

# Error in the Creation of Marriages in Modern Times under Jewish Law

*Michael J. Broyde\**

*A. Preface. B. Introduction. C. Marriage as Contract. D. Condition (Tenai) and Error (Ta'ut): The Conceptual Difference. E. Defects in Man. F. Continuing Marriages that Commenced with a Defect. G. Conclusion.*

## *A. Preface*

The objective of this article is to demonstrate the nature of the halachic response to questions of *kidushai ta'ut* — errors in the creation of a marriage that are based on information not being revealed to one of the spouses. Essentially, this article notes that while the grounds upon which women could argue that *kidushai ta'ut* had occurred were extremely narrow in *Talmudic* times and in the era of the *rishonim*, they have been widened even further in America in the last fifty years, and this *halachic* truth was predicated on a social reality regarding marriage. Indeed, the *Talmud* never considers a single case of error in the creation of a marriage due to a defect in the man. Rabbi Moshe Feinstein recognized this and understood that *kidushai ta'ut* was a factually

\* This work is an appendix to a longer book entitled *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Understanding of the Agunah Problems in America*. This paper was commissioned as part of the Tenth Orthodox Forum Series of Yeshiva University, in 1998.

more plausible argument in America during the last fifty years than in other times and other places, and he thus advanced arguments for *kidushai ta'ut* and for what is a significant defect (“*mum gadol*”), in a much larger number of cases than other *halachic* authorities in other places did. This is a sociological response to the recognition of the fact that there are more and more cases in America where had the woman been aware of the full reality vis-à-vis her husband at the time of the marriage, she would not have agreed to marry.

However, the recognition that the change in the status of women both economically and socially leads to an increased possibility of *kidushai ta'ut* does not — and, indeed, cannot — mean that all marriages generally are subject to any form of *kiddushai ta'ut* principles. Rather, in order for there to be any sort of a claim of error in the creation of the marriage, the following four conditions must be met:

1. the woman must discover a serious defect present in her husband after they have been married;
2. that defect must have been present in the husband at the time of the marriage;
3. the woman must have been unaware of the defect at the time of the marriage; and
4. the woman must discontinue marital relations with her husband either immediately or very soon after the discovery of the defect.

In cases of mistake, the marriage is void under *Torah* law, and in many cases, a *get* is not even necessary.

Claims of *kiddushai ta'ut* outside of the framework of these four conditions have absolutely no basis in *halacha*. No matter how serious the defect currently present in the husband or wife

might be, absent proof that the defect was present at the time of the marriage, it is impossible to assert that the marriage is void based on error. There are no *teshuvot* that permit claims of error in the creation of the marriage unless all four conditions are met. Newly developed conditions or defects can never be grounds for a claim of *kiddushai ta'ut*.

Consider the case of a couple married for twenty years, and in the twentieth year of the marriage, the husband commits adultery with his wife's sister. Although the wife would undoubtedly say, "Had I known about this, I would not have married him twenty years ago", this does not form the basis for a claim of error in the creation of the marriage, as the condition was not present at the time of the marriage. The same is true if the husband becomes physically abusive towards his wife after twenty years of marriage. While there is no doubt that the wife would say, "Had I known that he would abuse me after twenty years of marriage, I would not have married him twenty years ago", this does not prove any error in the creation of the marriage. This case is no different from that of a spouse who becomes blind or lame after many years of marriage. No claim of error in the creation of the marriage can be made in such a case either.

Both of these cases are distinguishable from those in which the error was present at the time of the marriage. Consider the case of a man who is engaged to one woman and, during the engagement, secretly has an affair with the woman's sister. In this case, one could argue that the error (fraud, actually) was present at the time of the marriage and that the marriage is void. The same is true regarding a man who is blind or lame or impotent prior to his marriage, but hides the fact from his fiancée. If the other conditions are met, both of these cases would be cases of error in the enactment, as the defect was clearly present at the time of the marriage.

## *B. Introduction*

The institution of marriage in the *halachic* tradition involves a multiplicity of types of relationships between husband and wife, some sacramental, some sexual, and some financial. Significant failures in any one of these areas creates marriages that are far from ideal (and sometimes void) in terms of the *halachic* tradition. Thus, for example, non-sexual marriages are frowned upon; spouses have financial obligations to one another that are immutable; and the *halacha* prohibits people from marrying each other if they are of certain consanguinities or have certain conditions, no matter how otherwise rewarding the relationship might be. On the other hand, the *halacha* does recognize the ability of a couple to deviate from the marriage norms of society if that is what both parties desire. Thus, for example, a husband and wife can decline to have regular sexual relations with each other if according to the wishes of both; a wife can insist on her right to be self-supporting and self-enriching; and even some improper marriages, if entered into, are valid and create a marriage that requires a divorce when the couple separates.<sup>1</sup>

However, in order to be acceptable under Jewish law, most deviations from the norm require the consent of both parties. Thus, error occurs in the creation of a marriage when one spouse does not inform the other of a highly relevant issue in any one of these

1 Indeed, one of the first systemic discussions related to *kidushai ta'ut* focuses on whether or not one assumes *kidushai ta'ut* when a couple marries unaware of the fact that Jewish law actually prohibits them from marrying. This topic is discussed at great length in *Otzar ha-Poskim* 39:12-13 (p. 210-216). Indeed, as noted by *Chelkat Ya'akov*, *infra* note 60, the proper resolution of this matter might depend on the religiosity of the parties. See also: *Acheizer* 1:27, who discusses the case of a divorced woman who married a *cohen*.

three significant (but not exclusive) areas: sexual, sacramental, and financial. The legal theory explaining *kidushai ta'ut*,<sup>2</sup> errors in the creation of a marriage, is fundamentally predicated on the view that the creation of a marriage has significant aspects of a commercial transaction in which there has to be a meeting of the minds and a proper *kinyan*,<sup>3</sup> in which each party is aware of to what he or she is agreeing. Absent the full meeting of the minds needed to create a valid *kinyan*, this marriage is apparently void (there is a failure in the creation of the marriage), and no divorce is actually required, as there is no marriage.<sup>4</sup> In a number of cases, the Sages decreed that a *get* is required according to rabbinic law, lest people be confused about when a marriage can end without a *get*. In other circumstances, no *get* is required.<sup>5</sup>

- 2 For a detailed review of this issue, see: *Shulchan Aruch* EH 39:1, and the commentaries thereto. It is clear that the formulation in the *Shulchan Aruch* regarding *pesulai cohanim* is not fully accurate, as left-handed individuals are ineligible to serve as *cohanim*; see: *Otzar ha-Poskim* 13 at p. 91. More generally, as noted by *Otzar ha-Poskim* 39:31:2, there is a vast consensus among *halachic* authorities that this determination is social and not strictly *halachic* (in the sense of being independent of the social reality, like, for example, the definition of *chametz*, which is objective).
- 3 This is the technical term used for transfer of title or status.
- 4 See: *Tosafot*, *Ketubot* 47b s.v. *shelo*, as well as *Tosafot*, *Ketubot* 72b s.v. *al*, and 73a s.v. *lo*. For reasons beyond the scope of this article's discussion, in such cases, a *get* normally would be given when possible.
- 5 When exactly one falls into the one category or the other remains the subject of significant dispute among *ahronim*; see: *Achiezer* 1:27, and compare it to *Iggrot Moshe* EH 1:79. A close reading of the three *Tosafot* referred to in the preceding note indicates that the *Tosafot*, too, could not reach agreement on this point. However, *Shulchan Aruch* EH 39, indicates quite clearly that the *Shulchan Aruch* thought that in the case of a serious hidden defect, "*mum gadol*", no *get* was needed, although that rule is only stated in reference to a defect found in the man and not to a defect found in the woman. The stakes, however, are the same, as the defect in the woman permits her to marry another man without a *get* from her first husband.

### C. Marriage as Contract

All Jewish marriages are created through an established process made up of four “contract-based” requirements:

1. the intention of the parties must be to voluntarily marry through this ceremony or procedure;<sup>6</sup>
2. the parties must be of suitable age, capacity, and (opposite) gender to marry;<sup>7</sup>
3. a proper method of marriage must be used (money, contract, or sexual relations) to create a valid marriage, with two witnesses present;<sup>8</sup> and
4. the fundamental components of the relationship between the two parties must be agreed upon.<sup>9</sup>

Point four is the requirement that is most dependent on the social norms of the parties, as it touches directly on the heart of each individual’s understanding of what is “created” when requirements one, two, and three are met. For example, it is generally recognized that marriage establishes the legal capacity to have licit sexual relations. While there is nothing intrinsically

6 *Shulchan Aruch* EH 26 (emphasis on the voluntary nature).

7 *Shulchan Aruch* EH 37. The case of *kidushai ketana* is a special one, in that the *Torah* directed that it is the father who is authorized to accept a marriage proposal on behalf of his daughter.

8 See: *Aruch Hashulchan* EH 26:1-6. This work notes, without directly commenting on, the famous view of R. Ezekiel Abromsky, that both in the area of family law and the area of contract law, the first requirement is significant and requirements two and three are mere manifestations of the first one; he claims that at least theoretically, valid transactions can occur without requirement three. See: Y. Abromsky, *Dinai Mamonut*.

9 See: *Shulchan Aruch* EH 38 and 39. EH 38 addresses explicit conditions (*tenaim*) and 39 addresses implicit or explicit states of mind (*al manat*).

violative of Jewish law in a marriage where sexual relations are actually not medically possible,<sup>10</sup> according to *halacha*, one must inform one's future spouse of what she or he is entering into in this respect. If this is not done, the marriage possibly is void.<sup>11</sup> The same is perhaps true when sexual relations are possible, but children cannot be conceived or borne.<sup>12</sup>

Let us consider an example outside the area of family law to understand the fourth requirement. Two individuals meet on an airplane flying from Los Angeles, California, to Sydney, Australia. One looks at the other's wristwatch with great interest and offers to buy it for "one thousand Dollars". The owner of the watch agrees, takes off his watch, and hands it to the purchaser. The purchaser places the watch on his wrist,<sup>13</sup> opens up his wallet, takes out one thousand Australian dollars, and offers full payment. The seller responds to this with, "The purchase price was one thousand US Dollars". The purchaser, speaking in his Australian accent, rejects this claim and states that he would not have purchased the item for US \$1000 and that he offered to purchase it for only AU \$1000. The *halacha* in such a case is clear: the purchase is void, as there never really was agreement. Even though they both agreed to what appears to be a deal, because there was a substantive misunderstanding of what was actually the price — a very significant facet of the deal — the deal is void. The seller would be required to return the AU \$1000 to

10 See: *Shulchan Aruch* EH 44:4 (first opinion). Indeed, many authorities assert that there is no dispute between the two opinions discussed in the *Shulchan Aruch*: one is aware of the fact and the other is not. *Kidushin shelo nimsaru lebiah* is a *halachic* concept and not a factual one.

11 For a discussion of this matter, see: *Iggrot Moshe* EH 1:79.

12 This is the *talmudic* discussion of an *iyonit*. For a lengthy review of this issue, see: *Seredai Aish* 3:33, which concludes that it is possible that a *get* is not needed.

13 *A ma'ase kinyan*.

the purchaser, and the purchaser would have to return the watch to the seller. If the two parties would wish to make a new deal, they certainly could; however, the agreement that they “made” on the plane would be void, as it is predicated on *ta'ut* — error.<sup>14</sup>

The same result would be reached even if the purchaser had agreed to pay the seller “one thousand dollars in 90 days” and the confusion about the terms of the deal were not to occur until 90 days from the purchaser's taking apparent title through the act of wearing the watch (*kinyan meshicha*). This is because there was not, in fact, a meeting of minds between the buyer and the seller regarding the terms of the deal. Indeed, the *talmudic* hypothetical “*mocher para, nemtza terefa, mechko batel*”<sup>15</sup> — of one who sells a cow found to be not *Kosher*, the sale is void, since the purchaser and the seller both intended that the cow be *kosher*. clearly applies, even though neither the buyer nor the seller is, nor even could be, aware of the defect.<sup>16</sup> In the case discussed in the *Talmud*, if it emerges that a significant defect in the animal's condition existed at the time of the sale, the sale is void. However, the voiding of the sale is contingent on showing the following: 1. that a defect was present at the time of the sale; 2. that the buyer was unaware of the defect; and 3. that had the buyer been aware of the defect, he would not have completed the sale.<sup>17</sup>

14 See: *Shulchan Aruch*, CM 232:3-9. CM 232:6 reads: “Anything which is agreed by the members of the city (state) as a defect that one must return the item for, one must return the item when that defect is found. Anything which all agree is not a defect, one need not return the item for as it is not a defect, one need not return the item unless one made it explicit [that such was a condition]. Anyone who does business unconditionally, does so in reliance on common commercial custom”.

15 *Chulin* 50a. *Kosher* here refers to a physiological defect in the cow that prevents it from ever being *kosher*, not a defect in the slaughtering process. See: *Tur*, 232, for more on this.

16 Many *irefas* cannot be detected until after slaughter.

17 As noted by *Tosafot* (*Bava Kama* 110a), this does not apply to a case where a person



It is important to grasp that the buyer's claim in the *talmudic* case is not predicated on fraud.<sup>18</sup> Rather, it is grounded on the fact that a valid deal requires agreement on the principal terms, and none exists in this case, as the buyer thought was he purchasing an animal that is edible under Jewish law, but the animal was, in fact, not.<sup>19</sup> If both parties had been aware of the true facts, they certainly could have made a valid deal, perhaps at a different price. They were not, however, and thus no valid deal was made. Obviously, the application of this rule is limited to significant elements of the deal; error regarding less significant elements does not lead to the deal being void, but, merely, a “reduction in purchase price”.<sup>20</sup>

This same basic principle applies to the marriage arrangement as well.<sup>21</sup> Indeed, the *Shulchan Aruch* in *Even Haezer* 39

purchased a cow and it later became *taref*, even though when he purchased it, he wished it to be neither *taref* nor become *taref*, the latter is not subject to disclosure and thus cannot be an implied condition in the deal. Of course, as noted elsewhere in this article (see note 36), this could be a formal *tenai*, but formal *tenai'im* require very specific formulas and do not arise implicitly. For more on this, see: *Beth Halevi* 3:3, who explicitly discusses this issue.

18 In the sense of intentional misrepresentation.

19 Of course, it is easier to prove the lack of agreement when there was actual intent to defraud. However, the presence of fraud is merely evidentiary in nature and not directly relevant. Consider the discussion in *Avnei Chafetz* 30, about someone who enters into a marriage with the intent to defraud the woman or the discussion in *Mari HaKohein Tenyana* 13. The same approach can be found in the discussion of someone who marries a woman without informing her that he is already married to another woman, in, for example, *Talumat Lev*, 3 Shelichut 1, and other sources.

20 Consider, for example, the discussion in *Yabia Omer* EH 2:9, concerning the case of a woman who represents herself as a virgin but is not. *Yabia Omer* concludes that the marriage is nonetheless valid and a *get* would be needed should the couple decide to separate over this matter.

21 It might not apply to the *yibum* relationship, in that *yibum*, like divorce under *Torah* law, does not require the consent of the woman in order to be valid. Thus, the position of the *rishonim* that an apostate brother does not void the marriage is not inconsistent with this.

enumerates many cases that focus on the problems raised by incomplete revelation by the woman concerning the physical state of her body, the presence of constricting vows, and a host of other cases. The basic rule seems clear: if a man should have been aware of the defect<sup>22</sup> or actually was aware of the defect,<sup>23</sup> he cannot claim that the marriage is void based on the defect. So, too, if the “defect” is one that is normally present in many people — even if the man claims he now objects to this defect, he is not to be believed,<sup>24</sup> as it is assumed that he was aware of this defect, or the possibility of this defect being present, and accepted this defect or risk thereof when entering into the marriage.<sup>25</sup> However, when there is a hidden defect in the woman that the man was not aware of and could not have been aware of and the defect is serious, the marriage is void or voidable.<sup>26</sup> (In the reality of the *halacha* in practice, this problem — of what defect is sufficiently serious to render the marriage void — is expressed in the technical literature as a discussion of what the minimally acceptable attributes of marriage are, given the modern state of marriage and the social and economic realities of the times. This varies with time period, geography, and as Rabbi Moshe Feinstein notes, level of religious observance).<sup>27</sup>

22 Rama EH 39:4.

23 Ibid.

24 *Shulchan Aruch* EH 39:3.

25 For examples of this, see: *Otzar Haposkim* 39:17-27, which discusses a variety of different hypothetical cases.

26 *Shulchan Aruch* EH 39:1-8.

27 *Iggrot Moshe* EH 4:83(2), in the last sentence of this section, notes this explicitly.

*D. Condition (Tenai) and Error (Ta'ut): The Conceptual Difference*

It is important to grasp the significant conceptual difference between a condition (*tenai*) in a marriage and an error (*ta'ut*) in the enactment of a marriage under *halacha*. Error in enactment is not simply the application of implicit conditions. A condition in marriage or divorce (and most areas of Jewish Law) follows a particular technical formulation and can cover contingencies that cannot ever be predicted by the parties and certainly need not be present at the time that the conditional agreement is made.<sup>28</sup> Thus, a man may marry a woman and he or she can state under the *chupa* that they are marrying each other only on the condition that neither one of them ever drinks wine. When one makes such a condition to a marriage and that condition is breached, the marriage is void, assuming that both of them never waived the marital condition.<sup>29</sup>

Thus, one can say that a formal *tenai* is a condition and limitation on the status of the marriage and is thus subject to significant procedural restrictions (both in terms of exact formula

28 Rambam, *Ishut* 6:1-5; for an excellent short essay on this topic, see: "*Mepi HaShmu'a*" *Mesorah* 2:39-42 (5744).

29 Consider the case of a couple who conduct a perfectly proper Jewish wedding ceremony for the sake of allowing one of the two parties to acquire a residency permit (a green card, in America) based on the citizenship of the other spouse. As Rabbi Moshe Feinstein notes in *Iggrot Moshe* EH 4:112, even in a case where the ceremony was completely proper in form (*chupa kedin*), if neither party had any intent to enter into a valid wedding, even if the putative couple takes up residence together, commences a sexual relationship, and acts as husband and wife after the ceremony, they are not married, since they both agreed that they would not be married by this ceremony. (Of course, as a matter of proof for this proposition, they would have to demonstrate that they had told others before the ceremony took place that the ceremony was not *bona fide*).

and assumed waivability). But *tenai* procedure — if correctly followed — works for almost every imaginable contingency, including those not present at the time of the marriage agreement. normative *halacha* assumes that couples waive conditions after they commence sexual relations as a couple, and thus the marriage is valid, even if the conditions subsequently are breached, as shortly after the marriage, happily married couples waive otherwise permanent conditions to the marriage for the sake of continuing to be married, which is of positive value.<sup>30</sup> However, when a *tenai* is made at the time of marriage and has effect during the conduct of sexual relations and then is breached, the marriage ends without any need for a divorce or a *get*, as though there had never been a marriage. This notwithstanding, the marriage is fully valid until such time as the condition is breached.

While it is true that the custom and practice are not to apply any conditions in a marriage, as there is a distinct *halachic* possibility that any such condition is void if the parties live together sexually without explicitly repeating the condition, such is clearly not the strict *halacha*, since Rama clearly rules that such conditions can and do work, and he proposes one to cover the case of a brother unwilling or unable to carry out *yibum*.<sup>31</sup> Certainly, all agree that a *tenai* can be maintained if, for example, the couple repeats the condition to a *bet din* each time prior to engaging in sexual relations.<sup>32</sup>

In sum, when a condition is used and the procedure for a *tenai* is followed, the marriage is valid but conditional. If the proper procedure is followed, the condition will have effect, and it

30 EH 38 and 39 (en passant); but see: Rama, EH 157:4.

31 EH 157:4.

32 See an extensive analysis of this topic in *Pitchai Teshuva*, EH 157:4.

can govern many unforeseeable activities. However, in the real world of Jewish marriages, formal conditions are never used, as the procedural requirements to keep them valid once a sexual relationship has commenced are rather onerous in all but the rarest of circumstances.

Such is not the case with a *ta'ut*, which functions along a completely different conceptual axis. In the case of errors, since the validity of a marriage is based on mutual agreement and the mutual agreement was predicated on a mistake of fact so great that had it been known, one party would not have consented to marry (or purchase the watch, in the case discussed above on page 45), the marriage (or sale) is void. It always was void and never was valid. The blessings recited under the *chupa* when the couple was married were in vain, and no marriage ever took force. While it is true that a subsequent valid marriage can take place between the parties,<sup>33</sup> this will only be possible if the parties are actually aware of the true facts and nonetheless desire to be married, just as the parties in the case of the wristwatch could agree — once aware of the misunderstanding — to sell the watch for 1000 Australian Dollars. However, the parties also could agree not to continue the relationship and seek to contract with others. Obviously, this type of error can only arise and apply to facts present at the time of the marriage ceremony.<sup>34</sup>

33 Either through a formal ceremony or by living together sexually with the intent to marry; see: *Even Haezer* 31:8-9.

34 When exactly one can assert that there is an implicit *tenai* and when that there is a mistake (*ta'ut*) is, at the margins of hard cases, a matter in dispute. Rambam, cited above, limits *tenai* to cases of explicit invocation of the conditions by either spouse, following the explicit doubling formulations (the doubling formulation requires that one mention what happens both if the condition is fulfilled and if it is not); all other cases fall under the rules of *ta'ut*. Ra'avad (*Ishut* 6:1) disagrees and allows for cases of implicit condition in all matters other than marriage and divorce. Ramban

### E. Defects in the Man

There is no discussion in the *Shulchan Aruch* itself concerning defects in the man, though there is a lengthy and detailed discussion of defects in the woman found throughout *Even Haezer* 39.<sup>35</sup> However, a discussion of defects in the man does appear quite clearly in the *Beit Shmuel*<sup>36</sup> and can be implied from the *talmudic* discussion found in *Bava Kama* 110b-111a concerning a woman who marries a man whose brother is diseased.<sup>37</sup> In this *talmudic* case, the *gemara* clearly states that Jewish law does not assume that a woman would decline to marry a man who is right for her merely because she might have to marry her future husband's brother as a *yevamah* because the brother might not

(Gittin 45b, and other places) categorizes all prospective stipulations as *tenai* and all retrospective conditions as *ta'ut*. *Tosafot* (*Kiddushin* 45b) asserts that all implicit conditions are really cases of *ta'ut* when the conditions are the normative ones expected in any transaction, and the only time there is a condition is if it is made explicit as a *tenai*. Rabbi Chaim Soloveitchik (*Chidushim*) argues that Rambam actually distinguishes between those conditions that are designed to prevent the marriage from taking effect immediately (*me'achshav*) and those stipulations that are immediately fulfillable at the time of the marriage, which are merely a form of *ta'ut*; Rabbi Moshe Feinstein (*Iggrot Moshe* EH 1:79-80) rejects this view and accepts the formulation of the Rambam mentioned above. For more on this, see note 18, which discusses this in the context of commercial norms.

35 Why that should be so can be easily explained from a social perspective and should not be understood to mean that the absence of this discussion indicates anything *halachically*. Indeed, one can find an explicit discussion of this among the *rishonim* who discuss *ach numar*. I will leave for another time an explanation of why the *Shulchan Aruch* does not address this problem in the context of the husband and, instead, only in the context of brothers of husbands.

36 EH 154:2.

37 *Beit Meir* on id. stands alone in arguing for this approach conceptually and is inclined to accept that there can be no concept of *kidushai ta'ut* for a woman for defects found in a man. He argues that the *talmudic* language seems to be limited to defects in the woman. One could respond to this objection by noting that the linguistic reference in the *gemara* is to the typical case.

wish to do *chalitza*. Indeed, the *rishonim* were split about what exactly the proper limit is to this presumption: Does it apply when the brother is an apostate? A heretic? A eunuch? All of these cases present troubling hypotheticals, and the *rishonim* disagreed over where exactly the line should be drawn.<sup>38</sup> However, it is important to understand the nature of the disagreement: At what point is the defect in the brother great enough that one can state with near certainty that it would have prevented the woman from marrying him under any circumstances?<sup>39</sup> Indeed, one cannot really find any systematic statement of *halacha* (in the sense of statement of legal principle) that restricts the application of the principle of “defect” to a case of a defect in the man.<sup>40</sup> The exact opposite argument can be found in the writings of both Rabbi Moshe Feinstein and Rabbi Chaim Ozer Grodzinski, who are inclined to rule that since a man can divorce a woman with less difficulty than the reverse, a man is more inclined to marry a woman who might be defective than the reverse, as he is prepared to gamble on a transaction that might not work and from which he can exit of his own free will. The woman, on the other hand, cannot exit merely because she wishes to and thus is less inclined to take such a risk.<sup>41</sup>

38 See, for example, *Terumat Hadeshin* 223. It is important to read closely Rashi's explanation of the *Bava Kama* 110b case, as Rashi indicates quite clearly that a social judgment is being rendered. Indeed, the language of “*annan sadi*” (“we attest”) is very consistent with a statement of a social reality and not rabbinic decree.

39 Consider the case of a man who is deathly ill, hides this fact from his fiancée, dies soon after the wedding, and leaves only a brother who is six-months old to do *chalitza*. As noted by Rabbi Chaim Berlin (*Even Shoham, Kuntress Haagunot*), this is a strong case of a circumstance in which one is fairly certain that the woman would not agree to marry the man.

40 The strongest such statement by a modern *posek* can be found in Rabbi Henken's *Perush Abira* at page 41, which clearly is discussing the facts of marriage and not the *halacha*.

41 *Iggrot Moshe* EH 1:80 and *Acheizer* 1:27.

The obvious question that needs to be resolved is as follows: How does one understand the rule of “It is better for a woman to be with another [unhappily] than to be alone”<sup>42</sup> and the related phrase “We can attest that she is better with anyone”<sup>43</sup> found in the *Talmud*? The question is, how can one even consider the issue of *kidushai ta’ut* when the *talmudic* principle clearly assumes that any given woman is better off married than being single? This issue requires a very direct response. This *talmudic* principle has not changed for all women across the world, but, rather, has created a rebuttable presumption that women are better off married, even in a less than ideal relationship, than they are being single.<sup>44</sup> This principle, under this approach, can be deemed inapplicable in any case where it can be shown to be untrue in light of the facts of the specific man and woman or, indeed, any category of specific men and women.<sup>45</sup>

Indeed, this might be the approach the *halacha* takes with regard to many areas where the *gemara* created presumptions that are not applicable in every single case, but which cannot be shown to be generally inapplicable. Consider, for example, child custody disputes between a man and woman who are divorced. Even though the *Talmud* provides rules of custody<sup>46</sup> that are cited in the *Shulchan Aruch*,<sup>47</sup> the *rishonim* and *ahronim*, almost unanimously, insist that these rules are mere presumptions, which

42 “*Tav lemativ tan du, melemativ urmelo*”.

43 *Anan saadi deminach necha la bekol deho*. *Bava Kama* 110b-111a and *Ketubot* 75a.

44 See, for example, *Iggrot Moshe* EH 4:113 or EH 4:83 or *Acheizer* 1:27, each of which reaches this result, which is fully consistent with the discussion found in the various *rishonim* about the *ach mumar* problem.

45 For example, *Iggrot Moshe* is inclined to state that the principle is completely inapplicable to people who are not religious; *Iggrot Moshe* EH 4:83.

46 See: *Eruvin* 82a, *Ketubot* 59b, 65b, 122b-123a.

47 EH 82:7.



a *beth din* need not follow in any given case when it recognizes that these presumptions are not applicable.<sup>48</sup>

The same is true in the area of *kidushai ta'ut*. One can show many specific cases where *poskim* determined that the presumption that a woman is better off with any husband, rather than being single, is rejected, sometimes accompanied by the attestation taken from the *Terumat Hadeshen*<sup>49</sup> concerning a husband who is an apostate, that such a husband is “less than anything”! Indeed, to adopt the position that these two principles are absolute and categorical presumptions is extremely difficult, as the *Talmud* itself recognizes that there are circumstances in which it is better for a woman to be single than to be married. Thus, for example, *Yevamot* 118b permits someone to accept a *get* on behalf of a woman who is categorically better off being divorced from her husband under the principle of *zachen leadam shelo befanav*<sup>50</sup> in the case of a dispute between the spouses, when the husband wants to divorce her, but the wife is not present to receive the *get*. This can only be justified by stating the obvious: the principle of “It is better for a woman to be with another [unhappily] than to be alone”<sup>51</sup> is a presumption that — when clearly inapplicable — is also *halachically* inapplicable.<sup>52</sup>

48 Since the facts of this particular case indicate that a child is better off being placed with the mother or father in any given case, even if the *talmudic* presumptions might not place this child with this parent at this time. For more on the topic, see E. Shochatman, “The Essence of the Principles Used in Child Custody in Jewish Law”, *Shnaton LaMishpat Halvri*, 5 (5738), p. 285 (Hebrew); see my article, “Child Custody and Jewish Law: A Review”, *Journal of Halacha and Contemporary Society* 36:21-46 (1999).

49 *Terumat Hadeshen* 223.

50 Meaning that one can take possession of something for a person when it is an unmitigated benefit for them.

51 See fn. 43.

52 This can also be implied from the view of Rava in *Ketubot* 75a. This is also

To give the most recent example of this approach of insisting that the general reality has not changed, but is merely factually inapplicable in any specific case, Rabbi Moshe Feinstein,<sup>53</sup> when discussing the case of a woman who married a bisexual man who hid this fact from her during their courtship, states that:

[E]ven nowadays one should not accept as proper this argument [that women generally are more content not to be married now than in *talmudic* times] and that, generally, reality has changed.

However, he continues:

In this case, where the defect is so great, the marriage is a void transaction based on error even for a woman, as I explain in *Iggrot Moshe* EH 1:79 and 80,<sup>54</sup> as this husband is involved in homosexuality which is a particularly great abomination, and greatly repugnant, an embarrassment to the whole family, and even more so to this woman that her husband chooses this disgusting form of sexual relations

consistent with the practices of *batei din* throughout the world, which permit the use of the *get zekui* procedure in cases where it clearly is of benefit for the woman to be divorced.

A number of readers have referred me to a recorded lecture given by Rabbi Joseph B. Soloveitchik in which he indicated that the principle of "*tav lemativ tan du, melemativ armelo*" is an immutable presumption that is applicable to every person and every marriage in every circumstance. As has been noted throughout this article, this view cannot be correct, and there is a wealth of *halachic* literature that suggests that even if this presumption is immutable on a general level, it is not applicable to every marriage and in every circumstance. Indeed, I suspect that Rabbi Soloveitchik's formulation in that particular lecture is limited to opposing the wholesale abandonment of the principle, rather than the more sweeping assertion that it does not apply in any given case or set of cases.

<sup>53</sup> *Iggrot Moshe* EH 4:113.

<sup>54</sup> EH 1:79 concerns *kidushai ta'ut* in the case of impotence, and EH 1:80 concerns insanity. In both cases, *Iggrot Moshe* concludes that the marriages are void, as no one would marry someone who is a sometime lunatic or impotent.

more than sexual relations with her. In such a case, the marriage was certainly based on error. It is certain to us that no woman would desire to marry a man as disgusting, repugnant, and embarrassing as this.<sup>55</sup>

Rabbi Feinstein applied a similar analysis to cases where the husband is a sometime lunatic, or impotent, or suffers from heart disease, or is an apostate, and other cases and hid the fact from his future spouse.<sup>56</sup>

Indeed, one can find a considerable number of *achronim* who address particular cases of possible *kidushai ta'ut* through this methodology and conclude that the rule "It is better for a woman to be with another [unhappily] than to be alone"<sup>57</sup> and the related *talmudic* phrase "We can attest that she is better with anyone"<sup>58</sup> can be determined to be inapplicable in specific cases based on the reality of the given time or place. Footnote 59 below cites no less than fifteen such cases; throughout this article, another nine *teshuvot* also adopt this view, and twice that number could have been cited.<sup>59</sup>

55 *Id.* Emphasis added.

56 See: *Iggrot Moshe* EH 4:73 and 4:13, for the cases of heart disease and sterility (or even, perhaps, compelled abortion). Rabbi Feinstein, surprisingly enough, does not consider it *kidushai ta'ut* in a case where a twenty-year-old woman was seeking to marry and did not wish to reveal that she had not yet begun to menstruate. See *Iggrot Moshe* EH 3:27, where he argues that such conduct can be explained as falling within the framework of normalcy. However, I believe that Rabbi Feinstein is less inclined to consider defects in the woman to be relevant for *kidushai ta'ut* than defects in the man, as defects in the woman can be grounds for compelling her to receive a *get*, thus reducing the need for this rationale. This important and logical insight is first noted by R. Chaim Ozer Grodzinski in *Achiezer* 1:27.

57 See fn. 43.

58 See fn. 44.

59 Besides the many *halachic* authorities cited throughout this work, one can find in the responsa literature a discussion of the relationship between the state of mind

The significant dispute over how to apply the principal of *kidushai ta'ut* derives from a fundamental disagreement over the sociological facts and a proper understanding of social reality: When does one reach the critical threshold of knowing beyond a doubt<sup>60</sup> certain facts about the intent of the parties to a marriage? As *Chazon Ish* states, "In the case of defects by the man when

of the parties, the intent to marry only a person of a particular character, and the rules of "*tav lemativ tan du, melemativ armelo*" and "*anan saadi deminach necha la bekol deho*". The following list is not intended to be complete and should not be taken to indicate that each *teshuva* permits each woman to leave her marriage without a *get*. Rather, these *poskim* discuss whether one does or does not assume that given the social reality of the couple and the society in which they live, one can consider whether there was enough of a failure in understanding the agreement that the marriage was not validly entered into when any particular defect is present. They are as follows: *Ain Yitzchok* 24, who discusses impotence as grounds for hidden error; *Avnai Chefetz* 30, who discusses marriage to a criminal as grounds for hidden error; *Berchat Retzai* 107, who discusses epilepsy and perhaps polio as grounds for hidden error; *Beth Halevi* 3:3, who discusses serious defects generally as grounds for hidden error; *Chaim shel Shalom* 2:81, who discusses apostasy as grounds for hidden error; *Chavat Yair* 221, who discusses impotence as grounds for hidden error; *Chelkat Ya'akov* 3:114, who discusses apostasy by the husband when the wife is secular as grounds for hidden error; *Divrai Malkiel* 1:86, who discusses whether there is a difference between intentional fraud and accidentally misleading information as grounds for hidden error; *Even Yekara* 53, who discusses epilepsy as grounds for hidden error; *Hari Besamim Mahadura* 2 EH 147, who discusses insanity as grounds for hidden error; *Mahari Hacohen Tenyana* 13, who discusses marriage to a criminal as grounds for hidden error; *Meluai Even* 29, who discusses insanity as grounds for hidden error (he is *makil* for a reason that is astonishing and beyond the scope of this work); *Nodah Beyehuda* EH 1:88, who discusses apostasy as grounds for hidden error (this is at odds with his *Tenyana* 80); *Seredai Ash* 3:33, who discusses impotence and apostasy as grounds for hidden error; *Sharit Yosef* 44, who discusses apostasy as grounds for hidden error; *Tashbetz* 1:1, who discusses impotence as grounds for hidden error; *Yad David (Piskai Halachot)* 186:3, who advances a general rule that any illness that would be grounds for a compelled divorce after marriage, if hidden, would be grounds for *kidushai ta'ut*; and *Yeriyot Shlomo* 1:8, who discusses what appears to be syphilis as grounds for hidden error.

<sup>60</sup> The reason that one would have to know beyond a doubt, rather than by some lower standard, is that following what appears to be a valid and proper wedding

there is an unconditional marriage it is clear that the marriage is valid, as there is no categorical presumption<sup>61</sup> that she [the wife] would not want [to marry the husband]”.<sup>62</sup> When there is a categorical presumption that had the wife been aware of the man’s defects, she would not have married him, even *Chazon Ish* would admit that the marriage is void.<sup>63</sup> Reasonable people or rabbis living in different communities, with different understandings of people’s mind-sets, might disagree on when that threshold is *reached* and what constitutes such a defect in the minds of most members of their communities. This is a sociological and *halachic* problem, with different results for different times and places. The rules remain the same, even as the results change. This is a common motif in many areas of *halacha* and neither unusual nor uncommon.

ceremony, the couple is presumed married and the woman *bechezkat eshet ish*. The *halacha* would not allow someone in that presumptive status to remarry without a nearly certain insistence that the presumptive status is wrong. For more on this, see Perushai Abira (Rabbi Henkin) at page 41.

61 “*Umdana demuchach*”.

62 *Chazon Ish* EH, *Ketubot* 69:23. He immediately thereafter makes reference to the difference between a diseased person and an apostate and why there is the presumption that she would not desire the second but perhaps would desire the first.

63 How exactly one demonstrates the presence of a categorical presumption has been the subject of significant *halachic* dispute among the *poskim* as to the relationship between presumption, categorical presumptions, and near certain knowledge that has no witnesses. It is generally accepted that an *umdana demochach*, in terms of probability, is somewhat more than 90%, with some *halachic* authorities asserting the probability to be 95% and some asserting 98%. Perhaps, by analogy, one can compare this to any other obligation to examine through statistical sampling whether one need be concerned about the presence of an item or activity. Consider, for example, a very simple matter: Must one check vegetables for bugs? *Halacha* divides the obligation to check into three categories: (1) cases where most of the vegetables have insect infestation; (2) cases where a statistically significant amount (but less than 50%) of the vegetables have insect infestation (*mi’ut hamatzoy*); and (3) cases where insect infestation is statistically extremely unlikely (*mi’ut she’ano*

*F. Continuing Marriages that Commenced with a Defect*

One of the frequent issues in the area of *kidushai ta'ut* relates to what is the response of the woman or man upon discovery of the error in the creation of the marriage. Does he or she leave the marriage immediately? Rabbi Feinstein's final comments on the case of the bisexual husband quoted above are worthy of further discussion:

If as soon as she found out that he was bisexual she left him, it is logical that if one cannot convince him to give a *get*, one should permit her to remarry because of the rule of *kidushai ta'ut* ...

Rabbi Feinstein repeats this again:

But all this<sup>64</sup> is limited to when she leaves him immediately, but if she lives with him (sexually), it is difficult to rule the marriage void.

This factor is significant to understanding limiting error in creation of a marriage. *Shulchan Aruch* EH 31:9 rules that in the case of a couple that conducts an improper wedding ceremony for a technical reason (such as the wedding ring was worth only half a *prutah*), when they discover the defect and decide to continue cohabiting (sexually), that decision creates a valid marriage based on their current sexual relationship since both parties were aware of the defect and aware of the fact that they could leave the

*matzuy*). In cases one and two, one must check for infestation, and in case three, one need not. See: *Shulchan Aruch, Yoreh Deah* 39:1 and *Biur Hagra* 39:2. See: *Mishkanot Yaakov, Yoreh Deah* 16, for a discussion of the exact statistical ranges for each category.

64 Her ability to leave without a *get*.

marriage because of it, but chose not to.<sup>65</sup> This rule is explicitly described in the context of defects in the woman by the *Aruch Hashulchan*, who states:

In the case of defects in the woman which he explicitly stated before the marriage that he does not desire such defects... if he lives with her after their sexual relationship for an extended period of time, as a man and woman who are married do, they are certainly married... The marriage was completed with certainty, when he lived with her, as that made it clear that he really does not care about these defects.<sup>66</sup>

This approach is logical. Every pot really does have its cover, and the *halacha* recognizes the ability of a person — even with glaring defects — to marry someone who understands the virtues and vices of marriage to such a person. Thus, there is little doubt that a woman who cannot bear children (an *ilonit*) can validly marry so long as she discloses that fact and that a man who is impotent can enter into a valid marriage so long as he discloses that fact.<sup>67</sup> The corollary of this is that when this woman or man becomes aware of a significant defect that was hidden, the pertinent question is did she or he take steps to leave the relationship or did he or she decide that they could live with the status quo? If he or she did the latter, even if the marriage was defective at its enactment, a very strong case can be made that this conduct (continuing the sexual<sup>68</sup> relationship with one's spouse with the intent to be

65 Such is the practice, for example, when individuals who are married in a civil ceremony become religious. When they realize that their civil marriage is void in the eyes of the *halacha* and yet remain married, they are married.

66 *Aruch Hashulchan* EH 39:13.

67 *Seredai Ash* 3:33.

68 A sexual relationship being one of the three ways a couple can create a valid *kinyan*.

married) creates a new — and valid — marriage.<sup>69</sup> In the event of a relatively non-significant defect, a case could be made that this is a ratification of the previous marriage, and in the event of a significant defect, a new marriage has been created.<sup>70</sup>

It is possible to devise a construct in which the woman or man immediately decides to leave, but stays for a short period of time while planning to leave. In order to explain this *halachically*, one would have to maintain that the man or woman never intended to have the ongoing sexual relationship (after discovery of the defect) create a new marriage. Even the *Aruch Hashulchan* admits the possibility of that construction stating, “If he lives with her after their sexual relationship for an extended period of time, as a man and woman who are married do, they are certainly married”.<sup>71</sup> The rationale, however, is *halachically* complicated, as there is a very strong presumption under the *halacha* that people who have sexual relations and represent themselves as married actually are such, as any known deficiencies in the marriage ceremony are cured by the continuing of the marital relationship.<sup>72</sup> However, if the woman is unaware that *al pe din*, her marriage is void and

As an alternative, the couple could actually conduct another wedding ceremony. For more on this, see *Yabia Omer* 2:9.

69 *Aruch Hashulchan* EH 39:13, quoted above, and others. It is for this reason that there is greater consensus that *kidushai ta'ut* in cases of impotence is easier than any other case, as there is no possibility of post-discovery ratification of the marriage through a sexual relationship, which, given the nature of the *ta'ut* here, cannot happen.

70 In the case of a relatively non-significant defect, there is dispute about whether the first marriage continues or a second marriage is created; compare the views of *Beit Shmuel* EH 68:6 and *Beit Meir* EH 68. However, a strong case can be made that Rama disagrees with this view, based on how he rules in the case of a “marriage” to a lunatic who recovers, which is discussed in EH 67. For more on this issue, see *Yabia Omer* EH 2:9.

71 *Aruch Hashulchan* EH 39:13.

72 The word “known” is of vital importance, as consensus has developed that when a



requires recreation through a sexual act, she can never have the proper requisite *halachic* intent to marry based on any given sexual act, as the now well-established halacha is that a couple does not become married merely by living together when they are not aware that their original marriage ceremony is void.<sup>73</sup>

### G. Conclusion

The problems of *kidushai ta'ut* have been brought to the forefront by recent developments, and it is important to grasp how socially and contextually defined this issue really is. What are the fundamental aspects of a marriage that enable one to assert that deception with regard to those aspects nullifies the marriage *ab initio*? *Halacha* does not have absolute answers to that question. *Halacha* recognizes a principle: the marriage can be nullified *ab initio* if defects or conditions in one party that were present at the time of the marriage were not revealed, and had the other party to the marriage, as well as most people in the given society, known about them, he or she would have refused to enter into the marriage. The application of this principle varies from place to place and from time to time and is affected by the differing social status accorded women, taking into consideration such matters as how easily a woman can earn a living without a husband and (if she is not observant of Jewish law) how easily she can engage

couple does not know that the marriage is deficient, they do not cure the defect by continuing to live together as husband and wife, as they lack any intent to ratify the marriage or create a new one. One cannot ratify that which one does not think to be deficient. A similar concept is present in the conversion of minors.

<sup>73</sup> This is the dispute between Rabbi Moshe Feinstein and Rabbi Yosef Henkin and has been explained well by others. The near unanimous practice in America is to rule following Rabbi Feinstein, at least in cases where a *get* cannot be procured.

in illicit sexual relations outside of marriage<sup>74</sup> as well as other factors, all of which differ from society to society.<sup>75</sup>

- 74 The first is important because it touches on the question of whether a woman would accept a marriage proposal from a man who is sexually unfit for purely economic reasons; the second is relevant as it touches on the question of whether a woman would accept a marriage proposal from one who is unfit for other reasons, so as to have a licit sexual outlet. The first of these factors is considered in *Iggrot Moshe* EH 1:79, and the second in EH 4:83. Rabbi Moshe Feinstein is prepared to consider the possibility that the principles used by the *halacha* in these circumstances differ very significantly when the couple is not generally religious, and even more so when they are promiscuous.
- 75 Consider five different cases that have been brought to *batei din* on which this author has sat:
1. While dating a woman, a physically normal man makes a representation to her that he is a partner in a large law firm and earning \$400,000 a year. In actuality, he works in the copy department of that firm and earns \$17,000. Indeed, he actively perpetuated this fraud by bringing his fiancée to see “his” large office in the law firm one early Sunday morning. The moment the woman found out the true facts — after the marriage — she left him. She claims *kiddushai ta’ut*.
  2. A woman has a physical defect present from birth that prevents both of her breasts from lactating. The man and woman are both modern professionals and did not intend to breastfeed their children. The marriage ended unrelated to this problem, and he claims *kiddushai ta’ut*.
  3. A man deceives a woman with regard to three different issues: he tells her that he is a partner in a business in which he is really an employee; that he is a citizen when he really needs to marry her so that he can get a green card; and that he is twenty-seven years old when he is really thirty years old. She discovers each of these defects after the couple has separated due to incompatibility; he will not give her a *get*.
  4. A man is impotent and hides this fact from his wife (he might not have been aware of it, in fact). After medically trying to fix this problem for a number of years, the woman seeks to leave the marriage without a *get*, as she does not wish to be considered a divorcee. She has never had sexual relations with her husband.
  5. A man states that he will not marry a woman who does not wear a head covering. The man and woman agree, while courting, that the woman will cover her head when she marries him. Immediately after the wedding, she announces that she will not and never intended to.

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The purpose of presenting these five cases is not to provide normative answers to the questions, but, rather, to insist that categorical answers to each one can only be found in a sociological review of the relevant *halacha*. Each of these cases could be *kiddushai ta'ut*, (although in each of these cases there is no doubt that a *get* should be given if possible). It is necessary to make a social determination of what is the categorical presumption in each of these cases and whether or not each of these defects rises to the level of a significant defect. The marriage might be void only when there is either a categorical presumption present in our society or an explicit discussion of ground rule norms by the couple and a categorical rejection of the marriage once the deviation from the norm or agreement is made clear. Determining when that happens requires both halachic proficiency and familiarity with social norms.