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Introduction

During the 2021-23 academic years, a cohort of Maharat alumnae participated in a unique fellowship program called "Halakha in Action." As the first initiative launched by Maharat's Center for Lived Torah, Halakha in Action was designed by Rabba Sara Hurwitz and Rabbi Jeff Fox to give alumnae halakhic and pastoral expertise in life cycle events and exposure to the individuals and organizations engaged in advocacy work in these areas. Rav Herzl Hefter was the primary teacher and cornerstone of the program, teaching ten halakha *shiurim* to the cohort each year.

This first cohort engaged in a deep study of halakhic, pastoral, and advocacy issues in Jewish marriage and divorce to help individuals navigating these life cycle events as well as to contribute to our communal effort to establish greater protections for individuals at these vulnerable times. Participants engaged in weekly *chevrutah* learning and *shiurim*, and produced a writing or advocacy project at the end of the two-year commitment.

Halakha in Action 2021-23 fellows were Rabba Wendy Amsellem, Rabba Yaffa Epstein, Rabbanit Adina Fredman, Maharat Miriam Gonczarska, Rabbanit Amalia Haas, Rabba Claudia Marbach, Rabbanit Gloria Nusbacher, Rabbanit Lisa Schlaff, Rabba Dr. Anat Sharbat, Rabbanit Liz Shayne, Rabbanit Aliza Sperling, Rabbi Alana Suskin, Maharat Victoria Sutton, and Rabbanit Dr. Agi Veto.

In its first year, the Halakha in Action fellowship focused on Jewish marriage, including the following sessions:

- Rav Herzl Hefter on topics including the nature and requirements of *kiddushin,* alternatives to *kiddushin, chuppah,* having a witness who is not halakhically observant, *ketubah, mamzerut,* and whether a woman can give a ring to the groom under the *chuppah*;
- Rabbi Jeff Fox on women and *birkat erusin* (the betrothal blessing), women and *sheva brachot,* and issues in filling out a *ketubah*;

- Rav Avi Weiss on premarital counseling and Dr. Esther Altmann on premarital red-flags;
- Rav Yoel bin Nun on his approach to *kiddushin* and the alternative *ketubah* that he has crafted;
- Dr. Irit Koren on her sociological research about Israeli families' approach to *kiddushin* and possible alternatives;
- Rabbi Jeff Fox on lesbian partnerships;
- Rabbi Zev Farber on *nedarim* as an alternative to *kiddushin*;
- Rabbi Mike Moskowitz on same-sex ceremonies and the use of *nedarim*;
- Rabbi Seth Farber, of Itim, on marriage in the State of Israel and Rabbanit Avital Engelberg, of Huppot, on issues and initiatives regarding marriage in Israel;
- Professor Yedidah Koren on *mamzerut*.

In its second year, the Halakha in Action fellowship focused on divorce and *aginut,* including the following sessions:

- Rav Hefter on the nature of *gerushin* (divorce)*,* writing *lishma, eidei mesirah* and *eidei chatimah* (types of witnesses)*, netinat haget* (the transfer of the *get*)*, shlichut, bitul, zechiya,* and grounds for divorce;
- Multiple sessions on the issue of using *tenai b'kiddushin* to prevent *aginut* with Rav Hefter, Rabbi Dov Linzer, Rabba Yaffa Epstein, and Rabbi Lila Kagedan;
- Rabba Ramie Smith on her work on GetOutUK, her work with *batei din* in England, and the important new tool of coercive control laws in the United Kingdom;
- Six sessions with the International Beit Din, where we heard from *agunot* about their experiences; learned about the reality of Jewish divorce in *batei din* today with Rabbi Barry Dolinger; studied *bitul kiddishin* with Rav Yoni Rosenzweig and Rav Dovid Bigman; and explored the extent to which secular law courts can be used to address *aginut* with Rabbi Zach Truboff.

- Blu Greenberg on her long advocacy for *agunot* and her vision for the future.

At the conclusion of the program, fellows created projects and curricula and authored articles to share what they had learned with their congregations, students, and communities. Among the projects created were marriage, divorce, and *aginut* curricula for high school and rabbinical school; articles, social media, and classes on aspects of marriage and divorce; direct aid to *agunot* within the *beit din* system; and halakhic articles exploring the nature of *kiddushin* and alternatives, marriage in the State of Israel, *bitul kiddushin* (nullifying a marriage), and other mechanisms to protect *agunot.* Some of these articles appear in this journal.

Thank you to Rabba Sara Hurwitz, Co-Founder and President of Maharat, and Rabbi Jeff Fox, Rosh HaYeshiva and Dean of Faculty at Maharat, for conceiving of the Halakha in Action program, and to Rabbi Dr. Erin Leib Smokler for editing this important journal. Thank you to Halakha in Action's central teacher Rav Herzl Hefter, whose love for halakhic analysis is accompanied by a clear understanding of the impacts it can have in the real world. And finally, thank you to the 2021-23 fellows, whose love for Torah and their fellow human beings shined through in every *shiur.* May our learning, writing, and advocacy lead to a world of complete peace in our interpersonal relationships and for all of *Am Yisrael.*

Rabbanit Aliza Sperling
Director of Halakha in Action
9 Tamuz 5784

Reactivating *Miun* to Free *Agunot* Within the Framework of Halakha

Dr. Ágnes Vető

Introduction

"Even the altar cries when a man divorces his first wife."[1] This is how bGittin 90b describes the impact of divorce, the loss and emotional devastation it causes to a human couple and, through their suffering, even to Hashem. Divorce certainly causes pain, sorrow, and regret. It is also, however, a tool for growth and healing: it can bring closure, liberation, and new possibilities, which is why Jewish law allows for it. In fact, one of the most ancient institutions of Jewish family law is divorce.[2] Yet, too often, this legal tool has been misused and withheld to hurt a spouse who wants to leave his or her marriage. Sometimes these victims are husbands;[3] most often, they are wives. The latter are referred to already in the Talmud by the term *agunah*, i.e., "chained woman."[4] A Jewish wife who would like to divorce but is not given a divorce document—a *get*—is indeed stuck.[5] First and foremost, she cannot engage in a romantic relationship with another man. Doing

[1] My translation of bGittin 90b: כל המגרש אשתו ראשונה אפילו מזבח מוריד עליו דמעות.

[2] The procedure of divorce is clearly delineated in Deut. 24:1: "A man takes a wife and possesses her. She fails to please him because he finds something obnoxious about her, and he writes her a bill of divorcement, hands it to her, and sends her away from his house" (JPS translation).

[3] There is a reason for the discrepancy: a vengeful wife can, at most, slow down the procedure of the divorce. However, even if she refuses to accept the *get* into her hands, her husband can put an end to their marriage through the halakhic institution of the *heter meah rabbanim*. This legal tool allows the husband, via the permission of a hundred rabbis, to view the marriage as terminated through divorce even though the *get* was never actually handed to the wife. This *takkanah*—decree—was enacted by the Ashkenazi Rabbeinu Gershom Meor HaGolah (960-1040).

[4] The root of the noun (עגן) refers to "anchoring."

[5] The later rabbinical term *get* is the abbreviation of *gmar tov*, i.e., "good ending." The biblical term for the document is *sefer kritut*—"a book of tearing."

so would place her into the category of a *sotah*, an adulteress, a transgressor of the biblical law according to which a married woman cannot have a relationship with any man prior to her receiving a *get* from her husband.[6] Secondly, if she does engage in an extramarital relationship and has a child from it, such offspring is severely punished by Jewish law. S/he is viewed as a *mamzer/et*, an offspring of a forbidden relationship for which the penalty is extinction—*karet*.[7] The legal status of a *mamzer* is irrevocably inferior to all other Jews and can therefore never marry anyone except another *mamzer/et*.[8]

These consequences are not trifles. The reason that they exist is rooted in the husband's prerogative: it is up to him and only to him to give a *get*. If and when he chooses, he terminates the marital relationship between himself and his wife via three specific acts: first, he has to write her a divorce document; then he must place it into her hands; and, finally, he must expel her from his house.[9] This series of events positions divorce as upholding a gendered hierarchy between the spouses since both its initiation and implementation are exclusively male prerogatives.[10] There is no divorce without the husband's specific acts, and there are no specific acts through which the wife might initiate and implement the severance of marital ties. The wife's role is exclu-

[6] See Numbers 5:11-30 on how biblical law adjudicated the case of a real or presumed adulteress. The Mishnah (and the Talmud) has an entire tractate on the subject in Masekhet Sotah.

[7] *Karet* is the most severe form of capital punishment in the Torah. It refers to the extinction of one's family line, caused by divine agency. Other transgressions also punished by *karet* include, for example, having sex with a *niddah* (a menstruating woman), a married woman, or a close female relative. See Leviticus 18:1-30.

[8] The origins of the prohibition is in Deuteronomy 23:3 "לא יבא ממזר בקהל ה' גם דור עשירי לא יבא לו בקהל ה'"

[9] See n. 2.

[10] Even though wives had spousal rights both according to biblical and rabbinic law, if their husbands infringed upon them, they had to contend with the *beit din*'s power to compel their husbands to rectify their behavior. If they chose not to remedy their behavior, the wife had little recourse.

sively passive—to accept the document in her hands.[11] Such a built-in inequality naturally leads to ample opportunities for abuse.

The rabbis were not naive. As guardians of the law, they took seriously the idea that Jews *should* live by it, but they also understood that for this to happen Jews must feel that they *can* live by it.[12] Therefore, one of their persistent undertakings in legislation was to make sure that halakha was liveable for the average Jew.[13] Similar to many other legal systems, Jewish law faced constant challenges. With the passage of time, certain legal practices or ideas lost their meaning because the reality they originally engaged with changed or disappeared. One of the solutions the rabbis offered in order to bridge the gap between old laws and new reality was a revolutionary innovation: they argued that, in some circumstances, a rabbinic court can allow the performance of an act that the Torah itself prohibits![14] They used a technical term to refer to this legislation: *kum-ve-aseh* (best translated as "get up and do it").[15] It was through the principle of *kum-ve-aseh* that the Amoraim could enact two important *takkanot* concerning *agunot*.[16] In bYevamot 116b, we read that Chazal allowed the remarriage of a wife on the strength of

[11] See n. 3.

[12] This idea is best articulated in bSanhedrin 74a or bYoma85b: "one shall live by them and not die because of them."

[13] See Menachem Elon, *Jewish Law: History, Sources, Principles*, Vol. II (JPS, 1994) 495-530.

[14] Deuteronomy 4:2 very clearly states that one can neither add to the laws of the Torah nor take away from them.

One of the exceptions where the rabbis allowed the application of the *kum-ve-aseh* principle was "that there is Good Cause." This term refers to scenarios where the aim is the alleviation of human suffering or the betterment of a person's circumstances. See *Alon*, Vol. II, 521-530.

[15] See the debate in bYevamot 89a-90b. The converse situation, where the rabbinic court prohibits an act the Torah would allow, was less controversial. Such a legislative act is referred to with the Hebrew phrase "*Shev ve al taaseh,*" and its examples include the enactment according to which we refrain from blowing the shofar when Rosh Hashanah falls on Shabbos even though the Torah allows it.

[16] This is the term that refers to the generation of rabbinic scholars whose legal activity produced the early teachings of the Gemara. They lived between the mid-third century to the 6th century CE.

her own testimony concerning the death of her husband.[17] The mishnah following the *baraita* is likewise lenient about the circumstances of the witnessing of the husband's death.[18] Finally, mYevamot 16:7 allows a wife to remarry on the basis of one testimony alone concerning the death of her husband in war. All these rulings needed the principle of *kum-ve-aseh* because the laws of bearing testimony in the Torah require minimally two witnesses.[19] In these scenarios, this demand is reduced to one, and an additional leniency is articulated in that a wife's testimony was listened to about a matter she stood to benefit from! Additional *takkanot* followed; for example, RaMBaM informs us in the *Mishneh Torah* that even an otherwise unacceptable witness's testimony such as that of a minor, a woman, a slave, or a non-Jew—is believed concerning the death of an *agunah*'s husband.[20]

These *takkanot* certainly made it easier for Jews to follow the path of halakha. They were important gains and demonstrated that there was rabbinic concern and determination to ameliorate the fate of the *agunah* throughout the centuries.[21] Yet they can not sufficiently address the needs of today's victims since there is a significant difference between these antique cases and those that we encounter today. Most of our contemporary *agunot* are not widows; their husbands did not disappear. They are able to give a *get*; they just do not intend to do so.

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[17] The *baraita* in bYevamot 116b holds that the widow's testimony about the death of her husband is believed even if she does not display any signs of emotional distress over her loss.

[18] The mishnah in bYevamot 116b relates the debate between Beit Hillel and Beit Shammai. The former argues that the wife's testimony is only believed if she witnessed the death of her husband in the course of a harvest, whereas Beit Shammai accepts her testimony even when she comes from an olive grove or from abroad. Beit Hillel eventually relents and accepts the more lenient position of Beit Shammai.

[19] Numbers 35:30; Deuteronomy 17:6.

[20] Maimonides, *Mishneh Torah*, Gerushin 13:29.

[21] Alon, Vol. II, 528. See also Elana Stein Hain, *Circumventing the Law: Rabbinic Perspectives on Loopholes and Legal Integrity* (University of Pennsylvania Press, 2024). Also Rabbi Daniel Z. Feldman, *Letter and Spirit: Evasion, Avoidance, and Workarounds in the Halakhic System* (Koren Publishers, 2024).

Like many other Jewish women and men, I would like to see a halakhic solution to emerge for these *agunot*. This concern is what motivates this paper.

The Torah in Leviticus 18:5 teaches that through the laws of Hashem "one should live." A *baraita* in bSanhedrin 74a interprets the verse to convey the idea that one should live and not die by these laws.[22] That should include the *agunah*. I am confident that there is a halakhic solution to a halakhic problem, and I also believe that we should seek it out and find it.

Below, I examine two rabbinic institutions in the hope that a close reading of their development and parameters will uncover as-yet-dormant halakhic solutions that may help to overcome the problem of the male prerogative vested in the *get*. The first institution is the expansion of the powers of the rabbinic court; the second is the ritual of *miun*.

Divorce through the Court

The expansion of the powers of the *beit din* is illustrated by the seventh chapter of Mishnah Ketubot.[23] Mishnayot 1 to 10 establish the sine qua non of the sustainable halakhic marriage—the minimal (gendered) responsibilities of the spouses necessary for securing a viable life together.[24] A spouse's failure to fulfill any of these responsibilities is understood to be so antithetical to a sustainable marriage that the dissolution of the bond is called for, with or without financial guarantees to the wife.[25]

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[22] BSanhedrin 74a: "וחי בהם, ולא שימות בהם"

[23] The straightforward series of acts described in Deuteronomy 24 eventually undergoes vigorous legal development, resulting in the complex rabbinic institution of *gerushin* delineated in the Mishnaic and Talmudic tractates *Gittin*, *Yevamot,* and *Ketubot*.

[24] See Ayelet Hoffmann Libson, "Grounds for Divorce as Values: Revisiting Rabbinic Law," *Oxford Journal of Law and Religion 5* (2016), 510-531; and also Ishay Rosen-Zvi, "Mishnah Ketubot Chap. 7: The Tannaitic Conceptualization of Marriage," *Diné Israel* 26 (2010), 91.). He seeks to understand the chapter as the articulation of what the rabbis thought of as gendered spousal obligations.

[25] This may occur either through a standard divorce procedure, divorce initiated by the court, or the retroactive annulment of the union. mKetubot 7:7-8 deals with

The first five *mishnayot* deal with five cases where the husband abuses his ability to take a vow[26] in order to: (a) delegate to others his own obligations to provide for his wife,[27] (b) regulate his wife's diet, (c) regulate her use of cosmetics, or (d) limit her socializing with her parents or other people in her neighborhood. It also includes a case (e) where the husband blackmails his wife to engage verbally in sexual play with a third party or to engage in contraceptive practices in exchange for him releasing her from a vow.[28] In all these cases, the *beit din* orders the husband to divorce his wronged wife.[29]

At the time of the redaction of the Mishnah, as "heads of the family," husbands had sweeping powers impacting the daily lives of their wives. Wives had rights too, though these were not on par with those of their husbands. In the instances elucidated in the Mishnah, the rabbis deemed the husband's infringements upon the basic spousal rights of the wife to be so profound that they implemented an ingenious innovation: he lost his right to choose the initiation of the divorce and instead

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the question of when a husband is entitled to divorce his wife without paying the money specified in her marriage document.

[26] Since making a vow requires freedom of will and of person, women's vows were subject to the veto of their fathers or husbands, who were vested with freedom of will and action. Married women could not take on vows against their husbands' wishes, and if they wanted to be released from a vow, they needed their husbands to do that for them. Mishnah Tractate Nedarim is dedicated to this issue.

[27] This mishnah's concern is to establish the limit of such vows: if a husband takes on a vow that obligates him to neglect his duty to provide for his wife for over 30 days, he is compelled by the court to divorce his wife. Within 30 days, he has the right to not provide for her personally, but he needs then to appoint someone else to provide for her while he does not.

[28] See R. Ovadyah MiBartenura's elucidation of the second half of mKetubot 13:5, "Frivolous things." And then: "The meaning of this is that after having sex when her womb is filled with semen, she would blast it (her womb), so that it would not retain the semen and become pregnant."

[29] See Mordechai Akiva Fridman, "Marriage Laws based on 'Ma'asim Livne Erez Yisrael." *Tarbiz*, vol. 50, 209-242.

Other scholars, such as Ishay Rosen-Zvi and Libson, also accept his claim (i.e., that these *mishnayot* articulate the new law that the *beit din* is empowered in certain cases to force the husband to give a *get*).

was forced to do it. Such a move was a complete departure from the normative practice, a derogation of the husband's agency. Though he retained his prerogative to the extent that he still carried out the acts of signing the divorce document and placing it into the hands of his wife, he was deprived of deciding whether to inaugurate the process. The rabbis also added a penalty, seemingly for poor behavior: the husband was not merely required to divorce his wife but was forced to accept a fine of sorts—he had to pay out to his wife the amount specified in her marriage contract.[30]

Empowering the court to decide about the initiation of the divorce is an absolute innovation because it introduces a third party into the institution of divorce and partially transfers the sole prerogative of the husband to that third party, thus casting the husband into a passive role, hitherto exclusively reserved for the wife. This innovation is a shining example of rabbinic concern for wives that dares to innovate halakha in order to protect wives and secure for them a life without pervasive abuse. It proves that the rabbis realized that there is such a thing as personal freedom and acknowledged that it must be among the inalienable rights of wives. Where there is a rabbinic will, then, there is—apparently—a way.

The next *mishnah* (7:6) tackles the opposite phenomenon, i.e., where the rabbis hold that the wife's behavior is unacceptable. There are two large areas in which she can infringe on the rights of her husband. The halakhic terms referring to them are *Dat Moshe* and *Dat Yehudit*, in other words "the laws of Moses and Yehudit." *Dat Moshe* refers to the wife's failure to perform her halakhic obligations, which then causes her husband to violate halakha. The examples given are serving her spouse food made of untithed produce, neglecting to separate a piece from the dough before baking it, not refraining from all physical contact during her menstrual period, and not fulfilling her vows. The term *Dat Yehudit* refers to the unwritten social norms about her spousal roles. The examples listed are walking in the public area with an uncovered

[30] For example, in mKetubot 7:5.

head, spinning at the marketplace, and talking to all men. According to minority opinions, it also includes cursing one's in-laws in front of one's husband and speaking very loudly.

A wife who falls short in the observation of either *Dat Moshe* or *Dat Yehudit* can be seen as hurting her husband's marital rights, and she then loses the money specified in her marriage document (*ketubah*) if and when her husband decides to divorce her.[31]

Finally, in mKetubot 7:9-10, the court forces a husband to give his wife a divorce document in cases where the husband has developed major physical blemishes during the marriage or even before. Five such cases are listed as qualifying for such drastic measures: when the husband's face is distorted by boils; when he has a medical condition called *polypus*;[32] or when he has a very bad smell on account of his being either a professional collector of excrement, a refiner of copper, or a tanner. In all these cases, the law mandates the rabbinic court to compel the husband not merely to divorce his wife but also to pay out her *ketubah* money, regardless of whether the husband's physical defects were present before the marriage or developed after. This point is an important concession for the wife, but a minority opinion goes even further. According to Rabbi Meir, the wife is entitled to demand a divorce and collect her *ketubah* money even if, when she entered the marriage, her husband stipulated with her that she was aware of and accepted his condition.[33] Normally such stipulation would financially penalize a

[31] That the two *mishnayot* are adjacent speaks volumes about the gendered, and therefore unequal, empowerment the husband and wife enjoy. It is presumed that a wife might find herself in a marriage where her husband curtails her personal freedom whereas no husband is imagined to run the risk of experiencing a similar predicament. The husband's rights can simply not be curtailed on such a basic level as personal freedom. This particular gender inequality is not redrawn by this mishnah; nonetheless, the protection offered is real and new.

[32] As per the gemara's clarification, this refers to a condition where his mouth or nose has a very pungent smell. See bKetuvot 77a "מאי בל פוליפוס? אמר רב יהודה אמר שמואל ריח החוטם".

[33] I read the Sages' rejoinder differently from Libson, who understands the Sages to answer the Tanna Kamma and not Rabbi Meir. Such a reading would limit the Sages' pro-women stance since they would argue with the original position of

subsequent change of heart on the part of the wife. The fact that here it does not testifies to the radicalism of Rabbi Meir. The scope of his leniency is somewhat reduced by the rabbis since they limit it to the case of the husband with boils.[34] Nonetheless, even this stricture leaves the original leniency (that of the Tanna Kamma) intact. Regardless of when a man develops one of these five conditions, all agree that his wife can exit the marriage with financial security through a court-initiated divorce, provided that she did not specifically state at the marriage that she accepted her spouse's condition.

Thus, the majority opinion of this mishnah offers a way, in these cases, for wives to find relief when their lot would otherwise be to live in a constant state of great physical disgust. This move undoubtedly constitutes a considerable gain for the protection of wives, if only in very limited circumstances.[35] Can we view it as a legal innovation that redresses the imbalance between men and women in terms of their abilities to divorce their spouse? Does this mishnah constitute an example of wife-initiated divorce? I don't think so.

Tanna Kamma and ask that the five categories of unbearably repulsive husbands should not, in fact, be forced to divorce their wives. I hold that such a reading is verifiably not the correct one here and that the Sages merely rein in, to a degree, the very lenient position of Rabbi Meir. I believe that my reading is supported by the wording: Rabbi Meir's leniency involves a case where a husband stipulated to his wife to accept his illness at the moment of their *kiddushin*. She used a specific phrase for the stipulation. Namely, "I thought I accepted it but now I cannot accept it." The Sages use the same phrase in their limiting rule, i.e., they refer back to the case of R. Meir and they limit that, not the one of Tanna Kamma.

[34] He needs to be divorced for his own good, given that his condition makes any sexual activity painful for him. The rabbis presume that the husband would not be able to abstain from sex while sharing his living space with a woman.

[35] The word *kofin* appears only in this mishnah, which might indicate that in this one case the court orders the husband to initiate the divorce regardless of what the wife wants (see bKetubot 77b: "הכא אף על גב דאמרה הוינא בהדיה, לא שבקינ לה") because she presumably lives in a constant state of disgust due to the husband's condition. This further showcases the radicalism of the innovation: the *beit din* in this case forces both spouses to divorce due to the notion that spousal life should secure a minimal level of physical comfort.

This chapter in the Mishnah limits the biblically established absolute power of husbands over the continuation or the dissolution of the marital bond. However, this limitation is not accompanied by a simultaneous act of empowerment for wives—they do not become active agents in the process of their divorce. The various parts of the legal procedure that prescribe specific acts continue to pertain to the husband alone: it is still he who writes and presents the divorce document to the wife, and not the other way around.

Rather than vesting Jewish wives with agency, the Mishnah introduces a third party—the *beit din*—as an active agent to the divorce in order to protect women's interest. This should not surprise us: rabbinic legislation was the product of a patriarchal legal system in which women assumed passive roles that reflected the nature of their designated place in the social hierarchy. To be sure, they were part of the rabbinic society and had marital and personal rights; their protection was one of the concerns of the rabbis. Yet the rabbis resisted disrupting the patriarchal order simply to achieve their protection: if women's protection was to be achieved, it had to occur through the agency of men—in this instance through the court. MKetubot 7:10, while innovative, is not yet a locus of autonomous agency for women. It was the institution of *miun* that came closest to such a sea change.

Miun

The Tannaitic origins of this little-known institution are found in the Mishnah, in Tractate Yevamot. It is the result of another rabbinic innovation. Originally, according to biblical law,[36] a bride about to marry was either a *naarah* (a girl between 12 and 12.5) or a *bogeret* (one having reached 12.5 years). Before the age of 12, she was a *ketanah*, a minor. The rationale behind this law was that such a transformational decision as marriage needed to be based on understanding and intention, complex ways of thinking sometimes lacking in a minor. To ensure, however, that the opportunity for a potentially beneficial match was not lost due

[36] bKiddushin 3b.

to a girl's tender age, the halakhic system empowered fathers to marry off their underaged daughters.[37] Though an innovation, this law was categorized by the rabbis as biblical.[38] If, however, the father of a minor unmarried girl had died, his orphan daughter still needed to get married with someone's permission since she herself had no agency. In such an instance, her brother or her mother could marry her off. However, this marital bond was viewed as merely rabbinic, a notch down from laws with biblical status.[39]

This difference has tremendous consequences, which we can appreciate in the regulations pertaining to the dissolution of such a marriage. In sharp distinction to a biblical-level marriage, this rabbinic-level marriage (facilitated by the minor's mother or brother) allowed the minor wife to retroactively annul her marriage—if she did so while still a minor—through a specific ritual called *miun* (refusal), so called because it is through this ritual that the wife "refuses" to continue to accept her husband *qua* husband. Upon performing the ritual, she does not become a divorcee, but her marital past is completely erased, and she is considered a free woman who was never married to the man who was subject to her *miun*. The retroactive dissolution of the marriage was taken seriously. Subsequent to the *miun* ceremony, the couple could marry each other's relatives, and a *memaenet* (woman who performed *miun*) was allowed to marry a *kohen* provided that she was not otherwise disqualified, e.g. by a different marriage.[40]

In thirteen laws, the thirteenth chapter of Mishnah Yevamot establishes when and how *miun* must be performed to annul a marriage. The specific themes of these thirteen *mishnayot* are varied and include:

—whether *miun* can be performed only by a betrothed orphan child (*arusah*) or even by a fully married one (*nesuah*);

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[37] Even against her wish, based on Deuteronomy 22:16. See bSotah 23a with Rashi: "האיש מקדש את ביתו=מקבל קידושי בתו קטנה שלו מדעתה".

[38] bSotah 23b Tosefot d. h. שנאמר; bKetubot 46b: "השתא אביה מקבל קידושיה...אלא מסתברא".

[39] On the concepts of rabbinical versus Torah law, see Alon, *Jewish Law*, Vol. I, 208-223.

[40] See mYevamot 13:4.

—whether her performance of the ritual requires the presence of her husband or whether she can effectively "refuse" her husband even in his absence;

—whether the presence of a rabbinical court is necessary for the *miun* to take effect;

—how many times an orphan child-wife may perform *miun*;

—when the child-wife can leave the marriage even without performing *miun*;[41]

—what behavior on the part of the wife amounts to *miun*;[42]

—how *miun* decreases (or increases) the pool of permissible partners for future

marriage;[43]

—and, finally, in what circumstances even a child-wife whose father is alive[44] can perform *miun*.

Miun in Tannaitic Sources

On all of these points, the final position of the *mishnayot* favors wives, in that it espouses the stance that makes it easier for the wife to perform *miun*.[45] On occasion, even Beit Shammai rules leniently: a *baraita* quot-

[41] mYevamot 13:2.

[42] Interestingly, the text of the mishnah and that of the gemara reflect a different organizing principle at this point. In the text of the Talmud, the two *mishnayot* of mYevamot 13:2 and 3 are grouped together as one.

[43] Both members of a divorced couple are forbidden to marry their respective ex-in-laws. A couple who split up through *miun*, however, is not divorced; their marriage is retroactively annulled. They, therefore, are allowed to marry each other's ex-in-laws.

[44] See mYevamot 13:6 and supra.

[45] Note, however, that the language of the first mishnah discussing *miun* refers to those who arrange for the orphan child-wife to perform *miun* and not to the wife herself: "they only arrange for the *miun* of *arusot*…". It portrays the court as the main player and active agent rather than the woman. Though as the deliberation of the mishnah unfolds, the wording changes and the verb is used in the singular feminine. The first example of the term betokens a deliberate editorial choice, one made in order to set the tone. Even here, there is a stylistic attempt to suggest that the final agency lies with the court.

ed in bYevamot 107b describes a case where a wife performed *miun* in the absence of her husband.

It was taught in a *baraita*: Beit Hillel said to Beit Shammai: Did not the wife of Pishon the camel driver perform *miun* when he was not present?

Beit Shammai responded to Beit Hillel: Pishon the camel driver used an inverted cup to measure; therefore they measured him with an inverted cup!

Since (Pishon) "devoured" the produce (of his wife), it is obvious (that his wife was) a *nesuah*, but then Beit Shammai said (in the *mishnah*) that a *nesuah* may not perform *miun*!?

The rabbis knotted him doubly! (bYevamot 107b)

Beit Shammai's position on these two points is clearly delineated in the first mishnah of the chapter: only a minor orphan *arusah* can perform *miun,* and only in the presence of her husband. The *baraita* relates the intriguing case of Pishon, the camel driver, whose wife was accorded an unusual double leniency. Not only was she allowed to perform *miun* after entering *nisuin*, but she was also granted the ability to do so in the absence of her husband. Yet Beit Shammai accepted this clearly very harsh decision against Pishon!

The *sugya* makes a point of emphasizing that Beit Shammai agreed with the double punishment shown to Pishon due to his especially egregious behavior in that he wilfully destroyed his wife's property.[46] This is crucial because it demonstrates that even the normally stricter rabbinical adjudication—that of Beit Shammai—applies leniency in order to help a wife exit an abusive marital bond. In other words, the law can be unusually flexible and allows for a range of possible legal outcomes. In particular, it takes into consideration the context of the divorce in the marriage that precipitated it.

[46] As a husband, he was entitled to enjoy the yield of the property his wife brought to the marriage while their marriage lasted but was not allowed to destroy it.

Miun in the Gemara

In contradistinction to the Tannaitic sources' wholesale pro-women stance, the gemara evinces a more diverse ideological commitment that results in its occasionally reversing some of the gains of these *mishnayot*. For example, in bYevamot 107b, the gemara establishes that, contrary to the mishnah's statement that Beit Hillel allows *miun* either with or without a *beit din* (i.e. the presence of a judge), the young wife can only perform *miun* in the presence of a *beit din* consisting minimally of two lay judges.[47] Additionally, the gemara in bYevamot 108a relates that early on it became the rule to supplement the verbal ritual with written documentation called the "*get miun*."[48] Its wording became highly regulated in order to distinguish it from a divorce document. The *get miun* had to register the date of the *miun* ritual, the name of the husband and the name of the wife, the fact that she performed the ritual, and her explicit stipulation that she did not want to be married to him. Especially beginning in the 8th century, when written culture began to supersede oral culture, the written document *de facto* guaranteed the wife's freedom because it provided irrefutable physical proof of the annulment of the marriage. At the same time, this also slowed down the procedure of *miun* since it demanded an additional step and an additional (male) person for the successful completion of the ritual. The scribe was now crucial in order to commit the required information to writing.

The halakhah of *miun*—certainly as constructed mishnaically—constituted a decidedly lenient pro-women stance from a legal point of

[47] The mishnah's wording suggests a very liberal stance when Beit Hillel allowed for *miun* to be performed even without the presence of judges. However, the elucidation of a *baraita* (first cited in 101b) in 107b quickly explodes the possibility of such an interpretation: according to it, Beit Hillel definitely required a *beit din* of three judges, who were merely allowed to be lay rather than expert judges. However, a minority ruling by R. Yosi bar Yehuda and R. Elazar ben Shimon is satisfied with two lay judges! Subsequent commentaries disagree whether the two lay judges are sufficient for *miun* only post facto (*bedi eved*) (see Tosafot bYevamot 107b d.h. "halakha") or even a priori (*lehatkhilah*) (see Rambam, *Mishneh Torah*, Laws of Divorce 11:8).

[48] As the Gemara explains in bYevamot 107b, this name was a misnomer and had nothing to do with the divorce document referred to as a *get*.

view. Unfortunately we don't know its *sitz im leben* and cannot gauge its impact on the actual lives of Jewish women. It is indisputable that child marriages were performed in Jewish communities—the practice continued, for example, through the twentieth century in Yemen.[49] Yet it seems that the beneficial impact of *miun* could not have been experienced by such a very young woman without some external help. It is hard to imagine that an abused young wife could have been aware of her rights and gathered the courage and the determination to perform *miun* all alone. In order to undertake such a dramatic initiative, it would have probably been necessary for her parents to live close enough to take her home following the ritual.[50] For those girls lucky enough to be in these circumstances, these *mishnayot* in mYevamot 13 would have been helpful.

Understanding, Mental Focus, and "Real" Sex: Prerequisites for Marriage

MYevamot 13:2 and 13:3 represent an additional radical ruling: a child-wife who was married off by her mother or brother without understanding the nature and significance of the event is not considered to be married even on rabbinical level.[51] Would such a child-wife die before she had the chance to remarry, her first husband could not inherit her and could not expose himself to the impurity of her corpse while mourning for her if he was a kohen. At the heart of this rabbinical legislation lies the rabbis' appreciation for the role of understanding in *kiddushin*. The rabbis seem to have held that without "understanding," it is impossible to offer consent. Thus, in a case where the fatherless

[49] Bat Zion Eraqi Klorman, *Traditional Society in Transition*: *The Yemeni Jewish Experience* (Brill, 2014), ch. 6.

[50] Though *miun* was not frowned upon, some Talmudic passages clearly testify to underlying discomfort or negativity surrounding *miun*. See the *baraita* in bYevamot 109b: "R. Nassan says: …distance himself from three things: …from acts of *miun*. (Because) perhaps when she becomes an adult she will regret (her *miun*).

[51] It seems on the bases of bYevamot 108a that one of the ways the child-wife could perform *miun* was to marry another man. This liberal practice changes with time though and falls into disuse.

child-wife undergoes a wedding ceremony without understanding its implications, she is viewed as someone who did not give her consent. Hence her *kiddushin* and *nisuin* cannot and do not effect a marital bond between her and her groom.

There are two minority opinions following this rule of Tanna Kamma. One is given in the name of Rabbi Hanina ben Antignos, the other by Rabbi Eliezer. The former more or less follows Tanna Kamma's rationale and agrees with its ruling. The latter dissents from both and argues that the child-wife still needs to perform *miun*, yet he agrees—based on an entirely different rationale—that the rabbinic bond between the couple is non-existent. I look closely at the details of these two opinions because they reveal a lot about rabbinical understandings of sex and its interconnectedness with intention.

According to Rabbi Hanina ben Antignos, a child-bride's level of understanding can be gauged by some very specific actions. For example, she can prove that she is understanding important ideas and implications by safeguarding her bridal gift, which is indeed important since it is the object that effects the *kinyan*. If she cannot successfully safeguard it and loses it, then she is presumed not to understand the significance of the object and the causation it effects. Indeed, precisely because of this lack of understanding, her *kinyan* would not be effected, and thus she would be allowed to leave her husband without performing *miun* if she wants to do so.

The other minority opinion relating to Tanna Kamma is attributed to Rabbi Eliezer. He dissents from Tanna Kamma's leniency. Nonetheless, he too holds that the bond between the couple does not exist. If he still insists that she performs *miun,* that insistence is due to his social conservatism, which the gemara duly points out.[52] So what is Rabbi Eliezer's argument? He holds that it is the quality of the fatherless child-wife's sex act that explains why no real marriage bond was effected:

[52] See bYevamot 108a: "אלא בכדי תיפוק". Should she leave him without any acts of severance at all? Certainly not!

> Rabbi Eliezer says: her sex act does not amount to anything but has merely the status of the sex act of a seduced girl.[53]

What, exactly, does this statement mean? Does Rabbi Eliezer think that the girl does not understand what sex is, or does he argue that, unlike a biologically mature woman, the young girl is physiologically not able to perform during cohabitation? If the former, then Rabbi Eliezer's point would be that sex that effects *kinyan* depends on understanding and intention and not merely on sexual pleasure or the sex act itself. Such a definition would show some affinity with the argument advanced by Rabbi Hanina ben Antignos. For him, too, as we saw, the main condition of *kinyan* is in the cognitive realm: the girl has to be able to understand and focus.

Alternatively, Rabbi Eliezer might insist here on the biological aspect of sex, without denying its tie to understanding and intention, or denying the relevance of understanding to marriage. I believe that he makes a scientific or medical statement, according to which the physiological functioning of a female's body that is younger than 12 years old cannot compare to that of a more mature female body's functioning.[54] In fact, he claims, such a body cannot really have sex even when it performs the sex act. There are several Talmudic texts that support this reading, and the *gemara*'s subsequent elucidation proves that indeed this is the correct interpretation here.[55] R. Eliezer's point is that since the biological imma-

[53] אליעזר אומר: אין מעשה קטנה כלום אלא כמפותה– The case of the "seduced girl" is spelled out in Exodus 22:15-16. It is clear that the sex act between the seducer and the seduced girl does not effect *kinyan*, which is why the seducer has to either to perform *kiddushin* with her or pay the bride price to the father if the latter does not give his permission to the marriage.

[54] BNiddah 45a and bKetubot 11b, for example, articulate the idea that a very young girl's hymen grows back after penetration. This seems to have been the position of medical experts during the 7-8th centuries CE in the Jewish world that Chazal inhabited.

[55] BYevamot 108a states the following about R. Eliezer: "Rav Yehuda says in the name of Shmuel: I reviewed all the opinions of the Sages, and I could not find

turity of the girl renders the cohabitation "not real," the *kinyan* is never effected, similarly to another compromised case of cohabitation, that of the seduced woman. In that instance, however, the *kinyan* could not take place due to lack of intention, not for lack of physiological maturity.[56] It appears that R. Eliezer's definition of a valid *kinyan* understands sex as a complex act that has ties to both physiology and intention (though not to pleasure). He thinks that a woman must be mature enough physically to meaningfully perform it, but physical maturity in and of itself does not effect it. It certainly is a *sine qua non* for valid sex, but it is not enough. Valid sex that effects *kinyan* is predicated on the intention to form a legal bond through cohabitation between mature bodies.[57]

As the commentary of R. Ovadyah of Bartenura explains, Rabbi Eliezer's opinion is rejected.[58] Against Rabbi Eliezer, Rabbi Hanina ben Antignos holds with Tanna Kamma, that what matters is understanding, and understanding has to be displayed through some everyday act. Additionally, there has to be cohabitation, which qualifies regardless of the intent or the age of the participants: cohabitation with a girl younger than 12 qualifies for a real sex act. There is much to appreciate in this

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anyone who was more consistent (in his rulings) with regard to (the marriage) of a minor female like R. Eliezer. For R. Eliezer considered her (merely) as one strolling with him in the courtyard (who then) rises from his bosom, immerses (herself to remove the impurity contracted by cohabitation), and may (then) eat terumah in the evening (if she is the daughter of a Kohen)." This description does not leave doubt that R. Eliezer refers to penetration in the Mishnaic text above. That the wording of the description would use the phrase "strolling with him in the courtyard" is in consonance with the general rabbinic practice that sex acts and sexual organs were described through architectural terms relating to a house.

[56] No one questions that the seduced woman derived pleasure through her sex act, but no one assumes either that through that act she established a lasting bond with her partner. That is why neither the seduced woman nor the seducer can have legal claims on each other. The seducer, for example, cannot inherit her or contaminate himself for her corpse and has no right over her earnings or findings and cannot annul her vows.

[57] This definition of what is a mature body is not ours since, for Chazal, the body of a 12 year old is mature.

[58] Yevamot 13:2 d. h: אין מעשה קטנה אלא כמפותה.

ruling: it means, *inter alia*, that having sex with a minor girl was viewed as a real sex act, so forcing a child to have sex qualified for rape.[59]

The final law concerning *miun* that is of interest to us is the extension of the right to a minor girl whose father is alive. This term appears in the context of *yibum* in mYevamot 13:6, in a scenario where a minor girl is originally married off by her father, is then divorced from her husband, then eventually remarries him, and is finally widowed by him while she is still a minor. Such a young widow is called "like an orphan in the lifetime of her father."[60] The term reflects the rule that a father's jurisdiction over his daughter ends upon her entering her first marriage. When this bond is undone (by death or divorce), she is not under her husband's authority but neither is she anymore under her father's. She is a free agent, can marry whomever she pleases, and can then undo this bond through *miun* if she is still a minor. The two pillars of such an exceptional status seem to be her halakhic sexual experience and her minority, which guaranteed for such a Jewess the best of both worlds: she was free to enter a marriage of her own choice and also free to exit it. These two criteria allowed her to escape both her father's and her husband's authority over her person.

Conclusion

To summarize: a younger than 12-year-old fatherless girl's marriage has a handicap. It is merely on a rabbinical level as opposed to a biblical one. This is due to the fact that such a marriage is not based on full adult consent: the minor herself can only give the consent of a minor, and her father is not there to give his adult consent. The rabbis acknowledged this lack in their legal categorization and also in the creation of the institution of *miun*, which allowed the fatherless minor-wife to annul retroactively that weak, merely rabbinical marital bond. *Miun* was thus a younger institution than biblical marriage or divorce. From its inception, it was

[59] This with the caveat that Chazal also held that a child less than three years and a day old cannot have real sex, and her hymen would recreate itself after rupturing. So for Chazal a toddler cannot be raped.

[60] Like an orphan in the lifetime of her father=כיתומה בחיי האב.

acknowledged to be an innovation of the rabbis in order to facilitate the functioning of another rabbinical innovation, the rabbinical marriage.

We today are likewise in need of halakhic innovations. They need to be innovations in order to make our lives liveable, and they need to be halakhic so that our lives can remain connected to their Jewish roots and framed by them. Could the institution of *miun* be utilized in the quest for a halakhic solution to the *agunah* problem? Some of its features certainly seem to correspond to the circumstances of contemporary cases of *agunot*: since *miun* was intended to free the least protected—the fatherless minor girl—it would be an ontologically perfect fit in a halakhic project whose objective is to help *agunot*. Another advantage of *miun* is that it was designed to be performed by a wife who married without her father. Today, the degree of paternal authority in Jewish families cannot compare to that described in the Mishnah. Jewish women today marry the man they choose; they are not given into marriage by their father. Measured by the standards of the Mishnah, most contemporary Jewish women about to marry are in the category of a "fatherless" woman. Surely, however, they are not minors, and the consent of a *bogeret* removes the applicability of *miun* since her marriage is on the biblical level. So *miun* as it appears in the rabbinical sources above does not offer a halakhic solution to our *agunah* problem. Nonetheless, we should be inspired by it: the Tannaim were capable of creating a halakhic tool that gave agency to some wives to annul their rabbinic-level marriages. We should be able to find *miun*'s equivalent, a halakhic institution that retroactively annuls the marriage of a *mesarev get*. It would be enough if the right of the annulment stayed with the court.

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Kiddushei Ta'ut and Mental Illness

Rabbanit Dr. Liz Shayne

There are, according to the Talmud in BT Kiddushin 2a, three methods by which a woman enters into a marriage (via contract, exchange of money or its equivalent, or intercourse) and two by which she leaves it. While this assertion is true, it is also incomplete. It is true that there are only two ways for a marriage to end: death and divorce, as the Talmud says. But there is another way that a marriage might dissolve. That process is called *hafka'at kiddushin*, and it refers to the power of the court to annul a marriage as though it never existed. A marriage that has been annulled has not been ended; it has been retroactively undone. Such a step is drastic but not unheard of throughout Jewish history. And although the rabbis are parsimonious in its use, they unequivocally believe in its power.

כָּל דְּמְקַדֵּשׁ – אַדַּעְתָּא דְרַבָּנָן מְקַדֵּשׁ, וְאַפְקְעִינְהוּ רַבָּנָן לְקִידּוּשִׁין מִינֵּיהּ.

> All who betroth do so under the will of the rabbis, and the rabbis can annul that betrothal (BT Gittin 33a).

One of the acceptable reasons for an annulment is when a betrothal and marriage happen under false pretenses. *Mekach ta'ut*—"mistaken acquisition"—is a legal category that applies broadly to all forms of acquisition but is used in the context of marriage to refer to situations where some information or known defect about either spouse ought to have been disclosed before the wedding and was not. These mistaken marriages, *kiddushei ta'ut,* are annulled because the spouse is understood to believe the following: "Had I known what I ought to have been told, I would never have entered into the marriage." It is worth remembering that, in the Talmudic era, betrothals could have been carried out by messengers at a long distance, and so this solution to spousal misrepresentation

seems perfectly reasonable. In our day and age, the value of *mekach ta'ut* is that—in cases of *get* refusal where we can also determine that the marriage happened under false pretenses—it can be used to unilaterally free a woman chained in marriage.[1]

The usefulness of *kiddushei ta'ut* should neither be over- nor understated. It is a tool in the rabbinic toolbox and one that has, historically, served as one possible key to unlock the chains of the *agunah*. The question that remains, about which we ought to be conscientious, is what constitutes "false pretenses." The Gemara discusses two contradicting scenarios of *kiddushei ta'ut*. One (BT Ketubot 72b) is a case where a man explicitly states that he is marrying a woman on the condition that she has no blemishes, only to discover that she has some sort of blemish. Such a marriage is voided. However, the marriage is only annulled if the husband had stated explicitly that the marriage is conditioned on her being blemish-free. If he marries her without qualification and then discovers that she has a blemish, the marriage stands. The other scenario (57b) involves a defect or blemish that annuls the marriage without mentioning any conditions set by the husband. According to the Rishonim, the solution to this seeming contradiction regarding preconditions is that there are actually two kinds of *kiddushei ta'ut*. The first is deception: one partner makes the presence or absence of a particular trait a condition of the marriage and the other partner conceals the fact that they do not meet the criteria. The second is a *mum gadol*, a significant defect. Some issues are of such weight that the marriage is presumed to be under false pretenses unless the partner understands the situation completely from the outset and consents anyway (what,

[1] As my goal is to discuss one particular part of *kiddushei ta'ut*, I will not go into the full details of how it has been used over the centuries. For a more extensive analysis of the history of *kiddushei ta'ut* as a method of unilaterally ending marriage, as well as a larger analysis of the halakhic positions and the reason that our community considers it a viable way to end a marriage, please see the International Beit Din's responsum "קידושי טעות" (https://www.internationalbeitdin.org/wp-content/uploads/2023/05/Kiddushai-Taut.pdf). For our purposes, we follow the International Beit Din's ruling that a *beit din* ought to rule *kiddushei ta'ut* when the situation warrants it.

in rabbinic language, is called *savra v'kibla*). Any marriage where one potential spouse sets a condition and the other fails to meet it can be annulled, but the only marriages that can be annulled without such preconditions are those where the defect is deemed sufficiently significant that it creates an unbearable marital situation.

"אֵין אָדָם דָּר עִם נָחָשׁ בִּכְפִיפָּה"—"No person would live in a basket with a snake." This quote appears in multiple scenarios in rabbinic literature, most notably in BT Ketubot 77a to explain why a man who will only provide for his wife when forced to by the court is compelled to divorce. In more modern contexts, it is used more broadly to justify claims of *kiddushei ta'ut* when one spouse makes the other's life unbearable. According to the International Beit Din, "It is important to note that rulings of *kiddushei ta'ut* have been made hundreds if not thousands of times throughout Jewish history. Poskim offer examples such as impotence, mental illness,[2] and psychological dysfunction that make married life untenable."[3] While the rulings of the individual courts are kept private out of respect for the individuals, the rabbis who evaluate these issues will discuss when and how they decide *mekach ta'ut* and one of the factors that enters into consideration is whether the husband has been diagnosed with a mental illness. That is to say that, in addition to looking at the behavior that makes married life untenable, the courts will also look at whether that behavior is accompanied by a diagnosis of mental illness and, if so, will consider the diagnosis as supporting evidence for declaring *kiddushei ta'ut*. It is easier to declare *kiddushei ta'ut* on someone who has been diagnosed with a mental illness.

This leaves us, as contemporary Jews, with something of a conundrum. *Kiddushei ta'ut* is a vital and useful tool that can, for example, end a marriage in which a husband has a persistent pattern of erratic or frightening behavior that demonstrably preceded the wedding. At the

[2]For the purposes of this essay ,I am going to use the language of" mental illness" to remain in line with the language of the modern sources ,even if it is often not the language that best reflects any given individual's relationship with their psychological state.

[3]See the Halakhic Methods section of the International Beit Din's website.

same time, the language of *mum gadol* is discomfiting because it is inherently judgmental. By definition, a *mum gadol* is something no person would want in a partner unless they go on the record saying that they accept it. In effect, it states that certain kinds of people are unfit partners. I have no problem saying that unpredictable, erratic, and harmful behaviors make one an unfit partner. But, as the boundaries of this category are established, we have a responsibility not to further stigmatize those with disability or mental illness by presuming that they are unfit. Indeed, we see the difficulty inherent in finding the right boundaries when we consider both contemporary and historical cases of *kiddushei ta'ut.* In any number of those cases, longstanding patterns of unpredictable and harmful behavior on the part of the husband were instrumental in declaring *kiddushei ta'ut.* However, when the courts use the diagnosis itself as part of the evidence for *kiddushei ta'ut*, we move towards dangerous assumptions and stigma. The work of freeing *agunot* is critical, and I would not, for all the world, suggest that we interfere with its efficacy. Yet I believe it is possible to construct a better understanding of *mum gadol* that does not disparage those of us with psychological diagnoses in the holy service of freeing *agunot.*

Given the trustworthiness of the courts doing this work and the overwhelming evidence that is amassed in cases of *kiddushei ta'ut*, this problem may seem academic. There are, to my knowledge, no cases of *mekach ta'ut* that rest entirely on a diagnosis; modern courts use it as supporting evidence to make an obvious case of *kiddushei ta'ut* based on the husband's behavior appear more ironclad. My anger is on behalf of the *agunot* whose husbands' behaviors are equally untenable, but whose claims of *kiddushei ta'ut* are harder to support because there is no history or evidence of mental illness. As soon as the presence of a diagnosis is used to bolster a claim, the absence of one will inevitably be used to undermine it. The women chained in marriage deserve better. And so do those of us with mental illness.

There is a particular feeling, one that is not unique to those of us with psychological diagnoses, of sitting in a presentation and feeling unmoored as a halakhic conversation veers into the realm of talking about us and our own unfitness. To be in the room and hear about the role

that having a mental illness can play in declaring *mekach ta'ut* is, frankly, horrible. Even with all the qualifiers and emphasis that the diagnosis works to support the claim only when harmful patterns of behavior are already present, it is impossible not to hear the underlying message: "No one would agree to marry someone like you." Halakhic thinkers owe us, the Jewish people, an ethical halakhic process and that means a process that works towards ethical ends through ethical means. Even if there will never be a case of *kiddushei ta'ut* that rests entirely on diagnosis, the way that the courts discuss the process is equally important. The conversation right now feels like a slap in the face to all of us doing our best to be good spouses while living with mental illness and psychological diagnoses. If it were necessary for freeing *agunot*, I could swallow the pain. Since, however, the courts can be equally if not more effective without relying on diagnosis at all, I believe they have a moral imperative to do so.

I want to suggest that, rather than using mental illness as evidence for *kiddushei ta'ut*, we only and always rely on behavior as evidence. The actual diagnosis should not enter into the *beit din*'s calculation. Identifying behavior rather than diagnosis is preferable for three reasons. First, mental illness differs from physical illness in that a diagnosis does not explain the cause of distress; it merely describes it. Diagnosis is designed to help medical professionals help patients (and unlock treatment benefits), but the rates of misdiagnosis, likelihood of missed diagnosis, and subjective nature of the criteria for diagnosis make official diagnoses less objective and less reliable than observed behavior. Second, using mental illness diagnoses to support a claim of *kiddushei ta'ut*—despite the rarity of the claim and how irrelevant it is to most marriages—perpetuates the stigma of mental illness in the observant community and makes it harder for those who need help to seek it. Finally, this approach will increase the likelihood that cases where the spouse displays a lifelong pattern of harmful behavior can be resolved swiftly, as there is no impulse to diagnose a specific mental illness in order to bolster the claim of *kiddushei ta'ut.* Diagnosis of mental illness ought to be irrelevant to claims of *kiddushei ta'ut.*

The first advantage of ignoring diagnosis when evaluating *kiddushei ta'ut* lies in the increased objectivity that comes from focusing on behav-

ior. By definition, a *mum gadol* is a fact about the person that would be deemed a significant problem in a potential spouse. The paradigmatic example in the Talmud is that of an *aylonit*, a woman who never develops female sex characteristics and cannot bear children. For some rabbis, the figure of the *aylonit* defines the category of *mum gadol* as an insurmountable obstacle to procreation. Other rabbis suggest that this example refers to any trait that either interferes with procreation or makes cohabiting with the person impossible. This would include anything that a spouse would be presumed to find distasteful, including persistent halitosis or bodily defects. I am, to be clear, deeply uncomfortable when the Talmud cites examples of a *mum gadol* that map onto physical disabilities. I hope that, as our society shifts and our perspective on disability changes, we stop seeing physical difference as a *mum gadol*.[4] Until that time, the last thing we should be doing is expanding the category of *mum gadol* to include other forms of difference.

The thread that connects the aforementioned examples is that they refer to objective features of the person. Mental illness, on the other hand, is a complex field where diagnosis rests on a clinician's judgment, the patient's experiences, and the constellation of symptoms. As indicated above, it remains subjective and misdiagnosis is always a concern. Specific behaviors, even those that constitute the criteria for certain diagnoses, are much more objective in the halakhic sense. The *beit din*'s job is to ascertain that there is a pattern of behavior that no person would consent to living with and that said pattern has persisted since before the marriage. The more the *beit din* relies on behavior rather than a diagnosis as a proxy for persistent behavior, the stronger the case for *kiddushei ta'ut*.

This leads to the second key advantage of using behavior rather than diagnosis as the proof for *kiddushei ta'ut*. Focusing on formal diagnosis perpetuates the stigma around mental illness in the Jewish community, disincentivizes seeking help with mental illness, and rewards those who

[4] To some extent, what constitutes a *mum* depends in part on what is normalized by society, and my fervent hope is, as we normalize disabled bodies in Jewish spaces, this example becomes less and less relevant.

refuse to seek help. Asking for help is difficult enough under the best of circumstances without adding the knowledge that part of the process may include undermining one's marriage. Providing better support for people with mental illnesses in our community means that we ought never consider them defective as human beings, even if only within the realm of a particular halakhic reality. If we include mental illness in the criteria for declaring *kiddushei ta'ut*, even if only as corroborating evidence, we are saying that, by definition, mental illness makes one defective. It is useful to remember the two different kinds of *kiddushei ta'ut* here. Were the issue simply that one spouse failed to disclose their mental health struggles, then *kiddushei ta'ut* would only apply if the other spouse had explicitly stated that they only intended to marry someone without mental illness. *Kiddushei ta'ut* based on *mum gadol*, however, works when the standard assumption is that no one would willingly marry a person with mental illness unless they understand the situation and consent, *savra v'kibla*. This strikes me as both untrue—especially given the current rates of mental illness—and deeply painful. At the end of the day, the problem with a person who has mental illness who withholds a *get* as part of a longstanding pattern of coercion and control is exactly the same problem as a person without mental illness who withholds a *get* as part of a longstanding pattern of coercion and control. It is, after all, quite possible for a person to make married life untenable without having any formal diagnosis and there is no reason to look for one in order to make a better case for *kiddushei ta'ut*. Bringing mental illness into the conversation just serves to make life harder for all those currently grappling with mental illness who are doing their best to be good spouses.

Finally, the third benefit of using behavior to judge the criteria of *kiddushei ta'ut* is that it avoids the trap of conflating mental illness with immorality. Western culture has linked the concepts of evil and madness in narrative for a long time. The ancient myth of Herakles, for example, portrays madness as a curse from the gods that leads to murder. The more modern iteration of myth, the superhero legend, is similarly filled with stories of villains whose origins consist of being driven mad and

going on to harm others.[5] It is, however, with the 19th-century's scientific bent and the dawn of modern psychology that we, as a culture, have sought to consider wrongdoing itself a pathology. One sees the proliferation of the diagnosis "moral insanity" in this era, a term which includes any of the following: melancholia (depression), lying, stealing, pyromania, and any behavior that is outside the bounds of good taste for one's class or station in life, especially if one is a woman.[6]

Since then, the idea that evil is a manifestation of mental illness has only entrenched itself further in our culture. We hear this rhetoric often in reactions to tragedy, that a person must have been insane to do the things that they did. We also hear it in attempts to explain bad behavior: they cannot help themselves because there is something wrong with them. Evil itself becomes a form of mental illness; if no sane person could do such an evil thing, then it must mean that all evil people are insane. There must *be* something wrong with people who *do* wrong. If we extend this logic to *igun*, we end up saying that anyone who withholds a *get* must have something wrong with them. Why else would they do wrong? If we can identify what is wrong with them, say, with a diagnosis of a specific condition linked to mental illness, we now have an answer to why they do wrong and will not change. Conversely, if we cannot find a diagnosis, we are taught to second guess whether the behavior is truly wrong. If there is nothing wrong with them, maybe what they are doing is not wrong. Perhaps this goes without saying, but this view of both mental illness and evil is incorrect.[7] The more we learn, the more mental illness unfolds as complex psychological phenomena that is not about morality. Moreover, the more we learn, the more we understand that something is not evil just because it is either different or difficult.

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[5] For more resources, I highly recommend Amanda Leduc, *Disfigured: On Fairy Tales, Disability, and Making Space* (Coach House Books, 2020).

[6] For more information about the evolution of psychology in the 19th century, see *Embodied Selves: An Anthology of Psychological Texts, 1830-1890*, Jenny Bourne Taylor and Sally Shuttleworth. eds., specifically Henry Maudsley on "A Case of Moral Insanity" (266-268) and George Henry Savage in "Moral Insanity" (282-4).

[7] Disabled people and those with mental illness are far more likely to be victims of crimes than to commit them, and there is no difference in criminal activity between those with mental illness and those without.

In a culture that has so much stigma around mental illness and that makes so many unfounded assumptions about the criminality of those with mental illness, the judge and the *beit din* must be exceedingly cautious to counteract that influence. There is a principle in halakhah (found in BT Sanhedrin 6b and elsewhere) "אין לו לדיין אלא מה שעיניו רואות"—"The judge has nothing but what his eyes can see." We cannot know what goes on inside a person's heart. We cannot see into the synapses of their brain. We cannot determine why mistreatment happens. We can, however, know whether there has been a pattern of controlling behavior and unreasonable demands since before the marriage. We cannot know whether that pattern comes from a person's own trauma or poor guidance or an imbalance of neurochemicals or an evil nature. It is important for the *beit din* to remember that a diagnosis of mental illness is merely psychology's way of affirming the presence of a certain constellation of symptoms. It is the *beit din*'s job to look at the behavior, not whether a doctor has ascribed a certain name to it.

An annulment based on *kiddushei ta'ut* is, and always has been, an important method for unilaterally ending marriages. Until *igun* itself is no more, and all participants in Jewish marriages are able to leave when they choose, we need halakhic interventions like *kiddushei ta'ut* to work whenever they can. I firmly believe that a focus on behavior rather than diagnosis will only strengthen the halakhic foundation and viability of this approach. We cannot hope to combat either the stigma of mental illness or spousal mistreatment—of which *get* refusal is often only the last in a long line of physical, emotional, and financial instances—if we are not absolutely clear that it is the behavior that is harmful, not the person's diagnosis or identity. In emphasizing what people do rather than who they are, we ensure that the holy work of freeing *agunot* builds a more just and more ethical world in all ways.

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Jewish Wedding Vows: Do Nedarim have a Place in the Jewish Wedding?

Rabbanit Gloria Nusbacher[1]

The typical wedding, as depicted in popular culture, has as its central element the exchange of marriage vows. This element is notably absent from the traditional Jewish wedding. Instead, the closest equivalent is the giving of a ring by the groom to the bride while reciting "*Harei at mekudeshet li b-ta'baat zo k'dat Moshe v'Yisrael*" ("Behold you are consecrated to me with this ring, according to the law of Moses and Israel"). Traditionally, the bride remains silent.

For some time now, there has been a search by couples to add greater mutuality to the halakhic wedding ceremony. Among the practices that some have instituted are a statement by the bride that she accepts the ring given by the groom or the actual giving of a ring by the bride to the groom at some point in the ceremony.[2] Both of these features have met with limited but growing acceptance.

But there is another aspect of Jewish marriage, not addressed by these ceremonial innovations, that remains deeply troubling for couples who see marriage as an equal partnership: the lack of parity between spouses' commitments to sexual exclusivity. Under Jewish law, a wife who commits adultery violates a major biblical (*d'oraita)* prohibition, in theory punishable by the death penalty (for both the wife and her

[1] Some of the ideas in this article were introduced to me by Rabbi Zev Farber and Rabbi Mike Moskowitz as part of the Halakhah in Action program of Yeshivat Maharat. I would like to thank Rabbi Mike Moskowitz, Rabba Wendy Amsellem, Rabbi Avigayil Halpern, and Rabbi Jeff Fox for their comments on earlier drafts of this article.

[2] For a discussion of these and other practices that give the bride a more significant role in the wedding ceremony, see Rabbi Dov Linzer, "*Ani L'Dodi v'Dodi Li:* Towards a More Balanced Wedding Ceremony," *JOFA Journal* (Summer 2003).

adulterous lover).[3] By contrast, polygamy by the husband was permitted both biblically and during Talmudic times. It was prohibited (for Ashkenazi Jewry) only by a rabbinic decree (*takkana*) generally ascribed to Rabbenu Gershom in the 11th century, which declared it punishable by *cherem* (excommunication).[4] Marital infidelity by the husband is not viewed as a capital offense under Torah law. It is, however, subject to the lesser prohibition of *yichud,* which prohibits any man and any woman from being secluded together unless they are married (or in certain other limited circumstances). The *poskim* disagree as to whether this is a Torah-level or rabbinic-level prohibition.[5] Rambam holds that sexual intercourse outside the marital relationship is prohibited by the Torah and subject to the punishment of lashes (*malkot*), but others disagree.[6] In order to address this inequality, couples and their rabbis have begun to consider whether biblical vows – *nedarim* – can be used to create greater parity in the relationship by elevating the groom's obligation of fidelity in marriage to a clearly biblical level, on par with that of the bride.

The Nature of *Nedarim*

The basic structure of a *neder* is a declaration that a specified thing is forbidden to the person making the *neder* as if that thing had been

[3] After the abolition of capital punishment, the husband was required to divorce an adulterous wife; she lost her property rights under her *ketubah*; she was not allowed to marry the man she had committed adultery with; and any child born of an adulterous relationship with another Jewish man was a *mamzer* who was precluded from marrying within the Jewish community except for a convert or another *mamzer.* See Sanhedrin 41a; Rambam, Mishneh Torah, Laws of Women *(Hilkhot Ishut*) 24:6,10; Shulhan Arukh, *Even HaEzer* 115:5, 6.

[4] See Henry Abramson, Henry Abramson, "Rabbenu Gershom and the Ban on Polygamy in the 11th Century." Youtube.com. 3 May, 2023. https://www.youtube.com/watch?v=zujcj2QiSvI.

[5] See Rabbi Chaim Jachter, "The Yichud Prohibition–Part One: To Whom Does it Apply?," *Kol Torah*, vol. 12, Halachah, May 22, 2002, https://www.koltorah.org/halachah/the-yichud-prohibition-part-one-to-whom-does-it-apply-by-rabbi-chaim-jachter.

[6] See Rambam, Mishneh Torah, Laws of Women (*Hilkhot Ishut*) 1:4 and comment by Ra'avad.

consecrated to the Temple.[7] The declaration typically begins with the word "*konam*," signifying that the thing being forbidden will be treated as if it were a *korban* (Temple sacrifice). The thing that is forbidden can be a particular action (such as eating ice cream), or it can be receiving benefit from a particular person. The declaration can be phrased so that the restriction is effective immediately, only takes effect upon occurrence of a specified condition, or only for so long as certain conditions are satisfied. In the context of a marriage, the thing being declared forbidden would be sexual relations outside the marriage, and typically the prohibition would remain in effect from the time of the marriage ceremony until such time as the marriage is dissolved or the couple are living apart for a specified period of time.

Jewish tradition has mixed views about the desirability of making *nedarim*. The Mishna in Avot 3:13 states Rabbi Akiva's view that a *neder* can serve as a way to help people avoid sin. For example, it can either add an additional basis of prohibition and thereby strengthen a person's resolve to resist the prohibited conduct, or, by broadening the category of prohibited things, can prevent inadvertent violation of the actual biblical or rabbinic prohibition.

By contrast, a *baraita* in Nedarim 60b compares a person who makes a *neder* to one who builds a *bama*, a forbidden personal altar, and compares one who keeps his *neder* to one who brings *korbanot* (sacrifices) on that altar. In other words, this *baraita* sees *nedarim* as a way of creating a personal set of obligations and prohibitions, tantamount to creating one's own religion.

The concern raised by this *baraita* is particularly acute where the purpose of the *neder* is to circumvent the traditional double standard of halakhic marriage. Nevertheless, the Torah expressly provides for

[7] The punishment for intentionally using or benefitting from consecrated property is death by the hand of Heaven (*mitah b'yedei shamayim*) according to some authorities and by lashes (*malkot*) according to other authorities. See Rabbi Adin Steinsaltz, *The Talmud: A Reference Guide*, First American Edition (Random House, 1989), 220. See Nedarim 2a; Rambam, *Mishneh Torah*, Laws of Vows (*Hilkhot Nedarim*) 1:16.

nedarim in great detail,[8] and they may be appropriate where communal ideas of marriage have shifted from those of Talmudic times.

Nedarim by Heterosexual Couple

In the case of a heterosexual couple, since the bride already has a biblical prohibition of adultery, parity of biblical obligations can be achieved by having the groom make a *neder* that sexual relations outside of the marriage will be forbidden to him during the life of the marriage. Adultery by him would then be a violation of his *neder*, which would constitute violation of a biblical prohibition. For example, the groom might say, "I hereby obligate myself to live with you in marriage and take this *neder* that, for as long as we are married according to halakhah, sexual relations with any woman other than you shall be forbidden to me."

Although not necessary to create parity, if the couple wants to create a more parallel ritual, the bride can take a similar *neder*.[9] The couple can also choose to include more emotional commitments, such as to love and respect each other as is common in non-Jewish wedding vows, but these are outside the scope of the *neder* formula and thus have no halakhic import as *nedarim*.[10]

Today, violation of a *neder* is not enforceable under Jewish law, but neither is adultery by the bride. Under secular law, the legal consequences of adultery are the same for both spouses. So having the groom take a *neder* of marital fidelity is essentially a matter between him and God, and adding it to a wedding ceremony is a symbolic statement that, under Jewish law, the obligation of fidelity within the marriage is equal for both

[8] Bamidbar 30:3 provides that a man who takes a vow (*neder*) or an oath (*shevua*) shall not break his word and shall carry out all that he has said. Bamidbar 30:4-16 requires a woman to carry out any vow (*neder*) she has made or any self-imposed obligation *(esar)* she has assumed, subject to her father's or husband's right to annul it in limited circumstances.

[9] See below for a discussion of additional considerations when the *neder* seeks to duplicate an existing Torah or rabbinic prohibition.

[10] See below for a discussion of such commitments in the context of *shevuot* (oaths).

parties.[11] The addition of a *neder* to the marriage ceremony does not eliminate the need for a *get* to effectuate a halakhic divorce.

Nedarim by Same-Sex Couple

The concept of *nedarim* can also be utilized by same-sex couples. The considerations regarding the use of *nedarim* in these cases are somewhat different. Here, there is no need to create parity between the two members of the couple, as is the case with the heterosexual couple. Rather, the purpose of the *nedarim* would be to add a Jewish element to a marriage or commitment ceremony. Since such a ceremony is not contemplated by halakhah, the couple has even more flexibility to design a ceremony that meets their needs than does a heterosexual couple. Some couples may choose to follow the format of a traditional Jewish wedding ceremony as closely as halakhically possible while others may choose to design a ceremony that looks completely different.

The making of mutual *nedarim* by which each partner publicly commits to an exclusive relationship with the other is one way of imbuing the ceremony with holiness by formulating their commitment to each other in halakhic terms. The form of such a *neder* could be that sexual relations with persons other than their partner will be forbidden to them (until termination of the relationship).

One issue of particular concern for same-sex couples is whether such a *neder* even works in their circumstances. Assuming that sexual relations between same-sex partners is either biblically or rabbinically forbidden,[12] the question is whether a *neder* can be effective if it merely duplicates the prohibition.

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[11] Even this symbolic statement has its limitations since the husband can, by utilizing the halakhic mechanism of *hatarat nedarim* described below, unilaterally annul his *neder* without the wife even knowing about it.

[12] The extent to which this assumption is correct is beyond the scope of this article. However, there is growing acceptance of queer people in the Orthodox community and of the desirability to find halakhic ways to accommodate them. See Rabbi Jeffrey Fox, *Nashim Mesolelot*: *Lesbian Women and Halakha—A Teshuva with Responses* (Ben Yehuda Press, 2024).

The Rishonim (medieval rabbinic scholars) disagreed over the effectiveness of such a *neder.* Rashi[13] and Ramban[14] state that a *neder* prohibiting to oneself something already forbidden by the Torah would be effective. So, for example, a person who made a *neder* that pork was forbidden to them would have made an effective *neder.* If that person then ate pork, they would be violating both a Torah prohibition and their *neder*. Tosafot,[15] Rosh,[16] and Baal HaMaor[17] take the opposite view: that such a *neder* is not effective since one cannot add a prohibition on top of an existing prohibition.

There may be an additional basis for upholding a *neder* if the self-imposed prohibition covers some things that are not already forbidden in addition to the things that are already forbidden. The argument is derived by analogy to the laws dealing with *shevuot* (oaths). The general rule regarding *shevuot* is that a *shevua* to refrain from doing something prohibited by the Torah is not effective. However, if the *shevua* covers both prohibited and non-prohibited things, such as a *shevua* to refrain from eating both kosher and non-kosher meat, the *shevua* is effective even regarding the non-kosher meat.[18] By analogy to this law, a *neder* to refrain from sexual relations with both members of the same and the opposite sex – other than with each other – should be effective even with respect to members of the same sex.

Thus, while there are conflicting views on the issue, there is a basis for the position that a *neder* under which the members of a same-sex couple forbid to themselves sexual relations with persons other than their partner would be effective under halakhah. The position would be strengthened if the *neder* were broad enough to prohibit sexual relations with both members of the same and of the opposite sex.

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[13] Rashi on Shevuot 20b, s.v. *hachi garsinan.*
[14] *Milchamot Hashem, Masechet Shevuot, dapei haRif* 12b.
[15] Tosafot on Shevuot 20b, s.v. *d'chi lo nadar.*
[16] Rosh on Nedarim 20a.
[17] Baal HaMaor, *Masechet Shevuot, dapei haRif* 12b.
[18] Shevuot 23b; Rambam, *Mishneh Torah*, Laws of Oaths (*Hilkhot Shevuot*) 5:10; Shulhan Arukh, *Yoreh De'ah* 238:6.

Another approach to a ceremony for same-sex couples is built more on the concept of *shevua* than *neder*. By contrast to a *neder*, in which the person making it declares some external thing forbidden to them, a *shevua* requires its maker to either do or refrain from doing a particular action.[19] So while a *neder* is typically phrased as a negative, a *shevua* can be a commitment to take positive actions.

Under this approach, the members of the couple could create a written declaration of mutual promises, such as to live together as a couple; to be faithful to each other; to do their best to love, cherish, respect, and support each other; and other similar commitments they find meaningful. This would be followed by a *shevua,* perhaps linked to the exchange of rings, to fulfill the commitments in the declaration. (Since an absolute promise to constantly love, support, etc. one's partner is likely unattainable, and a *shevua* should not be taken lightly, the declaration of promises should include language acknowledging that certain of these promises are statements of intention and that some lapses may occur.) The couple could choose to specify an end date to the *shevua*, such as upon obtaining a secular divorce. Alternatively, when either member of the couple wishes to end the relationship, that person could utilize the existing mechanism of *hatarat nedarim*, in which they ask a *beit din* (rabbinic court) to nullify their *neder* or *shevua*. In order to justify such nullification, the person seeking it must demonstrate that they regret having made the *neder* or *shevua* and would not have made it had they known then what they know now.[20]

The formulation of a *shevua* may be seen as coming closer to the essence of *kiddushin* since, like *kiddushin*, its focus is on the fact that the couple has chosen each other as their partner. By contrast, the focus of a *neder* is on all other potential sexual relationships, which are declared off limits. However, there is a sense that a *shevua* is more serious than a *neder,*[21] and, as a result, the use of *nedarim* seems to be more prevalent than the use of *shevuot* in the wedding context.

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[19] Mishna Shevuot 3:1.
[20] Shulhan Arukh, *Yoreh Deah* 228:1, 7.
[21] See, e.g., Nedarim 18a.

As in the case of *nedarim,* a *shevua* is not enforceable under Jewish law and is a matter between its maker and God. Making such a *shevua* in a public ceremony is a way of imbuing the ceremony with holiness by formulating the mutual commitments in halakhic terms.

Nedarim by Heterosexual Couple Instead of Kiddushin

Another theoretically possible approach to equalize marriage commitments is for a heterosexual couple to use mutual *nedarim* or *shevuot* as a substitute for traditional *kiddushin*. The rationale for such an approach could be that the couple finds the unequal power dynamic of traditional *kiddushin* offensive, even if tempered by adding *nedarim* and otherwise adapting the ritual to minimize the inequality of the traditional ceremony. However, for a heterosexual couple, *kiddushin* is currently the only form of halakhic marriage, so a ceremony consisting solely of mutual *nedarim* or *shevuot* would not constitute a halakhic marriage.

Conclusion

Nedarim could be added to a traditional *kiddushin* ceremony as a way of increasing parity in the relationship by making the bride's and groom's obligations of fidelity in the marriage more similar. Same-sex couples, for whom *kiddushin* is not halakhically available, could incorporate mutual *nedarim* or *shevuot* into their marriage or commitment ceremony as an alternative to *kiddushin* that nevertheless formulates their commitments to each other in halakhic terms. However, use of mutual *nedarim* or *shevuot* by a heterosexual couple instead of *kiddushin* is not currently acceptable as halakhic marriage.

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Coercive Control: An Old-New Way of Understanding Domestic Abuse and *Get* Refusal

Rabbi Zachary Truboff

Typically, domestic abuse is conceived of as something physical, along the lines of cuts and broken bones, sexual violence, and even murder. However, the emphasis on physical violence can often cause us to miss the true picture of abuse, which is more complicated and insidious than we might think. To better capture what really takes place in abusive relationships, experts have coined the term "coercive control," which consists of several different behaviors, all done with one goal in mind: to control and dominate one's partner.[1]

Though coercive control is not limited by gender, men are by far the worst offenders, and nearly every case of *get* refusal that comes before the International Beit Din was preceded by a marriage where coercive control was present. It usually starts at the beginning of the relationship when the man attempts to socially isolate his partner.[2] Before the marriage, a woman will have a close relationship with friends and family, but after the wedding, they begin to see her less and less. Usually, the husband will justify this distance by claiming that it is important that they spend time together as a couple away from others, or he will actively prevent her from making plans with friends and family. Social isolation is often accompanied by the husband's attempts to control his wife's behavior. It may start with small things, such as comments that the dishes must be done a certain way or that the food must be cooked in a particular fashion, but it can quickly escalate. What begin as demands

[1] The concept was developed by Evan Stark. See, for example, his *Coercive Control: How Men Entrap Women in Personal Life* (Oxford, 2007), and Lisa Fontes, *Invisible Chains: Overcoming Coercive Control in Your Intimate Relationship* (Guilford, 2015).

[2] For a clear description of what this can look like, see Lisa Fontes, *Invisible Chains*, 14-30.

about how she must act in the home soon become dictates about what she can or cannot do in public.

While many of us may imagine that we would refuse to comply with attempts at social isolation and control from a marital partner, many otherwise independent women can be snared by this gradually escalating behavior. The price of non-compliance can be high. Refusing to give in to the husband's demands often leads her to be cruelly punished in the form of lengthy periods of silence, the denial of sexual intimacy, and other vengeful acts.[3] Even more problematically, the husband's demands are often coupled with additional acts of humiliation and intimidation that take their toll on his wife's psyche. He might insult her by demeaning her appearance and attacking her insecurities, and he will often lie, making his wife think she is the cause of the marital problems, a behavior commonly known as gaslighting.[4]

Intimidation and threats of violence are particularly effective in ensuring that the wife submits to her husband's coercion. An abusive husband will often engage in extreme behavior to scare his wife and make clear what will happen if she defies him. When angry, he might violently punch a wall, smash dishes on the ground, or drive dangerously. Sometimes, the threat of violence need not even be spoken.[5] Instead, one day, he may come home with a gun, claiming it is for their protection even as she knows it is most likely to be used against her. Over time, the threats intensify, and the violence along with them, though not always in ways we might expect. One of the most common, yet least recognized, forms of violence in a marriage is sexual violence. Husbands who engage in coercive control often rape their wives and perform other violent sexual acts as a way of humiliating their wives and demonstrating their control.[6]

Though survivors of coercive control may experience physical violence, they often make clear that it pales in comparison to the emotional

[3] Fontes, *Invisible Chains*, 42-44.
[4] Fontes, *Invisible Chains*, 44-56.
[5] Fontes, *Invisible Chains*, 36-39.
[6] Fontes, *Invisible Chains*, 51-54. Fontes notes that when rape occurs in a relationship, it is an indication that the woman's life may be at risk.

and psychological abuse they experience. "The violence was not the worst part" is a tragic refrain we've become all too familiar with at the International Beit Din. Rather, it is the husbands' steady stream of threats and humiliations that often leaves women wracked by anxiety and depression. Because they are isolated from friends and family, they cannot easily ask for or obtain help. In addition, the husbands often take steps to put finances under their sole control so that their wives cannot easily access money and leave if necessary.

Though coercive control may be a newer concept, halakhah is no stranger to the profound suffering this kind of control can impose in the context of marriage. More than a decade ago, Rabbi Shlomo Daichovsky of the Israeli Chief Rabbinate issued an important ruling in a case involving a husband who had not been physically abusive but had emotionally and psychologically abused his wife for many years. Rabbi Daichovsky made clear that the husband had no choice but to divorce his wife and declared unambiguously that "Psychological violence is worse and often more dangerous than physical violence. Trampling a person's dignity, turning them into human dust, a rag and nothing more is worse in many cases than physical violence." In this case, the abuse took a profound toll on the woman, and he notes that she "sought to commit suicide several times . . .[w]e are talking about a case of absolute despair caused by his actions, and a life of sorrow, pain, and humiliation; a woman enters marriage to live and not to suffer."[7]

Coercive Control and the Divorce

In marriages where there is coercive control, the most dangerous time for wives is when they attempt to leave. If they feel their control slipping away, abusive husbands are liable to become extremely violent and do anything they can to stop their wives from leaving. As long as

[7] See Case 016788168-21-1 as cited in *Ha-Din Ve-Ha-Dayan*, vol. 1, Adar, 5763 (2003), 6. Rabbi Yosef Kapach makes a similar point regarding a case of spousal abuse where he writes that "physical wounds can heal and be forgotten, but psychological wounds leave behind disgusting scars that last forever and cannot be healed." See *Edut be-Yehosaf*, 37.

their wives are within their grasp, they will abuse her, and even if she is able to escape, the trauma does not end, for they will use the divorce process to further exert their control over their wives even after their physical separation. During the civil divorce, abusive husbands attempt to manipulate the legal system and drag out proceedings with the aim of preventing their wives from receiving what they deserve. This problem is only compounded in the Jewish divorce, where only the husband can end the marriage by giving his wife the *get*. For husbands with a history of coercive control, refusing to give a *get* is not just incidental but central to how they operate. It serves not only as an act of revenge but also as their last opportunity to dominate their wives. As long as they can prevent her from marrying anyone else again, they ensure she remains forever under their control.

In our experience, nearly every case of *get* refusal is preceded by a marriage where coercive control is present, and unfortunately, *batei din* can often become an unknowing party to it. Even in situations where an abused woman does manage to find a sympathetic rabbinic ear, few if any *dayanim* (rabbinic judges) are trained to understand the dynamics of abuse, nor do they typically have experience working with survivors of trauma. Further, because *dayanim* have little or no leverage over a recalcitrant husband, they often go out of their way to accommodate him, even if they believe he is in the wrong, out of the hope that it will lead him to give the *get.* In doing so, however, their actions facilitate extortion and further traumatize the woman.

In one particularly egregious case, a client of ours turned to her local *beit din* after years of an abusive marriage in which she had been subjected to all forms of coercive control: social isolation, financial control, humiliation, and intimidation. However, the *beit din* did not want to summon the husband to court because they were concerned that even a hint of pressure might cause him to withhold the *get*. After years of waiting, she was eventually notified that her husband had given the *get* and that she could come to the *beit din* to receive it. Yet when she arrived, suddenly, the story changed. Now the *dayanim* said she could only get it if she was willing to give in to her husband's demands. Hearing

the rabbis encourage her to give in to her husband's extortion left her stunned. After years of his coercive control, it felt as if he had violently humiliated her once more, this time empowered by those she looked up to as moral and religious authorities. As a result, she immediately began to spiral into a dark depression marked by thoughts of suicide.[8]

There is Nothing New Under the Sun

According to most halakhic authorities, acts of physical violence by the husband towards his wife are clear grounds for divorce. In these circumstances, not only is the husband obligated to give the *get*, but he can be physically coerced to do so.[9] However, not only acts of physical violence can force a husband to divorce his wife. A careful examination of halakhic literature reveals that the rabbis were sensitive to the ways coercive control could manifest in a marriage. They consistently ruled that acts of social isolation, humiliation, and intimidation by the husband towards his wife required the husband to divorce her and give the *get* immediately without any qualifications.[10]

Though most assume Massechet Gittin is the Talmudic tractate dedicated to divorce, it is only Massechet Ketubot, and the seventh chapter in particular, where one finds the laws about when a marriage must end. Some of the issues discussed include what happens if the husband

[8] A compelling case can be made that every *agunah* is a situation of *pikuach nefesh*. See, for example, Responsa, *Ein Yitzchak*, vol. 1, Even Ha-Ezer 11, where he argues that if a person is excluded from marrying and properly participating in communal life, it is a fate worse than death and is to be considered *pikuach nefesh*. Therefore, every effort must be made to find halakhic leniency that would allow them to do so.

[9] The topic is an extensive one. For an overview of the halakhic issues, see *Ataret Devorah*, vol. 2, siman 92, 662-672; *Mishpat Ha-Get*, vol. 2, 644-642; *Elu Kofin Le-Hotzi*, 123-133. For a historical overview, see Avraham Grossman, *Pious and Rebellious: Jewish Women in Medieval Europe* (Brandeis, 2004), 212-230; Naomi Graetz, *Wifebeating in Jewish Tradition*, Jewish Women's Archive, https://jwa.org/encyclopedia/article/wifebeating-in-jewish-tradition.

[10] It should be noted that most Rishonim understand the mishnah as requiring the husband to immediately give the *get* but not necessarily permitting the *beit din* to physically coerce him to do so. An exception to this is the *teshuvah* of the Tashbetz discussed below.

or wife violates halakhic practice or develops blemishes that negatively impact the marital relationship. However, in the first few *mishnayot* of the chapter, the issue of coercive control is most prominent. Each one describes a case where the husband or wife makes restrictive vows that impact the other party in severely negative ways, thereby requiring the marriage to end. In the first example, the husband makes a vow that his wife cannot receive benefit from him, which requires him to appoint a third party who will do so using his finances. If the vow continues for any length of time, he must divorce his wife. As mentioned, withholding intimacy or financial support is a common tactic of coercive control.

> One who prohibits his wife by a vow from benefiting from him—up to a month, he must appoint a provider; beyond this, he must divorce her and pay the *ketubah*. R. Judah says: For an Israelite—one month, he maintains; two months—he divorces and pays the *ketubah*; and for a priestess—two months, he maintains; three months—he divorces and pays the *ketubah*.[11]

The Talmud, however, questions the husband's ability to make such a vow, for the marriage contract obligates a husband to support his wife.[12] As a result, it interprets the mishnah as a case where the husband refused to support his wife but permitted her to keep her own financial earnings, which would normally go to him, and support herself from them. He must only appoint a third party to provide for her if she cannot get by on her own. Either way, it is clear to the rabbis that withholding in this

[11] Ketubot 7:1. Translation from *The Oxford Annotated Mishnah* (Oxford, 2022).
[12] Ketubot 70a. It should also be noted that the language of "one who prohibits his wife by a vow" is somewhat vague, for a husband cannot make a vow that restricts his wife's behavior. This is another reason why the Talmud reinterprets the mishnah as it does. For a critical historical reading of this mishnah and the ones that follow, see Shmuel Safrai, *Mishnat Eretz Yisrael: Ketubot*, vol. 2 (Michlelet Lifshitz, 2023), 415-423.

fashion is a clear sign there has been a breach of the marital relationship and that the wife must leave.

The next *mishnayot* involve more direct examples of coercive control in which a vow is made that would prevent the wife from eating fruit or adorning herself with jewelry.[13]

> One who prohibits his wife by a vow from tasting any one fruit—he divorces and pays the *ketubah*. R. Judah says: For an Israelite—one day, he maintains, two—he divorces and pays the *ketubah*; and for a priestess—two, he maintains, three—he divorces and pays the *ketubah*. One who prohibits his wife by a vow from adorning herself with any one sort of adornment—he divorces and pays the *ketubah*. R. Yose says: For poor women—if he did not set a limit; and for wealthy women—thirty days.[14]

At first glance, the meaning of these *mishnayot* is not completely clear, for a husband does not have the power to make a vow that restricts his wife's behavior.[15] As a result, the Talmud offers two different interpretations of the mishnah, both of which assume the wife is the one who initially makes the vow and that the husband chooses not to nullify it.[16] His unwillingness to do so, in the eyes of the rabbis, indicates a breakdown

[13] Though it could be argued the first mishnah is also an example of coercive control, in which the husband vows not to support his wife, the Talmud ultimately understands it as a case in which the husband refuses to support his wife, but she can keep any income she might earn as her own.

[14] Ketubot 7:2. Translation from *The Oxford Annotated Mishnah* (Oxford, 2022).

[15] See Talmud Yerushalmi, Ketubot 7:2.

[16] See Ketubot 71a, which states that the wife made a vow that eating a particular fruit or adorning herself with jewelry is forbidden to her. On Ketubot 71b, it states that the case in the mishnah is slightly different. It is one where the wife makes a vow that if she adorns herself with jewelry, she will be forbidden to have sexual relations with her husband. In both cases, the husband's refusal to nullify the vow is seen as a sign the marriage must end.

of the marital relationship that requires the marriage to end. However, Tosafot offers a third approach.[17] Though the husband cannot make a vow that directly restricts his wife's behavior, he can make a vow that sexual relations with her will become forbidden to him if she violates a condition he has made clear. For example, he can say, "If you eat from a particular fruit or adorn yourself, the pleasure of sexual relations with you shall be forbidden to me."[18] Though one should always be cautious about reading rabbinic texts through the lens of modern concepts, it is noteworthy how similar the cases in the Mishnah are to modern examples of coercive control. Through making a vow, the husband attempts to control his wife's behavior regarding matters of food and dress, both classic examples of coercive control. Furthermore, he exerts this control through the threat of withholding sexual relations, a common intimidation tactic used by husbands.[19]

Social Isolation

If this were the only instance of the rabbis showing concern for coercive control in the context of a marriage, one would have a right to be skeptical. However, the *mishnayot* that follow only seem to confirm that the rabbis were aware of the behaviors that make up coercive control and understood just how problematic they were. The very next mishnah

[17] Tosafot, Ketubot 71a, s.v. *bishlema le-rav*. The approach of Tosafot is also cited by the Ramban, Ketubot 71a, s.v. "ha" and with slight variation by the Ran as brought in the *Shita Mekubetzet*, Ketubot 71a, s.v. *bishlema le-rav*. According to the interpretation of the Magid Mishnah (Hilchot Ishut 12:24), this is also the approach of the Rambam as well; however, it should be noted that the Rambam is only explicitly like Tosafot regarding a vow made by a husband that his wife cannot go to her father's home. See Hilchot Nedarim 10:12.

[18] The approach of Tosafot was codified by the Shulchan Aruch and affirmed by numerous Achronim. See Tur, Even HaEzer 72; Shulchan Aruch, Even HaEzer 74:1; Chelkat Mechokek, Even HaEzer 74:2; Beit Shmuel, Even HaEzer 74:1; Shulchan Aruch, Yoreh Deah 235:3; Taz, Yoreh Deah 235:5; Shach, Yoreh Deah 235:11.

[19] For additional sources on the danger of a husband using threats or intimidation with his wife, see Gittin 6b-7a; Responsa, Mabit 2:158. For general sources on the prohibition of threatening another, see Sanhedrin 58b; Rambam, Sefer Ha-Mitzvot, prohibitions, 300; Semachot 2:4-5; Responsa, Iggerot Moshe, Yoreh Deah 4:30.

states that if a husband attempts to socially isolate his wife from her family and the wider community, this too is grounds for divorce, and he will be required to give the get.

> One who prohibits his wife by a vow from going to her father's house—when he is with her in the town: one month—he must maintain her, two—he divorces her and pays the *ketubah*; and when he is in another town, one festival—he must maintain her, three—he divorces her and pays the *ketubah*. One who prohibits his wife by a vow from going to a house of mourning or to a house of celebration—he divorces and pays the *ketubah*, because he has locked [the door] before her.[20]

The examples in the Mishnah can perhaps best be understood as attempts by the husband to prevent his wife from spending time with her family and friends. In the time of the Mishnah, it was understood that even during marriage, a wife would visit her father's home and that this was something to be encouraged.[21] While some leeway is given to the husband to limit the frequency of these visits, he cannot cut off the relationship and must allow his wife to visit her father's home at least several times a year. If he tries to socially isolate his wife, he will be required to divorce her. A similar concern is stated regarding attempts by the husband to stop his wife from going to communal activities, whether they be a house of celebration, typically understood to be a wedding or *sheva berachot*, or a house of mourning. By being unable to go to a house of celebration, the wife loses an important opportunity to socialize with others. However, it is not obvious to the Talmud why there should be a

[20] Ketubot 7:4-5; Translation from *The Oxford Annotated Mishnah* (Oxford, 2022).
[21] See, for example, Pesachim 8:1, where it is assumed that a wife will spend her first *regel* after the wedding at her parents' home, a custom that is also mentioned in Shir HaShirim Rabbah 8:2.

problem if she cannot go to a house of mourning. What benefit could there be for her there? The Talmud eventually concludes that if she were not to attend houses of mourning, "tomorrow she will die, and there will be no one to eulogize her."[22] The rabbis understood that the Jewish community is held together by a contract of sorts, and that if one does not participate and assist others in need, no one will do so in return. A husband's attempts to socially isolate his wife are driven by this very logic. If his wife does not stay in contact with members of her community, no one will think to check on her and perhaps discover the abuse.

According to some Rishonim, the vows made by the husband in these examples should be understood along the same lines as the previous *mishnayot*. He vows that were she to go to her father's home or to a house of mourning or celebration, sexual relations with her will become forbidden to him.[23] However, a more striking interpretation is suggested by the Ri Migash, who notes that the examples of the mishnah cannot be explained as situations where the wife makes a vow that the husband refuses to nullify. Unlike vows made by a wife that restrict food and dress, vows that restrict movement are not within the husband's purview to nullify. Instead, the Ri Migash suggests that the mishnah should be understood as a case where the husband made the vow preventing his wife from going to her father's home, a house of mourning, or a house of celebration out of the misplaced belief that he had the halakhic power to do so. After this, any time she might attempt to go to her father's house, he would physically restrain her.[24] Ri Migash notes that even if the husband were told his vow had no effect, he wouldn't listen, implying that his desire to prevent his wife from leaving had nothing to do with halakhah but reflected his own need to control her.

A husband's attempts to socially isolate his wife are also discussed elsewhere in the Talmud, where the behavior of Papos ben Yehuda is condemned; he "would lock the door before his wife and leave" when

[22] Ketubot 72a.

[23] See Rambam, Hilchot Nedarim 10:12 and Ritba as cited in Shita Mekubetzet, Ketubot 71b.

[24] See Ri Migash as cited in the Shita Mekubetzet, Ketubot 71b.

he left his home.[25] According to Rashi, he did this to prevent her from speaking with other men, but in doing so, he created enmity between him and his wife, which permanently damaged their marriage.[26] The Rambam further develops this theme and clarifies that a wife "is not in prison [in her own home] such that she cannot come and leave."[27] It is important to know that in many of the cases that have come before the IBD, husbands do go so far as to make their wives prisoners in their own homes. It is not uncommon that he threatens to hurt her if she tries to leave and even takes away her car keys or siphons gas from her car to keep her trapped in their home.

Humiliation

At the end of the *mishnayot* related to restrictive vows between a husband and wife, one final and important example of coercive control appears. The Mishnah states that if a wife requests her husband nullify a vow that she has made but he responds that he will only do so on condition that she act in a way that publicly embarrasses herself, he must divorce her immediately. The husband is clearly attempting to humiliate his wife by acting in a way that she would find degrading.

> If he said to her [your vow will only be void]: "On condition that you tell so- and- so what you said to me," or "what I said to you," Or "that she should fill up [a container] and pour it out on a dungheap," he must divorce her and pay the *ketubah*.[28]

[25] Gittin 90a.

[26] See Rashi, Gittin 90a, s.v. "Papos"

[27] Rambam, Hilchot Ishur, 13:11. That said, the Rambam does write that a woman shouldn't leave the home too frequently because it would be inappropriate, but as Rabbi Nahum Rabinovitch notes in his commentary Yad Peshuta, the Rambam does not say a woman's comings and goings should be limited as long as there is a reason for them.

[28] Mishnah, Ketubot 7:5. Translation from The *The Oxford Annotated Mishnah* (Oxford, 2022). Words in brackets added by this author.

In the first example, the husband says he will not nullify the vow unless his wife first shares details of their intimate conversations with others.[29] The Talmud concludes that there is no constructive purpose for this other than to cause her embarrassment, and therefore, if he makes this demand, he is required to divorce her. The same applies if the husband says he will not nullify her vow unless she fills up a container of water and pours it out on the ground. Though this may not seem like a dramatic request, the Talmud clarifies by citing a *baraita* that the husband's intention was for her to do this not just once but ten times. By doing something so absurd in view of the public, she would appear mentally unstable and experience great humiliation.

In its discussion, the Talmud expands upon the examples of this *mishnah* by citing an additional case where a husband vows that his wife must not loan or borrow any household items to or from their neighbors.[30] This is problematic because, by being unable to share with others, she will develop a bad reputation in the eyes of her neighbors. Therefore, any attempt by the husband to control his wife in this way will require him to give the *get* immediately.

For some *poskim*, this ruling provides clear justification that even when no vow has been made, a wife does not need to submit to unreasonable demands made by her husband that would cause her shame and embarrassment. When asked how a woman should respond if her husband tells her to go out in their yard and pretend she is riding an imaginary horse, as kids do, or to act like a donkey or dog, Rabbi Yosef Chaim of Bagdad (1835-1909) states in unambiguous terms that she can refuse to do this if it will cause her embarrassment.[31] As proof for this position, he cites the Talmud in Ketubot that a wife need not listen to her husband if he demands that she fill up water and spill it out on the

[29] Ketubot 72a.

[30] Tosafot once again make clear that if the wife does not listen to the husband's demands, the consequence will be that sexual relations with her will become forbidden to him. See Tosafot, Ketubot 72a, s.v. "hamadir et ishto shelo tishal."

[31] Responsa, Torah Lishma 319. See also Torah Lishma 270 where this logic is used to justify why a son need not listen to his father if he asks him to act in ways that will cause him embarrassment.

ground, for in both cases, the wife is made to appear mentally unstable in public and would be humiliated.

Financial Control

Elsewhere in Ketubot, the Mishnah discusses a husband's attempt to control his wife's use of the household finances, an issue that frequently emerges in cases of coercive control. The Mishnah states:

> One who sets his wife up as a shopkeeper or appoints her as a guardian may exact an oath from her any time he wishes. R. Eliezer says: Even concerning her spindle or her dough.[32]

According to the Mishnah, a husband may designate his wife as his shopkeeper, allowing her to function as his legal agent and run his store. However, along with this responsibility comes the right of the husband to make his wife take an oath at any time that she has not taken any of the store's proceeds for herself or spent them without her husband's permission. Rabbi Eliezer then adds that a husband can also force his wife to make a similar oath regarding the finances of their home, what he describes as matters of "her spindle or her dough."

In commenting on this mishnah, the Talmud debates whether Rabbi Eliezer's position applies only if the husband has already appointed his wife to be his shopkeeper. On the one hand, it is perhaps logical to allow a husband to make his wife take an oath regarding the finances of their home if she is already required to do so due to her role at his store. However, the Talmud ultimately concludes that we do not rule like Rabbi Eliezer, and therefore it limits the husband's ability to make his wife take a vow regarding the household finances. The reason for this is clear. If he had the power to do so, he could be overly exacting and controlling, demanding that she constantly take vows that she has

[32] Ketubot 9:4. Translation from *The Oxford Annotated Mishnah* (Oxford, 2022), 113.

not misspent their money, thereby making the marital relationship intolerable.[33]

Tosafot, on the *sugya,* explore a similar question by citing the Talmud Yerushalmi, which asks whether a wife is financially liable if she were to break something in the home. Given that her husband is most likely the legal owner of their possessions, would she be obligated to pay him for the damages? According to the Yerushalmi, the answer hinges on whether the wife would be considered as one who is paid to watch another's property (*shomer sachar*) and would be fully liable no matter how the objects became broken or whether she is like one who is not paid to watch another's property (*shomer chinam*) and may not be liable in all circumstances. In the end, the Yerushalmi concludes that a wife is neither a *shomer sachar* nor a *shomer chinam* and is exempt from all damages due to a *takkanah* of the rabbis. If this were not the case, the Yerushalmi explains, any damage in the home would cause a legal dispute, and "there would be no peace in the home at all."[34]

The ruling that a husband may not control his wife's access to the household finances is later affirmed by Mahari Mintz (1405-1508) when asked whether a husband can prevent his wife from giving *tzedakah* to her sister. He explains that as long as the couple has the financial means, the husband cannot stop her and derives his ruling by citing from the mishnah and gemara mentioned above.

If her sister is need of *tzedakah*, and she wants to give to her family members, this is correct behavior according to her wealth like all wealthy women, and her husband cannot stop her. As it is taught (Ketubot 7:5), One who prohibits his wife by a vow from going to a house of mourning or to a house of celebration, he divorces and pays the *ketubah*, because he has locked [the door] before her. In the Talmud, Rabbi Huna says "One who prohibits his wife by a vow from borrowing or loaning a sifter, sieve, or millstone, he must divorce his wife and pay the *ketubah*,

[33] See Ketubot 86b. Rambam, Hilchot Sheluchin ve-Shutafin 9:4; Shulchan Aruch, Even HaEzer 97.

[34] Tosafot, Ketubot 86b, s.v. Rabbi Eliezer. Talmud Yerushalmi, Ketubot 9:4; Rambam, Hilchot Ishut 21:9.

because he gives her a bad name. Therefore, one learns that regarding all the ways of women, even those things which cost money, a husband cannot prevent his wife from doing them. All the more so regarding neutral matters he cannot stop her, and even more so regarding the giving of *tzedakah,* which is a great mitzvah.[35]

Teshuvot on Coercive Control

In turning to the responsa literature regarding cases of abuse, one also finds important *teshuvot* from major halakhic authorities, both Rishonim and Achronim, which make clear that attempts at coercive control are grounds for requiring a husband to divorce his wife.[36] One of the most significant was written by the Tashbetz, Rabbi Simeon ben Zemah Duran (1361–1444), who was originally from Spain but spent most of his rabbinic career in Algiers. He was asked about the following case:

> Regarding a woman whose husband causes her to suffer to such a degree that she despises him, and everyone knows he is a very difficult man. She cannot tolerate him because of the many fights and squabbles. Also, he starves her until she hates life, and she cannot go to the *beit din* because one of the judges threatened her that if she comes to *beit din* and asks for her *ketubah*, she will lose it.

It should be noted that several important points emerge from the description of the case. First, one must know that most *teshuvot* on the subject of abuse and divorce rarely provide much, if any, background to the case. Usually, it's no more than a sentence or two. While it may

[35] Responsa, Mahari Mintz, 7.

[36] For additional *teshuvot* regarding cases in which it appears there is emotional and psychological abuse but not physical violence, see Responsa, Yachin u-Boaz 2:44; Responsa, Maharsham 5:38.

appear that the Tashbetz's description of the case isn't much more than this, he still includes key details that provide important context. Though he does not mention that the husband's abuse included hitting his wife, it is clear he fought with her and acted in ways that caused her serious emotional pain and suffering.[37] What clarifies this as a case of coercive control is the fact that the husband not only fought with his wife but restricted her access to food, effectively starving her. This kind of behavior is not uncommon in cases of coercive control, where a husband prevents his wife from receiving basic resources such as food or medical care to show his dominance.

The case description also includes another important detail. When the wife approached a *dayan* to raise the issue of divorce, he not only refused to act but told her that if she appealed to the *beit din*, she would lose her *ketubah*, her only financial asset in the context of the marriage. As mentioned earlier, rabbis often fail to recognize the significance of coercive control in marriage and the impact it has on the one being abused. Their failure to intervene can lead to a wife's being trapped for many years and can even put her life at risk. While it's unclear whether the rabbi in this particular case understood the extent of the abuse, his actions only reinforce the power of the abusive husband and grant him the appearance of religious sanction.

In his ruling, the Tashbetz makes a direct comparison between the abusive behavior of the husband and the example from the mishnah discussed above of a husband who makes restrictive vows on his wife. He even goes so far as to note that the abuse in the case before him exceeds that described in the mishnah.

> Even when a husband prohibits his wife by a vow, where there isn't so much suffering caused, the

[37] Though this *teshuvah* is often cited as a precedent that a husband can be compelled to give the *get* in cases where a husband hit his wife, a close reading makes clear that there was no direct physical violence. This is also made clear by the Maharsham, who cites this *teshuvah* as precedent for a case in which there was no physical violence. See Maharsham 5:38.

> rabbis say he must divorce her and give her the *ketubah*, as it says in many places (Ketubot 70a, 71b). All the more so this is true when the suffering is frequent and we must say that he should divorce her and give the *ketubah*, for a person cannot live together with a snake in a basket.[38]

To fully capture the suffering of the wife, the Tashbetz invokes a Talmudic principle that being trapped in a marriage with an abusive husband is like being forced to "live together with a snake in a basket." The end result is that one is constantly bitten and always in pain. To emphasize this point, he also cites verses from Mishlei, which make clear that one would rather be poor but live with those one loves than be rich and live with one who hates them.

> As it is explained in the Torah, "Better a dry crust with peace than a house full of feasting with strife" (Proverbs 17:1) and it is also written, "Better a meal of vegetables where there is love than a fattened ox where there is hate" (Proverbs 15:17). Fighting is more difficult than lacking food, and what good is there for a woman whose husband causes her to suffer by quarreling with her every day.

The seriousness with which the Tashbetz treats the woman's suffering is clear when reading the *teshuvah*, and he eventually rules that not only must the abusive husband divorce his wife, but he can be compelled to do so. Part of this ruling stems from his concern that if there are no consequences for the husband's actions, he can use the halakhah as a weapon against his wife. In effect, he would not only be able to abuse

[38] This same *kal v'chomer* is made by the Rashba and the Gra regarding actual physical violence. See Responsa, Rashba (attributed to Ramban) 112; Beur Ha-Gra, Even Ha-Ezer 154:10.

his wife, but the law would allow him to get away with it.[39] The Tashbetz also addresses the role of the *dayan*, who, consciously or not, aided and abetted the abuse. Not only does he make clear that the *dayan*'s actions were wrong, but he states that the *dayan* should be excommunicated for failing in his role as a religious leader.

Another important *teshuvah* dealing with coercive control was written by Rabbi Yehudah Miller (1660-1751). Though not well-known today, in part because his *teshuvot* remained in manuscript and were only published recently, Rabbi Miller was a leading halakhic authority of German Jewry during the 18th century. He was a contemporary of rabbinic figures such as the Chacham Zvi and the Shevut Yakov. Their writings contain correspondence with him, which make it clear they held him in high regard.

Part of what distinguishes this particular *teshuvah* is that it contains perhaps the most extensive description of any divorce case from the pre-modern era. The case involves a woman named Rachel who was cruelly abused by her husband for many years and made numerous attempts to leave the marriage. As in the case of the Tashbetz, the husband, for the most part, did not physically abuse his wife but instead engaged in coercive control through a variety of means such as social isolation, humiliation, and intimidation. Though written nearly three hundred years ago, the *teshuvah* presents a nearly textbook description of coercive control as it is understood today. Nearly every detail cited in it has also taken place in cases that have come before the IBD.

The beginning of his [the husband's] corrupt behavior was that he became extremely angry when his wife refused to listen to him and steal precious objects from her father's house. He regularly fought with her until several times in the depth of winter he would close the door to their bedroom and make her stand outside all night. He said many horrible things to her and would curse her and parents. Eventually he

[39] He cites God's words of condemnation regarding the actions of Ahab and Jezebel, who hired men to give false testimony against Nabot so that he would be killed and they could take possession of his vineyard. God says, "Would you murder and take possession?!" See Kings 1, 21:19.

did not speak to her out of increasing anger for three straight days and would not allow her to enter their bedroom. He regularly would seclude himself with single and married women, both Jewish and not Jewish, by telling them to make his bed. His wife would ask him why he secluded himself with women forbidden to him. She even tried to push her way into the room, but he would keep the door closed. The women would be with him for several hours such that all the people of the community would speak about it. The wife's parents would rebuke him, but it was to no avail.[40]

At the beginning of the marriage, the husband tried to coerce his wife into stealing from her parents, an action presumably meant to cause her humiliation and make clear that she must submit to his control. In addition, he would verbally abuse her on a daily basis and force her to sleep outside their room in the cold as a way of punishing her when she defied him. This was combined with a refusal to speak with her for days, causing her to feel alone and isolated in her own home. To add insult to injury, the husband also engaged in extramarital affairs, which he flaunted before his wife and which were known to the entire community.

Rabbi Miller goes on to describe how, eventually, the woman became pregnant, but as her due date approached, her husband took the house key from her, effectively making her a prisoner in her own home. Because she feared he would not even call for a midwife to assist in the delivery, she decided to flee to save her life and that of her unborn child. Somehow, she managed to reach her parents' house, where she was able to find temporary refuge, but the husband would not relinquish control over her. He used his connections with the non-Jewish authorities to compel her to return to him, and when she did, the abuse only worsened. Like the examples in the Mishnah, the husband took away his wife's jewelry and left her without proper clothing while also preventing her from seeing her parents for many years. Though he refused to have sexual relations with her, he still forced her to go to the *mikvah* and then lied publicly that she had cheated on him and that because he was a kohen, she was now forbidden to him. The abuse reached its

[40] Responsa, Rabbi Yehudah Miller, 14.

peak when, despite having not had sexual relations with her for some time, he cruelly raped her.

The level of detail presented above is rare in *teshuvot*, and it only further heightens the sense that Rabbi Miller felt it was essential that the abuse be clearly documented so readers would understand the pain and suffering that had taken place. Using poetic rabbinic language, he offers an essential insight understood by all victims of trauma and abuse. No matter how many words they try to use to describe what has happened to them, they are never enough to capture the full depth of what they experienced.

> If all the heavens were parchment and all the trees were quills and all the water in the ocean was ink, it would still be impossible to put all the details of the case into writing. In part, because they are so embarrassing, and in part because one forgets certain details because of the great pain.

In fact, one of the most striking aspects of the *teshuvah* is that, at a certain point in the case description, the narration switches from the third person to the first person, and it appears as though the words recorded are not those of Rabbi Miller but of Rachel herself. She offers a desperate plea to Rabbi Miller that she finally receives her freedom after so many years of pain and suffering.

> And now, instruct me, our teacher and master, if he is not obligated to free me with a *get*. I don't request anything from him, not a single penny of that which I brought into the marriage that is now his, and all the more so not the *ketubah* or the additional portion of the *ketubah*, and not anything from my jewelry or garments or any objects of value from the home, it will be what it will be. I am even willing to accept upon myself

> the stricture of not marrying another man, as long as I am free from him, and he no longer can abuse me. His wicked name will not be called on me.[41]

Rabbi Miller's *teshuvah* makes clear he understood the extent to which coercive control had destroyed Rachel's life, and by giving voice to her suffering, he also made clear that halakhah required he act boldly to help her even when others might not do so. In a typical legal dispute, the *beit din* will not accept testimony from one side nor rule if the other is not present, for they may wish to challenge it and offer their own version of the facts.[42] However, Rabbi Miller argues that there are halakhic grounds to accept the wife's testimony even though it's likely the husband would contest it.[43] As a result, he rules that the husband must immediately give his wife a *get* and that he can even be physically coerced to do so. In the end, what appears to have distinguished Rabbi Miller from his rabbinic colleagues, both past and present, was his willingness to listen to the woman and hear her pain. Coercive control is always an attempt by abusive husbands to do the opposite. It is a strategy used to take away their wives' agency and voice.

The examples discussed in the Mishnah and Talmud show the rabbis were sensitive to the fact that husbands may employ the means of coercive control to abuse their wives. In many ways, the *teshuvot* of the Tashbetz and Rabbi Miller can be seen as a continuation of this tradition, one that is also maintained in several key rulings of the Israeli Chief

[41] The shift in language is also noted by the editors of Rabbi Miller's published *teshuvot.* See Responsa, Rabbi Yehuda Miller, p. 40, footnote 1.

[42] This is a significant topic that deserves its own analysis, but for some basic sources on the issue, see Bava Kamma 112b; Shevuot 31a; Sanhedrin 7b. The Shulchan Aruch rules that testimony should not be received but also enumerates certain exceptions. See Choshen Mishpat 28:15-16. For more on how later *poskim* address this matter, see also Nodeh Be-Yehudah Mehadura Kamma, Even Ha-Ezer 72; Maharam Shik, Choshen Mishpat 2; Netanya District Religious Court, case 286251/1.

[43] This includes the fact that she did not request her *ketubah* and that some aspects of the husband's bad behavior appeared to be public knowledge.

Rabbinate.[44] Rather than assume their hands were tied, as was likely with their peers, both the Tashbetz and Rabbi Miller turn to halakhah to find the language necessary to address complex cases of abuse with a clear sense of justice.

The concept of coercive control offers crucial insights that can guide us in better addressing domestic abuse and the problem of *get* refusal that so often accompanies it in the Orthodox community. The Rambam writes in no uncertain terms that it is forbidden for a Jewish woman to be held captive by her husband whom she hates and forced to have sexual relations with him against her will.[45] While it is easy to read his words and think they only describe the distant past, we would do well to remember that they apply equally today.

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[44] In addition to the ruling by Rabbi Daichovsky mentioned above, see also Netanya District Regional Court, case 1040764/11; case 256526/13; case 966775/4; case 284462/9. These rulings primarily focus on behaviors of coercive control by the husband as grounds for mandating the *get*, but some also invoke the concept of *moredet* as well, including the *teshuvah* of Rabbi Yehudah Miller. According to many authorities, if a woman claims that her husband is disgusting to her and she no longer wants to be with him, the husband may be obligated to give the *get*. This can be due to his abusive behavior, and in recent years, the concept of *moredet* has been more commonly used in rulings of the Israeli Chief Rabbinate. For more on this, see Avishalom Westreich and Amichai Radzyner, "Mahapchanut ve-Shamranut be-Pesikat Beit ha-Din ha-Rabbani: Al Akifat Gerushin be-Taanat 'Mais Alai'," *Iyunei Mishpat*, vol. 42. More recently, Rabbi Aryeh Ralbag has engaged in close readings of several Rishonim and Achonrim to creatively argue that emotional and psychological abuse can serve as grounds to coerce the husband to give the *get*. See "be-Din Kefiyah le-Get be-Mevazeh u-Maknit Ishto," *Moriah*, Year 32, vol. 3-4, 2023, 218-223.

[45] *Mishneh Torah*, Hilchot Ishut 14:8.

נישואין ומגדר במדינת ישראל

הרבה ד"ר ענת שרבט

לחר חזרתי לארץ ממגורים בניו יורק, שם גם עבדתי כחלק מהצוות הרבני של בית הכנסת Hebrew Institute of Riverdale - the Bayit, פנו אלי זוגות וביקשו שאחתן אותם. חלקם היו קרובים אליי ורצו שאלווה אותם בטקס המשמעותי של קשירת חייהם יחד בקשר יהודי של נישואים. חלקם רצו את הסמליות בה בטקס הנישואים שלהם, עומדת אישה בתפקיד המחתנת.

בהיותי רבה[1] אורתודוקסית בניו יורק יצא לי להשתתף בעריכת חופות. אך האם מדינת ישראל מאפשרת לי לחתן זוגות?

מדינת ישראל, החוק והדת: נישואין וגירושין במדינת ישראל - סקירה היסטורית

אקדים ואומר מיד בתחילת הדברים, שפרשנות החוק במדינת ישראל (שתומכת במגוון דיניות המועצות הדתיות) אינה מאפשרת כיום לנשים להיות עורכות טקסי נישואין.

מעמד הנישואים והגירושים בחוק הישראלי הם מהמורכבים בעולם. במדינת ישראל, בשל סיבות היסטוריות של מדינה יהודית בהתהוות, משיכת הקיים במדינה שהוקמה, חוסר בזמן ובמשאבים להידרש לשאלה זו בעת הקמתה, ועוד, נוצרה הפרדה של דת ממדינה. גורם נוסף היה ההחלטה שבמדינה יהודית צריך להיות גוף שישמור על ההלכה היהודית, ויתן ייצוג הולם להקמת מדינה יהודית, שלא כמו שאר המדינות. הפרדת הדת מהמדינה משפיעה על אופייה של המדינה כיום ועל המרקם החברתי שבה. ערבוב שכזה יוצר אתגרים חברתיים, פוליטיים, דתיים ומגדריים. אחד היישומים של עניין זה, בא לידי ביטוי בכך שישראל היא המדינה היחידה בעולם המערבי בה קיימות שתי מערכות משפט בו זמנית - מערכת משפט אזרחית ומערכת משפט דתית. לצורך העניין, דיני הנישואים של יהודים בישראל נוהגים לפי ההלכה היהודית. הסמכות הבלעדית לרישום זוג יהודי לנישואים היא של רשם הנישואים, אשר סמכותו מוקנית לו על ידי החוק. את רשם הנישואים בישראל ממנה, ברובם המוחלט של המקרים, הרבנות הראשית. בהתאם לנהלי הרבנות הראשית מטרתו של רשם הנישואים היא לבדוק ששני בני הזוג יהודים ומותרי חיתון האחד עם השני. במקרים בהם מוצא הרשם ספק לגבי אחד מבני הזוג

[1] אין עדיין כינוי אחיד למי שהוסמכה לרבנות. בבית הכנסת בו שימשתי קראו לי רבה, בארץ הכינוי לרוב הוא רבנית, ניתן למצוא כינויים נוספים לנשים מוסמכות: רב, מהר"ת, מורת הוראה ועוד. יקח עוד זמן לתהליך ההבשלה סביב שם מקובל ואחיד.

או הקשר ביניהם, הוא מפנה את הצדדים לקבלת היתר נישואין מבית הדין הרבני. לגבי עורך טקס הנישואין, גם פונקציה זו מאושרת על ידי הרבנות הראשית ברשימות המפורסמות על ידה. עורך חופה וקידושין מוגדר בחוק כרב מתוך רשימות הרבנים אותם אישרה הרבנות הראשית. ראוי לציין כי בשל אותו חוסר הפרדה של דת ממדינה במדינת ישראל אין נישואים אזרחיים, אלא דתיים בלבד.

איך הגענו לזה?

מבחינה היסטורית, תחת השלטון העות'מאני, נושא המעמד האישי, ובתוכו הנישואים, הוסדר על ידי מנהיגי הדת, ולא כחלק מן החוק האזרחי. לכל דת ברחבי האימפריה ניתנה האפשרות להסדרים הדתיים המתאימים לה. את היהודים חיתנו החכמים - בזמנו היה זה החכם באשי, הכינוי העתיק לראשון לציון.

המנדט הבריטי, שהחליף את זה העות'מאני בארץ, השאיר את המצב 22הנתון על כנו, ויצא ב 1921 בהודעה רשמית של מזכיר המדינה של ממשלת המנדט בנושא הרבנות הראשית לישראל, אשר שימשה כתחליף לחכם באשי מימי השלטון העות'מאני. הרבנות הראשית קיבלה הכרה הן על ידי ההסתדרות הציונית העולמית והן על ידי שלטונות המנדט הבריטי, אך לא היתה בעלת מעמד משפטי ברור. בנוסף לרב הראשי נבחרו גם שלושה יועצים שאינם רבנים, שנקראו "חילונים יודעי תורה ושומרי דת". המינוי ניסה לתת ביטוי לדרישות הציבור להתאמת ההלכה לתנאי הזמן ולאוכלוסיה שאינה שומרת מצוות, אך בהמשך התבטל מעמדם של היועצים.

ב 1947, ערב קום המדינה, בשל חוסר היכולת של המדינה לקבוע את צביונה, ובשל העדר חוקה; יחד עם התנאי המקדמי באו"ם של חופש מצפון וביטוי של המדינה לכל תושביה - היה צורך בהסכם שיתאים לצדדים השונים - החילוניים והדתיים. ב 19 ביוני באותה שנה שלח דוד בן גוריון, אז ראש הסוכנות, מכתב לאגודת ישראל, הקובע עקרונות למדיניות ופעולה בארבעה תחומים עיקריים: שבת, כשרות, ענייני אישות וחינוך, המהווים בסיס ויסוד לדת היהודית. מכתב זה נקרא "מכתב הסטטוס קוו". החשוב לענייננו הוא שמכתב זה אכן יצר סטטוס קוו בנוגע לסוגיות המעמד האישי וקבע, כי הן ימשיכו להיות בסמכותן הבלעדית של הרשויות הדתיות, וזה, כאמור, כולל את מערכת הנישואים בישראל. וכך נותר המצב עד היום הזה.

ב 1953 נחקק חוק שיפוט בתי הדין הרבניים, בו הוענקה הסמכות הבלעדית לחיתון זוגות יהודיים במדינת ישראל לבתי הדין הרבניים. החוק נחקק מתוך התפיסה של יצירת סטנדרט אחיד לעניין קשרי חיתון והכנסתם לתוך חוק ההולם את מדינת היהודים.

ב 1980 נחקק חוק הרבנות הראשית לישראל, העוסק בסמכויות ובאופן הבחירה

של הרבנים הראשיים ומועצת הרבנות הראשית, שהיא הגוף העליון של הרבנות הראשית לישראל. החוק מונה את סמכויותיה של מועצת הרבנות הראשית, שאחד מהם הוא אישור כשירות לרשם הנישואין.

בפועל, מעמד בתי הדין הרבניים וסמכויותיהם פוגע בזכויות חלק מאזרחי המדינה היהודים, כולל בזכויותיהן של נשים. וכך קיים במדינת ישראל מוסד רבני ממלכתי יחיד, המכריע בענייני דת ללא פיקוח וללא תחרות - הרבנות הראשית, הפועלת מכוחו של החוק. הדבר יצר לימים את הבעיה המגדרית, שנשים אינן מורשות לחתן, ו/או להיות רשמות נישואים.

החוק קובע שרשם הנישואין הוא גם זה שעורך את החופה, אך בפועל, בשל מיעוט רשמי נישואים, רשם הנישואין מאציל מסמכותו ל"מורשים לעריכת חופה וקידושין", והם אלו אשר עורכים את טקס הקידושין לרוב רובם של הזוגות. על תעודת הנישואים חותם רשם הנישואין בלבד. נציין שהאצלת הסמכות אינה מעוגנת בחוק. הרבנות הראשית היא זו שקבעה את הקריטריונים השונים להאצלת סמכות זו לרבנים, וכך נוצרה רשימה של רבנים מורשים לעריכת חופה וקידושין. קריטריונים אלו אינם כוללים נשים ואינם מאפשרים לנשים למלא אחריהן, ולכן מתרחשת כאן הדרה של נשים מלשמש בתפקיד רושמות נישואין ו/או כמי שמורשות לסדר חופה וקידושין.

האם נשים מורשות לחתן לפי ההלכה

האם בכלל צריך רב לטקס חופה וקידושין?

בואו רגע נבחן האם השאלה היא הלכתית ולא חוקית: האם אשה רשאית לפי ההלכה למלא תפקיד של רשמת נישואין ומסדרת חופה וקידושין?

כדאי להקדים ולומר שאין הלכה מוסדרת בעניין, ויש דעות שונות לגבי מהות התפקיד. אסקור כאן בקצרה את ההשתלשלות ההיסטורית סביב השאלה.

במסכת קידושין[2] מופיעה הקביעה: "כל שאינו יודע בטיב גיטין וקידושין לא יהא לו עסק עמהם". נחלקו הפרשנים והפוסקים באשר למי ממוענת הוראה זו בגמרא. רש"י מפרש שהדברים נאמרו כלפי הדיין הדן בענייני קידושין וגיטין. התוספות לעומת זאת קבעו שמדובר באמירה לחתנים, שלא יטעו בדבריהם. רוב הפוסקים מצדדים בשיטת רש"י, עד שמפסיקת השו"ע[3] עולה שהדברים אמורים במורה הוראה: "כל מי שאינו בקי בטיב גיטין וקידושין לא יהא לו עסק עמהם להורות בהם, שבקל

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[2] ו, ע"א.

[3] אה"ע סי' מט סעיף ג.

יכול לטעות ויתיר את הערוה וגורם להרבות ממזרים בישראל". ומדבריו נשמע גם שהלכה זו לא נאמרה בדין סידור חופה וקידושין.

הט"ז ממשיך שיטה זו: "כן פירש"י, משמע דנתינת קידושין אין קפידא כ"כ דהיינו לסדר הקידושין תחת החופה שאין שם הוראה".[4] הט"ז מייחס את ההקפדה של השולחן ערוך לעניין הוראה בלבד, אך הדברים, לדעתו, לא נאמרו למסדר החופה והקידושין עצמו. ובשונה מגיטין ממשיך וכותב הט"ז: "דבנתינת קידושין אין שם הרבה פרטים באותו סידור ואין מצוין שינוים שם ששייך בהם הוראה". ועוד כותב שם ומבהיר: "וכן המנהג בינינו שמכבדין בסידור קידושין אפילו אינו למדן גדול", ומדגיש שכל העניין של אמירת הגמרא עוסקת בעיקר בעניין גיטין ולא בקידושין, שבקידושין ההלכות אינן רבות, והן ברורות.

יש לציין עוד, שתוקפם של נישואין יחולו גם ללא נוכחותו של עורך חופה וקידושין. לשם תיקוף הנישואין מספיקים עדי הקיום בלבד. ובכל זאת, נהוג לערוך חופה בהנחיית מסדר קידושין.

בתקופה מאוחרת יותר, בעל השו"ת ה"שבות יעקב", רב יעקב ריישר, שכיהן כראש בית הדין בפראג בסוף המאה ה 17, מביא תקנה של רבינו תם, לפיו זהו מנהג קדום שרק רב רשאי לערוך חופה וקידושין. לא זו אף זו, על עורך החופה להיות בקי בדינים מפני חשש לנישואי איסור. בדבריו ניתן לראות את הצורך לחזק את מעמדו של הרב המקומי,[5] שהרי הוא דרש גם ממסדר קידושין שבקי בהלכות לקבל את האישור לחתן מהרב המקומי. אך גם לפי שיטה זו ניתן להסיק שעורך הטקס יכול להיות גבר או אישה, כל עוד הם בקיאים בהלכות הרלוונטיות.

אם כך, עורך חופה וקידושין אמור להיות מסוגל לוודא את כשרות הקשר של הנישאים, להיות בקי בהלכות חופה וקידושין ולוודא שהטקס נעשה כהלכתו. לא־חרונה, נשמעים קולות לפיהם תפקיד עורך חופה וקידושין הוא לברך את ברכות הטקס, ברכת האירוסין ושבע הברכות שלאחר הקידושין, ולקרוא את הכתובה. האם הנושא הזה עלול לעכב אישה מלערוך את הטקס?

הרמב"ם (הלכות אישות ג, כג) קובע שברכת האירוסין (הברכה שמקובל שעורך החופה מברך בעצמו בנוסף לברכת היין) הינה ברכת מצווה. לדעתו הברכה נאמרת על ידי מי שמחוייב במצווה, והמצווה נתפסת כמצוות הגבר, וכך הוא פוסק - שאת ברכת האירוסין אומר החתן. הרא"ש דוחה את הגישה של הרמב"ם וקובע את הברכה כברכת השבח, וכך רואים זאת מרבית הראשונים, כברכת שבח שאותה ראוי שהקהל לברך. השו"ע פוסק שהחתן מברך, ומתוך כך מבין הרב עובדיה שזוהי ברכת מצווה,

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[4] ט"ז אבן העזר סימן מט ס"ק א.

[5] ר' https://www.meshivat-nefesh.org.il/post-411/

כפי שפסק הרמב"ם, והשיטה האשכנזית, לפי הרמ"א, היא שכל אחד מהקהל רשאי לברכה, מה שמחזיר אותנו להבנה שמדובר בברכת שבח. זוהי הפרקטיקה היום ברוב החתונות ככולן, שלא החתן מברך אלא הרב. לשיטת מי שאומר שמדובר בברכת מצווה, ההסבר לכך שהרב מברך את הברכה הוא שזה נובע מחוסר ידיעתו של החתן לברכה, על מנת לא להביכו. הט"ז מתייחס לפרקטיקה הזו וקובע שמדובר בברכת שבח, וזה מה שמאפשר את העובדה שלא החתן אומרה. הרב לינזר מביע תמיהה לגבי מי שמחשיב את הברכה כברכת מצווה - שהרי אז הרב היה אומר לחתן לכוון לצאת ידי חובה בעת ברכת הרב, וקובע שמדובר בברכת השבח, וככזאת היא מוטלת על הנוכחים, על מנת לשבח את ה', ולכן אין מניעה שאשה תאמר אותה.[6]

נחזור רגע למה שקורה בארץ כיום. מדובר בשתי אינסטנציות:

1. רשם הנישואים, שהוא הסמכות שבודקת את כשרות הנישאים ובוחנת את האתגרים סביב איסורי עריות, בדיקת המעמד האישי ועוד.
2. הרב המחתן.

לסיכום ניתן לומר, שהדיון ההלכתי אינו מוביל למסקנה שנשים אינן מורשות הלכתית לערוך חופה, אולם כיוון שבמדינת ישראל, על פי חוק הרבנות הראשית, הרבנות היא הממנה את רשימת הרבנים המחתנים - וכיוון שלפי החוק "רב" מוגדר כאיש ולא כאישה - אין אפשרות טכנית לאפשר לזוגות להתחתן עם אישה עורכת חופה וקידושין.

אלטרנטיבות בהן נשים יכולות לחתן

כיום מתקיימים בארץ ובחו"ל טקסים אלטרנטיביים, המציעים לזוגות שאינם רוצים להתחתן דרך המדינה או בטקס דתי - אלטרנטיבה לטקס עצמו ולמעמד שיקבע להם במדינת ישראל.

האלטרנטיבה הראשונה היא להינשא נישואים אזרחיים מחוץ לגבולות מדינת ישראל, מה שיאפשר לזוג להיחשב לנשואים, מבלי לעבור דרך הרבנות.

מעניין לציין שאם זוג כזה ירצו לפרק את הזוגיות, הם יאלצו בכל זאת לעבור בבתי הדין הרבניים, אבל, בשונה מזוג שהתחתן בארץ - בגלל שבחרו להינשא אזרחית - הם יידרשו לגט לחומרא בלבד. מצב כזה של נישואים אזרחיים, מאפשר במקרים מעטים ומסוימים לבית הדין להתיר את הזוג מקשר של נישואים, ללא גט כלל.[7] בט"ו באב בשנת תשע"ח (2018) הושק מיזם "חופות" שמחתן כהלכה, אך אינו כפוף למדיניות ההלכתית המחמירה והמצמצמת של הרבנות הראשית.

[6] ר' מאמרו של הרב לינזר לעניין ברכת אירוסין: https://library.yctorah.org/lindenbaum/may-a-woman-recite-birkat-eirusin/

[7] ר' את ההסבר של טוען רבני יהודה אבלס: https://www.toenr.com/2022/08/28/get-lehumra/

ההחלטות לגבי יהדותם של הזוג, בדיקות ענייני העריות וכל עניין יהודי אחר - אינן עוברות דרך הרבנות, אלא דרך אנשי ונשות הלכה הבקיאים ובקיאות בענייני חופה, קידושין, ואיסורי חיתון. שאלות הלכתיות רגישות מועברות לפוסקי הלכה מומחים עם כתפיים רחבות ועל פי פסיקתם פועלים. יוצא מכך, שבמיזם מתחתנים זוגות שאינם מורשים להתחתן דרך הרבנות (על ידי רשם הנישואין הממונה על ידי הרבנות), וכן זוגות שאינם מעוניינים להתחתן דרך הרבנות, כמחאה על התנהלותה. המיוחד ב"חופות" הוא, שבניגוד לרבנות הראשית, זוגות יכולים להינשא דרכה גם בעזרת נשים כעורכות הטקס, הבקיאות בהלכות חופה וקידושין. מיזם זה אינו מוכר בחוק, ופועל בצורה אקטיביסטית. הנישאים דרך "חופות" יוכרו ככל הנראה כ"ידועים בציבור" לאחר הנישואים, אבל לא יהיו רשומים כנשואים במשרד הפנים (אלא אם התחתנו בנוסף בנישואין אזרחיים בחו"ל).

בנוסף, בשל חוסר המענה לצרכים הנדרשים עבור אוכלוסיה שאינה מחויבת להלכה, התפתחה תופעה של טקסי נישואים חילוניים. הם אמנם אינם מקנים לבני הזוג מעמד משפטי, אך מאפשרים אלטרנטיבה חילונית לעריכת הטקס.[8]

בכל אחת מהאלטרנטיבות ישנה האפשרות לאשה כעורכת הטקס - הן אינן אלטרנטיבות הלכתיות ולכן, נשים יכולות להשתלב בקלות.

עתירה לבג"ץ בעניין נשים מחתנות ורושמות נישואין - מרכז רקמן

מרכז רקמן, המרכז לקידום מעמד האשה ע"ש רות ועמנואל רקמן, פועל במסגרת הפקולטה למשפטים באוניברסיטת בר אילן, במטרה לפעול נגד אפליית נשים ולמען חיזוק מעמדן בחברה הישראלית. בין היתר עותר המרכז לבג"צ כדי למנוע אפליית נשים. העתירה של מרכז רקמן בעניין נשים מחתנות מופנית נגד שר הדתות, נגד הרבנות הראשית ונגד מועצת הרבנות הראשית, כל אחד מטעמו הוא:

השר לשירותי דת אחראי על קביעת מדיניות ואספקת שירותי הדת לאזרחיה היהודיים של המדינה, כולל בענייני נישואים וגירושים.

הרבנות הראשית הוקמה, כאמור, עוד טרם הקמת מדינת ישראל, בשנות ה 20- בישראל. לפי החוק, היתר לחתן ניתן למי שמוגדר כרב, ולכן הרבנות אינה מאשרת לנשים לחתן, כיוון שאינן מוגדרות כרב לשיטת הרבנות.[9]

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[8] ר' לדוגמא את אתר הוויה: https://www.havaya.info/all-mcs/, ואתר טקסים: https://did.li/cJGaa .

[9] לדבר זה יש השלכות נוספות, כמו למשל האפשרות להשתלב בוועדה הבוחרת רבנים ראשיים, המורכבת ברובה מרבנים בוחרים, גם שם הדבר משפיע על כמות הנשים שיכולה להיכנס לוועדה, ובנוסף מונעת את האפשרות של נשים להיות מוגדרות מקצועית כרבניות.

אחד מתפקידי מועצת הרבנות הראשית לפי החוק הוא האפשרות של רב לכהן כרשם נישואין, ומינויו של רשם הנישואין.

העתירה מבקשת משר הדתות, מהרבנות הראשית וממועצת הרבנות הראשית, כל אחת לפי סמכותה, לקבוע קריטריונים להכרה בנשים כרשות רושמת נישואין, או כבעלות כושר לעריכת חופה וקידושין, מתוך ההכרה בכך שנשים יכולות לכהן בתפקידים אלו.

העתירה נובעת מההבנה, שטקס הנישואין הוא אבן דרך משמעותית בחיי הזוג. עורך הנישואים, מסדר החופה והקידושין הינו אדם משמעותי מאוד ברגע המרגש והחשוב הזה בחייו של הזוג. כיום במסגרת הפורמלית במדינה, אין אפשרות לנשים להיות חלק מהמעמד הזה בחייו של הזוג, למרות שיש נשים רבות שהן בעלות ידע תורני, והן דמויות רוחניות ומנהיגות דתיות.

ההלכה היהודית, כפי שהוסבר לעיל, אינה מצריכה רב או כל עורך טקס חופה וקידושין. הרעיון מאחורי רב עורך ורשם נישואין הוא השגחתי פיקוחי - לבדוק שאכן אין איסורי עריות (כמו למשל חיתון של כהן עם האסורות לו, חיתון של יהודי עם לא יהודיה ועוד) - תפקיד שברור שאישה יכולה לבצע גם כן.

את העתירה יזם מרכז רקמן לקידום מעמד האישה.

הצטרפתי לעתירה מתוך אמונה שלימה שנשים מסוגלות וראויות להיות חלק משמעותי מתחום ההלכה היהודית, יכולות להנהיג תורנית, רוחנית והלכתית, לענות לשאלות הלכתיות, ללמד תורה, לדרוש בבית הכנסת, ללוות רוחנית א.נשים וזוגות בחייהם, ולערוך טקסי חיים יהודיים.

העתירה מבקשת מבית המשפט הגבוה לצדק לקבוע קריטריונים על מנת לאפשר לנשים מלומדות להיות בעלות אפשרות לערוך חופה וקידושין. הבקשה הזו נשענת על עקרון השוויון, גם בחוקים הדתיים, ועל האפשרות של שר הדתות (אשר עושה זאת בפועל) למנות אנשים שאין להם הסמכה פורמלית לרבנות, כגון אדמו"רים, מורים ועוד, להיות עורכי קידושין, וגם על האפשרות לראות ברשם נישואים ומסדר חופה וקידושין - תפקידים מנהלתיים ולא בהכרח תפקידים רבניים. העתירה מציעה שהרבנות הראשית תסמיך נשים שתוכשרנה על ידה להיות רשמיות ועורכות טקסי נישואין.

המטרה בעתירה היא:

1. לשנות את הגדרת ההרשאה לרשם נישואין ולעורך חופה וקידושין.
2. להגדיר כ"רב" נשים בעלות ידע מתאים

את המטרה השניה, הגדרתן של נשים כ"רב", כבר מנסה עתירה אחרת לשנות. עתירה שהוגשה לבג"ץ על ידי ארגון "עיתים", שם מבקשות עותרות רבות להיבחן בבחינות הרבנות לרבנות שכונה ("יורה יורה"). ואכן, השופטים בעתירה שלנו כרכו

את שתי העתירות, והורו לדון בעתירה שלנו, כ"קומה שניה", רק לאחר סיומה של העתירה של עיתים. זאת אומרת, שההחלטה בדיון הראשון בעתירה שלנו שלחה אותנו, העותרות, לחכות לתוצאות המשפט בעתירה של עיתים, שעל בסיסה, אפשר יהיה להמשיך ולדון בעתירה שלנו.

לסיום

כיום, יש נשים בעלות ידע תורני, המשמשות בתפקידים ציבוריים קהילתיים. כפי שראינו, העתירה מציעה, שאם הרבנות אינה סומכת על הידע שאיתן מגיעות הנשים, תוכל היא ללמד את הנשים ולהסמיכן לתפקיד. כולי תקווה שהעתירה והצלחתה יהיו עוד צעד בדרך לשוויון מגדרי בנושאים הלכתיים במדינת ישראל, מתוך אמונה שלמה שנשים הן חלק מן המערך הדתי בכלל, ובמדינה בפרט.

ביבליוגרפיה

הרבנות הראשית

טיקוצ'נסקי מיכל, האם מותר לאישה לערוך חופה, משיבת נפש נישואים בישראל

שרבט ענת, 'היא רוצה שאחתן אותה למה זה לא אפשרי?' דעות: הארץ, 24.10.21

בירורים בנושא חופה וקידושין - הרב מיכאל אברהם https://library.yctorah.org/lindenbaum/may-a-woman-recite-birkat-eirusin/

רבה ד"ר ענת שרבט, אקטיביסטית בכיכר החטופים, לומדת בתכנית הלכתא "חושן משפט" במתן ירושלים, מוסמכת של ישיבת מהר"ת, ד"ר בתלמוד, מעבירה דף יומי, לשעבר חלק מהצוות הרבני בהיברו אינסטיטיוט בריברדייל - הבית.

Yeshivat Maharat is the first institution to ordain women to serve as Orthodox clergy. In doing so, it educates and invests in passionate and committed Orthodox women who model a dynamic Judaism to inspire and support individuals and communities.

מהרת
maharat