1. Introduction

Annulment of marriage is mentioned in various contexts in the Babylonian Talmud. A number of famous talmudic sugyot discuss the concept of *hafka‘ah*; אסקענטה רבנן עלדוהות ממעה, i.e. the Sages have “expropriated” the marriage from the husband, or: the Sages annulled the marriage. In a similar way the Yerushalmi, when discussing a case where the get was halakhically void but validated by the Sages, mentions the notion of: תפיעהא עוקרין דבריהן (their [i.e. the Sages’] words uproot the words of the Torah), according to which the Sages might
d1 have the authority to annul the marriage in certain circumstances.\(^1\)

From Geonim to Rishonim and Aḥaronim, from classic commentators to modern Jewish Law scholars, the character of *hafka‘at kiddushin* has been much debated. In particular, what is the legal construction of *hafka‘ah* and what are the conditions for its application: does it always entail retroactive annulment of the marriage or may it be “only” prospective, and if so based on what authority? Does a *get*, which is found in several talmudic sugyot of *hafka‘ah*, have a significant role in this process?\(^2\)

These debates revolve around the appropriate reading of talmudic sources. Nevertheless, textual analysis of the main sugyot reveals support for almost all the competing opinions. Typically for layered talmudic sugyot, there is no homogeneous meaning; each reading exposes one or more possible aspects of the sugya. Indeed, some scholars have pointed in the past to the contribution to the issue of the ultimate talmudic redactor, especially in interpreting *hafka‘ah* as a retroactive annulment.\(^3\) But in my opinion the picture which has been drawn is still incomplete, as regards both the development of the concept and the question of the authority of the Sages in relation to it. A re-reading of the sources is therefore required.

It should be emphasized that the advantage of revealing the talmudic strata is not merely for the purposes of historical research. This kind of tension between talmudic layers is a classic ground for creating contradictory interpretations amongst talmudic commentators.\(^4\) This discussion is therefore necessary for analysis of the dogmatic status of *hafka‘at kiddushin*.

An examination of the talmudic basis of *hafka‘ah* enables us to reach a deeper understanding of the later rabbinic literature. Proposals for practical implementation of *hafka‘at kiddushin* are an emotional issue which very frequently results in total rejection.\(^5\) Revealing the various approaches throughout the

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1. This depends on the exact context of this passage; see below.
2. Yerushalmi, Gittin, 4:2, 45c.
talmudic sources is essential for establishing the actual basis for such proposals. The context of the present discussion is however not limited to radical proposals whose object is enactment of constitutive annulment as a solution for the agunah problem. Annulment is frequently cited as an additional support for other means of terminating the marriage, such as a compelled get, and the basis for those cases requires clarification too.

2. Talmudic Cases of Hafka’at Kiddushin

Two “prototypes” of constitutive annulments are found in the Babylonian Talmud. The first is annulment granted shortly after the marriage and taking effect from the moment of the marriage, due to some fault in the marriage procedure. The second is annulment issued long after the marriage took place. All cases in the last group include a get which was written, delivered (perhaps to an agent) and sometimes even given to the wife, but which for some reason was invalidated. The hafka’ah, applied in these sources due to a variety of reasons, makes the couple practically divorced, despite the formal fault in the get.

Two cases are included in the first group:

(a) The case of Naresh (דנרש) – a minor orphan girl was (rabbinically) married to a man who sought to marry her after she became adult,7 but a second person “kidnapped” her and married her,8 and

(b) הלהי (הלהי) – a case in which the woman was forced (lit. “hanged”) and then willingly (from a formal point of view9 rather than a moral point of view10) gave her consent.

In both cases (a) and (b), the Talmud records that the marriage was annulled due to the misconduct of the “husband” when betrothing his wife:

ואם עשה שלא חתונת,ليفך עשה שלא חתונת ואදיעינו רבעים לא לך שמה.


7 Yeivamot, 110a.

8 When she attained her majority he placed her upon the bridal chair (תליוה), an act which is probably similar to a huppah.

9 Her agreement is not mentioned, but she probably gave it, at least after being kidnapped (otherwise the marriage was not valid and no hafka’ah was required, by contrast with the progress of the sugya): see Ran, 38a in Rif (in the Vilna edition); Ritba, Yeivamot 110a, s.v. hu, and compare Rambam, ibid., s.v. Rav Ashi.

10 Bava Batra, 48b.

11 The formal validity of the marriage is based on an expansion of Rav Huna’s statement: בנה מריהו בך טבעה יבכה (Bava Batra, 47b). Rav Huna’s statement is discussed by Binyamin Porat, “Ha-הזה Ha-קאיוב Ve-יק론 Ha-tzedek Ha-הזה”, Dine Israel 22 (5763), pp. 49-110 (hereinafter: Porat, Ha-הזה Ha-קאיוב), at pp. 102-106 (regarding betrothal).

12 The moral problem with the husband’s act is obvious and is therefore a reason for responding to his act even in contradiction to the formal laws of marriage and divorce; see next note. This explanation rejects the assumption that formal rules of the halakhah and moral rules are tautologous (for further discussion, see Avi Sagi and Daniel Statman, Religion and Morality, Amsterdam: Rodopi, 1995, pp. 5-8). Accordingly queries 1, 3 and mainly 4 in Porat, Ha-הזה Ha-קאיוב ( supra, note 11), p. 103, are not difficult at all.

13 Yeivamot, 110a; Bava Batra, 48b. This reasoning is mentioned in the case of Naresh by Rav Ashi, and his sources will be discussed below. In the second case it is mentioned by Mar bar Rav Ashi according to the following textual witnesses: Mss Oxford, Florence, Munich, Vatican 115 and print editions, while according to others (Mss Hamburg, Paris and Esorial) it is Rav Ashi here as well (see also below, note 50). Following the version of “Mar bar Rav Ashi” (see below, note 50), we may consider it as a “transferred” statement, but there is no reason to ascribe the transmission to a later editor (compare Hanina Ben Menahem, “Hu ‘Asa Shelo Ka-hogen”, Sinai 81 (1977), p. 157 [hereinafter: Ben Menahem, Hu ‘Asa]; Eliaf Shohtetman, “Kiddushin Mehamat ‘Ones”, Sinai 105 (1990), pp. 118-120 [hereinafter: Shohtetman, ‘Ones]; Porat, Ha-הזה Ha-קאיוב [ supra, note 11], p. 106 note 148). In my opinion it is reasonable to assume that Mar bar Rav Ashi used his own father’s memra, which fitted properly his case: According to Rav Huna and Amemar’s reasoning, the betrothal is formally valid though immoral. Therefore the response is similar שלא חתונת, i.e. beyond the formal borders of the halakhah. In fact, by contrast with H. Ben Menahem’s view ( ibid.), is a
Annulment of Marriage (Hafka’at Kiddushin)

He acted improperly; they, therefore, treated him also improperly, and deprived him of the right of valid betrothal.

Three cases are included in the second group. In all of these cases a valid *get* was written and submitted but some external events invalidated it:

(c) The first is a case of conditional divorce. The husband initially made a condition whose fulfilment would invalidate the *get*, and then tried to fulfill the condition (i.e. to invalidate the *get*) but an unforeseen accident prevented him from doing so. In principle the claim of-*אנס* (i.e. an unforeseen event) is acceptable, and in this case it means that the condition is considered as fulfilled and the *get* is annulled. However, Rava, according to one tradition in the Bavli, argues that the claim for-*אנס* cannot be accepted here and the wife is divorced. The Talmud explains that Rava’s reasoning is that in order to prevent extreme results the Sages enacted *hafka’ah* and the marriage is annulled despite the claim of-*אנס*. The results which the Sages were afraid of are (i) the wife’s second marriage when she was not properly divorced, if indeed it was an unexpected accident and the *get* was invalidated; or (ii) *aginut* when it was not-*אנס* and the *get* was valid, but a “chaste” observant woman would fear that the *get* is invalid and therefore would not remarry.

(d) A dying person (יהודי הלק) who gave his wife a *get* (in order, for example, to exempt her from being bound to a levir) but later recovered from his illness. According to Rav Huna, the *get* is annulled, since it was given under the assumption that he would die but he didn’t (a legal assumption – an ‘*umdena*’ – that it was a conditional *get*). Both Rabbah and Rava disagree with Rav Huna in cases which he hasn’t explicitly stipulated it, due to a fear of a mistake: שמא יאמר אינא שכנא תלך ויתא כנא מיסחי, i.e. people would mistakenly think that in the above case the *get* becomes valid only after the husband’s death and this is the reason for its annulment when the husband recovered. Because of that fear, explains the Talmud, although the *get* is *mi-deorayta* invalid (since he recovered), according to Rabbah and Rava she is divorced. Here too, the Sages enacted *hafka’at kiddushin*.

(e) A case17 in which the husband sends the *get* to his wife by a messenger, but cancels the *get* (as he is entitled to do) before the messenger delivers it. In order to prevent extreme results, such as the wife’s remarrying unaware of the cancellation, Raban Gamliel the Elder enacted that no one should cancel a *get* before a *bet din*, unless in the presence of the messenger or his wife, before she receives the *get*. His descendants, Raban Shimon ben Gamliel and Rabbi (i.e. Rabbi Yehuda Ha-nasi), disputed the status of the *get* where the husband ignores Raban Gamliel’s decree and cancels the *get*. According to Rabbi, the *get* is void so that the wife is not divorced, but according to Raban Shimon Ben Gamliel the *get* is not void and the wife is divorced. The reasoning behind Raban Shimon Ben Gamliel’s view is the authority and validity attributed to the Sages’ decrees – ישא כו ממה ממה לפי זאש (lit. “how is the power of the Bet din (i.e. the Bet din of Rabban Gamliel who made the regulation) [left] unimpaired?”). But, the Talmud asks, if the *get* is annulled *mi-de’orayta*, how can the Sages regard a married woman as a divorcée? The authority for that, explains the Talmud, is based on the concept of *hafka’at kiddushin*.

What is *hafka’at kiddushin*? As indicated above, this is subject to fundamental dispute amongst halakhic writers and scholars. *Hafka’ah* in cases (a) and (b) takes effect at the time of the betrothal and annuls the betrothal *ab initio*. A reasonable explanation for this is that the Sages invalidate the *act* of marriage (by

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14 Ketubbot, 2b-3a.
15 See further Gittin 33a, the various explanations of Rabbi Yoḥanan and Resh Lakish to MASKAT הכהנה which are in the Talmud, and compare Yerushalmi, Gittin 4:2. 45c. Interestingly, Resh Lakish explains it as מֵאָסֶר תִּקְוָה לְקַבּוּרָה, i.e. to forestall the problem of *agunot*, and according to Rashi *agunot* here has the modern meaning: a married woman, whose husband (after canceling the first *get*) refuses to divorce her; see Rashba, Gittin 33a, s.v. *ve-ha*.
making the money ownerless or declaring the cohabitation to be promiscuity)\textsuperscript{19} and thus the hafka'ah prevents the betrothal from becoming valid. Annulment in cases (c), (d) and (e) takes place a long time later. So we may ask whether a similar legal construction is to be applied to these cases, i.e. is the betrothal annulled \textit{ab initio}, resulting in retroactive annulment of the marriage? Or is hafka'ah here prospective, i.e. taking effect only from that time on? According to the second possibility, annulment would refer to the \textit{status} of marriage and not to the \textit{act} of marriage, in contrast to the previous reasoning.

A related question is the role of the \textit{get} in this process. If annulment is indeed prospective, a reasonable understanding of the ruling is that it validates a \textit{get} which was not valid \textit{mi-de'orayta}. The \textit{get} on this analysis is a substantive element in the process of hafka'ah. If annulment is retroactive, a \textit{get} is not necessarily required. As mentioned above, however, all the talmudic cases do involve a \textit{get}. Many Rishonim (but not all) regard this as supporting the view that demands a \textit{get} in the process of hafka'ah. However, this does not necessarily mean that a \textit{get} is an essential component of the process of annulment.

We may argue that though a \textit{get} is indeed necessary, and hafka'ah is thus limited to cases in which a \textit{get} was given, this is due to various “external” reasons (such as preventing a “slippery slope” in the use of hafka'ah, which will damage the stability of Jewish marriage), while conceptually the hafka'ah remains a retroactive annulment of the marriage.

We may summarize the issue as follows: when a \textit{get} is given, does hafka'ah still annul the marriage retroactively or does it operate only prospectively, from the time of the giving of the (faulty) \textit{get}? And is the \textit{get} an essential element in the process? This issue in particular involves questions of both history and dogmatics, and will conclude the discussion in this paper.

An additional issue is the authority of the Sages to enact hafka'ah. One possible view is that the Sages have by definition the authority to annul marriages by virtue simply of their jurisdiction. Another possibility is that the basis for hafka'ah is not the \textit{a priori} authority of the Sages, but rather the agreement of the spouses. The latter view, although conceptually less radical than the former, is significant for both the historical analysis (as a possible bridge between the Gaonic and the Palestinian traditions of unilateral divorce\textsuperscript{20}) and for the dogmatic analysis, by expanding the normative basis for any suggested terminative condition as a possible solution for the problem of agunot.

Thus both the normative basis of the talmudic concept of hafka'ah and the manner of its application in the various cases are critical. Analysis of the historical development of the talmudic concept of hafka'ah may assist us in answering these questions.

\textbf{3. Analysis of the Talmudic Sources}

\textbf{(a) The Foundation of Hafka'at Kiddushin}

It seems that all the possible approaches mentioned above regarding both the character of hafka'ah and the authority of the Sages to enact it may already be found in the talmudic sources. As a starting point however, we should analyze the earliest talmudic source which discusses hafka'ah. Amongst the five cases which mention hafka'ah, one (e) refers to a tannaitic source: the dispute between Rabbi and Rabban Shimon ben Gamliel regarding cancellation of a \textit{get} which was sent by a messenger. Here, Rabban Shimon ben Gamliel (against the majority) ruled that the wife is divorced despite the cancellation of the \textit{get}. This is interesting from a conceptual point of view, and both Talmudim discuss it.

The Bavli\textsuperscript{21} on the Mishnah (Gittin 4:1-2) which describes the decree of Rabban Gamliel, that a \textit{get} once delivered should not be cancelled, cites the concept of hafka'ah in the following way: \textit{לحرمך ארצה התוכן דמקדש אמות נזיקין \textit{מד막ש אמות נזיקין bribery}} (“When a man betroths a woman, he does so subject to the consent / willingness of the Rabbis, and in this case the Rabbis annul his betrothal”). We don’t have yet any indication of the date of this explanation, i.e. whether it is the source of the concept of hafka'ah or has been transmitted from the other cases ((a)-(d) above). However, the authority for hafka'ah is derived here

\textsuperscript{19} See Lifshitz, \textit{Afke’inho} (supra, note 6), pp. 318-319. In the talmudic sugyot however we find different approaches; see below.


\textsuperscript{21} See Gittin 33a. A parallel to this sugya will be discussed below.
from a kind of preliminary consent: the husband betroths subject to the willingness of the sages, and such a stipulation gives the Sages the authority to annul the marriage. There is more than one possible understanding of the exact meaning of the couple’s preliminary consent: it may reflect the consent of the husband derived from his saying: “ke-dat Moshe ve-Israel”, viewed as a form of condition, according to which the betrothals depends on the Sages’ willingness, or form part of the unique character of marriage as a legal and social institution, which was subject to the consent of the Sages. As to the meaning of the concept of hafka’ah, this is not completely clear at this stage. We will return later to its interpretation. The discussion regarding Rabbi and Rabban Shimon ben Gamliel’s dispute is found also in the Yerushalmi:

The Yerushalmi cites the discussion between Rabbi and Rabban Shimon ben Gamliel. Rabbi wonders: how can you, Rabban Shimon ben Gamliel, say that the get is valid – can the Sages uproot the words of the Torah? The next passage is Rabban Shimon ben Gamliel’s answer. He doesn’t state explicitly that the authority to annul marriage is unique to marriage and divorce, and not part of a wider authority of the Sages. The Yerushalmi here deploys a concept similar to hafka’ah. This finding has a significant contribution to the quest for dating the development of this concept: it is earlier than the redaction of the Palestinian Talmud (app. 400 CE), and thus earlier than Ravina and Rav Ashi, whose discussion is cited above.

Where do we find the earliest source of hafka’ah? Surprisingly, the roots of the concept of hafka’ah are not in the Yerushalmi, nor in any of the above sugyot which are directly related to the issue, but rather in a Babylonian sugya which discusses this concept only incidentally. In a different context, Rav Hisdas and Rabbah, two third generation Babylonian Amoraim, discussed whether the Sages have the authority to annul the laws of the Torah (דברי דברי התנאים, viewed as a form of condition, according to ). According to Rav Hisdas, the Sages do have the authority to annul the laws of the Torah. According to Rashi, the Sages do have

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22 The wife probably does the same, otherwise it might be considered as a mistaken marriage, see Shita Mekubetset, Ketubbot 3a, s.v. kol hamekadesh.
23 Riba explains the statement “ke-dat Moshe ve-Israel” as a form of condition (.usermodel). It might also be the view of Rashi: see Riskin, Hafka’at Kiddushin (supra, note 6, English version), pp. 12-14. Others dispute this: see Berkovits, Tenay (supra, note 3), pp. 120-121 (including Rashi, see Berkovits, ibid., pp. 134-135). In the definition of the second view as part of the character of kiddushin as a social institution, I follow Atlas, Netivim (supra, note 4), pp. 207-209 (cited below, note 39). The common denominator of the various explanations is that the authority to annul marriage is unique to marriage and divorce, and not part of a wider authority of the Sages.
24 Yerushalmi, Gittin 4:1, 45c.
25 The consequence of this act is far reaching: after the ruling of the Sages there is a permission for a regular person (a zar, i.e. not a priest) to eat the fruits (assuming that another terumah was made), while according to Torah law they are considered as a terumah, forbidden to a zar and their eating results in the severe punishment of mitah bide shamayim (death performed by heaven).
26 The precise meaning of the hafka’ah in the Yerushalmi (which we may also define as: “quasi hafka’ah”) will be discussed below.
27 Yevamot 89b-90b.
28 The context is the laws of terumah: a case in which according to the Torah the act of terumah was valid, but the Sages invalidated it. The similarity between the Bavli and the Yerushalmi is apparent; see further below.
such an authority, while Rabbah challenges his view.\textsuperscript{30} One of Rav Ḥisda’s proofs is Rabban Shimon ben Gamliel’s view in the case of a cancelled get. Rabbah then replies:\textsuperscript{31} הָּא מַעֲטְרֵשׁ אֵצְלָּא רְבֹּנִין פָּכָּרֵשׁ אֵמְסָפָּה: i.e.: the Sages do not have the authority to uproot the words of the Torah. Rather, their authority to rule that the wife is divorced is derived from the preliminary agreement: the betrothal was made subject to the consent of the Sages.

The similarities between the Bavli and the Yerushalmi cannot be overstressed. Both discuss “uprooting the words of the Torah”, almost in the same words. And in both the sugya has a similar structure, which includes the precedents for both invalidating terumah and validating a cancelled get. Since the Bavli is based on an actual debate between sages\textsuperscript{32} and the debate is there much more complete, I prefer to identify it as the source for that sugya. The structure of the sugya and process of its development is therefore as follow: Rav Ḥisda and Rabbah argued; both supported their views; Rav Ḥisda supported his argument from Rabban Shimon ben Gamliel’s opinion; Rabbah rejected that support. This debate was partially transmitted to the Yerushalmi, which discusses the main argument citing some of the sources, but retains the simple meaning of those sources without Rabbah’s final conceptual development. The view of Rabban Shimon ben Gamliel is thus explained in the Yerushalmi in the same way as Rav Ḥisda, but without Rabbah’s response, which creates a different conceptual structure.\textsuperscript{33}

Rabbah and Rav Ḥisda are the earliest Amoraim who discuss the concept of hafka’ah, and therefore their discussion may be regarded as the historical source of its definition. We may now describe more precisely the process by which the concept of hafka’ah was constructed: First, a tannaitic source – Rabban Shimon ben Gamliel’s view – validated an invalid get based on a decree of the Sages. Then Rav Ḥisda based this on the Sages’ authority to uproot the words of the Torah. This explanation was adopted in the Yerushalmi in its interpretation of Rabban Shimon ben Gamliel. Rabbah rejected this radical view. However, he agreed with Rabban Shimon ben Gamliel that the Sages have the authority to validate the divorce, but based this on a specific stipulation at the time of marriage. Rav Ḥisda’s view gives a wide – almost limitless – authority to the Sages. Though this was rejected by Rabbah, it was revived a few generations later by Rav Ashi.

In the case of Naresh\textsuperscript{34} ((a) above) Rav Ashi explains that the annulment of marriage is a result of the misconduct of the “kidnapper”:

He acted improperly; they, therefore, treated him also improperly, and deprived him of the right of valid betrothal.

Rav Ashi’s explanation is composed of two different parts: one completely in Hebrew (אֶלָּא מַעֲטְרֵשׁ אֵצְלָּא רְבֹּנִין פָּכָּרֵשׁ אֵמְסָפָּה) and one in Aramaic (אֶלָּא מַעֲטְרֵשׁ אֵצְלָּא רְבֹּנִין פָּכָּרֵשׁ אֵמְסָפָּה) (_Entice properly as אֶלָּא מַעֲטְרֵשׁ אֵצְלָּא רְבֹּנִין פָּכָּרֵשׁ אֵמְסָפָּה). The shift from one language to another indicates that his teaching might be based on two different sources.\textsuperscript{35} Obviously, the second – Aramaic – part is a quotation of Rabbah’s explanation of the authority of the Sages to annul marriage in

\textsuperscript{30} In the specific context in which Rav Ḥisda initially expressed his view it was Rav Natan bar Rabbi Hoshaya who was in dispute with him. However, the general discussion regarding this issue was between Rav Ḥisda and Rabbah.


\textsuperscript{32} See supra, note 31.

\textsuperscript{33} We find other cases in which there are similar traditions in the Bavli and Yerushalmi, even in regard to anonymous strata which are normally considered a later part of the Talmud. For discussion of this phenomenon see Avishalom Westreich, Hermeneutics and Developments in the Talmudic Theory of Torts as Reflected in Exceptional Cases of Exemption, PhD, Ramat Gan: Bar Ilan University, 2007, p. 223 n.5 (hereinafter: Westreich, Torts).

\textsuperscript{34} Yevamot, 110a.

\textsuperscript{35} See S. Y. Friedman, “Perek Ha-’isha Rabbah Ba-Bavli Betseruf Mavo Kelali Al Derekh Heker Hasugya”, Melkarim U-mekorot 1 (1978), p.301; Westreich, Torts (supra, note 33), p.52 n.60.
Annulment of Marriage (Hafka'at Kiddushin)

the case of the cancelled get.\(^{36}\) But Rav Ashi omits the first part of Rabbah’s teaching, which bases the authority to annul marriage on the previous consent of the husband (כל מדקש אונחה רבעני מקדש). Instead, he cites a different reasoning whose sources are found in the teachings the Amoraim of earlier generations, such as Rav Hama’s regarding the improper act of a debtor,\(^ {37}\) or even in tannaitic sources.\(^ {38}\)

The omitted part of Rav Ashi’s teaching – the concept of the authority due to the misconduct of the "kidnapper". The Sages have by definition the authority to annul marriage. In the case of Naresh they decided to use that authority due to the misconduct of the "kidnapper".\(^ {39}\)

If Rav Ashi had only shortened Rabbah’s statement, Rashi’s explanation would have been preferred. But Rav Ashi replaced Rabbah’s reasoning by a different one. This fact is significant. Its meaning is that Rav Ashi is close to Rav Ashi is based on the authority of the Sages rather than on mi-de'orayta. Instead, he discusses the procedure, and thus the legal construction, by which the Sages annul the betrothal. Since we are dealing here with annulment of the act of the betrothal,\(^ {42}\) the act itself should

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\(^{36}\) See supra, text to note 31.

\(^{37}\) This concept is used by Rav Hama for explaining a verdict of Rava to Rav Papa; see Bavli, Ketubbah 86a.

\(^{38}\) The general idea that a general substantive similarity; Bet Shammai do not in fact use there the language of אפקעינהוолько לקדושין ממנה: כל מדקש חולתו ב JetBrains הזמנת היא חכמה ירושלמי קאמוטו רבעני אפור

[The Sages] deprived him of the right of valid betrothal: since every one who betrothes does so subject to the consent of the Sages, as we say: “according to the laws of Moshe and Israel” ("ke-dat Moshe ve-Neve Israel"). And the Sages said that where one kidnaps a wife from his (intended) husband the betrothal is not valid.

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\(^{39}\) See supra, text to note 39, in that Rav Ashi is based on the authority of the Sages rather than on mi-de'orayta.}(b).

\(^{40}\) For further citation and analysis of Ravina and Rav Ashi’s discussion see below, section 2(b).

\(^{41}\) For example Bavli, Yoma 75a. See also Ben Menahem, <i>Shenaton Ha-mishpat Ha-Ivri</i> 21 (1998-2000), p. 34 (hereinafter: Edrei, <i>Ko'ah Bet Din Ve-dine Nisu’in ve-gerushin</i>), and Arye Edrei, "Ko’ah Bet Din Ve-dine Nisu’in ve-gerushin", <i>Shenaton Ha-mishpat Ha-Ivri</i> 21 (1998-2000), p. 34 (hereinafter: Edrei, <i>Ko’ah Bet Din</i>).

\(^{42}\) See supra, text to note 19.
be defined as an act which does not effect betrothal. There was less difficulty in the case of betrothal by money, since here the annulment could be was understood as due to the authority of the Sages to declare money as ownerless. But in case of betrothal by cohabitation, Ravina challenged Rav Ashi: how (and not by what authority) could the Sages give the act a new meaning which would affect its legal validity? Rav Ashi then answers that this is possible by declaring his cohabitation to be an act of mere promiscuity (see below).

The conclusion of this section is of the greatest importance. Rav Ashi is a later generation Amora, and his decisions are generally accepted. What makes it more decisive in our case is the possibility of the authority of the sages as initially suggested by Rav Hisda and accepted by the Yerushalmi in its interpretation of the view of Raban Shimon ben Gamliel.

(b) The Character of Hafka'at Kiddushin

How does hafka'ah work – it is a retroactive annulment of marriage or prospective, i.e. an act terminating the marriage from now on? And what if at all is the role of the get in this process?

In all of the above five talmudic cases of hafka'at kiddushin, after arguing for the annulment of the marriage, the Bavli cites the following discussion:

אמר לי רבי יוסי בר אשתMiami: הקדישה בכספים, כשירש במא? שוררת בני לבעילות בנה תוע.

Said Ravina to Rav Ashi: [Your explanation is] satisfactory where the man betrothed [her] with money; what [however, can be said where] he betrothed her by cohabitation? The Rabbis have declared his cohabitation to be an act of mere promiscuity.

If the Sages have indeed “declared his cohabitation to be an act of mere promiscuity”, the marriage must be retroactively annulled. Prospective annulment of marriage does not require declaring the cohabitation to be bi'at zenut, but rather leads to termination of an actual marriage.

However, it is unlikely that this discussion occurred five times. Moreover, one of its occurrences (b above) refers according to many textual witnesses to a statement of Mar bar Rav Ashi, who was the son of Rav Ashi — which makes the possibility of an original discussion between earlier Amora'im (his father, Rav Ashi, and Ravina) even less likely. As scholars already indicated, the discussion occurred originally in the case of Naresh, where it follows a statement of Rav Ashi himself. Later, a talmudic redactor added this discussion to all other occurrences of the concept of annulment.

43 See Rashi, Yevamot, 110a, s.v. tenah (and in all the other occurrences of Ravina and Rav Ashi’s discussion).
44 See for example Rashi, Yevamot 90b, s.v. kadish (and in slightly different words in the other occurrences): הקידוש בכספים: אמר לי רב באשתMiami: הקדישה בכספים, כשירש במא? שוררת בני לבעילות בנה תוע.
45 Depending on the exact version of case (b); see supra, note 13, and below, note 50.
46 Tosafot try to harmonize Rav Ashi with the view of kol de-mekadesh ’a-da ata de-rabanan mekadesh by contrast with the conclusion of this section. However, even according to their view the result is some expansion of the authority of the Sages to uproot the words of the Torah. See further supra, note 40.
47 Kiddushey Kesef (money) and bi’ah (cohabitation) are two of the forms of betrothal (Mishnah, Kiddushin 1:1). The Sages have the authority to confiscate a man’s property (הפקודה), so they might regard the money given by the husband as a mere gift to the girl.
48 See supra, note 13.
49 There were two or three Amoraim named Ravina. Ravina in our case is Rav Ashi’s disciple-friend (5th generation and perhaps later, see below). As for the other Ravina, his dates are unclear and disputed amongst scholars (see Albeck, Mavo [supra, note 29], p. 421; Avinoam Cohen, Ravina ve-Ikkhme Doro, Ramat Gan: Bar Ilan University Press, 2001, pp. 256-261). According to Albeck, the Ravina who had some relations with Mar bar Rav Ashi is a later Ravina, from the 7th generation (see Albeck, ibid., pp. 448-450). According to him, the Ravina of our discussion certainly never met Mar bar Rav Ashi, and couldn’t discuss his statement. According to Cohen, ibid., the Ravina of our discussion (the “main” Ravina of the Talmud) died after Rav Ashi and had some relations with 6th and 7th generation Amoraim, including Mar Bar Rav Ashi. However, even according to Cohen it is unlikely in my opinion that Ravina and Rav Ashi had a discussion regarding a statement of Rav Ashi’s son, Mar bar Rav Ashi.
Annulment of Marriage (Hafka'at Kiddushin)

We clearly need the explanation of Shoroh berei etzelot beikal ve'i made in the first two cases: the annulment is required to invalidate the improper act of betrothal of the “husband”. The legal construction here is therefore hafka'ah by expropriating the betrothal money or by declaring the cohabitation to be promiscuity (bi'at zenuit). But for the last three cases ((c) to (e) above) it is not necessarily required. Indeed, the later talmudic redactor did understand hafka'ah in this way, and we will discuss his motivations below. Nevertheless other talmudic strata reflect different approaches with several variations, which have not been given enough attention by writers in the past.

In order to examine this issue I would like to return to the case of a messenger of a get, which provides us with the earliest source for annulment. According to Rabban Shimon ben Gamliel, the husband cannot cancel a get which was already given to an agent to deliver to his wife in the absence of the agent or wife. In his words:

He (the husband) can neither cancel it nor add any additional conditions, since if so, what becomes of the authority of the bet din?!

This is quite explicit: the husband cannot cancel the get, so the get is valid. The Sages act here by validating the get rather than by actively annulling the marriage. This view seems to be shared also by the Yerushalmi, which merely discusses the cancellation of the get and its validation by the Sages.

But the Bavli explains Rabban Shimon ben Gamliel’s ruling in a slightly different way:

When a man betroths a woman, he does so subject to the will of the Rabbis, and [in this case] the Rabbis annul his betrothal.

The judicial act here is not by validating the get. The get is not valid since it was cancelled by the husband. However the couple are divorced since the marriage is annulled.

Why should the Talmud make such a shift in explaining Rabban Shimon ben Gamliel’s ruling? As we have argued above, this case is the source of the concept of hafka'at kiddushin, and its development is a result of the discussion between Rav Hisda and Rabban. The current shift between validating the get and annulling the marriage is part of that dispute: according to the first approach we need to assume that the Sages have the authority to uproot the words of the Torah, as Rav Hisda argues. Rabbah therefore explains Rabban Shimon ben Gamliel’s ruling as a result of the unique structure of Jewish marriage and thus rejects the view that the Sages can uproot the words of the Torah. Nevertheless, if the authority of the

(see supportive textual witnesses supra, note 13), and the source for the menra and the following discussion is this case (the case of the “hanger”, Bava Batra 48b); see Israel Franzus, “Od Le’ Kol De-mekadesh ‘Ada’ata De-rabanan Mekadesh’”, Sinai 77 (1975), pp. 91–92. His view was later accepted by Atlas, Netiyim (supra, note 4), p. 242. However, all these scholars agree that the discussion originally occurred in none of the second group of cases ((c) to (e) above). The discussion below is therefore consistent with both approaches. It even creates some interpretative difficulties, see Tosafot, Ketubbot 3a, s.v. tenah: Tosafot implicitly ask why we need the explanation of hafka'ah only for betrothal by cohabitation (kidushey bi'ah), since it is surely necessary also for betrothal by money (kidushey keseif), since after betrothal there would have been some cohabitation which needed to be declared to be promiscuity! (For explanation of this Tosafot see Maharam Shif, ibid.) See section 2(a) above.

53 Gittin 33a; Yevamot 90b.

54 This can be done by removing the power of the husband to cancel the messenger.

55 See supra, text to notes 24-26. Edrei, Ko‘ah Bet Din (supra, note 39), p. 34 n. 121, identifies this view as the view of the Yerushalmi, but argues for a different view in the Bavli (which is in fact the second stage of the development of the concept; see below).

56 See Edrei, ibid., pp. 34–35.

57 See supra, section 2(a). Yevamot 90b is the source of this dispute. In Gittin 33a Rabbah’s view is summarized in the talmudic question: “Can it be the case that where a get is cancelled according to the Torah we should nevertheless allow a married woman to marry another, (merely) in order to save the authority of the Beth din?”; compare Tosafot, Ketubbot, 3a, s.v. tenah; ibid., Bava Batra, 48b, s.v. tenah (discussed supra, note 40).

58 See note 23 above.
Sages is (only) in relation to the marriage, and not wider (including for instance cancellation of a messenger), we must explain Rabban Shimon ben Gamliel’s ruling as annuling the marriage, since these are the limits within which the Sages may act. Fascinatingly, although Rabbah’s explanation reduces the authority of the sages, the result (uprooting the whole status of marriage) is conceptually more radical than the previous view (validating an existing get). But Rabbah prefers this approach due to the wide and general dispute between him and Rav Ḥisda.

When Rabbah speaks about annulling the marriage there is no reason to interpret it as a retroactive annulment, which is much more drastic both conceptually and practically (declaring cohabitation to be promiscuity; the possible effect on the status of the children,59 etc.). Normally, expropriation (of property) means that an object in one’s possession is prospectively excluded from his possession. Status is no different: the status of marriage is prospectively “excluded” from the couple.60 But the transfer of Ravina and Rav Ashi’s discussion to cases (c)–(e), as described at the beginning of this section, entails our explaining hafka’ah as a retroactive annulment.

Interestingly, while the first development in understanding hafka’ah, i.e. from validating the get to annulling the marriage, is the result of a conceptual process (i.e. the debate between Rav Ḥisda and Rabbah), the second move, from prospective to retroactive annulment, is merely a result of a redactional work. Nevertheless, I assume that it was done with awareness. Transmitting the discussion to a group of cases reflects a quest for harmonization: since a similar concept is mentioned in these few cases, the later talmudic view sought harmony in its meaning and implications. Thus hafka’ah became a process which refers to the act of marriage even in the cases of improper divorce. In those cases the meaning of hafka’ah thus became retroactive annulment of the marriage.61

(c) The Various Talmudic Approaches as Bases for the Later Disputes: Does Hafka’at Kiddushin Require a Get?

Within the talmudic text we observe a tension between different approaches. This tension is reflected in the contradictory interpretations of the concept of annulment amongst both later poskim and modern scholars.62 Some poskin follow one approach, others take an opposite view, explaining the contradictory parts of the sugya by means of several different hermeneutical approaches.63 While total rejection of other views is common in this kind of debate,64 the present analysis shows that this would be incorrect.65

The different approaches found in the Talmud may be summarised as follows:

(a) The simple meaning of Rabban Shimon ben Gamliel in the baraita, adopted by Rav Ḥisda in the Bavli and by the Yerushalmi, is that the Sages validate the [externally flawed] get.

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59 I.e. declaring them not to be mamzerim, see Tosafot, Gittin 33a, s.v. ve-‘afke’inhu, and elsewhere.
60 Compare Halivni, Mekorot (supra, note 50), p. 530, according to whom hafka’ah at this stage is retroactive, but there is still a distinction between this stage and the discussion of Ravina and Rav Ashi: here, since annulment is based on the prior consent of the husband (כְּדַלֵּךְ אֶלָּדֶדְתָּ עֵדֶּנָּא דְּבָרֶן טַקָּלֶדֶּה), we do not need the Sages to declare his cohabitation as promiscuity.
61 See Lifshitz, Afke’inho (supra, note 6), p. 317 n.1; pp. 317-319. The shift between annulling the status of marriage and annulling the marriage act was first made by Rav Ashi who applied Rabbah’s concept to the case of Naresh. Yet, he didn’t apply it to the previous cases. However, his move made the next step of the talmudic redactor possible: viewing hafka’ah in all the five cases in a similar way, and thus understanding it as a retroactive annulment.
62 The dispute continues since the redaction of the Talmud, not only amongst classic commentators but even in modern days, amongst rabbis and dayanim, as well as Jewish Law Researchers. See Riskin vs. Goldberg and Lifshitz vs. Lavi, supra note 6; Berkovits vs. Shohetman, supra note 78.
63 See Westreich, Torts (supra, note 33), p.122 n.82.
64 Especially when the possibility of practical use of hafka’ah is under discussion; see Rabbi Goldberg and Rabbi Lavi, supra, note 62.
65 As opposed to Shohetman, Hafka’at Kiddushin (supra, note 3), p. 397. Shohetman’s conclusion is neither historically nor dogmatically decisive. Historically, it may reflect a specific stratum of the Talmud, but is not unanimous, as I have shown, so that the opposite view cannot be ignored. Dogmatically his view reflects Ri Halavan’s approach (see below), but many other Rishonim understand hafka’ah as a retroactive act, while both are rooted in the ambiguity of the talmudic text, as shown here. As a matter of fact, from a dogmatic point of view the last talmudic stage, which is rejected by Shohetman, is many times more authoritative (Shohetman doesn’t accept it in our case, following his analysis of Rambam’s view regarding coerced marriage, according to which late talmudic strata cannot stand against “Talmud arukh”: see Shohetman, Ones (supra, note 13), pp. 117-121).
Annulment of Marriage (Hafka’at Kiddushin)

(b) The Talmud, following Rabbah, explains Rabban Shimon ben Gamliel’s ruling as annulling the marriage. At this stage the meaning of the annulment is a prospective annulment.

i. Rav Ashi applied hafka’ah where the betrothal was improperly done (at the time of betrothal). As clarified in his discussion with Ravina, hafka’ah refers now to the act of betrothal.

ii. As regard to the authority of the Sages, although Rav Ashi uses the same concept as Rabbah (אמפטעינה בון לחקוריסין מFileNotFoundException), he accepts Rav Hisda’s expanded view as to the authority of the Sages.

(c) Finally, as a result of later redactional work, hafka’at kiddushin becomes retroactive annulment of the marriage.

i. The talmudic redactor transferred Ravina and Rav Ashi’s discussion to all cases of annulment. The discussion occurred originally in a case of improper betrothal which was annulled by hafka’ah. After this redactional transfer, all cases of annulment came to be understood as annulment of the act of betrothal (שוהה בון לביילוח ב镝לת התנה). For the three cases which discuss annulment long after the time of this act, this means retroactive annulment.

All three approaches are found in the Rishonim and Achronim. While recent debates frequently discuss how hafka’ah was interpreted by Rishonim and Achronim, the conceptual distinction between the various views has not always been clearly defined. The following discussion contributes to a more accurate understanding of the approaches amongst classic writers and their basis in the Talmud.

The last view (c) reflects the final talmudic stage, and is therefore the dominant view amongst Rishonim and Achronim. Indeed, some elements vary within writers of this group, as will be shown below. Nevertheless, the basic attitude (i.e. viewing hafka’ah as a retroactive annulment of the betrothal, being interpretatively influenced by Ravina and Rav Ashi’s discussion) is common to them. Although (c) is the dominant view, we do find some Rishonim who suggest different interpretations for the concept of hafka’ah, focusing on other talmudic stages.

Stage (a) is found in Ri Halavan’s commentary for hafka’at kiddushin: הרון מקונמה המת interpunction מתורע בתקנה, i.e.: the Sages in their decree made [the get] valid mi-de’orayta. He was followed by some scholars, who were influenced in their analysis by that talmudic stage.

This view should be distinguished from the view of Rashbam, followed by some Rishonim. Rashbam argues that in the three talmudic cases the get in fact is valid and the marriage is not retroactively annulled, since the husband fears that his marriage may be annulled, and therefore cancels the annulment of the agency (Gittin 33a), forgoes his condition (Ketubbot 3a) or, in the case of a dying person (Gittin 73a), agrees that the get should not be annulled even if he recovers. Although according to Rashbam the get is valid, in principle Rashbam admits that annulment of marriage is retroactive: if the Sages did have

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66 See supra, note 61.
67 See for example Rashi, Gittin 33a, s.v. tenah and shavyuha; Tosafot, ibid., s.v. ve’-afke’inhu; Ramban, Ketubbot, 3a, s.v. shavyuha and elsewhere. The Rishonim however were partly influenced by stage (a): see the discussion below on Rashi’s commentary and the discussion regarding the demand for a get in the process of hafka’ah.
68 See Tosafot Ri Halavan, London, 1954, Ketubbot 3a, s.v. kol de-mekadesh.
69 See Atlas, Netivim (supra, note 4), pp. 211-214; Shoctman, Hafka’at Kiddushin (supra, note 3), p. 355. This view is found also in Teshuvut Be-anshe ‘Aven, 13 (cited by Mar’e Cohen, Yevamot, 90b; Atlas, ibid.). The interpretative difficulty of this interpretation is in integrating the other parts of the sugya with the suggested understanding for hafka’ah. An interesting reflection of this difficulty is found in Teshuvut Be-anshe ‘Aven, 13, who suggests that we amend the Talmudic text and read: כל ההנדים ש发展机遇ים (everyone who divorces [his wife] does it subject to the will of the Sages) [who can prevent him from canceling the get]. This suggestion has no basis in any textual witnesses or any of the Rishonim (as correctly mentioned by Atlas, ibid.), and of course – as analyzed here – the text should not be amended since it views the hafka’ah in quite a different way. By contrast, the simple meaning of כל ההנדים is the basis for Teshuvut Be-anshe ‘Aven’s critic, R. Yitzhak Z. Margireten (Tokef Ha-Talmud, Ofen: Konigl Ungarischen Universitats Buchdruckerei Print, 3:1; 3:4), who argues that hafka’ah must be understood as retroactive annulment (see also Shitah Mekubetset, Ketubbot 3a, end of s.v. ve’-od katav).
70 See Ramban in the name of Rashbam (“Rabbi Shmuel Ramrogi”; i.e. from Ramerupt), Ketubbot, 3a, s.v. shavyuha; ibid., Gittin, 33a, s.v. kol (Ramban however seems not to accept this interpretation); Rashba, Ketubbot, 3a, s.v. kol; ibid., Responsa, 1162 (regarding his view see note 78). See also Pene Yehushu’a, Ketubbot, 3a, s.v. ’afke’inhu and s.v. kol.
the need to use *hafka'ah* (which they do not) it would be applied retroactively. Therefore from a conceptual point of view, Rashbam’s view follows stage (c).

Some Rishonim cited by Ritba in the *Shitah Mekubetset* followed stage (b) in their understanding of the concept of *hafka'ah*. This interpretation is also discussed by *Hiddushe Itkum Sofer*, and I assume that it was also the understanding of Rashi’s teachers. Amongst Jewish Law scholars it was recently suggested by Arye Edrei. It is not clear according to this interpretation why the Sages should declare the cohabitation to be promiscuity.

Based on the analysis of the different talmudic meanings of the concept, we can now understand better the motivation behind some integrated – and more complex – approaches, such as that of Rashi. Thus Rashi on the one hand explains *hafka'ah* as a retroactive annulment, while on the other still regards a *get* as a necessary element in this process. While Rashi’s view is not completely clear, for our purposes it is sufficient to emphasise the two elements which Rashi integrates together: the *get* on the one hand and the retroactive annulment on the other. One quotation from Rashi sharply reflects this integration:

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> Dr. Avishalom Westreich
Indeed, one major implication of the range of conceptual constructions encountered in the Talmud is the question of the necessity of a valid get for the process of hafka‘ah. According to the first stage ((a) above), in order to perform hafka‘ah there should obviously be a valid get, which became invalid only due to external reasons, such as being cancelled by the husband. This I assume is the view of Ri Ha-lavan and his followers. But at the second and third stages ((b) and (c) above), in principle there is no need for a get in order to annul the marriage.

Historically the mentioning of a get in the various sugyot could result from the integration of the different talmudic stages — both the first stage, according to which the get is a substantial element in the process of hafka‘ah, and the later stages, which negate it. Purely historically it was possible to argue that for the second and third approaches the get was not necessary at all. Some Rishonim held this view, as explicitly stated by Me‘iri.

However, from a classical dogmatic point of view, all parts of the sugya are meaningful, even if different in their origin. Thus, the main challenge becomes integrating the different meanings of the talmudic text into one harmonious approach. Since a get is mentioned in all of the talmudic cases of hafka‘ah, many writers deduced that a get is always needed for the process of hafka‘ah.

Thus many commentators, even though following the second or third stage in their interpretation of the concept of hafka‘ah, claimed that a get is a necessary element in this process. Nevertheless, hafka‘ah does not mean that the get is validated. So, by contrast to the first approach, a get according to the present analysis is not an essential element of hafka‘ah itself. It may be necessary, but this is due to external reasons, for example prevention of a “slippery slope” in the use of hafka‘ah or creation of a similarity between hafka‘ah and the normal halakhic way of terminating marriage. Accordingly, we would not necessarily demand a proper get, which was merely externally flawed (i.e. due to cancellation, an unexpected event in case of conditional divorce, etc.) in order to apply hafka‘ah. On the contrary, every כשר can fulfil those objectives, and it could even be replaced by other halakhic devices. Therefore, according to both Rashba and Rashi, hafka‘ah is applied when one witness testifies to the husband’s death: the additional required element for hafka‘ah, which normally means a get, is replaced here by one witness. Had hafka‘ah been conceived as a means of validating an externally invalid get, this would not have been possible.

In modern discussions, hafka‘at kiddushin is often suggested to be assisted by other means of terminating the marriage, as described in the epilogue that follows. Thus, the above discussion becomes significant for practice: do these means fulfil the demand for an additional supportive element in the process of hafka‘ah?

4. Epilogue

Can hafka‘ah be applied today?

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78 As regards Rashba, Berkovits and Shohetman dispute whether he held the view that hafka‘ah is effected by the get (Shohetman, ibid., pp. 359-360), or rather is used in cases when a get exists (Berkovits, ibid., pp. 123-133).

79 See Me‘iri, Ketubbot 3a, s.v. kol she-‘amru. Berkovits (supra, note 78) argues that the mention of a get by other Rishonim (Rashi and Rashba) is not essential to the process of hafka‘ah, but rather contingent, i.e. a descriptive element in the cases in which hafka‘ah was applied, while it can be applied in other cases as well.

80 Rashi according to some; Ri Migash; Ramban and his disciples: Ra‘ah and Rashba, and more.

81 The fear of the “slippery slope” is described in Shut Mishpetey Uzi‘el, Part 2, Even Ha-‘ezer, 87.

82 This might be the reasoning of the view that explains the demand for a get by the mere fact that the marriage was properly effected, see for example Ra‘ah (Shita Mekubetset, Ketubbot 3a, s.v. ve-chen katav ha-Ra‘ah): (for the term מַקְבֶּטֶטס used by Ramban in this context, see Lifshitz, Afke‘inhu [supra, note 6], p.320). I assume that this view is also the rationale of the argument that after hafka‘ah the couple is still bound by rabbinical marriage, and this is the formal reason for a get. See Rav Ovadya Yosef, “Kol Ha-mekadosh ‘Ada’ata De-rebanan Mekadesh Ve‘-afke‘inhu Rabanan Le-kidushin Mine”, Torah She-be‘al Peh 3 (5761), pp 100-101 (hereinafter: R. Yosef, Kol Ha-mekadosh).

83 I.e. any get [is sufficient for applying hafka‘ah], see Ri Migash, cited in Me‘iri, Ketubbot 3a, s.v. kol she-‘amru, as “Ge‘one Sefarad’. Similar is Rashba’s term: עם רבנן, See Rashba, Ketubbot, 3a, s.v. kol demekadash.

84 See Rashba, ibid. Rash, Shabbat, 145b, s.v. le-‘edut. Rashi’s view here contributes to the uncertainty about the exact meaning of his approach regarding hafka‘ah. See supra, note 77.

85 See Berkovits, Tenay (supra, note 3), pp. 127-139 (discussing Rash and Rashba’s views).
As already mentioned, this question has been repeatedly debated amongst writers in the last decades. The present paper contributes to the discussion by revealing the basis for the contradictory approaches as residing within the talmudic texts themselves. Indeed, the origin of the concept was quite limited in its application (stage (a) above), but was expanded in a process of several steps which culminated at a late talmudic stage. As regards the authority of the sages, late Amoraic generations re-enforce their authority to annul marriages which are valid according to the Torah.

In practice, however, *hafka’ah* was hardly used. Halakhic sources deal extensively with *hafka’ah* in cases of improper betrothal, such as fraud or betrothal in breach of requirements of *takkanot hakahal*, etc. While the main halakhic writers rejected the practical use of *hafka’ah* 86 some did accept it, at least where other considerations were involved. 87

The question now arises as to whether we can take *hafka’ah* a step further, and apply it also long after the marriage took place. Indeed, this application is much more radical and much harder to use in practice. It is also doubtful whether it was ever used in practice at all. 88 Nevertheless, some classic writers have mentioned retroactive *hafka’ah* as a supportive argument for problematic rulings. 89

This latter approach, which accepts in principle a wide use for *hafka’ah*, appears to be a potential way for using *hafka’ah* in the quest for a remedy to the problem of *agunot*. Yet many writers demand that its practical use not be on its own but rather with some support, though not necessarily that of an “externally flawed” get. *Hafka’ah* therefore could be accompanied by different (but still otherwise halakhically problematic) forms of termination of marriage. It could serve as a complement to a compelled get, making the latter a (permitted) form of coercion. 90 We may suggest that annulment may also be accompanied by other forms of termination of marriage, such as conditional marriage or *kiddushei ta’ut*. However, as in many other issues, *hafka’ah* still awaits the proper halakhic authority for its application in practice.

86 See *Rema*, *Even Ha-‘ezer*, 28:21, who negates the practical use of *hafka’ah* (לענלהחמירישחייאני.)
89 The most famous examples are Rosh regarding the Gaonic *moredet* (Shut Ha-Rosh, 43:8; see Westreich, *ibid.*); Ran regarding *teme’ah ‘ani* (Nedarim 90b, s.v. ve-’ika) and Rema regarding the Austrian pogroms (*Darkhe Moshe, Even Ha-‘ezer*, 7:13).
90 As Rosh argues, see above. In some cases Rosh supports coercion on this basis even in practice, although he usually rejected the Gaonic view which enacted coercion: see Shut HaRosh, 35: 2 (Westreich, *Terminative Conditions* [*supra*, note 20], section 3). On the issue of *hafka’at kiddushin* as a support for a coerced get see Rav Ovadya Yosef, *Kol Ha-mekadesh* (*supra*, note 82), pp. 96-103.