

The Wife's Right to Divorce in Jewish Law: History, Dogmatics and Hermeneutics*

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The paper has two aims: historical and dogmatic. Historical in studying two actual halakhic traditions in which divorce was issued at the wife's demand, with analysis of their interaction between them; dogmatic in examining the status of three halakhic concepts of unilateral termination of marriage: coercion of a *get*, terminative conditions and annulment of marriage. The two topics lead to one integrated outcome: exploring the halakhic tools which enable issuance of divorce against the will of a recalcitrant spouse.

1. The Divorce Clause and the Geonic *Moredet* – Common Denominators

Two related traditions have developed two different halakhic institutions for a single object: enabling the wife to demand – and obtain – a unilateral divorce, even against her husband's will. The first is the Palestinian tradition, according to Cairo Genizah *ketubbot* dated to the 10th–11th centuries CE,¹ but probably rooted in an older tradition, found already in the Palestinian Talmud.² The second is the Geonic tradition – also rooted in the talmudic era – which was in practice in Babylonia at the same time, throughout the Geonic era (approximately 7th–11th centuries CE).³ In the Palestinian tradition the couple stipulated

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¹ The *ketubbot* were discovered, researched and thoroughly discussed by Mordechai A. Friedman, *Jewish Marriage in Palestine – A Cairo Geniza Study*, Vol. 1 (Tel Aviv and New York: Tel Aviv University and the Jewish Theological Seminary of America, 1980 [hereinafter: Friedman, *Jewish Marriage*]). This paper relies on Friedman's research in many aspects, as indicated below.

² The relations between the Genizah *ketubbot* and the traditions of the Yerushalmi are discussed below, section 4.

³ See Friedman, *Jewish Marriage*, *supra* n.1, at 324-325; Y. Brody, "Kelum Hayu Ha-Geonim Mexokekim?", *Shenaton Hamishpat Ha-Ivri* 11-12 (1984-1986), 298-300 (hereinafter: Brody, *The Geonim*).

explicitly⁴ in their *ketubbah* that the wife is entitled to a unilateral divorce (the “divorce clause”).⁵ According to the Babylonian tradition the wife’s right to a unilateral divorce was based on positive law, i.e. the *halakhah* of the rebellious wife (*moredet*), as reflected in several gaonic decrees which permitted divorce at the wife’s unilateral demand.

Basically these are two different legal constructions: the first sees the right in question as contractual, while the other sees it as granted by the general law. But are they really different?

Both traditions construct legal routes to unilateral divorce. Both traditions are linked – although in different ways – to the talmudic sources of *moredet*. And in both traditions the constitutive authority of a *bet din* to annul the marriage plays a significant role (see below).

The relationships between these traditions are not completely clear: are they independent, without any direct connection – as described above: contractual vs. normative – but having some similar characteristics as a result of their similar historical environment or common cultural background? Or are they connected, perhaps even reflecting similar legal constructions but only expressed differently, having the same normative basis and with some reciprocal influence between them? In other words, is (as Me’iri’s teachers’ teachers argue) the decree of the Geonim in fact an implied condition (a “court stipulation”), which took its authority from the Palestinian tradition of making an explicit stipulation in the *ketubbah*? Or, *vice versa*: is the Geonic law of *moredet* a necessary normative basis for the Palestinian stipulation? And what role – if at all – does the authority of the Sages to annul marriage (*hafka ‘at kiddushin*) play in these rulings?

Clarifying the relations between these traditions requires us to define the character of divorce in both cases. Initially we need to distinguish “between the right to demand a divorce or initiate divorce proceedings, and the right or power to perform the formalities necessary (...) to dissolve an existing marriage”.⁶ The two traditions are similar in the first aspect: both are cases of divorce *initiated* by the wife. But it is not clear what procedures are taken in order to execute the divorce when the wife justifiably demands it. We should first make it clear that it is implausible to assume that, according to these traditions, the wife not only *initiates* divorce proceedings but also *executes* them. Typically, divorce in Jewish Law, as unanimously accepted in talmudic sources from the tannaitic era and onwards, is executed by a *get* delivered by the husband to his wife. While this statement is controversial regarding

⁴ This is clearer in the Genizah *ketubbot* than in the Yerushalmi. Nevertheless, the two belong to one continuing tradition; see below, section 4.

⁵ The exact operation of this stipulation is discussed below. For the current exposition it suffices to indicate (a) the wife’s right unilaterally to demand divorce, and (b) its being based on a *ketubbah* stipulation.

⁶ Robert Brody, “Evidence for Divorce by Jewish Women?”, *Journal of Jewish Studies* L (1999), 230; Ranon Katzoff, “Legal Commentary”, in N. Lewis, R. Katzoff and J.C. Greenfield, “Papyrus Yadin 18. I. Text, Translation and Notes (NL), II. Legal Commentary (RK), III. The Aramaic Subscription (JCG)”, *Israel Exploration Journal* 37 (1987), 244 (hereinafter: Katzoff, *Papyrus*).

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some early Jewish traditions, as may be seen from one of the Judaean Desert documents and from the Elephantine documents, in talmudic sources we do not find any contradictory precedents, i.e. sources which reflect divorce executed by the wife.⁷ But we do find rare cases in which divorce is executed by a constitutive act of *bet ha-din*, i.e. annulment of marriage (*hafka'at kiddushin*).⁸ In addition, there are cases (or at least a halakhic possibility) in which a terminative condition retroactively annuls the marriage.⁹ So what are the precise divorce procedures according to these Geonic and Palestinian traditions? Does the fact that divorce is initiated by the wife against the husband's will produce the use of a unique procedure, which performs the necessary formalities without the husband's participation?

2. *Hafka'at Kiddushin* as a Basis for the Similar Traditions

(a) Background

Annulment of marriage (Heb. *hafka'at kiddushin*; *hafka'a*) is mentioned in various contexts in the Babylonian Talmud (*Talmud Bavli*). A number of famous Talmudic passages (*sugyot*) discuss the concept of *hafka'ah*: אַפְקַעִינָהּ רַבְנֵי לְקִידוּשֵׁי מִינֵיהּ, i.e. the Sages have “expropriated” the betrothal from the husband, or: the Sages annulled the marriage. In a

⁷ See Brody, *supra* n.6. Under discussion are a divorce document and a marriage document from the second century C.E., found in the Judaean desert. Some scholars understand the divorce document as (or as referring to) a writ of divorce written by the wife, and similarly (but less explicitly), the marriage document was interpreted as providing the wife with this power; see Bernard S. Jackson, “Some Reflections on Family Law in the Papyri”, *Jewish Law Association Studies* 14 (2002), 141-177 (hereinafter: Jackson, *Papyri*). Others interpret it as a document relating to divorce, where the writ was issued by the husband (Brody, *supra* n.6, at 230-234), and also reject the power attributed to the marriage document; see Katzoff, *supra* n.6, at 246. The Elephantine documents are also discussed as a precedent for divorce executed by the wife. However, unlike Babatha's document, which reflects the rabbinical environment, and therefore challenges the above assumptions, the Elephantine documents do not raise any problem, even if divorce there was indeed executed by the wife. They reflect a syncretistic community/culture, and their divorce law may be similarly regarded (see Brody, *supra* n.6, at 231; Katzoff, *supra* n.6, at 245-247; and compare Jackson, *ibid.*, pp. 173-177).

⁸ See Avishalom Westreich, “Annulment of Marriage (*Hafka'at Kiddushin*): Re-examination of an Old Debate”, *Working Papers of the Agunah Research Unit* no.11, 2008, <http://www.mucjs.org/Annulment.pdf>, pp. 1-4 (hereinafter: Westreich, *Annulment*). I refer here to constitutive annulment, which is different from declarative annulment. In the former the marriage is valid until *bet ha-din* or the Sages *make* it invalid (whether retroactively or prospectively; see Westreich, *ibid.*, pp. 8-10). Their act of invalidation is therefore a constitutive act. In declarative annulment, on the other hand, the function of *bet ha-din* is merely to *reveal* that the marriage is (already) invalid. This is done by declaring the marriage a mistaken marriage or by using an implied condition which is in fact ascribed to the parties. On declarative annulment, see Avishalom Westreich, “*Umdena*: Between Mistaken Transaction (*Kidushey Ta'ut*) and Terminative Condition”, *Working Papers of the Agunah Research Unit* no.10, 2008, <http://www.mucjs.org/Umdena.pdf> (hereinafter: Westreich, *Umdena*).

⁹ As regard the debate concerning the halakhic legitimation of conditional marriage, see Yehudah Abel, “The Plight of the *Agunah* and Conditional Marriage”, *Working Papers of the Agunah Research Unit* no.4, 2008, <http://www.mucjs.org/MELILAH/2005/1.pdf>. Normally, conditional marriage is rejected in practice (see Abel, *ibid.*). However, it is sometimes used implicitly, under the talmudic construction of “*ada'ata de-hachi lo kidsha nafsha*” (according to a widespread interpretation of this construction); see Westreich, *Umdena*, *supra* n.9, at 5-19.

similar way the Palestinian Talmud (*Talmud Yerushalmi*), when discussing a case where a writ of divorce (a *get*) was halakhically void but validated by the Sages, mentions the notion of: דבריהן עוקרין דברי תורה (their [i.e. the Sages'] words uproot the words of the Torah), according to which the Sages have the authority to annul the marriage in certain circumstances.¹⁰

In an earlier paper I discussed the concept of *Hafka'at Kiddushin*,¹¹ showing that this concept is developed in the talmudic *sugya* through three main stages:

- (a) At the first stage, annulment (or, better: “quasi-annulment”) means that the Sages validate an [externally flawed] *get*. This refers to a case in which the husband gave his wife a valid *get* and later invalidated it, but the Sages re-validated the *get*. It need hardly be said that the question of prospective vs. retroactive annulment is irrelevant according to this view, since “annulment” here is in fact divorce performed by a *get* as in all normal cases, the involvement of the Sages simply being the validation of that *get*.
- (b) At the second stage some Amoraim, due to wider questions of the authority of the Sages, interpreted the concept of *hafka'ah* as a prospective annulment of marriage. Here, the Sages assume the authority to terminate marriage without any act taken by the husband, and the termination is valid from that point onward.
- (c) At the third stage *hafka'at kiddushin* becomes retroactive annulment of the marriage. This conceptual change is made by explaining *hafka'ah* as an annulment of the act of betrothal; when, therefore, it is applied after the betrothal has taken place, it means that the betrothal is retroactively annulled.¹²

The last stage reflects the view of the talmudic redactor, and was accepted by most talmudic commentators.¹³ In principle, according to this stage, the Sages have a wide authority, such that their act does not require a *get* to be given. However, due to interpretative difficulties and some other considerations (policy, meta-halakhic, etc.), many commentators demand that some additional element – either an invalid *get* (“*get kol dehu*”), one witness of the husband’s death, or something else – be present when applying *hafka'ah*.¹⁴

¹⁰ See Bavli, Yevamot, 90b; *ibid.*, 110a; Ketubbot, 3a; Gittin, 33a; *ibid.*, 73a; Bava Batra, 48b; Yerushalmi, Gittin, 4:2, 45c. For the exact context of these passages see Westreich, Annulment, *supra* n.8, section 2.

¹¹ See Westreich, Annulment, *supra* n.8.

¹² *Ibid.*, pp. 8-10.

¹³ See Berachyahu Lifshitz, “Afke’ihu Rabanan Le-kiddushin Minayhu”, in *Mi-perot Ha-kerem* (Yavne: Yeshivat Kerem Be-Yavne, 2004), 317-319.

¹⁴ Westreich, Annulment, *supra* n.8, at 10-13.

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Hafka'at kiddushin can therefore be a halakhic tool by which divorce¹⁵ initiated by the wife is performed. In addition, following the view of some talmudic commentators, it can accompany other halakhic tools and give or strengthen their validity.

The next question to be discussed is whether these two traditions were familiar with the concept of annulment and if so in what form?

We have a partial answer to this question. In the Palestinian tradition at the time of the Cairo Genizah *ketubbot*, it is hard to find indications of familiarity with the concept of *hafka'ah* in any of its forms¹⁶ (besides the divorce clause itself, if indeed the latter used *hafka'ah*, which we shall presently discuss). However, the predecessors of this tradition were familiar with some version of annulment. The Yerushalmi was familiar with *hafka'ah* as the first limited stage ((a) above), i.e. validating an invalid *get*: “דבר תורה הוא שיבטל והן אמרו שלא” “the Torah said that [the *get*] is void [when the husband cancels it], while they [=the Sages] said that it is not void [i.e. the husband's cancellation is invalid]”.¹⁷ However, the Yerushalmi bases this view on the wide concept of: “דבריהן עוקרין דברי תורה” (“their [i.e. the Sages'] words uproot the words of the Torah”), which means that the Sages have an authority (in appropriate cases) to rule against Torah laws. Since the Sages have an authority to “uproot the words of the Torah”, we may theoretically assume that the Palestinian tradition could even accept an expanded version of *hafka'ah*, i.e. complete annulment of marriage, prospective or retroactive, and even without a *get*. According to either option – a limited version of annulment or an expanded one – it is plausible that later generations in this tradition accepted this concept, following the Yerushalmi.

Turning to the Geonic tradition, we do find explicit references to annulment of marriage, as in the following Geonic responsum:

ותיקן להן זקיננו מרנא ורבנא יהודה גאון, שלא יקדשו אלא כסדר בבל בכתובה והתם ידי עדים וברכת אירוסין. וכל שאינו כסדר הזה, תיקן להן שאין חוששין לו כדאמרין: 'כל דמקדש אדעתא דרבנן קמקדש ואפקיענהו רבנן לקידושי מיניה'. אף אתם ראויים לסלק [=לבטל] מנהג כזה.¹⁸

Our grandfather, teacher and Rabbi, Yehuda Gaon, enacted for them that they should not betroth other than by the Babylonian procedure: with *ketubbah*, witnesses' signature and betrothal blessing. And as for one who doesn't follow this procedure he enacted that [we] disregard his betrothal [lit. him], since we say: 'everyone who betroths [a woman], does so subject to the will of the

¹⁵ I.e. termination of marriage, since according to stages (b) and (c) above, there is no formal divorce (a *get* given by the husband to the wife) but rather an annulment (retroactive or prospective) of marriage executed by the court.

¹⁶ This may be a result of the character of the sources: legal documents rather than theoretical writings.

¹⁷ Yerushalmi, Gittin, 4:2, 45c; see Westreich, Annulment, *supra* n.8, at 5, 9.

¹⁸ Rav Hai Gaon, *Otsar Ha-Geonim, Ketubbot*, 7b, pp. 18-19.

Rabbis, and the Rabbis annul his betrothal.' You should cancel such a custom [=which doesn't follow Yehuda Gaon's procedure] as well.

In fact, this responsum deals with a case of improper betrothal (i.e. when the betrothal was not according to the Gaonic enactment), in which *hafka'ah* can be applied more easily.¹⁹ Nevertheless, the Gaon uses here the concept as found in the Talmud, which in principle gives him a wider authority, including termination of marriage long after its creation.

The sources therefore do not provide direct proof of the use of retroactive annulment in the traditions here discussed; rather they reveal different levels of familiarity with it. Nevertheless, they do potentially validate its wider use. The question now to be discussed is whether annulment in its wider form was applied in our two specific traditions: the Palestinian *ketubbot* and the Geonic *moredet*.

(b) Mere Annulment or Coercion?

Rabbenu Asher ben Yehi'el (Rosh) describes the Geonic rule of *moredet* as follow (*Shut ha-Rosh*, 43:8):

...ותקנו שיגרש האיש את אשתו בעל כרחו, כשהיא אומרת: לא בעינא ליה לגבראי...
וסמכו על זה: כל המקדש אדעתא דרבנן מקדש, והסכימה דעתם להפקיע הקידושין
כשתמרוד האשה על בעלה.

...And they enacted that the husband should divorce his wife against his will when she says: I do not want my husband ... For they relied on this [dictum]: 'Everyone who betroths, does so subject to the will of the Rabbis', and they agreed to annul the marriage when a woman rebels against her husband.

According to Rosh, the Geonic enactment of coerced divorce in a case of *moredet* is based on annulment of the marriage (*hafka'at kiddushin*). One may argue that the annulment does not even require a *get* given by the husband, i.e. in this kind of case there is a constitutive verdict of the *bet ha-din* that the marriage is annulled, and this decision effects the couple's divorce.²⁰ Some suggested support for this interpretation has been derived from the plural formulation of the law of *moredet* in some Geonic writings:²¹

ומשהינן לה תריסר ירחי שתא והדר יהבינן לה גיטא.²²

¹⁹ This point is strongly reflected in the modern disputes regarding retroactive annulment versus annulment at time of marriage: see Westreich, Annulment, *supra* n.8, at p.1, n.6.

²⁰ This is the view of Prof. Jackson: see Jackson, Papyri, *supra* n.7, at 162; Bernard S. Jackson, "Preliminary Report of the Agunah Research Unit", *Working Papers of the Agunah Research Unit* no.8, 2006, <http://www.mucjs.org/PrelimRep.pdf>, 17-19 (hereinafter: Jackson, *Preliminary Report*).

²¹ Jackson, *ibid*.

²² *Halakhot Gedolot, Hilkhot Ketubbot*, 36. Similarly in *Teshuvot Ha-Geonim* (Harkavi edition), 71: "יבחר גמרא: תקינו רבנן דאפילו מאי דתפיסא מהפקינן ליה מינה, ויהבינן לה גיטא לאלתר" *Teshuvot Ha-Geonim (Geonim Kadmonim)*, 91. In *Shut Maharam me-Ruthenburg*, Prague ed., 443 (in the name of Rav Sherira Gaon) we find

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We make her wait twelve months, and then we give her her *get*.

Or, regarding the writing of the *get*: “וּכְתְּבֵי לָהּ גֵּט לְאֵלֶתֶר” (they write her a *get* immediately).²³

According to this approach, this statement is understood as a writ of divorce written and given by *bet ha-din*, which means that divorce is executed without the participation of the husband. Rosh's quotation above gives the normative basis for this possible interpretation: divorce by constitutive annulment of marriage upon the wife's demand. As we have concluded from the Geonic responsum cited in the previous section,²⁴ the concept of *hafka 'at kiddushin* was known and used. This interpretation of the law of *moredet* is therefore a possible expansion of the concept of *hafka 'ah*, based on the way that *hafka 'ah* was understood later.²⁵

Similarly, some scholars have argued that the Palestinian tradition is based on a variation of marriage annulment.²⁶ One of the Cairo Genizah *ketubbot* states the divorce clause as follow:²⁷

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

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

“על פום בית דינה ועל דעתיהון” means, according to this view, a constitutive divorce by the court. Accordingly, this stipulation gives the authority to the *bet ha-din* to decide when

“giving” in the plural formulation but in Hebrew: “נִוְתְּנִין לָהּ גֵּט מִיָּד” (the Hebrew formulation is found also in *Shut Maharam me-Ruthenburg*, Lemberg ed., 443, in the name of Rabbi Shemuel ben Rabbi Ali, the 12th century head of the Yeshiva of Baghdad). See also Mordechai A. Friedman, *Ribuy Nashim be-Israel*, Tel Aviv: Bialik Institute, 1986, p. 15 n. 44e.

²³ Cited in *Shut Maharam me-Ruthenburg*, Prague ed., 261, in the name of *Teshuvot ha-Geonim*. A major weakness of this argument is that in many responsa plural and singular formulations are used together, without making any distinction between them; see below.

²⁴ See *supra*, text to notes 18-19.

²⁵ Michael Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law* (Hoboken: Ktav, 2001), 19-20, 60-61, 160 n.3, seems to accept this view as historically correct (i.e. an accurate description of the Geonic view, rather than a dogmatically accepted approach for our days). According to Broyde, following Rosh, the Geonic ruling of *moredet* was based on *hafka 'ah*, and if the husband refused to divorce his wife and coercion was not possible, the marriage could be annulled even without compelling him to give a *get* (“Indeed, the *geonim* devised a mechanism to ensure that it [=marriage] did end: this appears to be annulment, or coercion to divorce even in the absence of fault”; *ibid.*, 19). Nevertheless, Broyde is not willing to adopt this view for practice today; see *ibid.*, 20: “such annulments remain a dead letter in modern Jewish law”; 61: “...the nearly insurmountable halachic objections to a return to halachic rules that have not been normative for 800 years”. Below, however, we take an opposite view, both historically (as discussed in the current section) and dogmatically (see section n 5(c)).

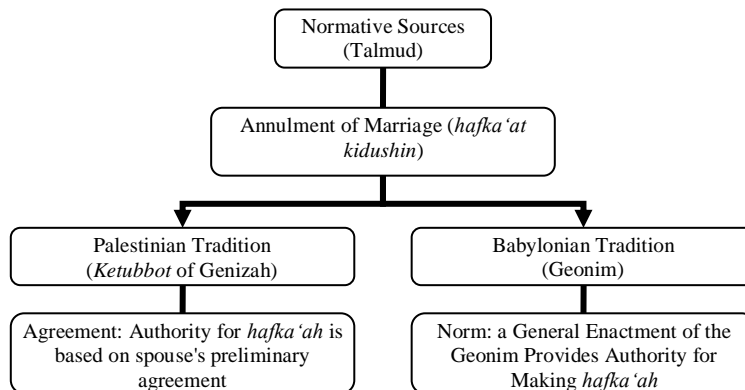
²⁶ See Friedman, *Jewish Marriage*, *supra* n.1, at 336 n.78 (this was Friedman's initial view, but he abandoned it entirely; see *ibid.*); Jackson, Papyri, *supra* n.7, at 161-162; Jackson, Preliminary Report, *supra* n.20, at 3-4.

²⁷ *Ketubah* no. 1, lines 23 – 24, in Friedman, *Jewish Marriage*, II, pp. 9 (Heb.); 13 (translation).

marriage should be terminated, similarly to the plural formulation of the Geonic dicta above, e.g. “הבינן לה גיטא”. Thus, when the wife “hates” her husband and unilaterally desire a separation, she may “exit” the marriage, based on the court’s final decision. It should be noted, however, that the Genizah divorce clause is less readily understood as a terminative condition which retroactively annuls the marriage.²⁸ The simple meaning of “ונפקה על פום בית” “דינא” is termination of the marriage prospectively, from now on, since the issue here is whether it is done by a *get* given by the husband, or merely a constitutive act of *bet ha-din*.²⁹

Interpreting the Babylonian and the Palestinian traditions as using constitutive annulment produces the following model: we have positive law basis for constitutive annulment of marriage by the court with no *get* given by the husband,³⁰ but we need to clarify the authority for applying it in practice to a recalcitrant husband. At this point the tradition develops into two branches: on the one hand, annulment based on agreement of the spouses (Eretz Israel), on the other, annulment based on a legal decree (Geonim).

Indeed, according to this view, there is no need to assume any direct historical connection between the Geonic decree and the divorce clause: one tradition may not have influenced the other, and might not even be familiar with it. However, both traditions had a similar substantive basis, which justified annulment of marriage. This basis may be found in the talmudic sources, which discuss annulment of marriage by the *bet din*.³¹ The scheme accordingly is as follow:



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

²⁸ See *supra* text to n.9 and in n.9.

²⁹ Adopting the last option (a constitutive act of *bet ha-din*) puts us in the second stage of the development of the concept of *hafka'ah* (see section 2(a) above). The authority for annulment in the Palestinian divorce clause, however, is not the authority to “uproot the words of the Torah” but a contractual agreement between the spouses (see below).

³⁰ The annulment can be either retrospective or prospective (see section 2(a) above, stages (b)-(c)).

³¹ See Section 2(a) above.

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Rosh's explanation of *Takkanat Ha-Ge'onim* as *hafka 'ah* is anachronistic. The Geonim based their view on the Talmud (or at least: on a decree of *Rabanan Savora'e*, as cited as the final stage in the talmudic *sugya*), which legitimated coercion of a *get* in cases of *moredet*,³² without relating it to *hafka 'at kiddushin*. This is explicitly stated in some Geonic responsa, as the following from Rav Sherira:³³

כך ראינו: ששורת הדין היתה מעיקרא שאין מחייבין את הבעל לגרש את אשתו אם בקשה גירושין... ואחר כך התקינו תקנה אחרת שיהו מכריזין עליה ארבע שבתות זו אחר זו... ואף על פי כן, לא היו מחייבין את הבעל לכתוב לה גט... והתקינו שמשנהין אותה כשתובעת גירושין שנים עשר חדש שמא יתפייסו ואם לא יתפייסו לאחר שנים עשר חדש כופין את הבעל וכותב לה גט. ואחרי רבנן סבוראי... תקינו... וכופין אותו וכותב לה גט לאלתר ויש לה מנה מאתים. ובזאת אנו מתנהגין היום כשלש מאות שנה ויותר. אף אתם עשו כן.

This is our opinion [lit. we saw in the following way]: the original law was that [*bet ha-din*³⁴] do not oblige [plural (מחייבין)]³⁵ the husband to divorce his wife if she asks to divorce... Later [the Sages] enacted another enactment that an announcement regarding her shall be made on four consecutive Sabbaths ... Nevertheless [*bet ha-din*] did not oblige the husband to write her a *get*³⁶... [Later the Sages] enacted that when she demands divorce [*bet ha-din*] make her wait twelve months perhaps they reconcile, but if they do not reconcile after twelve months [*bet ha-din*] compel the husband and he writes her a *get*.³⁷ After Rabanan Savora'e... [the Geonim] enacted... and [*bet ha-din*] coerce the husband and he writes her a *get* immediately [upon her demand] and she gets the hundred or two hundred [*zuz*, of her *ketubbah*]. This is the way that we have ruled for three hundred years and more. You should also act in this way!

³² See Avshalom Westreich, "Compelling a Divorce? Early Talmudic Roots of Coercion in a Case of *Moredet*", *Working Papers of the Agunah Research Unit* no.9, 2008, <http://www.mucjs.org/Moredet.pdf>, 2 (hereinafter: Westreich, *Moredet*).

³³ *Teshuvot Ha-Geonim, Sha'are Tsedek*, Vol. 4, 4:15. Both Friedman and Brody assume that this view was largely accepted by the Geonim: see Friedman, *Jewish Marriage*, *supra* n.1, at 324-325; Brody, *The Geonim*, *supra* n.3, at 298-299. For the progress of the law of *moredet* and the various enactments described here see Westreich, *Moredet*, *supra* n.32).

³⁴ I added "*bet ha-din*" when the Gaon refers to the judicial act. When he refers to the enactment I added "Sages" for the first two enactments and "Geonim" for the last one.

³⁵ Similarly, all the judicial acts below are formulated in the plural ("מכריזין"; "מחייבין"; "כופין"), despite the actual writing of the *get*: "וכותב לה גט" (see below).

³⁶ Compare Westreich, *Moredet*, *supra* n.32, section 3, where I argued that Rahi's view (which is supported by a simple reading of the sources) is that coercion of a *get* was possible already at this talmudic stage. Rav Sherira, however, ascribes it to the last talmudic stage; see next note.

³⁷ This enactment is the final section of the talmudic *sugya* ("ומשהינן לה תריסר ירחי שתא אגיטא" (*Ketubbot* 64a), which Rav Sherira ascribes to the Savora'im (see Westreich, *Moredet*, *supra* n.32, at 12).

According to Rav Sherira, the procedure of divorce in a case of *moredet* is by a coerced *get* and the talmudic *sugya* of *moredet* is the source for it. This *sugya* is a sufficient basis for this ruling, and no additional normative basis is required.³⁸

As for the use of the plural formulation, this should be understood in the light of Rav Sherira's explicit statement (and others, see below) as referring to the act of coercion which is performed by the court. "יְהִיבִינָהּ לָהּ גֵּט" or "כְּתָבִי לָהּ גֵּט" is a short formulation for "we (i.e. *bet ha-din*) coerce the husband and he writes (or: gives) her a *get*" as in this Geonic responsum ("כּוֹפִין אֶת הַבַּעַל וְכּוֹתֵב לָהּ גֵּט").³⁹

It is remarkable that in some responsa plural and singular formulations are used together, without intending any distinction between them. For example: "הַגְּאוֹנִים תִּיקְנוּ... מִשְׁתַּדְּלִין לַעֲשׂוֹת שְׁלוֹם בֵּינֵיהֶם, וְאִם אֵינָה שׁוֹמַעַת נּוֹתְנִין לָהּ גֵּט לְאַלְתֵּר... וְכֵן כָּתַב רַב הַאִי... הַגְּאוֹנִים הַרְּאִשׁוֹנִים לֵיתֵן גֵּט" ("the Geonim enacted... we try to make peace between them, and if she doesn't accept [we, the court] give [=plural] her a *get* immediately ... and so wrote Rav Hai ... the earlier Geonim enacted that [we, the court] compel her husband immediately to give a *get*").⁴⁰ The plural formulation of "giving her a *get*" thus means "compelling her husband to give a *get*". To be sure, this and the other responsa⁴¹ are based on different Geonic sources. Nevertheless, it is implausible to assume that they reflect a dispute between the Geonim regarding the procedure of the law of *moredet* (or different traditions regarding the actual enactment of the Geonim). If indeed this significant dispute had taken place, it would have been reflected more sharply and in a more explicit way. The plural formulation, therefore, reflects different styles and formulations of the same ruling: compelling the husband to give a *get*.

So why did Rosh mention *hafka'at kiddushin*? The dogmatic halakhah had developed in a direction different from that of the Geonim. The Geonic view was totally rejected by Rabbenu Tam, who argued that there is no basis in the Talmud for compelling divorce in such a case.⁴²

³⁸ Even if we interpret *hafka'at kiddushin* as validating an invalid *get*, as some have suggested (see Westreich, Annulment [*supra* n.8], at 10-11), it is still not required for our case. The *get* is a *get kasher* since we deal here with a legitimate coercion.

³⁹ Perhaps the plural formulation was also influenced by the talmudic style of the *sugya* of *moredet* which uses a plural formulation: "וְמַשְׁהִינָהּ לָהּ תְּרִיסָר יָרְחֵי שְׁתָּא אַגִּיטָא" (we make her wait twelve months for her divorce). Indeed, we find these two judicial acts cited together in the quotation from *Halakhot Gedolot* above ("וְיַהֲבִינָהּ... וְיַהֲבִינָהּ"). Thus, just as the waiting period is executed by *bet ha-din*, so is the giving of the *get*, but the actual giving is done by the husband who is compelled to do so by *bet ha-din*.

⁴⁰ *Shut Maharam me-Ruthenburg*, Lemberg ed., 443. See also *Shut Maharam me-Ruthenburg*, Prague ed., 261: the first part of the responsum (cited in some manuscripts in the name of Rabbenu Gershom Me'or ha-Golah) uses a singular formulation ("וְיַהֲבִיב לָהּ גֵּט לְאַלְתֵּר"), the middle part (in the name of *Teshuvot ha-Geonim*) uses a plural formulation ("וְיַכְתִּיבִי לָהּ גֵּט לְאַלְתֵּר") and the last part (in the name of *Halakhot Gedolot*) uses a singular formulation again ("וְיַכְתִּיב לָהּ גֵּט לְאַלְתֵּר"). The same phenomenon is documented in *Shut Maharam me-Ruthenburg*, Prague ed., 443.

⁴¹ See previous note.

⁴² See *Sefer Ha-yashar Le-Rabbenu Tam, -elek ha-Teshuvot*, 24. Indeed, it is arguable whether this total rejection of the Geonic view was indeed held by Rabbenu Tam (see Yehudah Abel, "Rabbi Morgenstern's Agunah

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Rabbenu Tam's view was largely accepted; therefore the Geonic view needed justification. Rosh very limitedly accepted the Geonic view (only in certain *bedi'avad* cases),⁴³ and attempted to provide some justification for it by interpreting it as entailing *hafka'ah*. In this way, Rosh could both adhere to Rabbenu Tam's view, that a coerced *get* in a case of *moredet* is not found in the Talmud, while at the same time legitimating the Geonic measures (*bedi'avad*). In any case, Rosh did not intend to introduce a different procedure for cases of *moredet*, but rather to base the problematic Geonic enactment of coercion on their authority of annulment.

Historically, therefore, it is hard to accept Rosh as a support for the view which sees the Geonic rule of *moredet* as based on *hafka'ah*. The procedure of divorce in the law of *moredet* is merely performing a compelled *get*, and, according to the Geonic responsum cited above, this *get* was a regular *get* given by the husband (although under the "pressure" of *bet ha-din*). This law is based on normative sources, i.e. the talmudic *sugya* of *moredet*, but in order to reconcile it with different views regarding those sources Rosh anachronistically suggested the reasoning of *hafka'ah*. However, the view of Rosh is important from a dogmatic point of view, as will be discussed below.⁴⁴

According to the analysis of Rosh here suggested, the procedure of *moredet* is not merely an annulment of marriage but rather a divorce by a coerced *get*, while the authority for it is derived from the authority to annul marriage. Another responsum of Rosh supports this view. In it,⁴⁵ Rosh justifies coercion of a *get* due to special circumstances.⁴⁶ Rosh then discusses the possibility of annulment:

אמנם, אם נראה לכם רבותי הקרובים אל הדבר, שאם המקדש אינו אדם ראוי והגון
לדבק בבת טובים, ובנכל ובתרמית פתיה, וקרוב הדבר לדמותו לעובדא דנרש, דגרסין
ביבמות בפרק ב"ש (קי): משום שנעשה שלא כהוגן, הפקיעו הקידושין. גם זה, שעשה

Solution", *Working Papers of the Agunah Research Unit*, no.5, 2008, <http://www.mucjs.org/Morg.pdf>, 18 n.57; *idem*, "A Critique of Za'aqat Dalot", *Working Papers of the Agunah Research Unit* no.6, 2008, <http://www.mucjs.org/ZD.pdf>, 10-11). However, later Rishonim attributed that view to Rabbenu Tam, and largely accepted it (see Elimelech Westreich, "The Rise and Decline of the Law of the Rebellious Wife in Medieval Jewish Law", *Jewish Law Association Studies* 12 (2002), 212-218). This fact led to re-interpretation of the Geonic view, as described below.

⁴³ See below.

⁴⁴ See section 5(a).

⁴⁵ *Shut HaRosh*, 35: 2.

⁴⁶ The husband is suspected as one who "אינו אדם ראוי והגון לדבק בבת טובים, ובנכל ובתרמית פתיה" (a suspicion that should be confirmed by the local court). This case is similar to that of Naresh in which, according to Rav Ashi, the Sages applied *hafka'at kiddushin* since "he acted improperly" (*Yevamot* 110a), as cited by Rosh. Rosh's reasoning is probably that in such a case it is right to apply the Geonic rule of *moredet* since there is no "moral fear" which usually prevents it (see *Shut ha-Rosh*, 43:8). On the role of the "moral fear" in Rosh's view see Suzanne Knol, "An Historical Overview of Some Overt Ideological Factors in the Development of the *Agunah* Problem", PhD thesis, Manchester, 2008, §3.5.

שלא כהוגן, נהי דקדושין לא נפקיע, מכל מקום יש לסמוך בנדון זה על דברי קצת רבותינו, שפסקו בדינא דמורדת דכופין אותו לגרשה.

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

Annulment according to Rosh should not be applied here. However, the partial similarity between the talmudic case of annulment and the current case legitimates coercion in the latter. Due to its special circumstances, Rosh argues, we can follow the view that supports coercion in cases of *moredet*, i.e. the Geonic view, which was normally rejected by Rosh.

If the Geonic law of *moredet* were merely a procedure of annulment, Rosh's discussion in this responsum would be superfluous or even internally contradictory: we can't apply annulment, but we can apply the rule of *moredet* — which is the same! We must assume therefore that they are different halakhic procedures: the one is coercion of a *get*, i.e. a divorce executed by the husband (against his will), while the other is annulment executed by *bet ha-din*. However, we can see here that there is a relationship between the two, since they are ultimately based on the same reasoning. This is reflected also in Rosh's view, which supports the Geonic coercion by the concept of annulment, as discussed above.

Thus, integrating Rosh's two responsa (35:2, which exceptionally authorises coercion, and 43:8, which explains the Geonic *moredet* on the basis of annulment) produces the following explanation: *Moredet* is partially based on annulment (specifically, in terms of the authority for it, but the procedure includes a coerced *get*. Since it includes a *get* it can be more easily applied than can termination by mere annulment of marriage. The case in 35:2 is similar to the talmudic *hafka 'ah* but for particular reasons does not admit of annulment.⁴⁷ However, the second possibility, coercion based on annulment, may be applied in such a case.

Let us now examine the possibility of annulment in the Palestinian divorce clause. "על פום בית דינה" might be interpreted as a constitutive decision of the court, without a *get*. However, we should be suspicious of any such interpretation. The divorce clause is also found in a second *ketubbah*, but in a slightly different form.⁴⁸

⁴⁷ Rosh does not detail the reasons for not applying it. It might be that this case is not as improper as the talmudic case or it may reflect a hesitation to apply *hafka 'ah* in practice.

⁴⁸ *Ketubbah* no. 2, lines 33-34, in: Friedman, *Jewish Marriage*, *supra* n.1, at II.41 (Heb.); 44-45 (translation), emphasis added.

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ואן הדה רחל כלתא תשנא להדן נתן בעלה ולא תרצי בשותפתיה תהוה מאבדה מאוחר מהרה ותיסוב מה דאעלת ולא תהוה נפקא אלא על פי בית דינא.

And if this Rachel, the bride, hates this Nathan, her husband, and does not desire his partnership, she shall lose the delayed payment of her *mohar* and shall take what she brought in, and she shall not leave, except by the authorization of the court.

“Except by the authorization of the court” is a phrase which provides an exception. Adopting the interpretation of this clause as an annulment makes the exception unclear: annulment is a judicial act, which obviously is performed by court, so what does this phrase exclude? According to this interpretation the term means: she shall leave only by the court, i.e.: not by a (voluntarily given) *get*! This is surely not the intention of this text.

It is more likely that the divorce clause does not replace a *get* but rather enforces it. According to these Palestinian conditions, in a case of hatred, on the wife’s unilateral demand, the husband should give her a *get*. *Get* is not a judicial act but a document written by the husband. We could think about “private” ways of forcing him to give the *get*, justifying it by the divorce clause. So emphasis is required: compelling the husband to give a *get* should be done only “by the authorization of the court”.⁴⁹

I accept that I have not found decisive support for either of the possible procedures (annulment or coercion). However, the history of the halakhah further supports the option of coercion. *Get* in the rabbinical tradition is a central matter and difficult to overcome.⁵⁰ Accepting the annulment theory requires us to assume that a condition (in Erets Israel) or a decree (in Babylonia) adopted such a radical practice, which dispenses with the need for a *get*, with no explicit discussion and with no reservations. I suspect that if such a decision had been taken, it would not have been left in silence, with no explicit mention either in the decree or in the *ketubbah*, without being accompanied by a deep halakhic discussion and without at least some objections.⁵¹

⁴⁹ See also Katzoff, Papyrus, *supra* n.6, at 246: “...to make it crystal clear that no right or powers of divorce are provided the wife other than those in rabbinic law, it is stipulated that ‘...ונפקה על פום בית דינה...’”.

⁵⁰ Reflected for example in *Ketubbot* 74a: “ולא היה כח... להרציאה בלא גט”, i.e., even in cases where there is some theoretical basis for annulling the marriage, the Sages do not have the authority to release the wife without a *get*. Interestingly, amongst some Karaites sages around the 15th century there was a practice of authorizing annulment of marriage by a *bet din* without requiring a *get*; see Ze’ev Falk, *Tevi’at Gerushin Mi-zad Ha’isha Be-dine Israel* (Jerusalem: Institute for Legislative Research and Comparative Law, 1973), 25-26 (hereinafter: Falk, *Gerushin*).

⁵¹ The later objections relate to the legitimation of coercion. Only Rosh raised the issue of *hafka’ah*, and even he, as analyzed above, treated it as a support for *kefiyah*.

3. The Divorce Clause as the Basis of Geonic Coercion

Above we discussed a hypothesis which linked the Geonic tradition and the Palestinian *ketubbot*, describing them as two branches of a single legal construction (*hafka 'ah*), based on a similar normative source. But we didn't accept that hypothesis, preferring the view that a *get* was required in both traditions, and that both allowed such a *get* to be coerced. Accordingly we have to ask whether we can document such a link between the two traditions, in respect of coercion of a *get*.

This link is made by Me'iri's teachers' teachers,⁵² who argue that the normative basis for the Geonic compulsion of a *get* in *moredet* is R. Yoseh's clause of the Yerushalmi.⁵³

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

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

This statement will be extensively discussed below. For the moment suffice it to say that according to Me'iri's teachers' teachers this clause is the basis for the Geonic enactment of *moredet*.

What is the exact meaning of the link between the two traditions? Me'iri opposed coercion in cases of *moredet*.⁵⁴ His discussion of the Geonic measures relates to their financial enactments, according to which the wife would not lose her basic *ketubbah* (and other monetary components).⁵⁵ Me'iri rejects these enactments ("ואין ראוי לדון כדבריהם", "it is not correct to rule like them"), but then cites his teachers' teachers who find some support for the Geonim in the customary Palestinian divorce clause. Accordingly, the link between the two traditions does not relate to the coerced divorce but rather to the financial aspects of *moredet*.

Nevertheless, taking the words of Me'iri's teachers' teachers (as cited in Me'iri's commentary) out of their context in Me'iri's text reveals a different intention: it appears that Me'iri's teachers' teachers tried to legitimate the coerced divorce itself and not [only] the financial aspects. Thus, they interpret "אין שנאת" in R. Yoseh's condition as: "אם היא שונאתו" "שיזקק הוא לגרשה אם בכל הכתובה אם בקצת פחיתה" "if she grows to hate him, so that he is required to divorce her whether while [receiving] all the *ketubbah* or with a small

⁵² See *Bet Ha-bexira Le-ha-Me'iri, Ketubbot*, 63a, s.v. *zehu din ha-Talmud be-moredet*. Meiri's teachers' teachers explicitly link the Geonic *moredet* to the divorce clause of the Yerushalmi. However, as shown below, the Yerushalmi and the later Genizah *ketubbot* are part of a single tradition. M.A. Friedman even suggests that Meiri's teachers' teachers based themselves also on an actual *ketubbah* and not only to the Yerushalmi; see below.

⁵³ Yerushalmi, *Ketubbot*, 5:9, 30b.

⁵⁴ See Me'iri, *ibid.*, s.v. *'ugedoley ha-mexabrim*: "ולדעתנו אין כופין" (according to our [i.e. Me'iri's] opinion the husband is not coerced [to give a *get*]).

⁵⁵ *Ibid.*, s.v. *zehu* ("אלא שבעניין הגובינא חדשו הגאונים", i.e. in the financial [lit. collection] issue the Geonim innovated, etc.).

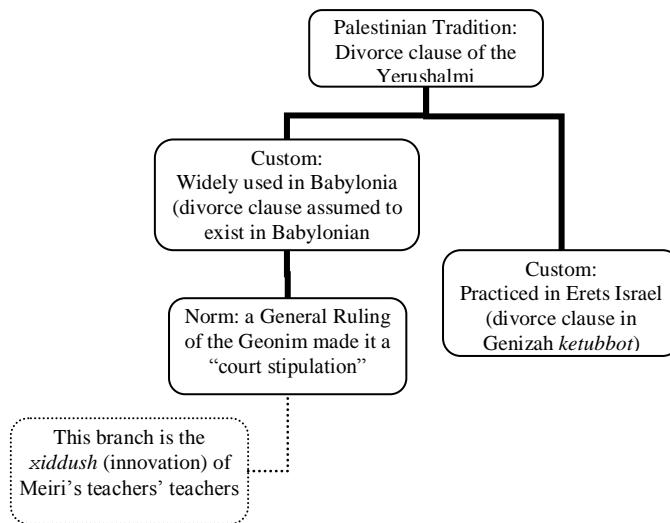
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reduction”.⁵⁶ In the same way, Me’iri’s teachers’ teachers refer to the fear of “להפקיע עצמה מיד בעלה” (that she may [unjustifiably] “take herself out of her husband’s control”) as the reason for their seeking to find support for the Geonic ruling, which means that the wife had the option of unilateral divorce and this needed justification. The divorce clause accordingly gives the wife the right to initiate unilateral divorce, and the Geonic enactments were based on this custom.

Me’iri’s teachers’ teachers’ argument is as follow: this condition was practiced not only in Eretz Israel, but was also known and used in Babylonia. Thus, the divorce clause was at first a widespread practice. Then the decree of the Geonim made it an obligatory norm, even when it was not written, thus authorising them to compel a divorce in all such cases (or require different financial arrangements, according to Me’iri). This is similar to other cases defined in the Babylonian Talmud as “court stipulations” (*tnai bet din*), i.e. a clause in the *ketubbah* (for example: *benin dikhrin*), which became a binding practice, so that the spouses are obliged to follow it even if it is not written explicitly in their *ketubbah*.⁵⁷ The scheme according to Me’iri’s teachers’ teachers is thus as follow:

⁵⁶ Similarly, they mention: “שאם תשנאנו תטול כתבתה או מקצתה ותצא” (“if she hates him she shall take her *ketubbah* or part of it and she shall leave”). The addition “ותצא” to the divorce clause in the Yerushalmi shows as well, to my mind, that they understood this clause as legitimating unilateral divorce.

⁵⁷ See Mishnah, *Ketubbot* 4:7-11.



Some scholars have accepted this view as historically correct.⁵⁸ Amongst them, an interesting compromise view is suggested by Moshe Shapira.⁵⁹ Shapira agrees with Friedman and Brody, who argue that the core of the Geonic decree was cancellation of the talmudic 12 months' waiting period and not the coerced divorce itself,⁶⁰ since this was based on the talmudic *sugya* of *moredet*. At the same time, Shapira bases the Geonic tradition on the Palestinian divorce clause, following Me'iri's teachers' teachers, but in a unique way: as a cause for the cancellation of the waiting period and not as a basis for compulsion of a *get* (or for other financial aspects). Therefore he argues as follow:⁶¹ (a) at first, there was a practice of writing the divorce clause, which became more and more widespread, to the extent that it became possible to coerce a divorce even if the divorce clause was not explicitly included.⁶² The divorce clause included, in addition to unilateral divorce, the right of the wife to receive her *ketubbah* or part of it. (b) Thus, according to Shapira, the 12 months' waiting period became otiose, since (based on the divorce clause) no sanctions were left during that period against the wife: she got alimony, and when divorced received her full *ketubbah*. (c) The Geonim ruled, therefore, that the coerced divorce should be effected immediately upon the wife's demand, canceling the 12 months' waiting period.

However interesting this argument is, it is historically unconvincing. Shapira bases his argument on the claim that according to the divorce clause the wife receives her *ketubbah* (and thus that the 12 months' waiting period lost its function). This claim is based on another

⁵⁸ See Saul Lieberman, *Hilkhot Ha-Yerushalmi Le-ha-Rambam* (New York: Bet Ha-midrash Le-rabanim Be-America, 1948), 61 n. 7. M.A. Friedman doubts whether this description is historically possible: see Friedman, *Jewish Marriage*, *supra* n.1, at 325-327), and see also below.

⁵⁹ Moshe Shapira, "Gerushin Be-din Me'isa", *Dine Israel* 2 (1971), 124-130 (hereinafter: Shapira, *Gerushin*).

⁶⁰ See Westreich, *Moredet*, *supra* n.32, at 2 and n.8.

⁶¹ Shapira, , *supra* n.59, mainly at p. 129.

⁶² Since this argument explains the Geonic decree, we must assume (according to Shapira's reasoning) that the process here described existed in Babylonia as well.

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citation of the divorce clause in the Yerushalmi, which gives the wife half of the *ketubbah*,⁶³ and on Me'iri, who adds the option of receiving all of the *ketubbah*: כלומר שאם תשנאנו תטול "כְּלוֹמֵר שְׂאֵם תִּשְׁנְאוּנוּ תִטּוֹל" ("[the divorce clause stipulates that] if she hates him she will receive her *ketubbah* or part of it and leave"). Historically, however, this is inaccurate: we do not find in the divorce clauses any precedents for receiving the *ketubbah* in full. Even receiving half the *ketubbah* was not the practice written into the Genizah *ketubbot* at the time of the Geonim, which always mention the wife's total loss of the *ketubbah*.⁶⁴ Thus, Shapira's description of stage (a) above is doubtful as to the wife's receiving the *ketubbah*, and therefore his whole historical reconstruction becomes problematic. According to Shapira's reasoning the 12 months' waiting period was still relevant, since the wife could lose at least part of her *ketubbah*, and there the Geonic decree had no reason for cancelling this waiting period.

Beyond these arguments, it is hard to accept Me'iri's teachers' teachers' view, following either Shapira's explanation or the classic interpretation of it as a support for coerced divorce or for the financial arrangements. It is correct that the divorce clause was a common practice, as we shall discuss below. Nevertheless, the Geonim do not refer to the Palestinian tradition of making such a condition as their normative basis. They refer rather to the Talmud as the source for coercion, and explain their decree as relating to the timing of coercion and to the monetary aspects. And even as regard these latter details, the Geonim didn't mention any contractual aspect ("תנאי ממון") as their basis but rather the needs of their time.⁶⁵

Indeed, it is possible that the Geonim were familiar with the Palestinian tradition (but not as a basis of their enactments). According to the following responsum, they interpret it as relating to the financial aspects of the law of *moredet*⁶⁶ rather than not to the basic right to demand divorce.⁶⁷ This familiarity may be deduced from Rav Hai Gaon, who legitimates some kinds of financial arrangements in cases of *moredet*⁶⁸ on the basis of: "שתנאיי ממון הוא" ("since it is a condition of monetary payment, and it is valid). This is almost word by word the Palestinian justification of the *ketubbah* clause,⁶⁹ and it is clearly cited here as a

⁶³ See below, text to n.78.

⁶⁴ According to Genizah *ketubbot*, the wife loses her *ketubbah* (*mohar*), but receives her dowry. Some *Ketubbot*, however, distinguished between the delayed *mohar* payment, which was forfeited by the wife, and the advanced portion (the *muqdam*), which was considered as her personal property and therefore was not returned to her husband; see Friedman, *Jewish Marriage*, *supra* n.1, at 333-335.

⁶⁵ See Rav Sherira's responsum, *supra*, text to notes 33-38.

⁶⁶ As some other suggest, see below, section 4(b).

⁶⁷ The structure is similar to Me'iri himself, as discussed above, but with a significant distinction: Me'iri rejected coercion while the Geonim supported it but find its basis in the Talmud; see Westreich, *Moredet*, *supra* n.32, at 16 n.99.

⁶⁸ See *Teshuvot Ha-Geonim* (Harkavi edition), 523: "מה שכתב במתנה לחדוד כך היא דעתנו כמו שכתב רבינו האי ז"ל: "שתנאיי ממון הוא" (since it is a condition of monetary payment, and it is valid). This is almost word by word the Palestinian justification of the *ketubbah* clause, and it is clearly cited here as a

⁶⁹ In the Bavli we find "דבר שבממון תנאו קיים" (*Ketubbot* 56a), and similarly in the Tosefta (*Kiddushin* 3:8). The formula "תנאי ממון הוא" is unique to the Yerushalmi.

support for monetary aspects rather than for the coercion. Yet, as mentioned above, even with regard to the financial aspect of the Geonic decree on *moredet*, the Geonim didn't refer to the Yerushalmi as their basis.

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

Me'iri's teachers' teachers' explanation of the Geonic decree is – just as I have argued regarding Rosh – a result of dogmatic acceptance of Rabbenu Tam. Since according to Rabbenu Tam the Talmud does not mention coercion, we need a different basis for the Geonim, and this suggestion finds its basis in the Palestinian tradition. As Me'iri mentions, his teachers' teachers were aware of the anachronistic character of their interpretation:

וכתבו בסוף הדברים שנוח לנו לטרוח ולפרש בדבריהם משנאמר שיעקרו כל הסוגיא
להדיא בלא טעם.

And they (i.e. his teachers' teachers) wrote at the end of their writings that it is better for us to take pains to interpret their teachings (i.e. the teaching of the Geonim) than to say that they explicitly uprooted the whole *sugya* without any reason.⁷⁰

Perhaps Me'iri's teachers' teachers were faced with a real situation, which proved the catalyst for their assumption. Mordechai Akiva Friedman assumes⁷¹ that Meiri's teachers' teachers were not only aware of Rabbi Yoseh's condition in the Yerushalmi, but also familiar with the real practice in Eretz Israel at their time, i.e., they saw a “real” Eretz Israel *ketubbah* which included a similar clause. According to Friedman, the teachers' teachers are likely to have been the Ra'avya (Rabbi Eliezer b. Joel Halevi), who examined a *ketubbah* that was brought from Eretz Israel and contained the divorce stipulation, similar to the divorce clause in the Yerushalmi.⁷² This actual finding “could have led him to conclude that there was a direct connection between the (Palestinian) clause and the (Babylonian) Geonic enactment.”⁷³

The Palestinian divorce clause is therefore not the basis for the Geonic enactment from an historical point of view. The Geonim did not refer to that tradition, and might even not have been familiar with it. The talmudic sources provide them with a sufficient normative basis for

⁷⁰ Me'iri, *ibid.* Me'iri himself needs this anachronistic support for the financial aspects, as argued above.

⁷¹ Friedman, *Jewish Marriage*, *supra* n.1, at 327.

⁷² See *Mishpete Haketubbah*, 309, p. 919

⁷³ Friedman, *ibid.*

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coercion. The Talmud itself might have been influenced by earlier customs of divorce clauses, documented since the 5th century B.C.E. in Elephantine.⁷⁴ In earlier pre-talmudic stages there might have been a court stipulation, i.e. a norm originating in the notarial practice of drafting *ketubbot*. But for the era discussed here – the Geonic era and the time of the Palestinian *ketubbot* – it is a rule of positive law found in the normative sources of talmudic literature.

4. The Yerushalmi Divorce Clauses and their Interpretation

Analyzing the character of the divorce clauses in the Palestinian *ketubbot* as we have done in previous sections may assist us in interpreting a related tradition, earlier in time: the divorce clauses documented in the Yerushalmi. We shall now turn to the study of these sources.

(a) The Divorce Clauses in the Yerushalmi

In the Yerushalmi we find two cases which have some similarity with the Palestinian divorce clause.⁷⁵ The first is R. Yoseh's condition, already mentioned above:⁷⁶

אמר רבי יוסה אילין דכתבין אין שגא אין שגאת תניי ממון ותניין קיים.

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

The second is a case in which a man kissed a married woman ("אחד שראו אותו נותן את פיו על") (פיה), where her entitlement to be paid the *ketubbah* fell to be decided. The Amoraim did not regard her as a *sotah* (adulteress), which would mean that her husband was obliged to divorce her and that she lost her *ketubbah*, but rather treated the case as one of hatred. Accordingly, they applied here the condition which was found in her *ketubbah*:⁷⁷

אין הדא פלנית תסבי (צ"ל תסני)⁷⁸ להדין פלוני בעלה ולא תיצבי בשור-פותיה (צ"ל בשותפותיה) תהוי נסבה פלגות פרן.

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

Unilateral divorce is not explicitly mentioned in the Yerushalmi either in the *sugya* of the kiss story or in R. Yoseh's condition. However, we can deduce from the clause in the kiss story that the wife did have the right to demand divorce: part of the clause is "ולא תצבי בשותפותיה",

⁷⁴ Falk, *Gerushin*, *supra* n.50, at 17-20, argues however, that some of those documents might not have permitted unilateral divorce upon the wife's demand. Confronting this argument is beyond the scope of the current paper.

⁷⁵ See Westreich, *Moredet*, *supra* n.32, at 14-16. In the following sections I shall expand that discussion by focusing *inter alia* on some of the unique monetary aspects of the conditions in the Yerushalmi.

⁷⁶ Yerushalmi, *Ketubbot*, 5:9, 30b.

⁷⁷ *Ibid.*, 7:6, 31c.

⁷⁸ For the exact reading of this passage see Westreich, *Moredet*, *supra* n.32, at 15 n. 93-94.

“if she does not desire his partnership”, thus that she had the option to initiate breaking of the “partnership”, i.e. to initiate divorce.⁷⁹ But what was the divorce procedure in these cases according to the Yerushalmi? Were it different from the procedures of the divorce clauses of the later Palestinian *ketubbot*?

The language and syntax of the divorce clauses of the Yerushalmi, as found in the “kiss story” and those of the Palestinian *ketubbot*, are quite similar. It includes the verb “hate”, which reflects the desire for divorce, and the following structure of the protasis: “If [wife / husband] hates this [husband / wife] and does not desire his / her partnership”.⁸⁰ R. Yoseh’s condition in the Yerushalmi includes only the beginning of the protasis, but this partial citation follows the same language and structure: “if he or she hates [his wife or her husband]”.

Accordingly, we may conclude that the Yerushalmi and the later *ketubbot* are part of a single halakhic tradition. This conclusion has an important implication for the character of divorce according to the divorce clauses of the Yerushalmi. As one continuing tradition, we may assume that both the Yerushalmi and later Palestinian *ketubbot* have the same divorce procedures, which means that divorce can be unilaterally initiated by the wife as well as by the husband, on the basis of the spouses’ preliminary stipulation, but the formal execution of divorce is exclusively done by the husband (although he might be coerced to do so).

However, the divorce clause of the Yerushalmi varied in important monetary aspects, as we shall now demonstrate.

(b) The Function of the Palestinian Clause: Divorce or Financial?

The above conclusion raises an essential question. If indeed, there was a basis in positive law for unilateral divorce, both for the Babylonian and for the Palestinian traditions, why was it necessary to write the divorce clause in the Palestinian *ketubbot*?

One of the two citations of the divorce clause in the Yerushalmi, “the kiss story” cited above, suggests a very unique version of it:

אין הדא פלגית תסוגי להדין פלוגי בעלה ולא תיצבי בשותפותיה תהוי נסבה פלגות פרן.

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

According to this clause, the wife is entitled to half of her *ketubbah* in case of unilateral divorce initiated by her. Thus, we can suggest a reasonable explanation for the practical necessity for this clause: it was required in order to regulate the financial arrangements, which might vary from case to case.

⁷⁹ See *ibid.*, at 15-16. In R. Yoseh’s condition it is completely missing, as is the entire apodosis (the “then” clause of the condition).

⁸⁰ See the divorce clauses of the Palestinian *ketubbot*, *supra* texts to notes 27, 48.

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Following this argument, the divorce clause which stipulated a total loss of the *ketubbah*, normally found in the (later) Palestinian *ketubbot*, was written to exclude this different option, that of loss of only half of the *ketubbah*. In other words, the divorce clause was *not* required in order to legitimate unilateral divorce, since the latter has an independent basis. It was required, rather, for the financial arrangements, which were subject to variation and therefore needed to be explicitly stated. The structure of the divorce clause supports this interpretation: divorce is only part of the protasis (the “if” part of the condition) while the apodosis (the “then” part of the condition) is the financial aspect, which is also the core of the amoraic discussion that follows.⁸¹

Accordingly, R. Yoseh’s justification for accepting this condition, “תנאי ממון ותניין קיים” (“[it is] a condition of monetary payment, and their condition is valid”), is interpreted simply as referring to the monetary arrangements; the condition can be accepted precisely because it does relate to a monetary issue. This clarification is important since if we interpret R. Yoseh as legitimating unilateral divorce, the term “תנאי ממון” must have a new expanded meaning according to which demanding divorce is defined as “ממון” (requiring the meaning of the term “ממון” to be expanded to include various other rights).⁸²

Interestingly, some Geonim⁸³ and Rishonim – Ramban and others – do explain the divorce clause of the Yerushalmi in the same way, i.e. as a clause which was required for the financial agreements.⁸⁴ However, both are affected by their understanding of the Babylonian *sugya* of *moredet* but in opposite ways: the Geonim understood the *sugya* as a source for coercion, and therefore the Palestinian divorce clause was not required to be understood as legitimating coercion. The Rishonim who cited the divorce clause understood the Bavli as excluding coercion, due to the adoption of Rabbenu Tam’s interpretation of the Talmud. Therefore they were motivated to interpret the clause of the Yerushalmi as discussing only financial aspects.⁸⁵

Explaining the divorce clause as required for the financial arrangements is not completely satisfying as regards the Genizah *ketubbot*. The equal distribution of the *ketubbah* which is

⁸¹ Westreich, *Moredet*, *supra* n.32, at 16 and n.97; Katzoff, Papyrus, *supra* n.6, at 245-246.

⁸² See Friedman, *Jewish Marriage*, *supra* n.1, at 319-320.

⁸³ See Rav Hai, *supra*, text to notes 66-69.

⁸⁴ See Ramban, *Ketubbot*, 63b: when the couple explicitly stipulated that in a case of *moredet* the wife receives all her *ketubbah*, it is valid since it is “תנאי ממון”. As a support for this ruling Ramban quotes the Yerushalmi: “אלא אם כן כתב לה שקבל על עצמו שאפילו תמרוד תטול, כמו שאמר הרב בן מיגש ז”ל, דהתם תנאי ממון הוא וקיים. ובירושלמי: ‘אילין דכתבין אין שנאי אין שנאת תנאי ממון הוא וקיים’, ואין זה צריך לפנינו.” This is probably also Me’iri’s understanding, as I argued in the previous section.

⁸⁵ Z. Falk makes similar argument, according to which the condition in the Yerushalmi deals only with the financial aspect, and suggests that coerced divorce might have not been part of this condition, as he claims to find in some of the Elephantine marriage documents: see Falk, *Gerushin*, *supra* n.50, at 22. In this paper, however, I follow my previous conclusions (see Westreich, *Moredet* [*supra* n.32], at 5-6. 14-16) according to which the Yerushalmi did accept coerced divorce.

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

It appears therefore that the divorce clause in the Palestinian *ketubbot* was written as part of a general custom in Eretz Israel, according to which court stipulations were frequently written, even though they were not required.⁸⁶ This assumption is supported by the fact that some *ketubbot* mention only the existence of the divorce stipulation without its details: “They agreed between themselves ‘concerning the matter of hate and love (“על עסק סנתה ורחמתה”, i.e. the divorce stipulation) and life and death’ and all court stipulations”.⁸⁷ We may conclude from this fact that the content of the divorce stipulation was known and common and there was no substantial need for it to be written.⁸⁸ Indeed, some scribes of the Genizah *ketubbot* were satisfied merely to mention its existence. Others, however, happily for us, preferred to write it out in detail.

5. Dogmatic Impact of the Rejected Historical Assumptions

(a) *Hafka'at Kiddushin*

As we have shown,⁸⁹ Rosh links the Geonic *moredet* to the concept of marriage annulment. While we had a great doubt whether we could consider his view as historically accurate, rather than as an anachronistic justification for an earlier *halakhah*, his responsum has important implications. Rosh here legitimates *hafka'ah* in practice at least in *bedi'avad* cases, and has no doubt that it may be used. This is particularly meaningful in a halakhic

⁸⁶ See Friedman, *Jewish Marriage*, *supra* n.1, at 15-18, 330. In Babylonia the opposite custom was observed: court stipulations were not written. See Friedman, *ibid.*, 16. This might be also the basis for the custom in several places of not writing a *ketubbah* at all: see Rashi, *Ketubbot* 16b, s.v. *rav Papa*.

⁸⁷ Friedman, *Jewish Marriage*, *supra* n.1, at 340.

⁸⁸ This is probably also the reason why R. Yoseh in the Yerushalmi does not give any details of the divorce clause, but only rules that it is legitimate.

⁸⁹ See section 2(b).

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environment in which the practical use of *hafka'at kiddushin* has become subject to major dispute, from the Geonim until our own days.⁹⁰

As we have argued, it is hard to assume that Rosh understood the Geonic rule of *moredet* as a judicial act of annulling the marriage without participation of the husband, namely as *hafka'ah* without a *get*. Rosh here tries to justify coercion of a *get*, rather than to revive a practice different from that in his own day. Therefore, the implication of Rosh's writing is that it legitimates *hafka'at kiddushin* at least when it is accompanied by a coerced *get*.⁹¹ We cannot however prove that Rosh demanded a *get* as a necessary condition for *hafka'ah*. Rosh does not discuss the typical cases of *hafka'ah*, but is concerned only to provide support for the rule of *moredet*; in regard to classic *hafka'ah* he may well have accepted it even without a *get*.⁹²

Another implication of defining Rosh's view as anachronistic relates to the opponents of the Geonic tradition. In a recently published paper, Rabbi U. Lavi argued, based on Rosh's reasoning, that the Rishonim who disagreed with the Geonim regarding *moredet* (mainly: Rabbenu Tam) rejected *hafka'ah* as well.⁹³ According to the analysis above, this is a false conclusion. The element of *hafka'ah* is a later one, added by Rosh, while the dispute between the Geonim and Rabbenu Tam relates to the authority for coercing a divorce, without taking *hafka'ah* into consideration.

Rosh's second responsum, which we have discussed in relation to the historical aspects of his view,⁹⁴ supports our current conclusions regarding its dogmatic implications. In this responsum, Rosh does not reject the possibility of annulment. More than that, it seems that Rosh would agree that in principle annulment can be applied, when the betrothal was done "improperly" (and here, the annulment is even when no *get* is given⁹⁵). As he writes:⁹⁶

אמנם, אם נראה לכם רבותי... וקרוב הדבר לדמותו לעובדא דנרש... משום שנעשה שלא כהוגן, הפקיעו הקידושין. גם זה, שעשה שלא כהוגן, נהי דקדושין לא נפקיע, מכל מקום יש לסמוך בנדון זה על דברי קצת רבותינו, שפסקו בדינא דמורדת דכופין אותו לגרשה.

But if it looks to you my masters who are close to this matter, that the betrothing man is not an appropriate and decent person in order to marry this girl of good descent, and that he has persuaded her by fraud and cheating, and that it is reasonable to compare [this case] to the case of Naresh (*Yevamot* 110a) where we learned that since it (the betrothal) was done improperly [the

⁹⁰ See Westreich, Annulment, *supra* n.8, at 1-2, and *ibid.*, n.6.

⁹¹ See Westreich, Annulment, *supra* n.8, at 10-14.

⁹² See further below. The necessity of a *get* for *hafka'at kiddushin* is part of a wide dispute; see Westreich, *ibid.*

⁹³ See Uri'el Lavi, "Ha'im Nitán Lehafki'a Kiddushin Shel Sarvan Get?", *Tezumim* 27 (5767), section 1.7.

⁹⁴ *Shut HaRosh*, 35:2; See *supra*, text to note 45.

⁹⁵ See further Westreich, Annulment, *supra* n.8, sections 3(c); 4.

⁹⁶ See full citation above.

Sages] annulled the betrothal — [then in the case of] this [person] as well, who acted improperly, although we would not annul the betrothal, nevertheless we should follow in this case the view of a few of our Rabbis who ruled in the law of *moredet* that [bet ha-din] should compel him to divorce her.

The case is therefore similar to the case of Naresh, in which the Sages annulled the betrothal and in principle we could annul the betrothal here as well. However, for an unmentioned reasons (perhaps because the case here discussed is not as radical as kidnapping the betrothed girl from her former “husband” in the case of Naresh,⁹⁷ or maybe because of a more general hesitation to apply annulment in practice) Rosh was not willing to apply annulment here, but rather preferred coercion.⁹⁸

(b) Conditions in Marriage

Me’iri’s teachers’ teachers base the Geonic tradition on the Eretz Israel custom. As argued above, the actual interaction between the two traditions might be limited from an historical perspective. But the very fact of making such a link has a dogmatic significance. For Me’iri’s teachers’ teachers, the Palestinian tradition is sufficient to legitimate the problematic Geonic tradition, probably⁹⁹ even in relation to what they (following Rabbenu Tam’s view) regarded as non-legitimate coercion. This attitude towards the Yerushalmi gives it an enormous dogmatic weight: it can justify customs, norms etc., even if they lack a normative basis in the Babylonian Talmud.

The core question now is what exactly can be supported by the Palestinian precedent. According to the view that no *get* was required,¹⁰⁰ the results are far reaching: a preliminary agreement between the spouses can be a basis for marriage annulment, and the fact that it was done in Eretz Israel in the past gives it its legitimization. But we had some doubt regarding this view and preferred the alternative explanation, according to which the husband was coerced to grant his wife a *get*. But here too, there is an important dogmatic implication: according to the view of Me’iri’s teachers’ teachers, a preliminary agreement can dissolve later problems of *get me’use*, when divorce is initiated solely by the wife.¹⁰¹

⁹⁷ See Westreich, Annulment, *supra* n.8, at 2.

⁹⁸ We should make a distinction between the possibility (and validity) of retroactive *hafka’ah* in principle and its practical implementation. While Rosh explicitly avoid the latter, he does not reject the former: cf. Eliav Shohetman, “Hafka’at Kiddushin”, *Shenaton Ha-mishpat Ha-Ivri* 20 (1995-1997), at 369 n.54.

⁹⁹ At least according to the teachers themselves; see previous section.

¹⁰⁰ See section 2(b) above.

¹⁰¹ We find precedents for this kind of conditions, as the monogamy condition, according to which the husband committed himself to divorce his wife if he takes a second wife: see Elimelech Westreich, *Temurot Be-ma’amad Ha-’isha Ba-mishpat Ha-’Ivri* (Jerusalem: Magnes Press, Year), 26-29). These cases are beyond the scope of the current paper.

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(c) History and Dogmatics

The right of the wife unilaterally to demand divorce was practiced in two different traditions: the Babylonian-Geonic tradition and the Palestinian-Genizah tradition (including its precedents in the Yerushalmi). These traditions developed in a similar environment but the sources of authority for this right were different in nature and did not influence each other: a positive law source (the *halakhah* of *moredet*) in the Geonic tradition; custom and contractual agreement in the Palestinian tradition. We have not found sufficient support for the argument that based them both on the same construction (*hafka 'ah*). Neither have we found support for basing one tradition (the Geonic coercion) on the other (the Palestinian divorce clause).

Even so, a fascinating interaction is revealed at a different level. Later in time some writers connected the two traditions. This is done by Me'iri's teachers' teachers. Other Rishonim who reject coercion do the same by interpreting the divorce clause as relating to a merely financial matter, similarly to the Geonic enactment (as it was understood by these Rishonim). Perhaps this interaction is compatible also with the reasoning of Rosh, if we extend that reasoning to the Palestinian divorce clause, and interpret both it and the Geonic *moredet* as based on *hafka 'ah*, as some writers have suggested.

Historically, therefore, we still lack decisive conclusions. Dogmatically, however, these old sources are still alive, being authoritative for the classic Rishonim. The present task is to discuss the question of what should be the place of these precedents – coercion, conditions and annulment – in the contemporary seek for a remedy to the problem of *agunot*. To my view, these solutions should not be treated as irrelevant to the current *halakhah*. They were still relevant for the Rishonim, even centuries after their actual use. In our time as well, the *poskim* should consider what dogmatic weight should be given to these solutions, taking into account the picture drawn in the present paper.