads *tan du* really as “two bodies” and sees in this the *issur* for a man to betroth through a *shaliach* when he has not seen the woman. Rashi also comments on the continuation of Kid. 41a which reads as follows:

A MAN MAY GIVE HIS DAUGHTER IN BETROTHAL WHEN A NA'ARAH. Only when she is a *na'arah*¹⁷⁷, but not when she is a minor (*ketanah*¹⁷⁸). This supports Rab. For Rab Judah said in Rab's name: One may not give his daughter in betrothal when she is a minor, [but must wait] until she grows up and says “I want So-and-so”.

Just as a woman can get betrothed through a *shaliach* without having seen the husband-to-be, Rashi¹⁷⁹ comments that because of *tav lemeitav* a father is allowed to marry off his daughter who is a *na'arah* without her knowing who the future husband is, but he does not have the same authority regarding his son. A son, even a minor son, does not fall under the authority of his father (ברשות אביו) in relation to marriage, whereas a daughter does. The son should thus be regarded as a man who needs to have seen his future wife before he agrees to marry her.

The Tosafot,¹⁸⁰ in explaining that a man should not marry off his minor daughter, say that it does not really constitute an *issur* because it is preferable for a woman to be

¹⁷⁶ Part. pass. of גנה deserving to be covered up, reprehensible, indecent, ugly (Jastrow, p. 259).

¹⁷⁷ A *na'arah* is a girl between twelve and twelve and a half years old.

¹⁷⁸ A *ketanah* is girl under twelve years old.

¹⁷⁹ Rashi, Kid. 45b.

¹⁸⁰ Tosefot, Kid. 41a.

married than not to be married because of *tav lemeitav*. The problem with marrying off a minor daughter is that when she grows up she might not want to be married to this man. However they also see a problem of the times they are living in, since they write “in everyday life where the exile weighs more heavily on us, if a father has the money for the *nedunyah* (dowry) while his daughter is a minor and he might not have this money later on and his daughter will sit as an *agunah* forever” (שבכל יום ויום הגלות) מתגבר עלינו ואם יש סיפק ביד אדם עכשיו לתת לבתו נדוניא שמא לאחר זמן לא יהיה סיפק בידו ותשב (בתו עגונה לעולם). In such a case where the father has the *nedunyah* while the daughter is still a minor, it is preferable to marry her off, since by the time the girl grows up the father might not have that money anymore. The Tosafot use the term *agunah* to explain that when the situation arises where there is no *nedunyah* the girl will be left unmarried; the girl is not chained to a dead marriage, but she is chained to a state of spinsterhood.

Similarly, Rashba¹⁸¹ writes:

Rav Yehudah learned in the name of Rav that it is forbidden to a man to marry off his daughter while she is a minor until she grows up and says “I want him”. And there are some who say and thus we say *tav lemeitav tan du mi lemeitav armelu*, some say especially when she is a grown up she is precise with her belongings that she is satisfied with anything (בכל דהוא), but when she is a minor when she grows up she might not agree to him.

Apparently there will be a time where a girl who has become a *gedolah*, a grown up, would agree to any husband, while a girl who is still a *ketanah* might not agree to the husband who is chosen for her and therefore one should wait till she grows up and says ‘I want such-and-such’. If this is the case, where does the line between marrying the man of her choice and accepting *kol dehu* lie? Will there be an age at which the *gedolah* has two choices: either accepting *kol dehu* or remaining a spinster forever? Should this be so, then *kol dehu* and consequently *tav lemeitav* can then only be applied to certain women, those unfortunate not to be married to the right person at the right time. The next question one can ask is whether the age at which a woman

¹⁸¹ Hiddushei HaRashba, Kid. 41a

would be regarded as a spinster changes? In this day and age women in orthodox circles tend to marry in their late teens/ early twenties, while at the time of the Talmud and in mediaeval times the age of marriage was around twelve.

Although the Talmud states that one should not marry off a minor daughter, there are various opinions which claim it is better for a father to marry off his daughter while she is still a minor. In addition to preventing spinsterhood for the girl because the father might lose the money to marry her off, marrying off a minor girl also prevents her from becoming morally corrupted. As long as the daughter is under the supervision of her father she will not go astray, but once she is grown up she might. Joseph Fleishman¹⁸² writes:

In this situation, according to Rabbi Akiva, there is a serious possibility that without male supervision the young woman will become morally irresponsible and give herself freely to anyone. Responsibility for this moral lapse will not be hers, but her father's, who did not marry her off, thereby allowing her to be independent without any male authority.

This suggests that women without the proper guidance are highly at risk of going astray, because they are inclined to do so. Rabbi Eliezer however holds (in Fleishman's words) that "the father [should] search scrupulously for a fitting husband for his daughter, both in terms of age and of character," thus not marrying her off as soon as possible. Rabbi Eliezer's statement is, thus, also aimed at preventing extra-marital relationships. He holds that when the girl is married to an unsuitable husband, she will be tempted to have relations with men other than her husband, thus also becoming morally corrupted. According to Fleishman the difference between R. Akiva's opinion and R. Eliezer's opinion on the danger of moral corruption of a Jewish woman is merely the timing;

"in order to battle adultery, one must ensure that the daughter marries someone suitable to her, and hence, one should not marry her off hurriedly and for inappropriate considerations to an unsuitable husband. In order to prevent

¹⁸² Fleishman, unpublished MS, 2006

pre-marital sex, one should ensure that the daughter marries early, as close to her maturity as possible”¹⁸³.

Both opinions however imply that women are prone to immorality.

2.2.4 Kethubot 75a

In Ket. 75a the relation between vows and a marriage bond are discussed. This discussion goes back to the Mishnah in Ket. 72b that deals with a woman who is “the vowing type”¹⁸⁴, i.e. she is in the habit of taking upon herself vows.

If a husband divorced his wife on account of a vow [she had made] he may not remarry her, nor may he remarry his wife [if he divorced her] on account of a bad name¹⁸⁵. R. Judah ruled: in the case of a vow that was made in the presence of many people he may not remarry her¹⁸⁶, but if it was not made in the presence of many people he may remarry her. R. Meir ruled: In the case of a vow [the disallowance of which] necessitates the investigation of a Sage her husband may not remarry her, but if he does not require the investigation of a Sage he may remarry her. R. Eleazar said: The prohibition against [remarriage where the disallowance of the vow] required [the investigation of a Sage] was ordained only on account [of a vow] which requires [no such investigation]. What is R. Judah’s reason? Because it is written in Scripture, [75a] *And the children of Israel smote them not, because the princes of the congregation had sworn unto them.*¹⁸⁷ And what is considered ‘many’ (רבים)? R. Nahman b. Isaac said: Three [men]; [for the expression of] ‘days’¹⁸⁸ implies two [days] and ‘many’ three. R. Isaac replied: Ten [for the term] congregation (עדה) was applied to them. [Now] ‘R. Meir ruled: In the case of a vow [the disallowance of which] necessitates the investigation of a Sage he may not remarry her’ [and] ‘R. Eleazar said: The prohibition [against remarriage where the disallowance of the vow] required [the investigation of a Sage] was ordained

¹⁸³ Ibid.

¹⁸⁴ See chapter one, footnote 32.

¹⁸⁵ Immoral conduct.

¹⁸⁶ “Since such a vow can never be disallowed”, in: Soncino Talmud, Ket. 74b, p. 467, n. 9.

¹⁸⁷ Josh. 9:18.

¹⁸⁸ “Referring to Lev. 15: 25. Cf. Nid. 73a”, in: Soncino Talmud, Ket. 75a, p. 468, n. 8.

only on account [of a vow] which required [no such investigation]’, on what principles do they differ? – R. Meir holds the view that ‘a man does not mind his wife’s being exposed to the publicity of a court of law’ and R. Eleazar holds the view that ‘no man wants his wife to be exposed to the publicity of a court of law’.

Raba replied: Here¹⁸⁹ we are dealing with the case of a woman from a noted family (באשה חשובה) in which case the man could say¹⁹⁰, ‘I have no wish to be forbidden to marry her relatives (לא ניהא לי דאיתסר בקרובותיה)’. If so, [consider] the final clause where it is stated, ‘But if he¹⁹¹ went to a Sage who disallowed his vow or to a physician who cured him, his betrothal of the woman is valid’, [why, it may be asked, was it not] stated, ‘the betrothal is invalid’ and explained, ‘Here we are dealing with the case of a man from a noted family (חשובבאדם) concerning whom the woman might plead, ‘I have no wish to be forbidden to marry his relatives (לא ניהא לי דאיתסר בקריביה)’? – A woman is satisfied with any sort [of husband] (בכל דהו) as Resh Laqish said. For Resh Laqish stated: ‘It is preferable to live in grief than to dwell in widowhood’. Abaye said: With a husband [of the size of an] ant (דשומשמנא גברא) her seat is placed among the great (הראתא).¹⁹² R. Papa said: Though her husband be a carder (דנפסא גברא)¹⁹³ she calls him to the threshold and sits down [at his side].¹⁹⁴ R. Ashi said: Even if her husband is only a cabbage-head (דקלסא גברא)¹⁹⁵ she requires no lentils for her pot.

A Tanna taught: But all such women play the harlot and attribute the consequences to their husbands (יהנתנא: וכולן מזנות ותולות בבעל).

In this case the rabbis deal with a woman who is the vowing type, a theme that often recurs in the context of *kiddushin*. Many men do not want to marry a woman who is in

¹⁸⁹ “The second Baraita which rules that the betrothal is invalid even if a Sage has disallowed the vow.”, *ibid.*, p. 469, n. 1.

¹⁹⁰ “In his desire to avoid a divorce and to obtain the retrospective annulment of his betrothal”, *ibid.*, n. 4.

¹⁹¹ “A man who betrothed a woman on the condition that he was under no vow or that he suffered no bodily defects”, *ibid.*, n. 7.

¹⁹² הראתא is the plural of חרתא, which means according to Jastrow, p. 508 ‘a free woman’.

¹⁹³ According to Jastrow, p. 925, a נפסא or נפצא is a flax-beater.

¹⁹⁴ “To show her friends that she is married woman. She is proud to be in the company of a husband however humble his occupation and social status.”, in: Soncino Talmud, Ket. 75a, p. 470, n. 1.

¹⁹⁵ The word קלסא is translated by Rashi as ‘of a tainted family’. According to Jastrow, p. 360., it means either ‘dull’ or ‘ugly’.

the habit of making vows; this because vows can interfere with the duties a wife has towards her husband. The discussion deals with the question whether a man can remarry his ex-wife after he divorced her because she turned out to be the vowing type. The rabbis then raise the case where a man is about to make *kiddushin* with a woman (of the vowing type) from a noted family. The man vows before the *kiddushin* that he does not wish to be forbidden to marry her relatives. Even though by marrying the woman this man would normally not be allowed to marry either her mother or her sister after he has divorced his wife, the man nevertheless wants to be permitted to marry these women anyhow. Basically the husband does not want the *kiddushin* to take effect if the woman turns out to be the vowing type, which means that he does not have to divorce her when this happens and he can thus marry her relatives. When the man then goes to a Sage and has his vow annulled, his betrothal to the woman is nevertheless valid. If however it was the man who was from a noted family and the woman made this vow of wanting to be able to marry his relatives when he turns out to be the vowing type, even if she goes to a Sage and has her vow annulled, the betrothal is invalid. This is because the rabbis state “a woman is satisfied with any sort [of husband] as Resh Laqish stated “It is preferable to live in grief than to dwell in widowhood”. Here again it is stated that a woman is satisfied בכל דהו.

The *Gemara* continues with examples of men whose social or financial status is not very flattering: the man is either very unimportant (‘has the size of an ant’ and ‘he is only a carder’) yet the woman feels that she is very fortunate to be married to him, or the man is very uninteresting (‘he is a cabbage-head’) and yet the woman will forgo anything, even the cheapest vegetables available, to be married to him. The *Gemara* ends with the quote of a *Tanna* who teaches: “All such women play the harlot and attribute the results to their husbands”. This appears to mean that if a woman prefers to be married to a husband who is not a great catch she does this because in reality she has lovers in addition to her husband and if she gets pregnant, she will claim that the children are her husband’s.

If this is the message that we have to learn from the *tav lemeitav* maxim what does that say about the way women are regarded? Does tradition not state that the majority of women are kosher? Next to that, if kosher women would only marry men who are financially and/ or socially well to do, then a great deal of humankind would probably

not be married. This can mean several things: either there are a lot of women in the world who cannot be trusted and these women marry men who are financially and socially unstable or there are women who care less about money and status and more about the personality of and compatibility to their husbands. In today's orthodox circles many families are poor because they choose a *kollel*-life. Even though there is honour in a husband who learns, not all men in *kollel* are *talmidei hachamim*, but one would not dream of calling the wives of these men immoral on the grounds that they are willing to be married to such a man. I think it is safe to conclude that the *Tanna* was not right in his assertion that women who are willing to be married to men who do not have a high financial or social status are immoral.

The Rosh (Ket 7:13) comments on the statement of Resh Laqish that

The *Geonim* were in doubt that when there is a disagreement between Abaye and Raba, whom should they follow? It is accepted by us that we go according to the *batrai*, even if he is against Raba, who is the teacher. Therefore one has to be strict and she needs a *get* even if she is an important woman and if you will say 'did we not already learn in a Mishnah that she is not *mekudeshet*?' No distinction is made between a case where a vow was dissolved or not. Thus we say that she is *mekudeshet*, either because the vow was dissolved before the husband knew about it or because he is not *makpid* (stringent) on the vows that are on her. But if it was known to him from the beginning (before the vow was annulled), the *kiddushin* will be annulled from the moment he knows about it and the Sage will not find an opening to permit her to annul the vow. The Yerushalmi brings *Tannaitic* sources that allow her to get married without a *get* and *Tannaitic* sources that it is forbidden to her to get married without a *get*. The one who says that she is permitted, follows Rabbi Eleazar and the one who says she is prohibited, follows *rabbanan* and there are those who say that the whole of it is in accordance with *rabbanan*. The one who says that she is permitted to get married explains that she knows that if she goes to a Sage and he dissolves her vow, her children will be *mamzerim*, thus she does not go to a Sage and thus she is permitted to get married without a *get*. The one who says that she is prohibited to get married without a *get* explains that she might go to a Sage and he will dissolve her vow and the initial *kiddushin* will retroactively

take effect, and thus the children of another man will be *mamzerim* and thus she is forbidden to get married without a *get*. If it was the woman who made the condition and he went to a Sage she is unconditionally married. A woman would not hold the view that she would not want to be prohibited to her husband's relatives because of *tav lemeitav*.

The Rosh's explanation can lead to several conclusions. First of all, one of the main reasons why the man wants to marry this woman is because she is of a noted family and this is apparently perfectly acceptable. By contrast, women are held not to care about the social status of their future husband, thus also explaining why the *Gemara* follows with a list of men who are economically or socially not well to do. A woman will accept any man because of *tav lemeitav* and thus she would not put a condition to the *kiddushin* which would allow her to marry his relatives when the *kiddushin* would be annulled. It is however not stated that a woman is not allowed to make conditions to the *kiddushin*! The fact that a woman cares much less about the social status of her future husband than a man cares about the social status of his future wife can be explained in a positive way: where in modern day opinions some women are regarded as 'gold diggers', the explanation of the Rosh shows quite the opposite. Men are the 'gold diggers' here and even more so, it is quite acceptable for them to be like that!

The Rashba¹⁹⁶ comments on “אבל הוא שהלך אצל חכם והתירו אצל רופא ורפא אותו מקודשת”

It was clear according to the *hachamim* that she did not stipulate specifically that there will be no vows on him at the time of the *kiddushin* and she was not *makpid* on him not having vows or *mumim*. Therefore there is no blame on the man after he was cured; alternatively we learn from Resh Laqish who said *tav lemeitav tan du*.

The Rashba holds that either the woman was not stringent in finding out whether her future husband had vows on him or had blemishes or she does not care at all that he does have vows on him or has blemishes, because it is better for her to be married no

¹⁹⁶ Hiddushei HaRashba, Ket. 75a.

matter what the man is like. Here again it is clear that a woman can attach a condition to the *kiddushin*.

2.2.5 Yebamot 118b

In Yeb. 118b a husband divorces his wife because they are quarrelling. Is a divorce preferable to a woman in such a situation or not?

Said Rabina to Raba: What [is the legal decision] if a husband transferred to his wife [through an agent] the possession of a letter of divorce at a time when a quarrel [raged between them] (המזכה גט לאשתו במקום קטטה)? [Is the divorce], since she has a quarrel with her husband, an advantage to her (זכות הוא לה) or [is it a disadvantage, since] the gratification of bodily desires is possibly preferred by her (דלמא ניהא דגופא עדיף לה)? – Come and hear what Resh Laqish said: It is preferable to live in grief than to dwell in widowhood.

Abaye said: With a husband [of the size of an] ant her seat is placed among the great.

R. Papa said: Though her husband be a carder she calls him to the threshold and sits down [at his side].

R. Ashi said: Even if her husband is only a cabbage-head she requires no lentils for her pot.

A Tanna taught: But all such women play the harlot and attribute the consequences to their husbands.

In this Gemara a clear reason is given, for the first time, why a woman would prefer to stay in a bad marriage than remain single: because she enjoys the bodily pleasures of a marriage. In another Gemara (Shab. 23a) it is already stated “everyone knows why a bride enters the bridal chamber”, i.e. because of sexual fulfilment. A woman apparently cares more about her sexual fulfilment than about her total well being. This even includes living with a man while the relationship is not good, in that they are quarrelling. Whether the quarrelling is constant or whether the husband acts on an impulse is not clear from the text. This Gemara continues with the same statements of the different rabbis mentioned in Ket. 75a about the men a woman is willing to marry and the statement of the *Tanna* that all these women are harlots. The relationship is

clear: since a woman prefers sexual fulfilment above any other thing she is very much willing to marry and to remain married to any man, no matter what his social or financial status, just in order to be married — and maybe have some lovers on the side. *Tav lemeitav* is thus linked to another maxim applied to women, namely that all women are loose in their moral conduct. This maxim will be explored further in the following chapters where we look at the fear of rabbis that women, when given a chance, cast their eyes on other men and destroy the relationship with their husbands.

2.3.1 Poskim on *tav lemeitav*

After having read many sources dealing with *tav lemeitav* it becomes clear that two Talmudic texts are used on a regular basis (B.K. 110b/111a and Yeb. 118b), while the case of a father who marries off his daughter who is *ketanah* (Kid 41a) appears occasionally. In many of the cases brought before the Sages either the husband has apostatised or the woman falls to a *yabam* who is an apostate. Do we uphold *tav lemeitav* in such a case? In a case where the *yabam* is a *mukeh shehin* the *poskim* hold that *tav lemeitav* applies and the woman should go through either *yibbum* or *halitsah*. The Ran¹⁹⁷ holds that a woman in such a case should only be required to go through *halitsah*. According to the *Geonim*,¹⁹⁸ in cases where the *yabam* is an apostate the woman requires neither *halitsah* nor *yibbum*. Although the Mahari Minz¹⁹⁹ also ruled accordingly, the majority of *poskim*²⁰⁰ hold that if the *yabam* is an apostate *tav lemeitav* cannot be applied to the woman, since such a marriage would not be preferable to the woman, yet the woman still requires *halitsah*. The Radak²⁰¹ argues that if it is possible for the woman to live in the same place as the *yabam* then maybe she should live with him because the bodily pleasures of a marriage are preferable to her, following M. Sot. 3:4 “a woman prefers one measure of food together with *tifluth* etc.”; thus *tav lemeitav* would be applicable to her. If the *yabam* lives in a place where it is dangerous for Jews to live the woman cannot be forced to live with the *yabam* and *tav lemeitav* is not applicable. At the end of this *teshuvah* he holds, however, that in this case where the *yabam* is an apostate the woman should be able to leave without

¹⁹⁷ E.g. R. Joseph Caro, Bet Joseph E.H. 140:5.

¹⁹⁸ As mentioned in e.g. Shut Radak 9; Terumat HaDeshen 223 and 237.

¹⁹⁹ Mahari Minz 12.

²⁰⁰ E.g. Maharam MiRothenburg 564; Binjamin Ze'ev 71;

²⁰¹ Shut Radak 9.

halitsah. His ruling is, nevertheless, only *halakhah velo lema'aseh*: only if other great *poskim* agree with the ruling will the Radak allow this particular woman to leave without *halitsah*.

According to Maharam Alashkar²⁰² it should be possible to force an apostate to perform *halitsah*, based on the concept of a woman who claims *ma'is alay*.²⁰³ However, since the apostate does not fall under the jurisdiction of the *bet din* (due to the fact that he placed himself outside this jurisdiction and is not considered a full Jew anymore) he cannot really be forced. The *bet din* cannot even use the civil court to force the *yabam*.

If the husband himself is an apostate the case is more difficult and according to some *poskim*²⁰⁴ the woman prefers this marriage to not being married at all, while others²⁰⁵ hold that the marriage is not preferable to the woman and the husband should divorce her. The husband will, however, not be forced to divorce his wife, because of *tav lemeitav*.²⁰⁶ Nor will the wife be forced to live with the husband, because it is difficult for her to live together with a snake.

In cases where an apostate husband sends a *get* to his wife there is discussion²⁰⁷ of whether this *get* is valid and, if he sent it by a *shaliach*, whether one should fear that the husband may have cancelled the *get* before it was handed over? These questions are strange in my view because (1) the marriage of an apostate is valid, thus why should his giving a *get* not equally be valid, and (2) the Talmud (Git. 33a) already ruled that if a man cancels a *get* after he has sent it with a *shaliach* the rabbis may annul the marriage because the man has not acted properly. Thus any *get* sent by a *shaliach* will render the marriage ended; either by the *get* or by the automatic annulment of the rabbis.

²⁰² E.g. R. Maharam Alashkar 73.

²⁰³ In which case the Rambam holds that one can force the husband to divorce.

²⁰⁴ E.g. Panim Me'erot 1:42; Hatam Sofer 4 E.H. 2:60;

²⁰⁵ E.g. She'eilot Yabets 1:29;

²⁰⁶ E.g. Rambam, H.I. 25:4-5; R. Joseph Caro, Bet Joseph E.H. 134:5.

²⁰⁷ E.g. Binjamin Ze'ev 109; Shut Maharil 100;

In cases where the father marries off his minor daughter without her having seen the husband, the majority of *poskim*²⁰⁸ hold that such a marriage is preferable to the daughter because of *tav lemeitav*. The father, however, does not have the same jurisdiction over his son, since a son does not fall under the authority of his father as does a daughter. R. Benjamin Ze'ev ben Mattathias of Arta²⁰⁹ holds that one should not marry off a minor daughter until she grows up and says "I want so-and-so". He asks why the *poskim* of his time do not rule in that way and answers that this is because of a general feeling that the Diaspora weighs more heavily on the people and a father therefore wants to marry off his daughter while he has the money available, so that at least she will be married.

Several cases²¹⁰ discuss whether a *get* given at the time of a quarrel is valid, because the bodily pleasures of a marriage might be preferable to a woman. In other cases as well there is discussion of whether the bodily pleasures of the marriage prevail above a divorce. In one case, for instance, the Maharik²¹¹ discusses the situation where the wife has committed adultery on numerous occasions. The husband has married a second wife and the question arises whether he has to divorce his first wife. Under other circumstances the rabbis would say that the bodily pleasures of the marriage are preferable to the first wife and thus the husband would not have to divorce her. Yet in a case where the wife is an adulteress she has prohibited herself to her husband; thus relations are impossible between them and *tav lemeitav* cannot be applied. Therefore the husband has to give her a *get*.

2.3.2 Rav Moshe Feinstein on *tav lemeitav*

The majority of the cases presented to Rav Moshe Feinstein differ from the cases that we have seen so far, yet the same question of whether *tav lemeitav* should be applied to the woman arises. In some of these cases Rav Feinstein has to deal with men who have some kind of physical or psychological defect. He has to decide whether one can claim that these defects are regarded as a *mum* such as to make the husband a *mukeh*

²⁰⁸ E.g. R. Joseph Caro, Dinei Kiddushin 7; Shut Bet Joseph Kid. 7; Rashi as quoted in Shut Radak 9; R. Zemah ben Salomon Duran 2:1 and 2:20.

²⁰⁹ Benjamin Ze'ev 41.

²¹⁰ E.g. Ran 43; Terumat HaDeshen 237; R. Eliyah Mizrahi 68; Binjamin Ze'ev 109; Hatam Sofer 4 E.H. 2:43; Ein Yitshak 1 E.H. 3.

²¹¹ Maharik 141.

shehin, in which case *tav lemeitav* would not be applicable to the woman. In Igrot Moshe E.H. 1:79, for instance, the husband turns out after the wedding to be incurably impotent. Since the woman did not marry on this understanding (אגן סדק) Rav Feinstein rules that the wedding was based on *kiddushei ta'ut* and thus the woman does not need a *get* from the husband. In Igrot Moshe E.H. 1:80 the husband suffers from insanity and this was already the case before the marriage. According to Yeb. 112b insanity is considered a major *mum* and an insane person cannot perform marriage. If the insanity had arisen after the *kiddushin* and the man is capable of giving a *get*, then he should be forced to give a *get* (Ket. 77a) since no one wants to live together with a snake. In this case it was clear that the man cannot give a *get*. Whether or not *tav lemeitav* should be applied in cases of insanity is discussed by several *poskim*.²¹² Rav Feinstein however rules that, since in this case there is no possibility of intercourse between the couple, the woman should be allowed to remarry without a *get* because of *kiddushei ta'ut*. In Igrot Moshe E.H. 3:46 a woman and her parents are led to believe that the man she is marrying is normal. Shortly after the marriage the man starts to show signs of insanity and dies. His father then admits that his son had been insane since childhood. The woman has now fallen to *yibbum* but the brother-in-law refuses to perform *halitsah*. Rav Feinstein rules that since insanity is a major *mum*, the *kiddushin* never took place and thus the woman is permitted to marry whomever she wants. In Igrot Moshe E.H. 4:113 a different kind of defect arises: the woman married a man who turns out to be a practising homosexual. Rav Feinstein starts by saying that women in our generation are more stringent regarding defects in their husbands than women of previous generations. Notwithstanding that fact, homosexuality is such a major *mum* that no woman would ever have wanted to live with such a man; thus one may say that the marriage was based on *mekah ta'ut* and *tav lemeitav* cannot be applied.

That a defect in a woman can also annul a marriage becomes clear in Igrot Moshe E.H. 4:82, where a daughter poses the question whether she is a *mamzeret*. Her mother married and got divorced with a *get*. Then she married again and left after a civil divorce. She then gave birth to a baby girl whom she conceived from another man. The mother was diagnosed as insane. The doctor stated that she had been insane

²¹² E.g. Bet HaLevi 3; Ein Yitshak E.H. 24; Baer Yitshak 4.

from her youth onwards and that her psychological problems are related to marriage. Thus she divorced from her first husband after only a few weeks and from her second after a few months. According to Rav Feinstein, the marriage of an insane person is based on *ta'ut* and thus the *kiddushin* is annulled. In this case one cannot apply *tav lemeitav*. Therefore the woman was not married to the second husband and the child is not a *mamzer*.

The validity of a *get* given at the time of a quarrel is discussed in Igrot Moshe E.H. 1:139. In this case the woman was not observant and had already been civilly divorced. The issue is whether she may be sent a *get zikui*. The Talmud discusses whether a *get* given at the time of a quarrel might be invalid due to *tav lemeitav*, because the bodily aspects of a marriage are preferable to a woman notwithstanding the strife which is going on between them. Rav Feinstein, however, reverses the effect of the maxim of *tav lemeitav*: whereas normally *tav lemeitav* is used to keep a woman in a marriage, Rav Feinstein uses it as a way for the woman to leave the marriage. Since a woman wants to be married (because of *tav lemeitav*) it is not good for her to be an *agunah*. Women really want to be married because of *tav lemeitav* and thus *igun* is, particularly for a young woman, a major grief. Here it becomes clear that one may use *tav lemeitav* for the benefit of the woman. Rav Feinstein takes into consideration the fact that because the woman is not observant, she transgresses the *halakhah* on a regular basis. He fears that she will not defer from starting a new relation until she receives a *get*, thus giving her a *get* is the better option, especially since she is already civilly divorced. Whereas the Gemara states that the physical aspects of a marriage might be more beneficial to a woman than a divorce, in this case a divorce is obviously more beneficial to the woman, and so one cannot apply *tav lemeitav* in the classical sense to the woman. Igrot Moshe E.H. 4:6 deals with a similar case be it that here the woman has already remarried. Due to the remarriage one cannot hold *tav lemeitav* regarding the first husband because a marriage to him is apparently not preferable to her, notwithstanding the fact that the second marriage is a forbidden relationship. If the woman still refuses to accept a *get*, for whatever reasons, the first husband can apply for a *heter me'ah rabbanim* and if this proves difficult he can send a *get zikui* to his wife against her will.

A case of an apostate husband is found in Igrot Moshe E.H. 4:83. The couple got married through *huppah vekiddushin* and had two sons. The husband refused to have either son circumcised and finally admitted to his wife that he was an apostate. According to the majority of opinions the *kiddushin* of an apostate are valid therefore it would be difficult to annul the marriage on this basis. Rav Feinstein used however the statement in the Talmud that says that women are willing to marry inferior men or men with defects because of *tav lemeitav*. In the context of the Talmud this is said about women who are prone to promiscuity but the woman in this case was known for her modesty and thus, Rav Feinstein ruled, one may not apply *tav lemeitav* to her. Rav Feinstein says that in our day and age one cannot even apply *tav lemeitav* to women who are prone to promiscuity nor to women who have no knowledge about *halakhah*, which is the case in our times where many women transgress the *halakhah*. Thus in a case where the woman keeps the *halakhah* one may certainly not apply *tav lemeitav* to her. The marriage is thus *ta'ut* and the woman is permitted to remarry.

It becomes clear through these cases that Rav Feinstein was very inventive in finding solutions for difficult marital problems. His basic objective in these cases was, so far as I can judge, to find a solution for a Jew in distress, be it a woman or a man who is bound to *igun* or a child who carries the stigma of *mamzerut*. In all these cases Rav Feinstein ruled that *tav lemeitav* may not be applied to women, certainly not in our day and age where women are more stringent about the kind of men they are marrying. In several cases Rav Feinstein ruled that the marriage was based on *kiddushei ta'ut*, thus annulling the original marriage and removing the need for a *get*. That there is a correlation between the use of *tav lemeitav* and *kiddushei ta'ut* will become clear in the next paragraphs.

2.4 *Tav lemeitav* and the claim for *kiddushei ta'ut*. The discussion between Bleich and Aranoff

In modern research there is a strong correlation between *tav lemeitav* and *kiddushei ta'ut*, in the sense that *tav lemeitav* has become the principal obstacle to *kiddushei ta'ut*. This is due to the emergence of two *batei din* which over the past ten years have freed *agunot* on the grounds of *kiddushei ta'ut*. These *batei din*, the former *Bet Din L'Ba'ayot Agunot*, which is better known as the Rackman-Morgenstern *bet din*, and

the *Agunah International Bet Din L'inyanei Agunot*,²¹³ claim that deriving from the halakhic principle of *mekah ta'ut*, a mistaken transaction, it should be possible to free women from a dead marriage on the basis of *kiddushei ta'ut*. The dealings of the *batei din* have been highly criticised from within orthodox circles due to the fear that they release women who are in fact halakhically still married. By telling these women that they are free to marry another man the number of adulterous relationships and *mamzerim* increases, forming a threat for Jews and Judaism on a whole. An example of a critique may be found in an online statement²¹⁴ by Rabbi Michael Broyde, Professor of Law at Emory University School of Law and a *dayan* on the *Bet Din* of America,²¹⁵ who says

It is my view that what Rabbi Rackman and his *bet din* are engaging in is a naked violation of Jewish Law, with no foundation, and the conduct of that *bet din* is a nullity. Women released by Rabbi Rackman's *bet din* remain married in the eyes of Jewish law.

The principle of *kiddushei ta'ut* is based on the *Gemara* in B.K. 110b/111a discussed above, where a woman falls to her levirate brother-in-law who is a *mukeh shehin*. In this case the woman may claim *kiddushei ta'ut*. Other talmudic cases of *kiddushei ta'ut* deal however only with defects in the woman and not in the man and from there it is clear that basically “all defects that disqualify priests also disqualify women”.²¹⁶ According to Broyde:²¹⁷

Although there are *rishonim* who maintain that only defects in the wife or in the brother-in-law are grounds for a finding of error in the creation of marriage (but never defects in the husband), this position is ultimately rejected by most halakhic authorities; they recognize that a severe defect in the husband not revealed at the time of the marriage can rise to the level of error in the creation of marriage such that if the woman were to otherwise remain an *agunah*, a rabbinic court would not require a *get* to end the marriage.

²¹³ The mission and policy of this *bet din* and articles by *Agunah International Inc.* can be found on <http://www.agunahinternational.com>

²¹⁴ [Http://www.jlaw.com/Recent/Agunah.html](http://www.jlaw.com/Recent/Agunah.html).

²¹⁵ For more information on this *bet din* see: <http://www.bethdin.org>.

²¹⁶ M. Ket. 7:7. See also M. Kid. 2:5.

²¹⁷ Broyde, Kislev 5765. Quotation appears there at p.3.

When large blemishes are found in a man he should be forced to give a *get*, any minor blemishes however do not render a man unfit for marriage.²¹⁸ Large blemishes in a man either means that the husband is a *mukeh shehin* or that he has a job that either gives him an unbearable smell (when he is a copper-miner or a tanner) or which is a degrading job, as for instance being a collector of excrement. The Talmud²¹⁹ even states that if a woman comes to a *bet din* and says that she thought that she could endure the husband's condition or profession but now it turns out that she cannot, the husband should be forced to give a *get*. This is, as Biale²²⁰ mentions, because "the rabbis held that knowing about these conditions from a distance is not like living with them every day".

According to the Rackman *Bet Din* and Agunah International Inc., *kiddushei ta'ut* can be applied to more cases than the ones mentioned in the Talmud and they try to justify this with halakhic evidence. They also state that the list of salient defects as mentioned in the Talmud is not closed and can be extended to include not only physical defects in one of the spouses but psychological defects as well. Rabbi Dr. J. David Bleich, Jewish Law professor at Yeshiva University, argues against an expansion of the list of salient defects, claiming that *kiddushei ta'ut* cannot be used as freely as these *batei din* do. He himself has written on many occasions on the *agunah*-problem²²¹ and has drafted in this context a pre-nuptial agreement which is however not used on a regular basis. Rabbi Bleich is thus also in favour of finding a solution to the *agunah*-problem, as he himself writes: "this writer has long maintained that responsible solutions to the *agunah* dilemma are within the realm of possibility."²²² In responding to the critique of R. Bleich to the actions of the Rackman *bet din*, Michael I. Rackman²²³ asks however

²¹⁸ M. Ket. 7:9, 10.

²¹⁹ M. Ket. 7:10; T.B. Ket. 77a.

²²⁰ R. Biale, 1995, p. 85.

²²¹ See for instance: J.D. Bleich, "Modern-Day Agunot: A Proposed Remedy", in: *The Jewish Law Annual*, 4 (1981), p. 167-187 and J.D. Bleich, "Survey of Recent Halakhic Literature: Kiddushei ta'ut: Annulment as a solution to the Agunah problem", in: *Tradition. A Journal of Orthodox Jewish Thought*, 33 (1998) 1, p. 90-128.

²²² Bleich, 1998, p. 118.

²²³ Michael I. Rackman, "Communications, Kiddushei ta'ut: Annulment as a solution to the Agunah problem", in: *Tradition* 33 (Spring 1999) 3, p.102.

One must only wonder why R. Bleich has not proposed and *acted upon* his own ‘responsible solutions’. The Jewish community needs a solution to this problem rather than a 39-page refutation

And Yehudis Irwin²²⁴ argues:

If the halakhic decisors are as concerned about solving the *agunah* problem as he [R. Bleich] describes, they would have long ago come forward with a solution. Let them come forward now rather than merely denounce non-halakhic solutions and wait another twenty years.

As becomes clear, the work of these *batei din* has given rise to many discussions, two of which will be considered here. The first is a discussion between Dr. Susan Aranoff, founder and co-director of Agunah International Inc., which works closely with the Rackman *bet din*, and Rabbi Bleich. The other more recent discussion is between Dr. Aviad Hacoen, a scholar at the Law Faculty of the Hebrew University in Jerusalem and the author of “Tears of the Oppressed”, and Rabbi Broyde, whose response to Hacoen's book in itself brought about a new discussion. These discussions basically deal with three major points: (1) what are the grounds for *kiddushei ta‘ut*? (2) Can the list of salient defects as mentioned in the Talmud be expanded to include other defects as well? (3) Is *tav lemeitav* a viable halakhic answer to *kiddushei ta‘ut* or does it not apply any more to women in this day and age?

2.4.1 Grounds for *kiddushei ta‘ut*

I defined *kiddushei ta‘ut* in chapter one as a marriage that was entered into under false premises; one of the partners was not aware of a salient defect in the other partner before the marriage and on discovering this defect can go to the *bet din* and say that had (s)he known about this defect (s)he would not have entered this marriage. The marriage is thus null and void and no *get* is necessary. The *bet din* will give to the woman a *get p’tur*, a letter of dismissal which states that the woman is free to marry any other man. The conceptual basis for *kiddushei ta‘ut* is to be found in the Talmud

²²⁴ Yehudis Irwin, “Communications, *Kiddushei ta‘ut*: Annulment as a solution to the Agunah problem”, in: *Tradition* 33 (Spring 1999) 3, p.109.

B.K. 110b-111a, which has been discussed earlier in this chapter. The Talmud provides several sources for defects found in a spouse in respect of which one can claim *kiddushei ta'ut*. One is in M. Ket. 7, which deals with defects in the spouse. The discussion deals with a man who marries a woman either on condition that she is not the vowing type or that she has no blemishes; when he finds out that she does, the betrothal is invalid. If he did not stipulate either of these but it was discovered that the woman has one of these defects, then the man should divorce her and the woman does not receive her *ketubah*. Basically all blemishes that render a *kohen* unsuitable to perform his tasks disqualify a woman for marriage. When large blemishes are found in the man (either because he is a *mukeh shehin*, a copper-miner or a tanner or when he collects dog excrement) then the husband should be forced to give a *get*. Any minor blemishes in a man do not render him unfit for marriage. However in history women have been freed when an unknown defect was found in the husband; for instance, Susan Aranoff notes: “Rabbi Isaac Moses of Vienna, the Ohr Zarua recorded a case in which his contemporary, Rabbenu Simcha of Speyer, ruled that a wife should be released without a *get* in the event that an unknown defect in the groom is revealed, on the grounds of *kiddushei ta'ut*.”²²⁵

According to Aranoff²²⁶ there are basically three categories of *kiddushei ta'ut*, which she distinguishes as follows: a salient defect (*kiddushei ta'ut* I), lack of informed consent when *kefiyah* is impossible²²⁷ (*kiddushei ta'ut* II), and lack of informed consent to *kinyan* (*kiddushei ta'ut* III). *Kiddushei ta'ut* I represents the classical case of the non-disclosure of a salient defect by one of the spouses to the other spouse, even if this spouse was not aware of the defect himself. What constitutes a salient defect is discussed by Aranoff at length and will be further dealt with under the next subhead. Regarding *kiddushei ta'ut* II Aranoff argues that since *kefiyah* in the sense of physical coercion is not possible any more, women are basically handing themselves over to the will power of their husbands when they get married, with no way out if the husband refuses to give a *get*. According to Aranoff, women are not aware of this fact when they get married and thus they can claim ‘lack of informed consent’ when they

²²⁵ Susan Aranoff, “Two Views”.

²²⁶ Ibid.; Aranoff, “Halakhic Principles and Procedures For Freeing Agunot”; Aranoff, “A Response to the Bet Din of America”, all to be found on: <http://www.agunahinternational.com>.

²²⁷ I would rather phrase *kiddushei ta'ut* II as “lack of informed consent given ignorance of the fact that *kefiyah* is impossible”. When *kefiyah* turns out to be impossible at the time of a wanted divorce one cannot claim that at the moment of *kiddushin* one had a lack of consent.

want to get divorced and then find themselves stuck in an *agunah*-situation. I find this reasoning weak for various reasons. First, I think that Jewish women with some sort of Jewish education are more knowledgeable about marriage and divorce than Aranoff gives them credit for. And even if a woman is not aware of the laws considering divorce, can she then thus claim that she did not enter the marriage on the assumption that she would have no way out of it? Is it not to be expected from a person who gets married that they have some idea of what the legal implications of a marriage are? Second, as mentioned in chapter one, there are other forms of *kefiyah* possible in our day and age; these might not be as effective as physical coercion, but, when applied, could help a woman out of an *agunah*-situation. The problem however is not the unavailability of *kefiyah* but the unwillingness of *batei din* to order a *get* (*hiyuv*) and then use the forms of *kefiyah* that are available. In addition to that, as Aranoff²²⁸ herself writes (quoting R. Feinstein):²²⁹

Even in the time when Jews had [the] power to coerce the husband to release (the wife with a *get*), many times the coercion would be ineffective, (he) would not say I am willing (to give the *get*), or it would be impossible to coerce him, or he would flee, or the like.

The third form of *kiddushei ta'ut* which Aranoff discusses is lack of informed consent to *kinyan*. Aranoff²³⁰ says that

Actual experiences with *agunot* ... has led us to conclude that no woman views marriage as a transaction in which her husband 'acquires' her. No one can credibly maintain today that brides are consenting to the concept of *gufah kanui*, that marriage is a *kinyan* in which the husband acquires title to the wife's body.

It is probably true that no woman in this day and age will feel that her body becomes the property of her husband but this is in my opinion not the actual meaning of the halakhic principle of *kinyan* in *kiddushin*. According to the most common

²²⁸ Aranoff, "Halakhic Principles".

²²⁹ Igrot Moshe, E.H. 1:79.

²³⁰ Aranoff, "Halakhic Principles".

interpretation of *kinyan* in *kiddushin* a woman sets her body and sexual relations aside solely for her husband; no other man will have access to her body. This does not however mean that her husband can do with her body whatever he wishes. Thus rape of a wife or abuse is halakhically forbidden. Susan Aranoff probably holds that since the husband has the right to withhold a *get* and thus can control the woman's sexual life, she has lost the ownership of her body. To this I can agree although this is not what the text says. Can one then say that if a woman would have known that at some point she would have no ownership over her sexual life, due to the fact that her husband has denied her a *get*, there was at the *kiddushin* a lack of informed consent to *kinyan*? I would say no.

2.4.2 List of salient defects

In the discussions between Aranoff and Bleich there is a huge debate about what constitutes salient defects. According to R. Bleich the list of salient defects as mentioned in the Talmud, expanded with the defects accepted by Rav Moshe Feinstein, are all the possible salient defects one can use in a case of *kiddushei ta'ut*. According to Aranoff the list should be extended to include other defects as well. She claims that the list is not a closed list and should be adapted in time. That the list of salient defects as mentioned in the Talmud is not a closed list can be seen from the *teshuvot* of R. Moshe Feinstein who ruled that in cases of pre-existing impotence, homosexuality and insanity *kiddushei ta'ut* applies, even if the groom did not hide his defect wilfully. The marriage can nonetheless be annulled on the basis of *kiddushei ta'ut*. Building on the expansion of R. Feinstein, the *Agunah International Bet Din L'inyanei Agunot* argues that other defects like

physical and psychological abuse, adultery (..), sexual molestation, abandonment, criminal activity, substance abuse, and sadism (withholding a *get* may be viewed as indicating a sadistic nature)²³¹

should be accepted as salient defects as well. They argue on the basis of current psychological research that the man must already have possessed these character

²³¹ Ibid.

traits, even though they may have been latent, before the marriage and thus they should qualify for ending a marriage on the basis of *kiddushei ta'ut*. They also argue that if Rav Feinstein had had access to recent psychological research on domestic abuse, he would have added these defects to the list of salient defects as mentioned in the Talmud. Aranoff also argues that rabbis cannot claim that it was allowed for Rav Feinstein to add to the list of salient defects but not for other people; Rav Feinstein probably had no intention of closing the list. I agree to that; either adding defects to the list, based on halakhic authority of course, is allowed or it is not. It is however possible that current day rabbis feel that in these days no one has the halakhic authority any more to add defects to the list and that Rav Feinstein due to his greatness in halakhic matters did have this authority. R. Bleich²³² however disagrees with Aranoff and states

Assuming, *arguendo*, that at least some of the enumerated forms of conduct constitute incontrovertible evidence of character flaw constituting a salient defect that serves to invalidate a marriage, the application of that putative principle in the *agunah* cases under discussion is unwarranted.

Although R. Bleich acknowledges that physical defects in a partner can render a marriage void on the basis of *kiddushei ta'ut* if, and only if, the defect already existed at the time of the *kiddushin* and the other partner was not informed about this defect, psychological defects cannot. As he puts it:²³³

The analogy between an even already existing character defect and a physical defect is fundamentally flawed, both theologically and halakhically.

According to him physical defects develop according to their normal course, but the same is not true for character flaws. The *halakhah* recognises that even though a person has in him a certain character trait he still has free will to decide whether or not he is going to act in accordance with that character trait. A person can, for

²³² Bleich, 1998, p. 91.

²³³ *Ibid.*, p. 92.

instance, have a temperamental character and still be absolutely calm throughout life, as R. Bleich writes:²³⁴

Thus, although an absolute causal connection may exist between a particular physiological state and the future emergence of a recognized salient defect, no such absolute causal connection exists between a particular psychological or moral state and future volitional acts. ... In affirming the doctrine of free will, Judaism denies that such conduct is determined and hence the character flaw of which such conduct is born cannot be regarded as a salient defect existing at the time of the marriage.

According to R. Bleich, if one accepts that a marriage can be annulled because of *kiddushei ta'ut*, based on the sole fact of a person possessing an evil character trait which (s)he did not disclose before the wedding, this could lead to the annulment of many marriages even if the person masters this character trait. This is one of the greatest problems R. Bleich has with the Rackman *bet din*. Aranoff argues against this and states that it is not true that all

women with similarly impotent or insane husbands could walk away from their marriage without consulting a rabbi and expect to be remarried by an orthodox rabbi without a *p'tur* in order to be free to remarry. Thus *batei din* findings of *kiddushei ta'ut* do not eradicate marriages, only the specific marriages that come before the *batei din*.²³⁵

It is thus not only the negative character trait which the spouse did not disclose before the wedding but also the subsequent acting upon this negative character trait which makes the Rackman *bet din* decide to declare the marriage null and void because of *kiddushei ta'ut*. Aranoff regards the character trait of the husband as a salient defect which he did not disclose before the wedding, and the acts he does because of it as results of that pre-existing defect. Thus, according to her, the marriage can be annulled on the grounds that the character trait is a salient defect. R. Bleich holds, however, that the character trait is not a cause which leads to an act. He regards the

²³⁴ Ibid., p. 93.

²³⁵ Aranoff, "A Response".

act as the defect, which means that the defect itself was not present at the start of the marriage and can thus not be used as a ground for *kiddushei ta'ut*.

Kiddushei ta'ut cannot be claimed in all cases. According to some halakhic authorities there are several conditions attached to claiming *kiddushei ta'ut*. First, *kiddushei ta'ut* can only be claimed if the wife was unaware of the defect at the time of the marriage; second, she has to leave the husband immediately upon discovery of the defect. As R. Bleich²³⁶ writes:

Both Helkat Mehukek, Even ha-Ezer 29:9, and Bet Shmu'el, Even ha-Ezer 39:15, declare that salient defects serve to void a marriage only if the aggrieved party moves to annul the marriage immediately. ... Failure to protest fraud or mistake is indicative of forgiveness of the defect, i.e. it is indicative of a desire for an enduring marital relationship despite the presence of the defect. .. Moreover, a conjugal relationship continued after the discovery of the defect serves to establish a recognized marital relationship requiring a *get* for its determination.

According to Aranoff and others, to require of a woman to leave the husband immediately upon discovering the defect is untenable and goes against the concept of *shalom bayit*. She argues that rabbis who try to get the woman to make *shalom bayit* with her husband should tell her that by doing this she forfeits any right to claim *kiddushei ta'ut* later on. A woman who adheres to the advice of the *bet din* and tries to make the marriage work, despite the defect in her husband, can find herself in problems when later on she wants a divorce on exactly these grounds. In addition, Aranoff²³⁷ argues:

For numerous practical and legal reasons, it is often impossible for a wife to abandon her home immediately upon discovering the salient defect in her husband.

²³⁶ Bleich, 1998, p. 94-95.

²³⁷ Aranoff, "A Response".

Lack of money, shelter and proper support are just a few of the reasons why a woman cannot always leave the marital abode immediately. In a case of insanity of a husband, for instance, the woman stayed with him for seven weeks before separating from him. R. Feinstein urged the *bet din* to find out why the woman had not left immediately. He concludes that if she can “offer ‘a reasonable explanation’ (*ta’am hagun*) or ‘valid excuses’ (*tirutzim nekhnim*) we would not say that she reconciled herself with his flaws (*sabrah ve-kibbelah*)” .²³⁸ In such circumstances if the woman does not leave immediately upon discovering the defect, she might still be entitled to *kiddushei ta’ut*. Broyde²³⁹ writes that

it is possible to argue that general ignorance about *kiddushei ta’ut* is so widespread in our community that until the woman *knows she can leave*, her ongoing sexual relationship with her husband is not a ratification of the marriage at all, because ratification requires awareness of the option to leave. Yet another possibility is the view of the Bet Din of America that a woman need not leave until she discovers that the defect is incurable.

Rabbi Bleich and others argue that if the woman knew about the defect before the marriage and thought she could handle it, she cannot claim later that she wants a divorce on those grounds. However, the Talmud already stated with regard to the wife of the husband who suffered from one of the defects mentioned in the Talmud²⁴⁰: even if the woman had known about the defect before the marriage she can still claim “I thought I could handle it, but it turns out that I cannot” and they will force the husband to give a *get*. Hacoen gives in his book *Tears of the Oppressed*²⁴¹ an example of a woman who returned to her husband on the advice of a rabbi and who ended up being an *agunah*. The case given deals with a woman who discovered on the wedding night that her husband suffered from epilepsy. The woman claimed deception immediately and went with the husband to see the Maharam, who appeased the woman and reassured her that the husband would be cured. She went back to live with him but only several weeks later the husband died of epilepsy. The woman was left as a *yevamah* and now needed *halitsah*. The *yavam* however was missing and

²³⁸ Igrot Moshe, E.H. 3:45 as quoted in Hacoen, 2004, p. 92.

²³⁹ Broyde, Kislev 5765, p. 13.

²⁴⁰ T.B. Ket. 77a.

²⁴¹ Hacoen, 2004, p. 48-50.

there were even rumours that he had died. R. Orenstein stated that even though there were rumours that the *yavam* was dead and even though the woman had not married on the assumption that her husband had epilepsy and thus the marriage could be voided because of *kiddushei ta'ut*, the woman nevertheless needed *halitsah* and had thus become an *agunah*. As we will see in other cases as well, even though a rabbi finds halakhic support for freeing an *agunah* he often does not act on this support: *halakhah velo le'ma'aseh*. This might be an exceptional case and the right to claim *kiddushei ta'ut* was not taken away from the woman, but still she ended up being an *agunah*.

As an argument against *kiddushei ta'ut* the well-known maxim of *tav lemeitav tandu milemeitav armelu* is often cited. Aranoff holds that this maxim is not applicable any more:

... the method of freeing a woman based on a finding of *kiddushei ta'ut* I is buttressed by the insight of Rav Yitzchok Elchanan Spektor²⁴² who wrote ‘... when a defect in the husband justifies coercion of the *get*, the Talmudic presumption of *tav lemetav tan du mi'l'metav armelu* ... is not applicable...’ The argument that women prefer to remain single rather than endure a miserable marriage is even more persuasive today given the increased economic and social autonomy women have achieved in our times. Rav Moshe Feinstein, in discussing *tav lemetav* (Igrot Moshe EH 1:79), considers the remote theoretical possibility that the inability to be self-supporting might induce some women to tolerate marriage to highly undesirable men. He goes on to say that only a small minority of women, if any, might be so economically desperate.²⁴³

According to Rabbi Bleich, however, there is no correlation between *tav lemeitav* and the social and economic status of women. He maintains that: “The concept of *tav lemeitav* is an immutable halakhic principle applicable to women”. As a support for his statement he quotes Rabbi J.B. Soleveichik, who wrote:

²⁴² Ein Yitzchok, Vol. I, 24:41

²⁴³ Aranoff, “Halakhic Principles”.

Let us take for instance the *hazakah ... tav lemeitav tan du mi lemeitav armelu*. This has absolutely nothing to do with the social and political status of the women in antiquity. The *hazakah* is not based upon sociological factors. It is a *pasuk* in *Bereishit*, “And thy desire shall be to thy husband” (Genesis 3:16). It is a metaphysical curse rooted in the feminine personality. ... And this will never change. It is not a psychological fact; it is an existential fact. An old spinster’s life is much more tragic than the life of an old bachelor. This was true in antiquity; it is still true. ... To say that *tav lemeitav tan du mi lemeitav armelu* was due to the inferior political or social status of women at the time is misinterpreting the *hazakah*. ... She was burdened with it by the Almighty after she committed the first sin.²⁴⁴

According to Hacoen²⁴⁵ due to the fact that “the modern woman of today is capable of supporting herself and guarding her financial independence without necessarily relying on her husband ... there has been an increase in wife-initiated divorce, which constitutes a great portion of cases of *igun* today”. From this one might conclude that once women are not dependant on their husbands any more for financial reasons they will not accept just any husband and they will try to leave the marriage. As a result, however, the number of men refusing to grant a *get* when the wife initiates the divorce increases as well. A woman is regarded as an asset for a man in any case, but it is likely that a wife who herself is financially well settled is an even bigger loss for the husband at the time of a divorce.

R. Bleich also holds that whereas a man “does not readily accept physical defects in a bride, ... a woman is much more willing to overlook the physical defects of a prospective husband”.²⁴⁶ When extrapolating this to character flaws which have been characterised as defects by the Rackman *bet din* and Aranoff, R. Bleich holds that

... since men afflicted by the various character flaws categorized by the authors as salient defects frequently do find mates even upon due disclosure of

²⁴⁴ Bleich, 1998, p. 124 , note 28.

²⁴⁵ Hacoen, 2004, p. 22.

²⁴⁶ Bleich, 1998, p. 102.

such defects, it is quite evident that, even in our era, at least some women find males of flawed character to be acceptable marriage partners”.²⁴⁷

Basing herself on the Talmudical texts Aranoff replies that

... *tav lemetav* read in its original Talmudic context is not a comprehensive, immutable halakhic presumption (*hazakah*) that defeats almost all claims of *kiddushei ta'ut*; it is, rather, no more than a maxim, perhaps a colloquialism used by women. Furthermore, this maxim is associated with women accepting relatively limited or benign defects in their grooms, the most serious being the slim possibility that the woman may have to undergo the *halitzah* ceremony in order to be free.²⁴⁸

Looking at cases however where the defect is physical, psychological or sexual abuse, infidelity which can lead to sexual transmittable diseases like the HIV-virus, substance abuse, criminal activity or sadism (withholding a *get* is regarded a sadistic act), Aranoff holds that the maxim of *tav lemetav* cannot be applied. In these cases the woman should have the halakhic right to come to a *bet din* and claim *kiddushei ta'ut*. R. Bleich however holds that this would mean

... that: (1) every woman is entitled to demand a *get* upon breakdown of the marriage; (2) failure of the husband to comply is indicative of sadism; and (3) sadism is grounds for compelling divorce.²⁴⁹

This would lead to a situation where a *get* will become unnecessary in all marriages in which the woman wants a *get* but the husband is not willing to grant it, because the rabbis will state that there never was a marriage to begin with.

Both positions have, in my opinion, both valid and invalid arguments. I agree with R. Bleich who holds that withholding a *get* has nothing to do with sadism but more with the acrimony that arises at the point when a marriage breaks down. However, at the

²⁴⁷ Ibid., p. 108.

²⁴⁸ Aranoff, “Two Views”

²⁴⁹ Bleich, 1998, p. 106.

moment a marriage is irretrievably broken down *halakhah* requires a couple to get divorced “to uphold the sanctity of both partners”. If the husband is not willing to give a *get* when the wife thinks that she has good grounds to receive one she may go to a *bet din* and ask them to compel her husband to give her a *get*. R. Bleich’s argumentation that a woman is not entitled to a *get* when the marriage breaks down is thus not completely true: as long as the woman can offer good reasons why she should be divorced she might be entitled to receive a divorce. With regard to the other defects Aranoff mentions, I agree that abusive behaviour is definitely a defect. Based on research I have done on domestic violence,²⁵⁰ abusive behaviour (be it psychological, physical or sexual) is a defect in a person’s character which has been in a person already from a very young age, although this might not always be apparent. Clues that could hint at the fact that a person has an abusive personality are obsessive controlling behaviour, inability to control anger, and cruelty to animals or siblings. As for substance abuse and criminal activity, when the husband is already addicted to a substance before the wedding, or involved with criminal activities, they might be regarded as defects when the woman is not aware of this. It is however more difficult to regard them as character defects in themselves. Substance abuse hints, as far as I am concerned, at a weak personality but not necessarily at a character defect. Infidelity is not a deficient character trait *per se*; there are people who have a constant drive to find sexual pleasures with different people and thus it is a negative character trait, but the majority of cases of infidelity happen because of an unhappy relationship, ‘I just fell in love’, or mere chance/opportunity. Thus I would not categorise infidelity as a salient defect, even where the infidelity poses a threat to the life of the wife.

2.5 The discussion between Broyde and Hacoen

In 2004 Aviad Hacoen wrote a book entitled *The Tears of the Oppressed*, in which he sought to explore the use of *kiddushei ta’ut* throughout the generations, by looking at various sources in the responsa literature and considering their possible use today. Even though Hacoen did not write his book as a justification for the practices of the Rackman *bet din*, it was interpreted as such by several opponents to the book, of

²⁵⁰ Suzanne Knol, “Till Death Do Us Part?” *Domestic Violence in Orthodox and Haredi Communities in Israel*, unpublished MA-thesis.

whom R. Michael Broyde²⁵¹ was just one. This interpretation was enhanced by the “afterword” in the book, written by R. Rackman. After a general introduction about the problem of *igun* and the use of *kiddushei ta’ut* from its source in the Mishnah and Talmud, Hacoen delves extensively into various sources which deal with cases where physical or psychological blemishes (including impotence and insanity) are found in the husband and he refuses to give a *get*; where the husband has abandoned his wife or has apostatized and refuses to give a *get*; or where the husband has died and the *yabam* is either missing or not willing to perform *halitsah*. In many of these cases it is ruled that due to a blemish in the husband (whether physical or psychological) or the behaviour of the husband, *tav lemeitav* or ‘a woman is satisfied with *kol dehu*’ cannot be applied to the woman.²⁵² Sometimes this is justified on the grounds that the majority of women would not want to be married to such a man, in other cases that this particular woman would not have agreed to marry such a man, thus taking into consideration the subjective feelings of the particular woman.²⁵³ In the majority of the cases the rabbis rule that the woman is entitled to leave the marriage without the need for a *get* or *halitsah*, although in some cases a *get mi-safek* would be preferable.²⁵⁴ Yet when it comes to actual practice, many rabbis in these responsa say that their decision is only *halakhah welo lema’aseh*, i.e. the ruling is only theoretical and cannot be applied until several other *poskim* rule likewise.²⁵⁵ In the cases where the woman had remarried without waiting for either *halitsah* or a *get*, the rabbis ruled more leniently and found a way to undo the first marriage, in order to prevent the children from the second marriage from being *mamzerim*.²⁵⁶ It seems morally anomalous that a more stringent approach is applied to an *agunah* who remains faithful to her husband than to a woman who gives in to her desires without waiting for her release. This gives the impression that it is better to be disobedient to the *halakhah* and get rewarded for it, than to be obedient. Yet, the predicament of

²⁵¹ Broyde, Kislev 5765.

²⁵² E.g. cases 1 (Ohr Zarua), 2 (Birkhat Retzeh), 6 (Igrot Moshe), 11 (Igrot Moshe), 13 (She’eilat Moshe), 15 (Beit Av), 16 (Sho’el u-Meshiv), 17 (Batei Kehunah), 18 (Avnei Hefetz) and 23 (Hayyim shel Shalom).

²⁵³ E.g. cases 15 (Beit Av) and 21 (She’arit Yosef).

²⁵⁴ E.g. cases 1 (Ohr Zarua) and 23 (Hayyim shel Shalom).

²⁵⁵ E.g. cases 2 (Birkhat Retzeh), 3 (Beit ha-Levi), 4 (Havvot Ya’ir), 9 Devar Eliyahu), 17 (Batei Kehunah) and 23 (Hayyim shel Shalom). In case 8 (Beit Av) Rabbi Yudlovich ruled *kiddushei ta’ut* and got the support of three other rabbis. Therefore the *kiddushei ta’ut* was actually applied and the woman in question did not need a *get*.

²⁵⁶ E.g. cases 7 (Igrot Moshe), 10 (Yabia Omer), 24 (Shevut Ya’akov), 25 (Sha’arei Zion), 26 (Agudat Ezov Midbari) and 27 (Yabia Omer).

children who would face the stigma of *mamzerut* weighs more than the necessity to punish the mother, and thus the woman will be helped through her children. This is possible, as Hacohe²⁵⁷ writes, because “*post-facto*, the violation of norms is no less than before, but the situation permits a more lenient ruling, accommodating reality”. He also observes that “interestingly, the question of the tension between compassion and “rewarding bad behaviour” has rarely been raised”.²⁵⁸

In the last five cases which are presented by Hacohe exactly this problem arises. In three cases the husband is suspected of having drowned in a *mayim she'ein lahem sof*²⁵⁹ and the woman either remarried or got engaged and the rabbis in question rule that had the woman asked before the marriage/engagement (*lekhathilla*) whether she could remarry then the answer would have been “no”. Now, *bediavad*, they will not ask her to divorce the second husband. The suspected death of the first husband plays a major role in these rulings. In a case presented to Rav Ovadya Yosef,²⁶⁰ where the husband supposedly drowned in a river, the Rav sees “the sociological reality of liberal denominations in Judaism”²⁶¹ and fears that the woman faced with *igun* will turn away from Judaism or simply remarry in a civil court, thus being lost to Judaism as well. He thus rules that in our time when the *agunah* is a young woman the situation should be considered to be an hour of emergency (*sha'at hadehaq*) and the woman should be released from her *igun*. In this case the woman had not yet taken any step towards transgressing the *halakhah*, but still Rav Yosef believed that it is better to free her from the marriage thus avoiding the possibility that she will find it necessary at some point to transgress the *halakhah*. The woman is thus *lekhathilla* ruled as if it was already *bediavad*. Here the fact that the woman is young and probably wants to be married and start a family plays the same role as the status of the children did in the previous cases. Yet again the (possible) transgression of the *halakhah* is better rewarded than the obedience to the *halakhah*. The ruling of Rav Ovadya Yosef is based upon that of the Shevut Ya'akov,²⁶² that as regards a young woman in the state of *igun* one should rule on the case as if it were already *bediavad*.

²⁵⁷ Hacohe, 2004, p. 96.

²⁵⁸ Ibid.

²⁵⁹ See chapter 1.2.1.

²⁶⁰ Yabia Omer, E.H. 7:16 (71a) as quoted in Hacohe, 2004, p. 92.

²⁶¹ Hacohe, 2004, p. 92.

²⁶² R. Yaakov Reisher, Shevut Ya'akov, E.H. 110.

However, this ruling of R. Reisher was in the case of a young woman who was prone to immorality and even so was only *halakhah velo lema'aseh*. He writes:²⁶³

Because even in a case of *igun* not all *agunot* are equivalent: in the case of an elderly woman who is not desperate to marry, there is no need to act leniently and rely on a minority opinion, in particular when we are hoping that other witnesses will come soon so that she can marry in reliance on them. ... But there are times when the *agunah* is young and desperate to marry, and there is concern lest she become promiscuous. And if we were not lenient in accordance with the minority opinion, there will be no relief to her predicament through the means of other witnesses, and this is considered to be an hour of emergency. ... So it appears to me halakhically, but not in practice.

It is obvious that the *poskim* hold that one can only rely upon this minority opinion in cases where the husband has supposedly died. Whether or not such a stance could be taken when the husband refuses to give a *get* is highly questionable, but it would help considerably in our day and age where women turn away from Judaism just because they cannot stand the state of *igun* any more. It is also for this reason that Hacoen argues for labelling every *agunah*-situation as a *sha'at hadehaq*.

In a review of Hacoen's book, R. Michael Broyde poses some objections. While asserting that due to

the increased opportunities available to women in the modern world, women now have less patience for flawed husbands and floundering marriages, *halakhah* recognizes that there are more and more cases nowadays where, had the woman been aware of the full reality of the situation at the time of the marriage, she would not have agreed to marry,²⁶⁴

Broyde holds that *kiddushei ta'ut* cannot be used in cases where the defect arose after the marriage. According to Broyde, Hacoen "can cite no precedent for the proposition ... that blemishes developing after the marriage can ever be used to

²⁶³ As quoted in Hacoen, 2004, p. 89.

²⁶⁴ Broyde, p. 3/4.

establish *kiddushei ta'ut* in situations where the husband is now alive (and a *get* would be required absent *kiddushei ta'ut*)".²⁶⁵ This is because there is no basis within *halakhah* for this view, for which Broyde is grateful. Otherwise, he argues, if all marriages could be undone on the basis of defects developing after the marriage then Jewish marriage would be fundamentally destroyed. The second objection Broyde has against Hacoen's book is that the examples given basically all deal with either a *yevamah* or a woman whose husband went missing. Broyde says that the *poskim* have determined *agunah*-cases throughout the ages having in mind the balance between being lenient towards an *agunah* and being strict due to the fear of the *humrah shel eshet ish*. Considering a *yavamah* this balance is not required because here the husband is dead; it is the *yabam* who refuses to perform *halitsah*. In such a situation it is much easier to rule leniently.²⁶⁶ According to Broyde, Hacoen puts the *igun* of a *yevamah* on the same level as that of a woman waiting to be released by her husband, which one cannot do. Nor will the other examples given, which deal with situations where the husband is missing and presumed dead, help us in cases of recalcitrance.

2.6 Conclusion

It has become clear in this chapter that the maxim of *tav lemeitav* has not been used throughout the generations as a universal truth applicable to all women. The ontological view of R. Soleveichik notwithstanding, *tav lemeitav* has been cited throughout the ages yet it has not always actually been applied to women. The majority of cases deal with either a husband who has become an apostate, a woman who falls to a *yabam* who is an apostate, or a *get* given while the couple is quarrelling. In none of these cases is *tav lemeitav* ever applied. Hacoen similarly observes:

The general maxims of *tav lemeitav tan du* and *niha lah be-kol dehu* ... are simply not substantiated in history. Some halakhists today continue to cite these statements as reasons for their objections to *kiddushei ta'ut*, but certainly there were great halakhists of the past who rejected these as universal truths.²⁶⁷

²⁶⁵ Ibid., p. 14.

²⁶⁶ Ibid., p. 7.

²⁶⁷ Hacoen, 2004, p.100.

Nevertheless, marriage was regarded by Midrashic and Talmudic rabbis as normally beneficial for both men and women. Baskin observes.²⁶⁸

Certainly in a patriarchal society in which unprotected women were at risk, where childless women faced a perilous future, and where there may also have been a shortage of males, it is not surprising that marriage was seen as crucial for a woman's well being.

This may also be supported by the T.B. Yeb. 113a: "More than the man desires to marry does a woman desire to be taken in marriage". In such a society the maxim of *tav lemeitav* might well be applied to women. However, according to many opinions nowadays,²⁶⁹ the improved economic and social status of women has led to a change in society and women are no longer willing to marry just any man. This also becomes visible in the increased number of divorce cases where both men and women are not willing to put up with behaviour in their spouse that they do not like. The problem within Jewish law is whether this dislike should automatically lead to a divorce? Marriage is one of the cornerstones of Judaism and should be entered into with the intention of a life-long commitment. Nevertheless divorce is also an option within Judaism and the question arises where we draw the line between objective grounds for divorce and subjective feelings, when only one party wants the divorce? When does a *bet din* acknowledge that a woman has solid grounds for wanting a divorce and has become an *agunah* due to her husband's refusal to give her a *get*? In cases where a couple is no longer living together as husband and wife there is probably a good ground for a divorce, since sexual gratification is one of the commandments of a marriage. In this context Hacoen writes:

Torah and *halakhah* mandate the satisfaction of women's sexual needs ... An *agunah* is required by *halakhah* to refrain from such satisfaction; yet many *poskim* realized that such a requirement imposes great, sometimes intolerable, pressure on her. The recognition by the *poskim* of this fact of female nature lent great halakhic urgency to the freeing of *agunot*, especially in the case of

²⁶⁸ Judith R. Baskin, *Midrashic Women. Formations of the Feminine in Rabbinic Literature*, Brandeis Series on Jewish Women, Brandeis University Press, Hanover and London 2002, p.98.

²⁶⁹ E.g. Rav Feinstein, R. Broyde, Susan Aranoff.

young and healthy women with desires and the need to marry and have children.²⁷⁰

Michael Satlow²⁷¹ also holds that women are not only portrayed as more sexual than men, but, unlike men, are assumed to be incapable of controlling their overwhelming desires. Thus it could create a halakhic problem if a woman is left as an *agunah* with no way out of the marriage and with no recourse to sexual relationships. Women's need for sexual fulfilment should therefore encourage rabbis to rule leniently in cases of *igun*. In the following chapter it will become, however, apparent that it is exactly the fear of women's sexual needs and promiscuous behaviour which has led on numerous occasions to not granting a woman the right to a divorce.

Whether or not a *bet din* will help a woman out of her *igun*-situation is based both on their opinion whether or not they apply the *halakhah* in a certain way, i.e. whether something that can be *lehalakhah* can also be used *lema'aseh*, and on their interpretation of the sources, to which both a lenient and a strict approach can be taken. Some *batei din* will hold that there is no halakhic basis whatsoever to free a woman from a marriage without a *get* while other *batei din* will use every lenient opinion in order to free a woman from *igun*. This becomes particularly apparent in the discussion between Aranoff and Bleich, each representing an extreme position. The preferable position lies somewhere between these two opinions. I would argue that it is possible to use the *halakhah* to a fuller extent, while at the same time keeping the core of Jewish marriage intact. To arrive at a solution to the *agunah*-problem will require both courage and a willingness to explore the possibilities which the *halakhah* offers.

²⁷⁰ Hachohen, 2004, p. 95.

²⁷¹ Michael Satlow, "*Tasting the Dish*": *Rabbinic Rhetorics of Sexuality*, Scholars Press, Atlanta 1995, p. 158-159 (as quoted in Baskin, 2002, p. 98).

Chapter three

The moral fear argument

3.1 The moral fear argument from its source in the Mishnah

In chapter one we studied the way women are perceived within Judaism and have found several examples where women are regarded as sexually untrustworthy and immoral. No matter whether one holds this view or not it is apparent in real life events that the view taken of women's sexuality has an influence on how matters are decided. This also plays a role in divorce cases within Judaism, as will become clear in this thesis. The background to the fear of women's immorality, which will be called the "moral fear-argument", can be traced back to Mishnah, Ned. 11:12²⁷² where it is stated²⁷³:

At first it was ruled that three women must be divorced and receive their *ketubah*. She who declares 'I'm defiled to you'²⁷⁴, or 'Heaven is between you and me'²⁷⁵ and 'May I be removed from the Jews'.²⁷⁶ But subsequently, to prevent her from conceiving a passion for another to the injury of her husband²⁷⁷ (ומתקלקלת), the ruling was amended, thus she who declared 'I'm defiled unto you' must bring proof, 'Heaven is between you and me' – they should engage in prayer²⁷⁸, and 'May I be removed from the Jews', he [the

²⁷² T.B. Ned. 90b; T.Y. Ned. 10, page 42, tur 2.

²⁷³ Soncino translation.

²⁷⁴ By saying this, the wife implies that she has been raped and is thus forbidden to her husband who is a *kohen*.

²⁷⁵ According to Danby and the Soncino this means that the husband is impotent.

²⁷⁶ Apparently intercourse is unbearable to the wife and she has thus taken a vow of abstinence, including foregoing marital relations with her husband. The wife is thus a *moredet* on the grounds of *ma'is alay*. Soncino Talmud

²⁷⁷ The Hebrew literally says "so that a woman does not cast her eyes upon another man and destroy the relationship with her husband". The Soncino translation is therefore slightly misleading since the Hebrew text says that a woman might say that she is defiled because she has cast her eyes upon another man; it is thus used as an excuse and the rabbis want to prevent that. It is however not possible in my opinion to prevent her from actually conceiving a passion for another man, as the Soncino translation states.

²⁷⁸ They should pray that his impotence will cease. The literal translation of the Hebrew is however: "let them use the way of appeasement". According to Rashi the husband should be asked to give a divorce. According to the Ran one should try to placate the wife so that she will not leave the husband.

husband] must annul his portion²⁷⁹, and she shall minister to him, whilst remaining removed from Jews.

One can see from this text that up until this point a woman could come to the *bet din* in these three circumstances (rape, impotence or vow of abstinence) and ask for a divorce which the husband then had to grant and even had to pay her the *ketubah*. However, due to the fear that a woman would use any of these reasons as an excuse to get out of a marriage because she had cast her eyes upon another man and wanted a divorce solely for this reason, the ruling was changed. Therefore, women would thus no longer be so readily trusted when they would come to the *bet din* and ask for a divorce on these grounds. The case where a woman would say that she had been defiled was, according to the Talmud, aimed at the wife of a *kohen*. The Talmud explains this as follows: if the woman was the wife of an Israelite and had been raped then there would be no need for her to be divorced by her husband. If she was the wife of either a *kohen* or an Israelite and had committed adultery, then she would have to be divorced, even against her will, and would not receive her *ketubah*.²⁸⁰ The woman in this Mishnah must thus be the wife of a *kohen* who has been raped. According to the Tosafot, if the *kohen* believed the words of his wife, and has thus prohibited her to himself (דאיסורא חתיכא אנפשיה שוויא), the rabbis would uproot his words and the woman would be permitted to him. As we will see in the continuation of this chapter, the *poskim* have extrapolated the moral fear argument to women who claimed that they committed adultery and at a later stage even to women who claim divorce on the grounds of *ma'is alay*.

The verb used to express the woman's destroying (ומתקלקלת) the relationship with her husband when she has cast her eyes upon another man is the same verb which is used in the Midrash of Rabbi Yehoshua, mentioned in chapter one, in connection with Eve who "spoiled (שקילקלה) the first Adam". The verb קלקל has as one of its meanings, according to Jastrow, "to disgrace oneself by immorality" and one might wonder whether it is from this explanation of the verb that, mainly in Christian thinking, Eve's sin is considered to be her seduction of Adam.

²⁷⁹ The husband will annul the part of the vow concerning him, thus being able to have relations with his wife. However, she will not be allowed to have relations with other Jewish men, even after the death of her husband or after a divorce.

²⁸⁰ See also: Tosafot Ned. 90b, 91b; Hiddushei haRashba Ned. 90b; Ran Ned. 90b.

That the moral fear argument was at some point also applied to women who (claimed that they) had committed adultery is already visible in the Talmud. In Ned. 91a-91b, for instance, an example is given of a woman who used to wash her husband's hands in the morning after relations had taken place between them. One morning she came with the water and he exclaimed that they did not have intercourse. She replied "It must have been one of the perfume sellers then who has been here today", thus admitting to unwittingly having committed adultery. The woman claims that she has had relations with someone and if it was not with the husband it must have been with another man. Thus she is an adulteress, even if she made an honest mistake (*beshogeg*), and should be divorced. R. Nahman however said that one should not trust the woman's story because in fact she may have cast her eyes upon another man and thus wants a divorce from her husband by claiming that she has committed adultery.

In T.B. Yeb. 112a the moral fear argument appears in a completely different setting. In this Mishnah the situation is discussed where a woman has vowed during the lifetime of her husband that she will not have any benefit from her brother-in-law. According to the Mishnah if this woman falls to *yibbum*, the *yabam* has to give her *halitsah* if she requests one. The Talmud rules accordingly, even after having quoted Mishnah Ned. 11:12, although one might have expected that it would annul her vow in accordance with Mishnah Ned. 11:12. According to Rashi,²⁸¹ however, the woman can go to a place where no one will know her or know of her vow and she will be able to get married to her *yabam* (ותלך למקום שאין מכירין בה ובנדרה ותנשא לו). He states that it might not have come into the mind of the woman that she would prohibit herself to her *yabam* by her vow and thus she would be permitted to marry him after the death of her husband.

In a comment on Yeb. 112a both the Ramban and the Rashba state that it is not the way of a woman to spread the word that she is defiled to her husband unless she has an alternative reason for wanting to leave the marriage, i.e. she has cast her eyes upon another man. The woman must thus bring proof of her claim. The same cannot be

²⁸¹ Rashi, Yeb. 112a.

applied to a woman who says that “heaven is between you and me” because she has no objective way to prove this. The Ritva says that in a case where a woman claims that she has been defiled to her husband and she falls to her *yabam*, the *yabam* should be forced to give her *halitsah* because he is not like her first husband. The woman could not have known when she made her statement that she would fall to her *yabam* and thus the moral fear argument cannot be applied.

3.2 The *takkanat haGeonim*

As we have seen in chapter one, the *Geonim* enacted a *takkanah* that when a woman comes to a *bet din* and claims a divorce on the basis of *ma'is alay*, she was granted a divorce immediately and given her *ketubah*. Whereas the moral fear argument reflects a fear that women would use any of the three reasons given to get out of the marriage, the *Geonim* enacted their *takkanah* out of a fear that women would either commit adultery or turn away from Judaism if they would have no chance to get out of the marriage. At the core of this change lay the number of women who, faced with a twelve-month waiting period before they would get a divorce while not being supported by *mezonot*,

... turned to the Muslim courts so as to force their husbands to issue them a Jewish divorce. The Sages were concerned that such a *get* would not be kosher, and refused to allow Muslim authorities to interfere in internal Jewish matters. The Muslims may have done so in an effort to encourage Jewish women to convert to Islam as, according to Muslim law, the previous marriages of a Jewish woman who converted to Islam are not recognized, and she should thereby free herself of her husband without requiring his consent.²⁸²

Other women faced with a similar situation either turned to apostasy²⁸³ or prostitution²⁸⁴ or transgressed the *halakhah* by simply starting a new relationship with

²⁸² Grossman, 2004, p. 241.

²⁸³ E.g. Riskin, 1989, p. 53; R. Moses Alashqar (114:54a) experienced this when an *agunah*, whom he refused to free, later apostatized to his lasting regret (as quoted in Lamdan, 2000, p. 209).

²⁸⁴ E.g. Riskin, 1989, p.51, 53.

another man²⁸⁵. The *Geonim* decided, due to this *sha'at hadehaq*²⁸⁶ (or *tsorekh hasha'ah*), that in a case of a *moredet* the husband would be forced (*kefiyah*) to give a *get* to his wife immediately and that he even had to pay her the *ketubah*, thus giving women the right of a unilateral divorce, while, according to the *halakhah*, divorce is a prerogative of the man. That the situation could really be regarded as a *sha'at hadehaq* has become clear from the various cases where women turned away from Judaism to start a new life in which they would not be bound to a recalcitrant husband.

Westreich²⁸⁷ points out that “the g[a]onic ordinance clearly originated as a result of factors that, although directly affecting Jewish circumstances, were extraneous to [*h*]alakhah”, thus being a clear example of an external influence on Jewish law. Halakhic decision making never happened in a vacuum: since the fall of the Second Temple until the establishment of the State of Israel Jews have lived, both in Israel and the Diaspora, under foreign rulers and have thus constantly been subjected to non-Jewish influences. The extent to which Jewish communities could practice their religion varied by country: whereas life in countries under Muslim rule proved to be quite safe for Jews for many centuries, coexistence with Christians was often dangerous. Different as life might have been in either of these surrounding cultures, both have influenced halakhic decision making. Notwithstanding such external influence, the *Geonim* claimed that they had based their *takkanah* on the *Talmud*,²⁸⁸ although this is disputed by the majority of the *Rishonim*.²⁸⁹ The Gaonic ruling was however accepted from the mid-ninth century onwards in many parts of the world, both in *Sephardic* and *Ashkenazi* countries.

²⁸⁵ Teshuvot ha-Geonim, Sha'arei Tsedek, part 4, page 4, number 15.

²⁸⁶ Teshuvot ha-Geonim, Sha'arei Tsedek, part 4, page 4, number 15 ואחרי סבוראי רבנן ואחרי ונתלות הולכות ישראל שבנות חכמים כשראו סבוראי רבנן ואחרי ונתלות הולכות ישראל שבנות חכמים כשראו סבוראי רבנן ואחרי על אף בפרק ל"ז להתוספות עיי' חורבא מינה נפיק וקא בדין שלא או בדין מעושה גט ומסתפק באונס גיטין כותבין ויש מבעליהן באונס גיטין להן ליטול בגויים גירושין ותובעת למורדת עדן נוחם הונאי מר בר רבה רב מר בימי תקינו (י"אעפ פרק אשירי בהגהת עיין: ח"א, זו לתקנה שכתבוה, ב"ע ג"ס דף כתובות, פי שהוא ומה, לה ישלם לא מצוי שאינו מה, עצמו על לה שכתב ומה, תחתיו לה ישלם אבד או שבלה מה ואפילו תשלם משלה לו שהכניסה ברזל צאן נכסי שכל שנה מאות כשלש היום מתנהגין אנו ובזאת. מאתים מנה לה ויש לאלתר גט לה וכותב אותו וכופין. לבעל ליה ומהדרינן מינה מפקינן לה דתפוסה ג"אע נמי מצוי הנה עד. כן עשו אתם אף. ויותר.

See also Rav Natronai Gaon, Berurei (Ofek) Even haEzer 304.

²⁸⁷ Elimelech Westreich, “The Rise and Decline of the Law of the Rebellious Wife in Medieval Jewish Law”, in: *JLAS* XII, The Zutphen Conference Volume, ed. H. Gamoran, Global Academic Publishers, Binghamton, 2001, p. 218.

²⁸⁸ E.g. E. Westreich, 2001, p. 209. He mentions the extensive study of Yerahmiel Brody on the legislative authority of the Geonim in this respect.

²⁸⁹ See: Avishalom Westreich, *Compelling a Divorce? Early Talmudic Roots of Coercion in a Case of Moredet*, Working papers of the Agunah Research Unit, no. 9, <http://www.mucjs.org?Westreich.pdf>

The abandonment of the *takkanat haGeonim* was also due to both internal and external halakhic debate. According to Westreich²⁹⁰ “The erosion in the “rebellious woman”-ground proceeded along the two axes of time and space. As we move forward in time, the ground of the rebellious wife, which allows coercing the husband to grant a divorce, is progressively eroded – the further South we move, the later in time the erosion”. The retreat from the *takkanat haGeonim* in Jewish communities in Christian countries was instigated by notes brought together in the name of Rabbenu Tam (*Sefer HaYashar*), which showed strong objection to the *takkanat haGeonim* and which had an enormous impact on halakhic thinking about the *moredet*. Rabbenu Tam supported his refutation by stating that even though the *Geonim* claimed that they based their ruling on the Talmud, he himself could find no source in the *Gemara* which would support enforcement of a *get*. However, as already noted in chapter one, the *Sefer HaYashar* also says that the *Geonim* did have the right to enforce a *get*, just not before the twelve month waiting period had ended. Notwithstanding this contradiction within the *Sefer HaYashar* the *takkanat haGeonim* was no longer used within *Ashkenazi* countries from this moment onwards. It is very likely, as both Westreich and Jackson²⁹¹ point out, that Rabbenu Tam’s objection against the *takkanat haGeonim* was fuelled by the Christian culture he was living in. As Westreich writes:

R. Tam's view constellated as Christian society becomes monogamous, and imposes Catholic laws making divorce impossible. In these circumstances, it is very hard to uphold divorce claims raised by the husband — ... — and even more so to uphold a blameless divorce initiated by the wife.²⁹²

Another aspect that might have influenced Rabbenu Tam’s refutation of the *takkanat haGeonim* was the concurrent existence of the *takkanat haGeonim* and the *takkanot* of Rabbenu Gershom within Jewish communities in Christian countries. According to Grossman²⁹³ Rabbenu Gershom (in addition to creating his own *takkanot*) accepted the *takkanat haGeonim* — which led to an interesting change within *halakhah*. Whereas according to Torah-law a man could divorce his wife whenever he wanted

²⁹⁰ E. Westreich, 2001, p. 217.

²⁹¹ Bernard S. Jackson, “How Jewish is Jewish Family Law?”, *JJS LV/2* (2004), 201-229.

²⁹² E. Westreich, 2001, p. 218.

²⁹³ Grossman, 2004, p. 242.

to, at the time of Rabbenu Gershom “the woman could force her husband to divorce her because of the ordinance of *moredet*, while he could not do so because of Rabbenu Gershom’s new *takkanah*”.²⁹⁴ Whether or not Rabbenu Gershom accepted the *takkanat haGeonim* or not, since the latter was an accepted practice at the time of the enactment of Rabbenu Gershom, this is what the situation turned out to be and during one century suddenly women had more rights regarding divorce than men. It might be that part of Rabbenu Tam’s objection to the *takkanat haGeonim* stems from this reversed inequality.

Changes to the *takkanat haGeonim* within Muslim countries started with the Rambam. While not refuting the *takkanat haGeonim* completely, he made a distinction in applying it to the *moredet ma’is alay*, to whom he still allowed immediate divorce yet with the loss of her *ketubah*, while not to the *moredet be’einei lei umatsarnah lei*, for whom he ruled that she would have to wait for her release for twelve months, as he writes²⁹⁵:

The wife who prevents her husband from having intercourse with her is called “a rebellious wife” and should be questioned as to the reason for her rebellion. If she says, “I have come to loathe him, and I cannot willingly submit to his intercourse”, he must be compelled to divorce her immediately for she is not like a captive woman who must submit to a man that is hateful to her. She must, however, leave with forfeiture of all of her *ketubah*, but may take her worn-out clothes that are still on hand. ... If she rebels against her husband merely in order to torment him, ... the court should send her a message stating as follows: “Be it known unto you that if you persist in your rebellion, your *ketubah*, ..., will stand forfeited”. After that an announcement should be made about her in the synagogue and the houses of study every day for four consecutive weeks. ... After the announcement the court should send her a second message ... If she persists in her rebellion and does not repent, a consultation should be held with her. Whereupon she is to forfeit her *ketubah* ... Nor should she be given a *get* until twelve months have passed, during which she is to receive no maintenance.

²⁹⁴ Ibid.

²⁹⁵ Rambam, H.I., 14:8-10.

The Rambam thus applied the *takkanat haGeonim* partially to a *moredet ma'is alay* while the Talmudic principle of proclaiming against the woman for four weeks after which she loses her *ketubah* and will have to wait for her *get* for twelve months, is applied to the *moredet* who wants to hurt her husband. The Rambam ruled in this way because even though he held that the *takkanat haGeonim* was no longer in effect, he also held that the coercion of a divorce was based on the Talmud and could thus still be applied. However, the Rambam's ruling was also not generally accepted. R. Yom Tov Zahalon, for instance, would not authorise *kefiyah* like the Rambam even in a case where he would accept the plea of *ma'is alay* "on the grounds that it had not yet been endorsed by the Egyptian sages. R. Meir Gavizon was consulted on the same matter, and reached the same conclusion".²⁹⁶ Why there was such reluctance to apply the Rambam's ruling is explained by the Radbaz²⁹⁷, who writes:

The convention in all communities of Israel is not to follow the Rambam in this matter, since it has been shown [...] that there is a need for a preventive law [*gadder*] to stop a woman who has set eyes on another man from seeking a divorce.

However, "the Radbaz himself occasionally rested his case on the Rambam, for fear that if a woman were denied a *get*, she could fall into bad ways".²⁹⁸ This shows that even though the Radbaz held like other *poskim* that there was not enough support to apply the Rambam's ruling to all cases of a *moredet ma'is alay*, he himself did apply it where there was a need for it because otherwise the woman would be lost to Judaism. Thus in times where a certain *posek* felt that the situation was one of *sha'at hadehaq* he would apply the ruling of the Rambam even though he would not do this in general circumstances. Also in cases of *ah mumar*, where the woman would end up as an *agunah*, rabbis would sometimes rule leniently, specifically when the woman would otherwise remarry without waiting for *halitsah*. Here one sees a leniency within halakhic decision making due to fear that women will act immorally if denied a way out of a marriage. Such leniency is possible in the case of a *yevamah* because here the first husband has died. However, several rabbis also tended to rule leniently

²⁹⁶ Maharitz, New Responsa, 2:172; R. Gavizon 2:42[43] (as quoted in Lamdan, 2000, p. 175).

²⁹⁷ Radbaz 4:1331; 1:205, 260 (as quoted in Lamdan, 2000, p. 175).

²⁹⁸ Radbaz, 1:187 (as quoted in Lamdan, 2000, p. 175).

in cases of *igun* where the husband had disappeared, either out of compassion or out of fear that women would remarry while disregarding the *halakhah*. As the Mabit argued “if *agunot* were anyway going to remarry, they might as well do so lawfully”.²⁹⁹ Thus again, when a situation presented itself as a *sha’at hadehaq* some *poskim* would rule leniently in the case of an *agunah*. This argument was supported by the fear of the social consequences which promiscuity by *agunot* would have; not only would the women themselves become sinners; they would pull other people into sin as well. As Lamdan³⁰⁰ writes:

This concern grew in the post-Expulsion period, when some single women began to flout moral and religious norms. Jewish society tried to cope with this moral decline by introducing rules and control mechanisms. The rabbinical emphasis on leniency in the case of *agunot* was actually an attempt to forestall immorality. The Radbaz emphasized that “in these times, stringency is not politic!” and that “leniency in matters of *agunot* has been universally adopted in these generations, as the better of two evils”.³⁰¹ R. Meir Gavizon even saw the fear of promiscuity as the *main* reason for leniency in cases of *igun*. “Besides this, there is no other!”.³⁰²

Where leniency was applied in certain cases of *igun*, thus pushing the moral fear argument aside, other *poskim*³⁰³ refuted the *takkanat haGeonim* completely by stating that the *sha’at hadehaq*, which was clearly felt by the *Geonim*, was no longer applicable. Rabbenu Zerahyah HaLevi (a contemporary of the Rambam), for instance, held that the *takkanat haGeonim* was established due to specific circumstances in the times of the *Geonim*. Since times had apparently changed the *takkanat haGeonim* could no longer be applied. Whether times had changed may be debated, since in subsequent ages rabbis struggled with lax morals amongst Jews in different countries which called for leniency in certain *agunah*-cases.³⁰⁴ Other *poskim* contemporary with

²⁹⁹ Mabit 3:54 (as quoted in Lamdan, 2000, p. 208).

³⁰⁰ Lamdan, 2000, p. 209.

³⁰¹ Radbaz 1:469, 7:26; Mizrahi Elijah 36.

³⁰² R. Gavizon 1:14, 3.

³⁰³ E.g. Rabbenu Zerahyah HaLevi.

³⁰⁴ See e.g. examples given by Yom Tov Assis, “Sexual Behaviour in Mediaeval Hispano-Jewish Society”, in: A. Rapoport-Albert & S.J. Zipperstein (eds.), *Jewish History, Essays in Honour of Chimen Abramsky*, Halban, London 1988, p. 25-59, and Lamdan, 2000.

Rabbenu HaLevi give a somewhat different reason why the *takkanat haGeonim* was not generally accepted: they feared that women who claim *ma'is alay* would not only have cast their eyes upon other men, but would also fabricate such a “claim in order to strip her husband of all his possessions. Under such circumstances, the rabbis felt that leniency was out of the question”.³⁰⁵ They have thus deployed not only a moral fear argument but also an economic fear argument.

It remains interesting that where a woman transgressed the *halakhah* she was treated more leniently than when this fear did not exist. As we have seen in the previous chapter this happened on other occasions as well. These examples give the impression that it is better to transgress *halakhah* and be rewarded for it than to wait patiently and be punished for it. This in itself should give rise to the thought: should rabbis wait until women actually transgress *halakhah* before they will act in a certain case, thus accepting that there will always be women who choose the wrong path, or should a solution be sought for all women ending up in an *agunah*-situation? Apparently finding a solution for the *agunah*-problem prompts bigger fears, i.e. that it will uproot marriage within Judaism or that possible halakhically still married women will be allowed to remarry (the *humrah shel eshet ish*), than accepting that there will always be women who transgress *halakhah*, which seems to be a problem which can be dealt with.

3.3 The *Tosafot* and the moral fear argument

The *Tosafot* deal with a woman casting her eyes upon another man in their comments on six different passages in the Talmud: Yeb. 25a, 65a; Ket. 63b; Ned. 90b, 91a and 91b. Regarding Yeb 25a the *Tosafot* argue that when a woman says that she is clean (טהורה (אני)) she is trusted and permitted to her husband. However when she states that she has been defiled (טעמי) she is not trusted, because the *hachamim* are aware that the majority of women who claim this are lying and have in fact cast their eyes upon other men and want to destroy the relationship with their husbands. They thus permit these women to remain with their husbands, i.e. they will not tell the husband to divorce his wife. Allowing these women to leave their marriage would be granting

³⁰⁵ See e.g. R. Isaac Don of Aleppo, *Zera' Anashim*, p. 194a-199a; Rambam, H.I. 14:8; Radbaz 1:205, 364; Badhab 99 (as quoted in Lamdan, 2000, p. 176).

approval to their wish to destroy the marriage. Permitting these women to stay with their husbands is thus a prevention of this.

In their explanation of the verse “between him and between her she is trusted” in Yeb. 65a the *Tosafot* write that if a couple has lived together for ten years and there is no offspring (whether because he is impotent or not), he has to divorce her and give her the *ketubah* because in such a case it is not feared that she has cast her eyes upon another man. They will even force (כּוּפִין) the husband to give a *get*. Even when he has children by another woman and after ten years of marriage with this woman they have no children, he should be forced to give her a *get* because he will not father any children by this woman. Only when the wife comes and claims that she has been defiled does the fear arise that she has cast her eyes upon another man.

When the *Gemara* says in Ket 63b in the name of Amemar “but if she says *ma’is alay* we do not force her” it means, according to the *Tosafot*, that if a woman comes to the *bet din* and requests a divorce because of *ma’is alay* she should not be forced to stay with her husband. Instead he should give her a *get* and divorce her without the *ketubah*. This does, however, not seem right according to Rabbenu Tam (as the *Tosafot* write) since we fear that she has cast her eyes upon another man, as we have learned in the Mishnah in chapter Batra in Nedarim. Other *poskim* hold however, as we will see later on, that when a woman claims *ma’is alay* she should be able to leave the marriage.

On Ned. 91a the *Tosafot* comment that if a woman says “you have divorced me” and her husband says “I have not divorced you” the woman is trusted and there is no fear that she has cast her eyes upon another man, because no woman would dare to lie in front of her husband. The reverence a woman has for her husband is so great that no woman would dare lying in front of her husband when they are at the *bet din*, while a man apparently would be able to lie. Thus the *bet din* chooses to believe her over her husband.

3.4 The Rambam and the moral fear argument

The Rambam is the only one who, in commenting on M. Ned. 11:12, holds that the

words “I am defiled to you” refer to the wife of an Israelite who has committed adultery. This is interesting, and also represents an extension of the moral fear argument. In discussing immoral behaviour on the part of the woman, the Rambam in his code³⁰⁶ holds:

If a woman tells her husband that she has, while under him, played the harlot of her own free will, no attention need be paid to her statement, since she may have cast her eyes upon another man. She does, however, forfeit her *ketubah*, both the statutory and the supplementary amount, as well as her right to worn-out garments, seeing that she has admitted harlotry. But if he believes her, and places reliance in her words, he is obligated to divorce her. The court, however, may not compel a man to divorce his wife for any of these causes, unless two witnesses come forth to testify that his wife has indeed played the harlot in their presence, and of her own free will. Only thereafter may they compel him to divorce her.

Here also the Rambam applies the moral fear argument not to the wife of a *kohen* who has been raped, but to a woman, who is either the wife of a *kohen* or the wife of an Israelite, who claims that she has committed adultery. According to the Rambam such a woman can only render herself prohibited to her husband if her husband believes her words, even without witnesses or other corroborating evidence. The husband will then have a *hiyuv* to divorce his wife but he will not be forced to divorce her until actual witnesses to the adultery appear. In cases where sexual relations were forced upon a woman, i.e. she was raped, she does not forfeit any part of her *ketubah* and there is no obligation on the husband to divorce her. However, in accordance with the Talmud, if the husband is a *kohen* then he should divorce her immediately and pay her the *ketubah* (H.I. 24:22). This is however only the case when the rape can be proven.

If a priest’s wife says to him, ‘I have been raped,’ or ‘I have unwittingly had intercourse with another man,’ he must pay no attention to her statement, since she may have cast her eyes upon another man. If he places credence in her,

³⁰⁶ Rambam, H.I. 24:18. R. Yosef Caro S.A. E.H. 115:6 also holds that as long as there are no witnesses who corroborate her claim that she has committed adultery she is not trusted because she might have cast her eyes upon another man.

however, or if his informant is a person in whom he places reliance, he must dismiss her and pay her her *ketubah*.³⁰⁷

The same can be found in Hilkhhot Issurei Bi'ah 18:8, where the Rambam states:

The raped wife of an Israelite, while permitted to her husband, is forbidden to the priesthood. If the wife of a priest says to her husband 'I have been raped' or 'I have been the victim of an error, whereby some man had intercourse with me,' or if a single witness comes forth and testifies against her that she had committed adultery, whether by rape or of her own will, she is not thereby forbidden to her husband, since it may be that she has set her eyes upon another man. If, however, he believes her or the witness, and gives credence to their words, he should divorce her in order to free himself from doubt.³⁰⁸

Even though the Rambam thus extends the context of the moral fear argument to include adultery on the part of the wife of an Israelite, he does, however, not require her to give evidence for her words. Quite the opposite; he urges the husband to disregard her words. Only if the husband believes his wife's words is there an obligation to divorce. On her words alone no woman should be divorced lest she has cast her eyes upon another man.

3.5 The Rosh and the moral fear argument

In Resp. 35:4 the Rosh deals with a case where Moshe betroths a woman and Jacob comes and says that he has betrothed this woman before, although he does not remember who the witnesses to this betrothal were. Later he claims that he betrothed the woman twice. The woman denies all this. When Jacob produces false witnesses, the woman has a fake *get* written so as to show that she is free to marry. The question arises whether the woman is allowed to marry Moshe or not? Jacob is not trusted regarding his statements or regarding his witnesses. The woman can give good reason (טובה אמתלאה) why she produced a *get* when she had not been betrothed; she is trusted and there is no fear that she has cast her eyes upon another man.

³⁰⁷ Rambam, H.I. 24:23; see also: Bet Yosef E.H. 6:12-13.

³⁰⁸ See also Rosh, S.A. E.H. 6:12.

In Resp. 43:2 a woman comes to the *bet din* to ask for a divorce and her *ketubah* on the grounds of the impotence of her husband. If the woman had only asked for a *get* she would have been trusted and he would have been forced to give her a *get*.³⁰⁹ Yet, due to the fact that she also asked for her *ketubah* she is not trusted and it is feared that she has cast her eyes upon another man. If the husband divorces her, she will not receive her *ketubah*. Apparently whether a woman's claim that her husband is impotent is accepted depends on outer circumstances, as we can see also in Resp. 43:1 where the woman, who claims that her husband is impotent, is already divorced and her husband paid her the *ketubah*. Since the divorce is a matter of the past, the woman is trusted regarding her claim and there is no fear that she has cast her eyes upon another man. In the case where the woman wants a divorce because the couple does not have children, the man will be forced after ten years of marriage, no matter whether he has children with another woman or not. In such a case there is no fear that the woman has cast her eyes upon another man.³¹⁰

With regard to women who claim a divorce on the basis of *ma'is alay* the Rosh, in accordance with Rabbenu Tam, is not willing to force the husband to divorce his wife, but if her husband divorces her she will not receive anything.³¹¹ The reason why the Rosh is opposed to enforcing a *get* when a woman claims *ma'is alay* is strongly expressed in Resp. 43:8, where he writes "if a woman will be able to remove herself from under her husband by saying 'I do not want him', not a single daughter of Abraham *avinu* will remain with her husband".³¹² They will cast their eyes upon others and will rebel against their husbands." The same opinion can be found in Resp. 43:6 where he writes that one should not enforce a *get* in the case of *ma'is alay* because it will result in a *get me'useh* and that will enlarge the number of *mamzerim* in the world — especially since women in his time are promiscuous and should thus not be trusted, because it is feared that they have cast their eyes upon other men.³¹³ Both the Ribash³¹⁴ and R. Caro³¹⁵ hold that only if a woman claims *ma'is alay* and claims her *ketubah* at the same time does the fear arise that she has cast her eyes upon

³⁰⁹ The same is stated in Rosh, Resp. 43:12.

³¹⁰ E.g. Rosh, Resp. 43:14.

³¹¹ E.g. Rosh, Resp. 43:6 and 43:14.

³¹² See also Bet Yosef E.H. 77:2-3.

³¹³ Ibid.

³¹⁴ Ribash 361.

³¹⁵ R. Caro, S.A. E.H. 77:2

another man. The (in)famous explanation of the Rosh has set the basis for an overall doubt considering women's trustworthiness regarding their moral standards within marriage and divorce. Whereas in most legal systems the rule is followed "innocent until proven guilty", here it is the other way round: a woman is immediately distrusted considering her motivations for the divorce until she can prove the opposite.

The Rosh is however not the first to adhere to this moral fear argument when it comes to divorce. In his commentary on the laws of divorce in Deut. 24:4, where it is stated that if a man divorces his wife and she then gets married to another man and either gets divorced again or becomes a widow, she may not return to the first husband, Philo already stated that this is because:

Another commandment is that if a woman after parting from her husband for any cause whatever marries another and then becomes a widow, whether the second husband is alive or dead, she must not return to her first husband but ally herself with any other rather than him, because she has broken with the rules that bound her in the past and cast them into oblivion *when she chose new love-ties in preference to the old*. And if a man is willing to contract himself with such a woman, he must be saddled with a character for degeneracy and loss of manhood. He ... has lightly taken upon him the stamp of two heinous crimes: adultery and pandering. For such subsequent reconciliations are proofs of both. The proper punishment for him is death and for the woman also.³¹⁶

According to the commentary on this passage in the Loeb Classic Library Philo "apparently ... understands the text as meaning that the remarriage shews that there was no real reason for the divorce. The woman is therefore 'defiled'³¹⁷ and an adulteress, and he not only a 'pander[er]' but an adulterer, either because he has connived at her adultery or perhaps because to marry an adulteress is in itself

³¹⁶ Philo, *De Specialibus Legibus, The Special Laws*, III:30-31, in: The Loeb Classical Library, T.E. Page, E. Capps, W.H.D. Rouse (eds.), London, Heinemann, New York, Putnam's Sons, 1929, volume 7, p. 493-495.

³¹⁷ This is however not what Philo says; it is thus the interpretation of the commentator.

adultery”.³¹⁸ If this is Philo’s understanding of the text then it implies that he considers that the wife had the right of unilateral divorce, thus also allowing her to leave the second husband when she wanted to return to the first husband. It is also implied that the woman initiated the first divorce because she had cast her eyes upon another man and her husband was aware and either approved of it or turned a blind eye to it. The couple in their “mutual agreement” agreed that the wife would have marital relations with this other man whom she desired, only to then later return to her first husband. This law was given, in Philo’s view, for exactly this reason, to prevent people from planning to commit adultery “legally”, by getting divorced and then marrying another person before returning to the original spouse.

3.6 Node beYehuda Mehadora Tanyana

In Y.D. 204 a woman wants to cancel the *shiddukhin* on the claim that the fiancé told her that he would rape her and he is thus now repulsive to her (מנהג בה לנהוג רוצה שהיה). She is however not believed because her claim is not considered sufficient proof (מבוררת שאינה אמתלא) and it might be that she has just cast her eyes upon another man and fabricated this story about him threatening to rape her. It is said that the woman might just want to annul the *shiddukh* in a way that is not according to the law. The *shiddukh* can, however, be annulled due to the fact that the groom does not adhere to the *tena'im* which the couple had signed and in which he promised to give her presents. It is striking to see that the woman’s claim of possible harm to her is cast aside due to the fear that she might have cast her eyes upon another man. Thus her claim is not sufficient to annul the *shiddukh* while not adhering to the *tena'im* is. This is explainable only because the absence of presents constitutes something tangible, while discussions between couples can hardly be proved. This is, however, exactly the problem: how can a woman prove that she is under threat when nothing has happened yet? Does one have to wait until something happens or does one, as happened in this case, assume that the woman is lying anyway? Again the principle of “innocent until proven guilty” is not adhered to.

³¹⁸ Commentary by F.H. Colson on Philo, *De Specialibus Legibus, The Special Laws*, III:30, p. 492-493, footnote b.

The case of a woman who confesses to her husband that she has committed adultery on a regular basis is discussed in E.H. 12. The husband believes her and there is also *reglayim ledavar* for her story. The question R. Landau deals with is whether the woman should really be believed or whether she should be regarded as having simply cast her eyes upon another man? He does this because he wants to leave the door open for the couple to remain married if they wish to do so. According to R. Landau one can only rely on the *reglayim ledavar* when they are so strong that even if the woman had not confessed to the adultery, there would have been enough signs that she had committed it. R. Landau also does not see the advantages a woman would get from confessing to having committed adultery voluntarily, because now she will not receive her *ketubah* and she has no means of forcing the husband to give her a *get*, while at the same time she is prohibited to him. One should thus not fear that she has cast her eyes upon another man. Only when the wife of a *kohen* claims that she has been raped should one fear that she has cast her eyes upon another man, because she would have to be divorced and receive her *ketubah*. According to the Rambam, however, the moral fear argument should be applied to every woman who wants to prohibit herself to her husband. While the moral fear argument is mentioned twenty three times in this *teshuvah*, they are all aimed at trying to let the couple remain married. R. Landau offers ample opportunity for both spouses to give proof for having lied initially and thus to retract their words. Apparently the moral fear argument can also be used in a positive way.

Another woman (E.H. 21) confesses to her husband that while travelling she shared a room with a young man, who was one of her relatives, in a hotel, due to the fact that there were so many non-Jews and she did not feel safe to sleep alone in a room. The woman claims that the young man forced himself on her. Her husband is now wondering whether she is permitted to him or not. The question arises whether she had confessed because she had cast her eyes upon another man. R. Landau says in accordance with tradition that a woman should not be trusted regarding matters of rape or adultery because she might have cast her eyes upon another man. Since the husband is an Israelite and not a *kohen*, his wife is permitted to him whether she has been raped or not. Thus in this case the woman may stay with her husband, notwithstanding the truthfulness or falseness of her claim. Again it is apparent that to save the marriage, the wife's words are not believed. This is, however, expressed with

the words that they want to prevent the woman from leaving the marriage because she has cast her eyes upon another man.

3.7 Rav Moshe Feinstein

In many of his *teshuvot* Rav Moshe Feinstein deals with cases where the question arises whether a woman is still permitted to her husband or not. These cases do not necessarily deal with divorce, as is often automatically assumed because the *teshuvot* deal with the same terminology (alleged adultery, casting her eyes upon another man, comparing her to a piece of prohibited food, etc.). The cases brought to the attention of Rav Feinstein, here researched, deal with women who tell their husbands that they have either had relations with a non-Jew before the marriage or committed adultery with a non-Jew during the marriage. It is striking to see that all the cases of alleged extra-marital relations or adultery have been committed with non-Jews. Considering the difference regarding the children born out of an adulterous relationship it is however plausible. When a married woman commits adultery with a Jew then she becomes an adulterous woman, liable to *karet*-punishment, and any children will be *mamzerim*. Even though when she commits adultery with a non-Jew she is liable to a capital punishment as well, any children born out of such a union are however not considered *mamzerim*.³¹⁹ According to Rav Feinstein an additional factor why a woman might claim that she has committed adultery with a non-Jew is because the majority of men would be very angry with their wives if they heard such a thing and would want to divorce their wives. Thus, he says³²⁰, a woman might think that this is a good excuse to get her husband to agree to a divorce. However, since it is feared that the woman has in fact cast her eyes upon another man she is not trusted when she claims that she has committed adultery or, in the case of a woman married to a *kohen*, when she claims that she had extra-marital relations with another man before her marriage. Also if the husband trusts his wife, he is not readily believed. The husband might claim that his wife normally is an honest person who does not lie, but as long as he has not investigated the matter and as long as he cannot bring proof (רגלים לדבר) for his trusting her words, he is not trusted either and the wife will be permitted to her husband.

³¹⁹ T.B. Yeb. 45b.

³²⁰ Igrot Moshe, E.H. 3:16.

The alleged extra-marital relations do not necessarily have to take place with the consent of the woman. In Igrot Moshe, E.H. 1:24 a wife of a *kohen* tells her husband after ten years of marriage that two years before they got married she was raped by an Arab. During and after the alleged rape there were however no signs of the rape (the woman did not feel any pain, nor did she see any virginal blood). These signs were however present when she first had intercourse with her husband. Rav Feinstein thus concludes that either the rape did not take place at all or the man did not penetrate the woman or only partly and thus she was not raped. In either case she should not be trusted when she claims that she has been raped, and even though her husband says that he believes her story, since there is no fear that she has cast her eyes upon another man (because she does not want a divorce), he should not be believed and she is permitted to her husband. The fact that the woman does not want a divorce plays a large role in this case. Even though the husband says that he trusts his wife's words, Rav Feinstein still rules that the woman is permitted to her husband who is a *kohen*. Not only does Rav Feinstein not trust the woman's words about the alleged rape, neither does he believe the husband who says he accepts his wife's statement. By ruling in this way Rav Feinstein has saved a marriage and any possible male children will still be *kohanim*.

In another case Rav Feinstein³²¹ deals with a woman who claimed immediately after she got married to her husband that she had already accepted *kiddushin* from another man before the wedding as a practical joke. The woman was not sure whether there had been any witnesses around when this happened. Rav Feinstein writes that there is an immediate need to decide whether one should trust the wife when she claims this, since she herself has now “compared herself to a piece of prohibited food” (שׁוּיָהּ נִפְשָׁהּ) (חֲתִיכָה דְאִיסוּרָא). The Ran at the end of Nedarim says: “she who claims ‘I’m defiled for you’ should not be trusted because she might have cast her eyes upon another man”. She can thus not prohibit herself to her husband. Also *rabbanan batrai*, the following generations of rabbis, have decided accordingly that when a woman says she is defiled there is a fear that in reality she has cast her eyes upon another man and she should thus not be trusted. If there is a fear that the woman has cast her eyes upon another man then the rabbis have the power to uproot her words and not to trust her

³²¹ Ibid., E.H. 1:90.

even if she claims that she has accepted *kiddushin* from another man earlier (אבל מתקנה דחשש נותנת עיניה באחר לתירוץ הראשון שיש כח ביד חכמים לעקור דבריה שלא תאסר וכן הוא (מסקנת התוס' עיי"ש, לכאורה אין להאמינה גם שקבלה קידושין מאחר her husband. Due to the fact that the rabbis can choose not to believe a woman when she says that she is prohibited to her husband, a greater halakhic tragedy can be prevented. Should the woman be trusted, then not only does she need a *get* from the first man but also from the second man. We see from the last two cases that whereas often the moral fear maxim can be interpreted very negatively it sometimes can be used to prevent other halakhic problems. The woman in this case probably did not want a divorce immediately after she got married, otherwise she would not have gone through with the ceremony, but she apparently wanted to 'come clean' about something that happened in the past, thus bringing herself into a halakhically difficult situation.

3.8 Leniency because of moral fear

Although the moral fear argument is in the majority of cases a negative factor when deciding a divorce case, in certain circumstances it has helped, strange as it may sound, some women to be freed from their *agunot*-situations. It is believed that women have a strong desire for sexual relations and this is thus an important aspect for women within a marriage ("everyone knows why a bride enters the bridal chamber"³²²). Whenever a woman comes to the *bet din* to ask for a divorce on either the claim that she is defiled to her husband or on the claim of *ma'is alay* the *poskim* hold that one should not trust her because there is the fear that she has cast her eyes upon another man. However, once a woman has become an *agunah* one should fear, according to some *poskim*, that her status of *igun* will cause her to commit adultery. The *takkanat haGeonim*, for instance, was enacted because of the fear that a woman may turn to bad ways, i.e. become adulterous. Another example of being lenient in an *agunah*-situation because of a woman's sexual inclinations is a statement of the Ravyah, Rabbi Eliezer ben Joel Ha-Levi, who writes "We should not, through flighty and irrelevant stringencies, cause a daughter of Israel to become an *agunah*; for it is

³²² T.B. Shab.23a.

forbidden to us to become advocates for the multiplication of ineligible”.³²³ Hacoen explains that a woman put in the situation of an *agunah* “will not be able to contain her natural inclinations and will engage in forbidden extramarital relations.”³²⁴ Thus there is a fear that the woman will bear *mamzerim*. Hacoen therefore argues in his book *The Tears of the Oppressed* that it might be better to prevent such a situation, of an *agunah* having children by another man, from arising, by treating every *agunah*-situation as a case of *sha‘at hadehaq*, an hour of emergency. He argues that when a woman becomes an *agunah* she is under so much pressure that she will inevitably be tempted to commit adultery. The earlier quoted³²⁵ 18th century Rabbi Ya‘akov Reisher however holds in his work *Shevut Ya‘akov* that one cannot use this concept of *sha‘at hadehaq* in all cases. He states that there is a difference between women who want to remarry and women who do not desire this. He, however, also holds that a woman who is young and wants to remarry should nevertheless abide by the *halakhah* and wait modestly for her release. As mentioned in chapter two, however, women who do not wait but give in to their sexual desires and start a new relationship can have their first marriage undone more easily than women who do wait for their release. Due to the fact that the rabbis want to prevent any possible children from this new relationship from becoming *mamzerim*, the woman is helped out of her *agunah*-situation.

3.9 The moral fear argument applied to men

Although the *halakhah* is conceived to be divine and thus unchangeable, change in the interpretation of the *halakhah* is and always has been possible. This is also visible with regard to the use of the moral fear argument. Whereas originally the fear that a woman might cast her eyes upon another man was only directed at women, a change has occurred from the time of the *takkanot* of Rabbenu Gershom onwards. I noticed this change in the *halakhah* while researching several cases in the *Piskei Din Rabbani'im* which are discussed in chapter 4. In his *takkanot* Rabbenu Gershom prohibited a man from divorcing his wife against her will and from marrying two women at the same time. While the Mishnah states that a woman is not trusted when

³²³ Hacoen, 2004, p. 9.

³²⁴ Ibid.

³²⁵ See chapter 3.5.

she wants to prohibit herself to her husband, after the *herem* of Rabbenu Gershom a husband might also not be trusted when he wants to prohibit his wife to himself. This is because there is a fear that the husband has cast his eyes upon another woman and wants to get divorced for that reason. Before the *herem* of Rabbenu Gershom a man could just divorce his wife whenever he wanted to or take a second wife if he wished to do so. After the *herem* of Rabbenu Gershom a husband needed to divorce his wife before entering into another marriage and had to have a valid reason for divorcing his wife when she was not willing to be divorced. The best reason a man can have to divorce his wife is the fact that she has committed adultery and is thus prohibited to him. In such a situation a man can divorce his wife, even against her will, and he is also not obliged to pay her the *ketubah*. One can see in the sources³²⁶ that from the moment of the *herem* of Rabbenu Gershom the rabbis started to distrust men when they came to the *bet din* to apply for a divorce stating that their wife was prohibited to them. The immediate fear that would arise when a woman comes to the *bet din* and claims a divorce on the grounds of either *ma'is alay* or because she is prohibited to her husband, now also arises when the husband wants to prohibit his wife to himself.

The Rashba was the first *posek* to apply the moral fear argument to a man. In Resp. 1237³²⁷ he deals with a case where Reuben married Rachel and they got into an argument. This resulted in a feud between him and her father. The word spread that Reuben had cast his eyes upon another woman yet due to the *herem* of Rabbenu Gershom he could not divorce his wife against her will. Reuben therefore said in the *bet din* that he has seen his wife talking to another man and this man told him that “he had his way with her” and Reuben believed him. The rabbis did not accept this as proof and thus Reuben claimed that he himself had seen his wife commit adultery. The Rashba held that the man gives his wife a bad name only because he wants to divorce her and thus he should not be trusted. Just as a woman is not trusted when she wants to prohibit herself to her husband, so also is the husband not trusted when he wants to prohibit his wife to him, because he might have cast his eyes upon another woman. Reuben will thus not be allowed to divorce his wife against her will.

³²⁶ Starting with the Rashba; also found in the Rosh, the Maharik, the Radbaz, the Mabit, the Rema, the Hatam Sofer, the Maharsham, the Heichal Yitschak, the Tsits Eliezer, Yabia Omer and the Igrot Moshe.

³²⁷ This case is repeated in Rashba Resp. HaMi'uhasot LeRamban 133.

However, while the majority of rabbis have started to apply the moral fear to men as well, R. Akiva Eiger (*mehadora kama*, nr. 101) doubts whether one should treat a man's claim that his wife is prohibited to him in the same way as a woman's claim that she is prohibited to her husband. He asks in this *teshuvah* how the Rashba can conclude that *Hazal* have given us this option. Even though after the *herem* of Rabbenu Gershom it is not halakhically permitted to a husband to divorce his wife against her will, if a husband does so, the divorce is nevertheless valid. In a marriage a man acquires a woman and in that sense she "belongs" to him. A woman does not acquire a man and thus he does not "belong" to her. If the man now gives the woman a *get* and pays her the *ketubah*, even when this is against her will, the *get* is valid and the couple is divorced. A woman does not have such a possibility. Thus when a woman says that she is prohibited to her husband we do not believe her because she might just want to get out of the marriage. According to R. Eiger we can however trust a husband who says that his wife is prohibited to him, because he still has the possibility of getting out of the marriage by giving her a *get*, even against her will. There is thus no reason to doubt his claim of prohibition.

The Rosh spoke vehemently against giving women the opportunity to be able to get divorced for no apparent reason other than the fact that they have cast their eyes upon another man. In the same way, however, he also opposed the situation where a man married a woman in one place, then casts his eye upon another woman and married her in another place. He therefore suggested (43:7) that communities should make a *takkanat hakahal* in which they prohibit men to leave their wives and marry another woman in another town, thus preventing women from becoming *agunot*.

That the moral fear argument can also be used as a measure preventing a marriage from breaking down becomes clear in Igrot Moshe 1:59. Here Rav Feinstein deals with a case, posed to him by Rabbi Menachem Tzvi Eckenstein, where a woman has the *minhag* to shave her hair. The husband however is very much against this custom and wants to prohibit his wife from doing so. The woman claims that since it is also the custom of the place where they live, she should be allowed to shave her hair. Rav Feinstein weighs the *minhagim* of the place one lives in against the different *minhagim* of both spouses. He states that when a woman gets married she should accept the husband's *minhagim*. However, in his final conclusion he writes that if the

woman follows her own *minhag* (and thus shaves her hair) her husband might become repelled by her and cast his eye upon another woman. To prevent this from happening the woman should not shave her hair. Although the rule of R. Akiva in T.B. Git 90a, who stated that a man can divorce his wife even when he finds another woman more attractive than his wife, is normally never adhered to, Rav Feinstein's ruling seems to be inspired by it; a wife should look attractive to her husband, which implies in this case that she should not shave her hair.

3.10 Conclusion

It has become clear in this chapter that the fear of women's sexuality or, even more, the fear of women's proneness to immorality, has prompted the *poskim* to decline women a right to a divorce when they want one against the wishes of their husbands. There is even an increase in stringency apparent, since the original (mishnaic) moral fear argument was only applied to the wife of a *kohen* who claimed that she was raped. Then, from the Rambam onwards, it was also applied to the wife of an Israelite when she claimed that she had committed adultery. The *Rishonim* then also applied the moral fear argument to a *moredet ma'is alay*. Thus, any woman who comes to a *bet din* and claims either that she has been defiled or that she is repelled by her husband will not be believed by the rabbis unless she can give sufficient proof for her claim. What constitutes sufficient proof will be discussed in chapter five.

On the other hand, though, we have also seen cases where, by not believing the woman's claim that she has been defiled, a couple could remain married. In these cases the woman confessed to a matter of (enforced) extra-marital relations while she had no wish to be divorced from her husband. In these cases it was ruled that the woman had not cast her eyes upon another man and thus her claim should not be trusted, rendering her not prohibited to her husband. This shows that the moral fear argument can be used in two opposite ways: either the woman's claim is not believed because it is feared that she has cast her eyes upon another man, or because there is no fear that she has cast her eyes upon another man. In either case, though, the *poskim* want the couple to remain married. This is a good solution if the woman herself wants to remain in the marriage, but when she wants a divorce against the will of her husband, the moral fear argument is an obstacle for her to receive the desired divorce.

There have also been times throughout history where the moral fear argument caused rabbis to rule leniently in the case of an *agunah* and sometimes even forced the husband to divorce his wife. In times of *sha'at hadehaq*, i.e. when the fear exists that a woman might end up in bad behaviour, she is given a possibility to get out of the marriage. This seems to be a *contradictio in terminis* since the moral fear argument is both used to keep women within a marriage and also to give them a chance to get out of it. In both cases, though, the rabbis try to prevent immoral behaviour on the part of the woman. Whether or not a situation is classified as a *sha'at hadehaq* is subjectively decided by the *poskim* in question. At the time of the *Geonim* there was a consensus that their time was a time of *sha'at hadehaq*. In later ages though a *posek* would decide a certain case on the basis of whether or not he regarded the situation as a *sha'at hadehaq*. It becomes clear that only in a situation where the moral fear argument turns into a moral fear panic that the woman will be given a chance to get out of the marriage. Otherwise she will have to wait for the release of her husband. The dubious result is that obedience to the *halakhah* is not rewarded while disobedience is. What are we to learn from that? It is hard to believe that *poskim* would advocate transgressing the *halakhah*. Maybe they accept that there will always be people who will transgress the *halakhah*, and that a small group of women will not wait indefinitely for a release from their husbands but will take matters in their own hands. While probably not condoning these situations, the *poskim* seek to deal with them in the best possible way. The question remains though why these situations do not inspire them to look at the problem of *igun* from a wider perspective? By preventing women from ending up in a situation of *igun* they would also prevent women from transgressing the *halakhah*. The changes which the rabbis would have to make within the *halakhah* in order to prevent *igun* from arising at all apparently does not outweigh the small amount of women lost to Judaism.

While it has become clear in the previous chapter that the maxim *tav lemeitav* has not been accepted as a universal truth regarding all women, the moral fear argument seems to be interpreted as applicable to all women. Women are regarded as loose and sexually immoral and will thus try to find a reason to get out of a marriage when they see someone more appealing to them than their husbands. While one can perhaps understand why the claim of *ma'is alay* is regarded with scepticism when the woman wants a divorce against the will of her husband, it is remarkable that the claim that she

has committed adultery is treated with the same scepticism. If women really are prone to immorality, should one not expect them just to commit adultery without trying to get divorced? What would the additional benefit of a divorce be considering that the woman loses her *ketubah* when divorced for this reason? Notwithstanding this fact women as a whole have been and are regarded as morally weak, and thus the moral fear argument can, at least in theory, be applied to all women. We have seen, however, that the specific circumstances of every case are taken into account, with the result that not all women are suspected of having cast their eyes upon another man.

Chapter four

The Piskei Din Rabbani'im statistical review

4.1 Data research on the two maxims

When starting the project I did a search on the Bar Ilan Responsa Project database version 12 regarding the two maxims and found that there are 516 sources for *tav lemeitav* and 1319 passages where the moral fear argument is mentioned. In eight *teshuvot* both *tav lemeitav* and the moral fear argument are used. These sources are particularly interesting because the two maxims seem to contradict each other. They can be found together in: Shut HaRibash, nr. 209; Shut Radbaz, 4:260; Shut HaRema nr. 96; Penei Yehoshua Ket. 63b; Shut Heichal Yitskhak E.H. 1:3; Shut Tsits Eliezer 5:22; Piskei Din Rabban'im 7/65-74 and Piskei Din Rabbani'im 11/4-73.

Of all the sources many are to be found in the Piskei Din Rabbani'im (henceforth PDR), which are the rabbinical court reports about actual cases in Israel. The PDR, which can be found on the Bar Ilan Responsa Project database version 12, deal with cases from the early fifties to the late seventies. Since the PDR formed such a large number of the sources (four sources for *tav lemeitav* in three court cases, and two hundred and eight sources for the moral fear argument, which is about fifteen percent of the total corpus of the moral fear argument, found in forty four court cases), I decided to read them first and look at the sources they use, thus working backwards in time. The PDR in themselves, however, gave some very interesting insights into the use of the two maxims throughout history, the results of which I have outlined in a chart, which can be found in addendum A. An analysis of the chart will be given in this chapter. The chart consists of thirteen columns, which are:

1. Where is the case found in the PDR?
2. Who filed for divorce?
3. On what grounds does the spouse file for divorce?
4. Is the moral fear argument specifically applied to either spouse?
5. If the moral fear argument is applied to one spouse in particular, to which one?
6. What is the context of the moral fear argument?

7. Does either spouse claim *ma'is alay*?
8. Is *kefiyah* used against one of the spouses?
9. Are other halakhic remedies used against the refusing partner?
10. Are conditions applied to the divorce?
11. Is there need for proof, and if so, what does it consist of?
12. Which halakhic arguments are used within the case?
13. What other issues can be found in the case?

4.1.1 Who filed for divorce and on which grounds?

A survey of the chart shows that of the forty five court cases of the PDR, in which either one of the two maxims are found, the woman filed for divorce in twenty two cases and the husband in fourteen cases. In four it is not clear who is filing for divorce and the remaining five cases do not deal with divorce. The reasons why a spouse files for divorce are quite varied. Two reasons are found on a regular basis and these are adultery on the part of the woman (eight times, claimed six times when a man filed for divorce and two times when the woman filed for divorce) and *ma'is alay* (five times, claimed once when a man filed for divorce and four times when a woman filed for divorce). Other grounds for claiming divorce are: illness (four times, once by a man and three times by a woman), behaviour (four times, all claimed by women), impotence (three times, all claimed by women), *mekach ta'ut* (three times, all claimed by a man), irretrievable breakdown of the marriage (twice, once claimed by a man and once by a woman), agreement to divorce (twice, both claimed by a man), remarriage of the husband (twice, both claimed by a woman), and *eshet ish*³²⁸ (once, claimed by a woman). In seven cases it is not clear why either spouse files for a divorce, this is in three cases where the woman files for divorce and in four cases where it is not clear who files for divorce. No fault divorce (unless there is agreement between the couple to divorce), is not possible, thus the person filing for divorce has to have a good reason to ask for it. It is apparent though that certain grounds to file for divorce are more readily claimed by either a man or a woman. A man often claims adultery on the

³²⁸ An *eshet ish* is a woman who is halakhically married and is thus not free to marry someone else. The woman in the case where the reason for divorce was *eshet ish* (PDR 6/366-376) claimed that in reality she never got a *get* from her first husband and thus was not allowed to have married her second husband. Now she wants a divorce from the second husband on the grounds that her marriage to him was fraudulent, which is a unique way of trying to get a divorce to say the least.

part of the woman or *mekach ta'ut* on the basis that he discovers a *mum*³²⁹ in his wife after the marriage; while a woman will claim as grounds for divorce more often *ma'is alay*, impotence, behaviour of the husband or remarriage of the husband. The ground for divorce in the majority of cases is a fault in the other spouse, although women sometimes incriminate themselves by saying that they have committed adultery or are really still married to another man, to be able to get a divorce.

4.1.2 The moral fear argument and its context

In twenty five cases the moral fear argument is actually used against a spouse, i.e. the spouse is suspected of having cast his/her eyes upon another person, while in the remaining nineteen cases the moral fear argument is merely mentioned to explain how one should rule if there were a fear that either spouse had cast his/her eyes upon another. In seventeen cases where the moral fear argument is used against a spouse it is applied to the wife. In six cases the moral fear argument is applied to both the husband and the wife and in two cases the moral fear argument is applied to the husband. In PDR1/129-138 the woman filed for divorce because her husband was ill. As a counter argument the husband claimed that his wife committed adultery, but the *dayanim* believed that in fact he had cast his eyes upon another woman. In PDR 11/4-75 it is the husband who files for a divorce because his wife is ill, but also in this case the *dayanim* rule that it is likely that the husband has cast his eyes upon another woman. It is striking to see that the moral fear argument can also be applied to men and this concept will be expanded upon later.

The context of the moral fear argument is very straightforward: in fourteen cases the husband accuses his wife of having committed adultery (in nine of these cases the moral fear argument is applied to the woman, twice to the man and in three cases to both the man and the woman) and in five cases the woman claims to have committed adultery (in all these cases the moral fear argument is applied to the woman). In five cases the context of the moral fear argument is *ma'is alay*; this is in two cases where the moral fear argument is applied to the woman and in three cases where it is applied

³²⁹ A *mum* is, in general, a physical defect in one of the spouses, although sometimes psychological problems are also regarded as a *mum*. According to the M. Ket. 7:7 and M. Kid. 2:5 all defects that render a *kohen* unfit for service render a woman unfit for marriage.

to both the man and the woman. One case (PDR 4/342-346) is extraordinary because there the moral fear argument is applied to a woman who filed for divorce on the grounds that her husband abused her³³⁰ and forced her to have marital relations. The text states, however, that since the woman was not observant she was regarded as a loose woman and therefore there was a discussion of whether any claims made by her, including that of abuse, should be trusted. The *dayanim* quoted for this a general maxim applied to women by the Maharam who wrote that “all women are frivolous”. An extended discussion of this case can be found in chapter five.

See for these statistics the following table:

Table 1

Who filed for divorce?	Moral fear argument applied to man	Moral fear argument applied to woman	Moral fear argument applied to both	Context for moral fear argument
woman	1	5	1	accusation
woman	-	3	-	adultery
woman	-	1	-	ma'is alay
woman	-	1	-	abuse
man	1	2	1	accusation
man	-	1	-	adultery
man	-	1	2	ma'is alay
not clear	-	1	-	accusation
not clear	-	1	-	adultery
not clear	-	-	1	ma'is alay
no divorce case	-	1	1	accusation

That the moral fear argument is applied against a woman when she files for divorce is understandable in cases where the woman claims that she has committed adultery, as happens in three cases. In other cases where the wife files for divorce without claiming that she has committed adultery, the husband will often accuse her of having

³³⁰ According to the Tashbetz (Respona 2:8) a man should be forced to divorce his wife when he abuses her to the extent that she will come to loathe him. He also ruled that the woman would not forfeit her *ketubah* in such a situation. Other great *poskim* of his time did not rule accordingly.

committed adultery, as happens in six cases. In modern day divorce cases it becomes apparent that if x claims a then y will claim b. Thus claims of suspected or committed adultery and *ma'is alay* are not necessarily real claims but rather formulae used either to obtain a divorce and/ or to get out of paying the *ketubah*.

4.1.3 *Ma'is alay*

In seventeen cases *ma'is alay* is claimed and in the majority of them (ten) it is the woman who claims this. In three cases it is claimed by the husband and in four cases by both. Also here it is obvious that the claim of *ma'is alay* is merely a formula used in the game called divorce. As one can see in the following table, in twelve cases the person who files for divorce is the same person who claims *ma'is alay* and the reason for divorce is often closely connected to a claim of *ma'is alay*: the majority of reasons to file for divorce deal with either behaviour of the other spouse or *ma'is alay* itself. In one case the husband says that his wife's illness makes her repulsive to him.

Table 2

Who claims <i>ma'is alay</i> ?	Who files for divorce?	Reason for divorce	How many
woman	woman	behaviour	3
woman	woman	<i>ma'is alay</i>	4
woman	woman	adultery	1
woman	woman	remarriage husband	1
woman	woman	illness	1
woman	no divorce case	-	1
woman	not clear	not clear	2
man	man	mekach ta'ut	1
man	man	illness wife	1
man	not clear	not clear	1
man and woman	man	adultery	1
man and woman	man	mekach ta'ut	1
man and woman	man	<i>ma'is alay</i>	1
man and woman	no divorce case	-	1

In ten cases where *ma'is alay* is claimed the moral fear argument plays a role; in four of these cases the context of the moral fear argument is *ma'is alay*, in five an accusation of adultery and in one case adultery. This again shows that a claim of *ma'is alay* is often supported by indecent behaviour of the one of the spouses.

Table 3

Who claims ma'is alay?	Moral fear argument	Context moral fear argument	How many
woman	woman	accusation	2
woman	woman	adultery	1
woman	woman	ma'is alay	1
woman	man and woman	accusation	1
man	man	accusation	1
man	man and woman	ma'is alay	1
man and woman	man and woman	accusation	1
man and woman	man and woman	ma'is alay	2

A combination of tables 2 and 3 show the following:

Table 4

Who claims ma'is alay?	Who files for divorce?	Moral fear argument	Context moral fear argument	How many
woman	woman	-	-	5
woman	woman	Woman	accusation	3
woman	woman	Woman	adultery	1
woman	woman	Woman	ma'is alay	1
woman	not clear	Woman	accusation	1
woman	not clear	-	-	1
woman	no divorce case	-	-	1
man	man	-	-	1
man	man	Man	accusation	1
man	not clear	man and woman	ma'is alay	1
man and woman	man	-	-	1
man and woman	no divorce case	man and woman	accusation	1
man and woman	man	man and woman	ma'is alay	2

4.1.4 Kefiyah

In the majority of cases (twenty six cases) the use of *kefiyah* is discussed but it is only applied in three cases (PDR 3/3-18, 9/149-152 and 9/171-184). In six cases³³¹ there is a *hiyuv* on the husband to give a *get* and in one case (PDR 7/353-382) there is a *hiyuv* on both spouses to either give or accept a *get*. In one case (PDR 8/312-320) the *dayanim* rule that it is a *mitswah* for the husband to divorce his wife. In cases where the husband has married a second wife he is obliged to give a *get* to his first wife if she demands it, but even here the *dayanim* will not force the husband to do so. When the *dayanim* rule that a woman should accept a *get* and she refuses to do so, the husband can apply for a *heter me'ah rabbanim*, which would allow him to marry another woman. In some cases,³³² where the wife refuses to accept a *get*, the *dayanim* allow the husband to withhold *mezonot* (maintenance) from her, which might lead to *kefiyah* of the wife into accepting a *get*. In PDR 5/306-308 it is ruled that if a woman is classified as a *moredet*, she will be forced to forgo her *ketubah*.

There are hardly any other possibilities of getting out of a marriage discussed; in one case (PDR 1/5-19) a woman tried to have the marriage undone on the basis of *mekach ta'ut* because her husband had had a vasectomy before the wedding and the woman was not aware of this, but this was not allowed and in three cases also a husband tried to have his marriage cancelled on grounds of *mekach ta'ut* to no avail (PDR 1/193-201, 3/225-232 and 9/265-288). In another case (PDR 1/55-58) there is a discussion of whether impotence can be regarded as a *mum* and, if so, what would this mean for the marriage? In some cases it is apparent that the husband puts conditions on the divorce. In one case (PDR 3/161-165) the foregoing of the *ketubah* is part of the divorce settlement and in another case (PDR 8/104-107) the husband stipulates that his wife's life should be restricted: he requires that his wife will not be allowed to adorn herself or visit her father's house. This is however not accepted by the *dayanim*. Women can also seek to attach conditions to a divorce, as becomes clear in PDR 11/4-75. In this case the husband wanted his wife to be forced to accept a *get*, failing which he wanted to be given a *heter* to remarry, since his wife was ill and he claimed to be repelled by her. The *dayanim* decided, however, that the woman did not have to

³³¹ PDR 1/5-19; 1/51-54; 1/55-63; 1/129-138; 2/188-196 and 7/201-205.

³³² E.g. PDR 3/225-234.

accept a divorce from her husband. In the end the woman agreed to a divorce on condition that the husband gives her the apartment, which is what happens. In two reports (PDR 7/353-382 and 8/3-15), which probably deal with the same case, a couple entered into a conditional marriage, i.e. they made a contract before the marriage that they would only get married for three months and then get divorced. Such a contract resembles a contract between a man and a *pilegash*, a concubine. The couple agreed to this because the woman was expecting a baby and for the sake of the baby they wanted to have been married; thus the baby would legally be considered to be that of this father. The wife however contested the agreement and did not want to divorce.

4.1.5 Evidence

As is apparent in table 5 there are basically three modes of evidence which are used on a regular basis in regard to divorce cases: a spouse can either have witnesses, bring *amatlah* or there are *reglayim ledavar* which can be applied to the case. In some cases different forms of evidence are brought together. All these possible options of evidence will be discussed at length in chapter five. There is only one case where evidence is not mentioned and this is in PDR 5/306-310, which shows that any claim for divorce has to be proved. No-fault divorce is just not possible and thus, when filing for divorce against the will of the other spouse, a spouse has to have a provable claim against the other. Also counter claims made by the spouse who does not file for divorce have to be proved by that spouse, thus preventing a spouse from getting out of the marriage on a false claim without taking the consequences for it. There is no mention of evidence in PDR 5/306-310 because the case at that point is no longer a divorce case: even though both husband and wife have at different times sought a divorce over the past five years, now the main issue of the case is *shalom bayit*. The question is whether the husband has to pay *mezonot* towards his wife or not since the woman was regarded as a *moredet be'einah lei umetsarna lei* for more than twelve months. The end conclusion of the *dayanim* is that the couple can live together in peace again and the husband is obliged to pay his wife *mezonot*.

Table 5

Evidence	Moral fear argument applied to man	Moral fear argument applied to woman	Moral fear argument applied to both
proof	-	1	1
witnesses	1	4	1
witnesses/ yichud	-	1	-
reglayim ledavar	-	1	-
reglayim ledavar/ yichud	-	1	-
reglayim ledavar/ witnesses	-	2	1
amatlah	-	4	3
amatlah/ reglayim ledavar	1	1	1
amatlah/ reglayim ledavar/ witnesses	-	2	-

Table five shows that both witnesses (six times) and *amatlah* (seven times) are being used on a regular basis, both on their own and in combination with other forms of evidence (once with regard to witnesses and five times with regard to *amatlah*). *Reglayim ledavar*, which really is circumstantial evidence, can be helpful in a case, but might not be sufficient to prove a case, as becomes clear from the number of times it is used on its own (only once).

4.1.6 Halakhic comments

In the column of the halakhic comments to the cases (see Table 6) several issues occur on a regular basis. The most common one is דאיסורא התיכא אנפשיה שוויא, which is translated as “he equated her to a piece of prohibited food”³³³ and basically means that a husband cannot have relations with his wife any more because she is prohibited to

³³³ In the discussion of sexual practices in T.B. Ned. 20a-b women are described by the metaphor of being a piece of meat or fish. Sexual relations between a man and a woman are often designated in terms of food or eating and women are often compared to food. Several examples are: “a woman has the right to eat with her husband every Friday night (M. Ket 5:9)”, “setting the table”, “turning the table”, “women are the house of bread”. It is thus quite understandable that once marital relations are prohibited this is also described by the metaphor of “prohibited food”.

him on the grounds that he has stated that she has committed adultery. Often in cases where the woman files for divorce when the husband does not want this he gives as a counter claim that she has committed adultery and is thus prohibited to him. This means in principle that the husband has an obligation to divorce his wife since, according to *halakhah*, they are not allowed to remain married. If the divorce takes place because the wife has committed adultery, the husband would be exempt from paying his wife her *ketubah*. Thus the husband would have to prove that his wife really had committed adultery. Again it becomes clear that claiming that his wife is prohibited to him is a common formula which is used in modern day divorce cases: the wife wants a divorce, so the husband claims that she has committed adultery. This counterclaim of the husband would help him financially, since he could be freed from paying his wife her *ketubah*, and, as stated in chapter one, he can discredit his wife's reputation thus diminishing her chances of getting a divorce on good grounds together with her *ketubah*.

Another halakhic comment which appears several times is the depositing of the *get* and *ketubah*: in cases where the husband files for divorce and he can prove the grounds on which he wants a divorce he can deposit the *get* and the money of the *ketubah* with the *bet din* and it will stay there until the wife accepts the divorce. In the meantime the husband has no obligation to support his wife with *mezonot* because he is willing to divorce her. Of the four cases in the PDR³³⁴ where the depositing of the *get* and *ketubah* is discussed, in only one (PDR 9/149-152) is there a *hiyuv* on both spouses to give/ accept the *get*. In the other three cases it is ruled that there is no *hiyuv* on the woman to accept a *get*. The depositing of the *get* and *ketubah* basically forces the woman indirectly to accept the divorce when she has no income of her own. To prevent this from happening when there is no *hiyuv* on the wife to accept a *get*, the *dayanim* in PDR 1/193-201 ruled that even though the husband is allowed to deposit the *get* and *ketubah* at the *bet din*, he is not exempted from paying his wife *mezonot*. In the two remaining cases (PDR 1/321-329 and 11/4-75) the husband is not allowed to deposit the *get* and *ketubah* while he is obliged to pay his wife *mezonot*.

³³⁴ PDR 1/193-201, 1/321-329, 9/149-152 and 11/4-75.

In a few cases a spouse appealed for a divorce on the grounds of a *mum*. What is regarded as a *mum* by the other spouse varies sometimes quite substantially from the original meaning of a *mum*. In PDR 3/225-234 the man wants the marriage to be undone because his wife did not disclose before the wedding that she used to work as a prostitute. In PDR 9/265-288 the husband wants his marriage undone on the basis of the invalidity of the marriage: his wife married him (husband B) on the basis of the presumed death of husband A. Now that it turns out that husband A is still alive, husband B wants his marriage to the woman to be undone and in the majority of cases this is also what will happen: the woman will need a *get* from both husbands. In both cases the grounds for divorce are classified as *mum*.

The most important halakhic comment I found is that in nine cases the ruling of *dina de-metivta* (better known as the *takkanat haGeonim*) is mentioned as a possibility to be applied to women. This is remarkable because this Gaonic rule was rejected by the *Rishonim* from Rabbenu Tam onwards, yet it appears in the PDR and will thus be discussed under the appropriate heading.

Table 6

Halakhic comment	Woman filed for divorce	Man filed for divorce	Not clear who filed divorce	No divorce case
“he equated ...”	3	3	1	3
depositing get and ketubah	-	4	-	-
dina de-metivta	5	-	3	1
mored(et)	5	1	1	1
takkanot R. Gershom	3	1	-	-
mum	3	1	-	-
nikhsei melug ³³⁵	-	1	2	-

³³⁵ *Niksei melug* is property that belongs to the wife and of which the husband has only the usufruct, without any right to the principal or any responsibility for loss or deterioration. See also chapter one, footnote 93. According to the *halakhah* all of the wife’s income belongs to the husband and he is thus free to do with it as he wants. Some men use this argument during divorce cases when they are ordered to pay *mezonot* to their wife. They then claim that the income the wife earns herself is the *mezonot* he is paying her. I.e. he does not really feel it in his own pocket because she has to work for her own *mezonot*. In cases where the husband rebels against his wife, as for instance in PDR 2/262-270, it is discussed whether the husband is still entitled to the *niksei melug*.

4.1.7 Other issues

Of the so called “other issues” in Table 7 several can be found on a regular basis as well. The five issues that appear most often are *mezonot* which have to be paid to the wife, *shalom bayit* which is sought by one of the spouses, a recalcitrant husband, a *heter me’ah rabbanim* which the husband is given or requires and return of assets after the divorce. *Mezonot* is one of the most important points in a divorce case because as long as the couple is separated yet not divorced the husband basically has a halakhic obligation to his wife to support her, even though this is often contested by the men in question. Especially when the woman files for divorce a man might not be willing to pay her *mezonot*, because he might feel that he is losing his wife, i.e. a valuable asset, while he is still responsible for supporting her. For many men to be exempted from *mezonot* could help to either obtain a divorce they want or to prevent their wives from divorcing them.

Shalom bayit is the claim of one of the spouses that (s)he wants to restore the marriage bond, thus trying to prevent a divorce from happening. Since *shalom bayit* is also the primary goal of every *bet din*, because they would like to preserve marriages whenever possible, to claim *shalom bayit* may delay a divorce procedure tremendously. In an interview I held in 1998 with a lawyer (*orech din*, who works for Isha LeIsha³³⁶ and who represents abused women in the *bet din*) I was told that in many cases the husband will offer his apologies for his violent behaviour and claim that he wants *shalom bayit*. Often a *bet din* will then try to encourage the wife to mend matters. According to Leah Ziegelaub, a rabbinical lawyer (*to’enet rabbanit*), proof of abuse will, however, favour a *bet din* towards the wife and in many cases they will put a *hiyuv* on the husband to give a *get* to his wife, even if he claims *shalom bayit*. This implies a change within rabbinical courts rulings.

Whenever a *bet din* rules that there is a *hiyuv* on the wife to accept a *get* and she refuses to do so, the husband can ask for a *heter me’ah rabbanim* in order to marry a second wife. Such a *heter* is not possible for a woman when her husband refuses to act according to the *hiyuv* that the *bet din* has placed upon him to give a *get*, since

³³⁶ Isha LeIsha is an organisation in Israel that works with and for abused women. The organisation has shelters and follow-up apartments for abused woman and provides them with legal and other care.

according to *halakhah* a woman is not allowed to be married to two men at the same time. This difference is possible due to the fact that the *halakhah* is not an egalitarian system. In a few cases within the PDR a man asks for his wife to be forced to accept a *get* and if she refuses, he wants to be given a *heter me'ah rabbanim*. In other cases a woman files for divorce after the husband has been given a *heter me'ah rabbanim*. These cases are interesting because, as we have just noted, a husband will only be given a *heter me'ah rabbanim* if the wife refuses to accept a *get*. How come then that she is now filing for a divorce? Apparently whenever the woman refuses to accept the *get* and the husband remarries on the basis of a *heter me'ah rabbanim*, he is not obliged any more to give her a *get* when she wants one. Thus the wife has to start a divorce case against her husband. This puts her in a difficult position since there is really no incentive for the husband to give a *get*: she first refused to accept a *get* when he wanted to give it, putting him through the trouble of obtaining a *heter me'ah rabbanim*, and now he has started a new life. There are thus women who have become *agunot* due to their own refusal to accept a *get*. We may conclude that the husband's possibility to receive a *heter me'ah rabbanim* when the wife refuses to accept a *get* serves in effect as an indirect form of coercion towards the wife.

Table 7

Other issues	Woman filed for divorce	Man filed for divorce	Not clear who filed divorce	No divorce case
mezonot	3	1	2	2
shalom bayit	2	2	-	2
recalcitrant husband	2	-	-	-
heter me'ah rabbanim	2	2	1	-
return of assets	-	2	-	-

All categories, which have been mentioned here in brief, will be expanded upon in greater depth in this chapter, where cases will be examined one by one or in the context of discussion of particular topics.

4.2 Five cases where there is no divorce

Before dealing with divorce cases in the PDR and the use of the two maxims in them we will first look at the cases which do not deal with divorce, because they also contain valuable information on how the two maxims are used in modern day court cases. Of the five cases which do not deal with a divorce, the first (PDR 5/306-310)³³⁷ has already been mentioned in section 4.1.5 where modes of evidence are discussed. This case originated as a divorce case: over the course of five years first the wife claimed for divorce because of *ma'is alay*, while her husband wanted *shalom bayit*, then she wanted *shalom bayit* and her husband wanted a divorce. At the time of the case the woman retracted her claim that she was repelled by her husband and also her husband wanted to start married life again with his wife. All they want to resolve in the case is whether the husband is still obliged to pay his wife *mezonot* because she was regarded as a *moredet be'einah lei umetsarna lei* for more than twelve months. Since the woman, when she filed for divorce on the grounds of *ma'is alay*, also claimed for her *ketubah*, there was a fear that she had cast her eyes upon another man, which consequently resulted in the fact that she was not classified as a *moredet ma'is alay* but as a *moredet be'einah lei umetsarna lei*. The only valuable information we retrieve from this case is that by asking for the *ketubah* together with the *get* without giving any evidence for her claim, a woman becomes not trusted and is even regarded as a *moredet be'einah lei umetsarna lei*, thus losing all her financial claims against her husband. Apparently though a woman in such a position can still retract her words and be given back her financial rights.

The second case (PDR 6/131-158) is an appeal of a woman to the High Rabbinical Court³³⁸ against a *pesak din* that classifies her daughter as a *mamzeret*. The daughter wants to get married but the *bet din* will not allow her *khupah wekiddushin* because they say that her background is doubtful: she may be a *mamzeret* and would thus not be allowed to marry an Israelite. The mother got pregnant with her daughter while she was not married, yet she never revealed who the father was. Since the mother got pregnant while not being married the *bet din* ruled that she became pregnant because

³³⁷ Dayanim Waldenberg, Yosef and Cohen presiding.

³³⁸ Dayanim Betsalel Zolti, Shaul Israeli and Ovadya Yosef presiding.

of *zenut*. *Zenut* is normally translated as “prostitution, harlotry”, but the Rambam defines *zenut* as any sexual act which disqualifies a woman to marry a *kohen*:

Any woman who has intercourse with a man who renders her a harlot, whether by rape or by consent, whether wilfully or by error, whether naturally or unnaturally – once he has initiated with her, she is invalidated for the priesthood, because she has become a harlot.³³⁹

A *kohen* is not allowed to marry a divorcee, a proselyte or a Jewish woman who has had intercourse with a gentile. This means in practice that a woman who works as a prostitute but only has Jewish clients can marry a *kohen*, while a woman who was raped by a gentile cannot. This seems strange because a prostitute is regarded as having low sexual morals while this cannot be said *per se* of a woman who is raped, but it is not the intention of the sexual relation that renders the woman unfit but the person she has had relations with. There is a certain spiritual blemish attached to a Jewish woman once she has had marital relations but was divorced, or has had relations with a gentile, or if she had been a gentile herself at some point (thus being suspected of having had sexual relations with a gentile). A woman can never get rid of this spiritual blemish.

If, in this the case, the woman would have said after she gave birth that the father was Jewish, and thus the child would be *kosher*, she would have been believed even if the majority of the people in that town were *mamzerim*. The woman however did not say this after the birth. She seems to have mentioned to someone, an unknown or unnamed person in the story, that “the bastard (*mamzer*) forced me to intercourse”. Even after she spoke to this person in this way the baby is still only a *safek mamzer*, even in places where the majority of people are *mamzerim*. The mother then changed her story and did not claim any more that she had been raped. According to the woman she was married to husband A but he died. She then got civilly married to husband B and, while being pregnant, they divorced civilly. She moved in with the brother of her first husband and they moved to Germany. The *bet din* there believed that they were married and that the daughter was theirs. The woman did not contest

³³⁹ Rambam, Hilkhhot Issurei Bi’ah 18:6.

this because it gave them many advantages such as an apartment to live in. Several witnesses testified against the woman and they all give different versions of the story the woman had told. Some claimed that this unnamed husband B was the father while others claimed that the brother of husband A was the father. All agreed however to the fact that the husband A had died when the woman got pregnant, although there was disagreement about when he died. In the end the *dayanim* decided to allow the daughter to marry any person she wanted, thus lifting the status of *mamzerut*. In this case the moral fear argument is mentioned seven times, all in connection with when proof (*amatlah*) is allowed considering a woman's own status and when it is not because of the fear that she has cast her eye upon another man. The moral fear argument is, however, never actually attached to the woman in the story because there was no reason to think that she had cast her eyes upon another man since the woman was not seeking either divorce or anything else for her own benefit; she only wanted her daughter to be classified as a non-*mamzer* so that she could get married to the man of her choice. With the absence of any benefit for herself, the woman was trusted not to have cast her eyes upon another man. This shows that the moral fear argument is not simply attached to all women no matter what, but only to those women who seek a divorce or any other benefit for themselves. This becomes apparent also in cases where the woman claims *ma'is alay* and is willing to forgo her *ketubah*: by doing this the woman shows that she hates her husband enough to even forgo her financial security and thus there is no fear that she has an alternative reason for wanting the divorce.

The third case in PDR 7/281-288³⁴⁰ is also a case of suspected *mamzerut*. In this case the *kashrut* of the marriage of the parents was in doubt and thus also the *kashrut* of the daughters born in that marriage. The two daughters of the couple came to the *bet din* and asked for permission to get married. They both brought their intended spouses with them. They also had a brother much younger than them. There was already a file within the *bet din* where the mother asked for permission to marry her current husband, whom she had only married civilly, with *khupah vekiddushin*. The woman had been married before to husband A in Odessa and he did not give her a *get* when the marriage was finished. When the woman left for Israel she turned to the Rav of

³⁴⁰ Dayanim Kani'el, Pink and Yaluz presiding.

Odessa to secure her a kosher *get* from husband A and she sent a *shaliach* to accept the *get* on her behalf. The woman said that the marriage to husband A was not performed in the presence of witnesses and thus the *dayanim* held that there probably was no marriage at all. The fact that the wife nevertheless asked to secure a *get* did not imply that she was married because “women are not educated in *halakhah*” and thus she thought that she would need a *get* from such a marriage while this is not the case. When husband B, who claimed to be a *kohen*, found out that his wife had been married before, he prohibited his wife to himself with the halakhic formula of שווייה דאיסורא התיכא אנפשיה. Husband B told the *bet din* that his wife was lying because, according to him, his wife had told him, before they got married, that she had never been married, either civilly or religiously, but that she had been with a man like people in Russia used to do. This man must have been a Jew; otherwise he could not have married her at all. Husband B had, by claiming that his wife was defiled, prohibited her to himself. The *dayanim* ruled that husband B could claim that he did not know that by stating that she was defiled he would prohibit her to himself. The *halakhah* in matters of prohibition by self-incrimination or accusation is as follows: (1) a person is not believed considering himself when he wants to prohibit himself to someone else by means of self-incrimination, since a person cannot turn himself into a *rasha*, a wicked person. (2) In the same line of reasoning a person cannot, by mere accusation, prohibit someone else to himself and thus he is not believed in his statement. (3) A person can declare about himself that he is a *mamzer*, and with this he has also declared his children to be *mamzerim*, but he cannot impose this status on other people. Thus, in our case, (1) the wife cannot prohibit herself by saying that she did not have a *get* from husband A when she married husband B, (2) husband B can neither prohibit his wife to himself nor (3) declare their children *mamzerim* by claiming that the mother was prohibited to him. After conferring with the rabbi in Odessa, the *dayanim* decided that there was no proof of the first marriage and thus the wife was not prohibited to marry husband B. The daughters were allowed to get married in *khupah vekiddushin* to the men of their choice. In this case the moral fear argument is mainly mentioned to say that a woman cannot prohibit herself to her husband, because there is always the fear that she has cast her eyes upon another man. Here, however, not believing the wife helped both her and her children. It is interesting to see that the *dayanim* held that even though the wife asked for a *get* from husband A the marriage to him was never valid. The reason they gave is another

general statement made about women: women are not educated in *halakhah* and thus one cannot rely on their asking for a *get*. It is apparent in this case, as also in other cases, that even though these general statements can have a negative impact on the way women are regarded within Judaism, on many occasions a marriage or a person's life is saved by not believing what a woman says, or thinking that women do not have enough knowledge of *halakhah* to start with. Turning women into a uniform group can thus also have positive aspects.

In the two last cases the status of the children probably played a big role in deciding that the woman's statements about either her pregnancy or her previous marriage were not to be believed. It is apparent also in other cases that *dayanim* try to turn possible *mamzerut* of the children into non-*mamzerut*, thus also helping the mother out of her precarious situation. Even though it is not the aim of the *bet din* to help the woman, which is very clear from the third case, they often however do. In the third case, for instance, the mother of the daughters had a file in the *bet din* asking for permission to marry husband B with *khupah vekiddushin*. This case was already on file before the daughters applied to the *bet din* to get married to their intended husbands, otherwise it could not have been mentioned in the opening statements of the file of the daughters. The case of the *safek mamzerut*-status of the daughters was, however, more quickly solved than the case of the mother asking for permission to marry. The side effect of the daughters' case was, nevertheless, that the mother also was now allowed to marry her husband with *khupah vekiddushin* (although this is not mentioned at the end of the case of the daughters, but I see no other logical sequence). Thus, at times, women are helped through the status of their children and this even applies to women in an *agunah*-situation. As has been discussed in the previous chapters, it is apparent in some cases that women who decide to take matters into their own hands by starting a new relationship, thus not waiting for a release from their husbands, are often helped more easily than women who wait patiently. The fear that the children born out of the relationship that such a self determined woman starts will be *mamzerim* helps to get the *dayanim* to find her a way out of her first marriage. It seems thus that women who transgress the law are more readily helped than women who do not, which in itself can be regarded as a perversion of the law. The willingness to help a woman out of an *agunah*-situation should always be the same. Nevertheless, these cases in themselves show that creativity in the *halakhah* is possible, but rabbis are only willing to use this

creativity *bediavad*, after something has become a fact, and not *lekhathilla*, before something becomes a fact. Maybe rabbis are afraid that if they would help more women *lekhathilla*, the institution of marriage would be destroyed. While understanding such an approach in principle, there are cases of *igun* where a more flexible approach to the *halakhah* is required.

The fourth case (PDR 8/104-112)³⁴¹ comes close to a divorce case and might in the original court have been a divorce case. The case, from the Rabbinical High Court, is an appeal on the part of the wife against a *pesak din* of the regional court of Haifa in which she had claimed for *mezonot*, *shalom bayit* and a restriction on the husband to leave the country. The couple is separated, but the wife wants to restart married life with her husband. As long as this does not happen, she wants her husband to supply her needs. During the proceedings in front of the *bet din* of Haifa, both spouses slandered each other and both claimed *ma'is alay*, i.e. (s)he is repulsive to me, while giving *amatlah mevureret*,³⁴² clear proof, for it. What the clear proof consists of is not mentioned here, but later on it is stated that the husband beats his wife³⁴³, gives her a bad name amongst the neighbours and that he has a relationship with another woman.³⁴⁴ Why the repulsion of the husband is justified is not mentioned at all. The wife now withdraws her accusations and wants to get back with her husband. In the case in the *bet din* of Haifa the husband had claimed *me'usah alay* and withheld relations from his wife on this ground, which he was entitled to do, according to the *dayanim*, which means that they do not classify the husband as a *mored*. His wife came with a similar complaint, that she is repelled by him and cannot have relations with him on that basis. The *dayanim* thus did not regard her as a *moredet* either because they have to “learn one from the other” (*dun mina vemina*), i.e. they have to apply the same standards to both the husband and the wife. In cases where the *dayanim* however fear that the woman has cast her eyes upon another man, she will be classified as a *moredet* and the *dina de-metivta* cannot be applied to her. The same would apply if the *dayanim* fear that the husband has cast her eyes upon another

³⁴¹ Dayanim Elyashiv, Zolti and Israeli presiding.

³⁴² For an extended explanation of *amatlah mevureret*, see chapter 5, The necessity of proof.

³⁴³ Domestic violence in itself is a ground for divorce nowadays, as we have learned while discussing the “other issues” in table 7. In this case, however, it is not regarded as such. Maybe a change has taken place in divorce cases and abuse by the husband has become an immediate ground for divorce.

³⁴⁴ Even the husband's relation with another woman seems to not have been a ground in itself for a divorce.

woman, which seems to be the case here. The woman has claimed constantly that the husband has a concubine (*pilegesh*). The husband denies this, but the wife names the woman. In the appeal case it is not mentioned whether or not the original court believed the woman, but since they apparently ruled in favour of the husband, one can infer that they did not believe her. The *dayanim* of the appeal case see in the end that there is no possibility that the couple can remain married; the husband shows no intention to resume the marriage, as is apparent from his actions (he slanders her and has another woman). In addition, even though the wife claims she wants *shalom bayit*, there is no real desire on her part to get back with her husband; it is a position she has taken for a certain purpose (*emdat panim*). What the purpose of her taking this stand is, is not mentioned, but I can imagine that saying that she wants *shalom bayit* can help the woman in various ways. First of all, it strengthens her position in asking for *mezonot*, since a man has to provide for his wife while they are married, and because the woman wants to remain married he has to provide for her. Second, the husband wants to divorce his wife, and even more so now that he has another woman, but he cannot divorce his wife against her will and by claiming *shalom bayit* his wife is preventing him from divorcing her. Thus, saying that she wants *shalom bayit* has become a tool in the hands of the wife. The *dayanim* see, however, that *shalom bayit* is out of the question. Since the husband is the cause of the separation he cannot be exempted from paying his wife *mezonot* until he gives her a *get*. The wife has thus succeeded in getting her *mezonot* but she can apparently not prevent a divorce.

In this case the moral fear argument appears only once, as I mentioned, in connection with the fact that the woman is not regarded as a *moredet* even though she withholds relations from her husband. If, however, the *dayanim* fear that she had cast her eyes upon another man, then they would classify her as a *moredet*. The fact that the woman claims that she wants *shalom bayit* takes away this fear, because if she really wanted to live with someone else she would not want a reconciliation with her husband.

There are two very important aspects in this case, aspects which also appear in other cases in the PDR: (1) apparently the moral fear argument is applicable to men as well and (2) *dina de-metivta* is still in principle applied today. Both aspects will be discussed later on under the specific subheads. Another aspect which is of importance is the fact that in the original case the claims of *ma'is alay* were accepted due to

amatlah mevureret. Modes of proof, such as *amatlah mevureret*, will be discussed in chapter 5.

In the fifth case (PDR 11/315-326)³⁴⁵ a couple asks for a *heter* to remarry after the husband divorced his wife because she had claimed that she had committed adultery. When she said that she had committed adultery, the husband believed her yet there were no witnesses to the adultery. There were however people who saw her in a taxi together with another man. The *dayanim* rule that it does not really matter whether the husband believed his wife's claim that she had committed adultery or not, because, due to the *herem* of Rabbenu Gershom, he himself is not believed when he says that he trusts his wife's words. After the *herem* of Rabbenu Gershom men are suspected of having cast their eyes upon another woman when they say that they believe their wife's claim of adultery.³⁴⁶ The wife in this case says that she claimed that she had committed adultery because she had problems with her husband and wanted to get a divorce. She thought that he did not want to give her a divorce and thus she made up the story of the adultery. Now the woman retracts her words and gives *amatlah*, an explanation, for them. The husband, in contradiction to his previous beliefs, believes that she is now telling the truth and the couple has been living together already for several months. Since there are no witnesses to the adultery the *dayanim* do not accept the woman's claim that she committed adultery because there is the fear that she might have cast her eyes upon another man. According to the Rema³⁴⁷, who wrote in the name of the Maharam of Padua, if a woman claims that she has committed adultery, even though she is not believed, when she is firm in her claim and he divorces her on that ground then the couple cannot get remarried. According to the Bet Shmuel,³⁴⁸ however, there is no fear that the woman has cast her eyes upon another man if the couple is already divorced, since she is now free to marry whomever she wants. This is supported by the Helkat Mehukek. If the woman gives *amatlah* for why she originally claimed that she had committed adultery while this was not the case, the couple is permitted to remarry. When the wife claimed that she had committed adultery, she also claimed that she had found blood on three occasions after she and her husband had had marital relations. The *dayanim* wonder why she

³⁴⁵ Dayanim Kaplan, Abitan and Hash'ai presiding.

³⁴⁶ S.A., E.H. 175:9.

³⁴⁷ Rema, E.H. 115:6.

³⁴⁸ Bet Shmuel E.H. 100:1.

claimed these two things at the same time, since the woman does not know the *halakhah* well enough³⁴⁹ to know that when a woman finds blood on three occasions after marital relations³⁵⁰ she is prohibited to her husband and thus, they decide, this cannot have come into her mind. The woman is therefore believed on the fact that she found blood on three occasions after marital relations and considering this there is no fear that she has cast her eyes upon another man. In the end the *dayanim* decide that they accept the husband's statement that he believes the woman when she says that she did not commit adultery and they allow the couple to remarry.

In this case there are nineteen places where the moral fear argument is mentioned: should the woman be believed if she says she has committed adultery or is there a fear that she has cast her eyes upon another man? Due to the fact that the *dayanim* go along with the ruling that one should not trust a woman when she says that she has committed adultery, they can allow her statement that she has been lying and thus can allow them to remarry. The fact that the couple had resumed living together did have an impact on the case. This might imply that if the couple had come to the *bet din* before they had resumed relations, the ruling might have been different. This is a good example of a ruling *bediavad* in contrast to a ruling *lekhathilla*.

A most striking difficulty arises, however, with this *pesak din* and this is related to the fact that the woman claimed that she saw blood three times after she and her husband had marital relations and the *dayanim* believed her. The question may be asked why the *dayanim* trust the woman regarding this statement if she does not bring proof for her claim and the answer to this is because women are trusted in matters of *nidah*. However, it is also claimed in this case that women do not know the *halakhah* well enough and thus cannot be trusted when they make a halakhic statement. In this case it is argued that the woman did not know that a claim of having discovered blood

³⁴⁹ This concept can be traced back to several sages in the sixteenth century who would sometimes side with a woman out of compassion and solicitousness towards her, just because "women are not conversant with the law". See e.g. Radbaz 1:53, 398, 401, 2:599, 801, 837, 3: 921; Radbaz, New Responsa 135; Mabit 2:119, 3:68, 131; R. Caro, Responsa Bet Yosef 84; R. Caro, Avkat Rokhel 184; R. E. Arha 32; Maharit 1:66; Maharitatz 177 (as quoted in Lamdan, 2000, p. 22).

³⁵⁰ Whenever a married woman finds blood after marital relations (after the hymeneal bleeding has ceased) on three occasions then the *halakhah* rules that the marital relations between this couple causes the woman to be a *nidah* and thus they have to divorce due to apparent physical incompatibility. This woman can then get married to another man, but if the same happens again, she should be divorced again. When it happens with three consecutive men, the woman is not allowed to get married any more.

three times after marital relations would bring her into a position where she had to be divorced. Having gone through *kallah*-lessons myself, i.e. the lessons a bride takes before the marriage in which the laws of *taharat hamishpakhah*, family purity, are explained, I know that this issue is discussed nowadays in the literature used during the lessons and thus it cannot really be claimed that a woman does not have this knowledge. The case in the PDR was held in 1977 and it might be that in those times *kallah*-lessons were not so explicit in mentioning sources. Additionally, from the very fact that the couple has been living together for several months without being married, it might be safe to conclude that the couple is not too religious and the woman might not have taken *kallah*-lessons before her wedding. Thus, from this point of view, it is more understandable why the *dayanim* ruled that she could not have known that she would bring herself into a position where she should be divorced when she stated that she had found blood on three occasions after marital relations. On the other hand, the woman does mention that she found blood on *three* occasions which implies that she knows that three times constitutes a *hazakah*, a presumption. In addition to that, it does not matter whether the woman knows the *halakhah* well or not, the *dayanim* say that they believe that she told the truth about finding blood three times. This means that she is forbidden to her husband no matter what. Thus, it is incomprehensible to me how the *dayanim* can rule that the couple can get remarried. The only explanations I can imagine are that it is possible that, since the couple is living together anyhow, the *dayanim* do not want to promote licentious behaviour and thus agree to a remarriage. Another point is that there is no mentioning of the woman finding blood after relations since the couple got back together so maybe the *dayanim* can argue that her body has apparently changed, thus not making her *nidah* any more after relations with this man.

4.3 The two maxims in one source: PDR 7/65-74 and PDR 11/4-75

That in current days not much value is attributed to *tav lemeitav* can be deduced from the *Piskei Din Rabbani'im*, where *tav lemeitav* is used only four times in three divorce cases, PDR 2/188-196, PDR 7/65-74 and PDR 11/4-75. However, in the last two of these divorce cases *tav lemeitav* is mentioned together with the moral fear argument.

In PDR 7/65-74 the *dayanim*³⁵¹ of the Rabbinic High Court are dealing with an appeal of the wife against the *pesak din* of the rabbinical court of Petach Tikva which refused to force the husband to give her a *get*. The husband has married a second wife without having been given a *heter me'ah rabbanim*³⁵² and his first wife wants a *get*. A discussion develops about whether the man should be forced to give a *get* to his first wife. According to the *dayanim* if a man marries a second wife and the first wife asks for a divorce, he has an obligation (*hiyuv*) to divorce his first wife, for two reasons: first of all, he promised his wife at the time of the wedding that he would not marry another woman. Second, it is degrading for a woman if her husband marries another woman and it gives her a bad name amongst the neighbours. The question is however whether the *dayanim* should force him to divorce, since there is a large discussion about this amongst the *poskim*. The husband claims that he loves his first wife and wants to continue family life with her; the fact that he has married another woman does not have an influence on that. There is also a discussion amongst the *poskim* whether the man should be forced to divorce his second wife. This is dependant on the discussion about whether transgressing the *herem* of Rabbenu Gershom only applies to the act of *nissu'in* to the second wife or whether even the continuation of such a marriage is a transgression in itself? If it only applies to the act of the *nissu'in* then according to many *poskim* one cannot force the husband to divorce his second wife, while if it applies to the continuation as well then one might force him to divorce his second wife. The Hagahot Mordechai writes that a man should not be forced to divorce his wife when he transgresses the law, not even when he is a *mumar*. The reason he gives is *tav lemeitav*, thus implying that such a marriage is better for a woman than no marriage at all. According to the Noda BeYehuda,³⁵³ where a husband (not being *Ashkenazi*) voluntarily took upon himself the obligation of the *herem* of Rabbenu Gershom, he should be forced to give a *get*. The *dayanim*, however, rule that there is no acceptance of the *herem* of Rabbenu Gershom here: the man stipulated at the time of the *nissu'in* that he would not marry another wife “like the *herem* of Rabbenu Gershom”, but he did not say that he bound himself to the *herem* itself. Nevertheless, the *herem* is accepted in Israel and thus the husband cannot divorce his

³⁵¹ This case, which is being held in 1966, was presided by *dayanim* Nissim, Elyashiv and Zolti.

³⁵² The husband could do this because he is Sephardic and thus not obliged to adhere to the takkanot of Rabbenu Gershom, which implies that he can be polygamous whenever the law of the country agrees to it. Whether the husband married his second wife outside Israel and took her back to Israel or whether he married her in Israel, does not become clear from the case.

³⁵³ Noda BeYehuda Tanyana, E.H. 90.

wife against her will by claiming that she has committed adultery, because there is the fear that he might have cast his eyes upon another woman. The *dayanim* rule that they will not force the husband to give a *get* because the *Acharonim* had already ruled that even in a case where the husband has married a second wife they will not force the husband to divorce his first wife if she asks for it, because they are afraid that she might have cast her eyes upon another man. The same applies to a woman who comes to a *bet din* and claims divorce on the grounds of *ma'is alay*; also in that case the rabbis ruled that there is a fear that she has cast her eyes upon another man. In the end the *dayanim* rule that they cannot change the *pesak din* which was given in the regional court and the husband will not be forced to give a *get*. They also do not see any grounds for the woman to appeal against their decision. This basically means that the woman will remain an *agunah* now that the Rabbinic High Court ruled that they cannot force the husband to give a *get* to her, because of the basic fear that the woman only asked for a divorce because she had found another man she wanted to marry. Notwithstanding the fact that the husband has married another woman, the first wife is suspected of having an ulterior motive for wanting a divorce. The *dayanim* accept that the husband is to some extent bound to the *herem* of Rabbenu Gershom, were it only because he lives in Israel, yet they see no grounds even in that for enforcing a *get*.

The basic question that comes to one's mind in this case is how the husband was able to marry a second wife while living in Israel, since according to the laws of the land a man can only be married to one woman at the same time. The fact that the man is a Sephardic Jew gives him the opportunity to marry a second wife in a different country where polygamy is accepted and then to return to Israel with his second wife, but it might even be possible halakhically³⁵⁴ for him to marry a second wife in Israel. Even though the man would be breaking the laws of the State of Israel, halakhically he has not committed a transgression and maybe that is why he was given the possibility to

³⁵⁴ The only source I found, with help from Rabbi Dr. Yehudah Abel, is Yabia Omer, Volume 5, E.H. 1, which speaks about a man who wants to divorce while his wife does not. Rav Yosef rules that if the man is willing to pay his wife the full *ketubah* and she refuses, then he can divorce her against her will or even marry a second wife. According to him the *takkanah rabbanut hareshit*, signed by Rav Uzziel, R. Herzog and others, does not apply to Sephardic Jews. He however also writes, citing Rav Ami, that a man who marries a second wife should give his first wife her full *ketubah* together with a *get*. Since, however, this case does not seem to be a case where the first wife initially refused a *get*, it is incomprehensible to me how the husband could be allowed to marry a second wife in Israel without having a *heter me'ah rabbanim*, thus I assume that he must have married his second wife outside of Israel and subsequently brought her to Israel.

marry a second wife. *Dina de-malkhuta dina* does not apply here because it is a case of *heter we'issur* and not one of financial matters. But even though the second marriage of the husband might be halakhically permissible can one view it as also halakhically correct? The first wife did not marry her husband with the intention that she would become one of many wives, since the husband married her stating that he would not marry another woman. Now she finds herself in a situation where not only has her husband married another woman, but also the Rabbinic High Court has taken away any possibility for her to get out of the marriage, due to the fear that she might have cast her eyes upon another man and due to the opinion, although mentioned only once, that it is better for any woman to be married, because of *tav lemeitav*, than to be divorced. Apparently it is held that the woman will be happier being one out of two wives in a marriage than to be no wife at all, which is doubtful in my opinion. If the woman would be happy sharing her husband with another woman then, first, she would not have asked her husband before the marriage to undertake not to marry a second wife, and, second, she would not have filed for divorce in a *bet din*. Both facts prove to me that the woman did not want to be married to a man who was at the same time married to another woman.

In PDR 11/4-75³⁵⁵ a husband applied to the *bet din* to force his wife to accept a *get*. The woman was an epileptic and her husband had lived with her and her illness for several years. Now, however, he claims that he has become repelled by his wife's illness and wants a divorce. If his wife refuses to accept the *get*, the husband wants to be given a *heter me'ah rabbanim*. If no *kefiyah* is ordered against his wife, then the husband wants at least to be able to deposit his wife's *get* and *ketubah* to force her indirectly to accept the *get*. The couple was Sephardic and the husband had taken an oath at the time of the *nissu'in* that he would not marry a second wife. The discussion deals with whether the wife's illness is grounds enough for the husband to claim *me'usah alay*. Considering the fact that he has lived with his wife several years while she was ill, the fear does arise whether he has cast his eyes upon another woman. His wife claims in the *bet din* that he has been living with another woman, which well supports the fear that he has cast his eyes upon another woman. The *dayanim* deal with the question of sequence: did the illness of his wife lead to his being repelled by

³⁵⁵ Dayanim Tana, Horwitz and Ben-Shimon presiding.

her and to his wanting a divorce and subsequently falling for another woman, or did he cast his eyes upon another woman and then file for divorce? This makes a difference to the case, because it has been argued in the halakhic literature³⁵⁶ that there is a *hiyuv* on a woman who is an epileptic to accept a *get* and in some cases the husband is even allowed to divorce her against her will or marry a second wife, even after the *herem* of Rabbenu Gershom.

When dealing with the claim of repulsion the rabbis quote the Rosh (43:7), writing about a woman who comes to the *bet din* with a claim of *ma'is alay*: "...in our times the daughters of Israel are loose and thus there is a fear that she has cast her eyes upon another man".³⁵⁷ Thus a woman who claims *ma'is alay* has to bring *amatlah* for her words. The same applies to a man who claims *me'usah alay*, especially in this case where the husband lived with his wife for several years after the woman became an epileptic. In this case the *dayanim* mention the fear that the man has cast his eyes upon another woman more often (fourteen times) than the fear that the woman has cast her eyes upon another man (four times). The sources that deal with the fear that the woman has cast her eyes upon another man serve as an example of how to deal with the case where there is a fear that the man has cast his eyes upon another woman. The rabbis learn one from the other: thus the man, too, has to bring *amatlah*. In this case the moral fear argument is never attached to the woman, but it is attached to the man.

Considering *tav lemeitav* the *dayanim* claim that it is not good for a woman to come home and find another wife there. They support their claim by quoting the Maharam of Padua,³⁵⁸ who wrote that a man has to do good for his wife because there are many women available to a man because of *tav lemeitav*, i.e. because a woman is satisfied with almost any man, but for a woman there are not many men available because she has to find favour in a man's eye, i.e. men are more particular about which wife they want. The *dayanim* continue by saying that the husband made the oath for the benefit

³⁵⁶ Radbaz 1:53, 7:46; Maharitatz 53, New Responsa 1:48; R. Meir Gavizon, Responsa 1:10, (as quoted in Lamdan, 2000, p. 145 and 191). If the man is an epileptic there is no *hiyuv* on him to divorce his wife, although it is considered a *mitsvah*

³⁵⁷ Note that already the Rosh in his time (1250-1327) regarded the women of his generation as loose women, a claim which has been heard ever since specifically regarding the notion of the decline of the generations. It seems that the moral fear argument is thus socially contingent.

³⁵⁸ Maharam of Padua, Darkhei Moshe, Y.D. 228:14.

of the woman, so that she would not have to live with another woman. He did not make the oath for his own benefit, even though he did receive a *nedunyah* when he married his wife. His wife would however not have married him had he not taken the oath. To this the *dayanim* ask: what about *tav lemeitav*? Do we not normally hold that a woman is willing to marry anybody, even a *mukeh shehin*? This question implies that the woman would have been happy to marry her husband even if he had not taken the oath. As a possible answer to their own question the *dayanim* quote the Rashba who wrote that “every marriage between a man and a woman should be performed like the agreement between Moshe Rabbenu and Yitro: only after Moshe vowed did Yitro give him his daughter.” I think it is safe to conclude from both passages that the *dayanim* in this case do not adhere to *tav lemeitav* because it is *not* good for a woman when her husband marries another wife and the husband has also sworn that he would not do this. At the end of the case the *dayanim* rule that there is no *hiyuv* on the woman to accept a *get* and they will not give a *heter* to the husband to marry another woman. The husband will be liable for *mezonot* to his wife and the confiscation of the apartment remains valid, which means that the woman can continue to live in the apartment. As an addendum to the case it is mentioned that the woman has agreed to a divorce on condition that the husband gives her the apartment and this has taken place. This makes it clear that it is possible for a woman to attach conditions to a divorce, just as it is possible for a man, although this may also be regarded as blackmail.

In this case the husband could not avoid his obligation due to the fact that he had sworn not to marry another woman. This stands in contrast to the previous case where the husband had made a similar promise, but not sworn. Nevertheless in that case the husband married another wife, presumably without a *heter me'ah rabbanim*, since this is not mentioned in the case. Here again we see a difference in a case being decided *bediavad* and *lekhathilla*. It is apparent that this is also applicable when it concerns the husband. In the first case the husband had already married another woman, without asking permission to do so, while in the second case the husband asks for permission and does not get it. Had the husband in the first case asked for permission then he might not have received it either. The situation for the woman in the first case remains negative though, because she wants to get divorced but the *dayanim* rule that the husband is not obliged to divorce her, even though he has married another woman.

This means that the woman remains an *agunah*. In the second case the woman is not obliged to accept a *get* while her husband has to provide for her. The woman even lives in the apartment they originally lived in together and she receives this apartment with the divorce settlement when she agrees to the divorce.

These two cases are good examples of when the moral fear argument is applied: in the first case it was the woman who filed for divorce, be it with good reason, nevertheless the fear that she had cast her eyes upon another man immediately arose, thus basically ignoring the facts of the case. In the second case the wife did not want a divorce, or so she says, and thus the moral fear argument was not applied to her, while it was to the man, which is supported with proof. This prompts the question to what extent the moral fear argument really is an existing fear amongst *dayanim* or to what extent it is basically used as a formula, as we have seen above. This diminishes the importance of the moral fear argument as such, while on the other hand it is clear that it can have an enormous impact on a divorce case.

4.4 The moral fear argument applied to men

While reading the PDR cases I discovered that even though it appeared that the moral fear argument is only applied to women, since the Mishnah in Ned. 11:12 speaks only about women as also do the many sources which come after the Mishnah, in actual divorce cases there is also a fear that men cast their eyes upon other women and try to get out of their marriage because of this. Further research on the Bar Ilan Responsa database showed that there are three hundred sources for the fear that a man has cast his eyes upon another woman. This first appears in the Rashba³⁵⁹ and it is subsequently found in many of the same sources which also apply the moral fear argument to a woman. It is apparent from the sources, and actually mentioned in the PDR, that this fear arises after the *takkanot* of Rabbenu Gershom were enacted. This can be explained by the fact that before the *takkanot* of Rabbenu Gershom a man could divorce his wife whenever he wanted and for whatever reason he wanted; thus he basically did not need his wife's approval for the divorce. If the husband did not want to divorce his wife but wanted another woman as well, then he could just get

³⁵⁹ Shut haRashba haMi' uhasdim leRambam 133.

married to this other woman, whenever the laws of the land would allow bigamy. After the *takkanot* of Rabbenu Gershom an Ashkenazi man could neither divorce his wife against her will nor marry another woman. Sephardi men could, in principle, still do both things, but it became the custom in many places to apply a *shevu'ah* to the *ketubah* in which the man promised not to marry a second wife. To prevent a husband from divorcing his wife against her will, an agreement by handshake was made at the time of the *kiddushin*³⁶⁰. If a Sephardi man married in a country where the *herem* of Rabbenu Gershom was accepted, he was bound, according to some rulings in the PDR, to this *herem*, even if he did not vow or agree to it at the time of the *kiddushin*. The *dayanim* say that such a man cannot claim that he was not aware that he was still agreeing to the *herem*, because it is the *minhag* of the country.

According to the Shulhan Arukh there are two instances where a man is allowed to divorce his wife against her will: when she has committed adultery or when she has developed a *mum* and he becomes repelled by it. The Encyclopedia Talmudit (Vol. 17, column 382) writes that in any case where the woman is permitted to her husband according to Torah, a man cannot divorce her against her will,³⁶¹ implying that when a woman has a *mum* her husband cannot divorce her against her will although he can still claim that she has become repulsive to him. After the *herem* of Rabbenu Gershom whenever a man wants to divorce his wife against her will, he can claim that she has committed adultery. As a result of his claim his wife will become prohibited to him, there will be an obligation on the man to divorce his wife and on her to accept it, and he will not have to pay her the *ketubah*. The rabbis have decided, however, that any man who comes to the *bet din* and claims that his wife has committed adultery, or that he believes his wife's claim that she has committed adultery, is immediately suspected of having cast his eyes upon another woman. The same applies to a man who claims that his wife is repulsive to him, thus equating the grounds for divorce against the will of the other spouse for a man and a woman. If the rabbis were to allow a man to divorce on a claim of adultery while in fact he had cast his eyes upon another woman, then this man would be doubly rewarded: not only would he get the divorce he desires, he would also be free from paying his wife her *ketubah*. The

³⁶⁰ PDR 9/74-75

³⁶¹ See also: Shut Ein Yitshak, E.H. 4:20; Rambam Mamrim 2:3; Shut Hatam Sofer E.H. 1:3.

herem of Rabbenu Gershom has thus, to some extent, created equality between men and women regarding divorce: neither one of them can enforce a unilateral divorce.

There are two cases in the PDR where the moral fear argument is only directed at the man. The first appears in PDR 1/129-138 and the second in the already discussed case of PDR 11/4-75. In PDR 1/129-138³⁶² it is the woman who files for divorce on the grounds that her husband is ill with *מהלת הברטולוזיה*³⁶³ and this disease has caused her, as she claims, to miscarry. The *dayanim* discuss whether the illness of the husband is enough grounds on its own for the woman to claim a *get*. Additionally, the husband only contracted this disease thirteen years after the *nissu'in* and thus the woman cannot claim that the reason why they do not have children is because the husband has this disease. The husband claims that his wife has committed adultery and due to this accusation the *dayanim* fear that he has cast his eyes upon another woman. On the other hand, however, since it is the woman who seeks the divorce and not the man, there might be grounds to believe the man's claim that his wife has committed adultery. This is derived from the Shut of the Haham Tvi 3 who wrote that when a woman claims that she has committed adultery she is not believed because she has probably cast her eyes upon another man. However, when the husband files for the divorce she is believed because then there is no reason to fear that she has cast her eyes upon another man. In this case the wife claims the *ketubah* money together with the *get* and she states that if she does not get her money she will not accept the *get*. Due to this statement the husband is not believed when he says that his wife has committed adultery, because this could only indicate that he wants to divorce his wife on his conditions. Thus the *dayanim* do not believe his claim and they rule that they will not enforce a *get* on that basis. Considering the wife's claim that the husband's illness caused her to miscarry, the *dayanim* listen to the testimony of professionals. These testimonies show that there is no connection between the husband's disease and

³⁶² Dayanim Rodner, Rosenthal and Hamavi presiding.

³⁶³ What this disease is, is something which, so far, I have not been able to find out. It is not known in any Hebrew dictionary or any (online) medical dictionary. A search in Greek dictionaries supplied me with the following results: *βροτος* means mortal, while *βροτο-λοιγος* means man-destroying. From the last we might perhaps infer that the disease the man is suffering from causes him either to be impotent or to produce bad seed. A query on H-Judaic gave me the following results: according to Em. Prof. Allan D. Corre "brotolozia" is a misspelling. He assumes that the disease must be proctologia, colon-cancer or some other proctological problem. But why this would cause the wife to miscarry is not clear. Professor Michael Weingarten commented that maybe the text should have read "mahalat ha-protolozali". Amebiasis, for instance, is one of many protozoal diseases. Such a disease, which is caused by a parasite, would be relevant to the clinical context of miscarrying.

the wife's miscarriages and thus the *dayanim* will not order a *get* on those grounds either. Notwithstanding the fact that they will not enforce a *get*, the *dayanim* do see that the relationship between the couple has broken down and that no reconciliation is possible and thus consider divorce to be the best option. The *dayanim* decide on how much *ketubah* the husband is required to pay his wife upon divorce and the amount of *mezonot* he should pay her till he gives a *get*. If the husband has not given a *get* within two months then the *dayanim* will review the amount of the *mezonot*. This implies that they will indirectly try to force the husband into giving a *get* by subjecting him to financial pressures.

The moral fear argument is discussed in this case only once regarding women while talking about the classical case of a woman claiming that she is defiled, while it is applied several times to the husband who claims that his wife has committed adultery. The *dayanim* feel that the husband is trying to push the divorce case to his benefit by claiming that his wife has transgressed the *halakhah*. The *dayanim* are not willing to let him do this and claim that they are afraid that he has cast his eyes upon another woman. In fact the moral fear argument is used here again as a formula and not as a real fear.

4.5 *Dina de-metivta*

As we have seen in chapter one and three, the *halakhah* regarding the *moredet* underwent a substantial change in the times of the *Geonim*. The rulings which the *Geonim* implemented at various stages³⁶⁴ are called *takkanat haGeonim* (sometimes also called *dina de-metivta* and *takkanta de-metivta*) and they brought about a new legal situation. If a woman came to a *bet din* and claimed divorce on the grounds of *ma'is alay* then her husband would be forced to give her a *get*. The husband had to pay his wife the basic *ketubah* and return to her all her remaining dowry, whether she had seized it upon leaving the marital home or not, and any “*niksei tzon barzel* (property which she had brought into the marriage but for which the husband had assumed full responsibility) that was no longer intact”³⁶⁵ had to be replaced by the husband. The latter means that if the woman had brought any property into the

³⁶⁴ See Riskin, 1989, p. 69.

³⁶⁵ Ibid.

marriage that had either been spent (like for instance money) or had been damaged or destroyed, then the husband was liable to replace it, at least to its monetary value, at the time of the divorce. This Gaonic ruling was dismissed by the *Rishonim* from Rabbenu Tam onwards, because according to them the *Geonim* did not have any authority to force a man to give a *get* on the grounds of *ma'is alay*. Even though the *Geonim* claimed that they had based their ruling upon the Talmud³⁶⁶, the *Rishonim* disagreed with them and claimed that the ruling was an invention of the *Geonim* themselves. It was therefore a great surprise to see *dina de-metivta* mentioned in nine cases³⁶⁷ within the Piskei Din Rabbani'im used in my research. Searching the Bar Ilan responsa database version 14+³⁶⁸ it became clear that there are ninety seven places in the PDR where *dina de-metivta* can be found, of which sixty occur in the nine cases mentioned. There is one place where *takkanta de-metivta* is mentioned (PDR 2:269) and eighteen places where *takkanat haGeonim* is mentioned, of which one is in PDR 4:264, which is part of the material I have researched. In total there are ten cases in the PDR which I have used for my research where a form of *dina de-metivta* is mentioned. It is clear that the *dayanim* will mention all available material from the past while solving modern day divorce cases, including the *dina de-metivta*. What is surprising is that it seems as if the *dina de-metivta* can still be applied even though the *Rishonim* have decided otherwise. To get a better understanding of this aspect we will look at the ten cases in the PDR which either deal with *tav lemeitav* or the moral fear argument where *dina de-metivta* has been found. Table eight deals with the ten cases where *dina de-metivta* is found

Table 8

Who filed for divorce?	Moral fear	Context of moral fear	Ma'is alay	How many
woman	-	-	Woman	2
woman	woman	accusation	Woman	1
woman	woman	adultery	Woman	1
woman	woman	ma'is alay	Woman	1
man	-	-	-	1

³⁶⁶ See chapter three, footnote 287.

³⁶⁷ PDR 2/188-196, 2/262-270, 4/175-182, 6/221-224, 6/257-265, 6/325-353, 8/104-112, 9/171-183 and 11/193-205.

³⁶⁸ After having originally used database 12, I have later made use of database 14+.

not clear	-	-	Woman	2
not clear	man and woman	ma'is alay	man and woman	1
no divorce	man and woman	accusation	man and woman	1

While reading the cases it became clear that even though the Rishonim have discarded the *dina de-metivta* rabbis after them have retained the *dina de-metivta* in a more restricted form. As is written in Shulhan Arukh E.H. 77:3:

And there are those who say that all this [i.e. the loss of all financial claims, which has been discussed before] applies to a woman who does not give *amatlah* or a reason for why she claims *ma'is alay*. But if she gives *amatlah* for her claim, for instance when she states that her husband went astray or that he is ill and she is divorced on that ground, then her case has to be decided according to the Gaonic rule of *dina de-metivta* (Tur in name of Maharam of Rothenburg), in which the husband is obliged to return to his wife everything that she has brought into the marriage: her *nedunyah* and the *niksei tson barzel*, whether it is still intact or not, the husband has to pay for it. ... If it is completely gone, however, then the husband does not need to repay it (*dina de-metivta* Tur in name of the Rif). Yet, everything he has given to her or which he has given to her in writing, she will not forfeit, and even all that she had seized she need not to return (Mordechai 90). And he will not be forced to divorce her, and she will not be forced to live with him.

Thus, in a case where a woman cannot support her claims of repulsion with sufficient evidence the Gaonic *takkanot* of *dina de-metivta* are not applied. In all other cases the *dina de-metivta* are annulled regarding forcing a man to give a *get*, but they can be applied insofar as they concern monetary matters. So, whenever a woman gives sufficient proof that she is repelled by her husband then the *dayanim* can rule that *dina de-metivta* is applicable to her and that she should receive upon divorce all that she brought into the marriage.³⁶⁹ Women receive that which they brought into the marriage when *dina de-metivta* is applied to them because, as is written in Bet Shmuel 77:27, daughters of Israel will otherwise turn to bad behaviour. The *dayanim* will

³⁶⁹ See also: Rosh 43:8 and Ket. 5:45 (according to the Maharam of Rothenburg).

however not force the husband into giving a *get*, and if the husband refuses to give it then the *dayanim* cannot do anything, because “it is in his power to bind (לעגן) her” (PDR 2/188-196). In that case the woman will not receive anything and the husband is not even obliged to give her *mezonot*. According to the Rosh the husband in such a situation loses his rights to the profits of his wife’s income (*niksei melug*), thus not leaving the woman destitute.

There is a discussion amongst the *poskim* whether *dina de-metivta* can also be applied to a woman when she claims her *ketubah* together with her *get*. According to the Ran (Shut 13) if the woman claims *ma’is alay* and also claims her *ketubah* then *dina de-metivta* cannot be applied to her because then the fear arises that she has cast her eyes upon another man. The Rema (E.H. 77) says that in the case where the woman claims the *ketubah* together with the *get* the ruling of *moredet ma’is alay* will be turned into a *moredet be’ainan lei umetsarna lei*, thus annulling the *dina de-metivta*. Thus it seems that the *dina de-metivta* will only be applied if the woman is a *moredet ma’is alay* and is willing to forgo her *ketubah*. The Maharshal, however, says that a woman does not have to forgo her *ketubah* specifically: even if she does not mention money at all the *dina de-metivta* can still be applied to her. The Hazon Ish (E.H. 69:16) holds that if it is clear to the *dayanim* that a woman’s claim of *ma’is alay* is justified then asking for the *ketubah* does not annul her claim of repulsion. Others³⁷⁰ rule that when a woman does not claim the *ketubah* directly and she has a justifiable claim of *ma’is alay*, then the case will be decided according to the *dina de-metivta*.

Even though forcing the husband when a woman claims *ma’is alay* and gives sufficient *amatlah* is annulled after the *Rishonim*, PDR 2/188-196 rules that there is a *hiyuv* on the husband to give a *get* to his wife and the woman will receive that which she brought into the marriage, her *nedunyah*. Until the husband gives a *get* to his wife he has to pay a certain amount of *mezonot* daily. The amount of the *mezonot* might force the husband indirectly into giving his a wife a *get*. The *dayanim* based themselves on the fact that where the woman has good grounds for not wanting to remain married to her husband, thus accepting her claim of *ma’is alay*, they will not apply *tav lemeitav* to her. This implies that where the *dayanim* see that the actual

³⁷⁰ See e.g. Radbaz 1333 and Hekri-Lev E.H. 35.

situation of the marriage is so bad for the woman that they cannot say that it is better for her to remain married to this man they will obligate the husband to divorce her. In PDR 9/171-184 the *dayanim* go even further and discuss whether direct coercion of the *get* can still be applied today, as part of *dina de-metivta*. They discuss the difference of opinion between the Rambam, who holds that the *get* can be enforced but only when the woman is a *moredet ma'is alay*, and the Rif who holds that this can be done even when the woman is a *moredet be'einan lei umetsarna lei*, thus not mentioning *ma'is alay*. In the end the *dayanim* decide to enforce a *get* by all possible means of *kefiyah* available, including use of the law of the State. This is interesting because a *get* is hardly ever enforced in modern day divorce cases.

In PDR 4/175-183 the *dayanim* rule regarding a claim of *ma'is alay* that the woman will receive her *nedunyah* and the *niksei tson barzel* even when the *amatlah* is not *mevureret*. This is astounding because it involves a broadening of the rulings of *dina de-metivta*. The husband responds to this ruling by accusing his wife of having cast her eyes upon another man. He wants therefore the woman to be classified as a *moredet be'einan lei umatsarna lei*, which would imply that the *dina de-metivta* cannot be applied to her. The husband's response is understandable because the ruling of the *dayanim* turns out negative for him and the only way to change the ruling is by accusing his wife of presumed adultery. However, the *dayanim* hold on to the classification of *moredet ma'is alay* and decide in the end that they will return the case to the regional *bet din* instructing it to clarify whether it took the claim of *ma'is alay* by the wife into account. If so, they want to know what effect this had on the husband's rights to the *niksei melug*.

4.6 Kefiyah

The coercion of a *get* is something which is not done on a regular basis, probably because *dayanim* are afraid of a coerced *get*. That *kefiyah* of the *get* hardly ever happens also becomes clear in the cases researched in the PDR. As written above, even though *kefiyah* of the *get* is discussed in twenty six cases, it is only applied in three cases (PDR 3/3-18, 9/149-152 and 9/171-184). In a discussion with Leah Ziegelaub, who works as a *to'enet rabbanit* in Haifa, it became clear that there are three possible stages within a divorce case in Israel. First, the *bet din* may decide to

recommend to the husband to divorce his wife; this is called *hamlatsot*. In divorce cases one might read that there is a *mitswah* on the man to divorce his wife. A next step is that the *bet din* decides that there is a *hiyuv* to divorce. A final step, which is only rarely used, is that the *bet din* applies *kefiyah* to get a divorce. A *bet din* will recommend to a husband to divorce his wife when they see that the marriage has broken down, but where there is no halakhic ground on which the couple should divorce, i.e. neither spouse committed adultery, just that they do not get along any more. For the *bet din* to order a *hiyuv* a halakhic reason to get divorced is necessary. In the majority of cases this applies to situations where one spouse has started a relationship with another person. Without a halakhic reason the *bet din* will not grant a *hiyuv*. However, once the *dayanim* rule that there is a *hiyuv* on the husband to divorce his wife then sanctions can be applied to him as is provided in the 1995 Law of Marriage and Divorce, ranging from withholding his driver's license or his visa to preventing him from leaving the country etc. To incarcerate a husband is only possible when the *bet din* makes a ruling of *kefiyah*. Since this is hardly ever done, men almost never get incarcerated for refusing to give a *get* to their wives. If the sanctions do not work then after one year one can apply in the *bet din* to "upgrade" the ruling of *hiyuv* to *kefiyah*, but in practice this is hardly ever done. According to Mrs. Ziegelaub *dayanim* are becoming stricter even in granting a *hiyuv*, which implies a hardening of the strategies within a divorce case.

In the cases of the PDR which I have studied, I have found one case (PDR 8/312-320) in which the *dayanim* ruled that it is a *mitswah* on the husband to divorce his wife. In six cases³⁷¹ a *hiyuv* is imposed on the husband to give a *get* and in one case (PDR 7/353-382) there is a *hiyuv* on both spouses to either give or accept a *get*. To get a better understanding of the circumstances under which a *bet din* will rule in favour of *kefiyah*, *hiyuv* or *mitswah*, we will have a look at the cases involved, starting with the three cases where actual *kefiyah* is ordered.

In PDR 3/3-18 a woman applied to the Rabbinic High Court³⁷² against a *pesak din* by the regional *bet din* that rejected her claim to force the man to give a *get*. The woman was married when she was a young girl and at the time of the case her age is still not

³⁷¹ PDR 1/5-19; 1/51-54; 1/55-63; 1/129-138; 2/188-196 and 7/201-205.

³⁷² This case which is being held in 1958 is presided by *dayanim* Nissim, Elyashiv and Zolti.

clear. There are also no signs of pubic hair (which determines that she still is not a grown up). The woman claims *ma'is alay*. The couple has stated before the *bet din* that they have not consummated the marriage. Due to both the age of the woman, who is probably still a *qetannah*, below twelve, and the fact that the marriage has not been consummated, the *dayanim* rule that there is doubt whether there is a marriage at all, and, if so, whether the marriage is *de'orayta* or *derabbanan*. Under these circumstances the *dayanim* consider the *ma'is alay* proved and they enforce a *get*. They also rule that the woman has to pay a certain amount of money to the husband at the time when he gives a *get*. The methods by which the *dayanim* propose to enforce the *get* are not mentioned; only the use of the carrot, i.e. the fact that his wife has to pay him some money when he gives her a *get*, is mentioned as a way to persuade the husband into giving a *get*.

PDR 9/171-184³⁷³ is a remarkable case: in this case the woman claims that she did not agree to the *kiddushin* that the man gave her and that he forced the ring on her finger in front of two witnesses and recited the required *berakhah* without a rabbi being present. This all happened in the street at eleven o'clock at night. The woman had agreed to meet the man that night because she thought that he was a bachelor, but right before he forced the *kiddushin* on her, she found out that he was in fact married. The woman says that she refused to accept the *kiddushin* by speech and by taking of the ring from her finger. Now she wants either the *kiddushin* annulled or the man to be forced to give a *get*. The man says that he has no intention of divorcing either of his wives. In describing the relation with the woman, the man states at one point in the case that he did not have relations her since they got engaged, at another point in time he states that he never had relations with the woman at all. There is however evidence in the form of hospital records which show that the woman was pregnant and subsequently had a miscarriage, which implies that she had relations with another man. Due to the pregnancy of the woman and the man's statement that he did not have relations with the woman, the *bet din* ruled that the woman is prohibited to the man since she must have committed adultery and there is thus a *hiyuv* on him to divorce her. The man however states that he wants to remain married to her. The *dayanim* see that the husband wants to bind to woman to him and they thus research

³⁷³ Dayanim Werner, Azulai and Zimbalist presiding.

the *poskim* on whether they can force him to divorce her. The Magen Avraham³⁷⁴ states that whenever a woman claims that she is defiled to her husband then he will not be forced to divorce her because there is the fear that she has cast her eyes upon another man, but when there are witnesses to the adultery then he should be forced. R. Akiva Eiger³⁷⁵ also rules in the name of the Rambam that one only forces a husband when two witnesses come to testify to the adultery. Even though according to the majority of the *poskim* a man should be forced to divorce his wife when it is clear that she has committed adultery, this is not often done in practice due to the *humrah shel eshet ish* and the fear of a *get me'useh*. The text discusses extensively what should be done in a case where a woman accepts *kiddushin* from man A and subsequently gets married to man B, which is a classical text from the Talmud. However it becomes unclear whether this is what happened in this particular case. The conclusion of this discussion is however that man A should be forced into giving a *get* to the woman, because he is not allowed to bind her.

The woman apparently also claims *ma'is alay* and there is a discussion of whether *dina de-metivta* can be applied to her. It is stated that when *dina de-metivta* is applied to the woman, this will only apply to monetary matters and not to forcing the husband into giving a *get*. The reason given why the original *dina de-metivta* was altered in the generations that followed the Gaonic era is that those generations became sexually untrustworthy and thus the opportunity of no-fault divorce which the *Geonim* had given to women had to be taken away. Thus the same reason which was used to enact the *takkanat haGeonim* was apparently also the reason why it had to be abolished. However, the *dayanim* say that according to the Rambam one can enforce a *get* when the woman claims *ma'is alay*. In combination with the later statement that “the *kiddushin* took place in Israel and not in Yemen” I assume that the couple is Yemenite and thus adhere completely to the *halakhah* of the Rambam. Therefore the Rambam’s ruling that one can enforce a *get* when the woman claims *ma'is alay* can be accepted.

The *dayanim* rule in the end that due to three separate facts — (1) that the woman has committed adultery; (2) that the *kiddushin* was not done *kehogan*, i.e. correctly; (3)

³⁷⁴ Magen Avraham on Tosefta B.K, his explanation on the end of Lekhem HaPanim, and Teshuvah Geonei Batrai 72.

³⁷⁵ R. Akiva Eiger at the end of his book “Daroush weHidoush” where letters are gathered.

the *kiddushin* took place in Israel and not in Yemen, thus being married to two women is not allowed — they will force the man by all possible forms of *kefiyah* to give a *get* to the woman. What is meant by “all possible forms of *kefiyah*” is not mentioned, but I assume that they will use the sanctions available to them under civil law.

A remarkable aspect of this case is that even though the woman files for divorce on the grounds that she did not agree to the *kiddushin*, the majority of the case deals with her presumed adultery. Only at the very end is it mentioned that the *kiddushin* was not properly conducted. Notwithstanding the fact that the man acted inappropriately it is the woman’s subsequent sexual actions which cause the problems; her relations with another man are of more importance to the case than the dubious validity of the enforced *kiddushin*. This shows the great emphasis which is put on the fear of women’s sexuality and the consequences women’s expressed sexuality has on the facts of Jewish life. As stated in the text, even when it is halakhically allowed to force a man into giving a *get*, this is not often done, due to the *humrah shel eshet ish*. The *humrah* itself consists of the fear that a married woman will sleep with another man and rabbis try to avoid giving women any legal possibility of becoming promiscuous, i.e. they prefer not to force a man to give a *get*, even when this would halakhically be possible, out of the fear that they might inadvertently allow a halakhically married woman to remarry.

A second remarkable aspect of the case is that the *dayanim* do not consider annulling the *kiddushin*; instead they discuss whether it is possible to force the man to give a *get*. This is remarkable because neither *nissu'in* nor any marital relations had taken place between the couple. If the *dayanim* had followed the ruling in the Talmud (B.B. 48a) where a woman was forced into marriage then annulment would have been more obvious. Even though our case does not completely resemble the case in the Talmud, since there violence was used to force the woman into the marriage, the *kiddushin* was nevertheless against the will of the woman. In two other places in the Talmud it is stated that that when a man does not act *kehogan* while betrothing a woman, the rabbis can act improperly (*lo kehogan*) towards him and annul the *kiddushin*. Yet in the present case annulment of the *kiddushin* is not even considered, which implies that the *dayanim* believe that a marriage bond came into being and, as we have just

established, due to the *humrah shel eshet ish* they cannot allow a possibly halakhically married woman to remarry without a definitive end to the first marriage.

PDR 9/149-152³⁷⁶ is remarkable in that its ruling is that both spouses will be forced to either give or accept a *get*. The marriage had been very unhappy and the couple used to quarrel on a regular basis. Now they have been separated for years and the *bet din* does not see any possibility for *shalom bayit*. Nevertheless it has been impossible for the couple to agree to a divorce. Both spouses claim *ma'is alay* and the *dayanim* say that whenever a woman claims *ma'is alay* they cannot rule according to the Rambam and enforce a *get*, because there is always the fear that she might have cast her eyes upon another man, while, if the man claims *me'usah alay*, then he can deposit the *ketubah* and the *get* and be free from supporting his wife with *mezonot*. According to the *Acharonim* (האחרונים מן יש), whenever a couple is separated for eighteen months and the *bet din* sees that there is no possibility for *shalom bayit* then the couple should be forced to give or accept a *get* until it is done out of free will. The *dayanim* therefore ordered that both spouses are obliged to accept the divorce, since a divorce is preferable for both the couple and their children. According to the children the mother is the cause of all the trouble and they fear her return home. The *dayanim* will force the man by letting him pay a certain amount of *mezonot* on a monthly basis. If the woman still refuses to accept the *get*, then the husband will be given a *heter* to remarry, which implies that they threaten the woman with *igun* and loss of income, since the husband is not obliged to pay *mezonot* to his wife when he is given a *heter* to remarry.

The first two cases where *kefiyah* is ordered deal with a situation where the marriage was forced upon the woman, and since it is already stated in the Talmud (Kid. 2b) that one can only marry a woman with her consent and not without it is obvious that the enforcement of the *get* is the required halakhic solution since the Israel rabbinical courts are no longer willing to annul. The fact that they are not willing to annul those marriages is all the more striking given the similarity with the Talmudic cases where it was applied. It becomes clear, however, why *kefiyah* of a *get* is hardly ever granted: the marriage itself has to be halakhically invalid for the *dayanim* to compel a *get*. In

³⁷⁶ Dayanim Yaluz, Richie and Topik presiding.

the third case however the marriage itself was valid, but the marital conflict had become irresolvable. Moreover, there was a fear that continuation of the marriage might harm the children and thus the *dayanim* ordered *kefiyah* of both spouses.

In the cases where *hiyuv* was ordered against one of the spouses, there is a halakhic reason why the couple should get divorced. In four out of the six cases where there is a *hiyuv* on the man to give a *get* either illness or impotence is the reason for divorce, both of which are considered a *mum*. In one case the marriage had irretrievably broken down and in the other the husband had remarried and his first wife wanted a *get*. In the case where there was a *hiyuv* on both spouses to give or accept a *get*, the couple entered into a conditional marriage in which they agreed to a limited time for the marriage. If the woman will not accept the *get* then the husband will be given a *heter me'ah rabbanim*. In the case where there is a *mitswah* on the man to give a *get* the man accused his wife of having committed adultery. There were no witnesses to the adultery, yet the woman stated that she had put herself in *yichud* with the other man. There was however doubt whether one should believe the woman's statement. Thus there was no halakhic ground for the divorce, yet the *dayanim* recommended the husband to divorce his wife.

4.7 The two maxims in a single source outside the Piskei Din Rabbani'im

As mentioned earlier there are in total eight sources where the two maxims are found in a single source. After having explained the two sources in the PDR earlier we will now examine the other six sources.

4.7.1. Tsits Eliezer 5:22

In the case presented to the Tsits Eliezer a man went to the *bet din* with woman A and stated that she was his wife and that he wanted to divorce her. The divorce took place and the husband took the certificate of divorce to his real wife (woman B) and told her that she was now divorced from him. The woman questioned how this could be possible; he replied that this is the way things are done here. Woman B then left her husband, from whom she thought she was divorced, married another man and gave birth to a child. The *bet din* found out about the false divorce and called woman B into

the *bet din*. Even though there was no blame on woman B the *dayanim* ruled that she is prohibited to both husbands and needed a *get* from both of them. This means that the child is a *mamzer*. The Tsits Eliezer explains how this is possible and what can be done about it. According to him, based on Yeb. 33b, the woman was allowed to the second husband. The child was therefore not considered a *mamzer* any more. Since woman B had not committed adultery willingly, since she was tricked by husband A, there was thus no fear that she had cast her eyes upon another man. It becomes apparent in this case that even though the *bet din* made a grave error themselves, the woman was the one who got hurt in the end: she was classified as an adulteress and her child a *mamzer*. The same is possible in cases where a husband is declared dead on account of witnesses or other evidence, the wife remarries and then the first husband reappears. Notwithstanding the absence of any bad intentions, the woman is not allowed to remain married to either husband, and children from the second marriage are considered *mamzerim*. Often, however, the rabbis will look for a possibility to undo the first marriage in order to undo the *mamzerut* status of the children, because even though the woman has become an adulteress in the eyes of the *halakhah* the adultery was not intentional.

4.7.2. Ribash 209

In a case presented to the Ribash a man (husband A) had died and his wife had thus become bound to his brother, her *yavam*. The two remaining brothers of husband A were sixteen (*yavam A*) and two years (*yavam B*) old. The wife herself was nineteen. The woman told the *bet din* that she wanted *yavam A* to be forced to give *halitsah*; otherwise, she threatens, she will be lost to the religion, i.e. she will transgress the *halakhah*. As an explanation she said that when she looked at *yavam A* she became afraid that he might die, which means that she would fall to the young *yavam* and thus have to wait many years before being married again. *Yavam A* said that he had the intention to carry out the *mitsvah* of *yibbum* and was not afraid that he would die. The Ribash states that he does not heed the woman's words that she will be lost to the religion because of M. Ned. 11:12, where it is said that one does not trust a woman who claims that she has committed adultery because one fears that she has cast her eyes upon another man. Here the woman cannot claim that she has committed adultery, because her husband is dead, but she can claim that she is going to commit

adultery if she is not released from the marriage bond with her *yavam*. The Ribash does not believe her because he holds that the only reason why the woman states that she might transgress the *halakhah* is because she has cast her eyes upon another man. All positive qualities of *yavam* A are mentioned in the *teshuvah*: his learning, his health and the fact that his father is very wealthy. The only negative aspect for the woman is that she will have to wait three or four years for *yavam* A to grow up, but the Ribash does not consider this to be a problem since other women in her position had to wait for their husbands. In addition, he rules, it is good for the woman to be married to *yavam* A because of *tav lemeitav*, as Resh Laqish said. The Ribash also says that it is better for the woman to marry the *yavam* because *yibbum* takes precedence over *halitsah*, and he cites all the rabbis who agree with that view. The Ribash says that even the rabbis who hold that *halitsah* should take preference over *yibbum* do not rule that they will compel (*kefiyah*) the *halitsah*. Only Rashi holds that one should force a *yavam* to give *halitsah* if the *yevamah* comes with sufficient *amatlah* as to why this should be done. The majority of the rabbis hold however that they will not force the *yavam* to *halitsah* because there is a fear that she might have cast her eyes upon another man. They might ask him to give *halitsah* anyway, but she will lose the *ketubah*.

In this case Ribash holds, on the basis of *tav lemeitav*, that it is good for the woman to be married even though she has to wait several years before her married life will start again. The fact that the woman asks for *halitsah* only brings up the fear that she has cast her eyes upon another man and the Ribash will thus not allow her to be given *halitsah*. There is here a strong correlation between the ruling that a woman prefers to be married because of *tav lemeitav* and the fear that she has cast her eyes upon another man when she wants to become free from this marriage. The Ribash also rules that *yibbum* takes precedence over *halitsah*. This is probably because he himself was a Sephardi Jew from Spain (Valencia) who lived between 1324 and 1408. The Sephardim held onto *yibbum* for longer than the Ashkenazim did, since they were not bound by the *herem* of Rabbenu Gershom which forbade men to be married to more than one woman at the same time.

A *yevamah* who does not wait for her *yavam* to perform either *yibbum* or *halitsah*, but who marries another man, is not liable to the same repercussions as those to which an

eshet ish would be subject, because here the first husband is dead. The marriage bond to the *yavam* exists yet if the woman goes off with another man then, *bediavad*, she is married to this latter man and their children will not be regarded *mamzerim*. *Lekhathilla*, however, no rabbi would give her permission to marry another man without waiting for either *yibbum* or *halitsah*. As I have observed elsewhere in my research, disobedience to the *halakhah* seems to be better rewarded than obedience and examples of this will be given throughout the thesis.

4.7.3 Radbaz 4:260

Radbaz deals with a case where a woman wants a divorce from her husband who wets the bed and does not notice when this is happening because he is ill. The question is whether one can force this man to divorce his wife and pay her the *ketubah* just like a man who suffers from a polypus or who gathers dog excrement as a profession. Radbaz says that there is a difficulty in comparing one case to the other. Even though the wetting of the bed is uncomfortable and might smell bad, the woman could wake up the man several times during the night and let him urinate outside, thus preventing the bed wetting from happening. If the woman claims *ma'is alay* then both the *Rishonim* and *Acharonim* have ruled that one cannot enforce a *get* and that applies to all regions which do not follow Rambam. The Sages, Radbaz states, have ruled like this to prevent a woman from casting her eyes upon another man. The Ravyah wrote in the name of his father that we will not force him, and this is *halakhah lema'aseh*, but we will also not force the woman to live with her husband. As with a *mumar* one will also not force him to divorce because of *tav lemeitav*, as the Ram ruled. Likewise with a man who has a polypus, which is considered a *mum*, one can only force him if the illness developed during the marriage, but not if he had it from the beginning of the marriage and she knew about it. In a case where the woman claims *ma'is alay* and she can prove it, she will not lose her *ketubah*.

In this case both the moral fear argument and *tav lemeitav* are discussed not directly in relationship to the woman, but to explain why enforcing of the *get* is difficult in most cases and thus also in this case. The woman does not have much ground for a divorce, it seems, and Radbaz is not willing to enforce a *get*.

4.7.4 Rema 96³⁷⁷

In this case³⁷⁸, which is listed under the Shut of the Rema but is in fact a responsum by R. Eliezer ben R. Eliyah Ashkenazi, Rachel married Reuben who became a robber during the first year of their marriage. Out of shame he left Venice and settled in Prague where he continued in his ways. He left his wife alone in Venice for several years, then returned and they had a son. Then he left again without providing for his wife or son, only to return again after some years, at which time a daughter was born to them who died. Rachel now wants a divorce from Reuben on the grounds of *ma'is alay* and asks the *bet din* to force him to give a *get* because she does not want to remain an *agunah* for the rest of her life. R. Ashkenazi quotes several *poskim*³⁷⁹ who rule that in the case of a *moredet a'is alay* one forces the husband to give a *get*. Several *poskim*³⁸⁰ though do not agree, out of fear that the woman has cast her eyes upon another man, especially in cases where the woman asks for the divorce. However, in cases where the woman forgoes her *ketubah* while asking for a divorce she is trusted in her claim. The Ran is one of the *poskim* who holds that one cannot force a husband to give a *get* because the *get* has to be given by the free will of the husband. He writes against the ruling of the Rif that the *takkanah* of forcing a *get* in a case of *moredet ma'is alay* was enacted for the generation of the *Geonim* because of *tsorekh hash'a'ah*: the Ramban has already written that in our times (i.e., the time of the Ran) this *takkanah* is annulled due to the licentiousness of the generation. In the *teshuvah Milkhamot HaShem* on the Rif it is however stated that the *takkanat haGeonim* was enacted for all generations. Yet, in cases where a woman who claims *ma'is alay* also claims for a divorce, the *get* cannot be enforced, even according to the Rambam, which is the case here as well: Rachel claims a divorce on the grounds of *ma'is alay*. As Rabbenu Tam and several *Acharonim* have said: anybody who enforces a *get* in such a way that a *get me'useh* is the result, i.e. the forcing is not halakhically valid, gives an *eshet ish* permission to remarry. Here again we see that the fear of allowing a possibly halakhically still married woman to remarry paralyzes possibilities of halakhically valid forms of forcing a *get*.

³⁷⁷ With thanks to my colleague Dr. Avshalom Westreich who helped me work through this *teshuvah*.

³⁷⁸ This case is also discussed under Rema, Shut 36, a responsum by R. Uziel Hazaqito. Here it is stated that Reuben abandoned Rachel for more than twelve years already, while visiting her on few occasions, and in that time he has not sustained neither her nor their children.

³⁷⁹ E.g. Rif 27:1; Tur E.H. 87; Rosh 43:8.

³⁸⁰ E.g. Rabbenu Tam; Ran 28.

Rachel claimed a divorce when her husband left her again to go to Prague, where he is well known robber; as a result of the criminal path her husband had chosen to go she did not want to follow him there nor live as an *agunah* in Venice. R. Ashkenazi states that in cases where a husband is a *mumar* or a *rasha* a *get* still cannot be enforced because of *tav lemeitav*. However, considering the shame which Rachel is experiencing, there might be a ground to enforce the *get*. Rosh (35) is cited for the view that if the man is not worthy of marrying a certain woman then the *kiddushin* might be flawed, i.e. *ta'ut* (בטעות היו שהקידושין), even if at the time of the *kiddushin* the man did not act in bad ways, but turned to bad ways only after the *kiddushin* (which is the case here): if in such cases the rabbis who are close to them see that he is not worthy to be married to a good woman, and she becomes a *moredet*, then there is reason to force a *get*. (This might prove an important view which could be used in modern divorce cases against men who turn out to be less than favourable husbands, when claims of *tav lemeitav* are raised against the wife.)

However, R. Ashkenazi continues, in Rema 36 R. Uziel Hazaqito holds that the Rosh wrote that in the case of a good daughter, i.e. an observant Jewess, who was *mekudeshet* with a borrowed ring, one must force the man to divorce her. In the present case, however, where the couple has been married for many years, the Rosh would not allow *kefiyah* of the *get* on the basis of the man acting improperly. When one reads Rosh 35:1 (at the end) it becomes clear that the Rosh says that in a case where a man does not act properly during *kiddushin*, the *kiddushin* can be annulled (and some rabbis have based themselves on this possibility in cases of *moredet*). Notwithstanding this halakhic possibility the Rosh prefers to try in those cases to appease the man with money first, to persuade him give a *get*, and only if this fails would the Rosh then coerce the man into giving a *get*. The Rosh thus prefers *kefiyah* above *hafka'ah*, even though he regards the latter as an option in theory.

R. Ashkenazi rules that Rachel is not obliged to follow her husband to Prague and live with him there and thus Reuben can be forced to divorce her. To strengthen his case he quotes the Tur (E.H. 154) who wrote, basing himself on his father's ruling (Rosh 43:1): if a husband turns to bad ways his wife is not obliged to follow him to another place. R. Hazaqito says that some rabbis do not force the husband to divorce his wife, but will force him to live in Venice with his family. Only if the husband refuses to do

so should he be forced to divorce his wife. R. Yitschak bar Moshe, however, argues that allowing a woman not to follow her husband to a different place and thus forcing the husband to give a *get* can become a *takkanah* for licentiousness, i.e. by allowing one woman to get a divorce on this ground the door may be open for numerous women to claim a divorce on this ground, while in fact they have cast their eyes upon other men. R. Ashkenazi sees however no ground to fear that Rachel has cast her eyes upon another man and thus should be granted a divorce. It is interesting to see that R. Ashkenazi's subjective opinion that there is no ground to think that Rachel has cast her eyes upon another man is sufficient to enforce a *get* from her husband. Apparently the criminal lifestyle of Reuben,³⁸¹ his abandoning of Rachel (which happened several times) and his failure to support her as he promised in the *ketubah*³⁸² are enough proof for the claim of *ma'is alay* which Rachel made. She thus does not have to give any other proof that she has not cast her eyes upon another man.

Even though both the moral fear argument and *tav lemeitav* could have been used against Rachel, R. Ashkenazi decides to follow other *poskim* who hold that in cases where the man turns to bad ways he can be forced to divorce his wife. This is a very lenient ruling since in cases where the husband becomes a *mumar* or a *rasha* it is normally ruled that the woman has to endure the marriage.

4.7.5 Penei Yehoshua on Ket. 63b

The Penei Yehoshua assembles all the comments on Ket. 63b which discuss the case of a *moredet ma'is alay*. This *moredet* has to bring solid proof (*amatlah mevureret*) for her claim otherwise she is not believed and the husband will not be forced to grant her a *get*. In collecting the comments both *tav lemeitav* and the moral fear argument are mentioned once, yet not in the same comment and thus this source cannot really be regarded as applying both maxims to the same case.

³⁸¹ According to R. Ashkenazi the fact that Reuben is a well known criminal in Prague should not lead to forcing him to give a *get* since the couple could live together in Venice. However, since he is also a well known criminal there, leaving no option for the couple to live there in anonymity thus putting Rachel in an embarrassing situation, is grounds for forcing him to divorce her.

³⁸² This last one is taken from Rema 36.

4.7.6 Heichal Yitshak E.H. 1:3

In his Shut E.H. 1:3 the Heichal Yitshak is confronted with a case where the woman has filed for divorce on the grounds that her husband beats her and she claims *ma'is alay*. Enlarged *mezonot* are awarded against the husband in order to force him indirectly to give a *get* to his wife. The question now arises whether the enlarged *mezonot* might produce a *get me'useh*. Heichal Yitschak points out the differences of opinion about the *takkanat haGeonim* in cases where a woman claims *ma'is alay* and states that according to some opinions this ruling should not be accepted any more, due to the fear that a woman might have cast her eyes upon another man. The validity of an enforced *get* is also discussed, which according to some *poskim* is not a valid *get*, while the Rambam and the Geonim hold that a *get* which is coerced in a halakhically valid way is valid. According to Rabbenu Yerocham a *get* which is given due to financial obligations is a valid *get*. The Rashbats (1:1) holds that when the monetary sanctions are not in accordance with the *halakhah* then the *get* will be a *get me'useh*. According to the Heichal Yitshak a man is obliged to pay his wife *mezonot* as long as they are married. In cases where a woman is ruled to be a *moredet* she will lose her rights to *mezonot* after twelve months. R Josef Caro stated that most *poskim* do not rule in accordance with the Rambam (according to whom one may enforce a *get* when the woman claims *ma'is alay*), specifically due to fears that such a *get* will result in a *get me'useh* and the possibility for opening ways for women to become licentious. On the other hand, when it is clear that a particular woman has a valid claim of repulsion and there is no fear that she has cast her eyes upon another man, then a daughter of Israel should not be bound to her husband. A *moredet* who either cannot substantiate her claim of repulsion,³⁸³ or who claims her *ketubah* together with her claim of *ma'is alay*, is suspected of having cast her eyes upon another man.

Tav lemeitav is mentioned only once in the case and this in connection to a *yevamah* who does not want to marry her *yabam* yet wants to be supported by him until he gives her *halitsah*. In such a case, when the *yabam* wants to marry the *yevamah*, *tav lemeitav* applies and she will not be granted a *halitsah*. The question is whether in the case of a *moredet ma'is alay* who does not want to remain married to her husband she

³⁸³ See chapter five on how a claim of repulsion can be substantiated.

is entitled to *mezonot*. In such a case she will receive her *mezonot* until the husband divorces her. It is interesting to see that the Heichal Yitshak does not apply *tav lemeitav* to a *moredet ma'is alay*.

The Heichal Yitshak rules in the end that the *bet din* which posed this question to him can impose enlarged *mezonot* on the husband, just as long as the level of the *mezonot* does not go beyond the means of the man. The *get* he will hopefully give will thus be a *get* out of free will, yet the man has the power to bind the woman if he is not willing to give her a *get*.

Only in one paragraph is the husband's abuse mentioned and discussed. According to most *poskim* whenever it is proved that a husband beats his wife, he should be forced to give his wife a *get*. Most of this lengthy case however deals with the claim of *ma'is alay* by the wife and how to rule in such a case. Regarding this claim the moral fear argument is mentioned no less than eighteen times, although never actually with regard to the woman in question. Again it becomes apparent that fears regarding women's behaviour are given greater consideration than the actual behaviour of a man.

4.8 Conclusion

The research on the PDR has revealed some interesting notions.

First, it has become clear in this chapter that both *tav lemeitav* and the moral fear argument are used as a formula in modern day divorce cases, i.e. they are not real concerns or fears considering a woman but rather are used as legal obstacles when she files for divorce. The same can be said about claims of *ma'is alay* and accusations of adultery; whenever a woman claims *ma'is alay* then the husband will claim that she has committed adultery, thus slowing down the process of divorce. This diminishes to some extent the importance of the maxims, even though it has also become clear that they can determine a case in either direction.

Second, there are cases where merely suspected behaviour on the part of the woman is considered more important than the actual behaviour of the man. The statement that

“women in our generation are loose”, which one hears in almost every generation, exemplifies the negative view which exists of women. This view, combined with the *humrah shel eshet ish*, has curtailed the use of *kefiyah*. *Kefiyah* is therefore hardly ever applied even in cases where halakhic forms of *kefiyah* of the *get* would be allowed, thus leaving very little chance for a woman to get the divorce to which she is halakhically entitled.

Third, it has become apparent that changes do occur in halakhic thinking: the fact that men are also suspected of having cast their eyes upon another woman after the takkanot of Rabbenu Gershom is just one example of this. The partial adoption of the *takkanat haGeonim* after its rejection by the Rishonim is another.

Chapter five

The necessity of proof

5.1 Introduction

In most justice systems facts can only be proved if evidence is given to state a case; no one can be convicted without proof against him or her and no verdict can be made without evidence being heard and judged. This applies equally to criminal law and civil law. Also within *halakhah* there is a strong notion of evidence, as has become clear in previous chapters where statements made by either the woman or the man were not believed until some form of proof was given. The divorce cases in the Piskei Din Rabbani'im in which the moral fear argument was discussed also show that various modes of proof were required. Those most commonly mentioned are witnesses, *amatlah mevureret* and *raglayim ledavar*, but questions about self-incrimination and accusation also play a large role. To distinguish between the usage and strength of these forms of proof we will look at various possible situations, asking: who has to give proof and what does the proof have to consist of? Is only eyewitness evidence accepted or are there other modes of proof? What differences are there between the different forms of evidence? Have the modes of proof changed during history and if so, how? Is self-incrimination and/or accusation by others accepted and if so to what extent? Why is proof necessary if the husband believes his wife's statement that she is defiled to him: could this not be a case of divorce by mutual consent or are there problems here (e.g. the husband believes his wife's words but he refuses to divorce her, thus having prohibited her to him yet remaining married)?

5.2 The *agunah* whose husband is missing

The notion of proof by eyewitnesses (עדים) has been established within Judaism in the context of the rules regarding the new month; the new month could only be established when two reliable eyewitnesses came separately from each other to the

Sanhedrin stating that they had seen the beginning of the new moon.³⁸⁴ That two witnesses are required to prove a case is already found in Deut. 19:15, where we read (Elon's translation):

One witness may not validate (יקרום) against a person any guilt or blame for any offence that may be committed; a case can be valid (יקרום) only on the testimony of two witnesses or three witnesses

A baraita³⁸⁵ comments:

It was taught: If it had stated “a witness may not validate”, would I not know that it refers to one witness? Why then does scripture state “one witness”? We deduce a general principle that in every case that refers simply to “witness”, the reference is to two unless Scripture specifies “one”.

However, not everyone can be a witness; “[t]he *halakhah* has strict requirements for competency of witnesses. Consanguinity³⁸⁶ and interest³⁸⁷ disqualify a witness”;³⁸⁸ only when “... the court is convinced that a particular person is not likely to commit perjury for gain, he should be accepted as a competent witness”.³⁸⁹ Whereas in secular courts people have to swear an oath to make sure that their testimony is the truth, Jewish law does not require such an oath. Instead

the court admonishes the witness to testify truthfully and, in the course of the admonition, explains to the witness the enormity of the punishment awaiting false witness. In addition the witness is rigorously interrogated along seven lines of inquiry and examination in order to determine how accurate and precise the testimony is.³⁹⁰

³⁸⁴ M. Rosh Hashana 1:4-7.

³⁸⁵ T.B. San. 30a; Sot. 2a/b; Sifrei Num. secs. 7, 161; Tosefta Shev. 3:8; T.J. Shev. 4:1, 19a/b (4:1, 35b/c), as quoted in Elon, 1994, Vol. 1, p. 356.

³⁸⁶ Tur and SA, Ch.M. 33 as quoted in Elon, 1994, Vol.2, p. 737; based on T.B. San. 27b; Shavuot 30a and B.B. 128a.

³⁸⁷ Tur and SA, Ch.M. 37 as quoted in Elon, 1994, Vol 2, p. 737; based on T.B. B.B. 42b, 43a and 46b.

³⁸⁸ Elon 1994, Vol. 2, p. 737.

³⁸⁹ Warhaftig, Osef Piskei ha-Din, 138, as quoted in Elon, 1994, Vol. 4, p. 1603.

³⁹⁰ M. San. 5:1-2, as quoted in Elon, 1994, Vol. 2, p. 606.

This is very important because the weight of eyewitness testimony (עדות) can be very strong because there basically is no better proof than people actually having seen the act and thus one needs to know how accurately the witnesses saw the act and one needs to prevent people from scheming together to make a false claim against someone else. This is already known from the story of Susanna, an apocryphal addition to the book of Daniel.³⁹¹ Whether, however, the judges in a case are going to believe the witnesses or rely upon their statements is a different matter; two witnesses are a necessary requirement but not necessarily a conclusive requirement for a case.

As mentioned in chapter one³⁹² in cases of an *agunah* whose husband disappeared without any evidence of his death, the ruling of the necessity of two witnesses was abandoned and the rabbis allowed one witness; even a witness who normally would not be accepted, including the wife herself, became acceptable in such a case. Also written statements or hearsay would be admissible as evidence. The rabbis went very far in making the rules more lenient to prevent a woman in such a situation from becoming an *agunah*. The only restrictions they put were on the testimony of the wife; this was only accepted when “there is peace in the world and peace between him and her”.³⁹³ To prevent the wife from having alternative reasons to become free from her husband the relationship between her and her husband had to be good. When it was known that the couple was having problems or if there was a war going on then the woman would have to bring additional evidence for the death of her husband. This evidence could consist of any proof of the husband’s death, ranging from eyewitness testimony to written documents.

5.3 *Tamei’a ani lecha: the wife of a kohen*

As we have seen before the Mishnah in Ned. 11:12 states

At first it was ruled that three women must be divorced and receive their *ketubah*. She who declares ‘I’m defiled to you’ (טמאה אני לך), ... But subsequently, to prevent her from conceiving a passion for another to the

³⁹¹ See, e.g., Bernard S. Jackson, “Susanna and the singular history of singular witnesses”, *Acta Juridica* (1977), p. 37-54.

³⁹² See 1.2.1.

³⁹³ M. Yeb. 15:1; T.B. Yeb. 116a.

injury of her husband, the ruling was amended, thus she who declared ‘I’m defiled unto you’ must bring proof (ראיה) ...

According to the Gemara in T.B. Ned. 90b the statement of defilement was related to the wife of a *kohen* who was raped and thus became forbidden to her husband. The *kohen* would have to divorce her while paying her the *ketubah*. Even though the rape was against the will of the wife, her husband nevertheless had to divorce her because she had become prohibited to him (Deut 24:4, Rambam Hilkhoh Issurei Bi’ah 18:7), as the Rambam³⁹⁴ writes:

Any woman who has intercourse with a man who renders her a harlot, whether by rape or by consent, whether wilfully or by error, whether naturally or unnaturally – once he has initiated with her, she is invalidated for the priesthood, because she has become a harlot.

To prevent the woman from making a false statement because she had cast her eyes upon another man and wanted to destroy the relationship with her husband, the Sages decided that she had to bring proof (ראיה) for her words. What does this proof consist of? From a linguistic point of view ראיה is a derivation of the verb ראה (to see), as Jastrow also observes, and the proof is thus something that can be seen. If a woman could bring eyewitnesses who would testify to her being raped, then she would have a strong case in the *bet din*. If, however, she did not have eyewitnesses who could corroborate her story then she would have to bring other evidence. In this case she would need *raglayim ledavar* (רגלים לדבר), which Alcalay understands as “there is substance in it; there is foundation for it; there is room to suppose; it makes sense”, i.e. there are circumstances which give cause to believe the accusation. *Raglayim ledavar* is basically circumstantial evidence which can still prove that a transgression has taken place. It has a long standing history within halakhic works and is mainly connected to women suspected of *zenut*³⁹⁵ and the drinking of the waters by a

³⁹⁴ Rambam, Hilkhoh Issurei Bi’ah 18:6.

³⁹⁵ According to the Rambam, Hilchot Issurei Bi’ah 18:6 *zenut* is any sexual relation, whether voluntarily or forced upon, which renders a woman unfit to marry a *kohen*. However, Fleishman in his unpublished article cites different opinions about when a woman becomes a *zonah*.

*sotah*³⁹⁶. In the Piskei Din Rabbani'im *raglayim ledavar* is used on a regular basis. An example is if the woman had been captured; then there is a strong suspicion that she has been defiled and her husband, the *kohen*, would have to divorce her. However, if there are no witnesses to the woman being captured, while she says that she has been, then the rule is that if she states that she was not defiled while being captured she should be believed. As the Rambam³⁹⁷ writes:

If a woman says “I was taken captive, but have not been defiled”, she is to be believed, since the mouth that forbids is the mouth that permits.

“The mouth that has prohibited is the mouth that has permitted” has become one of the principles of evidence within *halakhah*. This principle means that if someone wants to prove something by stating that first x (where x prohibits him/her to it), but now y (where y now permits him/her to it), (s)he is to be believed. This principle applies to both civil law and matters of *issurah* and can only be used if there are no witnesses for x. If there are witnesses for x then y needs to be proved by the claimant. Elon writes:

In the amoraic period, the principle “the mouth that has prohibited is the mouth that has permitted” was expanded into a principle called *miggo* (Aramaic for ‘since’). ... The principle is that ‘since’ the party, if he wanted to lie, could have stated a better claim, which would have been accepted, the weaker claim that he actually made should also be believed. The principle applies even where the assertion of the right or prohibition is made by someone other than the party himself, so long as there are no witnesses to provide direct evidence as to the merits of the claim or the prohibition.³⁹⁸

An example of this can be found in a case within the Piskei Din Rabbani'im 8/312-320³⁹⁹ where a husband, who apparently was a *kohen*, came to the *bet din* to have his wife permitted to him. After the marriage the woman had admitted that she had been

³⁹⁶ In the time of the Temple whenever a husband suspected his wife of having had relations he could subject her to drinking the waters without the need to provide any evidence; his jealous suspicions were enough.

³⁹⁷ Rambam, Hilkhhot Issurei Bi'ah 18:21.

³⁹⁸ Elon, 1994, Vol. 2, p. 995, fn. 27.

³⁹⁹ *Dayanim* Kook, Pitosi and Sefira presiding.

secluded with another man. On her statement alone she is not trusted, but if the husband believes her (דאיסורא התיכא אנפשיה שוויא), she becomes prohibited to him. The wife however states that she was not defiled and the *dayanim* in the case look into whether the wife can be permitted on the Amoraic principle of *miggo*. They ruled as follows:⁴⁰⁰

A woman is not trusted when she says that she is defiled, and this is the rule if she says that she secluded herself: she is not trusted even if she is already married. According to T.Y. Sot. 1:3 a woman who states טמאה אני לך is prohibited from eating *terumah* where there are *raglayim ledavar*. According to the commentators this only applies if the woman put herself into *yichud* with another man after she was married. If it happened before the marriage she is not trusted considering her statement.⁴⁰¹ If the husband believes her, she is prohibited to him according to Shulhan Arukh, E.H. 115. However according to E.H. 178 even if the husband believes her he is not believed with regard to prohibiting her, as is already written in the Node BeYehudah, if she later retracts her words and gives *amatlah* for them. If this is however not the case then he is believed in prohibiting her to him.

All depends on whether the husband believes his wife or not, even against the statement of a single witness:

Ohr Sameach, Hilkhos Ishut 24:24 writes that if one witness comes and says that she secluded herself and the husband believes him but the wife states that she is not defiled and he believes her as well, she is permitted.⁴⁰²

Amatlah (אמתלה/א) is, according to the Encyclopedia Talmudit,⁴⁰³ “an explanation or a reason why things that were said previously are incorrect”. Considering speech the Encyclopedia Talmudit writes: “A man who prohibits something to himself by way of דאיסורא כהתי אנפשיה שוויא, if afterwards he contradicts and refutes the matter and

⁴⁰⁰ PDR 8/314.

⁴⁰¹ Maharsham 1:229 and 3:350; Bet Meir, E.H. 178:11.

⁴⁰² PDR 8/314.

⁴⁰³ Encyclopedia Talmudit, volume 2, page 52, column 1.

gives *amatlah* why he said what he had said before, then he is believed.”⁴⁰⁴ The examples given in the Encyclopedia Talmudit are all linked to married life; either the man or the woman prohibited marital relations between them and later wants to undo it. According to the Encyclopedia Talmudit there are several conditions for *amatlah* to be accepted. First, “the *amatlah* has to be good, in that we can see there is substance to it, and we perceive it as true”, (טובה להיות צריכה האמתלא), (בה ממש שיש שראינו, והדברים, אמת לנו נראים).⁴⁰⁵ Second, “If the *amatlah* leads to the possibility of transgressing a prohibition, the person is not believed, because this is not good *amatlah*”, (י"ע אם), (טובה אמתלא זו שאין, נאמן אינו, איסור שעשה יוצא נותן שאדם האמתלא).⁴⁰⁶ Thus ‘good *amatlah*’ is not only evidence which is self-evidently true, it should also not create the possibility to commit a sin. “If one sticks to a statement considering a prohibition (literally: if a prohibition is presumed (הוזהק)) for three days then on the basis of one’s words no explanation (*amatlah*) will be helpful to annul the *hazaqah* (הזקה), unless the *amatlah* is of such importance that one cannot do without it, in which case the *amatlah* can be accepted even after three days”.⁴⁰⁷ This means that whenever a statement is made considering a prohibition and one keeps to one’s statement for three days, then it has become a *hazaqah*. It is very difficult to undo this *hazaqah*⁴⁰⁸ unless one has very strong *amatlah*. If something has been repeated three consecutive times, like holding to one’s statement for three days, then it becomes a *hazaqah*, a presumption. The presumption is accepted even though no corroborating evidence is available. Just by holding to the statement it has acquired a strength of its own.

When an act has happened it is almost impossible to annul it by *amatlah*, because an act can “speak” more than words. The Encyclopedia Talmudit⁴⁰⁹ gives the example of a woman who dresses in her *nidah*-clothes; this woman is considered a *nidah* even if she says that she is not a *nidah* and gives *amatlah* for the fact that she is not. Her act of putting on these clothes has given her the status of a *nidah* and no *amatlah* will help her. She will have to go through the normal procedures of *nidah* and immerse

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid., column 2.

⁴⁰⁶ Shut Chut HaSheni 17; Shut Shibut Yaakov 3:109 and Kesef Mishna Edut 3:5, as quoted in Encyclopedia Talmudit, volume 2, page 52, column 2.

⁴⁰⁷ Encyclopedia Talmudit, volume 2, page 53, column 1.

⁴⁰⁸ *Hazaqah* should be regarded here as “a legal presumption of the continued existence of a once-ascertained state of affairs, until the contrary be proved”, in Encyclopedia Judaica cd-rom, *Hazakah*.

⁴⁰⁹ Encyclopedia Talmudit, volume 2, p. 53, column 3.

herself into a *mikveh* before she is allowed to resume relations with her husband. In the case at hand (PDR 8/312-321): not only is the speech of the woman taken into consideration but also the fact that she secluded herself with another man. This act of seclusion is of graver importance than if she had stated that she is defiled. The woman in this case states however that although she has secluded herself, she is nevertheless not defiled.

Finally, the *dayanim* ask themselves whether even if the woman is believed that she was not defiled, there still remains a question here of transgressing the *halakhah*. If the woman states that she secluded herself after she was married, does this mean that she transgressed the *halakhah* and is there then a *mitswah* to divorce her? They argue:

The Ravad holds that she is not trusted considering herself, because no man can make himself into a *rasha*. Part of the *Rishonim* hold however that she is believed. The *halakhah* in Shulhan Arukh E.H. 116 is according to the *Rishonim*. Even though it is said in T.B. Ned. 90b that a woman who wants to prohibit herself to her husband is not believed, she is believed if she transgresses the *halakhah* [by putting herself in *yichud* with another man] and there is a *mitswah* to divorce her. There is however no *hiyuv* to divorce her.⁴¹⁰

The ruling continues with a most remarkable statement:

Since there is no *hiyuv* to divorce, but only a *mitswah*, it is not relevant to say that she might have cast her eyes upon another man because who knows whether he will divorce her and she would not spread a critical rumour about herself for no reason.⁴¹¹ However, others say that if she says “I secluded myself while being married”, she has cast her eyes upon another man and thus wants to prohibit herself. And even if she is not believed she has transgressed the *halakhah* and there is a *mitswah* on the man to divorce her.⁴¹²

⁴¹⁰ PDR 8/320.

⁴¹¹ See: Panim Meiros 2:12 and 2:100a.

⁴¹² PDR 8/320.

In the case of the PDR the question was whether the man believed the wife's statement that she was defiled, but there are also cases where the husband suspects that she has been defiled. Specific rules apply when the husband in such a case is a *kohen*, as the Rambam⁴¹³ writes:

In the case of a man who suspects his wife, and she then secludes herself with another man, and thereupon one witness comes forth and testifies that she has been defiled, the rule is that if her husband is a priest, and he subsequently has intercourse with her, he must be flogged for intercourse with a harlot.⁴¹⁴ For although it is only the mere root of the testimony that has been established by the one witness, she was already presumed to be a harlot.⁴¹⁵

The witness does not have to see the actual act of adultery, as the Rambam⁴¹⁶ writes:

The witnesses to the deed are not bound to see the culprits initiate intercourse, like a painting stick being inserted in the paint tube. Once they see them in close embrace, in the manner of those engaged in the sexual act, the culprits are liable to be put to death on this evidence. It cannot be said that perchance the act of coition has nevertheless not been initiated, for this posture constitutes presumptive evidence to the effect that it has.

Several things are of importance here; first, because the husband suspects his wife already of adultery the fact that there is one witness to her secluding herself becomes enough evidence to make her prohibited to him. Second, even though this witness does not necessarily have to have witnessed the actual act of adultery, just the initiating of it, the woman is nonetheless called a harlot. The *kohen* has a *hiyuv* to divorce his wife, although probably no *kefiyah* would be applied to make him divorce her. Questions arise as to the acceptability of suspicion and accusation as modes of evidence and these questions will be answered in section 5.6.

⁴¹³ Rambam, Hilkhote Issurei Bi'ah 1:22.

⁴¹⁴ People who engage in forbidden unions which are punishable by *karet* (extinction) and for which there are witnesses to the act, who gave prior warning to the perpetrators, are to be flogged on the order of the *bet din*.

⁴¹⁵ The husband's suspicions of his wife made her already susceptible to being classed a harlot, i.e. a woman forbidden to the priesthood.

⁴¹⁶ Rambam, Hilkhote Issurei Bi'ah 1:19.

5.4 *Tamei'a ani lecha: the wife of an Israelite*

The *halakhah* in M. Ned. 11:12 which was originally, according to the Talmud, aimed at the wife of a *kohen*, was later extended to the wife of an Israelite who told her husband that she had committed adultery; this woman was likewise not believed because she might have cast her eyes upon another man and wants a divorce solely for this reason. Thus the woman would have to bring adequate proof for her adultery. As in all other cases eyewitnesses would be the best possible proof one has, but to prove adultery by witnesses is impossible since the couple has to be warned by the two witnesses before they commit the adultery that they are about to commit a grave crime (*hatra'ah*⁴¹⁷). The couple has to state clearly that they know that they are transgressing the *halakhah* and know the consequences, yet nevertheless will continue in their act. Then the two witnesses have to see the actual act of adultery to prove that adultery has taken place. “[T]he purpose of warning in all instances is to distinguish between acts committed wantonly and those committed in error”.⁴¹⁸ It is thus much easier to prove by eyewitnesses that adultery has taken place on the basis of presumption (*hazaqah*), when a woman has been seen to seclude herself with a man prohibited to her⁴¹⁹ or when the witnesses saw the couple embracing in an act that presumed that they were going to engage in sexual relations.⁴²⁰ A *hazaqah* is a presumption that something is the case even though there is no actual proof for it. The Encyclopedia Talmudit⁴²¹ gives the example of when a man, a woman and two children come to a town and live together in one house. There is a presumption that the man and woman are married and that the children are theirs. When a married woman secludes herself with another man it is presumed that she will have relations with him otherwise she would not do such a thing, thus there is a *hazaqah* that she has committed adultery.

While discussing *amatlah*, the Encyclopedia Talmudit gives the example of a woman who tells her husband that she has committed adultery and later retracts her words:

⁴¹⁷ T.B. San 8b; Tosefta San. 11, 1.

⁴¹⁸ Rambam, Hilkhot Issurei Bi'ah 1:3.

⁴¹⁹ A woman is forbidden to seclude herself (*yichud*) with any man who is not her husband or a man in a first-lineage family relationship, like her father, brother or son.

⁴²⁰ See the aforementioned *halakhah* of the Rambam, Hilkhot Issurei Bi'ah 1:19.

⁴²¹ Encyclopedia Talmudit, volume 13, *hazaqah* 4, (*hukhzaq*), column 714.

In the case of a woman who says to her husband that she is defiled to him because she committed adultery, she is not believed, because she might have cast her eyes upon another man. But if her husband believes her words and she later retracts her words and gives *amatlah* for what she is saying now, she is believed and she is permitted to her husband. The woman was believed by her husband because of *raglayim ledavar* (רגלים לדבר).⁴²² There is a dispute amongst the *poskim* whether in the case of *raglayim ledavar* a woman should be trusted or not when she [later] gives *amatlah* [retracting the original statement]. The discussion deals with what the *raglayim ledavar* is: is the fact that the husband believes her and has thus prohibited her to him (אנפשיה שוויא) *raglayim ledavar* in itself, in which case the *amatlah* would work, or is the woman prohibited according to *halakhah* on the grounds of *raglayim ledavar* [such as *yichud*], in which case no *amatlah* would help⁴²³”⁴²⁴

The question asked about a woman who claims that she is defiled is whether one can incriminate oneself, as “no man can make himself into a *rasha*”.⁴²⁵ Within Jewish law confessions are only accepted if there is some form of corroborative evidence that the self incrimination is actually true, in order to prevent someone from harming himself by confessing to something he has not done. The basic rationale behind not trusting a woman who declares that she is defiled to her husband is however not because the rabbis fear that the woman might harm herself but rather because they fear in fact the opposite: that she might have cast her eyes upon another man and wants to free the way to marry her object of desire. The rabbis decided that it is not sufficient that the husband believes his wife’s statement that she is defiled. However, the couple would be prohibited from having relations, but there is no *hiyuv* on the husband to divorce his wife.

The reasoning behind not trusting the wife when she states that she is defiled to her husband may have been fuelled by a strong desire to preserve marriages. We can see

⁴²² Rema, SA, E.H. 115:6.

⁴²³ R. Akiva Eiger on Rema, SA, E.H. 115:6.

⁴²⁴ Encyclopedia Talmudit, volume 2, p. 53, column 1

⁴²⁵ T.B., Yev. 25b.

this, for instance, in some cases in the Igrot Moshe,⁴²⁶ where R. Feinstein actually saved several marriages by not acknowledging the wife's statement that she is defiled to her husband, even where the husband believed her. In these cases the woman did not ask for a divorce but "came clean" about a matter that happened in the past. Even though there might have been some ground to suspect that what the woman claimed actually happened, R. Feinstein chose not to believe her on the ground that a woman should not be believed when she wants to prohibit herself to her husband. A woman who says that she either has committed adultery or has been raped has to bring solid proof that she really is defiled to her husband and thus should be divorced. She can either bring proof based on eyewitnesses, police and/or doctor reports (in the case of a rape) or *raglayim ledavar* (if she, for instance, put herself in *yichud* with another man).

In the PDR several divorce cases deal with women who state that they have committed adultery and want a divorce on that ground. In all these cases the same questions are asked: is the woman believed on her own statement? Does the husband believe his wife's statement, and if so, why? Is there a fear that she has cast her eyes upon another man? Which corroborating evidence does the wife have for her statement?

The general rule is that a woman is not believed when she claims that she has committed adultery because there is always the fear that she has cast her eyes upon another man. However, in PDR 2/197-211 the *dayanim* Ben-Menachem, Hadas and Elyashiv ask: "Why, if the woman is not believed anyhow when she says that she has committed adultery, should there be a fear that she has cast her eyes upon another man?". If the *dayanim* do not believe her claim of adultery their fear that she has cast her eyes upon another man becomes irrational. In cases where it is very clear to the *bet din* that there is no fear that the woman has cast her eyes upon another, such as in the case where the woman does *not* claim a divorce,

... the poskim disagree whether according to the law a woman, who is oppressed by her husband, can forbid herself to him. According to those who

⁴²⁶ See examples in chapter 3.7.

think that she cannot forbid herself to him according to the law, she is not trusted when she says I am defiled for you in any case. But according to those who think that a woman can “make herself into a piece of forbidden food”, she is trusted when she says I am defiled for you, in any case where we can see that it is not her will to receive a *get*, and it is clear to us that there is no fear here that she has cast her eyes upon another.⁴²⁷

The latter thus hold that a woman is trusted to have committed adultery when she does not want a divorce and when it is obvious that she has not cast her eyes upon another man. This woman’s position will become very difficult once the *poskim* believe her words: she now has to be divorced against her will and will possibly not receive her *ketubah*.

In PDR 9/74-93 the woman claims that she is defiled and her husband believes her. The woman later on retracts her words and gives *amatlah* that she only made this statement of defilement during an argument she was having with her husband. She made the statement out of anger and now states that she is not defiled. There is also a witness to whom, in her anger, she said that she had committed adultery. The husband also believes this witness. The *dayanim* Graz, Lan’el and Batzrei rule that since the woman gives *amatlah* for why her original statement is not true, she should be believed now that she did not commit adultery. The fact that the husband believes her words does not matter since she could prove to them that she said it while they were having an argument. The witness is also not believed because he is declared an invalid witness (*passul*).⁴²⁸ Thus the woman is not prohibited to her husband and the husband has no ground to divorce his wife against her will.

5.5 Moredet ma’is alay

A woman who comes to the *bet din* to ask for a divorce on the grounds of *ma’is alay* has to prove that she really is repelled by her husband by giving *amatlah mevureret*. *Amatlah mevureret* (אמתלה/א מבוררת), clear proof, is a stronger notion than *amatlah*; it

⁴²⁷ PDR 3/257; chief rabbi of Israel, Yitschak Nissim, R. Elyashiv and R. Zolti presiding.

⁴²⁸ Had the witness not been declared *passul* then his evidence would have served as *raglayim ledavar* and the wife’s *amatlah* would not have helped her.

is not an excuse one gives to undo a previous statement but rather clear proof why something is true. *Amatlah mevureret* is basically only used in cases of *ma'is alay*. It first appears as a term in the Shulhan Arukh, E.H. 77:3 where it is connected to a woman who asks for a divorce on the basis of *ma'is alay*. But what does *amatlah mevureret* mean in such a case? There is a lot of discussion about what constitutes repulsion and when a claim of *ma'is alay* can be accepted or not. The assumption is that if a woman claims divorce on the grounds of *ma'is alay* and does not claim her *ketubah* she is more likely to be believed, because if she hates him enough she will forgo her *ketubah* just to become free from him.

The basic thought behind the assumption that a woman may not claim her *ketubah* when she claims *ma'is alay* is that if she claims *ma'is alay* then she must prove to the *bet din* that she is trustworthy. Claiming her *ketubah* at the same time arouses suspicion about her trustworthiness and her true reasons for claiming repulsiveness. Maybe the statement of repulsion is only an excuse and a trick to get both a divorce and her *ketubah*.⁴²⁹

According to some opinions, however, a woman does not have to waive her *ketubah* explicitly as long as she does not demand it while stating *ma'is alay*.

It is difficult, perhaps impossible, to find objective grounds of what the *poskim* regard as *amatlah mevureret* regarding *ma'is alay*. The closest one can get to an objective ground is to be found in Tur E.H. 77, who quotes Maharam Rothenburg, saying that a *moredet ma'is alay* would have to give proof for why he was not acceptable to her, or bring proof that he went astray or that he has a disease. Another objective ground for *amatlah mevureret* can be found in Maharam Alshich 11, who discusses the case of a *yevamah* who falls to a young *yabam*, and writes: “when she claims “he is young and ignorant and he cannot support me, yet he does not want to perform *halitsah*” that is considered great *amatlah* and he should be forced to perform *halitsah*”. Since these notions are very open it is safe to say that it is up to the discretion of the *dayanim* to decide whether the woman has enough *amatlah mevureret* to support her claim for

⁴²⁹ PDR 6/325-353.

ma'is alay. According to Professor Elimelech Westreich,⁴³⁰ *ma'is alay* in practice has no necessary connection with emotions: he regards it as a formula used to bring about a no fault divorce on the part of the wife. With the growing disagreement amongst rabbis about this possibility, *amatlah mevureret* was invented as a restriction on no fault divorce by the wife. Thus *amatlah mevureret* has become a weapon in the defence against statements of *ma'is alay*. It has become very difficult for a woman to justify her *ma'is alay* when she wants to get out of the marriage; she really must have acceptable reasons to get a divorce. Mere boredom, for instance, does not fall under this category. However, if the *bet din* accepts the *ma'is alay* on the grounds that the woman has given *amatlah mevureret*, she is not classified as a *moredet*, which entitles her to her *ketubah* if a divorce ensues. No matter whether the *bet din* allows the claim for *ma'is alay* or not, no *bet din* would actually force the husband to divorce his wife in such cases. An example where the *amatlah mevureret* was accepted is PDR 3/3-5. The wife in question was a minor when she was married and it was still not sure at the time of the case whether she was a grown up. In addition, the marriage was against her will and she wanted out of it. The *dayanim* Nissim, Elyashiv and Zolti held that she had given enough proof that she was repelled by this man whom she never wanted to marry in the first place. This *ma'is alay*, however, was not sufficient grounds in itself to force the man to divorce her. There were however other good reasons in the case to force him. First, the marriage might not have been valid *de'orayta* because it was against the wishes of the woman. In addition, the couple had stated that they had not engaged in marital relations, which also means that there is *safek kiddushin*. Based on these two grounds the *bet din* ruled that the marriage, even though there was only a slight chance that it was a valid, should be undone. The *dayanim* ordered *kefiyah* of the *get*, which in itself was only a *get safek*.

When a woman has to prove that she has no ulterior motive for wanting a divorce the matter becomes more complicated: how can anyone prove that she has not cast her eye upon another man? The only thing the woman can do is to prove that she is sincere in her repulsion, thus removing the *bet din's* fear that she has an alternative ground for her claim. But if any woman who comes to a *bet din* with the claim that

⁴³⁰ Elimelech Westreich, at a meeting of the Agunah Research Unit, Centre for Jewish Studies, Manchester, 20 September 2007. See also E. Westreich, תמורות במעמד האישה במשפט העברי. מסע בין מסורות, p. 39.

she is repelled by her husband is immediately suspected of having cast her eyes upon another man this might be considered a subversion of the burden of proof principle “innocent until proved guilty”; here it is the other way around: the woman has to prove her honesty.

This approach of the *batei din* appears to be based on a “slippery-slope” argument. If one looks at the image of women within Judaism then one encounters two contradictory maxims. One is “that all Jewish women are to be believed because they are virtuous”,⁴³¹ the other is the complete opposite: “all women are to be distrusted because they are frivolous.” This latter maxim is expressed within halakhic literature in different ways; the moral fear argument provides a first example: “lest she cast her eyes upon another man and destroy the relation with her husband”. Other examples are: “In these days women are not trusted regarding sexual matters because they are promiscuous”⁴³² and “Women these days are arrogant, therefore the wife is not trusted”.⁴³³ These maxims are not real fears applied to all women but merely an expression of a “slippery-slope” argument: the rabbis fear that if they would allow the statement of one woman to be accepted and grant her a divorce on that statement, then it would provide a leeway for other women to make similar statements even though they might have ulterior motives for wanting a divorce. Due to the possibility of abuse of the law by some, no one is trusted.

That women are regarded in such a negative light is influenced by the idea within orthodox Judaism of the decline of the generations. The more liberal the surrounding world becomes, the stricter the *halakhah* is applied within the orthodox communities. To some extent this fear is justifiable: in the Dark Ages in Spain,⁴³⁴ for instance, promiscuity increased as a result of the licentious environment and in our own times divorce rates amongst orthodox Jews have risen in accordance with divorce rates in the secular world surrounding them. Even so, generalising statements should not be used in court cases; every case is different and one cannot blame the whole of humanity for the bad intentions of some. This becomes painfully clear in PDR 4/342-346, where the woman appealed to the Supreme Rabbinical Court against a *pesak din*

⁴³¹ See, e.g., Grossman 2004, p. 31.

⁴³² PDR 4/342.

⁴³³ PDR 5/239.

⁴³⁴ Grossman, 2004, pp. 135-144, Assis, 1988.

that made her lose all her rights against her husband because she had left the marital abode. The woman had done so because her husband abused her both physically and sexually, both in the days that she was *tahorah* and the days that she was a *nidah*. The Rabbinical High Court acknowledged that even though the woman in the case was not “one of the kosher daughters of Israel”, i.e. she was not an observant Jewish woman who observed the laws of family purity, and was thus in a constant state of *nidah*, if the man forced himself on his wife he would have to divorce her and pay the *ketubah*. The *dayanim* however question whether they should believe the woman in her accusations against her husband and cite the Mahari Weill for the view that if a woman testifies in a *bet din* that her husband has relations with her both in days that she is allowed and also during days that she is a *nidah*, she should not be trusted, based on the rule in M. Ned. 11:12 where a woman who claims טמאה אני לך is not trusted. The Maharam on the Mordechai says that such a woman should not be trusted because “all women are frivolous”. In the end the *dayanim* ruled that even though they felt that both the man and the woman had transgressed the *halakhah*, they granted the appeal in favour of the wife and sent the case back to the regional *bet din* of Haifa. Though it is normal that the woman has to bring proof for the accusations she made against her husband there was already a prejudice against the woman who, because she was not observant, was placed in the generalising category of “loose women”, which made her statement dubious to the *dayanim*. The woman had to bring proof in the form of the husband’s hospital records and the divorce file from his previous marriage. In accordance with the Rema 154:7 who wrote that if there are *amatlot* and *umdanot* which show that the woman is telling the truth, the woman was in the end trusted.

5.6 Evidence when the husband accuses the wife of adultery

Until the *takkanot* of Rabbenu Gershom a man had the Torah right to divorce his wife whenever he wanted and for whatever reason, even against the will of his wife. The *takkanot* changed this however for Ashkenazi men, and made it impossible for them to divorce their wives against their will, unless accepted grounds were shown. In Sephardi communities, even though the *takkanot* were not accepted, the prohibition against taking a second wife has become part of many marriages by means of a *shevu'ah* written in the *ketubah*. To prevent a husband from divorcing his wife against

her will an agreement by handshake is made at the time of the *kiddushin*.⁴³⁵ When this is not done a Sephardi man might nevertheless be bound by the *takkanot* of Rabbenu Gershom when he marries an Ashkenazi woman or when he marries in a country where the *takkanot* of Rabbenu Gershom are accepted, as is discussed in the PDR.⁴³⁶

It is apparent within halakhic literature that the *takkanot* of Rabbenu Gershom produced another change, as a side effect. Starting with the Rashba⁴³⁷ it becomes clear that whenever a man wants to divorce his wife while she does not want a divorce the fear arises that maybe he has cast his eyes upon another woman and wants the divorce solely for this reason. Other sources are to be found, for instance, in the Rosh,⁴³⁸ the Rema,⁴³⁹ the Hatam Sofer⁴⁴⁰ and right up to Rav Ovadya Yosef⁴⁴¹ and Rav Moshe Feinstein.⁴⁴² In many divorce cases in the Piskei Din Rabbani'im, too, the moral fear argument is applied to men. In the majority of cases where a man wants a divorce and his wife refuses, he either claims *ma'is alay* on his side, that she is a *moredet* or that she has committed adultery (שוויה אנפשה חתיבה דאיסורא). Thus, a husband now uses against his wife the same reasons which a woman might use to get a divorce from her husband. Here it is not self incrimination but rather accusation which is used to get a divorce and the question arises as to what evidence is required? In several divorce cases in the Piskei Din Rabbani'im⁴⁴³ a man “gave his wife a bad name”, i.e. he slandered her amongst neighbours, friends and family. Can this kind of slandering be admitted as proof? As for general gossip about a married woman, not instigated by her husband, the Rambam wrote in Hilkhhot Issurei Bi'ah 15:20:

If there is a rumour abroad concerning a married woman that she had committed adultery while being under her husband, and everyone gossips about her, no apprehension need to be felt that her children might be bastards, since most of her intercourse is with her husband. One may, at the outset,

⁴³⁵ PDR 9/74-75

⁴³⁶ See, e.g., PDR 7/65-73 (“a husband who enslaves himself to the *herem*”); 9/74-93; 9/152-156; 11/4-68.

⁴³⁷ Shut HaRashba 1:1237.

⁴³⁸ Rosh 43:9.

⁴³⁹ Rema 12:5

⁴⁴⁰ Hatam Sofer 4 (EH 2) 109; 5:203.

⁴⁴¹ Yabya Omer E.H 2:2; 3:21.

⁴⁴² Igrot Moshe E.H. 3:30.

⁴⁴³ For instance: PDR 6/257-265; 7/201-205; 8/104-112 (here both slander each other).

marry her daughter, but the mother herself is under suspicion of being a harlot. If she is excessively dissolute, apprehension should be felt even concerning her children.

Further on, in *Hilkhot Issurei Bi'ah* 17:21, he writes

... If the town rumour has it that she had committed adultery, it too should be disregarded. Even if her husband had divorced her on the ground of transgression against Israelite custom, or because of evidence of indecent conduct, but died before he could give her the writ of divorcement, she is nevertheless permitted to a priest, since a woman cannot be rendered forbidden for these reasons, except on explicit testimony or by her own admission.

By the same token a husband cannot just slander his wife and get a divorce simply on those grounds, as is apparent in many cases in the PDR.⁴⁴⁴ In general a man is not believed when he wants to render his wife prohibited to himself, and if he wants to do so he has to give proof for his claim. Here again eyewitnesses would be the best possible form of proof, but other forms of evidence such as *amatlah mevureret* or *raglayim ledavar* are also accepted. If the woman wants a divorce and even more so when she asks for her *ketubah* together with the *get*, the *dayanim* are more likely to believe the husband when he says that his wife is forbidden to him. The reasoning behind this seems incomprehensible: why would a husband be believed regarding the status of his wife when she wants the divorce but not when he wants the divorce? An answer to this is given in PDR 1/55:

If the woman demands a *get*, we believe the husband's claim that his wife is forbidden to him, and he is obliged to divorce her since she has renounced her subjection to him.

When the husband asks for a divorce and states that his wife has committed adultery the fear arises that he has an alternative reason for stating this, such as another woman

⁴⁴⁴ See e.g. PDR 1/129-138; 5/286-289; 6/257-260; 7/201-205; 8/312-320.

or unwillingness to pay his wife her *ketubah*. However, when the wife asks for a divorce and the husband then states that his wife has committed adultery, he basically has ended the marriage, willingly or not, by that statement because now his wife is forbidden to him and he has a *hiyuv* to divorce her; thus the *dayanim* are more likely to believe him.

When a woman goes to the *bet din* to ask for a divorce it has become general practice that when she claims *ma'is alay* the husband responds by claiming that his wife is a *moredet* or that she has committed adultery. According to Professor Westreich,⁴⁴⁵ all these terms have become formulae in the game of divorce: the term *moredet* has become a sword in the hands of a husband seeking to be released from the obligations of *mezonot* or *ketubah*. A man who could get a divorce on either a claim of adultery by the wife or *moredet* would thus be doubly rewarded; not only would he get the desired divorce but he also would not have to pay his wife her *ketubah*. In cases where the woman applies for a *get* and the husband then starts to slander his wife amongst family and friends and not just in the *bet din*, there is discussion (as is apparent in PDR 6/257-265 and 8/104-112) whether there is a *hiyuv* on him to give her a *get*. In neither of these cases did the *dayanim* award a *hiyuv* in the end. In the latter case, where the wife after having originally claimed for a divorce now wanted *shalom bayit*, the *dayanim* ruled that even though *shalom bayit* was not a feasible option and yet there was no *hiyuv* upon the man to divorce the woman, he nevertheless was not released from his monetary obligations towards her. This means that the husband had to continue to provide for his wife by giving her *mezonot*, which in the end might have led to him voluntarily giving her a *get*.

5.7 Mored me'usah alay

Even though it is not as common as a woman who claims *ma'is alay*, there are cases where the husband claims that his wife is repulsive to him and that he wants a divorce on that ground. In PDR 1/193-201, the husband wanted a divorce while his wife did not. The husband stated that his wife was repulsive to him and gave *amatlah mevureret* for his claim. The *bet din* ruled that even though they would not grant a

⁴⁴⁵ E. Westreich, at a meeting of the Agunah Research Unit, Centre for Jewish Studies, Manchester, 20 September 2007; email October 2007.

hiyuv against the wife to accept the *get*, they do allow the husband to either withhold *mezonot* from the wife or to deposit his wife's *ketubah* and *get*. He is then not obliged to pay his wife any *mezonot*. The withholding of the *mezonot* might lead to the wife accepting the *get* out of financial pressure. The depositing of the *ketubah* and *get* is done in the *bet din*; the husband writes the *get* for his wife and hands over the money of the *ketubah* to the *bet din* and the wife is free at any agreed time to come and collect them. It is not clear in the case whether the husband can get married to another woman after depositing the *ketubah* and the *get* or whether he would still need a *heter me'ah rabbanim*.

In another case (PDR 3/225-232) a man wanted to have his marriage annulled based on *mekach ta'ut* because his wife did not disclose before the wedding that she used to work as a prostitute. The husband claimed *me'usah alay* on that ground. The wife however also claimed *ma'is alay* and she provided *amatlah mevureret*. The *dayanim* ruled that the marriage could not be undone on the basis of *mekach ta'ut*, because the husband should have investigated before the marriage whether there was a *mum* (here, the previous prostitution) in his wife. Despite the fact that the marriage could not be annulled on the basis of *mekach ta'ut*, the *dayanim* granted a *hiyuv* against the wife to accept a *get* and released the husband from paying her any *mezonot* until she did so.

In PDR 11/4-75, the husband filed for divorce on the grounds that his wife was an epileptic; he had lived with his ill wife for many years but claimed that he could not stand it any more and was now repelled by her. He wanted either his wife to be forced to accept a *get* or a *heter* to marry another woman. In the meantime he wanted to deposit the *ketubah* and the *get* and be freed from paying *mezonot* to his wife. The Ram had ruled that “since one cannot add to the *herem* of Rabbenu Gershom to divorce a wife against her will, a husband should have the right to deposit the *ketubah* and the *get* and thus be freed from paying *mezonot*”⁴⁴⁶, when he finds her repulsive. However, the *dayanim* noted:

... there is a great debate amongst the Acharonim: many hold that the Ram's ruling only applies to a second marriage and not to a first marriage, in which

⁴⁴⁶ See PDR 1/193.

case it will be forbidden by the Sages to divorce the wife against her will and the husband cannot be exempt from paying her *mezonot*. Even the Ram himself wrote in *Sefer Mayim Amukim* 1 that even where a man states *me'usah alay*, he is not allowed to divorce his wife against her will when it is the first marriage. According to others the ruling of the Ram only applies to the ruling of the *Gemara* and not in places where the *herem* of Rabbenu Gershom applies.⁴⁴⁷

In other divorce cases,⁴⁴⁸ too, men try to deposit the *ketubah* and the *get* whenever their wives refuse to accept a *get* just to get out of paying them *mezonot*. It is again money that is used to bring the refusing party to either give or accept a *get*. In the end the *dayanim* Tana, Horwitz and Ben-Shimon ruled that even though they accepted the claim of the husband that he could not stand to live with his wife any more, she was not obliged to accept a *get* nor could he withhold *mezonot* from her. He would also not receive a *heter* to marry another woman.

5.8 Conclusion

When one spouse wants a divorce against the will of the other, in the majority of cases either a claim of adultery or a claim of *moredet ma'is alay* is made. No matter whether it is the husband or the wife who claims these grounds, if such a claim were to be sufficient this would provide a basis for no fault divorce, and one in which the wife seeking such a divorce would still get the *ketubah* or the husband seeking it would have no obligation to pay the *ketubah*. To prevent this, the Sages decided that they would not believe any of these claims unless the claimant could bring proof in the form of eyewitnesses, *amatlah mevureret* or *raglayim ledavar*. Even though after the *takkanot* of Rabbenu Gershom the same requirements apply to a man as they apply to women, the man still has the advantage of being trusted more, especially when it is his wife who wants the divorce. Thus there is no complete balance in modes of proof attached to men and women.

⁴⁴⁷ PDR 11/69.

⁴⁴⁸ PDR 1/193-199.

Chapter six

***Tav lemeitav* and the moral fear argument: how do they influence divorce cases?**

6.1 *Tav lemeitav* and the moral fear argument: a summary

In the previous chapters we have looked at the historical development and current use of two maxims applied to women within Judaism. These two maxims deal with the way women's sexuality is regarded within Judaism. These views play an important role when dealing with divorce cases in general and with divorce cases where the woman wants the divorce against the will of her husband in particular. The maxim of *tav lemeitav* holds that women prefer the physical aspects of a marriage, even if the marriage itself is not happy, above being single. A woman who thus states that she wants a divorce must have cast her eyes upon another man she would rather be married to. There are, however, also women who, according to the *Tanna* in Ket. 75a and Yeb. 118b, will stay in a marriage and just have a lover on the side. All three opinions show that women are regarded foremost sexually: either in need of marital relations or prone to immoral behaviour.

We have noted a change regarding the use of both maxims throughout the generations. Whereas *tav lemeitav* is mentioned throughout history, it is hardly ever regarded as an ontological truth applicable to all women and thus is almost never applied in practice in a divorce case. Only with the introduction of new *batei din* who free *agunot* on the basis of *kiddushei ta'ut*, has the claim for *tav lemeitav* as an ontological truth been reinforced. It is strange to see that in previous centuries *poskim* would not apply *tav lemeitav* yet would rule for *kiddushei ta'ut* only *lehalakhah velo lema'aseh*, while in our day and age some rabbis end marriages on the basis of *kiddushei ta'ut* and are criticized by other rabbis because of *tav lemeitav*. The reasons these latter rabbis have for not wanting marriages to end with *kiddushei ta'ut* are threefold. First there is the meta-halakhic principle of the *humrah shel eshet ish*. Whereas with other halakhic questions leniency is applied when necessary and/or possible, when it comes to matters of *arayot* the rabbis go *lehumrah*. Any chance of allowing a woman who might possibly still be halakhically married to remarry must be prevented and in this respect one sees an ever stricter interpretation of the *halakhah*

regarding women and divorce. One can see this not only regarding *kiddushei ta'ut*, which was also not accepted in many previous centuries, but also regarding other halakhic tools that are available and which have been used in previous times and are now abandoned. Any form of pressure put on the husband, for instance, is considered forbidden and renders the *get* a *get me'useh*. Whereas the Rambam ruled that one can even beat a man into consenting to give a *get*, even the use of a prenuptial agreement, which the man entered into voluntarily, is considered nowadays as unlawful pressure. This is also due to the second reason why rabbis do not want to end marriages by *kiddushei ta'ut*. Amongst the *poskim* there is a strong notion that they do not have the power anymore to rule in the same manner as rabbis in previous times. And even though in the past most *poskim* did not rule *kiddushei ta'ut lehalakhah*, although they could have justified doing so, nowadays the possibility of ending a marriage by any other form than with a *get* is regarded as inconceivable. In this context it is strange to observe that someone like Rav Feinstein was willing to let marriages end on the basis of *kiddushei ta'ut* and that this has been accepted by most of his contemporary *poskim*. Apparently there is also the notion of daring to take a stand which influences rabbinical decisions. The third reason why most rabbis do not want marriages to end by means of *kiddushei ta'ut* has to do with the fact that the *batei din* who apply *kiddushei ta'ut* do so in a very broad manner, often irrespective of the circumstances. This will then lead to situations where most of these women are very likely to still be halakhically married, yet will regard themselves as free to remarry, with all its consequences. This leads us back to the fear of the *humrah shel ehset ish* and thus there is a vicious circle.

The moral fear argument has undergone several changes in its history. Whereas originally it was only aimed at the wife of a *kohen*, later on it was also applied to the wife of an Israelite. In a further change the moral fear argument was not only applied to women who said that they were defiled to their husbands, but also to women who claimed *ma'is alay*. In modern day divorce cases it has become apparent that the moral fear argument is applied to any woman coming to a *bet din* asking for a divorce against the will of her husband, no matter what her grounds are. These changes are not always due to inner halakhic debate but often reflect the (negative) influence which the outside world has had on normative Judaism. Even though Jewish communities have lived throughout the ages in close knit communities such as *stetlts*,

there has always been contact with the surrounding environment. This has had an influence on normative Judaism to some extent and is probably the reason why *haredi* communities in our day and age tend to live secluded from the secular society, thus sheltering themselves from its influences. Regarding the moral fear argument it has become apparent that the loose morals of the non-Jewish world have influenced rabbis in deciding divorce cases, this both in positive and negative directions.

Some of the halakhic changes considering the moral fear argument have been made as a result of *tsorekh hasha'ah* or *sha'at hadehaq*. It has become clear that where one generation would regard the moral fear argument as a necessary precaution against the (presumed) immoral behaviour of the women of their generation, rabbis in another generation would forego the moral fear argument out of fear that women in their day and age would become loose when not granted a divorce. Changes with regards to the moral fear argument have thus not only been made due to inner halakhic debate, but sometimes also due to external (foreign) influences.

6.2 The *agunah* problem today

The problems which surround *igun* nowadays cannot be seen as separate from the influences which the secular non-Jewish world has on Judaism. In addition to that, the variety of the Jewish religious map, which was created as a result of the *Haskalah*, also poses questions to the *agunah*-problem. Whereas before the *Haskalah* all Jews were considered orthodox, now a new form of Judaism arose which interpreted *halakhah* as, even though divinely inspired, made by humans and thus changeable when the need arises. This has increasingly led to a gap and even a break between orthodox Judaism on the one hand and conservative, reform and reconstructionist Judaism on the other. This break becomes acute in matters of personal status, such as marriage and divorce, the question of who is a Jew and conversion: where orthodox Judaism holds to the halakhic rulings regarding all these matters, the other three forms of Judaism hold a more liberal stance to variable degrees. Within orthodox Judaism the liberal attitude of conservative, reform and reconstructionist Jews is regarded with increasing dread. Within reform and reconstructionist Judaism, for instance, children who only have a Jewish father are accepted as Jews and religious marriages are regarded as undone once there has been a civil divorce. From an orthodox viewpoint

this increases the decline of Judaism, the number of adulterous marriages and the number of *mamzerim*. Reform and reconstructionist Judaism claim to be more open-minded and accepting and are proud not to have major problems with *igun*.

Due to the changing place of women in the outside world, the place of women within Judaism has also changed. The place of women within conservative, reform and reconstructionist Judaism differs much from the place of women within orthodox Judaism. Whereas orthodox Jewish women often fulfil traditional roles, women in the other three Jewish denominations hold similar positions to men, even within the religious context. Thus these women can become rabbis and cantors. Some of these women have taken an interest in the *agunah*-problem and are fervent advocates for the cause of *agunot*.⁴⁴⁹ Women's organisations (from all four streams of Judaism), mainly in Israel and the United States, have also taken up the fight for a solution to the problem of *igun*. This is regarded with suspicion from an orthodox point of view and any suggestion coming from this side is basically disregarded no matter how solid its arguments.

Both the changes within Judaism itself and the changing position of women within society have led to an increasing turn to the right within orthodox Judaism. While the surrounding world has become more liberal, the orthodox and, even more, the *haredi* world has become stricter. As for the *agunah*-problem, this has resulted in an instantaneous refutation of every solution proposed by either more left-wing Jewish groups or women's organisations. Further, the concept of the decline of the generations, which makes rabbis feel that they cannot rule in divorce cases like former *poskim*, and the increased fear of a *get me'useh* and the *humrah shel eshet ish* have led to a rigorous standpoint regarding finding a solution to the *agunah*-problem. Thus divorce cases have become extremely difficult when one party is not willing to cooperate, especially when the woman wants the divorce against the will of the husband. Excesses are not uncommon in modern day divorce cases, such as the *bet din* asking a man, when he comes to give a *get* to his wife, whether he has received all he wanted. If not, the negotiations for divorce are re-opened, thus increasing the

⁴⁴⁹ See e.g. Monique Ziskind Goldberg, Diana Villa, *Za'aqat Dalot*, Schechter Institute of Jewish Studies, Jerusalem 2006.

length of the divorce procedure.⁴⁵⁰ Given the fact that it is not uncommon these days within *haredi* circles for a man (or his parents in his name) to expect certain financial securities from his future wife or in-laws while he studies on a full time basis, it is understandable that this same man will ask for financial compensation when the marriage does not work. Once a social frame is created where it is accepted that it is a man's right to be provided for when he gets married, it is only a little step to extrapolate this to a divorce settlement as well.

Another example of an excess is the recent “innovation” of cancelling a *get* given to a woman when she later turns to the civil court in order to amend certain conditions she agreed to during the Jewish divorce procedure. Women often give in to financial or other demands made by men to obtain a *get*. Although these demands can be regarded as blackmail, they are often condoned by *batei din* on the basis of the Rosh and Rabbenu Tam, who both took the view that it is sometimes better to use the method of the carrot than the stick.⁴⁵¹ A woman who, after she has received her *get*, tries to rectify the situation can now find herself faced with a cancelled *get*, because the rabbis hold that the *get* was given *al tenai*. If the woman now wants to change these conditions, the *get* itself is not regarded as valid anymore. This cancelling of the *get* will even be done in cases where the woman has subsequently remarried and had children from this new marriage, thus turning these children into *mamzerim*. This practice is the total opposite of the positions taken by rabbis in the past in cases where a woman who had not waited for a *get*, got remarried and had children within this new marriage. To save these children from the stigma of *mamzerut*, a way was found to annul the first marriage. Although rewarding a woman who is disobedient to the *halakhah* while not doing so for a woman who adheres to the *halakhah* seems morally anomalous, the practice of cancelling a *get* is no less morally anomalous.

Notwithstanding these excesses, common measures which can help to prevent or solve an *agunah* situation, and which are halakhically sound, are disregarded or condemned as not halakhically valid. Prenuptial agreements, for instance, have been labelled by Rav Elyashiv as not halakhically valid and as creating a *get me'useh*. Rav Elyashiv has said that the groom at the time of the marriage did not expect to divorce,

⁴⁵⁰ This becomes clear from many messages posted on Gettlink, an online forum for *agunah* activists.

⁴⁵¹ See chapter 1, footnotes 11 and 12.

thus the agreement is given without proper intention and is therefore invalid. Second, he argues, “to force a husband to give a *get* in order to avoid paying a fine contradicts *halakhah*”.⁴⁵² Even though most PNA’s circumvent both objections, many rabbis follow Rav Elyashiv, who is considered to be the *gadol hador* in our generation. Another example where halakhic possibilities are not used due to an increasing stringency regarding divorce cases is the disuse of ordering *kefiyah* in divorce cases in Israel. The PDR cases which I have researched in chapter four show already that *kefiyah* is hardly ever applied within divorce cases. In an interview with Lea Ziegelaub, a *to’enet rabbanit* at the *bet din* in Haifa, it also became clear that *kefiyah* is hardly ever granted in divorce cases. The most a woman can expect is that the *bet din* will rule that there is a *hiyuv* on the man to give a divorce, although Ziegelaub has the impression that lately even *hiyuv* is not so easily given. A *bet din* will only grant a *hiyuv* if it feels that there is a halakhically valid reason why the couple should get divorced. Once they have granted a *hiyuv* they can apply the sanctions made possible in Israeli law, such as withholding a man’s driver’s license or his visa. To make sure that a *bet din* will consider a divorce halakhically necessary, a woman who files for divorce will have to prove that her claim for the divorce is true. Domestic violence, for instance, will almost automatically lead to a *hiyuv* to divorce, according to Mrs. Ziegelaub. When domestic violence is not the reason why a woman claims the divorce, but she has other grounds such as *ma’is alay*, she has to bring sufficient proof for her claim. It has already become very clear in the previous chapters though that *amatlah mevureret* is not well defined within halakhic sources, thus leaving it up to the discretion of the *batei din* whether they accept the evidence a woman presents to them or not.

In Israel several other problems which are unique to Israel arise with regard to marriage and divorce. Even though the majority of people in Israel are not orthodox the only forms of marriage and divorce are religious. As a result many people try to circumvent the situation in their country by either marrying in Cyprus, thus only having a civil marriage, or by not marrying at all and thus forming common law partnerships. These common law partnerships can nowadays be legalised under Israeli law. This new law of common law partnerships has, according to Mrs. Ziegelaub,

⁴⁵² See e.g. Segalovits, Thursday 24th February 2005, p. 8.

created inequality amongst the Israeli population because people who live in a common law partnership and separate have more legal rights than people who get married and subsequently get divorced. The female counterpart in a common law partnership will receive alimony up to four years after the couple breaks up. A married woman does not have any such right when the couple gets divorced. Another problem which arises in Israel is that many people who get halakhically married just do not bother to get a religious divorce once the marriage breaks down. They either get separated through a civil court, thus dividing the property they own without arranging a *get* afterwards, or they just divide the property amongst themselves. Subsequently these people will form new relationships, which leads to an increase of the number of *mamzerim*. Regarding these attitudes it is understandable why the discussion about the introduction of civil marriage in Israel is increasing.

From a halakhic point of view it is reasonable to ask whether all these problems do not constitute a *sha'at hadehaq*: in the only Jewish country in the world Jewish people are opting out of Jewish marriage because of the difficult situation which arises in the event of divorce. This surely should inspire the *batei din* to come up with a solution for women who become *agunot*. Instead of increasing the number of *agunot* by being more stringent than necessary, rabbis should try to use the *halakhah* to its full extent and provide solutions in difficult situations. Hiding behind the concept of the decline of the generations, and the argument that they no longer have the power or possibility to rule as former *poskim* did, is posing a threat to orthodox Jewish life. The response from within the (ultra)orthodox world is however not to deal with the problems, even though this means that many Jewish people will choose a non-observant lifestyle, but rather to move more to the right, thus forming a hard core group of orthodox Jews. Due to the high birth rate within *haredi* communities no need might be felt to reach out to other Jews who are not as religiously observant as they are. These communities might hold that they are growing so much that orthodox Judaism will survive no matter what. Throughout history Jews have abandoned Judaism, yet due to orthodox Jews Judaism has survived. Notwithstanding this fact, *igun* is a problem which also affects orthodox Jews and for that reason alone merits discussion. Shifman⁴⁵³ describes the unwillingness of orthodox rabbis to discuss the problem of *igun* as

⁴⁵³ Pinhas Shifman, "The Family Status of Women", in Rachel Elijor (ed.), *Men and Women. Gender, Judaism and Democracy*, Urim Publications, Jerusalem – New York, 2004, p.28.

follows:

There can be no denying ... that the rabbis' actions are rooted in a priori ideological premises: first and foremost the desire to preserve the patriarchal structure of the family. It is thus inconceivable that a woman might have the power to disengage from her husband simply because he has become repugnant to her, or claiming that reconciliation is not possible, although in so doing the rabbinical court is in fact acting contrary to the religious interest, whereby refusing to grant a divorce may encourage the couple to live in sin. This is a kind of mirror image of secular permissiveness – the more permissive the generation, the tougher and more intransigent the rabbinical court's position.

This gap between the secular and the religious Jews in Israel is however not the only reason why *batei din* in Israel do not try to explore possible solutions to the *agunah*-problem. Another problem lies in the definition of “who is an *agunah*?”. The definition which the *batei din* hold is different from the definition women's organisations have and this has an impact on the number of women who are regarded as *agunot*. According to the *batei din* a woman only becomes an *agunah* when they have granted a *hiyuv* and the husband refuses to give a *get*. Since a *hiyuv* is not easily granted, there are hardly any *agunot*. And this is why Shifman⁴⁵⁴ holds that “[t]he difficulty lies not in the lack of a halakhic solution, but first and foremost in the lack of the awareness that a halakhic problem does exist. Thus no significant effort is made to explore halakhic potential for a solution.” Due to the fact that according to *batei din* there are only a handful of women who are *agunot*, no necessity is felt to delve into the problem of *igun*. The *batei din* will hold, in accordance with Rabbi Willig, that “[a]s long as there is Jewish halakhic marriage, there are going to be cases of *agunah*. It is a by-product of halakhic Jewish marriage”.⁴⁵⁵ So, just as it is accepted that some women will turn away from Judaism when confronted with an *agunah*-situation, it is also accepted that *igun* is a possibility for any married Jewish woman.

⁴⁵⁴ Pinchas Shifman, 2004, p. 27.

⁴⁵⁵ This quote was taken from a lecture R. Willig gave in April 1999 and was quoted in Susan Aranoff, “Two Views of Marriage – Two Views of Women: Reconsidering *Tav Lemetav Tan Du Milemetav Armelu*”.

Women's organisations have a wider definition of when a woman becomes an *agunah*: they hold that if a *get* is not given within a specified time after the marriage has broken down or after divorce proceedings have started, the woman is an *agunah*. Also cases in which a woman pays for her *get* are sometimes considered *agunah*-cases, because they feel that a woman should not have to buy her freedom.⁴⁵⁶ The response to these women's organisations from the orthodox side is that they are exaggerating and just want publicity for the wrong reasons.

6.3 Conclusion

Even though it has become apparent that certain rulings by the Sages have been influenced by external factors, this does not mean that in our day and age such influences will necessarily help in solving our present *agunah*-problems. The *halakhah* can only be changed through arguments and sources within the *halakhah* and influences which stand much further from the *halakhah* cannot be taken into consideration. Whereas in former times the social environment often had an influence in helping *agunot* out of their situation, in our times the changing surrounding environment causes a radicalisation towards the right within orthodox Judaism and thus serves more as a negative influence than a positive one. No secular, non-Jewish or other foreign influences will help convince the halakhic authorities of our time to change their attitude to the *agunah*-problem. It is safer to say that influences from the emancipation movement have the just opposite effect, resulting in an immediate refutation of any argument or proposal brought forward by women's movements or anybody who is considered to be too modern, too leftist or simply not *frum* enough. In trying to preserve the status quo, actual problems are not dealt with. It is true that orthodox Judaism has survived because people kept to themselves and observed the *mitsvot*. History has proved that assimilation leads to an immediate decline in religious observance and does not protect the Jews from persecution; the assimilation of Jews in Germany in the late nineteenth and early twentieth centuries is a good example of that. Nevertheless, Judaism has also survived because there were great leaders who regarded the *halakhah* as a living entity, in which there is space for discussion and change. Looking for an adequate solution to the *agunah*-problem is

⁴⁵⁶ This view is also held by the Manchester *bet din*, which refuses to get involved in cases where one party, most often the man, requires money for giving or accepting a *get*.

also an essential part of ongoing Jewish life. The cancelled conference of orthodox rabbis in Jerusalem in November 2006 could have been a good starting point. Here there would have been a safe place for likeminded people to start at least discussing the possibilities of finding a solution to the *agunah*-problem or at least discussing the possibility that there is an *agunah*-problem. Even if the conference itself would not have resulted in an immediate solution (which it is quite reasonable to assume), the discussion itself would have been a major step forward in the right direction. It is a positive sign however that quite a few *dayanim* were willing to participate in the conference, hinting at a willingness to deal with a problem which is becoming larger in our day and age. This in itself might be the first step in the right direction and we should only hope for a continuation of it.

In relation to the historical overview of the two maxims central to this thesis, we may conclude that *tav lemeitav* did not have a major effect on how divorce cases were decided throughout the ages. *Tav lemeitav* was discussed as a possible ground for stating that the woman should not be allowed a way out of her marriage, because a woman would be satisfied with any marriage. In the majority of cases it was however decided that in that particular case *tav lemeitav* could not be applied and thus the woman could not be forced to stay in the marriage based on this maxim. Whether or not the woman was allowed to leave the marriage on other grounds is not always obvious. Even though rabbis found on occasion that a woman should be allowed to leave the marriage without a *get* (or the *yibbum* without *halitsah*), this was often ruled only *halakhah velo lema'aseh*. As long as there was no consensus amongst *poskim*, a single *posek* would not be inclined to rule leniently in the case of an *agunah*, even though he had found enough halakhic evidence that leniency was allowed. *Tav lemeitav*, as an ontological truth applicable to all women, became a topic again only in the last century and then more specifically as the counter claim to arguments that marriages should be undone on the basis of *kiddushei ta'ut*. Marriages undone on the basis of *kiddushei ta'ut* by certain *batei din* are regarded as still existing by the majority of orthodox rabbis. This increases the fear of the *humrah shel eshet ish* and subsequent *mamzerim* with regard to these women. This also shows that consensus amongst the *poskim* is essential in deciding the future of the *agunah*-problem: any solution that might be found needs the approval of minimally the *gedolei hador*.

As for the moral fear argument, it has become clear that this argument has had an increasing influence on deciding divorce cases. The influence of the lax morals of external societies on the Jewish community has played a major role in this. It is interesting to see though that rabbis in almost every century mention that the generations of their times are (morally) in decline and that women have thus become more promiscuous. That a connection is made within rabbinic writings between the changing times and women's lust for sexual relations can be seen up to our own days, as a ruling by Rav Moshe Feinstein (Igrot Moshe E.H. 3:28) proves when he writes "because of the promiscuity of this generation and jealousy for another woman's lot, a woman feels desire and erotic passion more often than once a week".⁴⁵⁷ The constant reference to the "promiscuity of the generation" might pose the question whether at some point in history there really was a perfectly moral Jewish society or whether certain aspects of licentious behaviour have been part of every Jewish society, just as in the rest of the world? On the other hand, while the *Geonim* instituted their *takkanah* as a response to the danger of women turning to bad ways, i.e. becoming promiscuous, this *takkanah* was abolished by later *poskim* who no longer recognised this *sha'at hadehaq* in their own times. This stands in complete opposition to the feeling that the generations are becoming more and more promiscuous. Would thus the *sha'at hadehaq* of women turning away from Judaism, which the *Geonim* experienced, not be sensed even more in following generations? History, in my perception, has also proved that nothing has really changed. Up until today there are women who will turn away from Judaism when confronted with an *agunah*-situation. But, as I have mentioned earlier, this appears to be a price that rabbis are willing to pay.

Based on all that has been written in the previous chapters it is apparent that throughout history there definitely has been a change in the attitude towards helping women out of an *agunah*-situation when the husband refuses to give a *get*. This is visible, for instance, in the change from the acceptance of corporal punishment of a man who refused to give a *get* to declining even self-imposed conditions in the form of a PNA as a possible form of coercing a man into giving a *get*. Whether we can only blame the rabbis for this is another question; the fact is, however, that in former times

⁴⁵⁷ As quoted in Boyarin, 1997, p. 145-146, footnote 22. He took this quote from Rachel Biale, 1984, p. 134.

there seemed to be a greater willingness amongst rabbis to do something when a woman became an *agunah*. Throughout history Jewish communities in themselves have changed, as has the place of women within them. In the past Jewish communities were tighter and thus it was easier to influence a man who refused to give a *get*. With the changing times, the response of and to *get*-refusing husbands has changed. Orthodox communities have become more dispersed, which makes it easier for a man to move around to a place where he will not be “bothered” by any communal actions against him. A stricter approach towards helping an *agunah* out of her situation as a reaction to the emancipation movement is also a sign of the times.

Another aspect that has become clear in the past chapters is that a different attitude is taken against women who adhere to the *halakhah* than to women who choose not to do so. Due to the additional problem of the possible *mamzerut* of children, rabbis have ruled more leniently in cases where a woman started a new relationship with another man without waiting for her release. In cases where the woman in question was a *yevamah*, this was done even more easily, because in that situation at least the first husband was dead. The morality or even the desirability of these rulings can be questioned, but maybe again that is a price that rabbis are willing to pay.

What does all this hold for the future? Is there a possibility of finding a solution for the *agunah*-problem or is that future bleak? All depends on the willingness of the *poskim* in our times to open up to admitting that there is a problem, maybe not in every community or country, but certainly internationally. In addition, a willingness is needed to sit down and discuss any possibility for finding a solution to that problem, incorporating all options which were used in the past. Even in the past century there was a *posek* who dared to use to the *halakhah* in a creative way and undoubtedly there are other great halakhic leaders around in our day and age. Change might come by work done on this subject at various institutions such as our research unit, but the ultimate halakhic change will have to come from the *gedolei hador*.

ADDENDUM A

The Piskei Din Rabbani'im Chart

Place	Who claims divorce	Reason for divorce	Moral fear	Wife or Husband?	Context of moral fear	Ma'is alay
1/5-19/4mf	woman	Illness	no	-	-	
1/51-55/1mf	woman	Irretrievable breakdown	yes	W	Accusation of adultery	-
1/55-63/1mf	woman	Impotence	yes	W	Accusation of adultery	-
1/129-139/1mf	woman	Illness	yes	H	Accusation of adultery	-
1/139-142/5mf	woman	Behaviour	yes	W and H	Accusation of adultery	woman
1/142-145/6mf	man	Adultery	yes	W	Adultery	-
1/193-201/1mf	man	Mekach ta'ut	no	-	-	man
1/321-329/3mf	man	Adultery	yes	W and H	Ma'is alay	man and woman
2/142-161/2mf	woman	Not clear	yes	W	Accusation of adultery	-
2/188-196/1t	woman	Illness	no	-	-	woman
2/197-212/23mf	woman	Adultery	yes	W	Adultery	-
2/262-270/1mf	Not clear; man appeals	Not clear	no	-	-	-
3/3-18/1mf	woman	Ma'is alay	no	-	-	woman
3/161-169/1mf	woman	Not clear	no	-	-	-
3/201-207/1mf	woman	Ma'is alay	no	-	-	woman
3/225-	man	Mekach	no	-	-	man and

234/1mf		ta'ut				woman
3/257-272/9mf	Not clear	Not clear	yes	W	Adultery	-
4/157-163/2mf	woman	Impotence	no	-	-	-
4/175-183/2mf	Not clear	Not clear	yes	W	Accusation of adultery	woman
4/257-266/2mf	man	Adultery	no	-	-	-
4/342-346/3mf	woman	Behaviour	yes	W	Abuse	-
5/239-257/6mf	woman	Impotence	no	-	-	-
5/286-291/5mf	man	Adultery	yes	W and H	Accusation of adultery	-
5/306-310/1mf	No divorce case anymore	-	no	-	-	woman
6/5-23/1mf	woman	Behaviour	no	-	-	woman
6/131-158/7mf	No divorce case	-	yes	-	-	-
6/221-224/1mf	woman	Behaviour	no	-	-	woman
6/257-265/2mf	woman	Ma'is alay	yes	W	Accusation of adultery	woman
6/325-354/30mf	woman	Ma'is alay	yes	W	Ma'is alay	woman
6/366-376/6mf	woman	Eshet ish	yes	W	Adultery	-
7/65-74/1t/2mf	woman	Remarriage husband	no	-	-	-
7/201-206/3mf	woman	Remarriage husband	yes	W	Accusation of adultery	woman
7/281-289/1mf	No divorce case	-	yes	W	Accusation of adultery	-

7/353-384/1mf	man	Agreement to divorce	no	-	-	-
8/3-10/15mf	man <i>This is probably the appeal on the case of 7/353-382</i>	Agreement to divorce	no	-	-	-
8/104-112/1mf	No divorce case	-	yes	W and H	Accusation of adultery	man and woman
8/312-321/2mf	man	Adultery	yes	W	Accusation of adultery	-
9/74-94/1mf	man	Adultery	yes	W	Accusation of adultery	-
9/149-152/2mf	man	Irretrievable breakdown	yes	W	Ma'is alay	-
9/152-168/1mf	man	Ma'is alay	yes	W and H	Ma'is alay	man and woman
9/171-184/4mf	woman	Adultery	yes	W	Adultery	woman
9/265-288/2mf	man	Mekach ta'ut	no	-	-	-
11/4-75/2t/4mf	man	Illness	yes	H	Accusation of adultery	man
11/193-209/21mf	Not clear	Not clear	yes	W and H	Ma'is alay	man and woman
11/315-326/19mf	No divorce	-	-	-	-	-

Place	Kefiyah	Other remedies	Conditions	Evidence/ burden of proof/ amatlah	Halakhic comments/ issues	Other issues
1/5- 19/4mf	Hiyuv on husband	Mekach ta'ut	-	Amatlah witnesses	He equated her to a piece of forbidden food Mum	Vasectomy
1/51- 55/1mf	Hiyuv on husband	-	-	Witnesses	Adultery then divorce	Giving of get (again)
1/55- 63/1mf	Hiyuv on husband	Mum	-	רגלים לדבר	Custody	Custody
1/129- 139/1mf	Hiyuv on husband	-	-	Witnesses	He equated her to a piece of forbidden food	-
1/139- 142/5mf	No hiyuv on husband	-	-	Proof	-	Couple has been married before
1/142- 145/6mf	-	-	-	רגלים לדבר Yichud	Accusations bittul	Shalom bayit
1/193- 201/1mf	No hiyuv on husband	-	-	Amatlah	Depositing get and ketubah	Separate dwelling places
1/321- 329/3mf	No hiyuv on wife	-	-	Amatlah	Depositing get and ketubah	-
2/142- 161/2mf	No kefiyah	-	-	Amatlah	He equated her to a piece of forbidden food.	Wife wants children but husband refuses marital relations
2/188- 196/1t	Hiyuv on husband	Dina de- metivta	-	Amatlah	To act kehogan Dina de- metivta Mum	-
2/197- 212/23mf	-	-	-	Amatlah רגלים לדבר	Takkanot R. Gershom	Recalcitrant husband
2/262- 270/1mf	-	-	-	Witnesses Proof (ראיה)	Moredet Dina de- metivta Niksei melug	Wife's property
3/3- 18/1mf	Kefiyah of get	-	-	Amatlah	Safek kiddushin	Marriage de'orayta or derabbanan?
3/161- 169/1mf	-	-	Foregoing of the ketubah	Amatlah	-	Payment of ketubah Separate dwelling places
3/201- 207/1mf	No hiyuv on husband	-	-	Amatlah	Yeminite couple: Rambam	Separate dwelling places
3/225-	-	Bitul	-	Amatlah	Mum	Return of

234/1mf		nissu'in.				assets Exemption of mezonot
3/257- 272/9mf	No hiyuv on husband	-	-	רגלים לדבר Witnesses	He equated her to a piece of forbidden food.	Mezonot Heter me'ah rabbanim
4/157- 163/2mf	-	-	-	רגלים לדבר Witnesses	-	Mezonot.
4/175- 183/2mf	-	-	-	Proof (ראיה)	Moredet Dina de- metivta Nikhsei melug	Monetary matters
4/257- 266/2mf	No hiyuv on wife	-	-	Proof Evidence	Moredet Nikhsei melug	Payment of ketubah Return of assets Takkanat haGeonim
4/342- 346/3mf	-	-	-	Amatlah רגלים לדבר Witnesses	-	Mezonot Abuse
5/239- 257/6mf	No hiyuv on husband	-	-	Evidence Amatlah	Mored	Shalom bayit
5/286- 291/5mf	-	-	-	רגלים לדבר Witnesses	-	-
5/306- 310/1mf	No hiyuv on husband	-	-	-	Moredet	Shalom bayit Mezonot
6/5- 23/1mf	-	-	Yes	Amatlah	Moredet	Mezonot Children other marriage
6/131- 158/7mf	-	-	-	Amatlah Witnesses	Safek mamzerut. He equated her to a piece of forbidden food	-
6/221- 224/1mf	No hiyuv on husband	-	-	Amatlah	Mum Moredet Dina de- metivta	Shalom bayit
6/257- 265/2mf	No hiyuv on husband	-	-	Amatlah	Moredet Dina de- metivta	Assets
6/325- 354/30mf	-	-	Yes	Amatlah	Moredet Dina de- metivta	Heter me'ah rabbanim
6/366- 376/6mf	-	-	-	רגלים לדבר Witnesses	He equated her to a piece of forbidden food	-
7/65- 74/1t/2mf	No hiyuv on husband	-	Yes	Evidence (עדות)	Takkanot R. Gershom	Recalcitrant husband
7/201-	Hiyuv on	-	-	Amatlah	Takkanot R.	Heter me'ah

206/3mf	husband				Gershom	rabbanim
7/281-289/1mf	-	-	-	Witnesses?	He equated her to a piece of forbidden food	-
7/353-384/1mf	Hiyuv on both; if wife refuses then heter me'ah rabbanim	-	Conditional marriage	Agreement Contract	Temporary kiddushin: pilagshut? Umdena in kiddushin and gittin. Get me'useh	Protection of child
8/3-10/15mf	-	-	Conditional marriage	Agreement Contract	Temporary kiddushin	-
8/104-112/1mf	-	-	Yes	Amatlah	Dina de-metivta	Mezonot Shalom bayit
8/312-321/2mf	Mitswah	-	-	Witnesses Yichud	He equated her to a piece of forbidden food Miggo	-
9/74-94/1mf	No hiyuv on wife	-	-	רגלים לדבר Amatlah Witnesses	He equated her to a piece of forbidden food	-
9/149-152/2mf	Kofin both	Shalom bayit	-	Witnesses	Depositing get and ketubah Heter me'ah rabbanim	Shalom bayit
9/152-168/1mf	No hiyuv on wife	-	-	Witnesses	Takkanot of R Gershom	Heter me'ah rabbanim
9/171-184/4mf	Kefiyat get	-	-	Witnesses	Dina de-metivta	-
9/265-288/2mf	No hiyuv on wife	-	-	Amatlah Witnesses רגלים לדבר	He equated her to a piece of forbidden food Din agunah Eshet ish?	-
11/4-75/2t/4mf	No hiyuv on wife	-	Apartment as part of divorce settlement	Amatlah רגלים לדבר	Depositing get and ketubah	Heter me'ah rabbanim
11/193-209/21mf	-	Dina de-metivta	-	Amatlah	Dina de-metivta	Mezonot
11/315-326/19mf	-	-	-	Amatlah	He equated her to a piece of forbidden food	-

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