Agunah:

The Manchester Analysis

Draft Final Report of the

Agunah Research Unit

University of Manchester

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"Although my knowledge will not tip the scales … nevertheless, there is no greater sin than [inaction] for someone capable [of learning] and of being of help to these women … perhaps I too will be worthy to aid them that the daughters of Israel be not as captives of the sword …"

Rabbi David Pipano, Sofia, Bulgaria

***Responsa Nose'* *Ha'Efod*, *responsum* 34 (5688/1927-28)**

NB: The contents of this paper are purely theoretical. Practical questions must be submitted to those with the appropriate Orthodox halakhic authority

Contents

Chapter One: Introduction

A. The Agunah Research Unit

1.1 The Agunah Research Unit was founded at the University of Manchester in 2004 and is concluding its work in 2009. Its personnel has consisted of Professor Bernard Jackson (Director), Rabbi Dr. Yehudah Abel (Senior Research Fellow), Dr. Avishalom Westreich (Postdoctoral Research Fellow), Dr. Shoshana Borocin-Knol and Mrs. Nechama Hadari (none working full-time for the whole period). We are indebted to a number of foundations, charitable trusts and individuals, who have supported our work, notably the Leverhulme Trust, the Rothschild Foundation Europe (formerly Hanadiv), the British Academy, the Harbour Charitable Trust, the David Uri Memorial Trust, the Steinberg Family Trust, the Davidson Family Trust, Mr. Romie Tager QC, Mr. Ralph Shaw and the late Dr. M. Ish-Horowicz.

1.2 We have been assisted at various times by a number of visiting Rabbis and Scholars, including R. Yeḥezkel Margalit, Rabbi Professor Daniel Sperber, Professor Elimelekh Westreich and a distinguished group of senior Rabbis and scholars who participated in a private feedback workshop in July 2008. We thank all who have interacted with our work, both in Manchester and at conference/seminar presentations. Naturally, we alone are responsible for the report which follows.

1.3 This report seeks to synthesise and develop a substantial body of Working Papers published on our web site in the course of our work.

1. Bernard Jackson, "Agunah and the Problem of Authority" - Text of lecture delivered in London on 13th March 2001 under the auspices of the Institute of Advanced Legal Studies, the Oxford Centre for Hebrew and Jewish Studies and the Jewish Law Publication Fund Trustees: http://www.mucjs.org/2001jlpf.pdf
2. Bernard Jackson, "Agunah and the Problem of Authority: Directions for Future Research", *Melilah* 2004/1, pp.1-78 - a much expanded, fully documented version of the above lecture, available in both pdf (Acrobat) and Word versions.
3. Bernard Jackson, "Agunah: Problems of History and Authority", Paper delivered at JOFA Fourth International Conference on Feminism and Orthodoxy, New York, November 10th, 2002: http://www.mucjs.org/jofaweb.htm
4. Yehudah Abel, "The Plight of the '*Agunah* and Conditional Marriage" (Working Papers of the Agunah Research Unit, June 2008): http://www.mucjs.org/MELILAH/2005/1.pdf
5. Yehudah Abel, "Rabbi Morgenstern's Agunah Solution" (Working Papers of the Agunah Research Unit, June 2008): http://www.mucjs.org/Morg.pdf
6 Yehudah Abel, "A critique of Za'aqat Dalot" (Working Papers of the Agunah Research Unit, June 2008): http://www.mucjs.org/ZD.pdf
7. Yehudah Abel, "Halakhah - Majority, Seniority, Finality and Consensus" (Working Papers of the Agunah Research Unit, June 2008): http://www.mucjs.org/Consensus.pdf
8. Bernard Jackson, "Preliminary Report of the Agunah Research Unit" (Working Papers of the Agunah Research Unit, December 2006): http://www.mucjs.org/PrelimRep.pdf
9. Avishalom Westreich, "Compelling a Divorce? Early Talmudic Roots of Coercion in a Case of *Moredet*" (Working Papers of the Agunah Research Unit, May 2008): http://www.mucjs.org/Moredet.pdf
10. Avishalom Westreich, "'*Umdena*: Between Mistaken Transaction (*Kidushey ta'ut)* and Terminative Condition" (Working Papers of the Agunah Research Unit, November 2008): http://www.mucjs.org/Umdena.pdf
11. Avishalom Westreich, "Annulment of Marriage (*Hafka'at Qiddushin*): Re-examination of an Old Debate" (Working Papers of the Agunah Research Unit, June 2008):

http://www.mucjs.org/Annulment.pdf

12. Yehudah Abel, "*Hafqa'ah, Kefiyah, Tena'im*" (Working Papers of the Agunah Research Unit, June 2008): http://www.mucjs.org/HKT.pdf
13. Yehudah Abel, "Comments on "'*En Tenai BeNissu'in*" by R. Zevi Gertner and R. Bezalel Karlinski" (Working Papers of the Agunah Research Unit, November 2008): http://www.mucjs.org/Gertner.pdf
14. Yehudah Abel, *"Herut* '*Olam* (London 1928) by Rabbi Yosef Shapotshnick" (Working Papers of the Agunah Research Unit, November 2008): http://www.mucjs.org/Shapotshnick.pdf
15. Avishalom Westreich, "History, Dogmatics and Hermeneutics: The Divorce Clause in Palestinian *Ketubbot* and the Geonic Compulsion of Divorce" (Working Papers of the Agunah Research Unit, December 2008): http://www.mucjs.org/DivorceClause.pdf
16. Shoshana Borocin-Knol, "An Historical Overview of Some Overt Ideological Factors in the Development of the Agunah Problem" (PhD thesis; Working Papers of the Agunah Research Unit, June 2009): http://www.mucjs.org/Knol.pdf
17. Nechama Hadari, "The Concept of Will in the Jewish Law of Divorce" (Working Papers of the Agunah Research Unit, June 2009): http://www.mucjs.org/Hadari.pdf
18. Yehudah Abel, *"*Confronting '*Iggun.* A combination of three possible solutions to the problem of the chained wife in Jewish Law" (Working Papers of the Agunah Research Unit, July 2009): http://www.mucjs.org/ConfrontingIggun.pdf
19. Yehudah Abel, "Comments on R. Broyde's Tripartite Agreement" (Working Papers of the Agunah Research Unit, July 2009): http://www.mucjs.org/Broyde.pdf
20. Yehudah Abel, "Additions" (Working Papers of the Agunah Research Unit, July 2009): http://www.mucjs.org/Additions.pdf
21. Bernard Jackson, *"*Launch Lecture" (Working Papers of the Agunah Research Unit, July 2009): http://www.mucjs.org/LaunchLecture.pdf
22. Bernard Jackson, *"*Draft Final Report" (Working Papers of the Agunah Research Unit, July 2009): http://www.mucjs.org/ARUDraftFinal.pdf

These papers are cited in what follows by Working paper and page numbers (plus paragraph numbers where applicable), in the format ARU 12:21, 16:103, etc. Naturally, there are some differences of view and emphasis amongst the members of the research team, even as regards aspects of "the Manchester solution" (§§7.49-50), which are reflected in the above papers and will be apparent also in the individual team member books to be published by the Unit in 2010.

1.4 This internet version of our report is labelled "draft", since it will be replaced with a print version in 2010 (incorporating further editing). **We invite comments in advance of the print version, to be sent to bsj@legaltheory.demon.co.uk**

B. The Problem and the Search for a "Global" Solution

1.5 Our objective has been the search for a "global" solution to the problem of *get* recalcitrance (women in the position of *mesurevot get*, a particular aspect of the problem of '*iggun*).[1] But what, precisely, is the problem? Its definition is a major issue in itself, and the reason for the vastly conflicting claims regarding the number of *agunot* — at one extreme counting all women who have not been granted a *get* irrespective of the grounds on which they claim it;[2] at the other,

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[1] Other than the parallel existence of civil marriage and divorce, there is little in our present difficulties which is inherently modern or new. Contrary to some contemporary voices, the present difficulties already existed long before the introduction of civil marriage and divorce. Nor can we blame our present predicament on inhibitions against beating the husband deriving from secular criminal law: the halakhic problem of when *kefiyah* is permissible is quite independent of such external constraints: see further ARU 2:4-5 (§1.4).

[2] On the grounds for divorce, see §§1.29-33 below.

counting only those women to whose husband the *bet din* has issued a *ḥiyyuv* (or even *kefiyah*) order which he has ignored for a substantial period. Since *batei din* are reluctant to issue such orders, they can themselves limit the number of women who meet that definition. There is moreover a deeper question which informs the issue: is the problem perceived to be that of the ("chaste") wife who complies with the halakhah and suffers in her "chains", or is it that of the ("unchaste") wife who breaks the halakhah by entering into a new relationship despite not having received a *get* and thereby commits adultery and may give birth to *mamzerim*?[3] It is apparent that many dayanim regard the case of the suffering (but halakhah-compliant) wife as less serious than that of the defiant (non-halakhah-compliant) wife, partly because there has been (in their view) no breach of the halakhah in the former case, partly for humanitarian reasons directed to the children on the other. We would argue that a woman should be defined as an '*agunah* whenever she has not received a *get* within 12 months of a *bet din* having at least recommended (*by hamlatsah)* that the husband grant it (assuming that the *bet din* spends no more than 12 months seeking *shlom bayit*). We would also include within the definition of *agunot* women who submit to extortionary conditions in order to receive it (though here the remedy must lie in reversal of such conditions, including repayment of any money paid).

1.6 By a "global" solution, we mean one which ideally has the capacity to prevent the problem from arising at all, or else will resolve it in all cases. We have, however, come to realise that this objective is not, in current conditions, best served by a single ("one size fits all") solution. This conclusion follows from both the characteristics of the global Jewish community and the nature of the "remedies" on the other. In what follows, therefore, the objective of a "global" solution is understood as a set of solutions which solves the problem for all, though not necessarily by the same means.

The global Jewish community

1.7 The global Jewish community is characterised by its diversity. Not only are we faced by the divide between "Orthodox" and "Progressive" communities; many argue nowadays that the principal fault-line is that between modern Orthodox (or, in Israel, Religious Zionist) and the *ḥaredi* community.[4] Very often, the differences between them relate not to theoretical issues of *halakhah*, but rather to *ma'aseh,* the permissibility of their practical implementation (see further below, §2.1). Such differences themselves often reflect differences in values, sometimes referred to as "meta-halakhic" issues. Much of this chapter is devoted to such issues. They have to be taken seriously. Nor is it a matter of imposing the values of one section of the community on another; rather, the ultimate criterion of a global solution (defined above as "a set of solutions which solves the problem for all, though not necessarily by the same means") is that it does not threaten *klal yisra'el*, in that intermarriage between the different communities remains halakhically permissible, notwithstanding their different halakhic practices. Thus we are told that Orthodox courts in the US will permit remarriage (without a *get*) to women whose original marriages were non-orthodox.[5]

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3 Thus, the *magiah* of R. David Pipano's *responsa* (see §3.48, below) writes that *"*amongst these *'agunot* are wanton women and decent women. As to the wanton, some of them convert to Christianity and some proceed to debauchery, offering themselves to anyone. The decent ones either bear a life of pain or commit suicide..."

4 Thus, J. Wieder, "*Hafka'at Kiddushin:* A Rebuttal", *Tradition* 36/4 (2002), 41, comments: "The probability of the entire *Haredi* community agreeing to R. Riskin's solution, be it because they don't see the problem or because they cannot swallow the solution, is somewhere between slim and none, with slim having left town."

5 Would the Israeli *posqim* take the same view if civil marriage were introduced? See now D.B. Sinclair, "A Definitive Rabbinical Court Decision on the Status of Civil Marriage", *The Jewish Law Annual* XVI (2006), 234-41, on SRC 4276/2003, which refuses to accord halakhic recognition (and thus the need for a *get*) to "ordinary" civil marriage. See also R. Shear-Yashuv Cohen, "Nisu'in 'Ezraḥiyim", *Teḥumin* 3 (5742/1982), 154-67, available at http://www.zomet.org.il/?CategoryID=262&ArticleID=243&Page=1.

1.8 Quite apart from differences between the religious makeup of different communities worldwide (here discussed mainly in terms of the differences between Israel and the US[6]), other factors impede the adoption of any "one size fits all" solution. One is the religious monopoly over marriage in Israel;[7] another is the relative decentralisation of rabbinic authority in the US, as contrasted with Israel. Both factors impinge on the issues of authority discussed in Chapter Two below.

1.9 In the Israeli context, the religious monopoly creates particular problems: the *rabbanut* is faced with the application of the *halakhah* to communities with distinctly different attitudes to that *halakhah.* One argument doubts the very validity of *qiddushin* in the case of non-observant women, on the grounds that there is '*umdena demukhakh* that non-observant women do not agree to religious Jewish marriage because of the aspect of *kinyan*.[8] Feldblum accordingly proposes that non-observant couples use "*derekh qiddushin*" instead of the usual *qiddushin*.[9] Others, too, have argued that the rabbinate is capable, in theory, of making arrangements for the non-observant community which would eliminate the possibility of '*iggun.* Thus the possibility of a contract of concubinage (*pilagshut*) between the partners with alternative formulae for its creation and dissolution has been discussed:[10] there would then be no requirement of a *get* for the dissolution of the partnership. Indeed, it has been suggested to us that contemporary *posqim* may be more inclined to leniency if the problem of '*iggun* were indeed confined to observant women.[11]

1.10 It is the insistence of some *posqim* on a "one size fits all" approach (i.e. imposition of their own *ḥumrot* on the whole community, refusing to distinguish between religious and non-religious women) that aggravates the contemporary problem. Yet this in itself implies that such an approach, entailing the creation of *agunot* with its risks of adultery and *mamzerut*, is preferable to (entails "less sin" than) a pluralistic approach which both addresses the problem within traditional *qiddushin* and which incorporates forms of union which, though recognised by the *halakhah*, fall short of traditional *qiddushin.* One has to ask whether such an evaluation reflects religious politics more than halakhic values. Yet even in terms of religious politics it may prove shortsighted. It is claimed that many couples return to Judaism after the sanctity of *qiddushin* is explained to them. That possibility is currently inhibited by the absence of a generally acceptable solution.

1.11 Even the rabbinic monopoly in Israel has a serious gap: it applies only to marriages conducted in Israel itself. A substantial number of non-observant Jews prefer to marry in Cyprus or elsewhere rather than submit to rabbinical jurisdiction, though even in such cases the rabbinical courts have assumed a jurisdiction in divorce.[12] Thus even in Israel there is a need to grapple with the problem of those who marry outside any (explicit) halakhic institution. It is claimed that where the marriage ceremony was civil or Reform and the case is one of '*iggun*, all *batey din* are accustomed to permit remarriage without a *get* (if they cannot obtain a *get leḥumra*), in spite of the assumption

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6 Where, it has been argued, orthodoxy is an option to which many are attracted because of *qiddushin*.

7 Not universally supported even within the religious establishment: the former Sephardi Chief Rabbi Eliyahu Bakshi-Doron has argued in favour of the introduction of civil marriage in Israel: see "Ḥok Nissu'in veGerushin – Hayatsa Secharo Behefsedo?". *Teḥumin* 25 (2005), 99-107.

8 M.S. Feldblum, "Ba'ayat Agunot U-mamzerim", *Diné Israel* 19 (5797-5798 [1997-1998]), 209-211. See, however, ARU 10:18 n.85, distinguishing this from R. Feinstein's argument.

9 See further below, §7.47. Of course, some non-observant couples will (continue to) opt not to marry at all or to marry only civilly (where available). A global solution must address the ultimate Orthodox marriageability of the children of all types of non-*qiddushin* unions. On the implications of the desire of non-religious couples for a definite married status (if not *qiddushin*), see ARU 18:20-21.

10 Rabbi G. Ellinson, *נישואין שלא כדת משה ויישראל* (Jerusalem: Alumim, 1980), but see R. David Mescheloff, "Heskemim Kedam Nissu'in", *Teḥumin* 21 (5761 [2001]), 292. See further §4.72, below.

11 In part, reflecting the sentiment of Rashbets (II 8) – "If she were their [daughter] they wouldn't have spoken so".

12 See n.5 above, and *Bagatz* 2232/03.

that אין אדם עושה בעילתו בעילת זנות.[13] The implication must be that account is to be taken of the differences between different communities in their attitudes to זנות. That in itself entails rejection of "one size fits all". It is difficult to see why the same approach may not be applied *within* the observant community.

The Nature of the "Remedies"

1.12 Though much of the literature seeking halakhic solutions to the problem of the recalcitrant husband debates the relative merits of three broad approaches, conceived as distinct "remedies" – the use of conditions (whether in marriage or divorce), coercion (in its various forms) and annulment (on whatever grounds) – further analysis indicates the close interaction of these remedies, in both historical-conceptual terms[14] and in practice. At root, the issues resolve into two basic questions: (a) how and when may a *bet din* secure the release of the wife in the absence of an uncoerced *get* delivered by the husband?; (b) what role is open to the married couple in providing the *bet din* with the authority to secure such a release?[15] This "interaction of remedies" informs much of the discussion below, even though separate chapters are devoted to the problems of conditions, coercion and annulment, respectively.[16]

1.13 We may note in this context that the principal justification of annulment (*kol hameqaddesh 'ada'ta' derabbanan meqaddesh*) is that it is based on an implied condition,[17] and that the mediaeval *taqqanot* establishing annulment for breach of additional requirements of *qiddushin* — themselves viewed as acts by which the people in effect adopt new standard conditions (*tna'ei bet din*) in their own future marriages — increasingly require that the powers there assumed to implement annulment be made explicit (§3.88). The same principle may be applied to conditions in individual marriage contracts.

The nature of halakhic authority

1.14 The very nature of halakhic authority also militates against the adoption of a "one size fits all" solution. Modern *mishpat ivri* scholars seek to understand halakhic authority in terms of secular jurisprudence, where systemic rules about authority are commonly termed "secondary rules" (following Hart).[18] They include "rules of recognition" and "rules of change", which provide

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13 See R. Shiloh Refa'el, "Qiddushin Reformiyim", *Teḥumin* 7 (5746/1986), 249-254, available at http://www.zomet.org.il/?CategoryID=262&ArticleID=244&Page=1. Conservative marriage is more problematic, but sometimes the wife may also be released without a *get*: see R. Chaim Jachter, "Qiddushin Conservativiyim", *Teḥumin* 18 (5798/1998), 84-91 available at http://www.zomet.org.il/?CategoryID=262&ArticleID=245.

14 Thus the relationship between annulment and coercion is expressed both in the proposition that annulment is possible only in the presence of a *get* (§§5.44-52, 6.82) and the fact that annulment is frequently cited as an additional support for other means of terminating the marriage, such as a compelled *get*: ARU 11:1-2. For the view that coercion is itself ultimately based on the authority to annul, see R. Shear-Yashuv Cohen, "Kefiyyat Haget Bazeman Hazeh", *Teḥumin* 11 (5750), 198 (based on Radbaz); see also *Shut HaRadbaz* I, 187, arguing that a coerced *get* is a valid *get* because the husband really wishes to do what the Sages say: כדי לשמוע דברי חכמים (either reflecting the basis of annulment in אדעתא דרבנן or the Maimonidean justification of *kefiyah*).

15 This is one of the functions of "conditions", as appears to have been recognised by the Geonim, if we accept the view of the teachers of the teachers of Mei'ri, as discussed in §§3.23-29 below.

16 See earlier ARU 2:65-68 (§5.3); ARU 8:2-3, 36-37 (§§1.5, 7.1-7.2), updated in chs.3-5 below.

17 For sources basing annulment on conditions, see R. Shlomo Riskin, "*Hafka'at Kiddushin*: Towards Solving the Aguna Problem in Our Time", *Tradition* 36/4 (2002), 15, quoting, *inter alia*, Maharam of Rothenberg, in *Mordekhai*, *Kiddushin* 3:522: "At the time of betrothal he did nothing wrong, and we judge him according to that time, and say that he betrothed her on condition that if he later violates a rabbinic regulation... his betrothal will not be valid." See further §5.56.

18 See B.S. Jackson, "*Mishpat Ivri, Halakhah* and Legal Philosophy: *Agunah* and the Theory of "Legal Sources"", *JSIJ - Jewish Studies, an Internet Journal* 1 (2002), 24-26 (§4.1), at http://www.biu.ac.il/JS/JSIJ/1-2002/Jackson.pdf.

criteria for recognising the validity of existing rules on the one hand, changes in rules on the other. In some secular legal systems, such "secondary rules" are defined in a Constitution. Not so in Jewish law. As Rabbi Abel's paper (ARU 7) demonstrates, they are subject to substantial uncertainties, and are on occasion "honoured in the breach". Not only does Jewish law lack a legislature; its "rules of recognition" of what is binding *halakhah* are themselves subject to debate,[19] nor is there at present a supreme adjudicatory body, recognised by all, capable of determining such issues. Moreover, a distinction between what is permissible in theory (*lehalakhah*) and what is permissible in practice (*lema'aseh*) has become commonplace[20] and there is little attempt to define criteria for what is permissible *lema'aseh* (although, against this, we must balance the availability of a more permissive approach to *ma'aseh*, in the form of the distinction between *lekhatḥillah* and *bedi'avad*[21]). Issues of authority thus become questions of "whose authority", and the answer to such questions cannot be given in institutional terms. Rather, they admit of only "personal" (*rebbe*-type) responses: who are the recognised *posqim/gedolei hador* of the age, and does any one of them enjoy such pre-eminence that his *psak* will be accepted by all? The latter question is rarely answered in the affirmative. Questions of halakhic authority thus themselves depend upon the particular community to which one belongs, and thus to whom it is anticipated that problems and disputes will be submitted. That in turn may determine the type of remedy to '*iggun* which is proposed. Little is lost by such a "pluralistic" approach, provided that an ethos of mutual respect and recognition, as in the traditional view (fortified by a *ḥerem* of Rabbenu Tam against questioning the *get* of a qualified Rabbi[22]) that *bate din* recognise each other's *gittin*, is maintained. Sadly, however, there are indications, particularly in the sphere of *gerut*, that this ethos is currently being challenged. If that prevents intermarriage between different halakhic communities, then the objective of a global solution (even as here defined) fails, and thus the unity of *klal yisrael* is compromised. The best that could then be achieved would be a set of solutions each with a "local" sphere of application. But this, we argue, may prove a vital step in an incremental process towards a truly "global" solution.

C. Jewish law and secular law: the need for a purely "internal" solution

1.15 Our entire work has been devoted to the search for a purely "internal" (halakhic) solution, rather than one dependent upon support from the institutions of secular law. That is not because the *halakhah* rejects in principle all recourse to secular law: a well-known Mishnah provides criteria for the validity of a *get* even when coerced by gentile authorities,[23] and an attempt has been made recently in Israel to use state action, authorised by the principle of *dina demalkhuta dina*, in order to circumvent some of the halakhic objections to the contemporary use of annulment.[24] Rather, it is for a combination of moral and pragmatic reasons.

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19 For example, the very status of the rule of following the majority (*rov*), and the dispute over whether it applies in the absence of a face-to-face debate. See §§2.8, 11, below.

20 We are not aware of any parallels in other legal systems. Of course, the American Realist School of Jurisprudence has emphasised the distinction between what courts do (or do not do) and what they say, privileging the former in their definition of law. The *halakhah*, however, goes further, in according the distinction doctrinal status. See, however, n.153, below.

21 So that measures which would be rejected if sought in advance may be recognised *expostfacto* (*bedi'avad*). There is authority for the use of this doctrine even in the case of a *get me'useh*: see ARU 6:11-12 (§6.7) and §§4.71, 7.9, below.

22 For an interpretation of this *ḥerem* as a measure designed to reinforce the judicial hierarchy established in France by Rabbenu Tam, see A. Reiner, "Rabbinical Courts in France in the Twelfth Century: Centralisation and Dispersion", *Journal of Jewish Studies* LX/2 (2009), 298-318, at 313 (with citation of his earlier studies in Hebrew).

23 *Mishnah Gittin* 9:8 (88b): "A bill of divorce given by force (*get me'useh*), if by Israelitish authority, is valid, but if by gentile authority, it is not valid. It is, however, valid if the Gentiles merely beat (*ḥovtin*) the husband and say to him: 'Do as the Israelites tell thee'." On this, see further ARU 17:135-37.

24 Berachyahu Lifshitz, "Afke'inhu Rabanan Lekiddushin Minayhu", in *Mi-perot Hakerem* (Yavne: Yeshivat Kerem BeYavne, 2004), 317-324; "'Al Massoret, 'Al Samkhut Ve'al Derech Hahanmakah", *Teḥumin* 28 (2008), 82-91.

1.16 The problem of recalcitrance is regarded by many as one of morality, in that it allows a sinner to be rewarded (*ḥot'e niskar*: see *M. Hall.* 2:7),[25] and thus jeopardises the reputation of the halakhic system as a whole. As such it can be remedied only by internal, halakhic measures. Indeed, the concept of *ḥillul haShem* means not only that everything must be done within the *Halakhah* as at present fixed to avoid the desecration of disrepute brought upon the Torah itself in the eyes of a well-informed and morally critical world (as well as within Orthodoxy itself[26]) but also that *psak Halakhah* should itself be affected by such considerations. In support of this, we may refer to the remarkable suggestion of Ḥazon 'Ish,[27] who discusses a ruling of Rambam apparently contradicting the Talmud (*B.K.* 38a), which records that an Israelite is exempt from paying damages caused by his ox to the ox of a heathen even if the customary practice of the heathen society is to impose damages in such a case. Against this, Rambam states that the Israelite is exempt only if the custom of the heathen society is *not* to make owners liable for the behaviour of their beasts. Thus, once general society has raised its moral standards and expects its members to accept responsibility for their animals' conduct an Israelite living in that society must do no less and the relevant halakhah must be changed so that neither the conduct of the Jew nor the Law upon which that conduct is based shall constitute a *ḥillul haShem*. Ḥazon Ish observes that this ruling of Rambam appears to be based on the view of R. Aqiva' (*B.K.* 113a) who, in his dispute with other authorities, states that money owed by a Jew to a heathen who is unaware of the debt (so that non-payment will not cause a *ḥillul haShem*) must nevertheless be paid (even if not required by *dina' demalkhutha'*) "because of *qiddush haShem*", i.e. because it is forbidden to fix the halakhah on any matter in a way that would be, by its very existence, a *ḥillul haShem* and thus thwart the whole point of Torah and Israel, which is *qiddush haShem*. Of course, it may be argued that this example involves *diney mamonot*. But is *'issur veheter* any less subject to the moral imperative of *qiddush haShem*?

1.17 The pragmatic reasons are twofold. First, such recourse – whether through enforcement of pre-nuptial agreements,[28] measures delaying secular divorce in the absence of a *get*,[29] exposing the recalcitrant husband to risks in respect of the (civil) divorce settlement,[30] actions for damages (in contract[31] and now also in tort[32]), or the range of civil disabilities now available as sanctions in Israel[33] – is necessarily "parochial", depending on the law of the particular jurisdiction in which any Jewish community resides. But not all *agunot* live in jurisdictions with "*get*-laws"; that legislative route has to be pursued separately in every jurisdiction where Jews live, and even once legislated may not prove immune from change for quite external, secular reasons. Such reasons

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25 See further ARU 2:6-7 (§1.5) and n.26.

26 R. Abel recalls that some years ago he was asked to address a group of teenage orthodox Jewish girls in Manchester on a topic of his choice. Instead, he decided to allow the audience to decide the topics. The first question was: "Why are women second-class citizens in Judaism?"

27 *Bava' Qama'*, section 10, sub-section 9.

28 See further ARU 2:6 n.23. On the halakhic problems, see ARU 17:162-63.

29 See n.34, below.

30 Notably, the (controversial) second New York "Get" Law – the 1992 amendment of the Equitable Distribution Law of 1980, concerning the exercise by the Court of its power of "equitable distribution" of marital property. See further ARU 2:5-6 n.22.

31 See further ARU 2:6 n.23.

32 See further ARU 2:6 n.24, and now Judge Ben-Zion Greenberger's July 2008 judgment, in the Jerusalem Family Court, File No. 006743/02.

33 Rabbinical Courts (Enforcement of Divorce Judgments) Law, 5755-1995: see further Y. Kaplan, "Enforcement of Divorce Judgments by Imprisonment: Principles of Jewish Law", *The Jewish Law Annual* XV (2004), 57-145, at 122-29; see also ARU 2:6-7 n.25 and n.877, below.

may be technical – as the fate of the "Jakobovits amendment" in England illustrates[34] – but they may also be overtly political, as may be seen from the abolition of religious arbitration in family law matters in Ontario in 2006, once the Muslim community sought to take advantage of it.[35]

1.18 Second, by their very nature, solutions reliant on recourse to secular law can at best provide "alleviations" rather than real solutions.

D. "Solutions" and "Alleviations"

1.19 We do not demean the sincere efforts of those who have sought to provide case-by-case alleviation, though the use of social (shaming[36]) and religious sanctions[37] (extending even to the threat of withholding burial rights[38]) or through the use of secular law. Many women have cause to be grateful for such efforts, and in the absence of more systematic solutions they can only be welcomed and further encouraged. But the very nature of these remedies depends on human factors: neither social, nor economic, nor religious – nor even physical[39] – pressure is guaranteed to work. The problem will continue to plague us until and unless we find solutions which either prevent the situation of *get*-recalcitrance from arising at all or provide a set of completely effective remedies (with global application) when it does arise.[40]

E Inducements

1.20 The above forms of pressure, however, are all traditionally regarded as inferior to the use of inducements: the carrot (persuasion by payment) is preferred to the stick (coercion). The strategy

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34 Family Law Act 1996, s.9(3-4), sponsored by Chief Rabbi Jakobovits; this whole Part of the Act, though it passed all its legislative stages, was never brought into effect for reasons unrelated to the *get* problem. Later, a similar provision was enacted (separately from any general divorce law reform) in the Divorce (Religious Marriages) Act 2002, a private member's bill sponsored by Andrew Dismore M.P., and *has* been brought into effect. Under both the 1996 and 2002 Acts an order that a decree of divorce be not made absolute (in the absence of a *get*, though expressed in different language) "may be made only if the court is satisfied that in all the circumstances of the case it is just and reasonable to do so." A stronger version, in which withholding the civil decree absolute would have been mandatory, had been proposed in 1990 by the late Dayan B. Berkovits (in his private capacity): see his "*Get* and *Talaq* in English Law: Reflections on Law and Policy", in *Islamic Family Law*, ed. Chibli Mallat and Jane Connors (London: Graham & Trotman, 1990), 119-146, at 143-46. See further ARU 2:72.

35 Family Statute Law Amendment Act 2006. For the background, see Christopher L. Eisgruber and Mariah Zeisberg, "Religious Freedom in Canada and the United States", *I-CON* 4/2 (2006), 244-268, at 265f. See further B.S. Jackson, "'Transformative Accommodation' and Religious Law", *Ecclesiastical Law Journal* 11 (2009), 149-50.

36 On *seiruvim* and web sites which publish them, see ARU 2:5 n.17 (the web site there mentioned is now at http://www.getora.com/seiruvim.html).

37 On the *haḥlakot deRabbenu Tam*, see R. Chaim Jachter, with Ezra Frazer, *Gray Matter*. *Discourses in Contemporary Halachah* (Teaneck, NJ: privately published: ISBN 0-9670705-3-8, 2000), 17f., and at "Viable Solutions II", http://www.tabc.org/koltorah/aguna/aguna59.2.htm.

38 R. Kurtstag, Head of the Johannesburg *bet din*, has indicated that his Bet Din included refusal to allow burial in Jewish cemeteries within the communal sanctions it was prepared to deploy: see *International Jewish Women's Human Rights Watch*, Winter 2000/2001, Newsletter #9, pp. 2-3. See further ARU 2:5 n.19.

39 Whether the physical coercion of the traditional *kefiyah* or the imprisonment available under Israeli law. The case of the recalcitrant husband who preferred to spend 32 years of his life in an Israeli jail, and die there, rather than release his wife, is often cited. See Jerusalem Post, February 22nd 1997, and further ARU 2:25 n.106.

40 At present, even in the context of the relatively limited remedies provided by current PNA's, there is a need for forum shopping. R. Jachter writes: "When choosing a Beit Din to resolve a potential problem of Igun, one should choose a rabbinic court which engages in a persistent and flexible manner to resolve problems of Igun. Similarly, the Beit Din designated in one's prenuptial or postnuptial agreement should be one which is known for its proactive approach to resolving problems of Igun": "Viable Solutions I", http://www.tabc.org/koltorah/aguna/aguna59.1.htm.

of rabbinic encouragement to the family of the '*agunah* to "pay off" the husband in order to achieve a "voluntary" *get* is attested at least as early as the twelfth century.[41] Indeed, Rabbenu Tam is not embarrassed to use the language of "bribery" in recommending it:

> A case was once decided by me regarding someone who had betrothed the daughter of R. Samuel in Chappes. The one who had betrothed her was ordered to divorce her, and I arranged that they permitted [it] for him (i.e. they cancelled their ruling that he is obliged to divorce her – *ve'asiti shehitiru lo*), and [instead of this] they "bribed" him with money (השחידוהו בממון ובדברים) and goods [to get him to agree].[42]

That language itself implies that the betrother is halakhically in the wrong.

1.21 More recently, the issue has sometimes come to be conceived as one of the husband's "rights"[43] – in spite of the commonly accepted view that the *halakhah* is based on duties and responsibilities rather than "rights"[44] (and quite apart from the very ambiguity of the concept of itself[45]). Yet even if the husband's capacity to refuse to grant a *get* is conceived as a right, it does not follow that such a right is absolute (very few rights are)[46] or immune from the ethical demands of the

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41 Raban (R. Eliezer b. Nathan of Mainz, 12th cent.; Elon (n.241, below), II.848f.): "We advised her relatives to pay the young man some money to free her, and this is what happened." See ARU 2:41 (§4.2.2) and n.183. In a responsum of Rosh (35:2; see further ARU 2:67 (§5.3.3)), discussed by Elon, the conclusion was: "it is advisable to appease and satisfy him with money to induce him to divorce her", although Rosh does go on to say that if the man is not willing to accept money "I will support you in compelling him to divorce her" (Elon (n.241, below), II.850f.). See also Rosh, *Responsa*, *Kelal* 43:3, in n.725 below.

42 *Sefer Hayashar leRabbenu Tam*, as adapted from S. Riskin, *Women and Jewish Divorce: the Rebellious Wife, the Agunah and the Right of Women to Initiate Divorce in Jewish Law* (Hoboken, N.J.: Ktav, 1989), 98 (Heb.), 102 (Engl.). It is semantically possible that the דברים here are words (persuasion), but the context points towards the translation in the text (favoured by Riskin).

43 R. Isirer uses the language of "rights" (*zekhut*) in his recent argument in the Rabbinical High Court, (1.2.05) 9(4) *DvD* 6,7, Appeal No. 022290027-21-1, following the Maharashdam, as quoted in a forthcoming article by Susan Weiss: "We will make it perfectly clear that the right [of a husband] to dictate the terms [of the divorce] is not only with respect to money matters, but also with respect to behavior, for example: that she should be prevented from eating certain foods, or wearing certain clothes. While the rabbinic court cannot order a woman to carry out these demands, such demands stand and are obligatory so far as they relate to the terms of the *get*, even in such circumstances that warrant obligating or compelling a husband to give a *get*. So long as these are conditions that the wife can fulfill, even though she may have no legal obligation to do so with respect to her ex-husband." Cf. R. David Bass, "Hatsavat tena'im 'al yedey ba'al hameyuḥav beget", *Teḥumin* 25 (5765 [2006]), 158-59. On the ideological background of R. Isirer's position, see ARU 17:151.

44 E.g. Moshe Silberg, "Law and Morals in Jewish Jurisprudence", *Harvard Law Review* LXXV (1961-62), 306-31; Aaron Kirschenbaum, *Equity in Jewish Law Beyond Equity: Halakhic Asperationism in Jewish Civil Law* (Hoboken, New Jersey: Ktav Publishing House, Inc., Yeshiva University Press, 1991), 1-58, cited by Aaron Levine, "Case Studies in Jewish Business Ethics: Introduction", http://www.jlaw.com/Articles/casestudiesintro.html, who writes: "Halakhah emphasizes duties over rights. Justice Moshe Silberg (Israel, 1900-1975) elaborates on this theme. One example that he gives is how Bet Din (Jewish court) treats a debt. Satisfaction of a debt is actionable, not primarily as enforcement of the creditor's right, but as a means of compelling the debtor to fulfil his religious duty to pay off his debt. How Bet Din handles a debt is the prototype of Judaism's whole system of legal obligations. Within the framework of a system that stresses duties over rights, it should come as no surprise that Halakhah allows a market participant little discretion to decide on his own that his particular duties do not apply to the situation at hand."

45 Classically discussed by Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven and London: Yale University Press, 1923), who distinguishes four different meanings: the right-holder may have a "claim", a "privilege", a "power" or an "immunity". See further B.S. Jackson, *Making Sense in Jurisprudence* (Liverpool: Deborah Charles Publications, 1996), 29-31.

46 Justice Englard, in an Israel Supreme Court case of 1997, is cited by Simon Jackson, http://www.torahmitzion.org/eng/resources/showLaw.asp?id=647, for the view that there is a clear ethical trend common to the Jewish legal tradition concerning the concept of ownership, whose aim is to *limit* a person's control over his possessions.

halakhah as expressed, inter alia, by such principles as *lifnim mishurat hadin* and *hatov vehayashar*. Indeed, R. Feinstein has argued that if a husband is willing to divorce his wife, but wants to retain the *get* as a bargaining chip, then even if he is forced to give up what he wanted to achieve by means of the *get*, his willingness to *divorce* renders the *get* valid.[47] As Hadari notes, this implies that the husband's (legitimate) choice whether or not to remain in a marital relationship is different from asserting that he has an absolute choice at any given moment whether or not to give her a *get*.[48]

1.22 In this context, two arguments of Rambam are particularly pertinent. First, his justification (distinct from that of the Ge'onim) of divorce for the *moredet me'is 'alay* :

> The woman who refuses her husband sexual relations - she is the one referred to as "the rebellious wife". So we ask her why she is rebelling. If she says 'because he is repulsive to me, and I am unwilling voluntarily to engage in sexual relationships with him,' we force him to divorce her immediately, for she is not as a captured slave (כשבויה) that she should be forced to have intercourse with one who is hateful to her.[49]

1.23 Second, we are entitled to ask in this context whether any "right" of the husband is limited by a concept of abuse of rights. This leads us to consider issues of motivation – which in fact are prominent in this area of *halakhah*.[50] Here, too, Rambam's analysis is pertinent. His famous defence of *kefiyah* is based on rejection of any motivation inspired by the *yetser hara*:

> ... he whose evil inclination (*yetser hara*) induces him to violate a commandment or commit a transgression, and who is lashed until he does what he is obligated to do, or refrains from what he is forbidden to do, cannot be regarded as a victim of duress; rather, he has brought duress upon himself by submitting to his evil intention.[51]

In short, if it is not the woman who is morally at fault, in seeking to get out of the original marriage in order to marry someone else, but if she claims *me'is 'alay* precisely because it is the husband who is morally at fault in seeking to "chain her" (as, indeed, is the situation very frequently today, where the motivation is spite or blackmail), then in such circumstances even the Rosh argues that it is possible to follow a local custom and adopt coercion: "If [her husband's] intent is to "chain" her (דעתו לעגנה), it is proper that you rely on your custom at this time to force him to give an immediate divorce."[52]

1.24 On insisting on his "rights", in the face of a decision of the *bet din*, the husband is either violating a commandment (if there has been a *ḥiyyuv*), or at least acting (if there has been a *mitsvah* or *hamlatsah*) *shelo kehogen* (the terminology used to justify annulment in the talmudic cases of abduction marriage):[53] he is abusing the right he has to enter into a marriage which biblically may

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47 *'Iggrot Mosheh 'Even Ha'Ezer* 3:44.

48 See further ARU 17:166-68.

49 *Hilkhot Ishut* 14:8. Cf. *Resp. Tsemah Tsedeq* 135, quoted by R. David Bass, "*'Al Gerushin wa'Aginut lefi Nuqudat Mabat 'Ortodoqsit*", http://www.snunit.k12.il/seder/agunot/view.html: "In this matter (of *me'is 'alay*) right is on his (the Rambam's) side for she is indeed not as a captive that she should be made to have relations with someone who is repulsive to her as it is written (Proverbs 3:17) 'Her ways are ways of pleasantness etc.'"

50 Cf. ARU 16:32f.

51 *Hilkhot Gerushin* 2:20.

52 *Resp.* 43:8, p.40b, Riskin, *Women and Jewish Divorce* (n.42 above), 126 (Heb.), 128 (Engl.). See further §4.32, below; ARU 2:29-30 (§3.5.2), and ARU 18:53, noting that R. Ovadyah Yosef, in his article "Kol Hameqaddesh ada'ta' deRabbanan Meqaddesh we'Afqe'inho Rabbanan leQiddushin Mineh", *Torah Shebe'al Peh* (Jerusalem 5721), 103, has expressed the view that coercion would be possible in a case where (i) *qiddushin* have been made at the time of the *shiddukh* – against the will of the Sages and in defiance of a communal enactment, and (ii) the wife claims afterwards *me'is 'alay* and (iii) he refuses to divorce her *in the hope of making some easy money*.

53 *Yevamot* 110a, *Bava Batra* 48b; see further ARU 11:2-3.

be valid despite the absence of true consent on the part of his wife.[54] Motivation is also prominent in the mishnaic account of the woman's grounds for divorce: they must not be a "cover" for an illicit motivation, that the woman *notenet eynehah be'aḥer*.[55] As for the husband, this issue raises a deeper conceptual question which we address in the course of this study (§§4.92 and elsewhere): is the "right" of the husband to remain married (because this is what he wants[56]) or to keep his wife chained (even though he does not want to remain married) by refusing to participate in the *procedure* of termination?

1.25 May it not be said that in a huge number of cases, the insistence by a husband on his "rights" in fact masks a *yetser hara* of greed or spite? The concept of "abuse of rights" is not foreign to the *halakhah*, as is shown by recent discussions of *kofin al midat sedom*.[57] Indeed, Kirschenbaum argues, from an analysis of the dictum of R. Yehuda HaNasi that "one may not throw away the waters of one's well when others are in need of them" (*Yevamot* 44a), that "Jewish law recognises a general legally enforceable prohibition of the abuse of rights."[58] While that concept is applied primarily in areas of *mamonot*, it is not restricted to that context;[59] indeed, its origins appear to lie in the halakhah of *ḥalitsah*,[60] where the deceased had more than one widow, one of whom was already forbidden to marry a priest (as a result of an earlier divorce). Since *ḥalitsah* of one widow effects *ḥalitsah* of the others (without rendering the latter forbidden to priests), early sources already debate the moral duty of the *yavam* to perform the *ḥalitsah* on the widow who is already ineligible.[61] Later, this was transformed into a legal duty, enforceable by *kefiyah*.[62] Could one imagine, in this situation, that the *halakhah* would have allowed the *yavam* to extort money from the "eligible" widow not to perform *ḥalitsah* on her? And if so, why should the right of the husband in an "ordinary" divorce be any greater? It is hardly satisfactory, in this context, to reply in terms of the special status of *qiddushin*, since that very status is premised upon a *monetary* analogy — *kinyan*. There is, of course, an internal limitation to this principle: "the prohibition of exercising a legal right out of spite or selfishness, in a spirit denying benefit to others *although incurring no loss or injury to oneself*" (*zeh neheneh vezeh lo ḥaser*).[63] But the husband in our context makes no "loss": he is simply derived of the very benefit which the halakhic principle

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54 See ARU 11:2 n.11.

55 *Mishnah Nedarim* 11:12, discussed further below, §§1.29, 31-32, and extensively in ARU 16, where it is termed the "moral fear argument". See also ARU 2:5-6 (§1.4) and n.14.

56 He may, in some cases, be persuaded to divorce on the grounds that there is no prospect of reconciliation even though his real desire was to remain married. On such a case as presented to R. Moshe Feinstein, *'Iggrot Mosheh, 'Even Ha'Ezer* Part 3, no.44, see ARU 17:166-67.

57 Shmuel Shilo, "Kofin al Midat S'dom: Jewish Law's Concept of Abuse of Rights", *Israel Law Review* 15/1 (1980), 49–78; A. Kirschenbaum, "Jewish law and the Abuse of Rights", *Tel Aviv University Law Review* 5 (1980-82), 98-114, reprinted in M. Golding, *Jewish Law and Legal Theory* (Aldershot: Dartmouth, 1994), 215-31; Irwin H. Haut, "Abuse of Rights and Unjust Enrichment: A Proposed Restatement of Jewish Law", *National Jewish Law Review* II (1987), 31-62; Moses L. Pava, "The Substance of Jewish Business Ethics", *Journal of Business Ethics* 17/6 (1998), 603-617; D.B. Sinclair, "Kofin al midat sdom: Abuse of Rights in Jewish law", *The Jewish Law Annual* XVI (2006), 229-34. See also the five articles on "Good Faith and Midat Sedom" by Simon M. Jackson, available from http://www.torahmitzion.org/eng/resources/JewishLaw.asp.

58 Kirschenbaum, *ibid*., at Golding (n.57, above), 219. *Aliter*, Shilo (n.57, above), 74, regarding it as probably only moral.

59 On its use in ritual contexts, see Shilo (n.57, above), 73-74.

60 What follows is based on Kirschenbaum, *ibid*., at Golding (n.57, above), 217-19. See also Shilo, (n.57, above), 74.

61 *Mishnah Yevamot* 4:11; Palestinian Talmud *Yevamot* 4:12 (following *Korban Ha'Edah*).

62 *Bet Yosef 'Even Ha'Ezer* 161, citing Rabbenu Yeruḥam, who cites R. Meir Todros Halevi Abulafia. Kirschenbaum cites *Turei Zahav, Bet Shmuel* and *Arukh HaShulḥan* on *'Even Ha'Ezer* 161:2 for acceptance of this view as the definitive halakhah by the Aḥaronim.

63 Kirschenbaum, *ibid*., at Golding (n.57, above), 231. He bases the full development of the principle, incorporating *zeh neheneh*, to Me'iri and R. Shimon b. Zemaḥ Duran.

refuses to accord to him.[64] Whether *kofin* is available where the right-exerciser stands to lose a benefit (though this presupposes that the "lost benefit" is a legitimate one) rather than suffer a loss provokes a dispute between Rabbenu Tam and the Rosh,[65] the former excluding *kofin* in such circumstances, the latter allowing it. The Rosh addresses Rabbenu Tam's arguments; on the principle of *hilketa kebatra'ei*, we may therefore follow the Rosh.[66] And there are, in fact, precedents for the use of *kofin al middat sedom* specifically to justify *kefiyah* of a *get*: a husband who wants to go to another land may be forced to deliver a *get al tnai* (effective if he does not come back within a year), according to a *teshuvah* of Ra'anah.[67] And *Yam shel shelomo* ruled that we compel a *get* in a case where a wife had become an apostate and thus forbidden to her husband on the presumption that she had had relations outside marriage; her relatives requested a *get* for her, in the hope that she would then return to the religion.[68]

1.26 The issue is debated in modern times in a more technical mode: is it legitimate to attach conditions to a *get*? Susan Weiss reports from her case files the following examples of such conditions which have received rabbinic authorization: the husband requests cash; custody;[69] more than his share of marital property, or all of it;[70] the waiver of child support, or part thereof;[71] the waiver of debts incurred for child support; that his children undergo DNA testing; that his wife take a polygraph test; the sale of the marital home before the *get* is given;[72] the return of his mother's earrings.

1.27 Those *dayanim* who agree to the making of such conditions base themselves on a responsum of Maharashdam[73] (against the views of Rashbash, Tashbetz[74] and Rashba,[75] that when the husband

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64 This distinction is elided by Pava (n.57, above), 608-09, summarising the view of Shmuel Shilo: Pava's summary speaks in terms of loss; his quotation from Shilo (p.77) in terms of benefit. But see Shilo's discussion of "economic motive" in the footnote below.

65 See Shilo (n.57, above), 60-64, based on *Tosafot B.B.* 12b, s.v. *Maalinan*; Resp. Rosh 97, 2.

66 Cf. Simon Jackson, http://www.torahmitzion.org/eng/resources/showLaw.asp?id=645, citing the Shach (here in contrast to the Sema) for the view that the mere fact that one person enjoys a certain benefit is not sufficient to prevent his conduct from constituting *Midat Sedom*; the benefit to him must also be justified from the ethical point of view.

67 No. 73 (end), *ET* vol. 27 col. 550 note 209.

68 *Yam shel shelomo* to Yev. Ch.1 s.6, cited in *ET* vol. 27 col. 556 note 255.

69 E.g., File No. 024612665-21-1 *T vs. T* (Jerusalem: RR. Levi, Elhadad and Basri, dissenting) (20.12.99) (holding that the husband's request for child was reasonable); rev'sd on Appeal File No. 024612665-64-1 *T vs. T* (2.5.00) (Sup. Rab. Ct, RR. Daichovsky, Nadav, Sherman), 1(10) *DvD* 9.

70 E.g., File No. 024415721-21-1 *A vs. A* (Haifa: Shahor, Naharai, Marveh) (1.2.07) (unpublished transcript available from Susan Weiss) (separated since 2005, still no *get*); 014504328-21-1 *T vs T* (Jerusalem: RR. Rabinovich, Eliezrov, Elgrabli) (11.6.2002) (woman gives up rights to house in exchange for *get* after 13 years of litigation) (unpublished divorce agreement and decision available from SW); File No. 058040221-25-1. *S vs. S* (19.07.95) (Jerusalem: RR. Basri, Levi, Elhadad (court tries to convince wife to give in to husband's demand to transfer house to him in exchange for *get*; receives *get* in 2001 after 11 years of litigation) (unpublished affidavit of wife and drafts of divorce agreements available from SW).

71 E.g., File No. 057930760-64-2 *C vs. C* (28.01.08) (Jerusalem: RR. Yifrach, Heizler, Scheinfeld) (unpublished transcript available from SW); File No. 012155131-21-1 *A vs. A* (5.09.02) (Ashkelon: RR. Beeri, Katz, Zar) (unpublished transcript available from SW) ; File No. *221-25-1. *S vs. S* (19.07.95) (Jerusalem: RR. Basri, Levi, Elhadad) (court tries to convince wife to give up child support in exchange for *get*; receives *get* in 2001 after 11 years of litigation) (unpublished affidavit of wife and drafts of divorce agreements available from SW).

72 E.g., File No. 052644200 *M vs. M* (Jer. Rab. Ct.: RR. Maletzki, Shapira, Cohen) (20.7.92) (unpublished decision available from SW) (received *get* 9 years later); Appeal File No. 062646849-21-1 *P vs. P* (Sup. Rab. Ct.: RR. Daichovsky, Bar Shalom, Sherman) (26.08.02) 4(7) *DvD* 7,8 (describing how woman was forced to sell house before *get*).

73 *Shut Maharashdam*, *'Even Ha'Ezer*, 41. Maharashdam's view is cited briefly by *Ba'er Hetev* on *Shulḥan Arukh, 'Even Ha'Ezer*, 154:1. However, Maharashdam is here used as a tool in the conflict between rabbinical and civil courts: the *bet din* accepts that it is the husband's right to have the financial aspects of divorce decided according to Torah Laws. See Dayan David Bass, "Hatsavat Tena'im 'Al Yedey Ba'al Hameḥuyav Beget", *Teḥumin* 25 (5765), 159-160; Pinḥas

is obliged to give a *get* he cannot make any conditions) but the scope of the *teshuvah* of Maharashdam is limited since:

(a) Some dayanim interpret the conditions that Maharashdam endorses in a limited way, as referring only to reasonable/justifiable conditions, which can easily be fulfilled, and as relating only to the wife and not others (such as the children).[76]

(b) Moreover, there are opinions which reject the view of Maharashdam justifying the husband in making any condition, including even demands justified by law.[77] Dayan Bass argues that studying the original *teshuvah* of Maharashdam leads to a different conclusion. He notes that R. Yitsḥak Elḥanan Spector rejects the husband's demand that his wife leave the city since this is "תנאי קשה...כמו גלות". He reviews decisions in the Israel rabbinical courts[78] and suggests that they are not a result of

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Shifman, "Hahalakhah HaYehudit Bi-metsi'ut Mishtana: Ma Me'akev 'Et Me'ukavot Haget?", *Aley-Mishpat* 6 (2007), 36-37. In one case, File 61/82 [82/סא], despite 18 years of separation the rabbinical court delayed the *get* until the husband's financial conditions were fulfilled.

74 HaKhut HaMeshulash IV, *tur* 1, responsum 6, *ot* 2-3, discussed in detail by Bass (n.73, above).

75 Maintaining that the *Maharashdam* is not correct: see Bass (n.73, above).

76 Bass (n.73, above), 162; Harav S. Daichovsky, "Ba'al Hamatne Et Matan Haget Bevitul Ḥiyuvav Hakodmim", *Teḥumin* 26 (2006), 156-159.

77 Bass (n.73, above), 157, 161, cites verdicts of the rabbinical court that do not take Maharashdam into account. See also Daichovsky (n.76, above).

78 In a case in the High Rabbinical Court (1-059024273-21; Bass (n.73, above), 155-156) where the husband had married a non-Jewish second wife and had a child from her, Dayanim Bar Shalom and Nadav accepted a condition (with a demand for custody abroad and a large sum of money) while R. Daichovsky rejected it due to other reasons (the husband's initial agreement to make a *harsha'ah* for a *get*). The case was passed to R. Mordechai Eliyahu and R. Shalom Mashash who decided that the condition was not reasonable and therefore could not be accepted: for his reasoning, see "Safeq Kefiyah Beget", *Teḥumin* 23 (2003), 120-24. The original *dayanim* changed their mind in the light of this. But in a different verdict (1-21-022290027; Bass (n.73, above), 157-59), the High Rabbinical Court (Dayan Izirer) ruled that the husband had the right to demand reduction of the alimony. R. Izirer explained that he referred to conditions the wife can fulfil, even if it is hard for her ("*afilu bedoḥak*"); indeed, at first he included also conditions such as that she would not eat things that would make her sick and prevent her from taking care of the children and that she would wear only modest clothing, but later limited his view to monetary conditions such as reducing the alimony. According to R. Izirer, this ruling is valid both in cases of *kefiyah* and in cases of *ḥiyyuv*. In another case, File 61/82 [82/סא], n.73 above), a local *bet din* ruled that the demand to retroactively cancel the civil court's decision [after 18 years of *sarvanut get*!] regarding alimony and rediscuss it in rabbinical court is legitimate. In the high rabbinical court, Harav Bakshi-Doron rejected the husband's demand without referring to Maharashdam (perhaps accepting the view of Tashbetz and others). R. Sherman ruled that it was a condition which was impossible for the wife to accept, since as a secular Jew she never brought her cases to rabbinical courts. Rabbi Z.N. Goldberg held that if the condition is justified (where, e.g., the wife took her husband's money), the husband can delay the *get*. R. Goldberg however, argues against Maharashdam. R. Tupik held that the case should be returned to the local rabbinical court to decide whether the wife needed to return parts of the alimony to her husband and how much it was possible for her to return.

Susan Weiss in a forthcoming article provides the following documentation of such decisions in the Israeli rabbinical courts which themselves either ignore, limit or reject the approach of Maharashdam: Appeal File Nos. 029612306-68-1, 053983847-53-4 (Sup. Rab. Ct.: RR. Amar, Daichovsky, BarShalom) (17.7.07), 19(3) *DvD* 4,5 (rejecting *Maharashdam* when husband demands custody of child, and attacking the cynical use of the Torah for personal interests); Appeal File Nos. 031411390-21-1 (Sup. Rab. Ct.: RR. Amar, Daichovsky, BenShimon) (11.1.06) 12(1) *DvD* 3-5 (rejecting *Maharashdam* when husband accused of extreme family violence moves to transfer marital disputes to the rabbinic courts); Appeal File No. 028055143-13-1 (Sup. Rab. Ct.: RR. Bar Shalom, Sherman and Daichovsky) (19.5.03) 5(5) *DvD* 10,11 (rejecting *Maharashdam* where husband asks for sum of money that woman cannot pay); File No. 2679/48 *Wife vs. Husband* (Jerusalem: RR. Batsri, Shrem, Goldberg) (19.07.90) 18 P.D.R 81 (see opinion of R. Batsri); Appeal File No. 168/54 *E vs. E* (Sup. Rab. Ct.: RR. Bakshi-Doron, Lau, Daichovsky) (17.11.94) 2(1) *DvD* 3 (abridged) (holding that visitation arrangements must be determined separately from the *get*); 024612665-64-1 *T vs. T* (Sup. Rab. Ct.: Daichovsky, Nadav, Sherman) (2.5.00) 1(10) *DvD* 9,10 (stating that child cannot be held hostage for the *get)*; Appeal File No. 022106561-21-1 *K vs. K* (Sup. Rab. Ct.: RR. Dichovski, Nadav, Goldberg) (9.9.99) 1(6) *DvD* 7

different readings of Maharashdam, but rather a question of "the fifth part of the *Shulḥan Arukh*", which mandates reading the *posqim* in the light of considerations of fairness and justice.

(c) The *teshuvah* of Maharashdam should not be taken out of its specific literary context – fear of misuse of the *ḥalitsah* for personal goals.[79]

E. The Stability of Jewish Marriage

1.28 Opposition to solutions to the '*agunah* problem is often expressed in terms of a fear that it would "undermine the stability of Jewish marriage".[80] In fact, a number of distinct arguments need here to be distinguished:

(a) the relationship between '*agunah* issues and the *grounds* for divorce (§§1.29-33);

(b) the threat to the sanctity and exclusivity of the marital relationship while it subsists, as justifying the essential role of the husband in the *get* process and distinguishing *qiddushin* from other forms of relationship (§§1.34-35);

(c) a particular form of (b), which raises further halakhic issues: the possibility of (legalised) "wife-swapping" (§1.36);

(d) the fear of *zenut* (§1.37);

(e) to a degree underlying all of them, fear of women's sexual tendencies, classically expressed in the *tav lemeitav* maxim (§§1.38-41).

1.29 There is in fact no necessary (logical) relationship between the problem of '*iggun* and the grounds for divorce.[81] If a woman is defined as becoming *mesurevet get*[82] only when a *bet din* has decided that she is entitled to divorce, but her husband refuses to implement that decision, the grounds for divorce are not affected: they are precisely the grounds on which the *bet din* decides whether or not the woman is entitled to divorce. As is well-known, different Jewish communities have in the

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(also discussed by Dayan Bass, n.73, above (maintaining that it is the right of every citizen to sue in the court of her choice, and cannot condition *get* on transfer of jurisdiction to rabbinic courts); Appeal File No. 029004991-21-1 *B vs. B* (Jerusalem: RR. Rabinivitch, Eliezrov, Elgrabli) (23.7. 01) (unpublished decision available from Susan Weiss) (claiming that husband makes impossible demands that do not have to be met).

79 Bass (n.73, above), 151-152.

80 E.g., the argument of R. Uriel Lavi, "Ha'im Nitan Lehafki'a Kiddushin Shel Sarvan Get?", *Teḥumin* 27 (5767), 304-310, that the use of annulment risks destruction of the Jewish family. Berachyahu Lifshitz, "'Al Masoret, 'Al Samkhut Ve'al Derekh Hahanmakah", *Teḥumin* 28 (5768), 82-83, notes the view of R. Weinberg regarding conditional marriage (in his introduction to Berkovits' *Tenai beNissu'in uVeGet*" see n.112, below), that we should consider also the view that the current status of the Jewish family (in terms of *giluy arayot*, fear of *mamzerim* etc.) is much worse than might result from the use of those solutions. Indeed, Berkovits rejected the basic premise on which arguments based on the stability of marriage are used in this context. R. Abel, ARU 18:33-34, quotes him thus: "The ethical and religious fibre of marriage is really dependent upon education and upon the ethical and religious conscience of the married couple, upon the influence of society and upon the conditions of everyday life. From the point of view of human psychology it seems to me that a condition in marriage will not cause an unravelling of the bond between man and wife even in the slightest degree. A person's conduct in the area of sex and married life is not defined or affected by such distant causes as the possibility of the annulment of the marriage in accordance with a particular condition. On the contrary, I say that the very [existence of the] condition will stress, in the eyes of the couple, the religious and ethical obligation that lies on both of them to lead their lives as a team and to conduct themselves towards each other according to the directives of Jewish ethics."

81 The lack of correlation between the grounds for divorce and the stability of marriage has also been claimed on the basis of sociological research: see Max Rheinstein, *Marriage Stability, Divorce and the Law* (Chicago and London: University of Chicago Press, 1972). See also Pinchas Shifman, *Family Law in Israel* (Jerusalem: Harry Sacher Institute, Hebrew University of Jerusalem, 1995, 2nd ed.), I.421-424 (Heb.).

82 On the definitional issue, see §1.5, above.

past adopted different approaches to this issue,[83] and such pluralism may well continue into the future.[84] The basic fear here is that of "unilateral (no-fault) divorce" (particularly, on the part of the wife), often seen as a concession to secular, liberal values but reinforced by a traditional Jewish fear, that the wife may, during the subsistence of the marriage "look astray" (*notenet eynehah beaḥer*).[85] In one respect, however, Jewish divorce law has always been "liberal": even after Rabbenu Gershom[86] abolished (for Ashkenazim) the husband's right to a "unilateral (no-fault) divorce",[87] the parties to a "dead marriage" could, without restraint (other than attempts to secure *shlom bayit*), agree to divorce, without the need for any allegation of fault on either side. The problem resides in cases where one spouse regards the marriage as dead but the other (normally, but not necessarily, the husband) either disagrees or insists on exacting a "price". One understands rabbinic reluctance to authorise a *get* when there still remains a genuine possibility of *shlom bayit* (which should not be equated with further time to agree financial terms); conversely, some *bate din* will regard the absence of any genuine possibility of *shlom bayit* as itself a sufficient basis for a *get*, even when one spouse remains recalcitrant.[88] Indeed, some simply adopt a criterion of a period of separation: R. Ḥayyim Palaggi would coerce after a period of separation[89] and R. Broyde in his tripartite agreement adopts a period of fifteen months,[90] the husband stating in the agreement: "Furthermore I recognize that my wife has agreed to marry me only with the understanding that should she wish to be divorced that I would give a *Get* within fifteen months of her requesting such a bill of divorce" – which he fully appreciates will not be acceptable to all

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83 R. Broyde in *Marriage, Divorce and the Abandoned Wife in Jewish Law* (Hoboken N.J.: Ktav, 2001) distinguishes five normative models of exit from marriage, arising from or reflecting different conceptions of the nature of marriage, and maintains that couples may (even must) choose the model of marriage within which they wish to live together. For a summary, see ARU 3 (opening of section: "The Present State of the Debate: Rabbi Broyde's analysis"); ARU 8:25 n.156. At p.86, he writes: "Each and every prospective couple must choose the model of marriage within which they wish to live together. They codify their choice through a prenuptial agreement regarding a forum for dispute resolution, or through a set of halachic norms underlining their marriage or through both."

84 See, however, the argument at ARU 17:151-53 for agreement on an updated list of grounds where "the entire community accepts that it would be well-nigh impossible for any reasonable woman to have a loving and intimate relationship with her husband", and where, therefore, he may be forced to release his wife, including domestic violence, abandonment and persistent sexual infidelity.

85 *Mishnah Nedarim* 11:12. For the husband, however, this was acceptable, at least according to R. Akiva in *Mishnah Gittin* 9:10 (n.87, below).

86 Responding, on some views, to his surrounding Christian environment. See further §4.44, below.

87 Thus taking a stricter approach than that of Bet Hillel in *M. Gitt*. 9:10 ("The School of Shammai say: A man may not divorce his wife unless he has found unchastity (*devar ervah)* in her, for it is written, *because he has found some indecency* (*ervat davar*) *in her.* And the School of Hillel say: [He may divorce her] even if she spoiled a dish for him, for it is written, *because he has found some indecency in her.* R. Akiva says: Even if he found another fairer than she, for it is written, *if then she finds no favor in his eyes*." The view of R. Akiva there seems never to have been accepted as halakhah, and may be thought inconsistent with the reasoning of *Mishnah Nedarim* 11:12, that "a woman must not be [so easily given the opportunity] to look at another man and destroy her relationship with her husband." Of course, the man in the situation envisaged by R. Akiva did have the option of polygamy (unless he had contractually excluded it). On this issue see Ishay Rozen-Zvi, "'Afilu Matza 'Aḥeret Nava Mimena – Mabat Nosaf 'Al 'Ilot Hagerushin Basifrut Hatana'it", *JSIJ* 3 (2004), 1-11, at www.biu.ac.il/JS/JSIJ/3-2004/Rosen-Zvi.pdf.

88 See n.94, below.

89 He further argues that one who impedes the divorce will ultimately be accountable, in rendering the couple liable to sin. See R. Cohen (n.14 above), 200; R. Riskin (n.17, above), 6). See also R. Moshe Feinstein, '*Iggrot Mosheh*, *Yoreh Deah* 4:15, which Broyde quotes thus: "In the matter of a man and a woman who, for these past years, has (sic) not had peace in the house. Since the *beit din* sees that it is impossible to make peace between them... it is compelling that they should be divorced, and it is prohibited from either side to withhold a *get*, not the man to chain the woman to the marriage or the woman to chain the man to the marriage, and certainly not over financial matters". Broyde, *Marriage* (n.83, above), 23, terms this "Marital Abode as the Norm", where the parties may agree that either has a right to divorce after a specified period of separation.

90 See n.95, and §6.63, below.

communities (§6.64).

1.30 The situation where the wife alone regards the marriage as dead is that of the *moredet me'is 'alay*. Those who oppose invocation of this halakhic tradition, on the grounds that Rabbenu Tam invalidated the use made of it by the Ge'onim,[91] tend however to overlook one vital consideration. What proved controversial here was not the grounds for divorce but rather the use of *kefiyah* in relation to them. The Gemara itself (*Ket.* 63b) accepts that the wife in such cases has justifiable grounds for a divorce,[92] albeit after a 12 month delay (without financial support).[93] Thus, the view found amongst some modern *posqim*, sometimes based on a period of separation (§1.29, above), that there is no point in seeking to rebuild a dead marriage ("אין אנו עוסקים בהחייאת מתים"),[94] itself has a firm halakhic basis.[95] Against this background, we are indeed bound to consider the suffering of the wife; that can hardly constitute a threat to the stability of Jewish marriage, where that marriage is already dead. Indeed, the possibility of being chained (treated as שבויה in the language of Rambam) to a dead marriage may well prove the greater threat to the stability of Jewish marriage, insofar as it inhibits women from entering into *qiddushin kedat moshe veyisra'el*.

1.31 The plea of *me'is 'alay* can be advanced both where fault is claimed and in its absence. There are many reasons why a wife may claim "he is repugnant to me". They range from cases of physical defect which might in any event have been regarded as *mum gadol*,[96] through cases of lesser *mum*, unacceptable behaviour on the part of the husband (and what is unacceptable may vary from one community to another),[97] to persistent quarrelling[98] (which may well be the background to the use of the language of "hatred" in divorce pleas, from biblical times onwards[99]). Though the fear that the woman might use it for ulterior motives (*notenet eynehah beaḥer*) does not originate in the

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91 See further chapter 4, below.

92 On whether according to Rabbenu Tam's school even a *ḥiyyuv* is available here, see §§4.38-39 below. A similar conclusion, that there may be a *ḥiyyuv* even where *kefiyah* is not permitted, appears to endorsed by Rema, *Yoreh De'ah* 228:20, discussing the case of a couple who had sworn to marry each other but the woman requests annulment of her oath (*hatarah*) on the basis that she has discovered faults in the man, to the extent that he had become repulsive to her. Rema holds that if she produces good evidence of his unacceptable nature (*'amatlah*), the *bet din* may annul her oath even without informing him, arguing by a *kal vaḥomer*: even if she were already married to him, he would be obliged to divorce her. See further ARU 5:19 (§12.2.13), noting also R. Ovadyah Yosef, *Yabia' 'Omer*, III, *'Even Ha'Ezer* , 18:13, interpreting *Rema* as following the ruling of Rabbenu Yonah who says that in a case of *me'is 'alay* although we do not coerce him we tell him that he is commanded to divorce her and if he does not do so there applies to him the saying of our sages: "If anyone transgresses rabbinic law it is permitted to call him a sinner", and citing also *ET* VI, col. 422, at note 968, where this view is cited in Me'iri in the name of "some of the sages of the [previous] generations".

93 The Geonim sought to eliminate both the delay and the lack of financial support, perhaps following a contractual condition first found in the Yerushalmi: see references in ARU 9:2 n.8 and (for a different view of the relationship to Palestinian divorce clauses) §§3.23-32.

94 Thus R. Shlomo Daichovsky: "We do not deal with resurrection of the dead and there is no reason to perform "artificial respiration" on dead marriages", in *Niago* vs. *Niago*, cited by Justice Yehudah Granit in Family Court File 094740/00, available at: http://www.courts.co.il/SR/mishpaha/sm0094740.htm.

95 See also *Or Zarua* per Broyde, *Marriage* (n.83, above), 23; R. Palaggi, Resp. *Ḥayyim VeShalom,* vol.2, no.112 (cited for other purposes by Riskin, "*Hafka'at Kiddushin*..." (n.17, above), 6f.), who took the view that if a couple is separated for eighteen months and there appears no chance of reconciliation, the Bet Din must coerce the husband to grant a *get.*

96 *Mishnah Ketubbot* 7:9-10, where *mumim* are presented independently of any *me'is 'alay* plea. See, however, PDR 2/188-196; 3/225-234; 6/221-224.

97 *Tashbets* II:8 accepts coercion when the husband makes his wife "suffer a lot" in the marriage ("מצער אותה הרבה"). May we not define *get* refusal as itself necessarily producing such suffering? Indeed, some may argue that what constitutes *me'is 'alay* at any time is at least in part a matter of social convention.

98 See §4.49 below, on *Tashbets* II:8.

99 *Deut*. 24:3, the Elephantine Papyri, R. Yoseh's condition and the *Genizah ketubbot*: see B.S. Jackson, *Journal of Jewish Studies* LV/2 (2004), 223.

context of *me'is* '*alay*, it soon came to be applied in that context.[100] This fear ultimately generated a demand that the woman claiming *me'is* '*alay* provide *amatlah*[101] (sometimes *amatlah mevureret*). This is hardly objectionable if it amounts merely to a requirement that, in appropriate cases, she is required to corroborate the sincerity of her claim that "he is repugnant to me".

1.32 However, two issues arise here which, though they might appear to be merely evidentiary, in reality affect the substance of the grounds for divorce. First, is she required to produce *amatlah* in every case where she claims *me'is* '*alay*? If so, this raises *notenet eynehah beaḥer* to the status of a (rebuttable) presumption. It is difficult to discern a uniform practice here. The matter appears to be within the discretion of the *bet din*,[102] and may well be exercised in terms of the perceived religiosity of the woman (and the particular community to which she belongs). Secondly, is there a list of "objective" criteria, one of which must be proved in order to constitute *amatlah*, or may the wife produce any (admissible) evidence of the sincerity of her disgust? If the former, then subjective disgust is no longer sufficient grounds for divorce; some further factor must be proved (very likely amounting to some form of fault). Here, too, it is difficult to identify any formal halakhic rule; the evidence of the *piske din rabbaniyim* suggests that the *bate din* treat this as a matter of practice.[103] It is however a matter which it is important to clarify, not least if women are to be presented with different forms of halakhically acceptable union and are to make an informed choice between them.

1.33 What, then, are the limits on the grounds for divorce? The tradition suggests two, implicit in the terminology already noted. There must not be the ulterior motive of entering into an alternative relationship (*notenet eynehah beaḥer*), and the strength of emotional rejection must be strong (*me'is* '*alay*, *sin'ah*). This would appear to exclude claims based either on boredom or the everyday irritations of marital life. We may note, in this context, that the *halakhah* has long (if not always) striven towards an egalitarian policy in this respect.[104] In Ashkenaz, a combination of the measures of Rabbenu Gershom (restricting the husband's right of unilateral divorce)[105] and Rabbenu Tam (restricting that of the wife, at least in relation to *keṭiyah*) severely limited no fault unilateral divorce; in Sepharad, the non-acceptance (at least at the formal level) of both the measures of Rabbenu Gershom, and the survival in some communities to modern times of a more liberal attitude to the *moredet me'is* '*alay*,[106] meant the continuation of no fault unilateral divorce for both spouses. This, indeed, appears to be the significance of the Cairo Geniza *ketubot* edited by Mordechai A. Friedman, which explicitly provide for divorce on the grounds of *sin'ah* by either spouse.[107] We may note that this was clearly not then regarded as incompatible with *qiddushin kedat moshe veyisra'el*, although today it is sometimes put forward as a model of a non-

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100 See ARU 16:37 (Rosh 43:8), 112, 114-116, 202.

101 See further §§4.53-55, below.

102 See ARU 16: 152, 191-195.

103 See ARU 16: 131, 35, 146-147, 152-156, 194-195. See further §§4.54-55, below. Susan Weiss reports from her courtroom experience in Israel that many *batei din* seem to restrict *me'is* '*alay* to sexual disgust and that some regard evidence of sexual relations with the husband as conclusively negating such disgust.

104 A surprising manifestation of this is the application of the "moral fear" argument (n.55, above) in respect of husbands, who may have to prove the sincerity of their divorce claims after the ban on polygamy in the *ḥerem deRabbi Gershom*, to rebut any possibility that they have the ulterior motive of *noten eynav be'aḥeret.* See ARU 16:156-59.

105 Along with the ban on polygamy, which however still remains biblically available, hence the remaining substantial inequality which consists in ultimate recourse where the woman (but not the man) is recalcitrant to a *heter me'ah rabbanim*.

106 See, e.g., R. Ratzon Arusi, "The Ethnic Factor in Halakhic decisions – Coercion of a *Get* on the grounds of "*Mais alay"* in Yemenite Jewry", *Diné Israel* 10-11 (5743-5761), 125–175. On 16th cent. and later sources still following Rambam on this issue, see §4.45, below.

107 See §§3.30-32, below.

qiddushin form of marriage, whether called *shutafut*[108] or *derekh qiddushin.*[109] As long as it continues to be viewed as within the spectrum of halakhic acceptability, its classification is relatively unimportant: what does matter is maintenance of the availability of intermarriage between halakhic communities opting for different models of marriage.

1.34 Opposition to conditional marriage, as expressed in *'Eyn Tnai beNissu'in*, emphasised the threat it was thought to pose to the exclusivity (and thus sanctity) of the marital relationship.[110] Such a condition, it was argued, would mar the ethos and sanctity of marriage in that it would render the wedding bond too easy to dissolve, and would open the way to adultery since a man contemplating an illicit relationship might think: "Maybe she is not married because she need only go to the civil court and undo her marriage retroactively."[111] We argue below (§§3.6-7) that this objection loses its force when the condition is formulated in a manner different from that of the French proposal against which *'Eyn Tenai BeNissu'in* was directed.[112] Of course, the fear of the authors of *'Eyn Tenai BeNissu'in* is not confined to solutions by means of conditional marriage; it may be applied to also to solutions by way of annulment (without any supporting condition), which equally lead to the theoretical possibility that adultery (too) can be retrospectively "annulled".[113] Indeed, when the authors of *'Eyn Tenai BeNissu'in* argue that conditional marriage treats Jewish marriage as concubinage because it makes it easy for either side to walk out and dissolve the marriage,[114] they are in effect arguing against any liberalisation of the divorce régime, and the same issues (of sincerity of the wife in seeking a divorce) arise as in the claim of *me'is 'alay.*

1.35 R. Hoffman (*'Eyn Tenai BeNissu'in*, 18) argues that Orthodox use of conditional marriage would be used by the Reform movement to say that what they rid Judaism of openly (*get* and *ḥalitsah*) the Orthodox got rid of surreptitiously; this *Ḥillul HaShem*, he maintains, would not be obviated even if the condition were to be formulated in a halakhically permitted manner. Rabbi M.S. HaKohen (*'Eyn Tenai BeNissu'in*, 31a-b) offers a more technical objection, arguing that such conditional marriage constitutes an abrogation/avoidance (*ha'aramah*[115]) of *halakhah* because the condition makes it clear that the couple really want a civil marriage merely dressed up as *qiddushin* and since we are dealing with a case of pentateuchal (as opposed to rabbinic) law it is impossible to apply the principle of *devarim shebelev* '*enam devarim*: although normally unexpressed intentions – here: "We really want civil marriage not true *qiddushin*" – are of no legal

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108 See §3.18, below.

109 See §1.9, above; §7.47, below.

110 A somewhat different version of this argument, leading to a pluralistic conclusion, is advanced by Hadari in ARU 17, arguing (at 124) that the "absolute unapproachability" of the betrothed/married woman (and thus her immunity from any attempt by another man to seduce her) is something which both husband and wife may feel is required for them to feel absolutely secure in the relationship, and that this requires maintenance of traditional *qiddushin*, without interference with the power of veto by the husband alone on divorce.

111 Rabbis: D.Z. Hoffmann in *'Eyn Tenai BeNissu'in,* 18, P.L. Horowitz at 27, M.S. HaKohen at 30, Tenenbaum at 32, Silberstein 38, Schwartz 42. See further ARU 4:11-12, with R. Berkovits's responses.

112 E. Berkovits, *Tenai beNissu'in uVeGet* (Jerusalem: Mosad Harav Kook, 1967), 57-58, 166-68, suggests that a condition that makes the *bet din* the arbiters of the matter rather than the civil courts could be halakhically and ethically acceptable, for example one which would retroactively annul the marriage if within two years of a civil separation and the advice of the *bet din* to divorce he still maintains his refusal to grant her a *get*. With such a condition, he argues, adultery will remain a serious matter because the marriage will only be retroactively annulled if a *bet din* says he should give a divorce and he refuses to do.

113 These problems are discussed by Tosafot Gittin 33a, s.v. *ve'afke'inhu*: Tosafot raises two problematic cases (a) anyone can save his adulterous wife (here, his niece) from punishment by annulling the marriage; (b) if the marriage may be retroactively annulled, any adultery is only *safek*, – so how can it be punished? See further n.1012. below.

114 Thus, they argue, replacing Jewish with Noahide marriage as recorded in *Yerushalmi Qiddushin* 1:1.

115 The rules of *ha'aramah* are complex: see the summary in *ET* IX cols. 699-701 at notes 35-58.

consequence, they *are* of legal consequence (in matters of Biblical law) where the true intention is obvious, and the fact that the parties deny it and claim that they do indeed want a Jewish marriage is of no avail. In short, this (and presumably any other) form of *qiddushin*, which reflects a desire to create a true Jewish marriage without its attendant possible future problems, is no more than a cover for concubinage.[116] It is clear that these objections reflect the religious politics of a particular age. Quite apart from technical replies to them (such as the criteria for determining when the true intention of the spouses is obvious), one has to wonder whether, today, the cause of Reform (and other non-Orthodox forms of Judaism) is not in fact furthered by this attempt to impose a "one size fits all" model of *qiddushin* (the very opposite of R. Broyde's approach). Moreover, there is a strong implication that any Jewish community which does adopt a form of marriage which might be classified as concubinage (despite the halakhic acceptability of that institution) is one with whose children (notwithstanding their own religious orientation as adults) intermarriage should be discouraged.

1.36 Another concern voiced in *'Eyn Tenai BeNissu'in* is that conditional marriage would legalise wife-swapping, since the wife would be free to marry another by means of retroactive annulment of her first marriage and then to annul the second marriage and return to her first partner.[117] The Torah, however, forbids a divorced woman from returning to her husband if she was married to another and her second marriage had ended in divorce or widowhood (*Deut*. 24:4) and Ramban there explains that this was to make it impossible for people to legally swap their wives and then take them back.[118] Here again, the argument is that *qiddushin* subject to the possibility of retrospective annulment is in effect no more than concubinage (to which *Deut*. 24:4 does not apply). Whether it would constitute *ha'aramah* of the halakhic restrictions on *qiddushin* is here more debatable: whereas spouses might well enter into *qiddushin al tnai* with the specific purpose of avoidance of *get*-recalcitrance, thus ensuring an escape route which might otherwise not be available, it is surely farfetched to imagine that spouses ("swingers"?) would enter into a particular form of marriage in order to keep open their option to engage in wife-swapping, quite apart from the onerous procedure they would then have to implement in order to keep within the *halakhah*.[119] Here, in fact, the authors of *'Eyn Tenai BeNissu'in* do acknowledge that such conduct would be within the *hakakhah*, albeit highly immoral. But does not the *status quo* itself authorise a form of conduct (*get*-recalcitrance) which is within the *hakakhah*, but highly immoral? Indeed it may be argued that the very fact that many couples in Israel avoid having a religious marriage because of the image of "religion" and the practices of the rabbinical courts may itself be regarded as a *ḥillul haShem* which in fact contributes to "wife swapping".

1.37 It may well be that we should regard the common maxim *'Eyn 'adam 'oseh be'ilato be'ilat zenut* as reflecting similar concerns. Its commonest occurrence is in relation to the maintenance (or not) of a preceding *tnai* (and the same may apply to a *harsha'ah*) in the face of subsequent marital relations between the spouses.[120] Such relations raise a (rebuttable[121]) presumption of cancellation of the *tnai*,

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116 Rabbi M. S. HaKohen, *'Eyn Tenai BeNissu'in*, 29b bottom – 30a top.

117 *'Eyn Tenai BeNissu'in*, Rabbis P.L. Horowitz at 27, Zilberstein at 38, Schwartz at 42; see ARU 4:12-13 at §§IX.8-9.

118 For an early ascription of such behaviour to the peoples of the biblical period see the midrash quoted in Rashi to Genesis 10:14.

119 See further ARU 4:12-13 at §§IX.9, on Berkovitz, *Tnai BeQiddushin UveGet* 67.

120 §§3.51, 63. Hadari, ARU 135 n.188, notes that the argument of R. Uzziel (*Mishpatei Uzziel,* 45 & 46, discussed at ARU 12:6-29) uniquely seeks to remove the objection of retrospective *zenut* from conditional marriage by arguing that so long as a condition makes the continuing validity of the marriage dependent upon the act or intention of a third party, when the marriage is retrospectively void there is no problem of *zenut* precisely because the husband had no control over the decision to void the marriage (and thus he had every intention of having fully marital relations).

121 Dayan Abramsky held it unnecessary to renew the *get* given by a soldier going on active military service, each time the soldier returned home on leave, on the grounds that "since the husband grants a divorce for the sole purpose of precluding the eventuality of his wife being an agunah, there is no reason to suppose that he will annul his proxy while

since otherwise (according to this argument[122]) such relations will be rendered *zenut*,[123] which it is assumed would run counter to the man's[124] intentions.[125] But any such fear of *zenut* is purely retroactive:[126] at the time of the preceding intercourse, the intercourse was, and was intended as, marital – unless one regards as *zenut* any intercourse which might *potentially* be so reclassified in the future. The maxim, moreover, begs an important question: what is *zenut*? The term has a very wide range, from actual prostitution to any union short of *qiddushin*.[127] As here used, the connotations of prostitution appear to have been transferred to any form of union which is not halakhically permissible.

1.38 It would appear that a fear of women's sexual tendencies, in the form of susceptibility to temptation if not actively seeking it out, underlies much of the above. This is classically expressed in the maxim *tav lemeitav tan du milmeitav armelu* ("it is better to dwell two together than to dwell in widowhood"[128]), meaning that a woman prefers to be in an unsatisfactory marriage rather than be single.[129] Though any such claim might be related to material support, its normal interpretation is related to sexual needs and is supported by the talmudic dictum: "More than the man desires to marry does a woman desire to be taken in marriage."[130] Such an understanding is also supported by the halakhic rules on *onah*, going back to the Mishnah,[131] though even this does not exclude the view that the fulfilment of women's sexual needs *within* (traditional) marriage also serves the interests of the husband, both as reducing the likelihood that the woman will behave like a "loose cannon" (seeking fulfilment elsewhere), and more generally as a mode of control.

1.39 The halakhic use of the maxim is most frequently discussed nowadays in the context of arguments against *qiddushei ta'ut*,[132] and thus serves to justify the validity of *qiddushin* where the informed

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on leave." See J.D. Bleich, *Contemporary Halakhic Problems* (New York: Ktav, 1977), 153.

122 Berkovits has argued eloquently that even with retroactive annulment during the husband's lifetime there *would be no promiscuity* in the case of his condition: see ARU 4:20 (§IX.40(iii)).

123 See further ARU 8:10-12.

124 For the argument that *'eyn 'adam 'oseh be'ilato be'ilat zenut* does not apply to a woman, see *Ḥayyim shel Shalom* II number 81; see also *ET* I, 559-60; ARU 8:11 n.51; ARU 5:42 (§21.2.6.11.3). The *Sedey Ḥemed, Ma'arekhet 'Ishut* 30, notes, however, that the *Noda' BiYhudah* applies this assumption also to women. Nevertheless, R. Uzziel argues in *Responsa Mishpetey Uzziel* 45 (near the end, s.v. *Uvifrat*), that even the *NB* rules that *'eyn tenai benissu'in* does not apply to a condition to protect him or her against a loss in spite of the possibility of *be'ilat zenut* (*NB* I *'Even Ha'Ezer* 54). However, R. Abel notes (ARU 12:27 n.132) that the wording of the *Mishpetey Uzziel* here appears confused (perhaps due to printing errors) and that he has based his remarks on what he found in the *Noda' BiYhudah.*

125 For *Shiltey haGibborim's* different understanding of *'eyn 'adam 'oseh be'ilato be'ilat zenut* as "A person cannot change his legitimate intercourse once it has taken place as such into a promiscuous intercourse", see ARU 4:22-23 (§IX.47).

126 For arguments that annulment is not necessarily always retroactive, see below, §§5.13-27.

127 See §§3.52-53, below. *Zenut*, in Hadari's understanding (ARU 17:131), is deliberately leaving open the possibility that another man can have relations with one's designated woman. "*Eyn adam oseh be'ilato bi'at znut*" (as she reads the *Me'il Tsedakah* at ARU 17:128) thus means that a man wishes his sexual acts to be carried out in a context in which the woman is exclusively and irrevocably his. On this understanding, a form of marriage in which there is no true *kinyan* is one in which the woman is never completely acquired and the husband's acts of intimacy might be defined as *zenut* not because of any actual unfaithful activity or planned activity on the part of the woman but merely because the possibility of another man's viewing her as available for seduction exists.

128 For discussion of the various linguistic problems it presents, see ARU 16:55-56. If "widowhood" is a correct translation, this might suggest that it originated in the context of (the justification of) *yibbum*; in fact, one of its five occurrences in the Talmud, *B.K.* 110b/111a (discussed at ARU 10:5-6, ARU 16:57-62), is such a case.

129 ARU 16:9, 55, 65-66, 71, 75, 93. See particularly the examples given in *Kidd*. 41a and (the parallel) *Yeb*. 118b, which concludes by ascribing the motivation "... all such women play the harlot and attribute the consequences to their husbands", i.e. once a woman is married it becomes possible for her to have affairs with other men and to pass off any children she has from them as her husband's: see further ARU 5:100.

130 *Yeb*. 113a; see ARU 16:100.

131 *M. Ket.* 5:6-7.

132 Discussed below, §§3.70-76. See also ARU 10:5-6 note 23, ARU 16: 24, 59-60, 201-202.

consent of the bride is questionable. That particular issue is relatively modern, and only one of the five talmudic occurrences approaches it.[133] Three other occurrences relate to different problems of the initial validity of *qiddushin*: whether a woman may forgo the prescribed *shaveh perutah*;[134] whether a woman may be betrothed through an agent, not knowing what the husband looks like;[135] where the husband had, without her knowledge, made vows before the marriage, but later has them annulled.[136] The final case is significantly different, relating not to the initiation but rather the grounds for divorce: Rabina asks whether a *get zikkui* given at the time of a quarrel is valid;[137] the issue is then discussed in terms of whether the divorce is an advantage to the wife (זכות הוא לה) or a disadvantage, in that she would prefer the gratification of her bodily desires (דלמא ניחא דגופא עדיף לה). The answer given is the latter, citing *tav lemeitav*.

1.40 In the context of the use of the maxim to rebut a claim of *qiddushei ta'ut*, there has been discussion of its status. Rabbi J.B. Soloveitchik[138] maintains that it asserts an ontological (thus, unchangeable) truth about the nature of women, derived from *Gen.* 3:16 ("And thy desire shall be to thy husband"), which he interprets as "a metaphysical curse rooted in the feminine personality. She suffers incomparably more than the male while in solitude … And this will never change ... It is not a psychological fact; it is an existential fact." However, R. Bleich, rejects this approach[139] and maintains: "As cited in the relevant talmudic discussion, the aphorism is neither reflective of a psychological truism descriptive of all women nor of a sociological generalisation regarding the reactions of the majority of women. Hence, any consideration of the possibility of *nishtaneh hateva*, i.e., that sociological, psychological, economic and attitudinal facts or values may have changed, is irrelevant."[140] But the concept of *nishtaneh hateva*[141] does not relate to "sociological, psychological, economic and attitudinal facts or values", but rather to "natural" facts. The real issue, as R. Abel argues,[142] is whether, even where nature has indeed changed, we are entitled to change a *halakhah* which was based on the earlier state of nature. The dominant view, he observes, is that we are not.[143] But even if it is a binding *halakhah* that (all?) women (really) prefer to be in an unsatisfactory marriage rather than be single, it can hardly be denied that

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133 *B.K.* 110b/111a (discussed at ARU 16:57-62): the *yevamah* faced with a problem of *mukeh sheḥin*. In mediaeval times, this *sugya* was the basis for annulling marriage in a case of *yavam mumar* (though for Maharam, only *lehalakhah*), and has continued to be used (*lema'aseh*) in modern times: see ARU 10:15-19.

134 *Kidd*. 7a, discussed at ARU 16:62-64.

135 *Kidd*. 41a, discussed at ARU 16:64-70. This is not a case of mistake; it is one of indifference.

136 *Ket*. 75a, discussed at ARU 16:70-75.

137 *Yeb*. 118b, discussed at ARU 16:75-76.

138 Quoted by Rabbi J.D. Bleich, "Survey of Recent Halakhic Literature: *Kiddushei Ta'ut:* Annulment as a Solution to the Agunah Problem", *Tradition* 33/1 (1998), 90-128, at 124-125 n.28; he also quotes a (more general) assertion by R. Soloveitchik, that such *ḥazakot* posited by the Gemara do not represent "transient psychological behavioural patterns, but are permanent ontological principles rooted in the very depths of metaphysical human personality." See further ARU 2:54-55.

139 R. Bleich (n.138, above), 106-107, citing in support the *Bet HaLevi, Ket*. 75a, who argues that "the Gemara is not making a universal statement applicable to all women but simply acknowledges the posibility that some small number of women might prefer the consort and companionship of a *mukeh shehin* to a life of spinsterhood." See also ARU 10:5-6 n.23.

140 R. Bleich (n.138, above), 106; ARU 2:54 n.237.

141 Cf. the approach of Rabbenu Tam, quoted in *Shittah Mequbetset* to *Ketubbot* 13b, s.v. השבתנו על המעוברת and in the glosses of R. Aqiva Eiger to BT *Pesaḥim* 94b. Cf. *Ḥazon Ish 'Even Ha'Ezer* 12:7 who cites *Tosafot* Avodah Zarah 24b s.v. *Parah*. See further the discussion in A.S. Abraham, *Nishmat Avraham* (English), III (*'Even Ha'Ezer* and *Ḥoshen Mishpat*), New York 2004, 38-39 and in Ḥanina ben Menaḥem, Neil Hecht & Shai Wosner (eds.), *HaMaḥloqet BaHalakhah* II (Boston: Institute of Jewish Law and Jerusalem: The Israel Diaspora Institute, 1993), 967-1070.

142 ARU 6:8-9 (§5.7), citing M.M. Kasher, *Mefa'ne'aḥ Tsefunot* (Jerusalem, 5736), 171-72, and especially note ב *ibid*., for further sources (for and against halakhic change) and discussion.

143 Rambam, *Guide*: II 8, III 14 (end), but noting that R. Yitsḥaq Lampronti, *Paḥad Yitsḥaq*, *'erekh tsedah*, puts forward a limited argument for changing the *Halakhah* in the light of new scientific knowledge.

conceptions of what is an "unsatisfactory" marriage are temporally and culturally contingent, so that the application of the law must be variable. Thus, in the context of *qiddushei ta'ut*, R. Feinstein noted that women in our generation are more stringent regarding defects in their husbands than women of previous generations, and ruled that *tav lemeitav* may thus not be applied in our day and age.[144] Indeed, relevant variations, R. Feinstein notes, include the level of religious observance.[145]

1.41 In the light of this, the specific relevance of *tav lemeitav* to the termination of marriage may now be reconsidered. Aranoff has argued against those who "contend that the Talmudic phrase *tav lemetav tan du milemetav armelu*, "better to dwell two together than to dwell alone," is a binding halakhic principle that negates the new *beit din*'s approach to freeing *agunot* from their intolerable marriages." This is directed against critics of the Rackman *bet din*'s extended use of *qiddushei ta'ut*.[146] There may be debate as to the precise scope of the principle of *qiddushei ta'ut*,[147] but it is clear that R. Feinstein in principle regards the logic of *tav lemetav* as leading, in modern conditions, to the release of the wife: she prefers to be free to contract a real marriage rather than be imprisoned in a dead one.[148] Moreover, this revised conception of the applicability of the principle does not stand alone. We must understand the talmudic case of a *get zikkui* given during a quarrel[149] to refer to a case where the wife does not really want the divorce: the *get* is held ineffective using the *tav lemeitav* principle. In the converse situation, where it is the woman whose

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144 ARU 16:79, 81. Knol's PhD study of *tav lemeitav* in the *piske din rabbaniyim* (ARU 16) indicates that it is relatively rarely invoked today. See also R. Broyde's documentation of the many *posqim* who view the presumption as subject to socio-cultural changes (*Marriage* (n.83, above), 98-100, 175-176 n.62, and his claim at 174 n.55 that R. Soloveitchik's view was "limited to opposing the wholesale abandonment of the principle [= of Resh Lakish] rather than merely asserting that it did not apply in any given case or set of cases". See further ARU 10:5-6, esp. n.23.

145 *'Iggrot Mosheh 'Even Ha'Ezer* 4:83(2) in the last sentence; ARU 2:54 n.239. See also ARU 10:17, citing *'Iggrot Mosheh, Ha'Ezer* 4, 121, for R. Feinstein's rejection of the application of *tav lemeitav* where the marriage was to a serving soldier going into battle, whose brother was an apostate: "It is clear to everyone that no woman would agree to get married for the sake of so short a period – days or even months – even though [as a rule] "it is better to live as two people (*tav lemetav tan du*)". Cf. Michael J. Broyde, "Error in the Creation of Jewish Marriages: Under what Circumstances Can Error in the Creation of a Marriage Void the Marriage without Requiring a *Get* according to Halacha", http://www.jlaw.com/Articles/KidusheiTaut.html; reprinted with minor differences as "Error in the Creation of Marriages in Modern Times under Jewish Law", *Diné Israel* 22 (5763/2003), 39-65 (English section): "In the reality of practical halacha, this problem — of what defect is sufficiently serious that the marriage is 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 reality of the times. This varies from time to time, place to place, and as R. Moshe Feinstein notes, from level of religious observance to level of religious observance", citing *'Iggrot Mosheh 'Even Ha'Ezer* 4:83(2) in the last sentence of that section. See further ARU 2:54 n.239; ARU 10:6 n.23, citing *inter alia* the analysis of Rabbi Y.E. Spector and Rabbi M. Feinstein's views by R. Halperin-Kaddari, "Tav Lemeitav Tan Du Mi-Lemeitav Armalu: An Analysis of the Presumption", *Edah* 4 (2002), 21-24.

146 S. Aranoff, "Two Views of Marriage – Two Views of Women: Reconsidering *Tav Lemetav Tan Du Milemetav Armelu*", *Nashim. A Journal of Jewish Women Studies and Gender Issues* 3 (Spring/Summer 5760/2000), 199-227, available at http://www.agunahintl.org/. See ARU 2:55-56.

147 See further §7.35, below, and ARU 16:81-99 on both the Bleich/Aranoff and HaCohen/Broyde debates. On the meaning of "latent defects", see A. Westreich, Review of A. Hacohen, *Tears of the Oppressed, An Examination of the Agunah Problem: Background and Halakhic Sources* (Jersey City, NJ: Ktav Publishing House, Inc., 2004), *The Tears of the Oppressed*, *The Jewish Law Annual* 17 (2007), 311-313.

148 See further ARU 16:80 on *'Iggrot Mosheh 'Even Ha'Ezer* 1:139 (where R. Feinstein writes: "..."since all women want to be married because of tav lemeitav, '*iggun* is a bigger burden on her and therefore they have ruled several *kulot* with regard to *agunot*") and ARU 16:100f., on Hacohen (n.147, above), 95.

149 *Yeb*. 118b, discussed at ARU 16:75-76. For later *teshuvot* dealing with the validity of a *get zikkui* given at the time of a quarrel, where the issue is whether the *get* is regarded as an unqualified advantage for the wife, so that the *zikkui* is valid as an application of *zakhin lo la'adam shelo befanav,* see ARU 16:78 n.210, citing *Ran* 43; *Terumat HaDeshen* 237; R. Eliyah Mizraḥi 68; Binjamin Ze'ev 109; *Ḥatam Sofer* 4, *'Even Ha'Ezer* 2:43; *Ein Yitsḥak* 1 *'Even Ha'Ezer* 3.

life was made a misery by a cantankerous and miserly husband (who would quarrel with her endlessly and starve her), *Tashbets* ruled that the husband could be compelled to divorce.[150] It is clearly not always the case that the *halakhah* regards it as preferable that a woman remain in an unsatisfactory marriage rather than be single; indeed, this would make a nonsense of the established grounds of divorce available to women. Again, that basic issue cannot be avoided.

[150] See §4.47, below.

Chapter Two: Issues of Authority

A. Introduction

2.1 From the outset of this project, we have stressed the overriding importance of issues of authority:[151] the problem is not resolved simply by reference to measures taken in the past; it consists rather in determining whether authority exists today to implement (and not merely assert the theoretical possibility of) such measures. In this context, appeal is often made to the need for "consensus" – arguably, a concept "foreign" to Jewish law,[152] but is more accurately debated in terms of the claim of *ḥumrah shel eshet ish*, which distinguishes our particular problem as one requiring special strictness, such that (as understood in relatively recent times) even one significant contrary opinion is claimed by some to have the status of a veto (§2.2-2.16). This being so, special importance attaches to the rules of *sfeq sfeqa* (§2.17-24). Historical research, moreover, may contribute to the construction of such "doubts", especially where the authority for rejection of remedies itself rests upon historically problematic claims and where historical research may itself unearth data relevant to the rules of *hilketa kebatra'ei* (§§2.25-37). Such arguments may be combined with the rules relating to authority in times of emergency, in such a way as to overcome the inhibitions felt by many *dayanim* against (i) applying *lema'aseh* what otherwise might only be available *lehalakhah* (about which R. Ovadyah Yosef has expressed some scepticism[153]) and/or (ii) adopting *lekhatḥillah* what otherwise might only be available *bedi'avad* (§2.38-41). The chapter concludes with some more general considerations (§2.42-50).

B. Consensus[154]

2.2 It has become commonplace to hear that any proposed solution to the problem of '*iggun* must command a consensus. If this is advanced simply as an application of some *general* claim that we require a consensus for (any) halakhic change, it is ill-founded.[155] It appears originally to have emerged in the context of the increasing limitations imposed upon the authority of *taqqanot haqahal*, particularly in their use of the power of expropriation.[156] This was itself relevant to marriage, insofar as *taqqanot* sought to impose additional requirements on *qiddushin*, failure to comply with which might be visited with annulment (using *hefker bet din*). The demand in that context of Ribash (*Resp.* 399[157]) for the approbation of "all the halakhic authorities of the region" (to the implementation[158] of a *taqqanah* requiring a *minyan* and the presence of the communal

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151 ARU 2:1-7, 57-65.

152 In the Introduction to *Mishneh Torah,* Rambam justifies the binding character of "all matters stated in the Babylonian Talmud" on the grounds that "with respect to all matters stated in the Talmud there is universal agreement among all Israel [הסכימו עליהם כל ישראל]." Some have seen here the influence of the Islamic doctrine of *ijma.* See ARU 1:13-14 and 2:58.

153 He writes at *Yeḥawweh Da'at* I (Jerusalem 5737) *Kileley HaHora'ah*, p. 15 no. 12, that "[if] a *poseq* concludes his *responsum* 'so it seems to me in theory but not in practice' or 'so it appears to me if [other] *posqim* will agree with me' we can assume that this is [merely] due to humility and we may [therefore] rely on his decision even in practice [and even if other authorities did not express their concurrence]": see ARU 18:53.

154 See further ARU 1:13-15; 2:57-61, 3:6-7, 7:13-25, 8:30-33 (§6.4).

155 See further ARU 8:31 (§6.4.1).

156 See further ARU 8:31 (§6.4.2), for the explanations of Morrell (viewing expropriation as threatening the inviolability of property rights and personal liberty and therefore requiring unanimous consent) and Kanarfogel.

157 Replying to a question posed to him by Abraham b. Alfual concerning an enactment adopted by the community of Tortosa: see further ARU 2:44-47 (§4.3.4).

158 Rivash argues at length for the *taqqanah*'s validity *lehalakhah*, but concludes: "This is my opinion on this matter in theory (להלכה). However, as to its practical application (למעשה) I tend to view the matter strictly; and I would not rely on my own opinion, in view of the seriousness of declaring that she needs no divorce to be free [to marry], unless all the halakhic authorities of the region concurred, so that only a "chip of the beam" should reach me." On this, see further

officials) may be viewed in this light. Moreover, as Elon argues, the possibility that a woman regarded in one place as married could be regarded elsewhere as unmarried — in terms of a local *taqqanah* — entailed an inherently serious threat to the upholding of a uniform law in one of the most sensitive spheres of the *halakhah*, that of the *eshet ish*.[159] Later, however, even the "region" became too local a basis for the operation of consensus.[160] If this analysis is correct, the demand for consensus appears to have been prompted by a problem of "popular" legislation, rather than being a restriction of the talmudic institution of the "majority rule" (of sages). More generally, it may reflect the desire to avoid any communal split. Ribash, however, gives a different reason for it: "so that only a 'chip of the beam'[161] should reach me", thus reflecting a desire "to divide the responsibility for the decision among as many authorities as possible".[162] In fact, we are left here with a paradoxical situation: such a power of communal enactment may, on Ribash's argument, itself be halakhically exercised without a consensus of rabbinic authorities, but a consensus is required for a formal *haskamah* for such exercise, since the individual authority consulted is reluctant to take sole responsibility for giving such an *haskamah*. This is quite evocative of the modern situation, and suggests that had Rivash been asked his opinion after the event (*bedi'avad*) on a marriage annulled in the light of such a *taqqanah*, his conclusion might well have been different. R. Abel notes that the desire to share the burden of a practical ruling and the distinction between theoretical and practical *Halakhah* can both be found in the Talmud[163] but has become a dominant feature only in the area of marriage and divorce.

2.3 Perhaps not unrelated to this is the paradox of the demand for consensus on the one hand, and the respect accorded to a *gadol hador* on the other. Sometimes this may be resolved in terms of a distinction between *psak* and reasoning. A story is told[164] of an occasion on which R. Ḥayyim of Brisk had a query regarding a practical matter and decided to turn to the leading authority of the day, R. Isaac Elḥanan of Kovno. He wrote: "These are the facts and this is the question; I beg you to reply in a single line – 'fit' or 'unfit,' Guilty' or 'not Guilty', without giving your reasons." When R. Ḥayyim was asked why he had done so, he replied "... decisions of R. Isaac Elḥanan are binding because he is the *Poseq* of our generation, and he will let me know his decision. But in scholarship and analysis my ways are different from his and if he gave his reasons I might see a flaw in it and have doubts about his decision. So, it is better if I do not know his reasons." On this account, the authority of the *gadol hador* is treated as charismatic,[165] rather than rational.

2.4 In contemporary halakhic discourse, however, "consensus" does not appear always to require unanimity.[166] Thus Zweibel writes: "It has been a longstanding policy of Agudath Israel, established years ago when the *Moetzes Gedolei HaTorah* was under the chairmanship of R. Moshe Feinstein זצ"ל and reaffirmed many times over the years..., that any secular Law

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§5.37, below.

159 M. Elon, "Taqqanot", *Encyclopedia Judaica* (Jerusalem: Keter, 1973), XV.726f.; ARU 2:59 n.261; 8:31 n.197.

160 Maharam Alashkar (end of the 15th, beginning of the 16th centuries) requires that "... the entire country and its Rabbis, with the concurrence of all or a majority of the communities", come to a decision, in reliance on those leading authorities (*Resp.* #48, in Elon (n.241, below), II.867f.), partly on the grounds that any individual community has a power of confiscation (*hefker bet din hefker*) only in relation to the property of its own members, and so could not effect an annulment where the husband was from a different town. See also Riskin, "*Hafka'at Kiddushin*..." (n.17, above), (2002), 24.

161 בי היכי דלמטיין שיבאמכשורא, cf. *Sanh*. 7b. See also ARU 7:14-15 (§IV.10).

162 Elon (n.241, below), II.856. On this issue of the personal responsibility for the decision, see further below, at §2.49.

163 ARU 7:14-15 (§IV.10) on *Sanh.* 7b and *Bava*' *Batra*' 130b, and noting that a similar tendency can already be detected in the *responsa* of Rashba (I no. 1206 at the end); on the latter see ARU 2:42-43 (§4.3.2) for text and commentary.

164 M. Elon, "More about Research into Jewish Law", in *Modern Research in Jewish Law*, ed. B.S. Jackson (Leiden: E.J. Brill, 1980), 89f. n.52.

165 Reflecting an ancient tradition in Jewish law: see n.276, below.

166 On the status of an "insubstantial minority", see further §2.44 (and Appendix A), below.

impacting upon *halachah*... must have a *broad base* of consensus support from authoritative *posqim* respected by all segments of the Torah community."[167] Similarly, when R. Riskin argued for the adoption of *taqqanot*, recognising that "this can only be done by a large gathering of the rabbis of Israel ... so that many authorities share the burden of the decision,"[168] he was met by the objection that a "large gathering" is not enough; the "virtual unanimity" of all of the rabbis of Israel was necessary.[169]

C. The *ḥumrah shel eshet ish*[170]

2.5 If claims that we require a consensus for halakhic change are ill-founded when put forward as general propositions, they have greater weight in the particular context of *gittin*,[171] where it is the accepted practice (though not agreed to by all authorities) to take into account *all* opinions (where these advocate stringency) even if they are opposed to the lenient rulings of the *Shulḥan 'Arukh*, the Rema and the vast majority of the *posqim*. Even a single stringent opinion would thus have to be taken into account[172] (thus going substantially beyond the view of Maharibal, who speaks of the need to abide by 'substantial minority' opinions in matters of *gittin* and *qiddushin*[173]).

2.6 The reasons for this may possibly be because the Sages' extremely strict treatment of '*erwah* is part of a pattern affecting all three major commandments where, when necessary, martyrdom is demanded, one aspect of which is the suspension of the rule of *rov* and the concern for even

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167 Chaim David Zweibel, "Tragedy Compounded: The Agunah Problem and New York's Controversial New "Get Law"," in *Women in Chains. A Sourcebook on the Agunah*, ed. J.N. Porter (Northvale, N.J. and London: Jason Aronson Inc., 1995), 149f., arguing that that this criterion was satisfied in relation to the halakhic acceptability of the 1983 New York *get* law, but not in relation to its 1992 successor.

168 S. Riskin, "*Hafka'at Kiddushin*..." (n.17, above), 29-30.

169 J. Wieder, "*Hafka'at Kiddushin*..." (n.4, above), 43 n.6.

170 See further R. Abel's full analysis in ARU 7:13-25 and ARU 16:13, 111, 166, 167, 201ff. Hadari understands the *ḥumrah shel eshet ish* to be halakhic parlance for what she describes as the "taboo" that in *kinyan*-marriage surrounds a married woman and serves to render her unseduceable (ARU 17:115-34, *passim*; 148). Thus, *ḥumrah shel eshet ish* is not a special *halakhic* category but rather a way of referring to visceral sexual fears. However, Hadari stresses that this depends upon the perception of traditional *qiddushin* by the particular community concerned, and that (a) the strength of *kinyan* is weakened anyway in communities which do not perceive the wife to be the "acquisition" of the husband and (b) the mutual trust and respect of which a non-*kinyan* union may be a marker (or may engender) may itself serve to strengthen Jewish partnerships. In a community in which a woman cannot be "forced" by *kinyan* into sexual fidelity, the most stabilising path may then be to introduce forms of relationship in which her feelings of being free, equal and equally valued will encourage her to remain faithful of her own accord. (ch.4 and ch.5 to p.132).

171 E.g., J.D. Bleich, "The Device of the Sages of Spain as a Solution to the Problem of the Modern Day *Agunah*", in J.D. Bleich, *Contemporary Halakhic Problems, Volume III* (New York: Ktav, 1989), 329-343, at 332: "Given the extreme and well-founded reluctance on the part of rabbinic authorities to sanction any procedure which would render the *get* invalid even according to a minority view, the remedy must avoid the taint of *asmakhta* in a manner accepted by all authorities." See also Bleich (n.138, above), 118: "... to be viable and non-schismatic, any proposed solution must be advanced with the approbation of respected rabbinic decisors and accepted by all sectors of our community." Cf. Jachter, www.tabc.org/koltorah/aguna/aguna59.7.htm: "... there have been interesting proposals made to solve the Aguna problem which have been rejected by the Orthodox rabbinate. There have been other very innovative suggestions, such as proposals made by R. Yosef Eliyahu Henkin (*Peirushei Ibra* pp. 115-117: see further below, §3.45-48) and Israeli Chief Rabbi Benzion Uzziel (*Teshuvot Mishpetei Uzziel*, *'Even Ha'Ezer* 1:27) which have simply not been accepted. What is crucial to note is that these proposals were not implemented in practice, because the rabbinic consensus rejected these proposals. Radical changes to Gittin procedures require a rabbinic consensus because of the potential for a communal split if part of the community rejects the proposal."

172 This would rule out not only coercion but even *harḥaqot* in cases of *me'is 'alay*: see R. Gertner's *Kefiyyah BeGet* (Jerusalem, 5758), p. 489, section 118, number 5 and p. 531, number 5.

173 R. Yosef ibn Lev 1505-1580, *Resp.* volume IV no. 19, quoted in *Pitḥey Teshuvah* to *'Even Ha'Ezer* 154 sub-para. 30. See ARU 6:14 (§6.10); ARU 7:15 (§IV.11, at n.106).

insubstantial minorities.[174] This, indeed, is reflected in the debate regarding conditional marriage, where the view that even a condition repeated at *ḥuppah*, *yiḥud* and *biah* may be cancelled during the act of intercourse was asserted as normative, on the basis apparently of a single opinion.[175]

2.7 This, however, appears to be a modern innovation. An oft-quoted source for this stringency of approach is R. Yom-Tov Algazi (18th century) who applies this "accepted practice" not only to *gittin* but also to *yibbum* and *ḥalitsah*.[176] His opinion is cited in a number of *teshuvot* of R. Ovadyah Yosef.[177] But this is purely custom or, at most, of rabbinic origin.[178] Thus R. Ovadyah Yosef, *Yabia'* '*Omer* VI *'Even Ha'Ezer* 6:3, quotes R. Refa'el Asher Qubo:[179]

> In a case of '*ervah* (adultery, incest) although [in any given circumstances] the majority of the *posqim*[180] rule leniently and *according to the law of the Torah we follow their lenient position*, nevertheless *by rabbinic enactment* we concern ourselves with the stricter opinion of the minority of the *posqim*, as Maharibal wrote in [his *responsa*] volume IV (no. 19). A root and base for this is that which we find explicitly stated in the Talmud that in a case of '*erwah* the [talmudic] Sages took into account a "substantial minority"[181] where this would lead to a stringent ruling (as *Tosafot* wrote in *Yevamot* 36b,[182] *Bekhorot* 20b;[183] cf. also *Tosafot*, *Qiddushin* 50b).

2.8 A fundamental uncertainty here relates to whether the basic rule of *rov* — which Rambam implied would have justified retention of the geonic measures,[184] and which Maharam Alashkar saw as justifying the extension of annulment beyond the cases enumerated in the Talmud[185] — applies at all where there was no face-to-face meeting of those comprising the majority with those comprising the minority.[186] If it does, the view that the concern for minority views in the area of

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174 ARU 7:22-23 (§IV.37-38). But see also ARU 7:17 (§IV.19-20).

175 See ARU 7:23-24 (§V.3). See also ARU 6:14 (§6.10), on opposition to the application of the modern Israeli version of the *harḥaqot* of Rabbenu Tam.

176 For the latter, see *Responsa Simḥat Yom-Tov*, cited in next footnote. On whether *yevamah lashuq* is considered as *'erwah,* see *Simḥat Yom-Tov* no. 11, 44c; *Yabia' 'Omer* (Jerusalem 5746) VI *'Even Ha'Ezer* 6:2, p. 296, col. 1, 11th line from base of column (including *yibbum* and *ḥalitsah* under the heading *'erwah*); *ET* XXI col. 433 at note 59. For those who do not consider her *'erwah* see *ibid*., note 71. A briefer summary of both sides can be found in *ET* VI col. 707 at notes 40-46.

177 The matter is extensively examined in *Yabia' 'Omer*: I *Yoreh De'ah* 3:12; IV *'Even Ha'Ezer* 5:4 & 6:2; VI *Yoreh De'ah* 15:5 end; VI *'Even Ha'Ezer* 2:6 p. 274a, beginning on the 17th line above the end of the column [in the large edition (Jerusalem 5746)] & 6:2. R. Yosef quotes in these *responsa* a number of sources in which R. Algazi's ruling is found – e.g. *Resp. Qedushat Yom-Tov* no. 9, 15d & *Simḥat Yom-Tov* no. 11, 44c. See *Yabia' 'Omer* (Jerusalem 5746) VI *'Even Ha'Ezer* 6:2, p. 296, col. 1, 11th line from base of column.

178 In Torah law there is no difference whatsoever, as regards halakhic decision making, between *gittin* and *qiddushin* (or, for that matter, *ḥamets* on *Pesaḥ*) on the one hand and all other areas of the *Halakhah* on the other; taking into account all opinions in the area of *gittin* and *qiddushin* is purely custom or, at most, of rabbinic origin: ARU 7:14 (§IV.9; see also §IV.11).

179 See further ARU 7:1 (§IV.11), relating this to the status of the majority rule even where the *posqim* never met in debate: ARU 7:1 (§I.2), ARU 7:15 (§IV.12).

180 Including the *Shulḥan 'Arukh* and the Rema.

181 Of course, this would not explain the practice of accepting the opinions of insubstantial minorities and even of unique opinions. On this, see below.

182 S.v. *Ha*'. See also *Tosafot* ibid. 121a, s.v.*Velo*'.

183 S.v. *Ḥalav poter*.

184 *Hilkhot Ishut* 14:14: see n.770, below.

185 *Resp.* #48 (*rov kehillot*). See Y. Breitowitz, *Between Civil and Religious Law. The Plight of the Agunah in American Society* (Westport Conn.: Greenwood Press, 1993), 65 n.181.

186 See further ARU 7:1-2, 7:15-16 (§IV.12-13). If the majority rule does not apply by Torah law to those *posqim* who never debated their disagreements face to face, so that *min haTorah* the matter remains in doubt and it is only by rabbinic authority that we accept the majority (albeit even in cases of Torah law), the concern for minority views in *gittin* and *qiddushin* is more easily understood because now we do not need to postulate a new rabbinic enactment

gittin and *qiddushin* must be a rabbinic stringency is reinforced; if not, the matter remains one of *safeq* but any *ḥumrot* derived from minority opinion must still be regarded as merely a rabbinic stringency, according to the majority opinion that *safeq de'Oraita' leḥumra'* is, as Rambam says, itself a rabbinic doctrine.[187]

2.9 Analysis of a *teshuvah* by R. Moshe Feinstein (*'Iggrot Moshe*, *'Even Ha'Ezer* I, 79)[188] also leads to the conclusion that insubstantial minority halakhic opinions, even in matters of '*erwah*, need not be considered[189] and that there is no source in the Talmud for those who rule that we must take into account even insubstantial minority, or unique, stringent opinions in the area of *gittin* and *qiddushin*.[190]

2.10 Moreover, R. Yosef himself maintains that once a situation of '*iggun* has materialised we revert to the usual rule of *rov posqim* and the *Shulḥan 'Arukh*. In his summary of halakhic guidelines, he concludes: "We customarily take a strict line in the laws of the grave matter of '*erwah* even against the opinion of Maran and the majority of *posqim* … but in a case of '*iggun*[191] we are lenient [and follow *Shulḥan 'Arukh* and *rov posqim*]".[192] This seems to be the position of today's Ashkenazi authorities also.[193] Regarding the Yemenite communities, some argue that there existed a dispute amongst their *posqim* as to whether the Rambam's rulings were accepted as final even in the matter of *kefiyat get* when she claims *me'is 'alay*. R. Ovadiah Yosef maintains that no such dispute existed – the Rambam's rulings were, he maintains, accepted on this point too.[194]

2.11 When all hope for a solution of an '*iggun* situation according to *rov posqim* is lost we may rely, according to the Taz and his school, on (even insubstantial) minority views and even on a lone opinion (even if the question is one of biblical law).[195] This is based on the view that (i) the law of *rov* operates, at the biblical level, only where the *maḥloket* was face to face (as in a debate amongst the judges of the Sanhedrin), but a *maḥloqet* amongst *posqim* who never met, whether due to historical or geographical constraints, is not governed, biblically, by the majority rule and remains a doubt in biblical law and (ii) *safeq de'Oraita leḥumra* is a rabbinic rule (the view of Rambam, followed by most *posqim*). The greater the emergency — for example, the '*agunah* is young, without children, desperate to remarry and facing the certainty of a ruined life — the more likely we are to rely on even a lenient minority view, and even on a single lenient opinion. R. Yosef (§2.13, below) takes the view that *lehalakhah* we can accept both (i) and (ii). In each case, sensitivity to the circumstances dictates what we should actually do.

2.12 Examples and applications of this advocacy of special leniency to resolve problems of *iggun* may

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towards stringency in cases of *maḥloqet haposqim* touching *gittin* and *qiddushin*; on the contrary, since there is no pentateuchal majority in such cases, we should automatically take the stricter view in all cases of Torah law (as we do in *gittin* and *qiddushin*) because *safeq de'Oraita leḥumra'* and a rabbinic enactment is required so that we can rely on the majority in other cases involving Torah law. This rabbinic leniency is more easily understood according to the view that *safeq de'Oraita' leḥumra'* itself is *miderabbanan*: see §2.13, below.

187 See further ARU 7:14-15 (§IV.11-12).

188 For the detailed argument, see ARU 7:18-22 (§§IV.24-35), reproduced as Appendix A below.

189 ARU 7:21 (§IV.32).

190 ARU 7:24 (§V.8).

191 Presumably including cases where, in spite of a ruling of *bet din*, a *get* cannot be obtained.

192 *Responsa Yeḥawweh Da'at* I, *Kileley haHora'ah*, p. 32, no. 9. See ARU 6:19 (§7.8); 7:18 (§IV.23).

193 See *Pisqey Din Rabbaniyim*, vol. IV, col. 166, discussed in §2.14, below.

194 *Responsa Yabia' 'Omer* III *'Even Ha'Ezer* 19:21 col. 2.

195 On Morgenstern's claims in this respect, see ARU 5:2-3 (§3) (on the claim: "All doubts in law and facts are resolved in favour of the Agunah. Even minority views in law in favour of annulment can be relied on"); ARU 5:21-23 (§15) (on the claim: "we rely on Taz *'Even Ha'Ezer* 17:15; Shakh 242; *'Arokh HaShulḥan Yoreh De'ah* 110 who permit us to rely on minority opinions to free an *'agunah*").

be found in the following sources:

(a) The Taz in *'Even Ha'Ezer* 17, sub-para. 15,[196] quotes authorities who were willing to rely on 'one *poseq*' when all hope of releasing an '*agunah* was otherwise lost, though this was in the context of a missing, rather than a recalcitrant husband.

(b) R. Ya'aqov Reischer (c. 1670–1733), *Responsa Shevut Ya'aqov* III, *'Even Ha'Ezer* 110, permitting a young woman whose husband had disappeared in the ocean but whose death had not been definitely attested, to remarry since this type of '*agunah* is forbidden remarriage only *lekhatehillah*. As she was a young lady her situation was *she'at hadehaq* and therefore in her case the *lekhatehillah* prohibition could be overridden.[197]

(c) R. Yosef Ḥazzan[198] argues that even in matters of *qiddushin* and *gittin* the lenient rulings of the *Shulḥan 'Arukh* should be followed (by the Sefaradim) *even when these are against the majority of the posqim*. He writes in his classic *Ḥiqrey Lev*:

> "…from all the writings of the '*Aḥaronim* it seems that also in a case of '*erwah* (adultery and incest) we (the Sefaradim) have accepted his (R. Yosef Qaro's) rulings even when these are the more lenient position. See what I have written in *Ḥiqrey Lev* to '*Oraḥ Ḥayyim* 95 & 96 … I explained there that in case of an '*erwah* prohibition, although we have accepted the rulings of *Maran*, it is within the rights of the rabbi issuing a ruling (in a specific case) to rule stringently *if he sees that a majority of the posqim … take a strict lin*e (against *Maran*'s lenient view). In all other matters of the *Halakhah* however, the rabbi issuing a ruling is *not permitted* to give a strict decision against the view of the Rambam and Maran".[199]

It is clear from this that the *Ḥiqrey Lev* would go no further than *allowing* (though not requiring) a stringent decision (in *gittin* and *qiddushin*) against the *Shulḥan 'Arukh* if a majority of the *posqim* are opposed to the *Shulḥan 'Arukh*'s lenient ruling. He would not abide by the Maharibal's acceptance of the substantial minority consideration and certainly not R. Algazi's concern for every single opinion.[200]

(d) In some cases of *qiddushey ta'ut* R. Feinstein ruled leniently in opposition to a number of outstanding '*Aḥaronim* and it seems that it is *his* ruling which stood, at the time, as a lone opinion. Hence his preference for a *get*. However, in cases where the procurement of a *get* proves impossible, so that the situation becomes an insoluble case of '*iggun*, R. Feinstein is satisfied that the marriage can be

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196 Cited by R. Moshe Morgenstern, who writes (*Hatarot Agunot*, I, ch.3 p.54): "All doubts in law and facts are resolved in favour of the Agunah. Even minority views in law in favour of annulment can be relied on". On this, and Taz*, Yoreh De'ah* 293:4, also cited by Morgenstern, see ARU 2:60-61 and n.268 (§5.1.4), ARU 5:2-3 (§3). In the latter, R. Abel notes that it does not apply to doubts regarding the *facts* such as the case of *mayim she'eyn lahem sof* and that even with regard to doubts in law the Rema there in *'Even Ha'Ezer* rules stringently against relying upon minority opinions, so that one cannot base a decision for leniency on this Taz alone. See, however, §2.20 (end).

197 On this amazing leniency it was remarked by Dayan Y. Abramsky of the London *Bet Din* that "his words could not be believed were they merely heard but only if they be read in the written text": see R. Meir Feuerwerger (Meiri), *'Ezrat Nashim* I:240 col. 2. On R. Reischer, see further ARU 7:17 n.118.

198 1741-1820. R. Yosef Refa'el Ḥazzan was Rabbi of Smyrna. In 1811 he moved to Ḥevron and 2 years later to Jerusalem where he was appointed *Rishon leTsiyon* (Chief Rabbi of the Holy Land). His monumental work *Ḥiqrey Lev*, *responsa* according to the order of the *Shulḥan 'Arukh*, was published in 7 volumes between 1787 and 1832. R. Ḥayyim Pallagi was his grandson.

199 *Ḥiqrey Lev*, *Mahadura' Batra'* II (*'Even Ha'Ezer* & *ḤM*), *HM siman* 4 on *Hilkhot Halwa'ah*, *siman* 60, p. 180d. ARU 7:18 (§§IV.21-22).

200 For other *'Aḥaronim* who take a similar line to R. Ḥazan see *Yabia' 'Omer* IV *'Even Ha'Ezer* 5:4; VI *'Even Ha'Ezer* 6:2,3; VI *Yoreh De'ah* 15:1.

considered void. R. Feinstein thus appears willing to rule as a sole lenient opinion; we may take it that he would certainly disregard all minority opinions.[201]

(e) In a case in which R. Ovadyah Yosef sat together with R. Waldenberg and R. Kolitz,[202] the *bet din* ordered the application of *harḥaqot* against the recalcitrant husband (in spite of the ruling of Maharibal who forbade their application), in order to save the wife from '*iggun*.

2.13 There is dispute as to the scope of the lenient approach of the Taz (§2.12(a), above): Shakh and his school[203] allow such reliance on a unique lenient opinion when all other possibilities of releasing an '*agunah* have been exhausted only if we are dealing with rabbinic law; Taz and his school[204] apply it even if we are dealing with biblical law. However, if we accept the arguments of R. Yosef,[205] who maintains (i) that in any *maḥloqet* where the disputants are *in absentia* of each other, the majority rule is not applicable in Torah law and the situation remains one of doubt and (ii) that the consensus of scholarly opinion follows the Rambam that a doubt in Torah Law being resolved strictly (*safeq de'Oraita leḥumra'*) is only rabbinic in nature,[206] it would seem that there is room to consider whether we could adopt the view of the Taz and rely, in an otherwise insoluble situation, on a single lenient authority even in a case of Torah law including, as the Taz says, '*iggun*.[207]

2.14 But even if we do not go so far as to accept a lone lenient opinion, there is general agreement that, where the *get* refusal reaches a stage classifiable as '*iggun*, we need not take account of stringent minorities (even if they are *mi'ut matsuy* and certainly not if they are *mi'ut she'eno matsuy* or unique opinions).[208] In a decision recorded in *Pisqey Din Rabbaniyim*, Rabbis Hadayah, Elyashiv and Zolti wrote that in a grave situation of '*iggun* when there is no hope of the wife's returning to live with the husband (as here, where the woman had remained chained for 8 years), the halakhah requires that we must rule like the majority (even if it is not in accordance with all opinions) and not concern ourselves with minority opinions as we find in the laws of *gittin*.[209] The *bet din*

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201 ARU 6:18-19 (§7.8).

202 *Yabia' 'Omer* VIII *'Even Ha'Ezer* 25:3-4. See ARU 6:14 (§6.10).

203 See the summary in *ET* IX cols. 260-262 and the footnotes thereon. On the implications of this approach, see further ARU 5:22-23 (§15.3.4).

204 *'Or Zarua'* II *Sukkah* sec. 306; *Responsa* of Rashba I no. 253 (as understood by Rashbash, *Responsa* no. 513); *Get Pashut, Kelalim*, sec. 6; Rabbi M. Y. Zweig, *Responsa 'Ohel Moshe*, *Mahadura' Tinyana'*, 123:2.

205 See *Yeḥawweh Da'at* Vol.1, *Kilelei HaHora'ah*, p.19 no.1 and *Yabia' 'Omer* Vol.2, OH 12:3.

206 See ARU 7:15 (§IV.12 and note 111), noting that, according to Rabbi M.Z. Landau in *Sefeqot Melakhim*, ch.7, the Rambam would maintain this lenient position even where the doubt is due to an argument amongst the *posqim*.

207 See further ARU 7:1-2 (§I.4), ARU 5:22-23 (§§15.3.1-15.3.4). R. Abel at ARU 5:22 (§15.3.2) notes that Rabbi A.Y. Kook in the tenth chapter of the introduction to his work *Shabbat Ha'Arets*, argues that according to those, however, who rule that in any *maḥloqet* where the disputants are *in absentia* of each other the majority rule is not applicable in Torah law (where the situation would be considered one of doubt) and is applied only by rabbinic enactment, we may rely, in an urgent case, on a single opinion even if the question is one of Torah law. See ARU 7:1 (§1.2 at note 3). Although this approach regards *maḥloqet haposqim* as one of doubt and, therefore, should the question be one of Torah law, we should not be allowed to rely on a lenient minority because *safeq de'Oraita' leḥumra'*, R. Yosef has shown that the view of the Rambam — that *safeq de'Oraita' leḥumra'* is only a rabbinic regulation — is the dominant halakhic opinion. Cf. ARU 7:15 (§IV.12). This would have important consequences according to the *responsum* of R. Ovadyah Yosef in which he reaches the conclusion that there is ample evidence to demonstrate that in any *maḥloqet* where the disputants are *in absentia* of each other, the majority rule is not applicable in Torah law (where the situation would be considered one of doubt) and is applied only by rabbinic enactment. Cf. ARU 7:15-16 (§IV.13).

208 R. Ovadyah Yosef, *Yeḥawweh Da'at*, I, *Kileley HaHora'ah*, p.32, cited in ARU 7:16-17 (§IV.16 and n.115).

209 *Pisqey Din Rabbaniyim*, vol. IV, col. 166, as noted by R. Ḥayyim Sha'anan, "Ofanim Li-khfiyat Haget", *Teḥumin* 11 (5750), 212: "In a grave situation of *'iggun* when there is no hope of her returning to live with him and especially in a case like ours where the woman has sat chained for 8 years we must hand down a [lenient] ruling even if it is not in accordance with all opinions."

therefore ruled that it would force him to divorce – provided the wife returned [the payment of] her *ketubbah* which she had already received from her husband and also gave him, at the time of receiving the *get*, the sum that had been agreed with her (the equivalent of $15,000).

2.15 Taking these sources together, it follows that before we reach the stage of '*iggun* all stringent opinions are taken into account but once we cross the threshold and enter the area of '*iggun* we abandon the 'all stringencies' approach and – even if we do not go so far as to accept a lone lenient opinion – we rely on the usual halakhic methodology.[210]

2.16 Naturally, this raises again the fundamental question: what counts as '*iggun* and what as *gittin* for the purposes of this distinction?[211]

Dogmatics of sfeq sfeqa[212]

2.17 In modern jurisprudence, systemic rules about authority are commonly termed "secondary rules".[213] They include "rules of recognition" and "rules of change", which provide criteria for recognising the validity of existing rules on the one hand, changes in rules on the other. In some secular legal systems, they are defined in a Constitution. Not so in Jewish law. As R. Abel's study (ARU 5) demonstrates, they are subject to substantial uncertainties. But the halakhah has developed ways of dealing with such uncertainties, in the form of rules concerning "doubt".

2.18 Particularly important here is the application to our problem of compound doubts (*sfeq sfeqa*). The issue is complicated. The principles of *safeq de'Oraita' leḥumra* and *safeq deRabbanan lequla*[214] provide a useful starting-point: a double doubt is sufficient to permit a Torah prohibition; a single doubt is sufficient to permit a rabbinic prohibition.[215] Yet what constitutes a "doubt" (to be distinguished from mere lack of knowledge) may itself be contested, and there are additional issues to be addressed, such as the combining of factual and halakhic doubts[216] and the status of a unique (but not excluded) opinion.[217]

2.19 In *Yabia'* '*Omer* VII *'Even Ha'Ezer* 6, R. Ovadyah Yosef discusses *sfeq sfeqa* at length (with regard to removing the blemish of bastardy), concluding that so long as one doubt is *shaqul* (= evenly balanced, i.e. 50-50) the other need not be. Thus, a double (here, factual) doubt solves the problem of *mamzerut*. Applying this to legal propositions, a minority opinion can qualify as the second doubt in a *sfeq sfeqa*; and in fact minority views, even if categorically rejected from *Halakhah*, are regularly used to create a *sfeq sfeqa*.[218]

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210 *Arokh Hashulḥan*, Y.D. 110, para.111 (end).

211 See §1.5, above.

212 A finely detailed study of *safeq* and *sfeq sfeqa* will be found in *Sfeqot Melakhim* by R. Moshe Zvi Landau. There is an excellent halakhic summary in R. Yosef's *Yeḥawweh Da'at*, I, *Kileley HaHora'ah*, *Kileley Sfeq sfeqa* (pp. 25-29).

213 Following H.L.A. Hart. See Jackson, "*Mishpat Ivri, Halakhah* and Legal Philosophy" (n.18 above), §4.1.

214 ARU 5:33 (§21.2.6.1.1) on *Responsa Maharashdam* II nos. 110 and 111. On this source, see further below, §2.22.

215 And this, despite *hilketa kebatra'ei.* Abel, ARU 7:4 (§III.10), observes: "The Rosh (*Mo'ed Qatan* 3:20, also cited in *Yavin Shemu'ah*, rule 277 in the name of the Rosh) maintains that where the dispute is in rabbinic law and the earlier authority rules leniently the earlier authority should be followed in spite of the rule of *batra'ei*. This accords with the general rule that in rabbinic law a doubt should be resolved leniently (*safeq deRabbanan lequla*')." He notes that the Ra'avad applied *batra'ei* even where this would lead to stringency in rabbinic law, as mentioned by the Rosh in *Mo'ed Qatan* there.

216 For an example of such, see R. Jachter's comments on R. Herzog's analysis of the lenient ruling in favour of annulment of the marriages of the "captured" wives of the Austrian *kohanim*, on the grounds of *sfek sfeka:* (i) were they raped?; (ii) is annulment possible in the post-talmudic age? See ARU 2:62 (§5.2.3).

217 See ARU 5:32 (§21.2.6 n.99).

218 *Yabia' 'Omer* Vol.2, OH 12:3; ARU 7:15 (§IV.14).

2.20 The question also arises whether these principles may be applied "reflexively". Do the rules about *safeq* apply to *sfeiqot* in the secondary rules themselves? For example, there are uncertainties in the scope and meaning of the basic rule of *hilkhata kebatra'ei*, such as its applicability as between "halakhic epochs" (particularly relevant in relation to the rejection by the Rishonim of the geonic enactments), the need for specific rejection by the *batra* of the ruling (and reasoning?) of the *qamma,* and the conditions required for the application of Rema's qualification.[219] There is little in the *halakhah* to indicate a negative answer to this question; indeed, some have questioned the very applicability of the distinction between "primary" and "secondary" rules to the *halakhah*.[220] Moreover, majority opinion has it that *safeq de'Oraita' leḥumra'* is, as Rambam says, a rabbinic doctrine.[221] Indeed, the question arises whether each of the rules about authority, considered in this chapter, are *de'orayta* or *derabbanan,* since this would determine whether we apply to them *safeq de'Oraita' leḥumra* or *safeq deRabbanan lequla.*[222] Thus, R. Abel notes that R. Ovadyah Yosef maintains that in any *maḥloqet* on matters whose status is that of Torah law (*de'oraita*) where the disputants are *in absentia* of each other (thus most inter-generational and inter-community disputes), the majority rule is *not* applicable (in biblical law) *and the situation thus remains (biblically) one of doubt.* But we have already seen (§2.13) that according to R. Yosef the rule that doubts in Torah Law are resolved strictly is itself only rabbinic in nature – which opens the possibility that we may rely, in an otherwise insoluble situation of '*iggun*, on a single lenient authority.

2.21 Are the normal rules of *sfeq sfeqa* applied where the situation is deemed one of emergency? Two issues arise here: (a) there would appear to be no reason why *sfeq sfeqa* should *not* be used in situations of emergency; the only question is whether it is itself to be applied more leniently, and we see no indication that this is the case; (b) in any event, do we have to distinguish the determination of individual cases in emergency situations from the adoption of *qulot* on a general basis? Although normally in a situation of urgency (*she'at hadeḥaq*) issues are dealt with on a case by case basis (as contrasted with a situation of *tsorekh hasha'ah*, when it becomes possible to "uproot" a Torah law), we may infer from *Ma'alot Lishlomo* (§3.5, below) that the leniency available in *she'at hadeḥaq* would extend to the adoption of *tnai bet din*.

Examples of use

2.22 The use of *sfeq sfeqa* in *qiddushin* and *gittin* is far from unknown. We encounter it in *Responsa Maharashdam* II nos. 110 and 111, in relation to the status of the marriage of an apostate:[223] he argues that the opinion that an apostate is considered a gentile and therefore cannot contract a marriage, although not accepted as normative, can still be used as a *snif* to some other doubt in order to create a *sfeq sfeqa*.[224] Similarly, R. Ya'akov Even Tzur (Yavetz) in 18th century Morocco was willing to use *me'is 'alay* as a *snif* to another ground, to release a widow from *yibbum*, even

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219 See further ARU 7:3-13 (§6.III.2).

220 M. Silberg, *Talmudic Law and the Modern State,* trld. B.Z. Bokser (New York: Burning Bush Press), 51, claims that Jewish law, being a system of religious law, "does not define norms for deciding the law, but norms of behaviour" – thus apparently reducing Jewish law (in Hartian terms) to a system of primary rules only.

221 See further ARU 7:15 (§IV.12), citing R. Ovadiah Yosef, *Responsa Yeḥawweh Da'at* I *Kileley HaHora'ah*, *Kileley Safeq De'Oraita*', no. 1 (and see n.187, above).

222 See, e.g., ARU 5:13-14 (§10.2.2) on *Devar 'Eliyahu* 48, in relation to doubts regarding facts or (substantive) law.

223 See further ARU 5:33 (§21.2.6.1.1), in relation to the (apparently conflicting) views found in *Bet Yosef* and in Mahari Mintz.

224 Here a *snif* is equated with a *safeq*. Not all authorities would agree. See however R. Ovadyah Yosef, *Yeḥawweh Da'at* I *Kileley Sfeq sfeqa*, p. 26, number 11, according to which a *snif* (almost as small as you like) can serve as the second *safeq* for the purposes of *sfeq sfeqa* so long as the first is at least 50-50.

after *me'is* '*alay* was abolished for married women, and ceased to be used directly in the case of widows seeking to avoid levirate marriage.[225] Yavetz cites several important *posqim* who use this ground similarly in levirate cases, among them R. Yosef Colon (Maharik),[226] as well as R. Karo himself.[227] Yavetz concludes that this ground can indeed serve as a *snif* to another ground.

2.23 The responsa of R. Ovadyah Yosef provide further evidence of the use of *sfeq sfeqa* in our context. In *Yabia'* '*Omer* VII *'Even Ha'Ezer* 6,[228] R. Ovadyah Yosef was faced with a case where a woman claimed to have been married with *ḥuppah* and *qiddushin*; to have separated from her husband without a *get* and to have married a second husband civilly, a daughter being born during this second marriage. This daughter became observant and sought to marry under Orthodox auspices (an example of the "upoward religious mobility" whose importance we stress later in this report). R. Yosef's permissive response was based on a *sfeq sfeqa*. The first doubt was whether the first marriage had actually taken place; the second was whether this child was from the first or second husband. Such (here, factual) doubts constituted a *sfeq sfeqa* and were enough to permit the daughter's *ḥuppah* and *qiddushin*. This is the context in which R. Yosef discusses *sfeq sfeqa* at length, concluding that so long as one doubt is *shaqul* (= evenly balanced, i.e. 50-50) the other need not be, so that a minority opinion may qualify as the second doubt in a *sfeq sfeqa*.[229] The argument in *Yabia'* '*Omer* III *'Even Ha'Ezer* 8:20 also shows that R. Ovadyah Yosef is willing in principle to apply *sfeq sfeqa* in order to rule leniently in a case of '*iggun*.[230] R. Yosef there quotes a *sfeq sfeqa* from Mahari Abulafia in *Responsa Peney Yitsḥaq* II no. 12, and a *responsum* of R. Shalom Moshe Ḥai Gagin in the work וישב יוסף[231] *'Even Ha'Ezer* no. 3, p. 30 col. 4. R. Yosef concludes: "Although some question this *sfeq sfeqa* if there is any other *safeq*, such as whether the witnesses were fit for testimony, one can be lenient in a case of '*iggun*".[232] He also notes that Meiri (*Qiddushin* 65a), amongst others, wrote that in a case of doubtful *qiddushin* if the wife does not want to go ahead with the *nissu'in* (= *me'is* '*alay*), we can coerce a divorce and observes that although one can infer the opposite from some *posqim* a doubt remains so that we have a *sfeq sfeqa*'[233] and may be lenient.

2.24 There is, thus, a warrant for the general strategy adopted by modern scholars who seek to deploy *sfeq sfeqa* in the search for a solution to the problem of *iggun.* Thus, of the overall strategy adopted by R. Berkovits, R. Abel observes: "Although he does not say so, it seems to me that the three approaches to the problem in *TBU*[234] were meant not as alternatives but as a combined three-fold approach creating a "triple-doubt" effect. If, after all the arguments and proofs, there exists any residual doubt about the halakhic efficacy of the Berkovits – or some similar – condition, we can rely on a *get*, prepared from the time of the *qiddushin*. Should there be doubt about that too, we can rely on the operation of retroactive communal annulment which also has its supporters

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225 Elimelech Westreich, "Historical Junctions in the Tradition of Moroccan Jewish Family Law: The Case of Levirate Marriages", in *Studies in Mediaeval Halakhah in Honor of Stephen M. Passamaneck*, ed. Alyssa Gray and Bernard Jackson (Liverpool: Deborah Charles Publications, 2007; Jewish Law Association Studies XVII), 319-20.

226 *Resp. Maharik*, ch.102.

227 *Resp. Beit Yosef*, *Hilkhot Yibbum veḥalitsah*, ch.2.

228 See further ARU 5:5 (§5.2.1), 5:98 (§46.21).

229 Thus *two* minority opinions may never constitute *sfeq sfeqa*: ARU 18:36 at n.108.

230 See ARU 5:9 (§8.2).

231 It is not clear whether this is *Wayashov Yosef* (Bereshit 50:14) or *WaYeshev Yosef* (Bereshit 50:22) and, accordingly, whether the author is R. Yosef Schwarz or R. Yosef Burgel.

232 See also ARU 18:65 n.249. For an example, see n.52, above.

233 Maybe the *halakhah* is like the Rif and the Rambam etc. that one can coerce in cases of *me'is 'alay* even where there are definite *qiddushin* and, even if the *Halakhah* is not so, maybe in a case of *qiddushin* given in defiance of a communal enactment there is no marriage at all.

234 Berkovits (n.112, above), discussed further, §§3.2-11, below.

amongst the *Gedoley Haposqim*."[235] More recently, Dayan Broyde has also outlined a theoretical tripartite solution comprising condition, a *harsha'ah* for a *get* and annulment.[236]

E. Doubts arising from historical error

History and Authority

2.25 From the very beginnings of this research project, we have stressed the priority of authority over history in the search for solutions.[237] That does not mean that history is irrelevant; it means rather that the role accorded to historical argument is itself determined by the authority structure of the *halakhah*. Historical study must always be accompanied by investigation of such "dogmatic" questions as: (i) by what authority was any change (including changes in the authority system itself) made in the past?; (ii) do we today possess comparable authority? We are not entitled to argue: "just because changes have been effected in the past, the authority must exist to make further changes today". But the converse proposition also follows: we cannot argue that "just because changes have *not* been effected in the past, the authority cannot exist to make changes today". One aspect of the relationship between history and dogmatics arises when the application of dogmatic rules depends upon historical claims which turn out (from historical analysis) to be problematic. Here, we note some of the complexities involved in determining how both *sfeq sfeqa* (§2.27) and *hilketa kebatra'ei* (§§2.28-30) may be applied to this issue, then (§§2.31-37) briefly review a range of issues, considered in detail later in this report, to which they prove relevant.

2.26 It goes without saying that the members of the '*agunah* Research Unit (even where with *semikhah*) claim no halakhic authority. In approaching these questions, we seek to deploy a combination of academic (historical and analytical) and traditional approaches to the issues. In using academic approaches, we claim no necessary privilege for them. Nor, conversely, do we accept that they may be excluded as "external". Halakhic argumentation has its own history, and methodological innovation is neither excluded (witness the Brisk school) nor does it exclude interaction with external traditions (witness Rambam). It is for contemporary *posqim* to judge the value of the argumentation here offered, and to use their authority in relation to it as they see fit.

How far may sfeq sfeqa be used in our problem?

2.27 Does historical doubt regarding the argumentation on which the halakhic rulings of earlier generations have been based constitute a *safeq*? In principle, there seems no reason to deny this, given the fact that *sfeq sfeqa* clearly applies to both factual and legal doubts, and historical claims may be regarded as claims about facts — not the facts of a particular case being decide in a *psak*, but nevertheless facts relevant to the *psak* in that the decision is affected by them. In this context, we need to determine how to "weigh" historical doubts. Where (in provisions of Torah law) there is a need to establish a "double doubt", of which one (following R. Ovadyah Yosef, §2.23 above) must be *shaqul* while the other may be a "minority opinion", may the historical doubt constitute either the *shaqul* or the minority; indeed, may both doubts (appropriately weighed) be historical? There seems no reason in principle to reject that latter opinion once it is accepted that historical doubt may constitute a *safeq*.[238] The question then arises how historical doubts may be weighed.

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235 ARU 4:37 (§XI.3); cf. ARU 2:69 (§ 5.4.2, end). See further ARU 18:35-36.

236 See further Broyde, *Edah Journal*, Kislev 5765, p.13, at nn.51-54 and pp.21-22; and in "A Proposed Tripartite Agreement to Solve the *Agunah* Problem: A Solution Without Any Innovation", in *The Manchester Conference Volume*, ed. L. Moscovitz (Liverpool: Deborah Charles Publications, 2010; Jewish Law Association Studies, XX), forthcoming.

237 ARU 1 (§1.1), ARU 2:1-4 (§1.1-1.3), ARU 3:2-3, ARU 8:2-3 (§1).

238 For an instance of combination of factual doubts in the context of '*iggun*, see §2.18 (n.216) above.

This will depend upon the nature of the historical doubt, and is discussed further in §§2.31-34 below.

The applicability of hilketa kebatra'ei

2.28 The principle of *hilketa kebatra'ei*[239] also has a clear historical dimension. The principle itself (as generally understood[240]) affirms that arguments (even minority arguments[241]) adopted by earlier generations may be reconsidered by later generations, provided that the latter were fully aware of and considered the earlier arguments. Rema formulates the principle thus:

> In all cases where the views of the earlier authorities are recorded and are well known (מפורסמים) and the later authorities disagree with them – as sometimes was the case with the later authorities who disagreed with the *Ge'onim* – we follow the view of the later, as from the time of Abbaye and Rava the law is accepted according to the later authority. However, if a responsum by a *gaon* is found that had not been previously published, and there are other [later] decisions that disagree with it, we need not follow the view of the later authorities (*aharonim*), as it is possible that they did not know the view of the *gaon*, and if they had known it they would have decided the other way.[242]

2.29 The summary wording of the *Enzyklopediah Talmudit* states that the *batra'ei* are to be followed against the *qamma'ey* "in those cases where the opinions of the *qamma'ey* are written in a book and are well known. However, in cases of statements or *responsa* of the *qamma'ey* which have not been printed, it is not necessary to rule like the *batra'ei* because it is possible that had they known the opinions of the *qamma'ey* they would have rescinded their ruling."[243] But this in itself poses further questions. In particular:

(a) how well known must the views of the *qamma'ey* be? We have found no explicit discussion of this.

(b) Are the opinions of the *batra'ei* binding if and only if they cite the earlier opinions they are rejecting? This is not suggested by the *Enzyklopediah Talmudit*, but Radbaz, Maharam al-Shekh, Shakh and Maharashdam all appear to require it.[244]

(c) Are the opinions of the *batra'ei* binding if and only if they show that they are aware of the reasoning of the *qamma'ey*, and not merely of the *psak* they are rejecting? *A fortiori*, this is not suggested by the *Enzyklopediah Talmudit*, but this appears to be the position

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239 See ARU 7:10-11 (§ III.18(8-9)); see also ARU 8:30 n.189 on *Pitḥei Teshuvah*, *Shulḥan Arukh Ḥoshen Mishpat* 25:8 ("Since the later authorities saw the statements of the earlier ones but gave reasons for rejecting them, we assume, as a matter of course, that the earlier authorities would have agreed with the later ones. Consequently, this principle applies even to the view of a single [later authority] against [the view of] the many [earlier authorities]"), as discussed by Elon (n.241, above), I.269, who cites also *Rif, Qiddushin* ch.2 for the view that *hilketa kebatra'ei* is normative even against contrary indications from other talmudic rules such as "Whenever an individual disputes the opinion of a group of scholars, the *halakhah* is like the majority."

240 Thus as applying to post-talmudic authorities: see further ARU 7:11 (§ III.17(10)). For academic discussion of the history and scope of the principle — notably, I. Ta-Shma, "The Law is in Accord with the Later Authority — *Hilkhata Kebatrai:* Historical Observations on a Legal Rule", in *Authority*, *Process and Method. Studies in Jewish Law*, ed. H. Ben-Menahem and N.S. Hecht (Amsterdam: Harwood Academic Publishers, 1998), 101-128, translated (with a 1994 Postscript) from *Shenaton Hamishpat Ha'Ivri* 6-7 (1979-80), 405-423 — see ARU 2:35-36 (§3.6.3).

241 In halakhic theory, non-normative views are themselves treated with sanctity: *elu ve'elu divre elokim ḥayyim*, *Erub.* 13b. M. Elon, *Jewish Law, History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), I.259, quotes Samson of Sens, commenting on *M. Eduy.* 1:5 (and relating it to *elu ve'elu* ...): "Although the minority opinion was not initially accepted, and the majority disagreed with it, yet if in another generation the majority will agree with its reasoning, the Law will follow that view."

242 *Rema* to *Shulḥan Arukh Ḥoshen Mishpat* 25:2, as quoted by Elon (n.241, above), I.271.

243 IX cols. 344-45 at n. 29.

244 See ARU 7:8-9 (§ III.18(2)).

of Radbaz, Maharam al-Shekh and Maharit al-Gazi.[245]

(d) Is it necessary that the *batra*' himself gives reasons for rejecting the opinion of the *qamma*'? There is very little suggestion of this in the sources, but Radbaz goes so far as to require that the *batra*' demonstrate with proofs based on the Talmud that he (the *batra*') is right.[246]

(e) What are the consequences of failure to meet these conditions? Here too we find differing opinions: some assume from this the *batra*'s ignorance of the *qamma*'s view;[247] others regard such ignorance only as a possibility.[248]

(f) While the statement that it is not necessary to rule like the *batra*' in the absence of knowledge (assumed or possible) by the *batra* of the *qamma*'s view is well supported,[249] Maharit accords greater weight to the view of the *qamma*' by arguing that it would presumably have been accepted by the *batra*' had the latter been aware of it.[250] Moreover, the fact that it is not necessary to rule like the *batra*' in such cases does not entail the view that it is necessary to rule like the *qamma*': a competent contemporary halakhic authority may use his discretion to decide between the *qamma*' and the *batra*' (though some insist that where the *batra*' does not know about the *qamma*, one *must* follow the *qamma*').

From the above survey it may be seen that the *Enzyklopediah Talmudit* does not provide a complete account. While it still represents the majority of the *posqim*, in any halakhic discourse it would be important to be aware of the dissident views cited above since they may themselves contribute towards a *sfeq sfeqa* argument.[251]

Relationship of hilketa kebatra'ei to sfeq sfeqa

2.30 As noted above, a double doubt is sufficient to permit a Torah prohibition; a single doubt is sufficient to permit a rabbinic prohibition (§2.18). It appears, however, at least according to the Rosh, that *sfeq sfeqa* takes priority over *hilketa kebatra'ei* where the two both apply.[252] Thus the Rosh held that where the *safeq* is in rabbinic law and the earlier authority rules leniently the earlier authority should be followed in spite of the rule of *batra'ei*.[253] True, Ra'avad applied *batra'ei* even where this would lead to stringency in rabbinic law, but this is itself mentioned by the Rosh, whose opinion prevails; indeed, even if the matter were left as a *safeq*, we would apply *safeq derabbanan lekulah*.

Types of historical doubt

2.31 In the course of our investigation, we have encountered a series of historical doubts which prove relevant to questions of authority.[254] Several of them concern the question whether the Rishonim

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245 See ARU 7:9 (§ III.18(3)).

246 See ARU 7:8 n.62.

247 See ARU 7:9-10 (§ III.18(5)).

248 See ARU 7:10 (§ III.18(4)).

249 See ARU 7:10 (§ III.18(6)).

250 See ARU 7:10 (§ III.18(7)).

251 On the "reflexive" application of *sfeq sfeqa* to other "secondary rules" such as *hilkhata kebatra'ei*, see further §2.20, above.

252 Despite other situations of conflict where it takes priority: see ARU 7:3-4 (§III.5).

253 ARU 7:4 (§III.10). See further n.215, above. For the more general proposition that the *halakhah* follows the later authority even if that authority is ruling leniently in Torah law, see ARU 7:4 (§§III.9-10, citing R. Ḥizqiyah da Silva (the '*Peri Ḥadash*'*)*, *Mayyim Ḥayyim*,'*Avodah Zarah*, chapter 2, *halakhah* 12. Cf. *ET* IX col. 344, n. 21).

254 Eliav Shochetman, *Ma'ase Haba Ba'averah* (Jerusalem: Mossad HaRav Kook, 1981), 151-53, discussing an error in the printed version of Ri ben Peretz in the light of MS sources, and citing Rambam (*Hilkhot Malveh veloveh* 15:2) on the Geonim being misled by a faulty text of the Talmud (see further §2.32 below, at n.264), argues that if a *halakhah* is

had accurate information as to what the Ge'onim did and on what authority the Ge'onim based themselves. Without prejudging such questions, each discussed later in its relevant context, we review here the different types of historical doubt, and their relationship to the issues discussed in this chapter.

New MS discoveries:

2.32 We noted above (§2.29) the formulation of the *Enzyklopediah Talmudit* that *hilketa kebatra'ei* applies (only) "in those cases where the opinions of the *qamma'ey* are written in a book and are well known. However, in cases of statements or *responsa* of the *qamma'ey* which have not been printed, it is not necessary to rule like the *batra'ei* because it is possible that had they known the opinions of the *qamma'ey* they would have rescinded their ruling." Newly discovered manuscripts (a dramatic instance of which concerns the Talmud's account in *Ket.* 63b of the position of Amemar on the wife proclaiming *me'is 'alay*[255]) fall within the class of "statements or *responsa* of the *qamma'ey* which have not been printed", and in principle would appear therefore to fall within the qualification of the basic rule. There is, however, considerable controversy about admitting new MS into halakhic debate: while the *Ḥafets Ḥayyim* welcomed recently discovered manuscripts,[256] the *Ḥazon 'Ish* was suspicious of them and regarded them negatively.[257] The latter approach,[258] however, was categorically rejected by R. Ovadyah Yosef,[259] who argues that newly discovered opinions of *Rishonim* in manuscripts that had been unknown to R. Karo may be employed as an argument that R. Karo would have changed his ruling had these sources been available to him (thus applying Rema's qualification to *hilketa kebatra'ei*[260]). Indeed, R. Yosef has contested a position of the *Ḥazon Ish* on *hilkhot sukkah*, which seemed correct in the light of the standard editions of Rambam's *Perush haMishnah*, on the basis, *inter alia*, of the reading in a

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based on a source which was found to be a mistake, the *posqim* hold the view that the *halakhah* should be changed according to the authentic version of that source. Shochetman also cites Rabbi M.M. Kasher, *Harambam vehaMekhilta deRashbi* (New York, 5703), 34ff.

255 §§4.7-9, below. See further ARU 1:4-5, ARU 2:21-22 (§3.3), ARU 5:17 n.56, ARU 7:6 (§III.15), ARU 8:2 (§1.3), 8:15-17 (§§3.2.3-5), ARU 9:1-3, 17 n.102.

256 Cf. *Mishnah Berurah* (*MB*) 27:5 and *Be'ur Halakhah* (*BH*) 43 s.v. *We'oḥzan b-imino* (both references to the *'Or Zarua*'); *BH* 363 s.v. *'eyno nitar* (referring to Rashba on *'Eruvin*); *BH* 626 s.v. *tsarikh sheyashpil* (referring to Rabbenu Ḥanan'el on *Sukkah*).

257 *Ḥazon 'Ish*, *'Orlah* 17:1; *Qovets 'Iggrot Ḥazon 'Ish* (Beney Beraq n.d.) part 1, no. 32 and part 2, no. 23. His view is discussed by M. Bleich, "The Role of Manuscripts in Halakhic Decision-Making: Hazon Ish, His Precursors and Contemporaries", *Tradition* 27/2 (1993), 43-44, stressing divine providence in the transmission of the MSS tradition (but not, apparently, in the discovery of new MSS, *qal vaḥomer* the now-available forms of electronic searching of the talmudic text, which put the modern generation of talmudic interpreters at a significant advantage compared to earlier generations, notwithstanding the legendary recall and command of the text which some of the latter are reputed to have possessed). See also the references to articles dealing with the approach of *Ḥazon 'Ish* in this area in M.B. Shapiro, *Between the Yeshivah World and Modern Orthodoxy*: *The Life and Works of Rabbi Jehiel Jacob Weinberg*, *1884-1996* (London: Littman Library of Jewish Civilization, 1999), 196 n.101.

258 Largely followed by R. Bleich (n.257, above), 42: "... for halakhic purposes, it is the consensus of contemporary authorities that inordinate weight not be given to newly published material. Even earlier authorities who gave a relatively high degree of credence to newly discovered manuscripts did so within a limited context. Accordingly, formulation of novel halakhic positions and adjudication of halakhic disputes on the basis of such sources can be undertaken only with extreme caution." He also gives the following account of the view of Rabbi S.Y. Zevin, the editor of the modern volume of *variae lectiones*: "... a variant talmudic text is significant only when it can be demonstrated that an early-day authority based his ruling upon that version of the text" (based on Yevin's introduction to the first volume of *Dikdukei Soferim haShalem*: n.85). See also n.254, above.

259 *Responsa Yabia' 'Omer* X *HM* 1 (2004), where R. Yosef permits a claim of *qim li* against the *Shulḥan 'Arukh*.

260 *Shulḥan Arukh Ḥoshen Mishpat* 25:2, quoted in §2.28 above.

critical edition (based on recently discovered manuscripts) which R. Ovadyah consulted,[261] and has noted a word added to the text of the Talmud by the Ge'onim.[262] R. Moshe Bleich, while largely following the view of the *Ḥazon 'Ish,* notes that a more liberal view towards the admissibility of MSS evidence was taken before the period of "definitive codifications of Halakhah" (and particularly the *Shulḥan Arukh*).[263] Indeed, we may note that Rambam states[264] that in the course of his research he had found in Egypt a variant reading in two manuscripts of the Talmud (written in scroll form) that were approximately 500 years old. This reading, he argued, accorded with logic and was undoubtedly the true version. A false reading in other versions of the Talmud, he tells us, had led some of the Ge'onim to rule incorrectly. Particularly relevant to our problem is the observation of P.S. Alexander, that "Gaonic commentators regularly solve problems in the Bavli through collation of old manuscripts and through conjectural emendation."[265]

2.33 Of course, whether the new MS raises an issue of *hilketa kebatra'ei* will depend upon a precise dating of both the traditional and the new MS[266]).[267] Yet even if the relative dating of MSS is unsure, a variant in a newly discovered MS may be sufficient to raise a *safeq* as to (a) what was the original talmudic text, or (b) what talmudic text was available to different authorities at different times. It may also provide evidence of a later authority's interpretation of the talmudic text. The question will then arise as to how we weigh such a *safeq* (for its usefulness will surely increase if it amounts to *shaqul*: §2.23, above).

2.34 Somewhat different questions arise from the discovery of "private" halakhic documents, such as *ketubbot* — particularly, in this context, those which have survived in the Cairo Genizah. Are they to be treated as evidence of the *minhagim* of various communities, particularly where they appear

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261 *Yeḥawweh Da'at* III (1980) no.46, p.140, 2nd footnote, lines 2-3: "However, I examined the Rambam's Commentary on the Mishnah in the [original] Arabic (ed. R. Y. Kafiḥ, Jerusalem 5624) and I saw that the words *weyiṯu la'aretz* were not there at all." This fact fortified R. Yosef's stand against the *Ḥazon Ish.* Newly discovered opinions of *Rishonim* in manuscripts that had been unknown to R. Qaro, says R. Yosef, may be employed as an argument that R. Qaro would have changed his ruling had these sources been available to him.

262 *Yabia' 'Omer* VII*, Oraḥ Ḥayyim*, 44:6, where R. Yosef discusses the view of R. Aḥai Gaon in the *She'iltot* that *ḥamets* on Pesaḥ is annulled in 60. In the course of the discussion R. Yosef shows that many *Rishonim* agree with R. Aḥai and maintain that the word *bemashehu* was added to the text of the Talmud by the Geonim and is therefore not halakhically binding. See further ARU 7:6-7 n.48; ARU 6:11-12 (§6.6).

263 ARU 2:23 n.100; ARU 8:17 n.95.

264 *Hilkhot Malveh veLoveh* 15:2 (see also *'Ishut* 11:13), noted by Rabbi M. Bleich (n.257, above), 23. Most of R. Bleich's argument is directed towards the emergence of MSS evidencing new post-talmudic views (such as might affect our view of what was the majority position at a particular time) rather than new MSS evidence of the text of the Talmud itself.

265 P.S. Alexander, "Why No Textual Criticism in Rabbinic Midrash? Reflections on the textual culture of the Rabbis", in *Jewish Ways of Reading the Bible*, ed. G.W. Brooke (Oxford: Oxford University Press, 2000; Journal of Semitic Studies Supplement X), 180. On the history of rabbinic text criticism of the Babylonian Talmud, see also D. Goodblatt, "The Babylonian Talmud", *Aufstieg und Niedergang der römischen Welt* (Berlin: W. de Gruyter, 1979), Bd. II.19.2, pp.268-70.

266 Rabbi Z.Y. Lehrer, "Manuscripts of the Early Commentaries [Rabbotenu haRishonim] and their Qualifications to Rule on Jewish Law" (Heb.), *Tsefunot* IV/4 (July, 1992), 68-73, clearly does conceive the problem as one of *hilketa kebatra'ei*, in that he argues that when manuscripts to which the Aḥaronim had no access are uncovered and reflect disagreement with the *halakhot* of the Aḥaronim, these manuscripts should be followed, since we presume that had the Aḥaronim had access to these manuscripts, they would have decided differently. We may assume that R. Lehrer had in mind manuscripts of the Rishonim and earlier.

267 But the halakhah as to how we treat new MS discoveries is itself subject to *hilketa kebatra'ei* (hence the dates given for R. Ovadyah Yosef's statements nn.259 and 261 above).

to authorise departures from the normal rules of divorce?[268]

Internal conflicts:

2.35 Doubts as to the reliability of historical claims on which dogmatic claims are made may also arise for different reasons. One is a conflict within a single work: A notable example, in the present context, relates to the position of Rabbenu Tam on *kefiyah*: did he reject coercion of the man in principle, or only the abolition of the talmudic 12-month waiting period?[269] Not only do we lack a critical edition of the *Sefer Hayashar*; we have reason to believe, from the circumstances of its compilation, that it does not represent the *ipsissima verba* of the author to whom it is attributed, but rather was compiled by various hands,[270] perhaps from his lecture notes. The works of most other *posqim* may not be subject to this latter problem, but that does not guarantee the integrity of their text. Here, where there is an apparent contradiction in the texts attributed to one and the same *poseq*, it can hardly be argued, as is sometimes done with regard to new manuscript evidence, that a traditional text has become hallowed by usage. Either we must leave the position of that *poseq* as one of *safeq*, or (as is suggested in the case of Rabbenu Tam[271]) we may have evidence from which to conclude that he changed his mind in the course of his life. We then have to ask which of his two opinions is authoritative. While *hilketa kebatra'ei* might, if only by way of analogy, suggest the later view,[272] we should also be open to explanations relating to changes in the circumstances with which the *poseq* was faced.

Questions of interpretation

2.36 In theory, questions of interpretation[273] ought not to raise issues of *sfeq sfeqa*, even when academic study claims that a particular interpretation was erroneous. After all, the very purpose of the "secondary" rules of "majority, seniority, finality and consensus" (ARU 7) is to provide means to resolve such questions, thus to resolve doubts. Significantly, however, minority opinions *are* used for the purposes of *sfeq sfeqa*,[274] even though a *safeq shakul* could be constructed only when the division of opinion was deemed even (a judgment which could hardly be made purely

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268 *Ketubbot* have also survived from earlier periods (5th cent. BCE Elephantine; 2nd cent. CE Judaea and Arabia) and cast interesting light on the history of the *halakhah* (see B.S. Jackson, "Some Reflections on Family Law in the Papyri", in *The Jerusalem 2002 Conference Volume,* ed. H. Gamoran (Binghamton: Global Publications, 2004; *JLAS* XIV), 141-77), but can hardly be taken into account for dogmatic purposes, insofar as they conflict with later talmudic positions.

269 For the texts, see ARU 2:22, 30-31 (§3.3.4 n.97, §3.5.3), ARU 16:38, and see further §§4.33-36, below.

270 I. Ta-Shma, "Tam, Jacob ben Meir", *Enc. Jud.* XV. 781, notes that it is preserved in an extremely corrupt state, and even after the great labour expended on editing it, still contains many obscure and inexplicable passages. In its present form it comprises excerpts collected in the days of the Rishonim and represents the work of many hands, including that of Tam himself, who repeatedly emended and improved much of it.

271 See further §§4.33-34, below.

272 See *Yeḥawweh Da'at* vol.1, *Kilelei Hahora'ah*, *Kilelei Hashulḥan Arukh* nos.29, 40, 44, for the view that where a *poseq* says one thing then the opposite, one follows the later statement.

273 Of which, of course, there are many in our context, e.g. (a) What was the original meaning of R. Yoseh's condition (§§3.17-21)?; (b) Assuming the traditional text of Amemar's ruling, did it imply coercion of the husband or not (§§4.9, 11)?*;* (c) Did the ruling of Rabbanan Sabora'i, requiring the wife to wait 12 months for her *get,* imply (as the Geonim clearly understood) that after that period the court would compel him (§4.16)?*;* (d) What did the Geonim mean (and practice) by compulsion? Were they willing, in the final resort, to override the husband's resistance, whether by having the court authorise the writing and delivery of the *get,* or by *hafqa'at qiddushin* (§4.20-22)?*;* (e) By what authority did the Geonim proceed: interpretation of the Talmud (or a different talmudic textual tradition), *taqqanah* (based on an emergency situation?), custom (§§4.26-29)?*;* (f) If they were motivated by *tsorekh hasha'ah,* did they themselves conceive their measures to be temporary, and if so how temporary (§4.27?)?

274 See, e.g., *Yabia' 'Omer* III*, Oraḥ Ḥayyim* 12:3 (end); 7*, 'Even Ha'ezer* 6:5,6.

mathematically).[275] From a secular positivist viewpoint, this might appear to defeat the object of the secondary rules. In fact, it only highlights the difference between the halakhah and secular legal systems. It certainly indicates that the *posqim* have, in effect, a discretion to review what would otherwise be the results of the application of the secondary rules (for there can be very few questions of interpretation where there is no minority viewpoint). If the *posqim* nowadays appear increasingly reluctant to exercise this discretion, the very nature of authority in the halakhah is put in issue. Such an approach may bring the halakhah somewhat closer to the model of secular law, but neglects the possibility that the very "weakness" of those secondary rules (from a secular point of view) is in fact part of the design of the halakhah, which is a mix of rational and charismatic authority.[276] Failure to exercise a discretion, it may be argued, is itself an exercise of discretion. We are entitled to ask why discretion is not exercised as much as on what grounds it is exercised. These are issues which raise fundamental questions about the role of the *dayan*, and to which we must return (§§2.48-49).

Reconstructions of talmudic history

2.37 Several of our analyses of talmudic material involve reconstructions of halakhic history within the talmudic period. We may ask what is the dogmatic status of such pre-final stages (and indeed of the tannaitic material on which it is based). Normally, it is the final conclusion of the Talmud which sets the halakhah. However, there are reasons why such reconstructions should not be dismissed as mere history, without dogmatic significance — quite apart from the weight which they may lend to views expressed in post-talmudic literature. According to the Rif, *hilketa kebatra'ei* does not operate until the period of the Amoraim.[277] This is relevant to our interpretation of a central mishnah in our study, Nedarim 11:12, which itself provides an historical account: "Originally (*barishonah*) [the Sages] said … The Sages then revised (*ḥazru*) [their views] and said …" The fact that a reason was given for the change may support the view that later opinions were not at that stage recognised as superior to earlier ones. There is, moreover, debate as to whether *hilketa kebatra'ei* operates within the Amoraic period, and in particular whether it favours a later Amora over an earlier one with a greater reputation:[278] in the debate in *Berakhot* 17b between R. Yoḥanan (d. 279 C.E.) and R. Shisha breh deRav Idi, a fifth generation (350-375 C.E.) Amora, the Rif and Rambam accepted the view of R. Yoḥanan because of his pre-eminence. Moreover, the literary features of the talmudic presentation are sometimes taken into account: when the Talmud records the view of the later Amora first and only then that of the earlier, the halakhah is fixed like the earlier authority because it is assumed that that is why the Talmud placed him later in the text – to demonstrate that the halakhah accords with his view.[279] Yet even if dogmatic status is denied to pre-final stages of talmudic history, their reconstruction still possesses dogmatic value, for the light it may cast upon the meaning of post-talmudic writings. We shall see, for example, that such analysis supports Rashi's view on the *moredet* (§§4.10-16), as against that of Rabbenu Tam, and that it both clarifies the origins of retroactive *hafka'ah* and the meaning (and weight) of the need for a *get* in this process (§§5.5-10).

F. Remedies in times of emergency

2.38 In emergency situations, all agree that the *bet din* may uproot temporarily even a negative

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275 Either by deeming "natural division" as equal (e.g. births of males and females), or (occasionally) by actual counting of *posqim: see Bi'ur Halakhah to Mishnah Berurah* 345:24.

276 Already expressed in *2 Chron.* 19:6, where Jehoshaphat charges the judges that God will be "with you" (*imakhem*) in rendering judgment: see also *Ps*. 82:1 and commentaries to it, warning the judges that they are accountable to God.

277 Rif *'Eruvin*, end. Cf. *ET* IX col. 342 n. 1.

278 See ARU 7:4 (§III.8) on *Bet Yosef* to *Tur 'Orah Hayyim* 70 s.v. *We'im ratsah*. Cf. *ET* IX col. 343 n. 20.

279 I.e. he is viewed as the *batra'*. *Tosafot 'Avodah Zarah* 22a s.v. *'En*. Cf. *ET* IX col. 344 n. 23; ARU 7:4-5 (§III.11).

commandment,[280] and some hold that such abrogation could, once made, be extended permanently.[281] There may, however, be a distinction[282] between "times of emergency" (where such abrogation may be possible due to *tsorekh hasha'ah*) and "times of urgent need" (*she'at hadeḥaq*, which would justify leniency within the *halakhah*).[283] Clearly, these classifications are difficult,[284] and there is also an approach which would regard a period of moral failing ("wantonness of the times") as a reason for greater strictness.[285] However, R. Shlomoh Itsban wrote in *Ma'alot LiShelomoh,* no. 2: "There is no greater *she'at deḥaq* than this. Moreover, R. Ovadyah Yosef has argued that our period, in this respect, is more comparable to that of the Ge'onim, using this as a partial justification for reverting to the measures of the Ge'onim (§4.84). Part of the opposition, voiced in *'Eyn Tenai BeNissu'in*,[286] to the proposals of the French rabbinate was that a small sin committed with the knowledge of the public and the connivance of the religious authorities (release from marriage on the basis of a problematic condition) was in fact worse than even a great sin of a private individual committed without the knowledge of the public and without the connivance of the religious authorities (remarriage of a woman on the basis of a civil divorce only, and without any attempt at halakhic justification). In other words, the halakhic authorities should not "connive" in what is perceived as immorality. Yet there is considerable precedent for such "connivance". The Ge'onim are quite explicit on what motivated their measures.[287] Moreover, many *agunot* are completely blameless as to the circumstances of the breakdown of their marriage. Are they to be presented with the choice between either committing

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280 Based on interpretation of *Deut*. 18:15. See ARU 5:11 (§9.3.2), ARU 6:29 (§8.13). For the early sources, which authorise "breaking" (temporary suspension) but exclude "uprooting" (*la'akor*) the law, see B.S. Jackson, "The Prophet and the Law in Early Judaism and the New Testament", in *The Paris Conference Volume*, ed. S.M. Passamaneck and M. Finley (Atlanta: Scholars Press, 1994; Jewish Law Association Studies, VII), 81-83. Though the terminology has changed, it seems clear that *la'akor* in יש כח ביד חכמים לעקור דבר מן התורה does mean "momentarily", i.e. suspension of the law in an individual case, and without setting a precedent.

281 See *Enzyklopediah Talmudit*, s.v. *yesh koaḥ*…; ARU 6:29 (§8.13). There is also a separate principle, based on the talmudic understanding עת לעשות לה' חפרו תורתך, used by Rabbi Y.Y. Weinberg, *Seridey 'Esh* II 8, in reaction to mixed youth groups: see ARU 5:12 (§9.5.1).

282 Though not consistently made, at least at the level of terminology. See further n.287, below.

283 On the nature of such leniencies, see §2.39 below.

284 Nor is it clear that innovation is excluded where the times are not so classified. At ARU 18:94-100 (Appendix IV: Historical changes in orthodox practice), R. Abel discusses the history of Orthodox adaptations of the *halakhah* in the light of contemporary social conditions. While some of them concern pure ritual or *dine mamonot* (albeit of biblical status), others (such as the the *ḥerem* of Rabbenu Gershom) are directly relevant to our present concern. Thus, he includes "All the cases in the Talmud where the Sages apply coercion or annulment, thereby evading Biblical Law, in the interest of the biblical demand for justice. According to some, this includes coercion in a case of the *moredet me'is 'alay*. According to those who understand the coercion in the latter case to be an enactment of the Sabora'im/Ge'onim, it is an evasion of both Biblical and Talmudic divorce law by the post-talmudic authorities in the interests of biblical and talmudic demands for justice."

285 See E. Westreich, "The Rise and Decline of the Law of the Rebellious Wife in Medieval Jewish Law", in *The Zutphen Conference Volume*, ed. H. Gamoran (Binghamton: Global Academic Publishers, 2002; JLAS XII), 214, on *Razah*.

286 Hungarian Rabbis at 49, quoting R. Yitsḥaq 'Aramah, c. 1420-1494, in gate 20 of his *'Aqedah*. Cf. R. Tenenbaum at 32. See ARU 4:13 (IX.10).

287 R. Sherira Gaon writes: "After the time of the Savoraim, Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands; and some husbands, as a result of force and duress, did grant a divorce that might be considered coerced and therefore not in compliance with the requirements of the law [as under the law one may not use duress to force the giving of a divorce]. When the disastrous results became apparent, …". An anonymous 13th-cent. responsum suggests that the talmudic twelve month delay (without financial support) was prompting women to resort to "bad ends (לתרבות רעה), either prostitution or apostasy (בין בזנות בין בשמד)". See further ARU 2:24-28 (§3.4.1-3). R. Rabbenu Zeraḥyah Halevi takes the situation as having been regarded as הוראת שעה; the Rosh as צורך שעה. In modern times, some distinguish between *hora'at sha'ah* and *tsorekh sha'ah*, the latter (but not the former) both needing and generating halakhic precedent: see Wieder, "*Hafka'at Kiddushin*..." (n.4, above), 71; S. Riskin, "Response", *Tradition* 36/4 (2002), 50, citing R. Kook.

a "great sin" (but happily without the connivance of the *posqim*) or suffering indefinitely as a woman chained to a dead marriage (without even the benefits assumed by the maxim *tav lemeitav*)? Moreover, what motivated the Ge'onim was neither the immorality nor the suffering alone; it was also the recourse to gentile courts. The situation today is not fundamentally different: recourse to gentile courts, applying their own criteria, is increasingly common, not only for a (required) civil divorce, but also to put pressure on the husband to grant a *get,* sometimes in ways which are halakhically problematic.[288]

2.39 The determination of whether we live in *she'at hadeḥaq* is important, since, if so, various relaxations of the rules of authority are permitted. It also becomes possible to permit *lekhatḥillah* what otherwise would be permitted only *bedi'avad*,[289] and to follow a majority despite opposition from a substantial minority,[290] or even to follow a minority opinion.[291] Indeed it is possible to argue, based on positions taken by Rabbi A. Y. Kook and R. Ovadyah Yosef, that we may rely in an emergency situation of '*iggun* even on a lone opinion (and even when dealing with a biblical prohibition).[292] This has been applied (with one qualification) to R. Moshe Feinstein's decisions on *qiddushei ta'ut*. R. Jachter observes: "Rav Moshe in these responsa certainly stretched the halacha to its outer limits and virtually no other halachic authorities have adopted his position (although a great rabbi may choose to issue a ruling in accordance with R. Moshe's views in cases of emergency when it is absolutely impossible to procure a Get from the husband)."[293] Whether every *dayan* would count as a "great rabbi" is not discussed. We may also note in this context the view of R. Ovadyah Yosef that when we find earlier *posqim* saying that a particular course of action is permissible *lehalakhah* but not *lema'aseh*, we can assume that this is merely due to humility and may therefore rely on it even in practice.[294] However one might regard R. Yosef's view in normal times, we may certainly regard this leniency as applicable in *she'at hadeḥaq*.[295]

2.40 Clearly, it is easier to apply such leniencies in cases where the "emergency" relates to features of the individual case (thus *bedi'avad*), as, for example, where the strain of the situation is judged as endangering the young woman's life;[296] indeed, the very concept of emergency has been stretched in cases of *iggun* to include the fact that the woman concerned is young, and may thus face many years in chains.[297] The very fact that in practice greater leniency is exercised once an issue of *mamzerut* has already arisen appears to reflect the same approach. But however commendable such decisions are, they cannot amount to a global solution. Indeed, even remedies based on emergency (adopted *lekhatḥillah*) may struggle to satisfy that criterion: even the emergency to which the Ge'onim responded had both geographical and temporal limitations. In an era of globalisation, however, geographical considerations appear less and less significant.

2.41 While the individual *bet din*, *dayan* or *poseq* may be able to deal with individual cases (even to

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288 See further ARU 2:63-64 (§5.2.4), ARU 6:29 (§8.13); ARU 5:11 (§9.3.2).

289 See ARU 8:32 (§6.4.5). On the status of an illegally coerced *get* in this context, see §4.71, below.

290 *Responsa Shevut Ya'aqov* III *'Even Ha'Ezer* no. 110 and other sources in *ET* VII col. 417, note 140. See ARU 5:49 (§21.2.7), ARU 7:16 (§IV.16), ARU 8:32-33 (§6.4.5) and sources cited there in n.210.

291 See further ARU 7:1-2 (§I.4), 7:24 (§V.6).

292 See further ARU 5:22 (§§15.3.2-3). Cf. §2.13, above.

293 http://www.tabc.org/koltorah/aguna/aguna59.8.htm, section entitled: "Rabbi Rackman's Error". This paragraph does not appear in the version in R. Chaim Jachter, with Ezra Frazer, *Gray Matter. Discourses in Contemporary Halachah* (Teaneck, NJ: privately published: 2000). See further ARU 1:12, ARU 2:50 (§4.4.2).

294 See n.153, above.

295 R. Yosef cites R. Ḥayyim Palaggi, *Resp. Ḥikekey Lev 'Even Ha'Ezer* 57; *Resp. Ohel Ḥasid*, *Yoreh De'ah* 16; *Resp. Yad Aharon* 165, *Hagahot Bet Yosef* 17 quoting the *Admat Kodesh* no.50 *lema'aseh* (even though, per R. Yosef, the latter had written *lehalakhah velo lema'aseh*). He also cites *Sdei Ḥemed*, *Kilelel HaPosqim* 16:47.

296 See Rabbi A. Volkin, *Zeqan 'Aharon,* II.124, discussed at ARU 5:47-49 (§21.2.7).

297 See *Resp. Shevut Ya'aqov* III, *'Even Ha'Ezer* 110, in §2.12(b), above.

the extent that a contemporary *bet din* may, according to the majority view, suspend a Torah-law in such situations[298]), and while a local *bet din* might adopt emergency measures for its own community,[299] greater authority is required for anything of a "legislative" character (e.g. globally to permit *lekhathillah* what otherwise would be permitted only *bedi'avad*: §2.39, above). To be effective globally, the *bet din* would need to possess authority recognised across the board, i.e. a *bet din* of *Gedoley HaDor*. This would need to be a *bet din* of *Gedoley HaDor* acceptable to all sects and communities if the measures taken involved permission to remarry without a *get*, since this has possible future repercussions on the entire Jewish people. Whether, in fact, the *Gedoley haDor* would need to convene as a *bet din* is far from clear. It may well depend upon the nature of the *ḥiddush*. R. Lubetsky in *'Eyn Tenai BeNissu'in* wrote*:* "Therefore, choose some of the *Gedoley haDor* and if they agree with you who will dare to challenge it?"[300] On the other hand, Maharam Al Ashqar is quoted as saying: "Therefore, if all that country and its rabbis, with the agreement of all the communities or most of them, took a vote and decided to rely upon these great trees [= authorities] to raise a barrier against, and to impose a fine upon, anyone who betroths in violation of their agreement and their enactment, and to annul the betrothal and requisition it [= the betrothal ring] for ever or until any time they choose, I too will support them."[301] Professor Elon quotes R. Shalom Moses Ḥai Gagin as attacking Abulafia for his use of *hafqa'at qiddushin* with the words: "It cannot possibly be contended that the world's great scholars ever gathered together and agreed to rule contrary to the saintly Caro even in a single particular."[302] This would appear to imply that a convention of the world's great scholars is indeed capable of making such a ruling (and on the basis of *rov*: §2.15). The cancellation of the global rabbinic conference in 2006 should not be taken as evidence of the impossibility of such a convention. Dayan Waldenberg, however, adopts a somewhat different institutional route, in advocating the use of coercion "through a general agreement of all the rabbinic courts".[303]

G. Conclusions

2.42 There are two main obstacles to finding a solution to the contemporary '*agunah* situation. Firstly, there is the fact that biblical law has given the husband the power to refuse his wife a *get* and has forbidden the wife, thus chained to her former husband, to have relations with any other man. For her to do so would be a capital offence of adultery and any progeny born to her from any such relationship with another Jewish man would suffer the stigma of *mamzerut* with its tragic and irreversible consequences. The husband on the other hand is free to take another wife and any other children that he fathers would be perfectly kosher. Although there are important constraints on the husband's behaviour in rabbinic law – including the land-mark excommunication decree of Rabbenu Gershom, a *ḥerem* of the *kadmonim* that a man should not make his wife an '*agunah*,[304] and considerable moral condemnation[305] – the fact remains that if a recalcitrant husband ignores all these and contracts a new marriage in spite of them or indeed if he goes on to father children

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298 See the article יש בח ביד חכמים לעקור דבר מן התורה in *Enzyklopediah Talmudit* XXV (n.22), and the comments on it at ARU 5:11-12 (§9.3.3) and ARU 6:29 (§8.13), including the *ET*'s observation (at 22, end) that R. Feinstein had agreed that this power may be used today.

299 On the authority of even non-ordained judges sitting in *batey din* in the Diaspora in emergency situations to impose the death penalty, see ARU 6:27-28 n.95.

300 See ARU 4:8 (§VII.9).

301 Quoted in M.S. Goldberg and D. Villa, *Za'akat Dalot. Halakhic Solutions to the Agunot of our Time* (Jerusalem: Schechter Institute of Jewish Studies, 2006), 378. See ARU 6:26 (§8.9).

302 Elon (n.241, above), II.876.

303 *Tzitz Eliezer* 5, 26. It is of this that R. Waldenberg tried to convince R. Elyashiv, but apparently failed to do so. See further ARU 5:18-19 (§12.2.12).

304 See R. Henkin, *Perishey Ivra* p.116 para.26.

305 See also ARU 18:99 n.376 for a list of biblical verses which may apply to the recalcitrant husband. For the view that he is *nikra rasha* if he refuses when a *bet din* has recommended a divorce, see §4.39, below.

without remarrying there is little in contemporary society that can be done to him and his subsequent marriage and children would be recognized by the *halakhah* as kosher.

2.43 Secondly, there is the customary stringency in deciding any law touching upon marriage or divorce. This means that many remedies that have been proposed as solutions for the problems described in the preceding paragraph have never been adopted or, if they have, have subsequently fallen into disuse because a minority view, sometimes a tiny minority view, has opposed them. As we have seen above, current practice would refuse the adoption of a remedy if it would fall foul of the opinion of even one recognised halakhic scholar. As an example we may cite the use of *Shiltey haGibborim* against Berkovits' advocacy of conditional marriage.[306]

2.44 The approach of יש כח ביד חכמים לעקור דבר מן התורה which, in emergency situations, applies still today,[307] is, perhaps, the one least likely to get any support from the *Gedoley haDor*. Hence, there is no hope of changing[308] the basic biblical or rabbinic laws described in §2.42 – even if agreement could be reached that we do indeed have an emergency on our hands. Therefore, the only way forward seems to be to try to find a method that will work within the constraints of biblical and rabbinic law. This is still an enormously difficult task but it would be rendered somewhat easier if we were free, where necessary, to rely on the views of most *posqim* as in other areas of the Halakhah, or at least if we were able to disregard unique opinions or opinions of an insubstantial minority. In the light of R. Feinstein's convincing resolution of the apparent contradictions in *Tosafot* and the Rosh concerning *mayim she'eyn lahem sof* (see Appendix A, below), it is apparent that there is no source in the Talmud for those who rule that we must take into account even an insubstantial minority, or unique, stringent opinions in the area of *gittin* and *qiddushin*. Indeed, once a situation of '*iggun* has been reached the standard practice is already to rely on *rov posqim*.

2.45 Furthermore, one must consider whether the situation regarding *get*-refusal today is one of compelling need (*she'at hadeḥaq*) so that we can apply the rule that whatever is normally permitted only *bedi'avad* is, in a *she'at hadeḥaq*, permitted even *lekhatḥillah*. In this context, we may recall the words of R. Yeḥi'el Ya'aqov Weinberg:[309]

> Rabbi Berkovits [who suggests the introduction of conditional marriage] has no intention, G-d forbid, of arguing against the great authorities of the previous generation [who had forbidden it] … He has only revisited the problem because the situation has worsened: the number of chained wives and the number of these who remarry without a *get* and go on to have more children, has greatly increased.

If so, in order to avoid ever reaching a situation of '*iggun* we could *ab initio* deal with *gittin* and *qiddushin* in accordance with *Shulḥan 'Arukh* and *rov posqim* and ignore even substantial minority opinions, especially as R. Yosef Ḥazzan and other great *posqim* have ruled that that is the

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306 See further n.386 and §3.64, below.

307 See further ARU 5:10-12 (§§9.2.1-9.3.3).

308 Such change would anyway be only momentary according to the Rambam; according to the Rashba, however, once made it could be left permanently in place. See ARU 5:11 (§9.3.2).

309 In his foreword to Berkovits (n.112, above). See also *Responsa Ta'alumot Lev* (*'Even Ha'Ezer* no. 14): "Even those who in practice take a strict view because of the stringency of forbidden sexual relations that is only when they can somehow force him to give a *get*. Not so in these lands where none can enforce the words of the sages and everyone does as he pleases…." R. Avraham Ibn Tawwa'ah, *Responsa Ḥut haMeshulash* (printed as the fourth section of *Tashbets*, Lemberg 5651), *HaḤut HaShelishi* no. 35, p. 13a col. 2, s.v. *'Od ra'iti*: "Even those who say that one must not coerce a *get* (in cases of *me'is 'alay*)… permit *ab initio* coercion when the circumstances call for it." He then proceeds to demonstrate that this is true of the Rosh, Tur, Rashba, Rivash, Rashbets and Rashbash. It is thus clear from their words, he writes, that "even according to those who say one must not coerce, at a time when there is a need for coercion let them use force for a judge can only be guided by what his own eyes see."

halakhah even in normal (i.e. non-urgent) circumstances.[310] Once a situation of '*iggun* has been reached, it may be possible in urgent situations to rely on a minority or even a singular opinion (even in matters of biblical law) in accordance with the Taz and his school (§§2.13, 2.45, above). And even his disputant, the Shakh, whose opinion is accepted by Arukh HaShulḥan (Y.D, 110:111), agrees that this may be done if the question is one of rabbinic law only.

2.46 Questions of historical doubt, viewed in the context of *sfeq sfeqa*, may also contribute to the search for solutions, not least when paralleled by differences in interpretation by later authorities.

2.47 Much of the above argumentation is necessarily technical. But beneath the surface, some important "meta-halakhic" issues are also apparent. One has already been raised in chapter one: the relationship between a "global" solution and the existence of distinct religious communities within Orthodoxy. This impinges on the technical questions of authority in a number of ways. On the one hand, some forms of authority are necessarily exercised *within* particular communities, as in the capacity of *batei din* to respond to emergencies within their own communities. This would create no problems if the criterion of a "global" solution were achieved: mutual recognition of the exercise of inner communal authority. The situation, however, is aggravated by the fact that authority is increasingly exercised *beyond* the communities of those exercising that authority (a situation given statutory authority by the jurisdictional arrangements in the State of Israel), increasingly with the imposition of norms, *ḥumrot*, which are neither universally mandatory nor conformable to the values of the subject community. The danger then arises that the authorities do not regard those subject to their authority as part of their own community, and may then be more inclined to tolerate consequences which foster alienation from the religious community as a whole.

2.48 Not unrelated to this is the role of the *dayan* and the interests of the community of the *posqim*. When R. Lavi argues that the proposal of new solutions is impudent towards earlier generations ("couldn't they think about this solution?!"),[311] one has to ask what this implies about the relative importance of the reputation of the community of the *posqim* and that of the community of women suffering as *agunot.*

2.49 More serious than this is the sense of personal responsibility of the *dayan*, and his fear that he will be personally accountable to Heaven for mistakes which lead to adultery and *mamzerut*. The response of Ribash to this, that such controversial decisions should only be taken collectively and on the basis of consensus[312] insofar as it seeks to spread responsibility (rather than ensure against taking a wrong decision), may be subject to debate. But we now have the voice of an esteemed senior *dayan*, Rav Daichovsky, who tells his colleagues, in no uncertain terms, that it is indeed the duty of the *dayan* to risk his eternal soul in pursuit of what he regards as the just solution, and thus not put his personal interest above that of the parties subject to his jurisdiction.[313]

2.50 In 1998, Rabbi Bleich wrote: "... to be viable and non-schismatic, any proposed solution must be advanced with the approbation of respected rabbinic decisors and accepted by all sectors of our community."[314] It may well be that such a criterion for a single global solution is currently out of reach. That does not exclude a solution which, though more "schismatic", still satisfies the criterion of a global solution as stated in §§1.6-7 above. Nor should we abandon the hope that the tide of religious polarisation will eventually recede, leading to a consensus on a solution which

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310 ARU 7:21-22 (§IV:33).

311 R. Lavi (n.80, above), at 304-05.

312 Rivash Resp. 399, discussed at ARU 2:44-47 (§4.3.4).

313 R. Shlomo Daichovsky, "Derekh Hashiput Hare'uyah Bevatey Hadin Harabaniyim", *Teḥumin* 28 (5768), 20. Cf. R. Waldenberg, *Tzitz Eliezer* 4.21, noted in §4.60 below.

314 Bleich (n.138, above), 118.

will emphasise the unity of *klal yisrael* rather than its divisions.

Appendix A : The position of R. Moshe Feinstein on stringency in *gittin* and *qiddushin*
(Paragraph numbers are those in Rabbi Abel's ARU 7)

IV.24. The following reference in *'Iggrot Moshe*[315] may shed light on using *mayim she'eyn lahem sof* as a source for stringency in halakhic decisions in the area of *gittin* and *qiddushin*.

The question dealt with in this *responsum* was of a woman who discovered directly after her wedding that her husband was impotent and it was not possible for her to acquire a *get* from him. R. Feinstein argues that a woman would not have agreed to marry such a man had she known the truth about him and on the basis of this he declares the marriage a *miqaḥ ta'ut* and releases her without a *get*. At some point in the debate he quotes a *responsum* of the *'Eyn Yitsḥaq*[316] who argued that one must take into account the possibility that this woman belongs to the tiny minority who would settle even for such a marriage just as the Talmud concerns itself with the tiny minority[317] who are lost at sea and survive.

IV.25. At this juncture, R. Feinstein points to an apparent contradiction in the writings of *Tosafot* and the Rosh who in some places describe the possibility of the husband's surviving in a case of *mayim she'eyn lahem sof* as being "a substantial minority" possibility (מעוט המצוי) whereas in other places they refer to it as a "highly insubstantial minority": (כלל) מעוט שאינו המצוי.[318] The question on *Tosafot* is not so serious, he says, because in *Yevamot* it is the Ri speaking and in *Bekhorot* it is Rabbenu Tam. In the case of the Rosh, however, it is very serious.

IV.26. Regarding the answer suggested to this in *Yashresh Ya'aqov*[319] at the end of *Yevamot* – that the Rosh simply follows *Tosafot* (even if this leads him into contradictions) – R. Feinstein comments:

> "Heaven forfend that we should suggest such a thing especially as the Rosh wrote his entire work as practical *Halakhah* so how could he not have been aware that he was contradicting himself? Besides, the Rosh writes his opinion at the beginning of the final chapter of *Yevamot* and in *Ḥullin* 11 like the *Tosafot* in *Bekhorot* (that the possibility of survival is insubstantial) although there is no mention of this in *Tosafot* in *Yevamot* or in *Ḥullin*.[320] It is furthermore far-fetched to say that there is an argument here about a fact: whether survivors of a ship-wreck are a substantial or an insubstantial minority. Facts can only be ascertained; they cannot be debated. The alternative solution to this problem proferred by the *Yashresh Ya'aqov* is forced and refutable and the solution suggested in *Responsa Ḥatam Sofer 'Even Ha'Ezer* 65[321] is extremely forced and not at all logical."

IV.27. R. Feinstein therefore says that both statements are true:

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315 *Responsa 'Iggrot Moshe*, *'Even Ha'Ezer* I, 79.

316 By R. Yitsḥaq Elḥanan Spektor (1817-1896).

317 The Talmud does not actually mention "insubstantial" or "tiny" minority in its treatment of *mayim she'eyn lahem sof* but the *Rishonim* understand it to include such cases also. See the next two paragraphs.

318 *Tosafot Yevamot* 36b s.v. *Ha'* and *Avodah Zarah* 40b s.v. *Kol* and the Rosh *Yevamot* 36b (= 4:5) describe it as substantial whereas *Tosafot Bekhorot* 20b s.v. *Ḥalav Poter* and the Rosh *Yevamot*, beginning of final chapter (119a = 16:1) and *Hullin* 12a (= 1:16 near the end) describe it as insubstantial.

319 Commentary on *Yevamot* by R. Shelomoh Drimmer.

320 I.e. whereas one could argue that the Rosh in *Yevamot* 36 is simply following the *Tosafot* (there) in declaring the survival rate of those lost at sea a *substantial* minority, one cannot explain the apparent contradiction to this in the Rosh at the end of the final chapter of *Yevamot* and in *Ḥullin* where he describes the survival rate as an *insubstantial* minority as being due to the Rosh's habit of following the lead of the *Tosafot* because there is no such statement of *Tosafot* there, neither in the last chapter of *Yevamot* nor in *Ḥullin* (but only in *Bekhorot* – see note 318).

321 S.v. *Hineh mah shekatav*.

"Those rescued from the sea constitute a substantial minority but there is only an insignificant minority of people who are rescued *and do not inform their family*. (For argument's sake we may say that, on average, of 100 people aboard ship, 30 survive a shipwreck but of these only 1 fails to communicate with his family within 3 months.) So it seems from Rambam, *Yad*, *Naḥalot* 7:3 who states that only when the memory of the disappeared father has become lost (אבד זברו)[322] can his heirs take over his property because before that we must be concerned for his return since a *substantial minority* survive. However, when enough time has passed since his disappearance for his memory to have been forgotten we may assume him dead because only the *very smallest minority* of those lost at sea survive *and* fail to contact their family after a protracted period. *Tosafot* and the Rosh maintain that because of an insubstantial minority the Sages would not have enacted any measure even in a case of a married woman but since the possibility of survival was substantial (say 25% – a degree of minority possibility which would trigger rabbinic enactments in other areas of the *Halakhah*)[323] they had to forbid her remarriage by rabbinic decree until the point of "the memory of him being lost" (*'avad zikhro*), i.e. a situation where the possibility of his survival had reached one of insubstantiality (say 1%). However, once that situation had been reached they extended the decree and forbade her remarriage (at least *ab initio*) due to the stringency of the law of a married woman (*ḥumrat 'eshet 'ish*) even beyond the point of *'avad zikhro* since some percentage of doubt remains (say 0.5%, 0.25%)[324] though if such a small percentage (say 1% or less) had obtained initially they would not have passed any enactment against her remarriage. If 0% doubt remained after *'avad zikhro* they would not have extended the prohibition any longer and they would have had to enter into the fraught area of "ruling on arbitrary limits" – נתת דבריך לשעורין – (in this case, time-limits). However, since some doubt, however small, always remains they forbade her remarriage so as not to enter the problematic area of arbitrary limits. We indeed find something similar to this in *Tosafot*, *Qiddushin* 11 in the answer of Ram of Narbonne."

R. Feinstein concludes this section with the comment:

"והארכתי בברור דבר זה הרבה והוא נכון ואמת"

"I have clarified this matter at great length. It[325] is well-based and true".

(x) *Translating R. Feinstein's responsum from 'facts' to 'law'*

IV.28. From the above *responsum* of R. Feinstein regarding *factual* doubts in cases of '*erwah* is it possible to draw conclusions as to his opinion concerning *halakhic* divergences amongst the *posqim* in this area? This question may perhaps be resolved as follows.

IV.29. R. Feinstein wrote[326] that *Tosafot* and the Rosh maintain that because of an insubstantial minority

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322 I presumed this to be a period of 12 months in accordance with the Talmudic (*Berakhot* 58b) interpretation of Psalms 31:13. I later found that Rabbi Y. M. Epstein in *'Arokh HaShulḥan* makes exactly this presumption based on the same sources. See similarly in *Responsa Ḥatam Sofer 'Even Ha'Ezer* 65 s.v. *Uviteshuvah 'aḥeret*, at the end.

323 For example, where the rate of infestation of a fruit or vegetable is more than 50% the obligation to check it before eating is Pentateuchal. In cases where the rate is less than 50% the obligation is rabbinic. If the rate was exactly 50% (if such an exact measurement were possible) the situation would be one of *safeq de'Oraita*' and the obligation would therefore be Pentateuchal according to the Rashba and rabbinic according to the Rambam.

324 See, however, the discussion by Dayan Abramsky in Feuerwerger (n.197, above), 239 col. 2.

325 The clarification.

326 See IV:27.

the Sages would not have enacted any measure even in a case of a married woman but since the possibility of survival was substantial they had to forbid her remarriage by rabbinic decree until the point of *'avad zikhro*,[327] i.e. a situation where the possibility of his survival had reached one of insubstantiality. However, once that situation had been reached they extended the decree and forbade her remarriage (at least *ab initio*) due to the stringency of the law of a married woman (*ḥumrat 'eshet 'ish*) even beyond the point of *'avad zikhro* since some percentage of doubt remains though *if an insubstantial percentage had obtained initially they would not have passed any enactment against her remarriage*.

IV.30. Thus R. Feinstein argues that an insubstantial minority is insufficient to justify rabbinic stringency in cases of factual doubt. Only where the level of doubt was *initially* substantial (though less than 50%) was an enactment deemed necessary (and this enactment was then perpetuated even beyond the point of insubstantial possibility).

IV.31. Now, minority *factual* possibilities (of the husband's survival) in the case of *mayim she'en lahem sof*, as we have seen,[328] are considered by some to be more of a halakhic problem than minority (stringent) *legal* opinions in cases of *'erwah*. Others do draw an analogy from fact to law[329] and apply the talmudic concern for even tiny minorities in the case of of *mayim she'eyn lahem sof* to the halakhic decision-making process also – i.e. as regards matters of *'erwah*.

IV.32. However, according to R. Feinstein, who says that insubstantial possibilities of factual doubt, even in matters of *'erwah*, need not be considered (save where they are the residue of substantial minority possibilities), even if we *do* compare legal debate concerning *'erwah* to the case of *mayim she'en lahem sof* it would still work out that insubstantial minority halakhic opinions need not be considered because such halakhic opinions are insubstantial minorities from the start, unlike the minority possibilities of *mayim she'en lahem sof* which are the residue of a substantial minority. Whether or not he would take note, in a case of *'erwah*, of a stringency of a substantial minority of the *posqim*[330] or he would differentiate between facts and law, is not clear.[331]

(xi) ***Analysis of the debate***

IV.33. We may now be in a position to understand the sources of the four distinct opinions concerning (*ab initio*) stringency in matters of marriage and divorce.

A Those who do not compare fact (as in *mayim she'eyn lahem sof*) to law (because in the former case there is always a possibility of the husband turning up whereas in the latter there is no possibility of the ruling of the *Shulḥan 'Arukh* and the *posqim* changing) follow the usual halakhic methodology:

> **1** The most lenient position is taken by R. Yosef Ḥazzan[332] who maintains that the Sefaradim should apply the accepted guidelines for halakhic rulings in all other areas of *Halakhah* to the area of *'erwah* also. This means that even lenient rulings of the *Shulḥan 'Arukh* regarding *gittin* and *qiddushin* must be accepted amongst the Sefaradim even when these are against the majority of the *posqim*. (At the same time, he *allows* a Sefaradi *poseq* to give a stringent ruling in such a case

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327 See above, n.322.

328 See ARU 7:17 (§IV:21) on the opinion of the *Ḥiqrey Lev*, who rejects the approach that takes a minority view of the *posqim* into account – although, of course, he accepts the talmudic concern for the minority in cases of מים שאין להם סוף.

329 Eg. Maharibal and Maharit AlGazi – see ARU 7:17 (§IV:20).

330 And rule strictly against the *Shulḥan 'Arukh*, the Rema and *rov posqim* on the basis of *mayim she'eyn lahem sof*.

331 I have skimmed through all R. Feinstein's *'Even Ha'Ezer responsa* but I have not found discussion of this point.

332 See ARU 7:17 (§IV:21).

if the *poseq* feels that he cannot ignore the majority opinion.)[333]

2 R. Ḥazan[334] also justifies a rabbi taking a stricter stance, i.e. accepting the *Shulḥan* '*Arukh*'s (and, in the case of the Ashkenazim, the Rema's) lenient rulings – even in the domain of '*erwah* – *only when these are supported by most of the posqim*.

B Those who do compare fact to law maintain one of the following positions:

3 There are some[335] who insist on always taking into consideration – in '*erwah* matters – the (stricter) opinion of a substantial minority of the *posqim* even if this is against the *Shulḥan* '*Arukh* and the Rema. These authorities compare fact to law and argue that just as the Talmud concerns itself (at least *ab initio*) with the substantial minority possibility in the case of *mayim she'eyn lahem sof*[336] so must we be concerned for a substantial minority of (strictly ruling) *posqim* in all matters of '*erwah*.

4 Finally, comes the most stringent camp[337] – that of those who maintain that we must take into consideration every strict opinion, even that of a lone *poseq*. These *posqim* base themselves on the stringency of the Talmud that disallows (at least *ab initio*) the remarriage of the wife of one who was lost at sea even if many years have passed since his disappearance though there is but an insubstantial likelihood of his still being alive.[338]

IV.34. As pointed out above,[339] according to R. Feinstein's explanation of the theory behind the rules of *mayim she'eyn lahem sof*, it is not possible to apply the stringency of insubstantial minorities – and certainly not the stringency of singular possibilities – that operates in such cases of uncertainty of fact to cases of uncertainty of law.

IV.35. As noted above,[340] the accepted practice amongst the Ashkenazim and Sefaradim is like the *fourth* group (*ab initio*) except in a situation of '*iggun* when the *second* group is followed. To my knowledge, the Yemenites follow the Rambam in all cases.

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333 Similarly it may be said that the Yemenite community would follow the Rambam's lenient rulings even against most *posqim* in all matters – including *'erwah*, though some express doubt about this. See ARU 7:18 (§IV.23). I am at present unaware of any Ashkenazi authority who takes a similar approach to the Rema.

334 See ARU 7:17 (§IV.21).

335 Maharibal et al. See ARU 7:14-15 (§IV:11).

336 I. e. the husband may be of the 25% (?) who survive ship-wreck.

337 R. Al Gazi et al. See ARU 7:14 (§IV.8).

338 I. e. he may be of the 1% or less who survive and fail to communicate with their family even after a prolonged period.

339 ARU 7:20 (§§IV:29-32).

340 ARU 7:18 (§IV:23).

Chapter Three: The Use of Conditions

3.1 "Conditional marriage" (to be distinguished from "temporary marriage"[341]), particularly the use of what we call "terminative" conditions, i.e. conditions which facilitate the termination of the marriage without a *get*,[342] raises major fears amongst *posqim*, and the maxim *'Eyn Tenai BeNissu'in* is often cited as a bar even to consideration of proposals for making marriage subject to conditions. In this chapter, we first consider the meaning and authority of the maxim *'Eyn Tenai BeNissu'in* in the context of proposals made in post-emancipation times (section A: §3.2-15) and the meaning and dogmatic weight of R. Yoseh's condition in the Yerushalmi and its significance as part of a particular tradition of termination of marriage (section B: §3.16-32). We then turn to other examples of and proposals for conditional marriage (section C), through which we address several crucial questions for the drafting of any condition: (i) the significance of the fact that the husband is still alive (by contrast with the *aḥ mumar* condition): §§3.34-38), (ii) the issue of conditions contrary to Torah: §§3.39-40; and (iii) the respective roles of the *bet din* and the spouses in termination under such a condition: (§§3. 41-50). We then discuss the particular practical objections to conditional marriage: the fear that, if the condition takes effect, it retrospectively converts the former marital relationship into *zenut* (section D: §§3.51-62) and the need to secure the condition against implied revocation through *bi'ah* (section E: §§3.63-69). Against these restrictive concerns, we note the potential for expansion of the use of (here implied) conditions through the doctrine of *'umdena*, which itself suggests that *qiddushei ta'ut* should not be regarded simply as an unwarranted extension of *hafka'ah* (section F: §§3.70-76). We conclude with some brief observations on the possibility of purely prospective terminative conditions (section G: §§3.77-80), formal requirements (section H: §§3.81-82), strategic issues (section I: §§3.83-85) and issues of authority (section J: §§3.86-89).

A. *'Eyn Tnai BeNissu'in*?

3.2 Current attitudes to the idea of solving the problem of the *'agunah* through conditional marriage are often informed by the view that the publication of *'Eyn Tenai BeNissu'in* in Wilna in 1930 put the issue to sleep, despite the later attempt of R. Eliezer Berkovits to reanalyse the issue in his *Tenai BeNissu'in UvGet* (1966).[343]

3.3 Civil divorce was introduced in France on July 29th 1884. In order to avoid the disastrous consequences of Jewish women who had been divorced civilly remarrying without a *get*, the French rabbinate, after failed initial attempts at a solution by way of communal annulment and the recognition of the State divorce as a *get*,[344] sought the advice of Rabbi Eliyahu Ḥazzan,[345] who

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341 The effect of *Nedarim* 29a is that if a man betrothed a woman saying "Be thou my wife to-day, but to-morrow thou art no longer my wife" the betrothal is valid for ever and cannot be undone in the husband's lifetime, without a *get*. Contrast the double condition approved in *Ḥiddushe haRashba* on *Gittin* 84a (§3.14, below). See also ARU 5:68 (§27.7). See also see n.381, below.

342 Only such a condition is capable of satisfying our criterion of a 'global' solution. Conventional PNA's seek only to incentivise the husband and, though they may well make a valuable contribution to solution of the problem, neither guarantee success nor address the fundamental issues of principle discussed in Chapter One. There is no reason, however, why a terminative condition may not be inserted into a PNA, even as a "safety net" should the incentivisation fail.

343 For a detailed review of both the historical background to *'Eyn Tenai BeNissu'in*, and Berkovits' replies to its arguments, see ARU 4, ARU 18:4-38. See also §3.5 below on the *hasqamot* to *Ma'alot LiShlomo* and §3.9 on the position of R. Ḥayyim Ozer Grodzynsky in relation to *'Eyn Tnai beNisu'in*.

344 R. Weil in 1884 proposed to use *hafka'ah* and recognise state divorce as a valid *get*; the rabbinic fraternity at home and abroad were consulted at the end of 1885 and responded with a unanimous no: see *'Eyn Tenai BeNissu'in* 2. Cf.

suggested, somewhat guardedly, the introduction of conditional marriage.[346] It is important to be clear about the nature of the earliest French proposal (of 1887[347]), based on Rabbi Ḥazzan's *teshuvah,* against which the *teshuvot* collected by Rav Lubetsky[348] in *'Eyn Tenai BeNissu'in* were primarily directed.[349] The proposal was for a *tenai* stating: "If the State judges should divorce us and I will not give you a divorce according to the Law of Moses and Israel, this betrothal shall not be effective." A later version, proposed in 1907, amended the marriage formula to read: "Behold you are betrothed to me on condition that you will not be left an '*agunah* because of me, so if the State judges should divorce us this betrothal shall not be effective." The arguments in *'Eyn Tenai BeNissu'in* were initially communicated privately, resulting in the withdrawal of the proposals. It was only after pamphlets were published in London in 1928 and 1929 by Rabbi Yosef Shapotshnik,[350] declaring the author's intention to solve the '*agunah* problem by a combination of condition and annulment, that *'Eyn Tenai BeNissu'in* (without supplementation to address post-1907 proposals) was published.

3.4 In the meantime, a different form of condition was proposed by the Constantinople *Bet Din* in 1924, in a pamphlet entitled *Maḥberet Qiddushin 'al Tenai* (Constantinople 5864), according to which the marriage would be retroactively annulled (and the *kesef* of the *qiddushin* would be retroactively deemed a gift), so that the woman would require neither *get* nor *ḥalitsah*, if (1) the husband abandons his wife for a substantial period without her permission or (2) he refuses to accept a ruling of the *bet din* [to give a divorce?] or (3) he becomes mentally ill or (4) he contracts an infectious/contagious disease or (5) his wife becomes subject to a levirate marriage to an uncooperative brother-in-law or one who has disappeared.[351] To further fortify the condition, the Constantinople rabbinate sought to institute a communal enactment providing for annulment whenever the conditions laid down in the agreement were not fulfilled. This annulment would be effective even after the *nissu'in* and years of living a married life together. It was also proposed to adjure the couple at the *qiddushin* that they would never cancel the condition.

Gabrielle Atlan, *Les Juifs et le divorce. Droit, histoire et sociologie du divorce religieux* (Bern: Peter Lang, 2002), 213 at n.5, quoting *L'Univers Israelite* IV (1885) 101-03.

345 Born Smyrna 1840. He became a member of Jerusalem Rabbinical College in 1868, Rabbi of Tripoli in 1874 and of Alexandria in 1888 (where he served as Chief Rabbi until 1908). In 1903 he presided over the Orthodox Rabbinic Convention at Cracow. He authored many works. His responsa, *Ta'alumot Lev*, appeared in three volumes: Leghorn 1877, Leghorn 1893 and Alexandria 1902.

346 *Responsa Ta'alumot Lev*, III 49, as quoted in A.H. Freimann, *Seder Qiddushin WeNissu'in* (Jerusalem: Mossad Harav Kook, 1964), 389, para. 4. See further ARU 4:5 (§IV.2-6), ARU 18:79.

347 For 1887 — as opposed to 1893 given by Freimann (n.346, above), 389, para. 4 — see *'Eyn Tenai BeNissu'in*, p.5, col. 1, top.

348 Opposition to the 1887 French proposal precedes the publication of *'Eyn Tenai BeNissu'in.* In 1893 R. Zaddoq HaCohen of Paris consulted R. Spector in Kovno and received a negative reply. After the death of R. Zaddoq HaCohen the French Rabbis made their second (1907) proposal. It was only when they resisted the opposition from R. Lubetsky that the latter alerted the *gedolim* whose *teshuvot* are collected in *'Eyn Tenai BeNissu'in*. In the light of those *teshuvot*, the French Rabbinate backed down. It was only in the light of subsequent events that the *teshuvot* were published. For a detailed account, see *'Eyn Tenai BeNissu'in*, 1-15.

349 Though both proposals are mentioned. *'Eyn Tenai BeNissu'in* fails to mention the fact that it was based on a *responsum* of R. Ḥazzan.

350 *Ḥerut 'Olam* (London 5688/1928) and *Liqrow La'Asirim Deror* (London, 5689/1929): see Freimann (n.346, above), 390. We have had access to *Ḥerut 'Olam* but not *Liqrow La'Asirim Deror*. On the former, see ARU 14. Freimann also records that Shapotshnik opened an "international office" for this purpose, and claims that he even went so far as to forge the signatures of leading rabbis to promote his work.

351 See Freimann (n.346, above), 391f.; Riskin, "*Hafka'at Kiddushin*..." (n.17, above), 27. This was later rejected by R. Ben Zion Uzziel of Israel (and others), and was never implemented: see ARU 12:13 (§XXXI). Support for the Constantinople proposals was voiced by Rabbi Eliyahu Ibn Gigi of Algiers and R. David Pipano of Sofia, see ARU 13:6 (n.29), ARU 18:79 (App.II [no.3]).

3.5 Probably related to the Constantinople condition was that in *Resp. Ma'alot Lishlomo, 'Even Ha'Ezer Siman* ,ב[352] written by R. Shlomo HaCohen [Itzban?] of Morocco, who proposed that if the husband disappeared (as in war) or refused to give a *get* through the *bet din*, then the money/ring should be regarded as a gift, and who required repetition of the condition at the first *bi'ah* together with a statement that if the condition took effect all subsequent intercourse should be regarded as *pilgashut*. This proposal is not mentioned in '*Eyn Tenai BeNissu'in* and it is not clear whether it was available to the writers of those *teshuvot.* However, the author claims that *Resp. Nofet Tsufim* and *Resp. Qiryat Ḥanah David* agree with him. When published (posthumously), it attracted *haskamot* from *posqim* who must by then have known '*Eyn Tenai BeNissu'in*: Dayan Shalom Massas (who knew the author), R. Ovadyah Yosef and R. Mordekhai Eliyahu.

3.6 The crucial weakness of the French proposals had been that they gave no role to the *bet din:* the condition authorised termination of the marriage solely on condition of action by the secular state (in granting a divorce) and, at most, the failure of the husband to grant a *get* (irrespective of whether a *bet din* considered that the wife was, in the circumstances of the case, entitled to a *get*). It would thus apply in *every* case where civil divorce action was initiated by the wife, but resisted by the husband. For these reasons, it appeared a direct threat to the stability of Jewish marriage, providing in effect for divorce on demand by either spouse. The Constantinople proposal, on the other hand, did not suffer from this problem. Rather, it built on traditional Jewish grounds for divorce, each of which occurred only in (relatively) exceptional circumstances.

3.7 The distinctive features of the Berkovits proposal[353] were that (a) unlike the French proposals, it did make operation of the condition dependent upon a decision of the *bet din,* and (b) unlike the Constantinople proposal (not considered in '*Eyn Tenai BeNissu'in*), it confined itself to *get* refusal in the face of a request or order[354] of a *bet din* to do so. Moreover, on Berkovits' model, a *get* from the husband is demanded and is usually given; it is only in the rare cases when he refuses though the *bet din* says he ought to give it that the marriage will be terminated without a *get*.[355] Berkovits recognised important weaknesses in the French condition and does not set out to defend it;[356] he argues that the objections in '*Eyn Tenai BeNissu'in* were aimed only at the condition(s) proposed by the French rabbinate and that nowhere in that pamphlet is a ban on conditional marriage *per se* promulgated.[357]

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352 Available at www.hebrewbooks.org. R. Itzban was born in 5641 (1881) and died in 5709 (1949). His responsum therefore could not have been written in the light of the first French proposal of 1887 and is temporally somewhat too close also to the second proposal of 1907. He may well have been prompted by the Constantinople proposal of 1924, but we cannot be certain. He refers to the situation in France, where men were divorcing their wives through the civil courts. The responsa were apparently published posthumously by a nephew. The latter mentions that R. Sakali, the author of *Responsa Qiryat Ḥanah David*, studied with R. Itzban; another pupil was R. Moshe ben Gigi. On the contributions of the latter two, see n.1143 below.

353 Berkovits does not propose an exact text of any such condition but offered some suggestions for making the marriage dependent on the bride's never becoming an *'agunah* through lack of a *get*: see *Tenai beNissu'in uVeGet* 2, 166.

354 Berkovits does not limit his suggested condition to cases where the Talmud says *kofin* or *yotsi* (we *coerce him* to divorce or *he must* divorce) but includes all cases where it is proper, becoming, to do so – using the term *min hara'uy* (one could also describe the required behaviour as *kehogen*). By this, he appears to mean cases where the *bet din* acknowledges a moral obligation to give a *get* (we might describe it as a *ḥiyyuv bediney shamayim*) rather than cases where the husband is in the right but is asked to act piously beyond even moral obligations (*middat ḥasidut*).

355 See further ARU 4:12 (§IX.7) on Berkovits (n.112, above), 57-58.

356 Berkovits (n.112, above), 67.

357 Berkovits (n.112, above), 57-58, 106-108; see further ARU 4:11-12 (§IX.6-7).

3.8 On the other hand, Rabbis Gertner and Karlinsky[358] point to a letter sent by R. Ḥayyim Ozer Grodzynsky to R. Hillman, *Av Bet Din* of London, in which the former writes of his astonishment to hear of the Constantinople proposal, and from which it is apparent that R. Grodzynsky understood the opposition recorded in R. Lubetsky's *'Eyn Tenai BeNissu'in* as being directed against any type of condition. The relevant section of the letter reads as follows.

> I have already made known to His High-ranking Torah Honour that I have in my possession a composition from all the contemporary *Gedolim* dating from 5667 who ruled publicly that one should not make *in any manner* an enactment of a global condition in marriage. When some French rabbis wanted at that time to introduce such an enactment all the leading rabbis of all countries publicly proclaimed, some briefly some at length, that Heaven forfend that they do such a thing and that the children born would be possible *mamzerim* with whom it would be impossible to marry …

3.9 However, whereas it is clear that R. Grodzynsky himself was opposed to *any* type of conditional marriage (as RR. Gertner and Karlinsky stress), it is difficult to see any proof of this stance in the text of *'Eyn Tenai BeNissu'in* itself.[359] It is also important to note that the public declaration of the Russian and Polish rabbinate (which is signed, amongst many others, by R. Grodzynsky himself) in *'Eyn Tenai BeNissu'in* apparently accepted that even the French condition, though not to be used, would, if put into practice, work [at least possibly] according to most *Posqim*.[360] Finally, we may note also that R. Grodzynsky did not in fact say that it is *forbidden* to institute any global condition in marriage but rather that "one *should not*" do so. This implies that it *is* possible to formulate a condition that would be halakhically *effective* and halakhically *permitted* to be used though still *practically proscribed* as a matter of policy. We may compare the observation of R. Ovadyah Yosef in *Yabia' 'Omer* (IX *OḤ* 1:2) that from the wording of the *SAOḤ* 2:6 ("It is forbidden to walk (*'asur lelekh*) with an erect gait and one should not walk (*welo yelekh*) bareheaded") one can derive that it is *not* forbidden to walk about with an uncovered head.[361]

3.10 Berkovits' proposal has not hitherto received serious consideration, but has often been dismissed (without necessarily having been read) on the basis of the *teshuvot* in *'Eyn Tenai BeNissu'in*. It has nevertheless received influential support.[362] Thus Rav Y.Y. Weinberg wrote in his initial *haskamah:* "There is no doubt that this work merits publication and broad deliberation by the leading halakhic authorities … I have not seen the equal of this work amongst the books of the

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358 "*'Eyn Tenai BeNissu'in*", *Yeshurun* 10 (5762), 749-50; see ARU 13:11, ARU 18:90, 92-93. The full article was published in three parts: *Yeshurun* 8 (5761) 678-717 (part 1), 9 (5761) 669-710 (part 2), 10 (5762) 711-750 (part 3); for an overall discussion, see ARU 13.

359 Indeed, Berkovits (n.112, above), 166-71, has argued that all the evidence in *'Eyn Tenai BeNissu'in* is to the contrary.

360 This is also noted by R. Zevi Gertner and R. Bezalel Karlinsky, "*'Eyn Tenai BeNissu'in*", *Yeshurun* 8 (5761) 678-717 (= part 1), 9 (5761) 669-710 (= part 2), 10 (5762) 711-750 (= part 3), at *Yeshurun* 10 (5762), 694 n.68 (in a reference to *'Eyn Tenai BeNissu'in*) where it is remarked that there was a surprising difference between the opinion of the French condition as expressed in the private letters of R. David Karliner, R. Ḥayyim 'Ozer Grodzynsky and others, and that expressed in their public protest (i.e. the public protest of the Russian and Polish rabbinate). Whereas in the former communications they stated that a woman who leaves her husband without a *get* on the basis of the French condition is a definite adulteress and her children from the second husband are definite *mamzerim*, in the latter they say only that according to the *halakhah*, derived from a profound examination of the Law as it is, "she is an adulteress *according to several (kammah) posqim*" (not even *rov posqim*) and her children from the second husband will be forever forbidden to marry into the congregation of Israel. This is repeated further on: "… and the woman who remarries without a *get* by means of this condition is a *possible* adulteress (*safeq 'eshet 'ish*) and the children will be excluded eternally from marrying into the Congregation according to all opinions (i.e. either biblically, as certain *mamzerim*, or rabbinically, as possible *mamzerim*)." This implies that when viewed from a strictly halakhic perspective ('the *halakhah* derived from a profound examination of the Law as it is') — leaving aside matters of policy, ethics and practicality — the French condition would have [at least possibly] worked according to most of the *posqim*.

361 *Yabia' 'Omer* (IX *OḤ* 1:2).

362 See further ARU 18:34-38.

various Aḥaronim amongst contemporary authors."[363] Rav Menaḥem Mendel Kasher (who later sought to discredit Weinberg's *haskamah*[364]) is said initially to have been enthusiastic about the proposal of conditional marriage;[365] indeed, Marc Shapiro states that he is in possession of a copy of a letter sent by Kasher to Berkovits congratulating the latter on the publication of *Tenai BeNissu'in UveGet*![366] Shapiro has also published a letter from Rabbi Moshe Botchko to Rabbi Leo Jung, dated 31 Dec. 1965 (three weeks before R. Weinberg's death), which states:

> Rabbi Weinberg has received your telegram as well as your letter in connection with the work of Dr. Berkovits. However, he is not well at all these days – may the Almighty grant him *Refuah Shelemah*. He asked me to write to you on his behalf, and to let you know, that he has not changed his mind at all, and he thinks that it is a very good thing, that the work should be printed in the *Hanoam*, to stimulate the discussion and the clarification on the matter. He asked me to state it, in unequivocal terms, that he stands 100% to his previous mind, and he really does not understand what has made Rabbi Kasher suddenly change his mind, since he wrote to Rabbi Weinberg that he is thrilled with the work.[367]

Rabbi Leo Jung, in an undated letter to Berkovits, states that he heard from R. Moshe Tendler that R. Moshe Feinstein expressed theoretical approval of Berkovits's position.[368] The late Dayan Berkovits wrote in 1988 that "... I think that the way forward is to reopen that avenue and to re-examine it".[369] More recently, Dayan Broyde, while acknowledging that "the custom and practice is not to use any conditions in a marriage", has written: "(T)he *tenai* procedure — if correctly followed — works for almost every imaginable contingency, including those currently not present ... when a *tenai* is made at the time of marriage, and kept in effect during the sexual relationship and then the *tenai* is breached, the marriage ends without any divorce, as if there never was a marriage. Nevertheless, the marriage is fully valid until such time as the condition is breached."[370]

3.11 In his *Tenai BeNissu'in Uv-Get*, R. Berkovits conducted a broad and profound examination of the talmudic and rabbinic texts relevant to three questions – conditional marriage, written authorisation (*harsha'ah*) at the time of the *qiddushin* for the writing of a *get* should it become necessary in the future, and communal annulment of marriage. As to the first, he responds in detail (at pp.57–71) to all the arguments in *'Eyn Tenai BeNissu'in,* taking full and respectful note of the opposition of the *Gedolim* to the solutions proposed by the French rabbinate in 1887 and 1907. On the basis of this analysis, he concludes that solutions to the *'agunah* problem can indeed be found within the *Halakhah* and argues that the wholesale opposition of the leading halakhic authorities (cited in *'Eyn Tenai BeNissu'in*) was properly directed at the specific French proposals which, R. Berkovits himself agrees, were halakhically and ethically wanting. He seeks to provide

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363 As published in *Tenai beNissu'in uVeGet* (n.112, above). In the second and third paragraphs, R. Weinberg points out that Berkovits never intended to dispute the prohibition of the earlier *Gedolim* but was arguing that since we find ourselves in an emergency situation far worse than anything which obtained in the previous generation, and since the condition he was proposing met all the criticisms of the French condition voiced in *'Eyn Tenai BeNissu'in*, there is good reason to believe that those *Gedolim* would have acceded to the Berkovits proposal. Cf. also *Seridey 'Esh* III:25 ("Mossad" edition), chapter 3, near the end of the *responsum* s.v. *Umit'oreret* (= I:90, *'anaf* 3, 56, first para. in the "Committee" publication): see further ARU 5:1 (§1.5.1) on these two editions.

364 Notably Berkovits' claim that the letter from R. Weinberg published in 1989 by R. Kasher, regretting the *haskamah,* was a forgery: ARU 4:38-39 (§§XI.10), ARU 18:36.

365 Goldberg and Villa (n.301, above), 143 n.255.

366 Shapiro 1999:191 n.83, 3rd paragraph.

367 Shapiro 1999:190-192, esp. 191 n.83, and see Mintz (n.484, below).

368 Shapiro, *ibid.*

369 See further ARU 4:39 (§XI.12).

370 "Error in the Creation of Jewish Marriages: Under what Circumstances Can Error in the Creation of a Marriage Void the Marriage without Requiring a *Get* according to Halacha", at http://www.jlaw.com/Articles/KidusheiTaut.html (2001), now reprinted with minor differences in *Diné Israel* 22 (5763/2003), 39-65. See further ARU 2:17-19 (§2.4.4).

independent support for condition, *harsha'ah* and annulment, conceived as independent, alternative remedies. In what follows, we argue (with others) that a combination (with variations) of such remedies has a better prospect of success (ARU 18:34).

3.12 Two distinct questions arise as to the role of the *bet din* in respect of *tena'in*, one in relation to the grounds for termination, the other regarding the termination itself. As for the grounds for termination, these may either be stated in a *tnai* or unstated. If they are unstated, then clearly the *bet din* will grant a recommendation (*hamlatsah*, sometimes the stronger *mitzvah* or *reshuyit*), obligation (*ḥiyyuv*) or a form of coercion (*kefiyah*) only on grounds it regards as halakhically recognised. Whether it is open to the spouses to include in the *tnai* grounds for termination which go beyond those generally recognised (in their particular community) is a matter discussed further below (§3.19). Clearly, however, the role of the *bet din* in declaring the terms of the *tnai* as satisfied or not gives it a *de facto* supervision over the grounds for termination, and thus provides an answer to those who would see in the use of *tena'in* a threat to the stability of marriage (§§1.29-31, above). But is the role of the *bet din* simply declaratory (of the fulfilment of the condition, by virtue of which the marriage is terminated), or is it constitutive? In the latter case, the role of the *tnai* would be, in effect, to empower the *bet din* to annul the marriage in circumstances in which *ḥafka'ah* is not normally available. The former analysis appears to be the better: the language of *ḥafka'ah* is not used in this context.[371] Moreover, the declaratory analysis retains a role for the husband:[372] by his (as well as his wife's) will (as expressed in the *tnai*) and act (refusal to comply with the mandate of the *bet din* to issue a *get*), the marriage is terminated.

3.13 We must now address the meaning and status of the maxim '*Eyn Tnai BeNissu'in*. It occurs first in the Talmud,[373] but *Tosafot*[374] explain it as '*Eyn regilut lehatnot benissu'in* (it is not *usual* to make a condition at *nissu'in*[375]), in that most conditions people would want to attach to marriage could be resolved one way or another in the (then) customary 12 month interval between *qiddushin* and *nissu'in*, since otherwise the fear would arise of retroactive promiscuity (*zenut*) should the condition take effect, that fear leading to a presumption that marital relations were intended to revoke the condition.[376] Berkovits argues (*Tenai beNissu'in uVeGet*, 67), moreover, that in talmudic times people behaved in accordance with Jewish law and ethics; if they failed to do so, the *batey din* had the power to enforce compliance so that there was, except in unusual circumstances, no need for conditional marriage and it was, therefore, not usual to make a condition in *nissu'in*. Since today, we often cannot rely upon people to behave according to the dictates of Jewish law and ethics and the *batey din* have no power to enforce their rulings, it is understandable that conditional marriage becomes a more general requirement. Both on this understanding, and on that which relates the maxim to the temporal division between *qiddushin* and *nissu'in*, '*Eyn regilut lehatnot benissu'in* is no more than a practice dependent upon the circumstances of the time.[377] Mahari Bruna's condition of the *aḥ mumar* may also be based on this

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371 Moreover, even forms of *hafka'ah* (as encountered, particularly in *qiddushei ta'ut*) may be declaratory. See ARU 15:3 n.8.

372 The importance of which is stressed by Hadari in ARU 17; for its application to conditions, see 17:169-71 and n.241.

373 *Yevamot* 107a, in the context of the *qiddushin* of a minor.

374 *Ketubbot* 73a s.v. *Lo' Tema*'; *Yevamot* 107a s.v. *Bet Shammai*.

375 As opposed to *qiddushin*. The distinction drawn between *qiddushin* and *nissu'in* in this respect is based on *Yevamot* 94b and *Ketubbot* 72b-74a.

376 ARU 4:3-4 (§II.4), ARU 18:3.

377 See further ARU 4:30-31 (§§XI.77-78), noting and dismissing the following argument of R. Danishevsky in '*Eyn Tenai BeNissu'in*: Accepting the word of *Tosafot* that '*eyn tenai benissu'in* is not a prohibition and means no more than that it was *unusual* for people (in talmudic times) to stipulate conditions in *nissu'in* (though it was possible to do so), how can we accept the French rabbinate's proposal of introducing a condition into *all nissu'in* thus making it *usual* to stipulate conditions in *nissu'in*? Are we not in violation of *Tosafot* who declare it unusual? Clearly, R. Danishevsky does not accept that a practice (here, the term used is *regilut*, something whose normativity is even less than that of *minhag*) may

kind of explanation.[378]

3.14 The single source[379] which elevates the maxim to a statement that such a condition is halakhically impossible appears to be the Rogachover Gaon, R. Yosef Rosen, in *Tsafenat Pane'aḥ*, section 6, where he rejects a condition stating that if the husband rebels against his wife and marries another woman, his marriage to his first wife will be retroactively annulled. His reasoning is that *'Eyn tenai benissu'in* means that a condition in *nissu'in* is impossible during the husband's lifetime, as violating the (ritual) acquisition that makes his wife forbidden to all others. This ritual aspect of the relationship is said to be absolute and not subject to human conditioning (even though it is clearly subject to the husband's will, if exercised through the normal procedures of divorce). But the talmudic sources from which this argument is derived are normally understood differently.[380] His argument also conflicts with some views we find in the *Rishonim*, particularly in *Ḥiddushe haRashba* on *Gittin* 84a,[381] from which it is clear that a marriage on condition that he will (in given circumstances) divorce ("If I divorce you (by a certain time) then you are betrothed to me … but if I do not divorce you (by that time) then you are not betrothed to me") is a halakhically valid arrangement.[382] It may well be that the acceptance by Rashba of such a condition reflects the "Palestinian" tradition discussed in the next section.

3.15 We may conclude that conditional marriage (conditions attached to both *qiddushin* and *nissu'in*) would be effective according to the vast majority of *posqim* provided that the Halakhah is meticulously adhered to both in the substance and form of the condition. This is the position of the major codes of Jewish Law: *Yad*,[383] *Shulḥan Arukh*[384] and *Levush*[385] and seems to have been recognised even within *'Eyn Tnai BeNissu'in* itself.[386] The commentators on both the *Yad* and the

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be dependent upon the circumstances of the time. The result is the imposition of the non-normative practices of a particular historical group on *klal yisrael.*

378 Rashi, *Yev*. 15a: see ARU 4:33 (§IX.88). See also ARU 4:33 (§IX.90).

379 Discussed by Berkovits (n.112, above), 60-61, who observes that nothing like this argument is to be found in the writings of other *posqim* who deal with conditional marriage.

380 See further ARU 4:32-34 (§IX.82-92), discussing R. Rosen's use of the debate regarding the status of the marriage of the daughter of Rabban Gamliel in *Yevamot* 15a (contrary to Rashi's explanation there). R. Berkovits also maintains that R. Rosen misinterprets the reasoning of Rav in *Ketubbot* 73a. R. Rosen's view was also rejected in *Resp. Devar 'Avraham* (III 29), *Seridey 'Esh* (III 22), and *Hekhal Yitsḥaq* (II *'Even Ha'Ezer* 30). Cf. Rabbi S. Daichovsky, "*Nissu'im 'Ezraḥiyim*", *Teḥumin* II, 252-66, at pp. 257 & 260.

381 Rashba, *Novellae*, *Gittin* 84a; see further ARU 4:29-30 (§IX.72-76). The statement at ARU 5:37 n.121 that *qiddushin* cannot be contracted for a limited period, based on the rhetorical question in *Nedarim* 29a ("What if one said to a woman, 'Be thou my wife to-day, but to-morrow thou art no longer my wife': would she be free without a divorce?") concurs with this ruling of Rashba where the time limitation on the marriage comes not in the marriage formula but in an attached condition making the marriage dependent upon the delivery of a *get* at a future point in time.

382 The Talmud there states that a woman has no way of entering a marriage which she will be able to leave without her husband's consent. Rashba asks why she cannot enter the marriage on condition that the husband will divorce her at some future time, so that if at that time he refuses to divorce her the marriage will be retroactively annulled and she will anyhow be free. He answers that *indeed she could do so* but (for other reasons) that answer would not solve the Talmud's problem there and that is why the Talmud did not suggest it.

383 *Gerushin* 10:19 – without opposition from the commentators.

384 *'Even Ha'Ezer* 149:5 – without opposition from the commentators.

385 *HaButs weHa'Argaman* 149:5.

386 See, for example, the remark of R. Danishevsky (at p. 35), who mentions only *Shiltey HaGibborim* in the name of Riaz as denying the efficacy of conditional *bi'ah*. See also *ibid*. p. 43, where it is stated in the Public Protest of the Russian and Polish Rabbinate that a woman who remarries on the basis of the (totally unacceptable and totally rejected) French condition is an adulteress only according to a minority of the *Posqim*! Furthermore, most of the objections raised there against the French condition were not halakhic and all – including the halakhic ones – were shown to be inapplicable to the type of condition proposed by Berkovits and others.

Shulḥan '*Arukh* are silent on this point, which means they all agree. R. Kook[387] described the effectiveness of conditional marriage as 'obvious' and it is reported that Rabbi Feinstein[388] agreed to the arguments of R. Berkovits in its favour. This is also apparent from the number of *posqim* who have proposed global conditional marriage in practice (§§3.33, 6.40, below).

B. "Palestinian" Divorce Conditions

3.16 Attention has been directed[389] to a "Palestinian" tradition of attaching to marriage particular conditions relating to divorce. Such conditions are mentioned in the Jerusalem Talmud, and examples of them have survived in *ketubbot* preserved in the Cairo Genizah. But there is controversy on a number of matters, which are discussed in this section:

(i) What is the exact meaning of the conditions discussed in the Yerushalmi (§§3.17-21)?
(ii) How were they intended to be enforced (§§3.22)?
(iii) What is their dogmatic weight, not least in the light of their citation by the teachers of the teachers of Meiri as the basis of the geonic measures in relation to the *moredet* (§§3.23-29)?
(iv) What is the halakhic significance of the Genizah *ketubbot* in respect of divorce procedures, given their own relationship to the line of tradition in (iii) (§§3.30-32)?

3.17 The *Jerusalem Talmud, Ketubbot* 5:9 (30b) records that R. Yoseh endorsed the following condition

> R. Yoseh said: For those who write [a stipulation in the marriage contract] that if he grow to hate her or she grow to hate him [a divorce will ensue, with the prescribed monetary gain or loss] it is considered a condition of monetary payments, and such conditions are valid and binding.
> אמר רבי יוסה אילין דכתבין אין שנא אין שנאת תניי ממון ותניין קיים

There is dispute, in both rabbinic and academic sources, regarding the nature of this condition, which is not fully reproduced in the text (an indication, perhaps, that it was well-known[390]). We have the protasis: "if he grow to hate her or she grow to hate him", but the apodosis is left unstated. The English translation here quoted[391] represents the dominant academic view,[392] namely that there is here an entitlement to divorce (even against the objection of the other party, and without proof of any further "cause"), and this derives support from a clause found in some *ketubbot* in the Cairo Genizah.[393] However, there is also academic support for the dominant (but not exclusive: see §3.20, below) rabbinic view, that the condition related *only* to (special)

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387 Letter dated 3 *Tevet* 5686 published at the beginning of *Torey Zahav* by Rabbi S.A. Abramson, New York 5687, quoted in Berkovits (n.112, above), 68; ARU 18:33. R. Kook accepts it in principle but does not agree to impose it through a general *taqqanah* "because of the damage that can arise from this through those who are not well-versed in the laws of conditions and generally in the laws of marriage and divorce".

388 See ARU 18:37 for evidence that R. Moshe Feinstein expressed theoretical approval of R. Berkovits' position.

389 Notably by Friedman, *Jewish Marriage* (n.392, below), 312-46; Riskin, *Women and Jewish Divorce* (n.42 above), 30; ARU 2:8-9 (§2.2.1-2).

390 A similar argument is advanced in relation to the abbreviated drafting of some clauses in later Palestinian *ketubbot*: see ARU 15:21.

391 Riskin, *Women and Jewish Divorce* (n.42 above), 29f., supporting this, at 31, by reference to *Y. Ket* 7:7 (31c).

392 E.g. L. Epstein, *The Jewish Marriage Contract. A Study in the Status of the Woman in Jewish Law* (New York: Jewish Theological Seminary of America, 1927), 198 n.19; M.A. Friedman, *Jewish Marriage in Palestine: A Cairo Geniza Study* (Tel-Aviv: University of Tel-Aviv and New York: Jewish Theological Seminary of America, 1980), Vol. I, 316-322; D.I. Brewer, "Jewish Women Divorcing Their Husbands in Early Judaism: The Background to Papyrus Se'elim 13", *Harvard Theological Review* 92:3 (1999), 353f., 356; Margalit (n.417, below).

393 See further below, §§3.29, 3.77.

financial terms of (a voluntary) divorce.[394] The latter view is certainly supported by the context in the Yerushalmi[395] (though the latter does not exclude coerced divorce and may even assume its existence as the basis for the financial discussion[396]). In any event, this is not necessarily conclusive as regards the original meaning of the clause, outside that context. It is argued also that it is supported by R. Yoseh's classification of such a clause as *mamon*.[397] Yet the Tosefta also classifies as *mamon* a condition which exempts the husband from providing *onah*, conjugal rights (see §3.20, below).[398]

3.18 Elsewhere in the Yerushalmi we hear of a case in which a man kissed a married woman. This was not regarded as evidence of adultery; the amoraim rather treated the facts as evidence of "hatred", in terms of the following condition found in her *ketubbah*:[399]

> If this So-and-so (fem.) hates[400] this So-and-so, her husband, and does not desire his partnership (בשותפותיה),[401] she will take half of the *ketubbah*.

The Yerushalmi discusses mainly the financial aspects of the condition: whether the woman was entitled to receive at least part of her *ketubbah*. This implies that a divorce had taken place. There is no indication that the husband in the "kiss case" was reluctant to divorce his wife; the dispute concerned only the financial terms. This has been seen by some as a distinct tradition of marriage (albeit within the concepts of *qiddushin* and *qinyan*), one conceived as a *shutafut*,[402] and thus admitting of claims to unilateral divorce on the part of the wife, backed up where necessary by *kefiyah*. Dr. Westreich argues that since there are independent talmudic bases[403] for coercion of the husband of a *moredet* to give a divorce,[404] this was probably not the main the function of the clause in the Yerushalmi.[405] That function, rather, was to determine in advance the financial arrangements (in the absence of which the wife divorcing on these grounds would have lost the

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394 See R. Katzoff, "Legal Commentary", in N. Lewis, R. Katzoff and J.C. Greenfield, "Papyrus Yadin 18. I. Text, Translation and Notes, II. Legal Commentary, III. The Aramaic Subscription", *Israel Exploration Journal* 37 (1987), 245f. See also ARU 5:16 (§12.2.4).

395 See further ARU 5:16 (§12.2.4).

396 For the view that the wife is entitled to a coerced divorce on the basis of the halakhah of *moredet*, see ARU 9:15-16; ARU 15:18-21.

397 ARU 9:16; ARU 15:20.

398 See Friedman, *Jewish Marriage* (n.392, above), 319-320, on the possibility of an expansive meaning. See also ARU 9:16 (text to note 96); ARU 15:20 (text to notes 80-81).

399 Ketubbot 7:6, 31c. On this, see further Riskin, "*Hafka'at Kiddushin*..." (n.17, above), 4; Riskin, *Women and Jewish Divorce* (n.42 above), 31; ARU 9:15-16, ARU 15:18-20.

400 The word: "תסבי" should be read as: "תסני" or "תשנא" according to Saul Lieberman, *Hilkhot HaYerushalmi LehaRambam* (New York, Bet Hamidrash Lerabanim BeAmerica, 1948), 61, based on Rambam, *Or Zaru'a* and *Meiri's* version. תסני was adopted by Friedman, *Jewish Marriage* (n.392, above), 317; Riskin, *Women and Jewish Divorce* (n.42 above), p. 31 n.16.

401 For this reading (amending פותיה רבשו), see Lieberman, *ibid*.; Friedman, *Jewish Marriage* (n.392, above), 329.

402 See n.401, above. See further Friedman, *Jewish Marriage* (n.392, above), 329: "*Shutafut* 'partnership' here clearly denotes 'marriage', as in Syriac. This felicitous term is particularly befitting in a stipulation which describes man and wife as equal partners in the business of marriage, each of whom can withdraw from the partnership at will." Cf. ARU 9:16: "being in a partnership with him means that the wife has the right to a coerced divorce."

403 Found almost explicitly in the Yerushalmi; see ARU 9:5-6, after note 398.

404 ARU 9, esp. pp.14-16 on the Palestinian clauses; ARU 15:18-21.

405 By contrast with the function of the clause found in the Genizah *ketubbot*, on which see §§3.31-32, below. Explaining the divorce clause in the latter context as required for the financial arrangements is not completely satisfactory. The equal distribution of the *ketubbah* which is mentioned in the Yerushalmi was very rare, and every other occurrence of the divorce clause – both in the early Elephantine marriage documents and in the later Palestinian *ketubbot* – has the standard financial arrangement, according to which if the wife unilaterally demands divorce she completely loses her *ketubbah*. It is therefore doubtful if the half sharing of the *ketubbah* was practiced at all at the time of the Palestinian *ketubbot* from the Cairo Genizah. Rather, the function of the clause in the Genizah *Ketubbot* was the grounds for divorce, as part of the Palestinian custom of explicitly writing the court stipulations: ARU 15:21.

ketubbah entirely[406]). This view is supported by the surrounding discussion in the Yerushalmi,[407] both here and in the context of R. Yoseh's condition.

3.19 Yet the "kiss case" illustrates the utility of the clause also for determining entitlement to divorce. Can we really be confident that this woman, who had manifestly *notenet eynehah*[408] *be'aḥer*,[409] would without it have been so readily regarded as entitled to a divorce? It is worth asking, also, whether we are entitled to assume[410] that R. Yoseh's clause did indeed include the *shutafut* clause. Perhaps there were two variations, one entitling the wife to a divorce on the grounds (to use the Babylonian terminology) of *me'is 'alay* ; the other (as in the "kiss case") entitling her to divorce even when she did *notenet eynehah be'aḥer.* In short, even if the clause was used primarily to determine financial consequences, its partnership terminology could certainly fortify the woman's position, particularly in extreme cases like the present (with its public immorality), even if the general law was in her favour. Moreover, the general history of the relationship between clauses in *ketubbot* and the general law (the *tna'ei bet din* of *Mishnah Ketubbot* 4:7-11) suggests that notarial practice preceded the development of general rules.[411] The Yerushalmi clauses may thus well have preceded in origin the development of talmudic rules entitling a woman to a divorce in these circumstances. Prudence might well have dictated continued use of such conditions even after such rules came to be accepted. After all, a woman might, even in those days, encounter a *bet din* with a tendency to *ḥumrot.* Indeed, it is claimed it was frequently the practice in Eretz Israel (perhaps amounting to a general custom) to include court stipulations explicitly, even though they were not required.[412]

3.20 The dominant rabbinic view is also supported by the general rules relating to conditions contrary to Torah-law.[413] Most pertinent here are the examples given in *Tosefta Qiddushin* 3:7-8:[414]

> [If he says] "I hereby betroth you... on condition that if I die you shall not be subject to levirate marriage," she is betrothed, and the condition is void, as he has contracted out of a Law contained in the Torah, and when anyone stipulates out of a Law contained in the Torah, the condition is void [כל המתנה על מה שכתוב בתורה תנאו בטל]. [If he says] "on condition that you have no claim against me for food, clothing, or conjugal rights," she is betrothed, and the condition is valid.[415] This is the principle: Contracting out of a Law contained in the Torah as to a monetary matter is valid, but as to a nonmonetary matter is void.
>
> זה הכלל כל המתנה על מ"ש בתורה בדבר שהוא של ממון תנאו קיים בדבר שאינו של ממון תנאו בטל.

This might appear to close the door against a condition obviating the need for a *get:* if the husband's (in principle, voluntary) delivery of a *get* is "a Law contained in the Torah", then the

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406 ARU 9:16, ARU 15:20.

407 In the Yerushalmi the right to divorce is based on an explicit tannaitic source: *bet din she'achrehen… veyotse'a*: see ARU 9:5–6.

408 And not only *eynehah*: a man was said to have been seen to נותן את פיו על פיה.

409 See §§1.29, 32, above.

410 Westreich at ARU 15:19 notes the similarity of language and structure of the two conditions, regarding that of R. Yoseh as a shortened version of that in the "kiss case" (though the reading of the first clause of the condition in the "kiss case" has been amended in the light of that of R. Yoseh: see n.400, above).

411 Westreich at ARU 15:14 makes this comparison in explaining (but not accepting) the claim of the teachers of the teachers of Meiri, that the geonic measures were based upon use of the condition of R. Yoseh. On the relationship between surviving early 2nd cent CE *ketubbot* and the *tna'in bet din*, see Jackson, n.268, above.

412 ARU 15:21, citing Friedman*, Jewish Marriage* (n.392, above), at 15-18, 330.

413 See further ARU 4:29-30 (§§IX.70-76).

414 Translation of Elon (n.241, above), I.125; for further discussion, see *ibid.*, at 124-127.

415 In the Babli, the matter is debated in a baraita, *Kidd.* 56a, with R. Meir rejecting the condition completely, but R. Judah accepting it at least insofar as it deals with *mamon.*

capacity to override it by a *tnai* depends upon classifying it as "monetary".[416] The distinction in *Tosefta Qiddushin* 3:7-8 might make that appear unlikely. However, divorce does involve financial consequences (regarding the *ketubbah*), and this may have influenced R. Yoseh.

3.21 A more radical (and persuasive) view has, however, recently been proposed by R. Yeḥezkel Margalit,[417] who sees R. Yoseh's *tnai* as part of a pattern of specifically Palestinian conditions[418] which (a) were often more "egalitarian" than the Babylonian tradition,[419] and (b) gave the parties to the marriage a greater discretion to modify the normal incidents of marriage (including the basic *ketubbah* sum) than is suggested by the distinction between monetary and non-monetary conditions. Thus, it appears to have been possible, by *tnai* (i) to exclude the triple obligations of Exodus 21:10 (*sh'erah, kesutah ve'onatah*), as in the above Tosefta;[420] (ii) to override the husband's right to inherit his wife's estate on her predecease; and (iii) to deny the husband his (then) right to take a second wife, by a condition that if he took another wife he would be coerced

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416 However, conditions to the effect that 'you will give me a divorce when necessary' do not contradict Torah law: see ARU 4:29-30 (IX.72-76) and ARU 18:26-27.

417 "On the Dispositive Foundations of the Obligation of Spousal Conjugal Relations in Jewish Law", in *The Bar-Ilan Conference Volume*, ed. J. Fleishman (Liverpool: Deborah Charles Publications, 2008; *Jewish Law Association Studies* XVIII), 164-83; ""Freedom of Contract" in Halachic Family Law? – A Comparison of the Babylonian Talmud and the Palestinian Talmud", *Bar-Ilan Law Review* 25/1 (2009) (Heb.) (forthcoming); English version forthcoming in *The Manchester Conference Volume,* to appear in *Jewish Law Association Studies* XX (2010).

418 See also Breitowitz (n.185, above), 59. *M. Kidd.* 3:1 already knows of a deferred betrothal, which Z.W. Falk, *Introduction to Jewish Law of the Second Commonwealth*, *Part II* (Leiden: Brill, 1978), II.286, compared to the Alexandrian form of *ketubbah* on which Hillel is said to have adjudicated in *T. Ket.* 4:9:

> When the people of Alexandria betrothed women, and then someone came from the market and stole her [and married her], and the matter came before the Sages, they considered declaring the children bastards (*mamzerim*). Hillel the Elder said to them: 'Bring me the *ketubbah* of your mothers'. They showed them to him, and it was written, 'When you enter my house you will be my wife according to the custom of Moses and Israel.'

The Alexandrian provenance of such betrothal practices is confirmed by Philo, *De Specialibus Legibus* iii.72 (who is critical of them). P. Segal, in N.S. Hecht, B.S. Jackson, S.M., Passamaneck, D. Piattelli and A.M. Rabello, *An Introduction to the History and Sources of Jewish Law* (Oxford: Clarendon Press, 1996), 137f., sees this form of *ketubbah* as evidence of "a law allowing one to make a condition under which the betrothal could be cancelled retroactively without the necessity of a *get* ... Thus, by virtue of the conditions laid down in the *ketubbah*, the acquisition made by the betrothal was cancelled without the requirement of a *get* even though the act of betrothal did result in the creation of the status of 'married woman'." See further ARU 2:9-10 n.40, for further literature.

419 In another respect, too, the Palestinian tradition appears to have been more favourable to the woman. The Mishnah, in introducing the issue of the *moredet,* had sought to "persuade" her back into compliance by reducing her *ketubbah* by 7 *denarii* per week, until it was entirely exhausted (*Mishnah Ketubbot* 5:7). Whether, at this stage, such exhaustion of the *ketubbah* was already taken to entail an obligation to terminate the marriage, is not clear. But such a view was not long in emerging. The Tosefta indicates that subsequent to the compilation of the Mishnah, "our Rabbis decreed that the court warn [her] for four and [or] five consecutive weeks, twice each week. If she continues [her rebelliousness] beyond this point, even if her marriage contract is worth one hundred maneh, she forfeits all of it" (*T. Ketubbot* 5:7). But the account of this in the Yerushalmi states: "The court after them [ruled] that the *moredet* be warned for four weeks, [at which time] she breaks her marriage contract and leaves": וחי שוברת כתובתה ויוצאה. Riskin, *Women and Jewish Divorce* (n.42 above), 14, takes ויוצאה to imply "[with a bill of divorcement]". At the very least, the formulation does suggest that the wife is here entitled to take the initiative in effectively bringing the marriage to an end. On the history of this tradition, see further ARU 9:3-7. There are also non rabbinic sources from 5th century BCE (Elephantine) to the 2nd cent. CE Dead Sea papyri which evidence a more egalitarian approach, in some cases going so far as to suggest that the woman could deliver the *get* to the man. See Jackson, "Some Reflections on Family Law in the Papyri" (n.268, above).

420 *Tosefta Qiddushin* 3:7-8, in §3.20 above. On the later halakhic attitude to such a condition, see ARU 4:28 (§IX.71 n.81) and 4:29 (§IX.74 at n.85 and 86), noting a distinction between a condition which denies the existence of rights and one which (as in the Tosefta) recognises but foregoes them. On R. Meir Posner's use of rejection of such a condition (regarding *onah*) in support of rejection also of a terminative divorce clause, and Berkovits' reply, see ARU IV:29 (§§IX.72, 74).

to give his first wife a *get*.[421] It may well be that the acceptance by Rashba of a condition: "If I divorce you (by a certain time) then you are betrothed to me … but if I do not divorce you (by that time) then you are not betrothed to me"[422] is to be viewed as reflecting the same tradition.

3.22 However this may be, even if the Yerushalmi clauses do validate unilateral divorce by the wife, they do not tell us *how* precisely the divorce is effected in this situation, and in particular what is the position if the husband refuses. Without more information, an entire spectrum of possibilities is theoretically open for consideration, each with some historical (if not rabbinic) precedent: thus we hear at 5th century BCE Elephantine (whose marriage contracts also use the language of "hatred", which sometimes has the technical connotation of effecting a divorce[423]) of an oral declaration before the assembly, which apparently was sufficient to execute the divorce;[424] one of the Herodian princesses, Salome, is said (by Josephus, who criticises this as contrary to Jewish law) to have sent a bill of divorce to her husband,[425] and a Dead Sea papyrus of the 2nd cent CE is thought by some to allude to such a procedure.[426] If, on the other hand, we assume the normal rabbinic procedure, we still need to ask whether the *bet din* would compel the husband if he proved recalcitrant,[427] and indeed what (if anything) it could do if even coercion failed. Radical answers to this (for the moment, purely historical) question are not to be excluded, given the radical nature of the application of the condition in the "kiss case" discussed above (§§3.18-19). Comparison may also be made of the procedure here to that in the Genizah *ketubbot* (§§3.31-32, below), which also use unusual terminology and may possibly admit of termination of the marriage by the *bet din* without a *get*.[428]

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421 For monogamy conditions, according to which the husband committed himself to divorce his wife if he takes a second wife, see Elimelech Westreich, *Temurot Bema'amad Ha'isha Bamishpat Ha'Ivri* (Jerusalem: Magnes Press, 2002), 26-29, noting (at 26) that the earliest explicit example of such a clause is in the Genizah *ketubbot.* The Elephantine marriage contracts contain a monogamy clause whose breach has been thought to entail automatic termination of the first marriage. Yaron, however, came to reject this notion of "divorce by conduct": see R. Yaron, *Introduction to the Law of the Aramaic Papyri* (Oxford: The Clarendon Press, 1961), 61-62 (on K7). In any event, the wife could (by her own action) unilaterally divorce the husband at Elephantine.

422 Rashba, *Novellae*, *Gittin* 84a; see ARU 4:28 (§IX.70) and see ARU 4:29-30 (§§IX.73-76) for Berkovits' use of this source. R. Abel's statement in ARU 5:37 n.121, based on *Nedarim* 29a-30b, that *qiddushin* cannot be contracted for a limited period (referring to a case where the marriage declaration was, for example, "You are my wife for the next week only") concurs with this ruling of Rashba where the time limitation on the marriage comes not in the marriage formula but in an attached condition making the marriage dependent upon the delivery of a *get* at a future point in time.

423 Yaron (n.421, above), 55, finds evidence at Elephantine of both its original usage as a motivation and its later technical (constitutive) function; for further literature, see ARU 2:9 n.36.

424 See B.S. Jackson, "Some Reflections on Family Law in the Papyri" (n.268, above), 148-51, including comparison with Hosea's reference to an oral divorce formula (*Hos.* 2:4).

425 See B.S. Jackson, "The Divorces of the Herodian Princesses: Jewish law, Roman law or Palace Law?", in *Josephus and Jewish History in Flavian Rome and Beyond*, ed. J. Sievers and G. Lembi (Leiden: E.J. Brill, 2005, Supplements to the Journal for the Study of Judaism, 106), 343-368 (see 346-56; for Josephus' account, see *Ant.* 15.259, quoted at 343).

426 See B.S. Jackson, "Some Reflections on Family Law in the Papyri" (n.268, above), 154-59 on P. Hever 13 and P. Yad. 18.

427 Riskin, *Women and Jewish Divorce* (n.42 above), 32, writes that by the stipulation the rabbis ensured "that she could virtually initiate the divorce herself. Her power was not truly *de jure* — that is, upon her stating her desire for divorce, the court would then coerce her husband until he acquiesced, and in the end it would still be he who gave the divorce to his wife — but it provided her with a *de facto* means of getting both her freedom and a livelihood." At 166 n.17, he adds: "It may be assumed that the divorce was effectuated by the court's coercing the husband to give his wife a divorce. It is unlikely that the Jerusalem Talmud discarded the Biblical command: "He shall write her a bill of divorce and place it in her hand" (Deut 24:1)."

428 See, however, the argument of Dr. Westreich in ARU 15, who accepts that the Yerushalmi divorce conditions and those of the Genizah *ketubbot* are part of a single, continuing halakhic tradition but concludes (at 19) that they both assume the traditional divorce procedure: divorce can be unilaterally initiated by the wife as well as by the husband, on the basis of the spouses' preliminary stipulation, but the formal execution of divorce is exclusively by the husband (although he might be coerced to do so).

3.23 One very specific — and initially surprising — answer to this question is that it formed a basis for the later geonic reforms regarding coercion of the *moredet* (§§4.17-21, below).[429] Me'iri writes:[430]

> And my teachers testified that their teachers explained that the Geonic innovation in this matter is based on what is written in the Western Talmud[431] הילין דכתבין אי שנאי אין שנאית תניי ממון הוא וקיים ... i.e. that anyone who stipulates that if he hates her he may divorce her, with payment of the *ketubbah* or the *tosefet*, and similarly (if they stipulate that) if she hates him, that he may be forced to divorce her (שיזקק הוא לגרשה), whether on payment of all the *ketubbah* or with less, everything is valid in accordance with what they have stipulated. And they wrote on this that the Ge'onim innovated as they did because they were accustomed to write in their *ketubbot* אי שנאי אין שנאית ... And after the *minhag* became widespread, they determined to apply it even where it had not been written [in the *ketubbah*] as if it had been written.

According to this, even though the agreement not to impose any financial sanctions upon her as a *moredet* and to grant her a divorce was not written in the *ketubbah*, it would have been understood and acted upon. Thus we now have an interpretation of R. Yoseh's ruling in the *Yerushalmi*, proposed by the teachers of Me'iri's teachers, and stating that an agreement to divorce is binding when written into the *ketubbah* and, where it is common practice to insert it into the marriage contract, it is effective — countenancing a coerced *get* — even if not written down. Scholars are divided as to whether this view is historically correct.[432] Indeed, most of the *Rishonim* (including Me'iri himself) understand R. Yoseh as referring only to fiscal matters. Nevertheless, the view of the teachers of the teachers of Mei'ri may create a *safeq* as to the authoritative interpretation of R. Yoseh's condition.

3.24 R. Yoseh's view is not disputed in the Jerusalem Talmud, and is not mentioned in the Babli.[433] It may well fall within Rema's qualification to *hilketa kebatra'ei*:[434] even though it was "recorded", we may have to determine whether it was "well known".[435] Moreover, there is specific authority for the view that, in the absence of explicit disagreement by the Babylonian with the Jerusalem Talmud, the authority of the latter is unaffected.[436]

3.25 As for what R. Yoseh's condition meant, the view of the teachers of the teachers of Meiri (§3.20) may be supported by a responsum of Rashba,[437] but otherwise stands alone. Rav Hai Gaon[438] and

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429 See Riskin, *Women and Jewish Divorce* (n.42 above), 82, quoting *Me'iri*; and citing Friedman, *Jewish Marriage* (n.392, above), II.42f., though Riskin himself, *ibid*. at 83, argues against this connection. See further Jackson, "*Mishpat Ivri, Halakhah* and Legal Philosophy" (n.18 above), nn.84-85; ARU 15:13-18.

430 R. Menaḥem HaMe'iri, *Bet HaBeḥirah* to *Ketubbot* (ed. A. Sofer, Jerusalem, 1968), Chapter 5, pp. 269-70.

431 Friedman, *Jewish Marriage* (n.392, above), 327, even suggests that Meiri's teachers' teachers based themselves also on an actual *ketubbah* and not only on the Yerushalmi. See §3.27, below (on Ra'avya).

432 See Lieberman (n.400, above), 61 n. ק; Friedman, *Jewish Marriage* (n.392, above), at 325-327, who doubts whether this description is historically possible. On the argument of Moshe Shapira, "Gerushin Bedin Me'isa", *Dine Israel* 2 (1971), 124-130, see ARU 15:15-16.

433 Unlike the condition relating to the wife's rights within marriage: see n.415, above.

434 See esp. §§2.28-29, above.

435 *Rema* to *Shulḥan Arukh Ḥoshen Mishpat* 25:2, quoted in text at n.242, above.

436 Ritba on *Kidd*. 60a; Maharik 100; *ET* IX.251 at n.155. Rabbi Y. Margalit argues in a forthcoming paper (n.417, above) that this is particularly so where the Yerushalmi is explicit and the Babli vague. Rambam's inclination towards the Yerushalmi is mentioned already by Ra'avad and has been further documented by R. Krasilchikov, the Poltava Gaon, in his commentaries on the Yerushalmi. See his introduction to the first volume of the ongoing publication of the Talmud Yerushalmi by *Makhon Mutsal Me'Esh*, Jerusalem. The matter is discussed also by R. Yosef in *Yabi'a* '*Omer*, vol.4 OH 35:5. See also Lieberman (n.400, above), and J.L. Maimon's introduction to the photographic reproduction of the Rome 5240 edition of Rambam's *Mishneh Torah*, pp. 22-4, s.v. *Talmud Yerushalmi*.

437 Rashba no. 176 in *Teshuvot Ḥahme Provence* (Jerusalem: Dfus Akiva Yosef, 1967), chapter 73 (see also the remarks of the compiler, R. Sofer, at 277), as cited by Margalit, "Freedom of Contract" (n.417, above): "This is the law of the

some Rishonim – Ramban and others – explain the divorce clause of the Yerushalmi as a clause which was required for the financial agreements.[439] But each had their particular motivations: R. Sherira Gaon certainly understood the Bavli *sugya* on *moredet* as providing the basis for the principle of coercion (§§4.26-27), and therefore the Palestinian divorce clause was not required to be understood as legitimating coercion; on the other hand, many of the Rishonim (Rambam being a notable exception) understood the Bavli as excluding coercion, due to the adoption of Rabbenu Tam's interpretation of the Talmud, and therefore interpreted the clause of the Yerushalmi as discussing only financial aspects. Indeed, even the use made by Me'iri himself of his teachers' teachers' views may have been different from those teachers' own intention. Me'iri himself opposed coercion in cases of *moredet*.[440] His discussion of the Geonic measures relates to their financial enactments, according to which the wife would not lose her basic *ketubbah* (and other monetary components).[441] Me'iri rejects also these financial enactments ("ואין ראוי לדון כדבריהם", "it is not correct to rule like them"), but then cites his teachers' teachers who find some support for them in the customary Palestinian divorce clause. He thus uses the view of his teachers' teachers to explain the basis of financial provisions for the *moredet*. Accordingly, the link between the two traditions does not relate to the coerced divorce but rather to the financial aspects of *moredet* which he himself rejects.

3.26 However, when we consider taking the words of Me'iri's teachers' teachers independently of their context in Me'iri's text, it appears that they were seeking to legitimate the coerced divorce itself and not [only] the financial aspects. Thus, they interpret "אין שנאת" in R. Yoseh's condition as: "if she grows to hate him, so that he *is required to divorce her* (שיזקק הוא לגרשה) whether while [receiving] all the *ketubbah* or with a small reduction".[442] In the same way, Me'iri's teachers' teachers refer to the fear of "להפקיע עצמה מיד בעלה" (that she may [unjustifiably] "take herself out of her husband's control") as the reason for their seeking to find support for the Geonic ruling, which means that the wife had the option of unilateral divorce and this needed justification. They thus regarded the divorce clause as giving the wife the right to initiate unilateral divorce, and viewed the Geonic enactments as based on the customary use of this clause. From this, a number of important questions arise:

(i) Did the teachers of the teachers of Meiri see actual *ketubbot* of the kind they described, or did they simply infer their existence from the R. Yoseh condition in the Yerushalmi? (§3.30)

(ii) When they cited the condition, did they thereby endorse the geonic measures, or simply offer an historical justification for what they regarded as a superseded

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rebellious wife and of the wife who finds her husband disgusting, but Rabbi Alfasi wrote in his laws that the Geonim's decrees were similar to that which was written in his laws, but it is very possible that the Geonim only made these decrees for their own generation as a temporary measure, but now there is no justification to be lenient and Ramban and Rabbi Zerachiah haLevi were also of this opinion, Jerusalem Talmud: Rabbi Yoseh said those that insert the penalties for rebellion in the *Ketuba*, these are financial conditions and are therefore valid." From the juxtaposition of sources, it may probably be inferred that this latter reference to the Yerushalmi implies a coerced divorce. As for Rashba's own attitude, see *Ḥidushe haRashba, Ketubot,* 64a.

438 He legitimates some kinds of financial arrangements in cases of *moredet*: see *Teshuvot HaGeonim* (Harkavi edition), 523, where שתנאיי ממון הוא וקיים is almost word for word the Palestinian justification of the *ketubbah* clause; in the Bavli we find "דבר שבממון תנאו קיים" (*Ketubbot* 56a), and similarly in the Tosefta (*Kiddushin* 3:8). The formula "תנאי ממון הוא" is unique to the Yerushalmi: see ARU 15:20.

439 On Ramban, *Ketubbot*, 63b, see ARU 15:20.

440 See Me'iri, *Ketubbot*, 63b, s.v. *'ugedoley hameḥabrim*: "ולדעתנו אין כופין" (according to our [i.e. Me'iri's] opinion the husband is not coerced [to give a *get*]).

441 *Ibid.,* s.v. *zehu* ("אלא שבעניין הגובינא חדשו הגאונים", i.e. in the financial [lit. collection] issue the Geonim innovated, etc.).

442 Similarly, they mention: "שאם תשנאנו תטול כתבתה או מקצתה ותצא" ("if she hates him she shall take her *ketubbah* or part of it and she shall leave"). The addition "ותצא" to the divorce clause in the Yerushalmi shows, as well, that they understood this clause as legitimating unilateral divorce.

tradition? (§3.28)

(iii) What is the present dogmatic significance of their argument? (§3.29)

3.27 Mordechai Akiva Friedman argues that not only were Meiri's teachers' teachers aware of Rabbi Yoseh's condition in the Yerushalmi; they were also familiar with the real practice in Eretz Israel in their time. He bases this on a source indicating that the Ra'avya (Rabbi Eliezer b. Joel Halevi), who is likely to have been one of Meiri's teachers' teachers, examined a *ketubbah* that was brought from Eretz Israel and contained a divorce stipulation similar to the divorce clause in the Yerushalmi.[443] This actual finding, Friedman maintains, "could have led him to conclude that there was a direct connection between the (Palestinian) clause and the (Babylonian) Geonic enactment."[444]

3.28 When Me'iri's teachers' teachers cited the condition, did they thereby endorse the geonic measures, or simply offer an historical justification for what they regarded as a superseded tradition? There is little indication of the former. The more likely explanation is that they sought to explain what the Ge'onim did against the background of dogmatic acceptance of Rabbenu Tam's arguments against them:[445] since according to Rabbenu Tam the Talmud does not mention coercion, a different basis was needed for the *kefiyah* of the Ge'onim, and this was found in the Palestinian divorce clause. In fact, Me'iri gives the following account of their motivation: "And they (i.e. his teachers' teachers) wrote at the end of their writings that it is better for us to take pains to interpret their teachings (i.e. the teaching of the Ge'onim) than to say that they explicitly uprooted the whole *sugya* without any reason."[446] We may note, however, that the Ge'onim themselves do not refer to the Palestinian tradition of making such a condition as their normative basis. So the explanation of Meiri's teachers' teachers would appear to be anachronistic.[447]

3.29 That does not, however, deprive it of dogmatic significance. For Me'iri's teachers' teachers, the Palestinian tradition is sufficient to legitimate the problematic geonic tradition, even in relation to what they (following Rabbenu Tam's view) probably regarded as non-legitimate coercion. This accords the Yerushalmi an enormous dogmatic weight: it confirms in this very context[448] that customs and norms lacking a normative basis in the Babylonian Talmud can be justified on the basis of the Yerushalmi. And if such traditions were still relevant for the Rishonim, even centuries after their actual use, the *posqim* of our time too may consider what dogmatic weight should be given to such solutions. In particular, it raises the question whether there is not a *safeq* as to whether coercion may still be used when authorised by a term in the marriage contract.

3.30 The fact, moreover, that Ra'avya appears to have relied upon a Palestinian divorce clause in an halakhic analysis indicates that we may not exclude the Genizah *ketubbot* from the halakhic debate. Not only do they indicate a continuation of the Yerushalmi traditions whereby the parties may specify "unilateral" grounds for divorce; they also raise important issues regarding the procedures for implementation of such divorces.

3.31 The language of the Genizah *ketubbot* as regards the divorce procedure in cases of "hatred" (whether of the husband or wife) is unusual:

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443 See Ra'avya, *Mishpete Ketubbah*, 919 (p. 309): "and I saw a ketubbah which was brought from Eretz Israel and all [i.e. all court stipulations] were written in it. And [also written there were] the law of *moredet* and the law of *mored* and all other matters of [the] *ketubbah* [as] explained / interpreted in [tractate] *Ketubbot*."

444 Friedman, *Jewish Marriage* (n.392, above), at 327.

445 See further §4.25, below.

446 וכתבו בסוף הדברים שנוח לנו לטרוח ולפרש בדבריהם משנאמר שיעקרו כל הסוגיא להדיא בלא טעם.

447 However, a similar argument in relation to the Rosh's explanation of the geonic measures appears less straightforward: see §§4.22-24, below.

448 For the more general proposition, see §3.22, above.

> And if this Maliha hates this Sa'id, her husband, and desires to leave his home, she shall lose her *ketubba* money, and she shall not take anything except that which she brought in from the house of her fathers alone; and she shall go out by the authorization of the court (על פם בית דינה) and with the consent of our masters, the sages.[449]

A second example even uses the "partnership" terminology of the condition in the "kiss case":

> And if this Rachel, the bride, hates this Nathan, her husband, and does not desire his p[artnership, she shall] [los]e the delayed payment of her *mohar* and shall take what she brought in, and she shall not leave except by the authorization of [the] cou[rt].[450]

It is not entirely clear whether, according to such *ketubbot*, (a) a *get* was necessary at all (perhaps the condition was regarded as self-executing[451]), or (b), if it was, whether the court would back up its permission with an order, *a fortiori* with coercion (as the teachers of the teachers of Me'iri appear to have thought). The latter view has attracted influential support.[452] However, it fails to account for the unusual terminology of על פם בית דינה (which we have not found paralleled elsewhere). Moreover, a different explanation of the basis of the Geonic measures, itself also probably motivated by a desire to mitigate the criticisms of Rabbenu Tam, is provided by the Rosh, who writes of the Ge'onim:

> ... For they relied on this dictum: "Everyone who marries, marries in accordance with the will of the Rabbis" [bKet 3a], and they agreed to annul the marriage when a woman rebels against her husband.[453]

וסמכו על זה כל המקדש אדעתה דרבנן מקדש והסכימה דעתם
להפקיע הקידושין כשתמרוד על בעלה

The Rosh here interprets the geonic practice not as coercion but rather as annulment, using the language of *hafqa'at qiddushin*.[454]

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449 TS 24.68, lines 5-7, in Friedman, *Jewish Marriage* (n.392, above), II.54 (dating), 55f. On the meaning of על פם בית דינה, see further §3.79, below.

450 Lines 33-34 of Friedman no.2, JNUL Heb.4 577/4 no.98, of 1023 C.E., at Friedman, *Jewish Marriage* (n.392, above), at II.41, 44-45, Friedman's translation (Riskin, *Women and Jewish Divorce* (n.42 above), 81, offers a different translation, but not differing in substance). See further M. Friedman, "Divorce upon the Wife's Demand as reflected in Manuscripts from the Cairo Geniza", *The Jewish Law Annual* 4 (1981), 103-126; Jackson (n.268, above), 161f., arguing against the view of Katzoff (n.394, above), 246, that the clause indicates no greater powers on the part of the court (or the wife) than in traditional *halakhah*, and supporting that of Friedman, *Jewish Marriage* (n.392, above), I.328-46.

451 But see Dr. Westreich's argument at ARU 15:11-12.

452 Friedman, *Jewish Marriage* (n.392, above), I.346, observes: "We have traced the development of a rare *ketubba* clause over a 1500 year period. Jewish law certainly never empowered a wife to issue a bill of divorce unilaterally and thus dissolve her marriage. However, it was stipulated in *ketubbot*, which, from talmudic times, followed the Palestinian tradition, and the rabbis eventually recognized this as binding law that through the wife's initiative, if she found life with her husband unbearable, the court would take action to terminate the marriage, even against the husband's will." See, however, Friedman at I.336 n.78, where he abandons the interpretations of (in effect) annulment whether with or without a *get*, but also regards it as unlikely that the phrase can mean "by standard Jewish divorce law". Friedman's final view is unclear from these passages. Riskin, *Women and Jewish Divorce* (n.42 above), 80, observes: "Apparently, the courts would force the husband to grant his wife the divorce she sought", arguing, at 81-83 (and at 2002:32 n.9), for two different traditions, the one of the Land of Israel (reflected in documents in the Cairo Genizah), the other that of the Babylonian Geonim. He notes that the Jerusalem Talmud appears unaware of the Babylonian tradition of the *moredet me'is 'alay* ; conversely, the Babylonian Talmud appears unaware of the Palestinian divorce clause. But even if the *taqqanah* of the Geonim was not followed in Palestine and Egypt, the converse proposition does not follow: post-talmudic Babylonian practice may have used R. Yoseh's condition, and the Geonim may have regarded it as contributing to the authority of their *taqqanah*: see further ARU 2:26 n.113.

453 *Resp*. 43:8, p.40b. Riskin, *Women and Jewish Divorce* (n.42 above), 125 (Heb.) 126f. (Engl.), and Riskin's own comments at 129; Breitowitz (n.185, above), 50f. n.135, 53. For evaluation of this analysis, see §§4.23-24, below.

454 See further §§4.22-24, below, and ARU 2:26 (§3.4.2), ARU 8:18-19 (§3.3.2), ARU 15:5-13 on the Rosh's interpretation of the geonic measures as a form of *hafka'ah.* Of course this is unlikely to have been known to Me'iri's

3.32 The question may be difficult to answer in historical terms. However, there are dogmatic implications whichever historical answer is given. Either the divorce clause indicates a practice (legitimated by its use in Eretz Israel in the past and cited by some Rishonim), according to which no *get* was necessarily required in cases of *moredet me'is* '*alay*, so that, in effect, a preliminary agreement between the spouses can be a basis for marriage annulment. Or the husband was in this situation coerced to grant his wife a *get*, so that, according to the view of Me'iri's teachers' teachers, a preliminary agreement can avoid later problems of *get me'useh*, when divorce is initiated solely by the wife. And even if we adopt the latter, more traditional, interpretation, historical questions remain regarding the basis of its authority.[455] More important, for present purposes, is the dogmatic use which may be made of these justifications of the geonic measures.[456] On the one hand, the argument of the Me'iri's teachers' teachers accords great dogmatic weight to the Yerushalmi, which may be used to justify customs, norms, etc., even if they lack a normative basis in the Babylonian Talmud; on the other hand, the Rosh's explanation clearly shows that he did not reject any post-talmudic use of *hafka'ah* (even in cases of *moredet me'is* '*alay*), albeit in the presence of a *get*.[457]

C. *Further Examples of and Proposals for Conditional Marriage*

3.33 In this section, we review a number of further examples of and proposals for conditional marriage. They are catalogued and examined more comprehensively by R. Abel at ARU 18:79-91 (and see §6.40, below). Here, they are treated in terms of the particular issues they raise, with a view to evaluating to what extent they may contribute to a global solution. These issues include the following:

(i) the difference between a condition retrospectively annulling a marriage already terminated by the death of the husband (classically, the *aḥ mumar* condition), and a condition terminating a marriage not already annulled by the death of the husband (§§3.34-38);

(ii) the issue of conditions contrary to Torah in the context of the apparent overriding of the will of the husband at the time of the termination of the marriage (§§3.39-40);

(iii) the question to whose act the condition grants the power to terminate the marriage – the act of the *bet din*, or the act of the husband or wife (§§3.41-50).

3.34 One post-talmudic example of a terminative condition which is universally recognised as valid, that of the Mahari Bruna relating to the *aḥ mumar,*[458] raises the difference between a condition retrospectively annulling a marriage already terminated by the death of the husband, and a

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teachers' teachers (Me'iri and Rosh were exact contemporaries, born in 1249 and 1250 respectively). However, the Rosh's own teacher, the Maharam of Rothenburg, cites a responsum of R. Shmuel b. Ali, which uses a plural formulation which, as argued below (§4.22), may indicate court action. Of course, the two explanations are different, but they also both offer dogmatic explanations of how the Geonim could have justified immediate *kefiyah* for the *moredet me'is 'alay*.

455 Dr. Westreich (ARU 15:24) distinguishes two distinct traditions: "The right of the wife unilaterally to demand divorce was practiced in two different traditions: the Babylonian-Geonic tradition and the Palestinian-Genizah tradition (including its precedents in the Yerushalmi). These traditions developed in a similar environment but the sources of authority for this right were different in nature and did not influence each other: a positive law source (the *halakhah* of *moredet*) in the Geonic tradition; custom and contractual agreement in the Palestinian tradition. We have not found sufficient support for the argument that based them both on the same construction (*hafka'ah*). Neither have we found support for basing one tradition (the Geonic coercion) on the other (the Palestinian divorce clause)."

456 See further ARU 15:23-24 and §§5.12,35, 6.27,74,81, 7.4, below.

457 On this issue, see further §§5.12, 44-51, below.

458 See further ARU 4:18-19 (§§IX.34-35); ARU 8:7 (§2.4); ARU 10:9-10, ARU 18:16-17.

condition terminating a marriage not already terminated by the death of the husband. Following a ruling of R. Yisra'el Bruna (c.1400-1480, Germany), in his Responsa, Rema held valid a clause annulling the marriage in the event that the husband dies childless, where the husband (at the time of the marriage) had only one brother, who had abandoned Judaism for another faith:

> If someone takes a wife and he has an apostate brother, he may marry her stipulating a … condition that if she finds herself bound to the apostate for levirate marriage [or *ḥalitsah*] then she shall not have been married [in the first place]. (Rema, *Even Ha'Ezer*, 157:4)

3.35 Much of the contemporary debate on the possible use of a terminative condition to solve the problem of the *mesorevet get* revolves around the significance of a basic factual difference between this problem and that of the *aḥmumar*.[459] In the latter case, the original husband is dead; in the case of the *mesorevet get* he is still alive. It is claimed in *'Eyn Tenai BeNissu'in*[460] that some, following R. Shemuel ben David HaLevi in *Naḥalat Shivah*, maintain that only a condition that takes effect after the husband's death, such as Mahari Bruna's, can be valid. In *Naḥalat Shivah* 22:8 the author asks how Mahari Bruna could have enacted a conditional marriage in the case of the apostate brother since the Talmud states unequivocally (*Yevamot* 94b, 95b, 107a) that there cannot be a condition in *nissu'in*. He answers that we do not find conditions in *nissu'in* such that, if she leaves him during his life his intercourse becomes retroactively promiscuous,[461] but if the condition takes effect only after his death and all his life his intimacy with her was on the basis of his betrothal — such a condition we do find in *nissu'in*.[462] In those cases described in *Yevamot* the references are to her leaving him (on the basis of the condition) during his lifetime. It would seem from this that *Naḥalat Shivah* would not agree to any condition that would retroactively dissolve a marriage during the lifetime of the husband.

3.36 In reply to this argument, R. Berkovits notes that such a question had been asked to the *Noda BiYehuda*. It seems that the questioner had seen this distinction in *Naḥalat Shivah* and asked the *Noda BiYehuda* what difference it makes, since when the marriage is annulled it will surely always result in retroactive illicit intercourse? Surely it is no more acceptable to the husband to practise illicit intercourse that will become apparent after his death any more than if it will become apparent during his life! Berkovits, however, notes that *Naḥalat Shivah* examines only the case of vows and blemishes mentioned in the Talmud (*Ketubbot* 72b-74a), where breach would create retrospective promiscuity,[463] and rejects the underlying distinction, that a dead husband does not care about the possibility of retrospective *zenut* while a living husband does. Berkovits, moreover, holds that a marriage terminated by an acceptable condition does not in fact create a situation of retrospective *zenut* (§3.59); hence the permissibility of bolth the *aḥmumar* condition and that of Berkovits.

3.37 It seems, then, that this undermines the basis for a distinction between a condition retrospectively annulling a marriage already terminated by the death of the husband, and a condition terminating a

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459 It might be argued that while the infrequency of the operation of the *aḥmumar* condition stems from unusual circumstances utterly outside the couple's control — a combination of widowhood, childlessness and the brother-in-law's apostasy — the problem of *get* recalcitrance is a problem completely within the control of the partners involved and the *Bet Din*. See Berkovits (n.112, above), 32-34; ARU 4:17 (§IX.29).

460 *'Eyn Tenai BeNissu'in*, R. Lubetsky 30, footnote.

461 And therefore we fear that he will cancel the condition at *nissu'in*.

462 R. Lubetsky and others understood this to mean that in this case the condition will not be cancelled by the groom at *nissu'in*, because he does not care about promiscuity that can only become retrospectively apparent after his death.

463 In this latter case, if he would insist on his condition throughout *nissu'in* and the marriage would be retroactively cancelled if she were found to have been subject to a vow or blemished, every intercourse would be regarded as having been promiscuous because, had she been honest with him, *he would never have wanted the marriage* and would regret that he had ever been intimate with her as the entire relationship was under false pretences: see ARU 4:16 (§IX.25). We therefore fear that the condition will be foregone at *nissu'in*.

marriage not already annulled by the death of the husband. Interestingly, Rav Kook wrote about the reluctance to use such conditions other than in relation to *yibbum* in terms not of any objection in principle, but rather because of lack of the necessary expertise:[464]

> Although it is clear that an explicit condition is effective even in *nissu'in* (as was customarily done in the case of an apostate brother) we have not agreed to introduce conditional marriage as a general enactment because of the damage that can arise from this through those who are not well-versed in the laws of conditions and generally in the laws of marriage and divorce yet are involved with such matters though they have no right to be.[465]

R. Berkovits argues, however, that if it is really possible to enact conditional marriage according to the Halakhah, we are permitted to deliberate and find a solution to the practical questions. We should not simply cling – without renewed investigation and contemplation and calm consideration – to the practical concerns of earlier generations.[466]

3.38 Mahari Bruna's condition has, in fact, been broadened in order to solve additional problems of problematic *yibbum/ḥalitsah* (for example when the brother of the groom suffers from mental retardation and the like). One such decision was that of the *Turey Zahav*, in the name of his father-in-law the *Bayit Ḥadash* (*ibid*., sub-para 1), regarding a man whose brother's whereabouts are unknown:

> And it seems that the same law applies to one who has a brother who has gone abroad and it is not known if he is alive: he also is allowed to marry on a condition that if he dies without children and nothing will be known of him (the brother) that she will not be married, and it is permitted to make such a condition even *ab initio* (*lekhatḥillah*).[467]

3.39 We noted in §3.14 above the acceptance by Rashba, *Ḥiddushe haRashba* on *Gittin* 84a, of the halakhic validity of a condition: "If I divorce you (by a certain time) then you are betrothed to me … but if I do not divorce you (by that time) then you are not betrothed to me." The question arises whether such a condition is contrary to Torah law (and not classified as *mamon*) insofar as it may override the will of the husband at the time of the termination of the marriage. However, the condition here is not that he shall divorce *against his will*. No-one forces him to marry this woman and if he agrees to the condition (to divorce) because he wants the marriage, at least for a time, then he also *wants* to give the divorce because he wants the marriage.[468] True, it may be that when it comes to giving the divorce he may have changed his mind and not want to give it, but this is not at all clear at the time of making the condition and the Rosh has already ruled in section 33 of his *responsa* that so long as it is not clear *at the time of making the condition* that the fulfilment thereof will be against the Torah such a condition is not "a condition against the Torah". Therefore, since he betroths on condition that he will divorce, at the time of the condition he intends to divorce willingly and so is not uprooting anything in the Torah by means of this condition.

3.40 Care is, however, required in the drafting of any *tenai*, in order not to endorse a condition contrary

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464 Letter dated 3 *Tevet* 5686 published at the beginning of *Torey Zahav* by Rabbi S.A. Abramson (New York 5687), and quoted in Berkovits (n.112, above), 68.

465 Cf. *Qiddushin* 13a, *'Even Ha'Ezer* 49:3.

466 Berkovits (n.112, above), 68-69.

467 Bah, *'Even Ha'Ezer*, 157, s.v. *venir'e dehu hadin*. Full details of this condition are set out *inter alia* in Rabbi Y.M. Epstein, *'Arokh HaShulḥan*, *'Even Ha'Ezer* 157:15-17.

468 The condition is thus not that he *has no right* to withhold divorce nor even that he *has foregone his right* to withhold divorce (on which distinction, see §3.38 below) but that he is agreeing now to *willingly divorce* her in the future if that becomes the proper thing to do.

to Torah law.[469] The condition should not state that the marriage is not subject to some aspect of the law (which would amount to uprooting a Torah law in a matter not generally regarded as one of *mamon*), but rather should indicate that the marriage is conditional on a particular state of facts not taking place. *Responsa Noda' BiYhudah* draws the distinction as follows:

> Now regarding the fact that the groom has an apostate brother, and the overseer gave a letter into the hands of the bride's father, that if the groom should die without surviving children that his wife would not be subject to *yibbum* – in this also he acted incorrectly … since this condition that [he is marrying her on condition that] she shall not be subject to the levir is a condition against the Torah [so the condition is cancelled and the marriage is unconditionally valid]. Rather, it is necessary to stipulate that the marriage shall not take effect [if she ever finds herself in a situation requiring *yibbum*]. (*Mahadura' Qama'*, '*Even Ha'Ezer*, *siman* 56)

We may recall that the example here given goes back to the classic exemplification of conditions contrary to Torah-law in *Tosefta Qiddushin* 3:7-8 (§3.20, above). Elsewhere, the possibility of admitting such conditions is based on the husband's committing himself to forego rights (rather than denying their applicability).

3.41 In considering the content of the condition, the question arises "by whose act ... is the marriage terminated?". We have seen that it was the effective delegation of this power to the *civil* courts which occasioned the powerful critique of conditional marriage in *'Eyn Tenai BeNissu'in.* Yet questions arise even when the condition reserves that power within Jewish hands: are those hands those of the husband or those of the *bet din*? This raises important issues: while *bet din* supervision in some form is clearly necessary to prevent abuse of the system, there is a strongly felt reluctance to take matters entirely out of the hands of the husband,[470] in the light of *Deut.* 24:1, 3. Normally, termination by the husband is via a *get*. Where the condition specifies that some other act of the husband brings the marriage to an end, can we regard such an act as a form of *get* (even *bedi'avad*, extending the concept that a *get me'useh* is still a *get* and only invalid)? And where the condition specifies the *bet din* as the agent of termination of the marriage, does that entail the view that such termination is a form of *hafka'ah*, thus raising the questions of authority debated in that context (§§5.43-53, below)? The answers to both these questions will depend in large measure on the drafting of the condition, and have been little discussed hitherto. Nor do all the proposals made in the last century include specific drafting. In this context, two proposals stand out, one (that of R. Uzziel) placing termination in the hands of the *bet din* (§§3.42-44), the other (that of R. Henkin) placing termination (primarily) in the hands of the husband (§§3.45-48).

3.42 In 5695 (1935-36), R. Benzion Meir Ḥai Uzziel[471] proposed[472] making the marriage conditional on the continuing acquiescence of the local *bet din*, the *bet din* of the locality/country[473] and the *bet*

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469 It is possible to reconcile this ruling of the Rema with *Tosefta Qiddushin* 3:7, which rules that a condition excluding *yibbum* is invalid, on the following grounds: the Tosefta deals with a man who betroths a woman on condition that (though his marriage will remain valid) the laws of *yibbum* will not apply. This type of conditional clause is invalid as it runs contrary to religious law, which says that every married woman *is* bound by the laws of *yibbum*. The Rema, on the other hand, is dealing with a man who betroths a woman on condition that she will not find herself in a situation requiring *yibbum*. This condition is valid because it does not contradict the Torah, in that the Torah nowhere says that a married woman must eventually find herself in a situation requiring *yibbum*. See further ARU 10:10.

470 See ARU 17:133-36, 163-64, 169.

471 1880-1953. Sefaradi Chief Rabbi of Israel 1939-1953. His responsa *Mishpetey Uzziel* were published in four volumes in 1947-64.

472 *Responsa Mishpetey Uzziel 'Even Ha'Ezer* nos. 45 & 46 as per Freimann (n.346, above), 391-92, para. 9. No. 45 was first published in *HaMaor* (*Iyyar* 5695), and prompted responses from RR. S.Y. Zevin, Yisrael Kark and E.Y. Waldenberg. No. 46 replies to these responses. See further ARU 12:6-30, including discussion of the responses.

473 Possibly following the proposal of R. Ya'aqov Mosheh Toledano in his *Responsa Yam HaGadol* (Cairo 1931) no. 74, as described by Freimann (n.346, above), 391 para. 8, that a condition be made at every marriage making it dependent on the continuing agreement of the local *bet din*, so that if they see that he has not acted fairly with her they can

din of the Chief Rabbinate in Jerusalem, who would thus be empowered to retroactively annul the marriage in cases of '*iggun*. Despite this formulation, however, it is clear from what he writes later, in response to R. Zevin, that he intended only a conditional marriage, and not a *hafka'ah* by the *bet din.*[474] His preference for a conditional marriage dependent upon the will of the *bet din* appears to have been based upon the view that such a condition could be regarded as in the interests of the spiritual well-being of the marriage, which (all agree) would exclude any question of retrospective promiscuity.[475] The formula he recommended was: "You shall be betrothed to me with this ring for as long as no objections are raised during my lifetime and after my death by the court in the city, with the agreement of the district court of the state, and the decision of the court of the chief rabbinate of Israel in Jerusalem, and on account of a persuasive claim of causing my wife to be an *aguna*."[476] This means in effect that the betrothal takes effect provided that the *bet din* never subsequently objects to the marriage. This reflects R. Uzziel's view that a condition which gives such a discretion to the *bet din* (or other outside body), thus taking it out of the hands of the spouses, avoids any problem of retrospective *zenut*.[477] We may note that R. Uzziel made his proposals after the publication of '*Eyn Tenai BeNissu'in*; indeed, in responding to R. Zevin's invocation of '*Eyn Tenai BeNissu'in*, he maintains that other permitted avenues (which were not there ruled out as forbidden) are not closed to us.[478] Here, the condition cannot take effect until a *bet din* (presumably, the local *bet din*, then endorsed by the civil court and the court of the Chief Rabbinate), determines that the woman has a persuasive claim that her husband caused her to be an '*agunah*. We may note three aspects of the drafting: (a) the woman does not still have to be alive;[479] this is clearly designed to aid any children born as *mamzerim*; (b) there is explicit reference to her '*agunah* status, but without further definition of what that is understood to mean;[480] (c) it is not clear whether the need to persuade the *bet din* that the husband had "caused her" to be an '*agunah* would be defeated by a claim that the wife had contributed to the situation.

3.43 R. Uzziel makes a strong distinction between conditional marriage where termination is in the hands of the *bet din* and conditional marriage where termination is in the hands the spouses. The latter, he argues, is too close to a business partnership (thus clearly rejecting the *shutafut* model[481]), where the dissolution of the agreement is determined by either one of the parties being dissatisfied with the continuation of the partnership. Such conditional marriage R. Uzziel considers worse than concubinage – which, he accepts, is (as long as it lasts) itself a marriage-type arrangement. Conditional marriage, however, which can be annulled at any moment because circumstances have arisen that one side does not like, cannot be considered even a marriage-type

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retroactively annul the marriage. At the time, R. Toledano was Av Bet Din in Cairo. He ultimately became Sepharadi Chief Rabbi of Tel Aviv-Jaffa and Minister of Religious Affairs. See further ARU 18:55-56.

474 See ARU 12:17 (§XXXX1), reporting *Mishpetey Uzziel 'Even Ha'Ezer* 46.

475 See ARU 12:15 (§XXXVI).

476 See Riskin, "*Hafka'at Kiddushin*..." (n.17, above), 27f., noting that the proposal was rejected by most of the generation's rabbinic authorities.

477 R. Uzziel maintains that wherever the Talmud says that the Sages made his intercourse promiscuous it speaks only of cases where he betrothed by intercourse and they decreed that that single act be considered one of promiscuity. See further ARU 12:12 (§(c)(ii)XXVIII), noting also R. Uzziel's argument from Rashi in his commentary to *Berakhot* 27a, s.v. *shemema'anim 'et haqetannah*, on marriage to a minor girl who later declares refusal*:* both here and where one marries on a condition that is later breached, there is no retrospective promiscuity since the relationship was formed, and the marriage was lived, on the basis of *qiddushin* and *nissu'in*. It may be embarrassing for the couple because others may look on it, retrospectively, as 'living in sin' but the truth is that there is no actual promiscuity.

478 See ARU 12:8 (§III). Moreover, against the argument that his was no more than tinkering with the French and Constantinople conditions, differing only in minor details, he replied that, as is well known in the world of Torah, the smallest variation can change the ruling from exemption to obligation and from prohibition to permission: ARU 12:9 (§IV).

479 His condition did contemplate the death of the husband, in order to prevent *yibbum.*

480 See further §1.5, above.

481 On which, see further §3.18, above.

situation and is really a type of *zenut*.

3.44 R. Uzziel cites Ritva's interpretation of Rashi in *Shittah Mequbetset* to *Ketubbot* 3a[482] to prove his point. Rashi is there said to explain that *kol hameqqadesh* does not mean that he is marrying on an implied condition which depends upon him, for then there would be no problem with *qiddushey bi'ah* because they would be automatically cancelled by the condition, just as would *qiddushey kesef*.[483] Rather, for Rashi (according to *Shittah Mequbetset*), it means that the groom marries on the implied condition that the marriage can only be undone by a *get* but *he agrees to any get that the Sages declare valid*, even if it is biblically void.

3.45 The use of a condition [here in the *get*] which explicitly brings a (here, delayed) *get* into effect was proposed in 1925 by Rabbi Yosef Eliyahu Henkin in *Perushey Ibra* (5:25).[484] His proposal was:

> At the time of the *qiddushin* and the *ḥuppah* the husband shall order the writing of a *get* that will take effect after the husband's last intercourse with his wife if, after that, he dies without surviving descendants or he becomes insane and remains so for three years or he leaves her an '*agunah* for three years whether through unavoidable circumstances or willingly and the *Bet Din* of Jerusalem[485] before whom the claims shall be brought will recognise that they are true. So it shall be if the claim is that he is not fit for matrimony or that he has disgusting blemishes such as the various types of leprosy *r"l*. In all these cases the *get* shall take effect after the final intercourse if and when the *Bet Din* set up for the purpose clarifies that the particular case before it is included in the enactment.

Various features of this proposal are noteworthy: (a) it deals with both *yibbum* and '*iggun*; (b) it includes recalcitrance along with other forms of '*iggun* and indeed *mumim* which occur after marriage; (c) it also apparently grants the *bet din* a wide discretion to declare that the husband "is not fit for matrimony" (although in context this may have been intended to refer to physical incapacities); (d) it makes it clear that the role of the *bet din* is declaratory (unless the *get* fails: see §3.43, below): the termination is thus generated by the act (or omission) of the husband in bringing into effect an advance "*get*"[486] (both complete and delivered) which he himself had earlier, and entirely willingly, authorised.[487]

3.46 R. Henkin's proposal uses a "validity" condition (at least as regards the *kashrut* of the *get*: §6.37), created not by *tnai* in the *ketubbah* but rather as a result of a general *taqqanat haqahal* with an initial 50-year duration,[488] in which the marriage was annulled only if his primary strategy, that of

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482 The second piece beginning *'Od katav*.

483 A problem noted by Ramban – see *Shittah Mequbetset* there, s.v. *Hatinaḥ*.

484 However, in an internet article at http://seforim.blogspot.com/search/label/Adam%20Mintz, R. Adam Mintz dates the publication of R. Henkin's proposal to 1928, and its withdrawal (in the light of the Louis Epstein controversy) to 1937. One wonders whether R. Henkin was aware of R. Pipano's proposal (§3.49) when he retracted (though he may have considered that that, like his own proposal, was no longer viable in the light of '*Eyn Tenai BeNissu'in.* See also R. Mintz, "The First *Heter Agunah* in America", *JOFA Journal* VI/4 (Shavuot 5767), 14-15, and see further ARU 6:4 (§3.1), ARU 18:88-91.

485 The marriage formula would then include "according to the Law of Moses and Israel and according to the conditions of the enactment of the [Jerusalem] *Bet Din* [for Marriage]". It appears that R. Henkin envisaged that this *bet din* would also deal with all cases invoking the procedure.

486 "The *get* shall be written in *meshita*' script under the auspices of the supervisor of the *qiddushin* and in a very curtailed version – as enacted by the *Bet Din*. It also should not be called a *get* but a *sefer petor* (document of release) by enactment of the *Bet Din*. The groom shall deliver it to her before witnesses and she shall place it in an area belonging to her and under her auspices."

487 On the issue of *bereirah*, see §7.34, below.

488 "They shall set the period of the enactment at 50 years and thereafter if the *Bet Din* finds that there is no need for it they shall nullify it even if the *Bet Din* be inferior to the previous one."

the (immediate) delivery of a *get al tnai*, failed, whether for halakhic or other reasons. The condition is thus activated by the act (or omission) of the husband in bringing into effect an advance "*get*" (both complete and delivered) which he himself had earlier, and entirely willingly, authorised; the role of the (specified) *bet din* is clearly to declare that the conditions for the coming into effect of the conditional *get* have been fulfilled. The *taqannah* would provide that "all Jewish marriages supervised by a rabbi be on the condition that if the aforementioned circumstances of '*iggun* come about and the [advance[489]] *get* is no longer in existence or is void according to the *Halakhah* then the *qiddushin* shall be retroactively annulled" (but by virtue of the condition).

3.47 Some time after publishing this proposal[490] R. Henkin was shown a copy of R. Lubetsky's '*Eyn Tenai BeNissu'in*, as a result of which he withdrew it and when the second edition of *Perushey Ibra* was published he arranged to have the words *hadri bi* ("I have retracted") printed alongside the text of the proposal.[491] R. Berkovits[492] expresses his admiration for the humility of Rabbi Henkin's retraction but maintains that it was based on a mis-reading of '*Eyn Tenai BeNissu'in*, which was in fact aimed only at the French condition and did not forbid any condition.[493]

3.48 We may wonder what might have been the fate of R. Henkin's proposals had it not been for his partial retraction, and the perception that any conditional marriage was now excluded. One may speculate that it may in any event have proved controversial, insofar as it involved a combination of conditional *get* and conditional marriage authorised by *taqqanah* from a senior body in Jerusalem, to be set up for this purpose. Substantively, however, it has considerable merit, and may well admit of modifications which would render it even more acceptable.

3.49 Just before R. Henkin published his proposal, R. David Pipano, in *Responsa Nose' Ha'Efod*, *responsum* 34, written at the end of '*Adar Rishon* 5684 (1924),[494] proposed the following addition to the *ketubbah*:

> Thus did the aforementioned groom say to the aforementioned bride in the presence of the witnesses signed below: 'If it should ever happen that, in the course of time, I need to journey away from home, I shall ask permission of the bride for the agreed period and I shall be obliged to write to her from wherever I am, telling her where I am and if the time allowed should need to be extended I must ask permission yet again by letter. If, however, I tarry there without her permission more than the period fixed between us … or if it be thus – that there be a quarrel between us and she sues me to judgment before a righteous *bet din* and the *bet din* make him [*sic*: read "me"] liable in any way and I shall be unwilling and shall disagree to accept the judgment upon myself or if I flee and my whereabouts be unknown then the betrothal shall not be effective

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489 See §§3.45-46, above.

490 Mintz (n.484, above), 15, plausibly suggests that this must have been after February 1931, when R. Henkin wrote a letter to R. Louis Epstein (of the Conservative Movement) in response to receipt of the latter's *Hatza'ah Lema'an Takanat 'Agunot* (New York, 1929/30), which Mintz describes as "in no way dismissive of his efforts". Later, in 1937, R. Henkin contributed an essay to *LeDor Aharon* (Brooklyn, NY, 1937), a collection critical of R. Epstein's work. R. Mintz quotes R. Henkin as distancing himself from R. Epstein, who had cited R. Henkin, mentioning at the same time that he had retracted his proposal in the light of *'Eyn Tenai BeNissu'in*, "for even the greatest scholar has to follow the majority view". This vividly illustrates the intrusion of denominational politics into the issue. Would R. Henkin have so readily retracted had he not been cited by R. Epstein?

491 RR. Gertner and Karlinsky (n.360, above), at *Yeshurun*10 (5762), 746, first new paragraph.

492 Berkovits (n.112, above), 170.

493 On this issue, see further §§3.8, 11 above.

494 But published a little later, at the end of the book *'Avney Ha'Efod* II, Sofia 5688 (1927/8): see Freimann (n.346, above), 391. See further ARU 13:12-15, ARU 18:79-85, and §§3.63-69 below on the question of revocation of the condition by *bi'ah*.

but shall be nullified retroactively and she will not need a *get*.[495]

The groom's declaration under the *ḥuppah* would be:

> With reference to all the conditions which are written in the *ketubbah* – [if] they are fulfilled, behold you are betrothed to me with this ring according to the Law of Moses and Israel and if the aforementioned conditions are not fulfilled, or even one of them or even a part of one of them, then the *qiddushin* shall be cancelled and shall not take effect at all and you will not need a divorce from me nor [will you need] *ḥalitsah* and the wedding ring will be a [mere] gift and all the acts of intercourse that I commit with you shall be on this understanding.[496]

Here termination occurs in fulfilment of one of a number of conditions involving actions (or omissions) of the husband. We may note here that there is no explicit reference to the wife's '*agunah* status, but rather an obligation to accept the ruling of a *bet din* which makes the husband "liable in any way" (which may well include failure to follow even a recommendation of the *bet din* to issue a *get*). Once the husband shows his unwillingness/disagreement, the role of the *bet din* is (here, too) only declaratory that these factual conditions have been fulfilled.

3.50 In 5687 (1926/7), R. Zvi Makovsky published a paper titled *Mipney Tiqqun Ha'Olam*[497] in which he proposed conditional marriage not as a communal enactment but only for specific cases where it is clear from the start that the woman was likely to become an '*agunah* because of the obvious irreligiosity of the husband (or levir). Perhaps this was in reaction to the wider scope of R. Henkin's proposal, and the need in it for a *taqannah*. It also raises the question of the "target" community (although problems of '*iggun* are far from the monopoly of the irreligious).

D. *The fear of be'ilat zenut*

3.51 We have seen[498] that the fear of *be'ilat zenut* is a major factor behind opposition to conditional marriage, in that marital relations are presumed to revoke any condition, on the assumption that this is preferable to the parties (or at least the husband) than the retroactive promiscuity (*zenut*) which would ensue should the condition take effect; moreover, some question whether it is permitted at all to make a condition that would, on its being triggered, convert retroactively every

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495 Followed by provisions for *yibbum/ḥalitsah* and financial provisions: "Furthermore, if I am worthy to have surviving descendants at the time of my death, the betrothal shall be effective. If, however, it should happen that I die without surviving descendants, Heaven forfend, the betrothal shall not be effective and she will not require *yibbum* or *halitsah*. Also, this marriage is on the understanding that I will be healthy and strong. If, however, an impure situation [illness] arises as a result of which I become ill with a contagious or infectious disease or if I was ill in such a way at the start of the marriage but this was not known to her until later or any similar situation in such a way that it is impossible to dwell with her then the betrothal shall not be effective and the money I give to her as betrothal shall be nothing more than a mere gift and she will not require a *get*. When the woman comes before the righteous *bet din* seeking her rights, the *bet din* shall investigate the matter thoroughly and if they find that right is on the woman's side they shall do all in their power to obtain a divorce from him or *ḥalitsah* from the levir but if they cannot achieve this they shall permit her to the world without a divorce or *halitsah*."

496 He comments that he could have simplified this wording (הרי את מקודשת לי בטבעת זו כדת משה וישראל על מנת שיתקיימו כל התנאים הכתובים בכתובה) but this would have lead him into areas of *maḥloqet haPosqim* so he preferred to keep to the straight and narrow. This, he maintains, is in accordance with the Geonim and many Rishonim. However, Rosh, R. Hanan'el, Ri, R. Tam and Ran disagree. And although in a case like this, where the *ketubbah* records that the condition was made "in accordance with the condition of beney Gad and beney Reuven", almost all agree that the actual wording spoken need not repeat the condition nor need it place the condition first and the marriage statement second (the mere *written acknowledgement* of the gadite/reubeneite condition being enough) R. Pipano did not choose this path because some *posqim* (Maharam Padua and *Ḥelqat Meḥoqeq*) still disagree.

497 Appended to the collection *Sha'arey Torah*, Warsaw, Year 17, *'Iyyar* 5687 as per Freimann (n.346, above), 392, para. 10.

498 §§3.13, 36, above, and ARU 4:14-15 (§§IX.20-21).

act of marital intercourse into *zenut*.[499] To the extent that the fear of retrospective *zenut* is well-grounded,[500] measures are required to ensure against such revocation (section E, below). In this section we examine this fear. Some say that even an irreligious couple not concerned about promiscuity would still prefer the definite relationship of an unconditional marriage to the comparatively uncertain relationship of a marriage predicated on a condition.[501] Moreover, we must take account of the financial implications of retrospective termination, and the need to make prior arrangements for the wife's future financial support, given that the *ketubbah* also would be annulled and the wife would thus lose all her post-marital rights (under Jewish law).[502] An initial observation is that the problem would be entirely avoided (for the "chaste" woman, at least) if the condition can be drafted so as to terminate the marriage only prospectively, an issue addressed below (§§3.77-80).

3.52 The concept of *zenut* has been debated since tannaitic times. A baraita in *Yebamot* 61b[503] offers no less than six different interpretations of *zonah*:

> Surely it was taught: *Zonah* implies, as her name [indicates, a faithless wife]; so R. Eliezer. R. Akiba said: *Zonah* implies one who is a prostitute (*mufkeret*). R. Mathia b. Ḥeresh said: Even a woman whose husband, while going to arrange for her drinking [i.e. the *sotah* procedure], cohabited with her on the way, is rendered a *zonah*. R. Judah said: *Zonah* implies one who is incapable of procreation (*eylonit*). And the Sages said: *Zonah* is none other than a female proselyte, a freed bondwoman, and one who has been subjected to any meretricious intercourse (*shenib'alah be'ilat zenut*). R. Eleazar said: An unmarried man who had intercourse with an unmarried woman, with no matrimonial intent (*shelo leshem ishut*), renders her thereby a *zonah*!

3.53 One may wonder whether the final opinion, that of R. Eleazar, should be taken as a serious explanation of the *shenib'alah be'ilat zenut* of the *ḥakhamim*, or whether it has more the sense of *nikra zonah.* The former view, however, appears to inform much of the halakhic discussion. Thus, if a marriage is retrospectively annulled, the spouses become, retrospectively, unmarried, and their intercourse is retrospectively rendered *be'ilat zenut*, *provided* that it was with no matrimonial intent (*shelo leshem ishut*). Few would seek to equate, in moral terms, all the various categories listed in the opinions in this *baraita*, and the use of the (equally generic) English term "promiscuity" is hardly more helpful in this regard. But the very range of the terms *zonah/zenut*, fortified by its biblical usage,[504] inevitably creates a connotation which contributes to the fear/horror of *be'ilat zenut* — even if it is entirely "innocent".

3.54 Another interpretation, however, is that retrospective *zenut* is not a retrospective characterisation of the intercourse of the couple after their marriage has been annulled, but rather as "leaving one's wife available to other men" — a reference to the fact that, whatever status it then had, it was no longer *qiddushin*, with the greater sanctity/exclusivity (and thus psychological security) that that entails (§1.34). On this view, a couple may hesitate about conditional marriage on the grounds that, even before the condition takes effect, their sense of security in the exclusivity of their relationship may be undermined. This, however, is not necessarily the same issue as that of *be'ilat*

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499 See ARU 6:2 (§2.3), ARU 12:11 (§XXV). There is an *'issur* against pre-marital sex, but it is only *derabbanan*.

500 Though this does *not*, of course, entail *mamzerut* for any children born before the annulment, there is apparently a sense in some circles that such children may be "spiritually blemished". See ARU 18:61, citing Bet Hillel, Mishnah, *Gittin* 79b and Gemara and Rashi there (*ET* V col. 690 at notes 14-16); the issue is addressed by R. Pipano: see ARU 13:15 (§59).

501 ARU 4:4 (§II.4), ARU 4:23-24 (§§IX.50, 53).

502 See R. Uzziel, *Responsa Mishpetey 'Uzziel 'Even Ha'Ezer* 44 and similarly R. Eliyahu Ḥazzan, *Resp. Ta'alumot Lev 'Even Ha'Ezer* I.5.

503 As discussed by Prof. Yosef Fleishman in a forthcoming study which he has kindly made available to us.

504 Used of Tamar (*Gen.* 38:15), Rahab (*Josh* 6:17 etc.), and frequently of Israel's faithlessness in the prophetic marriage metaphor, idolatry being equated with adultery.

zenut.[505] Even a relationship which is less than *qiddushin* will constitute *zenut* only if it is not *leshem ishut*.[506] The question thus becomes the meaning of *ishut*: is *pilagshut*, for example, a form of *ishut.*[507] If it is, then according to R. Eleazar in the *baraita,* it is not *zenut.*

3.55 The status of a marriage retrospectively annulled has, indeed, been regarded by some as *pilagshut*,[508] which is permitted by the majority of *posqim*, and even Rambam, who is the leading protagonist amongst those who forbid concubinage to anyone but a king, does so (according to Radbaz *Responsa* IV 225) only as a rabbinic prohibition. R. David Sinzheim,[509] however, argues that conditional marriage is permissible, even if we accept that Rambam's position is that concubinage for a layman is prohibited by biblical law:[510] the situation is thus one of doubt,[511] in that there is, at the time of the marriage, no certainty that the couple are entering concubinage because it may well be that the condition will never be broken and the liaison will prove to be *qiddushin* and not *pilagshut*.[512] R. Sinzheim also mentions that Mahardakh (Morenu HaRav David Kohen) suggests in a *responsum* that the Rambam would permit retroactive concubinage created as a by-product of a marriage annulled due to a broken condition. This, moreover, is argued by the *Noda' BiYhudah*, who says[513] that the Rambam prohibits a layman to have a concubine only when her liaison with her husband is one of concubinage *only*, but if the couple enter into conditional *qiddushin* then even if the condition is broken and the *qiddushin* retroactively annulled, the Rambam agrees that there is no prohibition whatsoever.

3.56 The very possibility of *pilagshut*, however, depends upon the nature of the condition. R. Uzziel maintains that if the breach of the condition is "external", i.e. dependent on a third party (e.g. on condition that a *bet din* never objects to the marriage) there is no question of promiscuity.[514] Thus where the condition makes the marriage dependent upon the will of the *bet din* (in the interest of the spiritual well-being of the marriage), not only do all agree that there is no question of retrospective promiscuity but, on the contrary, making *qiddushin* and *nissu'in* on such a condition is a *mitsvah*, as stated in *Shittah Mequbetset*.[515]

3.57 The problem of *nissu'in* cancelling a marriage condition is only found in the Talmud in

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505 On this alternative reading, moreover, there should be no fear of retrospective *zenut*: during the marriage, the man wanted the wife as exclusively his sexual partner; others in a community which takes even non-*kinyan* partnerships seriously also related to the wife as exclusively his. See, however, the discussion at ARU 17:113-20, esp. 119-20 n.128.

506 See §§3.52-53 above, and §§3.56, 58 below on the *Noda BiYhudah*.

507 Bilhah is described as a *pilegesh* in *Gen*. 35:22 (but also as both *amah* and *shifḥah* in *Gen*. 30:3-4), but this does not prevent Rachel from giving her to Jacob *le'ishah* in *Gen*. 30:4. Later, in Gen. 37:2 she is described (with Zilpah) as one of the *n'shei* of Joseph's father. Ramban suggests that their status increased to that of full wives after the deaths of Rachel and Leah, but their children were born before then. See also A. Tosato, *Il Matrimonio Israelitico* (Rome: Biblical Institute Press, 1982), 41-42.

508 On which see §§3.87, 6.33-34, 7.46.

509 *Responsa Bet Naftali* (Brooklyn, New York, 5766) number 45, part 1, s.v. *We'od yesh lomar* (p. 276, col. 2), though made in the context of the conditional marriage of a groom who has an apostate or missing brother.

510 As does R. Uzziel: see ARU 12:12 (§XXVIII). For further considerations, see ARU 12:12-13 n.55.

511 The Rambam himself (followed by most *Posqim* – see *Responsa Yeḥawweh Da'at* I *Kileley HaHora'ah*, *Kileley Safeq De'Oraita*', no 1 and ARU 7:15 (§IV.12 and n.110)) maintains that all doubtful prohibitions are permitted by Biblical Law. Hence according to the Rambam a conditional marriage would at most be only rabbinically prohibited (because it is *possibly* concubinage, i.e. it is a *safeq 'issur*) and in any rabbinic matter the rule (agreed to by all) is that we should follow the lenient view – in this case the view that concubinage is permitted! See further ARU 5:106-07 (§47.21).

512 ARU 6:4 (§4.1), ARU 5:60-61 (§24.7).

513 See n.531, below.

514 See ARU 12:12 (§§XXVI-XXVIII) and 14-16 (§§XXXIII-XXXVII); more generally, ARU 12:6-30 for a detailed account of the argumentation in *Mishpetey Uzziel 'Even Ha'Ezer* nos. 45 & 46, including discussion of the responses of Rabbis Zevin, Kark and Waldenberg.

515 *Shittah Mequbetset* to *Ketubbot* 3a, towards the end of the second section beginning *od katav*, citing Tosafot.

connection with conditions that could be clarified during the twelve months between the *'erusin* and *nissu'in*, such as those of *nedarim* and *mumim*. Such conditions, if not repeated at *ḥuppah*, *yiḥud* and especially *bi'ah*, may well be deemed to have been foregone. However, conditions which cannot be clarified before the *nissu'in*, such as those made in order to avoid '*iggun* or *yibbum/ḥalitsah*, were clearly made with the intention that they should span the post-*nissu'in* period of the marriage also – for if not, as the *Ḥatam Sofer* (*'Even Ha'Ezer* II:68) writes, what would be the purpose of stipulating them in the first place? Such a condition, therefore, does not really need repeating after the *qiddushin* and the custom of reiterating it (in the case of the apostate brother) at canopy, seclusion and intercourse[516] is a stringency over and above basic halakhic requirements, as the *Ḥatam Sofer* himself notes.[517] There are indeed many arguments for abandoning the requirement of repetition of '*iggun*-avoidance conditions in marriage at the later stages of canopy, seclusion and intercourse.[518] This would obviate one of the main problems raised[519] against introducing conditional marriage in contemporary society, namely that such a society could not adopt the practice of an ante-intercourse declaration of condition stipulation recited in the hearing, if not the sight, of two witnesses.

3.58 R. Uzziel supports the view that there is no prohibition of *bi'at zenut* when the relationship was conducted on the basis of *qiddushin* and *nissu'in*, even if later annulled by an ("externally-triggered") condition, from the Gemara itself (*Yevamot* 107a), supported by *Tosafot* in *Gittin* 81b s.v. *Bet Shammai*.[520] He adds that wherever the Talmud says that the Sages made his intercourse promiscuous it speaks only of cases where he originally betrothed by intercourse. What the Sages then decreed was that *that single act* be considered one of promiscuity,[521] so that it should not effect betrothal. Similarly, he maintains, every place where there is mention of the Sages having made [all] his acts of intercourse [during his retroactively dissolved marriage] promiscuous means that the acts [only] *appear* to be promiscuous.[522] He then demonstrates[523] that both *Tosafot*[524] and the Rambam[525] agree to this. The latter writes:

> Question: Concerning אין אדם עושה בעילתו בעילת זנות. The true meaning of the matter is as follows. When we see that he has relations with a woman and treats her as his wife we do not say that maybe he intended [the relationship] as promiscuity, because there is an assumption that a person would not make his intercourse promiscuous. According to this assumption we say that [if] one betrothed with an item worth less than a *perutah* and we afterwards saw that he had relations [with the woman he had married] we do not say that this was in reliance on the original *qiddushin* (which were invalid) but we say that anyone who has intercourse does so for the purpose of licit relations (and therefore she would need a *get*). Regarding 'the Sages made his intercourse promiscuous' there is no problem because it is the Sages who made it [so] *but he did not commit a promiscuous act and intended only licit relations with his wife*.

R. Uzziel then lists the *Rishonim* from whose words it may be inferred that they agree with this: Ramban, Re'ah, Don Crescas (pupil of the Re'ah), Ritba, and Rashi – all of whom say that the

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516 As noted by *Noda' BiYhudah*, R. Aqiva Eiger, *Ḥatam Sofer* and '*Arokh HaShulḥan*.

517 *Ibid*., s.v. *We'Omnam*.

518 See ARU 4:20 (§IX.40).

519 In '*Eyn Tenai BeNissu'in* (see ARU 4:15-16 (§IX.24)) and elsewhere.

520 See further ARU 12:12 (§XXVII).

521 As R. Uzziel demonstrates later (see ARU 12:14 (§XXXIII)), even this decree of the Sages does not make the intercourse promiscuous vis-à-vis the husband (or wife), only vis-à-vis the marriage.

522 See further ARU 12:12 (§XXVIII).

523 See further ARU 12:14-15 (§XXXIV).

524 *Shittah Mequbetset* to *Ketubbot* 3a towards the end of the second section beginning *'Od katav*.

525 *Responsa Rambam*, ed. *Meqitsey Nirdamim* (Freimann), Jerusalem 5694 no.167. The *responsum* appears also in Blau's edition of *Meqitsey Nirdamim*, Jerusalem 5746, no.356. This is one of the *responsa* to the Sages of Lunel, all of which were written in Hebrew (though some were dictated by the Rambam to his pupils). There is thus no question of inaccurate translation.

power invested in the Sages to annul marriages is vouchsafed them by the groom's declaration (*kol hameqaddesh* ...) being taken as the equivalent of "on condition that the Sages never protest".

3.59 Similarly, R. Berkovits argues that in the case of Mahari Bruna's condition, even if the *qiddushin* are retroactively annulled, the woman will not be considered to have been a concubine, since a concubine can leave the marriage whenever she wishes with or without her husband's agreement so that the marital bond is loose ("a semi-harlotry"), but a marriage based on the condition of Mahari Bruna cannot be annulled without a *get*.[526] For different reasons (the need for the *bet din* to sanction the termination under the condition), the wife in a conditional marriage as envisaged by Berkovits cannot leave the marriage whenever she wishes, and so this too cannot be considered concubinage. Even if the marriage was retroactively annulled due to the breach of the condition, says Berkovits, it would still not be viewed as having been *zenut* or *pilagshut*.[527] Since his proposed condition results in a marriage which she can exit only with a *get*, and there would be annulment only in a minority of cases (where there has been a civil divorce *and* he has been told/advised by a *bet din* to give a *get and* he has refused to do so), there would be no possibility of promiscuity.[528] In this context he stresses that the husband has far more control over the situation than under the condition of Mahari Bruna: he needs only to avoid being recalcitrant, and the condition will be maintained.[529] Conversely, the annulment of the marriage is not in the wife's hands but is dependent entirely upon the husband and the *bet din*. It follows, therefore, that so long as he has not acted in a way that will cause the marriage to be annulled she has the status of a definitely married woman.[530]

3.60 Many argue, moreover, that even if the condition is "internal" there is no retroactive promiscuity (whether *zenut* or [prohibited] *pilagshut*) on breach since the couple lived together willingly on the basis of their (albeit conditional) *qiddushin* and *nissu'in*.[531] As noted above (§3.55), even if Rambam would forbid *pilagshut* as a biblical prohibition (even where it came about as a result of a retroactively annulled conditional marriage), the fact that at the time of the marriage the eventuality of such a status is merely a doubt (a possibility) leads to the view that it would here be permitted for us, since we are also in doubt as to whether the Rambam was correct in forbidding concubinage to a layman; hence, to us the matter is a *sfeq sfeqa.*

3.61 Where there is both civil marriage and *qiddushin*, a further argument against retrospective *zenut* was made by Rabbi David HaKohen Sakali, *Rosh Bet Din* in Oran, Algeria, in 1936:[532]

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526 ARU 4:27-28 (§IX.68); ARU 4:16-17 (§§IX.26-29), citing R. Landsofer (quoted in *Me'il Tsedaqah* no. 1) quoting the *Baḥ* who quotes R. David Kohen (*Responsa Redakh*, *bayit* 9) and noting that the same view is expressed, *inter alia*, in *Shav Ya'aqov 'Even Ha'Ezer* II no. 39, *Naḥalat Shiv'ah* 22:8 and *Tsal'ot HaBayit* (at the end of *Bet Me'ir*), sec. 6.

527 All his arguments are summarised in ARU 4:14-28 (§§IX.20-69). He argues, for example, that the concern for retroactive illicit intercourse is relevant in the cases in the Talmud (*Ketubbot* 72b-74a) and *Shulḥan 'Arukh* (*'Even Ha'Ezer* 38:35) where the condition refers to the *present* status of the wife, for example where the groom made *qiddushin* on the condition that the bride is not subject to vows. The groom knows that at any moment it could become apparent that she has misled him and that he was tricked into marrying her so that the marriage is really non-existent. If this happened after intercourse it would be the case that he has engaged in sexual relations outside marriage – *bi'at zenut*. To avoid this possibility it is presumed that, if he has not discovered, between the *qiddushin* and *nissu'in* (a period of 12 months in talmudic times), that she is subject to vows and he nevertheless enters *nissu'in* without repeating his condition, he has foregone the condition. Thus the *qiddushin* become retroactively unconditionally valid or the act of intercourse functions as an unconditional *qiddushin*. See ARU 4:16 (IX.25).

528 ARU 4:17 (§IX.28).

529 Berkovits (n.112, above), 32-34.

530 Berkovits (n.112, above), 58-59 & 70; ARU 4:17-18 (§IX.32).

531 See, *inter alia*, *Responsa Bet Naftali* 45 (i) s.v. *uve'emet*, *Noda' BiYehudah* II *Ha'Ezer* 27 (at the end). See ARU 4:16-19 (§§IX.25-35) & 4:27-28 (§IX.68).

532 *Responsa Kiryat Ḥanah David* II 155-58 as per Freimann (n.346, above), 393, para. 13.

> There is no need nowadays to be concerned about the foregoing of the condition or about 'a man would not make his intercourse promiscuous' because our custom is that he does not make *qiddushin* or *nissu'in* until they are joined as a couple by the Almero (= according to the Law of the Land) so that she is singularly his and this is called marriage in the Secular Law. From the point of view of Jewish Law her status at that time is that of a concubine. If so, even if the *nissu'in* were to be annulled retroactively because of the condition [being breached] his acts of intercourse would not be [retrospectively] promiscuous because the couple would still be joined by the authority of the secular marriage so that she is singularly his like a concubine and even more than a concubine because since she is married to him according to the Law of the Land she is not allowed to enter into a sexual relationship with anyone besides him. Even if [one would argue] that because of the [breaching of the] condition his acts of intercourse are [rendered] promiscuous even so it is better that such be the case rather than the greater tragedy than this – that of the multiplication of *mamzerim* in Israel.

3.62 The view that in cases of retroactive annulment there is no problem of *be'ilat zenut* has, however, been challenged. R. Auerbach[533] argues that there is nevertheless a problem of *bi'at zenut*, since the view of Ramban,[534] Rashba[535] and others is that in practice the Sages do not annul the marriage; rather, the husband forgoes the cancellation of the agency and so the *get* is valid, which these Rishonim understand to be because he fears that his *bi'ot* will otherwise be declared *zenut*. Of course, this argument for *be'ilat zenut* presupposes that the husband's fears are halakhically well-grounded: such fears are indeed explicitly mentioned by the Rishonim, but does that necessarily imply their halakhic endorsement? R. Auerbach is, indeed, aware of the fact that others dispute such *zenut*.[536] Indeed, others consider the effect of "retrospective *zenut*" to be *pilagshut,* and whether the same arguments apply to the effect of a terminative conditions also has to be considered. At the very least, the matter is one of *safeq*.

E. *Avoiding Revocation of the Condition*

3.63 In the previous section, we considered the arguments that (i) retroactive annulment, resulting from a condition in the marriage, may produce a state of *zenut*, and (ii) that fear of such an outcome is sufficient to create a presumption, arising from marital intercourse, that the condition is thereby revoked. For those who do not accept the contrary arguments of R. Yeḥezkel Landau in *Noda BiYehudah*, R. Uzziel and R. Berkovits, it becomes necessary to provide a means of ensuring against revocation of the condition. Indeed, the *implied* revocation through the assumed fear of *be'ilat zenut* is not the only possible threat to the condition. What if the husband decides unilaterally and explicitly to revoke it?

3.64 A common reaction to the problem of implied revocation is that the husband must repeat the condition before the first *bi'ah* – and before witnesses (outside the door) – and even (for some) before *every* occurrence of *bi'ah*; moreover, if it is public knowledge that a couple is living together as man and wife, no further evidence may be required to establish that they are having intercourse for the purpose of (unconditional) *qiddushin*.[537] Indeed, the most extreme version of

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533 R. Shlomo Zalman Auerbach, "Be'inyan 'Afqe'inhu Rabbanan leQiddushin Mine", *Torah Shebe'al Peh* 16 (1974), 36-54, at 37-39. The article first appeared in *Moriah* 21-22 (5730), 6-24.

534 Ramban in the name of Rashbam, *Ketubbot* 3a, s.v. *shavyuha*; *ibid.*, *Gittin* 33a, s.v. *kol* (we may note, however, that Ramban seems not to accept this interpretation).

535 Rashba, *Ketubbot*, 3a, s.v. *kol*; *ibid.*, *Responsa*, 1162. See also *Pene Yehushu'a*, *Ketubbot*, 3a, s.v. *'afke'inhu* and s.v. *kol*.

536 E.g. *Shittah Mekubetset*, adopted by Maharsham and others: see R. Auerbach, n.523 above. See also *Ma'alot Lishlomo* and R. Sakali (§3.61, above).

537 *Bet Shemuel*, *'Even Ha'Ezer* 31:9, sub-para. 22, quoting Re'ah; for expressions of this view in *'Eyn Tenai BeNissu'in*, see ARU 4:14-15 (§IX.20). On the view of Re'ah, see ARU 4:41-41 (Appendix), noting *inter alia* that many *Rishonim*

this view, that of *Shiltey haGibborim* (R. Yehoshua Boaz, late 15th – early 16th century),[538] quoting Riaz (R. Yeshayahu Aḥaron Zal of Trani, Italy, end 13th cent),[539] has it that even where an explicit condition was declared immediately before intercourse, during the intimacy the couple will make an unconditional commitment to each other – i.e. the intercourse would become an act of unconditional betrothal.[540] Against this, however, the authority of *Tosafot*, Rosh, Rif and Rambam may be cited.[541] At the other end of the spectrum, the Constantinople rabbis, supported by R. Pipano, maintain that, according to most *posqim*, if one betroths a woman on condition and then weds her without repetition thereof, her requirement of a *get* is only rabbinic.[542] Moreover, even the objection of Riaz – if, indeed, relevant to our problem[543] – may be overcome if the groom made clear at the repetition at *bi'ah* that he means his condition to obviate the need for a *get*.[544]

3.65 Others argue, as a matter of principle, that *bi'ah* does not entail an implied revocation of the condition, and that there is therefore no need to repeat the condition.[545] In particular, the condition is for the benefit of the woman,[546] and there can be no presumption that she would forego it: there is, in fact, an argument that *'Eyn 'adam 'oseh be'ilato be'ilat zenut* does not apply to a woman.[547] Indeed, it was on that very basis (*adatha dehakhi*) that she agreed to the marriage in the first place. This, it might be argued, should at least reverse the *ḥazaqah,*[548] making it necessary for the woman to declare before witnesses her release of the condition, if she wishes to do so. Nor can the

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(e.g. Rambam, *Ishut* 7:23 and see *Magid Mishneh* there, Rashba, Rosh, *Tur*) dispute it: Re'ah expresses this opinion in the case of a minor who never objected to her (rabbinic) marriage; Rivash (*resp*. 6) rejects outright the opinion of Re'ah in a case not involving a minor.

538 See ARU 4:21 (§IX.42), ARU 7:23 (§V.3), ARU 18:17. For expressions of this view in *'Eyn Tenai BeNissu'in*, see ARU 4:21 (§IX.42), noting that R. Danishevsky (at p.35) observes: "Though there are *posqim* who disagree with this and maintain that if an explicit condition were made at *nissu'in* and *bi'ah* it would be effective, who will be able to tip the scale against Riaz and *Shiltey haGibborim* who quoted him?". Berkovits (n.112, above), 25, describes *Shiltey haGibborim* (*beshem* Riaz) as "the only dissenting voice", thus reflecting the view that we follow a single opinion *leḥumrah*. On understandings of and replies to the claim in *Shiltey haGibborim*, see further ARU 4:20-23 (§§IX.41-49).

539 *Ketubbot*, *Pereq HaMaddir*. Berkovits (n.112, above), 46, notes that there is evidence that even Riaz – whom *Shiltey haGibborim* is quoting – himself would agree that if the groom declares that he remains insistent on his condition the condition will remain in place.

540 Berkovits (n.112, above), 25.

541 For sources and discussion, see further ARU 4:21-23 (§IX.43-49), ARU 18:17-20. Berkovits (n.112, above), 45, 62, adds also Rabbenu Yeroḥam. I. Warhaftig, "Tenai BeQiddushin WeNissu'in", *Mishpatim* I (5725), 206 n.28, records that the Me'iri on *Ketubbot* 73a cites an opinion like that of Riaz in the name of the *Geoney Sefarad* and rejects it.

542 ARU 13:13 (§55).

543 On the difference between present proposals for conditional marriage and the conditional cases of the Talmud (vows and blemishes), to which the ruling of *Shiltey haGibborim* in the name of Riaz is relevant, see ARU 4:21 n.50; ARU 18:17 n.43.

544 ARU 13:13 (§56). Cf. the argument of Berkovits (n.112, above, at 25-7, 61-62), based on his novel explanation of the position of *Shiltey haGibborim* (see ARU 4:23 n.59 and ARU 4:19 (IX.37)): it follows logically from this that if he made clear that he does *not* presume his condition fulfilled and that he realises the possibility of his bride being subject to a vow and therefore he is repeating his condition *so that the intercourse will indeed be illicit if the condition is unfulfilled* then, if indeed it is not fulfilled, no wedding will have taken place and she will not require a *get* to be free from him [even according to Riaz]. See however ARU 4:23 n.57.

545 Discussed in detail in ARU 4:14-21 (§§IX.20-41). Berkovits argues that if there is a clear declaration that the procedures of *nissu'in* are subject to the same condition as that expressed at the *qiddushin*, there is no question of the intercourse being intended as an unconditional act of marriage. See ARU 4:19 (IX.36), citing *Ḥelqat Meḥoqeq* (*'Even Ha'Ezer* 38:49) in the name of *Maggid Mishneh*, Rosh and *Hagahot Asheri*. The *Bet Shemuel* (*'Even Ha'Ezer* 38:59) adds *Tosafot* to these sources.

546 Cf. Berkovits (n.112, above), 37, citing *Responsa Me'il Tsedaqah* no.1: see further ARU 4:20 (§IX.40(ii)); ARU 8:10-11 (§2.6.3); ARU 13:14 (§58), ARU 18:11-12, 16.

547 *Ḥayyim shel Shalom* II number 81; ARU 5:42-43 (§21.2.6.11.3). See also *ET* I, 559-60.

548 *Tosafot*, *Yevamot* 107a., s.v. *'Amar Rav Yehudah*: see ARU 4:3 (§II.4), suggesting that the status of the inference may be merely a suspicion, rather than a presumption.

husband unilaterally forego it against her will.[549] The Rashba and the Ran, moreover, maintain that foregoing a non-monetary condition is ineffective.[550]

3.66 Even if the condition is best repeated, that does not necessarily entail repetition on every subsequent occasion of marital relations.[551] R. Lubetsky and the Hungarian Rabbis themselves appear to have accepted, on the analogy of the condition of Mahari Bruna, that it would suffice for the condition to be made (in the hearing of two valid witnesses, from outside the room[552]) at *qiddushin*, *ḥuppah*, *yiḥud* and again at the first *bi'ah*.[553] Of course, the need to repeat at *nissu'in* a *tnai* entered into at *qiddushin* goes back to the period when the two were separated in time (customarily, by a year). Nowadays, when *qiddushin* and *nissu'in* are performed together, there is no reason to think that the parties intend the condition at *qiddushin* to be cancelled at *nissu'in*;[554] indeed, even the *Ḥatam Sofer* states (in the context of the condition of the *aḥmumar*) that the repetition of the condition at the various stages of *nissu'in* is only a stringency and is not essential.[555]

3.67 A widespread view is that the condition may be safeguarded against implied revocation (and also fortified against explicit revocation) by the use of an oath.[556] An oath supporting a *ketubbah* obligation to grant a *get* to avoid *yibbum* is in fact found in *ketubbot* of Sephardi Jews in the Ottoman empire.[557] R. Pipano would have both bride and groom swear that they will never forego the condition.[558] He makes the following proposal for the addition to the *ketubbah*:[559]

> The aforementioned groom at the time that he betrothed the aforementioned bride in the presence of witnesses made conditions with the aforementioned bride, absolute conditions like the conditions of *Beney Gad* and *Beney Re'uven*, with the condition preceding the declaration stating that he is wedding the aforementioned bride in accordance with these conditions and because of this the aforementioned bride agreed that if the conditions would be fulfilled the betrothal should be effective and if they would not be fulfilled – even one of them – the betrothal should be totally nullified and would have no effect at all and the article used for the betrothal should be a gift.
>
> Thus did the aforementioned groom say to the aforementioned bride in the presence of the witnesses signed below: [the specific conditions][560]
>
> In our presence – the witnesses signed below – the aforementioned groom and bride swore … that they shall not be allowed or permitted to annul any one of these conditions … and not to forego any one of them or a part of it.

3.68 More than a century earlier, Rabbi Aqiva Eiger (1761-1837, Germany) had already proposed, in the context of the condition of Mahari Bruna, an oath which would be non-annullable, that the

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549 As Berkovits (n.112, above), 37, points out, an unconditional betrothal cannot be effected without her consent. Cf. ARU 8:10-11 (§2.6.3).

550 ARU 13:14 (§58), on Ran to Rif, *Ketubbot* 73a, s.v. *Garsinan baGemara*.

551 *Piṯḥey Teshuvah 'Even Ha'Ezer* 157:4, para. 9.

552 ARU 4:15-16 (§IX.24), leading to the conclusion that conditional marriage was impossible, given the practical impossibility of achieving this. Of course, technology might be invoked here, perhaps in the form of a message to a voicemail system.

553 ARU 4:15 (§IX.23).

554 Berkovits notes that this was already pointed out in *Responsa Terumat haDeshen* (end of no. 223) and in *Ḥatam Sofer* (ibid. s.v. *We'omnam*): see ARU 4:20 (§IX.40(i)).

555 Berkovits (n.112, above), 48, 52-53, citing *Resp. Ḥatam Sofer* vol. IV (= *'Even Ha'Ezer* 2), no.68 s.v. *Wa'ani*: see *Za'aqat Daalot,* p.145 n.260; ARU 4:19-20 (§§IX.37-39).

556 A form of self-compulsion: see ARU 17:158, presupposing halakhic man to be a man of honour, *compelled* by his own (binding) word.

557 See E. Westreich (n.225, above), 291, 295.

558 ARU 13:14 (§58).

559 ARU 13:15-16 (§§60-66).

560 See §3.48, above.

spouses would never forego the condition at any future intercourse.[561] Its form would be an oath *al da'at harabim*, the termination of which is thus dependent on public consent; we could then rely on the presumption that he would never transgress his oath (a far more serious offence than promiscuous intercourse), neither at any stage of *nissu'in* nor at any act of intercourse. Though this may well have been intended *in terrorem,* rather than as an automatic means of guaranteeing the preservation of the *tenai*, the latter view is found amongst some *posqim*.[562] A variation on this is an oath taken before a *bet din* in which the husband swears that he would never make a new (unconditional) marriage with his wife and that, should he break his oath and marry her (unconditionally), the *qiddushin* will not be effective.[563] The use of an oath is also included in R. Toledano's proposal that couples agree at the *qiddushin* to post-betrothal annulment (§5.58).

3.69 R. Henkin (in *Perushey Ibra* 5:25) proposed to deal with the problem of implied revocation through his *taqqanah*. He envisaged that the *bet din* "shall enact that ... all the acts of intercourse from the *qiddushin* onwards shall be promiscuous". He sought to reinforce this by having the *bet din* impose a *ḥerem* on the husband and wife that they "not intend nor agree that the acts of intercourse should be for *qiddushin* [which would] not [be] in accordance with the aforementioned condition." This, he argued, would remove all problems of detailing, doubling and repeating the condition, as well as the *get*-related problems of *bereirah* and concerns over "intercourse for the purpose of unconditional marriage", since *kol hameqaddesh 'ada'ta' derabbanan meqaddesh* would be applied to such a general enactment of the contemporary sages.[564]

F. *'Umdena and qiddushei ta'ut*

3.70 The preceding issues of revocation (and related questions of *who* should make the condition) highlight the question of the basis on which a woman enters *qiddushin kedat moshe veyisra'el.* Indeed, in advocating in 1933 that a debate take place at a gathering of leading halakhic authorities about the introduction of conditional *qiddushin* and *nissu'in,* in order to avoid the need for a *get* should a situation of '*iggun* arise, R. Moshe Schochet observed: "For it is certain that there is a definite assumption (אומדנא דמוכח) that she did not marry on such an understanding" and therefore the marriage might be retroactively annulled even if no explicit condition was made.[565]

3.71 There would appear to be a firm theoretical basis for such a suggestion. The halakhah recognises the concept of unspoken conditions ('*ada'ta' dehakhi lo' qiddeshah 'atsmah*), which can be used in relation to marital defects arising after *nissu'in,* as where a husband[566] or even the levir himself[567] becomes a *mumar* in the course of the marriage.[568] Whether this could be extended to a

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561 *Pitḥey Teshuvah 'Even Ha'Ezer* 157:4, para. 9, citing Resp. R. Akiva Eiger no.93; ARU 4:20-21(§IX.41). R. Broyde in his Tripartite Agreement (draft of 3rd December 2007) has the groom recite that he declared to the bride under the *ḥuppah*: "I take a public oath that I will never remove this condition from the marriage" (citing Responsa R. Akiva Eiger 93) ... "Even a sexual relationship between us shall not void this condition" (citing *Bet Shmuel 'Even Ha'Ezer* 157:6). My wife shall be believed like one hundred witnesses to testify that I have never voided this condition" (citing *Pitḥei Teshuvah 'Even Ha'Ezer* 157:8, *Resp. Bet Meir* 6).

562 See *Pitḥei Teshuvah 'Even Ha'Ezer* 157:4, sub-para. 9.

563 R. Shemuel Avigdor Abramsohn, *Sefer Torey Zahav*, New York 5687, II pp. 8-17 as per Freimann (n.346, above), 392-93, para. 11.

564 See ARU 18:89.

565 *Responsa 'Ohel Mosheh* (Jerusalem 5663) no. 2 as per Freimann (n.346, above), 393, para. 12.

566 See ARU 5:45-46 (§21.2.6.12.1), on *Responsa Mahari Qatsbi*, *siman* 10, cited in *'Otsar HaPosqim* (on *'Even Ha'Ezer*) 39:32:26.

567 See *Responsa Maharam Mintz*, number 105, quoted in *Responsa Seridey 'Esh* III 25, p.71, arguing from Maharam (quoted in Mordekhai, *Yevamot*, *siman* 30): we can say that she did not accept the *qiddushin* on such an understanding and that therefore she is free to remarry without *ḥalitsah*. See further ARU 5:50 (§21.2.11).

568 See further §3.73, below.

recalcitrant husband deserves investigation. After all, the husband commits himself in the *qiddushin* formula to *qiddushin kedat Moshe veyisra'el,* which Ritba explains as a form of condition (כאילו התנה עמה על מנת שירצו חכמים)[569] (as, indeed, appears to be assumed by *kol hameqaddesh 'ada'ta' derabbanan meqaddesh*). Of course, any use of terminative conditions to provide a global solution to the problem of recalcitrance must not rely on the contingency of either explicit conditions or the subjectivity of implied conditions; what is required is a standard condition implied by law.[570] But, as in the past,[571] the case for *tna'ei bet din* gains weight from previous practice — or, indeed, from enactment (*taqqanah*) of the *qahal* to which the couple belong.[572]

3.72 This issue is also relevant to the concept of *qiddushei ta'ut*, which has been applied by R. Moshe Feinstein in several cases,[573] including one involving a mistake of law (§7.35, below). One main condition for applying it is that the defect existed at the time of marriage; only then is the transaction defined as mistaken.[574] However, *'umdena* is a potential tool for terminating marriage due to a later defect, which occurred only after marriage.[575] Those *posqim* who reject any explicit terminative condition (*'Eyn Tenai BeNissu'in*) as a matter of *ma'aseh* might be willing to recognise an implicit terminative condition by means of *'umdena* . However, the precedents for *'umdena* are mainly in cases of levirate marriage, in which the *ḥumrat 'eshet 'ish* does not exist. Our question is whether we can apply it for cases of *'aginut* as well?

3.73 Already in *Ḥiqrey Lev*,[576] R. Yosef Ḥazzan cites *Baba Qamma* 110b-111a for the view that, were

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569 See ARU 11:5 and n.23. This may also be the view of Rashi: see Riskin, *Hafka'at Kiddushin* (n.17, above), 12-14. A letter of R. Herzog addressed to R. Weinberg, printed at the beginning of *Resp. Seridey 'Esh* III:25 (= I:90), cites a statement of R. Shelomoh Kluger (Maharshaq) in *Resp. Ḥiddushey 'Anshey Shem* that since the groom declares in his marriage formula that he is acting "in accordance with the Law of Moses and Israel" he is, in effect, making a condition that the *qiddushin* depend upon his adherence to the Jewish faith. Should he apostatise, therefore, there will be no marriage. R. Herzog finds the suggestion "astonishing" (see further ARU 5:40 (§21.2.6.7.4)). We find the same suggestion in the responsa of Mahari Qatsbi, number 10 (see n. 566, above).

570 Cf. R. Henkin, §3.46 above.

571 For the argument that the standard *ketubbah* conditions of *Mishnah Ketubbot* 4:7-12 were themselves based on earlier notarial practice, see B.S. Jackson, *Journal of Jewish Studies* LV/2 (2004), 220-21.

572 In discussing a proposed *taqqanat haqahal* which would render void any marriage not conducted with the knowledge and in the presence of the communal officials and a *minyan*, Ribash (*Resp.* 399; see Elon (n.241, above), II.856-59) argues: "Under the law of the Torah, the townspeople may adopt enactments, regulations, and agreements, and may penalize violators ... Since the townspeople agree on them, it is as if each one of them took them upon himself and became obligated to carry them out."

573 The cases in which R. Feinstein suggested applying this ruling are listed by R. Jachter, http://www.tabc.org/koltorah/aguna/aguna59.8.htm (see also Chaim Jachter, with Ezra Frazer, *Gray Matter. Discourses in Contemporary Halachah* (Teaneck, N.J., 2000), 44) as (1) "an impotent man" (*'Even Ha'Ezer* 1:79); (2) "a man who concealed that he had been institutionalized prior to the marriage" (*'Even Ha'Ezer* 1:80); (3) "a man who concealed that he vehemently opposed having children and later forced his wife to abort a fetus" (*'Even Ha'Ezer* 4:13); (4) "a man who concealed that he was a practicing homosexual prior to the marriage" (*'Even Ha'Ezer* 4:113); and (5) "a man who concealed that he converted to another religion" (*'Even Ha'Ezer* 4:83)." See further ARU 2:48-56 (§4.5).

574 See R. Michael Broyde, "Error in the Creation of Jewish Marriages: Under what Circumstances Can Error in the Creation of a Marriage Void the Marriage without Requiring a *Get* according to Halacha", http://www.jlaw.com/Articles/KidusheiTaut.html, and "Error in the Creation of Marriages in Modern Times under Jewish Law", *Diné Israel* 22 (5763/2003), 39-65 (English section); Broyde, *Marriage* (n.83, above), 89-102. On the dispute in *Edah* 4 and 5 between R. Broyde and Dr. Aviad HaCohen which followed the publication of the latter's *The Tears of the Oppressed* (n.148, above), see ARU 10:16 n.82, especially concerning the analysis of the Maharam's view, and Dr. Westreich's review of *Tears of the Oppressed* in *The Jewish Law Annual* XVII (2007), 306-13. See further R. David Bass, "Hatarat Nisu'in BeTa'anat Mekah Ta'ut", *Teḥumin* 24 (5764), 201-217.

575 As argued in ARU 10.

576 Section 58 [on *'Even Ha'Ezer* 157] s.v. *natati libi*. See ARU 6:1-2 (§2.2).

it not for *tav lemeitav,* we would have *presumed* that a woman who finds herself before a leprous brother-in-law would not have married her late husband had she known that she would find herself in such a situation, and so would be exempt from *yibbum* entirely. The argument is developed by Dr. Westreich. Commencing with this same *sugya* (*Baba Kamma* 110b-111a),[577] he observes an initial ambiguity: a new circumstance which did not exist at the time of the marriage is the reason for voiding the marriage, and this ruling is justified by the legal presumption (אדעת דהכי לא קדשה נפשה, literally: "on this assumption she did not get married"). On the other hand, אדעת דהכי is described as generating a mistaken transaction. This suggests that it may be possible to analyse the legal situation in such a way as to define a case as *qiddushey ta'ut* even though it applies to an occurrence which at the time of the marriage was no more than a possibility. The ambiguity generates a difference of opinion amongst later writers: some interpret '*umdena* as an expansion of *qiddushei ta'ut*,[578] while many others interpret it as an implicit condition, which is implied by the court and means that the couple implicitly agreed that such a future occurrence would terminate the marriage.[579] *Tosafot*, however, adopts an integrated analysis in which he appears to accept that a woman may reject a marriage even without her husband's (even implicit) agreement if we conclude that, had she known about the possibility of a particular future event (the context is a leprous levir), she would not have got married.[580] Indeed, the Wilna Gaon derives the validity of the conditional marriage of a man who has an apostate brother from the statement in *Bava' Qamma'* 110 concerning the '*umdena*' where a woman was left bound to a leprous levir. From there, says the Gaon, it is clear that had she made an explicit condition it would have successfully annulled her marriage (both *qiddushin* and *nissu'in*) if the condition was breached (i.e., if she found herself bound to a leprous levir).[581]

3.74 A similar approach, Dr. Westreich argues, may be found in the responsa of R. Moshe Feinstein, particularly that relating to the communist levir,[582] which takes the definition of an implicit condition a step forward. Not only does *ad'ata dehakhi* deal with a condition which was not made explicitly by the two spouses (but one which, we may assume, they would have adopted had they been asked); it may also be used in relation to a condition the need for which was actually unknown to the couple, who were unaware of the levirate bond. It is therefore a condition implied by the law: it is sufficient, says Rabbi Feinstein, that the couple did not want the result (being bound to the apostate levir), while the legal construction of the condition and its imputation to the couple (unawareness of the obligation on the one hand; awareness but an implicit condition to cancel this obligation on the other) is the work of the *poseq*.

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577 Discussed at ARU 10:5.

578 E.g. Maharit El-Gazi; *Shut Ra'aviyah*, 1032, s.v. ואשר כתבת; and *Me'il Tsedaqah*, 2, p. 3b; as discussed by R. Shim'on Shkop, *Sha'are Yosher*, 5:18, pp. 68-70. See ARU 10:6-8.

579 See, e.g., *Shut HaRosh*, 34:1, discussed at ARU 10:8; *Shut Binyamin Ze'ev*, 71, discussed at ARU 10:9; *Shut Terumat Hadeshen* 223, discussed at ARU 10:9; *ET*, s.v. '*umdena* (as an assessment of the intention of the actor), 296-97. See further ARU 10:6 n.25; ARU 10:16 n.82 on *Shut Maharam meRothenburg*, Prague print, 564; 22b.

580 Combining Baba Kamma, 110b, s.v. דאדעתא, with *Ketubbot* 47b. For this analysis, see ARU 10:10-15, concluding (at 14): "'*umdena* of *'ada'ta' dehachi lo kidsha nafsha* according to Tosafot is an integrated concept. When one says: the wife claims "*ad'ata dehakhi*" and wishes to void the marriage, we must ask two questions: (1) Is it a mistaken transaction? (2) If it is not a mistaken transaction, is there an implicit condition? In (1) we deal with the "doubt" or possibility at the time of making the contract (the *kiddushin*): was she then aware of the chance that such an occurrence might happen? If she were not, the transaction is void for mistake. If she were aware of this option but nevertheless accepted the marriage, the transaction is valid. Yet, in this latter case we must also ask question (2): was there an implicit condition? The answer to this question depends on the kind of transaction. In a regular commercial transaction there is no implicit condition, since the seller would never agree to cancel the transaction in a case where, for example, his cow becomes *terefah*. But in a case of a betrothed widow when the levir is a leper, according to the *hava amina* on Bava Kamma 110b, there was such an implicit agreement. In that case, therefore, we can in principle invalidate the marriage, since, in Tosafot HaRosh's words: חשוב כאילו התנית."

581 *Bi'ur* of Vilna Gaon on *'Even Ha'Ezer* 157:4 (sub para. 13).

582 '*Iggrot Mosheh, 'Even Ha'Ezer* 4, 121. For the detailed discussion, see ARU 10:14-19.

3.75 On this analysis, we have here a case where a marriage is terminated, *lema'aseh*, on the basis of a form of conditional marriage.[583] It is true that R. Feinstein here uses *'umdena* regarding a future event only in order to cancel a levirate bond, not in order to release a married wife without a *get*. But from a theoretical point of view there is no difference between marriage and levirate: in both cases the marriage is retroactively annulled. Indeed, the practical hesitation in applying *'umdena* to a married wife is intelligible due to the fear of *mamzerut* and *ḥumrat 'eshet 'ish*, a distinction which we argued above should not be regarded as a sufficient basis for restriction of conditions in marriage to the contingency of levirate.[584]

3.76 We may note that, in a case where such arguments were not regarded as sufficient *lema'aseh* to terminate the (living) marriage on the grounds of *mekaḥ ta'ut*, they were nevertheless taken as a sufficient basis for a form of *kefiyah*. Rabbi S.-Y. Cohen, writing of a case in the Haifa District Rabbinical Court, where the husband had been in psychiatric care prior to the marriage acknowledged[585] that Rav Feinstein permitted annulment on the grounds of "erroneous purchase" (*mekaḥ ta'ut*) if it was impossible to obtain a *get*, but continued: "However, the Rabbinical Courts in Israel have never taken such a far-reaching step as annulling a marriage; in our case as well, we must emphasise that the person in question is not considered to be completely insane, like the person described in the above *responsum*. Nevertheless, it seems that one may use this as support for resorting to a solution of "compelling by way of forcing the options," in a case in which it can be argued that the marriage was mistaken, and there is basis for drawing a connection between his illness and the treatment he received, and the peculiar relations between himself and his wife, and his anger and beatings."

G. *Prospectivity*

3.77 The benefits of a condition which brings the marriage to an end prospectively rather than retrospectively are clear: any argument that a shadow is cast upon the status of the previous relationship is thereby excluded (§3.51). This may be perceived as an advantage in communities where, on the one hand, the fear of *zenut* is entrenched and where, on the other, the problem of *'iggun* is that of the chaste wife. However, there is a general assumption that the operation of such a *tnai* is equivalent to retrospective annulment of the *qiddushin,*[586] treating it in effect as a condition authorising *hafka'ah*[587] (itself assumed to be retrospective[588]). Indeed, in *Tzitz Eli'ezer* I 27, R. Waldenberg argues at length that if a condition annuls a marriage during the husband's lifetime, retroactive promiscuity will always result (a position which Berkovits contests[589]).

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583 ARU 10:20.

584 §§3.34-38.

585 "A Violent and Recalcitrant Husband's Obligation to Pay *Ketubbah* and Maintenance", in *Jewish Family Law in the State of Israel,* ed. M.D.A. Freeman (Binghamton: Global Academic Publishing, 2002), 331-348, at 342 (Jewish Law Association Studies XIII). See further ARU 2:49-50 n.217.

586 Breitowitz (n.185, above), 58 n.164, is clear that conditions in marriage, though they be conditions subsequent, operate *nunc pro tunc*. Similarly, Bleich (n.138, above), 107 writes: "As with all conditions of marriage, if the condition subsequent is violated or unfulfilled the marriage is retroactively and automatically null and void."

587 On the relations between explicit conditions, implicit conditions (*'umdena*) and *hafka'ah*, see ARU 10, esp. at p.20.

588 See ARU 11:3-4; §§5.28-42 below.

589 On R. Berkovits' response to this argument, see ARU 4:16-18 (§§IX.25-32), ARU 6:2 (§2.4), noting that *Ḥatam Sofer* vol. IV (*'Even Ha'Ezer* 2) no. 68 speaks only of the condition of Mahari Bruna when he declares that even in the event of annulment there would be no retrospective *zenut*, though Berkovits (n.112, above), 54-56, argues that *Ḥatam Sofer* would say the same to his condition also.

3.78 There are both conceptual and historical issues involved here: is there (and has there always been) a strict distinction between *hafka'ah*, a constitutive act of the court which necessarily annuls the marriage with retrospective effect, and a terminative condition which is activated by the act and will of the parties (always including the husband), the role of the court (assuming that the *tnai* is regarded as valid) here being simply declarative, confirming the facts required by the condition to bring it into effect? If, as our analysis suggests, there is such a distinction (notwithstanding the historical inter-relationships between the two), then any view that *hafka'ah* is *necessarily* retroactive would not necessarily determine the issue for conditions, which may then be capable of being made prospective in effect.

3.79 There is, moreover, evidence from the Cairo Genizah *ketubbot* of a *tnai* which *may* have been intended to terminate the marriage with only prospective effect:

> ואין הדה עזיזה כלתה תסני להדן מבשר בעלה ולא תצבי בשותפותיה... ונפקה על פום בית דינה ועל דעתיהון.
>
> And if this 'Aziza, the bride, should hate this Mevasser, her husband, and not desire his partnership ... and she will go out by the authorization of the court and with the consent of our lords, the sages.[590]

The meaning of the unusual expression "על פום בית דינה ועל דעתיהון" (and the parallel על פם בית דינה[591]) has been debated.[592] According to one view, it may indicate a divorce granted by the court itself (without any participation on the part of the husband),[593] similar to the apparent implication of the use of plural formulations in some accounts of the Geonic *kefiyah*.[594] An alternative view is that "ונפקה על פום בית דינא" means termination of the marriage prospectively, from now on, the only issue being whether that is done by a *get* given by the husband, or merely by declaration by the court that the conditions of the relevant *tnai* have been fulfilled. In either case (as in the first two stages of the internal talmudic development: §5.7, below), the effect is prospective rather than retrospective termination of the marriage.

3.80 We noted at the beginning of this chapter a distinction between "conditional marriage" and "temporary marriage" (*qiddushin lizman*). The latter ("Today you are my wife and after five years you are not my wife", stated in the *quddushin* declaration itself) is excluded; the former ("if I divorce you within five years, we are married; if I do not divorce you within five years, we are not married"[595]) is not. The difference between the two may appear to be purely formal, but it has the following consequence: according to the "conditional marriage" form, the marriage may be terminated by *get* on the last day of the fifth year with purely prospective effect; a day later, the marriage is terminated automatically, but with retrospective effect. There is a poverty of authority for a terminative condition with a purely prospective effect. It may well be that for prospective annulment, a *taqqanah* would be required. We see no reason why this should be excluded in principle.

H. *Formal Requirements*

3.81 The above example ("if I divorce you within five years, we are married; if I do not divorce you within five years, we are not married") conforms to drafting requirements rules set down in the

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590 *Ketubbah* no. 1, lines 23-24, in Friedman, *Jewish Marriage* (n.392, above), II, pp. 9 (Heb.); 13 (translation).

591 TS 24.68, ll.5-7; see §3.31, above.

592 Friedman 1980:I.328-46; Katzoff (n.394, above), 246; Jackson (n.268, above), 161f.; ARU 8:4 n.8; A. Westreich at ARU 15:5-13.

593 Jackson (n.268, above), 161f.; Friedman, n.452 above.

594 Discussed below, §4.21.

595 See §3.14, above.

context of the debate on the drafting of Mahari Bruna's condition.[596] Thus, the condition must be double, stating both the positive results of fulfillment and the negative results of lack of fulfillment, the former preceding the latter and the condition preceding the result. This point was debated by RR. Zevin and Uzziel.[597] R. Zevin noted that R. Uzziel's proposed condition did not comply with these formal requirements. R. Uzziel replied that this was no problem because the basis of his proposal was the explanation of the Rishonim that *kol hameqaddesh ada'ta' derabbanan meqaddesh* functions as an extension of '*al menat sheyirtseh 'abba*''. Just as *kol hameqaddesh* does not require *tenai kaful*, etc., so too in the case of '*al menat shelo' yimḥeh 'abba*'. The condition is no more than "a revelation of intent", and therefore a double condition is not required.[598] But nothing is lost here by complying with the stricter understanding of the formal requirements.[599]

3.82 The full conditions are stated in the *ketubbah* (and thus not necessarily in public[600]), but there are different views as to the extent to which they must be declared orally under the *ḥuppah*. It is not unknown for documents to include fictitious recitals as to the oral speech acts which they (in theory) attest. This may, indeed, be regarded by some as desirable, for aesthetic reasons, and is contemplated by R. Henkin,[601] but only when the condition achieves the status of a *tnai bet din,* which would require a *taqqanah* (§7.53, below). It is commonly suggested that the conditions be incorporated by reference in the oral declaration ("according to the conditions stated in the *ketubbah*", or according to the conditions authorised by a particular authority[602]), but this is

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596 See further ARU 19:1.

597 ARU 12:29 (Section C (ii) §LXVIII and n.140).

598 Cf. *Noda' BiYhudah* I *'Even Ha'Ezer* 56 s.v. *Wenimtsa'*. This, however, is problematic. In the case of conditions imposed by the Sages on all marriages one can say that, in the absence of evidence to the contrary, *kedat Mosheh veYisrael* is sufficient (and even that addition to the marriage formula may not be necessary) to make the marriage conditional upon the Sages' wishes. However, it does not follow, even in the case of '*al menat sheyirtseh* (or *shelo' yimḥeh*) *'abba'*, that the condition will operate on the basis of *'umdena/giluy da'at*. There is disagreement amongst the *Rishonim* as to whether an *'umdena* requiring *giluy da'at* can ever operate in the area of *gittin* and *qiddushin*. The Rema rules (*'Even Ha'Ezer* 42:1) that even an *'umdena mukhaḥat* (which does not require *giluy da'at*) does not operate as regards the execution of *qiddushin*. The *'Arokh HaShulḥan* (*'Even Ha'Ezer* 42:8,9) says that the same applies to the delivery of the *get*. The Wilna Gaon (*Shulḥan 'Arukh 'Even Ha'Ezer* 42:4) says that this is a *ḥumra'* due to the gravity of matters of marriage and divorce but the *'Arokh HaShulḥan* (*ibid*., 42:10,11) argues (though in the end he is uncertain: *ibid*., 42:12,13) that it may well be purely halakhic because, unlike monetary matters, both the delivery of the *qiddushin* and the delivery of the *get* are ineffectual without two witnesses. This is because the witnesses of marriage and divorce are intrinsic to the legal act and without them no marriage or divorce will have taken place whereas those witnessing monetary dealings are required only for proof that the transaction did indeed take place but the transaction itself is fully valid without them. Therefore, as an *'umdena* cannot be seen or heard by the witnesses it cannot have any effect on the marriage or divorce. Only an explicit condition could do this. [According to this, an *'umdena mukhaḥat* could still operate in cases of divorce at a stage preliminary to the delivery of the *get* (for example when the husband was dangerously ill and told witnesses to write a *get* for his wife but did not add that they should deliver it to her, where we apply the *'umdena* that he did mean that the *get* should be given to her). This must be so according to all opinions because such *'umdenot* in the case of *gittin* are accepted in the Halakhah without question.]

In consideration of all this, it would surely have been better to construct an explicit double condition with *'im* and*'im lo'*.

599 On the *maḥloqet* regarding use of *al menat* here, see ARU 12:29 (§LXVIII), ARU 19:1.

600 Thus R. Zvi Makovsky in 5687 (1926/7), in his paper entitled *Mipney Tiqqun Ha'Olam*, appended to the collection *Sha'arey Torah*, Warsaw, Year 17, *'Iyyar* 5687 as per Freimann (n.346, above), 392 para.10, suggests that the condition be made in the presence of the rabbi also a short while before the seclusion. Cf. *Responsa Yeḥawweh Da'at* (Jerusalem, 5695), sections 1-17 as *per* Freimann, *ibid*.

601 *Perushei Ivra* 5:24.

602 Thus R. Risikoff suggested *harei at... kedat Mosheh weYisrael ukhdat Bet Din HaGadol biYerushalayim*: see §6.46, below. And R. Henkin's proposal would add to the formula "and according to the conditions of the enactment of the [Jerusalem] *Bet Din* [for Marriage]": see n.485, above.

rejected by R. Pipano, for whom the full condition must be uttered orally under the *ḥuppah* in the hearing of witnesses.[603] For those who insist on the latter, the formula may be stated quietly, so that only the bride and the two witnesses can hear. Again, on such purely formal matters, nothing is lost by following the stricter view.

I. *Strategic Issues*

3.83 Proposals in modern times incorporate two distinct functions for conditions in the marriage contract. Not only may they be "substantive", stating the circumstances in which the marriage will terminate despite the husband's recalcitrance; they are also sometimes given the function of what we may term "validity conditions", stating that the marriage shall never have taken place if the halakhic validity of the substantive conditions is not accepted. Thus, R. Henkin, whose primary proposal was the (immediate) delivery of a *get al tnai* (not *qiddushin al tnai*), uses a "validity" condition (at least as regards the *kashrut* of the *get*), created not by *tnai* in the *ketubbah* but rather as a result of a general *taqqanat haqahal*: "if the aforementioned circumstances of '*iggun* come about and the *get* is no longer in existence or is void according to the *Halakhah*". This (limited) validity condition thus comes into play only if the primary strategy, that of the (immediate) delivery of a *get al tnai*, fails, whether for halakhic or other reasons: there is thus a major factual doubt as to whether it will ever come into effect.[604]

3.84 R. Broyde includes in his proposal two distinct conditions, one substantive, the other relating to validity. The substantive condition is:

> But if I am absent from our joint marital home for fifteen months continuously for whatever reason, even by duress, then our betrothal (*qiddushin*) and our marriage (*nisu'in*) will have been null and void. Our conduct should be like unmarried people sharing a residence, and the blessings recited a nullity.[605] The ring I gave you should be a gift.[606]

That relating to validity reads:

> Furthermore, should this agreement be deemed ineffective as a matter of *halachah* (Jewish law) at any time, we would not have married at all.

The latter, we may note, relates to the halakhic validity not only of the substantive condition but of all the elements of the tripartite agreement. This may well be helpful if it works. There is, however, a danger that it may be regarded as a condition contrary to the Torah which results, according to *Tosefta Qiddushin* 3:7-8, in the invalidity of the condition but the affirmation of the transaction to which it was attached (§3.20, above). Moreover, communities which reject the substantive condition are very likely also to reject the validity condition.

3.85 R. Broyde's substantive condition also raises strategic issues. The marriage terminates on fifteen months' continuous absence "for whatever reason" (on the grounds that "15 months is so far longer than the norm for marital absence that its violation would indicate divorce is proper").[607] In his book,[608] R. Broyde describes this model of marriage[609] as "Marital Abode as the Norm", and

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603 §§3.49, 3.67, above: "And at the moment of the *qiddushin* the groom shall say to the bride ..."

604 Compare the argument from *Responsa Bet Naftali* at n.512, above.

605 Citing *Ḥatam Sofer*, *'Even Ha'Ezer* 110 and 111.

606 Citing *Noda BiYehudah*, *'Even Ha'Ezer* 56.

607 "A Proposed Tripartite Prenuptial Agreement to Solve the *Agunah* Problem: A Solution without Any Innovation" (privately circulated), 13 n.39.

608 *Marriage* (n.83, above), 23. See further ARU 3:4.

609 See n.89 above, for the support R. Broyde derives from *'Iggrot Mosheh*, *Yoreh De'ah* 4:15, and for the (closer) view of R. Ḥayyim Palaggi (19th cent. Izmir), *Resp. HaḤayyim VeHashalom,* vol.2, no.112.

views it as one of five different models of marriage found in the history of the halakhah, into which it (still) remains possible for various communities to opt:[610]

> Each and every prospective couple must choose the model of marriage within which they wish to live together. They codify their choice through a prenuptial agreement regarding a forum for dispute resolution, or through a set of halachic norms underlining their marriage or through both.

Indeed, the most recent text of his tripartite agreement stresses the fact that the particular community to which the couple belong endorses such arrangements:

> Furthermore I recognize that my wife has agreed to marry me only with the understanding that should she wish to be divorced that I would give a *Get* within fifteen months of her requesting such a bill of divorce. I recognize that should I decline to give such a *Get* for whatever reason (even a reason based on my duress), I have violated the agreement that is the predicate for our marriage, and I consent for our marriage to be labeled a nullity based on the decree of our community that all marriages ought to end with a *Get* given within fifteen months. We both belong to a community where the majority of the great rabbis and the *batei din* of that community have authorized the use of annulment in cases like this, and I accept the communal decree on this matter as binding upon me.[611]

The problem with this approach (and, arguably, with any approach which specifies the grounds of divorce within the condition) is that it is limited to the particular community which accepts those grounds, and thus fails the test of a "global solution" insofar as it impedes the halakhic permissibility of intermarriage between different communities (§1.7, above). A clause which refers only to recalacitrance may be preferable, since although different communities may continue to apply different criteria for divorce, those differences will not be apparent from the face of the *ketubbah*, thus reducing the grounds for refusing remarriage to a woman (who may have moved across congregational boundaries) on the grounds that she is really still married. Of course, R. Broyde may seek to rely, in that situation, on the validity condition (§3.84, above).

J. *Issues of Authority*

3.86 As regards conditions which accord a role to the *bet din* (as opposed to the French conditions against which '*Eyn Tnai BeNissu'in* was directed), we may conclude that acceptable, properly drafted conditions are effective expostfacto (*bedi'avad*), independent of any other solution, according to most *posqim*. Against the lone view of the Rogachover Gaon, the major codes all agree that conditional *nissu'in* is effective.[612] Indeed, this seems to have been recognised even within '*Eyn Tenai BeNissu'in* itself.[613] R. Kook[614] described the effectiveness of conditional marriage as 'obvious' and it is reported that Rabbi Feinstein[615] agreed to the arguments of R. Berkovits in its favour. This is also apparent from the number of *posqim* who have proposed global conditional marriage in practice.[616]

3.87 When a marriage is subject to a terminative condition, there is no (factual) certainty that that condition will ever be fulfilled; moreover, the Rambam considers any doubtful biblical prohibition

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610 *Marriage* (n.83, above), 8.

611 Citing Maharam Alshakar 48.

612 See nn.383-385 in §3.15, above.

613 See, for example, R. Danishevsky (n.538, above). At '*Eyn Tenai BeNissu'in,* p.43, it is stated in the Public Protest of the Russian and Polish Rabbinate that a woman who remarries on the basis of the (totally unacceptable and totally rejected) French condition – is an adulteress only according to a minority of the *Posqim*! Furthermore, most of the objections raised there against the French condition were not halakhic and all – including the halakhic ones – were shown to be inapplicable to the type of condition proposed by Berkovits and others.

614 See §3.37 and n.464, above.

615 See n.388, above.

616 See §§3.33, 6.40.

as only rabbinically proscribed, so that to enter into such a matrimonial partnership would be, even according to the Rambam (who considers *pilagshut*, which would in his view be the result of retrospective annulment, as biblically prohibited), only a rabbinical prohibition.[617] Hence, we may argue, even if the *Rishonim* were evenly split on the question of the permissibility of *pilagshut* for a layman, we would be dealing, in the case of conditional marriage, with a *doubt* (the 50-50 split of the *posqim* concerning definite *pilagshut*) in relation to a rabbinic prohibition (the *possible* biblical prohibition of conditional marriage that might prove to be *pilagshut*) and *safeq derabbanan lequla*'! How much more so is it possible to rule leniently considering that a majority of the *posqim* permit *pilagshut*. In this context (a conditional marriage *not* authorised by a general *taqqanah*), we may further argue that in *she'at hadeḥaq*, such a condition may be accepted *lekhatḥillah*.[618]

3.88 Even if the issues of authority impede adoption of terminative conditions as an independent mode of marriage termination (by act of the parties, though without a *get*), the role of such conditions nevertheless fortifies the authority to implement another mode of marriage termination (annulment by act of the court, also – in principle[619] – without a *get*). That conditions may fortify remedies which otherwise may be regarded as halakhically problematic is supported by the use made of R. Yoseh's condition by the teachers of the teachers of Me'iri in support of the *kefiyah* of the Ge'onim (§§3.21-27, above). As regards *hafka'ah*, there is an even stronger conceptual link: the view that annulment itself relies upon the theory of *kol hameqaddesh,* i.e. through conditions imposed by rabbinic (or communal) authority.[620] Indeed, the medieval *taqqanot* imposing additional requirements on *qiddushin*, on pain of *hafka'ah* should those requirements not be fulfilled,[621] sometimes explicitly evoke a consensual basis: the people are by such *taqqanot*, in effect, adopting new standard conditions (*tena'in*) in their own future marriages.[622] That history itself indicates that any terms so imposed, and any powers assumed in order to enforce such terms (such as the power of confiscation of the *kesef*), should be made explicit in the *taqqanah* itself.[623]

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617 See further ARU 5:27 (§47.21, number 4) on *Responsa Bet Naftali*, no. 45, part 1, s.v *Uve'emet lo'* and s.v. *Wa'afilu*. This particular *responsum* was written by R. Yosef David Sinzheim, author of *Yad David* and head of Napoleon's "Sanhedrin" in Paris.

618 See §§2.39-41, 45, above, esp. at n.309. We may note, however, that R. Broyde writes that his proposal (incorporating conditional marriage as one element in his "tripartite agreement") "would require acknowledgement on the part of significant *halakhic* authorities that even if it is not ideal (*lekhatḥillah*), it is a *halakhically* satisfactory after-the-fact (*bedi-`avad*) response to a situation", and this despite the fact that it is premised on a "communal decree" (*taqqanay hatsibur*) of the particular community to which the couple belong ("...We both belong to a community where the majority of the great rabbis and the *batei din* of that community have authorized the use of annulment in cases like this, and I accept the communal decree on this matter as binding upon me").

619 On the question of whether annulment needs to be accompanied by a *get pasul*, see §§5.12, 44-51, below.

620 For Rishonim who explicitly base *hafqa'at qiddushin* on a condition, see Riskin, "*Hafka'at Kiddushin*..." (n.17, above), 15, esp. Maharam of Rothenberg, in *Mordekhai*, *Qiddushin* 3:522: "At the time of betrothal he did nothing wrong, and we judge him according to that time, and say that he betrothed her on condition that if he later violates a rabbinic regulation ... his betrothal will not be valid." See further ARU 2:65-66 n.293 for the argument that the view of the Mordekhai, when analysed in its entirety, may serve as a precedent for granting communities the power to annul marriages where there are irregularities in the delivery of the *get* or no *get* is possible.

621 ARU 2:41-47 (§4.3).

622 Ribash, *Resp.* 399: "Under the law of the Torah, the townspeople may adopt enactments, regulations, and agreements, and may penalize violators ... Since the townspeople agree on them, it is as if each one of them took them upon himself and became obligated to carry them out." See ARU 2:45 (D).

623 As in Ribash, *Resp.* 399. See Elon (n.241, above), II.850-56, on annulment of marriage on the strength of an explicit enactment. On the need for explicit mention in the *taqqanah* of the power of expropriation (in order to effect the annulment), see Rashba, *Resp*. 1, 551 (at ARU 2:44 n.195); Ribash, *Resp.* 399 (§H) (at ARU 2:45). Though *taqqanot* complying with these conditions, and explicitly empowering the court to annul on the basis of *hefker bet din hefker*, were increasingly discouraged (e.g. by R. Karo, *Bet Yosef* to *Tur*, *'Even Ha'Ezer* ch. 28 (end); *Rema* to *Shulḥan Arukh 'Even Ha'Ezer* 28:21; see Elon (n.241, above), II.870f.; Riskin, "*Hafka'at Kiddushin*..." (n.17, above), 24-26), Elon

3.89 The history of the relationship between conditions in individual marriage contracts and standard conditions in marriage also indicates a strategy leading to a global solution. The argument of the teachers of the teachers of Me'iri was that the Palestinian condition (of R. Yoseh) was practiced not only in Eretz Israel, but was also known and used in Babylonia. Thus, the divorce clause was at first merely a matter of practice, albeit widespread. Then the decree of the Ge'onim made it an obligatory norm, even when it was not written, thus authorising them (on the view of these teachers) to compel a divorce in all such cases.[624] This is similar to other cases defined in the Mishnah (*Ketubbot* 4:7-11) as "court stipulations" (*tnai bet din*), e.g. the *benin dikhrin* clause in the *ketubbah*, of which we now have evidence from the Bar Kochba period of its having already been adopted by notarial practice.[625]

finds evidence of their continuing use: see II.872-74 on 16th-17th cent. Italy and II.874-78 on R. Isaac Abulafia, *Resp. Pnei Yitsḥak*, *'Even Ha'Ezer* no.16 (p.94d) in the 19th cent.

624 See further ARU 15:14-15.

625 See n.571, above.

Chapter Four: Coercion

A. *Introduction*

4.1 The dogmatic history of *kefiyah* has played a central place in discussion of the problem of '*iggun*, particularly where the wife claims *me'is* '*alay*, that she cannot continue with a marital relationship with her husband on the grounds of "disgust". We here summarise the issues which arise in the classical *maḥloqet* between the Ge'onim and Rabbenu Tam (§4.4), before reviewing the issue in the light of the text of the vital talmudic *sugya* (section B: §§4.5-9) and its interpretations by later *posqim* (section C: §§4.10-16). We then examine the Geonic traditions, asking what precisely they did and on the basis of what authority (section D: §§4.17-29), before reviewing the views of the Rishonim (section E: §§4.30-55) and Aḥaronim (section F: §§4.55-73). We conclude this chapter (section G: §§4.74-95) with an overview of the issues of authority which arise in this area, in the light of both the history of the matter and the underlying policy and conceptual issues. An Appendix summarises an important Tosafot which discusses Rabbenu Tam's arguments.

4.2 It may be suggested that this whole issue is irrelevant, given the object of our enquiry, namely the search for a "global" solution, one which "ideally has the capacity to prevent the problem from arising at all, or else will resolve it in all cases" (§1.6, above). There is no guarantee that any measures of *kefiyah* (traditionally conceived) will resolve the problem "in all cases".[626] Nevertheless, our investigation serves two purposes which may contribute towards a "global" solution: on the one hand, the very concept of *moredet me'is* '*alay* defines the scope and limits of one of the basic underlying policy issues, that of the grounds available to a wife in seeking a divorce without the consent of her husband; on the other, the range of measures comprehended within *kefiyah* merits further study,[627] in case a form may prove available which transcends the traditional limitations.

4.3 We also have to ask a basic conceptual question: what conception of freedom of the husband's will is to be assumed as underlying the issue of (permissible and impermissible) *kefiyah*? Rambam's classical, and oft-quoted, explanation of *rotseh ani*[628] should immediately put us on our guard against adopting, without further thought, western secular notions of individual autonomy.[629] Rather, the true will envisaged in the classical halakhic sources (at least up to the time of the Talmud, many of the Rishonim and indeed many later authorities preceding the

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626 See further ARU 8:12-13 (§3.1.1-2). On the interpretation of *Ketubbot* 86b, *Ḥullin* 132b: "We beat him [if necessary] up to [the point] that his soul departs", see ARU 6:16-17 (§7.7).

627 On the historical relationship between these issues, see Hadari at ARU 17:160-62: "... Whilst there are Rishonim who still view the husband as a free man in the classical tradition and thus believe that his coerced רוצה אני must be indicative of a true internal will (I analysed Rambam, Rashbam and Ramban), there are also those who are less concerned to preserve his autonomy, who, we might say, view his coerced consent as more similar to the coerced evidence of the slave – produced by the act of will of the *bet din*, not that of the husband. It is no coincidence that this change is roughly contemporaneous with the tightening of the grounds for *kefiyah:* so long as the action of the (coerced) husband continues to be viewed as his autonomous action, one may find more extensive grounds for coercion to be legitimate; when the husband (who we now recognise does not necessarily have the Torah education or physical and spiritual resilience that might render him a truly "free" man in the classical sense) is viewed as having had no choice about assenting to the *get,* force must be kept at an absolute minimum ...".

628 *Hilkhot Gerushin* 2:20: "...in the case of one whose evil inclination drives him to avoid doing a *mitsvah* or to do a sin, and was beaten until he did the thing that he was obligated to do or to leave the thing that he was forbidden to do, this [later behaviour] is not compelled from him; rather [formerly] he compelled himself out of his bad judgement (*da'ato harah*)": see further ARU 17:107-111.

629 See however Hadari's discussion of Antiphon and Aristotle at ARU 17:156-59.

Haskalah) is that of a faithful member of the community who has internalised Torah values, including, we would argue, those discussed above (§§1.23, 25) in terms of "abuse of rights". If his behaviour shows that he has not internalised such values, coercion is not a violation of his will, but rather a form of education. It is only when he has internalised such values, including the obligation to follow the guidance of a *bet din*,[630] that his willingness to resist coercion may be regarded as a true expression of his will which, if wrongly overriden, will risk producing a *get me'useh.*[631]

4.4 In this context, it becomes relevant to revisit the history of the matter. The halakhic objections to the use of coercion as a solution to the problem of recalcitrance are often viewed in terms of Rabbenu Tam's rejection[632] of the measures of *kefiyah* taken by the Ge'onim against the husband of a *moredet me'is 'alay*. These objections may be summarised as follows:

(a) There is no explicit evidence for the use of coercion against the husband of a *moredet* claiming *me'is 'alay* in the Talmud.

(b) The Ge'onim practiced the traditional form of *kefiyah* (physical coercion) on the basis of an emergency situation.

(c) Rabbenu Tam explicitly denied that coercion was contemplated by the Talmud in such cases.

(d) Although the Ge'onim appear to have authorised coercion in such cases, they either lacked authority to do so (Rabbenu Tam), or, even if they did possess authority, we have no comparable authority today.

(e) While Rambam authorised coercion in such cases on grounds independent of the Ge'onim (logical inference from the Talmud),[633] his view was not followed other than by the Yemenite community.[634]

(f) The issue cannot be separated from that of the *grounds* for divorce, as is reflected in the traditional rabbinic "moral fear" (expressed already in the Mishnah) that accepted grounds for divorce may be misused by women who have an "ulterior motive": namely, that they have "cast their eyes on another man".

B. *The text of the Talmud*

4.5 The principle of coercion was accepted already in the time of the Mishnah in some cases where

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630 In her discussion at ARU 17:139-41, Hadari stresses this above internalisation of substantive values, so as to explain the partial validity or effectiveness of such coerced consent even when the *bet din* has *mistakenly* coerced a *get*: "... because it was Jews who coerced him he did decide and did divorce ... The *bet din* in this analysis represents to the husband either Torah or the community to which he wishes to continue to belong ... He does not ever have to want to do the action (the giving of the *get*) in and of itself; he does not have to be persuaded that giving the *get* is the right, good and best thing for him to do; he simply has to want (or at least be assumed to want) to be a good Jew" (ARU 17:140-41). She notes, however, that this reading does not satisfactorily explain the Rambam's description of what happens when gentiles coerce correctly (*Hilkhot Gerushin* 2:20 at ARU 17:107-08), where the Rambam does not focus on the husband's desire to conform with the local community but rather on his desire to divorce his wife when such is the right thing to do.

631 In all cases except *mumarim* it is generally agreed that halakhically condoned coercion by authority of a *bet din* produces a valid *get*. This would certainly be the case where the husband is one 'who has internalised Torah values'. Only in the case of a *mumar* – who has externalised everything Jewish – will the *bet din*'s coercion (possibly) produce a *get me'useh* according to the Rambam. On this distinction, see further ARU 18:69-70.

632 See *Sefer Hayashar LeRabbenu Tam*, *Ḥelek haTeshuvot*, 24.

633 *Hilkhot Ishut* 14:8; see further ARU 2:32-33 (§3.5.4).

634 On the latter, see R. Arusi, "The Ethnic Factor in Halakhic decisions – Coercion of a *Get* on the grounds of "*Mais 'alay"* in Yemenite Jewry", *Diné Israel* 10-11 (5741-43), 125-75.

the law recognised that the woman had a right to divorce:[635] broadly, cases of "major" physical defect and malodorous occupations inhibiting conjugal relations;[636] indeed, *Mishnah Ketubbot* 7:9 provides a list of cases where the husband is to be coerced: ואלו שכופין אותו להוציא. Later opinion is divided as to whether this list is now closed.[637]

4.6 The Mishnaic institution of coercion, however, is of limited value to the '*agunah:* it applies to a list of situations where the Mishnah itself recognises that the wife has a *right* to divorce. While the tannaitic sources already contemplate financial sanctions (in respect of the *ketubbah*) against the *moredet*[638] (*Mishnah Ketubbot* 5:7; *Tosefta Ketubbot* 5:7), it is only the Gemara which considers the possibility of coercion against the husband of the *moredet me'is 'alay*. This was to become a major issue between the Ge'onim and the Rishonim.[639] Its importance for the '*agunah* resides in the fact that any wife refused a *get* by her husband might well (and sincerely) declare herself a *moredet,* to whom her husband is "repulsive" (*me'is 'alay).* The issues which then arise are the following: (a) is such a wife entitled to a divorce? (b) is she entitled to a *coerced* divorce?; (c) what form might the coercion take?; (d) what if the husband resists the coercion?

4.7 In *Ketubbot* 63b, we encounter a dispute between two Amoraim regarding both the definition and

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635 The *bet din* is not, however, regarded as having the power to coerce in every case where the husband is obligated to give a *get*. See Breitowitz (n.185, above), 42, on the distinction between *yotzee* and *kofin*. Cf. Zweibel (n.167, above), 154, maintaining that it is only in extraordinary circumstances, as discussed in *Shulḥan Arukh*, *'Even Ha'Ezer* 154, that physical force or some other form of duress may be used.

636 *M. Ket.* 7:1, *M. Ned.* 11:12, *T. Ket.* 7:10-11, *Ket*. 77a (on infertility and refusal to maintain); *Shulḥan Arukh*, *'Even Ha'Ezer* 154:1-2, 6-7; see further Irwin H. Haut, *Divorce in Jewish Law and Life* (New York: Sepher-Hermon Press, 1983), 25; Breitowitz (n.185, above), 42-45; Riskin, *Women and Jewish Divorce* (n.42 above), 9ff.; B.Z. Schereschewsky, "Divorce, In Later Jewish Law", *Encyclopedia Judaica* (Jerusalem: Keter, 1973), VI.126-128, classifying the causes under two headings: physical defects and husband's conduct (abusive behaviour entering the tradition, not without contestation, in post-talmudic times). On domestic violence as a grounds for coercion, see further the court decision of R. She'ar-Yashuv Cohen, Case 42/1530, 5742, *Piskei Din Rabbaniyim* 15, pp.145-163; further, ARU 2:19-20 n.83.

637 For the view that the categories of permissible coercion are closed, see M. Chigier, "Ruminations over the Agunah Problem", *The Jewish Law Annual* 4 (1981), 208-225, at 213, reprinted in *Women in Chains. A Sourcebook on the Agunah*, ed. J.N. Porter (Northvale, N.J. and London: Jason Aronson Inc., 1995), 73-92, at 77, on *Shulḥan Arukh*, *'Even Ha'Ezer* 154 and earlier sources. See further ARU 2:20 n.84. A different view is taken by D. Villa, "Case Study Number Two", *Jewish Law Watch* (Jerusalem: Schechter Institute of Jewish Studies, 2000), who, while acknowledging that the *Ḥatam Sofer* (*'Even Ha'ezer*, no. 116) wrote that a divorce can be compelled only when "it is clear to the one divorcing that the compelling is valid according to all", cites a response to this by Rabbi S-Y Cohen, "*Kefiyyat haget*" (n.14, above), which quotes, *inter alia,* the *Ḥazon Ish*, *'Even Ha'ezer* 69, 23 ("The *Ḥatam Sofer's* ruling cannot be upheld...") and R. Isaac Herzog (*Responsa Heikhal Yitsḥak*, *'Even Ha'ezer*, part 1, no.1). But the *Ḥazon Ish* does not refer to that ruling of the *Ḥatam Sofer*, with which he agrees: see ARU 6:9-10 (§6.1). In fact, the *Ḥatan Sofer* (*Ḥatam Sofer*'s grandson) observed (*Resp*. 59; see further ARU 18:71 n.270) that his grandfather spoke only of equally balanced, irresolvable, debate (like Rosh v. Mordekhai) and maintained that in such cases coercion would produce a *get* that would be definitely invalid. However, in cases where there is a clear majority (in quantity and quality) in favour of coercion *Ḥatan Sofer* says that *Ḥatam Sofer* would agree that coercion is permitted and would produce a definitely valid *get*. For other Aḥaronim supporting the use of coercion, see Riskin, *Women and Jewish Divorce* (n.42 above), 139; Riskin (n.17, above)*,* 2002:6f., citing *inter alia* R. Ḥayyim Palaggi (19th cent. Izmir), *Resp. HaḤayyim VeHashalom,* vol.2, no.112. But see ARU 6:9-10 (§6.1), regarding the *Ḥazon Ish*.

638 In context, this must refer to refusing sexual relations, though the the Talmud discusses whether the *meridah* refers to sexual relationships (מהשמיש המתה) or domestic duties (ממלאכה). See further ARU 2:21 n.87; ARU 9:4 n.23, suggesting a move from a domestic rebellion in *Mishnah Ketubbot* 5:7 to sexual rebellion in the view of Rabbotenu in *Tosefta Ketubbot* 5:7; ARU 9:14-15 and n.90. On the history of the financial sanctions, see ARU 9:3-7.

639 See sections C-E below, *passim*; B.S. Jackson, "*Moredet*: Problems of History and Authority", in *The Zutphen Conference Volume,* ed. H. Gamoran (Binghamton: Global Publications, 2002; *Jewish Law Association Studies* XII), 117-122.

the treatment of the *moredet.* The definitional problem need not here concern us.[640] What is important is the substance. The essential issue is as follows:

> ... if she says, however, "He is repulsive to me (מאים עלי)," [Amemar said] she is not forced (לא כייפינן לה). Mar Zutra said: She is forced (כייפינן לה).

According to this, the traditional text, the issue between Amemar and Mar Zutra is whether the wife is to be compelled back (into marital compliance). Mar Zutra takes the view that she is; Amemar takes the view that she is not.[641] Are we to take Amemar to imply that she is entitled to a divorce, even a coerced divorce? The text is not explicit.[642] However, recent work towards a critical edition of the Talmud text has revealed a significant variant.[643] MS Leningrad Firkovitch[644] (which almost certainly comes from the Genizah MSS purchased by Firkovitch) reads:[645]

> ... if she says, however, "He is repulsive to me (מאים עלי)," [Amemar said] he is forced (כייפינן ליה). Mar Zutra said: She is forced (כייפינן לה).

Here, Amemar takes the view that it is the husband who is coerced,[646] which can hardly mean anything other than that he is coerced to give her a *get.*[647] The final view of the Talmud on the matter, that of Rabbanan Sabora'i,[648] is that the wife is made to wait twelve months "for a divorce

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640 For a full account of the *sugya*, following Rashi's interpretation, see ARU 9:8-9; the opposing (and less systematic) interpretation, of Rabbenu Tam, is taken to be prompted by the need to rebut Rashi's conclusion, that the talmudic *sugya* already contemplates *kefiyah*: see ARU 9:9-10.

641 Through the steady reduction of her *ketubbah*: the Gemara is here commenting on *M. Ket.* 5:7. Amemar takes the view that the Mishnaic sanctions apply only where the wife is withholding conjugal relations "to cause him pain" (ומצערנא), i.e. to put pressure on him over some dispute between them, but without seeking a divorce, but not where she seeks a divorce because she finds him repulsive. Mar Zutra would apply the sanctions also in the latter case. Rabbenu Tam rejects Mar Zutra's view and indicates that this is not the *halakhah:* see ARU 2:32-33 n.150. Cf. Riskin, "*Hafka'at Kiddushin*..." (n.17, above), 4f., noting that the *halakhah* follows Amemar in this respect.

642 On Rashi's interpretation of Amemar, see §4.15, below.

643 A different variant in the text was known to some of the Rishonim: the view of Amemar is presented as לא כייפינן ליה. That would most naturally be rendered: "he is not coerced". However, S. Friedman, "Three Studies in Babylonian Aramaic Grammar", *Tarbiz* 33 (1973-74), 64-69, has argued that ליה can itself be used as the feminine preposition, in which case the variant introduces no substantive change in Amemar's view from that in the traditional text. On this variant known to the Rishonim, see further Jackson (n.639, above), 109f.

644 The description of the Leningrad-Firkovitch MS of Ketubbot-Gittin, Preface to Masekhet Gittin (Jerusalem: Makhon HaTalmud HaYisraeli, 2000), 33, reads: "In this MS we find in the talmudic text, especially in Masekhet Ketubbot, many additions apparently made by Rabbanan Sabora'i and also the Heads of the Yeshivot which appear as "interpretations", but there are also additions which do not appear to be "interpretations"." We have to decide into which category the present variant falls. If the former, it may be difficult to view it as providing (talmudic) support for the geonic view; rather, it may itself reflect post-talmudic innovations (such as the geonic view itself). However, the form of the variant is not here the addition of an interpretation, but rather the substitution of a different text by the deletion of the negation and the addition of a *yod* in לה.

645 *Dikdukei Soferim haShalem* [*The Babylonian Talmud with Variant Readings... Tractate Kethuboth*], ed. R. Moshe Hershler (Jerusalem: Institute for the Complete Israeli Talmud, 1977), II.88. See E. Westreich, "The rise and decline of the wife's right to leave her husband in medieval Jewish law" (Heb.), *Shenaton Hamishpat Ha'Ivri* XXI (1998-2000), 126; *idem* (n.285, above), 209; Jackson (n.639, above), 110f.

646 Friedman's argument (n.643, above) cannot be applied to the variant in MS Leningrad Firkovitch, since to do so would eliminate any difference between the views of Amemar and Mar Zutra.

647 This is supported by Rashba, 64a, s.v. ומיהו: Rashba deals with the traditional text of Amemar, and argues that its meaning cannot be coercion, since the Talmud doesn't mention the words "כייפינן ליה" (שלא אמרו כאן אלא 'אבל אמרה מאיס עלי לא כייפינן לה' אבל 'כייפינן ליה' לא אמרו). Accordingly, MS Leningrad Firkovitch, which did mention "כייפינן ליה", must be interpreted as coercion of a *get* (but see Me'iri, 63b, s.v. וגדולי המחברים, who rejects the possibility of a variant like MS Leningrad Firkovitch). For an alternative (but less likely) explanation, following Ritva, 63b, s.v. ויש שגורסין, see ARU 9:2 n.11.

648 So Riskin, *Women and Jewish Divorce* (n.42 above), 44.

(אגיטא)", during which time she receives no maintenance from her husband. This view of Rabbanan Sabora'i does not say anything explicit about coercion,[649] but does appear to indicate that the wife who claims "He is repulsive to me (מאים עלי)," contrary to the view of Mar Zutra, is not to be compelled back (into marital compliance) but rather is entitled to a divorce.[650]

4.8 The issue raised by the variant text of Amemar's opinion may be significant for the later development of the *halakhah.* The Ge'onim accepted and developed the institution of compulsion against the husband of a *moredet* (section D, below)*,* but their view was ultimately rejected by Rabbenu Tam. For Rabbenu Tam, the Ge'onim had no authority to go beyond the Talmud, and the Talmud referred to coercion, in the case of the *moredet*, only in respect of the wife, not in respect of the husband (§4.34, below). But Rabbenu Tam does not appear to have had access to this variant MS tradition.

4.9 Suppose that scholarship ultimately concludes that the variant represents the original text, so that the Talmud does (in the opinion of Amemar, which would then have to be taken into account in interpreting the final decision of Rabbanan Sabora'i) contemplate coercion of the husband? Would such an historical discovery be taken into account by the halakhah? As noted above (§§2.32-33), views on this have differed: on the one hand, the *Ḥazon* '*Ish* was opposed to the use of new manuscript evidence for halakhic purposes (though even he does not exclude such evidence completely); on the other, the *Ḥafets Ḥayyim* was positive and R. Ovadyah Yosef applied here the principle of *hilketa kebatra'ei*. Thus, in this context, the view of the *Sabora'im*, *Ge'onim*, Rif and Rambam's school that a woman who declares that she can no longer abide her husband is entitled to a divorce, coerced if necessary, may be based upon an explicit ruling in the Talmud. If so, it may be argued that the opposition to Rambam's ruling by Rabbenu Tam and many other *Rishonim*, who forbid the application of force in such a case and whose view was accepted as normative in the *Shulḥan* '*Arukh* (*'Even Ha'Ezer* 77:2), would have been withdrawn had they been aware that Rambam's opinion was supported by a version of the talmudic text.[651]

C. *The Interpretation of the Talmud*

4.10 The above arguments do not stand alone. They may be taken to support more traditional arguments (contrary to that of Rabbenu Tam[652]), found in the Rishonim, that *kefiyah* was already authorised by the Talmud itself in cases of *moredet me'is* '*alay*. Particular reliance here is placed on Rashi's interpretation[653] of the *sugya* in *Ketubbot* 63b.[654] But his view on the matter does not stand alone. Recent research show that early Ashkenazi Rishonim, especially Rabbenu Gershom Me'or Hagolah, accepted the gaonic tradition of *moredet*:[655] Rashi, who followed them in this,

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649 For later interpretations, see §§4.16, 26, 31, 46, below.

650 Nonetheless, the view that coercion was here implied is found amongst the Rishonim. Riskin, *Women and Jewish Divorce* (n.42 above), 168 n.15, cites Rashi and Ritva for this view, and argues himself for such an interpretation, at 45. See also Breitowitz (n.185, above), 53f.

651 See further ARU 7:6 (§III.15), 7:24 (§V.7)

652 Accepted by the main halakhic authorities: see E. Westreich (n.285, above), 212-218.

653 Ascribing this view to Rashi is accepted by many commentators, both Rishonim (Sma"g, Lavin 81; Ritva, 63b, s.v. היכי דמיא מורדת; *Hagahot Maymoniot*, *Ishut*, 14: 6), and Aḥaronim (*Pne Yehoshua*, 63b, end of s.v אבל ה"בד בתוספות), as well as by academic researchers: see E. Westreich (n.285, above) and A. Grossman, *Pious and Rebellious – Jewish Women in Medieval Europe* (Waltham: Brandeis University Press, 2004), 242.

654 See further ARU 9, for the detailed argument.

655 See E. Westreich (n.285, above), 211; Grossman (n.653, above), 242. In many respects, Rashi continues *Perushey Magenza*, which largely continues the tradition of R. Gershom and his students: see Israel M. Ta-Shma, *Hasifrut Haparshanit LaTalmud* (Jerusalem: Magnes, 2000), I.35-56.

sought to base their tradition on the talmudic *sugya*.[656] And Rashbam, together with some other later authorities, follows Rashi in this.[657] Indeed, some scholars argue that the Ge'onim themselves regarded it as a talmudic law, based on the conclusion of the *sugya*: "ומשהינן לה תריסר ירחי שתא אגיטא".[658] This view was adopted by some Rishonim, including Rambam,[659] who treat coercion as a Talmud-based law rather than a *taqqanat haGe'onim*.

4.11 Although Rashi has the traditional text of Amemar, he integrates into his interpretation of the *sugya* the rule that the husband must give a *get*, and appears to understand this as authorizing coercion (where necessary). In fact, although the *sugya* deals with financial aspects, Rashi mentions the existence of a *get* four times[660] (whether requiring that it be given immediately, or after the mishnaic process of reduction of the *ketubbah*), and this informs his entire reading of the history of attitudes to the *moredet*, as reflected in the various stages which are themselves distinguished in the tannaitic and amoraic sources.

4.12 *M. Ketubbot* 5:7 rules:

> If a wife rebels against her husband (המורדת על בעלה), her *ketubbah* may be reduced by seven *denarii a* week. R. Judah said: Seven *tropaics*. For how long does he reduce it? Until the *ketubbah* is exhausted. Rabbi Yoseh says: he may reduce it for ever in case she inherits property, from which he may claim it.

The *Tosefta* (*Ketubbot* 5:7) characterises this as משנה ראשונה, and records that רבותינו changed the rule:

> ...(a court) should warn her (מתירין בה) four (or five) consecutive weeks, (twice a week).[661] [If she persists], even if her *ketubbah* is a hundred maneh, she has lost it all.

The reform from a gradual process (which would take approximately six months to exhaust the standard 200 denarii *ketubbah*) to a much accelerated conclusion appears to correspond to a difference in the very aim of the procedure: according to the Mishnah, it was designed to induce the wife to end her "rebellion"; according to Rabbotenu in the Tosefta, it functioned to bring the marital conflict to an end as quickly as possible, even if that entailed divorce. The choice here is in the wife's hands: preferably she may decide to withdraw her rebellion; however, if she insists, she is entitled to a divorce,[662] but must forfeit her *ketubbah*. Indeed, Rashi takes the view[663] that after losing the *ketubbah* the wife receives a *get* both in the mishnaic rule and in that of Rabbotenu.

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656 See also A. Grossman, *Ḥassidot Umordot* (Jerusalem: Merkaz Zalman Shazar, 2003), 443 n. 137. Ta-Shma (n.655, above), 43, claims that Rashi normally focuses on hermeneutic rather than halakhic considerations in his commentary, but this claim is disputed by halakhic writers; see *ET*, IX.337.

657 See E. Westreich (n.285, above), 212; Grossman (n.656, above), 435-436.

658 On this view, the effect of the gaonic *taqqanah* was to coerce the husband to give a *get immediately* and not only after 12 months. See Friedman,, *Jewish Marriage* (n.392, above), I.324-325; Y. Brody, "Kelum Hayu HaGeonim Meḥokekim?", *Shenaton Hamishpat HaIvri* 11-12 (1984-1986), 298-300. See also Ramban, s.v. ומצינו בירושלמי, who ascribes the view that coercion is the Talmud's final conclusion to some responsa of R. Sherira Gaon, but rejects it.

659 *Ishut*, 14:10-15.

660 Rashi's commentators usually point to s.v. לא כייפינן לה as a source for coercion in his commentary (see for example Resp. Maharam, Prague Print, 946, 135a), but in fact Rashi repeats it several times: (1) 63a s.v. עד כדי כתובתה (Mishnah): "ואחר כך נותן לה גט"; (2) 63b s.v. נמלכין: "משהין את גיטה"; (3) s.v. היכי: "דמשהין גיטא"; (4) s.v. לא כייפינן לה: "להשהותה, אלא נותן לה גט ויוצאה בלא כתובה". Accordingly, he views coercion as an integral part of every section of the *sugya*.

661 The words "a court", "or five" and "twice a week" are not accepted by all manuscripts of the Tosefta, see ARU 9:4 nn.17-19.

662 In this case the husband is compelled to give a *get*, by physical coercion if required: see Rambam, *Ishut*, 14: 8: "כופין אותו להוציא לשעתו, regarding *moredet ma'is* '*alay*.

663 As regards the Mishnah, see no.1 in n.660, above; on Rabbotenu, see no.4 in n.660, above (which is Rashi's explanation of Amemar, who here follows Rabbotenu: see ARU 9:§11-12 and n.62). In the view of Rabbotenu, a *get* is a substantive part of the rule of the *moredet*, as described above. In the mishnaic process, a possible explanation for requiring a *get*, according to Rashi, is on the basis of the rule (which the Bavli ascribes to R. Meir) that requires a *ketubbah* to be in

4.13 The view of Rabbotenu is also found in both the Bavli and the Yerushalmi, but with some differences. According to the Bavli (*Ket.* 63b):

> Our Masters, however, took a second vote [and ordained] that an announcement regarding her shall be made (מכריזין עלי ה) on four consecutive Sabbaths and that then the court shall send her [the following warning]: 'Be it known to you that even if your *ketubbah* is for a hundred *maneh* you have forfeited it'.

The version in Yerushalmi (*Ketubbot* 5:7, 30b, which appears to be citing a tannaitic source[664]) is:

> The later court[665] [enacted that we] warn her (מתירין בה) four weeks (after which) she cancels her *ketubbah* debt[666] and leaves (והיא שוברת כתובתה ויוצאה).

These versions differ (*inter se*) in two respects: (1) the language of the Bavli is suggestive of public announcement, thus involving a process which humiliates the wife;[667] (2) it is only in the Yerushalmi that the termination of the marriage is made explicit. These differences might well be related: the Bavli appears closer, in its objective, to the Mishnah, to induce the wife to end her "rebellion". Indeed, it might be argued that the Rabbotenu of the Tosefta still had the object of coercing the wife back into the marriage, as in the Mishnah, but by a sharper financial sanction. However, the Tosefta itself presents the view of Rabbotenu there as a "revolution" as compared to the earlier rule of the Mishnah. The version of Rabbotenu in the Yerushalmi may therefore be used to shed light on their goal and rationale in the Tosefta.

4.14 This accords with Rashi's interpretation of the Babylonian *sugya.* Indeed, Rashi describes the effect of the enactment of Rabbotenu as "לא כייפינן לה" (we do not force her). This hardly reflects the aim of inducing the wife to end her "rebellion". The goal of Rabbotenu, in Rashi's view, is rather to bring a quick end to the conflict – here by accepting the wife's demand for divorce (after trying to convince her, even by public humiliation, as in the Bavli) and "not forcing her to stay with her husband". Indeed, Rashi thus appears to endorse the view that the marital dispute must not remain static, without any movement towards a solution, and therefore that after loss of the entire *ketubbah* the husband is coerced to give a *get*.[668] Hence, receiving a *get* is a required stage both according to Rabbotenu and according to the Mishnah, after the end of the process of losing the *Ketubbah*. Although coercion is not explicit in Rashi's interpretation, it appears to be required by his logic.

4.15 Turning to the Amoraic stratum in the talmudic sugya, we encounter the same tension regarding the basic objective of the *halakhah.* Both Amemar and Mar Zutra follow the Mishnah regarding *moredet*. As Rashi puts it: היכי דמאי מורדת: דכופין אותה דמשהין גיתה ופוחתין כתובתה, i.e. the law of *moredet* involves forcing *her*, by making her wait for her *get* (דמשהין גיתה is an interpretive

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existence throughout the subsistence of a marriage. R. Meir in *Mishnah Ketubbot* 5:1 characterises as *be'ilat zenut* relations between spouses where the *ketubbah* is less than the standard amounts. *Bava Kamma* 89a interprets this as meaning: "It is prohibited for any man to keep his wife without a *ketubbah* even for one hour – so that it should not be an easy matter in his eyes to divorce her."

664 See ARU 9:5-6.

665 On the replacement here of Rabbotenu by "the later bet din", see ARU 9:4 n.17; 9:5 n.30.

666 שוברת means "writes a receipt" (*shovar*) for her *ketubbah* (see Bavli, *Sotah* 7a; Y.N. Epstein, *Mavo Lenusaḥ HaMishnah* (Jerusalem: Magnes, 2001), 616. A parallel term in *Tosefta Ketubbot* 9:1 is clearer: "שוברת לו על כתובתה"), acknowledging that she received her *ketubbah* payments, or, more accurately, cancelled her husband's debt.

667 Warning in the Tosefta appears to be private, perhaps by messenger. On the difference between "מתרין בה" in the Tosefta and "מכריזין עליה" in the Bavli, see S. Lieberman, *Tosefta Ki-fshutah* (New York: Jewish Theological Seminary of America, 1967), 267; Tosafot, 63b, s.v. דיקא.

668 This is the explanation of Rashi and Rambam found in *Pne Yehoshua*: "נראה לי... דכל היכא דאי אפשר לכופה שתשמשתו בעל כורחה אם כן ממילא דשורת הדין דמחייב לגרשה כדי שלא תתעגן... דלעולם נזקקין לכוף היכא דאיכא חשש עיגון" (*Pne Yehoshua*, *Ketubbot*, 63b, s.v. בתוספות).

addition of Rashi) and decreasing her *ketubbah*. They agree in applying this law in a case of "בעינא ליה ומצערנא ליה" ("I like my husband but wish to torment him") but disagree in applying it to a case of "מאיס עלי" ("he is repulsive to me"). According to Amemar, in this latter case we should *not* follow the mishnaic rule of *moredet*. Thus, the alternative option from earlier stages of the *sugya* arises, namely the rule of the Tosefta. Rashi therefore interprets Amemar's "לא כייפינן לה" as "לא כייפינן לה: להשהותה, אלא נותן לה גט ויוצאה בלא כתובה", i.e. we don't force her to remain with her husband; rather, he (must) give her a *get* while she loses her *ketubbah*. It is possible that the variant reading of Amemar in MS Leningrad Firkovich reflects this interpretation of Amemar, making the force of Rashi's נותן לה גט that more explicit.[669] Nor is Rashi alone in attributing *kefiyah* to Amemar,[670] despite the fact that the text is not explicit.

4.16 The final (*amoraic* or even *saboraic*[671]) stratum of the talmudic sugya rules:

> We also make her wait twelve months for her divorce, and during these twelve months she receives no maintenance from her husband.

Its exact meaning is a matter of great dispute between talmudic interpreters, following the basic attitude of each commentator to the interpretation of previous stages of the *sugya*. The Ge'onim, according to Brody, referred to this passage as a late talmudic *taqqanah*, which determined coercion after 12 months of *meridah*, whereas the Ge'onim themselves applied coercion immediately.[672] Rashi does not mention coercion explicitly at this point, but rather deals with the timing of the rule of *moredet*.[673] However, we may assume that since coercion is an integral part of his interpretation of the rest of the *sugya* (and thus of the Talmud's presentation of the earlier development of the halakhah), Rashi must understand coercion of a *get* at this stage as well.[674] In his view, the final talmudic conclusion delays coercion for 12 months in a case of *moredet me'is 'alay*.[675] Rashi thus appears to accept the view that coercion is implied here, a view that is shared by the Ge'onim and some other Rishonim.[676]

D. *The Ge'onim*

4.17 When we turn to the measures introduced by the Ge'onim, we are faced by a series of questions which continue to inform discussion of the problem of the *'agunah*, even if it is no longer possible simply to revert to the positions which the Ge'onim adopted: first, the precise circumstances in which they were prepared to exercise *kefiyah* against the husband of a *moredet* (§4.19); second, the form(s) of *kefiyah* they were prepared to apply (§§4.20-24); third, the authority on which their measures were based (§§4.25-29).

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669 For another respect in which MS Leningrad Firkovich follows Rashi, see ARU 9:10-11 n.55, 12 n.63.

670 See also R. Yehoshua Falk, *Pne Yehoshua*, *Ketubbot* 63b, s.v. *Tosafot d"h 'Aval* for another explanation of the wording of the dispute between Amemar and Mar Zutra, as understood by Rambam (cf. *Yabia' 'Omer* III *'Even Ha'Ezer* 18:5). R. Falk, *loc. cit.*, shows that Rashi also agrees with Rambam in this matter. Riskin (n.17, above), 5, takes Rambam and Rashbam and Rosh to have understood Amemar's view to have entailed an immediate divorce, coerced if necessary and, at *Women and Jewish Divorce* (n.42 above), 42, sees the ambiguity as (still) a potential resource: "Nevertheless, his words open the door for a liberal interpretation of the law, which would force the husband to divorce her and ensure that she receives her Ketubbah."

671 See Friedman, *Jewish Marriage* (n.392, above), 323 n.37.

672 See note 658, above.

673 See Rashi, 64a, s.v. ומשהינן לה and s.v. תריסר.

674 See ARU 9:12-14.

675 Cf. E. Westreich (n.285, above), 211f., citing Rashi, *Ketubbot* 63b, s.v. *aval amrah me'is 'alay*.

676 Riskin, *Women and Jewish Divorce* (n.42 above), 168 n.15, also cites Ritva (see Ritva, *Ketubbot* 63b, s.v. *Hechi Damya Moredet*): "Rashi and Ritva so understand this case." For other Rishonim who agreed with Rashi, such as Rabbenu Gershom and Rashbam, see ARU 9:2-3, nn.3-4.

4.18 The classical account of the matter is provided by Rav Sherira Gaon, who was asked about the position of "a woman [who] lived with her husband and told him, 'Divorce me; I do not wish to live with you'." In his *teshuvah,*[677] Sherira sets out the history of the matter:

> The law originally provided that a husband is not compelled [in fact, the *bet din* "do not oblige" (מחייבין) him] to divorce his wife when she demands a divorce, except in those instances where the Sages specifically declared that he is compelled to divorce her.

Thus the *mishnah rishonah* of *Ketubot* 5:7 is taken not to have entailed *kefiyah* even once the *ketubbah* was exhausted. Moreover, Sherira appears to take the procedure of Rabbotenu in *T. Ketubot* 5:7 as not necessarily involving total loss of the *ketubbah*:

> Afterwards, another *taqqanah* was enacted, which provided that a public proclamation should be made concerning her on four consecutive sabbaths and that the court should inform her: "Take notice that you have even forfeited one hundred *maneh* of your *ketubbah* ..."

The next stage,[678] for Sherira, was full forfeiture of the *ketubbah*, but even this, in his view, did not involve coercion:

> Finally, they enacted that public proclamation is to be made concerning her on four sabbaths and she forfeits the entire amount [of her *ketubbah*]; nevertheless, they did not compel the husband to grant her a divorce.

For Sherira, it was the Babylonian Talmud which introduced coercion, after the twelve month waiting period:

> They then enacted that she should remain without a divorce for twelve months in the hope that she would become reconciled, and after twelve months they would compel her husband to grant her a divorce ...[679]

But the Gaonim, he indicates, were willing to go further, both in relation to the wife's right to parts of her *ketubbah* in such circumstances and in abolishing the waiting period:

> ... After the time of the Savoraim, Jewish women attached themselves to non-Jews[680] to obtain a

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677 *Teshuvot HaGeonim*, *Sha'are Tsedek*, Vol. 4, 4:15. Translation quoted here from Elon (n.241, above), II.659; cf. Riskin, *Women and Jewish Divorce* (n.42 above), 56-59, for full Hebrew text and alternative translation. See also ARU 15:8-9; G. Libson in Hecht et al., *An Introduction to the History and Sources of Jewish Law* (n.418, above), 235-238 ("The *taqqanah* of the Rebellious Wife").

678 Sherira does not appear to be aware of the version in the *Yerushalmi* (§4.13, above) which concludes: והיא שוברת כתובתה ויוצאה.

679 בופין את הבעל וכותב לו גט: *Otsar HaGeonim*, 8, pp.191-92. Cf. Riskin, *Women and Jewish Divorce* (n.42 above), 59, who observes: "It is clear that R. Sherira Gaon interprets the final statement of the Talmud, "and we make her wait twelve months...," to mean that the husband is forced to grant his wife a divorce at the end of the twelve-month period, even against his will." See also Elon (n.241, above), II.660 n.68, citing also Ramban, *Ḥiddushei Ketubbot*, ad loc., for Sherira's view, but noting that according to other commentators the talmudic rule was only that the husband was legally obligated to divorce after 12 months, but no judicial compulsion was applied to enforce that obligation.

680 Similar language is used by R. Mesharshaya in *Gittin* 88b in relation to recourse to gentile courts: "According to pure Torah law, a *get* coerced by gentiles is valid, and the reason why they said that it was invalid was so that each and every woman should not go attaching herself to gentiles and releasing herself from her husband" (שלא תהא כל אחת ואחת הולכת ותולה עצמה בעובד כוכבי'.): see ARU 17:138. It has been suggested that the reference here may be to the use of gentile thugs, a practice attested in the responsa of Rashba: see Yom Tov Assis, "Sexual Behavior in Medieval Hispano-Jewish Society," in *Jewish History, Essays in Honour of Chimen Abramsky*, ed. A. Rapoport-Albert & S.J. Zipperstein (London: Halban, 1988), 25-59, at 36, citing I, 73. On the possible background in Islamic rules regarding the status of marriages of converts and the effect of conversion on antecedent marriages, see ARU 2:26-27 (§3.4.3), ARU 8:19-20 (§3.4.1), citing al-Maliki: "... If two unbelievers become Muslim, they are confirmed in their marriage, but if only one becomes a Muslim, then this is annulment without divorce". However, the references to apostasy in this context may refer to the halakhic tradition which maintains that apostasy annuls an earlier Jewish marriage: see Rashi, according to *Minḥat Ḥinukh* 203 and discussion at ARU 5:28 (§21.2.1), noting that "R. Babad refers to the *'miqtsat ge'onim*' — a minority of the Babylonian Geonim — who maintained that an apostate is treated by Torah law as a

> divorce through the use of force against their husbands (*shebnot yisrael holkhot venitlot bagoyim liytol lahen gittin be'ones miba'aleyhen*); and some husbands, as a result of force and duress, did grant a divorce that might be considered coerced and therefore not in compliance with the requirements of the law [as under the law one may not use duress except in certain specified circumstances]. When the disastrous results became apparent, it was enacted in the days of Mar Rav Rabbah b. Mar Hunai that when a *moredet* requests a divorce, all of the guaranteed dowry that she brought into the marriage (*nikhsei zon barzel*) should be paid to her — and even what was destroyed and lost is to be replaced — but whatever the husband obligated himself to pay [beyond the basic *ketubbah* amount], he need not pay, whether or not it is readily available. Even if it is available and she seizes it, it is to be taken from her and returned to her husband; and we compel him to grant her a divorce forthwith and she receives one hundred or two hundred zuz [the basic *ketubbah* amount]. This has been our practice for more than three hundred years, and you should do the same.

4.19 No explicit indication is given here of the grounds on which the woman is claiming to be a *moredet*, but we may safely assume that if she is prepared to seek the use of force from the non-Jewish authorities (or even, as an anonymous 13th-cent. responsum indicates, to resort to either prostitution or apostasy[681]), this is a case of *me'is* '*alay* rather than *ba'ena leh*. This, indeed, was the view of R. Zeraḥyah Halevi in the *Sefer HaMaor*.[682]

4.20 What exactly is meant by Sherira's "we compel him to grant her a divorce forthwith" (וכופין אותו וכותב לה גט לאלתר)? *Kofin* normally refers to physical coercion: thus, the husband is coerced (beaten)[683] into writing (or authorising the writing, and delivery) of the *get.* On this formulation there is no suggestion that the court itself takes over any of the required formalities. What, then, if the husband resists the coercion? Nowadays, it is assumed that this is the end of the matter. The case of the recalcitrant husband who preferred to spend 32 years of his life in an Israeli jail, and die there, rather than release his wife, is often cited.[684]

4.21 Yet there are hints of the use of different measures already being in the judicial power in some geonic sources. Rav Yehudai Gaon, Head of the Academy of Sura, c.760 C.E., mentions the use of a *ḥerem* against the husband: "When a woman rebels against her husband and desires a divorce, we obligate [the husband] to divorce her, and if he does not do so we place him under the ban until he does it."[685] According to the *Halakhot Gedolot* (ascribed to Rav Shimon Kiara, 9th cent.):

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gentile so that his marriage is void"; see also *Ohel Mosheh* II 123, discussed at ARU 5:31-32 (§21.2.6.1.3); ARU 5:21 (§19.2.1), ARU 5:37 (§21.2.6.7.1) on Maharsham. Some later views, however, deny that conversion to Islam is apostasy. See ARU 5: 40-41 (§21.2.6.11.3), on the view of *Ḥayyim shel Shalom* II 81. E. Westreich (n.285 above), 217, maintains that *me'is* '*alay* could be a plea in Islamic courts, which had a similar remedy (thus supporting the view that the threat in Geonic times was recourse to Islamic courts).

681 Quoted in Riskin, *Women and Jewish Divorce* (n.42 above), 52f. See ARU 2:27 (§3.4.3).

682 Quoted in Riskin, *Women and Jewish Divorce* (n.42 above), 86f. See ARU 2:27-28 (§3.4.3).

683 Cf. *Mishnah Gittin* 9:8 (88b): "A bill of divorce given by force (*get me'useh*), if by Israelitish authority, is valid, but if by gentile authority, it is not valid. It is, however, valid if the Gentiles merely beat (*ḥovtin*) the husband and say to him: 'Do as the Israelites tell thee'."

684 *Jerusalem Post*, February 22nd 1997, cited by Broyde, *Marriage* (n.83, above), 156 n.23. R. Broyde regards this as representing "the basic success of the system, not its failure" (at 51). See further ARU 2:25 n.106.

685 See Riskin, *Women and Jewish Divorce* (n.42 above), 47f. Rabbenu Tam took the view that a *ḥerem* is in fact more severe (and thus, in his view, objectionable) a measure than physical coercion: "If someone would wish to say that we do not force him by means of whips but by decrees and excommunication ... excommunication is more severe than stripes, and there is no coercion greater than that!" See Riskin, *Women and Jewish Divorce* (n.42 above), 98 (Heb.), 102 (Engl.). See also R. Henkin's reference to a *ḥerem* of the *kadmonim* that a man should not make his wife an '*agunah* (§2.42 above).

"... we grant her a bill of divorce immediately (ויהבינן לה גיטא אלתר).[686] Similarly, Rav Shmuel ben Ali, the 12th century head of the Yeshiva of Baghdad in the second half of the twelfth century, writes:

> [The court] endeavors to make peace between [husband and wife], but if she refuses to be appeased they grant her an immediate divorce (נותנין לה גט לאלתר), and do not [publicly] proclaim against her for four weeks.[687]

The use of plural verbs in these sources (נותנין, ויהבינן), suggesting the possibility[688] that the *get* is here effected by an act of the court rather than the husband, becomes more explicit still in an anonymous 13th-cent. responsum, which uses the expression: "they wrote her an immediate bill of divorce" (וכתבי לה גט לאלתר).[689]

4.22 A more explicit expression of the precise nature of the remedy granted by the Ge'onim to the *moredet* is found in *Shut haRosh*, 43:8 (p.40b)[690]

> …And they enacted that the husband should divorce his wife against his will when she says: I do not want my husband … For they relied on this [dictum]: 'Everyone who betroths, does so subject to the will of the Rabbis', and they agreed to annul the marriage (והסכימה דעתם להפקיע הקידושין) when a woman rebels against her husband.

We may note that the Rosh's own teacher, the Maharam of Rothenburg,[691] cites the responsum of R. Shmuel b. Ali (quoted in §4.21, above), which uses the plural formulation נותנין לה גט לאלתר. The Rosh thus appears to have interpreted the Gaonic practice not as coercion but rather as annulment (*hafka'at qiddushin*).

4.23 Doubts have been raised as to whether we may consider the view of Rosh as an historically accurate account of the geonic remedy, rather than as an anachronistic justification (in the light of the later rejection by Rabbenu Tam of the *kefiyah* of the Ge'onim) for an earlier *halakhah*.[692]

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686 *Halakhot Gedolot*, *Hilkhot Ketubbot*, 36; Riskin, *Women and Jewish Divorce* (n.42 above), 48f. Similarly in *Teshuvot HaGeonim* (Harkavi edition), 71: "ובתר גמרא תקינו רבנן דאפילו מאי דתפיסא מהפקינן ליה מינה, ויהבינן לה גיטא לאלתר"; *Teshuvot HaGeonim* (*Geonim Kadmonim*), 91.

687 Riskin, *Women and Jewish Divorce* (n.42 above), 62f. This ruling of R. Shemuel ben Ali is quoted in the *responsa* of Maharam of Rothenburg (the teacher of the Rosh), no.443, in Hebrew: "נותנין לה גט מיד" (though in the Prague edition of this *responsum* the ruling is quoted in the name of R. Sherira Gaon). See also Mordechai A. Friedman, *Ribuy Nashim beYisrael* (Tel Aviv: Bialik Institute, 1986), 15 n. 44e; Goldberg and Villa (n.301, above), 274 n.570.

688 See, however, Dr. Westreich at ARU 15:9-10, noting the plural also in the talmudic formulation "ומשהינן לה תריסר ירחי שתא אגיטא", and the presence of this same ומשהינן in the Halakhot Gedolot ("ומשהינן...]ו[יהבינן"), and arguing that the plural is purely stylistic. He notes also a mixture of singular and plural formulations in *Shut Maharam meRuthenburg* (Lemberg ed., 443; Prague ed., 261), but this may reflect a desire of Maharam to acknowledge the different formulations found in the geonic sources themselves.

689 Riskin, *Women and Jewish Divorce* (n.42 above), 52f.

690 See also Riskin, *Women and Jewish Divorce* (n.42 above), 125 (Heb.) 126f. (Engl.), and Riskin's own comments at 129; Breitowitz (n.185, above), 50f. n.135, 53.

691 M. Shapiro, "*Gerushin Begin Me'isah*", *Diné Israel* II (5731), 117-153, at 140-42, notes that the Maharam, in his younger years, disallowed coercion in cases of *me'is 'alay* but later reversed his position and permitted it.

692 See ARU 15:6-12, 21-23. M.S. Berger, *Rabbinic Authority* (New York and Oxford: Oxford University Press, 1998), 72 n.72 seeks to consign this remark to "the realm of legal theory", noting that the Rosh, here and elsewhere, speaks in terms of coercion of the husband to give a *get.* Yet the fact that he himself endorsed, on one occasion (35:2, quoted in the text below) a traditional form of coercion makes his account of the geonic practice all the more striking. R. Broyde, *Marriage* (n.83, above), 19-20, 60-61, 160 n.3, seems to accept the view of the Rosh as historically correct, maintaining that if the husband refused to divorce his wife and coercion was not possible, the marriage could be annulled even without compelling him to give a *get* ("Indeed, the *geonim* devised a mechanism to ensure that it [=marriage] did end: this appears to be annulment, or coercion to divorce even in the absence of fault"; *ibid.,* 19). Nevertheless, R. Broyde is not willing to adopt this view for practice today; see *ibid.,* 20: "such annulments remain a dead letter in modern Jewish

Here, we may note, Rosh appears to claim (unless his language is to be taken as either polemical or rhetorical) that *hafka'ah*[693] was used by the Ge'onim in practice.[694] Yet elsewhere, Rosh reverses the argument, and shows a preference for coercion over *hafka'ah* in a case clearly closer to the circumstances where *hafka'ah* is discussed in the Talmud than to the *moredet me'is 'alay*. In *Shut haRosh*, 35:2, we read:

> But if it looks to you my masters who are close to this matter, that the betrothing man is not an appropriate and decent person in order to marry this girl of good descent, and that he has persuaded her by fraud and cheating, and that it is reasonable to compare [this case] to the case of Naresh (*Yevamot* 110a) where we learned that since it (the betrothal) was done improperly (שלא כהוגן) [the Sages] annulled the betrothal — [then in the case of] this [person] as well, who acted improperly, although we would not annul the betrothal, nevertheless we should follow in this case the view of a few of our Rabbis who ruled in the law of *moredet* that [the *bet din*] should compel him to divorce her.

The case is compared to that of Naresh, in which the talmudic Sages annulled the betrothal. In principle, for Rosh, the betrothal might be annulled here as well, although no *get* was given. However, Rosh was not willing to apply annulment here, but rather preferred coercion. His precise reasons for this are not clear. We may note the following (complementary) possibilities:

(a) He regarded the case here discussed as less radical than the kidnapping of the betrothed girl from her former "husband" in the case of Naresh. Moreover, here there could be no suspicion of *notenet eynehah be'aḥer*.[695]

(b) He uses *sfeq sfeqa*: one *safeq* is whether the marriage is annulled like Naresh; another is whether, if not, we can rely on Rambam's coercion for *me'is 'alay*.

(c) Rosh in fact explicitly avoids the practical implementation of *hafka'ah* (*lema'aseh*), but does not reject it in principle (*lehalakhah*).[696]

4.24 On this analysis, Rosh rejects *hafka'ah* except where it is clearly within the scope of the talmudic precedents, and rejects the Geonic application of *kefiyah* in cases of *moredet me'is 'alay* (at least without the 12-month talmudic waiting period), but grants a form of *kefiyah* (apparently that of Rambam) in a case analogous to that of one of the talmudic precedents for *hafka'ah*. Taking the two *teshuvot* together, we may conclude that Rosh does not treat *hafka'ah* and *kefiyah* as entirely separate remedies. His understanding that this (35:2) is a situation close to those in the Talmud where *hafka'ah* is used provides support for his conclusion in favour of (the less radical) *kefiyah*. This amounts to an endorsement of the view that *hafka'ah* remains possible in post-talmudic times if accompanied by a coerced *get.*[697]

4.25 Similar questions arise in relation to the view of the teachers of the teachers of Me'iri, that the geonic measures were based on the presence of the *tnai* of R. Yoseh in the Yerushalmi in the

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law"; 61: "…there are nearly insurmountable halachic objections to a return to halachic rules that have not been normative for 800 years".

693 On whether, for Rosh, it needs to be accompanied by a coerced *get*, see ARU 15:21-22.

694 Indeed R. Ovadyah Yosef in *Torah Shebe'al Peh* (n.52, above), 101, writes that we may use this as part of the basis for annulment even today. See further ARU 18:51.

695 ARU 15:11 n.45. Dr. Westreich offers (at ARU 15:12) the following explanation of the relationship between the two *responsa*: "Thus, integrating Rosh's two responsa (35:2, which exceptionally authorises coercion, and 43:8, which explains the Geonic *moredet* on the basis of annulment) produces the following explanation: *Moredet* is partially based on annulment (specifically, in terms of the authority for it), but the procedure includes a coerced *get*. Since it includes a *get* it can be more easily applied than can termination by mere annulment of marriage. The case in 35:2 is similar to the talmudic *hafka'ah* but for particular reasons does not admit of annulment. However, the second possibility, coercion based on annulment, may be applied in such a case."

696 Eliav Shoḥetman, "*Hafqa'at Qiddushin – Derekh 'Efsharit leFitron Ba'yat Me'uqvot haGet*?", *Shenaton HaMishpat Ha'Ivri* 20 (1995-1997), 369 n.54.

697 See also ARU 15:21-22, and §5.43 below, esp. R. Yosef, cited in n.1064, below.

ketubbot of the geonic period (§§3.23-26, above), and indeed the claim of Ra'avya to have examined a *ketubbah* that was brought from Eretz Israel and contained a divorce stipulation similar to the divorce clause in the Yerushalmi (§3.27, above). That view, we concluded above, may itself have been anachronistic. Even so, it illustrates again the weak dividing line between *hafka'ah* and *kefiyah.* For what is added by the teachers of the teachers of Me'iri is not merely a further ("voluntarist") legitimation of a non-standard form of marriage termination; there is also a substantive element, the possibility (derived from the unusual language of the Genizah *ketubbot*) that we have here a form of *prospective* annulment (§3.79, above). That, indeed, would explain the otherwise arbitrary use by the Rosh of the language of *hafka'ah* in relation to the *kefiyah* of the Ge'onim, for *kefiyah* (in its traditional sense of a coerced *get*) is indeed a form of prospective termination of marriage.

4.26 R. Sherira Gaon very clearly takes the Talmud itself to have enacted *kefiyah* for a *moredet me'is 'alay*, and explains the geonic measures as having abolished the 12-month waiting period and as having improved the woman's financial position (§4.18, above).[698] That the basic principle is talmudic is affirmed also by both Rashi,[699] Rambam[700] and other Rishonim.[701]

4.27 It is in relation to the abolition of the 12-month waiting period and the improvement of the woman's financial position that R. Sherira Gaon uses the language of rabbinic *taqqanah* (תקינו), and explains it on "emergency" grounds, speaking of the "disastrous results" of the fact that "Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands".[702] According to those who understand this to be an enactment of the Sabora'im/Ge'onim,[703] it is an evasion of both Biblical and Talmudic divorce law by the post-talmudic authorities in the interests of biblical and talmudic demands for justice. In the *Sefer HaMaor* of R. Zeraḥyah Halevi, written between 1171 and 1186, the Gaonic decree (*taqqanah*) is attributed to הוראת שעה.[704] Rosh similarly claims that "there was a temporary need in their day to go beyond the words of the Torah and to build a fence and a barrier" (שהיה צורך שעה להסיע על דברי תורה ולעשות גדר סיג), and regards it as a temporary measure.[705] Ramban, on the other hand, maintained that "in truth they decreed for [all] generations."[706] Against the weight of this authority, it may appear somewhat surprising that Rabbenu Tam (if indeed he had direct access to the works of the Ge'onim[707]) pays no attention at all to the argument from צורך שעה. It has, however, been observed that this is a general characteristic of Rabbenu Tam's halakhic writing: he "never utilizes the argument that the conditions have changed since the days of the Talmud".[708]

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698 Cf. Riskin, *Women and Jewish Divorce* (n.42 above), 81-83.

699 See §§4.10-16, above.

700 §§4.32, 4.40, below.

701 See *Tzitz Eliezer* 5, 26, as discussed at ARU 5:17 (§12.2.12), on the *Mordekhai* and *Tosefot Rid*. On the wide range of opinions on this point, see E. Westreich (n.285, above), 212ff.

702 §4.18, and see n.680, above.

703 See *Responsa Rosh* 42:1, *Responsa Rashba* cited in Mahariq, *shoresh* 101 - *ET* XVII col. 379 s.v. *Benose*' *'ishah 'al 'ishto* and col. 382 s.v. *Begerushin be'al korkhah*.

704 See ARU 2:27-28 (§3.4.3).

705 Riskin, *Women and Jewish Divorce* (n.42 above), 125, 126 (Engl.). See further ARU 2:27-28 (§3.4.3).

706 *Milḥamot* on *Rif*, *Ketubot* 27a, quoted by Riskin, *Women and Jewish Divorce* (n.42 above), 112.

707 Riskin, *Women and Jewish Divorce* (n.42 above), 113, notes that the original decrees of the Geonim were apparently not available to Ramban, and that Rashba, too (*ibid.*, at 118f.), mistakenly denied that the practice of the Geonim was based upon interpretation of the Talmud. This might appear to justify application of the discretion conferred by Rema's qualification of *hilketa kebatra'ei.*

708 For the view that Rabbenu Tam "never utilizes the argument that the conditions have changed since the days of the Talmud. He rather chooses to resolve the problem by presenting new interpretations to the statements of the Talmud...", see S. Albeck, "Yaḥaso shel Rabbenu Tam LeVa'ayot Zemano", *Zion* 19 (1954), 104-41, quoted by Riskin, *Women and*

4.28 We have observed the view attributed to the teachers of Me'iri, that the geonic *kefiyah* was based on the *tnai* of R. Yoseh.[709] The language used there clearly indicates that regular use of particular clauses in a *ketubbah* (מפני שהיו רגילים לכתוב בכתבותיהם) was regarded as capable of establishing a *minhag* (ומאחר שנתפשט המנהג), such that the clause ultimately assumed the status of a *tnai bet din* (קבעוהו לעשותו אף בזמן שלא נכתב כאלו נכתב). Thus, a preliminary agreement can dissolve later problems of *get me'useh*, when divorce is initiated solely by the wife.[710] Other sources also speak of the Gaonic practice in terms of *minhag*, even where they no longer accept it.[711]

4.29 The combination of forms of authority attributed to the geonic measures – talmudic interpretation, *taqqanah* and *tenai* – might appear to provide a unique blend of institutional and voluntarist legitimation. But before concluding that this might prove a suitable model for the contemporary situation, we need to reassess the dogmatic status of such a combination in the light of the views expressed by the Rishonim and Aḥaronim.

E. The Rishonim: *kefiyah* for the *moredet me'is* '*alay*

4.30 There are differences amongst the Rishonim on both what precisely was the innovation introduced by the Ge'onim,[712] and on the authority by which they did it (§§4.31-32). Different positions are attributed to Rabbenu Tam – not only on *kefiyah* (§§4.33-37) but also on *ḥiyyuv* (§§4.38-39). Rambam, though not following the Ge'onim, accepted *kefiyah* (§§4.40-44), and his view has survived in some communities (§§4.45, 47-51). However, the view that Rabbenu Tam completely rejected *kefiyah* (though not *harḥaqot*) in the case of the *moredet me'is* '*alay* is widely followed by later *posqim* (§4.46). A mediation between these views has emerged, introducing the concept of *amatlah* as supporting a plea of *moredet me'is* '*alay* (§§4.52-55). This latter development (in common with analysis of the different positions attributed to Rabbenu Tam) shows that the issue is not confined to "remedies"; it also entails the basic question of the permissible grounds for divorce.[713]

4.31 Despite the explicit statement of R. Sherira that already according to the Talmud, "after twelve months they would compel her husband to grant her a divorce", [714] Ramban appears to believe that it was the Geonic decree which introduced the coerced bill of divorce.[715] Rashba also appears to deny that the practice of the Ge'onim was based upon interpretation of the Talmud: "And one should not bring a proof from the words of the Ge'onim ... because they all said that they do not force him to [divorce] her according to Talmudic law [but rather according to the specific decree of the Ge'onim] as Rashi ... wrote ...".[716] Of course, a geonic understanding that "they do not force him to [divorce] her according to Talmudic law" need not mean that the Ge'onim denied that the Talmud endorsed *kefiyah* (that would contradict the words of R. Sherira); it need only mean that Talmudic law did not endorse *immediate* coercion, and it was this – abolition of the 12-month

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Jewish Divorce (n.42 above), 108; ARU 2:28 n.125. But the matter is disputed. See further I.M. Ta-Shma, *HaSifrut haparshanit laTalmud be'Europah uveTsefon Afrika* (Jerusalem: Magnes Press 1999), 76-92.

709 See §3.23 above.

710 See further ARU 15:23.

711 See ARU 2:29-30 (§§3.5.2) for Rabbenu Tam, Rambam (in relation only to the financial provisions) and Rosh, and further §4.32 on the contrary attitude of Rabbenu Tam to the status of such *minhagim*.

712 Reflecting different interpretations of what was already authorised by the Talmud: see §§4.10-15, 26-29, above.

713 See §§1.29-31, above.

714 See n.679, above.

715 Riskin, *Women and Jewish Divorce* (n.42 above), 113, observing that the texts of the original decrees of the Geonim apparently were not available to Ramban.

716 Riskin, *Women and Jewish Divorce* (n.42 above), 118f.

talmudic waiting period – which the Ge'onim enacted. This is precisely the issue on which the texts of Rabbenu Tam are inconsistent.[717]

4.32 Other sources speak of the Gaonic practice in terms of *minhag.* Rabbenu Tam views this as illegitimate:

> And if we have learned [the rule] that custom may overcome a law, God forbid that [this should apply in a case which involves] a ritual prohibition, [the penalty of] strangulation, [the penalty for adultery], and the [birth of] illegitimate offspring.[718]

On the other hand, Rambam rejects the force of any such geonic custom (though he regards this as relevant only to the financial provisions of the Ge'onim) not on the grounds that it wrongly trespassed into the field of *'issura,* but rather because it had not spread sufficiently:

> And the Ge'onim said that in Babylonia they have other customs concerning the *moredet*, but these customs did not spread to the majority of the Jewish people,[719] and many and great people disagree with them in the majority of places. And [it] is proper to hold by and to judge in accordance with talmudic law [and not Gaonic decrees].[720]

Although Rambam here respects the objections of "many great scholars"[721] (ורבים וגדולים) to the geonic position, we may note that he does *not* here adopt a criterion of consensus; rather, he looks to the "majority" (רוב) of communities and of scholarly centres. Rashba is also concerned with the "spread" of the Gaonic practice (here referring to the practice of *kefiyah*, described as *taqqanah* rather than *minhag*), claiming that "their decree did not spread in our countries at all (לא פשטה אותה תקנה בארצותינו כלל)".[722] Rosh, moreover, accepts that such custom may retain some validity even in his own day. In one responsum he advises:

> If [her husband's] intent is to "chain" her, it is proper that you rely on your custom at this time to force him to give an immediate divorce.[723]

ואם דעתו לעגנה ראוי הוא שתסמוך על מנהגכם בעת הזאת לכופו ליתן גט לזמן.

This is a remarkable conclusion, given the overall view of the Rosh, who followed Rabbenu Tam and regarded the practice of the Ge'onim as a temporary necessity.[724] Indeed, even in a case involving a violent husband, he refuses to go beyond the cases of *kefiyah* found in the Talmud.[725]

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717 See §§4.33-34, below.

718 Riskin, *Women and Jewish Divorce* (n.42 above), 98 (Heb.), 101 (Engl.).

719 Riskin, *Women and Jewish Divorce* (n.42 above), 90, however, points to the testimony of R. Shmuel ben Ali that the Geonic decrees were normative practice throughout Babylonia during this period.

720 *Hilkhot Ishut* 14:14. Riskin, *Women and Jewish Divorce* (n.42 above), 88 (Heb.), 90 (Engl.).

721 Klein's translation, in the Yale Judaica Series translation.

722 *Resp.* 572, 573 in Bnei Brak ed., 1948, Pt.1, p.215, quoted by Riskin, *Women and Jewish Divorce* (n.42 above), 114 (Heb.), 116 (Engl.). See also Elon (n.241, above), II.664 n.84, noting that Rashba also wondered whether the Geonim "enacted it only for their own generation".

723 *Resp.* 43:8, p.40b, Riskin, *Women and Jewish Divorce* (n.42 above), 126 (Heb.), 128 (Engl.), and see further §§4.24-26*,* above. Rosh says that in this case the brother of the woman claiming *me'is* '*alay* told him that she gave reasonable bases for her rebellion. Cf. Breitowitz (n.185, above), 48 n.129, 155.

724 Elon (n.241, above), II.665, comments: "One may deduce from this decision that Asheri placed primary emphasis on his second reason [for rejecting the geonic enactments, namely that the circumstances of the time had changed], and he therefore permitted the enactment to be applied, when appropriate under the circumstances, in those places that had been following it."

725 *Responsa*, *Kelal* 43:3, where the wife claimed: "…that her husband is crazy and his stupidity increases day by day so she requests that he divorce her before he becomes totally mad and she would then be an '*agunah* for ever ... he is utterly crazy and she is afraid that he might kill her in his anger because when people anger him he strikes and kills and hurls and kicks and bites ... Re'uven counters that 'You knew him beforehand and you considered and accepted. Also, he is not crazy but merely not well-versed in worldly conduct and he will not divorce you unless you return the books or their value and then he will divorce you.' [Reply] I do not see from their claims anything for which it would be

4.33 While for the most part rejecting the continuing validity of the Gaonic decrees,[726] the Rishonim were far from agreed on where this left the authoritative halakhah. The predecessors of Rabbenu Tam had largely favoured unilateral divorce for the wife who claims *me'is* '*alay*, as we see from Raban,[727] Alfasi[728] and Rashbam.[729] It was, however, the view of Rabbenu Tam (R. Jacob b. Meir, France, 1100-1171, the younger brother of Rashbam) which was ultimately to prevail:

> And that which Rabbenu Shmuel [Rashbam] wrote — that the Ge'onim decreed that we do not delay twelve months for a divorce but rather, they force him — far be it from our teacher to increase the number of *mamzerim* in Israel. We hold the halakhic principle that Ravina and Rav Ashi are the last authoritative halakhic decisors, and even were the Ge'onim able to decree that a woman could collect her alimony from movable property, whether it be on the basis of Talmudic law or their own reasoned judgment, that is only as far as monetary value is concerned. But as for permitting an invalid bill of divorce (גט פסול), we have not had the power to do so from the days of Rav Ashi [nor will we] until the days of the Messiah. And this is an invalid bill of divorce. After all, we learned in the Talmud that [the Sages] did not force [a divorce] until twelve months, and they [the Ge'onim] advanced the forcing of the divorce before [the time which] the law [allows].[730]
>
> שאנו שנינו בתלמוד שאין כופין עד תריסר ירחי שתא והם הקדימו טרם דין כפיית הגט

Here, we may note, Rabbenu Tam clearly *accepts* that coercion after 12 months *was* authorised by the Talmud. What he here rejects is compelling such a *get* within 12 months, and this he classifies as '*issura*.[731]

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fitting to coerce him to divorce because one cannot add to that which the Sages enumerated in Chapter *HaMaddir* (77) … Therefore, she should persuade him to divorce her or she should accept him and be sustained from his properties": see ARU 12:4/ARU 18:72, based on Bass (n.49, above).

726 Elon (n.241, above), II.664 n.84, cites the view of the Rosh that those who followed the view of the Geonim on compulsion did so not because they had accepted the *taqqanot* of the Geonim, but rather because the enactment is recorded in Alfasi's code.

727 Rabbenu Eliezer b. Natan (b. 1090, Mayence). See Riskin, *Women and Jewish Divorce* (n.42 above), 92f.

728 *Rif*, *Ket.* 26b-27a: "But nowadays, in the court of the Academy, we judge the *moredet* in such a way: When she comes and says: "I do not want [to remain married to] this man, give me a bill of divorce," [he is made to] grant her a divorce immediately", quoted by Riskin, *Women and Jewish Divorce* (n.42 above), 64 (Heb.), 65 (Engl.). It is clear that Alfasi contemplates coercion (*kofin*) in such cases. The passage concludes: "And according to all [authorities], anyone whom we forced to divorce [his wife], either according to Talmudic law, as we learn in the mishnah, "These are those who are forced to divorce," and similar cases [gross physical afflictions], or according to the Gaonic decree, if the woman dies before she is given a bill of divorce by her husband, her husband inherits her [property] because the inheritance of the husband is not canceled without a complete divorce, and this is the law." See also Riskin, *Women and Jewish Divorce* (n.42 above), 85f.; E. Westreich (n.645, above), 128f.; (n.285, above), 209f.

729 c.1085 - c.1158. See Riskin, *Women and Jewish Divorce* (n.42 above), 93. Riskin comments that the "atmosphere among the early Franco-German leaders seems to have been one which was sensitive to the needs of the woman, and which therefore upheld the Gaonic decree (although there were still those who maintained that the divorce was Talmudically based)." On the early Rishonim who followed the Geonim, see also the secondary literature cited at ARU 9:1-2.

730 *Sefer Hayashar leRabbenu Tam*, *Resp.*, ed. Rosenthal, #24 (p.40), quoted by Riskin, *Women and Jewish Divorce* (n.42 above), 97 (Heb.), 98f. (Engl.); Elon (n.241, above), II.661f. On the difficulty that Rabbenu Tam's apparent claim in this passage is consistent with the position of Rashi (his grandfather), see ARU 5:17 (§12.2.12 n.57); ARU 6:10 (§6.4). On this passage, see also Reiner (n.22, above), at 306.

731 Elon (n.241, above), II.662, claims, however, that "most halakhic authorities held that the *geonim* did have authority to legislate even on matters of marriage and divorce, and even to adopt enactments that deviated from Talmudic law", though adding that most of these authorities nevertheless held that the geonic enactments concerning divorce for a *moredet* should not be followed. Cf. II.665: "The majority view is that the legislative power of the *geonim* was not limited to monetary matters (as Rabbenu Tam held it was), but was fully effective even with regard to marriage and divorce." With Rabbenu Tam's approach, contrast particularly that later expressed by Ramban (but sometimes attributed to Rashba: see further ARU 8:23 n.140): "Heaven forbid I should dispute a decree of the Geonim, for who am I to dispute or to change that which the Geonim of the Schools — my masters — were accustomed to do?" The

4.34 In another passage of the *Sefer HaYashar*, however, Rabbenu Tam denies that *kefiyah* against the husband was authorised by the Talmud at all: the Ge'onim had no authority to go beyond the Talmud,[732] and the Talmud referred to coercion, in the case of the *moredet*, only in respect of the wife, not in respect of the husband:

> And Rabbenu Tam raised another problem, that in the entire [Talmudic] discussion there is no mention of forcing the husband, only of forcing the wife ...[733]

דבכל השמועה אינו מזכיר כפיית הבעל אלא כפיית האשה

and similarly:

> And we do not find in any [part of the laws of divorce] that the husband is forced to give a divorce without any [logical] difficulty at all [in the law's formulation]".[734]

ובלא שום פירכא בעולם כפייה לבעל לא אשכחן בכולא שמעתא

And:

> How could a scholar make [such a] mistake as to say that we force a husband to divorce [his wife] when she says "He is repulsive to me! (איך יטעה חכם לומר שכופין הבעל לגרש באמירת מאוס עלי).[735]

Such an absolute rejection of *kefiyah* in the case of the *moredet me'is 'alay* is compatible with an argument found in the *Sefer Hayashar* based on the "moral fear" argument, that the woman *notenet eynehah be'aḥer*:[736] if the Tannaim had been concerned that a wife claiming *accepted* grounds for divorce might in fact be using them so as to conceal the fact that she had really "cast her eyes on another", all the more so was the "He is repulsive to me!" (*me'is 'alay*) grounds liable to abuse (an argument which implies for Rabbenu Tam that even a sincere plea of *me'is 'alay* is not an accepted grounds for divorce), so that coercion in such cases should not be contemplated.[737] In short, there is a fear here that a sinner may be rewarded.

4.35 One possible way of resolving the difficulty is by reference to Rabbenu Tam's view that the 12-month waiting period of the Talmud did not apply to the "*moredet*" who claimed "he is repulsive

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rejection of the Geonic decrees, he argues, is because of different circumstances: "it has already been nullified because of the generation (מפני פריצות הדור)." As for the general question of authority: "I rail against those who say that it is not fitting to follow the decrees but [rather to follow] the law of the Talmud": *Ḥiddushei HaRashba* (Jerusalem, 1963), pt.2, pp.97-98, quoted by Riskin, *Women and Jewish Divorce* (n.42 above), 117 (Heb.), 119 (Engl.). See also *Ḥiddushei HaRamban, Ketubot* 63b.

732 At ARU 6:11 (§6.6), R. Abel compares this to Rabbenu Tam's attitude towards the decision of the Geonim to add to the text of the Talmud and thereby change the halakhah regarding the annulment of *ḥamets* on Pesaḥ, citing R. Yosef, *Yabia' 'Omer* VII,*'Oraḥ Ḥayyim*, 44:6, quoting *Shibboley HaLeqet* (217) who writes: "…we are not to read in the Gemara *bemashehu* for it is not of the original Talmud that R. Ashi redacted but it is an interpretation of the Geonim which they added into the text. Nevertheless, even Rabbenu Tam said that one should not conduct oneself so in practice because *one must not deviate from the words of the Geonim to the right or to the left*." He notes that one might distinguish Rabbenu Tam's attitude here from that regarding *kefiyah* for a *moredet* on the grounds that non-annulment of *ḥamets* on Pesaḥ is a matter of rabbinic rather than biblical law, or that he acquiesced in their rulings when they were being stricter than the Talmud (non-annulment of *ḥamets* on Pesaḥ) but not when they were being more lenient than the Talmud (coercion of *gittin*). See, however, Rabbenu Tam's preferred explanation in §4.38, below.

733 Riskin, *Women and Jewish Divorce* (n.42 above), 94 (Heb.), 96 (Engl.), quoting *Sefer Hayashar leRabbenu Tam*, ed. E.Z. Margoliot (New York: Shai Publications, 1959), 39ff., based on *Sefer Hayashar leRabbenu Tam*, *Responsa*, ed. S.F. Rosenthal (Berlin: Itskovski, 1898), *Siman* 24, p.39.

734 Riskin, *Women and Jewish Divorce* (n.42 above), 98 (Heb.) 101 (Engl). R. Abel, ARU 6:10-11 (§6.6) and ARU 5:18 (§12.2.12 n.57), notes that this more radical version of Rabbenu Tam's view accords with the report in *Tosafot*, *Ketubbot* 63b, s.v. *'aval 'amrah*.

735 Riskin, *Women and Jewish Divorce* (n.42 above), 98 (Heb.), 101 (Engl.).

736 *M. Ned.* 11:12. See n.55 and §1.29, above.

737 *Sefer Hayashar LeRabbenu Tam*, quoted by Riskin, *Women and Jewish Divorce* (n.42 above), 98 (Heb.), 101 (Engl.). Yom Tov Assis (n.680, above), 35, notes this issue as reflected in the responsa of Rashba.

to me" (*me'is 'alay*). Rather, Rabbenu Tam confines it to the *moredet* who wishes to remain in the marriage and cause her husband pain (בעינא ליה ומצערנא ליה),[738] but assuming here (with R. Riskin[739]) his innovative interpretation of the latter situation: "I wish to remain married to him rather than forfeit my alimony, but I will cause him pain until he agrees to divorce me with alimony because indeed I do not wish to remain married to him."[740] But this does not satisfactorily resolve the tension between his statements regarding the geonic measures. For we would then have to understand his statement:

> After all, we learned in the Talmud that [the Sages] did not force [a divorce] until twelve months, and they [the Ge'onim] advanced the forcing of the divorce before [the time which] the law [allows].

as meaning:

> After all, we learned in the Talmud that [the Sages] did not force [a divorce] until twelve months (in the case of *ba'ena leh*), and they [the Ge'onim] advanced the forcing of the divorce (in a case of *moredet me'is 'alay*, or perhaps: in all cases) before [the time which] the law [allows].

The applicability of the final position of the Talmud (exit of a *moredet* from the marriage after a delay of 12 months without financial support) is indeed a matter of dispute between the Rishonim: Rashi applies it only to *me'is 'alay* ; others[741] apply it to both kinds of *moredet*, while yet others (Rambam,[742] Rashbam[743]) take the same view as Rabennu Tam[744] and apply it only to *moredet ba'eynah ley*. The position of Rabbenu Tam and his school appears best reconstructed as follows: the twelve month waiting period does not apply to the *moredet me'is 'alay* : since (on Rabbenu Tam's understanding) she is willing to forego the *ketubbah*, she may be divorced immediately (assuming the husband's willingness).[745] Rather, the twelve month waiting period applies to *ba'eynah ley*, interpreted as the wife who *does* want a divorce, but is not willing to forego the *ketubbah* (and is willing to engage in *meridah* to obtain it). Not only is there no *kefiyah* here: the husband is *not allowed* to divorce his wife during the 12 month waiting period, even if he wants to. The reasons for this may well be twofold: (a) a form of punishment or deterrence for using *meridah* for illegitimate reasons; (b) to give the wife an opportunity to change her mind and forego the *ketubbah* (at which point the husband may then divorce her). After the 12 month waiting period, the husband *may* divorce her (without paying the *ketubbah*) but he still cannot be compelled to do so.[746] The logic of this position is that the discontented wife (*moredet*) may seek a divorce only if she forfeits her *ketubbah* (and to that extent *me'is 'alay* is not regarded as a fully justifiable ground for divorce), and this forfeiture may come about either voluntarily on her part

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738 See further Riskin, *Women and Jewish Divorce* (n.42 above), 94-95, 103-04; ARU 2:30-31, nn.141, 143.

739 But this is not the only interpretation of Rabbenu Tam's position. In *Shiltey HaGibborim*, 27a, A, Sma"g takes Rabbenu Tam's view to be that for the *moredet ba'ena leh* the rule of Rabbotenu (4 weeks' of announcements and warnings, without the 12 month waiting period) applies; the 12 month waiting period is for the *moredet ma'is 'alay*, who must wait 12 months (probably without warnings) and then lose her *ketubbah*. See ARU 9:13-14.

740 Riskin, *Women and Jewish Divorce* (n.42 above), 107, implies that in such a case (for Rabbenu Tam), Amemar rules that we do not force her back into the marriage and that Rabbanan Saborai allow her to go free after twelve months without her *ketubbah.*

741 E.g. Rashba, 64a, s.v. ולענין (in the name of "there is someone who says so" – איכא מאן דאמר); Ritva, 64a, s.v. ומשהינן.

742 *Hilkhot Ishut* 14:8-14, granting divorce without any delay in the case of *me'is 'alay*, but applying Rabbotenu's rule of four weeks of announcements and warnings (and then loss of the *ketubbah*), together with the 12 months of waiting for her *get*, to *moredet ba'eynah leh*. See further ARU 16:36.

743 Mentioned in *Shiltey HaGibborim*, 27a, B.

744 *Tosafot*, 63b, end of s.v. ואינהו.

745 "... but [in the case of one who says:] "He is repulsive to me" there is no delay, since she is willing to forfeit [her rights], and when the husband agrees to the divorce": Riskin, *Women and Jewish Divorce* (n.42 above), 101.

746 See for example Ramban, 63b, s.v. וה"מ דאמרה, in the name of Rabbenu Hanan'el: כלומר אם אמר הבעל אתן לך גט לאלתר ואטול כל נכסיה לא משגחינן ביה, אלא משהינן לה תריסר ירחי שתא אגיטא לה למלך בה. On whether there is here a *ḥiyyuv*, see §4.38, above.

(*me'is 'alay*[747]) or involuntarily (*ba'eynah ley*[748]), the latter through exhaustion of the *ketubbah* by the application of the mishnaic sanctions. If, then, the *moredet* persists through the 12 months (without financial support), her husband may, if he wishes, divorce her without payment of the *ketubbah*. The denial of *kefiyah*, however, is made clear for both cases:

> But if the husband does not wish to divorce his wife, not in this manner, and not in this manner [i.e., neither with nor without alimony], we [the court] should not force him; but let him isolate her (יעגנה לעולם) [i.e., leave her in a status where she may not marry] forever... [749]

Here, Rabbenu Tam appears to use *'iggun* as the ultimate penalty: the husband has the right to treat his wife's disgust — with disgust.[750]

4.36 A different approach is that Rabbenu Tam changed his mind, from rejection (only) of the abolition of the 12-month delay,[751] to complete rejection of *kefiyah* (and some say even *ḥiyyuv*[752]) in cases of *moredet me'is 'alay*. The first (permissive) view, according to which coercion may be applied in cases of *me'is 'alay* (at least after the 12 month waiting period), reflects Rabbenu Tam's earlier opinion. The second (restrictive) view is the one he held later. R. Ovadyah Yosef[753] cites *Responsa Maharibal* III:13 for such a change of mind:

> … this custom, to coerce divorce due to the claim *me'is 'alay*, was the accepted practice in the (Babylonian) academies for 400 years[754] and *even Rabbenu Tam practised it at first*…

R. Abel suggests that Rabbenu Tam's change from a position of unquestioning acceptance towards the Ge'onim (accepting the account of Maharibal) may be related to differing views as to whether the period of the Ge'onim formed a superior "halakhic epoch" with whom later sages agreed not to argue: Rabbenu Tam may have at first held the same view as Ramban, who affirmed that superior status, but later adopted the view of Rambam, who denied it.

4.37 We may note that the account of Maharibal further complicates the issue, since *neither* of the *Sefer Hayashar* texts adopts a position of unquestioning acceptance towards the Ge'onim: even

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747 She is understood by Rabbenu Tam to be saying: "I do not desire him, neither him nor his alimony; rather, I forfeit everything to him."

748 "But we make a rebellious wife wait twelve months for a divorce after the proclamation — perhaps she will change her mind. If she did not change her mind, he divorces her without alimony if he wishes" (Riskin, *Women and Jewish Divorce* (n.42 above), 105), and later (at 105f.) "... if she had forfeited [the alimony] to him in the case of her finding him repulsive, because she thought that her husband was preventing [the divorce] because the alimony he would owe her would be great — even so, we force her [to remain with him] so that her forfeiture will not be valid even if he wishes to divorce her, until an entire year passes. In this way, Jewish women will not be without dignity and respect [hefker]. But after twelve months, if he wishes to divorce [her], he may divorce [her], and he is exempt from paying] alimony."

749 Riskin, *Women and Jewish Divorce* (n.42 above), 105.

750 But this may not be characteristic of Rabbenu Tam's approach as a whole. Reiner (n.22, above), at 302, notes a decision upholding a *get* given by a man who had converted to Christianity, even though the man's name was not properly recorded in the *get.* Reiner interprets the ban on *kefiyah* as related to the *ḥerem* of Rabbenu Tam against questioning another *bet din*'s *get* (at 313), once it had been delivered. He was himself the recipient of appeals against the decisions of the Paris rabbis, and wanted to ensure uniformity of practice in France. Banning *kefiyah* was part of that strategy.

751 Interestingly, the financial aspects of the *taqqanat haGeonim* were not criticised in *Sefer HaYashar*, perhaps because Rabbenu Tam accepted the authority of the Geonim to legislate in that area even against the Talmud. Ironically, the Rambam did reject the geonic financial measures, possibly because he saw no reasonable justification for them; elsewhere, he clearly accepted their changes to *dine mamonot* where he considered them reasonable – for example, in the case of security over of moveables.

752 See §4.38, below.

753 *Yabia' 'Omer* III *'Even Ha'Ezer* 19:15: see ARU 6:11-12 (§6.6).

754 Some sources give 300 years, some give 500 and some 600: see *Yabia' 'Omer* III *'Even Ha'Ezer* 18:6.

the "earlier" text rejects the Geonic abolition of the 12-month waiting period.[755] Indeed, it may well be premature to adopt this view. Israel Ta-Shma has noted that the *Sefer HaYashar* is preserved in an extremely corrupt state, and even after the great labour expended on editing it, still contains many obscure and inexplicable passages. In its present form it comprises excerpts collected in the days of the Rishonim and represents the work of many hands, including that of Rabbenu Tam himself, who repeatedly emended and improved much of it.[756] Nor is this the only tension in the text.[757] Serious text-critical work is clearly needed before we can arrive at conclusions. In halakhic terms, we are faced with a situation of *safeq* not dissimilar to that regarding the talmudic position itself: there, a (perhaps minority) opinion on a point of talmudic interpretation (did Amemar accept *kefiyah* of the husband for the *moredet me'is 'alay*?) is supported by a variant reading in a recently discovered manuscript; here a minority view not following Rabbenu Tam's outright rejection of *kefiyah* for the *moredet me'is 'alay*[758] is supported by a passage within the *Sefer HaYashar* itself which appears to accept such *kefiyah* provided that the original talmudic restrictions upon it are preserved. Indeed, the question may also be posed as to what direct access Rabbenu Tam had to the geonic writings[759] (let alone to the variant talmudic reading).

4.38 Also disputed is the question whether Rabbenu Tam (at least once he turned against the Geonic practice) went even further than rejecting *kefiyah* entirely, and denied that the wife had justifiable grounds for divorce in such circumstances – so that (as later sources would put it), the court should not even order (by *ḥiyyuv*) the husband to issue a *get*. But this fits ill with Rabbenu Tam's own willingness to apply *harḥaqot* in favour of a *moredet me'is 'alay*).[760] Indeed, R. Gertner points out that even if there is not a *mitsvah* to divorce, Rabbenu Tam agrees to *harḥaqot* for *me'is 'alay* because although he is not in the wrong in such a case neither is she![761]

4.39 Nevertheless, Rambam (followed in this respect by contemporary rabbinical courts[762]) regards the financial sacrifice she is willing to make as a sufficient guarantee of her sincerity and of the strength of her feeling that she can no longer tolerate the marriage. Moreover, amongst those who follow Rabbenu Tam, there are influential views favouring a *ḥiyyuv*. Rabbenu Yonah maintains that although the husband cannot be coerced to divorce he is obligated to do so and if he refuses one may refer to him as a sinner.[763] Rema in *Yoreh De'ah* 228:20 regards *me'is 'alay* as creating a *ḥiyyuv get.*[764] The *Noda' Bi-Hudah*[765] quotes the Rema's "obliged to divorce" in *Yoreh De'ah* without raising the apparent contradiction from *'Even Ha'Ezer*, which implies that he too sees no contradiction at all. The Rema would then be following the ruling of Rabbenu Yonah, who says that in a case of *me'is 'alay* although we do not coerce him we tell him that he is commanded to

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755 The issue is sometimes debated in relation to the Christian cultural environment (hostile in principle to divorce) of Rabbenu Tam as against the Islamic environment (with its liberal approach to divorce) of the Geonim: see §4.44, below. This would certainly conflict with Maharibal's account, but also (if less so) with the less restrictive of the two positions attributed to Rabbenu Tam in the *Sefer HaYashar.*

756 I. Ta-Shma, "Tam, Jacob ben Meir", *Enc. Jud.* XV.781.

757 For another relating to the correct categorisation of the talmudic case of the daughter-in-law of R. Zevid (as *ba'eynah leh* or *me'is 'alay*), compare the texts at Riskin, *Women and Jewish Divorce* (n.42 above), 101 and 105. See also ARU 2:32 n.149.

758 See further below, §§4.45, 47-49.

759 Cf. the question raised in relation to Ramban (albeit a few generations later): n.715, above.

760 At ARU 17:160-61, Hadari suggests a correlation between the movement from *kefiyah* to the *harḥaqot* (quoted in n.627, above).

761 ARU 18:70 n.262, citing Gertner, *Kefiyyah BeGet* (n.172, above), 118:1 (pp. 478-79).

762 See ARU 16:191-92, quoting PDR 6/325-353.

763 See *Yabi'a 'Omer*, *ibid*., 18:13; cf. Rema, *Yoreh De'ah* 228:20 (end). He does not mention any requirement of *amatlah* here.

764 See also Shakh, *Yoreh De'ah* 228:20, sub-para. 56. See further ARU 5:18-19 (§12.2.13).

765 Resp. NB I *Yoreh De'ah* no. 68 s.v. *Wekhol*, which simply quotes Rema.

divorce her and if he does not do so there applies to him the saying of our sages: "If anyone transgresses rabbinic law it is permitted to call him a sinner".[766] We find this view also in Me'iri in the name of "some of the sages of the [previous] generations".[767]

4.40 While Rambam, as we have seen (§4.32), also took the Gaonic practice as non-normative, his view that it is proper to follow the Talmud itself led him to the opposite conclusion to that of Rabbenu Tam:

> The woman who refuses her husband sexual relations — she is the one referred to as "the rebellious wife". So we ask her why she is rebelling. If she says [she is rebelling] 'because he is repulsive to me, and I am unwilling voluntarily to engage in sexual relationships with him,' we force him to divorce her immediately, for she is not as a slave (כשבויה) that she should be forced to have intercourse with one who is hateful to her. She must, however, leave with forfeiture of all of her *ketubbah* ...[768]

> האישה שמנעה בעלה מתשמיש המיטה -- היא הנקראת מורדת, ושואלין אותה
> מפני מה מרדה: אם אמרה, מאסתיהו ואיני יכולה להיבעל לו מדעתי,
> כופין אותו להוציא לשעתו, לפי שאינה כשביה שתיבעל לשנוי לה
> ותצא בלא כתובה כלל

We may reasonably read the strong language here as a direct reply to Rabbenu Tam's יעגנה לעולם (§4.35, above).[769]

4.41 Both Rambam and the Gaonim endorse an immediate divorce, backed if necessary by coercion, for a woman claiming *me'is* '*alay*. Rambam, however, was less liberal than the Ge'onim regarding the financial provisions.[770] But there is also an important difference in their reasoning. Rambam's ruling, as Riskin puts it, "is in no way bound up with any historical reasons of adultery, apostasy or dependence upon Gentiles, but is rather a humane consideration of the sensitivities of an unhappy wife."[771]

4.42 Rambam decides the Halakhah in accordance with his independent understanding of the statement of Amemar in the Talmud that [according to the traditional text] such a woman "is not to be forced [to remain married]", and interprets this to mean that the husband must be forced to grant a divorce."[772] Unless Rambam had access to the variant textual tradition of MS Leningrad

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766 R. Ovadyah Yosef, *Yabia' 'Omer*, III, *'Even Ha'Ezer*, 18:13.

767 See *ET* VI, col. 422, at note 968.

768 *Hilkhot Ishut* 14:8, Klein's translation in the Yale Judaica Series translation; cf. Riskin, *Women and Jewish Divorce* (n.42 above), 88 (Heb.), 88f. (Engl.).

769 Despite the fact that Rabbenu Tam's יעגנה לעולם implies that the husband will not treat her (sexually) כשבויה. Nevertheless, in both cases she is rendered *permanently* his dependent.

770 In its immediate context (see *Hilkhot Ishut* 14:13), his statement at *Hilkhot Ishut* 14:14 ("And the Geonim said that in Babylonia they have other customs concerning the *moredet*, but these customs did not spread to the majority of the Jewish people (ברוב ישראל), and many and great people disagree with them in the majority of places (ברוב המקומות.)" appears to refer to the property arrangements. For the criterion of "spread" as applied even to talmudic *gezerot,* see *Yad*, *Mamrim* 2:6. Riskin, *Women and Jewish Divorce* (n.42 above), 91, concludes that the net effect of his cancelling the Gaonic decrees on the one hand, but interpreting the Talmud in terms of the position of Amemar (taken to refer to coerced divorce) on the other, was effectively to equalize the positions of husband and wife: "If the husband finds his wife repulsive he may divorce her even against her will, but must pay her the alimony provided for by the marriage contract. If she finds him repulsive, she may obtain a divorce even against his will, but receives no alimony at all."

771 Riskin, *Women and Jewish Divorce* (n.42 above), 90f. Cf. *Resp. Tsemaḥ Tsedeq* no. 135, cited in ARU 12:5 (§B.VII) from R. Bass.

772 Riskin, *Women and Jewish Divorce* (n.42 above), 91, noting that the incident of R. Zevid in the talmudic *sugya* and the subsequent Sabboraic requirement of a delay of 12 months thus refers, according to Rambam, only to a wife who claims: "I wish [to remain married to] him, but [I wish] to cause him pain". This, he writes (at 175 n.10), is contrary to the interpretation of Rashi (cf. ARU 7:19), Rabbenu Tam, and Alfasi, all of whom interpret the case of R. Zevid as

Firkovich, the most likely explanation of his stance is that it is based on *sevarah:* a free Jewish woman (*pace* Mar Zutra[773]) cannot be forced into marital relations.

4.43 This reasoning, however, did not command universal appeal. Rosh asked:

> ... what kind of reason has he given for coercing the man to divorce [his wife] and to permit a married woman [to someone else]? [Rather,] let her not have sexual relations with [her husband] and let her remain chained all of her days,[774] for, after all, *she* is not commanded to be fruitful and multiply! Because she followed the dictates of her heart, [and] cast her eyes upon another and desired him more than the husband of her youth, do we then fulfill her lust and force the man who loves the wife of his youth to divorce her? Heaven forbid that any judge should judge thus![775]

Rashba moreover, remarked: "This too is a marvel (פלא) in our eyes, because of the proofs we have written [disproving this], and all who came after him disagreed with him."[776]

4.44 Some have argued for a correlation between the basic differences between Rambam and Rabbenu Tam and the external religio-legal environment.[777] The Gaonim had been concerned that women might be tempted either to seek the assistance of Islamic courts or perhaps even to convert to Islam in order to free themselves from their husbands.[778] Such considerations were foreign to Rabbenu Tam, living in a Christian environment where the *moredet* had no possibility of seeking gentile help in order to obtain a divorce, and where, indeed, there was external moral pressure to restrict divorce itself — a factor, as Ze'ev Falk argued many years ago, in the adoption by Rabbenu Gershom of the requirement that (absent specific cause) divorce required the consent of the wife, and could no longer be effected by the husband almost unilaterally.[779] The fact that the *ḥerem* of Rabbenu Gershom was accepted in Ashkenaz but not Sepharad may well also have been a factor in accentuating the divide over the *moredet.* For coercion where the wife claimed *me'is* '*alay* went some way towards balancing the rights of husband and wife, by giving the wife a unilateral right of divorce from her husband, corresponding to the unilateral right which he had to divorce her. In Ashkenaz, however, after the *ḥerem* of Rabbenu Gershom, the husband no longer had such a unilateral right;[780] in the absence of "statutory" cause, divorce had (in principle) to be by consent. Why, then, should the wife have a unilateral right to coerce the husband into giving

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dealing with a case of a woman who claims she finds her husband "repulsive". But the text of Rabbenu Tam is not consistent on this: see n.757, above.

773 Rabbenu Tam also rejects what he takes to be the position of Mar Zutra in the Talmud (Riskin, *Women and Jewish Divorce* (n.42 above), 104f.): "But if she said "He is repulsive to me" — we do not force her [to remain married]. That is to say: if she said, "I do not desire him, neither him nor his alimony; rather, I forfeit everything to him," this is not considered a forfeiture in error, and we do not force her to remain [in the marriage in the hope that] she will change her mind. If the husband wishes to divorce her without alimony he may divorce her, and he has no alimony obligation, for she has forfeited [it] to him; it is a complete forfeiture. Mar Zutra says: we force her; that is, we require her to remain, and perhaps she will change her mind, as with the case of "I desire him and I am causing him pain," for it is one case, and they are both considered rebellious [wives]; for since she forfeits on account of rebellion, it is not a complete forfeit, and if the husband wishes to divorce her, he gives her alimony. However, this is not [the law]; rather, as we explained before, [the woman who says] "He is repulsive to me" is not a rebellious wife."

774 Cf. יעגנה לעולם in the passage from Rabbenu Tam quoted in §4.38, above.

775 *Rosh*, *Resp.* 43:8, quoted by Riskin, *Women and Jewish Divorce* (n.42 above), 125f. (Heb.), 127f. (Engl.).

776 *Rashba*, *Resp.* 572, 573 in Bnei Brak ed., 1948, Pt.1, p.215, quoted by Riskin, *Women and Jewish Divorce* (n.42 above), 114 (Heb.), 116 (Engl., here slightly amended).

777 Riskin, *Women and Jewish Divorce* (n.42 above), 110f.; Jackson, *Moredet* (n.639, above), 119; E. Westreich (n.285, above), 218. See also ARU 8:24-25 (§3.6.1-2).

778 See n.680, above.

779 Z.W. Falk, *Jewish Matrimonial Law in the Middle Ages* (Oxford: Clarendon Press, 1966), ch.IV.

780 The extent to which this equality in principle was compromised by (a) the capacity to constitute the court as agent to receive a *get* on the wife's behalf, and (b) the *heter me'ah rabbanim*, are beyond the scope of this paper. See also §2.42 above, on the status of a *get* given in breach of the *ḥerem* of Rabbenu Gershom.

her a *get*?

4.45 Recent research, moreover, casts some doubt over the dominance of Rabbenu Tam's view, either in his own generation or later.[781] In geographical terms, we may note evidence that the geonic practice appears to have spread by the time of Rabbenu Tam (and on his own account) as far as Paris.[782] And in *Tosafot Ketubbot* 63b, s.v. *Aval*, we find a systematic reply to almost every argument against those who apply coercion in cases of *moredet me'is* '*alay* – except the argument that we do not find any mention of coercion in the text of the Talmud itself.[783] And if the variant reading of Amemar's view had been available to the Tosafists, that too might have admitted of a reply (see Appendix B, below).

4.46 However, Rabbenu Tam's rejection of both the Gaonic position and Rashi's interpretation of the talmudic *sugya* ultimately prevailed.[784] Indeed, Rabbenu Tam and his followers denied that the conclusion of the *sugya* (ומשהינן לה תריסר ירחי שתא אגיתא, והנך תריסר ירחי שתא לית לה מזוני מבעל) was to be interpreted as coercion (if indeed it referred to the *moredet me'is* '*alay* at all: §4.35, above).

4.47 Even so, the view of Rambam was not lost. On their arrival in Algiers following the edicts of 1391, Ribash[785] and Rashbetz (who followed Rabbenu Tam) encountered various communities which had persevered with Rambam's ruling.[786] Rashba had allowed members of these communities to act according to their customs, despite his personal opinion that followed

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781 Riskin, *Women and Jewish Divorce* (n.42 above), 108, 176 n.25, in relation to Rabbenu Tam's denial of "authority to legislate other solutions beyond the Amoraic period of Ravina and R. Ashi", in the context of the *moredet.* Dr. Yuval Sinai has drawn our attention also to the following sources: Maharitaz (16th century Sefat), *Shulḥan Arukh, 'Even Ha'Ezer* 72.2, writes that he heard that his teacher, R. Moshe Besodia, had ruled according to the Rambam on the issue of *me'is* '*alay "*in these places, which are the Rambam's regions", and that other contemporaneous halakhic authorities had concurred with the ruling: cf. R. Masuud Alfasi (*Mashka DeRevuta,* pt.1, *'Even Ha'Ezer,* 154; *Darkhei No'am* (17th century, Egypt)*, 'Even Ha'Ezer*, 15, who wrote in the name of Maharikash and Ridbaz that "Egypt and the surrounding areas and in Yemen and the West are regions of Rambam. [i.e. they adhere to his ruling]"; *Resp. Mekor Barukh* (16th century, Saloniki), s.17, wrote that if the halakhic authorities of a city deem that the woman's claims are well grounded and that his intention is to "chain her" and the custom is to coerce in cases of *ma'is* '*alay*, it is appropriate for them to rely on their custom [Cf. Rosh, *Resp.* 43:8, quoted in §1.23, above]. Echoes of these rulings are even found in the 19th century in the Land of Israel: *Resp. Ma'aseh Ish*, *'Even Ha'Ezer*, 11.

782 *Sefer Hayashar*, per Riskin, *Women and Jewish Divorce* (n.42 above), 98 (Heb.), 101f. (Engl.): "And regarding that which our Rabbis of Paris wrote: We hereby agree to whatever you will do to force [this] man — with whatever means of coercion lie at your disposal — until he says "I wish [to grant this divorce]" — this too is not proper in my eyes (perhaps it is an error on my part), for we do not find that we force him to divorce [his wife], as R. Ḥananel decided [as quoted] above, and since he states at the end of [his commentary to] Gittin: "[As to the case of an] Israelite's coerced divorce, [if it is arranged] according to law, it is valid; if not according to law, it is invalid and [prevents the woman's future offspring by another husband from marrying native-born Jews]." But R. Yosef in *Yabia' 'Omer* III *'Even Ha'Ezer* 18:8 quotes R. Ḥananel as apparently accepting *kefiyah.* See further Reiner (22, above), at 301-02.

783 On the argument of R. Herzog, *Responsa Hekhal Yitsḥaq*, *'Even Ha'Ezer* I 2:3, from Rambam's commentary to the Mishnah (not known to the Tosafists) that the mishnaic cases of *kefiyah* all involve payment of the *ketubbah*, unlike coercion in *me'is 'alay*, see Goldberg and Villa (n.687, above), 286-87; ARU 6:12 (§§6.8).

784 Already in the late 12th century *Sefer HaMaor*, R. Zeraḥya Ha-Levi from Provence had ruled against application of the geonic measures: see §4.29, above. See later *Shulḥan Arukh*, *'Even Ha'Ezer* 77:2, *Ḥelqat Meḥoqeq* 5, *Bet Shmuel* 7.

785 Y. Sinai, "Coercion of a *Get* as a Solution for the Problem of *Agunah*", in *The Manchester Conference Volume,* ed. L. Moscovitz (Deborah Charles Publications, 2010; Jewish Law Association Studies XX), forthcoming, cites the custom of Talmes (capital of Algiers) as attested by *Resp. Rivash* (end of s.104).

786 See Elimelech Westreich, "Historical Landmarks in the Tradition of Moroccan Jewish Family Law: The Case of Levirate Marriages", in *Studies in Mediaeval Halakhah in Honor of Stephen M. Passamaneck*, ed. A. Gray and B.S. Jackson (Liverpool: Deborah Charles Publications, 2007; Jewish Law Association Studies XVII), 304-05.

Rabbenu Tam.[787] At the beginning of the 14th century Rosh had found it necessary sharply to attack (but without immediate success) the sages of Cordoba, who still followed Rambam in applying coercion in cases of *me'is 'alay*.[788] In a responsum by Ran in the second half of the 14th century we hear of a local community in Spain which enacted an ordinance whereby all rulings should conform to the Rambam, including those involving rebellious women.[789] In a responsum (II:8) concerning a case where a woman's life was made a misery by a cantankerous and miserly husband (who would quarrel with her endlessly and starve her), Rashbetz ruled that the husband could be compelled to divorce, condemning the husband's behaviour in no uncertain terms,[790] and addressing those who denied the present generation the authority to coerce with, *inter alia*,[791] the words "It is possible that they did not say that about cases [involving] great suffering like this and how very much more so if he starves her. If she had been their [daughter] they would not have spoken so".[792] Indeed, "the *dayan* who forces her to return to her husband when she rebels, like the law of the Arabs, is to be excommunicated..."[793] Two generations later, Tashbetz's grandson still found it necessary to attack the local traditions in Algeria that followed the position of the Rambam.[794] Professor Westreich concludes that there was a real basis in the Castilian tradition for the creation of a law that coerced the husband to divorce his wife without relying upon a specific talmudic ground.[795] He adds that in the case of *yibbum,* there was a willingness to continue using *me'is 'alay* as an additional reason (*snif*), appended to another.[796] Even Rema in *'Even Ha'Ezer* 77:3 refers without criticism to places that practise coercion for *me'is 'alay*. [797]

4.48 R. Avraham Ibn Tawwa'ah (Rashbets's grandson) argues,[798] on the basis of *responsa* of Rashbets,[799] that the latter in practice agrees entirely with the ruling of the Rosh (*Resp.* 43:6) that if any *bet din* — even in a place where it is not the custom to follow the Rambam regarding coerced divorce in the case of the *moredet* — relied on the Rambam and coerced a *get* in a case of *me'is 'alay*, though the *bet din* acted incorrectly, the woman may, on the basis of that *get*, remarry (*lekhatḥillah*, but on the basis of a *get* which is valid *bedi'avad*). In fact, there is a difference between Rosh and Rashbets. The Rosh says that he would, *bedi'avad*, accept a coerced *get* in a case of *me'is 'alay*. This clearly means that he would allow the divorcee to remarry *lekhatḥillah*. Rashbets, however, is stricter in that he does not permit her remarriage *lekhatḥillah*[800] but is only

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787 See Westreich (n.285, above), 214-215.

788 See Westreich (n.786, above), 305.

789 See Westreich (n.285, above), 216.

790 "... it is proper for the *bet din* to rebuke him and to apply to him this [biblical] verse: "Have you murdered and also taken possession?" (*I Kings* 21:19), for this [marriage situation] is worse than death, for he is 'like a lion that treads and eats' (*Ta'anit* 8a) …". See further ARU 12:5, quoting R. David Bass's internet article, n.49, above.

791 He argues that this may be derived by *qol waḥomer* from the *ba'al polypus* in the Mishnah (*Ketubbot* 77a) especially as we find a *qol waḥomer* similar to this in the *Yerushalmi* (*Ketubbot* 5:7). He also cites *Responsa Rashba* I 693 in support.

792 See further ARU 12:5 (§VIII); ARU 18:74, both quoting the account of Bass (n.49, above).

793 For even those who say we cannot coerce the husband to divorce his wife who claims *me'is 'alay* agree that we cannot coerce her into compliance. See *Ketubbot* 63b for the dispute of Amemar and Mar Zutra. The *halakhah* follows Amemar – see *'Even Ha'Ezer* 77:2,3.

794 See Westreich (n.285, above), 217.

795 See Westreich (n.786, above), 306.

796 See Westreich (n.786, above), 306, cf. at 319-20, citing *Resp. Maharik*, ch.102 and Maran himself: *Resp. Beit Yosef*, *Hilkhot Yibbum veḥalitsah*, ch.2.

797 See ARU 5:18-19 (§12.2.13).

798 *Ḥut haMeshullash, HaTur HaShelishi* no.35, p.11b col.1, s.v. *umikol maqom*.

799 I:4, II:69 & 180. See further ARU 6:11-12 (§6.7 and n.39). For evidence in Tashbetz of a community in Spain at the end of the 14th century which still enacted an ordinance in the spirit of Rambam, see Westreich (n.285, above), 216.

800 That he is disagreeing with the Rosh rather than interpreting him is made clear by R. Avraham Ibn Tawwa'ah in *Ḥut haMeshullash* (printed at the end of *Responsa Tashbets*), *HaTur haShelishi* no. 35, p. 11b col. 2, lines 42-44, photostat of ed. Lemberg 1891, Tel Aviv, n.d.

willing to say that if she has already remarried she may remain with her new husband.[801]

4.49 Indeed, R. Ovadyah Yosef records the tradition that Maran saw only *Tashbets* I, so that if there is any contradiction in the other volumes of Tashbets to the rulings of the *Shulḥan* ‘*Arukh*, we may presume that R. Karo would have retracted, even if this meant replacing stringent rulings with lenient ones and even in cases of *gittin* and *qiddushin*.[802] On this basis R. Abel has argued that had R. Karo seen *Tashbets* II:69 and II:180 and the arguments of Ibn Tawwa’ah, he would have accepted the position of the Rosh — and the final position of Rashbets — as being that, though a *get* must not be coerced in cases of *me’is* ‘*alay*, if it was coerced the woman may remarry.[803] In effect, a *get me‘useh* is thus rendered valid *bedi’avad*.

4.50 This argument has a further possible consequence. Since in times of urgency (*she‘at hadeḥaq*) we may act *lekhatḥillah* in a manner which, in normal circumstances, is considered legal only *bedi’avad*, it follows that if the contemporary problem of ‘*iggun* constitutes a *she‘at hadeḥaq* (which seems highly likely: §2.38), we may nowadays permit coercion of a *get* in accordance with the Rambam even *lekhatḥillah*.[804]

4.51 In *Bet Yosef*,[805] R. Yosef Karo cites the ruling of Rashbets[806] (but in the name of Rashbash,[807] the son of Rashbets). Thus R. Karo’s ruling would be that in a case of *me’is* ‘*alay* [where the *get* has been obtained through coercion], the woman should not be allowed to remarry but if she has already remarried she need not leave [the marriage].[808]

4.52 As noted above (§1.31), there is a wide range of situations where a claim of *me’is* ‘*alay* may be made, including both faults and defects which are recognised as independent grounds for divorce and (mere, but genuine) “disgust”. In the past, there has been a fear that the plea may conceal a preference for a new partner (*notenet eynehah beaḥer*); today, there is equally a fear that the plea may be used as a formality concealing a request for “no fault divorce”, even where the circumstances do not amount to “irretrievable breakdown”. Such concerns with the basic grounds for divorce are already apparent in the literature of the Rishonim, in particular in the conflict between Rabbenu Tam and Rambam, most notably between Rabbenu Tam’s willingness to penalise a *moredet me‘is* ‘*alay* with יעגנה לעולם and Rambam’s unwillingness to have her treated כשבויה (§4.40, above). It is also evident in Rabbenu Tam’s own apparent ambivalence as to whether a *moredet me‘is* ‘*alay* should be punished or given the benefit of the *harḥaqot*.

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801 Goldberg and Villa (n.687, above), 284, quote *Tashbets* II 256: “However, this [rejection of the ruling of the Rambam] is only *ab initio* but if it occurred [that a *get* was coerced in a case of *me’is ‘alay*] in any of the places that conduct themselves according to his [the Rambam’s] works *zal*, the Rosh *zal* has written that we do not reverse the situation. I say that applies if she has already remarried i.e. she need not leave but it is difficult to permit her to remarry *ab initio*. It seems correct to me to argue for a legal ruling that [in a case of *me’is ‘alay* where the *get* has been obtained through coercion] the ruling is the same for all places: she shall not be allowed to remarry but if she has already remarried she need not leave [the marriage].” See further ARU 6:11 (§6.7).

802 *Resp. Yabia‘ ’Omer*, X, *Ḥoshen Mishpat* 1, s.v. *Teshuvah*.

803 See further ARU 6:12 (§6.7).

804 See further ARU 5:17-19 (§§12.2.12-14); ARU 6:10-12 (§§6.4, 6.6, 6.7, 6.8); ARU 7:5-6 (§III.15); ARU 7:23 (§V.7); ARU 8:22-24 (§3.5); ARU 9:9-14; ARU:15 ss.3a, 4, 5.

805 *’Even Ha‘Ezer* 79 s.v. *Umah shekatav wekhen hi*’, at the end.

806 II 256, quoted in n.801, above.

807 The second and third volumes of *Tashbets* were not seen by R. Karo.

808 Thus, in effect, in a case of *me’is* ‘*alay* a *get me’useh* is accepted *bedi’avad*: see further §4.73, below. However, in *Darkey Mosheh* there the Rema opines that she should not even be allowed to remain in the marriage.

4.53 It is this conflict which appears to have generated a demand for *amatlah*[809] in cases of *me'is 'alay*,[810] at least where *kefiyah* is sought.[811] This is not found amongst the Ge'onim[812] and early Rishonim[813] who accepted coercion for the *moredet*, including the Rif,[814] Rabbenu Gershom,[815] Rashi,[816] Rambam,[817] and Rashbam[818] all rule that the mere claim *me'is 'alay* is sufficient to generate *kefiyah*.[819] Against this, Rabbenu Tam appears to make *amatlah* a condition for application of the *ḥarḥaqot*[820] and holds that no *kefiyah* is justified even where there is an *amatlah mevoreret*.[821] We also encounter *amatlah* in Tosafot[822] and Maharam.[823]

4.54 This is hardly objectionable if it amounts merely to a requirement that, in appropriate cases, the woman is required to corroborate the sincerity of her claim that "he is repugnant to me". But we have to ask what kind of evidence is needed to demonstrate such sincerity. Is the required *amatlah* purely *evidentiary* (the *bet din* requires independent evidence that she does indeed find him repulsive) or *substantive* (there is a list of further grounds, one of which she must prove, for her finding him repulsive, e.g. domestic violence)? If the latter, then subjective disgust is no longer sufficient grounds for divorce; some other matter, amounting to a form of fault, must also be proved. But it is difficult here to identify any formal halakhic rule; the evidence of the *pisqei din rabbaniyim* suggests that the *batei din* treat this as a matter of practice.[824]

4.55 *Amatlah mevoreret* is sometimes taken as a higher standard than (plain) *amatlah* and appears to be

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809 On the nature of *amatlah* as rebutting presumptions or inferences raised by previous acts or conduct, see *Tosafot Ket*. 22b, where the woman is believed if she gives *amatlah* when "she retracts her words [of *temeia' ani*] and says I'm clean". Cf. PDR 9/74-93, discussed at ARU 16:191. See also ARU 16:184-85.

810 On *amatlah* in the context of a woman confessing to adultery (*teme'ah ani*), see *Encyclopedia Talmudit*, volume 2, p. 53, column 1, quoted at ARU 16:189.

811 Rema, *Yoreh De'ah* 228:20, appears to accept *amatlah* as the basis for a *ḥiyyuv* in *me'is 'alay*: see ARU 5:18 (§12.2.13). The question discussed by Rema is that of a couple who had sworn to marry each other and she requests annulment of her oath (*hatarah*) on the basis that she has discovered faults in him to the extent that he has become repulsive to her. If she produces good evidence of his unacceptable nature (*amatlah*), the *bet din* may annul her oath even without informing him. Rema concludes that even if she were married to him and says that she cannot stand him, he is obliged to divorce her; how much more so may she be released from an oath to marry him.

812 See sources discussed in §§4.17-29, above.

813 See sources discussed in §§4.33, above.

814 As shown by the fact that he does not criticise Rambam in his *hasagot* – an accepted argument amongst the *posqim*.

815 For the texts, see E. Westreich (n.285, above), 212; Grossman (n.653, above), 242.

816 ARU 9, esp. pp.1-3.

817 *Hilkhot Ishut* 14:10-15. See further ARU 14.

818 See E. Westreich (n.285, above), 211; A. Grossman, *Ḥassidot Umordot* (Jerusalem: Merkaz Zalman Shazar, 2003), 435-36. See further ARU 14.

819 See, *inter alia*, R. Avraham Ibn Tawwa'a in *Tashbets* IV (*Ḥut HaMeshullash*) *HaTur HaShelishi* number 35, s.v. *HaDa'at HaSheni* and s.v. *HaDa'at HaRevi'i*.

820 See R. Gertner, *Kefiyyah BeGet* (n.172, above), 118:1 = p. 478.

821 R. Avraham Ibn Tawwa'a (n.819, above) attributes this position also to Ramban, Rashba, Rosh and Ran. See, however, §4.55, below.

822 Though not directly in the context of *me'is 'alay*: the nearest case is *Tosafot* on *Ket*. 64a (rejection of the brother-in-law by a *yevamah*); see also *Tos. Yeb*. 39b, *Yeb*. 118a, *Gitt*. 99a and n.809, above (on withdrawal of a plea of *temei'ah ani*). *Tosafot Ketubbot*, 63b, s.v. *Aval* (see Appendix B, below), responds to Rabbenu Tam (who sought to prove from *Gittin* 49b that we do not coerce in cases of *me'is 'alay*) with the view that a wife may claim *me'is 'alay* if there are *raglayim ladavar*. On the relationship between *raglayim ladavar* and *amatlah* in the context of a woman confessing to adultery (*temei'ah ani*), see *Encyclopedia Talmudit*, volume 2, p. 53, column 1, quoted at ARU 16:189.

823 See R. Avraham Ibn Tawwa'a (n.819, above). Cf. R. Ovadyah Yosef, *Yabia' 'Omer* III *'Even Ha'Ezer* 18:2 and 18:3 (end), though R. Yosef has not yet said that we may rely on that alone (except for Yemenites). On Maharam's attitudes, see n.691, above.

824 See further §4.55, below.

used primarily in cases of *me'is 'alay*.[825] Rav S.-Y. Cohen notes that where there is *amatlah mevoreret*, more *posqim* agree that we may coerce the *get*,[826] and it appears also in *Shulḥan Arukh*, *'Even Ha'Ezer* 77:3.[827] *Amatlah mevureret* is not well defined in halakhic sources, thus leaving it up to the discretion of *batei din* whether they accept the evidence a woman presents to them or not. However, *Tur 'Even Ha'Ezer* 77 quotes Maharam Rothenburg for the view that a *moredet me'is 'alay* would either have to give proof showing why he was not acceptable to her (apparently, the "subjective" ground[828]), or bring proof that he had strayed or had a disease.[829] Another objective ground for *amatlah mevureret* is found in Maharam Alshich 11, who discusses the case of a *yevamah* who falls to a young *yabam*, and writes that when she claims "he is young and ignorant and he cannot support me, yet he does not want to perform *ḥalitsah*" that is considered a great *amatlah* and he should be forced to perform *ḥalitsah*.

F. The Aḥaronim: *kefiyah* for the *moredet me'is 'alay*

4.56 Issues relating to *kefiyah* continue to be discussed by the Aḥaronim, and in the decisions of rabbinical courts in Israel. In this section we review their analyses of issues of authority (§§4.57-62), the criteria for divorce implicit in their approaches (§§4.63-67), and the different forms of coercion which they consider (§§4.68-73).

4.57 It is commonly argued that most *posqim* do not allow *kefiyah* in cases of *meis 'alay*.[830] Indeed, R. Shemuel Amar of Morocco (d. 5649/1889) ruled[831] (against a number of the Rabbis and Sages of Fez) that a *get* cannot be coerced even in a case where the husband had attempted to murder his wife, on the grounds that the talmudic list of circumstances justifying *kefiyah* is closed. Indeed, R. Shemuel directs his readers to an earlier *poseq* who wrote that even if he pursues her with a knife in order to stab her, we cannot even say that he is *obliged* to divorce her.[832] R. Bass also cites R. Shabbetai Katz, the Shakh, who writes in *Gevurat 'Anashim*: "In any case where there is a possibility to explain a halakhic source leniently or stringently one must adopt *the strict interpretation which would exclude compelled divorce* so as to avoid the danger of a coerced *get* which would make the woman's children from another man who is not her husband into *mamzerim*."[833] However, this is far from a universal view. In recent, unpublished research, Dr. Yuval Sinai cites responsa of the Aḥaronim permitting coercion written *after* the dissemination of the *Shulḥan Arukh*,[834] despite the rejection there of Rambam's position.[835]

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825 ARU 16:191-92.

826 See Rabbi S.-Y. Cohen, "*Kefiyyat haget*" (n.14, above), 197-198 (citing *inter alia Tashbetz*, *Siman* 8, where the different levels of *amatlah* are discussed). R. Cohen mentions also *Yabia' 'Omer*, 3, *'Even Ha'Ezer* 18, arguing that where the *amatlah* is "visible" (*geluyah*) and "publicized" (*mefursemet*), the husband is coerced to give a *get*.

827 See further ARU 16:206.

828 We are informed by a leading *dayan* that even *amatlah mevoreret* does not require objective evidence (e.g. abuse etc.), but only evidence that the repulsion is real, and not an excuse for any other motive (including financial).

829 ARU 16:192-93.

830 R. David Bass, "*'Al Gerushin wa'Aginut lefi Nuqudat Mabat 'Ortodoqsit*" (n.49, above).

831 *Responsa Devar Shemuel* 23.

832 ARU 12:4/ARU 18:72, this latter view being derived from the Rosh, *Responsa*, *Kelal* 43:3, discussed in n.725 above. On modern decisions of the Rabbinical Courts in Israel, see now Batya Kahana-Dror, "Violence is not Grounds for Divorce!", *Conversations* 5 (2009), 91-104, available at http://www.jewishideas.org/articles/violence-not-grounds-divorce.

833 ARU 12:4 (§IV)/ARU 18:73. See, however, the argument against such automatic endorsement of *ḥumrot* in §§2.5-9, above.

834 See n.781, above.

835 *Shulḥan Arukh, Ha'Ezer,* 72.2.

4.58 Of particular interest in this context is the manner in which the Ḥatam Sofer[836] addresses Rambam's rationale for *kefiyah*.[837] The particular case was one where the husband had become epileptic). Here, the Ḥatam Sofer argued, there was a dispute amongst the *posqim* as to whether coercion could be applied, the Rosh saying that it could and the Mordekhai[838] that it could not. The *Ḥatam Sofer* then reasoned:

> Even if it is clear in Heaven that the *halakhah* is like the Rosh, since there is the opposing opinion of the *Mordekhai*, and we do not have anyone who can decide between them, if one forced him to divorce she is still a definitely married woman in Biblical Law and not a questionable one. The reason I say this is that a coerced *get*, even when it is enforced according to the Law, and he says 'I agree' the *get* is nevertheless only fit for the reason that the sages gave ... it is presumably agreeable to him to fulfil the words of the Sages who said one should compel him to divorce as the Rambam beautifully explained ... [but] this is only when it is clear to the husband that the coercion is in accordance with the Law according to every authority [for] if so it is a *mitsvah* [in his situation] to heed the words of the Sages. However, in this case the husband will say 'who says it is a *mitsvah* to heed the words of the Rosh? Perhaps it is a *mitsvah* to heed the words of the *Mordekhai*!' So if his statement 'I agree' was coerced and did not issue from his heart[839] there does not seem to be even a potential position[840] to coerce a divorce.

We may note that such an argument would exclude the application of Rambam's reasoning in any case where there is a *maḥloqet posqim*. Moreover, the natural meaning of Rambam is surely not that a person may assert his own halakhic opinion in the face of the *bet din*,[841] but rather that his true intention (disciplined if necessary by a measure of *kefiyah*[842]) is precisely to follow the instructions of the *bet din*. R. Shear-Yashuv Cohen notes that though the Ḥatam Sofer maintains that coercion may be used only when it is unanimously agreed, later Aḥaronim did not accept this in practice,[843] and that even opponents of *kefiyah*, such as Rabbi S.Z. Auerbach, agreed that it may be used in cases of emergency. We may add that although the Ḥatam Sofer maintains that coercion may be used only when it is unanimously agreed, his grandson in *Resp. Ḥatan Sofer* (no.59) limits this stringency to cases of equally balanced division of opinion, such as a conflict between the Rosh and the Mordekhai, where it is not possible to reach a clear halakhic ruling.[844] Where, however, there is a clear majority (*rov minyan* and *rov binyan*) favouring coercion, we may apply it in spite of the minority view, for even the minority must accept the ruling of the majority.[845]

4.59 Modern support for *kefiyah* does not rest only on such factors. Rabbi Yitsḥaq Herzog[846] cites manuscript responsa (nos. 17 and 47) of Rabbenu Yeshayah of Trani (end of the 13th cent.), in which the latter rules in accordance with the Ge'onim regarding coercion of the divorce of a

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836 *Responsa Ḥatam Sofer*, III *'Even Ha'Ezer* I No. 116.

837 ARU 12:4-5 (§VI); ARU 18:73.

838 But the Mordekhai at least acknowledges the opinions favouring coercion: see §4.62, below (as cited by R. Herzog).

839 Because according to the *Mordekhai* he was right.

840 Lit. an 'I would have said' (*hawa' 'amena'*).

841 Hadari, ARU 17:141, does take this to be the implication, though noting that there are numerous problems with this reading. She notes that the *mitsvah lishmo'a b'divre ḥakhamim* is here transformed from a commandment to obey the *bet din* by dint of the fact that they are the representatives of the Jewish, Torah-observant community into a commandment basically to obey the halakhah.

842 ARU 17:108-10, 140.

843 "*Kefiyyat haget*" (n.14, above), 200-201, citing R. Spector, R. Herzog and Ḥazon Ish.

844 As in the case of the *nikhpeh*, where the Rosh says *kofin* and the Moredekhai says *'eyn kofin* and we do not have any authority great enough to decide between them. We may note that in cases like *nikhpeh* few if any would allow coercion. The *ḥiddush* of Ḥatam Sofer is thus not the prohibition of the coercion; his *ḥiddush* is that whereas others may regard the *get* coerced under such circumstances as only *safeq batel* (because maybe the Halakhah follows Rosh) Ḥatam Sofer argues that it is definitely *batel* (because there is no possible presumption of inner acquiescence).

845 Whether by biblical or rabbinic decree: see ARU 7:1 (§§I.2 and I.3).

846 *Resp. Heikhal Yitsḥaq*, *'Even Ha'Ezer*, part 1, no.2. See ARU 6:10 (§6.5).

moredet, and in which he argues that the yeshivot of the Ge'onim are the replacement of the Great Sanhedrin, so that we must apply to their enactments the maxim *mitsvah lishmo'a divrei ḥakhamim*. Hence, R. Herzog argues, any *get* coerced in accordance with their enactment is valid. He observes that those who forbid coerced divorce for a *moredet* do not refer to this ruling of Rabbenu Yeshayah, which indicates that they did not know of it; it is therefore possible that had they become aware of it many of them would have withdrawn their ruling. Indeed, he writes:[847] "Rabbenu Yeshayah, as is well known, is a great pillar of the Halakhah of the stature of Rambam and Tosafot." Here again we have new manuscript evidence which falls within Rema's qualification of *hilketa kebatra'ei,*[848] and may argue that had Maran been aware of this, he might have adopted a different ruling in the *Shulḥan Arukh*, so that the position of those Aḥaronim who follow Rambam would be further strengthened.

4.60 In *Tzitz Eliezer* 4.21, Dayan Waldenberg asserts that *dayanim* are obliged to risk their souls to save the wives trapped in marriages they cannot bear, and rules at the end that a case of *me'is 'alai* with *amatlah mevoreret* can be subjected to coercion by means of *bereirah*: the wife is free to live apart from him and he is obliged to support her until he chooses to divorce. R. Waldenberg calls for this to be made law in all *batey din* in Israel. In a letter to R. Elyashiv published in *Tzitz Eliezer* 5.26, he defends this call for the re-introduction of coercion in cases of *me'is 'alay*. He points out[849] that the *Mordekhai* records that a number of the *Ge'onim* and Rabbenu Ḥanan'el maintain, like the Rambam and Rashbam, that in a case of *me'is 'alay* we coerce him to divorce her according to the law of the Talmud. So maintains *Tosefot Rid* in the name of Rav Sherira Ga'on — that according to the law of the Talmud after 12 months we force the husband to divorce her, the enactment of the *Sabora'im* [referring here to the initial enactment of the Ge'onim] being that where coercion is required it is applied immediately. A careful examination of the wording of the *Tosefot Rid* there makes it clear, Dayan Waldenberg maintains, that he, too, agrees to this.

4.61 Dayan Waldenberg also cites later authorities. At (ד) he points to the Rema in *'Even Ha'Ezer* 77:3 where reference is made to places where the custom is to coerce in cases of *me'is 'alay*, which proves that Rema has not excluded this opinion from the Halakhah. He also notes that for Rema, even where there is no such custom, the husband in cases of *me'is 'alay* is *obliged* (thus, by a *ḥiyyuv*) to divorce, – an opinion apparently endorsed by the Shakh there and in *Noda' Bi-Huda*.[850] Dayan Waldenberg concludes:

> Therefore, according to the poverty of my understanding, the words of Mahara' Tawwa'ah in *Ḥut HaMeshulash* may be relied on. He writes that even according to the opinion that one must not coerce, if the hour requires compulsion, let them coerce, for a judge must be guided by the circumstances confronting him — so long as the judge's intention is for the sake of Heaven and he investigates the matter as is proper.
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> As mentioned in my book there, I proposed that the final decision in this matter should be through a general agreement of all the rabbinic courts in the land so that we should not find ourselves divided into splinter groups in so fundamental an area of the Halakhah.

4.62 It has recently been claimed that "Rabbi Ovadyah Yosef is prepared to rule in favour of *get*-coercion when the wife claims *me'is 'alay*."[851] The passage quoted, however, while perfectly accurate, is misleading in that it does not represent R. Yosef's own final ruling. He is building up the argument for coercion but ultimately uses it, in this particular case, only as *part* of the solution, which amounts to a combination of many doubts. R. Yosef has not as yet said that

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847 Later in the responsum, s.v. *WeRabbenu Yeshayah*.

848 Cf. §§2.32, 4.9, above.

849 End of (א), s.v. *we'a'irenu*.

850 See §4.39 and ARU 5:17-18 (§§12.2.12) for the citations. See also Riskin, "*Hafka'at Kiddushin*..." (n.17, above), 6-7.

851 Goldberg and Villa (n.687, above), 290 (at note 607 in the main text), quoting from *Yabia' 'Omer* (III *'Even Ha'Ezer* 18). See ARU 6:12-13 (§6.9).

coercion may be applied in a case of *me'is 'alay* where there is no other argument for leniency. Furthermore, this particular responsum (which fills numbers 18, 19 and 20) deals with a Yemenite couple and, as R. Yosef reminds us, in Yemen the Rambam's rulings were accepted as the final Halakhah. Even so, R. Yosef points to many other reasons to employ coercion in this case. It may well be, however, that he would find a way of employing coercion should a situation of *me'is 'alay* arise where no other reason for leniency was present even if the case involved Ashkenazim or Sefaradim (rather than Yemenites), as indeed Rav Herzog (§4.59, above) and Dayan Waldenberg (§§4.60-61, above) do.

4.63 The sources on *kefiyah* in cases of *moredet me'is 'alay* cast important light on the limits of the grounds for divorce – and the (less discussed, but equally important) grounds for the husband's refusal. In this latter context, attention may be drawn to the following ruling of Rabbenu Yeroḥam,[852] that

> If she says, 'I do not want him. Let him give me *get* and *ketubbah*' and he says, 'I do not want you but I do not want to give a *get*', then after 1 year we force him to divorce but she loses the additions [to the *ketubbah*].

A clear distinction is here made between the husband's will to terminate the marriage, and his will to proceed with the procedure for such termination. In these circumstances, the recalcitrant husband's will is clearly regarded as illegitimate[853] and thus capable of being "corrected" by *kefiyah.* Indeed, R. Feinstein has argued that if a husband is willing to divorce his wife, but wants to retain the *get* as a bargaining chip, then even if he is forced to give up what he wanted to achieve by means of the *get*, his willingness to *divorce* renders the *get* valid (at least *bedi'avad*).[854] While Rabbenu Yeroḥam does not specify the reasons why the husband here does not want to give a *get*, R. Feinstein is specific in arguing that if the husband wants to retain the *get* as a bargaining chip, his willingness to *divorce* renders the coerced *get* valid and he may be forced to give up what he wanted to achieve by means of it. In short, the *get* is valid; it is only the condition the husband seeks to impose on it which is not (parallel to the rule applicable to some conditions in *qiddushin*[855]). Indeed, R. Feinstein states:

> Thus it turns out that the divorce itself he really want[ed] of his own accord, [the problem is] merely that he wanted to obtain by means of the divorce some other thing … and in this case, even if we should say that the settlement constituted real coercion, there was no coercion of the will to divorce, rather [simply coercion that] the divorce would not be a tool with which to obtain something from [the wife], about which there is good reason [to argue] that this is not considered coercion to invalidate the *get* …[856]

Similarly, Rav S.-Y. Cohen has also proposed (*lema'aseh*) that if a *bet din* awards a *ḥiyyuv* and the

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852 *Sefer Mesharim*, *netiv* 23, part 8. See also R. Sha'anan (n.209, above), 213, who observes there that we do not find amongst the *posqim* anyone who disagrees with this ruling. He notes, however, that some limit this to cases in which the situation was not the fault of the wife.

853 On the general issue, see further ch.1, section D.

854 *'Iggrot Mosheh*, *'Even Ha'Ezer* 3:44, noted at §1.21, above. R. Feinstein says that this is a strong argument. It should not however be relied upon by itself but may be used as a *safeq* to combine with other arguments for leniency.

855 See §3.20, above, on *Tosefta Qiddushin* 3:7-8.

856 *'Even Ha'Ezer* Part 3, no.44, discussed at ARU 17:166-689, commenting that as presently used as a bargaining tool, "the *get* is again a means to an end but instead of its end being a separation from a woman the husband has found fault with, it has become the extortion of privileges, behaviours and economic wealth from a wife from whom the husband is, often, already to all intents and purposes separated." In fact, R. Feinstein here goes beyond the circumstances of the particular case brought to him, where the husband was not actually using the *get* as a bargaining tool, but stated that he wished he could have done. R. Feinstein added that one could argue here that even if it was *kefiyyah* the get would still be *kasher*, since there was a basic agreement to divorce. To argue that one cannot extrapolate from this to cases where the husband says he does not agree to divorce unless his conditions are met would be to import the Common Law doctrine of *ratio decidendi*!

husband refuses to give a *get* for a long time, *in order to* blackmail his wife, abuse her etc., he may then be coerced to give the *get*.[857] Though R. Cohen does not appear here to presuppose a case where we know that the husband would say "I do not want you", we may still identify a conflict in his will, which may admit of similar severance: as a faithful member of the community who has internalised Torah values, we may assume that he betroths subject to rabbinic authority (*kol hameqaddesh*) and argue that it is his reluctance to observe the *ḥiyyuv* of the *bet din* which may be severed.[858]

4.64 Some may argue, in this context, that the grounds for coercion (or even the bases on which a woman may claim *me'is 'alay*) are closed.[859] R. Bass has cited a *responsum* of R. Feinstein[860] in which the latter states that it is possible to apply coercion during remission in a case of insanity even though this is not mentioned explicitly in the Talmud as a cause for a coerced divorce.[861] R. Feinstein writes that where a husband became afflicted with periods of insanity after the wedding it would be permitted to coerce divorce because the Talmud (*Yevamot* 112 b) applies to insanity the argument that "one cannot dwell with a snake in a single cage"[862] and the Talmud accepts such inability to dwell in the same cage as a snake as grounds for coercing a divorce.[863] In discussing the relationship between the present case and a *teshuvah* of the Rosh,[864] R. Feinstein argues that we do not coerce in such cases where the husband's behaviour is no more than very troublesome.[865]

4.65 The concept of *amatlah* has assumed a special prominence in modern discussions of the plea of *me'is 'alay*, and the possibility of applying *kefiyah.* We may usefully remind ourselves of the background in *Shulḥan Arukh 'Even Ha'Ezer* 77:3:[866]

> And there are those who say that all this [i.e. the loss of all financial claims, which has been discussed before] applies to a woman who does not give *amatlah* or a reason for why she claims *me'is 'alay*. But if she gives *amatlah* for her claim, for instance when she states that her husband went astray or that he is ill and she is divorced on that ground, then her case has to be decided according to the Gaonic rule of *dina demetivta* (Tur in name of Maharam of Rothenburg), in which the husband is obliged to return to his wife everything that she has brought into the marriage: her *nedunyah* and the *nikhsei tson barzel*, whether it is still intact or not, the husband has to pay for it. … If it is completely gone, however, then the husband does not need to repay it (*dina demetivta*, Tur in name of the Rif). Yet, everything he has given to her or which he has given to her in writing, she will not forfeit, and even all that she had seized she need not return (Mordechai 90). And he will not be forced to divorce her, and she will not be forced to live with him.

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857 "*Kefiyyat haget*" (n.14, above), 201.

858 Cf. ARU 12:4 (§B.VI): "The logic behind the acceptance of a coerced *get* is that the husband does indeed want in his heart of hearts to obey the words of the Sages as the Rambam explained."

859 See §§4.5, 57, above. The question would then arise as to whether they were closed before the period of the Rishonim, so as to exclude Rabbenu Yeroḥam (14th cent.).

860 *'Iggrot Mosheh*, *'Even Ha'Ezer* I:80.

861 See further ARU 12:6 (§IX), arguing that R. Feinstein here proves unequivocally that coerced divorce in a case of madness is sanctioned from the Talmud. The issue then becomes simply whether additions may be made to the 'talmudic list' by interpretation of the talmudic text.

862 I.e., one cannot expect a husband and wife to remain together if one has to be constantly on guard – for whatever reason – against the other. Cf. *ET* I pp. 249-50.

863 *Ketubbot* 77a and *Tosafot Ket*. 70a, s.v. *Yotsi' weyiten ketubbah*.

864 Cited from *Tur 'Even Ha'Ezer* 154, where the Rosh's ruled that a divorce could not be coerced, although it appeared to be a case of insanity in the husband. R. Feinstein argues however that the husband was in fact sane but bad tempered, so that "it is impossible to dwell with a snake in one cage" was inapplicable.

865 See §6.61, below, for analogical use of this argument in the context of *me'is 'alay.*

866 ARU 16:161.

Not only does this provide a useful indication, through the examples of illness and infidelity, of what may constitute *amatlah*; it also indicates that the function of *amatlah* was not that of a necessary condition for a divorce on the grounds of *me'is 'alay*, but rather as marking the distinction (for R. Karo, provided that the husband was willing to grant the divorce) between divorce with the financial protections of the Ge'onim (*me'is 'alay* with *amatlah*) and divorce without the financial protections of the Ge'onim (*me'is 'alay* without *amatlah*).

4.66 The financial consequences of divorce have come to be used as a test of the sincerity of the woman's plea of *me'is 'alay*: claiming her *ketubbah* at the same time as making this plea arouses suspicion about her true reasons for claiming repulsion and may prompt a fear that her real motive is financial gain.[867] The "moral fear" argument, that the woman *notenet eynehah beaḥer*, is no longer the exclusive concern. Indeed, it has been argued that *me'is 'alay* is now often used in practice simply as a formula to bring about a no fault divorce on the part of the wife,[868] and "no fault" may extend to occasional quarrelling or even simple boredom. *Amatlah* has come to be used as a safeguard against such use of the plea.[869] For example, the Haifa Rabbinical Court has permitted coercion (albeit not by physical means) provided that the wife's plea of *me'is 'alay* is supported by *amatlah* (in the case at hand, domestic violence).[870]

4.67 Indeed, there are indications that some would go further, and require *amatlah mevoreret.*[871] However, it is not clear whether this always functions as a higher standard of proof[872] (or even as an objective standard at all). The use of this latter concept does, however, take us back to the financial issue in *Shulḥan Arukh 'Even Ha'Ezer* 77:3 (§4.66, above): if the *bet din* accepts the *me'is 'alay* on the grounds that the woman has given *amatlah mevureret*, she is not classified as a *moredet*, which entitles her to her *ketubbah* if a divorce ensues.[873]

4.68 The debate over *kefiyah* for the *moredet me'is 'alay* extends to the very definition of *kefiyah*. It is significant that Rabbenu Tam himself, while opposing "*kefiyah*", approved the use of "lesser" measures, termed *harḥaqot*, which he must therefore have regarded as not constituting *kefiyah* – and even (as R. Gertner points out[874]) in a case of *me'is alai* where there was not even a *mitsvah* to divorce, since the woman was entitled to her freedom and the community was right to help her achieve it even if the husband was not legally or even morally obliged to divorce. These measures included the following: no-one shall speak to him, enquire after his welfare, show him any respect, do him any favour, invite him to a meal, give him any food or drink, visit him should he fall ill, do any business with him, allow him to sit in the synagogue, give him an *aliyah*, allow him to lead the service or say *qaddish*, circumcise his children, or allow him burial rights; in fact, all should keep as far from him as possible.[875]

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867 See ARU 16:192, discussing PDR 6/325-353, but noting that, according to some opinions, a woman does not have to waive her *ketubbah* explicitly as long as she does not demand it while stating *me'is 'alay*.

868 E. Westreich, תמורות במעמד האישה במשפט העברי. מסע בין מסורות (Jerusalem: Magnes Press. 2002), 39.

869 The introduction of a requirement of *amatlah* in order to justify *kefiyah* of the husband of a *moredet* is not, of course, an invention of the Rabbinical Courts of Israel. See, e.g., Rosh, *Resp.* 43:8 (n.723, above).

870 See Rabbi S.-Y. Cohen (n.585, above), 343f., citing *Ḥut hameshulash* on *Resp. Tashbets*, Pt.II, no.8, and *Sefer Tashbets*, Pt.IV, sec.35. See also R. Cohen's "*Kefiyyat haget*" (n.14, above), 201; ARU 2:49-50 n.217

871 ARU 16:200.

872 For an example where it did, see ARU 16:193 on PDR 3/3-5, where the *amatlah mevureret* was deemed sufficient to convince the *dayanim* of her repulsion, but not enough to justify measures of enforcement of a *get*. However, the fact that the marriage was based on *sfek sfeka* led eventually to such enforcement.

873 ARU 16:141, discussing PDR 5/306-310.

874 *Kefiyyah BeGet* (n.172, above), 487-89.

875 R. Yosef, *Yabia' 'Omer* VIII *'Even Ha'Ezer* 25:4 (at the end) records that in one case the *bet din* told the wife's lawyer that he was free to publicise all the above in the newspapers and anywhere else he saw fit and to bring it to the notice of the synagogue wardens and members throughout the city, so that all should keep apart from the husband and keep him

4.69 Yet there has been, in more recent times, a reluctance to use these *harḥaqot*, even in Israel[876] where the secular law has enacted a modern form of them.[877] The issue, as so often, is the desire to be strict in *gittin*, even to the extent of following a minority or lone view.[878] In this context,[879] the source of the opposition is a *responsum* of Maharibal quoted in *Pitḥey Teshuvah* to *'Even Ha'Ezer* 154 sub-para. 30. Maharibal argues as follows:

1. Rabbenu Tam said that in cases where we cannot apply physical coercion (such as, in his view, the case of *me'is 'alay*), we may not use excommunication (*ḥerem* or even *niddui*) either.
2. Nowadays people fear the *harḥaqot* more than *niddui*. Therefore,
3. Today there is more reason to forbid *harḥaqot* than *niddui* (which is certainly forbidden).

However, R. Ovadyah Yosef[880] strongly objects to this *ḥumra*' and argues powerfully for a full application of the *harḥaqot* wherever they would be sanctioned by Rabbenu Tam. The latter's point, he observes, is not that *harḥaqot* are less painful than *niddui* but rather that they are not imposed upon the recalcitrant husband but upon the rest of society who are being ordered by the Jewish authorities to separate themselves totally from a wicked man until he stops sinning. And in that particular case R. Yosef, together with R. Waldenberg and R. Kolitz, ordered the application of *harḥaqot* against the recalcitrant husband.

4.70 We are told that *batei hadin* in Israel today are increasingly prepared (more than in the past) in cases of *me'is 'alay* to grant a *ḥiyyuv*, but without any form of coercion. Some *dayanim*, however, are prepared to apply *harḥaqot*. Indeed, there is an argument, in the context of the power conferred by Israeli law,[881] that imprisonment is halakhically less objectionable than physical coercion,[882] on the grounds (a) that it is indirect,[883] and (b) that conditions in modern prisons are

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at a distance in every possible manner. The *Bet Din* may add any stringency they want so long as they do not put him in *ḥerem*: Rema *'Even Ha'Ezer* 154:21.

876 Goldberg and Villa (n.687, above), 303, remark: "Sadly, the rabbinic courts make little use of this powerful instrument which they possess due to our living in an independent Jewish state; no such weapon is available in the Diaspora."

877 Under the Rabbinical Courts (Enforcement of Divorce Judgments) Law, 5755-1995, passports may be confiscated, bank accounts frozen, driver's licenses suspended; there are also sanctions in relation to the holding of public office, professional work and business licenses. For the details, see Kaplan (n.33, above), who indicates that the explanatory notes accompanying the Knesset Bill enacted in 1995 claimed that the civil disabilities were consistent with the spirit of Rabbenu Tam's *harḥaqot*. It appears clear that R. Yosef regards aspects of these measures as implementing Rabbenu Tam's *harḥaqot*: he mentions non-renewal of passports in his discussion in *Yabia' 'Omer* VIII *'Even Ha'Ezer* 25:3-4. R. Jachter writes: "In Israel, laws have been enacted to permit State Rabbinic Courts to take away the driver's licence and checking accounts of recalcitrant spouses. This is a modern application of Harchakot D'Rabbeinu Tam": "Viable Solutions II", http://www.tabc.org/koltorah/aguna/aguna59.2.htm. The relationship is more fully (and critically) discussed by Kaplan (n.33, above), 130-33.

878 But see §§2.5-10, above.

879 Gertner, *Kefiyyah BeGet* (n.172, above), 475-89, especially 484(5) and 489(5) examines and summarises all the views.

880 *Yabia' 'Omer* VIII *'Even Ha'Ezer* 25:3-4 (published in 5755=1994/95).

881 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, s.6: "Where a rabbinical court, by final judgment, has ordered that a husband be compelled to grant his wife a letter of divorce or that a wife be compelled to accept a letter of divorce from her husband, a District court may, upon expiration of six months from the day of the making of the order, on the application of the Attorney General, compel compliance with the order by imprisonment." The Rabbinical Courts (Enforcement of Divorce Judgments) Law, 5755-1995, grant the rabbinical courts (more limited) powers of imprisonment directly: see Kaplan (n.33, above), 126-29.

882 For a discussion of (traditional) *kefiyah* in relation to concepts of torture and human autonomy, see Hadari, ARU 17:154-62, arguing (at 159) that a free and rational man is sufficiently master of himself to have been able to resist *kefiyah* had he truly so willed, so that what is produced by *kefiyah* is "coerced *consent*": the choice between submitting to ongoing torture and assenting to an act which one does not will, Hadari argues, whilst it may be a rather limited choice, is nonetheless a choice. This is more than a philosophical quibble. It relates directly to the respective roles of the

less oppressive than in the past.[884] Indeed, R. Daichovsky argues that on R. Herzog's analysis, both limited financial and physical sanctions (which he does not regard as constituting *kefiyah*[885]) may be used without rendering any resultant *get* as a *get me'useh*, and that this could be done even where there is no formal decision of *kefiyah*.[886]

4.71 R. Ovadyah Yosef has noted that we also find in the *responsa* of the Rosh[887] that if a *bet din* coerced a divorce in the case of *me'is 'alay* and she remarried on the basis of this *get*, she need not leave her new husband.[888] He argues that an illegally coerced *get* when enforced by the *Bet Din* is only rabbinically invalid according to the Rambam, at least if issued in error,[889] and that the Mabit, Maharashdam, Maharanaḥ and Radbaz therefore rule that if the woman remarried on the basis of such a coerced *get* she need not leave her new husband.[890] The remarriage is thus valid *bedi'avad*. Rema, however, takes a contrary view,[891] so that a marriage ended by such a *get* would be in a state of doubt (at least if the *get* were coerced under an error as to the halakhah, rather than in knowledge of its illegality) and such a doubt could be taken into account in the context of *sfeq sfeqa*. This is especially so in a *she'at hadeḥaq*, where it is possible to permit *lekhatḥillah* what is usually only permitted *bedi'avad*. Indeed, R. Feinstein (*Iggrot Mosheh EH* III no. 44) and others have noted that even when a *get* is coerced *shelo kadin* it may well be rendered valid even rabbinically if the wife is anyhow halakhically separated from the husband, in that the husband is losing nothing and also gains from the divorce (being exempted from *she'er* and *kesut*, and freed himself to remarry, despite the *ḥerem deRabbenu Gershom*). R. Feinstein adds that though one cannot rely on this alone, it is a powerful argument that may be added to others to permit her remarriage. R. Daichovsky has also maintained that in many cases a compelled *get* is valid at least *bedi'avad.*[892]

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spouses and the *bet din* in the termination process: see ARU 17:160: "... the halakha even in those most extreme situations still requires the husband to make that decision, albeit that it permits the exertion of pressure to encourage him to decide in the affirmative", noting the distinction of the *Ḥelkat Yo'av* (cited in Gertner: *Kefiyah b'Get* pp.465b-466a) between "the level of will or intentionality required in, for example, a sale (where there are two parties to the transaction and the *gemirat da'at* of both is required) and that required for the giving of a gift, or a *get* (where the will – *ratson* – of only one is required). "In the latter case it is רצון גמור – full will – which is required but in the case of legitimate *kefiyah*, the *Ḥelkat Yo'av* asserts, the will of the *bet din* supplies part of the necessary will." The issue is akin to that of the (declarative or constitutive) role of the *bet din* in *hafka'ah* (§§5.57-58, below) and that of the capacity of the parties, by means of conditions, to augment the power of the *bet din* (§§3.14,43,88, §4.25, above). The overall picture which emerges is that of a *partnership* between the spouses and the *bet din*, even when (in extreme circumstances) the role of the *bet din* might appear so dominant as to be overriding.

883 Cf. ARU 18:69.

884 See *Yabia' 'Omer* III *'Even Ha'Ezer* 20:34.

885 On R. Daichovsky's definition, in relation to the value of the husband's autonomy, see ARU 17:152, and his forthcoming article, "Darko Shel HaRav Herzog Bi-khefiyat Get".

886 Rabbi S. Daichovsky, "Kefiyat Get 'Al Yedey Hamlatsah leNikui Shlish Ma'asar", *Teḥumin* I (5740), p.248 and at greater length in his forthcoming article (n.885, above).

887 *Resp*. 43:6, in §4.48, above; see *Responsa Yabia' 'Omer* III *'Even Ha'Ezer* 19:21, citing Rashbets.

888 In *Torah Shebe'al Peh* (n.52, above), 99.

889 So Rambam, though it does seem from a few places in R. Yosef's writings that even if they knowingly coerced illegally Rambam would regard the *get* as only rabbinically invalid. It is noteworthy that Rabbenu Tam writes in *Sefer HaYashar* (beginning of *siman* 24 = p. 40 lines 4-7 in the Jerusalem 5732 ed.) that no-one can prove whether a divorce illegally coerced by a *bet din* is biblically or only rabbinically invalid, from which it also seems possible that even a *get* intentionally enforced illegally by a *bet din* could be biblically valid.

890 On these sources, see Gertner, *Kefiyyah BeGet* (n.172, above), section 42, pp.203-07, arguing that it is not possible clearly to prove the argument from them. R. Ovadyah Yosef seems to have had in mind the statement to this effect by *Agudat Ezov*, *'Even Ha'Ezer* 19 para.18 (which R. Gertner strongly questions).

891 The *Bet Yosef* (*'Even Ha'Ezer* 77) says (only) that if she remarried she need not leave him; the Rema, *Darkhey Mosheh* 10 on *Bet Yosef EH* 77, says that she must leave him.

892 "Derekh Hashiput...." (n.313, above), 21.

4.72 Indeed, there are circumstances, in principle, when some argue that the halakhah accepts that the husband's will may be by-passed entirely.[893] R. Mescheloff[894] notes that on the basis of the rule that זכין לו לאדם שלא בפניו – one may obtain an advantage for another [even] without his [the latter's] knowledge/agreement – some have suggested that where divorce is ordered by a *bet din* and the husband does not agree to the *get*, the *bet din* may arrange its writing, signing and delivery even without his permission, since it is to the advantage of himself and his wife. However, this path (the *get zikkui*) has only ever been used when it was absolutely clear that it was to the benefit of both husband and wife, and appears to underlie the observations of R. Feinstein (*Iggrot Mosheh 'Even Ha'Ezer* III no. 44) noted in §4.71 above – for example when the husband is serving life imprisonment and is known to be religiously observant, but where it was impossible to gain access to him, but we are sure that he would not want to chain his wife. This does not apply when the husband objects to the divorce (even though from a halakhic/ethical perspective it is the right and, therefore, advantageous thing to do).[895]

4.73 A less problematic argument, but to similar effect, relates to the situation where the husband has previously agreed to a *get*, whether by having it delivered in advance but subject to a condition, or by signing a *harsha'ah* delegating such delivery (on fulfilment of stated conditions) to a *bet din* in the future. These are both forms of conditional *get*,[896] where the issue becomes whether the condition may later be revoked. As argued above in relation to conditional marriage, there are ways of preserving such conditions against subsequent implied revocation.[897] What is important in the present context is that recognition that the condition is still valid (and thus that the husband's agreement to the *get,* though given in the past, remains valid) is not regarded as raising an issue of *kefiyah.*[898] Indeed, the talmudic case closest to this, where a *get* entrusted to a *shaliaḥ* is revoked before delivery to the wife, is discussed in terms of *hafka'ah*.[899]

G. Conclusions

4.74 The *halakhah* of the *moredet* claiming *me'is 'alay* presents a particularly complex set of problems concerning the interaction of history and authority, as well as a wealth of material which prompts further reflection on the policy and conceptual issues involved. The object of our enquiry here cannot be reduced to the simple question: "can the *taqanta demetivta* be revived today, in the light of the present state of the authorities?",[900] even though a reassessment of the dogmatic weight of both that tradition and (the distinct) tradition of Rambam do play an important part in our analysis.

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893 See, however, ARU 5:77 (§§30.8.5-6) on R. Morgenstern's citation of R. Eliyahu Klatzkin.

894 See n.10 above.

895 If it were possible to apply זכין לו לאדם שלא בפניו in such circumstances we might have a simple solution for obtaining a divorce for the wife of a Jew who had apostatized – a problem with which the Aḥaronim grappled at length. Recently, a number of rabbis in America have used this approach but the leading *dayanim* have totally rejected it – see *Responsa Seridey 'Esh* III no. 32. In no. 25 there, mention is made of the opposition of R. Herzog to the idea. See also ARU 2:67-68 (§5.3.3), 8:37 (§7.2), on R. Morgenstern's argument.

896 See §§3.45-48, above, on R. Henkin's proposal.

897 See §§3.63-69, above; ARU 18:57-58. Where the husband tells the wife or any two people explicitly that he declares the *get/harsh'ah* cancelled, there is no 100% solution — other, perhaps than including this contingency in the definition of recalcitrance which triggers a terminative condition.

898 For a full discussion of the issues, of principle and drafting, see further R. Abel's analysis in ARU 18:57-67, arguing, at 58, that a conditional *get* is preferable to a *harsha'ah* because of possible problems in later identifying the witnesses to the latter; supporting, at 65f., the suggestion of Berkovits (n.112, above), 73, that problems of *get muqdam* and *get yashan* may be solved by writing on the *get* that the date of the actual divorce has been delayed by mutual agreement of the couple; and replying, at 67f., to possible objections based on *bereirah.*

899 *Gittin* 33a; see §§5.14-16, below.

900 See further ARU 5:19 (§§12.2.14), criticising the approach of R. Moshe Morgenstern.

In this concluding section, we seek to review the historical issues in terms of their dogmatic weight (§§4.75-84) and then revisit the grounds for divorce (§§4.85-91), the status of the will of the husband in refusing it (§§4.92), and the range of measures which may (or may not) be viewed as *kefiyah* (§§4.93-94).

4.75 The historical issues we have reviewed (for their dogmatic significance) are the following:

(a) the recent discovery of a manuscript in which the view of Amemar in the Bavli is explicitly in favour of coercion: כייפינין ליה (§§4.7-9);

(b) the tradition of Rashi (and others) interpreting non-explicit talmudic statements as already presupposing forms of coercion (§§4.10-16);

(c) the possibility that the Ge'onim may have practiced a different form of *kefiyah,* more akin to annulment (§§4.20-25);

(d) the possibility that, while the Ge'onim recognised an emergency situation, they did not base their authority exclusively on that, but rather assumed that form of talmudic interpretation which itself already endorsed coercion (§§4.19, 26-29);

(e) the inconsistencies in the text of the *Sefer Hayashar* (§§4.33-38) in relation not only to Rabbenu Tam's attitude to *kefiyah* but also to *ḥiyyuv* (and thus his basic attitude to *me'is 'alay* as a grounds for divorce);

(f) the acceptance of Rambam's view beyond the confines of the Yemenite community (§§4.47-51, 57) — fitting, rather, into a more general pattern of division between (broadly) Ashkenazim and Sephardim, itself reflecting the different cultural environments within which these traditions developed

These issues now fall to be considered more systematically in dogmatic terms. We seek to do so by reviewing them in terms of the balance of opinion amongst later authorities (§§4.76-79), the applications of *hilketa kebatra'ei* (§§4.80-82) and doctrines of *safeq* (§4.83) and the assessment of the current situation as *she'at hadeḥaq* (§§4.84).

4.76 We do not claim that the discovery of the Leningrad Firkovich MS necessarily alters our view of the traditional text of the Talmud. Such a claim would require further examination by palaeographers of the relative dating of all manuscript sources (both of the Talmud itself and of other sources where the same issue is raised). However, the issue is not confined to what was the original text of the Talmud;[901] even a later textual tradition may have halakhic significance as evidence of what later authorities considered to be a necessary correction of the traditional text. So viewed, the variant reading in the Leningrad Firkovich MS may rank alongside evidence of what the Ge'onim and many of the Rishonim considered (by interpretation of the traditional text) to be the true talmudic position. More generally, we may ask whether the authority of tradition is affected by what may turn out to have been historical errors concerning its prior development?[902] For example, if Rabbenu Tam did take the view that coercion of the husband is never mentioned in the Talmud and that the Ge'onim did not base themselves on talmudic authority (even a minority opinion in the Talmud[903]), and these claims turn out to be historically incorrect, does that

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901 Potentially raising the issue of *hilketa kebatra'ei*: see further §4.83, below.

902 On the general issue, see §§2.25-37, above.

903 Riskin, *Women and Jewish Divorce* (n.42 above), 76, implies that this is what the Geonim did: "After all, the Mishnah itself teaches that the minority opinion is recorded together with the majority opinion in order to allow a later generation to decide in accordance with the former; and it is precisely because of such situations that the Sages teach, "[both] these and those are the words of the living God." Hence, the Geonim sought and found an Amoraic precedent for not forcing a woman to remain married to a husband she found repulsive. Moreover, the Talmudic decree of the Rabbanan Sabborai provided for a bill of divorce even against the wishes of the husband, according to geonic *interpretation*. This opened the way for subsequent geonic *legislation* when the Rabbis observed that Jewish women occasionally converted to Islam. The study of the development of the geonic decrees regarding the rebellious wife provides an excellent insight into the internal process of halakhic change."

affect the status of the objections Rabbenu Tam made to the reforms of the Ge'onim?[904] Or do we take the view that, like an erroneous textual tradition, error may be validated by subsequent acceptance? Is Rema's justification of his exception to the principle of *hilketa kebatra'ei*[905] relevant here?: we need not follow later authorities when the latter were unaware of a previously unpublished geonic responsum since, had it been known, the later authorities may have decided the other way.

4.77 A preliminary question in addressing the issue of the balance of authority is whether recourse to the position before Rabbenu Tam (when *me'is 'alay* appears to have been universally accepted as a valid grounds for divorce, and (by most) as a grounds for coerced divorce[906]) remains relevant in the light of the authority gained by Rabbenu Tam's objections. In part, this raises issues of halakhic epochs (in particular, the status of geonic opinions in general, when rejected by Rishonim[907]) and in part issues of the weight of Rabbenu Tam's own opinion, in the light of doubts regarding the certainty of our knowledge of it on the one hand (§§4.33-38) and the possible application to it, on the other, of Rema's qualification to *hilketa kebatra'ei* (§§4.80-82, below) on the other. We take the view that these factors, at the very least, raise a *safeq* regarding the authority conventionally attached to Rabbenu Tam's view, such as to admit Geonic opinions into the balance.

4.78 The assumption of a consensus amongst the Rishonim and later authorities in favour of Rabbenu Tam's view appears increasingly questionable. While the geonic measures themselves were increasingly rejected as general law (as opposed to local custom[908]), Rambam's acceptance of *kefiyah* (accompanied by less generous financial provisions than those of the Ge'onim) survived in Spain and amongst communities exiled from there to North Africa after the 1391 expulsion. Indeed, Rashbetz (himself a member of the generation of those exiles) spoke particularly strongly in favour of coercion (§4.47). Nor does it appear to be true that Rambam's view ultimately survived (after the *Shulḥan Arukh*) only in Yemen (§4.57). Rather, there appears to have been a broader division between Ashkenazi and Sephardi authorities (which still appears to persist today).

4.79 Nor has the issue proved to be closed in the era of the Aḥaronim. We noted above the position of the *Ḥatan Sofer* (§4.58). Moreover, R. Herzog has invoked manuscript evidence of (hitherto unknown) responsa of a Rishon, Rabbenu Yeshayah of Trani, in which the latter rules in accordance with the Ge'onim (§4.59). The view of the Ḥatam Sofer may thus not only be opposed by the views of later *batra'ei* but may also be subject to Rema's qualification: can we be sure that the Ḥatam Sofer would have maintained his view had he been aware of the responsa of Rabbenu Yeshayah of Trani? Dayan Waldenberg, moreover, has himself re-evaluated the balance of opinion amongst the Rishonim, and concluded that there remains a case for the re-introduction of *kefiyah* on a plea of *me'is 'alay* (§4.60).

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904 Thus, Riskin, *Women and Jewish Divorce* (n.42 above), 86 argues: "If it was the Geonim who initially provided for a coerced divorce, then if the Geonic decrees are ever rejected, their provision for a coerced divorce must be rejected as well. If, however, it was the Rabbanan Sabborai — i.e., the Talmud itself — who provided for a coerced divorce, then even if we were to reject the Geonic decrees granting the wife monetary compensation, we would nevertheless be forced to uphold the provision for a coerced divorce. Such is the position of Alfasi." Rif, however, sees the geonic measures as based on *taqqanah,* not interpretation.

905 *Rema* to *Shulḥan Arukh Ḥoshen Mishpat* 25:2, quoted in text at n.242, above.

906 See §4.33, above, for Raban, Alfasi and Rashbam; §4.45 on the spread of the geonic measures to Paris, on Rabbenu Tam's own evidence.

907 In fact, Rema gives the case of the later authorities who disagreed with the *geonim* as an application of *hilketa kebatra'ei*: see §2.28, above.

908 Accepted still by Rema: see §4.47 (end).

4.80 In two important respects, the rules of *hilketa kebatra'ei*[909] prove relevant to the issue. The first relates to the status of Rabbenu Tam's view (assuming we are confident that we know what it was[910]) of the basis on which the Ge'onim proceeded and his criticism that there was no talmudic warrant for what they did. We may ask whether the opposition of many *Rishonim* to *kefiyah* would have been withdrawn had they been aware that Rambam's opinion was supported by a version (that of MS Leningrad Firkovich) of the talmudic text. Indeed, Rashba[911] gave precisely the reading in the MS Leningrad Firkovich in arguing (against *kefiyah*) what Amemar *should have said* if Rambam were correct: "According to Rambam, Amemar ought to have said *kaifinan leh*!" It may be noted, moreover, that this is not a matter of seeking to overthrow a halakhic consensus on the basis of recently discovered MSS. There is here no halakhic consensus.

4.81 The claim of Rabbenu Tam that the Ge'onim lacked authority for coercion in such cases (of *moredet me'is 'alay*) is in fact based upon a series of assumptions, each one of which is subject to debate: (i) the text of the Talmud available to him, (ii) his interpretation of it (contrary to that of Rashi and others); (iii) his general reluctance to accept halakhic modification on the basis of emergency powers;[912] (iv) his unawareness of the claim that the geonic practice had been based in part upon a *tenai*.[913]

4.82 The second application of *hilketa kebatra'ei* to this issue relates to the *Shulḥan 'Arukh* itself. We have argued (§4.49) that had Maran seen *Tashbets* II:69 and II:180 and the arguments of Ibn Tawwa'ah, he would have accepted the position of the Rosh — and the final position of Rashbets — as being that, though a *get* must not be coerced in cases of *me'is 'alay*, if it was coerced the woman may remarry *lekhatḥillah*.[914] Moreover, we are now aware also of the *teshuvot* of Rabbenu Yeshayah of Trani (ruling in accordance with the Ge'onim), to which R. Herzog has drawn attention (§4.59, above).

4.83 These issues of *hilketa kebatra'ei* (as well as others not prompted by issues of historical doubt) may also be discussed in terms of the rules of *safeq*.[915] Indeed, we have already noted the view that *sfeq sfeqa* takes priority over *hilketa kebatra'ei* where the two both apply, and even that (according to the Rosh) where the *safeq* is in rabbinic law and the earlier authority rules leniently the earlier authority should be followed in spite of the rule of *batra'ei*.[916] Thus, insofar as the Geonic measures relate to rabbinic law, we should on this view follow them. But even as regards measures relating to biblical law, we have argued that there are sufficient doubts regarding Rabbenu Tam's opinion to (re-)admit the Geonic opinions into our assessment of the balance of authority.[917] Thus even if we do not know what Rabbenu Tam would have said to the variant in MS Leningrad Firkovich, this in itself may count as a *safeq*.

4.84 Arguments from both *hilketa kebatra'ei* and *sfeq sfeqa* may be combined with the rules relating to authority in times of urgency, in such a way as to overcome the inhibitions felt by many *dayanim* against applying (i) *lema'aseh* what otherwise might only be available *lehalakhah* and/or (ii)

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909 See, in general, §§2.28-29, 33, above.

910 See §§4.35-38, above.

911 See ARU 9:2 note 11.

912 See n.708, above.

913 The view Me'iri attributes to his teachers' teachers: see §§3.23-29, above.

914 ARU 6:12 (§6.7), citing *Resp. Yabia' 'Omer*, X, *Ḥoshen Mishpat* 1, s.v. *Teshuvah*.

915 See further §2.27, above.

916 See further §2.30, above.

917 See further §§4.37, 77, above.

against adopting *lekhatḥillah* what otherwise might only be available *bedi'avad*.[918] Thus we need to consider whether the situation regarding *get*-refusal today is one of compelling need (*she'at hadeḥaq*[919]), so that in our situation the Rashbets — and Maran — would allow, in a case of *me'is 'alay*, coercion (and, obviously, remarriage), even *lekhatḥillah*.[920] R. Ovadyah Yosef has, indeed, argued that our period, in this respect, is more comparable to that of the Ge'onim than that of Rabbenu Tam,[921] using this as a *partial* justification for reverting to the measures of the Ge'onim: recourse to gentile courts, applying their own criteria, is increasingly common, not only for a (required) civil divorce, but also to put pressure on the husband to grant a *get,* sometimes in ways which are halakhically problematic. Indeed, Dayan Waldenberg, who otherwise opposes *kefiyah*, has endorsed, in the current context, reliance on the view of *Ḥut HaMeshulash,* that compulsion is permissible if the hour requires it, "for a judge must be guided by the circumstances confronting him".[922]

4.85 The various passages in *Sefer HaYashar*, if all correctly attributed to Rabbenu Tam, reveal an ambivalence in his basic attitude to *me'is 'alay* as a ground for divorce. On the one hand, his (ultimate?) absolute rejection of *kefiyah* in the case of the *moredet me'is 'alay* is compatible with his extension of the "moral fear" argument, that the woman's real motive may be that she *notenet eynehah be'aḥer*, from the cases in *Mishnah Nedarim* 11:12 to the claim of *me'is 'alay* (§4.34, above), together with his desire to penalise such a woman (יעגנה לעולם: §4.38, above). On the other hand, if Rabbenu Tam is really driven here by such a moral policy why does he permit the use of *harḥaqot* (§4.52, above)?

4.86 It is understandable that, in some social circumstances at least,[923] there should be a desire to put the sincerity of women's pleas for divorce to the test. We do not, however, encounter such strong "ontological" claims regarding the "moral fear" argument (*notenet eynehah be'aḥer*) comparable to those which have been advanced by some in relation to *tav lemeitav*.[924] It may then be that the unanswered questions regarding the status of *amatlah*[925] – whether it is required at all, whether it amounts to a requirement of independent corroboration of the woman's sincerity in claiming diusgust, or whether it amounts to independent grounds for divorce, as a safeguard against using *me'is 'alay* as a cover for genuine "no fault" divorce[926] – reflect the reactions of different communities to the perceived moral climate.

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[918] On the various relaxations of the rules of authority permitted in a *she'at hadeḥaq*, see §§2.38-41 above, and especially §2.39, noting that it is possible to argue, based on positions taken by Rabbi A.Y. Kook and of R. Ovadyah Yosef, that we may rely in an situation of *'iggun* even on a lone opinion, even when dealing with a biblical prohibition.

[919] See R. Shlomo Itsban, §2.38, above.

[920] See further ARU 6:12 (§6.7); ARU 8:35-36 (§6.6 and nn.225-36).

[921] Arguing that in the period of the Ramban, women did not go so far as to live with other men without a *get*: today, he argues, women are prepared to leave the religion entirely. See *Yabia' 'Omer* vol.3, *'Even Ha'Ezer* 18:13.

[922] See further §§4.60-61, above; ARU 7:24 n.166.

[923] For a suggestion that the background to *Mishnah Nedarim* 11:12 was the loose moral standards of the Herodian aristocracy, see B.S. Jackson, "The Divorces of the Herodian Princesses" (n.425, above).

[924] See §1.40, above. We do, however, find the Rosh saying (*Resp.* 43:8): "if a woman will be able to remove herself from under a husband by saying "I do not want him" not a single daughter of *Avraham avinu* will remain with their husband. They will cast their eyes upon others and will rebel against their husbands." See ARU 16:115 on the occurrence throughout the ages of the view that "women in our days are promiscuous" and should therefore not be trusted because they will cast their eyes upon other men.

[925] §§4.54-55, above.

[926] Based, perhaps on mere boredom, occasional quarrelling or behaviour perceived as irritating: see §4.66, above. This, perhaps, lies behind the criterion of R. Moshe Feinstein (in the context of *qiddushei ta'ut*), that the behaviour must be more than "very troublesome", in the case described in §4.64, above.

4.87 We have seen that Maharam Rothenburg ruled that a *moredet me'is 'alay* should either give proof why her husband was not acceptable to her (apparently, the "subjective" ground), or bring proof that he went astray or had a disease.[927] This shows that *me'is 'alay* had come to be a standard divorce plea, even where there were quite distinct substantive grounds, and this appears still to be the practice in Israel, where we encounter cases where *me'is 'alay* is based (explicitly) on *mumim*.[928] But the linkage made by Maharam Rothenburg has another potential use, which we may derive by analogy with the plea of provocation in secular criminal law.[929] Here the question arises not only whether the subjective test (loss of control resulting from the provocation) was satisfied, but also whether such loss of control was reasonable. However, such reasonableness is increasingly judged not on the basis of the average person, but rather the standards to be expected of a person with the particular characteristics of the accused. For those who find *me'is 'alay* too broad a ground for divorce if understood simply as subjective disgust, a similar requirement could be devised, perhaps with the onus of disproving the reasonableness of the disgust placed on the husband.

4.88 The sources indicate a relationship between the grounds for divorce and their financial implications. On the one hand, the sincerity of a plea of *me'is 'alay* is strengthened by the woman's willingness to forego her *ketubbah*;[930] on the other hand, the presence of *amatlah*, according to in *Shulḥan Arukh 'Even Ha'Ezer* 77:3,[931] allows the woman to claim the financial protections of the Ge'onim (for R. Karo, provided that the husband was willing to grant the divorce), which she lost if she claimed *me'is 'alay* without *amatlah*. Such a distinction has a long historical pedigree,[932] and may be taken as a marker of the distinction between divorce for "cause" (if not "fault") and divorce without it. Thus some Rishonim distinguish between a case of coercion when the wife receives the amount of her *ketubbah*, as in the cases of *kefiyah* already authorised in the Mishnah,[933] and coercion without receiving the *ketubbah*, as in *moredet*.[934] It represents the converse of the fact that the husband is liable to pay the *ketubbah* if he divorces "unilaterally" (on the Bet Hillel grounds) whereas he is not liable to pay the *ketubbah* if he divorces for "cause" (such as adultery).

4.89 The most difficult type of case is the one where the wife claimes *me'is 'alay* (without *amatlah*) but the husband responds that he still loves her, wants to remain married to her, and places no conditions on any *get*. We may ask whether, and for how long, he can really still want to maintain a marriage with a woman who genuinely finds him repulsive? In such cases, a *bet din* would presumably make every effort to establish *shlom bayit* by reconciling her. But at some stage the *bet din* must surely give up and tell the man that it is hopeless to seek to maintain the marriage, and that for him to keep her is, in effect, to treat the wife as a *shevuyah*. On Rambam's reasoning, this might justify "educating" the husband, through coercion if necessary, to let her go. But most *batei din* would not follow this logic, and may well prove reluctant even to issue a *ḥiyyuv* (absent abuse/infidelity etc. on the part of the husband). Moreover, if the *bet din* merely "recommend" divorce, the husband could argue that he was following an opposing halakhic opinion or merely ignore the recommendation.

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927 See §4.55, above.

928 See PDR 2/188-196, 3/225-234, 6/221-224: ARU 16:161-162, 199.

929 See, e.g. P.J. Fitzgerald, *Criminal Law and Punishment* (Oxford: The Clarendon Press, 1962), 127-29.

930 As indicated at §§4.35, 39-40, 66, above, and in the practice of the rabbinical courts in Israel: see PDR 1/129-139 at ARU 16:158-159; PDR 5/306-310 at ARU 16:141, 143, 173.

931 See §4.66, above.

932 As may be seen from both the Elephantine marriage contracts (on which see Yaron, n.421, above) and the Genizah *ketubbot* (see §3.31, above).

933 E.g. *Mishnah Ketubbot* 7:7. See *Tosafot*, 63b, s.v. אבל; Ramban, 63b, s.v. וכולה הלכתא.

934 See Ritva, 63b, s.v. מורדת דמיא היכי, though Ritva himself rejects this distinction. See ARU 9:17.

4.90 This prompts the question whether a victim of recalcitrance may claim to be a *moredet me'is* '*alay*? If this were the sole grounds, and the question were posed with a view to *kefiyah,* a necessary condition of any affirmative answer would be that the list of situations where *kefiyah* is admissible is not closed. On this, as we have seen, opinions are divided.[935] However, our definition of recalcitrance entails that a *bet din* has at least made a recommendation that the husband give a *get*, which itself presupposes that there are grounds beyond mere recalcitrance. Moreover, even if *kefiyah,* in the traditional sense, is not sought, it is clear that the husband has compounded his offence by refusing to follow the *bet din*'s recommendation.[936]

4.91 The above summary of the criteria for divorce (§§4.85-90) implicit in discussions of *kefiyah* for the *moredet me'is* '*alay* has indicated a range of positions which may well reflect differences in the moral climate in different communities. We have also seen that some have argued for a correlation between the basic differences between Rambam and Rabbenu Tam and the external religio-legal (Islamic or Christian) environment.[937] There is thus good historical warrant for the type of analysis offered by Dayan Broyde in his book, distinguishing different (Orthodox) communities in terms of the exit régimes from marriage which they have adopted.[938] Such different communities may well be identifiable within the Jewish community today, and not merely historically. The more difficult questions are those of mobility between communities and mutual recognition.[939]

4.92 At the beginning of this chapter (§4.3), we posed a basic question: what conception of freedom of the husband's will is to be assumed as underlying the issue of (permissible and impermissible) *kefiyah*, and we advanced, as against secular notions of individual autonomy, the notion of the true will of a faithful member of the community who has internalised Torah values, for whom coercion represents not a violation of his will, but rather a form of education.[940] In this context, the observations of Rabbenu Yeroḥam, R. Feinstein and Rav S.-Y. Cohen in relation to the husband's motivation for refusing the *get* (§4.63) assume a particular importance.[941] These sources point to the conclusion that it is possible to "sever" that part of the husband's will prompted (as Rambam would say) by the *yetser hara* from the husband's "basic" will, which is "I do not want you". We may surely argue that it is a sin to disobey a *bet din*,[942] in which case why should a sinner be rewarded (*ḥote niskar*)? In short, if *kefiyah* follows failure of the husband to comply with a *ḥiyyuv* (a *ḥiyyuv* which Rabbi Ovadyah Yosef is prepared to contemplate: §4.62), should that be regarded as enforcement (by overriding the husband's will) of a *get*, or enforcement of the *ḥiyyuv*?

4.93 In the course of this chapter, we have encountered a range of views and different formulations regarding the (procedural) issue of the very nature of *kefiyah*, and argued that they may be related to the (substantive) issues of the grounds for divorce and the status of the husband's will in relation to the *get.* One of the most striking of these formulations is that of Rosh's interpretation (in *Shut* 43:8) of the geonic measures as a form of *hafka'ah* (§§4.22-24), not least in the context of his preference in particular circumstances (*Shut* 35:2) for coercion over (traditional) annulment. This suggests that the Rosh, even if not willing to adopt the geonic measures for cases of *me'is* '*alay* generally, did view *hafka'ah* as the "ultimate" form of *kefiyah* in those circumstances where

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935 For the view that the list is closed, see R. Shemuel Amar of Morocco in §4.57, above; for the view that it is not closed, see R. Moshe Feinstein in §4.64, above.

936 See §4.63, below.

937 See §§4.5(e), 4.44, above.

938 Broyde, *Marriage* (n.83, above).

939 See §2.47 above, §6.64, below.

940 One might even revisit the applicability of זכין לו לאדם שלא בפניו (§4.72) in this context.

941 Cf. ARU 17:139, arguing that "will to divorce is in fact will to terminate the marital relationship; not will to perform the act of *get*-giving"; ARU 17:167-68.

942 See §4.39, above.

he regarded its application as justified.

4.94 The Rosh is not alone in having contemplated "non-traditional" forms of *kefiyah*. Rav Yehudai Gaon mentions the use of a *ḥerem* against the husband (§4.21), though this is regarded as *more* coercive, and thus less acceptable, by Rabbenu Tam.[943] We have also noted the possibility that a *get* delivered by a *bet din* rather than the husband is contemplated by the plural verbs of several geonic sources (§4.21) and that the unusual formulations of the divorce clauses in the Genizah *ketubbot* (§3.79) may (if not authorising the delivery of such *gittin* by a *bet din* rather than the husband) indicate purely *prospective* termination of the marriage by virtue of the condition. If such a condition is indeed enforceable, this too represents a form of coercion and – even more important – a form whose precise modalities are specified by the parties themselves in the *ketubbah.*

4.95 The full implications of these arguments are considered in our concluding chapter. Suffice it here to indicate two basic questions prompted by our analysis: (a) if *kefiyah* follows failure of the husband to comply with a *ḥiyyuv* issued by a *bet din*, should that be regarded as enforcement (by overriding the husband's will) of a *get*, or enforcement of the *bet din*'s order? (b) insofar as the parties may by condition contribute to the authority for the application of *kefiyah*, may they not specify the *time* (in advance) at which the husband must consent to the *get,* and render that advance timing irrevocable?

Appendix B: *Tosafot Ketubbot*, 63b, s.v. *Aval*

Some say that we coerce a *get* in cases of *me'is 'alay*.

1. **Rabbenu Tam** asked: Maybe she set her eyes on another (as in the Mishnah end of *Nedarim*)?

2. ***Tosafot* respond** that in the case of *Nedarim* she would receive her *ketubbah* but in the case of *me'is 'alay* she would lose it. She would not countenance such a loss because of setting her eyes on another so we may believe her complaint of *me'is 'alay*.

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3. ***Tosafot*** add that her losing her *ketubbah* answers another question that **Rabbenu Tam** could have asked: If *me'is 'alay* triggers coercion why is it not mentioned in the list of cases where coercion is permitted (*Ketubbot* 7:10 = 77a)? **Answer** - that *mishnah* reckons only those cases of coercion where the *ketubbah* must be paid.

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4. Another question **Rabbenu Tam** could have asked: According to Rav Mesharshaya (Gittin 88b) a *get* coerced by a gentile (except where the gentile was carrying out the orders of a *bet din*) was invalidated by the Sages, lest Jewish women who wanted to be free of their husbands would befriend gentiles and persuade them to force the husband to agree to a divorce. According to R. Mesharshaya such a divorce would be *in all cases* biblically valid because 'due to the compulsion the husband would truly agree'. To frustrate such counsels the Sages decreed all such *gittin* invalid. But what did they achieve – all she need do is claim *me'is 'alay* and she has what she wants – a valid *get*? Do not Rav Mesharshaya's words imply then that the *moredet me'is 'alay* is not entitled to a coerced *get*? **Answer**: She would not so easily claim *me'is 'alay* because, again, she would not want to lose her *ketubbah*.

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943 See §4.69 and ARU 2:25 n.107.

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5. **Rabbenu Tam** asked another question from *Gittin* 49b. In the course of explaining a baraita there the Gemara says that the said baraita is answering the following unstated question: "If you will enquire - Just as the Sages instituted a *ketubbah* payment from him to her if he divorces her so should they have instituted a *ketubbah* payment from her to him when she divorces him."

To this the baraita responds: "She may be divorced even against her will but he divorces only of his own free will." (I.e. he can decide against divorce if he wishes and not pay the *ketubbah*. If he decides to divorce that's his decision and he must pay. She however is entirely passive and cannot divorce him or force him to divorce her, so why should she ever have to pay him?

6. **Rabbenu Tam** asks: If she is entitled to a coerced divorce by merely stating *me'is 'alay* she can, in effect, divorce him so why indeed should she not be liable to a *ketubbah* payment to her husband?

Tosafot answer that since we would coerce only in cases where there is *raglayim ladavar* [cf. *amatlah mevoreret*] coercion would be a rare occurrence for which, as is known, the Sages would not enact legislation.

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7. In *Qiddushin* 12b the Talmud relates that Yehudit, wife of Rabbi Ḥiyya, suffered great pain in childbirth as a result of which she told her husband that she had been told by her mother that her father had accepted *qiddushin* for her from another man during her minority [and Rabbi Ḥiyya would therefore have to divorce her]. Rabbi Ḥiyya responded that it was not within the power of his mother-in-law's statement to forbid his wife to him. *Tosafot* ask: if *me'is 'alay* triggers a coerced *get* why did she not simply say *me'is 'alay*?

8. ***Tosafot*** answer this in two ways:

(a) She did not want to utter such a disgusting lie against her husband.

(b) *Raglayim ladavar* would be required (as above) and this was certainly not available in the case of Rabbi Ḥiyya.

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9. According to the Mishnah here, Rabbi Yoseh says that even after there is nothing left of her *ketubbah* the *bet din* continue to fine her, so that should she receive some inheritance in the future the payment would be taken from it. ***Tosafot*** ask: If *me'is 'alay* is entitled to a coerced divorce surely she need only make the claim and she would receive an immediate divorce and be saved from any future loss of inheritance. The position of the Sages [that we fine her only to the point when her *ketubbah* runs out] is understandable beause she would not want to claim *me'is 'alay* and lose her *ketubbah* because she would reckon that he will not sit it out [unable to remarry] until the *ketubbah* is finished so he will cave in, divorce her and pay her *ketubbah* [or what is left of it] but once the *ketubbah* has been lost what gain has she in waiting longer and risking losing her future inheritance [according to Rabbi Yoseh]? Surely she would simply say *me'is 'alay* and receive her *get* immediately if indeed there was such a law?

10. ***Tosafot*** answer that in such a case we would not believe her claim since she did not utter it until after the *ketubbah* was exhausted and is clearly scheming.

[Maharsha notes that according to the earlier answer of ***Tosafot***, that *raglayim ladavar* are required, we can easily understand Rabbi Yoseh as referring to the majority of cases where there are no *raglayim ladavar*, but ***Tosafot*** simply wished to illustrate other possible answers.]

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11. The Talmud at the end of *Nedarim* (91b) says that if a man returned home to see another man breaking through a fence and fleeing from his house, although that indicates that there has been seclusion, he need not fear adultery and may remain married to his wife, since if adultery had occurred the man, out of shame, would have concealed himself in the house (to be sure he would not be recognised) until it would become safe to escape. However, if he had hidden in the house she would be forbidden to her husband. We must understand, **Tosafot add,** that she said to her husband that she was forbidden to him because otherwise she could not be forbidden to him unless there were witnesses who saw her with another man in a position indicative of adultery. Now if we speak of a case where she has declared herself defiled for him, she would not be eligible to receive her *ketubbah* payment because it was clearly not a case of duress (as it occurred in her own home and it does not seem from the Talmud that she cried out for help).

Nevertheless, she is forbidden to her husband only if the paramour concealed himself in the house but if he immediately fled she is permitted to her husband and we do not accept her admission of defilement because of the concern that she has set her eyes upon another.

However, **Tosafot ask,** if she can obtain a *get* [by coercion if need be] by simply claiming *me'is 'alay* we should accept her admission that she was defiled and forbidden to her husband on the grounds that (*miggo*) she could anyhow obtain her release from him by means of *me'is 'alay* (since she has anyhow lost her *ketubbah*).

12. **Tosafot** now do an about turn and declare that she did not admit defilement. On the contrary, she denied adultery and whether the man hid in the house or not she is permitted to her husband. [So the question of believing her argument to leave her husband on the basis of the *miggo* of *me'is 'alay* is now inapplicable.] When the Talmud says that if he fled and did not hide in the house she is permitted it means that she is permitted to the suspect if her husband divorced her or died. This is similar to **Rabbenu Tam**'s interpretation of the Talmud's statement in *Yevamot* 24b that "since the situation is squalid she must leave [him]" [husband comes home to see the peddler exiting and the wife dressing] and **Rabbenu Tam** says that it means she must leave the suspect.

13. **Tosafot** then add strength to their new understanding of the Talmud by arguing that if she had said that she was defiled it does not seem possible to permit her to her husband simply because the suspect did not hide in the house because she has made herself a forbidden item (*hatikhah de'issura*') [which combines with the circumstantial evidence to overcome the suspicion of her having set her eyes on another]. How much more so, says **Tosafot**, is this last statement correct according to the opinion of the *She'iltot* (Rav Aḥa Ga'on - from Shabḥa) who rules that witnesses to disgraceful behaviour between her and another man – even though there is no testimony to adultery – are sufficient to forbid her to her husband.

14. Another possible answer [to the problem arising from Nedarim 91b – see 11], says **Tosafot**, is that the Talmud refers to her being permitted/forbidden to her husband [not the suspect as in 12] and it speaks of a case where she was at first silent and only later denied guilt and gave an explanation for her silence. In such a case we say that if he did not hide in the house we can accept her explanation for her silence and she is permitted to her husband. Although once she has given her explanation for her silence we are left with only suspicious circumstances [her being alone with him] and we cannot forbid her on that basis, so why does the Gemara need the additional reason – that the suspect did not hide in the house – to permit

her? The answer is that we need an *amatlah* which is apparent to the *bet din* but since there are suspicious circumstances (the seclusion) the *amatlah* is not apparent because the suspicious circumstances support her initial silence [which implied acquiescence = guilt]. However, since there is the argument that he did not hide, which cancels the argument from the suspicious circumstances, she is believed to give an *amatlah* for her silence as this will be recognised as reasonable by the *bet din*.

In this explanation too there is no admission of defilement from her that we do not accept, and so the question of believing her on the basis of a *miggo* of *me'is* '*alay* does not arise.

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15. Finally, **Tosafot** quote the generalised question of **Rabbenu Tam** that we do not find anywhere that the husband of a *moredet me'is* '*alay* is to be coerced to divorce. The Talmud discusses only whether or not the wife shall be coerced into compliance. This is the only question the **Tosafot** do not answer.

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16. **Tosafot** then explain Amemar and Mar Zutra according to **Rabbenu Tam** and conclude that both Rabbenu Hanan'el and Rashi disallow coercion.

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We may note in conclusion that although Tosafot say that both Rabbenu Hanan'el and Rashi forbid coercion, many authorities maintain that both of them support coercion: *Yabia'* '*Omer* III *'Even Ha'Ezer* 18:5&8.

Chapter Five: Annulment

Introduction

5.1 We commence with an apparent anomaly. Whereas for Catholics, annulment is the standard (if difficult) form of termination of marriage (*inter vivos*) and divorce is excluded, for Jews divorce is the standard form of termination of marriage (*inter vivos*) and annulment is completely unknown in the Bible and even the Mishnah. Yet when we reach the Talmud, and those situations where the husband opposes the termination, it appears to receive at least as much attention (five *sugyot*) as the other two "remedies" we have considered. Even so, there is a distinct sense that it is regarded as a last resort, and indeed represents a violation of a basic principle, namely that the Torah insists on the free act of the husband as a condition of termination of marriage (*inter vivos*).

5.2 It is thus hardly surprising that the use of annulment as a possible solution to the problem of '*iggun* has proved highly controversial amongst the *posqim.* Any such use has to address some fundamental objections:

(a) that *hafka'ah* is completely excluded in our days because of a lack of authority;
(b) that *hafka'ah*, while not completely excluded in our days, is strictly limited to the cases found in the five talmudic *sugyot*;
(c) that *hafka'ah*, where it remains available, must always be accompanied by a *get* (albeit a *get* which would not be sufficient on its own: §6.72);
(d) that *hafka'ah*, even if theoretically possible on basis (c), should be avoided, because it retrospectively changes the relationship of the spouses into one of *zenut.*

5.3 These various objections, however, raise further questions which require detailed analysis:

(a) what precisely are the bases of authority and the grounds on which the talmudic (and later) cases of *hafka'ah* are based?
(b) what exactly do we mean by *hafka'ah* and how does it operate? Is it always retrospective, effected by a decision of the *bet din* (what may be called an act of "constitutive" annulment) or are there circumstances in which the role of the *bet din* is merely "declaratory", confirming that some act (or omission) of the parties (other than the delivery of a *get*) has itself had the effect of terminating the marriage (whether retrospectively or prospectively)?

5.4 *All* of these questions arise already in the talmudic *sugyot*; little which is substantively new is added in post-talmudic times (the principal exception being the development of *qiddushei ta'ut*). In this chapter, we offer first a broad historical overview (section B) and then proceed to analyse separately two distinct forms of annulment:

(a) prospective annulment, whether by means of validation of an otherwise invalid *get*, or otherwise (section C)
(b) (retrospective) annulment without a *get* (section D).

Here, as throughout our analysis, we find that conditions, coercion and annulment are not distinct "remedies" or procedures, but are, both historically and analytically, closely intertwined. In the light of this analysis, we then review (section E) the modern debate on the issues identified in §5.2 above (particularly whether *hafka'ah*, where it remains available, must always be accompanied by a *get*) and conclude (section F) with a summary of the issues which have emerged, and which form the background to the analysis and proposals in chapter 6.

B. *Historical Overview*[944]

5.5 In a study of *hafka'ah* in the Talmud (ARU 11), Dr. Westreich has described the development of the concept through a series of literary strata. The significance of this study is not limited to historical research. The tension between the talmudic layers is a classic basis for the creation of divergent interpretations amongst talmudic commentators.[945] The analysis of the talmudic strata is thus relevant to the ongoing consideration of the dogmatic status of *hafka'at qiddushin*.

5.6 According to the Bavli, the concept of *hafka'ah* appears to originate not in the concept of *qiddushin* but rather that of *terumah*,[946] where Rav Ḥisda and Rabbah, two third generation Babylonian Amoraim, discussed whether the Sages have the authority to uproot the laws of the Torah (בית דין מתנין לעקור דבר מן התורה). According to Rav Ḥisda, the Sages do have such an authority, while Rabbah challenges his view (*Yeb*. 89b).[947] One of Rav Ḥisda's proofs is Rabban Shimon ben Gamli'el 's view[948] in the case of a cancelled *get* (which, according to the argument at this stage of the *sugya*, validates the *get* and does not invoke *hafka'ah*). Rabbah then replies:[949] מאן דמקדש אדעתא דרבנן מקדש, ואפקינהו רבנן לקידושין מיניה, i.e.: the Sages do not have the authority to uproot the words of the Torah. Rather, they have an authority to annul, derived from the preliminary agreement between the spouses, who made the betrothal subject to the consent of the Sages.

5.7 The stages of talmudic development may be summarised thus.[950]

(i) At the first stage, annulment (better: "quasi-annulment") means that the Sages validate an [externally flawed] *get*.[951] This refers to a case in which the husband gave his wife a valid *get* and later invalidated it, but the Sages in effect re-validated the *get* (according to R. Shimon b. Gamli'el , by a *taqqanah* which retrospectively withdrew his ability to invalidate it). Termination of the marriage is thus entirely prospective, being by validation of the (otherwise invalid) *get*.

(ii) At the second stage Rabbah, due to wider questions of the authority of the Sages,[952] interpreted the concept of *hafka'ah* as a *prospective* annulment of marriage. Here, the Sages assume the authority to terminate marriage without any act on the part of the husband, and the termination is valid from that point onward.

(iii) At the third stage *hafka'at qiddushin* becomes retrospective annulment of the marriage. This conceptual change is made by explaining *hafka'ah* as an annulment of the act of betrothal; when, therefore, it is applied after the betrothal has taken place (as in the messenger case: §§5.14-15), it means that the betrothal is retrospectively annulled.

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944 A more detailed account of the sources is given in sections C-E, below.

945 Cf. Shamma Y. Friedman, *Tosefta Atikta* (Ramat Gan: Bar Ilan University Press, 2002), 149.

946 See further ARU 11:5-6 on *Yevamot* 89b-90b.

947 On the relationship between the *sugyot* in *Yevamot* and *Gittin*, and the positions of R. Ḥisda and Rabbah in them, see ARU 9:9-10 n.57.

948 On its interpretation in the Yerushalmi, see n.1020, below.

949 A possible argument is that this discussion is a later expansion of the basic Amoraic dispute, and was actually edited by later editors. However, this seems to be incorrect. The discussion between R. Ḥisda and Rabbah was indeed wide and complex and included several arguments for each side. It occurred not on just one occasion but was a continuing debate: שלח ליה רב חסדא לרבה ביד רב אחא בר רב הונא... אמר ליה: בעאי לאותובך ערל, הזאה, ואזמל, סדין בציצית, וכבשי עצרת, ושופר, ולולב (see *Yevamot* 89b-90b). Therefore it is most reasonable to see our *baraita* as part of the actual discussion between these two scholars.

950 This summary is based on ARU 11:6 and ARU 15:3-4.

951 First, a tannaitic source – Rabban Shimon ben Gamliel's view – validated an invalid *get* based on a decree of the Sages. Then R. Ḥisda based this on the Sages' authority to uproot the words of the Torah. This explanation was adopted in the Yerushalmi in its interpretation of Rabban Shimon ben Gamliel.

952 Here, Rabbah rejected the radical view in (i). However, he interpreted R. Shimon b. Gamliel as meaning that the Sages have the authority to validate the divorce, but based this on a specific stipulation at the time of marriage.

5.8 The talmudic sources differ not only in the manner in which they resolve the problem (validation of a *get,* prospective annulment, retrospective annulment) but also on the authority and types of rationale on which these different procedures are based: whether the Sages have an inherent authority to uproot the laws of the Torah (by validating an invalid *get* or by a form of annulment) or whether it is the preliminary agreement between the spouses which confers that authority (§5.6, above), or whether it is based on the behaviour of the husband (whether he has acted *kehogen* or not: §5.56, below).

5.9 The five cases (in six *sugyot*[953] of the Babylonian Talmud) are often divided into two classes, which we may describe as "immediate" and "delayed" annulment: in the first, annulment is granted shortly after but takes effect (retrospectively) from the very moment of betrothal, due to some fault in the procedure of the *qiddushin* itself; the second is annulment often granted long after the *qiddushin* (and probably also *nissu'in*) took place and involves a *get* which was written and delivered (in one case to an agent, in the other two to the wife herself), but which for some reason was then invalidated. This distinction has assumed a major dogmatic importance in the light of a series of medieval *taqqanot haqahal* which added additional requirements to the *qiddushin*, failure to observe which was stated to result in annulment:[954] those who claim that there is no post-talmudic authority for *hafka'ah* have to argue that these cases of "immediate" annulment are not relevant to our problem. We may be permitted one preliminary observation on this: despite the "immediacy" of the termination of the marriage, these are (in the original talmudic instances) still cases of retrospective annulment. However, for post-talmudic authorities, which treat the talmudic *sugyot* as normative rulings which they simply apply (rather than new judicial decisions), there never was in these cases any *qiddushin* to annul, so that "annulment" here becomes (at least in theory[955]) a declaratory act of the *bet din*, indicating that there was never any *qiddushin*, rather than a constitutive act, which retrospectively annuls an otherwise valid *qiddushin*.[956] They differ from the cases of "delayed" annulment in two respects: (i) there is no invalid *get* to be validated; (ii) in most cases (but not necessarily) they occur where only *qiddushin* and not *nissu'in* has taken place,[957] so that marital relations between the spouses have not in fact commenced.

5.10 Some may argue that, for dogmatic purposes, the internal historical development of the talmudic soures is not relevant; what matters is the final view (if we can ascertain it) of the Talmud, identified with the position of the ultimate talmudic redactor, which is normally taken as interpreting *hafka'ah* as retrospective annulment.[958] In all five talmudic cases, the Bavli cites the following discussion:

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

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953 *Yevamot* 110a (Naresh), *Baba Batra* 48b (forced marriage), *Ketubot* 3a (conditional *get*), *Gittin* 33a/*Yevamot* 90 (revoked agency), *Gittin* 73a (recovered *shekhiv mera*). For reviews of all the talmudic cases, see Breitowitz (n.185, above), 63f.; Riskin (n.17, above), 9-11; Jachter (n.37, above), 29-30; E. Shochetman, "Hafka'at Kiddushin – Derekh 'efsharit lepitaron ba'yat me'ukavot haget?", *Shenaton haMishpat haIvri* 20 (1997), 349-398, at 350-52.

954 See further ARU 2:41-47 (§4.3).

955 In practice, it is difficult to conceive of remarriage being permitted without it.

956 See Ḥanina Ben Menachem, "Hu 'Asa Shelo Kahogen", *Sinai* 81 (1977), 157. Thus, for *Tashbets,* Vol.1 no.133, the *qiddushin* here "*lo ḥalin*": see *ET* II p. 139, s.v. *Hafqa'ah bithillat haqiddushin*. For further debate on the question, see Wieder (n.4, above), 37; Riskin, "Response" (n.287, above), 44.

957 *Qiddushin* and *nissu'in* being traditionally separated by an interval of a year. Freimann (n.346, above), 18, finds the first signs of a combined ceremony of *qiddushin* and *nissu'in* in the time of R. Natrunai Gaon.

958 See generally Shmuel Atlas, *Netivim Bamishpat HaIvri* (New York: American Academy for Jewish Research, 1978), 206-224; *idem*, "Kol Demeqaddesh 'Ada'ata Derabanan Meqaddesh", *Sinai* 75 (1974), 119-143 and 79 (1976), 102-116; Shoḥetman (n.696, above), 352-355. On the latter, see ARU 17:147-48.

However, it is clear that the issue of *be'ilat zenut* is only relevant in the cases of "delayed" annulment, where there is an invalid *get*, if the *hafka'ah* is interpreted as retrospective annulment. But we have noted that this may well not be the original meaning (and is not accepted by all subsequent *posqim*). It is thus unlikely that this discussion between Ravina to Rav Ashi occurred five times;[959] rather, it reflects a harmonisation of the materials by the ultimate talmudic redactor.[960]

5.11 All three approaches to annulment found within the Talmud (§5.7, above) are found in the Rishonim and Aḥaronim, although the conceptual distinction between the various approaches is not always clearly defined.[961] The final talmudic stage, endorsing retrospective annulment, is certainly the dominant view amongst the Rishonim and Aḥaronim.[962] But there are variations even within the post-talmudic *posqim* (not least on whether such annulment needs to be accompanied by a *get*), as will be shown below.

5.12 The same issues are still reflected in contemporary arguments that *hafqa'ah* remains available only where there is an [externally] invalid *get* – as in the cases in the Talmud. Thus in the debate between R. Shlomo Riskin and R. Zalman Neḥemyah Goldberg[963] the latter repeatedly insists, in opposition to Rabbi Riskin, that retrospective annulment without a *get* is nowadays out of the question. R. Riskin's arguments from the Rosh's interpretation of the *taqqanat haGe'onim* (i.e. that the *taqqanah* was based on post-talmudic *hafqa'ah*, thus demonstrating that retrospective *hafqa'ah* is possible even after *ḥatimat haTalmud*[964]) are rejected by R. Goldberg because the enactment of the Ge'onim also operates only together with a *get* (here externally flawed as in the cases of the Talmud, but this time due to talmudically unsanctioned coercion[965]).

C. *Prospective Annulment*

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959 See further ARU 11:8-9.

960 It creates some interpretative difficulties: see Tosafot, Ketubbot 3a, s.v. *tenah*: Tosafot implicitly ask why does the Gemara only concern itself with the impropriety of the Sages causing *bi'at zenut* when the marriage is by means of *bi'ah*? Surely the same problem arises when it is by means of *kesef* because then also all his *bi'ot*, though not legally declared *zenut*, will become *zenut*!? So the question remains – how can it be acceptable for the Sages to do such a thing? *Tosafot* answer that in the case of *kesef* the act of the Sages is only to appropriate the ring, which is in itself not a sinful act, and the *bi'ot* then automatically become *zenut* – but that is an indirect result of the action of the Sages. No sinful act has been done by them, only caused indirectly. However, in the case of *qiddushey bi'ah* the Sages undo directly the *bi'at qiddushin* which is a *bi'at mitsvah* and they apparently directly change it into a *bi'at zenut*. It is the propriety of this that the Talmud questions (see Maharam Schiff, ibid.). The Talmud's response (see Maharsha) is that, having no other choice, they did indeed turn the *bi'at mitsvah* into a *bi'at zenut*.

961 On Rashi, *Gittin* 33a, s.v. *shavyuha* (and its use by R. Lavi), that the retrospective declaration of the cohabitation as promiscuity is effected by the *get* (thus integrating different approaches), see ARU 11:12.

962 See, e.g., Rashi, Gittin 33a, s.v. *tenah* and *shavyuha*; Tosafot, *ibid.*, s.v. *ve'afke'inhu*; Ramban, *Ketubbot* 3a, s.v. *shavyuha* and elsewhere.

963 See Riskin, "Hafka'at Qiddushin – Pitaron La'aginut", *Teḥumin* 22 (5762), 191-209; Goldberg, "Hafka'at Qiddushin Eynah Pitaron La'aginut", *Teḥumin* 23 (5763), 158-160; Riskin, "Koaḥ Hahafka'ah Mone'a 'Iggun" (Teguvah Li-tguvah)", *Teḥumin* 23 (5763), 161-64; Goldberg, "Eyn Hafka'at Qiddushin Lelo Get", *Teḥumin* 23 (5763), 165-68. There is also a summary article of Riskin's position in *'Amudim* XIV 17-22. For the English version of R. Riskin's article, see "*Hafka'at Kiddushin*..." (n.17, above). See also the exchange between Berachyahu Lifshitz, "Afke'inhu Rabanan Leqiddushin Minayhu", *Mi-perot Hakerem* (Yavne: Yeshivat Kerem BeYavne, 2004), 317-324, and R. Uriel Lavi (n.80, above).

964 See §§3.31, 4.22-24, above.

965 However, even if we accept the demand for a *get*, it does not necessarily have to be "externally flawed". It may be a *get kol-dehu* (see §5.20, below), in order both to prevent a "slippery slope" and make annulment closer to normal divorce: see ARU 11:13-14.

5.13 In this section, we consider the possibility of a purely prospective annulment, whether by means of validation of an otherwise invalid *get*, or otherwise.

5.14 In *Gittin* 33a/*Yevamot* 90b,[966] a husband sends an agent to deliver a *get* to his wife and then, without the knowledge of the wife or the agent (or any *bet din*), cancels the *get* (as he is entitled to do) or the agency before the *get* reaches her. By Torah law, the *get* is rendered ineffective. But since the wife will believe the *get* to be valid and may remarry unaware of the cancellation,[967] Rabban Gamli'el the Elder forbade such an action by the husband and declared the *get* valid.[968] His descendants, R. Shimon ben Gamli'el and Rabbi (R. Yehudah Hanasi), disputed the status of the *get* where the husband ignores Rabban Gamli'el's decree and cancels the *get*. According to Rabbi, the *get* is void (if he informed at least 2 people) and the wife is not divorced, but according to Rabban Shimon ben Gamli'el the *get* is not void and the wife *is* divorced.

5.15 According to R. Shimon ben Gamliel in this case, the husband cannot, in the absence of the agent or wife, cancel a *get* which had already been given to the agent to deliver to his wife. In his words: "He (the husband) can neither cancel it nor add any additional conditions, since if so, what becomes of the authority of the bet din? (שאם כן מה כוח בית דין יפה)."[969] This is quite explicit: the husband cannot cancel the *get*, so the *get* is valid. The Sages act here by validating the *get* rather than by actively annulling the marriage. This view appears to be shared also by the Yerushalmi,[970] which merely discusses the cancellation of the *get* and its validation by the Sages.[971]

5.16 In the light of the discussion between Rav Ḥisda and Rabbah on *terumah* in *Yevamot* 89a-b (see §5.6, above) and the *baraita* on the cancelled *get* (which, after citing the view of Rabbi, cites the view of R. Shimon ben Gamli'el[972]) introduced into that discussion in *Yevamot* 90b,[973] we may observe a shift between validating the *get* and annulling the marriage: according to the first approach[974] we need to assume that the Sages have the authority to uproot the words of the Torah. Rabbah on the other hand explains Rabban Shimon ben Gamli'el's ruling as a result of the unique structure of Jewish marriage (in which the authority to annul is unique to marriage and divorce, based on the preliminary agreement of the spouses,[975] who are taken to have made their betrothal subject to the consent of the Sages, *kol hameqaddesh 'ada'ta' derabbanan meqaddesh*, and not

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966 See further ARU 11:3, 4-5, 9, and the debate between Riskin, "*Hafka'at Kiddushin*..." (n.17, above), 9, 11; and Wieder, "*Hafka'at Kiddushin*..." (n.4, above), 38; Riskin, "Response" (n.287, above), 45.

967 See further *Gittin* 33a, the various explanations of R. Yoḥanan and Resh Lakish to מפני תיקון העולם, and compare *Yerushalmi, Gittin* 4:2, 45c. Interestingly, Resh Lakish explains it as מפני תקנת עגונות, i.e. to forestall the problem of *agunot*, and according to Rashi *agunot* here means a married woman whose husband (after canceling the first *get*) refuses to divorce her; see Rashba, *Gittin* 33a, s.v. *veha*.

968 This accords with the opinion of Rabban Shim'on ben Gamliel. According to Rabbi (Yehudah haNasi), according to whom the *Halakhah* is fixed, the husband's cancellation would be allowed to stand if he declared it in the presence of a *bet din* (of three and some say even two) even though neither the wife nor the agent was informed.

969 The reasoning here is the (inherent) authority attributed to the Sages' decrees. If the *get* were not validated, the decree of Raban Gamliel the Elder would be rendered otiose.

970 *Yerushalmi, Gittin* 4:1, 45c; for the text and discussion, see ARU 11:5, ARU 18:43-44; Arye Edrei, "Ko'aḥ Bet Din Vedine Nisu'in Vegerushin", *Shenaton Hamishpat HaIvri* 21 (1998-2000), 34 n.121. The Yerushalmi in fact mentions both Rabbi's and Rabban Shimon ben Gamli'el's views, but appears to prefer that of R. Shimon ben Gamli'el. On the talmudic redactor's approach to this issue, see §5.10, above.

971 See also *ET* II p. 138, at note 22, citing *Shittah Mekubetset* on 'There are some who answer'. This accords with the view of R. Ḥisda in the Bavli in his dispute with Rabbah: see *Yevamot* 89a-90b. Note, however, that in given situations Rabbah too would countenance active abrogation – see *ET* XXV cols. 634-37 (top) and especially notes 205 and 230.

972 "R. Simeon b. Gamaliel, however, said: He may neither annul it nor add a single condition to it, since, otherwise, of what avail is the authority of the Beth Din".

973 See further ARU 11:9-10.

974 The view of R. Ḥisda; the Yerushalmi appears to hold a similar view: see *Y. Gittin* 4:2, in the context of the *get* cancelled without informing the messenger. See also ARU 2:10 n.41 for further literature.

975 This is not the only explanation, and some do not explain it as an agreement of the spouses: see ARU 9:7 n.39.

part of a wider authority of the Sages[976]) and explicitly rejects the view that the Sages can uproot the words of the Torah. When Rabbah speaks about annulling the marriage there is no reason to interpret it (as was done later, as a result of the redactional additions to the *sugya*: §5.10) as a retrospective annulment,[977] which is much more drastic both conceptually and practically (declaring cohabitation to be promiscuity; the possible effect on the status of the children,[978] etc.). Indeed, it may be argued that *hafqa'ah* in the Talmud means to cancel or to make cease,[979] usually in the context of cancellation of a legal status or of the validity of a legal act, so that *ḥalitsah* nullifies the levirate bond (*zikah*: *Yevamot* 52b), the Sabbatical year cancels one's debts (*Shevu'ot* 58b), expropriation (of property) means that an object in one's possession is *prospectively* excluded from his possession, etc. Status is no different: the status of marriage is prospectively "excluded" from the couple.[980]

5.17 Similarly, in *Ketubot* 3a,[981] a husband issues a conditional *get* which is to take effect "if I do not return by a certain time"; he failed to return within the time but only because of circumstances beyond his control (אונס). By Torah law the *get* is not valid because he did everything he could to return and his failure to do so was not his choice. However, Rava, according to one tradition in the Bavli, argues that the claim for אונס cannot be accepted here and the wife is divorced. The Talmud explains Rava's reasoning as based on an enactment of the Sages that there can be no אונס in *gittin* – a policy measure designed to protect both chaste women and dissolute women: if the Rabbis had let the biblical law stand, then every time a husband failed to return on time, a chaste wife would think that perhaps this was due to אונס and would remain an '*agunah* although there may have been no אונס and the *get* is perfectly valid; on the other hand, an immoral wife might always presume that there was no אונס and would remarry, whereas in fact there may have been an אונס and the *get* would thus be void. Once the Sages enacted that there is no אונס in *gittin*, both the chaste and the immoral wife could remarry safely.

5.18 The third talmudic instance of "delayed" annulment is the case discussed in *Gittin* 73a. A dangerously ill person (שכיב מרע) divorced his wife. However the man recovered from his illness and expressed the wish to retract. According to Rav Huna, he can do so because he clearly intended to divorce only because of his impending death: the *get* is thus annulled (by Torah law), since it was given under the assumption that he would die (a legal assumption – an '*umdena* – that it was a conditional *get*). However, Rabbah and Rava declared the divorce valid in spite of his retraction, due to the fear of a mistake: people might mistakenly think that in such cases the *get* becomes valid only after the husband's death and will come to validate a *get* timed to take effect posthumously, and that this is the reason for its annulment when the husband recovered. However, once the Sages ruled that the *get* is valid even if he recovers no-one could possibly think that he gave the *get* on condition that it take effect after his death.[982]

5.19 The transfer of Ravina and Rav Ashi's discussion regarding annulment by *kesef* and *bi'ah* to the cases of "delayed" annulment entails explaining *hafka'ah* as retrospective. While the first

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976 See further ARU 11:5 and n.23.

977 For an expanded discussion of Rabbah's role in this development, see Dr. Westreich's forthcoming book, *Annulment, Condition, Get Compulsion: Talmudic Bases for Solutions to the Problem of 'Iggun*.

978 I.e. declaring the children of an adulterous liaison not to be *mamzerim*, see Tosafot, *Gittin* 33a, s.v. *ve'afke'inhu*, and elsewhere.

979 See Michael Sokoloff, *A Dictionary of Jewish Babylonian Aramaic of the Talmud and Geonic Periods* (Ramat Gan: Bar Ilan University, 2002), 158, and further discussion by Westreich (n.977, above).

980 Cf. D.W. Halivni, *Mekorot Umasorot*, *Nashim* (Toronto: Otsreinu, 1994), 530, according to whom *hafka'ah* at this stage is retrospective, but there is still a distinction between this stage and the discussion of Ravina and R. Ashi: here, since annulment is based on the prior consent of the husband (כל דמקדש אדעתא דרבנן מקדש), we do not need the Sages to declare his cohabitation as promiscuity.

981 See further ARU 18:41-42.

982 See *Gittin* 73a and Rashi there s.v. *Gezerah*.

development in the understanding of *hafka'ah*, i.e. from validating the *get* to annulling the marriage, is the result of a conceptual process (the debate between Rav Ḥisda and Rabbah: §5.16. above), this second move, from prospective to retrospective annulment, appears to result merely from redactional work. Nevertheless, we may assume that it was done with awareness. Transmitting the discussion to a group of cases reflects a quest for harmonization: since a similar concept (*hafka'ah*) is mentioned in these various cases, the later talmudic view sought harmony in its meaning and implications. Thus *hafka'ah* became a process which refers to the act of marriage even in the cases of improper divorce; in those cases its meaning thus became retrospective annulment of the marriage.[983]

5.20 Despite the logic of validation of an invalid *get* – that the *get* becomes valid and thus effective prospectively[984] – this conclusion is not drawn by most of those who insist that *hafka'ah* is possible only in the presence of a *get* (and thus that the required *get* may be a גט כל דהו[985]). If then, a *get* is required, it must be for external (meta-halakhic) reasons, for example prevention of annulment becoming a "slippery slope" for exit from marriage without the husband's agreement,[986] or the desire to make *hafka'ah* appear as similar as possible to the normal (biblical) manner of terminating marriage.[987]

5.21 Despite the harmonisation effected by the final talmudic redactor, applying the terminology of *hafka'ah* together with the rationale of *'ada'ta' derabbanan* to these cases of marriage termination in the wake of an externally flawed *get*, the idea that there is a form of 'annulment' which serves to cure a defect in a *get* survives amongst the Rishonim in various forms.[988] Ri Halavan says of the procedure in *Ketubbot* 3a that the Sages in their decree made [the *get*] valid *mi-de'orayta*: ורבנן בתקנתם העמידו כשרותם מן התורה.[989] He argues that where an externally flawed *get* is given, the Sages used their power to validate it and bring the marriage to an end (non-retrospectively[990]) — a view

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983 See Lifshitz, "*Afke'inho*..." (n.963, above), 317 n.1; 317-319. The shift between annulling the status of marriage and annulling the marriage act was first made by R. Ashi, who applied Rabbah's concept to the case of Naresh. Yet, he didn't apply it to the previous cases. However, his move made the next step of the talmudic redactor possible: viewing *hafka'ah* in all the five cases in a similar way, and thus understanding it as retrospective annulment.

984 Jachter (n.37, above), 30, cites the view of Rashba (*Resp*. 1:1162 and commentary to *Ket*. 3a) that this is not a real retrospective annulment but rather "the rabbis merely render the *get* effective despite the husband's initial wishes." This appears to mean that they threaten retrospectively to dissolve the marriage if the husband does not agree to leave the *get* valid. In the internet version, Jacher notes that "Rashi in these three cases explains that "Hafkaat Qiddushin" works because of the presence of the Get (despite its defects)." See also ARU 6:22 (§8.3), citing *Tosafot*, *Gittin* 32a s.v. *Mahu detema*' '*iglai milta*', quoted by R. Aqiva Eiger in his gloss to *Mishnah Gittin* 4:2, no.39; ARU 5:3 (§4.2.1), on Maharsham, *Resp*. I, 9.

985 See ARU 11:13, citing Ri Migash in Me'iri, *Ketubbot* 3a, s.v. *kol she'amru*; Rashba, *Ketubbot*, 3a, s.v. *kol demeqaddesh*, and noting the possibility, raised by Rashi and Rashba and discussed by Berkovits (n.112, above), 127-139, that in some circumstances (such as a disappeared husband), even the גט כל דהו may be replaced by other devices, such as a single witness.

986 See R. Uzziel in *Shut Mishpetey Uzzi'el*, Part 2, *'Even Ha'Ezer*, 87.

987 See Ra'ah, *Shittah Mekubetset*, *Ketubbot* 3a, s.v. *vekhen katav haRa'ah*, discussed at ARU 11:13, associating this with the view of R. Ovadyah Yosef, that *hafka'ah* leaves a rabbinical marriage in place: see §5.57, below.

988 For example, it is possible to view the account given by the Rosh of the measures of the Geonim in this way. See *Resp. Rosh* 43:8, discussed in §§4.24-26, above.

989 See *Tosafot Ri Halavan* (London, 1954), Ketubbot 3a, s.v. *kol demeqaddesh*.

990 Rashba (*Ketubbot*, 3a, s.v. *kol*; *ibid.*, *Responsa*, 1162, following Ramban in the name of Rashbam, *Ketubbot*, 3a, s.v. *shavyuha*; *ibid.*, *Gittin*, 33a, s.v. *kol*) is close to this view, since he argues that the *get* is valid and the marriage is not retrospectively annulled. However, in principle he admits that annulment is retrospective. This means that in spite of the husband's declaration of cancellation of the *get*, in his heart he really adheres to the ruling of the Sages who validated this *get*. See '*Otsar Mefareshey HaTalmud* to *Gittin* 33a, cols. 434-35 and footnote 89. Rashba's argument is that in practice, since the husband is afraid of a retrospective annulment which would make his cohabitation promiscuous, he cancels the annulment of the agency (*Gittin* 33a), forgoes his condition (*Ketubbot* 3a) or, in the case of a dying person

adopted in modern times by *Mar'eh Kohen*,[991] and more recently by both Shemuel Atlas[992] and Eliav Shoḥetman.[993]

5.22 *Tosafot* in *Gittin* 32a is also understood by some to mean that annulment may be non-retrospective in particular circumstances, and to be based upon the concept of the rabbinic authority to override Biblical Law.[994] Similarly, some Rishonim cited by Ritba in the *Shittah Mequbetset*[995] maintain that the Talmud means that the Sages annulled his marriage only from the time of the *get* and not retrospectively from the moment of *qiddushin*. This appears to have been the understanding of Rashi's teachers.[996] Ramban[997] argues that the groom's very awareness of the possibility of rabbinic retrospective annulment – something he does not want, since it will reduce his relationship with his wife from one of holy matrimony to one of secular (and possibly sinful) concubinage – will force him to validate the divorce in his heart and so the *get* remains biblically valid in spite of any indication to the contrary. Again, this means that the termination of the marriage is prospective.[998] This interpretation is also discussed by *Ḥatam Sofer*,[999] and amongst Jewish Law scholars was recently suggested by Arye Edrei.[1000] We may note also that *'Otsar Mefarshey HaTalmud* to *Gittin* 33a, col. 436, s.v. *Kammah*, states that a number of great *'Aḥaronim* stated that, despite appearances to the contrary, the *Rishonim* agree that the marriage is in fact annulled only from the time that the (flawed) *get* reaches her hand, and thus produces a prospective annulment.

(*Gittin* 73a), agrees that the *get* should not be annulled even if he recovers. Therefore if the Sages did have the need to use *hafka'ah* (which they do not) it would be applied retrospectively (see *Pene Yehushu'a*, *Ketubbot*, 3a, s.v. *'afke'inhu* and s.v. *kol*; Berkovits (n.112, above), 127-133). See also see *ET* II p.137 at note 22; Riskin, "*Hafka'at Kiddushin*..." (n.17, above), 16; ARU 18:43; ARU 11:11-12.

991 On *Yevamot* 90b. See further ARU 11:11 n.69.

992 Atlas (n.958, above), 211-14.

993 Shoḥetman (n.696, above), 355.

994 See R. Auerbach (§5.24, below) based on R. Akiva Eiger, glosses to Mishnah *Gittin* 4:2, number 39 and Tosafot: *Tosafot Gittin* 32a s.v. *Mahu detema*, arguing that the annulment countenanced by R. Yehudah HaNassi (for example, according to the *Shulḥan 'Arukh*, if the husband made cancellation in the presence of only one person who was neither his wife nor his agent) does not, according to *Tosafot* there, function retrospectively but from the moment of declaration by the *bet din*, so that it would not create retrospective promiscuity.

995 *Shitah Mekubetset, Ketubbot* 3a, s.v. *vechatav haRitva*, in the name of אית דמתרצי: דכי אמרינן אפקעינהו רבנן לקידושין מיניה לאו משעת קידושין אלא השתא משעת מעשה ("when we say that the Sages annul his betrothal, it does not [apply retrospectively] from the time of betrothal but [it applies] now, at time of the act"). The *get* mentioned later in the Ritba (אין הקידושין בטלין כי אם מכאן ואילך ובגט) has a similar meaning: it is an element required for applying *hafka'ah*, but this does not mean that the Sages validate the *get* (as they do according to Ri Halavan).

996 Rashi's teachers' view is cited — and strongly rejected — by Rashi in the various *sugyot* on *hafka'ah*. Rashi indicates that according to his teacher's (mistaken) understanding the betrothal is prospectively annulled, as opposed to his interpretation, see Rashi, *Ketubbot*, 3a, s.v. *shavyuha* (על כרחך צריך אתה לפרש כמו שפירשתי שהקידושין נעקרין מעיקרן ולא מכאן ולהבא, i.e. you must interpret (with me), that the betrothal is retrospectively annulled and not from now on [as his teachers argue]).

997 *Shittah Mequbetset*, *Ketubot* 3a, s.v. *Wezeh leshon haRamban zal*; Ramban, *Ḥiddushey Ketubbot* 3a, s.v. *shavyuha*, citing Rashbam. See further ARU 5:68 n.225.

998 Note here, as in Rambam, the "constructive" account of the husband's will: we construct his will as what we expect of a faithful member of the religious community.

999 *Ḥiddushe Ḥatam Sofer*, *Gittin*, 33a, s.v. *tenah*. It is not clear according to this interpretation why the Sages should declare the cohabitation to be promiscuity. Harmonizing all the parts of the *sugya* is quite difficult according to this approach and would apparently (like Ri Halavan's, above) need to use an historical approach: see further ARU 11:12 n.75.

1000 Edrei (note 970, above), 34-35. Edrei claims that this view is not found in previous writings, Rishonim as well as modern scholars. The above discussion indicates some examples of sources which did discuss this view.

5.23 Indeed, it has been suggested that the talmudic case of the revoked *get* (*Gittin* 33a/*Yevamot:* §5.14, above) may be used in order to engineer an annulment. This is the so-called "*get Maharsham*", which originated in a case where a wife whose husband had gone missing applied to the *bet din* for permission to remarry. The *bet din* concluded that the husband was dead, and granted permission. The wife remarried and had a child. Then the first husband reappeared. He was sympathetic to the wife's plight, and wished to remove from her the stain of adultery and from the child the status of *mamzer*. The Maharsham advised that it might be possible to do so by deliberately creating a scenario based on *Gittin* 33a / *Yevamot* 90b, i.e. by handing a *get* to an agent but then cancelling it (in the presence of just one person or in breach of other technical evidentiary requirements) before its delivery to the wife (a possibility already raised for such a case by Tosafot), so that the woman was not married to her first husband at the time of conception but had merely been his partner (פילגש). R. Moshe Morgenstern appears to argue that we could use this as a solution to the problem of '*iggun*:[1001]

> The procedure [of engineering halakhic retrospective annulment] was used in Israel by Chief Rabbi Goren [in cases of soldiers who went missing in combat and later reappeared, after their wives had, with *bet din* permission, remarried] and documented in a pamphlet known as "The *Get* of the Maharsham" vol. 1 – *responsum* 9. The *get* is given by an agent rather than the husband. When the agent leaves the Rabbinical Court his agency is revoked. Following [this], another *get* is thrown by the husband to the wife both standing in a public domain, half way[1002] where the wife is standing facing the husband.[1003] The effect of this procedure is to annul the marriage. This procedure was endorsed by Rav Shelomoh Kluger[1004] *Even Ha'Ezer* 141:60. Rav Mosheh Feinstein told me orally that *post facto* he likewise endorses this procedure. In addition to the above, if the husband presently giving the *get* violates the Sabbath publically, the *get* is, in effect, an annulment. Such is the ruling of the Manchester UK sage Rav Yitsḥaq Ya'aqov Weiss writing in *Minhat Yitshaq*, *Even Ha'Ezer* X no. 126.[1005]

There is in fact a record[1006] of a conference of dayanim in 1979 at which the issue of *get Maharsham* was raised. It describes Rav Goren's proposal (*lehalakhah velo lema'aseh*) to use the *get Maharsham* and its various responses: some, including that of Rav Ovadyah Yosef, seem to support it in unique cases and with limitations, while others strictly reject it.

5.24 The Maharsham in *responsum* I:9 did indeed say that it is possible to save a *mamzer* (conceived in adultery) using *bittul get*, by deliberately creating a scenario based on *Gittin* 33a / *Yevamot* 90b,[1007] so that the woman was not married to her first husband at the time of conception but had merely been his partner (פילגש).[1008] However, R. Morgenstern does not mention that this approach of Maharsham was criticised by R. Shlomo Zalman Auerbach,[1009] who points out, *inter alia*, that

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1001 *Hatarot Agunot*, vol. I, ch.13 pp.5-6, quoted at ARU 5:67-68 (§27.1-3). See also ARU 2:51-52 n.226.

1002 For a critique of this argument, see ARU 5:69-70 (§§27.13-18).

1003 Meaning, presumably, that the *get* is thrown and lands at a point equidistant from husband and wife.

1004 1783–1869, Galicia, in his *Ḥokhmat Shelomoh*. See further ARU 5:68-69 (§§27.4-11), for an account of what R. Kluger actually wrote.

1005 This in fact is incorrect: R. Weiss says there that nowadays public Shabbat desecration does not render the individual a *mumar*: see ARU 5:36 (§21.2.6.5).

1006 Qenes HaDayyanim 5739, ed. Hanhalat Batei HaDin HaRabbaniyim, Misrad HaDatot, in the library of Bar-Ilan University, copy very kindly provided by Dr. Amiḥai Radzyner. See also Rabbi S. Daichovsky, "Batey Din Rabbani'im Mamlachti'im: Be'ayotehem Vehesegehem", *Diné Israel* 14-15 (5748), 15, noting that the idea (with some improvements) was raised by R. Goren, but created "a great storm".

1007 See further ARU 5:3-4 (§4.2.1), noting the *maḥloqet* between R. Shim'on ben Gamliel and Rabbi regarding the validity of a cancellation before a *bet din*.

1008 In fact, the Maharsham could not employ this solution in the particular case with which he was dealing, because the husband had already given his wife a *get*. Nevertheless, he did attempt to invalidate the *get* so that annulment could still be employed with the writing and delivery of a new divorce, but in the end had to admit defeat.

1009 See n.533, above.

Tosafot,[1010] quoted by R. Aqiva Eiger,[1011] understood the annulment in this case as *non-retrospective* according to Rabbi and as an example of the power of the Sages to override, in some cases, the laws of the Torah (יש כח ביד חכמים לעקור דבר מן התורה), in this case by abruptly ending a marriage without a (valid) divorce from the husband. This, in fact, is a reversion to what seems to have been the original conception of the authority for (if not precisely the same procedure of) the decision in the talmudic case. But if so, this re-enactment of the talmudic scenario would not be effective in saving the *mamzer* because, though the annulment would indeed be achieved, it would only operate prospectively, from the time of the delivery of the (invalid) *get*, so that the mother would still have been a married women at the time of the conception of the child and the conceived child would thus still be a *mamzer*. R. Morgenstern also failed to report that the Maharsham confined this suggestion to the realm of halakhic theory (להלכה ולא למעשה) and that the suggestion was made only in a case where the wife had acted innocently (see §5.23). However, the possibility is raised in *Tosafot* that a husband may indeed remove the sin of adultery from his wife by sending her a *get* (through an agent) and cancelling it,[1012] and it has been argued that Maharsham would in fact apply it in practice to remove *mamzerut*, in conditions of "great urgency".[1013] Rav Lavi has also recently indicated that Me'iri may have contemplated the use of the *Get Maharsham* in order to prevent *mamzerut*,[1014] a view which appears now to be taken by the Supreme Rabbinical Court.[1015] It is highly doubtful, however, that this can be used in cases of recalcitrance: the initial delivery of the *get* which is then cancelled cannot be "engineered" by the process.

5.25 A lengthy modern study by Shemuel Atlas[1016] concludes that annulment is *never* really retrospective. Either it means that the husband divorces wholeheartedly because of his fear that otherwise the Sages will annul his marriage retrospectively – something he does not want – or it means that the Sages use their power to uproot biblical law[1017] and bring the marriage to an end without a *get*. Either way, the marriage ends now and not retrospectively. While this understanding of *hafqa'ah* has the advantage that it would obviate the problem of *bi'at zenut*, a disadvantage would be that it would not be possible to use *hafqa'ah* to undo cases of *mamzerut*, as was proposed by the Maharsham.[1018]

5.26 We are left with both dogmatic and practical problems in any construction of annulment as prospective. The dogmatic problem arises from the application of *'ada'ta' derabbanan*: "Everyone betroths only with the agreement of the Sages" means that the Sages take their power to annul a marriage from the fact that the marriage was entered into originally upon an implied condition, namely that the Sages agree to it. Hence, the groom himself has agreed to limit his marriage in accordance with the will of the Sages, and it is from this limitation accepted by the groom (and

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1010 *Gittin* 32a, s.v. *Mahu detema*' '*iglai milta*'.

1011 Glosses to Mishnah *Gittin* 4:2, no. 39.

1012 See ARU 4:17 (§IX.30) on *Tosafot*, chapter *Hashole'aḥ*, regarding the principle of annulment (*Gittin* 33a s.v. *We'afqe'inhu rabbanan*): R. Shemuel asks how we can ever make an adulterous married woman liable to the death-penalty since the warning is a *hatra'at safeq* for perhaps he will (at some future time) send her a *get* (through an agent) and cancel it.

1013 See R. (Dayan) David Malka, in a criticism of Prof. Lifshitz's proposal for *hafka'at kiddushin* (http://www.psakdin.co.il/fileprint.asp?FileName=/Mishpaha/Public/art_ccaa.htm).

1014 R. Uriel Lavi, "Hafka'at Kidushin 'Enah Ma'aneh Lesarvanut Get", *Teḥumin* 29 (5769), 247-256 (esp. 249-250).

1015 File סג/3276 dated 11.11.03, available at www.rbc.gov.il/judgements/docs/12.doc, p.8: in severe cases of *mamzerut* the *bet din* annuls the marriage. Although this does not explicitly refer to the *Get Maharsham*, R. Lavi (n.1014, above), 249, says explicitly that it does refer to the use of the *Get Maharsham*.

1016 "*Kol diMeqaddesh 'ada'ta' deRabbanan Meqaddesh*", in his *Netivim beMishpat Ha'Ivri* (New York: American Academy for Jewish Research,1978), 206-264. Cf. ARU 12:3 (§XVI).

1017 Cf. M. Elon, *HaMishpat Ha'Ivri* (Jerusalem: Magnes Press, 5738, 2nd ed.), I, 522 and note 55.

1018 §5.24, and see further §5.50, below.

bride) that the Sages derive their legal power to annul. But if the Sages themselves derive their authority in this matter (exclusively) from the groom, they cannot (according to most views) annul proactively (unless there is an *explicit* condition that they may do so — in which case no further power of the Sages may be needed).

5.27 The practical problem is that prospective annulment may assist only the "chaste" '*agunah*: if, on the other hand, she is "unchaste" and has already entered another relationship before the *bet din* annuls the marriage, the problems of *eshet ish* and *mamazerut* are not addressed. But this again highlights the distinction between an explicit condition which operates prospectively to terminate the marriage[1019] (where the role of the *bet din* is merely declaratory) and retrospective annulment (where the role of the *bet din* is, at least in cases of "delayed" annulment, constitutive).

D. *Retrospective Annulment*

5.28 It is a striking fact that in Babylon (where the Amoraim held judicial power over the Jewish community), efforts to stem improper behaviour in the area of betrothal took the form of enactments by the authorities rather than betrothal conditions, as was customary in Palestine (due to the fact that the Amora'im of '*Erets Yisra'el* were powerless to enforce Jewish law).[1020] Thus Rav forbade "betrothal in the street" (without proper preparation), betrothal without prior *shidukh* (= without parental involvement), betrothal by means of sexual intercourse and the groom's lodging in his father-in-law's home. Any one of these offences was punishable with *makkat mardut* – flogging by rabbinic decree (*Qiddushin* 12b). These measures were intended to put an end to the problems of secret or hasty betrothal but, in the event of transgression, resulted only in punishment of the guilty party but *not* in the annulment of the betrothal, which was deemed effective *post factum*.

5.29 However, Rav's pupils went further than their teacher. Rav had punished the offenders but had allowed their betrothals to stand. His pupils took the bold step of annulling the improper betrothals entirely. In one case, the Talmud reports (*Yevamot* 110a) an occurrence that occurred in Naresh:[1021] a minor orphan girl was (rabbinically) married to a man who sought to marry her (biblically) after she became adult,[1022] but a second person "kidnapped" her and married her.[1023] Rav Beruna' and Rav Ḥanan'el ruled that the second betrothal was invalid and she should return to the first husband without a *get*. Rav Ashi later explained this ruling on the basis that, though the second man had taken her and betrothed her *before*[1024] the first one had made *nissu'in*, his betrothal, though valid by the law of the Torah, was annulled by the rabbinic authorities (*'Afqe'inho Rabbanan leqiddushin mineh*), on the grounds that "He acted improperly; they, therefore, treated him also improperly,[1025] and deprived him of the right of valid betrothal" (הוא

1019 See §§3.77-80, above.

1020 See further ARU 18:40. The concept of annulment of marriage is alluded to in the Yerushalmi only in *Y. Gittin* 4:2: "Sages have the power to uproot Torah Law by annulling marriages" (where Rabban Shim'on ben Gamli'el's ruling is explained as being part of the broader authority of the Sages to abrogate Biblical Law and not as an independent concept of "marriage annulment"): for further literature, see ARU 2:10 n.41. For the development in the Bavli, see §§5.5-6. See further ARU 11:7-8; ARU 18:43 n.124, and §5.15, above.

1021 See further ARU 11:2, ARU 18:40.

1022 When she attained her majority he placed her upon the bridal chair (וגדלה ואותביה אבי כורסיא), an act which is probably similar to a *ḥuppah*.

1023 Her agreement is not mentioned, but she probably gave it, at least after being kidnapped (otherwise the marriage was not valid and no *hafka'ah* would have been required): see Ran, 38a in Rif (in the Vilna edition); Ritba, *Yevamot* 110a, s.v. *hu*, and compare Ramban, *ibid.*, s.v. *R. Ashi*.

1024 Contrary to the view of R. Pappa, *ibid*.

1025 On the origins of the concept that a שלא כהוגן act prompts a שלא כהוגן response, see ARU 11:7 n.38.

עשה שלא כהוגן, לפיכך עשו בו שלא כהוגן).[1026] There then follows the dialogue regarding the different means of annulment, depending on whether the betrothal had taken place by *kesef* or *bi'ah*.[1027]

5.30 The power of annulment was similarly applied in a case of "betrothal by coercion" (*Bava Batra* 48b), where the woman was forced (lit. "hanged", תליוה) and then gave her (formally sufficient[1028]) consent.[1029] Although a betrothal requires the consent of the woman in order to be valid, where that consent was obtained by force the betrothal would, technically, be valid. But here too the man's action was judged to be improper (שלא כהוגן).[1030] Accordingly, the Sages here too annuled the marriage.

5.31 Rashi[1031] and Tosafot offer different justifications for the retrospective annulment in these two cases.[1032] Rashi[1033] understands that in both these cases the power of the Sages to interfere in a betrothal which is a private contract between two willing individuals sanctioned by the Torah derives from the formula used by the groom declaring that the betrothal should be effective "according to the Law of Moses (the Divine Written and Oral Law) and Israel (the Rabbinic Law)". Since he made his betrothal dependent on the rabbinic authorities, it stands to reason that he meant it to take effect only if they agree with it.[1034] It is as if he had made a conditional marriage: you are betrothed to me only if the Sages do not disagree with this marriage (a form of "conditional marriage", we may note, to which no halakhic objection is taken). But here the Sages do not agree; hence the annulment. The Tosafists point out a difficulty with Rashi's interpretation, namely that in the two talmudic instances the groom did not in fact *betroth* in accordance with the will of the Sages. On the contrary, his behaviour was in opposition to their will, so how can we assume that he intended his betrothal to be subject to the Sages' agreement? Furthermore, the Talmud does not mention here, as it does in the cases of "delayed annulment", that we take it for granted that he subjected his betrothal to such a condition (*kol hameqaddesh 'ada'ta' derabbanan meqaddesh*). They therefore explain that in cases such as this the Sages are using their biblically granted power to "uproot" (*la'akor*) Biblical Law (by confiscating the wedding ring, invalidating the wedding document or declaring the marital intercourse promiscuous, depending on how the betrothal was effected).[1035]

5.32 However, the objection of (some of[1036]) the Tosafists would not apply to cases of "delayed annulment", where the groom *did* betroth in accordance with the will of the Sages, and where the Talmud does mention *kol hameqaddesh 'ada'ta' derabbanan meqaddesh*. The logic of what has become the majority view, namely that annulment even here works retrospectively to the moment of *qiddushin* (so that the couple's marriage is deemed never to have existed), is that since the groom declared that he is marrying according to the biblical and rabbinic law, which is understood

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1026 On the significance of the fact that R. Ashi's explanation is composed of two different parts: one in Hebrew, the other in Aramaic, and the relationship of this explanation to Rabbah's teaching, see ARU 11:6-7.

1027 On which, see §§5.10, 19, above.

1028 The formal validity of the marriage is based on an expansion of R. Huna's statement (*Bava Batra*, 47b): תליוהו וזבין זביניה זביני which was made by Amemar (but challenged by Mar bar R. Ashi): תליוה וקדיש קדושיו קדושין (*Bava Batra*, 48b). R. Huna's statement is discussed by Binyamin Porat, "Haḥoze Hakafuy Veikron Hatzedek Haḥozi", *Dine Israel* 22 (5763), 49-110.

1029 See further ARU 11:2.

1030 *Yevamot*, 110a; *Bava Batra*, 48b. Whereas this reasoning is ascribed in the case of Naresh to R. Ashi, here it appears in the name of Mar bar R. Ashi according to the several textual witnesses: see ARU 11:2-3 n.13 for further discussion of the textual, literary and substantive issues involved, responding to earlier academic literature.

1031 See further ARU 11:7.

1032 ARU 18:41.

1033 *Yevamot* 110a s.v. *Weqa*' *afqe'inho*.

1034 See further §5.32, below.

1035 Cf. *Tosafot*, *Bava*' *Batra*' 48b s.v.*Tinaḥ*.

1036 Ri of Tosafot in *Yevamot* 110a has an alternative understanding of the difference between the *sugyot*.

to mean that the original *qiddushin* is conditional on the continuing (not merely initial) acquiescence of the rabbinic authorities, once a situation arises which causes those authorities to withdraw their approval, the condition for preservation of the marriage has been broken and the union becomes automatically and retrospectively defunct.

5.33 In the final generations of the Babylonian Amoraim we find further extensions of annulment, now to the cases of "delayed annulment". Here, the original betrothal (and marriage) were perfectly acceptable, yet were annulled at a later stage (all in the context of an externally flawed *get*). These are the cases already described in §§5.14-18 above: the revoked *get* or agency (§§5.14-16); the conditional *get* defeated by אונס (§5.17); the *get* of the *shekhiv mera* who recovered (§5.18). In all three cases the Talmud asks: "Can there be a *get* which the Torah declares invalid that the Sages validate?" In each case the reply is "Yes,[1037] since everyone who betroths does so on condition of the Sages' concurrence". Here, they withdrew their agreement and consequently brought about the retrospective annulment of the betrothal.

5.34 When we reach the Rishonim, it is the position of Rashba (*Responsa* I:1185) which is often cited for the proposition that annulment is available today only in those cases where it is explicitly permitted in the Talmud.[1038] However, this "conservative" stance of Rashba has not gone without qualification. Berkovits maintains, on the basis of a study of all the *responsa* of Rashba relevant to post-talmudic annulment, that Rashba accepts annulment even in cases not matching those in the Talmud,[1039] provided that the Jewish authorities of the locality (*bet din* etc.) enact a *taqqanah* in which *hafqa*'ah is mentioned explicitly.[1040] For example, in *Resp.* 1, 551,[1041] *qiddushin* had been performed on a widow without her consent. She complained to the king. Rashba's questioner reported that he had "decided to order the man to give her a divorce and to flog him with whips" and asked Rashba's opinion. Rashba advised first that he should be "fined in an amount to be decided by the judge appointed by the king". Moreover, "a [Jewish] competent court may even impose corporal punishment as a protective measure (לצורך השעה)." He concludes, however, by recommending for the future a communal *taqqanah* which would annul such marriages (ויפקיעו...הפקעה גמורה הפקר גמור), citing R. Sherira Gaon and his forebears as having followed this practice.

5.35 Moreover, R. Ovadyah Yosef argues that Rashba viewed the *taqqanat heGe'onim* as an emergency measure (*Responsa* VI:72), in response to the circumstances prevailing in Babylon at the time, and that even according to Rashba, one could introduce retrospective *hafqa'ah* nowadays for the emergency needs of our time.[1042] Not only does he see the Rosh's interpretation of the *taqqanat haGe'onim*[1043] in terms of *hafqa'ah* as an application of this principle; he attributes to everyone (e.g. Ramban) who claims that coercion in cases of *moredet me'is 'alay* is a *taqqanah* the view that it is based on *hafqa'ah*. Indeed, he concludes that if the *qiddushin* were in defiance of a communal enactment *explicitly* threatening annulment one could enforce a *get* in practice even where the bride claimed *me'is 'alay*.[1044]

1037 The Talmud answers in the positive אין (= yes) in the sense that the *get is* rendered effective by means of the retrospective dissolution of the *qiddushin*.

1038 Goldberg and Villa (n.687, above), 362: "Where they said it they said it; where they did not say it we cannot say it ourselves"; see further ARU 6:22 (§8.4). On the general issue, see section E, below.

1039 See further §5.46, below.

1040 Berkovits (n.112, above), 143-49, summarised at ARU 6:22 (§8.4), where it is noted that Freimann (n.346, above), 66-70, comes to the same conclusion.

1041 ARU 2:43-44 (§4.3.3).

1042 ARU 18:51, on R. Yosef's article (n.52, above). See also ARU 18:51-52, for R. Yosef's argument from Ramban, Rosh, and Rambam (per *Responsa 'Ezrat Yisrael*).

1043 See §4.22, above.

1044 R. Yosef (n.52, above), 103. See also ARU 6:22-26 (§§8.4-8.9); ARU 12:1-3 (Section A §§VI–XV).

5.36 By the 14th century, we encounter a turn against *taqqanot* providing even for "immediate" annulment, based on a defect in the original *qiddushin.* In *resp.* 399, the following question was addressed to Rivash (1326–1408, Spain):[1045]

> The community agreed to adopt an enactment providing that no one may marry any woman except with the knowledge and in the presence of the communal officials, and in the presence of ten persons; and that if anyone should violate the law and marry contrary to these requirements, the marriage is void (שיהיו קדושיו נפקעין). At the time a marriage is contracted [in violation of the enactment], the community expropriates the money or other property given to effect the marriage, and the property is considered to be ownerless and of no value. The marriage is annulled (והקדושין יהיו מופקעין), and the woman may marry without any divorce (מבלי שום גט) and is not even required to obtain a divorce to remove any possible doubt. You are in doubt whether the community has the power to expropriate the property of another ... [and] whether even if the rabbi and elder of the town approve the enactment, they have the power, on the basis of the principle that "all who marry do so subject to the conditions laid down by the Rabbis, and the Rabbis annul this marriage," to annul a marriage that the Torah regards as valid.

Rivash seeks to reassure the questioner: there is an (independent) power conferred by the Talmud on בני העיר.[1046] Moreover, he buttresses this with a "consensual" argument: the communal institutions represent the people, so that the people are by such *taqqanot*, in effect, adopting new standard conditions (*tena'in*) in their own future marriages. The classical talmudic basis of annulment, by expropriation of the *kesef*, is therefore present. He adds that the approval of the local scholar is an additional support, though seemingly Rivash does not here regard it as essential. This basis obviates the need for use of the כל דמקדש principle, which Rivash regards as necessary only where the initial *qiddushin* was valid. Here, however, there was no valid *qiddushin* at all, so that no question arises as to whether the groom entered such *qiddushin* having agreed to rabbinic conditions. He adds, moreover, that even if it were necessary to rely upon the principle of כל דמקדש in cases such as this, the questioner need not hesitate in attributing that power to the community (על דעת הקהל) as well as to the Rabbis; the consensual basis is here invoked again, to the extent of specifying that when the people of that town marry (after the *taqqanah*) they need not even recite that they are doing so in accordance with the conditions laid down by the *qahal.* Having once agreed to those conditions by enacting the *taqqanah,* the conditions will serve as implied terms (binding even on one who מקדש סתם). Rivash concludes unequivocally that the community has the power to adopt the proposed *taqqanah*:

> .... Thus, we reach the conclusion that the community may adopt this enactment, and a marriage that contravenes a communal enactment is invalid, and no divorce is necessary (**אין** קדושיו קדושין,**ו**אינה צריכה גט).

5.37 That being so, Rivash's conclusion comes as a surprise:

> This is my opinion on this matter in theory. However, as to its practical application I tend to view the matter strictly (לה לכה.**אבל** למעשה,הייתי חוכך להחמיר); and I would not rely on my own opinion, in view of the seriousness of declaring that she needs no divorce to be free [to marry], unless all the halakhic authorities of the region concurred (**אם לא** בהסכמת כל חכמי הגליל ות), so that only a "chip of the beam"[1047] should reach me [*i.e.*, so that I do not take upon myself the full responsibility, but only part of it].

1045 See further ARU 2:44-47 (§4.3.4).

1046 *B.B.* 8b, cited also by *Rashba*, *Resp.* 1, 1206: see ARU 2:42-43 (§4.3.2).

1047 שיבא מכשורא, cf. *Sanh.* 7b: "When a case was submitted to R. Huna he used to summon and gather ten schoolmen, in order, as he put it, that each of them might carry a chip of the beam" (Soncino Talmud, *Sanhedrin I*, p.28, translated J. Schachter).

Rivash is not willing to bear the responsibility for this decision alone; he requires the concurrence of "all the halakhic authorities of the region" (הסכמת כל חכמי הגליל ות) — despite the fact that he had earlier pronounced the approval of the local scholar as desirable but not essential.

5.38 But this was not the end of the matter. Maharam Al Ashqar (1466-1542) wrote:[1048]

> Therefore, if all that country and its rabbis, with the agreement of all the communities or most of them, took a vote and decided to rely upon these great trees [= authorities] to raise a barrier against, and to impose a fine upon, anyone who betroths in violation of their agreement and their enactment, and to annul the betrothal and requisition it [= the betrothal ring] for ever or until any time they choose, I too will support them'.

We may note that the Maharam is here willing to rely on the agreement of a majority of the communities. Elon notes that such enactments were still being adopted in the 18th and 19th centuries by certain Sephardi communities.[1049] The context for annulment, he observes, was the abuse of the *qiddushin* procedure specifically with a view to putting the "husband" in a position to demand money in exchange for a *get*; indeed, according to Schereschewsky, some *taqqanot* provided for annulment specifically on the husband's wilful refusal to grant a *get*.[1050]

5.39 Moreover, after Rivash we still find an openness to new *taqqanot* permitting even "delayed" annulment. In a debate in 15th century Portugal (c.1470) between R. Shemuel Ibn Ḥalath and R. Yosef Ḥayyun, the former mustered a number of arguments to prove that the *bet din* still possessed the authority to annul marriages and maintained that this was so even after the *qiddushin* [and *nissu'in*] had taken place in conformity with *Halakhah* (and communal enactment) if this was necessary to save a woman from '*iggun*. R. Ḥayyun responded that whereas marriages *improperly contracted* may be dissolved if there is a communal enactment to annul them, those which have been correctly effected can be annulled later only in cases where there is a *get* (that is disqualified by Torah law but effective by Talmudic law through annulment of the marriage, as explained in the Talmud).[1051] Rabbi Y.M. Toledano, *Responsa Yam HaGadol*, no. 74, tells us that he had found an account of this debate in an ancient manuscript of R. Ḥayyun's *responsum*,[1052] which states that a number of Portuguese rabbis of the time accepted Ibn Ḥalath's ruling and as a result a number of '*agunot* were actually released.

5.40 A few decades later, in a collection of the customs and practical *novellae* of the early rabbis of Jerusalem from the time of the Nagid R. Yisḥaq HaKohen Sulal from the year 5269, we read:[1053]

> In *Yevamot*, ch. *Bet Shammai*, "אפקעינהו רבנן לקידושין מיניה" – the Sages annulled his marriage because everyone who betroths does so only with the consent of the Sages. Thus when he betroths

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1048 As quoted by Goldberg and Villa (n.687, above), 378. See ARU 6:25 (§8.9).

1049 Elon (n.241, above), II.874-78. Riskin, "*Hafka'at Kiddushin*..." (n.17, above), 26, cites Freimann (n.346, above), 345, for a list of seven such enactments between 1804 and 1921 in Italy, France, Algeria and Egypt.

1050 Ben-Zion Schereschewsky, "Agunah", *Enc. Jud.* II.433, writes: "It was also sought to avoid the disability of an *agunah* by the enactment of a *taqqanah* by halakhic scholars to the effect that the *kiddushin* should be deemed annulled retrospectively upon the happening or non-fulfillment of certain specified conditions, such as the husband being missing or his willful refusal to grant a *get*. But this *taqqanah*, based on the rule that "a man takes a woman under the conditions laid down by the rabbis... and the rabbis may annul his marriage" (Git. 33a), has rarely been employed since the 14th century." He does not cite the primary source for this, but appears to be relying upon Freimann (n.346, above), 385–97; M. Elon, *Ḥakikah Datit* (Tel-Aviv: Hakibbuts haDati, 1968), 182–84, and the judgment in an Israeli case: PD, 22 pt. 1 (1968), 29–52 (Civil Appeals nos. 164–7 and 220–67).

1051 See Freimann (n.346, above), 80.

1052 Published by R. Toledano in the monthly '*Otsar Ḥayyim* (published by Rabbi Ḥ. Ehenreich in Romania, 5690), 210-24. Cf. R. Yosef (n.52, above), 47-48.

1053 This is found in what is described as "a very ancient scroll", published at the end of *Ḥayyim waḤesed Mussafia* (Livorno 5604, letter צ"ד). See Freimann (n.346, above), 113. See also ARU 18:52, on R. Ovadyah Yosef's reference to this in *Torah Shebe'al Peh* (n.52, above), 101.

> improperly the Sages annulled his betrothal. I asked Kevod Morenu HaRashag [his identity is unknown] why they did not, accordingly, release the '*agunot* in one go and he answered me that the *Ge'onim* said that in a case of a woman already [properly] married that they should persuade him to divorce and it is proper to be concerned [about the leniency of annulment and it is, therefore, better to obtain a *get*]. *Nevertheless, if the Sages would agree to annul marriages* [without a *get*, even after they have been properly contracted and even after *nissu'in*] *that would be halakhically acceptable*, but [as for] past cases where she was already properly married before any such agreement, we lesser mortals could not annul them.

5.41 In this context, a number of important issues arise in relation to the meaning and application of '*ada'ta*' *derabbanan meqaddesh*:[1054]

(a) Are the Sages (*Rabbanan*) referred to only the Talmudic Sages (so that the spouses are taken to have consented to the application of established rabbinic law) or is this power of annulment invested in the leading scholars of every generation (by whom the contemporary *bet din* would be guided in exercising its judgment on the case in hand)?[1055] (See further §5.42, below). And if contemporary *bate din* do not have any such inherent authority, may it be conferred by an explicit condition?

(b) Is the application of '*ada'ta*' *derabbanan meqaddesh* limited to cases where the groom *explicitly* made such a condition[1056] or is it taken as implicit in the formula of betrothal? This may depend upon whether *kol hameqaddesh* means "everyone who betroths" or "everyone who utters the formula of betrothal": in the former (the usual) understanding, it is an implicit condition; on the latter an explicit condition.

Both these questions are important in determining precisely what the couple are committing themselves to by uttering the formula of *qiddushin*. If the answer to (b) is that the condition is implied, there is a subsidiary question regarding the status of the implied condition: is it imposed by the halakhic authorities as a *tenai bet din* or does it depend upon the assumed intention of the spouses (or at least the husband) as an instance of '*ada'ta*' *dehakhi* found also in other areas of the *Halakhah*?[1057]

5.42 As for (a) above, R. Ovadyah Yosef notes[1058] the statement of the Rema in *Darkey Mosheh* ('*Even Ha'Ezer* 7:13)[1059] that the reason the Great Rabbis of Austria permitted captured women to return to their husbands if the wives had willingly committed adultery with their captors and to return even if they had been raped, where the husbands were *kohanim*, was not in accordance with the regular *Halakhah* but was an emergency ruling, itself justified by '*ada'ta*' *derabbanan*:[1060]

> It seems to me that they relied on that which they said that whoever betroths a woman betroths her with the understanding that he has rabbinic approval, and the court is authorized to cancel his marriage, so they were like unmarried women, and even if they sinned, they are permitted to their

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1054 ARU 18:44.

1055 Freimann (n.346, above), 14, notes discussions over whether '*ada'ta*' *derabbanan* refers only to the *rabbanan* of the Talmud generation, so that the implied condition afterwards is to comply with rabbinic law rather than the ongoing consent of a particular *bet din*. See ARU 18:44. However R. Risikoff at least is clear that permission is given to a contemporary *bet din* if the condition is made explicit. A related point is the claim that such jurisdiction could be exercised only by a *bet din* of experts like R. Ami and R. Asi: see, e.g., Tashbetz, Vol.2, 5, cited by Lavi (n.1014, above).

1056 Tosafot *Ketubbot* 3a, s.v. *ada'ta*, appears to take *kedat Mosheh veYisrael* as an explicit condition.

1057 In this context, see ARU 10, and §3.71, above.

1058 See further ARU 18:51-52.

1059 See also *Rema, 'Even Ha'ezer*, 28:21; ARU 11:14 n. 86.

1060 Cf. Berkovits (n.112, above), 157, who concludes: "Nevertheless, in spite of the equivocation of these great authorities, other great rabbis in almost every generation, under the pressure of the problems afflicting marriage, were forced to make enactments and they agreed actually to annul betrothals on the basis of their enactments, relying on the principle that whosoever betroths etc" (quoted at ARU 6:24 (§§8.8)).

husbands.[1061]

In the course of his discussion he adds[1062] that even after *'afqe'inho* there remains a rabbinic marriage. This will explain why the Rashba insists that annulment by itself is not enough; a [flawed] *get*, or some other additional reason for permission to remarry, must be present to overcome the problem of the residual rabbinic state of marriage.[1063]

E. *Is Annulment available today?*

5.43 Those who deny the availability of *hafka'ah* today in fact adopt a range of positions, which need to be distinguished. The strongest form is that which even rejects the possibility of "immediate" *hafka'ah*, despite authorisation by a (contemporary) *taqqanah*, based on a number of responsa maintaining that *hafka'ah* should not be used in practice.[1064] Against this, R. Ovadyah Yosef maintains[1065] that there is no problem with "immediate" annulment, as even Rashba (along with many others) accepts: where the *qiddushin* were improper, having been carried out in defiance of a communal decree, very many Rishonim agree to the contemporary effectiveness of enactments of annulment. Less radical is the objection, more relevant for present purposes, that the *Rishonim* never proposed annulment subsequent to a properly performed *qiddushin* ("delayed" annulment) *except* in the presence of an externally flawed *get* – as in the three cases[1066] in the Talmud;[1067] such a combination, we have noted, is also the effect of the Rosh's interpretation of the *kefiyah* of the Ge'onim.[1068] Some Rishonim, however, held the view that for the second and third approaches [prospective or retrospective annulment] the *get* was not necessary at all,[1069] as explicitly stated by Me'iri.[1070]

1061 Riskin's translation (n.17, above), 26. For the preceding context of the quotation, see §5.44, below.

1062 R. Yosef (n.52, above), 101, final paragraph and at n.162.

1063 See also ARU 11:13 n.82.

1064 R. David Lau, "*Hafqa'at Qiddusin leMafrea' beYamenu*", *Teḥumin* XVII (5797), 251-271; R. Lavi (n.80, above), who is less opposed to immediate than to delayed annulment, although he rejects even the former for practice, on the basis of Rema and other considerations. For contrary authorities, see esp. Freimann (n.346, above); Lifshitz "'*Afke'inho*..." (n.963, above), s.12. On the argument of R. Lavi (at section 1.ה), based on the Rosh's analysis (43:8: see §4.22-24, above) of the geonic measures as a form of *hafka'ah*, that the Rishonim who disagreed with the Geonim regarding *moredet* rejected *hafka'ah* as well, see ARU 15:22, arguing that the dispute between the Geonim and Rabbenu Tam relates to the authority for coercing a divorce, and does not take *hafka'ah* into consideration. Indeed, R. Yosef (n.52, above), 97-98, argues that from the rationale suggested by the Rosh (and others) for the Ge'onic *taqqanat hamoredet*, namely that it is based on the power of annulment, we may infer that even nowadays the sages of each generation are empowered to enact the annulment of marriage (even after a properly conducted *qiddushin*); such power is not limited to the talmudic sages alone. R. Goldberg (n.963, above), however, argues that the enactment of the Ge'onim, even if viewed as a form of *hafka'ah*, also operates only together with a *get* (again externally flawed as in the cases of the Talmud, but this time due to talmudically unsanctioned coercion).

1065 Citing Rashba in a *responsum* cited in *Bet Yosef* (end of *'Even Ha'Ezer* 28); Rivash (*Responsa*, 399; we may note in this context R. Yosef's general approach to *lehalakhah velo lema'aseh*: §2.39); Rashbets (*Responsa*, II 5); Maharam Alashqar (*Responsa*, 48), and, for the *Aḥaronim*, *Kenesset HaGedolah* (*'Even Ha'Ezer* 28, *Hagehot Bet Yosef* 37), and noting that that Mahara ben Shimon in *Responsa Umitsur Devash* (*'Even Ha'Ezer* no. 6) maintains, along with many supporters, that one can rely in practice on enactments of annulment and that the *bet din* that succeeded him did rely on annulment in actual cases. See further ARU 18:52-53.

1066 §§5.14-18, above.

1067 Shoḥetman (n.696, above), 388-92, but see ARU 11:10 n.65, where Dr. Westreich argues that Shoḥetman's conclusion is neither historically nor dogmatically decisive. See also R. Zalman Neḥamya Goldberg, discussed at §§5.44-46, below.

1068 See §§4.22-24, above. See also ARU 15:22, arguing that though the implication of Rosh's writing is that it legitimates *hafka'at kiddushin* at least when it is accompanied by a coerced *get*, we cannot infer from that that Rosh *demanded* a *get* as a necessary condition for *hafka'ah*, certainly in cases other than *moredet*.

1069 ARU 11:13, citing Rashi (according to some); Ri Migash; Ramban and his disciples: Ra'ah and Rashba. The school of Ri Migash and Ramban, however, do demand a *get* (*get kol dehu*).

1070 See Me'iri, *Ketubbot* 3a, s.v. *kol she'amru*.

5.44 This latter view is advanced, most prominently by R. Zalman Neḥemyah Goldberg,[1071] in his debate with R. Shlomo Riskin.[1072] R. Goldberg writes:

> Annulment subsequent to a properly executed betrothal was very rare even in talmudic times when all the Sages of Israel were together; even then it was only employed in cases where there was a *get* which was valid in itself but had been rendered unfit due to some external factor. We do not find anywhere that this type of annulment can operate without a *get*.[1073]

However, R. Goldberg did not initially address the one clear case of "delayed" annulment without a *get* (cited by R. Riskin), namely the permission granted by contemporary leading rabbis[1074] to women who had been taken captive as a result of the 'Evil Decree of Austria'. Their captivity raised a suspicion of rape, and this would bar their return to husbands who were *kohanim*. The solution was to annul their original marriages (and allow the returnees to marry their former "husbands" as if for the first time). On this, Rema[1075] writes:

> It seems to me that the rabbinic authorities may have issued their lenient ruling not on the basis of the strict law, but because of the needs of the hour.[1076] For they saw that there was reason to be concerned about what women might do in the future. For if they knew that they would not be permitted to the husbands of their youth, they might sin, and so (the rabbis) were lenient. And don't say from where do we know that we might be lenient in a case that involves a possible Torah prohibition. It seems to me that they relied on that which they said that whoever betroths a woman betroths her with the understanding that he has rabbinic approval, and the court is authorized to cancel his marriage, so they were like unmarried women, and even if they sinned, they are permitted to their husbands.[1077]

Thus Rema (though not entirely sure of the reasoning behind the original decision[1078]) was willing to countenance post-talmudic dissolution of marriage even after an appropriate betrothal, in a case not mentioned in the Talmud, without an (externally flawed) *get* and even in the absence of an enactment embodying annulment or, indeed, of any enactment whatsoever.[1079] In his response to R. Riskin,[1080] R. Goldberg argues that the Austrian case did not deal with Torah prohibitions but rather with *derabanan* prohibitions (or at most a non-enhanced biblical prohibition[1081]).[1082] On

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1071 R. Goldberg agrees that even nowadays one could introduce annulment enactments which would operate at the moment of the *qiddushin* by invalidating the act of *qiddushin* (and hence there would be no requirement of a *get*) but points out that the Rema (*'Even Ha'Ezer* 28:21) rules that in practice even this is not to be allowed. Cf. Jachter, http://www.tabc.org/koltorah/aguna/aguna59.4.htm, quoting Rema thus: "A community that institutes a policy, accepted by the entire community, that anyone who marries in the absence of a Minyan will have his marriage considered invalid – must, nevertheless, be strict and require a Get [in this circumstance]."

1072 For the bibliography of the debate, see n.963, above; for further discussion, ARU 18:48-50.

1073 *Teḥumin* 23 (5763), 158-59. See ARU 6:23 (§8.5).

1074 Reported in *Terumat HaDeshen*, no. 241.

1075 Recorded in *Darkey Mosheh* (*'Even Ha'Ezer* 7:13).

1076 See further ARU 18:51-52.

1077 Riskin's translation (n.17, above), 26. In the version of this at ARU 6:22-23 (§8.5), the phrase here translated "and the court is authorized to cancel his marriage" is mistakenly quoted as יש כח ביד חכמים לעקור דבר מן התורה, whereas it should be ויש ביד בית דין לאפקועי קדושין מינייהו.

1078 *Hagahot* to *'Even Ha'Ezer*, 28:21: "*yesh lehahmir le'inyan ma'aseh*". See ARU 11:4, arguing that although all the "delayed annulment" cases in the Talmud cases do involve a *get*, and many Rishonim (but not all) regard this as supporting the view that a *get* is required in the process of *hafka'ah*, this may be due to various "external" reasons (such as preventing a "slippery slope" in the use of *hafka'ah*, which will damage the stability of Jewish marriage), while conceptually the *hafka'ah* remains a retrospective annulment of the marriage.

1079 Cf. Riskin (n.17, above), 26.

1080 "'Eyn Hafka'at Kiddushin Lelo Get", *Teḥumin* 23 (5763), p.168.

1081 *'issur zonah lekhohen*, punishable at most by flogging, and, since the case was one without witnesses, if she denies that she was contaminated and her husband believes her, there is only a rabbinic prohibition in her returning to him.

this basis, it may be argued that we cannot apply this leniency to cases of possible adultery and *mamzerut*. Moreover, this emergency ruling and its defence are palatable only because the *bet din*'s act of *hafka'ah* in this instance was not against the husband's will but rather supportive of it. Far from destabilising the institution of marriage, this particular act of *hafka'ah* supported and bolstered it.[1083] Moreover, even if annulment in the Austrian case enabled overruling an *'issur de'orayta*, it was still not a case of permitting an *'eshet 'ish* to have relations with a man not her husband (and thus a violation of *giluy 'arayot*).

5.45 R. Goldberg accepts that there are cases such as the missing husband whose death is attested by only one witness – even if that 'one witness' be a pagan's innocent talk – where the Sages allowed remarriage on the basis of annulment (and without a *get*) but that is because there is convincing evidence (albeit not proof) that the husband is dead and there is also the assumption that a woman enquires carefully before remarrying[1084] due to the fact that she is aware of the severe repercussions that would ensue were she to remarry and her husband subsequently to return. However, he maintains, we have no precedent for permitting the practice of annulment in cases of *get* refusal nowadays,[1085] and cites as authority Rashba, *Responsa* I:1162.

5.46 However, this view of Rashba's position has not gone unchallenged. Berkovits argues that the distinction between "immediate" and "delayed" annulment is wrongly inferred from Rashba:[1086] what the Rashba really maintains is that the fear of *'iggun* by itself is not sufficient for an annulment of the marriage; some other supporting issue is required. Sometimes the support is one witness testifying to the husband's death or a gentile 'innocently reporting' the husband's demise; either of these may be coupled with the assumption that a wife investigates thoroughly and [only then] remarries. Sometimes it is an [externally flawed] *get*. Only when he acted improperly did they annul the marriage without any other support. In the case of both "immediate" and "delayed" annulment, authority to annul flows from the ruling that 'anyone who betroths does so in accordance with the will of the Rabbis'. In view of all this, Berkovits concludes, we have plentiful support to institute enactments today to annul [even properly contracted] marriage even after the *nissu'in*, so long as the enactment precedes the marriage, if there is some additional supporting reason or even due merely to the fact that he acted improperly (specifically in matters touching marital life). All this is because of the gravity of the situation which forces us to put the *Halakhah* to practical use.[1087]

5.47 R. Yosef notes[1088] that even after *'afqe'inho* there remains a rabbinic marriage. This will explain why the Rashba insists that annulment by itself is not enough;[1089] a[n externally flawed] *get,*[1090] or

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1082 Lifshitz has responded that Rema deals also with cases of *'issur de'orayta* – as when the wives of *kohanim* without doubt committed adultery": see " 'Al Massoret..." (n.24, above). However, there is doubt nowadays about the priestly status of all *kohanim*: see *Ba'er Hetev*, *'Even Ha'Ezer* 6:2.

1083 See further ARU 17:146-47 n.211, and more generally at 121-23, arguing that the *hafka'ah* of the *Gedolei Austrich* is merely a logical extension of the view of Rava in *Ket*. 51b, who sought to permit married women who had been raped to return to their husbands.

1084 *Daiqa' uminasba'* – cf. *Yevamot* 25a et al.

1085 See further ARU 6:23 (§8.5), responding to an argument based on the observation of Rashi, *Shabbat* 145b s.v. *Le'Edut 'Ishah*, that where the Sages allowed the waiving of *de'orayta* rules of evidence so as to permit the remarriage of a woman whose husband had disappeared, they did so by retrospectively actively annulling the properly contracted marriage (and without a *get*). On a single witness as equivalent to a *get kol dehu*, see ARU 11:12-13 n.77.

1086 Berkovits (n.112, above), 162. See ARU 6:25-26 (§8.9).

1087 See further ARU 6:24-25 (§8.9, s.v. "Almost all"); ARU 11:13-14, esp. nn.78-79 (Berkovits' view on Rashba) and s.2 more generally; ARU 12:1-2 (esp §§A.II, IV, X).

1088 R. Yosef (n.52, above), 101, final paragraph.

some other additional reason for permission to remarry, must be present to overcome the problem of the residual rabbinic state of marriage. He furthermore notes that however one understands the Rema, it is clear that at a time of great need one can apply annulment even nowadays (i.e. even in cases not mentioned in the Talmud, even after *nissu'in*, even where there is no *get*, and even where there was no preceding enactment of annulment in the given circumstances).

5.48 The responses of both R. Berkovits[1091] and R. Yosef emphasise the greater authority available where contemporary conditions demand it. Moreover, this does not necessarily require us to declare an "emergency" (*tsorekh hasha'ah*) which would allow invocation of the power (following Rashba, Rambam and others) to "abrogate"[1092] Torah law (as did the Ge'onim, on some accounts), as opposed to recognition of a *she'at hadeḥaq*,[1093] in which we may rely on lenient opinions, here the view of those who think that *hafka'ah* today is *not* a matter of abrogation (as per Rema). If indeed the situation is classified as one of emergency, both retroactive and prospective annulment without a *get* might be possible;[1094] if it is (merely) *she'at hadeḥaq*, such leniencies may certainly be combined with other factors to justify a solution.

5.49 From the analysis of R. Yosef, it would seem that a declaration of retrospective annulment by the contemporary leading sages of Israel even without a prior enactment (and certainly with one) even in cases not matching the historical examples in the talmudic and geonic literature, even after the proper execution of *qiddushin* and *nissu'in* ("delayed annulment") and even without any kind of *get*, would be sufficiently halakhically effective at least to create a *safeq* which could combine with another, more substantial, *safeq* to form a *sfeq sfeqa*. As for cases of "immediate annulment", R. Yosef appears willing in some circumstances to contemplate a coerced *get*.[1095] He also notes that where the *qiddushin* were improper, having been carried out in defiance of a communal decree, very many Rishonim agree to the contemporary effectiveness of enactments of annulment. But since Rema writes that we should not rely on this opinion in practice, the matter is subject to

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1089 Berkovits (n.112, above), 123-133, argues that the mention of a *get* by Rashba (and other Rishonim, including Rashi) is not essential to the process of *hafka'ah*, but rather contingent, i.e. a descriptive element of the cases in which *hafka'ah* was applied, while it can be applied in other cases as well.

1090 As in the three talmudic cases of "delayed" annulment: §§5.14-18, above.

1091 Stressing the "gravity of the situation": §5.46, above.

1092 Rashba, contrary to Rambam, says that once the suspension has taken place it can be left on a permanent basis. Interestingly, this goes beyond the early sources, which understand the power as one of of suspension, derived from *Deut.* 18:15 (concerning the "prophet like Moses"). In these sources, a distinction is drawn between the power *la'akor* and *la'avur*. Compare *Sanh*. 90a: "R. Abbahu said in R. Johanan's name: in every matter, if a prophet tells you to transgress (*im yomar lekha avor*) the commands of the Torah, obey him, with the exception of idolatry: should he even cause the sun to stand still in the middle of the heavens for you (as proof of divine inspiration), do not Hearken to him" with the Baraita on the same page: "Our Rabbis taught: if one prophesies so as to eradicate (*la'akor*) a law of the Torah, he is liable (to death); partially to confirm and partially to annul it, — R. Shimon exempts him. But as for idolatry, even if he said, 'Serve it today and destroy it tomorrow,' all declare him liable." See also *Yeb*. 90b, *Sifre ad Deut*. 18:15: "Come and hear: *unto him ye shall Hearken,* even if he tells you "Transgress (*avor*) any of all the commandments of the Torah" as in the case, for instance, of Elijah on Mount Carmel, obey him in every respect in accordance with the needs of the hour."

1093 On this distinction, see §2.21, above.

1094 ARU 18:43-44(iv) and 45, according to the majority of *posqim* who rule that emergency legislation is possible nowadays also, even if that would mean actively abrogating Biblical Law. In support of this, R. Abel cites (ARU 18:45 n.134) *Responsa Tsemaḥ Tsedeq* (1) no. 28 in a gloss of the author's son; *Responsa Rashba*: VI no. 254, *Meyuḥasot* no. 244; *Responsa Ḥakhmey Provincia* I no. 64 (where the author also supports the Rambam's ruling for *kefiyah* in the case of the *moredet*); *Yeshu'ot Ya'aqov OḤ* 242 sub-para. 2; *Ḥesed Le'Avraham* (Te'omim) *'Even Ha'Ezer* 10 s.v. *'Od*, where it is stated explicitly that even the *'Aḥaronim* possess the authority to abrogate Biblical Law; *Responsa Bet Yehudah HM* 11; *Responsa Bet Shelomoh Yoreh De'ah* 29; *'Iggrot Mosheh OḤ* I.33 (though the subject there is only the abrogation of a positive commandment). Cf. *ET* XXV, col. 611, footnote 22 & cols. 637-639, at nn.231-44.

1095 See further ARU 18:53-54.

safeq, which could be resolved (in a case of *me'is 'alay*) by combining breach of the *taqqanah* with a coerced *get*. That being so, it may not be impossible (radical as it may sound) to contemplate, as part of an ultimate 'global solution', a *taqqanah* providing that failure to include in the *ketubbah* (or associated document) a condition which (in effect) rendered the marriage immune to '*iggun* would generate "immediate" annulment (on the model of the mediaeval *taqqanot haqahal* which, inter alia, made the very giving of a *ketubbah* an essential condition of *qiddushin*, failure to comply with which equally generated "immediate" annulment).

5.50 R. Shear-Yashuv Cohen[1096] also argues that though the authority for annulment was given to the talmudic Sages, nevertheless today we may be able use it in *she'at hadeḥaq* in combination with other factors (and particularly as a support to *kefiyah*). Otherwise, he maintains that we have no authority today to annul marriages, which would depend upon future acceptance of the authority of the sages of Jerusalem to make such an enactment.

5.51 Many of the above arguments are combined in Berkovits' analysis, which concludes:[1097]

> It is worthwhile to quote from the enactment of annulment of marriages that operated in Egypt in 5660 (= 1900). '…and the cure for this? The only answer is annulment, which has been used by the *Ge'onim*, *Rishonim* and *Aḥaronim* in order to put a stop to the lawlessness of the oppressors; although they in their days had real authority over their communities how much more so do we, who have lost the internal authority of earlier days, need the power of communal annulment'.
>
> If the matter was so severe in their days how much more so is it today.
>
> The problems today are not usually problems of '*agunah* but of married woman who remarry without a *get* and bear *mamzerim*. The truth is that he who is strict nowadays with annulment is in effect multiplying *mamzerim* in Israel. To the point, here are the words of the author of *Ta'alumot Lev* (*'Even Ha'Ezer* no. 14): "Even those who in practice take a strict view because of the stringency of forbidden sexual relations, that is only when they can somehow force him to give a *get*. Not so in these lands where none can enforce the words of the sages and everyone does as he pleases …".
>
> Again, I say that if it was so bad in his time how much more so today.
>
> On the basis of a number of great *posqim* who agreed to annulment in their time – Rosh, Rashba, *Tashbets*, Rivash, Maharam Alashqar – it can be argued that annulment today is not impossible. Maharam Alashqar writes (*Responsa* no. 48): "I agree with Rivash that the community has the power to annul a marriage … on the basis of כל המקדש אדעתא דרבנן מקדש and I note that whereas Rivash agrees to this in theory even in the event of a single community, he allows it in practice only if *all* the communities in the country agree to it. I add that if *all* the rabbis of the country and *all* its communities or *most* of them agree to annulment, I will go along with them."
>
> This is also implied by Mabit (*Responsa* I 206) who says that he follows *Tashbets* – who forbade the practice of annulment only by individual communities. *Tashbets* is the source for his son, Rashbash, and Rashbash is the source of the *Bet Yosef* and Rema (and even if the source of Rema was Mahariq – as claimed in gloss to *'Even Ha'Ezer* 28:21 – Mahariq also spoke only of annulment by a single community or rabbi).
>
> Hence, even those who ruled against the use of annulment nowadays did not speak of enactments of annulment by all or most of the communities and rabbis in a country. Indeed, thanks to modern technology, there is now a possibility to achieve annulment by the enactment of not just all or most communities and rabbis 'in the country' but even in the world!

However, Berkovits emphasises the need for a communal enactment, in which "they made it explicit at the time of [the composition of] the enactment that if anyone does not obey the enactment of the *bet din* or of the community, his betrothal will be annulled. If they did not

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1096 "*Kefiyyat haget*" (n.14, above), 198-200.

1097 The discussion is set out in Berkovits (n.112, above), 119–161; for the conclusion (here quoted in abbreviated form) see 161-64.

stipulate this condition from the beginning [= prior to the betrothal], he who transgresses the enactment is called a sinner but his betrothal is valid."[1098]

5.52 In his survey of marriage annulment, Menaḥem Elon[1099] adduces many sources to show that annulment by contemporary sages remains possible even in cases not mentioned in the Talmud. He suggests that the unwillingness of many *posqim* (including the *Shulḥan ʿArukh* and the *Mappah*) to permit in practice, in the area of marriage law, that which they regarded as perfectly acceptable in theory was due to the scattering of the Jewish people all over the world and the resultant divisions into countless communities each with its independent *bet din*. This would inevitably lead to variations in marriage practices, so that a woman whose marriage had been annulled in one place might well be regarded as still married in another – a problem that would hardly arise in other areas of Jewish law. He writes:[1100]

> It seems that the vast historical change … that has taken place in Jewish existence with the return of Jewish Sovereignty is sufficient to bring about change in the existing tendency towards avoidance of activating the authority to legislate. Just as the cause of this reticence was the fact of scattering and dispersal, of local communal legislation and of the lack of a central Jewish authority, so the cause of reactivating legislative authority must issue from the new situation of ingathering and unification, of the formation of a central authority, which will bring about legislation for all Jewry. The Halakhic centre which is in the Land of Israel is fit to be – and in fact is – the main centre and holder of halakhic hegemony over all the Jewish Diaspora. Consequently, it is entitled to take for itself the right to introduce enactments that will be from the moment of their introduction – or in due course – the heritage of the Jewish people everywhere. The new historical situation suffices to bring about also a new halakhic situation whose innovative point will be the return of the Crown to its former glory.[1101] This new situation contains also a power of authorisation – which, as it authorises, so it obliges – to restore the activity of legislation in all branches of Hebrew Law, including betrothal and marriage, to its full capacity in the interests of the improvement of the world of the Law and the world of Israel.

These words are reminiscent of Freimann,[1102] but whereas Freimann underscores the point that a leading halakhic centre in Jerusalem will have the power to introduce enactments of annulment due to its unquestioned seniority of scholarship vis-à-vis all other halakhic bodies, Elon sees the advantage of a renewed Jerusalem halakhic centre as being in its ability to communicate with, and align with itself, all other Jewish religious authorities in the world. The significance in this context of the modern communications revolution is stressed even more directly by Berkovits.[1103]

1098 ARU 6:24 (§8.8), on Berkovits (n.112, above), 154.

1099 *HaMishpat Ha'Ivri* (n.1017 above) I.686-712; ARU 18:47-48.

1100 *HaMishpat Ha'Ivri* (n.1017 above) I.712.

1101 *Yoma* 69b.

1102 Freimann (n.346, above), 397, quoted at ARU 18:45-46, including: "However, the establishment of the highest religious institution in the Land of Israel, the place of the Jewish People's vitality, has restored to the People of Israel an authoritative religious centre with authority throughout the Jewish World. After the destruction of the Torah centres in the countries of Europe, we have no remnant but the Torah of this land and the eyes of all Israel look to this highest religious institution as to the last fortress for the preservation of the Law and the Tradition which is left to us as a remnant from the destruction of the Exile ... This position gives to the *batey din* of the chief Rabbinate of the Land of Israel, from a halakhic perspective also, power and authority which no *bet din* of the people of Israel had during the latter generations ... The most important *bet din* in a generation possesses great authority – to judge and to hand down rulings and to requisition property and to annul marriages and to institute enactments based upon 'the superior power of the *bet din*'." On the religious Zionist ideology here expressed, as compared to the decentralising approach of Dayan Broyde as well as more *ḥaredi* religious ideologies, see ARU 17:143-44.

1103 See Goldberg and Villa (n.687, above), 378, quoted in ARU 6:125 (§8.9).

5.53 In a response to a *bagats*,[1104] R. Daichovsky in 2003 commented on *Ketubbot* 3a in terms which have been taken to imply that in severe cases (the issue in the case was *mamzerut*), *hafka'ah* may still be used even without a *get*.[1105] This is supported also by the simple meaning of the *sugya* as stated by Me'iri.[1106] Rav Lavi responded that this was directed mainly to the use of *Get Maharsham*[1107] in order to prevent *mamzerut*, and that nothing more general could be derived from it.[1108]

F. *Conclusions*

5.54 We are now in a position to provide a more detailed analysis of the basic problems raised at the beginning of this chapter: those of the very nature, authority and underlying objections to *hafka'ah*.[1109] This combines historical and analytical issues. On the one hand, we have seen that *hafka'ah* appears originally to have emerged in the Talmud as validation of an otherwise invalid *get* (§5.55); it was, moreover, based on the authority of the sages to "uproot" a law of the Torah in circumstances of need. On the other hand (§5.56), the classical form of *hafka'ah*, namely retrospective annulment of the marriage, performed by act of the *bet din*, was justified in terms of an implicit condition (*'ada'ta' derabbanan meqaddesh*). We have also observed a major ideological divide between those who insist that (despite the institution of *hafka'ah*), termination of marriage (other than by death) must be an act of the parties rather than an act of the court, and those who insist that it proceeds by virtue of an (inherent) authority of the *bet din*. But whether annulment is in fact retrospective or prospective (by validation of an externally flawed *get*), we may argue that there is a partnership between the parties and the *bet din* (§5.57), whether we classify the role of the *bet din* as declaratory or constitutive (§5.58). Nevertheless, both retrospective and prospective forms of annulment have distinctive roles to play in the search for a global solution to the problem of '*iggun* (§5.59).

5.55 As seen in §5.7 above, three distinct stages in the development of *hafka'ah* are identifiable within the Talmud itself: at the first stage, annulment (better: "quasi-annulment") means that the Sages validate an [externally flawed] *get* and termination of the marriage is thus entirely prospective, being by validation of the (otherwise invalid) *get*; at the second stage, the very concept of *hafka'ah* is interpreted as a *prospective* annulment of marriage (now without any act on the part of the husband); at the third stage *hafka'at qiddushin* becomes retrospective annulment of the marriage, by retrospective invalidation of the act of betrothal.

5.56 There is also variation in the talmudic sources regarding the basis of *hafka'ah*: on the one hand, the residual authority of the sages (not necessarily restricted to this context[1110]) to "uproot" a law of the Torah in circumstances of need;[1111] on the other the maxim *kol hameqaddesh 'ada'ta' derabbanan meqaddesh*. As regards the latter, views differ not only as to its meaning (subject to

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1104 High Rabbinical Court, file number: 4276/2003: see esp. pp.5-6.

1105 B. Lifshitz, "'Al Masoret, Al Samḥut Ve'al Derekh Hahanmakah", *Teḥumin* 28 (5768), 82-91.

1106 As Lifshitz indicates. See also ARU 11:13.

1107 See §§5.23-24, above.

1108 Lavi (n.1014, above), 249-250.

1109 See §§5.1-3, above, especially 5.3(b): "what exactly do we mean by *hafka'ah* and how does it operate? Is it always retrospective, effected by a decision of the *bet din* (what may be called an act of "constitutive" annulment) or are there circumstances where the role of the *bet din* is merely "declaratory", confirming that some act (or omission) of the parties (other than the delivery of a *get*) has itself had the effect of terminating the marriage (whether retrospectively or prospectively)?"

1110 See §2.38, above.

1111 §§5.6, 16, 25, 31, above.

talmudic law or subject to the continuing approval of a contemporary *bet din*),[1112] but also whether its underlying rationale is that of an implicit condition.[1113] If we accept the objections to the latter analysis,[1114] we are deprived of one means of construing *hafka'ah* as based in part on the will of the spouses. On the other hand, the fact that *'ada'ta' derabbanan meqaddesh* is exercised in some *sugyot* on the basis of improper conduct on the part of the husband (*hu asah shelo kehogen ...*)[1115] may serve as an alternative route to basing annulment on an act of will of the husband. But the objections to viewing *'ada'ta' derabbanan meqaddesh* as an implicit condition may not exist if the condition is made an explicit basis for annulment, as is the case in several proposals.[1116] For example, in 5691 (1930/1), R. Ya'aqov Mosheh Toledano proposed that a condition be made at every marriage making it dependent on the continuing agreement of the local *bet din*, to ensure that if they see that he has not acted fairly with her [married her *kedin vekashurah*] it can retroactively annul the marriage.[1117] Similarly, R. Menaḥem HaKohen Risikoff proposed a condition making the marriage dependent on the continuing acquiescence of a *Great Bet Din* in Jerusalem, thus empowering that *Bet Din* to annul the marriage retroactively in cases of otherwise irresolvable '*iggun*.[1118]

5.57 We have observed a major divide between those who insist that termination of marriage (other than by death) ought in principle be an act of the parties rather than an act of the court, and those who insist that annulment is based on an (inherent) authority of the *bet din* – the latter view, we may suggest, representing a reaction to a fear that otherwise the door may be left open for the parties to stipulate for no-fault, unilateral divorce. Yet, here as elsewhere, we may argue that marriage termination, whether by conditions, *kefiyah* or annulment, should be viewed as a partnership between the spouses and the halakhic authorities.[1119] This is clearly the case where annulment is by validation of an externally flawed *get* (the "delayed annulment" cases).[1120] We

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1112 §§3.69, 5.32, above. Freimann (n.346, above), 14, notes discussions over whether *'ada'ta' derabbanan* refers only to the *rabbanan* of the talmudic generations, so that the implied condition afterwards is to comply with rabbinic law rather than the ongoing consent of a particular *bet din*. However R. Risikoff (n.1118, below), at least, is clear that permission is given to a contemporary *bet din* if the condition is made explicit.

1113 §§1.13, 3.71, 5.31, above. The same issue arises in relation to the formula of *qiddushin,* "*kedat Moshe veIsrael*": see ARU 11:5 and n.23.

1114 On R. Uzziel's argument (§3.44) that Rashi agrees that *kol hameqaddesh* works on the principle of 'on the condition that the Sages do not protest the marriage' (parallel to '*al menat sheyirtseh* (or *shelo' yimḥeh*) '*abba*'), see ARU 12:29-30 n.140; ARU 20:3-4 n.2. On Rashi's view (and different interpretations of it), see ARU 11:7 and n.39.

1115 See further ARU 11:7 and n.39-40.

1116 Thus R. Uzziel (§§3.42) makes the marriage conditional on the continuing acquiescence of the local *bet din*, the *bet din* of the locality/country and the *bet din* of the Chief Rabbinate in Jerusalem. Cf. R. Toledano. R. Broyde comes close to this by including in his Tripartite Agreement: "I hereby grant jurisdiction to any Orthodox *beit din* selected by my wife to enforce any and all parts of this document and do not consent to jurisdiction in any *beit din* that my wife does not wish to select ..."

1117 *Responsa Yam HaGadol* (Cairo 1931) no. 74. See also Freimann (n.346, above), 391, para. 8. See further ARU 18:55-56, noting that the wording of this *responsum* makes it clear that the intention is not really conditional marriage but rabbinic annulment which is validated by the fact that the groom states that he is marrying in accordance with the will of the contemporary local rabbinate, thus engineering a modern day [explicit] equivalent of the Talmudic '*ada'ta*' *derabbanan meqaddesh*.

1118 *Responsa Sha'arey Shamayim*, New York 5697, *'Even Ha'Ezer* no. 42, as per Freimann (n.346, above), 394. See also ARU 18:56.

1119 See §§5.57-58, above. Cf. ARU 17:132: "It would appear from my short analysis of the nature of *kiddushin* that there are three parties to any Jewish marriage: the husband, the wife and the community. The community is, as a minimal legal requirement, represented in both the initiation of marriage and the effectuation of divorce by the critical presence of *edim* (as discussed in the previous chapter) – and in some circumstances by the community's court – the *bet din*."

1120 *Ket*. 3a, *Gitt*. 33a, 77a. For Rishonim supporting this view, see n.984, above.

have noted above that the "immediate annulment" cases (of dubious consent) also involve a (wrongful) act on the part of the husband.[1121]

5.58 Closely related is the question whether the role of the *bet din* is declaratory or constitutive. To put the matter simply, in the former case, the *bet din* merely declares (confirms) that termination has taken place, whether in accordance with some condition or some fact which the *halakhah* itself specifies as having the effect of terminating (or barring the creation of) the marriage; in the latter case, termination does not take place until the *bet din* so decides. The practical difference here may not be substantial, in that there will be few cases where a second marriage will be authorised without *bet din* confirmation that the first has terminated (one such may be cases of manifest incompetence of one of the spouses). But the theoretical difference is important from the viewpoint of those who see any termination of marriage other than by death or a *get* as a breach of fundamental principle. Here, at least, where the *bet din* is called upon to declare (confirm) that some act or omission of the spouses has taken place which has brought the marriage to an end, we may speak of a partnership between the spouses and the *bet din* (acting for the community), rather than termination purely by act of the *bet din*. In this context, we may distinguish the following situations:

(a) The *qiddushin* are tainted by the *incompetence* of one of the spouses, who, for example, is not Jewish[1122] or is a *shoteh*.[1123] Here, there never was any *qiddushin,* and any judgment of a *bet din* to that effect is purely declaratory.[1124] Indeed, any such declaration is strictly unnecessary: a Rabbi satisfied of such facts would be entitled to conduct or authorise a marriage for the other "spouse" without further ado (though in practice he is likely to require the confirmation of a *bet din*). It is difficult here to construct a "partnership between the spouses and the halakhic authorities" (§5.57), but this is not a case of marriage *termination.* Because of lack of competence, there was never a marriage to terminate.

(b) The spouses were both competent, but the *qiddushin* are tainted by a problem of *consent* in relation to one of them.[1125] These comprise the cases of "immediate" annulment in the Talmud. Despite the "immediacy" of the termination of the marriage, they were (in the original talmudic instances) still cases of retrospective annulment. However, for post-talmudic authorities, which treat the talmudic *sugyot* as normative rulings which they simply apply (rather than new judicial decisions), there never was in these cases any *qiddushin* to annul, so that "annulment" here becomes (at least in theory) a declaratory act of the *bet din* indicating that there was never any *qiddushin* – rather than a constitutive act, which retrospectively annuls an otherwise valid *qiddushin* (§5.9, above).

(c) The spouses both consent, but that consent is not "informed", because a significant (halakhically recognised) "defect" exists at the time of the *qiddushin* that is not known to one of the spouses. This is the issue of *qiddushei ta'ut*.[1126] Here, it is argued, the role of the *bet din* is declaratory (of the true intentions of the parties), since it involves a judgment on the particular facts as to what the woman would have done had she known

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1121 §5.56, above. More difficult are the other cases in the classification at ARU 8:27-28 (§5.2(a)), where (a) the *qiddushin* are tainted by the *incompetence* of one of the spouses; (b) the spouses both consent, but that consent is not "informed", because a significant (halakhically recognised) "defect" exists at the time of the *qiddushin* that is not known to one of the spouses (the issue of *qiddushei ta'ut*); (c) the initial *qiddushin* are tainted by the absence of some further (rabbinic) requirement, as in the medieval *taqqanot haqahal.*

1122 For the view that treats an apostate as a gentile, see ARU 8:20 n.118; ARU 5:28-29 (§21.2.1).

1123 *Mishnah Yevamot* 14:1.

1124 Cf. ARU 5:22 (§16.2.1), on *Torat Gittin* 121:5.

1125 *Yev*. 110a, *B.B*. 48b: see §§5.28-29, above.

1126 See §§3.70-76, above; ARU 2:48-56 (§4.4); ARU 10:3-4.

of the true facts.[1127]

(d) The *qiddushin* are tainted by the absence of some further (rabbinic) requirement, such as the consent of parents, the simultaneous execution of a *ketubbah,* the presence of a *minyan*. Such additional requirements form the subject matter of a series of medieval *taqqanot haqahal*, and it is in this context, in particular, that the authority for such annulment has come to be viewed as problematic.[1128] Here, in theory, the role of the *bet din* may be declaratory (as in (b)), but in practice no rabbi would authorise a second marriage without a decision of the *bet din,* confirming that there had been a breach of the additional *qiddushin* requirements. Again, the role of the *bet din* must be prompted by some act or omission of the parties.

(e) A *get* deemed invalid in Torah-law has been delivered to the wife (the "delayed annulment" cases,[1129] e.g. where the husband has withdrawn his consent for it, but the wife, in ignorance of the withdrawal, acts in good faith upon it). Whether we take the view that annulment is here retrospective (the presence of the externally-flawed *get* being purely "incidental") or prospective (by validation of that externally-flawed *get*), the role of the *bet din* is normally assumed to be constitutive (even though in theory the same distinction could be drawn as that in (b) between the original talmudic cases and later applications of the rules there establised). This is, perhaps, the clearest case of a "partnership between the spouses and the halakhic authorities" (§5.57): the husband has, at some stage, authorised a *get*; the *bet din* either validates that *get* or retrospectively annuls the marriage.

Of these, it is (e) which requires retrospective annulment in the strongest sense, for here there is no doubt that a constitutive decision of the *bet din* will be required: until any such *psak,* the original *qiddushin* remain valid. And in fact, the language of *hafka'ah* is not normally used in relation to cases (a) and (c).

5.59 We have argued in this chapter that there is at least enough authority to sustain a *safeq* in relation to both the retrospective and the prospective forms of annulment, and that both retain for the spouses a sufficient degree of involvement in the process to rebut the argument that *hafka'ah* is in principle a violation of the tradition. These different forms of annulment, however, have distinctive roles to play in the search for a global solution to the problem of '*iggun*. Where the woman has remained "chaste", and the problem is that of her capacity to enter into a new marriage, the prospective form is sufficient, and has the advantage of avoiding entirely any questions of retrospective *zenut.*[1130] Where, on the other had, the woman has not remained "chaste", but has already entered into a new relationship without receiving a *get* from her husband, retrospectivity is required in order to address any problem of *mamzerut*. How both these objectives are best achieved is addressed in the course of the concluding chapters.

1127 ARU 10:19: "The three concepts [i.e. conditions, mistake and umdena] here discussed reflect (in different measures) a declarative function of the rabbinical court. The same outcome, i.e. annulling the marriage, can be achieved in a different way: by a constitutive act of the court."

1128 See further ARU 2:41-47 (§4.3).

1129 *Ket*. 3a, *Gitt*. 33a, 77a.

1130 The issue of *be'ilat zenut* is discussed in the context of conditions (§§3.51-62, above), where the issue arises of preservation of a condition which may result in retrospective annulment against revocation by subsequent marital relations.

Chapter Six: Summary

A. *The "Meta-Halakhic" Issues*

6.1 In Chapter One, summarised in this section, we reviewed the basic theoretical ("meta-halakhic") issues which must necessarily inform the search for a solution: the very definition of the problem(s), including the focus on avoiding *mamzerut* (§6.2, below); the grounds for divorce (§6.3); the impact of solutions on the nature and stability of marriage on the one hand (§6.4) and the status of non-*qiddushin* relationships (including *zenut*) on the other (§6.5); the priority given to the *get*, and the husband's role in it, in marriage termination (§6.6), which raises questions of the balance between the autonomy of the individual and the role of the community (represented by the *bet din*) (§6.7); and the question whether this autonomy extends to the capacity to impose conditions on the granting of the *get* (§6.8). We argue that these particular "meta-halakhic issues" must be viewed also in the context of wider concerns: the concept of *ḥillul haShem* (§§1.16, 6.9), attitudes to women's sexuality (§6.10) and considerations of *klal yisrael* (§6.11).

6.2 The problem of '*iggun* arises in three distinct situations, which we may distinguish as follows:

(a) that of the "chaste wife", who complies with the halakhah and suffers in her "chains" for an intolerable period (if indeed ever released at all): we argue that a woman should be defined as an '*agunah* whenever she has not received a *get* within 12 months of a *bet din* having at least recommended (by *hamlatsah)* that the husband grant it.

(b) that of the "unchaste wife", who breaks the halakhah by entering into a new relationship despite not having received a *get* and thereby commits adultery and may give birth to *mamzerim*;

(c) that of the "blackmailed wife", who submits to extortionary conditions (sometimes without the knowledge of the *bet din*) in order to receive the *get.* Even though she may "buy" her freedom, and thus cease to be an '*agunah*, this may well entail intolerable delays and stress, quite apart from the issues of morality and *ḥillul haShem* which may arise.

We have noted (§1.5) that many dayanim regard (b) as the principal problem. But the freedom of the "chaste wife" to remarry is even more restricted than that of the *mamzer*. However, the situations of the "chaste wife" and the "unchaste wife" differ in one significant respect: that of the "chaste wife" is capable of being resolved by a purely prospective solution; that of the "unchaste wife" (and in particular her children) is capable of being resolved only by retrospective annulment (§§3.50, 5.26, 5.56).

6.3 The precise relationship between the *'agunah* problem and the grounds for termination has sometimes obscured the debate. In principle, the two issues are quite distinct (§1.29). Halakhic literature in fact discloses a wide range of positions (some, but not all, associated with the Ashkenazi-Sephardi divide) on the acceptable grounds for divorce, commencing with the *maḥloqet* between Bet Hillel and Bet Shammai in *Mishnah Gittin* 9:10 (including the "ultra-liberal" view of R. Akiva, in respect of the husband), and proceeding in the Talmud to the cases of problematic initial consent (Naresh etc.). We encounter both fault-based grounds (infidelity, physical and psychological abuse, failure to maintain), other "objective" grounds not based on fault (*mum gadol*, insanity), as well as no-fault grounds amounting to "irretrievable breakdown" (a period of separation and failure of attempts to restore *shlom bayit*: §1.29). Whatever their historical relations, both the Babylonian-Geonic tradition and the Palestinian-Genizah tradition

(including its precedents in the Yerushalmi)[1131] affirmed that a wife may unilaterally seek divorce on the grounds that she finds the continuation of the marriage intolerable.[1132] Thus, *me'is* [or *me'isa*] '*alay* is clearly acceptable in principle, whatever view is taken of its enforcement[1133] (which even Rabbenu Tam contemplated via *harḥaqot*: §§4.52-53). It is only when no fault-grounds reach the stage of triviality (§§1.33, 4.66), or are used as a "cover" for illegitimate ulterior motives that there appears to be a consensus that this crosses the bounds of what is acceptable within the halakhah (§4.52). However, this range of views on the acceptable grounds for divorce is correlated with different positions relating to

(a) the financial consequences of divorce (notably, whether a *moredet me'is* '*alay* can claim her *ketubbah*: §4.88); and

(b) the modalities of termination of marriage (notably, whether *kefiyah* is available to a *moredet me'is* '*alay*, either at all or on production of *amatlah mevoreret*).

In relation to each of these issues, the question also arises as to the extent to which either particular communities or the spouses themselves (by means of conditions) may specify their choices on the above issues. Such specifications are not unknown as regards the grounds of divorce: witness both the "Palestinian" tradition and the Sephardi incorporation of a monogamy clause following the reform of Rabbenu Gershom. Nor is it doubted that conditions may be made in relation to the financial consequences of divorce (§3.20). Less clear (and central to our issue) is the extent to which the modalities of termination of marriage (whether through a form of *kefiyah* or by *hafka'ah*) may also be so regulated. This is a distinct issue from that of the grounds of divorce themselves, although the closer we approach the boundaries of acceptable grounds, the more difficult it may be to specify by *tnai* the modalities of termination.

6.4 Arguments that proposed solutions to the *'agunah* problem undermine the stability of marriage take a number of different forms (§1.28), notably:

(a) in effect, arguments against more "liberal" grounds for divorce;

(b) arguments that any loosening of the husband's effective veto on divorce threatens the stability of marriage;

(c) arguments that such solutions convert traditional *qiddushin* marriage into something different.

Of these, (b) and (c) are considered further below (§6.7). (a) is a distinct matter from the effects of proposed solutions to the *'agunah* problem: whilst any solution "may" enable no fault divorce, none has to, and in theory at least the rabbinic authorities can retain control over the limits of acceptable grounds for divorce. More generally, it may be argued:

(i) that the very possibility of being chained (which we might regard as שבויה, using the language of Rambam) to a dead marriage may well prove the greater threat to the stability of Jewish marriage, insofar as it inhibits women from entering into *qiddushin kedat moshe veyisra'el* and thus itself promotes alternative forms of union.

(ii) consideration of the suffering of the wife can hardly constitute a threat to the stability of Jewish marriage, where that marriage is already effectively dead (as where there is a *de facto* physical separation with no desire for reconciliation).[1134]

6.5 The very fact that (a) enters into the discussion – despite the fact that the grounds for divorce is a separate matter from the effects of proposed solutions to the *'agunah* problem – represents an

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[1131] From the conditions in the Yerushalmi (§§3.16-19), through the Geniza *ketubbot* (§§3.30-31) to the interpretation of the teachers of the teachers of Me'iri (§§3.23-29).

[1132] §§3.16-31, §§4.17-19, above; ARU 15:24.

[1133] §§1.30, 4.89.

[1134] R. Shlomoh Daichovsky has observed that we do not have to give artificial respiration to dead marriages: see "Heskemey Mamon Kedam Nissu'in", *Teḥumin* 21 (5761), 286-87.

attempt (contrary to the traditionally wide range of positions on the grounds for divorce: §6.3) to impose a "one size fits all" model of *qiddushin*. More seriously, there is a strong implication that any Jewish community which does adopt a form of marriage which diverges from the current conception of *qiddushin* is one with whose children (notwithstanding their own religious orientation as adults) intermarriage should be discouraged, even if they are not technically *mamzerim* (§1.14). In short, the boundaries between *qiddushin* and *zenut* have been effectively redrawn, with the horror of retrospective *zenut* (as a perceived consequence of annulment) transferred to any form of *qiddushin* (and certainly to non-*qiddushin* relationships such as *pilagshut*) which gives the wife a grounds for divorce wider than those provided in the "one size fits all" model (as represented, for example, in the *shutafut* formulation: §6.7, below).

6.6 Related to the above is the rationale for retaining (in principle) the husband's veto on divorce, and the resistance to *hafka'ah* (normally regarded as a last resort) when not itself based on or accompanied by a *get,* on the grounds that otherwise the wife would be left "available to other men" (§3.54), and any such relationship should not be classified *qiddushin*, with the greater sanctity/exclusivity (and thus psychological security) that that entails. An external analysis might distinguish three different possible bases for such a claim:

(a) sociological: marriages break down more frequently in the absence of the husband's veto and where *hafka'ah* is available (which would require empirical verification);

(b) psychological: whether or not marriages do break down more frequently in such circumstances, value is attached to the sense of psychological security produced by such rules;

(c) identity: as elsewhere in the history of Jewish family law, commencing with the biblical rules of marriage of the priesthood, severity functions as a marker of religious and group identity.

Of course, these factors are not mutually exclusive. We may note, moreover, that the reservation of the category of *qiddushin* for this type of relationship is not a necessary consequence of (a) or (b); it may well be more related to (c).

6.7 Any such recognition, however, of the husband's veto on divorce should not necessarily be understood as a validation of selfish desires. Indeed, we have seen a distinction drawn between the husband's will to terminate the marriage, and his will to participate in the *get* procedure for such termination; according to Rabbenu Yeroḥam and some modern authorities (§4.63), it is the former which is essential. In terms of the husband's will, it is thus possible to "sever" that part of it prompted (as Rambam would say) by the *yetser hara* from the husband's "basic" will, which is "I do not want you" (§4.92). Here as elsewhere, we construct the husband's will as that of a faithful member of the community who has internalised Torah values (§§4.3, 5.21). Similarly, we do not construct the decision of the *bet din* as the exercise of a totally independent ("strong") discretion, in opposition to and overriding the will of the husband. Rather, the role of the *bet din* balances that of the husband, not only in representing the community interest[1135] (the "*shutafut*" (partnership) model of the relationship between the parties and the community institutions: §5.57) but also in ensuring that the husband does indeed behave as a faithful member of the Torah community. Indeed, it is possible to evaluate the relative claims of the various "solutions" in terms of just such a balance.

6.8 In this context, it can hardly be argued that a man who seeks to extort financial or other advantages from his wife, even though no longer wishing to live in a marital relationship with her, is acting as a faithful member of the Torah community (§§1.20-25). Technically, the matter is

[1135] ARU 17:149: "Marriage is a private contract *and* a matter for public concern in which courts may, finally, interfere. Human autonomy is extremely important, but it is the community's right and duty to shape that autonomy and, in the interests of others, to place firm limits on it."

discussed in terms of the permissibility of attaching such conditions to the granting of a *get*, and in particular reliance on the Maharashdam (§1.27), against what appears to be majority opinion (an application of the *ḥumra shel eshet ish*: §6.14, below). However, the issue goes beyond technicalities, and raises basic questions of morality. If we are to discuss the matter as one of "rights" (a questionable importation of secular concepts into the halakhah), we also need to take account of the attitude of the halakhah to abuse of rights (including the applicability of *kofin al midat sedom*: §1.25), and to the fact that the husband is in such cases normally defying at least a recommendation (*hamlatsah*) by the *bet din*, if not an indication that it is a *mitsvah* or even a *ḥiyyuv* to give his wife a *get*.

6.9 The situation of the *'agunah* in general, and the practice of extortion in particular, represent a manifest *ḥillul haShem*, a fact which itself provides a basis for halakhic change (§1.16).[1136] We are justified in invoking the concept of *ḥillul haShem* in the light of the disrepute brought upon the Jewish people and the Torah itself in the eyes of a well-informed and morally critical world – in large parts of which women enjoy full equality before the law – by the irony of a divine Law (whose ways are ways of pleasantness and all of whose paths are peace: *Prov.* 3:17) being harnessed as the very instrument of oppression. This means not only that everything must be done within the halakhah as at present fixed to avoid such scandalous desecration, but also that the very interpretation of the halakhah in this area should be influenced by such considerations.

6.10 Conceptions of women's sexuality also impinge significantly upon our problem. Resh Lakish's maxim *tav lemeitav* (§§1.38-41), used as a barrier to divorce (and, more recently to annulment on the basis of *qiddushei ta'ut*) on the grounds that a woman prefers (for reasons of sexual need) to be in an unsatisfactory marriage than to be single, has been claimed by some to represent an unchanging, ontological truth about the nature of women, based on the punishment of Eve. But this is not the mainstream understanding, and R. Moshe Feinstein, in particular, has argued that women in our generation are more stringent regarding defects in their husbands than women of previous generations, and ruled that *tav lemeitav* may thus not be applicable in our day and age, despite the ontological argument. Indeed, the logic of *tav lemeitav* would point, in modern conditions, to the release of the wife, who will prefer to be free to contract a real marriage rather than be imprisoned in a dead one. No such "ontological" claims are advanced regarding the "moral fear" argument reflected in *Mishnah Nedarim* 11:12, that we do not accept, without corroboration, certain claims for divorce made by women (the mishnaic list later extended to *me'is 'alay*) for fear that such claims simply mask an ulterior motive, that the woman has "cast her eyes on another" (*notenet eynehah be'aḥer*: §4.86). Indeed, it has come to be used also against men, in that they may have a comparable ulterior motive after Rabbenu Gershom's ban on polygamy. It is thus questionable whether this moral fear should always (in effect) reverse the burden of proof, imposing on the woman the need to rebut a presumption of ulterior motive through the production of *amatlah* (a need which arguably may vary according to the lifestyle of the particular community concerned). The *bet din* must of course be satisfied that the woman is sincere (in claiming *me'is 'alay*), but this ought not to be difficult in many cases, taking life-style considerations into account.

[1136] See also the words of the *magiah* to R. Pipano's *teshuvah*, quoted at ARU 13:18 (§70-77), ARU 18:86-87: "Furthermore, we see that humanity is developing every day so that if we shall succeed in this important business then not only will we wipe away the bitter tears of these women who scream and weep but we shall also seal the mouths which say terrible things against our Holy Torah, for many Jews and non-Jews speak – and justifiably so – 'Is this the Torah of which they say that it is a Law of life and righteousness and equity etc?' Therefore, it is our duty to try with every possible effort to put an end to these matters and to set up the Law upon her pedestal, to return the crown of the Torah to her former glory and to place it in the lofty heights fit for her. Then shall we have sanctified the Name of Heaven in public."

6.11 Many of the issues highlighted in this section reflect differences in values between different groups even within the Torah-observant community. In our search for a "global" solution (§§1.6-11), we recognise that such differences may inhibit a single "one size fits all" remedy. The ultimate criterion of a global solution (which we define as "a set of solutions which solves the problem for all, though not necessarily by the same means") is that it does not threaten *klal yisrael*, in that intermarriage between the different communities remains halakhically permissible, notwithstanding their different halakhic practices. This is particularly important in the present climate of "religious mobility". Ultimately, we may hope that the increasing unity of *klal yisra'el,* both politically in the State of Israel and through the worldwide use of modern media of communication, may allow us to transcend both the traditional Ashkenazi/Sephardi divisions and those between *ḥaredi* and modern Orthodox communities, with the establishment of universally recognised central institutions. For the moment, it seems, we may have to be content if we can implement a pluralistic approach.

B. *The Authority Issues*

6.12 We have stressed from the beginning of this project that the *'agunah* problem is fundamentally one of authority. In Chapter Two, these (complex but unavoidable) issues are reviewed in some detail. We often hear of a demand for "consensus" (§6.13), such as would accord a veto to any single (reputable) stringent opinion (§6.14). This applies particularly in the area of *qiddushin* and *gittin*, due to the importance of avoiding adultery and *mamzerut* (the *ḥumra shel eshet ish*). The halakhah lacks (to use modern jurisprudential terminology) clear "secondary rules" (§§1.14, 2.17) which generate the kind of "demonstrable" solutions which a secular positivist might desire. This leaves an important area of ambiguity even in the principle of following the majority (§6.15). Indeed, rather than clear "secondary rules", the concept of "doubt" (*safeq*), and the leeway which doubts of different kinds may provide, may be argued to be central.[1137] This opens the way to recourse to minority opinions (§6.16) and even unique lenient opinions (§6.17), in the context of combinations of doubts (*sfeq sfeqa*: §6.18). Such strategies are used, for example, by R. Ovadyah Yosef (§6.19), and may be applied in areas of historical doubt (§6.20). They are complemented by use of the principle of *hilketa kebatra'ei* and Rema's important qualification of it (§6.21). There are also special considerations which apply in times of "urgency" (§6.22). We conclude this section with the problem of imposition of *ḥumrot* across the boundaries of particular religious communities (§6.23), a more general reflection on our methodology (§6.24), and a preliminary indication of the application of *sfeq sfeqa* to the possibility of solutions combining more than a single strategy (§6.25).

6.13 We have argued (§2.2) that the demand for "consensus" (not necessarily complete unanimity: §2.4) appears to have been prompted by a problem of "popular" legislation (*taqqanot haqahal*), rather than being a restriction of the talmudic institution of the "majority rule" (of sages), and to have been related, in particular, to countering the possibility that a woman regarded in one place as married could be regarded elsewhere as unmarried. But there is also a more particular interest involved, the desire of the *poseq* not to take sole responsibility for decisions which may turn out to be erroneous.[1138]

6.14 The *ḥumrah shel eshet ish* takes the form in our context of the demand for consensus, according to which we take into account even a single stringent opinion, even if it is opposed to the lenient rulings of the *Shulḥan 'Arukh*, the Rema and the vast majority of the *posqim* (§2.5). This,

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[1137] Indeed, such rules may be applied reflexively to the concept and consequences of "doubt" themselves: see §6.18, below.

[1138] If *posqim*, for this reason (see, e.g. Ribash, at §§2.2, 2.49), pronounce particular courses of action acceptable *lehalakhah* but not *lema'aseh*, this may encourage people to seek opinions only *bedi'avad*.

however, appears to be a modern innovation, of purely customary or, at most, rabbinic origin and status (§2.7). Analysis of a *teshuvah* by R. Moshe Feinstein (*Iggrot Moshe*, *'Even Ha'Ezer* I, 79) also leads to the conclusion that insubstantial minority halakhic opinions, even in matters of '*erwah*, need not be considered;[1139] indeed, once a situation of '*iggun* has materialised we revert to the usual rule of *rov posqim* and the *Shulḥan* '*Arukh*, as R. Ovadyah Yosef confirms (§2.10). Moreover, according to the Taz and his school, in the absence of any other solution to an '*iggun* situation according to *rov posqim,* we may rely on lenient minority views and even on a lone opinion (§2.11). The Shakh and his school, however, limit this extreme leniency to cases involving rabbinic prohibitions.

6.15 There is an important area of ambiguity even in the principle of following the majority (*rov*). Some argue that it applies only where there was a face-to-face meeting of those comprising the majority with those comprising the minority (§2.8). R. Ovadyah Yosef holds this view, and thus argues that in most inter-generational and inter-community disputes involving a *maḥloqet* on *de'oraita* matters (where the disputants are *in absentia* of each other), the majority rule is *not* applicable and the situation thus remains (biblically) one of doubt, with the possibility of leniency via *sfeq sfeqa*. Furthermore, the rule that doubts in Torah Law are resolved strictly (*safeq de'Oraita leḥumra*'), he notes (according to the consensus of scholarly opinion following the Rambam), is itself only rabbinic in nature (§2.20). Hence it would be possible to accept the greater leniency of the Taz against the more cautious approach of the Shakh (§6.14).

6.16 However, even those who hold that there is no such restriction on the applicability of *rov* are able to have recourse to minority opinions for the purposes of the rules relating to *safeq* (§2.36). This means that the *posqim* have, in effect, a discretion to review what would otherwise be the results of the application of the secondary rules (for there can be very few questions of interpretation where there is no minority viewpoint) – a feature of the halakhah which should be regarded not as weakness (from a secular positivist point of view), but rather as flowing from the very design of the halakhah, which is a mix of rational and charismatic authority (§2.36). Failure to exercise this discretion is itself an exercise of discretion, which raises questions of responsibility.

6.17 Indeed, minority opinions (even unique lenient opinions) may have a special place in the present context. According to the Taz and his school, in the absence of a solution to an '*iggun* situation according to *rov posqim,*[1140] we may rely on lenient minority views (especially in situations of urgency) and even on a lone opinion (§2.11). A similar conclusion is arguable even according to Shakh and his school, who *prima facie* allow such leniency only if we are dealing with rabbinic law (§2.13). But even if we do not go so far as to accept a lone lenient opinion, there is general agreement that, where the *get* refusal reaches a stage classifiable as '*iggun*, we need not take account of stringent minorities, as is confirmed in a decision by Rabbis Hadayah, Elyashiv and Zolti in *Pisqey Din Rabbaniyim* (§2.14). Taking these sources together, it follows that before we reach the stage of '*iggun* (itself a matter of dispute involving meta-halakhic issues) all stringent opinions are taken into account but once we cross the threshold and enter the area of '*iggun* we abandon the 'all stringencies' approach and – even if we do not go so far as to accept a lone lenient opionion – we rely on the usual halakhic methodology (§2.15).

6.18 These issues are often managed through a 'calculus', the rules of *sfeq sfeqa* (§§2.17-21): while a single doubt on a *de'oraita* matter is resolved in favour of strictness (*safeq de'oraita leḥumra*), on a *derabbanan* matter it is resolved in favour of leniency (*safeq derabbanan lequla*): a double

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1139 §2.9, and Appendix A to ch.2.

1140 Based on the view that (i) the law of *rov* operates, at the biblical level, only where the *maḥloket* was face to face (as in a debate amongst the judges of the Sanhedrin), but a *maḥloqet* amongst *posqim* who never met, whether due to historical or geographical constraints, is not governed, biblically, by the majority rule and remains a doubt in biblical law and (ii) *safeq de'Oraita leḥumra* is a rabbinic rule.

doubt is sufficient to permit a Torah prohibition (which would include the remarriage of a 'doubtfully (still) married' woman). However, one of the doubts must be *shaqul* (= evenly balanced, i.e. 50-50); the other may be a minority opinion. This 'calculus' may well apply to doubts within *sfeq sfeqa* itself, and to the (sometimes disputed) status of a particular rule as *de'oraita* or *derabbanan.* Indeed, there is such a dispute regarding the status of *safeq de'oraita leḥumra* itself: majority opinion (thus more than *shaqul*) supports the Rambam in holding it to be *derabbanan*. As indicated above (§§6.14-15), this opens the possibility that we may adopt the view of the Taz (§6.17) and rely, in an otherwise insoluble situation, on a single lenient authority even in a case of Torah law – including, as the Taz says, '*iggun* (§2.20).

6.19 The use of *sfeq sfeqa* in *qiddushin* and *gittin* is far from unknown. We have noted its use in Maharik, Maran, Maharashdam and Yavetz (§2.22). Indeed, it was in the context of *mamzerut* resulting from a woman's second marriage without a *get* that R. Ovadyah Yosef discussed *sfeq sfeqa* at length, and was willing in principle to apply it in order to rule leniently in favour of a second marriage; indeed, there is authority even to permit coercion of a *get* based on a (factual) *sfeq sfeqa* in a case of doubtful *qiddushin* where the betrothed uses *me'is* '*alay* in resisting *nissui'in* (§2.23).

6.20 The principle of *sfeq sfeqa* applies to facts as well as halakhic doubts. There is no reason, therefore, not to apply it, in conjunction with other factors, to historical claims made in the course of halakhic argument (§§2.27, 31). In the course of our investigation, we have encountered a series of historical doubts which prove relevant to the basic questions of authority which lie at the basis of the problem of solving the *'agunah* problem. Several of them concern the question whether the Rishonim had accurate information as to what the Ge'onim did and on what authority the Ge'onim based themselves, including a variant in the talmudic text (found in a newly discovered manuscript) which, if known to the Ge'onim, might have provided them with a talmudic basis for *kefiyah* in the case of the *moredet me'is* '*alay*, and which, equally, might have altered the view of Rabbenu Tam as to such a talmudic basis (§§2.32-33. above; §6.49, below). There is also an historical problem in relation to Rabbenu Tam's own position, since the *Sefer HaYashar* includes seemingly conflicting statements (§6.50, below).

6.21 Where historical doubts arise from the discovery of new sources (including *ketubbot* which may evidence "deviant" *minhagim*: §2.34), the issue also arises of the application of Rema's qualification of *hilketa kebatra'ei*. The basic principle allows arguments adopted by earlier generations to be reconsidered by later generations, provided that the latter were fully aware of and considered the earlier arguments (§2.28). Rema's qualification indicates that this may be inapplicable, where the later generation was unaware of relevant earlier authority. But the precise definitions of both the basic principle and Rema's qualification admit of some uncertainties relating to (i) the manner in which the *batra'ei* handle the opinions of the *qamma'ey,* (ii) where the *batra'ei* do not mention an earlier opinion, how well-known the latter needs to be (in order to invoke Rema's qualification) and (iii) what then is the precise effect, for contemporary *posqim*, of the failure of the *batra'ei* to take it into account (§2.29). Minority opinions on these issues may themselves contribute towards a *sfeq sfeqa*' argument (though if *hilketa kebatra'ei* is itself *derabbanan*, the lenient opinion *on that* may in any event be adopted). We may note that according to the Rosh, the rules of *safeq* take priority over *hilketa kebatra'ei* where the two both apply. Thus the Rosh held that where the *safeq* is in rabbinic law and the earlier authority rules leniently the earlier authority should be followed in spite of the rule of *batra'ei* (§2.30).

6.22 It is widely accepted that the pressure of contemporary conditions (social, political, religious) may themselves justify greater leniency than would otherwise be available. But a distinction (not

always observed, at least in the choice of language[1141]) needs to be made between situations of "emergency" (*tsorekh hasha'ah*), where it is possible to "uproot" even a negative biblical commandment and situations of "urgency" (*she'at hadeḥaq*), where such uprooting is not authorised but where lenient minority opinions may be adopted, going beyond what would otherwise be possible. These include permitting *lekhatḥillah* what otherwise would be permitted only *bedi'avad* and following a minority opinion – even a lone lenient opinion (§6.17, above), despite the fact that a biblical prohibition may be involved (§2.39). The Ge'onim were quite explicit in stating the special circumstances which they took to justify their measures, and R. Ovadyah Yosef has argued that our period is comparable to that of the Ge'onim in this respect (§4.84). At the very least, we may argue that the situation regarding *get*-refusal today is one of "urgency" (§2.45); indeed the *Ma'alot LiShlomo* (*'Even Ha'Ezer* 2, s.v. *ve'im*) writes that there is no greater *she'at hadeḥaq* than this. To the extent that the leniencies which become available in a *she'at hadeḥaq* provide remedies only on a case by case basis, they may fail to fulfil the criteria of a "global" solution (§2.40). Yet the capacity exists to apply such leniencies on a "global" basis, provided that a *bet din* of *Gedoley HaDor* can be convened and would agree to such measures (§§2.41, 5.49).

6.23 Of course, application of the leniencies authorised by the various strategies discussed in this section – *sfeq sfeqa*, *hilketa kebatra'ei* and *she'at hadeḥaq* – are discretionary, not mandatory. Some communities may choose to apply them, others not (often because they take different views of the meta-halakhic issues discussed in section A). Questions of halakhic authority often depend upon the particular community to which one belongs, and thus to whom it is anticipated that problems and disputes will be submitted (§1.14). In order to achieve a "global" solution, particular religious communities which themselves choose not to exercise such discretion must not seek to impose their own *ḥumrot* on other communities which do exercise it (§2.47). The latter communities would not be violating any *'issur* and therefore any children born to second marriages entered into as a result of such discretionary leniencies would not be *mamzerim.*

6.24 The exercise of discretionary judgments thus depends in practice on the conventions (often unstated) of particular communities. This may extend to such vital matters as the now commonplace distinction (§1.14) between what is permissible (only) in theory (*lehalakhah*) and what is permissible in practice (*lema'aseh*). Issues of authority thus become questions of "whose authority", and the answer to such questions cannot be given in institutional terms. Rather, they admit of "personal" responses: who are the recognised *posqim/gedolei hador* of the age? Different answers to this may be given by different communities. Judgments on these matters are often so strongly internalised that they appear to their adherents as "objective", the converse being that advocates of reform are viewed as "cherry picking" (selecting only those sources as support their preferred model). But much of our analysis in Chapter 2 stems from the very character of the "secondary rules" of the halakhah. The issue is not whether any proposal is objectively correct, or immune from contrary argument, but rather whether it is a viable approach within halakhic thinking.

6.25 The strategy of *sfeq sfeqa* underlies the principal strategy advocated by a number of reform proposals and further developed in this report (section F, below), namely that of combining elements of conditions, non-standard *get* and annulment. Thus R. Abel writes (§2.24) of R. Berkovits' analysis: "Although he does not say so, it seems to me that the three approaches to the problem in *TBU* were meant not as alternatives but as a combined three-fold approach creating

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[1141] See Riskin, "Response" (n.287, above), 49f., on the use by *Rema* (commenting on the Austrian case) of *tsorekh hasha'ah* rather than *hora'at hasha'ah*, noting the distinction between them advanced by R. Kook in *Mishpat Kohen* 143, that *tsorekh hasha'ah* must be based on halakhic precedent and can itself form a precedent for the future. On this account, *tsorekh hasha'ah* appears closer to *she'at hadeḥaq* as understood in this report: see §2.38.

a "triple-doubt" effect. If, after all the arguments and proofs, there exists any residual doubt about the halakhic efficacy of the Berkovits – or some similar – condition, we can rely on a *get*, prepared from the time of the *qiddushin*. Should there be doubt about that too, we can rely on the operation of retrospective communal annulment which also has its supporters amongst the *Gedoley Haposqim*."

C. *Conditions*

6.26 In this section, we summarise the discussion of conditions in Chapter Three. We review the principal historical sources supporting and opposing conditions: the conditions of the Palestinian Talmud (§6.27) and the Genizah *ketubbot* (§6.28) on the one hand, the maxim *eyn tnai benissu'in* (§6.29) on the other (including the debate on the relevance of the *aḥ mumar* condition: §6.30). We then consider the basic halakhic issues involved in the controversy: the difference between a condition terminating marriage and a condition releasing from *yibbum* (the *aḥ mumar* condition: §6.30); the objection in principle that conditions are contrary to Torah-law (§6.31); the respective roles of the husband and *bet din* in termination of the marriage by virtue of a condition (§6.32); the effect of such termination on the previous relationship, whether *be'ilat zenut* (§6.33) or *pilagshut* (§6.34); the means of protecting the condition against implied revocation (§6.35); the possibility of choosing between conditions which act purely prospectively and those which have retrospective effect (§6.36); the difference between "substantive" and "validity" conditions (§6.37); the possibility of using implied conditions through the concept of *'umdena* (§6.38); and the possibility of making conditions universal, with the status of *tna'ei bet din* (§6.39). We then describe, in the light of these issues, the conditions proposed by a number of modern *posqim* (§6.40), those of R. Pipano (§6.41), R. Henkin (§6.42), R. Makovsky (§6.43), R. Uzziel (§6.44), R. Toledano (§6.45), and R. Risikoff (§6.46), and finally offer some conclusions on the halakhic status of conditions in the light of the principles of *safeq* (§6.47).

6.27 The Jerusalem Talmud records that R. Yoseh pronounced valid a partially preserved condition allowing divorce by either spouse on the grounds of "hatred", but it is not clear whether this extended the otherwise available grounds for divorce or was used primarily in order to regulate the financial consequences of this form of divorce (§3.17). A second condition recorded in the Yerushalmi regulates the financial consequences of divorce where the wife "hates ... her husband, and does not desire his partnership" (§3.18). Even if the primary function of these clauses was financial, they may well have strengthened the positions of the spouses in relation to the grounds for divorce (§3.19). Although the Tosefta already states that conditions contrary to Torah law are valid only if they are monetary, it interprets that criterion liberally, as including the obligation of *'onah* (§3.20), and this has been seen as reflecting a distinctive Palestinian tradition which was both more "egalitarian" than the Babylonian tradition and gave the spouses greater discretion to modify the normal incidents of marriage (§3.21). In any event, it remains unclear, in historical terms, whether these Yerushalmi conditions envisaged coercion (or other non-standard forms of divorce, reflected in early non-rabbinic sources) if the husband refused the *get* (§3.22). More important for our purposes is the fact that the teachers of Me'iri's teachers *did* understand R. Yoseh's condition as entailing coercion (§3.26), since they claimed that it was the use of just such a clause which justified the *kefiyah* of the Ge'onim (§3.23). There is, in fact, evidence that Ra'avya may have seen *ketubbot* including a clause of this kind (§3.27). Though most of the *Rishonim* understand R. Yoseh as referring only to financial matters (§3.25, perhaps reflecting their rejection of coercion in the case of the *moredet*), the view of the teachers of Me'iri's teachers may create a *safeq* as to the interpretation of R. Yoseh's condition (§3.23), even though these teachers may not themselves have endorsed coercion (§3.28). As for the status of that condition, it is undisputed in the Bavli and may perhaps (in relation to Rabbenu Tam's opposition to the Geonic measures) fall within Rema's qualification of *hilketa kebatra'ei* (§3.24). The fact that, for Me'iri's teachers' teachers, the Palestinian tradition was still sufficient to legitimate what they

(following Rabbenu Tam's view) probably regarded as non-legitimate coercion poses for the *posqim* of our time too the question whether there is not a *safeq* as to whether coercion may still be used when authorised by a term in the marriage contract (§3.29).

6.28 The fact that Ra'avya appears to have relied for halakhic purposes upon a Palestinian divorce clause found both in the Yerushalmi (as Me'iri testifies) and in a *ketubbah* from Eretz Israel which Ra'avya had himself seen (§§3.27, 3.30, 4.25) indicates that we may not exclude from the halakhic debate the mediaeval *ketubbot* discovered in the 19th century in the Cairo Genizah. Their language, moreover, is non-standard in relation to the actual procedure of divorce (על פם/פי בית דינה): different views are taken as to whether a *get* was necessary at all, and, if it was, whether the court would coerce if necessary(§3.31). Rosh, too, gives a non-standard interpretation (as *hafka'ah*) to the *kefiyah* of the Ge'onim (§3.31). Here too, whatever the true historical explanation, these post-talmudic interpretations may contribute to our dogmatic analysis (§3.32).

6.29 The maxim *'Eyn Tenai BeNissu'in* occurs in two talmudic passages, but has a doubtful status in the halakhah. Tosafot explain its meaning in the Talmud as *'Eyn regilut lehatnot benissu'in* (it is not *usual* to make a condition at *nissu'in*), thus as no more than a practice dependent upon the circumstances of the time (§3.13). Indeed, the major codes all agree that conditional *nissu'in* is effective (§3.15). At the other extreme, the Rogachover Gaon (§3.14) understands it as meaning: "it is halakhically impossible to attach conditions to *nissu'in*" (as opposed to *qiddushin*). In 1930 an influential collection of responsa was published under the title *'Eyn Tenai BeNissu'in*, directed against earlier proposals for conditional marriage made by the French (and later Constantinople) rabbinate (§§3.2-6). However, there is some reason to debate the precise strength of opposition to the principle of conditional marriage even in *'Eyn Tenai BeNissu'in* itself (§§3.7-8). The concept of conditional marriage was advocated again by R. Eliezer Berkovits in his *Tenai BeNissu'in UveGet* of 1966, in which he distinguished unacceptable from acceptable forms of condition in terms of the involvement of the *bet din* (§§3.2, 7), but controversy attaches to the precise halakhic status of his work. It is often dismissed in the light of the earlier *'Eyn Tenai BeNissu'in*, but it did attract a *haskamah* from Rav Y.Y. Weinberg (and a verbal endorsement, *lehalakhah*, from R. Moshe Feinstein), which is then claimed (not without refutation) to have been withdrawn (§3.10). R. Weinberg in his introduction to *Tenai BeNissu'in UveGet* describes the negative attitude of *'Eyn Tenai BeNissu'in* as predicated on *Shiltey HaGibborim beshem Riaz*.

6.30 One point of contention between *'Eyn Tenai BeNissu'in* and R. Berkovits' analysis is the relevance to the debate of the (generally accepted) condition of Mahari Bruna regarding the *aḥ mumar* (§§3.34-36). There is an obvious factual difference between a condition retrospectively annulling a marriage already terminated by the death of the husband (as in the case of the *aḥ mumar*, where the condition seeks to avoid the wife's being chained to an apostate levir, later extended to a missing levir: §3.38), and a condition terminating a marriage not already annulled by the death of the husband. Some, following R. Shemuel ben David HaLevi in *Naḥalat Shivah*, maintain that only the former type of terminative condition, which takes effect after the husband's death, can be valid. Berkovits, however, notes that *Naḥalat Shivah* examines only the case of vows and blemishes mentioned in the Talmud (*Ketubbot* 72b-74a), where breach would create retrospective promiscuity, and rejects the underlying distinction, that a dead husband does not care about the possibility of retrospective *zenut* while a living husband does. Berkovits, moreover, holds that a marriage terminated by an acceptable condition does not in fact create a situation of retrospective *zenut* (§3.36); hence the permissibility of the *aḥ mumar* condition, and that of Berkovits. Rav Kook, too, has rejected any principled distinction from the *aḥ mumar* condition, holding the problem to be one of lack of expertise (§3.37).

6.31 A further possible objection in principle to terminative conditions is that they are contrary to Torah-law, and thus invalid according to the criterion of the Tosefta (§6.27, above). However, according to the Rishonim the objection holds only if it is already clear at the time of making the condition that its fulfilment will necessarily violate Torah-law (§3.39); moreover, a condition may exempt even from non-monetary obligations (such as *yibbum*) if appropriately drafted (§3.40).

6.32 An important issue in halakhic debate concerning conditions is the respective roles of the husband and the *bet din*: while *bet din* supervision in some form is clearly necessary to prevent abuse of the system, there is a strongly felt reluctance to take matters entirely out of the hands of the husband, in effect authorising a form of *hafka'ah* (§3.41). More specifically, this raises two issues (§3.12): whether the condition itself specifies the grounds for termination on which the *bet din* should act, and whether it gives the bet din the role of *declaring* the marriage to be (prospectively) terminated by virtue of fulfilment of the conditions (which involve an act or omission of the husband), or authorises the *bet din* to annul the marriage with retrospective effect (a *constitutive* act). The latter issue is summarised below (§6.36), and contemporary *posqim* differ significantly in the respective roles to be accorded the husband and the *bet din*, as may be seen in particular by contrasting the proposals of R. Henkin (§6.42) and R. Uzziel (§6.44).

6.33 An influential objection to terminative conditions has been the fear of retrospectively reducing the relationship between the spouses to one of *zenut* (a concept with a wide range of connotations), which, though not rendering any children *mamzerim*, has occasionally been suggested (and probably more than occasionally felt) to risk conferring on them some kind of spiritual blemish.[1142] Such "retrospective *zenut*", however, may merely indicate that the spouses are not considered married; some consider their status to be that of *pilagshut* (§3.62). Indeed, according to a *baraita* in *Yebamot* 61b (§§3.52-53), R. Eleazar held that an unmarried man who had intercourse with an unmarried woman renders her a *zonah* only if the intercourse was without matrimonial intent (*shelo leshem ishut*). Significantly (as in our argument regarding the nature of the will required of a man for a valid *get*: §6.7), R. Eleazar here attaches more importance to the character of the intended relationship than the procedure for constituting it. In any event, an alternative explanation of the maxim that *'Eyn 'adam 'oseh be'ilato be'ilat zenut* is that a couple may hesitate about conditional marriage on the grounds that, even before the condition takes effect, their sense of security in the exclusivity of their relationship may be undermined by the knowledge that it could be terminated by virtue of the condition (§3.54). However, there may be a distinction between the effects of annulment (without a condition), and termination by virtue of a condition. As for the latter, R. Uzziel supports the view that there is no issue of *zenut* when the relationship was conducted on the basis of *qiddushin* and *nissu'in*, even if later annulled by a condition involving an act of the *bet din* (§3.56); indeed, he argues, wherever the Talmud says that the Sages made his intercourse promiscuous it speaks only of cases where he betrothed by intercourse (§3.58), and even then he accepts the view that though the intercourse is rendered ineffective to create *qiddushin*, it is not itself promiscuous (*zenut*). R. Berkovits also argues against retrospective *zenut*, stressing the fact that his proposed condition results in a marriage which the wife can exit only with a *get*, and only in a minority of cases would there be annulment (§3.59). Others argue that even if fulfilment of the condition depends upon the spouses rather than the *bet din*, there is no retrospective promiscuity since the couple lived together willingly on the basis of their (albeit conditional) *qiddushin* and *nissu'in* (again, in effect: *leshem ishut*, to which the existence of a *civil* marriage may be relevant).

6.34 An alternative objection to conditional marriage is that, should the condition take effect, the relationship would be reduced retrospectively not to *zenut* but to *pilagshut* (concubinage), which Rambam held was permitted only for kings (§3.55). However, a majority of *posqim* permit *pilagshut*, so that the prohibition is a matter of *safeq*, and Rambam himself considers any doubtful

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[1142] See sources cited in note to §3.51.

biblical prohibition as only rabbinically proscribed. Thus, even if the Rishonim were evenly split on the question of the permissibility of *pilagshut* for a layman, we would be dealing, in the case of conditional marriage, with a *doubt* (the 50-50 split of the *posqim* concerning definite *pilagshut*) in relation to a rabbinic prohibition (the *possible* biblical prohibition of conditional marriage that might prove to be *pilagshut*) and *safeq derabbanan lequla* (§3.87). It is also argued that Rambam himself would permit retrospective concubinage created as a by-product of a marriage annulled due to a broken condition (§3.55).

6.35 The fear of retrospective *zenut* is an obstacle to conditional marriage insofar as it is thought to create a presumption that marital intercourse is intended to revoke any such condition (§3.63), *'Eyn ʿadam ʿoseh be'ilato be'ilat zenut* being taken to mean that a man does not engage in intercourse which *might* subsequently be rendered *zenut*. One theoretical strategy to protect the condition against this threat is repetition of the condition (before witnesses) at *ḥuppah*, *yiḥud* and (at least the first: §3.66) *bi'ah* (§3.64). However, it is disputed whether marital intercourse does create a presumption of revocation, not least because the condition is for the benefit of the woman, and there can be no presumption that she would forego it nor may her husband unilaterally forego it against her will (§3.65). The Ḥatam Sofer regards repetition as a stringency over and above basic halakhic requirements (§3.57). Nevertheless, to be on the safe side, it may be advisable to protect the condition against subsequent express (intentional) revocation. This is accomplished in several contemporary proposals by the use of an oath (§3.67), as suggested already by R. Aqiva Eiger (§3.68). R. Henkin has suggested, in addition, that the *bet din* impose a *ḥerem* on the husband and wife that they "not intend nor agree that the acts of intercourse should be for *qiddushin*" (§3.69). Of course, these measures may well not prove effective outside the religious community, which is one reason for advocating a different solution for different communities.

6.36 Of course, the problem of implied revocation because of the fear of retrospective *zenut* does not arise if the condition can be made to have purely prospective effect (§3.51). Such a condition would also have the advantage of avoiding both the conceptual and dogmatic problems associated with *hafkaʿah*: the role of the *bet din* in the termination of the marriage becomes declaratory rather than constitutive (§3.78), and accords with the "partnership" model of the relationship between the parties and the community institutions (§5.57). Though there is a general assumption that the operation of a terminative condition is equivalent to retrospective annulment of the *qiddushin* (§3.77), it may be argued that *hafkaʿah* itself has not always and necessarily been viewed as retrospective (§§5.13-27); that *Tosafot* (according to some later opinions: §5.22) envisaged circumstances where *hafkaʿah* in the case of a cancelled *get* was only prospective; that the *tnai* of the Cairo Genizah *ketubbot* may well have been intended to terminate the marriage with only prospective effect (§3.79); indeed, Shemuel Atlas argues at length that annulment is *never* really retrospective (§5.25). In the light of all this, it may perhaps be possible to contemplate a condition which states *explicitly* that it is intended to be of only prospective effect. Of course, this would function as a remedy for the "chaste" but not the "unchaste" wife (§6.2).

6.37 An innovative form of condition found in some modern proposals is what we may call a "validity condition", stating that the marriage shall never have taken place if the halakhic validity of the substantive conditions is not accepted (§3.83). Thus, R. Henkin, whose primary proposal was the (immediate) delivery of a *get al tnai* (not *qiddushin al tnai*), made the marriage itself conditional on the non-failure (for halakhic or other reasons) of that *get* (§§3.45, 83). Similarly, R. Broyde includes in his proposed "tripartite agreement" a clause which states: "Furthermore, should this agreement be deemed ineffective as a matter of *halachah* (Jewish law) at any time, we would not have married at all" (§3.84). Of course, the validity of such a validity condition is an issue regarding which views may also differ.

6.38 Some have suggested that there may be no need for an explicit condition at all. Already in 1933

(well before recent debates over the scope of *qiddushei ta'ut*), R. Moshe Schochet observed in the context of our problem: "For it is certain that there is a definite assumption (אומדנא דמוכח) that she did not marry on such an understanding" (of the possibility of '*iggun*), and argued that the marriage might therefore be retrospectively annulled even if no explicit condition were made (§3.70). Similarly, Professor Feldblum argued that there is an אומדנא דמוכח, at least as regards non-religious women, in relation to the *qinyan* aspect of *qiddushin.* There would appear to be a firm theoretical basis for such suggestions. The halakhah recognises the concept of unspoken conditions ('*ada'ta' dehakhi lo' qiddeshah 'atsmah*), and annulment itself is justified in some talmudic sources on the grounds that *kol hameqaddesh 'ada'ta' derabbanan meqaddesh* (§§3.71, 5.33). Based on Tosafot and R. Moshe Feinstein, Dr. Westreich (in ARU 10) advances an analysis of '*umdena* as a potential tool for terminating marriage due to a defect or behaviour which occurred only after marriage (§§3.73-75), though whether the possibility of '*iggun* may be regarded as an '*umdena* (as opposed to the basis of *qiddushei ta'ut* – itself a contentious matter) is unclear.

6.39 Of course, any use of terminative conditions to provide a global solution to the problem of recalcitrance must not rely on the contingency of either explicit conditions or the subjectivity of implied conditions (unless R. Moshe Schochet's view in §6.38 is accepted); what is required is a standard condition implied by law (§3.71). But, as in the past, the case for *tena'ei bet din* gains weight from previous practice — or, indeed, from enactment (*taqqanah*) of the *qahal* to which the couple belong. Thus the conditions of *Mishnah Ketubbot* 4:7-11 appear to have been derived from notarial practice now evidenced from documents of the Bar Kochba period (§3.89), and we have noted that the thesis that the geonic decree was based on Palestinian conditions is supported by the evidence of Ra'avya (§§3.27). Of course, it would take a *taqannah* to elevate such conditions to the status of *tena'ei bet din*, and here greater problems of authority arise.

6.40 The French and Constantinople were not the only proposals for conditional marriage made in modern times. We have also encountered the following proposals for terminative (in principle, self-executing) conditions, but with some significant differences in the roles accorded the husband and the *bet din*. They are, in chronological order:[1143]

1887	R. Eliyahu Ḥazzan, *Ta'alumot Lev* III.49, on which the French Rabbis relied;[1144]
1924	R. David Pipano, *Responsa Nose' Ha'Efod*, no. 34 (§6.41);
1926	R. Yosef Eliyahu Henkin, *Perushey Ibra* 5:25 (§6.42);
1926/27	R. Zvi Makovsky in his paper entitled *Mipney Tiqqun Ha'Olam* (§6.43), together with a similar proposal the same year from R. Shemuel Avigdor Abramsohn;[1145]
1935-36	R. Benzion Meir Ḥai Uzziel, *Responsa Mishpetey Uzziel*, *'Even Ha'Ezer* nos. 45 & 46 (§6.44).

In addition, we may add the following proposals for *hafka'ah*:

1930/31	R. Ya'aqov Mosheh Toledano, *Responsa Yam HaGadol* (Cairo 1931) no. 74 (§6.45);
1937	R. Menaḥem HaKohen Risikoff, *Responsa Sha'arey Shamayim*, *'Even Ha'Ezer* no. 42 (§3.67).

We may note, in this context, that the responsa in '*Eyn Tnai BeNissu'in* were written in 1907-08,

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1143 R. Abel at ARU 18:79-91 provides a list of 12 "Posqim who accepted the practical possibility of conditional marriage as a solution for the tragedy of '*iggun*", but not all appear to have made substantive proposals. Thus the list commences with the French (R. Ḥazzan) and Constantinople proposals (nos.1 and 2) and the support the latter received from R. Eliyahu Ibn Gigi of Algiers (no.3) and includes R. Moshe Schochet (§3.70, above) who proposed a debate on conditional marriage (no. 8), and R. David HaKohen Sakali (of Oran, Algeria), *Responsa Qiryat Ḥanah David* II 155-58 (1936), as per Freimann (n.346, above), 393 para. 13, who advocated conditional marriage basing himself on the condition of Mahari Bruna (no.9), and concludes with R. Berkovits and the support he received from R. Weinberg.

1144 See further n.351, above.

1145 *Sefer Torey Zahav*, New York 5687, II pp. 8-17 as per Freimann (n.346, above), 392-93, para. 11.

but not published until 1930.[1146]

6.41 R. Pipano's proposal is the most specific in relation to the situation of '*iggun* (§3.49). It provides that "the betrothal shall not be effective but shall be nullified retrospectively and she will not need a *get*" if (inter alia) "there be a quarrel between us and she sues me to judgment before a righteous *bet din* and the *bet din* make me liable in any way and I shall be unwilling and shall disagree to accept the judgment upon myself or if I flee and my whereabouts be unknown." The expression "liable in any way" appears to have been intended to include the *bet din*'s regarding the husband's giving the *get* as a matter of *mitsvah,* if not *hamlatsah*. The groom's declaration under the *ḥuppah* states that if the conditions are not fulfilled "the *qiddushin* shall be cancelled and shall not take effect at all and you will not need a divorce from me nor [will you need] *ḥalitsah* and the wedding ring will be a [mere] gift and all the acts of intercourse that I commit with you shall be on this understanding" (i.e. on the understanding that they remain subject to the conditions). Though the annulment is clearly retrospective here, and is generated by specifically stated acts of recalcitrance by the husband (which a *bet din* is called upon merely to confirm), there is no specification of the grounds for divorce.

6.42 R. Henkin's proposal (§§3.45-48) uses a "validity" condition (at least as regards the *kashrut* of the *get*: §6.37), created not by *tnai* in the *ketubbah* but rather as a result of a general *taqqanat haqahal* with an initial 50-year duration (§3.46), in which the marriage was annulled only if his primary strategy, that of the (immediate) delivery of a *get al tnai*, failed, whether for halakhic or other reasons.[1147] The condition attached to the *get* specifies that it will take effect if, *inter alia,* "he leaves her an *'agunah* for three years whether through unavoidable circumstances or willingly and the *Bet Din* of Jerusalem before whom the claims shall be brought will recognise that they are true". It is thus activated by the act (or omission) of the husband in bringing into effect an advance "*get*" (both complete and delivered) which he himself had earlier, and entirely willingly, authorised (§3.45); the role of the (specified) *bet din* is clearly to declare that the conditions for the coming into effect of the conditional *get* have been fulfilled. The *taqqanah* would provide that if the *get*, when required to avoid '*iggun*, were lost, destroyed or halakhically invalid, "the *qiddushin* will be retrospectively annulled" (but by virtue of the condition). Some time after publishing this proposal R. Henkin was shown a copy of '*Eyn Tenai BeNissu'in*, as a result of which he withdrew it (§3.47). It is unlikely that when he did so he was aware of the proposals of R. Pipano. We can only speculate on what might have been the fate of R. Henkin's proposals had it not been for his partial retraction*,* and the perception that any conditional marriage was now excluded.

6.43 Shortly after R. Henkin published his proposal, Rabbi Zvi Makovsky (§3.50) proposed conditional marriage not as a communal enactment but only for specific cases where it was clear from the start that the woman was likely to become an '*agunah* because of the obvious irreligiosity of the husband (or levir). Perhaps this was in reaction to the wider scope, and need for a *taqannah*, of R. Henkin's proposal. It also raises the question of the "target" community (although problems of '*iggun* are far from the monopoly of the irreligious).

6.44 The approach of R. Uzziel (§§3.42-44) is similar, making the marriage conditional on the continuing acquiescence of the local *bet din*, the *bet din* of the locality/country and the *bet din* of the Chief Rabbinate in Jerusalem, which would thus be empowered to perform a retrospective annulment of the marriage in cases of '*iggun*. Despite this formulation, it is clear from what he writes later, in response to R. Zevin, that he intended only a conditional marriage, and not *ḥafka'ah* by a *bet din.* The formula he recommended was: "You shall be betrothed to me with this

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1146 For a detailed account of the history, see ARU 4:5-10.

1147 Cf. the suggestion made at the end of §5.49, above.

ring if no objections are raised during my lifetime and after my death by the court in the city, with the agreement of the district court of the state, and the decision of the court of the chief rabbinate of Israel in Jerusalem, and on account of a persuasive claim of causing my wife to be an *aguna*." This means in effect that the betrothal takes effect provided that the *bet din* never subsequently objects to the marriage. This reflects R. Uzziel's view that a condition which gives such a discretion to the *bet din* (or other outside body), thus taking it out of the hands of the spouses, avoids any problem of retrospective *zenut* (§3.41). We may note that R. Uzziel made his proposals after the publication of '*Eyn Tnai beNissu'in*.

6.45 R. Toledano's proposal (§3.56, addition) was that a condition be made at every marriage making it dependent on the continuing agreement of the local *bet din*: if the latter sees that the husband has not acted fairly with his wife they can retrospectively annul the marriage. This clearly gives the *bet din* the widest discretion, in that it provides no specification of either the grounds for divorce or the behaviour of the husband which triggers the condition (other than that he acts "unfairly"). The groom states that he is marrying in accordance with the will of the contemporary local rabbinate, thus engineering a modern day (but here explicit) equivalent of the talmudic *'ada'ta' derabbanan meqaddesh*; the criterion of the husband acting "unfairly" (*lo keshurah*) is very similar to the talmudic *lo kehogen*. The condition should be repeated at the seclusion and should be accompanied by an oath. This is in fact a condition for retrospective annulment performed by a constitutive act of the *bet din*, the role of the condition being primarily to provide spousal authorisation to the *bet din*.

6.46 The proposal of R. Risikoff (§5.56) appears to have been similar, the husband's declaration making the marriage dependent on the continuing acquiescence of a Great *Bet Din* in Jerusalem, with the groom declaring at the end of his betrothal formula *"kedat Mosheh veYisrael ukhdat Bet Din HaGadol biYerushalayim*".

6.47 We concluded above (§3.86, with its documentation) that acceptable, properly drafted conditions are effective *expostfacto* (*bedi'avad*), independent of any other solution, according to most *posqim*. Against the lone view of the Rogachover Gaon, the major codes all agree that conditional *nissu'in* is effective (*Yad*, *Shulḥan Arukh* and *Levush*). Indeed, this seems to have been recognised even within *'Eyn Tenai BeNissu'in* itself. R. Kook described the effectiveness of conditional marriage as 'obvious' and it is reported that R. Feinstein agreed to the arguments of R. Berkovits in its favour. This is also apparent from the number of *posqim* who have proposed global conditional marriage in practice.

D. *Coercion*

6.48 In Chapter Four, we reviewed the complex of historical, dogmatic and conceptual issues presented by the sources on coercion (*kefiyah*) of the recalcitrant husband. At one level, this whole issue is irrelevant to the problem, insofar as *kefiyah,* even in the form of the geonic measures, cannot be guaranteed to provide a "global" solution (§4.2). Nevertheless, analysis of the policy issues which arise – the limits of the permissible grounds for divorce, the nature of the will of the husband which the halakhah seeks to protect, and the range of possible measures of *kefiyah* – assists us towards our final conclusions.

6.49 The principle of coercion was accepted already in the time of the Mishnah in a number of situations where the law recognised that the woman had a right to divorce. Later opinion is divided as to whether the mishnaic list is now closed (§§4.5, 57, 64). The Mishnah considers only financial sanctions *against* the *moredet* (who is not included in the mishnaic list); her claim for a divorce may well be first indicated in a *baraita* in the Yerushalmi (§4.13) and is considered explicitly in the Gemara (§4.6). The dispute between Amemar and Mar Zutra in *Ketubbot* 63b

does not (explicitly) consider coercion of the husband according to the traditional text, but a variant reading in MS Leningrad Firkovitch records Amemar's view as "*he* is forced (כייפינין ליה)" (§4.7). The *sugya* records the final view of the Talmud as requiring that the wife is made to wait twelve months for her divorce (ומשהינן לה תריסר ירחי שתא אגיטא), but does not say anything explicit about coercion. We have to consider the impact of the variant text in the context of the post-talmudic interpretation of the *sugya*, as well as for any direct dogmatic weight which may be attributed to it (§§4.8-9, 4.76).

6.50 Early Ashkenazi Rishonim, including Rabbenu Gershom Me'or Hagolah, Rashi and Rashbam, interpreted the talmudic *sugya* as authorising *kefiyah* in the case of the *moredet me'is* '*alay*, the wife who rejected her husband for reasons of "disgust" (§4.10); indeed, the predecessors of Rabbenu Tam largely favoured unilateral divorce for the wife who claimed *me'is* '*alay*, as we see from Alfasi (§4.33). Of particular interest here is the interpretation of Rashi, who reads the whole history of the matter, commencing with the tannaitic financial measures *against* the *moredet*, as implying the giving of a *get* (reading the position of Rabbotenu in the Tosefta in a way similar to the more explicit formulation of the Yerushalmi: היא שוברת כתובתה ויצאה, and appears to understand both Amemar's position (in the traditional text) and the final conclusion of the *sugya* as authorizing coercion (§§4.11-16). It is possible that the variant reading of Amemar in MS Leningrad Firkovich reflects this interpretation of Amemar, making the force of Rashi's נותן לה גט that much more explicit. The view that coercion is implied also in the *sugya*'s conclusion is found explicitly in Rav Sherira Gaon and some Rishonim.

6.51 When we turn to the measures introduced by the Ge'onim, and the classical account of the matter provided by Rav Sherira Gaon (§4.18), we are faced by a series of questions which continue to inform discussion of the problem of the '*agunah*, even if it is no longer possible simply to revert to the positions which the Ge'onim adopted, including the form(s) of *kefiyah* they were prepared to apply. Sherira's "we compel him to grant her a divorce forthwith" (וכופין אותו וכותב לה גט לאלתר) is normally taken to refer to physical coercion (§4.20). But even that is not guaranteed to succeed. Yet there are hints of the use of different measures in some geonic sources. Rav Yehudai Gaon mentions the use of a *ḥerem* against the husband. The *Halakhot Gedolot* along with some other sources formulate the geonic measures using plural verbs (וכתבי, נותנין, ויהבינן), suggesting the possibility that the *get* may here have been effected by an act of the court rather than the husband (§4.21). Moreover, the Rosh explicitly interprets the geonic measures in terms of annulment (והסכימה דעתם להפקיע הקידושין), perhaps influenced by the citation of one of the plural formulations by his own teacher, the Maharam (§4.22). This (like the different explanation of the basis of the geonic measures by the teachers of Me'iri's teachers) illustrates the close historical and conceptual connections between the "remedies" of coercion, annulment and conditions (§4.25).

6.52 Also contentious is the question of the authority by which the Ge'onim proceeded. In fact, Rav Sherira Gaon was quite explicit in claiming that it was the Babylonian Talmud which introduced coercion of the husband of a *moredet me'is 'alay*, after the twelve month waiting period (§4.18), a view also adopted by Rambam (§4.42), but rejected by others, including Ramban and Rashba (§4.31). The Geonic innovation (using the language of *taqqanah*: תקינו), on R. Sherira's account, consisted in the abolition of the waiting period and preservation of the right of the *moredet me'is* '*alay* to parts of her *ketubbah*. He explains it on "emergency" grounds, speaking of the "disastrous results" of the fact that "Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands" (§4.27). The Rishonim variously take this as a case of הוראת שעה or צורך שעה (Ramban, for one, denying that it was purely temporary), an argument ignored by Rabbenu Tam. Others viewed the gaonic practice in terms of מנהג (§4.28), which Rabbenu Tam viewed as illegitimate (§4.32). Rosh accepted that such custom may retain its validity, particularly in a case of recalcitrance, advising that "If [her husband's] intent is to

"chain" her, it is proper that you rely on your custom at this time to force him to give an immediate divorce" (§4.32).

6.53 It was, however, the view of Rabbenu Tam, opposing the geonic measures, which was to prevail. There are, in fact, conflicting passage in the *Sefer HaYashar*, some of which appear to reject *kefiyah* in principle, on the grounds that "in the entire [Talmudic] discussion there is no mention of forcing the husband, only of forcing the wife ... And we do not find in any [part of the laws of divorce] that the husband is forced to give a divorce" (§4.34), while elsewhere we read: "After all, we learned in the Talmud that [the Sages] did not force [a divorce] until twelve months, and they [the Ge'onim] advanced the forcing of the divorce before [the time which] the law [allows]" (§4.33). It is difficult to reconcile these statements (§4.35), and the conflict may well best be understood in terms of the corrupt state of the text of the *Sefer Hayashar*, which in its present form represents the work of many hands – including that of Rabbenu Tam himself, who repeatedly amended and improved much of it (§4.37). *Responsa Maharibal* III:13 tells us that even Rabbenu Tam himself followed the custom of the Ge'onim at first (though this conflicts with both statements, and indeed with Rabbenu Tam's attitude to *minhag* in this context: §4.32), and R. Ovadyah Yosef cites this as evidence that Rabbenu Tam changed his mind, in the direction of greater stringency (§ 4.36). Though later Rishonim understood Rabbenu Tam as completely rejecting *kefiyah*, his real attitude towards the geonic measures must remain a matter of *safeq* (§4.37). Indeed, his basic attitude to *me'is* '*alay* as a grounds for divorce is also unclear (§4.85): the fact that he recommended *harḥaqot* (§4.52) against a recalcitrant husband implies that he accepted that *me'is* '*alay* was a legitimate grounds for divorce; the fact that he recommended elsewhere that a husband who did not wish to divorce her (even after she had forfeited her *ketubbah* and remained for 12 months without support) should indeed render her a permanent '*agunah* (יעגנה לעולם), apparently as a punishment (§4.38), points in the opposite direction. This last position is not widely accepted: amongst those those who follow Rabbenu Tam, there are influential views favouring a *ḥiyyuv* (§4.39).

6.54 Rambam (followed in this respect by contemporary rabbinical courts) regarded the financial sacrifice the *moredet me'is* '*alay* was willing to make as a sufficient guarantee of her sincerity and of the strength of her feeling that she could no longer tolerate the marriage (§4.39), in which case, he argued, she was not to be treated בשבויה (§4.40), and so "we force him to divorce her immediately" (כופין אותו להוציא לשעתו), albeit on less liberal financial terms than those of the Ge'onim (§4.41). He bases this on his independent understanding of the statement of Amemar in the (traditional text of the) Talmud (§4.42). Some have seen the basic differences between Rabbenu Tam and Rambam as reflecting their respective external religio-legal environments, Christian (hostile to divorce) on the one hand, Islamic (liberal on divorce) on the other (§4.44).

6.55 Though strongly attacked by the Rosh, who presumes the *moredet me'is* '*alay* to have the ulterior motive of *notenet eynehah be'aḥer*, and Rashba (§4.43), the view of Rambam was not lost. Rosh himself attests that the sages of Cordoba were still following Rambam at the beginning of the 14th century, and on their arrival in Algiers following the edicts of 1391, Ribash and Rashbetz (who followed Rabbenu Tam) encountered various communities which had persevered with Rambam's ruling. In the second half of the 14th century we hear of a local community in Spain which enacted an ordinance whereby all rulings should conform to the Rambam, including those involving rebellious women (§4.47). Most significantly, Rashbets ruled for *kefiyah* in *responsum* II:8, responding to those who denied the present generation the authority to coerce with, *inter alia*, the words "... If she had been their [daughter] they would not have spoken so"; indeed, "the *dayan* who forces her to return to her husband when she rebels, like the law of the Arabs, is to be excommunicated ..." Two generations later, Rashbetz's grandson, R. Avraham Ibn Tawwa'ah, still found it necessary to attack the local traditions in Algeria that followed the position of the Rambam. Even Rema in *Even Ha'Ezer* 77:3 refers without criticism to places that practise

coercion in cases of *me'is 'alay* (§4.47). There is thus doubt over the dominance of Rabbenu Tam's view, either in his own generation or later (§4.45). In geographical terms, the practice appears to have spread by the time of Rabbenu Tam (and on his own account) as far as Paris. And in *Tosafot Ketubbot* 63b, s.v. *Aval*, we find a systematic reply to almost every argument against those who apply coercion in cases of *moredet me'is 'alay* – except the argument that we do not find any mention of coercion in the text of the Talmud itself (see Appendix to ch.4). If the variant reading of Amemar's view (or Rashba's speculative attribution of Rambam's reconstruction of it: §4.80) had been available to the Tosafists, that argument too might have admitted of a reply.

6.56 R. Avraham Ibn Tawwa'ah argues, on the basis of *responsa* of Rashbets (§4.48), that the latter in practice agrees that if any *bet din* relied on the Rambam and coerced a *get* in a case of *me'is 'alay*, though the *bet din* acted incorrectly, the woman may, on the basis of that *get*, remarry (*lekhatḥillah*). There is a tradition, mentioned by R. Ovadyah Yosef, that had R. Karo seen the other volumes of *Tashbetz* subsequent to vol.1, and found in them some contradiction to his rulings in *Shulḥan 'Arukh*, he would have retracted his decision in favour of that of Rashbets, even if this would have meant adopting a lenient in place of a stringent ruling and even if the case were one of *gittin* and *qiddushin* (§4.49). We may argue that had Maran seen these responsa of *Tashbets* and the arguments of Ibn Tawwa'ah, he would have accepted that, though a *get* must not be coerced in cases of *me'is 'alay*, if it was coerced the woman may remarry *lekhatḥillah*. In effect, a *get me'useh* is thus rendered valid *bedi'avad*. This argument has a further possible consequence. Since in times of urgency (*she'at hadeḥaq*) we may act *lekhatḥillah* in a manner which, in normal circumstances, is considered legal only *bedi'avad*, it follows that if the contemporary problem of '*iggun* constitutes a *she'at hadeḥaq* (§6.22), we may nowadays permit coercion of a *get* in accordance with the Rambam even *lekhatḥillah* (§4.50).

6.57 A number of responsa of the Aḥaronim written *after* the dissemination of the *Shulḥan Arukh*, despite the rejection there of Rambam's position (*Shulḥan Arukh, Even Ha'Ezer*, 72.2), may also be cited in support of *kefiyah* in cases of *me'is 'alay* (§4.57). Indeed, *posqim* of the modern era have also supported it, sometimes adducing new sources. R. Herzog cites manuscript responsa of Rabbenu Yeshayah of Trani (end of the 13th cent.), whom he describes as "a great pillar of the Halakhah of the stature of Rambam and Tosafot" and applies to those who forbid coerced divorce without reference to this ruling Rema's qualification of *hilketa kebatra'ei* (§4.59). Indeed, we may argue that this may be applied even to the *Shulḥan Arukh* itself. And Dayan Waldenberg in *Tzitz Eliezer* cites *Tosefot Rid* as endorsing the view of Rav Sherira Ga'on, that according to the law of the Talmud after 12 months we force the husband to divorce her, but that the *Sabora'im* enacted that where coercion is required it is applied immediately (§4.60). Dayan Waldenberg also cites Rema in *'Even Ha'Ezer* 77:3 for acceptance of *kefiyah* in places where the custom is to coerce in cases of *me'is 'alay*, and notes that for Rema, even where there is no such custom, the husband in cases of *me'is 'alay* is *obliged* (thus, by a *ḥiyyuv*) to divorce, – an opinion he notes is endorsed by the Shakh and in *Noda' Bi-Huda*. He advocates a general agreement of all the rabbinic courts to adopt such a view (§4.61). It is not clear whether R. Ovadyah Yosef is prepared in principle to rule in favour of *get*-coercion when the wife claims *me'is 'alay*, but he does appear willing to do so where where there is some further reason for leniency, thus as *part* of a combined solution, based on multiple doubts (§4.62).

6.58 These issues now fall to be considered more systematically in dogmatic terms. We take the view that the uncertainties regarding Rabbenu Tam's true position, and the fact that he appears unaware of a significant textual variant in the talmudic text (applying Rema's qualification to *hilketa kebatra'ei*: §4.80), raise a *safeq* (perhaps even *shakul* as regards Rabbenu Tam's own view) regarding the authority conventionally accorded to Rabbenu Tam's view, such as to admit Geonic opinions and the Rambam's rulings into the balance (§4.77), despite the position of the *Shulḥan Arukh*. Indeed, similar arguments may be used in relation to the *Shulḥan Arukh*'s own rejection of

kefiyah (on the basis of both Rabbenu Tam and, by then, a considerable body of Rishonim), in respect of the earlier views of Rashbets (§4.82), the greater following for Rambam's views than has generally been assumed, and the continuation of the debate into the period of the Aḥaronim (§§4.78-79).

6.59 There is a wide range of situations where a claim of *me'is* '*alay* may be made, including both faults and defects which are recognised as independent grounds for divorce[1148] and (mere, but genuine) "disgust" (§§1.29, 4.52, 87). In the past, there has been a fear that the plea may conceal a preference for a new partner (*notenet eynehah beaḥer*); today, there is equally a fear that the plea may be used as a formality concealing a request for "no fault divorce" (whether or not the circumstances amount to "irretrievable breakdown").

6.60 This provides at least part of the explanation for the demand for *amatlah* (sometimes, *amatlah mevoreret*: §§4.55, 67) in cases of *me'is* '*alay*, at least where *kefiyah* is sought (and even, in some sources, apparently to justify a *ḥiyyuv*[1149]). This is not found amongst the Ge'onim and early Rishonim who accepted coercion for the *moredet*: we first encounter it in Tosafot and Maharam. Such a demand is understandable if it amounts merely to a requirement that, in appropriate cases, the woman is required to corroborate the sincerity of her claim that "he is repugnant to me". But we have to ask what kind of evidence is needed to demonstrate such sincerity. Is the required *amatlah* purely *evidentiary* (the *bet din* requires independent evidence that she does indeed find him repulsive) or *substantive* (there is a list of further grounds, one of which she must prove, for her finding him repulsive, e.g. domestic violence)? If the latter, then subjective disgust is no longer sufficient grounds for divorce; some other matter, amounting to a form of fault, must also be proved. It is difficult to identify here any formal halakhic rule; the evidence of the *pisqe din rabbaniyim* suggests that the *bate din* treat this as a matter of practice (§§4.53-54). We also find *amatlah* used as a criterion not for the divorce itself, but rather its financial terms (as in in *Shulḥan Arukh 'Even Ha'Ezer* 77:3: §§4.65, 67), reflecting an old view that where a woman gains a divorce without "cause", she should be penalised financially for it (§4.88). This has itself come to be used as a test of the sincerity of the woman's plea of *me'is* '*alay*: claiming her *ketubbah* at the same time as making this plea arouses suspicion about her true reasons for claiming repulsion and may prompt a fear that her real motive is financial gain (§4.66).

6.61 Less explicit than the issue of whether *me'is* '*alay* is sincere (without ulterior motive) is the question whether it is reasonable. In a different context, R. Feinstein has argued against applying *qiddushei ta'ut* where the husband's behaviour is no more than very troublesome (§4.64), thus arguing that it is not sufficient that the wife finds the husband (or his behaviour) intolerable if objectively it would be regarded as less serious. Secular criminal law faces a similar issue in the defence of provocation, where in addition to the subjective test (loss of control resulting from the provocation), it is in some jurisdictions also required that the loss of control be reasonable. However, such reasonableness is increasingly judged on the basis not of the average person, but rather the standards to be expected of a person with the particular characteristics of the accused. For those who find *me'is* '*alay* too broad a ground for divorce if understood simply as subjective disgust, a similar requirement could be devised, perhaps with the onus of disproving the reasonableness of the disgust placed on the husband (§4.87).

1148 See, for example, the decision of the Haifa Rabbinical Court permitting coercion (albeit not by physical means) provided that the wife's plea of *me'is* '*alay* is supported by *amatlah* (in the case at hand, domestic violence), described by Rabbi S.-Y. Cohen, "A Violent and Recalcitrant Husband's Obligation to Pay *Ketubbah* and Maintenance", in *Jewish Family Law in the State of Israel,* ed. M.D.A. Freeman (Binghamton: Global Academic Publishing, 2002), 331-348 (Jewish Law Association Studies XIII), esp. at 343f. It appears that the degree of domestic violence here was not regarded on its own as sufficient for *kefiyah.*

1149 See n.811, above.

6.62 Here, we approach the ultimate question of the criteria for divorce, that of a dispute between the spouses as to whether what in secular law is termed "irretrievable breakdown" has occurred. (Where there is no such dispute, and both parties wish to divorce, there is no problem.) Suppose the wife claimes *me'is* '*alay* (without *amatlah*) and the *bet din* believes she is sincere, but the husband responds that he still loves her, wants to remain married to her, and places no conditions on any *get*. In such cases, a *bet din* would first make every effort to establish *shlom bayit* by reconciling her. But at some stage it must surely give up and tell the man that it is hopeless to seek to maintain the marriage, and that for him to keep his wife an '*agunah* is, in effect, to treat her as a *shevuyah*. Whether it could coerce in such circumstances is doubtful (§4.89).

6.63 It is in the context of such cases that some adopt a criterion of a period of separation: R. Ḥayyim Palaggi would coerce after a period of separation of one or two years. It is possible for the spouses themselves to specify such grounds. R. Broyde includes in his tripartite agreement a commitment by the *husband* not to absent himself from the marital home for any (continuous) period of fifteen months and the wife accepts "subject to the condition that we are *both* in residence together in our marital home at least once every fifteen months". This same fifteen month period is included in what, in effect, is R. Broyde's definition of recalcitrance (which leads not to coercion but annulment):

> Furthermore I recognize that my wife has agreed to marry me only with the understanding that should she wish to be divorced that I would give a *Get* within fifteen months of her requesting such a bill of divorce. I recognize that should I decline to give such a *Get* for whatever reason (even a reason based on my duress), I have violated the agreement that is the predicate for our marriage, and I consent for our marriage to be labeled a nullity based on the decree of our community that all marriages ought to end with a *Get* given within fifteen months.

It follows from this that "irretrievable breakdown" is ultimately in the hands of the wife: if she separates and immediately requests a *get* she is entitled to one fifteen months later. No doubt a *bet din* would treat the fifteen months as the window available for attempts at *shlom bayit.*

6.64 R. Broyde fully appreciates that this approach to the grounds of divorce – which apparently goes beyond *me'is* '*alay* – will not be acceptable to all communities; indeed, in his book[1150] he distinguishes different (Orthodox) communities in terms of the exit régimes from marriage which they have (historically) adopted. He therefore includes in his tripartite agreement:

> We both belong to a community where the majority of the great rabbis and the *batei din* of that community have authorized the use of annulment in cases like this, and I accept the communal decree on this matter as binding upon me. The *beit din* selected by my wife shall be irrevocably authorized to annul this marriage when they feel such is proper and the above conditions are met.

Leaving aside any questions about the reality of such a community, this raises the question of inter-communal recognition. We have argued that even if a "one size fits all" solution is currently beyond reach, we must seek a "global" solution which involves mutual recognition, so that (given especially the phenomenon of "religious mobility") children are not born who are *kasher* in one community (that of their birth) but *mamzerim* in another community (which may be that of their intended marriage). In this context, the distinction between the grounds and procedure of divorce proves crucial: other communities may reject R. Broyde's grounds for divorce *for themselves*; what matters (on our criteria of globality, which are not those of R. Broyde) is that those other communities accept that the procedure of divorce (the combination of "remedies") is *kasher.* We may recall, in this context, the willingness in principle of the Schools of Hillel and Shammai to intermarry (*Mishnah Yebamot* 1:4), notwithstanding the halakhic differences between them – differences which included the grounds for divorce (*Mishnah Gittin* 9:10). The Gemara understands this as meaning that they gave information to each other regarding the eligibility of individual women, so that each could apply its own criteria (*Yevamot*, 14a).

1150 *Marriage* (n.83, above).

6.65 We also have to ask a basic theoretical question: what conception of freedom of the husband's will is to be assumed as underlying the issue of (permissible and impermissible) *kefiyah* (§§4.3, 92)? Rambam's classical, and oft quoted, explanation of *rotseh ani* should immediately put us on guard against adopting, without further thought, western secular notions of individual autonomy. We argue that the true will envisaged in the classical halakhic sources is that of a faithful member of the community who has internalised Torah values (including, we would argue, those discussed in terms of "abuse of rights": §§1.23-25). If his behaviour shows that he has not internalised such values, coercion is not a violation of his will, but rather a form of education.

6.66 Equally important is the issue of what it is, exactly, to which the husband must consent. Rabbenu Yeroḥam wrote (§4.63):

> If she says, 'I do not want him. Let him give me *get* and *ketubbah*' and he says, 'I do not want you but I do not want to give a *get*', then after 1 year we force him to divorce but she loses the additions [to the *ketubbah*].

A clear distinction is here made between the husband's will to terminate the marriage, and his will to proceed with the procedure for such termination. Indeed, R. Feinstein has argued that if a husband is willing to divorce his wife, but wants to retain the *get* as a bargaining chip, then even if he is forced to give up what he wanted to achieve by means of the *get*, his willingness *to divorce* renders the *get* valid: in such cases, he writes, "there was no coercion of the will to divorce" (§4.92). In terms of the husband's will, it is thus possible to "sever" that part of it prompted (as Rambam would say) by the *yetser hara* from the husband's "basic" will, which is "I do not want you". Similarly, Rav S.-Y. Cohen has also proposed (*lema'aseh*) that if a *bet din* awards a *ḥiyyuv* and the husband refuses to give a *get* for a long time *in order to* blackmail his wife, abuse her, etc., he may then be coerced to give the *get* (§4.92).

6.67 If "coercion" is rejected (or ineffective), we need to ask what alternative measures are available to secure the termination of the marriage, in those circumstances where the community concerned considers that the grounds for divorce are satisfied. One very direct answer to this is the Rosh's reconstruction of the geonic measures as *hafka'ah* (§§4.22-24, 93). Another is the use of a *ḥerem* against the husband, mentioned by Rav Yehudai Gaon (§§4.21, 4.94). A more radical measure would be for the *bet din* itself to issue the *get* on the husband's behalf, and without his consent. We have seen possible historical evidence of this in the plural formulations in some accounts of the geonic measures (§4.21) and in the interpretation of the unusual formula of the Genizah *ketubbot* (§3.79), but there is little halakhic support for such a procedure (use of זכין לו לאדם שלא בפניו is extremely limited, and probably excluded when the husband is recalcitrant: §4.72).

6.68 On the other hand, the indirect form of pressure represented by Rabbenu Tam's *harḥaqot* (of which the sanctions of the 1995 Israeli legislation (§1.17 and n.33) are often regarded as a modern version) has traditionally been regarded as not constituting *kefiyah* (§4.70) and therefore acceptable (§4.68). Yet halakhic opposition even to these has emerged in Israel in modern times, based on a *responsum* of Maharibal (§4.69). Though reliance on this may be regarded as an example of the *ḥumrah* of following a minority or lone view in order to be specially strict in *gittin* (see §6.14, above), R. Ovadyah Yosef has argued that Maharibal's argument is based on an erroneous understanding of Rabbenu Tam's *harḥaqot* (§4.69).

6.69 We are told that *batey hadin* in Israel today are increasingly prepared (more than in the past) in cases of *me'is 'alay* to grant a *ḥiyyuv*, but without any form of coercion (§4.70). Some *dayanim*, however, are prepared to apply *harḥaqot* in such cases; indeed, the power of imprisonment under Israeli law is justified by some on these grounds. Indeed, R. Daichovsky argues, following R. Herzog's analysis, that both limited financial and physical sanctions (which he does not regard as constituting *kefiyah*) may be used without rendering any resultant *get* a *get me'useh*, and that

this could be done even where there is no formal decision of *kefiyah* (§4.70).

6.70 A less problematic argument, but to similar effect, relates to the situation where the husband has previously agreed to a *get*, and has had it delivered in advance but with its coming into effect made subject to a condition (§4.73). This is not regarded as raising an issue of *kefiyah:* what is in issue is the timing of the husband's consent, and his ability to withdraw it, once given.

6.71 In any event, the precise status of a *get me'useh* (procured *shelo kadin* by a *bet din*) falls for consideration: we have noted the view that if a woman remarried on the basis of such a coerced *get* she need not leave her new husband (§4.71). The matter is one of doubt. But especially in a *she'at hadeḥaq*, a *get* even illegally coerced by a *bet din* could be valuable, as a *safeq* in calculations for leniency.

E. *Annulment*

6.72 The use of annulment as a possible solution to the problem of '*iggun* is highly controversial. Any such use has to address some fundamental objections:

(a) that *hafka'ah* is completely excluded in our days because of a lack of authority (sometimes attributed to all post-talmudic *posqim*), despite its occurrence in mediaeval *taqqanot haqahal* (§6.73), Rosh's account of the geonic measures (§6.74), and Rema's observations on the annulment in favour of the raped wives resulting from the 'Evil Decree of Austria' (§6.75);

(b) that *hafka'ah*, while not completely excluded in our days, is strictly limited to the cases found in the five talmudic occurrences (§6.76-77);

(c) that *hafka'ah*, where it remains available, must always be accompanied by a *get* – albeit a *get* which would not be sufficient on its own, because it is "externally flawed" (§§6.78-79) – unless it is a case of breach of a *taqqanah* imposing additional requirements on the initial *qiddushin*;

(d) that *hafka'ah*, even if theoretically possible on basis (c), should be avoided, because it retrospectively changes the relationship of the spouses into one of *zenut* (§6.80).

Yet despite all the above, some contemporary authorities argue that *hafka'ah* remains available, at least in situations of urgency (§6.81).

6.73 The claim that *hafka'ah* is *completely* excluded in our days because of a lack of authority is sometimes conflated with the second claim, in such a way as to suggest that only the Sages of the talmudic era had the authority to apply it (whether in already recognised situations or elsewhere). This is manifestly incorrect, in the light of the series of mediaeval *taqqanot haqahal* which added new requirements for a valid *qiddushin*, failure to observe which entailed annulment (§5.9). Some, however, claim that no such authority exists today, certainly as a matter of *ma'aseh* (§5.43); indeed, the hesitation to approve such cases *lema'aseh* (even while accepting that the authority exists in theory) is apparent already in the 14th century, in a responsum of Ribash (§5.37), although Maharam Al Ashqar (§5.38) and other 15th and 16th cent. authorities (§§5.39-41) still accept that such enactments may be adopted in practice. Moreover, the argument of Ribash does not necessarily exclude a *taqqanah* from the highest authority, with universal (rather than local) application.[1151] And we may note that while Rosh in *Resp.* 35:2 (§4.23) avoided applying *hafka'ah* in a case he considered "reasonable to compare to the case of Naresh (*Yevamot* 110a)", he was so determined not to leave the woman without a remedy that he concluded: "nevertheless we should follow in this case the view of a few of our Rabbis who ruled in the law of *moredet* that [the *bet din*] should compel him to divorce her", i.e. that (the Maimonidean) *kefiyah* should be applied,

[1151] See further R. Yosef's analysis, and the suggestion made at the end of §5.49, above.

despite the fact that the Rosh followed Rabbenu Tam in rejecting the geonic measures. Of course, these sources all refer to "immediate" rather than "delayed" annulment (§6.76): there was here an improper initial *qiddushin*, whereas in the case of recalcitrance the initial *qiddushin* was entirely proper; the problem relates (as in the three cases of "delayed" annulment in the Talmud) to the *get.*

6.74 While there may be doubt as to whether we may consider the view of Rosh (§4.22-24) as an historically accurate account of the geonic remedy, rather than as an anachronistic justification (in the light of its later rejection by Rabbenu Tam) for an earlier halakhah, his responsum has important implications: Rosh here legitimates *hafka'ah* in practice at least in *bedi'avad* cases, and has no doubt that it may be used (along with a *get*). R. Ovadyah Yosef infers from precisely this (and adds Ramban and other Rishonim to the Rosh) that even nowadays the sages of each generation are empowered to enact the annulment of marriage (even after a properly conducted *qiddushin*); such power is not limited to the talmudic sages alone (§5.43).

6.75 There is one recorded instance of the use of *hafka'ah* in post-talmudic times in an entirely new situation (neither resembling one of the talmudic cases nor involving breach of additional requirements for *qiddushin*). In 15th century Austria permission was granted by contemporary leading rabbis to women who had been taken captive (as a result of the 'Evil Decree of Austria') to return to their husbands if the wives had willingly committed adultery with their captors and even, where the husbands were *kohanim*, if they had been raped. Rema explains this as "due to the needs of the moment" (which might well allow it to stand as a precedent for situations which exhibit comparable need). However, what distinguishes this case from the possible use of *hafka'ah* in the case of recalcitrance is the fact that in the Austrian case the *hafka'ah* was not against the husband's will but rather supportive of it. Thus far from destabilising the institution of marriage, this particular act of *hafka'ah* supported and bolstered it (§§5.42, 44).

6.76 Some argue that *hafka'ah*, while not completely excluded in our days, is strictly limited to the cases found in its five talmudic occurrences.[1152] These five cases are often divided into two classes, which we may describe as "immediate" and "delayed" annulment: in the first, annulment is granted shortly after the betrothal but takes effect (retrospectively) from the moment of the marriage, due to some fault in the very procedure of the *qiddushin* (though there is discussion whether later *batei din* acting in such cases are retroactively annuling the marriage or simply declaring that it was never valid: §5.58); the second is annulment often granted some time after a valid and proper *nissu'in* took place and involving a *get* which was written, delivered and sometimes even given to the wife, but which for some reason was then invalidated (§5.9). The cases of "immediate" annulment differ from the cases of "delayed" annulment in two respects: (i) there is no invalid *get* to be validated; (ii) in most cases (but not necessarily) they occur where only *qiddushin* and not *nissu'in* have taken place, so that marital relations between the spouses have not in fact commenced. R. Ovadyah Yosef maintains that there is no problem with "immediate" annulment, as even Rashba (along with many others) accepts. Thus, where the *qiddushin* were improper, having been carried out in defiance of a communal decree, very many Rishonim agree to the contemporary effectiveness of enactments of annulment, although Rema writes that we should not rely on this opinion in practice (§§5.43-44): there is, thus, a *safeq*. However, R. Yosef appears willing in some cases of "immediate annulment" to contemplate a coerced *get.*[1153] The only real debate concerns "delayed" annulment (where R. Yosef still requires in practice some other *safeq* in the marriage, due to the accepted custom of taking account of all opinions).

1152 Often citing Rashba, *Responsa* I:1185: see §5.34.

1153 See further ARU 18:53-54.

6.77 R. Zalman Neḥemyah Goldberg argues we have no precedent for permitting the practice of annulment in cases of *get* refusal nowadays (which would be a new case of "delayed" annulment), and cites Rashba, *Responsa* I:1162, as authority for this (§5.45). However, this view of Rashba's position has not gone unchallenged. R. Berkovits argues that any distinction between "immediate" and "delayed" annulment is wrongly inferred from Rashba: what Rashba really maintains is that the fear of '*iggun* by itself is not sufficient for an annulment of the marriage; some other supportive issue is required (§5.46). Rashba, he maintains (on the basis of a study of all the *responsa* of Rashba relevant to post-talmudic annulment), accepts annulment even in cases not matching those in the Talmud, provided that the authorities of the locality enact a *taqqanah* in which *hafqa*'*ah* is mentioned explicitly and the husband has acted improperly (§§5.34, 46). R. Ovadyah Yosef also rejects the limitation derived from Rashba. He suggests that Rashba was following the opinion he expressed elsewhere in *Responsa* VI:72, that the *taqqanat heGe'onim* (interpreted by Rosh as retrospective *hafqa*'*ah*) was an emergency measure only, from which he infers that, even according to Rashba, we could introduce *hafqa*'*ah* nowadays for the emergency needs of our own time).[1154]

6.78 Less radical (and more relevant for present purposes) is the objection that the Rishonim never proposed annulment subsequent to a properly performed *qiddushin* ("delayed" annulment) *except* in the presence of an externally flawed *get* – as in the three cases in the Talmud (though some Rishonim do appear to have held that a *get* was not necessary, as stated by Me'iri). The issue has been debated recently by Rabbis Shlomo Riskin and Zalman Neḥemyah Goldberg (§5.12), the latter insisting, in opposition to Rabbi Riskin, that retrospective annulment without a *get* is nowadays out of the question. Rabbi Riskin's arguments from the Rosh's interpretation of the *taqqanat haGe'onim* are rejected by Rabbi Goldberg because the enactment of the Ge'onim also operates only together with a *get* (again externally flawed, as in the cases of the Talmud, but this time due to talmudically unsanctioned coercion). R. Goldberg does not address the one clear case of "delayed" annulment without a *get*, namely the Austrian case. We noted above (§6.75) the principal factors distinguishing that case; there are also other, more technical factors in the light of which R. Goldberg may not have thought the case required a reply (§5.44).

6.79 R. Ovadyah Yosef gives another reason why a *get* is required: even after annulment, there remains a rabbinic marriage. This explains why Rashba insisted that annulment by itself is not enough; a[n externally flawed] *get,* or some other additional reason for permission to remarry, must be present to overcome the problem of the residual rabbinic state of marriage (§5.47). On this analysis, we may note, the insistence on such a *get* represents the prototype of a "combined solution".

6.80 The feeling that *hafka*'*ah*, even if theoretically possible, should be avoided, on the grounds that it retrospectively changes the relationship of the spouses into one of *zenut*, has been addressed in the context of annulment consequent upon a condition (§6.33, above), where we found a significant body of opinion which throws that status into doubt.

6.81 Yet despite the reservations above, some contemporary authorities argue that *hafka*'*ah* remains available, at least in situations of urgency. As observed above (§6.74), R. Ovadyah Yosef derives this from combining the views of the Rosh and others on the geonic measures with Rema's account of the Austrian case (§§5.42, 44). Moreover, this does not require us to declare an "emergency" (*tsorekh hasha*'*ah*) which would allow invocation of the power to "abrogate" Torah law (*hora'at sha*'*ah*), as opposed to recognition of a *she*'*at hadeḥaq*, in which we may rely on lenient opinions, such as those who think that *hafka*'*ah* today is *not* a matter of abrogation (as per Rema). If indeed the situation is classified as one of emergency, even prospective annulment (without a *get*) might be possible; if it is (merely) *she*'*at hadeḥaq*, the above leniency may

1154 §§5.34, 47, 49; see also the suggestion made at the end of §5.49, above.

certainly be combined with other factors to justify a solution (§5.48). In addition, R. Berkovits has a lengthy argument in favour of the contemporary availability of *hafka'ah*, making reference inter alia to an enactment of the Egyptian Rabbis of 1900 (§5.51).

6.82 From the analysis of R. Yosef, it would seem that a declaration of retrospective annulment by the contemporary leading sages of Israel even without a prior enactment (and certainly with one) even in cases not matching the historical examples in the talmudic and geonic literature, even after the proper execution of *qiddushin* and *nissu'in* ("delayed annulment") and even without any kind of *get*, would be sufficiently halakhically effective at least to create a *safeq* which could combine with another, more substantial, *safeq* to form a *sfeq sfeqa*.

6.83 The role of annulment in any solution to the '*agunah* problem depends not only on the above basic issues of authority, but also on analysis of how it works. Three (interrelated) issues, in particular, concerns us: whether it necessarily operates retrospectively, or whether there is also a form of prospective annulment (§§6.84-87); whether the authority to perform *hafka'ah* is inherent in the powers of the *bet din* or whether the spouses contribute to it (§§6.88-92); and what are the respective role of the *bet din* and the spouses in the process itself (§§6.93-96).

6.84 Retrospective and prospective forms of annulment have distinctive roles to play in the search for a global solution to the problem of '*iggun*. Where the woman has remained "chaste", and the problem is that of her capacity to enter into a new marriage, the prospective form is sufficient, and has the advantage of avoiding entirely any questions of retrospective *zenut.* Where, on the other hand, the woman has not remained "chaste", but has already entered into a new relationship without receiving a *get* from her husband, retrospectivity is required in order to address any problem of *mamzerut*.[1155]

6.85 Analysis of the different strata in the talmudic *sugyot* indicates that there were three distinct stages in the development of *hafka'ah*, which originates as validation of an [externally flawed] *get*, so that termination of the marriage is entirely prospective, taking effect by virtue of the *get* (we may perhaps describe this as "quasi-annulment"); at the second stage, the very concept of *hafka'ah* is interpreted as a *prospective* annulment of marriage (not now acting via a *get*); at the third stage *hafka'at qiddushin* becomes retrospective annulment of the marriage, by retrospective invalidation of the act of betrothal (§§5.7, 55). The final talmudic stage, endorsing retrospective annulment, is certainly the dominant view amongst the Rishonim and Aḥaronim (§5.11), but the earlier prospective views (whether with or without a *get*) are also found.

6.86 The earliest stage ("quasi-annulment") is found in the case of the *get* canceled by the husband before it reaches the wife. In order to prevent adultery and *mamzerut* where the wife acted in good faith on the *get*, Rabban Gamli'el the Elder forbade such an action by the husband. His descendants, R. Shimon ben Gamli'el and R. Yehuda Hanasi, disputed the effect of this where the husband nonetheless cancelled the *get* (*Gittin* 33a/*Yevamot* 90b). According to Rabbi (whose view ultimately prevailed), the *get* was void and the wife was not divorced, but according to R. Shimon ben Gamli'el the *get* was not void and the wife *was* divorced by virtue of it, a view mentioned and apparently preferred by the Yerushalmi (§5.14-15). In the Bavli, this is understood by R. Ḥisda as based on the general authority of the Sages to uproot the words of the Torah, but by Rabbah as based on the preliminary agreement of the spouses, who are taken to have made their betrothal subject to the consent of the Sages, *kol hameqaddesh 'ada'ta' derabbanan meqaddesh* (§5.16). Similar issues arise in the case of a conditional *get* where the condition is fulfilled not by the will of the husband but as a result of אונס, circumstances beyond his control (*Ketubot* 3a: §5.17) and the case of a dangerously ill person (שכיב מרע) who divorced his wife but then recovered (*Gittin* 73a: §5.18). However, all three cases came to be viewed as retrospective annulment, by virtue of

1155 Hence, the inability of the "willing" husbands in the Austrian case (§§5.44, 6.75, above) to resolve the issue by *get.*

the incorporation in them of Ravina and Rav Ashi's discussion regarding annulment, which had originated in the cases of "immediate" annulment (§§5.19, 32).

6.87 However, the idea that there is a form of "annulment" which serves to cure a defect in a *get* survives amongst the Rishonim (§5.21-22). Ri Halavan says of the procedure in *Ketubbot* 3a: ורבנן בתקנתם העמידו כשרותם מן התורה, i.e. the Sages in their decree made [the *get*] valid *mide'orayta*, thus that where an externally flawed *get* is given, the Sages used their power to validate it and bring the marriage to an end non-retrospectively. *Tosafot* also understand that there is a possibility of annulment even according to Rabbi, and this is part of the basis from which R. Shlomo Z. Auerbach deduces that it is prospective (§5.24). Similarly, some Rishonim cited by Ritba in the *Shittah Mequbetset* maintain that the Talmud means that the Sages annulled his marriage only from the time of the *get* and not retrospectively from the moment of *qiddushin*, and this appears to have been the understanding of Rashi's teachers. Other Rishonim and Aḥaronim may also be cited, as may the more radical theory of Shemuel Atlas that annulment is *never* really retrospective (§5.25).

6.88 We have seen that there is a correlation in the talmudic sources between the forms of annulment and the authority on which they are taken to be based: "quasi-annulment" (by validation of the *get*) is based by Rav Ḥisda on the general authority of the Sages to uproot the words of the Torah; annulment is understood by Rabbah (apparently still prospectively: §5.16) as based on the preliminary agreement of the spouses, through the maxim *kol hameqaddesh 'ada'ta' derabbanan meqaddesh*. This latter was to become the dominant basis. But important questions then arise: is this an implied term, arising from the simple fact that the spouses marry under rabbinic auspices, or is it an express term, this being precisely the meaning of *kedat moshe veyisra'el* in the formula of *qiddushin*? And if the latter, to what extent may it be capable of modification?

6.89 A possible problem arises from the application of *'ada'ta' derabbanan*: "Every-one betroths only with the agreement of the Sages" means that the Sages take their power to annul a marriage from the fact that the marriage was entered into originally upon an implied condition, namely that the Sages agree to it. Hence, the groom himself has agreed to limit his marriage in accordance with the will of the Sages, and it is from this limitation placed by the groom (and bride) that the Sages derive their legal power to annul. But if the Sages themselves derive their authority in this matter (exclusively) from the groom, they cannot annul prospectively. Perhaps this could be remedied by an explicit condition indicating that the form of *hafka'ah* anticipated by the parties is based on one of the talmudic prospective forms.

6.90 This issue becomes manifest in the different analyses of Rashi and Tosafot of the justifications for retrospective annulment in the two talmudic cases of "immediate annulment", that of the incident at Naresh, where a minor orphan girl was (rabbinically) married to a man who sought to marry her after she became adult, but a second person "kidnapped" her and married her (*Yevamot* 110a: §5.29) and the "betrothal by coercion" case (*Bava Batra* 48b: §5.30), both of which stress that the behaviour of the man (whose marriage is annulled) was improper (שלא כהוגן). Rashi understands that in both these cases the power of the Sages to interfere in a betrothal derives from the formula *kedat moshe veyisra'el,* taken to mean "according to the Law of Moses (the Divine Written and Oral Law) and Israel (the Rabbinic Law)". Since he made his betrothal dependent on the rabbinic authorities, he must have meant it to take effect only if they agree with it: it is in effect a conditional marriage. The Tosafists point out a difficulty with Rashi's interpretation, namely that in the two talmudic cases the groom did not in fact *betroth* in accordance with the will of the Sages. Furthermore, the Talmud does not mention *kol hameqaddesh 'ada'ta' derabbanan meqaddesh* here, as it does in the cases of "delayed annulment". They therefore explain that in cases such as these the Sages are using their biblically granted power to abrogate Biblical Law, by confiscating the wedding ring, invalidating the wedding document or declaring the marital intercourse promiscuous, depending on how the betrothal was effected (§§5.31, 56).

6.91 However, the objection of the Tosafists would not apply to cases of "delayed annulment", where the groom *did* betroth in accordance with the will of the Sages, and where the Talmud does mention *kol hameqaddesh 'ada'ta' derabbanan meqaddesh* (§5.33). The logic of what has become the majority view, namely that annulment even here works retrospectively to the moment of *qiddushin* (so that the couple's marriage is deemed never to have existed), is that since the groom declared that he is marrying according to the biblical and rabbinic law – which is understood to mean that the original *qiddushin* is conditional on the continuing (not merely initial) acquiescence of the rabbinic authorities – once a situation arises which causes those authorities to withdraw their approval, the condition for preservation of the marriage has been broken and the union becomes automatically and retrospectively defunct (§5.33).

6.92 As regards the maxim *qol demeqaddesh 'ada'ta' derabbanan meqaddesh*, views differ not only as to its meaning (approval of the current *bet din* or of the provisions of talmudic law), but also whether its underlying rationale is that of an implicit condition (§5.56). If we accept the objections to the latter analysis, we are deprived of one means of construing *hafka'ah* as based in part on the will of the spouses. But the objections to viewing *'ada'ta' derabbanan meqaddesh* as an implicit condition may be met if the condition is made an explicit basis for annulment, as is the case in the modern proposals reviewed above (see §§6.40-46, above).

6.93 The recent proposals for conditional marriage generally prescribe retrospective annulment if the condition is fulfilled. They differ, as we have seen, in the degree to which they specify the circumstances in which this is to occur, and this very difference reflects different balances between the roles to be accorded to the spouses on the one hand, the *bet din* on the other. Yet even those which seek to give the *bet din* a "strong" discretion do so by an act of will of the spouses (in making the condition), who thereby at least confirm, if they do not confer, the jurisdiction of the *bet din* to act in those circumstances. Those proposals, on the other hand, which prescribe the circumstances in which termination (by virtue of the condition) may occur (for example, R. Pipano: §6.41) assume a capacity of the parties to contribute to the definition of the legal régime to which they submit (cf. R. Broyde: §6.63).

6.94 The same issue, of the respective roles of the spouses and *bet din*, arises in relation to the exercise of annulment. There is a major divide between those who insist that termination of marriage (other than by death) ought in principle to be an act of the parties rather than an act of the court, and those who insist that it must be by virtue of an (inherent) authority of the *bet din*. Yet, here as elsewhere, we may argue that marriage termination, whether by conditions, *kefiyah* or annulment, should be viewed as a partnership between the spouses and the halakhic authorities (§5.57).

6.95 Closely related is the question whether the role of the *bet din* is declaratory or constitutive. To put the matter simply, in the former case, the *bet din* merely declares (confirms) that termination has taken place, in accordance with either a condition or facts which the halakhah itself specifies as having the effect of terminating (or barring the creation of) the marriage; in the latter case, termination does not take place until the *bet din* so decides, so that their decision is constitutive (§5.58). The practical difference here may not be substantial, in that there will be few cases where a second marriage will be authorised without *bet din* confirmation that the first has terminated (one such may be the case of manifest incompetence of one of the spouses). But the theoretical difference is important from the viewpoint of those who see any termination of marriage other than by death or a *get* as a breach of fundamental principle. At least where the *bet din* is called upon to declare (confirm) that some act or omission of the spouses has taken place which has brought the marriage to an end, we may speak of a partnership between the spouses and the *bet din* (acting for the community), rather than termination purely by act of the *bet din* (§6.7, above). Clearly, the addition of a *get,* whether delayed or by *harsha'ah*, would further strengthen this partnership.

6.96 Whether annulment may be prospective when resulting from a condition attached to the *qiddushin* is a matter of some controversy. The unusual wording of some clauses found in Genizah *ketubbot* might appear to suggest this. But the matter is far from certain (§§3.31, 69). On the other hand, in *Tzitz Eli'ezer* I 27, R. Waldenberg is clear that if a condition annuls a marriage during the husband's lifetime retroactive promiscuity will always result. This, however, is contested by R. Berkovits.[1156] In the absence of a general *taqqanah* authorising prospective annulment (in the light of *tsorekh hasha'ah*), prospective termination may best be achieved by a non-standard *get* (by *harsha'ah* or a delayed *get*).[1157]

6.97 An unusual form of annulment is that called the *get Maharsham* (§§5:23-24), which seeks to "engineer" an annulment by a procedure based on the talmudic case of the cancelled agency. The procedure is used in Israel today, with the approval of the Supreme Rabbinical Court, in cases of soldiers who went missing in combat and later reappeared, and has been reconsidered in recent times as a means of removing *mamzerut*, in conditions of "great urgency" (where the "adultery" was "innocent"). However, Maharsham's reasoning has proved controversial, and it is unlikely that this device would prove useful in cases of recalcitrance, since it depends on the willingness of the husband to participate, and whether he would do so (or be allowed to do so) when his wife had knowingly committed adultery (unlike the case considered by Maharsham), is highly doubtful.

1156 On R. Berkovits' response to this argument, see ARU 4:16-18 (§§IX.25-32), ARU 6:2 (§2.4), noting that *Ḥatam Sofer* vol. IV (*'Even Ha'Ezer* 2) no. 68 speaks only of the condition of Mahari Bruna when he declares that even in the event of annulment there would be no retrospective *zenut*, though Berkovits (n.112, above), 54-56, argues that *Ḥatam Sofer* would say the same to his condition also.

1157 R. Broyde's tripartite agreement does include such a *harsha'ah*, but it is not made sufficiently clear (as it is in R. Henkin's model) that retrospective termination of the marriage comes into play only on the failure of such a *harsha'ah* (for whatever reason) to produce a *get*.

Chapter Seven: Conclusions

7.1 In this concluding chapter we summarise the effect of the preceding analysis on the possibility of solving the problem of the '*agunah* through a "combined solution" (Section A), review from previous suggestions the various elements which may contribute to it (Section B), offer our own preferred combination (Section C), and indicate some of the practical measures which may be desirable in seeking its implementation (Section D).

A. *The background to* "*combined solutions*"

7.2 The argument of our analysis of the classical sources indicates the close historical, dogmatic and conceptual relationships between conditions, coercion and annulment (§1.12). All commence from the basic biblical premise, that *qiddushin* may be terminated only in two ways: death or delivery of a *get*. Coercion represents a specification/qualification of the meaning of the rule that the *get* must be willingly given; (terminative) conditions and annulment prescribe that the marriage is deemed never to have taken place, the former "automatically", in the circumstances stated in the condition, the latter by virtue of a decision of a *bet din.*

7.3 We have noted two particularly prominent interactions between the remedies, in the interpretations by the Rishonim of the geonic measures:

(i) that of the Rosh, who justified those measures as a form of annulment (§§4.22-23);

(ii) that of the teachers of Me'iri's teachers, based on Palestinian conditions, which specified the modalities of a coerced *get* for the *moredet me'is* '*alay* (taken to be talmudic in origin) by removing the 12-month waiting period and altering the financial provisions (§§3.23-29, 4.28).

7.4 When seeking a combined solution to the problem of '*iggun*, we must assess each of its elements in terms of the authority for it, within the 'calculus' of *sfeq sfeqa* (§§2.17-21): while a single doubt on a *de'oraita* matter is resolved in favour of strictness (*safeq de'Oraita leḥumra*) but on a *derabbanan* matter in favour of leniency (*safeq derabbanan lequla*), a double doubt is sufficient to permit a Torah prohibition (which would include the remarriage of a 'doubtfully (still) married' woman). However, one of the doubts must be *shaqul* (= evenly balanced, i.e. 50-50); the other may be a minority opinion (according to most *posqim*). These rules take precedence over *hilketa kebatra'ei:* according to the Rosh, where the *safeq* is in rabbinic law and the earlier authority rules leniently the earlier authority should be followed in spite of the rule of *batra'ei* (§2.30).

7.5 As for the issues of authority, we have found authority for the following general propositions

(a) In deciding whether a situation of '*iggun* has arisen, we are in principle bound by the *ḥumra shel eshet ish*, but this, insofar as it requires that we take into account even a single stringent opinion (even if it is opposed to the lenient rulings of the *Shulḥan* '*Arukh*, the Rema and the vast majority of the *posqim*) appears to be a modern innovation, of purely customary or, at most, rabbinic origin and status (§2.7). Moreover, analysis of a *teshuvah* by R. Moshe Feinstein (*Iggrot Moshe*, *'Even Ha'Ezer* I, 79) leads to the conclusion that *insubstantial* minority halakhic opinions, even in matters of '*erwah*, need not be considered.

(b) Once a situation of '*iggun* has materialised we revert to the usual rule of *rov posqim* and the *Shulḥan* '*Arukh*.[1158] This represents the mainstream (majority)

[1158] The precise meaning of which may itself be subject to *safeq*: see §2.11; ARU 7:18 (§4.23).

view, as expressed by R. Ovadyah Yosef, R. Elyashiv and others. However, in the absence of a solution to an '*iggun* situation according to *rov posqim,* we may rely on lenient minority views and even on a lone opinion (§2.11).

(c) In a situation of "urgency" (*she'at hadeḥaq*) – a category lower than that of "emergency" (*tsorekh hasha'ah*) – it is generally accepted that leniencies may be adopted, going beyond what would otherwise be possible (§§2.38-41), including permitting *lekhatḥillah* what otherwise would be permitted only *bedi'avad*, following a minority opinion and even a lone lenient opinion (according to the Taz), despite the fact that a biblical prohibition may be involved. We may also note in this context the view of R. Ovadyah Yosef that when we find earlier *posqim* saying that a particular course of action is permissible *lehalakhah* but not *lema'aseh*, we can assume that this is merely due to humility and may therefore rely on it even in practice (§2.39). However one might regard R. Yosef's view in normal times, we may certainly regard this leniency as applicable in *she'at hadeḥaq*.

7.6 We may apply the above to our situation as follows:

(a) We have noted that the question whether a situation of '*iggun* has arisen is central to the very definition of our problem. Yet we find very little discussion of it in the halakhic (as opposed to the polemical) literature. It reflects meta-halakhic issues including the nature of the husband's 'veto', the morality of demanding a price for a *get*, and the practices of *batei din* in relation to the modalities of their decisions (*ḥiyyuv*, *hamlatsah*, *mitsvah*, etc.). Like the question of the precise grounds for divorce, we conclude that it is a matter which can and should be specified in an advance agreement by the spouses.

(b) The respective applications of *rov posqim* and the more lenient approach of the Taz, together with the issue of leniencies in a *she'at hadeḥaq*, are discussed in §§7.7-9 below, in relation to the different remedies.

(c) R. Ovadyah Yosef and others have argued that our period may well be comparable to that of the Ge'onim (§4.84). At the very least, we may argue that the situation regarding *get*-refusal today is one of "urgency" (§2.45). To the extent that the leniencies which become available in a *she'at hadeḥaq* provide remedies only on a case by case basis, they may fail to fulfil the criteria of a "global" solution (§2.40). Yet the capacity exists to apply such leniencies on a "global" basis, provided that a *bet din* of *Gedoley HaDor* can be convened and would agree to such measures (§2.41).

7.7 As regards conditions, we assume that the condition is one which accords a role to the *bet din*, as opposed to the French conditions against which *'Eyn Tnai BeNissu'in* was directed. Conditional marriage (*qiddushin* and *nissu'in*) would be effective according to the vast majority of *posqim* provided that the *Halakhah* is meticulously adhered to both in the substance and form of the condition. We have summarised the authority for this in §6.47 above. It would be possible to neutralise the opposition to conditional marriage on the bases indicated in chapter two (the status of minority opinions in areas of doubt, or reliance on *she'at hadeḥaq*). However, a better strategy is to combine conditions with other remedies, in a way which will invoke *sfeq sfeqa.*

7.8 As regards coercion there is a tradition that had R. Karo seen the other volumes of *Tashbets* subsequent to volume I and found in them a contradiction to his rulings in *Shulḥan Arukh* he would have retracted his decision in favour of R. Duran's – even from *ḥumra* to *qula* and even in *gittin* and *qiddushin*. On this basis it has been argued that had Maran seen the responsa of Rashbets (§4.47), he would have accepted that, though a *get* must not be coerced in cases of *me'is*

‘*alay*, if it was coerced the woman may remarry *lekhatḥillah*. Furthermore, if the situation nowadays in this area is *she‘at hadeḥaq* (as accepted, for example, in *Teshuvot Ma‘alot Shelomoh*) then one may apply the rule that in *she‘at hadeḥaq* one may act *lekhatḥillah* in a manner normally accepted only *bedi‘avad* and thus permit the coercion of a *get* in a case of *me’is* ‘*alay* according to the *Shulḥan* ‘*Arukh*. Furthermore, in most cases of *get* recalcitrance the situation is one of *me’is* ‘*alay* with *amatlah mevoreret* where all would agree that the wife is not halakhically obliged to live with her husband, and it has been argued that in such circumstances the payment of even a modest sum would render the coerced *get* valid and the *she’at hadeḥaq* would render the application of coercion permitted *ab initio*. Such a coerced *get*, even though considered insufficient by itself, would certainly be a powerful contribution to a *sfeq sfeqa*.

7.9 As regards annulment, there are three questions to be answered: (a) is it possible today without a *get*?; (ii) is it possible today with a *get*?; (iii) insofar as there is still a fear of retrospective *zenut*,[1159] can the annulment be made prospective rather than retrospective? Our responses are:

(i) According to *rov posqim*, annulment without a *get* is not possible in cases of “delayed annulment”;

(ii) whether annulment with a *get* is possible today is more debateable and is at least supported by minority opinion, so as to generate a *safeq* (if not *safeq shaqul*).

(iii) As regards prospective annulment, this has not been systematically debated as an halakhic issue, but has been suggested as a reading of Tosafot, while Ri Halavan sees the requirement of a *get*[1160] as indicating that annulment takes place by validating that *get* (and is thus prospective), as appears in the earliest stratum of the talmudic texts themselves (§§5.14-15, 22, 24).

7.10 However, though annulment nowadays, in cases of recalcitrance, would be supported only by a small minority of the *posqim* (even with an externally flawed *get*), it can still contribute to a solution as a *safeq* (where there already exists at least one *safeq hashaqul*), since, as R. Ovadyah Yosef has shown:

(i) most *posqim* say that the rule of *rov* does not apply biblically in *maḥleqot haposqim* so that *min haTorah* the matter is always considered a doubt, and

(ii) the rule *safeq de’Oraita leḥumra* is only a rabbinic stringency.

Indeed, it is because of this that the Taz and his school maintain that in any case of otherwise insoluble ‘*iggun* one may permit the wife’s remarriage on the basis of a lone opinion even when the question is one of biblical law. Although the Shakh and his school limited this permissive ruling to cases of rabbinic law, that is because:

(i) the Shakh maintains that *safeq de’Oraita leḥumra* is a biblical law and

(ii) that *rov* is biblically effective even in *maḥleqot haposqim*

but, as we have stated previously, R. Ovadyah Yosef has proved at length that the Taz’s view on these two points is the halakhically correct one. At the very least, the opinion of the Taz is certainly sufficient to generate a *safeq hara’uy lehitstaref*. Moreover, irrespective of whether we follow the Taz, the above arguments are available in a *she‘at hadeḥaq* even if they are minority views.

1159 There are two distinct issues here: (a) whether the fear of retrospective *zenut* would entail revocation of any condition authorising annulment, to which there appears to be a majority opinion that it can be protected against revocation (§§3.67-68, 4.73, 6.35) and in any event the power of the *bet din* to annul is not necessarily dependent on an express condition; (b) whether retrospective annulment does in fact produce *zenut*, on which there is considerable doubt (and the ’*issur* of *zenut* is *derabbanan*), but in any event this is not a form of *zenut* which would render the children *mamzerim*, since when the couple cohabitated she (and he) were not married.

1160 See further ARU 18:38.

7.11 In relation to both conditions and annulment we have been concerned to specify the respective roles of the spouses and the *bet din* in such a way as to ensure that any annulment does not completely overrride the will of the husband, and thus violate biblical principle. This has led us to a "partnership" model of that relationship (§§5.54, 57-58), which has the practical conclusion that the parties specify in the condition as much as is permissible according to the halakhah in relation to both the grounds of divorce (section B(i) below) and the modalities of the termination of the marriage (sections B(ii-iv) below).

B. *The Various Elements of a Solution*

7.12 In this section we review the various elements which may contribute to a combined solution, taking account of previous suggestions. We do so bearing in mind our criteria (not necessarily shared by other proposals) of a 'global' solution – one which recognises that there is no "one size fits all" formula, given the diversity of halakhic approaches within the Orthodox community, but demands also that any solution must be capable of achieving mutual recognition, so that the children of remarriages are not regarded as *kasher* by some communities but *mamzerim* by others. This is no easy task, given the cultural, ideological and organisational differences within Orthodoxy, and the impact of religious politics in the State of Israel.

(i) *The grounds for divorce*

7.13 Halakhic literature in fact discloses a wide range of positions (some, but not all, associated with the Ashkenazi-Sephardi divide) on the acceptable grounds for divorce (§6.3), ranging from serious fault-based grounds to no-fault grounds amounting to "irretrievable breakdown" (§§3.85, 6.60, 63). It is only when no-fault grounds reach the stage of triviality (§§1.33, 4.66), or are used as a "cover" for illegitimate ulterior motives, that there appears to be a consensus that this crosses the bounds of what is acceptable within the halakhah (§§4.52, 6.60). However, this range of views on the acceptable grounds for divorce is correlated, inter alia, with different positions relating to the financial consequences of divorce (notably, whether a *moredet me'is* '*alay* can claim her *ketubbah*: §4.88).

7.14 Both particular communities and the spouses themselves have in the past specified their choices as to the grounds for divorce: witness both the "Palestinian" tradition (§6.27) and the reform of Rabbenu Gershom. Nor is it doubted that conditions may be adopted correlating the financial consequences of divorce with the grounds for divorce, as in the traditional interpretation of R. Yoseh's condition (§3.17).

7.15 This prompts the possibility of using release of the *ketubbah* debt itself (given a real rather than a purely symbolic or enigmatic value[1161]) as an incentive where the wife seeks divorce on purely unilateral grounds.[1162] Other means may then be sought to ensure the wife's financial position. This may prove preferable to the current position, where PNA's using a financial stick are used to seek to persuade the husband to grant a divorce, or where a fund is sometimes used by the rabbinic courts effectively to bribe the husband.[1163]

7.16 Some recent proposals (e.g. that of R. Toledano: §6.45) for conditions which entail annulment in circumstances of recalcitrance provide no specification of the grounds for divorce or the

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[1161] See M. Broyde and J. Reiss, "The Value and Significance of the *Ketubbah*", *Journal of Halacha and Contemporary Society* XLVII (2004), 101-24.

[1162] Cf. the divorce clauses in the Elephantine papyri: nn. 268, 405 above.

[1163] Susan Weiss writes in a forthcoming article: "The rabbinic courts even have a special fund earmarked for paying off stubborn husbands known as the "*agunah* fund". The Executive Offices of the Rabbinic Courts have claimed that the fund is financed both from donations, as well as with taxpayer money - public funds."

behaviour of the husband which triggers the condition, but leave these matters to the discretion of the *bet din*. This is regrettable for both theoretical and practical reasons: it diminishes the role of the spouses in the ultimate termination and fails to provide the transparency required (see further §§7.34-37, below) in order to form part of any 'global' solution. We favour (as to a large extent does R. Broyde[1164]) explicit statement of the grounds for divorce, together with measures (§§7.57-59, below) designed to ensure that the couple know the full consequences of their choices (on both the grounds and other matters) not only in their own community, but also elsewhere. As argued in relation to R. Broyde's proposal (§6.64), it is not sufficient to create what in effect are halakhically-defined and ghettoised communities, within which (alone) the problem is solved, even though this may prove a useful starting point (§7.54, below).

(ii) *Defining recalcitrance*

7.17 Just as we argue that the agreement must be transparent as regards the grounds for divorce, so too must it be transparent as regards the circumstances (of recalcitrance) designed to trigger any ultimate annulment. As Mrs. Hadari puts it, "I would strongly urge the development of a mechanism by which *kinyan* marriage may be dissolved *in particular circumstances, delineated by rabbinic authorities, agreed by the entire community and known in advance of the marriage by the husband*."[1165]

7.18 Such transparency[1166] in defining the recalcitrance which triggers annulment is exemplified by the proposal of R. Pipano, which provides for annulment if (inter alia) "there be a quarrel between us and she sues me to judgment before a righteous *bet din* and the *bet din* make me liable in any way[1167] and I shall be unwilling and shall disagree to accept the judgment upon myself or if I flee and my whereabouts be unknown" (§§3.49, 6.41).

7.19 In this respect, R. Broyde's current formulation is lacking. It merely has the husband "... recognize that my wife has agreed to marry me only with the understanding that should she wish to be divorced that I would give a *Get* within fifteen months of her requesting such a bill of divorce. I recognize that should I decline to give such a *Get* for whatever reason (even a reason based on my duress), I have violated the agreement that is the predicate for our marriage, and I consent for our marriage to be labeled a nullity based on the decree of our community that all marriages ought to end with a *Get* given within fifteen months" (§3.85). There is no mention here of *bet din* involvement (not even a *hamlatsah*); the wife merely has to request a *get*, and the husband "consent[s] for our marriage to be labeled a nullity" fifteen months later, if he has not granted it. This certainly makes termination dependent on the act (here, omission) of the husband, but any hint of a "partnership" between the couple and the *bet din* (§5.57) is entirely absent. Perhaps R. Broyde is seeking here to make the annulment purely prospective,[1168] and the role of the *bet din* purely declaratory.[1169]

1164 "Each and every prospective couple must choose the model of marriage within which they wish to live together. They codify their choice through a prenuptial agreement regarding a forum for dispute resolution, or through a set of halachic norms underlining their marriage or through both" (quoted in §3.85, above).

1165 ARU 17:170 (emphasis in original).

1166 Though in fact the formulation of R. Pipano does not satisfy Hadari's criteria for the circumstances that may legitimately be stipulated in advance to terminate *kinyan*-marriage, being overly dependent upon the wife/*bet din* rather than the husband's action/inaction.

1167 Probably including *mitsvah,* if not *hamlatsah*.

1168 On Broyde's position in this respect, see also ARU 8:11 (§2.7.2) and his somewhat ambiguous formulation quoted in ARU 8:10 (§2.5.6) at n.44.

1169 Cf. ARU 17:146, suggesting that "Broyde's tripartite agreement rests on the assumption that no *bet din* ever does have to annul a marriage, as the marriage self-destructs or is terminated through some other mechanism before it should ever come to the point of annulment."

(iii) *Possible modalities of* get

7.20 The classical model of the *get* is that of direct delivery by husband to wife, with immediate effect in terminating the marriage. But this classical model may be modified in a number of ways: (i) immediate delivery subject to a suspensive condition, so that the *get* does not have immediate effect, but rather comes into effect in the future, on satisfaction of the condition; (ii) delivery not by the husband but by an agent authorised by him to write and deliver it (only) in given future circumstances (*harsha'ah*).

7.21 Problems of implied cancellation of either the *harsha'ah* (which is itself subject to condition) or the delayed *get* itself are basically the same as that of revocation of a conditional marriage, discussed above (§§3.63-69, 6.35-36). It is however argued in this context that the problem could be solved by the husband's advance declaration (both in an agreement and on the back of a delayed *get* delivered as part of that agreement) that his wife shall be believed when she says that no reconciliation ever took place,[1170] and account may be taken of the more stringent ruling of the Rambam (that seclusion is equivalent to an explicit statement by the husband before witnesses that he has cancelled the agency) by the groom's swearing an oath *al da'at harabbim* that he will never cancel the *harsha'ah*, and this is especially the case (perhaps even without an oath) where the *harsha'ah* is being employed (and is stated to be employed) to avoid future '*iggun*.[1171]

7.22 The two forms of this solution differ in that the *harsha'ah* (if provided in a document which encapsulates the various elements of a combined solution) is subject to the problem that the husband does not *verbally* and *directly* instruct the scribe, witnesses and agent to act,[1172] while the delayed *get* is subject to problems of *get muqdam/get yashan*.[1173] Neither problem, however, is insoluble as a matter of halakhah, especially when taking account of the permissibility of leniences in order to solve '*iggun* and the likely classification of contemporary conditions as *she'at hadeḥaq*. The *harsha'ah*, however, is subject to the practical difficulty that the longer the period before it is implemented, the more difficult it may be to find people who recognize the handwriting of the witnesses to it (unless the view is taken that this is not necessary for a *harsha'ah* originally signed in the *bet din*).

7.23 As for the problems of *get muqdam/get yashan*, there is an initial doubt as to whether the particular form here contemplated, namely a *get* written and signed on the date recorded, and delivered that same day to the wife, but subject to a condition that it take effect only in the future, is indeed properly classified as *get muqdam* at all. The problem rather is that of *get yashan*, which is permitted only *bedi'avad* (but then becomes permitted *lekhatehillah* in *she'at hadeḥaq*).[1174] It has been suggested, moreover, that the whole problem may be solved by writing on the *get* that the date of the actual divorce has been delayed by mutual agreement of the couple.[1175]

7.24 There is thus little to choose at the technical level between the *harsha'ah* and the conditional *get*. Two factors, however, prompt us to prefer R. Henkin's model of a delayed *get* (§3.45) to R. Broyde's use of a *harsha'ah*, despite the perceived psychological and ideological problems in

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1170 See *Maggid Mishneh*, *Gerushin* 9:25 citing *Ḥiddushey Ramban* to *Gittin* 26b.

1171 See further ARU 18:57-58.

1172 See further ARU 18:58.

1173 See further ARU 18:64-65.

1174 See further ARU 18:65-66.

1175 The custom recorded by the *Rishonim* not to write any condition in a *get* is only a customary stringency which is hardly relevant when *gittin* are no longer privately written; in order to avoid *'iggun* one could presumably permit such a practice: see further ARU 18:65-66.

giving (or depositing) a real *get* at the time of marriage.[1176] First, the Talmud already considers the problem of the husband's change of mind before delivery where an agent is involved: it is this which leads to the classical debates concerning annulment (§§5.9, 14-15). Indeed, if a *get* is cancelled it is still a *get kol dehu* but if the *harsha'ah* is cancelled the *get* written after such a cancellation may not even qualify as a *kol dehu*. Moreover, the fact that the delayed *get* can (and we would maintain should) be handed directly by the husband to the wife reduces the distance (as compared to the *harsha'ah*) from the original biblical model, and also involves a positive action on the part of the husband.

7.25 Neither the *harsha'ah* nor the conditional *get* provide a complete solution. We have argued for a distinction between the husband's will to have the marriage terminated and his will to participate in the *get* procedure (§6.66): we maintain that his change of mind on the latter can be discounted so long as he has not also changed his mind on the former. Where the former has occurred, a different solution (§7.43) is required.

7.26 If the spouses may by advance agreement modify the normal temporal modalities of the *get* – so that the husband is not necessarily required explicitly to consent to the *get* procedure at the time of delivery of the *get* (*harsha'ah*) or at the time of its coming into effect (delayed *get*) – may they also authorise a degree of compulsion (and if so what degree)? If the husband swears an oath not to rescind his agreement and to follow even a recommendation (*hamlatsah*) to give a *get*, then measures of compulsion (where available) might be contemplated (according to some *posqim*) to induce him *to fulfil his oath* (in his own best interest). In this context, it is argued that the *harḥaqot deRabbenu Tam* do not constitute *kefiyah* since, being addressed to the community to "distance" itself from the recalciltrant husband, they are applied to the husband only indirectly (§§4.69-70); explicit recognition, in an agreement, of the acceptability of such measures might reduce the halakhic objections to them still entertained in some circles. Even those opposed to *harḥaqot* would have to regard the resultant *get* as at least subject to *safeq*, so that it may contribute to a combined solution justified by *sfeq sfeqa*.[1177]

(iv) *Defining the temporal modalities of annulment*

7.27 As we have argued (§3.51), there is an advantage in prospective annulment (at least as regards the "chaste wife") if it can be achieved: any question of retrospective *zenut* simply does not arise. But we have also noted R. Waldenberg's rejection of the prospective model (at least when resulting from a condition: §3.77), notwithstanding the views of some Amoraim (§5.7), the interpretation by Tosafot, Ri Halavan and some other Rishonim of the talmudic "delayed annulment" cases in at least some special circumstances (§5.22), and a possible reading of the procedure envisaged in the Genizah *ketubbot* (§3.31). In the absence of a general *taqqanah* authorising prospective annulment (in the light of *tsorekh hasha'ah*), prospective termination is best achieved by a non-standard *get* (by *harsha'ah* or a delayed *get*). Of course, R. Broyde's tripartite agreement does include such a *harsha'ah*, but it is not made sufficiently clear (as it is in R. Henkin's model) that retrospective termination of the marriage comes into play only on the failure of such a *harsha'ah* (for whatever reason) to produce a *get*.[1178]

1176 An understanding of the reasons for it would, of course, form part of the halakhic counselling we advocate before every marriage: see §7.36, below.

1177 See further ARU 18:76 and §7.43, below.

1178 Despite Hadari's reading of its assumptions (n.1169, above). The sequence of R. Broyde's agreement is: (a) a condition for (apparently automatic) termination without a *get*: "... if I am absent from our joint marital home for fifteen months continuously for whatever reason, even by duress, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) will have been null and void"; (b) a *harsha'ah*, which apparently assumes that, despite the automatic nullity of (a), a *get* is preferable (whether as itself terminating the marriage, or as a concomitant of the ultimate annulment): "Should a Jewish divorce be required of me for whatever reason, by any Orthodox rabbinical court (*beit din*) selected by my wife..."; (c) annulment

(v) *Retrospective zenut and preservation of the* tnai

7.28 The issue of retrospective *zenut* raises in a special form the relationship between traditional *qiddushin* and other forms of 'marital' relationship, and thus represents a particular challenge to the search for a 'global' solution. For there are different views on the following issues:

- (a) whether *'Eyn 'adam 'oseh be'ilato be'ilat zenut* is
  - (i) an argument against annulment, on the grounds that annulment *would* produce a state of retrospective *zenut* (despite the fact that the relationship at the time was undoubtedly *leshem ishut*),[1179] or
  - (ii) an argument that marital intercourse creates a presumption of revocation of any condition placed on the *qiddushin* because of the fear of a *zenut* which it is feared would *otherwise* occur (§§6.33, 35);
- (b) if (i), what precisely is the status of children born during a marriage which is later retrospectively annulled, since while all agree that they are not *mamzerim*, some believe that nonetheless some form of spiritual taint attaches to them (§3.51) (a feeling perhaps associated with the wide connotations of the term *zenut*, despite the fact that a more accurate account of the resultant status is probably *pilagshut* (§§3.55-56);
- (c) if (ii), how effective are the measures designed to protect the condition against revocation (such as repetition and the use of an oath: §6.35)?

7.29 All these are issues on which there are strong answers. But just as there is an argument, in such matters, against any attempt by one community to impose its own *ḥumrot* on other communities (§2.47), so too there is an argument against any attempt by one community to impose its own *qulot* on other communities. We would advocate, in such matters of (often contested) doubt, a pluralistic approach in which communities accept that more lenient stances than they themselves adopt should be recognised to the extent that they do not inhibit the religious mobility of the children of the more lenient communities. In all this, we argue below (§§7.34-37), transparency is crucial (for both halakhic and policy reasons): a means must be found to ensure that every couple makes its choices on the basis of accurate knowledge of their full consequences, not only in their own community but also elsewhere.

7.30 Here as elsewhere, explicit statement of the intentions of the couple on all the issues mentioned in §7.28 can only prove helpful. This is relevant to irreligious as well as religious couples in the light of the argument advanced by some that, though they may not believe in (or object to) *zenut* and any consequences some may believe attach to children born in it, they too may be presumed to abandon any condition for fear that it undermines the definite married (if not halakhic) status they seek.[1180]

(vi) *Validity conditions*

7.31 Is it possible to construct a solution with the 'safety net' of a 'validity condition', which says that if other (substantive) conditions (or procedures) do not validly result in the halakhic termination of

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(perhaps prospective) in the event of recalcitrance (presumably, accompanied by withdrawal, despite the oath, of the initial condition): "I recognize that should I decline to give such a *Get* for whatever reason (even a reason based on my duress), I have violated the agreement that is the predicate for our marriage, and I consent for our marriage to be labeled a nullity based on the decree of our community that all marriages ought to end with a *Get* given within fifteen months ..."

[1179] See further §6.33 (including the views of R. Auerbach) and §§3.52-53 for the *baraita* in *Yebamot* 61b where R. Eleazar holds that an unmarried man who had intercourse with an unmarried woman renders her a *zonah* only if the intercourse was without matrimonial intent (*shelo leshem ishut*).

[1180] See further ARU 18:20-21.

a traditional (*qiddushin*) marriage, the parties shall be taken to have intended no *qiddushin* at all (in effect, a self-executing annulment clause)? That appears to be the intention of the clause in R. Broyde's tripartite agreement ("Furthermore, should this agreement be deemed ineffective as a matter of *halachah* (Jewish law) at any time, we would not have married at all"), if not that of R. Henkin's provision regarding the consequences of (technical) failure of his *get al tnai* (§6.37).

7.32 The issue once again becomes one of the scope of the solution. R. Broyde may envisage a halakhic community capable of accepting such a broad validity condition for itself, but cannot impose that understanding on others. Would other communities here accept the pluralistic approach or would they "sever" this condition, leaving an unconditional marriage which has not been terminated? It is this prospect which leads to the choice (discussed below: §§7.44-47) between a problematic *qiddushin* marriage and a non-*qiddushin* marriage.

7.33 On the other hand, R. Broyde is right to include within his agreement explicit mention of the basis of its halakhic validity. This is a necessary element of the transparency for which we argue, and informs our own view that an agreement should include detailed recitals of the basis of its own authority (§7.37).

(vii) *Transparency*

7.34 There are both halakhic and policy reasons in favour of optimal transparency. The objection to any proposal for a delayed *get* arises from the fact that such a *get* may run into the problem of *bereirah* if the time at which the *get* comes into effect is clarified only by an event after that point.[1181] Absolute transparency regarding the circumstances in which the husband's own actions (for example, his infidelity or physical abuse of his wife) trigger the *get* eliminates this problem, there being nothing retrospective about the clarification: the *bet din* merely confirms that such actions have taken place. In terms of policy, it may be argued that the sanctity of Jewish marriage is more likely to remain and be perceived to remain intact if the grounds on which the *bet din* may declare a marriage void are in no way nebulous. Further, the hierarchical structure of marriage remains unchallenged if these grounds are fully in the husband's own control. Against this, there is an argument (assumed in the proposal made in §§7.49-50 below) that it is better to take the risk of a *safeq bereirah* in order to secure the *get* against revocation (in case the husband breaches his oath) and thus leave a "kosher" (according to most opinions) *get* which can be used to fortify *hafka'ah*. For if we choose to avoid the risk of a *safeq bereirah* (for both technical and policy reasons) and thereby risk revocation (and thus also, for many, failure of *hafka'ah*), everything then depends upon the validity of the condition. While there is, as we have seen, good reason for supporting such a condition even standing alone, couples should be counselled about the risk of such an outcome, and advised also of other options.

7.35 Transparency has also become an issue within the halakhah in relation to the wife's knowledge of the full legal régime into which she is entering. The Talmud already recognises the principle *'ada'ta' dehakhi lo' qiddeshah 'atsmah*, that the woman did not enter *qiddushin* on such a basis.[1182] This was applied by R. Moshe Feinstein in *'Iggrot Moshe*, *Even Ha'Ezer* 4.121 (the case of the communist levir[1183]) to a wife's mistake, at the time of the marriage, in believing that (should

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1181 See ARU 17:163 for R. Aharon Kotler, *Mishnat Rabbi Aharon*, *'Even Ha'Ezer* 60; ARU 18:22 for R. Meir Simḥah HaKohen of Dvinsk. See also ARU 18:67-68 and ARU 18:88 for R. Henkin's claim that his formulation is immune to such objection.

1182 ARU 8:12 (§2.8.1), ARU 10:1 on *Baba Kamma* 110–111a.

1183 See also the discussion at ARU 5:41 (§21.2.6.11.4) of *Seridey 'Esh* III 33:2, regarding the case of an apostate groom whose apostasy was not disclosed to the bride, where R. Weinberg argues that there is no need to use the argument of *'ada'ta' dehakhi* because at the time of the *qiddushin* the consent of the bride was obtained in error. This was a factual

she become a childless widow) she would not be bound in a levirate obligation to her brother-in-law, since the latter was (in this case), already an apostate. Thus the wife was able to rely upon her mistake of law in order to argue that she did not enter *qiddushin* on such a basis. It may be argued that this was a mistake relating to a specific detail of the *halakhah*, i.e. the Jewish status of the converted brother (the wife having adopted the gaonic view that there are no levirate bonds to an apostate), rather than a "a general mistake" as to basic legal principles.[1184] As to the latter, the issue has provoked some controversy (§3.72).[1185] However, the degree of halakhic knowledge to be expected of a woman entering *qiddushin* must surely be a function of the kind of community to which she belongs, and it is difficult to avoid the conclusion that R. Feinstein's decision reflects a basic endorsement of the value and need for transparency, not least given the severity of the consequences which may ensue.[1186]

7.36 Such problems may be avoided if appropriate measures are taken, at the pastoral level, to ensure that every man and woman entering *qiddushin* is made fully aware of the halakhic consequences of so doing, and the risks which they may incur in the event of marital breakdown. Our argument for a global solution entails that they be made fully aware (whether by their communal Rabbi or by specialist counsellors appointed for this purpose by the congregational organisation to which they belong) of the attitudes not only of their own *kehillah* to any agreement they are contemplating, but also the attitudes of other *kehillot* to such agreements. For this purpose, there is a need for a worldwide source of information (kept up-to-date) regarding the halakhic attitudes of the various *kehillot*. We may note R. Henkin's recognition of this issue when he included in his proposal the requirement that: "The *Bet Din* shall publish documents of conditions of the enactment of the *Bet Din* of all Israel of such and such a year and at the time of the *qiddushin* there shall be delivered together with the *qiddushin* [the] document of conditions. They shall publicise the conditions in books and in newspapers and in synagogues and in study-halls so that it will not be necessary to speak of the matter at the time of the marriage."[1187]

7.37 If we are to achieve transparency not only at the level of the individual marriage and community, but also between communities, it is necessary that whatever measures are taken are transparent also in respect of the basis of authority which they claim. This has been a recurrent theme of our own analysis, and should be reflected in any agreement designed to prevent '*iggun*, which should therefore include outline recitals of the authority on which it is based, backed up by more detailed statements available on request. In our Preliminary Report,[1188] we provided an example of what such a set of recitals might look like when applied at the level of a general *taqqanah* with the *haskamah* of the *gedoley hador*. The same principle (but necessarily making lesser claims as to the basis of authority) should be adopted at the level of agreements not yet authorised by a general *taqqanah*.

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rather than a halakhic error, though in the context of *safeq* we have seen that the halakhah does not appear to regard this as a significant difference.

1184 See ARU 10:17 and nn.77-78, while recognising the importance of the *hiddush* of such recognition of a mistake regarding current knowledge of the law.

1185 S. Aranoff, "Halachic Principles and Procedures For Freeing *Agunot*", first published in the New York *Jewish Week*, August 28th 1997, now available at http://www.agunahinternational.com/halakhic.htm, arguing for annulment on the grounds that the wife did not realise, at the time of the marriage, that there was a possibility that she might ultimately find herself "chained", and that "no woman views marriage as a transaction in which her husband "acquires" her". This is supported by R. Moshe Schochet: see §3.58 and ARU 18:87 at n.329, and by Professor Feldblum. These propositions are strongly attacked by R. David Bleich (n.138, above), but no objection is raised to the fact that they are based on mistake of law. See also ARU 2:48 (§4.4.1).

1186 For recognition of leniency in relation to mistake of facts, in order to avoid '*iggun*, see ARU 5:43 (§21.2.6.11.5).

1187 Quoted at ARU 18:89.

1188 ARU 8:38 (§7.4).

(viii) *Towards a truly global solution*

7.38 The need for such a 'global' solution (§7.12) is probably greater now than at any time in Jewish history, given the phenomenon of religious mobility and the claim that "the number of people who will cross from one community to another in the course of their life is exponentially higher now than at any time in the past".[1189] Moreover, communities differ not only on the validity of particular halakhic propositions, but also on their approach to the halakhah (and the recognition of who has authority within it[1190]) in general (§1.14), and their approach to the meta-halakhic issues underlying problems of marriage and divorce in particular.[1191] This generates not only an inter-generational problem, affecting the marital prospects of children of second marriages; the spouses themselves may be members of a different religious community at the time of marital breakdown than at the time of the marriage. We thus need to consider, in relation to each element of a solution, not only the arguments for its halakhic acceptability, but also its consequences in other communities. These consequences may be of two kinds: either partial recognition ("we would not do this ourselves, but we will recognise it (*bedi'avad*) when done by (perhaps specified) others") or complete rejection (entailing the *mamzerut* of the children of such second marriages). This is why the need for transparency as regards the attitudes of other *kehillot* (§7.36) is so important. For where there is a risk that an agreement may elsewhere be regarded as resulting in *mamzerut*, a couple may wish to consider a form of relationship recognised by the halakhah as *not* constituting *qiddushin* but after the termination of which children equally are not *mamzerim,* and thus to whose religious mobility there is no halakhic objection. In this section, we highlight the various issues involved.

7.39 First, the grounds for divorce (section (i), above). We have indicated both the range of acceptable grounds for divorce (§§4.85-90) reflective of different cultural environments (§4.91). At the halakhic level, this should constitute no barrier to a 'global' solution; whether some communities would in fact accept the children of marriages capable of being terminated unilaterally without claim of fault, may be more debateable. We do not, however, advocate an 'anything goes' policy: issues of ulterior motive (if properly proved) remain relevant.

7.40 Second, there is the very definition of recalcitrance (section (ii), above), which constitutes the other part of the "trigger" of a conditional solution (whether a conditional *get* or a condition itself terminating the marriage). We noted above (§7.18) the formulation of of R. Pipano ("and the *bet din* make me liable in any way"), which may extend as far as *mitsvah* if not *hamlatsah*. This ought not to form a barrier to a 'global' solution: the consequence of such recalcitrance would be the operation of a terminative condition rather than *kefiyah* (which clearly would not be available in such cases).

1189 ARU 17:144-45, in the context of a discussion of R. Broyde's approach to this matter.

1190 Thus, Hadari: "... unless *every* religious community agrees that *every bet din* has the authority to annul marriage, it would be an extraordinary risk for any *bet din* to take to actually annul a marriage" (ARU 17:144-45); "The Broyde proposal would give the authority to implement a *harsha'ah* for a *get* to "every orthodox *bet din*". Unfortunately, there are few in the Orthodox world who will accept the *kashrut* certification of just "any orthodox *bet din*" – a situation which is reflective of precisely the communal diffusion which Broyde himself describes" (ARU 17:146).

1191 As Hadari puts it: "To insist that all marriage should be governed by new rules (such as a *taqqana* that there should be a condition in all marriages which allows either party to leave at will, or which predicates the continuance of the marriage on the ongoing approval of a *bet din*) attempts to render such an option [that of a woman who "believes that the emotional and material security she obtains for herself and for her children through marriage to a man who cannot leave her without her consent (under the *herem d'Rabbeinu Gershom*) outweighs the possible pain of not being able to leave and marry another man might she one day prefer to"] unavailable and, in my view rightly, earns the antagonism of more conservative thinkers who would wish to see Jewish communities exemplifying more family stability than our gentile counterparts" (ARU 17: 151).

7.41 Third, there are differing views (partly informed by meta-halakhic considerations: §6.6) on conditional marriage, despite our claim that an appropriate condition, where termination depends in part on a decision of a *bet din*, would be effective according to *rov posqim*. What would be the effect in a community which did not accept such a condition? The normal answer is that the marriage would be valid but the condition would be severed. If then the marriage were terminated by virtue of the invalid condition, that termination would be invalid and could result in *mamzerim* from the woman's second partnership. This is a risk of which couples need to be aware.

7.42 Fourth, there are substantial differences on the availability of annulment, even in the presence of a *get kol dehu*, to the extent that we advocate it (in effect) only together with a terminative condition and a delayed *get*. But what are the consequences for those who would not accept it even in such a context (despite the approval of an appropriate halakhic authority)? At that point, and in the absence of an appropriate *taqqanah*, the proposed combined solution fails to be globally effective.

7.43 Fifth, what would be the effect of including within the proposal a form of *kefiyah* which others might regard as resulting in a *get me'useh*? A marriage ended by such a *get* would be in a state of doubt, at least if the *get* were coerced under an error as to the halakhah, rather than in knowledge of its illegality, and such a doubt could be taken into account in the context of *sfeq sfeqa*'.[1192] Moreover, we have the authority of R. Ovadyah Yosef, echoing such a view as adopted by the Rosh, that such a *get* is valid *bedi'avad* even in a case *me'is* '*alay*, and R. Feinstein goes further in the circumstances he regards as creating a strong *safeq* in the marriage, despite an illegally coerced *get* (§4.71). If there is a danger that even such authority may not be accepted, even as part of a composite solution, recourse to a non-*qiddushin* form of marriage, – "a form of consecrated, monogamous union which the woman can leave at will" and which is clearly labelled as distinct from traditional *qiddushin*[1193] – would be advisable.

7.44 But communities may differ also in their approaches to non-*qiddushin* forms of marriage. We have had occasion to comment on the concept of *zenut* as one which may inhibit intermarriage notwithstanding the fact that there is no issue of *mamzerut* (§§6.5, 7.28). Traditionally, this problem has arisen in the context of arguments about the possible effects of either conditional marriage[1194] or annulment. However, the issue also arises in respect of forms of relationship designed from the outset not to conform to traditional *qiddushin*, whether for reasons of general religious ideology (§7.45) or specifically with a view to avoiding entirely the problem of '*iggun*. Two possibilities are debated in this latter context: *pilagshut* (§7.46) and marriage *derekh qiddushin* (§7.47).

7.45 Those who marry only by a civil ceremony (as may become available in Israel if civil marriage is introduced – a course of action advocated by former Chief Rabbi Bakshi-Doron[1195]) are generally regarded as having formed a relationship *leshem ishut* which is not *qiddushin*, and though a *get leḥumra* may be sought, remarriage is permitted if it cannot be obtained. This is already partially recognised by the rabbinical courts in Israel, in their handling of "Cypriot" marriages (§1.11). A similar view is taken of some Conservative and all Reform ceremonies (§1.7).

7.46 *Pilagshut* ("concubinage") – which has a very respectable biblical lineage – is terminable without a *get*, and could certainly be undertaken subject to a monogamy condition[1196] and indeed a form of

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1192 See the argument at ARU 18:71, and also that of R. Ovadyah Yosef at §4.71.

1193 For this argument, see particularly ARU 17:150-51, 169.

1194 As in the controversy over the French conditional marriage proposal: see ARU 4:26 (§IX.59), ARU 18:23.

1195 See n.7, above.

1196 Such a condition has been common in the marriages of Sephardim, who did not accept the *ḥerem deRabbenu Gershom* (this is not to suggest that the (biblical) polygamy otherwise available to Sephardim was *pilagshut*).

ketubbah.[1197] The problem with it is the (minority) opinion of Rambam that it is permitted only to kings. But that does not make children born of it *mamzerim.*[1198] It is argued that *Sheva Berakhot* may legitimately be recited at ceremonies for such non–*qiddushin* unions.[1199]

7.47 More hopeful in this respect is Feldblum's suggestion[1200] (for discussion) of *derekh qiddushin* (§1.9), for which the (restricted) talmudic base[1201] may be used as a model if not a precedent.[1202] He regards it as compatible with a ceremony akin to *qiddushin*, including blessings,[1203] but clearly distinct from the ceremony for regular *qiddushin* in that the oral formula would be different: Feldblum suggested *harey at meyuḥedet li*, but this may create doubtful *qiddushin* (and thus necessitate a *get* out of doubt); "Behold I am your husband by this ring" may be preferable.[1204] There would be no problem in incorporating financial terms in a *ketubbah.*[1205] While Feldblum advocates *derekh qiddushin* primarily for non-religious couples (and regards it as preferable to civil marriage in retaining a link with the tradition[1206]), we take the view that its particular value is for religious couples who wish to avoid the risks of traditional *qiddushin* in a world of religious mobility; indeed, it may be argued that for non-religious couples, ordinary civil marriage is (even from a halakhic point of view) the better option.

C. *The Manchester proposal*

7.48 All this leads us to consider a "combined solution", by which we mean not one which simply presents different remedies as alternatives, but rather one which presents them as part of a single

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1197 As argued at ARU 6:7 (§5.4), in the context of Feldblum's *derekh qiddushin* proposal. On concubinage, see further Goldberg and Villa (n.687, above), ch.5; ARU 6:4-6.

1198 In his discussion of concubinage, R. Abel, ARU 5:106 (§47.19), also notes the view of *Responsa Maharam Padua* 19 that a concubine, who had left her husband and been married to another man with *qiddushin* and then divorced, is permitted to return as a concubine to her first husband – though he would prefer, he says, that she should reunite with her first husband with *qiddushin*. In either case, he says, there would be no problem of *maḥazir gerushato*. This shows clearly that *pilagshut* is not absolutely forbidden.

1199 R. Elisha Ancselovits, "The Man Divorces – the Woman Gets Divorced: Explaining the Halakha as an aid to solving the problem of marriage for the Secular Sector", *Ma'agalim* 3 (5760/2000), 99-121, that the recital of the *sheva berakhot* does not constitute *berakhot levatalah* so long as the person reciting each *berakhah* believes that the union being consecrated is a true, non-violable marriage. Moreover, he argues (in the last section) that even someone who does not believe that a non-*qiddushin* union is a valid marriage should not attempt to prevent *sheva berakhot* from being recited, on the grounds that the recital of the *berakhot* strengthens the union (in the eyes of the couple and the community and, thus, in reality in terms of the couple treating their obligations to one another seriously).

1200 M.S. Feldblum, "Ba'ayat Agunot Umamzerim", *Diné Israel* 19 (5797-5798 [1997-1998]), 203-216; see further Goldberg and Villa (n.687, above), ch.6 (pp.235-55), and comments on it at ARU 6:6-9 (§§5.0-5.7).

1201 That of a minor male living with a female without *qiddushin*. In the geonic literature, it was extended to a minor female married by her family because her father had gone abroad. Feldblum argues that for Tosafot it is neither *pilagshut* nor *zenut* (it may even be a *mitsvah*), while Rambam and the Shulḥan Arukh regard the marriage of a minor as prohibited and likely to be classified as *zenut.* Rosh defines the cases of both the minor male and minor female as *derekh qiddushin*.

1202 Insofar as it is based on an '*umdena demukhakh* that non-observant women do not agree (despite *tav lemeitav*) to religious Jewish marriage because of the aspect of *kinyan* (being ignorant of it), it is subject to debate as to how far mistake of law may be taken into account: see §7.35 and n.1185, above.

1203 Here following Radbaz, who permits blessings in the case of the minor.

1204 See Goldberg and Villa (n.687, above), 247; contrast ARU 6:6 (§5.2), arguing that a declaration like "Behold I am your husband by this ring" would be ideal in that it *definitely* does not create a state of *qiddushin* (*Yad*, '*Ishut*, 3:6 and *'Even Ha'Ezer* 27:6: even if he had been speaking to her of *qiddushin* just prior to his declaration).

1205 See n.1197, above.

1206 See further ARU 6:7-8 (§5.5).

unit (to which the doctrine of *sfeq sfeqa* applies as a whole, rather than to its individual parts). Implementation would be subject to the appropriate rabbinic approvals (as would be made clear in the halakhic counselling we advocate: §§7.37, 57-58).

7.49 If the husband has not divorced after 12 months since the *bet din* recommended ending the marriage with an undisputably valid *get* (willingly written and delivered by the husband to the wife, albeit subject to such coercion as the halakhah may permit in the particular circumstances), the marriage shall be dissolved by means of *all* of the following three processes:

(a) breach of a condition written into the *ketubbah* or in a separate document making the marriage dependent on the non-objection of a *bet din* for *qiddushin* and *gittin* recognised by the *Gedolim* (set up for this purpose in Jerusalem), hereafter termed "BDJ";

(b) a *get* (so long as it is still in existence) initially given at the marriage but stated to take effect (inter alia) one minute before the BDJ withdraws its acquiescence from the marriage; and

(c) a formal declaration of annulment of the marriage by the BDJ 12 months after the husband was first advised to divorce and has still failed to do so, or 12 months after the husband's disappearance, insanity, etc.[1207]

7.50 This might be implemented by the following process:

(i) Prior to the *qiddushin*, the spouses will agree and sign an agreement which includes the conditions subject to which both the marriage (ii, below) and the *get* (v, below) operate and which explains the functions of the BDJ which will exercise the various powers indicated below.

(ii) Either:

(a)[1208] By means of a correctly constructed *tenai kaful*, the groom would make his marriage formula dependant on the BDJ's never objecting to his marriage during his life and after his death. In addition, in order to fortify the annulment, he would conclude by adding, after "according to the Law of Moses and Israel", "and the opinion of the BDJ"; or

(b)[1209] The details of all the necessary conditions, having been explained to bride and groom and agreed to by them, could be written into the *ketubbah* and, by means of a correctly constructed *tenai kaful*, the groom could then make his marriage formula dependant on the fulfilment of "all those conditions in the ketubbah [or other document]"; he would conclude by adding, after "according to the Law of Moses and Israel", "and the opinion of the BDJ".

(iii) The woman affirms that she married only on the condition that the above is halakhically valid and thus that she would not become chained, thus enabling a *bet din* to declare the marriage never to have existed if the condition is broken.

(iv) The couple would then swear an oath on G-d's name that they will never cancel the condition nor will they ever marry by means of any future act of intercourse.

(v) The groom would immediately after the ceremony order the writing and delivery of a *get* to be delivered to the bride to take effect one minute before he cancels it, one minute before he becomes insane, one minute before his death or one minute before the BDJ declares its objection to the marriage, whichever comes first.

(vi) Where the *bet din* recommends/orders a *get* but fails to obtain it from the husband of his own free will, then after 12 months of waiting/persuading, the BDJ shall

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1207 See §5.49, above, for a suggestion as to the type of *taqqanah* which might best authorise such annulment.

1208 R. Abel's preference.

1209 While the Aḥaronim largely sought to make the groom speak out every word of the *aḥumar* condition, R. Pipano (§3.49) was content to rely on incorporation in the oral declaration of the conditions written in the *ketubbah*: the groom says, "If the conditions added to our *ketubbah* are fulfilled *harey at* ... and if they are not fulfilled ..."

declare their objection to the marriage, thus triggering breach of the condition and thereby dissolving the marriage. This would also retrospectively clarify that the *get* was triggered one minute earlier. The BDJ would also then declare the marriage annulled by means of *'afqe'inhu*, in accordance with a *taqqanah* adopted by that community.

(vii) As a further precaution it may be considered worthwhile by the *bet din* to obtain a coerced divorce (as above). This could be done after the 12 months of waiting. Whether coercion succeeds or not, the *bet din* should proceed with the declaration of objection and the annulment.

Obviously, the details of the condition and delayed *get* are mere possibilities, and may be subject to variation in accordance with the halakhic stance of the particular community. More important is the principle of the combined solution, which derives from our analysis of the various authority issues (§§7.5-10). If that can be accepted, the details are a comparatively easy matter.

7.51 The agreement would include (or incorporate from a document authorised by the *kehillah* concerned) recitals regarding the basis of its authority, such as:

(a) the application of *sfeq sfeqa* to the various elements of the agreement;
(b) the authority for leniency once a state of '*iggun* has arisen;
(c) the reliance on contemporary circumstances constituting a *she'at hadeḥaq* (and the definition of such a *she'at hadeḥaq* in the context of '*iggun*: §2.40), and the leniencies consequent on that designation.
(d) the halakhic bases for each of the individual elements of the agreement.

7.52 The agreement would include recitals regarding the attitudes of the spouses, such as:

(a) We enter into this marriage after full counselling as regards its halakhic implications and risks and after considering alternative forms of marital arrangement;
(b) We have sworn an oath '*al da'at harabbim* that marital relations between us shall be assumed, without further evidence but in the absence of evidence to the contrary, to have been accompanied by a declaration that we reiterate our intention that the *tnai* shall remain in force, despite marital intercourse;
(c) We accept that in the event of recalcitrance, such measures comparable to *harḥakot* as are available within the halakhah may be taken.

7.53 The Orthodox community as a whole would facilitate the implementation of this proposal on a 'global' basis by taking the following measures:

(a) any halakhic authority implementing this agreement shall provide a *te'udah* to that effect;
(b) each institutional halakhic authority will publish and make available to a common source its stance on each of the halakhic issues involved in this proposal, so that it may be clear whether termination effected under its terms will be recognised (whether *lekhatḥillah* or *bedi'avad*) by that community;
(c) there shall be convened at an appropriate time a meeting of *gedoley hador* with a view to (i) incorporating this agreement in *qiddushin* marriages as a *tnai bet din,* and (ii) confirming the halakhic status of an alternative form of marriage which may be terminated without a *get.*

D. *Towards Practical Implementation*

7.54 We advocate a 'roadmap', or incremental path towards implementation of this proposal. It may well commence with adoption and implementation only within a small number of halakhic communities, but religious mobility will inevitably result in its presentation to more traditional

communities, often in the form of marriage applications of children of the second marriage of a wife whose first marriage was terminated under this agreement. Such applications may gradually lead to *bedi'avad* recognition and ultimately to demands for adoption of the agreement within such communities. Pressure in this direction will also be exerted by the choices of some couples, in the light of the risks of traditional *qiddushin* (and the transparency which we advocate) to adopt instead alternative forms of marriage, such as *derekh qiddushin*. Once a sufficient movement has developed in favour of the agreement, it may be opportune to request of the *gedoley hador* that they convene with a view to making these arrangements generally available (§7.53(c)).

7.55 Such an incremental approach is "bottom-up" (subject to an initial *haskamah*: §7.48). But this is not to exclude "top-down" measures, such as adoption of *taqqanot haqahal* in particular communities, or indeed on a broad basis should the current atmosphere change.

7.56 Such a programme requires a high degree of self-consciousness and commitment on the part of all concerned in the process: couples contemplating marriage, communal rabbis, the halakhic authorities of the different congregational groups, *dayanim* and the *gedoley hador*. We conclude with a brief word on the roles of each of these participants in the process.

7.57 Couples contemplating marriage have both a duty to themselves and their unborn children to enter *qiddushin* on the basis of full knowledge of its possible consequences and an opportunity to contribute to removal of the problem by the choices they make. Some will, in a spirit of altruism, undertake a degree of risk (but a known risk, given the measures of transparency we advocate) by entering an agreement of this kind; others will opt for no risk (an alternative to *qiddushin*) and will thereby contribute to the solution of the problem in a different way. Those who opt for traditional *qiddushin* without an agreement of this kind should do so in full realisation of the (different) risks they thereby incur.

7.58 Congregational rabbis are the first port of call of couples contemplating marriage. If they feel they do not have the ability or inclination to provide the halakhic counselling which we have argued is necessary for the informed choices couples have to make, they should at least ensure that the couple is referred to someone who has that ability and inclination.

7.59 The halakhic authorities of the different congregational groups are requested to engage in deliberation on the issues raised in this study, not only in respect of how they wish to advise the members of their own *kehillah*, but also how they will view those seeking marriage within their *kehillah* after the termination of an earlier marriage under an agreement such as the one here proposed. The results of these deliberations must be available to *klal yisrae'el*, so that couples may receive proper advice on the risks and benefits of different arrangements in a global halakhic environment.

7.60 Individual *posqim* and *dayanim* have traditionally taken account of their personal accountability to the Almighty in making decisions (the "chip of the beam" argument: §5.37). But a balance must here be struck. A prominent contemporary *dayan*, in his retirement letter to his colleagues, has recently argued that it is in fact the duty of the *dayan* to *risk* his personal accountability in the interests of doing justice to the parties before him (§2.49).

7.61 Most if not all *posqim* recognise that a *taqqanah* with global effect is possible only with the agreement of the *gedoley hador*, and calls for a meeting (or at least agreement: §2.41) of leading *posqim* have not been lacking.[1210] This would need to be a *bet din* of *Gedoley HaDor* acceptable to all streams and communities if the measures taken involved permission to remarry without a *get*, since this has possible future repercussions on the entire Jewish people. There is little doubt

[1210] E.g. R. Cohen (n.14, above), 202.

that such a meeting could take decisions on a majority basis. In earlier decades, it was natural to look to Israel for such a lead (§5.52); today, in different circumstances, one may hope that Diaspora leaders may cast off any self-imposed reticence.

7.62 The prospects for such a process may not appear great today. But the vision which underlies this report is one which rejects the inevitability of a fracture within *klal yisra'el*, and is premised upon the possibility of gradual, incremental progress, without imposing a single model upon communities who vary considerably in their attitudes, but with the practical goal of preserving Jewish unity and the possibility of religious mobility within the community.