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

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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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