

On the Dispositive Foundations of the Obligation of Spousal Conjugal Relations in Jewish Law

Yehezkel Margalit*

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1. Prologue

Several years ago, Israeli newspapers published a report¹ about an attorney, who regulated his relationship with his wife by a contract, which included, among other matters, the frequency and

* Adv. Rav Yehezkel Margalit is Ph.D. candidate in the law faculty in Bar-Ilan University; lecturer in the Ono Academic College and Associate Fellow of the Agunah Research Unit in Manchester University.

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¹D. Spiegelman "If We need a contract!" *Ma'ariv*, 17/11/2003.

type of intimate relations. In addition to the juicy details, which were undoubtedly a source of entertainment to the newspapers' readership, the report raises two important research questions.

Firstly, as a student of modern family law, we can only ask why do Israeli courts regularly and consistently refuse to discuss the use of private contracts to govern the conjugal relationship, an approach which is common to the rest of the liberal/modern Western states. I can attest, that when I conducted a search for legal precedents dealing with the use of contracts to govern conjugal relations, I found it very difficult to find results in foreign legal databases and even more so in Israeli sources.² I can confirm Graham's findings,³ who found very few precedents in the United States. The courts seem to be repelled by this particular matter.⁴ There are also very few academic discussions of the subject.⁵

² To the best of my knowledge, there is widespread treatment of the various criminal sexual offences, but apart from this, Israeli courts have rarely dealt with civil aspects of intimate relations with the exception of financial damages. The courts have most certainly not dealt with private contractual regulation of the said relations.

There are two major exceptions connected to this intimate sphere, which are related to the privileges to be enjoyed by prisoners. The right to intimate relations was discussed in the High Court of Justice, H.C. 114/86 **Weil v. The State of Israel and others**, 41 (3) P.D. 477. Similarly the right of a prisoner to intimate relations and insemination in the prison, a well-publicized ruling in the case of the prisoner Yigal Amir, the murderer of the Prime Minister, Mr. Yizhak Rabin, and his right to have intimate relations with his wife or to provide her with genetic material to be used in artificial insemination. See the final decision given in the High Court of Justice H.C. 2245/06 **M.K. Neta Dubrin, M.K. Ronan Zur v. Israel Prison Service, Yigal Amir, and Dr. Larisa Trimbobler** (not yet published, 13/6/06).

³ See below, *Supra* n. 5, at 1045. The scholar cites only one ruling, which dealt with the husband's claim that he does not have to pay alimony to his former wife, since she violated a contract dealing with the frequency of intimate relations (see *Favrot v. Barnes*, 332 So. 2d 873 (La. Ct. App. 1976)).

⁴ Besides academic treatment of the rights of the prisoner to intimate relations and artificial insemination and the right of the state to limit these privileges for security reasons, etc. see for example A. M. Breault, "Onan's Transgression": The Continuing Legal Battle Over Prisoners' Procreation Rights", 66 *Albany Law Review* (2002), 289 - 325; G. Richard, "Procreation And The Prisoner: Does the Right to Procreate Survive Incarceration and do Legitimate Penological Interests Justify Restrictions on the Exercise of the Right" 29 *Fordham Urban Law Journal* (2002), 2277 - 2342; R. Rachel, "No New Babies?: Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems" 12 *Am. U.J. Gender Soc. Pol'y & L.* (2004), 391 - 425.

⁵ The number of articles dealing with regulation of intimate relations between spouses, to the best of my knowledge can be counted on one hand: L. J. Weitzman, *The Marriage Contract: Spouses, Lovers, and the*

Secondly, since my field of interest is marital law within Jewish Family law, this article raises the question if Jewish religious law recognizes a private contractual agreement to regulate intimate relations in the case when the couple have been married according to Jewish law? Or it is possible that religious family laws regulate intimate relations in a conclusive manner and the parties to the marriage contract are not permitted to deviate from the general rule, even by mutual agreement?

It is important to understand that Jewish law places considerable emphasis on the regulation of intimate relations, requiring that the husband should fix times (“ona”) for intercourse or to put it another way, the husband cannot torture the woman by denying her intimate relations.

Can a couple make a condition during the wedding ceremony or at another time that their marriage is a “non-marriage”, i.e. an economic, emotional bond but without sexual intercourse?

Can the marriage contract include times when the couple will not have sexual relations, for example the case of a mixed couple, a Jew and a Karaite, where a Karaite is not permitted to have sexual intercourse on Friday nights?⁶

Law, (New York: Free Pr., 1987), at section 10; G. Temple, “Freedom of Contract and Intimate Relationships”, 8 *Harv. J. L. & Pub. Pol’y* (1985), 121 - 173; L. P. Graham, “The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage”, 28 *Wake Forest L. Rev.* (1993), 1037 - 1063.

⁶ We have evidence of similar conditions between mixed couples not to have sexual intercourse on Friday night, see for example references to four different Erez Israel *Ketubot* in Simhah Asaf (ed.) *Sefer ha-Shtarot le-Hai Gaon* 55-56 (Jerusalem: Azriel Press, 1930).

This tradition of a halachic prohibition on having sexual intercourse on Friday nights is documented extensively in the Apocryphal literature. We find different and various sources, for example “Hilkhat Sefer Yovlim”, *ha-Sefarim ha-Hizoni'im* (Kahana edition, Jerusalem: Makor Publishing, 1970, vol. 1), 312-313 – “Anybody polluting this day and lying with his wife ... shall surely die” (50, 8), this was the accepted halakha among the Samaritans, the Karaites, etc. For a survey of these opinions, see for example, M. M. Kasher in his *Torah Shlemah* (New York, 1954, vol. 14), supplements, 314-315 and in sources cited by M. Warmbrand, “Hilkhhot ha-Shabat etzel ha-Falashim” *Sefer Auerbach* (Arthur Birm, editor), (Jerusalem: The Society for Biblical Research in Israel, 1955) ,238, note 3. Cameroon also wanted to interpret the prohibition in *Megillat Brit Dameseq* 11, 4 in a similar fashion- “nobody should be intentionally involved on the Sabbath” as referring to those prohibitions involving ritual uncleanness on the sabbath in general and specifically that caused by sexual contact, see E. Cameroon, “Nobody Should be Involved on the Sabbath” *The Ninth World Congress of Jewish Studies* (Jerusalem: World Congress of Jewish Studies, 1985), Section D, vol. 1, 9 - 15, 11. Safrai thinks that the halachic doubts of the early Pietists, who also did not have sexual relations on the Sabbath, were because of the possibility of the woman’s excreting male semen after intercourse and being made unclean on the sabbath, see S. Safrai, “Hassidic Teachings in Tannaitic Literature”, *WeHine En Yosef*,

The first question dealing with the repugnance of the civil courts from dealing with intimate relations between couples will be considered in the next section. In the third section we will examine the various binding aspects of the obligation of 'ona', which tend to suggest that the halachic obligation is an inflexible matter derived from the status of the marriage as a religious ceremony. This approach would *prima facie* block any possibility of private contractual arrangements in the matter. In the fourth section, which is the core of the article, we will try to illuminate the various dispositive aspects of the duty of 'ona' in early sources, aspects which form the basis for a measure of contractual freedom given to the couple to use private contractual arrangements to regulate their intimate relations. This survey will demonstrate that there are considerable differences of opinion about the possibility of using private rather than public means to regulate intimate relations between a couple. Where the Babylonian Talmud is consistent with the Halachic approach which sees the duty of 'ona' as a fixed, inflexible, binding duty, which is not subject to private conditions, the Jerusalem Talmud has a different approach, seeing it as an area which may be governed by free contractual agreements. Just as one may make changes in the monetary aspects of the marital bond by mutual agreement, the intimate relationship between the couple may also be changed by mutual agreement.

In the epilogue of the article, we will try to lay the foundations for a general approach, based upon our conclusions, asking whether we are dealing with a local dispute between the two Talmuds on the subject of the freedom of contracts about 'ona' or is this one aspect of a general dispute regarding the possibility of agreements between the couple on other aspects of their intimate relations in a Jewish religious marriage. Could one, using the Jerusalem Talmud's approach, make conditions or

Qovetz le-Zihro shel Y. Amorai (Tel-Aviv: Family, 1973) ,136-152 and also His *Be-Shelhi ha-Bayit ha-Sheni uVe-Tekufat ha-Mishnah* (Jerusalem, 1981), 113 .Cameroon assumes that the existence of such a prohibition in the Apocrypha literature and the ascription of the prohibition by the sages of the Talmud to the early Hasidim, implies that this custom originated in the Second Temple period. However, Warmbrand is of the opinion that the matter was still disputed in the Second Temple period, and that the Talmudic sages, wishing to negate this opinion, specifically denoted the night of the sabbath as a time for intimate relations, see Warmbrand, *ibid*, pp. 236-243. The Falashas also prohibited this act in their religious literature about the sabbath, Tazz Sanbat, - "whoever has intimate relations with his wife on the sabbath will surely die", see A. Z. Eshkoli "Religious Law and Custom among the Jew of Ethiopia (Falashas) compared with Rabbinic and Karaitic Religious Law" *Tarbitz* 7 (1936), 31 – 56, 40 and the references in notes 79-80, p. 44 and sources quoted by Warmbrand, *ibid*, p. 238 together with note 3.

To the general interrelations between contract and legislation in the Jewish Law see Yosef Rivlin "Contracts and Legislation in Jewish Law: Interrelations" in this volume.

even cancel central provisions, which are generally seen as religious obligations rather than monetary arrangements, in the *Ketubah* (marriage agreement)? Could one make conditions about the possibility of the husband inheriting his wife, an inheritance which in the opinion of certain halachic authorities is derived from the Torah?⁷ May a woman, using the approach of the Jerusalem Talmud, stipulate that if she should hate her husband, she can initiate divorce just as the husband is permitted to divorce his wife if he finds himself hating her?

2. The Liberal/modern Ethos of Denying Freedom of Contracts Relating to the Intimate Relations Between Spouses

During the last decades, we have noticed a growing interest in the use of contracts between spouses to govern different aspects of their marital life, including pre-nuptial agreements, divorce agreements and even contracts between two people cohabiting, forming in essence a framework of civil marriage and divorce parallel to the religious framework.⁸ See, for example, the revolutionary decision of the Chief Justice (emeritus) Aaron Barak, in which the court recognized the breaking of a promise to marry as a legitimate reason to sue. Among the other reasons for his decision, the Chief Justice claimed and I quote –

“The laws of contract in Israel do not stop outside the household. The law does not disqualify contracts based on sentimental foundations, which are constructed between parties in intimate personal circumstances.”⁹

⁷ For a summary of the various opinions on the matter see the *Talmudic Encyclopedia*, entry ‘Yerushat ha-Baal’ (Jerusalem: Yad ha-Rav Herzog, 2002, vol. 25), column 451 – 538, 451 Y. Cohen *Taqanot Hazal be-Yahase Mamon Ben Bne Zug* (Israel: Kibbutz Sa'ad, 1997, vol. 1), 1-34; Y. Shifanski *Ha-Takanot be-Yisrael* (Jerusalem: Mosad ha-Rav Kook, Qeren Michael Sharf, 1993, vol. 2), 227-229.

⁸ For an exhaustive discussion see S. Lifshitz *Contractual Regulation of Spousal Relationship in Civil Law* (Ph.D. thesis, Bar-Ilan University, Faculty of Law, 2002), 141-145, 191-192 and his “Hasdarat ha-Hoze ha-Zugi be-Mishpat ha-Yisraeli – Matve Rishoni” *Qiryat ha-Mishpat* 4 (2004/5), 271 - 360.

⁹ Case no. 5258/98 x v. y 58 (6) P.D. 209 (2004). This decision served as a precedent for later cases, see, for example, Tel-Aviv (Civil Court) 3319/02 Safra Dan v. Grosberg, Lara Takdin 2005 (3), 7278, 7281 (not published, 30.8.05); Tel-Aviv (Civil) 136/01 x v. y Takdin 2005 (1), 11322, 11339 (not published 28.2.05). Scholars were not indifferent to the change of policy by the Supreme Court and their approach that in the case of an undertaking to marry, intimate relations between couples were subject to judicial review, in exactly the same fashion as if the subject of the contract was a regular business agreement dealing with the sale of goods, and using the same judicial tools. The following articles discuss the matter, O. Grosskopf and S. Halabi “Breaking a Promise to Marry”: from seduction to a Broken Heart” *Trials of Love* (Orna Ben-Naftali and Hannah Naveh, editors, Ramot-Tel-Aviv

Moreover, since the last decade of the previous century, we have witnessed demands to allow the establishment of parentage by private contract especially in the case of children born of the various fertility treatments.¹⁰ Even so, the question of intimate relations between a couple remains a subject with which the civil law avoids dealing.

As we have mentioned, until the last decades of the twentieth century, there was a tendency not to recognize the validity of any type of contract between a couple, which was generally accepted in almost all the legal systems of the Western world. In the research on the law of contract and that of family law, there are various rationales for not applying the law of contract to agreements between couples. Even so, in spite of the dramatic change in the courts and their growing recognition of the different contracts between couples, they still obstinately refuse to treat agreements or contracts dealing with intimate relations between couples and the question of fertility derived from the relations. This principle can be deduced from different incidental remarks made by judges of the

University, 2005), 107 - 156, 156; N. Cohen "The Fall and Rise of the Promise to Marry" *Ha-Mishpat* 21 (2006), 10 - 22, from p. 18 ff; especially Lifshitz, *The Marriage Contract*, *Ibid*, at 307-308.

¹⁰ The subject of my doctorate is the possibility of establishing parenthood by contract. It is entitled *Horut – ben Regulatziah le-Hofesh Hozim* and is being written under the supervision of Dr. S. Lifshitz of Bar-Ilan University. Among the major articles supporting this approach are C. Shalev, *Birth Power : The Case for Surrogacy* (New Haven: Yale University Press, 1989), 120 - 145; M. M. Shultz, "Reproductive Technology and the Intent-Based Parenthood: An Opportunity for Gender Neutrality" 1990 *Wisconsin Law Review* (1990), 297 - 398; A. Reichman Schiff, "Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity" 80 *Iowa Law Review* (1995), 265 - 296; A. Reichman Schiff, "Frustrated Intentions and Binding Biology: Seeking AID in the Law", 44 *Duke L.J.* (1994), 524 - 570; R. F. Storrow, "Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage" 53 *Hastings Law Journal* (2002), 597 - 679. The major articles against this approach are W. J. Wagner, "The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique" 41 *Case W. Res.* 1 (1990), 1 - 89; K. T. Bartlett "Re-Expressing Parenthood" 98 *Yale L.J.* (1998), 293 - 340; M. Garrison, "Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage" 113 *Harv. L. Rev.* (2000), 835 - 923, 859 - 867.

Israeli Supreme Court¹¹ and in judgements handed down in the United States.¹² These quotations suggest that it is necessary to restrict, as far as possible State intervention in the different intimate relations within the family cell. If so, why do the courts refrain from recognizing the wishes of a couple to order the intimate relations between them within a contractual framework??

Generally, modern law sees the family cell as on the individual level,¹³ the institution of marriage is primarily a human institution, based on a free relationship between two equal individuals. As a consequence of this approach, the possibility of marrying and leaving the marriage is seen as one of the most basic rights in the Western world – the right to marry and establish a family are anchored

¹¹ “... One of the basic rights of the citizen is that the state should not interfere in his private life and conduct in the bedroom as long as he does not illegally prejudice another person’s rights ... the courts should not appoint themselves arbiters of morality ... “ (H.C. 224/63 **Ben Ami v. Legal Adviser to the State**, 18 (3), P.D. 225, 238 (1964)); “Conception, pregnancy and birth are intimate experiences, which wholly belong to an individual’s right to privacy; the State should not be involved in such matters except for very grave reasons, involving either an individual’s rights or matters of supreme importance to the State” (413/80 **x v. y**, 35 (3) P.D. 57, 81 (1981)); “in the background lies the general question to what extent would it be appropriate to rule in the sphere of family relations, including the intimate relations between a couple using legal tools” (H.C. 1581/92 **Avraham Avi Valentine v. Dorit Valentine**, 49 (3) P.D 441, 454-455 (1995)); “not all of a person’s desires can be a basis for a legal ruling against another person. We should not make our complete way of life subject to legal writs. There are areas – including intimate relations and family planning – which should not be subject to legal procedures” (H.C. 2401/95 **Rut Nahmani v. Daniel Nahmani**, 60 (4), P.D 661, 689 (1996)).

¹² In one of the relevant key judgements, the judges commented – “Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey v. Population Services International*, 431 U.S., at 685, 97 S.Ct., at 2016. Our cases recognize “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Eisenstadt v. Baird*, 405 U.S., 453 (emphasis in original). Our precedents “have respected the private realm of family life which the state cannot enter.” *Prince v. Massachusetts*, 321 U.S. 158). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment” (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791).

¹³ For a justification of this claim, see the various works of S. Lifshitz, *Supra n. 8*, in the second part and also “Secular couple’s law in the next Fifty Years, between Libertarianism and Court’s Setting of Boundaries” *Mehkare Mishpat* 17 (2002), 159 - 262, 190.

in paragraph 16 (1) of The Universal Declaration of Human Rights of 1948 and in paragraph 23 (4) of The International Covenant on Civil and Political Rights of 1966.¹⁴ Similarly the right to divorce is one of the major liberal axioms.¹⁵ If a man's house is thought of as his castle, and the State and its law forces cannot just break in, so his marriage and divorce, even more so since they take place in his bedroom and everything done there is protected by the right to privacy and the law should not intervene and disturb this intimate area.

3. Binding Aspects of the Husband's Conjugal Duty

However, since Jewish law is a religious system it seeks to regulate all of a man's relationships, primarily with his G-d, but also between man and his fellow-man together with other aspects of his life. The Halacha sees the family cell as a compound entity, a basic unity which has to be protected. This protection includes regulation of anything which may disturb the family harmony, especially where that matter may impair the welfare of one of the members of the family cell. Obviously, the first priority is to regulate intimate relations, whose quality and nature may lead to differences of opinion, and to separation¹⁶ and in the case of adultery, to a halachic obligation to sever the family ties immediately.¹⁷ A good example of the halachic regulation of intimate relations can be found in the story of Rav Cahana who hid under his Rabbi, Rav's, bed while he had intercourse with his wife and even commented on his conduct, which was, in his opinion, unbecoming. As much as the

¹⁴ See, for example, A. Rubinstein "The Right to Marry" *Tel-Aviv University Law Review* 3 (1973), 433 - 458; C. Shalev "The Freedom to Marry and to Live Together (Living together without a religious ceremony)", *Women's Status in Israeli Law and Society* (P. Radai and others, editors, Schocken, Tel-Aviv, 1995), 459 - 502, 462-463.

¹⁵ For strong criticism of the current difficult situation with regard to marriage and divorce in Israel today, see the recent publication by S. Lifshitz "Registering Relationships" *Essays in Memory of Professor Menashe Shava* (A. Barak and D. Friedman, editors, Ramot-Universitat Tel-Aviv, 2006), 361 - 425, 365-372; Z. Triger "There is a State for Love: Marriage and Divorce between Jews in the State of Israel", *Trials of Love* (Orna Ben-Naftali and Hana Nave editors, Ramot-Universitat Tel-Aviv, 2005), 173 - 225.

¹⁶ Any survey of Rabbinical Legal Decisions will demonstrate how often the breach of regulated intimate relations is at the root of every typical marital dispute, this being either the true state of affairs or the appearance that one of the couple creates in order to break up the family cell.

¹⁷ See for example R. Halperin-Kaddari "A Husband's Adultery as a pretext for divorce" *Bar-Ilan Law Studies* 7 (1989), 297 - 329.

student's conduct was insolent, his justification of his conduct to his rabbi was even stronger – “This is a legal matter, and I have to study it”. Whatever the rights of the Rabbi to privacy, the pupil still has to learn this halachic matter from his rabbi.¹⁸

At this stage, I would like to return to basic legal axioms. I would like to define the concepts ‘binding’ and ‘dispositive’ – every legal system has two basic methods to regulate the legal aspects of an agreement between parties. The first, is to establish legal instructions which will bind the sides, and which are not subject to conditions or changes of any sort. These instructions are called *Jus Cogens* – Binding instructions. The second method is for the legislator to establish the legal instructions as the default where the parties have not reached a different agreement, and in this case, the parties retain the right to make special conditions and to regulate their legal relationship as they see fit. These instructions are called *Jus Dispositivum* – Dispositive instructions.¹⁹

As we have mentioned above, Jewish law regulates intimate relations narrowly, obligating the husband to have sexual intercourse with his wife (the Hebrew term being ‘ona’).²⁰ The halachic requirements are fixed and inflexible, the frequency of intercourse being a function of the husband's profession and the amount of time he spends at home, see the *Mishnah*, Tractate *Ketuboth* (5, 6) –

“the ‘ona’ required by the Torah, leisured men every day, workers twice a week, owners of asses once a week, owners of camels once a month, sailors once every six months, in the opinion of Rabbi Eliezer.”²¹

¹⁸ Babylonian Talmud, Treatise *Berakhot* 62b see A. Shremer, *Zakhar u-Nekeva Bara'am* (Jerusalem: Merkaz Zalman Shazar for the History of Israel, 2004), 13 for comprehensive treatment of the matter.

¹⁹ M. Elon *Ha-Mishpat ha-Ivri* (vol. 1, Jerusalem: Magnes, 3rd ed. 1998), 110. For the use of these terms in non-religious law see for example, G. Shalev *The Law of Contract – General Part – Likrat Kodifikazia shel ha-Mishpat ha-Ezrahi* (Jerusalem: Dean, 2005), The index includes entries ‘Dispositive law Instructions’ and ‘Binding law instructions’; N. Cohen and D. Friedman *Contracts* (Tel-Aviv: Aviram, 2001-2004) The index includes the entry ‘Binding and Dispositive’; S. Lifshitz *Cohabitation Law in Israel : be-Rei ha-Teoria ha-Ezrahit shel Dine ha-Mishpaḥa* (Haifa: Haifa University Press, 2005), 112-116, 156.

²⁰ For Public Halachic settlements of the ‘ona’ obligation see Y. Margalit's comprehensive treatment “Public Regulation and Private Agreement of Spousal Conjugal Privileges in Jewish Law “ (M.Ll. thesis Bar-Ilan University, The Faculty of Law, 2006), 1- 45.

²¹ For more details about the frequency of the ‘ona’ obligation for different professions see Margalit *ibid*, pp. 45-57

The continuation of the *mishnah* reveals additional aspects of the obligation of 'ona' which is incumbent upon the husband as a strict, binding obligation, with no freedom of action for the couple to make special conditions or to change the instructions, and the couple is certainly not free to refrain from sexual intercourse. The *mishnah* commences by negating the right of the husband to make an oath denying his wife any benefit from him, which would of course include sexual relations. The *mishnah* fixes the maximum period in which the husband can deny his wife sexual relations, before being forced to divorce her and to pay her the full sum written in the Ketubah –

“A husband who denies his wife sexual relations, Beth Shamai says the maximum period is two weeks, whereas Beth Hillel says one week.”²²

The *mishnah* also fixes a maximum period, that the husband may be absent from the house without his wife's permission. That is, how long may the husband be absent from the house, and thus not carry out his 'ona' obligation towards his wife –

“Students go to study without permission thirty days, workers one week.”²³

The Talmud points out (*Kethuboth* 62b) that it is accepted that a woman will always prefer her husband at home with her, carrying out his 'ona' obligations, rather than a husband who is often away from home and does not carry out his 'ona' obligations. This is true even when the absent husband is making a lot of money –

“Rabba bar Rav Hanan said to Abayye, a man who previously worked with asses and began to work with camels, what is the law, he answered his wife prefers one kav and a husband rather than 10 kavin and abstinence.”²⁴

In addition, in the Babylonian Talmud (*Gittin* 84b), there are various statements, which imply that the attempt to attach conditions or to abolish the 'ona' obligation is seen as an archetypal example

²² For more details about the invalidating of the 'ona' obligation by different sorts of oaths see Margalit, *Supra* n. 20, at 15-27.

²³ For more details about the prohibition of the husband leaving the house without his wife's permission see Margalit, *Supra* n. 20, at 27-39.

²⁴ For the prohibition for the husband to change his job where it will decrease his duties to his wife see Margalit, *Supra* n. 20, at 39-45.

of the prohibition of attaching mitigating conditions to Torah prohibitions, which are regarded as binding obligations. Thus, the freedom to make private contracts, which mitigate Torah prohibitions is rejected. There is a principle in halacha ‘whoever attaches mitigating conditions to a statement from the Torah, his conditions are invalid.’²⁵

Rav Ada the son of Rav Ika said, we say that whoever attaches mitigating conditions to a statement from the Torah, his conditions are invalid, for example, when the husband and wife agree that the husband does not have to clothe his wife or fulfil his intimate obligations ... Rabina said we say that whoever attaches mitigating conditions to a statement from the Torah, his conditions are invalid, for example, when the husband and wife definitely agree that the husband does not have to clothe his wife or fulfil his intimate obligations...

Apart from these Talmudic sources, there is a wealth of statements in early Halachic literature, which emphasize the importance of the ‘ona’ obligation in a marital relationship, and some even see it as the center of marital life, which in its turn stimulated the approach to the ‘ona’ obligation as a stringent halachic obligation, and that any attempt to mitigate or change it is doomed to failure – “the essence of intimacy”;²⁶ “the essence of a marriage in accordance with Torah without any compromises”;²⁷ “no compromises in marriage”²⁸ etc.

The halachic rulings in the major codices, Maimonides *Mishne Torah* (*Ishut*, chap. 6 halacha 9-10) and *Shulhan Arukh* (*Even ha-Ezer* 38, 5) are that any attempt to mitigate the ‘ona’ obligation will fail. To quote –

“and what they said whoever attaches mitigating conditions to a statement from the Torah, his conditions are invalid apart from monetary conditions ... but as regards ‘ona’ the condition is invalid, because the Torah requires ‘ona’ and it is sanctified and you are required to fulfil your obligation and there is no way to escape it using conditions...”

²⁵ This subject is treated by N. Rakover “Yahase ‘Ishut be-Kefiya” *Shenaton ha-Mishpat ha-Ivri* 6-7 (1979-1980), 295 - 317, 299 (also appeared as *Yahase ‘Ishut be-Kefiya ben Ba’al le-Ishto* (Ministry of Law Jerusalem, 1980)). For the general subject of conditions and Torah obligations see B. Lifshitz *Asmakhta, Hiyuv ve-Kinyan be-Mishpat Ivri* (Jerusalem: Magnes Press, 1988) 176-185.

²⁶ One of the first Rabbis to make this claim was the *Itur* (Meir Yona edition, Reprinted Warsaw, Vilna) letter mered 68, 1 and Responsa from the Provence Sages (Jerusalem, 1967), 72, 75.

²⁷ *Hidushe ha-Ramban, Baba Batra*, 126b.

²⁸ *Tosafot, Ketuboth*, 56, 1, paragraph beginning “Hare zu”; *Tosafot, Nazir*, 11, 1, paragraph beginning “Hae al menat”.

... if he made a condition not to fulfil his 'ona' obligation the condition is invalid and he is required to fulfil his obligation.”

4. The Dispositive Foundations of the Husband's Conjugal Duty

4.1 The Tannaitic Period – is this indeed Making a Condition Contrary to Torah Law?

The basic assumption derived from the passages in the Babylonian Talmud and the halachic decisions is, as we have pointed out, that any attempt to change the 'ona' obligation is invalid because it is 'attaching mitigating conditions to a statement from the Torah'. The 'ona' obligation appears in the Pentateuch, where it refers to a Hebrew female slave (Exodus, 21, 7-11) –

And if a man sell his daughter to be a maidservant, she shall not go out as the menservants do. If she shall please not her master, who has betrothed her to himself, then shall he let her be redeemed: to sell her unto a strange nation he shall have no power, seeing he has dealt deceitfully with her. And if he has betrothed her unto his son, he shall deal with her after the manner of daughters. If he takes another wife; her food, her garments and her 'ona' he shall not diminish. And if he do not these three unto her, then shall she go out free without money.

A careful examination of the Tannaitic sources reveals that the interpretation of this duty is disputed and it is not clear that it is indeed intended to strengthen the framework of the couple's intimate relations as an unyielding Torah obligation, leaving no flexibility to use a contract to amend its conditions. With regard to the source and exact identity of these three obligations, we have found a dispute between Tannaitic Rabbis which appears in the two Halachic midrashim to the Book of Exodus and in both Talmuds.²⁹ A comparison of the Tannaitic sources reveals that both sides agree as to the source of the husband's obligation to clothe his wife, however they disagree with regard to the source of the other two obligations – food and 'ona'.³⁰ However, in Rabbi Eliezer ben Yaakov's

²⁹ The parallel texts are presented in tabular form in Appendix A. We would like to point out that the phrase beginning with "davar aher" has been removed from its context before the statement by Rabbi Eliezer ben Yaakov and placed after his words for the sake of convenience, and some phrases from the Jerusalem Talmud have been shifted in order to facilitate the comparison with the appropriate parallel statements. For a summary of the different opinions, which we have presented, see M. M. Kasher, *Torah Shlemah* (New York: Schlesinger Brothers, 1956, vol. 17), 60-62, letters resh-vav to resh-tet.

³⁰ Note that we are not discussing a mere 'mashmaut dorshin' (a question of meaning) and semantics as Rabbi N. E. Rabbinovitz claims in his commentary *Yad Peshuta* to Maimonides ruling in *Sefer*

opinion (with the exception of the *Mekhilta de-Rabbi Yishmael* which ascribes the opinion to Rabbi Yonatan), the whole verse deals specifically with clothing, and therefore he has to deduce the obligations of food and 'ona' using the Talmudical logical rule *Qal we-Homer*.

The problem is that an examination of the parallel texts (in Appendix A) reveals that, although this logical deduction may be found in the *Mekhilta de-Rabbi Yishmael* and in the Jerusalem Talmud (the logical deduction for 'ona' has been emphasized for clarity), we have no trace of this deduction in the *Mekhilta de-Rabbi Shimon ben Yohai* and in the Babylonian Talmud. Thus a number of the early Rabbinical authorities reached the conclusion that since the logical deduction of *Qal we-Homer* which strengthens Rabbi Eliezer ben Yaakov's opinion is missing, it would seem that the obligation of 'ona' is, in his opinion, a Rabbinical obligation and not a Torah obligation.³¹ May we, perhaps, taking into account that our deduction is based upon a finding which is not positive, the lack of the logical deduction *Qal we-Homer* in the *Mekhilta de-Rabbi Shimon ben Yohai* and in the Babylonian Talmud, assume that in their opinion the obligation of 'ona' is not a Torah obligation, but rather a Rabbinic obligation.

A number of commentators, including the *Maggid Mishneh*, *Ba'al Hekhal ha-Melekh (Ishut, 12, 1)*; *Mare'e Apanim* on the Jerusalem Talmud; Rabbi Ovadiah Yosef and many others, reached this surprising conclusion, at least with regard to food. Even the attempt to import the necessary deduction from the Jerusalem Talmud into the Babylonian Talmud, as suggested by the *Ba'ale Tosafot* in the relevant commentary to Tractate *Ketuboth* is problematic and is inconsistent with the Babylonian Talmud's approach, that one of the participants in the discussion thinks that the food obligation is of Rabbinic origin, as several commentators have already pointed out.³² In addition, it should be pointed out that there was even a group of commentators who thought that the logical

Nashim, but the exact logical instrument used may have practical consequences which are not relevant to our current discussion.

³¹ Incidentally, we should point out that the conclusions about the parallelism between the sources may be confirmed by the closeness of the *Mekhilta de-Rabbi Yishmael* to the Jerusalem Talmud as opposed to the closeness of the *Mekhilta de-Rabbi Shimon bar Yohai* to the Babylonian Talmud. This relationship can be seen in *Teshuvat ha-Geonim* (Harkaby edition) 229 where Rav Hai Gaon calls the *Mekhilta de-Rabbi Yishmael* 'the Mekhilta from Eretz Yisrael', contrasting this work with the 'Sifre dbe Rav', which Hoffman identified in 1888 with the *Mekhilta de-Rabbi Shimon bar Yohai*.

³² As did S. K. Mirsky (editor) *Sheiltot de-Rabbi Ahai Gaon* in his commentary to Sheilta 68 (Jerusalem: The Foundation for the Publication of Sura Books, 1964, vol. 3), 187.

deduction *Qal we-Homer* in the *Mekhilta de-Rabbi Yishmael* and in the Jerusalem Talmud is of Rabbinic origin and is simply a support for the Rabbinical enactment. This is Rabbi Eliezer from Metz's opinion and in his *Sefer Yeraim* (Schiff edition) (Vilna, 1899) section 117, he stated -

“for Rabbi Eliezer ben Yaakov both food and ‘ona’ are Rabbinical obligations.”

Similarly the *Ba'al Sefer Mitzvot ha-Gadol*, at least in the first edition of this work, was of the same opinion. In addition, other commentators and Rabbinical scholars such as Rabbi Eliyahu Mizrahi,³³ the *Neziv* of Volozhin in his commentary on the *She'iltot* and *Mekhilta de Rabbi Yishmael*³⁴ and Rabbi Ovadiah Yosef in a halachic Responsum,³⁵ which dealt with the vulnerability of a *qal we-Homer* deduction, reached the conclusion that both food and ‘ona’ deduced using a *qal we-Homer* deduction, are at most rabbinical obligations and are most certainly not Torah obligations.

To summarize, the conclusions of the Talmudic discussion about the source and validity of the ‘ona’ obligation would suggest that its validity is not Torah validity. I offer three proofs to support this claim.

a. As we know, various Tannaitic sources state that the halacha is always resolved according to Rabbi Eliezer ben Yaakov because his teachings are concise and clear.³⁶ We should point out that this general rule is applicable, in the opinion of several halachic authorities, even when Rabbi Eliezer ben Yaakov differs with two *Tannaim*.³⁷ In this case Rabbi Eliezer ben

³³ Rabbi Eliyahu Mizrahi *Homash ha-Re'em* (M. Philip editor, Petah Tikvah, 1993, vol. 3), 318.

³⁴ Ha-Netziv of Volozhin in his commentary ‘ha-Ameq She’elah’ on *Ha-Sheiltot de-Rabbi Ahai Gaon* Sheilta 61 (Jerusalem: Mossad ha-Rav Kook edition, 1948, vol. 1), 406 (also ha-Netziv in his commentary ‘Birkat ha-Netziv’ to the *Mekhilta de-Rabbi Yishmael* (Jerusalem: Volozhin Yeshiva, 1997), 267-268.

³⁵ Rabbi O. Yosef Responsa *Yabia Omer* (Jerusalem, 1957-1995, vol. 3) *Even ha-Ezer*, 14.

³⁶ See *Seder Tannaim we-Amoraim* (I. Matzger edition, Jerusalem, 1988), part 2 letter 19; *Mesekhtot Qetanot, Mesekhet Avot de-Rabbi Natan*, version A, section 18, paragraph starting, “Issi ben Yehudah”; Babylonian Talmud, *Eruvin*, 62b; *Igeret Rav Sharira Gaon*, (I. Matzger edition, Jerusalem, 1988), “How the Mishnah was written”, letter 17.

³⁷ See, for example, *Maggid Mishneh, Hilkhos 'Ishut*, section 12, halakha 2; H. Benvanesht *Knesset ha-Gedola* (Jerusalem: Mekhon ha-Ketav edition, 1988), Gemara rules, p. 330, letter 17; Malakhi ha-Cohen *Yad Malakhi* (New York: Qeter, 1945), p. 104b-106a, letter 417. For a summary of the different opinions see *Talmudic Encyclopedia* entry *Halakha* (Jerusalem: Yad ha-Rav Herzog, 1959, volume 9), column 241 - 339.

Yaakov has to derive the obligation of 'ona' using a logical deduction, which some authorities claim does not derive its validity from the Torah but is merely a supporting text.

b. It is generally accepted, that this (*Qal we-Homer*) is a logical rule which can be overturned, and therefore, in other contexts, it is not used to derive Torah obligations, but merely Rabbinic ones.

c. This supporting logical derivation using *Qal we-Homer* is absent from the *Mekhilta de-Rabbi Shimon bar Yohai* and from the Babylonian Talmud.

Even if we follow the generally accepted opinion in Rabbinic literature that the obligation has Torah validity, we have found that in a number of Tannaitic sources there is a discussion as to whether in certain contexts one can make conditions, which differ from Torah rules. This is a *Beraitha*, which is quoted in the Babylonian Talmud (*Kethuboth* 56a and parallel sources) which deals with a dispute between Rabbi Meir and Rabbi Yehudah as to which of husband's obligations to his wife are subject to negotiation and can even be nullified:

“we have learnt that he who says to his wife, you are married to me on condition that you cannot claim food, clothing and 'ona', the marriage is valid, but the conditions are nullified in Rabbi Meir's opinion, whereas Rabbi Yehudah says, with regard to the financial matters, the husband's conditions can be upheld.”

The dispute between Rabbi Meir and Rabbi Yehudah regarding the possibility of making conditions regarding the financial matters, clothing and food, is indubitable, since we are discussing financial matters and their disputes centers around the question as to whether one may or may not make conditions regard to financial conditions which are not in accordance with the Torah ruling. We will continue with an analysis of Rabbi Yehudah's position with regard to the validity of conditions relating to the 'ona' obligation, since in all the citations in the Babylonian Talmud of this key Tannaitic dispute (*Kiddushin*, 19b; *Baba Mez'ia*, 51b, 94a; *Baba Batra*, 126b) Rabbi Yehudah's position is unclear, and we do not know what is his opinion as to the possibility of making conditions about this obligation. Indeed, there are authorities who claim that Rabbi Yehudah's position, 'in financial matters, his condition may be upheld', shows that he distinguishes between the financial conditions, 'clothing and food', where he differs with Rabbi Meir, and holds that the conditions are valid, whereas, the case of the 'ona' obligation is not a financial matter. Their position can be upheld, since if Rabbi Yehudah was of the opinion that the 'ona' obligation is also a

financial matter and the husband may indeed make conditions with regard to 'ona', it would have been sufficient for him to claim, "the husband's conditions are valid".³⁸

The Torah may be succinct in one place and more expansive in another place. The answer to our question may be found in the exact text of the *Tosefta Kiddushin* ((Lieberman edition) 3, 7-8:

"I hereby marry you ... on condition that if I die you will not have to make a levirate marriage, the marriage is valid, but the condition is nullified, since he made a condition, which is not in accordance with the Torah ruling and whoever makes a condition which is not in accordance with a Torah rule, the condition is invalid, on condition that you have no claim to food, clothing and 'ona', the marriage is valid and the condition is upheld".

This is the general rule, whoever makes a condition which is not in accordance with a Torah rule in financial matters, the condition may be upheld, if the condition is not financial the condition is invalid.³⁹

This *Tosefta* compares and contrasts a condition, whose aim is to save a woman from a levirate marriage if her husband will die without children, a condition which is invalid because it contradicts a Torah rule and seeks to uproot the law of levirate marriage, with a condition which aims to exempt a husband from his obligations for food, clothing and 'ona', a condition which may be upheld because it does not contradict a Torah rule. In other words, this approach is not in accordance with the generally accepted halachic opinion, including that of the *Amoraim* in the Babylonian Talmud, which sees the attempt to cancel the 'ona' obligation as an example of a condition which contradicts a Torah rule, and presents an opposing picture. In this opinion, not only is this condition not included in the conditions, which contradict Torah rules, but is also presented in the *Tosefta* as an opposite case, which is specifically excluded from that category.

From the combination of the two *halakhot* in the *Tosefta* and their presentation together, we can assume that in Rabbi Yehudah's opinion, which is presented without attribution in the second part of the *Tosefta*, and in light of the internal explanation of the Tannaitic sources attributed to Rabbi

³⁸ See, for example, Y. M. ben Menhaem *Parshat ha-Melekh* (Rambam, 'Ishut, section 6, *halakha* 10); Rabbi O. Hadayah *Yaskil Avdi* (Jerusalem, 1984, vol. 7) 20.

³⁹ This is the version of the passage in the Erfort manuscript of the *Tosefta* and in the printed version. Among the early authorities who accept this text is, the *Or Zarua* (Zitmir, 1862, vol. 3) *Piske Baba Mezia*, 301. For other positive evidence see S. Lieberman, *Tosefta ke-Peshuta Qidushin* (Jerusalem: Bet ha-Midrash le-Rabbinim be-America, 1973), 947, note 27.

Yehudah, the component, the 'ona' obligation is a dispositive component and conditions relating to this obligation are as valid as conditions relation to food and clothing.

4.2 The Approach of the Jerusalem Talmud – the Husband's Conjugal Duty is Dispositive

After we have established that in the Tannaitic sources the 'ona' obligation is regarded as dispositive and not binding, my intention is to demonstrate that the two Talmuds disagree on this question, and in contrast to the accepted halachic opinion based upon the Babylonian Talmud, the Jerusalem Talmud and apparently the Erez-Israeli midrash, *Bereshit Rabba*,⁴⁰ follow the *Tosefta* as they generally do. Indeed, an examination of the appropriate references in the Jerusalem Talmud, reveals that in one case, apparently, the Talmud cites the *Tosefta*, and in two additional cases it applies this unusual approach as normative. We will start our discussion with the source in the Jerusalem Talmud, which is based on the *mishnah* in *Baba Mezia* (chap. 7, mishnah 11), that same *mishnah* which is the basis for the treatment of the laws of guardianship of objects as resting on dispositive principles. The guard is entitled to fix the level of guardianship of the object for which he is responsible, and to use the appropriate category from the categories defined in the Torah. In the Jerusalem Talmud to the above *mishnah*⁴¹ the text reads:

“We have learnt that whoever makes a condition which is not in accordance with the Torah rule in financial matters, the condition may be upheld, if the condition is not financial the condition is invalid. How is this applied, if he says to a woman, marry me on condition that you have no right to food, clothing and 'ona', the marriage is valid and the condition may be upheld, however if he

⁴⁰ It would be appropriate to mention, that *Midrash Bereshit Rabbah*, which was edited after the Jerusalem Talmud (apparently towards the end of the fifth century C.E.) is an early midrash deriving from Erez Israel, see Y. Frankel *Darke ha-Agadah we-ha-Midrash* (Givatayim, יד לתלמוד, 1991, vol. 1), 6-7 in the introduction. *Rashi*, in his commentary to the Pentateuch (Genesis, 47, 2) calls this midrash, 'agadat Erez-Israel'; Z. Franckel *Mavo ha-Yerushalmi* (Jerusalem: Defus Omanim, 1967), 51, 2 commented, that many of the of 'aggadot', which appear in the Jerusalem Talmud appear in the midrashim especially in *Bereshit Rabbah*. H. Albeck is also of this opinion, see his edition of *Midrash Bereshit Rabbah* (Jerusalem: Sifrei Warman, 1965, vol. 3), 67 in the introduction, where he claims that the editor of *Midrash Rabba* used the Jerusalem Talmud heavily. We can therefore conclude that an additional early source, which demonstrates that the tradition in *Erez Israel* was to recognize conditions which nullified the various obligations incumbent upon the husband, including the duty of 'ona'

⁴¹ *Baba Mezia* (Escorial ms. (edition by E. S. Rosenthal and S. Lieberman)) section 7, halacha 7, 11, 3.

makes a condition that if I die intestate you will not need levirate marriage, the marriage is valid but the condition cannot be upheld.”

This would seem to be a direct quotation of the *Tosefta* from Tractate *Qidushin*, except that the presentation of the examples has been reversed, food, clothing and ‘ona’ appearing before levirate marriage, and indeed in his commentary *Mar’e Panim* was of this opinion. Similarly, the discussion in the Jerusalem Talmud, Tractate *Ketuboth* (Section 5, halacha 8, 30):

“If she brought slaves, she does not owe him labor, if he made the condition that he is not liable for clothing, food and ‘ona’, he is not liable.”

We thus see an approach whereby a husband can make conditions regarding or nullify his obligation of ‘ona’, in the same way as he can make conditions or nullify his monetary obligations of food and clothing. The *mishnah* in Tractate *Ketuboth* (section 5, *mishnah* 7) lays down that a wife who rebels and refuses to have intercourse with her husband is fined seven dinarim to be taken out of her *Ketubah* each week, whereas a husband who refuses to have intercourse with his wife has to add three dinar to the *Ketubah* each week. The Jerusalem Talmud presents Rabbi Yossi bar Haninah’s explanation, that since the wife has to undertake seven different household tasks, she therefore has to pay a fine of seven dinars per week, whereas the rebellious husband, who has not fulfilled his three obligations to his wife (food, clothing and ‘ona’) has to pay three dinars per week. The Jerusalem Talmud finds this approach problematic and asks what will happen in the case of a couple who did not have these obligations, for example either when a wife brought female slaves to do the housework or when a husband had already nullified these three obligations, would we not fine them and if not, “what is the point of the Rabbinical decree”?⁴²

This basic assumption also appears in the discussion in Tractate *Qidushin* (section 1, halacha 2, 59, 3), but during the discussion, the Jerusalem Talmud first raises an objection to this approach:

“we have learnt that a man may marry a woman on condition that she has no claim to food, clothing and ‘ona’, we understand food and clothing, but is not

⁴² Incidentally, please note that Jerusalem Talmud uses the term ‘consider’ frequently, this appears in the imperative quite often see Y. K. *Arukh ha-Shalem* (New York: Halacha Publishing 1955, vol. 4), 108, entry ‘yga’. However, in our context, it would be more appropriate to consider the term as an expression of surprise and not a commandment or explanation, as L. Moskovitz pointed out in his *ha-Termonologia shel ha-Yerushalmi* (Doctoral thesis, Hebrew University, 1998), 198. This explanation of the term is appropriate in most cases.

‘ona’ a physical rather than financial obligation, Rabbi Hiyya bar Ada claims that we are talking about a minor.”

The question in the Jerusalem Talmud is based on a *Beraitha*, which assumes the validity of conditions regarding ‘ona’, but the Talmud is surprised since is not ‘ona’ a physical rather than financial obligation and as such no condition would be valid?

Rabbi Hiyya answers that we are discussing a minor, i.e., we must limit the application of the Jerusalem Talmuds’ rule, that it is normative and that in every case we may make conditions applicable to ‘ona’. Commentators on the Jerusalem Talmud and many of the later Rabbinical authorities,⁴³ reached the conclusion that in the case of an adult wife, the husband would have no right to make conditions regarding ‘ona’, whereas in the case of a minor, who would not be hurt by the condition, the husband may make conditions or nullify his obligation.

Ha-Rav Pinhas ha-Levi Horowitz, author of *ha-Hafla’ah* (last section, 69, 6) and of *ha-Miqnah* (*Qidushin*, 19b, paragraph beginning “batos”) objects to this approach for several reasons and reaches the opposite conclusion, that the adult can nullify her ‘ona’ rights, and all the discussions in the Jerusalem Talmud referred to an adult who was capable of nullifying her rights to ‘ona’. The *Be’riata* which rejected the possibility of making such a condition dealt with a minor, since her father was not allowed to agree to such a condition, the Torah had given him no such right.⁴⁴

⁴³ This is in accordance with the opinion of the *Qorban Eda*, see his commentary to the discussion, paragraph commencing “u-meshane”, this is also the opinion of the *Mishne le-Melekh* (*Ishut*, section 15, halacha 1). The *Pne Moshe* has a similar comment, paragraph commencing “Tipater”, that a minor is not concerned with her “ona”, and many recent authorities concur, see for example, ha-Rav Shakh (Supra n. 49 below), S. Cohen in his responsa *Binyan Shelomo* (Jerusalem: Harav S. Neiman, 1992, vol. 2). The *Even ha-Ezer* 4, wrote that a minor, who is not negatively affected, would compromise on her ‘ona’ rights willingly, whereas in the case of an adult, even if she says that she agrees to nullify the husband’s obligation, we suspect that she is ashamed in his presence and her agreement is not whole-hearted; Rabbi O. Hadaya in his book *Yaskil Avdi*, 20 (Jerusalem, 2004, vol. 7) presented a more extreme approach, that in the case of a minor who was not concerned about the ‘ona’, and would not be distressed by the loss of the ‘ona’, then the husband has no obligation of ‘ona’, however, in the case of an adult who enjoys the ‘ona’, the husband is obligated and cannot compromise this right whether the compromise would distress the wife or not.

⁴⁴ The *Hafla’ah* explained the matter in his book *Beni Ahuvah* (Jerusalem, 1965, vol. 1) in his commentary on the laws of *Ishut* by Maimonides (vol. 6, halacha 10). Rabbi M. Si. ha-Cohen discussed the comment in his emendations to the Jerusalem Talmud in the passage: “and these are the

It would be appropriate to mention the group of Rabbinical authorities who adopted the Jerusalem Talmud's position, and for them the 'ona' obligation is dispositive and the sides may agree conditions which change the obligation or even nullify the obligation. Among others, we would mention the *Ritba*,⁴⁵ who is convinced that the obligation of 'ona' is dispositive and subject to conditions – basing himself primarily on the Jerusalem Talmud's approach which we have discussed in depth. Secondly, the Babylonian Talmud in a discussion in Tractate *Baba Qama*, 93a, is also of the opinion that bodily discomfort and pain can be translated into financial terms, and since we are discussing a woman's discomfort and pleasure, and since she is permitted to make conditions or nullify the obligation, the husband may also make conditions and nullify. This opinion is quoted in the name of the *Ritba* by the *Mordechai* on Tractate *Baba Mez'ia*;⁴⁶ *ha-Maharik* (Jerusalem, 1988) Root 10 and additional early Rabbinic authorities,⁴⁷ Some of the authorities

words of the living G-d and the Jerusalem Talmud is true for those who understand". Rabbi S. ha-Levi Wozner also adopted this approach in his book of responsa *Shevet ha-Levi* (no publication place, 2002, vol. 6) on *Even ha-Ezer* section 212, as does S. M. Diskin in his commentary *Massat ha-Melekh* on Tractate *Qidushin* 331 (Jerusalem: S. M. Diskin, 1998), that specifically in the case of a minor, whose father agreed to the limiting conditions on 'ona', the conditions are valid, whereas in the case of an adult woman who agrees to free her husband from the obligation of 'ona', the agreement is not whole-hearted.

⁴⁵ See his commentary to the various discussions in the talmud, for example, *Baba Mez'ia*, 51a, in the paragraph, "Rabbi Yehudah"; *Qidushin*, 19b, in the paragraph beginning "Rabbi Yehudah".

⁴⁶ Section 369. Similarly in *Qetubot*, section 313, where he states that the husband's conditions regarding 'ona' are valid, however the *Bach* in his comments (ibid. letter *kaf*) erased the word 'ona' and ignored the *Mordechai's* unconventional approach to the subject.

⁴⁷ It is possible that *Rashi* in his early edition (quoted in the *Shita Mekubetzet* to Tractate *Qetubot* 56a) thinks that a woman is not so ready to compromise her 'ona', but if she should agree to do so then her agreement would stand, and Rabbi Elhanan is of a similar opinion (*Tosafot*, ibid. paragraph "hare zu"), thus if a person uses the formula, "I want you to free me from the obligation of 'ona'", the condition would be valid. The *Parshat ha-Melekh* (*Ishut*, section 6, halacha 10) concluded from the words of the *Ba'al ha-Itur*, who after having presented the dispute between Rabbi Meir and Rabbi Yehudah quoted the Jerusalem Talmud, which supports the possibility that 'ona' can be the subject of a condition. However, on the other hand, we should point out another opinion within the *Itur* (Rabbi Yonah's edition, reprinted in Warsaw and Vilna) letter Kuf, on *Qidushin* 79a, in which he quoted Rabbi Yehudah's opinion without any comment, suggesting that he does not believe that 'ona' is a financial matter. For a full discussion of this approach and the views of other authorities, see *Mishne le-Melekh* and *Beni Ahuvah* on Maimonides (ibid.)

raised this unique opinion in their responsa. To summarize, this key difference of opinion was best presented by the *Mishne le-Melekh* (*Ishut*, chap. 6, halakha 10):

“We would summarize the opinions, in the opinion of *Rashi*, and the *Tosafot*, *Maimonides* and the *Ran*, and the *Tur* and *Rabenu Yeruham*, conditions regarding the obligation of ‘ona’ are invalid, whereas *Rabenu Tam*, the *Mordechai* and the *Ritba* believe that one may make conditions with regard to ‘ona’ just as one does regarding food and clothing and their source is the Jerusalem Talmud as we have shown.”

5. An Examination of the Commentators on the Talmudic Discussion

In order to explain the dispute between the two Talmuds, one could suggest any one of a number of dogmatic explanations, explanations with an internal halachic logic – explanations as to why in the Babylonian Talmud, the ‘ona’ is seen as a binding obligation, whereas, in the Jerusalem Talmud the ‘ona’ obligation is dispositive.

5.1 The Conjugal Duty as a Monetary Question

The crux of the matter is the question as to whether ‘ona’ is seen as a financial obligation, which is then open to modification, compromise, etc. The Jerusalem Talmud sees ‘ona’ as a financial question. However, the Babylonian Talmud disagrees and does not see ‘ona’ as a financial question, and there is therefore no room to modify its conditions. Thus, in the opinion of the Jerusalem Talmud, since we are discussing a woman’s physical pleasure, the husband may translate this pleasure into monetary terms, and the woman can give up her ‘ona’ in return for financial compensation, which proves that we are discussing a financial matter which is open to negotiation or even nullification. The Babylonian Talmud, following the approach of Rashi and of many other commentators, states that we are discussing bodily discomfort, and ‘ona’ is therefore not subject to compromise or nullification.

5.2 The Source of the Conjugal Obligation - Derived from the Torah or Extrapolated by Talmudic Sages

In the commentary to Maimonides' work, called *Nimuke ha-Grib*,⁴⁸ the commentator derived the dispute between the two Talmuds from a Tannaitic dispute, which was concerned with the source of the 'ona' obligation. As we pointed out above, in the opinion of those sages who disagree with Rabbi Eliezer ben Yaakov, the source of the 'ona' obligation is derived directly from the Torah, and its validity is derived from the Torah, and therefore any attempt to change the 'ona' conditions is invalid since it is attaching mitigating conditions to a statement from the Torah, and this is the Babylonian Talmud's approach. Rabbi Eliezer ben Yaakov, however, thinks that the source of the obligation of 'ona' is by derivation from the obligations of food and clothing using the logical tool *Qal we-Homer*, and therefore 'ona' cannot be more severe than its source food and clothing, and, just as the husband may change or nullify his obligation to provide food and clothing, so may he change or nullify his 'ona' obligation. This is the Jerusalem Talmud's approach.

5.3 Uprooting the Conjugal Obligation or Denying the Possibility of Remitting it

Rabbi El'azar Menahem Man Shakh⁴⁹ in his explanation of the dispute between the two Talmuds, stressed, that, in essence, we are discussing the nature of a woman's ability to give up her right to the 'ona' – the opinion in the Jerusalem Talmud can be explained in terms of what certain of the early Rabbinical authorities pointed out that in Rabbi Yehudah's opinion a husband may nullify his 'ona' obligation if his wife has first agreed to renounce her rights. The Torah only required a husband to undertake a commitment if his wife agreed, and it is usually accepted that after a person who is liable has made a commitment to somebody who is not liable, the latter may renounce his or her rights and in that case the person who is liable may nullify the obligation completely. Similarly, since the wife may renounce her rights to 'ona', in this opinion, the husband may modify or nullify his 'ona' obligation, and this forms the basis of the opinion expressed in the Jerusalem Talmud.⁵⁰

⁴⁸ It appears in a compendium called *Sefer ha-Likutim*, which is published at the end of Maimonides' *Mishneh Torah* (S. Frankel edition, Jerusalem – Bene Brak: Qehilat Bne Yosef, 1977). It refers to Maimonides' ruling, '*Ishut*, section 15, halacha 1.

⁴⁹ 'Avi 'Ezri (2nd edition, Bne Braq: The Author, 1967), '*Ishut*, section 6, halakha 10.

⁵⁰ Among contemporary Rabbinical authorities, we have found this novel approach, that since the husband can nullify his Torah obligation towards his wife, we must assume that the source of the 'ona' is in an obligation accepted freely by the husband towards his wife. Therefore, if the husband will

Whereas the Babylonian Talmud is, as is Maimonides, of the opinion that the 'ona' obligation cannot be modified, and we may assume that they concur with the opinion of most the early Rabbinic authorities,⁵¹ that Rabbi Yehudah explained that the husband made the condition that his wife should renounce her rights to 'ona', but since, in the case of 'ona' neither of the couple can change the Torah conditions, any attempt by the husband to nullify the obligation would be invalid since it is attaching mitigating conditions to a statement from the Torah and therefore the condition cannot be nullified.⁵² Other contemporary authorities such as Rabbi Moshe Ehrenreich⁵³ and Rabbi Sh. Yaloz⁵⁴ ascribed the dispute between the Talmuds to differing opinions regarding the content of the conditions – in the Jerusalem Talmud's opinion the change is temporary or the husband receives

make an agreement prior to the marriage that his wife has no right to food, clothing and 'ona', then the condition will be valid, see, for example, *Hagahot Havot Ya'ir* on Alfasi's commentary to *Baba Mez'ia* (section 7, 54, 1, letter khaf) – “from here we derive a new approach and a new law that if the husband made a condition with his wife prior to the marriage that she has no rights to food, clothing and 'ona', even in the case of 'ona', the condition is valid”. Y. Engel in the *Gilyone ha-Shas* ([no place of publication], 1964) on Tractate *Nedarim*, 15b – “this proves that the obligation is voluntary and that if he did not want to assume the obligation, he is free of the obligation, which is not Divinely imposed, but is purely voluntary” and he puts forward a similar approach in his novellae on Tractate *Makot*, 3b, see the paragraph, “al menat shelo..”. See also Rakover's research, *Supra* n. 25.

⁵¹ Various early Rabbinical authorities such as the *Rashba* (quoted in the *Shita Mekubezet, Ketubot*, 56a) and others, saw the dispute between Rabbi Meir and Rabbi Yehudah on the husband's condition that he is not liable to food, clothing and 'ona' as resting on different understandings of the husband's condition – whereas for Rabbi Meir the significance of the condition is that it contradicts a Torah obligation and therefore invalid, Rabbi Yehudah thinks that the husband has no intention of nullifying a Torah obligation, since he assumes that his wife agrees to renounce her rights, then the condition is valid. For a repudiation of this explanation, which transfers the dispute from the significance of the condition to the right to make conditions which nullify Torah obligations, see for example, *Hazon 'Ish* (Bne Braq: Rabbi Greneman, 1974) *Even ha-Ezer*, 56, letter 17.

⁵² Y. ha-Levi Be'eri *Mishnat Rishonim* (Jerusalem: The Author, 1966, vol. 3) 152, who is of the opinion that for both the Jerusalem Talmud and the *Tosefta*, the 'ona' is dispositive, since they understand that the essence of the condition is that the wife has no right to sue the husband, and this of course is a valid condition. The Babylonian Talmud see the condition as stating that the husband has no obligation whatsoever for 'ona' during the marriage, a condition which is obviously invalid.

⁵³ M. Ehrenreich “Hiyyuv Ona: Hova Regila 'o Iqar ha-Nisu'in” *Hemdat ha-'Arez* 2 (2002), 42-50, 50.

⁵⁴ S. Yaloz “'Ikuv Nesi'at ha-Ba'al le-Merhakim” *Sefer Rabi Eliyahu Pardes* (Jerusalem: The Municipality, Department of Culture, 1974) 50-61.

permission to refrain from his 'ona' obligation for a given period and this is a valid condition, whereas the Babylonian Talmud sees it as limitless and general permission to nullify the wife's 'ona', which is clearly an invalid condition.

5.4 The Conjugal Obligation - the Essence of the Marriage or Derived from it

With reference to the dispute between the two Talmuds, we would like to suggest that they differ in their definitions of the essence of marriage and its boundaries – the **Babylonian Talmud** sees the 'ona' as an **inherent and inseparable part of the institution of marriage**,⁵⁵ and therefore any attempt to make conditions or to nullify it are invalid, since it is attaching mitigating conditions to a statement from the Torah. In other words, according to this approach, any positive component, which is seen as part of a legal institution which is defined by the Torah, is entitled to defense and any attempt to mitigate it is invalid in the light of the rule forbidding the attachment of mitigating conditions to a statement from the Torah.

The **Jerusalem Talmud** has a different approach, and we would emphasize that the 'ona' obligation **is not an integral part of the marriage**, but may rather be considered to be similar to the food and clothing conditions and we are therefore dealing with **obligations derived from the status of being married**.⁵⁶ This may possibly facilitate the definition of 'ona' as dispositive, and therefore open to mitigating conditions and nullification, as is the case with the other financial obligations. In other words, any positive component which is not regarded as an integral part of the legal institution defined in Torah law, but rather as derived from or accompanying the institution

⁵⁵ See the famous responsum written by the *Neziv* in his responsa *Meshiv Davar* (Part 4, 35) – “The Torah states that the husband does not have any rights of ownership to his wife except for intimate relations, but apart from intimate relations, the husband does not own his wife”. For other discussions of the significance and halachic consequences of marrying a woman see, K. Kahanna *Birkat Kohan* (Jerusalem: Mosad ha-Rav Kook, 1972), 22-53, 101-123.

⁵⁶ See Ehrenreich, *Supra* n. 53; D. Mazger “Qinyan ‘Ishut we-Hiyuvav” *Sefer ha-Zikaron Darke Menahem* (Jerusalem: Private Publishing, 1981), 450-454. Please note, that from the status of being married, it follows that not only is the husband obligated to 'ona', but the wife is also prohibited from intimate relations with other men apart from her husband and is reserved for her husband. For further discussion see Y. Z. Grossman *Qunterese ha-Shi'urim*, Tractate Qidushin (Jerusalem: Yeshivat Nezaḥ Yisrael, 1992) section 1. For additional differences in the views of marriage between Babylonian and Palestinians see M. Satlow, *Jewish Marriage in Antiquity* (Princeton: Princeton University Press, 2001), 34 – 36.

may be defined as a 'financial condition', not in the narrow sense as a monetary component, which can be redeemed or translated into money terms, but rather as a dispositive component whose conditions may be changed. Since the component is not an inherent part of the Torah institution, it is not included in the rule against attaching mitigating conditions to a statement from the Torah. If our approach to the position of the Jerusalem Talmud is valid, since the 'ona' is not an inherent part of the marriage, we may reach the conclusion that it is possible to be more liberal in making conditions or even in nullifying the obligation, since we are not attaching mitigating conditions to a statement from the Torah, and in this situation, the person making the condition, is not changing anything which is an essential part of the marriage institution. However, since the Babylonian Talmud sees the 'ona' component as an inherent part of the marriage institution and a major part, which cannot be separated from it, any condition which would nullify the 'ona' would be invalid since it attaches mitigating conditions to a statement from the Torah.

5.5 The Conjugal Obligation - a Monetary Debt or a Personal Obligation⁵⁷

Rabbi Y. M. ben Menahem, author of *Parshat ha-Melekh*, in his commentary to Maimonides' ruling (*Ishut*, section 6, halakha 10) reached the conclusion from Maimonides' phrasing, that he thought that the key to understanding the dispute between the two Talmuds lies in the discussion in the Jerusalem Talmud, Tractate *Qidushin* above, which, together with most of the commentators reaches the conclusion that the possibility of nullifying the obligation of 'ona' applies to the case of a minor. Therefore, we may assume that the Jerusalem Talmud does not see the 'ona' as the husband's personal obligation, the discussion concentrates on the question as to whether nullifying the 'ona' causes bodily discomfort, and he therefore thinks that the 'ona' may indeed be nullified only in the case of a minor, who would not then suffer bodily discomfort.

The Babylonian Talmud, however, takes a unilateral view, where Rabbi Yehudah accepts Rabbi Meir's view, that the 'ona' obligation cannot be modified in any way. He sees 'ona' as an obligation incumbent on the husband and no attempt to modify or nullify this obligation is acceptable even directly prior to or during the marriage. The Babylonian Talmud holds that the husband must supply food, clothing and keep the 'ona'. He is obligated to fulfill his wife's different needs. Although, food and clothing are personal obligations, therefore if the wife renounces her rights, she

⁵⁷ A similar case dealing with alimony, discussed whether the payments were a financial debt or an obligation, see 1957/103 2 P.D.R 65, 88.

is able to sustain herself in other ways. Since the wife does have food and clothing, the husband is seen to have fulfilled his obligations. 'Ona' is different, since it is a personal obligation. The wife can only look to her husband for this obligation. There is no possible replacement. Since intimate relations cannot be subject to compromise and without these relations the marriage is meaningless, the husband has no right to modify or nullify the obligation.

The *Yeshu'ot Ya'akov* (Jerusalem, 1976) distinguishes between debt and obligation in his long explanation on a ruling in the *Shulhan 'Arukh*, 76, letter *gimmel*, recognizing a difference between the husband's financial obligations to sustain his wife and his bodily obligation to fulfill 'ona' and he explains the opinion of the *Ture Zahav*:

“With regard to sexual relations, it is not he who is obligated, the thing, i.e. his wife's body, is obligated to her husband for sexual relations, whereas in the case of sustenance, the husband may be obligated to his wife, but not his body ... since here the essence is that he owes her money only, whereas in the case of sexual relations, we are dealing with the body, similarly the woman's obligation to give the fruits of her labor to her husband is not a bodily obligation, but rather monetary.”

6. Epilogue – Does the Jerusalem Talmud Recognize Freedom of Contracts Relating to the Intimate Aspects of Spouse's Relations?

In this study, I discussed dispositive aspects of the 'ona' obligation in different early sources, using Tannaitic and Amoraic sources, devoting special attention to the unique approach in the Jerusalem Talmud, which offers the possibility of amending the Torah conjugal obligation by mutual agreement. We concluded the discussion by presenting the opinions of different early Rabbinical authorities, who follow the approach of the Jerusalem Talmud, although it is not the normative approach. In the light of this approach, we should ask if this is a general position, an example which illustrates a general rule, or are we dealing with a specific case, which cannot be used to deduce a rule. In other words, are we in a position to begin to trace a pattern of freedom of contract in which the Jerusalem Talmud allows us to introduced conditions with regard to different aspects of a couple's intimate relations, in fields such as the conditions of the *Ketubah*, the husband's inheriting his wife, the possibility of wife initiating divorce proceedings? A full and systematic discussion of this fascinating subject is beyond the scope of this article and I plan to discuss it in an

independent research project.⁵⁸

⁵⁸ “Freedom of Contract” in Halachic Family Law? – A Comparison of the Babylonian Talmud and the Jerusalem Talmud” (not yet published).

<p>מכילתא דרבי ישמעאל, מהד' הורוביץ, משפטים, מסכתא דנזיקין, פרשה ג, עמ' 258 – 259</p>	<p>מכילתא דרבי שמעון בר יוחאי, מהד' אפשטיין – מלמד, פרק כא, פס' י, עמ' 167 - 168</p>	<p>תלמוד בבלי, מהד' וילנא, מסכת כתובות, מז, ב</p>	<p>תלמוד ירושלמי, מהד' וינצ'יא, מסכת כתובות, פ"ה ה"ז ל, ב</p>
<p>שארה אלו מזונותיה וכן הוא אומר ואשר אכלו שאר עמי, וכתוב וימטר עליהם כעפר שאר כסותה, כמשמעו ועונתה זו דרך ארץ שנאמר וישכב אותה ויענה דברי רבי יאשיה. רבי יונתן אומר שארה כסותה כסות שהוא נופל לשארה אם היתה ילדה לא יתן לה של זקנה זקנה לא יתן לה של ילדה ועונתה שלא יתן לה של ימות החמה בימות הגשמים ולא של ימות הגשמים בימות החמה אלא נותן לה כל אחד ואחד בעונתה מזונותיה מנין אמרת ק"ו ומה דברים שאינן קיום נפש אי אתה רשאי למנע ממנה דברים שהם קיום נפש, דין הוא שלא תהא רשאי למנוע</p>	<p>שארה זו פרנסתה כענין שנא' ואשר אכלו שאר עמי וגומ' כסותה זו כסות עונתה זו עונה האמורה בתורהⁱ ר' אליעזר בן יעקב אומ' שארה כסותה לפי שארה תהא כסותה שלא יהא מלבישה כסות זקנה בילדה וכסות ילדה בזקנה כסותה ועונתה לפי עיתתהⁱⁱ תהא כסותה שלא יתן לה כלים של חמה בימות הגשמים ושלגשמים בימות החמה</p>	<p>שארה אלו מזונות וכן הוא אומר ואשר אכלו שאר עמי כסותה כמשמעו עונתה זו עונה האמורה בתורה וכן הוא אומר אם תענה את בנותי רבי אליעזר בן יעקב אומר שארה כסותה לפום שארה תן כסותה שלא יתן לה לא של ילדה לזקנה ולא של זקנה לילדה כסותה ועונתה לפום עונתה תן כסותה שלא יתן חדשים בימות החמה ולא שחקים בימות הגשמים²</p>	<p>אית תניי תני שאר זה המזון מאן דמר שאר זה המזון וימטר עליהם כעפר שאר עונה זה דרך ארץ עונה זה דרך ארץ אם תענה את בנותי זה דרך ארץ רבי ליעזר⁴ בן יעקב פתר קרייה שארה כסותה שתהא הכסות לפי השאר שלא יתן לה את הילדה לזקנה ולא את הזקנה לילדה כסותה ועונתה שתהא הכסות לפי העונה שלא יתן של קייץ בימות הגשמים ולא של גשמים בקייץ מנא לה מזון [מה אם דברי' שאין בהן קיום נפש אינו רשאי לימנע ממנה דברים שהן קיום נפש לא כל שכן</p>

² This is the text in the Rome edition, 130; Munchen 95, and the Soncino edition 1688, but in the Rome Ms. 113, 487, and in Paris. Ms 307 of *Sefer Hagadot Hazal* the two parts of Rabbi Eliezer ben Yaakov's presentation are reversed. The *Ritba* in the *Shita Mekubezet* noticed the different versions and that Rashi's version is similar to the print version, we have before us, whereas Rabenu Hayyim who is quoted by the *Ritba* and *Shita Mekubezet* followed the later version which reverses the order of study. For other early Rabbinical authorities who followed Rabbenu Hayyim see *Dikduke Sofrim ha-Shalem to Ketuboth* (Jerusalem: Machon Hatalmud Hashalem, 1967, vol. 2), 352, note 3. The *Ritba* summarises – "the result is the same".

<p>הימנה</p> <p>דרך ארץ מנין אמרת ק"ו ומה דברים שלא נשאת עליהם מתחלה אינו רשאי למנע הימנה דברים שנשאת עליהם מתחלה דין הוא שלא יהא רשאי למנע הימנה ר' אומר שארה זו דרך ארץ שני איש איש אל כל שאר בשרו וכתוב שאר אביך שאר אמך כסותה כמשמעו</p> <p>עונתה אלו מזונות שנא' ויענך וירעיבך.</p>	<p>ד"א שארה זו קרובת בשר כענין שנא' איש איש אל כל שאר בשרו וגומ'</p> <p>כסותה זו כסות עונתה זו פרנסתה.</p>	<p>רבי אלעזר³ אומר שארה זו עונה וכן הוא אומר איש איש אל כל שאר בשרו לא תקרבו לגלות ערוה כסותה כמשמעו</p> <p>עונתה אלו מזונות וכן הוא אומר ויענך וירעיבך.</p>	<p>מנא לה עונה⁵ מה אם דברים עד שלא נישאת לכאן משעה ראשונה אינו רשאי לימנע ממנה דברים שנישאת לכאן משעה ראשונה לא כל שכן</p> <p>אית תניי תני ששאר זה דרך ארץ מאן דמר שאר זה דרך ארץ איש איש אל כל שאר בשרו</p> <p>עונה זה המזון⁶ עונה זה המזון ויענך וירעיבך.</p>
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⁴ Kasher, *Supra* n. 29, at 61, letter 207 wrote that the Jerusalem Talmud should read not 'Rabi' but 'Rabbi Yohanan' as we find in the *Mekhilta de-Rabbi Yishmael*, we can then avoid the conclusion that the two Talmuds disagreed as to whether the 'food' obligation was a Torah obligation or a Rabbinic obligation.

³ E. Z. Melamed *Midrashe-Halakha shel ha-Tannaim be-Talmud Bavli* (Jerusalem: Magnes Press, 1988), rightly pointed out that Rabbi Eliezer's statements in the Babylonian Talmud were not attributed to him neither in the *Mekhilta de-Rabbi Yishmael* nor in the *Mekhilta de-Rabbi Shimon bar Yohai* – in the former the statement was attribute to Rabbi, whereas in the latter, it was "another opinion". It is possible that a mistake in understanding the initials caused it to be attributed to somebody else. In the Jerusalem Talmud, the text reads, "it tanye tanye". This term is explained by H. Albeck in "Nushot be-Mishnah shel ha-Amoraim" in: *Ma'amarim le-Zikhron Rabbi Zvi Peretz Hayyot* (A. Aptowitz and Z. Schwartz, editors, Wien: Memorial Fund of Alexander Kohut, 1933), 1-28, 3-5; Franckel, *Mavo ha-Yerushalmi*, *Supra* n. 40, at 19; E. Z. Melamed *Pirque Mavo le-Sifrut ha-Talmud* (Jerusalem: Yeshivat Sha'are Raḥamim, 1973) 282.

⁵ In the Leiden manuscript, the scribe added these words, whereas in the Constantinople manuscript, the text reads: "if he is not allowed to refrain from giving his wife non-essential things, he must certainly ensure that she receives that which is essential".

⁶ In the Leiden manuscript, there is an addition, "and he tortured you and starved you. This phrase apparently appeared twice by mistake and was erased from the manuscript by the reviser.

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- i In the Hoffman edition, the text reads – “her ‘ona’ is fair practice as it is written, if you distress my daughters”.
- ii In the Hoffman edition, the text reads – “onatah”. See also Binyamin De-Vries *Mehqarim be-Sifrut ha-Talmud* 142-147 (Jerusalem, 1968), who pointed out the difference, and the different terminology, between ‘she’erah’ in the *Mekhilta de-Rabbi Yishmae’l* and the two Talmuds, ‘Parnasah’ in the *Mekhilta de-Rabbi Shimon bar Yohai*. This is common to the various important editions including *Midrash ha-Gadol*, (edited by Mordechai Margoliot, Jerusalem, 1956, vol. 2), 469.