Agunah: The Manchester Analysis

Summary Report

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1. *Introduction*

1.1 *Aim and General Approach to Issues of Authority*

1.1.1 This article summarises the principal arguments of the Draft Final Report of the Agunah Research Unit of the University of Manchester.[1] The aim of the Unit has been the search for an ultimately

[1] Available at http://www.mucjs.org/ARUDraftFinal.pdf. The report is book-length, and itself summarises and synthesises 20 Working Papers (available from http://www.mucjs.org/publications.htm) written over a five-year period by members of the Unit. The report itself is cited (for fuller documentation and argumentation) in what follows by chapter and paragraph number, in the form §2.15, etc. The Working Papers are cited by number, page and (where

"global" solution to the problem of the *mesorevet get*; it has sought to do so with constant attention to the problems of halakhic authority necessarily involved, and to the objections raised to earlier proposals for a solution.

1.1.2 Our general approach to issues of authority is based on 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, appears to be a modern innovation, of at most rabbinic origin and status.[2] Moreover, analysis of a *teshuvah* by R. Moshe Feinstein (*Iggrot Moshe*, *EH* I, 79[3]) leads to the conclusion that *insubstantial* minority halakhic opinions, even in matters of '*erwah*, need not be considered.

(b) However, once a situation of '*iggun* has materialised we revert to the usual rule of *rov posqim.*[4] This represents the mainstream (majority) view, as expressed by R. Ovadyah Yosef, R. Elyashiv and others.[5] However, in the absence of a solution to an '*iggun* situation according to *rov posqim,* we may rely on lenient minority views and for some even on a lone opinion.[6] Indeed, if we accept the arguments of R. Yosef,[7] 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 *safeq de-'Oraita le-ḥumra*' is only rabbinic in nature,[8] it would seem that there is room to consider whether we could rely, in an otherwise insoluble situation, on a single lenient authority even in a case of Torah law[9] — including, as the *Taz* says, '*iggun*.[10]

(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, including permitting *lekhatḥillah* what otherwise would be permitted only *bedi'avad*,[11] following a majority despite opposition from a substantial

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available) paragraph number. Thus ARU 7:18 (§4.23), as in n.4 below, refers to paragraph 4.23 of Working Paper no. 7, on p.18. Cross-references within this paper are in the form s.2.1 rather than §2.1.

2 See R. Refa'el Asher Qubo, quoted in §2.7, and passages from *Yabia' 'Omer* VI (esp. *EH* 6:2-3), where R. Yosef also cites R. Yom-Tov Algazi, as in *Resp. Qedushat Yom-Tov* no. 9, 15d and *Simḥat Yom-Tov* no. 11, 44c.

3 Discussed in ch.2, Appendix A, of the Report, at pp.50-53.

4 The precise meaning of which may itself be subject to *safeq*: see §2.11; ARU 7:18 (§4.23).

5 *Pisqey Din Rabbaniyim*, vol. IV, col. 166, as noted by R. Ḥayyim Sha'anan, "Ofanim Li-khfiyat Ha-get", *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."

6 §§2.11-15, noting, *inter alia,* (i) R. Yosef Ḥazzan, *Ḥiqrey Lev*, *Mahadura' Batra'* II (*EH* & *ḤM*), *HM siman* 4 on *Hilkhot Halwa'ah*, *siman* 60, p. 180d; (ii) the position of R. Moshe Feinstein on *qiddushey ta'ut*; (iii) *Shakh – YD* 110:111, end (reliance on even a single view where the problem with her remarriage is rabbinic) and the *Taz – EH* 17:15 (even where the problem is biblical).

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

8 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*.

9 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 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).

10 The *Taz* in *EH* 17, sub-para. 15, 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). See further ARU 7:1-2 (§I.4), ARU 5:22-23 (§§15.3.1-15.3.4).

11 See ARU 8:32 (§6.4.5).

minority,[12] or even to follow a minority opinion[13] (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.[14] However one might regard R. Yosef's view in normal times, we may certainly regard this leniency as applicable in *she*'*at hadeḥaq.*[15]

Clearly, it is important for these purposes to define (halakhically) "once a situation of '*iggun* has materialised". We have not encountered clear statements on this matter. The issue is discussed further below (s.2.3), in the context of conditions designed to prevent '*iggun*.

1.2 *The Grounds for Divorce and the Stability of Marriage*

1.2.1 Objections that proposed solutions to the *agunah* problem undermine the stability of marriage take a number of different forms, including arguments against more "liberal" grounds for divorce and against any loosening of the husband's effective veto on divorce.[16] But there is no necessary relationship between the problem of '*iggun* and the grounds for divorce.[17] 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).[18]

1.2.2 Halakhic literature in fact discloses a wide range of positions on the acceptable grounds for divorce,[19] commencing with the *maḥloqet* between Bet Hillel and Bet Shammai in *M. Gittin* 9:10 and continuing with the Ashkenazi-Sephardi divide after the reform of Rabbenu Gershom. 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"[20] (a period of separation and failure of attempts to restore *shlom bayit*,[21] as in R. Broyde's current proposal,[22] based on the premise that couples

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[12] *Responsa Shevut Ya*'*aqov* III *EH* 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.

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

[14] *Yeḥawweh Da*'*at* I (Jerusalem 5737) *Kileley HaHora*'*ah*, p. 15 no. 12; see ARU 18:53.

[15] R. Yosef cites R. Ḥayyim Palaggi, *Resp. Ḥikekey Lev* EH 57; *Resp. Ohel Ḥasid*, YD 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.

[16] See s.1.3 below, and further §§1.28-29, 6.4, 6.7.

[17] See further s.2.2.1 below, in the context of conditional marriage.

[18] See R. Shlomo Daichovsky: "We do not deal with resurrection of the dead (אין אנו עוסקים בתחייאת המתים) 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; see also his "Heskemey Mamon Kedam Nissu'in", *Teḥumin* 21 (5761), 286-87.

[19] See further §6.3, summarising §§1.29, 1.33, 4.52-53, 4.66, 6.63.

[20] See further §§3.85, 4.89, 6.60.

[21] R. Ḥayyim Palaggi, Resp. *Ḥayyim VeShalom,* vol.2, no.112, who further argues that one who impedes the divorce will ultimately be accountable, in rendering the couple liable to sin. See R. Shear-Yashuv Cohen, "Kefiyyat Ha-get Ba-zeman Ha-zeh", *Teḥumin* 11 (5750), 200. See also R. Moshe Feinstein, *Iggrot Moshe*, *Yoreh Deah* 4:15.

may choose to adhere to a particular halakhic community which has opted for such a "liberal" exit régime[23]). "Subjective" grounds such as the "hatred" of R. Yoseh's condition (s.2.1.5, below), may encompass both fault and no-fault situations. There is a wide range of situations where a claim of *me'is 'alay* may be made, including both faults[24] and defects[25] which are recognised as independent grounds for divorce and (mere, but genuine) "disgust". Whatever their historical relations, both the Babylonian-Geonic tradition and the Palestinian-Genizah tradition[26] (including its precedents in the Yerushalmi) affirmed that a wife may unilaterally seek divorce on the grounds that she finds the continuation of the marriage intolerable.[27] Thus, *me'is* [or *me'isa*] *'alay*[28] is clearly acceptable in principle, whatever view is taken of its enforcement.[29] It is only when (unilateral) no fault-grounds reach the stage of triviality,[30] or are used as a "cover" for illegitimate ulterior motives[31] (hence the demand for *amatlah*[32]), that there appears to be a

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22 R. Broyde in his tripartite agreement adopts a period of fifteen months, 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". The husband undertakes 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.* – which he fully appreciates will not be acceptable to all communities (see further §§6.62-63).

23 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: see further n.34, below.

24 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 *Ketubah* 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.* See further §§1.29, 4.52, 87.

25 This is particularly clear from the modern Israeli *pisqei din rabbaniyim*, where pleas of *me'is 'alay* are sometimes based on allegations of *mumim.* See further ARU 16:138 on PDR 3/225-234, 9/265-88 and PDR 2/188-196, 6/221-224.

26 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). See also §6.27.

27 See further §§3.16-31, §§4.17-19; ARU 15:24.

28 On the possible bases of such a claim, see further §§1.30-31, 4.85-89.

29 See further §§1.30, 4.89. Even Rabbenu Tam contemplated *harḥaqot* in such cases: s.3.3.1. below and §§4.52-53.

30 See further §1.33, 4.66. If the spouses are agreed on divorce, and *shlom bayit* fails, there is no impediment to divorce however trivial the grounds: the parties to a "dead marriage" may thus agree to divorce, without the need for any allegation of fault on either side.

31 Classically, that the wife may, during the subsistence of the marriage, "look astray" (*notenet eynehah beaḥer*) and use established grounds as an excuse: Mishnah Nedarim 11:12. For the husband, however, such "looking astray" was acceptable (when polygamy was acceptable), at least according to R. Akiva in Mishnah Gittin 9:10. 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").

32 Sometimes, *amatlah mevoreret* (see further §§4.55, 67) in cases of *me'is 'alay*, at least where *kefiyah* is sought (and in some sources apparently to justify a *ḥiyyuv*: Rema, *Yoreh De'ah* 228:20 appears to accept *amatlah* as the basis for a *ḥiyyuv* in *me'is 'alay*: see further §4.53 n.811; ARU 5:18 (§12.2.13)). The demand for *amatlah* is not found amongst the Geonim and early Rishonim who accepted coercion for the *moredet*: we first encounter it in Tosafot and Maharam. See further §6.60.

consensus that this crosses the bounds of what is acceptable within the halakhah.[33] It appears clear that, within such limits, both particular communities and the spouses themselves may specify, by means of conditions, the grounds on which the marriage may be terminated.[34]

1.3 *The Roles of Husband and Bet Din in Marriage Termination*

1.3.1 According to biblical law, marriage is terminated either by death or by the act of the husband in issuing a *get*. It is not terminated by act of the *bet din*. Nevertheless *bet din* supervision has long been a feature of the *get* procedure, to ensure both that the formalities are properly performed and (particularly after the reforms of Rabbenu Gershom) that the husband does not abuse his right by unwarranted unilateral divorce.

1.3.2 In cases of recalcitrance, the role of the *bet din* is different, in "facilitating" a divorce which the husband is reluctant to grant. Yet in the three procedures of facilitation most commonly discussed – conditional marriage, coercion and annulment – care is needed to ensure that a sufficient role for the husband is preserved. This is discussed below in the context of all three "remedies" (and their interaction), as manifestations of the general principle that even here there is a "partnership" between the husband and the *bet din*.[35]

2. *Conditions*

2.1 *'Eyn Tenai Be-Nissu'in*

2.1.1 The possibility of using what we have called "terminative conditions" as a means of bringing a marriage to an end without a *get* has to overcome objections encapsulated in the maxim *'Eyn Tenai Be-Nissu'in*, which occurs in the Talmud, but whose precise status in the halakhah is unclear. Tosafot[36] explain its meaning in the Talmud as *'Eyn regilut le-hatnot be-nissu'in*, thus as no more than a practice dependent upon the circumstances of the time.[37] Indeed, the major codes all agree that conditional *nissu'in* is effective, at least *bedi'avad*.[38] This is the position of the major codes of Jewish Law: *Yad*,[39] *Shulḥan Arukh*[40] and *Levush*.[41] The commentators on both the *Yad*

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33 See further §§4.52, 6.60.

34 See further §3.19. 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. 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." 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." See further §6.64, discussing also the implications as regards recognition elsewhere; §1.29 and n.82; ARU 3 (opening of section: "The Present State of the Debate: Rabbi Broyde's analysis"); ARU 8:25 n.156.

35 See below ss.2.4.2-2.4.7 on conditions, s.3.5.5 on coercion and s.4.6.1 on annulment.

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

37 See further §3.13.

38 The Codes do not distinguish here between *lekhatḥillah* and *bedi'avad*.

39 *Gerushin* 10:19.

40 *EH* 149:5.

41 *HaButs weHa'Argaman* 149:5.

and the *Shulḥan* ‘*Arukh* are silent on this point, which indicates that they too agree. R. Kook described the effectiveness of conditional marriage as “obvious” [42] and it is reported that R. Feinstein agreed to the arguments of R. Berkovits in its favour.[43] This is also apparent from the number of *posqim* who have proposed conditional marriage in practice (see n.72, below). Thus, if there is any *safeq* in the matter, there is at least a *safeq shakul* in favour of conditional marriage. Indeed, almost all *posqim* (with the exception of Rav Yosef Rosen) appear to agree that conditional *nissu'in* is effective; the debate relates only to its practical application.

2.1.2 At the other extreme, the Rogachover Gaon in *Tsafenat Pane*’*aḥ* section 6 understands ’*Eyn Tenai Be-Nissu*’*in* 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 Be-Nissu*’*in*, directed against earlier proposals for conditional marriage made by the French (and later Constantinople) rabbinate.[44] However, there is some reason to debate the precise strength of opposition to the principle of conditional marriage even in ’*Eyn Tenai Be-Nissu*’*in* itself.[45] Indeed, the public declaration of the Russian and Polish rabbinate in ’*Eyn Tenai Be-Nissu*’*in* (which is signed, amongst many others, by R. Ḥayyim Ozer Grodzynsky himself[46]) 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*.[47]

2.1.3 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*).

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[42] Letter dated 3 *Tevet* 5686, published at the beginning of *Torey Zahav* by Rabbi S. A. Abramson, New York 5687, and quoted in R. Eliezer Berkovits, *Tnai beNisuin uVeGet* (Jerusalem: Mosad Harav Kook, 1967), 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”.

[43] See ARU 18:37 for evidence that R. Moshe Feinstein expressed theoretical approval of R. Berkovits’ position.

[44] See further §§3.2-6. For a detailed review of both the historical background to ‘*Eyn Tenai Be-Nissu*’*in*, and Berkovits’ replies to its arguments, see ARU 4, ARU 18:4-38.

[45] See, for example, the remark of R. Danishevsky (*ETB* 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. See further §§3.7-8.

[46] On his opposition to conditional marriage, see §§3.8-9.

[47] This is also noted by R. Zevi Gertner and R. Bezalel Karlinsky, “‘*Eyn Tenai Be-Nissu*’*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 Be-Nissu*’*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*.

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 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*. The distinctive features of the Berkovits proposal[48] were that (a) unlike the French proposals, it did make operation of the condition dependent upon a decision of the *bet din,* and (b) it confined itself to *get* refusal in the face of an order or request[49] 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, even though the *bet din* says he ought to give it, that the marriage will be terminated without a *get*.[50] Berkovits' work is often dismissed in the light of the earlier *'Eyn Tenai Be-Nissu'in*, but did attract influential support,[51] including 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. R. Weinberg in his introduction to *Tenai Be-Nissu'in Uv-Get* describes the negative attitude of *'Eyn Tenai Be-Nissu'in* as predicated (only) on *Shiltey HaGibborim be-shem Riaz*.

2.1.4 One point of contention[52] between *'Eyn Tenai Be-Nissu'in* and R. Berkovits' analysis is the relevance to the debate of the (generally accepted) condition of Mahari Bruna regarding the *aḥ mumar*.[53] There is an obvious factual difference: that 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[54]), and a condition terminating a marriage not already annulled by the death of the husband. Some, following R. Shemuel ben David Ha-Levi in *Naḥalat Shivah* 22:8, 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*;[55] hence the permissibility of both 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.[56]

2.1.5 Examples of terminative conditions are in fact found in the history of the *halakhah*, though what matters for our purposes is their dogmatic weight. The Jerusalem Talmud records that R. Yoseh

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48 Berkovits (n.42, above), 2, 166, 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*.

49 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 ha-ra'uy* (one could also describe the required behaviour as *ke-hogen*). 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 be-diney shamayim*) rather than cases where the husband is in the right but is asked to act piously beyond even moral obligations (*middat ḥasidut*).

50 See further ARU 4:12 (§IX.7) on Berkovits (n.42 above), 57-58.

51 See further §3.10, including the initial attitude of Rav Menaḥem Mendel Kasher. See also §3.5 on the *hasqamot* to *Ma'alot LiShlomo*.

52 See further §§3.34-36.

53 Rema, *Even Ha-'Ezer*, 157:4.

54 Later extended to a missing levir: see §3.38.

55 See further §§3.59.

56 See further §§3.37 and n.42, above.

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.[57] 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 (בשותפותיה)".[58] 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. 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*,[59] 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.[60] 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"[61] is to be viewed as reflecting the same tradition. In any event, it remains unclear, in historical terms, how these Yerushalmi conditions were to be enforced if the husband refused the *get*.[62] More important for our purposes is the fact that the teachers of Me'iri's teachers understood R. Yoseh's condition as entailing coercion, since they claimed that it was the use of just such a clause which justified the *kefiyah* of the Geonim.[63] There is, in fact, evidence that Ra'avya may have seen *ketubbot* including a clause of this kind.[64] Though most of the *Rishonim* understand R. Yoseh as referring only to fiscal matters,[65] the view of the teachers of Me'iri's teachers creates a *safeq* as to the interpretation of R. Yoseh's condition, even though these teachers may not themselves have endorsed coercion.[66] 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[67]) fall within Rema's

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57 *Jerusalem Talmud, Ketubbot* 5:9 (30b): אמר רבי יוסה איל'ין דכתבין אין שנא אין שנאת תניי ממון ותניין קיים. See further §3.17.

58 Ketubbot 7:6, 31c. See further §§3.18-19.

59 *Tosefta Qiddushin* 3:7-8. See further §3.20.

60 See further §3.21 on Y. Margalit, "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).

61 Rashba, *Novellae*, *Gittin* 84a; see ARU 4:28 (§IX.70); see also 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.

62 See further §3.22.

63 R. Menaḥem Ha-Me'iri, *Bet Ha-Beḥirah* to *Ketubbot* (ed. A. Sofer, Jerusalem, 1968), Chapter 5, pp. 269-70: "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 תניי ממון הוא וקיים היל'ין דכתבין אי שנאי אין שנאית ... 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 Geonim 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." See further §3.23.

64 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*." See further §3.27.

65 See further §3.25, perhaps reflecting their rejection of coercion in the case of the *moredet.*

66 See further §3.28.

67 If Rabbenu Tam was unaware of R. Yose's condition in the Yerushalmi, or of the use of the *ketubbah* clause seen by Ra'avya.

qualification of *hilkheta kebatra'ei*.[68] 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 *poskim* 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.[69]

2.1.6 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[70] 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 here necessary at all, and, if it was, whether the court would coerce if necessary.[71]

2.1.7 In the light of the above arguments, we should not regard '*Eyn Tenai Be-Nissu'in* as a bar to the consideration of any form of conditional marriage. Indeed, it would otherwise be difficult to account for the many proposals for conditional marriage made in the 20th century, both before and after '*Eyn Tenai Be-Nissu'in*.[72]

2.2 *The elements of the condition:(i) the grounds for divorce*

2.2.1 The use of terminative conditions to resolve the problem of '*iggun* has often been opposed on the grounds that it poses a threat to the stability of marriage.[73] One aspect of this fear is the

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[68] *Rema* to *Shulḥan Arukh Ḥoshen Mishpat* 25:2: "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 *geonim* – 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." See further §§2.28-29.

[69] See further §3.29.

[70] See n.64, above.

[71] See further §3.31 on JNUL Heb.4 577/4 no.98 (in 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), II.41, 44-45); TS 24.68 (Friedman, *ibid*., II.54-56). On the meaning of על פם בית דינה, see further §3.79.

[72] Those of RR. Pipano, Henkin, Uzziel and Broyde are discussed in s.2.4 below; for a full list, see §6.40. 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) 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 A.H. Freimann, *Seder Qiddushin We-Nissu'in* (Jerusalem: Mossad Harav Kook, 1964), 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.

[73] See further §§1.29-31, 6.4. Berachyahu Lifshitz, "'Al Masoret, 'Al Samkhut Ve'al Derekh Ha-hanmakah", *Teḥumin* 28 (5768), 82-83, notes the view of R. Weinberg regarding conditional marriage (in his introduction to Berkovits' book), 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

assumption that terminative conditions effectively endorse unilateral no-fault divorce whenever the wife wants it. But there is no necessary connection between the problem of ‘*iggun* and the grounds for divorce: if a woman is defined as becoming *mesorevet get* 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. Those grounds can either be stated in the condition in a form which excludes unilateral no-fault divorce (and which thus maximises the role of both husband and wife by having them specify in advance this crucial aspect of marriage termination) or the condition can make the continuation of the marriage dependent upon the continuing consent of a specified *bet din*.[74]

2.3 *The definition of recalcitrance*

2.3.1 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);

(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[75] and *ḥillul haShem*[76] which may arise.

For (a) and (b), the definition of recalcitrance is the same. Like the question of the precise grounds for divorce, we argue that (in the absence of any substantial halakhic consideration of the issue) it is a matter which can and should be specified in an advance agreement by the spouses. We maintain 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*)[77] and 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). We maintain that transparency in relation to the definition of recalcitrance is just as important as transparency in relation to the grounds for divorce.[78] All the more reason for prior consideration by the spouses with their halakhic advisers, and incorporation of the result in the condition.

2.3.2 The most specific proposal to date in relation to the definition of recalcitrance is that of

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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.”

[74] R. Uzziel (§3.44) maintains 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 further n.97, below): see ARU 12:29-30 n.140. On Rashi’s view (and different interpretations of it), see ARU 11:7 and n.39.

[75] For an argument for the applicability here of *kofin al midat sedom*, see §1.25.

[76] See further §§1.16, 6.9.

[77] And notwithstanding any purported cancellation of an advance *get* or *harsha*‘*ah* by the husband: see s.3.6.6, below.

[78] See further §§7.29, 34-37.

R. Pipano.[79] It provides that the condition take effect 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 consequence of such recalcitrance would be the operation of a terminative condition rather than *kefiyah* (which clearly would not be available in such cases).

2.3.3 The inclusion of the husband of the "blackmailed wife" within the definition of recalcitrance would be opposed by those who view the practice of attaching (financial and other) conditions to the giving of the *get* as authorised by a responsum of Maharashdam[80] (despite the contrary views of Rashbash, Tashbetz[81] and Rashba[82]). However, 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 reasonably be fulfilled, and as relating only to the wife and not others (such as the children).[83]

(b) Moreover, there are opinions which reject the view of Maharashdam insofar as it justifies the husband in making any condition, including even demands justified by law.[84] R. Bass 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 also reviews decisions in the Israel rabbinical courts[85] and suggests that they are not a result of different readings of Maharashdam,[86] but rather raise a question of "the fifth part of the *Shulḥan Arukh*", which mandates reading the *poskim* 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 *ḥalitsah* for personal goals.[87]

More generally, the view of Maharashdam may be regarded as, at best, an optional *ḥumra* which represents an insubstantial minority opinion. Once a situation of '*iggun* has arisen, we are not required to take it into account (s.1.2, above).

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79 *Responsa Nose' Ha'Efod*, *responsum* 34, written at the end of '*Adar Rishon* 5684 (1924), but published a little later, at the end of the book '*Avney Ha'Efod* II, Sofia 5688 (1927/8): see Freimann (n.72, above), 391. See further s.2.4.3, below; §3.49; ARU 13:12-15, ARU 18:79-85.

80 *Shut Maharashdam*, '*Even Ha'Ezer*, 41. Maharashdam's view is cited briefly by *Ba'er Hetev* on *Shulḥan Arukh, Even Ha'Ezer*, 154:1.

81 *HaKhut HaMeshulash* IV, *tur* 1, responsum 6, *ot* 2-3, discussed in detail by R. David Bass, "Hatsavat Tena'im 'Al Yedey Ba'al Ha-meḥuyav Be-get", *Teḥumin* 25 (5765).

82 Maintaining that the *Maharashdam* is not correct: see Bass (n.81, above).

83 Bass (n.81, above), 162; Harav S. Daichovsky, "Ba'al Ha-matne Et Matan Ha-get Be-vitul Ḥiyuvav Ha-kodmim", *Teḥumin* 26 (2006), 156-159.

84 Bass (n.81, above), 157, 161, cites verdicts of the rabbinical court that do not take Maharashdam into account. See also Daichovsky (n.83, above).

85 See further §1.27 n.78 on 1-059024273-21, citing R. Shalom Mashash (who sat in the case) and gave an account of his reasoning in "Safeq Kefiyah Be-get", *Teḥumin* 23 (2003), 120-24; 1-21-022290027; File 61/82 [סא/82]. See §1.27 n.78 also for documentation, from a forthcoming article by Susan Weiss, of decisions in the Israeli rabbinical courts which themselves either ignore, limit or reject the approach of Maharashdam.

86 Rather, 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 Bass (n.81, above), 159-160; Pinḥas Shifman, "Ha-halakhah Ha-Yehudit Bi-metsi'ut Mishtana: Ma Me'akev 'Et Me'ukavot Ha-get?", *Aley-Mishpat* 6 (2007), 36-37.

87 Bass (n.81, above), 151-152.

2.4 *The roles of the husband and the bet din in conditional marriage*

2.4.1. It is important to consider the respective roles of the husband and the *bet din* in the termination of a conditional marriage. We encounter here competing values: on the one hand, *bet din* supervision in some form is necessary to prevent abuse of the system (a fear which clearly informed opposition to the French proposals); on the other hand, there is a strongly felt reluctance to take matters out of the hands of the husband,[88] in the light of *Deut.* 24:1, 3 (according to which termination is by act of the husband). But what balance can be achieved between these competing demands? The more precise the specification of the behaviour of the husband which generates termination of the marriage, the more the role of the *bet din* may be regarded as "declaratory": it simply declares what has already occurred, namely that the marriage has come to an end as a result of fulfilment of the condition. The less precise that specification and the greater the discretion given to the *bet din*, the more the role of the *bet din* may be regarded as "constitutive": the marriage is in fact terminated by act of the *bet din* itself.

2.4.2 This distinction, in an extreme form, generates radical conclusions: on the "declaratory" model, the role of the *bet din* is strictly superfluous (even though in practice it is highly unlikely that the woman would be allowed to remarry without such a declaration); on the "constitutive" model, the role of the condition (and thus of the husband) is strictly superfluous, in that we really have here a form of *hafka*'*ah* (and in circumstances in which *hafka*'*ah* is not normally available). However, there is no need to resort to either extreme form: terminative conditions may be drafted in such a way as to establish a "partnership" between the husband and the *bet din*, in which the act of the *bet din* is not a constitutive act of *hafka*'*ah* but is still a *necessary* part of the condition by virtue of which the marriage is terminated.

2.4.3 The above (somewhat abstract) analysis may be illustrated by reference to a number of proposals made by 20th century halakhic authorities (though their language is not always precise in relation to these issues). A strong version of the declaratory model is that of R. Pipano, whose definition of recalcitrance (as part of the condition) was noted above (s.2.3.2). Indeed, the groom's declaration under the *ḥuppah*, according to R. Pipano, should state 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). No act of the *bet din* is here mentioned. But we have noted that R. Pipano's definition of recalcitrance includes: "... she sues me to judgment before a righteous *bet din* and the *bet din* make me liable in any way..." Clearly, this act of the *bet din* is a necessary part of the condition by virtue of which the marriage is terminated. The "partnership" model is, to this extent, present. R. Pipano does not state the need for a further act of the *bet din,* declaring that all the elements of the condition (including the decision of the earlier *bet din*) have been fulfilled, but we may assume that such a further declaratory act may be required in practice.

2.4.4 At the other extreme we may note the proposal of R. Ya'aqov Mosheh Toledano, 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 (*kedin vekhashurah*) with his wife it can retrospectively annul the marriage.[89] 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

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

89 *Responsa Yam HaGadol* (Cairo 1931) no. 74; Freimann (n.72, 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.

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*. 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*. 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*.[90]

2.4.5 The 1925[91] proposal of R. Yosef Eliyahu Henkin in *Perushey Ibra* 5:25[92] combined a delayed *get* with a form of conditional marriage.[93] The issues here discussed arise at each stage. 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;[94] 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 "partnership" model is here evident. But R. Henkin sought to combine this with conditionality of the marriage — but based not on a *tnai* in the *ketubbah* but rather on a general *taqqanat haqahal* (with an initial 50-year duration) providing that "all Jewish marriages supervised by a rabbi be on the condition that if the aforementioned circumstances of '*iggun* come about and the [advance] *get* is no longer in existence or is void according to the *Halakhah*[95] then the *qiddushin* shall be retroactively annulled". We may note that R. Henkin here used the terminology of both condition and annulment. It seems, however, that his intention was that the *taqqanah* should, in effect, create a *tnai bet din* making every marriage subject to a terminative condition. He does not mention any further role for the *bet din* in this respect, from which we may conclude that the role of the *bet din* at this stage is declaratory. Since the operation of the condition, like the coming into effect of the *get*, involves acts or omissions of the husband ("if the aforementioned circumstances of '*iggun* come about"), we may regard this, too, as manifesting the "partnership" model.

2.4.6 In 5695 (1935-36) R. Benzion Meir Ḥai Uzziel proposed[96] 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

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[90] *Responsa Sha'arey Shamayim*, New York 5697, *EH* no. 42 as per Freimann (n.72, above), 394. See further §5.56; ARU 18:56.

[91] 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 when he retracted (though he may have considered that that, like his own proposal, was no longer viable in the light of *'Eyn Tenai Be-Nissu'in*). See also R. Mintz, "The First *Heter Agunah* in America", *JOFA Journal* VI/4 (Shavuot 5767), 14-15, and see further, on R. Henkin's proposal, ARU 6:4 (§3.1), ARU 18:88-91.

[92] See further §§3.45-48, 6.37, 6.42.

[93] On the precise nature of the combination, see s.5.2.2, below.

[94] On the issue of *bereirah*, see §7.34.

[95] This appears to relate to the consequences of (technical) failure of the *get al tnai*. However, it prompts the question whether it is 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 a traditional (*qiddushin*) marriage, the parties shall be taken to have intended no *qiddushin* at all. That appears to be the intention of a 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." See s.5.2.4, below.

[96] *Responsa Mishpetey Uzziel EH* nos. 45 & 46, as per Freimann (n.72, 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 §§3.42-44, 6.44, and ARU 12:6-30, including discussion of the responses.

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.*[97] 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 would exclude any question of retrospective promiscuity.[98] 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*.”[99] 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*.[100] It therefore does not conform to the “partnership” model[101] (though the issue of *zenut* does not necessarily depend upon it: see the next section). We may note that R. Uzziel made his proposals after the publication of ’*Eyn Tenai Be-Nissu*’*in*; indeed, in responding to R. Zevin’s invocation of ’*Eyn Tenai Be-Nissu*’*in*, he maintains that other permitted avenues (which were not there ruled out as forbidden) are not closed to us.[102] Here, the condition cannot take effect until a *bet din* (presumably, the local *bet din*, then endorsed by the regional *bet din* and the court of the Chief Rabbinate), determines that the woman has a persuasive claim that her husband caused her to be an *agunah*.

2.4.7 Some may argue that the role of the husband in any “partnership” with the *bet din* in the process of marriage termination (s.2.4.2, above) is sufficiently manifest in his agreement to the condition, and that fulfilment of the condition should be exclusively a matter for the *bet din*. Though we argue that advance specification of the husband’s role in the process is desirable in the interests of general transparency (s.2.3.1, above), our proposal (s.5.3.3, below) incorporates both alternatives.

2.5 *The fear of zenut/pilagshut*

2.5.1 An influential objection to terminative conditions has been the fear of retrospectively reducing the relationship between the spouses to one of *zenut* (promiscuity), which, though not rendering any children *mamzerim*, has occasionally been suggested (and probably more than occasionally felt) to risk imposing on them some kind of spiritual blemish.[103] But views differ as to whether *zenut* does

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[97] See ARU 12:17 (§XXXX1), reporting *Mishpetey Uzziel EH* 46. R. Uzziel maintained that 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*’. See §3.81; ARU 12:16 n.65, 12:23 (Qus. 3 and 5), 12:26 (Qu.2 and LV), 12:29 (LXVIII and n.140); ARU 20:3-4 n.2.

[98] See ARU 12:15 (§XXXVI).

[99] See R. Shlomo Riskin, “*Hafka*‘*at Kiddushin*: Towards Solving the Aguna Problem in Our Time”, *Tradition* 36/4 (2002), 27f., noting that the proposal was rejected by most of the generation’s rabbinic authorities.

[100] See s.2.5.2, and n.106, below.

[101] Indeed, 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 where the dissolution of the agreement is determined by either one of the parties being dissatisfied with the continuation of the partnership. See further §3.43.

[102] 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).

[103] 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 also addressed by R. Pipano: see ARU 13:15 (§59).

indeed result from the operation of terminative conditions. Some consider the resultant status to be that of *pilagshut*.[104] Moreover, according to a *baraita* in *Yebamot* 61b,[105] 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*), which clearly is not the case in the situation here being considered.

2.5.2 Some modern *posqim*, too, have argued against *zenut* as retrospectively created by the operation of a terminative condition. 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, provided that the latter involves an act of the *bet din*,[106] arguing from the Gemara itself (*Yevamot* 107a), supported by *Tosafot* in *Gittin* 81b s.v. *Bet Shammai*.[107] He adds that wherever the Talmud says that the Sages made his intercourse promiscuous it speaks only of cases where he initially betrothed by intercourse. What the Sages then decreed was that *that single act* be considered one of promiscuity, so that it should not effect betrothal. The maxim thus does not relate to the status of subsequent intercourse.[108] The latter acts only *appear* to be promiscuous.[109] Even the act of intercourse with which he betrothed her (if he did so)[110] remains licit/*mitzvah* as regards the couple. The Sages made it promiscuous so that it should not effect marriage but not so that the couple should be guilty of a promiscuous act. He then demonstrates[111] that both *Tosafot*[112] and the Rambam[113] agree to this. R. Berkovits also argues against retrospective *zenut*, stressing the fact that his proposed condition results in a marriage which the wife can in principle exit only with a *get*, and only in a minority of cases would there be annulment.[114] In his view this would apply even if fulfilment of the condition depended upon the spouses rather than the *bet din*, 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).

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104 See s.2.5.5, below.

105 See further §§3.52-53.

106 See §§3.56, 58. 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.

107 See further ARU 12:12 (§XXVII).

108 See further §3.58.

109 See further ARU 12:12 (§XXVIII).

110 Of which the Talmud says that, in order to annul the marriage, they "made it promiscuous".

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

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

113 *Responsa Rambam*, ed. *Meqitsey Nirdamim* (Freimann), Jerusalem 5694 no.167 (quoted in §3.58). The *responsum* appears also in Blau's edition (Jerusalem: *Meqitsey Nirdamim*, 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.

114 See further §3.59; ARU 4:27-28 (§IX.68); ARU 4:16-17 (§§IX.26-29), ARU 4:14-28 (§§IX.20-69). He argues, for example, that the concern for retroactive illicit intercourse is relevant only in the cases in the Talmud (*Ketubbot* 72b-74a) and *Shulḥan 'Arukh* (*EH* 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).

2.5.3 In any event, there are alternative explanations of the maxim*'Eyn 'adam 'oseh be'ilato be'ilat zenut*, according to which no retrospective *zenut* is actually created. One version is that a couple may hesitate about conditional marriage (and may thus not firmly intend it) 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.[115] Another (more common) version is that even if they firmly intended that the marriage be conditional at the time of *qiddushin*, when it comes to intercourse there is a presumption that they impliedly revoke the condition for fear that, otherwise, their intercourse may be regarded as promiscuous, *'Eyn 'adam 'oseh be'ilato be'ilat zenut* thus being taken to mean that a man does not engage in intercourse which *might* subsequently be rendered *zenut*.[116] However, it is disputed whether marital intercourse does create such a presumption of revocation,[117] not least because the condition is for the benefit of the woman,[118] and there can be no presumption that she would forego it[119] nor may her husband unilaterally forego it against her will.[120] More importantly, it should not be forgotten that *Shiltey ha-Gibborim* was referring to cases of vows and blemishes (as in the Talmud) where conditional annulment would definitely create retrospective promiscuity as a by-product. However, in cases such as the Berkovits proposal (where no retroactive illicit relationship would be formed) *Shiltey ha-Gibborim* would agree that there is no fear of the condition being revoked at intercourse. Furthermore, the presumption will be defeated (despite *Shiltey ha-Gibborim*[121]) by explicit repetition of the condition (before witnesses) at *ḥuppah*, *yiḥud* and (at least the first) *bi'ah,*[122] especially when this is accompanied by an oath on God's Name, *'al da'at rabim*, never to abandon the condition (see §2.5.4, below). In fact, the Ḥatam Sofer regards such repetition as a stringency over and above basic halakhic requirements.[123] That argument must be all the stronger if the initial condition itself includes a statement that marital intercourse will not be intended to revoke the condition.[124]

2.5.4 The above considerations do not protect the condition against express (intentional) revocation. To meet this contingency (and, *a fortiori*, to protect also against implied revocation) several

115 See further §3.54, ARU 17:119-20.

116 See further §1.37.

117 See further §3.65.

118 Cf. Berkovits (n. 42, 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.

119 If, indeed,*'Eyn 'adam 'oseh be'ilato be'ilat zenut* applies to a woman at all: see *Ḥayyim Shalom* II number 81; ARU 5:42-43 (§21.2.6.11.3). See also *ET* I, 559-60.

120 As Berkovits (n.42, above), 37, points out, an unconditional betrothal cannot be effected without her consent. Cf. ARU 8:10-11 (§2.6.3).

121 Citing this opinion in the name of *Rabbenu Yeshayah 'Aḥaron z"l* of Trani (Riaz), c. 1300. See further §3.64, ARU 4:21 (§IX.42), ARU 7:23 (§V.3), ARU 18:17. Berkovits (n.42, above), 25, describes *SHG* (*beshem* Riaz) as "the only dissenting voice", thus reflecting the view that we follow a single opinion *leḥumrah*. See further ARU 4:20-23 (§§IX.41-49). Against this, however, the authority of *Tosafot*, Rosh, Rif and Rambam may be cited. For sources and discussion see further ARU 4:21-23 (§IX.43-49), ARU 18:17-20. Berkovits (n.42, 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.

122 See further §§3.66, ARU 4:20 (§IX.40(i), noting the argument in *Responsa Terumat ha-Deshen* (end of no. 223) and *Ḥatam Sofer* (ibid. s.v. *We-'omnam*), that 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*.

123 Berkovits (n.42, above), 48, 52-53, citing *Resp. Ḥatam Sofer* vol. IV (= *EH* 2), no.68 s.v. *Wa-'ani*: see M.S. Goldberg and D. Villa, *Za'akat Dalot. Halakhic Solutions to the Agunot of our Time* (Jerusalem: Schechter Institute of Jewish Studies, 2006), 145 n.260; ARU 4:19-20 (§§IX.37-39).

124 R. Broyde's Tripartite Agreement includes: "Even a sexual relationship between us shall not void this condition."

contemporary proposals include the use of a (sometimes non-annullable) oath,[125] as suggested already by R. Aqiva Eiger (in the context of the condition of Mahari Bruna), that the spouses would never forego the condition at any future intercourse.[126] 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*".[127] Of course, such measures may well not prove effective outside the religious community, which is one reason for advocating different solutions for different communities.

2.5.5 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.[128] Though there is a general assumption that the operation of a terminative condition is equivalent to retrospective annulment of the *qiddushin*,[129] we may note that *hafka*'*ah* itself has not always and necessarily been viewed as retrospective,[130] and that the *tnai* of the Cairo Genizah *ketubbot* may have been intended to terminate the marriage with only prospective effect.[131] 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.

2.5.6 As for the view 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,[132] we find that other *posqim* permit *pilagshut*, so that the prohibition is a matter of *safeq* (and Rambam himself considers any doubtful 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*'.[133] 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.[134]

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125 See further §3.67 for R. Pipano (ARU 13:14 §58) and the use of an oath supporting a *ketubah* obligation to grant a *get* to avoid *yibbum* found in *ketubot* of Sephardi Jews in Ottoman empire; §3.68 for the proposals of R. Toledano and R. Broyde. On the latter's most recent formulations, see s.5.2.6 and nn.361, 365 below.

126 *Pitḥey Teshuvah* EH 157:4, para. 9, citing Resp. R. Akiva Eiger no.93; ARU 4:20-21 (§IX.41), ARU 18:57-58.

127 *Perushey Ibra* 5:25. See further §3.69.

128 See further §3.51 and n.353 below, on Dayan Broyde's proposal. Of course, this would function as a remedy for the "chaste" but not the "unchaste" wife: see further §6.2.

129 See further §3.77.

130 See further §§5.13-27; *Tosafot* (according to some later opinions: see further §5.22) envisaged circumstances where *hafka*'*ah* in the case of a cancelled *get* was only prospective; indeed, Shemuel Atlas (n.314, below) argues at length that annulment is never really retrospective (see further §5.25).

131 See further §3.79.

132 According to Radbaz, *Responsa* IV 225, this is for Rambam only a rabbinic prohibition. See, however, §3.55 on the argument of R. Yosef David Sinzheim, in *Responsa Bet Naftali* (Brooklyn, New York, 5766) no.45, part 1, s.v. *We*'*od yesh lomar* (p. 276, col. 2), made in the context of the conditional marriage of a groom who has an apostate or missing brother, that the situation would still be one of *safeq* given the factual doubt at the time of the marriage as to whether the condition would ever be fulfilled. R. Sinzheim was the author of *Yad David* and head of Napoleon's "Sanhedrin" in Paris.

133 See 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*. See further §§3.87.

134 *Noda*' *BiYehudah* II *Ha*'*Ezer* 27 (at the end) argues 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.

2.6 *Conclusion regarding the authority for the use of conditions*

2.6.1 We concluded above (§2.1.1) that according to most *posqim* conditions are effective at least *bedi'avad*, independent of any other solution, provided that the *Halakhah* is meticulously adhered to both in the substance and form of the condition.[135] 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. It would be possible to neutralise the opposition to conditional marriage on the bases of either the status of minority opinions in this area of halakhah (s.1.2), or reliance on *she'at hadeḥaq*.[136] However, a better strategy is to combine conditions with other remedies, in a way which will invoke *sfeq sfeqa.*[137]

2.6.2 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.[138] Similarly, Professor Feldblum has argued that there is an אומדנא דמוכח, at least as regards non-religious women, in relation to the *qinyan* aspect of *qiddushin.*[139] 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 hameqadesh ada'ta derabbanan mekadesh*.[140] Based on Tosafot and R. Moshe Feinstein, Dr. Westreich advances an analysis of *'umdena* as a potential tool for terminating marriage due to a defect or behaviour which occurred only after marriage,[141] though whether the possibility of *'iggun* may be regarded as an *'umdena* is unclear.

3. *A 'defective' Get*

3.1 *Introduction*

While *kefiyah* in its classical sense — physical coercion — cannot serve as a global solution to the problem of recalcitrance, for a variety of reasons (both internal and external), the history of the matter casts significant light on issues which may prove relevant to such a global solution, and thus advances the overall halakhic analysis.

3.2 *The kefiyah of the Geonim*

3.2.1 When we consider the *kefiyah* of the Geonim in support of the *moredet me'is 'alay*, and the classical account of the matter provided by Rav Sherira Gaon,[142] we are faced by a series of

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135 Ss. 2.1.1-2.1.2; see also §§6.47, 7.7.

136 See further §§2.38-41, 6.22.

137 See further below, s.5.4, below.

138 *Responsa 'Ohel Mosheh* (Jerusalem 5663) no. 2; Freimann (n.72, above), 393, para. 12. According to this, however, there could never be a problem of *'agunah* yet it is clear from the Talmud that there can be cases of unresolvable *'iggun* such as *mayim she'en lahem sof* where no acceptable evidence of death presents itself. R. Schochet does not address this problem.

139 M.S. Feldblum, "Ba'ayat Agunot U-mamzerim", *Diné Israel* 19 (5797-5798 [1997-1998]), 209-11.

140 See further §§3.71, 5.33.

141 See further §§3.73-75, ARU 10.

142 *Teshuvot Ha-Geonim*, *Sha'are Tsedek*, Vol. 4, 4:15. See 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), 56-59; G. Libson in N.S. Hecht, B.S. Jackson, S.M., Passamaneck, D. Piattelli and A.M. Rabello (*An Introduction to the History and*

questions, 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.[143] 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.[144] 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.[145] 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.[146] This (like the different explanation of the basis of the geonic measures by the teachers of Me'iri's teachers[147]) illustrates the close historical and conceptual connections between the "remedies" of coercion, annulment and conditions.

3.2.2 Also contentious is the question of the authority by which the Geonim proceeded. Rav Sherira Gaon was quite explicit in claiming that it was the Babylonian Talmud which introduced coercion, after the twelve month waiting period[148] — a view also adopted by Rambam,[149] but rejected by others, including Ramban and Rashba.[150] 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".[151] The Rishonim variously take this as a case of הוראת שעה or צורך שעה[152] (Ramban, for one, denying that it was purely temporary[153]), an argument ignored by Rabbenu Tam. Others, including Rambam, viewed the gaonic practice in terms of מנהג, which Rabbenu Tam viewed as illegitimate.[154] 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".[155]

Sources of Jewish Law (Oxford: Clarendon Press, 1996), 235-238 ("The *taqqanah* of the Rebellious Wife"). See further §4.18, ARU 15:8-9.

143 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'." See further §4.20.

144 See Riskin (n.142, above), 47f. See further §4.21 on Rabbenu Tam's objection to such a *ḥerem*. See also R. Henkin's reference in *Perishey Ivra* p.116 para.26 to a *ḥerem* of the *kadmonim* that a man should not make his wife an *agunah*.

145 According to the *Halakhot Gedolot, Hilkhot Ketubbot*, 36, quoted in Riskin (n.142, above), 48f.: "... we grant her a bill of divorce immediately (ויהבינן לה גיטא אלתר)". Similarly in *Teshuvot Ha-Geonim* (Harkavi edition), 71: " ובתר גמרא תקינו רבנן דאפילו מאי דתפיסא מהפקינן ליה מינה, ויהבינן לה גיטא לאלתר"; *Teshuvot Ha-Geonim* (*Geonim Kadmonim*), 91. For the formulation of R. Shmuel b. Ali, see s.3.6.3, below. An anonymous 13th-cent. responsum uses the expression: "they wrote her an immediate bill of divorce" (וכתבי לה גט לאלתר): Riskin (n.142, above), 52f. See further §4.21.

146 *Shut ha-Rosh*, 43:8 (p.40b). 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. See further §4.22.

147 s.2.1.5, above.

148 See n.142 above and §4.18.

149 *Hilkhot Ishut* 14:8. See further §§4.32, 40-42.

150 See further §4.31.

151 *shebnot yisrael holkhot venitlot bagoyim liytol lahen gittin be'ones miba'aleyhen*. See further §§4.18, 27.

152 See further §4.27 for the *Sefer Ha-Maor* of R. Zeraḥyah Halevi and the Rosh.

153 *Milḥamot* on *Rif*, *Ketubot* 27a, quoted by Riskin (n.142, above), 112. See further §4.27.

154 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.

155 *Resp.* 43:8, p.40b, Riskin (n.142, above), 126 (Heb.), 128 (Engl.), and see further §§4.24-26, 32.

3.3 *The opposition of Rabbenu Tam*

3.3.1 It was, however, the view of Rabbenu Tam, opposing the geonic measures, which was to prevail. There are, in fact, two conflicting passage in the *Sefer Ha-Yashar*:[156] one appears to reject *kefiyah* on 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.[157]

elsewhere, however, we read:

> After all, we learned in the Talmud that [the Sages] did not force [a divorce] until twelve months, and they [the Geonim] advanced the forcing of the divorce before [the time which] the law [allows].[158]

It is difficult to reconcile these statements,[159] 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.[160] *Responsa Maharibal* III:13 tells us that even Rabbenu Tam himself followed the custom of the Geonim at first,[161] and R. Ovadyah Yosef cites this as evidence that Rabbenu Tam changed his mind, in the direction of greater stringency.[162] Though later Rishonim understood Rabbenu Tam as completely rejecting *kefiyah*, his real attitude towards the geonic measures must remain a matter of *safeq*.[163] Indeed, his basic attitude to *me*'*is* '*alay* as a grounds for divorce is also unclear: the fact that he recommended *harḥaqot* against a recalcitrant husband implies that he accepted that *me*'*is* '*alay* was a legitimate grounds for divorce, at least where there was *amatlah*;[164] the fact that he recommended elsewhere that a husband who did not wish to divorce his wife (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,[165] 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*.[166]

3.4 *Subsequent Authorities*

3.4.1 Early Ashkenazi Rishonim, including Rabbenu Gershom Me'or Hagolah, Rashi and Rashbam,

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156 See further §§4.33-38.

157 Riskin (n.142, 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. See also further passages from the *Sefer HaYashar* quoted in §4.34.

158 Riskin (n.142, above), 97 (Heb.), 98f. (Engl.), quoting *Sefer Hayashar*, ed. Rosenthal, *Siman* 24, p.40. See further §4.33.

159 See further §4.35, discussing a possible resolution based upon the understanding that Rabbenu Tam interpreted the *moredet* בעינא ליה ומצערנא ליה in an unusual way.

160 See further §4.37, citing I. Ta-Shma, "Tam, Jacob ben Meir", *Encyclopedia Judaica* (Jerusalem: Keter, 1973), vol. XV, col. 781.

161 Though this conflicts with both statements, and indeed with Rabbenu Tam's attitude to *minhag* in this context: §4.32.

162 *Yabia*' '*Omer* III *EH* 19:15: see ARU 6:11-12 (§6.6). See further §4.36.

163 See further §§4.37, 68.

164 SeeR. Shmuel Gertner, *Kefiyyah BeGet* (Jerusalem, 5758), 118:1 = p. 478. See further §§4.52-53.

165 See text at Riskin (n.142, above), 105, and further §4.35.

166 See further §4.39, citing Rema, *Yoreh De*'*ah* 228:20 (end); *Shakh*, *YD* 228:20, sub-para. 56; *Noda*' *Bi-Hudah* I YD no. 68 s.v. *Wekhol*; R. Ovadyah Yosef, *Yabia*' '*Omer*, III, *EH*, 18:13; *Enzyklopediah Talmudit* VI, col. 422, at note 968 (Me'iri in the name of "some of the sages of the [previous] generations").

interpreted the final decision of the talmudic *sugya* (*Ket.* 63b) as authorising *kefiyah* (after twelve months) in the case of the *moredet me*'*is* '*alay*, the wife who rejected her husband for reasons of "disgust";[167] indeed, the predecessors of Rabbenu Tam largely favoured unilateral divorce for the wife who claimed *me*'*is* '*alay*, as we see from as we see from Raban,[168] Alfasi[169] and Rashbam.[170] 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*.[171] It is possible that the variant reading of Amemar in MS Leningrad Firkovich[172] reflects this interpretation of Amemar's view in *Ket.* 63b, making the force of Rashi's נותן לה גט that much more explicit.[173]

3.4.2 Rambam (followed in this respect by contemporary rabbinical courts[174]) appears to have regarded the financial sacrifice the *moredet me*'*is* '*alay* was willing to make (in forfeiting the *ketubbah*) as a sufficient guarantee of her sincerity and of the strength of her feeling that she could no longer tolerate the marriage. That being so, he argued, she was not to be treated כשבויה,[175] and so "we force him to divorce her immediately" (כופין אותו להוציא לשעתו), albeit on less liberal financial terms than those of the Geonim.[176] He bases this on his independent understanding of the

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167 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), 211; A. Grossman, *Pious and Rebellious – Jewish Women in Medieval Europe* (Waltham: Brandeis University Press, 2004), 242. In many respects, Rashi continues *Perushey Magenza*, which largely continues the tradition of R. Gershom and his students: see Israel M. Ta-Shma, *Ha-Sifrut Ha-Parshanit La-Talmud* (Jerusalem: Magnes, 2000), I.35-56.

168 Rabbenu Eliezer b. Natan (b. 1090, Mayence). See Riskin (n.142, above), 92f.

169 *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 (n.142, 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."

170 See Riskin (n.142, above), 93. On the early Rishonim who followed the Geonim on *kefiyah*, see also secondary literature cited at ARU 9:1-2.

171 See further §§4.11-16 and ARU 9, for the detailed argument: Rashi understands the position of Rabbotenu in the Tosefta in a way similar to the more explicit formulation of the Yerushalmi: היא שוברת כתובתה ויצהא, and apparently understands both Amemar's position (in the traditional text) and the final conclusion of the *sugya* as authorizing coercion. 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 ה"בד בתוספות אבל), as well as by academic researchers: see E. Westreich (n.167 above), 214; Grossman (n.167 above), 242. See further §4.10-16.

172 *Dikdukei Soferim ha-Shalem* [*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. The traditional text there reads: "... if she says, however, "He is repulsive to me (מאיס עלי)," [Amemar said] she is not forced (לא כייפינין לה). Mar Zutra said: She is forced (כייפינין לה)"; in MS Leningrad Firkovich Amemar's view is recorded as "*he* is forced (כייפינין ליה)". See further §4.7.

173 On the dogmatic significance of this variant, see further §4.76.

174 See ARU 16:191-92, quoting PDR 6/325-353.

175 *Hilkhot Ishut* 14:8. See further §4.40.

176 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 (n.142, 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,

statement of Amemar in the (traditional text of the) Talmud.[177]

3.4.3 Though strongly attacked by the Rosh,[178] who presumes that the *moredet me'is 'alay* has the ulterior motive of *notenet eynehah be'aḥer*, and by Rashba,[179] 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,[180] and on their arrival in Algiers following the edicts of 1391, Ribash[181] and Rashbetz[182] (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.[183] 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 *dayyan* who forces her to return to her husband when she rebels, like the law of the Arabs, is to be excommunicated ...".[184] Two generations later, Rashbetz's grandson, R. Avraham Ibn Tawwa'ah, was aware of local traditions in Algeria which still followed the position of the Rambam.[185] Even Rema in *Even Ha'Ezer* 77:3 refers without criticism to places that practise coercion for *me'is 'alay*.[186] There is thus doubt over the dominance of Rabbenu Tam's view, either in his own generation[187] or later. In geographical terms, the practice appears to have spread by the time of Rabbenu Tam (and on his own account) as far as Paris.[188] And in *Tosafot Ketubbot* 63b, s.v. *Aval*, we find a systematic reply to every argument against those who apply coercion in cases of *moredet me'is 'alay* – except the argument that we do not find any

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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." See further §4.41.

177 Riskin (n.142, 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". See further §4.42.

178 *Rosh*, *Resp.* 43:8, quoted by Riskin (n.142, above), 125f. (Heb.), 127f. (Engl.). See further §4.43.

179 *Rashba*, *Resp.* 572, 573 in Bnei Brak ed., 1948, Pt.1, p.215, quoted by Riskin (n.142, above), 114 (Heb.), 116; (Engl.). See further §4.43.

180 See Westreich (n.167 above), 305.

181 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, 2009; Jewish Law Association Studies XX), forthcoming, cites the custom of Talmes (capital of Algiers) as attested by *Resp. Rivash* (end of s.104).

182 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.

183 See §4.47; Westreich (n.167, above), 216.

184 See further ARU 12:5 (§VIII); ARU 18:74, both quoting the account of R. David Bass, "'*Al Gerushin wa'Aginut lefi Nuqudat Mabat 'Ortodoqsit*", at http://www.snunit.k12.il/seder/agunot/view.html.

185 See Westreich (n.167, above), 217. See further §3.4.4, below.

186 See further §4.47; ARU 5:18-19 (§12.2.13).

187 See Riskin (n.142 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.*

188 *Sefer Hayashar*, per Riskin (n.142 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 *EH* 18:8 quotes R. Ḥananel as apparently accepting *kefiyah.* See further §4.45.

mention of coercion in the text of the Talmud itself.[189] If the variant reading of Amemar's view had been available to the Tosafists, that argument too might have admitted of a reply. Indeed, Rashba[190] 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*!"

3.4.4 R. Avraham Ibn Tawwa'ah argues,[191] on the basis of *responsa* of Rashbets,[192] 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 *bediavad*). 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*[193] but is only willing to say that if she has already remarried she may remain with her new husband.[194] 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.*[195] We may thus argue that had Maran seen responsa II:69 and II:180 of *Tashbets* 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.[196] 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*,[197] we may nowadays permit coercion of a *get* in accordance with the Rambam even *lekhatḥillah*.[198]

3.4.5 A number of responsa of the Aḥaronim written *after* the dissemination of the *Shulḥan Arukh*,

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189 See Appendix B (to ch.4), at pp.136-39 of the Draft Final Report, and §4.45.

190 See §4.80 and ARU 9:2 note 11.

191 *Ḥut haMeshullash, HaTur HaShelishi* no.35, p.11b col.1, s.v. *umikol maqom*.

192 I:4, II:69 & 180. See further ARU 6:11-12 (§6.7 and n.39).

193 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.

194 Goldberg and Villa (n.123, 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).

195 *Resp. Yabia*' '*Omer*, X, *Ḥoshen Mishpat* 1, s.v. *Teshuvah*.

196 See further §4.51 on *EH* 79 s.v. *Umah shekatav wekhen hi*', at the end, but noting the contrary opinion of Rema; ARU 6:12 (§6.7). See also §§4.78-79, 4.82, 6.58.

197 Which seems highly likely: §2.38 on R. Shlomoh Itsban, *Ma*'*a lot LiShelomoh,* no. 2, and R. Ovadyah Yosef, *YO* III *EH* 18:13. See also §6.22.

198 See further §7.8; 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.

despite the rejection there of Rambam's position (*Shulḥan Arukh, Even Ha'Ezer*, 72.2),[199] may also be cited in support of *kefiyah* in cases of *me'is 'alay*.[200] Indeed, *posqim* of the modern era have also supported it, sometimes adducing new sources. R. Herzog[201] 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"[202] and applies to those who forbid coerced divorce without reference to this ruling Rema's qualification of *hilkheta kebatra'ei*.[203] Indeed, we may argue that this may be applied even to the *Shulḥan Arukh* itself. And Dayan Waldenberg in *Tzitz Eliezer* 4.21 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.[204] Dayan Waldenburg also cites Rema in *EH* 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 which, he notes, is endorsed by the *Shakh* and in *Noda' Bi-Huda*.[205] He advocates a general agreement of all the rabbinic courts to adopt such a view.[206] 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.[207]

3.5 *The Nature of the husband's veto*

3.5.1 Here we have to ask a basic theoretical question: what conception of freedom of the husband's will underlies the issue of (permissible and impermissible) *kefiyah*?[208] Rambam's classical, and oft quoted, explanation of *rotseh ani*[209] 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. 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.

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[199] Of particular interest is the reply of the *Ḥatan Sofer* (*Resp*. no.59) concerning his grandfather, the *Ḥatam Sofer*, on this matter: see §4.58.

[200] See further Sinai (n.181, above), noting, inter alia, that 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. R. Baruch Kelei, *Resp. Mekor Barukh* (16th century, Saloniki), s.17, wrote that, where the custom is to coerce in cases of *ma'is 'alay*, if the halakhic authorities of a city deem the woman's claims to be well grounded and conclude that his intention is to "chain her", it is appropriate for them to rely on their custom. Echoes of these rulings are even found in the 19th century in the Land of Israel: *Resp. Ma'aseh Ish*, *Even Ha'Ezer*, 11. See further §4.45.

[201] *Resp. Heikhal Yitsḥaq*, *Even Ha'Ezer*, part 1, no.2. See ARU 6:10 (§6.5).

[202] Later in the responsum, s.v. *WeRabbenu Yeshayah.*

[203] See further §4.59.

[204] See further §4.60 on his letter to R. Elyashiv published in *Tzitz Eliezer* 5.26 defending his call for the re-introduction of coercion in cases of *me'is 'alay*.

[205] See §4.39 and ARU 5:17-18 (§§12.2.12) for the citations. See also Riskin, "*Hafka'at Kiddushin*..." (n.99, above), 6-7.

[206] Quoted in §4.61.

[207] See further §4.62.

[208] See further §§4.3, 4.92.

[209] *Hilkhot Gerushin* 2:20: "...in the case of one whose evil inclination drives him to avoid doing a mitzvah 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 ha-rah*)": see further ARU 17:107-111.

3.5.2 Equally important is the issue of what it is, exactly, to which the husband must consent. Rabbenu Yeroḥam wrote:

> If she says, 'I do not want him. Let him give me *get* and *ketubah*' 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 *ketubah*].[210]

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".[211] 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*.[212]

3.5.3 If, then, we construct the husband's will as that of a faithful member of the community who has internalised Torah values, 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.[213] As noted above (s.2.3.3), the matter is discussed technically in terms of the permissibility of attaching such conditions to the granting of a *get*, and involves the question of the nature and status of the *ḥumra shel eshet ish*. However, the issue goes beyond technicalities, and raises basic issues of morality. If we are to discuss the matter as one of "rights", we also need to take account of the attitude of the halakhah to abuse of rights,[214] 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 is a *mitsvah* or even a *ḥiyyuv* to give his wife a *get*.

3.5.4 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.[215] 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

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210 *Sefer Mesharim*, *netiv* 23, part 8. R. Sha'anan, "Ofanim Li-khfiyat Ha-get", *Teḥumin* 11 (5750), 213, observes there that we do not find amongst the *posqim* anyone who disagrees with this ruling, although he notes that some limit it to cases in which the situation was not the fault of the wife. See further §4.62.

211 *Iggrot Moshe* EH 3:44. R. Feinstein says that this is a strong argument. At the very least, it may be used as a *safeq* to combine with other arguments for leniency. See further §§4.63, 4.92.

212 R. Shear-Yashuv Cohen, "Kefiyyat Ha-get Ba-zeman Ha-zeh", *Teḥumin* 11 (5750), 201.

213 See further §§1.20-25.

214 Including the applicability of *kofin al midat sedom*: see further §§1.23-25.

215 See also the words of the *magiyah* 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." See further §1.16, discussing, *inter alia*, the remarks of the Ḥazon 'Ish, *Bava*' *Qama*', section 10, sub-section 9.

parts of which women enjoy full equality before the law – by the irony of a divine Law[216] 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.

3.5.5 This understanding of the nature of the husband's "veto" has implications for the role played by the *bet din* where *kefiyah* is applied. The *bet din* is not here exercising a totally independent ("strong") discretion, in opposition to and overriding the will of the husband. Rather, its role is that of ensuring that the husband does indeed behave as a faithful member of the Torah community, thus giving effect to his "true" intentions. Here again we see that the role of the *bet din* balances that of the husband, both in its educational role as regards the husband and in representing the community interest[217] — here again, the "partnership" model of the relationship between the parties and the community institutions.[218]

3.6 *Modifications of the basic principle*

3.6.1 The basic biblical principle is clear: *qiddushin* may be terminated only by death of one of the parties or the voluntary giving of a *get* by the husband. However, the use of coercion against the husband was accepted already in the time of the Mishnah in some cases where the law recognised that the woman had a right to divorce:[219] broadly, cases of "major" physical defect and malodorous occupations inhibiting conjugal relations;[220] 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.[221] If it is not closed, it would not be difficult to argue that

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216 Whose ways are ways of pleasantness and all of whose paths are peace: *Prov.* 3:17.

217 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."

218 Cf. s.2.4.7, above.

219 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 Y. Breitowitz, *Between Civil and Religious Law. The Plight of the Agunah in American Society* (Westport Conn.: Greenwood Press, 1993), 42, on the distinction between *yotzee* and *kofin*. Cf. 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), 154, maintaining that it is only in extraordinary circumstances, as discussed in *Shulḥan Arukh*, *Ha'Ezer* 154, that physical force or some other form of duress may be used.

220 *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.219, above), 42-45; Riskin n.142, above), 9ff.

221 For the view that the categories of permissible coercion are closed, see M. Chigier, "Ruminations over the Agunah Problem", *The Jewish Law Annual* Vol. 4 (1981), 208-225, at 213, reprinted in *Women in Chains* (n.219, above), 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 Shear-Yashuv Cohen, "Kefiyyat haget bizeman hazeh", *Teḥumin* 11 (5750), 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*. See further ARU 6:9-10 (§6.1). For other Aḥaronim

recalcitrance in the face of the *bet din*, its very purpose being to keep the wife chained, may itself constitute a form of abuse analogous to behaviour already recognised in post-talmudic sources as giving the wife a right to divorce.[222] These issues are distinct from that of the *maḥloqet* between the Geonim and Rabbenu Tam, which is specific to the *moredet me'is alay*, the wife who refuses relations with her husband on the grounds of "disgust" (and even here, of course, divorce is unproblematic where the husband *does* agree). Yet even where we do follow Rabbenu Tam, the prohibition of *kefiyah* requires consideration of the following further issues:

(a) the exact definition of what it is the husband must agree to — the termination of the marriage or his participation in the *get* procedure (s.3.5.2, above);

(b) the exact definition of what constitutes *kefiyah*, and what may fall within the (permissible) range of *harḥaqot* (s.3.6.2, below);

(c) the relationship between an invalid *get* and *hafka'ah* (s.3.6.3, below) and the related issue of the status of a *get me'useh* (s.3.6.4, below);

(d) the status of the husband's consent if originally given in the form of a *harsha'ah* or advance *get*, where the husband changes his mind before the *get* takes effect (s.3.6.5-8, below).

3.6.2 Rabbenu Tam himself, while opposing *kefiyah*, approved the use of "lesser" measures,[223] designed to "distance" the offender from the community[224] (hence, the term *harḥaqot*), even (as R. Gertner points out[225]) in a case of *me'is 'alai* where there was not (in his view) even a *mitswah* to divorce.[226] The sanctions of the 1995 Israeli legislation[227] are often regarded as a modern version of the *harḥaqot*.[228] Yet halakhic opposition even to these has emerged in Israel in recent times, based on a *responsum* of Maharibal,[229] despite R. Ovadyah Yosef's argument that Maharibal's *ḥumrah* is based on an erroneous understanding of Rabbenu Tam's *harḥaqot*.[230] Some *dayanim*, however, are prepared to apply *harḥaqot* in such cases: R. Daichovsky argues,[231] following

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supporting the use of coercion, see Riskin n.142, above), 139; Riskin, "*Hafka'at Kiddushin...*" (n.99, above), 6f., citing *inter alia* R. Ḥayyim Palaggi (19th cent. Izmir), *Resp. HaḤayyim VeHashalom,* vol.2, no.112.

222 B.Z. Schereschewsky, "Divorce, In Later Jewish Law", *Encyclopedia Judaica* (Jerusalem: Keter, 1973), VI.126-128, classifies the wife's grounds for divorce 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.

223 Rav Yehudai Gaon had mentioned the use of a *ḥerem* against the husband (see Riskin (n.142, above), 47f.), though this is regarded as *more* coercive, and thus less acceptable, by Rabbenu Tam, for whose view see §4.21 n.665.

224 Involving communication, social and business relations, *bikur ḥolim*, synagogue participation, circumcision and burial. See further §4.68.

225 *Kefiyyah BeGet* (n.164, above), 487-89.

226 In fact, we are told that *batey hadin* in Israel today are more prepared than in the past to grant a *ḥiyyuv* in cases of *me'is 'alay*, albeit without any form of coercion.

227 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, and the halakhic relationship to the *harḥaqot, see* Y. Kaplan, "Enforcement of Divorce Judgments by Imprisonment: Principles of Jewish Law", *The Jewish Law Annual* XV (2004), 57-145, at 122ff.

228 Kaplan (n.227, above) notes that the explanatory notes accompanying the Knesset Bill 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 EH 25:3-4. Cf. R. Jachter, "Viable Solutions II", http://www.tabc.org/koltorah/aguna/aguna59.2.htm. The relationship is more fully (and critically) discussed by Kaplan (n. 227, above), 130-33.

229 Quoted in *Pitḥey Teshuvah* to *EH* 154 sub-para. 30; see further §4.69.

230 *Yabia' 'Omer* VIII *EH* 25:3-4 (published in 5755=1994/95); see further §4.69.

231 Rabbi S. Daichovsky, "Kefiyat Get 'Al Yedey Hamlatsah leNikui Shlish Ma'asar", *Teḥumin* I (5740), p.248; on his definition, in relation to the value of the husband's autonomy, see ARU 17:152.

R. Herzog's analysis,[232] that both limited financial and physical sanctions 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*. Indeed, even the power of imprisonment under Israeli law[233] is justified by some on these grounds.[234]

3.6.3 While an illegally coerced *get* may be insufficient in itself to terminate a marriage, it may provide a basis for *hafka'ah*. For this appears to be exactly the analysis adopted by the Rosh, in commenting on the geonic *kefiyah*:[235]

> … 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 (והסקימה דעתם להפקיע הקידושין) when a woman rebels against her husband.[236]

At first sight this may appear a somewhat arbitrary confusion of categories, a rather crude and anachronistic attempt to rehabilitate the geonic measures despite the fierce criticism of Rabbenu Tam.[237] After all, one might argue, a *get* is an act of the husband while *hafka'ah* is an act of the court. Yet the early history of the matter (of which the Rosh was assuredly aware) does not distinguish the two forms of termination in so radical a manner. On the one hand, the Rosh's own teacher, the Maharam of Rothenburg,[238] cites a responsum of R. Shmuel b. Ali,[239] which (not alone[240]) uses a plural formulation נותנין לה גט לאלתר in describing the *kefiyah* of the Geonim: this appears to suggest that the *bet din* used what we may regard as the ultimate form of coercion — the writing and delivery of the *get* by the court itself, without the husband's participation.[241] Conversely, there is a stratum of the Talmud itself which understands *hafka'ah* not as a simple act

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232 See R. Daichovsky's forthcoming article, "Darko Shel Ha-Rav Herzog Bi-khefiyat Get".

233 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.227, above), 126-29.

234 See *Yabia' 'Omer* III *EH* 20:34. For a discussion of (traditional) *kefiyah* in relation to concepts of torture and human autonomy, see §4.70 n.882 and ARU 17:154-62.

235 *Shut ha-Rosh*, 43:8 (p.40b). See also Riskin (n.142, above), 125 (Heb.) 126f. (Engl.), and Riskin's own comments at 129; see further §§4.22-24.

236 R. Ovadyah Yosef, "Kol Hameqaddesh ada'ta' deRabbanan Meqaddesh we'Afqe'inho Rabbanan leQiddushin Mineh", *Torah Shebe'al Peh* (Jerusalem 5721), 101, writes that we may use this as part of the basis for annulment even today. See further ARU 18:51.

237 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". On the other hand, R. Broyde, *Marriage* (n.34, 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 law"; 61: "…there are nearly insurmountable halachic objections to a return to halachic rules that have not been normative for 800 years".

238 On the views of the Maharam, see n.146 above.

239 Riskin (n.142, above), 62f., quoted in §4.21. It is quoted in the *responsa* of Maharam of Rothenburg, 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 be-Israel* (Tel Aviv: Bialik Institute, 1986), 15 n. 44e; Goldberg and Villa (n.123, above), 274 n.570.

240 See n.145, above.

241 See further §4.21. See also the suggestion in §3.79 that the unusual formula in some Cairo genizah *ketubbot*, authorising termination of the marriage על פם/פום בית דינה, may reflect the same procedure.

of the court but rather as the validation of an otherwise invalid (e.g. biblically cancelled) *get*.[242]

3.6.4 /The above analysis is clearly relevant to our understanding of the status of a *get me'useh*. R. Ovadyah Yosef[243] has noted that we also find in the *responsa* of the Rosh 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.[244] 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,[245] 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.[246] The remarriage is thus valid *bedi'avad*. Rema, however, takes a contrary view,[247] 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.[248] 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.*[249] Underlying these arguments we may detect a survival of the view that the various forms of marriage termination, whether by act of the husband (*get*) or by the court (*hafka'ah*) are in fact complementary, and that in appropriate circumstances the court may validate an otherwise invalid *get.*

3.6.5 A less problematic argument 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,[250] or by signing a *harsha'ah* delegating such delivery (on fulfilment of stated conditions) to a *bet din* in the future.[251] What is in issue here is simply the timing of the husband's consent, and his ability to withdraw it, once given. As argued above in relation to conditional marriage (ss.2.5.2-3), there are ways of preserving such conditions against subsequent (implied or

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242 See further ss.4.2.3-4, below. Of course, this applies only in cases where there is a defective *get*, not cases of invalidity of the initial *qiddushin*. In the latter situation (*Shut ha-Rosh*, 35:2 deals with a case where the groom "persuaded her by fraud and cheating"), the Rosh appears more inclined to resort to (genine) *kefiyah.* See further §4.23. We may note that neither strategy is applied to a case of *me'is 'alay.*

243 *Torah Shebe'al Peh* (n.236, above), 99.

244 See further §4.71 on *YO* III *EH* 19:21, citing Rashbets; Bet Yosef *EH* 77. On Rosh's view see also s.3.4.4 above.

245 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.

246 On these sources, see Gertner, *Kefiyyah BeGet* (n.164, above), section 42, pp.203-07, arguing that it is not possible clearly to prove the argument from these sources. R. Ovadyah Yosef seems to have had in mind the statement to this effect by *Agudat Ezov* EH 19 para.18 (which R. Gertner strongly questions).

247 Rema, *Darkhey Mosheh* 10 on Bet Yosef *EH* 77.

248 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*).

249 "Derekh Hashiput Hare'uyah Bevatey Hadin Harabaniyim", *Teḥumin* 28 (5768), 21.

250 See s.2.4.5 above, on R. Henkin's proposal, and §§3.45-48.

251 For R. Broyde's proposal, see "Review Essay. An Unsuccessful Defense of the Beit Din of Rabbi Emanuel Rackman: *The Tears of the Oppressed* by Aviad Hacohen", *The Edah Journal* 4 (Kislev 5765), 21-28 (at http://www.edah.org), at nn.51-54 and pp.21-22; and more fully in M. Broyde, "A Proposed Tripartite Agreement to Solve the *Agunah* Problem: A Solution Without Any Innovation", in *The Manchester Conference Volume,* ed. L. Moscovitz (Deborah Charles Publications, 2009; Jewish Law Association Studies XX), forthcoming. See further §§3.84-85.

explicit) revocation. 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.*[252] Indeed, the talmudic case closest to this, where a *get* entrusted to a *shaliaḥ* is revoked before delivery to the wife, is itself discussed in terms of *hafka*'*ah*.[253]

3.6.6 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.[254] 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.[255] We have seen, moreover, that several contemporary proposals include the use of a (sometimes non-annullable) oath.[256] As for explicit cancellation, the groom may swear an oath *al da*'*at harabbim* that he will never cancel the *harsha*'*ah* (whether by intercourse or otherwise),[257] but even this provides no complete safety net: if the husband subsequently tells his wife or any two people explicitly that he declares the *get/harsh*'*ah* cancelled, he simply compounds the making of his wife an *agunah* with a broken oath. It therefore becomes necessary to incorporate this contingency into the definition of recalcitrance which ultimately may trigger *hafqa*'*ah.*[258]

3.6.7 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,[259] while the delayed *get* is subject to problems of *get muqdam/get yashan*.[260] 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

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252 For a full discussion of the issues, of principle and drafting, see further R. Abel's analysis in ARU 18:57-67, arguing, at p.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.42, 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 *bererah.*

253 *Gittin* 33a (s.4.2.3 below); see further §§5.14-16.

254 See s.2.5.2 above; §§3.63-69, 6.35-36; ARU 18:57-58.

255 See *Maggid Mishneh*, *Gerushin* 9:25 citing *Ḥiddushey Ramban* to *Gittin* 26b.

256 See s.2.5.3 above. On the possible use of measures of compulsion in support of *fulfilment of the oath*, see §7.26.

257 R. Broyde's strategy for avoiding cancellation, in his Manchester article (n.251, above), involves (i) a "*hoda*'*at ha-ba*'*al* (declaration by the husband) that he will never revoke his consent to the condition outlined in the appended agreement and he grants his wife the ability to state this"; (ii) "any man who signs this pre-authorization agreement and then attempts to revoke his agency not in front of his wife will fortify the case for annulment (the *get* will ultimately be given nonetheless)", noting that "This is exactly the case where the Gemara (Gitt. 33a and Yev. 90b) explicitly permits *hafka*'*ah*". But this does not assist where the revocation is "in front of his wife"; see also ARU 20:5; (iii) An Orthodox man will hesitate to cancel the harsha'ah for fear that the marriage would still end, not by *get* but rather in a way that creates *be*'*ilat zenut* (though noting that a different view is taken in *Iggerot Moshe* EH 1:147); (iv) "if the husband revokes his agency to pre-authorize a *get,* then the wife is provided with a basis to claim erroneous and hence invalid betrothal (*kiddushei ta*'*ut*), if this was his intention at the time of marriage."

258 See n.77, above; s.5.3.2(c), below.

259 See further ARU 18:58.

260 See further §7.23 and ARU 18:64-66. The *get yashan* is permitted only *bedi*'*avad* (but then becomes permitted *lekhateḥillah* in *she*'*at hadeḥaq*). 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.

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*).

3.6.8 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[261] of a delayed *get* to R. Broyde's use of a *harsha*'*ah*, despite the perceived psychological and ideological problems in giving (or depositing) a real *get* at the time of marriage.[262] 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.[263] 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*. Second, 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.

3.7 *Conclusions regarding the use of kefiyah*

3.7.1 The main line of halakhic discussion regarding *kefiyah* relates to the situation of the *moredet me*'*is* '*alay*. But we should not overlook the fact that *kefiyah* was and remains unproblematic in other situations (s.3.6.1). Whether the list of situations where *kefiyah* is available is closed or not falls within the category of "once a situation of '*iggun* has materialised" (s.2.1), so that leniencies are permissible in the absence of a solution to an '*iggun* situation according to *rov posqim*. It may therefore be possible to consider recalcitrance in the face of the *bet din* as itself justifying *kefiyah*, especially in cases where (in the words of the Rosh), it is the husband's "intent ... to "chain" her" (s.3.2.2). Such recalcitrance in the face of the *bet din* would include the 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 (s.3.5.3), where *kefiyah* has the educational role of ensuring that the husband does indeed behave as a faithful member of the Torah community, thus giving effect to his "true" intentions (s.3.5.5).

3.7.2 As regards the use of *kefiyah* in favour of the *moredet me*'*is alay*, the line of authority is not as unproblematic as is usually assumed. There are notable areas of *safeq*, often resulting from application of Rema's qualification to *hilkheta kebatra*'*ei*,[264] in relation to (i) the interpretation of the Talmud (ss.3.4.1-2), (ii) what the Geonim did and on what authority (ss.3.2.1-2); (iii) the position of Rabbenu Tam (s.3.3.1) and the extent of the later acceptance of his view (s.3.4.3, 3.4.5), and (iv) the authority of the *Shulḥan Arukh*'s ruling (ss.3.4.3-4). Such views are echoed amongst some modern *posqim* (s.3.4.5). Arguments from both *hilkheta 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) against adopting *lekhatḥillah* what otherwise might only be available *bedi*'*avad*.[265] This leads to the conclusion that in a *she*'*at hadeḥaq* coercion (and, obviously, remarriage), may be permitted, in a case of *me*'*is* '*alay*, even *lekhatḥillah*.[266] R. Ovadyah Yosef uses this as a *partial* justification for reverting to the measures of the

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261 See n.250, above.

262 An understanding of the reasons for it would, of course, form part of the halakhic counselling we advocate before every marriage: see §7.36.

263 See further §§5.9, 14-15. R. Broyde himself invokes the talmudic precedent (n.257, above), but the situation in Gitt. 33a/Yev. 90b is surely closer to that of the delayed *get* rather than the *harsha*'*ah:* the husband in the former has himself fully executed the *get.*

264 See further §§4.80-82.

265 See further §§2.38-41, 4.83-84.

266 See further ARU 6:12 (§6.7); ARU 8:35-36 (§6.6 and nn.225-36).

Geonim[267] and Dayan Waldenberg, who otherwise opposes *kefiyah*, has endorsed, in the current context, reliance on the view of *Ḥut Ha-Meshulash,* that compulsion is permissible if the hour requires it, "for a judge must be guided by the circumstances confronting him".[268] R. Herzog in *Hekhal Yitsḥaq* EH I:2 also argues for reversion to *kefiyah* in cases of *me'is 'alai*.

3.7.3 Moreover, the status of a *get me*'*useh* also falls into consideration, especially in *she*'*at hadeḥaq*, both in its own right and in conjunction with *hafka*'*ah*. The Rosh goes so far as to allow remarriage *lekhatḥillah* where the wife's first marriage was terminated by a coerced *get* in a case of *me*'*is* '*alay*, even in places where where it was *not* the custom to follow the Rambam (s.3.4.4) — thus providing an example of a pluralistic approach to diversity in halakhic practice which is highly relevant to our contemporary situation. We do not, however, advocate a return to traditional *kefiyah* as a solution to the problem of recalcitrance: quite apart from anything else, the jurisdictional situation in the Diaspora disqualifies it as a global solution. More significant, for present purposes, is the fact that a *get me*'*useh* may be used in combination with *hafka*'*ah* in order to satisfy the view (ss.4.7.3-4, below) that *hafka*'*ah*, unless directed to a defect in the original *qiddushin*, must be accompanied by a *get kol dehu.* This view is supported by the Rosh in both his account of the geonic *kefiyah* and in a *teshuvah* directed to practice, as well as by contemporary *posqim* (ss.3.6.3-4).

3.7.4 The argument in the last paragraph is further strengthened when the nature of the coercion is limited to the *timing* of the husband's consent, as it is when the husband willingly gives either an (advance) *get* or a *harsha*'*ah* for a *get*, but subsequently seeks to change to his mind. 'Coercion' here consists in not allowing him to retract such an original consent, especially when the husband committed himself by oath not to do so (ss.3.6.5-8).

4. *Annulment*

4.1 Introduction: Is Annulment possible in post-talmudic times?[269]

4.1.1 The prospect of annulment (*hafka*'*ah*) sends shivers down the halakhic spine: of all the forms of termination of marriage, it appears to conflict to the greatest degree with the basic biblical principle that termination is either by death or *get* (the latter conceived as requiring the voluntary act of the husband). Yet five instances of *hafka*'*ah* are found in the Talmud. This prompts the following range of responses:

(a) Only the talmudic sages had the authority to implement *hafka*'*ah*: no one after Ravina and Rav Ashi may do so;

(b) Rashba (*Responsa* I:1185) is often cited for the proposition that annulment is available today only in those cases where it is explicitly permitted in the Talmud (in other words: the talmudic list is closed);[270]

(c) *hafka*'*ah* remains available and is not restricted to the talmudic list, but must be accompanied by a *get kol dehu*.[271]

These various claims need to be assessed against the background of analysis of both the talmudic

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267 See *Yabia*' '*Omer* vol.3, EH 18:13.

268 *Tzitz Eliezer* 4.21. See further §§4.60-61; ARU 7:24 n.166.

269 See further §§5.43-53.

270 Goldberg and Villa (n.239, above), 362: "Where they said it they said it; where they did not say it we cannot say it ourselves"; see further §5.34 for Berkovits' contrary argument, based on a full review of Rashba's responsa (notably *Resp.* 1, 551); ARU 6:22 (§8.4). On cases the use of annulment in cases of missing husbands whose death is attested by only one witness, see §5.45.

271 See, e.g., R. Berkovits at §5.46. Of course, there is debate on both the circumstances when it may be used and the court which may utilise it.

cases themselves and post-talmudic practice. From this we see that:

(d) the five talmudic cases are clearly divisible into two groups, which we here call "immediate" and "delayed" annulment: the former addresses defects in the original *qiddushin* and does not involve any *get*; the latter addresses particular defects in the *get* procedure (s.4.2, below);

(e) we do find in post-talmudic times new cases of "immediate" annulment (without any *get*), authorised by *taqqanot haqahal* which added new requirements to a valid *qiddushin,* failure to comply with which resulted in *hafka*'*ah* (s.4.3, below);

(f) there is one clear case of "delayed" annulment in post-talmudic times, that resulting from the 15th century 'Evil Decree of Austria', though it is unusual in that it was with the consent of the husbands (s.4.4.1, below), and in circumstances where a *get* would have been irrelevant.

These issues are further considered in this section, with a view to answering the following questions:

(g) Is it possible today to create a new case of "immediate" annulment (without any *get*) which might assist the *agunah*, and if so by what process and with what form of implementation?

(h) Is it possible today to create a new case of "delayed" annulment (with a *get kol dehu*) which might assist the *agunah*, and if so by what process and with what form of implementation?

4.2 *The talmudic cases*

4.2.1 There are two cases of "immediate" annulment in the Talmud. The first is that arising from the incident at Naresh, where a minor orphan girl was (rabbinically) married to a man who sought to marry her (biblically) after she became adult, but a second person "kidnapped" her and married her.[272] 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* 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 le-qiddushin mineh*), on the grounds that "He acted improperly; they, therefore, treated him also improperly, and deprived him of the right of valid betrothal" (הוא עשה שלא כהוגן, לפיכך עשו בו שלא כהוגן). The second case is more clearly one of "betrothal by coercion", where the woman was forced (lit. "hanged", תליוה) and then gave her (formally sufficient) consent.[273] 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). Accordingly, the Sages here too annulled the marriage. In both of these cases, 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*;[274] these cases of "immediate" annulment differ from the cases of "delayed" annulment in that there is no invalid *get* to be validated: this is "pure" *hafka*'*ah.*

4.2.2 Rashi and Tosafot offer different justifications for the retrospective annulment in these two cases.[275] Rashi[276] understands that in both these cases the power of the Sages to interfere in a

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272 *Yevamot* 110a: see further §5.58. The woman's 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*.

273 *Bava*' *Batra*' 48b: see further §5.30, ARU 11:2.

274 There is discussion whether later *batei din*, acting in such cases, are retroactively annulling the marriage or simply declaring that it was never valid: see §§5.9, 5.58.

275 See further §5.31, ARU 11:7, ARU 18:41.

276 *Yevamot* 110a s.v. *Weqa*' *afqe*'*inho*.

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. 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 hameqadesh ada'ta derabbanan mekadesh*). 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 copulation promiscuous, depending on how the betrothal was effected).[277]

4.2.3 The three cases (in four *sugyot*) of "delayed" annulment in the Talmud all presuppose that a valid and proper *nissu'in* took place and involve 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. In *Gittin* 33a/*Yevamot* 90b,[278] 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, Raban Gamliel the Elder forbade such an action by the husband and declared the *get* valid. Amongst his successors, however, there is dispute as to the status of the *get* where the husband ignores Rabban Gamliel's decree and nevertheless cancels the *get*. According to Rabbi, the *get* is void (if he informed at least 2 people[279] and the wife is not divorced (even though neither the wife nor the agent had been informed), but according to Rabban Shimon ben Gamliel the *get* is not void and the wife *is* divorced. The latter says that otherwise the authority of the bet din (in the form of Raban Gamliel's decree) is subverted: (שאם כן מה כוח בית דין יפה)."[280] The Sages thus act here by validating the *get* rather than by actively annulling the marriage (which Rav Ḥisda bases on the general authority of the Sages to uproot the words of the Torah). This view appears to be shared also by the Yerushalmi,[281] which merely discusses the cancellation of the *get* and its validation by the Sages.[282] Later, however, Rabbah explains Rabban Shimon ben Gamliel's ruling as a result of the unique structure of Jewish marriage, in which the authority to annul is based on the preliminary agreement of the spouses,[283] who are taken to have made their betrothal subject to the consent of the Sages, *kol hameqadesh ada'ta derabbanan mekadesh*. Similarly, in *Ketubot* 3a,[284] a husband issues a conditional *get* which is to take effect "if I do not return by a certain time"; he

277 Cf. *Tosafot*, *Bava' Batra'* 48b s.v.*Tinaḥ*.

278 See further §§5.14-16; ARU 11:3, 4-5, 9, and the debate between S. Riskin, "*Hafka'at Kiddushin...*" (n.99, above), 9, 11; and J. Wieder, "*Hafka'at Kiddushin:* A Rebuttal", *Tradition* 36/4 (2002), 38; S. Riskin, "Response", *Tradition* 36/4 (2002), 45.

279 According to EH 141:60, the cancellation is valid if declared before the wife, the agent or two other people.

280 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.

281 *Yerushalmi, Gittin* 4:1, 45c; for the text and discussion, see ARU 11:5, ARU 18:43-44; Arye Edrei, "Ko'aḥ Bet Din Ve-dine Nisu'in Ve-gerushin", *Shenaton Ha-mishpat Ha-Ivri* 21 (1998-2000), 34 n.121. The Yerushalmi in fact mentions both Rabbi's and Rabban Shimon ben Gamliel'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.

282 See also *ET* II p. 138, at note 22, citing *Shittah Mekubetset* quoting '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.

283 This is not the only explanation, and some do not explain it as an agreement of the spouses: see ARU 9:7 n.39.

284 See further §5.17, ARU 18:41-42.

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 third talmudic instance of "delayed" annulment is the case discussed in *Gittin* 73a, where a dangerously ill person (שכיב מרע) divorced his wife but then recovered from his illness and expressed the wish to retract (which he was entitled to do in biblical law, since the *get* was given on the unspoken but obvious condition that he would die). Rabbah and Rava declared the divorce valid in spite of his retraction.[285]

4.2.4 The idea that there is a form of "annulment" which serves to cure a defect in a *get* survives amongst the Rishonim.[286] 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 *mi-de'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.[287] However, this is regarded as justified by *kol hameqadesh ada'ta derabbanan mekadesh*, and the ultimate application of this maxim to all five talmudic cases is used by Berkovits to argue that in the cases of both "immediate" and "delayed" annulment, the authority to annul flows from *kol hameqadesh*.

4.3 *"Immediate" annulment in post-talmudic times*

4.3.1 The proposition that annulment is available today only in those cases where it is explicitly permitted in the Talmud fails to take account of the post-talmudic instances of "immediate" annulment found in the medieval *taqqanot haqahal*, designed to deal with cases where 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*, etc. [288] But the restrictions placed on *hafka'ah* in such *taqqanot* were never absolute. They require that the workings of *hafka'ah* be made explicit in the *taqqanah*,[289] and although Rivash concludes (after a lengthy review of the sources which would *validate* the continuing authority to enact such *taqqanot*) that he could approve a proposed *taqqanah* only *lehalakhah* and not *lema'aseh*, he clearly implies that approval *lema'aseh* would be possible if supported by a consensus of the (local) halakhic authorities (בהסכמת כל חכמי הגליות).[290]

4.3.2 Nevertheless, some contemporary authorities reject the possibility of "immediate" *hafka'ah*, even where there exists authorisation by a *taqqanah*, based on a number of responsa maintaining that *hafka'ah* should not be used in practice.[291] Against this, R. Ovadyah Yosef maintains[292] that there

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285 See *Gittin* 73a and Rashi there s.v. *Gezerah*: further at §5.18.

286 See further §§5.21-22, 6.87.

287 See further §7.9(iii), ARU 18:38 and s.4.4. elowb.

288 See Rashba Resp. 1, 1206, discussed at ARU 2:42-43 (§4.3.2); and sources in the next two notes.

289 Rosh, Resp. 35:1, discussed at ARU 2:41-42 (§4.3.1); Rashba Resp. 1, 551, discussed at ARU 2:43-44 (§4.3.3).

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

291 R. David Lau, "*Hafqa'at Qiddusin leMafrea' beYamenu*", *Teḥumin* XVII (5797), 251-271; R. Uriel Lavi, "Ha'im Nitan Lehafki'a Kiddushin Shel Sarvan Get?", *Teḥumin* 27 (5767), 304-310, 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 Berachyahu Lifshitz, "Afke'inhu Rabanan Le-kiddushin Minayhu", *Mi-perot Ha-kerem* (Yavne: Yeshivat Kerem Be-Yavne, 2004), 317-324, s.12.

292 In "Kol Hameqaddesh ..." (n.236, above: see further ARU 18:52-53), citing Rashba in a *responsum* cited in *Bet Yosef* (end of *EH* 28); Rivash (*Responsa*, 399); Rashbets (*Responsa*, II 5); Maharam Alashqar (*Responsa*, 48), and, for the *Aḥaronim*, *Kenesset HaGedolah* (*EH* 28, *Hagehot Bet Yosef* 37), and noting that that Mahara ben Shimon in *Responsa Umitsur Devash* (*EH* 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.

is no problem with "immediate" annulment, as even Rashba[293] (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, although Rema writes that we should not rely on this opinion in practice. There is, thus, a *safeq*.

4.3.3 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).

4.4 *"Delayed" annulment in post-talmudic times*

4.4.1 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'[294]) 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 in *Darkey Mosheh* ('*Even Ha*'*Ezer* 7:13)[295] 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. Moreover, it was only to allow the women to return to their husbands which, even if in some cases involving a biblical prohibition, would still not have been equal in severity to the prohibition of adultery. Thus far from destabilising the institution of marriage, this particular act of *hafka*'*ah* supported and bolstered it.[296]

4.4.2 There is, however, evidence that the Rosh did not exclude the use of "delayed" annulment in post-talmudic times in situations neither resembling one of the talmudic cases nor involving breach of additional requirements for *qiddushin*. For how, otherwise, may we understand his account of the geonic measures in favour of the *moredet me*'*is* '*alay*, which (as already noted: s.3.4.3) concludes: "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?"[297] Though the Rosh does not himself advocate this,[298] he does appear to claim that *hafka*'*ah*[299] was used by the Geonim in practice. While there may be doubt 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 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 (here, along

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[293] Rashba, Berkovits maintains (n.270, above), 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 (see further §5.34).

[294] Reported in *Terumat Ha-Deshen*, no. 241.

[295] See also *Rema, Even Ha-*'*ezer*, 28:21; ARU 11:14 n. 86. See further §5.42, noting the justification by '*ada*'*ta*' *derabbanan*.

[296] See further §5.44, on R. Goldberg's response to R. Riskin on this issue.

[297] *Shut ha-Rosh*, 43:8 (p.40b), quoted more fully in s.3.6.3, above.

[298] See further §§4.23-24.

[299] On whether, for Rosh, it needs to be accompanied by a coerced *get*, see §4.24, ARU 15:21-22.

with a *get*). R. Ovadyah Yosef[300] 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* and *nissu'in*).

4.4.3 There remains, however, considerable dispute as to the scope of such authority.[301] On the one hand, R. Riskin[302] and Professor Lifshitz[303] argue that *hafka'ah* remains possible even in the absence of a defective *get* (relying in part on the Austrian precedent);[304] on the other hand, R. Zalman Neḥemyah Goldberg argues that *hafka'ah* is not available even where there is a defective *get,* other than in the three talmudic cases of "delayed" annulment, and thus concludes that we have no precedent for permitting the practice of annulment in cases of *get* refusal nowadays.[305] Yet these opposing views share a common defect: they overlook both the historical and conceptual relationships between the different forms of marriage termination, and — more important still — fail to take advantage (some would say: or recognise the necessity[306]) of the dogmatic possibilities which remain available through combining these forms, in a way which would authorise the use of *hafka'ah* in the presence of a defective *get*[307] even beyond the three talmudic cases of "delayed" annulment (precisely in line with the Rosh's analysis of the geonic practice).

4.5 *Prospective or Retrospective Termination*

4.5.1 The combination of *hafka'ah* with a defective *get*, which we have seen goes back to the original three talmudic cases of "delayed annulment" (s.4.2.3) and survives amongst the Rishonim (s.4.2.4), raises a further issue which may potentially be helpful in dealing with the problem of *get* recalcitrance. For if the form taken by annulment is the validation of an otherwise invalid *get,* it follows that termination of the marriage is prospective rather than retrospective (since termination by *get* is prospective). There is, indeed, evidence that annulment was originally conceived to operate in this manner.[308]

4.5.2 The view of Ri Halavan (as noted above in s.4.2.4) appears to imply non-retrospective annulment. *Tosafot*[309] also understand that there is a possibility of apparently prospective annulment even

300 R. Ovadyah Yosef (n.236, above), 101. See further ARU 18:51.

301 See further §§5.12, 5.44-45, 6.75, 6.78.

302 R. Shlomo Riskin, "Hafka'at Qiddushin – Pitaron La-'aginut", *Teḥumin* 22 (5762), 191-209; "Koaḥ Ha-hafka'ah Mone'a 'Iggun" (Teguvah Li-tguvah)", *Teḥumin* 23 (5763), 161-64.

303 Berachyahu Lifshitz, "Afke'inhu Rabanan Le-kiddushin Minayhu", *Mi-perot Ha-kerem* (Yavne: Yeshivat Kerem Be-Yavne, 2004), 317-324, responding to R. Uriel Lavi, "Ha'im Nitan Lehafki'a Kiddushin Shel Sarvan Get?", *Teḥumin* 27 (5767), 304-310.

304 We may note that R. Shemuel Ibn Halath (c. 1470) argued for the contemporary possibility of delayed annulment (without a *get*) as a solution for *'iggun* and this opinion was also accepted as valid in the Enactments of the Jerusalem Rabbinate of 1509. R. Ovadyah Yosef writes in his article in *Torah Shebe'al Peh* (5721) 96-103 that "although a number of *posqim* disagree, at a time of great need it would seem that there is a possibility to take a lenient stance …" (using annulment at least as part of a solution). See further ARU 18:49, 52nn. 163 and 164.

305 R. Zalman Neḥemyah Goldberg, "Hafka'at Qiddushin Eynah Pitaron La-'aginut", *Teḥumin* 23 (5763), 158-160; "Eyn Hafka'at Qiddushin Lelo Get", *Teḥumin* 23 (5763), 165-68, citing Rashba, *Responsa* I:1162 as authority for this.

306 R. Ovadyah Yosef (n.236, above), 101, final paragraph, 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 (see further §5.47). Here too, the insistence on such a *get* represents the prototype of a "combined solution".

307 Not necessarily a *get me'useh:* see Me'iri, *Ketubbot* 3a, s.v. *kol she-'amru*.

308 See further §§5.7, 5.14-169, 6.85-86; ARU 11:6 and ARU 15:3-4

309 *Gittin* 32a, s.v. *Mahu de-tema' 'iglai milta'*.

according to Rabbi, and this is part of the basis from which R. Shlomo Z. Auerbach deduces that the *get Maharsham* would not (at least according to this understanding of *Tosafot*) have achieved retroactive annulment.[310] Similarly, some Rishonim cited by Ritba in the *Shittah Mequbetset*[311] 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.[312] Ramban appears to have taken the same view.[313] Other Rishonim and Aḥaronim may also be cited.[314]

4.5.3 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 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*.[315]

4.5.4 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. Thus we find:

> 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.[316]

But the matter is far from certain.[317] 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.[318] In the absence of a general

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310 See further §§5.22, 24 on R. Auerbach, arguing (from R. Akiva Eiger, glosses to Mishnah *Gittin* 4:2, number 39 and *Tosafot Gittin* 32a s.v. *Mahu detema*), 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 the wife's reception of the *get* (as confirmed by declaration by the *bet din*), so that it would not create retrospective promiscuity.

311 *Shitah Mekubetset, Ketubbot* 3a, s.v. *ve-chatav ha-Ritva*, in the name of איח 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).

312 Rashi's teachers' view is cited — and strongly rejected — by Rashi in the various *sugyot* of *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 that the betrothal is retrospectively annulled and not from now on [as his teachers argue]).

313 *Shittah Mequbetset*, *Ketubot* 3a, s.v. *Wezeh leshon haRamban zal*; Ramban, *Ḥiddushey Ketubbot* 3a s.v. *Shavyuha* citing Rashbam. See further §5.22; ARU 5:68 n.225.

314 See further §5.22 on *Ḥiddushe Ḥatam Sofer*, Gittin, 33a, s.v. *tenah*; '*Otsar Mefarshey HaTalmud* to *Gittin* 33a, col. 436, s.v. *Kammah* and other sources. See also §5.25 and ARU 12:3 (§XVI) on the argument of Shemuel Atlas, "*Kol diMeqaddesh* ‘*ada*‘*ta*' *deRabbanan Meqaddesh*", in his *Netivim beMishpat Ha‘Ivri* (New York: American Academy for Jewish Research,1978), 206-264, that annulment is *never* really retrospective.

315 Hence, the inability of the "willing" husbands in the Austrian case (s.4.4.1) to resolve the issue by *get.*

316 TS 24.68, lines 5-7, in Friedman, *Jewish Marriage* (n.71, above), II.54 (dating), 55f.

317 See further §§3.31, 3.79.

318 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

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*).[319]

4.6 *Roles of the husband and bet din*

4.6.1 Recent proposals for conditional marriage generally prescribe retrospective termination for breach of the condition. They differ, however, 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 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, on the other hand, who prescribe the circumstances in which termination (by virtue of the condition) may occur assume a capacity of the parties to contribute to the definition of the legal régime to which they submit. 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.[320] This is clearly the case where annulment is by validation of an externally flawed *get* (the "delayed annulment" cases).[321] We may note also that the talmudic "immediate annulment" cases (of dubious consent) also involve a (wrongful) act on the part of the husband.[322]

4.6.2 Thus, R. Pipano's proposal[323] 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[324] and I shall be unwilling and shall disagree to accept the judgment upon myself or if I flee and my whereabouts be unknown." 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). But 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.

4.6.3 On this latter point, R. Broyde's proposal is more specific. Like R. Ḥayyim Palaggi,[325] he adopts the criterion of a period of separation: the husband commits himself 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

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of annulment there would be no retrospective *zenut*, though Berkovits (n.42, above), 54-56, argues that *Ḥatam Sofer* would say the same to his condition also.

319 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*.

320 See further ss.2.4, 3.5.5 above.

321 *Ket*. 3a, *Gitt*. 33a, 77a. See further §5.57.

322 See further §5.56, above.

323 See s.2.3.2 and n.79, above. See further ARU 13:12-15, ARU 18:79-85, and §§3.63-69 on the question of revocation of the condition by *bi'ah*. See further §§3.49, 6.41.

324 The expression "liable in any way" may have been intended to include a recommendation to divorce (*hamlatsah*), or at least a *mitsvah.*

325 *Resp. HaḤayyim VeHashalom,* vol.2, no.112.

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 all this that "irretrievable breakdown" is ultimately in the hands of either the husband or 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.*

4.6.4 The distinction between termination by condition and termination by annulment (even in the presence of a *get kol dehu*) is not always clear in the proposals we have examined,[326] but is important for the issue of the respective roles of the husband and *bet din*. The distinction involves two questions: first, by virtue of what authority — that of the condition or that of a *taqqanah* — is the marriage terminated without a "normal" *get*? Second, is the role of the *bet din* constitutive of the termination or merely declaratory?[327] It is declaratory where the *bet din* merely declares (confirms) that termination has (already) taken place, in accordance with either a condition or facts which the *halakhah*[328] itself specifies as having the effect of terminating (or barring the creation of) the marriage; it is constitutive where termination does not take place until the *bet din* so decides.[329] Yet even in this latter case, we may speak of a partnership in that the *bet din* not only represents the community interest[330] but also ensures that the husband does indeed behave as a faithful member of the Torah community. Clearly, the addition of a *get,* whether delayed or by *harsha*'*ah*, would further strengthen this partnership.

4.7 *Conclusions on Annulment*

4.7.1 We have seen that new cases of "immediate annulment" are not excluded in post-talmudic times, though they may require a consensus to be applied *lema*'*aseh*. Even though issues of recalcitrance do not relate to the "immediate" circumstances of the original *qiddushin*, a *taqqanah* could make that original *qiddushin* dependent upon the validity of an accompanying arrangement (as was the case in the requirement that it be accompanied by a valid *ketubbah*).[331] It appears that R. Ovadyah Yosef is willing in some circumstances of "immediate annulment" to contemplate a coerced *get.*[332] This option may then form part of a combined solution based on *sfeq sfeqa*.

4.7.2 According to *rov posqim*, annulment without a *get* is not possible in cases of "delayed annulment", although from the analysis of R. Yosef it would appear that a declaration of retrospective annulment by the contemporary leading sages of Israel even in cases not matching

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326 Those of Rabbis Toledano and Risikoff (s.2.4.4, above) are the closest to termination by annulment.

327 See further §§5.58, 6.7, 6.95. All four combinations of these two variables are in theory possible: a condition may make termination either declaratory or constitutive (depending in part on the degree of discretion accorded the *bet din* by the drafting of the condition); a *taqqanah* may also make termination either declaratory or constitutive. This latter issue arises in analysing the act of the *bet din* in post-talmudic times when it applies *hafqa*'*ah* in cases within the exact scope of one of the talmudic cases of *hafqa*'*ah*. See further §5.58(e).

328 In the talmudic cases or new cases established by *taqqanah*.

329 See further §§5.58, 6.95.

330 See n.217, above.

331 See ss.4.3.1, 4.3.3 above.

332 See further ARU 18:53-54.

the historical examples in the talmudic and geonic literature would be sufficiently halakhically effective at least to create a *safeq* which could combine with another, more substantial, *safeq* to form a *sfeq sfeqa*.

4.7.3 There is, however, no need to insist on annulment without a *get*, if annulment with a *get (kol dehu)* is possible today. The latter view is supported by minority opinion and may thus 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 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 for leniency are available in a *she'at hadeḥaq* even if they are minority views.

4.7.4 Such arguments are further strengthened in situations of urgency. R. Ovadyah Yosef derives this from combining the views of the Rosh and others on the geonic measures[333] with Rema's account of the Austrian case.[334] Moreover, this does not require us to declare an "emergency" (*tsorekh hasha'ah*) such as 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 leniency regarding annulment with a *get kol dehu* may be combined with other factors to justify a solution.[335]

5. *A Combined Solution*

5.1 *Historical Analyses Entailing Combinations*

5.1.1 In the course of the above analysis, we have encountered important connections between the different forms of marriage termination. Here, we summarise them, with particular reference to their implications regarding the nature of the authority for marriage termination. These connections are of two kinds: on the one hand, between annulment and the validation of an invalid *get* (5.1.2); on the other, between terminative conditions and the validation of an invalid *get* (5.1.3).

5.1.2 The earliest understanding of annulment in the talmudic cases of "delayed annulment" appears to

[333] R. Ovadyah notes that for Rashba, *Resp.* VI:72, 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. See further §§5.34, 47, 49, 6.77.

[334] See further §§5.42, 5.44, 6.74, 6.77.

[335] See further §5.48. See also §§5.46, 5.51, ARU 6:25-26 (§8.9), ARU 18:54, for R. Berkovits' arguments in favour of the contemporary availability of *hafka'ah*, making reference *inter alia* to an enactment of the Egyptian Rabbis of 1900.

be that the (biblically) invalid *get* is in fact validated, which Rav Ḥisda bases on the general authority of the Sages to uproot the words of the Torah.[336] Rabbah, on the other hand, bases annulment here on the preliminary agreement of the spouses, through the maxim *kol hameqadesh ada'ta derabbanan mekadesh*.[337] On this understanding of the basis of *hafka'ah*, which becomes the dominant one once annulment is understood as retrospective, annulment comes to incorporate elements of *both* conditions and a defective *get*. There is some dispute as to whether this condition making the *qiddushin* subject to (contemporary) rabbinic law should be regarded as an implied term, arising from the simple fact that the spouses marry under rabbinic auspices, or is an express term, this being precisely the meaning of *kedat moshe veyisra'el* in the formula of *qiddushin*.[338] But the objections to viewing *ada'ta derabbanan meqadesh* as an implicit condition may be met if the condition is made an explicit basis for annulment. An express term also has the advantage of clarifying the meaning of *ada'ta derabbanan meqadesh*, as referring to the continuing approval of a contemporary *bet din*.[339] We have seen (s.4.4.2, above) that the Rosh applied just this analysis to the geonic measures, regarding them as having used *hafka'ah* even in cases of *me'is 'alay* and even when the defect in the *get* was that it was regarded (by Rabbenu Tam and his followers) as *me'useh*, and that R. Ovadyah Yosef sees this as relevant to our problem today.[340]

5.1.3 We also find amongst the Rishonim a view that the use of terminative conditions may itself validate an otherwise invalid *get*. This is the effect of the view attributed to the teachers of Me'iri's teachers, that the geonic *kefiyah* was based on the *tnai* of R. Yoseh in the Jerusalem Talmud.[341] 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),[342] such that the clause ultimately assumed the status of a *tnai bet din* (קבעוהו לעשותו אף בזמן שלא נכתב כאלו נכתב). On this view, a preliminary agreement can dissolve later problems of *get me'useh*.[343]

5.1.4 The effect of several proposals made in modern times is to combine these two strategies.[344] The Manchester proposal builds upon earlier suggestions, and seeks to justify it more systematically in terms (principally) of *sfeq sfeqa*.

5.2 *Modern Proposals for Combined Solutions*

5.2.1 We have seen (s.2.4.4) that the proposals of Rabbis Toledano and Risikoff combine conditions and annulment, but only in the sense that the authority for annulment is fortified by an explicit condition in the marriage contract. At the same time, the use of an explicit condition has the advantage of affording the parties the opportunity to specify what *bet* din has the power to annul. On this point Rabbis Toledano and Risikoff differ, the former conferring the power on the local

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336 See s.4.2.3 above; Rav Ḥisda's analysis here is in line with the rationale in the cases of "immediate annulment" (by confiscation of the *kesef*, etc): see s.4.2.2, above.

337 No longer understanding it as validation of an invalid *get*, but still apparently assuming the *hafka'ah* to be prospective: see further §§5.16, 5.33, 6.18, 6.91.

338 See further §§5.56, 6.88, 6.92.

339 As is the case in the modern proposals reviewed in §§6.40-46. See further §5.56, esp. at n.1111.

340 See ss.4.4.2, 4.7.4 above.

341 Section 2.1.5 above; see further §§3.23-29.

342 Other sources also speak of the Gaonic practice in terms of *minhag*, even where they no longer accept it. 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.*

343 See further ARU 15:23.

344 That in 5.1.3 differs from that in 5.1.2, even if one regards *kol hameqadesh ada'ta derabbanan mekadesh* as conferring the status of an explicit term on the groom's *kedat mosheh veyisra'el,* since the kind of condition contemplated in 5.1.3 is directed explicitly to the terms on which the marriage may be terminated.

bet din, the latter on a *Bet Din Gadol* in Jerusalem.[345]

5.2.2 The proposal of Rav Henkin described in s.2.4.5 above adopted a more substantive form of combination: on the one hand a delayed *get* taking effect only on certain conditions (including those of recalcitrance); on the other, a marriage whose subsistence is made conditional on the non-failure of that delayed *get*. Here, the combination involves two forms of termination arranged in a particular sequence, the assumptions being that:

(i) in the vast majority of cases the husband will not be recalcitrant but rather will deliver a new *get* (which will therefore not require certification by the *Bet Din* of Jerusalem);

(ii) where the husband is recalcitrant, the marriage will still be terminated by a kosher *get* (where the conditions of delay are certified by the *Bet Din* of Jerusalem as having been fulfilled); and

(iii) the marriage will terminate retrospectively by virtue of the condition only where (ii) is not possible.

5.2.3 R. Eliezer Berkovits in his book, *Tnai beNissu'in uVeGet*,[346] analyses the arguments for the contemporary availability not only of conditional marriage but also delayed *get* and annulment. Though not couched in the form of a formal proposal, his analysis appears to imply, as R. Abel puts it,[347] that these three approaches might be used not as alternatives but rather 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 retrospective communal annulment which also has its supporters amongst the *Gedoley Ha-posqim*."

5.2.4 Most recently, Dayan Broyde has proposed a "Tripartite Agreement" comprising a condition, a *harsha'ah* for a *get* and annulment:[348]

(i) The condition states that if the husband is absent from the joint marital home for fifteen months continuously for whatever reason, even by duress, then the betrothal (*qiddushin*) and marriage (*nissu'in*) will have been null and void.[349]

(ii) The *harsha'ah* takes effect "should a Jewish divorce be required of me for whatever reason, by any Orthodox rabbinical court (*beit din*) selected by my wife, even if at the time of our separation I explicitly reject the particular rabbinical court (*beit din*) she selects";

(iii) Annulment is prescribed for breach of the husband's agreement to grant his wife a *get* within fifteen months of her requesting one. In that event, the husband consents "for our marriage to be labeled a nullity based on the decree of our community[350] that

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345 The approach of Rav Uzziel contemplated a combination of local, regional and central *batei din*, but despite his formulation, it is clear from what he writes in response to R. Zevin that he intended only a conditional marriage, and not a *hafka'ah* by the *bet din*. See further §§3.42-44, 6.44.

346 See n.42, above.

347 See further §2.24.

348 See n.251, above. The most recent version also includes "a reciprocal condition to which the woman agrees and allows for a claim of error in the creation of the marriage if the provisions are void as a matter of *halakhah*." On the choice between a delayed *get* (R. Henkin) and a *harsha'ah*, see s.3.6.8, above.

349 The language here suggests annulment, fortified by the husband's further statement that in that event: "The ring I gave you should be a gift." However, the intention is clearly that of a self-executing terminative condition, the role of any *bet din* later called upon to adjudicate upon it being declaratory rather than constitutive.

350 R. Broyde here clearly contemplates a (local) *taqqanat haqahal* for a new form of "delayed annulment". He now accepts that "one could critique this by noting that such a community does not exist geographically", but the issue (particularly in this global age) transcends geography: it is the adoption of solutions acceptable only within particular

all marriages ought to end with a *Get* given within fifteen months."

The agreement as a whole is fortified by (what we have called) a "validity condition": "Furthermore, should this agreement be deemed ineffective as a matter of *halachah* (Jewish law) at any time, we would not have married at all."[351]

5.2.5 The relationship between the various components of this agreement may be viewed in both functional and dogmatic terms. Functionally, the expectation (as in R. Henkin's proposal) is that the very existence of the agreement will make recourse to *any* of the three devices (terminative condition, *harsha'ah*, annulment) unnecessary, in that the husband will honour his commitment to respond within 15 months to his wife's request for a *get*, and will do so by the issue of a regular *get.* Should that not occur, then intervention by a *bet din* is in practice required for all three devices. Like R. Henkin, Dayan Broyde assumes that priority in that instance would be given to the *harsha'ah*;[352] after that, priority is given to the terminative condition over annulment, both choices resulting from the assumed preferences of the husband in avoiding any issue of retrospective *zenut*.[353]

5.2.6 The combined solution, Dayan Broyde argues, also confers dogmatic advantages: "...these approaches interlock with each other so that the whole is stronger than the sum of its parts." Not only does it satisfy the demand that *hafka'ah* "can be implemented only when some kind of *get* is given as well"; the very presence of *hafka'ah* within the agreement itself limits the problem of revocation of the *harsha'ah* "since the husband would prefer the implementation of the conditional *get* in order to avoid the *hafka'ah* and resultant *be'ilat zenut*."[354]

5.3 *The Manchester Proposal*

5.3.1 All this leads us to consider a "combined solution", by which we mean not one which simply presents different remedies as alternatives,[355] but rather one which presents them as part of a single unit, all of whose parts take effect, and to which the doctrine of *sfeq sfeqa* applies as a whole. Implementation would be subject to the appropriate rabbinic approvals.[356]

5.3.2 If the husband has not divorced after 12 months since the *bet din* recommended ending the marriage with an indisputably 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;[357]

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solutions rather than globally. However, R. Broyde's approach can contribute to the "incremental" strategy outlined in s.5.5 below. Cf. our s.5.3.3(vi).

351 On this, see further §§3.84, 6.37, 7.31.

352 "What's more is that he would rather have the pre-authorized *get* be given because that completely eliminates the problem of non-marital relations."

353 "Yet if the husband were to maintain a desire to minimize *be'ilat zenut*, it is clear that he would prefer the termination of a valid conditional marriage to its dissolution by annulment." It thus appears that Dayan Broyde assumes that the terminative condition will take effect purely prospectively.

354 On Dayan Broyde's use of *sfeq sfeqa*, see n.367, below.

355 This appears to be Dayan Broyde's approach. See n.367, below.

356 To be made clear in the halakhic counselling we advocate before every marriage: See further: §§7.37, 57-58.

357 On the problem of *bererah* (which renders this a *safeq get* only) in this context, see ARU 18:66f.

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 (notwithstanding any purported cancellation of an advance *get* or *harsha*‘*ah*) or 12 months after the husband's disappearance, insanity etc.[358]

5.3.3 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)[359] 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)[360] 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,[361] or, at least, that she agrees to the conditions upon which the marriage is based.

(iv) The couple would then swear an oath on G-d's nanly me 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.[362]

(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 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

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358 See above s.4.3.3 and §5.49, for a suggestion as to the type of *taqqanah* which might best authorise such annulment.

359 R. Abel's preference.

360 While the Aḥaronim largely sought to make the groom speak out every word of the *aḥ mumar* 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 ..."

361 Cf. Dayan Broyde's inclusion in his agreement of the following conditions stipulated by the bride and accepted by the groom: "... if either one of us is 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, and I impose this as a condition of my acceptance of this marriage proposal. Our conduct should be like unmarried people sharing a residence ... I further declare that I would not have accepted a marriage proposal from a man if he were ever to revoke his authorization to give me a *get*, or if as a matter of *halakhah* (Jewish law) as determined by an authorized *beit din* the communal *takkanah* (decree) were to be considered invalid."

362 Cf. n.357 above on *bererah*.

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.[363] If that can be accepted, the details are a comparatively easy matter.

5.3.4 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*,[364] and the leniencies consequent on that designation.

(d) the halakhic bases for each of the individual elements of the agreement.

5.3.5 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 subject to the *tnai* upon which we married;[365]

(c) We accept that in the event of recalcitrance, such measures comparable to *harḥakot* as are available within the halakhah may be taken.

5.4 *The Basis in Authority for the Manchester Proposal*

5.4.1 Some elements of the Manchester proposal are justifiable in terms of the current halakhah, applying established doctrines relating to authority,[366] and in particular *sfeq sfeqa*,[367] *hilkheta*

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363 §§7.5-10, summarised in s.5.4, below.

364 And the definition of such a *she'at hadeḥaq* in the context of *'iggun*: §2.40.

365 Dayan Broyde's agreement is very much concerned with this issue. Both the groom and the bride declare that in the event of the marriage terminating by virtue of the condition "Our conduct should be like unmarried people sharing a residence." The groom also declares: "I recite this condition to our marriage not only during the wedding ceremony, but prior to our intimate relationship and *yichud* (seclusion). I take a public oath that I will never remove this condition from the marriage. ... Even a sexual relationship between us shall not void this condition."

366 Though even some of the basics are subject to dispute (and thus to *sfeq sfeqa*), as in the definition of the rule of *rov*: see s.1.1.2, above.

367 See further §§2.17-24, 6.18-20. Our account and application of *sfeq sfeqa* is rather more specific than that of R. Broyde, particularly in following R. Ovadyah Yosef in requiring that one of the doubts be *shaqul* (= evenly balanced, i.e. 50-50). Citing Shach, *Yoreh De'ah* 242, at the end, and his own "Letter to the Editor: Halakhic Pluralism," *Tradition* 27 (1993), 108–110, R. Broyde observes: "In assessing solutions to the *agunah* problem, two virtues arise from using the combinational method. The first is that it makes a consensus possible despite many differing, but not contradictory opinions. When reviewing each of the five approaches on their own, one finds that a considerable number of contemporary halakhic authorities support one approach or another and a majority of *poskim* oppose it. But theoretically, one written agreement could represent each approach such that authorities could clearly see that the solution they support is present, and then a great many *poskim* should validate the resulting agreement."

kebatra'ei (and its qualification by Rema)[368] and *she'at hadeḥaq*.[369] Others, notably the conferring of the status of a *tnai bet din* on any terminative condition[370] and the recognition of any new grounds for annulment (even with a *get*), would require a *taqqanah* and the issue will arise as to who may be authorised to issue such a *taqqanah.*[371]

5.4.2 In particular, we take the view that

(a) a correctly conditioned marriage[372] is valid according to almost all the *Posqim* and thus if there is any *safeq* as to its status, it is at least *shaqul*.[373]

(b) the status of the delayed *get* (even if purported to be cancelled or regarded as *me'useh*)[374] is one of *safeq.*[375]

(c) the annulment[376] would require a *taqqanah* at least of the supreme authority of the community concerned, and would then have the status of *safeq*.[377]

5.4.3 While the individual *bet din*, *dayan* or *posek* may be able to deal with individual cases and while a local *bet din* might adopt emergency measures for its own community,[378] greater authority is required for anything of a "legislative" character.[379] To be effective globally, the *bet din* would need to possess authority recognised across the board, i.e. a *bet din* of *Gedoley Ha-Dor*. 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. However, there are incremental steps which may be taken between purely "local" and a fully "global" solution, as we argue in the next (and final) section.

5.5 *The Strategy for a 'Global Solution'*

5.5.1 The prospects for a global solution to the problem of *get* recalcitrance cannot be isolated from the more general rifts within the Jewish world, and Orthodoxy in particular. It can hardly be denied that the dominant tendency today is (in many areas of Halakhah) *leḥumra*, reflecting the

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368 According to the Rosh, where the *safeq* is in rabbinic law (*safeq derabbanan lequla*) and the earlier authority rules leniently the earlier authority should be followed in spite of the rule of *batra'ei* (see further §2.30). However, the Ra'avad disagrees with the Rosh on this point. See ARU 7:4 (§III.10 and note 41 there).

369 R. Ovadyah Yosef and others have argued that our period may well be comparable to that of the Geonim (see further §4.84). At the very least, we may argue that the situation regarding *get*-refusal today is one of "urgency" (see further §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 (see further §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 (see further §2.41).

370 See further §§3.71, 6.39.

371 Our (vi) in s.5.3.3 assumes that a central *bet din* (BDJ) would apply *hafka'ah* authorised by particular communities (and in this sense is comparable to the proposal of R. Broyde), even though any such *taqqanah* might not be of global effect. Most if not all *posqim* recognise that a *taqqanah* with global effect is possible only with the agreement of the *gedoley hador*. Calls for such a meeting of leading *posqim* (or at least their agreement: §2.41) have not been lacking. See further §§5.52, 7.61. There is little doubt that such a meeting could take decisions on a majority basis: see s.1.1.2(b).

372 In ss.5.3.2(a), 5.3.3(ii)-(iii), above.

373 See ss.2.1.1-2, 2.1.5, 2.6.1, above. See also §§3.86, 6.47, 7.7.

374 In ss.5.3.2(b), 5.3.3(v),(vii), above.

375 See ss.3.6.4, 3.7.2, 3.7.4, above.

376 In ss.5.3.2(c), 5.3.3(vi), above.

377 See ss.4.7.1, 4.7.2, above.

378 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.

379 E.g. globally to permit *lekhatḥillah* what otherwise would be permitted only *bedi'avad*: see further §2.39.

increasing dominance of the *ḥaredi* community, both in Israel and elsewhere. Even so, there is one element in the current situation which provides a medium-term window of opportunity, namely the phenomenon of 'upwards 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".[380] We therefore have to consider the marital prospects of children born to second marriages entered into as a result of solutions such as that here proposed.

5.5.2 Suppose such children wish to marry into a community which does not accept such solutions? It is not inevitable that they will be rejected as *mamzerim*. Just as application of *sfeq sfeqa lekula* is discretionary rather than mandatory, so too is its rejection.[381] Communities who adopt solutions validated by *sfeq sfeqa* do not violate any *issur* and therefore any children born to second marriages entered into as a result of such discretionary leniencies are not *mamzerim.* If they are rejected by stricter communities, that is a reflection of the desire of those latter communities to impose their own *ḥumrot* on *klal yisra'el.*[382] Yet the halakhah provides a middle way in this matter: this is just the kind of situation in which a course of action rejected *lekhatḥillah* may nevertheless be accepted *bedi'avad.*[383] Such communities, faced with the prospect of gaining adherents, may thus accord to the solution a form of partial recognition: "we would not do this ourselves, but we will recognise it (*bedi'avad*) when done by (perhaps specified) others". And this in turn may eventually pave the way for acceptance *lekhatḥillah*, and for the kind of *taqqanot* which are required for a truly global solution.

5.5.3 Of course, any such strategy requires optimal transparency.[384] Any couple contemplating an agreement based on *sfeq sfeqa* need to be aware of its halakhic status not only within their own community but also within other communities, into which their children might ultimately move. Practical measures, outlined in our full report,[385] are therefore required for proper halakhic counselling on the basis of the fullest and most accurate information.

5.5.4 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.

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380 ARU 17:144-45, in the context of a discussion of R. Broyde's approach to this matter.

381 The exercise of discretionary judgements depends in practice on the conventions (often unstated) of particular communities, including questions of whose authority is accepted. See further §§6.23-24. It may extend to such vital matters as the now commonplace distinction (see further §1.14) between what is permissible in theory (*lehalakhah*) and what is permissible in practice (*lema'aseh*). We may note in this context that R. Ovadyah Yosef 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.

382 See further §§2.47, 7.29.

383 For the use of this distinction, see ss.1.1.2(c), 2.1.1, 2.6.1, 3.4.4, 3.6.4, 3.7.2, 4.4.2, above; §§4.71, 7.9; ARU 6:11-12 (§6.7).

384 See further §§7.34-37.

385 See further §§7.53-60.