Key points from Agunah Report

A General Issues

1 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 (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 a *get* (1.5).

2 We seek a "global" solution, meaning one which ideally has the capacity to prevent the problem from arising at all, or at least will resolve it in all cases. Such an objective is not, however, best served in current conditions by a single ("one size fits all") solution; rather, we may need a set of solutions which solves the problem for all, though not necessarily by the same means (1.6).

3 This entails consideration of the position also of non-Orthodox Jews (whose children may become more traditional: the phenomenon we describe as "upwards religious mobility"). Already in Israel remarriages after a Civil or Reform marriage are often permitted even if a *get* (*lehumra*) is not possible (1.11).

4 The problem of recalcitrance is regarded by many as one of morality, in that it allows a sinner to be rewarded (*hot'e niskar*: see *M. Hall.* 2:7), 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 *hillul 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) but also that *psak Halakhah* should itself be affected by such considerations, as seen from an argument of the Hazon Ish (1.16).

5 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 *hiyyuv*), or at least acting (if there has been a *mitsvah* or *hamlatsah*) *shelo kehogen*. Consideration should be given here to the applicability of *kofin al midat sedom* (abuse of rights), whose very origins appear to lie in the halakhah of *halitsah* (1.24-25).

6 Those who support the "right" of the husband to impose financial and other conditions on his granting the *get* rely on an argument from Maharashdam, but the scope of this *teshuvah* is limited and in any event represents an insubstantial minority opinion, by which we are not bound (1.27, 6.8, and see section B1-2 below, on the *humra shel eshet ish*).

7 Despite arguments that any solution to the problem of *iggun* would undermine the stability of Jewish marriage, the issue has no necessary connection with that of the grounds for divorce (1.5, 6.3-4).

B Issues of Authority

1 In deciding whether a situation of *'iggun* has arisen, we are in principle bound by the *humra shel eshet ish*, but this, insofar as it may require that we take into account even a single stringent opinion, 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*, *EH* I, 79) leads to the conclusion that *insubstantial* minority halakhic opinions, even in matters of *'erwah*, need not be considered (6.14, 7.5). See also Rabbi Yitzhak Elkhanan Spektor of Kovna: Ein Yitzhak, *Even Ha'ezer* 1, 62, Sections 7-8.

2 Once a situation of *'iggun* has materialised 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). Moreover , 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, 6.17, 7.5).

3 There is a controversy regarding the applicability of the rule of *rov* where no face-to-face meeting has taken place (*Taz* v. *Shakh*). On such a view, the matter is one of *safeq* (6.15).

4 There is authority for the applicability of the doctrine of *sfeq sfeqa* even in *qiddushin* and *gittin* (6.18-19).

5 Since the doctrine of *sfeq sfeqa* clearly includes factual as well as halakhic doubts, there is no reason why it may not be applied to historical facts (6.20-21: particulary relevant to the issue of coercion, below).

6 In a situation of "urgency" (*she'at hadehaq*) – a category lower than that of "emergency" (*tsorekh hasha'ah*) – it is generally accepted that leniencies may be adopted (2.38-41), including permitting *lekhathillah* 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 (6.22, 7.5).

C Conditions

1 The use of the condition of R. Yose (found in the Palestinian Talmud) relating to a marriage failing because of "hatred" is claimed by the teachers of the teachers of Meiri as having provided justification for the geonic measures of coercion. The fact that Ra'avya indicates that he had seen such a clause in *ketubbot* leads at least to a *safeq* regarding the use of terminative conditions today (§6.27**)**.

2 The major codes accept conditional marriage (§3.15), despite the talmudic maxim *eyn tnai benissu'in*. The booklet edited by R. Lubetsky, bearing that title, was written in the context of the proposals of the French Rabbinate, which eliminated any role for the *bet din* in the operation of the condition, and should not be taken as entailing any general

ban, as argued by R. Berkovits. Tosafot explain the maxim as meaning only *'Eyn regilut le-hatnot be-nissu'in* (§6.29**)**.

3 The fear of *be'ilat zenut* if *qiddushin* is retrospectively terminated is contested, as argued particularly by R. Uzziel. R. Eleazar in a *baraita* in *Yebamot* 61b excludes *zenut* where cohabitation was *leshem ishut* (§§3.52, 6.33).

4 Where the fear of *be'ilat zenut* promopts an asumption that any marital interrcourse revokes any antecedent condition, the latter may be safeguarded by oath, and perhaps by making the marriage conditional also on observance of the oath (6.35**).**

5 Ultimately, there is a need for a *taqqanah* of *gedoley hador* making any such *tnai* standard (*tnai bet din*) (6.39**)**.

6 A substantial number of proposals for forms of conditional marrtiage have been made by reputable *posqim* in the 20th century (6.40**)**. Of particular interest are those by Rabbis Pipano, Henkin and Uzziel.

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. 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 hadehaq*). However, a better strategy may be to combine conditions with other remedies, in a way which will invoke *sfeq sfeqa* (6.47, 7.6).

D Coercion

1 Rabbenu Tam accepted *me'is alay* as a grounds for divorce (even justifying *harkhakot*), though not for (the Geonic) *kefiyah* (§4.52), and some authorities (e.g. R. Hayyim Palaggi: §6.63) accept a period of separation as sufficient evidence for termination of the marriage (§6.53).

2 There are substantial doubts regarding Rabbenu Tam's rejection of *kefiyah* for the *moredet me'is alay*, as regards (6.49ff.):

- (a) the interpretation of the *sugya* of *moredet*, and particularly its final conclusion (4.8-16);
- (b) the variant text of Amemar in *Ketubbot* 63b (4.7);
- (c) Rabbenu Tam's own position (4.34-36);
- (d) the degree of acceptance of *kefiyah* by both early Rishonim (e.g. Rabbenu Gershom, Rashi, Rashbam) and later (post-Rabbenu Tam) Rishonim (as attested by Rosh, Rivash, Rashbetz and Rema: 6.55) and Aharonim (e.g. Resp. Maharitaz, Darkhei No'am: 4.57) and modern *posqim* (R. Herzog, Dayan Waldenburg, R. Yosef: 6.57), often following **inter alia** Rambam;
- (e) the issue of whether the position of the Shulhan Arukh needs to be reviewed in the light of the position of Rashbetz, not available to R. Karo (6.56).

3 Thus a coerced *get*, even though considered insufficient by itself, would significantly contribute to a *sfeq sfeqa* argument (6.58, 7.8).

4 There are also issues as to what measures the Geonim actually authorised. Important here is the interpretation of these measures by the Rosh as a form of *hafka'ah* (6.51).

5 We may also ask to what exactly the husband must consent: the *get* procedure or the termination of the marriage. Both Rabbenu Yeruham and R. Moshe Feinstein appear to take it to be the latter (§§4.63, 6.66). On this view, a *get* may be coerced where the husband consents to the divorce, even if he does not consent to participation in the *get* procedure.

6 We may also ask *when* must the husband consent to the *get*? There is an argument that he may give a non-revocable agreement (supported by an oath) to an advance *get*, written at the time of the *nissu'in*.

7 There is a *safeq* whether a woman remarried on the basis of a *get me'useh* (procured *shelo kadin* by a *bet din*) need leave her new husband (4.71). In effect, some may regard such a *get me'useh* as valid *bediavad*. In any event, it may at least count as a *get kol dehu* for the purposes of the view (below) that *hafka'ah* may still be available if accompanied by a *get* (6.70-71).

E Annulment

1 There is enough authority (including that of R. Ovadyah Yosef) in favour of the use of *hafka'ah* today, provided that it is accompanied by a *get* (even a *get me'useh*), to constitute at least a *safeq* (§§6.78-79, 7.9-10), especially if the contemporary situation is regarded as one of *she'at hadehaq* (§§5.42, 44).

2 Moreover, a series of mediaeval *taqqanot haqahal* added new requirements for a valid *qiddushin*, failure to comply with which resulted in *hafka'ah* (§5.9) at the time of the *qiddushin* itself, and even Rivash's reluctance to endorse such a measure *lema'aseh* did not apply where there were *haskamot* representing a (local) consensus (§§5.37, 6.73). 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. This would enable the *gedoley hador* to require that all future *qiddushin* be made subject to an appropriate condition against *iggun*, on pain of *hafka'ah*.

3 There are different approaches to the respective roles to be accorded to the spouses on the one hand, the *bet din* on the other, in relation to *hafka'ah*. On the one hand, some proposals give the *bet din* a "strong" discretion to annul the marriage when they think it appropriate to do so (so interpreting *qol demeqadesh ada'ta derabbanan meqadesh*); others prescribe very specifically the circumstances in which annulment (authorised by a condition) may occur (for example, R. Pipano: 6.41), thus assuming a form of "partnership" between the spouses and *bet din* in the termination of the marriage, and thus reducing the force of the basic objection that annulment violates the biblical principle that termination (other than by death) involves an act of the husband (6.92-93). The basic objection is further met when the *hafka'ah* is accompanied by a *get kol dehu.*

4 The concept of *'umdena* has elements of both conditions and annulment (3.70-76) and in many cases would provide a sufficient basis, supported by practice, for the declaratory annulment of marriage.

F Proposals

1 We favour maximum transparency as regards both the grounds for divorce, the definition of recalcitrance and the halakhic authority for all elements in any solution, for both halakhic and public policy reasons (7.16-18, 7.34-37). This entails the creation of mechanisms (7.36) for providing all couples, in advance of marriage, with full information regarding the risks they undertake in entering any particular arrangement (including traditional *qiddushin* unaccompanied by any special conditions).

2 We advocate 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. Where the doctrine of *sfeq sfeqa* is available, but is *not* applied, any *humrot* are discretionary rather than mandatory. Failure to comply with them is thus not violation of an *issur* (so that children born of a second union, after termination of the first in circumstances of *sfeq sfeqa*, would not be *mamzerim*). Thus such children should be acceptable (*bediavad*) even within communities which do themselves apply such *humrot* (*lekhathillah*). This creates the possibility of an "incremental" approach, particularly given the phenomenon of "upwards religious mobility" (§§7.29, 38).

3 Such an "incremental" approach may commence with the adoption by (no doubt, initially) a minority of Orthodox communities of a form of *qiddushin* which incorporates elements of conditional marriage, an advance *get* and annulment, combined in a form designed to take advantage of *sfeq sfeqa*. Our preferred formula is set out in §§7.49-51. Naturally, the ideal would be for it (or something comparable) to be endorsed and made mandatory for all *qiddushin* by a *taqqanah* of the *gedoley hador*. In the absence of any immediate prospect of such a *taqqanah*, our pluralistic and incremental approach advocates that particular communities adopt it, on the basis of appropriate halakhic authority (which this Report, of course, does not claim). Assuming a continuation of the present phenomenon of "upwards religious mobility", this will result in presentation, *bediavad*, of the results of the "combined solution" when second generation children present themselves for marriage in more traditional communities. Acceptance *bediavad* may in time lead to acceptance *lekhathillah* even within such communities, thus paving the way for an ultimate "global" *taqqanah* (§§7.54-62).