Talmud-Based Solutions to the Problem of the Agunah

To my parents

Talmud-Based Solutions to the Problem of the Agunah

Avishalom Westreich

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Abbreviations

B.K.:	Bava Kamma
BT:	Babylonian Talmud
EH:	Even Ha'Ezer
Ket.:	Ketubbot
M:	Mishnah
PT:	Palestinian Talmud (Talmud Yerushalmi)
T:	Tosefta

Introduction

Is there a solution to the *Agunah* problem?

Divorce in Jewish law is executed by a writ of divorce (henceforth: a *get*) delivered by the husband to his wife. Typically, divorce requires both spouses' consent: the husband's agreement is fundamentally mandated by talmudic law (a desideratum that has been unanimously accepted from the talmudic era onwards), while that of the wife is required according to medieval rabbinical authorities ("the ban of Rabbenu Gershom", which was originally adopted by Ashkenazi communities, but today is accepted by most, if not all, Jewish communities).[1]

The Mishnah[2] lists several cases in which the husband is coerced to divorce his wife. Several others are added by the Talmud and post-talmudic authorities.[3] Usually, these are cases of faults, blemishes, and so on, which support the wife's entitlement to the divorce.[4] But even when a formal fault does exist, it is not always possible to obtain divorce, due to the husband's recalcitrance or incapability. Does Jewish Law provide us with routes for solving this kind of cases?

More than that. Not rarely, one spouse demands divorce, but cannot prove one or more of the classic faults. So, is this spouse – usually the wife – entitled to divorce when no formal fault exists? And if she (or he) is entitled to divorce, how can it be executed, if her or his spouse refuses to participate?

This book discusses several halakhic routes for executing unilateral divorce, or, when divorce cannot be obtained, routes for establishing a formal halakhic separation between the couple by-passing divorce, as follows: *get* compulsion in no-fault-divorce cases, mainly on the basis of the law of the rebellious wife (*moredet*); constitutive marriage annulment on the basis of the talmudic maxim:

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[1] On the ban of Rabbenu Gershom and its spreading among Jewish communities see E. Westreich, *Temurot*.

[2] M Ketubbot 7:10.

[3] See, e.g., Rema (Rabbi Moses Isserles), gloss to *Shulḥan Arukh*, *EH* 154:1.

[4] In those cases the wife receives her financial rights (the *ketubbah* payment, i.e., the husband's obligation of payment written in the marriage document, including the dowry, the wife's prenuptial property, etc.). Similarly, there are cases in which the husband is entitled to divorce. According to talmudic law, prior to the ban of Rabbenu Gershom, the husband usually had a right unilaterally to divorce his wife, with or without a basis in fault, and with or without her consent. The effect of a fault or blemish in such cases was therefore mainly financial (i.e., the wife would not receive her *ketubbah* payment). After Rabbenu Gershom's ban, consent for divorce, or fault or blemish on the part of the wife, became needed to establish the husband's right to divorce and not only to support his financial claims.

"everyone who betroths does so subject to the consent of the Rabbis, and the Rabbis annul his betrothal" (כל דמקדש אדעתא דרבנן מקדש ואפקעינהו רבנן לקידושין מיניה); declarative marriage annulment on the basis of a mistaken transaction; and conditional marriage, whether explicitly stipulated by the couple, or implied retroactively by the halakhic decisor (*posek*).

These routes are rooted in the talmudic literature, and were discussed and used (with more or less hesitation) by post-talmudic decisors. Some post-talmudic traditions adopted one solutions or another for actual practice, although it is not always clear what was the halakhic basis for them. Amongst them are the geonic tradition in a case of a rebellious wife (*moredet*) and the divorce clause in the Palestinian tradition, as reflected in Genizah *ketubbot*. Both are rooted in the two Talmudim – the Palestinian Talmud and the Babylonian Talmud; I shall discuss the halakhic construction on which they were based, and analyze the talmudic justification for their use.

Accordingly, the structure of this book is as follows: *Chapter One* discusses the basis for *get* compulsion in the case of the rebellious wife (*moredet*) in the Mishnah and Babylonian Talmud. *Chapter Two* discusses the law of the *moredet* in the Palestinian tradition. *Chapter Three* discusses the relations between the post-talmudic Palestinian Tradition and the geonic law of the rebellious wife. *Chapter Four* turns to discuss marriage annulment. First, I analyze the Talmudic basis for constitutive marriage annulment. Then, in *Chapter Five*, I ask whether it is possible that marriage annulment was used in practice in the above post-talmudic traditions, the Palestinian and the geonic. *Chapter Six* turns to the way post-talmudic commentators viewed marriage annulment, and examines the possible use of marriage annulment in modern times. *Chapter Seven* analyzes a related route: a declarative marriage annulment on the basis of either mistaken betrothal (*kiddushei ta'ut*) or terminative condition. It then reveals a unique and innovative approach, which integrates both, and thus enables retroactive cancellation of marriage due to an unexpected future event on the basis of the wife's claim that "on this assumption she did not get married".

The object of the book is to present the main solutions to the *Agunah* problem, and indicate their (stable) basis in the Talmud and from it to later *poskim*. Finding a solution however is not enough. We need a prior willingness for its use, but this does not always exist. *Chapters Eight* therefore discusses the pluralistic nature of the *halakhah*, which in principle enables the use of the above solutions. *Chapter Nine* tries to define who is an *agunah*, a definition which may well prove crucial for the willingness of halakhic authorities to solve the problem. This involves discussion of the ideological dispute which stands behind the modern *agunah* problem: what is the halakhic basis for the spouses' right to demand divorce? If this right does not exist, we don't have a problem at all, and apparently no solution

is required and justified. But if the problem does exist, and the situation is defined as one of *'iggun*, the halakhic gates are opened for using one or more of the solutions to the *agunah* problem discussed in this book.

Chapter One

The Rebellious Wife (*Moredet*):
A Talmudic Source for Unilateral Divorce?

1.1 Introduction

Jewish law approves divorce by agreement. There are however several causes for which classic Jewish law sources approve *unilateral* coerced divorce. For example, the Mishnah states:[5]

> And these [men] are coerced [to divorce]: one who is affected with boils [a type of leprosy], one who has a polypus [a growth in the nose], one who collects [dog excrement], one who is a coppersmith or a tanner, whether these [conditions] were in them before they married or whether they arose after they married.

But would Jewish law recognize a more general right, that of no-fault divorce? The answer, perhaps surprisingly, is Yes.

A possible talmudic basis for this right is the law of the rebellious wife (*moredet*), which according to some post-talmudic views enables coercion of a *get* upon the wife's demand. The most important and well known among these post-talmudic views is the geonic tradition regarding coercion of a *get* in a case of *moredet*.[6] It is true that this and other such views encounter severe criticism from other post-talmudic scholars. However, coercion of a *get* in the case of the *moredet* has deep roots in both tannaitic and amoraic sources. These roots are the object of this chapter.

In what follows the relevant talmudic sources are analyzed, arguing that the roots of the well-known geonic and other post-talmudic traditions are to be found already in the tannaitic and amoraic sources. Several parts of our argument are based on Rashi's interpretation of the Babylonian *sugya* (discursive unit), which is compatible with the geonic tradition but more far reaching in the way it legitimates coercion on the basis of talmudic interpretation. Although it is in the very nature of this kind of source that alternative interpretations are possible, which in our case differ *inter alia* as regards coercion, the interpretation here suggested has important advantages compared to the others, and may be considered as the simple reading of

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[5] M Ketubbot 7:10. Sometimes the right to divorce is based on post-talmudic sources: see, e.g., Moses Isserles (*Rema*), gloss to *Shulḥan Arukh*, *EH* 154:1.

[6] See Friedman*, Jewish Marriage*, 324-325; Brody, *HaGeonim*, 298-300.

the sources, as will be argued at length below.[7]

The argument that follows has both historical and dogmatic importance: historical insofar as it supports the claims (i) that coercion was implied, even where it was not explicit, already in tannaitic and amoraic sources, and (ii) that the geonic measures regarding divorce compulsion were based on talmudic interpretation rather than an independent enactment; dogmatic insofar as it points to a body of opinion (here exemplified in the interpretation of Rashi,[8] his predecessors[9] and successors[10]) amongst the Rishonim which supports the view (despite that attributed to Rabbenu Tam, which was accepted by the main halakhic authorities[11] and largely followed since) that coercion was authorized by the Talmud in the case of the *moredet.*

Some background: Rabbenu Tam's main argument is that coercion could not be found in the Babylonian Talmud, and the Geonim had no authority to introduce it as an enactment (*takkanah*).[12] Indeed, many Rishonim agree that coercion is a geonic enactment (*takkanat haGeonim*), while they debate whether the Geonim had the authority for it.[13] However, Friedman and Brody maintain that the Geonim themselves regarded it as a talmudic law, based on the conclusion of the *sugya*: "we make her wait twelve months for her divorce" (lit. on her *get*: ומשהינן לה

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[7] This chapter focuses on the hermeneutic considerations which are the basis of the dispute regarding coercion in a case of *moredet*. Nevertheless, this dispute also reflects different conceptual models of marriage and divorce in Jewish Law; see Broyde, *Marriage*, 15-28.

[8] Ascribing this view to Rashi is accepted by many commentators, both Rishonim (Smag, Lavin 81; Ritva, 63b, s.v. היכי דמיא מורדת; Hagahot Maymoniot, Ishut, 14: 6), and Aharonim (Pene Yehoshu'a, 63b, end of s.v בתוספות בד״ה אבל), as well as by academic researchers (E. Westreich and A. Grossman, see note 9 *infra*).

[9] Recent researches show that early Ashkenazic Rishonim, mainly Rabbenu Gershom Me'or Hagolah and probably a few of his students, accepted the geonic tradition of *moredet*: see E. Westreich, *Rise and Decline*, 211; Grossman, *Pious and Rebellious*, 242. Rashi, who followed these scholars (see E. Westreich, *ibid.*; Grossman, *Hasidot Umordot*, 443 n.137 [this note does not appear in the English edition]), tried to base their tradition on the talmudic *sugya*. Indeed, in many aspects Rashi continues *Perushey Magenza*, which largely continues the tradition of R. Gershom and his students: see Ta-Shma, *Hasifrut Haparshanit*, 35-56. However, Ta-Shma (*ibid.*, 43) claims that Rashi normally focuses on hermeneutic rather than halakhic considerations in his commentary (this claim is disputed by halakhic writers; see *Talmudic Encyclopedia*, vol. 9, 337, entry "*halakhah*").

[10] For example: Rashbam, see E. Westreich, *Rise and Decline*, 212; Grossman, *Hasidot Umordot*, 435-436.

[11] See E. Westreich, *Rise and Decline*, 212-218.

[12] See *Sefer Hayashar LeRabbenu Tam*, Helek haTeshuvot, 24.

[13] There is a wide range of opinions on this point, from accepting the *takkanah* (Rif), through accepting it with limitations (Ba'al Hama'or's opinion of *hora'at sha'ah*) and totally rejecting it (R. Tam). See E. Westreich, *Rise and Decline*, 212 and further.

(תריסר ירחי שתא אגיטא).[14] This view was adopted by some Rishonim, who treat coercion as a Talmud-based law rather than a *takkanat haGeonim*. Amongst them are Rambam[15] and Rashi.[16]

In many cases new manuscript discoveries shed light on the text of the talmudic *sugya*. In this context, MS Leningrad-Firkovitch[17] explicitly supports the geonic tradition in that Amemar's opinion in a case of *moredet* who claims מאיס עלי (he is repulsive to me) is stated as כייפינן ליה, i.e. "we forced him", which could hardly be understood other than coercion of a *get*.[18] However, this surprising support for the geonic tradition is not without problems. A preliminary reading of the talmudic *sugya* reveals an intensive discussion on the financial aspects of *moredet* with no explicit mention of a *get*. Thus, if we accept MS LF, we must ask why was it only in the era of Amemar that the *get* became an issue for the *amoraim*?[19]

Interestingly, Rashi, although having the traditional text of Amemar, integrates into his interpretation of the *sugya* the rule that the husband must give a *get*, and

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[14] The effect of the geonic *takkanah* was therefore to coerce the husband to give a *get immediately* and not only after 12 months. See, Friedman, *Jewish Marriage*, 324-325; Brody, *HaGeonim*, 298-300. See also Ramban, s.v. ומצינו בירושלמי, who ascribes the view that coercion is the Talmud's final conclusion to some responsa of Rav Sherira Gaon, but rejects it, arguing that: "this coercion has never occurred to the Sages of the Talmud": "in some of the responsa of Rav Sherira Gaon, of blessed memory, too, I saw that he interpreted that, by strict law, [divorce] is not coerced. When we [i.e., the final talmudic conclusion] said that we delay the *get* for twelve months, [this implies] an additional [Talmudic] enactment, that afterwards the husband is coerced to issue a *get*. This has no substantial basis; clearly, there is no new enactment here to coerce, and this coercion has never occurred to the Sages of the Talmud". (ובמקצת תשובות לרב שרירא ז"ל נמי ראיתי שפי' דמדינא אין כופין, וכשאמרנו משהינן לה תריסר ירחי אגיטא תקנתא אחריתי הות לומר דאח"כ כופין את הבעל בגט. ואין לדברים הללו עיקר כלום, ודבר ברור הוא שאין כאן תקנה חדשה לכוף ומעולם לא עלתה על דעת חכמי התלמוד כפייה זו לעולם).

[15] See Rambam, *Ishut*, 14:8-14.

[16] See the discussion *infra*.

[17] MS Saint Petersburg National Library 187 EVR I. I use hereafter the previous and more common name, MS Leningrad-Firkovitch or MS LF.

[18] It is possible to suggest another explanation, following Ritva, 63b, s.v. ויש שגורסין: when the husband wants to divorce his wife he cannot do it immediately without paying her *ketubbah*. He is therefore coerced (כייפינן ליה) to divorce her only after the mishnaic process of decreasing the *ketubbah* (on this process see *infra*). Our interpretation of כייפינן ליה is however more reasonable. It is also supported by Rashba, 64a, s.v. ומיהו: Rashba deals with the traditional text of Amemar, and argues that its meaning cannot be coercion, since the Talmud doesn't mention the words כייפינן ליה: "all that was said is 'but if she said he is repulsive to me she is not coerced', But they did not say 'he is coerced'". (שלא אמרו כאן אלא "אבל אמרה מאיס עלי לא כייפינן לה" אבל "כייפינן ליה" לא אמרו). Accordingly, MS LF's text, which did mention כייפינן ליה, must be interpreted as coercion of a *get* (but see Me'iri, 63b, s.v. וגדולי המחברים, who rejects the possibility of a variant like MS LF).

[19] Rabbi Shlomo Riskin regards the stage of Amemar as a turning point, claiming that in earlier generations the *moredet* was not interested in divorce: see Riskin, *Divorce*, 40-42. Nevertheless, divorce was a consequence of the tannaitic laws of *moredet* (Riskin, *ibid.*, 17-18). Below I suggest a different view of coercion in the earlier sources.

probably understands this as authorizing coercion (where necessary). In fact, although the *sugya* deals with financial aspects, Rashi mentions the existence of a *get* four (!) times, sometimes requiring that it be given immediately, elsewhere later.[20] Accordingly, MS LF's variant of Amemar appears not to be the only proof for coercion. There appear to have been broader interpretative advantages supporting this view throughout the whole sugya, beyond the specific dispute in the *memra* of Amemar. These will be described in the sections that follow.

1.2 Tannaitic and Amoraic Sources Regarding the *Moredet*

1.2.1 Tannaitic Sources: Would the *Moredet* receive a *Get*?

Our Mishnah says (M Ketubbot 5:7):

> If a wife rebels against her husband, her *ketubbah* may be reduced by seven *denarii a week*. R. Judah said: Seven *tropaics*. For how long does he reduce it? Until the *ketubbah* is exhausted. Rabbi Yoseh says: he may reduce it for ever in case she inherits property, from which he may claim it.

According to the Mishnah, in a case of *moredet* the court act against her by decreasing the value of her *ketubbah* (the sum due to her on termination of the marriage, guaranteed in the marriage document) in a gradual process (conversely, the Mishnah adds, in a case of a rebellious husband – a *mored* – the value of the *ketubbah* is increased). The Tannaim in the Mishnah argue about the exact weekly sum and the limits of this process. According to both opinions in the Mishnah it is a long process. Take for example a basic *ketubbah* with a value of 200 *zuz* (or: 200 *denarii*): according to the first view in the Mishnah (Tanna Kamma), decreasing the *ketubbah* can take more than half a year (200 / 7 *denarii* in a week = 28.57); according to Rabbi Yehuda more than a year;[21] and according to R. Yoseh it can take forever.[22] In fact, it is a much longer process even according to Tanna Kamma and Rabbi Yehuda, if we take into consideration other property which according to

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[20] Rashi's commentators usually point to s.v. לא כייפינן לה as a source for coercion in his commentary (see for example Resp. Maharam, Prague Print, 946, 135a), but in fact Rashi repeats it several times: (1) 63a s.v. משהין את גיטה :נמלכין (Mishnah): ואחר כך נותן לה גט; (2) 63b s.v. עד כדי כתובתה s.v. (3); להשהותה, אלא נותן לה גט ויוצאה בלא כתובה :לא כייפינן לה s.v. (4); דמשהין גיטא :היכי. Accordingly, he views coercion as an integral part of every section of the *sugya*, and not only of one single part of it. See also *infra*, text at notes 43-44, for further discussion of Rashi's references to a *get*.

[21] A tropaic (טרפעיק) is half a dinar and the amount of decrease per week is thus 3.5 dinars, half that of the Tanna Kamma.

[22] לעולם, i.e. the court continues to remove it from her property as an "overdraft", in case she might get an inheritance and her husband would be able to collect from it.

the Mishnah's commentators was also subject to the mishnaic decrease process.[23]

The tannaitic attitude of reducing the *ketubbah* in a gradual process is unanimously agreed in the Mishnah (but disputed in its specific details). It was however changed in a later tannaitic generation. The later opinion is found in the Tosefta (Ketubbot 5:7), which comments on the Mishnah thus:

> "If a wife rebels against her husband" – this is the first Mishnah. But our Rabbis enacted that a court[24] should warn her four or five[25] consecutive weeks, twice[26] a week. [If she persists] more than that, even if her *ketubbah* is a hundred maneh, she has lost it all.

According to the Tosefta, there is no gradual process, but rather only a few weeks of warning,[27] and after that the *moredet* loses her entire *ketubbah*.[28] This enactment introduces the prospect of a defined and rapid end to this process.

The difference between these two tannaitic approaches is that between an almost

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[23] The additions to the *ketubbah*, husband's gifts, dowry (נכסי צאן ברזל and נכסי מלוג) etc. might also be reduced according to the mishnaic rule of "until the *ketubbah* is exhausted" (עד כדי כתובתה). The exact belongings that are subject to this process are disputed by the Geonim and Rishonim. See for example Ramban, 63b, s.v. וכתב רבינו הגדול; Rashba, 63a, s.v. ועד מתי: " 'Until the *ketubbah* is exhausted' – this means, the main body of the *ketubbah*, addition, and dowry, except for her usufruct property, that is not included in the *ketubbah* [...] And there is an interpretation [...] that even according to *rabanan* he detracts from the usufruct property that she had when she rebelled". (' עד כנגד כתובתה': פירוש: עיקר כתובה ותוספת ונדוניא, חוץ מנכסי מלוג שלה שאינן בכלל כתובה... ויש מי שפירש[...] דאפילו לרבנן פוחת מנכסי מלוג שהיו לה בשעה שמרדה). For the geonic view regarding the monetary aspects of the original law of *moredet*, comparing their own *takkanah,* see Brody, *HaGeonim*, 300-303.

[24] The words "a court" (בית דין) do not appear in the Erfurt MS or in the print edition. In Vine MS they were marked for deletion: see Lieberman, *Tosefta Kifshuta*, 266-267. These words might be an addition influenced by the Bavli (see next section) or by misinterpretation of בית דין in the Yerushalmi (see *infra*, n.36), which was corrected later. In many cases MS Vine is closer to the tradition of the Yerushalmi, while MS Erfurt is closer to the Bavli: see Friedman, *Tosefta Atikta*, 79-86; Westreich, *Torts*, 107 n.23. Here בית דין appears in MS Vine and this fact supports the option of Yerushalmi's influence. On the other hand, the word "twice" (פעמים) in MS Vine is similar to the Bavli's tradition (see *infra*, note 26 and note 58), so the issue cannot be conclusively determined.

[25] Some variants and Rishonim do not include the word "five" (וחמש): see Lieberman, *Tosefta Kifshuta*, 267.

[26] "Twice" (פעמים) is according to MS Vine, the print edition and Talmidey Rabbenu Yonah. According to MS Erfurt and some Rishonim (Tosafot, Smag and more), the text here is: פעם אחת. See Lieberman, *Tosefta Kifshuta*, 266-268, who concludes without any decision.

[27] "Warn her" (מתרין בה) in the Tosefta is without any public humiliating announcement, significantly different from מכריזין עליה, which is found in the parallel Babylonian *baraita* (see Lieberman, *Tosefta Kifshuta*, 267; *infra*, note 29). Warning in the Tosefta may thus reflect a private warning, by a messenger for instance.

[28] This is the most widespread explanation of the Tosefta. For an exceptional approach which integrates a gradual process into Rabbotenu's rule (as in the Mishna) see Me'iri, 63a, end of s.v. אמר המאירי, in the name of גדולי הדורות לפי מה שהעידו תלמידיהם בשמם. Me'iri rejects that view, following the Yerushalmi, which mentions explicitly an act of losing the *ketubbah*: והיא שוברת כתובתה ויוצאה, see *infra*.

endless story ("the first Mishnah") on the one hand and a story with a clear and sharp end ("our Rabbis"; "Rabbotenu") on the other. The goal of the first opinion is to lead the wife to end her "rebellion", and the process is designed to influence her finally (and voluntarily) to change her mind. But this was probably not enough for Rabbotenu, who apparently adopted a more coercive approach, with the prospect of a more immediate loss of the *ketubbah*,[29] and is thus thought to operate more efficiently than the Mishnaic process.

The cause for this move is not explicit in the Tosefta. I assume that the character of the rebellious wives changed between the Mishnah and Rabbotenu. Maybe it was a move from a domestic *moredet* (ממלאכה) to a *moredet* from sexual relationships (מתשמיש המטה), which forced Rabbotenu to enact a process which would be effective almost immediately. Those two kinds of *moredet* are mentioned in a later generation in an amoraic dispute, which may reflect an earlier situation.[30] However reasonable this explanation, we cannot prove it from the texts of the Mishnah and the Tosefta, nor from their context: while the previous Mishnah and previous *Halakhah* of the Tosefta deal with sexual relations, what follows deals with financial aspects.[31]

Explaining the very goal of Rabbotenu as inducing the wife to end her "rebellion" by providing a more drastic sanction is problematic. The *takkanah* of Rabbotenu is indeed more radical than the Mishnaic rule. But assuming its goal is to induce the wife to finish her rebellion, is it really more efficient than the rule of the Mishnah? According to Rabbotenu, loss of the *ketubbah*[32] occurs in a single action against the wife, and then, after only four weeks, there are no further possible sanctions, whereas the mishnaic process envisages a long period of time in which the required impact can be created. Thus, if the goal was to influence the wife to return to her husband, it would be more practical to use a lesser sanction over a longer period of time, rather than using the maximal sanction almost immediately, where the *moredet* has been "in rebellion" for only four weeks.[33]

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[29] In the parallel Babylonian *baraita* there is an additional element, a process of public announcement, which is actually a process of humiliation designed to end the rebellion. However, the public humiliation does not exist in the Tosefta (see *supra*, note 27, and compare Tosafot, 63b, s.v. דיקא) nor in the *Yerushalmi* (see *infra*), and therefore I refer here only to the financial aspects of Rabbotenu's ruling.

[30] See BT Ketubbot 63a, and implicitly in the Yerushalmi: PT Ketubbot, 30b, 5:8, see *Shitah Mekubetset*, 63a, s.v. וזה לשון הראייה ז״ל.

[31] See also Riskin, *Divorce*, 4-9, discussing the definition of *moredet*, and 12-14, explaining the cause for Rabbotenu's rule as "the increasing number of rebellious wives".

[32] The humiliation does not exist in the Tosefta, see *supra*, n.29.

[33] The term "marginal deterrence" is used by modern researchers to describe a legal system which imposes different measures of sanctions for different kind of offences, in order to create an efficient

On this analysis,[34] the rationale of Rabbotenu may not have been deterrence but rather something different, namely to put an end to the conflict as quickly as possible, whether by bringing the couple back together or by leading to a complete separation between them. This might be a response to a social change, as suggested above, according to which the phenomenon of *moredet* from sexual relationships became common, and, for that reason, Rabbotenu were forced to enact a process which would be effective almost immediately. In their enactment the choice was put into the wife's hand: preferably she may decide to withdraw her rebellion; however, if she insists, she is entitled to a divorce, but must forfeit her *ketubbah*. In this case the husband is compelled to give a *get* (otherwise the wife's entitlement has no meaning), by a physical coercion if required.[35]

This explanation is supported by the Yerushalmi. Another version of the *baraita* appears in the Yerushalmi and introduces Rabbotenu as follow (PT Ketubbot, 5:10, 30b):

> The later court [enacted that we] warn her for four weeks[36] (after which) she cancel her *ketubbah* debt[37] and leave.

Comparing the Yerushalmi and the Tosefta, there is a significant addition in the Yerushalmi: "and leave" (ויוצאה), which means that after losing the *ketubbah* she

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deterrence for each offence. Accordingly, the sanction would be enhanced as a function of the severity of the offence, the number and extent of offences etc. (see George J. Stigler, "The Optimum Enforcement of Laws", *The Journal of Political Economy* 78 (1970), 527-528: "If the offender will be executed for a minor assault and for a murder, there is no marginal deterrence to murder"; see also Steven Shavell, "A Note on Marginal Deterrence", *International Review of Law and Economics* 12 (1992), 345; 351-352). On this view, it is more efficient to use a low sanction for a rebellion which is at its beginning and to enhance the sanction when the rebellion becomes more severe, rather than using the higher level sanction each time.

[34] It should be emphasized that this explanation is a suggested rationale of Rabbotenu's view, rather than a proof, on the basis of the modern view regarding deterrence. The proof for this rationale is an internal proof, on the basis of Rabbotenu's variant cited in the Palestinian Talmud.

[35] See Rambam, *Ishut*, 14: 8: כופין אותו להוציא לשעתו. Rambam refers to *moredet ma'is alay*, but the halakhic implications of the different kinds of *moredet* are in regard to financial aspects and questions of timing, as discussed at length below, rather than regarding the character of coercion: see for example below, text at notes 89-93. The same applies to the *mored*, coercion of whom is compared to coercion in a case of *moredet*: see *infra*, notes 60-63.

[36] מתירין בה ארבע שבתות :בית דין שאחריהן. The words בית דין שאחריהן does not refer to the warning (i.e. warning is done by the later *bet din*) since the word שאחריהן has no meaning according to this interpretation. It refers to the whole enactment, while the predicate of this sentence ("enacted") is missing. Its meaning is the same as in the other two parallels of this *baraita*: רבותינו התקינו (Tosefta) or רבותינו חזרו ונמנו (Bavli).

[37] והיא שוברת כתובתה ויוצאה. "*Shoveret*" means "writes a receipt" (*shovar*) for her *ketubbah* (see BT Sotah, 7a; Epstein, *Mavo LeNusaḥ HaMishnah*, 616. A parallel term in Tosefta, Ketubbot, 9:1, is clearer: שוברת לו על כתובתה), acknowledging that she received her *ketubbah* payments, or, more accurately, canceled her husband's debt.

receives a *get*.[38] According to the first explanation of Rabbotenu above, which focuses on deterrence, this addition is not explained. But according to the second suggested interpretation it is meaningful. ויוצאה is the completion of the whole process, representing its current goal: to lead to a separation between the couple. *Get*, according to this explanation, is a necessary condition for ending the story and thus an integral part of Rabbotenu's teaching.[39] The version of Rabbotenu in the Yerushalmi thus sheds light on their goal and rationale in the Tosefta.[40]

The view of Rabbotenu here suggested accords with Rashi's interpretation of the Babylonian *sugya*. As argued below, Rashi creates a parallelism between all sections of the *sugya*. Accordingly, Amemar's view that "we don't force her" (לא כייפינן לה), or "we forced him" (כייפינן ליה) as in MS Leningrad-Firkovitch, is parallel to Rabbotenu's enactment. It is hard to understand it as a rule whose goal is to increase the deterrence on the *moredet*, since the words "we don't force her" are in her favour.[41] We can conclude therefore that the goal of Rabbotenu in Rashi's view is not to deter the *moredet* but rather to bring a quick end to the conflict – here by accepting the wife's demand for divorce (after trying to convince her, even by public humiliation, as in the Bavli) and not forcing her to stay with her husband.[42] In the next section however, I discuss Rashi's view further and point out its advantages as against other possible interpretations.

The object of the law of the rebellious wife according to Rabbotenu is to put an end the conflict, either by bringing the couple back together or by a complete separation between them. According to the Mishnah, on the other hand, the object is to induce the wife to end her rebellion by decreasing the value of her *ketubbah* in a gradual process. What then shall we do after the *moredet* has lost her *ketubbah*?

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[38] See Friedman, *Jewish Marriage*, 322. There are also two other important differences between the Yerushalmi and the Tosefta: (i) Rabbotenu are replaced by "the later bet din" (see *supra*, n.24 and n.36); (ii) there is no mention of twice a week (see *supra*, note 26, and *infra*, text at note 58).

[39] This view differs from Riskin's suggestion (*Divorce*, 17-18) that divorce in the tannaitic stratum is a final penalty for the wife, who really does not want it.

[40] A quite different reading is possible: Rabbotenu of the Tosefta still had the object of coercing the wife back into the marriage, as in the Mishnah, but by a sharper financial sanction. Only in the Yerushalmi has the goal changed and become the quest for ending the conflict, "one way or the other", and this is reflected by the addition: ויוצאה. However, I prefer the explanation suggested above. A revolution in our case is mentioned explicitly in the move from the Mishnah to Rabbotenu, while the alternative reading finds a more radical distinction between the Tosefta and the Yerushalmi. In fact, the Tosefta, Yerushalmi and the Babylonian *baraita* are three parallel versions of one turning point; these sources differ from one another in a few elements but not in essence. It is less likely that there was a significant but implicit change between the Yerushalmi and the Tosefta, while the sources explicitly point to Rabbotenu as the turning point of this *sugya*.

[41] The same argument is found in Ra'avad's interpretation of נמלכין בה: see *infra*, text at note 64.

[42] See Rashi, Ketubbot, 63b, s.v. לא כייפינן לה.

At this moment there are no more sanctions against the wife and so she is not likely to agree to go back to her husband. Would she receive a *get*?

Rashi takes his view regarding compulsion of a *get* a step further. He suggests that after losing the *ketubbah* the wife receives a *get* both in the mishnaic rule and in that of Rabbotenu, albeit the *get* is not an essential part of the mishnaic rule of *moredet*, contrary to Rabbotenu's rule. As noted above,[43] he repeats this point four times:

(1) According to Tanna Kamma, the mishnaic gradual process of decreasing the *ketubbah* is until the *ketubbah* is exhausted. Rashi (63a, s.v. עד כדי כתובתה) adds here: ואחר כך נותן לה גט וייוצאה בלא כתובה, i.e. afterwards he gives her a *get* and she goes out (i.e., divorced) without receiving her *ketubbah*;

(2) On 63b Rashi interprets נמלכין בה (she is to be consulted) as: משהין את גיטה ומחזירין עליה שתתחזור בה (we hold back her *get* and try to make her change her mind).

(3) A similar interpretation is given for היכי דמיא מורדת (what is to be understood by "a rebellious woman"?): דכופין אותה, דמשהין גיטה ופוחתין כתובתה, i.e. we force her [by] holding back her *get* and reducing the *ketubbah*.

Quotations (2) and (3) are discussed at length below. For the moment, we may already draw two important conclusions: (a) the mishnaic gradual process of reducing the *ketubbah* does not deny a *get* but only postpones it, and after this process is ended she will receive a *get*, as mentioned explicitly in quotation (1); (b) Without the mishnaic gradual process (for example: according to Rabbotenu of the Tosefta), her *get* is not delayed, but she receives it immediately (or: after four weeks). This conclusion is explicit in the fourth appearance of *get* in Rashi's commentary:

(4) According to Amemar, *moredet ma'is alay* (see at length below) is not regarded as a *moredet*, but לא כייפינן לה, i.e. we do not force her, or: no pressure is to be brought to bear upon her. This is interpreted by Rashi as follows: לא כייפינן לה להשהותה, אלא נותן לה גט וייוצאה בלא כתובה, i.e. we do not hold her back, but he gives her a *get* and she is to be divorced without receiving her *ketubbah*.

It is hard to understand these four repetitions as no more than a description of a contingent event, which occurs only when the husband is willing to grant the *get*.[44]
It is much more plausible to understand it, following Rashi, as an integral part of

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[43] See *supra*, note 20.

[44] Some Rishonim explained Rashi in this way. See Tosafot, 63b-64a, s.v. אבל; Rashba, 63b, s.v. היכי דמיא מורדת (Rashba quoted Rashi that the husband gives a *get*, but with an addition: "if he wants to"). But other Rishonim and Aḥaronim explained Rashi as here suggested: see *supra*, note 8.

the halakhic rules of *moredet*.

Rashi thus appears to endorse the view that the marital dispute must not remain static, without any movement towards a solution, and therefore that after loss of the entire *ketubbah* the husband is coerced to give a *get*. It is also possible that a broader consideration is involved here: a rule ascribed in the Bavli to Rabbi Meir requires a *ketubbah* to be in existence.[45] The result of accepting this rule is that a *get* must be given after total loss of the *ketubbah*.[46] Anyway, receiving a *get* is a required stage both according to Rabbotenu and according to the Mishnah, after the end of the process of losing the *ketubbah* debt.

Supporting this view by Rashi's interpretation has a dogmatic importance, by pointing to later opinion (i.e. Rashi's view) which supports the view that coercion was authorized by the Talmud in the case of the *moredet*. But as an interpretation of the sources, can coercion be considered as their simple reading (the *peshat*)? I would argue that although it is not explicit, it is a reasonable explanation. Moreover, it has a significant advantage. It provides us with a harmonious view, which ties together systematically the tannaitic and amoraic sources. The talmudic *sugya* has a logical structure, in which two different options (already apparent in the tannaitic sources) are in tension in each of its sections, and where coercion is an integral issue throughout. Nevertheless, this systematic and logical structure, most clearly elaborated by Rashi, is opposed by competing interpretations of the *sugya* (notably that of Rabbenu Tam). We now turn to the talmudic *sugya* and its interpretation by the *Rishonim*.

1.2.2   The Babylonian *Sugya* of *Moredet*

This section explores the Babylonian *sugya* of *moredet*, focusing on Rashi's interpretation compared to that of his opponents.[47] Our analysis indicates Rashi's advantages in every section of the *sugya*. However, its persuasiveness is attained by introducing a harmonious and systematic structure into the *sugya* as a whole. This fascinating structure, based on our previous conclusions (which found coercion already in the tannaitic sources), enables us to find coercion attributed in amoraic sources as well as in the anonymous late talmudic stratum.[48]

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[45]   See BT, Bava Kamma, 89a (ascribing this view to R. Meir, on Mishnah, Ketubbot 5:1): "It is prohibited for any man to keep his wife without a *ketubbah* even for one hour. But what is the reason of this? So that it should not be an easy matter in his eyes to divorce her".

[46]   See Riskin, *Divorce*, 18.

[47]   Palestinian Talmud (Yerushalmi) is discussed in the next chapter.

[48]   I define here "amoraic" as attributed rather than anonymous sources. This distinction is significant here since the final development of the talmudic law of *moredet* is found in an anonymous stratum which belongs to the last generations of the Babylonian *Amoraim* or may even be a *saboraic*

The first part of the *sugya* deals with the content of the rebellion, i.e. whether it is a rebellion regarding sexual relationships (מתשמיש המטה) or regarding domestic duties (ממלאכה).[49] The next part of the *sugya* is composed of a number of sections. At its beginning, the *sugya* cites a *baraita* (a tannaitic source other than the Mishnah), which parallels the Tosefta with a few changes.[50] The *sugya* continues as follows (BT Ketubbot, 63b):

(a) [To turn to] the main text. If a wife rebels against her husband, her *ketubbah* may be reduced by seven *denarii* a week. R. Judah said: Seven *tropaics*. Our Rabbis (רבותינו), however, revised [their views] [and ordained] that an announcement regarding her shall be made on four consecutive Sabbaths and that then the court shall send her [the following warning]: 'Be it known to you that even if your *ketubbah* is for a hundred *maneh* you have forfeited it'…[51]

(b) Rami b. Hamma stated: The announcement concerning her is made only in the synagogues and the houses of study. Said Rava: This may be proved by a deduction, it having been taught, 'Four Sabbaths consecutively'. This is decisive.

Rami b. Hamma further stated: [The warning] is sent to her from the court twice, once before the announcement and once after the announcement.

(c) R. Naḥman b. R. Ḥisda stated in his discourse: The law is in accordance with our Rabbis (הלכה כרבותינו). Rava remarked: This is senseless. Said R. Naḥman b. Isaac to him, 'Wherein lies its senselessness? I, in fact, told it to him, and it was in the name of a great man that I told it to him. And who is it? R. Jose the son of R. Ḥanina!'

(d) Whose view then is he following? – [The first of the undermentioned:] For it was stated: Rava said in the name of R. Shesheth, 'The law is that she is to be consulted' (נמלכין בה), while R. Huna b. Judah stated in the name of R. Shesheth, 'The law is that she is not to be consulted' (אין נמלכין בה).

The *sugya* introduces at (a) the dispute between the Mishnah and Rabbotenu. At (b) there are some clarifications about the procedure of announcing (*hakhrazah*). Then (c) the *sugya* cites R. Naḥman b. R. Ḥisda, who follows Rabbotenu in the

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passage; see *infra*, text at notes 75-77. The distinction between attributed sources and anonymous sources has a general importance in talmudic research: see Friedman, *Ha'isha Rabbah*. Friedman's view is criticized by Brody, *Stam HaTalmud*, 220-224. However, Brody's main criticism is chronological rather than in regard to the basic distinction between attributed and anonymous sources: see Westreich, *Torts*, 14-15.

[49] See *supra*, text at nn.29-31.

[50] See *supra*, n.29. Additional changes are discussed below.

[51] The *baraita* states here that the same law is applicable to a woman betrothed or married, even to a menstruant, sick, or a woman "waiting for levirate". The case of the menstruant is then discussed between R. Ḥiyya bar Yosef and Shmuel. This discussion is a comment on the *baraita* and not part of the progression of the *sugya*. For that reason, I do not define it as a separate section.

baraita. The phrase "the law is in accordance with" (הלכה כ...) which is used by R. Naḥman bar Rav Ḥisda usually means that the law is determined according to somebody and not according to his opponent, and here the main controversy is between Rabbotenu and the Mishnah. Thus Rav Naḥman bar Rav Ḥisda follows the rule of Rabbotenu, while Rava, who condemns this view as "senseless", follows the Mishnah. Section (d) explains the authority for Rava's decision. Accordingly, the dispute between "she is to be consulted" (נמלכין בה) and "she is not to be consulted" (אין נמלכין בה) is parallel to the earlier tannaitic dispute between the Mishnah and Rabbotenu.

The verb נמלכין means trying to convince the wife to change her mind. This is done by the mishnaic gradual process of reduction of the *ketubbah*. On the other hand, אין נמלכין means that the court does not use this process of convincing her, but the wife loses her *ketubbah* at once, and, as Rashi adds in his commentary, receives a *get* (similar to our conclusion above in regard to the Tosefta).

This explanation follows Rashi's interpretation.[52] Its simplicity and clarity are discernible, but it was not accepted by many Rishonim, including Rabbenu Tam. I assume that Rabbenu Tam's objection to Rashi's interpretation of these sections is not only as a result of local interpretative considerations. Rashi's interpretation takes a harmonious view of the complete *sugya*, whose conclusion is the need for coercion, as will be shown hereafter. It was therefore necessary for Rabbenu Tam to suggest different interpretations of almost every section of the *sugya*.[53]

Rabbenu Tam suggests a different interpretation of the *sugya*.[54] According to him, Rami bar Hamma in section (b) makes some additions to Rabbotenu. Rav Naḥman bar Rav Ḥisda's determination of the law following Rabbotenu at section (c) does not refer to the tannaitic dispute. His statement opposes Rami bar Hamma by accepting the original law of Rabbotenu without any additions. This last view was condemned by Rava as "senseless".

This interpretation is problematic. Rami bar Hamma does not argue with Rabbotenu. I would even say that Rami bar Hamma does not even make additions

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[52] See Rashi, 63b, s.v. נמלכין בה: "we hold back her *get* and try to make her change her mind, and in the mean time we reduce her *ketubbah* by seven *denarii* a week" (עליה ומחזירין גיטה את משהין). נמלכין (שתחזור בה, ובתוך כך פוחתין מכתובתה שבעה דינרין בשבת) is thus exactly the mishnaic rule, and consequently this is Rava's opinion. The dispute between Rav Naḥman bar Rav Ḥisda and Rava is therefore between determining the law in accordance with Rabbotenu and in accordance with the Mishnah (see Tosafot, 63b, s.v. ואינהו).

[53] Riskin, *Divorce*, 38-40, accepts Rabbenu Tam and rejects Rashi's interpretation. Riskin's main argument is that according to Rashi, Rava on section (c) rejects Rabbotenu, but on section (b) supports Rami b. Hamma's interpretation of Rabbotenu's teaching. This argument can easily be met by viewing Rava as interpreting Rabbotenu without determining the law according to them.

[54] See Tosafot, s.v. ואינהו. A few more interpretations will be mentioned below.

to Rabbotenu, as described by Tosafot, but only interprets them: the *baraita* mentions two verbs (מכריזין and שולחין), and Rami bar Hamma's two statements refer respectively to these verbs, integrating them into one judicial process. The first statement describes how the public announcement is made, while the second exposes the timings of sending the messages for the wife, which are before and after the public announcement.

Viewing Rami bar Hamma's statements as an interpretation of Rabbotenu enables us to ascribe a more complicated object to him: to integrate the two traditions of Rabbotenu, that of the Babylonian *baraita* and that of the Tosefta.[55] Whereas his first statement, which mentions public announcement in synagogues and in *batei midrashot*, reflects merely the Babylonian *baraita*, his second statement, which deals with personal warning (שולחין), reflects the concept of the Tosefta (מתרין בה[56]) as well. Thus, presenting the public announcement and the personal warning as two parts of one process denies any possible disagreement between these two sources. The variant פעמיים בשבת of the Tosefta[57] makes the link between Rami bar Hamma's second statement and the Tosefta more stable and explicit. Accepting this variant as the original text of the Tosefta[58] increases the meaning of the integration between the Babylonian *baraita* and the Tosefta and makes it reciprocal: the *baraita* contributes the aspect of public announcement, while the Tosefta contributes the number of personal warnings.[59]

In brief, interpreting "the law is in accordance with Rabbotenu" as rejecting Rami bar Hamma, who is understood as an opponent of the original meaning of Rabbotenu, while ignoring the Tosefta, as Tosafot suggest, is less likely. In fact, Rami bar Hamma does not oppose Rabbotenu; thus determining the law according

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[55] Compare Riskin, *Divorce*, 15-16, who sees the *baraita* as a result of a later redactor's work, in order to make the Tosefta consonant with Rami bar Hamma's rule of announcement.

[56] See *supra*, n.27.

[57] This is the variant of Vine MS and others: see *supra*, n.26.

[58] One could argue that this variant is a correction of the original text, influenced by the Bavli's tradition of Rami bar Hamma and is not the source for his teaching: see Lieberman, *Tosefta Kifshuta*, 268. Nevertheless, if this were the case, we would expect to find it as MS Erfurt's variant, which was more influenced by the Bavli than MS Vine (see *supra*, n.24). I prefer therefore to view this variant as the original basis for Rami bar Hamma and not as a consequence of his teaching (as to MS Erfurt: see Tosafot, 63b, s.v. דיקא).

[59] Accordingly, "[The warning] is sent to her from the court twice" in Rami bar Hamma's second statement refers exclusively to the Tosefta. See Talmidey Rabbenu Yonah, in *Shitah Mekubetset*, 63b, s.v. שתי: "Rami bar Abba [variant reading: Rami bar Hama] came to interpret the Tosefta, saying, do not think that in these two times, both precede the public announcement, or that both follow the public announcement. Rather, one precedes the public announcement, and the other follows it" (או ורמי בר אבא בא לפרש התוספות ולומר שלא תחשוב שאלו השתי פעמים שתיהן קודם הכרזה שתיהן אחר הכרזה, אלא אחת קודם הכרזה ואחת אחר הכרזה).

to Rabbotenu by Rav Naḥman b. R. Ḥisda has no implication for Rami bar Hamma's own statements. Rashi's interpretation of "the law is in accordance with" (כ הלכה...) as referring to the dispute between Rabbotenu and the Mishnah is much more probable.

There is another advantage to Rashi's interpretation. According to Tosafot, "she is to be consulted" (נמלכין) at (d) supports Rami bar Hamma's teaching, and its meaning is that the court sends messages to the wife both before the announcement and afterwards.[60] But the verb (נמלכין; in a different inflection) appears earlier, in the first part of the *sugya* (on 63a) and its meaning there is totally different. At 63a the *sugya* deals with aspects of *mored* (a rebellious husband). One kind of *mored* is a financially rebellious husband, who refuses to support his wife and according to Rav is coerced to divorce her and pay the *ketubbah* (האומר איני זן ואיני מפרנס יוציא ויתן כתובה).[61] According to the mishnaic rule of *mored* we increase the value of the *ketubbah*. The Talmud then confronts this gradual process with Rav's immediate rule of יוציא and answers: "isn't it required to consult him?!" (ולאו לאמלוכי ביה בעי?!),[62] i.e. before the *mored* is coerced to give a *get* we try to convince him to reconsider his rebellion by increasing the *ketubbah*. לאמלוכי here is far from Tosafot's interpretation of נמלכין in the context of *moredet*. Rashi on the other hand follows the simple meaning of the sources, and interprets the verb consistently (almost word by word) in its two appearances.[63] Perhaps the similarity between those two led Rashi to interpret "she is to be consulted" in the sugya of *moredet* as including coercion, just as is in the *sugya* of *mored*. However, there are

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[60] Accordingly, נמלכין can also be accepted by Rabbotenu. Following this view, many Rishonim (Rif and others probably even earlier than Rif: see Halakhot Gedolot, 36, s.v. המורדת) determined the *halakhah* both according to Rabbotenu and נמלכין, while according to Rashi these are conflicting approaches (see Tosafot, *ibid.*; Rashba, s.v. ויש and more). Tosafot connect these different interpretations to different variants of the talmudic text at section (d): ואיהו כמאן סבר according to Rashi (also in most MSS), which refers to Rava at section (c), who follows the Mishnah, or ואינהו כמאן סברוה (this variant appears in MS Munich 95) according to *Tosafot*, which refers to Rami bar Hamma and Rava, who according to Rabbenu Tam both follow Rabbotenu.

[61] The ruling יוציא (he should divorce her) has the same meaning as כופין אותו להוציא ([the court] *coerce* him to divorce her): see Shmuel's response to Rav (whose ruling is יוציא), Ketubbot, 77a: עד שכופין אותו להוציא יכפוהו לזון, i.e. rather than *coerce him* to divorce her (as Rav claims) let him be coerced to maintain her. See also Friedman, *Divorce*, 103-104. Some Rishonim (e.g. Rabbenu Hananel, and see also Tosafot, Yevamot, 64a, s.v. יוציא) dispute this, and argue that when כופין is not mentioned, physical coercion is not permitted and may lead to an invalid coerced divorce (*get me'useh*). Their opinion led the later *halakhah* to distinguish between coercion of a *get* (כפייה) and obligation (חיוב) without physical coercion; see *Shulḥan Arukh* and Rema, *EH* 154:21.

[62] But see different variants of this sentence, *infra*, at n.67.

[63] Rashi interprets ולאו לאמלוכי ביה בעי?! as follows: שמא יחזור בו, ובתוך זמן שאנו נמלכין בו ומחזירין עליו שיחזור בו מוסיפין על כתובתה. Rashi suggests the same interpretation, almost word by word, of נמלכין in a case of *moredet*: משהין את גיטה ומחזירין עליה שתחזור בה ובתוך כך פוחתין מכתובתה שבעה דינרין בה בשבת.

broader considerations for Rashi, as discussed in this chapter.

It should be mentioned that Rashi's and Tosafot's interpretations are not the only ones. A third meaning of "she is to be consulted" (נמלכין) is suggested by Ra'avad:[64] the *moredet* has the option to choose either the mishnaic rule of decreasing the *ketubbah* or the rule of Rabbotenu.[65] It is difficult to explain, according to Ra'avad, what would cause the *moredet* to choose the rule of Rabbotenu and lose immediately all her *ketubbah*, especially if we follow those opinions which deny coercion of a *get* in this case.[66] The advantage of Ra'avad's interpretation is that we can interpret consulting in 63a (נמלכין) and in 63b (לאמלוכי) in a similar way, although it depends on questions of text.[67] Yet, it is not explained why the choice either in *mored* or in *moredet* is given to the wife. Rashi on the other hand is systematic also on this point: in a case of *mored* he is to be consulted, while in the case of *moredet* she is to be consulted (and, as already mentioned, consulting has the same meaning in both cases). Rashi's interpretation, here again, is thus more simple and reasonable.[68]

We now turn back to the progress of the *sugya* of *moredet*. The sugya continues as follows:

(e) What is to be understood by 'a rebellious woman'? Amemar said: [One] who says, 'I like him; but wish to torment him' (בעינא ליה ומצערנא ליה). If she said, however, 'He is repulsive to me' (מאיס עלי), no pressure is to be brought to bear upon her (lit. we do not coerce her). Mar Zutra ruled: Pressure is to be brought to bear upon her (lit.

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[64] Ra'avad agrees with Rashi that Rav Naḥman, who determines the *halakhah* in accordance with Rabbotenu, means not according to the Mishnah (see Ritva, 63b, s.v. אמר רבא). His argument is on the meaning of נמלכין (see *infra*) and accordingly concerns the interpretation of Rava's exact opinion.

[65] See Ramban, 63b, s.v. הא.

[66] See Ritva's explanation (63b, s.v. והראבי״ד ז״ל).

[67] At 63a (the case of *mored*) the Rishonim (see for example Rashba, s.v. ופרקינן) introduce another variant: ולאו לאמלוכי בה בעי (compare the traditional text, *supra*, text at note 62: ולאו לאמלוכי ביה בעי) which means that the wife is given a choice between two halakhic options, similar to the interpretation of this phrase in 63b (but on 63a, since it is a case of *mored*, her choice is between immediate divorce while receiving her current *ketubbah* and delaying the divorce but increasing the *ketubbah*, whereas on 63b her choice is between divorce without *ketubbah* and decreasing the *ketubbah*). It should be remarked that most MSS take the traditional text, despite MS Vatican 130, whose original text was בה but was corrected above the line to the traditional text. Interestingly, according to *Shitah Mekubetset*, בה was Rashi's text in the first edition of his commentary (see 63a, s.v. ולאו), and it is also the text of "Rosh and all of Aḥaronim" (*ibid.*, end of s.v. והאמר רב). I am therefore still doubtful whether Rashi in his last edition chose his text because of its advantages, or maybe this text is a result of his correction of the talmudic text, which was done in order to make his interpretation consistent with those two parts of the *sugya*.

[68] There is at least one more explanation of this passage: see Rashba's explanation of Rif (63b, s.v. ויש), which seems to integrate Rashi and Rabbenu Tam.

we coerce her).

Such a case once occurred, and Mar Zutra exercised pressure upon the woman and R. Ḥanina of Sura was born from the re-union. This, however, was not [the right thing to do]. [The successful result] was due to the help of providence.

Like earlier stages, the dispute in section (e) continues the basic tension of the *sugya*. Basically, both Amemar and Mar Zutra follow the Mishnah regarding *moredet*. As Rashi interprets it, the law of *moredet* involves forcing her by making her wait for her *get* (again, an interpretive addition of Rashi) and decreasing her *ketubbah*, exactly the mishnaic rule.[69] Amemar and Mar Zutra agree to apply this law when the wife claims "I like my husband but wish to torment him" (בעינא ליה ומצערנא ליה), but disagree in applying it to a case of "he is repulsive to me" (מאיס עלי). According to Amemar, in this case we should not follow the mishnaic rule of *moredet*. Thus, the alternative option from earlier stages of the *sugya* arises: the rule of the Tosefta. Rashi therefore interprets the ruling as: "we don't force her to remain under her husband, but he (must) give her a *get* while she loses her *ketubbah*."[70]

Coercing a *get* is not unique to Amemar's teaching. It is part of an entire approach, whose roots are much earlier, in *Rabbotenu* of the Tosefta or even in the Mishnah. This approach is to be found, according to Rashi, at each section of the *sugya*, which consistently opposes the two approaches. However, at section (e), following Rashi's interpretation, we have MS LF which raises explicitly the rule of coercion.[71]

One comment should be made here. As we have seen, the dispute regarding "he is repulsive to me" at section (e) is equivalent to the dispute between the Mishnah and Rabbotenu, and to the dispute between "she is to be consulted" and "she is not to be consulted" at section (d). However, the rhetoric is quite different. "Consulting" at section (d) has a positive orientation, probably from the viewpoint of the husband or *bet din*. "Pressure" (or even coercion) at section (e), on the other hand, although having the same meaning, has a negative orientation, and probably reflects the viewpoint of the wife.[72] This fact may reflect diverse conceptions of different generations or of the sources of each part of the complete *sugya*.

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[69] See Rashi, 63b, s.v. היכי: דכופין אותה דמשהין גיטה ופוחתין כתובתה :היכי דמיא מורדת.

[70] Rashi, s.v. לא: לא כייפינן לה: להשהותה, אלא נותן לה גט ויוצאה בלא כתובה. Rashi does not refer explicitly to the question whether it is done after announcement, as it is in the *baraita*, or immediately. Since the other elements of this rule are similar to the *baraita*, it is a reasonable understanding to apply the missing element (the announcement) here too.

[71] See *supra*, text at notes 17-20. MS LF follows Rashi also in section (d): ואיהו כמאן סברה: see *supra*, n.60, although there it is not unique – at that point the majority of MSS follow Rashi.

[72] See Riskin, *Divorce*, 41.

However, the redactor of the *sugya* integrated them into one complete *sugya*, reflecting in fact the same halakhic approach.[73] Following him, Rashi, as we have shown, interprets it in a clear and harmonious way.

The Rishonim who rejected coercion opposed Rashi also in their interpretation of (e), sometimes in too complicated a way. Thus, for Rabbenu Tam, it is not completely clear whether the pressure upon the *moredet* who claims "I like him but wish to torment him" is according to the Mishnah or Rabbotenu. It probably can be according to both of them. However, it seems that Rabbenu Tam prefers to interpret it following Rabbotenu, according to whom the *halakhah* is fixed. On the other hand, "no pressure is to be brought to bear upon her", in relation to the *moredet* who claims "he is repulsive to me", is neither according to the Mishnah nor according to Rabbotenu. Its meaning is an immediate loss of the *ketubbah* and immediate divorce, depending of course on the husband's will, without any four weeks of warnings, announcements or other waiting periods.[74]

The next section of the *sugya* continues discussing aspects of *moredet*, mainly financial ones (whether she lost parts of her dowry or not). Finally, it reaches a highly important conclusion (63b-64a):

> (f) R. Zevid's daughter-in-law rebelled [against her husband] and took possession of her silk [cloak] … Now that it has not been stated what the law is, [such clothing] is not to be taken away from her if she has already seized them, but if she has not yet seized them they are not to be given to her.
>
>   And we make her wait twelve months for her divorce, and during these twelve months she receives no maintenance from her husband (ומשהינן לה תריסר ירחי שתא אגיטא, ובהנך תריסר ירחי שתא לית לה מזוני מבעל).

The conclusion, "we make her wait twelve months for her divorce", belongs to a late talmudic stratum, amoraic or even saboraic.[75] It determines a waiting period of 12 months before receiving a *get*. The exact meaning of this passage is a matter of great dispute between talmudic interpreters, following the basic attitude of each commentator to the interpretation of previous stages of the *sugya*. The Geonim, according to both Friedman's and Brody's conclusions, referred to this passage as a late talmudic enactment, which determined coercion after 12 months of rebellion, whereas the Geonim themselves applied coercion immediately.[76] Rashi does not mention coercion explicitly. However, I assume that Rashi, as a continuation of his

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[73] In this *sugya* the Rishonim show awareness of the redactor's work but in a different section. See Ritva, 63b, s.v. ולהני פירושי, regarding Rav Huna bar Yehuda's opinion in section (d).

[74] See Tosafot, 63b-64a, s.v. אבל.

[75] See Friedman, *Jewish Marriage*, 323 n.37.

[76] See *supra*, n.14.

interpretation of the whole *sugya*, of which coercion is an integral part at every point, integrates coercion of a *get* at this stage as well. Rashi explicitly deals here with the timing of the rule of *moredet*,[77] which was earlier interpreted by Rashi as coercion of a *get*.

Contrary to the Geonim and Rashi, Rabbenu Tam and his followers denied coercion here, in the same way as at every point in the *sugya*. There are a few versions of the interpretation of this passage according to Rabbenu Tam's school. Their common denominator is that the Talmud teaches here that the husband is *not allowed* to divorce his wife, even if he wants to, without paying her financial rights, because she might reconcile during this period. However, after 12 months the husband *may* divorce his wife, and she loses her ketubbah.[78]

An important question is which kind of *moredet* this passage refers to, "I like him, but wish to torment him" (*ba'ena leh*) or "he is repulsive to me" (*ma'is alay*). The Rishonim and Aḥaronim usually follow Amemar, who makes a distinction between *ma'is alay* and *ba'ena leh*.[79] Thus, to whom does this passage refer? Three possible options are mentioned by the Rishonim: *ma'is alay*, *ba'ena leh* and both.[80] Rashi at this point is not clear, and in what follows we will complete our previous discussion on his commentary of the *sugya* by explaining his view of this passage.

The previous part of the *sugya* deals with a story about Rav Zevid's daughter-in-law, which Rashi interprets as a case of *moredet ma'is alay*.[81] We may conclude that the present passage, which mentions the 12 months waiting period before receiving the *get*, continues that case, i.e. that of the *moredet* who claims "he is repulsive to me" (*ma'is alay*).[82] We have argued that Rashi interprets the whole *sugya* as a logical and systematic structure, which divides its parts between two basic concepts: the mishnaic on the one hand and that of Rabbotenu on the other. Interestingly, when describing the Mishnah and its followers, Rashi uses the terminology of delaying,[83] the same as is used by the Talmud in our passage:

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[77] See Rashi, 64a, s.v. ומשהינן לה and s.v. תריסר, and see *infra*.

[78] See for example Ramban, 63b, s.v. וה"מ דאמרה, in the name of Rabbenu Hanan'el: "that is, if the husband said, 'I will issue you a *get* immediately and I will take all the property', we do not take heed of this, but we delay the *get* for twelve months, in order to consult her" (כלומר אם אמר הבעל אתן לך גט לאלתר ואטול כל נכסיה לא משגחינן ביה, אלא משהינן לה תריסר ירחי שתא אגיטא להמלך בה).

[79] In 63b the Talmud tries to support Mar Zutra, but finally rejects it in the words: ולא היא ("This was not [the right thing to do]"). This makes possible and even preferable the determination of *halakhah* according to Amemar: see Rashba, 63b, s.v. היכי דמיא מורדת.

[80] See Rashba, s.v. ומשהינן ; ולעניין; Ritva, 64a, s.v. ומשהינן. See also *infra*, text at note 90.

[81] See Rashi, s.v. כלתה. It is a matter of dispute amongst the Rishonim: see Rashba, 63b, s.v. והרמב"ם.

[82] See Ritva, 64a, s.v. ומשהינן.

[83] משהין (63b, s.v. נמלכין) דמשהין גיטא ופוחתין כתובתה (s.v. היכי); or when introducing the opposite view: לא כייפינן לה : להשהותה (s.v. לא).

ומשהינן לה. If indeed Rashi deals here with *ma'is alay*, the fact that the terminology used here is the mishnaic one means that there is at this point a withdrawal from the earlier approach regarding *ma'is alay*. According to Amemar's original teaching we do not force the *moredet ma'is alay* (לא כייפינן לה), i.e. in this case we would not use the mishnaic rule and delay her *get*, but her husband must divorce her, probably according to Rabbotenu's rule.[84] Here, on the contrary, we impose a delay for giving the *get*, and according to Rashi this is in order to give her the option to change her mind.[85] It is a conceptual withdrawal from the strict approach of Rabbotenu, whose goal was the bringing to an end of the conflict as quickly as possible, towards an attempt to make it possible for the wife to change her mind, as in the mishnaic rule.[86] However, it is not a complete withdrawal, but a sort of combination of the two approaches. On the one hand לא כייפינן לה, i.e. we would not use the decreasing process of the Mishnah. On the other hand, she would receive her *get* not immediately (or after four weeks) but only after 12 months.[87] In the meantime, according to Rashi, she has a chance to change her mind. Thus, if she does change her mind, she probably would not lose her *ketubbah*.[88]

To sum up Rashi's view, the final stage of the talmudic *sugya* imposes a waiting period of 12 months. The interpretation of this conclusion depends on the interpretative path of the *sugya,* especially as regards the legitimation of coercion. According to Rashi, here too coercion plays an important role: the final talmudic conclusion delays coercion for 12 months in a case of *moredet ma'is alay*. Yet, whether in *ma'is alay* or in *ba'ena leh*, at the end of the halakhic process the wife can demand a *get*, and her husband is coerced to divorce her.[89]

The application of this late talmudic conclusion to *moredet ma'is alay* is a matter of dispute between Rishonim. Opposing Rashi, some Rishonim apply this

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[84] See Rashi, 63b, s.v. לא, and see also *supra*, n.70.

[85] Maybe she reconcile (אולי תחזור בה): see Rashi, 64a, s.v. ומשהינן לה.

[86] See above, section 3.1. The current conclusion may therefore reflect a doubt, whether the *halakhah* in a case of *ma'is alay* is according to the Mishnah or according to the Tosefta (= Amemar's לא כייפינן לה : see above, text at note 84): see Ba'al Ha'itur, letter *Mem*, 68b: "the Savoraim [...] are undecided whether the law is as Rav Nahman bar Rav Hisda, who said the halakhah is in accordance with Rabbotenu; or as Rava who said in the name of Rav Shesheth, the halakhah is that she is to be consulted (משום דמספקא להו אי כרב נחמן בר רב חסדא דאמר הלכה כרבותינו אי כרבא דאמר רב שׁשת דאמר). The ruling [therefore] is that we delay the *get* for twelve months" (הלכה נמלכין בה).

[87] See Riskin, *Divorce*, 44-46.

[88] See Ritva, 64a, s.v. ומשהינן. There are Rishonim who argue that the wife loses her *ketubbah* even if she changes her mind during the 12 months waiting period: see Ritva, *ibid.* As to Rashi, since this *takkanah* sounds in favour of the wife, I prefer the first explanation.

[89] The last *takkanah* of 12 months does not refer to *ba'ena leh*, as discussed above. Thus, the law here is the basic mishnaic law, agreed by both Amemar and Mar Zutra, and defined as: כייפינן לה. According to Rashi, at the end of the mishnaic law, as already mentioned, she receives a *get*.

rule to both kinds of *moredet*, while others apply it only to *moredet ba'ena leh*.[90] Amongst the latter are Rambam, Rashbam and Rabennu Tam,[91] according to whom the law of *moredet ma'is alay* is as originally determined by Amemar. But at this point Rambam and Rashbam differ from Rabbenu Tam. While the latter rejects coercion, the former two both accept it, and according to their view the *moredet ma'is alay* loses her *ketubbah* and receives a *get* immediately.[92] In regard to coercion, therefore, there is an important group amongst the Rishonim which is in favour of it and puts it within the core of the talmudic *sugya*.[93]

1.3   Conclusions

Coercion of a *get* in the case of a rebellious wife (*moredet*) is a matter of great dispute between talmudic commentators, whether Geonim, Rishonim or Aḥaronim. One most influential view was that of Rabbenu Tam, who strictly rejected coercion. Opposing the geonic view, Rabbenu Tam argued that coercion had no basis in talmudic sources. However, we have revealed a wide basis for coercion in tannaitic and amoraic sources, as well as in later anonymous talmudic discussions.

Justifying coercion in a case of *moredet* is mainly a question of interpretation of talmudic sources. The interpretative option suggested here is a legitimate – we would even say: preferable – way of interpretation, with the significant advantages of clarity, simplicity and consistency. Furthermore, it creates a logical structure which holds together the Mishnah, the Tosefta and every stage of the discussion of the Babylonian Talmud. Not surprisingly, it was chosen by Rashi and some other commentators when interpreting the *sugya*.

One methodological comment should be made here. Rabbenu Tam's objection is based primarily on broader considerations, i.e. harmonizing all talmudic sources, and not on the simple meaning of this specific *sugya*. His main argument is

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[90]
Supra, n.80.

[91]
See Rambam, *Ishut*, 14:9-10; Shiltei Gibborim, 27a, A; Tosafot, 63b, end of s.v. ואינהו.

[92]
See the famous *halakhah* of Rambam, Ishut, 14:8: "([*Bet din*] asks her why she rebelled. If she says: 'he is repulsive to me, and I cannot willingly have sexual relations with him', [*Bet din*] coerce him to divorce her immediately, since she is not like a captive woman, who must have sexual relations with someone she hates, and she goes out (=she is divorced) without any *ketubbah* at all..." (ושואלין אותה מפני מה מרדה, אם אמרה מאסתיהו ואיני יכולה להבעל לו מדעתי, כופין אותו להוציא לשעתו, לפי שאינה כשבויה שתבעל לשנוי לה, ותצא בלא כתובה כלל). Divorce in this case is without any delays, whereas Rabbotenu's rule of four weeks of announcements and warnings (and then losing the *ketubbah*) are applied to the *moredet ba'ena leh*, together with the 12 months of waiting for her *get*: see Rambam, *ibid.*, 9-10.

[93]
The different types of *moredet* and the dispute between the Mishnah and Rabbotenu concerning the proper halakhic process do not relate to the character of coercion, which is the basic physical one: see *supra*, nn.35, 61.

supported by some tannaitic sources, in which *moredet* is not mentioned amongst the accepted cases of coercion.[94] The Rishonim deal with those sources in accordance with Rashi's approach, for example: solving the difficulty above by making a distinction between a case of coercion when the wife receives the amount of her *ketubbah*, as in the cited *mishnayot*, and coercion without receiving the *ketubbah*, as in *moredet*.[95]

Explaining Rashi's view in this way is based on a harmonising approach. Nevertheless, we may suggest a historical view: contradictory sources may be explained synchronically, as sources in a dispute (סוגיות חלוקות), or, as may be more accurate in our case, diachronically, as a developing law. That is to say, at an early tannaitic stage *moredet* was indeed not amongst the cases of coercion, but this changed during the generations, and the sources discussed in this chapter reflect this change in varying measures. Thus, coercion of a *get* in the Tosefta is an essential part of the *halakhah* and not only a possible outcome of losing the *ketubbah* as it is in the Mishnah, which may be the reason for not mentioning it amongst the mishnaic cases of coercion. Yet both sources focus on the monetary aspects, while coerced divorce is still not explicit. It becomes explicit only in late amoraic generations, Amemar according to MS Leningrad-Firkovitch or the final determination of late talmudic stratum: "we make her wait twelve months for her divorce" (ומשהינן לה תריסר ירחי שתא אגיטא). This halakhic process is influenced by sociological changes, which characterise the case of *moredet*. As briefly described by Rabbi Ya'akov Yehushu'ah Falk (Pene Yehoshu'ah):[96]

> Even without that, we find a number of enactments regarding *moredet*, corresponding to changing circumstances: talmudic law, saboraic law, which was cited by Tosafot, and the law of *metivta* (i.e., the geonic law), which was cited by Rif and Rosh z"l...

We have found a stable basis for *get* compulsion in the case of a rebellious wife. But the picture is not yet complete: was this a unique approach, developed merely in the Babylonian Talmud? Can we on the other hand point on branches of this law found in the Palestinian tradition? And what legal construction was built for justifying it?

We turn now to examine these questions.

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[94]   Mishnah Ketubbot, 7:10. See Tosafot, 63b, s.v. אבל; Ramban, 63b, s.v. וכולה הלכתא.

[95]   See Ritva, 63b, s.v. היכי דמיא מורדת. Actually, Ritva rejects this distinction: see *ibid.*

[96]   See Pene Yehoshu'ah, 63b, s.v. בגמרא ואיהו. The context of Pene Yehoshu'ah's statement is his question: היאך פליג רבא אהאי ברייתא וקאמר הא בורכא?! (How could Rava be in a dispute with the *baraita* and describe their view so negatively?). His possible answer is that after *Rabbotenu* the Sages changed their mind again and moved back from Rabbotenu to the Mishnah as a result of changing circumstances (literally: "changing times").

Chapter Two

Ketubbah Stipulations and the Rebellious Wife in the Palestinian Tradition

2.1   The Rebellious Wife in the Palestinian Talmud

The previous chapter identified the basis in the Babylonian Talmud for *get* compulsion in the case of a rebellious wife. Is this conclusion compatible with the Palestinian Talmud (the Talmud Yerushalmi)?

The Yerushalmi discusses different aspects of *moredet*.[97] As elsewhere, there are variations between the two Talmudim, the Babylonian and the Palestinian, both in citing tannaitic or amoraic sources and in the literary and conceptual development of the *sugya*. In our case, the Yerushalmi cites Rabbotenu differently and thus can shed light on their goal and rationale, as already discussed. In short, the *baraita* in the Yerushalmi varies on two significant points: (a) by mentioning divorce according to Rabbotenu, which is explicit in the Yerushalmi but not in the Tosefta and the Bavli,[98] and (b) in the absence of public humiliation, similar to the Tosefta but contrary to the Bavli.[99] We concluded, accordingly, that Rabbotenu's goal is to lead to a separation between the couple and that divorce (where appropriate, coerced), being a necessary condition for such separation, is therefore an integral part of Rabbotenu's teaching.[100]

Another part of the Palestinian Talmud *sugya* is the question of the character of the *moredet*, whether her "rebellion" relates to her domestic or sexual role. These two options are raised implicitly in the Yerushalmi as two, not necessarily contradictory, alternatives, when explaining the differences between the rebellious wife and the rebellious husband. In the Bavli on the other hand these options are the core of an explicit dispute between two *Amoraim*, one of whom, Rabbi Yoseh bar Ḥanina, is mentioned also in the Yerushalmi.[101] Interestingly, the anonymous conclusion of the Bavli limits the amoraic dispute to a domestic *moredet*, while both Amoraim agree to define *moredet* from sexual relationships as a *moredet* (אלא

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[97]   See PT Ketubbot 5:9-10, 30b.

[98]   See *supra*, chapter 1, text at notes 36-40.

[99]   The Yerushalmi uses the term מתרין בה while the Bavli uses מכריזין עליה: see *supra*, n.29. Two more differences between the Yerushalmi and the other sources are mentioned *supra*, n.38.

[100]   See *supra*, text at nn.34-40.

[101]   See Riskin, *Divorce*, 21-23. This phenomenon is well known, and reflects the high level of Babylonian conceptualization: see Moscovitz, *Talmudic Reasoning*, 306-309.

מתשמיש כולי עלמא לא פליגי דהויא מורדת). Although this talmudic limitation cannot be literally derived from the amoraic dispute in the Bavli, it does not necessarily contradict their original teaching: according to the Yerushalmi these are alternative interpretations of the Mishnah, and not necessarily a conceptual dispute.

The following passage is of the greatest importance:[102]

אמר רבי יוסה אילין דכתבין אין שנא אין שנאת תניי ממון ותניין קיים.

R. Yoseh said: For those who write [a stipulation in the marriage contract]: 'if he grows to hate her or she grows to hate him', it is considered a condition of monetary payment, and their condition is valid.

In the Cairo Genizah *ketubbot*, dated to the 10th-11th centuries C.E.,[103] we find divorce clauses that are similar to the Palestinian Talmud in both syntax and content. The 5th century B.C.E. Jewish community of Elephantine also reflects a very similar tradition; thus all three may be considered part of a "long chain of tradition in writing the Jewish marriage contract".[104] Historically, it is possible that this Jewish tradition was influenced by ancient Near Eastern traditions of stipulations in marriage documents. Another possible influence, Karaite (or Palestinian influence on the Karaites), is questionable: divorce clauses, as well as provisions for slavery and burial, were absent from Karaite marriage documents.[105]

The Genizah *ketubbot* and their relation to the Yerushalmi are discussed below, while here we focus solely on the divorce clauses of the Yerushalmi. R. Yoseh legitimates a condition in a case of hatred between the couple by referring to it as a monetary condition. But the exact content of the condition is not clear, and it is greatly disputed in both rabbinic and academic sources. The commentators usually deal with two main questions: First, what is the exact content of R. Yoseh's condition – does it relate only to financial aspects, for example: rejecting the mishnaic process of decreasing the *ketubbah* in a case of *moredet*, or does it relate also to the marriage itself, enabling a coerced divorce in such a case? Second, suppose the condition refers to the marriage, how is it used in practice – by coercing the husband to give a *get* or by a judicial act of the *bet din* itself? The first

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[102] Yerushalmi, *ibid.*

[103] The *ketubbot* were discovered, researched, and thoroughly discussed by Mordechai A. Friedman (Friedman, *Jewish Marriage*). In the following discussion I rely on Friedman's research in many aspects, as indicated in the footnotes below.

[104] Friedman*, Jewish Marriage*, 319.

[105] See Friedman*, ibid.*, 313–320; Olszowy-Schlanger, *Karaite Marriage*, 263-269. As to general influence, Friedman claims some influence of the Palestinian tradition on the Karaites (see Friedman*, ibid.*, 46–49), while Olszowy-Schlanger disputes this. For an extensive analysis of the relationship between Karaite marriage documents and Babylonian, Palestinian, and Muslim documents, see Olszowy-Schlanger, *ibid.*, 266-271.

question is discussed here, the second question in the next chapters.

In a case described later in the Yerushalmi, a similar condition is mentioned.[106] A man kissed a married woman (אחד שראו אותו נותן את פיו על פיה), and her entitlement to be paid the *ketubbah* fell to be decided. The amoraim did not regard her as a *sotah* (adulteress), which would mean that her husband should divorce her and she loses her *ketubbah*, but treated the case as one of hatred. Accordingly, they applied here the condition which was found in her *ketubbah*:

אין הדא פלנית תסבי להדין פלוני בעלה ולא תיצבי בשור-פותיה תהוי נסבה פלגות פרן.

If this So-and-so (fem.) hates[107] this So-and-so, her husband, and does not desire his partnership,[108] she will take half of *ketubbah*.

Unilateral divorce is not explicitly mentioned in the Yerushalmi either in the *sugya* of the kiss story or in R. Yoseh's condition. The amoraim discuss mainly the financial aspects of the condition: whether she is entitled to receive at least part of her *ketubbah*. However, these aspects were probably accompanied by divorce, and this presumes that it includes unilateral divorce on the part of the wife. This argument is based on the clause: ולא תיצבי בשותפותיה, i.e. she would reject being in a partnership with him, which means that the wife has the right to demand and obtain a unilateral divorce.[109]

One possible interpretation is that the wife's entitlement to a coerced divorce is achieved by the quoted condition. If that is correct, the term "a condition of monetary payment" (תניי ממון) in R. Yoseh's condition (which supplies its legitimization) includes stipulating the right to a unilateral divorce. תניי ממון has therefore a wide meaning: "'monetary stipulations' include agreements to forfeit a right or benefit assured one by law" (M.A. Friedman).[110]

Yet divorce is not the main legal consequence of the condition. Divorce is only part of the protasis (the "if" part of the condition) while the apodosis (the "then"

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[106] PT Ketubbot, 7:6, 31c.

[107] The word: תסבי should be read as: תסני or תשנא: see Lieberman, *Hilkhot HaYerushalmi*, 61, based on Maimonides, Or Zaru'a and Me'iri's version. This reading was adopted by Friedman, *Jewish Marriage*, 317; Riskin, *Divorce*, 31 n.16.

[108] The two words: בשור פותיה should be read as: בשותפותיה: see Lieberman, *ibid.* See Friedman, *Jewish Marriage*, 329: "*Shutafut* 'partnership' here clearly denotes 'marriage', as in Syriac. This felicitous term is particularly befitting in a stipulation which describes man and wife as equal partners in the business of marriage, each of whom can withdraw from the partnership at will."

[109] Riskin, *Divorce*, 31-32. The right to unilateral divorce appears more explicitly later in conditions in Palestinians *ketubbot* from the gaonic period found in the Cairo *Geniza* (e.g., "and if this Maliha hates this Sa'id, her husband, and desires to leave his home, she shall lose her *ketubbah* money… and she shall go out by the authorization of the court"): see Friedman, *Jewish Marriage*, 327-346, and see *infra*, section 2.2.

[110] Friedman, *Jewish Marriage*, 319-320.

part of the condition) is the financial aspect, which is also the core of the amoraic discussion that follows. Accepting the above explanation, that the entitlement to divorce is based on the condition, requires one to assume that "the text that is quoted omits... the wife's exit from the marriage, the divorce itself which resulted from her 'hating' her husband."[111]

But why does divorce seem to be less significant in the conditions of the Yerushalmi? As we have argued, a *get* was an integral part of the law of *moredet* already in tannaitic sources, and in particular is part of Rabbotenu's rule in the Tosefta, as is explicit in the Yerushalmi's version of the *baraita*. Demanding a divorce therefore did not have to be based on any condition, but was based rather on the law of *moredet* itself. Accordingly, the reason why the amoraim do not discuss the right to demand divorce is that it was already known and accepted, rather than this being the "point of the innovation" of the condition. The same conclusion applies to the missing apodosis of Rabbi Yoseh's condition: it might have mentioned the coerced divorce, but its core is monetary, i.e. to regulate the financial terms of the tannaitic coerced divorce.[112]

R. Yoseh merely adds a financial aspect, which overrides the tannaitic rule of *moredet*. Namely, although a *moredet* loses her *ketubbah*, if the couple has stipulated that she would not lose it, the condition is valid since it is a condition of monetary payment. The justification for accepting the condition, "[it is] a condition of monetary payment and their condition is valid" (תנאי ממון ותניין קיים), has its simple meaning: it is interpreted as referring to the monetary arrangements; the condition can be accepted precisely because it does relate to a monetary issue. The right of the *moredet* to receive a *get* may appear in this sort of condition, but its basis is not the condition but a more stable one: the basic tannaitic law of *moredet*.

Interestingly, some Geonim[113] and Rishonim – Ramban and others – do explain the divorce clause of the Yerushalmi in the same way, i.e. as a clause which was required for the financial agreements.[114] Both are affected by their understanding of

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[111] Friedman, *ibid.*, 318.

[112] This interpretation of R. Yoseh's condition is briefly suggested by Friedman, *Jewish Marriage*, 320, as a second interpretative option. The present research supports this option and puts it in a wider context.

[113] See Rav Hai, *infra*, text at notes 144-146.

[114] See Ramban, BT *Ketubbot* 63b: when the couple explicitly stipulated that in a case of *moredet* the wife receives all her *ketubbah*, it is valid since it is תנאי ממון. As a support for this ruling Ramban quotes the Yerushalmi: "but if he wrote her that he accepts upon himself that even if she were to be rebellious she would take [all her *ketubbah*], as Rav [Yosef] ibn Migash, of blessed memory, said, that in that case it is considered to be a condition of monetary payment and is valid. And in the Yerushalmi: 'for those who write: If he grows to hate her or she grows to hate him, it is considered to be a condition of monetary payment, and their condition is valid' " (אלא אם כן כתב לה שקבל על

the Babylonian *sugya* of *moredet* but in opposite ways: the Geonim understood the *sugya* as a source for coercion, and therefore the Palestinian divorce clause was not required to be understood as legitimating coercion. The other Rishonim who cited the divorce clause understood the Bavli as excluding coercion, due to the adoption of Rabbenu Tam's interpretation of the Talmud. Therefore they were motivated to interpret the clause of the Yerushalmi as discussing only financial aspects.[115]

2.2   *Ketubbah* Stipulations in the Post-Talmudic Palestinian Tradition

Genizah *Ketubbot* indicate that the Palestinian custom of *ketubbah* stipulations, and in particular the Palestinian divorce clause, continued (maybe even expanded) in the post-talmudic era. In the Palestinian tradition the couple stipulated explicitly in their *ketubbah* that the wife is entitled to a unilateral divorce, for example:[116]

ואין הדה עזיזה כלתה תסני להדן מבשר בעלה ולא תצבי בשותפותיה... ונפקה על פום בית דינה ועל דעתיהון.

And if this 'Aziza, the bride, should hate this Mevasser, her husband, and not desire his partnership [...] and she will go out by the authorization of the court and with the consent of our masters, the sages.

The Genizah *ketubbot* and the tradition found in the Palestinian Talmud are, in Friedman's words as indicated above, part of a "long chain of tradition". The Genizah tradition could thus issue unilateral divorce on the basis of the law of the rebellious wife. I support this conclusion in the next chapters, discussing the relations between the Palestinian and the geonic traditions and the place of marriage annulment in both.[117] This conclusion, however, raises an essential question. If, indeed, there was a basis in positive law for unilateral divorce, both for the Babylonian and for the Palestinian traditions, why was it necessary to write the divorce clause in the Palestinian *ketubbot*?

One of the two citations of the divorce clause in the Yerushalmi, "the kiss story" cited above, suggests a unique version of it: "If this So-and-so (fem.) hates this So-

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עצמו שאפילו תמרוד תטול, כמו שאמר הרב בן מיגש ז"ל, דהתם תנאי ממון הוא וקיים. ובירושלמי: 'אילין (דכתבין אין שנאי אין שנאת תנאי ממון הוא וקיים', ואין זה צריך לפנים).

[115]   Z. Falk makes a similar argument, according to which the condition in the Yerushalmi deals only with the financial aspect, and suggests that coerced divorce might have not been part of this condition, as he claims to find in some of the Elephantine marriage documents: see Falk, *Gerushin*, 22. Here, however, we follow our previous conclusions, according to which the Yerushalmi did accept coerced divorce.

[116]   *Ketubbah* no. 1, lines 23–24, in Friedman, *Jewish Marriage*, II, 9 (Heb.); 13 (translation).

[117]   See *infra*, Chapters Three and Five.

and-so, her husband … she will take half the *ketubbah*." According to this clause, the wife is entitled to half of her *ketubbah* where she initiates unilateral divorce. Thus, we can suggest a reasonable explanation of the practical necessity for this clause: it was required in order to regulate the financial arrangements, which might vary from case to case.

Following this argument, the divorce clause which stipulated a total loss of the *ketubbah*, normally found in the (later) Palestinian *ketubbot*, was written to exclude this different option, that of loss of only half of the *ketubbah*. In other words, the divorce clause was *not* required in order to legitimate unilateral divorce, since the latter had an independent basis, as argued above. It was required, rather, for the financial arrangements, which were subject to variation and therefore needed to be explicitly stated. As seen in the previous section, the structure of the divorce clause supports this interpretation: divorce is only part of the protasis (the "if" part of the condition) while the apodosis (the "then" part of the condition) is the financial aspect, which is also the core of the amoraic discussion that follows.[118]

However, this explanation of the divorce clause as required for the financial arrangements is not completely satisfying, as regards the Genizah *ketubbot*. The equal distribution of the *ketubbah* which is mentioned in the Yerushalmi was unique to that case, and every other occurrence of the divorce clause – both in the early Elephantine marriage documents and in the later Palestinian *ketubbot* – has the standard financial arrangement, according to which if the wife unilaterally demands divorce she completely loses her *ketubbah*.[119] I doubt therefore if the half sharing of the *ketubbah* was practiced at all at the time of the Palestinian *ketubbot* from the Cairo Genizah. It may be the case that at some stage (the first centuries C.E., which are reflected in the Yerushalmi) this stipulation was required in order to exclude other possible financial arrangements. But in later times those alternatives were no longer in use and their exclusion was not necessary any more. The question of the necessity for this condition thus arises again: if only one arrangement was in practice, it did not need to be stipulated. And as regards the legitimization of coercion – we do have a rule of positive law for it.

It appears therefore that the divorce clause in the Palestinian *ketubbot* was written as part of a general custom in the Land of Israel, according to which court

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[118] *Supra*, text at notes 110-111.

[119] According to Genizah *ketubbot*, the wife loses her *ketubbah* (*mohar*), but receives her dowry. Some *ketubbot*, however, distinguished between the delayed *mohar* payment, which was forfeited by the wife, and the advanced portion (the *muqdam*), which was considered as her personal property and therefore was not returned to her husband: see Friedman, *Jewish Marriage*, 333-335.

stipulations were frequently written, even though they were not strictly required.[120] This assumption is supported by the fact that some Palestinian *ketubbot* mention only the existence of the divorce stipulation without its details: "They agreed between themselves 'concerning the matter of hate and love (על עסק סנתה ורחמתה, i.e. the divorce stipulation) and life and death' and all court stipulations".[121] We may conclude from this fact that the content of the divorce stipulation was known and common and there was no substantial need for it to be written. This might be also the reason why R. Yoseh in the Yerushalmi does not give any details of the divorce clause, but only rules that it is legitimate. Indeed, some scribes of the Genizah *ketubbot* were satisfied merely to mention its existence. Others, however, happily for us, preferred to write it out in detail.

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[120] See Friedman, *Jewish Marriage*, 15-18, 330. In Babylonia the opposite custom was observed: court stipulations were not written. See Friedman, *ibid.,* 16. This might be also the basis for the custom in several places of not writing a *ketubbah* at all: see Rashi, *Ketubbot* 16b, s.v. רב פפא.

[121] Friedman, *Jewish Marriage*, 340.

Chapter Three

Palestinian *Ketubbah* Stipulations and the Geonic *Moredet*

The Palestinian custom of *ketubbah* stipulations, and in particular the Palestinian divorce clause, continued (maybe even expanded) in post-talmudic era, as reflected in Palestinian *ketubbot*. At the same time, in Babylonia, the Geonim (approximately 7th-11th centuries C.E.) widely practiced the law of the rebellious wife in order to enable unilateral divorce on the wife's demand.[122] These two post-talmudic traditions have developed two different institutions for a single object: enabling the wife to demand – and obtain – a unilateral divorce, even against her husband's will. Was there an interaction between them?

In the Palestinian tradition the couple stipulated explicitly[123] in their *ketubbah* that the wife is entitled to a unilateral divorce. According to the geonic tradition the wife's right to a unilateral divorce was based on the law of the rebellious wife (*moredet*). The Geonim based their view on the Talmud, or more precisely: on a decree of the Saboraim, as cited at the final stage in the talmudic passage, which legitimated coercion of a *get* in the case of a rebellious wife: "we make her wait twelve months for her divorce" (ומשהינן לה תריסר ירחי שתא אגיטא, *Ketubbot* 64a).[124] The effect of the geonic enactment was therefore (a) to coerce the husband to give a *get* immediately and not only after 12 months, and (b) to impose one or more of several possible monetary regulations in favour of the wife (such as not losing her basic *ketubbah*).[125] This is explicitly stated in some geonic responsa, as in the following from Rav Sherira:[126]

[122] See Friedman, *Jewish Marriage*, 324-325; Brody, *HaGeonim*, 298-300.

[123] This is clearer in the Genizah *ketubbot* than in the Palestinian Talmud. Nevertheless, the two belong to one continuing tradition (see *supra*, text at note 104).

[124] See *supra*, text at notes 13-14. According to our analysis, the basis for coercion of a *get* is much earlier, in the Tosefta, or even in the Mishnah (see *ibid.*, section 1.2.1).

[125] The exact monetary aspects of the geonic enactment(s) are not clear, and were probably disputed by the Geonim themselves. See Brody, *HaGeonim*, 300-304.

[126] *Teshuvot HaGeonim*, *Sha'arei Tsedek*, Vol. 4, 4:15. Both Friedman and Brody assume that this view was largely accepted by the Geonim: see Friedman, *Jewish Marriage*, 324-325; Brody, *HaGeonim*, 298-299.

> This is our opinion [lit. we saw in the following way]: the original law was that [the *bet din*[127]] does not oblige[128] the husband to divorce his wife if she asks to divorce […] Later […] Nevertheless [the *bet din*] did not oblige the husband to write her a *get* […] [Later the Rabbis] enacted that when she demands divorce [the *bet din*] makes her wait twelve months [in case] perhaps they reconcile, but if they do not reconcile after twelve months [the *bet din*] compels the husband and he writes her a *get*.[129] After the Saboraim […] [the Geonim] enacted […] and [the *bet din*] coerces the husband and he writes her a *get* immediately [upon her demand] and she gets the hundred or two hundred [*zuz*, of her *ketubbah*]. This is the way that we have ruled for three hundred years and more. You should also act in this way.

In his responsum, Rav Sherira indicates that the geonic enactment was a response to specific historical circumstances. A growth in the number of wives appealing to Muslim courts led to the fear of a coerced get (*get me'useh*) and probably also to the fear of conversion to Islam. The Geonim responded by improving the wife's legal power in family matters deliberated in Jewish courts.[130] In the basic ruling of compelling a divorce for the *moredet*, however, they followed the Talmud.

The relationships between these traditions are not completely clear: are they independent, without any direct connection, i.e., contractual vs. normative, but having some similar characteristics as a result of their similar historical environment or common cultural background? Or are they connected, perhaps even reflecting similar legal constructions but only expressed differently, having the same normative basis and with some reciprocal influence between them?

A link between the two traditions is made by Me'iri's teachers' teachers, who argue that the normative basis for the geonic compulsion of a *get* in the case of a rebellious wife is R. Yoseh's clause[131] in the Palestinian Talmud: "and my teachers testified that their teachers explained that the geonic innovation in this matter is based on what is written in the Western Talmud in this *sugya*: הילין דכתבין אי שנאי אי שנאית תנאי ממון הוא וקיים.[132] What is the exact meaning of this link? Me'iri

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[127] I have added "the *bet din*" when the Gaon refers to the judicial act. When he refers to the enactment I have added "Rabbis" for the first two enactments and "Geonim" for the last one.

[128] Verb in plural (מחייבין). Similarly, all the judicial acts *infra* are formulated in the plural (מחייבין; מכריזין ; כופין), in contrast with the actual writing of the get: וכותב לה גט.

[129] This enactment is the final section of the talmudic passage (ומשהינן לה תריסר ירחי שתא אגיטא), which Rav Sherira ascribes to the Saboraim.

[130] See Rav Sherira's responsum, *ibid.*, and see E. Westreich, *Rise and Decline*, 217-218; Brody, *HaGeonim*, 295.

[131] *Supra*, text at note 102.

[132] *Bet haBeḥirah*, *Ketubbot*, 63a, s.v. זהו דין התלמוד במורדת. Me'iri's teachers' teachers explicitly link the geonic rebellious wife to the divorce clause of the Palestinian Talmud. However, the Palestinian Talmud and the later Genizah *ketubbot* are part of a single tradition. M.A. Friedman even suggests

himself opposed coercion in cases of *moredet*.[133] His discussion of the geonic measures relates to their financial enactments, according to which the wife would not lose her basic *ketubbah* (and other monetary components).[134] Me'iri rejects these enactments ("it is not correct to rule like them"), but then cites his teachers' teachers who find some support for the Geonim in the customary Palestinian divorce clause. Accordingly, the link between the two traditions does not relate to the coerced divorce but rather to the financial aspects of the rebellious wife.

Nevertheless, taking the words of Me'iri's teachers' teachers (as cited in Me'iri's commentary) out of their context in Me'iri's text reveals a different intention: it appears that Me'iri's teachers' teachers tried to legitimate the coerced divorce itself and not (only) the financial aspects. Thus, they interpret "if she grows to hate him" in R. Yoseh's condition as: "if she grows to hate him, so that he *is required to divorce her* (שיזקק הוא לגרשה) whether while [receiving] all the *ketubbah* or with a small reduction".[135] In the same way, Me'iri's teachers' teachers refer to the fear that she may (unjustifiably) "take herself out of her husband's control" (להפקיע עצמה מיד בעלה) as the reason for their seeking to find support for the geonic ruling, which means that the wife had the option of unilateral divorce and this needed justification. The divorce clause accordingly gives the wife the right to initiate unilateral divorce, and the geonic enactments were based on this custom.

Me'iri's teachers' teachers' argument is as follows: this condition was practiced not only in the Land of Israel, but was also known and used in Babylonia. Thus, the divorce clause was at first a widespread practice. Then the decree of the Geonim made it an obligatory norm, even when it was not written, thus authorizing them to compel a divorce in all such cases (or require different financial arrangements, according to Me'iri). This is similar to other cases defined in the Babylonian Talmud as "court stipulation" (*tnai bet din*), i.e., a clause in the *ketubbah* (for example: *benin dikhrin* [a clause that gives preferential inheritance rights to the sons of this wife]), which became a binding practice, so that the spouses are obliged to follow it even if it is not written explicitly in their

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that Me'iri's teachers' teachers based themselves also on an actual *ketubbah*, and not only on the Palestinian Talmud; see below.

[133] See Me'iri, *ibid.,* s.v. וגדולי המחברים: according to our [i.e., Me'iri's] opinion the husband is not coerced [to give a *get*] (ולדעתנו אין כופין).

[134] *Ibid.,* s.v. זהו דין התלמוד במורדת: "in the financial [lit. collection] issue the Geonim innovated".

[135] Similarly, they mention (*ibid.*): "if she hates him she shall take her *ketubbah* or part of it and she shall leave (ותצא)". The addition ותצא to the divorce clause in the Palestinian Talmud shows as well that they understood this clause as legitimating unilateral divorce.

ketubbah.[136]

Some scholars have accepted this view as historically correct.[137] Amongst them, an interesting compromise view is suggested by Moshe Shapira.[138] Shapira bases the geonic tradition on the Palestinian divorce clause, following Me'iri's teachers' teachers, but in a unique way: as a cause for the cancellation of the talmudic 12 months' waiting period and not as a basis for compulsion of a *get* (or for other financial aspects). Therefore he argues as follows:[139] (a) at first, there was a practice of writing the divorce clause, which became more and more widespread, to the extent that it became possible to coerce a divorce even if the divorce clause was not explicitly included.[140] The divorce clause included, in addition to unilateral divorce, the right of the wife to receive her *ketubbah* or part of it. (b) Thus, according to Shapira, the 12 months' waiting period became otiose, since (based on the divorce clause) no sanctions were left during that period against the wife: she got alimony, and when divorced received her full *ketubbah*. (c) The Geonim ruled, therefore, that the coerced divorce should be effected immediately upon the wife's demand, canceling the 12 months' waiting period.

However interesting this argument is, it is historically unconvincing. Shapira bases his argument on the claim that according to the divorce clause the wife receives her *ketubbah* (and thus that the 12 months' waiting period lost its function). This claim is based on another citation of the divorce clause in the Palestinian Talmud, which gives the wife half of the *ketubbah*,[141] and on Me'iri, who adds the option of receiving all of the *ketubbah*: "[the divorce clause stipulates that] if she hates him she will receive her *ketubbah* or part of it and leave". Historically, however, this is inaccurate: we do not find in the divorce clauses any precedents for receiving the *ketubbah* in full. Even receiving half the *ketubbah* was not the practice written into the Genizah *ketubbot* at the time of the Geonim, which always mention the wife's total loss of the *ketubbah*.[142] Thus, Shapira's description

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[136] See M *Ketubbot* 4:7-12. In the Palestinian *ketubbot*, however, the divorce clause *was* written. This may be explained as part of a general custom in the Land of Israel, according to which court stipulations were frequently written, even though they were not required: see *supra*, text at notes 120-121.

[137] See Lieberman, *Hilkhot haYerushalmi*, 61 n.ק. M.A. Friedman doubts whether this description is historically possible: see Friedman*, Jewish Marriage*, 325-327, and see also below.

[138] Shapira, *Gerushin*, 124-130.

[139] Shapira, *Gerushin*, mainly at 129.

[140] Since this argument explains the geonic decree, we must assume (according to Shapira's reasoning) that the process here described existed in Babylonia as well.

[141] The "kiss story"; PT *Ketubbot* 7:6, 31c.

[142] See *supra*, text at note 119.

of stage (a) above is doubtful as to the wife's receiving the *ketubbah*, and therefore his whole historical reconstruction becomes problematic. According to Shapira's reasoning the 12 months' waiting period was still relevant, since the wife could lose at least part of her *ketubbah*, and there the geonic decree had no reason for canceling this waiting period.

Beyond these arguments, it is hard to accept Me'iri's teachers' teachers' view, following either Shapira's explanation or the classic interpretation of it, as a support for coerced divorce or for the financial arrangements. It is correct that the divorce clause was a common practice. Nevertheless, the Geonim do not refer to the Palestinian tradition of making such a condition as their normative basis. They refer rather to the Talmud as the source for coercion, and explain their decree as relating to the timing of coercion and to the monetary aspects. And even as regarding these latter details, the Geonim did not mention any contractual aspect (תנאי ממון) as their basis but rather the needs of their time.[143]

Indeed, it is possible that the Geonim *were* familiar with the Palestinian tradition (but not as a basis of their enactments). According to the following responsum, they interpret it as relating to the financial aspects of the law of the rebellious wife rather than to the basic right to demand divorce.[144] This familiarity may be deduced from Rav Hai Gaon, who legitimates some kinds of financial arrangements in cases of the rebellious wife[145] on the basis of: "since it is a condition of monetary payment, and it is valid" (שתנאיי ממון הוא וקיים). This is almost word for word the Palestinian justification of the *ketubbah* clause,[146] and it is cited here as a support for monetary aspects rather than for coercion. Yet, even with regard to the financial aspect of the geonic decree on the rebellious wife, the Geonim did not refer to the Palestinian Talmud as their basis.

Thus, a distinction should be made between the positive law aspects of the rebellious wife, which were regulated by geonic enactments (either financial or the timing of coercion), and the contractual aspects, which were left to the spouses' agreement. The geonic enactment on the rebellious wife was a piece of independent legislation, not based on the Palestinian divorce clause. In other words, it appears that there is some interaction between the Geonim and the Palestinian divorce clause with regard to financial aspects, but not with regard to

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[143] See *supra,* text at notes 125-130.

[144] The structure here suggested is similar to Me'iri himself, as discussed above, and to some other talmudic commentators, but with a significant distinction: those *Rishonim* rejected coercion, while the Geonim supported it, but found its basis in the Talmud: see *supra*, text at notes 113-115.

[145] See *Teshuvot HaGeonim* (Harkavi edition), 523.

[146] In the Babylonian Talmud we find דבר שבממון תנאו קיים (*Ketubbot* 56a), and similarly in the Tosefta (*Kiddushin* 3:8). The formula תנאי ממון הוא is unique to the Palestinian Talmud.

the right to demand divorce unilaterally, and not as a support for the enactments.

Me'iri's teachers' teachers' explanation of the geonic decree is a result of dogmatic acceptance of Rabbenu Tam.[147] Since, according to Rabbenu Tam, the Talmud does not mention coercion, we need a different basis for the Geonim, and this suggestion finds its basis in the Palestinian tradition. As Me'iri mentions, his teachers' teachers were aware of the anachronistic character of their interpretation:

> And they (i.e., his teachers' teachers) wrote at the end of their writings that it is better for us to take pains to interpret their teachings (i.e., the teaching of the Geonim) than to say that they explicitly uprooted the whole talmudic passage without any reason.[148]

Perhaps Me'iri's teachers' teachers were faced with a real situation, which proved the catalyst for their assumption. Mordechai Akiva Friedman assumes[149] that Me'iri's teachers' teachers were not only aware of Rabbi Yoseh's condition in the Palestinian Talmud, but were also familiar with the real practice in the Land of Israel at their time, i.e., they saw a "real" Palestinian *ketubbah* which included a similar clause. According to Friedman, the teachers' teachers are likely to have been *Ra'avyah* (R. Eliezer b. Joel Halevi), who examined a *ketubbah* that was brought from the Land of Israel and apparently contained the divorce stipulation, similar to the divorce clause in the Palestinian Talmud.[150] This actual finding "could have led him to conclude that there was a direct connection between the (Palestinian) clause and the (Babylonian) geonic enactment."[151]

Me'iri's teachers' teachers thus base the geonic tradition on the Erets Israel custom. As argued here, the actual interaction between the two traditions might be limited from an historical perspective. But the very fact of making such a link has a dogmatic significance. For Me'iri's teachers' teachers, the Palestinian tradition is sufficient to legitimate the problematic geonic tradition, probably[152] even in relation to what they (following Rabbenu Tam's view) regarded as non-legitimate coercion. This attitude towards the Palestinian tradition gives it an enormous dogmatic weight: it can justify customs, norms etc., even if they lack a normative basis in the Babylonian Talmud.

The core question now is what exactly can be supported by the Palestinian precedent. Some scholars argue that the Palestinian tradition is based on a variation

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[147] See *supra*, text at n.11.

[148] Me'iri, *Bet haBeḥirah*, *Ketubbot*, 63b, s.v. זהו דין התלמוד. Me'iri himself needs this anachronistic support for the financial aspects, as argued above.

[149] Friedman, *Jewish Marriage*, 327.

[150] See *Sefer Ra'avyah*, Vol. 4, §919 (*Mishpete haKetubbah*), 309.

[151] Friedman, *ibid*.

[152] At least according to the teachers themselves; see above.

of marriage annulment, and according to their view no *get* was required in order to perform divorce.[153] The results are (dogmatically, rather than historically)[154] far reaching: a preliminary agreement between the spouses can be a basis for marriage annulment, and the fact that it was done in Erets Israel in the past gives it its legitimization. An alternative explanation of the Palestinian tradition[155] is that the husband was coerced to grant his wife a *get* on the basis of the preliminary agreement. Here too, there is an important dogmatic implication: according to the view of Me'iri's teachers' teachers, a preliminary agreement can dissolve later problems of *get me'useh*, when divorce is initiated solely by the wife.[156]

As mentioned, some parts of the Palestinian *ketubbot* as well as later interpretations of the geonic enactment raise another possibility: that of explaining these two traditions on the basis of marriage annulment. We now turn to discuss this issue: the next chapter discusses the talmudic sources of marriage annulment, after which, in chapter 5, we return to the Palestinian and the geonic traditions, examining their possible use of marriage annulment.

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[153] I, however, reject this view; see *infra*, text at nn.260-272.

[154] See Westreich, *Divorce on Demand*, 360-363.

[155] Below, I accept this explanation; see *ibid*. .

[156] We find precedents for this kind of condition, as in the monogamy condition, according to which the husband committed himself to divorce his wife if he takes a second wife: see E. Westreich, *Temurot*, 26-29. These cases are beyond the scope of the current discussion.

Chapter Four

Marriage Annulment: From Mishnah to Talmud

4.1 *Hafka'at Kiddushin*

Annulment of marriage (Heb. *Hafka'at kiddushin*) is mentioned in various contexts in the Babylonian Talmud. A number of famous talmudic passages discuss the concept of marriage annulment: "the Sages annulled his betrothal" (אפקעינהו רבנן לקידושין מיניה). In a similar way the Palestinian Talmud, when discussing a case where a *get* was formally void but validated by the Sages, mentions the notion that: "their [i.e., the Sages'] words uproot the words of the Torah" (דבריהן עוקרין דברי תורה), according to which the Sages have the authority to annul the marriage in certain circumstances.[157]

From early classic commentators to modern Jewish Law scholars, the character of marriage annulment in Jewish Law has been much debated. In particular, what is the legal construction of marriage annulment and what are the conditions for its application: does it always entail retroactive annulment of the marriage or may it be only prospective, and based on what authority? And does a writ of divorce, which is mentioned in several talmudic passages in the context of annulment, have a significant role in this process?[158]

These debates revolve around the appropriate reading of talmudic sources. Nevertheless, textual analysis of the main passages reveals support for almost all the competing opinions. Typically for layered talmudic text, there is no homogeneous meaning; each reading exposes one or more possible aspects of the text. Indeed, some scholars have pointed in the past to the contribution to the issue

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[157] See BT Yevamot 90b; 110a; Ketubbot 3a; Gittin 33a; 73a; Bava Batra 48b; PT Gittin 4:2, 45c. The exact context of these passages will be discussed below. *Hafka'at kiddushin* (annulment) literally means cessation of the *betrothal*. The legal result, however, is annulment of *marriage*, and it is commonly used in this context. In the following I therefore refer to annulment of marriage and annulment of betrothal as synonymous, unless otherwise explicitly specified.

[158] For the moment, see Freimann, *Seder Kiddushin*, and the classic literature he cites (e.g., R. Solomon ben Abraham Adret [*Rashba*] and R. Asher ben Yeḥiel [*Rosh*], 66-72); Berkovits, *Tnai*, ch.4; Shoḥetman, *Hafka'at Kiddushin*. Additional sources and references to modern debates are cited below. On the (more general issue of the) authority of the Sages to uproot the words of the Torah, see Gilat, *Perakim*, 191-204; Elon, *Jewish Law*, chs. 14-16. Both Elon and Gilat discuss also the particular case of marriage annulment; see below. On the authority to uproot the words of the Torah as a halakhic tool used in cases of conflict between Jewish law and morality see Sagi, *Yahadut*, 230-256.

of the ultimate talmudic redactor, especially in interpreting annulment as retroactive.[159] But the picture which has been drawn is still incomplete, as regards both the development of the concept and the question of the authority of the Sages. A re-reading of the sources is therefore required.

The advantage of revealing the talmudic strata is not merely for the purposes of historical research of the talmudic text, but also for analysis of the legal status of marriage annulment. This kind of tension between talmudic layers is a classic ground for creating contradictory interpretations amongst talmudic commentators.[160] In what follows attention is directed to several post-talmudic interpretations of the concept of marriage annulment, each of which was influenced by a different talmudic stage. Revealing the various approaches throughout the talmudic sources and post-talmudic literature is thus essential for establishing the actual basis for modern proposals for practical implementation of marriage annulment as a solution to the problem of *agunot*.

Jewish Law is normally characterized by a pluralist discourse and, despite acrimonious controversies, the merits of competing arguments are recognized, receiving some legitimacy – at least on a *post factum* level.[161] Nevertheless, Jewish family law, and especially marriage annulment, is characterized quite differently. In the last few decades some proposals of marriage annulment were raised as a solution to the problem of *agunot*. On the basis of the analysis of talmudic and post-talmudic sources we might expect some acceptance of these proposals. Yet those solutions have met with severe objections, frequently resulting in total rejection, accompanied by strong emotional reactions.[162] These phenomena patently diverge from the pluralist hermeneutic discourse normally characterizing Jewish Law. The discussion that follows thus makes a significant contribution: it reveals the deep and stable basis of marriage annulment in talmudic and post-talmudic literature.[163]

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[159] See Atlas, *Netivim*, 206-24 (= Atlas, *Kol Demekadesh*); *idem*, *Addition*; Shoḥetman, *Hafka'at Kiddushin*, 352-355.

[160] See Friedman, *Tosefta Atikta*, 149.

[161] See Sagi, *The Open Canon*. Specific references are supplied below.

[162] See Goldberg, *Hafka'at Kiddushin 'Enah Pitron*; *idem*, *'Ein Hafka'at Kiddushin*, as opposed to Rabbi Shlomo Riskin's proposal: Riskin, *Hafka'at Kiddushin*. For an English version, see Riskin, *Hafka'at Kiddushin* (English Version), criticized by Rabbi Jeremy Wieder, *Rebuttal*. See also Riskin, *Response*; Wieder, *Rejoinder*. Another debate is between Rabbi Uri'el Lavi and Prof. Berakhyahu Lifshitz: see Lavi, *Ha'im*, as opposed to Lifshitz's proposal: Lifshitz, *Afke'inhu*. See also Lifshitz's response: Lifshitz, *Al Masoret*, and Lavi's reply: Lavi, *Hafka'at Kiddushin Einah Ma'aneh*. Several aspects of these debates are discussed below.

[163] The debate over marriage annulment, however, requires an extensive discussion, taking into consideration various aspects, e.g. hermeneutical, political (i.e. the struggle over authority which characterizes the Israeli family law) and sociological: see Westreich, *Gatekeepers*.

4.2   Talmudic Cases of *Hafka'at Kiddushin*

Two prototypes of constitutive annulments are found in the Babylonian Talmud. The first is annulment granted directly after the betrothal and taking effect from the moment of the betrothal, due to some fault in the betrothal procedure (hereinafter: immediate annulment). Although divorce in Jewish Law is executed by a writ of divorce willingly given by the husband to his wife, here no such writ would be required. The second is annulment issued quite a while after a valid betrothal (and marriage) took place (hereinafter: delayed annulment). All cases in the latter group deal with a defect in the *divorce* procedure. They include a writ of divorce which was written, given to the wife, or sometimes delivered to an agent, but which for some reason external to the writ itself was invalidated (hereinafter: an externally flawed *get*). Annulment, applied in these cases due to a variety of reasons, makes the couple practically divorced, despite the formal defect in the *get*.

Two cases are included in the first group:

(a) the case of Naresh[164] – a minor orphan girl was married (in a ceremony valid only by Rabbinic law, and not by Torah law) to a man who sought to marry her after she became an adult, but a second person kidnapped her and married her (by Torah law);[165] and

(b) the case[166] in which the woman was forced to get betrothed and then willingly (from a formal perspective[167]) gave her consent (תליוה וקדיש).[168]

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

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

He acted improperly; they, therefore, also treated him improperly, and the rabbis annulled his betrothal.[169]

Three cases are included in the second group. In all of these cases a valid writ of divorce was written and given but was invalidated by external events:

(c) The first is a case of conditional divorce.[170] The husband initially made a condition whose fulfillment would invalidate the writ of divorce, and then tried to fulfill the condition (that is, to invalidate the *get*), but an unexpected accident prevented him from doing so. In principle the claim of an unforeseen event (אונס) is acceptable, and in this case it means that the condition is considered as fulfilled, the *get* is annulled, and the wife is not divorced. Rava, however, according to one tradition in the Babylonian Talmud, argues that the claim of an unforeseen event cannot be accepted here, and the wife is divorced. The Talmud explains that Rava's reasoning is that in order to prevent extreme results the Sages enacted that the marriage is annulled. The results which the Sages feared are (1) the wife's remarrying when she was not properly divorced, if indeed it was an unexpected accident and the *get* was invalidated; or (2) the woman becoming an *agunah*, if the event was really not unforeseen and the *get* was valid, but a chaste observant woman would fear that it is invalid and therefore would not remarry.[171]

(d) A dying person who gave his wife a *get* (in order, for example, to exempt her from being bound to a levirate marriage) but later recovered from his illness.[172] According to R. Huna, the writ of divorce is annulled, since it was given under the assumption that he would die but he did not. Both Rabbah and Rava disagree with R. Huna in cases where he has not explicitly made such a stipulation, due to a fear of a mistake: people would erroneously think

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[169] BT Yevamot, 110a; Bava Batra, 48b. This reasoning is mentioned in the case of Naresh by Rav Ashi, and his sources are discussed below. In the second case it is mentioned by Mar bar Rav Ashi according to the following textual witnesses: Mss Oxford, Florence, Munich, Vatican 115 and print editions, while according to others (Mss Hamburg, Paris and Escorial) it is Rav Ashi here as well (see also *infra*, n.241). Following the version of "Mar bar Rav Ashi", we may consider it as a "transferred" statement, but there is no reason to ascribe the transmission to a later editor (compare Ben Menahem, *Hu 'Asa*; Shoḥetman, *Ones*, 118-120; Porat, *HaḤoze Hakafuy*, 106 n.148). In my opinion it is reasonable to assume that Mar bar Rav Ashi used his own father's statement, which fitted properly his case: according to Rav Huna and Amemar's reasoning, the betrothal is formally valid though immoral. Therefore the response is "improperly", i.e. beyond the formal borders of the *halakhah*. In fact, by contrast with H. Ben Menahem's view (*ibid.*), שלא כהוגן is a modification of a common expression (see *infra*, n.203), used for *Hafka'ah* by both Rav Ashi and Mar bar Rav Ashi, so it is hard to derive any proof from its literal meaning.

[170] BT Ketubbot, 2b-3a.

[171] "On account of the chaste women and on account of the loose women" (BT Ketubbot, 2b-3a).

[172] BT Gittin, 72b-73a.

that in the above case the *get* becomes valid only after the husband's death and this is the reason for its annulment when the husband recovered. Because of that fear, explains the Talmud, although the *get* is invalid by Torah law (since he recovered), the wife is (regarded as) divorced. Here too, the Sages enacted marriage annulment.

(e) The husband sends the *get* to his wife by a messenger, but cancels the *get* (as he is entitled to do) before the messenger delivers it.[173] In order to prevent extreme results, such as the wife's remarrying unaware of the cancellation,[174] Rabban Gamliel the Elder enacted that no one may cancel a writ of divorce before the wife receives it, unless in the presence of the messenger or his wife. His descendants, Rabban Shimon ben Gamliel and R. Judah haNasi (Rabbi), disputed the status of the *get* when the husband ignores Rabban Gamliel's decree and cancels it. According to R. Judah haNasi, the *get* is void and the wife is not divorced, while Rabban Shimon Ben Gamliel does not void the *get*, and the wife *is* divorced. The reasoning behind Rabban Shimon ben Gamliel's view is the authority and validity attributed to the Sages' decrees, since otherwise: "how is the power of the Court [i.e., the court of Rabban Gamliel, who enacted the regulation) [left] unimpaired!"[175] But, the Talmud asks, if the writ of divorce is annulled according to Torah law, how can the Sages regard a married woman as a divorcee? The authority for that, explains the Talmud, is based on the concept of annulment of marriage.

The Babylonian Talmud introduces the annulment in the last three cases in the following way: "Everyone who betroths [a woman], does so subject to the consent of the Rabbis, and in this case the Rabbis annul [his] betrothal" (*kol demekadesh ada'ata derabanan mekadesh ve'Afke'inhu rabanan leKiddushin mineh*; כל דמקדש אדעתא דרבנן מקדש ואפקעינהו רבנן לקידושין מיניה). The authority for the annulment is derived from a kind of preliminary consent: the husband betroths subject to the willingness of the Sages,[176] and such a stipulation gives the Sages the authority to

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[173] BT Gittin, 33a; Yevamot, 90b.

[174] See further BT Gittin, 33a, the various explanations of R. Yoḥanan and Resh Lakish of this enactment, and cf. PT Gittin 4:2, 45c. Interestingly, Resh Lakish explains it as forestalling the problem of *agunot*, and according to Rashi's commentary *agunot* here has the modern meaning: a married woman, whose husband (after cancelling the first *get*) refuses to divorce her: see *Rashba*, Gittin 33a, s.v. והא.

[175] This reasoning is found in the Babylonian Talmud, but is missing in the parallel texts in the Tosefta (Gittin 3:5) and the Palestinian Talmud (Gittin 4:2, 45c); see Weiss, *Leḥeker HaTalmud*, 389 n.366.

[176] The wife probably does the same, otherwise it might be considered as a marriage made in error: see *Shitah Mekubetset*, Ketubbot 3a, s.v. כל המקדש.

annul the marriage. This is derived from his saying: "according to the laws of Moses and Israel" (כדת משה וישראל), viewed as a form of condition, according to which the betrothal depends on the Sages' consent. Another possible understanding of the authority to annul marriage is that it derives from the unique character of marriage as a legal and social institution, which was subject to the consent of the Sages.[177]

The meaning of the concept of annulment of marriage is the subject to fundamental disputes among both traditional commentators and modern scholars. *Hafka'ah* in cases (a) and (b) takes effect at the time of the betrothal and annuls the betrothal *ab initio*. It appears that in these cases the Sages invalidate the *act* of betrothal (by making the money ownerless or declaring the cohabitation to be promiscuity)[178] and thus the *hafka'ah* prevents the betrothal from becoming valid. Annulment in cases (c), (d) and (e) takes place some period of time later, after valid betrothal (and probably also marriage) took place. So we may ask whether a similar legal construction is to be applied to these cases, i.e. is the betrothal annulled *ab initio*, resulting in retroactive annulment of the marriage? Or is *hafka'ah* here prospective, taking effect only from that time on? According to the second possibility, annulment would refer to the *status* of marriage and not to the *act* of betrothal, by contrast with the previous reasoning.

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

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[177] *Ritva* explains the statement "according to the laws of Moses and Israel" as a sort of condition (כאילו התנה עמה על מנת שירצו חכמים). It might also be the view of Rashi: see Riskin, *Hafka'at Kiddushin* (English version), 12-14. Others dispute this: see Berkovits, *Tnai*, 120-121, 134-135. In the definition of marriage as a social institution, I follow Atlas, *Netivim*, 207-209. The common denominator of the various explanations is that the authority to annul marriage is unique to marriage and divorce, and not part of a wider authority of the Sages.

[178] See Lifshitz, *Afke'inhu*, 318-319. In the talmudic *sugyot* however we find different approaches: see *infra*.

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

An additional issue is the authority of the Sages to enact marriage annulment. Do the Sages have the authority to annul marriages by virtue simply of their jurisdiction? Or may the power to annul be not the *a priori* authority of the Sages, but rather the agreement of the spouses? The latter view, although conceptually less radical than the former, is significant for both historical analysis and for its legal implication, in that it expands the normative basis for any suggested terminative condition as a possible solution for the present problem of *agunot*.

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

4.3 The Foundation of *Hafka'at Kiddushin*

It seems that all the possible approaches mentioned above regarding both the character of *hafka'ah* and the authority of the Sages to enact it are already found in the talmudic sources. As a starting point, however, we should indicate the earliest talmudic source which discusses *hafka'ah*.[179] In cases (a) and (b) annulment is mentioned by Rav Ashi or Mar bar Rav Ashi, 6th-7th generation Babylonian Amoraim.[180] In cases (c) and (d) annulment is mentioned by the anonymous stratum of the Talmud as an explanation of several amoraic statements and appears to belong to a late chronological stage of the Talmud.[181] Case (e) is a discussion between two 3rd generation Babylonian Amoraim of a tannaitic source: the dispute between Rabbi and Rabban Shimon ben Gamliel regarding cancellation of a *get* which was sent by a messenger. It seems therefore that this case is the source of the concept of marriage annulment, and in what follows I shall support this argument.

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[179] See Weiss, *Leḥeker HaTalmud*, 393.

[180] See n.169 above.

[181] See Friedman, *Ha'Isha Rabbah*, 283-321; Halivni, *Mevo'ot*. Robert Brody has recently criticized Friedman and Halivni's approaches: see Brody, *Stam HaTalmud*. However, his list of early anonymous passages in tractate Ketubbot (*ibid.*, 228-232) does not include case (c) above, although it belongs to this tractate. I assume therefore that Brody agrees that this case, and similarly case (d), belong to a later talmudic stratum. This leaves us with case (e) as the earlier source of marriage annulment, as discussed further in this section.

In the case of the messenger (e), Rabban Shimon ben Gamliel rules that the wife is divorced despite the cancellation of the *get*. This is interesting from a conceptual point of view, and both Talmudim discuss it. In the Palestinian Talmud we find as follows:[182]

עבר וביטלו – נישמעינה מן הדא : אם ביטלו הרי זה מבוטל דברי רבי, רבן שמעון בן גמליאל אומר :
אינו יכול לבטלו ולא להוסיף על תנאו.

The Yerushalmi first cites the dispute between Rabbi and Rabban Shimon Ben Gamliel when the husband ignored Rabban Gamliel the Elder's enactment and cancelled the *get*. According to Rabbi, despite the breach of the enactment, the *get* is void and the wife is not divorced. According to Rabban Shimon Ben Gamliel, on the other hand, the *get* is not void, and the wife *is* divorced.

יאות אמר רבן שמעון בן גמליאל, מאי טעמא דרבי? דבר תורה הוא שיבטל והן אמרו שלא ביטל,
ודבריהן עוקרין דברי תורה?!

Rabban Shimon Ben Gamliel's view is reasonable. So what is the reasoning behind Rabbi's ruling? Rabbi, according to the Yerushalmi, claims: how can you, Rabban Shimon ben Gamliel, say that the *get* is valid: "the Torah said that [the *get*] is void [when the husband cancels it], while they [= the Sages] said that it is not void [i.e., the husband's cancellation is invalid] – can their words uproot the words of the Torah?!"

וכי שמן על זיתים וענבים על היין לא תורה הוא שיתרום מפני גזל השבט והן אמרו שלא יתרום, ולא
עוד אלא שאמרו עבר ותרם אין תרומתו תרומה!

This passage is Rabban Shimon ben Gamliel's answer. He doesn't state explicitly that the Sages do have that authority. He rather proves it from a different case in which what was regarded according to the Torah as *terumah* (a ritual giving of a certain percentage of the agricultural produce to a priest) could be cancelled (and defined as non-*terumah*, i.e. *ḥullin*) by the Sages.[183] Surely, in marriage, as in the case of *terumah*, the Sages do have the authority to uproot the words of the Torah.

ר' אושעיה בר אבא אמר לרבי יודן נשייא : באגדה דסבך מאן דייק לן.

In the final passage Rabbi Osha'aya bar Abba rules in favour of Raban Shimon ben

Gamliel. Rabbi Osha'aya bar Abba claims against Rabbi Yehuda Nesi'a, Rabbi's grandson, that [nearly] no one can understand (מאן דייק לן) his grandfather's ruling (אגדה דסבך).

The core of the dispute between Rabbi and Rabban Shimon ben Gamliel according to the Yerushalmi is whether the Sages have the authority to rule against the Torah, including declaring a married woman as a divorcee. According to Rabban Shimon ben Gamliel, this authority *does* exist, here as well as in other cases, and does not depend on any preliminary consent of the spouses (which is irrelevant to the case he compares: *terumah*).

The Palestinian Talmud here deploys a concept similar to *hafka'ah*:[184] the wife is considered as a divorcee despite the defect in the *get* since "the Sages uproot the words of the Torah". This very explanation is found in the Babylonian Talmud in the name of Rav Ḥisda, in the following sugya.[185]

In a different context,[186] Rav Ḥisda and Rabbah, two third generation Babylonian Amoraim,[187] discussed whether the Sages have the authority to uproot the laws of the Torah (בית דין מתנין לעקור דבר מן התורה). According to Rav Ḥisda, the Sages do have such an authority, while Rabbah challenges his view.[188] One of Rav Ḥisda's proofs is Rabban Shimon ben Gamliel's view in the case of a cancelled *get*. Rabbah then replies: "Everyone who betroths [a woman], does so subject to the consent of the Rabbis, and the Rabbis annul his betrothal" (מאן דמקדש אדעתא דרבנן מקדש, ואפקעינהו רבנן לקידושין). According to Rabbah, the Sages do not have the authority to uproot the words of the Torah. Rather, their authority to rule that the wife is divorced is derived from the unique character of betrothal, which was made subject to the consent of the Sages.[189]

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[184] The precise meaning of the *hafka'ah* in the Yerushalmi (which we may also define as: "quasi-*hafka'ah*") will be discussed below.

[185] BT Yevamot, 89b-90b. The whole *sugya* is extensively analyzed in Friedman, *Ha'Isha Rabbah*, 346-357. For further discussion on the literary aspects of this *sugya* see Westreich, *Hafka'at Kiddushin*.

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

[187] See Albeck, *Mavo*, 289-290; 307-308. The generation is significant: teachings of third generation Babylonian Amoraim are still found in the Palestinian Talmud, while those of later generations rarely exist; see Zussman, *Veshuv LiRushalmi Nezikin*, 98-99, and notes 178a, 179.

[188] In the specific context in which Rav Ḥisda initially expressed his view it was Rav Natan bar Rabbi Osha'aya who was in dispute with him. However, the general discussion regarding the authority of the Sages to uproot the words of the Torah was between Rav Ḥisda and Rabbah.

[189] Rabbah could have replied that his view is according to Rabbi, who rejected the authority of the Sages to uproot the words of the Torah and disputed Rabban Shimon ben Gamliel in this point. Nevertheless, Babylonian Amoraim usually preferred to minimize the scope of tannaitic disputes

One may argue that the discussion between Rabbah and Rav Ḥisda is a later expansion of the basic amoraic dispute, and was actually inserted by later editors. If this is correct, the concept of marriage annulment cannot be ascribed to Rav Ḥisda and Rabbah. However, here this is not the case. The discussion between Rav Ḥisda and Rabbah was indeed wide and complex in its origin and included several arguments for each side. It didn't happen on just one occasion but was a continuing debate which included several participating Amoraim.[190] Therefore it is most reasonable to see the "messenger passage" as part of the actual discussion between these two scholars, both in regard to Rav Ḥisda's argument and in regard to Rabbah's response.[191] This conclusion follows S.Y. Friedman's analysis of the *sugya*. Friedman points to the literary character of the debate, which included seven arguments (a typological number). We find corpora of seven arguments in other debates between Rav Ḥisda and Rabbah (see *Eruvin*, 43a). Therefore, concludes Friedman, the impression is that we have here "a full and defined corpus", rather than "a continuing accumulation of proofs, some of whom were added after the time of Rav Ḥisda".[192]

The similarities between the Bavli and the Yerushalmi cannot be overstressed. Both discuss "uprooting the words of the Torah", almost in the same words. And in both the *sugya* has a similar structure, which includes the precedents for both invalidating *terumah* and validating a cancelled *get*.[193] Apparently there was an interaction between the two Talmudim and either the basic Palestinian *sugya* was transmitted to Babylonia and adopted by Rav Ḥisda (while expanding its spectrum to a few other cases) but rejected by Rabbah,[194] or Rav Ḥisda's view was transmitted to Erets Israel.[195] According to the latter alternative, the process was as

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and not to create parallelism between amoraic disputes and tannaitic ones: see Goldberg, *Tsimtsum Maḥlokot*, 139-142. Rabbah preferred therefore to explain Rabban Shimon ben Gamliel in accordance with Rabbah's own view.

[190] See BT Yevamot, *ibid.*: "Rav Hisda sent to Rabbah through Rav Aha son of Rav Huna [...] He said to him: it was my intention to raise objections against your view from [the Rabbinical laws which relate to] the uncircumcised, sprinkling, the knife [of circumcision], the linen cloak with *tzitzit*, the Shavuot lambs, the *shofar*, and the *lulav*."

[191] It is unlikely to assume that Rabbah's original response was omitted from an unknown reason, with no real indication for it, and the current response was added by a later talmudic stratum.

[192] See Friedman, *Ha'Isha Rabbah*, 350-351. Friedman argues that only the second half of the sentence is Rabbah's original statement, but there is no reason, neither literary nor conceptually, to make such a distinction.

[193] This parallelism is an additional indication that the "messenger case" is an integral component of the general *sugya* of uprooting the words of the Torah.

[194] This is a common phenomenon: see for example Dor, *Torat Erets Israel.*

[195] See Zussman, *Veshuv LiRushalmi Nezikin*, 98-99, and *ibid.*, notes 178a, 179; Florsheim, *Rav Ḥisda*, 126-131, indicating a few of Rav Ḥisda's students who transmitted his teachings.

follow: Rav Ḥisda and Rabbah argued; both supported their views; Rav Ḥisda supported his argument from Rabban Shimon ben Gamliel's opinion; Rabbah rejected that support. This debate was partially transmitted to the Yerushalmi, which discusses the main argument citing some of the sources, but retains the simple meaning of those sources without any mention of Rabbah's final conceptual development.[196]

We can now describe more precisely the process by which the concept of *hafkaʿah* was constructed. First, a tannaitic source – Rabban Shimon ben Gamliel's view – validated an invalid *get* based on a decree of the Sages. This source describes an act of marriage annulment, or quasi-annulment, but yet in a casuistic formulation rather than conceptualized.[197] Then early Palestinian and Babylonian Amoraim (Rav Ḥisda) based this on the general principle of the Sages' authority to uproot the words of the Torah. Rabbah rejected this view. He did agree with Rabban Shimon ben Gamliel that the Sages have the authority to validate the divorce, but suggested an innovatory reasoning: the Sages have a specific authority to annul the marriage, since "Everyone who betroths [a woman], does so subject to the consent of the Rabbis, and the Rabbis annul his betrothal."[198]

Rabbah formulates a new and innovative concept: the concept of marriage annulment. According to the Palestinian Talmud and Rav Ḥisda, on the other hand, no such an innovation is required. The Sages indeed have a wide authority to uproot Torah Laws, thus they may declare the *get* as valid, despite its cancellation by the husband. Though this view was rejected by Rabbah, it was revived a few generations later by Rav Ashi.

In the case of Naresh[199] Rav Ashi explains that the annulment of marriage is a result of the misconduct of the "kidnapper":

<div dir="rtl">

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

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[196] Rabbah is hardly mentioned in the Yerushalmi (if at all; see Zussman, *ibid.*, 131-132 n.179). In our case as well, only Rav Ḥisda's view is reflected in the Yerushalmi (maybe as a result of Rav Ḥisda's students' transmission: see previous note) while there is no reflection of Rabbah's view.

[197] See Moscovitz, *Talmudic Reasoning*, 1-6. It is more evident in the Yerushalmi and the Tosefta, where even the general reasoning of "since if so, what becomes of the authority of the bet din" is missing; see *infra*, n.217.

[198] According to the present analysis, the source of the concept of marriage annulment is the talmudic *sugya* in Yevamot 90b. Accordingly, the parallel *sugya* in Gittin 33a is a shortening of the original one. The basic discussion between Rabbah and Rav Ḥisda is presented there anonymously, and Rabbah's approach is the final conclusion of that passage (compare Gilat, *Perakim*, 201).

[199] Yevamot, 110a; see case (a), *supra*, text at nn.164-165. According to some talmudic variants the source of this statement might be case (b): see n.169 above (for current purposes this issue doesn't have any further implications).

He acted improperly; they, therefore, treated him also improperly, and the Rabbis annulled his betrothal.

Rav Ashi's explanation is composed of two different parts: one completely in Hebrew ("he acted improperly; they, therefore, treated him also improperly", הוא עשה שלא כהוגן, לפיכך עשו בו שלא כהוגן) and one in Aramaic ("and the rabbis annulled his betrothal", ואפקעינהו רבנן לקידושיה מיניה). The shift from one language to another indicates that his teaching might be based on two different sources.[200] Obviously, the second part – the Aramaic – is a quotation of Rabbah's explanation of the authority of the Sages to annul marriage in the case of the cancelled *get*,[201] which, as we have argued, is an original statement of Rabbah. Rav Ashi uses the core of Rabbah's teaching – the marriage annulment concept (*afke'inhu*) – as a stock phrase but omits its first part, which bases the authority to annul marriage on the previous consent of the husband ("everyone who betroths does so subject to the consent of the Rabbis", כל דמקדש אדעתא דרבנן מקדש). Instead, he cites a *different reasoning* whose sources are found in the teachings of the Amoraim of earlier generations, such as Rav Hamma's regarding the improper act of a debtor,[202] or even in tannaitic sources.[203] What stands behind Rav Ashi's new formulation?

Some talmudic commentators restored the omitted part of Rav Ashi's teaching, the principle that "Everyone who betroths does so subject to the consent of the Rabbis", as Rashi writes:[204]

[The Sages] annulled his betrothal: since every one who betroths does so subject to the consent of the Sages (דכל דמקדש תולה בדעת חכמים הוא), as we say: "according to the laws of Moshe and Israel" (כדת משה וישראל). And the Sages said that where one kidnaps a wife from her (intended) husband the betrothal is not valid.

Rashi's view was challenged by Tosafot. Tosafot argue that since the mere act of betrothal was against the will of the Sages, how can we say that he betroths subject

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to the consent of the Rabbis (אדעתא דרבנן מקדש).[205] Some commentators reply to Tosafot's query. Maharam of Rothenburg for example explains (following Rashi), that although he acted here in a rude way, he didn't mean to act against the will of the Sages and therefore we can say "everyone who betroths does so subject to the consent of the Rabbis".[206] Nevertheless, according to Maharam, in cases where he did intend to act against the will of the Sages, we cannot say "everyone who betroths does so subject to the consent of the Rabbis" and we cannot annul the marriage.

Maharam's explanation, as well as those of others,[207] do not deal with one central argument against Rashi's view. If Rav Ashi had only shortened Rabbah's statement, Rashi's explanation would have been preferred. But Rav Ashi replaced Rabbah's reasoning by a different one. This fact is significant. Its meaning is that according to Rav Ashi, we *do not need* Rabbah's explanation since we have the *alternative* reason: "he acted improperly; they, therefore, treated him also improperly".

Rav Ashi thus rejects Rabbah, and opposes his view, that the authority of the Sages depends on the unique character of marriage ("everyone who betroths does so subject to the consent of the Rabbis"). Rather, Rav Ashi is close to Rav Ḥisda: the Sages have by definition the authority to annul marriage, since, we now may add, the Sages have the authority to uproot the words of the Torah when required. In the case of Naresh they decided to use that authority due to the misconduct of the "kidnapper".

This explanation follows Tosafot,[208] in that Rav Ashi's view is based on the authority of the Sages rather than on "everyone who betroths does so subject to the consent of the Rabbis". It is reasonable to conclude accordingly that Rav Ashi opposes Rabbah. Tosafot however do not say that Rav Ashi accepts Rav Ḥisda, and consequently the *sugyot* that mention *kol demekadesh* are in dispute and follow

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[205] See Tosafot, Bava Batra, 48b, s.v. תינח, and see also Ri in Tosafot, Yevamot 110a, s.v. לפיכך, who leaves this issue without decision.

[206] Cited in Mordekhai, Kiddushin, §522. Maharam defines the act of the kidnapper as mere insolence (חוצפא בעלמא).

[207] For a different explanation of Rashi's view see Atlas, *Netivim*, 207-209, according to whom the authority to annul marriage derives from the unique character of marriage as a legal and social institution, which was subject to the consent of the Sages, and does not depend on the intent of the husband: "the primary validity of marriage comes from the laws of Moses and Israel, while the Sages established the form and conditions of the institution of marriage. If one acts improperly [...] even though he does not act in accordance with the opinion of the Sages, nor does he heed their will, he cannot extricate himself from the authority of the Sages by changing the form and the conditions for validating the institution of marriage". See also Edrei, *Koaḥ Bet Din*, 34; Wieder, *Rejoinder*, 76 n.21.

[208] *Supra* n.205. This view was adopted by Weiss, *Leḥeker HaTalmud*, 391-392.

Rabbah. Rather Tosafot harmonize Rav Ashi with the other *sugyot* of *kol demekadesh* by arguing that even according to Rav Ashi when the betrothal was valid, and the annulment is applied only later, the concept of the authority of the Sages to uproot the words of the Torah is not sufficient and we need *kol demekadesh* as a support. Here however we follow the simple meaning of Rav Ashi, according to which he revives Rav Ḥisda's expanded view of the authority of the Sages.[209]

One comment should be made here. Following Rav Ashi's ruling, Ravina agrees that when the betrothal was effected by money (*kiddushei kesef*) the Sages could annul it. Nevertheless he wonders how the Sages could annul the betrothal when it was effected by cohabitation (*kiddushei bi'ah*).[210] According to the present analysis, Ravina did not challenge the authority of the Sages to annul cohabitation by betrothal. Rather, he discusses the procedure, and thus the legal construction, by which the Sages annul the betrothal. Since we are dealing here with annulment of the validity of an *act* of betrothal,[211] the act itself should be defined as an act which does not effect betrothal. There was less difficulty in the case of betrothal by money, since here the annulment could be understood as due to the authority of the Sages to declare money as ownerless.[212] But in case of betrothal by cohabitation, Ravina challenged Rav Ashi: how (and not by what authority) could the Sages give the act a new meaning which would affect its legal validity?[213] Rav Ashi then answers that this is possible by declaring his cohabitation to be an act of mere

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[209] As regards the expanded authority of the Sages see also Tosafot, Ketubbot 11a, s.v. מטבילין, who ascribe this view to Rav Huna as well: in some circumstances a bet din may supply the consent in conversion of a minor, but according to Ri such a conversion is only by rabbinic law (*mi-derabanan*) and not valid according to Torah law (*mi-de'orayta*). The converted man may now marry a Jewish woman even though he is a gentile *mi-de'orayta*, since, explain Tosafot, the Sages have the authority to uproot the words of the Torah. The expanded authority of the Sages is suggested also by Rabbi Akiva Eiger (Gittin, 33a, s.v. ואפקעינהו) as an explanation of the view of Rabbi (!): According to R. A. Eiger, Rabbi agrees that when the husband cancelled the *get* in the absence of any *bet din*, the marriage is annulled. The annulment however is not based on "*kol demekadesh*" but rather on "uprooting the words of the Torah": "for in an instance in which there is an important reason, the Sages have the power to uproot the words of the Torah" (אין צריך לטעמא דאפקעינהו, אלא דבמקום טעם חשוב יש כח ביד חכמים לעקור דבר מן התורה). For additional sources who support an expanded authority of the Sages see Gilat, *Perakim*, 201-204; Elon, *Jewish Law*, 521-533.

[210] For full citation and analysis of Ravina and Rav Ashi's discussion see below.

[211] See *supra*, text at note 178.

[212] See Rashi, Yevamot, 110a, s.v. תינח (and in all the other occurrences of Ravina and Rav Ashi's discussion).

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

promiscuity (see below).

The conclusion of this section is of the greatest importance. Rav Ashi is a later generation Amora, and his decisions are generally accepted. What makes it more decisive in our case is the possibility[214] that it was accepted also by his son, Mar bar Rav Ashi. The implication of the above analysis is therefore that the final talmudic stage accepts a significantly expanded authority of the sages as initially suggested by Rav Ḥisda and by the Yerushalmi in its interpretation of the view of Raban Shimon ben Gamliel.[215] The Sages, hence, have the wider authority, the authority to uproot the words of the Torah.

4.4   The Character of *Hafkaʿat Kiddushin*

How does *hafkaʿah* work – is it a retroactive annulment of marriage or is it prospective, i.e. an act terminating the marriage only from now on? And what if at all is the role of the *get* in this process? In order to examine this issue we must return to the case of the *get* messenger, which provides us with the earliest source for annulment.[216] According to Rabban Shimon ben Gamliel, the husband cannot cancel a *get* which was already given to an agent (messenger) to deliver to his wife in the absence of the agent or the wife. In his words:

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אינו יכול לא לבטלו ולא להוסיף על תנאו שאם כן מה כוח בית דין יפה.
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He (the husband) can neither cancel it nor add any additional conditions, since if so, what becomes of the authority of the bet din (מה כוח בית דין יפה)?![217]

This is quite explicit: the husband cannot cancel the *get*, so the *get* is valid. The Sages act here by validating the *get* (or, more precisely, by preventing the husband from invalidating the *get*),[218] rather than by actively annulling the marriage. This view seems to be shared also by the Palestinian Talmud, which merely discusses the cancellation of the *get* and its validation by the Sages.[219]

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[214] Depending on the exact version of case (b); see *supra*, n.169, and *infra*, n.241.

[215] Tosafot try to harmonize Rav Ashi with the view of *kol demekadesh adaʿata derabanan mekadesh* by contrast with the conclusion of this section. However, even according to their view the result is some expansion of the authority of the Sages to uproot the words of the Torah. See further *supra*, text at notes 208-209.

[216] See *supra*, text at notes 179-182.

[217] BT Gittin, 33a; Yevamot 90b. In the Yerushalmi, Gittin 4:1, 45c (cited above, text at note 182) and in the Tosefta, Gittin 3:5, the reasoning of Rabban Shimon ben Gamliel's ruling ("since if so, what becomes of the authority of the bet din") is missing.

[218] This can be done by removing the legal power of the husband to cancel the agency of the messenger.

[219] See *supra*, text at notes 182-184. Edrei, *Koaḥ Bet Din*, 34 n.121, identifies this view as the view of the Yerushalmi, but argues for a different view in the Bavli. See also Gilat, *Perakim*, who explains

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

> When a man betroths a woman, he does so subject to the will of the Rabbis, and [in this case] the Rabbis annul his betrothal (כל דמקדש אדעתא דרבנן מקדש ואפקעינהו רבנן לקידושין מיניה).

The judicial act here is not validating the invalid *get*. The *get* is not valid since it was cancelled by the husband. However the couple are divorced since the *betrothal* is annulled.[220]

Why should the Talmud make such a shift in explaining Rabban Shimon ben Gamliel's ruling? As we have argued above, this case is the source of the concept of *hafka'at kiddushin*, and its development is a result of the discussion between Rav Ḥisda and Rabbah.[221] The current shift between validating the *get* and annulling the marriage is part of that dispute: according to the first approach we need to assume that the Sages have the authority to uproot the words of the Torah, as Rav Ḥisda argues. Rabbah therefore explains Rabban Shimon ben Gamliel's ruling as a result of the unique character of Jewish marriage[222] and thus rejects the view that the Sages can uproot the words of the Torah. Nevertheless, if the authority of the Sages is (only) in relation to the marriage, and not wider, we must explain Rabban Shimon ben Gamliel's ruling as annulling the marriage, rather than validating the cancelled *get*, since these are the limits within which the Sages may act. Fascinatingly, although Rabbah's explanation diminishes the authority of the sages (since, as he argues, the Sages do not have the wider authority to uproot the words of the Torah[223]), regarding marriage his view (marriage annulment) gives much more authority to the Sages than according to Rav Ḥisda's view (validating an existing *get*). Thus, according to Rav Ḥisda, divorce is performed by a writ of divorce, like any other Jewish divorce, while the Sages prevent its cancellation. According to Rabbah, on the other hand, in the messenger case the Sages constitutively annul the marriage without the (ritual) act of divorce. Rabbah however, prefers this approach as regards marriage, due to his objection to ascribe a wide and general authority to the Sages to uproot the words of the Torah.

What is the meaning of marriage annulment in Rabbah's teaching? I argue that

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the Yerushalmi in this way. Some scholars and classic commentators interpreted the Bavli in a similar way: see below.

[220] See Edrei, *ibid.*, 34-35.

[221] See *supra*, section 4.3.

[222] See *supra*, text at notes 176-177.

[223] Rabbah, however, agrees that the Sages do have the authority to uproot the words of the Torah in a passive manner, without any active act: see BT Yevamot, 90a-b (שב ואל תעשה שאני).

it is more reasonable to understand it as prospective annulment rather than retroactive annulment. Interpreting annulment of marriage as retroactive is much more drastic both conceptually and practically (declaring cohabitation to be promiscuity, the possible effect on the status of the children,[224] etc.). Moreover, *hafka'ah* in the talmudic context is usually prospective rather than retroactive. It means to cancel, to cause to cease, or the like, usually in the context of (prospective) annulment of a legal status or voiding the validity of a legal act.[225] Thus, for example, the act of *ḥalitsah* nullifies the levirate bond (*zikah*);[226] the Sabbatical year cancels one's debts and so on.[227] Marriage annulment in our context is no different: the status of a betrothed couple is prospectively taken away from the couple and the couple is not considered married from that moment on.[228]

Thus, in Rabbah's teaching *hafka'ah* means prospective annulment of the marriage. However, it is not the final meaning of that concept in the Talmud. Later, Rav Ashi implied Rabbah's concept of annulment in a case of which "he acted improperly".[229] In Rav Ashi's case, the case of Naresh,[230] the *act* of betrothal was performed improperly and the Sages sought to annul its validity. This was done by expropriating the betrothal money or by declaring the cohabitation to be promiscuity (*bi'at zenut*), as in the discussion Rav Ashi and Ravina, that follows Rav Ashi's statement:

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[224] I.e. declaring them not to be *mamzerim*: see Tosafot, Gittin 33a, s.v. ואפקעינהו, and elsewhere.

[225] See Sokoloff, *Dictionary*, 158 (translating אפקעתא as suspension) and 925-926 (translating the root פק״ע as to rupture, split, cease, cancel, confiscate). The root PQA (פק״ע; ܦܩܥ) has a similar meaning both in Mandaic and Syriac; see Drower and Macuch, *Mandaic Dictionary*, 376; Brockelmann, *Lexicon Syriacum*, 590.

[226] See Yevamot 52b. See also Rashi, *ibid.*, 50a, s.v. צריכה, who uses the root פקע to describe prospective annulment of marriage by either *get* or *ḥalitsah* (דחליצה אפקעתא לזיקתה ובעי גט לאפקועי קדושין דיליה).

[227] See Shevuot 58b. For more examples see Sokoloff, *ibid.*

[228] Sokoloff, *ibid.*, translates *hafka'ah* in our context as follows: "the scholars (retroactively) nullified his betrothal". The word in brackets is the translator's addition based on the common interpretation of the concept. Nevertheless, the meaning of the concept in the specific talmudic context (as opposed to later stages; see below) is as I have argued above: prospective annulment of the status of the couple. See also Halivni, *Mekorot*, 530, according to whom *hafka'ah* at this stage is retroactive, but there is still a distinction between this stage and the discussion of Ravina and Rav Ashi: here, since annulment is based on the prior consent of the husband (כל דמקדש אדעתא דרבנן מקדש), we do not need the Sages to declare his cohabitation to be promiscuity.

[229] See *supra*, text at nn.199-203.

[230] Case (a), *supra*, text at nn. 164-165.

Said Ravina to Rav Ashi: [Your explanation is] satisfactory where the man betrothed [her] with money; what [however, can be said where] he betrothed her by cohabitation?[231] [Rav Ashi answers that] the Rabbis have declared his cohabitation to be an act of mere promiscuity (שויוה רבנן לבעילתו בעילת זנות).

The discussion between Rav Ashi and Ravina is a discussion regarding how the Sages could effect the legal validity of the act of betrothal, as argued above.[232] The shift here is between annulling the status of marriage according to Rabbah, in a case of which the annulment is executed after the couple was already married (a delayed annulment), and annulling the validity of the act of betrothal, in a case of which the betrothal itself is improper (an immediate annulment).[233] At this stage however, annulment is still prospective, according to Rav Ashi as also according to Rabbah, although different in its meaning: *hafka'ah* for Rabbah is annulment of *marriage* from the time of cancelling the messenger's agency and breaching Rabban Gamli'el's enactment, whereas for Rav Ashi *hafka'ah* means annulment of the act of *betrothal* which occurs immediately when the husband betroths the woman improperly.[234]

But the development of the concept of marriage annulment was not completed by Rav Ashi. Rav Ashi and Ravina's discussion is cited in all of the five talmudic cases of *hafka'at kiddushin*, after arguing for the annulment of the marriage.[235] It is unlikely that this discussion occurred five times. One of its occurrences (case (b)) refers according to many textual witnesses[236] to a statement of Mar bar Rav Ashi, who was the son of Rav Ashi – which makes the possibility of an original discussion between earlier Amoraim (his father, Rav Ashi, and Ravina) even less likely.[237] Moreover, as Tosafot indicate, there are some interpretative difficulties

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[231] *Kesef* (money) and *bi'ah* (cohabitation) are two of the forms of betrothal (Mishnah, Kiddushin 1:1). The Sages have the authority to confiscate a man's property (הפקר בית דין הפקר), so they might regard the money given by the man as a mere gift to the woman. See Rashi, Yevamot, 110a, s.v. תינח.

[232] See *supra*, text at notes 208-213.

[233] See Lifshitz, *Afke'inhu*, 318-319.

[234] See Riskin, *Response*, 44, and compare Wieder, *Rebuttal*, 37. In my opinion, annulment in Rav Ashi's case is prospective, as argued here (see also Westreich, *Hafka'at Kiddushin*, n.89).

[235] See *supra*, text at nn.164-175.

[236] *Supra*, n.169.

[237] There were two or three Amoraim named Ravina. Ravina in our case is Rav Ashi's disciple-friend (5th generation and perhaps later: see below). As for the other Ravina, his dates are unclear and disputed amongst scholars (see Albeck, *Mavo*, 421; Cohen, *Ravina*, 256-261). According to Albeck, the Ravina who had relations with Mar bar Rav Ashi is a later Ravina, from the 7th generation (see Albeck, *ibid.*, 448-450). According to him, the Ravina of our discussion certainly never met Mar bar Rav Ashi, and couldn't discuss his statement. According to Cohen, *ibid.*, the Ravina of our discussion (the main Ravina of the Talmud) died after Rav Ashi and had relations with 6th and 7th

when we read the discussion in the context of the delayed annulment cases – cases (c)-(e).[238] We may conclude therefore, as some scholars have already indicated, that the discussion occurred originally in one case, probably the case of Naresh (case [a]),[239] or according to some, in the case of the coerced betrothal, "the hanging" (case [b])[240], where it follows a statement of Rav Ashi himself.[241] Indeed, we clearly need the explanation of "the Rabbis have declared his cohabitation to be an act of mere promiscuity" (שויוה רבנן לבעילתו בעילת זנות) in these two cases: the annulment is required to invalidate the improper act of betrothal of the "husband". The legal construction here is therefore *hafka'ah* by expropriating the betrothal money or by declaring the cohabitation to be promiscuity (*bi'at zenut*). Later, a talmudic redactor added Ravina and Rav Ashi's discussion to all other occurrences of the concept of annulment.

According to Rav Ashi the Sages "declared his cohabitation to be an act of mere promiscuity", and as a result of the talmudic redactional work it became the reasoning of annulment in all talmudic cases. Yet, in cases (c)-(e), the delayed annulment cases, the annulment takes place some period of time after the couple married. If indeed his cohabitation was declared as an act of mere promiscuity, it must mean that the marriage is retroactively annulled. Prospective annulment of marriage does not require declaring the cohabitation to be promiscuity, but rather leads to termination of an actual marriage and the past cohabitation does not affect (and is completely irrelevant to) the annulment. It is a dramatic conceptual change: *hafka'ah* at this final stage became retroactive annulment of the act of betrothal.

The change between annulling the status of marriage and annulling the marriage

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generation Amoraim, including Mar Bar Rav Ashi. However, even according to Cohen it is unlikely in my opinion that Ravina and Rav Ashi had a discussion regarding a statement of Rav Ashi's son, Mar bar Rav Ashi.

[238] See Tosafot, Ketubbot 3a, s.v. תינח: Tosafot implicitly ask why we need the explanation that "the Rabbis have declared his cohabitation to be an act of mere promiscuity" only for betrothal by cohabitation – it is surely necessary also for betrothal by money, since after betrothal there would have been some cohabitation which needed to be declared to be promiscuity! (For explanation of this Tosafot, see Maharam Schiff, *ibid.*)

[239] BT Yevamot, 110a.

[240] BT Bava Batra, 48b.

[241] See Shoḥetman, *Hafka'at Kiddushin*, 354-355; *idem*, *Ones*, 118-119; Halivni, *Mekorot*, 530 n.2. I. Franzus argues that the case of the coerced betrothal (the "hanging") should properly refer to "Rav Ashi" and not "Mar bar Rav Ashi" (see supportive textual witnesses *supra*, n.169), and the source for the statement and the following discussion is this case; see Franzus, *Od LeKol Demekadesh*, 91-92. His view was later accepted by Atlas, *Netivim*, 242. In my opinion, Rav Ashi's original teaching and the discussion that follows occurred in the case of Naresh (see *supra*, n.169). Anyway, all these scholars agree that the discussion between Rav Ashi and Ravina originally occurred in none of the second group of cases – cases (c) to (e). The discussion below is therefore consistent with both approaches.

act was first made by Rav Ashi, who applied Rabbah's concept to his case, probably in the case of Naresh (a), and was adopted by his son, Mar bar Rav Ashi, in the case of the coerced betrothal.[242] They did not apply it to the other talmudic cases of marriage annulment. However, Rav Ashi's move made the next step of the talmudic redactor possible: viewing *hafka'ah* in all the five cases in a similar way and consequently understanding it as a retroactive annulment. Thus, the transfer of the discussion to cases (c)-(e), as described above, entails our explaining *hafka'ah* as retroactive annulment.

What motivated this quite significant conceptual change? While the first development in understanding *hafka'ah*, from validating the *get* to annulling the marriage, is the result of a conceptual process (i.e. the debate between Rav Ḥisda and Rabbah), and the next development, from annulling the status to invalidating the validity of the legal act, is the result of applying the concept of *hafka'ah* in new circumstances (i.e. by Rav Ashi in a case of improper betrothal), the last move, from prospective to retroactive annulment, is merely a result of redactional work. Nevertheless, I assume that it was done with awareness. Transmitting the discussion to a group of cases reflects a quest for harmonization: since a similar concept is mentioned in these few cases, the later talmudic view sought harmony in its meaning and implications. Thus *hafka'ah* became a legal concept which refers to the act of betrothal not only in cases of improper betrothal, but also in the cases of improper divorce. In those cases the meaning of *hafka'ah* thus became retroactive annulment of the marriage.[243]

To sum up, the concept of annulment of marriage (*hafka'at kiddushin*) was developed in the talmudic sources through four main stages:

(a) At the first stage, annulment (or, better: "quasi-annulment") means that the Rabbis validate an (externally flawed) *get*. This refers to a case in which the husband gave his wife a valid *get* and later invalidated it, but the Rabbis re-validated the *get*. It need hardly be said that the question of prospective vs. retroactive annulment is irrelevant according to this view, since "annulment" here is in fact divorce performed by a *get* as in all normal cases, the involvement of the Rabbis simply being the validation of that *get*.

(b) At the second stage Rabbah, due to wider questions of the authority of the Rabbis, interpreted the concept of annulment as prospective annulment of marriage. Here, the Rabbis assume the authority to terminate marriage without any act of the husband, and the termination is valid from that point onward. Their authority is derived from the unique character of marriage:

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[242] See *supra*, n.241.

[243] Lifshitz, *Afke'inhu*, 317 n.1, 317-319.

"Everyone who betroths [a woman], does so subject to the consent of the Rabbis, and [in this case] the Rabbis annul his betrothal".

(c) At the third stage *hafka'at kiddushin* became an annulment of the act of betrothal, and was applied by Rav Ashi to cases of improper betrothal. This was justified since "he acted improperly; they, therefore, also treated him improperly, and the rabbis annulled his betrothal". According to our suggested analysis, the authority for marriage annulment according to Rav Ashi, following Rav Ḥisda, is derived from the wide and general authority of the Sages to uproot the words of the Torah.

(d) Finally, *hafka'ah* becomes retroactive annulment of the marriage. This conceptual change was made by applying *hafka'ah* as an annulment of the act of betrothal after the betrothal has taken place, which means that the betrothal is retroactively annulled. This significant change results from talmudic redactional work, which applied Rav Ashi's reasoning of *hafka'ah* in all talmudic cases, including those after the betrothal has taken place.

In conclusion, *hafka'at kiddushin* can be a halakhic tool by which divorce initiated by the wife is performed. More precisely, it is a halakhic construction by which marriage is terminated and thus recalcitrance (*sarvanut get*) can be by-passed.[244] It, however, depend on the way we understand the concept of marriage annulment, and within the talmudic text we have found several possible understandings. How, if so, was *hafka'at kiddushin* treated by post-talmudic commentators? Can it, in principle, be adopted for practice? Was it adopted for practice? We turn now to the discussion of these questions.

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[244] I define it as termination of marriage since according to stages (b)-(d) of the Talmudic *sugya* there is no formal divorce (a proper *get* given by the husband to the wife) but rather an annulment (retroactive or prospective) of marriage executed by the court.

Chapter Five

Marriage Annulment in Post-Talmudic Times

5.1   Introduction

In the previous chapter we discussed the concept of annulment of marriage in the Talmud, arguing that it developed in the talmudic passage through several stages. The next question to be discussed is whether post-talmudic traditions were familiar with the concept of annulment, and if so, did they use it in practice.

A.H. Freimann has discussed at length the severe debates around the practical use of marriage annulment since the Talmud to modern generations,[245] a debate which continues up to our days.[246] It would not be possible to discuss here the practical use of marriage annulment throughout the whole history of the halakhah. Rather, the focus is on two unique traditions which we have already encountered: those of the Palestinian Genizah and the Babylonian Geonim. These two traditions were discussed above in relation to *get* compulsion.[247] The current discussion completes our survey by providing a broader account of these traditions. Though focused on two old traditions, this discussion nevertheless is relevant to the contemporary debate about marriage annulment: it emphasizes the way that marriage annulment was understood and perhaps practiced in the past.

Were these two traditions *familiar* at all with the concept of annulment (even if they did not use it in practice)?

In fact, it is difficult to find explicit indications of familiarity with the concept of *hafka'ah* in any of its forms (besides the divorce clause itself, if indeed the latter used *hafka'ah*, which we shall presently discuss) in the Palestinian tradition at the time of the Cairo Genizah *ketubbot*. This may result from the character of the sources: legal documents rather than theoretical writings. Nevertheless, the predecessors of this tradition were familiar with some version of annulment. The Palestinian Talmud was familiar with *hafka'ah* in its preliminary form (that found also in the earliest stratum of the Babylonian Talmud), i.e., annulment of marriage by validating an invalid *get*: "the Torah said that [the *get*] is void [when the husband cancels it], while they [= the Sages] said that it is not void [i.e., the

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[245] Freimann, *Seder Kiddushin*.

[246] See *supra*, text at n.158.

[247] See *supra*, Chapter Three.

husband's cancellation is invalid]".[248] However, the Palestinian Talmud based this view on the wide concept that: "their [i.e., the Sages'] words uproot the words of the Torah" (דבריהן עוקרין דברי תורה), which means that the Sages have the authority (in appropriate cases) to rule against Torah laws. Since the Sages have authority to "uproot the words of the Torah", we may theoretically assume that the Palestinian tradition could even accept an expanded version of *hafka'ah*, i.e., complete annulment of marriage, prospective or retroactive, and even without a *get*. According to either option – a limited version of annulment or an expanded one – it is plausible that later generations in this tradition (such as the Genizah tradition) accepted this concept, following the Palestinian Talmud.

Turning to the geonic tradition, we do find explicit references to annulment of marriage, as in the following geonic responsum:[249]

> Our grandfather, teacher, and Rabbi, Judah Gaon, enacted for them that they should not betroth other than by the Babylonian procedure: with *ketubbah*, witnesses' signature, and betrothal blessing. And as for one who does not follow this procedure, he enacted that [we] disregard his betrothal [lit. him], since we say: "everyone who betroths, does so subject to the will of the Rabbis, and the Rabbis annul his betrothal." You should cancel such a custom [which does not follow Judah Gaon's procedure] as well.

This responsum deals with a case of improper betrothal (i.e., when the betrothal was not according to the geonic enactment), in which *hafka'ah* can be applied more easily.[250] Nevertheless, the Gaon here uses the concept as found in the Babylonian Talmud but for a case other the five cases mentioned in the Talmud, and this concept in principle gives him a wider authority, including termination of marriage long after its creation, without any hesitation or limitations.

To conclude this section, the sources do not provide us with a direct proof of the use of retroactive annulment in the traditions here discussed; rather they reveal different levels of familiarity with it. Nevertheless, they do potentially validate its wider use. The question now to be discussed is whether annulment in its wider form was applied in our two specific traditions: those of the Palestinian *ketubbot* and the geonic rebellious wife.

5.2   Mere Annulment or Coercion?

Rabbenu Asher ben Jeḥiel (*Rosh*) describes the geonic rule of the rebellious wife as

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[248]   PT, Gittin, 4:2, 45c; stage (a), *supra*, text at nn.182-185.

[249]   Rav Hai Gaon, *Otsar HaGeonim, Ketubbot*, 7b, 18-19.

[250]   This point is strongly reflected in the modern disputes regarding retroactive annulment versus annulment at time of marriage: see *supra*, n.162.

follows (*She'elot uTeshuvot* [*Shut*] haRosh, 43:8):

> […] And they enacted that the husband should divorce his wife against his will when she says: I do not want my husband […] For they relied on this [dictum]: "Everyone who betroths, does so subject to the will of the Rabbis" (כל המקדש אדעתא דרבנן מקדש) and they agreed to annul the marriage when a woman rebels against her husband (והסכימה דעתם להפקיע הקידושין כשתמרוד האשה על בעלה).

According to *Rosh*, the geonic enactment of coerced divorce in the case of a rebellious wife is based on annulment of the marriage. One may argue that the annulment does not even require a *get* given by the husband, i.e., in this kind of case there is a constitutive verdict of the *bet din* that the marriage is annulled, and this decision effects the couple's divorce.

Michael Broyde,[251] amongst others, accepts this view as historically correct (i.e., as an accurate description of the geonic view). According to Broyde, following *Rosh*, the geonic ruling of the rebellious wife was based on annulment, and if the husband refused to divorce his wife and coercion was not possible, the marriage could be annulled even without compelling him to give a *get*. Broyde emphasizes, however, that it is not possible to adopt this view for practice today:[252] "such annulments remain a dead letter in modern Jewish law", and "…the nearly insurmountable halachic objections to a return to halachic rules that have not been normative for 800 years." Bernard Jackson seems to agree with Broyde's historical conclusions, while – as opposed to Broyde – giving this precedent a dogmatic weight, even for the halakhic practice today.[253]

Some have suggested that support for this interpretation may be derived from the plural formulation of the law of the rebellious wife in some geonic writings.[254] Accordingly, statements such as "they write her a *get* immediately" (וכתבי לה גט לאלתר)[255] are understood as a writ of divorce written and given by the *bet din*, which means that divorce is executed without the participation of the husband. *Rosh*'s quotation above gives the theoretical basis for this possible interpretation: divorce by constitutive annulment of marriage upon the wife's demand. As we have concluded from the geonic responsum cited above,[256] the concept of annulment was known and used. The current interpretation of the law of the rebellious wife is therefore based on a possible expansion of the concept of

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[251] Broyde, *Marriage*, 19-20, 60-61, 160 n.3.

[252] *Ibid.*, 20, 61.

[253] See Jackson, *Papyri*, 162; Jackson, *Agunah*, 96-97.

[254] See Westreich, *Divorce on Demand*, 347-348.

[255] Cited in *Shut Maharam meRothenburg*, Prague ed., 261, in the name of *Teshuvot HaGeonim*.

[256] *Supra*, text at notes 249-250.

annulment.

Similarly, some scholars have argued that the Palestinian tradition is based on a variation of marriage annulment.[257] One of the Cairo Genizah *ketubbot* states the divorce clause as follows:[258]

> And if this 'Aziza, the bride, should hate this Mevasser, her husband, and not desire his partnership [...] and she will go out by the authorization of the court and with the consent of our masters, the sages.

"By the authorization of the court and with the consent of our masters, the sages" (על פום בית דינה ועל דעתיהון) means, according to this view, a constitutive divorce by the court. Accordingly, this stipulation gives the authority to the *bet din* to decide when marriage should be terminated, similarly to the plural formulation of the geonic dicta above. Thus, when the wife "hates" her husband and unilaterally desire a separation, she may exit the marriage, based on the court's final decision (which very likely means a prospective termination of the marriage[259]).

Interpreting the Babylonian and the Palestinian traditions as using constitutive annulment produces the following model: we have a positive law basis for constitutive annulment of marriage by the court with no *get* given by the husband, but we need to clarify the authority for applying it in practice to a recalcitrant husband. At this point the tradition develops into two branches (without any necessary historical connection between them): on the one hand, annulment based on agreement of the spouses (Land of Israel); on the other, annulment based on a legal decree (Geonim).

Yet from a historical point of view, in my opinion, this description is doubtful, in regard to both the Palestinian divorce clause and the Geonim.

Rosh's explanation of the enactment of the Geonim as marriage annulment (*hafka'ah*) is anachronistic. The Geonim based their view on the Talmud (or at least on a decree of the Saboraim, as cited at the final stage in the talmudic passage), which legitimated coercion of a *get* in cases of a rebellious wife,[260] without relating it to annulment. This is explicitly stated in some geonic responsa,

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[257] See Friedman, *Jewish Marriage*, 336 n.78 (this was Friedman's initial view, but he abandoned it entirely; see *ibid.*); Jackson, *Papyri*, 161-162; Jackson, *Agunah*, 130-131.

[258] *Ketubbah* no. 1, lines 23–24, in Friedman, *Jewish Marriage*, II, 9 (Heb.); 13 (translation).

[259] I.e., the second stage of the development of the concept of annulment (see above, text at note 243). The authority for annulment in the Palestinian divorce clause, however, is not the authority to "uproot the words of the Torah", but rather a contractual agreement between the spouses.

[260] See above, text at nn.123-130.

such as that of Rav Sherira:[261]

> The original law was that [the *bet din*] does not oblige[262] the husband to divorce his wife if she asks to divorce […] [Later the Rabbis] enacted[263] that when she demands divorce [the *bet din*] makes her wait twelve months [in case] perhaps they reconcile, but if they do not reconcile after twelve months [the *bet din*] compels the husband and he writes her a *get*. After the Saboraim […] [the Geonim] enacted […] and [the *bet din*] coerces the husband and he writes her a *get* immediately [upon her demand] and she gets the hundred or two hundred [*zuz*, of her *ketubbah*]. This is the way that we have ruled for three hundred years and more. You should also act in this way.

According to Rav Sherira, the procedure of divorce in the case of a rebellious wife is by a coerced *get*, and the talmudic passage of the rebellious wife is the source for it. This passage is a sufficient basis for this ruling, and no additional normative basis is required.[264]

As for the use of the plural formulation, this should be understood in the light of Rav Sherira's explicit statement as referring to the act of coercion which is performed by the court. כתבי לה גט or יהבינן לה גיטא is a short formulation for "we (i.e., the *bet din*) coerce the husband and *he* writes (or: gives) her a *get*", as in this geonic responsum (כופין את הבעל וכותב לה גט).[265]

It is remarkable that in some responsa plural and singular formulations are used together in reference to the giving of the *get*, without intending any distinction between them. For example: "the Geonim enacted […] we try to make peace between them, and if she does not accept [we, the court] *give* [plural] *her a get* immediately (*נתנין לה גט לאלתר*) […] and so wrote Rav Hai […] the earlier Geonim enacted that [we, the court] *compel her husband* immediately to give a *get*

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[261] *Teshuvot HaGeonim*, *Sha'are Tsedek*, Vol. 4, 4:15 (cited above, text at notes 123-130). Both Friedman and Brody assume that this view was largely accepted by the Geonim: see Friedman, *Jewish Marriage*, 324-25; Brody, *HaGeonim*, 298-99.

[262] Verb in plural (מחייבין). Similarly, all the judicial acts below are formulated in the plural (; מחייבין מכריזין ; כופין), in contrast with the actual writing of the get: וכותב לה גט (see *infra*).

[263] According to the final Saboraic section of the talmudic passage: ומשהינן לה תריסר ירחי שתא אגיטא (*Ketubbot* 64a).

[264] Even if we interpret annulment as validating an invalid *get*, as some have suggested (see Shoḥetman, *Hafka'at Kiddushin*, 356–365; *supra* text at note 243), it is still not required for our case. The *get* is a valid *get* since we deal here with a legitimate coercion.

[265] Perhaps the plural formulation was also influenced by the talmudic style of the passage of the rebellious wife, which uses a plural formulation: ומשהינן לה תריסר ירחי שתא אגיטא (we make her wait twelve months for her divorce). Thus, just as the waiting period is executed by the *bet din*, so is the giving of the *get*, but the actual giving is done by the husband who is compelled to do so by the *bet din*.

(שׁכּוֹפִין אֶת בַּעֲלָהּ מִיד לִיתֵּן גֵּט)"[266] The plural formulation of "giving her a *get*" thus means "compelling her husband to give a *get*". To be sure, this and the other responsa[267] are based on different geonic sources. Nevertheless, it is implausible to assume that they reflect a dispute between the Geonim regarding the procedure of the law of the rebellious wife (or different traditions regarding the actual enactment of the Geonim). If indeed this significant dispute had taken place, it would have been reflected more sharply and in a more explicit way. The plural formulation, therefore, reflects different styles and formulations of the same ruling: compelling the husband to give a *get*.

So why did *Rosh* mention annulment? The dogmatic *halakhah* had developed in a direction different from that of the Geonim. The geonic view was totally rejected by Rabbenu Tam, who argued that there is no basis in the Talmud for compelling divorce in such a case.[268] Rabbenu Tam's view was largely accepted;[269] therefore the geonic view needed justification. *Rosh* very limitedly accepted the geonic view (only in certain *bedi'avad* [ex post facto] cases),[270] and attempted to provide some justification for it by interpreting it as entailing annulment.[271] In this way, *Rosh* could both adhere to Rabbenu Tam's view, that a coerced *get* in a case of a rebellious wife is not found in the Talmud, while at the same time legitimating the geonic measures (ex post facto). In any case, *Rosh* did not intend to introduce a different procedure for cases of a rebellious wife, but rather to base the problematic coercion enacted by the Geonim on their authority to annul marriage.[272]

Historically, therefore, it is hard to accept *Rosh* as a support for the view which sees the geonic rule of the rebellious wife as based on annulment. The procedure of divorce in the law of the rebellious wife is merely the performance of a compelled

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[266] *Shut Maharam meRothenburg*, Lemberg ed., 443. See also *Shut Maharam meRothenburg*, Prague ed., 261: the first part of the responsum (cited in some manuscripts in the name of Rabbenu Gershom Me'or haGolah) uses a singular formulation (וִיהֵיב לָהּ גִּיטָּא לְאַלְתַּר), the middle part (in the name of *Teshuvot HaGeonim*) uses a plural formulation (וְכָתְבִי לָהּ גֵּט לְאַלְתַּר), and the last part (in the name of *Halakhot Gedolot*) uses a singular formulation again (וְכוֹתֵב לָהּ גֵּט לְאַלְתַּר). The same phenomenon is documented in *Shut Maharam meRothenburg*, Prague ed., 443.

[267] See previous note.

[268] See *Sefer haYashar leRabbenu Tam*, *Teshuvot*, 24. It is arguable whether this total rejection of the geonic view was indeed held by Rabbenu Tam (see Abel, *Morgenstern*, 18 n.57; *idem, Za'aqat Dalot*, 10-11). However, later *Rishonim* attributed that view to Rabbenu Tam, and largely accepted it (see E. Westreich, *Rise and Decline*, 212-218). This fact led to the reinterpretation of the geonic view, as described *infra*.

[269] See E. Westreich, *ibid.*

[270] See *infra*.

[271] Me'iri's Teachers' Teachers' were motivated by similar considerations in making a link between the geonic *moredet* and the Palestinian divorce clause; see *supra*, text at notes 147-151.

[272] See also Shoḥetman, *Hafka'ah Kiddushin*, 377.

get, and, according to the geonic responsum cited above, this *get* was a regular *get* given by the husband (although under the pressure of the *bet din*). This law is based on the talmudic passage of the rebellious wife. Yet, in order to reconcile it with different views regarding those sources, *Rosh* anachronistically suggested the reasoning of annulment. However, the view of *Rosh* is important from a dogmatic point of view, as discussed below.

According to the analysis of *Rosh* here suggested, the procedure of the rebellious wife is not merely an annulment of marriage but rather a divorce by a coerced *get*, while the authority for it is derived from the authority to annul marriage. Another responsum of *Rosh* supports this view. In it,[273] *Rosh* justifies coercion of a *get* due to special circumstances: the husband was suspected as an immodest man who cheated his betrothed wife (see citation below). Rosh argues that this case is similar to that of Naresh in which, according to Rav Ashi, the Rabbis applied annulment since "he acted improperly".[274] *Rosh* then discusses the possibility of annulment:

> But if it looks to you, my masters, who are close to this matter, that the betrothing man is not a person worthy and decent to marry this girl of good descent, and that he has persuaded her by fraud and cheating, and that it is reasonable to compare [this case] to the case of Naresh (BT *Yevamot*, 110a) where we learned that since it (the betrothal) was done improperly [the Rabbis] annulled the betrothal – [then in the case of] this [person] as well, who acted improperly, although we would not annul the betrothal, nevertheless we should follow in this case the view of some of our Rabbis who ruled in the law of the *moredet* that [the *bet din*] should compel him to divorce her.

Annulment, according to *Rosh*, should not be applied here. However, the partial similarity between the talmudic case of annulment and the current case legitimates coercion in the latter. Due to its special circumstances, *Rosh* argues, we can follow the view that supports coercion in cases of a rebellious wife, i.e., the geonic view, which was normally rejected by *Rosh*. His reasoning is probably that in such a case it is right to apply the geonic rule of the rebellious wife since there is no "moral fear" which usually prevents it.[275]

If the geonic law of the rebellious wife were merely a procedure of annulment, *Rosh*'s discussion in this responsum would be superfluous or even internally contradictory: we cannot apply annulment, but we can apply the rule of the rebellious wife – which is the same. We must assume therefore that they are

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[273] *Shut ha-Rosh*, 35:2.

[274] BT *Yevamot*, 110a, and see *supra*, text at nn.164-165.

[275] See *Shut haRosh*, 43:8. On the role of the "moral fear" in *Rosh*'s view, see Knol, *Agunah and Ideology*, ch.3, mainly at 89-91.

different halakhic procedures: the one is coercion of a *get*, i.e., a divorce executed by the husband (against his will), while the other is annulment executed by the *bet din*. However, we can see here that there is a relationship between the two, since they are ultimately based on the same reasoning. This is reflected also in *Rosh*'s view, which supports the geonic coercion by the concept of annulment, as discussed above.

Thus, integrating *Rosh*'s two responsa (35:2, which exceptionally authorizes coercion, and 43:8, which explains the geonic rebellious wife on the basis of annulment) produces the following explanation: the law of the rebellious wife is partially based on annulment (specifically, in terms of the authority for it), but the procedure includes a coerced *get*. Since it includes a *get*, *hafka'ah* can be more easily applied than can termination by mere annulment of marriage. The case in responsum 35:2 is similar to the talmudic annulment, but for particular reasons does not admit of annulment.[276] However, the second possibility, coercion based on annulment, may be applied in such a case.

Considering annulment in the Palestinian divorce clause, although "by the authorization of the court" (על פום בית דינה) might be interpreted as a constitutive decision of the court without a *get*, it is more likely that the divorce clause does not replace a *get* but rather enforces it. The phrase "by the authorization of the court" is thus required, as Katzoff put it, "… to make it crystal clear that no right or powers of divorce are provided the wife other than those in rabbinic law".[277]

I accept that I have not found decisive support for either of the possible procedures (annulment or coercion). However, the history of the *halakhah* further supports the option of coercion. *Get* in the rabbinic tradition is a central matter and difficult to ignore.[278] Accepting the annulment theory requires us to assume that a condition (in the Land of Israel) or a decree (in Babylonia) adopted such a radical practice, which dispenses with the need for a *get*, with no explicit discussion and with no reservations. I suspect that if such a decision had been taken, it would not have been left in silence, with no explicit mention either in the decree or in the *ketubbah*, without being accompanied by a deep halakhic discussion and without at

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[276] *Rosh* does not detail the reasons for not applying it. It might be that this case is not as improper as the talmudic case, or it may reflect a hesitation to apply annulment in practice: see *infra*.

[277] See Katzoff, *Papyrus*, 246. For further support see Westreich, *Divorce on Demand*, 353-354.

[278] Reflected, for example, in BT *Ketubbot* 74a: "and the rabbis did not have the power to release her without a *get*", i.e., even in cases where there is some theoretical basis for annulling the marriage, the Rabbis do not have the authority to release the wife without a *get*. Interestingly, amongst some Karaite sages around the 15th century there was a practice of authorizing annulment of marriage by a *bet din* without requiring a *get*: see Falk, *Gerushin*, 25-26.

least some objections.[279]

What is the significance of our conclusion? As we have shown, Rosh links the geonic *moredet* to the concept of marriage annulment. While we had great doubt whether we could consider his view as historically accurate, rather than as an anachronistic justification for an earlier *halakhah*, his responsum has important dogmatic implications. Rosh here legitimates marriage annulment in practice at least in *bedi'avad* cases, and has no doubt that it may be used. This is particularly meaningful in a halakhic environment in which the practical use of *hafka'at kiddushin* has become subject to major dispute, from the Geonim until our own days.[280]

As we have argued, it is hard to assume that Rosh understood the geonic rule of *moredet* as a judicial act of annulling the marriage without participation of the husband, namely as *hafka'ah* without a *get*. Rosh here tries to justify coercion of a *get*, rather than to revive a practice different from that in his own day. Therefore, the implication of Rosh's writing is that it legitimates *hafka'at kiddushin* at least when it is accompanied by a coerced *get*. We cannot however prove that Rosh *demanded* a *get* as a necessary condition for *hafka'ah*. Rosh does not discuss the typical cases of *hafka'ah*, but is concerned only to provide support for the rule of *moredet*; in regard to classic *hafka'ah* he may well have accepted it even without a *get*.[281]

Another implication of defining Rosh's view as anachronistic relates to the opponents of the geonic tradition. In a recently published paper, Rabbi U. Lavi argued, based on Rosh's reasoning, that the Rishonim who disagreed with the Geonim regarding *moredet* (mainly, Rabbenu Tam) rejected *hafka'ah* as well.[282] According to the analysis above, this is a false conclusion. The element of *hafka'ah* is a later one, added by Rosh, while the dispute between the Geonim and Rabbenu Tam relates to the authority for coercing a divorce, without taking *hafka'ah* into consideration.

Rosh's second responsum, which we have discussed in relation to the historical aspects of his view,[283] supports our current conclusions regarding its dogmatic implications. In this responsum, Rosh does not reject the possibility of annulment. Moreover, it seems that Rosh would agree that in principle annulment can be

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[279] The later objections relate to the legitimation of coercion. Only *Rosh* raised the issue of annulment, and even he, as analyzed above, treated it as a support for coercion.

[280] See *infra*, Chapter Six; Westreich *Gatekeepers*.

[281] See further *infra*, text at nn.302-316.

[282] Lavi, *Ha'im*, 308.

[283] *Shut HaRosh*, 35:2; see *supra*, text at notes 273-276.

applied even when no *get* is given. As he writes:[284]

> [I]t is reasonable to compare [this case] to the case of Naresh (BT *Yevamot*, 110a) where we learned that since it (the betrothal) was done improperly [the Rabbis] annulled the betrothal – [then in the case of] this [person] as well, who acted improperly, although we would not annul the betrothal, nevertheless we should follow in this case the view of some of our Rabbis who ruled in the law of the *moredet* that [the *bet din*] should compel him to divorce her.

The case is similar to the case of Naresh, in which the Sages annulled the betrothal. In principle, we could annul the betrothal here as well, although no *get* was given. However, for an unmentioned reason (perhaps because the case here discussed is not as radical as kidnapping the betrothed girl from her former husband in the case of Naresh,[285] or maybe because of a more general hesitation to apply annulment in practice), Rosh was not willing to apply annulment here, but rather preferred coercion. Accordingly, a distinction should be made between the possibility (and validity) of retroactive *hafka'ah* in principle and its practical implementation. While Rosh avoids the latter, he does not reject the former.[286] We return to the practical use of *hafka'ah* in the next chapter.

[284] See full quotation above.

[285] See *supra*, text at nn.164-165.

[286] Cf. Shoḥetman, *Hafka'at Kiddushin*, 369 n.54.

Chapter Six

Hafka'at Kiddushin in Practice

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

Within the talmudic text we observe a tension between different approaches. This
tension is reflected in the contradictory interpretations of the concept of annulment
amongst both later *poskim* and modern scholars.[287] Some *poskim* follow one
approach, others take an opposite view, explaining the contradictory parts of the
sugya by means of several different hermeneutical approaches.[288] While total
rejection of other views is common in this kind of debate,[289] the following analysis
shows that this would be incorrect.

　　Let us repeat the main approaches found in the Talmud:[290]

　　(a) At the first stage, Rabban Shimon ben Gamliel's decision on the husband
　　　　who cancelled his writ of divorce before the wife received it was that the
　　　　Sages essentially validate the (externally flawed) writ of divorce (a quasi-
　　　　annulment).
　　(b) At a second stage, the Talmud (following Rabbah) explains this ruling as
　　　　annulling the betrothal. At this stage, an annulment is understood as a
　　　　prospective annulment of the status of the couple as a betrothed (and
　　　　married) couple (a "delayed annulment"). As claimed by Rabbah, the Sages'
　　　　authority is derived from the unique character of marriage: "everyone who
　　　　betroths [a woman], does so subject to the consent of the Sages, and [in this
　　　　case] the Sages annul his betrothal".[291]
　　(c) Rav Ashi at a later stage applied annulment where the betrothal was
　　　　improperly entered into (an "immediate annulment"), either by expropriating
　　　　the betrothal money or by declaring the cohabitation to be mere promiscuity

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[287] The dispute continues since the redaction of the Talmud, not only amongst classic commentators but
even in modern days, amongst rabbis and dayanim, as well as Jewish Law Researchers. See Riskin
v. Goldberg and Lifshitz v. Lavi, *supra*, text at n.162; Berkovits v. Shoḥetman, *infra*, n.303.

[288] See Westreich, *Kama Milim*, 245-261.

[289] Especially when the possibility of practical use of *hafka'ah* is under discussion; see Rabbi Goldberg
and Rabbi Lavi, *supra*, n.287.

[290] These approaches are discussed at length above: see *supra*, text at nn.216-244.

[291] See *supra*, text at nn.186-189.

(*bi'at zenut*).

As regards the authority of the Sages, Rav Ashi accepts an expanded view of the authority of the Sages to uproot the words of the Torah.[292]

(d) Finally, as a result of later talmudic redaction, annulment was applied to invalidate the act of betrothal in both "immediate" and "delayed" cases. Invalidation of the act of betrothal quite a while after it took place (the "delayed" case) makes this a retroactive rather than prospective annulment of the marriage.

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

The last view (d)[293] reflects the final talmudic stage, and is therefore the dominant view amongst Rishonim and Aḥaronim.[294] Indeed, some elements vary within writers of this group, as will be shown below. Nevertheless, the basic attitude (i.e. viewing *hafka'ah* as a retroactive annulment of the betrothal, being interpretatively influenced by Ravina and Rav Ashi's discussion) is common to them. Nevertheless, although (d) is the dominant view, we do find some Rishonim who suggest different interpretations for the concept of *hafka'ah*, focusing on other talmudic stages.

Stage (a) is found in Ri Halavan's Tosafot, whose explanation of *hafka'at kiddushin* is as follows: ורבנן בתקנתם העמידו כשרות מן התורה, i.e.: the Sages in their decree made [the *get*] valid according to Torah law.[295] He was followed by some scholars, who were influenced in their analysis by that talmudic stage.[296]

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[292] See, *supra*, text at notes 199-215.

[293] Stage (c) is the basis for the conceptual development in stage (d). Commentators who interpret annulment as retroactive, following stage (d), would adhere to stage (c) as well, as regards the immediate annulment.

[294] See for example Rashi, Gittin 33a, s.v. תינח and שויוה; Tosafot, *ibid.*, s.v. ואפקעינהו; Ramban, Ketubbot, 3a, s.v. שויוה and elsewhere. The Rishonim however were partly influenced by stage (a): see the discussion below on Rashi's commentary and the discussion regarding the demand for a *get* in the process of *hafka'ah*.

[295] *Tosafot Ri Halavan*, London, 1954, Ketubbot 3a, s.v. כל דמקדש.

[296] See Atlas, *Netivim*, 211-214; Shoḥetman, *Hafka'at Kiddushin*, 355. This view is found also in *Teshuvut Be'anshe 'Aven*, 13 (cited by *Mar'e Kohen*, Yevamot, 90b; Atlas, *ibid.*). But if we follow this interpretation, it becomes difficult to integrate the other parts of the *sugya* with the suggested understanding for *hafka'ah*. An interesting reflection of this difficulty is found in *Teshuvut Be'anshe 'Aven*, 13, who suggests that we amend the Talmudic text and read: כל דמגרש אדעתא דרבנן מגרש ("everyone who *divorce*s [his wife] does it subject to the will of the Sages" [who can prevent him

This view should be distinguished from the view of Rashbam, followed by some Rishonim.[297] Rashbam argues that in the three talmudic cases the *get* in fact is valid and the marriage is not retroactively annulled, since the husband fears that his marriage may be annulled, and therefore cancels the annulment of the agency (Gittin 33a), forgoes his condition (Ketubbot 3a) or, in the case of a dying person (Gittin 73a), agrees that the *get* should not be annulled even if he recovers. Although according to Rashbam the *get* is valid, in principle Rashbam admits that annulment of marriage is retroactive: if the Sages did have the need to use *hafka'ah* (which they do not) it would be applied retroactively. Therefore from a conceptual point of view, Rashbam's view follows stage (d).

Some Rishonim cited by Ritva in the *Shitah Mekubetset* followed stage (b) in their understanding of the concept of *hafka'ah*.[298] This interpretation is also discussed by *Ḥatam Sofer*,[299] and I assume that it was also the understanding of Rashi's teachers.[300] Amongst Jewish Law scholars it was recently suggested by Arye Edrei.[301] It is not clear according to this interpretation why the Sages should

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from canceling the *get*]). This suggestion has no basis in any textual witnesses or any of the Rishonim (as correctly mentioned by Atlas, *ibid.*), and of course – as analyzed here – the text should not be amended since it views the *hafka'ah* in quite a different way. The simple meaning of כל דמקדש is the basis for *Teshuvut Be'anshe 'Aven*'s critic, R. Yitsḥak Z. Margireten (*Tokef HaTalmud*, Ofen: Konigl Ungarischen Universitats Buchdruckerei Print, 3:1; 3:4), who argues that *hafka'ah* must be understood as retroactive annulment (see also *Shitah Mekubetset, Ketubbot* 3a, end of s.v. *ve'od katav*).

[297] See Ramban in the name of Rashbam ("Rabbi Shmuel Ramrogi"; i.e. from Ramerupt), Ketubbot, 3a, s.v. שויה; *ibid.*, Gittin, 33a, s.v. כל (Ramban however seems not to accept this interpretation); Rashba, Ketubbot, 3a, s.v. כל; *ibid.*, *Responsa*, 1162 (regarding his view see n.303). See also *Pene Yehoshu'a*, Ketubbot, 3a, s.v. אפקעינהו and s.v. כל.

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

[299] *Ḥiddushe Ḥatam Sofer*, Gittin, 33a, s.v. תינח.

[300] Rashi's teacher's view is cited – and strongly rejected – by Rashi in the various *sugyot* of *hafka'ah*. Rashi indicates that according to his teacher's (mistaken) understanding the betrothal is prospectively annulled, as opposed to his interpretation: see Rashi, Ketubbot, 3a, s.v. שויה: על כרחך צריך אתה לפרש כמו שפירשתי שהקידושין נעקרין מעיקרן ולא מכאן ולהבא, i.e. you must take the view that the betrothal is retroactively annulled and not only from now on [as his teachers argue]). Rashi's teacher's view requires more investigation and is beyond the scope of the current discussion; see Westreich, *Hafka'at Kiddushin*, text at notes 118-123.

[301] Edrei, *Koaḥ Bet Din*, 34-35.

declare the cohabitation to be promiscuity.[302]

Indeed, one major implication of the range of conceptual constructions encountered in the Talmud is the question of the necessity of a valid *get* for the process of *hafka'ah*. According to the first stage ([a] above), in order to perform *hafka'ah* there should obviously be a valid *get*, which became invalid only due to external reasons, such as being cancelled by the husband. This I assume is the view of Ri Halavan and his followers.[303] But at the other stages, in principle there is no need for a *get* in order to annul the marriage.

Based on the analysis of the different talmudic meanings of the concept, we can now understand better the motivation behind some integrated – and more complex – approaches, such as that of Rashi. Thus Rashi on the one hand explains *hafka'ah* as a retroactive annulment, while on the other still regards a *get* as a necessary element in this process. While Rashi's view is not completely clear, for our purposes it is sufficient to emphasise the two elements which Rashi integrates together: the *get* on the one hand and the retroactive annulment on the other. One quotation from Rashi sharply reflects this integration:[304] שוויה רבנן : לההיא ביאה למפרע על ידי גט זה, i.e. the retroactive (למפרע) declaration of the cohabitation as promiscuity is effected by the *get*. His view accordingly is a result of mediation between different views which are found in the talmudic text itself: one which bases *hafka'ah* on (validation of) the *get*; the other which bases it on retroactive annulment of the act of marriage.

I assume that the ambiguity in Rashi's interpretation is the interpretative price he is willing to pay for integrating contradictory parts of the *sugya*. The result is that the exact object of the *get* according to Rashi is still disputed. Rashi mentions the existence of a *get* several times, and this led some (e.g. the Israeli rabbinical court Dayan, Rabbi Uriel Lavi) to understand the *get* as a substantive element in the process of annulment.[305] However, other passages of Rashi indicate that the *get*

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[302] See *Ḥatam Sofer*, Gittin, 33a, s.v. תינח. Harmonizing all the parts of the *sugya* is quite difficult according to this approach and would apparently (like Ri Halavan's, above) need to use an historical approach, according to which Ravina and Rav Ashi's discussion is explained as a transferred part of the *sugya*, and therefore isn't consistent with its meaning (as argued by all the above writers: *Teshuvut Be'anshe 'Aven*, Atlas and Shoḥetman, *supra*, n.296). Nevertheless, a harmonious solution is possible but quite complicated. See the view of Rashi's teachers and their explanation of the declaration of the cohabitation as promiscuous, cited by Rashi, Ketubbot, 3a, s.v. שוויה (and more), discussed in Westreich, *Hafka'at Kiddushin*, ibid.

[303] As regards Rashba, Berkovits and Shoḥetman dispute whether he held the view that *hafka'ah* is effected *by* the *get* (Shoḥetman, *Hafka'at Kiddushin*, 359-360), or rather is used in cases *when* a *get* exists (Berkovits, *Tnai*, 123-133).

[304] Rashi, Gittin, 33a, s.v. שוויה.

[305] See Rashi, Ketubbot, 3a: על ידי גט זה, which can be understood as: "[the annulment is effected] by this get". Rabbi Uriel Lavi seems to understand Rashi in this way: see Lavi, *Ha'im*, 306: בכל

is (merely) described in the cases in which the Sages enacted *hafka'ah,* but is not a necessary element in the legal process of *hafka'ah.*[306] Accordingly, some (e.g. Berkovits) argue that Rashi does not refer to a *get* as a necessary condition for applying *hafka'ah,* but merely says that *hafka'ah* is applied in such a case, but can be applied in some other cases as well.[307]

Nevertheless, following the repeated mentioning of *get* in Rashi's commentary, it is hard to say that a *get* doesn't have *any* role according to Rashi. On the other hand, Rashi could not be taken as far as is done by Rabbi Lavi, as maintaining that a *get* is a substantive element in the process of annulment. It seems to me that according to Rashi *hafka'ah* does *not* validate the *get*. Rather, Rashi sees the *get* as a supportive element for the process of *hafka'ah,* which is indeed required (see the possible reasoning below), but not substantive, and thus could be replaced by other elements. Therefore *hafka'at kiddushin* could be initiated with the "support" of one witness, without any *get*: releasing a wife on the basis of one witness to her husband's death is, according to Rashi, based on *hafka'at kiddushin.*[308]

Historically the mentioning of a *get* in the various talmudic passages could result from the integration of the different talmudic stages – both the first stage, according to which the *get* is a substantive element in the process of *hafka'ah,* and the later stages, which negate it. Purely historically, it was possible to argue that for the second, third and fourth approaches the *get* was not necessary at all. Some Rishonim held this view, as explicitly stated by Me'iri.[309] However, from a classical dogmatic point of view, all parts of the *sugya* are meaningful, even if different in their origin. Thus, the main challenge becomes integrating the different meanings of the talmudic text into one harmonious approach. Since a *get* is mentioned in all of the talmudic cases of *hafka'ah,* many writers deduced that a *get* is always needed for the process of *hafka'ah.*[310]

Thus many commentators, even though following stage (d) in their interpretation of the concept of *hafka'ah,* claimed that a *get* is a necessary element in this process. Nevertheless, *hafka'ah* does not mean that the *get* is validated. So,

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המקומות ביאר רש"י שהפקעת הקידושין נעשית על ידי הגט – אע"פ שמעיקר הדין היה פסול, בכל זאת חכמים
תקנו להכשירו; וטעם הכשרו הוא הפקעת הקידושין.

[306] See Rashi, *ibid.*, s.v. כשיבא גט זה אחריהם :ואפקעוה רבנן לקידושין (i.e. the Rabbis annulled the marriage *when* it is followed by such a *get*); see Shoḥetman, *Hafka'at Kiddushin*, 360.

[307] See Berkovits, *Tnai*, 133-141; Riskin, *Hafka'at Kiddushin* (English version), 12-14; 33-34, notes 23-26; *ibid.*, 46-47 (a response to Wieder, *Rebuttal*, 39-40).

[308] Shabbat, 145b, s.v. לעדות, and see also below.

[309] Me'iri, *Ketubbot* 3a, s.v. כל שאמרו. Rabbis Riskin and Wieder are in dispute as to whether Me'iri accepted this view: see Riskin, *Response*, 47-48 (in my opinion - correctly); or withdrew from it: see Wieder, *Rejoinder*, 64-67.

[310] Rashi according to some; Ri Migash; Ramban and his disciples: Ra'ah and Rashba, and others.

by contrast to the first approach, a *get* according to them is not an essential element of *hafka'ah* itself.[311] It may be necessary, but this is due to external reasons, for example prevention of a "slippery slope" in the use of *hafka'ah*[312] or creation of a similarity between *hafka'ah* and the normal halakhic way of terminating marriage.[313] Accordingly, we would not necessarily demand a proper *get* which was merely externally flawed (i.e. due to cancellation, an unexpected event in case of conditional divorce, etc.) in order to apply *hafka'ah*. On the contrary, גט כל דהו, i.e. any *get*[314] can fulfil those objectives, and is sufficient for applying *hafka'ah*. It could even be replaced by other halakhic devices. Therefore, according to both Rashba and Rashi,[315] *hafka'ah* is applied when one witness testifies to the husband's death: the additional required element for *hafka'ah*, which normally means a *get*, is replaced here by one witness.[316] Had *hafka'ah* been conceived as a means of validating an externally invalid *get*, this would not have been possible.

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

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

[312] The fear of the "slippery slope" is described in *Shut Mishpete Uzzi'el*, Part 2, *Even Ha'Ezer*, 87.

[313] This might be the reasoning of the view that explains the demand for a *get* by the mere fact that the marriage was properly effected: see for example Ra'ah (*Shita Mekubetset*, Ketubbot 3a, s.v. וכן כתב הרא"ה): "but in a case in which the marriage was effected in accordance with the Sages, she cannot go out without a *get*" (אבל היכא דמקדשא ברצון חכמים אי אפשר להוציאה בלא גט) for the term לגט זה used by Ramban in this context: see Lifshitz, *Afke'inhu*, 320. See also Wieder, Rejoinder, 73-74 n.1. I assume that this view is also the rationale of the argument that after *hafka'ah* the couple is still bound by rabbinical marriage, and this is the formal reason for a *get*. See Rabbi Ovadya Yosef, *Kol Ha-mekadesh*, 100-101.

[314] See Ri Migash, cited in Me'iri, *Ketubbot* 3a, s.v. כל שאמרו, as "Ge'one Sefarad". Similar is Rashba's term: סרך גיטא, See Rashba, Ketubbot, 3a, s.v. כל דמקדש.

[315] Rashba, *ibid.*; Rashi, Shabbat, 145b, s.v. לעדות. Rashi's view here contributes to the uncertainty about the exact meaning of his approach regarding *hafka'ah*: see above, text at notes 303-308.

[316] See also Berkovits, *Tnai*, 127-139 (discussing Rashi and Rashba's views).

6.2   Marriage Annulment in Practice: Can *hafkaʿah* be applied today?

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

In practice, however, *hafkaʿah* was hardly used. Halakhic sources deal extensively with *hafkaʿah* in cases of improper betrothal, such as fraud or betrothal in breach of requirements of communal enactments (*takkanot hakahal*). While the main halakhic writers rejected the practical use of *hafkaʿah*,[317] some did accept it, at least where other considerations were involved.[318]

The question now arises as to whether we can take *hafkaʿah* a step further, and apply it also after a proper marriage took place (the "delayed annulment" situation). This application is indeed much more radical and difficult to use in practice. It is also doubtful whether it was ever used in the past in practice at all.[319] This solution therefore has met severe objections, frequently total rejection, from opposing scholars, who have punctuated their analysis with strong emotional reactions.[320]

Nevertheless, some classic writers have mentioned the use of retroactive annulment as a supportive argument for problematic rulings.[321] This latter approach accepts in principle a wide use of *hafkaʿah,* and appears to be a potential way to use *hafkaʿah* in the quest for a remedy to the problem of *agunot*. Yet many writers demand that *hafkaʿah* in practice not be used without any other elements, but rather requires some support such as an "externally flawed" *get* (but not necessarily that support). *Hafkaʿah* therefore could be accompanied by different (but still otherwise halakhically problematic) forms of termination of marriage. Thus, it could serve as

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[317] Even *Rema, Even HaʿEzer*, 28:21, who accepts *hafkaʿah* in principle negates its practical use: "even so, we should be strict in practice" (אפילו הכי יש להחמיר לענין מעשה).

[318] See the famous case of the Egyptian enactment of 1901: Freimann, *Seder Kiddushin*, 338-344.

[319] See *supra*, Chapter Five, and Westreich, *Divorce on Demand*.

[320] See Goldberg, Lavi and others, *supra*, text at n.162. The debates around marriage annulment contain three levels which may be defined as hermeneutical, political, and sociological. I have analyzed these aspects elsewhere: see Westreich, *Gatekeepers*.

[321] The most famous examples are Rosh regarding the geonic *moredet* (*Shut HaRosh*, 43:8; see discussion *supra*, text at nn.279-286); Ran regarding *temeʾah ʾani* (Nedarim 90b, s.v. ואיכא) and Rema regarding the Austrian pogroms (*Darkhe Moshe, EH* 7:13).

a complement to a compelled *get*, making the latter a (permitted) form of coercion.[322] It is mostly relevant to the Israeli context: whereas rabbinical courts have legal authority to use sanctions against a recalcitrant spouse, they are too often reluctant to use it in practice due to the fear of an illegitimate coerced *get* (*get me'useh*). An enactment which combines difficult cases of coerced *get* with marriage annulment would make the coercion easier to apply. If the *get* is invalid (*me'useh*), annulment would be applied; if annulment cannot be applied on its own and needs support, the coerced *get* provides us with such a support – it would surely be considered as at least a *get kol dehu*, which according to many Rishonim is sufficient in order to make *hafka'ah* legitimate. We may also suggest that annulment may be accompanied by other forms of termination of marriage, such as conditional marriage or *kiddushei ta'ut*. This suggestion adheres to the rationale behind Rabbi Prof. Michael Broyde's recent proposal of a Tripartite Prenuptial Agreement, in which annulment is supported by an advance authorization to give a *get*, conditional marriage and *kiddushei ta'ut*.[323]

At any rate, the issue is still debated. And as in many other issues, *hafka'ah* still awaits the proper halakhic authority for its application in practice.

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[322] As Rosh argues. In some cases Rosh supports coercion on this basis even in practice, although he usually rejected the geonic view which enacted coercion: see *Shut HaRosh*, 35:2. On the issue of *hafka'at kiddushin* as a support for a coerced *get* see Rabbi Ovadya Yosef, *Kol Hamekadesh*, 96-103. This model was suggested by Rabbi Wieder, *Rejoinder*, 76-77 n.28, as an alternative to Rabbi Riskin's more radical proposal.

[323] See Broyde, *Tripartite Agreement*, 3-11. For a suggested version of the tripartite agreement see Broyde, *ibid.*, 12-15.

Chapter Seven

Mistaken Marriage, Conditional Marriage:
The Talmudic Basis of an Innovative Approach

7.1   *Introduction*

This chapter discusses a different form of marriage annulment: a declarative
marriage annulment on the basis of mistaken transaction (*mekaḥ taʿut*, or mistaken
betrothal; *kiddushei taʿut*)[324] and some other related halakhic constructions, mainly
terminative conditions.

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

In the Babylonian Talmud we find a case which is introduced as a theoretical
possibility, ultimately to be rejected (*hava amina*), although later *poskim* applied it
in practice in some circumstances as a possible paradigm for retroactive
cancellation of marriage. In that case a new circumstance which did not exist at the
time of the marriage is the reason for voiding the marriage, and this ruling is
justified by a legal presumption: had the wife known that this circumstance would
develop, she would never have married her husband (אדעתא דהכי לא קדשה נפשה,
i.e., "on this assumption she did not betroth herself").[325] Such a case is defined in
the rabbinic literature as a case of *umdena* (literally: assessment).

Umdena is a concept commonly used by halakhic sources to fill in gaps in a
wide range of halakhic areas: civil law (*dinei mamonot*), criminal law (including
capital jurisdiction), family law, etc.[326] It can be applied as an assumption regarding
factual events or as an assessment of the intentions of the parties. By applying

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[324] For the current purpose (as indicated above regarding marriage annulment: see *supra*, n.157), I refer
to mistaken marriage and mistaken betrothal as synonymous unless otherwise explicitly specified.

[325] BT *B.K.*, 110b-111a.

[326] See *Talmudic Encyclopaedia*, 1, s.v. אומדנא, 295-302.

umdena, various legal constructions become possible, depending upon the nature of the particular case. Thus, *umdena* can substitute for factual evidence, serve as the basis for validating constitutive acts, and so on.[327]

In our case the function of the *umdena* is to reveal retrospectively the intention of the wife at the time of the marriage: "On this assumption she did not get married." But exactly what legal construction is used when applying the *umdena*?[328] Do we assume the presence of an implied condition which retroactively annuls the marriage?[329] Or might the *umdena* reflect the existence of a mistaken transaction: the betrothal was initially based on a mistake and therefore never took place?

In fact, we find three conceptual understandings of *umdena* in halakhic literature: that it is (a) an implicit condition; (b) a mistaken transaction; (c) a combination of both these notions.[330] This chapter explores each approach at length, and discusses the main halakhic writings which adopted each view. One responsum will be examined separately in the final section of this chapter: a responsum of Rabbi Moshe Feinstein, who makes a unique and in my view brilliant use of the integrated conception of *umdena*.

Our discussion derives from the Talmudic source, but focuses on post-talmudic literature. Its main object is the conceptual aspects of the *umdena* of *ada'ata dehakhi lo kidshah nafshah*, and it is therefore a dogmatic analysis rather than an

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[327] See Ben-Meir, Re'ayah Nesibatit, 95-108, regarding *umdena* in betrothal and divorce. Ben-Meir, following H.S. Hefetz, focuses on *umdena* in the law of evidence, which is beyond the scope of this chapter, and therefore has a limited contribution to the current discussion (see the next note).

[328] It should be emphasized that the current discussion does not seek to analyze *umdena* as a general concept, as is done in some studies (see previous notes). My object here is the study of a specific *umdena*: *ada'ata dehakhi lo kidshah nafshah*, and similar cases in other realms of the *halakhah*. However, this discussion has broader implications for the study of marriage and divorce in Jewish Law.

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

[330] One possible practical implication of defining a case as a condition rather than a mistake (*ta'ut*) is that it may lead to certain formal halakhic requirements to which conditions are subjected (see *Resp. Me'il Tsedakah*, 2, 4b, s.v. והנה, at the end). However, this is not a necessary conclusion, as shown by commentators who define *umdena* as a condition (see below), but ignore these formal requirements. See for example *Resp. Beit HaLevi* (Vilna, 1863), 3:3, 22-24, regarding *umdena demukhakh*; *Talmudic Encyclopaedia,* s.v. אומדנא), 296-297.

historical one: we seek to explore the significance of the three conceptions within halakhic literature and not to discuss the time and place of each conception's evolution. Hence this presentation does not necessarily reflect the chronological order and historical importance of the halakhic sources.

A further preliminary remark: classical mistaken marriage (*kiddushei ta'ut*) and the use of conditional marriage (*tnai*) have been extensively discussed in previous scholarship,[331] and I do not seek to repeat well-known facts and conclusions. The focus here is therefore on the issue of *umdena*, which has not yet received proper conceptual clarification. Nevertheless, *umdena* in our context is closely related to the issues of *kiddushei ta'ut* and *tnai*. Therefore, analysis of its conceptual significance may shed new light also on *kiddushei ta'ut* and *tnai* themselves, both with regard to their conceptual substance and their use in practical *halakhah*.

7.2   Mistaken Marriage; Conditional Marriage

Marriage in Jewish law reflects a contractual relationship: it requires the consent of both spouses and without such consent there is no marriage. Consent here means informed consent: when consent is based on misleading facts, there is no real consent and thus no marriage.[332]

This is the core of the notion of mistaken marriage (*kiddushei ta'ut*). More specifically, according to many halakhic authorities,[333] when betrothal is based on an error which existed at the time of the betrothal, and one spouse – for the present purposes, the wife[334] – was unaware of this, the marriage is void *ab initio*. From a conceptual viewpoint, the basis for *kiddushei ta'ut* is the same as that for nullifying any other commercial transaction contracted in error: a transaction based on a mistake is void from the outset, and is considered as if it had never taken place.

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[331]   For *kiddushei ta'ut* see for example Broyde, *Marriage*, 89-102; Hacohen, *Oppressed*. For terminative conditions: see Berkovits, *Tnai*; Abel, *Confronting 'Iggun*, Chapter One.

[332]   Broyde, *Marriage*, 89-102. See also *ibid.*, 33-35 (implications of a private law model of marriage).

[333]   See Bass, *Mekaḥ Ta'ut*. Some *poskim* reject this notion due to considerations of halakhic policy, or because of a broad adoption of Resh Lakish's presumption of *tav lemeitav*: see Bass, *ibid.*, 195-201, and the discussion regarding Resh Lakish *infra*, text at nn.347-349. In a recently published article, Rabbi Eitam Henkin challenged Rabbi Bass' view that many *poskim* support *kiddushei ta'ut*. Bass however responded, in my opinion – correctly. See Henkin, *Ha'omnam*, 282-290; Bass, *Batlut Nissu'in*, 291 and further.

[334]   In principle these claims are relevant to both spouses. However, according to some *poskim* it is harder to apply such claims to the husband since he has the option of unilateral divorce without paying a *ketubbah*, an option which does not exist for the wife. Therefore the claim of *mekaḥ ta'ut* was more easily applied in the woman's favour. See *Shut Noda BiYehudah, Mahadura Tinyana, Even Ha'Ezer*, 80 (last paragraph of the responsum). See also Broyde, *Kiddushei Ta'ut*, 214 and 215 n.24, who ascribes this view to Rabbi Ḥayyim Ozer Grodzynsky and Rabbi Moshe Feinstein.

The concept of conditional marriage is different. Conditional marriage applies where a condition was made regarding a future event (conditions subsequent), whose occurrence (or non-occurrence, if the condition is formulated in a negative manner) retroactively voids the marriage, which originally was valid. Another kind of condition may also be mentioned here, a condition regarding facts at the time of the marriage (conditions precedent), which is a branch of the concept of mistaken transaction. For example,[335] if one betroths a woman on condition that she hasn't made any past vows which still obligate her, and it was discovered that she had made such vows, her betrothal is not binding. Although in both types of condition the relevant sources use the expression *'al menat* ("on condition that"), the conceptual significance of this expression differs: in the first type of case the transaction is made subject to the occurrence of a future event, whereas in the second this expression refers to a present situation.[336] Accordingly, the latter type of condition is an integral component of the transaction, and violating it entails a mistake in the creation of the transaction, which in our context constitutes *kiddushei ta'ut*.[337]

This conceptual distinction also has practical implications. For example, the concern about voiding the condition between *kiddushin* and *nissu'in*, according to some writers, is relevant only in conditions which refer to the present status of the wife and not in conditions which refer to a future event.[338] This has significant consequences. According to this view it is possible to make a condition which refers to a future event. Thus, the notion that there is no conditional marriage (*ein tnai benissu'in*; see BT *Yevamot*, 107a) is merely a descriptive statement: people usually make conditions which apply only to *betrothal*, and ordinarily such conditions are either waived before marriage, or they prevent the couple from getting married in the first place.[339]

In our case, that of conditional marriage, the marriage was created properly. Both spouses were aware of every important fact and fully agreed to the marriage. The marriage is therefore halakhically valid. However, the spouses made a condition which may lead to retroactive cancellation of the marriage. The continuing validity of the marriage therefore depends on that condition, even after

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[335] BT *Ketubbot*, 72b-75a.

[336] Cf. Lifshitz, *Asmakhta*, 166-167.

[337] Therefore the term *ta'ut* is used in the Talmud and by talmudic commentators in this context; see BT *Ketubbot*, 73b and Alfasi, *Ketubbot*, 34a. This is also the meaning of *kiddushei ta'ut* in the dictum of R. Judah in the name of Samuel in the name of R. Ishmael, *ibid.* See also Rashi, *ibid.*, 51b, s.v. קדושי טעות.

[338] See Berkovits, *Tnai*, 23; Abel, *Confronting 'Iggun*, 13-16.

[339] See Tosafot on *Ketubbot* 73a, s.v. לא.

the marriage took place. This kind of condition may be defined as a terminative condition. Indeed, not all conditions regarding a future event necessarily lead, when violated, to cancellation of the marriage. There are conditions which include an agreement on acts which must be done or not be done, but they do not affect the validity of the marriage.[340] We deal with such conditions later, when discussing some unique approaches to *umdena*. However, for the conceptual analysis here in general, and for comparison of the concepts of *kiddushei ta'ut, tnai* and *umdena* in particular, we focus on terminative conditions.

The last century witnessed great debates, generated by a variety of halakhic problems and approaches to halakhic policy, as to whether conditional marriage could be entered as a matter of actual practice (*halakhah lema'aseh*).[341] However, the conceptual basis of conditional marriage was generally accepted as viable, at least in principle, and we shall focus on this dimension, without considering for the present problems of its concrete application. The latter question is mainly one of authority: are the halakhic decisors of our days allowed to adopt such a solution, despite its possible problems?

7.3   "And the Sages Did Not Have the Power to Release Her without a *Get*" (BT Ketubbot 74a)

Before discussing the retroactive annulment of marriage based on *ada'ata dehakhi lo kidshah nafshah* (on this assumption she was not married), I wish to indicate the difficulty, both substantive and epistemological level, in retroactive annulment of marriage based on a stipulation or on error.

The Mishnah (Ketubbot 7:7) states:

> If a man betrothed a woman on the condition that she was under no vow and she was found to be under a vow, her betrothal was not valid. If he married her [כנסה] making no conditions [סתם], and she was found to be under a vow, she may be divorced [תצא, lit.,

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[340] Those conditions are mainly monetary, dealing with *ketubbah*, alimony, etc. Some prenuptial agreements are based on such conditions: for example, if the husband refuses to give a *get* to his wife, he will pay a large sum of alimony. We may also include in this category the monogamy condition, which sometimes includes an agreement for a coerced *get* when the husband marries another wife: see E. Westreich, *Temurot*, 26-28.

[341] See Abel, *Confronting 'Iggun*, 6-45. Two halakhic scholars recently published a series of articles which reject any use of conditional marriage: see Gertner and Karlinsky, *Ein Tnai BeNissu'in*. These articles emphasize that the main arguments are based on halakhic policy, while substantive issues are hardly mentioned, and most of these can be satisfactorily resolved. See, for example, the writers' objection to Rabbi Berkovits's suggestion, a suggestion which was supported in principle by Rabbi Y.Y. Weinberg. Gertner and Karlinsky's objections to this approach are total, no matter what halakhic basis may be found for it (see the final conclusion to the third and last article, s.v. בירורם של דברים).

go out] without [receiving] her *ketubbah*. [If he betrothed her] on the condition that there were no defects in her, and defects were found in her, her betrothal is not valid. If he married her making no conditions, and defects were found in her, she may be divorced without [receiving] her *ketubbah*.

This Mishnah teaches that when the husband made an explicit stipulation, and it became known after the betrothal that his condition was not fulfilled and the marriage is based on an error, the betrothal is retroactively voided.[342] However, as regards the status of the error after the wedding, the picture is by no means clear. According to the Mishnah, if "he married her making no conditions", the woman requires a *get*, and she is in an inferior position regarding monetary matters ("without receiving her *ketubbah*"). Consequently, if the husband had explicitly stipulated the condition prior to the wedding, the condition is valid, and the marriage is retroactively voided. The Mishnah, however, does not state this expressly, and the views in the Babylonian Talmud on this point are not unanimous.

This Mishnah is the subject of an extensive discussion in the Babylonian Talmud. The *sugya* centres around the question of whether a stipulation at the time of the betrothal is valid after the wedding as well. Thus, using the example given in the Mishnah, if the husband stipulated at the time of the betrothal that the betrothal is effected on condition that the woman is under no vows, and later married her, but then she was found to be under vows, is the marriage annulled, with no *get* necessary; or does she require a *get* from her husband?

The *sugya*, which extends over about two pages in the Talmud, presents a number of views as to the validity of the marriage, and a number of interpretations for the various positions. Rav and Shmuel, for instance, dispute this point: while Rav demands a *get*, Shmuel argues that a *get* is not required.

Towards the end of the *sugya* (BT Ketubbot, 74a) the following position is cited, and supported by an actual case:

> Rav Kahana said in the name of Ulla: If a man betrothed a woman on a certain condition and then had intercourse with her, she requires a *get* from him. Such a case once occurred, and the Sages did not have the power to release her without a *get*.

According to this opinion, the act of intercourse (which effects marriage) cancels the stipulation made at the time of the betrothal. The decision in this case is quite forceful: "and the Sages did not have the power to release her without a writ of divorce". That is, in this discussion the Sages tried with all their might to release the woman from marriage without the need for a *get*. Their efforts, however, were

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[342] The *sugya* is concerned with stipulation (תנאי), but its legal construct is that of mistaken betrothal. See *supra*, text at notes 335-337.

not fruitful, and they required the issuance of a *get*.

In opposition to the stance of Rav Kahana in the name of Ulla, the Talmud cites the position attributed to Rabbi Ishmael (74a-b):

> [The dictum by R. Kahana is meant] to exclude [the view] of the following Tanna. For Rav Judah said in the name of Shmuel in the name of Rabbi Ishmael: "And she be not seized" [Num. 5:13] – [only then is she] forbidden; if, however, she was seized, she is permitted. There is, however, another [kind of woman] who is permitted, even though she was not seized. And who is she? A woman whose betrothal was mistaken, and who may – even if her son sits riding on her shoulder – make a declaration of refusal [against her husband] and go away [i.e., leave the marriage].

Talmudic literature contains several expositions of the law of "and she be not seized" (such as the deduction that the wife of a *kohen* who engaged in sexual relations with another, even if raped, is forbidden to her husband: "but there is another class of woman who is forbidden, even though she was seized. And who is that? The wife of a *kohen*" [BT Ketubbot, 51b]). In our case, R. Ishmael expounded the verse as follows: the *sotah* (wife accused of infidelity) who was not seized is forbidden to her husband. If, however, she was seized (that is, raped), she is permitted to her husband. All this, R. Ishmael establishes, refers to the *sotah*; but there is "another class of woman," who is permitted, even if she willingly engaged in sexual relations. This permitted woman is one who was betrothed in error (such as in our case: the husband made a condition regarding facts existed at the time of the betrothal, and it turned out to be a mistaken betrothal). In this case, the marriage is retroactively not valid, even if much time has passed, so that she already gave birth and "her son sits riding on her shoulder." In such a case, the first marriage is retroactively voided, and she is therefore permitted to either of these men, even if she engaged in relations with another. All that she must do is to declare that she does not desire to remain married, and she can go on her way unhindered.

From a stylistic perspective, and also in terms of the literary structure of the *sugya*, it seems that the case mentioned in the statement by Rav Kahana is part of his dictum, and is not an interpretive-redactional addition. The case plays a significant halakhic role, providing additional support for Rav Kahana's halakhic ruling. Rav Kahana uses this case to show that, despite those who permitted releasing the wife without a *get*, and despite the Sages' inclination to do so, in practice, the Sages did not have legal grounds to do so.

The interpretive and redactional elements in this *sugya* – here referring not necessarily to later redaction, but rather to the formulations by the Amoraim themselves – are highly significant, and the role they play in Rav Kahana's statement cannot be dismissed. A strong argument can be raised, inter alia, that the *halakhah* presented in the name of R. Ishmael, too, is based on an actual case,

possibly the one that was mentioned by Rav Kahana elsewhere (see BT Niddah 52a).[343] We cannot, however, disregard the force of the teaching by Rav Kahana, that the practical attempt to void the marriage failed, for "the Sages did not have the power to release her without a *get*".

Eliezer Berkovits extensively examined this issue in his attempt to establish the talmudic and post-talmudic foundations for conditional marriage. He based the halakhic sources that justify this solution on the various opinions set forth in the *sugya* and the differing interpretations given to it. This was recently supported by Yehudah Abel.[344] Notwithstanding these attempts, it is possible that the impression made by R. Kahana's case influenced the post-talmudic *halakhah*, in its objection to mistaken betrothal and stipulation in marriage, because of the difficulty in the attempt "to release her without a *get*". The *halakhah*, therefore, found a different way to establish the basis for the institutions of erroneous betrothal and stipulation in marriage: "on this assumption she did not get married". This path is complex and sophisticated, contains elements of both stipulation and *ta'ut*, and possibly of both together. As argued in the next section, it also facilitates the use of the error argument in relation even to a future event.

7.4   *Ada'ata dehakhi lo kidshah nafshah* (*Umdena*) – Mistake or Condition?

We find the *umdena* that *ada'ata dehakhi lo kidshah nafshah* ("on this assumption she did not betroth herself") in a well-known talmudic source (BT *Bava Kamma*, 110b–111a). The talmudic discussion deals with a few different transactions: consecrating an animal as an offering, marriage (or betrothal, according to Tosafot), etc.[345] In each of the cases discussed here a later event occurs, and we assume that, had it been known at the time of the transaction that such an event would take place, the transaction would not have been entered. The term used here is *ada'ata dehakhi lo…*, i.e. "on this assumption [that such an event would take place] one would not have entered the transaction." As to marriage, the concept is discussed with reference to the case of a levir who has a severe skin disease:[346]

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[343]   I intend to expand on this in the future. For now, see Westreich, *Halakhic Story*.

[344]   See Berkovits, *Tnai*, Chapter 1; Abel, *Confronting 'Iggun*, Chapter 1.

[345]   These cases are not classic contracts; see *infra*, text at nn. 375-377.

[346]   The term used here, *mukkeh shehin* (מוכה שחין), literally means "afflicted with boils". This expression probably refers to a kind of leprosy: see Preuss, *Biblical and Talmudic Medicine*, 346-347.

> But still, according to your argument why should a deceased brother's wife on becoming bound to one affected with leprosy [*mukkeh shehin*] not be released [even] without the act of *halitsah*, for she did not betroth herself on this assumption?

Levirate marriage (*yibbum*) and *halitsah* refer to the relationship which arises between a childless widow and the brother of her deceased husband. Under Jewish law they are obliged to marry one another, and indeed even prior to any ceremony they are connected by the bond of a "levirate marriage". Their quasi-marital condition, however, can be dissolved by a ceremony called *halitsah*, in which (among other things) the widow removes one of her brother-in-law's shoes. The brother-in-law may, however, refuse to perform *halitsah*, leaving the widow bound and unable to remarry. In this talmudic passage the Talmud argues that if the levir is affected with leprosy, no *yibbum* or *halitsah* would be required at all, since the wife did not betroth herself on the assumption that she would be required to marry a brother-in-law with such a physical condition.

The assumption *ada'ata dehakhi lo* is a legal presumption – one that claims to discover the implicit thoughts which were part of the transaction. In rabbinic literature this presumption is defined as *umdena*.[347]

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

> In that case we can all bear witness that [the wife] was prepared to accept any situation, as we learn from Resh Lakish. For Resh Lakish said: It is better to dwell as two than to dwell in widowhood (טב למיתב טן דו מלמיתב ארמלו).

Resh Lakish presumes that a woman always prefers to be married, and thus can never claim *ada'ata dehakhi lo kidshah nafshah*. However, numerous commentators[348] argue that this presumption is not always applicable, and there are cases where women do prefer to remain unmarried. In such cases it is legitimate therefore to claim *ada'ata dehakhi lo*.[349]

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[347] The term is common in the writings of more recent commentators (Aharonim) who discuss the conceptual basis for this talmudic discussion (Beit Halevi, R. Shimon Shkop and others: see below), but it is also found in earlier sources dealing with this issue. See e.g. Rosh, Ketubbot, 9, in connection with *Ket.* 47b, who defines the approach which accepts the claim that "he wrote for her [i.e. he obligated himself in the *ketubbah*] only [on the assumption that] he would marry her" (שלא כתב לה אלא על מנת לכונסה, Hebrew equivalent of the Aramaic אדעתא דהכי לא) as "he follows ... *umdena*" (אזיל... בתר אומדנא).

[348] See e.g. Broyde, *Marriage*, 98-100 and 175-176 n.62; Hacohen, *Oppressed*, 45-92.

[349] One of the well known opponents of the (widespread?) use of *ada'ata dehakhi lo* in actual halakhic practice is Rabbi J.B. Soloveitchik, who suggests an ontological understanding of Resh Lakish's presumption, according to which it is not subject to sociological or psychological changes, and is indeed immutable. See Bleich, *Kiddushei Ta'ut*, 106-107 and 124-125 n.28. Broyde, *Marriage*, 174 n.55, argues on the basis of a complex of halakhic sources that total rejection of *ada'ata dehakhi lo* cannot be accepted and that even Rabbi Soloveitchik would agree with this. R. Soloveitchik's view

It is difficult to propose a conceptual definition of the *umdena* discussed here. On the one hand, this *umdena* addresses the moment of the transaction (for our purposes, marriage) by arguing that if the event or the changed fact – which, to be sure, occurs in the future – had been known at that moment, the spouse would never have agreed to the marriage. From this perspective, our *umdena* seems to be a kind of *kiddushei ta'ut*.[350] On the other hand, the fact that this is a future event brings the *umdena* close to the concept of condition, i.e., the marriage is valid, but a future occurrence changes its status retroactively, based on an implicit stipulation of the couple at the time of marriage. Thus, many writers seem to construe the *umdena* of our case as an implicit condition.[351]

A clear conceptual discussion is offered by Rabbi Shimon Shkop in his *Sha'arei Yosher*.[352] What makes his analysis of great importance for our discussion is the fact that Rabbi Shkop applies his conceptual arguments to our *sugya*, i.e. to the claim of *ada'ata dehakhi lo* with regard to the case of a leprous levir.

Rabbi Shkop criticizes the view that identifies *umdena* as a mistaken transaction, ascribing it to Maharit Al-Gazi. Maharit deals with mistaken donation of a firstborn animal (*bekhor behemah tehorah*) to a priest (*kohen*), where the owner was not obliged to give the firstborn to the priest. He then compares this case to *umdena* regarding a future event:

> The same applies when a person rents a boat and [the boat] sinks in the middle of the journey [i.e. during the rental] ... [Here] also he did not give [the payment] on this presumption [that it would sink].

In the last case we do not accept the claim that the renter didn't pay to use the boat for only half a journey. Maharit compares this case to a mistaken donation of a

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is therefore "limited to opposing the wholesale abandonment of the principle [=of Resh Lakish] rather than merely asserting that it did not apply in any given case or set of cases" (Broyde, *ibid.*). In any case, according to Broyde, many *poskim* do view this presumption as subject to socio-cultural changes (see also the analysis of Rabbi Y.E. Spektor and Rabbi M. Feinstein's views regarding Resh Lakish's presumption by Halperin-Kaddari, *Tav Lemeitav*, 21-24). It is noteworthy that Broyde proposes a similar argument with regard to interpreting Rabbi Yosef Eliyahu Henkin's objection to *kiddushei ta'ut* in a limited way and not as an objection on principle, an argument which was rejected by Bass: see Bass, *Mekaḥ Ta'ut*, 197 n.12.

[350] See for example *Shut Sho'el uMeshiv*, *Mahadura Kamma*, 1:197, who explains that it "retroactively becomes *kiddushei ta'ut*." Additional sources which adopt this view are cited below.

[351] This seems to be a widespread view regarding *umdena* in cases similar to ours in various realms of the *halakhah*. See for example *Shut HaRosh*, 34:1. See further *Talmudic Encyclopaedia*, s.v. אומדנא, 295-302, according to which *umdena* is an implicit alternative to an explicit condition (different kinds of *umdena* are discussed in the *Talmudic Encyclopaedia*; the relevant one for our discussion is that which entails an assessment of the intention of the actor). See especially *ibid.*, 296-297, part 3.

[352] Rabbi Shimon Shkop, *Sha'arei Yosher* (New York: HaVa'ad Lehotsa'at Sifre HaGaon Rabbi Shimon z"l, 1959), 5:18, 68-70.

firstborn animal, and therefore argues that one cannot claim for a mistaken giving of a firstborn to a *kohen*.[353]

However, the mistake regarding the firstborn takes place at the time of its being given, and therefore it is a pure case of mistaken transaction, so how can it be compared to renting a boat that later sank? R. Shkop thus deduced that Maharit identifies *umdena* as a mistaken transaction, and does not distinguish between a mistake with regard to an existing fact and a mistake with regard to a future one. But R. Shkop rejects this view. According to him, the case of the firstborn is a mistaken transaction, where the transaction was based on an error and is cancelled *ab initio*. By contrast, the case of the sinking boat cannot be regarded as a mistaken transaction, since there was no error at the moment of the transaction (in R. Shkop's words: "For it is impossible to know the future"). *Umdena* can therefore only be regarded as an implicit condition.

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

> Regarding what is stated in the Talmud, where it is proposed that a deceased brother's wife (*yevamah*) who found herself bound to a leprous levir should be free without ḥalitsah, because "on this assumption she did not get married", it is not possible to explain that this means that it is retrospectively clarified that there was an error in the marriage, for how is it possible to say that there was an original error? What it means is that the [marriage] was in suspense, as if it had been a conditional marriage.

R. Shkop's argument seems to be convincing: one cannot claim that there was a mistake at the time of the marriage due to a fact which was not then in existence. Nevertheless, there are a number of authorities who take the opposite view and define *umdena* as a mistaken transaction.[354] The most explicit is *She'elot uTeshuvot Me'il Tsedakah*.[355] Discussing the case of a levir,[356] he writes:

> It seems to me that the questioner [in the Talmud] also did not mean to ask whether [the wife] should go free without ḥalitsah because this is considered as if there had been a condition [in the marriage]. What he meant was that it was like a mistaken transaction, a

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[353] Maharit ascribes his view to Ramban and Rosh, contrary to Rema, *Yoreh De'ah*, 315:1, and Shakh, *Tekafo Kohen*, 62 (cited in *Sha'arei Yosher*, *ibid.*).

[354] In addition to the writers cited below, see *Shut Sho'el uMeshiv* (*supra*, n.350), who probably holds this view. However the conceptual approach of *Sho'el uMeshiv* is not fully clear, since at the same time he discusses the relation between *umdena* and regular conditions, and seems to understand *umdena* as a form of the latter (see *ibid.*).

[355] Rabbi Yonah Landsofer, *Shut Me'il Tsedakah* (Prague, 1757), 2, 3b. *Me'il Tsedakah* (p.4a) also ascribes this view to Maharam of Rothenburg, according to the version of Maharam's teaching cited in *Shut Maharam*, ed. Prague, 564, but this conclusion is questionable.

[356] BT *B.K.*, 110b, quoted above.

marriage contracted in error, as when he says to her "[I marry you] on the understanding that I am a *kohen*" and he was discovered to be a Levite.

Thus, disregarding the fact that the significant event occurred after the transaction, this approach defines the transaction as a mistaken one.

In fact, this view is found in sources much earlier than *Me'il Tsedakah*. Ra'avyah[357] defines *umdena* as a mistaken transaction, and applies this notion to the case of a leprous levir ("there too she was betrothed in error"). According to Ra'avyah, the *umdena* here is not based on a condition, since the parties were not aware of the future occurrence that might require such a condition. Hence it is only "we" – the *poskim* or court – who assess the parties' intention.[358] We accordingly assume that the parties would not have agreed to the transaction had they contemplated this occurrence, and this is therefore considered a mistaken transaction. Astonishingly, Ra'avyah supports his view with the same argument and even uses the same terminology as was used centuries later by R. Shimon Shkop in support of exactly the opposite view, namely that *umdena* is a condition and not an error! Ra'avyah writes:

> But *umdena* is a mistaken transaction (literally: giving in error) ... and so all cases of *umdena* entail error, [because] no one knows the future at the time of the transaction.

Thus, whereas R. Shkop argued that the fact that one didn't know the future at the time of marriage ("for it is impossible to know the future") makes it impossible to define a case as one of *ta'ut*, Ra'avyah argues that this very fact makes it impossible to define the case as a condition!

However, many other writers, both talmudic commentators and halakhic decisors in their responsa, define our *umdena* as an implicit condition and accordingly reject the equation of *umdena* and *ta'ut*. This view can already be found in the medieval commentators, although it is not always expressed as clearly there as by R. Shimon Shkop. For example, it is found in the writings of the Tosafists, as we may conclude from the following remarks of *Tosafot HaRosh*:[359]

> For if [the wife] had wanted to make a condition at the time of betrothal that if [the husband] should die before he married her, then the betrothal would be annulled, so that

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[357] Rabbi Eliezer b. R. Joel Halevi, *Sefer Ra'avyah*, *Teshuvot UVe'urei Sugyot* (ed. David Deblitski, Bene Brak, 2000), §1032, s.v. ואשר כתבת, 321-322.

[358] "[In cases of] *umdena* it is not in the person's mind to make a condition, so at the time of the transaction he did not consider making any condition ... but we assess his [subconscious] intention ... therefore what reason could he have had to make a condition [as he was unaware of future developments]?!"

[359] Cited in *Shitah Mekubetset*, *B.K.* 110b. This is an expanded version of Tosafot on *B.K.*, 110b, s.v. אדעתא; see below. Rosh himself holds the same view: see *Shut HaRosh*, 34:1, regarding a case of breaching a marriage agreement due to conversion of the bride's sister.

she would not find herself bound to his leprous brother, the husband would not have objected. Therefore it is considered as if she had made such a condition.

What is the content of this implicit condition? The most widespread interpretation sees it as follows: if a future event occurs, the marriage will be regarded as invalidated from its beginning, even though it was created properly.[360] According to this interpretation *umdena* is comparable to a terminative condition. However, we also find a different view, which understands *umdena* as a normal (non-terminative) condition, without any retroactive invalidation, comparable to standard conditions pertaining to certain aspects of the marriage contract. This view is found in *Terumat HaDeshen*,[361] who defines the *umdena* in our *sugya* as "a manifestation of [the husband's] intention that the levirate bond should not take effect". Accordingly, the *umdena* here does not invalidate the marriage, but releases the wife from the levirate obligation.[362] Thus, the marriage is valid even if the *umdena* is applied, and only the duty of levirate (*zikah*) is terminated.[363]

But there is an even more far-reaching view of the function of the implicit condition. In *She'elot uTeshuvot* Binyamin Ze'ev[364] we find the view that the *umdena* (the implicit condition) refers to the levirate marriage itself rather than to the levirate bond (*zikah*). Accordingly, the implicit condition was that if such circumstances occur the wife would not be obliged to enter into a levirate marriage with her apostate brother-in-law. However, although she is not obliged to have *yibbum*, she has in principle the duty to undergo *ḥalitsah*. But she is exempted due to another halakhic principle: "whoever is subject to the obligation of levirate marriage is also subject to *ḥalitsah* and whosoever is not subject to the obligation of the levirate marriage is not subject to *ḥalitsah*".[365] According to this view,

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[360] See *Sha'arei Yosher*, *supra*, n.352, *ibid.* Many more recent commentators (Aḥaronim) interpret matters this way, following Mahari Bruna against *Terumat HaDeshen*: see below.

[361] *Shut Terumat HaDeshen*, 223.

[362] According to *Terumat HaDeshen* the Bavli accepts this condition, whereas the Yerushalmi considers it a stipulation in violation of Torah law, rendering the condition void. See *Terumat HaDeshen*, *ibid.*, and *infra*, n.370. *Terumat HaDeshen*'s argument was rejected by Rabbi Yosef Karo: see below.

[363] See *Shut Maharam Schick*, 70, 35; Berkovits, *Tnai*, 29-32. However, some more recent commentators argue that even *Terumat HaDeshen* deals with a condition which invalidated the marriage. See for example Rabbi Avraham Brody, cited in *Shut Me'il Tsedakah*, 1, 1a-3a; Maharam Schick, *ibid.* In my opinion, however, the first approach is more persuasive.

[364] *Shut Binyamin Ze'ev*, 71.

[365] כל העולה לייבום עולה לחליצה וכל שאינו עולה לייבום אינו עולה לחליצה. This principle explains why a woman who is forbidden to the levir on the grounds of incest (more accurately, in the specific talmudic context: the second wife of the dead man, who herself is not forbidden; צרת הבת) is exempt not only from the *yibbum*, but also from *ḥalitsah*: see Bavli, Yevamot, 3a and elsewhere.

umdena is a regular condition, and – quite unlike *kiddushei ta'ut* – does not invalidate the marriage at all, but only avoids the obligation of *yibbum* and consequently the obligation of *ḥalitsah* as well.

Analyzing *Terumat HaDeshen* is important also with regard to a related issue: whether an *explicit* terminative condition is valid.[366] In this responsum, *Terumat HaDeshen* informs us of a concrete custom in his days of making an explicit condition at the time of marriage in order to avoid levirate marriage in the case of an apostate levir (*yavam mumar*). Later, this condition was rejected by Rabbi Yosef Karo, but Rema accepts a very similar condition in the name of Mahari Bruna:[367]

> Shulḥan Arukh: If [a woman] found herself bound to an apostate levir, there is someone who permits [her release without *ḥalitsah*] if [the brother-in-law] had been an apostate when his brother married her, but one should not rely on this.

> Gloss of Rema: ... a person who wishes to marry and has an apostate brother is permitted to marry with a double condition[368] stating that if she finds herself bound to the apostate brother, then she will not have been married [in the first place].

Nevertheless, there is a clear difference between the views of *Terumat HaDeshen* and Mahari Bruna.[369] According to the former, the condition (whether explicit or implicit, by *umdena*) cancels the duty of levirate, and thus is problematic in that it entails a stipulation made in violation of Torah law (*matneh al mah shekatuv baTorah*), which is void.[370] The latter, on the other hand, suggests a condition which explicitly invalidates the marriage,[371] and therefore is not *matneh al mah*

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[366] For full and detailed discussion regarding *Terumat HaDeshen*'s condition vs. Mahari Bruna's condition (below), see Freimann, *Seder Kiddushin*, 386-394; Berkovits, *Tnai*, 29-32.

[367] *Shulḥan Arukh*, *EH* 157:4, and Rema, ad loc. As indicated, the source of Rema's ruling is Mahari Bruna, who is cited fully in Rema's *Darkhei Moshe* on Tur, *EH* 157:5. Rabbi Yosef Karo, on the other hand, explicitly rejects *Terumat HaDeshen*'s condition in his Bet Yosef on Tur, *EH* 157, end of s.v. כתוב בתרומת הדשן, but does not refer to Mahari Bruna's condition.

[368] A "double condition" (i.e., if A then B, and if not A, then not B) is required due to the formal rules of conditions: see Maimonides, *Ishut*, 6:1-6. However, this is not the core of the distinction between this condition and that of *Terumat HaDeshen*; see Berkovits, *Tnai*, 31, citing *Shut Tsela'ot HaBayit*, and see below.

[369] See Bach, *EH* 157, s.v. כתב רב שרירא; Resp. Maharam Schick, 70, 35; Berkovits, *Tnai*, 29-32. Some writers reject this view for various reason: see Rabbi Avraham Brody, cited in *Resp. Me'il Tsedakah*, *supra* n.363.

[370] This principle is widely accepted in rabbinic literature; see for example T *Kiddushin* 3:7-8 and BT *Kiddushin* 19b. The details of this principle, however, are disputed, so that *Terumat HaDeshen* might argue that according to the Bavli his condition is valid; see *supra* n.362.

[371] See Rema, above: "If she finds herself bound to the apostate brother then *she will not have been married* [in the first place]".

shekatuv baTorah, so that the condition is valid. Accepting this distinction (i.e. the conceptual distinction between the rejected view of *Terumat HaDeshen* and the accepted view of Mahari Bruna) may legitimate the use of explicit terminative conditions in order to prevent cases of *agunot*,[372] as suggested by some contemporary writers.[373]

To conclude this section, both ancient and modern authorities are divided in defining *umdena*. Some writers compare it to *kiddushei ta'ut*, arguing that had the bride known about this fact at the time of the marriage, even though it did not yet exist, she would not have married her husband, and therefore the whole transaction is regarded as mistaken. However, other writers classify *umdena* as an implicit condition, according to which the marriage is valid at the moment of its creation, but can be invalidated retroactively by this condition.[374]

7.5   The Integrated Approach

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

At first sight, Tosafot on the *sugya* of a leprous brother-in-law (on *Bava Kamma*, 110b, s.v. אדעתא) reflects an understanding of *umdena* as a condition. Here Tosafot interprets the initial part of the talmudic discussion about *ada'ata dehakhi lo* as referring only to the case of a betrothed wife (ארוסה). Tosafot then raises the following question:

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

> The answer is that there the matter is not dependent only on the buyer but also on the seller, and the seller sold it to him on that understanding [that if it is broken in the future, this is the buyer's risk]. But here, the betrothal depends on [the woman], as he is not

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concerned how [i.e., under what conditions] she wants to become betrothed. Similarly regarding a person who consecrated [an offering], everything depends on him, and so is it with one who restores money that was stolen from a proselyte [who died] – it all depends on him.

According to Tosafot, the *umdena* of *ada'ata dehakhi* cannot stand on its own, but, being a term of the contract, requires the agreement of both parties to the transaction. Therefore, in a normal commercial transaction the buyer cannot cancel the sale based on the argument of *ada'ata dehakhi* when something happens after the transaction. Nevertheless, in the cases discussed in the *sugya* (giving priests money stolen from a proselyte who subsequently died,[375] consecrating something as an offering, and a leprous levir) such agreement is either not required (as in the first two cases, which are not mutual transactions, but unilateral acts[376]) or is assumed implicitly to exist (as in the case of a sister-in-law potentially subject to levirate[377]).

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

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

The basis of Tosafot's discussion is therefore the understanding of *umdena* as a condition, and in principle we need at least the implicit agreement of both parties

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[375] The Mishnah (*B.K.* 9:11-12) discusses the first case. The Babylonian Talmud compares this case with the other two cases.

[376] See Tosafot on *Ket.* 47b, s.v. שלא: "[the transaction] depends only on the giver".

[377] According to Tosafot, *ibid.*, the Talmud refers here to a betrothed woman and not to a married one, and therefore the husband would not mind invalidating the betrothal in the event of his death, if his brother is afflicted with a skin disease. By contrast, had the husband been married, he might oppose this option, due to concern that nullification of the marriage would render his cohabitation promiscuous.

to the transaction. We find this view almost explicitly in Tosafot HaRosh,[378] which at this point may be regarded as a better-explained version of our Tosafot.[379]

However, the interpretation of *umdena* as a condition is not the only analysis found in Tosafot. Elsewhere,[380] we find an additional element, which reflects a more complicated conception of *umdena*.

In *Ketubbot* 47b, the Talmud discusses the case of a betrothed woman who got divorced or became a widow. R. Elazar Ben Azaryah maintains that the betrothed wife receives her basic *ketubbah* (100 or 200 *zuz*), but is not entitled to any additional *ketubbah* payments that her husband promised. R. Elazar Ben Azaryah's reasoning is that the husband obligated himself only on the assumption that he would marry her, and therefore if the marriage does not take place, whether because of death or divorce, his wife does not receive any of these additional payments.

Tosafot ad loc. (s.v. שלא) raises a question similar to that raised in connection with the *sugya* of a leprous levir:

> And if you ask: If so, [when] anyone buys a cow from someone else and it becomes *terefah* [nonkosher] or dies, we can testify that he did not buy it on that understanding [and he should therefore always be able to obtain a refund] …!

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

> The answer is that there we can be sure that [the buyer] would have been willing to take that chance [literally: he would have been willing to enter into that doubt, i.e., the possibility that the cow might die]. Indeed, even if the [seller] said to him: "If it becomes *terefah* you must accept the loss", he would have bought it. Here, however, he wrote [the addition to the *ketubbah*] only on the understanding of marrying her, and he had no intention whatsoever of entering into a doubt[ful situation].

The *umdena* here depends on the following argument. We ask whether the party to the contract would have accepted the agreement even if s/he had been aware of the possibility that a certain future event *might* occur. If we assume that had s/he known this possibility at the time of the transaction s/he would have accepted the

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[378] דאם היתה רוצה להתנות... לא היה הבעל מעכב על ידה, הלכך חשוב כאילו התנית. For the full quotation see *supra* text at n.359.

[379] Tosafot HaRosh is a collection of some corpora of earlier Tosafot: Those of R"i, Rash of Sens and others. On the redaction of Tosafot by the Rosh (the "Tosafot HaRosh"), compared to "our" Tosafot (which are cited in the printed editions of the Babylonian Talmud), see Urbach, *Ba'aley HaTosafot*, Vol. 2, 585-599.

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

agreement anyway, taking the "risk" of the future event (as s/he would in the case of any normal transaction), s/he cannot cancel the transaction later on the basis of *ada'ata dehakhi lo*. But if we assume that had the party known that a future event might occur s/he would not have accepted the agreement due to that future possibility, s/he can claim *ada'ata dehakhi lo*.

This explanation is not conceptually clear. Is it an implicit condition or a sort of *mekaḥ ta'ut*? And what is the relation between this concept and the mutual agreement required by Tosafot in Bava Kamma on the *sugya* of the leprous levir? Are these explanations compatible, or are they different and contradictory approaches?[381]

Further on in Ketubbot, Tosafot (*ibid.*) discuss the need for mutual agreement, in terms similar to those presented in Bava Kamma. But in Ketubbot the discussion regarding the need for mutual agreement is related to the previous discussion, i.e., to the question of whether the party to the contract would have accepted the agreement even if he or she knew that a particular event might occur in the future:

> And regarding what [the Talmud] asks at the end of the first [chapter] *HaGozel*: "A *yevamah* who found herself bound to a leper should be released without *ḥalitsah*, because she did not [agree to] marry on that understanding" – although she would probably have taken that risk at the time of betrothal, Rabbenu Yitsḥak explains... that since it depends only upon the one who gives (i.e. the wife), we should follow her[382] intention, and since it depends upon her, [we may say] that she certainly does not want to take any chances.

> This cannot be compared to one who buys an object to which an accident occurs, in which case we do not say that he did not buy it on that understanding, so he can annul the transaction. For [in that case, the matter] does not depend on the mind of the buyer only, as there is also the mind of the seller, who [we presume] would not sell to him in accordance with [the buyer's] intention unless he expressly [agrees].

The widow, according to Tosafot here and in Bava Kamma, is in a different position from the normal buyer, who cannot cancel the transaction based on a future event. The widow can claim *ada'ata dehakhi lo* due to the implicit consent of her deceased husband, which does not exist in regular commercial transactions. However, Tosafot on Ketubbot links this notion with the earlier discussion: mutual consent, although implicit, becomes a significant element in the case of the

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[381] Below I argue that the two explanations are not mutually exclusive, but rather reflect a single, combined approach which was followed by Tosafot on Ketubbot. Historically, the Tosafot may be based on different sources, i.e. different Tosafists, or on different compositions used by the redactor of our Tosafot (probably Rabbi Eliezer from Touques: see Urbach, *Ba'aley HaTosafot*, 625-629; 639-645). However, the redactor harmonized those sources, and his view accordingly reflects the adoption of an integrated approach which is worthy of clarification. The method used here thus follows the general conceptual-dogmatic approach adopted in this chapter.

[382] In the English translation I use the feminine forms instead of masculine forms used by Tosafot.

yevamah only since we assume that if she were asked at the time of betrothal, she would probably have agreed to the marriage even with the possibility of finding herself obliged to marry a leprous levir. Because of the assumption that she might have accepted that possibility, Tosafot argues, we need to base her claim for voiding the betrothal on mutual agreement. And in the case of the *yevamah*, contrary to normal commercial transactions, this mutual agreement implicitly exists.

This analysis leads to the following conclusion: if we know that if the woman had known about the possibility of this future event, she would not have got married, her claim to void the marriage will be accepted even without her husband's (implicit) agreement. This has an extremely significant conceptual implication: the question of whether she did or did not know about the possibility of this future event brings us back to the concept of *kiddushei ta'ut*: it focuses on only one party to the transaction and on that party's assumption at the moment of the creation of the contract.[383] But isn't this a mistake with regard to a future event? Isn't it the same as the argument that we saw in Maharit Al-Gazi and *Me'il Tsedakah*?[384] I would claim that the answer to these two questions is negative.

Maharit Al-Gazi and *Me'il Tsedakah* deal with a future event, lack of knowledge about which renders the transaction mistaken. Tosafot on the other hand does not deal with that event on its own, but rather with the party's perception of its possibility: would she accept the possibility that this event might happen? This difference is of the utmost importance. According to Tosafot, the discussion relates purely to the present: in the present we can have only a doubt that such an event may occur, or we may be aware that there is a statistical possibility that this kind of thing might happen. Both here and in Bava Kamma, the formulation of Tosafot's view found in Tosafot HaRosh makes this argument clearer:[385] had he or she known about this possibility, s/he would not have refrained from the transaction. A case of *ta'ut* exists then only when one party was unaware of this possibility, and when, had he or she known of it, s/he would have refrained from the transaction.

The view of Maharit Al-Gazi and *Me'il Tsedakah* is problematic, for how can anyone claim a *ta'ut* on the basis of an event that has not yet happened? But Tosafot's view solves this problem: the mistake applies to the way each side views the present. In the present what exists is a doubt or a statistical possibility that an event might happen. If one of the parties was aware of this future possibility, the

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[383] For a different view see *Me'il Tsedakah*, 4, 6b-7a, who suggests, *inter alia*, that *ta'ut* also requires the agreement of both parties.

[384] See *supra*, text at nn. 352-359.

[385] Tosafot HaRosh on *Ket.* 47b, s.v. *shelo*.

transaction is not a *ta'ut*, but if they were not, and we assume that knowing about this possibility would have prevented the transaction, the transaction is considered mistaken.[386]

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

To summarize and clarify the above discussion: according to Tosafot, the *umdena* of *ada'ata dehakhi lo kidshah nafshah* combines the notions of implicit stipulation and erroneous transaction. When the wife claims *ada'ata dehakhi* and wishes to void the marriage, we must ask two questions: (1) Is this a mistaken transaction? (2) If it is not a mistaken transaction, is there an implicit condition? In (1) we deal with the possibility at the time of making the contract (the betrothal): was the woman aware then of the chance (or risk) that such an occurrence might happen? If not, the transaction is void because it is mistaken. If she was aware of this option but nevertheless accepted the marriage, the transaction is valid. Yet in this latter case we must also ask question (2): Was there an implicit condition? The answer to this question depends on the kind of transaction. In a regular commercial transaction there is no implicit condition, since the seller would never agree to cancel the transaction in a case where, for example, his cow becomes nonkosher (*terefah*). But in a case of a betrothed widow when the levir is a leper, according to the possibility initially suggested in BT *B.K.*, 110b, there was such an implicit agreement. In that case, therefore, the marriage can be voided in principle, since, in Tosafot HaRosh's words, "It is considered as if she had made such a condition".

In practice, however, it is problematic to apply *umdena* in marriage, according to the Talmud's conclusion:

> In that case we can all bear witness that [the wife] was prepared to accept any situation, as we learn from Resh Lakish. For Resh Lakish said: It is better to dwell as two than to dwell in widowhood (טב למיתב טן דו מלמיתב ארמלו).

However, the commentaries, both earlier and later, have noted numerous cases in which the notions of *ta'ut*, implicit conditions and *umdena* were invoked, while Resh Lakish's assumption was there considered irrelevant, as briefly discussed above.[387]

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[386] A similar construction was proposed by Daniel Friedman for the concept of *ta'ut* in modern Israeli Law. According to Friedman, an argument of a mistaken transaction may be applied even for a future event, if the party (at the time of the transaction) was not aware of the risk he or she assumes. See Friedman, *Contractual Risk*, 467-471, 475-476.

[387] *Supra*, text at nn. 348-349.

The next section examines one interesting responsum, which is remarkable for its practical use of the integrated approach of Tosafot.

7.6   *Iggrot Moshe*: an Application of the Integrated Approach

One famous halakhic decisor who accepted the claim of *kiddushei ta'ut* in actual halakhic practice (*halakhah lema'aseh*) is Rabbi Moshe Feinstein.[388] This fact is well known and has been discussed by a number of scholars.[389] However, it is usually claimed that Rabbi Feinstein accepted only a limited version of *kiddushei ta'ut*, which demands *inter alia* that the basis for the wife's claim is a fact which had been in existence at the time of the marriage,[390] similar to our conceptual analysis of *kiddushei ta'ut* above.[391] Nevertheless, the responsum discussed here reveals a more complicated approach, which is closer in many aspects to Tosafot's integrated approach.[392]

The responsum[393] deals with a communist levir, who refused to perform *ḥalitsah* for his sister-in-law. As background to a proper understanding of this responsum, we briefly summarize relevant halakhic discussion regarding an apostate levir.

According to some Geonim, where the levir is an apostate there is no obligation of *yibbum*.[394] Traditionally, until Maharam of Rothenburg, this was explained as a result of the fact that the apostate, having converted out of the faith, is not considered Jewish and is therefore not bound to his brother's wife.[395]

Some Rishonim discussed the significance of the date of the brother's

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[388]   *Iggrot Moshe*, *Even Ha'Ezer*, 1:79; 80 and elsewhere (see references in the following note).

[389]   See Broyde, *Marriage*, 89-102; Bass, *Mekaḥ Ta'ut*, 208-213; Halperin-Kaddari, *Tav Lemeitav*, 19-24; Hacohen, *Oppressed*, 57-60.

[390]   Broyde, *Marriage*, 90; Broyde, *Error*, 51-52 n.34 (English section).

[391]   See text at nn.332-334.

[392]   In correspondence with the Agunah Research Unit, Rabbi Prof. M. Broyde argues that Rabbi Feinstein uses *umdena* regarding a future event only in order to cancel a levirate bond, as in the responsum discussed below, but not in order to release a married wife without a *get*. In a private discussion, Rabbi Prof. David Bleich raised a similar argument, i.e. that this is a unique responsum of Rabbi Feinstein, in which he retroactively annulled marriage on the basis of a later event (becoming bound to an apostate levir).

    Although this might be true in practice, from a theoretical point of view there is no difference between marriage and levirate: in both cases the marriage is retroactively annulled. Indeed, the practical hesitation in applying *umdena* to a married woman is understandable, in the light of concerns about bastardy (*mamzerut*) and adultery (*ḥumrat eshet ish*) which would apply in such a case.

[393]   *Iggrot Moshe*, *Even Ha'Ezer* 4:121.

[394]   *Shut Maharam MeRothenburg*, ed. Prague, 564.

[395]   *Ibid.*

conversion according to this geonic view, whether before his brother's marriage or after. This is related to the halakhic dispute as to when the legal relationship (*zikah*) between the brother-in-law and the wife is created: is it at the moment of the brother's marriage or at his death (נישואין מפילין vs. מיתה מפלת). If the legal relationship is created at the moment of the brother's marriage, the brother-in-law must already be converted at that moment for the widow to be exempt from *yibbum*. Otherwise his conversion would not affect the levirate bond – if he converted after the marriage but before the brother's death, the obligation of *yibbum* would still exist. On the other hand, if the legal relationship (*zikah*) between the widow and her brother-in-law is created only at the moment of the brother's death, then provided that he converted before this moment (even after marriage) the widow would be exempt from *yibbum*.[396]

Rashi strongly objected to the geonic view and considered the apostate as Jewish, so that there is a levirate obligation in this case, even if the brother-in-law converted before his brother's marriage. But 200 years later, Maharam of Rothenburg suggested an innovative explanation of the geonic view: the reason there is no levirate obligation is not the halakhic status of the apostate, but rather because the widow did not marry her husband on the assumption that she might find herself subject to a levirate bond with an apostate. To be sure, the Talmud rejects this claim in the case of the leprous levir, based on Resh Lakish's presumption that a woman prefers to be married. However, an apostate husband, according to Maharam, is worse than a man afflicted with leprosy. Hence Resh Lakish's presumption is not applicable when the levir is an apostate, and the widow is exempt from levirate.[397]

This is a clear case of *umdena* – the *yibbum* occurs after the marriage, and only then does the wife claim that had she known that this would happen, she would not have married her husband.[398] Therefore, this is not a standard *mekaḥ ta'ut*, since the widow's claim is related to the later obligation of *yibbum* (which did not exist at time of marriage) and not to the current status of her brother-in-law.[399]

Defining this case as an *umdena* regarding a future event is not affected by the time of the apostasy. Even if the brother had already converted at the time of the marriage, the *yibbum* occurred only later, and the wife's claim refers to this later event. Indeed, Maharam's students dealt with the question of the time of the apostasy according to his reasoning: some accept the *umdena* even if the apostasy

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[396] *Hagahot Mordekhai*, Yevamot, 107, and see also below, explaining this dispute according to Maharam's reasoning.

[397] See references *supra*, n.394.

[398] See *Beit HaLevi*, 3:3; *Iggrot Moshe, Even Ha'Ezer* 1:79, §1.

[399] See *Shut Maharam*, *supra* n.394; *Teshuvot Maimoniyyot, Nashim*, 29.

took place after the apostate's brother's betrothal,[400] while others dispute it, arguing that in order to apply the *umdena* the brother-in-law must be an apostate at the time of his brother's betrothal.[401] However, this dispute, as correctly explained by Rabbi Joel Sirkes in his commentary to the Tur (Bach), focuses on the strength of the *umdena*.[402] For if the brother became an apostate only after the marriage, the wife's claim runs as follows: had she known that this brother would convert and that she might become subject to levirate, she would never have married her husband. This is quite a weak argument, since such occurrences are very rare, unlike the case where the brother was already an apostate at the time of the marriage and the wife claimed that had she known that she might have to marry him in the framework of levirate, she would never have married her husband. However, even in the former case some sources argue that Maharam's *umdena* is valid, as mentioned above.[403]

Neither Maharam nor later halakhic authorities accepted the claim of *ada'ata dehakhi lo kidshah nafshah* in practice, and this approach was rejected almost totally in normative *halakhah*.[404] Furthermore, according to *Hagahot Mordekhai*, based on Tosafot, Maharam's ruling applies only to a betrothed woman and not to a married one.[405] However, in some cases this ruling was applied in actual practice, even to a married woman.

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

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

This case, he argues, is extraordinary since the danger of the husband's death was very real and well known. Accordingly, Rabbi Feinstein argues that Resh Lakish's

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[400] See *Hagahot Mordekhai*, *Yevamot*, 107, and *Shut Maharam*, 1022.

[401] *Teshuvot Maimoniyyot*, *Nashim*, 29.

[402] See Bach, *Even Ha'Ezer*, 157, s.v. כתב רב שרירא.

[403] Cf. Hacohen, *Oppressed*, 39-41; Broyde, *An Unsuccessful Defense*, 8-9; Westreich, *Book Review*.

[404] See *Shulḥan Arukh*, *Even Ha'Ezer* 157 (quoted above, text at note 367). Even Maharam himself did not rely on this approach in actual practice: see *Terumat HaDeshen*, 223; *Mordekhai*, *Yevamot*, 29. However, this was the basis for the explicit condition in the case of a converted levir, which was partly accepted; see *supra*, text at nn. 366-373.

[405] See *Hagahot Mordekhai*, *Yevamot*, 107, based on Tosafot on *B.K.* 110b, s.v. דאדעתא.

principle that "a woman prefers to be married" is irrelevant in this case, and thus the wife may claim *ada'ata dehakhi lo kidshah nafshah*. Rabbi Feinstein explains:

> It is clear to everyone that no woman would agree to get married for the sake of so short a period – days or even months – even though [as a rule] "it is better to live as two people" (*tav lemeitav tan du*).

Hence, it is legitimate to claim *ada'ata dehakhi lo kidshah nafshah* here, and this claim cannot be rejected by Resh Lakish's presumption.

At this point Rabbi Feinstein discusses two issues. The first pertains to the wife and to her assumptions regarding her marriage:

> And therefore, since in [our] case [she knew] her marriage was [merely] for days, because she knew that there was a great likelihood that he would be taken to the army and [that] he would die in battle, we are forced to say that she did not know that she would be bound to this levir for levirate or *ḥalitsah*. Since, however, it is far-fetched to say that she did not know that there is such a thing as a bond of *yibbum* and *ḥalitsah*, which is a matter well-known even to women and ignoramuses, [we must say that she assumed that there would not be a levirate bond] because she thought that [the levir] was not considered a Jew, since he had become a member of the [Communist] party, for he and the [Jewish] community regard him as separated from the general communal body. Therefore she thought that such a brother does not generate a levirate obligation. Had she known that he does generate a levirate obligation, she would not have got married even to the kosher brother for a [mere] few days – even twice twenty days – and certainly [for] more.

The second issue pertains to both parties:

> And it is logical [to say] that also on the husband's side this *umdena* applies, because he also certainly knew that for the sake of a few days [of marriage] he would not find any woman in the world who would marry [him], unless it were on condition that if he should die childless she would not be married to him. There is a clear assumption that [the validity of the marriage was based] specifically on a condition [agreed to] by both sides.

This last argument views *umdena* as an implicit condition, namely, that if the husband dies without children, the marriage is retroactively invalidated. So why do we need the previous argument, which claims that the wife did not know that she would be obliged to undergo levirate with her brother-in-law? Isn't it sufficient to say that although she knew about these obligations, she made an implicit condition that the marriage would be invalidated if she became subject to a levirate bond? The condition is indeed an acceptable condition since the husband agrees, as indicated by the second argument!

Rabbi Feinstein does not base his halakhic decision on a happenstance group of unrelated considerations which could support his decision regarding this difficult case. I suggest that these two arguments work in tandem. This double

argumentation confronts both aspects of Tosafot's *umdena*, that of a mistaken transaction and that of a terminative condition.

In the first argument, Rabbi Feinstein deals with *ta'ut*, addressing the position of the wife only, whose claim that there was a mistake stems from the fact that she was unaware of the possibility of *yibbum*. But here R. Feinstein takes a very innovative approach: whereas Tosafot deal with unawareness of the possibility of a factual situation (in a normal case of *yibbum*, for example, unawareness of the possibility that the woman might be left a childless widow and be subject to levirate, a claim that would not be accepted), Rabbi Feinstein extends this to a mistake concerning the law.[406] According to Rabbi Feinstein, in this unique case, the wife was unaware of the possibility that she might be subject to levirate, since she thought that such a brother would not be halakhically regarded as a levir. This is quite a sophisticated argument: the woman's mistake is not simple unawareness of a specific *halakhah*, since, as Rabbi Feinstein claims, it is difficult to assume that she didn't know the basic law of *yibbum*. Rather, her mistake lies in adopting the geonic view that the converted brother is considered a non-Jew, thereby freeing the wife from the levirate obligation. But had she known at the time of the marriage that the apostate brother was subject to the obligation of levirate, she would never have agreed to the marriage. Therefore the marriage is based on a mistake, and is void *ab initio*. It should be emphasized, according to our previous discussion,[407] that this is not a mistake with regard to a future event, but rather a mistake with regard to the present. Rabbi Feinstein finds the *ta'ut* to be a mistake regarding the woman's current knowledge of the law – a very innovative analysis.

In the second argument, Rabbi Feinstein deals with an implicit condition. When the husband died the widow became subject to levirate marriage. This event had not occurred at the time of marriage (only its statistical possibility), so the marriage cannot be regarded as a mistaken transaction. But was there an implicit condition which invalidates the marriage when such an event occurs? Maharam suggested such an argument regarding an apostate brother, but his view was rejected by normative *halakhah*.[408] However, Rabbi Feinstein distinguishes his case from those of Maharam and Tosafot, and argues that since the marriage was only for a short

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[406] The use of mistakes concerning the law was introduced to support the practice of R. Rackman's *bet din* in cancelling marriage on grounds of *kiddushei ta'ut*, as explained by Susan Aranoff: "Kiddushei ta'ut III emphasizes that a woman would not knowingly consent to a domestic partnership based on *gufah qanui*..." (Aranoff, *Response*, 2). Rabbi Feinstein's argument is quite different, since he applies it in a specific case, where the mistake pertained to a specific detail of the *halakhah*, whereas a general mistake which broadly applies cannot be accepted as grounds for annulling a marriage. See also Rabbi Bleich's critique of Aranoff's argument in Bleich, *Kiddushei Ta'ut*, 108-116.

[407] *Supra*, text at nn.383-386.

[408] See *supra*, n.404.

period, we assume that both the husband and the wife agreed to cancel the marriage in these circumstances. The wife thus can claim that *ada'ata dehakhi lo kidshah nafshah*, and the marriage is retroactively invalidated.

Rabbi Feinstein hence uses double argumentation in order to support his claim to annul the marriage, based on the two aspects of *umdena*. But his two arguments appear at first sight to contradict each other: the first is based on a mistake about the obligation of levirate, while the second is based on the fact that an implicit terminative condition (if the woman needed levirate, the marriage would be cancelled) may be upheld in practice. But how can we assume that the couple made a condition to invalidate the marriage in a case of *yibbum* (the second argument), if they thought that the obligation of *yibbum* was halakhically irrelevant (the first argument)?

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

> It is obvious that even though she married him without explicit specification (*bistam*), and no condition was made, because they did not know that [in this case] there would be a levirate bond, and not because they knew the rules of conditions [i.e., that the *umdena* would render the marriage conditional], even so the marriage is annulled just as if they did know of the laws of conditions. [This is because] *we do not need them to be knowledgeable of the law, but [only that] they had no desire to get married on condition that she would need ḥalitsah from this man* if her husband died [childless]. If [the situation] is such that we can clearly assume this, it is considered as if they made a condition and the [marriage] is annulled. This is because in the cases of assumptions (*umdena*) mentioned in the *gemara* nowhere is a distinction made between ordinary people [who do not know the details of the law] and scholars. [emphasis added]

Rabbi Feinstein's conclusion takes the definition of an implicit condition a step forward: not only can this be a condition which was not made explicitly by the two spouses (but one which, we may assume, they would have adopted had they been asked), but this is a condition the need for which was rejected by the couple (since the wife thought that she would not be bound to this brother-in-law for levirate marriage or *ḥalitsah*). This is thus an extremely complex situation: there is an implicit condition that the marriage would be cancelled in a case of a bond to an apostate levir, but making this condition explicit would not be possible, since it would conflict with the first argument. For, as stated in the first argument, the wife was unaware of the levirate bond, and thus could not know that there is anything to make a condition about. This is accordingly a condition implied by the law: it is sufficient, according to Rabbi Feinstein, that the couple did not want the result (being bound to the apostate levir), while the legal construction of the condition and its imputation to the couple (unawareness of the obligation on the one hand; awareness with an implicit condition to cancel this obligation on the other) is the work of the *posek*.

7.7   Conclusion

Three concepts have been discussed above: (a) "terminative conditions", i.e. cases where an event which occurs during married life renders a marriage retroactively void, based on an explicit stipulation of the spouses at the time of marriage; (b) "mistaken transaction", i.e. cases in which a fact obtained at the time of marriage, but one spouse was unaware of it, and if he or she had been aware of it, they would not have married. In this case, the awareness of that fact at a later time reveals the actual status of the marriage: the marriage was based on a mistake, and therefore was never valid; (c) *umdena* (an assessment – in our context, of one's intentions) that "on this assumption she did not get married". This possibility occupies a middle ground between the previous two: it is based on a fact which we assume could lead one of the spouses to cancel the marriage. But this fact did not exist at the time of the marriage, so no mistake actually occurred at that time. Consequently, the commentators do not agree about how to define this case: as an implicit condition, as a kind of mistaken transaction, or as a combination of both: (a) a mistake regarding the "facts" that obtained at the time of the marriage, i.e., a mistake regarding the possibility of a particular future occurrence; and (b) an implicit condition in regard to the later actual occurrence of that fact.

Beyond the conceptual discussion, these three concepts share one common function: nullifying the marriage. In some cases – and *get* refusal is a typical one – halakhic authorities seek a solution which will void the marriage without a *get* or *ḥalitsah*. The formal halakhic approach which is used varies from case to case. Sometimes two contradictory arguments can be used even in the same case (as by Rabbi Feinstein above), but the goal is identical.

But discovering the three concepts and finding their legitimation in the talmudic literature and the *poskim* is not the end of the quest for a solution. Although there is a halakhic basis for them, the move from theory to practice is not always an easy one. *Kiddushei taʻut* and *umdena* were accepted in practice by some *poskim*, but were rejected in practice by others, and this seems to be a common view in the rabbinical courts, at least in Israel.[409] With regard to conditional marriage, the rejection is almost total. It is not used today at all (maybe only in private, rare cases), although it is sometimes discussed theoretically. Nevertheless, as I have shown, in its implicit appearance – as the basis for *umdena* according to some views – we do find a use of conditional marriage, both in theory and in practice.

The three concepts here discussed reflect (in different measures) a declarative annulment of the marriage. The court here reveals (sometimes indeed fictionally) the intention of the parties and on this basis defines the marriage as annulled. The

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[409] Cf. Bass and Henkin, *supra*, n.333.

same outcome, i.e. annulling the marriage, can be achieved in a different way: by a constitutive annulment of the court, based on the talmudic maxim that "everyone who betroths does so subject to the consent of the Rabbis, and the Rabbis annul his betrothal" (כל דמקדש אדעתא דרבנן מקדש ואפקעינהו רבנן לקידושין מיניה). An explicit, constitutive, *hafka'at kiddushin* is the ultimate means of voiding marriage without a *get* in exceptional cases. Yet, as discussed in previous chapters, the concept of *hafka'at kiddushin* is much more radical from a halakhic point of view, and its application, both in theory and practice, is largely disputed since the *Rishonim* to our days.[410] The previous discussion therefore opens another route for annulling marriage, not in every case, but when the marriage developed into an unsustainable situation, in which the wife might claim that on this assumption she did not get married (*ada'ata dehakhi lo kidshah nafshah*).

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[410] See *supra*, text at nn.317-323.

Chapter Eight

From Theory to Practice: Will and Ability

8.1   The Pluralistic Nature of the (Normal) Halakhic Discourse

Halakhic discourse is characterized by an internal pluralism: in spite of the numerous controversies, this legal system recognizes the significance and value of opposing views. The basis for this approach can already be found in the talmudic literature, which affords theoretical, normative, and practical legitimization to a diverse spectrum of positions.

On the theoretical (or, may we say, theological) level, the pluralistic view is anchored in such statements as "these and those are the words of the Living God",[411] which imply that there may be a number of equally legitimate interpretive positions.[412] This view is linked to, and even based on, a pluralistic hermeneutical attitude, which posits multiple possible interpretations of the texts of the Torah; the classical formulation is that there are "seventy faces to the Torah".[413] The pluralistic approach is also grounded on an understanding of the hermeneutical process as a dynamic and creative one, which ascribes an essential role to the Sages in the process of interpreting the Torah, which was given "as wheat, to bring forth from it fine sifted flour".[414]

In legal practice, the Sages afford validity to minority and rejected views in certain circumstances, at least after-the-fact (*bedi'avad*) or in emergency situations (*bishe'at hadeḥak*).[415] The coexistence of different halakhic approaches was legitimized by the Sages in their practice of recognizing the particular halakhic

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[411] BT Eruvin, 13b.

[412] This position is not the only view. We see in the talmudic literature the tension between the view expressed in "these and those are the words of the Living God" and those emphasizing the importance of halakhic traditions, with its consequent difficulty in recognizing opposing opinions. Nonetheless, the dominant trend is to acknowledge the authority of the expositions of the Sages. See BT Bava Metsia, 59b ("it [the Torah] is not in Heaven"; לא בשמים היא), a statement which may legitimate a range of views (cf. Statman, *Autonomy*, 639-662). See also Sagi, *The Open Canon*, 1-7. This conclusion is supported by the two additional aspects, normative and practical, described *infra*, text at nn.415-417.

[413] BT Shabbat, 88b. On the term "seventy faces to the Torah", see Mack, *Shiv'im Panim*, 449.

[414] *Seder Eliyahu Zutta*, 2 (ed. Ish-Shalom) 172.

[415] See, e.g., BT Berakhot, 8b-9a ("R. Shimon is worthy [i.e., sufficiently authoritative] to rely upon in a case of emergency").

authority of the local community. Sometimes local customs that went against the mainstream view were legitimated and even encouraged by the Sages, as local communities followed their leader, as shown by this passage:[416]

> The Sages taught: In R. Eliezer's locality they would cut timber to make charcoal for making iron on the Sabbath. In the locality of R. Yoseh the Galilean they would eat the flesh of fowl with milk [both of which are prohibited by normative Jewish law] [...]

> R. Isaac said: There was one town in the Land of Israel where they followed R. Eliezer, and they died at the proper time. Moreover, the wicked authorities once issued a decree against Israel concerning circumcision, but did not decree this against that town.

From a practical point of view, the Sages were capable of bridging the immense legal gulfs between the opposing views. This commitment to pluralism is sharply reflected in the mishnaic statement that despite deep controversies in matters of marriage and divorce, "[the men of] the House of Shammai did not abstain from marrying women of the House of Hillel, nor did [the men of] the House of Hillel abstain from marrying women from the House of Shammai".[417]

These talmudic foundations find practical expression in post-talmudic Jewish law.[418] In the consciousness of the rabbis, the statement that "these and those are the words of the Living God" has become a guiding principle which reflects the essence of the *halakhah* and the nature of halakhic deliberations. Many rabbis have even invoked extreme pluralistic positions, holding that all positions expressed in halakhic discourse are equal, reflecting halakhic truth (or halakhic truths).[419] Conceptually rather than practically, however, others take a monistic position that does not recognize a multiplicity of halakhic truths, but strives for one halakhic

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[416] BT Shabbat, 130a.

[417] M *Yevamot* 1:4. It is noteworthy that the talmudic interpretation of the mishnaic statement limited its pluralistic meaning. According to the Talmud (BT Yevamot, 13b-16a), the Houses did not abstain from marrying women from the other's House in general, but they did abstain from marrying each other's women if they were the subject of a dispute between the Houses, and they notified each other about such women. The Houses, according to the Talmud, respected the other's view, which they regarded as legitimate – as may be expected following a pluralistic approach – although they did not adopt it for themselves. In fact, there might be a difference on this issue between the Babylonian Talmud and the Palestinian Talmud, where the Babylonian Talmud reflects a more pluralistic attitude, although "The Bavli, like the Yerushalmi, is not willing to entertain the possibility that they would put tolerance above risking *mamzerut*": see Hidary, *Legal Pluralism*, 213, and cf. Levine, *Review*.

[418] See Ben Menahem et al., *Hamaḥloket*, Vol. 2, 855-964.

[419] Sagi, *The Open Canon*, 67-107. Alongside recognition of the authority of diverse positions, it is necessary for practical reasons to decide that a particular position is the law, a decision left to the rabbis (see *ibid.* at 71-87). The significance of internal pluralism from the point of view of halakhic decision-making is that it justifies recognition of the possibility of change in the law from accepted practice (*ibid.*, at 93-97; M Eduyot 1:4-6).

verity.[420] Yet even for those adhering to the monistic view, halakhic truth is unknown and can only be revealed by means of halakhic discourse, using a framework of equality of interpretation. Thus, even according to the monistic view, halakhic discourse is necessarily pluralistic, though its objective – admittedly an ideal – is monistic.[421]

The pluralistic nature of Jewish law in practice is well-reflected in the extremely influential Jewish law codex compiled in the past half-millennium, the sixteenth-century *Shulḥan Arukh* by R. Yosef Karo, together with the glosses by R. Moses Isserles (*Rema*).[422] The code does not produce one single ruling on all specific issues; rather, it is often possible to derive differing legal rulings from this code, resting on differing views in Karo's core rulings and Isserles' dissenting addenda. The codex and its interpretations suggest that all are valid and legitimate, reflecting the nature of the dispute as "the words of the Living God".[423]

8.2   Legitimizing Solutions to the Problem of '*Iggun*

Creative solutions for new problems are an integral part of the world of Jewish law. Such solutions are based upon an interpretation of halakhic sources viewed in the light of the contemporary situation. As an example of how the problem of the *agunah* was dealt with in a different historical period, fifteenth-century Ashkenazic communities began to add a stipulation to the betrothal ceremony that would prevent the bride from becoming an *agunah*, should she become subject to the levirate bond but the brother-in-law is unable or unwilling to release her (by performing *ḥalitsah*). In this case, the rabbis of Ashkenaz interpreted the relevant talmudic sources as permitting a stipulation that – under certain circumstances – retroactively annuls the marriage.[424]

Halakhic controversies, at times consequential, intense and acrimonious, are also quite routine, and this is the nature of *halakhah* since its inception. It is also natural that novel ideas deriving from halakhic sources will encounter some type of opposition. Indeed, this Ashkenazic stipulation permitting retroactive annulment

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[420] Sagi, *ibid.*, 11-65.

[421] This is "weak pluralism" as defined by Sagi, *ibid.*, at 185-186.

[422] See Elon, *Jewish Law*, ch.36.

[423] The pluralistic view of the *halakhah*, here justified from a theological viewpoint, requires a hermeneutical justification as well. See Westreich, *Gatekeepers*, section II, text at notes 58-65.

[424] *Shut Terumat HaDeshen*, 223; Rema, *Even Ha'Ezer* 157; *idem.*, *Darkhei Moshe*, *Even Ha'Ezer*, 157:5. On this issue see *supra*, text at notes 366-373.

was greeted with criticism (for example, by R. Yosef Karo).[425] Nonetheless, for many years, numerous Jewish communities adopted it in practice, although its use has nearly faded into history.[426]

Similarly, throughout the history of Jewish law, the rabbis have disputed the nature of marriage annulment and their authority to employ it in practice. Most of these deliberations up to the present day focus upon cases of marriage improperly performed or not in accordance with community regulations (triggering what we termed "immediate annulment"). In spite of the profound halakhic debates on the propriety of these annulments, Jewish communities have still passed marriage annulment regulations relating to such cases, especially in the modern age with the loss of Jewish communal and judicial autonomy and limitations placed upon the ability of the rabbis to act by alternative methods.[427]

Today's *agunah* problem is no less severe and no less may be regarded as an emergency situation, or at least as a one of *she'at hadeḥak*. These concepts have halakhic implications, mainly by legitimizing lenient views which in our case may support the use of solutions to the problem of the *agunot*, despite the usual tendency towards stringency in matters of marriage and divorce, as discussed at length in the Agunah Research Unit's analysis of the *agunah* problem.[428] The above study of the pluralistic nature of Jewish Law strengthens this conclusion.

However, it is not unusual to encounter views that object to particular solutions (and sometimes to *any* solution) to the *agunah* problem. Interestingly, the opponents may sometimes accept these very solutions in practice, but not for the *agunot* themselves. For example, some critics of the marriage annulment proposal for *agunot* accept it, at least on a *post factum* level, to prevent a person's stigmatization as a *mamzer*.[429] This solution was first suggested (in theory, rather than for practical use) by Rabbi Shalom Mordekhai ben Moses Shwadron (Maharsham) at the end of the 19th century (known as *Get Maharsham*).[430] Yet the

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[425] See R. Yosef Karo, *Bet Yosef*, *Even Ha'Ezer* 157, s.v. כתוב בתרומת הדשן; *supra*, note 367.

[426] Freimann, *Seder Kiddushin*, 386-388.

[427] Abraham H. Freimann assembled most of the material in his book, *Seder Kiddushin*. The modern period is discussed at 310-345; as Freimann states (at 345): "what internal pressure did not accomplish, external pressure did [...] [W]ithin the period of about a hundred years (1804-1901) seven regulations annulling illegally performed marriages (in accordance with state law) were passed and practiced in various countries, including Italy and France, Algeria and Egypt".

[428] See mainly Jackson, *Agunah*, 44-83.

[429] Rabbi David Malka, a severe critic of the marriage annulment proposal on behalf of *agunot*, admits that in extreme cases, to prevent *mamzerut*, rabbinical courts use marriage annulment. See Malka, *Ein Hafka'at Kiddushin*, end of second section; Westreich, *Gatekeepers*, Section III.

[430] Preventing *mamzerut* using marriage annulment was mentioned quite a few times by Rishonim and Aḥaronim (see, e.g., Tosafot, Gittin, 33a, s.v. ואפקעינהו) in the context of the talmudic messenger

exegetical basis for the use of this solution for *mamzerut* is highly untenable.[431] In fact, the *mamzerut* solution is an extremely novel view and from some aspects it is easier to apply marriage annulment to solve the problem of an *agunah* than to prevent *mamzerut*.[432] Truly, Jewish law considers releasing a married woman from her marital bond to be a very serious matter, which, if not performed according to the *halakhah*, may lead to promiscuity and *mamzerut*. Therefore, the halakhic authorities are discouraged from following any innovative routes for terminating marriage other than by a writ of divorce, while employing these same avenues to prevent *mamzerut* is legitimate and encouraged. Yet, the legal construction is quite similar, and, as mentioned, from a purely exegetical point of view, is even easier to apply it to *agunot*. Nevertheless, the option of marriage annulment for *agunot* has been forcefully rejected by the opponents, although some acceptance, at least for emergency cases or on a *post factum* level (i.e. stating that if an annulment has been granted it would be recognized "after the fact", even though they might not have granted one had the case been presented to them earlier), could have been expected. What, then, might explain this hostile reaction?

Elsewhere I have discussed the debate over marriage annulment, identifying three different levels which characterize it: hermeneutical, political and sociological.[433] Here, however, I limit myself to discussion of one central aspect, which may clarify the wider objections of any of the above solutions to the problem of *agunot*. This aspect is the ideological aspect, i.e. whether Jewish Law recognizes that women have a right to divorce (and, if so, in what circumstances). For if the answer to that question is negative, we do not have a problem in the first place.

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case (*supra*, text at nn.173-175, fifth Talmudic case). Following theses sources Maharsham proposed a theoretical solution by deliberately simulating such circumstances: see *Shut Maharsham*, Part 1, 9, and discussion in Jackson, *Agunah*, 227-230 (§§5.23-24).

[431] See, e.g., Auerbach, *Afke'inhu*; Shoḥetman, *Hafka'at Kiddushin*.

[432] The issue is quite complex, and requires an intensive discussion of the Talmudic sources. In brief, marriage annulment to prevent mamzerut is based on the view of Rabban Shimon ben Gamliel (fifth Talmudic case, *supra*, text at nn.173-175), but according to important halakhic decisors (presumably including Maimonides), the law was determined according to his disputant, Rabbi Judah haNasi. The supporters of marriage annulment to prevent *mamzerut* use innovative interpretations in order to ascribe the concept of annulment to R. Judah haNasi as well. On the other hand, marriage annulment on behalf of *agunot* is proposed to be based on an explicit enactment, one not necessarily linked to the rejected view of Rabban Shimon ben Gamliel.

[433] Westreich, *Annulment*, section IV.

Chapter Nine

Who is an *Agunah*?

9.1   Introduction

According to a statement released by the Rabbinical Courts' Administration (26.6.2007), the number chained wives was 180 and of chained husbands 190.[434] On the other hand, according to research conducted by Israeli women's organizations and presented to a special meeting of the Israeli Parliament Commission of the Advancement of the Status of Women, there are around 100,000 chained wives (23.3.2005).[435]

Surely, the gap between these two countings is not merely statistical. Rather, it reflects a deep conflict over the definitions of *get* refusal and *aginut*: a wide definition according to women's organizations on the one hand; a narrow definition according to the Israeli rabbinical courts on the other. This reflects an ideological conflict on the right to divorce, which directly influences the way each side views the *agunah* problem. Bridging the gap would not only accord recognition to many chained spouses (mainly chained wives), but would also legitimate the use of various solutions, as discussed in the previous chapter.

In the current chapter, I discuss the deep, often emotional, debate surrounding the right to divorce, which, in other words, is the disagreement between those who favour a (limited version of) no-fault divorce in cases of irretrievable breakdown of marriage, and those who regard it as invalid under Jewish law. Some claim that this is a debate between a traditional Jewish approach on the one hand and a modern liberal secular approach on the other. But this would be wrong: no fault divorce has a stable basis in classical Jewish law sources, as is recognised by some contemporary dayanim. Nevertheless, in current rabbinical court decisions it has become the subject of keen debate: there is also a significant school of rabbinical judges which rejects any such right to divorce, and thus opposes compulsion of divorce (or other solutions) in such cases. In what follows I analyze the various legal and hermeneutic methods used in order to establish the view that no-fault divorce has no basis in or validity under Jewish law.

There are several possible explanations of the roots of this debate. An important

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[434] See http://www.rbc.gov.il/statistics/2007/1.doc.

[435] See http://www.knesset.gov.il/protocols/data/html/maamad/2005-03-23.html.

one is political. Israeli family law is based on a unique system, which gives jurisdiction either to rabbinical or civil courts, and sometimes to both. As a result, the system is characterized by a contest (or race) for jurisdiction: an implicit or explicit competition between the two institutions to expand their authority in matters of family law (even though jurisdiction in divorce itself is exclusive to the rabbinical courts).[436] However, I argue that any such political explanation is not sufficient, and therefore suggest a supplementary ideological reason.[437] I argue that some decisions of the school that opposes irretrievable breakdown of marriage as a ground for divorce are based on a deep ideological rejection of this approach. This rejection is absolute. It rests on the assertion that divorce for "irretrievable breakdown" belongs to "the laws of the nations"; that is, that it arises from non-Jewish sources and lacks roots in Jewish law. This argument is incorrect. But it reveals the ideological nature of the controversy regarding the right to divorce.

9.2   No-Fault Divorce?

A prominent halakhic authority, Rabbenu Yeroḥam (Provence-Spain, fourteenth century), wrote:[438]

> My teacher Rabbi Abraham ben Ishmael wrote that […] a woman who says: "I do not desire him, [I demand that] he will give me a writ of divorce and *ketubbah*", and he says: "I also do not want you, but I do not want to give you a writ of divorce", it seems that we do not rule her to be a rebellious wife [who is subject to social and financial sanctions], so that she would lose her basic *ketubbah* payment and dowry. Rather, we have her wait twelve months for her divorce, [in case] perhaps they will be reconciled; and after a year we coerce him to divorce her and she loses the addition [that is, extra obligations of the husband in the *ketubbah*] and all that he gave her from his own [property], since he did not give it to her on the understanding that she takes it and divorces [lit., *goes forth*].

According to Rabbenu Yeroḥam, if both spouses desire to divorce, but the husband refuses to give a writ of divorce (possibly because he wishes to impose some financial conditions),[439] after 12 months (during which time they might reconcile) he will be coerced to divorce his wife. This view is of extreme importance: even

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[436]   See Rosen-Zvi, *Forum Shopping*, 347-396; Westreich, *The Right to Divorce*, 184-187. The conflict, however, is not necessary: see Daichovsky, *The Rabbinical Courts*; Shifman, *Safa Datit*.

[437]   Pinḥas Shifman has indicated the importance of considering both of these two aspects – the political and the ideological – as each plays a significant role in matters of family law. See Shifman, *HaHalakhah*, 27-46, and see also Shifman, *Safa Datit*, 423-425.

[438]   Yeroḥam ben Meshulam, *Mesharim*, *Netiv* 23:8 (Venice, 1553), vol. 3, 60b–61.

[439]   Unfortunately, this is common today: see, e.g., Rabbinical Court (Ariel), file no. 057140493-21-1 (12.3.2006) (*HaDin vehaDayan* 18 [2008], 6–7).

were there no specific cause for divorce, the husband would under certain circumstances be coerced to divorce his wife. This ruling is hereafter referred to as the "Yeroḥam Ruling".

Rabbenu Yeroḥam does not speak explicitly about the state of the marriage. We may, however, reasonably understand his ruling as based on marital breakdown. We might therefore conclude that, according to Rabbenu Yeroḥam, in a case of an irretrievable breakdown of marriage, which is reflected in the failure to reconcile over the course of 12 months, a divorce shall be executed.

A more explicit source that takes a similar view is a ruling by R. Ḥayyim Palaggi (Izmir, nineteenth century; sometimes rendered "Palache"), who rules as follows:[440]

> Whenever it seems to the rabbinical court that they are separated for a long time and cannot reconcile, contrary [despite efforts to make peace between them (discussed earlier in the responsum)]: great efforts must be taken to separate them one from the other and to issue a writ of divorce, so that they would not commit many sins, both the husband and the wife.
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> And I give the measure of time for this: if a dispute were to arise between husband and wife, they failed to make peace between themselves, and there is no hope for them, they are to wait a period of 18 months. And if […] it appears to the court that there is no hope of making peace between them, [the court] is to separate the couple, and coerce them to grant a writ of divorce until they would say "I am willing" [i.e., to give the writ of divorce].[441]

Accordingly, after 18 months of a court-imposed reconciliation period following the breakdown, the court is obliged to coerce the couple to divorce. Needless to say, in such a case the court has the authority to impose sanctions in order to compel the recalcitrant spouse to consent to the divorce (as Palaggi explicitly writes: "and coerce them to grant a writ of divorce").

This ruling has been widely discussed, and is hereafter referred to as the "Palaggi Ruling". It has been endorsed by several halakhic decisors,[442] and indeed rabbinical courts in Israel often adopt similar views.[443]

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[440] Ḥayyim Palaggi, *Ḥayyim veShalom* 2, *Even haʿEzer* 112 (Izmir, 5632 [1872]), folio 148b.

[441] Coercion is effected by imposing sanctions upon the recalcitrant spouse, until she or he says "I am willing [to be given/give a writ of divorce]." See Maimonides, *Mishneh Torah*, *Gerushin* 2:20.

[442] The influential and leading twentieth-century American *posek*, R. Moshe Feinstein, seems to accept this view: see *Iggrot Moshe*, Vol. 8, *Yoreh Deʿah* 4:15. For a discussion and further references to modern Jewish law decisors: see Broyde, *Marriage*, 23, 25-28.

[443] Rabbinical courts take this approach not only when the wife refuses to divorce but also when it is the husband who is recalcitrant, despite the possible fear of *get meʿuseh* in an unlawful compulsion. See, e.g., High Rabbinical Court, file no. 028127447-21-1 (1.4.2008) (*HaDin vehaDayan* 24 [2010], 6);

The Yeroḥam Ruling, as well as the Palaggi Ruling, are far removed from the severely restrictive doctrinal pattern as regards the wife's right to divorce under the main sources of talmudic law. However, talmudic law itself – in the case of the rebellious wife (*moredet*) – approves unilateral divorce, as we have seen in previous chapters.[444] Throughout the history of Jewish law several traditions have expanded the legitimation of unilateral no-fault divorce, e.g. the Genizah tradition and the geonic tradition,[445] and both Yeroḥam and Palaggi may be regarded as branches of those views. The Yeroḥam and Palaggi rulings are however important (compared to the earlier traditions), since in some sense they have been accepted as authoritative for modern halakhic discourse, either as requiring full acceptance or at least as challenging us to engage in sophisticated hermeneutical tactics, as discussed below.

The rationale behind these views is that the formal status of marriage has an instrumental object: to be the necessary condition for a stable marital relationship. When such a relationship does not exist, there is no justification for forcing the spouses to be formally bound one to the other. R. Shlomo Daichovsky, a former High Rabbinical Court judge, describes this rationale thus:[446]

> The wife is not entitled to continue residing in the marital home[447] […] in a case of death of marriage, no matter whose fault it is. We do not deal with "resurrection of the dead", and there is no reason to perform "artificial respiration" on dead marriages.

Rabbinical Court (Tel Aviv), file no. 8564-21-1 (22.10.2003); Rabbinical Court (Tel Aviv), file no. 307426676-21-1 (21.12.2005) (*HaDin vehaDayan* 18 [2008], 3).

[444] See *supra*, Chapter One. Regarding the relations between the sources see *ibid.*, text at nn.93-96. Indeed, some additional support for the Yeroḥam and Palaggi rulings may be found in the law of the rebellious wife. Although the view that approved coerced divorce in the case of a rebellious wife was rejected by later Jewish law decisors following Rabbenu Tam's criticism (see *ibid.*), some rabbinical courts rule that a husband is obliged to divorce his rebellious wife, especially when there is an apparent justification for the wife's claim that her husband is repulsive to her (see, e.g., High Rabbinical Court, file no. 011926961-21-1 [23.10.2007] [*HaDin vehaDayan* 18 [2008], 3). This ruling implies that while the husband may not be directly coerced, indirect measures may be applied, such as social sanctions, the denial of a driver's license, or a ban on leaving the country. Israeli Rabbinical courts derive their authority to apply these and other measures from the Rabbinical Courts Law (Enforcement of Divorce Decrees) 5755-1995.

[445] *Supra*, Chapter Three.

[446] High Rabbinical Court, file no. 21-02887447 *Niago v. Niago* (24.10.02). The verdict was not published, but it was partly cited in Daichovsky, *Batei Hadin*, 283 n.463. This statement was cited a few times by civil judges, who expressed their agreement; see, e.g., Judge Yehudah Granit in Family Court (Tel Aviv), file no. 94740/00 K. Sh. v. K. S. (3.3.2003).

[447] According to Jewish law, the wife is entitled during the marriage to a pleasant home, which usually means that she cannot be forced to leave the marital home, and that, in practice, the couple's home cannot be sold without her consent. Rabbi Shlomo Daichovsky argues that in a case of "death of marriage" the wife would not be entitled to continued residence in the marital home, which could be sold without her consent (and the proceeds distributed between the spouses), even though the formal

Western legal systems have broadly adopted a liberal conception of marriage and have provided for "no-fault" divorce.[448] This approach is applied in several systems in an extreme way, according to which any demand for divorce is accepted, without taking into consideration broader elements or other contextual considerations. There is also, however, significant support for a more moderate conception, which involves social and communal considerations, in addition to the liberal basic right of freedom.[449] This view is consistent with a "death of marriage" divorce model, similar to that of the halakhic decisors and rabbinical judges discussed above.[450]

Yet, a large group of rabbinical judges rejects the "death of marriage" divorce model. Thus, for example, in one case of a recalcitrant wife, Rabbis A. Sherman and H. Izirer wrote:[451]

> Rabbi H. Palaggi's ruling does not create an obligation of the wife [to accept] a writ of divorce, and [does not result in her] losing her alimony. It is a ruling regarding the obligation of the rabbinical court to act for divorce, and possibly also an obligation of the couple to heed the court, but there is no obligation on the wife vis-à-vis the husband [to accept a writ of divorce].

The judges use here the concept of *obligation* with various meanings. First, in "an obligation […] to accept a writ of divorce", it refers to an enforceable legal requirement. According to the judges' interpretation, the Palaggi Ruling imposes no such obligation. Second, in an "obligation of the rabbinical court", it means an instruction, or possibly a word of guidance, for the court, without any legal implications for the spouses.[452] Third, in "an obligation of the couple", it refers to

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divorce had not yet taken place. His view is disputed by other panels of judges in the High Rabbinical Court. See Rabbinical Court (Tel Aviv), file no. 8801-21-1 (24.6.2009) (available at www.rbc.gov.il/judgements/docs/400.doc). Among those challenging R. Daichovsky's view are Rabbis Sherman and Izirer, who are the leading opponents of the "death of marriage" model (see text at n.451, *infra*). See High Rabbinical Court, file no. 007998479-24-1 (29.10.2007) (*HaDin vehaDayan* 21 [2009], 8–9).

[448] See Wardle, *International Marriage*, 511-512.

[449] See Lifshitz, *The Liberal Transformation*, 28-44.

[450] Israeli civil law has recently adopted this approach regarding property distribution, and it is reflected clearly in the 2009 amendment of the Spouses (Property Relations) Law, 5733-1973, 27 LSI 313. Nonetheless, executing divorce (rather than the monetary aspects that are ancillary to divorce) is under the exclusive jurisdiction of the rabbinical courts.

[451] High Rabbinical Court, file no. 059133397-21-1 (25.12.2007) (*HaDin vehaDayan* 18 [2008], 11).

[452] In another verdict (High Rabbinical Court, file no. 034524637-21-1 [4.11.2007] [*HaDin vehaDayan* 18 (2008), 8–9]), issued a few weeks before the verdict cited in previous note, the High Rabbinical Court (Rabbis Sherman [chairman], Hashay, and Algrabli) characterized the Palaggi Ruling as "an advice" (עצה) to the court lacking authority to coerce divorce. This characterization is very similar to that suggested by the phrase "an obligation of the rabbinical court".

an obligation which cannot be legally enforced and which has no legal implications; perhaps it alludes to a duty of an educational or religious[453] nature to obey the rabbinical court's instructions. In "an obligation on the wife vis-à-vis the husband", the writers finally return to the first meaning, the legal duty to divorce, and emphasize once again that none is imposed.

The judges' interpretation empties the Palaggi Ruling of any effective legal implication. If it imposes no legal duty, but only guidance for the court or for the couple, the ruling lacks real enforcement power, and possesses only declarative importance.

Similarly, the Yeroḥam Ruling, that if both spouses do not desire each other but the husband still refuses to formally divorce his wife he should be compelled to divorce, receives a new limiting interpretation, according to which the "right" under discussion, the wife's right to divorce, is significantly limited. In several rulings rabbinical judges argue that Rabbenu Yeroḥam distinguishes between cases in which both spouses desire divorce owing to an objective reason and those in which one spouse consents only as a result of the other's attitudes.[454] The Yeroḥam Ruling is interpreted as referring only to the former case, not the latter. The reasoning is that in the latter case the consenting spouse does not really want the divorce, though he or she had at one time agreed to it owing to the impossible situation in which he or she had been placed. (For example, when the wife had been insisting upon divorcing for a long time, and the husband finally agreed: we may surmise that his agreement resulted from his wife's not leaving him any real choice.) In the last group of cases, Rabbenu Yeroḥam would not allow the coercing of the husband to divorce his wife. Or so it is argued.

This distinction is not clear. A marriage breakdown is usually the result of continuing bad relationships between the couple. Applying the reasoning described above, a recalcitrant spouse could avoid the compulsion of a divorce in almost any instance by claiming that his or her agreement was the result of the other spouse's behaviour. The group of cases in which the coercion could be applied would be negligible.

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[453] The religious nature of this duty is made explicit in the other High Rabbinical Court's decision (*supra, n.*452), which identifies the Palaggi Ruling as "based on the principle of 'a compulsion to fulfill the commandments of the Torah'" (מדין כופין על המצוות; an expression which refers to a religious duty).

[454] See, e.g., Rabbinical Court (Tel Aviv), file no. 023559859-21-1 (11.6.2007) (*HaDin vehaDayan* 18 [2008], 4–5); High Rabbinical Court, file no. 323397786-22-1 (8.8.2007) (*HaDin vehaDayan* 18 [2008], 6). The judges in the High Rabbinical Court were, again, Rabbis Sherman and Izirer, here together with Rabbi N. Shaynin.

9.3   The Right to Impose Conditions on Divorce

The strict approach regarding no fault divorce goes hand-in-hand with a strict approach in a related matter – the husband's right to impose conditions upon divorce, a right which in fact gives him the legal ability to evade divorce. According to this view, even when the husband is required to agree to the divorce, he is entitled to stipulate conditions, for example, relating to money and property[455] and the custody or education of the children.[456] Such doctrines limited the effective scope of the wife's (apparent) entitlement to divorce.

Some rabbinical rulings (mainly from recent years)[457] accept in principle the right of the husband to impose such conditions. The basis of these rulings is the following statement by one of the leading sixteenth-century halakhic authorities, R. Shmuel ben Moses de Medina of Salonika (*Maharashdam*):[458]

> [T]here is no doubt, that even in those cases in which the Sages ruled in the Mishnah […] "and these [men] are coerced [to divorce]: one who is affected with boils, etc.", they say that he is coerced to divorce only when he does not want to divorce at all. Nevertheless, if he is desirous of divorcing, but wishes to impose some condition in the writ of divorce, in this case they surely did not say that [the court] coerces him to divorce unconditionally.

According to *Maharashdam,* even though coerced divorce is legitimate in certain cases, the husband may impose conditions. Divorce should not be coerced unless the conditions were fulfilled.

Margins have an important purpose: being out of the mainstream, the margin assists us in defining the centre. This approach is valid in sociological research,[459] as well as in the humanities. It is also helpful in legal theory: legal concepts and principles may be better defined and better understood by examining marginal cases. For our purposes, the margin sheds light on the fundamental question of the right to divorce in Jewish law.

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[455] E.g., he might stipulate that the property be divided according to the ruling of the rabbinical court, rather than in a civil family court.

[456] For example, he might stipulate that the children be given an ultra-Orthodox education, rather than a modern one. In this instance (and in the previous one) a rabbinical court, as a religious tribunal, might see the stipulation as legitimate owing to the husband's beliefs.

[457] See *infra,* notes 460-462, and accompanying text.

[458] Shmuel ben Moses de Medina, *Shut Maharashdam, Even ha'Ezer* 41 (1959, photocopy ed. of Lvov [Lemberg] 1862 ed., folio 22b-23).

[459] See Durkheim, *Division of Labour*, 291: "[T]he study of deviant forms will allow us to determine better the conditions for the existence of the normal state." See also Durkheim, *Rules*, 47-75 at ch. 3, "Rules for Distinguishing between the Normal and the Pathological".

Maharashdam's case is a marginal one, owing to the fact that entitlement to coerced divorce is not disputed. However, we have now seen that even in such a case, the husband can evade his obligation to divorce his wife. The right to divorce, accordingly, is as a practical matter quite limited, and would be difficult to exercise. We may take this a step further. If the husband can avoid divorce even when he is obliged to do so owing to specific faults, it is unlikely that a general right to divorce exists in no-fault cases. The wife therefore would not be entitled to divorce in such cases.

Maharashdam's view is a minority view amongst decisors.[460] The paucity of precedent can be surmised from *Maharashdam*'s own words.[461] After presenting his innovative decision, *Maharashdam* tells us about his quest for finding some support for his unique ruling ("I wonder whether I could find support for what I wrote"). He admits that his view is unusual amongst halakhic decisors ("up to now I have not found any place supporting this"), and expresses great satisfaction when finally he finds some support for it ("I saw and rejoiced"). The support, it should be noted, is a deduction from an earlier authority, which is not explicit and not decisive, and, anyway – it is still a single view among other halakhic authorities.

Moreover, even according to *Maharashdam,* there is a limit to the sort of condition that a husband may impose. *Maharashdam* discusses two extreme conditions: one is the sort of condition that is almost impossible to fulfill and the other the sort that can easily be fulfilled. The first is not accepted, while the second is. But what is the status of the majority of conditions, which are possible but not easy to fulfill (for example, monetary conditions)?

Some writers have argued that even according to *Maharashdam* only a minor condition, which can easily be fulfilled, should be accepted.[462] This view is supported by the context of *Maharashdam*'s response. That case involved not a marriage formed in the usual way, but rather a brother-in-law who refused to allow the *ḥalitsah* ceremony except on condition that the widow would not thereafter marry her uncle. (The uncle was already married to one of the brother-in-law's relatives, and he feared that if the *ḥalitsah* took place, the uncle would divorce his first wife and marry the widowed niece.) Fulfilling the brother-in-law's condition may be defined as easy (and might even be justified as intended to protect his relative).

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[460] See Daichovsky*, Ba'al Hamatne*, 156-159; Bass, *Tena'im*, 149-162; Jackson, *Agunah*, 16-18.

[461] *Shut Maharashdam*, *supra,* n.458.

[462] Daichovsky, *Ba'al Hamatne*. This opinion (or even a complete rejection of *Maharashdam*'s view) seems to have been reflected in the common practice among rabbinical courts until the last decade or two. See Bass, *Tena'im.* Rabbi Daichovsky, who served as a rabbinical judge for more than 30 years, including 20 years on the High Rabbinical Court, has expressed himself as having the same impression: see Daichovsky, *Batei Hadin*, 19-27.

Nevertheless, some rabbinical courts adopt *Maharashdam*'s view, not only for minor conditions, but also for more demanding ones. Those courts apply *Maharashdam*'s ruling to conditions regarding matters such as custody and finances, which cannot easily be fulfilled. What stands behind that position?

An important factor in this issue in the Israeli context is the deep conflict over jurisdiction, as well as over substantive matters, between civil and rabbinical legal authorities.[463] Accordingly, some rabbinical courts use Maharashdam's view in order to expand their authority, as in the following decision:[464]

> We have written and proved in several rulings, that even when the husband is obliged to divorce [lit., to give a writ of divorce], if the husband is willing to divorce, but demands to receive the property and rights to which he is entitled by Torah law and the wife refuses, he is not to be obliged to divorce, but rather the obligation [to divorce] should be postponed.

The political explanation seems to be attractive (as may be the nature of this kind of explanation), but it is not completely satisfactory.[465] It misses a strong ideological aspect, which links together the death of marriage conflict and the debate around Maharashdam's view. We shall now analyze this aspect.

9.4   The Motivating Force: Restricting the Right to Divorce

In previous sections we directed attention to the desire behind some rabbinical judges' interpretations to limit the scope of the Yeroḥam and Palaggi Rulings. There is much in common between the devices used to limit these rulings and the device of limiting the right to divorce by authorizing the imposition of conditions on the basis of Maharashdam's view. In each of these instances an apparent right to divorce has been circumvented by one or another legal and hermeneutic method: establishing a new right of the husband (the right to impose conditions) that enables him to evade divorce; interpreting the recalcitrant spouse's duty to divorce as legally nonbinding (in an interpretation of the Palaggi Ruling); or limiting the scope of the cases in which coercion can be applied (in an interpretation of the Yeroḥam Ruling).

Those methods appear to be tightly connected, like two sides of the same coin.

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[463] See *supra*, n.436.

[464] Rabbinical Court (Tel Aviv), file no. 054331665-21-1 (3.7.2008) (*HaDin vehaDayan* 22 [2009], 7).

[465] For an expanded discussion see Westreich, *The Right to Divorce*, 192-195. The political explanation may, however, well clarify other strict rulings of (some) rabbinical courts. A recent and sharp example is the relatively new willingness among rabbinical courts to retroactively cancel a divorce on the ground of mistake when the wife, supported by the civil courts, breaches a divorce agreement that was made in the rabbinical court. See Radzyner, *Get Mut'eh*, 215-229.

In one case,[466] the husband stipulated certain monetary arrangements as a condition to agreeing to divorce his wife. The court accepted the stipulation, justifying its decision on the ground that the Yeroḥam Ruling did not apply because the husband did not really desire the divorce, but agreed only owing to his wife's incessant demands to end the marriage. In this case, limiting the Yeroḥam Ruling had the same object and implication as the expansion of *Maharashdam*'s ruling: namely, it justified conditions stipulated by the husband.

The result of those hermeneutical and legal moves is quite significant. There are several cases that afford a stable basis for a right to divorce, and some of these cases even recognize a limited version of the concept of no-fault divorce, on the basis of the irretrievable breakdown of marriage. In practice, however, this right is significantly limited, and is close to being completely eliminated.

The husband's right to impose conditions on divorce and actually to evade the legal duty to divorce is supported by only a minority, and perhaps only a single view, among the post-talmudic commentators and decisors, but is adopted by several rabbinical courts as binding. Both Rabbi Ḥayyim Palaggi and Rabbenu Yeroḥam legitimize divorce in "death of marriage" cases, but their rulings have been effectively undermined. The rabbinical judges who adopt the restrictive approaches are undoubtedly aware of the fact that they are based on a minority view (*Maharashdam*), as well as on an innovative interpretation of the sources (Palaggi and Rabbenu Yeroḥam). This was cogently expressed by R. Zion Bo'aron, who opposed the restrictive interpretation of the Palaggi Ruling:[467]

> I have reservations about the interpretation of what the distinguished personage of his generation, Rabbi H. Palaggi, wrote, since the interpretation written here is *completely the opposite of what was explicitly stated* in R. H. [Palaggi]'s *Responsa* (and his teaching was cited many times in rabbinical verdicts).

What, then, motivates the restrictive approach? We mentioned above the political motivation of the expansion of *Maharashdam*'s ruling ("forum shopping", with reference to the contest or race for jurisdiction between rabbinical and civil courts).[468] But the political motivation provides only a partial explanation. It clarifies the use of *Maharashdam*'s opinion when this ruling has assisted the ambitions of a rabbinical court in a jurisdictional competition with a civil family

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[466]   Rabbinical Court (Tel Aviv), file no. 023559859-21-1, *supra,* n.454.

[467]   High Rabbinical Court, file no. 059133397-21-1 (25.12.2007) (*HaDin vehaDayan* 18 [2008], 11, emphasis added). R. Bo'aron was in the minority in this case, as well as in other aspects of the "death of marriage" conflict (see *supra,* n.447).

[468]   See *supra*, n.436, and the accompanying text.

court, but it is not sufficient for clarifying a broader right to impose conditions.[469] Moreover, restrictive hermeneutical approaches regarding the Yeroḥam and Palaggi rulings have been applied in cases in which the main question is whether the spouse is entitled to divorce or not, where the opportunity for forum shopping or jurisdictional disputes was slight. Above all, it seems that the political explanation misses a strong ideological aspect behind the right-to-divorce debate.

In what follows we shall therefore examine the ideological aspect of the debate. It should be noted, however, that this is not to say that the political aspect does not play any role in this dispute. Political motives, conscious or unconscious, might be part of the story. The argument here is that the ideological aspect is real and substantive, rather than only rhetorical, and therefore needs to be explored.[470]

The "death of marriage" model sees marriage as a platform for a stable marital relationship. The right to exit marriage is applicable when such a relationship does not exist, as stated by Rabbi Shlomo Daichovsky: "We do not deal with 'resurrection of the dead,' and there is no reason to perform 'artificial respiration' on dead marriages".[471] Those who oppose this point of view see marriage as a durable institution, perhaps due to its religious dimensions, which should be terminated only in very formal and limited cases. Otherwise, it is claimed, "there would be no restraints against this being permitted in any case", i.e., marriage would become too easily terminated upon one spouse's demand.[472]

When the ideological dispute surfaced, the opponents went a step further. In a case of irretrievable breakdown of marriage, while rejecting the right to divorce, Rabbis Sherman and Izirer justified their view with the following trenchant and powerful argument:[473]

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[469] See Bass, *Tena'im*, 151-162.

[470] This suggestion might accord with some moderate critical theories of law, such as Gordon's, according to whom the Critical Legal Studies school "doesn't argue that law is just a mask for privilege and exploitation", but takes seriously doctrinal legal discourse as "deliver[ing] real resources to get some leverage on social change" (Gordon, *Critical Theories*, 653ff.). This view (the "moderate external point of view") has been adopted in Jewish legal scholarship as well: see, e.g., Jackson, *Jewish and Islamic Law*, 109-121.

[471] See *supra,* text at notes 446-448.

[472] See*, e.g.*, High Rabbinical Court, file no. 5727/109 (18.12.1967), *Piskei Din Rabaniyim* 7, 111-113. In that case the High Rabbinical Court accepted a suit for divorce on the basis of the Palaggi Ruling. The court emphasized that the Palaggi Ruling is to be accepted only in exceptional cases, while usually unilateral divorce should be limited.

[473] High Rabbinical Court, file no. 059133397-21-1 (25.12.2007) (*HaDin vehaDayan* 18 [2008], 11). It should be noted that in this case the husband demanded divorce and was refused. The opponents' attitude is therefore not necessarily "patriarchal" (see Shifman, *HaHalakhah*, 3), but rather reflects a fundamental attitude concerning divorce, and a basic view concerning marriage, as described here.

> The approach of "death of marriage" is not based on Torah law or [the laws of] the Sages, but rather on the law of the [non-Jewish] nations regarding civil marriage. … [In those legal systems] there is no need for a cause for divorce; rather, irretrievable breakdown of marriage and "death of marriage" suffice.

The dispute reflected in this passage is acutely ideological. One side accepts divorce in cases of irretrievable marital breakdown. The other side argues that this approach is not halakhic, but rather is influenced by an external point of view, namely, by "the laws of the nations",[474] and presents the strict view as the traditional and authentic Jewish law view of the socio-religious institution of marriage and divorce.

The dispute can now be seen to have a new dimension. It is not a typical halakhic dispute, which focuses on interpretative questions concerning the classic sources. Rather, it is an ideological dispute about the correct image of divorce in Jewish law. While the supporters of the "death of marriage" model present sources that support their view, the opponents totally reject this understanding. According to the latter, this view has no basis in Jewish law, but rather comes from external, civil legal systems, and any apparent support within Jewish law for the "death of marriage" model is innovatively interpreted in a restrictive way.

Had this been a normal halakhic dispute, the opponents of the "death of marriage" model would have considered all the sources, and based their decision on the relevant sources while rejecting the others. In our case, however, the opponents delegitimize the "death of marriage" view, defining it as an external approach, not rooted in Jewish law but rather as based on "the laws of the nations". As we have shown, they do this using several hermeneutic and jurisprudential methods. The alternative to the "death of marriage" model can now, from the opponents' point of view, be presented as the only Jewish law approach.

In reality, however, the strict approach may be no less problematic, not only from a moral point of view (which is recognized by the *halakhah* as an important principle and part of its internal considerations, that is, the need for leniency in cases of *'iggun*), but also from a formal-halakhic point of view (i.e., the fear of breaching the prohibition of *eshet ish*),[475] and might no less threaten the stability of Jewish marriage, as discussed at length by the report of the Agunah Research

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[474] This phrase apparently makes reference to the adoption of no-fault divorce in many legal systems. See *supra,* n.448, and accompanying text.

[475] See, e.g., Cohen, *Kefiyat HaGet*, 195-196, who defines this situation as "the problem of our generation".

Unit.[476] Despite the contrary arguments, then, the "death of marriage" model appears to remain an appropriate proper approach, which lives on in both classical and modern halakhic discourse.

At the beginning of this chapter the question "who is an *agunah*?" was raised. The "death of marriage" conflict here revealed influences the way *get* refusal and *aginut* are defined: while the supporters of death of marriage as a ground for divorce would consider a death of marriage case (where no *get* is given) as a case of '*iggun*, the opponents would object it, using a narrow definition of *aginut*. As claimed above, bridging the gap between these approaches would not only accord recognition to many *agunot*, but would also legitimate the use of the various solutions discussed in this book in order to solve the problem of the *agunah*.

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[476] See Jackson, *Agunah*, chapter one. For further discussion (and rejection) of the argument that the "death of marriage" divorce regime contradicts Jewish law and may threaten the stability of Jewish marriage, see Jackson, *ibid.*, 29-43.

Epilogue

Can we, from a halakhic point of view, use any method in order to solve the *Agunah* problem? Several halakhic options have been discussed in this book: coercion of a *get* in a no-fault-divorce case (on the basis of *moredet ma'is alay*), constitutive marriage annulment (on the basis of *kol demekadesh* – "everyone who betroths does so subject to the consent of the Rabbis") and declarative annulment, using an implied condition or a retroactive assumption of mistaken marriage (on the basis of *ada'ata dehakhi lo kidshah nafshah* – "on this assumption she did not betroth herself"). The analysis has shown a quite stable basis from Talmud to post-talmudic decisors for one or more of these solutions. Yet, their application in practice is disputed, sometimes totally rejected, accompanied by strong emotional reactions.

The question, thus, is not merely a hermeneutical question, whether this or that kind of interpretation is correct or incorrect. Rather, it is an ideological question: do we acknowledge the right of the chained spouse to divorce, even if she (or he) cannot show a classical fault as the basis for the divorce suit. In other words, is this wide range of cases – cases of "death of marriage" which are not necessarily based on a specific fault, but create an unsustainable situation for the spouses – rightly defined as cases of *'iggun*. The question becomes sharper when a formal fault does exist, but the spouse (usually the husband) refuses to participate in the divorce process, and no means can be taken against him – isn't this a case of *'iggun*?

Were these cases to be defined as cases of *'iggun*, we might expect some leniency towards the use of halakhic solutions to the *get* refusal problem. The Talmud already mentions that the Sages were lenient in *agunot* cases (משום עיגונא אקילו בה רבנן),[477] and such leniency was adopted in practice by post-talmudic scholars, accepting sometimes minority views or basing their decisions on evidence which normally was not accepted.[478]

Several possible halakhic routes have been presented in this book, focusing on their talmudic origins and their development in post-talmudic literature. Some (the geonic *moredet* and Palestinian divorce clause) were discussed also historically, by examining their use in practice and the halakhic justifications given for so doing. All this reveals a wide range of possible remedies for current *agunot*. But the use of these solutions in practice still awaits their adoption by today's halakhic authorities.

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[477] BT Yevamot, 88a, and elsewhere.

[478] See, e.g., *Taz*'s discussion on relying on minority views in *she'at hadeḥak*: *Shulḥan Arukh*, *EH* 17:15, and *Taz*, *ibid.*, sub-paragraph 15; and see Jackson, *Agunah*, 50-51 (§2.11).

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