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HAFKA'AT KIDDUSHIN: TOWARDS SOLVING THE AGUNA PROBLEM IN OUR TIME

I. MARRIAGE AS AN INSTITUTION

There are two fundamental ways to understand the legal underpinnings of the institution of marriage:

1. Marriage as a legal institution is a contractual arrangement created by the two partners to the marriage. Just as the two parties create the marriage contract, it is only they who can terminate it.
2. Marriage is indeed a contractual arrangement between the two parties, but it requires the formal ratification or validation of the city or state in which those two parties live, or the local judicial authorities. From this perspective, therefore, since a marriage is only effectuated, or rendered legal, by such an extrinsic authority, it can only be terminated by the decision of some similar authority. This is the situation in most of the western world.

The Jewish tradition adopts the first path: "If a man takes a woman" (*Deuteronomy* 24:1)—the husband "takes" his partner as his wife by way of betrothal and marriage. And therefore "he shall write her a bill of divorce, and give it in her hand"—in order to break the marital bond, the husband must give his wife a *get*. A court's decision on the matter does not suffice.

II.

At the time of betrothal and marriage, both the bride and the groom perform mutual transactions and they assume mutual obliga-

tions. Hatam Sofer describes the transaction that is performed as *kinyan halifin*, the transaction in which each of two parties gives something and receives something else in return:

> In the case of betrothal, there is no buyer or seller, but rather *halifin*. [The groom] 'sells' himself, giving over his person to his betrothed by assuming specified obligations, namely, sustenance, clothing, and cohabitation. In return, [the bride] 'sells' herself, giving over her person by assuming the obligation of cohabitation by Torah law, and handing over her handiwork by rabbinic law. This is *halifin*.[1]

This mutuality notwithstanding, the active partner in the acts of betrothal and marriage, as well as in the act of divorce, is the husband. In betrothal, the rabbis specify that "*he* must give [the betrothal gift] and *he* must recite [the betrothal formula]" (see *Kiddushin* 5b); in marriage, it is the groom who brings the bride into *huppa*, or *his* house (*Shulhan Arukh, Even ha-Ezer* 61:1); and in divorce, it is the husband who writes his wife a bill of divorce, and gives it into her hand. The husband's active role in these areas might stem from the fact that it is he who is regarded as the active partner in the sexual act, which is truly the exclusive and therefore defining aspect of marriage, or else from the fact that it is he alone who is obligated to have children.[2]

Nevertheless, Jewish law attempted as much as possible to reach a greater degree of mutuality between husband and wife even with regard to these ritual ceremonies. Thus, betrothal requires the woman's approval: "with her consent, yes [the betrothal is valid]; without her consent, no" (*Kiddushin* 2b). And furthermore, *Hazal* enacted that the husband must write his wife a *ketuba* at the time of marriage. That document, which obligates the husband to pay his wife a considerable sum of money should he choose to divorce her, was instituted in order to prevent rash and hasty divorces (*Ketubot* 10a).[3] And while by Torah law a woman may be divorced against her will, a millennium ago Rabbenu Gershom, "Light of the Exile," enacted that a woman can only be divorced if she accepts her *get* voluntarily, just as the Torah requires that the husband grant the divorce of his own free will (cited in Rema's strictures to *Even ha-Ezer* 119:6).[4]

III.

All this having been said, the halakhic principle that the husband cannot be forced to divorce his wife against his will (*Yevamot* 113b, *Gittin* 49b)

opens the door to the *aguna* problem should a woman seek a divorce and her husband refuse to grant her a *get*.[5] This problem is especially exacerbated when recalcitrant husbands acquire civil divorces—which enable them to remarry with state sanction—and then "hold up" their wives for a great deal of money in exchange for the religious divorce. There are two aspects to this *aguna* problem: first, there is the tragic predicament and ordeal of the *aguna* herself (and indeed the entire community); second, there is a challenge to halakha as a reflection of "righteous laws." Leaving an *aguna* inextricably tied to a husband with whom she cannot live contradicts the Torah's imperative, "And you shall do that which is right and good" (*Deuteronomy* 6:18). So too it stands in conflict with the obligation to walk in the ways of God (see *Sota* 14a; Rambam, *Sefer ha-Mitsvot, asin* 8), Who is "merciful and gracious" (*Exodus* 34:6); moreover, the halakha itself declares that "its ways are ways of pleasantness" (*Sukka* 32b; *Yevamot* 87b). Clearly, it must be possible to find a solution to this complicated problem within the framework of halakha. And indeed, our talmudic authorities already viewed the *aguna* problem as one that requires non-conventional solutions and leniencies—"on behalf of the *aguna*, the Sages ruled leniently" (*Yevamot* 88a). In dealing with this problem, *Hazal*, the *Geonim*, and the *Rishonim* suggested solutions and enacted legislation that reflect their concern for the honor of a woman who seeks a divorce from her husband.

IV.

The *mishna* in *Ketubot* (77a) states that in certain cases the Jewish court may indeed compel the husband to divorce his wife: "The following are forced to divorce: one afflicted with boils, one stricken with a polypus [whose nose or mouth is ill-smelling], a scraper [of canine excrement], one who smelts copper, and a tanner." In the first two cases mentioned in the *mishna*, the husband is forced to divorce his wife because of a medical condition from which he suffers and which makes it impossible for his wife to live with him. In the last three cases, divorce is coerced upon the husband because of the foul odors that he bears on account of his profession, preventing intimacy. So too a man suffering from impotence may be compelled to divorce his wife.[6] In these cases, the court may apply pressure upon the husband to divorce his wife until he says that he agrees to the divorce (*Arakhin* 21a). In that way the husband is viewed as though divorcing of his free will,[7] and the problem of an imposed divorce does not arise.

The Jerusalem Talmud cites two examples of prenuptial conditions that were customarily attached to the *ketuba* at the time of marriage in order to protect the woman's interests:

> Rabbi Yosa said: Those who write,[8] 'If he comes to hate [his wife]', or 'if she comes to hate' [then the woman receives a divorce as well as financial compensation], it is considered a monetary stipulation, and the stipulation is valid (*Ketubot* 5:8).[9]
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> It once happened . . . Rabbi Mana said to them [the woman's relatives]: 'Bring her *ketuba*, so that we may read it.' They brought her *ketuba*, and found written in it: 'If this woman marries this man, and does not wish the partnership[10] [i.e., if she seeks a divorce], she shall [receive a *get* and] collect half of her *ketuba*' (*Ketubot* 7:6).

In our day as well, various prenuptial agreements have been formulated in which the husband obligates himself to pay his wife a large sum of money for her maintenance in the event that he delays giving her a bill of divorce. Such agreements are intended to protect the woman, and force the husband to grant her a divorce. The Rabbinical Council of America endorses the use of prenuptial agreements of this sort in the United States.[11] But this arrangement does not solve the *aguna* problem in all cases—e.g. where a wealthy husband is ready to pay for his wife's maintenance, but refuses to divorce her, or where the two parties never signed such an agreement.

V.

The *mishna* (*Ketubot* 63a) teaches the law pertaining to the rebellious wife—a woman who refuses to lie with her husband, as the *Gemara* concludes—according to which a specified sum is deducted from the woman's *ketuba* each week she persists in her rebellion, or as the law was later emended, a four-week warning period is followed by immediate forfeiture of her entire *ketuba*. In the course of its discussion, the *Gemara* asks: "What is the case of a rebellious wife?" The *Amoraim* disagree about this point. Amemar: "Where she says, 'I wish to remain married to him, but I wish to cause him distress [by refusing].'" In other words, the woman wishes to use the sexual relationship as a bargaining chip. "But if she says, 'I find him repulsive,' we do not force her [nor do we reduce her *ketuba*]. Mar Zutra said: We do force her." Even if the woman says that she cannot bring herself to have sexual relations with her

husband because she finds him repulsive, she is forced to do so by way of the weekly deductions from her *ketuba*, or by way of the public announcements and immediate forfeiture of her *ketuba*. The law is in accordance with Amemar that a woman is not forced to live with her husband when she claims that she finds him repulsive. She is only considered a rebellious wife if she uses sex as a weapon, but not if she finds her husband repelling. The *Gemara* concludes that when a woman claims that she finds her husband repulsive, "she is made to wait twelve months for her bill of divorce."

Amemar asserts that if a woman claims that she finds her husband repulsive, we do not force her to cohabit with him. But the question whether or not we force him to give her a *get* remains open. Rashbam[12] understands that according to the *Gemara*'s conclusion, the husband is required to divorce his wife immediately, even against his will. The words, "we do not force *her*" imply that we do not force the woman to return to her husband, but we do indeed force the husband to grant his wife a divorce. This is also the position of Rambam (*Hilkhot Ishut* 14:8):

> A woman who refuses to cohabit with her husband is called a rebellious wife. We ask her why she refuses. If she says, 'I am repelled by him, and cannot willingly engage in sexual relations with him,' we force him to divorce her immediately, for she is not like a captive who must surrender to someone whom she hates. She is divorced without receiving any part of her *ketuba*, but she takes the worn clothing that is still extant.[13]

The *Geonim* in general[14] and Rav Sherira Gaon in particular[15] understood from what is stated at the end of the talmudic passage, "and she is made to wait twelve months for her bill of divorce," that according to halakha the woman is made to wait twelve months, and only then do we force her husband to grant her a divorce. However, their assumption is that the rabbis did sanction compelling the husband to grant a divorce to a wife who claims she finds him repulsive. In a later generation, the *Geonim* went one step further than the Talmud and enacted that the court force the husband to divorce his wife immediately. This seems to be the position of R. Yitshak Alfasi (Rif) as well.[16]

Most of the *Geonim* and early *Rishonim* maintain that when a woman claims that she finds her husband repulsive, we compel the husband to grant an immediate divorce—either by talmudic law or Geonic enactment. Some authorities, however, disagree. The chief proponent of the position rejecting the possibility of compulsion was Rabbenu Tam (1100-1171). Rabbenu Tam[17] understood the *Gemara* as follows:

If a woman claims that she is repelled by her husband, and that she is ready to waive her *ketuba* in order to leave him, we do not force her, that is to say, we do *not* say that her waiver is regarded as having been given in error, and so she must remain with her husband until she changes her mind. Rather, we say that if her husband is willing to divorce her without paying out her *ketuba*, he may do so. But under no circumstances do we force him to grant her a divorce. Rabbenu Tam was aware of the Geonic enactments on the matter, but for various reasons rejected the possibility of enforcing those enactments beyond the period of the Geonim.

Even though the majority of Rabbenu Tam's predecessors maintained that when a woman finds her husband repulsive we compel the immediate divorce, once Rabbenu Tam expressed emphatic opposition to this policy few arose later to disagree with him. Here is the *Shulhan Arukh* (*Even ha-Ezer* 77:2):

> If a woman refuses to cohabit with her husband, she is called a rebellious wife. We ask her why she refuses to cohabit with him. If she says, 'I am repelled by him, and cannot willingly cohabit with him'—then if the husband wishes to divorce her, she does not have any part of her *ketuba*, but she takes the worn clothing that is still extant.

There were, however, a number of *Aharonim* who were ready to rely on Rambam and the *Geonim* and force the "repulsive" husband to divorce (if not with actual physical force then at least with milder forms of coercion). Here are a number of examples.

R. Hayyim Palaggi (*ha-Hayim ve-ha-Shalom* II, 35):

> It would therefore appear that once a year or two have passed following their separation, we force the husband to divorce his wife, for two reasons: The man cannot live without a wife, and the woman too cannot live without a husband. And all the more so, if she is young, for we are concerned that it will lead to her ruin, her being chained to her husband [against her will]. Go and see how the halakhic authorities ruled leniently regarding an *aguna*, especially when she is young. They went as far as to say that we may rely on the opinion of a single authority. And all the more so, the obligation rests upon the judges of Israel to rule leniently on this matter, lest they come to mishap.

R. Eliezer Waldenberg (*Tsits Eliezer* IV, 21; V, 26):

> Nevertheless, there is ample room to discuss compelling a divorce when

> the claim, 'He is repulsive to me,' is supported by genuine reasons, and the court sees a pressing need to force the husband to divorce his wife so that she not fall into bad ways.

At the end of his piece, R. Waldenberg suggests that the court force the issue by offering the husband the choice to grant his wife a divorce or pay for her maintenance.

VI.

As will be explained below, the Talmud recognizes the possibility of *hafka'at kiddushin,* the annulment by a *bet din* of a marriage hitherto considered legally valid. This contrasts with those marriages created in error or under false pretenses. If, say, one party was kept from knowing an essential piece of information regarding the other, the marriage may be declared as having *never* been legally valid, and therefore not, legally, having ever taken effect. In such a case, a *get* is not necessary. The question arises as to just when it may be argued that a marriage was founded upon an error. It would appear from the responsa of Rabbi Moshe Feinstein[18] that four conditions must be met in order to declare a marriage invalid for having arisen in error.

1. The heretofore-unknown blemish must have existed already at the time of marriage.
2. The unknown factor only came to the other party's attention after the marriage had already taken place.
3. The previously unknown factor affects the essence of the marital bond (such as impotence), or is a major defect that makes it impossible to live with the affected partner (such as mental deficiency).
4. The unknown factor is a matter that would seriously vex most people[19] and deter them from marrying the affected partner had they known about the matter from the outset.

It was recently suggested that the criteria for error be expanded, so that the discovery of a negative personality trait, such as anger or miserliness, be recognized as a valid basis for a claim of a marriage made in error.[20] According to this suggestion, if a woman claims that she would never have married her husband had she known earlier of his rage or miserliness, her marriage can be cancelled on the grounds that it had been based on false pretenses. It would seem to me that the criteria

established by Rabbi Feinstein cannot be expanded. Indeed, were it true that personality traits can serve as grounds for arguing that a marriage had been created in error, the need for a *get* would never arise, for everyone appearing before a divorce court would maintain that, had he or she been previously "aware," the marriage would never have taken place.

VII.

With all the good intentions we have seen reflected in the rabbis' concern for the *aguna's* plight, the very fact that a woman seeking divorce must receive a *get* from her husband places her at a disadvantage. Cases do arise, we well know, where husbands refuse to grant their wives *gittin*, and women remain *agunot* for years. This problem became particularly acute following the period of the Emancipation, when civil marriage and divorce became available. In Western countries, even if a man marries a woman in a religious ceremony and in accordance with Jewish law, he may divorce her in a civil court and delay granting a *get* in order to "punish" or extort money from her, and rabbinical courts are largely helpless to do anything about it. Even in Israel, where rabbinical courts have authority in matrimonial law, the judges are not always able to deal effectively with a husband who absolutely refuses to grant his wife a divorce. It is true that the situation has been greatly alleviated of late, since the secular courts now impose sanctions on recalcitrant husbands (who refuse to give their wives *gittin* after being ordered to do so by a religious court). These include removal of his professional and driver's licenses and even incarceration, but still, there are some husbands who prefer lengthy jail sentences to granting their wives a divorce, and in that event, women have no recourse.

It would appear, however, that a halakhic solution based on talmudic texts is available to us. It merely awaits our initiative to make full use of the latent possibilities. Surely the Torah promises us "righteous laws," and if a legal solution exists it is our responsibility to find the judge to put it into practice within the framework of an eternal halakha that displays compassion to the *aguna*. The solution I am suggesting is that of *hafka'at kiddushin*, the cancellation of a marriage. Even though betrothal and marriage are regarded as contracts created by the two parties and thus terminated by them, a number of talmudic passages prove that in certain circumstances the rabbis are authorized to cancel a marriage without the husband's consent and even against his will.

VIII.

Five different talmudic passages bring up *hafka'at kiddushin*. Two of the passages deal with *hafka'a* taking place already at the time of betrothal, whereas the other three address *hafka'a* at the time of divorce. Obviously, the latter group is most relevant to our problem, but all of the selections require consideration to get at the principles underlying this legal mechanism.

Gittin 33a contains a discussion of the case of a husband who cancels a *get* that he had sent with an agent without notifying the agent or his wife. The *mishna* at the beginning of the chapter states: "If someone sends a *get* to his wife . . . at first he was permitted to convene a court somewhere else and cancel it. Rabban Gamliel the Elder enacted that they not do this for the sake of the social order (*tikkun olam*) [so as not to increase *mamzerim* or *agunot*]." A *Beraita* cited by the *Gemara* discusses a man who violates Rabban Gamliel's enactment, and cancels a *get* outside the presence of his wife: "Our rabbis taught: 'If he cancels it, it is cancelled; these are the words of Rabbi [Yehuda ha-Nasi]. Rabban Shimon Ben Gamliel says: He cannot cancel it, nor can he add a condition [to the *get*], for if [he were able to do] so, how would we affirm the authority of [Rabban Gamliel's] court, [if his enactment carries no consequences]?'"

The *Gemara* raises a question about Rabban Shimon ben Gamliel's reasoning: "Is there a case where by Torah law a *get* would be void, and because of the argument, 'how would we affirm the court's authority,' we permit a married woman to [marry anyone else in] the world?" The *Gemara* answers that indeed it is possible for the rabbis to validate a *get* that is invalid by Torah law,

> for whoever betroths [a woman] betroths [her] with the understanding that his act has rabbinic approval. Hence the rabbis have the authority to cancel his betrothal. Ravina said to Rav Ashi: Granted in the case where he betrothed her with money. But what is there to say if he betrothed her with sexual intercourse? [Even so] the rabbis have the authority to declare his intercourse an act of prostitution.

This passage appears once again in *Yevamot* 90b, in the context of a discussion regarding the Sages' authority to abrogate a Torah law. *Rishonim* rule in accordance with the view of R. Yehuda ha-Nasi (Rambam, *Hilkhot Gerushin* 6:16).

Gittin 73a visits the man who on his deathbed gives his wife a *get*

and then recovers. Halakha prescribes that if a dying person instructs that a gift be given to a certain individual, the gift is valid at the time of his death, and no formal act of acquisition is required. But if the dying man recovers, he may retract the gift (Rambam, *Hilkhot Zekhiya* 8:14). The *Amoraim* disagree about a *get* given by a dying man. Rav Huna maintains that his *get* is like his gift, so that if he recovers, the *get* is no longer valid, for we presume that he granted the divorce assuming that he would die, which is no longer the reality. But Rabba and Rava maintain that the *get* is valid, not because of some basic legal principle, but "lest people say that a *get* is valid [even if it is given] after [the husband's] death."[21] The *Gemara* raises a question about the position of Rabba and Rava: "Is there a case where by Torah law a *get* is void, and because of a decree we permit a married woman to the world?" The *Gemara* answers in the affirmative, arguing that "whoever betroths [a woman] betroths [her] with the understanding that his act has rabbinic approval, and the rabbis cancelled his betrothal." The law is in accordance with Rabba and Rava (Rambam, *Hilkhot Gerushin* 9:16,18).

Finally, *Ketubot* 3a deals with the case of a husband who gives his wife a conditional *get* and the condition goes unfulfilled due to circumstances beyond his control. For example, a husband sets out on a trip, and, for his wife's protection, gives her a *get* in the event he does not return home within a specified time. As it happens, he plans to return in time, but is kept from his doorstep by a dividing stream. According to the first and accepted version of Rava's position, there is no claim of "unavoidable interference" ("*ones*") regarding a *get*, so it is valid. The *Gemara* explains that even though Torah law recognizes the validity of the claim of unavoidable interference ("*ones rahamana patrei*"), the rabbis declared that in our case there is no such claim "because of virtuous women and because of licentious women." Simply explained, no virtuous woman would ever remarry on the basis of such a conditional *get*, because she would always fear that an unavoidable interference had prevented her husband's return. The *Gemara* asks: "And because of virtuous women and licentious women we permit a woman who is [still] married [by Torah law] to [marry anyone else in] the world?" The *Gemara* answers yes, for "whoever betroths [a woman] betroths [her] with the understanding that his act has rabbinic approval, and the rabbis have the authority to cancel his betrothal." The law is in accordance with the view that there is no claim of unavoidable interference regarding a *get* (*Tosafot, ad loc., s.v. ikka,* in the name of Rabbenu Hananel; Rambam, *Hilkhot Gerushin* 9:8, and *Mishne le-Melekh*).

Of the two passages dealing with *hafka'a* at the time of betrothal, the first is *Bava Batra* 48b. There we meet the man who unfairly uses his authority or power to coerce a woman into accepting his betrothal. Says Amemar: "If a man coerced [a woman] into accepting his betrothal, his betrothal is valid." Mar bar Rav Ashi: "In the case of a woman [who was so coerced], the betrothal is certainly not valid." Why? Even though by Torah law the betrothal in such a case would be valid, "he acted improperly, and so they acted improperly toward him, and the rabbis cancelled his betrothal." The law follows this last opinion (Rambam, *Hilkhot Ishut* 4:1).

Finally, for the *Bavli*, *Yevamot* 110a deals with the case in which a man betrothed a minor—such a betrothal being valid only by rabbinic law—and intended to bring her under a bridal canopy upon her reaching the age of twelve. But before he could do so, another man snatched her away and betrothed her. Even though by Torah law the second husband's betrothal is valid, for she accepted his betrothal, "Rav Bruna and Rav Hananel, disciples of Rav, were there, and did not require [the woman to receive] a get from the second one. . . . Rav Ashi said: He acted improperly, and so they acted improperly toward him, and the Rabbis cancelled his betrothal." This case, though not explicitly codified by Rambam or the *Shulhan Arukh,* is cited by a number of *Rishonim* (see, for example Rashba, *Responsa,* I, 1206) as a legitimate precedent.

The Jerusalem Talmud cites only one case of *hafka'at kiddushin* in connection with a husband who cancelled a *get* after sending it to his wife via an agent (*Gittin* 4:2). It would appear from that discussion that *hafka'a* is based on the authority invested in the rabbis to uproot a Torah law. It would also appear that the Jerusalem Talmud rules that the rabbis have the authority to uproot a Torah law, even in an active manner, unlike the conclusion of the Babylonian Talmud (*Yevamot* 90b).

IX.

The following points must be clarified when analyzing the views of the legal authorities to be cited below:

1. What is *hafka'at kiddushin*? What is the mechanism through which a marriage may be cancelled?
2. What is the result of *hafka'at kiddushin*? Is the marriage cancelled retroactively, or only from the time of cancellation?
3. Who is invested with the authority to cancel a marriage? Did

this authority come to an end at the close of the talmudic period?
4. In which instances may a marriage be cancelled? Only in the cases mentioned explicitly in the Talmud, or in other cases as well?
5. Is there a distinction between *hafka'a* at the time of betrothal and *hafka'a* at some later point—e.g., at the time of divorce?

Of the five instances of *hafka'at kiddushin* in the *Talmud Bavli*, the three involving *hafka'a* at the time of divorce invoke the principle that a man betroths his wife with the sanction of the rabbis. The two passages dealing with *hafka'a* at the time of betrothal make no mention of this principle. In its place we find the notion that "he acted improperly, and so they act improperly toward him." It is clear that when the *hafka'a* takes effect at the time of betrothal, a *get* is not required. As we shall see regarding those cases where the *hafka'a* takes place at some later point, the *Rishonim* disagree as to the requirement of a *get*, and whether that *get* must be valid by Torah law or mere rabbinic decree. The question arises: What is the relation between the two types of *hafka'a*, or in other words, is *hafka'a* at the time of betrothal also based on the principle that a man betroths a woman with the understanding that his act has rabbinic approval? The answer to this question has profound halakhic ramifications, for if the two types of *hafka'a* share the same basis, we may infer or extrapolate certain laws from one to the other. For example, were we to conclude that the authority to cancel a marriage at the time of betrothal remains in force even after the close of the talmudic period, then it might follow that the same may be said about *hafka'a* at a later point in the marriage. Similarly, it might be argued that in the same way that a *get* is not required for *hafka'a* at the time of betrothal, so may enactments allowing for the cancellation of a marriage at a later date, and perhaps without a *get*, be instituted.

In order to understand the halakhic foundation of *hafka'at kiddushin,* let us carefully analyze the words of Rashi (1040-1105) in his commentary to the various passages dealing with the topic. At first glance, his position appears to be rather consistent, and based upon the principle that the marital formula makes every betrothal dependent upon rabbinic approval. Nevertheless, alternate explanations of his view have been suggested.

We will cite here a section of Rashi's commentary to *Ketubot* 3a:

> *Whoever betroths*—whoever betroths a woman betroths her according to the understandings instituted by the sages of Israel in Israel that the

betrothal take effect and remain in effect in accordance with the words of the sages and that the betrothal be invalidated in accordance with the words of the sages by means of a *get* validated by the sages.

And the Rabbis cancelled his betrothal—when it is followed by a *get* like this.

Granted—that you can say the betrothal is cancelled when he betrothed her with money, for you can say that this *get* nullifies the betrothal and transforms the money retroactively into a gift.

If he betrothed her with sexual intercourse, what—retroactive cancellation is there? Granted when there is a valid *get*, even though the betrothal was in effect until now, the Torah declares that the *get* severs [the marital bond] and permits that which had been forbidden from now on. But this which is not a *get* by Torah law, and you validate it because of his understanding that he betrothed her with the assumption that his act has rabbinic approval, and therefore it may be cancelled by those very rabbis—you must say that it was not a betrothal from the very beginning. And if he had betrothed her with sexual intercourse, and you nullify his betrothal retroactively, what happens to his act of sexual intercourse?

The Rabbis declared his intercourse—an act of prostitution retroactively because of a *get* that is valid by rabbinic decree. And they have the authority to do this, for he relied upon them.

Rashi clearly maintains that the *hafka'a* works retroactively, but what is the halakhic basis for canceling a betrothal? The usual interpretation of the super-commentaries is that according to Rashi, *hafka'at kiddushin* is based on a set condition always and automatically attached to the betrothal.[22] Whenever a man betroths a woman he conditions his betrothal on rabbinic approval. The rabbis as a whole act as silent partners in his betrothal, and the validity of the betrothal depends upon their consent. Even though Rashi doesn't mention the term "*tenai*" (condition) explicitly, this seems to be how he interprets the established betrothal formula, "You are hereby betrothed to me in accordance with the laws of Moses and Israel." Hence, Rashi's words under the heading "*Whoever betroths*" above; hence his commentary to *Gittin* 33a: "He betroths her with the understanding that his act has Rabbinic approval—that his betrothal should take effect in accordance with the law of Moses and Israel instituted by the sages of Israel, and surely they said that any betrothal in Israel should be cancelled with such a *get*. Therefore the

betrothal is nullified, for he betrothed her with that understanding"; and hence his commentary to *Yevamot* 110a: "And they cancelled his betrothal—for whoever betroths [a woman] relies on the approval of the sages, for we say 'in accordance with the laws of Moses and Israel.'"[23]

According to this understanding of Rashi's position that *hafka'at kiddushin* is based on our conditional betrothal formula, the *get* is not needed to implement the *hafka'a*. Similarly, according to this view that *hafka'a* is based on the conditional betrothal formula, there is no need to say that the authority to cancel a marriage ended with the close of the talmudic period. So too there is room to say that new enactments and practices may be instituted regarding marriage and divorce, and that *hafka'at kiddushin* is not limited to the cases mentioned in the *Gemara*. And furthermore it may be argued that Rashi does not distinguish between *hafka'a* implemented at the time of betrothal and *hafka'a* implemented at some later point. After all, in the *Yevamot* (110a) passage dealing with *hafka'a* at the time of betrothal, the *Gemara* does not mention the principle that a man betroths a woman with the understanding that his act has rabbinic approval. Nonetheless, Rashi in his commentary to that passage does cite that principle to explain the application.[24] Thus, it may be argued that just as there is no need for a *get* when the *hafka'a* is implemented at the time of betrothal, so too it may be possible to cancel a marriage at some later point without a *get*.[25]

Shita Mekubbetset (R. Betzalel Ashkenazi) on *Ketubot* 3a understands Rashi's position in a completely different manner, insisting that without a *get*, there is no room for *hafka'a* after the time of the betrothal itself. According to the *Shita*, when the *Gemara* says that a man betroths a woman with the understanding that he has rabbinic approval, it does not mean that the husband conditions his betrothal on that approval, akin to a person who betroths a woman on condition that his father approves. If that were the case, then when the rabbis deny their approval, there would not be any need for a *get*. Rather, Rashi maintains that a person wants his betrothal to be absolute and unconditional, but that betrothal may be cancelled by a *get* that is declared valid by the rabbis. According to this, a distinction must be made between *hafka'a* at the time of betrothal and later *hafka'a*. If the husband acts improperly at the time of betrothal, his betrothal is not valid, for the rabbis declare his property ownerless (invalidating the betrothal money), and his sexual intercourse an act of prostitution. When the *hafka'a* is implemented at some later point, the marriage can only be cancelled by a *get* that is valid at the very least by rabbinic decree.[26]

X.

While there may be a certain ambiguity in Rashi's position, because he does not use the term "*tenai*" outright, other *Rishonim* state clearly that *hafka'at kiddushin* is based on a condition. We will cite here just a few of them.

R. Aharon ha-Levi (*Ketubot* 3a):

> It may be asked: since we say 'whoever betroths a woman betroths her with the understanding that he has Rabbinic approval,' why mention money or intercourse? Surely he is like [someone who says] 'on condition that Father approves,' and he didn't approve.
>
> Since he betrothed her with the understanding of their approval, it is as if he said, 'on condition that Father approves.'

Ritva (*Ketubot* 3a):[27]

> [Therefore] he says, 'in accordance with the law of Moses and Israel.' Thus it is as if he stipulated 'on condition that the Sages approve.'[28]
>
> He is like someone who said, 'You are betrothed to me on condition that Father approves.'

R. Avraham ben ha-Rambam (*She'elot u-Teshuvot Birkat Avraham* no. 44):

> You can apply here the principle that whoever betroths a woman betroths her with the understanding that he has rabbinic approval, and it is like a condition attached to the betrothal.

Maharam of Rothenburg (in *Mordekhai, Kiddushin* 3: 522, regarding a case where a man betrothed a woman in a valid manner):

> At the time of betrothal he did nothing wrong, and we judge him according to that time, and say that he betrothed her on condition that if he later violates a rabbinic regulation . . . his betrothal will not be valid.

Get

On the other hand, there are *Rishonim* who raise objections against the principle of *hafka'at kiddushin* in general, and against Rashi's understanding that the *hafka'a* takes effect retroactively in particular.

After all, if a marriage can be cancelled retroactively because of unavoidable interference or cancellation of a *get*, then whenever a woman commits adultery—so that the woman is forbidden to her husband and lover, the adulterers are liable for the death penalty, and any child born from their relationship is a *mamzer*—all the husband has to do is send a *get* to his wife through an agent and then cancel the *get*, or attach to the *get* a condition that is likely to lead to unavoidable interference. Once this is done, the marriage will retroactively be cancelled, his wife will retroactively be considered a single woman, and she and her children will be saved from all the penalties of her adultery. This objection leads a number of *Rishonim* to a different understanding of *hafka'at kiddushin.*

Rashbam argues that the *Gemara* does not mean to say that a valid betrothal that has already been in effect can be cancelled retroactively. Rather, a marriage is terminated going forward by way of the *get*. A person does not want the rabbis to declare his relations acts of prostitution, so when divorcing his wife he gives her a *get* in such a way that the rabbis will not cancel his marriage. In other words, from the outset he waives all claims of unavoidable interference, and "cancels" all future cancellations of the *get*. In those cases where the rabbis cancelled a betrothal even without a *get* (*Yevamot* and *Bava Batra*), the husband acted improperly at the time of betrothal. Since a man betroths a woman with the understanding that he has rabbinic approval, if he betroths her in an improper manner against the Rabbis' wishes, the betrothal never takes effect, and the woman is free to leave even without a *get*. But if a man betroths a woman in the proper manner, the betrothal can be terminated only with a *get* that is valid by Torah law.

Ri ha-Lavan adds that just as we say that a man betroths a woman with the understanding that he has rabbinic approval, so does he divorce her with the same understanding. Thus, whenever a man divorces his wife, he is considered as if he had stipulated at the time of the divorce that unavoidable interference and even retraction do not invalidate a *get*. Ri ha-Lavan agrees with Rashbam that once a marriage has begun—that is, the betrothal has taken effect—the marriage can only be terminated with a *get* that is valid by Torah law. Thus, the positions of Rashbam and Ri ha-Lavan do not advance the possibility of canceling a marriage when the husband refuses to give his wife a *get*.

Rabbenu Tam and Ri propose alternate solutions to the difficulties raised above. While they do not actually get into the details of how *hafka'a* works, it would appear that they feel its effect is retroactive.