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HAFKA'AT KIDDUSHIN: A REBUTTAL

Rabbi Shlomo Riskin has proposed using the halakhic institution of annulling a marriage as a partial solution to the *aguna* problem. The presentation of the topic is lucid and thorough, but, in my opinion, falls short of justifying his solution.

I.

R. Riskin outlines two types of annulment that are found in the Talmud. The first, not relevant to the most common contemporary *aguna* problem, is a situation in which the marriage was defective from its inception. In one of the two examples found in the Talmud (*Bava Batra* 48b), the woman agreed to marry the man only because of physical coercion. In Jewish law, transactions undertaken as a result of physical duress are (theoretically) deemed valid when fair compensation is given (*ibid.*). If I threaten to harm someone if he does not sell me his field, and he consents because of the coercion (*rotseh ani*), the sale is valid provided that I pay him its full value. The same is assumed with marriage, i.e. that the benefits that accrue to the woman[1] serve as consideration for her forced consent to marry. Nonetheless, the rabbis declared that the marriage is null and void because the marriage process itself was conducted in an outrageous manner. In such a case, no *get* was required because the marriage was never viewed as having gotten off the ground. The most common situation of *aguna*, however, entails a marriage that began quite happily, and may even have existed blissfully for many years, only to break down at a later point, and hence this kind of marital annulment provides no model for a solution of the contemporary problem.

The second model of annulment involves a legitimate marriage that breaks down later. In each of the talmudic precedents (*Ketubot* 3a, *Gittin* 33a, 73a), the husband ordered a *get* for his wife and either handed it to her with an implied stipulation attached (*tenai*), or sent it to her via an

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agent and in the interim changed his mind and attempted to annul the *get*. In each case the *get* was perfectly written but lacked something in its delivery—i.e., written at the behest of the husband but some external factor threatened to invalidate it—and hence the rabbis resorted to a retroactive annulment of the marriage.[2] It is this model of (retroactive) annulment that R. Riskin proposes using when he suggests that we retroactively annul the marriage of a recalcitrant husband who categorically refuses to authorize a *get* after being ordered to do so by a *bet din*. The problem that confronts R. Riskin is that precedent for this kind of annulment exists only when a valid get was ordered (*gitta kol de-hu*), but the contemporary problem he proposes to solve involves those cases where the husband refuses to authorize a *get*. The only clear post-talmudic usage of this type of annulment[3] was the geonic enactment of *ma'is alai*, where the husband was not rightfully obligated to give a *get*, but even there the *Geonim* mandated that the husband be forced to give a *get*. The problem we confront involves a husband who is rightfully required to give a *get* but cannot be persuaded to authorize its writing.

R. Riskin then undertakes an analysis of the second kind of *hafka'at kiddushin*, searching for a model for a *get*-less retroactive annulment. He notes that among the *Rishonim*, there are two basic approaches to the underlying mechanism of this "retroactive annulment." The first is that the original *kiddushin* has an implicit stipulation attached that if such-and-such will happen in the future (e.g. the husband will attempt to annul a *get* which he has already sent by establishing a *bet din* in another location without informing the courier or the wife) then the *kiddushin* will not be valid. In effect then, even though there is a *get* that has been delivered, the husband and wife were never actually married and on a fundamental level the *get* is unnecessary. The second approach adopted by many *Rishonim*, beginning with the *Rashbam*, is that the rabbis did not actually annul the original *kiddushin*, but simply threatened to do so.[4] When faced with the reality that his wife will no longer be his wife, the man decides to forgo his stipulation (*mehilat hatenai)* or forgo his annulment of the *get* (*bittul bittulo)* so that the *get* will be a proper *get* even on the level of *de-oraita*. The incentive for the husband to forgo his rights to annul the *get* is that if the rabbis annul the original marriage it will turn out that the entire coital relationship of the marriage will be *be'ilat zenut*, whereas by releasing his divorce-annulment rights, no such stigma will be attached to his past relationship. According to this second approach, as R. Riskin acknowledges, there is no theoretical precedent for the rabbis annulling a mar-

riage which was proper from the start without a proper *get*. According to the first approach, he argues, we should be able to institute a *hafka'at kiddushin* without any *get* since, in theory, the *get* in the talmudic precedents doesn't actually accomplish anything and we have the two talmudic cases (*Yevamot* and *Bava Batra*) in which no *get* at all was required.

II.

To my mind, there are three serious substantive problems with this approach.

(1) Granting for the moment the premises of the above analysis, there is a large group of major *Rishonim* (Rashbam, Ramban, Rashba, Re'ah) who adopt the second approach to these "retroactive" annulments. In the area of *ishut* there is a long established tendency to be stringent in all elements that touch upon the possibility of a married woman remarrying without a proper *get*, probably due both to the severity of the prohibition of *lo tin'af* and to the potential for *mamzerut*. A brief perusal of the section of *Even ha-Ezer* (154) that deals with the laws of *kefiyat ha-get* demonstrates a very strong bias in favor of stringent minority opinions because of the aforementioned concerns. It is problematic to advocate in this area a solution contrary to what may be the majority opinion of *Rishonim* and adopt an approach that is not explicitly advocated by any *Rishon*, i.e. employing retroactive annulment without a *get*.

(2) On a more fundamental level, even according to those *Rishonim* for whom the *get* is primarily cosmetic, there is no precedent in halakhic literature for a retroactive annulment without a *get*. Rashi, whose position serves as the basis for R. Riskin's proposal, repeatedly states (no fewer than four times in the sugya on *Ketubot* 3a) that the mechanism for annulment is the dissolution of the original marriage *by means of the get involved*. Rashi (*Ketubot* 3a) writes:

> *Anyone who marries*—Anyone who marries a woman does so in accordance with the intent which the sages of Israel have enacted, i.e. they [the *kiddushin*] should be valid according to the words [i.e. desire] of the sages and should be annulled *according to the words of the sages by means of a get which the sages validated.*
>
> *And the Sages dissolved the kiddushin—When such a get shall follow them.*

Mei'ri, about whom R. Riskin writes, "states explicitly that *hafka'at kiddushin* does not require a *get*," also adopts Rashi's position of

hafka'at kiddushin. Unfortunately, however, quoting that part of Me'iri is effectively quoting only half of the sentence. After Me'iri cites proof to his argument, he then states:

> Nonetheless, the sages of Spain have written that whenever the *kiddushin* were executed improperly, the woman goes out without a *get*; but whenever the *kiddushin* were executed properly and because of some event that occurs later they dissolve the *kiddushin*, [this can happen] *only with some kind of a get* [*get kol de-hu*].

At no point does Me'iri disagree with this assertion of the Spanish Sages; his opening statement regarding *hafka'at kiddushin* without a *get* is in effect stating the obvious, i.e. the passage in *Yevamot* explicitly states that there was no *get* required in the context of the *hafka'a*, hence sometimes annulment can proceed without a *get*. He does not, however, state that all scenarios of *hafka'a* can be done without a *get*.

(3) Finally, it should be noted that even R. Riskin recognizes the importance of precedents when he acknowledges that according to the approach of *Rashbam* and his followers (the second approach), retroactive annulment cannot be used to solve our *aguna* problem. Those *Rishonim* assert that the rabbis merely *threatened* to annul the marriage and therefore the husband chooses to let his *get* be valid. Such a threat obviously assumes that the rabbis have the power to annul a marriage without a *get* (if the husband chooses not to allow the *get* to be valid), for otherwise what kind of a threat would it be?[5] The reason that no one would cite the position of Rashbam as support for *hafka'a* without a *get*, even though *Rashbam* must acknowledge the theoretical possibility, is that, according to *Rashbam*, *the rabbis never actually annulled a marriage retroactively* and hence there is no precedent for the future. Similarly, even according to Rashi and those who follow him, *the rabbis never actually annulled a marriage retroactively without a get.*

III.

There are serious obstacles on a practical level as well. R. Riskin proposes that we use the tool of *hafka'at kiddushin* even though the *Shulhan Arukh* effectively bans its use. It seems to me that the only way that we could use this tool is if all segments of the Orthodox community would agree to its use.[6] In most areas of halakha, individual communities can opt for certain practices without creating a fundamental schism between

themselves and other parts of the community. *Ishut*, however, is one of several areas in which this luxury does not exist. If parts of the broader Orthodox community do not support the use of *hafka'at kiddushin*, they will view the children of subsequent marriages, and all future descendants, as *mamzerim*, creating an irreparable schism within the Orthodox community. To the best of my knowledge, there are no significant segments of the Orthodox community that, categorically speaking, will not allow another Orthodox Jew who has adopted the practices normative in their own community to marry amongst them. This proposal could change that. The probability of the entire *Haredi* community agreeing to R. Riskin's solution, be it because they don't see the problem or because they cannot swallow the solution, is somewhere between slim and none, with slim having left town.

IV.

One final note which I believe is in order is that R. Riskin's proposal misses the larger problem. Aware of the radical nature of his solution, R. Riskin proposes limiting a *takkana* to those situations in which the *bet din* has ordered the husband to give a *get* and he refuses to do so, even after sanctions have been imposed. My sense of the *aguna* problem in Israel (which I presume to be the primary aim of R. Riskin's proposal) is that the husband who would rather have his basic societal privileges revoked instead of giving his wife her *get* represents a very small minority of cases. Every case of *aguna* is a tragedy, but solving so few cases is not worth the price of adopting a radical proposal that may undermine the integrity of *kiddushin* in general. The larger problem, it seems to me, is the situations in which the courts cannot force the husband to give a *get*, even though they recommend one. One striking example of this would be a husband who provides for his wife financially and maritally, but regularly beats her. The *Shulhan Arukh* rules that we cannot force the husband to divorce his wife in such a case, although we would certainly encourage him to do so.[7] Such cases[8] are ripe for extortion on the part of the husband, who knows that the *get* will be given purely at his discretion, and in most of these cases, the wife will get a *get* only after paying his price. For this problem, the solution of a prenuptial agreement that can be applied to a much broader set of scenarios, even if not perfect, will go a lot farther.

Much work, both halakhic and communal, needs to be done to

solve the *aguna* problem, and R. Riskin is certainly to be commended for his efforts. In my opinion, however, to use the words of the prophet Elisha (*II Kings* 6:19): לא זה הדרך ולא זה העיר.

I too, like R. Riskin, look forward to the day when we can use Elisha's conclusion: לכו אחרי ואוליכה אתכם אל האיש אשר תבקשון.

NOTES

1. His obligation to provide for her financially.
2. Henceforth, I use the term "retroactive annulment" to distinguish it from the first type of *hafka'at kiddushin* in which the annulment is immediate because the *kiddushin* are, *ipso facto*, immorally executed.
3. R. Riskin cites the *Rema* from the *Darkhei Moshe* on *Tur Even ha-Ezer* 7:13 who cites a case in Austria in which married women, including wives of *kohanim*, who had been taken captive were allowed to return to their husbands and the only plausible explanation for the phenomenon was *hafka'at kiddushin*. In that case there were no *gittin*. Unfortunately, R. Riskin fails to note several crucial points which render the case irrelevant to ours:

   (i) The *Rema* suggests that perhaps it was a *hora'at sha'a* to allow the women to return to their husbands for fear that they would do worse. (He doesn't specify, but I would imagine apostasy.) A *hora'at sha'a* is usually just as its name suggests—an exceptional case, not to be used for any kind of *takkana*.

   (ii) With respect to the priestly wives, we have to accept that the mechanism for permitting them to return to their husbands could not have been annulling the marriage, because annulment would not have solved the problem. If the concern had been over a wife of a non-*kohen* who might have willingly committed adultery with her captors, then retroactive annulment would indeed solve the problem because by annulling the marriage it turns out that she was single when she slept with her captors. However, in the case of a *kohen*'s wife, annulment would not have made a difference, because even a single woman who has a sexual relationship with a gentile is not permitted to marry a *kohen*.

   (iii) Even if we accept the idea that the *gedolim* who dealt with the problem were utilizing a marital annulment, it still is not equivalent to our situation because the stakes there were much lower. In that case, there was no issue of adultery; those women simply wished to return to their husbands. Even if doing so was a violation of Torah law, it would not have been a case of *giluy arayot* (adultery in our case) but one of *sota*, which does not entail *karet* or capital punishment and is not classified as *arayot* (cf. *Yevamot* 82a, 119a). The child born of the union of a man and his wife who has committed adultery (and remains with her husband) technically bears no *halakhic* stigma (*Rema*, *Even ha-Ezer* 4:16) and even the child of an equivalent priestly marriage is only a *hallal* and not a *mamzer*. In our case, however, the issue at hand of allowing a woman to remarry is one of *arayot* and the child, if we err in utilizing the annulment, would carry the stigma of *mamzerut*.

4. See *Tosafot Ri ha-Lavan* who adopts a position that is similar from the standpoint of process. He argues that just as people undertake *kiddushin* with the consent of the rabbis, so too do those who give a *get*, and the rabbis decided that in certain cases they want him to disregard his own stipulation or invalidation of the *get*, and he does so in deference to the rabbis' wishes. From a pragmatic standpoint, the position approximates that of Rashbam since the mechanism that actually dissolves the *kiddushin* is the *get*.
5. If the threat were a bluff, the *get* would be regarded as a *get be-ta'ut*, a *get* executed under false pretenses.
6. R. Riskin appears to address this problem when he calls for "a large gathering of the rabbis of Israel who must decide on the matter so that . . . the Torah not become like two Torahs." A "large gathering" is not enough; virtual unanimity of "all of the rabbis of Israel" is necessary.
7. *Rema*, *Even ha-Ezer* 154:3 and 154.21.
8. I believe that most dysfunctional marriages fall in the same category. There are marriages, however, in which it might be argued that using the *get* as financial leverage may be perfectly reasonable. In a marriage where there is no abuse, neglect or fundamental breakdown, but one partner for whatever reason wants out, it may be perfectly reasonable for the other spouse to demand compensation. It might be regarded no different than a financial partnership where one partner may have to pay a king's ransom to get out of the partnership. In such cases, the wife as well, is able to use a refusal to accept the *get* as leverage in the financial arrangements.

RESPONSE—RABBI SHLOMO RISKIN:

Rabbi Wieder begins his rebuttal of my position by restating my citation of the talmudic sources—but his usage of language is such that he actually distorts the talmudic position. He divides the five incidents of annulment found in the Talmud into two separate typologies: one in which the marriage is annulled right after it occurs—and in these incidents there is no mention of any *get*—and the other in which the marriage is annulled much later on. The first category he refers to as "a situation in which the marriage was defective from its inception" leading us to believe that a valid marriage had never taken place; indeed, he goes on to say "the marriage was never viewed as having gotten off the ground"—and *therefore* "no *get* was required."

However, a study of each of the two cases in which the marriage is annulled immediately after it occurs reveals that in each instance the marriage was a perfectly valid and legal marital act: in the one (*Bava Batra* 48b) because any legal transaction which is accepted under duress is considered legally valid under Torah law as long as the recipient receives all necessary compensation and benefits, and in the other (*Yevamot* 110a) because the second suitor betrothed the woman as soon as she reached the age of majority. A valid and legal betrothal had taken place and had gotten off the ground. In both instances, however, the betrother took unfair advantage of the letter of the law to the disadvantage of the original husband. Hence the rabbis *annulled a legal marriage that had already taken place* by utilizing their power to either make *hefker post facto*, the money with which the groom had betrothed his bride or to "prostitute" *post facto* the marital act of coitus with which the marriage had become legalized. This is how the Talmud itself in both these instances explains the annulment; there is no hint in these two Talmudic passages of the idea proffered by R. Wieder that betrothal was defective and had never gotten off the ground; had that been the case, an act of annulment predicated upon "*hefker*" or "prostitution" would have been superfluous.

II

He then goes on to discuss the second typology or category of annulment, three instances in the Talmud which involve some kind of *get*. Once again R. Wieder's choice of words is misleading at best: He