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

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*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 the halakhic perspective, marriage is a voluntary agreement and its dismantling is similarly regarded as a voluntary, agreed-upon solution: 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 get it, out of revenge or as economic blackmail or any justified reason, and the spouse becomes a *mesorevet/mesorav get*. I’ll use the feminine term *Mesorevet* because of its frequency and more sever situation) Presently framed in terms of a rights discourse—as the right of the woman to end the marriage—the legal solutions for this situation seek to induce the husband to fulfill his duty to release his wife from the marriage.

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

The Hohfeld Table proposes the following typology:

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

Trying to accurate the legal speech and lrgal thinkig, 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 that has a duty to fulfill this right/ Sometimes it means, that if we want to check if a right, whatever right, exists we shold look for duty performer. 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 Bs legal status. B will than have liability, or be subordinate to A s power. B has immunity in certain matters in which A s power cannot influence her.

Hohfeld was not interested in defining the nature of legal relationships, but rather in their description and exemplification. 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 nonuniform 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 illumine our understanding of more than a few halachic issues, and the *seruv get* problem among them. Throughout legal history, many solutions have been proposed to resolve the problem of *mesoravot get.* However, I propose not an analysis of their advantages or disadvantages, but rather a categorization of the known solutions according to the Hohfeld table. A taxonomic project. This will elucidate how these solutions function within the legal system, and might indicate which have greater potential for ameliorating this problem.

As I said in the beginning, the common legal discussion will classify the *mesorevet get* problem at the right verses duty square. In a world in which creating and terminating marital relations are at the hands of the system, the discourse is around the claim that she/he has the right, in certain circumstances or on demand, to leave the marital connection and to start a new way, to write her/his own story. If she has a right, somebody, according to Hohfeld, has a duty. It could be the legal system, or whatever authority that can grant her the desired Get

The Israeli discussion adapt this way of thinking, and I think it is misleading our understanding, and even preventing us from directing our efforts toward the right direction instead of the right direction.

The main difference as we all know, is that the person who is supposed to give the get is the husband. If he doesn’t fullfil his duty according to the law, we should put a pressure on him, just the right amount of pressure that will make him give the get and won’t make it a *get meusse*. So we try to pay, take rights, put in jail, sue for damages, ect. This are the solutions that are written up there on the slide.

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| --- | --- | --- | --- | --- |
| When A has a: | Right  The right to terminate the connection | Privilege/ freedom | power | immunity |
| B has a: | Duty  Solutions that are supposed to make the husband do his duty:  prenuptial agreements  Legal sanctions  Torts suits  Rabbenu Tam’s sactions | No-right | Liability/  subordination | Disability/  no-power |

The solutions resting on coercion of the husband include prenuptial/premarital agreements such as those who set a certain amount of money for not giving a get after a certain time, tort suits that are the tool prof. Benny Shmueli is dealing with, Rabbenu Tam’s sanctions, and sanctions issued by the Israeli Rabbinic Court. These solutions all share the desire to pressure the husband to fulfill his duty to divorce his wife. Although frequently suggested, and the fact that some of them work at some of the cases, do not see, to solve the plight of *mesoravot get,* mainly because they do not address the key aspect of the problem: the fear from *get meuseh shelo Kadin*.

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

1. The analytic question: Can we define a legal duty I this very very unique legal framework in which the will of the agent is not the way the act is performed but rather one of its main elements of the law.
2. The realistic question: Can we define a legal duty in a place where the Bet Din itself does not treat it as a duty and is incapable of compelling the duty. I do not mean that there is no such halachic option as “kofin otto ad sheyomar rotse ani”, on the contrary, whoever and whenever this approach is used it do constitutes a right. It is that in current halachic world this option is not an option.

So, talking 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 cause for divorce. One might ask What about the method of rabenu yeruham that prof Radziner dealt with? That says that there is no need for any external cause but the mutual agreement that the marriage can no longer work? Does it constitute a right?

I think that in the western world, where marriage and divorce are not in the hands of the sides but the system says if you are married or divorced, it is enough .If a woman gives a new reason for divorce she can ask the court to work according to it, within its logical boundaries. However’ It is not enough in the halachic world because even if a woman has the best cause or need no cause she still doesn’t 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 life story, still doesn’t help if in the end we are coming back to the same point – we can’t replace his unwillingness to do it, so he doesn’t have a duty, so she doesn’t have a right.

The broader look of Hohfeld’s table can assist us in this moment. Classification of this problem using the Hohfeld method of analysis shifts the problem of *mesoravot get* awayfrom the discourse of the sphere 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 has the mutual legal power to change their spouse‘s status from married to divorced. If he wants 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 from being divorced against her will, but her position remains inferior to that of the man, who can be permitted to take a second wife.

If power Is the key concept, and it is used in an desirable way, we should think of abrogation of the husband’s power.

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| --- | --- | --- | --- | --- |
| When A has a: | Right | Privilege/ freedom | Power:  Solutions that expropriate the husbands power:  annulment of *kiddushin*  קידושין על תנאי  שליחות לגט | Immunity  Rabenu Geshoms Ban |
| B has a: | Duty | No-right | Liability/  Subordination  The mutual subordination to the power to change the spouses status from married to divorced | Disability/  no-power  היתר 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 declaration by the court annuls the relationship of subordination and power. According to the categorization suggested above, this type of solution not only directly addresses the problem, but also supports an intuitive preference for solutions of this type. In this section, we can also include conditional marriage. further thought should be made to whom this power is given; it should be given to someone that will actually use it. Will the Israeli Beit Din use the power? We might think giving thie power to 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 Kneset as a representative of the kahal. This is the base of the proposition in the Proposed Law: Rabbinical Courts (Implementation of Divorce Decisions) (Amendment - Expropriation of Rights), 5766 – 2016 following Berachyahu Lifshits (and others) suggestion determining the expropriation of the money given on the marriage ceremony and the nullification of the marriage. The common ground for these halachic solutions, without judging their acceptability and rareness of use, is their target: the man’s power.

To complete the picture, let us have a look at the freedom square.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| When A has a: | Right | Privilege/ freedom  Mistress  State/civil marriage | Power: | Immunity |
| B has a: | Duty | No-right | Liability/  Subordination | Disability/  no-power |

Maybe we should put there the Pilagshut, mistress solution suggested by Rabbi Prof. Feldblum. Without going into details, it seems that these kind of spousal relations leave the couple out of the hands of the halachic marriage, and allows the parting people to decide whether and when to step out. State marriage can also be considered as freedom. Of course, from the state’s point of view, they are binding and they belong to the rights and duties square. However, according to certain halachic opinions, civil marriage do not bind at all and the parties are free to go, which means freedom. The solutions of privilege include Shahar Lifshitz’s partnership covenant with its explicit demand not to enter religious marriage, and the enacting common-law marriage, as long as we halachicaly recognize them as the desire of both parties not to enter the arena of power.

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

In line with the Hohfeld table, the solutions for the *mesoravot get* issue can be divided into three groups: 1. privilege; 2.; and 3.. power.

1. GRAHAM FERRIS AND ERIKA KIRK, *Fundamental Legal Conceptions* by Wesley Newcomb Hohfeld, 17 *Nottingham L.J*. 39 (2008):.43. [↑](#footnote-ref-1)