Back to Hohfeld’s Table: A Reconsideration of the Problem of Get Deprivation

Dr. Hila Ben-Eliyahu

*Hohfeld knew that his analytical framework could not solve legal problems. It was meant to allow legal problems to be seen clearly*.[[1]](#footnote-1)

From a halakhic perspective, the dissolution of a marriage, like its foundation, requires a voluntary agreement: the man grants the divorce, the woman accepts it. There are cases, however, when a husband refuses to grant his wife a divorce, or she refuses to receive it – an act of revenge or financial blackmail, or any justified reason – and the spouse becomes a *mesurevet/mesurav get*. In this lecture, I will use the feminine term *mesurevet* because of its frequency and more severe consequences. The legal discourse for this situation is presently framed within a rights discourse – that is, the right of the woman to end the marriage – and therefore, seeks to induce the husband to fulfill his duty and release his wife from the marriage.

This lecture aims to apply the insights of legal thinking that derive from application of the so-called Hohfeld Table to the *mesuravot get* issue. Although more than a hundred years have passed since the publication of Wesley N. Hohfeld’s seminal article “Fundamental Legal Conceptions,” and in spite of the criticisms and attempts at fine-tuning during these years, the eight legal relationships that he defined continue, in my opinion, to serve as powerful tools for the clarification and simplification of legal thinking.

The Hohfeld Table proposes the following typology:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| When A has: | Right | Privilege | Power | Immunity |
| B has: | Duty | No right | Liability/subordination | Disability/no power |

In an attempt to provide an accurate picture of legal speech and legal thinking, Hohfeld identified four jural opposites and four correlatives. I will address here only the correlatives: if A has a right, it means that there is a B who has a duty to fulfill this right. Sometimes this means that if we want to examine if a right – whatever it is – exists, we should look for the one responsible for performing the duty. Privilege is not a right but a situation in which no one has the right to stop A from acting. Power means the legal power A has to change B’s legal status. B will then have a liability, or be subordinate to A’s power, though B has immunity in certain matters in which A’s power cannot influence him/her.

Hohfeld was not interested in defining the nature of legal relationships, but rather sought to describe and exemplify them. His typology contributes three central tools to the solution of legal problems: (1) as a powerful interpretive tool, it uses common denominators to link different legal phenomena, suggesting similar solutions to comparable problems; (2) it reduces conflict between non-uniform terminologies; and (3) it facilitates conscious, directed choice and freedom from prejudgment.

I suggest that a new approach that applies this conceptual framework to Jewish law has the potential to illuminate our understanding of more than a few halakhic issues, the *seruv get* problem among them. Throughout Jewish legal history, many solutions have been proposed to resolve the problem of *mesuravot get.* However, instead of offering an analysis of their origins, acceptability, and relative advantages or disadvantages, and instead of suggesting my own solution, I wish to propose a categorization of the problem and existing solutions according to the Hohfeld table, a taxonomic project at its core. This will elucidate how these solutions function within the legal system and may indicate which solutions have greater potential for ameliorating the problem.

As I said at the outset, the common legal discussion will classify the *mesurevet get* problem as pertaining to the right verses duty square in the aforementioned table. In a world in which creating and terminating marital relationships are in the hands of a legal system, the discourse revolves around the claim that she/he has the right, in certain circumstances or on demand, to leave the bonds of marriage embark upon a new path and write her/his own story. If she has a right, somebody, according to Hohfeld, should have a duty. It could be the legal system, or whatever authority that can grant her the desired *get*.

The discussion of this issue in Israel tends to adopts this mindset and vocabulary; I think this can be misleading and may even lead us to misdirect our efforts, affectedby streetlight effect...

As we all know, the main difference between Western legal systems and Jewish law is that in the latter the party expected to issue a divorce is the husband. If he does not fulfil his duty according to the Beit Din’s verdict of *hiyyuv* or *kfiya*, we should put pressure on him, but just the right amount so that he will be compelled to give the *get*, but without it becoming a *get meuseh* *shelo ka-din*, an unlawfully coerced *get*. We, therefore, can demand payment of *mezonot* or sums agreed upon in prenuptial agreements. We can also curtail his rights, incarcerate him, use peer pressure as *Harhaqot* (sanctions) *Derabbenu Tam* or sue him for damages, etc. These solutions appear on the current slide.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| When A has a: | RightThe right to terminate the connection | Privilege/ freedom | Power | Immunity |
| B has a: | DutySolutions that are supposed to make the husband do his duty:Prenuptial agreementsLegal sanctionsTort suitsRabbenu Tam’s sanctions | No right | Liability/subordination | Disability/no power |

The solutions which depend on coercion of the husband to fulfill his duty include prenuptial/premarital agreements such as those which fix a certain amount of money for not giving a *get* after a certain time; tort suits (which will be discussed at length later today) Rabbenu Tam’s sanctions, and sanctions issued by the Israeli Rabbinical Court. These solutions all share a desire to pressure the husband to fulfill his duty to divorce his wife. Although frequently suggested, and in some cases effective, they do not seem to solve the plight of *mesuravot get* mainly because they do not address the key question of the problem: Is there a duty?

In Hohfeldian terms, in order to determine whether the woman has a right to receive a *get*, we should check if the husband has a duty. This question should be viewed from two angles:

1. The analytic question is: Can we define a legal duty in this unique legal framework in which the will of the agent is not the way in which the act is performed, but is rather one of its constitutive elements according to the law?
2. The realistic question is: Can we define a legal duty when the Bet Din itself does not treat it as such and is incapable of compelling the fulfillment of that duty? I do not mean that there is no such halakhic option as “*kofin otto ad she-yomar rotse ani*”, coercing him until he assents. On the contrary, whenever and by whomever this approach is used, it does constitute a right. It is rather that in the current halakhic world this option is very rarely used.

The answer to both questions tends to be no., We can thus see that speaking in terms of rights and duties does not suit Jewish law as it is almost impossible to constitute the husband’s duty to divorce his wife because of the *get meuseh* restriction.

I would like to emphasize that my discussion is not dealing with the mere existence of a legal grounds for divorce. One might ask: What about the method of Rabbenu Yeruham that Prof. Amichai Radziner has dealt with, which says that there is no need for any external cause but mutual agreement that the marriage can no longer work? Does this constitute a right?

I think that in the Western world, where marriage and divorce are not controlled by the litigants, but rather by the system itself which determines who is married or divorced, a woman can provide new grounds for divorce and ask the court to rule accordingly within its logical boundaries. However, this is not enough in the halakhic world because, even if a woman has the most righteous cause or needs no justification, she still does not have the right. Adding a new cause, a more liberal cause that is based on the claim that a woman has a right to write her own life story, still does not help if in the end we return to the same starting point: we cannot replace the husband’s unwillingness to give a *get*. If he does not have a duty, she does not have a right.

A broader look at Hohfeld’s table can assist us at this point. Classification of this problem using the Hohfeld method of analysis shifts the problem of *mesuravot get* awayfrom the discourse of rights. I argue that, in halakhic terms, whether we like it or not, the male-female relationship is located elsewhere: it is a relationship of power and liability or subordination. The man and the woman have the mutual legal power to change their spouse’s status from married to divorced. If he wants to and she agrees, there is no problem. If she objects to this change in her legal status, she has immunity: she is protected by Rabbenu Gershom’s ban against being divorced against her will. Nevertheless, her position remains inferior to that of the man, who can receive permission to marry a second wife.

If power is the key concept here, and when it is used in an undesirable way, we should think of a way to abrogate of the husband’s power:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| When A has a: | Right | Privilege/ freedom | Power:solutions that expropriate the husband’s power;annulment of *kiddushin*קידושין על תנאישליחות לגט | ImmunityRabbenu Geshom’s ban |
| B has a: | Duty | No right | Liability/subordinationMutual subordination to the power to change the spouse’s status from married to divorced | Disability/no powerהיתר מאה רבנים |

Among the solutions that involve abrogation of power, I note the annulment of *kiddushin*. In the case of the annulment of *kiddushin,* the Beit Din abrogates the power vested in the husband and grants a divorce in his stead. The court’s declaration annuls the relationship of subordination and power. According to the categorization suggested above, this type of solution not only directly addresses the problem, but may also explain the intuitive preference for solutions of this type raised by some of the scholars and organizations confronting the no-actual-right problem. In this context, we can also include conditional marriage. Further thought should be given to whom this power is granted; it should be given to someone who will actually use it. Will the Israeli Beit Din use this power?

We might also think about granting this power in other instances, for example, the appointment, in advance, of an emissary to grant a *get*. It can also be the community, *kahal*, or the Israeli Knesset as a representative of the *kahal*. This is the basis of the proposition in the Proposed Law: Rabbinical Courts (Implementation of Divorce Decisions) (Amendment - Expropriation of Rights), 5766–2016 following the suggestion of Berachyahu Lifshits (and others) determining the expropriation of the money given at the marriage ceremony and the nullification of the marriage. The common ground for these halakhic solutions, without judging their acceptability and rareness of use, is their target: expropriation of the man’s power.

What else can Hohfeld’s table provide us? To complete the picture, let us have a look at the freedom square.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| When A has a: | Right | Privilege/ freedomMistress/*pilegesh*State/civil marriagePartnership covenant | Power | Immunity |
| B has a: | Duty | No right | Liability/Subordination | Disability/no power |

Perhaps we should add to this square the *pilagshut*, mistress solution suggested by Rabbi Prof. Meir Simcha Feldblum. Without going into detail, it seems that these kinds of spousal relationships remove the couple from the hands of the halakhic marriage and allow the two parties to decide whether and when to opt out. State marriage can also be considered a freedom. Of course, from the state’s point of view it is binding and belongs to the rights and duties square. However, according to certain halakhic opinions, civil marriage is not binding at all and both parties are free to leave, which places them in the freedom/privilege square. The solutions of privilege also include Shahar Lifshitz’s partnership covenant with its explicit demand not to enter into religious marriage, and the recognition of common-law marriage, as long as we halakhically recognize it as the desire of both parties not to enter the arena of power.

To conclude my suggestion, I would like to emphasize again: I am not arguing that Hohfeldian analysis can resolve the problem of *mesuravot get*,rather, I am arguing that it promotes a better understanding of it and its suggested solutions. It also suggests, that of the types of solutions proposed to date, abrogation of the husband’s power is to be preferred if we fully understand the halakhic obstacle of *get meuseh*. We cannot ignore, however, the fact that the application of solutions involving abrogation of power requires a court system that is willing to assert its power.

1. Graham Ferris and Erika Kirk, “Fundamental Legal Conceptions by Wesley Newcomb Hohfeld,” 17 ***Nottingham Law Journal***, no. 1 (2008): 39–43. [↑](#footnote-ref-1)